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CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

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Immigration and Homesteading

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Abstract: Which is the proper libertarian position on immigration? Open borders? Closed borders? Governmentally regulated borders? We argue for the former. But, then, what about the problem of immigrants who engage in rape, bombings, driving a truck through crowds of innocent people? The present paper argues that we can have our cake and eat it too: adhere strictly to open border libertarian principles, and, let the “magic of the market” (full private property rights) deal with any attached challenges.

*Immigration and homesteading*¹

In part I of this essay, we examine the case in favor of allowing the uninvited immigrant to homestead bits and pieces of land clearly previously homesteaded, but now in the hands of the state and/or its minions. In part II, we do so for land never before occupied by human beings, and, yet, claimed by the government. We reject this claim on libertarian grounds. Part III is our conclusion.

¹ I would like to thank David Gordon for bibliographical help Jeff Herbener. The usual caveats of course apply.

I. Occupied state lands²

Would an immigrant, or anyone else for that matter, be justified in seizing public land, for instance, an acre or so of Audubon Park in New Orleans, on the ground that the government, its present owner, is a thief?

The answer emanating from Rothbard (1969) would appear to support that sort of act: “Suppose, for example, that A steals B’s horse. Then C comes along and takes the horse from A. Can C be called a thief? Certainly not, for we cannot call a man a criminal for stealing goods from a thief. On the contrary, C is performing a *virtuous* act of confiscation, for he is depriving thief A of the fruits of his crime of aggression, and he is at least returning the horse to the innocent ‘private’ sector and out of the ‘criminal’ sector. C has done a noble act and should be applauded. Of course, it would be still better if he returned the horse to B, the original victim. But even if he does not, the horse is far more justly in C’s hands than it is in the hands of A, the thief and criminal. C, here, could of course be our immigrant; A, the government and B the hapless taxpayer. Continues Rothbard (1969):

“Let us now apply our libertarian theory of property to the case of property in the hands of, or derived from, the State apparatus. The libertarian sees the State as a giant gang of organized criminals, who live off the theft called ‘taxation’ and use the proceeds to kill, enslave, and generally push people around. Therefore, any property in the hands of the State is in the hands of thieves, and should be liberated as quickly as possible. *Any* person or group who liberates such property, who confiscates or appropriates it from the State, is performing a virtuous act and a signal service to the cause of liberty. In the case of the State, furthermore, the victim is not readily identifiable as B, the horse-owner. All

² This essay is dedicated to all the otherwise stalwart libertarians who reject the open –borders position, the only one compatible with this philosophy. See footnote 11 below for a listing of them

taxpayers, all draftees, all victims of the State have been mulcted. How to go about returning all this property to the taxpayers? What proportions should be used in this terrific tangle of robbery and injustice that we have all suffered at the hands of the State? Often, the most practical method of de-statizing is simply to grant the moral right of ownership on the person or group who seizes the property from the State. Of this group, the most morally deserving are the ones who are already using the property but who have no moral complicity in the State's act of aggression. These people then become the 'homesteaders' of the stolen property and hence the rightful owners."

Let me repeat and emphasize one thought therein: "*Any* person or group who liberates such property, who confiscates or appropriates it from the State, is performing a virtuous act and a signal service to the cause of liberty."³ Well, the immigrant is a person. This can hardly be denied. Thus, in Rothbard's view, he would be justified in "liberating" this property, and returning it, at long last, to the private sector. But Rothbard (1969) is by no means finished in his analysis along these lines. He states:

Take, for example, the State universities. This is property built on funds stolen from the taxpayers. Since the State has not found or put into effect a way of returning ownership of this property to the taxpaying public, the proper owners of this university are the 'homesteaders', those who have already been using and therefore 'mixing their labor' with the facilities. The prime consideration is to deprive the thief, in this case the State, as quickly as possible of the ownership and control of its ill-gotten gains, to return the property to the innocent, private sector. This means student and/or faculty ownership of the universities.

As between the two groups, the students have a prior claim, for the students have been paying at least some amount to support the university whereas the faculty suffer from the moral taint of living off State funds and thereby becoming to some extent a part of the State apparatus.

The same principle applies to nominally 'private' property which really comes from the State as a result of zealous lobbying on behalf of the recipient. Columbia

³ Emphasis added by present author

University, for example, which receives nearly two-thirds of its income from government, is only a 'private' college in the most ironic sense. It deserves a similar fate of virtuous homesteading confiscation.

But if Columbia University, what of General Dynamics? What of the myriad of corporations which are integral parts of the military-industrial complex, which not only get over half or sometimes virtually all their revenue from the government but also participate in mass murder? What are *their* credentials to 'private' property? Surely less than zero. As eager lobbyists for these contracts and subsidies, as co-founders of the garrison state, they deserve confiscation and reversion of their property to the *genuine* private sector as rapidly as possible. To say that their 'private' property must be respected is to say that the property stolen by the horsethief and the murderer must be 'respected.'

What of the view that the government is merely our agent, holding property (parks, roads, empty land) for us in our behalf? This would be difficult to reconcile with Rothbard's aforementioned analysis.⁴ We can almost hear him say something along the following lines: "The state as an *agent*? Surely, you jest. No, the government is a band of thieves writ large, albeit it with a very good public relations firm supporting it, but the idea that it holds property for the benefit of the citizenry is ludicrous."

II. Unoccupied lands claimed by the state, but never before homesteaded

So much for the transfer of clearly homesteaded land legally but not properly owned by the government, or its collaborators, such as General Dynamics or Columbia University. What of the case of land never before homesteaded?

Again, we return to Rothbard (1969) for insight: "The homesteading principle means that the way that unowned property gets into private ownership is by the principle that this

⁴ In the view of Rothbard (1978, p. 49): "if you wish to know how libertarians regard the State and any of its acts, simply think of the State as a criminal band, and all of the libertarian attitudes will logically fall into place."

property justly belongs to the person who finds, occupies, and transforms it by his labor. This is clear in the case of the pioneer and virgin land.”

Thus, if the immigrant confines himself to territory never before homesteaded, he violates no rights that must be respected in accord with libertarian law. If an agent of the government stops him from so doing, it is that latter who is acting the part of a criminal. Thus, open borders is the only policy compatible with the libertarian philosophy.

How, then, are we to protect ourselves from waves of immigrants who not only mean us physical harm, but who, based on past experience will likely inflict it on us? Unhappily, we need not document the hundreds of cases in which such newcomers have engaged in mass rapes, bombings, shootings, running innocent people over with trucks, etc.; these indecencies are almost omnipresent. The answer is simple. All we need do is privatize every square inch on the country under attack by these malevolent immigrants.⁵ Then, while we still can maintain open borders, the only proper libertarian position, anyone who crosses them without permission from owners can be removed on grounds of trespass.

In my analysis, we can have our cake and eat it too. We can adhere, rigidly, to libertarian principle (open borders is the *only* view compatible with libertarianism, since the outsider who starts homesteading virgin land, or government -land, violates no rights, and anyone who stops him is acting incompatibly with libertarianism), and, also, keep hordes of undesirables from our borders (by privatizing every single square inch of territory.) Libertarian critics of open borders are satisfied with accomplishing the second of these desiderata, keeping us safe, but jettison the first. I argue we must adhere to *both* if we wish to cleave to libertarian principles.

⁵ This certainly includes all roads, streets, highways, avenues. On this see Block, 2009. It also encompasses other terrain now under the control of government such as parks, museums, libraries, symphony halls, etc.

This claim, however, has been challenged by Mosquito (2017A). He denies that, at present, there is any such thing as virgin territory. He maintains that all land in the U.S., for example, is already owned; the government is merely in effect the agent for the citizenry, and all those who have paid it taxes. This scholar offers the following analysis:

As to government controlled land...I own it.

In the ... correct homesteading view, you own only that which you mix your labor with. So, I think I can safely say that homesteading is the mixing of labor with virgin land, land never before touched by human hands... [Let us] begin with the practical: in today's world, how many immigrants are moving to 'virgin land, never touched by humans'? I will suggest that the answer is about as close to zero as one can get. In Europe, they are not climbing to the top of the Swiss Alps, in the US, they are not setting up camp in the middle of the Mojave (or in untouched land in Alaska). So even if I grant [the] point that this is virgin land, never touched by humans, I find no practical use of [that] concept in today's discussion of immigration. Therefore, I find it dangerous to speak of open borders immigration based on a model that no immigrant employs.

If [we] are speaking purely theoretically, and at the same time speaking against the form of immigration we see around us today (in other words, [the] definition of 'open borders immigration' is significantly narrower than the definition employed by those who demand it), this is a different matter – but I (and many others) would appreciate it if [this was] said so clearly.

Now...how much mixing of labor with land is required to make one an owner? [Is there] an objective answer for this? An answer that fits in all situations, all cultures, at all times? An answer that can be derived solely from the NAP [non-aggression principle]?

If [so], this would be a real breakthrough. Remember – *an objective answer*: ten minutes of labor per square meter per week – something along these lines.

Now, absent an objective answer – meeting all of my conditions noted above – I suggest that the amount of labor to be mixed with the land is not fixed; the answer is to be subjectively derived. Yes, at the extremes (just like with the extremes in

defining ‘aggression’) we can all agree: a farmer ploughs the field, builds a home and barn, plants crops, and regularly rotates the field, etc. This is easy. Conversely, for me to claim ownership of the sun would be kind of silly – and equally as easy to point to as the (opposite) extreme.

But absent an objective answer to the question...where do we draw the line between two such points? After all, it is in the points in between – the continuum, – where the difficulties (from a pure NAP standpoint) lie.

So, now we can address this virgin land in Wyoming or Alaska – government controlled, to be sure, and as you clarify. What mixing of labor, if any, has a government employee or contractor done with this land?

Certainly, they have built roads along the land; they provide security services over 100% of the land; they offer fire prevention services over 100% of the land; 100% of the land is regularly patrolled; they have built structures of various sorts – land offices, tourist rest stops; they manage it for proper use of forest harvesting; they manage the game on the land; etc.

In every way, they treat the land as a private owner would treat similar land ...

For example, it is said that Ted Turner owns a few million acres of forest. I am certain he is not ploughing fields every day,⁶ nor is he having any of his employees do this. Weyerhaeuser, similarly, owns hundreds of thousands if not millions of acres. Yet, [no one] would ... say neither Turner nor the lumber company ‘owns’ the land.

So, what is different in these two cases – the public vs. the private?

Sure, you can say – “bionic, that is not enough mixing of labor!” And I would say – ‘... give me your objective definition to the issue of how much labor is required – and base this solely on the NAP.’

⁶ Rothbard (1982, p. 64) answers that objection in the following way: “Note that we are not saying that, in order for property in land to be valid, it must be continually in use. The only requirement is that the land be once put into use, and thus become the property of the one who has mixed his labor with, who imprinted the stamp of his personal energy upon, the land. After that use, there is no more reason to disallow the land’s remaining idle than there is to disown someone for storing his watch in a desk drawer.”

And I suggest, in the end ... [this] cannot [be done]. My answer to the question of ‘How much labor?’ is just as good as [anyone else’s] answer to the question. The NAP offers no guidance to this.

Now, given that my answer is just as good as [any other], and I paid for the government employees and contractors who did the work and provided the services on that property in Wyoming and Alaska, well...just like Ted Turner...I own the land.

Just because the colors of the rainbow meld into one another, Red, Orange, Yellow, Green, Blue, Indigo, Violet, does not mean we cannot distinguish those that are located close to each other from those placed far away from each other. Yes, there is a continuum⁷ between Red and Orange; there is a “grey” area between them; it is difficult to tell them apart, at some points. But that does not at all apply to Red versus Blue, or Orange in comparison to Violet. This is precisely the flaw in Mosquito’s (2017A) analysis. Yes, it is difficult to draw the line between planting a bush and claiming either a single square yard or two square yards. The one fades into the other, and we have no sharp dividing line that can be drawn between the two of them. But the same does not apply to making a distinction between one acre and one million square miles. That is the conclusion this author wishes to draw, and it is an invalid one.

Mosquito (2017A) poses this challenge: “How many immigrants are moving to ‘virgin land, never touched by humans?’ I will suggest that the answer is about as close to zero as one can get.”

As far as I’m concerned, this might even be a minus number. This author is of course correct; the number is probably zero. Well, maybe one or two, in the history of the entire

⁷ For an analysis of this phenomena, see Block and Barnett (2008).

world. Immigrants usually go to big cities, sometimes to farming areas, virtually never, ever, do they settle in virgin unhomesteaded territory.

However, this is irrelevant to our discussion. We do not need even one such person to make the point in favor of open borders. Even a hypothetical such person will do just fine. In my book *Defending I* (Block, 1976), I defended the pimp on the ground that he need not be a violator of the NAP. As far as I know, there is not a single solitary pimp who does not abuse his prostitutes, and this could not properly be defended on libertarian grounds. But I was discussing a sort of Platonic Pimp: a hypothetical one, who did not in any way abuse his prostitutes. I was trying to make the point that a pimp *need* not violate the NAP, even if all of them as a matter of fact actually did. I was defending the *idea* of a pimp, not any actual one. I now make much the same point with regard to the immigrant who settles in virgin territory. I do not much care if any of them ever did any such a thing. But, my Platonic Immigrant *could* have done this. With this, I think I have proven the case for open borders. There is nothing, *nothing*, intrinsically wrong from the libertarian perspective with an immigrant violating immigration law. Any immigration official who stops him is himself violating the NAP. Remember, the policy advocated by opponents of open borders makes no provision for a (probably hypothetical) immigrant who wants to settle in the middle of Wyoming or Alaska, on virgin territory. The argument that Mosquito (and other US citizens) really own this land, so that my hypothetical immigrant is really trespassing, goes against everything that eminent libertarian theorists⁸ have ever said about homesteading, which constitutes a bedrock of this philosophy.

⁸ Block, 1990B, 2002C, 2002D; Block and Edelstein, 2012; Block and Yeatts, 1999-2000; Block vs Epstein, 2005; Bylund, 2005, 2012; Grotius, 1625; Hoppe, 1993, 2011; Kinsella, 2003, 2006, 2009B; Locke, 1948 (pp. 17-19), 1955 (chapter 5); Paul, 1987; Pufendorf, 1673; Rothbard, 1973, 32; Rozeff, 2005B; Watner, 1982

I am just as concerned as any open borders opponent are about being overrun by hordes of rapefugees, and bombfugees, and running over people with a truck-fugees. I insist that my way of looking at the matter enables us to have our cake and eat it too. We privatize every square inch of the country. Then and only then will an immigrant who enters this country be guilty of trespass. With full private property, along with open borders, we can retain our hold over the libertarian NAP. The stance of libertarian open borders opponents, jettisons something very important to libertarians, the NAP.

But Mosquito (2017A) is not without a response to this rejoinder of mine. He states:

I will summarize my two main points from my lengthy response: first, [the open borders] position – even if one grants that it is correct in theory (which I do not ...) – is a theory in search of an application in reality; second, the government-controlled land is owned by me – and every other individual who has been forced to pay for the associated government labor.

[The open borders position is a] theoretical position with no useful application in today's world – certainly not in the west... So even if I grant [the] point that this is virgin land, never touched by humans, I find no practical use of [this] concept in today's discussion of immigration. Therefore, I find it dangerous to speak of open borders immigration based on a model that no immigrant [actually] employs. "If [we] are speaking purely theoretically, and at the same time speaking against the form of immigration we see around us today (in other words ... 'open borders immigration' [this] is significantly narrower than the definition employed by those who demand it), this is a different matter – but I (and many others) would appreciate it if [this were] said ... clearly.

We are not speaking today of pimps and prostitutes; there is no ongoing debate on this topic amongst libertarians. There *is* a context to the dialogue of open borders and immigration ...

... [the] "open borders" position has nothing to do with the general dialogue of today – the practical application of this topic within the context of today's dialogue; [t]his 'open borders' position is irrelevant to the situation today.

Let us consider the last point first. What I am attempting to do is to apply libertarian theory, accurate, uncompromising, libertarian theory, precisely to “the situation today.” Also, I want the target countries⁹ to be safe. In my analysis, this requires two things: not to initiate violence against immigrants peacefully tilling virgin territory, and, also, full private property, so that no uninvited guests may appear within our shores. Do I think that full privatization is immanent? Of course not, given the political economy of the day. But that is irrelevant. My prime purpose in my writings on the subject¹⁰ is not to be practical in that compromising sense. No, it is to carve out the correct libertarian position, one that, happily is also utilitarian in the sense that it will safeguard the resident population.

As for Mr. Mosquito, or any other tax-paying citizen being the legitimate owner of virgin territory, a veritable contradiction in terms, this has been refuted, over and over, by pre-eminent libertarian scholars.

For example, in the view of Rothbard (1982, 49):

If every man has the right to own his own person and therefore his own labor, and if by extension he owns whatever property he has ‘created’ or gathered out of the previously unused, unowned state of nature, then who has the right to own or control the earth itself? In short, if the gatherer has the right to own the acorns or berries he picks, or the farmer his crop of wheat, who has the right to own the land on which these activities have taken place? Again, the justification for the ownership of ground land is the same for that of any other property. For no man actually ever ‘creates’ matter: what he does is to take nature-given matter and transform it by means of his ideas and labor energy. But this is precisely what the pioneer – the homesteader -- does when he clears and uses previously unused virgin land and brings it into his private ownership. The homesteader – just as the

⁹ The U.S., preeminently, but also others such as Sweden, German, France, etc., to be safe from immigrants with no respect for women, for gays, for the NAP.

¹⁰ Block, 1983A, 1983B, 1988, 1990A, 1998, 2004, 2006B, 2011A, 2011B, 2013, 2016A; Block and Callahan, 2003; Gregory and Block, 2007. Other open borders libertarian essays include the following: Berg, 2010; Ebeling, 2015A, 2015B; Esplugas and Lora, 2010; Friedman, 1973, 2006; Hornberger, 2016A, 2016B; Hudson, 1986; Krepelka, 2010; Rothbard, 1962; Rozeff, 2005A; Salin, 2000, chap. 11; Todea, 2010

sculptor, or miner -- has transformed the nature-given soil by his labor and his personality. The homesteader is just as much as 'producer' as the others, and therefore just as legitimately the owner of his property. As in the case of the sculptor, it is difficult to see the morality of some other group expropriating the product and labor of the homesteader. (And, as in the other cases, the 'world communist' solution boils down in practice to the ruling group.) Furthermore, the land communalists, who claim that the entire world population really owns the land in common, run up against the natural fact that before the homesteader, no one really used and controlled, and hence owned the land. The pioneer, or homesteader, is the man who first brings the valueless unused natural objects into production and use.

From this we can readily infer that Mr. Mosquito's position is akin to that of the "world communist" or the "land communalist." It is difficult to understand how this author, world-renowned for his many and important, contributions to libertarian theory, can be brought to such a pass. But, it is difficult to resist this conclusion. For, he avers in effect that there is no such thing as virgin territory, that the minions of the government can be considered the proper owners of territory they never so much as placed a foot on. To engage in a bit of motive mongering for the moment, I discern that his intention is to ward off the domestic country being overwhelmed by millions of rape-fugees, bomb-fugees, and others of their ilk. He is no less than eloquent in his condemnation of these dangers, to his immense credit. He simply does not realize that we need not jettison pure libertarian theory in order to attain these ends.

States Rothbard (1982, 47): "Let us return to our island of Crusoe and Friday. Crusoe, isolated at first, has used his free will and self-ownership to learn about his wants and values, and how to satisfy them by transforming nature-given resources through 'mixing' them with his labor. He has thereby produced and created property. Now suppose that Friday lands in another part of the island. He confronts two possible courses of action: he may, like Crusoe, become a producer, transform unused soil by his labor ... also creating

property. Or he may decide upon another course: he may spare himself the effort of production ... He may aggress against the producer.

If Friday chooses the course of labor and production, then he in natural fact, as in the case of Crusoe, will own the land area which he clears and uses, as well as the fruits of its product. But, as we have noted above, suppose that Crusoe decides to claim more than his natural degree of ownership, and asserts that, by virtue of merely landing first on the island, he ‘really’ owns the entire island, even though he had made no previous use of it. If he does so, then he is, in our view, illegitimately pressing his property claim beyond its homesteading – natural law boundaries, and if he uses that claim to try to eject Friday by force, then he is illegitimately aggressing against the person and property of the second homesteader.

It should by now be clear that the “second homesteader,” Friday, is the innocent person in this scenario; he plays the role of the homesteader of land in the middle of Alaska or Wyoming. Further, that the first homesteader, Crusoe, is “illegitimately pressing his property claim beyond its homesteading -- natural law boundaries.”

In the view of Rothbard (1982, 47):

Some theorists have maintained—in what we might call the ‘Columbus complex’—that the first discoverer of a new, unowned island or continent can rightfully own the entire area by simply asserting his claim. (In that case, Columbus, if in fact he had actually landed on the American continent—and if there had been no Indians living there—could have rightfully asserted his private ‘ownership’ of the entire continent.) In natural fact, however, since Columbus would only have been able actually to use, to ‘mix his labor with,’ a small part of the continent, the rest then properly continues to be unowned until the next homesteaders arrive and carve out their rightful property in parts of the continent.” Rothbard (1982, 47-48, fn. 2): “A modified variant of this ‘Columbus complex’ holds that the first discoverer of a new island or continent could properly lay claim to the entire continent by himself walking it (or hiring others to do so), and thereby laying out a boundary for the area. In our view, however, their claim would be no more than to the boundary *itself*, and not to any of the land within it, for only the boundary will have been transformed and used by man.

Further, Rothbard (1982, 63-64) avers:

Suppose ... that Mr. Green legally owns a certain acreage of land, of which the northwestern portion has never been transformed from its natural state by Green or by anyone else. Libertarian theory will morally validate his claim for the rest of the land – provided, as the theory requires, that there is no identifiable victim (or that Green had not himself stolen the land.) But libertarian theory must invalidate his claim to ownership of the northwestern portion. Now, so long as no ‘settler’ appears who will initially transform the northwest portion, there is no real difficulty; Brown’s claim may be invalid but it is also mere meaningless verbiage. He is not yet a criminal aggressor against anyone else. But should *another* man appear who does transform the land, and should Green oust him by force from the property (or employ others to do), then Green becomes at that point a criminal aggressor against land justly owned by another. The same would be true if Green should use violence to prevent another settler from entering upon this never-used land and transforming it into us.

Just so there will be no mistake about this matter, Green, here, is clearly either El Senor Mosquito, and/or his agent, the government. In very sharp contrast indeed, Brown, the person who starts to mix his labor with the so far unoccupied, unhomesteaded, untouched, virgin territory in the northwest, plays the role of the peaceful immigrant; he is acting totally in accord with the NAP of libertarianism. When Green “ousts” Brown, the former is violating the rights of the latter.

Rothbard (1982, 64) powerfully makes this point yet in another¹¹ way:

Crusoe, landing upon a large island, may grandiosely trumpet to the winds his ‘ownership’ of the entire island. But, in natural fact, he *owns* only the part that he settles and transforms into use. Or ... Crusoe may be a solitary Columbus landing upon a newly-discovered continent. But so long as no other person appears on the scene, Crusoe’s claim is so much empty verbiage and fantasy, with no foundation in natural fact. But should a newcomer – a Friday – appear on the scene, and begin

¹¹ Am I being somewhat repetitive here? Without a doubt, this is true. My justification for so doing is that this is a complex issue, and many highly credentialed libertarians, have misunderstood it. For a listing of such, see [Brimelow, 1995](#); Hoppe, 1998, 2001, 2002; Hospers, 1998; Kinsella, 2005; Machan, 1998; Mosquito, 2016A, 2016B, 2016C, 2016D, 2016E, 2016F, 2016G, 2016H, 2016I, 2017A, 2017B; Rockwell, 2015A; Rothbard, 1994; Simon, 1998; de Soto, 1998

to transform unused land, then any *enforcement* of Crusoe's invalid claim would constitute criminal aggression against the newcomer and invasion of the latter's property rights.

It is almost as if Rothbard had Mosquito in mind when he penned these words. Here, first, comes Mosquito's government (Columbus or Crusoe), with its "claim (to the entire continent, or large island that) is so much empty verbiage and fantasy, with no foundation in natural fact." Then Friday turns up on the scene, and begins homesteading land completely untouched by human hands or feet. Whereupon the evil state, or Columbus, or Crusoe *enforces* this totally invalid claim, with Mosquito's blessing. It is difficult to see how more clearly it is demonstrated that the two views, Rothbard's and Mosquito's, diverge.

But does the latter not have a response? He might accuse me of an argument from authority: just because Rothbard disagrees with Mosquito does not necessarily mean that the latter is incorrect. Perhaps Rothbard, on this one occasion, was in error? No. Not a bit of it. My argument is supported by the exegesis of Rothbard, but is by no means totally dependent upon it. Or, put this in another way, it is Rothbard's arguments, not his persona, that demonstrates the error of the Mosquitoian analysis. The latter is subject to all sorts of *reductio ad absurdum*. For example, it is a basic tenet of libertarianism that secession is always and ever justified.¹² There are disquieting implications here for secession. If the government really owns all the land, secession by its very nature must be prohibited. It would constitute a theft from the legitimately owned property of the state. But to say that this would run counter to libertarian thought would be an understatement of the highest

¹² Adams, 2000; Baldwin, 2015; Block, 2002A, 2002B, 2007; Denson, 1997; DiLorenzo, 2002, 2006, 2007, 2015; Fedako, 2013; Gordon, 1998; Hulsmann, 2003; Hummel, 1996; Kinsella, 2009A, Kreptul, 2003; McGee, 1994A, 1994B; Rosenberg, 1972; Rockwell, 2015B; Rothbard, 1967; Stromberg, 1979; Thies, 2009; Thornton, 1994; Thornton and Ekelund, 2004; Williams, 2015.

order.

Let us next consider the views of Mosquito, 2017B.

He begins by reiterating his entirely correct claim that

... there is no objective answer to how much labor must be mixed with the land to determine ‘ownership.’” But from this he deduces the entirely incorrect conclusion “that even the so-called vacant stretches of desert and the mountaintops have ‘some’ labor mixed into them by government employees – whom I have paid for; therefore the government controlled land is owned by me – and every other individual who has been forced to pay for the associated government labor.

Here, he is subject to the withering “Columbus” fallacy: anyone can pretty much say anything about homesteading, since there are no objective criteria to distinguish licit from illicit homesteading. I now look out my window and see the moon. According to the Mosquito, there is no one who can say me nay. I am the legitimate owner of this heavenly body. All others stay away, or else!

No, I of course cannot offer any exact criteria for successful homesteading, such as two months per acre, or anything like that. In Rothbard’s (1982) view, to which I fully subscribe, it all depends upon context, history, past practices.

But, Mosquito (2017B) allows a good thing for his side of this debate, the non-objectivity of homesteading in terms of time spent per acre, get the better of him. He takes a reasonable principle, and runs too far with it. Suppose that the US lands an astronaut on Mars or the Moon. He plants a US flag there. He builds a few roads, etc., and then claims the entire heavenly body as the private property of the US government, and stands ready

to protect this claim by force. According to the argument of this author, this claim would be legitimate. It is difficult to reconcile any coherent theory of homesteading with so grotesque a conclusion. The idea that because the state builds a few roads 1000 miles away from an uninhabited part of Alaska, claims ownership over it, it willing to fight to protect it, seems so far removed from legitimate homesteading as to be totally unrelated to it.

Mosquito (2017B) then makes much of the fact that there are rich individuals, and corporations, who and which now own vast holdings of terrain, too large to have homesteaded all of the property in question. Several of them are in the several millions of acres. He states: “These individuals *own* such properties by the millions of acres; the government *controls* such properties by the millions of acres. If size matters, well these landowners can hold their own. The individuals have roads and buildings (*or not*) sufficient for the purpose of the property; the government has roads and buildings (*or not*) sufficient for the purpose of the property. In other words, the amount of labor mixed with land is dependent on the property owner’s view of the best use for the land. There is no formula. The individuals have rules about who can and can’t enter the property; the government has rules about who can and can’t enter the property. This needs no explanation, and certainly not in the context of immigration. So...what’s the difference between government controlled land and privately owned land (within the context of this discussion)?”

His clear implication is that there is none. But this will not suffice. First of all, there is all the difference in the world between private and government land. As Rothbard (1978) puts it, “the State as a criminal band,”¹³ while private individuals are not. Secondly, The Mosquito (2017B) is conflating the normative and the positive. It cannot be denied that these individuals do indeed own their vast acreages, as a matter of extant law. So much for

¹³ See fn. 4, *supra*

the positive. But, if they did not homestead these territories, nor pay others to do so for them, then, according to normative libertarian law, they are not the proper owners of it. Therefore, extrapolating from these examples to government ownership and control is fraught with philosophical danger.

Then, too, this scholar's position is subject to a whole host of *reductio ad absurdum*.

If we can extrapolate from his promiscuous use of libertarian homesteading theory, the Mosquito would support the Chinese in their insistence upon a 12 mile area of ownership, merely because, traditionally, cannon could fire for that distance. The point is, the Chinese did nothing, nothing at all, at least nothing that could be regarded even by an extremely stretched homesteading theory, to "mix their labor" with these surrounding waters, at least not more so than any of the other nations in the surrounding area. "An extremely stretched homesteading theory" is an apt description of the Mosquito's position. No. I take that back. His perspective is an outright rejection of homesteading *per se*. But without homesteading as the very basis of licit property titles, the entire edifice of libertarianism collapses.

Here is another *reductio*: according to the Mosquito, there is no such thing, there cannot be any such thing, it would be a logical contradiction for there to be any such thing as, "previously unused, unowned state of nature." For as long as there are governments around to claim ownership of what would otherwise be considered virgin territory, it just plain cannot exist. This, too, is highly problematic.

This author must confront several questions, as well. Precisely when did the US government attain proper libertarian ownership of the wilds of Alaska and Wyoming, given that no human being came within hundreds of miles of it? How did they attain these

ownership rights, compatible with the libertarian theory that the Mosquito so eloquently supports in all of his other writings?

III. Conclusion

I stand foursquare with Mr. Mosquito in not wanting to be over-run by hordes of rape-fugees, truck-fugees, bomb-fugees. We both have children and grandchildren for who we wish a safer gentler world, entirely separate from such goings on elsewhere, and, now, all too often,¹⁴ in our home territory. Where my learned friend and I depart is that he wishes to attain this end via the violation of the NAP, and I am attempting to strive mightily to achieve this goal while not jettisoning the libertarian perspective. Crossing the U.S. border illegally is not per se a violation of rights, at least not of the libertarian variety. This can be done, compatibly, as demonstrated above, by doing so and settling in virgin territory, of which there is much. Therefore, any policeman who stops and immigrant from homesteading such land violates his rights. Thus, any border control is necessarily incompatible with the freedom philosophy. But will not the open borders position open up the domestic population to being swamped? No, not if another part of the basic libertarian edifice is also implemented: homesteading of every square inch of the target country: land, roads (Block, 2009), parks, waterways (Block and Nelson, 2015).

There are two obstacles to this happy occurrence, one relatively easily overcome, the other all but impossible to attain.

First, much of this terrain is sub-marginal. There is a good and sufficient reason why much of the Rocky Mountains and the interior of Alaska are uninhabited: the marginal revenue productivity of this topography is at present negative. It costs more to occupy this

¹⁴ Once is too much

geography than it is worth. But this does not apply to victims of terrorism fleeing to the U.S. for their very lives. They would give their eye teeth to settle in the midst of even the most rugged parts of Wyoming, for example. If they are to be precluded from so doing in any significant numbers, then the sub-marginality of this land must be changed. And, under a regime of free enterprise, this is precisely what would happen. People like Mosquito, and other libertarians who wish not to be inundated by foreign hordes, would make it so. The psychic benefits associated with safety would overcome the present sub-marginality of the land. Individuals and groups would homestead that land even though the monetary profits would be negative.¹⁵

Second, this one-two punch of (legally) open borders combined with total private property rights requires an entirely libertarian society. This, given present political economic realities, is not “all but impossible to attain.” Rather, it is totally impossible, with no “all but” about it. We live in a country in which Hillary, Bernie and Donald were all contenders for president in 2016. For us to attain a libertarian society, not only would Ron Paul have to be president, but he would have to have the support of both houses of congress and numerous state legislatures to boot. This will not bloody likely happen. Therefore, open borders, it cannot be denied, will result in the domestic population being overcome.

¹⁵ The argument against this is that such activities would be subject to the market failure of public goods. Each person would wait for others to do this; no one would engage in such acts. That is the extreme version of this doctrine. The more moderate version is that too little, too late, of this would occur under a regime of economic freedom, and we would still be swamped by immigrants. For a refutation of this objection, see: Barnett and Block, 2007, 2009; Block, 1983C, 2000, 2003; Cowen, 1988; De Jasay, 1989; Holcombe, 1997; Hoppe, 1989; Hummel, 1990; Osterfeld, 1989; Pasour, 1981; Rothbard, 1985, 1997B; Schmidt, 1991; Sechrest, 2003, 2004A, 2004B, 2007; Tinsley, 1999. Rothbard's (1997B, 178) *reductio absurdum* of the public goods argument is as follows: “A and B often benefit, it is held, if they can force C into doing something. . . . [A]ny argument proclaiming the right and goodness of, say, three neighbors, who yearn to form a string quartet, forcing a fourth neighbor at bayonet point to learn and play the viola, is hardly deserving of sober comment.”

I do not give two hoots about that eventuality, much as I love not only my children and grandchildren, and, indeed, this country and its people. My only concern in this essay is to clarify the libertarian position on this troublesome matter. If we are to attain the exalted libertarian society mentioned in the previous paragraph, we must be meticulous in understanding this philosophy, wherever it leads us. If we are to make compromises, let us do so while fully understanding what the pure libertarian position is. Mosquito, and all other libertarians who favor controlled borders, thus do a disservice to our political economic position. In my view, the last best hope for all of our children and grandchildren, is libertarianism, in its most pure version. Jettison that, for whatever reason, and we do damage to our progeny. From a utilitarian point of view, we do greater harm to them by being unclear about what libertarianism is all about, than by seizing temporary relief. From a realpolitik point of view, we libertarians can afford to take an unadulterated position. We are not in charge of immigration policy. Our views will be little noted, and certainly not implemented, by the powers that be

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ATTORNEY-CLIENT PRIVILEGE: INCARNATION AND INTERPRETATION

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Abstract: The fallacy of the absolutist nature of attorney-client privilege owes much of its legacy to Lord Taylor's articulation in *R v Derby Magistrates' Court, Ex parte B*.¹ In this 1995 English case, the House of Lords, constituted by Lord Taylor of Gosforth CJ, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Keith of Kinkel and Lord Mustill, anchored the doctrine to a 16th-century paradigm which held that, once attorney-client privilege attached to a certain communication, the privilege was absolute and could not be breached by any court for any reason. This result left no opportunity to balance the needs of other competing interests against the interest in preserving the confidentiality of privileged communications.² Lord Taylor of Gosforth CJ announced:

If a balancing exercise was ever required in the case of [attorney-client] privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits.³

In utilising Jeremy Bentham and John Henry Wigmore's philosophies, this article unveils the historical justification for the existence of attorney-client privilege and introduces some ideas about the way this has shaped contemporary judicial thinking. Exposing the factors which led to Lord Taylor's pronouncement that the privilege was settled once and for all

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¹ [1996] AC 487.

² Adrian Zuckerman, *Legal Professional Privilege – The Cost of Absolutism*, 112 LAW Q. REV. 535, 535–6 (1996).

³ *R v. Derby Magistrates' Court; Ex parte B* [1996] AC 487, 508E (Lord Taylor).

in the 16th century, this article concludes that the rule was not an Elizabethan construct, but a product of time immemorial.

I Attorney-Client Privilege: Historical Underpinnings

A Wigmore's Hatrick: Best of Three

The position taken by Lord Taylor CJ that attorney-client privilege was settled in the 16th century may logically be attributed to the influence of Wigmore. Contending that the privilege was initially conceived to safeguard the oath and the honour of the lawyer in a society predicated on inequality of rank,⁴ Wigmore's rationale supported the traditional justification for the existence of the rule.⁵ It is most likely that Wigmore's pronouncement on attorney-client privilege was connected to the evolution of the legal profession throughout the later Middle Ages, reinforcing the fact that the legal profession had established the necessary level of specialisation such that client–counsel communications were entitled to fall under an obligation of secrecy.⁶

‘Characterised as a sacred trust that touch[ed] the very soul of lawyering’,⁷ attorney-client privilege allowed lawyers to defend their status by appealing to the public's need for their services and unique area of expertise. This enabled them to morph into important

⁴ Michel Rosenfeld, *The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism: The Adversary System and the Corporate Client's SEC Disclosive Obligations*, 33 HASTINGS L. REV. 495, 496 (1982).

⁵ *Developments in the Law: Privileged Communications*, 98 HARVARD L. REV. 1450, 1472 (1985).

⁶ Anton-Hermann Chroust, *Legal Profession During the Middle Ages: The Emergence of the English Lawyer Prior to 1400*, 31 NOTRE DAME L. REV. 4, 566-8 (1956).

⁷ Adam Dodek, *Reconceiving Solicitor-Client Privilege*, 35 Q.L.J. 493, 517 (2010).

exemplars of order in medieval society.⁸ The value attached to medieval Elizabethan lawyers culminated in the expansion of legal business such that they exerted a far greater influence on how proceedings were conducted. Wigmore interpreted the *theoretical justifications underpinning* attorney-client *privilege* as a status-based exception courtesy of the esteemed nature of lawyering and argued that, under the tenets of oath and honour, the privilege could be waived by the lawyer⁹ because it was for the lawyer alone to determine what honour demanded.¹⁰

An inference may be drawn that the reactionary and parallel evolutionary paths shared by the legal profession and attorney-client privilege would eventually converge and be mutually reinforced.¹¹ The basis for this proposition lies in the assumption that, as the status of the legal profession grew in prominence, corresponding rules of professional conduct would also emerge to govern client–counsel relations.

Through strictly limiting the operation of attorney-client privilege to communications arising between clients and their lawyers, lawyers were afforded a competitive advantage over other professional groups which ensured they were indispensable to the proper functioning of the legal system¹² and the administration of justice, which could not be advanced if clients were unable to confide in those skilled in law.¹³ In limiting the privilege in this manner, relations between lawyer and client were emphasised as conveying special significance and constituted part of the functioning of the law itself. Ensclosed in their

⁸ The author notes, per Richard Helmholz, *The IUS Commune in England: Four Studies, 191* (2001) that while ecclesiastical privilege has been thoroughly documented in the Middle Ages, little to no attention has been devoted to the civil aspect of ‘privilege’, with Blackstone and Maitland concentrating on the clergy’s privileged jurisdictional status.

⁹ John Wigmore and Colin McNaughton, *Evidence in Trials at Common Law*, § 2291 (1905).

¹⁰ Justin Leeson, James Watson and Elisabeth Peden, *Historical Foundations of Australian Law: Volume ii – Commercial Common Law*, 136 (2013).

¹¹ Anton-Hermann Chroust, *supra* 8, 573.

¹² *Baker v. Campbell* (1983) 153 CLR 52, 94 (Wilson J).

¹³ Justin Gleeson et al, *supra* 10, 143.

privileges, lawyers could afford to be tolerant; so long as they guarded those privileges well, both barristers and solicitors were indispensable.¹⁴

Lawyers defended their privileges by appealing to the public's need for their services and unique area of expertise, thereby morphing into important beacons of order in society. Evinced the growing sense that lawyers were becoming increasingly important components within the English judicial system,¹⁵ an inference may be drawn that, in order to advance the best possible case for one's client, a strong sentiment of maintaining client confidences would evolve into a necessary function of the lawyer. This provided additional incentive for clients with something to hide to hire lawyers so as retain control over communications and not to risk their secrets being compromised or divulged.

In the eighth volume of *A Treatise on the Systems of Evidence in Trials at Common Law*,¹⁶ Wigmore announced that the testimonial disqualification enjoyed by lawyers sprang from medieval jurisprudence, with the venerated history of attorney-client privilege dating back to the reign of Elizabeth I. He specifically claimed that the rule had its origins in section 12 of the 1562 *Act for Punishment of Such as Shall Procure or Commit Any Wilful Perjury*¹⁷ and anyone who failed to testify upon service of process, or bore false witness, was liable to penalty.¹⁸ "The history of the privilege goes back to the reign of Elizabeth I, where the

¹⁴ Michael Birks, *Gentlemen of the Law*, 1 (1960).

¹⁵ William Dunham, *Radulphi de Hengham Summae* 4-7 (1932).

¹⁶ John Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdiction of the United States, vol iv* (1905). Bentham distinguished *treatises* and *abridgements* as follows: '*treatises* contain, with or without rules, argumentation about rules, while *abridgements* contain alleged rules with or without (though commonly without) the argumentation out of which the rules were spun, and in which they were drowned'. See Jeremy Bentham, *Codification of the Common Law: Letter of Jeremy Bentham, and Report of Judges Story, Metcalf and Others*, 10 (1882).

¹⁷ Act for Punishment of Such as Shall Procure or Commit Any Wilful Perjury 1562, 5 Eliz 1 c 9.

¹⁸ Jonathan Auburn, *Legal Professional Privilege: Law & Theory*, 2-3 (2000).

privilege already appears as unquestioned. It is therefore the oldest of the privileges for confidential communications'.¹⁹

Erroneously claiming that it arose contemporaneously in response to the then-novel right of testimonial compulsion which officially gained recognition in the 1570s,²⁰ Wigmore stated that attorney-client privilege already appeared as unquestioned at this time and concluded that it was one of the oldest of the privileges for confidential communications.²¹ He later recanted this statement and insisted that attorney-client privilege emerged from the Court of Chancery in the 14th century, most likely around the year 1375.²² In a separate statement, he added:

The policy of the privilege has been plainly granted since the latter part of the 1700s on subjective considerations. In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the lawyers must be removed, hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory.²³

In misstating its origins, not once, but thrice, Wigmore failed accurately to report the history of attorney-client privilege and imparted a lasting, albeit erroneous, impression that the privilege first took root in the 16th century as a by-product of Elizabethan transformation.²⁴ For Lord Taylor CJ to accept Wigmore's various statements is to overlook his terminology in which the scholar expressly articulated that the privilege already appeared as unquestioned by the 1570s and was one of the oldest of the privileges

¹⁹ Attorney-client privilege applies to confidential communications, whether written or oral, between a client and lawyer, where the latter is acting in a professional capacity. The privilege constitutes a guarantee of security in which discussions can take place absent a fear of disclosure. Communications must be made for the purpose of enabling the lawyer to conduct the cause, with the test being whether communications are necessary for the purpose of carrying on the proceeding in which the lawyer is engaged. See Wigmore and McNaughton, *supra* 9, §2290–1.

²⁰ Jonathan Auburn, *supra* 18, 2–3.

²¹ Wigmore and McNaughton, *supra* 9, § 2290–1.

²² *Id.*

²³ *Id.*

²⁴ Ronald Desiatnik, *Legal Professional Privilege in Australia*, 9 (1999).

for confidential communications, having originated in section 12 of the 1562 *Perjury Act*. An argument may reasonably be made that, if the privilege was already unquestioned by the 16th century and was regarded as one of the oldest privileges pertaining to confidential communications, it must have been in use prior to this era.

Assuming that attorney-client privilege was in fact framed in section 12 of the 1562 *Perjury Act*, it would *not* have been a preserve of the common law as is universally agreed, but would have conformed to a statutory provision. Attorney-client privilege cannot be distinctly traced back to any statutory enactment. Rather, this article asserts that it derived its authority and recognition from the common law; through systematic reporting and publication of precedent-driven cases in the early 1500s.²⁵

Consider *Lee v Markham*,²⁶ in which the defendant's counsel was excused from testifying so as 'not [to] be compelled to answer to any interrogation, to [have] ministered unto him which shall touch or concern the discussing of the title'.²⁷ Similarly, in *Breame v Breame*²⁸ and *Windsor v Umberville*,²⁹ the Court proscribed counsel acting in a cause from being examined in that same matter.³⁰ In *Berd v Lovelace*,³¹ the Court of Chancery ordered that Thomas Hawtry, lawyer, should not be examined in relation to communications that had passed between himself and his client. Declaring that Hawtry would 'not be compelled to be deposed, touching the same, and that he was not in danger of any contempt, touching the

²⁵ See Geoffrey Hazard, *A Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978). These 16th century cases involved judicial consideration, without guidance of statute.

²⁶ (1569) *Monro* 375, *Tothill* 48.

²⁷ *Id.*

²⁸ (1571) *Tothill* 48. See also Ronald Bridgman, *A Digest of the Reported Cases on Points of Practice and Pleading in the Courts of Equity in England and Ireland and of the Rules and Orders of the Same Courts; from the Earliest Period to the Present Time*, 178 (1829).

²⁹ (1574) *Monro* 411.

³⁰ Ronald Bridgman, *supra* 28, 178.

³¹ [1577] *Cary* 62.

not executing of the said process',³² the Court's ruling signified that, while lawyers *were* competent to testify, it would not compel their testimony.³³

The position enunciated in *Berd v Lovelace*³⁴ established the rule that a lawyer previously retained to act could not be subpoenaed to testify against a client,³⁵ either past or present, as this was repugnant to the policy of the law. In addition to ignoring any injury to clients, the early justification ignored protection of any particular professional relationship or the preservation of client–counsel communications. These were not valued as an end in and of themselves.³⁶

The rationale that the privilege belonged to the lawyer was carried through in several cases which essentially limited the scope of attorney-client privilege to the exchange of communications between lawyer and client for the purpose of obtaining legal advice.³⁷ The next of these, in chronological order, is *Austen v Vesey*,³⁸ in which a solicitor for one of the litigants was discharged and 'not admitted to be examined'. *Hartford v Lee*³⁹ similarly determined that counsel could not be compelled to testify 'touching a matter in variance, wherein he hath been of counsel; it is ordered he shall not be compelled to testify'. In *Kelway v Kelway*,⁴⁰ Roger Taylor enjoyed the same privilege when he was excused from

³² *Id.*

³³ Jonathan Auburn, *supra* 18, 1. With the passing of the *Common Law Procedure Act 1854* and the *Supreme Court of Judicature Act 1873* (UK), the High Court of Justice assimilated the legal procedures of the Court of Chancery and the Court of Common Law (as well as other courts). Where there was any variance between the old practice of the two courts, the more convenient one would prevail. See William Hastings, a digest of the law of practice under the judicature acts and rules: and the cases decided in the chancery and common law divisions from november 1875 to august 1880, 1-3 (1880) See also Colin Tapper, *Privilege, Policy and Principle*, 121 L.Q.R. 181, 182 (2005).

³⁴ [1577] Cary 62.

³⁵ *Id.*

³⁶ Edward Imwinkelreid, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV.315, 319–20 (2003).

³⁷ Paul Rice, John Corr and David Drysdale, *Attorney-Client Privilege in the United States*, 6 (2009).

³⁸ (1577) Cary 63.

³⁹ (1577) Cary 63.

⁴⁰ (1579) Cary 89.

answering any interrogatories touching the secrecy of the title ‘or any other matter which he knoweth as solicitor only’. In the 1579 matter of *Dennis v Codrington*,⁴¹ it was ordered that a lawyer in that suit should not be compelled, by virtue of subpoena or otherwise, ‘to be examined upon any matter wherein he had been counsel, either by the indifferent choice of both parties or with either of them, by reason of annuity or fee’.

In the subsequent cases of *Strelly v Albany*⁴² and *Cutts v Armingier*,⁴³ the Court confined the operation of attorney-client privilege to matters arising from the respective lawyers’ involvement in the case at hand.⁴⁴ In *Strelly*, the Court ordered that the lawyer should not be examined in this cause⁴⁵ and in *Cutts*: ‘He hath not dealt therein but as a counsellor for the plaintiff; it is therefore ordered, that the said Fuller shall not be enforced to be examined in the cause’.⁴⁶

By the time *Ward v Waldron*⁴⁷ came to be prosecuted, the Court permitted counsel to invoke a claim of privilege only to avoid being ‘bound to make answer for things which may disclose the [innermost] secrets of his client’s cause and thereupon he was [unable] to be examined’. The shallow scope of attorney-client privilege was again evident in *Havers v Randall*,⁴⁸ where counsel could not be questioned over ‘anything concerning his clynts title’. *Creed v Trap*⁴⁹ meanwhile limited the operation of attorney-client privilege to the professional knowledge acquired by the lawyer in relation to his representation of the client; ‘but for any other matter, it shall be lawful for the plaintiff to examine him’.

⁴¹ (1579) Cary 100.

⁴² (1583) Monro 519–520.

⁴³ (1585) Monro 544.

⁴⁴ *Breame v. Breame* (1571) Tothill 48.

⁴⁵ *Strelley v. Albany* (1583) Monro 519–520.

⁴⁶ *Cutts v. Armingier* (1585) Monro 544.

⁴⁷ (1654) 82 ER 853.

⁴⁸ (1581) Choyce Cas 149.

⁴⁹ (1578) Choyce Cases 121.

Containing principles which were recognised and applied as sound law on the subject of client–counsel communications, these Court of Chancery cases – which together comprised the basis for Wigmore’s ‘honour theory’ of attorney-client privilege – contained principles which were recognised and applied as sound law on the subject of client–counsel communications. As a general precept in early modern English law, these cases demonstrate that attorney-client privilege evolved through the common law as opposed to legislative enactments per Wigmore’s assertion.

These authorities failed to describe the right of a lawyer to ‘avoid compulsory disclosure as a privilege and certainly not as an attorney-client privilege’.⁵⁰ This is to say that 16th–century English law did not recognise the rule as a means of excusing lawyers from testifying. This view was firmly enunciated in *Bulstrode v Lechmere*.⁵¹ In *Bulstrode*, the defendant allegedly had in his possession an ancient deed belonging to his client, Dingley, which the plaintiff sought to discover by exhibiting a demurrer to a bill.⁵² The defendant pleaded that he was a counsellor and it had been agreed between the parties that no information should be disclosed or made use of by the other side.⁵³ The court ruled that the defendant ‘shall have the privilege of the bar and is *not* obliged to answer’.⁵⁴ Furthermore, any information that came to the knowledge of his lawyer *prior* to being retained as counsellor in the conduct of the cause, or upon any other account, should afford him the privilege of the bar and he should not be put to answer.⁵⁵

Unfortunately, the word ‘privilege’ misstated the application of the doctrine, with the English Law Report commenting that the word *not* should have been inserted between

⁵⁰ Justin Gleeson et al, *supra* 10, 132.

⁵¹ (1676) 2 Freeman 5.

⁵² Ronald Bridgman, *supra* 28, 179.

⁵³ *Id.*

⁵⁴ *Bulstrode v. Lechmere* (1676) 2 Freeman 5.

⁵⁵ *Id.*

shall and *have*, so as to actually read: ‘The barrister for the defendant shall *not* have the privilege of the bar and is obliged to answer’.⁵⁶ While historical records do not elaborate on precisely how this mistake occurred, it has been suggested that the negative was transposed probably through typographical error.⁵⁷ This erroneous version, which gave the privilege an evolutionary advantage, would become the emerging practice as documented in cases for the next two hundred years.⁵⁸

It was not until 1816 that *Parkhurst v Lowten*⁵⁹ corrected the erroneous *Bulstrode v Lechmere* judgment, wherein that court held that, with regard to facts known to a lawyer unprofessionally, the claim of privilege could *not* be maintained and ‘refusal to answer was in itself a breach of trust’. This is significant because, prior to *Parkhurst*, any knowledge or information, whether or not independently acquired by the lawyer, mistakenly fell within the scope of the privilege, when in actual fact no privilege should have attached. While the vision for attorney-client privilege reached reasonable clarity only in the 16th century, with the value attached to Elizabethan lawyers culminating in an expansion of legal business, it found its origins in the accumulated historical events which preceded it.

B Bentham, Rome and the Origins of Attorney-Client Privilege

English utilitarian philosopher Jeremy Bentham dominated English legal thought of the 18th and 19th centuries with his ‘truth theory’ of adjudication. Bentham insisted that the

⁵⁶ Id.

⁵⁷ See English Law Reports: (1557–1865) 22 ER Equity Cases Abridged, Volume 2 in which it is stated: ‘The negative has obviously been here transposed; probably through a mere typographical error. With respect to facts known by a barrister, or attorney, unprofessionally, the claim of privilege can not be maintained’. See also John Beames and William Halstead, *The Elements of Pleas in Equity: with Precedents of Such Pleas* (Halstead, 1824) 279.

⁵⁸ While no direct correlation exists between the *Bulstrode* and *Derby* judgments, Lord Taylor CJ pronounced in *Derby* that when claimed, attorney-client privilege ‘could not be overridden’. This parallels the fallible *Bulstrode* ruling that the lawyer ‘shall have the privilege of the bar and is *not* obliged to answer’.

⁵⁹ (1816) 36 ER 589.

overriding objective of the judicial system was the ascertainment of truth.⁶⁰ Attaching priority to rectitude of decision, he opposed exclusionary rules which defeated access to probative evidence.⁶¹ He argued: ‘Evidence is the basis of justice: exclude evidence, you exclude justice’.⁶² In contrast to Wigmore, who claimed the privilege was formed in the 16th century, Bentham paid homage to the Roman origins of English jurisprudence when he stated that attorney-client privilege was grounded in the Roman legal maxim that no one was bound to accuse himself.⁶³

Noting that these ‘principles and rules were of such high antiquity that the time cannot be assigned when they did not have an existence and use’,⁶⁴ Bentham cautioned against the propensity to forget that ‘both Roman and English systems of law were in use in England’,⁶⁵ with English law having been, in its first concoction, imported from ancient Rome.⁶⁶ While Bentham noted an evolutionary connection, he differentiated between the severity of exclusion created by the privilege and observed differences between the effects of the Roman law and those cemented in later English practice.

Where the Roman objective was to keep secret as much client–counsel evidence as possible, the English rule was confined to complex causes.⁶⁷ According to Bentham, the degree of refinement accorded the rule constituted no small improvement, with England’s interpretation of the ancient Roman privilege excluding not only client–

⁶⁰ Edward Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 *Univ. Pittsburgh L. Rev.* 145, 150 (2004).

⁶¹ Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice*, Vol V, 227 (1827). See also William Twining, *Theories of Evidence: Bentham and Wigmore*, 70 (1985).

⁶² *Id.* 227.

⁶³ Jeremy Bentham And John Bowring, *The Works Of Jeremy Bentham, Published Under the Superintendence of His Executor, John Bowring*, Vol Vii (1843).

⁶⁴ Jeremy Bentham, *Codification of the Common Law: Letter of Jeremy Bentham, and Report of Judges Story, Metcalf and Others*, 29 (1882).

⁶⁵ Bentham and Bowring, *supra* 61.

⁶⁶ *Id.*

⁶⁷ *Id.*

counsel relations, but extraneous witness testimony.⁶⁸ As a result, the mischief produced by the English rule was not nearly as damaging as that produced under Roman law, in which the systematic concealment was so unnatural to justice and so unpalatable to the general complexion of the English judicature that it required justification in the sight of English lawyers when it was planted in English soil.⁶⁹

According to Bentham, the roots of contemporary attorney-client privilege were clearly traceable to the era of Roman jurisprudence ‘which provided the organisational and legal framework’ for the rule to seep into later legal practice.⁷⁰ He excoriated the judiciary for failing to consider that ‘English precedents have been grounded on original Roman law’⁷¹ and limiting their reflections to English precedents for attorney-client privilege. Notwithstanding the fact that the ancient Romans ‘failed to develop distinctive standards of professional conduct, professional organisations or disciplinary standards’,⁷² Roman law faintly foreshadowed the beginnings of a distinctive and prestigious legal profession,⁷³ with Roman orators and lawyers forming the earliest legal profession in any sense of the term.⁷⁴

⁶⁸ This was not limited to client–counsel communications, but also excluded testimony based on the characteristics of impropriety, inconsistency and mischievousness. Bentham and Bowring, *supra* 61.

⁶⁹ *Id.*

⁷⁰ The *Corpus Iuris Civilis* was the body of civil law incrementally introduced from 529 to 534 on the orders of Justinian I and bearing his name: Wise or fortunate is the prince who connects his own reputation with the honour or interest of a perpetual order of men. The defence of their founder is the first cause, which in every age has exercised the zeal and industry of the civilians. See also Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* (1846).

⁷¹ Jeremy Bentham, *Rationale Of Judicial Evidence: Specially Applied To English Practice*, Vol VII, 848 (1843).

⁷² Anton-Hermann Chroust, *Emergence of Professional Standards and the Rise of the Legal Profession: The Graeco-Roman Period*, 36 B.U.L. REV. 587, 58 (1956).

⁷³ James Brundage, *The Medieval Origins Of The Legal Profession: Canonists, Civilians And Courts*, 11 (2008).

⁷⁴ *Id.* 58.

An ancient variation of attorney-client privilege can be traced back to the prosecutions of Herennius and Hortensius in 116 BC and 70 BC respectively.⁷⁵ In the first case, Gaius Marius⁷⁶ was charged with *ambitus*; the offence of electoral corruption⁷⁷ for which he would later be acquitted.⁷⁸ The prosecutor, of which history records no name, sought to compel Gaius Herennius to testify against Marius; who had been a client of the House of Herennii.⁷⁹ Under Acilian law, consul Manius Acilius Glabrio decreed that no one could be ordered to give evidence if they are their ancestors are past or present clients of the defendant or of his ancestors, or if they or their ancestors are, whether now or in the past, *patrons* of the defendant or of his ancestors,⁸⁰ including anyone pleading the case of the defendant.⁸¹ This highlights that Herennius' objection to testifying was partially based on an assumed duty of loyalty and servitude towards his client.

By contrast, the 70 BC proceedings against former Sicilian governor Gaius Verres on a charge of extortion,⁸² invited early discussion of 'honour' in connection with men who engaged in the practice of law. This concept was adopted throughout the Ciceronian period, in which Cicero lamented his inability to summon Verres' defence counsel, Quintus Hortensius Hortalus, to testify against his client.⁸³ Declaring that counsel was feigning ignorance as to 'what our experience at the Bar has repeatedly shown to us',⁸⁴

⁷⁵ Max Radin, *The Privilege of Confidential Communication between Lawyer and Client*, 16 CAL. L. REV. 487, 488 (1928).

⁷⁶ Abel Greenidge, *The Legal Procedure in Cicero's Time*, 484 (2013).

⁷⁷ Id; *Plutarch, Lives: Demetrius and Antony. Pyrrhus and Gaius Marius*, Vol IX, Bernadotte Perrin Trans, 5 (1920).

⁷⁸ Plutarch, supra 77, 475.

⁷⁹ Id; Greenidge, supra 76, 484.

⁸⁰ The significance of 'ancestry' rested on the virtuous displays of excellence achieved by past generations of men for the benefit of ancient Rome. Providing structure by operating within a shared behavioural code, an integral feature of the *mos maiorum* was the duty to increase the level of glory for one's family which lasted in perpetuity. See *Sarolta Takacs, The Construction Of Authority In Ancient Rome And Byzantium: The Rhetoric Of Empire* (2009).

⁸¹ *Avalon Project, Acilian Law on the Right to Recovery of Property Officially Extorted*, 122 BC Yale Law School <http://avalon.law.yale.edu/ancient/acilian_law.asp>.

⁸² Max Radin, supra 75, 487.

⁸³ Id.

⁸⁴ Marcus Cicero, *Verrine Orations 2 – Second Pleading Speech on Gaius Verres* (C. D. Yonge Trans, 149 (1903).

Cicero noted that he could not ignore the duty to prosecute ‘so flagrant a plunderer as Verres was commonly believed to be’,⁸⁵ particularly in an era when it was becoming increasingly difficult for Roman citizens to obtain justice:

*For indeed, in these days, no surer means of securing our country’s welfare can be devised than the assurance of the Roman people that – given the careful challenging of judges by the prosecutor – our allies, our laws, our country can be safely guarded by a court composed of senators; nor can a greater disaster come upon us all than a conviction, on the part of the Roman people, that the Senatorial Order has cast aside all respect for truth and integrity, for honesty and duty.*⁸⁶

Cicero commented that only a lawyer in his representation of an accused was exempt from bearing witness against him⁸⁷ on the grounds that he cannot give testimony in the case he was conducting: ‘Only [the] patronus is exempted from giving evidence’. Cicero’s rationale corresponded with the Herennian decision of 116 B.C. This is significant insofar as it demonstrates that it was merely customary, rather than mandatory, that a lawyer not bear witness against his client.

The ancient incarnation of attorney-client privilege was not the subject of honour concomitant with the practice of law as Wigmore alleged. It was instead grounded in the notion of slavery, with the privilege belonging to the client. This view gains currency when one accepts that the concept of not speaking against one’s client was rooted in an equally old and powerful feeling that a servant must keep his master’s secrets.⁸⁸ Within the framework of traditional Roman views, there was an expectation that a promise between lawyer and client created a natural obligation whereby the unifying principles of fidelity and piety would be obeyed by members of the legal fraternity who were conceived of as servants and helpers.⁸⁹ In the following section, a selection of academic opinion is

⁸⁵ Frank Cowles, *Gaius Verres: An Historical Study* (PhD thesis, 1917).

⁸⁶ Cicero, *supra* 77, 125 [4–5].

⁸⁷ *Id.* See also Greenidge, *supra* 76, 484.

⁸⁸ Radin, *supra* 75, 487.

⁸⁹ *Id.*

considered in order to discern whether the majority of cited authorities echoed Benthamic or Wigmorean sentiments regarding the absorption of Roman legal principles into later English law. This will aid in determining which view prevailed and eventually influenced Lord Taylor in *R v Derby Magistrates' Court; ex parte B*.⁹⁰

II Genesis of the Privilege: Contrary Academic Views

Albert Alschuler succinctly stated that ‘the history of the privilege ... is almost entirely a story of when and for what purpose people would be required to speak under oath’,⁹¹ while William Twining wrote that attorney-client privilege had ‘a rich and complex history that stretched back at least as far as classical rhetoric’.⁹² Geoffrey Hazard noted that ‘the historical record is not authority for a broadly stated rule of privilege’ and commented that it was ‘rather, an invitation for reconsideration’.⁹³ Eben Moglen noted that the history of attorney-client privilege revealed how procedure made substance and how legal evolution, like natural selection itself, adapted old structures to new functions, bringing us closer to the real mechanisms of legal development.⁹⁴ It is of relevance to note that Wigmore made a striking, albeit similar, concession when he stated:

If one instance better than another serves to exemplify the manner in which history may cover up the origin of a legal principle, destroy all traces of its real significance, change and recast its purpose and its use, while preserving an identity of form and leaving it with its vigour of life unabated and its legal orthodoxy untainted, it is this rule.⁹⁵

⁹⁰ [1996] AC 487.

⁹¹ Albert Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent* 94 MICH. L. REV. 2625, 2641–2 (1995–96).

⁹² William Twining, *supra* 61, viii.

⁹³ Geoffrey Hazard, *supra* 25, 1070.

⁹⁴ Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1090 (1994).

⁹⁵ John Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARVARD L. REV. 1, 71 (1891).

Frederick Pollock and Frederic Maitland who, as historians of English law, distinguished themselves through their ‘insights and superb historical sense’,⁹⁶ stated that Roman law failed to exhibit a face of authority in the English courts.⁹⁷ They perceived the 16th-century form of attorney-client privilege as distinct from the privilege practised in the preceding Roman and medieval eras, and offered grounds to support their contention. Firstly, Roman legal principles were not received into later English law, with every shred of evidence belonging to Roman law crushed, thrashed and forced to give up its meaning.⁹⁸ Secondly, labelling Roman law a product of time and circumstance, an historical artefact rather than a body of universally valid legal wisdom,⁹⁹ they claimed that the duty to uphold client confidences was the result of primitive custom, rather than a natural extension of a formally constituted legal profession governed by a code of conduct.

This assertion stands in contrast to arguments advanced by William Holdsworth, Charles McCormick and Lord Brougham, each of whom affirmed the Benthamic pronouncement that the loyalty owed by a lawyer to his client was deeply rooted in Roman law.¹⁰⁰ Pollock and Maitland concluded that the absence of a fully formed legal profession in Roman times precluded the need to accord special protection to the client–counsel relationship and fixed 3 September 1189 as the date at which English law began to speak clearly, articulately and

⁹⁶ Pollock revered Maitland as ‘a man with a genius for history, who turned its light upon law because law, being his profession, came naturally into the field’. Indeed, Maitland used medieval law as a tool to ‘open ... the mind of medieval man and to reveal the nature and growth of his institutions’. Pollock, on the other hand, exhibited ‘commanding qualities of mind and character’, and overwhelmed with the sweep of his learning and knowledge of facts. Robert Schuyler, *The Historical Spirit Incarnate: Frederic William Maitland*, 57(2) *American Hist. Rev.* 303, 303 (1952).

⁹⁷ See also Richard Hurd, *Moral And Political Dialogues: Being The Substance Of Several Conversations Between Diverse Eminent Persons Of The Past And Present Age, Digested By The Parties Themselves* 232 (1759).

⁹⁸ Frederick Maitland, *Why the History of English Law is Not Written*, *An Inaugural Lecture Delivered in the Arts School at Cambridge* on 13th October 1888, 5 (1888)5.

⁹⁹ William Bouwsma, *Lawyers and Early Modern Culture* 78(2) *American Hist. Rev.* 303, 326 (1973).

¹⁰⁰ Charles McCormick, *Mccormick On Evidence* 175 (1972). See Also William Holdsworth, *A History Of English Law*, Vol IX, 98 (1944); University of Northern Iowa, *Review: Life and Character of Henry Brougham*, 33(72) *Nth. American Rev.* 227, 247 (1831).

continuously.¹⁰¹ Brougham noted that the English common law underwent many additions and alterations in the process of time, with parts collected from a variety of ancient Roman codes.¹⁰² Plainly acknowledging the correlation between Roman and Elizabethan principles of confidentiality, Max Radin¹⁰³ and James Gardner¹⁰⁴ claimed that traces of Roman law could be found in the procedures of English courts and the reality, whether or not we care to admit it, is that Roman and medieval attitudes are very much “in our bones”.¹⁰⁵

The effects of Roman law did not disappear entirely, with medieval lawyers deriving much of their law from Roman sources,¹⁰⁶ while courts and jurists adopted the Roman tradition of preventing lawyers from testifying in proceedings in which they were professionally engaged.¹⁰⁷ Bentham stated that this was born of ancient Roman influence. Wigmore discounted its Roman origins and made several conflicting statements in which he variously contended that the privilege came into existence in 1375, was born of the 1562 *Perjury Act*, stated that it did not gain recognition until the 1570s and asserted that the policy of the privilege was granted in the latter part of 1700. Wigmore’s pronouncement lacks the evidential foundation to support it, but his contention proved sufficiently persuasive to convert mainstream thinking into adopting the 16th century as the birthplace of the doctrine.

Attorney-client privilege did not arrive in English law on a certain footing. Its way was paved by successive historical steps, including a series of largely isolated responses to

¹⁰¹ Frederick Maitland, *supra* 98, 4.

¹⁰² University of Northern Iowa, *Review: Life and Character of Henry Brougham*, 33(72) NTH. AMERICAN REV. 227, 247 (1831).

¹⁰³ Max Radin, *supra* 75, 487–8.

¹⁰⁴ James Gardner, *A Re-evaluation of the Attorney-Client Privilege (Part I)* 8 VILL. L. REV. 279, 289 (1963).

¹⁰⁵ Max Radin, *supra* 75, 493.

¹⁰⁶ James Brundage, *Vultures, Whores and Hypocrites: Images of Lawyers in Medieval Literature*, 1 Roman Legal Tradition 56, 57 (2002).

¹⁰⁷ Guillaume Durand, *Speculum Iudiciale*, Sandra Hindman Ed, (2013). See also James Brundage, *supra* 106, 325.

particular problems at different times'.¹⁰⁸ A more appropriate phrasing of its evolution might be that attorney-client privilege, rather than serving as a quaint remnant of an ancient legal system, enjoyed a reassertion of its status, whereby it finally achieved formal recognition in the common law. Attorney-client privilege was boldly articulated in the 16th century, but it was not a phenomenon of Elizabethan England. Despite the doctrine coming to prominence in this era when the Court of Chancery issued precedent-making pronouncements on this subject matter, England did *not* give birth to the concept of attorney-client privilege. This is significant because the House of Lords in *Derby* recognised English law as the relevant starting point and consequently overlooked other historical edicts in which the privilege was narrowly construed, with suppression of confidential communications requiring justification rather than being granted automatically.¹⁰⁹

III Conclusion

This article has analysed the rationales underpinning the historical justification for attorney-client privilege according to the perspectives of Jeremy Bentham and John Henry Wigmore. The first defining attribute of the privilege was a moral underpinning informed by the concepts of servitude and loyalty rather than profession and honour. The foundations of not speaking against someone with whom one had a particular relationship were embedded in the ancient rationale whereby lawyers were proscribed from testifying against clients.

Wigmore denied the struggles and achievements of his legal predecessors and obscured the ancient common law application of the privilege. This article has demonstrated that, through adopting a Wigmorean view of the history of attorney-client privilege, Lord

¹⁰⁸ William Twining, *supra* 61, 1.

¹⁰⁹ *Id.*

Taylor's pronouncement in *R v Derby Magistrates' Court; Ex parte B*¹¹⁰ fails to withstand detailed scrutiny and obfuscates the true heritage of the doctrine.

¹¹⁰ [1996] AC 487.

An American Tragedy:
The Story of Johnny Lynn Old Chief

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According to a writer summarizing a recent report by the Bureau of Justice “Native Americans are incarcerated at a rate 38% higher than the national average and Native American youths are 30% more likely than whites to be referred to juvenile court than have charges dropped. That same report also notes that Native Americans are more likely to be killed by police than any other racial group, according to the Center on Juvenile and Criminal Justice.¹ This same report also notes that “Native Americans fall victim to violent crime at more than double the rate of all other US citizens, according to BJS reports. Eighty-eight percent of violent crime committed against Native American women is carried out by non-Native perpetrators.”²

As most cases in the criminal justice system these individuals who make up these statistics are reduced, by and large, to nothing more than a statistical flashpoint and then forgotten. This article will attempt to place a name and a face with one of those forgotten Native Americans who were caught up in the “reservation to prison pipeline” for most of his juvenile and adult lifetime. Life on a reservation is a stark and vivid contrast to the life most non-native Americans lead. Monotony, alcohol, unemployment, are constants of reservation life and the lives of those Native Americans who life on reservations. The reservation lifestyle is vastly different from the rest of the non-member, i.e. non-Native

¹ Flanagin, Jake, *Reservation to Prison Pipeline: Native Americans Are the Unseen Victims of a Broken US Justice System*, <http://qz.com/392342/native-americans-are-the-unseen-victims-of-a-broken-us-justice-system/>

² Id.

Americans and the way Native Americans are treated by the justice system is different as well. Native Americans are considered to be citizens of the United States and members of their tribal nations, however, when it comes to the federal criminal justice system, they have become a special category and treated much differently than other groups who fall under the control of the federal justice system and the federal prison system.

According to the National Congress of American Indians “[N]ative peoples and governments have inherent rights and a political relationship with the U.S. government that does not derive from race or ethnicity. Tribal members are citizens of three sovereigns: their tribe, the United States, and the state in which they reside. They are also individuals in an international context with the rights afforded to any other individual.”³ However, this sovereignty does not extend into the criminal justice system, or so it would seem.

This article will attempt to focus on one individual who has spent his entire life under the control of the federal government and who epitomizes the tragedy of the duality of the reservation system and the criminal justice system. The federal Census Bureau recognizes over 567 different tribes in the United States. The United States Constitution recognizes the Indian Tribes as sovereign nations,⁴ however, on June 2, 1924, that Congress granted United States citizenship to Native Americans born in the United States. But even after the Indian Citizenship Act⁵ passed, some Native Americans weren’t allowed to vote because the right to vote was governed by state law.

³ See, “*Introduction to the Indian Nations in the United States*,” Introduction 2016.

⁴ United States Constitution Article I, Section 8 “Congress shall have the power. . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;”

⁵ 43 U.S. Stats. At Large, Ch. 233, p. 253 (1924)

The subject of this article came into general public view in January, 1997, when the United States Supreme Court issued an opinion dealing with judicial abuse of discretion regarding the admission or rejection of relevant evidence. That would not be so noteworthy except for the fact that it was the first decision by the Court which even attempted to define and place limitations on a trial judge's use of his or her discretion in evidentiary matters. As noted in the opinion, the principal issue in the case was the scope of a trial judge's discretion under Federal Rule of Evidence 403. FRE 403 which authorizes a judge to exclude even relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice. . ."⁶ The central focus of that issue, in the Court's opinion, dealt with the term "unfair prejudice." This case has become the case most often cited when lawyers request that a judicial decision based on discretion be reviewed by appellate courts. Ironically, the facts of the case are hardly touched upon in the Court's language addressing what is fair and what is unfair with regard to a particular defendant.

Justice Souter, writing for the majority of the Court, noted that whenever a particular item of relevant evidence raises a danger of unfair prejudice, the trial judge, in deciding whether to exclude that evidence pursuant to the authority of Rule 403, would have to "make these calculations with an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case. . ."⁷ In the Old Chief case, this issue boils down to whether or not the prosecution needed the underlying facts of one of Johnny Lynn Old Chief's prior convictions in order to make its case. This article will not attempt to fathom the depths of the legal issues in that question, but rather, it will attempt to present the history of Johnny Lynn Old Chief's life and whether or not that "evidentiary richness and narrative integrity" should or should not have been a part of his prosecution. The Supreme Court, in the Old Chief case, decided that the facts of Johnny Lynn Old Chief's prior

⁶ Johnny Lynn Old Chief v. United States, 519 U.S. 172, 179, 136 L.Ed.2d 574 (1997)

⁷ Id. at page 183.

criminal conviction was not necessary because of a reasonable alternative offered by Old Chief's attorneys.

Historically, a judge's discretion has been defined as:

[n]ot an arbitrary power, but one which must be exercised wisely and impartially. In its practical application [...] judicial discretion is substantially synonymous with judicial power. . . . The term 'discretion' has been defined to be an impartial discretion, guided and controlled in its exercise by fixed legal principles; a legal discretion to be exercised in conformity with the spirit of the law, and in a manner to sub serve and not to defeat the ends of substantial justice.⁸

In legal opinions, there is perhaps no term more blithely used and so little understood than the phrase "abuse of discretion." It would shock the average non-lawyer to realize fully the enormous power that trial judges have in exercising their individual discretion over the lives and affairs of individuals who appear before them. The only oversight of the extent to which a trial judge may exercise his or her discretion in matters such as the admissibility of evidence, the scope of questioning of witnesses, the length of time allocated to trial preparation, and whether a defendant is sentenced to a term of incarceration within the guidelines provided by a legislative body, is an appellate court's determination of whether the trial judge, in any particular matter, may have unfairly "abused" his or her discretion. Only in the rarest instances will an appellate court find that a trial judge has abused (or misused) his or her discretion. As noted, it was not until the late 1990's that the United States Supreme Court even attempted to render a meaningful decision on what constitutes an "abuse of discretion."⁹

⁸ Griffin v. State, 12 Ga. App. 615 (1913).

⁹ Old Chief v. United States, 519 U.S. 172 (1997).

The terms “discretion” and “abuse of discretion” have been discussed since the very earliest of our judicial times. Lord Camden, one of our most distinguished professional ancestors, once noted that, “The most odious and dangerous of all laws would be those depending on the discretion of judges [and] that the discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature can be liable.”¹⁰

Another legal scholar in the early formation of our legal system and the rules of evidence, Sir Edward Coke, is reported to have written that “Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colorable glasses and pretenses, and not to do according to their (the judges’) wits and private affections.”¹¹ The allocation of discretion to trial judges assumes that judges will act in accordance with due process fairness as required by constitutional mandates (at both the state and federal levels of the judiciary). Both the Fifth Amendment and the Fourteenth Amendment of the United States Constitution demand that individuals be afforded due process.

At the intersection of due process and discretion is the concept of fairness. Courts across our nation have uniformly held that “the requirement of due process is a requirement of *fundamental fairness*. [However] there is no fixed standard that applies in all cases. Instead, due process implies a flexible standard that varies with the nature of the interests affected and the circumstances of the deprivation.”¹² This article will attempt to focus on the

¹⁰ State v. Cummings, 36 Mo. 263 (1954).

¹¹ Kaufman, Henry P., “Judicial Discretion,” 17 Am. Law Review, 567-73 (1883). (Kaufman noted that judicial discretion arose from the exercise of the kingly prerogative when the judicial was really a part of the executive power.

¹² Furey v. Temple University, 884 F. Supp. 223, United States District Court for the E.D. of Pennsylvania (2012)

“fairness” issues associated with the abuse of discretion standard and that focus will use the case of Johnny Lynn Old Chief as a vehicle for that analysis. Was he treated fairly by the courts or is he just another example of the horrible way our country has treated Native Americans over the centuries?

Many courts across the nation have held that “the Due Process Clause of the Fifth Amendment and the rules of evidence are not synonymous.” (cites omitted). “Rather, ‘the Due Process Clause is the baseline standard with which a statute must comply to remain fundamentally fair, and the rules of evidence are a set of heightened procedural rules that go beyond the minimum standards required by the Fifth Amendment.’”¹³ A reasonable explanation of the full definition of “due process” would be “fairness.” Whether a decision is fair, in far too many instances, depends on how a judge exercises his or her discretion.

Whether a decision is “fair” or not is vested in the trial judge and that judge’s decision (about what is fair or unfair) is part of the extremely broad discretion given to him or her. Thus, a trial judge’s determination that a particular action will not be overruled unless it is clear that he or she has abused that discretion in arriving at that discretionary decision.¹⁴ Just what does the term “fairness” mean in the legal setting? The final arbiter of that and other legal questions is always going to be the appellate courts and ultimately the United States Supreme Court. However, as noted previously, the Court has only taken up that question, in substance, once in its history and that is the case involving Johnny Lynn Old Chief. As noted in the introduction, this article will attempt to present a picture of the person behind the case styled “Old Chief v. United States of America” and what little we know about the “richness and narrative integrity” of his life.

¹³ United States v. Taylor, 302 F. Supp. 901 United States District Court N.D. Indiana (2003)

¹⁴ Mister v. State, 286 Ga. 303 (2009)

The road to the United States Supreme Court began in northern Montana with a raucous Native American member of the Blackfeet Nation named Johnny Lynn Old Chief. On October 23, 1994 Johnny Lynn Old Chief was arrested for the second time (as an adult) by the officers of Bureau of Indian Affairs and charged with the crime of assault with a dangerous weapon and of the offense of being a felon in possession of a firearm, using or carrying a firearm during the commission of a violent crime.¹⁵ This case and the issue of what is and what is not an abuse of discretion in evidentiary matters eventually led to the United States Supreme Court's decision under discussion in this article. The crime which started this case to the United States Supreme Court occurred one month and six days after Johnny Lynn Old Chief had been released from federal custody on a 1989 conviction for assault resulting serious bodily injury.¹⁶

The charges arose after a wild and drunken all-day Saturday party in the town of Browning, Montana, the home of the Blackfeet Nation Tribal Council.¹⁷ Johnny Lynn Old Chief, after a one punch fist fight at a local bar, set in motion the legal case that would put the question of what is "fair" and what is an "abuse of discretion" before the United States Supreme Court.

Johnny Lynn Old Chief's almost life-long battle with the United States judicial system began as so many other encounters between the United States government and Native Americans had begun, on the vast plains of Montana near the Great Rocky Mountains. Johnny Lynn Old Chief is a member of one of the largest tribes of Native American

¹⁵ The information contained in this memorandum were taken from several sources, including, trial court transcripts and exhibits from Johnny Lynn Old Chief's various appeals and from the website devoted to the Museum of the Plains Indian Artist Association.

¹⁶ Brief of Appellee, United States of America, v. Johnny Lynn Old Chief, C.A. 95-30283, In the United States Court of Appeals for the Ninth Circuit (1996)

¹⁷ The Blackfeet Indian Reservation is home to the 17,321-member Blackfeet Nation, one of the 10 largest tribes in the United States. Established by treaty in 1855, the reservation is located in northwest Montana. See, <http://blackfeetnation.com/>

Indians, the Black Foot Indian Tribe. As will be noted later in this article in more detail, Johnny Lynn Old Chief and his many relatives lived in and around Browning, Montana where, as an adult, he earned a living working on the fire lines for the Federal Bureau of Land Management¹⁸ and occasionally earning money as an amateur boxer. It does not require too much conjecture to imagine a Johnny Lynn Old Chief two hundred years ago, as a North American Plains Indian, riding across the northern Montana plains in search of the bison that are now raised on ranches to feed easterners.

Johnny Lynn Old Chief, rightly or wrongly, is a sad stereotype of the condition of so many Native Americans who have been forced to live for over a century on “Indian Reservations.” Johnny Lynn Old Chief and many of his family members grew up in Browning, Montana (population 1,065). One of his cousins works for the local welfare agency and another works for at the local hospital in the town of Browning. The town of Browning is a 0.3 square miles on the Blackfeet Indian Reservation. The City of Browning, Montana was incorporated in 1919 and is located about 4,375 feet above the sweeping plains of northern Montana in the foothills of the Rocky Mountains. The Town is 13 miles east of what the Blackfeet call the “Backbone of the World”, the Rocky Mountains.

The small town of Browning is divided by Highway 2 and that highway is the only connection between Browning and the rest of Montana, or for that matter the rest of the world. Driving into Browning from the southeast, the town appears to be nothing more than a spread of old houses and abandoned stores. Just before entering the town limits, there is a casino and grocery store and very little of anything else. As the highway continues into the town, there is a middle school and several abandoned businesses, services stations,

¹⁸ According to the job description advertised by the Department of Interiors Bureau of Land Management, the Montana and Dakotas, a fire fighter is required to be “highly motivated with a strong work ethic strongly committed. Firefighting is a full time job that requires an enormous amount of time and fire fighters must be physically fit when reporting to work and not afraid to sleep in the dirt and be unable to shower daily. See, <http://www.blm.gov/mt/st/en/prog/fireaviation/bdc/jobs.html>

and other once locally owned stores. When the highway turns northwest, you can begin to see poorly constructed houses or mobile homes stretching out north and south of Highway 2. In less than a quarter mile, the town limits end and you will find another casino, a Holiday Inn Express, and the Junction Café. There is nothing more than a tribal hospital just north of the highway, a Blackfeet Indian Trading Post, and more homes in disrepair.

Few members of the tribe leave Browning except to spend extended periods of time in federal prisons like Johnny Lynn Old Chief. When asked if he had lived in Browning his whole life, one member of the tribe responded “except for the time I lived somewhere else.”¹⁹ This is the world in which Johnny Lynn Old Chief lived except for the time he lived as a resident of the U.S. government’s federal prison system.

Johnny Lynn Old Chief’s life on the Blackfeet Nation Reservation is, in many ways, typical of the lives of so many Native Americans. The 1972 Montana Constitution (continuing from previous state constitutions in Montana) provides that the “The Enabling Clause” of the United States Constitution²⁰ explicitly acknowledged Congress’s absolute control and jurisdiction over all Indian land, including state authority to tax the land, and forever disclaiming title to lands owned or held by or reserved for an Indian or for Indian tribes. Article X, section 1(2), of the 1972 Montana Constitution recognizes “the distinct and unique cultural heritage of the American Indians” and commits the state in its educational goals to “the preservation of their cultural integrity”. Montana is alone among the 50 states in having made an explicit constitutional commitment to its Indian citizens.²¹ However,

¹⁹ Conversation with Ernie Heavy Runner at the Junction Café on July 29, 2016.

²⁰ The section of a constitution or statute that provides government officials with the power to put the constitution or statute into force and effect. Seven of the amendments to the U.S. Constitution contain clauses that give Congress the power to enforce their provisions by appropriate legislation.

²¹ “*Tribal Nations of Montana: A Handbook for Legislators*,” Published by the Montana Legislative Council. Rep. Bob Gervais, Chairman of the Committee on Indian Affairs, at page 4 (1995)

that commitment is, in many ways, a hollow shell and of no real benefit to Native Americans like Johnny Lynn Old Chief.

For centuries the northern plains of the State of Montana were the homes of the Northern Plains Tribal people including the Blackfeet, Crow, Northern Cheyenne, Sioux, Assiniboine, Arapaho, Shoshone, Nez Perce, Flathead, Chippewa, and Cree. These Native Americans roamed freely on lands which they called their own, living as a Plains people, far away from the coming of the Europeans and Manifest Destiny.²² However, after the European descendants began to move onto these lands, life became a round of seemingly endless conflicts between these tribes with the United States government.

In 1877, the legendary Chief Joseph of the Nez Perce Indian Nation fought his tribe's last battle with the United States Army just east of the present day site of the Black Foot Indian Reservation in northern Montana. After eluding the pursuing army troops from Utah, Chief Joseph, in an attempt to move his tribe into Canada and out of reach of the army troops pursuing him, camped with his people near the Bear Paw Mountains, just south of the Canadian border. Chief Joseph thought that is site would provide refuge for his people from the continuing efforts to place them in subjugation and condemn these Native Americans to live on designated reservations.

Unfortunately for Chief Joseph and his people, he was not prepared for the tenacious pursuit of the U.S. Army and the United States government's intent to remove or conquer all of the plains tribes living in Montana and in the Dakotas. After a prolonged battle (which actually ended in a draw) Chief Joseph gave up and provided history with a remarkable coda to his hope of living freely on the plains of the Northwest. In surrendering himself and his people to the army, Chief Joseph told his warriors:

²² Eric Foner and John A. Garraty, Editors, *"The Reader's Companion to American History,"* Houghton Mifflin Harcourt Publishing Company (1991).

I am tired of fighting. Our chiefs are killed.... The old men are all killed.... It is cold and we have no blankets. The little children are freezing to death. My people, some of them, have run away to the hills and have no blankets, no food; no one knows where they are, perhaps freezing to death. I want time to look for my children and see how many of them I can find. Maybe I shall find them among the dead. Hear me, my chiefs; I am tired; my heart is sick and sad. From where the sun now stands, I will fight no more forever.²³

Chief Joseph surrendered at a site just south of the present intersection of U.S. Highway 2 and U.S. Highway 87. That is the same Highway 2 that runs through the middle of Browning, Montana, about a hundred miles to the west. U.S. Highway 2 runs through the middle of Browning, Montana, Johnny Lynn Old Chief's hometown. While the story of Johnny Lynn Old Chief might be a hundred years removed from the lament of Chief Joseph that all the "chiefs are killed," Johnny Lynn Old Chief's life of defeat is one more example of the never-ending results of Chief Joseph's defeat.

Browning, Montana is the largest community on the Blackfeet Indian Reservation. The 1.5-million acre Blackfeet Indian Reservation includes most of Glacier County and the reservation itself is home to about 8,600 members of the Blackfeet Nation, the largest tribe in Montana. Although, Browning is the hub of the Blackfeet Reservation and the home of several tribal offices and a Blackfeet Indian Trading Post not everyone who lives in Browning are Native Americans. Non-Native Americans are referred to as "non-members"²⁴ and not permitted to participate in tribal council elections.²⁵ Major uses of the

²³<http://www2.gsu.edu/~eslmlm/chiefjoseph.html>

²⁴ See, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). United States Federal Courts have consistently held that Native American Nations lack inherent sovereign authority over non-Indian (non-member) criminal offenders.

²⁵ Conversation with Ernie Heavy Runner, July 29, 2016.

land around Browning include ranching and farming, with the principle crops being wheat, barley and hay. Upon leaving Browning on U.S. Highway 2 there are herds of domesticated bison being raised for the trendy restaurants in the east.

Further south, near Big Sky, Montana is the home of the Flying D Ranch, Ted Turner's 113,613-acre ranch used for, among other things to raise bison for his "Montana Grills" across the United States.²⁶ Only one of his "grills" is in Montana and that is in the city of Bozeman in the Baxter Hotel.²⁷ Leaving Browning and heading west on Highway 2, there is the last encampment of the largest contingent of members of the Blackfoot Confederacy, often referred to as "The Lords of the Great Plains." Johnny Lynn Old Chief is a direct descendent of the great people who once called this part of the North America their homeland.

Johnny Lynn Old Chief was born in 1963 and before he reached his 14th birthday in 1977 he had been adjudicated in federal juvenile court as a delinquent based upon a charge involving two counts of burglary and one count of theft.²⁸ In May of 1978, after reaching his 14th birthday, Johnny Lynn Old Chief was again adjudicated delinquent for assault with a knife and failure to comply with the alcohol and curfew conditions of his previous probation on the burglary charges. As a result of those charges and a finding that he had

²⁶ <http://www.tedturner.com/turner-ranches/turner-ranch-map/flying-d-ranch-montana/>

²⁷ See, <https://www.tedsmontanagrill.com/tmg061.html>

²⁸ Model Indian Juvenile Code at § 2454 provides that:

The Secretary of the Interior, either directly or by contract, shall provide for the development of a Model Indian Juvenile Code which shall be consistent with the Juvenile Justice and Delinquency Prevention Act of 1974 [42 U.S.C.A. § 5601 et seq.] and which shall include provisions relating to the disposition of cases involving Indian youth arrested or detained by Bureau of Indian Affairs or tribal law enforcement personnel for alcohol or drug related offenses. The development of such model code¹ shall be accomplished in cooperation with Indian organizations having an expertise or knowledge in the field of law enforcement and judicial procedure and in consultation with Indian tribes. Upon completion of the Model Code, the Secretary shall make copies available to each Indian tribe.

violated the terms of his probation he was committed to the custody of the Yellowstone Boys Ranch in Billings, Montana, for “observation and study.” The mission of the Yellowstone Boys and Girls Rand is to support, promote, advance and enable charitable, religious, and educational organizations and programs whose services primarily benefit youth and adults with special needs. The residential facility was founded in 1957 and is designed to provide residential and community based care and treatment for emotionally troubled youth.²⁹

In October of 1978 Johnny Lynn Old Chief again violated the terms and conditions of his probation and in January 1979 he was sent to the Chemawa Indian School in Salem, Oregon. According to that school’s website, the “Chemawa Indian School is currently over 125 years old and is the oldest, continuously operated boarding school for Native American students in the United States. While its mission has changed some over the years its highest goal has always been to educate Native American students for the world outside.”³⁰ Two months after arriving there he was expelled for fighting and drinking. In October of 1979, he was sent to the Kicking Horse Job Corps Center in Ronan, Montana, which is located on the Flathead Indian Reservation 150 miles to the west of Browning. Kicking Horse Job Corps Center is part of the national Job Corps and is operated by the Confederated Salish and Kootenai Tribes of the Flathead Nation. The Kicking Horse Job Corps Center’s mission, according to its website, is to “teach eligible young people the skills they need to become employable and independent and placing them in meaningful jobs or further education.”³¹ Five months after being arriving at the job corps program, Old Chief was expelled because he repeatedly violated the rules and regulations of the Job

²⁹ <http://www.yellowstonefoundation.org/>

³⁰ <http://www.chemawa.bie.edu/history.html>

³¹ <http://kickinghorse.jobcorps.gov/about.aspx>

Corps Center. The violations which led to his expulsion were possession and use of drugs; possession and the manufacture of weapons; and possession of stolen property.³²

After returning to Browning, and while still on probation, he was charged with the burglary of a grocery store in downtown Browning. Again, he was committed to custody of a juvenile institution, this time in the Pine Hills School in Miles City, Montana and again for a period of observation and study. Pine Hills is Montana's only long-term state operated facility for adjudicated male youthful offenders (ages 10-17) committed by the District Youth Courts.³³ Miles City is located approximately 450 miles east of Browning. Miles City was founded originally as a fort after Custer's defeat at the Battle of Little Bighorn.³⁴

Johnny Lynn Old Chief's stay in Miles City ended like most of his other juvenile incarcerations –badly! He was expelled from that program in the middle of 1980 and in October of 1980, he was placed in a foster home in Alaska under the supervision of the federal District Court of Alaska. His tenure in that foster home lasted less than a year and he was returned to Browning after being involved in a fight with another student at the school he was required to attend. (It was also reported that he had attempted to have marijuana mailed to him from Browning). In November 1981, after returning to Browning, he allegedly shot a man in the face with a sawed-off shotgun. Although the shooting was found to be in self-defense, he was once again found to be in violation of his probation because, even in self-defense, he was found to be in possession of an illegal weapon (a portend of adult charges later on). He was again returned to Montana's juvenile reform school in Miles City the Pine Hills School. He remained there until he was released and returned to Browning in May, 1982.³⁵

³² <http://mileschamber.com/contact-us/>

³³ See, <https://cor.mt.gov/Youth/pinehills>

³⁴ See, <http://mileschamber.com/contact-us/>

³⁵ See, Brief of Petitioner, 1996 WL 279413 (U.S.) on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Johnny Lynn Old Chief was represented by Daniel Donovan, Assistant Federal

In June of 1982, Johnny Lynn Old Chief was again charged with a probation violation because he had become intoxicated in a local Browning bar and he assaulted his girlfriend, and then fought with another customer. On July 16, 1982, he got into a fight while drunk in the same bar and shot someone in the foot. When the Browning police attempted to serve an arrest warrant on him, he attempted to elude them and got into a high-speed car chase with officers from the Bureau of Indian Affairs³⁶ and was finally arrested in Browning at his parents' home.³⁷ As a result of this incident, he was sent to the Flandreau Indian School on the Flandreau Indian Reservation in Flandreau, South Dakota. Flandreau is over a thousand miles east of Browning in the most eastern part of South Dakota. An article in the Omaha-World Tribune described the school as the last of its kind. The school belongs to the federally recognized Flandreau Santee Sioux Tribe of South Dakota. They are Santee Dakota people, part of the Sioux tribe of Native Americans. The reservation is located in Flandreau Township in central Moody County in eastern South Dakota, near the city of Flandreau.

The U.S. government, by treaty obligation, must provide education and vocational opportunities to members of the Indian Nations. "The federal Bureau of Indian Education, an arm of the U.S. Department of the Interior, funds and oversees 183 day and boarding schools in 23 states, plus two postsecondary schools. Most of the schools are now run by tribes. The Bureau directly manages four off-reservation boarding high schools, including Flandreau. The boarding schools still serve a purpose. They are

Defender, Federal Defenders for the District of Montana. (quoting Section 4A1.3, U.S.S.G. a Presentence Report prepared by the Probation Department of the Justice.

³⁶ The Bureau of Justice Indian Affairs- Office of Justice Services is responsible for the protection of lives, resources, and property which lies at the heart of the BIA's law enforcement effort. This federal agency is responsible for the overall management of the Bureau of Indian Affairs' law enforcement program. There are more than 567 registered Native American Tribes within the boundaries of the United States of America. The Bureau of Indian Affairs provides police, investigative, corrections, technical assistance, and court services. According to the website maintained to recruit new officers to its ranks, its "main goal is to uphold the constitutional sovereignty of the federally recognized Tribes and preserve peace within Indian country." See, <http://www.bia.gov/WhoWeAre/BIA/OJS/ojs-careers/index.htm>

³⁷ Id.

designed for students from troubled homes and schools, an alternative to schools at remote reservations.” Based upon Johnny Lynn Old Chief’s juvenile record it would seem that he was being removed as far away from Browning as possible.³⁸

Unfortunately, in October 1982, at the age of 19, Johnny Lynn Old Chief was expelled from the “last of its kind” school for seriously assaulting another student. After he was expelled from the school, he once again returned to the Blackfeet Nation and Browning, Montana. However, this time he returned to Browning not as a juvenile but as an adult. If he committed further crimes, the criminal justice system would now begin to punish Johnny Lynn Old Chief as an adult and not a child.

Those “future crimes” began less than two years after his return to Browning and the only life Johnny Lynn Old Chief had known. Law enforcement matters involving adults on Indian reservations in Montana are primarily the responsibility of the tribal police and the Bureau of Indian Affairs. Tribal courts can impose only minor sentences; however, the Bureau of Indian Affairs and the police officers working for that bureau have jurisdiction to arrest for felonies and misdemeanors. The Courts of the United States have jurisdiction over serious crimes committed on Indian reservations, even those crimes by one “member” against another.³⁹ Congress has provided that a state may assume criminal jurisdiction within Indian Territory with tribal consent, but Montana has never done so.⁴⁰

In 1984, two years after returning from Flandreau, Johnny Lynn Old Chief, now as an adult, was convicted of armed robbery and sentenced to four years in federal prison. According to the arrest records in that case, he had attempted to rob a bar with a pistol.

³⁸ Grace, Erin, “*Grace: Among the Last of Its Kind, Flandreau Indian School Catches Second Wind*,” Omaha-World Tribune, September 21, 2015.

³⁹ 18 U.S.C. section 1153.

⁴⁰ See 25 U.S.C. § 1321 (1994).

According to witnesses, he was quite drunk when he drew his pistol to rob the bar, the bartender drew his pistol and shot him twice thus preventing the armed robbery and wounded Johnny Lynn Old Chief. After that conviction, Johnny Lynn Old Chief spent just over four years in federal prison, his first, but not last, prison sentence as an adult.⁴¹

Johnny Lynn Old Chief was released from federal prison in July 1988 and he once again returned to Browning. Less than six months later, in December, Johnny Lynn Old Chief was charged with of "knowingly and unlawfully assault[ing] Rory Dean Fenner on the 18th of December 1988. In that case, the assault resulted in serious bodily injury to the victim. After a jury trial in early 1989, Johnny Lynn Old Chief was convicted and sentenced to a term of five years in a federal prison. After his release in September of 1993 for the shooting of Rory Dean Fenner, he, once again, returned to the Blackfeet Indian Nation and Browning. For most of his childhood, from age 14 to age 19, Johnny Lynn Old Chief had either been on juvenile probation or living in various types of juvenile reform schools. After his release from federal prison in 1993 for the assault charge, Johnny Lynn Old Chief had spent the first nine years of his adult life in federal prison. In 1993 he turned thirty years of age.

At the age of thirty in October 1993, one month and six days after his release from prison Johnny Lynn Old Chief was again arrested and charged with the crime which took him and the issue of abuse of discretion to the United States Supreme Court. This time he was once again charged with the crime of assault with a deadly weapon. This trip to the justice system began on Saturday night, October 23, 1993, Johnny Lynn Old Chief was involved in a "fracas"⁴² involving gunfire. Three separate groups of people were involved and the

⁴¹ Details concerning much of Johnny Lynn Old Chief's crimes taken from proposed sentencing memorandum which were filed in his cases.

⁴² A fracas is defined as a noisy disturbance or quarrel, Compact Oxford English Dictionary, Third Edition, page 397.

incidents took place at two different locations, Ick's Bar and the old Exxon gasoline station on U.S. Highway 2.⁴³ Four people, Stacey Everybody Talks About, Stephanie Spotted Eagle, Jess Wesley Crawford and Johnny Lynn Old Chief had been riding around Browning during the day in a pickup truck. The pickup was owned by Ms. Everybody Talks About's boyfriend, Marvin England. Mr. England would encounter the group a little later when the alleged gunshot incident. Ms. Everybody Talks About did the driving. Various purchases of alcohol were made during the day and, in fact, everyone was highly intoxicated. Ms. Everybody Talks About stated that she had consumed too many beers to remember or count. After driving around for some time, Mr. Crawford (a paraplegic) got tired and asked to be dropped off at his home.

Mr. Crawford, a local used car dealer, was carrying a bank bag of money and a 9 mm pistol, both hidden under the seat of the pickup. When Mr. Crawford was dropped off, the pistol was accidentally left under the seat. Although the gun belonged to Mr. Crawford, Ms. Everybody Talks About had placed the pistol under the driver's seat of the pickup. There was no evidence that Johnny Lynn Old Chief was aware of the gun. Sometime after dropping Mr. Crawford off at his home, the three others got back together in the same pickup and Ms. Everybody Talks About continued to do the driving. At some point in the afternoon, they parked the pickup truck in front of Ick's Bar. Ick's Bar is a rather decrepit building with a liquor store to one side and a bar room to the other side. The parking lot is gravel and full of potholes. The parking lot is sometimes used for overnight parking for tractor trailers traversing U.S. High 2.

⁴³ The author of this article visited Ick's Place when investigating the background for this article and seeking witnesses to interview. The bar, located on U.S. Highway 2, is in the middle Browning in a somewhat rundown building with is also the home of a liquor store. The wall of the front of Ick's Place announces that the bar is "air conditioned", and is also adorned with two large cartoon-like characters depicting drunken Native Americans wearing cowboy hats. The white stucco building is covered with a red-roofed corrugated tin cover and about one quarter mile from the offices of the Blackfeet Nation Tribal Council. The bar is located less than 200 yards from a building housing the "Blackfeet Trading Post.

Sometime later another vehicle, a Chevrolet Suburban occupied by Anthony Calf Looking and Luis Reevis, pulled into the parking lot at Ick's Bar and parked near the pickup truck occupied by Ms. Everybody Talks About and Johnny Lynn Old Chief. Anthony Calf Looking and Louis Reevis had also been drinking all day. Mr. Calf Looking testified that they had "drank a couple of cases of beer that day" and as a result, he couldn't remember "too much." Mr. Reevis said that he had been "kind of drunk all weekend." Mr. Reevis admitted that because he was drinking beer and whiskey, he did not have a clear memory of the events that occurred in front of Ick's Bar. As one of Johnny Lynn Old Chief's attorneys wrote in his appeal to the United States Supreme Court, "drinking to the point of memory loss is not uncommon on the Black Foot Indian Reservation in Browning, Montana."⁴⁴

Anthony Calf Looking and Luis Reevis saw the pickup truck driven by Ms. Everybody Talks About and they also saw Johnny Lynn Old Chief sitting beside her in the truck. All of these individuals had known each other for years. Johnny Lynn Old Chief had quite a reputation in Browning as an amateur boxer; that reputation made him the target of challenges from men like Anthony Calf Looking.⁴⁵

Anthony Calf Looking apparently wanted to pick a fight with Johnny Lynn Old Chief. The fight occurred because Anthony Calf Looking yelled over at the occupants of the pickup truck "Who wants to fight." Then directly looking at Johnny Lynn he said, "You think you are tough?" Upon hearing this, Johnny Lynn got out of the pickup truck and walked over to the car where Anthony Calf Looking was exiting the passenger side of the Suburban,

⁴⁴ Brief of Petitioner on Writ of Certiorari to the United States Supreme Court, Old Chief versus the United States of America, October 1995.

⁴⁵ Conversation with Ernie Heavy Runner, July 29, 2016 while being interviewed at the "Junction Care" on the outskirts of Browning, Montana. Mr. Heavy Runner, a lecturer on Blackfeet culture knows Johnny Lynn Old chief and indicated that he also was working, at times, on the fire lines for the local utility companies whenever fires threatened the lines.

he turned around and found himself face-to-face with face Johnny Lynn Old Chief. As Anthony Calf Looking was stepping out of his vehicle, Johnny Lynn Old chief knocked him to the ground with one punch. After recovering from the punch, Anthony Calf Looking got up and took off running. He ran away from Ick's Bar and ran across Highway 2 toward the Exxon Service Station. After he had crossed the highway, he heard a gunshot and immediately fell to the ground. There was no indication that the gunshot had been fired in his direction.

Anthony Calf Looking later testified that he had never seen Johnny Lynn with a gun. Mr. Reevis also testified that he never saw Johnny Lynn with a gun and he only heard what he thought was a gunshot. At Johnny Lynn Old Chief's trial, Ms. Spotted Eagle admitted that she was the person who grabbed the gun from under the seat and shot it.

After the brief fight, the three, Stacey Everybody Talks About, Stephanie Spotted Eagle, and Johnny Lynn Old Chief got back into the pickup truck and drove across Highway Number 2 to the old Exxon gasoline station. After Anthony Calf Looking ran from the Exxon Station, the occupants of the pickup truck and Johnny Lynn drove the short distance over to the station and parked the pickup truck near another vehicle parked there and occupied by Marvin England and Kirn Radasa. At the old Exxon station, Mr. England and Mr. Radasa testified that they had heard a gunshot, but neither had seen Johnny Lynn Old Chief with a gun.

The next day, Ms. Everybody Talks About told Mr. Crawford that Johnny Lynn Old Chief had gotten into a fight and that she had fired Mr. Crawford's pistol. The pickup truck in which Ms. Everybody Talks About and Johnny Lynn Old Chief were riding belonged to Marvin England, who, was reported to be the boyfriend of Ms. Everybody Talks About. Later during the investigation, Mr. England stated that he had been drinking with Mr.

Radasa “all day and all night.” Mr. Radasa said that the two of them had consumed a case and a half of beer by the time they got to the old Exxon station.

Even though Ms. Everybody Talks About would later testify that Johnny Lynn Old Chief fired one shot in the air before they drove over to the Exxon Station, but she later admitted that she had not seen Johnny Lynn fire the gun there. Johnny Lynn Old Chief did not make any statements nor did he testify at his trial. However, when he was arrested the police found four bullets and one shell casing in his pocket. A latent fingerprint was discovered on the magazine of the pistol.

This fingerprint did not match the known fingerprints of Johnny Lynn Old Chief nor the known fingerprints of Ms. Spotted Eagle or Mr. Crawford. Despite attempts by Johnny Lynn Old Chief’s attorneys to secure an expert to test the fingerprints that were found (none of which belonged to Johnny Lynn Old Chief), the trial judge refused their repeated requests. No comparison was ever made of this latent fingerprint to the known fingerprints of Ms. Everybody Talks About or anyone else involved in these incidents.

In addition to the charges against Old Chief for his alleged firing of the gun at Anthony Calf Looking, the government also charged Johnny Lynn Old Chief with the crime of being someone “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year” to “possess in or affecting commerce, any firearm”⁴⁶ The federal prosecutors announced that they intended to use the underlying facts of Johnny Lynn Old Chief’s first conviction (the case involving Rory Dean Fenner) to prove that he was a “felon in possession of a firearm.” Not only did they intend to use a copy of the conviction itself, but told the trial judge that they intended to call witnesses

⁴⁶ This is a status offense which provides, in part, that “It shall be unlawful for any person— who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year. . . [to] possess. . . any firearm or ammunition. . .”

and present evidence concerning the Fenner assault. They did not offer this evidence as a similar transaction, but rather to simply prove that Johnny Lynn Old Chief had in fact been convicted of using a firearm in that case.

When this case went to trial⁴⁷, Old Chief's attorney offered to stipulate in writing that Old Chief had indeed been convicted of an offense which conferred upon him the status of a person who is not permitted to possess a firearm. However, as part of the stipulation, his attorney requested that the government not discuss or put into evidence any of the underlying facts of Johnny Lynn Old Chief's first crime, the assault on Rory Fenner. Old Chief's attorney argued that the jury did not need to know about the underlying facts of that previous conviction. The argument was simple. If the government was offering the prior conviction involving Rory Fenner to establish that Johnny Lynn Old Chief was a convicted felon in possession of a firearm the stipulation that he was in fact a convicted felon was all that needed to be proven. The prosecution only needed, with that stipulation, to prove that he had fired the gun at Anthony Calf Looking. Unlike offering prior bad conduct to show relevant facts which needed to be proven in the current trial nothing more was needed to prove the elements of the offense of being a felon in possession of a firearm.⁴⁸

On behalf of Old Chief, the attorney argued that it was unfair for the jurors to hear the details of his assault on Rory Fenner. The attorney argued that, in all fairness, the judge

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⁴⁸ See Federal Rule of Evidence Rule 404(b), FRE 404(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

should use his discretion and allow only the fact that he was a convicted felon and thus subject to the additional penalties provided for being a second-time offender as set forth in the applicable statute. The Federal Rules of Evidence clearly gave the trial judge the discretion to limit the underlying evidence of that prior conviction. The federal rules of evidence provide that “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”⁴⁹ Comments to this rule clearly express the opinion that the rule was crafted in such a way as to “...[c]all for balancing the probative value of and need for the evidence against the harm likely to result from its admission.”⁵⁰ The government, unsurprisingly, refused to accept this stipulation and the federal trial judge, the Honorable Paul Hatfield,⁵¹ stated that “[i]f he [the prosecutor] doesn’t want to stipulate, he doesn’t have to.”⁵²

The underlying facts of Johnny Lynn Old Chief’s previous assault case on Rory Fenner were submitted to the jurors and he was quickly found guilty of the assault with a deadly weapon on Anthony Calf Looking and of being a felon in possession of a firearm. Johnny Lynn Old Chief was sentenced for the assault and for the additional crime of being a convicted felon in possession of a firearm.⁵³ Judge Hatfield gave Johnny Lynn Old Chief

⁴⁹ Federal Rule of Evidence Rule 403, (Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1932; Apr. 26, 2011, eff. Dec. 1, 2011.)

⁵⁰ Notes of Advisory Committee on Proposed Rules, Slough, *Relevancy Unraveled*, 5 Kan. L. Rev. 1, 12–15 (1956); Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 Van. L. Rev. 385, 392 (1952); McCormick §152, pp. 319–321.

⁵¹ Judge Hatfield served as United States District Court Judge in United States District Court of Montana from 1979 until 1996 (the last six years of his term was served as the Chief Judge of the District Court).

⁵² *Supra*, (Brief of Petitioner on Writ of Certiorari).

⁵³ *United States v. Old Chief*, 56 F.3d 75 (C.A.9 (Montana 1995)). Judge Hatfield was quoted in the transcript of the sentencing hearing as stating ““Mr. Old Chief and I have got [sic] to be friends over the years.” (“Because this was his third felony assault conviction in federal court, Old Chief was designated a “career offender.” Given this designation and the levels of his current offenses, the maximum sentence Old Chief could have received under the Guidelines was 51-63 months. The district court, however, departed upward to a sentence of 120 months, imposing an additional 57-month sentence on the unlawful possession count.

an additional sixty months on the felon in possession of a firearm's charge. Old Chief appealed his conviction and argued that the trial judge had abused his discretion by rejecting his offer of stipulation.

Until 1997, the United States Supreme Court had never directly addressed the issue of whether or not a trial judge abuses his or her discretion when a defendant offers to stipulate to certain facts in order to avoid unfairly inflaming and arousing the passions of the jurors. In a five to four opinion, Justice Souter, writing for the majority, agreed that the trial judge had abused his discretion. The Court agreed that the offer to stipulate that Johnny Lynn Old Chief was indeed someone who had previously been convicted was a reasonable alternative to allowing all of the underlying facts of the case to be presented to the jurors. In other words, the judge abused his discretion in deferring to the wishes of the prosecutor and the inclusion of the underlying facts of his previous conviction was unfairly prejudicial.

The United States Supreme Court noted in its opinion that the principal issue in the case was the scope of a trial judge's discretion under the federal rules of evidence.⁵⁴ This discretion can authorize the exclusion of even relevant evidence when that evidence's "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Court noted that Johnny Lynn Old Chief's appeals focused on the "unfair prejudice" portions of applicable rule of federal evidence.

The term of 60 months on the assault charge, was to be served concurrently. Thus, in effect, what should have been a five-year sentence, became a ten-year sentence. Moreover, the Guidelines impose a mandatory five-year enhancement on the "use" conviction, which the judge ordered to be served consecutively."

⁵⁴ All references in this article to the United Supreme Court's decision and rulings are taken from Justice Souter's opinion for the majority reported at *Old Chief v. United States*, 519 U.S. 172 (1997).

The Court noted that the term “unfair prejudice” goes to the capacity of some even relevant evidence to “lure the factfinder in declaring guilt on a ground different from proof specific to the offense charged.” The Court further held that “[I]f an alternative to the evidence is found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. It noted that what counts as the rule relating to “probative value” of an item of evidence is distinct from its relevancy. “Relevance,” may be calculated by comparing evidentiary alternatives.” (Emphasis added)

When the Supreme Court remanded Old Chief’s case to the U.S. District Court by the Supreme Court, the trial judge “threw the book” so-to-speak at him. Apparently, the judge did not take kindly to having been reversed by the Supreme Court. He resentenced sentenced Johnny Lynn Old Chief to 180 months, departing from the sentencing guidelines which called for only a 57-month sentence. Needless to say, Johnny Lynn appealed this sentence and argued that the trial judge had “unreasonably departed” from the sentencing guidelines. This time the Ninth Circuit Court of Appeals agreed with Old Chief and they reversed the district court judge and sent the case back for the entry of a sentence in accordance with the sentencing guidelines. Johnny Lynn Old Chief also asked the Ninth Circuit to assign a different district court judge to his case, but the Ninth Circuit refused.⁵⁵

Johnny Lynn Old Chief served his sentence of nearly five years and, unfortunately, once again returned to Browning, Montana and picked up with his old lifestyle. Once more, he was charged with an aggravated assault in a case which arose from another night of drinking and fighting. On December 29, 2007, Johnny Lynn (who, by this time, was also

⁵⁵ U.S. v. Old Chief, 85 F.3d 638 (1996).

known by his friends and acquaintances as “Johnny Rotten”) was hosting a party at his residence on “Low Rent Street” in Browning. The party had begun a few days earlier and included, among others a friend named Maynard, Lundy Red Head (“Red Head”), and Jay Old Chief, along with an abundance of alcohol. As witnesses described the events, on the night in question, several fights broke among the various party guests and became more intense as more liquor was consumed.

Red Head, who described himself as “pretty drunk” at the time, eventually left Johnny Lynn's residence. An argument had already started between Little Garrett Renville and some of the other party guests in front of Carl La Plant's home, a few houses down from Johnny Lynn's house. As Red Head was leaving Johnny Lynn Old Chief's house the house, he saw La Plant, accompanied by another individual named Little Garrett Renville, coming out of La Plant's home with “two-by-fours,” bricks, and rocks. Red Head ran down the street to join the fight.

Johnny Lynn and Maynard apparently heard the “fracas” and joined Red Head in the fight which was just getting started. Maynard was carrying a knife, and Jay Old Chief picked up a metal fence post and told Red Head to stay behind him because of Red Head's intoxication. As Maynard continued to advance toward them with the knife in his hand, Jay Old Chief hit Maynard in the head. Red Head described Maynard as falling to the ground momentarily, but quickly getting up. Maynard was then joined by Johnny Lynn Old Chief and he began to pursue Red Head.

To avoid being caught by Maynard and Johnny Lynn, Red Head ran behind a house located at 636 Low Rent Street. Red Head, momentarily believing that he was safe he relaxed is guard. That was a mistake on his part because Johnny Lynn and Maynard were able to catch up to him. Red Head later said that Johnny Lynn pulled his hands behind

his back while Red Head struggled. When Red Head tried to raise his arms to protect himself and get away from the grasp of Johnny Lynn, Maynard stabbed him on his right bicep with his knife. Red Head then broke one arm free from the grasp of Johnny Lynn and swung at Maynard. Red Head jerked his body back, but was stabbed again by Maynard, this time on his left arm and shoulder. Red Head fell to his knees. He began screaming for help, and was then stabbed by Maynard for the third time, this time in the neck.

A short time later, Officer Edwin Salois answered a call about a disturbance in the neighborhood and arrived at the scene. Salois eventually persuaded Maynard to drop the knife. Meanwhile, Johnny Lynn was still on top of Red Head, holding him down. After Maynard released Red Head, Officer Salois told Maynard to stay on the ground. Several other officers arrived and took Johnny Lynn and Maynard into custody.

On May 6, 2008, Maynard and Johnny Lynn's consolidated jury trial began before Judge Haddon in Great Falls, Montana. After deliberating less than a day, the jury returned a verdict of guilty to the single count presented and on August 25, 2008 Johnny Lynn Old Chief was sentenced by Judge Haddon to a term of 120 months in federal prison.⁵⁶ Judge Haddon is not one of the most respected judges in his district according to many comments posted on a web blog titled "The Robing Room."⁵⁷

⁵⁶ U.S. v. Old Chief, 571 F.3d 898 (2009)

⁵⁷ See, <http://www.therobingroom.com/Judge.aspx?ID=217>

"Comments: Judge Haddon is a loose cannon, who, although he enjoys abusing counsel in general, he goes off the deep end in heaping abuse on the lawyers on the side he doesn't like. He is a bully from the bench, and if you are a lawyer who will not stand up to that bullying and hold your ground if you think you are correct, he will roll right over you. He generally likes short and sweet orders and he usually if not always has his written decision when he takes the bench. He could care less about the law if it conflicts with whatever it is that he wants to do. I don't mind judges who disagree with my arguments when discretion is available, but I have a serious problem with following his own agenda irrespective of the law. Advice to a lawyer appearing before him: Stand your ground, don't be bullied, and don't let him cut you off or push you into positions you don't agree with."

"Comments:

Imperious, mean-spirited, Holier-than-thou, abusive and degrading towards counsel and parties alike. One of the best descriptions that I have heard of the man came from a civil lawyer who described him as someone

Following Johnny Lynn Old Chief's last trial, Judge Haddon was removed from another federal case because he abused his discretion in sentencing a defendant serve a prison sentence for in excess of what the sentencing guidelines provided. The case involved charges of simple theft case. Upon appeal of the case, the Ninth Circuit Court of Appeals reversed Judge Haddon (unlike their previous action in Johnny Lynn Old Chief's case) and took the almost unprecedented action of removing him from the case upon remand. The Ninth Circuit Court ruled that the 16 months sentence imposed by Judge Haddon was excessive and sent the case back to Judge Haddon with instructions to resentence that defendant to a sentence more in line with the mitigating factors presented by the defendant. Judge Haddon, upon receiving the case back into his court on remand, resented the defendant to 15 months, reducing the original sentence by one month. The defendant again appealed and again the Ninth Circuit reversed Judge Haddon and noted that the 15 months was still too harsh and again sent the case back to the trial court for resentencing. However, Judge Haddon would not be the judge resentencing the defendant. In very strong language, the Court of Appeals ordered that Judge Haddon be removed from the case and that another judge be appointed to the case for the purposes of resentencing.⁵⁸

Johnny Lynn Old Chief served most of the 120 month sentence handed down by the Court in his last trial. He served most of that sentence in a high security United States Penitentiary located in the most northeastern county in Pennsylvania, twenty miles east of Scranton, and 134 miles north of Philadelphia. He was released from federal custody on

who made up "his mind forty years ago." Superficially and briefly charming, his true character shows through very quickly. I've seen him abuse jurors, witnesses, law enforcement, and counsel with alacrity. By disposition and temperament, he was a horrible choice for the bench. Making matters worse, he is not very smart. He denigrates those who appear before him as a way of compensating for his lack of intellect."

⁵⁸ Iwanski, Len, "*Appeals Court Removes Judge Haddon for Not Following Instructions*," Missoulian, April 3, 2009.

November 18, 2016 after being housed in a Residential Reentry Management Center operated by the Bureau of Prisons. Residential Reentry Management Centers serve the Bureau of Prisons by providing federal offenders with community-based services that will assist with the prisoners' reentry into society.⁵⁹

He, once again, returned to Browning, Montana and the Blackfeet Indian Reservation and began serving a term of supervised release under the supervision of the United States Probation Office.⁶⁰ Less than one month after returning to Browning, Montana, Johnny Lynn Old Chief was once again arrested for violating the terms of his supervised probation. United States District Judge Brian Morris. After hearing a complete history of Johnny Lynn Old Chief's use of alcohol and illegal drugs allowed him to continue his supervised release with the understanding that he would attend chemical dependency treatment and bring himself into compliance with his conditions of supervised release. However, on December 27, 2017, the Probation Office filed a petition to have Johnny Lynn Old Chief rearrested. He was accused of violating the conditions of his supervised release by failing to appear for drug and alcohol testing; and failing to attend outpatient chemical dependency treatment.

The facts, as presented at the hearing, were that when a probation officer went to the home of Johnny Lynn Old Chief's brother, Maynard Old Chief, Johnny Lynn preventing the probation officer from conducting a home inspection by threatening the officer's safety. He also refused to provide a breath sample. When the probation officer showed Johnny Lynn Old Chief the terms of his supervised release conditions Johnny Lynn Old Chief uttered a profanity and again threatened the officer. He stepped outside the house and continued to resist arrest on the probation violation. Upon his arrest he was found to be carrying a concealed weapon, a knife. However, before the probation officer could take

⁵⁹ See, www.bop.gov.

⁶⁰ See, *United States District Court, D. Montana, Great Falls Division*. August 28, 2017 Slip Copy 2017 WL 4020422 (2017) J. JURIS. 91

Johnny Lynn Old Chief into physical custody, his brother, Maynard Old Chief, pushed the probation officer back into the house and closed the door effectively trapping him in the home. Maynard was also subsequently charged with attacking the officer. Back-up officers arrived on the scene and both Johnny Lynn and Maynard were subdued and placed in custody.⁶¹

On January 30, 2017, Old Chief's probation was revoked and he was sentenced to six months in custody, followed by 30 months supervised release. He is currently being housed in the high security United States Penitentiary at Florence, Colorado. Johnny Lynn Old Chief will, hopefully, once again be released from federal custody on July 21, 2018 at the age of fifty five.⁶²

⁶¹ Id.

⁶² <https://www.bop.gov/inmateloc/>