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Article

*1 BUSH JUSTICE: THE INTERSECTION OF ALASKA NATIVES AND THE CRIMINAL JUSTICE SYSTEM IN RURAL ALASKA

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*2 The Alaska Native Population [FN1] is overrepresented within Alaska prisons at a rate of nearly three to one. [FN2] According to the most recent statistics compiled by the Alaska Department of Corrections, thirty-four percent of the current population in Alaska prisons is Alaska Native (966 out of a total of 2,841 inmates). [FN3] The percentage of incarcerated Alaska Native females is slightly less, thirty-percent (50 out of a total of 168). [FN4] However, Alaska Natives are only sixteen percent of the overall population of the state and only twelve percent of the adult age (incarceration age) population. [FN5] The more telling statistic is that the rate of incarceration for Alaska Natives is nearly three times that of Whites (1,127 per 100,000 as compared to 332 per 100,000). [FN6]

This Article attempts to examine some of the systemic aspects of the justice system in rural Alaska that may contribute to this overrepresentation. Although the Article focuses on Alaska, comparisons can be made to other situations where a traditional culture clashes with the Anglo legal culture. This Article also suggests possibilities for alternative forms of dispute resolution which could be adopted in other communities.

A casual observer may believe that Alaska Natives are simply committing more crimes than other racial groups. There is some support for the belief that crime rates are higher in rural Alaska, [FN7] *3 which might contribute to the higher rate of incarceration of Alaska Natives. [FN8] Others may speculate that the higher rate of incarceration is related to institutional racism within the criminal justice system. Judge Richard Erlich from Kotzebue speculates that two factors may lead to overrepresentation of Alaska Natives in Alaskan prisons: (1) that there are more police per capita in rural Alaska; and (2) that offenders in small communities are more likely to be identified than in urban areas. [FN9] All of these factors may or may not be true, but this Article looks for explanation elsewhere.

This Article focuses on structural aspects of the criminal justice system in rural Alaska which may influence the outcomes of criminal cases. It also examines cultural [FN10] mores within

the Alaska Native community that clash with the institutional expectations of the adversarial system, resulting in worse outcomes for Alaska Native defendants. This Article is divided into several topic areas that affect the outcome of a criminal proceeding: (1) establishing the attorney-client relationship; (2) bail; (3) difficulty participating in court proceedings; (4) tendency not to assert Fifth Amendment rights; (5) jury selection and composition; and (6) sentencing and probation compliance. The combination of geographic [FN11] challenges and culture clashes between Alaska natives and the Anglo system account for some of the overrepresentation problem. I also argue that the criminal justice system is not working in rural Alaska because the adversarial system is incompatible*4 with traditional culture and because life in rural Alaska poses many practical problems. The last part of this Article suggests some possibilities for reforms.

This Article is based on my work in rural Alaska as an assistant public defender. For three years, I represented indigent clients in the Alaskan bush, [FN12] in the jurisdictions of Ketchikan, Kodiak, and Kotzebue. Each of these areas is populated by different Alaska Native Tribes: Tlingit, Haida, and Tsimshian Indians [FN13] in Ketchikan, Alutiiq [FN14] in Kodiak, and Inupiat in Kotzebue. [FN15] Some of these topics are applicable to all of the three regions where I worked, but the experiences in each region are by no means identical. There are differences both between the Native-Alaskan cultures and the court systems in each area.

During my three years of work, I kept a detailed journal recounting experiences from these communities. As I observed the legal system, I became, in effect, an ethnographer, learning about the communities by participating in day-to-day activities. [FN16] Because I was just beginning my legal career, I was simultaneously learning about the legal culture and the Alaska Native culture. I have tried to record my own behavior as objectively as possible, but true objectivity is, of course, impossible.

At times I have quoted directly from my journal. Many portions of this Article are written in narrative form. This form is *5 intended to both document the experiences of my clients and “trigger an empathetic response” from the reader. [FN17] It is my hope that these insights will provide useful information to court personnel, police, attorneys, and judges working in the criminal justice system who may be able to improve the justice system for all Alaskans.

I Establishing the Attorney-Client Relationship

Several factors help structure the attorney-client relationship and may ultimately change the outcome of a client's criminal case. Communication in the Alaskan bush is hampered by the large geographic distances between the attorney and her rural Alaskan clients, cultural barriers (including lack of trust between the client and the attorney) and language problems affecting the client's ability to communicate with the attorney and to understand court

proceedings. The sum total of the communication problems impacts the outcome of cases for defendants in rural Alaska. The Alaska Native defendant is prosecuted, represented, and judged by attorneys who do not understand or share his culture or language. Apart from the language barriers, geographic distances and antiquated modes of communication make representation more difficult than in urban areas. These challenges contribute to the higher rate of conviction of Alaska Native defendants.

A. Geographic Distances

Huge geographic distances separate clients in rural Alaska and the few attorneys available to represent them. In more remote parts of the state, transportation and communication systems resemble those in developing countries. In my public defender practices, communication by phone was [FN18] usually possible but not as easy as one expects in the United States on the eve of the twenty-first century. Power outages, poor equipment, and bad weather interfere with communication.

*6 **1. Southeast Alaska**

While working out of the Ketchikan office, I served three islands in Southeast Alaska--Ketchikan, Prince of Wales Island, and Metlakatla. I traveled between islands by ferry, plane, or charter boat. Once a month I hopped a float plane or put my car on the ferry and traveled to Craig, the court seat for Prince of Wales Island. This monthly visit was the only chance I had to meet with clients in person, unless they made a special trip to see me. It was not practical given my caseload to travel more frequently.

My first jury trial typified the challenges of representing clients in Southeast Alaska. The client lived in Whale Pass on Prince of Wales Island. The only telephone in Whale Pass was at the general store, a place without privacy. Pretrial communication and strategizing with my client was limited to writing and the one visit she made to Ketchikan.

To investigate the case before trial, I left Ketchikan the Saturday before the scheduled trial date set for the following Tuesday in Craig. From Ketchikan, I boarded the ferry early Saturday morning for Prince of Wales Island from Ketchikan, a ride of several hours. I drove one and a half hours on a paved road to a logging road--a dirt road built by a logging company to use for transporting timber. From the end of the pavement to Whale Pass, a distance of about 125 miles, the drive took nearly four hours. I arrived in Whale Pass in the evening, about twelve hours after boarding the ferry.

Whale Pass had no public accommodations, so I slept on the floor of the laundromat. The laundromat was actually the back room of a one-room store selling convenience items, such

as cigarettes, Coke, potato chips, and frozen burritos. The store owner ferried me on his boat from where the road ended to my client's home at the end of the point. My client's log-cabin homestead lacked indoor plumbing, electricity, or a telephone.

My client was charged with theft and criminal trespass--charges that stemmed from her taking some gasoline from her neighbor. To prepare my client's defense, I needed to examine the property boundaries between her cabin and the neighbor and question the townspeople about the character of the complaining witness. I videotaped the property boundaries and spoke with some of the residents of Whale Pass, learning enough about the complaining witness to impeach her during cross-examination. *7 The jury acquitted my client. Without the trip to Whale Pass, the result may have been otherwise.

Not all villages on Prince of Wales Island are as remote as Whale Point, but it was common that clients did not have telephones. Nor did most of my clients living on the island of Metlakatla. [FN19] If they could afford to come to Ketchikan by plane or boat, we met in my office. Often, they could not, so we met right before the court date, or not at all.

Clients arrested or charged during a time not corresponding with the traveling calendar, appeared in court by themselves. If a client specifically requested to speak to an attorney, the magistrate for the district court called me to inform me that I had been appointed to a new case. If I happened to be in my office at the time the magistrate called, I handled the court proceeding telephonically. It was not unusual to receive a phone call while the court was already in session on the record.

Because I did not live in the community where the court was located, it was common for clients to seek advice about their cases from the district court magistrate or the local police. The magistrate was an attorney and usually responded to questions with the advice to call me. Unfortunately, local police officers were not always as concerned about protecting the rights of defendants, and on more than one occasion, spoke with my clients in violation of their right to counsel. [FN20]

2. Kodiak

Many of the same geographic characteristics of Ketchikan exist in Kodiak, but the Kodiak public defender's office only covers the one island of Kodiak rather than three islands. Most clients lived in the city of Kodiak, but some lived in the four Native villages on the island accessible only by boat or plane. [FN21] The same pretrial communication problems existed. Financial and time constraints made it difficult for me to visit my clients, and *8 like the southeast villages, many clients did not have their own telephones.

Clients in custody for more than a few days are transported to Anchorage, several hundred miles away. The court holds many hearings telephonically due to the cost of transporting clients back to Kodiak. For example, one change-of-plea hearing occurred with the client in Anchorage and the judge, district attorney, and myself in court in Kodiak. The state charged my client with stealing the purse of the assistant district attorney's wife and forging checks. Before accepting a plea of no contest, the judge asked the client some questions. The following journal entry describes what happened:

The judge asked Paul if he was forced or threatened to change his plea. He said that he had "been given the shaft" by the state and was coerced by the police officer who told him he was "really going to go after him" in this case because [the D.A.'s wife] was the victim. When the judge was trying to decide whether to accept his plea, he kept asking me what I thought. I kept asking Paul to say how he felt. Because Paul was in custody in Anchorage, I couldn't control him as you normally can with a client who is in court with you, and Paul said, "Well, Miss King thinks I'm getting the shaft, too." What can I say? I do think he's getting the shaft, and if I try to cover up the comment or explain it away, my client won't trust me. If I don't say anything, the prosecutor and the judge won't trust me. [FN22]

After my client's comment, the judge asked me what I thought, and I said that I felt that the district attorney's office was prosecuting the case more aggressively because of who the victim was but that the client understood he was not obligated to accept the offer. Later, the prosecutor told me he was angry with me for my remarks.

3. Kotzebue

The geographical problems in Kotzebue were the most extreme of all. In Kotzebue, I was the only public defender for the entire Northwest Arctic Borough, which encompasses an area of approximately 37,300 square miles. [FN23] The communities within the Borough range in population from 665 in Selawick to 141 in *9 Deering. [FN24] Although I lived in Kotzebue where the courthouse was located, many of my clients lived in villages, accessible only by boat or plane (or snowmachine or dog team in the winter). Caseload and time constraints made regular travel to the villages impossible.

Rural villages in the Northwest Arctic Borough did not have holding facilities. If troopers arrested clients in villages, they took them temporarily to the Kotzebue jail, and then on to the Nome jail. The following excerpt describes meeting a client from Noorvik in the Kotzebue jail:

Pauline is one of my favorite clients because she is so beautiful and intelligent and has gone through so much. Her husband was convicted twice for sexually abusing their kids, and

Pauline was basically driven out of her village by public humiliation, which just made her own drinking problem worse. Now, the state has taken away her kids, and they are spread out all over the Arctic with different family members. She is trying to stop drinking so she can get her kids back, but as soon as she gets sober she has a slip, then she does well again and says she is okay. I remember the first time I met her, it was a Sunday morning when I was checking into the jail to see who had been arrested over the weekend. She was all disheveled and dirty with broken glasses, stringy hair, and her bra hanging out of her shirt. Yet she was so lucid. When she talks, she speaks in allegories--tonight she made this beautiful analogy to recovery as shifting out the dirt and stems from the berries. I could just imagine her in a different time and place picking berries, catching fish, and feeding her family. She was not the Pauline I see now going from house to house, getting drunk off her friends, and ending up in jail full of remorse and all alone. [FN25]

Pauline's efforts at recovery were complicated by the difficulties imposed by geographic constraints. Although she was from Noorvik, the alcohol treatment center was in Kotzebue. She had some friends in Kotzebue, but most of them did not support her recovery. Her children were in Noorvik and other outlying villages, so visiting them required a plane ride to get there. Pauline was usually broke, so traveling around the Arctic was difficult for her. These frustrating circumstances exacerbated Pauline's efforts at change; she seemed stuck in the cycle of going in and out of drinking and in and out of the Kotzebue jail. Her goal of reuniting with her children was always outside her grasp.

*10 **B. Language Barriers**

Most Alaska Natives speak English, although it is not necessarily their first language. However, being able to speak English does not ensure that an Alaska Native will understand Anglo legal proceedings. Communication problems arose because some clients did not speak English, or it was their second language. Other cross-cultural problems arose even among people speaking the same language.

There are a number of pitfalls for lawyers who are communicating with clients from a different culture, even if they both speak the same language. Dr. William Haskins, a communications specialist, has identified a number of common issues including ethnocentrism, assumed similarity, stereotyping, and verbal and nonverbal misunderstandings. [FN26] Haskins uses an example of an attorney who assumed that a Native-American witness who would not look her in the eye was lying. He explains that, for Native Americans, it is more respectful not to look someone in the eye, yet the failure to make eye contact arouses suspicion for Anglos. [FN27] I am certain that in spite of my attempts to be sensitive to my clients, I unwittingly said or did things or made assumptions about them that affected my ability to establish a rapport with my clients.

The courtroom is perhaps one of the most complex communicative settings a layperson is likely to encounter. [FN28] Many types of "Englishes" are spoken in the courtroom. An unusual alternation of linguistic registers, ranging from highly formal to highly informal, are all employed within a single proceeding. [FN29] To participate easily in legal proceedings, one must ideally be able to "code switch" among these. Attorneys and judges routinely do so, constantly gauging the impact (in terms of intelligibility and/or persuasiveness) of their speech on various listeners. [FN30] It is difficult for some Alaska Natives to understand the complex speech patterns involved in court proceedings. [FN31]

*11 It is also sometimes difficult for Anglo court personnel or attorneys to understand Alaska Natives. Varonis and Gass have studied communication patterns between native and nonnative language speakers and have formulated theories of communication misunderstandings. [FN32] The less interlocutors know about each other, the more likely they are to misunderstand each other on a linguistic, social, or cultural level. Such misunderstandings are particularly pronounced between native and nonnative speakers of a language; they may have radically different customs, modes of interacting, notions of appropriateness, and, of course, linguistic systems. [FN33]

I advised my clients based on my experience as a member of the dominant culture, advising them what was in their own best individual self-interest. Yet my Alaska Native clients processed my advice based on their experiences as members of a minority culture that does not place as much emphasis on individual self-interest. Their self-interest was inextricably linked to the interests of the community. [FN34] Their personal and cultural history differed*12 vastly from my experiences.

This relationship of self to the larger society is described beautifully by Robin Ridington writing about the Inuit in Northern Canada:

You are a character in every other person's story. You know the stories of every person's life. You retain an image or model of the entire system of which you are a part. Each person is responsible for acting autonomously and with intelligence in relation to that knowledge of the whole. Each person knows how to place his or her experience within the model's meaningful pattern. Each person knows the stories that connect a single life to every other life. People experience the stories of their lives as small whole, not as small parts of the whole. The stories of lives are not meaningless components of a coded message analogous to phonemes; rather, they are metonyms, small examples of a meaningful totality. [FN35]

Language and cultural barriers were most noticeable in the Arctic. My clients and I communicated in vastly different styles. Even though we both spoke English, I often suspected that we did not understand each other. My Inupiat clients were very respectful and reserved. They listened attentively as I explained to them the legal aspects of their cases, nodding at intervals. When I finished, I typically asked them what they wanted to do in their case. The most common choice they were required to make in a criminal case was whether

to take the case to trial or negotiate a settlement with the prosecutor. Usually they said, “Well, whatever you think is best,” or “I'll just get it over with now.”

Pronounced differences exist between the use of English by Eskimos and non-Eskimos. There is a pervasive circumspection of assertion. It is considered bad manners to assert or speculate about topics. [FN36] Expression is more tentative, the use of the word “maybe” is common and “acknowledges the possibility of incomplete knowledge.” [FN37]

Judge Richard Erlich, the Superior Court Judge in Kotzebue who has lived in the Arctic for many years, has found it difficult to explain legal concepts to Inupiat defendants. He writes:

*13 The idea that one is “not guilty” even if they committed the act, is a terribly complex idea to convey. The idea that one can plead “no contest” and “not guilty” is also confusing. Finally, the role of the jury is even more intricate. Here, the defendant/client is subjecting himself to judgment by the community which he or she may wish to avoid because of other cultural values. [FN38]

University of Fairbanks Anthropology professor Phyllis Morrow has studied the Yup'ik Eskimo culture and cross-cultural communication problems within the Anglo criminal justice system. She bases her observations about speech and behavior patterns in a legal context on attending proceedings in Bethel, Alaska. [FN39] She notes that Eskimo speech patterns use lengthy pauses between thoughts. [FN40] Anglo speech tends to be more hurried with shorter pauses. Eskimo speech is qualified and less direct than Anglo speech. Yupiit rarely volunteer questions or elaborate on questions asked by attorneys or judges. [FN41] Defendants frequently answered “yes” to indicate understanding on a question posed even when subsequent discussions revealed they did not understand. [FN42] Yup'ik speech was characterized by numerous qualifiers, hedges, pauses, and topic shifts from direct answers, characteristics which rate as making the speaker appear less credible, certain, intelligent, and capable than those who use more direct constructions. [FN43]

In my experiences, I found myself wondering if I truly understood and, thus, represented the wishes of my client. I wondered if I adequately explained the various choices and consequences and often feared that I did not. I wondered if clients told me what they wanted, or merely what they thought I wanted to hear. “Straight talk,” which I used with nonnative clients, did not result in a direct answer. I sensed uneasiness about some of the outcomes of cases and felt that, although I handled the case correctly*14 in a technical sense, there was a disconnection between what my client really wanted and the outcome of how I handled the case.

C. Distrust of the “System”

White people control the criminal justice system in Alaska. In the three parts of the state where I worked, I did not meet an Alaska Native defense attorney, prosecutor, magistrate,

judge, or probation officer. There were, however, some Alaska Natives who were Alaska State Troopers, Village Public Officers (V.P.O.), [FN44] and Village Police Safety Officers (V.P.S.O.). [FN45] The lack of Alaska Natives in decision-making or authoritative positions created obvious problems. Attorneys and judges with immense good will tried hard to be culturally sensitive but still remained outsiders imposing justice on a foreign culture. [FN46]

One of my trips to the small town of Selawick in the Northwest Arctic Borough is a striking example of the imposition of Anglo culture on Alaska Natives. In an effort to be more sensitive to Alaska Native defendants, the presiding judge in Kotzebue suggested that we handle some of the routine change-of-plea hearings in Selawick. On the appointed day, the prosecutor and I boarded a four-seater plane to Selawick, which first stopped in Kiana to pick up the magistrate, a White man who was a former *15 state trooper. The three of us landed in Selawick where the local V.P.S.O. met us on his three-wheeler waiting to take us into town, about a mile away. The road system was a series of interconnected wooden boardwalks. The V.P.S.O. who met us at the airstrip was the law enforcement officer who had filed the cases we would be hearing that day. He took turns ferrying us into town: first the magistrate, then the prosecutor, and lastly me, obviously understanding the relative worth of each of our positions.

Court was held in a very small room located in the town hall. The room was about twelve by fifteen feet with two desks and a number of chairs. The clerk had an office in the adjoining room; it housed the telephone for the entire village and some office equipment. A restroom contained a honey bucket, [FN47] which emitted an odor that permeated the entire small building.

Court proceeded with the young V.P.S.O. retrieving each defendant from his or her home and bringing him or her to the town hall on the three-wheeler. The first meeting with my clients took place in the hallway, outside the closet-sized room and within earshot of the magistrate and prosecutor. On this particular day, I advised every one of my eight clients to go to trial because the V.P.S.O. had done a poor job investigating the cases and the state would have difficulty proving the elements at trial. However, none of my clients was interested in trial, nor did any want me to challenge the V.P.S.O.'s investigative skills. All of them chose to enter pleas of no contest instead of choosing to go to trial, as I advised, claiming they just wanted to “get the case over with.”

I do not know why my clients chose not to follow my advice. I suspect that they were more interested in maintaining a good relationship with the local V.P.S.O. than in following the advice of their White lawyer who had flown in for the afternoon. After all, they had to live in very close proximity to him, and they would not see me again any time soon.

Another time, I took a trip to Point Hope to investigate a complicated sexual-abuse case. My client was charged with having sex with several teenage girls. I decided to spend the entire

weekend in Point Hope investigating this case, as well as others. This passage describes my arrival in Point Hope:

*16 My weekend in Point Hope was an eye opener. There literally was nothing green--no grass, no tundra. The town is built on a sandbar which juts into the ocean and as far as I can tell really only serves to whip up the wind. It was in the low forties in July, with a bitter wind, so bitter that my ears hurt after only being exposed for a few minutes. The town is on a gravel bar, so the roads are thick gravel and difficult to walk on. There were no hotels or guest houses in town, so we stayed at the community center and worked out of the magistrate's office, which was currently vacant. It was a building designed in the shape of an igloo, a geodesic dome painted white with separate little offices glassed off inside. My intern, Heidi, and I got a ride as we were walking into town from the airport (just a gravel strip without a building) from a sister of my client who fortunately had keys to the building. She didn't have keys to the magistrate's office, though. She had to call the mayor on the CB radio because he did not have a phone. [FN48]

After setting up office in the igloo, I contacted the witnesses to set up interviews for the following day. I sent out word through a young girl hanging around us that I needed to talk with the four girls and could she ask them to come by at two o'clock the next day. All of the witnesses arrived at the appointed time. However, none of them would give me any information, neither confirming nor denying the police reports. I do not think their silence reflected anger because I represented the man charged with abusing them. Many of the girls had already told the district attorney that they did not wish to pursue charges. I think their silence stemmed from the fact that I had invaded their territory. I was the outsider, and they felt comfortable not cooperating with the system when they were in their home town. Perhaps it had been naive of me to think that I could waltz into town and interact with the locals, yet it seemed even more patronizing not to attempt to do so.

Another example of cross-cultural communication problems that stands out involved a Tlingit client named James. He was a fisherman, and a serious alcoholic who was incapable or unwilling to abide by conditions of his probation, specifically the requirement that he not drink and that he get help for his drinking problem. The assistant district attorney in Juneau had filed a probation revocation charge against him for failure to complete an alcohol treatment program. After a convoluted series of negotiations, the assistant district attorney finally agreed to allow *17 James to fish in the halibut opening, [FN49] even though it meant he would leave town and not be under strict supervision as required as a condition of his probation. The following excerpt describes what happened when I arrived for the court hearing:

I showed up in court a few minutes before the hearing, and there sat James on a bench right next to the D.A. and the probation officer, obviously intoxicated. This was my first time meeting James. As I tried to talk to him about what was going to happen in court, he was totally oblivious and obviously not able or willing to understand anything I was saying.

Instead of agreeing that he needed treatment, which he had previously agreed to, he said that he didn't understand why the White men's laws were always trying to get him to do things that he didn't want to do. He turned to some White people waiting outside the courtroom, pointed at them and said, “I hate White people, I hate you, I hate you, I hate you.” [FN50]

Although he did not say so, I suspect James hated me, too.

Steve Conn, who has written extensively about the criminal justice system in rural Alaska, cites many sound reasons why Alaska Natives distrust the criminal justice system. [FN51] Chief among them is the fact that citizens in urban Alaska seem uninterested in what happens in rural villages, yet are unwilling to let the villages control their own form of government. [FN52] One example of this is that the magistrate advisory panel of judges and lawyers recommended that the court system disassociate itself from alternatives to dispute resolution in rural villages when those options would have restored more control to the local authorities. [FN53] The components of the justice system are operated from selfish institutional perspectives which emphasize service only when that objective coincides with institutional self-interest. The emphasis on towns and regional models in legal and nonlegal fields has tended to strip away even residual power from the villages in governmental matters. [FN54] This attitude cannot help but contribute to the Alaska native client's distrust of the system.

*18 **D. The Cumulative Impact of Communication Problems**

It is difficult, if not impossible, to prove that Alaska Natives are convicted at a higher rate because of communication and cultural misunderstandings. Yet it is a logical conclusion to assume that this is so. Factors, such as distrust of the system, distrust of attorneys, difficulty meeting and receiving consultations with attorneys, and cultural and communication barriers with attorneys and other players in the criminal justice system, all impact the outcome of criminal cases.

The predominantly White racial makeup of the Alaska bush also creates a “gatekeeping” function that impacts Alaska Natives. Gatekeeping situations are those in which a person or group of persons is given the authority to make decisions that control the social or economic mobility of another. This person who controls the “gate” decides “whether to open the ‘gate’ and let people through, or keep them out.” [FN55] For example, John Gumperz and Celia Roberts studied cross-cultural communication in Britain between White housing-authority employees and Indian clients seeking services. [FN56] The study showed that White clients seeking housing assistance had better success than Indian clients. In this situation, both races spoke English, but the researchers noted other ways that communication was different. The clients had different types of nonverbal signaling (eye contact), [FN57] different assumptions about the degree of detail the speakers expected to provide, [FN58] and different

assumptions about the interviewer's role. [FN59] The authors noted that while both groups shared a common language, they did not share a common “rhetorical strategy.”

For the clients, therefore, the social, political and cultural baggage they bring to an interaction consists of attitudes, organizational knowledge and culturally based knowledge and which includes command of rhetorical and contextualization strategies for managing the emergent interaction. So, when we look at inter-ethnic communication, we need to identify where *19 there is a fundamental difference in cultural/organizational knowledge. [FN60]

Additionally, Ron and Suzanne Scollon studied gatekeepers and communication styles between Alaska Natives and nonnatives, particularly focusing on Athabaskans. The Scollons identified three areas where they noted substantial differences in communication style: the presentation of self, the distribution of talk, and the contents of talk. Table 1 breaks down some concrete differences in communication style. [FN61]

In the case of the criminal justice system in the Alaska bush, the gatekeepers are the prosecutors, defense attorneys, and judges who have the power to bring charges or influence the outcome of cases. Yet the Alaska Native defendant does not share the same rhetorical strategy as the players in the system. He is hampered both by his culture and the fact that he is unfamiliar with the legal system.

This power disparity has been noted in other court systems. For example, the Oregon Supreme Court issued a report in May of 1994 on the results of its Task Force on Racial and Ethnic Issues. [FN62] The report concluded that “[m]any of the problems recounted in this report stem from cultural differences between minorities and non-minorities. The dominant culture of this state and nation is reflected in its courts. Largely non-minority judges and court staff do not understand the cultures of minorities who appear in the courts.” [FN63]

These remarks could have been written about Alaska. Although this observation is an obvious one, it is not necessarily obvious to the players within the system who believe they are trying to be as fair and understanding as possible. They may not realize that intercultural communication problems exist. As Gumperz and Roberts note, “[w]hen there are significant differences in background knowledge, the same message may be interpreted differently by different individuals. Yet the miscommunications that can arise in such circumstances are rarely recognized as such while participants are involved in a verbal exchange and intent on getting their own points across.” [FN64] These communication*20 problems caused by inter-ethnic differences and geographical distances probably increase the likelihood that Alaska Natives will have worse outcomes in their criminal cases.

Table 1

What's Confusing to English Speakers About Athabaskan Speakers	What's Confusing to Athabaskans About English Speakers

The Presentation of Self	
They do not speak.	They talk too much.
They keep silent.	They always talk first.
They avoid situations of talking.	They talk to strangers or people they don't know.
They only want to talk to close acquaintances.	They think they can predict the future.
They play down their own abilities.	They brag about themselves.
They act as if they expect things to be given to them.	They don't help people even when they can.
They deny planning.	They always talk about what's going to happen later.
The Distribution of Talk	
They avoid direct questions.	They ask too many questions.
They never start a conversation.	They always interrupt.
They talk off the topic.	They only talk about what they are interested in.
They never say anything about themselves.	They don't give others a chance to talk.
They are slow to take a turn in talking.	They just go on and on when they talk.
The Contents of Talk	
They are too indirect, too inexplicit. They don't make sense.	They aren't careful when they talk about people or things.
They just leave without saying anything.	They have to say ‘goodbye’ even when they can see that you are leaving.

II Bail

Representing clients from rural Alaska who are in custody presents additional geographical and social problems. Because few rural towns and villages have jail facilities, the state transports defendants out of their village (and then sometimes out of *21 the region) to be detained. As discussed above, geographical constraints restrain the attorney-cleint

relationship. Additionally, pretrial incarceration contributes to higher rates of incarceration for three reasons. First, it is difficult for Alaska Natives to post bail money because much of rural Alaska has a noncash economy. Second, pretrial detention is often in a community away from where defendants live, making it difficult to get support from friends or family. Finally, some Alaska Native clients do not seek pretrial release because they prefer to stay in jail until their cases are resolved.

A. Geographic Challenges

Most of rural Alaska does not have jail facilities, which means that clients must be transported outside of their communities if they are arrested and unable to post bail. Ketchikan has a jail that houses clients awaiting trial. Both Craig on Prince of Wales Island and Metlakatla have short-term holding facilities. If defendants are unable to post bail within one or two days, they are transported to Ketchikan.

Kodiak has a temporary facility that holds defendants for up to a week. Defendants unable to post bail within that time frame are transported to Anchorage, which is an hour plane flight. Defendants from villages outside of Kodiak are transported first to Kodiak and then to Anchorage, two plane rides away from home.

Kotzebue is the hub community for the entire Northwest Arctic Borough. Anyone arrested in a village and not released immediately by a magistrate is transported to Kotzebue. None of the local villages have holding facilities. For example, a defendant arrested in Point Hope is transported several hundred miles to Kotzebue for arraignment. Flying from Point Hope to Kotzebue involves a forty-five minute plane ride at a cost of over a hundred dollars. The defendant may not know anyone in Kotzebue. The defendant may not be able to call family or friends to ask for bail money (not everyone in Point Hope has a telephone). If the defendant cannot bail himself out within a couple of days, he or she is transported to Nome, another one-and-a-half hour plane ride that costs about three hundred dollars round trip from Kotzebue.

Attorney visits were difficult and infrequent if the holding facility was located in a different town. Once a client was transported from Kotzebue to Nome, or from Kodiak to Anchorage, it *22 was very difficult for me to visit. The trip usually required spending at least one night away from home. The costs away from other cases usually meant that I averaged visits to the prisons in Nome and Anchorage about once every six weeks. [FN65]

Communication by telephone was also complicated. A defendant was permitted to call his lawyer collect fairly regularly. Unfortunately, I was not always in my office and available to accept the call. The inmate could call family and friends collect during specific times if they had a phone or could get access to one. Due to these limitations, the defendant incarcerated in a distant city was unable to provide much assistance in preparing his defense.

The following journal passage describes my frustration with trying to represent a client from Deering who was in custody in Kotzebue:

A lot of people here do not have the resources to pay bail, and the courts are not inclined to give O.R. releases (release from jail on one's own recognizance, and promise to appear for future court appearances), at least not in cases where someone has an ongoing problem, like Brian Moto who just got out of jail last week for assaulting his wife and then ended up in jail again on Friday. The court imposed a $1500 cash bail. We have some possible third-party custodians. Now Eleanor, his girlfriend, wants him to come home and help take care of the kids. But she was just in court on Thursday seeking a restraining order. She has since dropped her charges, and now tomorrow she wants to go to court and ask the judge to let Brian go home. The judge actually denied her last request to withdraw her restraining order, which is fairly unusual. So Brian probably will not get out of jail, even though he has a fairly good third-party custodian. He has no way to get to his house which is in Deering. He'll be stuck here in Kotzebue and then will be transported to Nome. We'll have to deal with trying to get him out of jail after he has served a long period of time in jail. The jail seems to transport clients really quickly, so if I don't get to them right away, they are off to Nome. Then, everything is just that much more complicated. [FN66]

One particularly difficult case involved a deaf client from Kiana who was detained in Nome. He was arrested for sexually abusing a minor, then transported from Kiana to Kotzebue. When I could not find a suitable bail arrangement, he was transported*23 to Nome. I could not call him in jail, so he called me collect, using the deaf translator phone service chancing that I would happen to be in the office when he called, which was unusual. Visiting him in jail cost several hundred dollars and a full workday.

Apart from the difficulties of posting bail, some of my Inupiat clients were even reluctant to request bail. I do not understand this phenomenon, but it was common for my Eskimo clients to choose to stay in jail pending the resolution of the case. The first time this happened, I was surprised. I had just arrived in Kotzebue and was trying to familiarize myself with my clients. I was in court during arraignments when a new client charged with driving under the influence of intoxicants was appointed to the Public Defender's Agency. I approached him and told him to call me, so we could arrange for a bail hearing. He did not call me, so I went to see him in jail. He told me he did not want a bail hearing. He said, “I'll just stay in jail and get my time over with.” “But you haven't been convicted yet,” I said. “What if the case is dismissed or you are acquitted?” He replied, “Well, if you think it's a good idea.” He reluctantly agreed to let me schedule a bail hearing.

At the bail hearing, I could not convince the magistrate to lower the bail amount, and my client could not post it. After serving ten days in jail, the district attorney made an offer that if my client plead no contest he would agree to a sentencing cap of ten days, which was the sentence he would likely have received from the judge even without a “deal.” I suspected my client knew something that I did not. He may have already figured that he was not going to

be able to post the bail money or convince the magistrate to lower the bail, so he decided to accept his circumstances and not bother to request a bail hearing. I was angry at the magistrate and disappointed with myself for being unable to get him out of jail. I also felt that my client's decision to plead no contest to the charge was not as much of a reflection of his guilt as of his inability to make bail. This disturbed me deeply. It is impossible to know what the outcome of this case would have been had my client posted bail and taken his case to trial. Of course, he could have decided to wait in jail until his trial, which would have required him to spend up to four months in jail. [FN67] *24 His inability to make bail effectively prevented him from exercising his right to trial.

B. Compliance With Bail Conditions

Went on a nice run along the beach today with a terrific view of Kotzebue Sound. The natives live on the beach in the summer in tents and wood huts of various descriptions. A variety of interesting decomposing things were seen, a seal corpse and a bear skin hanging on a shack with a small wooden roof open to the air exposing the hanging cured bones of the former owner of the skin. The sun is truly brilliant, and each day more and more tundra flowers of various colors bloom. [FN68]

Representing clients in the summer added a new dimension to life as a public defender. Unlike other areas of the country where life slows down in the summer and time is set aside for relaxation, the summer is work time in Alaska, especially in the Arctic. Besides holding down jobs and raising families, summer was the time of gathering food for the coming winter. Many clients travelled to fish camps away from their regular homes, and even people who lived in Kotzebue moved from their homes to live on the beaches near the harvesting sites. The summers are spent fishing and drying fish. Whale and seal hunting involve the entire community. Most people go to “fish camps” away from the regular village, where they set up camp at prime fishing locations, living there and fishing and hunting for the summer. In August and September, people hunt caribou and pick berries. [FN69]

In the midst of their subsistence activities, clients often felt that it was too difficult to attend to required court appointments and attorney meetings. Clients often chose to simply plead guilty, do their jail time (or get it deferred if possible) to get the case resolved as quickly as possible. This may have resulted in innocent clients being convicted, or the state obtaining easy convictions that it might not otherwise have obtained had the clients been willing to take the time to go to trial. Alaska Natives simply could not afford the time of protracted litigation, especially for minor misdemeanor cases, so pleading guilty or no contest was *25 the easiest, and often most sensible, solution. This explained why when I asked my clients if they would like a bail hearing, a common response was, “I'll just do my time and get it over with.”

People who do not practice subsistence have a difficult time understanding the time required. In his new book, Chase Hensel describes subsistence:

Subsistence activities are a major focus of time and energy for most people in villages, even for those who have full-time jobs. This includes not only the time spent shooting or checking nets, but also the usually greater number of hours spent making and repairing equipment, scouting locations, and so on. This also applies to processing, where preparation and cleanup, drying, smoking, and storage may take more time than the actual "cutting." [FN70]

C. Legal Impact of Pre-Trial Detention

Persons who are incarcerated before trial have very different outcomes in their cases from those released prior to trial. Pretrial detention interferes with a defendant's ability to defend himself, compromises his ability to support himself, and deprives his family of personal and economic support. [FN71] Incarceration hinders the detainee's ability to meet freely with his attorney and investigate his case. [FN72] These factors contribute to a higher conviction rate among those detained before and during trial. [FN73]

Others argue that pretrial detention increases the conviction rate is because incarcerated defendants have a strong incentive to accept plea bargains. [FN74] In my experiences, clients who could not bail out of jail were more likely to plead to the charge instead of *26 waiting for trial. This was especially true for misdemeanors and lower-level felony charges. The Alaska Rules of Criminal Procedure guarantee the right to a speedy trial within 120 days of arraignment, [FN75] but few people charged with misdemeanors or low-level felonies are willing to spend up to four months in jail to go to trial on a case where if convicted they might not receive any jail sentence.

Prosecutors commonly offered clients "credit for time already served," meaning that they would not have to serve any additional time in jail if they agreed to plead guilty or no contest instead of going to trial. It was very difficult for me to convince clients to hold out and take a case to trial if they had already served as much time in jail through pretrial detention as they would get if convicted after trial. In fact, while working in the Kotzebue office, I never convinced a client to pursue a trial on a misdemeanor charge. My clients from that region invariably had very lengthy misdemeanor records, though I suspect that had they not pled to these charges the state might ultimately have dismissed the charges, or my clients would have prevailed at trial.

Most academics agree that pretrial detention leads to an increased likelihood of conviction. [FN76] The theory that detention correlates with and causes increased conviction rates was first explored by Wayne Morse and R. Beattie in a study of Multnomah County, Oregon in the 1920s and by Caleb Foote's Philadelphia studies in the 1950s. Foote found a strong correlation between detention and conviction, when comparing acquittal rates between bailed and jailed defendants. When charged with violent crimes, sixty-seven percent of

released defendants and twenty-five percent of jailed defendants were acquitted. When charged with property crimes, the acquittal rates were forty-nine percent for released defendants and seven percent for jailed defendants. [FN77] A 1960 study of New York City by Charles Ayres, Anne Rankin, and Herbert Sturz confirmed this correlation, using statistical analysis to prove a causal relationship. [FN78]

A positive correlation between pretrial detention and length of *27 prison sentence has also been revealed in at least two empirical studies. [FN79] The reason for this increase may be that a defendant who is detained pretrial does not have the opportunity to make a case for his rehabilitation because few pretrial facilities have rehabilitation programs. [FN80] Also, pretrial detainees cannot demonstrate their ability to hold a job. [FN81]

There have not been any studies comparing the detention rates for Alaska Natives versus nonnatives, or for detained defendants versus released defendants, yet in my experience, Alaska Natives were detained pretrial at a higher rate than nonnatives, usually because they did not actively pursue bail or because they did not have access to cash. The Alaska Judicial Council found that the defendant's custodial status affected the length of sentence imposed. Using a multiple regression analysis to eliminate other variables, the study found that if the defendant was incarcerated prior to conviction, that fact added approximately sixteen months to [FN82] a felony sentence. [FN83] This fact, combined with the research that establishes that persons who are detained pretrial get worse outcomes in their cases (either because of increased likelihood of conviction, or increased sentence) suggests that pretrial detention of Alaska Natives may be one factor which leads to the overrepresentation of Alaska Natives in Alaska prisons.

*28 III Difficulties Participating In Court Proceedings

Geographical problems often prevented my client and I from being at the same place for a court proceeding. The judge usually appoints a public defender at the arraignment, the first court appearance. Alaska law requires that defendants appear before a judge or magistrate within twenty-four hours of arrest. [FN84] The conflict between the two rights is always resolved by holding the hearing within twenty-four hours and appointing an attorney as soon as possible.

Clients are required to participate in court proceedings, but this participation may be telephonic. [FN85] If a client was detained in a facility located in a different place from the courthouse, the Department of Corrections generally transported the defendant to the proceeding, if possible. Practically speaking, transportation was sometimes impossible either because of inclement weather or insufficient state troopers to provide transportation. Clients sometimes requested not to be transported because they did not want the disruption of being moved back and forth between facilities. Clients who had prison jobs or were trustees would lose their positions if transported. Because of all these factors, it was common for either myself or my client to participate in a court proceeding telephonically.

The following passage describes representing a client from Metlakatla at a change of plea hearing whom I never met during the time I represented him:

So much of court life in Southeast Alaska is not done in person. William Johnston pled out to one count of minor in possession . . . for sticking a bottle of Jim Beam inside his coat. He did this while standing at the counter of the liquor store while his wife bought a couple of cases of beer. He says he was playing a joke and did not intend to steal it. Besides, if he had intended to steal it, it would have been a pretty stupid thing for him to do it in such an open and obvious way. But William lives in Metlakatla, and he did not want to go to trial or come to Ketchikan for court. So he plead without ever having consulted with me in person about his case. He is just one of the many faceless clients I represent in this island country. [FN86]

*29 The ability of an attorney to represent her client competently depends on establishing a good relationship with her client. Geographic impediments made it difficult to meet with clients regularly. For example, in the above case, William may have felt differently about taking his case to trial if the trial would have been held in Metlakatla or if he and I had regular contact with each other and had established a better relationship.

IV Fifth Amendment Rights

A. Tendency to Confess

My observations suggest that Alaska Native clients in all three areas I worked were more likely to confess than not. [FN87] This phenomenon was most pronounced in the Kotzebue region with Inupiat clients. Out of the hundreds of clients I represented in the Northwest Arctic Borough, only one Alaska Native defendant did not make some type of admission. [FN88] Defendants were more likely to give false confessions, were reluctant to be involved in conflicts with the accusers, and had strong cultural predispositions to confess.

Alcoholism contributes to the rate of confessions because clients would admit that they probably did things even when they experienced a blackout, which left them with no memory of the incident. Current research suggests that false confessions are quite prevalent despite a common perception that innocent people do not confess to crimes. [FN89] Police are more likely to obtain false confessions from people who are particularly vulnerable. [FN90] *30 Scholars have not yet examined whether Alaska Natives are particularly vulnerable to police interrogation, but extreme intoxication combined with inter-cultural interaction seems to suggest particular vulnerability to confess falsely. Persons in an alcoholic blackout state are more likely to be persuaded into a version of events suggested by the interrogator, a phenomenon referred to as a “persuaded confession.” [FN91]

I also observed clients who were reluctant to contradict accusations made against themselves. Sometimes the admission was a statement like, “Well, I don't remember [FN92] if I did it, but if she said I did, then I must have done so.” [FN93] This type of statement probably stems from a deep-seated aversion to direct confrontation within the Eskimo community. [FN94]

Lastly, there is a predisposition within the Eskimo culture to confess. Since aboriginal times, the Eskimos considered confession to be a good thing. This expectation arose because Eskimo society was essentially noncensorious. Confession had as much of an aspect of news-bringing as it did alleviation of guilt. [FN95] Yupiit tendency to confess stems from a belief system that emphasizes that the universe responds to human actions. [FN96] A failure to disclose offenses could influence health, luck in subsistence pursuits and interpersonal relationships, and leave minds burdened with bad thoughts and feelings. [FN97]

Conn and Hippler describe the connection between feelings of guilt and the need to confess within the Eskimo culture:

Eskimo magistrates and Eskimo defendants rarely distinguish between evidentiary guilt and guilty feelings. In fact, Eskimo defendants generally do not request counsel because of this tendency. The failure to make this distinction is not caused by a lack of training on the part of the magistrate nor of incapacity for analytic thinking on the part of either the magistrate or *31 the defendant. In pre-magistrate times, an Eskimo's tendency to confess had the practical purpose of mending disrupted social relations and worked as a positive social tool. As the statistics on guilty pleas and rates of conviction from one Northern Eskimo magistrate court indicate, the aggregate effect is that an arrested Eskimo is a convicted Eskimo. [FN98]

The predisposition to confession can also be explained by the Alaska Native model of justice. Eskimo models of justice are similar to the “parental” model first articulated by Karl Llewellyn. [FN99] Llewellyn distinguished between “parental justice” and “arm's length” systems of justice, such as the adversarial system. The key characteristics of the parental model are:

[A] feeling of togetherness, or ‘we-ness,’ in Llewellyn's idiom, between the miscreant and the group-government. The defendant is viewed as an integral part of the community, a member of a going team. There is no distrust of officials, who harbor parental emotions, even feelings of love. The goal of any activity directed toward the miscreant is to re-integrate him into the community, through repentance and open confession. Thus, punishment, when imposed, is not thought of as merely a deterrent or simple vengeance; it becomes an educational tool. [FN100]

Other scholars have expanded on Llewellyn's model. John Griffiths articulated a “family” model, in which participants valued each other and encouraged and nurtured relationships. [FN101]

Thus, confessions are more prevalent within the parental or family model used by Alaska Natives because of the need for repentance and reconciliation. However, the dominant culture in rural Alaska has imposed a set of values not shared by the original people living in the area. Suspects in rural Alaska are influenced by a culture that stresses a “parental” or “family” model of justice, but the adversarial system is an “arm's length” system. [FN102] *32 This dichotomy likely leads to a higher rate of false confessions among Alaska Native defendants.

B. Legal Impact of Confessions

The effect of confession [FN103] on the outcome of cases is well-documented. Although statistics vary, most studies suggest that people who waive their Miranda rights and make admissions are more likely to be charged by prosecutors, [FN104] less likely to have their cases dismissed, [FN105] more likely to plea bargain, [FN106] more likely to be convicted, [FN107] and more likely to receive a more severe punishment following conviction. [FN108] Defendants who confess are more likely to give up their right to have their case presented to a grand jury, less likely to go to trial, and they receive fewer concessions from the prosecutor (especially during plea bargaining). [FN109] They are also less likely to be released on *33 bail. [FN110] Confessions also affect the guilty-plea process. [FN111] Some commentators believe that a confession is the single most important piece of evidence the police can obtain. [FN112] Studies suggest that persons who confess are ten [FN113] to fifty [FN114] percent more likely to be convicted than their counterparts who do not.

Ironically, our adversarial system punishes those who take responsibility for their behavior more severely than those who do not. This irony is particularly troubling in the case of the Eskimo whose culturally prescribed desire is to restore harmony within the community. Yet because this desire leads the Eskimo defendant to confess, he or she will ultimately be punished more severely than another defendant who does not confess and is acting out of self-interest instead of a desire to heal the communal breach.

C. Tendency Not to Assert Right to Trial

Alaska Native clients strongly resisted going to trial. While it is true that most criminal cases do not go to trial, [FN115] my experience suggests that Alaska Native clients go to trial even less frequently than the general average. [FN116] It is a truism among criminal defense*34 attorneys that the most obnoxious clients get the best results. Under the adversarial system of justice, the way to protect your rights and to promote your interests is to be adversarial. Clients who refuse to cooperate with the police, refuse to provide evidence to incriminate themselves, and refuse to make the state's job easier by pleading guilty or no contest, fare better than those who cooperate. The adversarial system of American criminal justice does not reward the strong cultural mores of cooperation and compliance.

An attorney might advise a client to go to trial for many reasons, apart from the issue of the client's innocence. Often, the prosecutor charges a more serious charge than he or she can actually prove, and a client chooses to go to trial to be convicted of a less serious crime. Sometimes a client does something “morally wrong,” but because the prosecutor lacks sufficient evidence to prove each element of the charge the client may go to trial and be acquitted. However, of the hundreds of Alaska Native clients I represented in three years, only one ever went to trial.

Many of my clients had lengthy criminal records. I suspected that their records were padded with convictions for which they may not have been legally responsible. Had they been willing to litigate and challenge the system, they might have had fewer convictions on their records. [FN117] However, Barrow, which is also an Inupiat community, historically has had one of the highest felony trial rates in the state. Since 1992, the Barrow felony-trial rate has stayed at eight percent or above, and for three years it was at least sixteen percent, compared to a statewide average felony-trial *35 rate of six percent. [FN118] Because I have never worked in Barrow, I cannot give a first-hand explanation of the differences between Barrow and Kotzebue. I suspect that because Barrow is a “home-rule borough” with an established tax base from oil production at Prudhoe Bay, the relative wealth of the North Slope Borough has had an impact on the trial rates in this area because the Alaska Native community as a whole enjoys more economic power than in other parts of the state.

According to Hippler and Conn, conflict avoidance was the inherent attribute of traditional Eskimo justice, which emphasized identification of mutual interests between the offender and the offended faction, group, or community. [FN119] “Conciliation, in short, predominated and continues to mark the style of Eskimo justice.” [FN120] Eskimo culture attempts to avoid open conflict by making decisions that maintain peace and order in the village. [FN121] “Contrary to the Anglo system of justice, the village goal is to heal and re-establish harmony and not to stigmatize and wreak retribution.” [FN122]

Morrow explains the Yup'ik preference not to go to trial as neither compliance nor resistance, but rather a decision based in a societal ideology where one does not separate the court system from other arenas of interaction. While lawyers are advising their Eskimo clients to act in a way which will result in the best outcome for their legal case, Yupiit may not make such a distinction between what happens in court and what happens in the larger set of human and nonhuman relationships. [FN123] The characteristics of Eskimo justice are similar to those theorized by Griffith in describing his idyllic “family model of justice,” [FN124] one which assumes an “ultimate reconcilability of interest between the state and the accused” [FN125] and demonstrates “concern with the *36 range of relationships between the state and its citizens.” [FN126]

V Jury Selection, Composition, and the Likelihood of Conviction

The two cases of the police officers prosecuted for beating Rodney King demonstrate the drastic differences between outcomes when one has a jury of one's peers. [FN127] Under the Alaska Administrative Rules, juries (both grand juries and petit juries) are comprised of people who reside within a fifty-mile radius of the courthouse. [FN128] Courthouses are located in the largest town within a borough. The fifty-mile limitation automatically excludes those who fall outside the radius, often those living in the smallest Alaska Native villages. People may also be excluded from jury service because they are not on the list from which the jury pool is comprised. [FN129]

This selection process raises constitutional concerns. The right to a trial by a jury of one's own peers is a fundamental cornerstone of American jurisprudence. [FN130] Both the Alaska and U.S. Supreme Court have interpreted the right to a jury of one's peers as imposing a "vicinage" requirement, the right to a jury from one's own village. [FN131] This vicinage requirement is often not met *37 in rural Alaska. For example, the client from Whale Pass did not have anyone from her community in the jury pool for her trial in Craig because Whale Pass was more than fifty miles from the court. Clients from Point Hope did not have anyone from their community in the jury pool for a trial in Kotzebue. Excluding residents of rural villages is particularly noticeable when the trial is held in a "city" like Ketchikan, Craig, or Kodiak where the majority population is White. Persons from rural villages are tried by people from larger urban areas who will probably be White. In Kotzebue, however, the majority population is Inupiat, so even if people from the village may not be in the jury pool, there will likely be Inupiat on the jury. [FN132]

I discovered a particularly noteworthy example of juror exclusion while practicing in Ketchikan. While representing a young Tsimshian Indian from Metlakatla, I learned that the Ketchikan court systematically excluded Metlakatlans from serving on juries. The reason for this exclusion was the unpredictability of weather in Southeast Alaska. Because Metlakatlans had to travel by boat or plane to get to Ketchikan, the weather often made travel difficult or impossible. The result of this exclusion, which had been the practice for many years, was that people from Metlakatla who were tried in Ketchikan would never have Metlakatlans sitting on their jury. I filed a motion challenging the constitutionality of this exclusion, and the Superior Court Judge, unaware himself of the practice, changed the selection process by administrative order. No one was aware how long this unconstitutional practice had been in effect.

Similarly, the court usually held major felony trials for all of the islands, Ketchikan, Prince of Wales, and Metlakatla, in *38 Ketchikan. [FN133] The jury pool for Ketchikan trials was the island of Ketchikan (and after the judge changed the practice, the island of Metlakatla). This meant that anyone from Prince of Wales Island would not have persons from their

community sit on their jury because of the thirty-mile radius requirement. [FN134] This practice had implications for Haida clients because the largest Haida community was Hydaburg, located on Prince of Wales Island. The majority Alaska Native population on the island of Ketchikan was Tlingit. Thus, an Alaska Native client from Hydaburg was likely to get a predominantly White jury (because the majority population in Ketchikan is White), and to the extent that there were Alaska Natives on the jury, they would likely have been Tlingit instead of Haida.

Many scholars have written about the impact of trial by a jury not of one's own peers. [FN135] Racial bias, racial stereotyping, ethnocentrism, and “in group” bias are all terms used to explain the phenomenon of what happens when one racial group decides the fate of another. [FN136] This tendency to empathize with or subconsciously favor members of one's own race stems in part from the psychological need to maintain a positive self-image. [FN137] A juror's inability to understand the testimony of defendants and witnesses from another race or culture may also explain why juror race sometimes influences jury decisions. [FN138] Jurors will tend to convict other-race defendants under circumstances in which they would acquit same-race defendants. [FN139] Apart from the concern that defendants will not receive a fair trial if they do not have *39 members of their community on the jury, another concern is that members of the community do not have the ability to participate in decision-making functions within the community. [FN140]

These concerns impact Alaska Native defendants living in rural Alaska who are less likely to be tried by a jury of their peers and more likely to be convicted as a result. They are less likely to serve on jury trials as jurors and, therefore, are not participating fully in the decision-making responsibilities of their community.

VI Sentencing, Probation, and Compliance

The Alaska Judicial Council has concluded that there is no disparity in sentences between Alaska Natives and other racial groups. [FN141] My experience with the magistrates and judges in the Alaska bush was that they tried very hard to be sensitive to Alaska Native clients. However, there are certain factors that sentencing judges are required to take into consideration such as prior criminal history, [FN142] work history and possibility for rehabilitation. [FN143] Consideration of these three factors alone may result *40 in more severe sentences for rural Alaskans. This section discusses the sentencing factors, the presentencing interview process, probation and parole, and the effects of alcohol abuse on compliance.

A. Sentencing Factors

1. Impact of Prior Criminal Record

As mentioned earlier, many rural Alaskans have lengthy criminal histories in part because they are likely to plead to charges instead of taking them to trial. [FN144] Once a defendant has a conviction on his record, that record will impact what happens to him in future court proceedings. Each time a defendant comes before the court for sentencing, the judge is required to consider the defendant's prior criminal history. The longer the record, the harsher the sentence. Two cases illustrate this problem, one from Kotzebue and the other from Ketchikan.

One client, a thirty-year-old Inupiat from Kotzebue, had twenty-two prior misdemeanor convictions, all of them alcohol-related. I represented him on a charge of theft of a bottle of vanilla, which he stole for its alcohol content. His alcohol problem was so severe that he told me he drank cocktails made from Lysol and hair spray diluted with water. Each time he was charged with one of these petty offenses, he pled no contest, amassing a significant criminal record.

Despite his obvious alcohol problem and the number of times that he had been incarcerated, this defendant had never actually successfully completed alcohol treatment for any of his offenses. He either lacked money, could not find an appropriate treatment program, or behaved too unruly. In spite of the very marginal nature of the crime, the judge sentenced him to the maximum sentence of ninety days recommending that he serve it in an inpatient treatment program if possible.

A younger Tlingit client from Saxman, the Alaska Native village just outside of Ketchikan, was well on his way to accumulating a similar record. At the time I represented him, he had *41 fifteen prior misdemeanors, nearly all charges of consuming alcohol as a minor. This client had the reputation of hosting drinking parties at his home. The local police often broke down the door to his house and arrested people inside the home without arrest warrants. I repeatedly advised my client to litigate the cases and challenge the constitutionality of the police investigation, but my client always plead no contest to the charges despite my recommendations. Each time the client entered a no contest plea, he was sentenced. [FN145] Because the judge had no choice but to consider his lengthy record when imposing jail time, my client eventually served fairly substantial sentences for minor charges.

2. Work History

In addition to lengthy prior records, courts also consider a client's employment record and prospects for rehabilitation. This is another area where Alaska Natives are at a disadvantage and are likely to receive an increased sentence. Many Alaska Native clients did not have regular paid employment since few jobs were available in their villages.

Although they might not have had jobs, many residents in rural Alaska work very hard living a subsistence lifestyle. [FN146] Subsistence is not a casual pasttime like hunting is for a

sportsman. Subsistence is necessary both for physical sustenance and for cultural continuity. The disruption of subsistence resources can damage the Alaska Native culture. A decrease in subsistence harvests may precipitate a breakdown in the interdependence between generations of native families, impair the spiritual significance of exchanging goods with other community members, and disrupt social and spiritual interaction which may foster an inability to transmit traditional language between generations. "[W] hat ultimately is at stake in protecting subsistence resources is the future existence of a unique and long-standing Native culture."*42 [FN147] Because the sentencing courts do not give participation in subsistence activities the same status as traditional employment, many Alaska Native defendants are subject to higher sentences.

3. Prospects for Rehabilitation

Besides not fitting into the traditional economy, Alaska Native clients often had a hard time successfully completing alcohol programs, either because programs were unavailable in their communities or culturally inappropriate. While there is no hard evidence that Alaska Natives or American Indians are less successful in traditional alcohol-treatment programs than nonnatives or Indians, [FN148] many native people believe that treatment programs must be culturally sensitive to be successful. [FN149]

When the sentencing judge is required to weigh the defendant's criminal record, employment prospects, and likelihood of success in a treatment program, the end equation is that the Alaska Native defendant's prospects for rehabilitation are not always promising by Anglo standards. The following passage describes the obstacles faced by one young Alaska Native client:

Poor Charles Newsom got sentenced yesterday. He is an eighteen-year-old Alaska Native kid who came from a really unstable home and spent his growing up years in and out of juvenile facilities and foster homes. He just turned eighteen and since turning eighteen has had five separate police contacts in a matter of months, three out of Fairbanks, one in Anchorage, and one in Ketchikan. All alcohol-related stuff. When I first saw him in court, he burst into tears. He had returned to Ketchikan for his brother's funeral. His brother had just shot himself. [FN150]

B. Presentence Report Interviews

The presentence report has a substantial influence on the outcome of a felony sentencing hearing. The probation officer bases this report on an interview with the defendant and research into the defendant's family history, criminal history, education, plans, *43 and goals for the future. [FN151] Alaska Native notions of politeness can work to disadvantage them during the presentence report interview. First, Alaska Natives seldom have significant work histories but may be good subsistence hunters. For example, the probation officer might ask a defendant whether he is employed. As mentioned above, a young man from Point Hope

may not be employed in the traditional capitalist sense of the word but may be a successful whaling captain or a hunter and thus be of invaluable service to his community. The probation officer, in determining what sentencing recommendations to make to the court, may decide that since the defendant is unemployed he should serve a jail sentence; whereas, he might recommend that an employed person receive probation with a suspended sentence.

Second, the Alaska Native use of “deference politeness” during the presentence report interview may prevent them from casting themselves in the best light possible. Ron and Suzanne Scollon describe the way that cultural differences between Whites and Alaska Natives can affect the presentence report. [FN152] They document differences between the reports written for Natives and nonnatives. [FN153] Presentence reports for nonnatives focused on plans for the future, goals, and a desire to improve themselves. [FN154] Presentence reports for natives, however, did not include any plans for the future or goals. [FN155] The Scollons explain these differences by what they describe as differences in communication styles between Alaska Natives and Anglos. They describe the two styles of “solidarity politeness” and “deference politeness.” [FN156] Solidarity politeness assumes that there is little social distance between the interviewer and the interviewee. This would be true of Whites speaking with White probation officers. In deference politeness, the interviewee does not assume that he knows what the other person thinks or wants. In deference politeness, the speaker is usually careful not to speak too *44 quickly or too often and tends to remain quiet. [FN157]

The Scollons attribute Alaska Native defendant's reticence in the interview process to their use of deference politeness. The interviewer will not get an entire picture of all the defendant's skills and character traits to use in making recommendations to the judge. [FN158] If the interviewer expects the offender to use the solidarity politeness style, but the offender uses deference politeness, the interviewer may subconsciously conclude that the offender is cold or unfriendly.

The lack of Alaska Native probation officers exacerbates this problem. Alaska Native probation officers would understand the cultural nuances and the differences in communication styles while the Anglo probation officers would not. Presentence reports prepared for my Alaska Native clients were typically shorter than others. This discrepancy may be due to differences in communication styles, or it may also result from the fact that the activities in which Alaska Natives participate are not valued by the White culture.

C. Probation and Parole

Many of the same problems of complying with pretrial conditions apply to defendants on probation and parole. [FN159] At sentencing, judges often impose both a term of incarceration and a period of probation following incarceration. The typical probation

conditions imposed by judges are difficult for rural Alaskans to meet because they involve attending treatment programs that are unavailable in rural Alaska. This means that offenders from rural communities are obliged to remain in urban areas during probation or parole; thus, they are removed from their support systems and more likely to fail. [FN160] Most villages do not have probation officers living within the village. This may account for a higher failure rate. [FN161]

*45 One practical example of the difficulty that some villagers have complying with probation conditions is the experience of an older Alutiiq man from the village of Karluk. This client was initially charged with a felony for chasing his nephew with a knife. The state reduced the charge to a misdemeanor in exchange for his guilty plea. The judge sentenced him to probation with credit for time served in jail on the condition that he seek alcohol treatment.

The alcohol screening consisted of a two-part process that the defendant had to complete in person, rather than over the phone. The flight from Karluk to Kodiak was seventy-six dollars one way, and the screening took place on two consecutive Wednesday nights. My client traveled to Kodiak for the alcohol screening, and the counselor recommended that he attend an intensive outpatient program that met twice a week for six weeks. This man was in his sixties and lived on a limited income. He did not have any place in Kodiak where he could live during treatment, nor could he afford to fly back and forth twelve times over the course of six weeks. Karluk had no alcohol programs that he could attend. Although I left Kodiak before learning if he had completed probation, I suspect that his chances of successfully completing all the requirements of the alcohol program were slim. Even if he completed the program, many people in similar situations could not.

D. Alcohol Abuse and Compliance

The problem of rampant alcoholism in rural Alaska must be considered especially in the context of how to rehabilitate the offender. The connection between alcohol abuse and criminal behavior is well established. [FN162] Alaska state officials have long acknowledged the need to address the problem of alcohol abuse. [FN163] Some communities try to address the problem by passing*46 local option laws that forbid the sale or use of alcohol. [FN164] Some communities prohibit any sale or possession of alcohol (known as dry villages). [FN165] Some allow the personal use of alcohol but forbid the sale of alcohol within the community (known as damp villages). [FN166] Others allow the use of alcohol to the same extent as the rest of the state (wet villages). [FN167]

Kotzebue was a damp village, but all of the Native villages within the Northwest Arctic Native Association region were dry. Substance abuse was still a problem even in dry communities. Some people abused other substances, such as glue, markers, gasoline, after-shave lotion, vanilla, Draino, and hair spray. Bootlegging was common--either selling commercial alcohol at an inflated rate or producing grain alcohol. Although I am personally skeptical, many people

believe that alcohol bans are effective in reducing crime. A new study of Barrow, a village which recently changed from wet to dry, indicated that the rate of violent crime decreased after the change. [FN168]

VII Recommendations

The present criminal justice system in the Alaska bush serves only some of the needs of Alaska Natives. Some of the problems are structural, stemming from the difficulty of providing the same type of legal representation to people living in remote areas as that which is provided in urban areas. Other problems result from cultural differences between Alaska Natives and the Anglo system. These differences predispose Alaska Natives to act in *47 ways that disadvantage them, such as the tendency to confess and not to go to trial. As a result, Alaska Natives may be more likely than nonnatives to be convicted, more likely to receive more severe sentences, and more likely to fail while on probation.

My recommendations fall into two categories: a return of some of the prosecutorial power to the villages and giving some of the responsibility for managing the institutions of the Anglo system to Alaska Natives. It would not be possible to discard the system entirely, nor is it necessary to do so. However, some changes could occur relatively easily since most communities have some form of alternative dispute resolution already in place. [FN169]

A. Allow Alaska Natives to Adjudicate Minor Offenses At the Village Level

I recommend a transfer of some of the state's prosecutorial power back to the tribes to handle at the most local level. [FN170] All *48 misdemeanor crimes should be handled at a tribal level, by those tribes that are willing to do so. Some tribes may not want to take on this responsibility, and I would not recommend requiring any group to do so. [FN171]

Each village could handle these cases within the structure of its village government. Many native villages have established tribal councils and tribal courts that have operated for years. [FN172] In *49 1936, Congress extended the Indian Reorganization Act to Alaska Natives, thereby making their legal status similar to other American Indians. [FN173] The Indian Reorganization Act gave American Indians and Alaska Natives the authority to establish tribal courts and councils. Over seventy villages eventually adopted constitutions under the Indian Reorganization Act, some of which provided for tribal councils and tribal courts. [FN174] Stephen Conn describes the role of village councils as:

[A] village institution of last resort. Within its processes of case adjustment were opportunities in most instances to admit one's guilt, ask for forgiveness and be re-integrated into the community. Orientation or counseling and not punishment were the usual results of the process. Two or three appearances before a council could be anticipated before the council sought to draw in outside police authority. [FN175]

Three tribal organizations are already successfully adjudicating disputes: (1) the Minto Tribal Court; (2) the Sitka Tribal Court and Council; and (3) PACT (which is actually a cross-cultural alternative dispute organization formed of Inupiat, Filipinos, and Anglos). [FN176] Besides tribal courts and councils, some communities have used conciliation boards to handle disputes. [FN177]

*50 A legal infrastructure already exists throughout Alaska that is not being used to its fullest degree. At the same time, the state criminal justice system handles hundreds of minor misdemeanors at an enormous cost but without apparent benefit to Alaska Natives in rural Alaska. Alaska Natives could probably resolve many of these local disputes in more culturally appropriate ways and at a tremendous savings to the state.

Some researchers believe that abandoning the traditional Eskimo dispute resolution system has been a step backward for Alaska Natives. [FN178] For instance, Thomas Berger, author of the Alaska Native Review Commission Report, believes that many of the assimilationist policies of the last few decades have created some of the social problems faced in rural Alaska.

I have seen the effects of assimilationist policies in the villages. Among some Alaska Natives, there is a feeling of deep, bitter resignation, a sense of irretrievable loss that has weakened the hold of some on their very lives. This sense of loss, of intolerable grievance, has a bearing on the rates of alcoholism, violence, and suicide in rural Alaska. Notwithstanding an undoubted rise in living standards during the past decade, these rates have increased. No one can be certain of the causes of social pathology or of its cures, but it seems reasonable to suppose that if the Native peoples can regain a sense of self-worth, a measure of control over their communities, and an opportunity to make a living off the land, they will have a firm basis for a renewed collective and personal sense of well-being. [FN179]

My proposal may help reduce tensions and address other problems associated with assimilationist policies.

The proposal has several advantages. First, tribal authorities can experiment with reclaiming their own power. If Alaska Natives make the decisions about how to handle minor matters, they may feel more a part of the system and less that the system is imposed upon them. The state courts would continue to handle*51 the serious crimes. I do not advocate that a tribal court or council handle a case that it does not feel equipped to adjudicate. Even if the case is only a misdemeanor, a village council or court could decide it did not want to handle the case because a particular person posed a danger to community safety. Tribal members could decide in the first instance how to handle the minor criminal cases. Ideally, cooperation between tribal councils and state prosecuting authorities might lead to overall improved law enforcement in rural Alaska. Second, participation in a tribal court or tribal council may encourage more Alaska Natives to participate in the larger criminal justice system as police, lawyers, magistrates, and judges. Third, the state could realize substantial savings. [FN180]

Despite the state's efforts, troopers, prosecutors, and public defenders in rural Alaska cannot handle the current volume of criminal cases. By freeing up their time in the minor matters, they can better prepare for the more serious cases. Finally, this proposal gives the state a chance to try alternative types of dispute resolution. [FN181]

The proposal also has some possible drawbacks. First, some tribes may not be prepared to adjudicate particular cases because they do not have an active tribal court or tribal council. If the tribe believes it is not equipped to handle this responsibility, however, it can ask the state to continue prosecuting all cases. Or as an intermediate step, the tribal court may chose to handle one discrete type of case, for instance all nonassaultive misdemeanors or other types of crimes where violence is less likely to be a concern. This proposal creates a risk that prosecutors and courts will use criminal convictions obtained through the tribal court process against Alaska Native defendants. Some tribal court proceedings are informal. The due process protections of *52 the adversarial system, such as the right to attorney, the right to remain silent, presumption of innocence, and the right to trial, are not always used in tribal courts. Because it would be unfair to use convictions obtained without adequate due process protections, I recommend against using trial court convictions as a means of enhancing a sentence in a state court proceeding.

B. Explore Alternative Sentencing Practices

Judges should be encouraged to explore alternative sentencing practices, especially for first felony offenders. Alaska's presumptive sentencing laws restrict judicial discretion when sentencing persons with prior felony convictions. This also restricts a judge's ability to experiment with alternative sentencing. Although I support the elimination of presumptive sentencing because it restricts judicial discretion, that is the subject of another article and beyond the scope of this paper. However, judges are given fairly broad discretion when sentencing first felony offenders, and I suggest using alternative types of sentencing. For example, some judges in Canada have experimented with using sentencing circles when sentencing Aboriginal defendants. The idea behind the sentencing circle is to break down the traditional power relationships, equalize them, and incorporate values from traditional dispute resolution methods used by the Aboriginals. [FN182]

Judge Stuart describes the sentencing circle in the following way:

By arranging the court in a circle without desks or tables, with all participants facing each other, with equal access and equal exposure to each other, the dynamics of the decision making process were profoundly changed. Everyone in turn around the circle introduced themselves. Everyone remained seated when speaking. After opening remarks from the judge and counsel, the formal process dissolved into an informal, but intense*53 discussion of what might best protect the community and extract the offender from the grip of alcohol and crime. The tone was tempered by the close proximity of all participants. For the most

part, participants referred to each other by name, not by title. While disagreements and arguments were provoked by most topics, posturing, pontification, and the well worn platitudes, commonly characteristic of courtroom speeches by counsel and judges were gratefully absent. [FN183]

Other types of alternative sentencing methods can be employed within the traditional sentencing process. For example, a Washington judge referred two Alaska Native defendants from Southeast Alaska to a traditional council for recommendations before conducting formal sentencing. The council recommended a year of banishment for both young men prior to formal sentencing. [FN184] There are mixed reviews as to the success of this experiment, but the judge should be applauded for attempting to integrate traditional forms of sanction into the sentencing process. Judges in Alaska could easily ask tribal councils or elders for sentencing recommendations before imposing sentence such as the Washington judge did.

C. Allow Alaska Natives to Administer Corrections Programs

Alaska Natives must be more involved in developing treatment programs, both alcohol-treatment programs and other correctional programs. The Alaska Native community has unique needs arising from its experiences. Persons with a different history and culture cannot understand these experiences. For example, Harold Napoleon, a Yup'ik Eskimo who served on the Alaska Natives Commission, [FN185] believes Alaska Natives suffer from posttraumatic stress syndrome in response to the death of their culture. [FN186] Napoleon believes that since the 1960s a dramatic rise in alcohol abuse, alcoholism, and associated violent behaviors has upset the family and village life and has resulted in the physical and psychological injury, death, and imprisonment of Alaska Natives. In an unpublished manuscript describing his experiences within the criminal justice system he writes:

[It is] as though something had ‘loosened’ from within the *54 Alaska Native people--something self-destructive, violent, frustrated, angry. And it is the young that are dying, going to prison, and maiming themselves. Their families, their friends, their villages say they cannot understand why. Every suicide leaves a shocked, stunned family and village. Every violent crime and every alcohol related death, elicits the same reaction. No one seems to know why. It has now become an epidemic, this alcohol related nightmare. One thing we do know--it is not due to any physical deprivations. Native people have never had it so good, in terms of food, clothing and shelter. [FN187]

The Alaska Sentencing Commission has recognized that Alaska Natives should be a more integral part of corrections. The Commission recommended that the Department of Corrections develop or contract for treatment programs sensitive to the needs of Alaska Native offenders with substance abuse problems including options such as subsistence and culture camps, family camps, and programs designed for urban and rural natives. [FN188]

Quality aftercare programs accessible to rural Alaskans must be developed to follow up after completion of the treatment programs. [FN189]

Alaska Natives also should help run corrections facilities [FN190] and participate in developing alternatives to traditional incarceration, such as work camps that are run as fish camps or culturally appropriate halfway houses for Alaska Natives. [FN191]

D. Allow Alaska Natives to Aid in Supervising Probation

The probationary system does not work. Rural Alaskans are sometimes forced to choose between living in their communities or complying with court-imposed conditions of probation. As mentioned earlier, the most common special condition of probation is to seek alcohol treatment. However, most rural villages do not have alcohol treatment programs. Anger-management programs, for men who abuse women, or sexual offender programs*55 are not available in the villages. If the judge requires these conditions as part of probation, an offender must choose between living in his or her community and complying with probation. Even assuming that the offender chooses to temporarily reside in an urban area to comply with probation, that person is not necessarily learning skills that will enable him or her to transition back into life in the village.

The probation system could change relatively easily to accommodate Alaska Natives. The Alaska Judicial Council has recommended that parole and probation officers should initiate contacts with local organizations, such as tribal courts and tribal councils, and request assistance in supervising offenders. [FN192] Local organizations already have taken responsibility in specific cases for every aspect of supervision from developing the conditions of supervision to setting timetables, enforcing compliance, monitoring successful completion or violations, and reporting back to a probation or parole officer. [FN193]

Alaska needs to change the probation system to make it more accommodating to people in rural communities to increase their likelihood of success. Programs handled locally will be more culturally appropriate and culturally sensitive. Successful completion of probation would lower the number of incarcerated Alaska Natives. It would also increase the level of safety within the villages because people who successfully complete probation are less likely to cause further harm to other members of the village.

E. Implement Programs to Increase Cultural Sensitivity

The Canadians have experimented with various ways to improve cultural sensitivity. Canadians have identified similar problems with overrepresentation of Aboriginals within their justice system. [FN194] They have implemented the use of native court personnel and cross-cultural sensitivity training, thus, protecting the Aboriginal defendant's rights within the court system. Ideally under our system, that role is played by the defense attorney. Alaska

does have an excellent public defender system. However, even though it has made it a priority, the agency has not been successful at recruiting Alaska Native attorneys due primarily to *56 the small number available. Until Alaska Natives are employed more fully in all roles within the court system, a native court liaison could be used to fill in some gaps. The court system could provide funding for one native court liaison at each of the rural courts. This liaison could assist the defendant when he or she initially appears before the court, prior to the appointment of the defense attorney. Even after appointment, the liaison should be available to explain the process to the defendant in a culturally relevant way. The liaison could advise the police, district attorney, and the court of ways that defendants are being treated unfairly within the system and suggest improvements. The liaison would be, in effect, a neutral paralegal whose job is to protect the defendant as well as assist all players within the system to become more culturally sensitive.

The Canadians have also tried to implement the use of sensitivity training for all persons within the criminal justice system who work with Aboriginals. The Commission of Canada Report on Aboriginal Peoples recommended that:

Cross-cultural training for all participants in the criminal justice system, including police, lawyers, judges, probation officers and correctional officers, should be expanded and improved. This training should be mandatory and ongoing for those whose regular duties bring them into sufficient contact with Aboriginal persons. Local Aboriginal groups should be closely involved in the design and implementation of the training. [FN195]

Cross-cultural training would be helpful in Alaska as well. For instance, cultural sensitivity would dictate that participants in the sentencing process would credit accomplishments with traditional subsistence activities in the same manner that credit is given to other types of work. [FN196] Some of the agencies currently offer sporadic training, but a more systematized program available to all participants should improve the overall functioning of the criminal justice system.

*57 **Conclusion**

The criminal justice system in Alaska should become more integrated. [FN197] Alaska Natives should participate in all aspects of the process from the police to the judiciary. Prosecutors, defense attorneys, judges, and probation officers, should become more sensitive to Alaska Native cultures. [FN198] I have suggested several concrete recommendations that could be implemented immediately with minimal costs.

I have tried to promote suggestions to encourage the justice system to change instead of recommending that Alaska Natives should assimilate into the system. It makes more sense to explore how the Anglo system can adapt itself to take advantage of the vast and rich culture of Alaska Natives. We can learn much from Alaska Natives who had established systems of justice long before arrival of the Anglo system. We should integrate those values into the Anglo system to the benefit of all. As Eleanor McMullen from Port Graham states: “Native

people are different. . . . Our thinking is totally different. People that are nonNative don't quite understand our way of thinking and somehow, if we could close those gaps so they can better understand them, I think many good things can happen." [FN199]

[FNa1]. Legislative Counsel, American Civil Liberties Union, Washington National Office. B.A. 1985, Smith College; J.D. 1990, Northeastern University School of Law; LL.M. 1998, Temple University School of Law. I would like to thank the following people for their insightful comments and suggestions on earlier drafts: Richard Greenstein, James Shellenberger, Louis Natali, Deborah Zalesne, Phyllis Morrow, Richard A. Leo, Theresa Carns, Suzanne DiPietro, Susan Orlansky, Bill Murray, and Jennifer Wells. I would also like to thank my Temple Law School research assistants, Chuck Bowser, Dina Chavar, and Christy Posnett. Special thanks also go to Art Koeninger for technical assistance.

[FN1]. The term Alaska Native refers to a citizen of the United States who is a person with one-fourth degree or more of Alaska Indian including Tsimshian Indian, Eskimo, or Aleut blood. Eskimos and Aleuts are referred to as Alaska Natives, although ethnologically, they are not American Indians. However, they have always been referred to as Alaska Natives and treated as such for purposes of federal Indian policy. David H. Getches & Charles F. Wilkinson, Cases and Materials on Federal Indian Law 774 (2d ed. 1986).

[FN2]. Robert Cole, Division of Administrative Services, Inmate Profile, State of Alaska, Department of Corrections 10 (1995).

[FN3]. Id.

[FN4]. Id. at 15.

[FN5]. Alaska Department of Labor, Alaska Population Overview: 1995 Estimates 36-37 (1996) (percentages calculated by author) [hereinafter Alaska Population Overview].

[FN6]. Cole, supra note 2, at 9.

[FN7]. A comparison of the crime rate between Alaska and other states shows that the overall crime rate in Alaska is lower than other states. However, the crime rate in rural Alaska is higher than in rural areas of other states. (Crime rate per 100,000 residents: Alaska Large Cities 5746.7, U.S. large cities 6547.2; Alaska small cities 6528.6, U.S. small cities 5302.6; Alaska rural areas 3311.1, U.S. rural areas 2022.1). Alaska Sentencing Commission, Annual Report to the Governor and the Alaska Legislature, app. D (1992).

[FN8]. According to a study conducted by the Department of Public Safety from 1985 to 1986 in eight rural, traditional Eskimo villages, the violent crime rate was 1.64 times higher than that for the rest of Alaska. Nella Lee, Rural Crime Rates High, Alaska Just. F., Summer 1988, at

2. See also Gary Copus & Carolyn Holmes, North Slope Police Reports: A First Look, Winter 1990, at 8.

[FN9]. Richard H. Erlich, An Analysis of the Criminal Justice System in the Northwest Arctic Borough, Alaska Just. F., Fall 1996.

[FN10]. I am using Haskins' definition of “culture” as a “system of knowledge shared by a relatively large group of people.” William A. Haskins, Pitfalls in Intercultural Communication for Lawyers, 16 Trial Dipl. J. 71, 72 (1993). A nonacademic definition of culture from Delbert Rexford is “[t]he great law of culture is to let one become what they were created to be. Let me be an Inupiat with the freedom to hunt, to fish, to trap, and to whale as my forefathers did in past centuries.” Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission (1985) (quotation from unpaginated section on subsistence).

[FN11]. Some of the problems attributed to geographic constraints are applicable to nonnative defendants as well as native defendants. The focus of this Article, however, is to offer some suggestions to explain the overrepresentation of Alaska Natives in the prison system. I do not mean to suggest that nonnatives are not also negatively affected by these problems, but this Article does not focus on them.

[FN12]. In defining the term “bush,” I am borrowing from Stephen Conn's definition: “We use the term ‘bush’ to refer to those sparsely-inhabited, minimally-accessible areas of the state which participate only marginally in the urban money economy.” Stephen Conn, Comparative Analysis of Alaska Law, Rules and Practice with A.B.A. Standards Relating to Criminal Justice n.2 (1974) (distributed at the Alaska Judicial Conference September 1994).

[FN13]. Southeast Alaska Indians include Tlingit, Haida, and Eyaks, and Tsimshian Indians who moved from Canada to Metlakatla in the latter part of the nineteenth century. I worked with Tlingits, Haidas, and Tsimshian Indians, but to my knowledge did not work with any Eyaks.

[FN14]. In anthropological terms, the Alutiiq are classified as Pacific Eskimos and comprised of three subgroups: the Chugachmiut (Prince William Sound area), the Unegkurmiut (lower Kenai Peninsula), and the Koniagmiut (Kodiak Island area and Alaska peninsula). A Gathering of the Alutiiq Nation (anonymous paper calling for a reunion of the Alutiiq nation).

[FN15]. Inupiat includes at least two major groups of Eskimos, those living on the North Slope and those in the Kotzebue Sound area. Another distinct group of Inupiat are Siberian Inupiat, and other groups living in Canada, Greenland, and other circumpolar areas. Alaska Judicial Council, Resolving Disputes Locally: A Statewide Report and Directory 1 n.3 (1993) [hereinafter Resolving Disputes Locally].

[FN16]. Gay Gellhorn et al., Law and Language: An Interdiscipinary Study of Client Interviews,

1 Clinical L. Rev. 99, 252 (1994).

[FN17]. Charles J. Ogletree, Jr., Beyond Justifications: Seeking Motivations to Sustain Public Defenders, 106 Harv. L. Rev. 1239, 1244 (1993) (explaining reason for using the narrative form in his article).

[FN18]. I will use the past tense when describing my work experiences and relaying anecdotes.

[FN19]. Metlakatla is the only Indian reservation in Alaska. It opted out of participating in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601-29 (1996) [hereinafter ANCSA] and continued with its reservation status instead. Metlakatla's legal status is different from other native villages because of its reservation status. It is the only native land in Alaska to be definitively recognized as “Indian Country” by both the federal and state courts. This is explained further at note 170 infra.

[FN20]. Alaska Rules of Professional Conduct Rule 4.2 (Michie 1996).

[FN21]. A Gathering of the Alutiiq Nation, supra note 14.

[FN22]. Rachel King, Journal (Mar. 12, 1993) (unpublished manuscript, on file with author) [hereinafter King Journal].

[FN23]. Richard Erlich, Criminal Justice in the Northwest Arctic Borough, Alaska Just. F., Fall 1996, at 1 (available at <http:// www.uaa.alaska.edu/just/forum/>).

[FN24]. Id.

[FN25]. King Journal (July 26, 1993).

[FN26]. Haskins, supra note 10, at 72-75.

[FN27]. Id. at 72.

[FN28]. Phyllis Morrow, Legal Interpreting in Alaska, Alaska Just. F., Winter 1994 (available at <http://www.uaa.alaska.edu/just/forum/>).

[FN29]. Id.

[FN30]. Id.

[FN31]. Susan Berk-Seligson has outlined nine lexical features typical of legal English that

make it incomprehensible to the nonlawyer: (1) technical terms; (2) common terms with an uncommon meaning; (3) words with a Latin origin; (4) polysyllabic words; (5) unusual prepositional phrases; (6) doublets--combinations of words of Anglo-Saxon origin with words derived from either French or Latin; (7) formality; (8) vagueness; and (9) overprecision. Susan Berk-Seligson, The Bilingual Courtroom: Court Interpreters in the Judicial Process 15-17 (1990).

[FN32]. The process of communication is a dynamic one with many variables and possibilities for misunderstanding. Samovar and Porter have broken down the elements of communication into eight parts: (1) source--the one who needs to communicate; (2) encoding--the internal selecting and arranging of behaviors using long-range rules; (3) message--the set of symbols resulting from encoding; (4) channel--the means of transmitting a message from source to receiver; (5) receiver--the one who “intercept(s) messages”; (6) decoding-- “converting external messages into a meaningful experience”; (7) receiver response--“what a receiver decides to do about the message”; and (8) feedback or information about communication effectiveness. Joan B. Kessler, The Lawyer's Intercultural Communication Problems with Clients from Diverse Cultures, 9 Nw. J. Int'l L. & Bus. 64, 75 (1988) (citing Richard E. Porter and Larry A. Samovar, Approaching Intercultural Communication, A Reader 26 (Richard E. Porter & Larry A. Samovar eds., 3d ed. 1982). In my experience, communication broke down particularly during steps six through eight.

[FN33]. Evangeline Marlos Varonis & Susan M. Gass, Miscommunication in Native/Nonnative conversation, 14 Language & Soc. 327, 343 (1985).

[FN34]. As Earlene Baggett wrote:

Notwithstanding the fact that Native American subcultures continue to maintain their distinctiveness and individuality, characteristics of the traditional Native American culture known as ‘Indian Ways' still exist among some Native Americans. These characteristics include tribal loyalty, respect for elders, reticence, humility, avoidance of personal glory and gain, giving and sharing with as many as three generations of relatives, an abiding love for their own land, attribution of human characteristics to animals and nature, and strong spiritual beliefs.

Earlene Baggett, Note, Cross-Cultural Legal Counseling, 18 Creighton L. Rev. 1475, 1491 (1985).

[FN35]. Robin Ridington, Cultures in Conflict: The Problem of Discourse, Canadian Literature, Spring-Summer 1990, at 277-78.

[FN36]. Patricia Kwachka & Charlotte Basham, Literacy Acts and Cultural Artifacts: On Extensions of English Modals, 14 J. of Pragmatics 413, 414-15 (1990).

[FN37]. Id. at 417.

[FN38]. Judge Richard Erlich, An Analysis of the Criminal Justice System in the Northwest Arctic Borough, 18 (unpublished manuscript 1995).

[FN39]. Morrow has studied and written about Yup'ik Eskimos from the Bethel region of Alaska. See Phyllis Morrow, Yup'ik Eskimo Agents and American Legal Agencies: Perspectives on Compliance and Resistance, 2 J. of the Royal Anthro. Inst. 405 (1996). Based on my experiences, I believe that her observations also apply to Inupiat Eskimos from the Arctic.

[FN40]. Id. at 411.

[FN41]. Id.

[FN42]. Id.

[FN43]. Id. at 412 (citing William M. O'Barr, Linguistic Evidence: Language, Power and Strategy in the Courtroom (1982)).

[FN44]. The V.P.O. was initiated with funding from the Bureau of Indian Affairs to provide law enforcement services to rural communities. Lawrence C. Trostle, et al., The Nonenforcement Role of the VPSO, Alaska Just. F., Winter 1992, at 1 (available at <http://www.uaa.alaska.edu/just/forum/>).

[FN45]. The V.P.S.O. program was established in 1982 by the Department of Public Safety as a rural off-shoot of the Alaska State Troopers, originally envisioned to have duties beyond those of the V.P.O. including fire-fighting, boat safety, first aid and law enforcement. Resolving Disputes Locally, supra note 15, at 99 (1993). Some villages elected to replace V.P.O.'s with V.P.S.O.'s, others retained V.P.O.'s and some chose to have both. Trostle, supra note 44.

[FN46]. Anthropologists and commentators have written extensively about the cultural differences between U.S. middle class and American Indian and Alaska Natives. For example, the order of value preference for one's relationship to nature and the environment is diametrically opposite. The U.S. middle class prefer “control over,” then “subject to,” and then “harmony with” nature. American Indians and Alaska Natives prefer “harmony with,” “subject to,” and then “control over” nature. The U.S. middle class prefer a time orientation in the future, then the present, and then the past. American Indians and Alaska Natives prefer the present, then past, and then future. Regarding relationships with people, U.S. middle class prefer individual, collateral, then lineal. American Indians and Alaska Natives prefer collateral, individual, then lineal. These cultural values permeate all interactions

between participants in the criminal justice system. Carolyn Attneave, American Indians and Alaska Native Families: Emigrants in their Own Homeland, in The Paradigms.

[FN47]. Many Arctic villages do not have septic systems for waste disposal. The honey bucket is literally a plastic bucket used as a toilet and emptied into a common open sewage pit.

[FN48]. King Journal (Aug. 23, 1993).

[FN49]. Until recently, commercial halibut fishing in Alaska has been done twice (sometimes more) a year for short one- or two-day periods called “openings.”

[FN50]. King Journal (June 1, 1992).

[FN51]. Alaska Natives expressed dissatisfaction with state government during the Alaska Native Review Commission Hearings. See generally Berger, supra note 10.

[FN52]. Social Impacts and Issues Related to Northern Development, presented at the Northern Frontier Development Sessions at the Western Regional Science Association (unpublished manuscript).

[FN53]. Id. at 29.

[FN54]. Id.

[FN55]. Ron Scollon & Suzanne Scollon, Interethnic Communication 17 (1980).

[FN56]. John J. Gumperz & Celia B.K. Roberts, Understanding in Intercultural Encounters, Proceedings of the 1987 Meetings of the International Pragmatics Association (J. Vershueren ed., forthcoming).

[FN57]. Id. at 17.

[FN58]. Id. at 14-15.

[FN59]. Id. at 17.

[FN60]. Id. at 18.

[FN61]. Table taken from Scollon, supra note 55, at 17.

[FN62]. Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, 73 Or. L. Rev. 823 (1994).

[FN63]. Id. at 829.

[FN64]. Gumperz & Roberts, supra note 56, at 2.

[FN65]. However, it was actually easier for me to see clients from Metlakatla or Prince of Wales Island if they were in custody because they were detained in Ketchikan where I lived.

[FN66]. King Journal (June 21, 1993).

[FN67]. Criminal cases must be brought to trial within 120 days unless there are statutorily specified exceptions. Alaska R. Crim. P. 45(b) (Michie 1997).

[FN68]. King Journal (June 30, 1993).

[FN69]. Recent studies have found that annual subsistence harvests range from 700 to 1,100 pounds of food per person, per year in the smaller communities. L. Huskey, Institute of Social and Economic Research, The Economy of Village Alaska 8 (1992).

[FN70]. Chase Hensel, Telling Our Selves: Ethnicity and Discourse in Southwestern Alaska, 65 (1996).

[FN71]. Esmond Harmsworth, Bail and Detention: An Assessment and Critique of the Federal and Massachusetts Systems, 22 New Eng. J. On Crim. & Civ. Confinement 213, 216-218 (1996); Jeffrey Fagan & Martin Guggenheim, Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment, 86 J. Crim. L. & Criminology 415, 429 (1996).

[FN72]. Ann M. Overbeck, Detention for the Dangerous: The Bail Reform Act of 1984, 55 U. Cin. L. Rev. 153, 198 (1986).

[FN73]. Id. at 199. But see Harmsworth, supra note 71, at 217-18 (claiming that most studies have found no statistically significant relationship between detention and conviction once relevant variables are controlled).

[FN74]. Harmsworth's research found that for many defendants, a plea to a charge with an agreement for credit for time served leads to less incarceration than release after acquittal at trial. Id. at 219; Jeff Thaler, Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial, 1978 Wis. L. Rev. 441, 456-57.

[FN75]. Alaska R. Crim. P. 45(b) (Michie 1997).

[FN76]. Anne Rankin's study of the Manhattan Bail Project found little evidence to support a link between detention and conviction. Harmsworth, supra note 71, at 219.

[FN77]. Id.

[FN78]. Id. at 218. However, Edmond Harmsworth's study disputes some of these conclusions. Id.

[FN79]. This particular correlation was first noted by Caleb Foote, who found in his Philadelphia sample that over 2.5 times as many jailed defendants received prison sentences as bailed defendants. See Caleb Foote, Compelling Appearance in Court: Administration of Bail Philadelphia, 102 U. Pa. L. Rev. 1031, 1053 (1954). Anne Rankin's study of the Manhattan Bail Project found that 64% of jailed persons and only 17% of released persons received prison sentences. See Anne Rankin, The Effect of Pretrial Detention, 39 N.Y.U. L. Rev. 1031, 1053 (1954); Preventive Detention: An Empirical Analysis, 6 Harv. C.R.-C.C. L. Rev. 289, 350 (1971) (“the individual who is incarcerated is ... prejudiced at sentencing”).

[FN80]. See Harmsworth, supra note 71, 218.

[FN81]. See Maureen J. Mann, Comment, Overlooking the Constitution: The Problem with Connecticut's Bail Reforms, 24 Conn. L. Rev. 915, 968 (1992) (“Pretrial detainees are deprived of any means of employment ... and generally receive harsher sentences, since during the long period between their arrest and the disposition of their cases they cannot prove themselves to be productive members of society who are gainfully employed.”).

[FN82]. Alaska Stat. § 12.25.150(a) (Michie 1996).

[FN83]. Resolving Disputes Locally, supra note 15, analyzing felony sentences from 1976-1979.

[FN84]. Alaska Stat. § 12.25.150(a).

[FN85]. Alaska R. Crim. P. 38.1.

[FN86]. King Journal (May 19, 1992).

[FN87]. I am not aware of any academic studies that measure the difference in confession rates between Alaska Natives and nonNatives. Obviously, my impressions are not meant to be taken as scientific conclusions. My general impression is that Inupiat and Alutiiq nearly always confessed. Tlingits and Haidas may have confessed somewhat more frequently than White clients, but not nearly at the same rate as Eskimos. However, the reader unfamiliar with the criminal justice system should keep in mind that confession is very common, even

among White defendants.

[FN88]. The case that did not have a confession involved the serious sexual abuse of a minor. It was so unusual not to have a confession that I was convinced beyond any doubt that my client was innocent. He did go to trial (another extremely unlikely occurrence) and was acquitted. I believe he was acquitted because the Eskimo jury believed him when he said he did not do it, because had he done so, he would have confessed.

[FN89]. Richard J. Ofshe & Richard A. Leo, The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions, 16 Law, Pol. & Soc. 189 (1997).

[FN90]. Id. at 212.

[FN91]. Id. at 216.

[FN92]. Harold Napoleon, YuuYarag: The Way of the Human Being, 1, 1-4 (Eric Madsen ed., 1991) (describing his personal battle with alcohol and the phenomenon of persons committing crimes during blackout periods).

[FN93]. The Alaska Sentencing Commission estimated that at least 75% of offenders have problems with substance abuse, and this figure is probably even higher for Alaska Native offenders. Alaska Sentencing Commission, supra note 7, at 18.

[FN94]. Arthur Hippler & Stephen Conn, Northern Eskimo Law Ways and Their Relationship to Contemporary Problems of Bush Justice: Some Preliminary Observations on Structure and Function 28 (1973).

[FN95]. Id. at 33-34.

[FN96]. Morrow, supra note 29, at 417.

[FN97]. Id.

[FN98]. Hippler & Conn, supra note 94, at 46.

[FN99]. Karl N. Llewellyn, Jurisprudence: Realism in Theory and Practice 439, 444-50 (1962).

[FN100]. Mirjan Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. Pa. L. Rev. 506, 571 (1973).

[FN101]. John Griffiths, Ideology in Criminal Procedure or A Third “Model” of the Criminal Process, 79 Yale L.J. 359, 371 (1970) (arguing that the pre-existing “battle” model for criminal

procedure--a model that pits the criminal defendant in an adversarial fight against the state--is inferior to a "family" model which would emphasize reconciliation between the litigants and rehabilitation of the wrongdoer).

[FN102]. Id. at 395 ("the prevailing Battle Model ideology accounts for the most basic and characteristic qualities of our unlimited process").

[FN103]. Most studies address the impact of confessions in the context of assessing the impact of the decision in Miranda v. Arbona. 384 U.S. 436 (1966) established the safeguard that before law enforcement officers could conduct a custodial interrogation, a defendant had to be informed of his rights under the Fifth Amendment, including the right to remain silent and the right to an attorney. For purposes of this Article, I am using the term confession as synonymous with waiving Miranda rights.

[FN104]. Leo found a 20% increase in charging rate by prosecutors. Richard A. Leo, Inside the Interrogation Room, 86 J. Crim. L. & Criminology 266, 298 (1996).

[FN105]. Leo found that defendants who confessed were 24% less likely to have their cases dismissed. Id. at n.15; Paul G. Cassell & Bret S. Hayman, Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda, 43 UCLA L. Rev. 839, 911 (1996) (finding that defendants who were successfully questioned by police were less likely to have their charges dismissed).

[FN106]. Leo found that defendants who confessed were 25% more likely to have their cases resolved by plea bargaining as opposed to jury trial. Leo, supra note 104, at 298-99. Plea bargaining is a common practice in criminal cases where a defendant waives his right to a jury trial and pleads guilty or "non contest" usually in exchange for a reduced charge or a sentence agreement. Alaska does not officially use a system of plea bargaining, but it does use a charge bargaining system where the prosecution agrees to lower the charge in exchange for a guilty or no-contest plea. Alaska Judicial Council, Alaska's Plea Bargaining Ban Re-Evaluated 10-12 (Jan. 1991) [hereinafter Alaska's Plea Bargaining].

[FN107]. Leo found defendants who confessed were 26% more likely to be convicted. Leo, supra note 104, at n.15; Cassell & Hayman, supra note 105, at 913 (finding that suspects who invoked their rights were less likely to be convicted as charged than suspects who gave incriminating statements, 15.4% vs. 30.0%, although he concluded that these differences were not statistically significant).

[FN108]. Id.

[FN109]. David Neubauer, Confessions in Prairie City: Some Causes and Effects, 65 J. Crim. L. and Criminology 103, 110 (1974). Other researchers have corroborated Neubauer's findings.

Peter Nardulli, James Eisenstein, and Roy Flemming have found that defendants who confessed were less likely to receive a reduction in the number of counts charged against them. The effects of confessions were more pronounced when the data were separated into four groups of counties defined by the extent of the plea bargaining practices. In three of the four groups, confessions had some effect on charge or count reductions. Paul G. Cassell, Miranda's Social Costs: An Empirical Reassessment, 90 Nw. U. L. Rev. 387, 443 (1996).

[FN110]. Richard A. Leo, A Day of Contrition Revisited: False Confessions and Miscarriages of Justice Today, (paper presented at the Contemporary Hysteria Condemns the Innocent, Conference in Salem, MA, January 14, 1997).

[FN111]. Peter F. Nardulli et al., The Tenor of Justice: Criminal Courts and the Guilty Plea Process 205 (1988).

[FN112]. A confession can strengthen a prosecution's case considerably. A confession is “direct” evidence of a defendant's guilt. Indeed, the Supreme Court has recognized that a “defendant's confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.” Cassell, supra note 109, at 441.

[FN113]. Id.

[FN114]. Id.

[FN115]. The most recent trial statistics prepared by the Alaska Court System for Fiscal Years 1994-1996 respectively indicate that 1.3%, 1%, and .01% of misdemeanors and 9%, 6.7% and 6.5% of felony cases were resolved by trial state-wide. Alaska Court System, 1994, 1995 and 1996 Annual Report at S-23, S-45 (percentages calculated by author based upon representations and figures stated in the report).

[FN116]. There are no statistics available which calculate the rates at which Alaska Native clients assert their right to trial versus Whites or other nonNatives. The best comparison to make is the difference in trial rates between urban and rural Alaska, urban being predominantly White and rural being predominantly Alaska Native. Statistics from 1978 indicate that the trial rate in Southeast Alaska (5%) and the Bush (6%) is approximately half that of Anchorage and Fairbanks (10%). Alaska's Plea Bargaining, supra note 106, at 92. The following are the most recent trial rates taken from the 1994-1996 Alaska Court System Reports for a sample of six communities (Ketchikan, Kodiak, and Kotzebue, which are the focus of this Article, and Juneau, Fairbanks and Anchorage, the three major population centers in the state): (1) Ketchikan District Court 1.3%, 1.1%, and 1.5%, Superior Court 7.9%, 5%, and 8.6%; (2) Kodiak District Court 1.3%, 1%, and .4%, Superior Court 1.25%, 3.6%, and

1.2%; (3) Kotzebue District Court .4%, 0%, and 0%, Superior Court 1.9%, 6.9%, and 3.8%; (4) Juneau District Court .8%, .55%, and 1.05%, Superior Court 1.3%, 2.6% and 7.6%; (5) Fairbanks District Court 1.6%, 1.4%, and 1.7%, Superior Court 28.7%, 13%, and 11.6%; and (6) Anchorage District Court .98%, 1%, and 1.3% and Superior Court 9.3%, 6%, and 5.4%. Id. (Percentage calculations made by author based upon representations and figures stated in the report).

[FN117]. Stephen Conn wrote about the reaction by rural magistrates to his advice on how to explain a defendant's rights including the right to plead not guilty and have a jury trial. An Alaska Native judge accused him of “teaching Eskimos to lie.” Hippler & Conn, supra note 94, at 15.

[FN118]. Alaska's Plea Bargaining, supra note 106, at 106.

[FN119]. Hippler & Conn, supra note 94, at 28.

[FN120]. Id.

[FN121]. James W. Vanstone, Point Hope: An Eskimo Village in Transition 103 (James W. Vanstone ed., 1962).

[FN122]. David A. Blurton & Gary D. Copus, Administering Criminal Justice in Remote Alaska Native Villages: Problems and Possibilities, 11 The Northern Review 118, 141 (1993).

[FN123]. Morrow, supra note 28.

[FN124]. John Griffiths, Ideology in Criminal Procedure or A Third “Model” of the Criminal Process, 79 Yale L.J. 359, 373 (1970).

[FN125]. Id.

[FN126]. Id.

[FN127]. As early as 1879, the U.S. Supreme Court recognized that de jure exclusion of Blacks from jury venires violated a Black defendant's right to equal protection. Strauder v. West Virginia, 100 U.S. 303, 309 (1879) (“It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.”).

[FN128]. Alaska Admin. R. 15(b)(2). Exceptions exist, especially in the Third Judicial District, which uses a 30-mile radius. Judges can, and periodically do, draw juries from outside these

limits, usually at the request of a party in the case.

[FN129]. Each state has its own way of compiling lists of potential jurors. Common sources are voter registration lists and licensing lists (hunting, fishing and automobile). Alaska draws all jurors from permanent fund dividend lists.

[FN130]. As the court in Batson v. Kentucky noted:

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. “The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.”

Batson v. Kentucky, 476 U.S. 79, 86-87 (1986) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

[FN131]. The Alaska Supreme Court first articulated the vicinage requirement in Alvarado v. State, 486 P.2d 891, 902 (Alaska 1971). The court advanced a three-part test for determining constitutional error in the jury selection process:

(1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Tugatuk v. State, 626 P.2d 95, 100 (Alaska 1981); See also Duren v. Missouri, 439 U.S. 357 (1979).

[FN132]. According to the most recent census information, the Northwest Arctic Borough is 85.2% Alaska Native. The population breakdown for each village has not been done by race. However, Kotzebue has been characterized as an Alaska Native Village Statistical Area for census purposes. Alaska Population Overview, supra note 5, at 70, 117.

[FN133]. The Superior Court sometimes used the District Court in Craig for felony trials.

[FN134]. Alaska Admin. R. 15(b).

[FN135]. Deborah Zalesne & Kinney Zalesne, Saving the Peremptory Challenge: The Case for a Narrow Interpretation of McCollum, 70 Denver L. Rev. 313 (1993); Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153 (1989); Raymond J. Broderick, Why the Peremptory Challenge

Should be Abolished, 65 Temple L. Rev. 369 (1992); Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1 (1990); Barbara D. Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum. L. Rev. 725 (1992).

[FN136]. Nancy J. King, Post-conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Juror Decisions, 92 Mich. L. Rev. 63, 77 (1993).

[FN137]. Id. at 78 (citing Marilyn B. Brewer, In-group Bias in the Minimal Intergroup Situation: a Cognitive-Motivational Analysis, 86 Psychol. Bull. 307 (1979).

[FN138]. Id. at 79.

[FN139]. Sheri L. Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1640 (1985).

[FN140]. Professor Drew L. Kershan articulated the dual concerns of excluding certain segments of the community from jury service.

[E]xcluded citizens are not members of the community for the purposes of making the law, but are members of the community for the purpose of obeying it. The Supreme Court has long recognized that the second deprivation suffered by excluded citizens--accountability to standards set by a limited portion of the community--is a violation of the Constitution of the United States.

Drew L. Kershen, Vicinage, 30 Okla. L. Rev. 95-96 (1977); Bush v. Kentucky, 107 U.S. 110 (1882); Neal v. Delaware, 103 U.S. 370 (1880); Ex parte Virginia, 100 U.S. 339 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880). See also Baston v. Kentucky, 476 U.S. 79, 1712, 1713 (1986) (“Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”).

[FN141]. Alaska's Plea Bargaining, supra note 106, at 148.

[FN142]. Alaska's presumptive sentencing scheme requires judges to determine a felony sentence based on prior felony convictions. Alaska Stat. § 12.55.145 (Michie 1996). According to data compiled by the Alaska Sentencing Commission, Alaska Natives were more likely to have a prior felony record than White or African-American offenders. Under Alaska's presumptive sentencing scheme, a prior felony record would increase the length of a sentence for a new offense. Alaska Sentencing Commission, supra note 7, at app. B-1.

[FN143]. State v. Chaney, 477 P.2d 441 (Alaska 1970) (setting out the criteria to consider

before sentencing which are required by the Constitution and Alaska Statute § 12.55.005: (1) the seriousness of the offense; (2) prior criminal history of the defendant and likelihood of rehabilitation; (3) need to confine the defendant to prevent further harm to the public; (4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered public safety; (5) the effect of the sentence in deterring the defendant or other members of society; and (6) the effect of the sentence in imposing community condemnation and a reaffirmation of societal norms).

[FN144]. See supra Part VI text and accompanying notes.

[FN145]. In this case, my client lost because he ended up with a conviction which I could have avoided. More importantly, the community lost because there was no oversight to the illegal police behavior. As an assistant public defender, I could only represent my clients in criminal cases and could not file civil suits on their behalf. The local legal service office had been closed due to budget cutbacks, and my indigent client could not afford to hire an attorney to sue the police for the intentional violation of his constitutional rights.

[FN146]. William M. Bryner, Towards a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives, 12 Alaska L. Rev. 293, 296, 300-301 (1995).

[FN147]. Id. at 301.

[FN148]. Robert J. Miller & Maril Hazlett, The “Drunken Indian:” Myth Distilled into Reality Through Federal Indian Alcohol Policy, 28 Ariz. St. L.J. 223, 226 n.9 (1996).

[FN149]. Id. at 227 n.10 (citing Randy Furst, Indians Seeking to Run Their Own Treatment Centers, Star Tribune, May 16, 1993, at 1B).

[FN150]. King Journal (July 22, 1992).

[FN151]. Alaska Stat. § 12.55.025 (Michie 1996).

[FN152]. Scollon & Scollon, supra note 55. The Scollons analyzed data researched and reported by the Alaska Judicial Council and reported in the “Interim Report of the Alaska Judicial Council on Findings of Apparent Racial Disparity in Sentencing.” Prepared by Michael L. Rubinstein, Stevens H. Clarke and Theresa J. White (October 1979).

[FN153]. Id. at 36.

[FN154]. Id.

[FN155]. Id.

[FN156]. Id.

[FN157]. Morrow explains the reluctance of Eskimos to speak of the future not only as a form of deference politeness, but as a cultural custom which resists making predictions about the future which is always uncertain. Interview with Phyllis Morrow, May 6, 1997.

[FN158]. Id.

[FN159]. There is some indication that Alaska Natives are less likely to get a strictly probationary sentence. According to the most recent statistics compiled by the Alaska Department of Corrections, 24% of all probationers/parolees are Alaska Native, as compared to 34% of inmates. Inmate Profile, supra note 2.

[FN160]. Resolving Disputes Locally, supra note 16, at 122.

[FN161]. Forty-one percent of those in prison, on probation, or parole revocations are Alaska Natives. This rate is even higher than the inflated incarceration rate of 32%. Alaska Sentencing Commission, supra note 7, at 19.

[FN162]. Kai Pernanen, Theoretical Aspects of the Relationship Between Alcohol Use and Crime, in Drinking and Crime: Perspectives on the Relationships Between Alcohol Consumption and Criminal Behavior 1 (James J. Collins, Jr., ed., 1981).

[FN163]. One of the original reasons for starting the Village Public Safety Officer program (V.P.S.O.) was to devise means for villages to control the use of alcoholic beverages.

Simultaneously with the development of the Village Public Safety Officer Program, a research effort should be mounted to explore all the means and options that a village has or could have with changes in the law in order to deal with the alcohol problem. The Attorney General's office, the Criminal Justice Planning Agency, and the State Troopers should be involved and possibly the Office of Alcoholism and selected social service agencies. The objective is to identify the means a village could use to prevent/control the influx of liquor into the village, rather than any attempts to determine the sociological reasons people drink, etc. No more worthy commitment of resources can be imagined.

James Messick, Village Public Safety Officer Program, Alaska Just. F., June 1979, at 9.

[FN164]. Alaska Stat. § 04.11.491 (Michie 1996).

[FN165]. Id. § 04.11.491(b)(4).

[FN166]. Id. § 04.11.491(b)(1).

[FN167]. Id.

[FN168]. Frank Wake, Alcohol Related Violent Crime: A Study in Barrow, Alaska from April, 1994 to October, 1995, (April 1996) (unpublished directed study, Xavier University (on file with author).

[FN169]. Stephen Conn has suggested some unique ways to assure protection of the Alaska Native defendant's rights within the system.

One reform might be to remove from magistrates the power to accept guilty pleas except for offenses with penalties significantly less than the present statutory penalties obtainable for misdemeanors. A second reform might be to allow magistrates to accept guilty pleas only on village ordinances (assuming that a valid set of village ordinances is adopted by the village). Each reform suffers from other flaws in the system. Both reduce the potential harm done village defendants who plead guilty out of ignorance of their rights or for cultural reasons but do little to firm up constitutional standards of due process within the system. Obviously, both also increase the workload on the district courts by reducing the possibility of disposing of certain cases by guilty pleas.

Hippler & Conn, supra note 94. While I applaud this as a creative suggestion, my concern is that adopting it would only separate the Alaska Native defendant from the system even more than he already is.

[FN170]. Federal law allows Indian tribes to prosecute their own members for crimes punishable for up to one year in jail and a $5,000 fine. 25 U.S.C. § 1302(7) (1996). This is the equivalent of the maximum punishment for misdemeanor crimes under Alaska criminal statutes. Alaska Stat. § 12.55.135(a) (Michie 1996). See also 25 USCA §§ 1301 (passed by Congress to extend jurisdiction to allow Indians to prosecute nonmember Indians for offenses occurring in Indian Country).

However, the status of Alaska Natives vis-a-vis other American Indians is uncertain. On the one hand, in 1936 Congress extended the Indian Reorganization Act (IRA) to Alaska Natives thereby making their legal status similar. 25 U.S.C. §§ 461-497 (1996). The IRA gave American Indians and Alaska Natives the authority to establish tribal courts and councils. Over 70 villages eventually adopted IRA constitutions, some of which provided for tribal councils and tribal courts. Resolving Disputes Locally, supra note 15, at 14. In 1971, Congress passed the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 668 (1971) [hereinafter ANCSA] which provided Alaska Natives with fee simple title to 44 million acres of land through the formation of 13 regional corporations in exchange for abrogation of all Native claims to aboriginal title to the land and all prior hunting and fishing rights. Kathleen A.

Nelson, The Alaska Native Claims Settlement Act After 1991: Looking Forward to the Future?, 31 Santa Clara L. Rev. 261 (1990). Subsequent to the adoption of ANCSA, some court decisions had found that Alaska Native villages are not "Indian Country," thus calling into question their legal authority to govern themselves to the extent that American Indians living on reservations may. Yukon Flats School District v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988) (Venetie I); see also U.S. Dept of the Interior, Opinions of the Solicitor General, Governmental Jurisdiction of Alaska Native Villages Over Land and Non-Members, No. M-36, 975 (Jan. 11, 1993) (leaving open the question of whether Alaska Native villages are Tribes). More recent court decisions have concluded that at least some Native villages do have the status of "Indian Country" and that their tribal councils have the status of tribes under federal law. Alaska v. Native Village of Venetie, 856 F.2d 1390 (9th Cir. 1994) (Venetie II), cert. granted, 501 U.S. 775, 111 S.Ct. 2578 (June 23, 1997) (holding that the State of Alaska must afford full faith and credit to adoption decrees issued by the tribal court of the Native Village of Venetie Tribal Government); Alyeska Pipeline Service Co. v. Kluti Kaah Native Village of Copper Center, 101 F.3d 610 (9th Cir. 1996) (holding that the Kluti Kaah Native Village was a tribe, but it could not tax the Alyeska Pipeline Service Company because the trans-Alaska pipeline corridor was specifically exempted from the ANCSA settlement and avoiding the question of whether the land at issue was Indian Country). However, the Supreme Court has recently held that tribal lands surrounding Venetie do not qualify as "Indian Country." Alaska v. Native Village of Venetie, No. 96-1577, 1998 WL 75038 (U.S. Feb. 25, 1998).

It is unclear to what extent the Venetie decision will impact day to day life for Alaska natives. The State of Alaska had already taken the position that tribal villages were not "Indian Country," and its dealings with villages reflected that belief. There is no reason the state cannot continue to defer to tribal court authority and encourage methods of alternative dispute resolution in the villages. The major impact of Venetie is that the tribes do not have the authority to levy taxes independent from the state or federal governments. That power is not directly related to the day to day running of tribal courts or councils.

[FN171]. Conn and Hippler have suggested a somewhat different approach than what I recommend, such as allowing village councils on a case-by-case basis to decide how to handle a case. For example, after arrest, a council-like body could determine which complaints to resolve informally and which to send to the magistrate for a hearing. Hippler & Conn, supra note 94, at 59.

[FN172]. In 1992, the following villages had, or planned to create, Tribal Courts: Pt. Hope, Native Village of Barrow (planned), Kiana, Selawick, Brevig Mission, Diomede, Gambell, King Island, Koyuk, Mary's Igloo, Nome Eskimo Community, Saint Michael, Shaktoolik, Shishmaref, Stebbins, Teller, Unalakleet, Wales, White Mountain, Akiachak, Chevak, Goodnews Bay, Kipnuk, Kotlik, Kwethluk, Kwigillingok, Mekoryuk, St. Mary's, Tooksook Bay, Nondalton

(planned), New Stuyahok (planned), Togiak, Kodiak Tribal Council (planned), Chalkyitsik, Eagle, Hughes, Minto, Nenana, Northway, Tanacross, Tanana, Chickaloon, Kenaitze Tribe, Kluti-kaah (planned), Mentasta Lake, Chilkat Indian Village (Klukwan), Ketchikan, Metlakatla, and Sitka. The following Tribal Councils have had some activity in dispute resolution: Inupiat community of Arctic Slope, Native Village of Barrow, Arctic Slope Native Association, Ambler, Buckland, Deering, Kivalina, Kobuk, Kotzebue, Noatak, Noorvik, Selawik, Shungnak, Savoonga, Golovin, Akiachak, Akiak, Atmautluak, Chevak, Chuathbaluk, Emmonak, Goodnews Bay, Hooper Bay, Kipnuk, Kotlik, Kwethluk, Kwigillingok, Lower Kalskag, Mekoryuk, Mt. Village, Napakiak, Saint Mary's, Scammon Bay, Toksook Bay, Aleknagik, Dillingham, Ekwok, Manokotak, Naknek, New Stuyahok, Nondalton, Port Heiden, Togiak, Akutan, St. George, St. Paul, Akhiok, Larsen Bay, Alatna, Allakaket, Anvik, Arctic Village, Beaver, Birch Creek, Canyon Village, Chalkyitsik, Circle, Dot Lake, Eagle, Evansville, Fort Yukon, Galena, Grayling, Healy Lake, Holy Cross, Hughes, Huslia, Kaltag, Koyukuk, Lake Minchumina, Manley, McGrath, Medfra, Minto, Nenana, Nikolai, Northway, Nulato, Rampart, Ruby, Shageluk, Stevens Village, Takotna, Tanacross, Tanana, Telida, Tetlin, Venetie, Wiseman, Chickaloon, Eklutna, Ninilchik, Seldovia, Tyonek, Nanwalek (English Bay), Port Graham, Tatitlek, Chistochina, Chitina, Kluti-kaah, and Saxman. Resolving Disputes Locally, supra note 15, at 90-92.

[FN173]. 25 U.S.C. § 461-497 (1996).

[FN174]. Id. at 11.

[FN175]. Stephen Conn, Inuit Village Councils in Alaska--An Historical Model for Effectuation of Aboriginal Rights?, 9 Etudes/Inuit/Studies 49 (1985).

[FN176]. Id. at 69-123.

[FN177]. The community of Kagilakak previously used a conciliation board that resembled a tribal council. Persons selected to sit on a conciliation board were not necessarily tribal council members. The requirements for board members were that the person could listen, did not dominate other people, and was not led by other people. The board heard cases related to excess drinking, relationship problems, and minor property damage. Arthur Hippler & Stephen Conn, The Village Council and its Offspring: A Reform for Bush Justice, 5 UCLA-Alaska L. Rev. 22, 46 (1975).

[FN178]. Hippler & Conn, supra note 94, at 54. Conn and Hippler speculate that the introduction of a formal Anglo-American court in the bush changed the shape of law in Eskimo villages replacing the once-effective village council, run by Eskimos and based on traditional Eskimo ways.

[FN179]. Berger, supra note 10, at 187.

[FN180]. Blurton and Copus have noted the need to develop alternatives to the current criminal justice system to address the dwindling state resources, which will affect the prosecution of crimes in rural villages. Blurton & Copus, supra note 122, at 128.

[FN181]. The State of Alaska has previously experimented with alternatives to the traditional criminal justice system. The Pre-trial Intervention Program (PTI) was an alternative to full prosecution in cases where the offense did not appear to warrant it. The objectives of the program were to provide: (1) prosecuting attorneys with viable alternatives to formal processing within defined criteria and guidelines; (2) rehabilitative service to Alaska residents charged with essentially nonserious first offenses; and (3) restitution either to the victim through reimbursements for monetary damages or to society through performance of community service. A study conducted by the Alaska Justice Statistical Analysis Unit at the Justice Center indicated that the program successfully met its objectives. N.E. Schafer, Alaska Just. F. 1, Alaska Pretrial Intervention Found Successful, (Fall 1988, at 1).

[FN182]. Rupert Ross describes a traditional Ojibway tribunal:

At an Ojibway reserve--while the miscreant and his victim were summoned before an elders panel, there was never any discussion of what had happened and why, of how each party felt about the other or of what might be done by way of compensation. Nor was there any imposition of punishment. Each party was instead provided with a counselling Elder who worked privately to cleanse his spirit. When both counselling Elders so signified by touching the peace pipe, it would be lit and passed to all. It was a signal that both had been restored to themselves and to the community ... As far as the community was concerned, the matter was over.

Troy Chalifoux, A Need for Change: Cross-Cultural Sensitization of Lawyers, 32 Alberta L. Rev. 762, 778-79 (1994).

[FN183]. Id. at 779.

[FN184]. Tom Kizzia, Whose Law and Order? Tribal Courts Fill Void Left by State, but Critics Fear Rights May Be Lost, Anchorage Daily News, July 3, 1997, at A6.

[FN185]. A state-wide commission formed to examine the status of Alaska Natives. It completed its work and issued a report.

[FN186]. Napoleon, supra note 92.

[FN187]. Id. at 13.

[FN188]. Alaska Sentencing Commission, supra note 7, at 18.

[FN189]. Id.

[FN190]. Harold Napoleon has recommended that Congress establish several correctional facilities for Alaska Native offenders, to be run by Alaska Natives themselves in recognition of the fact that the village offender is not the same as the Black or White offender and that only culturally relevant programs can rehabilitate. Napoleon recommends that these facilities should have a span of 20 years and close at the end of that period. Napoleon, supra note 92, at 27.

[FN191]. Alaska Natives have a good success rate at half-way houses, or community corrections centers--84.5%. See N.E. Schafer & Michael Tubbs, Alaska Just. F., Alaska Community Corrections Residents, Winter 1992, at 6.

[FN192]. Resolving Disputes Locally, supra note 15, at 121.

[FN193]. Id. at 122.

[FN194]. For a general discussion of overrepresentation of Canadian Aboriginals within their criminal justice system see Chalifoux, supra note 182, at 777-78.

[FN195]. Id. at 780.

[FN196]. Federal law has recognized the importance of subsistence. See Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980), 16 U.S.C.A. §§ 3111-3126. Congress explicitly found that "the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses." William M. Bryner, Note, Toward a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives, 12 Alaska L. Rev. 293, 297 n.17 (1995). Passage of ANILCA codifies and legitimizes the subsistence lifestyle.

[FN197]. The Alaska Court System may want to form a racial and ethnic task force to study issues of race within the judicial system and make recommendations for possible changes. Several jurisdictions have established task forces which have published reports of their findings including: Oregon (Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, 73 Or. L. Rev. 823 (1994)), Michigan (Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts: Conclusions and Recommendations (1992)), New York (New York State Judicial Commission on Minorities), Washington State (Minority and Justice Task Force Final Report) and Washington, D.C. (Report of the Special Committee on Race and Ethnicity, 64 Geo. Wash. L. Rev. 189 (1996)). In general, I am disinclined to recommend a task force which tends to get bogged down in studying a problem, as opposed

to making substantive changes. Instead, I suggest spending the energy and time in implementing an actual project and then studying its impact. For example, a study could examine the impact of returning prosecutorial authority to adjudicate minor crimes in one particular community. The village of Point Hope could adjudicate all the minor offenses through its village structure and study the results of that implementation. Then, the results of that study could be used to learn what improvements could be made in subsequent experiments.

[FN198]. Scollon and Scollon suggest ways to improve interethnic communication situations: (1) listen until the other person is finished; (2) allow extra time; (3) try to communicate one on one whenever possible; (4) talk openly about communication; (5) talk openly about discrimination; (6) seek help; and (7) learn to expect and appreciate difference. Scollon & Scollon, supra note 55, at 43-45.

[FN199]. Berger, supra note 10 (quotation from unpaginated section on Subsistence).