

ALTERNATIVE METHODS FOR SENTENCING YOUTHFUL OFFENDERS: USING TRADITIONAL TRIBAL METHODS AS A MODEL

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Today, a young, urban black man stands a greater chance of being killed by gunfire than an infantryman did in Vietnam.¹ More than 800,000 young gang members roam the streets of America's cities, a number that exceeds the U.S. Marine Corps' membership.² If incarceration rates remain at their current level, 6.6% of all U.S. residents born in 2001 will be imprisoned at some time during their lifetime.³ Imprisonment in at least seventeen states and territories will involve constitutional violations, resulting in federal investigations.⁴ Even before trial, much less conviction, beatings and abuse await those detained in America's prisons and jails.⁵ The problem is neither new, nor approaching resolution. Approximately 170 years ago, Alexis De Tocqueville observed:

Some years ago several pious individuals undertook to ameliorate the condition of the prisons. The public were moved by their statements, and the reform of criminals became a popular undertaking. New prisons were built; and for the first time the idea of reforming as well as punishing the delinquent formed a part of prison discipline.

But this happy change, in which the public had taken so hearty an interest and which the simultaneous exertions of the citizens rendered irresistible, could not be completed in a moment. While the new penitentiaries were being erected and the will of the majority was hastening the work, the old prisons still existed and contained a great number of offenders. . . . [A]s the general attention was diverted to a novel object [building new prisons], the care which had hitherto been bestowed upon the others [old prisons] ceased. . . . [S]o . . . in the immediate neighborhood of a prison that bore witness to the mild and enlightened spirit of our times, dungeons existed that reminded one of the barbarism of the Middle Ages.⁶

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1. CHARLES W. COLSON, *JUSTICE THAT RESTORES* 5-6 (2001).
 2. *Id.* at 6.
 3. *Kane v. Winn*, 319 F. Supp. 2d 162, 166 (D. Mass. 2004) (citation omitted).
 4. *See id.* at 183 (citation omitted).
 5. *See id.* at 185 (citation omitted).
 6. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 258 (Alfred A. Knopf 1994) (1835).

The French traveler might as well be describing the modern day prison system, a system that causes devastating impacts on youthful offenders, especially youthful minorities.

Wakanyeja is the Lakota Sioux word for child.⁷ Translated literally, it means “the child is also holy.”⁸ What do *wakanyeja*, De Tocqueville’s observations, and modern crime statistics have to do with one another? Everything. America’s *wakanyeja* now comprise a formidable number of criminal offenders and, as offenders, are likely to spend especially formative time in prison, a deplorable setting that has existed for at least 170 years. The Sioux, and other tribes, did not utilize incarceration to punish criminals. Instead, they often used sentences aimed at purifying deviants and reintegrating them into the community. Such tribes formulated, and continue to design today, punishments that better address the needs of criminal offenders, especially youthful offenders. And, while not every youthful offender possesses the characteristics necessary to benefit from these punishments, such punishments offer a myriad of benefits for the suitably situated offender, the local community, and society as a whole.

This note explores the inadequacies inherent in waiving youthful offenders into the adult criminal justice system and sentencing these youthful offenders as adults.⁹ These inadequacies recently reared their heads in *Roper v. Simmons*,¹⁰ where the Supreme Court recognized that youths, whether or not they are waived into the adult criminal justice system, are still impressionable and merit different treatment from adults.¹¹ This note explores current inadequacies in

7. IAN FRAZIER, *ON THE REZ*, 19 (2000).

8. *Id.*

9. Some states automatically consider seventeen and eighteen-year-old offenders adults. See Abbe Smith, *They Dream of Growing Older: On Kids and Crime*, 36 B.C. L. REV. 953, 953 n.2 (1995). See also MICH. COMP. LAWS § 764.27 (2005) (setting the age for juvenile adjudication at less than seventeen and allowing offenders fourteen years of age and up who are charged with a felony to be waived into general criminal jurisdiction). For convenience, and because such arbitrary age brackets do not alter the fact that eighteen-year-olds differ from adults, this note will consider all offenders under nineteen “youthful.” This consideration largely comports with the Supreme Court’s recent decisions. See *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (stressing that offenders who committed their crimes when they were less than eighteen years of age could receive treatment different from their adult counterparts).

10. 125 S. Ct. 1183 (2005) (forbidding the execution of offenders who committed their crimes when they were under eighteen years of age).

11. It is important to distinguish youthful offenders waived into the adult penal system from juvenile delinquents, who are adjudged delinquent in the juvenile justice system. This

federal, state, and tribal courts, and suggests that each of these court systems would benefit from utilizing traditional tribal sentencing methods in adjudicating cases involving youthful offenders waived into adult criminal courts. It focuses on the plight of youthful offenders, both tribal and non-tribal, and suggests that traditional tribal sentencing could benefit and should be used for these individuals.

Part I introduces the difficulties all three court systems—federal, state, and tribal—now face and the current inadequate state of the criminal justice system in regards to waiver of youthful offenders into the adult adjudication system. Additionally, this Part delves into the problems of tribal identity and how insufficient use of tribal adjudication methods contributes to these problems. Part II focuses on modern day application of tribal sentences, while also offering a brief history of various sentencing methods, including traditional Anglo-American methods. Specifically, in exploring the use of banishment, a tribal sentence gaining some notoriety within the last decade, as a sentence in modern day proceedings, this part will review a case involving two Tlingit teenagers banished to remote islands in Alaska. Part III suggests an alternative that will benefit federal, state, and tribal courts by integrating traditional tribal sentencing options into these courts' current sentencing regimes. Part IV concludes that integrating traditional tribal sentencing options within the broader context of federal and state criminal adjudication is manageable. In addition, such a system can help both tribal communities and the broader American society towards the goal of walking "with beauty all around."¹²

note does not address the situation of the latter. Many alternative programs are now in use to meet the needs of juvenile delinquents. Such programs are beyond the scope of this note. What is critical to remember is that there is a burgeoning recognition of the unique needs of young people tried and sentenced *as adults*.

12. *Navajo Blessing Way Prayer*, http://www.unityofflagstaff.org/prayers/NavajoBlessing_Way_Prayer.htm (last visited Jan. 11, 2006).

I. THE PROBLEM

A. *Inadequacies of the Modern Anglo-American System of Waiving Juveniles into the Adult Criminal Justice System*

Lawyers and the public alike are concerned with America's prison systems.¹³ For instance, "The United States imprisons more people than any other nation in the world, and federal prison sentences are becoming longer. But the current sentencing policies have come under fire for being ineffective and too costly . . ." ¹⁴ The October 2004 *ABA Journal* featured a question regarding federal sentencing and the Federal prison system as its first question for the 2004 presidential candidates.¹⁵ And, as the subsequent discussion will reveal, the issue of sentencing youthful offenders who are waived into the adult penal system demands unparalleled attention.

In 1990 one in four adolescents was at risk for delinquency, substance abuse, dropping out of school, or practicing early unprotected sexual intercourse.¹⁶ Even affluent, suburban "good kids" bring guns to school, shoot one another, form "sex posses" that engage in aberrant sexual behavior, descend upon malls to shoplift, and engage in vandalism and graffiti.¹⁷ One young lady expounded upon her life for her parents:

I first tried Ecstasy last August at a rave. About 25 times I think I have done Ecstasy. I also would sell Adderall to my friends or snort it with them. I have also snorted cocaine a couple of times, whenever anyone I know had any.

Usually every weekend when y'all would go to bed, I would have people over and we would drink and smoke or be on some other drug. We would usually all hang out in the basement or playroom and y'all had no clue.

13. *Id.*

14. *Another Close Call: George Bush and John Kerry Comment on Key Issues in the 2004 Presidential Election Race*, A.B.A. J., Oct. 2004, at 50.

15. *Id.*

16. Cynthia M. Conward, *Where Have All the Children Gone?: A Look at Incarcerated Youth in America*, 27 WM. MITCHELL L. REV. 2435, 2436 (2001).

17. WAYNE S. WOODEN, *RENEGADE KIDS, SUBURBAN OUTLAWS: FROM YOUTH CULTURE TO DELINQUENCY* 2-3 (1995).

When I said I was studying for exams I would usually be getting high with friends.

I started stealing cash from y'all about a couple of months ago when y'all started to notice all the times I would take the credit card. The most I ever stole was 200 dollars. I used this money to buy weed for the Lone Star Youth Ministry Western Tour.¹⁸

This young lady's confession reveals two illuminating truths about youthful offenders. First, even young people with affluent, supportive families, and lives of privilege, as this girl enjoys,¹⁹ can go astray and commit criminal acts that carry harsh penalties under the adult criminal justice system.²⁰ Second, though these offenders may commit serious crimes, they essentially remain kids, lacking in maturity and judgment and in need of rehabilitation and guidance.

Since 1960, crime has increased dramatically—overall crime has increased by 300% and violent crime has risen by nearly 500%.²¹ During this time, any decreases in crime rates were mostly due to demographic factors such as baby boomers maturing past the crime-prone age groups.²² Future decreases are anticipated to be short-lived as Generation X matures into the crime-prone age group and “revolving-door prisons graduate new classes of hardened criminals.”²³ The most distressing aspect of the current trend in crime is that offenders are getting “younger and meaner.”²⁴ In fact, there is a “perception that society is no longer in control of its destiny—that this next generation of youths is not just dazed and confused . . . but armed and dangerous as well.”²⁵

Society reacts to these confused, lost, misguided, enraged young people and attempts to regain control of its youthful citizens by building up the “most massive justice industrial complex the world

18. DAVID L. MARCUS, WHAT IT TAKES TO PULL ME THROUGH: WHY TEENAGERS GET IN TROUBLE—AND HOW FOUR OF THEM GOT OUT 79 (2005).

19. *Id.* at 52-53.

20. *See, e.g.*, MICH. COMP. LAWS § 333.7403 (2005) (enumerating the punishments for possession of controlled substances); § 750.356(4) (2005) (making larceny of property valued between \$200 and \$1000 a misdemeanor punishable by up to a year's imprisonment and a fine of up to \$2000).

21. COLSON, *supra* note 1, at 4.

22. *Id.* at 5.

23. *Id.* (positing that the recidivism rate consistently hovers around 70%).

24. *Id.*

25. WOODEN, *supra* note 17, at 4.

has ever known.”²⁶ Furthermore, society is increasingly willing to surrender youthful offenders to the adult penal system.²⁷ Since 1991, almost every state has widened the scope of offenders under the age of 18 who are eligible for processing by adult criminal courts.²⁸ Researchers estimate that “at least 200,000 American youths under the age of 18 are tried as adults each year, and by 1997 the number of young people in adult prisons had reached 7,400—double the number in 1985.”²⁹ For youthful offenders subjected to the adult criminal justice system, the repercussions may entail the following: forgoing education;³⁰ being incarcerated beside adults,³¹ a disproportionately high risk of exposure to AIDS, STDs, and other health problems;³² and up until very recently, execution.³³

While the American Bar Association position on the transfer of youthful offenders to adult criminal jurisdiction is clear—“only persons 15 years of age or older should be eligible for transfer to adult court, and then only after an extensive hearing before a juvenile court judge”³⁴—their position still contains substantial leeway. To address similar concerns of practitioners in the field of criminal justice, multiple ABA committees authorized creation of a task force to consider the implications of transferring the burgeoning number of

26. DENNIS SULLIVAN & LARRY TIFFT, *RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES* 8 (2001). For a revealing discussion of the attitudes surrounding the juvenile justice system, public cries to try juveniles as adults, and statutes and cases leaning toward increased trial of youthful offenders as adults, see Smith, *supra* note 9, at 956 n.8.

27. *E.g.*, MICH. COMP. LAWS § 712A.2(a)(1) (2005) (allowing the court to designate certain juvenile cases for trial as adult cases); § 764.27 (2005) (allowing offenders fourteen years of age and up who are charged with a felony to be waived into general criminal jurisdiction); § 764.27a(3) (2005) (allowing temporary imprisonment of offenders under seventeen years of age who are charged with a felony and awaiting trial, even if the probate court has retained jurisdiction).

28. Robert E. Shepherd, Jr., *Juvenile Justice: Task Force Report for Practitioners, Policymakers*, 16 A.B.A. CRIM. JUSTICE 66, 66 (2001).

29. *Id.*

30. Conward, *supra* note 16, at 2442.

31. *Id.* at 2443.

32. *Id.* at 2449-50.

33. *Id.* at 2440. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989), upheld the death sentence for sixteen and seventeen-year-old juveniles. However, *Roper v. Simmons*, 543 U.S. 551 (2005), recently decided by the Supreme Court, reversed *Stanford* and now forbids the execution of anyone who was under eighteen at the time of the crime. *Id.* at 578.

34. Shepherd, *supra* note 28, at 66.

youthful offenders into the adult criminal justice system for trial and incarceration.³⁵ Not surprisingly, the task force found that:

Youths are developmentally different from adults, and these developmental differences need to be taken into account at all stages and in all aspects of the adult criminal justice system. . . .

If detained or incarcerated, youths in the adult criminal justice system should be housed in institutions or facilities separate from adult facilities until at least their eighteenth birthday.

Youths detained or incarcerated in the adult criminal justice system should be provided programs that address their educational, treatment, health, mental health, and vocational needs. . . .

*Judges in the adult criminal justice system should consider the individual characteristics of the youth during sentencing.*³⁶

Sentencing is the ultimate end of the criminal process and the aspect of the process with the greatest potential to indelibly influence the youthful offender. As this sub-part details, the modern Anglo-American system fails to account for the differences between youthful offenders and adults. Accordingly, this system must be changed to address the unique needs of youthful offenders.

B. *Inadequacies in Modern Tribal Criminal Justice Systems*

American Indians³⁷ are more than twice as likely as other citizens to become victims of violent crimes.³⁸ Unfortunately, tribes are the

35. *Id.*

36. *Id.* at 66-67 (emphasis added).

37. I use the word Indian in this note to describe members of North American tribes and other native peoples. While I would prefer to refer to such peoples by using their tribal affiliations (e.g., Navajo), such reference is not always possible. I hope that my use of the word is inoffensive and acceptable. Literature on the subject indicates that this word is acceptable to native peoples if used with an open mind and a respect for the fascinating cultural heritage of such peoples. See, e.g., Michelle Young, *Get the Guide to NW Native American Places*, THE ONLINE DAILY OF THE UNIVERSITY OF WASHINGTON, Sept. 3, 1996, <http://archives.thedaily.washington.edu/1996/090396/guidewel.html> (last visited Jan. 16, 2006).

38. LAWRENCE A. GREENFELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 2 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf> (compiling data from 1992 to 1996 and positing that while the national average for violent

least prepared and have the fewest resources to address this state of affairs; insufficient financial resources increasingly force tribes to waive their youthful offenders into state or federal jurisdiction.³⁹ While this waiver constitutes a loss in sovereignty, the only alternative is to let youthful offenders go unpunished because the tribe cannot afford to detain them.⁴⁰ “Occasionally, even sending juveniles to state facilities is too costly and many juvenile delinquents are released into the custody of their parents, even after committing violent crimes. Worse yet, many juveniles on reservations who commit crimes, or are under the influence of alcohol, are never arrested, incarcerated, or rehabilitated.”⁴¹ These problems emanate from insufficient funding for tribal policing.⁴² Alternative sentencing methods would help alleviate this crisis because they are less costly than traditional sentences—namely, incarceration.⁴³

Not only do tribal penal systems suffer from insufficient funding, but the prisons themselves are terribly mismanaged. In October 2004, the Inspector General’s Office of the U.S. Department of the Interior (“DOI”) issued its Semiannual Report to Congress. Declaring the prison situation on Indian reservations a “national disgrace,” the DOI pointed to apathy and neglect by the Bureau of Indian Affairs (“BIA”) as the source of this disgrace and admonished that “anything short of a heroic effort by BIA personnel would be unacceptable” in mitigating the situation.⁴⁴ The report details “deplorable conditions” in the facilities and shows “that over a 3-year period, 11 prisoners died, 236 prisoners attempted suicide, and 631 escaped from jails. The BIA, which oversees and funds these jails, was unaware of 98 percent of these incidents due to poor record-keeping and mismanagement.”⁴⁵

This prison situation is both unacceptable and a national blight. America as a whole cannot ignore this situation simply because the

victimizations per 1000 people, aged 12 and above, is 50, it is 124 for Indians) (last visited Jan. 16, 2006).

39. Sarah M. Patterson, *Native American Juvenile Delinquents and the Tribal Courts: Who’s Failing Who?*, 17 N.Y.L. SCH. J. HUM. RTS. 801, 815 (2000).

40. *Id.*

41. *Id.* at 816 (citation omitted).

42. *Id.*

43. See discussion *infra* Part III.E.

44. OFFICE OF INSPECTOR GEN. U.S. DEP’T OF INTERIOR, SEMIANNUAL REPORT TO THE CONGRESS, OCTOBER 2004 NO. 10-S-04 (2004), <http://www.oig.doi.gov/upload/October2004SAR1.txt> (last visited Jan. 16, 2006).

45. *Id.*

prisons are Indian detention facilities. Implementing traditional tribal sentencing for youthful offenders in tribal, state, and federal courts will not solve these inadequacies of the Indian detention facilities, but such sentencing will help alleviate some of the burdens on these facilities. Most importantly, adopting these sentencing guidelines will take young, impressionable offenders out of venues that serve to foment suicidal tendencies and rage.

II. HISTORICAL AND CURRENT SENTENCING REGIMES

A. *Selected Tribal Sentencing Options*

1. *Historical*

Each North American Indian tribe constitutes its own nation with its own culture. Consequently, each tribe has developed its own "sentencing system."⁴⁶ Historically, these tribes utilized various "sentences" to punish offenders who transgressed social boundaries. For instance, banishment was "deeply rooted in certain tribal cultures in the Americas" and used by tribes for centuries.⁴⁷ The Cheyenne Law of Killing refers to banishment as a traditional punishment for murder.⁴⁸ Some controversy exists over whether tribes like the Tlingit of Alaska used banishment. Given the rugged, taiga environment in which the Tlingit live, such punishment may "have been a virtual death sentence."⁴⁹ This note focuses on banishment as a punishment and rehabilitation for the preceding reasons, but banishment is not the only American Indian sentencing method that would benefit all juvenile offenders.

46. Consideration of each tribe's individual sentencing patterns is beyond the scope of this note. It is enough that there were and remain many tribes that used and want to use punishments like banishment and victim reconciliation to sentence youthful offenders.

47. Colin Miller, *Banishment from Within and Without: Analyzing Indigenous Sentencing Under International Human Rights Standards*, 80 N.D. L. REV. 253, 255 (2004).

48. *Id.*

49. *All Things Considered: Tlingit Indians Embarrassed by Tribal Court Attention* (NPR radio broadcast Aug. 31, 1994). The Tlingit may have used more retributive, corporal punishments like cutting off offenders' hands or "stak[ing offenders] out at low tide." *Id.* It should go without saying that such corporal punishments are *not* the focus of this note and are in no way advocated as appropriate.

2. *Modern Tribal Sentencing*

Tribal sentencing still reflects many traditional values and often utilizes traditional standards and methods. The following case highlights the worth of traditional tribal sentencing as a modern criminal justice tool. In 1993, two Thlawaa Thlingit⁵⁰ youths, Simon Roberts and Adrian Guthrie, attacked and robbed a pizza delivery man in Everett, Washington, a town located near, but not on, an Indian reservation.⁵¹ One of the sixteen-year-olds distracted the victim while the other crept up from behind and hit the victim with a baseball bat, fracturing the victim's skull.⁵² While the victim lay helpless, the boys stole forty dollars in cash and a pizza.⁵³ Afterward, the youths were waived into the criminal court's jurisdiction and pled guilty to first-degree robbery.⁵⁴ Guthrie faced a sentence of thirty-one to forty-one months of total confinement; Roberts faced a harsher sentence of fifty-five to sixty-five months of confinement because he used a deadly weapon in the commission of the crime.⁵⁵

After receiving a request from members of the Thlawaa Tlingit Nation in Alaska, the Snohomish County Superior Court agreed to grant the young men an eighteen month continuance of the sentencing hearing.⁵⁶ During these eighteen months, the youths

50. The Washington state court used this spelling of the tribe's name. *State v. Roberts*, 894 P.2d 1340, 1341 (Wash. Ct. App. 1995). The tribe itself uses Tlingit. The Tlingit and Haida Indians have no reservation lands, but under the Alaska Native Claims Settlement Act of 1971, the tribes own Sealaska Corporation. With its headquarters in Juneau, Alaska, this regional corporation provides for the tribes through logging, plastic manufacturing, and other industrial endeavors. Sealaska Corporation, http://www.sealaska.com/aboutus_corphist.htm (last visited Jan. 16, 2006).

51. *Roberts*, 894 P.2d at 1341. This case has garnered international attention for both its legal significance and human interest. See generally BEN MIKAELSEN, *TOUCHING SPIRIT BEAR* (2001); Bill Donahue, *I Was a Teenage Gilligan*, *OUTSIDE*, Jan. 1996, at 20. Thomas W. Haines, *Teens Edge Toward Banishment: Pair Released from Jail for Trip to Alaska*, *THE SEATTLE TIMES*, Aug. 25, 1994, at B3 (describing the incident and where it took place); Susanne Burg, *Ein US-Gericht erkennt die Indianische Rechtsprechung an*, *DEUTSCHLANDRADIO BERLIN*, Sept. 2, 2004, <http://www.dradio.de/dlr/sendungen/kalender/298379/> (last visited Jan. 16, 2006).

52. *Id.*

53. *Id.*

54. See WASH. REV. CODE ANN. § 13.04.116 (West 2004) (prohibiting incarceration of juveniles in adult facilities unless certain attenuating circumstances exist). The boys in this case could not have faced prison sentences unless they were waived into the adult criminal justice system. *Roberts*, 894 P.2d at 1341 (detailing the defendants' guilty plea for first-degree robbery).

55. *Id.*

56. *Id.* at 1342.

would be subjected to the tribe's "sentence"—banishment to remote islands off of the Alaskan coast.⁵⁷ "Tribal members believed this alternative to the State's punishment would be more likely to steer the young men away from a life of crime and reincorporate them into their traditional culture."⁵⁸ For the tribal hearing, the two boys returned to their hometown of Klawock, Alaska.⁵⁹ While a haze of controversy enshrouded the entire proceeding, many, including the boys' victim, heralded the experiment as worthwhile.⁶⁰

As a result of the tribal hearing, the two young men were banished to separate, isolated islands for a year beginning on September 5, 1994.⁶¹ In preparation, the two offenders received assistance from tribal elders in building shelters on their respective islands and training in hunting and fishing.⁶² They were allowed to take with them Bibles and Christian literature, their dogs, and hundreds of pounds of groceries.⁶³

After visiting the youths to report on their conditions, a tribal official commented, "They worked very hard, were very cooperative and had a very serious attitude."⁶⁴ Earlier, while contemplating his pending banishment, Roberts had affirmed, "[i]t's better than going to prison and being some guy's girlfriend."⁶⁵ The two ultimately found themselves in prison, however, when the Washington Court of

57. *Id.*

58. *Id.*

59. *Teens, Victim Arrive in Alaska for Tribal Ruling*, THE SEATTLE TIMES, Aug. 31, 1994, at A2 [hereinafter *Teens, Victim*]. Klawock is a Prince of Wales Island fishing village of 758 residents. *Id.*

60. Karen Alexander, *Beating Victim's Plea: Don't Let Court Intervene in Banishment, He Says*, THE SEATTLE TIMES, Mar. 9, 1995, at A1 [hereinafter *Beating Victim's Plea*].

61. Karen Alexander, *Banished Teens on Their Way to Islands: Tribal Members to Help Build Shelters, Teach Survival*, THE SEATTLE TIMES, Sept. 6, 1994, at B1 [hereinafter Alexander, *Banished Teens on Their Way*]. The two offenders were also to work with the tribe to make restitution to their victim. See *Beating Victim's Plea*, *supra* note 60. Rudy James, the Tlingit man who oversaw the banishment proceedings, said his group would raise \$200,000 to build the victim a duplex. *Id.*

62. *Banished Teens OK, Tribal Officials Say*, THE SEATTLE TIMES, Oct. 6, 1994, at B1 [hereinafter *Banished Teens OK*].

63. Alexander, *Banished Teens on Their Way*, *supra* note 61, at B1.

64. *Banished Teens OK*, *supra* note 62, at B1. In December 1994, tribal authorities removed Guthrie from the island for minor mouth surgery; one of his wisdom teeth as well as his throat became infected. *Tooth Yanks Teen Exile off Isle*, THE SEATTLE TIMES, Dec. 21, 1994, available at <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=1948537&date=19941221&query=tooth+yanks+teen+exile+off+isle>.

65. Alexander, *Banished Teens on Their Way*, *supra* note 61, at B1.

Appeals, citing a lack of legal support for the experiment, ended the banishment on May 1, 1995.⁶⁶

Now, ten years later, positive results emanate from this experiment in tribal justice. While Adrian Guthrie fell into recidivism after his release from prison in 1996,⁶⁷ Simon Roberts unquestionably benefited from his unique punishment. After his banishment and twenty-six months in prison, Roberts said, "Instead of being negative and angry, I have a different perspective now. . . . The banishment was rehabilitation and purification, with introspection. I started looking at my past. I didn't like half the things I did."⁶⁸ He is now a musician and a leading member of the Tlingit tribe.⁶⁹

Recently, the members of the Northern Cheyenne Nation attempted to persuade a U.S. District Judge in Montana to release a young criminal into tribal custody for traditional sentencing.⁷⁰ Twenty-three-year-old Gaylon Lame Woman had been convicted of selling marijuana on his reservation.⁷¹ Judge Jack Shanstrom declined the tribe's request to have Lame Woman returned to the reservation; the judge ruled that the request came too late and sentenced Lame Woman to five years in prison.⁷² Under the tribe's proposal, the young man would have been sentenced by the Tsisistas-Suhtaio Nation traditional tribal court of the Northern Cheyenne to banishment in an isolated wilderness area.⁷³ Tribal leaders said they viewed banishment as a "healing process" rather than punishment.⁷⁴ Lame Woman's father argued allowing the banishment "would help bring a sense of power and unity back to the people."⁷⁵

66. *State v. Roberts*, 894 P.2d 1340, 1345 (Wash. Ct. App. 1995). The youths seem to have remained banished into October 1995, awaiting their prison sentences. *Native American Felon Returns 'Purified' After Banishment for Robbery*, THE EXAMINER, Jan. 3, 1998, available at <http://archives.tcm.ie/irishexaminer/1998/01/16/fhead.htm> [hereinafter *Native American Felon*] (last visited Feb. 2, 2006).

67. *Native American Felon*, *supra* note 66.

68. *Id.*

69. Burg, *supra* note 51.

70. *Judge Refuses to Let Northern Cheyenne Traditionally Punish Tribal Drug Dealer*, THE INDIAN TRADER, June 2004, at 24 [hereinafter *Judge Refuses*].

71. *Id.*

72. *Id.*

73. *Id.*

74. Mike Stark, *Judge Declines Request to Let Tribal Members Punish Drug Dealer*, MONTANA FORUM, May 27, 2004, <http://www.montanaforum.com/print.php?sid=166> (last visited Jan. 19, 2006).

75. *Id.*

B. *Anglo-American Sentencing*

1. *Historical*

Anglo-American criminal justice is based on a mixture of philosophical underpinnings that include deterrence, rehabilitation, incapacitation, and retribution.⁷⁶ Rehabilitation rarely predominates, however, with retribution usually garnering the most focus. The *Virginia Articles, Laws, and Orders* (“*Articles*”) illustrate the primacy of retribution. The *Articles* were issued by decree in 1610 after the governor of the Virginia colony was forced to declare martial law to restore order.⁷⁷ Murder, sodomy, adultery, rape, and bearing false witness were all punished by death.⁷⁸ Regarding fornication, the punishment was whipping.⁷⁹ If one was found guilty of fornication three times over, the sentence was a whipping three times a week for a month and the perpetrator had to ask “publique forgiveness in the Assembly of the Congregation.”⁸⁰ Robbing a garden or willfully plucking up roots, herbs, or flowers were punishable with death.⁸¹ A baker who defrauded his customers out of the proper measure of flour or meal would lose his ears for the first offense.⁸² These punishments show that the *Articles* differentiated punishments according to moral gravity and recidivism, which is a retributivist understanding of punishment.

In the mid to late nineteenth century, rehabilitation began to take root as a goal of the criminal justice system. In 1878, Massachusetts formalized court-supervised release of offenders after more than thirty years of informal, community based release programs that stressed reform.⁸³

76. See JOSHUA DRESSLER ET AL., *CASES & MATERIALS ON CRIMINAL LAW* 31-40 (3d ed. 2003).

77. VIRGINIA ARTICLES, LAWS, AND ORDERS (1610-11), reprinted in THE AMERICAN REPUBLIC: PRIMARY SOURCES 4 (Bruce Frohnen ed., 2002). While the *Orders* came in response to a unique situation—one that militated for martial law—they are nonetheless instructive in that they reflect the retributivist values of Western culture at the time.

78. *Id.* at 5.

79. *Id.*

80. *Id.*

81. *Id.* at 8.

82. *Id.* at 9.

83. *Id.* at 4.

2. *Modern State and Federal Sentencing Trends*

For many countries that share an Anglo-American common law justice system, the face of criminal justice is experiencing a dramatic shift. In the last two decades, various governments have recognized restorative justice as a valid, even vital, goal for the criminal justice system. In Australia and the United States, restorative justice systems have taken tenuous root.⁸⁴ Since the 1990s, an increasing number of commentators have adopted the belief “that any method of correction that is based in punishment . . . is just another form of violence.”⁸⁵ Restorative justice systems avoid this objection by responding to violence and social deviance in personal ways, such as by addressing the suffering and misery of victims harmed by offenders, and allowing the perpetrators an opportunity to face the direct consequences of their crimes.⁸⁶

In recent years, criminal law has also seen the rise of a “modest trend”—increasing use of “shaming” sentences, which involve public displays of contrition.⁸⁷ A court in Rhode Island ordered a convicted child molester to take out an advertisement in a local newspaper; the ad featured the offender’s picture and an admonition that child molesters seek professional help.⁸⁸ A federal court ordered a man convicted of stealing mail in San Francisco to wear a sandwich board proclaiming, “I stole mail. This is my punishment,” for 100 hours while standing in front of a U.S. Post Office.⁸⁹

In addition, some states have initiated efforts to use alternative methods for achieving rehabilitation and, in some instances, victim-offender reconciliation. For example, the Hawaiian pono kaulike⁹⁰ and Ho’oponono⁹¹ methods promote peacemaking and reconciliation. “This [pono kaulike] restorative justice program provides an

84. See DECLAN ROCHE, *ACCOUNTABILITY IN RESTORATIVE JUSTICE* 1 (2003).

85. SULLIVAN & TIFFT, *supra* note 26, at vii.

86. *Id.* at viii.

87. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1882-83 (1991).

88. *Id.* at 1881.

89. Brian Sullivan, *Board Walk: Thieves Are Main Ingredient in These Sandwiches, With Humble Pie for Dessert*, A.B.A. J., Oct. 2004, at 86.

90. See Loren Walker & Leslie A. Hayashi, *Pono Kaulike: A Pilot Restorative Justice Program*, HAW. B. J., May 2004, at 4 [hereinafter *Pono Kaulike*].

91. See Native Hawaiian Bar Association, <http://www.hawaiianbar.org> (last visited Jan. 23, 2006).

opportunity to identify potential problems between the parties that may arise again without some type of intervention."⁹² The District Court of the First Circuit in Honolulu uses pono kaulike, and as of April 2004, after one year of service, twenty-eight cases have been referred to the program.⁹³ One practitioner emphasizes that this program

gives people the opportunity to address the underlying emotional and personal issues which need to be addressed. . . . If these emotional issues are not addressed, the resolution of the legal dispute doesn't work to bring ultimate peace to the situation which will lead to reoccurrence of the problem.⁹⁴

Federal courts have also shown sensitivity to personal characteristics when issuing sentences. In *United States v. Martinez*,⁹⁵ a New Mexico district judge deviated from the sentence recommended by the United States Sentencing Guidelines because of factors "which ordinarily are not relevant in determining whether a sentence should be outside the guideline range . . . [but which] remove this case from the 'heartland' of cases to which the guidelines are intended to apply."⁹⁶ Among these factors were the defendant's: age, mental and emotional condition, employment record, family ties, employment-related contributions, and susceptibility to abuse during incarceration.⁹⁷ In closing, Judge Parker stated that the courthouse mural emblazoned with the maxim "Justice Tempered By Mercy" guided his decision.⁹⁸

These examples, coupled with a rising interest in restorative justice,⁹⁹ demonstrate that courts are willing to implement alternatives to traditional incarceration. Stated another way, restorative and alternative justice forms are in vogue. Courts are aware that imprisonment is both inappropriate and ineffective in many cases.

92. *Pono Kaulike*, *supra* note 90, at 9.

93. *Id.* at 9-10, 12.

94. *Id.* at 9.

95. 978 F. Supp. 1442 (D.N.M. 1997).

96. *Id.* at 1451.

97. *Id.* at 1451-52.

98. *Id.* at 1443, 1454.

99. See RUTH ANN STRICKLAND, RESTORATIVE JUSTICE 3 (2004) (stating that "the recent interest in restorative justice [can be attributed] to some of the limitations associated with the traditional Western legal system practices").

Accordingly, they are striving to construct sentences and use programs that confront the underlying conditions and causes of anti-social behavior and lawbreaking, while moving away from the “one size fits all” retributive justice system that remains the dominant regime.

III. AN ALTERNATIVE

Integrating traditional tribal sentences such as banishment, victim reconciliation, and restitution into federal and state criminal systems for use with youthful offenders is a constructive alternative for lawmakers to consider. Evidence of similar tribal integration into mainstream American judicial systems dates back to the initial contact between European settlers and North American tribes.¹⁰⁰ In New England, an Algonquian custom may have influenced colonial divorce “proceedings.”¹⁰¹ Evidence suggests English colonists adopted divorce customs similar to those of the Algonquians.¹⁰² Finally, and most remarkably, the Iroquois Confederation undeniably influenced the Constitution, Enlightenment thinkers, and modern legal scholarship. Some scholars argue “that as much as one third of the United States Constitution can be traced back to the five Iroquois Nations’ form of government.”¹⁰³ Felix Cohen wrote: “Politically, there was nothing in the kingdoms and empires of Europe in the fifteenth and sixteenth centuries to parallel the democratic constitution of the Iroquois Confederacy, with its provisions for initiative, referendum and recall, and its suffrage for women as well

100. James F. Brooks, *“Lest We Go in Search of Relief to Our Lands and Our Nation”: Customary Justice and Colonial Law in the New Mexico Borderlands, 1680-1821*, in *THE MANY LEGALITIES OF EARLY AMERICA* 152 (Christopher L. Tomlins & Bruce H. Mann eds., 2001) (“Far away from the learned jurists of Mexico and Spain, New Mexicans drew upon Castilian legal customs, *derecho indiano criollo* (law promulgated in the New World), and local traditions, including those of Indians, to initiate litigation and reach resolutions.”).

101. Katherine Hermes, *“Justice Will Be Done Us”: Algonquian Demands for Reciprocity in the Courts of European Settlers*, in *THE MANY LEGALITIES OF EARLY AMERICA*, *supra* note 100, at 147 (“[M]ale Indians often divorced their wives with little bother, telling them to ‘stand away’ . . .”).

102. *Id.* (citations omitted) (quoting one traveler of the time who opined, “Indeed those uncemely *Stand aways* are too much in Vogue among the English in this (Indulgent Colony)”).

103. Robin Paul Malloy, *Letters from the Longhouse: Law, Economics and Native American Values*, 1992 WIS. L. REV. 1569, 1587 (1992); see also Charles Radlauer, *The League of the Iroquois: From Constitution to Sovereignty*, 13 ST. THOMAS L. REV. 341, 342 (2000) (discussing Bruce Johansen’s, Donald Grinde’s, and Gregory Schaaf’s ideas that the Iroquois Confederation’s oral tradition served as a foundation for the American Constitution).

as [for] men."¹⁰⁴ He suggested that the Iroquois Confederation's ideas spread to Europe and found a place in St. Thomas More's *Utopia*, as well as in the writings of Locke, Montesquieu, Voltaire, and Rousseau.¹⁰⁵ One scholar even suggested that the Iroquois model can be used today to incorporate multi-cultural interaction and peacemaking elements into the American justice system.¹⁰⁶

In 1996, non-tribal communities in Minnesota began experimenting with tribal Sentencing Circles as a means of healing violent criminal offenders and their victims and reintegrating them into the community.¹⁰⁷ Traditionally used by native peoples in Canada, this system actually involves two Circles—a Healing Circle and a Sentencing Circle.¹⁰⁸ Currently, non-tribal communities in Massachusetts, Minnesota, and Pennsylvania use this tribal technique.¹⁰⁹

As stated earlier, integrating tribal and Anglo-American jurisprudence began when the first European settlers landed in the New World. And, while limited in scope, undeniable success emanates from this integration. Continued integration with tribal sentencing regimes will yield a better, more responsive sentencing framework for juvenile offenders waived into adult state and federal penal systems.

A. *Addressing the Problem of Non-Tribal Youthful Offenders*

Western civilization has been contemplating the conundrum of young people transgressing social boundaries and options for treatment of offending youths for millennia. After all, it was because the young Patroclus killed a youthful peer in a "childish quarrel over the dice" that he was sent to his cousin Achilles's home and made the

104. Radlauer, *supra* note 103, at 348 (quoting Felix Cohen, *Americanizing the White Man*, 21 AM. SCHOLAR 177, 182 (1952)).

105. *Id.*

106. Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CAL. L. REV. 981, 996 (1994) ("In seeking solutions for the[] recurrent problems of human diversity and conflict, perhaps we can learn lessons of value from the teachings of a North American indigenous vision of law and peace.").

107. See STRICKLAND, *supra* note 99, at 51.

108. *Id.*

109. *Id.*

latter's squire.¹¹⁰ Modern researchers are attempting to pinpoint the causes of youthful criminal transgressions. For instance,

The Office of Juvenile Justice and Delinquency Prevention lists specific risk factors in the development of delinquent behavior. These include child abuse and family disintegration, economic and social deprivation, low neighborhood attachment, parental attitudes condoning law violating behavior, academic failure, truancy, school drop-out, lack of bonding with society, fighting with peers and antisocial behaviors early on in life.¹¹¹

Traditional tribal sentencing directly addresses three of these risk factors and indirectly tackles the academic and schooling issues. Punishments like banishment and victim reconciliation increase neighborhood attachment, help center youths within society, and promote favorable social behaviors. They also encourage emotional growth, deeper consideration, and introspection—emotional attributes that aid in efficient study and scholarship. Simon Roberts, one of the banished Tlingit youths, explained that he spent substantial time writing,¹¹² and he pointed out that introspection was fundamental to his experience.¹¹³

Banishment and victim reconciliation provide youthful offenders with constructive, rather than destructive, stimuli. Punishments like banishment require the banished youth to learn self-reliance and creative problem solving. Roberts explained in an interview how he devised a way to bring water to his shanty and how he fashioned a radio antenna out of wire to obtain music.¹¹⁴ Similarly, therapeutic schools that cater to troubled teens have used wilderness experiences with success.¹¹⁵ Counselors from the Academy at Swift River in

110. HOMER, *THE ILIAD* 272-73 (Samuel Butler trans., Julie Nord ed., Dover Publ'ns 1999) (n.d.).

111. Sandy Wilber, *Can Prevention Programs Stem the Tide of Delinquency?: Are We Penny Wise and Pound Foolish?*, *JUVENILE JUSTICE MAGAZINE*, available at <http://juvenilejustice.com/prevention.html> (last visited Jan. 25, 2006). While youths waived into the adult criminal justice system are not technically "juvenile delinquents" because they have been treated as adult criminals, the roots of delinquency and criminal conduct are the same. The distinction between delinquents and criminals is a procedural one formulated by the legal system.

112. Donahue, *supra* note 51.

113. *Native American Felon*, *supra* note 66.

114. *Id.*

115. MARCUS, *supra* note 18, at 37-38.

Massachusetts found that there is “something cleansing about living simply in nature.”¹¹⁶ In explaining the benefits of the wilderness program, these counselors emphasize that living in the wilderness “remove[s] kids from the mindless materialism of their daily lives—the ‘mall crawl.’”¹¹⁷ Both materialism and the destructive aspects of “mall culture” contribute to young people’s decisions to transgress society’s laws.¹¹⁸ These counselors also point out the need to be self-reliant in a wilderness setting: “In nature, every misstep ha[s] a stark consequence. . . . No whining, no histrionics [can] change what happen[s] outdoors. . . .”¹¹⁹ Like the Tlingit Simon Roberts, the Swift River teenagers write during their solitude, and some describe themselves as “changed” and “cleansed” after their confessions and introspection.¹²⁰

While traditional tribal sentencing methods may be viewed as unorthodox by non-Indian youths, they nonetheless offer many benefits for non-Indian offenders. They directly address several factors researchers have found contribute to youthful transgressions and indirectly address scholastic issues that lead to deviant behavior. Youths subjected to banishment experiences have described the cleansing nature of such ordeals. These sentences meet head-on many social and personal shortcomings that contribute to young people choosing to break laws.

B. *Addressing the Problem of Tribal Youthful Offenders*

Youthful tribal offenders are overrepresented in the mainstream juvenile justice system. 61% of youths incarcerated in the Federal Bureau of Prisons are American Indians,¹²¹ a population group that accounts for only 1.5% of the country’s total population.¹²² While part of this overrepresentation is caused by 18 U.S.C. §§ 1152-1153, which place under federal jurisdiction certain crimes committed on Indian

116. *Id.* at 38.

117. *Id.* The program follows research that shows that American teenagers have insufficient time away from television, shopping, and peers. *Id.* at 76.

118. See WOODEN, *supra* note 17, at 2-3.

119. MARCUS, *supra* note 18, at 38.

120. *Id.* at 79.

121. Conward, *supra* note 16, at 2454.

122. *QT-P5. Race Alone or in Combination: 2000*, U.S. CENSUS BUREAU, 2000, http://factfinder.census.gov/servlet/QTTTable?_bm=y&-geo_id=D&-qr_name=DEC_2000_SF1_U_QTP5&-ds_name=D&-_lang=en (last visited Feb. 2, 2006).

reservations,¹²³ social factors play a far greater role in accounting for this condition. “Fewer job opportunities, low income, lack of cultural awareness and a lack of positive role models are prevalent factors, which exist among confined minority juveniles.”¹²⁴ Traditional tribal punishments would directly address the two latter factors by making youths more aware of their cultural roots, instilling in offenders a greater sense of heritage and pride, and bringing young people into contact with tribal and community role models and leaders. “The methods of rehabilitating youth in tribal courts are far removed from the methods in state detention facilities. In a state penitentiary[, youths do] not benefit from the tribal traditions maintained in the tribal courts.”¹²⁵

The sentencing alternative proposed here will meet tribal juvenile offenders’ cultural needs while also aiding tribes as a whole. As discussed previously, tribes lose sovereignty when they waive their youths into state and federal penal systems. But if state systems were receptive to tribal sentencing recommendations, as the Snohomish County Superior Court was in the Tlingit boys’ case, sovereignty would be preserved because the tribe would be able to influence a youthful offender’s treatment. In addition, if state and federal systems applied tribal punishments to youthful offenders regardless of race, tribal sovereignty would actually be bolstered. Tribes would influence the country’s criminal justice system as a whole rather than passively accepting whatever lawmakers, with whom tribal members may not identify, are meting out.

An integrated system would also improve the country’s awareness of tribal issues. By integrating tribal punishment methods into the criminal justice system, lawmakers, judges, lawyers, youthful offenders, and citizens in general would become more aware of both the challenges tribal courts face and the traditional cultural values espoused by tribes. By receiving tribal punishment methods into the criminal justice system, lawmakers, judges, lawyers, youthful offenders, and citizens in general would be made more aware of the challenges tribal courts are facing and of the traditional cultural values espoused by tribes. Such awareness would build support for tribal courts and increase tribal recognition. These benefits for tribes

123. 18 U.S.C. §§ 1152-1153 (2000).

124. Conward, *supra* note 16, at 2454-55.

125. Patterson, *supra* note 39, at 813 (citations omitted).

as a whole could lead to improved community situations on reservations which would actually mitigate some of the factors that contribute to youthful transgressions. In addition, cultural awareness in young people and appreciation and respect for tribal culture in the broader American society would build tribal pride. Pride contributes to a sense of belonging that will combat delinquency. And even if a tribal youth were waived into a state or federal penal system, alternative sentencing options would ensure that the youth could still receive a culturally appropriate sentence.

C. *Constitutionality*

These alternative sentences are constitutional. Criticism regarding the banishment sentence in the Tlingit robbers' case has focused on two constitutional claims—Fourteenth Amendment Equal Protection and Eighth Amendment Cruel and Unusual Punishment.¹²⁶ As will be explained below, neither of these constitutional guarantees are violated by the alternative sentencing regime proposed here.

1. *Fourteenth Amendment Equal Protection*

One critic decried the banishment of Simon Roberts and Adrian Guthrie by claiming, “[i]ndeed, it is too plain to argue that if the boys were white, they would never have received this singular sentence.”¹²⁷ But that racial limit is exactly the problem. Why should *any* youthful offender be denied the opportunity to have a sentence that better fits his need for rehabilitation? If punishments like banishment were available to youthful offenders regardless of whether they were affiliated with a tribe, there would be no grounds for an Equal Protection claim.¹²⁸ A fundamental purpose of the Fourteenth Amendment is to abolish all government imposed racial discrimination.¹²⁹ Racial classifications are subject to strict scrutiny and must be justified by a compelling governmental interest and

126. Stephanie J. Kim, *Sentencing and Cultural Differences: Banishment of the American Indian Robbers*, 29 J. MARSHALL L. REV. 239, 239-40 (1995).

127. *Id.* at 246.

128. See U.S. CONST. amend. XIV, § 1 (guaranteeing that no state shall deny “to any person within its jurisdiction the equal protection of the laws”).

129. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category.”).

narrowly tailored to accomplish their legitimate purpose to pass constitutional muster.¹³⁰ If these sentences were available to all juvenile offenders, regardless of race, there would be no suspect racial classification and, thus, strict scrutiny would not apply.

2. *Eighth Amendment Cruel and Unusual Punishment*

Other critics claim that banishment violates the Eighth Amendment's prohibition against cruel and unusual punishment.¹³¹ Although this criticism is more compelling, it also fails. Eighth Amendment protections apply to state prosecutions as well as federal.¹³² The Amendment's protections, however, are less pertinent in analyzing banishment's impermissibility in tribal courts. Tribal courts are autonomous and, in many situations, not bound by the laws of the United States.¹³³ Because of this autonomy, the application of the Amendment's protections varies in tribal courts. A multi-prong test determines what constitutes cruel and unusual punishment:

[It] will ordinarily be a cumulative one: If a punishment is unusually severe, [i]f there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhumane and uncivilized punishments upon those convicted of crimes.¹³⁴

The first prong of this test asks if the sentence in question is unusually severe.¹³⁵ Sentences that have been held to be unusually severe include ninety days of imprisonment for narcotics addiction alone¹³⁶ and the punishment of *cadena temporal* for falsifying an

130. *Id.* at 432-33.

131. U.S. CONST. amend. VIII (reading "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

132. *See* *Robinson v. California*, 370 U.S. 660, 667 (1962).

133. *See* 18 U.S.C. § 1152 (2000); *Talton v. Mayes*, 163 U.S. 376, 383 (1896).

134. *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring) ("[P]unishment must not by its severity be degrading to human dignity.").

135. *Id.* at 281.

136. *Robinson*, 370 U.S. at 667.

official document.¹³⁷ The U.S. Supreme Court has also found the application of the death penalty to a fifteen-year-old to be a “needless imposition of pain” and thus unconstitutional.¹³⁸ In contrast, the Court did not find life imprisonment, imposed under a recidivist statute, for “obtaining \$120.75 by false pretenses” to be cruel and unusual punishment.¹³⁹ The Court did go to some lengths to address the fact that the defendant could be paroled and might not actually serve a life sentence.¹⁴⁰

Given this precedent, it cannot be said that banishment is an unusually severe punishment. Rather than degrading human dignity, it actually respects it. It does not involve imprisonment for an affliction that may be beyond a person’s control, hard labor and an ankle chain, death, or even life imprisonment for a petty crime! It simply involves giving young offenders the choice to experience a more self-reliant and introspective lifestyle. It recognizes the offender’s human dignity by giving him an affirmative choice of sentences. Banishment instills in the offender self-reliance and independence; the offender is asked to meet a challenge and succeed on his or her merits. Few things are more degrading than locking up a confused, rebellious, and angry young person and “warehousing” him like an animal in an environment where, in Simon Roberts’s words, they could become “some guy’s girlfriend.”¹⁴¹ As an individual who underwent a positive banishment experience, Roberts would advocate for banishment as a punishment for young offenders.¹⁴²

137. *Weems v. United States*, 217 U.S. 349, 382 (1910) (interpreting a provision in the Philippine Bill of Rights that was taken from the Eighth Amendment and entitled to the same interpretation as the latter amendment). *Cadena temporal* involves “from twelve years and one day to twenty years [imprisonment] which shall be served in certain penal institutions. And it is provided that those sentenced to *cadena temporal* . . . shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution.” *Id.* at 364 (internal quotations omitted).

138. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). *Roper v. Simmons* has extended this prohibition to those aged sixteen and seventeen at the time of their crimes. 125 S. Ct. 1183, 1200 (2005).

139. *Rummel v. Estelle*, 445 U.S. 263, 266, 285 (1980). The defendant’s previous crimes were credit card fraud involving \$80 and passing a forged check for \$28.36. *Id.* at 265.

140. *Id.* at 280-81.

141. Alexander, *Banished Teens on Their Way*, *supra* note 61, at B1.

142. *Native American Felon*, *supra* note 66.

The test's next prong considers whether there exists a strong probability that a punishment will be inflicted arbitrarily.¹⁴³ This inquiry pertains more to procedure, and the Supreme Court often defers to state sentencing schemes in this matter. Even still, the Court admonishes that sentencing durations should not be the personal views of the individual Justices, and the excessiveness of one prison term as compared to another "is invariably a subjective determination, there being no clear way to make 'any constitutional distinction between one term of years and a shorter or longer term of years.'"¹⁴⁴ Thus for felonies, the duration of a sentence actually imposed is a matter purely in the realm of legislative prerogative.¹⁴⁵

Given this deference to legislative determinations on appropriate sentences, legislative integration of banishment into the arsenal of sentences from which a trial court may draw for sentencing a youth waived into adult court would address this prong of the test. If banishment were a sentencing option for all similarly situated youthful offenders whose crimes were similar in nature, there would be no risk of arbitrary imposition. If youthful offenders and, if necessary their parents, were given a choice and were asked to make a knowing and intelligent waiver of the other possible sentence (i.e. imprisonment),¹⁴⁶ even less chance would exist for a court to see the sentence of banishment as arbitrarily imposed.

Next, the question of whether a sentence has been "substantially rejected by contemporary society" must be addressed.¹⁴⁷ The Eighth Amendment draws its meaning from the constantly "evolving standards of decency" and appropriateness that denote the progress of a maturing society.¹⁴⁸ Review of a sentence's proportionality under these evolving standards must be informed by objective factors, at least to the extent possible.¹⁴⁹ Legislation, enacted by a country's elected representatives, is the most incontrovertible and reliable

143. *See Furman v. Georgia*, 408 U.S. 238, 282 (1972).

144. *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275 (1980)).

145. *Id.*

146. Waiver will be discussed below. *See infra* text accompanying notes 217-18.

147. *Furman*, 408 U.S. at 282 (Brennan, J., concurring).

148. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

149. *Id.* at 312.

objective evidence of a country's contemporary values.¹⁵⁰ But even legislation may still be found unconstitutional.¹⁵¹

The Supreme Court places limits on traditionally accepted punishments to comport with these evolving standards. To begin, in *Atkins v. Virginia*, the Court held as unconstitutional the imposition of the death penalty on a mentally retarded defendant.¹⁵² Although throughout American history the death penalty had been considered an acceptable ultimate punishment,¹⁵³ the Court limited its use where such use would not further deterrence or retribution, the modern standards of decency.¹⁵⁴ To come to that decision, the Court canvassed different states' recent legislative enactments,¹⁵⁵ and emphasized "the consistency of the direction of change."¹⁵⁶ The Court also noted the wide ranging ideological backgrounds of the amici curiae advocating against the sentence and the prohibitions against execution of the mentally retarded in other nations.¹⁵⁷ Using similar analysis, the Court recently overturned *Stanford v. Kentucky*,¹⁵⁸ finding the death penalty to be cruel and unusual when applied to offenders who were under eighteen years of age at the time of their crimes.¹⁵⁹

The "evolving standards of decency" prong potentially precludes use of banishment as a sentence. It does not, however, pose an insurmountable challenge. Although banishment would be perceived as an unusual punishment in modern, mainstream, American society, in actuality, history shows it as an acceptable form of punishment for

150. *Id.* (citation omitted).

151. *See id.* at 321.

152. *Id.*

153. *See Gregg v. Georgia*, 428 U.S. 153, 176-77 (1976).

The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. . . . [T]he penalty continued to be used into the 20th century by most American States It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State.

Id.

154. *Atkins*, 536 U.S. at 321 (citation omitted).

155. *Id.* at 313-16.

156. *Id.* at 315 (citation omitted).

157. *Id.* at 316 n.21 (citations omitted).

158. 492 U.S. 361 (1989).

159. *Roper v. Simmons*, 543 U.S. 574 (2005).

many tribal, and other, societies.¹⁶⁰ Additionally, tribes in modern society advocate for use of banishment and see it as positive and reintegrative for offenders who transgress social norms.¹⁶¹ In Canada, “circle sentencing” for First Nation offenders tried in Canadian courts has gained recognition as an alternative to traditional sentencing.¹⁶² One of the sentences imposed through this “circle sentencing” is banishment. In *R. v. Lucas*,¹⁶³ the tribunal imposed a twelve month banishment from the town in which the offender committed his offense, as well as from Dawson City and Whitehorse, to a First Nation “bush settlement” known as No-Gold.¹⁶⁴ During this banishment, “the intention was that he would gain ‘the rehabilitative effects of required bush living, living the Indian way.’”¹⁶⁵ The sentence survived appeal by the Crown.¹⁶⁶ With Canada using banishment, it is more difficult to argue that banishment is an indecent sentence in a civilized society.

Finally, a sentence is cruel and unusual “if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment.”¹⁶⁷ In *Nelson v. Heyne*,¹⁶⁸ the Seventh Circuit found that the Indiana Boys School, a medium security state correction institution for youths twelve to eighteen years of age, violated some of the boys’ Eighth Amendment rights by administering corporal punishment and tranquilizing drugs.¹⁶⁹ In so finding, the court stressed that these beatings, which were administered to youths who tried to escape or who assaulted their peers and involved “a ‘fraternity paddle’ between ½” and 2” thick, 12” long, with a narrow handle” and the administration of several “blows on the clothed buttocks, often by a staff member weighing 285

160. *Modern Court Adopts Ancient Tribal Justice; 2 Teenagers Banished to Islands for Year*, WASH. POST, July 16, 1994, at A3.

161. *Id.*; *Judge Refuses*, *supra* note 70, at 24.

162. Ross Gordon Green, *Aboriginal Community Sentencing and Mediation: Within and Without the Circle*, 25 MANITOBA L.J. 77, 77 (1997).

163. 1995 CarswellYukon 8, ¶¶ 1,8 (Yukon C.A.).

164. Luke McNamara, *Appellate Court Scrutiny of Circle Sentencing*, 27 MANITOBA L.J. 209, 214 (2000).

165. *Id.* (quoting *R. v. Lucas* at ¶ 14).

166. *Id.* at 214-15.

167. *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring).

168. 491 F.2d 352 (7th Cir. 1974).

169. *Id.* at 353-54.

pounds,” were counterproductive.¹⁷⁰ The court stated, “The uncontradicted authoritative evidence indicates that the practice does not serve as useful punishment or as treatment, and it actually breeds counter-hostility resulting in greater aggression by a child.”¹⁷¹

Banishment does not parallel beatings and tranquilizer use; rather, banishment serves penal purposes in ways that cruel and unusual punishments cannot. Banishment is rehabilitative and re-integrative. Additionally, banishment promotes constructive introspection and emotional exploration—both Simon Roberts and the Swift River Academy teens’ experiences demonstrate these qualities.¹⁷² Unlike banishment, which these youths described in positive terms, jail yields an unmitigated negative impact on offenders, especially Indian offenders:

Jail has shown not to be effective for First Nation people. Every family in Kwanlin Dun [the Yukon] has members who have gone to jail. *It carries no stigma and therefore is not a deterrent. Nor is it a “safe place” which encourages disclosure, openness, or healing.* The power or authority structures within the jail operate against “openness.” An elder noted: “[j]ail doesn’t help anyone. A lot of our people could have been healed a long time ago if it weren’t for jail. Jail hurts them more and then they come out really bitter. In jail, all they learn is “hurt and bitter.”¹⁷³

While these comments were made regarding First Nation people of Canada, they apply equally to American Indians, and even to some non-Indians. In discussing Canada’s problem of First Nation people being overrepresented in jail populations, one scholar notes, “While concerns over conventional sentencing *practices* cannot be considered the sole cause of aboriginal over-incarceration, new sentencing approaches and philosophies may form part of the solution to this inequity.”¹⁷⁴ Banishment, not incarceration, can treat these symptoms of penal system inadequacy. For this reason, banishment passes the final prong of the Eighth Amendment cruel and unusual punishment test.

170. *Id.* at 354-55.

171. *Id.* at 355.

172. *See supra* text accompanying notes 117-21.

173. Green, *supra* note 162, at 78 (quotation omitted).

174. *Id.* (citation omitted).

Before concluding this inquiry under the Amendment, it must be noted that banishment raises special issues regarding the care a state owes to those who are convicted. The state and federal governments have a duty to provide minimal care to inmates: The Eighth Amendment cruel and unusual “provision could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment.”¹⁷⁵ The Supreme Court, however, has been reluctant to uphold such claims without a showing that prison officials “possessed a sufficiently culpable state of mind.”¹⁷⁶ Moreover, “only the ‘unnecessary *and wanton* infliction of pain’ implicates the Eighth Amendment.”¹⁷⁷ For claims regarding medical care in prison, a prisoner must, as a minimum, allege that officials were deliberately indifferent to his or her serious medical needs; only such indifference constitutes a violation of the Eighth Amendment.¹⁷⁸ In terms of prison appointments, the Constitution “does not mandate comfortable prisons,” and “only those deprivations denying ‘the minimal civilized measure of life’s necessities’ are sufficiently grave to form the basis of an Eighth Amendment violation.”¹⁷⁹

In carrying out “circle sentences,” Canada met the preceding concerns—specifically, providing basic living necessities—directly and with success. In *R. v. Taylor*,¹⁸⁰ the defendant was banished to a remote island in northern Saskatchewan for one year.¹⁸¹ Tribal officials devised a comprehensive plan that detailed the banishment terms: staying within two miles of the cabin provided for him; receiving vital tools, utensils, and materials for hunting; improving his cabin and even building a new one.¹⁸² Every three weeks, the banishee received supplemental food to provide proper sustenance, and he was given a first-aid kit and materials on anger management, alcoholism, and general education.¹⁸³ Finally, the terms strictly limited his contact with the outside world; a resource person visited

175. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

176. *Id.*

177. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

178. *Id.*

179. *Id.* at 298 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

180. *Miller*, *supra* note 47, at 255-56.

181. *Id.*

182. *Id.* at 258.

183. *Id.*

him at intervals to monitor his status.¹⁸⁴ Despite a “few members of the sentencing circle not[ing] that the sentence was particularly harsh and more suspect than prior banishments because of the severe winter conditions in Northern Saskatchewan,” the sentence was carried out.¹⁸⁵ This case and its careful plan demonstrate that banishment can be tailored in such a way as to provide offenders with the basic living necessities and the care they need.¹⁸⁶

Analyzing all the prongs of the Eighth Amendment cruel and unusual punishment test together, banishment passes. It is not unusually severe compared to sentences that have been upheld.¹⁸⁷ There is no necessary presumption that it will be inflicted arbitrarily. Canada and many tribes advocate for its use, so it cannot be said that contemporary society substantially rejects the punishment. Finally, it serves a variety of penal purposes that other punishments do not and cannot serve. In fact, some critics of banishment concede that it passes muster under Eighth Amendment jurisprudence.¹⁸⁸

As an aside, rights, even certain constitutional rights, can be waived.¹⁸⁹ While no Supreme Court case holds that a convicted citizen may waive their Eighth Amendment rights, there is precedent suggesting that inmates sentenced to death may waive their right of

184. *Id.*

185. *Id.* at 258-59.

186. One Tlingit teen was removed from banishment to receive needed medical attention regarding appendicitis; leave from banishment was also granted for less dire medical attention—namely, removal of a wisdom tooth. *Id.* at 266.

187. See *supra* notes 136-41 and accompanying text.

188. See Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 457 (1998).

However strongly one argues that either of the above are sufficient reasons for outlawing banishment, there is nothing constitutionally improper about banishment *qua* banishment. Though banishment may offend the sense of political and social justice of all involved, the banishing community reaps material and spiritual benefit from the banishment sentence. . . . Though many arguments against banishment do have merit, each one of them is susceptible to becoming moot should individual state legislatures deem banishment to be in their best interest.

Id.

189. See *Boyd v. Dutton*, 405 U.S. 1, 2-3 (1972) (noting, however, that “[w]aiver will not be ‘lightly presumed,’ and a trial judge must ‘indulge every reasonable presumption against waiver’” (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))).

appeal.¹⁹⁰ In applying these alternative sentences, especially potentially controversial sentences like banishment, courts could offer youthful offenders and, if necessary, their parents a choice between an alternative sentence and a standard sentence like imprisonment. If the offender chooses an alternative sentence, then he or she can be asked to knowingly and intelligently waive his or her right to a standard sentence.¹⁹¹

D. *Answers to Other Objections Regarding Alternative Sentencing*

Critics of alternative sentencing regimes posit other factors, such as proportionality and equality as weighing against use of non-standard sentences.¹⁹² Their arguments are aimed mainly at “shaming” sentences, yet they could also be directed at other alternative sentences, so these arguments will be addressed here briefly. While these matters may be similar to and in places overlap the constitutional arguments, they remain distinct. Other contentions focus on the following grounds: state constitutional prohibitions against banishment; adverse psychological and social impacts of banishment on the offender and the affected communities; substantive due process; and Freedom of Association.¹⁹³ Therefore, this section will address each of these other areas of contention in turn.

1. *Proportionality*

The Supreme Court explained that “it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”¹⁹⁴ With alternative sentences like shaming, scholars argue that the harm to the offender may be largely intangible and beyond

190. *See* *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (“Gary Mark Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court’s sentence was imposed, and, specifically, that the State’s determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded.”).

191. *Johnson*, 304 U.S. at 464 (“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.”).

192. Massaro, *supra* note 87, at 1937-40.

193. Snider, *supra* note 188, at 455-58.

194. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

assessment.¹⁹⁵ These punishments “may not, for some offenders, be ‘negative’ at all, and the same stimulus may not be experienced equally by equally culpable actors.”¹⁹⁶ This criticism is certainly true, but it applies equally to incarceration, parole, hard labor, and community service—some of the traditional Anglo-American sentences. Every person experiences situations, especially punishments and castigations, differently. While one youthful offender may view banishment as “camping out” and another see it as utter “deprivation,” the realities of the situation are likely to bring both to similar realizations—that banishment “ain’t no camping trip,” but a process that requires serious commitment.¹⁹⁷ Additionally, just as with prison, banishment’s external circumstances will be very similar for each offender. The parameters of banishment may vary somewhat with the circumstances, but if a relatively standard plan is used, as in the Canadian case *R. v. Taylor*, the physical harm should be acceptably uniform.¹⁹⁸

2. *Equality*

One critic opines, “If judges have discretion to fashion creative sentences, they may be inclined to deliver harsher sentences to some defendants than others.”¹⁹⁹ This concern posits that alternative sentences are just additional arbitrary tools in a judge’s arsenal. While a legislative plan incorporating alternative tribal sentences into mainstream sentencing guidelines would be ideal, allowing judges to give offenders sentencing options—incarceration or banishment—would answer the equality challenge. If the offender were given the choice of sentences, he could not argue disparate treatment. Prison, or some other standard sentence, would always be an option—the standard fall-back. Which offenders are given the choice of an alternative sentence could raise equality issues, but given that the equality argument is aimed *against* alternative sentences, these issues are not ones we need to face at this point. Therefore, with standard

195. Massaro, *supra* note 87, at 1937.

196. *Id.*

197. Donahue, *supra* note 51, at 20 (discussing the view that some banished minors would consider it “camping out”); MARCUS, *supra* note 18, at 33 (discussing the view that some would view banishment as complete deprivation).

198. See Miller, *supra* note 47, at 255-59 for a brief discussion of the case.

199. Massaro, *supra* note 87, at 1940.

banishment plans and judicial presentation of sentencing options, criticisms against these alternative sentences can be laid to rest.

3. *Other Contentions Directed Specifically at Banishment—State Constitutional Bars, Community Impact, Freedom of Association*

Critics of banishment are quick to point out that certain state constitutions, such as Georgia's,²⁰⁰ explicitly preclude the use of banishment as a penal sentence.²⁰¹ They also raise issues of community harmony, arguing that banishing unsavory criminals to other communities will create tension between the banishing community and the receiving community.²⁰² Finally, these critics point to the impact of banishment on the offender's First Amendment right of association.²⁰³

While these arguments may have merit in other banishment situations, they fail when applied to banishment to uninhabited wilderness areas. The Georgia Constitution provides a straightforward example of a state constitutional bar to banishment *from* the state: "Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime."²⁰⁴ In the one case interpreting this provision, *State v. Collett*,²⁰⁵ the Supreme Court of Georgia made a vital distinction—banishment beyond the state is different from a sentence that requires the convicted to stay in one place: "[the state code] provides the court may require the probationer to 'remain within a specified location,' in addition to compliance with other conditions set forth in the statute."²⁰⁶

The court's distinction in this case provides a basis for using banishment, even in the face of statutes that seem to prohibit its use. When a young offender is banished to uninhabited wilderness, he or she is not so much banished *from* the state as banished *to* the wilderness area of that state. Such a banishment scheme necessarily

200. GA. CONST. art. I, § 1.

201. Snider, *supra* note 188, at 455.

202. *Id.* at 457.

203. *Id.* at 458. See also Freeman v. City of Santa Ana, 68 F.3d 1180 (9th Cir. 1995) (The First Amendment, while not expressly containing a right of association, does protect the right to for the purpose of engaging in those expressive activities otherwise protected by the Constitution.).

204. GA. CONST. art. I, § 1 (emphasis added).

205. 208 S.E.2d 472 (Ga. 1974).

206. *Id.* at 473.

involves demarcating an area for the banishee to inhabit and from which he or she cannot leave. These requirements pose no state constitutional problems, for even critics of banishment concede that banishment to a designated region is usually legal and upheld.²⁰⁷

The criticisms regarding psychological impact, community strife, and Freedom of Association rights are likewise inapposite. The idea that banishment informs the offender that

(1) the community either does not want to take the time to rehabilitate the offender or does not feel that the person is capable of being rehabilitated; and (2) the community feels that its physical safety is best served by having the offender outside of its boundaries, and by logical extension, no longer under its supervision²⁰⁸

is misplaced when leveled at banishment of young offenders to the wilderness. Rather than sending a negative message regarding rehabilitation, such banishment would send a positive message, one that would tell a young person that the community believed he or she was capable of being self-reliant, capable of succeeding on his or her own, and too precious to warehouse in prison. Rather than engendering strife between communities, communities would learn to work together. The situation would not be one of a sending community foisting its troublesome youths onto a receiving community, but rather, communities would work together to manage appropriate wilderness areas, to preserve them for banishments. Tribal communities could work with non-tribal communities to develop training regimes for young banishees to go through before serving their sentences. Overall, community interaction would necessarily be cooperative as opposed to sullenly passive.

Finally, critics of banishment argue that the sentence would violate a convict's First Amendment rights:

To banish someone is to unconstitutionally deprive that individual of the ability to affect the political process in the geographical area in which his speech would be most relevant, and by extension, "indispensable to the discovery and spread of political truth." Banishment unconstitutionally separates government from the governed. One who is given a choice of incarceration or banishment

207. See Snider, *supra* note 188, at 474.

208. *Id.* at 456.

has been stripped of all rights to challenge the executive, legislative, and judicial mechanisms. Those that could have benefitted [sic] from his voice are commensurably, though ignorantly, worse off. Consequently, it is the lack of information as to the reason and justification for the banishment that proves to be most deleterious to the community.²⁰⁹

Once again, this First Amendment argument does not apply to the young offender banished to the wilderness. Such an offender, as we saw with the Tlingit Simon Roberts, may actually *find* their voices and build intangible, yet vital, associations through introspection and writing. Regardless, these same criticisms also apply to imprisoned convicts. In *Richardson v. Ramirez*,²¹⁰ the Supreme Court held that a felon may be excluded from voting.²¹¹ Losing one's voting right is the ultimate political disability and curtailment of political association. A state may revoke a felon's right to vote whether they are imprisoned, banished, or sentenced in some other way. For this reason, banishment does not uniquely infringe upon the offender's First Amendment right.

Banishment simply does not create the psychological or community harm some critics posit. Rather, it is rehabilitative and encourages community cooperation. Instead of depriving young people of the right to participate in democracy, it may actually encourage them to contemplate their political rights and engage in politically communicative writing. Finally, even states that explicitly bar banishment as a sentence in their constitutions have held that there is a difference between banishment from a state and banishment to a specific place within the state. They have allowed the latter to stand. For these reasons, banishment can clear the hurdles posed by certain critics.

E. *Benefits to the Community*

The cost to society of supporting the penal system is enormous. To incarcerate a youthful offender costs between \$35,000 and \$64,000 annually.²¹² Unfortunately, this money is not necessarily money well

209. *Id.* at 495 (citation omitted).

210. 418 U.S. 24 (1974).

211. *Id.* at 56.

212. Wilber, *supra* note 111.

spent. “[A] 1996 report from the RAND Corp. [indicates] that early in[ter]vention programs can prevent as many as 250 crimes per \$1 million spent while the same amount spent in prisons would prevent only 60 such crimes a year.”²¹³ While it is not always politically popular, the idea of investing in preventative and rehabilitative programs is sounder. Alternative sentencing, for all of the rehabilitative reasons discussed above, is such a program.

Furthermore, banishment to some extent addresses the racial inequities and hostilities that continue to sunder this nation. Cases involving jury nullification vividly illustrate the racial hostility surrounding the criminal justice system. For instance, Black juries may refuse to convict Black defendants, perceiving the law as a tool for Caucasians to oppress Blacks.²¹⁴ Speaking of the Canadian justice system, in terms that apply equally well to the American, one critic writes, the “system of justice grinds Indians through its ravenous jaws so systematically and impersonally that it doesn’t even notice the substitution of one brother for another, so long as it can digest another Indian.”²¹⁵ A native spiritual leader writes, “Oh God, protect us/From/The/Game/Called/Justice,/Where the rich get richer,/And the poor,/They go to jail.”²¹⁶ These accounts vividly illustrate the gulf between many minority communities and the mainstream middle class, the socially crippling “us/them” dichotomy harbored by many people of many different races and ethnicities. A sentencing system that integrated native culture and a judicial system that turned to native culture would send the message of a unified country seeking the best possible solution for its criminal justice system problems. In addition, an integrative system would send the message that Indian communities promote universally accepted values. Finally, it would promote collaboration that over time could contribute to the demolition of the daunting wall now erected between “us and them.”

213. *Id.*

214. COLSON, *supra* note 1, at 37-38.

215. RUTH MORRIS, CRUMBLING WALLS . . . : WHY PRISONS FAIL 98 (1989). Morris recounts a story of two Indian brothers. One was caught for a liquor violation, but because his wife was expecting a baby, his brother went to court, pled guilty, and served time for the offending brother. The justice system was ambivalent toward the local native peoples and did not bother checking appearances or fingerprints to ensure that the right person was pleading guilty. *Id.*

216. *Id.* at 9.

Through traditional tribal sentencing, Indian youths can be spared the sub-human conditions of the Indian detention facilities described in Part I and the tribulations that would normally accompany waiver into state or federal penal systems. Such schemes would also better ground youthful tribal offenders in their traditional cultures.²¹⁷ Tribes could waive their young offenders into state and federal penal systems knowing that these offenders would still receive culturally appropriate sentences. With this avenue open, tribes could stop trying to stretch their limited resources and could begin to use these resources to benefit the tribe as a whole.

Non-Indian youths could likewise be spared the degradation of incarceration and be exposed to the self-reliance and introspection that a life away from MTV, Tupac music, Grand Theft Auto III, drugs, fornication, vandalism, and violence provides. Simon Roberts, the Tlingit youth who returned from his banishment to become a tribal leader,²¹⁸ represents the young citizen that a sentence emphasizing self-reliance, dignity, and introspection can produce, the citizen that can return to his or her community after serving an alternative sentence and make a meaningful contribution.

Tribal sentences like banishment could serve to integrate mainstream American and American Indian cultures, save both communities money, lessen the burden on overtaxed prisons (especially tribal prisons), and produce better adjusted young citizens. If integration with sentencing options occurs, waiving tribal juvenile offenders into state or federal judicial systems would be less of a crisis because the systems could provide culturally appropriate sentences. In all these ways, the American community as a whole would benefit from these sentences.

CONCLUSION

In this walk through the current and potential sentencing regimes of modern federal, state, and tribal criminal justice systems as they apply to youthful offenders who are waived into adult courts, we have seen that youths are undeniably one thing: young. Their needs differ from adult needs. In sentencing these young people, courts need to recognize these needs. Integrating traditional tribal

217. Miller, *supra* note 47, at 288.

218. Burg, *supra* note 51.

punishments into the sentencing judge's arsenal is constitutional, beneficial to society in that it builds awareness of tribal culture, cost-effective, and most importantly, responsive to the needs of the young offenders. Consistent with the tradition of tribal and Anglo-American integration that includes assimilation of Iroquois values into the U.S. Constitution, tribal sentencing can be brought into the modern courtroom and applied to our *wakanyeja*.