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Strategies for Bridging the Divide

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Aaron F. Arnold Director Tribal Justice Exchange Center for Court Innovation	2011	<p>This report was supported by Grant No. 2008-DD-BX-0274 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime. Points of view or opinions in this document are those of the authors and do not represent the official position or policies of the U.S. Department of Justice.</p> <p><i>On the cover:</i> Wah-wa-suk, Potawatomi elder and spiritual advisor, talks with Minnesota state judges and Leech Lake Band of Ojibwe judges and officials about the significance of their partnership and its impact on future generations, prior to the signing of a joint-powers agreement and flag installation at the Itasca County Courthouse on Feb. 22, 2008. Pictured are, from left to right, Associate Justice Lorie Gildea of the Minnesota Supreme Court, Associate Judge Anita Fineday of the Leech Lake Tribal Court, Itasca County District Court Judge Jon Maturi, Chief Justice Russell Anderson of the Minnesota Supreme Court, Itasca County District Court Judge John Hawkinson, Chief Judge Corey Wahwassuck of the Leech Lake Tribal Court, County Itasca District Court Judge Lois Lang, Chairman George Goggeley Sr. of the Leech Lake Band of Ojibwe, District I Representative Robbie Howe-Bebeau of the Leech Lake Tribal Council, and Wah-wa-suk. Photograph by Frank Bibeau and reprinted with his permission.</p>
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STATE AND TRIBAL COURTS: STRATEGIES FOR BRIDGING THE DIVIDE

INTRODUCTION

It is a chilly Friday morning at the Itasca County District Court in Grand Rapids, Minnesota. Fifteen men and women, all defendants facing criminal drug charges, sit quietly in the gallery of the wood-paneled courtroom waiting for the court session to begin. At first glance, nothing about this court seems out of the ordinary. But behind the judge's bench is something not usually found in a state courtroom. Next to the familiar stars and stripes of the American flag and the blue and gold Minnesota state flag stands a third flag, featuring a yellow triangle inside a bright red circle. Around the circle, in bold black letters, are the words "Leech Lake Band of Ojibwe," the name of the Native American tribe whose land overlaps part of Itasca County.

The door to the judge's chambers opens softly and instead of one judge, two judges take the bench. On the left, in the familiar jet-black robe of a state court judge, is Itasca County District Court Judge John Hawkinson. On the right, wearing a robe adorned with two thick vertical stripes of colorful beads and thread, is Leech Lake Tribal Court Judge Korey Wahwassuck. Together, Judge Hawkinson and Judge Wahwassuck created this special court, known as the Leech Lake-Itasca County Wellness Court, to address the persistent challenge of drug and alcohol abuse, a problem that afflicts both Native and non-Native residents.

To the court's participants, nothing seems unusual about this innovative approach to justice. To them, it makes perfect sense that state and tribal judges would join forces to deal with the community's problems. And that is exactly what happens. The two judges jointly hear each case that comes before the court, whether the offender is Native American or non-Native. They make all critical decisions about the case together and are able to use their diverse backgrounds and experiences to arrive at the best possible outcomes. Native American offenders have reported a greater sense of trust and respect for the court, and non-Native offenders often express their appreciation for the thoughtful decision-making that two judges bring to each case. The court has broken down old barriers between the state and tribal governments and built a foundation for future collaboration.

Not long ago, the courtroom just described would have been impossible. The notion of two judges—one from a state court, the other from a tribal court—presiding together over a single courtroom would have been rejected as absurd. This is because the relationship between state and tribal court systems has been historically characterized by mistrust, misunderstanding, and outright hostility. In some areas of the country, there was no relationship at all, either because local tribal justice systems had been forcibly dismantled or because state authorities refused to recognize their legitimacy. Even in places where these relationships existed, they were often hampered by inconsistent federal policies.

This troubled history has produced a range of serious and persistent problems. Tribal communities have long complained that non-Native offenders who commit crimes on tribal land too often go free—federal law has stripped tribal courts of jurisdiction over non-Native offenders, and federal and state authorities routinely decline to prosecute these cases. And the problems extend beyond criminal prosecution. For generations, state authorities removed Native children from their families, refusing to recognize tribal court authority over domestic relations matters and even ignoring tribal court orders. More broadly, the uneasy relationship between state and tribal courts has contributed to the ongoing tensions between state and tribal governments that persist in many areas of the country today.

Fortunately, as the scene from Leech Lake-Itasca County Wellness Court illustrates, this picture has started to change. Conflict and miscommunication are giving way in many states to relationships that are more productive, amicable, and mutually beneficial.

These positive advances stand to benefit both state and tribal justice systems. In many areas of the country, state and tribal courts are neighbors—their jurisdictions share common physical boundaries, and local problems impact both systems. Moreover, these courts share overlapping legal jurisdiction—including shared authority to adjudicate matters and issue binding orders—in areas like domestic relations, criminal prosecution, and contracts. Given this reality, it is important that these systems coordinate their actions and work together toward the fair and effective administration of justice. Greater coordination, in turn, can produce better outcomes in real-world cases.

The purpose of this paper is to describe the current landscape of collaboration between state and tribal justice systems, detailing the history, barriers to effective cooperation, and promising recent developments in the field.

HISTORICAL BACKGROUND

To strengthen relationships between state and tribal courts, it is important to understand the complex factors that have fueled mistrust and misunderstanding. As law professors Aliza G. Organick and Tonya Kowalski point out, “The extent to which tribal-state cooperation succeeds or fails depends in large part upon their ability to understand each other’s philosophical, legal, and historical realities.”¹ Similarly, the American Bar Association’s Center on Children and Law found that “talks and/or agreements between neighboring state and tribal governments frequently fail because there had been inattention to the history, cultural considerations, and important political or fiscal realities that form an ever-present context for tribal/state co-existence.”²

Federal Indian Policy

Prior to European contact, tribes across North America employed a variety of traditional approaches to dispute resolution. Given the diversity of tribal cultures, it is difficult to generalize, but tribes used such disparate responses as peacemaking, public shaming, banishment, and capital punishment. What tied these various approaches together was the fact that tribes decided for themselves how to address breaches of community norms.

European conquest had dire implications for tribal justice systems. While the colonizing nations initially treated indigenous governments as independent sovereign nations on legal par with the nations of Europe—an attitude reflected in the hundreds of treaties between tribes and colonial governments—the situation changed as more settlers arrived, shifting the balance of power. Eventually, the colonizing nations, followed by federal and state governments, broke or ignored many of the treaties (although there are still more than 200 “valid and extant treaties”³ helping define the relationship between the U.S. and many Native American governments).

The legal status of Indian nations grew increasingly complicated after the ratification of the U.S. Constitution. The Constitution contains two provisions suggesting that, when the United States was founded, tribes were considered separate and sovereign entities—a reference to “Indians not taxed”⁴ and a provision giving Congress the authority to regulate commerce with Indian tribes.⁵ Nonetheless, subsequent Supreme Court decisions dramatically altered the legal relationship between Indian tribes and the federal government. In 1831, the Court defined Indian tribes as “domestic dependent nations” and described the relationship between the tribes and the United States as that “of a ward to its guardian.”⁶ This relationship, called a “trust” relationship today, implies that the United States has a duty to protect the interests of Indian tribes. In 1886, however, the Court held that Congress has “plenary,” or complete and unqualified, power over tribes.⁷ The “trust” relationship and Congress’ “plenary power” have been in various degrees of conflict ever since.

The Supreme Court’s rulings did not cause the federal government to change its policies toward Indian tribes—they simply provided a legal foundation for actions that the federal government was already taking. In 1819, for example, Congress passed the Indian Civilization Fund Act, which was intended to “civilize” Indians by funding missionary groups “willing to provide for the ‘moral’ education of American Indian children.”⁸ Teachers in the mission schools used curricula “devoid of any indigenous cultural knowledge” and “strove to keep the children away from the influences of family by denying or limiting parental and familial visitation.”⁹ In 1824, the Bureau of Indian Affairs was created in part to help administer payments to the missionary groups funded under the 1819 Act.

While these policies separated children from their parents, other federal policies separated Indians from their land. The General Allotment Act of 1887, for example, divided tribal lands into 160-acre parcels and any excess lands (roughly two-thirds of the original set-aside) were redistributed to non-Indians. This not only diminished the amount of Indian-controlled territory but turned reservations into checkerboards of Indian and non-Indian properties that contributed to confusing jurisdictional issues for states and tribes.

The 20th century was marked by pendulum swings in tribal-U.S. relations that, at times, attempted to foster sovereignty among the tribes and, at other times, diminished it. A relative high point for tribal autonomy came in 1934, when President Franklin Delano Roosevelt’s administration implemented the Indian Reorganization Act (IRA), sometimes referred to as the “Indian New Deal.” The IRA encouraged tribes to create constitutional governments and their own court systems, albeit systems based on “largely Anglo-American models of jurisprudence.”¹⁰

In the mid-20th century, sometimes known as the “Termination Era,” federal policies once again emphasized assimilation. Congress used the full might of its “plenary power” to terminate federal recognition of many tribal governments, undermining their sovereignty, eliminating their communally-held land bases, and ending their access to federal funding and services. The government launched a relocation program to move Native populations from reservations to urban areas, resulting in “tremendous poverty as well as cultural isolation.”¹¹ And various federal initiatives continued to remove Native American children from their families and cultures by placing them in educational institutions, foster care, and non-Indian adoptive homes;¹² conservative estimates compiled by the Association of American Indian Affairs in the 1970s indicated that “one-third of all American Indian children were being separated from their families.”¹³

While federal policies after 1970 have tended to support tribal sovereignty,¹⁴ it is important to remember that the trauma suffered by Native Americans following European conquest continues to pervade Indian society. As Josh Lohmer, a policy analyst with the National Conference of State Legislatures, points out, “Decades of grinding conditions...have left their mark on Indian Country. Poverty still hovers near 40 percent—more than triple the national rate. Incomes remain about half the U.S. average. Chronic health problems such as heart disease and diabetes have become a scourge on reservations, and deaths from liver disease and cirrhosis surpass national rates by 500 percent.”¹⁵ This troubling history, and the conditions that it has helped to create in tribal communities, are an important part of the context in which tribal and state court systems are attempting to interact.

The Development of Tribal Courts

When tribes were first forced by federal authorities to live on reservations, they were generally allowed to establish their own systems for resolving disputes—or at least were given latitude to incorporate tribal custom and tradition into proceedings. That began to change in the mid- to late 1800s. Among other milestone events, Congress in 1885 passed the Major Crimes Act, which gave the federal government concurrent jurisdiction over several serious offenses that might occur between Indians on Indian lands.¹⁶ As “the first assertion of federal criminal jurisdiction in Indian country,” the Major Crimes Act “was a response to a false perception of lawlessness in Indian country as the Bureau of Indian Affairs and other officials did not understand tribal dispute resolution and wanted federal jurisdiction as a mechanism to assert control on Indian territories,” according to Carrie Garrow, executive director of the Center for Indigenous Law, Governance & Citizenship at the Syracuse University College of Law.¹⁷

Also in the late 1800s, the federal government began imposing adversarial-style courts on tribal lands. These courts, which were created under the Code of Federal Regulations and still exist in places today, became known as “CFR courts.” They featured judges, lawyers, rules of court, and other trappings of Anglo courts.¹⁸ This approach to justice was foreign to tribal communities.¹⁹ To this day, some tribal justice practitioners point out that the idea of one tribal member sitting as a “judge” over other tribal members is inconsistent with basic cultural principles.

Tribal members widely believed that the CFR courts were little more than puppets doing the bidding of the Bureau of Indian Affairs. “These courts were the agents of assimilation, and followed laws and regulations designed to assimilate the Indian people into both the religious and jurisprudential mainstream of American society,” writes B.J. Jones, director of the Tribal Judicial Institute at the University of North Dakota School of Law.²⁰ In describing the history of Navajo courts, former Navajo Nation Chief Justice Robert Yazzie writes: “The code was designed to destroy Indian customs and religious practices, and used as a vehicle to control the Navajo People. The code of the Courts of Indian Offenses provided that agency superintendents appoint Indian judges who could have only one wife and wear Anglo-style clothes.”²¹

The IRA authorized the creation of tribal court systems to replace the CFR courts. Between 1934 and 1997, an estimated 150 tribal courts were created under the IRA.²² This growth has continued even more rapidly in the last two decades. Today, there are over 250 tribal courts.²³ As these figures demonstrate, tribes are re-establishing their own court systems in ever-greater numbers, allowing tribal communities to adjudicate civil, criminal, and family matters.

The growth of tribal courts, however, has not been without challenge or controversy. In 1953, Congress passed Public Law 83-280, which transferred the federal government’s jurisdiction over cases occurring on tribal lands to the state governments in six enumerated states. The law also allowed other states the option of assuming similar jurisdiction.²⁴ This law effectively ended the federal government’s responsibility for prosecuting crimes in P.L. 280 states and shifted that burden to the states. P.L. 280, however, was an unfunded mandate—it shifted the burden of investigating and prosecuting crimes to the states, but it provided no funding to support these state law enforcement efforts. Moreover, federal funding after the enactment of P.L. 280 was directed to tribes in non-P.L. 280 states. The apparent assumption was that P.L. 280’s grant of jurisdiction to the states rendered tribal courts unnecessary. Today, many tribes in P.L. 280 states lack functioning tribal courts or have courts that exercise only civil jurisdiction over internal tribal matters, like domestic relations, child welfare, and tribal membership.²⁵

In 1968, Congress passed the Indian Civil Rights Act, which, among other things, restricted tribal courts’ sentencing authority. It limited tribal court sentences to a maximum of one year imprisonment, a fine of \$5,000, or both.²⁶ This restriction was modified under the Tribal Law and Order Act of 2010, which expanded tribal court sentencing authority to three years and a fine of \$15,000, or both, as long as offenders are afforded certain constitutional protections, including representation by a licensed attorney.²⁷ John Clark of the Pretrial Justice Institute notes that, because tribal court sentencing authority is limited, “tribal criminal courts typically confine

themselves to hearing misdemeanor and traffic cases, leaving felony cases to the appropriate federal or state authority.”²⁸ Frequently, however, federal and state authorities decline to prosecute crimes that occur in Indian country. When this happens, the tribal court may choose to handle the case, but it can only impose a sentence within the confines of federal law.

In 1978, the U.S. Supreme Court held that Indian tribes lack criminal jurisdiction over non-Indians,²⁹ a decision that has had lasting negative implications for public safety on tribal lands.³⁰ In addition, the Supreme Court ruled in 1990 that Indian tribes lack criminal jurisdiction over non-member Indians.³¹ But, in a familiar swing of the pendulum, Congress subsequently restored tribes’ jurisdiction over non-member Indians through legislation commonly known as the “*Duro fix*.”³² The U.S. Department of Justice recently asked Congress to adopt new legislation allowing tribal courts to exercise “special domestic violence criminal jurisdiction” over non-Indians.³³

The rapid growth in tribal courts over the past 20 years has been supported in part by the creation of federal grant programs. The Tribal Courts Assistance Program, for example, was created in 1999 to provide competitive grant funding to tribal justice systems. Administered by the U.S. Department of Justice, Bureau of Justice Assistance, the program has been praised by tribal justice practitioners for its flexibility.³⁴ Tribes are encouraged to propose justice system enhancements that meet local needs, including supporting traditional forms of dispute resolution like peacemaking or other forms of restorative justice.

Although the Tribal Courts Assistance Program and other federal programs have provided unprecedented support for tribal courts, lack of funding continues to represent one of the most pressing challenges facing tribal justice systems. As President Barack Obama observed at the July 2010 signing of the Tribal Law and Order Act, crime rates on tribal land remain exceedingly high—“more than twice the national average and up to 20 times the national average on some reservations.”³⁵ Native American women remain particularly vulnerable: 34 percent of American Indian and Alaska Native women will be raped in their lifetime,³⁶ a rate Obama called “an assault on our national conscience...an affront to our shared humanity” and “something that we cannot allow to continue.”³⁷

BARRIERS TO COMMUNICATION

If state and tribal governments are to work together effectively to address these kinds of problems, they will have to confront numerous barriers to effective communication and cooperation.

Jurisdictional Confusion

One of the most frequent causes of misunderstanding between state and tribal courts is confusion about overlapping jurisdiction. As Paul Stenzel, court attorney for the Forest County Potawatomi Community, has observed, “Human activity does not confine itself to imaginary lines on the map.”³⁸ People move across political boundaries to marry, start families, build homes, conduct business, find jobs, and even commit crimes. The day-to-day human activities that give rise to disputes take place across political boundaries. When this happens, two or more court systems may share jurisdiction over the same dispute. Should one court defer and allow the other to

hear the case? If one court issues an order, should the other court recognize it? What if both courts hear the case and issue conflicting orders?

The U.S. Constitution attempted to address these jurisdictional issues through the Full Faith and Credit Clause, which provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”³⁹ In effect, this clause requires states to recognize and enforce the court orders of other states. Although this clause has not eliminated all jurisdictional disputes between states, it provides a basic legal framework and has reduced jurisdictional conflict.⁴⁰ Given that there are over 560 federally-recognized Indian tribes within the United States and that over 250 of these tribes have created formal court systems, it seems natural that policymakers and practitioners would look to the Full Faith and Credit Clause to reduce jurisdictional conflict between state and tribal courts. Unfortunately, this clause does not apply to Indian tribes.⁴¹

The jurisdictional confusion has led, in Paul Stenzel’s words, to “nightmarish results.”⁴² Stenzel points to several specific cases for illustration. In Arizona, a married couple’s four children were held in legal limbo for years while the wife pursued custody first in tribal court, then in state court. The wife, a non-Native, first filed for divorce from her husband, a member of the Hopi Indian Tribe, in Hopi Tribal Court. The tribal court granted the divorce and awarded permanent custody of the couple’s children to the husband. Unhappy with this result, the wife filed a second action for divorce in Arizona state court. The Arizona court, initially unaware of the Hopi court’s previous order, granted temporary custody of the couple’s children to the wife, thereby launching a legal tug-of-war. The husband ultimately regained permanent custody, but only after more than three years of legal wrangling.⁴³

This kind of “forum shopping,” with the parties searching for the court that they feel will produce the most advantageous outcome for their side, is all too common. Cases can even involve three or more court systems. In Montana, an enrolled member of the Blackfeet Nation lived with her non-Native husband off the reservation with their two children. The father took the children to Colorado, and the mother filed for custody and divorce in Montana state court. The father then filed for custody in Colorado state court. The Montana court declined to exercise jurisdiction and deferred all subsequent matters to Colorado. The Colorado court then split physical custody of the children between the mother and father until the next court hearing. Between court hearings in Colorado state court, the children were reunited with the mother, who had by then moved to the Blackfeet reservation, and the mother filed and was granted an emergency protective order in the Blackfeet tribal court. The tribal court and the wife failed to inform the Colorado court of the Blackfeet tribal court order. Only when the permanent custody hearing was heard later that month in Colorado was the Colorado court informed that the Blackfeet tribal court had concurrent jurisdiction of the custody matter.⁴⁴

Similar jurisdictional disputes have occurred in commercial cases,⁴⁵ employment cases,⁴⁶ and many other contexts. Perhaps most troubling, however, is the effect of jurisdictional confusion on crime and public safety. As early as the 1880s, federal statutes and case law began carving out special categories of jurisdiction in criminal cases involving tribal land. First, the federal government granted itself concurrent jurisdiction over serious felony

offenses occurring on reservations. Later, federal law stripped tribes entirely of the authority to prosecute non-Native defendants. In cases involving Native defendants, tribal courts are limited to imposing a maximum punishment of three years incarceration for each offense, or nine years total for concurrent offenses, regardless of the severity of the crime involved.⁴⁷ Even where tribal governments retain the authority to arrest, try, and punish offenders, a lack of funding for tribal law enforcement and justice systems has, in effect, prevented tribes from effectively securing the safety of their communities.

Whenever a crime occurs on tribal land, criminal jurisdiction depends on a complex analysis involving the race of the offender, the location of the crime, and the severity of the crime. In many areas of the country, non-Native offenders appear to have discovered new opportunities for crime in these jurisdictional ambiguities. According to the Bureau of Justice Statistics, more than 86 percent of offenders in sexual assault cases against Native women are non-Native.⁴⁸

Harry Wallace, who serves as the elected chief of the Unkechaug Nation,⁴⁹ which is located on Long Island in New York State, describes how the overwhelming majority of crime in the Unkechaug community is committed by non-Natives. “We did an informal survey in 1994 when I was first elected chief, and there were 394 arrests on our land [according to Suffolk County Police Department records]. All but two arrests were non-Indian outsiders coming on our land and committing an illegal act.”⁵⁰ Ten years later, the Unkechaug Nation conducted an experiment to isolate the causes of criminal activity. As Chief Wallace explains, “back in the year 2004, we were concerned that summer about an influx of outsiders engaging in illegal drug activity, so what we did, from the hours of 9:00 p.m. until 7:00 a.m. in the morning all summer for a period of 12 weeks, we blocked the roads through our land and did not allow anyone onto the rez who was not a resident or who was not visiting a resident...That was an experiment that we engaged in to determine who was, in fact, causing destruction in our community. During that period of time when the road was blocked, you could hear a pin drop on this reservation...and we discovered that the people who are engaging in illegal activity don’t come from the reservation.”⁵¹

Many reservations near the Mexican and Canadian borders, in particular, are used “as conduits for bringing marijuana, Ecstasy, and other illicit drugs into the U.S.”⁵² Gangs from Mexico and Canada have set up shop on reservations, often recruiting young tribal members, using them to transport drugs across the border and distribute the drugs within and beyond the reservation. According to the National Drug Intelligence Center, Mexican drug trafficking organizations are the “principal wholesale suppliers and producers of most illicit drugs available on reservations throughout Indian Country.”⁵³ Some have even started growing marijuana and producing other drugs directly on the reservations. As the Seattle Times has reported, “Mexican drug cartels take advantage of the often complicated law-enforcement jurisdictions in Indian Country.”⁵⁴

Misperceptions

Many, perhaps most, state court practitioners are unfamiliar with basic notions of tribal sovereignty, do not understand why tribal courts exist, and are dubious about the quality of justice in tribal courts. As both state and tribal court practitioners have pointed out, it is exceedingly difficult to enter into productive communication

when the relationship between the two systems is clouded by fundamental misperceptions and a lack of understanding.

According to the National Conference of State Legislatures, many of those involved in state government have “outdated and inaccurate perceptions of American Indian tribes.”⁵⁵ Among other things, “state officials may not understand that tribes are functioning governments” and when they do, they sometimes “assume that tribal governments do not have the capacity or jurisdiction to relate to state government on a government-to-government basis.”⁵⁶ These statements point to a basic misunderstanding of tribal sovereignty. “State courts often do not understand, or refuse to accept, the role of tribal courts as legitimate decision makers,” tribal, state, and federal leaders declared in a 1993 report.⁵⁷

Some state court practitioners believe that tribes lack written constitutions or legal codes upon which to base their decisions. B.J. Jones says he’s encountered people who believe tribal courts “make decisions based upon some mystical, unwritten law that defies common sense or defies common understanding by non-Indians.”⁵⁸ In truth, most tribes have written laws,⁵⁹ and many tribal courts have the same guiding principals as state courts. Korey Wahwassuck, associate judge of the Leech Lake Band of Ojibwe Tribal Court, notes that in child welfare cases her court uses the same standard as state judges: the best interests of the child. “The misperception that we have ‘no written laws’ or that it’s a ‘lawless place’ can be corrected through communication and letting people see the process and educating people,” Wahwassuck says.⁶⁰ P.J. Herne, chief judge of the St. Regis Mohawk Tribe, which straddles the New York-Canadian border, has encountered a different problem: the mistaken belief by some lawyers that the St. Regis Mohawk Tribe must follow New York State law or Canadian law rather than its own code.⁶¹

There also appears to be a widespread misperception among state court practitioners that tribal courts are biased against non-Indians. In fact, this view reaches the highest levels of government. Senator Slate Gorton in 1997 introduced legislation that would have required all tribes receiving federal funds to waive sovereign immunity in federal court for cases brought by non-Indians. Although this proposal was defeated, the clear implication was that tribal courts are not capable of administering justice in a neutral manner. B.J. Jones, who serves as a judge in several tribal courts, has heard non-Natives give voice to this misperception. “I’m amazed by the number of attorneys who have told me they represent a bank, and they make no attempt to repossess collateral or foreclose on properties because they say they have understood that the tribal court is not available to provide a remedy to a nonmember. Then they come into court and they realize that the system is actually more creditor-friendly than the state court system.”⁶²

Nell Jessup Newton, who currently serves as dean of the University of Notre Dame Law School, surveyed 85 tribal court cases and reached the same conclusion as Judge Jones—tribal courts treat non-Natives fairly.⁶³ Professor Newton observed in 1998 that “[w]hen tribal courts have been subjected to intense scrutiny, as they have been in the past 15 years, they have survived the test. Even investigations which began with apparent hostile intent have ended by stressing the strengths of tribal courts and noting their weaknesses stem from lack of funding and not pervasive bias.”⁶⁴

Perhaps worse than specific misperceptions is an overall lack of confidence in the competency of tribal judges—this despite the fact that many tribal court judges are licensed attorneys, that some tribes employ non-Native attorneys to serve as judges, and that some tribal judges also work as judges or lawyers in state courts and are therefore steeped in knowledge of both systems. “I think they have no confidence in us. There is this kind of overriding idea that we are wild beings on the edge of civilization and that’s been true forever,” said Abby Abinanti, who serves both as chief judge of the Yurok Tribal Court and a commissioner for the California Superior Court, where she handles juvenile delinquency cases.⁶⁵ Joseph Flies-Away, who has served as chief justice of the Hualapai Tribal Court and currently serves as a pro tem judge for several tribes, recounts how he was once asked (not as a joke) whether tribal courts meet in teepees.⁶⁶

Barbara Smith, who serves as chief judge of the Supreme Court of the Chickasaw Nation and also teaches at the University of Oklahoma, points out that state court practitioners are not alone in their ignorance about tribal sovereignty and tribal courts. She reports that, in her classes, Native American students have raised similar questions. According to Justice Smith, “Students sometimes say, ‘We were conquered. So why are we sovereign?’ They just don’t understand tribal sovereignty. You have to understand that or you don’t ever understand why there are tribal courts and how they work.”⁶⁷

Impact of Federal Policies

Jurisdictional confusion and deeply-ingrained misperceptions pose serious barriers to state-tribal court cooperation. Unfortunately, federal policies have often exacerbated these problems. Consider the confusion that has resulted from the Indian Child Welfare Act of 1978 (ICWA).

ICWA was enacted in response to the problem of Native children being removed from their homes and placed with non-Native families in astonishing numbers. ICWA is the most comprehensive piece of federal legislation protecting the rights of Native American children and their families and has generally succeeded in giving tribal courts greater control over the placement of Native children. Nonetheless, there remains widespread confusion about the law, especially in state courts, and that confusion can dilute the protections the legislation affords.⁶⁸

ICWA is a complex law that is not well understood by state court practitioners. Judges, lawyers, and child welfare professionals do not receive sufficient training in the law and generally have not put procedures in place to ensure that it is implemented properly. The result of this confusion has been inconsistent compliance with the law. To complicate matters further, subsequent federal legislation, particularly the Adoption and Safe Families Act, has created additional federal guidelines that sometimes conflict with the provisions of ICWA, leaving practitioners to guess at how various federal laws interact and how to comply with all of them.

Federal policy can cloud state-tribal court relations even when the issues in question do not directly affect court practitioners. Disagreements over natural resources provide an instructive example. These disputes have traditionally been adjudicated in marathon federal court cases, with one party the “winner” and the other the “loser,” thus leading to long-standing hostility that immobilizes cooperation on other matters.

Federal Indian policy has tended to allow Indian tribes to retain sovereignty over natural resource management, and court decisions over the past several decades have facilitated tribal control over natural resources on their lands. Although these policies have been supportive of tribal sovereignty, they have precipitated direct conflicts with state authorities and soured state-tribal relations. In 1981, the U.S. Supreme Court held in *Montana v. United States* that tribes have the authority to regulate the conduct of non-Natives on tribal land if that conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁶⁹ Subsequent court decisions used this principle to hold that tribes can apply their own water quality standards to state waterways if they can prove that an off-reservation party’s actions detrimentally impact the tribe’s health or welfare.

These decisions have real-world effects. In *Wisconsin v. EPA*,⁷⁰ *Montana v. EPA*,⁷¹ and *Albuquerque v. Browner*,⁷² federal courts found that state and municipal activities that were clearly acceptable under the Clean Water Act were prohibited when tribal water quality standards were applied, in effect forcing state and municipal governments to make costly changes to mining operations, water-front zoning, and wastewater treatment. The long-lasting anger and distrust that arose out of these disputes should not be underestimated; it can damage relationships and significantly impact the willingness of states and tribes to work together cooperatively on other issues.

RECENT DEVELOPMENTS IN TRIBAL-STATE RELATIONS

Despite the many barriers that inhibit state-tribal cooperation, there have been significant improvements in the landscape of tribal-state relations in recent years. In 1988, the Conference of Chief Justices established a Committee on Jurisdiction in Indian Country, which sparked renewed attention to the need for improved relationships among tribal, state, and federal justice systems. This effort led, among other things, to the first “Building on Common Ground” conference in 1993, where tribal, state, and federal leaders met to develop a national agenda addressing civil and criminal jurisdictional problems. The participants agreed on a detailed list of recommendations, which were memorialized in a report entitled “Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts.”⁷³

Since this initial meeting, the U.S. Department of Justice has funded numerous national and regional conferences, including two “Walking on Common Ground” gatherings in 2005 and 2008. Each of these multi-jurisdictional gatherings has served to bring additional attention to the pressing issue of state-tribal court relations, and the discussions and ideas generated at these meetings have begun to translate into tangible results.

State-Tribal Court Forums

In 1989, the Conference of Chief Justices combined forces with the State Justice Institute and the National Center for State Courts to launch the Prevention and Resolution of Jurisdictional Disputes Project. This project focused on addressing intersystem disputes among tribal, state, and federal court systems, and it spawned one of the most important innovations in tribal-state relations in the past two decades: the tribal-state court forum.

These forums bring together leaders from tribal and state (and sometimes federal) court systems for regular meetings to discuss common challenges and work toward improved relationships. The first tribal-state forums were established in Washington, Oklahoma, Arizona, Michigan, North Dakota, and South Dakota. In subsequent years, forums were created in several more states; today, at least 17 states have created forums.⁷⁴

According to Paul Stenzel, “These forums have improved the delivery of justice by dispelling ignorance and fostering relationships between state and tribal judges. The results show that the application and carrying out of the law is not a mechanical procedure, but relies on shared human understanding and trust.”⁷⁵ The forums have organized educational programs, cultural exchanges, cross-training opportunities, and other events designed to build relationships and break down misperceptions and barriers to cooperation.

In Wisconsin, the tribal-state forum inspired tribal and state judges to come together voluntarily to establish a protocol for resolving jurisdictional disputes. New Mexico’s forum succeeded in persuading state and tribal courts to use a standardized cover sheet for protective orders in domestic violence cases, a practice that is expected to eliminate confusion about the validity of tribal protective orders and facilitate the consistent enforcement of protective orders across the state.

In New York, the forum has taken the unique approach of developing a pilot full faith and credit protocol that is regional in scope—it applies only to the recognition of court orders between the state’s Fifth Judicial District, located in the center of the state, and the Oneida Indian Nation, whose reservation land overlaps the Fifth Judicial District. According to New York’s forum members, this individualized approach reflects respect for the differences among the tribes in New York. Paul Stenzel sees this as a “measured and cautious approach” that has enabled the New York forum to “focus its efforts in an area where cross-jurisdictional support already exists and early success is possible.”⁷⁶

Just as important as the written agreements and new court procedures, tribal-state court forums have helped to open new lines of communication and improved relationships between tribal and state court judges, administrators, and practitioners. As Michigan Supreme Court Justice Michael Cavanagh has written, “A good test of whether an appropriate relationship exists is whether each side understands the potential for learning from the other.”⁷⁷ Tribal-state court forums are helping to foster just this spirit of mutual respect and willingness to learn from each other. In fact, cross-training, education, and cultural exchanges have played a central role in the activities of many tribal-state court forums. In Wisconsin, the forum is planning a series of “cracker barrel” meetings where state and tribal court judges can have informal conversations and build relationships.

According to B.J. Jones, “Cultural and legal education in the judicial forum is by no means a one-way street. Tribal judges have much to learn from state and federal judges who participate in judicial forums. Although tribal courts may be just as talented in rendering cogent and just decisions, state and federal justice systems are far more advanced in the accouterments of justice.”⁷⁸ Jones points out that tribal courts often lack the technological capacity to store and retrieve information from court cases, and they do not have reliable access to compilations of tribal court decisions from other jurisdictions.

Idaho's Tribal-State Forum decided it was time to confront state-tribal jurisdictional confusion by creating a "Benchmark" booklet in 1997. This document is available online and includes the laws and customs of various tribes, the names and addresses of attorneys who are admitted to practice before each tribal court, and tribal court contact information that state court judges and clerks can use to discuss cases, procedural issues, and attorney misconduct.⁷⁹ In explaining the reason for creating the Idaho Tribal-State Forum, Idaho Supreme Court Chief Justice Chas McDevitt writes, "For more than 150 years non-Indian residents of the State of Idaho have lived adjacent to the six Indian Tribes of Idaho...In 1994, the Supreme Court of the State of Idaho determined that it was time we became neighbors, understanding and respecting each other's customs, lifestyles, and laws."⁸⁰

Looking forward, it seems likely that tribal-state court forums will play a central role in improving communication and cooperation among state and tribal court systems. These forums allow key decision-makers from both systems to come together and break down barriers that may have hindered communication for generations.⁸¹

Joint Jurisdiction Courts

While tribal-state court forums are producing slow and steady progress, a small group of tribal and state court leaders in northern Minnesota are moving ahead at their own, much faster, pace. In 2006, Judge Korey Wahwassuck of the Leech Lake Band of Ojibwe Tribal Court and Judge John Smith of the Cass County District Court partnered to create the Leech Lake-Cass County Wellness Court, the country's first joint-jurisdiction court. The Wellness Court, which follows the drug treatment court model that has become widespread across the country in recent years, is a post-conviction, post-sentencing DWI court that handles cases involving both tribal members and non-Natives. The tribal and state court judges preside over each case together, although they sit in their own courtrooms (about 20 miles apart). The two courtrooms are connected by a state-of-the-art Interactive Videoconferencing (ITV) system, and clients have the option of appearing in whichever courtroom is most convenient.

It is difficult to overstate the significance of this unique collaboration. Because Minnesota is a Public Law 280 state,⁸² tribal courts in Minnesota receive minimal federal funding, and jurisdiction over criminal and civil matters arising on Minnesota tribal lands has been granted to state authorities. As a result, many tribes in Minnesota, including the Leech Lake Band, have not developed criminal codes or asserted criminal court jurisdiction over crimes that occur on tribal land. This means that Leech Lake Band members who commit crimes, whether on or off tribal land, are prosecuted in state court. Prior to the creation of the joint-jurisdiction court, the Leech Lake tribal court had no role in these cases. This situation reportedly led to resentment on the part of tribal members and distrust of the "white man's" courts.⁸³ Moreover, the county courts did not have the benefit of the tribal court's understanding of the cultural background and needs of Native American defendants or access to the unique, culturally-specific programming resources available to the tribal court.

The joint-jurisdiction court has changed this situation. Now, when a Leech Land Band member is charged with an alcohol-related crime and referred to the Wellness Court, the tribal court judge has an equal role in the

proceedings. The tribal and state court judges make decisions jointly, and clients can be referred to services in both systems, including intensive substance abuse treatment programs offered by the state as well as culturally-appropriate services and educational programs offered by the tribe. The Wellness Court even contracts with tribal police for some supervision services. When one judge is absent, the other judge handles the proceedings alone, regardless of whether the offender is Native or non-Native.

For more than a year, the Leech Lake-Cass County Wellness Court operated without a formal written agreement. This groundbreaking collaboration was built solely upon the mutual respect and understanding of two judges who recognized the need for a better approach to alcohol-related crime. In 2008, the two courts entered into a “Joint Powers Agreement.” This document is only 52 words long and does not outline the parameters of the relationship in complex legalistic detail. It says simply:

*Be it known that we the undersigned agree to, where possible, jointly exercise the powers and authorities conferred upon us as Judges of our respective jurisdictions in furtherance of the following common goals: 1. Improving access to justice; 2. Administering justice for effective results; and 3. Fostering public trust, accountability, and impartiality.*⁸⁴

The benefits of the joint-jurisdiction model go beyond giving the tribal court a role in state court proceedings; they also strengthen relations between the tribe and the surrounding counties. Judge Wahwassuck reports that the relationship between the tribal council and the county board of commissioners is much more cordial and cooperative than in years past. Where the tribe and county were once embroiled in litigation over taxation and land rights, the tribal council and board of commissioners now hold joint meetings and actively seek ways to work together.

One possible criticism of this collaboration is that the tribal court, by participating in state court proceedings, is lending support and legitimacy to a system in which the state court has jurisdiction over all criminal cases involving tribal members. In reality though, the only alternative available at the present time is for the tribal court to have no involvement in these cases at all. The tribe’s long-term goal is to develop its own criminal codes and assert criminal court jurisdiction over cases involving tribal members on tribal land. Until this is possible, however, the joint-jurisdiction court enables the tribal court to have a significant voice in what happens to tribal members.

In 2007, Judge Wahwassuck partnered with Itasca County District Court Judge John Hawkinson to replicate the Cass County model. The Leech Lake-Itasca County Wellness Court, which is described at the beginning of this report, follows the Cass County model in all major respects, except that it focuses on drug cases rather than DWI cases and the judges sit together in the Itasca County District Court rather than using the ITV system. In recent years, Judge Wahwassuck, Judge Smith, and Judge Hawkinson have presented separately and together at several national conferences to spread the word about their groundbreaking collaborations. And the word is spreading: several other tribal court jurisdictions are exploring similar models.

The Leech Lake experiment is showing that individual actors at the local level can make a difference. As Judge Wahwassuck explains it, this groundbreaking collaboration started when Judge Smith, together with the Cass County probation director, walked into the Leech Lake administrative office and asked to meet with the chairman of the tribal council. “Judge Smith risked being rejected, because historically tribal members have been mistrustful, even hostile, toward the state judicial system in Minnesota. But Judge Smith was willing to take that chance for the sake of meaningful, lasting change.”⁸⁵

Written Agreements

It has been nearly 20 years since the first tribal-state court forums began meeting. During this time, it has become clear that there is a “critical need for written collaborative agreements” among tribal, state, and federal governments.⁸⁶ While some of the best collaborations, like the Leech Lake model, are formed on the basis of personal relationships, these collaborations risk falling apart when the original players leave. Moreover, some challenges are so broad and systemic in nature that they cannot feasibly be addressed without a formal, government-to-government agreement.

Jerry Gardner, executive director of the Tribal Law and Policy Institute, has outlined some of the challenges that could be the subject of a written collaborative agreement. In the criminal justice arena alone, these could include extradition agreements, sharing of criminal history records, inter-jurisdiction management of probationers and parolees, and the sharing of detention facilities.⁸⁷ Beyond the field of criminal justice, written cooperative agreements can be used to address issues related to the Indian Child Welfare Act, domestic relations matters, contracts, torts, repossessions, taxation, economic development, gaming, hunting and fishing, water rights, repatriation, and religious practice issues.⁸⁸

In fact, government-to-government written agreements have multiplied since the 1990s. For example, in Michigan the tribal-state court forum lobbied the Michigan Supreme Court to adopt a new court rule that calls for the enforcement of tribal court judgments in state court as long as the tribal court has enacted a reciprocal ordinance, court rule, or other binding measure to enforce state court judgments.⁸⁹ As Judge Michael Cavanagh has noted, the forum also worked closely with the Michigan State Bar Association to create an American Indian Law section to give attorneys practical skills and educational opportunities in Indian Law, as well as create a database of tribal codes and tribal government structures at the State Law Library.⁹⁰

In New Mexico, a 1996 Government-to-Government Policy Agreement calls on the state, tribes, and pueblos⁹¹ to cooperate with each other on issues including state land use and rights-of-way on tribal land, environmental regulation, quality-of-life and cultural issues, and civil jurisdiction.⁹² In Wisconsin, the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, the Wisconsin Department of Natural Resources, and the U.S. Forest Service signed a 2000 Joint Agency Management Plan for the Chippewa Flowage, one of the largest lakes in Wisconsin. The plan outlines each government’s role in implementing long-term management while allowing independence in decision-making. It took 12 years of negotiations to secure the management plan due to a histo-

ry of litigation that dragged through federal courts in the 1970s, but after just 3 years of implementation the tribe received the Honoring Nations award from Harvard University’s Kennedy School of Government.⁹³

Sometimes, states will unilaterally pass laws requiring state officials to take specific actions to promote state-tribal court collaboration. Oregon passed a law in 2001 requiring each state agency that regularly interacts with tribes to send employees to annual cultural-competency trainings, to submit a yearly report documenting successful communications with tribes, and to meet with the governor, state, and tribal representatives yearly to discuss developments in Indian country.⁹⁴ Additionally, the state created six “clusters” or state-tribal work groups to address cooperation in the areas of cultural resources, economic development and community services, education and workforce training, health and human services, natural resources, and public safety and regulation. Montana followed Oregon’s lead in 2003, passing similar legislation that mandated training for state government employees, yearly meetings called by the governor, and reporting by all state agencies that regularly interact with Indian tribes.⁹⁵

Many states and tribes that are struggling to determine jurisdiction over child welfare cases have returned to the table to find common ground. Minnesota and Washington, for example, have signed cooperative agreements with the tribes in their states designed to clarify jurisdictional authority and service provisions for tribal youth in crisis. Montana and North Dakota have entered into contracts with the tribes within their borders to fund Native American foster care and adoptions, using federal Title IV-E dollars. And the Navajo Nation and New Mexico have a long-standing tribal-state agreement that recognizes the cultural importance of placing Navajo children in foster care homes where “the child is raised as an Indian.”⁹⁶

Culturally-Competent Programs in State Courts

State courts across the country are beginning to recognize the fact that cultural differences affect the way that Native American litigants perceive state court systems and may even impact the effectiveness of state court responses to family disputes, crime, and other kinds of cases.⁹⁷ Fortunately, some of these courts are taking steps to incorporate practices and procedures that are more culturally appropriate for Native American litigants.

Sentencing Circles

Minnesota has been at the forefront of developing culturally-competent state court programs, including Native American restorative justice programs that focus on requiring offenders to make restitution to victims and the community.⁹⁸ The Mille Lacs Band of Ojibwe, in conjunction with the Mille Lacs County District Court, developed the first sentencing circle in 1996 for nonviolent adult misdemeanor offenders.⁹⁹ Sentencing circles were adopted by the Minnesota legislature in 1998 to provide an alternative adjudication process to the state court system and are available to all offenders, including non-Natives. Sentencing circles are also used in juvenile delinquency cases and child abuse and neglect proceedings.¹⁰⁰

The sentencing circle is a consensus-based approach that brings together the victim, the community, and the offender to discuss the impact of the offender’s actions on the victim and the community at large. The circle pro-

vides public support for the victim who suffered trauma, assigns an appropriate sanction to the offender, and seeks to reintegrate the offender into the community.¹⁰¹ An offender must first plead guilty to the offense in court and agree to accept a community-imposed sentence, which can include community service, restitution, apologies, and even, in some cases, jail. After the sentencing circle hands down a sentence, members of the circle, sometimes called “circle keepers,” mentor the offender to ensure compliance and to create a sense of responsibility.¹⁰² If the circle members cannot come to a consensus on the sentence, the judge, who is often a circle member, decides.

In a study of victim satisfaction with Minnesota sentencing circles, victims stated that the most helpful aspect of the circle is the opportunity to explain the effect of the offender’s actions on them and to hear the offender’s explanations.¹⁰³ According to Kay Pranis, the restorative justice planner for the Minnesota Department of Corrections, sentencing circles identify crime “as an opportunity to strengthen the community, to reweave the community fabric.”¹⁰⁴

B.J. Jones notes in reference to sentencing circles that “fusing the Native paradigm of justice with the traditional Anglo law...is especially important for state judges in those areas where many litigants who appear before them are Native people. Understanding the history of how those Native people resolved conflicts may bring extra credibility to the state court judge and may, in the long run, make her job easier.”¹⁰⁵

Elder Mentoring

State courts have long recognized their own limitations in adjudicating Native American youths, and some are exploring innovative strategies, like elder mentoring, that incorporate traditional Native approaches. One example is the Seventh Generation Mentoring Program for Court-Involved Tribal Youth, which is being integrated into state court juvenile delinquency proceedings as a way of providing culturally-specific treatment for young Native American offenders. Five tribes¹⁰⁶ are currently funded by the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, to implement Seventh Generation. The program allows 180 court-involved tribal youths to choose from 180 trained elders who teach indigenous history, skills, language, and values. By recognizing the extended kinship relationships that exist among Native American tribes and the cultural importance of elders, the Seventh Generation program strives to prevent repeat offenses and to teach troubled youth how to become leaders in their own communities.¹⁰⁷

Adoption/Subsidized Guardianship

Tribal custom and state law have traditionally been at odds over child permanency placements. State court adoptions have moved from “closed” to “open” in recent decades, allowing birth parents to have more access to children after formally terminating parental rights. Nonetheless, these adoptions still rely on a firm legal distinction between “birth parents” and “adoptive parents.” Tribal courts, by contrast, are moving away from these labels in favor of legal arrangements that better reflect the important role of extended kinship in tribal communities. Tribal cultural norms typically define family as an extended kinship network of the whole tribe rather than a

child's immediate family members. Thus, permanency placements that terminate the birth parents' relationship with the child may not be appropriate in some cases involving Native American children. Termination, in effect, can serve to disinherit a child from her tribe.

State courts are beginning to experiment with approaches that reflect Native American attitudes toward kinship and family. Montana and New Mexico have instituted demonstration projects that allow for "subsidized guardianships" when a child is in tribal custody. Subsidized guardianships provide financial assistance to caretakers who assume legal responsibility. These guardianships are substitutes for adoptions. Instead of a formal termination of parental rights (TPR), subsidized guardianships allow the court to grant legal custody to a guardian while maintaining parental involvement. Both states noted in their demonstration project proposals that tribal cultural norms against TPR led to this alternative.¹⁰⁸

"Customary adoption" is another alternative to standard adoption that avoids a formal TPR. Customary adoptions focus on maintaining family/clan connections and modifying parental rights rather than terminating parental rights outright.¹⁰⁹ Some tribes already practice tribal customary adoptions, including the White Earth Band of Ojibwe, which has codified customary adoption in children's court.¹¹⁰ California was the first state to recognize tribal customary adoptions, passing legislation in 2009 that would allow a child to maintain legal ties to the tribe and permit continued contact with birth parents if appropriate. California's legislation does not affect all Native children placed for adoption in the state. Instead, the tribe is given the discretion to determine whether customary adoption is appropriate, and the tribe must petition the court.¹¹¹ Other states considering tribal customary adoptions are Minnesota and Washington.¹¹²

Wrap-Around Process

In North Dakota, state and tribal child welfare systems are experimenting with a traditional Native practice known as the wrap-around process. This is a crisis intervention method that relies on the tribal community to help a family in crisis, particularly when parents have been accused of child abuse or neglect. Ideally, the wrap-around process looks at a family holistically and attempts to address all issues affecting them, such as domestic violence, poverty, mental health, and addictive behaviors. The tribal community then steps in to help address each issue and provide emotional, financial, and legal support. The Medicine Moon Initiative, which is being coordinated by the Native American Training Institute in Bismarck, North Dakota, is working with the state and tribes to create strategic plans to implement wrap-around services for tribal families. The Medicine Moon Initiative provides technical assistance, training, best practices research, and data collection methods to state and tribal agencies who seek to use the wrap-around method.¹¹³

Permanency/ICWA

Despite the fact that many jurisdictional questions about the Indian Child Welfare Act remain unresolved, some states have taken a proactive stance in promoting compliance with ICWA and coordinating jurisdiction and services in child welfare cases.¹¹⁴ In Washington, the Department of Social and Health Services created Local Indian

Child Welfare Advisory Committees throughout the state to review state child custody cases involving Native American children. Each committee reviews cases individually to ensure compliance with the ICWA. The state's caseworker presents the case to the committee and receives advice, feedback, and resources from local Native Americans who have been trained in child welfare issues. Rather than waiting for the child custody case to become entrenched in jurisdictional confusion as state and tribal agencies wrangle over best practices for dealing with abused and neglected Native children, the local advisory committee is involved in every step of the case to ensure that Native American children are protected from misunderstandings surrounding which state or tribal agency should be providing services.¹¹⁵

Alaska has taken several innovative steps to improve state court compliance with ICWA. The state's Office of Children's Services has established an Indian Child Welfare Act Help Desk, which "functions as a comprehensive information resource for case workers searching for available Native American placements for Indian children."¹¹⁶ In addition, the Office of Children's Services has developed a Tribal/State Collaboration Group that meets regularly to discuss a wide range of issues faced by Alaska Native children, as well as a Native Rural Recruitment Team for Foster Care and several other cooperative initiatives. The state also has in place aggressive education and training programs for state case workers as well as explicit written ICWA guidelines for staff.

Professional Training

Cooperation between state and tribal courts can be advanced by simply building a practicing bar that is informed about tribal court jurisdiction, procedures, and laws. Attorneys who understand the overlapping jurisdiction of state and tribal courts and the role that both courts play in legal disputes can be expected to see tribal courts as legitimate forums for addressing their clients' grievances.¹¹⁷ Some states and tribes are beginning to take steps to promote a broader understanding of tribal court practice. The State of Washington has taken the lead in this area by including Indian law on the state bar exam and stressing the importance of Indian law in the state's law schools.¹¹⁸ Several tribes, including the Navajo Nation and the Oglala Sioux Tribe, now require admission to their own tribal bar associations before an attorney may practice in the tribal court. Requirements for admission to tribal bar associations vary from payment of a small fee to passing a bar exam on tribal law.¹¹⁹ Regardless of how states and tribes develop a competent bar, the goal of fostering a pool of attorneys and court advocates schooled in Indian law and tribal court practice is instrumental in eliminating forum shopping and fostering respect for tribal justice systems.¹²⁰

CONCLUSION

The specific initiatives, experiments, and collaborations discussed in this paper are not intended to provide an exhaustive list of promising practices. On the contrary, the very nature of state-tribal court collaboration makes such a listing virtually impossible. In a country that includes more than 560 federally-recognized tribes (and many more that are not federally-recognized), 50 states, and hundreds of county and municipal governments,

collaboration is guaranteed to be an intensely local affair. What the examples above demonstrate are some of the potential benefits when tribal, state, and local governments work together.

The paths that have led to these various collaborations have been many. All, however, are supported by strong communication, mutual respect, and informed understanding of the various justice systems involved. The strategies or tools that state and tribal justice practitioners have used to foster or strengthen lines of communications include:

Tribal-State Court Forums: The 17 or more forums currently in existence across the country bring together leaders from tribal and state court systems for regular meetings. Among other things, forums have organized educational programs, cultural exchanges, cross-training opportunities, and other events designed to build relationships and break down misperceptions and barriers to cooperation.

Written Agreements: Written agreements provide frameworks for resolving longstanding jurisdictional conflicts. The topics that written agreements among state and tribal partners have addressed include extradition, water rights, domestic relations matters, sharing of resources (such as detention facilities and social service programs), and sharing of information (such as criminal records). Agreements can also allow for cross-appointment of judges, clerks, probation officers, and law enforcement officers.

Trainings: Through joint trainings, state and tribal practitioners can learn about tribal culture and traditions, relevant law, emerging best practices, and helpful innovations. Regular trainings are helpful in developing cultural-competency for state practitioners who encounter Native populations.

Publications: Publications can promote better understanding of history, pressing jurisdictional conflicts, and relevant cultural practices and can promote awareness of written agreements pertaining to state and tribal court interactions. Publications can include tribal court handbooks complete with tribal constitutions and codes.

Advocacy: In the early 1990s, the states that sponsored the original forums (Arizona, Oklahoma, and Washington) recommended nearly a dozen methods for promoting state-tribal court cooperation. Some of the recommendations called for strengthening tribal justice systems by:

- Promoting congressional funding of tribal courts and law enforcement sufficient to enable their full partnership with state justice systems.
- Helping tribal courts justify their importance and resource needs to tribal governments.

- Promoting state legislation, as needed, authorizing criminal extradition to and from Indian country and sharing conviction information for the purpose of license suspensions and enhancement of sentences.

Ultimately, improved communication and cooperation helps strengthen sovereignty on both sides. When Native Americans and their tribal governments see that state governments and court systems respect tribal laws and customs, it fosters good will and greater respect for state laws. And when state practitioners confer regularly with tribal practitioners, they're more likely to support Native American justice systems. By working together to tackle problems—like addiction, domestic violence, and child neglect—practitioners who bridge the state-tribal divide increase government efficiency, promote justice, and increase the likelihood that the justice system will produce beneficial outcomes for victims, offenders, justice agencies, and the community as a whole.

ENDNOTES

¹ Aliza G. Organick & Tonya Kowalski, *From Conflict to Cooperation: State and Tribal Court Relations in the Era of Self-Determination*, 45 CT. REV. 48 (2008). The authors also note: "If we agree that Tribal-state relationships should evolve, we must first accept that the historical animosity and distrust are the products of a powerful legacy of colonization, genocide, and oppression." *Id.* at 48.

² Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 JUDICATURE 154, 156 (1995).

³ Matthew L.M. Fletcher, *Sovereign Comity: Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts*, 45 CT. REV. 12 (2008).

⁴ U.S. CONST., art. I, § 2, cl. 3.

⁵ U.S. CONST., art. I, § 8, cl. 3.

⁶ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

⁷ *U.S. v. Kagama*, 118 U.S. 375, 384 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

⁸ Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Family Doctrine*, 23 AM. INDIAN L. REV. 1, 14 (1998).

⁹ *Id.* at 14-15.

¹⁰ Organick & Kowalski, *supra* note 1, at 49. See also Carey N. Vicenti, *21st Century Indians: The Dilemma of Healing*, 2 J. CT. INNOVATION 279, 284-287 (2009). Vicenti points out that the IRA gave tribes the (somewhat dubious) opportunity to "reorganize as Constitutional governments or as corporations." In either case, the Secretary of the Interior retained the power "to accept or reject the tribes' chosen form of governance," and the Secretary "was aided by "Area Directors, who themselves were aided by Indian Agents." Not only were the forms of tribal government available under the IRA foreign to the tribes themselves, the true power remained largely vested in federal authorities. As Vicenti argues, "with so much power remaining in the federal government, the manner of control went from military to political but it remained nonetheless."

¹¹ See Graham, *supra* note 8, at 21.

¹² See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T. OF HEALTH AND HUMAN SERVICES, TRIBAL-STATE RELATIONS (2006), http://www.childwelfare.gov/pubs/issue_briefs/tribal_state/index.cfm.

¹³ Graham, *supra* note 8, at 24.

¹⁴ Among other legislation, Congress passed the Indian Self-Determination and Education Assistance Act in 1975 and the Tribal Self-Governance Act in 1994. These laws encouraged tribes to re-build independent governments and take over the direct provision of many essential services to their communities, including health care, education, transportation, law enforcement, and other services.

¹⁵ Josh Lohmer, *An Issue of Sovereignty*, ST. LEGISLATURES, Feb. 2009, at 16, 17.

¹⁶ Ch. 341, § 9, 23 Stat. 385 (1885) (current version at 18 U.S.C. § 1153 (2006)). This Act has been amended several times to expand the list from the original seven crimes—murder, manslaughter, rape, arson, kidnapping, incest and assault with a deadly weapon—to 18 at present count.

¹⁷ Carrie E. Garrow, *Treaties, Tribal Courts, and Jurisdiction: The Treaty of Canandaigua and the Six Nations Sovereign Right to Exercise Criminal Jurisdiction*, 2 J. CT. INNOVATION 249, 251 n. 19 (2009).

¹⁸ There is some uncertainty about the appropriate terminology when referring to contemporary “American” courts in relation to the courts of Native Americans. Commentators have used a range of terms, including “western courts,” “Anglo courts,” and other terms. “Anglo” seems to be particularly apt, as it emphasizes the fact that the court systems that the colonizers developed in America are rooted predominantly in British traditions and practices.

¹⁹ See generally, Carey N. Vicenti, *21st Century Indians: The Dilemma of Healing*, 2 J. CT. INNOVATION 279, 283 (2009).

²⁰ B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 470 (1998).

²¹ Chief Justice (Emeritus) Robert Yazzie, *History of the Courts of the Navajo Nation*, JUDICIAL BRANCH OF THE NAVAJO NATION, <http://www.navajocourts.org/history.htm> (last visited Sept. 7, 2010).

²² Feldman & Withey, *supra* note 2, at 155.

²³ See Organick & Kowalski, *supra* note 1, at 49 (citing more than 250 tribal courts); see also Lohmer, *supra* note 15, at 16 (citing 275 tribal courts).

²⁴ P.L. 280’s intent was to give states and tribes concurrent criminal jurisdiction, while authorizing states to intervene in civil matters which had previously been under exclusive tribal jurisdiction. The six mandatory states are: Alaska, (except Metlakatla Indian Community criminal jurisdiction) California, Minnesota (except the Red Lake Reservation), Nebraska (except the Omaha and Winnebago Reservations), Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation). Various other states elected to take partial or full jurisdiction under the authority granted in P.L.280 until 1968, when Congress amended P.L.280 to include a tribal consent requirement. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 96 (Nell Jessup Newton et al eds., 2005). Notably, two Indian Nations have been forced to submit to P.L.280 jurisdiction upon receiving federal recognition since 1968: the Mashantucket Pequot Nation (Connecticut) and the Ysleta Del Sur Pueblo (Texas). Jerry Gardner & Ada Pecos Melton, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/articles/gardner1.htm> (last visited Sept. 20, 2011).

²⁵ Gardner & Melton, *supra* note 24.

²⁶ Tribal Law and Order Act of 2010 § 234, 25 U.S.C. § 1302(7)(b) (2010).

²⁷ 25 U.S.C. § 1302. In order to utilize the Tribal Law and Order Act’s expanded sentencing authority, tribal courts must ensure (1) the right to counsel as afforded by the U.S. Constitution, (2) indigent offenders are provided free legal counsel, (3) judges receive sufficient legal training and are licensed attorneys in any U.S. jurisdiction, (4) all tribal criminal laws, rules of evidence, and rules of criminal procedure are publicly available, and (5) the court maintains an audio recording or written transcript of the criminal proceeding.

²⁸ John Clark, *The State of Pretrial Decision-Making in Tribal Jurisdictions: Closing the Knowledge Gap*, 2 J. CT. INNOVATION 297, 301 (2009).

²⁹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (“By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”)

³⁰ Tribal courts have adopted various methods to hold non-Indians accountable for criminal behavior on tribal land, including exercising civil contempt power to punish non-Indians who violate orders of protection and decriminalizing traffic offenses and redefining them as civil infractions. See Jerry Gardner, *Tribal Efforts to Address Problems Presented by the Lack of Tribal Criminal Jurisdiction over Non-Indians*, in INTRODUCTION TO TRIBAL LEGAL STUDIES 162-3 (Justin B. Richland & Sarah Deer eds., 2d ed. 2010).

³¹ *Duro v. Reina*, 495 U.S. 676 (1990).

³² See Garrow, *supra* note 17, at 250.

³³ In July of 2011, the Department of Justice sent model legislation to Congress for inclusion in the Violence Against Women Act reauthorization bill. DOJ proposes creating “special domestic violence criminal jurisdiction over all persons” who perpetrate domestic violence on tribal land or who violate orders of protection. Additional language clarifies that “tribal courts have full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian.” Letter from Ronald Weich, Assistant Attorney General, U.S. Department of Justice, to Hon. Joseph R. Biden, Jr., President, U.S. Senate (July 21, 2011), *available at* <http://www.tribal-institute.org/download/LegislativeProposalVANW.pdf>.

³⁴ See, e.g., B.J. Jones, *Interview*, 2 J. CT. INNOVATION 367, 378 (2009).

³⁵ *Remarks by the President Before Signing the Tribal Law and Order Act*, WHITE HOUSE (July 29, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-signing-tribal-law-and-order-act>.

³⁶ PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T. OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

³⁷ *Remarks by the President*, *supra* note 35.

³⁸ Paul Stenzel, *Full Faith and Credit and Cooperation Between State and Tribal Courts: Catching Up to the Law*, 2 J. CT. INNOVATION 225, 227 (2009).

³⁹ U.S. CONST. art. IV, § 1.

⁴⁰ See Stenzel, *supra* note 38, at 227.

⁴¹ See *id.* Stenzel points out that federal law requires full faith and credit in only three specific areas: domestic violence protection orders, child support orders, and child custody orders in abuse and neglect cases.

⁴² *Id.* at 228.

⁴³ See *Leon v. Numkena*, 689 P.2d 566 (Ariz. Ct. App. 1984).

⁴⁴ See *Baisley v. Vielle*, 748 P.2d 446 (Colo. Ct. App. 1987).

⁴⁵ See, e.g., *Plains Commerce Bank v. Long*, 128 S.Ct. 2709 (2008).

⁴⁶ See, e.g., *Teague v. Bad River Band of Lake Superior Chippewa*, 665 N.W.2d 899 (Wisc. 2003).

⁴⁷ Tribal Law and Order Act of 2010 § 234, 25 U.S.C. § 1302(a)(7) (2010).

⁴⁸ AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 4 (2007), available at <http://www.amnesty.org/en/library/info/AMR51/035/2007>.

⁴⁹ The Unkechaug Nation is a New York state-recognized Indian tribe, meaning that the Unkechaug have a government-to-government relationship with New York. However, the Nation is not federally-recognized by the Bureau of Indian Affairs and does not receive federal funding or services. See N.Y. INDIAN LAW §§ 2-19, 150-153 (2011).

⁵⁰ Telephone interview with Harry Wallace, Chief, Unkechaug Nation (July 17, 2009).

⁵¹ *Id.*

⁵² Tim Johnson, *Indian Reservations on both U.S. Borders Become Drug Pipelines*, MCCLATCHY NEWSPAPERS, June 16, 2010, <http://www.mcclatchydc.com/2010/06/16/96003/indian-reservations-on-both-us.html>.

⁵³ NAT'L DRUG INTELLIGENCE CTR., INDIAN COUNTRY DRUG THREAT ASSESSMENT 2008 (2008), available at <http://www.justice.gov/ndic/pubs28/29239/drugover.htm>.

⁵⁴ Angie Wagner, *How Meth Came to an Indian Reservation and Took Hold*, SEATTLE TIMES, May 1, 2007, available at http://seattle-times.nwsource.com/html/nationworld/2003687991_meth01.html.

⁵⁵ "Government to Government: Models of Cooperation Between States and Tribes," National Conference of State Legislatures, April 2009, p. 1.

⁵⁶ *Id.*

⁵⁷ *Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts*, TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/articles/common.htm> (last visited Sept. 7, 2010).

⁵⁸ Jones, *supra* note 34, at 371.

⁵⁹ For a database of tribal codes and statutes, see the Tribal Court Clearinghouse web site at <http://www.tribal-institute.org/lists/codes.htm>.

⁶⁰ Korey Wahwassuck, *Interview*, 2 J. CT. INNOVATION 405, 407 (2009).

⁶¹ P.J. Herne, *Interview*, 2 J. CT. INNOVATION 359, 360 (2009).

⁶² Jones, *supra* note 34, at 371.

⁶³ See Nell Jessup Newton, *Tribal Court Paxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998).

⁶⁴ *Id.* at 287.

⁶⁵ Abby Abinanti, *Interview*, 2 J. CT. INNOVATION 347, 354 (2009).

⁶⁶ Telephone interview with Joseph Flies-Away, former Chief Judge, Hualapai Tribal Nation (May 28, 2010).

⁶⁷ Barbara Smith, *Interview*, 2 J. CT. INNOVATION 391, 394 (2009).

⁶⁸ See JUSTINE VAN STRAATEN & PAUL G. BUCHBINDER, THE INDIAN CHILD WELFARE ACT: IMPROVING COMPLIANCE THROUGH STATE-TRIBAL COORDINATION (forthcoming Dec. 2011), available at <http://www.courtinnovation.org>.

⁶⁹ 450 U.S. 544, 565 (1981).

⁷⁰ 266 F.3d 741 (7th Cir. 2001).

⁷¹ 137 F.3d 1135 (9th Cir. 1998).

⁷² 97 F.3d 415 (10th Cir. 1996).

⁷³ This report is available in full on the Tribal Court Clearinghouse website, at <http://www.tribal-institute.org/articles/common.htm>.

⁷⁴ See, e.g., NEW YORK FEDERAL-STATE-TRIBAL COURTS AND INDIAN NATIONS JUSTICE FORUM, <http://www.nyfedstatetribal-courtsforum.org/history.shtml> (last visited on Sept. 7, 2010).

⁷⁵ See Stenzel, *supra* note 38, at 226.

⁷⁶ *Id.* at 247.

⁷⁷ Michael F. Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. DET. MERCY L. REV. 709, 719 (1999).

⁷⁸ Jones, *supra* note 20, at 476.

⁷⁹ http://www.isc.idaho.gov/TribalCourtBenchBook_2005.pdf

⁸⁰ Chas McDevitt, *Preface to Idaho Tribal-State Forum, BENCHMARK* (1997), available at http://www.isc.idaho.gov/TribalCourtBenchBook_2005.pdf.

⁸¹ There are several resources available for states and tribes that are interested in developing a forum. As far back as 1993, the National Center for State Courts published a tool called “Tribal Court-State Court Forums: A How-To-Do-It Guide to Prevent and Resolve Jurisdictional Disputes and Improve Cooperation Between Tribal and State Courts.” Other resources include: H. Ted Rubin, *Tribal Courts and State Courts: From Conflicts to Common Ground*, ST. CT. J., Winter 1992, at 17; William Thorne, *Partnership: Bringing Together Tribal and State Court Jurisdictions*, 9 TRIBAL CT. REC. 21(1996); Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 JUDICATURE 154 (1995); ARIZONA COURT FORUM, STATE AND TRIBAL COURT INTERACTION: BUILDING COOPERATION: AN ARIZONA PERSPECTIVE, available at www.supreme.state.az.us/stfcf/handouts/State-Tribal_20Court_Interaction.pdf. In addition, some tribal-state court forums have developed websites that describe their activities in great detail. For example, the New York State forum is available at: www.nyfedstatetribalcourtsforum.org/.

⁸² Enacted in 1953, Public Law 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 28 U.S.C. § 1321-1326 (2006)) mandated the transfer of the federal government’s criminal and civil jurisdiction over cases occurring on tribal lands to the state governments in several enumerated states: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska (upon statehood). The law also allowed others states the option of assuming criminal and civil jurisdiction over cases occurring on tribal lands within their borders. Public Law 280 has been the source of much controversy and has greatly complicated questions of criminal jurisdiction and law enforcement responsibility in the affected tribes and states. See, e.g., CAROLE GOLDBERG ET AL., LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2007), available at http://www.tribal-institute.org/download/pl280_study.pdf.

⁸³ See Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 750 (2008).

⁸⁴ CASS COUNTY LEECH LAKE BAND OF OJIBWE WELLNESS COURT: FROM COMMON GOALS TO COMMON GROUND 3, available at http://www.tribaljusticeandsafety.gov/docs/fv_tjs/session_4/session4_presentations/Sustaining_Wellness_Courts.pdf (last visited Sept. 7, 2010).

⁸⁵ Wahwassuck, *supra* note 83, at 750-51.

⁸⁶ Jerry Gardner, *Improving the Relationship between Indian Nations, the Federal Government, and State Governments*, Tribal Court Clearinghouse, <http://www.tribal-institute.org/articles/mou.htm> (last visited Sept. 7, 2010).

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See MICH. CT. R. 2.615 (2010).

⁹⁰ Cavanagh, *supra* note 77, at 718.

⁹¹ Pueblos are Native settlements located in the Southwest. There are 21 federally-recognized pueblos, all but two of them in New Mexico. They are technically different geographic/political entities from reservations due to their historical relationship with Spain, Mexico, and the United States, but for the purpose of this paper pueblos are included with tribes in estimating census data and statistical information. See generally Joe S. Sando, PUEBLO NATIONS: EIGHT CENTURIES OF PUEBLO INDIAN HISTORY (1992).

⁹² THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 72-73 (2008).

⁹³ Ash Center for Democratic Governance and Innovation, Chippewa Flowage Joint Agency Management Plan (2003), <http://www.innovations.harvard.edu/awards.html?id=6162> (last visited Sept. 7, 2010).

⁹⁴ See 182 OR. REV. STAT. §§162-168 (2001).

⁹⁵ See THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, *supra* note 92, at 72.

⁹⁶ CHILD WELFARE INFO. GATEWAY, *supra* note 12, at 13.

⁹⁷ Jerry Garder, Executive Director of the Tribal Law & Policy Institute, contends that cultural differences are one of the most significant impediments to improving state-tribal relationships. *See* Gardner, *supra* note 86.

⁹⁸ *See* ROBERT B. COATES, MARK UMBREIT, & BETTY VOS, RESTORATIVE JUSTICE CIRCLES IN SOUTH SAINT PAUL, MINNESOTA (2000), available at <http://www.cehd.umn.edu/ssw/rjp/Resources/Research/default.asp>.

⁹⁹ Jim Adams, *Circle Justice*, MINNEAPOLIS STAR TRIBUNE, Aug. 18, 1998, at A1.

¹⁰⁰ *See* 611A MINN. STAT. § 775 (2010); 609 MINN. STAT. § 092 (2010); Adams, *supra* note 99, at A1.

¹⁰¹ *See* 611A MINN. STAT. § 775 (2010).

¹⁰² *See* Adams, *supra* note 99, at A1.

¹⁰³ MARK S. UMBREIT, ROBERT B. COATES, & BETTY VOS, THE IMPACT OF RESTORATIVE JUSTICE CONFERENCING: A REVIEW OF 63 EMPIRICAL STUDIES IN 5 COUNTRIES, 4 (2002), available at <http://www.restorativejustice.org/articlesdb/articles/2412>.

¹⁰⁴ Adams, *supra* note 99, at A1.

¹⁰⁵ Jones, *supra* note 20, at 466.

¹⁰⁶ The five tribes implementing the Seventh Generation program are: the Oglala Sioux Tribe (South Dakota), the Ponca Tribe of Indians of Oklahoma (Oklahoma), the Red Lake Band of Chippewa Indians (Minnesota), the Leech Lake Band of Ojibwe (Minnesota), and the Organized Village of Kake (Alaska).

¹⁰⁷ *See* Education Development Center, Inc., 7TH GENERATION MENTORING PROGRAM FOR COURT-INVOLVED TRIBAL YOUTH, http://www.edc.org/projects/7th_generation_mentoring_program_court-involved_tribal_youth (last visited Sept. 7, 2010); Education Development Center, Inc., STRENGTHENING THE FUTURE OF TRIBAL YOUTH, <http://www.hhd.org/resources/story/strengthening-futures-tribal-youth> (last visited Sept. 7, 2010).

¹⁰⁸ *See* CHILD WELFARE INFO. GATEWAY, *supra* note 12, at 15. Notably, Oklahoma allows subsidized guardianships for everyone except “tribal children.” Exactly who fits the definition of “tribal children” is unclear. *See* CHILDREN’S DEFENSE FUND, EXPANDING PERMANENCY OPTIONS FOR CHILDREN: A GUIDE TO SUBSIDIZED GUARDIANSHIP PROGRAMS (2003), available at <http://www.aecf.org/upload/PublicationFiles/Expanding.pdf>.

¹⁰⁹ *See* CHILD WELFARE INFO. GATEWAY, *supra* note 12, at 16.

¹¹⁰ Customary Adoption Code, 4a. (White Earth Band of Ojibwe).

¹¹¹ Press Release, California Indian Legal Services, Tribal Customary Adoption (Jan. 8, 2010), available at <http://www.calindian.org/alerts/62-2010-alert/99-tribal-customary-adoption>; Duane W. Gang, *Customary Adoption Legislation in California*, CAL-IWCA, May 13, 2009, available at <http://calicwa.wordpress.com/2009/05/20/customary-adoption-legislation-in-ca>.

¹¹² CHILD WELFARE INFO. GATEWAY, *supra* note 12, at 16.

¹¹³ What is the Medicine Moon Initiative?, NATIVE AMERICAN TRAINING INSTITUTE, <http://www.nativeinstitute.org/mmi.htm> (last visited Sept. 7, 2010).

¹¹⁴ CHILD WELFARE INFO. GATEWAY, *supra* note 12, at 6.

¹¹⁵ *Id.* at 13.

¹¹⁶ Van Straaten & Buchbinder, *supra* note 68.

¹¹⁷ *See* Feldman & Withey, *supra* note 2, at 156.

¹¹⁸ Washington State Bar Association, <http://www.wsba.org> (last visited Sept. 7, 2010).

¹¹⁹ *See*, e.g., Navajo Nation Bar Association, http://www.navajolaw.org/new2008/examination_4-2.htm (last visited Sept. 7, 2010); Ogalala-Sioux Tribal Bar Association, Chapter 45 of Ogalala-Sioux Tribe Law and Order Code, available at: <http://www.narf.org/nill/codes/ogalalacode/chapter45-bar.htm> (last visited Sept. 7, 2010).

¹²⁰ The Tribal Law & Order Act of 2010 contains provisions that may further promote attorneys’ exposure to and familiarity with tribal courts. In order to utilize the Tribal Law and Order Act’s expanded sentencing authority, tribal courts must ensure (1) the right to counsel as afforded by the U.S. Constitution, (2) indigent offenders are provided free legal counsel, (3) judges receive sufficient legal training and are licensed attorneys in any U.S. jurisdiction, (4) all tribal criminal laws, rules of evidence, and rules of criminal procedure are publicly available, and (5) the court maintains an audio recording or written transcript of the criminal proceeding. *See* FN 27 *supra* and related text.

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