

Judge Abby Abinanti Is Fighting for Her Tribe—and for a Better Justice System

Once considered illegitimate, Native American peacemaking courts offer a model for criminal-justice reform.

By [Rebecca Clarren](#) November 30, 2017



Judge Abby Abinanti. (Courtesy of Yurok Tribe)

On a gloomy day in September, Lisa Hayden rushed through the circular door of the Yurok Tribal Court in Klamath, California, with her 1-year-old son on her hip. Hayden, 31, worried that the day wouldn't turn out any different from all the others she'd spent in court trying to protect herself from her ex-

husband. For 12 years, starting when she was pregnant with their first child, Hayden alleges, her ex-husband had held guns to her head, punched her, and called her terrible names.

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The abuse that Hayden says she suffered is shockingly common: According to a Justice Department study in 2016, [four out of five Native Americans](#) have experienced violence from an intimate partner. In 97 percent of those cases, Native women were victimized by non-Natives. To make matters worse, indigenous people are less likely to receive fair treatment when interacting with police and judges, according to a [recent analysis of data](#) from the Centers for Disease Control and a [report](#) from the National Council on Crime and Delinquency.

This has been Hayden's experience. Last year, anticipating her ex-husband's release from prison, Hayden went to county court to request a restraining order, showing the judge threatening letters her ex had sent from prison. After spending less than five minutes listening to Hayden, the judge dismissed her fears as something "she had to work through" and denied her request. Within six months of his release, according to Hayden, her ex-husband—high on heroin, wearing a bulletproof vest, and armed with three guns—kicked in the front door of her apartment, yelling that he wanted to kill her, as she and her three children huddled on the floor. Though her ex was sent back to prison, Hayden remained afraid.

This was why Hayden brought her request for a restraining order to Judge Abby Abinanti of the Yurok Tribal Court, a respected figure with a distinctive approach to jurisprudence. Abinanti doesn't wear a robe, opting instead for jeans and cowboy boots. She sits not on a dais, but behind a wooden desk in a small room. Immediately upon entering Abinanti's courtroom on that September day, Hayden said, she felt "more like a person" than she had in county court. Abinanti listened at length, squinting as if trying to solve a puzzle.

Ultimately, Abinanti issued the restraining order. But she also made an offer to Hayden’s ex-husband, to send letters to his children and receive photos through a caseworker; an earlier offer still stands for him to attend a program designed by Abinanti’s court to rehabilitate batterers, and to remove his gang tattoos on the tribe’s dime. The goal was to protect Hayden while giving her ex-husband a chance to end his cycle into and out of prison. (So far, he’s refused all services.) “No one ever came up with that in the county system,” Hayden said after Abinanti’s ruling, smiling as her kids played nearby. “No one ever tried to get at the root of it. ‘Relieved’ is the big word for today.”

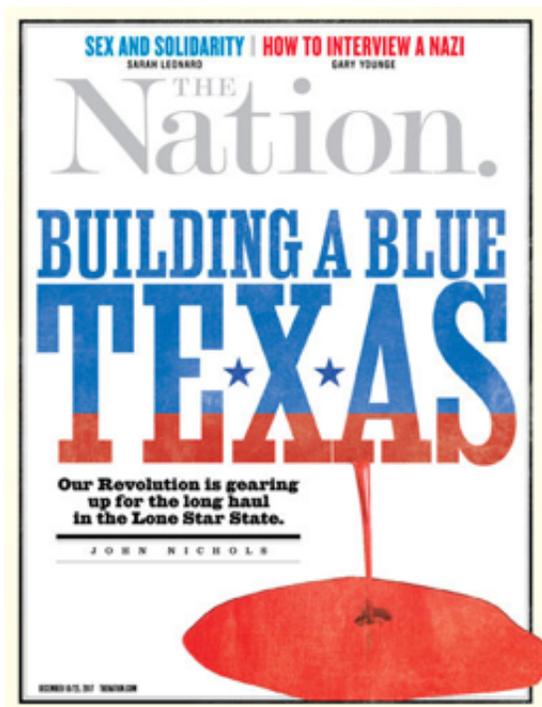
Abinanti is one of a growing number of tribal judges nationwide incorporating traditional culture into their courtrooms, with the dual aim of rehabilitating individuals and providing justice to people often failed by the regular criminal-justice system. Abinanti, whose court was recently described in a federal assessment as “extremely fair and balanced in its rulings,” is more likely to ask defendants to devise their own ways to atone for a crime or settle a dispute than to slap them with fines or incarceration. As Abinanti explains, “I’m looking at: How did we resolve things before our cultural interruption, when invasion occurred? We were village people, and we sat around and had discussions. My purpose is to help you think up how to make it right if you made a mistake.... For me, jail is banishment. It’s the last resort.”

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Traditional models of dispute resolution, which are characterized by the involvement of everyone affected by an offense and emphasize repairing harm instead of inflicting punishment—an approach often called “restorative justice”—are gaining attention outside Native communities. It’s a significant shift, as historically both Congress and the Supreme Court have diminished the legitimacy of tribal courts and peacemaking forums. (In almost all circumstances, [tribal courts cannot hear criminal cases involving non-Native](#)

[people](#), even for crimes committed on Native land.) Now five Western states as well as Michigan are using tribal models to develop courts that seek to create a consensus between the plaintiff and the defendant. Casey Family Programs, one of the nation's largest child-welfare foundations, is promoting partnerships between state and tribal courts in which judges, social workers, and attorneys convene to adjudicate cases. In the past several years, courses in Native American peacemaking have been taught at the Columbia, Lewis and Clark, and University of New Mexico law schools. Prestigious law-review journals, including the American Bar Association's, have [published articles](#) on the importance of therapeutic tribal courts and peacemaking. As a sign of this increasing respect, Senators Al Franken (D-MN) and Lisa Murkowski (R-AK) recently introduced legislation that would grant tribal judges expanded ability to prosecute non-Native assailants.

Current Issue



The new attention is partly due to the growing recognition that the country's punitive approach to criminal justice has failed: The United States has 5 percent of the world's population [but 25 percent](#) of its population of prisoners, a disproportionate number of them people of color. "The American justice system is in crisis, and we have to think about what else could work," said Cheryl Fairbanks, a board member at the National American Indian Court Judges Association. Could the old practices revived by Abinanti be part of this future?

Every other week, Abinanti packs her hatchback with groceries, books, and blankets and drives six and a half hours from her apartment in San Francisco, through the tawny hills of Northern California, and up into the foggy redwood forests of the Yurok Reservation. Abinanti, 70, has been making this drive her entire life.

As a child, Abinanti was shuttled from her drug-addicted mother's house near the reservation to the home of her paternal grandmother, who lived in San Francisco's Noe Valley neighborhood, blocks away from Abinanti's current apartment. Like many Native children, Abinanti was misdiagnosed by her school and placed in a class for developmentally delayed students; not until high school did a teacher realize she was bright. Abinanti was angry a lot. ("I'm better now, even though I'm still half-mean," she offered with a dry smile.) Relatives often said she reminded them of her grandfather, Marion Rube, a bank robber who once escaped from San Quentin prison. Her childhood isn't something that she typically shares from the bench, but it informs her empathic orientation.

"You don't start out to be a meth-head—it's not, like, a career objective," Abinanti said on a recent drive north. When not talking, she hummed along with Hank Williams on the radio. "You don't know what breaks a person, and if you're strong enough to come back, you can't judge someone who isn't."

Abinanti speaks often about intergenerational trauma, the idea that the events of colonization in the past—rape, murder, and the dissolution of indigenous languages and cultures—create ongoing problems in the present: Native American communities now experience physical and sexual assault at three times the national average. For the Yurok, that traumatic history is recent. Throughout Abinanti's childhood and until 1970, the federal government, eager to assimilate indigenous people, stripped citizens of more than 100 nations of their land and made it illegal to dance ceremonially or practice Native religions. Through most of the twentieth century the federal government didn't formally recognize the Yurok government. By 1974, when Abinanti became the first Native American woman to pass the bar in California, there was no tribal court for her to work for, so she joined California Indian Legal Services, a nonprofit law firm for the state's tribes and tribal members. In some courtrooms, she was the first Native American lawyer ever to enter there.

Abinanti was the first Native woman in California to become a state judge; she also taught law at the University of California, Berkeley, and served as a judge or attorney for seven other tribes. In 2007, after the Yurok Tribe reclaimed its legal status and reestablished its government, Abinanti became chief justice. At the time, the court was open only once a month, mostly to adjudicate fishing violations. Under Abinanti, it's grown into an enterprise with about 20 employees and hears an average of 670 cases per year, ranging from illegal trash dumping to domestic-abuse cases.

Innovation and flexibility are what distinguish Abinanti's court. For instance, if both parents agree to the terms, she permits nonmonetary child-support payments such as manual labor or salmon. Abinanti and her staff have created a handful of programs intended to provide alternatives to incarceration. A wellness program sanctioned by the state allows the Yurok Tribe to pull members accused of drug crimes out of the court system and bring them home for addiction treatment; the program includes cultural rituals like sweat lodges and prayer. Another program is designed to rehabilitate people who have beaten their partners or children. It's the first in the state of California, and possibly in the country, certified to include non-Native people. That's imperative on the Yurok's checkerboard reservation, where tribal members and non-Natives are often neighbors and partners. Participants in the yearlong program consult with elders and learn to identify personal triggers and to use anger-management tools. Since the program began two years ago, none of its participants have returned to jail for domestic violence.

Once attacked as illegitimate forums, tribal courts are beginning to be seen as partners with innovative approaches.

The tribe has yet to analyze its recidivism rates overall, but a handful of studies indicate that other tribal courts are achieving better success for their members than are state courts. The Kake Tribe in Alaska found that members enrolled in a peacemaking project fulfilled their court-ordered amends 97.5

percent of the time, compared with a [22 percent success](#) rate in the Alaskan state-court system. Participants in the Leech Lake Band of Ojibwe Wellness Court, which allows people arrested for driving while intoxicated to receive culturally specific treatment on the reservation, had 60 percent fewer rearrests one year after entering the program than the DUI offenders, both Native and non-, who attended a county rehab program.

Timothy Connors, who's been a state judge in Michigan for more than 25 years and has served by invitation in the past five on the court of the Little Traverse Bay Bands of Odawa Indians, is leading an effort to create county courts that use a tribally inspired peacemaking approach in cases where the parties involved will have an ongoing relationship after they leave court. In the first four years of these peacemaking courts, 94 percent of the cases resulted in an agreement between both parties and avoided litigation. Unlike mediation, the goal of these courts isn't simply the resolution of a given issue, but rather a deepened understanding between the affected parties. "It's the idea of cleansing and healing versus judging," Connors said. "They are designed not to get even, but to get well."

Under current law, states aren't required to recognize most tribal-court rulings. Yet there are now at least 15 Tribal-State Court Forums—coalitions of federal, state, and tribal judges, which meet regularly to facilitate efficient cross-jurisdictional enforcement of court orders, civil proceedings, and compliance in child-welfare cases. "Tribal courts have been continuously attacked as illegitimate forums since contact," said Jerry Gardner, executive director of the Tribal Law and Policy Institute. "But with the rise of restorative justice, tribal courts are being seen not just as legitimate institutions but as partners, which have wise and innovative approaches and resources to probe the root causes of crimes."

One recent evening, Abinanti sat on her couch watching baseball with a few colleagues and discussing the people who'd ended up in jail over the weekend. For the judge—who spends much of her spare time studying

economic development, searching for a way to help her tribe overcome its 73 percent unemployment rate—knowing these families is an asset, as it deepens her understanding of the impact of a particular crime.

In non-tribal courts, by contrast, judges must recuse themselves if they know a defendant. That's just one of a number of barriers to applying tribal models to America's criminal-justice system more broadly. The scale of the state-court system alone makes it nearly impossible for judges to take the time required for Abinanti's approach: There were nearly 7 million cases filed in California state court in 2015. Mandatory-sentencing laws would also have to be overhauled. As Savala Trepczynski, executive director of the Thelton E. Henderson Center for Social Justice at the UC Berkeley School of Law, noted by e-mail: "If we were serious about mirroring Judge Abby's style, we'd have to create and sustain a society with minimal incarceration. We'd have to reimagine the purpose of the criminal-justice system and destroy the economic incentives to incarcerate."

Developing such courts can be a challenge even for tribes. There's no reliable data on how many of the 567 federally recognized tribes have set up courts that reflect their traditions. But at least 19 have written tribal codes, and many more are revitalizing their courts with cultural concepts. However, many face significant budget challenges. (Abinanti likens herself to a street hustler for all the time she spends applying for grants.) The Bureau of Indian Affairs is funding most tribal courts at just 6 percent of what is needed, according to a 2015 BIA report to Congress. Certain states, including California and Alaska, receive no allocated federal funds for tribal courts. A pilot project to determine funding needs in those states was created during the Obama administration, but it would be eliminated under President Trump's proposed budget.

There is also the question of whether a restorative-justice model is appropriate for every crime, particularly those involving sexual predators. There is a real potential for further harm if the victims of sexual violence are

expected to communicate with the perpetrators, said Sarah Deer, a professor of women, gender and sexuality studies at the University of Kansas. “I get nervous about putting victims in that system,” Deer continued, “because it sets up a lot of victim-blaming.”

Still, Abinanti believes that for perpetrators truly committed to making amends, rehabilitation is possible, even though it may take years. “This isn’t as simple as saying you’re sorry and moving on,” she said. “Some things aren’t fixable, but... you at least have to try.”

Editor’s note: A previous version of this article stated incorrectly that the Yurok tribe was terminated by the federal government. It has been updated to reflect the fact that the tribe was instead not formally recognized by the federal government.

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By [Bob Dreyfuss](#)

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