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# REGAINING CONTROL OVER THE CHILDREN: REVERSING THE LEGACY OF ASSIMILATIVE POLICIES IN EDUCATION, CHILD WELFARE, AND JUVENILE JUSTICE THAT TARGETED NATIVE AMERICAN YOUTH

Ryan Seelau\*

## *Introduction*

It is conservatively estimated that in 1491 there were at least forty million people living in the Americas.<sup>1</sup> By the time the United States was founded in 1776, that number had decreased so substantially that federal Indian policy during President Washington's tenure was to let non-Indian population growth force "the savage as the wolf, to retire."<sup>2</sup> More than 200 years of assimilative policies followed, but those policies never achieved their insidious purposes. Native Americans<sup>3</sup> have proven to be both resourceful and resilient people, and they are now rebuilding their nations.

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\* S.J.D., University of Arizona, 2009; LL.M., University of Arizona, 2006; J.D., University of Iowa, 2005. I would like to thank the following individuals for their contributions to this piece (in alphabetical order): Raymond Austin, Stephen Cornell, Carole Goldberg, James Hopkins, Jacquelyn Kasper, Ian Record, Marren Sanders, Laura Seelau, and Robert Williams, Jr. Although their help was invaluable, any shortcomings contained within this article should reflect solely on me.

1. CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 133 (2005).

2. Letter from George Washington to James Duane (Sept. 7, 1783), *reprinted in* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 97-98 (6th ed. 2011).

3. The terms "Native American," "American Indian," "Indian," and "Indigenous peoples" are used interchangeably in this paper. All three terms refer to the same groups of people — namely, those individuals who self-identify as one of the aforementioned terms, and who live in the United States. Although sometimes referenced separately, "Alaska Natives" are also included in this group. However, it should be noted that my paper is largely written from the context of a federally-recognized tribe that is not subject to Public Law 280 (Pub. L. No. 83-280, 18 U.S.C. § 1162, 28 U.S.C. § 1360). This federal legislation granted certain states the right to assume control of Native American policy within their borders. Although I hope that my argument will fit various contexts (including those of Alaska Natives, state-recognized tribes, and tribes subject to Public Law 280), it does not explicitly address the variations in the legal frameworks operating in each of those contexts. For more information on Public Law 280 and how it relates to tribal jurisdiction, see, for example, Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U.L. REV. 1627 (1998).

According to the 2010 U.S. Census, more than 5.2 million people identify as American Indian or Native Alaskan.<sup>4</sup> As a population, Native Americans are growing at a considerably faster rate than the general population. From 2000 to 2010, the Native American population increased by 18.4%, which is nearly double the 9.7% increase for the general population.<sup>5</sup> Not only is the Native American population growing at a faster rate, but they are also a younger population as a whole, with a median age of 29.5, compared to 36.8 for the general population.<sup>6</sup> In fact, there are more than 1.3 million Native American juveniles in the United States, which is over 25% of the total Native American population.<sup>7</sup>

Native American youth are the future for U.S. Native nations. As in all societies, young Native Americans will be called on to pass their culture to the next generation and to be tomorrow's leaders. Unfortunately, there are many reasons to be concerned about Native American youth. Mental and physical health statistics, socio-economic data, education attainment levels, and criminal statistics all show that Native American youth are routinely among the most disadvantaged in the United States, sometimes living in conditions most Americans would only associate with a developing country.

While the plight of Native American youth obviously has dozens — if not hundreds — of contributing factors, U.S. legal policy towards Native American youth is a substantial factor. Specifically, state and federal policies towards Native American youth in the areas of education, child welfare, and juvenile justice — the three areas where legal frameworks most substantially intersect with the lives of juveniles — have historically

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4. Tina Norris, Paula L. Vines & Elizabeth M. Hoeffel, *The American Indian and Alaska Native Population: 2010*, U.S. CENSUS BRIEFS, Jan. 2012, at 1.

5. *Id.* at 4. Native Hawaiian and Other Pacific Islanders had an even larger percentage increase, rising from just under 400,000 individuals in 2000 to more than 530,000 individuals in 2010. This resulted in an increase of 35.4%. See Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010*, U.S. CENSUS BRIEFS, Mar. 2011, at 4.

6. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbl. 10 (2012) available at <http://www.census.gov/compendia/statab/2012/tables/12s0010.pdf> (last visited Oct. 5, 2012).

7. Press Release, U.S. Census Bureau News, Nation's Population One-Third Minority (May 10, 2006) available at <http://www.census.gov/Press-Release/www/releases/archives/population/006808.html> (indicating that there are over 4.45 million individuals who identify as either American Indian or Alaska Native alone, or in conjunction with another race. Of those individuals, twenty-nine percent were under the age of eighteen, for a total Native youth population of approximately 1.3 million) [hereinafter Nation's Population One-Third Minority].

been used to assimilate Native Americans into mainstream society. Over time, the policies themselves have changed, but their legacies continue to affect Native Americans.

The good news is that not only have legal policies moved away from assimilation as a stated goal, but they have also moved toward self-determination for Native American. Research indicates that self-determination is necessary to achieve meaningful changes in community development.<sup>8</sup> Native nations are currently utilizing both traditional knowledge and innovation to craft solutions that can have lasting, positive impacts on their youth, communities and culture.

This article examines the current interplay between the law and Native American youth. It asserts that the meaningful exercise of tribal self-determination will undo the effects of assimilation and create Native societies that reflect tribes' hopes and dreams. Self-determination prepares the Native leaders of tomorrow for the never-ending task of preserving and growing their cultures.

Part I illustrates the challenges currently facing Native American youth by drawing from a broad array of available statistical data. Part II examines the major legal factors that contributed to those problems. Specifically, this part looks at U.S. policy in the contexts of education, child welfare, and juvenile justice. Part III examines possible solutions for reversing centuries of assimilative policies. The answer is meaningful self-determination, and the ability of Native nations to exercise true sovereignty over their own children and the issues that affect them. Based on research by the Harvard Project on American Indian Economic Development and the Native Nations Institute for Leadership, Management and Policy, Part III puts forth the argument that self-determination is the only proven effective method for change.<sup>9</sup> The article concludes in Part IV with a few final thoughts about how Native nations can continue to overcome the effects that centuries of assimilative policies had on their youth.

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8. See e.g., Stephen Cornell & Joseph P. Kalt, AMERICAN INDIAN SELF-DETERMINATION: THE POLITICAL ECONOMY OF A SUCCESSFUL POLICY (Nov. 2010) available at [http://nni.arizona.edu/pubs/jopna-wp1\\_cornell&kalt.pdf](http://nni.arizona.edu/pubs/jopna-wp1_cornell&kalt.pdf); see also Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 2, 15 (Stephen Cornell & Joseph P. Kalt eds., 1992) [hereinafter *Reloading the Dice*].

9. Specifically, the research has culminated in a series of five key principles for Native communities wishing to produce meaningful and sustained change — the “Nation Building Model.” The Nation Building Model can be used to improve the lives of Native American juveniles.

*I. The Lives of Native American Youth: A Picture Taken from Statistics*

This section presents a picture of current Native American and Alaska Native youth life in the United States. This article focuses solely on the challenges facing Native populations.<sup>10</sup> The analysis of Native American juveniles is accomplished by comparison with non-Native youth. The analysis is limited to four key (but not entirely distinct) areas: physical and mental health; socio-economic conditions; education; and violent crime. Ultimately, the statistics<sup>11</sup> demonstrate that Native children “are living in a world far worse than that of the typical non-Indian child.”<sup>12</sup>

There are more than one million Native youth in this country,<sup>13</sup> making them one of the youngest and fastest growing ethnic groups in the United States.<sup>14</sup> In 2007 the median age for Native Americans was 30.3 compared to the national average of 36.6.<sup>15</sup> The birthrate for Native Americans is 63% higher than that of combined U.S. races.<sup>16</sup> A higher percentage of American Indians and Alaska Natives are under the age of twenty than any other

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10. The discussion in this article is limited to those areas of life where Native American youth seem to suffer disproportionately when compared with non-Native youth. There certainly are areas where Native American juveniles have things better than their non-Native counterparts. Regrettably, those (more positive) areas of Native youth life are beyond the scope of this article.

11. Note that, as Mark Twain famously opined, statistics cannot always be trusted. “There are three kinds of lies: lies, damned lies, and statistics.” Mark Twain, *Chapters from My Autobiography—XX*, 185 N. AM. REV. 465, 471 (1907) (issue of July 5, 1907) (attributing the remark to Benjamin Disraeli).

12. CHARLOTTE GOODLUCK & ANGELA A.A. WILLETO, NATIVE AMERICAN KIDS 2000: INDIAN CHILD WELL-BEING INDICATORS 34 (2000) [hereinafter NATIVE AMERICAN KIDS 2000] (citing Rita Ledesma & Paula Starr, *Child Welfare and the American Indian Community*, in CHILD WELFARE: A MULTICULTURAL FOCUS 117 (Neil. A. Cohen ed., 2d ed. 2000)).

13. Nation’s Population One-Third Minority, *supra* note 7.

14. *The American Indian and Alaska Native Population: 2010* 3-4, U.S. CENSUS BUREAU (2012) (“...the American Indian and Alaska Native alone population increased almost twice as fast as the total U.S. population, growing by 18 percent from 2.5 million to 2.9 million.”) available at <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

15. Press Release, U.S. Census Bureau News, U.S. Hispanic Population Surpasses 45 Million Now 15 Percent of Total (May 1, 2008), available at <http://www.census.gov/newsroom/releases/archives/population/cb08-67.html> [hereinafter Hispanic Population Surpasses 45 Million].

16. *Problems Facing Native American Youths: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. 9 (2002) [hereinafter *Hearings*] (statement of Vincent M. Biggs, M.D., American Academy of Pediatrics).

race,<sup>17</sup> and between 1995 and 2015, the Native American youth population (under age eighteen) is projected to increase by 17%.<sup>18</sup>

In terms of geography, Native American youth live in all fifty states, but comprise the largest minority group in Alaska, Montana, North Dakota, Oklahoma and South Dakota.<sup>19</sup> They live in rural, suburban, and urban areas, with approximately one-third of all Native youth living on reservations or other tribal lands.<sup>20</sup> Given that Native nations will have the most success exercising self-determination with respect to on-reservation members, I limit my descriptive analysis to on-reservation populations only when possible.

### *A. Physical and Mental Health*

This section divides the statistical data on Native American youths into three categories: (1) physical health, including figures on morbidity and mortality rates; (2) mental health, including data on suicide; and (3) substance abuse, which raises both physical and mental health issues and intersects with delinquent or criminal behavior.

#### *1. Physical Health*

The problems for Native American youth begin at birth. According to data collected by the Indian Health Service ("IHS")<sup>21</sup> from 2002-2004, the Native American/Alaskan Native infant mortality rate was 8.3 deaths per

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17. CHARLOTTE GOODLUCK & ANGELA A.A. WILLETO, *NATIVE AMERICAN KIDS 2001: INDIAN CHILDREN'S WELL-BEING INDICATORS DATA BOOK 31* (2001) [hereinafter *NATIVE AMERICAN KIDS DATA BOOK*] (citing *Population by Age, Sex, Race and Hispanic Origin*, U.S. CENSUS BUREAU (2001), available at <http://www.census.gov/population/socdemo/age/ppl-147/tab01.txt>).

18. *NATIVE AMERICAN KIDS 2000*, *supra* note 12, at 33.

19. *Hispanic Population Surpasses 45 Million*, *supra* note 15.

20. Christopher Hartney, *Native American Youth and the Juvenile Justice System*, FOCUS (Nat'l Council on Crime & Delinq., Oakland, Cal.), Mar. 2008, at 7.

21. "IHS is an agency within the Department of Health and Human Services . . . [that] provides a comprehensive health service delivery system for approximately 1.9 million . . . American Indians and Alaska Natives." *Indian Health Service: A Quick Look*, INDIAN HEALTH SERVICE, <http://info.ihs.gov/QuickLook09.asp> (last visited Oct. 2, 2012). The Native American and Alaska Native data analyzed by IHS comes from their own service population, "most of whom live on or near reservations. . . ." *Id.* Although this data is not a perfect representation of on-reservation health, it is far more accurate than the data provided by the U.S. Census, which includes all Native American populations, the bulk of whom do not live on reservations.

1000 live births.<sup>22</sup> This rate is 20% higher than that of the general population,<sup>23</sup> and 43% higher than that of whites.<sup>24</sup> Approximately one in 300 Native infants born have Fetal Alcohol Syndrome (“FAS”).<sup>25</sup> FAS is a preventable disease caused by alcohol consumption during pregnancy that may result in “physical and intellectual disabilities, as well as problems with behavior and learning.”<sup>26</sup> It affects every area of an individual’s life, contributing to learning and memory problems, physical developmental problems,<sup>27</sup> an increased likelihood of hyperactivity and erratic behavior,<sup>28</sup> and an increased likelihood of delinquency.<sup>29</sup> The rate of FAS in Native births is over 800% higher than the general population.<sup>30</sup> In addition to higher rates of FAS, Native infants also have elevated rates of Sudden Infant Death Syndrome (“SIDS”).<sup>31</sup> SIDS occurs when an infant (under one year of age) dies with no clinical explanation, despite a thorough

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22. *Indian Health Disparities*, INDIAN HEALTH SERVICE, <http://info.ihs.gov/Disparities.asp> (last visited Oct. 2, 2012); see also T.J. Matthews et al., *Infant Mortality Statistics from the 2002 Period Linked Birth/Infant Death Data Set*, NAT’L VITAL STAT. REP. (Centers for Disease Control and Prevention, Atlanta, Ga.), Nov. 24, 2004, at 4 [hereinafter *Infant Mortality Statistics*] (stating that the infant mortality rate for Native Americans/Alaska Natives was 9.1 in 2002, compared to a national rate of 6.2, and a white rate of 5.4; there is no distinction between on-reservation and off-reservation Native American populations in this data).

23. *Indian Health Disparities*, *supra* note 22; *Infant Mortality Statistics*, *supra* note 22, at 4.

24. Kenneth D. Kochanek & Betty L. Smith, *Deaths: Preliminary Data for 2002*, NAT’L VITAL STAT. REP. (Centers for Disease Control & Prevention, Atlanta, Ga.), Feb. 11, 2004, at 20, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52\\_13.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_13.pdf).

25. *Fetal Alcohol Syndrome – Alaska, Arizona, Colorado, and New York, 1995-1997*, 51 MORBIDITY & MORTALITY WKLY. REP. 433, 433 (2002) [hereinafter *Fetal Alcohol Syndrome—Four States*], available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5120a2.htm>.

26. *Fetal Alcohol Spectrum Disorders Fact Sheet*, CENTERS FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/ncbddd/fasd/documents/fasd\\_english\\_spanish.pdf](http://www.cdc.gov/ncbddd/fasd/documents/fasd_english_spanish.pdf) (last visited Dec. 10, 2012).

27. *Id.*

28. COALITION FOR JUVENILE JUSTICE, ENLARGING THE HEALING CIRCLE: ENSURING JUSTICE FOR AMERICAN INDIAN CHILDREN, REPORT ON THE 5TH ANNUAL ETHNIC AND CULTURAL DIVERSITY TRAINING CONFERENCE 13 (2000) [hereinafter ENLARGING THE HEALING CIRCLE], available at [http://www.juvjustice.org/media/resources/public/resource\\_135.pdf](http://www.juvjustice.org/media/resources/public/resource_135.pdf).

29. See *FASD: What the Justice System Should Know*, NAT’L ORG. ON FETAL ALCOHOL SYNDROME, <http://www.nofas.org/wp-content/uploads/2012/05/justice.pdf> (last visited Nov. 12, 2012).

30. *Fetal Alcohol Syndrome—Four States*, *supra* note 25, at 433.

31. *Infant Mortality Statistics*, *supra* note 22, at 2.

investigation.<sup>32</sup> Although there have been major strides in reducing SIDS on a national scale, the Native American SIDS rate is more than double that of non-Natives.<sup>33</sup> Taken in the aggregate, Native Americans are “more than twice as likely to die in their first [four] years than their non-Indian peers.”<sup>34</sup>

Unfortunately, the statistics do not improve as Native children grow older. Native youth are more than twice as likely to die than their non-Native peers through the age of twenty-four.<sup>35</sup> This can be partially explained by the fact that Native Americans and Alaska Natives experience higher rates of injury mortality (i.e. death from accidents, or by intentional means) and morbidity (i.e. contraction of illnesses) than any other ethnic group in the United States.<sup>36</sup>

Unintentional injury is the leading cause of death for on-reservation Native youths over the age of one.<sup>37</sup> Native American children are four times more likely to die from a pedestrian-motor vehicle than non-Indian children;<sup>38</sup> they are nearly twice as likely to drown;<sup>39</sup> and they are nearly twice as likely to die from fire and burn injuries.<sup>40</sup> Overall, Native child injury mortality rate is about double that of the general U.S. population.<sup>41</sup> Furthermore, the Native children and teen death rate is currently forty-one per 100,000 youth, which is still the highest of any race/ethnicity, and significantly higher than the national rate of twenty-seven deaths per 100,000 youth.<sup>42</sup> When teens are isolated from the data, they have a death

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32. *Sudden Infant Death Syndrome (SIDS) and Sudden Unexpected Infant Death (SUID): Home*, CENTERS FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/SIDS/> (last visited Oct. 15, 2012).

33. *Infant Mortality Statistics*, *supra* note 22, at 8.

34. *Hearings*, *supra* note 16, at 9 (statement of Vincent M. Biggs, MD, American Academy of Pediatrics).

35. *Id.*

36. *Id.* at 41.

37. *IHS Fact Sheets: Injuries*, INDIAN HEALTH SERVICE, <http://info.ihs.gov/Injuries.asp> (last visited Oct. 15, 2012).

38. *Hearings*, *supra* note 16, at 41.

39. *Id.*

40. *Id.*

41. *Id.*

42. KIDS COUNT DATA BOOK 19 (The Annie E. Casey Foundation, 2012) available at <http://www.aecf.org/KnowledgeCenter/~media/Pubs/Initiatives/KIDS%20COUNT/123/2012KIDSCOUNTDataBook/KIDSCOUNT2012DataBookFullReport.pdf>.

rate of ninety-one per 100,000 youth, more than 33% higher than the national average for non-Native teens.<sup>43</sup>

Native American youth morbidity rates are also higher than any other ethnic group. For example, sexually transmitted diseases (“STDs”) affect Native youth disproportionately, with infection rates for some STDs between two and six times that of non-Natives, and oftentimes significantly higher than the average rate for the general population.<sup>44</sup> Perhaps the greatest current health epidemic among Native youth, however, is Type-II Diabetes. Less than three decades ago, Type-II Diabetes was believed to only affect adult populations, but now Native youth are being diagnosed at an alarming rate.<sup>45</sup> Specifically, although data is scarce, it appears that now more than 300 Native youths are diagnosed with this disease annually — more than any other ethnic group.<sup>46</sup> Additionally, this epidemic is getting worse. According to the Indian Health Service, in just a fourteen-year period (from 1990 to 2004), the Native diabetes rates increased 128% among fifteen to nineteen-year-olds, and 77% among those under age fifteen.<sup>47</sup>

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43. Robert Wm. Blum & Farah Qureshi, *Morbidity and Mortality Among Adolescents and Young Adults in the United States 2*, (2011) available at [http://www.jhsph.edu/research/centers-and-institutes/center-for-adolescenthealth/az/\\_images/US%20Fact%20Sheet\\_FINAL.pdf](http://www.jhsph.edu/research/centers-and-institutes/center-for-adolescenthealth/az/_images/US%20Fact%20Sheet_FINAL.pdf).

44. See U.S. DEP'T OF HEALTH & HUMAN SERVS., INDIAN HEALTH SURVEILLANCE REPORT: SEXUALLY TRANSMITTED DISEASES 2009 (2012), available at <http://www.cdc.gov/std/stats/IHS/IHS-Surv-Report-2009.pdf>.

45. See U.S. DEP'T OF HEALTH & HUMAN SERVICES, *Diabetes in American Indians and Alaska Natives: Facts at a Glance*, [http://www.ihs.gov/MedicalPrograms/Diabetes/HomeDocs/Resources/FactSheets/2012/Fact\\_sheet\\_AIAN\\_508c.pdf](http://www.ihs.gov/MedicalPrograms/Diabetes/HomeDocs/Resources/FactSheets/2012/Fact_sheet_AIAN_508c.pdf); see also *Rise in Diabetes Among American Indian Youth Focus of New National Education Program for Tribal Schools*, UNIV. OF NEV., LAS VEGAS NEWSCENTER (Nov. 17, 2008), <http://news.unlv.edu/release/rise-diabetes-among-american-indian-youth-focus-new-national-education-program-tribal-school>.

46. See *National Diabetes Fact Sheet: General Information and National Estimates on Diabetes in the United States, 2007*, CENTERS FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/diabetes/pubs/pdf/ndfs\\_2007.pdf](http://www.cdc.gov/diabetes/pubs/pdf/ndfs_2007.pdf) (last visited Nov. 12, 2012) (utilizing data collected from the IHS service population); see also INDIAN HEALTH SERV. DIV. OF DIABETES TREATMENT & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., *SPECIAL DIABETES PROGRAM FOR INDIANS: TYPE 2 DIABETES AND YOUTH: ACTING NOW FOR FUTURE GENERATIONS* (2008), available at <http://www.choctaw.org/government/tribalServices/health/diabetes/preventingYouthDiabetes1.pdf> (utilizing data collected from the IHS service population (meaning data that primarily comes from on-reservation and nearby populations)).

47. *Special Diabetes Program for Indians: Hearing Before the Senate Committee on Indian Affairs*, 110th Cong. 3 (2007) (statement of Charles W. Grimm, D.D.S., M.H.S.A., Director of Indian Health Service), available at [http://indian.senate.gov/public/\\_files/Grim020807.pdf](http://indian.senate.gov/public/_files/Grim020807.pdf) (utilizing data collected from the IHS service population).

In addition to the data relating to disease and death, other health issues, such as childhood obesity and tobacco use affect Native youth disproportionately.<sup>48</sup> In 2009, a comprehensive study was published that looked at obesity among four-year-olds. This study indicated that 31.2% of Native youth were obese — compared to 18.4% obesity among the general population.<sup>49</sup> The United States Department of Agriculture estimates that between one-third and half of all Native American children are either overweight or obese.<sup>50</sup> With regards to tobacco use, recent data shows that the prevalence of smoking among Native high school students on reservations is 56.5%, compared to the 22.9% among all U.S. high school students.<sup>51</sup> The research also indicated that Native students see their parents and peers as more approving of cigarettes than non-Native tend to see their parents and peers.<sup>52</sup>

## 2. Mental Health

Mental health issues are prevalent in all pockets of U.S. society. A conservative estimate is that one out of every eight children in the U.S. is considered at high risk for environmental, psychological and/or social

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48. With respect to childhood obesity *see, e.g.*, Peggy Halpern, Ph.D., OBESITY IN AMERICAN INDIANS/ALASKA NATIVES ix (2007) available at <http://aspe.hhs.gov/hsp/07/ai-an-obesity/report.pdf>. With respect to tobacco use, *see, e.g.*, Meg Riordan, CAMPAIGN FOR TOBACCO-FREE KIDS, NATIVE AMERICANS AND TOBACCO USE 1 (2011), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0251.pdf> (utilizing data from predominantly on-reservation populations).

49. *Childhood Obesity Prevalence Differs Among Racial and Ethnic Groups in the U.S.*, MEDICAL NEWS (Apr. 6, 2009, 10:20 PM), <http://www.news-medical.net/news/2009/04/06/48024.aspx> (utilizing data that does not distinguish between on-reservation and off-reservation populations).

50. *Addressing Child Hunger and Obesity in Indian Country: Report to Congress* (January 2012), UNITED STATES DEPARTMENT OF AGRICULTURE, available at <http://http://www.fns.usda.gov/ora/MENU/Published/CNP/FILES/IndianCountrySum.pdf>. *See generally* Paul Spicer & Kelly Moore, *Responding to the Epidemic of American Indian and Alaska Native Childhood Obesity*, in 2 OBESITY IN CHILDHOOD AND ADOLESCENCE 143-56 (Dele Daxies & Hiram E. Fitzgerald eds., 2008). *But cf.* Chery Smith & Kimberly Rinderknecht, *Obesity Correlates with Increased Blood Pressure in Urban Native American Youth*, 15 AM. J. HUM. BIOL. 78 (2003).

51. Riordan, *supra* note 48, at 1.

52. *Id.*; *see also* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2005 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 42 (Office of Applied Studies, NSDUH Series H-30, DHHS Pub. No. SMA 06-4194, 2006) [hereinafter 2005 NATIONAL SURVEY] (stating that 41.7% of American Indians or Alaska Natives had reported using tobacco in the past thirty days).

problems.<sup>53</sup> Unfortunately, as was the case for physical health problems, many mental health issues also disproportionately affect Native American children.

A 2005 study found that Native American youth are more than twice as likely to suffer from severe emotional dysfunction as compared to non-Indian youth.<sup>54</sup> The Native prevalence rate was 16.7% compared to a rate of 6.9% for whites.<sup>55</sup> Specifically, there is strong evidence that Native youth suffer from depression at a higher rate and are suffer more psychological trauma than any other group of the U.S. population.<sup>56</sup> This is supported by data on suicide rates. Based on data collected by the Center for Disease Control between 2005-2009, Native Americans age 10-24 have higher rates of both suicide and attempted suicide than any other race or ethnic group.<sup>57</sup> Furthermore, according to the Office of the Surgeon General, Native youths experience Post Traumatic Stress Disorder (“PTSD”) at a rate of 22%, almost three times that of the general population (at 8%).<sup>58</sup> To put this in perspective, this rate of PTSD exceeds or matches the prevalence rates of PTSD in military personnel who served in the latest wars in Afghanistan, Iraq, and the Persian Gulf War.<sup>59</sup>

A discussion of Native youth mental health would be incomplete without discussing suicide. It is important to first note that there is significant variation among Native nations in terms of attempted suicide rates and completed suicide rates.<sup>60</sup> That said, Native students, on average, seriously contemplate suicide at an extremely high rate. In 2001, close to one in five Native high school students had seriously considered suicide in the previous

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53. NATIVE AMERICAN KIDS 2000, *supra* note 12, at 27-28.

54. *Hearings*, *supra* note 16, at 54 (written testimony of Teresa Dorsett).

55. *Id.*

56. EIDELL WASSERMAN, UNDERSTANDING THE EFFECTS OF CHILDHOOD TRAUMA ON BRAIN DEVELOPMENT IN NATIVE CHILDREN 3 (2005), *available at* [http://www.tribal-institute.org/download/Understanding the Effects of Childhood Trauma on Brain Development in Native Children.pdf](http://www.tribal-institute.org/download/Understanding%20the%20Effects%20of%20Childhood%20Trauma%20on%20Brain%20Development%20in%20Native%20Children.pdf).

57. CENTER FOR DISEASE CONTROL, National Suicide Statistics at a Glance: Suicide Rates Among Persons Ages 10-24 Years, by Race/Ethnicity and Sex, United States, 2005-2009, <http://www.cdc.gov/violenceprevention/suicide/statistics/rates03.html> (last visited Dec. 10, 2012).

58. WASSERMAN, *supra* note 56, at 3.

59. Matthew Tull, *Rates of PTSD in Veterans*, ABOUT.COM <http://ptsd.about.com/od/prevalence/a/MilitaryPTSD.htm> (last updated July 22, 2009) (reporting PTSD rates between 9% and 24% for veterans of the Persian Gulf War, and a rate of 12.5% for veterans of the Afghanistan and Iraq Wars).

60. NATIVE AMERICAN KIDS DATA BOOK, *supra* note 17, at 23.

year.<sup>61</sup> Moreover, Native youths commit suicide far more often than their non-Native counterparts. Although the data varies slightly from year to year, the suicide rate for fifteen to twenty-four-year-old Native Americans has hovered around thirty-four suicides per 100,000 youths.<sup>62</sup> This rate is more than double the national average, which has held steady at approximately thirteen suicides per 100,000 individuals.<sup>63</sup> Sadly, similar statistics exist for younger Native American children. In the case of juveniles ages seven to seventeen, the Native suicide rate is more than three times that of African-Americans and Asian-Americans, and is almost double that of white juveniles in the same age group.<sup>64</sup>

### 3. *Substance Abuse*

Substance abuse is a problem in many communities, but is particularly serious among Native youth populations. Rates of alcohol usage, alcohol-related arrests, alcohol-related deaths, drug usage, drug usage disorders, and drug treatment are higher in Native communities than for the general population. For Native youths ages twelve to seventeen, alcohol use rates slightly exceed those of the general population (28.3% to 27.9%);<sup>65</sup> binge drinking rates<sup>66</sup> exceed those of the general youth population (23.6% to 18.6%);<sup>67</sup> heavy alcohol consumption rates<sup>68</sup> are slightly less than those of

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61. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, SHARING THE SPIRIT OF WISDOM: TRIBAL LEADERS LISTENING CONFERENCE 19 (2004), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/220712.pdf> [hereinafter SHARING THE SPIRIT OF WISDOM] (citing a study utilizing data from predominantly on-reservation populations).

62. *Hearings*, *supra* note 16, at 35 (written statement of the American Psychiatric Association); SHARING THE SPIRIT OF WISDOM, *supra* note 61, at 19; NATIVE AMERICAN KIDS DATA BOOK, *supra* note 17, at 23.

63. *Hearings*, *supra* note 16, at 35 (written statement of the American Psychiatric Association); SHARING THE SPIRIT OF WISDOM, *supra* note 61, at 19; NATIVE AMERICAN KIDS DATA BOOK, *supra* note 17, at 23.

64. *Juvenile Suicides: 1981-1998*, OJJDP-CDC YOUTH VIOLENCE RES. BULL. (Office of Juvenile Justice & Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, Washington, D.C.), Mar. 2004, at 1.

65. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 42 (Office of Applied Studies, NSDUH Series H-34, DHHS Pub. No. SMA 08-4343, 2008) [hereinafter 2007 NATIONAL SURVEY].

66. "Binge drinking" is considered drinking five or more alcoholic beverages on the same occasion at least once in the past thirty days. See 2005 NATIONAL SURVEY, *supra* note 52, at 31.

67. 2007 NATIONAL SURVEY, *supra* note 65, at 270 (relying on 2006 survey data that makes no distinction between on-reservation and off-reservation populations).

the general youth population (4.7% to 6.2%);<sup>69</sup> and rates of alcohol dependence and/or abuse in the past year for all Natives over the age of twelve exceed those of the general youth population (21%<sup>70</sup> to 9.1%).<sup>71</sup> This last statistic is particularly alarming considering evidence that the alcoholism death rate for juveniles (ages fifteen to twenty-four) is 5.5 per 100,000 youths, compared to 0.3 per 100,000 for non-Indian youths.<sup>72</sup> Thus, Native Americans between the ages of fifteen and twenty-four are twenty-three times more likely to die of alcoholism than their non-Native counterparts. Another study indicates that in the same age range, alcohol-related death rates for Native Americans are seventeen times higher than for other races.<sup>73</sup>

Given these numbers, it is not surprising that American Indians are arrested for alcohol-related violations at twice the national average as other races.<sup>74</sup> Although Native youth make up about 1% of the total U.S. juvenile population, they represent 2% of all public intoxication and driving under the influence arrests as well as 3% of all liquor law violations.<sup>75</sup>

A similar problem exists with respect to drug abuse. Native American and Alaska Natives ages twelve to seventeen are more likely to have used illicit drugs at some point in their lives than non-Natives (43.1% to 26.2%, respectively);<sup>76</sup> as well as to have used illicit drugs in the past month (18.7% to 9.8%).<sup>77</sup> Natives over the age of twelve are also more likely to have received treatment for illicit drug use in the past year than other races (4.0% to 2.8%).<sup>78</sup>

Of all illicit drugs, methamphetamine use currently receives a great deal of attention in the media despite conflicting data. Research indicates that

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68. "Heavy alcohol consumption" is considered drinking five or more alcoholic beverages on the same occasion at least five times in the past thirty days. *Id.*

69. *Id.*

70. 2005 NATIONAL SURVEY, *supra* note 52, at 319.

71. *Id.* at 67. This data includes all individuals over the age of twelve, and thus, is not specific to juveniles.

72. *Hearings, supra* note 16, at 36 (written statement of the American Psychiatric Association).

73. *Id.* at 15-16 (statement of Nick Lowery, Native Vision).

74. Sarah M. Patterson, *Native American Juvenile Delinquents and the Tribal Courts: Who's Failing Who?*, 17 N.Y.L. SCH. J. HUM. RTS 801, 818 (2000).

75. ENLARGING THE HEALING CIRCLE, *supra* note 28, at 13.

76. 2007 NATIONAL SURVEY, *supra* note 66, at 261.

77. *Id.*; see also *Hearings, supra* note 16, at 73 (written testimony of John P. Walters, Director of National Drug Control Policy).

78. 2007 NATIONAL SURVEY, *supra* note 65, at 278.

methamphetamine usage is actually on the decline nationally.<sup>79</sup> While more studies are required to confirm this trend, there is ample evidence that in the past decade, methamphetamine use among Native American youth has increased substantially. Furthermore, the current usage rate remains two to three times that of the general population.<sup>80</sup> The picture for other illicit drugs is often very similar. Again, despite making up only 1% of the population, Natives age twelve to twenty-one make up 3% of all youth treatment admissions,<sup>81</sup> including 7% of adolescent admissions for inhalants<sup>82</sup> and 2% of youth marijuana admissions.<sup>83</sup>

### *B. Socioeconomic Conditions*

Economically, Native Americans are debatably the most disadvantaged group in the United States.<sup>84</sup> Multiple studies have demonstrated strong correlations between poverty and rates of violence, as well as poverty and rates of death among Native Americans and Native American children.<sup>85</sup> It is important to note, however, that although Natives as a whole tend to be poorer than any other ethnic group, they are not uniformly poor.<sup>86</sup> Even though some communities are economically successful, more than 25% of

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79. *Methamphetamine Use Among Young*, ADOLESCENT SUBSTANCE ABUSE KNOWLEDGE BASE, <http://www.adolescent-substance-abuse.com/meth-use-among-youth.html> (last visited Oct. 15, 2012).

80. GENERATIONS UNITED, METH AND CHILD WELFARE: PROMISING SOLUTIONS FOR CHILDREN, THEIR PARENTS AND GRANDPARENTS 6 (2006), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster\\_care\\_reform/hhs\\_foster\\_care\\_gu\\_meth\\_report.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/hhs_foster_care_gu_meth_report.pdf) (citing a study which does not distinguish between on-reservation and off-reservation populations).

81. *Youth Marijuana Admissions by Race and Ethnicity*, DASIS (DRUG & ALCOHOL SERVS. INFO. SYS.) REP. (Office of Applied Studies, Substance Abuse & Mental Health Admin., Arlington, Va.), Aug. 9, 2002, at 3, available at <http://www.oas.samhsa.gov/2k2/raceMJtx/raceMJtx.pdf>.

82. *Adolescent Admissions Involving Inhalants*, DASIS (DRUG & ALCOHOL SERVS. INFO. SYS.) REP. (Office of Applied Studies, Substance Abuse & Mental Health Admin., Arlington, Va.), Mar. 14, 2002, at 2, available at <http://www.oas.samhsa.gov/2k2/inhaltx/inhaltx.pdf>.

83. Youth Marijuana Admissions by Race and Ethnicity, *supra* note 81, at 3.

84. NATIVE AMERICAN KIDS 2000, *supra* note 12, at 13.

85. NATIVE AMERICAN KIDS DATA BOOK, *supra* note 17, at 20; see also AMY BESAW ET AL., THE CONTEXT AND MEANING OF FAMILY STRENGTHENING IN INDIAN COUNTRY: A REPORT TO THE ANNIE E. CASEY FOUNDATION BY THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT 5 (2004).

86. STEPHEN CORNELL & JOSEPH P. KALT, TWO APPROACHES TO ECONOMIC DEVELOPMENT ON AMERICAN INDIAN RESERVATIONS: ONE WORKS, ONE DOESN'T 2 (2006) [hereinafter TWO APPROACHES].

all Native Americans and Alaska Natives still live below the poverty line, nearly twice the rate of the general population.<sup>87</sup> Slightly older data indicates that two out of every five Native youths (under age eighteen) live below the poverty line, which is double the rate for non-Indian juveniles.<sup>88</sup>

In addition, the unemployment rate as of mid-2010 for all Native Americans is 15.2%, substantially higher than the non-Native rate of 9.1%.<sup>89</sup> This rate varies widely, with some reservations reporting unemployment rates as high as 75%.<sup>90</sup> Ultimately, Native American children are twice as likely than non-Natives to live in a home with no parent in the labor force.<sup>91</sup>

### C. Education

A growing number of researchers are coming to the conclusion that schools have not only failed Native Americans historically, but continue to fail Native students today.<sup>92</sup> Native students routinely wrestle with the reality that “their civil rights and cultural identities are often at risk in the educational environment.”<sup>93</sup> Specifically, they experience “difficulty maintaining rapport with teachers and establishing relationships with other students; feelings of isolation; racist threats; and frequent suspension.”<sup>94</sup> Because of policies like the “No Child Left Behind Act,” educators focus their time on dealing with budgets and test scores rather than addressing the educational barriers that many Native youth face.<sup>95</sup>

There is quantitative evidence that Native youth have been left behind by the current system. To begin with, Native American test scores are below

87. ALEMAYEHU BISHAW & JESSICA SEMEGA, INCOME, EARNINGS AND POVERTY DATA FROM THE 2007 AMERICAN COMMUNITY SURVEY 20 (2008), available at <http://www.census.gov/prod/2008pubs/acs-09.pdf>.

88. NATIVE AMERICAN KIDS DATA BOOK, *supra* note 17, at 19-20; see also *Hearings*, *supra* note 16, at 9-10 (statement of Vincent M. Biggs, M.D., American Academy of Pediatrics).

89. Algernon Austin, *Different Race, Different Recession: American Indian Unemployment in 2010*, ECONOMIC POLICY INSTITUTE, Nov. 18, 2010, available at <http://www.epi.org/page/-/pdf/ib289.pdf>.

90. *Reloading the Dice*, *supra* note 8, at 2-4; see also NATIVE AMERICAN KIDS 2000, *supra* note 12, at 13.

91. NATIVE AMERICAN KIDS 2000, *supra* note 12, at 13.

92. NATIVE AMERICAN KIDS DATA BOOK, *supra* note 17, at 16.

93. U.S. COMM’N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 84 (2003) [hereinafter A QUIET CRISIS].

94. *Id.*

95. See, e.g., Greg Toppo, *How Bush Education Law Has Changed Our Schools*, USA TODAY, Jan. 7, 2007, [http://www.usatoday.com/news/education/2007-01-07-no-child\\_x.htm](http://www.usatoday.com/news/education/2007-01-07-no-child_x.htm).

the national average.<sup>96</sup> For example, 40% of Native American eighth graders score in the lowest quartile of the population on math, science and reading tests.<sup>97</sup> Most research indicates that minorities, including Native Americans, score approximately 10% below whites on all standardized tests.<sup>98</sup> The most startling aspect of this statistic is that the gap in scores has “persisted over time, regardless of the type of test, whether it is an ‘IQ’ test, norm-referenced or proficiency test, regardless of a test’s publisher, or educational level of the test-taker, be it kindergarten or graduate school.”<sup>99</sup> This disparity has caused some to question the use of standardized testing altogether,<sup>100</sup> and yet educators throughout the country continue to rely upon such testing.

Beyond testing, “Native Americans have the lowest educational attainment of all groups in the United States.”<sup>101</sup> While the data at the high school level is conflicted, there is strong evidence that somewhere between 25% and 45% of Native Americans and Alaska Natives drop out of school before graduating high school.<sup>102</sup> This rate holds true whether the Native students live on reservations or in cities.<sup>103</sup> Roughly two times as many Native Americans dropout of school than any other racial or ethnic group in the U.S.<sup>104</sup> This divergence continues into upper-education.<sup>105</sup> Despite great strides over the last few decades, Native Americans are still

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96. Joan Oleck, *Native American Students’ Test Scores Unimproved*, SCH. LIB. J. (May 19, 2008), <http://www.schoollibraryjournal.com/article/CA6562335.html?nid=2413&rid=>.

97. NATIVE AMERICAN KIDS DATA BOOK, *supra* note 17, at 16.

98. JEAN MOULE, *CULTURAL COMPETENCE: A PRIMER FOR EDUCATORS* 188 (2d ed. 2010).

99. *Id.*

100. William Brescia & Jim C. Fortune, *Standardized Testing of American Indian Students*, NATIVE CHILD, <http://www.nativechild.com/resources/test.html> (last visited Oct. 15, 2012).

101. NATIVE AMERICAN KIDS DATA BOOK, *supra* note 17, at 16 (citing National Center for Educational Statistics).

102. SHARING THE SPIRIT OF WISDOM, *supra* note 61, at 18; NATIVE AMERICAN KIDS DATA BOOK, *supra* note 17, at 16-17, 37; A QUIET CRISIS, *supra* note 93, at 84; *see also* STEPHEN BRIMLEY ET AL., STRENGTHENING AND REBUILDING TRIBAL JUSTICE SYSTEMS: LEARNING FROM HISTORY AND LOOKING TOWARDS THE FUTURE: A PARTICIPATORY PROCESS EVALUATION OF THE US DEPARTMENT OF JUSTICE COMPREHENSIVE INDIAN RESOURCES FOR COMMUNITY AND LAW ENFORCEMENT (CIRCLE) PROJECT, FINAL EVALUATION REPORT 92 (Mar. 2005).

103. SHARING THE SPIRIT OF WISDOM, *supra* note 61, at 18; NATIVE AMERICAN KIDS DATA BOOK, *supra* note 17, at 16-17, 37; A QUIET CRISIS, *supra* note 93, at 84; BRIMLEY ET AL., *supra* note 103, at 92.

104. SHARING THE SPIRIT OF WISDOM, *supra* note 61, at 18.

105. BESAW ET AL., *supra* note 85, at 5.

underrepresented at the bachelor's, master's and doctoral levels of the academy.<sup>106</sup>

#### D. Violent Crime

While all crime statistics have important limitations related to how they are gathered<sup>107</sup> and interpreted,<sup>108</sup> they remain beneficial in comprehending

106. *Id.*; see also ELEANOR L. BABCO, THE STATUS OF NATIVE AMERICANS IN SCIENCE AND ENGINEERING (2005), available at <http://ehrweb.aaas.org/mge/Reports/Report1/Babco-StatusOfNativeAmericansInSandE.pdf>.

107. Although all forms of data can contain flaws, data on crimes statistics are particularly susceptible to miscalculation and misinterpretation. Robert A. Silverman, *Patterns of Native American Crime*, in NATIVE AMERICANS, CRIME AND JUSTICE 58, 58-65 (Marianne O. Nielsen & Robert A. Silverman eds., 1996). Inaccurate calculations occur, first and foremost, because crime is not perfectly reported and crimes that go unreported are not always accounted for in the data. More importantly, the methods for determining crime rates vary. The most common data is based on arrest rates. *Id.* at 59. However, referral rates, imprisonment rates, or victimization rates can also be used. Lisa Bond-Maupin et al., *Research on Juvenile Delinquency in Indian Communities: Resisting Generalization*, in NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM 187, 196 (Jeffrey Ian Ross & Larry Gould eds., 2006); see also, e.g., HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT (Mar. 2006), available at <http://ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>. When examining crime rates of various races and ethnicities, data is largely limited to arrest rates because it is generally not until an arrest is made that a perpetrator's race is recorded. Silverman, *supra* note 107, at 59. As such, race-based crime statistics really only examine the portion of criminals actually arrested and processed by the system. *Id.* In examining juvenile delinquency and crime rates, there are three additional problems that must be considered: first, even in the best of circumstances, reliable numbers are scarce. Long-term, systematic data about juveniles, which could be used to draw large-scale conclusions is almost completely lacking. Bond-Maupin et al., *supra*, at 190. Second, most Native American crime rates are calculated using small sample sizes, which can skew the outcomes greatly since there is extreme variation in criminal activity from one Native nation to the next. *Id.* at 196; TROY L. ARMSTRONG ET AL., NATIVE AMERICAN DELINQUENCY: AN OVERVIEW OF PREVALENCE, CAUSES, AND CORRELATES, NATIVE AMERICANS, CRIME AND JUSTICE 75, 77 (1996). Third, Native juveniles differ from their non-Native counterparts in that they may be subject to the control of three separate jurisdictions: federal, state and tribal. As such, crime rates may be inflated due to duplicate arrest reports from multiple jurisdictions, or, alternatively, an arrest report may never get filed due to the jurisdictional confusion. Hartney, *supra* note 20, at 8; see also ARMSTRONG ET AL., *supra*, at 77.

108. Misinterpreting what crime rates signify is routine. The most common critique with interpreting crime rate data is that, on its face, the data says nothing about the cultural, economic, and social conditions in the community where the data is collected — each of which can meaningfully affect criminal activity. LESTER, *supra* note 14, at 20; Bond-Maupin et al., *supra* note 107, at 196. This is problematic because criminal data generally does not compare similarly situated individuals. LESTER, *supra* note 14, at 16. If it did,

and analyzing Native American juvenile delinquency. The analysis presented here is largely confined to violent crime for three reasons: first, reporting relevant data on every type of crime would consume several books, and therefore is beyond the scope of this article; second, violent crime is generally considered more serious, which means that more comprehensive data is available; and third, outside of violent crimes, the most common criminal activities Native American juveniles are involved in relate to alcohol and drugs, which were discussed in a previous section.

Conflicting data exists on the current trends of Native juvenile crime,<sup>109</sup> but generally speaking:

Crime has declined throughout the United States, except in Indian Country, where statistics indicate that the incidence of crime by and against American Indians, particularly juveniles, far surpasses that of ethnic groups in other areas. The crime rate for American Indians and Alaska Natives is 656 incidents per 100,000 — 150 incidents more per 100,00 citizens than the rate for the general U.S. population.<sup>110</sup>

Most research indicates that Native juvenile crime is on the rise despite the fact that overall crime rates are on the decline.<sup>111</sup>

With the rise in Native juvenile crime rates has come a rise in Native juvenile *violent* crime rates<sup>112</sup> — about 350 arrests for violent crimes per

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there is a small amount of evidence indicating that Native American juveniles are actually more law-abiding than their non-Native counterparts despite being represented more frequently in the criminal justice system. *Id.* at 38; *see also* Bond-Maupin et al., *supra* note 107, at 190. Additionally, Native nations in the United States vary greatly in size, culture, history, etc.; and, as such, lumping all Native juveniles together can be misleading. *Id.* at 196. Finally, it is significant to note that the misleading picture created by statistics is oftentimes reinforced and magnified by the media. *See* JEFFREY FERRO, *JUVENILE CRIME* 35 (2003).

109. *See, e.g.*, Chyrl Andrews, *OJJDP Tribal Youth Program: Juvenile Justice*, *JUV. JUST.*, Dec. 2000, at 9, available at [https://www.ncjrs.gov/html/ojjdp/jjnl\\_2000\\_12/ojjdp.html](https://www.ncjrs.gov/html/ojjdp/jjnl_2000_12/ojjdp.html); *see also* Bond-Maupin et al., *supra* note 107, at 187.

110. SHARING THE SPIRIT OF WISDOM, *supra* note 61, at 15.

111. *See, e.g.*, FERRO, *supra* note 108, at 4-5; *see also* Patterson, *supra* note 74, at 808, 819; Kay McKinney, *OJJDP Tribal Youth Initiatives*, *OJJDP: JUV. JUST. BULL.* (Office of Juvenile Justice & Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, Washington, D.C.), May 2003, at 1, available at <http://www.ncjrs.gov/html/ojjdp/193763/contents.html>.

112. Andrews, *supra* note 109, at 9.

100,000 youth.<sup>113</sup> Although violent crime rates are high, they are not substantially higher than those of other races. They are, however, increasing.<sup>114</sup> At least part of the increase in Native American violent crime can be traced to a growth in Native youth gangs.<sup>115</sup> According to a 2000 survey, 23% of Indian Country reported having active youth gangs.<sup>116</sup> These gangs were comprised primarily of youths under the age of eighteen.<sup>117</sup> When examining solely those communities with populations greater than 2000 individuals, the number of communities with active youth gangs jumped to 69%,<sup>118</sup> indicating that gang activity is a substantial problem for larger communities.

Native youth gangs are a relatively recent development, with more than half of the Native nations responding that gangs arrived in their communities less than twenty-five years ago.<sup>119</sup> Since these gangs are comprised largely of youth, there is a strong gang presence in many Native schools,<sup>120</sup> resulting in higher levels of “violent victimization, availability of drugs, and students who carry guns than schools reported not to have gang activity.”<sup>121</sup>

In terms of victimization, Native Americans (both juveniles and adults) are more than twice as likely as non-Natives to be the victims of violent crime.<sup>122</sup> Violence among Native Americans is higher than the national average.<sup>123</sup> More than one out of every six Native youths (ages twelve to seventeen) is the victim of violence.<sup>124</sup> This rate of violent victimization is

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113. LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 7 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/aic.pdf>; Patterson, *supra* note 74, at 817-19; Bond-Maupin et al., *supra* note 107, at 187.

114. McKinney, *supra* note 111, at 1.

115. Patterson, *supra* note 74, at 819; Aline K. Major et al., *Youth Gangs in Indian Country*, OJJDP: JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, Washington, D.C.), Mar. 2004, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/202714.pdf>.

116. Major et al., *supra* note 115, at 4.

117. *Id.* at 6.

118. *Id.* at 4.

119. *Id.* at 5.

120. *Id.* at 6.

121. *Id.*

122. Patterson, *supra* note 74, at 817-18.

123. SHARING THE SPIRIT OF WISDOM, *supra* note 61, at 15.

124. Patterson, *supra* note 74, at 817-18.

32% higher than that for all non-Natives.<sup>125</sup> Furthermore, in at least 70% of these victimizations, the offender was a non-Native.<sup>126</sup>

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As indicated above, Native American youths face significant obstacles, many of which are not encountered to the same degree by their non-Native counterparts. In many ways, Senator Ben Nighthorse Campbell summed it up best in front of the Senate Committee on Indian Affairs when he said:

Indian youngsters today face many of the same problems I and many in my age group did, family alcohol and substance abuse, joblessness and all too often a feeling of hopelessness. There are also new problems facing Indian youngsters today. Gangs are growing where tribes and family once ruled and like all American kids they are not getting enough exercise, often have poor diets, become overweight too soon, and for a population that suffers from diabetes the way we do, obesity is an alarm bell which should certainly prompt us to act.<sup>127</sup>

Action is necessary, but in order for such action to be effective, it must address the underlying causes of these daunting statistics.

## *II. The Assimilation of Native Juveniles via Federal Policies on Education, Child Welfare and Juvenile Justice*

There are, of course, countless factors that have exacerbated the problems encountered by Native youths, and many of these factors have developed over time. Native American juveniles and their families are the product of centuries of internal and external forces – both positive and negative. For over 200 years, the federal government's policies towards Native Americans have been among the strongest of those forces. These policies have historically been designed to assimilate Native Americans into the dominant culture. While that is no longer the goal of federal policies, inadvertent assimilation does still occur and the legacy of assimilation lives on.

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125. *Id.*; see also Hartney, *supra* note 20, at 5.

126. GREENFIELD & SMITH, *supra* note 113 (utilizing data from a variety of sources, which does not distinguish between on-reservation and off-reservation populations); Hartney, *supra* note 20, at 5; Bond-Maupin et al., *supra* note 107, at 187.

127. *Hearings*, *supra* note 16, at 1.

Since the time of European contact<sup>128</sup> all Native Americans have been under constant attack. Originally the attacks came in the form of exposure to lethal diseases,<sup>129</sup> consistent violent conflict,<sup>130</sup> and forced relocation,<sup>131</sup> all of which greatly reduced Native populations.<sup>132</sup> Even after the formation of the United States, some Native nations were completely obliterated, while others suffered large-scale wounds to their cultures, families, and ways of life.<sup>133</sup> Over the course of U.S. history, Native Americans were subject to policies of assimilation and termination, which further weakened many Native nations.

Native American children were not shielded from this history of attempted assimilation. Indeed, Native American juveniles have oftentimes been its intended victims. Focusing assimilative efforts on children makes sense (from a colonizer's point of view) considering that children are the logical target for any policy "designed to erase one culture and replace it with another" because children are "vulnerable to change and least able to resist it."<sup>134</sup> While it might seem that a government would have to be particularly sinister to target children as a means of assimilating a culture, that is precisely what the United States has done over the past 230 years. As one author stated, "The main thrust of federal policy, since the close of the Indian wars, has been to break up the extended family, the clan structure, to detribalize and assimilate Indian populations."<sup>135</sup>

Whether intentional, federal policy over the past two centuries had the effect of breaking up families, indoctrinating Native children with non-Native values, and pulling apart the very social fabric that allows communities to function healthily. Specifically, the federal government's policies with respect to education, child welfare, and criminal justice have functioned to assimilate Native American youth, predominantly by separating children from their families, their culture, and their nations.

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128. Traditionally, this would refer to 1492 although the date of European contact for any individual Native nation would obviously vary.

129. See, e.g., MANN, *supra* note 1, at 100-04.

130. Lorie M. Graham, "The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 13 (1998).

131. See, e.g., JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION (1997).

132. Graham, *supra* note 130, at 13.

133. Catherine M. Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation for the Future*, 27 CREIGHTON L. REV. 661, 661-62 (1994).

134. Graham, *supra* note 130, at 10.

135. William Byler, *The Destruction of American Indian Families*, in THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 1, 6-7 (Steven Unger ed., 1977).

## A. Assimilation through Education Policy

### I. Missionary Schools

Education is a natural place to begin the process of assimilation because whoever controls the education of children, controls — in large part — what those children know, value, and how they perceive the world around them. The history of assimilation of Native American youth through education policy can be traced back to missionaries who started the first Indian schools.<sup>136</sup> These missionaries used formal education as a means of accomplishing their primary goal, namely converting the Natives to Christianity.<sup>137</sup> To achieve their goal they utilized a tactic that would be used repeated over the next few centuries: separating Native youth from their families and kinship groups so that the children could be “Christianized” and “civilized.”<sup>138</sup> As Vine Deloria recounts, “[a]n old Indian once told me that when the missionaries arrived they fell on their knees and prayed. Then they got up, fell on the Indians, and preyed.”<sup>139</sup>

For more than 150 years, missionary schools were the “chief agent for spreading Christianity and Western culture.”<sup>140</sup> These schools were deliberately devoid of any Native culture and at times prohibited the use of Native languages.<sup>141</sup> For more than a century these schools acted with Congress’s political and financial support.<sup>142</sup> Despite experimenting with different types of schools and curricula, the missionary schools never made the large-scale changes for which both Congress and the various religious groups had hoped.<sup>143</sup> They were, however, able to set the tone for future educational policies “from religious indoctrination, to cultural intolerance to wholesale removal of American Indian children.”<sup>144</sup>

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136. Graham, *supra* note 130, at 12 (discussing how the first boarding school for Indians started in 1754 for the express purpose of Christianizing the students and teaching them how to do agriculture).

137. LORRAINE HALE, NATIVE AMERICAN EDUCATION: A REFERENCE HANDBOOK 7 (2002) [hereinafter NATIVE AMERICAN EDUCATION].

138. Graham, *supra* note 130, at 10.

139. VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 101 (1988).

140. NATIVE AMERICAN EDUCATION, *supra* note 138, at 8.

141. Graham, *supra* note 130, at 14-15. *But see* NATIVE AMERICAN EDUCATION, *supra* note 138, at 11 (noting that some missionary schools did use Native language to try and speed up the process of conversion).

142. Graham, *supra* note 130, at 14-15; NATIVE AMERICAN EDUCATION, *supra* note 138, at 10.

143. Graham, *supra* note 130, at 16.

144. *Id.* at 13.

## 2. Federal Boarding Schools

Although missionary groups ran boarding schools for Native American children during most of the nineteenth century, the federal government had an increasingly significant role in Indian education during that same time period.<sup>145</sup> By 1838, the federal government oversaw approximately 2900 students in six manual-training schools and eighty-seven boarding schools.<sup>146</sup> In the 1870s, the number of federal boarding schools (and the number of students they oversaw) began to increase dramatically.<sup>147</sup> According to the Bureau of Indian Affairs (“BIA”), these federal boarding schools were designed to (1) replace native languages with English; (2) replace communal ethics with individualistic ethics; (3) convert students to Christianity; and (4) teach U.S. history, democracy and Manifest Destiny.<sup>148</sup>

Richard Henry Pratt, who was responsible for opening the first off-reservation boarding school in 1879,<sup>149</sup> put it more bluntly stating that the purpose of the school was simply to “kill the Indian and save the man.”<sup>150</sup> To accomplish this, federal boarding schools separated children from their families and natural support systems by placing children in schools outside of reservations.<sup>151</sup> Additionally, they punished any child who clung to his or her culture by using Native languages, observing Native religious traditions, or wearing Native clothing.<sup>152</sup>

Despite the magnitude of the federal government’s efforts, the boarding schools failed to assimilate Native children as completely as had been hoped. Due to these failures, some believed the answer lay in the “earlier, longer, and perhaps even permanent removal of American Indian children from their families and communities.”<sup>153</sup> Thus, the “Outing System” was created in which a Native child was placed with a white family to completely isolate the child and immerse him or her in white culture.<sup>154</sup> In

145. NATIVE AMERICAN EDUCATION, *supra* note 137, at 14.

146. *Id.*

147. Graham, *supra* note 130, at 15.

148. *Id.*

149. NATIVE AMERICAN EDUCATION, *supra* note 137, at 15.

150. *Id.* at 22; see also Robert Bergman, *The Human Cost of Removing American Indian Families*, in THE DESTRUCTION OF AMERICAN INDIAN FAMILIES, *supra* note 135, at 34 (indicating that first Navajo boarding school was established in 1890s to “remove the Navajo child from the influence of his savage parents”).

151. Brooks, *supra* note 133, at 661-62.

152. *Id.*

153. Graham, *supra* note 130, at 18.

154. NATIVE AMERICAN EDUCATION, *supra* note 137, at 15-16; Graham, *supra* note 130, at 18; Dorothy H. Bracey, *Criminalizing Culture: An Anthropologist Looks at Native*

many respects, the Outing System was little more than state-sponsored kidnapping,<sup>155</sup> and to make matters worse, the living conditions at these schools were often very poor.<sup>156</sup> High morbidity and mortality rates were commonplace, meaning that some Native parents never saw their children return from school.<sup>157</sup> For children who did return after their schooling, they oftentimes felt completely disconnected from their family, friends, and community.<sup>158</sup>

By 1928, the Meriam Report was published and boarding schools came under heavy criticism.<sup>159</sup> The report advised the BIA to abandon assimilation as the goal of education.<sup>160</sup> In 1934 the Indian Reorganization Act<sup>161</sup> attempted to accomplish this by shifting the responsibility of Native education to the states,<sup>162</sup> however, this shift in policy was short-lived.<sup>163</sup> By 1944, a congressional report called for a return to off-reservation boarding schools,<sup>164</sup> and by the 1950s, the federal government's policy of assimilation through the termination of tribes was in full-effect.<sup>165</sup> As late as 1974, over 34,000 Native American children remained in federal boarding schools,<sup>166</sup> which represented more than 17% of all Native youth.<sup>167</sup>

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*Americans and the U.S. Legal System*, in NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM 35, 47 (Jeffrey Ian Ross & Larry Gould eds., 2006).

155. Dane Coolidge, "Kid Catching" on the Navajo Reservation: 1930, in THE DESTRUCTION OF AMERICAN INDIAN FAMILIES, *supra* note 135, at 18.

156. See Bergman, *supra* note 150, at 34 (describing the educational environment, which consisted of as many as two hundred children for every one teacher, meaning that the possibility of any meaningful relationship between child and adult was oftentimes very remote).

157. NATIVE AMERICAN EDUCATION, *supra* note 137, at 23.

158. *Id.*

159. INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928). This report is commonly referred to as "the Meriam Report."

160. NATIVE AMERICAN EDUCATION, *supra* note 137, at 26-27; Graham, *supra* note 130, at 18.

161. Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. § 461).

162. NATIVE AMERICAN EDUCATION, *supra* note 137, at 27; Graham, *supra* note 130, at 19-20.

163. Graham, *supra* note 130, at 20.

164. *Id.* at 20-21.

165. *Id.* at 20.

166. LESTER, *supra* note 14, at 19.

167. Byler, *supra* note 135, at 1-2.

Fortunately, in 1972, Congress passed the Indian Education Act,<sup>168</sup> and, in 1975, the Self-Determination and Education Assistance Act,<sup>169</sup> which were designed to help end federal dominance over Native nations in many areas, including education.<sup>170</sup> In the years following these Acts, Native nations have made significant progress in exercising control over their own education by establishing more than seventy-five tribally-operated primary and secondary schools, more than two dozen community colleges and universities, and a stronger presence in higher education through a variety of programs, such as American Indian Studies.<sup>171</sup> Despite this progress, the damage of generations of assimilative educational policies cannot be completely reversed in one or two generations, and so the legacy of these policies lives on.

### *B. Assimilation through Child Welfare Policy*

Education was not the only tool used to assimilate Native American children. For years, Native children were removed from their homes at alarming rates and given new families — white families — either through adoption or foster care.<sup>172</sup> As might be expected, the decision to remove Native children and place them with white families was not made by Native Americans, but by foreign institutions, such as state and federal courts.<sup>173</sup>

The idea that Native children would be better off living with white families seemed to take its strongest form during the Termination Era,<sup>174</sup> when federal policy was directed at assimilating all Native Americans.<sup>175</sup> During this time, the federal government encouraged private organizations,

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168. Indian Education Act, Pub. L. No. 92-318, 86 Stat. 334 (1972).

169. Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. 93-638, 88 Stat. 2203 (1975).

170. Stacie S. Polashuk, *Following the Lead of the Indian Child Welfare Act: Expanding Tribal Court Jurisdiction Over Native American Juvenile Delinquents*, 69 S. CAL. L. REV. 1191, 1201-02 (1996); NATIVE AMERICAN EDUCATION, *supra* note 138, at 33.

171. NATIVE AMERICAN EDUCATION, *supra* note 138, at 35-36.

172. LESTER, *supra* note 14, at 18; Brooks, *supra* note 133, at 663.

173. Brooks, *supra* note 133, at 665; Joseph Westermeyer, *The Ravage of Indian Families in Crisis*, in THE DESTRUCTION OF AMERICAN INDIAN FAMILIES, *supra* note 135, at 54-55.

174. JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 66-67 (Jerry Gardner ed. 2004) [hereinafter INTRO TO TRIBAL LEGAL STUDIES]. Generally, the Termination Era is seen as lasting from 1945-60. See generally DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW at 199-216 (5th ed. 2005) [hereinafter FEDERAL INDIAN LAW].

175. INTRO TO TRIBAL LEGAL STUDIES, *supra* note 174, at 66-67.

such as religious groups and state agencies, to get involved in the lives of Native American youths.

An example of such an agency was the Indian Adoption Project, which took place in the 1950s at the urging of the federal government. It was created to place Native children with non-Native parents so they would receive better care.<sup>176</sup> Before it ceased operating, the Indian Adoption Project had placed nearly 400 Native children with white parents.<sup>177</sup> With regards to religious groups, the practices varied greatly between denominations, but at least one denomination displaced more than 5,000 Native children *per year* in the years preceding the passage of the Indian Child Welfare Act of 1978.<sup>178</sup> Contemporaneous with these types of projects, the BIA began substantially involving the states in Native child welfare decisions by referring the majority of their cases to state agencies and courts. Thus, for the first time in history, state welfare agencies and courts were interacting with significant numbers of Native American children.<sup>179</sup>

Involving states in Native child welfare decisions created jurisprudence that fundamentally misunderstood Native culture and ultimately tried to alter and assimilate it.<sup>180</sup> State courts took it upon themselves to define proper child-rearing techniques and when Native parents did not follow their ideals for child rearing, they removed Native children from the care of their parents.<sup>181</sup> Teachers and social service workers, who were often responsible for initiating these types of cases, frequently agreed with the court's take on proper child-rearing techniques.<sup>182</sup> The problem with this practice was its assumption that there was only one proper method of parenting children. Simply put, it failed to take into account Native concepts of child rearing.

For instance, courts typically believed that only the mother and father of a child constituted a "family" that could properly raise a child.<sup>183</sup> Thus, if the child was not predominantly in the care of these two parents, courts

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176. Graham, *supra* note 130, at 22.

177. *Id.*

178. Indian Child Welfare Act (ICWA), Pub. L. 95-608, Nov. 8, 1978, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1963).

179. Graham, *supra* note 130, at 21-22.

180. Brooks, *supra* note 133, at 665; Charmel L. Cross, *The Existing Indian Family Exception: Is It Appropriate to Use a Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?*, 26 CAP. U. L. REV. 847, 848 (1997).

181. Brooks, *supra* note 133, at 665.

182. Cross, *supra* note 180, at 853-54; Graham, *supra* note 130, at 26.

183. Graham, *supra* note 130, at 27.

would find neglect or endangerment and remove the child from the home.<sup>184</sup> Although Native communities' parenting techniques vary greatly,<sup>185</sup> their conceptions of family tend to be broader and more inclusive than those associated with the Anglo-nuclear family.<sup>186</sup> Often, Native families are comprised of a "large network of relationships"<sup>187</sup> that includes a "multi-generational complex of people and clan and kinship responsibilities."<sup>188</sup> Thus, a child may literally have dozens or hundreds of relatives who "are counted as close, responsible members of the family."<sup>189</sup> Courts rarely recognized this concept of family to the detriment of Native children.

The problems associated with state social services and courts handling child welfare cases go beyond mere misunderstanding of Native child-rearing techniques.<sup>190</sup> There is evidence of procedural biases that contributed to Native children displacements. For example, there were due process concerns related to lack of notice to tribal parents,<sup>191</sup> an inability to claim a defense to the court action,<sup>192</sup> and the use of coercion to get Native parents to waive their rights with respect to their children.<sup>193</sup> Additionally, the law was unevenly applied to Native Americans as compared to other races, especially in cases that involved alcohol abuse.<sup>194</sup>

The result of the federal government's implicit — and sometimes explicit — approval of these child welfare policies was the removal and subsequent assimilation of Native children at astounding rates.<sup>195</sup> Conservative estimates indicate that during the 1960s and 1970s, approximately one out of every three Native youth were removed from their

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184. *Id.* at 25.

185. Graham, *supra* note 130, at 5; BESAW ET AL., *supra* note 86, at 18.

186. Brooks, *supra* note 133, at 665 (noting that tribal languages often do not have an analog for the Anglo word "adoption").

187. Evelyn Blanchard, *The Question of Best Interest, in THE DESTRUCTION OF AMERICAN INDIAN FAMILIES*, *supra* note 135, at 59.

188. VINE DELORIA JR., *INDIAN EDUCATION IN AMERICA: EIGHT ESSAYS BY VINE DELORIA JR.* 22 (1991).

189. Byler, *supra* note 135, at 3.

190. *See, e.g.*, Cross, *supra* note 180; Graham, *supra* note 130.

191. Graham, *supra* note 130, at 29.

192. *Id.* at 28.

193. *Id.* at 29.

194. *Id.* at 26.

195. James Abourezk, *The Role of the Federal Government: A Congressional View, in THE DESTRUCTION OF AMERICAN INDIAN FAMILIES*, *supra* note 135, at 12-13; Westermeyer, *supra* note 174, at 54-55 (noting that the result was the de facto ethnocide of values, attitudes and customs chosen by a group of people).

homes.<sup>196</sup> The overwhelming majority of these removals resulted in placements outside the Native community, with substantial numbers of children being completely removed from the state in which they lived.<sup>197</sup> The rates of placement outside the home differed from state-to-state, but invariably a Native child was far more likely to have been removed from his or her home than a white child. In some states, the rates for Native American removals were nearly twenty times higher than those of white children.<sup>198</sup> Furthermore, although white adoptions of Native children were commonplace in many states, the reverse situation — where a white child was placed with another race — was virtually nonexistent.<sup>199</sup>

Fortunately, in 1978 Congress passed the Indian Child Welfare Act (“ICWA”) in an attempt to correct the serious problems surrounding Natives in the child welfare system.<sup>200</sup> Congress noted the high rates of child displacement and realized that the long-term survival of Native American peoples and cultures was put in great jeopardy when Native children were raised by non-Natives and denied access to Native culture.<sup>201</sup> Moreover, they recognized that a fundamental aspect of Native autonomy is the ability to participate in child custody proceedings.<sup>202</sup>

ICWA gives Native nations exclusive jurisdiction over child custody cases when the child is residing or domiciled on the reservation.<sup>203</sup> The Act also instructed state courts to transfer any Native child custody cases to tribal courts upon request of the parents or the tribe, unless there was good cause not to.<sup>204</sup> Finally, ICWA laid out a hierarchy of people with whom a Native child should be placed in the event that the child must be removed from the home of his or her parents. The hierarchy in the Act is designed to keep Native children with their extended family when possible, and within the Native nation if there is no suitable extended family available.<sup>205</sup>

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196. Cross, *supra* note 180, at 847; Graham, *supra* note 130, at 24.

197. Graham, *supra* note 130, at 24.

198. Brooks, *supra* note 133, at 663-64; Cross, *supra* note 180, at 852; Graham, *supra* note 130, at 24; Byler, *supra* note 135, at 1.

199. Brooks, *supra* note 133, at 663-64.

200. Graham, *supra* note 130, at 2.

201. Cross, *supra* note 180, at 852.

202. *Id.*

203. Manuel P. Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat of Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51, 67 (1979).

204. *Id.*

205. *Id.* at 69-70.

The ICWA was passed to remedy an existing problem. Although its impact has been impeded by some court systems,<sup>206</sup> it has accomplished some of its goals.<sup>207</sup> The rate of removal for Native American children from their families has decreased significantly.<sup>208</sup> Unfortunately, the number of Native American children removed from their homes continues to be disproportionately higher than for non-Indian families,<sup>209</sup> and by some measures, as many as 20% of Native children are still being placed outside of their nations.<sup>210</sup> Additionally, the effects of Native American adoptions that occurred before ICWA continue to be felt and have had a lasting impact for many Native nations.<sup>211</sup>

### C. Assimilation Through Criminal Justice Policy

The criminal justice system is a powerful assimilative mechanism because criminal laws (and the police and courts that enforce them) define what behavior is and is not acceptable within a community. The criminal justice system is both a mechanism of norm creation and norm reinforcement.<sup>212</sup> When an outside culture controls the criminal justice system of another society, the outside culture can define and promote its

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206. Despite the progress that has been made, the assimilation of Native children does continue to occur within the child welfare context. Over the past three decades many state courts have developed what is called the “Existing Indian Family Doctrine.” This doctrine states that ICWA does not apply to cases when a Native child is not being removed from an “existing Indian family or home.” Graham, *supra* note 130, at 35. The argument put forth by state courts is that ICWA was only intended to apply to children that grew up in a Native cultural environment or bonded with a parent or relative who is connected to his or her Native culture. *Id.* Although counterarguments to this line of reasoning have been put forth, the doctrine continues to exist in a significant number of states throughout the country. *Id.* at 4, 35; Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 625 (2002).

207. LESTER, *supra* note 14, at 18-19 (noting that, in 1975, the rate of Native adoption was three times that of other races, but by 1986 the rates of Native and non-Native adoptions were nearly equal; likewise, in 1975 the rates of Native foster care placement were six times higher for Natives than other races, but by 1986 the rate had dropped to where Natives were only three times more likely to be placed in foster care than other children).

208. Cheyafña L. Jaffke, *Judicial Indifference: Why Does the “Existing Indian Family” Exception to the Indian Child Welfare Act Continue to Endure?*, 38 W. ST. U. L. REV. 127, 136 (2010-2011).

209. *Id.*

210. Graham, *supra* note 130, at 3.

211. See generally Judge Tim Connors, *Our Children Are Sacred: Why the Indian Child Welfare Act Matters*, 50 JUDGES J. 33 (2001).

212. CARRIE E. GARROW & SARAH DEER, *TRIBAL CRIMINAL LAW AND PROCEDURE* 10 (Jerry Gardner ed., 2004) [hereinafter *TRIBAL CRIMINAL LAW*].

own norms within the other society. This is what the United States has done to Native nations for more than a century.<sup>213</sup>

While all Native Americans are affected when the federal government uses the criminal justice system to create, impose and reinforce norms, Native youth are particularly vulnerable. The criminal justice system routinely exposes Native juveniles to foreign courts, and often acts to separate them from their families, cultures, and nations. Native youths frequently end up in state or federal systems. Once in those foreign systems they are treated more harshly than their non-Native counterparts.<sup>214</sup>

Under the current jurisdictional scheme, Native juveniles often fall under the control of the state. For instance, if a youth commits a delinquent act outside of Indian Country, Native nations automatically lack jurisdiction, regardless of where the Native juvenile is domiciled.<sup>215</sup> In such cases, it is the state that regularly has jurisdiction.<sup>216</sup> In such cases Native youths are subject to state law and the state juvenile justice system.

Similarly, the majority of Alaskan Native juveniles are subject to state jurisdiction under the reasoning articulated by the Supreme Court in *Alaska v. Native Village of Venetie Tribal Government*.<sup>217</sup> When Native nations lack the judicial, financial or treatment resources to properly handle juvenile delinquents, they often transfer jurisdiction to the state and contract for use of the state's judicial and treatment systems.<sup>218</sup> For some Native

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213. Polashuk, *supra* note 170, at 1202; TRIBAL CRIMINAL LAW, *supra* note 212, at 37.

214. *See generally* Hartney, *supra* note 20; *see also* ARMSTRONG ET AL., *supra* note 107, at 75.

215. Max Minzer, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 92 (2005-06) ("In general, tribes and the federal government have jurisdiction and authority over lands within Indian Country and the state controls lands outside Indian Country.").

216. Polashuk, *supra* note 170, at 1208; Patterson, *supra* note 74, at 811-12.

217. 522 U.S. 520 (1998). The Supreme Court held that the Alaska Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 689 (1971) (codified at 43 U.S.C. 1601, as amended), eliminated virtually all of Indian Country in Alaska. "To this end, ANCSA revoked 'the various reserves set aside . . . for Native use' by legislative or Executive action, except for the Annette Island Reserve inhabited by the Metlakatla Indians, and completely extinguished all aboriginal claims to Alaska land." *Id.* at 524. The *Venetie* decision made it clear that Alaskan Native villages — including the juveniles living in those villages — are subject to state jurisdiction.

218. *See, e.g., In re Elmer J.K.*, 591 N.W.2d 176, 177 (Wis. Ct. App. 1999); *see also* Patterson, *supra* note 74, at 813 (observing that if a Native nation has jurisdiction over a juvenile delinquent and willingly turns that youth over to the state, and that juvenile then commits a crime while in state custody, the state will have exclusive jurisdiction assuming this second crime did not take place in Indian Country).

nations, the alternative to turning their juvenile delinquents over to the state is to merely return them to their homes without any formal processing or treatment whatsoever.<sup>219</sup>

Native juveniles can also fall under federal jurisdiction. For instance, federal courts have jurisdiction over any crime committed in Indian Country that is listed in the Major Crimes Act.<sup>220</sup> Federal courts also have jurisdiction over crimes that fall under the Indian Country Crimes Act,<sup>221</sup> or the Assimilative Crimes Act.<sup>222</sup> These two Acts apply only when a Native individual commits a crime against a non-Native in Indian Country, and even in those circumstances, their applicability is limited.<sup>223</sup> Finally, the Federal Juvenile Delinquency Act ("FJDA")<sup>224</sup> allows federal courts to assert jurisdiction over Native juveniles who violate any federal law prior to their "eighteenth birthday[,] which would have been a crime if committed by an adult,"<sup>225</sup> with Attorney General certification. Certification requires the Attorney General, after investigation, to certify to a federal district court that in that particular case: state courts have no jurisdiction or refuse to assume jurisdiction; or the state does not have adequate services for the juvenile in question; or there is a substantial federal interest in adjudicating the juvenile in the federal system.<sup>226</sup> In such cases, the Attorney General's

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219. Patterson, *supra* note 74, at 811.

220. Amy J. Standefer, *The Federal Juvenile Delinquency Act: A Disparate Impact on Native American Juveniles*, 84 MINN. L. REV. 473, 483 (1999); *see also* Polashuk, *supra* note 171, at 1208 (observing that if federal courts want to exercise jurisdiction over Native juveniles they are doing so through the Federal Juvenile Delinquency Act, which makes federal laws applicable to juveniles in various circumstances).

221. Polashuk, *supra* note 170, at 1203, 1208 (noting that if federal courts want to exercise jurisdiction over Native juveniles they are doing so through the Federal Juvenile Delinquency Act, which makes federal laws applicable to juveniles in various circumstances).

222. *Id.* at 1205-06, 1208.

223. FEDERAL INDIAN LAW, *supra* note 174, at 491 (limiting the scope of these statutes further, pursuant to treaty provisions in the case of some Native Americans). Whenever these statutes apply, Native nations retain concurrent jurisdiction. *Id.* *But see* Standefer, *supra* note 220, at 488; Polashuk, *supra* note 170, at 1204-05. This question has not yet been resolved by the Supreme Court.

224. 18 U.S.C. §§ 5031-5042 (2006); *see also* Standefer, *supra* note 220, at 476-80. The FJDA does allow the federal government to prosecute juveniles as adults, but it was created, in part, to allow for federal adjudication of juveniles without having to treat them as adults. *Id.* at 477-78.

225. 18 U.S.C. § 5032.

226. *Id.*; *see also* Polashuk, *supra* note 170, at 1208.

certification need not address the issue of tribal jurisdiction or tribal juvenile services.<sup>227</sup>

There are therefore multiple ways that a Native juvenile might be pulled into the state or federal system. When this happens, Native nations are unable to apply their “traditions and customary rehabilitative” processes to their own children.<sup>228</sup> Instead, foreign procedures and values are imposed upon Native youth. To complicate matters further, once a juvenile enters an outside system, he or she might end up being placed in an off-reservation residential treatment facility, separated from his or her family and community. This occurs frequently in federal juvenile proceedings because the federal government neither owns nor operates any juvenile detention facilities. Thus, “American Indian youth are often shipped to public and private facilities hundreds of miles from their homes.”<sup>229</sup> In such cases Native nations have no say in the decisions that greatly affect their own youths.

Tragically, there is strong evidence that when outside governments make decisions about juvenile delinquents, they do not treat all races equally.<sup>230</sup> Native Americans are disproportionately represented at all levels of the juvenile justice system, indicating systemic biases against Native children.<sup>231</sup> For instance, although Native youth make up approximately 1.4% of the juvenile population, they are arrested at rates significantly higher.<sup>232</sup> If a juvenile continues through the system after arrest, there are two primary options available: diversion or detention (which generally leads to formal processing).<sup>233</sup> At this stage, the more lenient option of diversion occurs 10% less often for Native Americans than it does for whites, and detention occurs 10% more often for Native Americans than

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227. Polashuk, *supra* note 170, at 1208.

228. Patterson, *supra* note 74, at 811.

229. ENLARGING THE HEALING CIRCLE, *supra* note 28, at 11 (noting that this separation not only has detrimental effects on youth, but can also make coordinating and planning for a court proceeding very difficult).

230. See generally Hartney, *supra* note 20.

231. ARMSTRONG ET AL., *supra* note 107, at 75.

232. Hartney, *supra* note 20, at 1; ARMSTRONG ET AL., *supra* note 107, at 75; Cynthia M. Conward, *Where Have All the Children Gone?: A Look at Incarcerated Youth in America*, 27 WM. MITCHELL L. REV. 2435, 2454 (2001). But see Hartney, *supra* note 20, at 4 (“At the points of arrest and formal processing there is no disproportion, meaning Native Americans and Whites are equally likely to be arrested . . .”).

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

whites.<sup>234</sup> Native juveniles are adjudicated<sup>235</sup> at a higher rate than any other race,<sup>236</sup> and after adjudication, Native youth are put on probation at a lesser rate than any other race.<sup>237</sup> Rather, they are more likely to receive the most punitive sanction — out-of-home placement.<sup>238</sup> Native Americans make up 2.3% of all out-of-home placements and they are at least 50% more likely than whites to be removed from their home and placed in a residential treatment facility.<sup>239</sup>

In addition to adjudication, in some circumstances juveniles can be entirely removed from the juvenile justice system and tried as adults. Removing a minor from a juvenile court is very serious as it exposes him or her to possible prison time. Of all races, Native Americans are the most likely to be removed to adult court, and they are 50% more likely to be tried as an adult than their white counterparts.<sup>240</sup> Once a Native youth is tried as an adult, he or she is almost twice as likely as a white youth to end up in a state adult prison.<sup>241</sup> In some states, the rate of Native juvenile imprisonment is more than fifteen times that of whites.<sup>242</sup>

Native youths do not fare any better when removed and treated as adults in federal court. Between 1994 and 2001, more than 60% of all incarcerated youth in the federal system were Native.<sup>243</sup> Some of this over-representation can be explained by the fact that the federal courts have jurisdiction over certain crimes when they occur in Indian Country, but social factors also contribute to the over-representation.<sup>244</sup> Native over-

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234. Hartney, *supra* note 20, at 4-5.

235. "Adjudication" is the juvenile justice system's equivalent to a trial. It tends to be less formal than an actual trial, and the rights of juvenile delinquents are not identical to the rights possessed by adult criminal defendants; see e.g., John M. Stuart & Amy K.R. Zaske, *What Does a "Juvenile Adjudication" Mean in Minnesota? Some New Answers After a Century of Change in Juvenile Court*, 32 WM. MITCHELL L. REV. 919, 923 (2005-06).

236. Hartney, *supra* note 20, at 5 ("Native American youth are about 30% more likely than White youth to be referred to court rather than having the charges dropped.")

237. *Id.*

238. *Id.*

239. *Id.* at 5-6 (indicating that the Native youth rate of residential placement is more than 2.5 times that of whites).

240. *Id.* at 4-5.

241. *Id.* at 7.

242. *Id.*

243. Clare E. Lyon, *Alternative Methods for Sentencing Youthful Offenders: Using Traditional Tribal Methods as a Model*, 4 AVE MARIA L. REV. 211, 230 (2006); Andrews, *supra* note 109, at 9.

244. Lyon, *supra* note 243, at 230; Andrews, *supra* note 109, at 9 ("The overrepresentation exists in large part because certain types of crimes committed on tribal

representation in the federal system coupled with harsh federal sentences reveals that Native juveniles are being treated differently, and more severely, due to their status as Indians.<sup>245</sup>

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As indicated, federal policies have routinely separated Native youths from their families, and then allowed non-Native institutions such as schools, non-Native families, juvenile placement facilities, or federal prisons to impose outside norms on those same youth. Generally, these norms have nothing to do with the youth's Native culture and understanding of the world. They obviously harm Native nations' sovereignty and right to preserve their own peoples and cultures; but they also have very real impacts on the families who are victims of these policies.<sup>246</sup>

Humans are social beings by nature. In order to develop properly, young children must have opportunities to establish meaningful attachments to their parents or caregivers.<sup>247</sup> Many Native communities use extended family and kinship relatives to raise a child, ensuring that such attachments occur because even if a "child's parents are not emotionally or physically available, these other extended family or community members may become critical 'objects of attachment' for the child."<sup>248</sup> Research indicates that brain development is hampered without these attachment opportunities.<sup>249</sup> Additionally, a child who has no critical object of attachment is more likely to lack essential social skills (including the ability to feel empathy and

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lands are federal offenses"); A QUIET CRISIS, *supra* note 93, at 68 ("Many Native Americans attribute disproportionate incarceration rates to unfair treatment by the criminal justice system, including racial profiling, disparities in prosecution, and lack of access to legal representation.").

245. Standefer, *supra* note 220, at 492.

246. Although my focus here is solely on children and the effects they feel from separation and the imposition of outside norms, the truth is that parents experience real trauma when their children are taken from them. Specifically, federal policies that have separated children from parents have resulted in (1) parental hopelessness and powerlessness, *see, e.g.*, Graham, *supra* note 130, at 31-32; (2) alienation, *see, e.g.*, Byler, *supra* note 135, at 7; and (3) emotional instability, *see, e.g.*, Lewis Meriam, *The Effects of Boarding Schools on Indian Family Life: 1928*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES*, *supra* note 135, at 14, 17. There is evidence that these policies have also weakened both the institution of marriage, *see, e.g., id.* at 17, as well as traditional parenting practices and values, *see, e.g.*, SHARING THE SPIRIT OF WISDOM, *supra* note 61, at 29.

247. WASSERMAN, *supra* note 56, at 1; Meriam, *supra* note 246, at 16.

248. WASSERMAN, *supra* note 56, at 1.

249. *Id.* at 11.

remorse), lack the ability to understand his or her own feelings, lack the ability to adjust to change, act defensively, and have a lower IQ than other children.<sup>250</sup>

It is also the case that the strict routines of certain institutions — such as boarding schools — serve to increase a child's dependence on outside decision-makers, thus stunting creativity and independence.<sup>251</sup> When federal policies separate a child from his or her caregiver, the government is traumatizing that child in a way that has the potential to affect the child's physical and emotional development in irreversible ways.<sup>252</sup> Even when separation occurs at older ages — as is sometimes the case with boarding schools or the juvenile justice system — there is evidence that this separation still produces "severe distress" that can interfere with the youth's "physical, mental, and social growth and development."<sup>253</sup>

Moreover, when children are separated from their families and are raised by outside institutions, they lack the experience of being parented.<sup>254</sup> This, in turn, means that when these separated Native youth become parents themselves, they have no model to draw from,<sup>255</sup> and no amount of formal training can adequately compensate for this deficiency.<sup>256</sup> The tragic nature of this situation is perhaps best-stated by the late Native American psychologist Carolyn Attneave, who writes:

I recall vividly how often each year worried sets of parents would come to the clinic begging for help in securing placement in a boarding school for their eight- or nine-year old child. This puzzled me, and it soon became clear that although it was heartbreaking for them to part with their child, they knew of nothing else to do. Neither they nor their own parents had ever known life in a family from the age they first entered school. The parents had no memories and no patterns to follow in rearing children except for the regimentation of mass sleeping and

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250. *Id.*

251. Meriam, *supra* note 246, at 16-17.

252. WASSERMAN, *supra* note 56, at 1.

253. Byler, *supra* note 135, at 3 (citing a study of boarding home programs and regional high schools for Alaska Natives that concluded the separation of students from their families was "helping to destroy a generation of village children").

254. Graham, *supra* note 130, at 30-31; Meriam, *supra* note 246, at 17.

255. Graham, *supra* note 130, at 30-31.

256. Meriam, *supra* note 246, at 17.

impersonal schedules that they had known. How to raise children at home had become a mystery.<sup>257</sup>

The act of imposing and reinforcing foreign norms on children who have been separated from their families is just as harmful as the act of separation itself. When Native children are separated from their community, they lose the opportunity to learn about their own culture and heritage.<sup>258</sup> This loss is worsened by the fact that these same children may be learning values that conflict with those of their Native communities, or they may be taught to devalue their own culture altogether.<sup>259</sup> These youth are often reminded that they neither fit in with majoritarian society, nor with their Native communities.<sup>260</sup> This results in feelings of alienation, invisibility, and loss of self-esteem and self-identity.<sup>261</sup> Although difficult to quantify at times, the internal conflict and poor self-image often associated with Native youth who have been raised with conflicting norms may result in serious social problems, including increased unemployment, substance abuse, and suicide.<sup>262</sup>

### *III. The Nation Building Model and Reversing the Effects of Assimilation*

#### *A. The Nation Building Model*

There is a revolution currently taking place in Native American communities throughout the United States. After more than 200 years of policies designed to destroy and/or assimilate Native American culture, many Native nations have started taking control of their own destinies by exercising true self-determination over the decisions that affect their everyday lives.<sup>263</sup> The result has been stronger, healthier communities. Across Indian Country, an increasing number of Native nations are having success in community and economic development, but these successes are not uniform among all Native nations. Why? “What explain[s] the fact that — despite decades of crippling poverty and powerlessness — some American Indian nations recently [have] been strikingly successful at

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257. Carolyn Attneave, *The Wasted Strengths of American Indian Families*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES*, *supra* note 135, at 30.

258. Graham, *supra* note 130, at 31.

259. *Id.*

260. *Hearings*, *supra* note 16, at 60.

261. *Id.*; Graham, *supra* note 130, at 31.

262. Graham, *supra* note 130, at 31.

263. Miriam Jorgensen, *Editor's Introduction*, in *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* xi, xii (Miriam Jorgensen ed., 2007).

achieving their own economic, political, social and cultural goals, while others [are] having repeated difficulty accomplishing the same things?"<sup>264</sup>

The Harvard Project on American Indian Economic Development ("Harvard Project"), and the Native Nations Institute for Leadership, Management, and Policy ("NNI") have been examining these types of questions for over twenty-five years.<sup>265</sup> The results of this extensive research indicate that there are five crucial principles for successful community development in Indian Country: (1) Native nations must make their own decisions by exercising *practical sovereignty, or self-rule*; (2) Native nations must reinforce their decisions with *effective governing institutions*; (3) These governing institutions must match their own political cultures, that is, they must exhibit *cultural match*; (4) Native nations need a *strategic orientation* when making their decisions; and (5) Native *leadership* is necessary to mobilize the community and promote community development.<sup>266</sup> Taken together, these five foundational elements can be referred to as the Nation Building Model for Community and Economic Development, or simply, the "Nation Building Model."<sup>267</sup>

The Nation Building Model "refers to the processes by which a Native nation enhances its own foundational capacity for effective self-governance and for self-determined community and economic development."<sup>268</sup> The more a community adheres to these five elements, the greater chance that community has of successfully achieving its cultural, economic, political and social goals.<sup>269</sup> Practically speaking, the Nation Building Model takes on many shapes and forms within in Indian Country.<sup>270</sup> It does not offer a one-size-fits-all formula that can be replicated in every community; but rather, presents those factors that are critical for a community to successfully address its own unique problems with its own unique solutions.

As with other social problems, there is no panacea for all the struggles facing Native youths. That does not mean, however, that nothing will help, nor that nothing will ever change. Through the use of the Nation Building

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264. *Id.* at xi.

265. *Id.*

266. TWO APPROACHES, *supra* note 86, at 18.

267. For a more complete presentation of the Nation Building Model and its key components, see, for example, Ryan Seelau, *The Kids Aren't Alright: An Argument to Use the Nation Building Model in the Development of Native Juvenile Justice Systems to Combat the Effects of Failed Assimilative Policies*, 17 BERKELEY J. CRIM. L. 1, 20-36 (2012).

268. Jorgensen, *supra* note 263, at xii.

269. TWO APPROACHES, *supra* note 86, at 19.

270. *Id.* at 18.

Model, Native nations have turned around situations of extreme poverty, unemployment, and other social ills. Native nations now have the opportunity to build on their successes in other areas and regain control over the issues affecting their own children while simultaneously combating the effects of assimilative federal policies that have been in force for centuries. Some Native nations have already begun fighting for control over the matters that concern their youth, and they have been successful.

The remainder of this section examines three case studies where Native nations have used principles from the Nation Building Model in order to effectively exercise their right to self-determination for the betterment of their youth. These case studies are taken from the Harvard Project on American Indian Economic Development's "Honoring Nations" awards program. The Honoring Nations program awards Native nations who demonstrate excellence in the innovative exercise of self-determination to solve Native problems.

The three cases selected mirror the three policy areas already discussed: the first case study looks at the Chickaloon Village of Alaska and the creation of the Ya Ne Dah Ah School, which has been used to turn around the effects of more than a century of assimilative education policies; the second case comes from the Houlton Band of Maliseet Indians and examines the Department of Indian Child Welfare Services established to combat racist child welfare practices in the state of Maine; the third case study lays out the Mississippi Choctaw's efforts to create a Teen Court in order to end the cycle of losing their youth to non-Native justice systems.

### *B. Case Studies*

#### *1. Chickaloon Village's Ya Ne Dah Ay School*

*Background.* Chickaloon Village is an Alaska Native community comprised of approximately 250 members.<sup>271</sup> It is a part of the Athabascan Indian community and is located approximately sixty miles northeast of Anchorage in the Matanuska Valley.<sup>272</sup> While the Athabascan people once controlled enormous swaths of territory, their land holdings have dwindled over the centuries since European contact was first made.<sup>273</sup> Today, the

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271. KERRY R. VENEGAS, THE YA NE DAH AH SCHOOL: MELDING TRADITIONAL TEACHINGS WITH MODERN CURRICULA 3 (2005) (Excellence in Tribal Governance: An Honoring Nations Case Study), available at <http://nnidatabase.org/db/attachments/text/YN DAS.pdf>.

272. *Id.*

273. *Id.*

Athabascan people of the Chickaloon Village are a minority in their own ancestral lands.<sup>274</sup>

*The effects of assimilative policies.* Chickaloon Village's proximity to Anchorage means it has to deal with issues of assimilation and acculturation on far larger scales than other, more isolated Alaska Native villages.<sup>275</sup> This has been particularly true with respect to education. As Kerry R. Venegas, who, in 2005, documented Chickaloon Village's struggles with assimilative educational policies, writes:

For many generations, education in American Indian/Alaskan Native (AI/AN) communities has been controlled by sources external to the communities and the people themselves. Large bureaucratic agencies, such as the Bureau of Indian Affairs (BIA) or public school systems overseen by state governments, decided on policies and practices for educating Indian children, mainly without regard for the concerns and priorities of Native communities. The cumulative effect of this disconnect is a long-standing legacy of low academic achievement, high [dropout] rates, and limited options for AI/AN students in school systems across the United States. In addition, the imposition of assimilationist educational policies resulted in ever-dwindling numbers of tribal and village members who are fluent in traditional languages and cultural practices.<sup>276</sup>

Chickaloon students attending Alaskan public schools have suffered from lower educational attainment rates, lower test scores, and higher dropout rates than their non-Native counterparts.<sup>277</sup>

Beyond merely impacting individual students, educational policies were also taking a toll on Athabascan language and culture. Policies that forbade the use of Native languages, combined with curricula that was completely lacking in Native components led to the diminution of Athabascan culture.<sup>278</sup> By 1992, fewer than fifty fluent speakers of the Athabascan language existed in the world, and several cultural practices had been lost

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274. *Id.*

275. HARVARD PROJECT ON AM. INDIAN ECON. DEV., HONORING NATIONS: 2002 HONOREE: YA NE DAH AH SCHOOL (n.d.) [hereinafter YNDA], available at [http://nnidatabase.org/db/attachments/text/honoring\\_nations/Ya\\_Ne\\_Dah\\_Ah\\_School.pdf](http://nnidatabase.org/db/attachments/text/honoring_nations/Ya_Ne_Dah_Ah_School.pdf).

276. VENEGAS, *supra* note 271, at 1.

277. YNDA, *supra* note 275, at 1.

278. VENEGAS, *supra* note 271, at 2.

forever.<sup>279</sup> Without action, Athabascan language was in serious risk of going extinct.

*The nation's response.* Faced with losing key components of their culture, Chickaloon Village decided to improve the lives of their children and to revitalize their culture. At first, the actions taken were small. A single woman — an elder fluent in the Athabascan language — began teaching classes about language and culture every Saturday.<sup>280</sup> And thus, in 1992, the Ya Ne Dah Ah (meaning “Ancient Teachings”) School was created. The school initially served twenty students and taught a curriculum that merged traditional teachings with modern non-Native subjects.<sup>281</sup>

Over the years, the school has expanded. What began with a single volunteer teacher is now comprised of a full-time certified teacher and more than a dozen full-time volunteers.<sup>282</sup> Serving kindergarten through high school students,<sup>283</sup> Chickaloon Village soon hopes to offer adult education and perhaps even college courses in the near future.<sup>284</sup> In 2005, the school expanded its facilities and moved into a newly constructed building.<sup>285</sup> Today, there is a waiting list to get into the School each year.<sup>286</sup>

Beyond the number of community members involved, the school has also expanded its curriculum. Students now learn the Athabascan language in a variety of manners and also have daily exposure to their culture.<sup>287</sup> The school has gone so far as to develop its own innovative curriculum about the Athabascan people and culture — a curriculum that was ultimately incorporated into the nearby public school system that serves more than 5000 students, including some of Athabascan descent.<sup>288</sup> Amazingly, the School has achieved all of these successes without accepting any state or federal funding, but rather has relied on private donations and the Village's own economic development activities.<sup>289</sup>

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279. *Id.* at 4.

280. *Id.* at 4-5.

281. YNDA, *supra* note 275, at 2.

282. VENEGAS, *supra* note 271, at 5.

283. *History of the Ya Ne Dah Ah School*, ATHABASCAN NATION: CHICKALOON VILLAGE, [http://www.chickaloon.org/index.php?option=com\\_content&view=article&id=149&Itemid=164](http://www.chickaloon.org/index.php?option=com_content&view=article&id=149&Itemid=164) (last visited Nov. 12, 2012).

284. VENEGAS, *supra* note 271, at 18.

285. *History of the Ya Ne Dah Ah School*, *supra* note 284.

286. VENEGAS, *supra* note 271, at 6.

287. YNDA, *supra* note 275, at 3.

288. VENEGAS, *supra* note 271, at 10.

289. YNDA, *supra* note 275, at 3.

*The fruits of self-determination.* The creation of the Ya Ne Dah Ah School has already begun to reverse the effects of more than a century of assimilative policies. Students enrolled in the school are no longer at risk of dropping out, and their standardized test scores are now higher than both state and national levels.<sup>290</sup> Chickaloon Village has, through the curriculum they designed, begun to produce new speakers of the Athabascan language.<sup>291</sup> Other cultural practices have been revived as well. For example, the school boasts a Youth Dance and Drum group, which “is well-regarded and is often invited to open ceremonies, participate in powwows, and perform at schools regionally and statewide.”<sup>292</sup> In addition, parental involvement at the school is close to 100% and young families are beginning to move back to the Village so that their children might be a part of the school and grow up learning about their culture.<sup>293</sup> In short, Chickaloon Village’s decision to act has paid off and has begun reversing the effects of assimilative education policies in their community.

## 2. *The Houlton Band of Maliseet Indians’ Department of Child Welfare Services*

*Background.* The Houlton Band of Maliseet Indians historically resided along the present-day border of Maine and New Brunswick, Canada.<sup>294</sup> Their land was, over time, illegally acquired by the state of Maine.<sup>295</sup> In a decision handed down in 1975, the Maliseet, along with the Passamaquoddy and Penobscot tribes, successfully sued the state of Maine in federal court for violating the Non-Intercourse Act.<sup>296</sup> The victory led to the Maliseet gaining federal recognition in 1980 and receiving money to

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290. VENEGAS, *supra* note 271, at 10-11.

291. *Id.* at 11.

292. *Id.*

293. YNDA, *supra* note 275, at 2.

294. HARVARD PROJECT ON AM. INDIAN ECON. DEV., HONORING NATIONS: 2006 HONOREE: INDIAN CHILD WELFARE SERVICES, DEPARTMENT OF INDIAN CHILD WELFARE SERVICES, HOULTON BAND OF MALISEET INDIANS (n.d.) [hereinafter ICWS], available at [http://nnidatabase.org/db/attachments/text/honoring\\_nations/Indian\\_Child\\_Welfare\\_Services.pdf](http://nnidatabase.org/db/attachments/text/honoring_nations/Indian_Child_Welfare_Services.pdf).

295. *Id.*

296. *Morton v. Joint Tribal Council of the Passa*, 528 F.2d 370 (1st Cir. 1975).

purchase land for a reservation<sup>297</sup>. Today, approximately 500 of the 800 members of the Houlton Band now live on this reservation.<sup>298</sup>

*The effects of assimilative policies.* The formation of the new reservation meant that a large number of Maliseet people were localized, which in turn allowed the state of Maine to keep a watchful eye on the welfare of Native children — something Maine did vigilantly.<sup>299</sup> Although ICWA had been passed two years prior to the formation of the Houlton Band's reservation, Maine seemingly ignored the mandates found in the legislation that were aimed at keeping Native children with Native families.

Instead, for a period of nearly twenty years, the state of Maine removed a large percentage of Maliseet children from their families and their culture.<sup>300</sup> While the exact number removed between 1980 and 1998 is unknown, in 1999, 16% of the Houlton Band's youth had been placed outside their homes.<sup>301</sup> This number was more than five times the rate experienced by other Native American communities at that point in time.<sup>302</sup> Many of these placements were carried out by Maine without any notification given to the Maliseet government. As one Houlton Band citizen put it, "It was like genocide, our children were taken from us and we didn't know where to find them."<sup>303</sup>

*The nation's response.* Fortunately, the Maliseet people did not accept what was happening to their youth; instead, the Houlton Band took action. Specifically, they took steps both internally and externally (with the state of Maine) in order to protect their children and families.<sup>304</sup> Internally, the Houlton Band created a Department of Indian Child Welfare Services. As part of its creation, the Band had to create standards related to a wide variety of child welfare issues. They very carefully and very deliberately crafted standards that exceeded those enforced by the state of Maine, and then made certain to enforce their stricter standards.<sup>305</sup> By doing so, and by

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297. Nicole Friederichs, *A Reason to Revisit Maine's Indian Claims Settlement Acts: The United Nations Declaration on the Rights of Indigenous Peoples*, 35 AM. INDIAN L. REV. 497, 513 (2010-2011).

298. ICWS, *supra* note 294, at 1.

299. *Id.*

300. *Id.* at 1-2.

301. *Id.* at 3.

302. *Id.*

303. *Id.* at 2.

304. *Id.*

305. *Id.*

reaching out to state officials personally and via the media, the Houlton Band gained the respect and trust of state and county officials.<sup>306</sup>

In 2002, the Band signed a Memorandum of Agreement (“MOA”) with the Maine Attorney General and the Department of Human Services specifically to address the removal of children from Maliseet homes.<sup>307</sup> The agreement involved the creation of a Child Protective Team made up of eight individuals — four from the Band, and four from the state.<sup>308</sup> The Child Protective Team meets monthly to discuss cases involving Maliseet tribal members with the goal of finding resources that can help families stay together.

Since signing the MOA, the Houlton Band has been able to adopt further actions to protect their children. Around the same time that they signed the MOA with Maine, the county their reservation was located in was also in the process of revamping its child welfare system.<sup>309</sup> The Band participated in the reform process and convinced the county to add questions to their intake procedures that ensured quick identification for cases involving Natives.<sup>310</sup> Similar intake procedures have now been established across the state and Maine to ensure that Native nations are notified anytime their members are involved in child welfare proceedings.<sup>311</sup> Finally, until the Houlton Band develops its own court system, it currently has the right to use the courts of the Penobscot and Passamaquoddy tribes to resolve child welfare cases involving its members, rather than having to rely on non-Native state court systems.<sup>312</sup>

*The fruits of self-determination.* The results of the Houlton Band’s efforts have been impressive. The policies and institutions developed by the Band, along with the improved relationship with the county and state, have reduced out-of-home placements.<sup>313</sup> In 2006, just four years after signing the MOA, Maliseet children were being placed outside their homes

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306. *Id.*

307. Press Release, Houlton Band of Maliseet Indians and State to Sign Historic Indian Child Welfare Agreement, Office of the Maine Attorney Gen. (Sept. 13, 2002), available at [http://www.maine.gov/tools/whatsnew/index.php?topic=AGOffice\\_Press&id=48250&v=article](http://www.maine.gov/tools/whatsnew/index.php?topic=AGOffice_Press&id=48250&v=article).

308. ICWS, *supra* note 294, at 2.

309. *Id.* at 2-3.

310. *Id.*

311. MAINE DEP’T OF HEALTH & HUMAN SERVS., MAINE CHILD AND FAMILY SERVICES PLAN FOR FY 2010-2014, at 45-47, (2009), available at <http://www.fosteringconnections.org/tools/assets/files/Maine-IV-B-Plan-2010-2014.pdf>.

312. ICWS, *supra* note 294, at 3.

313. *Id.*

at approximately half the rate they were in 1999.<sup>314</sup> While this rate is still higher than in many other Native communities, it represents a substantial improvement in a very short amount of time. The Houlton Band exercised their right to self-determination and, in the process, started changing the effects of centuries of assimilative policies.

### 3. *The Mississippi Band of Choctaw Indians' Teen Court*

*Background.* The Mississippi Band of Choctaw Indians (“Choctaw Nation”) is a federally recognized tribe of approximately 10,000 individuals located on a reservation comprised of 35,000 acres of non-contiguous land spread over seven counties in the state of Mississippi.<sup>315</sup> Once among the poorest Native nations in the country,<sup>316</sup> the Choctaw Nation is now one of the most economically successful.<sup>317</sup>

*The effects of assimilative policies.* The Choctaw Nation knows all too well what assimilative policies can do to a Native community. During the 1830s, they were forced to cede more than twenty-three million acres of land to the federal government and, as a result, their people were subject to several forced relocations.<sup>318</sup> For more than 100 years after these policies were enacted, the Mississippi Band of Choctaw lived in abject poverty and were not even federally recognized as a tribe. That finally changed in 1945 when the Choctaw Nation gained federal recognition and reservation lands were put into trust for their use.<sup>319</sup> Over the next seventy years, the Choctaw Nation would transform in amazing ways, producing huge economic growth and revitalizing the language and culture of the its people.<sup>320</sup>

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314. *Id.*

315. *History*, MISSISSIPPI BAND OF CHOCTAW INDIANS, <http://www.choctaw.org/about/MBCI/history/index.html> (last visited Nov. 12, 2012).

316. HARVARD PROJECT ON AM. INDIAN ECON. DEV., HONORING NATIONS: 1999 HONOREE: CHOCTAW HEALTH CENTER, MISSISSIPPI BAND OF CHOCTAW INDIANS 1 (n.d.), available at <http://hpaied.org/images/resources/publibrary/ChoctawHealthCenter.pdf>.

317. HARVARD PROJECT ON AM. INDIAN ECON. DEV., HONORING NATIONS: 2005 HONOREE: CHOCTAW TRIBAL COURT SYSTEM, CHOCTAW TRIBAL COURT, MISSISSIPPI BAND OF CHOCTAW INDIANS 1 (n.d.), available at [http://nnidatabase.org/db/attachments/text/honoring\\_nations/Choctaw\\_Tribal\\_Court\\_System.pdf](http://nnidatabase.org/db/attachments/text/honoring_nations/Choctaw_Tribal_Court_System.pdf) [hereinafter CTCS].

318. *History*, *supra* note 315.

319. *Welcome from the Tribal Chief of the Mississippi Band of Choctaw Indians*, MISSISSIPPI BAND OF CHOCTAW INDIANS <http://www.choctaw.org/> (last visited Nov. 12, 2012).

320. CTCS, *supra* note 317, at 1.

Even though the Mississippi Band of Choctaw ultimately enjoyed many successes, escaping the effects of assimilative policies did not occur overnight. Prior to federal recognition, the Band lacked its own court system and its members — adults and juveniles alike — were largely tried in county and state courts. Despite the creation of a Mississippi Choctaw justice system, Choctaw juveniles — like all Native juveniles — are still often subject to non-Native courts. While the Choctaw Nation was able to open its own juvenile justice system, the system created was unable to meet all of the community's needs.<sup>321</sup> Specifically, with limited resources available for delinquency prevention, youth crimes on the reservation continued to rise.<sup>322</sup> The Choctaw Nation knew something needed to be done, and that it needed to reflect their cultural values.

*The nation's response.* The Mississippi Band of Choctaw created a Teen Court to help with their large number of juvenile cases.<sup>323</sup> The hopes for the Teen Court included “[k]eep[ing juvenile offenders] from accumulating a Youth Court file” and “[d]eter[ing] repeat offenders by holding them accountable to their peers.”<sup>324</sup> These objectives were to be accomplished through a Teen Court system in which “youth are sentenced by their peers for minor delinquent and problem behavior.”<sup>325</sup> Such courts are designed to empower juveniles by giving them responsibility over the program and control over its development.<sup>326</sup>

With the creation of the Teen Court, the Choctaw Nation sought to reach their juvenile population and expose them to Choctaw culture in a way previously not possible. Specifically, the Choctaw Teen Court counted among its goals educating Choctaw youth “about their rights, responsibilities and role within [Choctaw] law.”<sup>327</sup> To accomplish this, the Teen Court relied on restitution and reconciliation principles, rather than punitive ones when handling juveniles. Thus “[t]he purposes of the process are to get the youths to take responsibility for their actions, to provide

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321. *Id.*

322. *Choctaw Tribal Teen Court*, MISSISSIPPI BAND OF CHOCTAW INDIANS, <http://www.choctaw.org/government/court/teenAbout.html> (last visited Nov. 12, 2012).

323. CTCS, *supra* note 317, at 2.

324. *Choctaw Tribal Teen Court*, *supra* note 322.

325. Ada Pecos Melton, *Building Culturally Relevant Youth Courts in Tribal Communities*, in *SELECTED TOPICS ON YOUTH COURTS: A MONOGRAPH* 65, 71 (Tracy Godwin Mullins ed., 2004), available at <http://www.aidainc.net/monograph.pdf>.

326. *Id.*

327. *Choctaw Tribal Teen Court*, *supra* note 322.

restitution to the victims, receive appropriate punishment and learn more productive ways of living.”<sup>328</sup>

*The fruits of self-determination.* For the Mississippi Band of Choctaw, the creation of the Teen Court had the desired effect of lessening the Tribal Court’s caseload, but it also produces other positive results.<sup>329</sup> The Teen Court gives Choctaw youth the opportunity to become more informed about Choctaw values through learning and practicing Choctaw law.<sup>330</sup> Additionally, it promotes peer-to-peer community building among Choctaw youth.<sup>331</sup> Specifically, “interactions with peers through court service generates a set of common experiences and shared sense of accomplishment” that allows teens of all different backgrounds to come together.<sup>332</sup> In doing this, the Teen Court raises future leaders and creates friendships among youth that hopefully will last into adulthood, while at the same time addressing less complicated juvenile offenses in an effective way.<sup>333</sup> The Teen Court system instills Choctaw values into the youth who pass through its doors, and as a result, the effects of assimilative justice policies are unraveling.

### Conclusion

This article sought to expose three important aspects of juvenile delinquency in Indian Country. First, it brought into focus a picture of life for Native American juveniles by examining available statistical data. The picture is bleak — Native youth were (and still are) disadvantaged compared to the general population in a wide range of aspects related to quality of life. Second, a partial explanation was offered for the obstacles facing Native youth. Specifically, for more than 200 years, state and federal policies towards Native American youth have been assimilative, particularly in the areas of education, child welfare, and juvenile justice. The effects of these assimilative policies have been devastating.

Although the legacy of assimilation lives on, the third goal of this article was to convey hope. Native nations are beginning to reverse the trends put in place centuries ago by outside governments. The Nation Building Model provides guiding principles that Native nations can utilize to reclaim control

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328. *Id.*

329. CTCS, *supra* note 317, at 2.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

over the issues affecting their children. Some Native nations are already putting this model into effect. With respect to Native youth, some Native nations have targeted education, child welfare, and juvenile justice policies in their communities.

Perhaps the most valuable lesson of this article is that in the quest to improve the lives of Native juveniles, one size does *not* fit all. There is no single solution that will reverse the centuries of assimilative practices against Native children. While the Nation Building Model provides principles that can be applied to a variety of situations, it does not provide a prototypical education, child welfare, or juvenile justice system that can simply be replicated throughout Indian Country. Rather, the Nation Building Model encourages Native nations to meaningfully reflect on the needs of their community and then incorporate its cultural values into each institution created. Simply put, the key to success is the exercise of self-determination: Native nations must make their *own* decisions about the way they want to live — including the way they want to handle education, child welfare issues, and juvenile justice. If Native nations are willing to reclaim control and design programs that meet their own unique community needs, then the effects of assimilative policies will start to fade and the difference will be seen in the lives of the children and, in turn, throughout the entire nation.