



Crime and Justice Institute at
Community Resources for Justice

Crime and Justice in Indian Country:

A summary of talking circle findings and the Tribal Law and Order Act of 2010

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Crime and Justice Institute (CJI) at Community Resources for Justice

CJI strives to improve the effectiveness of criminal justice systems nationwide with our creative, collaborative approaches to today's most pressing and complex public safety problems. Our primary goal is to make criminal and juvenile justice systems more efficient and cost effective to promote accountability for achieving better outcomes.

Through our work, we help to make the public safety system more results-driven and cost-effective and improve public safety throughout the country. We do this mainly through policy analysis, capacity and sustainability building technical assistance, research and program evaluation, and educational activities. A key CJI strength lies in our ability to work with researchers, practitioners, academics, and those affected by crime to bridge the gap between research and practice in corrections. We have a reputation built over many decades for innovative thinking, unbiased issue analysis, and our ability to translate research into practice. For more information about CJI, please visit www.cjinstitute.org.

CJI's parent corporation, Community Resources for Justice (CRJ), is a Boston-based non-profit corporation that has been providing direct care and supportive services to society's most challenged citizens for over 130 years. CRJ's direct service programs include residential and day programming for adult and youth offenders reentering the community, at-risk youth, and adults with mental illness and developmental disabilities across New England. More information on CRJ's programs can be found at www.crjustice.org. While CJI is also headquartered in Boston, MA, its staff and network consultants work at sites throughout the country.

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Introduction

This report summarizes information regarding culture and criminal justice issues in Indian Country today, most of it gathered through talking circles¹ and focus groups with members of different American Indian communities in the United States in 2009-2010. Findings from the talking circles highlight some of the major issues facing American Indian tribal governments and communities in terms of criminal justice issues, strategies being used to address such issues, and areas in need of improvement. The intent of this writing is to educate those who may not be familiar with American Indian culture, courts, governments, and current criminal justice challenges; to better inform those making Indian policy and funding decisions; to share with tribal communities a sampling of criminal justice resources and initiatives in Indian Country today, and to outline for all the significant legal changes created by the recently enacted Tribal Law and Order Act.

Chapter 1 of the report discusses the legal framework of tribal criminal justice systems in the United States, including an overview of tribal sovereignty, the role of tribal courts, and an introduction of Public Law 280 (PL 280) and jurisdictional authority. Chapter 2 summarizes the talking circle discussions, focusing primarily on the complexities of jurisdictional issues, program needs and resources, and culture and cultural identity as the foundation for tribal justice. With one exception, all talking circles were held prior to the enactment of the Tribal Law and Order Act (also referred to as the TLOA); consequently, discussion of jurisdictional issues in Chapter 2 does not reflect the legal amendments created by the TLOA. Finally, Chapter 3 describes some of the recent changes brought about by the Tribal Law and Order Act, which was passed in July 2010.

The Talking Circles Initiative grew out of a larger research project conducted by the Crime and Justice Institute (CJI) at Community Resources for Justice, examining how culture may play a role in assessing and treating the needs of American Indian offenders in order to help reduce criminal behavior and rates of incarceration. To determine the impact of culture on risk and need assessment and the resulting interventions, data elements from thousands of probation files were reviewed and risk scores of American Indian offenders were compared to those of the general population to determine whether discrepancy exists.²

A significant part of this research focused on state and local corrections agencies because the research design required a comparison between American Indian and non-

¹ Talking circles are a traditional method of communication in American Indian communities with a focus on egalitarian, consensus building conversations, with everyone allowed to speak uninterrupted; most often accompanied by prayer, smudging, and other traditional practices to open and close the circle of conversation.

² More information on this research project can be found at www.cjinstitute.org.

American Indian offenders. Tribal justice systems, by definition, do not serve non-Indian offenders, making such a comparison impossible. Consequently, CJI believed it important to hear from tribal communities on the issues of culture and crime, both deeply complex issues with differing implications for tribes.

Participating tribal communities represented both Public Law 280 and non-Public Law 280 states, geographically diverse communities, and different levels of development in terms of tribal self-governance. Participants included two tribal communities in the Southwest, two tribal communities in the Southeast, and four tribal communities in the Midwest. Areas of discussion included sovereign governments, tribal justice systems, criminal justice needs, strength-based strategies that may have possibility of application or replication in other communities, and how culture plays a role in the system.

It is important to recognize that there are over 560 federally recognized tribes in the United States. The information contained in this document is intended as a sampling of information gathered from a handful of Indian nations, tribes or bands across the Country. In no way should the information contained herein be interpreted as representative of all tribal communities. Further, this report provides an introduction to the legal complexities and cultural richness of tribal people and their governments. Additional reading and discussions with tribal justice stakeholders are encouraged.

Chapter 1 Tribal Sovereignty and the Role of Tribal Courts

Interpreting Tribal Sovereignty: Historical Cases and Federal Acts

Federal recognition of tribal sovereignty status comes primarily from the Commerce Clause's reference to the authority of Congress to engage with tribes in the same context as other foreign nations. In *Cherokee Nation v. Georgia*, Justice John Marshall described the native groups inhabiting the lands as 'domestic dependant nations' which existed in a relationship with the federal government as a 'ward to its guardian'.³ In *Worcester v. Georgia*, Justice Marshall elaborated, characterizing Indian tribes as "distinct, independent political communities," whose inherent sovereignty was limited but not *abolished* as a result of coming under our 'guardianship'.⁴ This line of cases serves as the framework for "analogizing the government-to-government relationship between tribes and the federal government as a trust relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities."⁵

It was another fifty years after *Worcester v. Georgia* that the next major Supreme Court decision addressing Indian Sovereignty was decided in the case of *Ex Parte Crow Dog* in 1883⁶. This case involved the murder of an Indian man named Spotted Tail, committed by Crow Dog, on what is now the Lakota Reservation in South Dakota. In response to the committed crime, the Lakota tribe ordered Crow Dog to make restitution to Spotted Tail's family in the form of providing monetary restitution, horses, and blankets. Territory officials viewed the tribal response as inappropriate punishment for the crime of murder and subsequently had Crow Dog arrested, convicted, and sentenced to hang for his crime. The case was appealed to the United States Supreme Court which ruled that only a tribal government could punish an Indian person for a crime committed against another Indian person in Indian Country, absent a clear expression of Congress otherwise.

In response to the *Ex Parte Crow Dog* decision, Congress passed the Major Crimes Act of 1885⁷ which gave the federal government jurisdiction over felony offenses committed by Indians against Indians in Indian Country. This exercise of Congressional plenary power, usurping tribes' authority over felony offenders, was upheld the following year by the Supreme Court in *United States v. Kagama*⁸ (1886). And, in 1896 the Supreme

³ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

⁴ *Worcester v. Georgia* 31 U.S. 515, 559 (1832).

⁵ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §5.04, 2005 ed.

⁶ *Ex parte Crow Dog*, 109 U.S. 556 (1883)

⁷ U.S. STATUTES AT LARGE. Vol. 23, chap 341.

⁸ 118 U.S. 375 (1886)

Court ruled in *Talton v Mayes*⁹ that because sovereign authority of tribes predated the United States Constitution, constitutional rights do not apply to criminal defendants in tribal court proceedings.

The twentieth century saw the Indian Reorganization Act of 1934 which was the beginning of modern tribal courts; Public Law 280 in 1953, which gave some states (as opposed to the federal government) criminal authority in Indian Country regardless of tribal assent; the Indian Civil Rights Act of 1968 establishing a bill of rights requiring tribal courts to provide due process and equal protection for defendants while limiting tribal imposition of criminal sanctions; and *Oliphant v. Suquamish* (1978) in which the Supreme Court ruled that tribal governments do not have criminal jurisdiction over non-Native individuals.

These Supreme Court decisions and Congressional acts, among others, have come to define tribal sovereignty and the relationship between federal, state, and tribal governments. Tribes retain exclusive authority over their members and their lands subject to certain limitations imposed by federal law. These legislatively and judicially created limitations primarily concern restraints on tribes' ability to exercise civil and criminal jurisdiction over non-Indians' conduct that impact their lands and members. In those instances, the primary authority over such conduct will lie either with the federal or state government depending on the identity of the parties (Indian or non-Indian), the nature of the conduct (criminal or civil), and the location where the incident arises (Indian or non-Indian held land).

⁹ 163 U.S. 376 (1886)

Limiting Tribal Sovereignty: Enactment of Public Law 280

American Indians are the only United States citizens that have unique status in terms of criminal justice law and policy. An American Indian person can be prosecuted and sentenced at the tribal, state, or federal level for crimes that if committed by non-Native people would be prosecuted and sentenced in state court. Navigating jurisdictional authority can be a complicated process and can have significant consequences for Native offenders and Native communities.

There are slightly less than three-million American Indians and Alaska Natives residing in the United States. Approximately half of that population resides outside of Indian Country and are generally subject to state criminal law when the criminal act is committed outside of Indian Country. Of the 50 percent that reside within Indian Country, criminal jurisdiction depends on the nature of the crime, who committed it (a Native or non-Native person), and in what state and in what part of that state Indian lands are located.

Public Law 280 (PL 280) determines much of the legal authority for criminal jurisdiction in Indian Country. Indian Country is a legal term,¹⁰ generally meaning: a) all land within the limits of any Indian reservation, b) all dependent Indian communities, and c) all Indian allotments in which Indian titles are still in effect. In 1953, PL 280 mandated that criminal jurisdiction over crimes committed in Indian Country be transferred from the federal government to state government in six states. Consequently, the states of California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska are responsible for policing and prosecuting all crimes occurring in Indian Country, although limited Indian lands within these states were excluded.

The remaining states had the option of acquiring PL 280 jurisdiction in whole or in part. Some states did seek jurisdiction in whole and others in part, some states sought jurisdiction over certain crimes and other states only over certain areas such as on highways, but some states later retroceded jurisdiction back to the federal government. Most states did not seek PL 280 jurisdiction; federal authorities retained responsibility for policing and investigating, and the United States Attorney's Office retained responsibility for prosecuting "major crimes"¹¹ committed in Indian Country. (It is important to note that there are nuances and exceptions to almost all of these jurisdictional procedures, requiring legal interpretation and determination.)

¹⁰ Defined in 18 U.S.C.A. §1151

¹¹ Defined in 18 U.S.C. § 1153.

Because tribal governments are sovereign nations, they have the jurisdictional authority to prosecute enrolled members of their Indian Nation, based on violation of tribal code. While tribes have the absolute right to prosecute their own members for any crime, they are limited by federal law in the amount of jail time they may impose. Under the Indian Civil Rights Act of 1968,¹² the maximum sentence allowed was one-year incarceration and a \$5,000 fine¹³. These sentencing limitations were expanded in July 2010 with the passing of the Tribal Law and Order Act, which is discussed in more detail in Chapter 3, to allow for up to three years of incarceration and a \$15,000 fine. Tribal courts are prohibited from prosecuting any non-Native person unless that person submits to jurisdiction.

While PL 280 states have police and prosecutorial authority over crimes committed in Indian Country, defining “crime” also requires some analysis. Case law has held that PL 280 states have jurisdiction over crimes that are considered “prohibitive” in nature such as drunk driving, assault, theft, and most other crimes one would consider criminal. However, states do not have jurisdiction over crimes in Indian Country that are considered “regulatory” in nature such as speeding, driving without a license, and others that may be generally thought of as “victimless crimes.”

Factual issues are often the crux of determining jurisdictional authority in PL 280 states, and can often be difficult to ascertain. Was a crime committed inside or outside of Indian Country boundaries? Was the offender Indian or non-Indian? Was the crime regulatory or prohibitive in nature? For example, if a non-Native individual is driving without a valid driver’s license *inside or outside* of Indian Country he could be prosecuted in state court. If a Native individual is driving without a valid license *outside* of Indian Country, he could be prosecuted in state court; but if he is driving without a valid driver’s license in Indian County, the state has no prosecutorial authority (because driving without a license is a civil regulatory offense not a criminal prohibitory one) but the tribal court would. If the offense were drunk driving instead of driving without a valid license, the crime is criminal in nature and the state would have criminal jurisdiction whether the crime occurred on or off Indian Lands.

¹² See footnote 7, *supra*.

¹³ TLOA

Tribal, Federal, and State Jurisdiction Tribal Criminal Jurisdiction

		Type of Crime			
		"Major" Crimes as defined by Major Crime Acts		All Other Crimes	
Perpetrator	Victim	Non-PL 280 States	PL 280 States	Non-PL 280 states	PL 280 States
Indian	Indian	Federal* & Tribal	State	Tribal	State, Federal, or Tribal
Indian	Non-Indian	Federal* & Tribal	State	Federal** & Tribal	State or Federal
Non-Indian	Indian	Federal **	State	Federal**	State or Federal
Non-Indian	Non-Indian	State	State	State	State

*Under Major Crimes Act, **Under General Crimes Act

In a non-PL 280 state, only tribal and federal agencies have law enforcement and prosecutorial authority in Indian Country, although tribal authority does not extend to non-Native individuals. (The state would only have jurisdiction if neither the perpetrator nor the victim is American Indian.) Federal authorities generally investigate and prosecute "major crimes" and tribal authorities generally investigate and prosecute lesser crimes. The preceding chart¹⁴ illustrates just some of the complexities of identifying criminal jurisdictional authority in Indian Country.

¹⁴ Adapted from chart from <http://www.tribal-institute.org/lists/jurisdiction.htm>
http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm (visited on June 15, 2011),

Sovereignty in Action: Tribal Courts

[The recently passed Tribal Law and Order Act of 2010 has several provisions which speak to supporting the role of tribal courts and addressing the problems created by past legislation and Supreme Court precedent. Since the Talking Circles were held prior to this enactment (which one exception) the information contained in chapters one and two are written based on the law prior to July 29, 2010. Chapter Three discusses the new Tribal Law and Order provisions.]

In the Census of Tribal Justice Agencies (2002), conducted by the Bureau of Justice Statistics, it was reported that 562 federally recognized Indian tribes were located in the United States; 341 of those tribes located in the lower 48 continental states¹⁵. The Census survey was limited to the 341 tribes in the continental states; over 92 percent (314) responded to the survey. One hundred eighty-eight tribes reported having “some form of tribal justice system” and 175 tribes reported having a “formal tribal court.” The survey found that 200 judges, 153 prosecutors and 20 peacemakers were employed full-time in Indian Country in 2002¹⁶.

Tribal court systems may be established in a number of ways. Some tribal constitutions specifically provide for a framework of lower courts, administrative tribunals, and a court of last resort. Others may be silent on establishing a judiciary while leaving it up to the tribe’s legislative branch to create one as a matter of tribal law. Tribes may also establish so-called ‘CFR Courts’, which are courts operated by the Federal Bureau of Indian Affairs under regulations contained in volume 25 of the Code of Federal Regulations¹⁷. The scope of any given tribe’s judiciary will depend on a number of factors including, but not limited to: federal law limitations, tribal government organization and separation of powers, the availability of resources to fund judicial bodies, and the relative importance of traditional knowledge and values involved in dispute resolution.

Federal limitations placed on tribal law enforcement and judicial systems have resulted in significant challenges to tribal communities and may have compromised safety in Indian communities. The Indian Civil Rights Act¹⁸ of 1968 prohibited tribal court criminal sentences from exceeding one year imprisonment or \$5,000 in fines.¹⁹ In situations where federal authorities have declined to prosecute, such sanctioning limitations made it difficult for tribal courts to provide adequate measures of justice or punishment in trying violent crimes such as homicide, rape, child abuse, and aggravated assault. This limited punishment would only apply to Indian people in Indian Country due to the U.S.

¹⁵ Perry, Steven; Bureau of Justice Statistics, NCJ 205332, December 2005

¹⁶ Id.

¹⁷ Cohen’s Handbook of Federal Indian Law §4.04, 2005 ed.

¹⁸ 25 USCS §1302(7).

¹⁹ Information from Talking Circle and Focus Group participants was obtained prior to enactment of the Tribal Law and Order Act (TLOA) of 2010, §§304, 402 (with limited exception). Consequently, changes that occurred as a result of TLOA are not reflected in the comments of participants, unless otherwise explicitly stated herein.

Supreme Court's pronouncement that Indian nations were implicitly divested of criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*.²⁰

As previously discussed, in July 2010, the Tribal Law and Order Act (TLOA)²¹ was signed into law with the intent of improving public safety in Indian Country. One provision of this Act gives tribal courts greater sentencing authority and discretion, allowing for the imposition of up to three years incarceration and a \$15,000 fine upon providing adequate constitutional protections to defendants. Specifically, tribes would have to afford the same right to counsel that would be available in state or federal court in order to take advantage of the increased sentencing provision. The Act also provides for tribal courts to impose consecutive sentences and utilize federal prison facilities when tribal resources do not allow for effective or extended incarceration. In addition, the Act provides for the reauthorization of funding to support and improve tribal justice systems.²² A summary of provisions contained in the Tribal Law and Order Act is discussed in Chapter 3.

²⁰ 435 U.S. 191 (1978).

²¹ Tribal Law and Order Act of 2010, §§304, 402.

²² *Id.*

Chapter 2 Talking Circles and Focus Group Findings

The intent of convening talking circles was to improve understanding of the criminal justice challenges facing tribal governments and communities, to hear from the voices that have experienced such challenges first hand, and to communicate these issues to agencies and individuals that may be able to help through improvements in policy and practice.

The talking circles and focus group meetings were all very different. Some groups started off with a written agenda, others with a prayer and smudging ceremony. Discussions were held in tribal court rooms, detention facilities, tribal colleges, police departments, community meeting rooms, and casino conference rooms. Participants included tribal judges, attorneys, police, jailors, tribal and state probation officers, council members, department heads, college professors, elders, medicine men, victim and women's advocates; social workers, community members, previously incarcerated individuals, and an FBI representative.

Similar issues were raised across most discussion groups. While each community had its own strengths and challenges, jurisdictional issues, programs and resources, and cultural identity emerged as fairly global themes.

Jurisdictional Authority and Complexities

Jurisdictional issues, in one way or another, have created challenges for many Indian communities. In some PL 280 states, tribes have reported over-zealous arrests and prosecutions by state authorities; in non PL 280 states, some Indian communities have expressed concerns that the Federal Government has not been responsive enough in investigating and prosecuting felony cases in Indian Country. In tribal systems, there are internal obstacles to overcome in terms of developing, expanding, and funding adequate law enforcement, courts, and treatment services.

Without a doubt, jurisdictional issues were one of the biggest frustrations facing tribal communities. Which jurisdiction has arrest and prosecutorial authority depends upon so many different factors. The legal and factual determinants were described in the Public Law 280 section of this report, but the effects of trying to navigate such jurisdictional complexities have an abundance of negative consequences for tribal communities.

Law Enforcement

Indian lands are often remote and cover vast areas, with villages located many miles apart from another. Even communities that have their own tribal police departments expressed frustration with the difficulty in effectively patrolling and responding to emergency calls with a limited number of officers to patrol large areas of land. While state and county law enforcement have police powers on Indian lands in PL 280 states, often these agencies enter into cross-deputization agreements with tribal governments allowing for mutual aid and assistance, regardless of jurisdictional boundaries. While tribes expressed value in such agreements, there was also frustration with the fact that such agreements can be rescinded by local and state governments at any time.

Major crime investigations in Indian Country are generally handled by federal law enforcement in non-PL 280 states. While some tribes have good working relationships with federal investigators, other tribes described federal lack of interest in tribal cases resulting in less than vigorous investigation practices. Further, in many cases, it is “outside” investigators and not community tribal police that interview victims, witnesses, and suspects. Because factual questions must be answered before jurisdictional authority is determined, delay can also occur in investigations.

In Oklahoma for example, Indian lands are not large tracts or vast reservations; they are allotment parcels that dot the entire state. A plot plan and attorney review is often necessary to determine on which lands the crime occurred and consequently, which law enforcement and prosecutorial agency has jurisdiction. Victim advocates expressed frustration with the significant delay victims must endure before being informed about which agency will be handling their case.

Prosecution

Individuals from almost all groups expressed concern with effective prosecution in all levels of government – federal, state, and tribal. One site reported that a large number of cases referred to the federal attorney general’s office for prosecution are denied, often without notice to tribal authorities until inquiry is made. One specific example involved a non-Native male who committed an assault on a tribal police officer. The tribal authorities did not have jurisdiction over this non-Native individual; the state had no criminal jurisdiction to prosecute crimes in Indian Country involving an Indian victim; and the federal government declined to exercise its prosecutorial authority.

According to a December 13, 2010 report by the United States Government Accountability Office²³, of the 9,000 Indian Country cases referred to the US Attorneys Office for prosecution between 2005 and 2009, 77 percent were categorized as violent

²³ U.S. Department of Justice Declinations of Indian Country Criminal Matters, GAO-11-167R, Dec 13, 2010

crimes and 24 percent as non-violent crimes. The Attorney General's Office declined to prosecute 52 percent of the reported violent cases and 40 percent of the non-violent cases. Two categories of crimes accounted for 55 percent of the total cases reported: assault (29 percent or 2,922 cases) and sexual abuse cases (26 percent or 2,594 cases). Prosecution was declined in 46 percent of the assault cases and 67 percent of the sexual abuse cases.

Frustration with the number of prosecutorial denials by the federal government permeated discussion. Groups talked about the resulting communal disrespect for law and order when crimes go unpunished, as well as fear and anger of victims who do not see perpetrators brought to justice. Because of this, tribes (with their own court systems) will often attempt to prosecute cases in tribal court that have been denied for prosecution in federal court. When requests are made for return of evidence to tribal authorities, there can be a long delay or worse, missing or damaged evidence. As in all criminal cases, delay between commission of the act and the charging of the offense, exacerbated by missing or damaged evidence, can compromise a successful prosecution. Further, even if a defendant is convicted, tribal authorities reported being prohibited by federal law from imposing incarceration for more than 365 days, inadequate punishment for many serious crimes.

State prosecutorial authorities received mixed reviews from participants; some communities reported over-zealous prosecution and other communities reported just the opposite – state apathy toward prosecuting crime in Indian Country. One tribal attorney stated that tribal youth suffer discrimination at the hands of state district attorneys, courts, and probation departments. She and others in the group reported (as did participants in a neighboring state) that Indian youth are prosecuted more zealously than non-Indian youth who commit similar offenses and that Indian youth receive longer sentences and are viewed with disdain by supervising agencies. According to the tribal attorney, Native people in general are more apt than non-Natives to admit to crimes as charged without seeking legal representation or entering into plea negotiations. Many of the defendants that the tribal attorney is able to represent have been found not guilty after a jury trial. She believes it is the “nature of Native people” to avoid conflict and avoid drawing attention to oneself; pleading guilty to criminal charges accomplishes both. Other individuals described lack of state prosecutorial interest in pursuing crimes occurring in Indian Country, similar to the issues raised in federal prosecutions.

Tribal prosecutors have different issues with which to contend. In one large Indian community, a single prosecutor was responsible for handling all criminal matters and many civil matters that occurred across a large area of land. To further complicate the matter, there were only eight jail beds available to confine all those convicted and sentenced by the tribal court in this particular district. The jail was described as a “revolving door”; one offender had to be released before another could be held.

Programs and Resources

An absence of adequate resources, both human and financial, presents significant barriers to promoting safe communities. Lack of programs and services for Native people both on and off Indian lands was a reality echoed by all tribes. Other topic areas included infrastructure needs such as expanded tribal courts and additional detention and jail facilities, as well as workforce development needs in recruiting American Indians to serve in criminal justice (and related) positions. Another priority raised was the need to train and educate non-Native police, courts, correction officials, and treatment providers regarding Native government, culture, experiences, and the importance of exercising traditional Native practices in order to better serve American Indians who have contact with local, state, and federal criminal justice officials.

Available and Appropriate Services

Tribal governments expressed difficulty in doing long term criminal justice planning because of dependency upon available short-term grants, in comparison to broad-based funding for tribes to apply to the specific needs of individual governments and communities. Further frustration results from program funding that is cut or not reinstated shortly after implementation. As one participant put it, “we lose the trust of the young people” by engaging them in something positive that does not last. Of biggest concern was the need for greater access to, and availability of, basic services that mirror those identified in the offender reentry literature as necessary for successful community reintegration: housing, employment, substance abuse and mental health programs, family services, and more.

Specific needs varied depending on the individual community. Mental health services was the number one need facing one community, and of concern to other tribal participants. Research regarding specific mental health issues and diagnoses facing American Indians indicates that mental health needs are great for this population. According to some studies, the prevalence of psychiatric disorder, especially mood and substance use disorders, are atypically high in Native communities. Both adults and children suffer from depression, anxiety and the use of alcohol and other drugs. Other common mental-health problems include panic disorders, psychosomatic symptoms, and emotional problems resulting from distressed interpersonal and family relationships²⁴. Suicide rates for American Indian people are 190 percent greater than the general U.S. population. Statistics are particularly disturbing for adolescent boys and young Indian men. According to national data from 2002, suicide was the fourth-leading cause of death for Indian and Alaskan Native males aged 10 through 14, and the

²⁴ Gone, J.P. *Mental Health Services for Native Americans in the 21st century United States*. Professional Psychology: Research and practice. The American Psychological Association, Inc. 2004, 35:1

second-leading cause of death among Indian and Alaska Native males aged 15 through 34²⁵.

One community that participated in the talking circle groups reported that 97 percent of crimes committed on its land were alcohol related, yet substance abuse treatment services were not accessible to a large proportion of its population. While some services were available in Indian Country, many were located off tribal lands requiring long distance travel and few transportation options. Further, sober housing was an issue. Many individuals returning from residential treatment, or trying to abstain with the assistance of out-patient programs, often return home to alcoholic family members and unhealthy environments with few, if any, housing alternatives. While lack of access and availability of services affect many rural areas, Indian communities are often additionally faced with treatment providers that lack cultural understanding, contributing to the difficulty of developing a treatment relationship, which studies indicate contribute to successful behavioral change.

While needs were plenty, participants described community-led Alcoholics Anonymous meetings, traditional cultural ceremonies, and sweat lodges as helpful in achieving and maintaining sobriety.

Infrastructure and Workforce Development Needs in Indian Country

Tribal criminal justice systems are expanding across the Country in spite of external funding issues and internal economic hurdles. Expansion is occurring despite the inherent challenges in building an intrinsically complex justice system incorporating both Indigenous and Western concepts while meeting the needs and expectations of the community and overcoming the skepticism of state and federal systems.

One participating community has a well established, respected, and complex judicial system yet still struggles to maintain adequate jail space. Other communities had fully developed court systems, including special problem-solving courts, yet had no jail or correctional facilities. Still other tribes had part-time tribal courts presided over by respected lay members of the community. Further development of tribal courts and corresponding detention or community supervision facilities were needed in almost all communities interviewed.

Attracting American Indians into criminal justice and related professions is a significant challenge in Indian Country and beyond. While the establishment of tribal police departments was not expressed as a need by any of the participating tribes, adequate recruiting, staffing and funding were expressed concerns. One law enforcement representative talked about the struggle to recruit tribal officers. In one tribe, a strategy

²⁵ Gone, J.P. *Mental Health Services for Native Americans in the 21st century United States*. Professional Psychology: Research and practice. The American Psychological Association, Inc. 2004, 35:1

to address recruitment was to lower the educational requirement from a high school diploma to an eighth-grade education. When that failed to produce any qualified applicants, the educational requirement was lessened again. While this produced eligible candidates, their ultimate job performance was less than adequate, resulting in reinstatement of the higher educational requirements.

Other communities talked about the need for Native social workers, mental health professionals, and substance abuse counselors on and off reservation lands. Talking circle participants expressed feeling more comfortable seeking help from other Native people and felt there was more cultural awareness and/or cultural inclusion of Native practices when working with Indian professionals. Some participants had been through state and federal criminal justice systems and expressed a significant lack of interaction with Native professionals in jail and prison facilities.

Training and Education for Non-Native Professionals

In many different ways, the need for the cultural training of non-Native professionals was identified by participants; feelings of anger, hurt, and frustration were expressed regarding the treatment they received from the mainstream system. Basic cultural awareness and sensitivity training was identified almost unanimously as something that would be useful for all those working in the system and especially for those they serve. For example, understanding differences in cultural norms, such as lack of eye contact representing respect, would reduce assumptions made by non-Native people that it indicates evasiveness, dishonesty, or disrespect.

Understanding the true value many Native people place on cultural practices such as sweats, smudging, traditional medicines, baby-naming ceremonies, and funerals, to name a few, would be a relatively simple improvement that would be greatly appreciated in the Native community. During the course of the talking circles, participants talked of incarcerated community members and those under the supervision of probation or parole who were denied the ability to practice their traditional beliefs and the resulting emotional impact of loss and shame.

Not all Native people are interested in practicing a traditional way of life, but for those who are, preventing such practices can have far-reaching negative consequences, further perpetuating distrust and disillusionment with criminal justice authorities. Many participants identified cultural practices not only as a protective factor, but also a healing factor. According to focus group participants, for those trying to change negative behavior, being allowed to return to Indian lands to participate in traditional practices may be promoting pro-social behavior that is key to long-term change.

One specifically identified training need was trauma-informed response training for tribal and non-tribal police. One defense attorney talked about the high numbers of Native women that are victims of sexual assault and how encounters with police can

exacerbate what may otherwise be a routine encounter. She gave one example of a woman that was pulled over by police at night for a minor traffic infraction, asked by a male officer to get out of the car, and escorted to the side of the road behind the vehicle. This woman had recently been sexually assaulted and had an immediate protective response to fight or flee; the otherwise routine stop by the officer resulted in her struggling to get away and a subsequent arrest.

Cultural Identity and Criminal Justice

Cultural identity was an issue permeating discussions with all tribes. Cultural pride, traditional practices, native language, oral history, honor of elders, preservation and loss were some of the topics explored. Some might ask what culture has to do with criminal justice. From the talking circles, it appears the two are indivisible. As one participant stated, “my own Native teachings are about not judging other people . . . all are to be treated equal . . . but this is in direct contrast with the state system in that a judge sits on the bench and renders judgment on other individuals.”

Many conversations about criminal justice referenced the importance of Native culture. Answers to questions were sometimes prefaced by brief history lessons, descriptions of traditional practices, or knowledge gained from elders. Group introductions with some tribes started off with a history of their land and their people. Beliefs were tied to family stories and clan teachings. Some members of the group were uncomfortable offering such private information; others felt it was important to share what they held true in order to build relationships through understanding.

Indigenous Justice

There was a great deal of discussion about the impact Native culture played or plays in tribal criminal justice systems. The commission of crime is viewed by Indian communities not only as a direct offense against the identified victim(s), but also a crime against the community as a whole. Traditionally, offenders were held accountable for making the victim whole through restitution and reparations, while the community helped to make the offender whole through support and healing practices. Individual well-being is often viewed as requiring a balance of physical, mental, emotional, and spiritual health. If one commits a crime, he/she may be considered unbalanced or unwell, requiring him or her to look within to heal that which may be broken or wounded. The worst punishment that could be handed out, one that was rarely used, was that of banishment from the community, which was reserved for those with little hope of redemption.

Groups described the Western criminal justice system as contradictory to many traditional Native values. The concept of an individual judge in a hierarchical position on the bench, rendering judgment on another, often removing the offender from the community to a confinement facility, resulting in barriers toward reparations to the

victim(s), is in contrast to restorative justice practices valued by many tribal communities.

This is not to suggest that tribal governments do not believe in appropriate punishment and need for confinement facilities. Tribal law enforcement agencies, courts, and jails are expanding all over the country. What many individuals expressed was a desire to get back to “our traditional roots.” It is this balance of judgment and forgiveness, accountability and support, tradition and innovation, which tribes are trying to achieve. This balancing act of incorporating the old and the new is evident in many tribes’ criminal codes. As one tribal judge wrote, “tribal courts are constantly struggling not only to maintain external credibility through the application of Anglo-American legal concepts and procedures, but also to retain internal credibility by not straying too far from Indian cultural influences.”²⁶

Cultural Transitions

Some talking circle groups described a “community breakdown of traditional values.” Youth gangs were described as “needing somewhere to belong,” that they “have lost their Indian identity and are now adopting a gang mentality.” Groups talked about children being raised by television and parents who were suffering from substance abuse and mental health issues. While violence in Indian Country is increasing, national crime statistics decline. Many attributed this to a lack of cultural identity. As one participant explained, “loss of cultural identity is tragic.” Another participant shared, “those that have not embraced traditional practices and a connection to the land are confronted with a void in their lives that results in negative behavior.”

Others described the reality of racism that still exists; “prejudice and racism can still be felt in stores and in public places ... It results in feelings of hurt and anger, drugs and alcohol medicate such feelings.” Some participants described historical and intergenerational trauma resulting in “soul wounds” that need healing. The forced boarding school policy of the federal government from the 1880s until as late as the mid-1970s and the resulting long term trauma it caused was another topic that was raised in group discussion. As one woman stated, “when I learned what my mother went through in the boarding schools, it’s a wonder she was able to raise us at all.” The loss of land, language, traditional songs, and oral history, imperative to cultural identity were also deeply imprinted on this population. However, after acknowledging a history of loss, one group described itself as having a “culture of survival.”

²⁶ The Honorable Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction* (2008) vol.47 Washburn Law Journal p. 733, 735.

Cultural Interventions

Almost all tribes who participated in the talking circles described cultural initiatives used in the prevention or intervention of criminal justice related issues. These initiatives are replicable program models that could be modified to fit the needs of different tribes. While there is no evidence regarding efficacy at the current time, the programs and initiatives described are identified by the authors as promising practices that should receive additional attention in the form of research and evaluation.

Tribal Healing to Wellness Court is a tribal justice court that focuses on healing individuals, families, and communities from the abuses of alcohol and drugs. While there are ten key model components to Wellness Court, its strength is that it supports the adoption of community-specific cultural interventions. The key components²⁷ include: bringing community healing resources together with tribal justice; identifying participants early and through various referral points; providing holistic, structured and phase-based services that incorporate culture and tradition; using intensive supervision, random testing, progressive sanctions and rewards; fostering judicial involvement with participants and in team staffing; continuing interdisciplinary education; monitoring and evaluation; and ongoing communication and collaboration with team, community, and organizations.

Joint Jurisdictional Court²⁸ is an example of a Wellness Court taken to a new level with an innovative collaborative component. In 2006 the Leech Lake Band of Ojibwe Tribal Court partnered with the Cass County District Court to create the Leech Lake-Cass County Wellness Court, the first of its kind in the Nation. A year later, the Leech Lake-Itasca County Wellness Court was created. The Courts handle post-conviction, post-sentencing DWI cases based on the principles of Wellness Court identified above.

The Joint Jurisdictional Court includes a team of tribal and district court judges, attorneys, probation, law enforcement, treatment providers, and information technology representatives. The clients include both tribal and non-tribal participants. The Joint Jurisdictional Court, based on a 54 word memorandum of understanding, was created for the common goals of 1) improving access to justice; 2) administering justice for effective results; and 3) fostering public trust, accountability, and impartiality. As Judge Wahwassuck wrote, “the judges have worked so well together that they have become very confident in each other and are comfortable having the other judge handle the proceedings in their absence. This is true even if it means that the tribal court judge takes the bench alone in state court, or that the state court judge takes the bench alone in tribal court²⁹ .

²⁷ Identified in *Tribal Healing to Wellness Courts: the Key Components (2003)* prepared by the Tribal Law and Policy Institute.

²⁸ The Honorable Korey Wahwassuck, The Honorable John P. Smith, and The Honorable John R. Hawkinson, *Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction*, vol.36:2 William Mitchell Law Review, 859 (2010).

²⁹ Id.

Peacemaker Court is a traditional cultural approach to solving problems or disputes between parties. Instead of a vertical, hierarchical approach of a judge rendering a win-lose judgment on opposing parties; the Peacemaker brings the two parties together to “talk things out” and reach agreement based on the consensus of the parties and the best interest of all involved. Healing and forgiveness are the foundations of Peacemaker Court.

While many Indian Nations have Peacemaker Courts, much has been studied and written about the Navajo Nation Peacemaker Court. Additional information is available on the website of the Navajo Nation Peacemaking Program.³⁰

Justice Circles – The Wisconsin Department of Corrections has partnered with tribal communities to establish “Circles” for Native people involved in the justice system. Circles are used throughout Wisconsin for a number of different purposes. The participating communities use Circles as an alternative to prison for probation violators. Those who violate probation conditions, primarily through technical violations, are given the option to attend Circle in lieu of having their sentence revoked. The Circles, whose members include both tribal and state representatives, provide offenders support as well as hold them accountable for their actions.

Tribal communities across the Nation are implementing culturally-based interventions and initiatives to improve criminal justice outcomes for their members. The Federal government has also recently created new policies, programs, and initiatives through the Tribal Law and Order Act of 2010, aimed at improving criminal justice outcomes in Indian Country. The next chapter summarizes the contents of this new Federal Act.

³⁰ <http://www.navajocourts.org/indexpeacemaking.htm>

Chapter 3 Tribal Law and Order Act of 2010

On July 29, 2010, President Obama signed into law legislation aimed at addressing public safety issues that have affected Indian Country for years. The Tribal Law and Order Act of 2010 (TLOA) will affect broad changes in expanding tribal capacity and in fostering increased cooperation between tribal, federal, and state officials in fighting the alarmingly high crime rates in Indian Country. To quote Senator Byron Dorgan, the Act's main sponsor, this effort is premised on the notion that, "Native American families have a right to live in a safe and secure environment. The federal government has treaty and trust obligations to see that they do."³¹

Prior to the Act's passage, tribal government faced various challenges that made it difficult to effectively provide for the safety of its people. Some of these challenges have been discussed in the previous chapters. On a practical level, many tribal governments simply do not have adequate resources to provide for sufficient law enforcement and/or administer effective court systems. They are often forced to depend on state and federal officials to investigate, apprehend, and prosecute individuals that commit crimes in Indian communities. However, as previously discussed, a report by the United States Government Accountability Office found that 52 percent of the reported violent cases and 40 percent of the non-violent cases in Indian Country between 2005 and 2009 were declined³². The rates at which the Department of Justice prosecute violent offenders have been very low, oftentimes with the tribe receiving no notification as to why prosecutions do not move forward.

However, as previously discussed, the unique legal framework that defines the parameters of criminal jurisdiction in Indian Country also limits tribes with well-developed criminal justice infrastructure. Depending on the nature of the crime, the location of the incident, and the identities of the parties (Indian/non-Indian), a tribe's authority to deal with that crime can range from primary to non-existent.

These jurisdictional gaps and lack of attention from federal and/or state law enforcement often leave victims feeling secondarily victimized when perpetrators are brought to justice far too late, if at all. Of particular concern is the degree of impact this system has upon Native American and Alaskan Native women and children. The Act and the accompanying Senate Report cite to the grim statistics that 34 percent of these

³¹ Press Release, United States Senate Committee on Indian Affairs (July 29, 2010) *available at* <http://www.indian.senate.gov/news/pressreleases/2010-07-29.cfm>

³² U.S. Department of Justice Declinations of Indian Country Criminal Matters, GAO-11-167R, Dec 13, 2010

women will be raped in their lifetime while 39 percent will be subject to some sort of domestic violence.³³ Additionally, Native youth are 50 percent more likely than the general population to be the victims of child abuse.

The major provisions of the Tribal Law and Order Act (TLOA) are provided below.

TLOA Provisions:

Section A – Federal Accountability and Coordination:

- *Sec. 211 Office of Justice Services Responsibilities* requires Bureau of Indian Affairs (BIA) to: engage in greater consultation with tribes regarding criminal justice policy; provide training to tribes in data access, collection and analysis; report to Congress on staffing, funding formulas, and unmet needs of criminal justice programs serving Indian Country. This section also requires the Department of the Interior to develop a long-term plan for tribal detention and alternatives to incarceration.
- *Sec. 212 Disposition Reports* requires reporting by federal investigators and prosecutors of declination in Indian Country criminal cases, and requires coordination with tribal authorities regarding testimony and use of evidence in tribal proceedings.
- *Sec. 213 Prosecution of Crimes in Indian Country* allows tribal prosecutors to serve as special federal prosecutors for Indian Country offenses to be prosecuted in Indian Country. It also requires the appointment of Tribal Liaisons in each U.S. District Attorney's district to serve as a link between Indian Country and federal justice authorities.
- *Sec. 214 Office of Tribal Justice* gives the Office of Tribal Justice, within the U.S. Department of Justice, a more permanent status.

Subtitle B – State Accountability and Coordination

- *Sec. 221 State Criminal Jurisdiction and Resources* gives tribes in PL 280 states the right to request that the United States reassume criminal jurisdiction in Indian Country which the Attorney General is allowed to accept or deny. If accepted, it would not divest the states of jurisdiction; it would simply allow another layer of federal jurisdiction creating a tribal, state, federal system of justice in Indian Country.

³³ S.Rep. No. 111-93, at 2 (2009) available at <http://www.indian.senate.gov/issues/upload/SenateReport-111-93.pdf>

- *Sec. 222 State, Tribal, and Local Law Enforcement Cooperation* authorizes the Attorney General to provide technical and other assistance to states and tribes for the purpose of entering into mutual-aid and cross-deputization agreements.

Subtitle C – Empowering Tribal Law Enforcement Agencies and Tribal Governments

- *Sec. 231 Tribal Police Officers* provides for enhanced standards and training for tribal law enforcement, raises the officer age limit to 47, and promotes mechanisms to commission tribal law enforcement officers as “federal law enforcement officers.” This section also amends the Indian Self-Determination and Education Assistance Act³⁴ by establishing an Indian Law Enforcement Foundation, a non-profit organization dedicated to raising funds to support the provision of public safety and justice services in Indian Country.
- *Sec. 232 Drug Enforcement in Indian Country* amends a number of federal codes to include tribal involvement relating to education and law enforcement of drugs in Indian Country.
- *Sec. 233 Access to National Criminal Information Databases* expands tribal access to national law enforcement databases.
- *Sec. 234 Tribal Court Sentencing Authority* amends the Indian Civil Rights Act³⁵ to allow tribes to impose longer sentences dependent upon certain conditions being met, primarily providing for the rights of the defendant. Sentences of up to three years imprisonment and \$15,000 fine *per offense* are now allowable, with a maximum limit of nine years incarceration for combined offenses.
- *Sec. 235 Indian Law and Order Commission* established to conduct a comprehensive study of law enforcement and criminal justice in tribal communities and develop recommendations on necessary modification and improvements to justice systems at the tribal, federal and state levels.

Subtitle D – Tribal Justice Systems

- *Sec. 241, 242, 243, Indian Alcohol and Substance Abuse, Legal Assistance, and Grant Program* extends authorization for funding to criminal justice services and technical assistance programs in Indian Country including training for BIA, tribal law enforcement, and tribal courts in substance abuse prevention, investigation, and prosecution, as well as training for public defenders in Indian Country. It also prioritizes Community Oriented Policing Services (COPS) funding for parts of Indian Country with the biggest needs.

³⁴ 25 U.S.C. 450

³⁵ 25 U.S.C. §1302

- *Sec. 244 Tribal Jails Program* supports construction of tribal jails, tribal contracts with state and local detention facilities, and alternatives to incarceration.
- *Sec. 245 Tribal Probation Office Liaison Program* encourages the appointment of Indian Country residents as federal probation officers and substance abuse and mental health service providers.
- *Sec. 246 Tribal Youth Program* authorizes grants to Tribes for juvenile delinquency prevention programs.
- *Sec. 247 Improving Public Safety Presence in Rural Alaska* provides additional grant funding to communities that have employed a Village Public Safety Officer.

Subtitle E – Indian Country Crime Data Collection and Information Sharing

- *Sec. 251 Tracking of Crimes Committed in Indian Country* provides federal consultation with Indian Tribes to establish data collection systems.

Subtitle F – Domestic Violence and Sexual Assault Prosecution and Prevention

- *Sec. 261 Prisoner Release and Reentry* requires notification to Tribal officials when certain federal prisoners are released or sentenced to probation.
- *Sec. 262 Domestic and Sexual Violence Offense Training* provides training to law enforcement in Indian Country “including training to properly interview victims of domestic violence and sexual violence and to collect, preserve, and present evidence to Federal and tribal prosecutors to increase the conviction rate. . .”
- *Sec. 263 Testimony by Federal Employees* requires Indian Health Services to approve or disapprove, in writing, of any request or subpoena from tribal or state law enforcement for documents or testimony in criminal proceedings.
- *Sec. 265 Sexual Assault Protocol* requires the Indian Health Services to develop standardized sexual assault policies and protocol for Indian Health facilities.
- *Sec. 266 Study of Indian Health Service (IHS) Sexual Assault and Domestic Violence Response Capabilities* requires the Comptroller General of the United States to conduct a study of the capabilities of IHS in certain communities to “collect, maintain, and secure evidence of sexual assaults and domestic violence incidents required for criminal prosecution” and to develop recommendations for improvement.

One vital necessity is the coupling of the Act’s provisions with significant appropriations so that these mandates can be actualized. The Congressional Budget Office estimates that implementing the Act would cost \$1.1 billion over the 2010 to 2014 period and an

additional \$380 million after 2014.³⁶ The legislation's sponsors remain committed to fight for these additional appropriations. While the Act is still in its infancy, it is the hope of tribal governments across the nation that its provisions will lead to significant improvements in the public safety of their people and a better working relationship with state and federal authorities.

³⁶ S.Rep.No. 111-093, at 27.

Conclusion

Enactment of the Tribal Law and Order Act certainly is a promising development. The provisions of the Act respond to most of the issues raised in Chapter 2 of this report. Implementing the mandates of the Act, however, will require considerable funding as well as human capital, neither of which has yet been realized.

It is important for affected parties to closely monitor the developments of the Tribal Law and Order Act and advocate for funding to implement the mandated programs, services, staffing, policies, trainings, activities, studies, reports and recommendations. It is also necessary for change to be initiated from within our own communities and our own governmental agencies, both tribal and non-tribal. The criminal justice system can and should do a better job attaining public safety outcomes in Indian Country while addressing the abnormally high levels of abuse and injustices committed upon Indian women and children. Equally important, public safety decision-makers should consider the effect of the removal of Indian men from communities to federal penitentiaries, absent significant threat to public safety.

While the TLOA addresses the maze of jurisdictional complexities and the inadequacies of available programs and resources, it cannot legislate tolerance, communication, or trust. These are values that must be adopted by individuals in order for long-term change in communities and in government-to-government relationships to occur. To truly impact crime reduction in Indian Country, partnerships must occur at all levels of government and in all disciplines including justice, education, and social services.

With respect and appreciation, many thanks are offered to tribal communities that contributed to this project. It is through such efforts that greater education and understanding is fostered, contributing to positive change.