

# Alternatives to Sentencing\* Criminal Law and the Social Fabric

April 5, 2019

Version 9

Presented by:  
University of North Dakota  
School of Law  
Rural Practice Association

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\*aka: Restorative Justice, Remedial Justice, Non-Judicial Punishment, Peacemaking, Alternatives to Incarceration, Therapeutic Jurisprudence; Courts of equity (such as Veterans, Addictions, or Suspended License Courts)

# Alternative Sentencing Handbook

## A Social Contract

UNIVERSITY OF NORTH DAKOTA

SCHOOL OF LAW

Doctrine of Risk, )

Plaintiff, )

April 5, 2019

v. )

### THE COMPLAINT

Doctrine of Control, )

Defendant. )

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¶ 1 Comes now several law students of the University of North Dakota School of Law to propose an alternative approach to criminal justice in North Dakota.

¶ 2 It is the nature of criminal law to expand. As laws become increasingly restrictive, does society have some responsibility to bear the costs of new sanctions on behavior? Consider that everyone breaks the law in some way. Consider that once a person has been labelled Criminal, they are no longer entitled to the highest of Constitutional protections and rights.

¶ 3 Consider the possibility that, at some point, a tangled web of laws can become oppressive and tyrannical in its own right. Has our criminal justice system played some role in the opioid epidemic, the fracturing of communities, and widespread declines in mental health?

¶ 4 We, in North Dakota, simply do not have the bodies to continue on this path of retribution and incarceration. The presentation on **April 5, 2019**, and the enclosed proposal is based on the proposition that risk is a necessary component of growth. This is not a proposal for leniency; it is one of personal accountability.

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# ALTERNATIVE SENTENCING: A SOCIAL CONTRACT

## The Purpose:

The following is a vision for an **alternative to** criminal sentencing for North Dakota. It is broad and general because it is not intended to function as a new set of laws, but rather, it is a type of contract between the State and the Defendant. Whereby, the Defendant voluntarily earns certain concession from the State. The agreement process works to facilitate communication and problem solving between defendants, victims, the justice system, and the community. This process is not intended to replace the entirety of criminal prosecutions, rather, it is a specialized tool for special circumstances. If criminal justice is a sledgehammer, this is a surgical scalpel.

Our hope is that you will use these guidelines as a tool, empowering your own search for alternatives to criminal sentencing. Hopefully these guidelines answer only the most fundamental questions and leave the rest open to your discretion and creativity.

Consider three things: first, any person sitting in a jail cell is of no use to their own family, their children, themselves, or the community; second, people do not change unless they want to change; and, third, if power over others was regarded as a tool to *empower* others<sup>1</sup> our society might not be so fractured.

## The Philosophy:

The following short-story is critical to a unique understanding of justice and equity. Note: The words were chosen carefully. Any attempt to distill the story further, or distort its characters would damage the story and its intended meanings.

### The Two Wolves: The Story of the Other Wolf

By: Angelo Mondragon

A grandfather sat with his grandson and granddaughter on a bluff overlooking a deep and lush river valley. Behind them lay a large city. They were playing a game to see who could throw rocks the farthest.

The grandfather stopped, and, still holding his next rock, said, "I'd like to tell you a story."

"Ok!" said the small boy.

"Ok!" said the small girl.

The grandfather began, with forceful words, and the measured pace of a weary traveler. "It is a story of two wolves, one named Process, and the other, Substance." He looked up at the sky, and then continued. "Process is a beautiful white wolf. Her fur is white, and shines as bright as the clouds. She has a single jet-black spot surrounding one eye."

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<sup>1</sup> See Appendix 2.

He turned to the children. “Substance is a beautiful black wolf. His fur shines like the night between the stars. He also has one spot. It is brilliant white, and surrounds one eye.”

“Am I the white wolf?” asked the girl.

“And, am I the black wolf?” asked the boy.

“No.” replied the grandfather. “These two wolves live inside each of you, and inside me.”

The grandfather continued reverently. “Process is powerful. She is the ruler of judgment and emotional intelligence. She is the gatherer of all the food we need to prepare for the long winter. She is the practical and loves order and predictability. She is your protector, and never wants to see you get hurt. She speaks words of caution into your ear when you are about to do something dangerous.”

“Substance is also powerful. He is the ruler of the wild, and of physical intelligence. He is the hunter, the creative, and the warrior. His job is to provide for the community. He desires to sacrifice himself for his family. He is your protector, and never wants to see you get hurt. You can feel him encouraging you to challenge yourself physically, and to risk.”

“How do we know they are there?” asked the boy.

“I can’t feel them,” said the girl.

“That’s because we’re having fun.” said the grandfather. “But, they are there, and every day they wrestle for power over the other.”

“Which one wins?” asked the children simultaneously.

The grandfather replied. “If you feed one wolf it grows and becomes strong, but, if you starve the other it becomes angry, resentful, and toxic. When you are struggling in life you can feel them fighting in the center of your chest, just below your heart. The people that live in the city behind us call it anxiety.”

“Each wolf desires peace, but neither can have it unless they take care of the other. The black wolf is physically strong but emotionally vulnerable. The white wolf is emotionally strong, but physically vulnerable. When each is cared for, they are in balance, and you are at peace.”

“So how can I make sure that my two wolves are in balance?” asked the girl.

The grandfather was proud of the young child’s question. He smiled. “To feed Process, get your work done and finish the projects you start. To feed Substance, spend time with your friends and the wilderness. To feed them both, listen to music, and the drums, because both wolves love to dance. Move every day. Drink water to clear your thoughts. Eat, to grow your mind. Pray, to grow your soul. Choose carefully what new chaos you allow into your life.”

“I’m confused” said the boy.

The grandfather smiled and gestured. “The city behind us represents order. The valley below us and the field beyond it represent the wild. The city is always growing, and one day it will consume the valley.”

“But this is where we get our food!” exclaimed the boy.

“Right!” said the grandfather. “So...we must have balance.”

“Process helps us to slow down and reflect on ourselves, but, if we are always planning for the future, we miss the present.”

“Substance is social by nature. He pulls people out of their isolation. He brings them together, like the glue in one of your class projects.”

“If we are in search of people willing to stand up and fight for others, we must have people who have been in fights. A warrior is willing to sacrifice his life for others, and so, he is short-term thinking **by design**, by necessity. He struggles with process, procrastination, and impulse. He has trouble sitting still in class, because he requires the outdoors and activity every day. He is always questioning and watchful, because a hunter understands that he is also the hunted.”

Again, he paused. He looked down at the ground, and his brow furrowed. “It is ironic. If we try to change the warriors, to make them into something they are not, we do violence to them, and they cease to be what they are – Warriors.”

“Just as day requires night, growth requires risk, and a healthy society requires its warriors.”

“Thank you, grandfather,” said the twins.

“Now, let’s go get ice cream!” said the grandfather.

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Our theory is that society is so fractured because the social contract is faltering. For the sake of control, we eliminate all risk. For the sake of order, we eliminate the wild.<sup>2</sup> We believe the way forward is to let go of some of the control, allow people to earn freedom from their “irrevocable past,”<sup>3</sup> and regain their right to self-determination.

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<sup>2</sup> C.S. Lewis:

“And all the time—such is the tragi-comedy of our situation—we continue to clamour for those very qualities we are rendering impossible. You can hardly open a periodical without coming across the statement that what our civilization needs is more ‘drive’, or dynamism, or self-sacrifice, or ‘creativity’. In a sort of ghastly simplicity, we remove the organ and demand the function. We make men without chests and expect of them virtue and enterprise. We laugh at honour and are shocked to find traitors in our midst. We castrate and bid the geldings be fruitful.”

*The Abolition of Man*, C.S. Lewis Pte. Ltd. (1944); Harper Collins, pg. 26 (1977).

<sup>3</sup> *The Scarlet Letter*, Nathaniel Hawthorne, Ch. 18, pg. 3 (1850). (Excerpt in Appendix 1)

In the name of “humanity” and civility we destroyed the culture and customs of Native American tribes.<sup>4</sup> Yesterday’s warriors were called the *Akíchita*, by the Dakota. (Guideline 1.1). Today our veterans, our actual warriors, return to an American that claims to value the warrior spirit, but moves to break it - in the name of order and civility - by law, ordinance, regulation, and administrative policy. Twenty veterans commit suicide every day.<sup>5</sup>

We do the same to energetic and rowdy little boys, or little girls that act like tomboys. For their own protection, we remove the “wild” from them by forcing them to always sit still and be attentive in class. At the same time, we remove daily physical education, art, and music from school curriculum. Sadly, these are the exact things the little creative person **requires** for focus, calm, and centering.

The children that struggle within the confines of the classroom are considered “different,” “weird,” and “disruptive.” They are pushed to the fringes and they become truants. These children brush with the law. Later, many end up incarcerated. Families are separated. Children grow up in single-parent households, and the process begins again. The phrase we hear, over and over, justifying this treatment is that the criminal “should have thought of that ahead of time.”

As the story of the Other Wolf suggests, perhaps the same people that rush *towards* danger may be biologically different from those that always think of long-term consequences. This story represents a direct challenge to the singular and decisive standard of the *reasonable and prudent person*. If we desire leaders and creatives, consider the possibility that they are not always reasonable and prudent people. Is it possible that if we don't value our young warriors for what they are, we repress their spirit? Could this explain why they escape into drugs, gangs, and violent outbursts?

Consider that our Founding Fathers were deviants (in all senses of the word), and committed multiple felonious acts by today’s standards. In multiple states they would not be able vote, get a driver’s license, qualify for student loans, find work, secure an apartment, and in Grand Forks they would not even have access to a shelter in the middle of winter. (*See generally* Footnote 2). Are we turning our back on our ancestors?

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<sup>4</sup> *Case and Materials on Federal Indian Law*, David H. Getches, et. al., Seventh Ed., at 195 -197 (2017)(quoting *History of the Allotment Policy, Hearing on H.R. 7902 Before the House Comm. On Indian Affairs*, Delos Sacket Otis, 73d Cong., 2d Sess., pt. 9 at 428-85 (1934)).

<sup>5</sup> US Dept. of Veterans Affairs (2018) [www.va.gov/opa/pressrel/pressrelease.cfm?id=4074](http://www.va.gov/opa/pressrel/pressrelease.cfm?id=4074).

## FAQs:

In short, we suggest that the warrior is the creative, the global thinker, the leader, the ADD, the fighter, and ultimately, the glue that holds society together.

This program is not about leniency. It requires that defendants/participants demonstrate personal accountability, growth, and hard work in order to earn concessions from the State. It reflects North Dakota's values of hard work, service, and sacrifice. Further, if we relieve some of the demands on the State penitentiary, we free up space for the people that actually belong there.<sup>6</sup> Further if we remove some cases from overburdened courts they might have more time and resources to spend on more serious cases.

### **A. What is the program?**

These guidelines are meant to bring uniformity, clarity, and predictability to Alternative Sentencing throughout North Dakota. Many lawyers already practice some form of Alternative Sentencing in the way of plea bargains, diversion, or deferred prosecution.

These guidelines and the accompanying CLE / CJE will hopefully provide a new sense of purpose to the practice. This program will be successful through the ongoing participation of the legal system together with participants who benefit from it. If our philosophy is correct, current participants will become the program's future shepherds.

### **B. What is the goal of the program?**

The goal is to remove Participants (Definition 1.11) from the criminal justice system as much as possible. These guidelines emphasize understanding before judgment, for the purpose of solving problems rather than contributing to them. The underlying themes are personal accountability, community fabric, self-reflection, group-involvement, and the opportunity to make amends for the past. Our theory is that by attempting to control rather than foster individuals in the criminal justice system, our society has become fractured, overly cautious, and suspicious. Personal change and accountability involve difficult and painful work. Some potential Participants will choose criminal sentencing rather than go through this process.

### **C. Who is a good candidate for this program?**

Recommendation of a potential participant is both subjective and discretionary. It will vary by community. It is expected that this program would begin with one or two participants per county. Communication between the parties in order to identify "good" candidates, and track their progress, is essential. The guidelines place emphasis on the personal judgement of the people involved. For this reason, the guidelines identify roundtable discussions, coordinators, stand-ins, interested parties, and evidence rules. Local problems require local solutions.

Slow growth will allow for learning and experimentation. Since this program is selective, there are no hardline exclusions.

Possible candidates include:

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<sup>6</sup> Multiple law enforcement officers have expressed frustration with blanket early release policies.

1. Candidates in Need of Problem Solving - These Candidates are characterized by a strong desire to change and grow, but find themselves shackled to the criminal justice system. They have been labeled as criminals and cannot find work, housing, loans and they are struggling to pay their bills.<sup>7</sup> Solutions in this case could be as simple as appointment of a public defender to advocate on the Participant's behalf to the various agencies involved in the problem. A judicial order may be required in order to empower the attorney to advocate on the Participant's behalf. (Ex: Driver's License troubles, employment, housing, mental or physical health.)
2. Intervention Candidates - This could be a domestic disturbance situation, where a husband and wife are each abusive to the other. (See Footnote 16). Currently, the police struggle to intervene in foggy situations before a serious physical injury occurs. Children may be involved, as well as public and officer safety. A police officer could issue a citation to both parties, thereby allowing the prosecutor to divert them into this process.  
An Individual Justice Plan (IJP) (see Appendix 3) could be drafted to identify underlying problems and see to it that both Participants get access to proper services and mental health care. (North Dakota Task Force on Justice Planning, (2005) pdf available at [law.und.edu/students/student-life/organizations/rural-practice/index.html](http://law.und.edu/students/student-life/organizations/rural-practice/index.html)).  
Rural resources are scarce; therefore, each partner could be asked to read books on domestic violence and codependence, and keep a written journal about what they have learned. They could also be asked to start support groups.
3. Addictions Candidates – Addictions are a complex mix of physical, emotional, and spiritual issues. The paradox is that, whatever the drug, it is often the escape from difficult times,<sup>8</sup> and the celebration in good times; it is both the problem and the “answer.” One thing is certain, in these cases, an element of service to others is required. That service can consist of forming support groups for fellow Participants, or serving as individual advocates for the program.  
For example, this candidate could be asked to help a family that has lost a loved one to addictions.

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<sup>7</sup>In every courtroom you find people begging for relief. In 1773, John Locke wrote about the danger of this moment. “For when the people are made miserable, and find themselves exposed to the ill usage of arbitrary power, cry up their governors as much as you will for sons of Jupiter, let them be sacred and divine, descended or authorized from Heaven....” *An Essay Concerning the True Origin, Extent and End of Civil Government*, John Locke (1773).

<sup>8</sup>Brené Brown, Ph.D., LMSW, wrote about the experience of addicts.

“I’ll never forget when a twenty-year-old man who was part of a small group of college students that I was interviewing said, “Let me show you the box.” I knew that he was a tall guy, but when he stood up, it was clear that he was at least six foot four. He said, “Imagine living like this,” as he crouched down and pretended that he was stuffed inside a small box.”

“Still hunched over, he said, “You really only have three choices. You spend your life fighting to get out, throwing punches at the side of the box and hoping it will break. You always feel angry and you’re always swinging. Or you just give up. You don’t give a shit about anything.” At that point he slumped over on the ground. You could have heard a pin drop in the room.”

“Then he stood up, shook his head, and said, “Or you stay high so you don’t really notice how unbearable it is. That’s the easiest way.”

*Daring Greatly*, Penguin Random House, Pages 92-93 (2010)



4. Leadership Candidates - Generally, this is a proactive search for the type of people society requires: warriors and future leaders. Leadership is, by definition, non-conformity. Our belief is that our potential leaders are weeded out by a society that favors those who sit still in class and excel at conformity.

Some traits to look for include a history of volunteering or standing up for others; military service; or passion and creativity manifested in trouble sitting still in school. There is also some connection between the characteristics of warriors, creatives, and Attention Deficit Disorder. Therefore, ADD may also be a strong indicator of a Leadership Candidate. (ADD traits can be found in readings about the lives and struggles of the Founders).

#### **E. Who is an inappropriate candidate?**

Hope alone is not enough for personal change. Some defendants are very skilled at saying what we want to hear. Individuals with a history of manipulation will try to use this as a way to escape responsibility and accountability. (See Guidelines: 11 – Admission of Guilt, and, 19 – Early Termination.) Resentments, where the defendant continues to **only** blame others for their situation, could make this process premature. Also underlying conduct so severe that it would endanger public support for this process would be inappropriate.

#### **F. How does it work?**

A potential candidate is identified. (Guideline.10). Prosecution and defense then begin discussions as to whether the person is a good fit for the program. If they agree, the defense attorney becomes the initial coordinator for services. A written plan is drafted, addressing underlying problems, solutions, and concessions. (Guideline 11). If the candidate agrees to the plan, they become a Participant, and the agreement, or “social contract”, is signed by the parties. The defense attorney then determines the next course of action and, if they are to remain the Coordinator, is in charge of keeping track of the defendant’s progress. Otherwise, they may designate a Coordinator. In order to ensure the Participant fulfills their obligations a Stand-in may also be required. (Guideline 1.16). Once the plan is completed to a satisfactory level (Guideline 1.4), the defense attorney discusses the status with the prosecutor or judge and charging/prosecuting/sentencing decisions are made (Guideline 31), and agreement is signed again by all involved parties (Guideline 33).

The recommendations are case dependent, and could include, for example, the Participant’s agreement to get a job, regain a driver’s license, begin mental health, or attend addictions therapy. The idea is to be flexible, solve problems, and keep the community and families together. (For more ideas see Appendix 2).

It is highly recommended that most cases include some element of group therapy involvement.

#### **F. What are some sentencing alternatives?**

See Appendix 2.

## **G. Who will pay for this program?**

The resources and funding required for the underlying remedial efforts already exist. What is needed is the desire, motivation, and leadership to coordinate existing services toward the goal of problem-solving, remediation, rehabilitation, and reintegration.

If our theory about the type of people who end up in the criminal justice system is correct, these very people will become the champions of the program. They desire purpose and a cause to fight for.<sup>9</sup> If we empower and encourage them, they will breathe life into the program, assist subsequent participants, and advocate for the program's future. For example, the F5 Program was created by a five-time convicted felon, not because he had to, but out of some deeper desire to help others. A passion for volunteering, and desire to be of service to the community is particularly important in the rural communities where resources are scarce.

The following are some programs that already exist:

Free Through Recovery - A North Dakota "community based health program" available to people on parole or probation. It offers care coordination, recovery services, and peer support. The program pays "care coordinators" \$400 per month, per participant. Defense attorneys may apply to be care coordinators. ([behavioralhealth.nd.gov/addiction/free-through-recovery](http://behavioralhealth.nd.gov/addiction/free-through-recovery)).

**Note:** Senate Bill 2012 (2019) could extend this program beyond the parole or probation requirements.

Recovery Reinvented – North Dakota's First Lady Kathryn Burgum developed a resource designed to address addictions issues by emphasizing education and recovery through support groups. ([RecoveryReinvented.com](http://RecoveryReinvented.com))

Health Insurance – Medicaid is federally funded and run by the State. Eligibility is income based. Services may include medical and mental health. Medicaid is not available to people that are incarcerated. If people are kept out of jail, they may retain access. An open question is whether Judicial orders might be required to gain access services such as mental health therapists.

F5 Project – A service program in Fargo, ND. Founded by a convicted felon, F5 helps to coordinate services and provide personal support to convicts in order to deter repeat offenses. ([www.f5project.org/](http://www.f5project.org/))

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<sup>9</sup> WWII Field Marshall Bernard Montgomery on Leadership: "Now, I found, of course, that bottled up inside men are great emotional forces ...and they've got to be given an outlet. And, that outlet must be positive and constructive and must warm the heart and excite the imagination." "And, if I could gain their confidence, and their trust, and their respect ... then the greatest achievements became possible, within that little group." Memorial University of Newfoundland, (approx. 1960) ([www.youtube.com/watch?v=H1dz3pqbRaw](http://www.youtube.com/watch?v=H1dz3pqbRaw), at 2:50).

## **H. Success Stories.**

### The Benefits of Open Communication:

There is a large and popular park outside a small town in North Dakota. The town owns a long paved-path from the town to the park. A man that lived next to the park lit a fire in his outdoor trash pile, in violation of a burn ban. The wind picked up and the fire spread to his yard. The fire then spread into the park. The damage to the park and the cost of the multiple fire departments that responded was into the tens of thousands of dollars.

Criminal charges were filed against the man.

The defendant approached the prosecutor to ask for leniency because he did not have a job, he was on disability, and the small home was his only significant asset. In the discussion with prosecutor it came out that the defendant enjoyed volunteering at a nearby cultural center as a groundskeeper.

The prosecutor made some phone calls to confer with the interested parties and the defendant, on his own accord, met with the park managers. As it turned out, the town was having trouble finding, and paying for, someone to clean and maintain the long path to the park.

The prosecutor conferred with the interested parties and came up with a win-win solution. The defendant agreed to maintain the path and the exchange received deferred prosecution. The effect of the agreement was much larger. The man developed a friendship with the park managers and will continue to maintain the path even after his community service is complete. Over the coming years, the value of his efforts will easily surpass the monetary value of the damages.

The prosecutor's efforts focused on the needs of the community, while still meeting the deterrence, rehabilitation, and punishment goals of traditional sentencing:

### **I. How will we ensure Participants do the work required?**

Central to the military's Article 15 Non-judicial Punishment process is the commanding officer's legal control over the individual, along with the general chain of command.

Our proposal recognizes that people do not change unless they want to. The pressures on the Participant are based on their sense of duty to peers, and the Participant's desire to take control of their future. The State may ask for a Stand-In (Definition 1.16) to co-sign the agreement, the Coordinator may be an elder or member of the local community, and the State agrees to remove the individual from criminal prosecution upon successful completion.

## **A Message to the Rural Practitioner**

The guidelines were written with the unique interests and limited resources of the rural communities in mind. The guidelines are intentionally minimal. Remedial work does not have to be complex, and certainly should not give in to outside pressures of control, manipulation, and retribution. Local problems require local solutions. Given the right cause, communities and volunteers pull together in support of each other.

The formal requirements should also remain minimal. Under Guideline 2, Equity is the choice of law, and Footnote 20 states that the principles of equity were created as a response to

excessive procedure and writs. The *positive social contract*, as John Quincy Adams called it<sup>10</sup>, is founded in mutual trust before it is reduced to paper.

For example: Coordinators can be community elders, retirees, community leaders, or peers. (Hopefully, their philosophy aligns with the values of *service before self*, and *self-determination*). The Agreement is reviewed on the good faith standard. Additionally, while rural communities have limited access to mental health professionals, support groups are available throughout the State. 12-Step programs have repeatedly demonstrated the restorative power of group meetings.

## Model Guidelines for North Dakota Alternative Sentencing

(Main Sources: Navajo Peacemaking, and Unif.Code of Military Justice – Art. 15.<sup>11</sup>)

(Citation: N.D.Alt.Sent. G.[ ])

### 1. Definitions

- 1.1. **Akíchita** – The Dakota (Sioux) warrior. A person willing to fight for others, protect them, provide for them, and if necessary, police them.<sup>12</sup>
- 1.2. **Agreement** – The contract between the State and the Candidate, that describes the work the Candidate must do in order to earn the State’s concessions.
- 1.3. **Candidate** – A person being considered for participation in this program.
- 1.4. **Coordinator** - The support person who serves as the intermediary between the interested parties. This is the main facilitator of the North Dakota Alternative Sentencing process. The person’s role is similar to that of a sherpa,<sup>13</sup> or one who shows the path but does not tell others how to walk the path.

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<sup>10</sup>On the importance of the Mayflower Compact. *Mourt’s Relations*, at 17, notes by Dwight Heath. (1969 Ed.).

<sup>11</sup> Commanding Officer’s Non-judicial Punishment, [10 U.S.C.A. § 815](#).

<sup>12</sup> Dallas Ross, a Sioux elder, on the Akíchita:

“A warrior’s life is to fight for the people, protect them, hunt for them, provide whatever. Police. And so, their life ended the same way as it began. They began a life that led to them being the Akíchita. Their life ended being Akíchita. Whether or not anybody has respect for the Dakota warriors, and what they fought for, has really no bearing from my standpoint because their spirits were probably more pure than anyone else’s in what they were trying to do.”

*U.S. - Dakota War of 1862*, Minnesota Historical Society, *Upper Sioux Community (Pejuhutazizi Oyate)* (2011) (transcript and audio at [www.usdakotawar.org/node/1103](http://www.usdakotawar.org/node/1103)).

<sup>13</sup> The term Sherpa implies support, humility, and courage as opposed to paternalism. The Sherpa follows the individual down the path – as opposed to leading them, directing them, or whipping them down the path. To the Sherpa the path is sacred, so every journey holds ethical and religious meaning. (<https://www.urbandictionary.com/define.php?term=sherpa>). Just as force begets an equal and opposite force, most people react defensively when told what kind of person they **should** be or how they **should** act. They entrench and harden their views rather than change.

- 1.5. **Creativity** – An ability to connect seemingly unrelated concepts. Non-linear thinking.
- 1.6. **Doctrine of Control** - A paternalistic attitude that allows a person or government actor to manipulate, coerce, and abuse a subject into compliance with the law. It is how society removes non-conformist behavior. It requires establishing power and dominance. At its most dangerous, it is the destruction of the individual. Compliance becomes more important than productivity. Control is easy to mandate and expensive to enforce. The use of Administrative procedure to control human behavior is founded here.
- 1.7. **Doctrine of Risk** - A philosophy guided by a belief that growth requires risk<sup>14</sup>; accompanied by affirmative efforts to protect and promote that ideal. As we remove all risk of injury in life, from early childhood education to criminal justice, society becomes incapable of handling risk. Personal accountability and self-determination require that people be allowed to risk, fail, learn from mistakes, and grow. It is a recognition that *chance* of injury is necessary for growth and personal development.<sup>15</sup> Advocating for Risk is an investment; and it pays dividends.
- 1.8. **Interdiction Point** - The specific moment a Participant is diverted into this program. For example: prior to the filing of a charge; at the time of arraignment or initial appearance; prior to trial; prior to the imposition of a sentence; or following imposition of a sentence.
- 1.9. **Interested parties** – Interested parties can include any combination of defendant, the State, the victim or victims, the local community, parole officers, advocacy groups, or social workers.
- 1.10. **Involved parties** – Those immediate parties involved in implementation of the agreement.
- 1.11. **Participant** - A party who enters into the social contract, for whose benefit the plan is created. This is not a title or a brand.
- 1.12. **Punishment** - This is a general term used to describe the recommended solutions to the problems identified. It does not imply guilt or sentencing in the criminal justice system.
- 1.13. **Successful completion** - The satisfactory completion of remediation services in a particular case. It does not imply that the Participant is cured or by any means perfect.

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<sup>14</sup> See generally, the Business Judgment Rule (where growth requires a deference to risk).

<sup>15</sup> From principles of Stoicism, and Native American understanding of Natural Law.

- 1.14. **Recovery** – A life stage based on a demonstrated mindset against addiction; as opposed to the popular belief that anything other than perfect abstinence is failure. Here, failure is only a temporary setback made permanent.
- 1.15. **Roundtable discussion** - A meeting between interested parties.
- 1.16. **Stand-In** - An individual willing to sign the Participant’s agreement and accept any fees or punishments in the place of the Participant, upon early termination of the program due to the Participant’s willful failure or abandonment.
- 1.17. **Emotional Abuse**<sup>16</sup> - The intention to gain power and control over the victim, resulting in the domination over their body, mind, and spirit.<sup>17</sup> The abuser, be they male or female, leverages a combination of the following tools:
- (1) Gaslighting – Manipulation of memories and context (see, Definition 1.17). (2) Shame - By verbal abuse, constant name calling, belittling, or shackling to past failures. (3) False Light – Using rumor and allegation to humiliate and isolate from friends and family. (4) Consortium – Withholding, or using as a tool, physical or emotional affection. (5) Favor – Isolating from the children and others by currying their favor with gifts or self-martyrdom. (6) Lien on Responsibility - An intense pressure on the victim’s sense of duty to finances, family, or the children. For example, victimizing the children to which the victim responds by sacrificing themselves as a shield to protect the little ones. (7) Domination Over Independence – Control over the bank account, spending, and intrusions on privacy in every corner of the house and mind. (8) Abuse of Process – Manipulative use of resources, such judicial procedure, or filing false reports to authorities.<sup>18</sup> (9) Threats and Intimidation – Threatening any of the above and endangering access to children, housing, and work.
- 1.18. **Gaslighting** – Distorting the past to suit the present. It involves perverting yesterday’s reasonings to fit into today’s argument. If done effectively, the victim loses faith in their own memory. It includes taking past statements out of context in order to win current arguments, and repeating for future arguments.<sup>19</sup>

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<sup>16</sup> Emotional Abuse is defined here because it is often present in childhood of offenders, domestic violence situations, and family law cases. It is particularly challenging for the law to recognize because the scars are invisible. Determining whether it exists, and what damage it has caused, are subjective. Principles of equity may be better suited to address it.

<sup>17</sup> The strings of the puppet master - Emotional abuse corrupts, corrodes, and decays the mind. It coerces by subjecting the victim to extreme emotional duress. It renders the victim to absolute despotism, and convinces upon them complete blame for their own current station. In this way, a grown man will submit to beatings by a much smaller wife, or, a wife will abandon all thought of escape from a physically abusive husband.

<sup>18</sup> For example, using the low evidentiary requirements for Temporary Restraining Orders in order to gain child custody.

<sup>19</sup> See also, [www.psychologytoday.com/us/blog/here-there-and-everywhere/201701/11-warning-signs-gaslighting](http://www.psychologytoday.com/us/blog/here-there-and-everywhere/201701/11-warning-signs-gaslighting)

2. **Choice of Law** - This process is remedial, flexible, and guided by principles of Equity.<sup>20</sup> This is a social contract of mutual trust and commitment. Therefore, the conduct of all parties, including the State of North Dakota, are evaluated under the good faith and fair dealing standard.
3. **Scope** - This program may apply to criminal cases, juvenile cases, family law cases, and partnership disputes.
4. **Judicial Review** - Review of the decision to divert a defendant, program progress, successful completion, or complaints is discretionary. Disputes tilt in favor of the Participant.<sup>21</sup> Complaints against any party are evaluated under the standard of progress, not perfection. Judicial discretion allows judges to look through the form of complaints and identify roadblocks, transgressions, and process manipulations.<sup>22</sup>
5. **Judicial Orders** - Judicial orders are based on the contempt powers of the Court handling the original case or of local jurisdiction. Orders may be required to facilitate or initiate the program.<sup>23</sup> Orders do not constitute a judgment on the merits of the case, or effect the frozen status of the case.
6. **Coordinator** - This role may be filled by any resident of North Dakota, including the Participant, whether acting in their official or personal capacity, provided their interest is primarily the proper implementation of the Agreement. The Coordinator's role is to serve as the primary intermediary between all interested parties. They will be responsible for ensuring the Participant is actively working towards successful completion of the program.
7. **Defense Attorney** - If the public defender serves as the main contact between the parties, they will be paid their standard representation fees.<sup>24</sup> They may also have access to outside sources, such as Freedom Through Recovery.
8. **Appropriate Candidate** - This process is best suited to individuals demonstrating an interest in personal growth, who want to change and are willing to go through the difficult work of self-reflection that makes growth and change possible. Such individuals

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<sup>20</sup> “The origin of equity as a separate system of law began in fourteenth century England. The King’s common law courts were incapable of doing justice in some circumstances because of the procedures and writs. Not all litigants could conform their cases to the rigidity of the pleading requirements. Alternative relief was sought from the King’s Chancellor, who possessed a greater freedom to do justice. ...equity became a separate court system that afforded relief to petitioners who had no adequate remedy at law because of a harsh application of legal doctrine”. *Remedies in a Nutshell*, 3rd Ed, at page 13, West Academic Publishing, William M. Tabb and Rachel M. Janutis.

<sup>21</sup> Society is quick to judge, slow to forgive, resistant to change, and tends toward retribution rather than rehabilitation.

<sup>22</sup> Perhaps a situation is so clouded by conflicting evidence that the terms “victim” and “defendant” can be used to describe both parties - in which case both the defendant and the victim could be required to participate in remedial work.

<sup>23</sup> For example: a defense attorney, serving as advocate for the Participant, may aid in the successful reacquisition of the driver’s license. Orders may also be needed for garnishment of wages, or problems with family law, or other legal matters.

<sup>24</sup> Depending on budgetary concerns, the State of North Dakota may need to approve this.

are ready to stop blaming others and focus on personal accountability. Empty promises will not suffice.

9. **Agreement** - The Agreement must be reduced to writing and signed by the Participant, and the State of North Dakota at a minimum. The Participant's duties and the State's concessions should be included. A Stand-In may be requested to share responsibility for the Participant's actions (e.g., the payment of restitution, fees, participation in a program, undertaking certain actions, or refraining from certain conduct).<sup>25</sup> The agreement may be as simple as a checklist or as complex as an Individual Justice Plan.
10. **Subpoena** – In addition to the Court's traditional subpoena powers, any person who signs the agreement<sup>26</sup>, or assists in the administration of the program shall thereby submit themselves to the Court's subpoena power.<sup>27</sup>
11. **No admission of guilt required** – No admission of guilt is required; however, an eligible defendant must accept responsibility for their actions that underly the charge and its effects. Such an acceptance of responsibility shall not constitute an admission of guilt or a statement against interest.<sup>28</sup>
12. **Resolution of disputes** - The evaluating official or magistrate shall weigh the dispute against the commitment made by the parties. (e.g. Balance the needs of the State, public safety, and actual commitment to personal self-reflection and growth of the Participant.)<sup>29</sup>
13. **Changes to Guidelines and Oversight** - The Supreme Court of North Dakota shall have the power to oversee or change these guidelines.<sup>30</sup> Criminal and civil procedure rules and legislative authority may be required to ensure the function, and empower the application, of these guidelines. (e.g. Freezing, *infra*).
14. **Participation** - A party may voluntarily opt into the program or out of the program up to the implementation phase. Participation is a privilege, not a right.
15. **Process initiation** - The prosecuting attorney, or presiding judge may divert any defendant into this program in lieu of admonition or reprimand. Any person may recommend a party for participation in this program.<sup>31</sup>

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<sup>25</sup> See Rule 11(b) -. *Navajo Nation Peacemaking: Living Traditional Justice*, Marianne O. Nielsen & James W. Zion eds., (2005) (Hereinafter, "Peacemaking")

<sup>26</sup> Consider the example of a Participant's family instigating the Participant to violate the contract terms. In alcoholic families, for example, as one spouse becomes sober, the other may do things to get the alcoholic to fall off the wagon. In that way the instigating family member maintains their own image of martyr, and saint.

<sup>27</sup> See Peacemaking - Rule 15.

<sup>28</sup> *Id.* Rule 7(c).

<sup>29</sup> Consider that often one partner in a relationship may have ulterior motives, such as gaining favor in a child custody case.

<sup>30</sup> Derived from 10 U.S.C.A. § 815(a).

<sup>31</sup> See Peacemaking - Rule 8.



16. **Waiver of speedy trial rights** - An eligible defendant must waive the right to a speedy trial for the duration of the program.<sup>32</sup>
17. **Freezing** - A proceeding or process, right or obligation, existing at the time the parties enter in the Alternative Sentencing process, is frozen upon entry, and revitalized upon premature exit from the program. Some examples of proceedings include decisions to prosecute, plea negotiations, suspensions in prosecution, suspended sentences, etc.
18. **Culpability** - The program shall not be manipulated by any party in order to escape or establish culpability. Good faith and fair dealing of the Participant, and the State, is fundamental to the success of this program.
19. **Early Termination Requests** - Self-reflection is a painful process. One party's desire to end the program early shall not serve to poison the process, or sour the evaluation of the effectiveness of the program. The Participant and the State must show a willingness to fully cooperate with all aspects of the Agreement, and comply with all conditions established by the court, probation officer, treatment program, or other relevant agency. The cooperation must be substantial and done in good faith.<sup>33</sup> If the Participant or the State is deliberately abusing the system, or if the program is unredeemable, may be grounds to terminate.
20. **Groups** – Group meetings are sacred forums of sharing and communal growth; therefore, the government shall have no ear in the meetings. Support groups shall be self-governed. Members of the group may serve as advocates to the entire Alternative Sentencing program.<sup>34</sup> In the absence of an existing group, a Participant may be directed to establish a group; in which case the initial meetings will consist of one person who must read group materials aloud to himself. Groups can consist of “graduates” of the program. Meetings may be held daily or weekly. No attendee may be present in an official capacity. Group types can include addictions groups, support groups, therapy groups, veterans, or PTSD groups.
21. **Regions** - The Alternative Sentencing regions should match the eight health regions of the North Dakota Department of Health and Human Services in order to accommodate health care needs.
22. **Sentencing options** – Sentencing options are based on principles of equity and community building. They should include a remedial component, as well as a group participation component. Flexibility and creativity are encouraged. Sentencing options might be based on the skills of the offender or tailored to fit the offense.
23. **Evidence and Sharing of Information** - Information regarding general progress shall be freely shared among the court, involved parties, and probation officers. However, no

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<sup>32</sup> See Peacemaking - Rule 9(b).

<sup>33</sup> *Id.* Rule 9(f)

<sup>34</sup> Monetary resources are finite. If the members of the group gain deep personal benefit from the program, they will have a personal commitment to see that the program persists.

information developed during the course of the program may be used as evidence against a participant in any future court proceeding or prosecution other than the fact of noncompliance with the terms and conditions of this program.

No information shall be provided to any police officer, prosecutor, or state or federal law enforcement officer without the specific leave of the presiding judge. Any person who violates this section shall be charged with contempt of court.<sup>35</sup> This process encourages communication and discussion, similar to jury room deliberations. This program does not operate as a safe harbor for culpability, nor does it shield a malicious prosecutor.

Cooperation and communication are critical to this process; therefore, Candidates and Participants should be protected from self-incrimination and have some immunity for information revealed during the process.

Further, based on the wildfire nature of gossip, great care should be given to protect the Participant's personal information during this process. Transformation is a vulnerable time.

24. **Severity of the Offenses** - The imposition and enforcement of the program recommendations are not a bar to criminal prosecution for an underlying serious crime or offense; but the fact that a program has been completed may be shown by the accused upon sentencing.<sup>36</sup>
25. **Term** - Participation in this program, shall not run longer than 51 weeks.
26. **Subsequent Offenses** - If the program is meeting its goals, the offender shall continue with the program. If the offender demonstrates flagrant disregard for the lessons learned, access to the program shall terminate and the initial offense proceedings shall resume. Subsequent offenses remain independent of the initial offense, although the State may fold those offenses into the Agreement and this program. If subsequent offenses are folded in, the effects on prosecution and rights to speedy trial are treated in the same way as the initial case.
27. **Successful Completion** - Successful completion is generally a joint determination made by all Involved parties. Interested parties (Guideline 1.9), including the victim and the victim's family, may have input in this determination. The unit of measurement is progress, not perfection.<sup>37</sup> The question to be answered is: Has the Participant made satisfactory personal progress such that the underlying issue is currently resolved?<sup>38</sup> (e.g. a period of sobriety, successful employment, group participation, etc.)
28. **Effect of Program Completion** - The effect of program completion shall be determined before the parties agree to enter into the program. Some examples include dropping of

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<sup>35</sup> See Peacemaking - Rule 14.

<sup>36</sup> Derived from 10 U.S.C.A. § 815(f)

<sup>37</sup> The phrase "progress, not perfection," comes from the addictions and 12-step community. A standard of perfection leads to a sense that nothing is ever good enough. Perfectionism can result in depression, anxiety, and acts as a bar to any progress. Perfectionism is a Disease; and the sister of procrastination.

<sup>38</sup> Evidence of completion could include decreased calls for service to the police, gainful employment or remedial efforts made towards the victim(s).

charges, suspended prosecution, suspended sentencing, or credit toward sentencing and time served, and petition for pardon.

29. **Appeal of Recommendation** - A person punished under these guidelines who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the court. The appeal shall be promptly decided, but the person punished may in the meantime be required to continue with the recommendations.<sup>39</sup>
30. **Records** - The administrator of this program may prescribe the form of records to be kept of the proceeding under these guidelines and may also prescribe that certain categories of those proceedings shall be in writing.
31. **Tracking** - The Participant's Coordinator will be in charge of tracking the Participant's progress, and reporting on that progress to the judicial representative. The judicial representative may be the judge, clerk, or prosecutor from the instigating case, or some other representative of the State.
32. **Release of Information** – The Agreement is a private contract between private parties. Participation, completion and past participation is the private information of the Participant. A close analogy is the jury room deliberation. Additionally, current failings should not reflect on past success, and current success should not be colored by past failings. (See footnote 18).
33. **Recognition** – For the purpose of public recognition of the Participant's progress, once the process is completed, the Agreement is signed again by all involved parties.

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<sup>39</sup> Derived from 10 U.S.C.A. § 815(d)

# Appendices:

## Appendix 1: Excerpt from *The Scarlet Letter*

*The Scarlet Letter* (1850)  
By Nathaniel Hawthorne,  
Chapter 18, pg. 3,  
(emphasis added).

“O exquisite relief! She had not known the weight, until she felt the freedom! By another impulse, she took off the formal cap that confined her hair; and down it fell upon her shoulders, dark and rich, with at once a shadow and a light in its abundance, and imparting the charm of softness to her features. There played around her mouth, and beamed out of her eyes, a radiant and tender smile, that seemed gushing from the very heart of womanhood. A crimson flush was glowing on her cheek, that had been long so pale. Her sex, her youth, and the whole richness of her beauty, came back from what men call **the irrevocable past**, and clustered themselves, with the maiden hope, and a happiness unknown, with the magic circle of this hour. And, as if the gloom of the earth and sky had been but the effluence of these two mortal hearts, it vanished with their sorrow. All at once, as with a sudden smile of heaven, forth burst the sunshine, pouring a very flood into the obscure forest, gladdening each green leaf, transmuting the yellow fallen ones to gold, and gleaming adown the gray trunks of the solemn trees. The objects that had made a shadow hitherto, embodied the brightness now. The course of the little brook might be traced by its merry gleam afar into the wood’s heart of mystery, which had become a mystery of joy.

Such was the sympathy of Nature—that wild heathen Nature of the forest, never subjugated by human law, nor illumined by higher truth—with the bliss of these two spirits! Love, whether newly born, or aroused from a death-like slumber, must always create sunshine, filling the heart so full of radiance, that it overflows upon the outward world.”

## Appendix 2.

### A List of Unusual Options:

(A note to Prosecutors and Defense Attorneys: *please, do not abuse this process.*)

- A candidate that enjoys reading, playing music, or singing could be asked to read/play/sing to seniors in a palliative care facility.
- Ten In, Twenty Out – Alternating periods of incarceration (within criminal sentencing) punishes, but also encourages personal change.
- A candidate that has stolen items could be asked to return each item personally, with the assistance of a chaperone.
- Pay Detention – Instead of forfeiture, interest earned while the funds are held could go to indigent defense fund.
- Family members may be requested to participate helping the Participant.
- Gratitude journals have been proven to improve depression. A Participant could be asked to write a gratitude journal every night; One idea is to find three things to be grateful for, no matter how inconsequential.
- A review of all the financial demands on the Participant, such that an ability to provide food, shelter, and access to transportation, could account for many of a Participant's problems.
- In the case of an unruly child, rather than removal from the home, perhaps the parent should take parenting classes.
- In a domestic violence case where both parties play some role, the husband must attend addictions groups, and the wife attend codependency groups.
- A candidate with trucking experience could be asked to organize a program to ship livestock, that would otherwise be culled, to a food program for the poor. (Often-culled animals: Male cows at a milking farm, male chicks at an egg laying farm, lower grade pigs at a hog barn.)

- A candidate with access to horse corrals and equipment could be asked to start a horse program for troubled children. (Note: the US Dept. of the Interior, Wild Horse and Burro Program pays \$1,000 per horse for horse-breaking.)
- A candidate with event planning experience could be asked to organize a street dance, or festival in the park.
- A candidate with addictions problems could be asked to start a local addictions support group; and, until others join the group, he or she would be meeting alone and reading materials aloud to himself or herself.
- A candidate that enjoys gardening could be asked to establish a community garden, or volunteer with a local community beautification group.
- A candidate with physical fitness or yoga experience could be asked to start a morning exercise program in the park.
- A candidate that struggles with anti-social behavior could be asked to volunteer at an animal shelter, or maintain hiking trails.
- A candidate with a truck could be asked to start a composting program for expired produce from a grocery store, or left-over food from a local cafeteria.
- If the family and friends of a candidate are part of the problem, the State could assist the Participant in relocating.
- A candidate with construction, carpentry, or contracting experience could be asked to build a play structure at a local daycare.
- Commitments to find work could be coupled with a weekly promise to submit copies of completed job applications.

**Appendix 3: Individual Justice Plan (IJP) Worksheet**  
North Dakota Protection and Advocacy Project (2005).

**Client Name**  
**Individual Justice Plan**

**I. Presenting Problems**

**II. Assessment**

Residential  
Vocational  
Education/Training  
Medical  
Mental/Behavioral Health  
Financial  
Social/Recreational  
Family  
Cultural background  
Transportation  
Advocacy  
Further Assessments Needed

**III. Recommendations**

Positive Behavior Supports  
Counseling  
Supervision/Case Management  
Community Service  
Hospitalization  
Agency Transfer  
Other Treatment/Training  
Psychotropic Medication Management  
Restitution  
Fine  
Probation  
Incarceration

**IV. Other Recommendations**

**V. Anticipated Outcome**

**VI. Integration**

**VII. Review of the IJP**

**VIII. Consent**

**IX. Confidentiality**

**X. Signatures**