

## BUILDING A LEGACY OF HOPE: PERSPECTIVES ON JOINT TRIBAL-STATE JURISDICTION

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*That is what I meant by putting a new memory in the minds of our  
children. We have to get to the point where we stop talking in anger.  
We have to put ourselves in the position to tell stories about freedom,  
success, love, safety, and the kind of future we want to have.*

— *Satsan (Herb George), quoting a Wet'suet'en Chief*<sup>1</sup>

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<sup>†</sup> The Honorable Korey Wahwassuck is Associate Judge of the Leech Lake Band of Ojibwe Tribal Court in Cass Lake, Minnesota. The Honorable John P. Smith is a District Court Judge for Minnesota's Ninth Judicial District, Cass County. The Honorable John R. Hawkinson is a District Court Judge for Minnesota's Ninth Judicial District, Itasca County. **AUTHORS' NOTE:** For any collaborative effort to be successful, those who are "in the trenches" must be involved in the process and take ownership in it. We have all attended seminars or read articles in which the virtues of exciting new programs are extolled by the leaders who pioneered them, but unfortunately we seldom hear from those who are the nuts and bolts of these programs. We have thus incorporated into this article not only the perspectives of some who are directly involved with our Wellness Courts, but also those of area leaders and experts on criminal justice and tribal law. We acknowledge their contributions, not just to this article, but for their hard work each and every day. Without them, joint jurisdiction would not be possible. And to all those whose lives are dedicated to changing the world for the benefit of future generations, *Chimigwetch!*—many, many thanks.

1. Satsan (Herb George), *Afterword* to *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 322 (Miriam Jorgensen ed., Univ. of Ariz. Press

## I. SOWING SEEDS OF HOPE—SYNOPSIS

Poverty, addiction, and hopelessness know no jurisdictional boundaries. All systems struggle to improve outcomes for families, to have fewer children in out-of-home placement, to decrease incarceration and recidivism rates, and to reverse the tide of disproportionate minority contact. But in this era of evaporating resources, no system has proved completely successful on its own. Dismal statistics bear witness that “justice as usual” does not result in acceptable outcomes for those involved in the juvenile and adult justice systems.<sup>2</sup> But in northern Minnesota, tribal and state courts are breaking the cycle of drug and alcohol abuse by exercising their jurisdiction jointly, using inter-governmental and inter-agency collaboration of an unprecedented nature. In 2006, the Leech Lake Band of Ojibwe Tribal Court teamed up with Minnesota’s Ninth Judicial District’s Cass County District Court, to form a unique problem-solving court that was the first of its kind in the nation. A post-conviction, post-sentencing DWI Court founded on the ten principles of drug courts,<sup>3</sup> the Leech Lake-Cass County Wellness Court handles the cases of both tribal members and non-Indians. The judges are part of a multi-jurisdictional, multi-disciplinary core team made up of representatives from tribal, county, state, and other agencies, and they preside together over hearings. In 2007, a similar Wellness Court was formed in collaboration with the

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2007) [hereinafter REBUILDING NATIVE NATIONS].

2. See Yamiche Alcindor, *People’s Backs Are Against the Wall; Amid Downturn, a Rise in Jobless D.C. Parolees and Chances of Recidivism*, WASH. POST, Sept. 6, 2009, at C1 (correlating higher unemployment rates with greater recidivism rates in Washington D.C.); Peter S. Goodman, *Budget Cuts Eroding Progress in Juvenile Justice*, N.Y. TIMES, July 11, 2009, at A9 (exploring the effects of slashed budgets on programs for paroled youth to help them find jobs and receive tutoring and mentoring after school in South Carolina); Editorial, *The California Prison Disaster*, N.Y. TIMES, Oct. 25, 2008, at A22 (comparing the recidivism rate of sixty-six percent for parolees within three years of being released in California to about forty percent nationally).

3. DONALD J. SHOEMAKER, *JUVENILE DELINQUENCY 207–08* (2009) (citing the ten principles as (1) Integration of drug treatment with criminal justice services and case processing, (2) use of a non-combative approach to case handling while maintaining the due process rights of participants, (3) placement of participants into the program as soon as possible in order to begin treatment, (4) provision of a range of treatments and services tailored to each participant, (5) use of random and frequent drug testing and monitoring of participants, (6) emphasis on coordination and information sharing among the members of the drug court team; (7) close judicial monitoring of each case, (8) assessments and evaluations of the effectiveness of the program, (9) provisions of continuing education and updating of information for drug-court team members, and (10) creation of partnerships and cooperation among treatment specialists, justice agencies, and local community agencies).

Ninth Judicial District's Itasca County District Court to work with offenders charged with controlled substance crimes. Three-and-a-half years later, these courts are still operating successfully. While the journey has not been without obstacles, the courts have found solutions to problems along the way. This article explores how these joint jurisdiction courts developed, gives a brief overview of the nature of tribal-state-federal relationships, outlines the historical and legal basis for tribal-state collaborative agreements, and demonstrates how this innovative approach to justice allows for more effective administration of justice and far better results across all systems.

## II. NECESSITY: THE MOTHER OF INVENTION—BACKGROUND

On a bone-chilling morning in February 2008 that started out with double-digits-below-zero temperatures, a long line of black-robe-clad state and tribal judges stood outside the Itasca County Courthouse in Grand Rapids, Minnesota. Hundreds of spectators stood watching as a nine-year-old *Nishnabek*<sup>4</sup> boy made his way down the line, smudging each one of the judges with cleansing smoke to clear away any negative thoughts and feelings. As a young drum group from the Leech Lake Band of Ojibwe's Bug-O-Nay-Ge-Shig School sang an honor song, the judges followed in a procession behind the Leech Lake Honor Guard, upstairs to one of three Itasca County District Court courtrooms. There, history was made as the judges of the Itasca County District Court and the judges of the Leech Lake Tribal Court signed a Joint Powers Agreement, committing to work together toward the common goals of improving access to justice; administering justice for effective results; and fostering public trust, accountability, and impartiality. With news cameras rolling, Leech Lake Tribal flags were installed in all three Itasca County Courtrooms while two Minnesota Supreme Court Justices, the Minnesota Supreme Court Administrator, and scores of other dignitaries, elders, and local children looked on. Perhaps surprisingly, this was not the first time that the Leech Lake Tribal flag has come to fly between the Stars and Stripes and the Minnesota State flag. One year and a day earlier, a similar ceremony was held in Cass County District Court before a standing-room-only crowd that included legislators from both sides of the aisle, all there to witness the historic event. Both of these ceremonies memorialized the first Tribal-State Joint Jurisdiction Courts in the nation.

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4. Potawatomi for "The People."

The Leech Lake-Cass County Wellness Court was formed in 2006 with the mission of enhancing public safety by providing hope and opportunities for appropriate treatment with accountability, thereby improving the quality of life within families and in the community. The program handles the cases of Tribal members and non-Indians alike. Wellness Court sessions run simultaneously in Cass Lake (in the tribal courtroom) as well as in Walker (in the district courtroom). Participants have the option of appearing for court hearings either in Cass Lake or Walker, whichever is most convenient, and the courtrooms are connected by interactive videoconferencing (ITV) for hearings. In 2007, the Itasca County Wellness Court went operational,<sup>5</sup> its mission to unite judiciary, criminal justice entities, substance abuse treatment providers, and the community to support the long-term recovery of participants and restore them to law-abiding productivity; to reduce drug and alcohol use of non-violent addicted participants; to enhance public safety; to reduce the financial impact on society; and to change behaviors.<sup>6</sup>

Jennifer Fahey of the Crime & Justice Institute<sup>7</sup> “recently witnessed first-hand the sharing of jurisdictional authority, and found the level of collaboration between state and tribal governments in Cass and Itasca Counties to be unprecedented.”<sup>8</sup> Fahey “observed that both of these programs employ many of the evidence-based practices (EBP) that are proven to reduce recidivism: utilizing data to drive decision making; identifying offender risk and appropriately targeting treatment interventions and supervision strategies; infusing positive reinforcement balanced with swift, yet suitable, sanctions for violations of conditions; providing consistent performance feedback, each week, to both the offender and staff; and measuring progress toward

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5. See Corey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 749 (2008).

6. See *id.* at 747.

7. The Crime & Justice Institute (CJI) is a non-profit agency that provides nonpartisan consulting, policy analysis, and research services to improve public safety throughout the country. See Crime & Justice Institute, Community Resources for Justice, <http://www.cjinitiative.org/about> (last visited Oct. 17, 2009). The CJI works with a diverse group of practitioners and policymakers, including correctional officials, police, courts, and political and community leaders with the goal to make criminal and juvenile justice systems more efficient and cost-effective to promote accountability for achieving better outcomes. *Id.* (“Letter From the Director” section).

8. E-mail from Jennifer Fahey, Assistant Director, Crime & Justice Institute, to author Corey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (Oct. 16, 2009, 16:14 CST) (on file with author).

articulated goals.”<sup>9</sup> Fahey also states that, “[r]esearch has shown that by consistently applying EBP principles, criminal recidivism can be reduced and the health of individuals, families, and communities can be restored.”<sup>10</sup>

The Wellness Courts are indeed making a difference. Pam Norenberg, Drug Court Coordinator for Minnesota’s Ninth Judicial District, has been working with drug/DWI courts for five years and is impressed by our participants’ accomplishments.<sup>11</sup> These include reunification with family, becoming healthier parents who are more involved with their children, continuing their education, and becoming reliable and valued employees. Norenberg points out that “[t]hese achievements might sound like the ‘usual’ stuff but when we are talking about people that only cared about their next whiskey, joint, rock, etc., providing them with the tools that enable them to live a healthy lifestyle is a major accomplishment.”<sup>12</sup> Wellness Court participants’ success has been aided by the resources provided to the Wellness Courts through the three units of government: the Leech Lake Band of Ojibwe, the State of Minnesota, and the counties of Cass and Itasca. “Having these three entities working together towards one goal, healthy and productive citizens, has been a very rewarding venture for all involved . . . . Addiction is everywhere and pulling all resources and units of government together to keep these programs moving forward is well worth the investment.”<sup>13</sup>

To understand why these courts are so successful, and so necessary, one need only look at the overwhelming challenges facing the Leech Lake Reservation and the counties with which it overlaps. Located in rural north-central Minnesota, approximately 235 miles north of Minneapolis/St. Paul and 100 miles south of the Canadian border, the Reservation covers over 1050 square miles within its boundaries, and primarily consists of forests, lakes, and wetlands with small Indian and rural residential communities.<sup>14</sup> The Reservation has few towns and eleven Indian communities, or “villages,” that are

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9. Fahey, *supra* note 8; see also Roger K. Warren, *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries*, CRIM. & JUST. INST., Aug. 30, 2007 (examining evidence-based practices in the sentencing stage).

10. Fahey, *supra* note 8.

11. E-mail from Pam Norenberg, Drug Court Coordinator, Ninth Judicial District, to author Korey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (July 31, 2009, 16:33 CST) (on file with author)

12. *Id.*

13. *Id.*

14. See Leech Lake Band of Ojibwe, History, <http://www.llojibwe.org/history.html> (last visited Nov. 13, 2009).

separated by distances of twenty to eighty miles.<sup>15</sup> The rural location and size of the Reservation presents serious challenges for delivery of services to residents. The Reservation encompasses sections of four counties: Beltrami, Cass, Hubbard, and Itasca, all of which are located within Minnesota's Ninth Judicial District.<sup>16</sup> The Native American unemployment rate on the Reservation is nearly 26%, reflecting that poverty is a serious problem.<sup>17</sup> Statistics from the Leech Lake Band of Ojibwe Addictions and Dependency (A&D) Program show that drug and alcohol abuse is epidemic on the Leech Lake reservation, with "60% of the residents having serious drug or alcohol problems, [and] 95% of the residents being directly affected by alcoholism or drug abuse by a family member."<sup>18</sup> While the Leech Lake Band of Ojibwe has a Human Services Division with Mental Health, Addictions and Dependency, Opioid Treatment, and Child Welfare Programs,<sup>19</sup> all "are seriously under-staffed and under-funded and struggle to deal with the needs of" the reservation's population.<sup>20</sup> As stated in a recent grant application, "Tribal members frequently must be sent outside of the community to receive in-patient substance abuse treatment, and there is a lack of adequate aftercare services . . . ."<sup>21</sup> As a result, "many relapse after being returned to the same home environment, and without having had their mental health needs adequately addressed."<sup>22</sup> In addition, the waiting list for tribal chemical dependency assessments can be up to several weeks long.<sup>23</sup>

Drinking and driving is a serious issue throughout the Reservation and within Cass and Itasca Counties. According to the Minnesota

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15. *Id.*

16. *Id.* See Ninth District, District Court Directory, <http://www.mncourts.gov/district/9/?page=2> (last visited Nov. 13, 2009).

17. OFFICE OF TRIBAL SERVS., U.S. DEP'T OF THE INTERIOR, AM. INDIAN POPULATION AND LABOR FORCE REP. 18 (2003) *available at* <http://www.bia.gov/idc/groups/public/documents/text/idc-001777.pdf>.

18. Planning Correctional Facilities on Tribal Lands Competitive Grant: Leech Lake Band of Ojibwe 8 (*Dep't of Justice Programs approved grant Aug. 2008*) (on file with author) [hereinafter Competitive Grant].

19. See Leech Lake Band of Ojibwe, A & D Program, <http://www.llojibwe.org/divisions/humanservices/adprog.html> (last visited Nov. 13, 2009); Leech Lake Band of Ojibwe, Leech Lake Child Welfare, <http://www.llojibwe.org/divisions/humanservices/llcw.html> (last visited Nov. 13, 2009); Leech Lake Band of Ojibwe, Opioid Treatment Program, <http://www.llojibwe.org/divisions/humanservices/opioidtp.html> (last visited Nov. 13, 2009).

20. Indian Alcohol and Substance Abuse Prevention Competitive Grant: Leech Lake Band of Ojibwe 5 (on file with author).

21. *Id.*

22. *Id.*

23. *Id.*

Department of Public Safety, during 2005–2007, nearly 50% of the state’s 272 alcohol-related fatalities and 663 injuries occurred in just thirteen of eighty-seven counties and cost the state and communities an estimated \$356 million.<sup>24</sup> In 2006, Cass County ranked seventh in the “13 Deadliest Impaired Driving Counties” list.<sup>25</sup> From January 1, 2001 through December 31, 2005, Cass County experienced 32 fatalities, and 49 persons experienced incapacitating injuries that were alcohol-related.<sup>26</sup> These 32 alcohol-related fatalities represent one death for every 901 people, compared with one death for every 12,509 people in Hennepin County, Minnesota during the same time period.<sup>27</sup> Cass County’s population of 28,843 represents only a fraction of all other counties, but its 32 deaths were the sixth highest in the State of Minnesota.<sup>28</sup>

Statistics for Itasca County are just as grim. In July 2005, 94% of all people who came into the Itasca County Jail had methamphetamine in their possession or in their system.<sup>29</sup> Additionally, the meth problem resulted in a 33% increase in jail costs in 2004 in Itasca County.<sup>30</sup> From 2005 to 2007, the number of third degree felony drug possession charges increased by 57%, and fourth degree felony drug possession charges more than quadrupled.<sup>31</sup> In 2005, methamphetamine possession accounted for 64% of adult felony drug charges,

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24. See MINN. OFFICE OF TRAFFIC SAFETY, OPERATION NIGHTCAP, *available at* [http://www.dps.state.mn.us/ots/enforcement\\_programs/NightCAP/default.asp](http://www.dps.state.mn.us/ots/enforcement_programs/NightCAP/default.asp) [hereinafter NIGHTCAP]; MINN. OFFICE OF TRAFFIC SAFETY, 13 DEADLIEST COUNTIES FOR IMPAIRED DRIVING, *available at* [http://www.dps.state.mn.us/ots/enforcement\\_programs/NightCAP/default.asp](http://www.dps.state.mn.us/ots/enforcement_programs/NightCAP/default.asp) (scroll halfway down the page to “NightCAP Fact Sheet”) [hereinafter DEADLIEST COUNTIES].

25. MINN. OFFICE OF TRAFFIC SAFETY, OPERATION NIGHTCAP, TRIBES AND TRANSPORTATION REP., at slide 19, *available at* <http://www.dot.state.mn.us/mntribes/2006conf/presentations/powerpoints/NightCAP%20Tribes%20and%20Transportation.ppt> [hereinafter TRIBES AND TRANSPORTATION].

26. *Id.* at slide 9.

27. TRIBES AND TRANSPORTATION, *supra* note 25; MINN. OFFICE OF TRAFFIC SAFETY, IMPAIRED DRIVING FACTS, *available at* [http://www.dps.state.mn.us/OTS/crashdata/impaired\\_driving.asp](http://www.dps.state.mn.us/OTS/crashdata/impaired_driving.asp).

28. *See id.*

29. 3 *Proctor Educators Attend Meth Forum*, PROCTOR JOURNAL (Proctor, Minn.), Mar. 24, 2005, *available at* <http://www.proctormn.com/placed/story/03-24-2005meth.html> (relating comments made by Itasca County Sheriff Pat Medure).

30. *Id.*

31. Report, Itasca County Court Administrator’s Office, Itasca Felony Drug Charges 2005-2008 [hereinafter Itasca County]. The information in this report was compiled using data from the Minnesota Court Information System. E-mail from Abby Kuschel, Wellness Court Coordinator, Itasca County, to author Korey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (Nov. 4, 2009, 11:16 CST) (on file with author).

compared to marijuana, which accounted for 14%.<sup>32</sup> The rate of impaired driving incidents in Itasca County has steadily increased over the past several years. In 2008, Itasca County was newly added to the list of the “13 Deadliest Counties for Impaired Driving” in Minnesota.<sup>33</sup> Between 2004 and 2007, 37% of traffic fatalities were alcohol-related, compared to 34% statewide.<sup>34</sup> During the same time, Itasca County had 1855 impaired driving incident arrests, eleven alcohol-related fatalities, and fifty-eight alcohol-related serious injuries, costing the state and local community an estimated \$17 million.<sup>35</sup> From 2004 to 2007, Itasca County saw a 46% increase in impaired driving incident arrests.<sup>36</sup> Prescription drug abuse in Itasca County has also become a serious problem.<sup>37</sup>

Despite their best efforts, neither the Leech Lake Band nor officials in Cass and Itasca Counties have been completely successful on their own. When thoughts of establishing a DWI Court for Cass County surfaced in 2005, it was clear that such an endeavor would not be successful without overcoming logistical and cultural obstacles.<sup>38</sup> Reno Wells, Director of Cass County Probation, was instrumental in taking the first step. Wells knew that it would be impossible to “accomplish what we believed would truly make a difference in the lives of those entrusted to our care, until we also reached out and asked for help ourselves.”<sup>39</sup> With this willingness to cooperate in mind, the Cass County District Court approached the Leech Lake Tribal Council to gain its support. Thus, the first Joint Jurisdiction Wellness Court in the nation was formed.<sup>40</sup> Within a year, Itasca County was making plans of its own for a drug court, and representatives from the Leech Lake Band of Ojibwe were invited to participate in formation of the court from the ground up.<sup>41</sup>

There are five levels of interaction that can exist between tribal courts and state courts. The first level is no cooperation—efforts to help the other operate are absent. The second is a minimal level of

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32. Itasca County, *supra* note 31.

33. DEADLIEST COUNTIES, *supra* note 24.

34. *See id.*

35. *See* NIGHTCAP, *supra* note 24; DEADLIEST COUNTIES, *supra* note 24.

36. NIGHTCAP, *supra* note 24.

37. Competitive Grant, *supra* note 18, at 5.

38. Wahwassuck, *supra* note 5, at 747–50.

39. E-mail from Reno Wells, Director of Cass County Probation, to author Corey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (Aug. 13, 2009, 21:09 CST) (on file with author).

40. Wahwassuck, *supra* note 5, at 747–50.

41. *Id.* at 750.



cooperation—efforts that provide some help to the other court to operate more efficiently. The third level is full cooperation—the organizations work together so that they each operate at maximum efficiency, but their operations are completely independent. The fourth level is collaboration—at this level there is interaction whereby the courts not only operate at maximum efficiency themselves, but actively seek to help the other court operate better through some interactive efforts. The fifth and final level is co-creation—at this level the courts are working together so that they can maximize the results for both courts through joint efforts at all possible levels. For the most part the level of interaction between state and tribal courts is at level one or two. The Wellness Courts represent a level four interaction. We have plans to extend the level of interaction to level five, and feel confident that we can create additional programs that will create an integrated system of justice between the tribal court and state court.

One founding member of the Leech Lake-Cass County Wellness Courts said “[t]his is people helping people at its finest . . . . This is people coming together, to create a bigger energy than themselves, to feel hopeful, to find motivation and support, to actually experience that ‘someone cares about me and is showing it!’”<sup>42</sup> So what makes the Joint Jurisdiction Wellness Courts so different and so successful? To answer this question, we turn next to how these joint jurisdiction courts have developed, and to the people who make them work.

### III. CHANGING ATTITUDES, CREATING BELIEVERS—OVERCOMING OBSTACLES

State courts historically have focused on the symptoms of the drug and alcohol epidemic, often being inadequately equipped to deal with the root causes.<sup>43</sup> Jay Sommer, a public defender and member of the original Leech Lake-Cass County Wellness Court’s core team, points out that it is “easy to lose hope in the criminal justice system.”<sup>44</sup> Chemical dependence and abuse account for a high percentage of cases in the system. Those that come before the court have “tough issues which need more attention than the system can give . . . . [P]eople need other people, to pay attention to them, to

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42. E-mail from Jay Sommer, Managing Attorney, Ninth District Public Defender, to author Korey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (Aug. 11, 2009, 11:26 CST) (on file with author).

43. Wahwassuck, *supra* note 5, at 746.

44. Sommer, *supra* note 42.

care, and to actually do something instead of just giving out instructions[.]”<sup>45</sup> Unfortunately, those of us who work in the courts day-in and day-out sometimes become so used to the routine affairs of the day that we become hesitant to look at changing how we do things. Far too often we stop looking for ways to make improvements in the way we operate. But the Wellness Courts have replaced stagnation with action, using innovative methods to change outcomes for those involved in the criminal justice system. The result? What “started as a tiny operation . . . has now swelled to surprising volume”<sup>46</sup> despite overwhelming odds.

When our venture began, we quickly found that even where there is willingness to collaborate, there is no magic formula for success. We hoped at first to find an existing model that we could copy so that we would know how to handle the complexity of a multi-jurisdictional court. We searched around the country to see how other courts in similar situations were operating, only to find that collaboration of this nature was truly unprecedented; if we wished to be successful, we would need to learn together.

Although governments and judicial systems are institutions, they are run by individuals, and those individuals determine whether a collaboration will be successful. As Reno Wells points out, the easy part “was convincing chemically dependent people that there was hope for them, the challenge . . . was convincing . . . both governments that [the systems] could actually be successful by working together.”<sup>47</sup> As with any relationship, building a partnership between jurisdictions requires trust and a willingness to openly communicate. At the outset, there was deeply rooted mistrust between the governments and judicial systems, and relationships between the County Sheriff’s Office and the Leech Lake Tribal Police Department had seen periods of highs and lows over the years. Many in the law enforcement community harbored mixed feelings about the program. Ryan Fisher, former Leech Lake Tribal Police Officer who has since gone to work for the Cass County Sheriff’s Office, has experienced a deeply rooted subculture in law enforcement that is resistant to change.<sup>48</sup> After being assigned to the Wellness Court as a Tribal

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45. *Id.*

46. *Id.*

47. Wells, *supra* note 39.

48. Letter from Ryan Fisher, Officer, Leech Lake Tribal Police Department, to the Harvard Project of American Indian Economic Development Honoring Nations Award committee (Mar. 13, 2008) (on file with author) (supporting of Leech Lake Band of Ojibwe nomination for The Harvard Project of American Indian Economic

Police representative, he came to believe in the concept whole heartedly and was proud to be a part of the program.<sup>49</sup> Fisher has pointed out that “[t]he level of acceptance that the Wellness Courts have achieved within the Law Enforcement community has been nothing short of remarkable.”<sup>50</sup> He continued, “I believe that these relationships are better today than they have ever been and I believe Wellness Court has influenced these relationships.”<sup>51</sup>

Tom Burch, Chief Deputy for the Cass County Sheriff’s Office and a member of the Wellness Court’s core team from the beginning in 2006, is still amazed by the success of the collaboration. “I was not very optimistic about the Wellness Court program and had my doubts, but it certainly appears to be working. We’re making a positive difference in people’s lives. It’s important to keep this initiative countywide so the entire county benefits from the reduction in repeat offenses and recidivism.”<sup>52</sup> Itasca County Sheriff Pat Medure, a member of the Itasca County Wellness Court’s core team, believes that the collaboration has opened up lines of communication, giving all of the players a better insight into the issues that affect individuals and the community.<sup>53</sup> Sheriff Medure cites the Wellness Court as a “prime example of a great collaboration which benefits both governing bodies.”<sup>54</sup> Looking to the future, Medure points out that “we have a good foundation built today and we all have to continue to enhance what i[s] in place for the good of the cause . . . . [I]’m proud of our accomplishments to date.”<sup>55</sup>

Law enforcement officers were not the only ones whose initial skepticism was overcome by the success of the program; the prosecuting attorneys have become believers as well. Former Cass County Attorney Earl Maus served on the Wellness Court team until he was appointed as a District Court Judge in the Ninth Judicial District.<sup>56</sup>

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Development Honoring Nations Award).

49. *Id.*

50. *Id.*

51. *Id.*

52. E-mail from Tom Burch, Chief Deputy, Cass County Sheriff’s Office, to author Corey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (Oct. 6, 2009, 15:23 CST) (on file with author).

53. E-mail from Pat Medure, Sheriff, Itasca County Sheriff’s Office, to author Corey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (Aug. 10, 2009, 22:43 CST) (on file with author).

54. *Id.*

55. *Id.*

56. Diane McCormack, *Earl Maus Looking Forward to New Challenges as a District Court Judge*, PINEANDLAKES.COM, Mar. 19, 2008, <http://www.pineandlakes.com/>

Judge Maus admits that he had to be sold on the effectiveness of drug courts in general, and he emphasizes the importance of educating the general public on the cost effectiveness of wellness courts.<sup>57</sup> Judge Maus has also found that “the unified tribal-state court has helped dissolve racial barriers that often exist . . . both staff and participants appear to be more trusting of each other.”<sup>58</sup> Itasca County Attorney Jack Muhar agrees that the Joint Powers Agreements have resulted in mutual benefits to the parties and provide “building blocks for greater diversity, trust, cooperation and efficiency.”<sup>59</sup>

Supervision for Wellness Court clients is provided by Minnesota Department of Corrections probation agents, and sharing of supervisory duties has created challenges in and of itself. Compounding this issue is uncertainty surrounding funding for drug courts.<sup>60</sup> Department of Corrections District Supervisor Victor A. Moen “likes the strong focus on root causes of criminal conduct including addictions, mental illness, cultural differences/trauma, and upbringing.”<sup>61</sup> He also shares the Wellness Court teams’ “frustration with temporary funding, which makes it difficult to obtain the program stability that is essential to the success of such programs.”<sup>62</sup> Despite these obstacles, Moen observes that the experience “has productively brought several agencies together forming a collaborative approach working toward a common goal of facilitating change in peoples’ lives.”<sup>63</sup>

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stories/031908/news\_20080319004.shtml; Press Release, Office of the Governor, Governor Pawlenty Appoints De May and Maus to Ninth Judicial District Judgeships (Oct. 5, 2007), [http://www.governor.state.mn.us/mediacenter/pressreleases/Judicial Selections/2007/PROD008340.html](http://www.governor.state.mn.us/mediacenter/pressreleases/Judicial%20Selections/2007/PROD008340.html) (last visited Oct. 30, 2009).

57. E-mail from Earl Maus, Judge of District Court, Crow Wing County, to author Korey Wahwassuck (Aug. 12, 2009, 14:05 CST) (on file with author).

58. *Id.*

59. E-mail from Jack Muhar, County Attorney, Office of the Itasca County Attorney, to author Korey Wahwassuck (Aug. 10, 2009, 12:42 CST) (on file with author).

60. See Minnesota Senate, Judiciary Budget Division Update (Apr. 23, 2009), [http://www.senate.leg.state.mn.us/committees/2009-2010/finance\\_judiciary/update.htm](http://www.senate.leg.state.mn.us/committees/2009-2010/finance_judiciary/update.htm) (“[First Judicial District Judge] Knutson said courts collect \$200 million annually and the revenue would be significantly interrupted by implementing [proposed budget] cuts. In addition, Knutson said the cuts could lead to shutting down many of the successful drug courts, which cut the cycle of recidivism and avoid millions of dollars in jail and prison bed days, save lives and restore offenders to law abiding taxpayers.”).

61. E-mail from Victor A. Moen, District Supervisor, Minnesota Department of Corrections, to author Korey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (Oct. 11, 2009, 21:52 CST) (on file with author).

62. *Id.*

63. *Id.*

Even the very judges who spearheaded this novel approach to justice had to overcome uncertainties along the way. Initially, there were reservations about how the collaboration would work, but sharing a common problem made it easier to work toward a common goal. Concerns lingered about how things would work when a major difference in opinion arose. It has come as a surprise to all that after nearly four years operating these joint courts, the judges have not had a serious difference of opinion on any issue. The collaboration has had a number of unintended benefits as well. Having two judges, especially of different genders, makes it much easier to conduct the hearings and support the needs of the participants. A second benefit is coverage for Wellness Court when one judge has a scheduling conflict or is unavailable. In fact, the judges have worked so well together that they have become very confident in each other and are comfortable having the other judge handle the proceedings in their absence. This is true even if it means that the tribal court judge takes the bench alone in state court, or that the state court judge takes the bench alone in tribal court. Finally, the collaboration with Wellness Court and several years of working together make it much easier to envision how state courts can continue to work with tribal courts in other areas, such as juvenile proceedings or family law matters, as the tribal courts continue to exercise their sovereignty.

The collaborative process is intended to move participants away from the traditional definition of power as control or domination, towards a definition that allows for shared authority. The fact that full-blown collaboration has blossomed in an environment where deeply ingrained ill will once prevailed, bears witness to the fact that fundamental systems change is possible.<sup>64</sup> Jennifer Fahey was especially moved by the collaboration of the two governments, proclaiming that “this is a model to be replicated by other jurisdictions seeking to promote public safety by addressing the criminogenic needs of all offenders within a community.”<sup>65</sup>

One Wellness Court team member has commented that one of the best ways to eliminate distrust between people is to require them to work together on a common project.<sup>66</sup> This has proved to be true time and again. And while there is no magic formula for success, there are certain key ingredients that no partnership can survive

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64. See Fisher, *supra* note 48 (describing how collaboration with the Wellness Court has been successful for law enforcement).

65. Fahey, *supra* note 8.

66. Maus *supra*, note 57.

without. A relationship of trust is one of those ingredients. Since the beginning of the Wellness Court partnerships, both the District Courts and the Leech Lake Tribal Court have focused on what is best for the participants in our programs and the safety of the public. These are common goals that we share. Another ingredient to success is mutual respect. We do not have to do everything the same way or believe the same ideas to respect each other. We do not always agree on what is best for our participants, but we have learned how to disagree and still reach a desirable result. The success of our participants is the best evidence of our working relationship. Jon A. Maturi, Chief Judge of the Ninth Judicial District, credits the success of the collaborative efforts to “a mutual understanding of our respective sovereignty, but, more importantly, [to] our mutual understanding of what we hold in common and our joint desire to better serve the residents of [the] County, Leech Lake and the Ninth Judicial District.”<sup>67</sup>

The benefits of the collaboration have extended well beyond the judicial realm, and the collaboration has fostered better relationships between tribal, state, and local governments. Progressive leaders, those willing to be proactive in working for change for the community-at-large, make this possible. Arthur “Archie” LaRose, elected Chairman of the Leech Lake Tribal Council in 2008, recognizes that “Leech Lake is not an island. We are not alone in our needs.”<sup>68</sup> Acknowledging the importance of creating and nurturing partnerships, Chairman LaRose has made it clear that it is “time for Leech Lake to reach out and come to the table with our neighbors and find common needs. Together we have power . . . This Council is willing to do the heavy lifting and hard work because it is in the Band’s best interest to move in this direction.”<sup>69</sup> The Leech Lake Band of Ojibwe Tribal Council is convinced that the Leech Lake Band can be part of the solution and a positive, meaningful presence at the Minnesota legislature. “One way for us to do this is to expand our Joint Powers Agreements with the four counties within our Reservation borders . . . the timing is right for us to assert our [s]overeignty because we can help reduce the overburdened and underfunded [s]tate [c]ourts by

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67. Letter from Jon A. Maturi, Chief Judge, Ninth Judicial Dist. of Minn., to Amy B. Medford and Megan M. Hill, The Harvard Project on Am. Indian Econ. Dev. (Mar. 7, 2008) (on file with author).

68. ARTHUR “ARCHIE” LAROSE, LEECH LAKE BAND OF OJIBWE TRIBAL COUNCIL CHAIRMAN, CHAIRMAN’S QUARTERLY REPORT (2008) (on file with author).

69. *Id.*

reducing their caseloads.”<sup>70</sup>

Government officials in Cass and Itasca Counties share this spirit of progressive, proactive government fostered by the Joint Powers Agreements. Robert Kangas, Chairman of the Cass County Board of Commissioners, finds that:

the Cass County/Leech Lake Band of Ojibwe Wellness Court has not only addressed a significant community problem, but has also served as a national model of intergovernmental cooperation. The level of cooperation that has been experienced has improved relationships on many levels between Cass County and the Leech Lake Band of Ojibwe. We hope that this initiative will continue to serve as a building block between the two governments.<sup>71</sup>

For its part, the Itasca County Board of Commissioners passed a resolution in 2008 acknowledging “the importance of enlisting diverse inter-governmental and inter-jurisdictional involvement in solving problems and delivering services.”<sup>72</sup> The Board officially supports the joint work between the courts, and “welcomes cooperation with the Leech Lake Tribal Council to solve issues common to both governments.”<sup>73</sup>

Finally, this drive to foster collaboration extends to all levels of the Minnesota Judicial Branch. In April of 2007, the Ninth District bench adopted a strategic plan that includes as a priority the desire to “enhance cooperation and coordination with tribal courts.”<sup>74</sup> Minnesota Supreme Court Chief Justice Eric J. Magnuson has promised that developing partnerships is central to building the judiciary of the 21st Century, stating that collaborative justice exemplifies “government at its best, working across boundaries, breaking down barriers and implementing innovative approaches to better serve citizens.”<sup>75</sup>

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70. *Id.*

71. E-mail from John P. Smith, District Court Judge, Cass County, to Robert Kangas, Chairman, Cass County Board of Commissioners (Oct. 8, 2009, 14:31 CST) (on file with author).

72. County Bd. of Comm’rs Res. 02-08-01 (Itasca County 2008).

73. *Id.*

74. E-mail from Paul Maatz, Administrator, Ninth Judicial District, to author Corey Wahwassuck (Aug. 5, 2009, 9:47 CST) (on file with author).

75. Eric J. Magnuson, C.J. of the Minn. Sup. Ct., *The State of the Judiciary, Building a 21st Century Judiciary*, Remarks at the annual convention of the Minnesota State Bar Association (June 26, 2009), in 66 BENCH & BAR OF MINN. 18, Aug. 2009, available at <http://www2.mnbar.org/benchandbar/2009/aug09/judiciary.html> (remarks made by Chief Justice Magnuson at the annual convention of the Minnesota State Bar Association on June 26, 2009).

According to Vincent Knight, Executive Director for the National Tribal Justice Resource Center,<sup>76</sup> “[t]ribal sovereignty was recognized out of a tribal-state controversy and it is only fitting that almost 180 years later tribes and states are beginning to sow the fruits of cooperation and share their governing duties and responsibilities through cooperative agreements sovereign to sovereign.”<sup>77</sup> To gain a full understanding of what a significant step the joint Wellness Courts represent, we turn next to an historical framework of tribal-federal-state relations and the basis for the jurisdictional authority of tribal courts.

#### IV. THE ROOTS OF JOINT JURISDICTION—HISTORICAL ANALYSIS

In all states there are two parallel judicial structures, the state and federal systems. In many states, however, there is a third judicial entity—tribal courts. Since their emergence, which has been only fairly recently in Minnesota, tribal courts have provided a unique challenge in the administration of justice in those states in which they operate. Tribal courts are not United States courts. Although Congress has plenary power over all Indian affairs, Indian tribes remain independent sovereigns with the power and ability to govern themselves by creating and enforcing their own laws.<sup>78</sup>

The National Congress of American Indians (NCAI) states that: Tribal governments are the primary source of law enforcement and government services on fifty-six million acres of land—about 2% of the United States, a land area larger than the ten states of West Virginia, Maryland, Vermont, New Hampshire, Massachusetts, New Jersey, Hawaii, Connecticut, Delaware, and Rhode Island combined.

Tribal governments face a broad range of governmental issues—in many ways the same issues faced by the state and

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76. The National Tribal Justice Resource Center is dedicated to tribal justice systems, personnel and tribal law. The Resource Center is the central national clearinghouse of information for Native American and Alaska Native tribal courts, providing both technical assistance and resources for the development and enhancement of tribal justice system personnel. Programs and services developed by the Resource Center are offered to all tribal justice system personnel—whether working with formalized tribal courts or with tradition-based tribal dispute resolution forums.

77. E-mail from Vincent Knight, Executive Director, National Tribal Justice Resource Center, to author Korey Wahwassuck (Aug. 10, 2009, 09:53 CST) (on file with author).

78. Wahwassuck, *supra* note 5, at 733–34.



federal governments. One key difference is that the federal government has committed itself to a trust responsibility to protect tribal communities, tribal lands, and to provide services. Today, under the federal policy of Tribal Self-Determination, tribal governments make the decisions at the local level and provide many of the services themselves,<sup>79</sup> while the federal government retains its trust responsibility.

Leo Brisbois (White Earth Ojibwe), the first Minnesota State Bar Association President of American Indian heritage and descent, says that:

[t]he Joint Powers Agreements which memorialize the Wellness Court collaborations between the [t]ribal [c]ourt and the [s]tate [d]istrict [c]ourts within Minnesota's Ninth Judicial District are a move forward for the modern era, but they have their genesis deep in history. The government-to-government collaborations of the [t]ribal and [s]tate courts, as branches of co-equal sovereigns, which lie at the heart of the Joint Powers Agreements are not only a manifestation of how things should be, but those government-to-government relationships as equal sovereigns harken to how things were at the beginning of European migration to this continent. The original English colonies and the fledgling United States of America thereafter regularly negotiated and entered into government-to-government relationships with the indigenous tribes of North America, i.e. treaties. Indeed, the status of American Indian communities as sovereign nations is enshrined in the Constitution of the United States wherein the Federal Government reserves to itself the power to make treaties and regulate trade with the Indian Tribes of the continent. This is not to say that relations between Tribal government and the Federal and State governments of the United States during the treaty era were ever all that easy, but it is evident from even a cursory consideration of intervening North American history that American Indian communities suffered most egregiously when mainstream governmental units acted with either indifference to or outright hostility toward the sovereign status of the American Indian Nations. The execution of the Joint Powers Agreements between the Tribal Court and State District Courts within the Ninth Judicial District are an important example of how broader inter-governmental relations can begin to

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79. NCAI Policy Issues, <http://www.ncai.org/Policy-Issues.6.0.html> (last visited Nov. 13, 2009).

come full circle back to that of co-equal sovereigns; it is fitting therefore that just as the Wellness Courts promote and foster healing for individuals within our communities, the mutual respect and efforts at cross-jurisdictional understanding and collaboration giving rise to the Wellness Courts, as embodied in the Joint Powers Agreements, promote and foster healing within the circle of Nations.<sup>80</sup>

*Cohen's Handbook of Federal Indian Law*<sup>81</sup> gives an extensive history of federal Indian policy outlining why history matters in the context of current tribal courts. The history that is relevant to this study begins with the period of Allotment and Assimilation (1871–1928).<sup>82</sup> During the period of Allotment and Assimilation, the United States government took commonly held tribal lands and allotted them to individual tribal members.<sup>83</sup> This had the effect of breaking up the tribal unit.<sup>84</sup> The purpose behind the assimilationist policy was to have the same law apply equally to Indians as applied to whites.<sup>85</sup> Another effort during this period of assimilation and civilization was the forced re-education of Indian children at boarding schools that were often long distances from the reservations.<sup>86</sup> The period of Indian Reorganization (1928–1942)<sup>87</sup> marked a transition to increased tolerance and respect for traditional Indian culture. This period was highlighted by the Indian Reorganization Act of 1934 that included the Indian tribes' authority, within prescribed limits, to operate as governmental units

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80. E-mail from Leo Brisbois, President, Minn. State Bar Ass'n, to author Corey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (July 27, 2009, 23:49 CST) (on file with author).

81. FELIX S. COHEN, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* (Matthew Bender ed., LexisNexis 2005) (1941).

82. *Id.* at 75–84.

83. *Id.* at 75–80.

84. *See id.* at 80 (explaining that the assimilation process had the effect of transforming Indian culture into white culture. "Assimilationists wished to civilize the Indian and drive the native into the mainstream of civilization. Thus the goal was to end the tribe as a separate political and cultural unit, destroy the Indian's own heritage and language, and replace all of this with a 'civilized' American heritage. ").

85. *See id.* at 81 (providing the example of an 1883 incident where Congress interfered in an intratribunal criminal matter after one Sioux killed another Sioux on a reservation and after the tribe applied its own criminal regulation, the Sioux was prosecuted and convicted in federal district court when Congress set up a system of regulation of Indian criminal law. However, on appeal, the Supreme Court held that in the absence of a specific congressional statute the federal court lacked criminal jurisdiction).

86. *Id.* at 81.

87. *See COHEN, supra* note 81, at 84.

including the creation of tribal courts.<sup>88</sup> The Indian Reorganization period was followed by the period of Termination (1943–1961)<sup>89</sup> in which seventy Indian tribes and bands were terminated by congressional act in 1954.<sup>90</sup> Another policy of this period was the passage of Public Law 280, which transferred criminal and civil jurisdiction over Indian lands from the federal government to the state government in five states.<sup>91</sup> There were provisions for this to be done in all other states.<sup>92</sup> The current period of Self-Determination and Self-Governance (1961–present)<sup>93</sup> recognizes tribes as the basic government unit of Indian policy that has allowed tribal courts to develop and strengthen.<sup>94</sup>

*Cohen's Handbook of Federal Indian Law* also discusses at length the nature of tribal powers and the independent origin of tribal sovereignty, pointing out that

[m]ost Indian tribes were independent, self-governing societies long before their contact with European nations, although the degree and kind of organization varied widely among them. The forms of political order included multi-tribal confederacies, governments based on towns or pueblos, and systems in which authority rested in heads of kinship groups or clans . . . . Like other governments, Indian tribal governments organized collective action, facilitated social control, and resolved disputes.<sup>95</sup>

“The history of tribal self-government forms the basis for the exercise of modern powers,”<sup>96</sup> and “Indian tribes consistently have been recognized, first by the European nations, and later by the United States, as ‘distinct, independent political communities,’ qualified to

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88. *See id.* at 86 (also known as the Wheeler-Howard Act, 48 Stat. 984–988 (1934) (codified as amended at 25 U.S.C. § 461 et seq.)).

89. *See* COHEN, *supra* note 81, at 89.

90. *See id.* at 89–96. In the 1950s, termination became official Indian policy when the House of Representatives passed a resolution on July 1, 1952 which directed the Committee on Interior and Insular Affairs to conduct a full investigation into Bureau of Indian Affairs activities and draft legislative proposals to achieve termination of all federal supervision and control over Indians. *See id.* at 94; *see also* H.R. Rep. No. 82–2503 (1952).

91. COHEN, *supra* note 81, at 96 (These five states were California, Minnesota, Nebraska, Oregon and Wisconsin; exceptions were made for individual reservations in Minnesota, Oregon, and Wisconsin).

92. *Id.* at 96.

93. *Id.* at 97.

94. *Id.* at 98.

95. *Id.* at 204.

96. *Id.* at 205.

exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty.”<sup>97</sup> Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice.<sup>98</sup> Tribes’ relationship with the federal government began with the sovereign powers of independent nations.<sup>99</sup> Tribes came under the authority of the United States through treaties and agreements between tribes and the federal government, and since that time “[t]he established tradition of tribal independence within a tribe’s territory has survived the admission of new states, citizenship of the Indians, and other changes in American life.”<sup>100</sup> According to Cohen,

[p]erhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather ‘inherent powers of a limited sovereignty which has never been extinguished.’<sup>101</sup>

Indeed, “[n]either the passage of time nor the apparent assimilation of native peoples can be interpreted as diminishing or abandoning a tribe’s status as a self-governing entity.”<sup>102</sup>

The significance and contribution of tribal systems of governance cannot be overemphasized. In 1987, the United States Senate passed Senate Concurrent Resolution 76—To Acknowledge the Contribution of the Iroquois Confederacy of Nations to the Development of the U.S. Constitution and to Reaffirm the Continuing Government-to-Government Relationship Between Indian Tribes and the United States Established in the Constitution—declaring that:

Whereas, the original framers of the Constitution, including most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts, principles and governmental practices of the Six Nations of the Iroquois Confederacy; and,

Whereas, the Confederation of the original thirteen colonies into one Republic was explicitly modeled upon the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself

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97. *Id.* at 205 (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)).

98. *Id.* at 204–20.

99. *Id.*

100. *Id.* at 206.

101. *Id.*

102. *Id.*

. . . .

Be it resolved by the Senate (the House of Representatives concurring), [t]hat [ ] The Congress, on the occasion of the 200th Anniversary of the signing of the United States Constitution, acknowledges the historical debt which this Republic of the United States of America owes to the Iroquois Confederacy . . . .<sup>103</sup>

With this historical framework as a backdrop, we turn next to an examination of tribal courts themselves. Former Attorney General Janet Reno called the tribal courts “vital” to Native American sovereignty.<sup>104</sup> In fact,

a Native nation’s capable exercise of authority over its territory and population through the effective functioning of its justice system defends the nation’s rights as a sovereign against encroachment by other governments (local, state, and federal) and reinforces its capacity to enter into government-to-government relationships with other nations or states.<sup>105</sup>

Tribal courts are created as an exercise of inherent tribal sovereignty, a sovereignty that predates the United States and its Constitution.<sup>106</sup> The effective operation of such courts is essential to promote the sovereignty and self-governance of tribes.<sup>107</sup> And, as one observer notes, “it is increasingly clear that tribal government is the only government that can create and maintain the social, political, economic, and legal environment necessary to meet the needs of [a]

103. S. Con. Res. 76, 100th Cong., 133 CONG. REC. 12214 (1987).

104. Janet Reno, U.S. Attorney General, Address to Tribal Court Symposium with Northeastern Tribal Nations in Cambridge, Mass. (Dec. 2, 1995).

105. REBUILDING NATIVE NATIONS, *supra* note 1, at 117–18.

106. Gordon K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1401–02 (1985) (tribal courts are far from uniform in both procedural and substantive law); Office of Tribal Justice, U.S. Dept. of Justice, Concurrent Tribal Authority Under Public Law 83-280, Nov. 9, 2000, [http://www.tribal-institute.org/lists/concurrent\\_tribal.htm](http://www.tribal-institute.org/lists/concurrent_tribal.htm) (last visited Jan. 10, 2010).

107. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *cf.* *United States v. Wheeler*, 435 U.S. 313, 323–24 (1978) (holding right to punish Indian offenses is integral aspect of tribal sovereignty); *Klammer v. Lower Sioux Convenience Store*, 535 N.W.2d 379, 384 (Minn. Ct. App. 1995) (holding unnecessary exercise of jurisdiction over Indian affairs by state courts in lieu of tribal courts interferes with tribal sovereignty and self-governance); see also Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1671 (1998) (“Tribal courts are essential institutions of tribal self-governance . . .”); Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 2 (1997).

growing community.”<sup>108</sup> For many Indians, sovereignty and self-governance mean “the ability to operate a justice system that takes into account the goals and traditions of tribal societies, without direct regard for Anglo-American ideals.”<sup>109</sup>

Outside a limited number of Indian law scholars and a handful of judges and attorneys, little is known about tribal courts and tribal justice.<sup>110</sup> This is attributable to a variety of factors, including a general disposition among judges and lawyers that Indian law is irrelevant to their adjudication and practice.<sup>111</sup> The consequences of this lack of knowledge are twofold. On the one hand, it shapes the conception of tribal courts by non-Indians and makes them susceptible to believing any of the few popular reports on Indian justice regardless of the truth of such reports.<sup>112</sup> On the other hand, it causes lawyers, judges, and lawmakers to act with excessive caution when interacting with tribal courts or to avoid them altogether.<sup>113</sup>

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108. Douglas B.L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142, 146 (1995).

109. Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever Be Made Into a Right?*, 90 J. CRIM. L. & CRIMINOLOGY 1317, 1335 (2000).

110. See Christian M. Freitag, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 IND. L.J. 831, 842 (1997); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 293 (1998) (discussing effects of colonial origins and tribal courts' constant strive for internal legitimacy); Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110, 111 (1995) (discussing two-fold challenge of maintaining credibility and legitimacy).

111. E.g., *Little Horn State Bank v. Crow Tribal Court*, 690 F. Supp. 919 (1988) (refusing to inquire into tribal court procedural posture); see Michael F. Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. DET. MERCY L. REV. 709, 713, 715, 717 (1999) (discussing the need to circulate Indian law materials through Bar Association and to develop Indian law committee).

112. See Newton, *supra* note 110, at 285–86. For instance, a 1997 edition of the *Washington Post* printed a letter to the editor from Bernard Gamache, a father whose son was killed in an accident involving tribal police officers. See *id.* at 285 (citing Bernard Gamache, Letter to the Editor, *Simple Justice*, WASH. POST, Sept. 16, 1997, at A16). “Mr. Bernard Gamache’s letter implied that he had no remedy because he could not sue the tribe in state or federal court. He apparently did not even attempt to file suit in tribal court, asserting that the tribe has a ‘makeshift court system that operates without a constitution.’ Mr. Gamache broadened this denunciation of the Yakima Tribal Court system to include *all* tribes: ‘Indian tribal courts have routinely shown their inability to administer justice fairly.’” *Id.* Newton points out that Mr. Gamache’s letter is misleading because federal law provides a forum for such accidents. *Id.* at 286. Thus, in addition to already having misconceptions about the fairness of tribal courts, Mr. Gamache went on to instill those misconceptions in the readers who picked up that day’s copy of the *Washington Post*.

113. See Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311 (2000) (discussing litigants’ preference

According to the NCAI, “States and Indian tribes have a range of common interests.”<sup>114</sup> “Both states and tribes have a shared responsibility to use public resources effectively and efficiently; both seek to provide comprehensive services such as education, health care and law enforcement to their respective citizens; and both have interconnected interests in safeguarding the environment while maintaining healthy and diversified economies.”<sup>115</sup> “In this country, 50 state governments and more than 550 tribal governments are expected to protect the health, safety and welfare of their citizens.”<sup>116</sup> “By keeping these objectives in mind, both entities may realize that they have more in common than in conflict and that coordination and cooperation between states and tribes can be beneficial to all.”<sup>117</sup>

The jurisdiction of tribal courts to adjudicate matters arising in Indian country encompasses all civil and criminal matters absent limitations imposed by federal authority, making tribal courts more like state courts of general jurisdiction than like federal courts.<sup>118</sup> With respect to internal laws and usages, “the tribes are left with broad freedom not enjoyed by any other governmental authority in this country.”<sup>119</sup> Tribal courts face many of the same challenges that state and federal courts do. They schedule and manage a growing case load, tackle complex and often ill-defined legal problems, must appease all parties involved, and through it all conduct a fair and efficient dispensation of justice. Tribal courts, however, face a myriad of challenges which state and federal courts have long since put behind them. Unlike state and federal courts, “tribal courts work under a constant threat that the dominant legal society, acting through Congress or the federal courts, may react to one out of hundreds of tribal disputes in any given year by diminishing the judicial jurisdiction of *all* tribes.”<sup>120</sup>

There are currently at least 350 tribal justice systems operating

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for state court so as to avoid difficulties in having state judges enforce tribal judgments); Newton, *supra* note 110, at 285 (citing Sen. Slade Gorton, *Equal Justice For Indians, Too*, WASH. POST, Sept. 16, 1997, at A17 (expressing concern that non-Indians and state governments may not seek justice in an impartial court when they have a dispute with tribal governments)).

114. NCAI.org, Tribal-State Relations, <https://www.ncai.org/Tribal-State-Relations.28.0.html> (last visited Nov. 13, 2009).

115. *Id.*

116. *Id.*

117. *Id.*

118. See COHEN, *supra* note 81, at 217.

119. *Id.* at 219.

120. Newton, *supra* note 110, at 293.

within Indian Country.<sup>121</sup> Modern tribal courts are far from uniform in structure, jurisdiction, procedure, and substantive norms.<sup>122</sup> While tribal courts are often quite different from state courts, they nonetheless deliberate over the same issues as state and federal courts.<sup>123</sup> Even though pending issues are remarkably similar, the environments in which tribal courts must operate, and the challenges they face, are markedly distinct from state and federal courts. For example, tribal courts are constantly struggling not only to maintain external credibility through the application of Anglo-American legal concepts and procedures, but also to retain internal credibility by not straying too far from Indian cultural influences.<sup>124</sup>

Tradition and culture play an important role in tribal justice systems.<sup>125</sup> As many tribal courts have adopted Anglo-American judicial systems, procedures, and laws, one critical way they retain internal validity is by the integration of traditional notions of justice.<sup>126</sup> Not only do tribes use traditional or non-Anglo procedures, but they also use traditional laws, and are encouraged to do so under the Indian Reorganization Act (IRA) of 1934<sup>127</sup> and the federal policy of self-governance.<sup>128</sup> While many tribes have developed their own legal codes, few are as extensive as those used in state and federal courts.<sup>129</sup> Where tribal law fails to cover certain circumstances, tribal courts will

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121. See National American Indian Court Judges Association Testimony on Fiscal Year 2001 Interior Appropriations, Before the Subcomm. on Interior and Related Agencies of the H. Appropriations Comm., 106th Cong. (2000) (statement of the Honorable Mary T. Wynne, President of the National American Indian Court Judges Association (NAICJA)) [hereinafter Wynne, *Subcomm. on Interior and Related Agencies Testimony*].

122. See Max Minzer, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89 (2005) (discussing tendency of U.S. Supreme Court to treat all tribal courts essentially the same); Newton, *supra* note 110, at 291; Wright, *supra* note 106, at 1401 (tribal courts are far from uniform in both procedural and substantive law).

123. See Wynne, *Subcomm. on Interior and Related Agencies Testimony*, *supra* note 121.

124. See Newton, *supra* note 110, at 293 (discussing effects of colonial origins and tribal courts' constant strive for internal legitimacy); Pommersheim, *supra* note 110, at 111 (discussing two-fold challenge of maintaining credibility and legitimacy); Wright, *supra* note 106, at 1332 (discussing internal legitimacy concerns when tribal courts adopt Anglo-American models).

125. See generally Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995).

126. See B.J. Jones, *Indigenous Renaissance: Law, Culture & Society in the 21st Century: Tribal Courts, Protectors of the Native Paradigm*, 10 ST. THOMAS L. REV. 87, 91 (1997).

127. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C.A. §§ 461–79 (2000)).

128. See Jones, *supra* note 126, at 91.

129. See *id.* at 91–92 (explaining how tribal laws are necessarily limited by federal constraints, such as the Indian Civil Rights Act and the federal court exhaustion rule).



often use federal and/or state law to fill in the gaps.<sup>130</sup> Some tribal justice systems have specific procedural protocols for the establishment and use of custom and tradition within tribal courts.<sup>131</sup> Many Minnesota tribes, for instance, have sections of their judicial codes detailing both the cases to be referred to traditional forums and the importance of using custom in modern tribal courts.<sup>132</sup>

The history of hostility between tribes and states, which once led the U.S. Supreme Court to describe states as the “deadliest enemies” of the tribes, has caused many tribes to resist cooperative dealings.<sup>133</sup> Tribal law scholar and professor Matthew L. M. Fletcher notes that

[f]or decades, Michigan tribes have exercised their sovereignty to cut jurisdictional and cooperative agreements with the State, counties, and townships. Such deals are always a gamble, not only on the merits of the deals, but in the fact that either side can terminate the deal at any time. Moreover, these deals are compromises of tribal sovereignty, something many tribal leaders cannot stomach.<sup>134</sup>

Despite some tribal leaders’ skepticism toward tribal-state agreements, Washburn Law School Associate Professor Aliza Organick points out that “[w]e are in an era when Indian [t]ribes and [s]tates are recognizing common areas of responsibilities and interests that affect their citizens.”<sup>135</sup> According to Professor Organick, the need for

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130. See, e.g., UPPER SIOUX JUD. CODE tit. 1, ch. V, §§ 1–3 (2001), available at <http://maiba.org/pdf/UpperSioux-JudicialCode.PDF> (applicable law); Freitag, *supra* note 110, at 864; Wright, *supra* note 106, at 1402–03.

131. Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 120 (2000). The Navajo Nation’s procedures for invoking and using custom in tribal courts is so well recorded that it is often the case that state courts hearing cases involving Navajo members can look to such codes and implement them without transferring the case to tribal court.

132. See, e.g., GRAND PORTAGE BAND OF CHIPPEWA JUD. CODE tit. I, ch. IX § 2 (2001) available at <http://www.maiba.org/pdf/GrandPortageJudicialCode.pdf> (traditional forum); GRAND PORTAGE BAND OF CHIPPEWA JUD. CODE tit. I, ch. V § 4 (2001), available at <http://www.maiba.org/pdf/GrandPortageJudicialCode.pdf> (tribal customary and traditional law); UPPER SIOUX JUD. CODE tit. 1, ch. V, §§ 1–3 (2001), available at <http://maiba.org/pdf/UpperSioux-JudicialCode.PDF> (applicable law and use of custom); MILLE LACS BAND STATS. ANN. § 601 (2004), available at <http://www.millelacsobjibwe.org/pdf/StatutesTitle10.pdf> (action for causing cultural harm).

133. See COHEN, *supra* note 81, at 593.

134. E-mail from Matthew L.M. Fletcher, Associate Professor, Michigan State Univ. College of Law, and Director, MSU Indigenous Law Center, to author Korey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (July 17, 2009, 14:04 CST) (on file with author).

135. E-mail from Aliza Organick, Associate Professor, Washburn Univ. School of Law, to author Korey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal

government-to-government relationships between tribes and states is inherent in this recognition.<sup>136</sup>

A literature review of law journals and articles by legal scholars reveals the complexities and difficulties that exist in the relationship between tribal courts and state courts. These same and sometimes different problems exist with federal courts. As relayed in *Searching for Justice: American Indian Perspectives on Disparities in Minnesota Criminal Justice System (2005)*,<sup>137</sup> the American Indian Policy Center used a reality-based research process to collect and analyze data from an Indian perspective on how the criminal justice system affected their lives.<sup>138</sup> The statistical information showed that American Indians have the highest poverty rate of any racial/ethnic group in Minnesota.<sup>139</sup> It also revealed a large disparity in the percentage of Indian adults and juveniles that entered the criminal justice system.<sup>140</sup>

This study, while deliberately based on a Native American perspective, identifies issues such as poverty, alcohol and drug abuse, historical trauma, and educational failure as significant problems for the Native American community to overcome.<sup>141</sup> The study also identifies failures in the criminal justice system that create a lack of trust and confidence in the traditional state-operated court system.<sup>142</sup> These failures include a lack of training for criminal justice personnel, lack of communication between the two domains, and a lack of an overall policy for addressing disparities in the criminal justice system.<sup>143</sup>

In his monograph *Role of Indian Tribal Courts in the Justice System, (2000)*, the Honorable B.J. Jones describes how tribal courts function and sets out the limitations on tribal court authority over certain kinds of cases and persons.<sup>144</sup> These are the result of Supreme Court decisions and Acts of Congress.<sup>145</sup> The article also describes the

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Court (Nov. 9, 2009, 11:26 CST) (on file with author).

136. *Id.*

137. See JOHN POUPART ET AL., AMERICAN INDIAN POLICY CENTER, *SEARCHING FOR JUSTICE* (2005), available at <http://www.airpi.org/research/SearchingforJustice/searching.htm>.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. See JOHN POUPART ET AL., *supra* note 137.

144. See B.J. Jones, *Role of Indian Tribal Courts in the Justice System* (2000), available at <http://www.icctc.org/Tribal%20Courts-final.pdf>.

145. *Id.* at 6.

similarities and differences between tribal courts and state courts.<sup>146</sup> Judge Jones concludes that despite the fact that Indian tribal courts are an unknown commodity because people are uneducated about their authority and procedures, tribal justice systems should be respected by those who interact with them.<sup>147</sup>

The problems of limited jurisdiction in the tribal courts are the subject of several law journal articles. *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Act*, addresses the difficulties of enforcing domestic abuse restraining orders against non-Indians on Reservations.<sup>148</sup>

Tribal courts have no criminal jurisdiction over non-Indians for violations of domestic abuse restraining orders and cannot prosecute offenders in tribal courts.<sup>149</sup> *The Legacy of Bryan v. Itasca County, How an Erroneous \$147 County Tax Notice Helped Bring Tribes \$200 Billion in Indian Gaming Revenue*, documents the case that created the concept of civil regulatory authority in favor of tribal government.<sup>150</sup>

Cohen makes clear that cooperative agreements between state and tribal systems are not a new concept.<sup>151</sup> Cohen cites the fact that both tribal leaders and progressive state officials have recognized the advantages of tribal-state compacts, noting that these agreements have created mutual respect between Indian and non-Indian professionals.<sup>152</sup> Cohen encourages these agreements:

Given the complexity, uncertainty, and cost of state and tribal jurisdiction in Indian country, tribes and states may benefit from entering into cooperative agreements or compacts. While federal Indian law privileges Congress as the ultimate arbiter of jurisdictional arrangements, federal statutes do not provide comprehensive resolutions, especially in the civil arena. Furthermore, even when federal statutes exist, such as Public Law 280, tough interpretive questions remain. Judicially crafted rules, sometimes differentiating jurisdiction based on land and tribal membership status, often deny both Indian nations and states of the possibility of effective regulation if they act on their own. In the face of potentially

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146. *Id.* at 2–14.

147. *Id.* at 13–14.

148. Melissa L. Tatum, 90 Ky. L.J. 123, 168–72 (2001–2002).

149. *Id.* at 145–49.

150. Kevin K. Washburn, 92 MINN. L. REV. 919, 920–21 (2008) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)).

151. See COHEN, *supra* note 81, at 589–94.

152. *Id.*

overlapping or conflicting jurisdictional claims, tribal-state cooperative agreements offer both sets of governments the opportunity to coordinate the exercise of authority, share resources, reduce administrative costs, deliver services in more efficient and culturally appropriate ways, address future contingencies, and save costs of litigation. They also enable governments to craft legal arrangements reflecting the particular circumstances of individual Indian nations, rather than relying on uniform national rules. Insofar as cooperative agreements create a stable legal environment conducive to economic development, they may appeal to the common interests of tribes and states. States and tribes have concluded these agreements in a wide array of subject areas, including enforcement of judgments, education, environmental control, child support, law enforcement, taxation, hunting and fishing, and zoning.<sup>153</sup>

According to Cohen, tribal-state agreements generally “contain a clause acknowledging each government’s sovereignty and agreeing to disagree about the precise scope of each government’s jurisdiction.”<sup>154</sup> Examples of other specific provisions in such compacts are agreements “aligning the terms of their regulatory codes, recognizing one another’s judgments, cross-deputizing the officers of each government to act on behalf of the other, creating joint plans, allocating revenues, contracting for the provision of services or technical assistance, and sharing information necessary for regulatory or law enforcement effectiveness.”<sup>155</sup> Cohen describes these agreements “as reintroducing the ‘consent principle’ into relations between Indian nations and other governments.”<sup>156</sup> Indeed, a willingness to acknowledge historical reality is essential to the long-term success of such agreements. As Professor Organick advises:

[T]o maximize the potential benefits that these new relationships can provide for both parties, it is imperative that these relationships are built on a foundation of mutual respect and appreciation. It is equally important for states to understand that the Tribes are not mere communities of the state, but are sovereign nations who are critical stakeholders in the decisions that affect them. Past state policies that negatively affected Tribal nations must be acknowledged in order to create collaborative and creative problem-solving

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153. *Id.* at 589–90 (citations omitted).

154. *Id.* at 592.

155. *Id.*

156. *Id.*

and in order to enhance understanding between the parties in the future.<sup>157</sup>

With the jurisdictional authority of tribal courts and precedent for tribal-state collaboration firmly established in law and history, we turn next to specific examples of cooperative agreements and their power to change systems and lives.

#### V. THE FRUITS OF CHANGE—BENEFITS OF JOINT JURISDICTION

The Center for Court Innovation (Center) is a nonprofit think-tank dedicated to justice system reform.<sup>158</sup> Since 1993, the Center has helped design and implement strategies for improving the performance of justice systems nationally and internationally.<sup>159</sup> The Center currently operates more than a dozen demonstration projects, each of which is experimenting with new solutions to difficult problems like addiction, mental illness, delinquency, domestic violence, and community disorder.<sup>160</sup> Aaron Arnold is the Center's Director of Tribal Justice Exchange. Arnold points out that "[f]ederal, state, and tribal jurisdictions across the country are beginning to recognize the importance of interjurisdictional communication and cooperation in addressing common problems. These problems, which include drugs, gangs, domestic violence, juvenile delinquency, family relations, and other critical issues, transcend government boundaries and call for a collaborative response."<sup>161</sup> After having had the opportunity to observe both Wellness Courts in action, Arnold stated that "[m]ulti-jurisdictional courts, like the Leech Lake Wellness Courts pioneered in Minnesota, offer an important new approach that other jurisdictions can adapt to address local problems in a more coordinated and effective manner."<sup>162</sup>

The Honorable Eugene White-Fish served for more than eight years as President of the National American Indian Court Judges

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157. Organick, *supra* note 135.

158. About the Center for Court Innovation, <http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&pageID=471> (last visited Nov. 13, 2009).

159. *Id.*

160. See ROBERT V. WOLF, BUREAU OF JUSTICE ASSISTANCE, DON'T REINVENT THE WHEEL: LESSONS FROM PROBLEM-SOLVING COURT 17 (2007), available at [http://www.courtinnovation.org/\\_uploads/documents/Dont%20Reinvent.pdf](http://www.courtinnovation.org/_uploads/documents/Dont%20Reinvent.pdf).

161. E-mail from Aaron Arnold, Director, Center for Court Innovation's Change, to author Korey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe (July 17, 2009, 13:37 CST) (on file with author).

162. *Id.*

Association (NAICJA).<sup>163</sup> Judge White-Fish maintains that mutually determined cooperative agreements between tribes and states strengthen both sovereigns and “demonstrates a sense of maturation and bilateral acceptance of their legal environment and creates a positive atmosphere in which to foster growth and economic development.”<sup>164</sup> Judge White-Fish also points out that:

Competition between tribes and states is mutually destructive, wastes taxpayer dollars, impedes economic development, and is based on racism and self-defeatism. Only through communication, cooperation, and understanding can sovereignty be made a positive force for the continued growth and development of both sovereigns and the people they serve. Cooperative agreements between states and tribes in which both sovereigns are recognized provide a positive roadmap to future prosperity for both sovereigns and brings a true sense of peace and harmony that nurtures effective and efficient governance for both.<sup>165</sup>

Although the Joint Jurisdiction Wellness Courts are truly groundbreaking, the comments of Aaron Arnold and Judge Eugene White-Fish demonstrate that current socio-political conditions and fiscal reality are bringing tribes and states together on many fronts. One does not have to look hard to find stand-out examples of innovative tribal-state collaborations. Several are discussed below.

Almost all states that have crafted some form of tribal court/state court agreement on recognition of judgments and other judicial matters have done so through the formation of a tribal-state forum. The forums typically consist of state, federal, and tribal court judges and lawyers. The objective of a forum is for individuals to come together in order to discuss and formulate cooperation between state and tribal courts. While federal law prohibits forums from altering jurisdictional distribution between the state and tribes, there is nothing prohibiting forums from developing struc-

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163. A non-profit corporation established in 1969, the NAICJA is a national voluntary association of tribal court judges. Its membership is primarily judges, justices and peacemakers serving in tribal justice systems. NAICJA is devoted to the support of American Indian and Alaska Native justice systems through education, information sharing and advocacy. The mission of the Association, as a national representative membership organization, is to strengthen and enhance tribal justice systems. See National American Indian Court Judges Association, <http://www.naicja.org> (last visited Jan. 10, 2010).

164. Knight, *supra* note 77 (quoting Judge Eugene White-Fish) (on file with author).

165. *Id.*

tures for cooperation within the current jurisdictional allocation and the mutual recognition of judgments. The forum is an extension of state and tribal judiciaries working to develop procedural guidelines, not a legislative body attempting to alter substantive law. The first meeting of Minnesota's Tribal-State Court Forum was held in July 1998, when working groups were created to explore issues such as Full Faith & Credit, Children's Law, and Judicial Exchange. After a decade in existence, Minnesota's Forum continues to be active.<sup>166</sup>

The State of Wisconsin has led the way in bringing tribal and state courts together, as evidenced by the Tribal/State Protocol for the Judicial Allocation of Jurisdiction Between the Four Chippewa Tribes of Northern Wisconsin and the Tenth Judicial District of Wisconsin.<sup>167</sup> Also known as the *Teague Protocol*,<sup>168</sup> this agreement "effectively and efficiently allocate[s] judicial resources by providing a legal mechanism that clearly outlines the path a legal dispute will follow when both a tribal court and a circuit court have jurisdiction over a matter."<sup>169</sup> The "protocol does not apply to cases in which controlling law commits exclusive jurisdiction to either the tribal court or the circuit court."<sup>170</sup> The protocol also provides for a judicial conference in which the judges schedule a joint hearing on the issue of allocation of jurisdiction at which both judges preside.<sup>171</sup> The judges have the discretion to jointly decide on the location of the hearing and the conduct of the hearing.<sup>172</sup>

Another shining example of collaboration is found in northeastern South Dakota. Chief Judge B.J. Jones of the Sisseton-Wahpeton Oyate has presided over a Tribal Treatment (Drug) Court for ten years during which time the Court has worked extensively with adjoining state courts, which do not have drug courts, to assure that Oyate members have an opportunity to complete the Tribal Treat-

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166. Wahwassuck, *supra* note 5, at 743.

167. See Tribal/State Protocol for the Judicial Allocation of Jurisdiction Between the Four Chippewa Tribes of Northern Wisconsin and the Tenth Judicial District of Wisconsin, Dec. 7, 2001, available at <http://www.tribal-institute.org/2004/handouts/Closing-Tribal%20Perspective%20-%20David%20Raasch-State%20Tribal%20Courts%20Work%20to%20Build%20-%20Handouts.pdf> [hereinafter *Teague Protocol*].

168. Judge David Raasch, *State, Tribal Courts Work to Build Cooperation*, THE THIRD BRANCH, Summer 2004, at 7, available at <http://www.wicourts.gov/news/thirdbranch/docs/summer04.pdf>.

169. *Teague Protocol*, *supra* note 167, § 1.

170. *Id.*

171. *Id.* § 6(a).

172. *Id.*

ment Court as an alternative to incarceration for felony drug and alcohol offenses.<sup>173</sup> During this time, over 130 Oyate members and other Indians have completed the Treatment Court.<sup>174</sup> Eighty percent of the graduates were referred by adjoining state courts and had received suspended impositions of sentence or execution of sentences with a condition that they complete the Treatment Court.<sup>175</sup> The average sentence suspended was three years in the penitentiary and the majority of these graduates have remained law-abiding and gainfully employed in the community.<sup>176</sup> Judge Jones points out that without the cooperation of adjoining state courts and their willingness to suspend sentences to allow Oyate members to complete the Treatment Court, the state incarceration rate for Oyate members would be much higher than the current rates.<sup>177</sup>

As discussed above, tribes in Michigan have been entering into cooperative agreements with their state counterparts for many years. Michigan State University Associate Professor Matthew L.M. Fletcher points out that

for most tribes in Michigan, especially in the lower peninsula, the deals have been a qualified success. The omnibus tax agreement with the State treasury had the benefit of expanding reservation boundaries for taxation purposes, recognizing and legitimizing tribal courts, and simply saving money for many tribal members. The tribal court judgment recognition agreement with the Michigan Supreme Court helped pave the way for cross-deputization agreements with counties, which led to other agreements, such as snow plowing. Finally, the very notion that tribes and local governments could use an inter-sovereign agreement to blur complex jurisdictional lines has import for environmental regulation and economic development.<sup>178</sup>

Other projects bring tribal and state leaders together to exchange ideas and work toward solving common problems. For example, the NCAI and the National Conference of State Legislatures (NCSL) have been working together for five years to promote intergovernmental cooperation between states and tribes through a

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173. E-mail from Honorable B. J. Jones, Chief Judge, Sisseton-Wahpeton Oyate, to author Corey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (Aug. 10, 2009, 09:35 CST) (on file with author).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *See*, Fletcher, *supra* note 134.



State-Tribal Relations Project.<sup>179</sup> The Bureau of Justice Assistance, the National Conference of Chief Justices and the Criminal Justice Center for Innovation at Fox Valley Technical College initiated a symposium in 2005 called *Walking on Common Ground: Pathways to Equal Justice*.<sup>180</sup> The purpose of the symposium was to address the common concerns and problems of the federal, state, and tribal courts as they relate to Indian issues.<sup>181</sup> A follow-up conference, *Walking on Common Ground II*, was held in 2008 to build on that work.<sup>182</sup> Another example is *The First New York Listening Conference*, held in 2006 in Syracuse, New York.<sup>183</sup> The conference brought together participants from New York's tribal, federal, and state court systems to exchange information and learn about their respective concepts of justice.<sup>184</sup>

Other collaborations have developed between tribes themselves, including formation of intertribal courts that allow separate nations to pool human and financial resources, leading to stronger courts and stronger justice systems overall.<sup>185</sup> For example, the Southwest Intertribal Court of Appeals (SWITCA) is a voluntary court of appeals available to indigenous nations in Arizona, Colorado, New Mexico, and west Texas.<sup>186</sup> The Northwest Intertribal Court System (NICS) is a consortium of Native nations based in Puget Sound region of Western Washington.<sup>187</sup> NICS also supported development of tribal court systems for Lummi, Suquamish, Nisqually, and Squaxin Island nations.<sup>188</sup>

Cooperative law enforcement agreements are another example of collaboration. These cross-deputization agreements between tribal police and county and state authorities improve the reach of tribal law enforcement and yield positive results such as improving the image of tribal law enforcement and generating greater respect for the entire

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179. National Congress of American Indians, Tribal-State Relations, <http://www.ncai.org/index.php?id=28&type=123> (last visited Nov. 13, 2009).

180. U.S. DEP'T OF JUSTICE, WALKING ON COMMON GROUND: PATHWAYS TO EQUAL JUSTICE (2005), available at [http://its.fvtc.edu/CJ/WOCCG05/WOCCG\\_Brochure.pdf](http://its.fvtc.edu/CJ/WOCCG05/WOCCG_Brochure.pdf).

181. *Id.*

182. U.S. DEP'T OF JUSTICE, WALKING ON COMMON GROUND II: CONTINUING PATHWAYS TO EQUAL JUSTICE (2008), available at <http://www.fvtc.edu/public/itemattach.aspx?type=page&id=20496>.

183. JO ANN HARRIS, THE NEW YORK FEDERAL-STATE-TRIBAL COURTS FORUM: FIRST NEW YORK LISTENING CONFERENCE (2008), available at <http://www.nyfedstatetribalcourtsforum.org/pdfs/NYListeningConference2006.pdf>.

184. *Id.*

185. REBUILDING NATIVE NATIONS, *supra* note 1, at 133.

186. *Id.* at 133-34.

187. *Id.* at 134.

188. *Id.*

tribal justice system.<sup>189</sup> The Leech Lake Band of Ojibwe has entered into such an agreement with other local law enforcement agencies.<sup>190</sup> Itasca County Attorney Jack Muhar recalls that his earliest experience in tribal/county cooperation came from the negotiation of the Cooperative Law Enforcement Agreement (Agreement) between the Leech Lake Band and its neighboring Counties of Itasca, Beltrami, Cass and Hubbard, as well as the City of Cass Lake.<sup>191</sup> Completed in October of 2000, the Agreement authorized law enforcement officers from the tribe and counties to issue citations to either state or tribal court under the respective laws of the tribe or state.<sup>192</sup> Muhar notes that this

was a great step forward in cooperative law enforcement. A significant jurisdictional issue for tribal and state law enforcement officers was resolved regarding conduct which may be civil regulatory and subject to tribal court or criminal prohibitory and subject to the state courts. The result to our residents was greater highway safety.<sup>193</sup>

Former Cass County Attorney Earl Maus observed that the Agreement made all law enforcement better.<sup>194</sup>

The Leech Lake Band has also received federal funding to conduct a feasibility study and create a master plan for a state-of-the-art Regional Justice and Public Safety Center with adequate space to host visiting judges from other tribal, state, and federal courts, including Bureau of Indian Affairs probate judges.<sup>195</sup> The Public Safety Center will have adequate space to house overflow inmates from local sheriffs' departments, resulting not only in a cost savings to the counties, but also in a unique economic development opportunity for the Leech Lake Band.<sup>196</sup> The planning team for this project includes not only tribal representatives, but also representatives from Minnesota's Ninth Judicial District, the Minnesota Department of Corrections, and the Minnesota Office of Justice Programs.<sup>197</sup>

Other instances of local tribal-state collaboration include agree-

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189. *Id.* at 135–36.

190. Muhar, *supra* note 59.

191. *Id.*

192. *Id.*

193. *Id.*

194. Molly Miron, *Take Historic Step*, THE BEMIDJI PIONEER (Bemidji, Minn.), Feb. 24, 2007, at 1.

195. Competitive Grant, *supra* note 18.

196. *Id.*

197. *Id.*

ments concerning the provision of Child Welfare Services; district judges holding joint meetings with tribal court judges, giving judges from all jurisdictions an opportunity to learn about each others' court processes, as well as to discuss topics of mutual concern; and tribal court administrators being invited to participate from time to time in district court administrator meetings.<sup>198</sup>

Collaboration between tribal and state courts is expanding into the field of juvenile justice as well. In 2009, legislation was passed in Minnesota that would potentially mandate transfer of some state court first-time juvenile offenders to tribal court if the tribe has a restorative justice program.<sup>199</sup> In addition, the Leech Lake Tribal Council recently passed a resolution in support of a multi-jurisdictional juvenile delinquency court in collaboration with the counties overlapping the Leech Lake Reservation.<sup>200</sup> Since Leech Lake currently has no probation delivery system of its own, Cass County Probation Services will provide host probation services for the cases of tribal youth whose cases will be transferred to the Leech Lake Tribal Court from all four local district courts. Although the probation officer will be an employee of Cass County Probation, the officer will have office space in the tribal court facility and will report directly to the tribal court judge. Finally, greater communication and collaboration between tribal courts and state courts is being encouraged in cases subject to the Indian Child Welfare Act.<sup>201</sup>

As the discussion above clearly demonstrates, collaboration between tribal and state courts is becoming more and more popular and is being seen as a practical solution to common challenges faced by both systems. Sue Dosal, State Court Administrator for the Minnesota Judicial Branch, points out that

[c]ooperation among state and tribal courts has become

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198. Wahwassuck, *supra* note 5, at 748–51 (2008).

199. MINN. STAT. § 609.092 (2009). Under this new law, the prosecutor must maintain a list of approved restorative justice programs, and then refer many first-time juvenile defenders to one of those programs. *Id.* The law also contains a provision mandating a preference for restorative justice programs that are “culturally specific” to the offender, assuming that such a program is on the list of approved programs. *Id.*

200. Leech Lake Tribal Council Res. No. 2009-62, *Resolution in Support of Creation of Multi-Jurisdictional Juvenile Delinquency Court* (Leech Lake Reservation 2008) (on file with author).

201. Donna J. Goldsmith & Korey Wahwassuck, *Achieving Permanency Through Tribal-State Judicial Cooperation*, JUDGE’S PAGE NEWSLETTER, July 2008, at 22, available at <http://www.casaforchildren.org/> (click on “Judges” link at upper right, “Newsletter Archive” in right-hand menu, then select “July 2008”).

essential to the effective administrative of justice. Strengthening relationships between our courts has been approved by the Minnesota Judicial Council as a key initiative of the fiscal year 2010–2011 Judicial Branch Strategic Plan. I am proud that Minnesota is a national leader in fostering state-tribal court collaboration.<sup>202</sup>

And in these times of fiscal crisis throughout the nation,<sup>203</sup> it is essential for all systems to make the most of available resources. Recognizing that budget constraints are the reality for the foreseeable future, Minnesota Supreme Court Chief Justice Eric Magnuson has promised that “the Judicial Branch is redoubling its efforts to answer the question, ‘how can we do this better?’ We have found that the quality of the answer often depends on who helps us tackle the question.”<sup>204</sup> Tribes such as the Leech Lake Band of Ojibwe stand ready, willing, and able “to step in and be part of the solution for the State’s budget shortfall.”<sup>205</sup>

Joint tribal-state jurisdiction has brought numerous benefits. First and foremost, the collaborative venture makes our Wellness Courts possible.<sup>206</sup> Because of the geographical distances and the demands of such problem-solving courts, we do not believe that the program could have been realistically operational without such collaboration.<sup>207</sup>

Second, the use of resources is maximized. Because we are able to use the resources of both the tribal court and the state court, we can choose which of the resources will be most effective in addressing the needs of our participants. In the past, the services that a person might have needed could have been best provided by a tribal entity, such as their drug and alcohol treatment program. However, access to such a service could not have been directed by the state court with any authority. Now, by exercising jurisdiction jointly, we have the ability to direct the participant to the most appropriate program. The result is a more efficient method of getting the desired outcome.

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202. E-mail from Sue Dosal, State Court Adm’r, Minn. Judicial Branch, to author Corey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (Oct. 19, 2009, 22:50 CST).

203. E.g., Nancy Gibbs, *The Great Recession: America Becomes Thrift Nation*, TIME, Apr. 15, 2009, available at <http://www.time.com/time/nation/article/0,8599,1891527,00.html> (“Nearly half [of Americans] say their economic status declined this year, and 57% now think the American Dream is harder to achieve.”).

204. Magnuson, *supra* note 75.

205. See LaRose, *supra* note 68.

206. See *supra* Part III.

207. See *supra* Part III.

Third, the development of cultural understanding has occurred. Through the course of the operation of the Wellness Courts, each court has developed an awareness and sensitivity to cultural values as well as cultural differences. The day-to-day communication required for the operation of the Wellness Courts familiarizes each court and their personnel with cultural values. These cultural values are important to understand because they are part of the makeup of each individual and his or her approach to society. The development of cultural understanding reinforces goals of the Wellness Courts. Retired Minnesota Supreme Court Chief Justice Russell A. Anderson agrees that the Joint Wellness Courts represent an innovative and progressive program that helps people and helps society.<sup>208</sup> Justice Anderson's experiences as a trial court judge in the Ninth Judicial District helped him appreciate the significance of the cooperative efforts that these courts have made:

[t]his cooperative program between the state court and the tribal court has demonstrated how jurisdictional and cultural differences can work together for the benefit of the citizens of the State of Minnesota . . . . A gap in understanding between tribal courts and state courts has existed for far too long. This effort represents an important step in bridging that gap.<sup>209</sup>

Fourth, the opportunities for funding are enhanced. The multi-jurisdictional approach of the Wellness Courts allows us to seek funding through each entity separately or as a joint endeavor. This allows flexibility in our approach to funding to sustain the operation of the Wellness Courts. It also promotes the development of ideas for new programs that may be of benefit to our respective courts.

Fifth, cooperative efforts have increased public trust and confidence. The state court has historically been viewed by the Indian community as an institution that is biased against them and one that does not have their best interests in mind.<sup>210</sup> The Wellness Courts change this perspective by working together in an effort to help those who are chemically addicted find a road to a better life. The tribal court as a working partner in this effort demonstrates that the goals of both courts are the same. It further demonstrates that as institutions

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208. E-mail from Russell Anderson, former Chief Justice, Minnesota Supreme Court, to author John P. Smith, District Court Judge, Ninth Judicial District, Cass County (July 28, 2009, 14:35 CST) (on file with author).

209. *Id.*

210. See Brisbois, *supra* note 80; Maus, *supra* note 57.

we are capable of working with each other. This has also resulted in improvements in the relations of other inter- governmental agencies.<sup>211</sup>

As President of the National American Indian Court Judges Association, the Honorable Judge Eugene White-Fish considers himself fortunate to have seen and heard about the different innovations around Indian country. Judge White-Fish has visited both Wellness Courts and finds that the collaboration “is remarkable and greatly benefits both communities as demonstrated by the results. At the same time, the joint effort affirms the sovereignty of the Tribe and State. Collaboration and cooperation are an important trend of the future.”<sup>212</sup>

## VI. LOOKING FORWARD—CONCLUSION

Each jurisdiction, be it tribal or state, brings to the table tools unique to its system, and by exercising jurisdiction jointly, the courts can leverage scarce resources and achieve better results. For far too long, opportunities to change the perspective of racial and cultural fairness in the judicial system have been lost. We work hard to do our best, but the reality is that sometimes we fail. We fail, many times, because of misunderstanding. What would be an even worse failure would be if we did not try to understand each other. This Joint Jurisdiction model demonstrates that state courts and tribal courts can work together to promote the interests of the public. In fact, the failure to do so works against the public interest since there is so much to be gained by working together.

It was once said that “[o]bstacles are those frightful things you see when you take your eyes off your goal.”<sup>213</sup> While the prospect of exercising joint jurisdiction may appear daunting at first, the model created by the Leech Lake Tribal Court and the district courts for Cass and Itasca Counties can be reproduced elsewhere, in other contexts. Our journey has not been without obstacles, but we have

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211. See Brisbois, *supra* note 80.

212. E-mail from Eugene White-fish, President, Nat’l Am. Indian Court Judges Ass’n, to author Corey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court (Aug. 12, 2009, 9:21 CST) (on file with author).

213. This quotation is typically attributed to either Henry Ford or Hannah More. The original source remains unknown. See, e.g. AMERICAN SOCIETY OF CIVIL ENGINEERS, QUALITY IN THE CONSTRUCTED PROJECT: A GUIDE FOR OWNERS, DESIGNERS, AND CONSTRUCTORS 10 (2d ed. 2000) (attributing quotation to Henry Ford); THE BOOK OF POSITIVE QUOTATIONS 459 (John Cook ed.) (2d ed. 1993) (attributing the quotation to Hannah More).

found solutions to each problem. As long as we are working toward a common goal, the problems that we encounter take care of themselves. In the end, each obstacle has transformed into an outstanding opportunity for greater understanding and change, all through open communication, patience and flexibility.

On that cold February morning when Minnesota Supreme Court Associate Justice Lorie Gildea witnessed the Leech Lake flags being installed in the courtrooms of the Itasca County District Court and the Joint Powers Agreement being signed, she said that she had been “advised by an elder that it was fitting this ceremony took place in the winter, for that is the time of storytelling.”<sup>214</sup> She told the crowd that she hoped “the story of today is told so that everyone can learn the power of partnership and the good that can come from that partnership.”<sup>215</sup> When we give we also get, and the Wellness Courts are working proof of this axiom. Society needs to pay closer attention to this old but often neglected reality.<sup>216</sup> Joint tribal-state jurisdiction in northern Minnesota has built a bridge, not only between systems, but between cultures. Ultimately, it will be up to those who come after us to ensure that the way remains open. As one who witnessed the Joint Powers Agreement being signed in Itasca County pointed out, “[t]he youth of today and tomorrow will become the adults and then the elders who carry on this agreement and craft it to fit the changing needs.”<sup>217</sup> Leech Lake Tribal Council Member Robbie Howe was also in attendance that day, and she said that “the Joint Powers Agreement show[s] that anything is possible and that together ‘we can conquer anything.’”<sup>218</sup> That is the legacy: a gift of hope passed down to future generations.

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214. Louise H. McGregor, *Joint Powers Agreement Signed by Leech Lake Tribal and Itasca County 9th Judicial District Court Judges*, WESTERN ITASCA REV., Feb. 28, 2008, at 4 (quoting Lorie Gildea).

215. *Id.*

216. Sommer, *supra* note 42 (explaining that the Lake Band of Ojibwe Wellness Court is working proof that “when we give, we also get” and arguing that society needs to pay closer attention to this axiom).

217. McGregor, *supra* note 214, at 4 (quoting a speaker at the signing of the Joint Powers Agreement).

218. Daniel LeClaire, *Flags Demonstrate ‘Power of Partnerships’*, CASS LAKE TIMES (Cass Lake, Minn.), Feb. 28, 2008, at 1.