
CONSTRUCTING THE TRIDENT OF THE REASONABLE
PERSON: ENOUGH IS ENOUGH! IT’S TIME FOR THE
REASONABLE INDIAN STANDARD

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I. INTRODUCTION

American Indians are the only minority group in the United States that suffer burdens unlike other groups. To start, they experience a number of illnesses caused by perpetual "Historical Trauma."¹ Indian tribes are sovereign nations originating prior to the American Constitution. They are not protected from "double jeopardy," and as a result are often tried for the same offense in both state and federal court, while non-Indians only face state court for the same crime.² Federal sentencing is harsher than state sentencing, and federal courts are often hundreds of miles from many Indian reservations, which impedes fair trials.³ Additionally, tribal members identify collectively where the best interests of the tribe are considered before themselves. This impacts dealings with "mainstream culture,"⁴ which is

¹ Maria Yellow Horse Brave Heart, *Wakiksuyapi: Carrying the Historical Trauma of the Lakota*, 246–47 (2000) (unpublished manuscript) (on file with Tulane University School of Social Work) [hereinafter *Wakiksuyapi*], Maria Yellow Horse Brave Heart et al., *Historical Trauma Among Indigenous Peoples of the Americas: Concepts, Research, and Clinical Considerations*, 43 J. PSYCHOACTIVE DRUGS 282, 282–83 (2011) [hereinafter *Historical Trauma*]; see also Vinnie Rotondaro, 'Reeling From the Impact' of Historical Trauma, INDIAN COUNTRY TODAY (Sept. 20, 2015), <https://newsmaven.io/indiancountrytoday/archive/reeling-from-the-impact-of-historical-trauma-bquQIFv7dkyE04u8KHdebg/> (quoting Maria Yellow Horse Brave Heart's definition of historical trauma as "cumulative emotional and psychological wounding, over the lifespan and across generations, emanating from massive group trauma.").

² See *United States v. Lara*, 541 U.S. 193 (2004) (holding that the Double Jeopardy Clause did not apply in the federal prosecution of an Indian defendant unless the source of his tribal prosecution was federal power); see also Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 405 (1974) ("Where one criminal court has entered a final judgment disposing of an issue of ultimate fact, and a second court then hears a contest over the same issue, the defendant may successfully invoke the fifth amendment protection only if the two courts are 'arms of the same sovereign.'") (citing *Waller v. Florida*, 397 U.S. 387, 393 (1970)); Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1666–69 (2016) (discussing double jeopardy as it relates to Indian Tribes).

³ See, e.g., Jake Flanagan, *Native Americans Are the Unseen Victims of a Broken US Justice System*, QUARTZ (Apr. 27, 2015), <https://qz.com/392342/native-americans-are-the-unseen-victims-of-a-broken-us-justice-system/>. ("Native Americans are typically prosecuted under federal law for serious offenses . . . [while] [s]tate punishments for the same crimes tend to be lighter."); see also Vollmann, *supra* note 2, at 387 ("Federal and state [] courts are often many miles from a reservation.").

⁴ See *Acculturation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/acculturation> (last visited Nov. 28, 2019) (defining acculturation as "a merging of cultures as a result of prolonged contact"); see also *United States v. Woody*, No. CR-13-08093-001-PCT-NVW, 2015 WL 1530552, at *7, *10–11 (D. Ariz. Apr. 6, 2015); see also *United States v. Woody*, 652 F. App'x 519, 520, 520–21 (9th Cir. 2016); L. Scott. Gould, *The Congressional*

individualistic, and reduces the ability to successfully navigate through the American adversarial system with equal footing to those who communicate with an individualistic vantage point. The inability to navigate on equal footing often leads to "disparities," which include frequent false confessions and guilty verdicts.⁵ The higher probability of an Indian making a false confession arises from growing up within the traditional way of life in a tribe. There are nuances and mannerisms that come to play as a tribal member that are contrary to the social norms of non-Indians.⁶ As a result of this conflict, communication is amiss when being interrogated by non-Indians.⁷ Statistics show that American Indians have the highest incarceration rates among minority groups.⁸ Therefore, it is highly likely that implicit biases contour the fate of an Indian being prosecuted, whether it be during interrogation by law enforcement, or while being evaluated by judges and jurors that have never experienced what it is to be Indian.⁹

Now that science and medicine confirm the existence of Historical Trauma through epigenetic transfer in American Indians,¹⁰ it is the perfect time to bring to light a new theory called "the Reasonable Indian Standard." Its purpose is to provide a bright-line rule which allows expert testimony in support of Historical Trauma, and also recognizes the delicate, yet prolific, conflicts with mainstream culture that members of a tribe experience when practicing traditional ways. This standard applies to both Indian plaintiffs and defendants and provides an explanation for the inherent flaws and fallacies that occur when non-Indian police officers, judges, and jurors preside over

Response to Duro v. Reina: Compromising Sovereignty and the Constitution, 28 U.C. DAVIS L. REV. 53, 55–61 (1994). "Congress attempted, through the Dawes Act, to assimilate Indians into mainstream culture[.]" *Id.* at 56.

⁵ *Woody*, 2015 WL 1530552, at *13; see also *Woody*, 652 F. App'x at 520, 520–21.

⁶ See Pat K. Chew, *The Pervasiveness of Culture in Conflict*, 54 J. LEGAL EDUC. 60, 65 (2004).

⁷ See generally *Woody*, 2015 WL 1530552 (discussing the impact of interrogation techniques by a non-Indian officer on an American Indian).

⁸ Flanagan, *supra* note 3 ("Native Americans are incarcerated at a rate 38% higher than the national average . . .").

⁹ See Chew, *supra* note 6; see also Phil Dierking, *Are US Federal Courts Harder on Native American Offenders*, VOA: LEARNING ENG. (Oct. 21, 2017), <https://learningenglish.voanews.com/a/are-us-federal-courts-harder-on-native-american-offenders/4069778.html>.

¹⁰ See Kathleen Brown-Rice, *Examining the Theory of Historical Trauma Among Native Americans*, 3 PROF. COUNSELOR 117, 120 (2013), <http://tpcjournal.nbcc.org/wp-content/uploads/2014/10/Pages-117-130.pdf>.

an Indian. Additionally, this standard also highlights an in-depth understanding of the nuances of the Indian culture that is unfamiliar to non-Indians in mainstream culture. The standard points out the flaws in diagnostic testing, which fails to adequately test an Indian properly, and recognizes the significance of Historical Trauma and its effects on an Indian brain and body. Further, it outlines where the status quo of mainstream society is counter-productive to the status quo of being Indian. Awareness of these factors provides alternative remedies to the reasonable person standard, which historically, and even now, defeat the Indian from legal perspectives. For purposes of this article, the Reasonable Indian Standard applies to both plaintiffs and defendants. Additionally, the discussion here is narrowly tailored to in-custody interrogation and the voluntariness analysis.

There are four primary areas of the Reasonable Indian Standard which should be administered by experienced practitioners in medicine, psychology, and science: (1) Historical Trauma;¹¹ (2) Conflicts of Acculturation¹² (different values and behavioral patterns among American Indians as compared to mainstream culture);¹³ (3) Individual Mindedness versus the Tribal Collective Mind;¹⁴ and (4) Cognition, Reasoning, and Emotional Control.¹⁵ By using this standard, it is my hope that American Indians and Alaska Natives can level out some of the disparities in the adversarial system that face them now and in future generations to come.

My hypothesis is that standard diagnostics, originally developed through testing on the non-Indian majority, only test for specific symptoms or conditions that have no template for epigenetic transfer or Historical Trauma. As a result, standard diagnostics fail to capture the subtle, yet profound, differences of the Indian body and mind, which have been exposed to multiple generations of Historical Trauma.¹⁶ This article explores these profound differences caused by

¹¹ See generally *Wakiksuyapi*, *supra* note 1 (presenting both quantitative and qualitative data on the historical trauma among American Indians); see also *Woody*, 2015 WL 1530552, at *6.

¹² *Acculturation*, *supra* note 4.

¹³ *Woody*, 2015 WL 1530552, at *7.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See generally *Native American Communities and Mental Health*, MENTAL HEALTH AM., <http://www.mentalhealthamerica.net/issues/native-american-communities-and-mental-health> (last visited Nov. 26, 2019) (providing statistics of Native American communities and

"epigenetic transfer," which modifies the human gene, marking it sensitive to "stress."¹⁷ When "epigenetic markers" derived from Historical Trauma activate, they overload the brain and body with toxic levels of cortisol, which deactivates reasoning and emotional control.¹⁸ Standard diagnostic testing is usually performed in tranquil environments when the epigenetic markers on the gene are not activated.¹⁹ Therefore, the Reasonable Indian Standard is important because it attests to how the American Indian is affected during the event, and explains why Indians respond differently in comparison to America's reasonable person. For example, a judge would infer that a highly charged interview with an FBI agent is stressful, but not enough to cause an Indian suspect to make a false confession, because a reasonable person in like circumstances would never cave in. The necessity for a standard that distinguishes how Indians are affected came to realization after reading *United States v. Woody*.²⁰ In this case, Mr. Woody, a Navajo criminal defendant, prevailed at a motion to suppress hearing.²¹ Mr. Woody used his Navajo background to show he was overborne by FBI interrogation,²² which was successful at the Arizona

mental health); OFFICE OF MINORITY & NAT'L AFFAIRS: AM. PSYCHIATRIC ASS'N, *Mental Health Disparities: American Indians and Alaska Natives* (2010), http://www.integration.samhsa.gov/workforce/mental_health_disparities_american_indian_and_alaskan_natives.pdf. (revealing mental health disparities among Native Americans).

¹⁷ *Can Trauma be Passed to Next Generation Through DNA?*, PBS NEWSHOUR EXTRA (Aug. 31, 2015), <https://www.pbs.org/newshour/extra/daily-videos/can-trauma-be-passed-to-next-generation-through-dna/>; see also Mary Annette Pember, *Trauma May Be Woven into DNA of Native Americans*, INDIAN COUNTRY TODAY (Oct. 3, 2017), <https://newsmaven.io/indiancountrytoday/archive/trauma-may-be-woven-into-dna-of-native-americans-CbiAX-pzar0WkMALhjrcGVQ/> (noting "populations affected by historical trauma "show[] physical and psychological symptoms in response to the trauma").

¹⁸ See generally Michael D. De Bellis & Abigail Zisk, "*The Biological Effects of Childhood Trauma*", 23 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 185, 3 (2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3968319/pdf/nihms-555973.pdf> ("Cortisol levels become elevated . . . [and] contribute to changes in heart rate, metabolic rate, blood pressure, and alertness. . . . [It] also leads to the activation of other biological stress systems."); see also *id.* ("Stress activation has behavioral and emotional effects . . .").

¹⁹ See *id.*

²⁰ *Woody*, 2015 WL 1530552; *United States v. Woody*, 652 F. App'x 519 (9th Cir. 2016).

²¹ The Ninth Circuit reversed which is why this error needs to be addressed and corrected. See *Woody*, 2015 WL 1530552, at *15; *Woody*, 652 F. App'x 519.

²² The Arizona federal court judge allowed an expert to testify on four topics that proved his confession was not voluntary. *Woody*, 2015 WL 1530552. The topics discussed at Woody's hearing by Dr. McIntyre were: Historical Trauma, Different Values and Behavioral Patterns Among Native Americans as Compared to Mainstream Culture, Cognitive Impairment, and Intelligence. *Woody*, 652 F. App'x 519.

Federal Court but eventually overturned by the Ninth Circuit.²³ Had the Reasonable Indian Standard been implemented during the federal government's appeal at the Ninth Circuit, he likely would have seen a different outcome.

Part II of this article presents the background on Indian statistics that reflect the effects of colonization²⁴ and Historical Trauma and exposes how these problems are unaccounted for in the American justice system. These problems cause a severe disparity for American Indians navigating through the adversarial system. Part III discusses how *Woody* establishes the framework for the Reasonable Indian Standard and offers an in-depth analysis of why the Ninth Circuit is incorrect.²⁵ Here, Part III discusses why a Reasonable Indian Standard is an appropriate remedy for an Indian being overborne by an interrogator.²⁶ The conclusion discusses how *J.D.B. v. North Carolina*²⁷ supports a justification for creating a third variation of the reasonable person.²⁸

II. BACKGROUND

A. American Indian Statistics

Studies show that American Indians make up only 1.2 percent of the United States population yet comprise the highest incarceration rates for an ethnic population in proportion to all other minorities

²³ *Woody*, 2015 WL 1530552; *Woody*, 652 F. App'x 519.

²⁴ See Robert A. Williams, Jr., *Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes*, 39 FED. B. NEWS & J. 358, 359 (1992) ("Colonization of one race of peoples by another race then, indelibly inscribes a legal system of racial discrimination based on cultural differences, denying rights of self-determination to the colonized race which has been displaced from the territory desired by the colonizer race."); Howard J. Vogel, *Healing the Trauma of America's Past: Restorative Justice, Honest Patriotism, and the Legacy of Ethnic Cleansing*, 55 BUFF. L. REV. 981, 999–1000 (2007); see also Vollmann, *supra* note 2, at 387–88.

²⁵ *Woody*, 2015 WL 1530552; *Woody*, 652 Fed. App'x 519.

²⁶ See generally *Woody*, 2015 WL 1530552, at *6 (relying on expert testimony from Dr. David McIntyre who opined that, "to a reasonable degree of psychological certainty, [] the interrogation techniques employed by [the interrogator] may have affected the voluntariness of Mr. Woody's admission.") (internal quotation marks omitted).

²⁷ 546 U.S. 264 (2011).

²⁸ *Id.*

combined.²⁹ In a 2017 report, the American Bureau of Justice Statistics announced that incarceration rates for American Indians and Alaskan Natives in local state jails is thirty-eight percent higher than the national average.³⁰ The number of American Indians incarcerated in jail and prison increased seventy-two percent from 1999 to 2014, compared to a fifteen percent increase among inmates of both Hispanic origin and all other races combined.³¹ These statistics do not include the disparaging statistics on youth, revealing that seventy percent of juveniles sent to the Federal Bureau of Prisons are American Indian.³²

Statistics prove that American Indians³³ prosecuted for major crimes³⁴ are tried in federal courts when non-Indians are tried in state courts for the same crime.³⁵ Federal sentencing is harsher than state sentencing, which results in a disproportionate outcome for the

²⁹ Jordan Gross, *Let the Jury Fit the Crime: Increasing Native American Jury Pool Representation in Federal Judicial Districts with Indian Country Criminal Jurisdiction*, 77 MONT. L. REV. 281, 309 (2016); see TODD D. MINTON ET AL., U.S. DEP'T OF JUSTICE, NCJ250652, AMERICAN INDIANS AND ALASKA NATIVES IN LOCAL JAILS, 1999-2014 (2017), available at <https://www.bjs.gov/content/pub/pdf/aianlj9914.pdf>; Michael Leroy Oberg, *Incarceration Rates for Native Americans*, NATIVE AM: A HIST. (Mar. 9, 2018), <http://michael-leroyoberg.com/current-events/incarceration-rates-for-native-americans/>.

³⁰ Flanagan, *supra* note 3.

³¹ See MINTON ET AL., *supra* note 29, at 10.

³² Dierking, *supra* note 9.

³³ Which includes Alaska Natives for the remainder of this article.

³⁴ Gross states:

The Major Crimes Act currently provides: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). Legislative history indicates Congress used the words "or other person" to make clear that Indians were to be prosecuted in federal court for all enumerated crimes committed in Indian country, regardless of the race of the victim. 16 CONG. REC. 934 (1885).

Gross, *supra* note 29, at 288 n.30.

³⁵ *Id.*; see Dierking, *supra* note 9.

American Indian.³⁶ A sentence in state court may consist of a few months in prison, while federal sentencing begins at a few years.³⁷ In the past five years, the number of Native Americans incarcerated in federal prisons has increased by twenty-seven percent.³⁸ For example, South Dakota, which has the fourth highest percentage of American Indian residents among states in the United States, reported that American Indians comprise sixty percent of the federal caseloads, but only 8.5 percent of the total population.³⁹ Consequently, studies reveal that American Indians end up serving the longest sentences than any other group in America. Moreover, this disparity flows from laws and jurisdictional issues that adjudicate Indians either in federal instead of state court, or in both for the same crime.⁴⁰

Victimization statistics are also striking, showing that American Indians are the likeliest to be killed by police, even more so than members of Black populations,⁴¹ and fall victim to violent crime at more than double the rate of all other U.S. citizens.⁴² Additionally, eighty-eight percent of violent crimes committed against Indian women are carried out by non-Indian perpetrators,⁴³ and seventy percent of violent victimizations against both male and female Indians are committed by non-Indian offenders.⁴⁴ The average annual violent crime rate per 1,000 persons age twelve or older was 124% for American Indians, sixty-one percent for Blacks, and forty-nine percent for Whites.⁴⁵ Furthermore, among persons age twelve or older, American Indians experience one violent crime per every eight residents, while Black residents experience one violent crime per every sixteen residents and white residents experience one for every twenty residents.⁴⁶

³⁶ See Dierking, *supra* note 9.

³⁷ See Flanagan, *supra* note 3.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Emily R. Brault, *Sweating in the Joint: Personal and Cultural Renewal and Healing Through Sweat Lodge Practice by Native Americans in Prison*, 12 (Aug. 2005) (unpublished Ph.D. dissertation, Vanderbilt University) (on file with author).

⁴¹ Flanagan, *supra* note 3.

⁴² Brault, *supra* note 40, at 13.

⁴³ Flanagan, *supra* note 3.

⁴⁴ Brault, *supra* note 40, at 14.

⁴⁵ *Id.* at 13.

⁴⁶ *Id.*

B. Historical Trauma

These statistics are symptoms of a perpetual process called Historical Trauma⁴⁷ which began as early as the Colonization, Removal, and Assimilation periods of Indian history.⁴⁸ American Indians experience devastating intergenerational massive group trauma, discrimination, racism, and oppression, which continues even after several centuries.⁴⁹ Historical Trauma,⁵⁰ which is a term coined by Maria Yellow Horse Brave Heart, PhD,⁵¹ refers to the genetic transfer of traumatic experiences from an ancestor to their descendants through "epigenetic transfer."⁵²

Epigenetic transfer occurs in the human body when it passes what is known as a "chemical marker" onto the descendant's genes through DNA shared by an ancestor.⁵³ The chemical marker from the epigenetic transfer replicates the ancestor's physiological and emotional reaction to traumatic experiences, which creates a living DNA response that is activated within a descendant during stressful circumstances.⁵⁴ Essentially, trauma experienced by earlier generations can influence

⁴⁷ *Wakiksuyapi*, *supra* note 1.

⁴⁸ Rotondaro, *supra* note 1; *see also* GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 116–17, 150–53, 168–69 (7th ed. 2017). The Removal period included the Cherokee Trail of Tears and other tribes' removal from ancestral lands which occurred during the eighteenth and nineteenth centuries. *Id.* at 116, 153. The Assimilation period, 1871–1928, still reverberated long after its initial ending. *Id.* at 168. This period, as the authors suggest, was enacted by Congress to structure a national allotment scheme that accomplished two legislative goals: opening up land for white settlers and ending Indian tribalism. *Id.*

⁴⁹ *Historical Trauma*, *supra* note 1.

⁵⁰ *Id.* at 283.

⁵¹ Dr. Maria Yellow Horse Brave Heart identifies as Hunkpapa/Oglala Lakota Indian and is President of the Takini Institute. She is an Associate Professor of the Department of Psychiatry and the Director of Native American and Disparities Research at the University of New Mexico in the Center for Rural and Community Behavioral Health. Dr. Brave Heart was a professor at Columbia University in New York and has researched and written several articles on how Historical Trauma affects Indigenous peoples and began her career as a social worker in her early twenties. *Yellow Horse Brave Heart, Maria: Associate Professor*, U. N.M. HEALTH SCIS: CLINICAL & TRANSLATIONAL SCI. CTR., <https://vivo.health.unm.edu/display/n57908>.

⁵² *See* Pember, *supra* note 17.

⁵³ *Can Trauma be Passed to Next Generation Through DNA?*, *supra* note 17. Dr. Rachel Yehuda, director of Mount Sinai's Traumatic Stress Studies Division, has scientifically determined that epigenetic change affects the chemical marker for a gene rather than the gene itself. *Id.*

⁵⁴ *See* Pember, *supra* note 17.

the structure of genes in later generations. This cycle occurs because the gene markers predispose descendants as trigger happy to negative situations, which is deeply associated with replicating stress and trauma from descendants.⁵⁵ Dr. Brave Heart describes this condition as "cumulative social and psychological wounding across generations, including one's own life span to the present reality that happened just a minute ago."⁵⁶

The effects of epigenetic transfer are prevalent in American Indians. Statistics indicate American Indians have the highest rates of adverse childhood experiences, post-traumatic stress, depression, substance abuse, suicide, and diabetes.⁵⁷ These illnesses are all associated with the "methylation"⁵⁸ of genes regulating the body's response to stress.⁵⁹ Studies have revealed that the body's ability to regulate stresses caused by Historical Trauma and present-day trauma, such as discrimination and clashes with mainstream culture,⁶⁰ add immeasurably to these challenges.⁶¹ For example, Indian suicide rates are fifty percent higher than the national average.⁶² Dr. Bitsoi, a Research Associate in Genetics at Harvard University, remarks that epigenetics is uncovering scientific proof that intergenerational trauma is real.⁶³ Historical Trauma contributes to the development of post-traumatic stress disorder ("PTSD"), depression, and Type Two diabetes.⁶⁴ Bonnie Duran, Associate Professor in the Department of Health Services at the University of Washington School of Public Health and Director for Indigenous Health Research at the Indigenous Wellness Research Institute, remarks that research has proven the classic symptoms American Indians face—such as high rates of addiction, suicide, mental

⁵⁵ See *id.*

⁵⁶ See Pamela Weintraub, *The Mind Body Connection: Out of The Past*, CENTENNIAL SPECIALS: ESSENTIAL GUIDE TO YOUR BRAIN, 2018, at 71.

⁵⁷ Pember, *supra* note 17.

⁵⁸ *DNA Methylation*, WHAT IS EPIGENETICS, <https://www.whatisepigenetics.com/dna-methylation/> (last visited Nov. 27, 2019) ("DNA methylation is an epigenetic mechanism that occurs by the addition of a methyl (CH₃) group to DNA, thereby often modifying the function of the genes and affecting gene expression.")

⁵⁹ Pember, *supra* note 17.

⁶⁰ *Wakiksuyapi*, *supra* note 1, at 282–87.

⁶¹ Pember, *supra* note 17.

⁶² *Wakiksuyapi*, *supra* note 1, at 283.

⁶³ Pember, *supra* note 17.

⁶⁴ *Id.* at 4.

illness, and sexual violence—are influenced by Historical Trauma.⁶⁵ Duran emphasizes that these effects can be traced back through epigenetics to a "colonial health deficit," which is the result of colonization and its aftermath.⁶⁶

1. American Indian Genocide

American Indian genocide is a product of colonization, the primary contributor to the Historical Trauma of Indian ancestors and their descendants today.⁶⁷ Dr. Brave Heart provides rehabilitative services for Indian descendants of ancestors that suffered the effects of mass-genocide at the Wounded Knee Massacre.⁶⁸ Dr. Brave Heart is a member of the Lakota Tribe, and her experience conducting workshops and healing sessions for tribes suffering with Historical Trauma is transcribed in her research.⁶⁹ This research includes some of the members of the Lakota tribe that identify as "Wakiksuyapi," which are Indian members of the Lakota as well as other affiliated tribes that carry the "unresolved grief" of many generations suffering with Historical Trauma imposed through epigenetic transfer.⁷⁰ For the Lakota Indians, the Wounded Knee Massacre was one of the greatest cataclysms in American Indian history and is resilient in the epigenetic cycle of Historical Trauma.⁷¹

Clinical research performed by Dr. Brave Heart on the effects of Historical Trauma reports the following stories⁷² from members of

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *Wakiksuyapi*, *supra* note 1, at 283.

⁶⁸ Maria Yellow Horse Brave Heart, *Oyate Ptayela: Rebuilding the Lakota Nation Through Addressing Historical Trauma Among Lakota Parents*, 2 J. HUM. BEHAV. SOC. ENV'T 109, 111 (1999).

⁶⁹ *Wakiksuyapi*, *supra* note 1.

⁷⁰ *See id.* at 248.

⁷¹ *Id.*

⁷² *Id.* at 245, 253. Brave Heart writes:

The Lakota (Teton Sioux) historical trauma response is a constellation of features associated with massive group trauma across generations, such as the 1890 Wounded Knee Massacre and the removal of children to federal boarding schools. Similar traits have been identified among Jewish Holocaust descendants. This article presents both quantitative and qualitative data on the experience of Lakota historical trauma among a coping segment of the population. The data supported the theory of a Lakota historical trauma response.

Indian tribes. Dr. Brave Heart introduces an important historical story that illustrates how tribes from different areas create an intimate network of interwoven epigenetic transfer through marriages to other tribes of the Wounded Knee Massacre:

[F]ollowing the assassination of Tatanka Iyotake (Sitting Bull), many traumatized Hunkpapa fled to join the Hohwoju who mourned the death as a near relative. These Hunkpapa and Hohwoju, led by Sitanka (Bigfoot), were pursued by the cavalry and massacred at Wounded Knee two weeks later. Settlement and intermarriage of many Hunkpapa and Hohwoju survivors among the Oglala have placed these three bands at special risk for unresolved grief and trauma responses. Additionally, other Lakota and Dakota bands, because of their own traumatic histories and intermarriage with the Hunkpapa and Hohwoju, may also carry this particular historical legacy of trauma and unresolved grief.⁷³

During the massacre at Wounded Knee, thousands of Indians including women, elderly, and children, were slaughtered by American cavalry and piled up in mass graves in order to clear the land for white settlers.⁷⁴

A Lakota member describes the perception of Historical Trauma across generations of Lakota members and discusses the impact and issues to be resolved by members of the Lakota tribe:

We look at ourselves and our nation and we look at where we were traumatized. . . . Our development is arrested, and we are stuck. [The trauma] continues to be perpetuated. I mean, that it happens over and over again in lots of different ways . . . individually, personally, emotionally, and to us as a group, so we just continue to be victimized. . . . I think that is why a lot of our people have become apathetic and cold because this thing is so overwhelming and hopefully someone will look at all the layers of the [trauma] that we have to deal with . . . it's overwhelming to me at times.⁷⁵

Another Lakota member describes a memory and the impact of its passing from ancestors to descendants in the perpetual epigenetic cycle of Historical Trauma, and also discusses relatives and the tragedies faced as a result of the mass grave at Wounded Knee:⁷⁶ ". . . so this thing I talked about, about man and woman, the mother and the grandson, the mother-in-law . . . bodies, on top of one another

Id. at 245.

⁷³ *Id.* at 248.

⁷⁴ *Id.* at 246; *see also id.* at 254.

⁷⁵ *Id.* at 258.

⁷⁶ *Id.* at 253.

in death . . . [non-Indians] don't see it that way; all they see are corpses."⁷⁷

2. Colonization and Boarding Schools

"Colonization" began as early as manifest destiny, where settlers began expanding their conquering of America. One of the prominent causes of Historical Trauma for American Indians occurred through "boarding school trauma."⁷⁸ Studies reveal that abuse from boarding school traces back through generations of Indians and is manifested in addiction, cycles of incest, anger, rage, depression, and hopelessness found in American Indians today.⁷⁹ During the "Assimilation period,"⁸⁰ which is a period in Indian history under the umbrella of colonization, the United States government mandated that all Indian children must attend boarding school.⁸¹ As a result, mass collections of Indian children were involuntarily stripped from their tribes and families and placed into boarding schools, which were often hundreds, even thousands, of miles from their tribe.⁸² In research involving tribes affected by boarding school Historical Trauma, Dr. Brave Heart shares the testimony of some of the tribal members recalling their personal experiences.⁸³ These stories illustrate how boarding school trauma is a generational factor that impacts not only the Indian who experiences the abuse inflicted upon them, but also remains within the hearts

⁷⁷ *Id.* at 254.

⁷⁸ *Id.* at 246, 254–62; see generally Howard J. Vogel, *Healing the Trauma of America's Past: Restorative Justice, Honest Patriotism and Legacy of Ethnic Cleansing*, 55 BUFF. L. REV. 981, 999 (2007).

⁷⁹ Pember, *supra* note 17; *Wakiksuyapi*, *supra* note 1, at 245–49, 253–55.

⁸⁰ See Maria Yellow Horse Brave Heart & Lemyra M. Debruyne, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 60, 63–64 (1998); see also FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 18–36 (1997). Pommersheim states that the General Allotment Act of 1887 was described by President Theodore Roosevelt as "a mighty pulverizing engine to break up the tribal mass. It acts directly upon family and the individual." *Id.* at 19. Justice Pommersheim is a Professor of Law at the University of South Dakota School of Law, a visiting professor at Lewis & Clark Law School Indian Law program, and Chief Justice on the Rosebud Sioux Tribal Court of Appeals, and Chief Justice on the Cheyenne River Sioux Tribal Court of Appeals. *Frank Pommersheim: Professor Emeritus*, U. S.D., <https://www.usd.edu/faculty-and-staff/Frank-Pommersheim> (last visited Nov. 28, 2019).

⁸¹ Brave Heart & Debruyne, *supra* note 80, at 63.

⁸² *Wakiksuyapi*, *supra* note 1, at 246.

⁸³ *Id.* at 253–62.

and memories of descendants who suffer in subsequent generations decades later:

I've been sexually abused . . . it's not pretty . . . I was there [at boarding school] for 12 years . . . since I was five years old. I had a brother there and I don't remember ever getting to see him . . . The nun . . . made me kneel in the hall and I don't know if she forgot about me or what in the morning when she came to wake us up I was still, I was laying in the hall and was locked out of the dorm. So, there were a lot of abuse things. . . . I felt deprived in both cultures . . . I didn't have a doll . . . no music . . . no art classes. When I was 17, I graduated and . . . I didn't know how to use a pay phone when I got to the city.⁸⁴

Another tribal member shares how boarding school was an experience that compromised self-worth and promoted demoralization to the extent of feeling inferior to whites:

I went to boarding school at six. . . . Being oppressed all these years, I feel angry . . . We had a matron come by and grab us by our hair or by our ears and just drag us and put our hands on the desk and just beat us with a ruler. I had broken fingers. That hurts as a kid.⁸⁵

One of the descendants speaks of her own father who was sexually abused at his boarding school and then sexually abused her.⁸⁶ The trauma she experienced was heightened because her genes were already marked with his trauma, so she is in turn, likely to experience pain and stress to a greater degree:

I've never been in a boarding school, I wished I [had] because all the things . . . happened in my home—the sexual abuse, the neglect. Maybe if it happened by strangers it wouldn't be so bad. . . . Then, I could blame it all on another race instead of my own family[.]⁸⁷

Participating Indians also shared stories of how their parents would appear calm and quiet one moment, and then during daily activities, scream as if they were reliving the abuse.⁸⁸ Others described their own suffering with continuous bouts of anger and despair that never went away, especially when waking after sleeping.⁸⁹ However, even when children were no longer required to go to boarding schools, racism and mistreatment of Indian children resulted in adverse childhood experiences at day schools operated by churches and the

⁸⁴ *Id.* at 254.

⁸⁵ *Id.*

⁸⁶ *Id.* at 254–55.

⁸⁷ *Id.* at 254.

⁸⁸ *Id.* at 256–57.

⁸⁹ *Id.* 256–58.

Bureau of Indian Affairs.⁹⁰ The racism experienced by the Indian children is illustrated by this tribal member:

At six years old when I first went to school I had a ruler broken on my head because I couldn't speak English. This was my first contact with the Whites . . . Monday morning, I was sent into the bathroom—hot scalding water and [they'd] wash my hair with DDT. When I'd come back that evening, my mother would wash that DDT off . . . DDT permeates the skull and the bones and eventually that's what kills all the brain cells. . . . DDT was used at the schools on our reservations. . . . At 16, I was beaten again at a day school by a Catholic priest.⁹¹

The passages illustrated above depict examples of generational suffering. The following section elaborates on the harmful side effects resulting from this generational suffering from Historical Trauma.

C. Trauma Affects Cognition, Emotional Control, and Reasoning

According to the American Indian and Alaska Native Genetics Research Guide created by the National Congress of American Indians, studies show that various behavior and health conditions are caused by inherited epigenetic changes and its experiences.⁹² The human suffering experienced in physiological and psychological ways by ancestors are shared with descendants through epigenetic transfer, which works within the neuroendocrine system.⁹³ The neuroendocrine system in the human brain is strongly influenced by life experiences.⁹⁴ Neuroendocrine cells help the nervous and endocrine system work together to produce substances—such as adrenaline, the hormone associated with the fight or flight response.⁹⁵ Neuroendocrinologist, Dr. Bruce McEwen of Rockefeller University in New York City, is an expert on stress, and has found that when genes are exposed to epigenetic alteration as a result of trauma passed from an ancestor to descendants, a proclivity is produced for excess production of the adrenal stress hormone, cortisol.⁹⁶

⁹⁰ *Id.* at 255.

⁹¹ *Id.*

⁹² Pember, *supra* note 17.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*; see generally Bruce S. McEwen et al., *Redefining Neuroendocrinology: Stress, Sex and Cognitive and Emotional Regulation*, 226 J. ENDOCRINOLOGY T67, T70–71 (2015).

⁹⁶ Weintraub, *supra* note 56, at 72; see also Craig A. McEwen & Bruce S. McEwen, *Social Structure, Adversity, Toxic Stress, and Intergenerational Poverty: An Early Childhood Model*, 43 ANN. REV. SOC. 445, 450–51 (2017).

American Indians affected by Historical Trauma have genes that produce more severe responses to stress due to an "over-production of cortisol,"⁹⁷ and may suffer even more severe responses to this condition than other groups. Cortisol kills brain cells and has even been shown to alter and discolor areas in the body after too much exposure.⁹⁸ Scientists have also proven that overexposure to cortisol compounds negatively affect the brain and its ability to combat stress.⁹⁹ The result of the "over-response" to stress is often found in health disorders including diabetes, obesity, decreased immune function, metabolic disease, heart disease, and alcohol and drug addiction.¹⁰⁰ American Indians have the highest rates in the country for Type Two diabetes,¹⁰¹ alcoholism, and other health disparities—more than any other racial minority in the United States.¹⁰² To clarify, it is likely that the medical symptoms enumerated above are directly caused by too much stress because Indians respond to stress at a heightened over-response.¹⁰³ This reaction makes Indians more susceptible to the diseases enumerated above and is supported by the high statistics.

⁹⁷ See McEwen & McEwen, *supra* note 96; see also Robin Berzin, *10 Reasons Why Stress Is the Most Dangerous Toxin in Your Life*, MIND BODY GREEN, <https://www.mindbodygreen.com/0-14560/10-reasons-why-stress-is-the-most-dangerous-toxin-in-your-life.html> (last visited Nov. 29, 2019).

⁹⁸ See Eva Boonen & Greet Van den Berghe, *Endocrine Responses to Critical Illness: Novel Insights and Therapeutic Implications*, 99 J. CLINICAL ENDOCRINOLOGY & METABOLISM 1569, 1575 (2014); see also Berzin, *supra* note 97; Colin Champ, *Stress and Cancer - It's Bad, But Not All Bad*, COLIN CHAMP MD (May 9, 2017), <http://colinchamp.com/stress-and-cancer/>.

⁹⁹ Pamela Kulbarsh, *Cortisol: Law Enforcement Obesity, Chronic Stress, Death*, OFFICER.COM (Aug. 13, 2014), <https://www.officer.com/training-careers/article/11622789/cortisol-law-enforcement-obesity-chronic-stress-death>.

¹⁰⁰ McEwen & McEwen, *supra* note 96, at 448; see also Amanda Merck, *4 Ways Childhood Trauma Changes a Child's Brain and Body*, SALUD AM. (Feb. 6, 2018), <https://salud-america.org/4-ways-childhood-trauma-changes-childs-brain-body/>.

¹⁰¹ Melissa L. Walls et al., *Stress Exposure and Physical, Mental, and Behavioral Health Among American Indian Adults with Type 2 Diabetes*, 14 INT'L J. ENVTL RES. & PUB. HEALTH 1, 1 (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5615611/pdf/ijerph-14-01074.pdf>.

¹⁰² *Wakiksuyapi*, *supra* note 1, at 282; see also U.S. Dep't of Health & Human Servs., *Behavioral Health Barometer: United States, Volume 4: Indicators as Measured Through the 2015 National Survey on Drug Use and Health National Survey of Substance Abuse Treatment Services*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. 1, 15 (2017), available at <https://store.samhsa.gov/system/files/sma17-barous-16.pdf> [hereinafter *Behavioral Health Barometer*].

¹⁰³ See *Behavioral Health Barometer*, *supra* note 102.

Dr. McEwen's studies report that too many toxic experiences produce high levels of stress, which produce high levels of cortisol by the body, which affect the brain in three ways.¹⁰⁴ First, the hippocampus, which is a center for memory and regulation of mood, is compromised resulting in a degradation of mood and memory.¹⁰⁵ Second, the amygdala, the brain center for emotion and fear, activates genes designed to trigger anxiety.¹⁰⁶ Third, the frontal lobes are blocked by cortisol, which squelches the brain's processes for planning, control, decision-making, and logical thought processes.¹⁰⁷ This condition has serious effects if cortisol is continually being produced at high levels due to stress resulting from Historical Trauma and present-day trauma.¹⁰⁸ Further, excessive high-levels of stress exposure as a child can damage the developing brain.¹⁰⁹ Studies show that the greater the childhood trauma, the higher the likelihood of functional impairments and high-risk behaviors.¹¹⁰ Over-response to stress in adolescence leads to both negative health and unsuccessful social outcomes in adulthood.¹¹¹

Early life trauma also stunts emotional maturity and intellectual development.¹¹² Studies show that adults exposed to chronic and severe trauma as children have delays in both emotional maturity and impaired reasoning.¹¹³ Unlike adult trauma, when children experience trauma during the brain's critical developing stages, the ability to regulate emotion and interact with others is impaired.¹¹⁴ Excessive trauma produces hormones called glucocorticoids, which alter gene

¹⁰⁴ Weintraub, *supra* note 56, at 72; *see also* McEwen & McEwen, *supra* note 96, at 448, 451.

¹⁰⁵ Weintraub, *supra* note 56, at 72.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See* Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLINICAL L. REV. 201, 214 (2018) ("While temporary increases in these stress hormones are normal—and, in fact, necessary to trigger a protective reaction in dangerous situations—excessively high levels or long-term exposure to stress hormones as a child, can damage the developing brain.").

¹⁰⁹ *See id.*; *see also* Merck, *supra* note 100.

¹¹⁰ Gold, *supra* note 108, at 214–15.

¹¹¹ *Id.* at 213.

¹¹² *See* De Bellis & Zisk, *supra* note 18.

¹¹³ *See id.*

¹¹⁴ Gold, *supra* note 108, at 215.

expression.¹¹⁵ Chronic exposure to glucocorticoids inhibits genes in the hippocampus from regulating the hormone, essentially deactivating functions of the hippocampus due to over-exposure.¹¹⁶ Usually, this occurs in response to a series of traumatic events, such as abuse during childhood.¹¹⁷ The area of the brain affected controls lifelong decision-making, working and long-term memory, the ability to distinguish danger from safety, social and emotional skills, language skills, cognitive skills, and reasoning capacity.¹¹⁸ Frequent characteristics of adults suffering from symptoms of childhood trauma include anxiety, depression, anger, aggression, social isolation, low self-esteem, self-blame, helplessness, hopelessness, trouble concentrating, and expectation of rejection and loss.¹¹⁹ In light of the purpose of this article exploring the relationship between high incarceration rates and Historical Trauma, a deactivated hippocampus explains yet another layer of how Indian defendants are easily overborne during interrogation when occupying a sense of hopelessness.¹²⁰ The attribute of easily being overborne is much more complex than it appears and provides a viable link to the disparity of high incarceration and is discussed in greater detail in Part III of this article.¹²¹

Exposure to trauma results in reduced neural connections in the thinking area of the brain dedicated to learning, reasoning, and cognitive ability.¹²² Continuous trauma rewires brain pathways by weakening neural pathways responsible for cognition, and by heightening the neural pathways to fight or flight responses.¹²³ Adults suffering from a weakened neural connection find it difficult to cope with adversity, which presents an ever-present challenge in maintaining

¹¹⁵ De Bellis & Zisk, *supra* note 18.

¹¹⁶ Gold, *supra* note 108, at 215; De Bellis & Zisk, *supra* note 18.

¹¹⁷ Pember, *supra* note 17; McEwen et al., *supra* note 95, at T76–77.

¹¹⁸ Gold, *supra* note 108, at 216.

¹¹⁹ See *id.* at 215–16; see also *Wakiksuyapi*, *supra* note 1, at 247.

¹²⁰ See Gold, *supra* note 108, at 215; see also Andrea Brandt, Ph.D., *4 Ways that Childhood Trauma Impacts Adults*, PSYCOL. TODAY, June 1, 2017, <https://www.psychologytoday.com/us/blog/mindful-anger/201706/4-ways-childhood-trauma-impacts-adults>.

¹²¹ See *infra* Part II.

¹²² See Merck, *supra* note 100; see also *Brain Architecture*, CTR. ON DEVELOPING CHILD: HARV. U., <https://developingchild.harvard.edu/science/key-concepts/brain-architecture/> (last visited Nov. 28, 2019).

¹²³ Merck, *supra* note 100.

healthy relationships, maintaining a healthy mental state, and maintaining emotional control.¹²⁴ Adversity triggers what has already been marked by epigenetic genes from Historical Trauma in adults with weakened neural connectors, which creates the probability that this condition is more severe in American Indians.¹²⁵ As such, disparities in mental health, obesity, alcohol and drug addiction, decreased immune function, metabolic disease, and heart disease are distinctly prevalent in Native communities.¹²⁶

D. Acculturation and Its Effect on Native Health

American Indians may express emotional distress in ways that are inconsistent with standard diagnostic categories—which is attributed to "acculturation."¹²⁷ Acculturation can be seen in statistics reporting that American Indians suffer the most in relation to mental disorders, disease, high incarceration rates, and stress.¹²⁸ Acculturation is the outcome of processes that are simultaneously occurring at multiple levels within a society, and involves the acquisition of alien beliefs and values, which produces stress.¹²⁹ The forced acculturation on reservations resulting in subsequent loss of traditional family, clan, tribal roles, traditions, customs, and religion contributes to a rise in mental disorders and stress.¹³⁰ A study published in the *International Journal of Environmental Health and Public Research* concluded that the stress process is influenced by social stratification systems, and that American Indians occupying marginalized social and economic statuses are more likely to experience higher levels of stress.¹³¹ The

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*; see generally Nat'l Sci. Council on Developing Child, *Early Experiences Can Alter Gene Expression and Affect Child Development*, CTR. ON DEVELOPING CHILD: HARV. U. (2010), <https://developingchild.harvard.edu/wp-content/uploads/2010/05/Early-Experiences-Can-Alter-Gene-Expression-and-Affect-Long-Term-Development.pdf>.

¹²⁷ *Native American Communities and Mental Health*, *supra* note 16; see also Patricia D. Mail, *American Indians, Stress and Alcohol*, 3 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 7, 9 (1989).

¹²⁸ *Native American Communities and Mental Health*, *supra* note 16.

¹²⁹ Mail, *supra* note 127.

¹³⁰ *Id.*

¹³¹ Walls et al., *supra* note 101; see also Norman G. Dinges & Sandra K. Joos, *Stress, Coping and Health: Models of Interaction for Indian and Native Populations*, 1 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 8, 32 (1988); see *Native American Communities and Mental Health*, *supra* note 16.

study recognized that American Indians have the highest risk for Type Two diabetes, and have the largest population affected with the disease.¹³² The study also provided that the source was not physical health, but instead, studies concluded that Type Two diabetes is caused by stress attributed to mental, environmental, and behavioral issues.¹³³ This condition is correlated with frequent conditions on Indian reservations which are notorious for alcoholism, drugs, missing Indian children and women,¹³⁴ domestic violence, violent crimes, mental health illnesses, high suicide rates, poverty and isolation, all of which attribute to chronic stress, PTSD, and other mental and emotional disorders.¹³⁵

Chronic stress, including PTSD, can keep the autonomic nervous system out of balance and cause serious, lasting, and damaging changes to the heart and brain.¹³⁶ Some of these changes manifest through a cognitive decline in decision-making skills.¹³⁷ Those suffering from

¹³² Walls et al., *supra* note 101.

¹³³ *Id.* at 6 ("A study of two distinct tribal communities found that early-life trauma and neglect, environmental hassles, family dysfunction, community economic distress and discrimination were significantly higher among adults with diabetes than those without.")

¹³⁴ Kelsey Mo, 'Historical Trauma': Native Communities Grapple with Missing and Murdered Women, CRONKITE NEWS: ARIZ. PBS (Mar. 4, 2019), <https://cronkitenews.azpbs.org/2019/03/04/missing-and-murdered-indigenous-women/>. Kelsey Mo states:

Limited data exist[s] on the number of missing and murdered indigenous women – one account recorded 506 cases in 71 urban areas – but experts say it's likely undercounted because authorities inconsistently collect data. A bill in the Arizona Legislature would establish a committee of community leaders from tribes and police departments to officially track and analyze missing and murdered indigenous women. Legal issues surrounding violent crime on reservations further complicates the issue. Native American tribes, under federal government law, have limited jurisdiction to indict and sentence defendants in tribal courts. Sometimes, cases are sent to federal court. Figuring out whether the federal or tribal courts have jurisdiction to prosecute violent crimes can drag out cases for years.

Id.

¹³⁵ *Native American Communities and Mental Health*, *supra* note 16. This research concludes that Native Americans "experience serious psychological distress 1.5 times more than the general population . . . [and] experience PTSD more than twice as often as the general population." *Id.* As a result, self-medication on the reservation includes "use and abuse [of] alcohol and other drugs at younger ages, and at higher rates, than all other ethnic groups[.]" and higher suicide rates. *Id.*

¹³⁶ Sherry Baker, *Heart and Mind*, CENTENNIAL SPECIALS: ESSENTIAL GUIDE TO YOUR BRAIN, 2018, at 62.

¹³⁷ *Id.* at 67.

mental health issues, such as symptoms of depression and anxiety, also place their heart at risk.¹³⁸ PTSD, specifically, is an anxiety disorder triggered by exposure to a violent or extremely frightening event or abuse.¹³⁹ Medications for mental health disorders, including antidepressants, mood stabilizers, and anti-anxiety drugs, play a role in increasing cardiovascular risk by impairing the breakdown of blood sugar and by raising cholesterol levels.¹⁴⁰ Unregulated blood sugar and cholesterol problems can lead to diabetes.¹⁴¹ In a test performed by Harvard University, and published in *Neurology*, scientists revealed that research subjects with Type Two diabetes experienced negative changes in their ability to regulate blood flow to the brain.¹⁴² Among one of those negative impacts is mental decline.¹⁴³ As a result of less oxygen to the brain, which is supplied by blood flow, the test scores of research subjects suffering from Type Two diabetes were lower than scores from the same mental tests performed two years prior.¹⁴⁴ The Harvard scientists determined through the two-year study, that diabetes and high blood sugar impose a chronic negative effect on cognitive and decision-making skills.¹⁴⁵ Recent data from the Centers for Disease Control and Prevention and Indian Health Services show that diabetes prevalence among adults is as high as sixty percent within American Indian and Alaska Native communities.¹⁴⁶ One in six American Indian and Alaska Native adults has diagnosed diabetes—more than double the prevalence rate of the general U.S. population.¹⁴⁷

Toxic stress links American Indians and Alaska Natives to the highest diabetes prevalence rates of all racial and ethnic groups in the United States.¹⁴⁸ More than sixteen percent of the members of this population have been diagnosed, compared with 8.7% of non-Hispanic whites.¹⁴⁹ The Pima Indians of Arizona have the highest

¹³⁸ *Id.* at 64.

¹³⁹ *Id.* at 72.

¹⁴⁰ *Id.* at 64.

¹⁴¹ *See id.* at 67.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Sue McLaughlin, *Traditions and Diabetes Prevention: A Health Path for Native Americans*, 23 *DIABETES SPECTRUM* 272, 272 (2010); *see also* Walls et al., *supra* note 101.

¹⁴⁷ McLaughlin, *supra* note 146.

¹⁴⁸ *See id.*

¹⁴⁹ *Id.*

rates of diabetes in the world, with more than fifty percent diagnosed with Type Two diabetes.¹⁵⁰ Data from the 2003–2004 National Health Interview Survey (NHIS) and the 2004 NHIS outpatient database show that male and female American Indians and Alaskan Natives have the highest rates of diabetes for each age-group when compared to rates for non-Hispanic whites and non-Hispanic Blacks.¹⁵¹

All of the statistics and scientific data enumerated above point to one thing: American Indians and Alaskan Natives have the highest rates in life-changing circumstances that are linked by toxic stress. Therefore, it is probable that the repetitive cycle of Historical Trauma, current living conditions, social infrastructures, and acculturation, exasperate toxic stress levels at a disparate rate and frequency in American Indians compared to other groups. This perpetual overexposure to toxic stress over time provides another layer to understanding impairments that contribute to being overborne during an interrogation.

III. THE REASONABLE INDIAN STANDARD

The Reasonable Indian Standard provides a bright-line remedy to courts that counters previous rulings which dismissed evidence pertaining to the effects of Historical Trauma and acculturation. In essence, these elements should be allowed in support of proving whether an Indian defendant was overborne during interrogation, in addition to other legal arguments pertaining to Indian plaintiffs and defendants. The previous sections in Part II of this article depict how disparities effect the mental and physical well-being which makes it difficult for American Indians to navigate successfully in the American adversarial system.¹⁵² Part III discusses why the beginning stages of interactions with law enforcement are the most critical and vulnerable stages American Indians experience in this system because these interactions often lead to a higher probability of false confessions and guilty verdicts.¹⁵³

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *See supra* Part II.

¹⁵³ *See generally* Pember, *supra* note 17 (In criminal cases attempting to use this as a defense by expert testimony, the Ninth Circuit has determined this is "no such diagnosis" (quoting *United States v. Woody*, 652 Fed. App'x 519 (2016))). Subjectivity can fluctuate from person to person and circumstance to circumstance, rendering no guidelines for a court of law to determine an impartial outcome independent of personal choices. Treating

Based on factors that illuminate how Historical Trauma affects the brain, the mental condition of the Indian defendant should be permitted as evidence.¹⁵⁴ As stated by the Ninth Circuit, "the mental condition of the defendant is a more significant factor in the 'voluntariness' calculus."¹⁵⁵ If this ruling is so, then it is illogical not to consider the Indian defendant's background because it prevents the paramount inquiry of a fair and accurate depiction of that mental condition. Studies indicate that standard diagnostics are often inaccurate when testing American Indians.¹⁵⁶ Thus, factors that demonstrate what diagnostics fail to show should be used. In the absence of a Reasonable Indian Standard, non-Indian law enforcement, attorneys, judges, and jurors draw from their own experiences, perceptions, and implicit biases to establish their status quo from which to evaluate and judge the Indian defendant.¹⁵⁷ Statistics alone reveal discrepancies in this practice and prove that the majority of American Indian and Alaskan Native convictions were from non-Indian juries.¹⁵⁸ American Indians who face Historical Trauma, differing values and behaviors that clash with mainstream culture, and cognitive impairment with limited emotional control,¹⁵⁹ are misunderstood and often prejudiced¹⁶⁰

everyone the same has been the courts' usual guidelines, with the exception of mentally incompetent persons and juveniles. *Id.*

¹⁵⁴ See *United States v. Preston*, 751 F.3d 1008, 1021–22, 1033 (9th Cir. 2014) (en banc); see generally *Pember*, *supra* note 17; *supra* note 151 and accompanying text.

¹⁵⁵ *Preston*, 751 F.3d at 1023.

¹⁵⁶ See, e.g., *Native American Communities and Mental Health*, *supra* note 16.

¹⁵⁷ Ashley M. Votruba, *Will the Real Reasonable Person Please Stand Up: Using Psychology to Better Understand How Juries Interpret and Apply the Reasonable Person Standard*, 45 ARIZ. ST. L.J. 703, 704 (2013).

¹⁵⁸ See *id.* at 713 ("[W]hile jurors deliberate, they intuitively rely on 'ordinary moral intuitions' regarding what is considered reasonable behavior. The prevalent community moral norms have a strong influence on the individual's moral intuition, thus supplying them with a moral basis"); see also Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1719 (2016) ("[T]here is substantial evidence that juries in state courts across the country do not reflect a fair cross-section of their communities, in violation of the Sixth Amendment and federal and state statutes.").

¹⁵⁹ *United States v. Woody*, No. CR-13-08093-001-PCT-NVW, 2015 WL 1530552, at *6 (D. Ariz. Apr. 6, 2015) ("The cumulative psychological wounding resulting from colonization, relocation, and other historical traumas can create a sense of hopelessness or lack of control that permeates Native America culture."); see also *United States v. Woody*, 652 F. App'x 519 (9th Cir. 2016).

¹⁶⁰ *Woody*, 2015 WL 1530552, at *13; see also Votruba *supra* note 157, at 713 ("Community norms supply a generally understood basis for knowing what are and are not acceptable

when not adjudicated by persons of similar backgrounds and characteristics.¹⁶¹ The purpose of the Reasonable Indian Standard is to provide an explanation for what diagnostic tests are incapable of identifying. Therefore, it serves as a tool for Indian plaintiffs and defendants by explaining the aspects of their lives unknown to non-Indian persons throughout the adjudication process. Ideally, the Reasonable Indian Standard sheds a light on areas of the Indian experience unknown to non-Indians and supports the uniqueness of Indian defendants. The Reasonable Indian Standard is an alternative to the reasonable person standard.¹⁶²

A. The Reasonable Person Standard

Historically and even now, the "Lernaean hydra,"¹⁶³ also known as the reasonable person, or reasonable person standard, influences criteria used to judge American Indians and Alaskan Natives. This metaphor of a seven headed monster that produces more heads when one is cut off expresses the conundrum¹⁶⁴ that what is reasonable or prudent to one person will be very different to another,¹⁶⁵ especially when that defendant is American Indian and facing a non-Indian audience. For almost two centuries—since 1837—this standard has been a bone of contention for marginalized groups.¹⁶⁶ Over the years, it has evolved from its original form of a middle-aged white man¹⁶⁷ (often a judge or scholar)—who more than likely never suffered from Historical Trauma, mass-colonization; mass-removal; mass-assimilation; mass-genocide; mass-incarceration; racial, gender, socio-economic discriminations; mental illness; or PTSD. Today, among judges and jurors, the

actions. In other words, community norms can help cue a jury to what actions are inappropriate, i.e., negligent."). As such, the author of this paper proposes if these norms are not the community norms of the defendant then the defendant will be judged by an unbalanced scale of justice.

¹⁶¹ See *Woody*, 2015 WL 1530552, at *9–13.

¹⁶² See *Votruba*, *supra* note 157.

¹⁶³ Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, 14 LEWIS & CLARK L. REV. 1435, 1436 (2010).

¹⁶⁴ *Id.* at 1436 n.1.

¹⁶⁵ See *id.* at 1450; see also Susan Bryant, *The Five Habits: Building Cross-Culture Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

¹⁶⁶ John Gardner, *The Many Faces of the Reasonable Person*, 131 L. Q. REV. 563, 2 (2015) (citing *Vaughn v. Menlove* (1837) 132 ER 490 (CP)); see also *Votruba*, *supra* note 157, at 703, 707.

¹⁶⁷ See Gardner, *supra* note 166; see also *Votruba*, *supra* note 157.

reasonable person resonates as an indefinite, genderless,¹⁶⁸ raceless, and objectively tailored adult-human because the only subjectivity allowed when applying the standard is usually based on the defendant's perception of events leading up to the incident.¹⁶⁹ Rarely does this standard consider an in-depth analysis of the defendant's mental and emotional history, tribal affiliation, or socio-economic status.¹⁷⁰ Studies have shown that behaviors and mannerisms in American Indian tribes are interpreted by non-Indians very differently, which causes problems when interrogated by law enforcement or speaking before a non-Indian jury.¹⁷¹

B. Why the Reasonable Indian Standard Is Necessary

Statistics from the United States Bureau of Justice report that states located in the west, which make up the Ninth Circuit, have some of the highest American Indian incarceration rates in the country.¹⁷² Arizona, is part of the Ninth Circuit, and has the second largest American Indian population in the country¹⁷³ which includes the Navajo Nation. Arizona has five federal courthouses, which are all located over two hundred miles from the Navajo reservation.¹⁷⁴ That

¹⁶⁸ Votruba, *supra* note 157, at 707 n.23 ("Originally the modern Reasonable Person Standard was cast as the 'Reasonable Man' but in its evolution was later made gender neutral.").

¹⁶⁹ *Id.* at 704–05.

¹⁷⁰ As Chernoff states:

These disproportionately white juries are inconsistent with constitutional requirements for the proper operation of juries. They are inconsistent with social science data on the actual operation of juries. And racially under-representative juries are inconsistent with the laws of all 50 states that guarantee criminal defendants a jury selected from a fair cross-section of the community.

Chernoff, *supra* note 158, at 1722

¹⁷¹ See Bryant, *supra* note 165, at 42.

¹⁷² MINTON et al., *supra* note 29, at table 2 ("Excludes jails in Indian country, jails under federal jurisdiction, and combined jail and prison systems in Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont.").

¹⁷³ Victoria M. Massie, *Voting from a Native American Reservation Is Much Harder Than It Should Be*, VOX (Oct. 28, 2016, 9:20 AM), <https://www.vox.com/identities/2016/10/28/13386492/native-american-voting-access-reservation>.

¹⁷⁴ For a listing of all Federal courthouses in Arizona, see U.S. DISTRICT CT.: DISTRICT ARIZ., <http://www.azd.uscourts.gov/locations> (last visited Nov. 28, 2019). For driving distances from Arizona Federal courthouses to Navajo Nation, see GOOGLE MAPS, <https://www.google.com/maps/> (follow the directions hyperlink; then search each city the

presents a problem not only to Navajos, but to any Indian in Arizona without reliable transportation because only one-quarter of Native households' own cars.¹⁷⁵ Further, this disparity makes transportation to federal courthouses an onerous burden for any defendant mounting a defense, which includes housing witnesses for trial.¹⁷⁶ The distance from each courthouse also creates an obstacle for Indians to be included in the federal jury pools.¹⁷⁷ These circumstances are what Indians in Arizona and across the nation face, and these circumstances also perpetuate a non-Indian jury, high incarceration rates of Indians, and recidivism.

High incarceration rates are likely a result of a predisposition to being overborne by law enforcement interrogations.¹⁷⁸ The Indian defendant is vulnerable where social mores and behaviors are contrary to one another, manifesting as conflicts between cultures.¹⁷⁹ In the adversarial criminal justice system,¹⁸⁰ statements made to authorities

federal courthouse is located in, designate as "start" then add "Navajo Reservation" as "end"). The results of searching the distances reveal the following: the federal courthouse in Prescott is three hundred and ten miles from the Navajo reservation. The federal courthouse in Yuma is four hundred and ninety-five miles from the reservation. The federal courthouse in Flagstaff is two hundred and seventeen miles from the reservation. The federal courthouses in both Tucson and Phoenix are three hundred and sixty-two, and three hundred and thirteen miles from the Navajo reservation.

¹⁷⁵ Massie, *supra* note 173.

¹⁷⁶ See *id.*

¹⁷⁷ *Id.* (explaining that American Indian jury pools have subsequently been affected by a reduction in registered Native voters after the Supreme Court invalidated parts of the 1965 Voting Act). Further, it is illegal for ballots to be mailed by other persons unless they are close relatives and many Natives do not have conventional mailboxes or transportation or even valid identification required for voting. *Id.*

¹⁷⁸ See generally Jack Ross-Pilkington, *Mass Incarceration and Police Violence in Native American Communities*, ROOSEVELT INST.: CORNELL U. (Nov. 3, 2017), <https://www.cornell-rooseveltinstitute.org/dom/mass-incarceration-and-police-violence-in-native-american-communities> ("[S]tatistics show that mass incarceration and police violence disproportionately affect Native communities . . .").

¹⁷⁹ See Pember, *supra* note 17 (In criminal cases attempting to use this as a defense by expert testimony, the Ninth Circuit has determined this as "no such diagnosis" (quoting *United States v. Woody*, 652 Fed. App'x 519 (2016))). Subjectivity can fluctuate from person to person and circumstance to circumstance rendering no guidelines for a court of law to determine an impartial outcome independent of personal choices. Treating everyone the same has been the courts' usual guidelines with the exception of mentally incompetent persons, and juveniles.

¹⁸⁰ See Richard W. Garnett, *Once More into the Maze: United States v. Lopez, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. Rev

are often the beginnings, even makings, of a criminal case. Historical Trauma and acculturation provide clues to explaining the disparity of why one of the smallest populations occupies the largest crime and incarceration statistics in America. Therefore, discussing how an Indian is likely to be overborne, make incriminating statements, and give false confessions, when under the pressure of police interrogation is essential to understanding the reasoning behind the Reasonable Indian Standard.

C. Miranda and Voluntariness Requirements

In determining whether to grant a motion to suppress, a court first determines whether *Miranda v. Arizona* applies, and if not, whether a defendant's statements were made involuntarily.¹⁸¹ For *Miranda* to apply, a court determines whether the defendant was in custody when the inculpatory statements were made.¹⁸² This inquiry examines if "there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."¹⁸³ Next, the court determines whether, "based on objective factors, a 'reasonable innocent person in such circumstances would conclude that after brief questioning, he or she would not be free to leave.'¹⁸⁴ Note that this legal principle uses an objective analysis and does not permit the use of extraneous subjective circumstances. Historically, most defendants, especially from marginalized groups, are found not to be in custody and therefore cannot suppress their statements under *Miranda*.¹⁸⁵

If *Miranda* does not apply, then the only way to suppress statements is to prove they were made involuntarily by determining "whether a defendant's will was overborne by the circumstances surrounding the giving of a confession."¹⁸⁶ In *Doody v. Ryan*, the Ninth Circuit set precedent for the voluntariness test as "consider[ing] the totality of all the surrounding circumstances—both the characteristics

433, 442–43 (1996) (The adversarial system is a network of American jurisprudence including both federal and state courthouses and does not include tribal courts).

¹⁸¹ See *United States v. Woody*, No. CR-13-08093-PCT-NVW, 2015 WL 1530552 (D. Ariz. Apr. 6, 2015), *rev'd* 652 Fed. Appx 519 (2016); *infra* note 237.

¹⁸² *Id.* at *7 (quoting *United States v. Bassignani*, 575 F.3d 879, 883 (9th Cir. 2009)).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *United States v. Woody*, 652 Fed. App'x 519 (2016).

¹⁸⁶ See *Woody*, 2015 WL 1530552, at *9 (quoting *Doody v. Ryan*, 649 F.3d 986, 1008 (9th Cir. 2011) (en banc)).

of the accused and the details of the interrogation."¹⁸⁷ Shortly after *Doody* was decided, the Ninth Circuit further contributed to *Doody*'s precedent in *United States v. Preston*,¹⁸⁸ which outlined that "the manifest attitude of the police toward [the defendant], his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant."¹⁸⁹ The Ninth Circuit clarified that the "government must prove voluntariness by a preponderance of the evidence,"¹⁹⁰ and also determined in *Preston* that "courts have found *the mental condition of the defendant a more significant factor* in the 'voluntariness' calculus."¹⁹¹ Further, the Court states that "[i]t simply 'takes less' in terms of sophisticated police interrogation techniques to interfere with the deliberative processes of *one whose capacity for rational choice is limited* than it takes to affect the deliberative processes of one whose capacity is not so limited."¹⁹² Thus, in considering generations of Historical Trauma, present-day trauma from acculturation, and the predisposition to chronic levels of toxic stress which result in permanent issues in emotional, cognitive, and reasoning abilities, it is reasonable to infer that the above mentioned disparities can alter one's voluntariness quite a bit.

The benefits that flow from legally recognizing the Reasonable Indian Standard could be accomplished across the nation if approved by the United States Supreme Court. Based on the background of American Indians and all they have faced, it seems logical to take the case precedent emphasized above as a window of opportunity allowing expert testimony as evidence explaining whether a "capacity for rational choice"¹⁹³ exists. Moreover, expert evaluation and analysis from an expert in the field on *how* that rational choice-making is limited, is one of the primary goals of the Reasonable Indian Standard. Unfortunately, the Ninth Circuit opposes its own precedent on behalf of an Indian defendant's "mental condition" or "rational choice," as seen in *United States v. Woody*, which is exactly why the Reasonable

¹⁸⁷ *Doody v. Ryan*, 649 F.3d at 1008 (quoting *Dickerson v. United States*, 530 U.S. 428, 434 (2000)).

¹⁸⁸ 751 F.3d 1008, 1016 (9th Cir. 2014) (en banc).

¹⁸⁹ *Id.* (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

¹⁹⁰ *United States v. Williams*, 435 F.3d 1148, 1153 n.5 (9th Cir. 2006) (citing *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (emphasis added)).

¹⁹¹ *Preston*, 751 F.3d at 1023 (quoting *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (emphasis added)).

¹⁹² *Id.* (quoting *Smith v. Duckworth*, 910 F.2d 1492, 1497 (7th Cir. 1990) (emphasis added)).

¹⁹³ *Id.* at 1016.

Indian Standard is necessary and also why this discrepancy needs to be addressed.¹⁹⁴

D. The Reasonable Indian Standard Corrects Ninth Circuit Error

The Reasonable Indian Standard should be a bright-line standard correcting and guiding courts. In the case of *United States v. Woody*, when the Federal Court of Arizona ruled that Les Calvary Woody, a practicing Navajo Indian, was *overborne* by an FBI interrogator who failed to record the lengthy interrogation, the Ninth Circuit reversed the decision.¹⁹⁵ The expert testimony provided by Mr. Woody's trial counsel relied on the argument that certain factors that Mr. Woody experienced as an Indian played a role in him being *overborne* during interrogation.¹⁹⁶ The Ninth Circuit referred to the factors enumerated by Mr. Woody through expert testimony as merely "cultural differences."¹⁹⁷ The Ninth Circuit dismissed the evidence supporting Mr. Woody's theory of being *overborne*, and ruled that "there was no such diagnosis"¹⁹⁸ in regard to Historical Trauma, which contradicted the Ninth Circuit's own ruling in *Preston* that "courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus."¹⁹⁹ Prior to the appellate ruling in *Woody*, Arizona correctly followed Ninth Circuit precedent set by *Preston*. Arizona found enough evidence to support that Mr. Woody, an Indian defendant, was "one whose capacity for rational choice [was] limited."²⁰⁰ This was in contrast to the ethnocentrism voiced by the Ninth Circuit when it viewed the same evidence as a cultural difference and then rejected the expert testimony referring to both Historical Trauma and acculturation.

¹⁹⁴ *United States v. Woody*, No. CR-13-08093-001-PCT-NVW, 2015 WL 1530552, at *10 (D. Ariz. Apr. 6, 2015) (quoting *Preston*, 751 F.3d at 1023).

¹⁹⁵ *Id.* at *13.

¹⁹⁶ *See id.* at *10–11.

¹⁹⁷ *Id.* at *11.

¹⁹⁸ *United States v. Woody*, 652 Fed. App'x 519, 520 (9th Cir. 2016).

¹⁹⁹ *Preston*, 751 F.3d at 1019.

²⁰⁰ *Id.* at 1023 (quoting *Smith v. Duckworth*, 910 F.2d 1492, 1497 (7th Cir. 1990)).

E. What Is the Reasonable Indian Standard?

The Reasonable Indian Standard raises essential differences necessary to fairly evaluate and judge Indians with debilitating backgrounds. This standard presents paramount differences between mainstream culture and tribal living, individualistic and collective consciousness, and tribal social mores. In court, the Reasonable Indian Standard should be applied through the expert testimony of highly experienced scholars, doctors, and scientists. The criteria covered should be: (1) Historical Trauma²⁰¹ and contemporary environmental trauma;²⁰² (2) Conflicts of Acculturation²⁰³ (different values and behavioral patterns among Native Americans as compared to mainstream culture);²⁰⁴ (3) Individual Mindedness versus the Tribal Collective Mind;²⁰⁵ and (4) Cognition, Reasoning, and Emotional Control Abilities.²⁰⁶ These factors are modified from the original four enumerated in *United States v. Woody*.

1. Historical Trauma and Contemporary Environmental Trauma

At Mr. Woody's motion to suppress hearing, Dr. McIntyre²⁰⁷ testified that the first factor he considered regarding Mr. Woody's involuntary testimony was the phenomenon of Historical Trauma.²⁰⁸ He opined that Historical Trauma is the "traumatic effect of certain events in Native American history [which] is internalized and passed

²⁰¹ *Wakiksuyapi*, *supra* note 1 (coining the term Historical Trauma).

²⁰² See generally Brown-Rice, *supra* note 10 (explaining that Contemporary Environmental Trauma is present-time occurrences that are substantial enough to perpetuate high levels of stress which is found on reservations and includes growing up and living amongst high suicides rates, drug and alcohol related deaths and abuses, domestic violence, murder, rape, prostitution, poverty, and isolation).

²⁰³ *Acculturation*, *supra* note 4.

²⁰⁴ See *United States v. Woody*, No. CR-13-08093-001-PCT-NVW, 2015 WL 1530552, at *7 (D. Ariz. Apr. 6, 2015) (noting that acculturation was originally the second factor of Dr. McIntyre's four factors set in *United States v. Woody*) (internal quotation marks omitted).

²⁰⁵ See *id.* (noting that it was originally found as a component to Dr. McIntyre's second factor).

²⁰⁶ See *id.* at *6 (referring to Dr. McIntyre's third and fourth factors. Originally, Dr. McIntyre's third factor was Cognition and the fourth was Intelligence and IQ).

²⁰⁷ *Id.* at *5 (recognizing that Dr. David J. McIntyre is a licensed psychologist with a master's degree and Ph.D. in psychology, and formerly the chief psychologist for the Pennsylvania Department of Corrections. Dr. McIntyre is currently serving as regional chief of the behavioral health branch for the Indian Health Service in Phoenix).

²⁰⁸ *Id.* at *6.

on to later generations through epigenetic transfer, among other means."²⁰⁹ Dr. McIntyre explained that "[t]he cumulative psychological wounding resulting from colonization, relocation, and other historical traumas can create a sense of hopelessness or lack of control that permeates Native American culture."²¹⁰ This elemental factor is principal to determining whether there are "diverse pressures which sap or sustain [the Indian defendant's] powers of resistance and self-control[.]"²¹¹ which determines a capacity to be overborne.²¹²

During his testimony, Dr. McIntyre explained that "historical trauma often induces a feeling of powerlessness that could render a Native American willing to provide desired information simply in order to terminate an uncomfortable interrogation,"²¹³ and that he "has personally observed [H]istorical [T]rauma in some of the patients he treats through his work at the Indian Health Service."²¹⁴ Based on Dr. McIntyre's expert testimony, his observation isn't an anomaly, but rather occurs as a grand scheme of tribal behavior. Moreover, his testimony cements the evidence that American Indian and Alaskan Native communities share similar behaviors across the nation which commonly and frequently result in false confessions.

2. Conflicts of Acculturation (different values and behavioral patterns among American Indians as compared to mainstream culture)

The second factor enumerated in Dr. McIntyre's analysis was acculturation.²¹⁵ He opines that there are "different values and behavioral patterns among Native Americans as compared to mainstream culture,"²¹⁶ and among these values is "a more fatalistic view of life."²¹⁷

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at *6; *United States v. Preston*, 751 F.3d 1008, 1016 (9th Cir. 2014) (en banc).

²¹² *Id.*

²¹³ *Woody*, 2015 WL 1530552, at *6.

²¹⁴ *Id.* (The author upon introducing the Reasonable Indian Standard has determined that Historical Trauma should be capitalized in order to distinguish it from the general medical term and usage of historical trauma usually meaning a history of injuries).

²¹⁵ *Id.* at *7.

²¹⁶ *Id.*

²¹⁷ *Id.*

As a result, Native Americans have an "inclin[ation] to give up control and take on a belief of 'what is meant to happen will happen and you can't change it.'"²¹⁸ To explain how mainstream culture collides with tribal social mores, Dr. McIntyre testified that Native Americans "consider directness and assertiveness as offensive behaviors."²¹⁹ During McIntyre's inquiry with Mr. Woody, Mr. Woody expressed the discomfort he experienced as a result of the special agent yelling and staring at him.²²⁰ Dr. McIntyre's assessment that Native Americans have an "inclin[ation] to give up control"²²¹ is on-point to the degree that Mr. Woody admitted to "telling Agent Fuller *anything he wanted*, to get the interrogation over with."²²²

Acculturation²²³ has significant bearing on the importance of recognizing why a Reasonable Indian Standard should be applied in the review of interrogations. Agent Fuller's body language, demeanor, tone of voice, and stance, had much more of a negative impact against Mr. Woody than the naked eye could recognize.²²⁴ Because of his past and the effects of epigenetic transfer marking his genes as stress responsive, it is likely Mr. Woody did not experience the same response a reasonable person of ordinary sensibilities would.²²⁵

Mr. Woody stated that Special Agent Fuller "became increasingly angry and rais[ed] his voice" at him.²²⁶ Based on Dr. McIntyre's second factor, the agent's direct and assertive behavior is offensive to a Navajo, especially when Navajo Indians are raised to keep the peace while living within a tribal community by "giving in."²²⁷ Further, with so much history of oppression in America, giving in is a survival technique. As a result, Mr. Woody perceived Agent Muller's conduct as demoralizing, which triggered "a more fatalistic view of life,"²²⁸ and is the same type of conduct that Dr. McIntyre described as triggering

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at *6.

²²¹ *Id.* at *7.

²²² *Id.* at *6 (emphasis added).

²²³ *See id.* at *7.

²²⁴ Bryant, *supra* note 165, at 41.

²²⁵ *See generally* Votruba, *supra* note 157; *see also* White v. Monsanto Co., 585 So. 2d 1205, 1211 (La. 1991).

²²⁶ *Woody*, 2015 WL 1530552, at *6.

²²⁷ *See id.* at *7.

²²⁸ *Id.*

a false confession to get the unpleasant situation over with.²²⁹ Mr. Woody described the experience: "[Special Agent Fuller] would say things like 'I know you did it, I know you did it'. . . . [and] stare at [me.]"²³⁰ According to Dr. McIntyre, staring is interpreted by American Indians as offensive and intrusive, even disrespectful.²³¹ In fact, when eye contact is not invited, it can usurp the dignity of the Indian, and when done amongst an Elder,²³² it may also disrespect their authority in the tribe.²³³

Mr. Woody stated he felt "overwhelmed and scared," and then "became more upset and started agreeing with Special Agent Fuller."²³⁴ Here, Mr. Woody admits to giving in and shifting from his original testimony to give the interrogator what he wanted because American Indians "avoid conflict at all costs, and when conflict becomes too great, they may submit or walk away rather than push back."²³⁵ Mr. Woody felt uncomfortable and demoralized, and yet he still remained in the chair, inside the interrogation room, even after the lie detector equipment was removed from his body.²³⁶ In the end, Arizona and the Ninth Circuit found that Mr. Woody was not in custody and he was not given his *Miranda* rights.²³⁷ Mr. Woody's counsel argued that

²²⁹ *Id.*

²³⁰ *Id.* at *6.

²³¹ *Id.*

²³² Elders are considered leaders and are given great respect and status in Indian tribes regardless of their old age or poverty level, in contrast to mainstream values, which consider more materialistic views that merit financial and economic status as a basis of worth, attributing power and respect.

²³³ This knowledge was acquired during a conversation with the honorable J.D. Williams, Tribal Judge of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians located in Southern Oregon.

²³⁴ *Woody*, 2015 WL 1530552, at *6. (internal quotation marks omitted).

²³⁵ *Id.* at *7.

²³⁶ *Id.* at *4.

²³⁷ *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (stating that a person questioned by law enforcement officers after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."). *See also* *United States v. Bassignani*, 575 F.3d 879, 883 (9th Cir. 2009) ("But [a]n officer's obligation to give a suspect a *Miranda* warning before interrogation extends only to those instances where the individual is 'in custody.'") Further, "[t]o determine whether an individual was in custody, a court must, after examining all of the circumstances surrounding the interrogation, decide whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.* The court asks whether,

factors unique to Indian defendants, such as Mr. Woody, include the propensity for being overborne and feeling a sense of hopelessness when being interrogated in such a manner due to Historical Trauma and acculturation.²³⁸ However, this motion to suppress was defeated at the Ninth Circuit. This is why the Reasonable Indian Standard is necessary to force courts like the Ninth Circuit to recognize the effects of Historical Trauma and the disadvantages of acculturation which impact dealings with interrogators and law enforcement. *Miranda* is hard to come by, therefore, justice and fairness for Indians is necessary and must be achieved by other means.

3. Individual Mindedness Versus the Tribal Collective Mind

The third factor in the Reasonable Indian Standard, which I modified from Dr. McIntyre's second factor during his testimony at Mr. Woody's trial, is the individual mindedness of mainstream culture versus the collective mind or consciousness of a tribal member.²³⁹ Dr. McIntyre articulates that "Native Americans are inclined to consider others (family, community) before making a decision," with the result that "decisions can [be] shaped by others, especially if making a decision will avoid or reduce conflict in the present moment."²⁴⁰ Here, is yet another reason why Indians are more often overborne during interrogation.

Growing up on a reservation is like living within one giant family, where giving in is done to maintain peace amongst siblings and neighbors. Mr. Woody, and Indians alike, have grown up with that collective mentality. It is in their nature, which unfortunately is often misunderstood and perceived by mainstream culture as a weakness or even *guilt*. Perhaps this tendency is another clue to link the disparity amongst high Indian incarceration with non-Indian interrogators, jurors, and judges that identify with American mainstream

based on objective factors, a "reasonable innocent person in such circumstances would conclude that after brief questioning, he or she would not be free to leave." *Id.*

²³⁸ *Woody*, 2015 WL 1530552, at *8 (During the interrogation Woody was alone with the agent, without any counsel, he was not given a private time without the interrogator present to go over his rights which were on a computer screen, and there was no video or audio recording during the interrogation. A lie detector test was performed on him during the same interrogation and yet he was determined by the court that he was not in custody and *Miranda* did not apply).

²³⁹ *Id.* at *7 (This factor was originally part of Dr. McIntyre's second factor).

²⁴⁰ *Id.* (internal quotation marks omitted).

culture, which has been identified as the most individualistic culture in the world.²⁴¹ The problem with being judged by mainstream culture, is that those individuals assume that the Indian defendant fights for innocence the same way they would. A remedy to this misunderstanding is the implementation of the Reasonable Indian Standard, which bright-lines the distinction between the collective-minded Indian versus the individualistic vantage point of non-Indians existing in mainstream culture. The conflict between these two differing vantage points is prominent throughout the adversarial system because the individually minded person could not possibly understand why someone innocent would admit they were guilty unless they were guilty. The recognition of these differing views may adjust the scales when determining whether an Indian was overborne or felt as though they were in police custody.

4. Les Calvert Woody's Story

Mr. Woody's story provides a lens to understand values and behavioral patterns among American Indians as compared to mainstream culture. Mr. Woody was raised as a Navajo and lived with six siblings and a single mother on the Navajo reservation.²⁴² The "cultural differences" the Ninth Circuit referred to when it rejected his evidence in support of his motion to suppress, begin with these significant influences of living on a Navajo reservation as an "enrolled member of the Navajo Nation who practiced traditional Navajo ways."²⁴³ The following is Mr. Woody's story taken from Dr. McIntyre's report:

As the youngest of seven children[,] . . . Woody left the reservation to attend boarding school from first through fifth grades. After returning to the reservation, Woody attended public schools through the tenth grade, when he dropped out [and] hung out with the wrong group of kids . . . [and accumulated] more than ten arrests for public intoxication. Between the ages 15 and 21, he reported drinking an average of six cans of beer every night, plus a pint of whiskey on weekends. This heavy consumption resulted in at least ten alcohol-related blackouts. During this period, Woody smoked marijuana "almost daily." When he was 18, Woody got into a drunken fight and was hit in the back of the head with a metal bar. Three years later, during another fight, an assailant struck him on the top of his head with a nightstick. He pursued his G.E.D. while living in New Mexico from 2006 to 2010, but never completed the coursework.

²⁴¹ Bryant, *supra* note 165, at 46.

²⁴² *Woody*, 2015 WL 1530552, at *5.

²⁴³ *Id.*

[His] MacCAT-CA [score] determined that Woody had minimal to no impairment in his understanding ability, mild impairment in his reasoning ability, and mild impairment in his appreciation ability. Woody's overall score of 38 on the Shipley Institute of Living Scale "place[d] him in the classification of low-average intellectual functioning."²⁴⁴

Dr. McIntyre testified and verified that "Native Americans may be more susceptible to interrogation pressures . . . [and in the] many years working with Native American people, [h]e observed some typical Native American characteristics in his interactions with Woody."²⁴⁵ In contrast, mainstream culture provides that it is irrational to admit to something you did not do, and yet, the very opposite outcome of this status quo occurs frequently in Indian life, where giving in is a duty to keep the peace, or an act necessary for survival.

5. Cognition, Reasoning, and Emotional Control

Cognition, reasoning, and emotional control abilities are the founding factors inspiring the Reasonable Indian Standard. Without testimony regarding Historical Trauma and epigenetic transfer, the detrimental interplay between Historical Trauma and acculturation is unrecognized amongst courts. Instead, courts lean towards traditional medical diagnostics, which are inaccurate²⁴⁶ in that they only capture a slice of the pie when depicting the American Indian condition. This information coincides with high crime and incarceration statistics because there are few occurrences where an Indian plaintiff or defendant prevails in court based on medical diagnostics. None have made it beyond the Ninth Circuit or its equivalent, regardless of attempts to educate higher courts on how Historical Trauma affects an American Indian's cognition, reasoning, and emotional control.²⁴⁷

In Mr. Woody's case, several tests were performed to evaluate his cognitive aptitude, and despite being on the low-average mark, he was not determined cognitively impaired²⁴⁸ to the degree considered

²⁴⁴ *Id.* at *5 (internal quotation marks omitted).

²⁴⁵ *Id.* at *7.

²⁴⁶ *Native American Communities and Mental Health*, *supra* note 16.

²⁴⁷ In a Westlaw search, only 14 cases came up when searching for Historical Trauma. Out of all the cases of both defendant and plaintiff Indians arguing they suffered from Historical Trauma none prevailed.

²⁴⁸ *Woody*, 2015 WL 1530552, at *5; *see also What Is Cognition?*, CAMBRIDGE COGNITION (Aug. 19, 2015), <http://www.cambridgecognition.com/blog/entry/what-is-cognition> ("Cognition refers to a range of mental processes relating to the acquisition, storage, manipulation, and retrieval of information.").

intellectually challenged (previously known as mentally retarded).²⁴⁹ Dr. McIntyre reported Mr. Woody's IQ to be "closer to the range for borderline mental retardation, 70–79, than it is to the mean."²⁵⁰ Had he been diagnosed with that condition, he would fall under another class of protection. In Mr. Woody's case, without the testimony of Dr. McIntyre, the Arizona Federal Court would not have found that Mr. Woody's statements were involuntary,²⁵¹ which enabled Mr. Woody's statements to be suppressed at *that* court level.²⁵² This error is why specific diagnostics that relate more effectively to Indians, including scientifically proven data supporting Historical Trauma, should become part of the Reasonable Indian Standard.

Therefore, it is likely that many Indians in the justice system have unaccounted for disabilities, undetected injuries, and improper diagnosis all leading to improper footing in the justice system. This is because the testing performed on Indians does not encapsulate enough of the brain science required to fully recognize an Indian's disabilities. Further, their predisposition to chronic levels of toxic stress can result in permanent issues in emotional, cognitive, and reasoning abilities. This unequal footing likely contributes to false confessions. This fallacy also might be another piece of the puzzle in explaining why American Indians have the highest incarceration statistics in the country.

²⁴⁹ *Words Can Hurt*, GLOBAL DOWN SYNDROME FOUND., <https://www.globaldownsyndrome.org/about-down-syndrome/words-can-hurt/> (last visited Nov. 28, 2019).

²⁵⁰ *Woody*, 2015 WL 1530552, at *7.

²⁵¹ See generally *United States v. Gomez*, 725 F.3d 1121, 1125–26 (9th Cir. 2013) ("Statements obtained in violation of *Miranda* generally are inadmissible in the government's case-in-chief."); see also *Deweaver v. Runnels*, 556 F.3d 995, 1002–03 (9th Cir. 2009) ("But compliance with *Miranda* does not necessarily ensure the admissibility of inculpatory statements. A confession must be suppressed, even absent a *Miranda* violation, when the totality of the circumstances demonstrates that the confession was involuntary.").

²⁵² *Woody*, 2015 WL 1530552, at *10 (citing *United States v. Williams*, 435 F.3d 1148, 1153 n.5 (9th Cir. 2006) (Voluntary is referring to the statements made by Woody. If they were not made voluntarily, then they are considered inadmissible. The "government must prove voluntariness by a preponderance of the evidence."); *Id.* at *8 (citing *Doody v. Ryan*, 649 F.3d 986, 1008 (9th Cir. 2011) (en banc)) (To protect against this possibility, courts ask "whether a defendant's will was overborne by the circumstances surrounding the giving of a confession.").

In Jenny E. Carroll's, *Brain Science and Theory of Juvenile Mens Rea*,²⁵³ Carroll concludes, the Supreme Court of the United States, found that juveniles should be tried with a different standard and an entirely different court system, based on the scientifically proven data showing cognitive and emotional maturity factors in juveniles.²⁵⁴ This ruling can be applied when considering Indians suffering from early traumas, such as Mr. Woody. In fact, Carroll argues,

In *Miller v. Alabama*, *Graham v. Florida*, and *Roper v. Simmons*, the [Supreme] Court has relied on evidence of juvenile brain development to conclude that life without the possibility of parole and death sentences violate the Eighth Amendment's prohibition against cruel and unusual punishment. Likewise[,] in *Atkins v. Virginia*, the Court relied on neuroscience to hold that the imposition of the death penalty on mentally retarded defendants violated the Eighth Amendment.²⁵⁵

Clinical research at Duke University describes how early exposure to trauma stunts emotional development, which in turn stunts emotional maturity and control.²⁵⁶ If trauma stunts emotional maturity and cognitive ability, and juveniles were given a different standard by the United States Supreme Court based on those same factors proved by science, then American Indians and Alaska Natives also affected by those factors should be given a different standard as well. Based on Mr. Woody's background, it can be presumed he suffers from undiagnosed trauma and undetectable disabilities and injuries, which include a far more severe developmental disorder than diagnostics convey. It is also possible that Mr. Woody's disabilities, injuries, Historical Trauma, and effects of acculturation present during his life, which include adverse childhood experiences, may have prevented him from maturing into adulthood. As a result, his emotional maturity and cognitive abilities were compromised. Therefore, there should be a different standard for him and other American Indians and Alaskan Natives who face similar circumstances.

²⁵³ Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 576 (2016).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 598.

²⁵⁶ De Bellis & Zisk, *supra* note 18, at 21–23 (Michael D. De Bellis MD, MPH is a Professor of Psychiatry and Behavioral Sciences and Director of Healthy Childhood Brain Development and Developmental Traumatology Research Program at the Department of Psychiatry and Behavioral Sciences at Duke University).

IV. CONCLUSION: CREATING THE TRIDENT OF THE REASONABLE PERSON

In *Miller v. Alabama*,²⁵⁷ *Graham v. Florida*,²⁵⁸ and *Roper v. Simmons*,²⁵⁹ the United States Supreme Court relied on scientific data proving that cognitive and emotional maturity factors in juveniles were drastically different than those in adults. In Mr. Woody's case, he was a juvenile during his adolescent years, was a son to a single-Indian mother, and attended boarding school, which has a reputation for adverse childhood experiences.²⁶⁰ He began drinking and smoking marijuana during his formative years, which was bad for the brain and may have even been attempts to self-medicate. If he was self-medicating, then it is possible he was suffering from responses²⁶¹ to Historical Trauma as well as present-day trauma and acculturation. Dr. McIntyre testified that "intergenerational trauma suggests that some Native Americans experience depression, substance dependence, dysfunctional parenting, and unemployment as a result of unresolved trauma" ²⁶² Dr. Brave Heart addresses the impact of unresolved grief on Indians and describes it as "a component of the [H]istorical [T]rauma response."²⁶³ Science Daily reports that early childhood trauma may stunt intellectual development.²⁶⁴ Further, clinical research at Duke University reports that early exposure to trauma stunts emotional development, which in turn stunts emotional maturity and control.²⁶⁵

Dr. McIntyre opined that "Woody's low average intelligence makes it difficult for him to resist the kinds of stresses and pressures a subject might experience during a police interrogation. Historical [T]rauma and cultural differences amplify his susceptibility to coercive interrogation techniques . . . and may have contributed to Woody's will being overborne."²⁶⁶ In 2017, after Mr. Woody's statements were

²⁵⁷ 132 S. Ct. 2455, 2475 (2012).

²⁵⁸ 560 U.S. 48 (2010).

²⁵⁹ 543 U.S. 551, 598–99 (2005).

²⁶⁰ United States v. Woody, No. CR-13-08093-001-PCT-NVW, 2015 WL 1530552, at *5 (D. Ariz. Apr. 6, 2015); see *Wakiksuyapi*, *supra* note 1, at 252–53.

²⁶¹ *Woody*, 2015 WL 1530552, at *5; see *Wakiksuyapi*, *supra* note 1, at 253.

²⁶² *Woody*, 2015 WL 1530552, at *6.

²⁶³ *Wakiksuyapi*, *supra* note 1, at 248.

²⁶⁴ See *Early Life Emotional Trauma May Stunt Intellectual Development*, SCI. DAILY (Apr. 2, 2012), <https://www.sciencedaily.com/releases/2012/04/120402222022.htm>.

²⁶⁵ See De Bellis & Zisk, *supra* note 18, at 21–23.

²⁶⁶ *Woody*, 2015 WL 1530552, at *7 (citation omitted).

no longer suppressed, he accepted a plea of seventy-one months in prison and lifetime supervision.²⁶⁷ Consequentially, had the Reasonable Indian Standard been available at the Ninth Circuit level, his involuntary statements would have remained suppressed. This dilemma shows why the Reasonable Indian Standard should be recognized and implemented by judiciaries and jurors across the nation.

In *J.D.B. v. North Carolina*, the Supreme Court of the United States deviated from the reasonable person standard for the first time in history by creating the reasonable juvenile standard.²⁶⁸ The reasonable person standard is paramount to custodial interrogation because it controls how judges and jurors view defendants and determines whether crucial statements become convicting evidence.²⁶⁹ The unveiling of the reasonable juvenile standard sheds light on different cognitive and emotional capacities when adjudicating whether a defendant feels free enough to leave the interrogation.²⁷⁰ The United States Supreme Court found that the former standard failed to represent young adults because they differ in experience, cognition, and emotional maturity.²⁷¹

If juveniles have a different standard to be judged, then so too should American Indians. The Court in *Roper*, a seminal case leading up to the juvenile standard, determined that "juveniles have less control, or less experience with control, over their own environment."²⁷² Adverse childhood experiences have been proven to stunt emotional

²⁶⁷ COURT ORDER OF SENTENCING, Amended Judgment As To Calvert Les Woody, 652 Fed. App'x 519 (9th Cir. 2016). ("(1) - Count 4s, Defendant committed to the Bureau of Prisons for SEVENTY-ONE (71) MONTHS followed by supervised release for LIFE. Special Assessment: \$100.00. Counts 1, 1s, 2, 2s, 3, 3s, dismissed. Signed by Senior Judge Neil V Wake on 3/2/2017. (LMR) (Entered: 03/02/2017).").

²⁶⁸ See 131 S. Ct. 2394, 2403 (2011); Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 503 (2012).

²⁶⁹ See generally Levick & Tierney, *supra* note 268, at 504 ("The 'reasonable person' . . . is an objective standard against which triers of fact measure individuals' conduct or blameworthiness.").

²⁷⁰ See *J.D.B.*, 131 S. Ct. at 2402-03 ("[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.").

²⁷¹ Levick & Tierney, *supra* note 268, at 518.

²⁷² *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005); see also Gold, *supra* note 108, at 207-11.

maturity at the age the trauma originally occurred.²⁷³ Based on the factors and circumstances this article has covered, all of the traumatic experiences each Indian faces, especially in their youth, is enough to stunt emotional growth to a degree necessitating that American Indians diagnosed with these issues are given the same Constitutional protections afforded to juveniles. In considering the plight American Indians faced it is reasonable to conclude that American Indians suffering from Historical Trauma have less control, and less experience with control over their own environment. This is because previously, they faced removal from lands, genocide of generations of Indians, and their children being ripped from families to attend boarding schools that abused them physically, psychologically, and sexually. Currently, they face living in remote reservations where statistics prove they are highly victimized. These conditions promote a cycle of living within a fatalistic view of life where studies prove that the existence of epigenetic transfer and Historical Trauma is plaguing Native people in America today²⁷⁴ unless something can be done to stop the cycle.

The Supreme Court recognizes two significant characteristics that influenced their decision to create a bifurcation from the original reasonable person standard: a limited decision-making capacity and susceptibility to outside influences.²⁷⁵ As discussed in Part III of this article, the epidemic of Indians suffering from Historical Trauma has long-term afflictions, including limited decision-making capacity and susceptibility to outside influences.²⁷⁶ Outside influences are seen in epidemics or tidal waves of substance abuse, victimization, and the kidnapping of Indian women for the sex trade.²⁷⁷ Further, domestic violence against Native women is mostly perpetrated by non-Indian offenders.²⁷⁸ Susceptibility to outside influence is also manifested in high concentrations of depression and the highest suicide rates in the

²⁷³ See Michelle Bosquet Enlow et al., *Interpersonal Trauma Exposure and Cognitive Development in Children to Age 8 Years: A Longitudinal Study*, 66 J. EPIDEMIOLOGY & COM. HEALTH 1005 (2012).

²⁷⁴ See De Bellis & Zisk, *supra* note 18.

²⁷⁵ See Levick & Tierney, *supra* note 268, at 519.

²⁷⁶ See *Wakiksuyapi*, *supra* note 1, at 253.

²⁷⁷ See Mo, *supra* note 134.

²⁷⁸ See LAWRENCE A. GREENFIELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, NCJ173386, AMERICAN INDIANS AND CRIME (1999), available at <https://www.bjs.gov/content/pub/pdf/aic.pdf>.

country as a result of Historical Trauma and acculturation.²⁷⁹ Additionally, depending on what the Court referred to as susceptibility, Indians are the most likely to be killed by law enforcement—more than any other minority.²⁸⁰ As a result, they are highly susceptible, and downright vulnerable, to pressures from forces outside their reservation when living on the reservation and when within mainstream culture outside of the reservation.

In conclusion, the Reasonable Indian Standard presents essential factors regarding Historical Trauma that must be considered to fairly evaluate and judge Indians with debilitating backgrounds. This standard sheds light on paramount differences between mainstream culture and tribal living, individualistic and collective consciousness, and tribal social mores. Therefore, the Reasonable Indian Standard should be implemented to address and account for the disparities facing American Indians and Alaskan Natives in the adversarial system today and among future generations.

²⁷⁹ Kathleen Brown-Rice, *supra* note 10, at 123.

²⁸⁰ Eliza Racine, *Native Lives Matter: The Overlooked Police Brutality Against Native Americans*, LAKOTA PEOPLE'S L. PROJECT (Nov. 21, 2017), <https://www.lakotalaw.org/news/2017-11-21/native-lives-matter-the-overlooked-police-brutality-against-native-americans>.