

The Kids Aren't Alright: An Argument to Use the Nation Building Model in the Development of Native Juvenile Justice Systems to Combat the Effects of Failed Assimilative Policies

Ryan Seelau^{*}

INTRODUCTION

A.J.¹ is 17 years old. He is Native American.² He is one of more than 400,000 Native youths living on a reservation in the United States.³

^{*} S.J.D., University of Arizona, 2009; LL.M., University of Arizona, 2006; J.D., University of Iowa, 2005. I would like to thank the following individuals for their contributions to this piece (in alphabetical order): Raymond Austin, Stephen Cornell, Carole Goldberg, James Hopkins, Jacquelyn Kasper, Ian Record, Marren Sanders, Laura Seelau, and Robert Williams, Jr.

¹ “Any Juvenile.” Specifically, this term refers to any Native American juvenile living on a reservation. I use this fictional name to exemplify what commonly occurs on Native American reservations when juveniles are caught committing delinquent acts.

² The terms “Native American,” “American Indian,” “Indian,” and “Indigenous peoples” are used interchangeably in this paper, and all refer to the same groups of people—namely, those individuals who self-identify as one of the aforementioned terms, and who live in the United States. Although sometimes referenced separately, “Alaska Natives” are also included in this group. However, it should be noted that my paper is largely written from the context of a federally-recognized tribe that is not subject to Public Law 280, which is federal legislation that granted certain states the right to assume control of Native American policy within their borders. Pub. L. No. 83-280, 67 Stat. 588. Although I hope that my argument will fit various contexts (including those of Alaska Natives, state-recognized tribes, and tribes subject to Public Law 280), it does not explicitly address the variations in the legal frameworks operating in each of those contexts. For more information on Public Law 280 and how it relates to tribal jurisdiction, see, for example, Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627 (1998).

³ Press Release, U.S. Census Bureau, Nation’s Population One-Third Minority, (May 10, 2006), available at <http://www.census.gov/newsroom/releases/archives/population/cb06-72.html> (indicating that there are over 4.45 million individuals who identify as

Like a significant portion of youths in this country, A.J. has had some run-ins with the law.⁴ And like a significant portion of Native nations⁵ in this country, A.J.'s nation has a tribal justice system that handles juvenile offenses.⁶ Over the years, A.J. has become very familiar with this system. He was introduced to it at age fourteen when he was caught vandalizing the local health facility. After dealing with the authorities (and his parents), A.J. found himself in tribal court. What confronted him there would be familiar to anyone who has ever been in a courtroom or seen a courtroom drama on television. Despite living on a reservation, A.J. found himself in an Anglo-American courtroom, complete with petitions, prosecutors, and a robed judge sitting behind an imposing desk. To A.J., it was familiar from television, but foreign and cold in many other respects. The result of A.J.'s first courtroom appearance was typical for youths in his situation, regardless of what court they might find themselves in: A.J. was required to do community service as punishment for his actions.⁷

either American Indian or Alaska Native alone, or in conjunction with another race, and of those individuals, twenty-nine percent were under the age of eighteen, for a total Native youth population of approximately 1.3 million); STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, at 2-3 (2005) (indicating that 43.5% of all American Indians resided on a federal reservation or in a tribal statistical area during Census 2000).

⁴ CRYSTAL KNOLL & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DELINQUENCY CASES IN JUVENILE COURT, 2008, at 1-2 (2011) ("It is estimated that juvenile courts handled nearly 1.7 million delinquency cases nationwide in 2008. . . . In 2008, white youth accounted for 78% of the U.S. juvenile population, black youth 16%, Asian youth (including Native Hawaiian and Other Pacific Islander) 5%, and American Indian youth (including Alaska Native) 1%. Sixty-three percent of delinquency cases handled in 2008 involved white youth, 34% black youth, 1% Asian youth, and 1% American Indian youth.").

⁵ The terms "Native nations," "bands," and "tribes" are used interchangeably in this paper and refer to federally-recognized Indian tribes, which includes "Alaskan Native Villages" and "Tribal Statistical Areas" as well. As much as possible, I try to use the term "Native nations"; however, when quoting other sources I retain the wording originally used.

⁶ PERRY, *supra* note 3, at iii, 20 (indicating that of three hundred and fourteen responding tribes, one hundred and fifty-seven (fifty percent) of them handle juvenile justice issues with some sort of on-reservation justice system).

⁷ Approximately seventy-three percent of Native nations who utilize a tribal justice system (or, alternatively, forty-three percent of all Native nations) use some type of community service when dealing with juvenile misconduct. *See id.* at 43.

One year later, A.J. was back in the tribal court. The procedures and appearance of the courtroom had not changed in that time, but A.J.'s offense had. This time, A.J. was caught trying to steal from the local convenience store while under the influence of alcohol. Fortunately for A.J., his nation runs an alcohol rehabilitation program modeled after a state facility.⁸ He was sent there and was able to stay on the reservation. For a brief period of time, the program seemed to have some positive effects on A.J., and he managed to stay out of trouble.

However, all of that changed last Christmas Eve when A.J. and two of his friends got drunk, then high, and, finally, bored, and started to wander around the town. This eventually led to a run-in with a local community member, where words were exchanged and punches were thrown. A.J. was arrested yet again. Fortunately for A.J., the federal government declined to exercise jurisdiction over the matter—deeming it too unimportant for federal resources.⁹ So now A.J. finds himself back in tribal court for the third time in his young life. Once again, a petition is filed with the court, the attorneys say their piece, and the tribal judge questions A.J.—but this time there isn't much more the tribal court can do. The tribe has no residential treatment facility of its own.¹⁰ The tribe has no traditional programs to deal with troubled youths,¹¹ and sending A.J. back to alcohol rehabilitation seems inadequate. Ultimately, the court has to choose between two imperfect options: sending A.J. to a state-run facility where his future will be dictated by those outside of his

⁸ Approximately seventy-four percent of Native nations who utilize a tribal justice system (or, alternatively, forty-four percent of all Native nations) use some sort of alcohol rehabilitation program when dealing with juvenile misconduct, although such programs are not always tribally-run. *See id.*

⁹ Christopher Hartney, *Native American Youth and the Juvenile Justice System*, FOCUS (Nat'l Council on Crime & Delinquency, Oakland, Cal.), Mar. 2008, at 8 (noting that "a large number of crimes committed against residents of reservations go uninvestigated by any law enforcement agency" and that state or federal agencies may not pursue crimes for a variety of reasons).

¹⁰ Less than ten percent of Native nations have their own juvenile residential facility. *See PERRY, supra* note 3, at 43.

¹¹ Many Native nations do not utilize traditional practices when dealing with their youth. For example, only twelve percent of Native nations employ victim-offender reconciliation—which, for some Native nations, is likely a more culturally appropriate practice than other practices commonly employed, such as monetary fines (which forty-four percent of Native nations use) and/or community service (which forty-three percent of Native nations use). *See id.*

culture and community, or, essentially, do nothing and let A.J. remain on the reservation.¹²

A.J.'s story is one that is repeated throughout Indian Country¹³ time and time again.¹⁴ While it is commendable that his nation has invested the time and resources to get to the point where there is a justice system that can hear juvenile issues and an alcohol rehabilitation facility within the community, is this all that can be done? After all, the results of the nation's efforts with A.J. do not seem much different from those of county and state courts across this country.¹⁵ Is there a reason for this?

¹² *Id.* ("Of the 175 reservations with a tribal court system . . . 68% placed juveniles in county or non-tribal agency facilities."); see also Sarah M. Patterson, *Native American Juvenile Delinquents and the Tribal Courts: Who's Failing Who?*, 17 N.Y.L. SCH. J. HUM. RTS. 801, 815 (2000) ("Tribes continue to have to choose between losing their sovereignty and allowing juveniles to enter the state facility, thus, subjecting them to adjudication under state jurisdiction; or, to inadequately rehabilitate and detain the offender creating a danger to the juvenile and to the community."); Kim Baca, *State Law Boosts Tribal Youth Programs*, SANTA FE NEW MEXICAN, Oct. 13, 1999, at B-1 ("If you get a kid who commits murder and the federal government declines to prosecute it, the only thing the kid goes before is tribal court, which may place him on probation. But this may be a kid who needs incarceration . . .").

¹³ As defined by 18 U.S.C. §1151 (2006), "Indian Country" means "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

¹⁴ See, e.g., Matt Kelley, *American Indian Youth Crime Rises*, ASSOCIATED PRESS, July 13, 2000, available at <http://www.apnewsarchive.com/2000/American-Indian-Youth-Crime-Rises/id-e54172ef968056b348d31ddcd3b77c0b>; Kevin Taylor, *Case Opens Tribal Juvenile Justice System*, SPOKESMAN-REVIEW, Jan. 26, 2004, at A1; Larry Oakes, *The Lost Youth of Leech Lake*, STAR TRIBUNE, April 25, 2004, at 23A.

¹⁵ It may come as no surprise that systematic research probing on-reservation juvenile recidivism rates is practically nonexistent for comparison, but even without such data there are obvious flaws in how county and state systems are combating juvenile recidivism. See, e.g., WASH. STATE SENTENCING GUIDELINES COMM'N, OFFICE OF FIN. MGMT., *RECIDIVISM OF JUVENILE OFFENDERS: FISCAL YEAR 2007*, at 1 (2008) available at http://www.cfc.wa.gov/PublicationSentencing/Recidivism/Juvenile_Recidivism_FY2007.pdf (indicating that approximately fifty-one percent of juvenile offenders in 2007 had committed previous offenses, including approximately fifty-six percent of Native American juveniles who entered the Washington state system); JUVENILE JUSTICE INFORMATION SYSTEM, OR. YOUTH AUTH. & OR. JUVENILE DEP'T.

Should Native nations expect better results than states or the federal government when their juvenile justice systems are largely indistinguishable? Is there anything Native nations can do to better serve juveniles and their communities?

In this paper, I will argue that something can be done to help end the cycle portrayed by A.J.'s case. This argument will be presented in three parts:

First, I will examine how Native-American juveniles interact with justice systems both on and off the reservation. I will show that when Native youths are forced to interact with state or federal justice systems, they are exposed to values and policies designed by foreign—that is, non-Native—governments. The consequence of such interactions is that, over time, relationships between Native peoples and their children are disrupted. I will also demonstrate that many Native nations are utilizing their own systems to adjudicate their youths, which is a positive development. However, oftentimes these systems mirror the Anglo-American juvenile justice systems used by the states and federal government and do not reflect Native concepts of justice.

Second, I will present the theoretical framework for attacking the problems raised in this paper: the Nation Building Model. This model wrestles with the question, “Why are some communities able to achieve their cultural, economic, political, and social goals better than others?” Several decades of research by the Harvard Project and NNI have produced five principles that are key to successful community development. Of particular note is the principle of “cultural match,” which states that governing systems will be more effective if they reflect the values and expectations of the community in which they function. Ultimately, I will argue that these principles can be used to help improve the lives of Native juveniles.

DIRS. ASS'N, RECIDIVISM CHARTS AND TRENDS (2007), at 2-6 (2008), *available at* http://www.oregon.gov/OYA/reports/jjis/2008/2007_recidivismtrendscharts.pdf. For a more comprehensive picture of juvenile justice successes and failures across the country, see generally CHARLENE RHYNE ET AL., MULTNOMAH CNTY. DEP'T OF CMTY. JUSTICE, JUVENILE CRIME TRENDS AND RECIDIVISM REPORT (2008), *available at* http://web.multco.us/sites/default/files/dcj/documents/juvenile_crime_trends_08.pdf; see also HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT (2006), *available at* <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

Finally, I will argue that applying the Nation Building Model to the realm of juvenile justice means that Native nations should seriously consider designing or redesigning their own juvenile justice systems to reflect their own cultural values and expectations. Specifically, I will suggest that the creation of Native-operated juvenile justice systems is not only consistent with the Nation Building Model, but also is a significant step in exercising real control over the lives of Native-American youths, countering the assimilative effects currently associated with the juvenile criminal justice system, and beginning to improve the day-to-day lives of Native children. To accomplish these goals, I will present several case studies that exemplify how the Nation Building Model can be used effectively and the results that can be produced.

I. JUVENILE JUSTICE ON NATIVE-AMERICAN RESERVATIONS

A. Introduction

Why care about juvenile justice systems at all? The simple answer is that juvenile justice systems interact with children, particularly troubled children, and this is important because children are a vital part of any society. Not only are children important, they also are our future and more valuable than anything on this earth.¹⁶ Native-American societies certainly appreciate the special role children play in the world. For example, one need not look any further than the Lakota Sioux word for child—Wakanyeja—which literally translates as “the child is also holy.”¹⁷ Although there are countless reasons why children are valuable to any community, three are significant for this paper.

First, children are an important part of any family. Although “family” is a term that has different definitions in different cultures,¹⁸ it is universally true that the family is “the most fundamental economic,

¹⁶ See Ada Pecos Melton, *Building Culturally Relevant Youth Courts in Tribal Communities*, in NAT'L YOUTH COURT CTR., SELECTED TOPICS ON YOUTH COURTS: A MONOGRAPH 65, 70 (Tracy Goodwin Mullins ed., 2004); see also *In re Custody of S.R.T.*, 18 Indian L. Rpt. 6158 (Navajo S. Ct. 1991).

¹⁷ Clare E. Lyon, *Alternative Methods for Sentencing Youthful Offenders: Using Traditional Tribal Methods as a Model*, 4 AVE MARIA L. REV. 211, 213 (2006).

¹⁸ AMY BESAW ET AL., HARVARD PROJECT ON AM. INDIAN ECON. DEV'T, THE CONTEXT AND MEANING OF FAMILY STRENGTHENING IN INDIAN COUNTRY: A REPORT TO THE ANNIE E. CASEY FOUNDATION 2, 18-19 (2004).

educational, and health-care unit in society and the center of an individual's emotional life."¹⁹ As one Native author puts it:

Indian people are often seen as too diverse and varied to speak as one; yet every American Indian family shares experiences which have affected both us and our children. . . . All tribes are based upon the family unit, and in all tribes we both share in the love of our children and find meaning in helping them grow to maturity to represent the best that human beings can be. In this an Indian parent is no different from any other parent, and an Indian child no different from any other child, no matter what their race or station in life may be.²⁰

Second, children are the bearers of culture from one generation to the next.²¹ Any society that has unique cultural attributes, customs, norms, rituals, etc., and wishes to have this "cumulative knowledge"²² survive over time, must teach them to someone. Children are the most natural recipients and perpetuators of this knowledge.²³ Even the United States federal government has recognized this, stating, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."²⁴

Finally, children are the decision-makers of tomorrow.²⁵ This is particularly true in Indian Country, which has been growing increasingly younger in recent years.²⁶ As of 2007, approximately one-third of Native

¹⁹ William Byler, *The Destruction of American Indian Families*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* 1, 7-8 (Steven Unger ed., 1977).

²⁰ Carolyn Attneave, *The Wasted Strengths of American Indian Families*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* 29 (Steven Unger ed., 1977).

²¹ Stacie S. Polashuk, *Following the Lead of the Indian Child Welfare Act: Expanding Tribal Court Jurisdiction Over Native American Juvenile Delinquents*, 69 S. CAL. L. REV. 1191, 1209 (1996).

²² Lorie M. Graham, "The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 9-10 (1998).

²³ See Melton, *supra* note 16, at 80; see also Patterson, *supra* note 12, at 810.

²⁴ Indian Child Welfare Act of 1978 § 2, 25 U.S.C. § 1901 (2006).

²⁵ STEPHEN BRIMLEY ET AL., COMPREHENSIVE INDIAN RES. FOR COMTY. AND LAW ENFORCEMENT (CIRCLE) PROJECT, STRENGTHENING AND REBUILDING TRIBAL JUSTICE SYSTEMS 88 (2005).

²⁶ COALITION FOR JUVENILE JUSTICE, ENLARGING THE HEALING CIRCLE: ENSURING JUSTICE FOR AMERICAN INDIAN CHILDREN 6 (2000), available at http://www.juvjustice.org/media/resources/public/resource_135.pdf.

Americans and Alaskan Natives were under the age of twenty.²⁷ For some nations, such as the Northern Cheyenne Nation, the number of individuals under the age of thirty exceeds sixty percent.²⁸ Given these statistics, it is obvious that the future of Native America is in the hands of today's children.

Keeping in mind the significance of children to Native societies, what does the current landscape of juvenile justice on Native-American reservations look like? According to data collected in 2002,²⁹ approximately sixty percent of Native nations have some sort of tribal justice system.³⁰ These systems vary in both their histories and their functionalities, but the vast majority (83.5%) of them do handle juvenile offenses.³¹ Of those Native nations equipped to handle juvenile crime, half of them (eighty nations in total) do so with a separate juvenile court.³² For nations without justice systems, juvenile crime is commonly handled by state (or county) courts, although federal courts—or even

²⁷ See U.S. CENSUS BUREAU, 2009 STATISTICAL ABSTRACT 11 (2009), available at <http://www.census.gov/prod/2008pubs/09statab/pop.pdf> (based on Table 8 there were 2,938,000 individuals in the “American Indian, Alaska Native alone” column and 947,000 of them are listed as nineteen years old or younger (when the category is enlarged to include individuals age twenty-nine or younger, the number is 1,456,000, or about fifty percent of the population), but it is important to note that neither of these numbers includes individuals who indicated that they were two or more races).

²⁸ BRIMLEY ET AL., *supra* note 25, at 88.

²⁹ The data comes from three hundred and fourteen of the three hundred and forty-one federally recognized American Indian tribes in the lower forty-eight states, which is a response rate of more than ninety percent— however, none of the data comes from Alaskan Native villages because of insufficient responses from that area; see PERRY, *supra* note 3, at iii.

³⁰ *Id.* at 19 (for purposes of this data, “tribal justice system” includes at least one of four primary legal institutions: Court of Indian Offenses (also called CFR (Code of Federal Regulation) courts), tribal courts of general jurisdiction, tribal courts of appeal, and/or indigenous forums (also called traditional courts).

³¹ *Id.* at 19, 20. Note, however, that just because a Native nation does handle its own juvenile affairs does not preclude outside authorities (county, state, or federal) from interacting with on-reservation juvenile offenders. For instance, 54.8% of all Native nations (whether they have a justice system or not) are subject to county law enforcement authority in at least some instances when it comes to juvenile delinquency. See Bureau of Justice Statistics, *2002 Census of Tribal Justice Agencies in Indian Country Data File* [hereinafter 2002 Data File], data from questionnaire item A9, <http://bjs.ojp.usdoj.gov/content/pub/sheets/ctjaic02dst.csv>.

³² PERRY, *supra* note 3, at 20.

another nation's tribal court—may be relied upon.³³ This part examines what juvenile justice looks like for Native American youth, whether they are processed on- or off-reservation.

B. Juvenile Justice for Native Americans Off the Reservation

Frequently, Native youths end up in state or federal systems and, once there, research indicates they are treated more harshly than their non-Native counterparts. Not only does the current construction of the criminal justice system routinely expose Native juveniles to foreign courts, but it also often acts to separate Native juveniles from their families, cultures, and nations. When Native youth are adjudicated in non-Native systems, they are being exposed to assimilative forces.³⁴

How do Native youth end up in foreign systems in the first place? Criminal jurisdiction in Indian Country is a complicated topic and two centuries of congressional acts and Supreme Court decisions have created a jurisdictional maze in Indian Country.³⁵ The race of the criminal and the victim, the type of crime, and where the crime was committed are all

³³ See *id.* (“About 140 (45%) of all tribes relied on state court judicial services in some form.”); see also JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, JUVENILE DELINQUENTS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1997), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/Jdfcjs.pdf> (indicating that sixty-one percent of juveniles confined in federal prisons were Native-American and that this occurs because “[w]hen Native American tribal jurisdictions lack resources or jurisdiction or where there is a substantial federal interest, a U.S. attorney may initiate juvenile delinquency proceedings”).

³⁴ In the United States, this has been occurring with respect to criminal justice for more than a century. See, e.g., Polashuk, *supra* note 21, at 1202; CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 37 (2004).

³⁵ See generally Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976). It should be noted that adding to the jurisdictional maze for many Native nations is Public Law 280, which transferred various forms of jurisdiction over Native nations from federal authorities to state authorities including, in some cases, jurisdiction over juvenile delinquency. Pub. L. No. 83-280, 67 Stat. 588. Fully dissecting the effects of Public Law 280 on juvenile justice in individual contexts is beyond the scope of this paper, but the argument I am making in this paper should have (at least limited) application to Native nations regardless of whether they are in Public Law 280 states or not. For more information on Public Law 280 and its effects on criminal jurisdiction, see, for example, Jimenez & Song, *supra* note 2.

factors considered when determining jurisdiction in Indian Country.³⁶ Generally speaking, the jurisdictional rules for Native juveniles mirror those that govern Native-American adults.³⁷ Thus, a Native nation has jurisdiction over a juvenile offender if that same Native nation would have jurisdiction over an adult committing the same act.³⁸

Under the current jurisdictional scheme, a Native juvenile may end up under the jurisdiction of a state for a variety of reasons. When a Native youth commits a delinquent act outside of Indian Country, Native nations do not have jurisdiction, regardless of where the Native juvenile is domiciled.³⁹ In such cases, it is the state that usually has jurisdiction.⁴⁰ Meaning, Native youths are subject to state law and the state juvenile justice system. Other Native youths automatically fall under state jurisdiction by virtue of Public Law-280.⁴¹ Furthermore, the vast majority of Alaskan-Native juveniles are subject to state jurisdiction under the reasoning articulated by the Supreme Court in *Alaska v. Native Village of Venetie Tribal Government*,⁴² which held that the Alaska Claims Settlement Act of 1971⁴³ eliminated virtually all of Indian Country in

³⁶ See, e.g., Robert A. Silverman, *Patterns of Native American Crime*, in NATIVE AMERICANS, CRIME AND JUSTICE 58, 66-67 (Marianne O. Nielsen & Robert A. Silverman eds., 1996).

³⁷ Patterson, *supra* note 12, at 808.

³⁸ *Id.* Generally, Native nations do not have jurisdiction over non-Native juveniles who commit crimes on the reservation. See, e.g., Polashuk, *supra* note 21, at 1203; see also Silverman, *supra* note 36, at 66 (the fact that Native nations do not have jurisdiction over non-native juveniles can be a serious problem when no other government chooses to exercise its jurisdiction over non-Native crime in Indian Country).

³⁹ Max Minzer, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L. J. 89, 92 (2005) ("In general, tribes and the federal government have jurisdiction and authority over lands within Indian Country and the state controls lands outside Indian Country.").

⁴⁰ Polashuk, *supra* note 21, at 1208; Patterson, *supra* note 12, at 811-12.

⁴¹ Pub. L. No. 83-280, 67 Stat. 588. The criminal provisions of this law, as amended, are codified at 18 U.S.C. §1162 (2006) (mandatory states) and 25 U.S.C. §1321 (2006) (optional states). For a closer look at Public Law 280's reach and effect in Indian Country, see generally, Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975); Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006).

⁴² 522 U.S. 520 (1998).

⁴³ Pub. L. No. 92-203, 85 Stat. 689 (codified as amended at 43 U.S.C. § 1601, et seq.).

Alaska.⁴⁴ The *Venetie* decision made it clear that Alaskan Native villages—including the juveniles living in those villages—are subject to state jurisdiction.

In addition to these statutory-based mechanisms that create state jurisdiction over Native youth, oftentimes when a Native nation lacks the judicial, financial, or treatment resources to handle juvenile delinquents, the nation will transfer jurisdiction to the state and contract for use of the state's judicial and treatment systems.⁴⁵ For these Native nations, the alternative to turning their juvenile delinquents over to the state is to merely return them to their homes without any formal processing or treatment whatsoever.⁴⁶

Native juveniles can also easily fall under federal jurisdiction. For instance, federal courts have jurisdiction over any crime committed in Indian Country that is listed in the Major Crimes Act.⁴⁷ Federal courts also have jurisdiction over crimes that fall under the Indian Country Crimes Act⁴⁸ or the Assimilative Crimes Act.⁴⁹ However, these two Acts only apply when a Native individual commits a crime against a non-Native in Indian Country. Yet even in those circumstances, their applicability is limited⁵⁰ and the Native nation retains concurrent

⁴⁴ 522 U.S. 520, 524 (1998) (“To this end, ANCSA revoked ‘the various reserves set aside . . . for Native use’ by legislative or Executive action, except for the Annette Island Reserve inhabited by the Metlakatla Indians, and completely extinguished all aboriginal claims to Alaska land.”)

⁴⁵ See, e.g., *In re Elmer J.K.*, 591 N.W.2d 176, 177 (Wisc. Ct. App. 1999); see also Patterson, *supra* note 12, at 813 (if a Native nation has jurisdiction over a Native juvenile delinquent and willingly turns that youth over to the state, and that juvenile then commits a crime while in state custody, the state will have exclusive jurisdiction assuming this second crime did not take place in Indian Country).

⁴⁶ Patterson, *supra* note 12, at 811.

⁴⁷ Amy J. Standefer, *The Federal Juvenile Delinquency Act: A Disparate Impact on Native American Juveniles*, 84 MINN. L. REV. 473, 483 (1999); see also, Polashuk, *supra* note 21, at 1208 (technically, if federal courts want to exercise jurisdiction over Native juveniles they are doing so through the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-42 (2006), which makes federal laws applicable to juveniles in various circumstances).

⁴⁸ Polashuk, *supra* note 21, at 1203, 1208.

⁴⁹ *Id.* at 1205-06, 1208.

⁵⁰ DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 491 (5th ed. 2005) (for certain Native nations, the scope of these statutes may further be limited by treaty provisions).

jurisdiction.⁵¹ Finally, the Federal Juvenile Delinquency Act (FJDA)⁵² allows federal courts to take jurisdiction over Native juveniles who violate any federal law prior to their “eighteenth birthday which would have been a crime if committed by an adult,”⁵³ so long as the Attorney General, after investigation, certifies to a federal district court one of the following: (1) state courts do not have jurisdiction or refuse to assume jurisdiction; (2) the state does not have adequate services for the juvenile in question; or (3) there is a substantial federal interest in adjudicating the juvenile in the federal system.⁵⁴ In such cases, the Attorney General’s certification need not address the issue of tribal jurisdiction or tribal juvenile services.⁵⁵

To summarize, Native nations maintain either exclusive or concurrent jurisdiction over any crime committed by an Indian against another Indian in Indian Country. However, there are numerous circumstances under which a Native juvenile might be pulled into the state or federal system. When this happens, Native nations are unable to apply their own “traditions and customary rehabilitative” processes to their own children.⁵⁶ Foreign procedures and values are imposed upon Native youths when they are subject to state or federal jurisdiction.⁵⁷ To complicate matters further, once a juvenile enters an outside system, he or she might end up being placed in an off-reservation residential treatment facility, which will separate the youth from his or her family and community. This occurs especially frequently in federal juvenile

⁵¹ *Id.* But see Standefer, *supra* note 47, at 488; Polashuk, *supra* note 21, at 1204-05 (this question has not yet been litigated in the Supreme Court).

⁵² 18 U.S.C. §§ 5031-42; see also Standefer, *supra* note 47, at 476-80 (the FJDA does allow the federal government to prosecute juveniles as adults, but it was created, in part, to allow for federal adjudication of juveniles without having to treat them as adults).

⁵³ 18 U.S.C. § 5032.

⁵⁴ *Id.*; see also Polashuk, *supra* note 21, at 1208.

⁵⁵ Polashuk, *supra* note 21, at 1208.

⁵⁶ Patterson, *supra* note 12, at 811.

⁵⁷ See, e.g., Jessica Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. DISP. RESOL. 517, 519-20 (“The creation of adversarial justice systems by agents of American jurisprudence illuminated many of the conflicts between Western and Native American ideologies about the nature of law. The United States imposed its ideology because of the pervading view that a Western legal system represented the correct way to administer justice, despite any conflicts with native culture that the imposition of such a system might cause.”) (citations omitted).

proceedings because the federal government neither owns, nor operates, juvenile detention facilities. Thus, "American Indian youth are often shipped to public and private facilities hundreds of miles from their homes."⁵⁸ In these foreign systems, Native nations have no say in decisions that greatly affect their own youths. This is assimilation in action.

Tragically, there is strong evidence indicating that when outside governments are left to make decisions about juvenile delinquents, it does not treat all races equally.⁵⁹ Native Americans are disproportionately represented at all levels of state and federal juvenile justice systems, indicating systemic biases that can have an assimilative effect on these children.⁶⁰ Juveniles are generally introduced to the justice system by being arrested,⁶¹ and although Native youths make up approximately 1.4% of the juvenile population, they are arrested at significantly higher rates.⁶² After an arrest has been made, a decision as to whether the youth will go forward in the system or not must occur. If a juvenile continues through the system, there are two primary options available: diversion or detention (which generally leads to formal processing).⁶³ At this stage, the

⁵⁸ COALITION FOR JUVENILE JUSTICE, *supra* note 26, at 11 (noting that this separation not only has detrimental effects on youth, but can also make coordinating and planning for a court proceeding very difficult).

⁵⁹ See generally Hartney, *supra* note 9. "A growing number of studies and reports have made it clear that minority youth in general are more likely than White youth to be arrested, adjudicated, and incarcerated in juvenile justice systems across the US. Although not as large as those for African Americans, disparities between Native American youth and White youth are alarmingly high and in need of remediation." *Id.* at 1.

⁶⁰ Troy L. Armstrong et al., *Native American Delinquency: An Overview of Prevalence, Causes, and Correlates*, in NATIVE AMERICANS, CRIME AND JUSTICE, *supra* note 36, at 75.

⁶¹ See Melissa Sickmund, *Juveniles in Court*, JUVENILE OFFENDERS & VICTIMS NAT'L REP. SERIES BULL. (Office of Juvenile Justice & Delinquency Prevention, Washington, D.C.) June 2003, at 2, available at <http://www.ncjrs.gov/pdffiles1/ojdp/195420.pdf>.

⁶² Hartney, *supra* note 9, at 1; Armstrong et al., *supra* note 60, at 75; Cynthia M. Conward, *Where Have All the Children Gone?: A Look at Incarcerated Youth in America*, 27 WM. MITCHELL L. REV. 2435, 2454 (2001). *But see* Hartney, *supra* note 9, at 4 ("At the points of arrest and formal processing there is no disproportion, meaning Native Americans and Whites are equally likely to be arrested . . .").

⁶³ "Diversion" is the removal of a juvenile from the formal criminal justice system because proceeding formally may cause more harm than good. "Formal processing" means papers are filed with the intention of placing a juvenile before a court.

more lenient option of diversion occurs ten percent less often for Native Americans than it does for whites, meaning the second option—detention—occurs ten percent more often for Native Americans than whites.⁶⁴ Once a juvenile has been detained and processed, a juvenile may be released, adjudicated,⁶⁵ or removed to adult court. The research indicates that Native juveniles are adjudicated at a higher rate than any other race.⁶⁶ After being adjudicated, Native youth are put on probation less than any other race⁶⁷ and receive the most punitive sanction—out-of-home placement—more often than any other race.⁶⁸ More specifically, Native Americans make up 2.3% of all out-of-home placements even though they represent less than 1.5% of the juvenile population,⁶⁹ and they are at least fifty percent more likely than white juveniles to be removed from their home and placed in a residential treatment facility.⁷⁰

Alternatively, Native youths may be removed from the juvenile justice system and tried as adults in state or federal courts. Removing a juvenile to adult court is a very serious matter because it exposes the juvenile to the possibility of prison time.⁷¹ As is the case with out-of-home placements, Native-American youths are disproportionately affected by removal proceedings.⁷² In fact, Native Americans are more likely to be removed to adult court than any other race, and they are fifty percent more likely to be removed to adult court than their white counterparts.⁷³ Once removed to adult court, a Native youth is almost

⁶⁴ Hartney, *supra* note 9, at 4-5.

⁶⁵ “Adjudication” is the juvenile justice system’s equivalent to a trial. It tends to be less formal than an actual trial, and the rights of juvenile delinquents are not identical to the rights possessed by adult criminal defendants.

⁶⁶ Hartney, *supra* note 9, at 5 (“Native American youth are about 30% more likely than White youth to be referred to court rather than having the charges dropped.”).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 5-6 (one 2003 study suggests that the Native youth rate of residential placement is more than two-and-a-half times that of whites).

⁷¹ Richard Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, Washington, D.C.), June 2010, at 1 (“[Juvenile] offenders [are] eligible for transfer from the juvenile court for trial and sentencing in the adult criminal court.”).

⁷² Hartney, *supra* note 9, at 4-5.

⁷³ *Id.*

twice as likely as a white youth to end up in a state adult prison.⁷⁴ In some states, the rate of Native juvenile imprisonment is more than fifteen times that of white juvenile imprisonment.⁷⁵

Native youths do not fair any better when removed and treated as adults in federal court. Between 1994 and 2001, “the Federal Bureau of Prisons system experienced a 50-percent increase in the number of incarcerated [American-Indian and Alaskan-Native] youth,”⁷⁶ resulting in a system where more than sixty percent of all federally incarcerated youths were Native.⁷⁷ Some of this overrepresentation can be explained by the fact that the federal courts have jurisdiction over certain crimes when they occur in Indian Country, but that does not explain all of it.⁷⁸

Additionally, once Native youths find themselves in adult federal courts, they are more likely to receive a harsher federal sentence than they would have received had they been tried in state court for the same crime.⁷⁹ Thus, Native overrepresentation in the federal system (due in part to the jurisdictional scheme designed by the federal government), coupled with more punitive federal sentences, means that Native juveniles are being treated differently, and more severely, solely due to their status as Indians.⁸⁰ This differential treatment is seen throughout

⁷⁴ *Id.* at 7.

⁷⁵ *Id.*

⁷⁶ OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, SHARING THE SPIRIT OF WISDOM: TRIBAL LEADERS LISTENING CONFERENCE 18 (2004), *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/220712.pdf>.

⁷⁷ Lyon, *supra* note 17, at 230; Chyrl Andrews, *OJJDP Tribal Youth Program: Juvenile Justice*, JUVENILE JUST. J., Dec. 2000, at 9.

⁷⁸ Lyon, *supra* note 17, at 230 (“While part of this overrepresentation is caused by 18 U.S.C. §§ 1152-1153, which place under federal jurisdiction certain crimes committed on Indian reservations, social factors play a far greater role in accounting for this condition.”); Andrews, *supra* note 77, at 9 (“The overrepresentation exists in large part because certain types of crimes committed on tribal lands are federal offenses.”); U.S. COMM’N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 68 (2003) (“Many Native Americans attribute disproportionate incarceration rates to unfair treatment by the criminal justice system, including racial profiling, disparities in prosecution, and lack of access to legal representation.”).

⁷⁹ *See, e.g.*, Standefer, *supra* note 47, at 484 (“If the transfer [to be tried as an adult in federal court] is granted, the juvenile faces more severe consequences than her non-Indian counterpart who would be prosecuted as an adult in state court.”).

⁸⁰ *See id.* at 491-92; *see also* NEELUM ARYA & ADDIE C. ROLNICK, A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS 27 (The Campaign for Youth Justice, Race and Ethnicity

every aspect of the criminal justice system. It does not occur by Native design, but has been imposed by outside governments.

C. Juvenile Justice for Native Americans on the Reservation

For those Native nations that have justice systems and are handling juvenile crime, what exactly do their systems look like? For many Native nations, the answer is that their juvenile justice systems look strikingly similar to those created by the state and federal governments. This does not mean that all tribal justice systems closely resemble Anglo-American courts. There are Native nations that have developed systems based on traditional justice systems and others that have created new and innovative systems to handle complex justice issues.⁸¹ However, many Native nations are still utilizing court procedures and criminal laws that are indistinguishable from those found off-reservation.

Series, vol. 1, 2008), *available at* http://www.campaignforyouthjustice.org/documents/CFYJPB_TangledJustice.pdf, (“The Federal juvenile system exists almost as an afterthought, yet this ‘system’ has been applied to youth in Indian country without any real consideration of the circumstances of Native American juvenile delinquents. The [Federal Juvenile Delinquency Act] places a premium on state jurisdiction, but not tribal jurisdiction, so most routine cases involving non-Native youth remain at the state level and are subject to state sanctions, while Native youth end up facing federal sanctions for the same types of cases.”).

⁸¹ For example, many Native nations have incorporated various types of Peacemaking procedures into their justice systems. *See, e.g.*, CONFEDERATE TRIBES OF THE COOS, LOWER UMPQUA AND SIUSLAW INDIANS TRIBAL CODE tit. 2, ch. 14 (2005); CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OR., Tribal Code § 310(k) (2003), *available at* <http://www.narf.org/nill/Codes/grcode/gr310trcourt.htm>; LITTLE RIVER BAND OF OTTAWA INDIANS ORDINANCES AND REGULATIONS tit. 2, ch. 900, § 4.01(b) (2012), *available at* <http://www.lrboi-nsn.gov/images/docs/council/docs/ordinances/Title%20900-02.pdf>; ONEIDA INDIAN NATION JUVENILE JUSTICE CODE ch. 3 (2004), *available at* <http://www.narf.org/nill/Codes/oneidacode/juvenilejustice.htm>; PIT RIVER TRIBE OF CA. CODE tit. 8, ch. 15 (2005), <http://pitrivertribe.org/law/ordinances/33-title8-15>; SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE ch. 36, § 36.405 (2004), *available at* <http://www.saulttribe.com/-saultt5/images/stories/government/tribalcode/chaptr36.pdf>; WHITE EARTH BAND OF CHIPPEWA COMPREHENSIVE LAW AND ORDER MANUEL tit. III, ch. 12A (2010), *available at* <http://www.narf.org/nill/Codes/wearthcode/codejuvenilejustice.pdf>.

With respect to procedural law, it is not uncommon for Native nations to incorporate state law directly into their own tribal codes.⁸² This is oftentimes done overtly. For example, the Ely Shoshone Tribal Law and Order Code explicitly adopts Nevada's juvenile delinquency procedures, stating, "The Ely Colony Shoshone Tribe hereby adopts Title 5 of the Nevada Revised Statutes, Chapter 62, Juvenile Courts except for the following provisions . . ."⁸³ More common, however, is the practice of creating tribal law that mirrors the federal law found in Title 25, Part 11, of the Code of Federal Regulations (25 C.F.R. § 11). This law was originally created to "provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where tribal courts have not been established to exercise that jurisdiction."⁸⁴ In essence, 25 C.F.R. § 11 is the law that was originally created for use by the Courts of Indian Offenses (now called CFR courts).⁸⁵ Some Native nations explicitly incorporate provisions from 25 C.F.R. § 11 relating to juvenile procedures directly into their code, while other Native nations⁸⁶ insert the wording of 25 C.F.R. § 11 into their own code after replacing references to federal entities with references to tribal entities.⁸⁷ For instance, the code relating to juvenile

⁸² See, e.g., ELY SHOSHONE TRIBE LAW AND ORDER CODE, Ordinance No. 88-EC-XVI (2011) (incorporating by reference Nevada law), *available at* <http://www.narf.org/nill/Codes/elycode/elycodeordinances.htm>; MASAHTUCKET PEQUOT TRIBAL CODE tit. 2, ch. 1, § 3 (2011) (incorporating by reference Connecticut law), *available at* http://www.narf.org/nill/Codes/mpcode/title_2.pdf.

⁸³ ELY SHOSHONE TRIBE LAW AND ORDER CODE, Ordinance No. 88-EC-XVI.

⁸⁴ 25 C.F.R. 11.100(b) (2008).

⁸⁵ The Courts of Indian Offenses were created in the 1880s and administered by the Bureau of Indian Affairs. Although many are gone, some still function today, but are generally referred to as "CFR courts." See Polashuk, *supra* note 21, at 1193.

⁸⁶ See, e.g., ORDINANCE OF THE CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION, ORDINANCE ADOPTING LAW AND ORDER CODE AND CREATING TRIBAL COURT (2006) (incorporating by reference 25 C.F.R. 11.900, et. seq. and 11.10000, et. seq.), *available at* <http://www.narf.org/nill/Codes/goshute/goshute.pdf>.

⁸⁷ For an example of a Native nation that has copied the code directly, see ORDINANCE OF THE CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION, ORDINANCE ADOPTING LAW AND ORDER CODE AND CREATING TRIBAL COURT (incorporating by reference 25 C.F.R. 11.900, et. seq. and 11.10000, et. seq.); for an example of a Native nation that has replaced references to federal procedures with references to tribal court

procedures for the Confederated Tribes of the Colville Reservation mirrors federal law very closely. Both the Colville Law and Order Code and 25 C.F.R. § 11 cover the same topics, in the same order, often with the same language.⁸⁸ References in the CFR to terms like “presenting officers,” “law enforcement officers,” and “children’s court” are replaced with references to terms like “probation officers,” “tribal officers,” and “Juvenile Court” in the Colville Law and Order Code. In addition to these slight changes in wording, there are minor changes in other sections as well.⁸⁹ However, the overall process found in the Colville Law and Order Code is the same one found in the Code of Federal Regulations (“CFR”). These slightly modified CFR provisions on juvenile justice abound in Indian Country,⁹⁰ meaning that the juvenile courtroom

procedures, see Colville Tribal Law and Order Code 5-2-180 to 5-2-211 (2010), *available at* <http://www.colvilletribes.com/media/files/5-2.pdf>.

⁸⁸ Compare COLVILLE TRIBAL LAW AND ORDER Code 5-2-180 to 5-2-211 with 25 C.F.R. §§ 11.1000 to 11.1014 (West, Westlaw 2012).

⁸⁹ For example, COLVILLE TRIBAL LAW AND ORDER CODE 5-2-184 to 5-2-187 has more detail on detaining juveniles than does 25 C.F.R. 11.1004, which covers the same topic.

⁹⁰ See, e.g., BAY MILLS TRIBAL CODE ch. 7 (2004); BLACKFEET TRIBAL LAW AND ORDER CODE ch. 7 (1999), *available at* <http://indianlaw.mt.gov/content/blackfeet/codes/1999/chapter07.pdf>; CHITIMACHA COMPREHENSIVE CODES OF JUSTICE tit. V (2011), *available at* http://www.narf.org/nill/Codes/chitimachacode/CCCJ_Title_V_Child_Welfare_Code.pdf; COLVILLE TRIBAL LAW AND ORDER CODE tit. V, ch. 2 (2008), *available at* http://www.narf.org/nill/Codes/colvillecode/title_5_2.pdf; COUSHATTA TRIBE OF LA. JUDICIAL CODES tit. VI (2004), *available at* <http://www.narf.org/nill/Codes/couscode/coutitle6.htm>; CHEROKEE CODE ch. 7A (2010), *available at* <http://www.narf.org/nill/Codes/ebcicode/7ajuvenile.pdf>; FORT MCDERMOTT PAIUTE-SHOSHONE TRIBE LAW AND ORDER CODE ch. (Nat. Indian L. Library through 2010); FORT MCDOWELL YAVAPAI LAW AND ORDER CODE ch. 11 (2010), *available at* <http://www.narf.org/nill/Codes/ftmdecode/ftmcdch6juv.htm>; HOPI CHILDREN’S CODE (1991), *available at* <http://www.narf.org/nill/Codes/hopicode/child.htm>; WAGANAKISING ODAWA TRIBAL CODE tit. 5, ch. 4 (2009), <http://www.ltbodawa-nsn.gov/TribalCode/TRIBAL%20CODE%20121709%20REVISED%20DLB%20MASTER.pdf>; LUMMI NATION CODE OF LAWS tit. 8 (2008), *available at* <http://www.narf.org/nill/Codes/lummi/8Childrens.pdf>; MAKAH LAW AND ORDER CODE tit. 6 (1999), *available at* <http://www.narf.org/nill/Codes/makahcode/makahlawt6.htm>; MILLE LACS BAND STAT. ANN. tit. 8, ch. 3 (2003), *available at* <http://www.narf.org/nill/Codes/mlcode/mltitle8childfam.htm>; NEZ PERCE TRIBAL CODE tit. 2, ch. 4 (2011), *available at* http://www.narf.org/nill/Codes/nezpcode/title_2.pdf; NISQUALLY TRIBAL CODE tit. 50 (2011), *available at* <http://www.narf.org/nill/Codes/nisqcode/nisqcode50.htm>; OGLALA SIOUX TRIBE LAW AND ORDER CODE

procedures used on reservations are essentially procedures designed by foreign governments that have been renamed and then implemented by Native nations.

This same practice—taking state or federal codes and changing minor pieces of them—also occurs with respect to substantive juvenile law. Generally speaking, delinquent acts (i.e. juvenile offenses) are defined as “act[s] which, if committed by an adult, would be designated a crime” under relevant federal, state, or tribal law.⁹¹ Thus, Native nations’ criminal codes are the substantive law to look to for comparison. As with procedural law, substantive law can be incorporated directly in certain instances. For example, the Mashantucket Pequot Tribal Nation’s criminal code states, “the criminal laws of the state of Connecticut shall serve as Tribal criminal law.”⁹² While Native substantive law does vary

ch. 5 (2002), *available at* <http://www.narf.org/nill/Codes/oglalacode/chapter05-juvenile.htm>; PAWNEE TRIBE OF OKLAHOMA LAW AND ORDER CODE tit. VII (2005), *available at* <http://www.narf.org/nill/Codes/pawneecode/juvenile.htm>; POARCH BAND OF CREEK INDIANS CODE § 10 (2004), *available at* <http://www.narf.org/nill/Codes/poarchcode/poarchcode10juvenile.htm>; ROSEBUD SIOUX TRIBE LAW AND ORDER CODE tit. 3 (2004), *available at* <http://www.narf.org/nill/Codes/rosebudcode/title3juveniles.htm>; CONFEDERATED SALISH AND KOOTENAI TRIBES LAWS CODIFIED tit. III, ch. 3 (2003), <http://www.cskt.org/documents/laws-codified.pdf>; SAN ILDEFONSO PUEBLO CODE tit. IX (1996), *available at* <http://www.narf.org/nill/Codes/sicode/sanildcodet9children.htm>; SISSETON-WAHPETON SIOUX TRIBAL CODES ch. 38 (1996), *available at* <http://www.narf.org/nill/Codes/sissetonwahpeton%20code/swjuvenile1>; SHOSHONE AND ARAPAHO TRIBE LAW AND ORDER CODE tit. III (2004), http://shoshone-arapaho-tribal-court.org/title_III.html; SKOKOMISH TRIBAL CODE tit. 3, ch. 2 (2001), <http://www.skokomish.org/SkokConstitution&Codes/Codes/STC3-02.htm>; UTE INDIAN TRIBE LAW AND ORDER CODE tit. IV (1988), *available at* <http://www.narf.org/nill/Codes/uteuocode/utebodyt4.htm>; YANKTON SIOUX TRIBAL CODE tit. V (1995), *available at* <http://www.narf.org/nill/Codes/yanktoncode/yanktoncodet5juvenile.htm>; YOMBA SHOSHONE TRIBE LAW AND ORDER CODE tit. 9 (2001), *available at* <http://www.narf.org/nill/Codes/yombacode/yomba9juv.htm>; YSLETA DEL SUR PUEBLO CODE OF LAW art. 5 (2000), *available at* <http://www.narf.org/nill/Codes/ysletacode/ysletaarticle5.htm>.

⁹¹ 25 C.F.R. 11.900 (f) (2008). Native nations commonly use this same definition. *See, e.g.*, BLACKFEET TRIBAL LAW AND ORDER CODE ch. 7, § 1 (E) (1999), *available at* <http://indianlaw.mt.gov/content/blackfeet/codes/1999/chapter07.pdf>; PAWNEE TRIBE OF OKLAHOMA, LAW AND ORDER CODE tit. VII, Ch. 1, § 3(m) (2005), *available at* <http://www.narf.org/nill/Codes/pawneecode/juvenile.htm#1>.

⁹² MASHANTUCKET PEQUOT TRIBAL LAWS tit. II, ch. 1, § 2 (f) (2008), *available at* <http://www.mptnlaw.com/laws/Titles%201%20-%2023.pdf>.

considerably between nations,⁹³ at a minimum, most Native criminal codes deal with similar types of crimes that state and federal codes deal with and oftentimes use very similar definitions.⁹⁴ Not only do Native nations generally utilize Anglo-American procedures when they are adjudicating their youth, but they also generally use Anglo-American substantive definitions of delinquent behavior during those processes. As such, Native nations rely on the value judgments of foreign governments in determining what is and is not appropriate behavior for their own children.

An examination of the sanctions applied by Native juvenile justice systems to delinquent youths and those applied by state and county systems reveals a similar story. Common intermediate sanctions⁹⁵ for juveniles on reservations include counseling/therapy (utilized by seventy-five percent of Native juvenile justice systems), alcohol rehabilitation (seventy-four percent) community service (seventy-three percent), drug rehabilitation (seventy percent), fines (seventy-one percent), probation (sixty-six percent), and restitution (sixty-two percent).⁹⁶ These sanctions are all frequently found—albeit to varying degrees—in the juvenile justice systems of the various states.⁹⁷ In contrast to the frequency of other responses, only 20.9% of Native nations with juvenile justice systems use victim-offender reconciliation,⁹⁸ which is a process based on restorative justice principles.⁹⁹ This is significant because

⁹³ Minzer, *supra* note 39, at 109.

⁹⁴ Even a cursory look at any Native nation's tribal code will reveal crimes familiar to us all, such as assault, burglary, homicide, narcotics possession, rape, and trespassing. *See, e.g.*, PAWNEE TRIBE OF OKLAHOMA LAW AND ORDER CODE tit. VI (2005), *available at* <http://www.narf.org/nill/Codes/pawneecode/crimoffense.htm>; *see also* Polashuk, *supra* note 21, at 1212.

⁹⁵ That is, sanctions that do not require a juvenile to be placed in a non-residential or residential treatment program.

⁹⁶ PERRY, *supra* note 3, at 43.

⁹⁷ *See generally* JUVENILE SANCTIONS CENTER, GRADUATED SANCTIONS FOR JUVENILE OFFENDERS (2005), *available at* http://www.ncjfcj.org/sites/default/files/vol.2planningguidejsc18_0.pdf.

⁹⁸ PERRY, *supra* note 3, at 2.

⁹⁹ JOHN HOWARD SOCIETY OF ALBERTA, VICTIM-OFFENDER RECONCILIATION PROGRAMS 1 (1998), *available at* <http://www.johnhoward.ab.ca/pub/pdf/C27.pdf> (explaining the process as one in which the “victim and offender work together to find a solution, leaving the victim, the offender and the community with the feeling that

restorative processes like this one are designed to bring about the “renewal of damaged personal and communal relationships.”¹⁰⁰ This type of restorative process tends to fit in well with many Native nations’ justice paradigms.¹⁰¹ Yet relatively few nations are utilizing this procedure or others like it.

As sanctions become more serious in Indian Country, Native nations tend to lose control over the lives of their youths. When non-residential programming is necessary, 46.3% of Native nations turn to other governments (county, state, and/or federal) for such social services.¹⁰² When residential juvenile facilities are required, more than sixty-eight percent of Native nations utilize facilities operated by a non-tribal entity.¹⁰³ When these Native youth are sent to non-Native programs and/or facilities, they are often being sent into an environment that is considerably different than the one in which they were raised.¹⁰⁴ To make matters worse, there is evidence that these off-reservation, Anglo-American residential programs are actually less effective than

justice has been served and that life will return to normal”); Polashuk, *supra* note 21, at 1212.

¹⁰⁰ *Indigenous Justice Systems and Tribal Society*, NAT’L INST. OF JUSTICE (Dec. 3, 2007), <http://www.ojp.usdoj.gov/nij/topics/courts/restorative-justice/perspectives/indigenous-tribal.htm>.

¹⁰¹ *Id.*

¹⁰² 2002 Data File, *supra* note 31 (data comes from response to question B10 of the survey and is found in columns “EM” thru “ES” in the data file).

¹⁰³ PERRY, *supra* note 3, at 43 (noting that about thirteen percent of Native nations with justice systems utilized their own residential facility, and approximately twenty-six percent had utilized a residential facility operated by another tribe).

¹⁰⁴ See generally MARK MARTIN, N.D. DIV. OF JUVENILE SERVS., ASSESSMENT OF OVER-REPRESENTATION OF NATIVE AMERICAN YOUTH IN THE JUVENILE JUSTICE SYSTEM (2002) (referencing a lack of culturally appropriate processes for Native Americans at various stages of the North Dakota juvenile justice system); cf. Polashuk, *supra* note 21, at 1213 (“[T]ribal courts should have control over juvenile defendants so that the traditional values, necessary to support their culture, can be properly instilled in their children.”); James Austin et al., *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, JUVENILE JUST. BULL. (Office of Juvenile Justice and Delinquency Prevention, Washington, D.C.), Sept. 2005, at 2 (“Detaining or confining youth may also widen the gulf between youth and positive influences”), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf>.

community-based strategies at reducing recidivism and improving community adjustment.¹⁰⁵

In sum, for many Native nations, juvenile justice looks no different on the reservation than it would if it were taking place in a state or federal court. The procedures are similar, the substantive laws are similar, and the dispositions are similar. The ineffectiveness of juvenile justice systems at the state and federal level in preventing recidivism and successfully reintegrating youths back into society is something found in many Native juvenile justice systems as well. As one tribal court judge put it, “You can’t take the state system of punishment and prison and put it in a tribal community and expect different results.”¹⁰⁶

II. THE NATION BUILDING MODEL

A. Introduction to the Nation Building Model

There is a revolution currently taking place in Native-American communities throughout the United States. After more than two hundred years of policies designed to destroy and/or assimilate Native-American culture, many Native nations have started taking control of their own destinies by exercising true self-determination over the decisions that affect their everyday lives.¹⁰⁷ The result has been stronger, healthier communities.¹⁰⁸ Across Indian Country, an increasing number of Native nations are having success in community development and/or economic development. Yet these achievements are not found uniformly

¹⁰⁵ Austin et al., *supra* note 104, at 3. The term “community adjustment” refers to the ability of an individual to reintegrate into society after being a part of the criminal justice process. Empirical measurements of community adjustment vary, but, for youth, tend to examine an individual’s engagement in school and school-related activities, as well as whether and to what extent a youth has employment. *See, e.g.*, Trent Atkins et al., *Wealthy and Wise? Influence of Socioeconomic Status on the Community Adjustment of Previously Incarcerated Youth*, 32 BEHAV. DISORDERS 254 (2007).

¹⁰⁶ Theresa M. Pouley, *Some Tools to Govern Effectively*, VIMEO, 06:55 (posted Jan. 18, 2012), <http://vimeo.com/35278809> (originally available at <http://www.uanativenet.com/>).

¹⁰⁷ Miriam Jorgensen, *Editor’s Introduction* to REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT, at xii (Miriam Jorgensen ed., 2007).

¹⁰⁸ Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT, *supra* note 107, at 3, 6.

among all Native nations. Why is this the case? “What explain[s] the fact that—despite decades of crippling poverty and powerlessness—some American Indian nations recently [have] been strikingly successful at achieving their own economic, political, social and cultural goals, while others [are] having repeated difficulty accomplishing the same things?”¹⁰⁹

The Harvard Project on American Indian Economic Development (“Harvard Project”) and the Native Nations Institute (“NNI”) have been examining these types of questions for decades.¹¹⁰ Their research began in 1986, at a time when the majority of data coming from Indian Country was that collected by the Bureau of Indian Affairs. What separated the work of the Harvard Project and NNI was its ability to enter communities and combine qualitative data collected through interviews with the quantitative economic data being collected by government organizations. The results of this unique research approach produced robust findings on a wide variety of Native topics and led to important research programs, including the National Executive Education Program for Native American Leadership and the Honoring Contributions in the Governance of American Indian Nations Program.¹¹¹

Specifically, the results of the extensive research done by the Harvard Project and NNI indicate that there are five crucial principles for successful community development in Indian Country: (1) Native nations must make their own decisions by exercising practical sovereignty, or self-rule; (2) Native nations need to back-up their decisions with effective governing institutions; (3) these governing institutions must match their own political cultures; that is, they must exhibit cultural match; (4) Native nations need a strategic orientation when making their decisions; and (5) Native leadership is necessary to mobilize the community and promote community development.¹¹² Taken together, these five foundational elements can be referred to as the Nation Building Model for Economic and Community Development, or simply, the “Nation Building Model.”

In its most basic formulation, the Nation Building Model refers to “the processes by which a Native nation enhances its own foundational

¹⁰⁹ Jorgensen, *supra* note 107, at xi.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Cornell & Kalt, *supra* note 108, at 18.

capacity for effective self-governance and for self-determined community and economic development.”¹¹³ The more a Native community can adhere to these five elements, the greater the chance that the community has of successfully achieving its cultural, economic, political, and social goals.¹¹⁴ Practically speaking, the Nation Building Model takes many shapes and forms within Indian Country.¹¹⁵ The Nation Building Model does not offer a one-size-fits-all formula that can be replicated in every community, but presents those factors that are critical for a community to successfully address its own unique problems with its own unique solutions.

As with other social problems, there is no single solution that can act as a panacea to all the struggles Native youth face. Through the use of the Nation Building Model, however, Native nations have turned around situations of extreme poverty, unemployment, and other social ills. Applying the Nation Building Model to juvenile justice systems, for instance, gives Native nations an opportunity to address the serious problems their youth face everyday. In doing so, Native nations have the chance to regain control over their own children and combat the effects of assimilative federal policies that have been in force for centuries. Before examining specific cases in which this has occurred, a more careful look at the Nation Building Model’s five core principles—and how those principles relate to juvenile justice—is necessary.

1. Principle #1: Practical Sovereignty (or Self-Rule)

The first principle of the Nation Building Model—practical sovereignty, or self-rule—is the key to sustainable development.¹¹⁶ Practical sovereignty exists when “decision-making power [is] in the hands of Native nations.”¹¹⁷ Although Native nations have been recognized as sovereign—first by colonizers then by the United States—

¹¹³ Jorgensen, *supra* note 107, at xii.

¹¹⁴ Cornell & Kalt, *supra* note 108, at 18-19.

¹¹⁵ *Id.* at 18.

¹¹⁶ *Id.* at 21.

¹¹⁷ *Id.* at 19; see also JOSEPH P. KALT & JOSEPH WILLIAM SINGER, MYTHS AND REALITIES OF TRIBAL SOVEREIGNTY: THE LAW AND ECONOMICS OF INDIAN SELF-RULE 5-6 (Native Nations Inst. & The Harvard Project on Am. Indian Econ. Dev., Joint Occasional Papers on Native Affairs, No. 2004-03, 2004) (noting that *de facto* sovereignty appears to be far more useful than *de jure* sovereignty when discussing successful development in Indian Country).

centuries of paternalistic federal policies have weakened much of this sovereignty.¹¹⁸ It was not until the federal government's policy of Indian self-determination¹¹⁹ that the widespread use of practical sovereignty became a reality for Native nations.¹²⁰

There are two primary reasons why the element of practical sovereignty is crucial for successful development. First, "practical sovereignty puts the development agenda in Native hands."¹²¹ Native nations decide for themselves: the policies that best serve their communities; the institutions that should be used to implement those policies; how those institutions should be organized and managed; and the standards that should be used to determine whether a policy is effective or not. For most of the history of American–Native American relations, there has not been decision-making at the tribal level.¹²² Similarly, exercising practical sovereignty also means that outside governments are not in a position to dictate or implement policy. Rather, outside governments are only there to offer advice and assistance when solicited by Native nations.¹²³

Second, "self-governance means accountability. It marries decisions and their consequences, leading to better decisions."¹²⁴ When outside governments make the decisions for a Native nation, there is little accountability because the outside government does not answer to that nation's citizens.¹²⁵ Additionally, decision-makers from outside

¹¹⁸ Cornell & Kalt, *supra* note 108, at 19.

¹¹⁹ See GETCHES ET AL., *supra* note 50, at 216-55 (detailing the Self-Determination Era).

¹²⁰ Cornell & Kalt, *supra* note 108, at 21; see also Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J., no. 3, 1998, at 187 [hereinafter Cornell & Kalt, *Sovereignty and Nation-Building*].

¹²¹ Cornell & Kalt, *supra* note 108, at 21.

¹²² *Id.* at 19.

¹²³ Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 2, 15 (Stephen Cornell & Joseph P. Kalt eds., 1992).

¹²⁴ Cornell & Kalt, *supra* note 108, at 21.

¹²⁵ *Id.* While it is certainly true that Native Americans are U.S. citizens and have the right to vote, the actual voting power they possess is minimal. According to the 2010 Census, Native-American, Alaska-Native, and Native-Hawaiian individuals comprise only 1.1% of the general population. KAREN R. HUMES ET AL., U.S. CENSUS BUREAU,

governments are not living in the communities where they are making decisions. Thus, they are unlikely to see and feel the effects of any poor decisions they have made.¹²⁶ Conversely, Native leaders will feel political and social pressure to make good decisions because they understand that their decisions will have an impact on their families, neighbors, and their chances of keeping their political positions.¹²⁷

As previously stated, sovereignty under the Nation Building Model means control is placed in Native hands.¹²⁸ Sovereignty is vital to the preservation of culture. It means having control over your own children.¹²⁹ When a nation controls its own juvenile justice system, it is exercising practical sovereignty because it then controls: when a youth is brought into that system; the procedures and practices that are encountered within that system; the consequences, treatments, or out-of-home placements that are necessary for a particular youth; and where such treatments or residential placements—if necessary—should occur.

At this moment in history, Native nations should exercise control over these types of decisions because there are chronic problems with the quality of life juvenile delinquents experience while in non-Native systems.¹³⁰ Additionally, there is an intense debate over whether juvenile justice systems are even necessary in our society any longer.¹³¹ This debate is not purely academic, as evidenced by the fact that more and more juvenile behavior has been criminalized and tried in adult courts

OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 (2011). Furthermore, “[a]s a voting block, Native Americans were the last group in the U.S. to get the right to vote,” and although the U.S. Census Bureau does not track Native-American election data, historically, “Native Americans have some of the lowest voter turnout rates of any ethnic group in the country.” Tristan Ahtone, *Paying Attention to the Native American Vote*, PBS (Nov. 4, 2008), <http://www.pbs.org/frontlineworld/election2008/2008/11/paying-attention-to-the-n.html> (last accessed April 10, 2012).

¹²⁶ Cornell & Kalt, *supra* note 108, at 21.

¹²⁷ *Id.*

¹²⁸ *Id.* at 19.

¹²⁹ Julian D. Pinkham, *Speaking to Tribal Judges on Improving Children's Court Practice in Child Abuse and Neglect Cases in Our Country: A Proposal for a Uniform Children's Code*, 31 U. MICH. J.L. REFORM 159, 162 (1997).

¹³⁰ Conward, *supra* note 62, at 2446.

¹³¹ See, e.g., Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing Juvenile Court*, 69 N.C. L. REV. 1083, 1096-1101 (1991); see generally Abbe Smith, *The Dream of Growing Older: On Kids and Crime*, 36 B.C. L. REV. 953 (1995).

throughout the country in recent years.¹³² Thus, while the Nation Building Model calls for Native control over its own people and decisions in all contexts, there is an added urgency for Native nations to do so with respect to juvenile justice. When Native nations implement their own juvenile justice systems, they not only get to make their own determinations about the value of possessing such institutions, but they also get to add their voice to the debate over juvenile justice systems generally—a debate that potentially affects all children in this country.

Given these arguments, it is obvious that practical sovereignty in this context is appealing in a theoretical sense. Further, in a practical sense, it is possible to actually exercise sovereignty over juvenile justice. Although Native nations do not have absolute jurisdiction over Native juveniles who commit crimes in Indian Country, they do still retain a substantial amount of jurisdiction. Native nations have *de jure* sovereignty with respect to a large portion of Native juvenile crime, making a Native-controlled juvenile justice system possible.¹³³

The problem is that, while *de jure* sovereignty exists, *de facto* sovereignty does not for many Native nations.¹³⁴ *De facto* sovereignty is lacking with respect to Native juveniles on many reservations because oftentimes Native nations lack juvenile justice systems.¹³⁵ The reason for this often has to do with a lack of funding¹³⁶ and/or community support for juvenile courts and services. Due to these constraints, many Native nations end up choosing between giving up their sovereignty over their youths and allowing those same youths to commit crimes without

¹³² Lyon, *supra* note 17, at 216-17.

¹³³ Literally “of law,” but in this case meaning that Native nations legally have the ability to exercise sovereignty in this area.

¹³⁴ Literally “of fact,” but in this case meaning that while Native nations have the legal right to exercise sovereignty in a given area, in reality they are unwilling or unable to do so effectively.

¹³⁵ PERRY, *supra* note 3, at 19 (stating that sixty percent (one hundred and eighty-eight Native nations out of three hundred and thirteen respondents) had some form of justice system, which included CFR courts, tribal courts, and traditional courts, and of those, approximately 83.5% (one hundred and fifty-seven of the one hundred and eighty-eight with justice systems) handled juvenile cases, meaning that approximately 50.2% of all Native nations surveyed handled juvenile cases).

¹³⁶ See, e.g., U.S. COMM’N ON CIVIL RIGHTS, *supra* note 78, at 72 (noting that the federal budget for juvenile justice in Indian Country was cut nearly eighty percent between 1998 and 2004).

consequences or treatment.¹³⁷ When Native nations cannot, or do not, exercise practical sovereignty over juvenile crime, their youth regularly end up in outside systems.¹³⁸ This situation is at odds with the Nation Building Model because, in such cases, it is outsiders who are making important decisions about Native youths. The goal of the Nation Building Model is to return that decision-making power to Native nations that are in a better position to meet the needs of their youth¹³⁹ and are more likely to change their strategy if it is not producing the desired results.¹⁴⁰

2. Principle #2: Effective Governing Institutions

If sovereignty is going to lead to sustained community development, a nation must have effective governing institutions that are capable of carrying out its policies.¹⁴¹ These institutions are responsible for implementing policy and transforming it from an idea on paper to something practical that affects the lives of citizens. Effective governing institutions must be stable. There must be clear rules and policies in place to define an institution's rights and responsibilities as well as its relationship with other aspects of government.¹⁴² Additionally, effective governance must include a forum for non-politicized dispute resolution.¹⁴³ An independent dispute resolution system is necessary to ensure that the rules and policies created are enforced even-handedly, regardless of who is seeking to have them enforced. Finally, effective governing institutions must "provide administration that can get things done reliably and effectively."¹⁴⁴ This is a practical requirement—without a competent bureaucracy, a government will accomplish very little in the

¹³⁷ Patterson, *supra* note 12, at 815.

¹³⁸ *Id.* at 811.

¹³⁹ Lisa Bond-Maupin et al., *Research on Juvenile Delinquency in Indian Communities: Resisting Generalization*, in NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM 187, 196 (Jeffrey Ian Ross & Larry Gould eds., 2006); Marianne O. Nielsen, *Contextualization for Native American Crime and Criminal Justice Involvement*, in NATIVE AMERICANS, CRIME AND JUSTICE, *supra* note 36, at 10, 18.

¹⁴⁰ Cornell & Kalt, *supra* note 108, at 21.

¹⁴¹ *Id.* at 22.

¹⁴² *Id.* at 22-23.

¹⁴³ *Id.* at 23 (emphasis omitted).

¹⁴⁴ *Id.*

arena of asserting and exercising sovereignty.¹⁴⁵ When Native nations “back up sovereignty with stable, fair, effective, and reliable governing institutions” they “increase their chances of improving community well-being.”¹⁴⁶

In short, institutions and programs are the mechanisms that transform the concept of sovereignty into a practical reality.¹⁴⁷ Without these mechanisms, sovereignty often rings hollow. In the context of Native juvenile justice, Native nations have practical sovereignty over many juvenile delinquents (in the form of jurisdiction), but often have no institutions to exercise this power. Without the institutions to put sovereignty into effect, the fact that sovereignty exists in and of itself is simply not very useful.

The good news for Native nations is that effective governing institutions can be created and utilized in the arena of juvenile justice. In fact, history has demonstrated that Native nations have the ability to address their justice needs through development of innovative and capable courts and dispute resolution systems of all varieties.¹⁴⁸

One thing to keep in mind, however, is that under the Nation Building Model, not just any institution will suffice for community development. Instead, the institution must be effective at achieving its designed purpose.¹⁴⁹ Effective juvenile justice systems are complex structures that must rely on carefully coordinated efforts to capably treat youths.¹⁵⁰ First, such systems require a mechanism of locating delinquent or troubled youths and bringing them into the system. Without this mechanism, even the greatest juvenile court or treatment facility ever

¹⁴⁵ Cornell & Kalt, *supra* note 108, at 23.

¹⁴⁶ *Id.* at 24.

¹⁴⁷ *Id.* at 22.

¹⁴⁸ See generally, e.g., Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287 (1998); Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509 (1998); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).

¹⁴⁹ Cornell & Kalt, *supra* note 108, at 24.

¹⁵⁰ See *Challenges Facing American Indian Youth: On the Front Lines With Senator Ben Nighthorse Campbell*, Juv. Just. J., Dec. 2000, at 3, 6 [hereinafter, *Challenges Facing American Indian Youth*], available at <http://www.ncjrs.gov/pdffiles1/ojdp/184747.pdf>.

designed would go unused.¹⁵¹ Second, such systems need an institution—such as a court or healing circle—that can determine what delinquent action took place and/or what should happen next to the youth in question. This is the part of the system that most people think of when they come across the term “juvenile justice,” but it is only one component among several in an effective system. Third, such systems usually require that some sort of treatment facility and/or program is in place for children who need them. Research indicates that having programs and facilities designed specifically for rehabilitation is the most effective way to reduce recidivism rates,¹⁵² especially when they address the fact that juvenile delinquents tend to have very high rates of mental health problems.¹⁵³ The effectiveness of these rehabilitative efforts increases when multiple programs exist, when these programs work in concert with crime-prevention measures,¹⁵⁴ and when they have been designed by the community they are being implemented in.¹⁵⁵ In summary, juvenile justice systems are simple in concept—they exist to locate troubled youths and connect these youths with programs or services specifically designed to help them. In reality, however, to be truly effective they require a coordinated effort among multiple institutions.¹⁵⁶

¹⁵¹ Generally speaking, some combination of police, educators, health care employees, and/or social service workers is responsible for bringing juveniles into such a system.

¹⁵² See Conward, *supra* note 62, at 2464; OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 76, at 29.

¹⁵³ See generally LINDA A. TEPLIN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN: PSYCHIATRIC DISORDERS OF YOUTH IN DETENTION 1 (2006), available at <http://www.ncjrs.gov/pdffiles1/ojdp/210331.pdf> (presenting a comprehensive overview of research done on mental health disorders and juvenile delinquents and concluding that although more research needs to be done, it is clear that “a significant number of youth in detention suffer from psychiatric disorders”).

¹⁵⁴ *Challenges Facing American Indian Youth*, *supra* note 150, at 6.

¹⁵⁵ See Conward, *supra* note 62, at 2458; Nielsen, *supra* note 139, at 18.

¹⁵⁶ Although I have very broadly described what is necessary for an effective juvenile justice system, there are countless other details that must be resolved to make a workable system. For example, Native nations would need to consider issues related to record-keeping and institutional memory, see, e.g., Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 129 (2001); living standards for out-of-home placements, see, e.g., Conward, *supra* note 62, at 2446; and cultural competency, see, e.g., Melton, *supra* note 16, at 77.

The Nation Building Model promotes the idea of having effective governing institutions not simply because a capable institution can meet its goals better than an incapable one, but also because such institutions have other positive effects. For instance, effective governing institutions reduce a Native nation's dependency on other governments. Dependency is a direct result of the centuries of "subjugation and disempowerment" perpetrated by the United States government and has resulted in communities where federal support programs permeate nearly every aspect of life.¹⁵⁷ This dependency on outside governments produces many negative effects. When Native nations rely on other governments to police, adjudicate, and treat their own children, they lose any say in how those processes occur and what effects they might have on their youth. The creation of an effective juvenile justice system eliminates this type of dependency and returns Native nations to their proper role of determining what happens to their own citizens.

Effective institutions not only reduce federal dependency, but also provide an opportunity for Native nations to demonstrate their skill in addressing social issues, which may lead to future opportunities to increase practical sovereignty. One can imagine a situation where a Native juvenile justice system is so effective in helping to heal Native youths that other governments become interested in allowing their citizens to utilize the system (either through contractual agreements or formal legislation). For example, the Citizen Potawatomi Nation has increased its practical sovereignty by developing a court system that is so effective in administering justice that local non-Native communities willingly submit themselves to its jurisdiction.¹⁵⁸ If Native-run institutions repeatedly achieved this type of success, not only would Native nations stand to gain practical sovereignty in some cases, but their combined efforts might also result in federal policy reform that would expand Native nation jurisdiction throughout Indian Country.

Finally, effective institutions, if designed to be culturally relevant, can be used to create and reinforce Native norms, just as non-Native institutions have been used to impose foreign norms throughout

¹⁵⁷ BESAW ET AL., *supra* note 18, at 1.

¹⁵⁸ *Bethel Trustee Removed 'Under Operation of Law,'* TECUMSEH COUNTYWIDE NEWS & SHAWNEE SUN, Dec. 6, 2007.

history.¹⁵⁹ Judicial bodies are particularly effective at reinforcing norms, in part because they promote the values and beliefs of the community by educating citizens about the consequences of wrongdoing.¹⁶⁰ Thus, effective governing institutions not only address social issues, but can also be a tool in the struggle against assimilation and for cultural preservation.

3. Principle #3: Cultural Match

For centuries, federal Indian policies have forced Native nations into a state of dependency so that they have been forced to rely on “someone else’s institutions, someone else’s rules, [and] someone else’s models to get things done.”¹⁶¹ These policies have resulted in “mismatches between formal structures of government and indigenous beliefs about the legitimate use and organization of governing authority,” which ultimately means that many Native Americans see their own governments as “foreign and illegitimate.”¹⁶² When governing institutions are seen as illegitimate, their effectiveness within a community decreases dramatically because the citizens see it as working against their own values and interests.¹⁶³

In the Nation Building Model, when an institution does not reflect a community’s political culture, it is said to have low cultural

¹⁵⁹ JOHN G. RED HORSE ET AL., FAMILY PRESERVATION: CONCEPTS IN AMERICAN INDIAN COMMUNITIES 12 (2000); *see also* Melton, *supra* note 16, at 80.

¹⁶⁰ JOSEPH THOMAS FLIES-AWAY & CARRIE E. GARROW, CROW TRIBAL COURTS IN THE 21ST CENTURY: CHANGING PATHS—STRENGTHENING THE VISION 3 (1999), available at <http://hpaied.org/images/resources/publibrary/PRS99-4.pdf>; *see also* Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 598 (2000); Fredric Brandfon, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 1000 (1991); GARROW & DEER, *supra* note 34, at 10; Polashuk, *supra* note 21, at 1213.

¹⁶¹ Cornell & Kalt, *Sovereignty and Nation-Building*, *supra* note 120, at 195-96.

¹⁶² Cornell & Kalt, *supra* note 108, at 25.

¹⁶³ *See generally* Jeffrey Fagan, *Legitimacy and Criminal Justice: Introduction*, 6 OHIO ST. J. CRIM. L. 123 (2008). *See also* Cornell & Kalt, *Sovereignty and Nation-Building*, *supra* note 120, at 201-02; Robert J. Sampson & Dawn Jeglum-Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC’Y REV. 777 (1998); Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Authorities?*, 19 BEHAV. SCI. & L. 215 (2001); Ronald Weitzer, *Citizens’ Perceptions of Police Misconduct: Race and Neighborhood Context*, 16 JUST. Q. 819 (1999).

match. In order to turn around this history of dependency, Native nations need institutions to design and implement administrative institutions that match their unique political culture. This important process will legitimize the institutions in the eyes of the community, and thus make them more effective.¹⁶⁴

When Native nations seek to create institutions that have high cultural match, they do not necessarily need to return to pre-colonial traditions and practices.¹⁶⁵ Instead, the crucial issue is “the degree of match or mismatch between formal governing institutions and today’s Indigenous ideas . . . about the appropriate form and organization of political power.”¹⁶⁶ This means that successful governing institutions draw from the current political culture, which may be comprised of both traditional and contemporary values.¹⁶⁷

In order to build a juvenile justice system that exercises practical sovereignty in an effective way, Native nations must concern themselves with the principle of cultural match. The problems related to non-Native juvenile justice systems are not limited to the fact that they take decision-making power out of Native hands; these outside systems also often operate in opposition to Native culture. As such, these foreign systems are assimilative in their effects on Native communities. Additionally, these outside systems tend to be ineffective at accomplishing the purpose for which they were designed.¹⁶⁸ An institution that does not exercise its power in a manner consistent with the cultural understandings of that institution raises issues of legitimacy with the community it is supposed to serve.¹⁶⁹ When an individual or community does not see an institution as legitimate, the effectiveness of, and trust in, that system quickly disappears.¹⁷⁰ Indian Country is ripe with examples of institutions that are ineffective because they do not reflect the values of the communities they are in. Many of these institutions have been imposed upon Native nations by outside governments. For example, in the criminal justice

¹⁶⁴ See Cornell & Kalt, *supra* note 108, at 24-25.

¹⁶⁵ *Id.* at 25.

¹⁶⁶ *Id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 24-25.

¹⁶⁹ *Id.*

¹⁷⁰ See Cornell & Kalt, *supra* note 108, at 25.

context, there is evidence of distrust and ineffectiveness at every stage: policing, courts, and sentencing.¹⁷¹

If Native nations want to produce effective juvenile justice systems, they need to make sure such systems are culturally relevant to the community they serve. Fortunately, juvenile justice systems provide an excellent forum for both the creation of traditional and/or innovative systems that fit in with a Native nation's cultural values. Additionally, the use of those systems provides Native nations with the opportunity to create and reinforce important cultural norms. Native nations have traditionally dealt with juvenile crime using a myriad of culturally specific mechanisms.¹⁷² Generally speaking, the philosophy underlying these methods differs from that of the states and federal government.¹⁷³ Although Native nations can learn from non-Native systems, there is no reason that Native juvenile justice systems should be designed to mirror non-Native systems.¹⁷⁴ Instead, Native nations should draw from their own culture and values when designing a juvenile justice system. In doing so, it is vital to keep in mind the fact that such institutions promote values and beliefs to both the youth they serve and the community at large.¹⁷⁵ Thus, to be truly effective institutions, juvenile justice systems should both reflect and reinforce the culture of which they are a part.

One reason Native nations sometimes resist recreating traditional systems or developing new and innovative systems is because they fear that non-Native governments will condemn such systems as

¹⁷¹ See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 78, at 68-69; see also Melton, *supra* note 16, at 68.

¹⁷² See generally Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 127, 131 (1995); see also *Challenges Facing American Indian Youth*, *supra* note 150, at 6; Atwood, *supra* note 160, at 592-93.

¹⁷³ Patterson, *supra* note 12, at 813. See also Atwood, *supra* note 160, at 585-86; Melton, *supra* note 16, at 65; Ramona Gonzales & Tracy Godwin Mullins, *Addressing Truancy in Youth Court Programs*, in NAT'L YOUTH COURT CTR., *supra* note 16, at 1, 13, 16-17; James W. Zion, *Justice as Phoenix: Traditional Indigenous Law, Restorative Justice, and the Collapse of the State*, in NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 139, at 57, 63.

¹⁷⁴ In fact, the Nation Building Approach predicts that Native justice systems that mirror those of the U.S. are likely to fail precisely because the institution would not match the culture it is serving.

¹⁷⁵ See Brandfon, *supra* note 160, at 1000; Polashuk, *supra* note 21, at 1213; Atwood, *supra* note 160, at 598.

illegitimate.¹⁷⁶ However, in the context of juvenile justice, there is precedent for experimentation and variation. In many respects, the entire U.S. juvenile justice system is just an experiment that has been going on for barely over a century.¹⁷⁷ Furthermore, the American system was designed on the beliefs that procedural formality (which tends to make all adult court proceedings more-or-less identical) is counterproductive to rehabilitation and that rehabilitation is an extremely individualistic process requiring unique solutions for different youths (and communities).¹⁷⁸ These principles, in conjunction with the federal government's policy of self-determination for Native nations, are more than enough reason for Native nations to have free-range in the development of their own culturally appropriate juvenile justice systems.¹⁷⁹

4. Principle #4: Strategic Orientation

Strategic orientation refers to the manner in which successful Native nations approach decision-making. Successful and sustainable community development focuses on the question: “[W]hat kind of society are we trying to build?”¹⁸⁰ This question should be considered first so that a vision is established before any action takes place. Once a vision has been set, a strategic orientation considers the question: “[H]ow do we put in place the systems and policies that will attract and hold the people and the capital that the nation needs?”¹⁸¹ This question forces nations to consider the long-term sustainability of their visions, and of the Native nation as a whole. Thus, effective strategic decision-making may involve substantial time and research, but the result is a clear goal with clear steps on how to achieve and sustain it.

¹⁷⁶ See Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power Over Children*, 83 MINN. L. REV. 927, 929 (1999); Melton, *supra* note 172, at 126; Marianne O. Nielsen et al., *Recent Trends in Community-Based Strategies for Dealing Juvenile Crime in the Navajo Nation*, in NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 139, at 197, 213.

¹⁷⁷ Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 398 (1996); see Ainsworth, *supra* note 131, at 1096.

¹⁷⁸ Ainsworth, *supra* note 131, at 1099-100.

¹⁷⁹ See Polashuk, *supra* note 21, at 1231.

¹⁸⁰ Cornell & Kalt, *supra* note 108, at 25.

¹⁸¹ *Id.*

Juvenile justice systems require strategic, long-term planning because there are no quick fixes when it comes to solving the multitude of problems Native juveniles face. Specifically, Native leaders must consider how juvenile justice systems fit into the broader strategic context of producing healthier children. Juvenile justice systems have a lot to offer, but they are primarily a reactive set of institutions, which only intervene after a youth has caught the attention of the system. They are at their best when they work in concert with prevention programs, and Native nations must decide what balance should exist between these two types of institutions.¹⁸²

In addition to determining how a juvenile justice system will interact with other institutions, Native nations must think strategically about the components that comprise their own system. In doing so, Native nations will likely have to determine what their legal philosophy says about juveniles,¹⁸³ the law,¹⁸⁴ and the proper response to criminal acts.¹⁸⁵ Once those questions are answered, then the process of determining how best to implement those philosophies—while keeping in mind the culture of the community—can begin. Even though I have only scratched the surface of the issues associated with Native juvenile justice systems, it is easy to see that, in order for any juvenile justice system to be successful, there must be careful planning and a clear strategic orientation.

5. Principle #5: Leadership

The final element of the Nation Building Model is effective leadership. When there is a lack of effective leadership, little or nothing is

¹⁸² ALINE K. MAJOR ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN: YOUTH GANGS IN INDIAN COUNTRY 11 (2004), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/202714.pdf>.

¹⁸³ Native nations might wrestle with the very question juvenile law scholars are struggling with right now: do any worthwhile reasons for treating juveniles differently than adults still exist? See generally Ainsworth, *supra* note 131; Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM.L. & CRIMINOLOGY 68 (1997).

¹⁸⁴ Native nations must determine what they view the role of law as in their society. See generally, e.g., NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1997).

¹⁸⁵ Native nations must determine whether punishment, deterrence, rehabilitation, or some other philosophy underlies the nation's response to juvenile crime. See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 13-26 (3d ed. 2001).

accomplished. Community support and action are necessary for societies to grow and change, but without leadership, these essential factors are often missing.

That said, what makes an effective leader? In the Nation Building Model, an effective leader is primarily concerned with “putting in place the institutional and strategic foundations for sustained development and enhanced community welfare.”¹⁸⁶ Under this definition, leadership is not limited to governing officials, but includes any citizen who takes responsibility for the future of his or her nation.¹⁸⁷

Creating and implementing a juvenile justice system is not an easy task. It requires financial resources, a vision, strategic planning, and, ultimately, the support of the citizens in the community where it will operate. As such, Native leaders, political and non-political alike, are the ones who can make such a project happen. As Senator Ben Nighthorse Campbell put it, “[j]uvenile justice and related youth issues” must rely “on the involvement of parents, elders, religious leaders, and teachers” if they are to improve.¹⁸⁸ If anything is going to get done, the Nation Building Model says that it all must start with community leaders. They are the ones responsible for educating themselves and the community. They are the ones who can use the principles of the Nation Building Model, along with the resources available to them in their own community, to turn ideas into institutions and visions into realities.

III. CASE STUDIES

Thus far, I have argued that Native nations should create and exercise control over their own juvenile justice systems because such systems have the potential to utilize Native concepts of justice (both procedural and substantive) when handling youthful offenders; to rehabilitate, restore, and/or treat delinquent youths in a culturally-appropriate manner; and to combat the federal history of Native juvenile assimilation by simultaneously keeping Native youths out of foreign systems and keeping them in juvenile systems where Native youths can learn about the norms of their own community. Additionally, I have argued that the Nation Building Model is the framework that should be

¹⁸⁶ Cornell & Kalt, *supra* note 108, at 26.

¹⁸⁷ *Id.* at 27.

¹⁸⁸ *Challenges Facing American Indian Youth*, *supra* note 150, at 7.

used to guide Native nations in the process of creating (or re-creating) their juvenile justice systems. But, is this framework practical? Can the Nation Building Model's principles realistically be applied to Native juvenile justice systems? And, if so, what might a juvenile justice system informed by the Nation Building Model look like? To answer these questions, there is no need to look any further than Native nations themselves to see what some are already doing in the realm of juvenile justice.

A. Organized Village of Kake

1. *The Problem*

The Organized Village of Kake is a federally recognized tribe comprised of less than five hundred individuals located about two hundred miles south of Juneau, Alaska.¹⁸⁹ For several decades leading up to the turn of the century, the Tlingit people of Kake watched as the problem of underage drinking and substance abuse ravaged its community.¹⁹⁰ One member recalls watching the change occur:

When I was growing up, we never heard of suicides and we hardly experienced alcohol. . . . I can attribute it to the [mid-1960s when] the city owned alcohol store moved in here. . . . There weren't many deaths to alcohol prior to that that I knew of. When I went out to school I heard about people passing on, but I didn't know what it was from. When I came back I found that 21 people [had] died in one year from suicides. One hundred percent of it was because of alcohol.¹⁹¹

¹⁸⁹ DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, 2005 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT 26 [hereinafter 2005 AMERICAN INDIAN POPULATION] (noting that the Organized Village of Kake has a tribal enrollment of four hundred and sixty-five members).

¹⁹⁰ HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEV., KAKE CIRCLE PEACEMAKING, HONORING NATIONS: 2003 HONOREE 1 (2004) [hereinafter KAKE CIRCLE PEACEMAKING], available at <http://hpaied.org/images/resources/publibrary/Kake%20Circle%20Peacemaking.pdf>.

¹⁹¹ ALASKA DEPT. OF HEALTH AND SOCIAL SERVS., HEALTHY ALASKANS 2010: TARGETS AND STRATEGIES FOR IMPROVED HEALTH: VOL. II: CREATING HEALTHY COMMUNITIES: AN ALASKAN TALKING CIRCLE 6 (2010) [hereinafter HEALING OUR COMMUNITY] (quoting Mike A. Jackson who was, at the time of the interview, the

Sadly, the problem of alcohol was not something localized to the Tlingit people of Kake. According to a report by the National Institute on Alcohol Abuse and Alcoholism, between 1990 and 1993, more than two-thirds of Alaska Native deaths were alcohol-related.¹⁹²

Why was this happening? Why could no one curtail or stop the pervasive abuse of alcohol among the youth? Part of the difficulty in addressing this problem related to the fact that the Alaska State justice system—as opposed to the federal system—was clearly supposed to handle juvenile offenders,¹⁹³ but despite decades of attempts, had not been able to improve the situation.¹⁹⁴ In fact, due to a lack of resources, the Village of Kake was nearly forgotten by the system. For instance, the juvenile probation officer assigned to handle juvenile offenders from Kake did not even live on the same island as the village, and since this officer was also responsible for juvenile felony offenses in the area, there was little time to handle misdemeanor alcohol offenses or monitor the actions of past offenders.¹⁹⁵ The result was that alcohol usage in Kake went largely unchecked and juveniles became entrenched in their dependency on alcohol as they grew into adults.¹⁹⁶

2. *Applying the Nation Building Model*

Fortunately, the people of Kake did something. As the Nation Building Model advocates, the people of Kake took control of the situation. They developed a system to address the problem of juvenile crime, in particular alcohol abuse, occurring in their community. This process did not come from outsiders, but from within. And all five principles of the Nation Building Model can be found in what they did.

president of Keex Kwaan, the Kake IRA Council), *available at* http://www.hss.state.ak.us/dph/targets/ha2010/PDFs/Volume%202/Vol_II.pdf.

¹⁹² Bernard Segal, *Drinking and Drinking-Related Problems Among Alaska Natives*, 22 ALCOHOL USE AMONG SPECIAL POPULATIONS 276 (1998) (alcohol-related deaths means that the deceased had a Blood Alcohol Content (BAC) of .08 or higher; for the general Alaskan population, this rate was approximately twenty-five percent, compared to 66.6% for Alaska Natives), *available at* <http://pubs.niaaa.nih.gov/publications/arh22-4/276.pdf>.

¹⁹³ KAKE CIRCLE PEACEMAKING, *supra* note 190.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

First, starting in the 1980s, members of Kake began looking for a way to address their alcohol problems. Leadership arose from within the community. Many of these leaders were elders who thought the younger generation was falling away from the customs and traditions of the Tlingit people.¹⁹⁷ While Kake leaders originally turned to outside consultants for help,¹⁹⁸ eventually they came to the realization that they had to remedy the situation themselves.¹⁹⁹ With this decision, the people of Kake moved into a phase of strategic planning. Discussions began immediately about “what was right and what was wrong and what was religion, what was tradition, and the common values of love, respect, and forgiveness.”²⁰⁰ In 1998, after years of discussion and learning more about the traditional ways of dispute resolution among the Tlingit people, the Organized Village of Kake decided to create their own traditional dispute resolution system—the Healing Heart Council, which would ultimately utilize the process of Circle Peacemaking.²⁰¹

The decision to create the Healing Heart Council was an act of practical sovereignty—it was a decision made by the people of Kake regarding their own way of life. Despite substantial limits in the de jure jurisdiction Kake had over their youths, the Village went forward with their Council anyway—exercising de facto sovereignty.²⁰²

In order to give their decision the greatest chance to succeed, the people of Kake did two things. First and foremost, they paid attention to the concept of cultural match. The Circle Peacemaking process draws on restorative principles such as the importance of dialogue, the accountability of the offender, and the restoration of the victim.²⁰³ These principles, and the process used to put them into action, are imbedded in Tlingit tradition.²⁰⁴ It is important to note that Circle Peacemaking is succeeding “because of, and not in spite of, all of its cultural realities.”²⁰⁵

¹⁹⁷ HEALING OUR COMMUNITY, *supra* note 191, at 6.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 6-7.

²⁰² *See generally* KAKE CIRCLE PEACEMAKING, *supra* note 190.

²⁰³ HEALING OUR COMMUNITY, *supra* note 191, at 11.

²⁰⁴ KAKE CIRCLE PEACEMAKING, *supra* note 190, at 2.

²⁰⁵ *Id.* (“Skeptics of Circle Peacemaking challenged the ability of an isolated, small, and socially interconnected village to establish a successful sentencing process. In Circle Peacemaking, however, these realities lie at the heart of the circles’ successes. Circle

Second, the Organized Village of Kake took steps to ensure that their system would work in conjunction with the Alaska system.²⁰⁶ This was a necessary step given the lack of de jure jurisdiction Kake had over its juveniles, but it was taken in a way that honored its own community traditions.²⁰⁷ Before the establishment of the Council of Hearts, Kake juveniles were only subject to state court. After the Council was set up, Native youths (and their families) had another option. Specifically, when a youth is willing to enter a guilty plea in the Alaskan court system, it is now possible for he or she to be sentenced by the Council of Hearts using the Circle Peacemaking process.²⁰⁸ If youths are non-compliant with the sentence reached via Circle Peacemaking, they must return to state court for sentencing.²⁰⁹ By ensuring that both the people served by the Council of Hearts and the state of Alaska understood that the system was legitimate, the people of Kake created a capable governing institution that flourishes to this day.²¹⁰

3. *The System Created*

As previously stated, the process created by the Organized Village of Kake is called Circle Peacemaking. A juvenile who pleads guilty to an offense in state court can come before the Council of Hearts for sentencing.²¹¹ This Council starts the Circle Peacemaking process by bringing together the offender, the victim, their families, and other community members to respond to a particular offense.²¹² The process typically lasts several hours and involves traditional prayers.²¹³ The goal is to bring about forgiveness and healing for everyone involved.²¹⁴ More

Peacemaking is not an impersonal, but a deeply personal justice system that depends upon and promotes the interconnectedness of a compact and culturally whole village.”).

²⁰⁶ *Id.*

²⁰⁷ *Id.* (“[N]otwithstanding targeted state efforts to reduce tribal decision-making power, Kake has instituted a system of justice that increases tribal sovereignty. It has done so in a manner that commands the respect of the state judicial system while honoring its own community traditions.”).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ HEALING OUR COMMUNITY, *supra* note 191, at 11.

²¹¹ *Id.*

²¹² *Id.* at 11.

²¹³ KAKE CIRCLE PEACEMAKING, *supra* note 190, at 2.

²¹⁴ *Id.*

specifically, the hope is to address the underlying cause of the offender's behavior, and then to figure out a way to restore community life by repairing the various relationships damaged by the offender's action.²¹⁵ The process ends only after everyone has had their chance to speak, genuine forgiveness and healing are apparent, and the Council has reached consensus on the offender's sentence.²¹⁶ At this point in time the sentence is made public, but that is not the end of the process. It is up to all of the circle participants to assist the offender and hold him or her accountable in his or her efforts to adhere to the sentence.²¹⁷ This accountability and support can be as critical as the circle itself. As one circle participant puts it, "[t]o me the circle is about compassion. . . . We don't just do it when someone's in need. We do it when we know they're doing good, to encourage them, and that seems to be helping. They know that people care for them."²¹⁸ Sentences may include formal apologies, community service, and/or meetings with elders, and the circle itself is responsible for assessing whether the sentence has been complied with in a satisfactory manner. If the circle decides the sentence has not been complied with, then additional Peacemaking Circles may be called and the process repeated.²¹⁹

4. *The Results*

The results of the Circle Peacemaking process have been nothing short of phenomenal. As of 2003, all twenty-four juveniles who completed Circle Peacemaking for underage alcohol abuse had successfully completed their sentences with extremely low rates of recidivism.²²⁰ Additionally, over the years the need for sentencing circles has decreased,²²¹ which is a testament to their ability to influence not only the offenders who go through the process, but the outside community as well. Perhaps most telling of the successes of the Circle Peacemaking process is the fact that other communities, including the

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ HEALING OUR COMMUNITY, *supra* note 191, at 8.

²¹⁹ KAKE CIRCLE PEACEMAKING, *supra* note 190, at 2.

²²⁰ *Id.*

²²¹ *Id.*

Juvenile Justice Center in Anchorage, are now successfully using Circle Peacemaking with juvenile offenders.²²²

In addition to the reduction in underage alcohol usage, the creation of the Council of Hearts has resulted in an expansion of sovereignty for the Organized Village of Kake.²²³ Not only do they now have more control over their own delinquent youths, but Kake has also been able to expand their Circle Peacemaking program to allow adult offenders to participate in it as well. As with the youth, the results for adult participants have been staggering. After four years of operation, the Circle Peacemaking process (for both youths and adults) has experienced a 97.5% success rate in sentence fulfillment compared to twenty-two percent for the Alaskan court system.²²⁴

When one takes into consideration the fact that, traditionally, Alaska has been either neglectful or even openly hostile towards Alaska Natives,²²⁵ and the fact that the Circle Peacemaking system is an extremely inexpensive system to run (in part, due to its heavy reliance on community volunteers),²²⁶ then one realizes just how significant Kake's story is. It is also an excellent illustration of how the principles of the Nation Building Model can be used by Native nations to take control of juvenile justice in their communities, and do so in a way that makes a difference in the lives of everyone. "We are rebuilding community," says one member of the Healing Heart Council, and "[i]f we're going to get healthier as a people, as a family, as a community, as a nation, then those very institutions that govern us have to take a good look at themselves and see how they can start to compliment our efforts and help us return to the place of spirit."²²⁷

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ KAKE CIRCLE PEACEMAKING, *supra* note 190, at 4.

²²⁶ HEALING OUR COMMUNITY, *supra* note 191, at 10.

²²⁷ *Id.* at 9.

B. Grand Traverse Band of Ottawa and Chippewa Indians

1. *The Problem*

The Grand Traverse Band of Ottawa and Chippewa Indians is a federally recognized tribe comprised of approximately four thousand members,²²⁸ of which seventeen hundred live on or nearby a reservation located about one hundred and fifty miles north of Grand Rapids, Michigan.²²⁹ As was the case with many Native nations,²³⁰ in the 1800s, the Grand Traverse Band was subject to policies that tried to destroy their way of life. Specifically, the Grand Traverse Band's people were splintered, their language was forbidden, and their children were sent away to boarding schools.²³¹ It wasn't until 1980 that the Grand Traverse Band was federally recognized and granted powers of self-governance.²³² In the fifteen years that followed, many members of the Grand Traverse Band moved back to or near the reservation, oftentimes for jobs and services.²³³ Some of the members were familiar with Native culture and traditions while others were not.²³⁴ This mix of individuals, combined with the increase in population over a relatively short period of time, led to many problems, one of which was a substantial increase in juvenile crime.²³⁵

²²⁸ 2005 AMERICAN INDIAN POPULATION, *supra* note 189, at 20.

²²⁹ Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 888 (1999).

²³⁰ See e.g., Graham, *supra* note 22, at 13 (consistent war used to destroy Native culture); JOHN EHLE, *TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION* (1997) (forced relocation used to destroy Native culture); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986) (attack on Native culture by U.S. Supreme Court); Catherine M. Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation for the Future*, 27 CREIGHTON L. REV. 661 (1994) (modern-day policies used to weaken Native culture).

²³¹ Costello, *supra* note 229, at 888.

²³² *Id.*

²³³ *Id.* at 888-89.

²³⁴ *Id.* at 889.

²³⁵ *Id.*

2. *Applying the Nation Building Model*

In order to address this problem, the Grand Traverse Band's leadership knew that they needed a solution that would be legitimate in the eyes of all their members—that is, one that matched the culture of the community. To find such a solution, the Grand Traverse Band brought together the entire community and involved them in the strategic process of designing a juvenile justice system.²³⁶ The result of this process was a true act of sovereignty, and ultimately, was the creation of an effective governing institution—the Grand Traverse Band's Peacemaking Court, known as “Mnaweejeendiwin,” which translated means, “walking together in a good way.”²³⁷

3. *The System Created*

The Mnaweejeendiwin involves no judges, lawyers, social workers, or dockets.²³⁸ It is based on a traditional practice²³⁹ involving a peacemaker who ensures “everyone has an opportunity to say what they want to say” and focuses the group on restoring harmony to the community.²⁴⁰ A case gets to the Mnaweejeendiwin by referral from a tribal social worker, law enforcement officer, prosecutor, or judge.²⁴¹ The juvenile offender may then choose to go forward with the process instead of having an official complaint filed against him or her in tribal court.²⁴² If the Mnaweejeendiwin process goes forward, then the offender, the victim, their families, and other community members take part in a peacemaking session.²⁴³ The session ends when a consensus has been

²³⁶ *Id.* The Grand Traverse Band also used a strategic process to improve their own laws with respect to juvenile crime. Specifically, the Band noted what types of crimes were most prevalent amongst their youth and amended their laws accordingly. See V. RICHARD NICHOLS ET AL., U.S. DEPARTMENT OF JUSTICE, TRIBAL STRATEGIES AGAINST VIOLENCE: GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS CASE STUDY 14-15 (2002), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/206035.pdf>.

²³⁷ Costello, *supra* note 229, at 876.

²³⁸ *Id.* at 875.

²³⁹ *Id.* at 879.

²⁴⁰ *Id.* at 876-77.

²⁴¹ *Id.* at 881.

²⁴² *Id.*

²⁴³ Costello, *supra* note 229, at 881-82.

reached and “a contract outlining the terms of the resolution is signed by both the wrongdoer and the victim.”²⁴⁴

In addition to being a dispute resolution body that promotes community harmony, the Mnaweejeendiwin serves as an educational tool in the community. The peacemaking sessions themselves involve traditional prayers and ceremonies that can teach all individuals involved about the Grand Traverse Band’s culture and history.²⁴⁵ Additionally, the process is used to show individuals how to mend relationships and teach them model behavior with the Grand Traverse Band.²⁴⁶ In certain cases, the Mnaweejeendiwin has used innovative means to teach these lessons. For instance, in 1998, four fatherless, chronically truant youths were taken on a ten-day, two-hundred-and-sixty-mile canoe trip.²⁴⁷ The goal of the trip was to “teach the young men that when faced with a hard challenge, their best option was not to give up, but to complete the difficult task.”²⁴⁸ The journey was also used to teach the youths about their culture and life itself.²⁴⁹ Similarly, the Native nation has since developed a residential peacemaking camp where juvenile offenders partake in physical activities, receive education about health and wellness, and attend workshops on tribal culture, instead of being placed on probation.²⁵⁰

4. *The Results*

Overall, the Mnaweejeendiwin has served the Grand Traverse Band very well. It has been vital in rebuilding and reeducating the community about the values, culture, and traditions that make the Grand Traverse Band unique.²⁵¹ In short, it is another example of how the Nation Building Model’s principles can be found in the actions of a Native nation who has taken control of its own juvenile justice system for the betterment of everyone involved.

²⁴⁴ *Id.* at 882.

²⁴⁵ *Id.* at 880-81.

²⁴⁶ *Id.* at 880.

²⁴⁷ *Id.* at 884.

²⁴⁸ *Id.* (quoting Peacemaker Coordinator Paul Raphael).

²⁴⁹ Costello, *supra* note 229, at 885.

²⁵⁰ *Id.*; see also NICHOLS ET AL., *supra* note 236, at 22-23.

²⁵¹ Costello, *supra* note 229, at 890.

C. Three More Ideas

1. *The Mississippi Band of Choctaw's Youth Court*

The Mississippi Band of Choctaw is a federally recognized tribe of approximately ten thousand individuals located on a reservation approximately one hundred and seventy-five miles west of Birmingham, Alabama.²⁵² Prior to 1997, the Mississippi Band of Choctaw Tribal Court was comprised of three divisions—criminal, civil, and youth.²⁵³ The problem, however, was that a heavy caseload meant that there was an enormous backlog of cases under this system.²⁵⁴ So the Mississippi Band of Choctaw went looking for a solution. Ultimately, a major reform of the entire court system was undertaken. Part of this reform involved the creation of a Peacemaker Court that, in principle, is similar to those discussed previously.²⁵⁵ Additionally, the Choctaw nation also decided to create a Teen Court to help with their large number of juvenile cases.²⁵⁶

Generally, Teen Courts are “programs in which youth are sentenced by their peers for minor delinquent and problem behavior.”²⁵⁷ Such courts are designed to empower juveniles by giving them responsibility over the program and control over its development.²⁵⁸ For the Mississippi Band of Choctaw, the Teen Court has had the desired effect of lessening the Tribal Court’s caseload, but it has also produced other fruits.²⁵⁹ For instance, the Teen Court is giving youths the opportunity to become more informed about Choctaw values through learning and practicing Choctaw law.²⁶⁰ Additionally, it is promoting peer-to-peer community building among the Choctaw youths.²⁶¹ Specifically, “interactions with peers through court service generates a set

²⁵² 2005 AMERICAN INDIAN POPULATION, *supra* note 189, at 6.

²⁵³ HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEV., CHOCTAW TRIBAL COURT SYSTEM, HONORING NATIONS: 2005 HONOREE 2, [hereinafter CHOCTAW TRIBAL COURT SYSTEM], *available at* http://www.hks.harvard.edu/hpaied/hn/hn_2005_ChoctawTribalCourt.htm.

²⁵⁴ *Id.*

²⁵⁵ *Id.*; see discussion of Kake Peacemaker Court, *supra* Part III, Section A.

²⁵⁶ *Id.*

²⁵⁷ Melton, *supra* note 16, at 71.

²⁵⁸ *Id.*

²⁵⁹ CHOCTAW TRIBAL COURT SYSTEM, *supra* note 253, at 2.

²⁶⁰ *Id.*

²⁶¹ *Id.*

of common experiences and shared sense of accomplishment” that allows teens of all different backgrounds to come together.²⁶² In doing these things, the Teen Court is also raising future leaders and creating friendships among youths that will hopefully last into adulthood, and it is doing this all while addressing less complicated juvenile offenses in an effective way.²⁶³

2. *The Navajo Nation’s Hozhooji Youth Diversion Project*

The Navajo Nation, which is comprised of approximately two hundred and fifty thousand individuals²⁶⁴ on a reservation that is nearly the size of South Carolina,²⁶⁵ is the largest federally recognized tribe in the United States. Given the size and population of the Navajo Nation, juvenile crime has long been a problem on the reservation²⁶⁶ and the Navajo Nation has sought to address this problem in a myriad of ways. One tool used by the Navajo Nation is traditional law and procedure, which draws on concepts of harmony instead of retribution.²⁶⁷ For example, in 1982, the Navajo Nation became the first Native nation to rebuild traditional legal institutions on their reservation.²⁶⁸ They did this through the creation of the first Peacemaker Court system.²⁶⁹ This system uses traditional dispute resolution, or “original dispute resolution,” to handle a wide variety of cases, including juvenile crime.²⁷⁰ The specifics of the Peacemaker Court system, including the traditional Navajo

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ 2005 AMERICAN INDIAN POPULATION, *supra* note 189, at 11.

²⁶⁵ Robert Yazzie, “*Hozho Nahasdlii*”—*We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 118 (1996).

²⁶⁶ *See generally* Nielsen et al., *supra* note 139.

²⁶⁷ *See generally* Raymond Darrel Austin, *Navajo Courts and Navajo Common Law* (April 6, 2007) (Ph.D. Dissertation, University of Arizona 2007), *available at* <http://turtletalk.files.wordpress.com/2010/05/ray-austin-dissertation.pdf>.

²⁶⁸ Adam Mendelowitz, *Restorative Justice: Integrating Peacemaking into Modern America* 8 (2008), *available at* <http://www.nyc.gov/html/oath/downloads/pdf/Mendelowitz.pdf>.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 7-8.

concepts it draws from, are beyond the confines of this paper but are extensively documented elsewhere.²⁷¹

What is significant about the Navajo Nation's efforts in the arena of juvenile justice is that they have not only produced a dispute resolution system that fits with their values, but they have also created diversion programs and treatment programs that are also culturally appropriate. For example, the "Hozhooji Youth Diversion Project" (HYDP) was designed by the Navajo Nation as a diversion program for first-time, non-violent, juvenile offenders.²⁷² The program brings together the juvenile with his or her family and provides an array of traditional services and education. These include services such as traditional sweats and talking circle sessions,²⁷³ as well as information on topics such as drug abuse and "the Navajo view of offenses against the community."²⁷⁴ The HYDP is just one example of what can happen when Native nations take control of their entire juvenile justice system and not merely the portion that deals with dispute resolution (i.e., the court).

3. *The Healing Lodge of the Seven Nations*

The Healing Lodge of the Seven Nations is another example of how Native nations can take control over juvenile justice in their communities. The Healing Lodge, unlike the various courts previously mentioned, is not a dispute resolution system but a treatment facility that addresses the underlying causes of juvenile delinquency.²⁷⁵ Additionally,

²⁷¹ See, e.g., Yazzie, *supra* note 265; Robert Yazzie, "Life Comes From It": Navajo Justice Concepts, 24 N.M.L. REV. 175 (1994); James W. Zion, *The Navajo Peacemaker Court: Deference to Old and Accommodation of the New*, 11 AM. INDIAN L. REV. 89 (1983).

²⁷² Kendall L. Long, *Hozhooji Youth Diversion Project Summary* (Restorative Justice Online Website), available at <http://rjonline.org/articlesdb/articles/2531> (the actual paper was presented at "Dreaming of a New Reality," the Third International Conference on Conferencing, Circles and Other Restorative Practices, August 8-10, 2002 in Minneapolis, Minn.).

²⁷³ *Id.*

²⁷⁴ OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPT. OF JUSTICE, HOLDING UP BOTH ENDS OF THE SKY: JUVENILE JUSTICE PARTNERS IN INDIAN COUNTRY 6 (2003), available at http://www.juvenilnet.org/jjtap/archives/sky/Participant_Guide.pdf.

²⁷⁵ HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEV., HEALING LODGE OF THE SEVEN NATIONS, HONORING NATIONS: 2002 HONOREE (2002), available at http://www.hks.harvard.edu/hpaid/hn/hn_2002_healing.htm.

the Healing Lodge is not the creation of one Native nation, but of seven.²⁷⁶ The Healing Lodge is an attempt to take a shared problem—substance abuse among Native youths in the Pacific-Northwest—and combine resources and wisdom to combat this problem.

The Healing Lodge draws from Native traditions and values for its treatment program in a variety of ways. First, it understands that community and family are necessary in the recovery of any youth, and seeks out that type of support for all its patients.²⁷⁷ Second, it utilizes traditional medicines and physical activities in its treatments.²⁷⁸ Third, the Healing Lodge is able to integrate cultural ceremonies and practices into the rehabilitation process. Although serving multiple cultures, “the Healing Lodge is able to tap into widely shared cultural tenets while accommodating distinct cultural beliefs” effectively.²⁷⁹ The results of this process have been substantial. During its first decade of operation, the Healing Lodge served more than fifteen hundred youths from more than one hundred and fifty Native communities and has transitioned youths back to their communities at an increasingly successful rate.²⁸⁰ In total, more than seventy-five percent of Native youths who have completed the program show less drug and alcohol abuse afterwards, with many of these youths citing cultural components of the program as a primary reason for their improvement.²⁸¹ Thus, the Healing Lodge is yet another example of the positive results that can come from applying the Nation Building Model principles to the issues of juvenile justice.

IV. CONCLUSION

I have laid out the argument that Native nations wishing to break the cycle of juvenile delinquency on their reservation must ensure that both their procedural and substantive laws relating to juvenile crime reflect the norms and values of the Native nation’s culture specifically. I

²⁷⁶ *Id.* (the Confederated Tribes of the Colville Reservation, the Spokane Tribe of Indians, the Kalispel Tribe of Indians, The Kootenai Tribe of Idaho, the Coeur d’Alene Indian Tribe, the Nez Perce Tribe, and the Confederated Tribes of the Umatilla Reservation).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

made this argument in three parts. First, I established that most Native-American juveniles, whether living on or off a reservation, interact with criminal justice systems that do not necessarily reflect the culture within which they were raised. This is often true even when Native juveniles are processed in juvenile justice systems on Native-American reservations. Second, I laid out the Nation Building Model, a theoretical framework that has been applied to a wide range of Native-American issues. I argued that this model can be used to help improve Native juvenile delinquency. Third, I contended that applying the Nation Building Model to the issue of juvenile justice requires Native nations to carefully consider whether their own institutions reflect the values of the people they serve. Case studies involving Native nations who have done just that are beginning to see meaningful improvements with respect to juvenile delinquency on their reservations.

Perhaps the most valuable lesson this paper can offer to help improve juvenile delinquency is that one size does not fit all. While the Nation Building Model provides principles that can be applied to a variety of situations, it does not provide a prototypical juvenile justice system that can simply be replicated throughout Indian Country or elsewhere. Rather, the Nation Building Model encourages Native nations to meaningfully reflect on what it means to be Native in their communities and then to incorporate those values into a juvenile justice system in order to produce positive results.

Although no single system can work for all Native nations, there are common problems that will need to be overcome in order to make meaningful changes to an existing juvenile justice system or a new system where none exists. While an analysis of these issues is beyond the scope of this paper, they are worth mentioning here because they are likely to arise in nearly all contexts. According to a 2005 study conducted by the Office of Juvenile Justice and Delinquency Prevention, common obstacles to improving Native juvenile justice systems include: restrictions placed on sovereignty by federal and state law; limited financial, technical, and human resources; lack of consultation on jurisdictional issues that affect youths in Native communities; a dearth of programs that promote and

strengthen Native culture among youths; and inadequate secure and non-secure facilities for Native juveniles.²⁸²

These obstacles provide a natural jumping-off point for researchers seeking to improve the problem of juvenile delinquency on Native-American reservations. Understanding the root causes of these challenges and developing strategies to overcome them will undoubtedly benefit future Native leaders who seek to change the way juvenile justice operates within their nation. Additionally, empirical research focused on the effectiveness of various Native juvenile justice systems will not only benefit Native nations, but is also likely to provide larger policy lessons that can be used to improve juvenile justice systems at county, state, and federal levels.

Although Native nations seeking to improve the issue of juvenile delinquency will undoubtedly face obstacles, examples like the Organized Village of Kake's Circle Peacemaking system and the Mississippi Band of Choctaw's Youth Court demonstrate that these challenges can be overcome. The key for success is simple: Native nations must make their own decisions about the way they want to live—including the way they want to handle juvenile justice. If Native nations are willing to go forward with the process of taking back control, then they stand to make a real difference in the lives of their youths and the entire nation.

²⁸² ARYA & ROLNICK, *supra* note 80, at 18-19 (citing M. Petoskey et al., *Tribal Youth Education Project: Juvenile Justice System Analysis*, (NCJ Publication No. 212432, 2005)).