

# Tribal Juvenile Justice


Background and Recommendations



National  
Congress of  
American  
Indians







This document contains references to the historic and current trauma experienced by American Indian and Alaska Native youth and may be difficult for some readers. Despite the many challenges confronting tribal youth that are detailed in this report, the resilience that Native peoples have demonstrated for millennia makes us hopeful for the future. While this brief focuses on juvenile justice systems, this is one of many systems that must work in coordination to build and strengthen equitable and local supports for vulnerable Native children in their communities. NCAI is committed to working to cultivate and nurture strategies and policies that will allow Native children to thrive. For more information about NCAI's work on the First Kids 1st Initiative, please visit [www.firstkids1st.org](http://www.firstkids1st.org). You can also find additional tribal juvenile justice resources at <http://www.ncai.org/policy-issues/tribal-governance/public-safety-and-justice/tribal-juvenile-justice>.

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## // INTRODUCTION

American Indian and Alaska Native (AI/AN) children are the future of Indian Country. The next generation of AI/AN youth brings purpose and grounding to tribal communities. Tribal governments are responsible for protecting, teaching, and guiding their youth, providing services to families, and creating supportive environments where children can flourish. In exercising this responsibility, tribal governments rely on collaborations and partnerships with other stakeholders. Tribes are committed to supporting all of their youth, including those who struggle, make mistakes, and end up in courtrooms.

Tribes face an uphill battle. Both the federal and state justice systems are ill-equipped and ill-suited to support the unique needs of the AI/AN youth population whose encounters with the juvenile justice system are far too frequent. Adequate—let alone effective—preventative AI/AN youth support programs are severely lacking. The juvenile justice system in the United States tends to re-traumatize, rather than heal, AI/AN youth who come into contact with the system. Recent reports underscore the severity of this crisis and the need for improvement at various levels.<sup>1</sup> These reports confirm that AI/AN youth need treatment and rehabilitation instead of incarceration and punishment,<sup>2</sup> and support a move away from the existing system of relying on “dysfunctional Federal and State controls” and instead “empower[ing] [tribes] to provide locally accountable, culturally informed self-government.”<sup>3</sup>

This issue brief provides an overview of the challenges that AI/AN youth face in the juvenile justice system and highlights policy changes that would improve the experience of AI/AN children within the system and support at-risk AI/AN youth. It also provides interested stakeholders with background information to inform much-needed conversations about reforming the juvenile justice system to better support AI/AN children.

### *Information provided in this brief includes:*

- Overview of the AI/AN youth population and specific challenges faced by AI/AN youth
- Context for high rates of incarceration, poverty, substance abuse, suicide, exposure to violence, and mental health issues
- Explanation of jurisdictional complexities that complicate AI/AN youth interactions with the justice system
- Unique assets available to support AI/AN youth in tribal communities
- Spotlight on best practices
- Policy recommendations



# OVERVIEW OF THE PROBLEM

## INDIAN TRIBES IN THE UNITED STATES

There are 573 federally recognized tribes in the United States.<sup>4</sup> These tribes represent a great diversity of cultures, languages, and traditions and are located across the country. American Indian tribes control approximately 56 million acres of land in the United States as either reservation land or trust land.<sup>5</sup> Additionally, Alaska Native corporations and villages control another 44 million acres of land. Nineteen different tribes have land bases larger than the state of Rhode Island.<sup>6</sup>

Each of these 573 tribes is a separate sovereign nation in the United States—entirely separate from state governmental structures and occupying a unique space within federal law. Tribal nations are governments, and as such they retain the sovereign power to create laws and prosecute certain persons who break those laws on their lands.

Additionally, tribes have the power—just like any other government—to set policy priorities, provide services, and structure their justice systems in whatever manner they choose.<sup>7</sup> Because of tribes’ unique status under federal law, in some ways tribes have more flexibility than state governments when it comes to designing their justice systems. Many tribes retain culturally traditional, non-adversarial or restorative justice systems.

## AMERICAN INDIAN AND ALASKA NATIVE CHILDREN

Approximately one in three AI/AN people in the United States today is under the age of eighteen, making the AI/AN communities comparatively young among U.S. populations.<sup>8</sup> Some tribes have an even higher proportion of young people. In South Dakota, just under 40 percent of the American Indian population in the state is under the age of eighteen.<sup>9</sup> This compares to 24 percent nationally.<sup>10</sup>

Unfortunately, after centuries of oppression, AI/AN children are struggling from historic trauma and current trauma. Today over a quarter of AI/AN children live in poverty,<sup>11</sup> close to twice the rate of the general U.S. population.<sup>12</sup> Many AI/AN children live in communities that have limited social safety net services.<sup>13</sup> They are more likely to face physical and mental health problems,<sup>14</sup> to drop out of school, to struggle with drug and alcohol use,<sup>15</sup> commit suicide,<sup>16</sup> and they are less likely to attain higher education. An estimated 22 percent of AI/AN children experience Post Traumatic Stress Disorder (PTSD), which equals or exceeds the rate of PTSD among Afghanistan, Iraq, and Persian Gulf veterans.<sup>17</sup> AI/AN children are often abused, victims of violent crime,<sup>18</sup> or at least exposed to violence of some kind at extremely high rates.<sup>19</sup> “Leaders from some Native communities estimate that nearly all of their children are exposed to violence.”<sup>20</sup>

## HISTORICAL TRAUMA AND THE HARMS OF ERASURE

Over the course of United States history, the federal government has called for the eradication, relocation, and assimilation of AI/AN people, and the termination of their tribal sovereignty. Several government policies have directly targeted AI/AN children and have undermined Native family systems. Historically, the federal government established Indian Boarding Schools and a system that forcibly removed Native children from their families and sent them to schools thousands of miles away from their homes, under harsh environments where the children were forbidden from speaking their language, practicing their religion, or practicing their cultures.<sup>21</sup>

After the boarding school era it became common practice for state social services to declare Native parents unfit, remove children from their homes, and send them to white Christian families for adoption, even when there was no basis for the removal.<sup>22</sup> Such practices disrupted the social fabric of Native communities, creating lost generations of children and lasting psychological effects on their families. Studies confirm that the historical trauma created by these policies continues to negatively impact AI/AN communities to this day.<sup>23</sup>

Additionally, the predominance and widespread acceptance of the stereotypical imagery of AI/AN people, combined with the lack of modern AI/AN representation in American media and culture, impairs the self-esteem of AI/AN children—making them feel invisible. Numerous studies confirm the negative psychological effects of harmful AI/AN imagery in mainstream media—even media containing what some call ‘positive’ stereotypes like Pocahontas—on AI/AN children. Negative psychological effects include but are not limited to lower self-esteem, lower sense of community worth, and fewer achievement-related positive selves.<sup>24</sup>

*The trauma endured by AI/AN people is both an important context of hardship, and a context for unique strength that is equally vital for advocates and reformers to understand.*

Despite historic and ongoing oppression, AI/AN peoples have always demonstrated resilience, a resource that we are just now beginning to appropriately recognize and study.<sup>25</sup> AI/AN individuals and communities draw strength from their traditions, cultures, kinship and other relationships, ceremonies, humor, and collective successes. They use that strength to weather tremendous adversity.<sup>26</sup> Public health experts suggest that explicitly acknowledging the context of AI/AN trauma is a necessary part of harnessing the energy of resilience, directed toward more meaningful health and wellness programs for AI/AN communities. The Center for American Indian Resilience (CAIR), takes a strengths-based perspective and asserts that “American Indians have prospered in the face of adversity,” while acknowledging that these successes have largely been ignored.<sup>27</sup> To rectify this, the CAIR promotes examining community assets and “the role of traditional knowledge, collective memory, and cultural strategies” in supporting positive outcomes.<sup>28</sup> Such a model of traditionally-grounded, trauma-aware, and community-centered resilience frameworks could and should be replicated in juvenile justice and public safety to promote the most effective healing and support.<sup>29</sup> In this way, the trauma endured by AI/AN people is both an important context of hardship, and a context for unique strength that is equally vital for advocates and reformers to understand.

## **OVER-INCARCERATION AND HIGHER RISK OF INTERACTION WITH THE CRIMINAL JUSTICE SYSTEM**

AI/AN youth are at a greater risk of entering the juvenile justice system than their non-Native counterparts. AI/AN youth face higher rates of mental and physical health issues, poverty, alcohol and substance abuse, suicide, and exposure to violence.<sup>30</sup>

Like many other ethnic groups in the United States, AI/AN children experience systemic biases within the justice system. However, AI/AN juveniles are over-represented in federal and state detention facilities when compared to any other racial or ethnic group.<sup>31</sup> In the state court system, AI/AN youth are twice as likely as white youth to be petitioned for a status offense.<sup>32</sup> American Indian youth are more likely than any other minority group to be found delinquent.



In 2018, the U.S. Government Accountability Office (GAO) reported that between 2010 and 2016 the number of AI/AN youth involved in federal, state, and local justice systems declined based on available data.<sup>33</sup> While the report appeared to show positive trends, it actually revealed a large gap in data collection for AI/AN youth in the justice system. The GAO detailed that the federal government does not have a consistent definition of who qualifies as AI/AN across the multiple departments and agencies that investigate, prosecute, and incarcerate tribal youth.<sup>34</sup> Additionally, these agencies and departments do not have a uniform method of identifying AI/AN youth once they are in the system.<sup>35</sup> Some federal departments rely on the youth to self-identify as AI/AN, some rely on the youth's documents to have an indication of their AI/AN status, and some rely on a government employee to visually identify the youth as AI/AN.<sup>36</sup> While all three methods of identification have problems, the last one is particularly troubling since it relies on subjective perceptions and stereotypes of what AI/AN youth should look like. This likely leads to the misclassification of AI/AN youth as Hispanic, African American, Asian American, or Caucasian.

Additionally, the GAO reported that states also have problems tracking and reporting AI/AN youth through their juvenile justice systems.<sup>37</sup> The GAO further noted that the lack of centralized data across all justice systems makes it impossible to track AI/AN youth who come in contact with or go through all phases of the justice system.<sup>38</sup> Accurate data collection and reporting of AI/AN youth across all levels of the juvenile justice system is greatly needed to help access and address the true scope of this widespread issue.

## **THE GAP IN SERVICES AND SOLUTIONS**

Today there are far too few services and supports available to prevent and respond to the extreme levels of trauma AI/AN youth experience. The Attorney General's National Taskforce on American Indian and Alaska Native Children Exposed to Violence and the Indian Law and Order Commission used the following phrase to describe the status quo in AI/AN youth support services: "an exceptional degree of unmet need."<sup>39</sup> As further detailed by the Attorney General's Taskforce "[t]he vast majority of children involved in the juvenile justice system have survived exposure to violence and are living with the trauma of those experiences."<sup>40</sup>

The juvenile justice system tends to re-traumatize rather than heal the youth who come in contact with it.<sup>41</sup> AI/AN are one of the most vulnerable populations in the United States and have an enormous amount of trauma to overcome. Time and again, advocates, researchers, and federal reports have made clear that this is a population that needs support, treatment, and rehabilitation instead of incarceration and punishment.<sup>42</sup>



Two American Indian youth in their traditional tribal regalia taking a break after a cultural ceremony.

A close-up photograph of two young Alaska Native children wearing traditional regalia. The child on the left is smiling and wearing a red headband with a large, ornate, multi-colored feathered headdress. The child on the right is looking up and wearing a red headband with a large, ornate, multi-colored feathered headdress. The background is dark and out of focus.

## Section Two: Unique Challenges & Assets

Two Alaska Native youth in their traditional tribal regalia.



# UNIQUE CHALLENGES & ASSETS

## JURISDICTIONAL COMPLEXITIES

AI/AN children living on reservations are subject to a complex jurisdictional scheme that puts these children at an even greater disadvantage. Depending on where one commits an offense and the severity of the offense, the AI/AN youth may be subject to the laws of either state, federal, and/or tribal governments. The usually complex jurisdictional scheme at work in Indian Country is made even more complex in the juvenile context since juvenile justice falls in the grey area between civil and criminal jurisdiction, and tribal civil and criminal jurisdiction are subject to different rules and restrictions.<sup>43</sup> The Indian Law and Order Commission has also noted that “the link between dependency and delinquency among Indian youth makes it anomalous to have dependency jurisdiction exclusively Tribal, but delinquency jurisdiction shared with the federal system.”<sup>44</sup> In delinquency cases, the multiple governments involved must determine who holds the jurisdictional authority to proceed with the case. AI/AN children often come into contact with several governments at once—making the process even more daunting and confusing for these children. Because of the overlapping jurisdictions everyone from policy makers to police regularly assume that AI/AN children and their cases will be someone else’s responsibility. As a result, AI/AN children in the juvenile justice system often receive no services or support.



A courtroom in the Mississippi Band of Choctaw Indians Tribal Court located in Choctaw, Mississippi.

## FEDERAL PROSECUTION AND INCARCERATION

Due to the complex jurisdictional scheme at play, AI/AN children are more likely to end up in the federal justice system, a system not designed or equipped to address their needs.<sup>45</sup> Federal courts do “not have a juvenile component” and lack personnel who specialize in working with children.<sup>46</sup> An AI/AN child tried in federal court will be charged under federal laws written with adult criminals in mind. The charged children are then faced with longer federal sentences than they would have received in the state court system, which do not always include diversion, parole, or other services.<sup>47</sup> Juveniles make up only one percent of the federal criminal caseload, however

approximately half of the federal juvenile justice cases involve AI/AN youth.<sup>48</sup> Because the federal government does not run any juvenile facilities, AI/AN youth convicted in federal court may be imprisoned in contracted state or local facilities far from their homes and communities.<sup>49</sup>

## **TRIBAL GOVERNMENTS**

### ***Tribal Prosecution and Intervention***

While the complex jurisdictional scheme can be an additional barrier for many AI/AN children, it also creates the opportunity for tribal government jurisdiction. When AI/AN children are placed in culturally competent tribal court systems, they can potentially receive appropriate intervention and rehabilitative support. When AI/AN children commit offenses that fall under tribal jurisdiction, the tribe and/or the federal government has the authority to prosecute the case, depending on the severity of the offense. An AI/AN youth who commits a crime on tribal land can be prosecuted by both the tribal government and the federal government. Frequently, the U.S. Attorney's Office determines whether it will prosecute the youth, after considering the severity of the offense, the age of the offender, and the tribe's ability to prosecute and sentence the offender.<sup>50</sup> For this reason, increased federal and tribal communication, collaboration, and increased tribal capacity would encourage more U.S. Attorneys to defer to tribal courts in prosecuting these cases exclusively. Tribal courts may also have the power to assert a stronger role in juvenile matters involving their youth through civil jurisdiction. Courts have recognized that civil matters involving tribal members that occur outside of Indian lands—such as child custody, domestic relations, probate, and membership—can still be adjudicated by the tribe in tribal court.<sup>51</sup>

Tribal governments as sovereign governments have the opportunity to shape their judicial systems to specifically address the needs of their AI/AN youth. This can be accomplished by tribes developing culturally appropriate juvenile codes or adapting model juvenile codes to fit their needs.

In 2016, the Bureau of Indian Affairs (BIA) updated its Model Indian Juvenile Code.<sup>52</sup> The updated Code can be a resource to assist tribes as they begin or continue drafting tribal codes that focus on juvenile matters in their communities.<sup>53</sup> The BIA Model Code was drafted in consultation with tribal governments and focuses on three areas: Juvenile Delinquency, Truancy, and At-Risk Youth. The BIA Model Code also includes structures for diverting youth out of formal processes, restricting the use of detention, and distinguishing between delinquent acts and need for services.<sup>54</sup>

### ***Culturally Relevant Tribal Programs***

Both federal and tribal officials view culturally informed programs—particularly those based in tribal communities—as the programs best positioned to help AI/AN children.<sup>55</sup> Importantly, the effectiveness of a culturally informed approach requires non-tribal stakeholders, advocates, and governments to partner with tribes and respect tribal expertise in the field. Centuries of eroding the role of tribal governments and tribal systems in the lives of AI/AN children has caused significant harm. Rebuilding those systems requires effective partnerships and a willingness by non-Native allies to step aside for tribes to make the decisions—decisions that may be different from the non-Native allies' standard method of addressing juvenile issues.

### ***Barrier: Funding for Tribes***

Relying on tribal courts and tribal programs could allow for a higher level of care and tailored support for AI/AN children in the justice system or those who are identified as high-risk cases. However, many tribal justice



systems and programs are woefully underfunded, and many are unable to provide the services that are needed by their tribal citizens.<sup>56</sup>

Federal law currently restricts the ability of tribal governments to raise governmental revenue through taxation. As a result, tribes heavily rely on funding and resources from outside sources. This requires tribes to navigate multiple federal agencies or private grant funding opportunities. The complex network of funding streams often fluctuates depending on the priorities of funders rather than the needs of tribes. When tribes do obtain funding, the money received is often inflexibly allocated for only specific purposes. If a tribe's need changes or shifts, inflexible funding stipulations can prevent a tribe from using the funding to adequately respond to their developing needs. Furthermore, many of the grant funds that tribes receive come from competitive grant programs. Due to the competitive nature of such grant funds, tribes cannot depend on receiving the same funding year-to-year. These shifting and unreliable funding sources make it incredibly difficult for tribes to build a reliable infrastructure to address their needs.<sup>57</sup>



Alaska Native youth watching eagles.

Financial barriers prevent many tribal governments from taking a greater leadership role in juvenile justice cases and providing services to their youth. In most cases, tribes want to provide more to their youth, but simply cannot afford to assist them. A 2011 report that interviewed tribal officials across the United States, documented that those officials consistently reported a lack of facilities, programs, and services available to address the needs of tribal youth in both the federal and tribal systems.<sup>58</sup> As discussed in detail below, many tribes rely on outside funding sources to support the community's basic services, and the scarcity and variability of alternative funding sources creates a huge barrier to developing tribal government infrastructure.

## **KEY POINTS FROM UNIQUE CHALLENGES AND ASSETS**

- Prioritize healing and treatment
- Understand jurisdictional complexities
- Enlist tribal governments
- Create culturally sensitive supports
- Reform federal policy that affects tribal youth in federal prisons
- Increase flexible funding available to tribal governments and programs



# Section Three: Best Practices





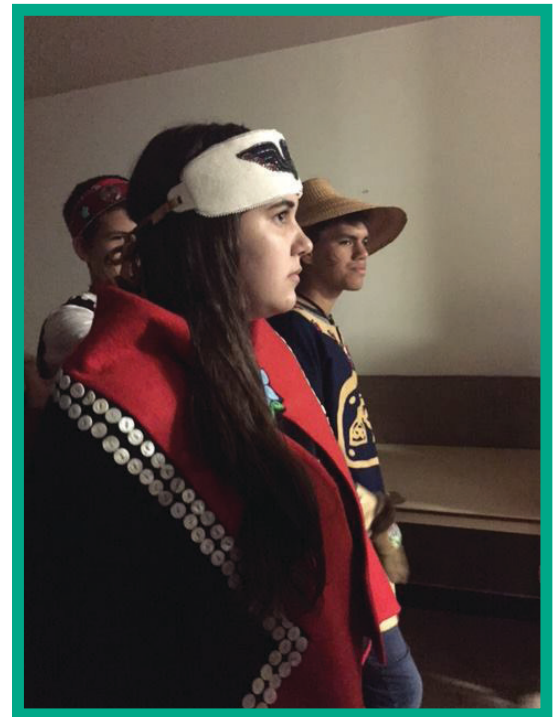
## BEST PRACTICES

Tribal youth offenders in the justice system have demonstrated better outcomes when they receive targeted, culturally-and community-based preventative and rehabilitative services.<sup>59</sup> Highlighted below are examples of three types of such services that are currently being provided by tribes across the nation.

### 1. TRIBAL JUVENILE DELINQUENCY PREVENTION PROGRAMS

#### *Confederated Salish and Kootenai Tribes' Youth Tracking System*

Since 2013, the Confederated Salish and Kootenai Tribes' Education Department—with the aid of funding from an NCAI Partnership for Tribal Governance Grant—has been developing a program to promote educational and career success of their children by collecting and analyzing data. The Tribe hoped that they could use this data to identify struggling, at-risk children and provide those children with targeted support. The Tribe built and fostered relationships with state, local, and federal actors to gain access to the most important sources of data for their purposes, the local community schools. The increased collaboration between the Tribe and other groups created a foundational relationship to provide collaborative and coordinated services to the AI/AN youths identified. Through this program, the Tribal Educational Department analyzed the lack of parental engagement, student attendance, school policy responses to truancy, and school counseling. The coordinated efforts by the partners also revealed where the gaps existed in the data—particularly with homeschooled children—and was an impetus for bringing everyone within the Tribal Educational Department together regarding internal tribal data sharing and collaboration.



Tlingit youth in traditional tribal regalia.

#### *United Keetoowah Band of Cherokee Indians in Oklahoma – Cherokee Talking Circle (CTC)*

CTC is a culturally-based intervention that targets substance use among AI/AN adolescents. The program is designed for students who are citizens of the United Keetoowah Band of Cherokee Indians in Oklahoma, and integrates Keetoowah-Cherokee cultural values. The program is based on the Cherokee concept of self-reliance. Researchers found that CTC, when compared with non-cultural standard substance abuse education programs, was significantly more effective overall in reducing substance use and other related problem behaviors among AI/AN adolescents.<sup>60</sup>

### 2. CULTURALLY-BASED RESTORATIVE JUSTICE PRACTICES AND DETENTION ALTERNATIVES

#### *Tribal Juvenile Healing to Wellness Courts*

The Tribal Juvenile Healing to Wellness Courts (TJHWC) are specialized judicial interventions aimed at promoting accountability and healing for AI/AN youth in the juvenile justice system suffering from drug and alcohol abuse. TJHWCs rely on a tribe's unique cultural practices and implement a system of sanctions and incentives to encourage the youth to change their behavior. Information about these courts can be accessed

through the Office of Juvenile Justice and Delinquency Prevention, which maintains an in-depth website identifying resources and tools for developing these courts.

## **Mississippi Band of Choctaw Indians' Alternative to Detention Program**

The Mississippi Band of Choctaw Indians (MBCI) piloted a project for the development of a Tribal Juvenile Detention Alternatives Initiative in collaboration with the Annie E. Casey Foundation (AECF), the National Indian Child Welfare Association, and the Association on American Indian Affairs. AECF started the Juvenile Detention Alternatives Initiative to develop “a comprehensive detention reform model that utilizes a collaborative data driven approach to reduce the reliance on juvenile incarceration.”<sup>61</sup> Because the model is community based and relies on a holistic approach, it is a natural fit for tribal communities. The project leaders began by interviewing Choctaw stakeholders to identify specific juvenile justice problems and challenges unique to the community. The leaders then identified all of the various stakeholders across the local, state, tribal, and federal levels that needed to be included in the planning.



AI/AN youth at a family gathering.

Specific detention alternatives employed by a tribe may be tied to unique tribal cultural practices or tribal needs. The MBCI provides for the following alternatives to detention: “(1) a cultural practice known as *Immannumpuli*; (2) an Informal Process with a Behavior Contract; (3) Teen Court; (4) Healing to Wellness Court; (5) Peacemaking Court; (6) Transitional Living Programs; (7) The Green Re-Entry program *Osapausi Amasalichi*; and (8) GPS Monitoring.”<sup>62</sup>

Many of the MBCI alternatives to detention are principled on reinforcing Choctaw traditions and culture in the youth’s life. For example, the cultural practice of *Immannumpuli* roughly translates to “a talking to” and is traditionally carried out by the maternal uncle of the youth, who holds a parent-like role in Choctaw culture. If the youth has no maternal uncle, a respected employee of the tribal court will meet with the youth to educate them about the Choctaw justice system and speak to them about their life choices. Another example is the green



Re-Entry Program, *Osapausi Amasalichi* that roughly translates to “that little garden heals me.” In this program Choctaw youth who live in transitional housing are taught Choctaw cultural values and how to grow their own food using traditional Choctaw methods.

### 3. TRIBAL-STATE JUVENILE JUSTICE COLLABORATIONS

#### *Tribal Notification for Native Youth in the State of New Mexico*

Under current federal law, states must notify a tribe when one of their children is involved in the state child welfare system. However, states are not required to notify the tribe if a tribal youth is involved in a delinquency proceeding. According to a 2018 report by the Association on American Indian Affairs “[o]ften state courts and juvenile justice programs do not collaborate with Tribal communities nor do they utilize culturally appropriate programs that could help support Native youth.”<sup>63</sup> Tribal governments frequently raise concerns about not being informed when their youth come into contact with the state juvenile justice system. Lack of notification prevents tribes from supporting the rehabilitation and reintegration of their youth, both during and after the youth’s experience with the juvenile justice system.

New Mexico was the first state to introduce a robust tribal notification law. This law, codified as N.M. Stat. § 32A-2-5, requires state officials to identify tribal youth in state delinquency proceedings and contact the youth’s tribe to consult and exchange information. Tribal notification increases tribal-state communication, collaboration, and opportunities for joint advocacy. This collaboration prevents the two from providing repetitive services and allows both to determine what is in the best interest of the tribal child.<sup>64</sup>



The Mississippi Band of Choctaw Indians detention facility.



# Section Four: Policy Recommendations



## POLICY RECOMMENDATIONS

Changing the status quo to best support AI/AN youth requires a comprehensive set of reforms targeted at multiple levels of government and involving numerous stakeholders. Broadly these reforms can be split into six basic categories as follows:

1. Encourage Tribal Courts to Handle a Larger Share of Indian Juvenile Justice Cases
2. Develop and Support More Culturally Appropriate Programs
3. Increase Collaboration Between Tribal, State, and Federal Governments
4. Increase Funding for Tribal Youth Services and Juvenile Justice
5. Reform Existing Federal and State Programs to Better Support AI/AN Youth
6. Collect and Report Accurate Data on AI/AN Youth in all Juvenile Justice Systems

These six recommendations can only be accomplished by multiple parties working together to improve the existing system and supporting the construction of new programs to support AI/AN children. This issue brief provides specific policy recommendations with specific sets of first steps targeted toward tribal, state, and federal policy makers. Stakeholders and allies are encouraged to follow these recommendations in their advocacy efforts.

## TRIBAL POLICYMAKERS

### ***1. Update Tribal Codes to Include a Culturally Informed Juvenile Justice Code***

Laws are the backbones of legal systems. Tribes can set the bar for effective, innovative, and successful juvenile justice systems starting with their codes. In addition to relying on resources, such as the BIA Model Indian Juvenile Code, tribes can pull together a diverse group of stakeholders to consult on their codes throughout the drafting process. Convening stakeholders in this way helps ensure that the code is written to reflect the specific needs of the community and reflects tribal values.

### ***2. Increase Communication with the State and Federal Governments about Juvenile Offenders***

Tribal governments should do all they can to track their tribal youth who interact with other governments, and reach out to those governments to create the vital lines of communication that will allow tribes to better support their youth. By increasing communication between the prosecutors, educators, and others coming into contact with at-risk youth, information can be shared and best approaches can be discussed while jurisdictional boundaries are negotiated.

### ***3. Initiate Tribal Consultation on State and Federal Juvenile Justice Programs***

Engaging and supporting meaningful consultation between tribes and other governments on the design, content, and operation of juvenile justice programs will help ensure the programs maintain culturally appropriate components to best meet the needs of AI/AN youth. Tribes should seek consultation on state and federal programs that involve their tribal youth. Additionally, tribes should call for a tribal representative to be placed on any government body tasked with juvenile justice issues, in order to contribute to juvenile justice programs at the state or federal level—such as State Advisory Groups under the Juvenile Justice and Delinquency Prevention Act (JJDP A).



#### ***4. Incorporate Trauma-Informed Screening, Assessment, and Care in Tribal Services***

Tribal governments should ensure that their court officials, law enforcement, educators, and healthcare providers receive regular training in trauma-informed interventions and resilience to avoid re-traumatizing their youth and increase the effectiveness of their interventions.

### ***STATE POLICYMAKERS***

#### ***5. Include Tribal Representatives on State Advisory Groups***

The inclusion of tribes on state advisory groups, convened under the JJDPa is important. In 2018 the JJDPa was amended to require states in which one or more tribes are located to include an “Indian tribal representative (if such representative is available) or other individual with significant expertise in tribal law enforcement and juvenile justice in Indian tribal communities” on the state advisory group.<sup>65</sup> Including a representative from tribes on the state advisory group allows for ongoing tribal input on fashioning tribal notice protocols and ensures tribal input in the local delinquency grant selection process. Tribal participation will foster communication across stakeholders, optimize limited resources, increase shared information, resolve jurisdictional issues, and increase access to culturally relevant services for AI/AN youth charged in a state court. However, much of the benefit of collaboration between states and tribes will be lost if the person placed on the state advisory group is simply an individual who has expertise in the field but no authority to represent a tribe. We would recommend that if at all possible states should seek to have tribal representatives at the table to maximize cooperative efforts.

#### ***6. Pass State Laws That Expand Notice Requirements***

States should adopt laws that require tribal notification when AI/AN juveniles come into contact with the state juvenile justice system, similar to the system set up in New Mexico. This will not only ensure that tribes are informed about their struggling youth, but allow for tribes to work with the state to coordinate their services or step in and provide services that the state may be unable or ill-equipped to provide.

#### ***7. Pass State Laws to Track and Report AI/AN Youth in the State Juvenile Justice System***

It is important to establish consistent procedures across state law enforcement and court systems to track AI/AN youth when they come in contact with state juvenile justice systems. An accurate reflection of data regarding the number of youth and their tribal citizenship would encourage state and tribal collaborations to address tribal youth recidivism rates and prevention. This would also help states assess how their juvenile justice resources could be shifted to have a greater impact.

#### ***8. Increase Communication with the Tribes and Federal Government about Juvenile Offenders***

Since the decision of which jurisdiction(s) ultimately has responsibility for a juvenile offender involves some degree of flexibility under current law, all parties involved should be included in transparent communication with the best interests of the AI/AN child in mind. By increasing communication between the prosecutors from each government, information can be shared and best approaches can be discussed while jurisdictional boundaries are negotiated.

## ***9. Incorporate Trauma-Informed Screening, Assessment, and Care in State Services***

Health and justice providers should receive regular training in culturally adapted trauma-informed interventions. Cultural competency is needed for providers to deliver appropriate services to AI/AN children and their families. These trainings should be conducted in collaboration and with consultation from the local tribes in the state about their unique cultures, histories, and needs of each community.

### ***FEDERAL POLICYMAKERS***

## ***10. Require the Accurate and Consistent Reporting of AI/AN Youth in Federal Justice Systems***

Today various federal agencies and departments involved in the investigation, prosecution, and incarceration of AI/AN youth have no consistent definition of who qualifies as AI/AN and have no consistent process for identifying tribal youth. The lack of data makes it incredibly difficult to see an accurate picture of tribal youth in the federal justice system. It also makes it hard to fashion the appropriate support and services to meet their needs. A consistent definition and tracking policies and procedures should be crafted to allow for consistent tracking.

## ***11. Reform Policies to Support AI/AN Youth in the Federal Justice System***

For the many AI/AN youth who end up in the federal justice system, a preference should be established for community-based treatment of AI/AN youth rather than incarceration in locations far from their homes and communities. In the most extreme cases where a secure facility is necessary, the juvenile should be housed and receive treatment within a reasonable distance from their community.

## ***12. Increase Funding Available to Tribal Courts for Basic Operating Costs and Specific Programs***

As discussed previously, financial barriers are often the primary reason that tribal courts and tribal governments are not already doing more for their youth. Increasing federal funding, or reconfiguring existing funding programs to make them more reliable and flexible, would allow tribal governments, who are ready and willing to take up a call to action, to help their struggling youth. Existing funding should be consolidated and streamlined and distributed equitably among all tribes. In addition, tribes should be allowed to use existing federal funding for construction and operation of secure juvenile facilities to treatment and other rehabilitative services.

## ***13. Support Amending the Federal Juvenile Delinquency Act to Defer to Tribal Jurisdiction by Requiring a Waiver of Tribal Jurisdiction***

Under the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. § 5032, federal prosecutors may not file charges against a juvenile in federal court unless the state certifies that either it does not have jurisdiction or that its resources are insufficient to prosecute. However, no such certification is required from tribal courts—although tribal youth make up a majority of federal juvenile cases. Amending the FJDA to require tribal governments to submit a similar certification would create the kind of dialogue about resources and priorities that is sorely needed. Amending FJDA would also affirm that juvenile justice should be handled by a local community first, and include larger government involvement only when necessary.



## ***14. Increase JJDPa Funding for Tribes***

Tribes currently receive juvenile justice funding in two primary ways: through a discretionary grant program (the Tribal Youth Program) administered by the Office of Juvenile Justice and Delinquency Prevention, and on a pass-through basis from states. The methodology for the state pass-through funding is based entirely on population. As a result, the pass-through varies widely by state and is too small to be effective in many places. For example, in New Mexico there are 16 tribes eligible to receive a pass-through grant, but the total amount available for pass-through is under \$7000 (1.7 percent of the amount allocated to the state). In Oklahoma, in contrast, the state is required to pass-through about 12 percent of its funding to tribal programs. In order to run effective juvenile justice and delinquency prevention programs, tribes need a consistent and sufficient funding stream that remains stable over time. We recommend the inclusion of a 10 percent tribal set-aside from the state juvenile justice formula program, directed to the Tribal Youth Program and combined with other funds appropriated for that program.

## ***15. Pass Federal Legislation Increasing JJDPa Funding Eligibility for all Tribes***

Under current law, only tribes that perform law enforcement functions are eligible for state pass-through funding. This is problematic as not all tribes perform these functions, due to issues of capacity, land, or jurisdiction, but still have an obligation to provide their juvenile members with preventative and rehabilitative services. It is important that all tribes are eligible for JJDPa funding.

## ***16. Amend the JJDPa to Require Tribal Consultation on Juvenile Justice Programs***

Engaging and supporting meaningful consultation between tribes and states on the design, content, and operation of state juvenile justice programs will help to ensure that programs maintain cultural integrity and meet the needs of tribal youth. This could be required by statute. Congress could amend the JJDPa to include requirements that the Department of Justice and the states must create a formal process for obtaining local tribal input on policy and funding decisions concerning AI/AN children. Such changes could include requirements for states to involve only representatives from tribes rather than an individual who is simply a tribal justice expert on State Advisory Groups, as discussed in paragraph five. While the 2018 JJDPa amendment requires that the Administrator of the Office of Juvenile Justice and Delinquency Prevention consult with tribes, the consultation is limited to the implementation of the act and does not entail the necessary level of consultation discussed above.<sup>66</sup>

## ***17. Amend Federal Law to Include a Notice Requirement***

While states could pass laws requiring notification of Indian tribes when their youth are in state custody, this could also be accomplished through an amendment to federal law.

## ***18. Amend the FERPA***

Congress should amend the Federal Education Rights and Privacy Act (FERPA) to allow tribes to access their members' school attendance, performance, and disciplinary records. Granting tribes to access these records will help them identify AI/AN youth who need assistance before they end up in the juvenile justice system. Tribes could then provide their members with culturally appropriate support.

## ***19. Incorporate Trauma-Informed Screening, Assessment, and Care in Federal Services***

The Indian Health Service (IHS) in the Department of Health and Human Services (HHS) and tribal and urban Indian behavioral health service providers should receive regular training in culturally adapted trauma-informed interventions and cultural competency to provide appropriate services to AI/AN children and their families.

## ***20. Support the Creation of an Inter-Tribal Working Group to Share Best Practices and Troubleshoot Common Problems***

Federal officials are in a unique position to create and/or financially support nationwide efforts to bring together different tribes working on juvenile justice issues. Effective identification and sharing of best practices is key to creating effective juvenile justice for AI/AN children. The formation of a group to share best practices and develop relationships would be invaluable to participating tribes and the federal and state stakeholders. The voluntary working group of tribal representatives may facilitate the exchange perspectives, information, and advice on juvenile justice issues in a peer-to-peer manner, ensuring an effective, efficient, and supportive method of technical assistance.



Two American Indian youth from the Choctaw Nation of Oklahoma.

## END NOTES

<sup>1</sup> INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 149-180 (2013) (discussing Juvenile Justice and Native American Youth) (hereinafter “ILOC REPORT”); ATTORNEY GEN.’S ADVISORY COMM’N ON AM. INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 36-153 (2014) (hereinafter “THRIVE REPORT”).

<sup>2</sup> See THRIVE REPORT at 112-113, 119; See ILOC REPORT at 166-167.

<sup>3</sup> ILOC REPORT at 159.

<sup>4</sup> See Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Pub. L. No. 115-121; NCAI, NCAI Congratulates Tribal Nations in Virginia on Federal Recognition, <http://www.ncai.org/news/articles/2018/01/30/ncai-congratulates-tribal-nations-in-virginia-on-federal-recognition> (last visited Aug. 8, 2018).

<sup>5</sup> U.S. Department of the Interior, <https://www.bia.gov/frequently-asked-questions> (last visited Aug. 8, 2018).

<sup>6</sup> NCAI, TRIBAL NATIONS AND THE UNITED STATES 8, [http://www.ncai.org/attachments/PolicyPaper\\_VmQaz-PEqbvZDMeaDvbupWTSZLmzyzBKOknQRXnUyoVMoy-FkEWGH\\_Tribal%20Nations%20and%20the%20United%20States\\_An%20Introduction.pdf](http://www.ncai.org/attachments/PolicyPaper_VmQaz-PEqbvZDMeaDvbupWTSZLmzyzBKOknQRXnUyoVMoy-FkEWGH_Tribal%20Nations%20and%20the%20United%20States_An%20Introduction.pdf) (last visited Aug. 8 2018).

<sup>7</sup> Although tribes are free to structure their governments as they see fit, what powers those governments may exercise can be curtailed by federal law.

<sup>8</sup> NCAI, *supra*, at 11.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> ILOC REPORT at 151.

<sup>12</sup> See SUSAN MCCARTNEY ET AL., U.S. CENSUS BUREAU POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007-2011 3 (2013).

<sup>13</sup> Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 LEGISLATION AND PUBLIC POLICY 49, 79 (2016).

<sup>14</sup> See NEELUM ARYA & ADDIE C. ROLNICK, A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS 4-5 (2008).

<sup>15</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., RESULTS FROM THE 2012 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 82 (2012).

<sup>16</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVICES, INDIAN HEALTH SERVICE, INDIAN HEALTH DISPARITIES 2 (2018); CENTER FOR NATIVE AMERICAN YOUTH AT THE ASPEN INSTITUTE, FAST FACTS:

NATIVE AMERICAN YOUTH AND INDIAN COUNTRY 2 (2014); ILOC REPORT at xxv, 43, 151.

<sup>17</sup> ILOC REPORT at 151.

<sup>18</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVICES, ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN’S BUREAU, CHILD MALTREATMENT 2012 20 (2013); JENNIFER TRUMAN ET AL., CRIMINAL VICTIMIZATION 2012 7 (2013).

<sup>19</sup> ILOC REPORT at 151-153.

<sup>20</sup> *Id.* at 151.

<sup>21</sup> For more information about the impact of federal boarding schools on AI/AN children and communities, please see: National Native American Boarding School Healing Coalition, US Indian Boarding School History <https://boardingschoolhealing.org/education/us-indian-boarding-school-history/> (last visited May 24, 2018).

<sup>22</sup> For more information about Indian child removal, please see: David E. Simmons, Improving the Well-being of American Indian and Alaska Native Children and Families through State-Level Efforts to Improve Indian Child Welfare Act Compliance, National Indian Child Welfare Association (2014), <https://www.nicwa.org/wp-content/uploads/2016/11/Improving-the-Well-being-of-American-Indian-and-Alaska-Native-Children-and-Families.pdf>.

<sup>23</sup> See JEN ROUNDTREE, PHD, AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN THE JUVENILE JUSTICE SYSTEM, THE TECHNICAL ASSISTANCE NETWORK FOR CHILDREN’S BEHAVIORAL HEALTHY; 2 (2015); ILOC REPORT at 149-155 (2013).

<sup>24</sup> Stephanie A. Fryberg, Hazel Rose Markus, Daphna Oyserman, & Joseph M. Stone, *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 BASIC AND APPLIED SOCIAL PSYCHOLOGY 208, 209, 215-216 (2008).

<sup>25</sup> See SURVIVANCE: NARRATIVES OF NATIVE PRESENCE 138-139, 334 (Gerald Vizenor ed. 2008).

<sup>26</sup> TERRY CROSS, UNDERSTANDING FAMILY RESILIENCY FROM A RELATIONAL WORLDVIEW, IN (EDS.), RESILIENCY IN NATIVE AMERICAN AND IMMIGRANT FAMILIES 143-158 (H. McCubbin, E. A. Thompson, A. I. Thompson & J. E. Fromer eds., 1998).

<sup>27</sup> See What is CAIR?, CENTER FOR AMERICAN INDIAN RESILIENCE, <http://nau.edu/CAIR/About-CAIR/> (last visited May 24, 2018).

<sup>28</sup> *Id.* at <https://nau.edu/centers-institutes/cair/online-learning-module/>.

<sup>29</sup> See NCAI Policy Research Center, Resilience & Trauma, <http://www.ncai.org/policy-research-center/research-data/prc-publications/Backgrounder-Resilience.pdf> (last visited Aug. 8, 2018).

<sup>30</sup> THRIVE REPORT at 38, 217; U.S. DEP’T OF HEALTH AND HUMAN SERVICES, INDIAN HEALTH SERVICE, INDIAN HEALTH DISPARITIES 1 (2018).



- <sup>31</sup> See NEELUM ARYA & ADDIE C. ROLNICK, *A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS 16* (2008); See THRIVE REPORT at 63.
- <sup>32</sup> COALITION FOR JUVENILE JUSTICE AND TRIBAL LAW AND POLICY INSTITUTE, *AMERICAN INDIAN/ALASKA NATIVE YOUTH & STATUS OFFENSE DISPARITIES: A CALL FOR TRIBAL INITIATIVES, COORDINATION & FEDERAL FUNDING 1* (citing National Center for Juvenile Justice, Juvenile Court Statistics 2011) (2015).
- <sup>33</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-591, *NATIVE AMERICAN YOUTH INVOLVEMENT IN JUSTICE SYSTEMS AND INFORMATION ON GRANTS TO HELP ADDRESS JUVENILE DELINQUENCY*, 5, 89 (2018).
- <sup>34</sup> *Id.* at 98.
- <sup>35</sup> *Id.*
- <sup>36</sup> See *Id.*
- <sup>37</sup> See *Id.* at 89, 98.
- <sup>38</sup> *Id.* at 5.
- <sup>39</sup> ATTORNEY GEN.'S NAT'L TASK FORCE ON AM. INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, FINAL REPORT 38 (2012); ILOC REPORT at 166.
- <sup>40</sup> THRIVE REPORT at 189.
- <sup>41</sup> See *Id.* at 24, 28.
- <sup>42</sup> See *Id.* at 119-122; ILOC REPORT at xxix.
- <sup>43</sup> Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 LEGISLATION AND PUBLIC POLICY 49, 82-87 (2016).
- <sup>44</sup> ILOC REPORT at 160.
- <sup>45</sup> Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 LEGISLATION AND PUBLIC POLICY 49, 53-54, 103-105, 122 (2016).
- <sup>46</sup> *Id.* at 53.
- <sup>47</sup> *Id.* at 53-54.; ILOC REPORT at 5, 160.
- <sup>48</sup> URBAN INSTITUTE, TRIBAL YOUTH IN THE FEDERAL JUSTICE SYSTEM, FINAL REPORT (REVISED) ix (2011).
- <sup>49</sup> THRIVE REPORT at 120; ILOC REPORT at 155.
- <sup>50</sup> URBAN INSTITUTE, TRIBAL YOUTH IN THE FEDERAL JUSTICE SYSTEM, FINAL REPORT (REVISED) viii (2011).
- <sup>51</sup> Rolnick *supra* at 98 (citing *e.g.*, John v. Baker, 982 P.2d 738, 744-59 (Alaska 1999) (discussing member based jurisdiction over internal matters and holding that Alaska tribes retain jurisdiction to adjudicate child-custody matters regardless of whether these occurred in Indian country); See *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1475 (9th Cir. 1989) (holding that the federal court lacked jurisdiction to consider a case involving enforcement of tribal property law against a tribal member because it was as an exercise of "internal jurisdiction").
- <sup>52</sup> Matthew T. Ficcaglia & Ron J. Whitener, Model Indian Juvenile Code: 2016 Revision, United States Department of the Interior, United States Department of Justice, and United States Department of Health and Human Services, <https://www.bia.gov/sites/bia.gov/files/assets/bia/ojs/ojs/pdf/idc2-047015.pdf> (last visited Aug. 8, 2018).
- <sup>53</sup> See Bureau of Indian Affairs, Office of the Assistant Secretary, Roberts Announces Publication of Final, Updated BIA Model Indian Juvenile Code (2016), [https://www.bia.gov/sites/bia.gov/files/assets/public/press\\_release/pdf/idc2-050414.pdf](https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/idc2-050414.pdf) (last visited Aug. 8, 2018).
- <sup>54</sup> *Id.* at 2.
- <sup>55</sup> ILOC REPORT at 158 (citing Urban Institute, Tribal Youth in the Federal Justice System, Final Report (Revised) 27 (2011).
- <sup>56</sup> See U.S. DEP'T OF JUSTICE, REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS 1-3 (1997).
- <sup>57</sup> Rolnick *supra* at 113, 118-119.
- <sup>58</sup> URBAN INSTITUTE, TRIBAL YOUTH IN THE FEDERAL JUSTICE SYSTEM, FINAL REPORT (REVISED) viii (2011).
- <sup>59</sup> See, *e.g.*, THRIVE REPORT at 100, 119-120 (throughout discussing the need for "culturally appropriate" supports that focus on traditional healing and community involvement); Brenda Donelan, The Unique Circumstances of Native American Juveniles Under Federal Supervision, 63 FED. PROB. 69, 2-4 (1999) (recommending cultural awareness for probation officers who work with Native American children and encouraging reliance on cultural programs).
- <sup>60</sup> U.S. DEPT' OF JUSTICE, TRIBAL YOUTH IN THE JUVENILE JUSTICE SYSTEM, LITERATURE REVIEW 5 (2016).
- <sup>61</sup> Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative, Tribal JDAI & The Mississippi Band of Choctaw Indians' Experience, 2014 Tribal Juvenile Justice Meeting <https://www.indian-affairs.org/uploads/5/4/7/6/54761515/2014juvenilejusticemeeting.pdf> (last visited Aug. 8, 2018).
- <sup>62</sup> *Id.*; "Juvenile Justice," NICWA, <https://www.nicwa.org/juvenile-justice/> (last visited Aug. 8, 2018).
- <sup>63</sup> ASSOCIATION ON AMERICAN INDIAN AFFAIRS, *JUVENILE DETENTION ALTERNATIVES INITIATIVE EXAMINING HOW JDAI SITES INTERACT WITH NATIVE YOUTH AND TRIBES 12* (NOV. 2018).
- <sup>64</sup> The National Indian Child Welfare Association and the Association of American Indian Affairs, Tribal Notification for Native Youth in the State of New Mexico Juvenile justice System: A Policy Research Project, presented at National Congress of American Indians 2015 Mid Year Conference, Saint Paul, MN (June 30, 2015), [http://www.ncai.org/policy-research-center/initiatives/Rountree-Trope\\_TribalNotification.pdf](http://www.ncai.org/policy-research-center/initiatives/Rountree-Trope_TribalNotification.pdf).
- <sup>65</sup> JUVENILE JUSTICE REFORM ACT OF 2018, PUB. L. NO. 115-385 (2018).
- <sup>66</sup> *Id.*



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