



# DETENTION AND ALTERNATIVES: COMING FULL CIRCLE, FROM *Crow Dog* TO TLOA AND VAWA

In August 1881, Crow Dog, a Brule Lakota man, shot and killed Spotted Tail, a fellow member of his Tribe.<sup>1</sup> The matter was settled according to long-standing Lakota custom and tradition, which required Crow Dog to make restitution by giving Spotted Tail's family \$600, eight horses, and a blanket. After a public outcry that the sentence was not harsher, Federal officials charged Crow Dog with murder in a Dakota Territory court. He was found guilty and sentenced to death. The Federal government had never before asserted authority over Indian-versus-Indian criminal justice issues in Indian country, and on appeal, the U.S. Supreme Court affirmed Tribal jurisdiction, noting that the territorial court had inappropriately measured Lakota standards for punishment "by the maxims of the white man's morality."<sup>2</sup> Members of Congress, outraged by the Supreme Court's ruling, overturned the decision by enacting the Major Crimes Act of 1885, which for the first time extended Federal criminal jurisdiction to a list of felonies committed on reservations by Indians against both Indians and non-Indians.<sup>3</sup> In the 130 years since, detention and imprisonment have risen in prominence as responses to crime in Indian country, and Tribal governments have struggled to reassert their views about the value of reparation, restoration, and rehabilitation.

Through the Tribal Law and Order Act of 2010 ("TLOA") and the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments), Tribal governments have regained significant authority over criminal sentencing. If the Indian Law and Order Commission's recommendations

concerning the restoration of Tribal criminal jurisdiction are implemented along with appropriate safeguards to protect defendants' Federal constitutional rights, Tribal governments will have more authority to determine sentences than at any time since the *Crow Dog* days.

Yet, to take full advantage of these current and potential opportunities, Tribes will need to develop the governing system to take responsibility for the serious offenses now handled by State and Federal courts and to do so in a way that fully protects the Federal civil rights of all U.S. citizens. Many Indian nations currently lack this capacity; they make do with detention facilities that are too small, short of funds, understaffed, and without the wrap-around of services that would make more alternative sentencing possible. These challenges to the implementation and exercise of Tribes' reaffirmed rights are detailed below.

The Commission's findings offer hope, as well as financial relief for taxpayers. If Tribes can succeed in reserving detention for the offenders who need it most and in developing alternatives to reduce the demand for jail time, it becomes possible to achieve significant Federal or State cost savings as Tribal governments adopt their own laws and effectively defederalize Tribal justice systems or retrocede them from State jurisdiction where P.L. 83-280 currently applies.

## FINDINGS AND CONCLUSIONS: DEFICIENCIES IN DETENTION

Indians who offend in Indian country and are sentenced to serve time may be held in Tribal, Federal, or State facilities. In mid-year 2011, 2,239 self-identified American Indians and Alaska Natives were held in Indian country facilities.<sup>4</sup> Another 3,500 were in Federal prisons.<sup>5</sup> Approximately 24,000 American Indians and Alaska Natives are incarcerated in State prisons or detained in county jails; some of these offenders are held for crimes committed in Indian country under the authority the Federal government transferred to States through P.L. 83-280, but that fraction is not publicly reported.

*Indian offenders in State and Federal facilities.* While there are hardships associated with any incarceration, American Indians and Alaska Natives serving time in State and Federal detention systems experience a particular set of problems. One is disproportionality in criminal sentencing as well as geography. In many cases, this results from State and Federal officials' practical concerns. How, for example, can they supervise an offender from a distance when reservation infrastructure to support house arrest or other forms of community corrections are lacking?

But in other cases, disproportionality arises because Indian offenders are caught up in what is to them a "foreign" justice system: prosecutors, public defenders and defense counsel, judges, and probation officers may be more likely to make inaccurate assumptions about defendants; system processes may not mesh with Indigenous world

views; and myriad opportunities exist for miscommunication. According to extensive testimony to the Commission, these and other factors contribute to a system that is inherently discriminatory, both in terms of how individuals are often treated and in the adverse impacts to Native Americans and Alaska Natives as a group versus other offender categories:

- Research on the 10,800 felony offenders processed by the State of Minnesota (a P.L. 83-280 State) in 2001 concluded that, “For most sentencing decisions, Native Americans are receiving harsher treatment in sentencing decisions at both the ‘front’ [imposition of the sentence] and ‘back’ [fulfillment of the sentence] stages of the criminal justice process.”<sup>6</sup> In fact, the decision point for early release was the only stage in the process in which Americans Indians were not statistically worse off than Whites. In the year studied, Indians were 16.6 percent more likely to be granted a shortened sentence, although on average, their time already served was longer and their sentence reduction less than that of Whites. As the study authors note, this finding actually affirms system disparities: “The more severe treatment of Native Americans at earlier decision stages subsequently allows for less harsh treatment for Native American offenders at the pronounced length of stay decision.”<sup>7</sup>
- Related analyses indicate that Federal sentencing guidelines systematically subject offenders in Indian country to longer sentences than are typical when the same crimes are committed under State jurisdiction. Extrapolating from a detailed South Dakota dataset, Federal sentences for assault during 2005 were “twenty-five months longer than those for Native Americans sentenced in state court and thirteen months longer than those for whites sentenced by the state.”<sup>8</sup> While developments in Federal case law since 2005 have created maneuvering room for Federal judges to exercise downward discretion and make Federal sentences for Native Americans more equitable, by 2008 at least, statistics showed that judges were not reducing their sentences for Native American defendants.<sup>9</sup>
- As detailed in the chapter on juvenile justice (Chapter 6), the situation is particularly egregious when Native American juveniles enter the Federal criminal justice system, where parole is unavailable and the opportunities for diversion, wellness, and other incentivized rehabilitation programs are typically nonexistent. As a direct result, these juveniles serve systematically longer terms of incarceration for the same or similar offenses than they would off-reservation.

Another hardship borne by American Indians and Alaska Natives in State and Federal facilities—and their families—is their distance from home. Testimony throughout the Commission’s field hearings emphasized the problems that arise when Tribal members, including juveniles, are detained in far-off facilities. Families must drive long distances or in

Defendants that would otherwise be released to their families and be supervised in their own homes with their children, with their parents, with their grandparents, may have to be detained at a halfway house or in custody many, many miles from their home, or if there is no one in a halfway house, then incarcerated, many times simply because there is no phone and we can't do electronic monitoring. If they had a phone, we could monitor them from their homes as we do anybody else. So sometimes the only difference is that they do not have a phone and we cannot do electronic monitoring, and therefore they are deprived of the opportunity to prove themselves before sentencing.

*Martha Vazquez, Judge, United States District Court, District of New Mexico  
Testimony before the Indian Law and Order Commission, Hearing at the Pueblo of Pojoaque, NM  
April 19, 2012*

Some of our sister Tribes [in northern Nevada], the counties are charging them something like \$150 a day for bed space. Some counties refuse flat out to accept any Native Americans unless they have been arrested by their county deputies. So . . . we have three, four Tribes that utilize one [BIA] facility in Reno. If they make an arrest, they have to contact the facility to make sure there's bed space, and then they have to contact the BIA detention and make sure that they're able to transport that person. Otherwise they transport them to Duck Valley, which is a 7- to 8-hour drive for some of them.

*Billy A. Bell, Chairman, Fort McDermitt Paiute and Shoshone Tribe,  
and President, Inter-Tribal Council of Nevada  
Testimony before the Indian Law and Order Commission, Hearing on the Salt River Indian Reservation, AZ  
January, 13, 2012*

many cases take commercial airline flights to visit. The Commission is aware of numerous examples of offenders being incarcerated hundreds or even thousands of miles from their family support networks and fellow Tribal citizens. In some instances, the distances involved are practically incomprehensible. The State of Alaska incarcerates Alaska Native inmates in detention centers as far away as the State of New York.<sup>10</sup>

Nor is the issue of geographically remote detention services limited to prisons. For instance, in the case of the Oneida Nation of New York local sheriffs' refusal to provide contract jail space resulted in Tribal jail inmates being routinely transported to Pennsylvania and back.<sup>11</sup> In such circumstances, a Tribe's ability to exert any influence on an offender's behalf is greatly diminished. In general, culturally relevant support is not available to offenders. Community reentry processes become more difficult and may be ill coordinated.<sup>12</sup> While this problem is more commonly associated with detention under State and Federal jurisdiction, distant placement also can occur under Tribal jurisdiction. For example, Tribes increasingly contract with other governments to house offenders. In this situation, there may be additional community costs, including transportation and removing scarce policing personnel from the community.

*Indian country detention facilities.* There are three kinds of detention facilities in Indian country: those operated by the Bureau of Indian Affairs (BIA), those operated by Tribal governments under P.L. 93-638 contracts, and those that are fully Tribal facilities, funded and managed by a Tribe itself. These three types of entities are referred to collectively as "Tribal jails." As one long-time analyst of Tribal criminal justice systems notes, "The expansion of Tribal sovereignty and the safety of Indian communities are critical priorities for Tribal governments, and an essential element of each is the detention and rehabilitation of criminal perpetrators."<sup>15</sup>

According to the U.S. Department of Justice (DOJ), 79 Tribal jails served Indian country in 2012.<sup>14</sup> Among these, there are an increasing number of exemplary facilities that serve as anchors along a continuum of care from corrections to community reentry and that are able to connect detainees with core rehabilitation services, such as substance abuse treatment, mental health care, cultural programming, and education. For many Tribes, financial assistance from the U.S. government for facility planning, renovation, expansion, staffing, and operations have been important in these efforts. Funding has included \$225 million in economic stimulus funds for Tribal correctional facility construction.<sup>15</sup> Among the 79 jails serving Indian country in 2012, 21 are new since 2004.<sup>16</sup>

On the other hand, 11 Tribal detention facilities permanently closed between 2004 and 2012.<sup>17</sup> In most cases, deficiencies in funding, staff, and appropriate space proved their undoing. The Indian Law and Order Commission has found these specific issues to be of continuing concern for many other jails in Indian country.<sup>18</sup> One such jail that has

**Salt River Department of Corrections** is one of a growing number of exemplary detention centers in Indian country. Designers of this purposefully built facility, which opened in 2007, did not just focus on meeting the standards necessary for housing a variety of offenders. They also consciously included elements that reflect culture and support rehabilitation. Reentry is a key focus for the corrections center, and it offers classes ranging from basic life skills to vocational certification as a food handler. But the center's programming also focuses on the very human side of reentry, helping keep families together even when a loved one is in jail. For example, through the Storybook Project, incarcerated parents can record themselves reading a children's book, and the book and recording are sent to the child. This innovative spirit has served juvenile offenders well, too: Salt River is the first corrections facility in Indian county to host a full Boys and Girls Club. The partnership was recognized with a Merit Award from the Boys and Girls Clubs of America in 2012.<sup>20</sup>

BIA officials told us that they need to know which Tribes DOJ plans to award grants to construct correctional facilities at least 2 years in advance so that they can plan their budget and operational plans accordingly in order to fulfill their obligation to staff, operate, and maintain detention facilities. According to BIA, there have been instances where they were unaware of DOJ's plans to award grant funds to Tribes to construct Tribal detention facilities, which could result in new facilities remaining vacant until BIA is able to secure funding to operate the facility.

DOJ has implemented a process whereby when Tribes apply for DOJ grants to construct correctional facilities, DOJ consults BIA about each applicant's needs as BIA typically has first-hand knowledge about Tribes' needs for a correctional facility and whether the Tribe has the infrastructure to support a correctional facility, among other things. BIA then prioritizes the list of applicants based on its knowledge of the detention needs of the Tribes. DOJ officials noted that the decision about which Tribes to award grants to rests solely with them; however, they do weigh BIA's input about the Tribes' needs for and capacity to utilize a correctional facility when making grant award decisions. To help BIA anticipate future operations and maintenance costs for new Tribal correctional facilities, each year DOJ's Bureau of Justice Assistance (BJA) provides BIA with a list of planned correctional facilities that includes the site location, size, and completion date. BIA officials noted that this level of coordination with DOJ is an improvement over past years as it helps to facilitate planning and ensure they are prepared to assume responsibility to staff, operate, and maintain Tribal detention facilities.

*United States Governmental Accountability Office, "Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts," 2011*

since been closed was the former Office of Justice Services (OJS) Adult Detention Center on the Rosebud Sioux Nation in South Dakota, which the Commission visited in May 2012. At that time, as many as six inmates were incarcerated in cells designed for one person. The living conditions were so deplorable that no more than two of the six inmates could stand in the cells at any given moment; the rest had to lie or sit on their bunks.<sup>19</sup> Looking to the future, these and related issues will challenge the effective use of Tribal detention resources.

**Funding for New Jails.** Tribal governments must solicit funding from DOJ to pay for construction costs and from the U.S. Department of the Interior (DOI) to pay operation and maintenance costs. While the Departments are striving to improve their collaboration, this has proven bureaucratically difficult, and Tribes continue to bear primary responsibility for managing coordination, sometimes without success. As stressed in Chapter 3, these Federal departments' overlapping responsibilities are problematic and justify the Commission's recommendation for consolidating Federal programming for Indian country criminal justice within a single executive branch agency.

**Funding for Operations.** Appropriate funding for Tribal jail operations is difficult to estimate. Because many are in rural or remote locations, Tribal jails' staffing and day-to-day operating costs tend to be higher than for their non-Tribal counterparts. Because of the "thinness" of the overall institutional and service provision environments in which most operate, Tribal jails may need to provide more services, at greater cost, than non-Tribal jails. These facilities serve at least three distinct purposes: pretrial detention, short-term incarceration for nonviolent offenders, and longer term incarceration for violent offenders. The facilities must serve multiple populations: men and women, and sometimes both adults and juveniles. At least two of these purposes are associated with higher detention costs: pretrial detainees' short stays drive up administrative processing costs, and more violent offenders require higher, more costly security. Thus, it is difficult to identify appropriate facilities for cost comparisons. Using average daily census as the basis for per prisoner cost comparison, Tribal jails operate with fewer resources than one-quarter of State prison systems. Maine, Minnesota, North Dakota, Washington, and California (States with significant Native populations), are all part of this upper quartile. Tribal jails that operate closer to their rated inmate capacity fare much worse. They must fulfill their many functions with resources comparable to those available to a rural county lock-up or a Federal low-security prison.

**Overcrowding.** In both 2011 and 2012, one out of five Indian country jails operated at 150 percent of their rated capacity on their most crowded days. For at least six of these jails, adequate space may be a more constant concern, as they reported overcrowded conditions not only on peak days, but also on randomly sampled dates.<sup>21</sup> When coupled with low staffing levels, overcrowding results in less supervision, restrictions on offender privileges (such as time outside), and less access to rehabilitation services.

A \$2 million American Indian detention center for youth offenders remains empty and nonfunctioning five years after it was built using Justice Department grants, the Star Tribune of Minneapolis-St. Paul reported Sunday. The center was finished in 2005 and the Red Lake Band of Chippewa, Minnesota's most cash-strapped Tribe, expected the Federal Bureau of Indian Affairs to request more than \$1 million a year to help run the 13,000-square-foot, 24-bed facility. But the BIA never requested the funding and the Tribe said it does not have the money to operate the center. The Tribe has now hired lawyers to take the Federal government to court. The plight of the Red Lake Band has caught the attention of Sen. Al Franken (D-Minn.) and has frustrated former Minnesota U.S. Attorney Tom Heffelfinger. Heffelfinger told the Star Tribune that the delay on opening the facility is "ridiculous." "Just putting the bricks and mortar up and then walking away doesn't solve the problem," Heffelfinger told the newspaper.

*Eric Roper, "Red Lake Lockup Sits Locked Up and Empty," Star Tribune  
March 21, 2010*

**Table 5.1 Annual per Inmate Cost, FY 2010**

| Facility Types                                                     | Amount          |
|--------------------------------------------------------------------|-----------------|
| Federal minimum security prison <sup>a</sup>                       | \$21,005        |
| Average across rural Pennsylvania jails <sup>b</sup>               | \$25,185        |
| Federal low security prison <sup>a</sup>                           | \$25,377        |
| <b>Tribal jails, based on rated capacity<sup>c</sup></b>           | <b>\$25,562</b> |
| Federal medium security prison <sup>a</sup>                        | \$26,248        |
| Average across federal facilities <sup>a</sup>                     | \$28,282        |
| Average across state prisons—DOJ BJS estimate <sup>d</sup>         | \$28,323        |
| Average across state prisons—Vera Institute estimate <sup>e</sup>  | \$31,286        |
| 90th percentile rural Pennsylvania jail cost <sup>b</sup>          | \$32,850        |
| Federal high security prison <sup>a</sup>                          | \$33,858        |
| <b>Tribal jails, based on average daily census<sup>c</sup></b>     | <b>\$37,548</b> |
| 75th percentile state prisons—DOJ BJS estimate <sup>d</sup>        | \$40,175        |
| 75th percentile state prisons—Vera Institute estimate <sup>e</sup> | \$48,826        |

**Notes:** 1. County jail costs vary significantly based on size, location, and services offered. A recent study of Pennsylvania’s rural county jails is one of the few available that provides an example of this variation. 2. State prison costs estimated by DOJ are lower than those estimated by the Vera Institute, a nonprofit group that tracks prison costs. Vera Institute’s numbers attempt to account for all spending by State prison systems even if it originates outside a State’s corrections budget.

**Sources:** a. Nathan James, *The Federal Prison Population Build Up: Overview, Policy Changes, Issues, and Options*, Congressional Research Service 15 (2013), <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

b. Gary Zajac & Lindsay Kowalski, *An Examination of Pennsylvania Rural County Jails 14*, The Center for Rural Pennsylvania (December 2012) (“The system-wide average cost-per-day, per-inmate was \$60.41 during the study period (2004-2010).”),

[http://www.rural.palegislature.us/documents/reports/rural\\_county\\_jails\\_2012.pdf](http://www.rural.palegislature.us/documents/reports/rural_county_jails_2012.pdf).

c. *Activities, Subactivities, Program Element, Subelements, Operation of Indian Programs, Enacted Budgets for the Bureau of Indian Affairs*, DOI (2013), on file with the Commission; Todd Minton, *Jails in Indian Country, 2011* at 2, Bureau of Justice Statistics, DOJ (2012),

<http://www.bjs.gov/content/pub/pdf/jic12.pdf>.

d. Tracey Kyckelhan, *State Corrections Expenditures, FY 1982-2010* at 4, T.2, USDOJ, Bureau of Justice Statistics, Office of Justice Programs, <http://www.bjs.gov/content/pub/pdf/scefy8210.pdf>.

e. Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers* 10, fig. 4 (showing average cost by state), Vera Institute of Justice (January 2012, updated 7/20/12),

[http://www.vera.org/sites/default/files/resources/downloads/Price\\_of\\_Prisons\\_updated\\_version\\_072512.pdf](http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf).

**Pilot BOP Prison-Sharing Program.** TLOA allows for Native nations to contract with BOP to incarcerate at the closest and most appropriate facility those offenders who are violent and have served at least two years of their sentence. At any time Tribes can choose to withdraw their prisoner. The Federal government covers the cost. The BOP will take up to 100 Tribal prisoners from across the United States. The first Indian Tribe to make use of the BOP program was the Confederated Tribes of the Umatilla Indian Reservation. The Tribal court sentenced an offender to 27 months for assault, with the sentence to be served in a BOP facility. By applying to send the offender to Federal prison under TLOA, the Tribe avoided spending the approximately \$50 a day for the Tribe to utilize the Umatilla County Jail. Appropriate paper work and approval by the BOP were needed to ensure entry into the program.<sup>28</sup>

**The Leech Lake Band of Ojibwe Joint Jurisdiction Wellness Court: An Example of Tribal Alternatives to Detention.** In the mid-2000s, both Leech Lake Band of Ojibwe and Cass County, MN were faced with high rates of drunk driving, recidivism, and little money. In 2006, Cass County approached the Tribe about collaborating through a joint powers agreement to create a DWI court. Historical tensions between the Tribe and the county made it easy to think of “a million and excuses why it won’t work.” However, they had the common goal to lower the recidivism rate of impaired driving. Finally, both sides collaborated on how the DWI court would look and function and, in 2006, the Leech Lake-Cass County Joint Jurisdictional Court began operations.

The collaboration, which combines the jurisdiction of the Tribe with the federally transferred jurisdiction the State exercises under P.L. 83-280, has been a success. Judges from the Tribe and county preside over the court together, which creates trust between the Tribe and county. Using drug court and wellness court principles, the program provides holistic, culturally relevant services that address the sources of offenders’ problems rather than simply the symptoms. Besides the court judges, Tribal and county law enforcement, and Tribal and county service providers participate in the court’s programming, which is overseen by the county’s probation office. By 2012, the recidivism rate among offenders processed through the joint jurisdictional court reach only 4 percent, a marked decrease from the rates of 60-70 percent that had prevailed before the court came into operation. However, the most telling sign of success is the change in attitude of the community. For example, there is a growing community of people who are choosing to be sober or who are reaching out when they need help instead of reoffending.<sup>38</sup>

**Understaffing.** In 2004, the DOI Office of the Inspector General released the report “Neither Safe nor Secure: An Assessment of Indian Detention Facilities,” which documented deficiencies in Indian country jails’ safety, security, staffing, staff training, funding, maintenance, space, and policies and procedures.<sup>22</sup>

In a 2011 follow-up report, the Inspector General noted that these staffing shortages had not been addressed. DOJ survey data back up this finding: “Overall, the ratio of inmates to jail operations employees was 2.1 inmates to 1 jail operations employee at midyear 2012, up from 1.8 to 1 in 2011, and down from 2.5 to 1 in 2004.”<sup>23</sup> Yet, Tribal detention facility staffing is a difficult problem to resolve. BIA had invested nearly \$1 million in recruitment efforts in the intervening years, an effort that had limited results and ended in a recruitment firm’s contract termination. But the Inspector General also noted that BIA’s financial management and tracking tools, which should be an aid to Tribes in changing practice and marking progress, “do not provide the necessary management information to address funding and staffing concerns.”<sup>24</sup>

**Poor Physical Conditions.** Reiterating its 2004 report, the DOI Inspector General’s 2011 report notes:

“Not only are BIA facilities understaffed, but the physical conditions of the buildings also need improvement. We consider more than half of the [eight] detention facilities we visited to be in unsatisfactory or poor condition. We observed leaky roofs; defective heating, fire safety, and security systems; non-detention grade doors, windows, and fencing; rust-stained sinks, toilets, and showers; and an overall lack of cleanliness.”<sup>25</sup>

**Violent Offenders.** The number of violent offenders in Indian country detention facilities has fallen slightly from a peak of 41 percent of the inmate population in 2007 to 32 percent in 2012.<sup>26</sup> However, with new authorities available to Tribes under TLOA and the VAWA Amendments (providing Tribes the opportunity, under Tribal law, to incarcerate violent offenders and non-Indian offenders convicted of domestic violence or sexual assault for up to 9 years), these numbers are expected to rise. Given that pretrial detainees always will compose a significant segment of the Tribal jail population,<sup>27</sup> adjusting the use of resources to provide appropriate quarters for various classes of offenders is of increasing importance. Jails and prisons are two very different kinds of institutions.

Jails are designed for short-term detainees (violent offenders, pretrial, and nonviolent offenders), and generally do not provide many services. Prisons are for longer-term detainees, and are prepared to make longer term “investments” in them. If Tribes are going to have to house violent offenders for longer periods, different kinds of detention facilities will be needed. One important option for Tribal governments may be the development intertribal, regional facilities for longer-term, more violent

**Tulalip Tribes Alternative Sentencing Program.** Twenty years ago, the Tulalip Tribes confronted growing crime, violence, and drug use problems on their lands and among their citizens. Located along the I-5 corridor 40 miles north of Seattle, WA, the Native nation experienced all the advantages and disadvantages of its location. It was able to develop a highly successful gaming enterprise, but its lands had become an attractive locale for drug dealing.

The Tulalip Tribes' solution was to take control of criminal justice in the community. Because it was subject to P.L. 83-280, which creates concurrent State and Tribal jurisdiction on reservation land, the Tribe's first step was to advocate for retrocession—or the transfer of criminal jurisdiction from the State to the Federal government. After the transfer, the Tribal government was free to develop justice programming without State interference.

Today, rather than sentencing offenders to jail, the Tulalip Tribes' alternative sentencing program requires offenders to address the underlying issues that brought them to court in the first place. A multitude of agencies provide services and support and meet to hold offenders accountable. Programs that may be part of an offender's sentence include: substance abuse treatment, mental health treatment, anger and stress management, community service, random drug testing, meetings with elders, vocational classes, life skills and parenting classes, job search support, and family reunification. The court relies on GPS-enabled ankle bracelets to monitor and restrict offenders' activities and uses brief jail stays as a last resort. Recidivism in the program is approximately 20 percent lower than the county benchmark, and compared to its spending under the previous system, the Tribe saves approximately \$100,000 annually in jail-use fees.<sup>59</sup>

detainees. In the meantime, the Federal Bureau of Prisons' (BOP) pilot project authorized by TLOA already has been of use to Tribes working to adjust to these renewed authorities.

## FINDINGS AND CONCLUSIONS: OPPORTUNITIES IN ALTERNATIVES

“Alternatives to incarceration” or “alternatives to detention” are programs to which a judge may send criminal offenders instead of sentencing them to jail. Alternative sentencing aims to create pathways away from recidivism by addressing the core problems that lead offenders to crime, which may include substance abuse, mental health problems, and limited job market skills, and by helping them develop new behaviors, such as anger management, job skills, among others that support the choice to not commit crimes. Jail may still be part of an offender’s experience with an alternative sentence, but it would be used sparingly and as a short-term measure, functioning as a component in a more comprehensive program involving intensive supervision, coordinated service provision, and high expectations for offender accountability.

A considerable amount of data demonstrates the effectiveness of some alternatives to detention across a wide range of court settings and offense categories. From New York City’s mainstream courts to Bethel, Alaska’s Tribal forums and for offenses along the spectrum from misdemeanor to felony, meta-analysis shows that participants in alternative programs reoffend at rates at least 10-20 percent lower than non-participants.<sup>29</sup> There also is growing evidence that other positive life outcomes—holding a job, getting an education, reuniting with children, enjoying better health, among others—are associated with participation in alternative programs, especially those with a substance abuse treatment component.<sup>30</sup> This is not to say that alternative sentences are proven to be effective in all cases, but rather that such approaches suggest the possibility of substantial cost savings in many instances.

Effectiveness translates to cost-savings. Taxpayers can save money when nonviolent offenders are diverted from jail into alternative programs. Counties and Tribes that lease jail space from other jurisdictions notice immediate savings; governments that manage their own jail facilities gain savings as decreased demand decreases operating costs.

As recidivism falls, jurisdictions save even more money as they make fewer arrests, adjudicate fewer cases, and further decrease the use of jail and prison facilities.<sup>31</sup> For example, California estimates that its alternatives to detention programs save State taxpayers \$90 million a year.<sup>32</sup> San Bernalillo County, NM found that in the 6 years following its implementation of alternatives to detention for juveniles, there was a decrease in every offense category tracked, and State taxpayers realized over \$4.7 million in cost savings.<sup>33</sup> Broad-based research by the Pew

At Lummi we know that incarceration makes better criminals, not healthier people. We do recognize that sometimes there is no alternative to incarceration to protect vulnerable members of our community. However, incarceration is rarely the best method to help anyone—especially our Tribal people—to function in a healthy manner in our communities when they are released. We have learned the hard way that for successful reentry into our communities, our people need a comprehensive continuum of care that includes addiction treatment, job-related education and training, housing, and employment supported by traditional ceremony, language, and spirituality.

*Ron Tso, Chief of Police, Lummi Nation  
Testimony before the Indian Law and Order Commission, Hearing on Tulalip Indian Reservation, WA  
September 7, 2011*

I was a prosecutor for a long time. There are some people that need to be locked up. But there's also a need for some alternatives to incarceration—modern facilities that have either electronic home monitoring, work release, healing programs—especially in Indian Country; some ways that some of these offenders, especially the youthful offenders, can come back to the Tribe, whether it's the use of a sweat lodge, whether it's the use of an elders council, or a peacemaker court. These are important alternatives I think that have to be included in any corrections model.

*Philip Harju, Tribal Attorney, Cowlitz Indian Tribe,  
Testimony before the Indian Law and Order Commission, Hearing in Portland, OR  
November 2, 2011*

I think what really needs to be done in a larger focus is to look at the prevention efforts. Ninety-seven percent of our calls are for domestic violence and drunken driving. And they're not bad people; they just have a bad habit. And I really feel that once we beef up our efforts on that—that side will go a long ways in Indian Country.

*Ivan Posey, Chairman, Chairman, Eastern Shoshone Tribe on the Wind River Indian Reservation  
Testimony before the Indian Law and Order Commission, Hearing on Rosebud Indian Reservation, SD  
May 16, 2012*

Charitable Trusts demonstrates that alternatives as basic as probation and parole rule changes generate substantial cost savings.<sup>54</sup> The Annie E. Casey Foundation, which has helped design and evaluate alternatives to detention for juveniles across the United States (including the San Bernalillo County program), has concluded that incarceration can be comparatively wasteful of taxpayers' money in many cases.<sup>55</sup>

Numerous witnesses at the Commission's field hearings expressed a desire for greater use of alternatives to detention in Indian country. This finding echoes feedback provided to the Departments of Justice and the Interior in government-to-government consultations concerning the Departments' implementation of TLOA. In fact, the leading conclusion from the consultations is that "Alternatives to incarceration (which could include treatment) should be the paramount objective in any plan to address the corrections aspect of public safety in Tribal nations. Detention of Tribal members should be a rare exception in the corrections context, where many of the offenders are suffering the effects of poverty, isolation and substance abuse."<sup>56</sup>

From the Tribal standpoint, this finding is neither surprising nor new. Tribes are long-time advocates for alternative approaches. It is difficult to find a policy paper, research study, or evaluation report from the past 20 years that addresses Indian country corrections that does not call for more alternatives to detention. In part, the emphasis reflects the strong similarity between alternative sentencing and Tribes' traditional approaches to justice—which, echoing the *Crow Dog* case from long ago, focus on making reparations, healing victims and offenders, and restoring community.

But the Tribal orientation is more than "cultural correctness." It also reflects the evidence (gathered through lived experience prior to *Crow Dog* and through more academic methods in the modern era) that alternatives are more effective than purely punitive measures. They are better able to address the fundamental causes of crime and violence. Today, alcohol and drug addiction is associated with much of the misery and crime in Indian country. Looking deeper still, America's historical Indian policies, which focused on colonial domination and dispossession, have led to economic, social, and political marginalization within once healthy and self-sustaining Indian nations. The conditions of marginalization have given rise to accumulated feelings of powerlessness, hopelessness, and lack of personal value—that, in turn, lead to substance abuse, anger, and violence. Unless justice responses address these addiction and mental health concerns, little true progress can be made against Indian country crime.<sup>57</sup>

The Commission concludes that creating and maintaining fair, restorative, culturally compatible, and community healing justice institutions is a primary goal of many Indian nations. Without the option to build culturally acceptable Tribal justice institutions that are directly accessible and accountable to local citizens, Tribal community members

Mike was an individual who I had the opportunity to come across when I was Chief of Police on the Crow Reservation. Mike was not a criminal, but he had an alcohol and substance abuse problem that caused him to what I call “do a life sentence two weeks at a time” in Indian country jails. We would get called because he would be intoxicated. We would go; we would bring him to the detention center. We would book him in, and we could have sent him over to the Tribal court Monday. He would have been fine by himself just to walk over there. That’s who he was when he was not intoxicated. And the judge would then put him back into our facility for two weeks, and while he was in there he was great. He would come, work, clean and vacuum and was just a model human being—not [just] a model inmate—but a model human being, a person you liked to be around. But then he would get out because we didn’t provide programs to address his addictions . . . and then shortly thereafter he would be back in that same cycle . . . I was happy to hear there’s a happy ending to that story, to his story. I didn’t do anything to help him at the time. I could have, but that’s not what I was thinking at the time. But somebody got to him, and now he is actually working at the Seven Hills Treatment Center on the Crow Indian Reservation in its substance abuse program, not as a counselor, but as a custodian, kind of a maintenance man there. I got an opportunity to talk to him not too long ago, and he was so proud to tell me that he has been sober for all those months and is doing good . . . . If Mike can do it, anybody can do it. So we want to get out of the business of warehousing our people, and [start] looking at alternatives to sentencing, treatment, rehabilitation, those types of efforts.

*Darren Cruzan, Director, BIA-OJS,  
Testimony before the Indian Law and Order Commission, Hearing in Arlington, VA  
March 7, 2012*

will consider their Tribal governments as failures and will tend not to freely collaborate. Associated Federal- and State-managed justice systems will frequently be seen by many Tribal members as coercive, discriminatory, and self-serving. Tribal economic and political development will be seriously impaired, resulting in continued social distress, resistance, and alienation.

In making these recommendations, the Commission stresses that many crimes will and should remain within the Federal and State adversarial court system. However, many lesser crimes and civil matters can be managed by alternative methods. By way of illustration, the Navajo Nation has a peacemaker court, limited to non-lawyers and based on community mediation by a court-certified lay peacemaker, on whom Navajo District Court judges often rely in determining criminal sentencing. Such approaches have worked well for decades, if not centuries, and hold tremendous promise for adjudicating more disputes at less cost and for determining sentences where, based on community norms and mores, the punishment fits the crime.

Yet, the call for more alternatives to detention programs in Indian country also proves there are too few. The Indian Law and Order Commission heard testimony about exemplary programs, including the Leech Lake Band of Ojibwe Joint Jurisdiction Wellness Court and Tulalip Tribes Alternative Sentencing Program. Why are there not even more? And why are the extant programs threatened?

A review of many successful programs inside and outside Indian country points to the reasons. Positive outcomes from alternatives to detention programs depend on having:

- judges or other sentencing decision makers who are well-informed about sentencing options;
- a legal code that supports alternative sentencing and does not, by default, create a “jail only” option;
- screening mechanisms that appropriately select individuals into alternative programs and to divert offenders with similar criminal histories into the same supervision groups;
- a strong probation or community oversight unit that is able to manage the alternatives program; and
- access to the array of services that will help equip the offender to navigate the pathway away from recidivism.<sup>40</sup>

Testimony and other data available to the Commission indicate that at present, only some Tribes are in a position to achieve success. But with targeted assistance and relief from Federal command-and-control policies, additional advancement can proceed exponentially.

For some of the problems that we have that need resolving, alternative sentencing is really a good thing. I don't see incarceration as being the answer to our problems. We have many people who come through our jails, they have a high recidivism rate, but there is little to no programming outside of detention.

*Miskoo Petite, staff member, Rosebud Sioux Tribe Juvenile Detention Center  
Testimony before the Indian Law and Order Commission, Hearing at Rosebud Indian Reservation, SD  
May 16, 2012*

They have to classify the kids and the problems to fit into the Federal programs they have. That can be dealt with [by] interagency funding and coordination. But whenever I talk about that people roll their eyes, "Oh, yeah, well it's human nature not to coordinate."

*Sam Deloria, Director, American Indian Graduate Center  
Testimony before the Indian Law and Order Commission, Hearing at Santa Ana Pueblo, NM  
December 14, 2011*

Most of the wheels of justice actually occur outside of the courtroom. A sovereign must bear the burden of ensuring that all of these various systems are operational. For many Tribal governments tremendous financial barriers stand in the way of implementing justice.

*Montie Deer, Vice Chief Judge, Muscogee Creek Nation  
Testimony before the Indian Law and Order Commission, Hearing in Oklahoma City, OK  
June 14, 2012*

It is important that we not be an island unto ourselves. If Annie Casey (Foundation) didn't teach us anything else, that stakeholders, all the stakeholders needed to be at the table. We were co-equal; we needed to be heard; we needed to give our input if it was going to be a meaningful collaboration . . . . And some of the very important and, maybe indispensable, stakeholders are our community partners.

*John Romero, Judge, Bernalillo County Children's Court and Participant,  
Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative  
Testimony before the Indian Law and Order Commission, Hearing at Santa Ana Pueblo, NM  
December 14, 2011*

- **Trained Sentencing Decision Makers.** Over the last 15 years, numerous Tribal court staff have been trained in the development and management of Tribal “Healing to Wellness” courts, and in 2011, 79 Tribes reported having such forums.<sup>41</sup> These courts “bring together community-healing resources with the Tribal justice process, using a team approach to achieve the physical and spiritual healing of the participant and the well-being of the community.”<sup>42</sup> This description is quite general, yet because Healing to Wellness courts began as drug courts, even the Tribes that have them may be unprepared to offer alternatives to detention to defendants with other offense profiles. Fortunately, infrastructure and some content already exist for training, much of which was created with support from the DOJ.<sup>45</sup>
- **Supportive Legal Codes.** Data from the 2002 survey of Tribal justice agencies show that nearly 200 Tribes provided some intermediate sanctions (sentences that do not involve detention) against adults for criminal violations in Indian country<sup>44</sup>—an indicator of the number of Tribes whose legal codes may provide for alternative sentencing. For Tribes whose law and order codes do not specify sentencing options other than fines and jail time, the opportunity to implement law-backed detention alternatives is limited.
- **Screening Mechanisms.** “A Desktop Guide for Tribal Probation Personnel: The Screening and Assessment Process,” published in 2011 with support from BJA, provides risk evaluation assistance for Tribal sentencing decision-makers. Such information is valuable; nonetheless, if a Tribe does not have its own screening protocol for diversion or staff who know how to use the protocol, it will not have provided the best opportunity for offender success.
- **Probation Programs.** The best available information suggests that many Tribes do not have probation offices: data from the 2002 survey of Tribal justice agencies show that a decade ago, only 41 percent of the 315 responding Tribes operated probation programs.<sup>45</sup> While the numbers surely have risen since, many of these offices are grant-funded and require more financial stability to ensure consistent offender supervision, let alone the option for community-based supervision.
- **Appropriate Services.** In 2011, most Indian country jails had difficulty providing more than a few services (Table 5.2), indicating that it may be equally difficult for Tribes to provide services to offenders supervised in the community. The absence of collaboration across Tribal programs further impedes service provision. Because many of the services needed to assist offenders are not available through OJS or DOJ programs, probation officers must coordinate with providers funded by the Indian Health Service, Bureau of Indian Education, the Substance Abuse and Mental Health

Services Administration (SAMHSA), and others to ensure access for their clients. Moreover, service provision alone is inadequate to support effective alternatives to detention; it also must be coordinated and managed in a way that marks offenders' progress, meets their multiple needs, sanctions slippage, and provides praise for forward momentum.

That lawmakers have sometimes been more interested in expanding jail and prison space than in alternatives to incarceration is yet another challenge. But two recent trends provide counter balance. For one, State governments are increasingly interested in the cost savings achievable through alternatives to detention.<sup>46</sup> In P.L. 83-280 States, this shift may provide new opportunities for Tribal governments to collaborate with States on community supervision partnerships. It may also help Native defendants in State systems retain cultural, community, and family ties that might support their rehabilitation and recovery in some cases.

**Table 5.2 Service Provision by Tribal Jails, 2011**

| Service or program                          | % of facilities* offering services or program |
|---------------------------------------------|-----------------------------------------------|
| Mental health services                      | 93%                                           |
| Drug dependency counseling/awareness        | 84%                                           |
| Alcohol dependency counseling/awareness     | 80%                                           |
| Spiritual counseling                        | 75%                                           |
| Domestic violence counseling                | 54%                                           |
| GED classes                                 | 49%                                           |
| Parenting skills                            | 48%                                           |
| Basic and high school classes               | 43%                                           |
| Life skills & community adjustment programs | 35%                                           |
| Sex offender treatment                      | 12%                                           |

\* Not all facilities responded to this question; base is between 68 and 75 reporting facilities (of 80 total facilities overall in 2011).

Source: Todd Minton, Jails in Indian Country, 2011 at Tables 11 and 12, Bureau of Justice Statistics, DOJ (2012), <http://www.bjs.gov/content/pub/pdf/jic12.pdf>

Second, reentry programming—or the management of a nonviolent offender’s transition out of detention and back into the community—has become a significant focus for the Federal government.<sup>47</sup> The context of reentry programming is post-detention, but its emphasis on offender recovery and restoration, reduced recidivism, and community safety are the same as alternatives to detention programming.<sup>48</sup> As a result, investment in reentry may raise the profile of alternatives to detention in Indian country and create new opportunities to pursue them.

## RECOMMENDATIONS

Based on testimony and its study of the current status of detention and alternatives to detention in Indian country, the Commission makes four recommendations. In nearly every case, they may be understood as detention-specific versions of the broader recommendations on Tribal jurisdiction, justice funding, and intergovernmental collaboration offered elsewhere in this report.

The recommendations also reflect the Commission’s findings concerning the impact and cost-effectiveness of incarceration as compared to alternatives to detention. As Tribes strive to create more self-determined corrections systems, where community safety permits, the Commission encourages a shift away from detention-centered programming, toward more alternatives to detention, more rehabilitation and restoration programs, and more supportive reentry processes. To date, many Tribes have viewed construction of a local jail as a positive for Tribal self-determination and effective crime fighting, and rightly so. But, in planning for the future, Tribes should also be encouraged to ask how Tribal corrections resources can be most effectively spent and whether there are other options for the use and location of detention facilities.

*5.1: Congress should set aside a commensurate portion of the resources (funding, technical assistance, training, etc.) it is investing in reentry, second-chance, and alternatives to incarceration monies for Indian country; and in the same way it does for State governments, to help ensure that Tribal government funding for these purposes is ongoing. In line with the Commission’s overarching recommendation on funding for Tribal justice, these resources should be managed by the recommended Indian country unit in the Department of Justice and administered using a base funding model. Tribes are specifically encouraged to develop and enhance drug courts, wellness courts, residential treatment programs, combined substance abuse treatment-mental health care programs, electronic monitoring programs, veterans’ courts, clean and sober housing facilities, halfway houses, and other diversion and reentry options, and to develop data that further inform the prioritization of alternatives to detention.*

DOJ announced a commitment of more than \$58 million to second-chance and reentry programs in 2013. SAMHSA also declared

the availability of \$12.9 million for offender reentry programs. Especially in response to the Affordable Care Act, the Centers for Medicare and Medicaid Services (CMS) are working to improve access to healthcare during the reentry process. Besides SAMHSA and CMS, other units within the U.S. Department of Health and Human Services have commitments to reentry programming. The U.S. Department of Veterans Affairs also provides funding for reentry through its Health Care for Re-entry Veterans Program.<sup>49</sup> Other funds are available from these and other Federal agencies for the management of alternatives to detention.

The Federal government is committing significant resources to reentry, second-chance, and alternatives to detention programming of which Indian country should receive a commensurate share. Rather than administering these funds in a piece-meal fashion from these many agencies, funds for Indian country should be carved out of each program, consolidated, and managed from a single, tribally focused agency in DOJ. This guarantees funding to Tribes, reduces administrative overhead, and allows greatest flexibility and effectiveness in American Indian programming.

*5.2: Congress should amend the Major Crimes Act, General Crimes Act, and P.L. 83-280 to require both Federal and State courts exercising transferred Federal jurisdiction 1) to inform the relevant Tribal government when a Tribal citizen is convicted for a crime in Indian country, 2) to collaborate, if the Tribal government so chooses, in choices involving corrections placement or community supervision, and 3) to inform the Tribal government when that offender is slated for return to the community.*

This recommendation is a detention-specific version of the recommendations for increased intergovernmental collaboration made elsewhere in this report. Tribal, State, and Federal governments should collaborate to ensure that Tribal governments are knowledgeable about: (1) which of its citizens are in the custody of non-Tribal governments; (2) that each offender's Tribal government has the option to be engaged in decision making regarding corrections placement and supervision; and (3) that the nation is informed about and prepared for the offender's eventual reentry to the Tribal community. This information helps increase Tribal citizens' access to alternatives to detention across a variety of jurisdictional arrangements.

*5.3: Recognizing that several Federal programs support the construction, operation, and maintenance of jails, prisons, and other corrections programs that serve offenders convicted under Tribal law, appropriate portions of these funds should be set aside for Tribal governments and administered by a single component of the U.S. Department of Justice. This includes any funds specifically intended for Tribal jails and other Tribal corrections programs (e.g., those available through the Bureau of Indian Affairs) and a commensurate*

*Tribal share of all other corrections funding provided by the Federal government (e.g., Bureau of Prisons funding and Edward J. Byrne Memorial Justice Assistance Grants/JAG program funding). To the extent that alternatives to detention eventually reduce necessary prison and jail time for Tribal-citizen offenders, savings should be reinvested in Indian country corrections programs and not be used as a justification for decreased funding.*

The Commission has two major concerns with regard to funding for Indian country corrections. The first is that Tribes must receive a fair share of funds available at the Federal level for corrections systems creation and operation. While some corrections funds are specifically designated for Tribes, most are allocated in a manner that privileges State and local governments above Tribal governments. New approaches to funding should ensure that Tribes are treated equally in the allocation of resources.

The Commission's second concern is that savings realized through the creation and increased use of alternatives to detention should not be lost to Tribal governments, which is the case today. Instead, funding should follow each individual offender, so that if an offender's time served is reduced, money that would have been spent on detention is then available for service provision. In the event that the detailed accounting needed to enable such a system proves to be impractical, some scaled-down or simplified version of this "follow the offender" system would still be worthwhile to make the Federal government accountable about the real-dollar value of its investments in Indian country justice programming. Success with alternatives to detention should allow a reprioritization of spending without reducing the pool of money available to Indian country. Similarly, any given Tribe should realize savings it generates through community supervision and reductions in recidivism.

*5.4: Given that even with a renewed focus on alternatives to incarceration, Tribes will continue to have a need for detention space,*

*a) Congress and the U.S. Department of Justice should provide incentives for the development of high-quality regional Indian country detention facilities, capable of housing offenders in need of higher security and providing programming beyond "warehousing," by prioritizing these facilities in their funding authorization and investment decisions; and,*

*b) Congress should convert the Bureau of Prisons pilot program created by the Tribal Law and Order Act into a permanent programmatic option that Tribes can use to house prisoners.*

While the thrust of the overall recommendations in this report is that Tribes should have the freedom to decide how justice monies are used in their communities, the Commission believes that the creation of incentives for regional Indian country detention centers will lead to higher-

quality facilities and more effective in-facility programming. While this approach would mean that some prisoners are housed farther from their home communities than may be ideal, the increased use of alternatives to detention will limit the use of incarceration to those offenders for whom detention makes the most sense. Other offenders will remain in the community under probation and other types of community supervision, which keeps them close to home.

Especially as Tribes move toward implementation of enhanced sentencing and expanded jurisdiction, having Federal BOP space available for incarcerating offenders under Tribal law will be of increasing importance. While there have been concerns that Tribes are not taking advantage of the pilot program,<sup>50</sup> the reality is that meeting the requirements of the enhanced sentencing provisions under TLOA and the expanded jurisdiction under the VAWA Amendments take time. Many Tribes are working toward implementing one or both laws, and to remove the option for BOP placements limits their ability to successfully strengthen their justice systems.<sup>51</sup>

In fact, in addition to transitioning the program from a pilot effort to a permanent collaboration, BOP should consult with Tribes to reduce the administrative burden of using the Federal prison option. Among the few Tribes that have done so or attempted to, the administrative hurdles are significant, and a reduction in these barriers would increase Tribal access. For example, communication to the Commission suggests that the reports mandated by BOP for the placement of prisoners—reports that are completed by Federal pretrial services officers for Federal prisoners—are difficult and unwieldy for Tribal personnel to complete. TLOA already recommends that the Federal probation officers have a role delivering pretrial services and post-sentencing probation; their engagement with administrative reporting would simply be an extension of these services and help ensure appropriate information is provided about prisoners to BOP prior to their transfer.

## CONCLUSION

Despite a growing number of higher-quality detention facilities in Indian country, there is a tremendous need for Tribes and the Federal government to collaborate on improving the condition, programs and services, and functionality of facilities. At the same time, Tribes are deeply interested in expanding available alternatives to detention in their communities. Certainly, upfront investments in improved detention facilities and the creation of quality alternatives to detention programs are necessary. But, because of the substantial cost savings associated with effective alternative programs, the spending profile may soon reflect a redirection of detention dollars, rather than an ongoing need for higher budgets.

Rather than fear such changes, Federal and State leaders should embrace them. Providing greater freedom of choice to Tribal governments to design and run their own correctional systems and to innovate more broadly with alternative (or what many Tribes prefer to call “traditional”) sentencing options, has enormous and largely untapped potential to save Federal and State taxpayers’ money. It can also make Native nations safer and more secure—thereby helping close the public safety gap—by relying on locally based systems that more accurately teach and enforce community values.

## ENDNOTES

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<sup>1</sup> *Ex parte Crow Dog*, 109 U.S. 556 (1883).

<sup>2</sup> *Id.* at 571.

<sup>3</sup> 18 U.S.C. § 1153, 23 Stat. 385 (1885). Despite its remarkable longevity and pervasive impact in Indian country, the Major Crimes Act was attached to the annual congressional appropriations bill for 1885 as a so-called “rider” and never received a legislative hearing in either house of Congress. For a detailed review of the legislative history of the Act, see Troy A. Eid and Carrie Covington Doyle, *Separate But Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1076-85 (2010).

<sup>4</sup> Todd Minton, *Jails in Indian Country*, 2011 at 2, Bureau of Justice Statistics, DOJ (2012), <http://www.bjs.gov/content/pub/pdf/jic11.pdf>.

<sup>5</sup> *Id.* The total population of federal inmates under the jurisdiction of the Federal BOP, part of the DOJ, is approximately 219,000, or slightly less than one-tenth of one percent of the U.S. population. John P. Walters, “Who Gets Sent to Prison?” *The Weekly Standard*, p. 15 (Sept. 19, 2015).

<sup>6</sup> Keith A. Wilmot & Miriam A. Delone, *Sentencing of Native Americans: A Multistage Analysis Under the Minnesota Sentencing Guidelines*, 8 J. ETHNICITY IN CRIM. JUSTICE 8, 151, 172 (2010), <http://dx.doi.org/10.1080/15377938.2010.502821>.

<sup>7</sup> Wilmot & Delone, *supra* note 6 at 172-73.

<sup>8</sup> Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 Marquette L. Rev. 723, 745 (2008).

<sup>9</sup> *Id.* at 811.

<sup>10</sup> STATE OF ALASKA, 2011 CENSUS DEMOGRAPHIC PROFILE, <http://labor.alaska.gov/research> and STATE OF ALASKA DEPARTMENT OF CORRECTIONS, 2011 OFFENDER PROFILE, <http://www.correct.state.ak.us/admin/docs/2011Profile06.pdf>

<sup>11</sup> Testimony of Arthur Pierce, Superintendent of Nation Police, Oneida Indian Nation, meeting of the Indian Law and Order Commission, Nashville, TN, July 12, 2012.

<sup>12</sup> See also USDOJ and DOI, Workgroup on Corrections, *Tribal Law and Order Act: Long Term Plan to Build and Enhance Tribal Justice Systems* 37-38 (2011), (especially pp. 37-38). <http://www.justice.gov/tribal/docs/tloa-tsp-aug2011.pdf>.

<sup>13</sup> Eileen M. Luna-Firebaugh, *Incarcerating Ourselves: Tribal Jails and Corrections*, 83 THE PRISON J. 51, 64 (2003), <http://dx.doi.org/10.1177/0032885502250384>.

<sup>14</sup> The BIA may use a different methodology to count Indian jails, however, as the Office of the Inspector General of the DOI counted 84 jails in 2011 versus 80 reported by the USDOJ in the same year. Compare DOI, Office of the Inspector General, *BIA Affairs Detention Facilities*, Report No.: WR-EV-BIA-0005-2010 (March 2011) and Minton, *supra* note 4.

<sup>15</sup> Much of this money flowed from the DOJ. See Bureau of Justice Assistance, Office of Justice Programs, *Overview of Correctional Facilities on Tribal Lands*, [https://www.bja.gov/Programs/Tribal\\_corrections/index.html](https://www.bja.gov/Programs/Tribal_corrections/index.html); Jimmy Steeve, *Program Performance Report: Correctional Systems and Corrections Alternatives of Tribal Lands, October 2011-March 2012*, USDOJ Bureau of Justice Assistance (2012), [https://www.bja.gov/Publications/CSCATL\\_PPR\\_03-12.pdf](https://www.bja.gov/Publications/CSCATL_PPR_03-12.pdf); USDOJ, Bureau of Justice Assistance, *Fact Sheet: Planning Correctional Facilities on Tribal Lands*, Winter 2009, <https://www.bja.gov/Publications/TribalCorrFacilitiesFactSheet.pdf>. For information on increased spending by the BIA, see Semi-Annual Report to Congress, April 2011, DOI, Office of Inspector General 6, <http://www.doi.gov/oig/reports/upload/SemiannualApril2011Public.pdf>

<sup>16</sup> Todd Minton, *Jails in Indian Country*, 2012 at 1, Bureau of Justice Statistics, DOJ (2013), <http://www.bjs.gov/content/pub/pdf/jic11.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> This is not only a finding of the Indian Law and Order Commission, but also a key conclusion in the DOJ and DOI's Workgroup on Corrections, *supra* note 12.

<sup>19</sup> The BIA-OJS jail is now closed and the Tribe's Corrections Service has since begun operating a new adult detention center. See Rosebud Sioux Tribe Corrections Services website <http://www.rstcorrections.com/web/index.php?siteid=251>.

<sup>20</sup> USDOJ and USDOJ, *supra* note 12; William Daly and James Shorts, From Cell Block to Clubhouse, *AMERICAN JAILS* (September/October 2012), <http://www.readperiodicals.com/201209/2795836991.html>; Salt River Pima Maricopa Indian Community, Department of Corrections, "Corrections Facility," <http://www.srpmic-nsn.gov/government/doc/facility.asp>; Salt River Pima Maricopa Indian Community, Department of Corrections, "FAQ," <http://www.srpmic-nsn.gov/government/doc/faqs.asp>; Salt River Pima Maricopa Indian Community, Department of Corrections, "Latest News," Salt River Department of Corrections, accessed August 1, 2013, <http://www.srpmic-nsn.gov/government/doc/news.asp>.

<sup>21</sup> Minton, *supra* note 16 at 5.

<sup>22</sup> DOI, Office of Inspector General, *Neither Safe nor Secure: An Assessment of Indian Detention Facilities* (September 2004), July 28, 2013, <http://www.hsdl.org/?view&did=688492>.

<sup>23</sup> Minton, *supra* note 16 at 7.

<sup>24</sup> Semi-Annual Report to Congress, April 2011, DOI, Office of Inspector General 6, <http://www.doi.gov/oig/reports/upload/SemiannualApril2011Public.pdf>.

<sup>25</sup> *Id.* at 7.

<sup>26</sup> Minton, *supra* note 4 at 6.

<sup>27</sup> *Id.* Pre-trial detainees composed a consistent 39-44 percent of the tribal jail population over the period 2000-2012.

<sup>28</sup> *Tribes Sentencing Under New Federal Law*, CONFEDERATED UMATILLA J., December 2012, at 3, available at <http://www.umatilla.nsn.us/CUJ%20Dec%202012.pdf>

<sup>29</sup> Rachel Porter, Sophia Lee, & Mary Lutz, *Balancing Punishment and Treatment: Alternatives to Incarceration in New York City; Vera Institute of Justice* (May 2002) (New York study), [http://www.vera.org/sites/default/files/resources/downloads/Balancing\\_ATI.pdf](http://www.vera.org/sites/default/files/resources/downloads/Balancing_ATI.pdf); John M. Ptacin, Jeremy Worley, and Keith Richotte, *The Bethel Therapeutic Court: A Study of How Therapeutic Courts Align with Yup'ik and Community-Based Notions of Justice*, 30 *Am. Indian L. Rev.* 133 (2005) (Bethel, Alaska tribal forums). Roger K. Warren, *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries*, the Crime and Justice Institute, the National Institute of Corrections, & Community Corrections Division 24 (2007) (finding that well-implemented rehabilitation and treatment programs carefully targeted with the assistance of validated risk/needs-assessment tools at the right offenders can reduce recidivism by 10% to 20%), <http://static.nicic.gov/Library/023358.pdf>. Other key literature on the success of alternatives to detention include Michelle Evans-Chase & Huiquan Zhou, *A Systematic Review of the Juvenile Justice Intervention Literature: What It Can (and Cannot) Tell Us About What Works With Delinquent Youth*, 10 *Crime & Delinquency* 1 (December 2012) <http://dx.doi.org/10.1177/0011128712466693> and Vera Institute of Justice, *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* (July 2013), <http://www.vera.org/sites/default/files/resources/downloads/potential-of-community-corrections.pdf>. Comparison across studies suggests that some programs achieve reductions in recidivism even greater than 20%.

<sup>30</sup> See Memorandum re: Costs and Benefits/Costs Avoidance Reported by Drug Court Programs and Drug Court Program Evaluations Reports (rev.), DOJ. BJA Drug Court Clearinghouse, Bureau of Justice Assistance, Office of Justice Programs (August 4, 2011) [http://www.ndcrc.org/sites/default/files/cost\\_benefits\\_costs\\_avoidance.pdf](http://www.ndcrc.org/sites/default/files/cost_benefits_costs_avoidance.pdf). The final sections of this compendium list the non-monetary benefits that derive from drug courts, a type of alternative sentencing.

<sup>51</sup> See, *id.*

<sup>52</sup> Administrative Office of the Courts, Center for Families, Children, and the Courts, *Research Summary: California Drug Court Cost Analysis Study 5* (May 2006), [http://www.courts.ca.gov/documents/cost\\_study\\_research\\_summary.pdf](http://www.courts.ca.gov/documents/cost_study_research_summary.pdf).

<sup>53</sup> Thomas E. Swisstack, Douglas E. Mitchell, & Cynthia Leyba, *Smaller, Smarter and More Strategic: Juvenile Justice Reform in Bernalillo County*, Bernalillo County Youth Services Center Juvenile Detention Alternative Initiative (2011), <http://www.jdaihelpdesk.org/bernalillo/Smaller%20Smarter%20More%20Strategic%20Bernalillo%20County%202011.pdf>.

<sup>54</sup> Pew Center on the States, “*State of Recidivism: The Revolving Door of America’s Prisons*,” (April 2011), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2011/Pew\\_State\\_of\\_Recidivism.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_State_of_Recidivism.pdf). 2015.

<sup>55</sup> The Annie E. Casey Foundation, *No Place For Kids The Case for Reducing Juvenile Incarceration* (2011), [http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ\\_NoPlaceForKids\\_Full.pdf](http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf).

<sup>56</sup> USDOJ and USDOJ Workgroup on Corrections, *supra* note 12 at 10.

<sup>57</sup> Historical U.S. American Indian policies include ejection from ancestral lands, confinement on reservations, armed reprisal, disruption of traditional lifestyles, ongoing competition for lands, theft of natural resources, suppression of Native religious practices, involuntary fostering and adoption arrangements for children or their forced attendance at distant boarding schools, prohibition of Tribal language use, and management of all aspects of Indian people’s lives by local “Indian agents” of the U.S. government. Unsurprisingly, these practices have caused intergenerational mental health problems. Often referred to as “historical trauma,” this form of post-traumatic stress disorder is common among peoples who have suffered from genocide, and has been linked to a greater propensity for alcohol and substance abuse and violence. In the simplest—but accurate—terms, those who have been exposed to violence tend to perpetuate violence, harming themselves, their families, and their communities. See Teresa Evans-Campbell, *Historical Trauma in American Indian/ Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities*, 25 J. OF INTERPERSONAL VIOLENCE 316 (March 2008); Historic Trauma May Be Causing Today’s Health Crisis, Public Broadcasting System, Indian Country Diaries Series, Sept. 2006, <http://www.pbs.org/indiancountry/challenges/trauma.html> (There also is an informative film clip at this site.).

<sup>58</sup> Korey Wahwassuck, John P. Smith, & John R. Hawkinson, *Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction*, 36 William Mitchell L. Rev. 859 (2009): 859-897; Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733 (2008); Testimony of Korey Wahwassuck, Hearing of the Indian Law and Order Commission, Salt River Indian Reservation, January 13, 2012 and Telephone Interview with the Commission, December 11, 2012, on file with the Commission.

<sup>59</sup> *Tulalip Alternative Sentencing Program*, in Harvard Project on American Indian Economic Development, HONORING NATIONS, 2006: CELEBRATING EXCELLENCE IN TRIBAL GOVERNANCE (2007), 8-13, available at <http://hpaied.org/images/resources/publibrary/Tulalip%20Alternative%20Sentencing%20Program.pdf>

<sup>40</sup> See, e.g., Mark Martin, *Native American and Alaskan Technical Assistance Project, Project Guide: Alternatives to Incarceration of Offenders*, National Institute of Corrections and Bureau of Justice Assistance, <https://www.bja.gov/Publications/AltIncarceration.pdf>; Karen Gottlieb, *Lessons Learned in Implementing the First Four Tribal Wellness Courts*, unpublished DOJ paper (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/251168.pdf>.

<sup>41</sup> See the table “Number and Types of Drug Courts (As of December 31, 2011),” on the webpage National Institute of Justice, “Drug Courts,” <http://www.nij.gov/topics/courts/drug-courts/>.

<sup>42</sup> Tribal Law and Policy Institute, *Tribal Healing to Wellness Courts: The Key Components*, Office of Justice Programs, USDOJ, NDJ 188154 at iii (April 2005), <https://www.ncjrs.gov/pdffiles1/bja/188154.pdf>.

<sup>43</sup> Fortunately, infrastructure is in place for such training; in part, through DOJ investments, entities such as the National Tribal Judicial Center of the National Judicial College and the Tribal Law and Policy Institute are in a position to offer training concerning broader alternatives to detention options. For information on the National Tribal Judicial Center see <http://www.judges.org/ntjc/>; for information on the Tribal Law and Policy Institute's Healing to Wellness Court trainings see [http://www.tribal-institute.org/lists/drug\\_court.htm](http://www.tribal-institute.org/lists/drug_court.htm) and <http://enhtraining.tlpi.org>. See also Kimberly A. Cobb & Tracy G. Mullins, *Tribal Probation: An Overview for Tribal Court Judges*, Bureau of Justice Assistance, USDOJ (May 2010), <http://www.appa-net.org/eweb/docs/appa/pubs/TPOTCJ.pdf>; Charlene Jackson, Carrie Garrow & Lawrence Lujan, *The Judge's Role in Tribal Healing to Wellness Court*, Presentation at the National Association of Drug Court Professionals 2015 Annual Drug Court Training Conference, Arlington, VA, July 15, 2013, available at [http://www.tribal-institute.org/download/NADCP/2015/Judges%20in%20Healing%20to%20Wellness%20Court%20-%20July%202015%202013%20\[Read-Only\].pdf](http://www.tribal-institute.org/download/NADCP/2015/Judges%20in%20Healing%20to%20Wellness%20Court%20-%20July%202015%202013%20[Read-Only].pdf)

<sup>44</sup> Steven W. Perry, *Census of Tribal Justice Agencies in Indian Country*, 2002 at 43, 52-56, USDOJ, Bureau of Justice Statistics (December 2005), <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>45</sup> *Id.* at 43.

<sup>46</sup> Ram Subramanian & Rebecca Tublitz, *Realigning Justice Resources: A Review of Population and Spending Shifts in Prison and Community Corrections*, Vera Institute of Justice (September 2012), [http://www.vera.org/sites/default/files/resources/downloads/Realigning\\_Justice\\_full\\_report.pdf](http://www.vera.org/sites/default/files/resources/downloads/Realigning_Justice_full_report.pdf).

<sup>47</sup> *Press Release, Justice Department Announces \$58 Million to Improve Reentry Outcomes: Grants Support Improved Probation, Parole and Reentry Programs*, USDOJ, Office of Public Affairs, October 1, 2012, <http://www.justice.gov/opa/pr/2012/October/12-ag-1185.html>.

<sup>48</sup> The connections are especially evident in recent guides for tribes concerning the development of alternatives to detention and reentry programming. On the development of alternatives to detention, see Martin, *supra* note 40. On the development of reentry programming, see Ada Pecos Melton, Roshanna Lucero, & David J. Melton, *Strategies for Creating Offender Reentry Programs in Indian Country*, American Indian Development Associates (August 2010), [http://www.aidainc.net/Publications/Full\\_Prisoner\\_Reentry.pdf](http://www.aidainc.net/Publications/Full_Prisoner_Reentry.pdf).

<sup>49</sup> On DOJ funding see, *Press Release, Justice Department Announces \$58 Million to Improve Reentry Outcomes: Grants Support Improved Probation, Parole and Reentry Programs*, USDOJ, Office of Public Affairs, October 1, 2012, <http://www.justice.gov/opa/pr/2012/October/12-ag-1185.html>. On SAMHSA funding, see *SAMHSA Bulletin, SAMHSA is accepting applications for up to approximately \$12.9 million in Offender Reentry Program grants*, February 19, 2013, <http://www.samhsa.gov/newsroom/advisories/1302192652.aspx>. On CMS efforts, see Council of State Governments Justice Center, *The Implications of the Affordable Care Act on People Involved with the Criminal Justice System*, CORRECTIONS.COM, May 27, 2013, <http://www.corrections.com/news/article/33145-the-implications-of-the-affordable-care-act-on-people-involved-with-the-criminal-justice-system>; Susan D. Phillips, *The Affordable Care Act: Implications for Public Safety and Corrections Populations*, The Sentencing Project, (September 2012), [http://sentencingproject.org/doc/publications/inc\\_Affordable\\_Care\\_Act.pdf](http://sentencingproject.org/doc/publications/inc_Affordable_Care_Act.pdf). On other DHHS efforts see Erica Meade and Linda Mellgren, *Overview and Inventory of HHS Efforts to Assist Incarcerated and Reentering Individuals and their Families*, Office of the Assistant Secretary for Planning and Evaluation (January 2010), <http://aspe.hhs.gov/hsp/11/incarceration&reentry/Inventory/index.pdf>. On Veterans Association funding see program information on the webpage *Incarcerated Veterans*, National Coalition for Homeless Veterans, [http://nchv.org/index.php/help/help/incarcerated\\_veterans/](http://nchv.org/index.php/help/help/incarcerated_veterans/). The Veterans Administration also supports a pilot effort, the Incarcerated Veterans Outreach Initiative, homepage at <http://www.nynj.va.gov/homeless.asp>.

<sup>50</sup>United States General Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Department of Justice Could Clarify Tribal Eligibility for Certain Grant Funds* (May 30, 2012), <http://www.gao.gov/assets/600/591213.pdf>.

<sup>51</sup>In fall 2013, the Commission has learned that at least these Tribes are may be actively pursuing TLOA implementation, or have already done so: Chickasaw Nation, Eastern Band of Cherokee, Fort McDowell Yavapai Nation, Gila River Indian Community, Hopi Tribe, Rosebud Sioux Tribe, Salt River Pima-Maricopa Indian Community, Southern Ute Indian Tribe, Snohomish Tribe of Indians, and Tulalip Tribes and Confederated Tribes of the Umatilla Indian Reservation.

