



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.”¹⁵ 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.³⁰

*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. 83-280 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. 85-280 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. 83-280 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.

6.3: 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. 83-280, 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. 83-280 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. 83-280 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.”⁸³

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*, 52 (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/imagenes/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*, 52 (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/oia/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. 2005) (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).

⁸⁷25 U.S.C. § 1901 *et seq.*

⁸⁸560 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).

