

AGENDA

ARIZONA STATE, TRIBAL & FEDERAL COURT FORUM

Friday, January 8, 2016 - 10:00 a.m. - 2:00 p.m.

Conference Room 119A/B

1501 West Washington, Phoenix, AZ

- I. Registration - (Beginning at 9:30 A.M.)**
(Lunch will be provided for a \$5.00 contribution around noon.)
- II. Call to Order and Greeting**
- III. Participant Introductions**
- IV. Member Additions to Agenda**
- V. Approval of Minutes**
- VI. Meeting Business**
 - A. Probation Committee Report - Summit Planning**
 - B. Restorative Justice in Tribal Courts**
 - C. Involuntary Commitment Update**
 - D. Tribal Order of Protection Update**
 - E. Child Support Follow-up**
 - 1. Committee**
 - 2. Forms Availability**
- LUNCH**
 - F. Equitable Treatment of Minority Youth**
 - G. ICWA Committee Update**
- VII. Open Forum for Discussion of Issues of Concern**
- VIII. Next Meeting – April 29, 2016 Meetings – Ak-Chin Indian Community Court**
- IX. Adjournment**

V. Approval of Minutes

ARIZONA STATE, TRIBAL & FEDERAL COURT FORUM
Arizona State Courts Building, Conference Room 119A/B
Draft Minutes of the August 14, 2015 Meeting

Court Forum Members Present:

Hon. Brian Burke Ak-Chin Indian Community Tribal Court	Jan Morris (via telephone) Public Member
Jeff Harmon State Bar of Arizona	Tracy Van Buskirk U.S. Attorney's Office
Hon. John Lamb Yavapai-Apache Tribal Court	Hon. Claudette White Quechan Tribal Court
John Major Public Member	Hon. David Widmaier Pinetop-Lakeside Municipal Court
Maria Morlacci Arizona Office of the Attorney General	Hon. Ida Wilber Hualapai Tribal Court

Administrative Office of the Courts (AOC) Staff Present:

David Withey	Joseph Kelroy
Brenda Lee Dominguez	Kathy Waters

Participants/Visitors Present:

Barbara Atwood (via telephone)	Vickie Steinhoff
Lydia Hubbard-Pourier	Dawn Williams (via telephone)
Sharon James-Tiger (via telephone)	Hon. Lawrence Winthrop
Hon. Lawrence King (via telephone)	Sheina Yellowhair

I. Registration - (Beginning at 9:30 a.m.)

II. Call to Order and Greeting

Meeting called to order by David Withey at 10:10 a.m.

III. Participant Introductions

David announced the following new members to the Court Forum:

- Hon. Brian Burke, Ak-Chin Indian Com. Tribal Court
- Hon. Randall Howe, Arizona Court of Appeals, Division 1
- Deanne Romo, Clerk of Court, Navajo County Superior Court
- Hon. Lamb, Yavapai-Apache Tribal Court
- Hon. Osterfeld, White Tank Justice Court
- Hon. Douglas Rayes, U.S. District Court
- Hon. Wayne Yehling, Pima County Superior Court

IV. Member Additions to Agenda

None at this time.

V. Approval of Minutes

Motion: Judge Widmaier made a motion to approve the minutes for December 5, 2014, Judge Lamb second the motion, which was unanimously approved.

VI. Meeting Business

A. ICWA IGA Option

Sharon James-Tiger, Arizona Department of Child Safety (ADCS) Tribal Liaison, and Dawn Williams, Arizona Attorney General's Office, reported on IGA procedures and training – DCS Tribal Consultation Report 2015. DCS works in collaboration with the 22 tribes of Arizona regarding child welfare program, policies, and new regulations. The Navajo Nation and DCS engaged in extensive discussions to develop and finalized an IGA in December 2014 for coordinating child welfare cases under ICWA. The Navajo Nation IGA will serve as a model for establishing agreements with other tribes within the state of Arizona. The Salt River Pima Maricopa Indian Community, Pascua Yaqui, Tohono O'odham Nation, and Hopi tribes are actively working with ADCS to develop an IGA that meets the needs of each tribe.

Judges Wilber and White recommended sending meeting notices to Tribal Court. Training on the IGA has been offered to state and tribal child welfare workers but not to state and tribal court personnel. The judges suggested that they be included in meetings concerning an IGA with the tribe the serve.

B. ICWA Update

Barbara Atwood, Professor at University of Arizona, and David Withey reported on the latest additions to the Arizona ICWA Guide 2015 (Guide) concerning the federal ICWA guidelines. Send comments regarding the Arizona ICWA Guide 2015 to David at dwithey@courts.az.gov.

Barbara reported that the BIA issued new guidelines this year. The guidelines are much stronger and there are major changes from the prior 1979 guidelines. There are Arizona cases that now conflict with the guidelines. Dawn Williams prepared an outline showing the changes from the 1979 guidelines to the new guidelines. Guideline Comparison Outline.

Action Item: The guideline comparison outline will be posted on the Court Forum/ICWA webpage [<http://www.azcourts.gov/stfcf/ICWA-Committee>].

C. Child Support Follow-up

1. Committee. Commissioner Myra Harris was not able to attend the meeting.
2. Forms Availability. Child Support forms on establishing child support and Navajo Nation Child Support Guidelines provided in meeting material.

D. Veterans Court Update

David Withey reported that an Administrative Order was signed on April 10, 2015 establishing the latest Regional Veterans Court in La Paz County. Most limited jurisdiction veterans courts involve pre-adjudication diversion, which means the sequence of court proceedings is reversed. For instance, in a typical DUI the individual is convicted and then must comply with education and treatment requirements as a condition of probation and license reinstatement. In veteran courts the vet is usually required to do the treatment then a plea agreement is negotiated depending on the veteran's success in the treatment. There is no reason a tribal judge could not be appointed as a judge pro tem and serve as a judge, or at least a back-up judge in a regional limited jurisdiction veterans court. The sending court retains jurisdiction over the case. The veterans court generally would only supervise the veteran during the treatment portion of the case and, depending on the procedure set up by the participating courts, could impose the final judgment per a plea agreement, or refer the case back to the sending court. If a veteran fails to progress in the veterans court, the case would be sent back to the sending court. All tribal treatment and dispute resolution options can be incorporated into the veteran court process. There are no "rules" that require these courts to operate a certain way. They can function based on the agreements reached between the courts and the prosecutors from participating jurisdictions.

E. Involuntary Commitment Update

Lydia Hubbard-Pourier introduced Sheina Yellowhair, Cenpatico Tribal Relations Team Lead for the Regional Behavioral Health Authority (RBHA) Southern Geographic Service Area. Lydia will be retiring on August 31. Sheina will be attending future Court Forum meetings to provide technical advice from the tribal and RBHA behavioral health service perspective. She has been a major part of the recently completed Department of Behavioral Health Services (DBHS) Involuntary Commitment for American Indians training. In the last 6 months there have been 10 trainings with over four hundred participants.

Action Item: Sheina Yellowhair to provide David Withey with a flowchart of the Involuntary Commitment process and the curriculum for the DBHS Involuntary Commitment for American Indians training.

David Withey reported that he will continue work on a webinar that will cover the entire process of the involuntary commitment.

LUNCH – 12:15 p.m.

F. Indian Law & Order Commission Roadmap

David Withey provided a brief report on the Indian Law and Order Commissions Roadmap. This report reflects one of the most comprehensive assessments undertaken of criminal justice systems servicing Native American and Alaska Native communities.

G. U.S. Attorney Update

Tracy Van Buskirk reported on the Special Assistant U.S. Attorneys (SAUSA) program. The Indian county SAUSA program makes it possible for U.S. Attorneys to appoint qualified prosecutors to work in the capacity of an Assistant U.S. Attorney for the prosecution of certain Indian country cases. SAUSAs work collaboratively with their respective U.S. Attorney's Offices to refer cases arising on Indian lands so that the investigations do not fall through the cracks. The Salt River Pima-Maricopa Indian Community, Gila River Indian Community, White Mountain Apache, Pascua-Yaqui, Fort McDowell, and Tohono O'odham tribes are currently involved in the program and eleven SAUSAs.

H. Probation Committee Report

1. Cooperation Options
2. Review of Summit Objectives
3. Presentation to ITCA – Tribal CEOs
4. Work Group Meetings
5. Summit Meetings

Kathy Waters, Adult Probation Services Director, reported that there are two upcoming training opportunities (1) Sex Offender Supervision Essentials, September 9-10 and (2) Supervising Offenders with Serious Mental Illness, October 14-15 – both are being held at the Judicial Education Center in Phoenix, Arizona. Contact Michelle Wessels at mwessel@courts.az.gov if interested in attending.

Kathy reported that the State Probation Academy encourages tribal officers to attend the probation officer training program. Tribal officers who attend will receive a certification of completion.

A regional summit meeting is being planned for the spring of 2016. Kathy asked for recommendations on how to approach the ITCA - Tribal CEOs before going forward with the summit. Kathy asked for volunteers to go with the staff when they make their presentation. Contact Kathy at kwaters@courts.az.gov regarding volunteering or recommendations.

Judge Burke commented that the risk assessment tools need to be addressed for tribal court convictions. Kathy reported that the risk assessment tools are offender based – dependent on behavior of crime. Kathy volunteered to meet and discuss this matter with Judge Burke.

Kathy reported that the Coconino Online Probation Education (COPE) has been funded by a grant from the U.S. Department of Justice's Bureau of Justice Assistance Second Chance Act Federal Award. As part of the program Page's Coconino County Adult Probation Department will have Smart TVs and computer kiosks installed which will allow probationers in the COPE program to

participate in online cognitive behavioral therapy, classes that train participants to think about criminal behavior and its consequences in a healthy way, and utilize an online mentoring program.

David Withey reported on the Port Gamble S'Klallam Tribe's Re-Entry Program out of Kingston, Washington. Their program is dedicated to providing hope for tribal and community members with barriers to employment due to a criminal past. They focus on providing job training skills, life skills, and employment. This could be a model for state/tribal/federal collaboration on re-entry to tribal communities.

Tracy Van Buskirk reported that a residential re-entry program is being set up in Northern Arizona and that the Department of Justice's "Smart on Crime" program is getting the word out and pushing re-entry efforts by making grants accessible.

I. AZ Access to Justice Commission Update

Judge Winthrop reported on the establishment of the Arizona Commission on Access to Justice by Chief Justice Bales on August 20, 2014. The goal of the Commission is to make courts more accessible to all by examining legal representation for moderate and low-income person, helping self-represented litigants and others navigate the judicial process, and by using technology to make courts more accessible to all. The Commission's work groups are working on the court navigator pilot project, standardized/simplified forms and instructions, web-based self-help service center, and community library legal information pilot project.

A Flagstaff center is being setup to house virtual information that can be accessed by the public in remote locations.

The community based public libraries will provide (1) court-supervised training for librarians to assist with locating legal information; (2) computer access to electronic court forms, and (3) on-site legal clinics. Judge White stated that Imperial County has a similar program through a grant funded by the Department of Justice.

VII. Open Forum for Discussion of Issues of Concern

None at this time.

VIII. Next Meeting - December 4, 2015

- Next meeting will be held on December 4, 2015. If anyone would like to host this meeting please contact David Withey at dwithey@courts.az.gov or 602-452-3325.

- Hon. Brian Burke volunteered to host the March 2016 meeting (date to be determined).
- Dates for the 2016 meetings will be selected at the December 4, 2015 meeting.

IX. Adjournment

Meeting adjourned at 2:52 p.m.

VI. Meeting Business
B. Restorative Justice in Tribal Courts

24 N.M. L. Rev. 175

New Mexico Law Review
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Indian Law Symposium

"LIFE COMES FROM IT": NAVAJO JUSTICE CONCEPTS

The Honorable Robert Yazzie*

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INTRODUCTION

Navajo justice is unique, because it is the product of the experience of the Navajo People. Prior to contact with European cultures, Navajos developed their ways of approaching life through many centuries of dealing with obstacles to their survival. Likewise, Navajo concepts of justice are a product of the experience we have gained from dealing with problems. To fully understand these concepts, the essential character of Anglo-European law must be compared to that of Navajo law.

Law, in Anglo definitions and practice, is written rules which are enforced by authority figures. It is man-made. Its essence is power and force. The legislatures, courts, or administrative agencies who make the rules are made up of strangers to the actual problems or conflicts which prompted their development. When the rules are applied to people in conflict,¹ other strangers stand in judgment and police and prisons serve to enforce those judgments.² America is a secular society, where law is characterized as rules laid down by human elites for the good of society.

The Navajo word for "law" is *beehaz'aanii*. It means something fundamental, and something that is absolute and exists from the beginning of time.³ Navajos believe that the Holy People⁴ "put it there for us from the time of beginning"⁵ for better thinking, planning, and guidance. It is the source of a healthy, meaningful life, and thus "life comes from it."⁶ Navajos say that "life comes from *beehaz'aanii*," because it is the essence of life. The precepts of *beehaz'aanii* are stated in prayers and ceremonies which tell us of *hozho*—"the perfect state." Through these prayers and ceremonies we are taught what ought to be and what ought not to be.

*176 Our religious leaders and elders say that man-made law is not true "law." Law comes from the Holy People who gave the Navajo people the ceremonies, songs, prayers, and teachings to know it. If we lose our prayers and ceremonies, we will lose the foundations of life. Our religious leaders also say that if we lose those teachings, we will have broken the law.

These contrasts show that while Anglo law is concerned with social control by humans, Navajo law comes from creation. It concerns life itself, and the means to live successfully. The way to a meaningful life can be learned in teachings which are fundamental and absolute.

Navajo justice is also pragmatic, and to explain how that is so, I will describe the problems Navajos address, contrast Navajo thinking with the major concepts of Anglo-European law, outline Navajo dispute resolution processes, and discuss the practical, problem solving emphasis of Navajo law.

THE SOCIAL PROBLEMS NAVAJOS FACE

The core of Navajo justice is problem-solving. Navajo legal thinking requires a careful examination of each aspect of a given problem to reach conclusions about how best to address it.⁷ Navajos have faced different problems as they learned the ways of survival in a sometimes hostile environment. In the times of legend, Navajos slew monsters. Today, Navajos face new monsters, including:

- Domestic violence, involving abuse to spouses, elders, and children.⁸
- Gang violence, where Navajo youths refuse to listen and do what they please.⁹
- Alcohol-related crime¹⁰ such as driving while intoxicated, with resulting loss of productive lives;¹¹ and disorderly conduct and fighting among neighbors and families in communities.¹²
- *177 • Child abuse and neglect.¹³
- The breakup of families in divorce and separation, with lasting effects upon children.¹⁴

These problems are today's monsters; they are problems which get in the way of a successful life. The element which is common to all of the stated problems, including widespread alcohol abuse, is a loss of hope. There is a disease of the spirit which infects too many Navajos and leads to rising court caseloads.¹⁵ What do modern systems of justice offer to deal with these problems? Have the courts been effective in addressing them? Perhaps the very nature of these problems, grounded in a loss of self-respect and hope, gives us clues as to how they can effectively be addressed.

THE ADVERSARIAL SYSTEM: "VERTICAL" JUSTICE

The first modern courts were introduced to the Navajo Nation in 1892.¹⁶ Today's Navajo Nation courts were created in 1959¹⁷ and reconstituted in 1985.¹⁸ The Courts of the Navajo Nation use the state model of adjudication, i.e. the adversarial system. There are obvious conflicts between Anglo-European justice methods and those of Navajo tradition. In trying to resolve these conflicts, Navajo Nation justice planners sometimes use models to help analyze the differences between the Anglo-European and Navajo legal systems. One useful model describes the Anglo-European legal system as "vertical" and the Navajo legal system as "horizontal."¹⁹

A "vertical" system of justice is one which relies upon hierarchies and power.²⁰ That is, judges sit above the parties, lawyers, jurors and other participants in court proceedings. The Anglo-European justice system uses rank, and the coercive power which goes with rank, to address conflicts. Power is the active element in the process. Judges have the power to directly affect the lives of the disputants for better or worse. Parties to a dispute have limited power and control over the process. A decision is dictated from on high by the judge, and that decision is an order or *178 judgment which parties must obey or else face a penalty. The goal of the vertical system or adversarial law is to punish wrongdoers and teach them a lesson. For example, defendants in criminal cases are punished by jail and fines.²¹ In civil cases, one party wins and the other party is punished with a loss.²² Adversarial law offers only a win-lose solution; it is a zero-sum game. The Navajo justice system, on the other hand, prefers a win-win solution.

A fundamental aspect of the vertical justice system is the adjudicatory process. Adjudication makes one party the "bad guy" and the other "the good guy;" one of them is "wrong" and the other is "right." The vertical justice system is so concerned with winning and losing that when parties come to the end of a case, little or nothing is done to solve the underlying problems which caused the dispute in the first place.

For centuries, the focus of English and American criminal law has been punishment by the "state." The needs and feelings of the victims are ignored, and as a result no real justice is done. There are many victims of any crime. They include the direct recipients of the harm and those who depend on them, family members, relatives and the community. These are people who are affected by both the dispute and the legal decision. Often, the perpetrator is a victim as well, caught in a climate of lost hope, alcohol dependency and other means of escape.

The victims, or subjects of the adjudication, have little or no opportunity to participate in the outcome of a case. Their needs and feelings are generally not considered, and thus not addressed.²³ They leave the courtroom feeling ignored and empty-handed. The adversarial system is "all or nothing," where strangers with power decide the future of people who have become objects rather than participants.

Money is a driving force in modern American society. Lawyers operate the adversarial system, and money buys lawyers. The

best lawyers cost the most. Legal procedures are costly, and only the most wealthy litigants can afford them. Money for justice turns it into a commodity to be bought and sold.²⁴ Many people in our wage and money-driven industrial society cannot afford redress so they sometimes turn to extralegal methods for a remedy. For instance, the verdict in the Rodney King case sparked angry outbursts in Los Angeles because the adversarial trial of police ignored systemic violence and racism.²⁵

***179** What do consumers of law get from the adversarial adjudication process of the vertical system? This is a difficult question to answer since its methods do not repair damaged relationships, families, communities and society; instead this process promotes further conflict and disharmony.

Another element of the vertical system is a preoccupation with "the truth." The adversarial system dictates that there must be a winner and a loser. The side that represents the truth as it is perceived by the court wins, while the other side loses. "Truth" becomes a game where people attempt to manipulate the process, or undermine it where it does not suit their advantage. Each person has a version of "the truth," which represents that individual's understanding or perception of what happened.

People have strong feelings about truth, yet the vertical system does not allow the individual an opportunity to express his or her version of the truth in court. This role is taken from the individual and given to a power figure who is a stranger, both to the participants and the situation in question. Individual perceptions of the truth are based upon one's perspective; the "rules" of the vertical system prevent the parties from presenting their perspective. As a result, the parties feel disappointed and cheated because each of them knows what they think happened and the conclusions which should be drawn from that perspective.

When there must be a winner and a loser, truth is important. However, not all situations are best resolved through the adversarial determination of winner and loser. Sometimes solving the problem presented by a situation is more important than determining right and wrong and imposing penalties. Truth is irrelevant to a method of law that emphasizes problem solving.

For example, in a divorce, husbands and wives fight over property, child custody and hurt feelings. Each party views the situation from his or her perspective of the truth. Based on that "truth," each feels that he or she should win and that the other party should lose. The adversarial system calls upon a husband and wife to make important decisions about their future-and those of their children-at a time when they are not emotionally prepared to wisely look to the future. The couple is not allowed a means to express their hurt and anger, and because there is no opportunity to deal with emotions, lawyers and judges make unpalatable decisions for the couple. In the process, children are wounded, and the separated couple often fight more after the divorce than before. This process is alien to Navajo thought. In the Navajo tradition, there is a greater concern with the well-being of children and the ability of people to go on with life without hurt feelings.

Vertical justice looks back in time, to find out what happened and assess punishment for it. We may never know what really happened.²⁶ Vertical justice does not look to the future. It does not try to find out what went wrong in order to restore the mind, physical well-being, the ***180** spirit, and emotional stability. I insist that any definition of "law" must contain an emotional element: one of spirit and feelings. Where the feelings of parties are separated from the process and the decision does not address them, dissatisfaction follows. Where the legal system ignores the emotions of the parties, there can be no restoration of relationships.

Vertical adversarial adjudication relies upon power, force and coercion. Where powerful figures abuse their authority, there is authoritarianism and tyranny.²⁷ Navajo thought recognizes the danger of hierarchical or vertical systems. There is a Navajo maxim that one must "beware of powerful beings." Likewise, coercion is so feared in Navajo ethics that the invocation of powerful beings (e.g. calling upon them to use their force against another)-a form of coercion-is considered to be witchcraft.²⁸ The inappropriateness of the vertical system, as imposed upon Indian nations in modern systems of law and courts becomes more obvious when it is compared to the "horizontal" Navajo approach.

THE NAVAJO SYSTEM: "HORIZONTAL" JUSTICE

The "horizontal" model of justice is in clear contrast to the "vertical" system of justice.²⁹ The horizontal justice model uses a horizontal line to portray equality: no person is above another. A better description of the horizontal model, and one often

used by Indians to portray their thought, is a circle. In a circle, there is no right or left, nor is there a beginning or an end; every point (or person) on the line of a circle looks to the same center as the focus. The circle is the symbol of Navajo justice because it is perfect, unbroken, and a simile of unity and oneness. It conveys the image of people gathering together for discussion.

Imagine a system of law which permits anyone to say anything during the course of a dispute. A system in which no authority figure has to determine what is "true." Think of a system with an end goal of restorative justice which uses equality and the full participation of disputants in a final decision. If we say of law that "life comes from it," then where there is hurt, there must be healing.

Navajo concepts of justice are related to healing because many of the principles are the same. When a Navajo becomes ill, he or she will consult a medicine man.³⁰ Patients consult Navajo healers to summon outside healing forces and to marshal what they have inside them for *181 healing. A Navajo healer examines the patient to determine the illness, its cause and what ceremony matches the illness to cure it.³¹ The cure must be related to the exact cause of the illness because Navajo healing works through two processes: first, it drives away or removes the cause of illness; and second, it restores the person to good relations in solidarity with his or her surroundings and self.

The term "solidarity" is essential to an understanding of both Navajo healing and justice.³² Language is a key to law, and those who share common understandings of the values and emotions which are conveyed in words are bonded through them.³³ Words are signs which also convey feelings. The Navajo understanding of "solidarity" is difficult to translate into English, but it carries connotations which help the individual to reconcile self with family, community, nature, and the cosmos-all reality. The sense of oneness with one's surroundings, and the reconciliation of the individual with everyone and everything, makes an alternative to vertical justice work. Navajo justice rejects simply convicting a person and putting them in prison; instead it favors methods which use solidarity to restore good relations among people. Most importantly, it restores good relations with self.

Navajo justice is a sophisticated system of egalitarian relationships where group solidarity takes the place of force and coercion. In it, humans are not in ranks or status classifications from top to bottom. Instead, all humans are equals and make decisions as a group. The process-which we call "peacemaking" in English-is a system of relationships where there is no need for force, coercion or control.³⁴ There are no plaintiffs or defendants; no "good guy" or "bad guy." These labels are irrelevant.³⁵ "Equal justice" and "equality before the law" mean precisely what they say.³⁶ As Navajos, we do not think of equality as treating people equal *before* the law; they are equal *in* it.³⁷ Again, our Navajo language points this out in practical terms.

*182 Under the vertical justice system, when a Navajo is charged with a crime, the judge asks (in English): "Are you guilty or not guilty?" A Navajo cannot respond because there is no precise term for "guilty" in the Navajo language.³⁸ The word "guilt" implies a moral fault which commands retribution. It is a nonsense word in Navajo law due to the focus on healing, integration with the group, and the end goal of nourishing ongoing relationships with the immediate and extended family, relatives, neighbors and community.

Clanship-*dooneeike*'-is a part of the Navajo legal system. There are approximately 210 Navajo clans.³⁹ The clan institution establishes relationships among individual Navajos by tracing them to a common mother; some clans are related to each other the same way. The clan is a method of establishing relationships, expressed by the individual calling other clan members "my relative." Within a clan, every person is equal because rank, status, and power have no place among relatives.

The clan system fosters deep, learned emotional feelings which we call "*k'e*". The term means a wide range of deeply-felt emotions which create solidarity of the individual with his or her clan.⁴⁰ When Navajos meet, they introduce themselves to each other by clan: "I am of the (name) clan, born for the (name) clan, and my grandparents' clans are (name)."⁴¹ The Navajo encounter ritual is in fact a legal ceremony, where those who meet can establish their relationships and obligations to each other. The Navajo language reinforces those bonds by maxims which require duties and mutual (or reciprocal) relationships. Obviously, one must treat his or her relatives well, and we say: "Always treat people as if they were your relative." That is also *k'e*.

Navajo justice uses *k'e* to achieve restorative justice. When there is a dispute⁴² the procedure, which we call "talking things

out," works like this: Every person concerned with or affected by the dispute or problem receives notice⁴³ of a gathering to talk things out. At the gathering everyone has the opportunity to be heard. In the vertical legal system the "zone of dispute"⁴⁴ is defined as being only between the people who are directly involved in the problem. On the other hand, as a Navajo, if my relative is hurt, that concerns me; if my relative hurts another, I am responsible to the injured person. In addition, if something happens in my community, I am also affected. I am entitled to know what happened, and I have the right to participate in discussions of what to do about it. I am within the zone of a dispute involving a relative. In the horizontal system the zone is wider because problems between people also affect their relatives.⁴⁵

The parties and their relatives come together in a relaxed atmosphere to resolve the dispute.⁴⁶ There are no fixed rules of procedure or evidence to limit or control the process. Formal rules are unnecessary. Free communication without rules encourages people to talk with each other to reach a consensus.⁴⁷ Truth is largely irrelevant because the focus of the gathering is to discuss a problem. Anyone present at the gathering may speak freely about his or her feelings or offer solutions to the problem. Because of the relationship and obligation that clan members have with each other, relatives of the parties are involved in the process. They can speak for, or speak in support of, relatives who are more directly involved in the dispute.

The involvement of relatives assures that the weak will not be abused⁴⁸ and that silent or passive participants will be protected. An abused victim may be afraid to speak; his or her relatives will assert and protect that person's interests. The process also deals with the phenomenon of denial where people refuse to face their own behavior. For instance, a perpetrator may feel shame for an act done, and therefore hesitant to speak. Relatives may speak to show mitigation for the act and to try to make the situation right. For example, Judge Irene Toledo of the Navajo Nation Ramah Judicial District has recounted a story in which the family helped a man confront the results of his actions.

The actions of this particular man commenced as an adversarial paternity proceeding familiar to today's child support enforcement efforts. The alleged father denied paternity while the mother asserted it. Judge Toledo sent the case to the district's Navajo Peacemaker Court⁴⁹ for resolution. The parents of the couple were present for talking things out in peacemaking. It is difficult for a man and a woman to have a relationship in a small community without people knowing what is going on. The couple's family and everyone else who was present at the *184 peacemaking were well aware of the activities of the couple. In light of the presence of family, the man admitted that he was the father of the child, and the parties negotiated paternity and child support as a group.⁵⁰ The participation of a wider circle of relations is an effective means to address denial and get directly to a resolution of a problem rather than get sidetracked in a search for "the truth."⁵¹

The absence of coercion or punishment is an important Navajo justice concept because there are differences in the way people are treated when force is a consideration. If, as in the vertical system, a decision will lead to coercion or punishment, there are procedural controls to prevent unfair decisions and state power. These safeguards include burdens of proof on the state, a high degree of certainty (e.g. "proof beyond a reasonable doubt"), the right of the accused to remain silent, and many other procedural limitations. If, however, the focus of a decision is problem-solving and not punishment, then parties are free to discuss problems.

Thus, another dynamic which we may see in Judge Toledo's example is that if we choose to deal with a dispute as a problem to be solved through discussion, rather than an act which deserves punishment, the parties are more likely to openly address their dispute.

Traditional Navajo civil procedure uses language and ceremony to promote the process of talking things out. Navajo values are expressed in prayers and teachings-using the powerful connotative force of our language-to bring people back to community in solidarity. Navajo values convey the positive forces of *hozhooji*, which aims toward a perfect state. The focus is on doing things in a "good way," and to avoid *hashkeeki naat'aah*, "the bad or evil way of speaking."

The process has been described as a ceremony.⁵² Outside the Navajo perspective, a "ceremony" is seen as a gathering of people to use ritual to promote human activity. To Navajos, a ceremony is a means of invoking supernatural assistance in the larger community of reality. People gather in a circle to resolve problems but include supernatural forces within the circle's membership. Ceremonies use knowledge which is fundamental and which none of us can deny. Traditional Navajo procedure invokes that which Navajos respect (i.e. the teachings of the Holy People or tradition) and touches their souls. Put in a more secular way, it reaches out to their basic feelings.

For example, traditional Navajo tort law is based on *nalyeeh*, which is a demand by a victim to be made whole for an injury. In the law of *nalyeeh*, one who is hurt is not concerned with intent, causation, fault, or negligence. If I am hurt, all I know is that I hurt; that makes me feel bad and makes those around me feel bad too. I want the hurt *185 to stop, and I want others to acknowledge that I am in pain. The maxim for *nalyeeh* is that there must be compensation so there will be no hard feelings. This is restorative justice. Returning people to good relations with each other in a community is an important focus. Before good relations can be restored, the community must arrive at a consensus about the problem.

Consensus makes the process work. It helps people heal and abandon hurt in favor of plans of action to restore relationships. The dispute process brings people together to talk out a problem, then plan ways to deal with it. The nature of the dispute becomes secondary (as does "truth") when the process leads to a plan framed by consensus. Consensus requires participants to deal with feelings, and the ceremonial aspects of the justice gathering directly addresses those feelings. If, for any reason, consensus is not reached (due to the human weaknesses of trickery, withholding information or coercion), it will prevent a final decision from being reached or void one which stronger speakers may force on others.⁵³

There is another Navajo justice concept which we must understand for a better comprehension of Navajo justice, and that is distributive justice. Navajo case outcomes are often a kind of absolute liability where helping a victim is more important than determining fault. Distributive justice is concerned with the well-being of everyone in a community. For instance, if I see a hungry person, it does not matter whether I am responsible for the hunger. If someone is injured, it is irrelevant that I did not hurt that person. I have a responsibility, as a Navajo, to treat everyone as if he or she were my relative and therefore to help that hungry person. I am responsible for all my relatives.⁵⁴ This value which translates itself into law under the Navajo system of justice is that everyone is part of a community, and the resources of the community must be shared with all.⁵⁵ Distributive justice abandons fault and adequate compensation (a fetish of personal injury lawyers) in favor of assuring well-being for everyone. This affects the legal norms surrounding wrongdoing and elevates restoration over punishment.

Another aspect of distributive justice is that in determining compensation, the victim's feelings and the perpetrator's ability to pay are more important than damages determined using a precise measure of actual losses. In addition, relatives of the party causing the injury are responsible for compensating the injured party, and relatives of the injured party are entitled to the benefit of the compensation.

*186 These are the factors that Navajo justice planners have used in the development of a modern Navajo legal institution—the Navajo Peacemaker Court. Before the development of the Peacemaker Court, Navajos experienced the vertical system of justice in the Navajo Court of Indian Offenses (1892-1959) and the Courts of the Navajo Nation (1959-present). Over that one hundred-year period, Navajos either adapted the vertical system to their own ways or expressed their dissatisfaction with a system that made no sense.⁵⁶ In 1982, however, the Judicial Conference of the Navajo Nation created the Navajo Peacemaker Court.⁵⁷ This court is a modern legal institution which ties traditional community dispute resolution to a court based on the vertical justice model. It is a means of reconciling horizontal (or circle) justice to vertical justice by using traditional Navajo legal values, such as those described above.

The Navajo Peacemaker Court makes it possible for judges to avoid adjudication and avoid the discontent adjudication causes by referring cases to local communities to be resolved by talking things out. Once a decision is reached, it may (if necessary) be capped with a formal court judgment for future use.

The Navajo Peacemaker Court takes advantage of the talents of a *naat'aanii* (or "peacemaker").⁵⁸ A *naat'aanii* is a traditional Navajo civil leader whose authority comes from his or her selection by the community. The *naat'aanii* is chosen due to his or her demonstrated abilities, wisdom, integrity, good character, and respect by the community. The civil authority of a *naat'aanii* is not coercive or commanding; he or she is a leader in the truest sense of the word. A peacemaker is a person who thinks well, who speaks well, who shows a strong reverence for the basic teachings of life and who has respect for himself or herself and others in personal conduct.

A *naat'aanii* acts as a guide, and in a peacemaker's eyes everyone—rich or poor, high or low, educated or not—is treated as an equal. The vertical system also attempts to treat everyone as an equal before the law, but judges in that system must single out someone for punishment. The act of judgment denies equality, and in that sense, "equality" means something different than the Navajo concept. The Navajo justice system does not impose a judgment, thereby allowing everyone the chance to *187 participate in the final judgement, which everyone agrees to and which benefits all.

Finally, *naat'aanii* is chosen for knowledge, and knowledge is power which creates the ability to persuade others. There is a form of distributive justice in the sharing of knowledge by a *naat'aanii*. He or she offers it to the disputants so they can use it to achieve consensus.⁵⁹

Today's consumers of justice in the Navajo system have a choice of using the peacemaking process or the Navajo Nation version of the adversarial system.⁶⁰ The Navajo justice system, similar to contemporary trends in American law, seeks alternatives to adjudication in adversarial litigation. The Navajo Nation alternative is to go "back to the future" by using traditional law.⁶¹

NAVAJO JUSTICE THINKING

The contrast between vertical and horizontal (or circle) justice is only one approach or model to see how Navajos have been developing law and justice. We, as Navajo judges, have only recently begun to articulate what we think and do on paper and in English.⁶² Navajo concepts of justice are simple, but our traditional teachings which we use to make peace, may sound complicated.⁶³ Peacemaking-Navajo justice-incorporates traditional Navajo concepts, or Navajo common law, into modern legal institutions. Navajo common law is not about rules which are enforced by authority; it deals with correcting self to restore life to solidarity. Navajo justice is a product of the Navajo way of thinking. Peacemakers use the Navajo thought and traditional teachings. They apply the values of spiritual teachings to bond disputants together and restore them to good relations.

This paper uses English ways of saying things and English language concepts. It uses "paper knowledge"⁶⁴ to try to teach you some of the *188 things that go on in a Navajo judge's mind. To give a flavor of Navajo language thinking consider the following:

Never let the sun catch you sleeping. Rise before the sun comes up. Why? You must not be dependent. You must do things with energy and do things for yourself. You must be diligent or poverty will destroy you.

Watch your words. Watch what you say. Remember, words are very powerful. The Holy People gave them to us, and they created you to communicate. That is why you must think and speak in a positive way. Be gentle with your words. Do not gossip. Gossip has a name. It has a mind, eyes and a voice. It can cause as much trouble as you make by calling it, so do not call it to you. It causes disharmony and creates conflict among people. It is a living monster because it gets in the way of a successful life. So, as we and our young Anglo friends say, "What goes around comes around." Remember that there are consequences to everything you say and do.

Know your clan. Do not commit incest. You cannot court or marry within your own clan. If you do, you will destroy yourself; you will jump in the fire. Incest is something so evil that it will make you crazy and destroy you.⁶⁵

You have duties and responsibilities to your spouse and children. If you are capable and perform them, you will keep your spouse and children in a good way. If not, you will leave them scattered behind. You will not be a worthy man or woman. If you act as if you have no relatives, that may come to you.⁶⁶

The Holy People created human beings. Due to that fact, each must respect others. One cannot harm another. If so, harm will come back on you. There are always consequences from wrongful acts, just as good comes from good. Like begets like, so harm must be repaired through restitution (*nalyeeh*), so there will be no hard feelings and victims will be whole again.

These teachings, and many others, are spoken from the beginning of childhood. Navajo judges are beginning to look at familiar childhood experience as legal events. For example, when a baby first becomes aware of surroundings and shows that in a laugh, there is a ceremony-the "Baby's First Laugh Ceremony." Family and relatives gather around the baby, sharing food and kinship, to celebrate with it. What better way can we use to initiate babies into a world of good relationships and teach them the legal institution that is the clan?

*189 These learned values serve as a guide in later years. As a child grows, he or she will act according to the teachings. Elderly Navajos tell us that we must always talk to our children so they can learn these Navajo values and beliefs. If we do

not there will be disorder in the family and among relatives. The children will not listen, and they will have no responsibility to live by. We have youth violence because parents failed to talk to their children.⁶⁷

CONCLUSION

Traditional peacemaking is being revived in the Navajo Nation with the goal of nourishing local justice in local communities. The reason is obvious: life comes from it. Communities can resolve their own legal problems using the resources they have. Local decisions are the traditional Navajo way, in place of central control. Everyone must have access to justice that is inexpensive, readily available and does not require expensive legal representation. Peacemaking does not need police, prosecutors, judges, defenders, social workers or the other agents of adversarial adjudication. Peacemaking is people making their own decisions, not others forcing decisions upon them. There are 110 chapters or local governmental units in the Navajo nation. As of this writing, there are 210 peacemakers in 89 chapters, and we will extend the Navajo Peacemaker court to every community.⁶⁸

This revival assures that Navajo justice will remain *Navajo* justice, and not be an imported or imposed system.⁶⁹ Navajo peacemaking is not a method of alternative dispute resolution; it is a traditional justice method Navajos have used from time immemorial.

AUTHOR'S NOTE

I adapted this article from an instructional outline I developed for presentations to non-Navajo lawyers and judges. It evolved in my thinking since January 20, 1992, when I assumed responsibilities as the Chief Justice of the Navajo Nation, and chose Navajo common law and the Navajo Peacemaker Court as personal priorities. These ideas will continue to grow as I discover more about my culture, language and traditions.

I draw upon two sources as I attempt to reconcile Navajo justice thinking with Anglo-European thought. I am a product of a Bureau of Indian Affairs (BIA) boarding school education which was so destructive *190 of the Navajo culture.⁷⁰ When I got out of boarding school, I was given a ticket to California to learn a manual skill in an electronics school. They told me I could not go to college, so I went to college. I was fascinated with the power, authority and (as I thought then) the money that went with being a lawyer so I went to law school. When I got my law degree, I put it to use as a trial judge in the Courts of the Navajo Nation. That returned me to another school-the school of the Navajo life. Now, I seek to reconcile my paper knowledge with the vast knowledge that is held by my Elders-"the keepers of the tribal encyclopedia."⁷¹

Sometimes I get impatient when I consider how traditional wisdom has so much value that has been forgotten. Sometimes I get angry about how Anglo law has overcome Navajo law, to the harm of Navajos. I read an evaluation of my talk on Navajo common law after a conference with state judges and lawyers which said, "Yazzie is bashing Anglo justice systems again." That is not my intent.

Emotions are important to me. The stereotype of the stoic, passive, or unemotional Indian is false, and emotions are an important part of Indian life. Navajos have a lot of pride, and when used in a good way, it is a very positive emotion. How else could I have thrown away a ticket to an electronics school and insisted that I was capable of getting a college degree? It took a lot of drive, and a little angry pride to tough it through law school in a time when non-Indians assumed that Indians were not capable of understanding the mysteries of "the law."

To me, and to many other Navajos, law is something that "just is." To explain it in my own mind and to you, I need a basis for comparison. That basis is the shortcoming of modern American adjudication, and I am not alone in decrying its destructive elements. I share a fondness for centuries of English-American common law traditions, but changing circumstances now require us to take a new look at that undefinable quality we call justice. As we of the Navajo Nation discuss the traditional knowledge that gives us power to survive in modern times, I find a property that is immensely valuable. I want to share it with you out of respect and to honor Navajo distributive justice. You, who have taken an interest to read this, are like a relative. This relationship will help us grow together in a good way because life comes from it.

Footnotes

- ^a The Honorable Robert Yazzie is the Chief Justice of the Navajo Nation. He is a graduate of Oberlin College, B.A. 1973, and the University of New Mexico School of Law, J.D. 1982.
- ¹ The conflict is most often with the "state" in criminal law, thereby losing sight of the harm done to a victim.
- ² This is a criminality and police model, which has created many problems for tribal courts today. Russell Lawrence Barsh and J. Youngblood Henderson, *Tribal Courts, The Model Code, and the Police Idea in American Indian Policy*, in AMERICAN INDIANS AND THE LAW 25 (Lawrence Rosen ed., 1976).
- ³ Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6009, 6011 (Navajo 1990).
- ⁴ The term Holy People refers to divine personages or spirit forces which were instrumental in the creation of the world. Following creation and the exodus of the Navajo People to their present place in this world, the Holy People went into the rocks and earth, where they still help.
- ⁵ "Put there from the time of beginning" is a well-known Navajo phrase which means that the Holy People established certain fundamentals as part of creation.
- ⁶ "Life comes from it" refers to the fact that law is basic and that a meaningful life is one of its products.
- ⁷ I recently compared the process of justice planning to the traditional Navajo method of using a crystal ball to look into the future. Robert Yazzie, *Tribal, State, and Federal Relationships in Our Future Society*, address at Building on Common Ground: A Leadership Conference to Develop a National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts (Sept. 18, 1993). I explained that predicting the future requires a careful examination of each aspect or facet of the present as the means to see into the future.
- ⁸ While spouse abuse was present in pre-contact times, Navajos developed successful approaches to addressing it; modern social violence is an alien import. James W. Zion & Else B. Zion, *Hozho' Sokee'-Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L. J. 407, 412, 416 (1993).
- ⁹ We, as Navajo judges, are shocked to learn of gang fights with weapons in our communities.
- ¹⁰ We estimate that of our current criminal caseload (cases brought forward plus new filings), approximately 90,000 matters or 70% of the offenses are related to or the product of alcohol use. This leads us to wonder whether criminal law is the best tool to address crime and alcohol. See Barsh & Henderson, *supra* note 2, at 53.
- ¹¹ This is a problem all jurisdictions in the Southwest share. Alcohol-related mortality, e.g., deaths which are the product of alcohol consumption is high in New Mexico. It has the highest motor vehicle accident fatality rate in the United States. Liza D. Chavez et al., *Alcohol-Related Mortality*, in RACIAL AND ETHNIC PATTERNS OF MORTALITY IN NEW MEXICO 108, 113 (Thomas M. Becker et al. eds., 1993). Blood alcohol levels were present in 51% of auto crash deaths, 49% of homicide victims, and 42% of suicides. *Id.*
- ¹² This is our greatest category of criminal offenses. Navajo Nation trial judges agree that disorderly conduct most often involves drinking and fighting in family and community settings.

- ¹³ Given Navajo attitudes toward children as special treasures, this too is an imported social disease. *See* Lizabeth Hauswald, *Child Abuse and Child Neglect: Navajo Families in Crisis*, 1 DINE BE'IINA': A JOURNAL OF NAVAJO LIFE 37 (1988).
- ¹⁴ As it is with general patterns of criminality in the United States, Navajo Nation judges can directly relate youth and adult crime to family disruption.
- ¹⁵ Over 85,000 pending criminal and civil cases in FY 1992, and 93,000 in FY 1993.
- ¹⁶ SIXTY-FIRST ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 209 (1892); DAVID ABERLE, THE PEYOTE RELIGION AMONG THE NAVAHO 34 (1982).
- ¹⁷ 1958 Navajo Nation Council Res. Nos. CO-69-58 and CJA-5-59 (codified at NAVAJO TRIB. CODE tit. 7, § 101 (1978)). The courts of the Navajo Nation, as the judicial branch of the Navajo Nation, came into being on April 1, 1959.
- ¹⁸ 1985 Navajo Nation Council Resolution No. CD-94-85 (codified at NAVAJO TRIB. CODE tit. 7, § 101 (1978)).
- ¹⁹ MICHAEL BARKUN, LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY 16-17 (1968); *see also* Richard A. Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMPLE L. Q. 295 (1959).
- ²⁰ BARKUN, *supra* note 19, at 16.
- ²¹ This is punishment for the sake of punishment: "Eye for eye, tooth for tooth, hand for hand, foot for foot." *Exodus* 21:24.
- ²² Retired Navajo Nation Associate Justice Homer Bluehouse says that in this win-lose alternative, one party goes out of the courtroom with his tail up and the other goes out with his tail down.
- ²³ This is especially true when outsiders intervene in a dispute, imposing the use of their own moral codes and rules.
- ²⁴ People in turn become consumers and too often the subjects of law. *See* Edmond Cahn, *The Consumers of Injustice*, in 2 THE WORLD OF LAW 574 (Ephraim London ed., 1960).
- ²⁵ In 1988, the President of El Salvador begged Congress to delay the return of illegal Salvadoran refugees in the United States citing systemic violence in El Salvador. Doris M. Meissner, *Don't Deport Central American Immigrants*, THE WASH. POST, Dec. 29, 1988, at A23. The systemic violence and deprivations he recited are strikingly similar to the systemic violence minorities face in American society today.
- ²⁶ Perhaps that is why conspiracy theories, such as those about the Kennedy assassination, and books about horrible murders are so popular.
- ²⁷ "Tyranny is an abuse of hierarchy." ELI SAGAN, AT THE DAWN OF TYRANNY: THE ORIGINS OF INDIVIDUALISM, POLITICAL OPPRESSION AND THE STATE 277 (1985). Wherever political power (which includes law) involves hierarchies there is always a danger of abuse. Sagan also observes that: "Political oppression is easier when there is a racial or cultural distinction between the masters and the oppressed. Tyranny will be harsher in a state established through conquest of one people by another than in a state where all share the same language, culture and history." *Id.* at 278.

28 Witchcraft is a crime which carries the death penalty under Navajo common law.

29 See BARKUN, *supra* note 19; see also Falk, *supra* note 19.

30 There are also medicine women. I use the term "medicine man" because of its popularity in the English language. Classification by gender, however, perpetuates a stereotype about Indian healers that they are usually men. Having used "medicine man" to introduce healers, I will use that as a gender-neutral term in the continuation of the text to include women.

31 In Navajo thought, like begets like.

32 Note that one dictionary definition of the word "solidarity" recognizes native thought as: "A union of interests, purposes, or sympathies among members of a group; fellowship of responsibilities and interests: *The savage depends upon the group ... for practical cooperation and mental solidarity*' (Bronislaw Malinowski)." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1229 (William Morris ed., 1981).

33 See SAGAN, *supra* note 27, at 278. People bound by language and culture are less likely to abuse each other.

34 Again, forcing a person to do something against his or her will is a form of witchcraft; something which is considered horrible in Navajo thought.

35 Associate Navajo Nation Justice Raymond D. Austin recently told an audience of lawyers at a conference that we must not use bad words to accuse others because the Holy People gave us our language and told us we must not abuse others with it. I cannot call another a "bad guy," and when Navajos are called upon to do so in adjudication that goes against their ethical values.

36 Navajos sometimes appear to be literal because the Navajo language is very precise. The maxim is that "words are very powerful" because we use them with precision, and they mean what they say.

37 In Anglo thought everyone is equal *procedurally* within the judicial system. Yet there are still glaring inequalities among the poor, women, AIDS victims and others who are distinguished by gender, class, race or sexual orientation. In Navajo thought, all people are genuinely equal in status and outcomes; equality is not limited to an individual's involvement with the judicial process.

38 Judges of other Indian nations point out the same conclusion for their languages. As in the state and federal courts, guilty plea rates are high in tribal courts. Is it because of the overwhelming power of the "state"? Is it because (as we believe) Indians are essentially honest and tell the truth? Is it because those who are charged in our courts have a different concept of fault? Is it because our traditional law disregards "guilt" and "innocence" in place of problem-solving?

39 There are four original clans. As Navajo women married people from other Indian nations, or women from other nations became clan mothers, the number of clans grew. However, the exact number of clans that resulted from this process is a point of some controversy among the Navajo people.

40 Again, it is difficult to translate into English because of its strong connotations.

41 A Navajo is a member of his mother's clan and "born for" his or her father's clan; the use of grandparent clans establishes even more extended relationships so that most Navajos are relatives of most others.

42 Disputes commonly involve matters such as land squabbles, divorce, probate or contract.

- 43 Navajo "notice" need not be in writing, and it is not concerned with a specific written statement of an accusation or proposed punishment. There is a right to participate in a gathering to solve problems because it affects everyone. Navajo Due Process requires notice to a wider circle of people than is required by general American Due Process.
- 44 A "zone of interests to be protected or regulated by the statute or constitutional guarantee in question" operates as a rule of standing. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).
- 45 Law is feelings. We share the feelings poets express-as John Donne put it, "I am involved in Mankind; And therefore never send to know for whom the bell tolls; it tolls for thee." JOHN DONNE, DEVOTION NO. XVII, *reprinted in THE COMPLETE POETRY AND SELECTED PROSE OF JOHN DONNE & THE COMPLETE POETRY OF WILLIAM BLAKE*, at 332 (1941).
- 46 Often prompted by a meal and always commenced with a prayer.
- 47 There are some unspoken limitations, of course, such as the prohibition against abusing each other with words.
- 48 For example, this is apparent in situations involving domestic violence.
- 49 *See infra* text accompanying note 57.
- 50 Judge Toledo also saw a creative use of services, e.g., supplying firewood, in place of money-which the father did not have.
- 51 We find that peacemaking is an effective means to get at denial which is a psychological barrier present in driving-while-intoxicated, domestic violence, and child abuse or neglect cases making these cases difficult to resolve.
- 52 Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993).
- 53 The Navajo language tells us a lot about Navajo attitudes toward Anglo justice. A lawyer, *agha'diit'ahii*, is one who takes away with words. It is a definition which describes someone who uses words for coercion. Someone who "takes away with words" is a pushy bossyboots.
- 54 Navajo maxims sometimes work their way into popular books. One which illustrates this point is: "A man can't get rich if he takes proper care of his family." ROBERT BYRNE, 1,911 BEST THINGS ANYBODY EVER SAID 307 (1988).
- 55 One study of Navajo witchcraft directly relates the beliefs and practices to sharing and group survival. *See* CLYDE KLUCKHOHN, NAVAHO WITCHCRAFT (1944).
- 56 Some of the best discussions of the still undeveloped legal history of the period are in 2 THE LAW OF THE PEOPLE: DINE BIBEE HAZ'AANII (Dan Vicenti et al. eds., 1972).
- 57 *See* JUDICIAL BRANCH OF THE NAVAJO NATION, THE NAVAJO PEACEMAKER COURT MANUAL (1982).
- 58 The word "*naat'aanii*" refers to someone who speaks well and whose words reflect good guidance. Sometime around the year

1832, Chinle area Navajos attacked the Hopi village of Oraibi because of the killing of a Navajo leader, Darts At the Enemy, by a Hopi. The death was particularly harmful to the man's Towering House Clan because when he delivered speeches, "he would 'talk in' all kinds of goods from every side (i.e. he would bring prosperity to his people by saying that they were to receive it)." SCOTT PRESTON, *The Oraibi Massacre*, in NAVAJO HISTORICAL SELECTIONS 31 (Robert W. Young & William Morgan eds., 1954). It shows that successful planning is the aspect of "speaking well" that Navajos respect in a leader.

59 I have often said that "knowledge is power." To Navajos, knowledge is a form of wealth or property. Sharing it with those who do not have it is distributive justice and assumes that those the *naat'aanii* helps are entitled to a fair share of that power.

60 Peacemaking is open to all, Navajo or non-Navajo. The Navajo courts also attempt to incorporate traditional justice concepts into adjudication. See The Navajo Nation Code of Judicial Conduct (1991); Tom Tso, *Moral Principles, Traditions and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15 (1992). (The Honorable Tom Tso is a former Chief Justice of the Navajo Nation.).

61 Raymond D. Austin, *ADR and the Navajo Peacemaker Court*, JUDGES' J., Spring 1993, at 48.

62 One of the fruits of our efforts is a greater use of Navajo traditions in all phases of Navajo Nation programs. See *Traditional Healing Beliefs Are Utilized and Integrated into Navajo Sexual Abuse Prevention/Treatment Program*, 10 No. 5 LINKAGES FOR INDIAN CHILD WELFARE PROGRAMS 8 (1993) (Navajo Nation social service program use of traditional ceremonies and philosophies).

63 As the Navajo judges and their staffers discuss law, history, religion and philosophy to improve their system, language barriers and conceptual differences become more obvious-that is, there are difficulties when we discuss such things in English and write them down. Mary White Shirley, a Navajo lawyer, once complained to a non-Navajo lawyer: "You silly Anglos; you always have reasons for everything. Don't you know that some things just *are*?"

64 In the words of a Navajo academic-lawyer, Else B. Zion.

65 As retired Associate Justice Homer Bluehouse points out, Navajo prohibitions are figurative, not literal. The admonition that "you'll jump into the fire" uses the moth as a simile; the moth that flies around the flame is eventually destroyed by it.

66 Navajos say of a wrongdoer, "He acts as if he has no relatives." It is horrible to think that such a thing could happen. Again, relying upon the wisdom of Homer Bluehouse, he once said that when a person did something very evil, or was a repeat offender, the community would shun him or her. That often leads to suicide because being without relatives is the worst thing that can happen.

67 See Hauswald, *supra* note 13 (relating contemporary social problems involving children to educational policies which stripped Navajos of the means of communication with their children-the Navajo religion, language and culture). Destruction of a common Navajo language or culture opens the door for systemic abuses. Cf. SAGAN, *supra* note 27.

68 In a nation which is as large as the island of Ireland and only slightly smaller than the State of South Carolina-the 40th state in size.

69 See generally Raymond Austin, *ADR and the Navajo Peacemaker Court*, JUDGES' J., Spring 1993, at 90. (an overview of the Peacemaker Courts by Associate Justice Raymond D. Austin who is a driving force in the Navaho Nation's "back to the future" movement).

70 See Hauswald, *supra* note 13, at 43-46.

⁷¹ In the words of Canadian philosopher Marshal Macluhan.

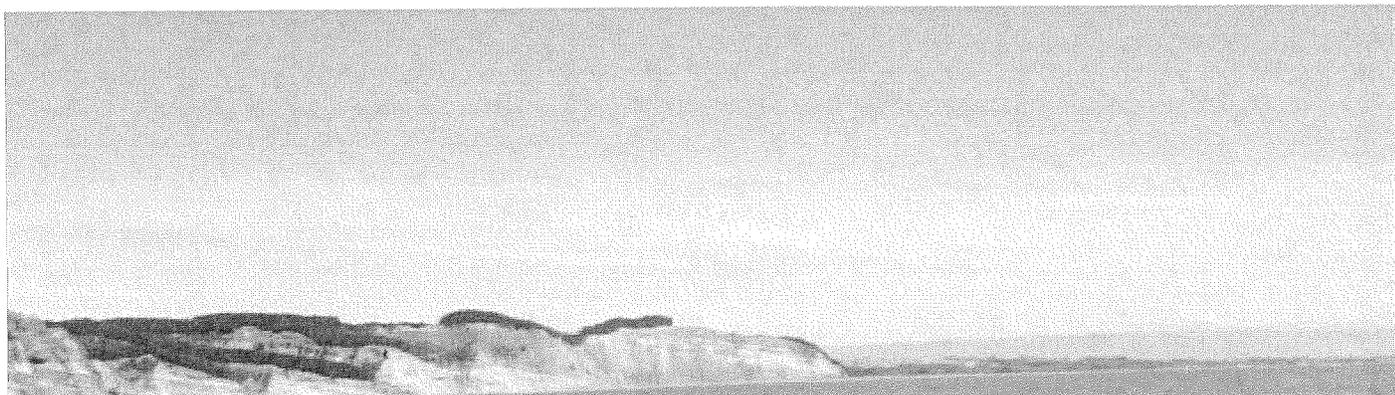
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Therapeutic Jurisprudence in the Mainstream

Creating better laws & legal systems



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Te Whare Whakapiki Wairua (The House that Heals the Spirit)

Posted on [October 25, 2015](#) by [mainstreamtj](#)

This week guest blogger Liz Moore gives a run down the Alcohol and Other Drug Treatment Court's in New Zealand building on the observations of [Prof. Michael Perlin in his earlier blog](#). Mainstream/traditional courts can learn a lot from this specialist court practice, in particular, the powerful role of culture in healing and recovery...

There are 27 specialist courts in New Zealand (two Alcohol and Other Drug Treatment Courts (Waitakere and Central Auckland); eight Family Violence Courts; 13 Youth Courts; one Youth Drug Court; one Youth Intensive Monitoring Court and two Homeless Courts).

The Courts have been operating for three years as part of a five year pilot. The court in Waitakere has graduated 55 participants to date, each of whom has undertaken an average of 196 hours of community service work. [Therapeutic Jurisprudence](#) is part of the court's strategic planning.

Like most of the criminal courts, the AODTC is heavily populated by Maori participants who typically demonstrate all the classic symptoms of a colonized culture (poverty, crime, health and housing issues, lack of education, employment, structure and

motivation, etc.) One of the most remarkable and unique aspects of the AODTCs is the incorporation of Maori culture into court proceedings. The court uses Maori ceremonial rituals such as singing (*waiata*) and prayer (*karakia*). When a participant graduates there is a recovery *haka* performed. Both courtrooms are adorned with three panels by a prominent Maori artist representing the AA Serenity Prayer. The contributions of the participants' family (*whanau*), the wider community and that of the *Pou Oranga* or Maori Cultural Adviser to the Court cannot be measured.

The *Pou Oranga* Rawiri "Ra" Pene is a tribal elder and addict in recovery for 24 years who has a dramatic impact on proceedings. Relevant metaphors and cultural references to participants' lives are tools which the court can use to inspire participants to become their better / higher selves. This has a powerful and uplifting effect on those present, and there is a palpable sense of dignity and respect in the courtroom. The cultural context is a superb example of best practice in action.

The Judge engages therapeutically with each individual and allows the time necessary for each case, at least five minutes per person. Research has shown that the judge has the biggest effect on drug court participants and in New Zealand it is no different. The relationship between the judicial officer and the participant is 'the power in the room'.

The best work in drug courts is done with high risk, high needs non-compliant offenders, not 'catch and release' offenders. ('If they're easy, they don't need drug court'). Drug court should be 'easy to get into and hard to fail out of'. If the right cohort is targeted, half should graduate and half should do better than they were doing before. It appears that the AODTC is right on track.

This blog is an adjunct to Prof. Michael Perlin's [previous blog on the AODTCs](#) With thanks to Peggy Hora!

Liz Moore, Court Diversion Officer, Court Mandated Diversion (Drug Court), Community Corrections, Tasmania.

Therapeutic jurisprudence in action

Posted on [September 5, 2015](#) by [mainstreamtj](#)

Guest blogger New Yorker Michael Perlin shares his observations of specialist courts in New Zealand and we see some of the features of these courts that can inform our practice in mainstream court settings...

I leave Auckland, New Zealand, having spent an extraordinary two weeks here. I did some wonderful nature sightseeing (lists of the species of endemic and endangered birds that I saw are available to anyone interested), saw many of my best friends in the world, lectured to Professor Warren Brookbanks' criminal law course on insanity defense myths, presented a seminar on the need for a Disability Rights Tribunal in Asia and the Pacific (along with my good friend Yoshi Ikehara) at a Human Rights Commission seminar, and spent two days – and was one of the keynoters (along with David Wexler and others) — at one of the very best conferences I have ever attended in my career: the [Aotearoa Conference on TJ](#), at the University of Auckland, co-chaired by Warren and Katey Thom (and it was magnificent).

But I am doing this blog post to share my experiences in three days of court observations: of the youth court, the homelessness court, and the drug court, that I attended over an 8 day period.

Simply put, I have never, in such a short period of time, had the honor to observe such examples of therapeutic jurisprudence in action. In my entire career as a lawyer – spanning over 40 years, practicing in NJ and NY – I have only seen a handful of judges that ran their courtroom with the level of **dignity** that I observed and that showed the defendants and all others who came before them the level of **respect** that I saw here.

The judges – Judge Hemi Taumaunu in the youth court (held at the marae, a Maori meeting house), Judge Tony Fitzgerald in the homelessness (“new beginning”) court, and Judge Fitzgerald and Judge Lisa Tremewan in the drug court – were, there is no other word for it, spectacular.

They knew every aspect of each case. They consulted with the court coordinating teams, defendants' lawyers, police prosecutors, family members, advocates and others in thoughtful, integrative ways that left me agape.

Maori practices were integrated seamlessly into each of the court sessions (including the performance of the traditional haka dance, to help **celebrate** the drug court graduation of one of the persons before Judges Fitzgerald and Tremewan, something I will never forget). I was fortunate enough to be able to participate in the pōwhiri ceremony, both at the beginning of youth court and later, at the beginning of the TJ conference, sang along with the waita that opened the court proceedings, and joined in the karakia, the closing prayers. It is a memory that will be etched in my mind forever.

And yes, I did **shed tears in the courtrooms**, when I saw the “**before and after**” **pictures** of some of the drug court defendants, when Judge Fitzgerald was kind enough to ask me to participate in a ceremony in which several of the defendants before him were given **certificates of progress** (and, as a bonus, vouchers which allowed them to make purchases at the local mall!), and when I realized that these courts were the fruition of what we in the TJ community have been working towards for 25 years. Although only the homelessness court was actually called a “new beginnings” court (Te Kooti O Timatanga Hon), all of the courts were dedicated to giving those before it – ranging from 14 year olds to persons in their 60s – **new beginnings**. I was so honored to be a part of it, and am so lucky to have had the opportunity to spend this amazing time in New Zealand.

Kia ora to all.

**Michael L. Perlin, Esq. Professor Emeritus of Law. Founding Director,
International Mental Disability Law Reform Project. New York Law School**

VI. Meeting Business
E. Child Support Follow-up

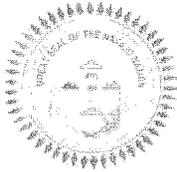


Navajo Nation Department of Child Support Enforcement

REQUIRED INFORMATION NEEDED WHEN APPLYING FOR CHILD SUPPORT SERVICES

Please provide the following documents:

- ❖ Copy of Driver's License or Identification Cards.
- ❖ Social Security Cards (for present family members).
- ❖ Children's Birth Certificate(s) or Paternity Papers of the Parties Children.
- ❖ Certificate of Indian Blood (for present family members).
- ❖ Copy of Divorce Decree or any other Court Judgments.
- ❖ Financial Information (TANF grant letter, check stubs, etc.).
- ❖ Information of ABSENT PARENT required as follows:
 1. Mailing and Physical Address.
 2. Social Security Number.
 3. Date of Birth.
 4. Tribal Census Number.
 5. Income Information.
 6. Employment Information.
 7. Driver's License, Picture Identification or Picture (*if available*).
 8. Detailed MAP of Residency.
- ❖ Any and all records regarding child support payments received and/or delinquent amounts (*if available*).



Navajo Nation Department of Child Support Enforcement Application

CASE NUMBER: _____ Relationship to Child(ren): _____

CUSTODIAL PARENT/GUARDIAN INFORMATION:

Last Name: _____ First Name: _____ Middle Name: _____

Mailing Address: _____

City: _____ State: _____ Zip Code: _____

Residential Address: _____

City: _____ State: _____ Zip Code: _____

Telephone #: _____ Message Phone #: _____ Cell #: _____

CUSTODIAL PARENT DEMOGRAPHICS INFORMATION:

Social Security #: _____ Tribal Census: _____

Chapter Affiliation: _____ Clanship: _____

Weight: _____ Height: _____ Eye Color: _____ Hair Color: _____

Date of Birth: _____ Sex: _____ Race: _____ Tribe: _____

Mother's Name: Last Name: _____ First Name: _____ Middle Name: _____

Mother's Maiden Name: _____

Father's Name: Last Name: _____ First Name: _____ Middle Name: _____

CUSTODIAL PARENT EMPLOYMENT INFORMATION:

Employer: _____ Occupation: _____

Employer's Address: _____

City: _____ State: _____ Zip Code: _____

Employer's Phone #: _____ Monthly Income: _____

PUBLIC ASSISTANCE INFORMATION:

Public Assistance Recipient: () YES () NO Grant Amount: _____ Medical Benefits: () YES () NO

Date Last Received: _____ Length of Time Received: _____

Please give the name and address of a contact person if we are unable to reach you: _____

Relationship: _____ Phone #: _____ Message #: _____

NON-CUSTODIAL PARENT INFORMATION:

What is the non-custodial parent's relationship to the dependents? () Father () Mother

Last Name: _____ First Name: _____ Middle Name: _____

Mailing Address: _____

City: _____ State: _____ Zip Code: _____

Residential Address: _____

City: _____ State: _____ Zip Code: _____

Telephone #: _____ Message #: _____ Cell #: _____

NON-CUSTODIAL PARENT DEMOGRAPHICS INFORMATION:

Social Security #: _____ Tribal Census #: _____

Chapter Affiliation: _____ Clanship: _____

Date of Birth: _____ Sex: _____ Race: _____ Tribe: _____

Weight: _____ Height: _____ Eye Color: _____ Hair Color: _____

Physical Description: _____

Driver's License #: _____ State where Issued: _____

Mother's Name: Last: _____ First: _____ Middle Name: _____

Mother's Maiden Name: _____

Father's Name: Last: _____ First: _____ Middle Name: _____

Other Relative Name: _____ Address: _____ Phone #: _____

Other Relative Name: _____ Address: _____ Phone #: _____

NON-CUSTODIAL PARENT EMPLOYMENT INFORMATION:

Employer: _____ Occupation: _____

Employer's Address: _____

City: _____ State: _____ Zip Code: _____

Employer's Phone #: _____ Monthly Income: _____

Bank Name: _____ Checking/Savings Account #: _____

Previous Employer: _____ Occupation: _____

Employer's Address: _____

City: _____ State: _____ Zip Code: _____

Employer's Phone #: _____ Monthly Income: _____

Bank Name: _____ Checking/Savings Account #: _____

Self Employed? () YES () NO If yes, give Occupation: _____

Does the Non-Custodial Parent have Health Insurance? () YES () NO

If yes, please provide the following information if available:

Insurance Company: _____
Policy #: _____ Group #: _____
Address: _____
City: _____ State: _____ Zip Code: _____
Phone #: _____

Is the Health Insurance through the Employer? () YES () NO

Is the Non-Custodial Parent currently in: () Prison () Jail If Yes, please provide the following information:

Name of Institution: _____
City: _____ State: _____ Zip Code: _____
Identification #: _____ Expected Date of Release: _____

Is Non-Custodial Parent on: () Probation () Parole If either answer is yes, please provide the following information:

Parole or Probation Officer's Name: _____ Phone #: _____
Address: _____
City: _____ State: _____ Zip Code: _____

Has the Non-Custodial Parent ever served in the Armed Forces? () YES () NO If yes, which Branch? _____

Dates of Services: From: _____ To: _____

Does the Non-Custodial Parent receive Federal or other benefits (Social Security, SSI, VA, Retired Military, etc.)?

() YES () NO if yes, please provide source:

Source: _____ Approximate Monthly Income Amount: \$ _____

Non-Custodial Parent's Asset Information:

Car / Truck: Make: _____ Color: _____ Model: _____
Year: _____ License Plate #: _____ State Registered: _____

INFORMATION ABOUT THE CHILD/CHILDREN:

Name: _____ Social Security #: _____
Date of Birth: _____ Sex: _____ Race: _____ Tribal Census #: _____

City/County/State of Birth: _____

Were the parents married to each other at the time of birth? () YES NO ()

Was the mother married to another person at time of birth? () YES NO ()

If this child was born out of wedlock, has paternity been established? () YES NO ()

If yes, was paternity established by? () signed acknowledgement, () court order, () other (please specify)

Please attach a copy of the acknowledgement or court order.

Name: _____ Social Security #: _____

Date of Birth: _____ Sex: _____ Race: _____ Tribal Census #: _____

City/County/State of Birth: _____

Were the parents married to each other at the time of birth? () YES NO ()

Was the mother married to another person at time of birth? () YES NO ()

If this child was born out of wedlock, has paternity been established? () YES NO ()

If yes, was paternity established by? () signed acknowledgement, () court order, () other (please specify)

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Date of Birth: _____ Sex: _____ Race: _____ Tribal Census #: _____

City/County/State of Birth: _____

Were the parents married to each other at the time of birth? () YES NO ()

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If this child was born out of wedlock, has paternity been established? () YES NO ()

If yes, was paternity established by? () signed acknowledgement, () court order, () other (please specify)

Please attach a copy of the acknowledgement or court order.

CUSTODIAL/NON-CUSTODIAL PARENT RELATIONSHIP INFORMATION:

Date Relationship Began: _____ City: _____ State: _____ Navajo Nation: _____

Date Relationship Ended: _____ City: _____ State: _____ Navajo Nation: _____

Married Date: _____ City: _____ State: _____ County: _____

Divorced Date: _____ City: _____ State: _____ County: _____

Legal Separation Date: _____ City: _____ State: _____ County: _____

COURT ORDER/CHILD SUPPORT INFORMATION:

Name of the Court: _____ City: _____ State: _____ County: _____

Docket/Case Number: _____ Date of Orders: _____

Amount of Child Support: \$ _____ Amount of Spousal Support: Alimony Ordered? \$ _____

Health Insurance Ordered? () YES () NO Are Children Covered? () YES () NO

Policy No.: _____ Dental () or Health ()

CHILD SUPPORT PAYMENT AND ARREARAGE INFORMATION:

MONTH	Year:			Year:			Year:		
	Due	Received	Balance	Due	Received	Balance	Due	Received	Balance
JANUARY	\$	\$	\$	\$	\$	\$	\$	\$	\$
FEBRUARY									
MARCH									
APRIL									
MAY									
JUNE									
JULY									
AUGUST									
SEPTEMBER									
OCTOBER									
NOVEMBER									
DECEMBER									
TOTAL	\$	\$	\$	\$	\$	\$	\$	\$	\$

Have you ever applied for Child Support Services with any other offices such as NNDSCSE or other State Offices?

OFFICE: _____ STATE: _____

ACKNOWLEDGEMENT OF PUBLIC ASSIGNMENT:

Pursuant to the Navajo Nation Child Support Enforcement Act or any other Provision of Applicable Navajo Nation Law

A. APPLICANT HEREBY APPLIES FOR SERVICES FROM THE NAVAJO NATION DEPARTMENT OF CHILD SUPPORT ENFORCEMENT AND AFFIRMS THAT HE/SHE UNDERSTANDS THE ASSIGNMENT OF CHILD SUPPORT RIGHTS WHICH INCLUDES:

- 1) **The right to prosecute any action to establish parentage;**
- 2) **To establish child support obligation;**
- 3) **To enforce child support on existing Court Order; and**
- 4) **To modify child support obligation.**

ALL SUCH ACTIONS SHALL BE BROUGHT IN THE NAME OF THE NAVAJO NATION.

B. APPLICANT AGREES TO FORWARD TO THE NAVAJO NATION DEPARTMENT OF CHILD SUPPORT ENFORCEMENT ANY AND ALL SUPPORT PAYMENTS, WHICH ARE RECEIVED DIRECTLY FROM THE NON-CUSTODIAL PARENT;

C. APPLICANT UNDERSTANDS THAT THE NNDCESE MAY TERMINATE ITS SERVICES TO THE APPLICANT, IF THE APPLICANT REFUSES TO COMPLY WITH POLICIES AND PROCEDURES, OR IF THE ACTIONS OF THE APPLICANT ARE DETRIMENTAL TO THE OPERATION OF THE NAVAJO NATION DEPARTMENT OF CHILD SUPPORT ENFORCEMENT;

D. APPLICANT HEREBY AFFIRMS THAT ALL STATEMENTS IN THIS APPLICATION ARE TRUE AND CORRECT TO THE BEST OF THE APPLICANTS KNOWLEDGE.

APPLICANT'S SIGNATURE: _____ DATE: _____

Navajo Nation Department of Child Support Enforcement Offices:

NNDCESE-Central Administration
St. Michaels Professional Bldg. Hwy 264, Mission Rd.
St. Michaels, AZ 86511
PO Box 7050 Window Rock, AZ 86515
Phone #: (928) 871-7194
Fax #: (928) 871-7196

NNDCESE-Shiprock Agency Office
City Market Shopping Center Space #5
PO Box 3499 Shiprock, NM 87420
Phone #: 1-800-288-7207 (In-State Calls)
Phone #: 1-800-585-7631 (Out of State Calls)
Fax #: (505) 368-1036

NNDCESE-Crownpoint Agency Office
Navajo Route 9, State Hwy 371
Bashas' Shopping Center, Suite 7
PO Box 1940 Crownpoint, NM 87313
Phone #: 1-800-288-7207 (In-State Calls)
Phone #: 1-800-585-7631 (Out of State Calls)
Fax #: (505) 786-2206

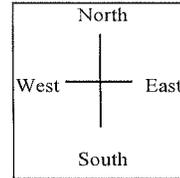
NNDCESE-Ft. Defiance Agency Office
Morgan Blvd. B1dg# W008-011
PO Box 2339 Window Rock, AZ 86515
Phone #: (928) 871-6895
Fax #: (928) 871-6878

NNDCESE-Chinle Agency Office
La Casa Blanca Office Complex 200 E. Route 7
PO Box 160 Chinle, AZ 86503
Phone #: (928) 674-2300
Fax #: (928) 674-2307

NNDCESE-Tuba City Agency Office
Dook'oo's'liid Office Rental Center Main Street
Hwy 160 Suite 102
PO Box 2988 Tuba City, AZ 86045
Phone #: (928) 283-3416
Fax #: (928) 283-3423

Please provide a detailed map of the Non-Custodial Parents Residential Address:

Describe the location of Home:



Any Additional Information to Locate Home, Please Provide Here:

Applicability of the Full Faith and Credit for Child Support Orders Act to States and Tribes

AT-02-03

Published: May 28, 2002

ACTION TRANSMITTAL

OCSE-AT-02-03

DATE: May 28, 2002

TO: STATE AGENCIES ADMINISTERING CHILD SUPPORT ENFORCEMENT PLANS UNDER TITLE IV-D OF THE SOCIAL SECURITY ACT, TRIBES AND TRIBAL ORGANIZATIONS, AND OTHER INTERESTED INDIVIDUALS

SUBJECT: Clarifying the Applicability of the Full Faith and Credit for Child Support Orders Act (FFCCSOA) to States and Tribes.

PURPOSE: The purpose of this action transmittal is to inform states and tribes of provisions of the Full Faith and Credit for Child Support Orders Act (FFCCSOA) and their application to both jurisdictions.

Congress enacted FFCCSOA (28 U.S.C. 1738B) in 1994 because of concerns about the growing number of child support cases involving disputes between parents who live in different states and the ease with which noncustodial parents could reduce the amount of the obligation or evade enforcement by moving across state lines. FFCCSOA requires courts of all United States territories, states and tribes to accord full faith and credit to a child support order issued by another state or tribe that properly exercised jurisdiction over the parties and the subject matter.

Congress amended FFCCSOA in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 to be consistent with the requirements of the Uniform Interstate Family Support Act (UIFSA) regarding which of several existing orders prospectively controls the current support obligation, as well as UIFSA's choice of law provisions. Most of the provisions regarding modification of orders in FFCCSOA and UIFSA are consistent as well. While tribes are not obliged to enact UIFSA as a condition of receipt of Federal funding of their child support enforcement programs operated under title IV-D of the Social Security Act, states are obligated to do so.

FFCCSOA addresses the need to determine, in cases with more than one child support order issued for the same obligor and child, which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement.

Definitions applicable to FFCCSOA appear in section 1738B(b). FFCCSOA defines "state" to include "Indian country" as this term is defined in 18 U.S.C. section 1151. This means that wherever the term state is used in the Act, it includes tribe as well. "Court" is defined as "a court or administrative agency of a state [or tribe] that is authorized by state [or tribal] law to establish the amount of child support payable by a contestant or make a modification of a child support order."

Provisions of the Full Faith and Credit for Child Support Orders Act

General Rule: FFCCSOA section 1738B(a) provides that the appropriate authority in each state and tribe shall enforce a child support order made consistent with the provisions of FFCCSOA in another state or tribe according to its terms and that a state or tribal court may not modify an order of another state or

tribal court except in accordance with subsections (e), (f) and (i) of FFCCSOA. Where a state or tribal court or administrative agency issues an order that is consistent with FFCCSOA the order must be recognized and enforced by other states and tribes.

Requirements of Child Support Orders: Section 1738B(c) of FFCCSOA contains the requirements of child support orders. In order for a child support order to be consistent with FFCCSOA, a court with subject matter jurisdiction and personal jurisdiction over the contestants must have issued it. Additionally, the contestants must have been given reasonable notice and opportunity to be heard.

Continuing Jurisdiction: Section 1738B(d) of FFCCSOA contains the provisions on continuing jurisdiction. A state or tribe has continuing, exclusive jurisdiction over an order issued by a court of that state or tribe if the state or tribe is the child's residence or the residence of any individual contestant unless the court of another state or tribe, acting in accordance with subsections (e) and (f) has modified the order.

Recognition of Child Support Orders: Section 1738B(f) contains the provisions for determining the order recognized for continuing, exclusive jurisdiction. Both FFCCSOA and UIFSA have consistent rules for determining which order is the single effective order entitled to prospective enforcement when multiple orders exist. The rules are:

"If one or more child support orders have been issued with regard to an obligor and a child, a court shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement:

- (1) If only one court has issued a child support order, the order of that court must be recognized.
- (2) If two or more courts have issued child support orders for the same obligor and child, and only one of the courts would have continuing, exclusive jurisdiction under this section, the order of that court must be recognized.
- (3) If two or more courts have issued child support orders for the same obligor and child, and more than one of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home state of the child must be recognized, but if an order has not been issued in the current home state of the child, the order most recently issued must be recognized.
- (4) If two or more courts have issued child support orders for the same obligor and child, and none of the courts would have continuing, exclusive jurisdiction under this section, a court having jurisdiction over the parties shall issue a child support order, which must be recognized.
- (5) The court that has issued an order recognized under this subsection is the court having continuing, exclusive jurisdiction under subsection (d)."

Authority to Modify Orders: A state or tribe may modify its own order as long as it has continuing, exclusive jurisdiction. The authority to modify the child support order of another state or tribe under FFCCSOA is found at section 1738B(e). Under this section, a state or tribal court may modify the order of another state or tribe if it has jurisdiction and the issuing state or tribe no longer has continuing, exclusive jurisdiction or if each individual contestant files written consent with the state or tribe of continuing, exclusive jurisdiction. FFCCSOA prohibits a state or tribe from modifying an existing order issued by another state or tribal court, unless these criteria are met.

Enforcement of Modified Orders: Section 1738B(g) of FFCCSOA contains the enforcement provision. If a state or tribe no longer has continuing, exclusive jurisdiction it may enforce the nonmodifiable aspects of the order and collect on arrearages that accrued before the date on which the order was modified under subsections (e) and (f).

Choice of Law: Section 1738B(h) contains FFCCSOA's choice of law provision. In a proceeding to establish, modify, or enforce a child support order, the law of the forum state or tribe applies. As an exception to this rule, courts must apply the law of the state or tribe that issued the order when interpreting the order's obligations, such as the amount and duration of support payments. In a proceeding for arrearages, the statute of limitations under the laws of the forum state or tribe or the issuing state or tribe, whichever is longer, applies.

Registration for Modification: Section 1738B(i) contains FFCCSOA's registration for modification provision. If all of the individual contestants have left the issuing state or Indian country, the contestant seeking to modify an order issued in another state or tribe must register that order in a state or tribe with jurisdiction over the nonmoving contestant for purposes of modification. Either a state IV-D agency or a tribal CSE agency may be a party who is seeking to modify and enforce an order under this subsection.

RELATED REFERENCES: For further information on determining which order is entitled to prospective enforcement in cases with more than one order, consult OCSE-IM-01-02 which issued a TEMPO on determining controlling orders and DCL-00-64 which provided material and resources to help states and tribes make determinations of controlling order.

INQUIRIES TO: ACF Regional Administrators

ATTACHMENT: 28 U.S.C. 1738B

Sherri Z. Heller, Ed.D.
Commissioner
Office of Child Support Enforcement

VI. Meeting Business
F. Equitable Treatment of Minority Youth



ARIZONA SUPREME COURT
ADMINISTRATIVE OFFICE OF THE COURTS
COMMISSION ON MINORITIES

Equitable Treatment of Minority Youth



Fifth Statewide Report Card-2015

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MEMBERS

Honorable Maurice Portley
Court of Appeals, Division 1

Honorable Maria M. Avilez
Sahuarita Municipal Court

Mr. Mike Baumstark
Administrative Office of the Courts

Ms. Diandra D. Benally, Esq.
Fort McDowell Yavapai Nation

Professor Paul D. Bennett
University of Arizona James E. Rogers
College of Law

Professor Patricia Ferguson-Bohnee
ASU Sandra Day O'Connor College of
Law

Honorable Gilberto Figueroa
Superior Court in Pinal County

Judge Anna Huberman
Maricopa County Justice Courts

Ms. Catharina M. Johnson
Maricopa County Juvenile Probation
Department

Ms. Frankie Y Jones
Maricopa County Attorney's Office

Ms. Roxana Matiella
Juvenile Justice Services

Mr. Kendall D. Rhyne
Gila County Probation Department

Honorable Dan Slayton
Coconino County Superior Court

Honorable Roxanne K. Song Ong
Phoenix Municipal Court

Honorable Alma Vildosola
Justice of the Peace City of Douglas

Mr. John Vivian
Arizona Department of Juvenile
Corrections

Honorable Penny L. Willrich, (Ret.)
Summit Law School

Ms. Marian Zapata-Rossa
Quarles & Brady, LLP

Message from the Commission

Arizona is required, by federal law, to maintain and report data on disproportionate minority contact (DMC) on an ongoing basis and to make efforts to reduce any disparity that may exist. Arizona had been monitoring DMC on a statewide level for over a decade and partnered with local jurisdictions to combat DMC in our courts.

One notable accomplishment is the collaboration between the Governor's Juvenile Justice Commission and the Commission on Minorities in the Judiciary in combining efforts to reduce the incidence of DMC by establishing the Arizona Statewide DMC Committee. As a result, Arizona partnered with Arizona State University to examine the data in detail and explore the factors that may contribute to the DMC, and the report of its findings, *Arizona Juvenile Justice System: Disproportionate Minority Contact Assessment*, was published in 2014. The Commission on Minorities in the Judiciary then reached out to the Presiding Juvenile Court Judge of each county, and their court leadership teams should be commended for their courage and commitment in paying critical attention to procedural fairness.

This is the 5th Arizona Statewide Report Card on the Equitable Treatment of Minority Youth. These reports have challenged juvenile court judges, court administration, county attorneys, and many other judicial employees and community leaders, to ensure all youth in the Arizona juvenile justice system are provided with fair and equitable justice. The report indicates improvements in some areas and things remaining unchanged in other areas, with a few decisions points getting worse.

The purpose of this report is to analyze each major decision-point in the juvenile justice continuum to determine whether all youth are receiving similar treatment. It is our intent that this report be used as a tool by juvenile court leadership teams and policy makers to prioritize and focus their efforts in creating fair outcomes for all children who have contact with Arizona's juvenile courts.

The Commission on Minorities in the Judiciary would like to thank Helen Gandara and John Raeder with the Governor's Juvenile Justice Commission for their commitment efforts in addressing DMC statewide. Additionally David Redpath of the Administrative Office of the Courts, and Commissioners Dr. John Vivian of the Arizona Department of Juvenile Corrections, the Honorable Maria Montano-Aviles and Professor Paul D. Bennett of the University of Arizona, James E. Rogers College of Law are to be commended for their work with producing this report and work presenting these findings with jurisdictions statewide.

Respectfully submitted,

Judge Maurice Portley
Chair, Commission on Minorities in the Judiciary

Executive Summary-2015

This report is a result of the 2002 Equitable Treatment of Minority Youth report produced by the Arizona Supreme Court Commission on Minorities in the Judiciary (COM). One of the recommendations issued in that report was to create an annual report card to assess progress on the reduction of over-representation of minority youth in the juvenile justice system. The decision has been modified to produce a report card every third year.

According to the Office of Juvenile Justice and Delinquency Prevention, measuring disproportionate minority contact is like taking vital signs, it alerts one to potential problems and helps focus efforts. This report card is intended to be used as one would a general physical, to detect change and recommend appropriate action.

This report addresses the 2002 Equitable Treatment of Minority Youth recommendation by highlighting decision points from referral to the juvenile court through disposition. The first report serves as a baseline for the second, third, fourth and fifth report cards. The intent is to illustrate the current situation, provide a basis for future comparison, highlight areas of special concern and compare these results with prior report cards. It is important to note that offense severity and prior offense history are not included in the analysis of these reports. Tables illustrating **Relative Rate Index (RRI's)** at various decision points across four years and by county are included in the appendix of this report.

While Arizona is enjoying unprecedented declines in the number of youth entering the system, minority youth are not fairing as well as White youth in the Arizona juvenile justice system. The following provides a summary of the results of this report.

All Youth:

- Juvenile delinquency activity is decreasing
- Only 3.25% of court-age youths were referred to juvenile court in FY2013
- Minority youth are under-represented in diversion cases
- Only 17.93 % of all referrals are brought to detention, this is a downward trend over the last 4 years.
- Very little difference in rates of adjudication among all groups of youth
- Minority youth are more likely to be Direct Filed in adult court

African American Youth:

- In the 2004 report, were referred at a rate that was 2 times higher than would be expected based on their proportion in the population. The following four reports indicate this has dropped to 1.8 times.
- Were Committed to ADJC and brought to detention are higher rates.
- The most significant finding continues to be the rate of Direct Filing in Adult Court. The overall rate of Direct Filing for African American youth ranged from 2.92-5.62 over the 4 cohorts examined.

Hispanic Youth:

- Are under-represented at the referral decision point however they were over-represented in being brought to detention
- Had higher rates of being petitioned and ending up on Juvenile Intensive Probation Services (JIPS).
- Were Direct Filed in Adult Court at 3.55 times higher than White youth—an increase from the 2010 Report Card.
- Are about even to the White youth on being adjudicated
- Had higher rates for being committed to ADJC.

American Indian Youth:

- Although they are over-represented at being referred and brought to detention, they are more likely to be released.
- The Direct Filed data shows a decrease from the 2006 Report card with an RRI of 1.56. Transferred youth show under-representation for the American Indian youth, but this rate involves an extremely small number.
- They are under-represented on Diversion, ADJC and Penalty Only.

Arizona Has a History of Addressing Disproportionate Minority Contact

Arizona has a long history of focusing on DMC in the juvenile justice system.

- 1991 – 1994** Arizona was selected as one of five states to address DMC through an initiative sponsored by the Office of Juvenile Justice and Delinquency Prevention (OJJDP).
- 1993** The Arizona Juvenile Justice Advisory Council published the first Equitable Treatment of Minority Youth report.¹ This report assessed the over-representation of minority youth in the juvenile justice system in Maricopa and Pima counties.
- 1998** OJJDP published DMC: Lessons Learned From Five States² and includes Arizona as one of the five states.
- 2000** The Arizona Supreme Court created the Building Blocks Initiative to address DMC in Maricopa County.
- 2001** Pima County Juvenile Court publishes A Comparative Analysis of Minority Over-Representation in the Pima County Juvenile Justice System, 1990 versus 2000.
- 2002** The Arizona Supreme (COM) published the second Equitable Treatment of Minority Youth report.³ This report assessed the progress made from 1990 to 2000 in Maricopa and Pima counties and recommended that an annual report card be developed.
- 2004** COM published the First Annual Arizona Statewide Report Card.⁴ This document examined the proportion of youth by race and ethnic group at various decision points in the Justice System. It also examined the information using the Relative Rate Index.
- 2004** Pima County selected by the Annie E. Casey Foundation as a Juvenile Detention Alternatives (JDAI) site, Disproportionate Minority Contact is included in the initiative.
- 2006** COM published the Second Arizona Statewide Report Card.
- 2008** COM published the Third Arizona Statewide Report Card.
- 2009** The Governor's Juvenile Justice Commission and COM collaborate to establish the Statewide DMC Committee and commence to review individual county's DMC data and meet with each county's court leadership team to discuss their DMC data and to promote and support efforts to focus on areas of concern.
- 2010** COM publishes the Fourth Arizona Statewide Report Card. The information in this report is statewide and includes all fifteen Arizona counties. The population is a group of juveniles referred to the juvenile justice system in calendar year (CY) 2008 and followed through late July of 2009 rather than using different juveniles at each decision point. This is the Fourth Report Card and is comparable to the first three as the analysis procedures and decision points remain constant.
- 2013** Arizona partner's with Arizona State University to produce "Arizona's Juvenile Justice System: Disproportionate Minority Contact Assessment" which was a five year analysis and file review to systematically assess what might be causing DMC in Arizona.
- 2015** COM publishes the Fifth Arizona Statewide Report Card.

The information in this report is statewide and includes all fifteen Arizona Counties. The population is a group of juveniles referred to the juvenile justice system in calendar years (CY) 2010 and 2011 and Fiscal Years (FY) 2012 and 2013. These youth are followed through the entire court process to accurately represent outcomes for each cohort. This is the Fifth Report Card and is comparable to the first four as the analysis procedures and decision points remain constant. New this year is the appendix in which trend data is presented as well as county specific data.

JUVENILE VS. REFERRAL LEVEL DATA

- Data is presented for juveniles referred in Table 1. Each number represents one juvenile. The population data comparison is the only place that juvenile level data is presented.
- All subsequent data is presented based on total referrals. This means that if a juvenile is referred to the juvenile court three times in a given year, each referral is reported separately.

TWO TYPES OF INFORMATION PRESENTED

This report provides two types of information: percentages and relative rates.

- Percentages show the proportion of that racial/ethnic group that appears at a particular decision point (referral, detention, petition, etc.) based on the preceding decision point.
- Relative Rates (RRI) offer a comparison to White youth. This allows for an assessment of the degree of over-representation of minority youth in the juvenile justice system (see **What is the Relative Rate Index?**)

It is important to realize that while the percentages may suggest differences, the RRI scores will indicate whether DMC may exist. This can happen because the proportions may look large, but when compared to the proportions for White youth, a truer picture of disparity is presented. This is the main advantage of using RRI scores in addition to percentages.

FOUR GROUPS OF JUVENILES – 19 MONTHS

The population for this report is all juveniles referred in Fiscal Year (FY) 2013. Additionally the appendix will display the same data for the preceding three years with four cohorts in and trend lines. The four years examined will be calendar years (CY) 2010 and 2011 and fiscal years FY 2012 and 2013. The juveniles referred in each of those years represent a cohort that was followed for up to 19 months until their referrals were disposed of. African American, White, Hispanic and American Indian youth are presented in this report. "Other" and "Unknown" race designations were not included in the breakouts or the totals.

Any juvenile court activity that occurred after August of 2014 was not captured for this report. Therefore, while most of the referrals are followed through disposition, some were still pending action as of August 2014.

What is the Relative Rate Index (RRI)?

The Relative Rate Index (RRI) is a measure of over/under-representation used by the Office of Juvenile Justice and Delinquency Prevention. **It is designed to be an "early warning sign" measure, not an outcome.** It should be used to point out problems so that the systems attention can be more effectively focused.

The RRI is a comparison of rates of occurrence for racial/ethnic groups.

A *rate of occurrence* is the number of cases of a juvenile justice event (for example, referral) in terms of another event (for example, juvenile population).

The RRI is calculated by taking the rate of occurrence of referrals for one race/ethnicity divided by the rate of occurrence of referral for another race/ethnicity (for this report, the base group is always White). The RRI score is not calculated for any group whose proportion of the population is less than 1%.

For example, the rate of referral for Hispanics based on the Hispanic juvenile population (.0492) is divided by the rate of referral for Whites based on the White juvenile population (.0463).

This calculation provides a relative rate index (RRI) of 1.1 (with rounding) for Hispanic Youth (compared to the base RRI of 1.0 for White youth). This suggests that Hispanic youth are only slightly more likely to be referred to Juvenile Court than White youth.

An RRI of greater than one indicates some degree of over-representation, likewise an RRI less than one points to a degree of under-representation and warrants further attention.

DECISION POINTS REVIEWED

A decision point is one step in the juvenile justice process. This report reviews the following decision points (see the Glossary for further explanation):

- Referral (paper or physical/detention)
- Diversion, Petition Filed, No Petition Filed,
- Direct filed in adult court
- Adjudicated, transferred to adult court, or non-adjudication
- Dispositions (penalty only, Department of Juvenile Corrections, or probation (standard or intensive))

All of the data on the decision points are collected either in the Juvenile On-Line Tracking System (JOLTS) or on the Integrated Court Information System (ICIS) for Maricopa County.

In 2013, 28,837 juveniles were referred to the Juvenile Court in Arizona. This represents 3.25% of the population of Arizona’s juveniles age 8 – 17 who are African American, White, Hispanic, Asian or American Indian.⁵

- For the most recent population data, White youth made up 43% of all youth age 8 to 17 in Arizona. Hispanics accounted for slightly over 42% and African Americans, American Indians and Asians each accounted for 5.32%, 5.17% and 3.12% respectively of the population.
- The RRI indicates that the rate of referral for African Americans is 1.8 times than that of Whites and that the rates of referral for Asians (0.3) and Hispanics (0.8) are less than that that of White youth and while American Indians (1.0) were referred at the same rate as Whites.

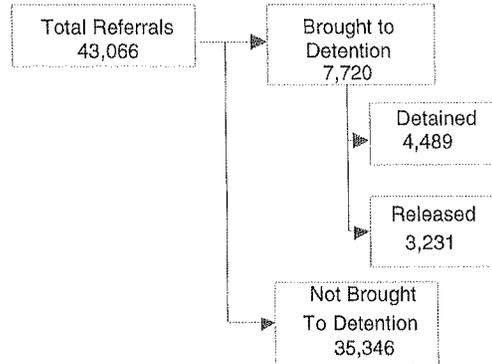
Table 1. Arizona Population and Referrals: Youth aged 8 – 17 years of age by Race for Calendar Year 2013⁶

	Number		Percentage		RRI Score ⁷
	Arizona Population	Juveniles Referred ⁵	Arizona Population	Juveniles Referred	
Total Juveniles	906,445	28,837	100.00%	100%	--
White	394,628	13,176	43.6	46.7	1
African American	48,254	2,834	5.3	9.8	1.8
Asian	28,269	232	3.12	0.8	0.3
Hispanic	388,453	10,960	42.9	38.0	0.8
American Indian	46,841	1,635	5.2	5.6	1

MOST REFERRALS NEVER BROUGHT TO DETENTION

In 2013, the 28,837 juveniles referred accounted for 43,066 referrals. In Arizona, about 4 out of every 5 referrals are not brought to detention (paper referral). In 2013, 58.1% of those brought to Detention were detained. This is a lower percentage than in previous year and is indicative that the Juvenile Detention Alternatives Initiative (JDAI) the Arizona Court System has implemented in many of its counties

has been successful in ensuring only the appropriate kids are being detained for the right reasons. This is a positive outcome as one of the goals of this initiative is to reduce the inappropriate and unnecessary use of detention. In Arizona, great strides have been made to reduce this percentage over the last 4 years as Arizona has actively sought alternatives to detention while maintaining public safety.



- **Minorities show a higher rate of being brought to detention. However of those brought to detention centers White youth are actually detained at a higher rate than minorities; Asian American Youth show the highest rate of being released.**

Table 2: Brought to Detention or Not

	Total Juvenile Referrals	White Referrals	Asian Referrals	African American Referrals	Hispanic Referrals	American Indian Referrals
Total Referrals	43,066	19,007	322	4,486	16,761	2,490
Percentage						
Not Brought to Detention	82.07%	85.17%	84.47%	79.45%	79.37%	81.08%
Brought to Detention	17.93%	14.83%	15.53%	20.55%	20.63%	18.92%
Detained	58.15%	59.77%	42.00%	46.64%	59.57%	62.21%
Released	41.85%	40.23%	58.00%	53.56%	40.43%	37.79%
RRI						
Paper Referral	--	1	0.9	0.9	0.9	0.9
Brought to Detention	--	1	1.05	1.39	1.39	1.28
Detained	--	1	0.7	0.78	1	0.97
Released	--	1	1.44	1.33	1	0.94

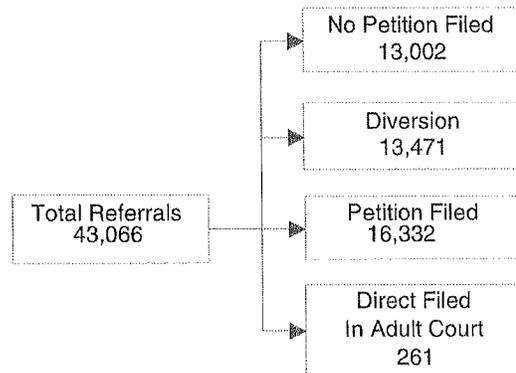
* Percentages are of the total referrals for that racial/ethnic group

Of the 18% of referrals that resulted in a juvenile going to detention (physical referral):

- In 2013, almost 6 out of every 10 juveniles brought to a detention facility due to a referral were detained at the initial screening.
- The RRI scores (1.05-1.39) indicate that minority youth were over-represented in the group *brought* to detention.
- Once brought to detention, the RRI scores (.7-.97) indicate that minority groups of juveniles were less likely to be detained. This positive outcome was not seen in previous report cards this may be attributed to the increased utilization of objective detention screening tools implemented across the state to assist in the detention decision.

TO FORMALLY PROCESS IN COURT OR NOT?

Referrals may result in formal court processing (Petitions or Direct File to Adult Court) or informal court processing (Diversion or No Petition Filed). It is possible for a referral to be diverted and then be filed as a petition if the consequence (sanction) is not completed. Of the 43,066 referrals filed in 2013, there were only petitions filed on 16,368 (28.2%).



➤ **Minority Youth were more likely to petitioned and Direct Filed on than White youth.**

Table 3: Formal and Informal Court Processing

	All Juvenile Referrals	White Referrals	Asian Referrals	African American Referrals	Hispanic Referrals	American Indian Referrals
Total Referrals	43,066	19,007	322	4,486	16,761	2,490
Percentage						
No Petition	30.19%	30.30%	23.29%	29.22%	26.97%	28.79%
Diversion	31.28	32.91	45.34	27.6	31.35	23.17
Petition Filed	37.92	33.54	31.06	41.82	40.83	45.7
Direct Filed	0.6	0.24	0.31	1.36	0.86	0.36
RRI						
No Petition	--	1	0.7	0.88	0.81	0.92
Diversion	--	1	1.38	0.84	0.95	0.7
Petition Filed	--	1	0.93	1.25	1.22	1.36
Direct Filed	--	1	1.28	5.62	3.55	1.49

* Percentages are of the total referrals for that racial/ethnic group.

* Column percentages may not sum to 100%. Some referrals in the “No Petition” group may be pending decision.

➤ Diversion is a process that allows juveniles to avoid formal court processing if one or more conditions are completed and the juveniles accept responsibility for the offenses. Of the 43,066 referrals filed in

2013, 13,471 (31.3%) were diverted. In general, African American, Hispanic and American Indian youth referrals were under-represented at the Diversion decision point with RRI's ranging from 0.7 to 0.95, while Asian youth were afforded the opportunity more often than white youth with an RRI of 1.38. African American, Asian, Hispanic and American Indian youth are also under-represented at the No Petition point. The converse of this is all minority groups other than Asians were over-represented on the Petition Filed decision point (RRI Range 1.22-1.36). All minority youth were more likely to be direct filed in adult court than White youth with African American youth most likely to be direct filed on with a rate that is over 5 times that of White youth. This is a future challenge for Arizona and an area to target moving forward.

➤ **Referrals for Minority Youth were More Likely to be Filed as Petitions.**

A petition is filed when a juvenile is alleged to be delinquent or incorrigible and formal court processing is warranted. Of the 43,066 referrals filed in 2013, 16,332 (37.92%) resulted in petitions filed in juvenile court. The actual number of petitions is less than this because multiple referrals may be contained in a single petition.

- 41.82% of African American referrals filed in 2013 resulted in a petition. This compares to 40.83% for Hispanic youth, 45.70% for American Indian youth, 31.06% for Asian youth and 33.54% for White youth.
- The RRI score paints a picture that suggests that the referrals of minority youth are more likely to be filed as petitions than White youth (.93-1.36).

➤ **Minority Youth Referrals were More Likely to be Direct Filed in Adult Court**

A juvenile aged 15 or older must be directly filed into adult court if accused of murder, forcible sexual assault, armed robbery, or other specified violent offenses. A juvenile will also be directly filed if previously convicted in adult court or if the juvenile has two prior felony adjudications and is arrested for a third felony. Finally, a juvenile who is 14 and a chronic offender or who is 14 or older and has committed one of a specified set of offenses may be directly filed in adult court at the discretion of the county attorney.

The direct filings in Arizona having been decreasing dramatically in number of the last five years, close to a 50% decline. Less than one percent (261 or 0.61%) of the total referrals in 2013 resulted in a direct file to adult court. Nonetheless, the decline in total numbers of youth effected hasn't stemmed the significant over-representation exists at this decision point.

The rates of Direct Filing for Asian, Hispanic and American Indian youth referrals was higher (1.28, 3.55 and 1.49, respectively) than for White youth. African American youth referrals had a Direct Filing rate 5.62 times higher than White youth. These findings are the most serious DMC findings in the state and invite an further examination. While the number of youth involved is smaller than most decision points, making the relative rates across races more easily impacted by a small number of cases, adult charging is likely to have the greatest impact on the youth's future.

FOLLOWING THE PETITION

This section of the report looks at three general categories of outcome that follow a petition: adjudicated, transfer to adult court (pending a transfer hearing), and non-adjudication.

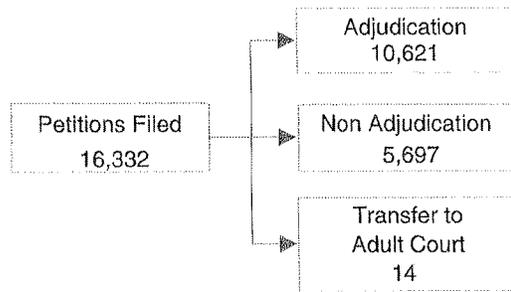


Table 4: Post Petition Decisions

	All Juvenile Referrals	White Referrals	Asian Referrals	African American Referrals	Hispanic Referrals	American Indian Referrals
Petition Filed	16,332	6,375	100	1,876	6,843	1,138
Percentage						
Adjudicated	65.03%	65.65%	61	57.52%	68.04%	68.28%
Transferred	0.08	0.08	0	0.11	0.07	0.18
RRI						
Adjudicated	--	1	0.93	0.88	1.01	1.04
Transferred	--	1	0	1.36	0.92	2.24

* Percentages are of the total referrals for that racial/ethnic group.

Of the 16,332 petitions filed in FY 2013, 5,697 (34.88%) were not adjudicated. Adjudication is the juvenile equivalent of a “conviction” in adult court. Of the 16,332 referrals resulting in petitions filed, 65.03% (10,621) were adjudicated. There were no major differences in the rates of adjudication between White and Minority youth. Rates of adjudication were lower for Asian, American Indian and African American youth while the Hispanic rate of adjudication was very comparable to that of White youth (1.01). This finding is a positive one for Arizona’s courts as it demonstrates in the court room, where there rules of evidence and representation for the youth exists, minority youth can expect similar outcomes to White youth.

➤ **American Indian Youth Petitions were less likely to Fall Under “Non Adjudication.”**

In addition to adjudication and transfer to adult court, a petition may result in no further action taken. This is generally called “dismissed,” in which case the juvenile is not adjudicated delinquent. These cases can also involve situations in which a juvenile has turned 18, is transferred to another jurisdiction, has absconded, plead to another charge or the court rules there is insufficient evidence to merit an adjudication. In addition, when multiple charges are pending, one charge can be dismissed while another receives a disposition.

- The RRI scores suggest that American Indians (0.92) and Hispanics (0.99) had a slightly lower non-adjudication rate than White youth. On the other hand, African American (1.24) and Asian youth (1.14), had a higher rate of non-adjudication as White youth, which is positive outcome for these youth.

- African Americans had the highest proportion of non-adjudication (42.38%) and Native American youth had the lowest (31.6%).

The county attorney may request that a juvenile be transferred to adult court following the filing of a petition in juvenile court. Of the 16,322 petitions filed in juvenile court, 14 (0.08%) referrals resulted in a transfer to adult court request. As the total number of youth transferred is less than 1% of the petitions filed the comparison of the rates provides little value.

DISPOSITION OPTIONS

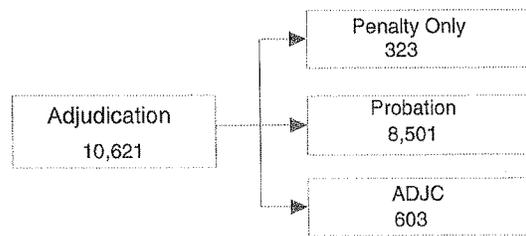


Table 5: Disposition Decisions

	All Juvenile Adjudications	White Adjudications	Asian Adjudications	African American Adjudications	Hispanic Adjudications	American Indian Adjudications
Adjudicated	10,621	4,185	61	1,079	4,519	777
Percentage						
Probation	80.04	81.51	72.13	73.49	78.54	82.37
Standard	61.12	64.87	65.57	62.19	56.83	64.09
JIPS	19.53	17.54	6.56	18.07	22.04	18.66
ADJC	5.68	5.07	4.92	8.71	6.02	2.83
RRI						
Probation	--	1	0.88	0.97	0.96	1.01
Standard	--	1	1.01	0.96	0.88	0.99
JIPS	--	1	0.37	1.03	1.26	1.06
ADJC	--	1	0.97	1.72	1.19	0.56

* Percentages are of the total referrals for that racial/ethnic group.

➤ **Little Difference in the Rates of Receiving Probation for White and Minority Youth**

Four-fifths (80 %) of the adjudicated referral dispositions were to probation. The RRI scores indicate that all minority are less likely to receive a disposition of probation than white youth. Hispanics and American Indian youth are less likely to receive Standard Probation and are more likely to be placed on JIPS than their white counterparts.

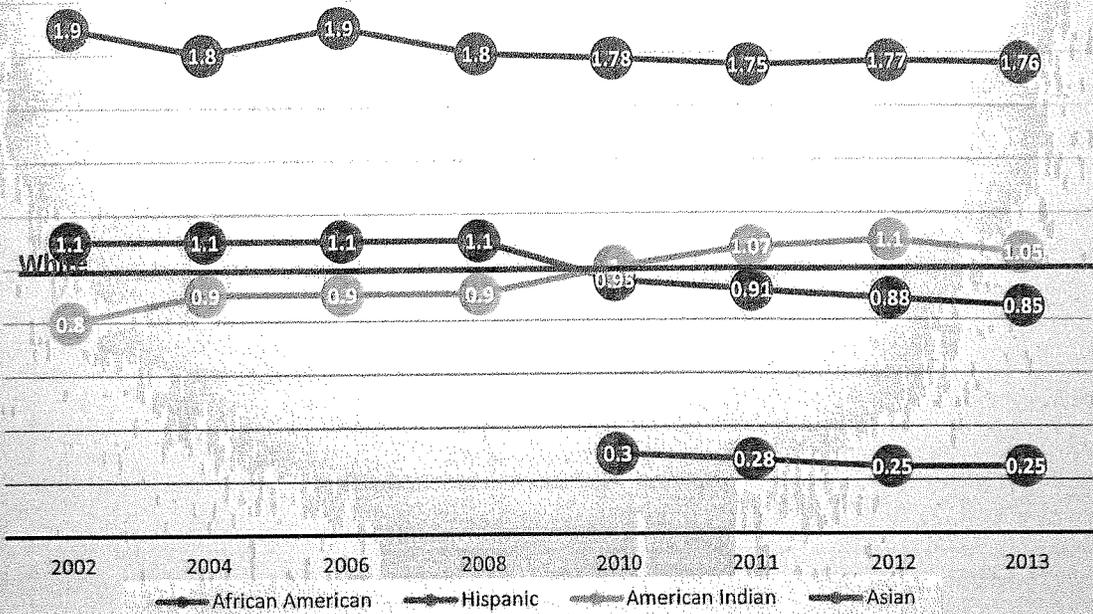
➤ **African American and Hispanic Youth Referrals Committed to ADJC at a Higher Rate than White and American Indian Youth Referrals.**

Disposition to the Arizona Department of Juvenile Corrections (ADJC) is governed by statute and the Arizona Code of Judicial Administration. Only 5.6% of the adjudicated referrals from FY2013 involved commitments to ADJC.

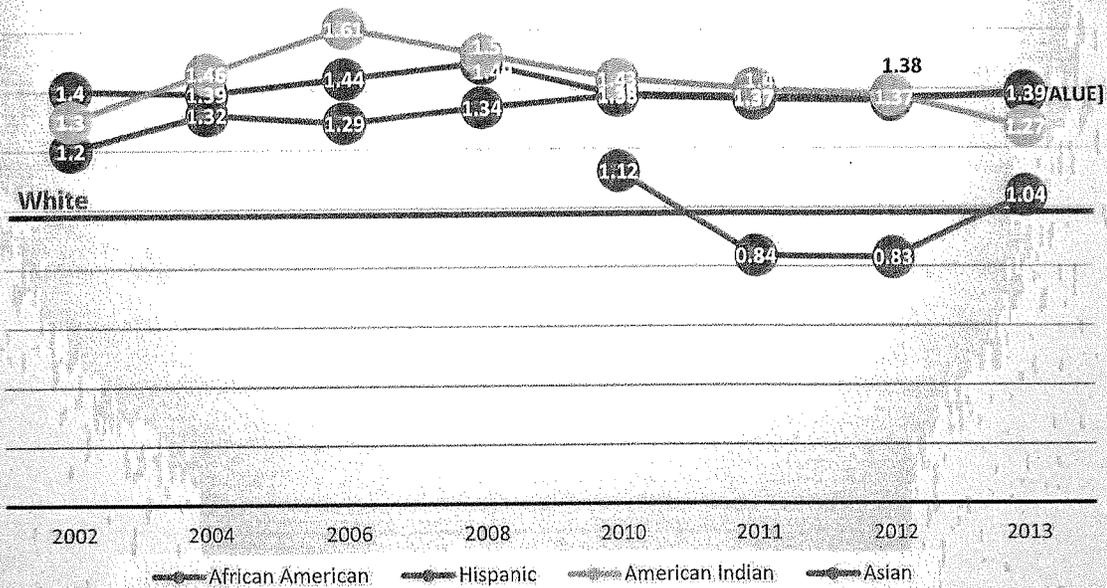
- African American (RRI=1.72) and Hispanic (RRI=1.19) youth referrals had a higher rate of commitment to ADJC than White youth referrals. The percentages support this as well (8.7%, 6.0% and 5.1% respectively).
- Asian youth (4.9% and an RRI of 0.91) and American Indians (2.8% and an RRI of 0.56) had a lower rates of referral to ADJC.

APPENDIX A: SELECT TRENDLINES 2002-2013

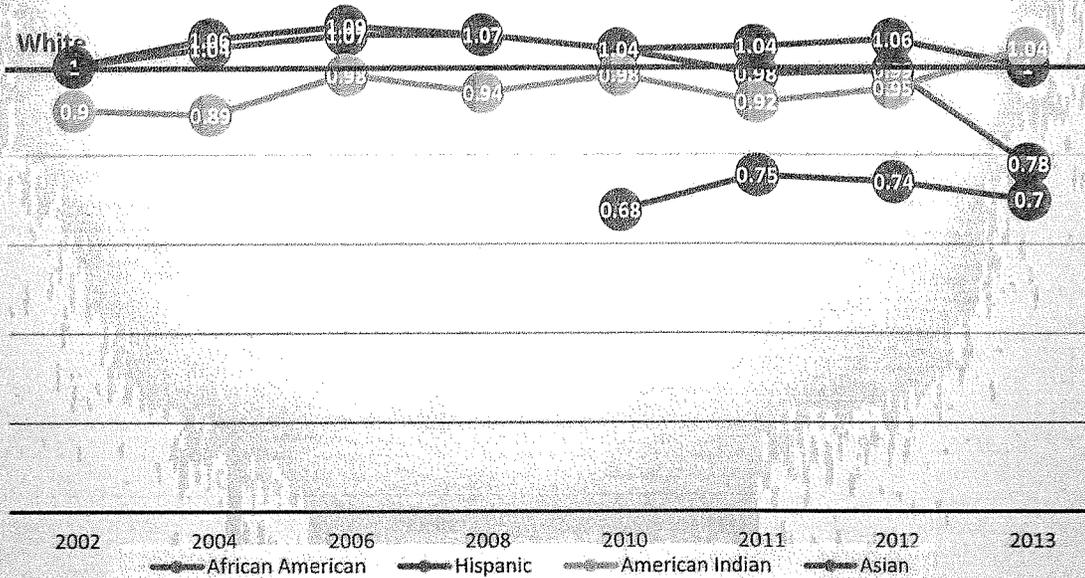
RRI's For Referred Youth 2002-2013



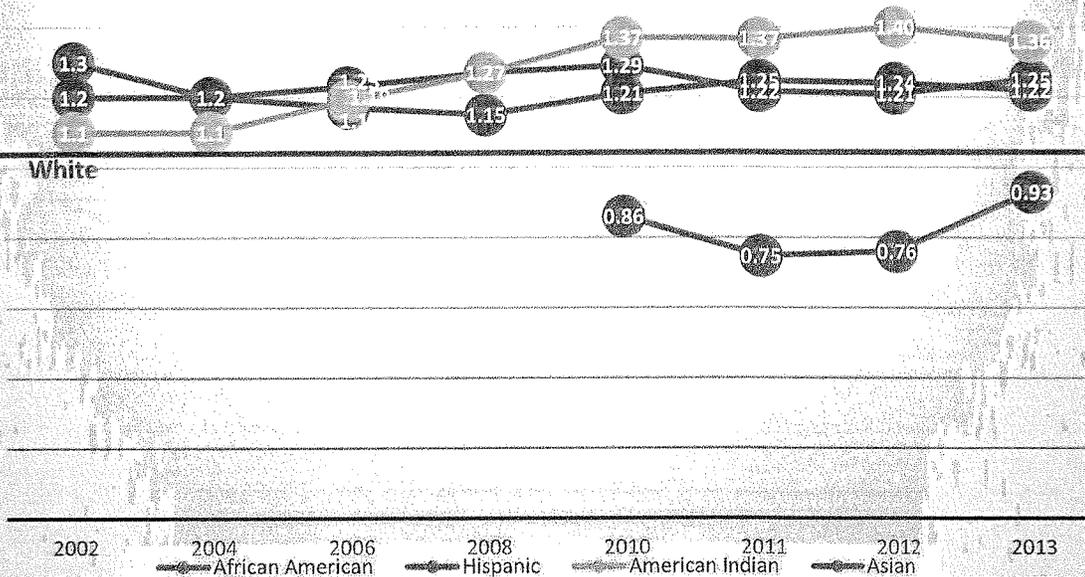
RRI's For Youth Brought to Detention 2002-2013



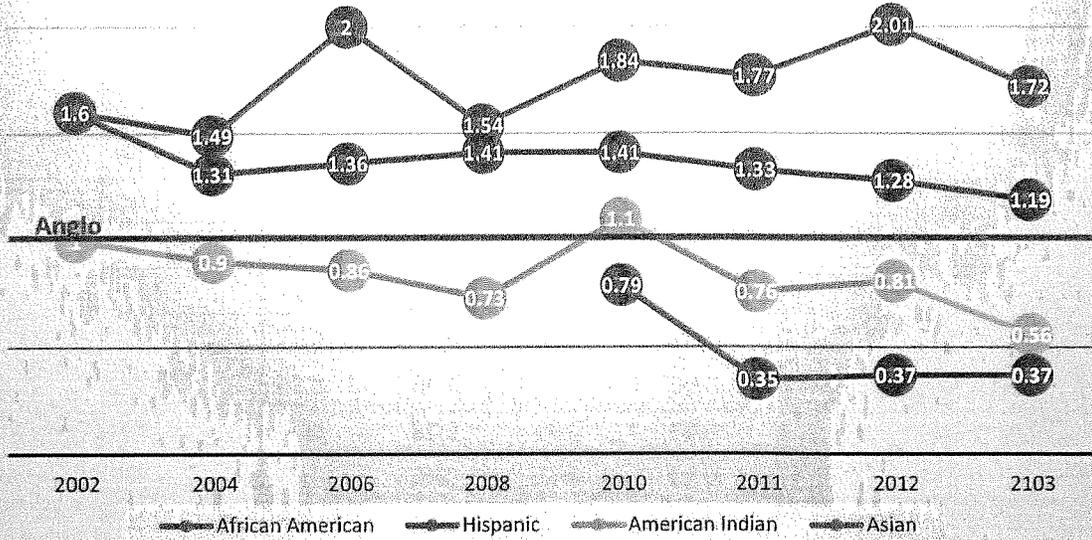
RRI's For Detained Youth 2002-2013



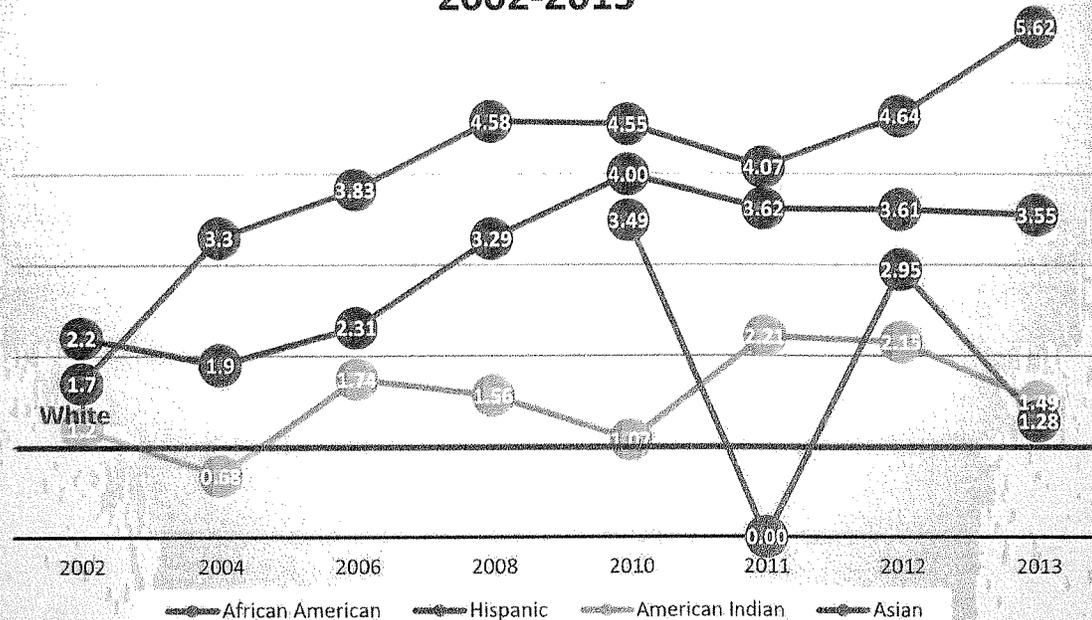
RRI's For Petitioned Youth 2002-2013



RRI's For ADJC Committed Youth 2002-2013



RRI's For Direct Filed Youth 2002-2013



APPENDIX B: SELECT COUNTY SPECIFIC RRI'S

TABLE 1:

RRI's of Juveniles Referred FY2013 by County					
	Asian	African American	Hispanic	American Indian	White
Arizona	0.25	1.76	0.85	1.05	1.00
Apache	4.17	0.20	0.52	0.06	1.00
Cochise	0.34	1.11	0.62	1.50	1.00
Coconino	0.25	2.00	1.04	1.21	1.00
Gila	1.58	0.97	0.55	0.37	1.00
Graham	0.00	*	0.48	0.54	1.00
Greenlee	0.00	0.00	0.28	0.52	1.00
LaPaz	0.00	0.65	0.40	0.00	1.00
Maricopa	0.22	2.05	0.82	1.76	1.00
Mohave	0.13	*	0.37	0.73	1.00
Navajo	0.24	*	0.85	0.47	1.00
Pima	0.36	1.95	1.03	1.48	1.00
Pinal	0.48	2.26	0.85	1.27	1.00
Santa Cruz	0.00	*	1.83	0.00	1.00
Yavapai	0.39	1.28	0.69	1.55	1.00
Yuma	0.58	1.85	1.00	2.41	1.00

*LESS THAN 5 CASES IN THE CELL, MAKING THE RRI SPURIOUS.

TABLE 2:

RRI's Juveniles With Petitions Filed FY2013 by County					
	Asian	African American	Hispanic	American Indian	White
Arizona	0.93	1.25	1.22	1.36	1.00
Apache	*	*	0.65	0.93	1.00
Cochise	1.71	1.15	0.98	*	1.00
Coconino	*	1.50	1.31	1.34	1.00
Gila	*	1.33	1.15	1.09	1.00
Graham	*	1.49	1.03	1.28	1.00
Greenlee	*	*	1.10	*	1.00
LaPaz	*	*	0.71	*	1.00
Maricopa	1.00	1.50	1.45	1.46	1.00
Mohave	0.00	1.17	1.39	1.55	1.00
Navajo	0.00	0.94	1.13	1.10	1.00
Pima	1.40	1.22	1.09	1.02	1.00
Pinal	0.73	*	1.14	1.33	1.00
Santa Cruz	*	1.75	0.92	*	1.00
Yavapai	0.40	1.39	1.08	1.25	1.00
Yuma	0.77	1.01	0.96	1.35	1.00

*LESS THAN 5 CASES IN THE CELL, MAKING THE RRI SPURIOUS.

DISCUSSION

In general, this report suggests that over-representation exists ranging from a limited to a significant extent within certain parts of Arizona's juvenile justice system. There are some minor differences across the last 11 years presented in the Appendix, however overall much remains the same with minor movement. The most significant over-representation to of minority populations exists at the deep end involvement with the juvenile justice system, with commitments to ADJC and the Direct filing of youth in Adult Court. This fifth report card was developed using the same process and procedures that mirror the first four reports and thus the outcomes can be compared across time. Four new years of data are presented in the appendix this year.

Limitations of State Data

It is important to note that offense severity and prior offense history were not included in this analysis. Thus, no comparisons between juveniles with similar offenses or prior histories were conducted. It is recognized that using state data for this report has some limitations. Differences in the various counties due to ethnic diversity tends to be blurred when the report is state based. It is encouraged that each county conduct its own review of the over-representation issue experienced in their local. The Commission on Minorities has prepared County data for the counties to consume this year.

Referrals

African American youth continue to be referred at a rate slightly under 2 times than would be expected by their representation in the overall juvenile population (50 per 1,000 youth). Asian youth were the least likely to be referred (8 per 1,000). White youth, the baseline upon which the RRI scores are generated, were referred at a rate of 33 per 1,000 youth.

The Relative Rate Index (RRI) score provides a statistical comparison of each minority group to White youth. The RRI scores bear out the over-representation for African American youth (1.8). At the State level, American Indian and Hispanic youth evidence no over-representation at the referral stage. Both the percentages and the RRI suggest that, at the state level, the juvenile courts began with a disproportionate number of African American youth before any court/probation decisions were made.

Physical versus Paper Referrals

Across the state, the majority of juvenile referrals come to the juvenile court as paper referrals. Less than one-fifth of the juveniles are even brought to detention. Instead, over 4/5 of juvenile referrals are sent directly to the court or county attorney. Of the referrals that bypass detention, White youth are the most likely to initially avoid detention (85.2%).

In Arizona, just under four in ten juveniles who are brought to detention are released after screening. This is a significant improvement from previous years. This improvement can be attributed to the work occurring in the JDAI initiative and in the implementation of the mandatory use of and objective detention screening instrument through the Arizona Detention Standards. Eighty-five percent of the state's juvenile population reside in JDAI participating counties which are: Cochise, Gila, Maricopa, Pima, Pinal, Santa Cruz and Yuma.⁸

Hispanic and African American youth are brought to detention at a higher rate (RRI = 1.38) than other groups yet show the equal likelihood or increased likelihood of release at screening (RRI's of 1.0 and 1.33).

Decision made Post-Referral

Referrals to the juvenile court can be diverted or not filed at all, filed as a petition, or direct filed in adult court. In general, the pattern that began with referral is carried through these decisions. African

American and Hispanic and American Indian youth referrals are direct filed in adult court and filed as petitions in juvenile court at a higher rate than White youth referrals.

Conversely, the former are sent through the diversion process proportionately less than the latter. While this could suggest that minority youth are not given the same opportunities to avoid formal court processing, there are certain criteria that juveniles must meet in order to be eligible for diversion.⁹ The lack of review of offense severity further limits any conclusion about what are the forces that are causing this phenomenon. Regardless of the cause, the courts are in possession of this data have an obligation to educate others on it in an effort to mitigate and eliminate this issue for future generations.

The Direct Filing process gives one cause for major concern. African American and Hispanic youth are direct filed at a much higher rate than White youth. RRI of 5.26 and 3.55 indicate concern in this area.

Transfers to adult court do not have the same degree of over-representation as direct filings, but there is evidence of over-representation at this decision point, particularly for African American and Hispanic youth referrals. The number of youth currently processed in this manner is very small, 14 referrals in this study. The direct file process is the main pathway to the Adult Court for juveniles. The American Indian and Asian representation here is too small to award significance. This decision point has a mix of mandatory and discretionary decisions.

Dispositions

In general, juveniles in Arizona are overwhelmingly placed on probation following adjudication. More than four-fifths of all adjudicated juvenile referrals are dispositioned to either standard or intensive probation (JIPS). All groups cluster at around the same rate of being placed on probation. Intensive is higher for Hispanic and lower for American Indian youth. Juveniles in all groups were more likely to receive dispositions of standard probation with under one in five referral dispositions being to JIPS.

Alternatively, African American and Hispanic youth referrals were proportionately more represented in commitments to the Arizona Department of Juvenile Corrections (ADJC), RRI = 1.72 and 1.19 for these groups. With Hispanics decreasing while the African American decision point has increased since the last report.

Population Estimates

A note must be made regarding the population estimates used as the basis for the Relative Rate Index. It is a very difficult task to confirm consistency in the population estimates in Arizona for the racial/ethnic characteristics and 8 to 17 age group. The baseline for the juvenile populations come from estimates compiled at the National Center for Juvenile Justice.

Relative Rate Index

One of the advantages of the RRI analysis is that the comparison of youth is based on a previous decision point and not always on base population rates. Some discussion can take place as to which previous decision point should be used as the basis for the ratio. For instance, if one examines Probation, what is the basis used for the comparison, referrals, petitions or adjudications. This document uses adjudications as that is the decision point that allows sentencing and thus a choice for probation or some other disposition. As you can see, we have attempted to "reset" the bar at each decision point so they can viewed independently. Listed is the ratio information used to compute the RRI scores:

Referrals (Juveniles Referred : Population), Detention (Paper or Brought : All Referrals), (Detained or Released : Brought to Detention), Court Processing (No Petition, Petition or Diversion : All Referrals) (Direct Filed : Referrals), Post-Petition (Adjudicated, Transferred or Non Adjudicated : Petitioned), Disposition (Penalty Only, Probation, ADJC : Adjudicated), (Standard or JIPS : Probation).

GLOSSARY OF JUVENILE JUSTICE TERMS

Adjudication: The proceeding in which the juvenile is found to be delinquent. In some respects, an “adjudication” for a delinquent offense is the juvenile court’s equivalent of a “criminal conviction” in adult court.

Arizona Department of Juvenile Corrections (ADJC): The ADJC is operated by the executive branch and is the juvenile counterpart of the Department of Corrections. ADJC operates facilities and programs primarily aimed at more serious juvenile offenders committed to their care and custody by the juvenile courts. ADJC operates secure correctional facilities, community-based after care programs, and juvenile parole.

Delinquent Juvenile: A delinquent juvenile is a juvenile who commits an illegal offense. If the same offense had been committed by an adult, the offense would be a criminal act.

Detention: Juvenile detention is defined as the temporary confinement of a juvenile in a physically restricting facility. Juveniles are typically held in detention pending court hearings for purposes of public safety, their own protection, or as a consequence for misbehavior. This report is concerned with detention as a result of a referral and not as a consequence.

Disposition: Disposition refers to the process by which the juvenile court judge decides the best court action for the juvenile. It is comparable to “sentencing” in the adult system.

Direct Filed in Adult Court: A.R.S. §13-501 mandates that the “county attorney shall bring criminal prosecution against a juvenile in the same manner as an adult if the juvenile is 15, 16, or 17 years of age and is accused of any of the following offenses”: first degree murder; second degree murder; forcible sexual assault; armed robbery; any other violent offenses defined as aggravated assault, aggravated assault with a deadly weapon, drive by shooting, and discharging a firearm at a structure; a felony offense committed by a juvenile who has two prior and separate adjudications; and any offense joined to the other offenses. The county attorney also has statutorily defined discretion for direct filing.

Diversion: Diversion is a process by which formal court action (prosecution) is averted. The diversion process is an opportunity for youth to admit their misdeeds and to accept the consequences without going through a formal adjudication and disposition process. By statute, the county attorney has sole discretion to divert prosecution for juveniles accused of committing any incorrigible or delinquent offense.

Juvenile Intensive Probation (JIPS): Arizona Revised Statutes (A.R.S. §8-351) defines JIPS as “a program ... of highly structured and closely supervised juvenile probation...which emphasizes surveillance, treatment, work, education and home detention.” A primary purpose of JIPS is to reduce the commitments to the Arizona Department of Juvenile Corrections (ADJC) and other institutional or out-of-home placements. Statute requires that all juveniles adjudicated for a second felony offense must be placed on JIPS, committed to ADJC, or sent to adult court.

Non Adjudication: Includes cases where the petition is filed but the case may be dismissed or the juvenile turns 18 or is transferred to another jurisdiction or absconds.

No Petition Filed: Includes judicially adjusted complaints (typically juveniles assigned a consequence), absconders, complaints where there is insufficient evidence to continue, victim refusals to prosecute, and other reasons a petition might not be filed.

Penalty Only: A disposition involving only fines, fees, restitution, and/or community work service.

Petition: A “petition” is a legal document filed in the juvenile court alleging that a juvenile is a delinquent, incorrigible, or a dependent child and requesting that the court assume jurisdiction over the youth. The petition initiates the formal court hearing process of the juvenile court. The county attorney,

who determines what charges to bring against the juvenile, prepares the delinquent or incorrigibility petition.

Referral: Referral can be made by police, parents, school officials, probation officers or other agencies or individuals requesting that the juvenile court assume jurisdiction over the juvenile's conduct. Referrals can be "paper referrals" issued as citations or police reports or "physical referrals" as in an actual arrest and custody by law enforcement. Juveniles may have multiple referrals during any given year or over an extended period of time between the ages of 8-17. Multiple referrals typically signal high risk, even when the referrals are for numerous incorrigible or relatively minor offenses.

Standard Probation: A program for the supervision of juveniles placed on probation by the court. These juveniles are under the care and control of the court and are supervised by probation officers.

Transfer to Adult Court: Adult court has been defined in statute as the appropriate justice court, municipal court or criminal division of Superior Court with jurisdiction to hear offenses committed by juveniles. Statute specifies that juveniles who commit certain offenses, are chronic felony offenders, or have historical prior convictions, must be prosecuted in the adult court and if convicted, are subject to adult sentencing laws.

End Notes

¹Equitable Treatment of Minority Youth: A Report on the Over-Representation of Minority Youth in Arizona Juvenile Justice System. Published by the Arizona Juvenile Justice Advisory Council, Minority Youth Issues Committee. Dr. P. Bortner et al, July 1993.

² Devine, Coolbaugh, and Jenkins, NCJ 173420

³Equitable Treatment of Minority Youth in the Arizona Juvenile Justice System: A Follow-up to the 1993 Equitable Treatment Report Published by the Commission on Minorities, 2002.

⁴Equitable Treatment of Minority Youth: First Annual Arizona Statewide Report Card 2004 Published by the Commission of Minorities. For information see website:
<http://www.supreme.state.az.us/courtserv/ComMinorities/2004ReportCard.pdf>

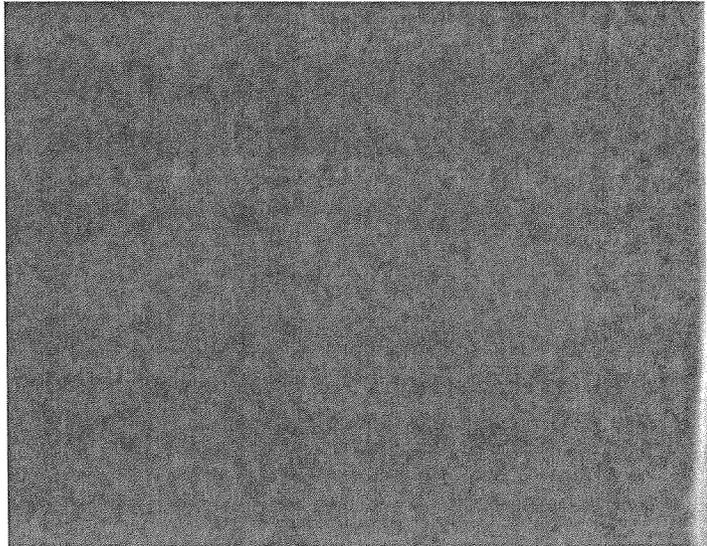
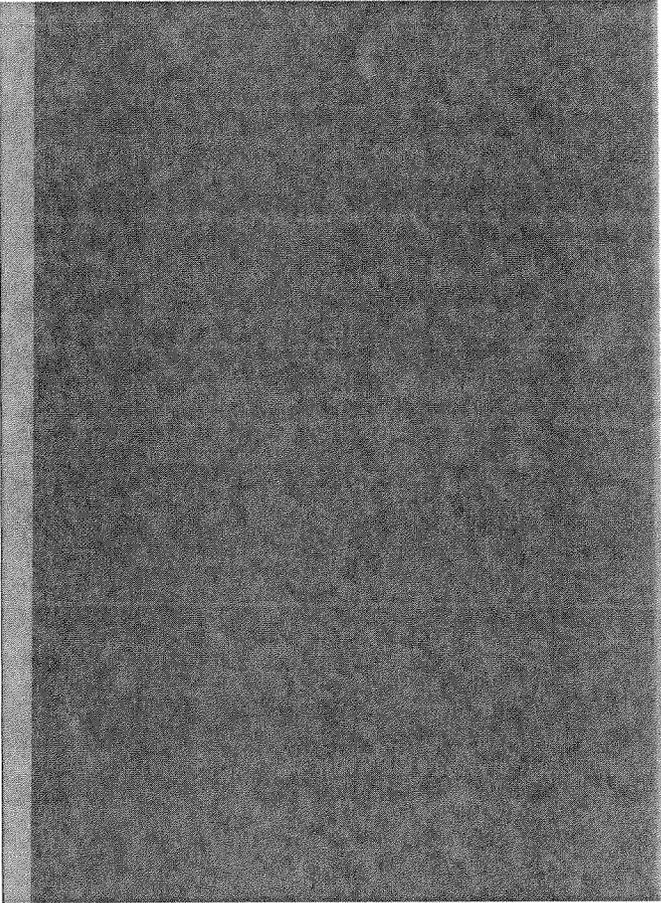
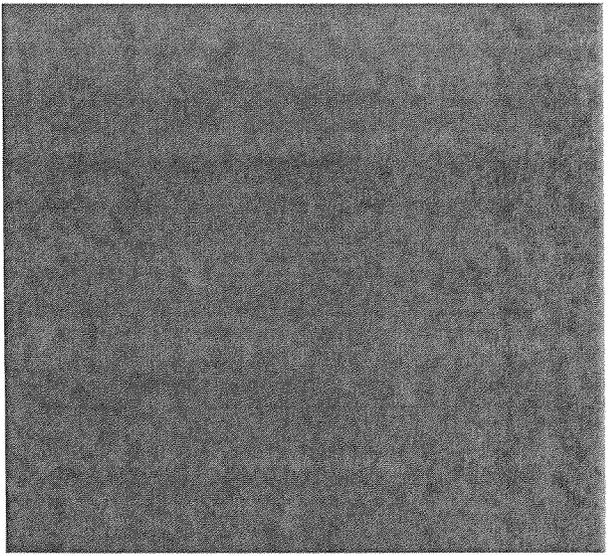
⁵The “other” and “unknown” race/ethnicity categories are not included. The actual total of juveniles referred is 29,382.

⁶The figures for 2013 are the most recent data available for the state of Arizona. Data was obtained from the National Center for Juvenile Justice. Computations for the “at risk” population, (i.e., 8-17 year old youth) along with race and ethnicity come from the NCJJ’s Easy Access to Juvenile Populations.

⁷RRI – Relative Rate Index – a comparison of the rate of referral for each race/ethnicity to the rate of referral for White youth. Over-representation occurs with scores greater than 1. Under-representation is indicated by scores less than one. The RRI is not calculated when the race/ethnic group is less than 1% of the population.

⁸The Annie E. Casey Foundation launched the JDAI in December of 1992 and funds the efforts of juvenile jurisdictions around the nation. For more information, see their website: www.aecf.org

⁹The county attorney determines which juveniles are eligible for diversion based on statutorily established criteria. In addition, the juvenile must admit responsibility and either pay restitution, pay a fine, or participate in community work service or some type of programming.



JUVENILE JUSTICE: FAILING THE NEXT GENERATION

Indian country juvenile justice exposes the worst consequences of our broken Indian country justice system. At the same time, juvenile justice illustrates the fundamental point and promise of this report—greater Tribal freedom to set justice priorities, supported by resources at parity with other systems and full protection of Federal civil rights of all U.S. citizens, will produce a better future for Indian country and, importantly, for Native youth.

FINDINGS AND CONCLUSIONS: VULNERABLE AND TRAUMATIZED YOUTH

Any discussion of Indian country juvenile justice must begin with the dire situation of Indian children. Today’s American Indian and Alaska Native youth have inherited the legacy of centuries of eradication- and assimilation-based policies directed at Indian people in the United States, including removal, relocation, and boarding schools.² This intergenerational trauma continues to have devastating effects among children in Indian country, and has resulted in “substantial social, spiritual, and economic deprivations, with each additional trauma compounding existing wounds over several generations.”³

National statistical data, which include the 64 percent of Indian children who live outside Indian country as well as the 36 percent who live within, indicate that Native youth are among the most vulnerable

Today's Tribal youth carry the wounds of their ancestors, compounded by generations of atrocities committed against this nation's Indigenous people, including historical traumatic campaigns of eradication, reservation assignment, boarding schools, and relocation. Although they carry these wounds, these contemporary youth will be the first generation with an opportunity to heal from historical trauma.¹

Ivy Wright-Bryan, National Director of Native American Mentoring, Big Brothers Big Sisters of America

One year before I was 17, I was a pallbearer at 15 funerals.

Northern Arapaho youth⁸

We have concluded that 100 percent of our children and youth are exposed to violence, directly or indirectly...We now know that at least two children a day are victims of a crime, exposed to abuse and neglect, school violence, and domestic violence on the Rosebud reservation. We know that the unreported direct and indirect exposures to violence must be significantly higher.¹⁵

Mato Standing-High, former Attorney General, Rosebud Sioux Tribe

group of children in the United States. Over a quarter of these children live in poverty, compared with 13 percent of the general population.⁴ They graduate from high school at a rate 17 percent lower than the national average, and are expected to live 2.4 years less than other Americans.⁵ The rates of cigarette use, binge drinking, and illegal drug use among Native youth are higher than for any other racial and ethnic group.⁶ Native youth are more than twice as likely to die as their non-Native peers through the age of 24.⁷

One of the most troubling problems facing Native youth today is their level of exposure to violence and loss. Such exposure may include witnessing, being the victim of, or learning about domestic and intimate partner violence, child abuse, homicide, suicide, sexual violence, and community violence.⁹ While statistics about the overall rates of exposure of Native youth to violence are difficult to find, statistics about specific types of violence and exposure to violence in particular Native communities indicate the levels are extremely high. A report published by the Indian Country Child Trauma Center in 2008 calculates that Native youth have a 2.5 times greater risk for experiencing trauma when compared with their non-Native peers.¹⁰ Of all racial groups in the United States, American Indians and Alaska Natives have the highest per capita rate of violent victimization.¹¹ Native youth experience double the rates of abuse and neglect of White children, and are more likely to be placed in foster care. American Indian and Alaska Native women experience the highest rates of sexual assault and domestic violence in the nation. Native youth between the ages of 12 and 19 are more likely than non-Native youth to be the victim of either serious violent crime or simple assault. Native youth are 2.5 times more likely to commit suicide than non-Native youth.¹²

Indian juveniles experience Post Traumatic Stress Disorder (PTSD) at a rate of 22 percent, close to triple the rate of the general population. As Ryan Seelau points out, “to put this in perspective, this rate of PTSD exceeds or matches the prevalence rates of PTSD in military personnel who served in the latest wars in Afghanistan, Iraq, and the Persian Gulf War.”¹³ Further, “American Indian and Alaska Native children are... exposed to repeated loss because of the extremely high rate of early, unexpected, and traumatic deaths [among Native people in the United States] due to injuries, accidents, suicide, homicide, and firearms—all of which exceed the U.S. all-races rates by at least two times—and due to alcoholism, which exceeds the U.S. all-races [rate] by seven times.”¹⁴

Leaders from some Native communities estimate that nearly all of their children are exposed to violence.¹⁶ A 2003 U.S. Department of Health and Human Services report estimated that on the Wind River Indian reservation, “66 percent of families have a history of family violence, 45 percent of children have run away, 20 percent of children have been sexually abused, and 20 percent have attempted suicide. Life expectancy is in the early 40s for Tribal members.”¹⁷

Too often [children exposed to violence] are labeled as “bad,” “delinquent,” “troublemakers,” or “lacking character and positive motivation.” Few adults will stop and, instead of asking “What’s wrong with you?” ask the question that is essential to their recovery from violence: “What happened to you?”²¹

*Robert L. Listenbee, Jr. et al.
Report of the Attorney General’s National Task Force on Children Exposed to Violence*

On the Rosebud Sioux reservation in South Dakota, former Attorney General Mato Standing-High estimates that every child on the reservation has been exposed to violence.¹⁸ Confirmation of this level of violence can be found in the number of calls to police. The 12 officers serving the 25,000-person service area receive close to 25,000 calls per year, approximately one call for every resident of the reservation. “At least two children a day are victims of a crime, exposed to abuse and neglect, school violence, and domestic violence,” Standing-High says.¹⁹ In Alaska in 2010, 40 percent of children seen at child advocacy centers were Alaska Natives, even though the overall population of Alaska Native peoples is 14.8 percent.²⁰

According to the U.S. Department of Justice’s (DOJ) Defending Childhood Initiative, “[e]xposure to violence causes major disruptions of basic cognitive, emotional, and brain functioning that are essential for optimal development ...When [children who experience violence] go untreated, these children are at a significantly greater risk than their peers for aggressive, disruptive behaviors; school failure; posttraumatic stress disorder; anxiety and depressive disorders; alcohol and drug abuse; risky sexual behavior; delinquency; and repeated victimization.”²² Further, research indicates that exposure to violence is associated with “long-term physical, mental, and emotional harms,” including “alcoholism, drug abuse, depression, obesity, and several chronic adult diseases.”²⁵ Because of the compounding effects of historical trauma in Indian country, “untreated trauma poses the greatest risk for further complications and risk for additional trauma in Tribal communities.”²⁴

American Indian and Alaska Native children are disproportionately exposed to violence and poverty, and their communities often lack access to funding for mental health and other support resources. The compounding effects of these realities make this population of children particularly susceptible to entry into the juvenile justice system, and increase the obstacles they face to a successful and healthy reentry. Further exacerbating these damaging vulnerabilities, entry into the justice system often means that children are separated from their Tribal communities and culture, robbing Tribes of their ability to shape the lives of their children, and removing the youth from one of their most essential resources for support, healing, and recovery.

Congress passed the Indian Child Welfare Act (ICWA) of 1978²⁵ to help ensure the safety of Indian children. ICWA also established in Federal law the fundamental principle that young Tribal citizens, when in need of out-of-home care, should first be referred to their Tribes for placement. A key reason is that through the care and nurturing of children, Tribal culture and traditions are passed on to future generations, which is an important element in the survival of Indian nations. Nonetheless, Federal law is incomplete in its protections of Tribal youth and Native nations. When Tribal youth commit offenses that would be crimes if committed by adults, ICWA does not apply at present, and processes outside the Tribal

Children should not be in an adult system, (particularly) an adult system which is not prepared to work with youth. There needs to be some sort of alternative that the youth still need to be able to access— there still needs to be a justice system accountable but through a rehabilitative system.⁵⁰

*Chori Folkman, Managing Attorney, Tulalip Office of Civil Legal Aid
Testimony before the Indian Law and Order Commission, Hearing on Tulalip Indian Reservation
September 7, 2011*

government's control remove young Tribal citizens from their homes and place them in State or Federal facilities, sometimes far from their homes.

FINDINGS AND CONCLUSIONS: FEDERAL AND STATE JUVENILE JUSTICE ARE MAKING MATTERS WORSE, NOT BETTER

At present, Tribal youth who live on reservations, like their adult counterparts, are under the authority of one of several jurisdictional arrangements: they may be subject to many different regimes: Federal, Tribal-Federal, State, or State-Tribal. The same complexities and inadequacies that plague the Indian country adult criminal justice system impair juvenile justice as well. As with adults, Tribes face significant obstacles toward influencing the lives of their young Tribal citizens involved in juvenile justice systems. In addition, features of the Federal and State juvenile justice systems, combined with the special needs of traumatized Native youth, magnify the problems.

The Federal court system has no juvenile division—no specialized juvenile court judges, no juvenile probation system—and the Bureau of Prisons (BOP), a DOJ component, has no juvenile detention, diversion, or rehabilitation facilities. Federal judges and magistrates, for whom juvenile cases represent 2 percent or less of their caseload,²⁶ hear juvenile cases along with all others. Native youth processed at the Federal level, along with their families and Tribes, face significant challenges, such as great physical distance between reservations and Federal facilities and institutions, and cultural differences with federal personnel involved in Federal prosecution.²⁷ If juveniles are detained through the Federal system, it is through contract with State and local facilities, which may be several States away from the juvenile's reservation.²⁸

Within Federal juvenile detention facilities for misdemeanor violations operated in Indian country by the Office of Justice Services (OJS), a component of the Bureau of Indian Affairs (BIA), secondary educational services are either lacking or entirely non-existent. Officials of the Federal Bureau of Indian Education, which is statutorily responsible for providing secondary educational services and programs within OJS juvenile detention centers, confirmed for the Commission that Congress has not appropriated any Federal funds for this purpose in recent years. This means that Native children behind bars are not receiving any classroom teaching or other educational instruction or services at all.²⁹

When one of the situations triggering Federal Indian country juvenile jurisdiction arises, the corresponding U.S. Attorney's Office decides whether to proceed against the Native youth. This decision is based on "seriousness of the crime, age, criminal history, evidence available, and Tribal juvenile justice capacity."³¹ As with adults, the U.S. Attorneys often decline to prosecute juvenile cases, even serious ones. As one research study points out, "[t]ribal governments are left to fill this void . . . [and] . . . many youth simply fall through the cracks, getting no intervention at all."³²

“Within Federal juvenile detention facilities for misdemeanor violations operated in Indian country by the Office of Justice Services (OJS), a component of the Bureau of Indian Affairs (BIA), secondary educational services are either lacking or entirely non-existent....

Native children behind bars are not receiving any classroom teaching or other educational instruction or services at all.”

Because some Tribes do not currently have the infrastructure or funding to house juveniles, they are unable to address problems with youth in their communities.

Indian country youth may become part of State juvenile justice systems if they commit a crime in a Tribal community where State criminal jurisdiction extends to Indian country under P.L. 83-280, a settlement act, or some other similar Federal law.³³ In State juvenile systems, there is generally no requirement that a child's Tribe be contacted if an Indian child is involved.³⁴ Thus, "once Native youths are in the system, their unique circumstances are often overlooked and their outcomes are difficult to track."³⁵ The juveniles effectively "go missing" from the Tribe. Furthermore, State juvenile systems do not adequately provide the cultural support necessary for successful rehabilitation and reentry back into the Tribal community.³⁶

Although data about Indian country juveniles in Federal and State systems are limited, the available data reveal alarming trends regarding processing, sentencing, and incarcerating Native youth. Native youth are overrepresented in both Federal and State juvenile justice systems and especially in receiving the most severe dispositions.

While the Federal government does not have a "juvenile justice system," youth do end up in Federal detention, and typically, the majority of these youth are American Indians and Alaska Natives. Between 1999-2008, for example, 43-60 percent of juveniles held in Federal custody were American Indian. In 2008, 72 Native youth were in Federal custody,³⁷ although the number fell to 49 in 2012.³⁸ According to the BOP, contracting to place a juvenile costs \$259 per day or \$94,535 per year.³⁹

Many States have significant populations of Native youth within their systems, and there are a disproportionate number of Native juveniles in State juvenile justice systems compared with non-Indian juveniles.⁴⁰ Although the State systems data do not separate Indian country youth and offenses from others, there is no reason to believe there are systematic differences.

In 2010 in the State systems, American Indians made up 367 of every 100,000 juveniles in residential placement, compared with 127 of 100,000 for White juveniles.⁴¹ This is especially alarming since American Indians make up little more than 1 percent of the U. S. population. In Oregon, a P.L. 83-280 State, Native American youth are over-represented in the State's juvenile justice system and in its detention programs run by the Oregon Youth Authority (OYA). While Native American youth make up approximately 2 percent of the State's 10-17 year olds, they are 5 percent of the youth committed to OYA.⁴² In 2008, the average cost for juvenile detention was \$240.99 per day or \$87,961.35 per year.⁴⁵

[W]here they exist, Tribal facilities, based in the community and therefore able to involve Tribal elders in the delivery of interventions that incorporate traditional Tribal beliefs and customs, may be better positioned to provide culturally competent services than the Federal system.

Consensus view expressed by both Federal and Tribal officials surveyed by the Urban Institute ⁴⁴

FINDINGS AND CONCLUSIONS: APPLYING THIS REPORT'S RECOMMENDATIONS FOR ADULT CRIMINAL JUSTICE TO JUVENILE JUSTICE

Indian country juvenile justice is even more disturbingly broken than its adult counterpart. Tribal youth in non-P.L. 83-280 jurisdictions become ensnared in a Federal system that was never designed for juveniles and literally has no place to put them. In P.L. 83-280 jurisdictions, Tribal youth may be thrust into dysfunctional State systems that pay no attention to the potential for accountability and healing available in the Tribal community. In both situations, there is no regularized way of ensuring that the Tribal community can know where its children are, let alone participate in fashioning a better future for them. These and other shortcomings of the Indian country juvenile justice system compromise traumatized, vulnerable young lives, rupture Native families, and weaken Tribal communities that depend on their youth for their future.

How to improve juvenile justice for Native communities and break cycles of intergenerational trauma and violence? Many recommendations in this report for the adult justice system apply with even greater urgency to Indian country juvenile justice. All of this report's recommendations for juvenile justice drive toward a single end—enabling Tribal communities to know where their children are and to be able to determine the proper assessment and response when their children enter the juvenile justice system.

The Commission's aim for juvenile justice is consistent with the overall thrust of this report—releasing Tribes from dysfunctional Federal and State controls and empowering them to provide locally accountable, culturally informed self-government. With the very health and future of Tribal communities resting on the vulnerable shoulders of their often-traumatized youth, the stakes could not be higher.

RECOMMENDATIONS

Recommendations concerning jurisdiction. For a Native nation, losing control over its children has ramifications beyond losing control over adult offenders. The Congress that passed the Indian Child Welfare Act of 1978 recognized that “[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.”⁴⁵ Enhancing Tribal jurisdiction over Indian children was central to ICWA's scheme for remedying this problem.

For non-P.L. 83-280 jurisdictions, ICWA clarified that Tribal jurisdiction is exclusive for children residing or domiciled in Indian country. For P.L. 83-280 jurisdictions, ICWA created a mechanism for Tribes to reassume exclusive jurisdiction, regardless of State consent, but subject to Federal approval. ICWA limited its Tribal jurisdiction-enhancing

provisions to dependency cases, that is, cases involving parental abuse or neglect. Delinquency cases involving acts by juveniles that would be criminal if committed by an adult were excluded.

The rationale for jurisdictional change presented earlier (Chapter 1) applies as readily to juvenile offenses as to adult. Just as Tribal self-determination and local control are the right goals for adult criminal matters, they are the right goals for juvenile matters. Just as distance, both geographic and cultural, reduces the legitimacy and effectiveness of Federal adult criminal justice in Indian country, so too does distance impede Federal juvenile justice.

There are, however, additional reasons for striving to return exclusive juvenile jurisdiction to the Tribes that want it. As discussed at the outset of this chapter, the Federal justice system is not designed or equipped to deal with juveniles. The lack of diversion services and programs, parole, and other aspects of State and local justice systems means that Native juveniles in Federal custody are systematically receiving longer sentences of incarceration for the same or similar offenses. Moreover, the link between dependency and delinquency among Indian youth makes it anomalous to have dependency jurisdiction exclusively Tribal, but delinquency jurisdiction shared with the Federal system. If many Tribal delinquency cases are really extensions of dependency-related conditions, then it makes sense to integrate greater Tribal authority over both.

Based on these conclusions, the Commission recommends that Tribal communities that have the capacity and desire to do so should be able to regain control over juvenile justice, leading to two recommendations concerning jurisdiction.

6.1: Congress should empower Tribes to opt out of Federal Indian country juvenile jurisdiction entirely and/or congressionally authorized State juvenile jurisdiction, except for Federal laws of general application.

Analogous to the process set forth in the Chapter 1 (Jurisdiction: Bringing Clarity Out of Chaos), for any Tribe that exercises this option, Congress would recognize the Tribe's inherent jurisdiction over those juvenile matters, subject to the understanding that juveniles brought before Tribal courts would receive equivalent protection of their civil rights than to that they would receive in the Federal system, and the juveniles would be entitled to limited review of any judgments entered against them in a newly created U.S. Court of Indian Appeals. As in adult criminal court, the Tribe opting for this exclusive jurisdiction could offer alternative forms of justice, such as a juvenile wellness court, a teen court, or a more traditional peacemaking process, so long as the juvenile properly waived his or her rights.

If Tribes choose not to opt out entirely from the Federal criminal justice system for offenses allegedly committed by their juvenile citizens, Tribal governments should still be provided with a second option:

6.2: Congress should provide Tribes with the right to consent to any U.S. Attorney's decision before Federal criminal charges against any juvenile can be filed.

The U.S. Criminal Code already provides for such Tribal consent in adult cases where Federal prosecutors are considering seeking the death penalty. Specifically, in 1994 Congress required that notwithstanding the General Crimes Act⁴⁶ and the Major Crimes Act,⁴⁷ no person subject to the criminal jurisdiction of an Indian Tribal government shall be subject to a capital sentence for any Federal offense committed within Indian country unless the governing body of the Tribe has authorized the death penalty to be imposed as a sentence.⁴⁸ The same reasoning ought to apply to U.S. Attorneys' decisions to file Federal charges against Indian juveniles for Indian country offenses. The governing body of the young person's Tribal government—that is, the Tribal council, business committee, or other such institution as established by that Indian nation's own laws—should be required to consent before that Tribe's juvenile citizen is subjected to Federal Indian country criminal jurisdiction. Such consent would help ensure that community standards are applied and Tribal sentencing options carefully considered, before any Federal prosecution could proceed.

Recommendations related to strengthening Tribal justice. During its site visits, the Commission questioned Tribal juvenile justice officials about the reasons why some juvenile cases get referred to the Federal system or handled by a county in a P.L. 85-280 State. Was it because the Tribe lacked sufficient sentencing authority to manage the proceeding itself (due to limitations imposed by the Indian Civil Rights Act), or was it because the Tribe lacked resources to address the youths' need for treatment? Insufficient resources, not inadequate detention authority, was almost always the response.⁴⁹ Resources for Indian country juvenile justice must be more effectively deployed in the interests of achieving parity between Tribal and non-Indian justice systems, safer Tribal communities, and healthier Tribal youth.

For example, on the Wind River Indian Reservation in Wyoming, homeland of the Eastern Shoshone and Northern Arapaho Tribes, Tribal officials testified about the scope of the situation they face. The child protective services agency, with a caseload larger than the city of Cheyenne, has only one-third the available staff. There are only 2 juvenile probation officers available to manage 45 cases. They cannot refer matters to a juvenile drug court because on this vast reservation there is not a close enough monitoring site. There is no detoxification placement at all for juveniles, so they wind up being released without any assistance from social services. And the only local detention placement for juveniles is in a county facility that is about to close.

We do have a green reentry program in our juvenile detention center, and they are half way through a 4-year grant. And that program has been very successful at keeping our juveniles in school and keeping them from returning to detention. But again, it's a 4-year grant and not sustainable.⁵²

*Miskoo Petite, Facility Administrator, Rosebud Sioux Tribe Correction Services
Testimony before the Indian Law and Order Commission, Hearing at Rosebud Indian Reservation
May 16, 2012*

Despite these difficulties, the Wind River community has done its best to piece together resources to help prevent and address substance abuse and violence among its youth. Sadly, the impetus for much of this action was a shocking string of youth suicides in the 1980s. The national organization UNITY has an active chapter there, led by boys and girls representing each high school. Known as the Youth Council, it sponsors monthly meetings and events focused on connecting with tradition, community betterment, leadership skills, healthy lifestyles without drugs and alcohol, anti-bullying, and transition to college. At least 20 of its participants have gone on to college. One Youth Council member was so incensed by what he regarded as a negative story about Wind River that appeared in *The New York Times* that he sent in an essay response, pointing out all that was positive in his community, including continuity of culture, community events, and people who are sober and care for their families. *The Times* published this response on its website.

Another Tribal initiative, the Wind River Tribal Youth Program, blends prevention, treatment, and Tribal tradition to assist a diverse array of Tribal youth who may be on probation, in foster care, runaways, truants, referred by family members, or just coming on their own. Elders play a key role in many of the activities, including weekly sweat ceremonies. In 2012, the Federal Substances Abuse and Mental Health Services Administration (SAMHSA) within the U.S. Department of Health and Human Services recognized the Tribal Youth Program with its Voices of Prevention Award. It was one of five prevention and substance abuse programs in the country to receive such an award, and the only one that was reservation-based. Its participants speak highly of the impact that sweats, talking circles, and other tribally based activities have had in enabling them to see beyond the cycles of substance and domestic abuse.

Like many Tribal communities the Commission visited, Wind River is investing the very limited resources at its disposal in such youth programs. The Tribal resources available are no match for the magnitude of the problems, however, and Federal support is both inadequate and poorly deployed. Most Federal community-based juvenile justice programs⁵¹ are funded piecemeal, and are burdened by extensive reporting requirements. Further, administering a program through multiple 2- to 4-year grants is unsustainable. Any tribally operated program runs the risk of losing critical components because of temporary funding.

Most critically, as the Wind River case underscores, funding is needed for the prevention and treatment components of juvenile justice services. There is not enough institutional support in Tribal communities to keep youth busy so they do not get into trouble, as well as to actively reach the ones who are already following the path of delinquency. This issue needs to be addressed at the community level. It can include participating in traditional activities, Boys and Girls Clubs, community sports teams, active social services, and truancy prevention. Though these efforts are likely to be community-led, they still need funding.

As the example of Salt River Pima-Maricopa Indian Community shows, where Tribes have benefited from more ample resources, as from Tribal gaming enterprises, they have demonstrated success in treating youth and turning them away from self-defeating and destructive behaviors. The Commission convened a field hearing at Salt River and was inspired to see some of its juvenile justice programs in action. However, few Native nations are in a position to have revenue streams from such highly successful economic development ventures in an urban setting. For them, Federal support for similar Tribal programs can have the same benefits, making communities safer and youth healthier.

If Federal, State, and Tribal agencies are to be accountable for their use of juvenile justice resources, data about Tribal children in those systems must be maintained. As this report's chapter on strengthening Tribal justice points out (Chapter 3), adult crime data are entirely unavailable for P.L. 83-280 Tribes and for other Tribes subject to State jurisdiction. The Federal system also does a poor job of maintaining Indian country statistics for policing, court actions, probation, detention, and other justice system stages.

The deficiencies in the availability of data for adult criminal justice are magnified in the case of juveniles. In 2009, two agencies within the U.S. Department of Justice (DOJ), the Bureau of Justice Statistics (BJS) and the Office of Juvenile Justice and Delinquency Prevention (OJJDP), commissioned the Urban Institute to analyze data on juveniles in the Federal justice system, focusing specifically on Tribal youth. Early on, the authors felt compelled to offer a major caveat about the reliability of the data, which came from a variety of sources, including BIA, DOJ, and BOP. The Urban Institute warned:

The project team encountered numerous challenges in identifying these cases, primarily because neither juvenile cases nor IC [Indian country] cases are recorded in a consistent manner across federal agencies. The capacity of agency data systems to identify juveniles and Indian Country cases vary substantially. There are some agency data systems that simply lack an indicator variable to identify IC juveniles ... *As such, we must caution the reader that the numbers of Indian Country juvenile cases reported in this study vary considerably from stage to stage and do not necessarily track well or consistently across processing stages.* As a result of these limitations with the data, we are left, not with a clear picture of juveniles and Tribal youth, but instead a mosaic with some missing pieces [emphasis in the original].⁵⁵

If a study sponsored by the Federal government cannot secure complete and consistent data about Tribal youth in the Federal justice system, Tribal communities have no hope of learning how many of their children are engaged with the system at various stages. However bad this arrangement is for juveniles involved in the Federal system, the problem

is considerably worse in P.L. 85-280 and other State jurisdiction situations. For purposes of collecting and maintaining statistics, those States treat Tribal children without regard to the location of the juvenile's misbehavior or the child's Tribal membership.⁵⁴ Thus, there are no data, period. It is simply impossible for Tribes to evaluate how Federal and State systems are managing their children in the absence of data. Proper data collection is also essential if Tribes and families are to maintain contact with Tribal youth, many of whom may be sent to facilities far from home.

This Commission's recommendations in Chapter 3 for strengthening Tribal justice—better coordinated, more effectively directed resources that are sufficient to achieve parity with non-Indian justice systems—apply with special force to juvenile justice.

6.5: Because resources should follow jurisdiction, and the rationale for Tribal control is especially compelling with respect to Tribal youth, resources currently absorbed by the Federal and State systems should flow to Tribes willing to assume exclusive jurisdiction over juvenile justice.

6.4: Because Tribal youth have often been victimized themselves, and investments in community-oriented policing, prevention, and treatment produce savings in costs of detention and reduced juvenile and adult criminal behavior, Federal resources for Tribal juvenile justice should be reorganized in the same way this Commission has recommended for the adult criminal justice system. That is, they should be consolidated in a single Federal agency within the U.S. Department of Justice, allocated to Tribes in block funding rather than unpredictable and burdensome grant programs, and provided at a level of parity with non-Indian systems. Tribes should be able to redirect funds currently devoted to detaining juveniles to more demonstrably beneficial programs, such as trauma-informed treatment, and greater coordination between Tribal child welfare and juvenile justice agencies.

6.5: Because Tribal communities deserve to know where their children are and what is happening to them in State and Federal justice systems, and because it is impossible to hold justice systems accountable without data, both Federal and State juvenile justice systems must be required to maintain proper records of Tribal youth whose actions within Indian country brought them into contact with those systems. All system records at every stage of proceedings in State and Federal systems should include a consistently designated field indicating Tribal membership and location of the underlying conduct within Indian country and should allow for tracking of individual children. If State and Federal systems are uncertain whether a juvenile arrested in Indian country is, in fact, a Tribal member, they should be required to make inquiries, just as they are for dependency cases covered by the Indian Child Welfare Act.⁵⁵

6.6: Because American Indian/Alaska Native children have an exceptional degree of unmet need and the Federal government has a unique responsibility to these children, a single Federal agency should be designated to coordinate the data collection, examine the specific needs, and make recommendations for American Indian/Alaska Native youth. This should be the same agency within the U.S. Department of Justice referenced in Recommendation 6.4. A very similar recommendation can be found in the 2013 Final Report of the Attorney General's National Task Force on Children Exposed to Violence.

Recommendations concerning detention and alternatives. Alternatives to detention are even more imperative for Tribal youth than for adult offenders. Experts in juvenile justice believe detention should be a rare and last resort for all troubled youth, limited to those who pose a safety risk or cannot receive effective treatment in the community.⁵⁶ According to the Attorney General's National Task Force on Children Exposed to Violence, "[t]he vast majority of children involved in the juvenile justice system have survived exposure to violence and are living with the trauma of that experience....What appears to be intentional defiance and aggression ... is often a defense against the despair and hopelessness that violence has caused in these children's lives. When the justice system responds with punishment, these children may be pushed further into the juvenile and criminal justice systems and permanently lost to their families and society."⁵⁷

Drawing on extensive research and the experience of states that have reduced their juvenile detention substantially, Bart Lubow, Director of the Annie E. Casey Foundation's Juvenile Justice Strategy Group, told the Commission that "[J]uvenile detention and incarceration are generally unsafe, abusive, ineffective, and horribly expensive interventions that generally worsen the likelihood that the kids who come before juvenile courts will, in fact, succeed as adults."⁵⁸ He also pointed out the likelihood that "children from different racial or ethnic background would be treated differently simply as a result of those characteristics."⁵⁹

The implications for Indian country juvenile justice are clear. Tribal youth often experience severe trauma that is not only immediate, but also intergenerational—a legacy of dispossession and forced assimilation.⁶⁰ At one large reservation the Commission visited, a Tribal juvenile justice official pointed out that 80 percent of those who were referred for mental health treatment had previously attempted to commit suicide and that all of them had at least one friend or relative who had committed suicide.⁶¹

Data show that Federal and State juvenile justice systems take Indian children, who are the least well, and make them the most incarcerated. When they do incarcerate them, it is often far from their homes, diminishing prospects for positive contact with their communities.⁶² Furthermore, conditions of detention often contribute to the very trauma

that American Indian and Alaska Native children experience.⁶⁵ Detention is often the wrong alternative for Indian country youth, yet it is often the rule rather than the exception.

The Commission also heard widespread evidence that when Tribal children are detained in BIA-operated facilities, schooling and mental health services are unavailable to them. For example, the Ute Mountain Ute Tribe in Colorado and Utah utilizes a BIA Code of Federal Regulations (CFR) court⁶⁴ rather than its own Tribal court, and juveniles who come before that court may be sent for detention to a regional Federal facility in Towaoc, Colorado. As the Tribe's director of social services, Janelle Doughty, told the Commission, "I asked about education in our juvenile facility there.... There is no program. We do not have an educational program. We do not have any counseling services.... So we house them, they just sit there."⁶⁵

These findings lead the Commission to conclude that detention or secure treatment must be the last resort for Indian country juveniles, and appropriate alternatives should be legally preferred and practically available. Where detention or secure treatment is necessary, they should be structured and administered to meet the needs of Tribal youth. The Commission specifically recommends:

6.7: Whether they are in Federal, State, or Tribal juvenile justice systems, children brought before juvenile authorities for behavior that took place in Tribal communities should be provided with trauma-informed screening and care, which may entail close collaboration among juvenile justice agencies, Tribal child welfare, and behavioral health agencies. A legal preference should be established in State and Federal juvenile justice systems for community-based treatment of Indian country juveniles rather than detention in distant locations, beginning with the youth's first encounters with juvenile justice. Tribes should be able to redirect Federal funding for construction and operation of juvenile detention facilities to the types of assessment, treatment, and other services that attend to juvenile trauma.

6.8: Where violent juveniles require treatment in some form of secure detention, whether it be through BOP-contracted State facilities, State facilities in P.L. 83-280 or similar jurisdictions, or BIA facilities, that treatment should be provided within a reasonable distance from the juvenile's home and informed by the latest and best trauma research as applied to Indian country.

Recommendations concerning intergovernmental cooperation.

Intergovernmental cooperation is essential to achieve more effective use of limited resources and greater accountability to Tribal communities as long as Native nations share authority with Federal and State governments in the complex system of Indian country criminal justice. Government-to-government partnerships grounded in mutual respect have been shown to improve community safety while reducing redundancies, conflicts, and costs.⁶⁶ For some Tribes, including very small nations and those

[W]hen the monies run out or there's no service available, we have to send our kids to Kyle, South Dakota, which is an 8-hour drive—or 6-hour drive from us, and that's where our youth are detained over the weekend or if they have to go back, they are detained there.

*Statement of Vivian Thundercloud, Chief Clerk and Court Administrator, Winnebago Tribe of Nebraska
Testimony before the Indian Law and Order Commission, Hearing in Oklahoma City, OK
June 14, 2012*

enjoying good relations with local States, counties, and municipalities, intergovernmental cooperation may even be a better alternative than assuming exclusive jurisdiction.

Where juveniles are involved, intergovernmental cooperation is especially important, enabling Tribes to ensure that their often-traumatized youth receive proper assessment and treatment that is attentive to the resources and healing potential of Tribal cultures. Intergovernmental cooperation for juvenile justice takes different forms for the Tribes subject to Federal authority as compared with Tribes under P.L. 83-280, settlement acts, or other forms of State jurisdiction.

Where Federal authority exists, there is far less collaboration with Tribes than with State governments. In fact, the very structure of Federal juvenile jurisdiction builds in deference to States—indeed to the District of Columbia and to all U.S. territories and possessions—but not to Tribes. For example, if a juvenile in Los Angeles commits a Federal handgun crime, the Federal Delinquency Act, 18 U.S.C. § 5032, provides that Federal prosecutors may not proceed against the juvenile *unless they certify to the Federal District Court, after investigation*, that one of three conditions exists: 1) California juvenile courts do not have jurisdiction or refuse to assume jurisdiction over the juvenile, 2) California does not “have available programs and services adequate for the needs of juveniles,” or 3) the offense is a violent felony or a specified drug offense in which there is “a substantial Federal interest.” Under current law, the U. S. territory of American Samoa is entitled to the same deference as the State of California and every other State, but the Navajo Nation and the Rosebud Sioux Tribe are not.

The Federal Delinquency Act’s provisions limiting Federal prosecution promote Federal consultation and coordination with every other form of government except for Native nations. That disparity must end. Some U.S. Attorney’s offices, such as in South Dakota, have shown that Federal-Tribal cooperation on juvenile matters can be established and can be successful.

The Tribal Youth Pretrial Diversion Program, implemented by U.S. Attorney Brendan Johnson of the District of South Dakota on a trial basis on the Rosebud Indian Reservation, allows qualifying youth to be sentenced in Tribal court instead of Federal court. If the juvenile successfully completes the Tribal program ordered by the Tribal judge, the juvenile is not prosecuted in Federal court.⁶⁷ The Commission recommends that this type of diversion program should be mandatory in all Federal judicial districts with willing Tribal court partners, even though diversion will only be needed for a small number of Indian country cases remaining within Federal juvenile jurisdiction assuming the other recommendations in this report are adopted. For example, a juvenile’s designated Federal drug offense of general applicability or an offense by a juvenile whose Tribe does not have its own juvenile justice system would be diverted to Tribal court.

Tribal-Federal cooperation is also imperative when a Federal prosecutor considers making a motion to transfer a juvenile offender for trial as an adult. Transfer catapults Tribal youth into the realm of harsher sentences and detention conditions, and removes them from the protections of juvenile proceedings, including confidentiality. In recent years, very few Indian country juvenile cases appear to be transferred for adult prosecution. Between 2004 and 2008, the number of Indian country juveniles referred as adults to BOP dropped from a high of 54 to 12.⁶⁸ It is too soon, however, to discern whether this decline represents a long-term trend. Furthermore, the fate of each individual Tribal child matters.

Under the Federal Juvenile Delinquency Act,⁶⁹ transfer is mandatory for certain juvenile repeat offenders. In addition, if a child has passed a 15th birthday and has committed a crime of violence or one of several named drug and handgun offenses, the court has discretion to grant a transfer, taking into account a variety of considerations such as the juvenile's prior record and the juvenile's level of intellectual development and psychological maturity. Since 1994, in a narrower subset of violent crimes and crimes committed with a handgun, transfer is discretionary if the offense was committed after the child's 13th birthday; but Congress also provided that transfers for the juveniles age 13 and 14 for Indian country offenses will be allowed only if the juvenile's Tribe has elected to have Indian youth that age transferred.⁷⁰ To date, there is apparently only one report of a Tribe having allowed adult prosecutions of 13- and 14-year olds.⁷¹

Tribal control over the decision to transfer a juvenile for adult prosecution has the salutary effect of encouraging Tribal-Federal cooperation. Under the statute, however, Tribes lose their protective control once the juvenile turns 15, when the range of offenses that can trigger a transfer expands. That age cut-off is arbitrary. Considering the deeply rooted trauma that Tribal youth have experienced and the preference for tribally developed responses to that trauma, Tribes should be able to prevent all transfers of juveniles to adult status for all of the offenses specified in the Juvenile Delinquency Act and for juveniles of all ages, so long as Indian country is the basis for Federal jurisdiction.⁷² If, as recommended above, Federal juvenile authority is to be restricted when the Tribe is willing to assert jurisdiction, the number of cases eligible for transfer will likely be small, and few potential transfers will be affected.

For Indian country offenses under 18 U.S.C. § 1152 and § 1153, this report's recommendations on jurisdiction (Chapter 1) would afford Tribes the option to eliminate Federal juvenile jurisdiction altogether or, alternatively, to consent to any such Federal prosecutions should they wish to retain Federal jurisdiction over juvenile offenses. For Tribes that choose not to exercise these options and for Federal offenses of general application committed within Indian country, the following recommendations will create structures and incentives promoting greater Tribal-Federal cooperation with respect to juveniles.

6.9: The Federal Delinquency Act, 18 U.S.C. § 5032, which currently fosters Federal consultation and coordination only with States and U.S. territories, should be amended to add “or tribe” after the word “state” in subsections (1) and (2).⁷³

6.10: The Federal Delinquency Act, 18 U.S.C. § 5032, should be amended so that the Tribal governmental consent to allow or disallow transfer of juveniles for prosecution as adults applies to all juveniles subject to discretionary transfer, regardless of age or offense.

6.11: Federal courts hearing Indian country juvenile matters should be required to establish pretrial diversion programs for such cases that allow sentencing in Tribal courts.

Tribes subject to State criminal and juvenile jurisdiction under P.L. 85-280, settlement acts, and other Federal statutes must contend with State juvenile justice systems that typically take no special account of the often-traumatic experiences of Tribal youth or the cultural and other resources Tribes might be able to contribute toward accountability, treatment, and rehabilitation. Indeed, State justice systems never even record the Tribal member status or Indian country location associated with juvenile or other offenses, making it impossible for Tribes to hold the State systems accountable for how their children are treated. These same Tribes have also long complained that State justice systems provide inadequate service to reservation communities, while discriminating against Tribal members when they do appear as defendants or victims.⁷⁴ To make matters worse, the P.L. 85-280 and other State jurisdiction Tribes also operate without funding from the U.S. Department of the Interior for their policing, court systems, and detention, because of the Department’s policies denying financial support to Tribes under State jurisdiction.⁷⁵

Under current Federal law, Tribes are powerless to extricate themselves from State criminal jurisdiction—a process known as retrocession—unless the State agrees.⁷⁶ Both in this chapter and Chapter 1 (Jurisdiction: Bringing Clarity Out of Chaos), this report recommends that Congress alter that situation, and give Tribes the option to effect retrocession on their own. However, not every Tribe will have the capacity or the desire to carry out retrocession, either immediately or in the future.

Even if the recommendations in this report for strengthening Tribal justice are implemented (Chapter 3), and Tribes under State jurisdiction receive enhanced resources, some Tribes may still be too small to support a separate justice system. For those Tribes remaining under State jurisdiction, Tribal-State cooperation can greatly improve juvenile justice by providing notice to Tribes when their children enter the State system and engaging Tribes in crafting and implementing appropriate responses. Indeed, Tribes and local governments in several P.L. 85-280 States have already begun to implement cooperative measures with positive results.

In the P.L. 85-280 State of Oregon, for example, many Tribes and the State have a memorandum of agreement to inform the Tribes if one of their juveniles enters the custody of Oregon Youth Authority.⁷⁷ The Oregon Youth Authority (OYA) has been actively engaging Tribal governments in four main ways: 1) individually, through government-to-government relationships, as established in a memorandum of understanding with each Tribe; 2) collectively, through the OYA Native American Advisory Committee; 3) collaboratively, through implementing and coordinating culturally relevant treatment services for Native American youth in OYA custody; and 4) through the coordination and chairing of Public Safety Cluster meetings.⁷⁸

OYA has acknowledged that “[r]esearch shows that the most effective way to encourage youth to lead crime-free lives is by providing the appropriate combination of culturally specific treatment and education.”⁷⁹ The Youth Authority and the Tribes have set up a protocol for letting each other know when youth have gone into OYA jurisdiction, and they also discuss together how to plan for work with each youth and also for reentry.⁸⁰ A designated Tribal liaison represents OYA in Tribal relationships, and Oregon Tribes identify a contact person to begin communications between OYA and the Tribes. Although this arrangement introduces the Tribe into a juvenile’s proceeding after rather than before disposition, the relationship does allow Tribes to provide input throughout the entire commitment process and integrate their youth back into their Tribal community. The notice and information sharing aspects of the agreements are key to the success of this practice in allowing for more Tribal participation in the lives of their youth.

Another promising strategy for Tribal-State cooperation, coordinated exercise of concurrent jurisdiction and diversion of juvenile cases from State to Tribal court, involves the Yurok Tribe and Del Norte County in California, another P.L. 85-280 State.⁸¹ The Yurok Tribal Court and Del Norte County have negotiated a memorandum of understanding that provides for the two jurisdictions to coordinate disposition of juvenile cases, allowing for a joint determination to be made about which jurisdiction will handle the primary disposition of a youth’s case. Information is shared between the two court systems, and a procedure has been established for postponement of cases pending in county court in situations where the Tribal court has assumed jurisdiction and the youth completes an accountability agreement and any other conditions ordered by the Tribal court. This MOU acknowledges both concurrent jurisdiction and the possibility of the Tribal court petitioning for transfer of cases from the county.⁸² As one description of this cooperative arrangement notes, “[b]oth court systems have acknowledged that the Tribal court will order culturally appropriate education and case plan activities, including a restorative justice component, for all juveniles.”⁸⁵

Two key mechanisms of enhanced Tribal-state cooperation are notice to Tribes when their children enter State juvenile justice systems

and opportunities for Tribes to participate more fully in determining the disposition of juvenile cases. Notice, of course, is essential if participation is to occur. If the State is exercising juvenile jurisdiction over an act that would not be a crime if committed by an adult, such as truancy or underage drinking, notice and other requirements from the Indian Child Welfare Act apply. For a P.L. 83-280 or other State jurisdiction Tribe, that means the State must inquire into the child's Tribal status, and the Tribe will be notified and given an opportunity to intervene if the child is at risk of entering foster care.⁸⁴ Further, even though jurisdiction over Indian juveniles living in Indian country is concurrent under P.L. 83-280 and ICWA, the Tribe will be able to transfer the case from State to Tribal court absent parental objection or good cause to the contrary.⁸⁵ In contrast, if the State is exercising juvenile jurisdiction over an act that *would* be a crime if committed by an adult, none of these ICWA protections will be available for the Tribe.⁸⁶

That double standard must fall if this Commission's recommendations regarding local Tribal control are accepted. The great vulnerability of Tribal youth, the profound interest of Tribal communities in the welfare of their children, and the benefits of incorporating Tribal accountability and healing measures into the treatment of juveniles from those communities all point toward one conclusion: ICWA notice, intervention, and transfer measures should apply to State court proceedings involving actions of Tribal juveniles that take place within that Tribe's Indian country, whether or not the offense would be criminal if committed by an adult. Once this principle is established, further cooperative measures, such as diversion programs from State to Tribal court, will be more likely to take root. The Commission's recommendation concerning ICWA reflects these conclusions.

6.12: The Indian Child Welfare Act⁸⁷ should be amended to provide that when a State court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in State delinquency proceedings, ICWA should be amended to require notice to the Tribe and a right to intervene.

CONCLUSION

There is perhaps no more telling indication of how mainstream society values—or rather devalues—Native Americans and Alaska Natives who live and work on Tribal homelands than how existing Federal and State laws and institutions treat Native youth. In unanimously proposing these far-reaching recommendations to restructure the current system and to accelerate and incentivize their replacement by locally based Tribal systems, the Indian Law and Order Commission paid particular attention not only to statements by Tribal leaders, but also to the testimony of Federal and State officials charged with carrying out—and in many cases,

propping up—the existing juvenile justice system. The Commission was struck by the official statements of U.S. Attorneys, as well as their informal, and often passionate comments to Commission members.

Given the extraordinary dysfunction of the prevailing juvenile justice system that is supposed to serve and protect Indian country and its citizens, including but not limited to the 1938 Juvenile Delinquency Act, it is perhaps not surprising that some of the most informed and impassioned pleas to reform it come from Federal prosecutors and, albeit quietly, U.S. District Court judges and magistrate judges.

A consistent complaint is the inherent unfairness of the system, which often imposes harsher sentences on Native juveniles simply because they happen to be Native and have committed offenses on Tribal homelands rather than off-reservation. A recent example involves *Graham v. Florida*, where the U.S. Supreme Court declared that State courts may not sentence juvenile offenders to life imprisonment without parole; to do so violates the Eighth Amendment to the U.S. Constitution.⁸⁸ Because *Graham* applies only to such sentences imposed by State courts, several Federal prosecutors observed that it does not benefit Native American juveniles who have been sentenced by Federal courts, sentenced as adults, and are incarcerated by the Federal Bureau of Prisons.

Indeed, shortly after *Graham* was announced, a divided Federal appeals court panel upheld a 576 month (48 year) Federal prison sentence for a Native American juvenile who was 17 years old at the time he committed a homicide. In that case, *United States v. Boneshirt*,⁸⁹ two judges of the U.S. Court of Appeals for the Eighth Circuit ruled that notwithstanding *Graham*, a 576-month sentence, with no possibility for parole, was not the equivalent to an impermissible life sentence. This prompted the dissenting judge, who observed that the average life expectancy for Native American males in the United States is just 58 years, to remark: “Even if he earns all his good time credit, which the district court was not optimistic about, he will still serve more than 40 years in prison. The district court anticipated Boneshirt would be an old man when he was released, but in reality he may be a dead man.”⁹⁰

Given the prevailing system of injustice toward Native young people, all U.S. citizens, no matter where they live and work, have a stake in ensuring that meaningful change happens soon. After all, we’re talking about our children. No one and nothing on this earth is more important.

ENDNOTES

¹ *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 32 (2012) (written testimony of Ivy Wright-Bryan, National Director of Native American Mentoring, Big Brothers Big Sisters of America).

² *Id.*

³ *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 108 (2012) (written testimony of Elsie Boudrou, Licensed Master Social Worker at Alaska Native Justice Center); .see also Maria Yellow Horse Brave Heart and Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN AND ALASKA NATIVE MENTAL HEALTH RESEARCH 56 (discussing the impact of intergenerational trauma on Native peoples in the United States).

⁴ Neelum Arya and Addie Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems*, at 4 (5 Campaign for Youth Justice Policy Brief 2008), available at <http://ssrn.com/abstract=1892959>.

⁵ *Id.* at 5.

⁶ *Id.* at 4.

⁷ Ryan Seelau, *Regaining Control Over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice That Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63, 69 (2012), available at <http://libredeterminacion.org/proldi/images/lawReview-remaking.pdf>.

⁸ *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 32 (2012) (written testimony of Carole Justice) (quoting anonymous Arapaho youth to illustrate the level of violence Native children are exposed to on the Wind River Indian Reservation).

⁹ *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 108-11 (2012) (written testimony of Gil Vigil, National Indian Child Welfare Association Board Member) (discussing trauma and youth exposure to violence in Indian Country); see also Dolores Subia BigFoot et al., *Trauma Exposure in American Indian/Alaska Native Children 1-4* (Indian Country Child Trauma Center 2008), available at <http://www.theannainstitute.org/American%20Indians%20and%20Alaska%20Natives/Trauma%20Exposure%20in%20AIAN%20Children.pdf>.

¹⁰ *Id.* at 2.

¹¹ Michelle Sarche and Paul Spicer, *Poverty and Health Disparities for American Indian and Alaska Native Children: Current Knowledge and Future Prospects*, 1136 Ann N Y Acad Sci. 126 (2008) at ¶4, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2567901/>; see also BigFoot et al., *supra* note 9 (providing similar statistical data on disparities experienced by Native youth).

¹² Bigfoot et al., *supra* note 9.

¹³ Seelau, *supra* note 7 at 72.

¹⁴ Sarche and Spicer, *supra* note 11.

¹⁵ *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 61 (2012) (written testimony of Mato Standing-High, Rosebud Indian Reservation Attorney General).

¹⁶ See *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in*

Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence, 94 (2012) (written testimony of Lyle Claw, Founder of CLAW Inc.) (indicating that in rural communities served by CLAW Inc., “[i]t is not uncommon for 90-98 percent of [Native] youth to acknowledge their exposure to domestic violence”).

¹⁷ Testimony of Carole Justice, *supra* note 8, at 44.

¹⁸ Testimony of Mato Standing-High, *supra* note 15, at 61.

¹⁹ See Testimony of Mato Standing-High, Indian Law and Order Commission Listening Session with Tribal Representatives in Santa Ana Pueblo, NM (Dec. 13, 2011), on file with the Commission.

²⁰ Written Testimony of Elsie Boudrou, *supra* note 3, at 27.

²¹ Robert L. Listenbee, Jr. et al., Report of the Attorney General's National Task Force on Children Exposed to Violence 31 (2012).

²² *Id.* at 27; see also U.S. Dept. of Justice, Defending Childhood Fact Sheet, 2010 (supporting the proposition that children exposed to violence experience harmful and debilitating mental, physical, and emotional effects).

²³ David Finkelhor et al., *Children's Exposure to Violence: A Comprehensive National Study*, U.S. Dept. of Justice Juvenile Justice Bulletin (Oct. 2009) at 3, available at <https://www.ncjrs.gov/pdffiles1/ojdp/227744.pdf>.

²⁴ Written Testimony of Gil Vigil, *supra* note 9, at 109; see also Yellow Horse Brave Heart and DeBruyn, *supra* note 3, at 60 (discussing the impact of intergenerational trauma on Native people in the U.S.).

²⁵ 25 U.S.C. § 1901 et seq.

²⁶ Arya and Rolnick, *supra* note 4, at 24 (“Approximately 300 to 400 juveniles under the age of 18 are arrested each year under the federal system, which is about 2 percent or less of the total arrests under the federal system.”).

²⁷ WILLIAM ADAMS ET AL., URBAN INSTITUTE JUSTICE POLICY CENTER, TRIBAL YOUTH IN THE FEDERAL JUSTICE SYSTEM, (2011) at viii, available at <http://www.urban.org/uploadedpdf/412369-Tribal-Youth-in-the-Federal-Justice-System.pdf>.

²⁸ Arya and Rolnick, *supra* note 4, at 26.

²⁹ Reported at a meeting of the Indian Law and Order Commission with personnel from the Department of the Interior, Bureau of Indian Education, Arlington, VA, March 6, 2012.

³⁰ Testimony of Chori Folkman, Hearing before the Indian Law and Order Commission, Tulalip Indian Reservation, WA (Sept. 7, 2011), transcript on file with the Commission. (See also endnote 65.)

³¹ William Adams et al., *supra* note 27, at viii.

³² Arya and Rolnick, *supra* note 4, at 25.

³³ See NELL JESSUP NEWTON ET AL., EDs., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[4] (2012).

³⁴ *In re* W.B. Jr., 55 Cal.4th 30, 57-58 (Cal. 2012).

³⁵ Arya and Rolnick, *supra* note 4, at 20.

³⁶ *Id.* at 24.

³⁷ Federal Justice Statistics Program: Federal Bureau of Prisons' data file (entry cohort), annual, 1999-2008; see also William Adams et al., *supra* note 27.

³⁸ Jon Gustin, “Native American Juveniles in Custody of Bureau of Prisons.” Communication to Jeff Davis, Executive Director, Indian Law and Order Commission, Nov. 6, 2012. Informa-

tion request per 25 U.S.C.A. § 2812(g)(3)(A). Email response.

⁵⁹ *Id.*

⁴⁰ See *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 71 (2012) (written testimony of Janell Regimbal) (“Even though Native American Youth comprise only 1.9 percent of [North Dakota's] population and 8.9 percent of the total youth state population, they represented 43 percent of the March 1, 2011 census of North Dakota Youth Correctional Center, housing youth from across the state and considered the most secure environment for corrections placements.”).

⁴¹ NATIONAL CENTER FOR JUVENILE JUSTICE, CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT 1997-2010 (2011), available at <http://www.ojjdp.gov/ojstatbb/ezacjrp/>; see also M. Sickmund, T.J. Sladaky, W. Kang, and C. Puzanchera, *Easy Access to the Census of Juveniles in Residential Placement* (2011), <http://www.ojjdp.gov/ojstatbb/ezacjrp/>.

⁴² OREGON YOUTH AUTHORITY, 2012 GOVERNMENT-TO-GOVERNMENT REPORT ON TRIBAL RELATIONS: SUPPORTING THE RIGHTS AND NEEDS OF OREGON'S TRIBAL YOUTH 3 (2012), http://www.oregon.gov/oya/reports/SB770Report_2012.pdf

⁴³ AMERICAN CORRECTIONAL ASSOCIATION, ADULT AND JUVENILE CORRECTIONAL DEPARTMENTS, INSTITUTIONS, AGENCIES, AND PROBATION AND PAROLE AUTHORITIES (2008).

⁴⁴ William Adams et al., *supra* note 27, at 24.

⁴⁵ H.R. Rep. No. 95-1386, at 9 (1978).

⁴⁶ 18 U.S.C. § 1152.

⁴⁷ 18 U.S.C. § 1153, also known as the Indian Country Crimes Act.

⁴⁸ 18 U.S.C. § 3598.

⁴⁹ The U. S. Attorney for the District of Wyoming corroborated this view, while lamenting the fact that once local Tribal youth were routed into the Federal system, they could wind up in placements as far away as the California Youth Authority. Testimony of Christopher “Kip” Crofts, Hearing before the Indian Law and Order Commission, Wind River Reservation, WY (May 23, 2012), on file with the Commission. Further corroboration can be found in William Adams *supra* note 27, at 26.

⁵⁰ See Kelsey Dayton, *Wind River Tribal Youth Program Blends Prevention, Treatment and Tribal Tradition*, CASPER, STAR-TRIB. (April 1, 2012).

⁵¹ The two main programs available through the U. S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP) are the Tribal Youth Program and the Tribal Juvenile Accountability Discretionary Grant Program. These programs make grants to federally recognized tribes for an array of activities, including delinquency prevention and intervention, juvenile justice system improvement, building or improving detention facilities, and specialized mental health and substance abuse services for Tribal youth and families. SAMHSA within the Department of Health and Human Services makes grants available to Tribes for youth suicide prevention, and opens many of its general substance abuse prevention and treatment program to Tribes. However, it does not target Tribal youth specifically. More information on these programs is available on the OJJDP website, <http://www.ojjdp.gov/index.html> and the Substance Abuse and Mental Health Administration Website, <http://www.samhsa.gov/grants/>.

⁵² Testimony of Miskoo Petite, Hearing before the Indian Law and Order Commission, Rosebud Reservation, SD at 73 (May 16, 2012), on file with the Commission. Similar concerns were expressed about successful, but temporary grants for child advocate and mental health services.

⁵³ William Adams et al., *supra* note 27, at ix.

⁵⁴ CAROLE GOLDBERG, DUANE CHAMPAGNE, AND HEATHER SINGLETON, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2008) at 21-22, available at

<https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

⁵⁵ See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, B.1 (1979); *In re Nikki R.*, 131 Cal. Rptr. 2d 256 (Ct. App. 2003) (requiring juvenile court to oversee adequacy of inquiries).

⁵⁶ Robert L. Listenbee, Jr. et al., *supra* note 21, at 179.

⁵⁷ *Id.* at 171, 173. The Report further states: “Children exposed to violence, who desperately need help, often end up alienated. Instead of responding in ways that repair the damage done to them by trauma and violence, the frequent response of communities, caregivers, and peers is to reject and ostracize these children, pushing them further into negative behaviors. Often the children become isolated from and lost to their families, schools, and neighborhoods and end up in multiple unsuccessful out-of-home placements and, ultimately, in correctional institutions.” *Id.* at 172.

⁵⁸ Testimony of Bart Lubow, Hearing before the Indian Law and Order Commission, Nashville, TN at 94 (July 20, 2012), on file with the Commission.

⁵⁹ *Id.* at 95. This critique of juvenile detention is based on long-term research across 175 sites in 38 states.

⁶⁰ “The unfortunate and often forgotten reality is that there is an epidemic of violence and harm directed toward this very vulnerable population.... American Indian/Alaska Native children and youth experience an increased risk of multiple victimizations,” she said. “Their capacity to function and to regroup before the next emotional or physical assault diminished with each missed opportunity to intervene. These youth often make the decision to take their own lives because they feel a lack of safety in their environment. Our youth are in desperate need of safe homes, safe families and safe communities.” *Indian Youth Suicide Prevention Act of 2009: Hearing Before the S. Comm. On Indian Affairs* (2009) (Testimony of Dolores Subia BigFoot, Director of Indian Country Trauma Center, University of Oklahoma).

⁶¹ Testimony of Miskoo Petite, Facility Administrator for the Rosebud Sioux Tribe Correction Services, Hearing before the Indian Law and Order Commission, Rosebud Reservation, SD at 75 (May 16, 2012).

⁶² See testimony of Honorable Martha Vasquez, Judge for the United States District Court, District of New Mexico, before the Indian Law and Order Commission, Pojoaque Pueblo, NM (April 19, 2012).

⁶³ Robert L. Listenbee, Jr. et al., *supra* note 21, at 179; Testimony of Bart Lubow, *supra* note 57, at 102-103.

⁶⁴ Also known as Courts of Indian Offenses, CFR Courts are Federal courts for Tribes that lack their own judiciaries and responsible for misdemeanor enforcement pursuant to 25 CFR Part 11.

⁶⁵ Testimony of Janelle Doughty, Hearing before the Indian Law and Order Commission, Rosebud Reservation, SD at 105 (May 16, 2012), on file with the Commission. Ms. Doughty further testified that the Ute Mountain Ute Tribe has stepped forward to provide services to its children, but children from other tribes incarcerated at this Federal facility do not receive any education or other services. (See also endnote 29.)

⁶⁶ Duane Champagne and Carole Goldberg, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 at 153-161(2012).

⁶⁷ Testimony of Brendan Johnson, Hearing before the Indian Law and Order Commission, Rosebud Reservation, SD at 133 (May 16, 2012), on file with the Commission. See also Executive Office of the United States Attorneys, Outreach to Indian Country, Empowering Native American Women and Youth: *Outreach Events and Wind River Indian Reservation and Wyoming Indian High School*, available at http://www.justice.gov/usao/briefing_room/vw/ic.html. See also

⁶⁸ See William Adams et al., *supra* note 27, at 65.

⁶⁹18 U.S.C. § 5032.

⁷⁰ See *Crime Prevention and Criminal Justice Reform Act of 1994: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Jud. Comm.* (February 22, 1994) (Written Testimony of Helen Elaine Avalos, Assistant Attorney General, Navajo Department of Justice, on Behalf of Peterson Zah, President of the Navajo Nation) (supporting a Tribal election provision for juvenile transfers, enhanced death penalty provisions, and other enhanced sentencing measures in the Crime Prevention and Criminal Justice Reform Act, due to disproportionate impact on Tribal members and infringement on Tribal sovereignty).

⁷¹ Arvo Mikkonen, *Federal Prosecution of Juveniles*, 58 United States Attorneys' Bulletin No. 4, July, 2010, at 57.

⁷² This power could be asserted for some or all of the offenses listed in 18 U.S.C. § 5032.

⁷³ The new language for 18 U.S.C. § 5032 would read: "A juvenile alleged to have committed an act of juvenile delinquency, ... shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that

(1) the juvenile court or other appropriate court of the *State or Tribe* does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency,

(2) *the State or Tribe* does not have available programs and services adequate for the needs of juveniles,..."

⁷⁴ See Duane Champagne and Carole Goldberg, *supra* note 65, at 67-111.

⁷⁵ *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell* at 1, 13 Cal. Daily Op. Serv. 9855 (9th Cir. Sept. 4, 2013).

⁷⁶ See Duane Champagne and Carole Goldberg, *supra* note 65, at 165-191.

⁷⁷ OREGON YOUTH AUTHORITY, 2012 GOVERNMENT-TO-GOVERNMENT REPORT ON TRIBAL RELATIONS: SUPPORTING THE RIGHTS AND NEEDS OF OREGON'S TRIBAL YOUTH, available at http://www.oregon.gov/oya/reports/SB770Report_2012.pdf

⁷⁸ *Id.* at 2.

⁷⁹ Oregon Youth Authority, *2012 Government-to-Government Report on Tribal Relations: Supporting the Rights and Needs of Oregon's Tribal Youth* 1 (2012) http://www.oregon.gov/oya/reports/SB770Report_2012.pdf

⁸⁰ Testimony of Stephanie Striffler, Hearing before the Indian Law and Order Commission, Portland, OR (Nov. 2, 2011), on file with the Commission.

⁸¹ Press release, Coordinated Adult and Juvenile Probation Parties: Yurok Tribal Court and Counties of Del Norte and Humboldt, California, <http://www.courts.ca.gov/documents/Tribal-Resources-JuvDelAgreement-Yurok.pdf>.

⁸² Tribal Law and Policy Institute, *Promising Strategies: Tribal-State Court Relations* (March 2013) 35-39, http://www.walkingoncommonground.org/files/TLPI%20Promising%20Strategies%20Tribal-State%20Court%20Relations_FINAL_Updated%208-15-13.pdf.

⁸³ *Id.* at 37.

⁸⁴ See 25 U.S.C. §§ 1911-1912; *In re W.B. Jr.*, 55 Cal.4th 30 (Cal. 2012).

⁸⁵ See 25 U.S.C. § 1911(b); *In re M.S.*, 40 Cal. Rptr. 3d 439 (Ct. App. 2006).

⁸⁶ See 25 U.S.C. § 1903(1) (definition of "child custody proceeding"). California law currently goes further than ICWA, and requires inquiry into the child's Indian status for all delinquency proceedings where the child is at risk of entering foster care, even if the underlying offense would be a crime if committed by an adult. Cal. Welfare & Institutions C., § 224.3(a). However, California courts have refused to interpret state law as applying any other ICWA

protections in such cases, such as the right of the Tribe to notice and to intervene. In re W.B. Jr., 55 Cal.4th 30, 55 (Cal. 2012).

⁸⁷ 25 U.S.C. § 1901 *et seq.*

⁸⁸ 560 U.S. 48 (2010).

⁸⁹ *United States v. Boneshirt*, 662 F.3d 509 (8th Cir. 2011).

⁹⁰ *Id.* at p. 23 (Judge Bright, dissenting as to the sentence).