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A Native Vision of Justice

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CLASSIC REVISITED
A NATIVE VISION OF JUSTICE†

Carole Goldberg*

THE SURROUNDED. By D'Arcy McNickle. New York: Dodd Mead. 1936. (University of New Mexico Press 1978 ed.). Pp. 297. \$23.95.

That's the way it goes now; the old law is not used and nobody cares about the new.

Old Modeste
The Surrounded (p. 207)

He could tell himself, as he stood there, not only listening but seeing, that of all joys, there was none like that of capturing the future in a vision and holding it lovingly to the eye.

Archilde
The Surrounded (p. 255)

INTRODUCTION

Although largely unheralded in its time,¹ D'Arcy McNickle's *The Surrounded* has become a classic of Native American literature. When the University of New Mexico Press reissued the book in 1978, a year after McNickle's death, the director of Chicago's Newberry Library, Lawrence W. Towner, predicted (correctly) that it would "reach a far wider audience."² Within *The Surrounded* are early stirrings of a literary movement that took flight several decades after the novel's first publication in the writings of N. Scott Momaday, Louise Erdrich, James Welch, Leslie Marmon Silko, and Gerald Vizenor, among others.³ All of these Native American authors share with McNickle a desire to present, from a Native perspective, the challenges of establishing identity and sustaining community in a world where indigenous societies must contend with powerful forces of colonization and modernity. Literary critics have offered sharply differing interpretations of the ultimate message *The Surrounded* conveys about the future of

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1. For a description of its poor financial showing and initial mixed reviews, see DOROTHY R. PARKER, *SINGING AN INDIAN SONG: A BIOGRAPHY OF D'ARCY McNICKLE* 56–57 (1992); JOHN LLOYD PURDY, *WORD WAYS* 79–81 (1990).

2. Afterword to the 1978 Edition, p. 299.

3. Professor Kenneth Lincoln gave a name to this literary movement—Native American Renaissance. KENNETH LINCOLN, *NATIVE AMERICAN RENAISSANCE* (1983).

indigenous peoples. Some view the novel as a statement of despair,⁴ while others discern McNickle's confidence in the strength of Native cultures and their capacity for renewal.⁵ There is broad consensus, however, that *The Surrounded* is a seminal work.⁶

What the literary critics have largely overlooked is the novel's pointed analysis and critique of criminal justice in Indian country. Much of the novel's plot is driven by acts viewed as criminal by the dominant, non-Native social order. The protagonist, Archilde Leon, returns home to the Flathead Reservation of the Confederated Salish and Kootenai Tribes in Montana, hoping to say a last farewell to his family before making his way as a fiddler in the cities. His relationship with both parents has become strained, following his education in the local Catholic mission school and in a federal Indian boarding school. For different reasons, neither parent wanted him to pursue his ambition of making his way far from home in a big city. Greeting him is news that his older brother, Louis, is hiding in the mountains, accused of stealing horses—conduct outlawed by the local authorities but long carried out by the Salish against their enemies.⁷ Archilde's non-Indian father is so displeased with Louis's behavior that he has disassociated himself from the other members of his family, living apart from his Salish wife, Catharine, and refusing all contact with Louis. At first, Archilde also feels alienated from the more traditional Salish ways that Catharine, his mother, still practices, despite her long-ago conversion to Catholicism. But as he develops greater appreciation for his mother—through feasts and Salish stories told in his honor by the blind elder, Old Modeste—Archilde agrees to accompany her on one last hunting trip into the snowy mountains. There they first encounter the hostile local sheriff, Sheriff Quigley, and later are surprised to discover Louis. Louis proceeds to shoot a young, female deer. When the local game warden comes upon the group and accuses Louis of violating state game laws, there is a confrontation, and the warden mistakenly believes Louis is about to shoot him. The warden fires his gun, killing Louis, and a furious Catharine steals behind the warden and fells him with a hatchet.

The remainder of the story unwinds the consequences of this double homicide. Archilde and Catharine hide the body of the game warden by burying him in the snow-hardened ground and drag Louis back to the reservation mission town of St. Xavier for a proper burial. They give no report of the actual events to the non-Indian authorities. The local federal government agent brings Archilde in for questioning by Sheriff Quigley,

4. See, e.g., Louis Owens, *The Red Road to Nowhere: D'Arcy McNickle's The Surrounded and "The Hungry Generations"*, AM. INDIAN Q., Summer 1989, at 239.

5. See, e.g., PURDY, *supra* note 1, at 34–81. For additional interpretations, see PARKER, *supra* note 1, at 251–52.

6. "More than any other Indian writer, D'Arcy McNickle would prove to be a seminal figure in the new American Indian fiction . . ." LOUIS OWENS, *OTHER DESTINIES* 61 (1992). For a collection of essays praising *The Surrounded* and McNickle's other writings, see *THE LEGACY OF D'ARCY McNICKLE* (John Lloyd Purdy ed., 1996).

7. See *infra* text accompanying notes 54–55.

who is highly suspicious of the circumstances of the warden's disappearance. Archilde, however, denies any involvement, and the Sheriff must wait until the spring thaw to search for any evidence against him. After Archilde is released, he explains what happened to his father, who urges his son to leave Flathead as soon as possible to study music in Europe. Archilde agrees and reconciles with his father, but almost immediately thereafter, his father contracts a serious illness and dies. Archilde decides to remain on the reservation to complete the season of his father's ranching and farming enterprises—a decision that is reinforced when Archilde becomes attached to Elise, a young, flamboyant Indian woman, who is the granddaughter of Old Modeste. As spring turns to summer, Catharine has dreams that lead her to disavow her Catholic faith. Rejecting belief in sin and confession, she turns to Old Modeste and the elders to dispense the traditional punishment for wrongdoing—the whip. In a proceeding held in secret from the non-Indian authorities, Catharine receives her whipping.

Some time later, Sheriff Quigley reports his discovery of the warden's saddle at a location in the mountains that conflicts with Archilde's earlier story. As the Sheriff continues his search for the warden's remains, and Catharine nears death from a stroke, Archilde tells the federal agent what really happened. The agent, who thinks well of Archilde, responds that there will be some difficulties persuading the Sheriff of Archilde's innocence. But the agent allows Archilde to remain with his dying mother, trusting Archilde to turn himself in. Meanwhile, Elise warns Archilde not to expect fair treatment at the hands of the non-Indian justice system. After his mother's death, Archilde follows Elise into the mountains. The agent sends his federally commissioned Indian police force to track them down, without success. Eventually Sheriff Quigley locates them and enters their camp. As he tries to arrest Archilde, Elise throws hot coffee in his face and fatally shoots him. The federal agent and Indian police are nearby, and as the story ends, Archilde extends his arms so they can handcuff him and take him away.

Nearly seventy-five years after publication of *The Surrounded*, Congress passed the Tribal Law and Order Act of 2010 ("TLOA"),⁸ acknowledging "a crisis of violent crime on many Indian reservations that has persisted for decades."⁹ The TLOA introduced some modest improvements to the complex system of federal, state, and tribal criminal justice operating in Indian country.¹⁰ The Act left more far-reaching, fundamental reforms to the recommendations of a bipartisan, hybrid legislative-executive commission, the

8. Tribal Law and Order Act (TLOA) of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261–301 (codified in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.).

9. S. REP. NO. 111-93, at 1 (2009).

10. For example, the Act authorized United States Attorneys to appoint tribal prosecutors as Special Assistant United States Attorneys in order to conduct federal prosecutions of Indian country offenses. The Act also authorized tribes subject to state criminal jurisdiction to request a further layer of federal Indian country criminal jurisdiction. See TLOA sec. 213, § 13(d), 124 Stat. at 2269–70; *id.* § 221, 124 Stat. at 2271.

Indian Law and Order Commission.¹¹ As a member of that Commission¹² and someone who has conducted extensive empirical research on the current state of criminal justice in Indian country,¹³ I found an uncanny correspondence between McNickle's understanding of the problems of Indian country criminal justice in 1936 and the assessments of contemporary scholars. Although that system has experienced some changes between the initial publication of *The Surrounded* and passage of the TLOA, many of the system's fundamental features have remained constant. The special power of *The Surrounded* is that it presents both the weaknesses of the present system and recommendations for improvement through a compelling story, rather than through data or scholarly exposition. A rereading of *The Surrounded* could help build support for long-needed reformation of Indian country criminal justice.

Part I of this Review presents both biographical and historical background that may explain how McNickle arrived at his perceptive, far-sighted understanding of justice issues affecting indigenous communities. Part II draws out the elements of narrative and character in *The Surrounded* that bear most directly on Indian country criminal justice. I show how the novel develops a critique of the Indian country criminal justice system—and an implicit argument for change—that accords remarkably with contemporary theory and policy analysis.

I. BIOGRAPHICAL AND HISTORICAL CONTEXT FOR McNICKLE'S VISION

The sources of McNickle's remarkable insights and vision can be found both in his personal biography¹⁴ and in the history of federal Indian policy during his lifetime. Like most of the more recent writers of what has been called the Native American Renaissance,¹⁵ McNickle had biological and cultural ties to both Indian and non-Indian communities. Born in 1904 on the Flathead Indian Reservation of the Confederated Salish and Kootenai Tribes, located in northwest Montana, McNickle was enrolled as a tribal member, even though neither of his parents was Salish or Kootenai. His father was of Irish descent, and his mother was Metis, a descendent of intermarried French and Cree who had made their home in what is now Saskatchewan, Canada. Beginning in the 1860s, many Metis—including

11. TLOA § 235, 124 Stat. at 2282–86. The work of the Commission is presented at www.indianlawandordercommission.com. In a report to be issued in 2013, the Commission will address a wide array of issues affecting criminal justice in tribal communities, including jurisdiction, juvenile justice, enhancement of tribal justice systems, intergovernmental cooperation, crime prevention, and detention, as well as alternatives to incarceration. See TLOA sec. 235, § 15(e)–(f), 124 Stat. at 2284.

12. All of the views expressed in this Review are solely the author's and were not vetted with the Indian Law and Order Commission.

13. See DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 (2012).

14. For a full biography of McNickle, see PARKER, *supra* note 1.

15. See LINCOLN, *supra* note 3.

McNickle's maternal grandfather—violently resisted dispossession by the Canadian government, which had begun dividing up the lands of that area for settlement by non-Natives. When the rebellion failed in 1885 and the Canadian government tried and hanged the rebel leader, many Metis fled south across the U.S.–Canadian border, seeking refuge among tribes such as the Confederated Salish and Kootenai. Not only did the Salish and Kootenai provide a sanctuary for McNickle's family, they also granted them tribal citizenship in 1905, part of the enrollment process that preceded allotment of tribal land into individually held parcels.¹⁶ McNickle, his mother, and his two sisters all received allotments of Flathead land as a consequence.¹⁷

Like the protagonist he created for *The Surrounded*, McNickle was born in the opening years of the twentieth century and raised in a mission town in Montana, the site of a Catholic church and mission school. Jesuit priests established both the fictional town of St. Xavier and McNickle's actual birthplace of St. Ignatius in 1855 on the Flathead Reservation.¹⁸ Like Archilde, McNickle first attended the local mission school and was then sent to a federally operated Indian boarding school in Oregon, where he studied and developed skills as a musician. And also like Archilde, McNickle became estranged from his non-Indian father and his Indian mother.¹⁹ In the novel, the couple live in separate homes on the reservation—he in a large, comfortable ranch house, she in a "dirt-roofed log cabin" (p. 1). Archilde's father is a successful non-Indian rancher, and his mother is a full-blood, Salish-speaking elder in the process of rejecting a Catholic faith that she had embraced so fully in her youth that she was known as "Faithful Catharine" (p. 22). Although McNickle does not reveal the cause of Archilde's parents' disaffection until late in the story, the rift is wide and deep-seated. They rarely speak, and when they do, there is scarcely any mutual understanding. In McNickle's real life, the parental rupture played out somewhat differently but was just as significant. His Metis mother and non-Indian father separated in 1912 and divorced a year later. A prolonged battle over custody ensued, resulting in orders for young D'Arcy to attend Chemawa, the federal Indian boarding school in Oregon.²⁰ In 1916, when he was twelve years old, his mother regained custody, and McNickle was reunited with her and her second husband at Flathead. Soon, however, the family left the reservation, while McNickle's father remained in the area.²¹

The Surrounded is also autobiographical at a more metaphorical level. The novel opens as Archilde, having left the reservation as a young man to make his way as a fiddler in Portland, returns for what he believes is a final farewell visit (pp. 1–2). Instead, he is drawn powerfully into reservation life,

16. PARKER, *supra* note 1, at 12. Allotment was authorized and initiated by the Act of Apr. 23, 1904, ch. 1495, 33 Stat. 302, 303.

17. PARKER, *supra* note 1, at 13.

18. *Id.* at 7–8.

19. *Id.* at 17.

20. *Id.* at 13–14, 17.

21. *Id.* at 18, 21–22.

and the non-Indian criminal justice system ultimately ensnares him. McNickle himself spent two years living at Flathead after leaving Chemawa. But in 1918, he left for the Pacific Northwest with his mother and her non-Indian second husband, who had found work in wartime shipbuilding.²² McNickle never again made his home among the Salish, and he rarely came back to visit. He pursued studies in literature, drama, and American history, first at Montana State University, then at Oxford (affordable only because he sold his allotment upon turning twenty-one), and finally at Columbia University. As the country plummeted into the Great Depression, McNickle made a meager living working in New York City's publishing industry while working on a manuscript first titled *The Hungry Generations*—later revised significantly and renamed *The Surrounded*.²³

Even though McNickle broke his residential and cultural ties with the Salish after 1918, becoming engulfed in non-Indian educational and economic pursuits and marrying a non-Indian woman, he did return to Indian country in a larger sense. In 1936, he joined the staff of Franklin Roosevelt's Commissioner of Indian Affairs, John Collier.²⁴ Collier was proposing an entirely new agenda for federal Indian policy, commonly called the Indian New Deal.²⁵ Captured most fully in the Indian Reorganization Act,²⁶ which Congress passed in 1934, this new agenda provided protection of tribal land bases and support for greater tribal control over reservation life. McNickle traveled throughout Indian country, explaining the plan for tribal reorganization under federally approved constitutions, dealing with issues of tribal enrollment, supporting tribal community development projects, and working with applied anthropologists to document tribal practices to be incorporated into their constitutions and laws.²⁷

In 1941, while still working for the Indian Service, McNickle was one of the founders of the National Congress of American Indians, envisioned as an intertribal coalition advocating for Indian interests affected by federal legislation. It has since become the premier national organization promoting tribal self-determination.²⁸ During that time, he also authored the first significant history of Indian-white relations from a Native perspective.²⁹ With that book, McNickle attempted to answer a question posed to him at a Hopi village: Why, a Hopi man had asked, did the Europeans think that it was proper to intrude on the Indians' land, uninvited, and impose their rules on tribal communities that maintained very different ways of life? McNickle left the Indian Service in 1952, frustrated by another turn in federal Indian policy,

22. *Id.* at 22.

23. *Id.* at 24–35.

24. *Id.* at 35.

25. *Id.*

26. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–494a (2012)).

27. *Id.* at 91–95.

28. *Id.* at 106.

29. D'ARCY McNICKLE, *THEY CAME HERE FIRST* (rev. ed. 1975).

this time toward termination of tribal treaty rights, land bases, and federal recognition of tribes as distinct governments.³⁰ Termination policy, as it was called, attacked Indians' collective tribal ties and values in order to promote stark individualism.³¹ Until his death in 1977, McNickle resisted termination, offering a competing vision of Indian–non-Indian relations. He used his dual links to the Indian and non-Indian worlds to teach, write, and advocate for greater mutual understanding, stressing that Native peoples should be free to adapt to Euro-American society in the ways and at the paces that fit their cultures and communities.³²

Although McNickle's views about forced assimilation may have grown stronger during his years as a federal official, they were already evident at the time he wrote and published *The Surrounded*. His appreciation for cultural differences and the need to respect those differences were what attracted him to working with John Collier in the first place. Indeed, McNickle's analysis of the morality and practicality of forced assimilation, drawn from his own experience and studies of American history, is central to understanding *The Surrounded*. The novel is set in 1916—one of the worst points for tribes in the history of federal Indian policy. Throughout the nineteenth century, the U.S. government confined tribes to smaller and smaller reservation tracts through warfare, treaties, presidential executive orders, and congressional acts.³³ By the final decades of that century, however, the threat of armed conflict with tribes had receded, and the federal government adopted a policy of further dispossession and forced assimilation.

Allotment was the centerpiece of that policy. It advanced both dispossession and assimilation in the name of transforming Indians from communally oriented hunters, fishers, and gatherers into rugged individualists and farmers.³⁴ Through allotment, the federal government broke up reservations that were protected under federal law against alienation and taxation into individual parcels, typically with 160 acres for each designated tribal member. On very large reservations, allotment left plenty of “surplus” lands available for non-Indians to acquire. Because land for sale flooded the market, the non-Indians got great deals while the Indians received little in exchange. Furthermore, the parcels allotted to individual Indians were protected against sale and property taxes only for a limited period of

30. PARKER, *supra* note 1, at 136.

31. Congress launched termination policy with House Concurrent Resolution 108 in 1953 and followed up with numerous statutes ending the federally recognized status of seventy tribes, including the Klamath in Oregon and the Menominee in Wisconsin. NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 90–91 (2012 ed.).

32. See PARKER, *supra* note 1, at 126, 174.

33. See NEWTON ET AL., *supra* note 31, at 55–71.

34. The most far-reaching statute was the Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887). Although its effects on Indian property remain, most of the Act has either been repealed, e.g., 25 U.S.C. §§ 331–333 (1994) (repealed 2000), or substantially replaced, most recently by the American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, § 6(c), 118 Stat. 1773, 1805.

time—usually twenty-five years. Once the time period expired, unscrupulous land speculators and county assessors often preyed on the Indian allottees, wresting from them their only asset. The upshot of allotment was that vast amounts of collectively held tribal reservation lands wound up as the private property of non-Indians. Supporters of allotment policy—many of them self-styled “friends of the Indians”—hailed this transfer of tribal lands to non-Indians. They argued that the newly arrived non-Indian farmers would serve as models for their indigenous neighbors, hastening their full integration into the non-Indian world.

In the case of the Salish and Kootenai, their 1855 Treaty of Hellgate had ceded twenty-two million acres of aboriginal lands in exchange for a far-smaller reservation—1.25 million acres of valleys, mountains, and the southern part of Flathead Lake—as well as off-reservation hunting, fishing, and gathering rights.³⁵ In the treaty, the United States had promised that the Flathead Reservation would belong to the Salish and Kootenai forever, a seeming guarantee against allotment. Unsurprisingly, when the federal government first proposed allotment, the Salish and Kootenai protested vociferously. Nonetheless, in 1904 Congress set the process in motion, eventually causing the loss of half a million acres—nearly half the reservation.

Allotment was not the only instrument of forced assimilation during the period leading up to and including *The Surrounded*. As depicted in the book, the federal government established boarding schools aimed at stripping children of their tribal cultures and inculcating non-Indian languages, values, and practices. The government also enlisted the federal criminal justice system in the forced assimilation campaign. Policymakers used that system to outlaw and replace tribal authority structures, normative systems, and cultural practices.³⁶ Until the late 1800s, tribal members’ conduct within reservations was ordinarily subject only to tribal law. Even if a tribal member committed an offense against a non-Indian, prosecution under federal law was possible only if the offender had not previously been punished under tribal law or if a treaty specially dictated federal action.³⁷ Thus, Native nations remained free to respond to disruptive behavior according to their own rules, which varied considerably from tribe to tribe. Beginning in 1883, however, the Department of the Interior promulgated a Code of Indian Offenses and set up Courts of Indian Offenses and Indian police forces throughout Indian country to enforce it.³⁸ This Code prohibited Indians from engaging in activities deemed antithetical to their assimilation—everything

35. Treaty of Hellgate, July 16, 1855, 12 Stat. 975.

36. See WILLIAM T. HAGAN, *INDIAN POLICE AND JUDGES* (1966).

37. See 18 U.S.C. § 1152 (2012).

38. See HAGAN, *supra* note 36; see also Robert N. Clinton, *Code of Indian Offenses*, OFF. ROBERT N. CLINTON (Feb. 24, 2008, 10:36 PM), <http://robert-clinton.com/wordpress/?p=72> (discussing the history and linking to a transcribed text of the original 1883 Code of Indian Offenses).

from sacred tribal ceremonies to cohabitation.³⁹ A few years later, Congress passed the Major Crimes Act, allowing federal criminal jurisdiction for the first time over serious offenses that Indians committed on reservations.⁴⁰

Within decades it became apparent that the allotment-era policies had succeeded in dispossessing the Indians but had failed at assimilating them. The dispossession was plain to see. Allotment caused the loss of nearly ninety million acres of tribal land across the country, until the Indian Reorganization Act put a halt to further allotment in 1934.⁴¹ The loss of tribal land and resources spurred economic marginalization, as well as disruption of the foundations for social systems, ceremonies, and behavioral norms. Supporters of the forced assimilation policy had assumed that these losses would lead Indians to discard their tribal affiliations and ways of life. They were wrong. Defying the federal agents who enforced the Code of Indian Offenses and sent Indian children to boarding schools, tribal members took their ceremonies underground, maintained the primacy of their kinship bonds, and drew upon their longtime norms and practices to resolve conflicts. This stubborn refusal to abandon their lands and their communities often coexisted with extreme material deprivation—the very situation McNickle’s protagonist, Archilde Leon, encounters when he returns home in 1916.

In the late 1920s, exactly when McNickle began working on *The Surrounded*,⁴² the Secretary of the Interior charged a team of investigators with inspecting and reporting back on the conditions of tribal communities. In 1928, they issued their report, titled *The Problem of Indian Administration*, which is known today as the Meriam Report. Its opening lines were an indictment of the allotment-era policies: “An overwhelming majority of the Indians are poor, even extremely poor, and they are not adjusted to the economic and social system of the dominant white civilization.”⁴³ The report went on to chronicle the painfully poor state of Indian health, education, employment, housing, and other living conditions. Not all of its recommendations directly supported tribal self-determination; nonetheless, scholars and practitioners have widely credited the Meriam Report with launching the shift in Indian policy that led to the Indian New Deal. By highlighting the resistance of Native peoples to forced assimilation, it implicitly made the case for a federal strategy that recognized and engaged, rather than attacked wholesale, tribal ways of life.

The persistence of tribal cultures—and the persistent pull of those cultures on their people—is at the heart of *The Surrounded*. McNickle’s novel

39. See, e.g., HAGAN, *supra* note 36, at 107–08.

40. See 18 U.S.C. § 1153 (2012).

41. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10–12, 13 & n.59 (1995). The provisions in the Indian Reorganization Act barring future allotment of tribal lands and extending the trust status of existing allotments can be found at 25 U.S.C. §§ 461–465 (2012).

42. PARKER, *supra* note 1, at 40.

43. INST. FOR GOV’T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* 3 (1928).

demands acknowledgement of those realities and condemns to futility those who—for noble reasons or bad—believe that they can and should force Indians to reject their own ways of life. McNickle was not yet positioned in the Department of the Interior, the center of federal Indian policymaking, when he wrote *The Surrounded*. So the lessons of the Meriam Report did not reach him through that channel. But he was aware of the harmful effects of allotment-era policies from his own upbringing, and he studied American frontier history at Columbia while penning his novel, which brought that history back to his consciousness.⁴⁴

An earlier version of *The Surrounded*—rejected by several publishers under the title *The Hungry Generations*⁴⁵—offered a message about assimilation that contrasts sharply with the Meriam Report. In that early incarnation of the novel, Archilde actually leaves the reservation after the warden and Louis are killed in the mountains, and he goes to Paris to study music. There he finds company and solace in a non-Indian woman, Claudia. Archilde eventually returns to his father's Montana ranch, which he has inherited. Although someone finds the warden's body and the authorities arrest and try Archilde for murder, Archilde successfully establishes his innocence. As *The Hungry Generations* ends, Archilde awaits Claudia's arrival and the resumption of his life as a prosperous rancher. The lesson of this version is that assimilation is not only possible—it is the best hope for a satisfying life.

McNickle's biographer, Dorothy R. Parker, contends that McNickle experienced a shift in feelings about his mother—and by extension, his Native heritage—over the course of writing his novel.⁴⁶ Despite his close relationship with his mother as a boy, he completely lost contact with her during his twenties. While working on the book, McNickle sought out his mother's whereabouts, as well as more information about his Tribe and its history.

As a consequence, *The Surrounded* is far less sanguine about the benefits of assimilation and far more respectful of Native culture. Like the Meriam Report, it grounds its critique of forced assimilation in the Indians' powerful connections to their beliefs and practices. As the story unfolds, Catharine "the Faithful" becomes thoroughly disillusioned with the Catholic Church. Beset by the influx of non-Indians and their technology, her Tribe had sent representatives over mountains, plains, and rivers fifty years earlier to find priests who would establish a mission in their community. They believed that Christianity was more powerful than their old ways and would deliver them from the calamities of disease, dispossession, and social disintegration. But in her old age, Catharine concludes, to the surprise of those Salish who had perpetuated old spiritual practices in secret, that Catholic

44. PARKER, *supra* note 1, at 35.

45. The plot of *The Hungry Generations* and the evolution of that story into *The Surrounded* are detailed in PARKER, *supra* note 1, at 40–52. McNickle first submitted *The Hungry Generations* to publishers in 1929. Five years and numerous rejections later, a very different version of the book took final form, now named *The Surrounded*.

46. *Id.* at 42–43.

prayer and devotion did her and her family “no good.”⁴⁷ In her dreams, there was no place for Indians in the Christian heaven, and she would be excluded from the Indian afterlife unless she renounced her baptism.

The Surrounded takes a similarly jaundiced view of other forces of assimilation—the capitalist economy, the federal Indian agency, and the mission and non-Indian boarding schools. McNickle brings the failure of economic assimilation to life in his portrayal of an “old [Indian] woman, in her rags and filth,” reduced to waiting at the slaughterhouse so she could fill her “battered washtub” with “blood-smeared entrails . . . the greenish-blue guts, on which flies were swarming” (pp. 233–34). Archilde’s father, Max, explodes in rage at the local non-Indian merchant, who has complained about his failing business and the Indians who owe him money:

You know yourself this country is dead broke. . . . It’s rich, virgin country but it’s broke. I don’t understand it. Well, and what about the Indians? What have they got? We killed off their game so they can’t live in the old way. They don’t know how to work and maybe never will. . . . I don’t see what the world can thank us for. Put it to yourself—what did we bring? Railroads, banks, a fine business like yours, which you’d like to get rid of—put it to yourself!

. . . .

. . . People are starving! They’re freezing to death in those shacks by the church. (pp. 146–47)

McNickle captures the inability of federal agents to reshape Indian worldviews and behavior through the ruminations of Mr. Parker, the fictional federal agent assigned to the Flathead Reservation:

He saw [the Indians’] helplessness and realized, without getting excited about it, that he was of little use to them. He did what he could but at every turn he was hampered by a system which penalized initiative and by the Indians’ own poor understanding of what was expected of them. Taking over an Indian Agency was always like moving into a ready-furnished house in which the pieces not only did not match but were falling apart and you had no authority to throw out anything or make better use of what was provided. . . . (p. 151)

The mission school is depicted as an instrument of human wreckage, failing utterly at its supposed goal of Indian assimilation. Catharine complains that after Louis returned from the mission school, “there was a change” in her strong, obedient son, and “[s]he could not understand why it was. He rode wild horses. He rode at night singing songs. She never saw his eyes again” (p. 131). Indeed, he took to stealing horses and drew a knife on a man. Archilde’s two nephews go to the mission school, and when they return, one of them—Mike—is psychologically damaged. Where once Mike rode horses, fished, and laughed, he is now listless and fearful, prone to

47. Pp. 209–10. Likewise, Archilde’s father asks himself during the funeral for the local priest, “[W]ere [the Indians] saved or were they destroyed” by the introduction of the Catholic idea of sinfulness? P. 139.

waking in the night, screaming like a "lost soul," and wetting his bed (pp. 186–87).

Through his narrative, McNickle condemns the forced assimilation policy for failing to improve the lives of Native peoples. That policy was doomed to failure, he implies, because it attempted to displace indigenous worldviews and practices that could not be so easily discarded. Just as Archilde could not extricate himself from his family and tribal community, so Native peoples generally could not and would not readily cast off their kinship ties, collective responsibilities, norms of behavior, and spiritual and ceremonial systems.

Undeniably, the tribes were "surrounded" by the non-Indian economy and culture—hence one allusion in the book's title.⁴⁸ That circumstance would require adaptation by Native peoples if they were to survive, let alone thrive. But adaptation is not the same as abandonment, which is what the "superior" white civilization demanded. Indigenous peoples, as portrayed in *The Surrounded* and in real life, were not prepared to surrender their distinct worldviews and ways of life, no matter the cost. As the local priest exclaims in frustration, the "Indian congregation . . . sat always at the back of the church [and] still followed its old custom of breaking out into its own prayers and its own songs at odd moments of the Mass. The songs had a pagan wildness" (p. 263).

In one haunting and highly metaphoric scene in the novel, Archilde encounters a starving, aged mare, left out on the drought-depleted pasture because she was no longer a working animal (p. 238). Her colt is with her, drinking in her meager stores of nourishment. Archilde tries to bring her some oats and cut her mud-caked tail, too heavy for her to lift; but she only nibbles on grain he leaves on the ground, and she runs away whenever he tries to rope her. After a long chase, which becomes an obsession for Archilde, the mare finally collapses, and Archilde is able to rope her and lead her to a water hole. Just as he is feeling satisfied with himself, "the perverse creature at the end of his rope" stumbles and rolls over (p. 242). McNickle writes, "She groaned aloud, a final note of reproach for the ears of the man who had taken it upon himself to improve her condition" (p. 242). Eventually, Archilde must shoot her. No one familiar with the history of federal Indian policy could mistake the symbolism: Archilde represents non-Indian assimilationists, no matter how well intentioned, obsessed with "saving" the Indian. The mare represents Native peoples, materially devastated but proud and unwilling to be roped into an alien way of life.

McNickle could have limited his critique of turn-of-the-century forced assimilation policy to the pragmatic argument that it will not work. He goes further, however, offering implicit normative arguments, grounded in a positive assessment of indigenous cultures. In other words, it is not just that

48. McNickle explains in the book's epigraph: "The Surrounded—they called that place *Sniél-emen* (Mountains of the Surrounded) because there they had been set upon and destroyed." The title could also refer to the agents of non-Indian law enforcement closing in on Archilde at the novel's end.

Native peoples are unwilling or unable to give up their beliefs and ways of life, rendering assimilation an elusive goal. In addition, there are estimable features of their cultures that we should prize rather than eradicate. His Salish characters appear bitter, angry, and pitiful at times, but they are also forgiving, generous, and good-hearted.⁴⁹ Moreover, they are excellent storytellers, conveying life lessons that sustain them through desperate times even as they entertain.⁵⁰ Beyond that, they have strong communal ties of mutual support, a value that attracted broad appeal during the Depression when McNickle wrote *The Surrounded*.⁵¹ As Archilde's story unfolds, he evolves from viewing Salish practices as degraded, distasteful, and unreal to vital, nurturing, and necessary to his being.⁵²

II. LESSONS FROM *THE SURROUNDED* FOR CONTEMPORARY CRIMINAL JUSTICE POLICY IN INDIAN COUNTRY

McNickle's critique of forced assimilation policy comes into sharp focus in *The Surrounded* through the responses of both the Indian and non-Indian communities to violent or disruptive acts. At bottom, the two communities do not understand harmful conduct in the same way. Even when they might agree on the wrongfulness of particular actions, their understandings of why they are wrong and how to respond diverge. Forced assimilation policy, in other words, was failing in its effort to eradicate distinct, indigenous worldviews about justice and social order.⁵³

For example, Louis's horse theft has roots in longstanding intertribal rivalries. In times past, he would have gained stature among his people from such bold seizures;⁵⁴ but in the non-Indian world of the early twentieth century, he is a thief, to be tried and hanged. When Louis hunts deer in the mountains, his mother applauds him for providing food; but in the non-Indian world, he violates the fish and game laws.⁵⁵ And Salish traditions could construe Catharine's killing of the state game warden as a permissible act of revenge

49. McNickle highlights these qualities in his description of Catharine and Elise. Pp. 183, 250.

50. See, e.g., pp. 210–11.

51. For McNickle's favorable portrayal of these characteristics, see pp. 255, 268. For a discussion of these values during the 1930s, see KENNETH R. PHILP, *JOHN COLLIER'S CRUSADE FOR INDIAN REFORM* (1977).

52. See, e.g., pp. 69–74.

53. For an analysis of why indigenous North American peoples have maintained cultural differences despite pressures to assimilate from Euro-American society, see DUANE CHAMPAGNE, *SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK* (1992) (deploying differentiation theory).

54. See John C. Ewers, *Intertribal Warfare as the Precursor of Indian-White Warfare on the Northern Great Plains*, 6 W. HIST. Q. 397, 402 (1975).

55. As Louis Owens points out, "McNickle is writing from an accurate knowledge of Indian-white relations in an area where conflicts over hunting rights had long been a source of strain between the Flathead tribe and surrounding whites." OWENS, *supra* note 6, at 68.

for the warden's killing of Louis;⁵⁶ but for Sheriff Quigley, it is murder, plain and simple.

This divergence plays out even when characters in the story seem to agree that some wrong has been committed. When the game warden goes missing and the authorities first suspect homicide, the federal agent and Sheriff Quigley haul Archilde in for questioning. These officials threaten Archilde with trial and execution. At the very end of the novel, after the warden's body has been found, these same non-Indian authorities close in on Archilde in the mountains. Their purpose, again, is to put him on trial for the warden's death, doubtless before a non-Indian judge and jury. The reader is aware that Catharine, not Archilde, actually killed the warden. Nonetheless, Archilde had earlier lied under questioning to protect his mother, and we sense the ensuing trial will not go well for Archilde. Even if the non-Indian legal system would be willing to accept Archilde's version of what happened, it would have to sort out issues such as accessory liability, felony-murder rules, and obstruction of justice in order to establish his guilt and an appropriate sentence. As the federal agent himself points out, while encouraging Archilde to cooperate, "Unfortunately, the law can make these affairs complicated and—disagreeable. I don't mean to alarm you, but be prepared for trouble."⁵⁷

In stark contrast to the non-Indian response, the Salish have their own way of meting out responsibility for the warden's death. When Catharine's faith in the Catholic belief in sin, confession, and redemption is shaken, she turns to Old Modeste, asking for punishment under Salish law. The night of the Indians' midsummer dance, he convenes a group of elders in secret. The Indians are so fearful of discovery that they meet "in a close circle without a fire, the only light coming from a pale moon which was just clearing the tree tops" (p. 206). To underscore the comparison with non-Indian justice, McNickle describes the assembly as "holding court" (p. 206). Federal authorities had demanded that the Salish cease using their traditional form of punishment—the whip—calling it barbarous. Modeste had promised that they would stop. Catharine insists, however, that the non-Indian ways have failed her and her family, recounting disturbing dreams that showed she would never fully belong or find peace in that world. She pleads that she must be dealt with under Salish law. McNickle artfully weaves into the story passages that read more like cultural anthropology than fiction.⁵⁸ He points out that in times past, a form of communal cleansing preceded midsummer ceremonies:

56. See JOHN PHILLIP REID, *PATTERNS OF VENGEANCE: CROSSCULTURAL HOMICIDE IN THE NORTH AMERICAN FUR TRADE* 89 (1999).

57. P. 270. In the earlier version of the novel, *The Hungry Generations*, the plot of which is detailed in PARKER, *supra* note 1, at 40–52, Archilde is able to defend himself successfully before a non-Indian court. This shift in the novel bespeaks McNickle's growing awareness of the incompatibility and unfairness of the non-Indian justice system for Native peoples.

58. In the book's front matter, McNickle provides an explanatory Note, listing his sources as journals of trappers and priests, as well as collections of Flathead stories.

All old scores would have been settled, the pipe would have been smoked between men who had quarreled, and restitution would have been made of any damages which had been inflicted upon another. And finally the lash would have been laid on anyone who was guilty of wrongdoing. . . . The “whip covered the fault.” (pp. 205–06)

Addressing the elders, Modeste continues the account, pointing out that “[i]n the old days [the whip] was a good thing because it kept the people straight. We knew our guilt and we told it; or, if we tried to forget, somebody would speak up and then it came out” (p. 207). Catharine herself amplifies further: “In the old days you were whipped and no one spoke of it again. The heart was free. I have asked this to be done to me” (p. 207). After telling his own story about the strength of the old ways, Modeste eventually accedes to Catharine’s pleas. He allows her to recount the events surrounding the warden’s death, as well as her communal wrongs in disavowing Salish ways. As McNickle writes, “The old lady, with the red stripes of the whip on her back, slept without dreaming” (p. 211). The Salish system of justice, like the non-Indian system, incorporated punishment; but the purposes of Salish punishment were calming community tensions and reintegrating the individual into the group, not retribution for immoral conduct.

As McNickle shows, these fundamental differences between indigenous and Euro-American visions of justice erect obstacles when non-Indians attempt to impose the apparatus of police, courts, and prisons in Indian country. At the very least, there will be cross-cultural misunderstandings that produce cycles of violence and injustices in individual cases. Early in the book, the local priest tells Archilde the story of Big Paul, son of the respected peacemaker of the Tribe. Big Paul became embroiled in a series of misunderstandings between the Salish and a group of rough, non-Indian miners, prompting several rounds of revenge killings (pp. 52–59). The failures of understanding in that story have parallels in the later circumstances surrounding the killings of Louis and the state game warden. One of McNickle’s lifetime pursuits was fostering cross-cultural knowledge and awareness, based on his abiding belief that such knowledge would enhance relations and develop mutual respect between Natives and non-Natives. As an embodiment of both worlds, McNickle saw himself as a natural source of translation and dialogue between them.⁵⁹ He challenged both negative views of Native cultures and assumptions, fostered in literary tropes such as James Fenimore Cooper’s *The Last of the Mohicans*,⁶⁰ that Native peoples and cultures are extinct.⁶¹

Moving from individual misunderstandings to the systemic or institutional level, cultural differences pose even greater threats to successful criminal justice for Indian country. McNickle illustrates this point throughout *The Surrounded* in ways that reinforce contemporary assessments of the

59. See PARKER, *supra* note 1, at 258.

60. JAMES FENIMORE COOPER, *THE LAST OF THE MOHICANS* (1826).

61. See PARKER, *supra* note 1, at 199; PURDY, *supra* note 1, at 8.

“crisis” of community safety on reservations.⁶² McNickle offers not only an analysis of the causes of violence and disruption afflicting tribal communities—relevant both then and today—but also a diagnosis of what is wrong with externally imposed systems of justice, also strikingly relevant today.

On the causes of disruptive behavior, McNickle provides us with lessons from the lives of Louis, Archilde’s older brother, and Mike, Archilde’s young nephew. Both of these characters are products of mission and boarding schools that denigrated and attacked their Native language, beliefs, and tribal connections. These schools were also known for their harsh and abusive treatment of students.⁶³ Late in the novel, when Catharine asks the elders to administer the whip, she tells the story of Louis’s death, asking, “Why was it that when he came home from school he went ‘bad’ . . . ?” (p. 208). Louis, of course, had become a horse thief and overall disruptive force in the community, his actions triggering a chain of events that included multiple homicides. McNickle is plainly suggesting a causal connection between the engines of forced assimilation and Louis’s antisocial behavior. But what are the causal mechanisms at work? Mike’s story begins to provide some explanation. Mike returns from his first year in boarding school in a broken state. He is so fearful that the elders describe him as “sick” (p. 198). Old Modeste tells Archilde that he wants to assign Mike a special role in the upcoming tribal dance, in which Modeste occupies the position of honor. Because Modeste is blind, Mike will walk in front, holding a thong—a strip of metal—and Modeste will hold the other end, following. Normally Modeste’s grandson would have this honor, but Modeste offers it to Mike instead, knowing Mike’s “sickness” (pp. 198–99). Archilde realizes that this literal and material means of tying Mike to the older Salish ways holds the promise of curing the young boy: “Mike would be stirred by this, his pride would be awakened—if it were still alive” (p. 199). McNickle suggests that forced assimilation policy has not only brought social and economic distress, but also personal suffering and disorientation that may manifest in disruptive behavior. If that is true, then reconnecting tribal members to their elders and other culture bearers can advance the healing process—both for the individual tribal member and for the community affected by that individual’s harmful conduct.

McNickle wrote long before the concept of historical or intergenerational trauma emerged from the psychological literature and was applied to tribal communities.⁶⁴ Social scientists have now begun to document rela-

62. See *Oversight of the [U.S.] Dep’t of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 16 (2009) (statement of Eric H. Holder, Jr., Att’y Gen. of the United States).

63. See, e.g., BRENDA J. CHILD, *BOARDING SCHOOL SEASONS* (1998); TIM GIAGO, *CHILDREN LEFT BEHIND: THE DARK LEGACY OF INDIAN MISSION BOARDING SCHOOLS* (2006); *BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES* (Clifford E. Trafzer et al. eds., 2006).

64. See, e.g., EDUARDO DURAN, *HEALING THE SOUL WOUND* (2006); Teresa Evans-Campbell, *Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities*, 23 J. IN-

tionships between the joint traumas of demographic and cultural assaults on Native peoples and the intergenerational experiences of substance abuse and domestic violence.⁶⁵ In an interesting parallel to the story of Old Modeste and Mike, these researchers suggest that spirituality and engagement with traditional healing practices may be associated with improved ability to cope with life stresses and enhanced mental and physical health.⁶⁶

McNickle is equally in accord with contemporary analyses when he suggests reasons why the criminal justice system imposed on Indian country is failing. Drawing upon our large-scale empirical studies of Indian country justice systems, as well as a wide range of social theory, Professor Duane Champagne and I have developed a contemporary framework that models the institutional conditions for successful Indian country criminal justice.⁶⁷ We posit that six conditions—cultural compatibility, control, fairness, resources, intergovernmental cooperation, and management effectiveness—should be satisfied to achieve success. An important underpinning of this framework is the idea that to be successful, a criminal justice system must enjoy *perceived legitimacy* within the affected community. For example, when tribal communities do not consent to the criminal justice system operating within their territory, when that system is culturally incompatible with the community's understandings of justice, and when the system is perceived to be unfair, the system will lack legitimacy. Individuals will be far less likely to comply with legal requirements and cooperate with criminal justice authorities by reporting crime or providing evidence against wrongdoers.⁶⁸

Throughout *The Surrounded* are passages suggesting that the violent and disruptive behavior at Flathead has its roots in loss of tribal control, cultural compatibility, and unfairness in the imposed, non-Indian system. Speaking at the ceremony called to inflict the whip on Catharine, Old Modeste complains as follows:

When we were told to give [up the whip], they said they would give us new laws. Well, they gave us those new laws and now nobody is straight. Nobody will confess and nobody will go to the white judge and say "My nephew has broken the law," or "my relative over there on Crow Creek whipped his woman and ought to go to jail." (p. 207)

TERPERS. VIOLENCE 316 (2008); Rebecca Tsosie, *Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination*, 15 UCLA J. INT'L L. & FOREIGN AFF. 187, 233–34 (2010).

65. This literature is surveyed in Karina L. Walters et al., *Substance Use Among American Indians and Alaska Natives: Incorporating Culture in an "Indigenist" Stress-Coping Paradigm*, 117 PUB. HEALTH REP. (SUPP. 1) S104, S109–S110 (2002).

66. *Id.* at S111–S113. The researchers caution, however, that empirical research involving American Indians has not yet documented such benefits. *Id.* at S113. The healing-to-wellness courts (also known as drug courts) that have been operating in Indian country for the past twenty years, with support from the U.S. Department of Justice, typically incorporate elements of traditional healing. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, TRIBAL HEALING TO WELLNESS COURTS: THE KEY COMPONENTS 9–10 (2003), available at <https://www.ncjrs.gov/pdffiles1/bja/188154.pdf>.

67. See CHAMPAGNE & GOLDBERG, *supra* note 13, at 27–61.

68. *Id.* at 34–35.

After Catharine's death, when Archilde tells Elise that he is going to tell the federal agent the true story of what happened to the game warden, as there is no longer a need to protect his mother, Elise protests that he should not trust the system: "That's foolish, going to him. That fellow will get you put in jail. Stay away from him" (p. 267). After Elise and Archilde have fled into the mountains, the federal agent initially sends tribal members, commissioned by the federal government as Indian Police,⁶⁹ to bring him in. McNickle describes the Indian police officer, Joe La Ronde, to show how policing can be more successful when the community trusts those charged with law enforcement:

When he had to arrest one of his friends, he was very sociable about it. He would tell the fellow that he had come to arrest him, then he would propose that they go fishing first. Sometimes he got drunk with his intended prisoner, and it would be the prisoner, some days later, who would bring Joe to the Agency to restore him to duty. (p. 281)

In contrast, Sheriff Quigley embodies the unfairness, unaccountability, and cultural incompatibility of the imposed, non-Indian justice system. For an Indian law scholar, McNickle is infuriatingly nonspecific throughout *The Surrounded* about whether the homicides in the mountains occurred within or outside the Flathead Reservation. That one fact would determine whether the United States or the state of Montana had jurisdiction.⁷⁰ The prominent role of Sheriff Quigley forces us to assume that Archilde and Catharine had ventured outside Indian country, triggering state authority. Whether or not McNickle is right about the jurisdiction, his main point seems to be the antagonism between state authorities and tribal members. McNickle lets the federal agent provide a description of the lawman, and it is not a flattering portrait. His hostility toward the Indians prompts Archilde to flee rather than turn himself in and Elise to murder the Sheriff when he tries to capture them. Quigley "carried with him out of the past a grudge against all Indians" and acted "as if a state of war existed between the two races" (p. 280). Today, about one-quarter of all tribes outside Alaska, and all Alaska Natives, are subject to state criminal jurisdiction even within Indian country, as a result of congressional legislation passed in the second half of the twentieth century.⁷¹ Echoing the concerns about Sheriff Quigley, reservation residents in those jurisdictions still complain of bias against Indian defendants and victims in the state court systems, as well as overreaching and abuse by state police.⁷²

69. For the history of this federal program of indirect rule, implemented on many reservations in the 1880s and ensuing decades, see HAGAN, *supra* note 36.

70. See NEWTON ET AL., *supra* note 31, at 763. Within the reservation, only federal and tribal governments would have had jurisdiction over charges against Indian defendants. Sheriff Quigley would have had no authority. Outside the reservation, only the state (and Sheriff) would have had jurisdiction over the same acts committed by Indians.

71. See CHAMPAGNE & GOLDBERG, *supra* note 13, at 3-18.

72. *Id.* at 69-70, 96-100.

McNickle's prescription for what ails Indian country criminal justice is built into his narrative of the two nephews, Mike and Narcisse. Although Archilde winds up handcuffed and taken away by the federal authorities, Mike and Narcisse are still holed up in the mountains, resisting their forced return to boarding school. In a passage that is directed at Archilde's two young nephews but seems to be a broader point about Indian affairs, McNickle writes, "All they asked was to be let alone, and perhaps this time he [Archilde] would not forget it" (p. 247). Archilde is concerned that there should be something more for them than mere isolated survival—"there ought to be something better" (p. 273)—but he is still unsure what that is. In his later career with the Indian Service and as an anthropologist, McNickle gave greater shape to that "something better." He emphasized the importance of allowing Native nations to control the timing and degree of their adaptation to the inescapable non-Indian world. The impetus for such change would have to come from within, through consensual intergovernmental relations. Outside authorities could never successfully impose it.⁷³

In terms of contemporary Indian country criminal justice policy, McNickle's insight could move the discussion among legislators and other policymakers toward greater tribal control over reservation offenses, administered fairly so as to ensure legitimacy both within and outside tribal communities. As Professor Kevin Washburn has observed, criminal justice policy is an outlier in relation to the dominant federal Indian law paradigm of respect for tribal self-determination; the federal government has retained far more control of criminal jurisdiction.⁷⁴ Congressionally imposed state criminal jurisdiction under Public Law 280 and similar statutes compounds the problem of lack of tribal consent and control.⁷⁵ Tribes are hobbled by limitations on their jurisdiction over non-Indians and on the punishments they may impose.⁷⁶ So long as the system lacks fundamental legitimacy, it is likely to fail. Contemporary policymakers can draw understanding and guidance from McNickle's powerful narrative, as they struggle with the painful realities of domestic abuse and other violent crime in Indian country. McNickle's depiction of the persistence and enduring strengths of tribal law and lifeways could form the foundations of a more effective justice system.

CONCLUSION

The gifts of *The Surrounded* are not only literary and anthropological. McNickle's remarkable first novel also instructs us about criminal justice policy for Indian country. Literary critics have argued that the book presents

73. For an account of McNickle's views on this point, see PARKER, *supra* note 1, at 125–26.

74. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006). In September 2012, the U.S. Senate confirmed President Obama's appointment of Kevin Washburn as Assistant Secretary of the Interior for Indian Affairs.

75. See CHAMPAGNE & GOLDBERG, *supra* note 13. The criminal jurisdiction provision of Public Law 280 is codified at 18 U.S.C. § 1162.

76. See NEWTON ET AL., *supra* note 31, at 765–66, 982–83.

only two stark choices for Archilde and also, metaphorically, for Native peoples—assimilate or be engulfed and destroyed.⁷⁷ Even though Archilde is captured in the end, his journey of discovery—discovering the survival, strength, and sustaining value of tribal lifeways—urges the reader on a similar path of understanding. With its vivid characters and captivating prose, *The Surrounded* points the way to a better form of Indian-country criminal justice, one that embraces McNickle's vision of greater respect for tribal self-determination.

77. See, e.g., OWENS, *supra* note 6, at 69–70.