

INJUSTICE IN INDIAN COUNTRY: THE NEED FOR A SERIOUS RESPONSE TO NATIVE AMERICAN ELDER ABUSE

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Traditionally, elders have held an important position filled with prestige and authority in Native American culture. However, elder abuse is still a problem in this community. To combat this issue, a number of different tactics have been employed. The success of various programs, however, has been highly contingent upon their cultural sensitivity. Additionally, the attempts on various levels—tribal, state, and federal—have created another level of confusion and have slowed progress.

Mr. Seigler offers a three-prong resolution to combat these issues. First, implementation of tribe-specific alternative dispute resolution mechanisms should be increased and the tribal elder abuse codes should be reformed. Second, jurisdictional issues between different levels of government should be resolved and the independence of tribal court systems in dealing with these issues should be increased. Finally, Mr. Seigler suggests increasing federal monetary appropriations under the Older Americans Act to attack the causes of elder abuse and create programs to raise awareness and promote prevention.

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I. Introduction

A Native American tradition holds that when a young member of the tribe bids farewell to an elder, the elder replies, "May you live as long and as good a life as I have and when you grow old may the young ones treat you with honor and respect."¹ Generally, Native American cultures place tribal elders in a unique and important social position.² Elders have traditionally been seen as "repositories of knowledge" and "invaluable community resources" by younger members of the tribe.³ They have occupied positions of prestige and authority within their tribes and have been viewed as purveyors of wisdom and experience.⁴ In the words of the Great Lakes Inter-Tribal Council, "Elders are the ones who teach us the ways of the ancient ones. They are the ones who have lived through many changes and see things through wiser eyes . . . and say, 'After all is said and done, this is what is really important in life.'"⁵

Unfortunately, despite their strong traditions, Native American elders have fallen victim to an alarmingly pervasive trend within the senior population of the United States: elder abuse. As researchers study the problem and interview informants, stories of abuse in all of its various guises begin to surface. Informants' stories vary in form and degree.⁶ One elderly woman was removed from her nursing home so that her family could take advantage of her income checks, while another elderly woman had her necessary medications withheld as punishment.⁷ One elder was beaten and sexually molested by her children; another had her home "taken over by younger people on the reservation who [were] alcoholic."⁸ Another elder signed over her home to her grandson, expecting to live there until she passed; instead, he evicted her.⁹ Informants have also revealed information

1. NAT'L INDIAN COUNCIL ON AGING, PREVENTING AND RESPONDING TO ABUSE OF ELDERS IN INDIAN COUNTRY 18 (2004) [hereinafter PREVENTING & RESPONDING], available at http://www.nicoa.org/Elder_Abuse/elderabusereport.pdf; see also *This We Believe*, ESSELEN TRIBE OF MONTEREY COUNTY, <http://www.esselen.com/believe.html> (last visited Oct. 6, 2011).

2. See HALLIE BONGAR WHITE, SW. CTR. FOR L. & POL'Y, OFFICE ON VIOLENCE AGAINST WOMEN, ELDER ABUSE IN TRIBAL COMMUNITIES 2 (2004), available at <http://www.vaw.umn.edu/documents/elderabusetribe/elderabusetribe.pdf>.

3. *Id.*

4. *Id.*

5. PREVENTING & RESPONDING, *supra* note 1, at 18.

6. See *id.* at 5.

7. *Id.*

8. *Id.*

9. *Id.*

concerning particular patterns of exploitation or abuse.¹⁰ For example, young children are frequently left with elders who do not have the strength, resources, or assistance needed to care for them.¹¹ Elders are often left isolated from their family and friends, and those family members who want—or have a duty—to provide elder care often lack adequate resources.¹²

Elder abuse is a widespread problem across the United States regardless of race, color, or culture.¹³ While the exact extent of the problem within Indian Country¹⁴ remains largely unknown, elder abuse requires new responses due to the unique cultures of the various tribes, combined with the diverse experiences of their elders and their attitudes toward abuse.¹⁵ Measures have been taken at the tribal, federal, and state levels, but new approaches must be specifically tailored to Native American cultures—perhaps even on a case-by-case basis¹⁶—if their traditions are to be preserved.

This Note analyzes the various approaches employed to combat elder abuse in Native American communities. Part II provides useful background information regarding elder abuse in general—including its various forms, the parties involved, possible causes, lack of reporting, the problem as it exists today, and the jurisdiction of the relevant courts. Part III examines the differing approaches that have been taken to combat elder abuse, particularly at the tribal, state, and federal levels. Lastly, Part IV offers a multi-pronged resolution of the prob-

10. *Id.*

11. *Id.* at 5–6.

12. *Id.* at 6.

13. See *How Many People Are Suffering from Elder Abuse*, NAT'L CTR. ON ELDER ABUSE, http://www.ncea.aoa.gov/NCEARoot/Main_Site/FAQ/Questions.aspx (last visited Oct. 6, 2011). "It is difficult to say how many older Americans are abused, neglected, or exploited, in large part because surveillance is limited and the problem remains greatly hidden. Findings from the often cited National Elder Abuse Incidence Study suggest that more than 500,000 Americans aged 60 and over were victims of domestic abuse in 1996." *Id.*

14. See 18 U.S.C. § 1151 (2006) (defining "Indian Country" as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

15. See PREVENTING & RESPONDING, *supra* note 1, at 7.

16. See *id.* at 13 ("Further exploration is needed to determine when these approaches are appropriate . . . [t]his may need to be determined on a case-by-case basis.").

lem by advocating: (1) increased implementation of tribe-specific alternative dispute resolution and the reformation of tribal elder abuse codes; (2) resolving jurisdictional issues among the tribal, state, and federal levels and increasing the independence of tribal court systems with the aid of federal funding; and (3) increasing federal monetary appropriations under the Older Americans Act to attack the root causes of elder abuse while helping to fund programs for awareness and prevention.

II. Background

A. What is Elder Abuse?

The National Center on Elder Abuse divides elder abuse into seven distinct categories.¹⁷ Physical abuse is perhaps the most obvious form.¹⁸ Physical abuse includes “the use of physical force that may result in bodily injury, physical pain, or impairment.”¹⁹ Typical acts of violence (e.g., hitting, pushing, shaking) are included in this category, in addition to misuse of drugs and force-feeding.²⁰

Another form of elder abuse is sexual abuse, defined as “non-consensual sexual contact of any kind with an elderly person.”²¹ This includes engaging in sexual conduct with a person who is unable, perhaps due to mental issues associated with age, to give legal consent.²² A third form of elder abuse is emotional or psychological abuse which involves the “infliction of anguish, pain, or distress through verbal or nonverbal acts.”²³ This includes any type of verbal harassment, humiliation, or social isolation.²⁴ It may even include condescension or losing one’s temper.²⁵

A fourth type of elder abuse is neglect, which is broadly defined as the “refusal or failure to fulfill any part of a person’s obligations or

17. WHITE, *supra* note 2, at 3.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.*

23. *Id.*

24. *Id.*

25. *See id.* (“Emotional/psychological abuse includes, but is not limited to, verbal assaults, insults, threats, intimidation [and] . . . treating an older person like an infant.”).

duties to an elder.”²⁶ This may include refusal or failure to pay for care services or, more typically, failure to provide adequate “life necessities” (e.g., nutrition, shelter, and decent standards of living).²⁷ The nature of this category means that even a caregiver who does not intend to be neglectful may nonetheless be responsible for elder abuse.²⁸ A fifth type of elder abuse is abandonment, which is defined as “the desertion of an elderly person by an individual who has assumed responsibility for providing care for an elder, or by a person with physical custody of an elder.”²⁹ In the case of many elders, it is not difficult to imagine the potential severity of this type of abuse, especially for the infirm. A sixth type of elder abuse, perhaps less commonly equated with traditional notions of “abuse,” is financial or material exploitation, or “the illegal or improper use of an elder’s funds, property, or assets.”³⁰ This may include stealing from an elder; forging an elder’s signature, especially to cash checks in the elder’s name; or forcing an elder to sign a legal document to the abuser’s advantage.³¹ Exploitation may also include misuse of fiduciary positions by the abuser (e.g., guardianship or power of attorney).³²

The last—and perhaps least commonly identified—type of abuse is self-neglect, or “the behavior of an elderly person that threatens his/her own health or safety.”³³ This type bears all of the same characteristics as neglect by a caregiver or other abuser, with the caveat that the elder is the abuser.³⁴ Self-neglect does not include circumstances in which a mentally competent elder makes a conscious life choice to abstain from necessities (e.g., food, water, shelter) or medication.³⁵

Tribal definitions of elder abuse may vary due to the tribes’ differing cultures and worldviews.³⁶ For example, it may be that a fami-

26. *Id.*

27. *Id.*

28. *See id.*

29. *Id.*

30. *Id.*

31. *Id.* at 3.

32. *See* ANN VINING, NW. JUSTICE PROJECT, ALTERNATIVES TO GUARDIANSHIP FOR ADULTS 4 (2007), available at <http://www.lawhelp.org/documents/1487813302EN.pdf?stateabbrev=/WA/> (noting the potential for abuse of fiduciary positions, especially powers of attorney).

33. WHITE, *supra* note 2, at 4.

34. *See id.*

35. *Id.*

36. *See id.* Compare White Mountain Apache Health and Safety Code § 15.2(A)(1) (2006), available at <http://www.wmat.us/Legal/Health%20Safety.pdf>

ly's cashing of an elder's social security check—upon which the entire family depends for survival—is not elder abuse in certain tribal cultures, while in others it may be considered financial exploitation.³⁷ One study showed that Native American elders were more likely than Caucasian and African-American elders to classify certain types of behavior as abuse.³⁸ According to this study, Native Americans were also more likely to reject the more common notion that abuse must be recurring to warrant that label, instead regarding one instance as enough to qualify.³⁹ Perhaps these differences are grounded in the fundamental social importance of elders in Native American societies as opposed to the comparatively less central role elders play in other American cultures.

B. Typical Abusers and Victims

According to one study focusing primarily on the Navajo Nation, the most vulnerable elders, as identified by Navajo elders, were those who had either “suddenly become dependent” or those who had mental problems marked by confusion.⁴⁰ Service providers also identified four categories of vulnerable elders: (1) female elders, (2) elders who are among the oldest in the community, (3) elders who are

(defining abuse as “(a) [i]ntentional infliction of physical and or emotional harm; (b) [i]njury caused by negligent acts or omissions; (c) [u]nreasonable confinement; or (d) [s]exual abuse or sexual assault”), with The Family Code of the Blackfeet Tribe Ch. 10 § 2, available at <http://www.narf.org/nill/Codes/blackfeetcode/blkft1to22familyct.htm#top> (limiting “the offense of Elder Abuse/Neglect/Exploitation” to (1) “bodily injury,” (2) “apprehension of bodily injury,” (3) purposeful “neglect[,]” and (4) “exploit[ation] or steal[ing] items of value”), and Oglala Sioux Tribe: Law and Order Code, Ch. 6 § 1(a) (2010), available at <http://www.narf.org/nill/Codes/oglalacode/chapter06-elder.htm> (broadly defining abuse as “(a) . . . the willful infliction of physical injury or pain, sexual abuse, mental anguish, unreasonable confinement, intimidation, financial exploitation, the willful deprivation by a caretaker of the basic necessities of life—such as but not limited to food, shelter, clothing, and medical and personal care—which are necessary to avoid physical harm, mental anguish, or mental illness, or any other type of maltreatment,” and exempting “nonmedical remedial treatment by spiritual means through prayer alone in accordance with a recognized religious method of healing in lieu of medical treatment.”).

37. See WHITE, *supra* note 2, at 3.

38. Margaret F. Hudson et al., *Elder Abuse: Two Native American Views*, 38 THE GERONTOLOGIST 538, 546 (1998), available at <http://gerontologist.oxfordjournals.org/content/38/5/538.full.pdf>.

39. *Id.* at 547.

40. CTR. ON CHILD ABUSE & NEGLECT, NATIVE AMERICAN ELDER ABUSE 6 (2000), available at <http://www.nicoa.org/PDFs/Native%20American%20Elder%20Abuse%20Monograph.pdf>.

“socially isolated,” and (4) elders who reside alone with their primary caregiver.⁴¹

The same Navajo study revealed that the vast majority of abusers tend to be members of the victims’ families.⁴² In most cases, elders identified the abusers as members of their immediate families, particularly spouses or direct descendants such as children or grandchildren.⁴³ About eighty percent of Navajo service providers indicated that family members were at fault, while less than ten percent identified abusers as members of the extended family, and a small percentage named others in the community.⁴⁴ Seventy-three percent of the interviewed elders from seventeen other tribes also identified family members as abusers, especially those with a history of mental illness.⁴⁵

C. Possible Causes of Native American Elder Abuse

Elder abuse, like other types of abuse such as domestic violence, may result from the power dynamics within a household and a “sense of entitlement” held by the abuser.⁴⁶ Holly Ramsey-Klawnsnik, a sociologist and social worker, has identified a number of different causes, each in conjunction with a certain type of offender:

(1) [C]aregivers who are normal and capable of providing good care but who are chronically stressed and lash out through abuse and neglect; (2) people who are well intentioned but who have significant impairments themselves, like physical or mental illness or low IQs, which prevent them from providing adequate care; (3) narcissistic persons with “user mentalities” who get themselves into caregiving arrangements because of what they expect to get out of them; (4) persons with abusive personalities who are unhappy, frustrated, easily angered, and who feel entitled to lash out at others with less power[;] and (5) sadistic persons who enjoy inflicting harm and terrifying others.⁴⁷

According to Dr. Ramsey-Klawnsnik, physical abuse and neglect may be the results of caregivers’ chronic stress, mental illness, or low IQs, while financial or material exploitation and neglect are often the re-

41. *Id.*

42. *Id.*

43. *See id.*

44. *Id.*

45. *Id.*

46. WHITE, *supra* note 2, at 4.

47. *Speaking the Unspeakable: An Interview About Elder Sexual Assault with Holly Ramsey-Klawnsnik*, NAT’L COMM. FOR THE PREV. OF ELDER ABUSE, <http://www.preventelderabuse.org/nexus/hrklawnsnik.html> (last visited Oct. 8, 2011) [hereinafter *Ramsey-Klawnsnik Interview*].

sults of the narcissistic “user mentality.”⁴⁸ Those with “abusive personalities,” anger issues, entitlement issues, and “sadistic” mentalities are most likely to subject elders in their care to sexual abuse or other physical abuse.⁴⁹

Other researchers have linked elder abuse in Native American communities to poverty.⁵⁰ A study focusing on the Navajo Nation suggested that poverty, unemployment, and the often overwhelming nature of family caregivers’ duties are at the core of elder abuse.⁵¹ Another study—this time focused on two Plains tribes—also linked high rates of abuse to the caregiver’s poverty.⁵² Native Americans also blame drug and alcohol abuse and a “turning away from traditional cultural values” as causes of elder abuse.⁵³

An interesting theory held by some elder care service providers states that present abuse has its roots in the abuses of the past.⁵⁴ David Baldrige, of the National Indian Council on Aging (NICOA), hypothesizes that many modern-day elderly victims were abused as children after being forced into “mainstream” American boarding schools as part of the federal government’s efforts to assimilate Native cultures.⁵⁵ This vicious cycle—passing abusive tendencies from generation to generation—may be what has led current elders’ children and grandchildren to abuse their relatives.⁵⁶

D. Lack of Reporting

Studies have shown that over seventy-nine percent of elder abuse cases go unreported.⁵⁷ According to the National Center on Elder Abuse (NCEA), elder abuse may go vastly unreported because of the social isolation of the elders, which in turn increases the likelihood

48. *Id.*

49. *Id.*

50. WHITE, *supra* note 2, at 4.

51. *Id.* (citing generally A. S. BROWN ET AL., N. ARIZ. UNIV. SOC. RESEARCH LAB., SERVICE PROVIDER PERCEPTIONS OF ELDER ABUSE AMONG THE NAVAJO (1990)).

52. *Id.* (citing E. K. Maxwell & R. K. Maxwell, *Insults to the Body Civil: Mistreatment of Elderly in Two Plains Indian Tribes*, 7 J. CROSS-CULTURAL GERONTOLOGY 3, 3–23 (1992)).

53. *Id.*

54. David Baldrige, *Indian Elders: Family Traditions in Crisis*, 44 AM. BEHAV. SCIENTIST 1515, 1521 (2001), available at <http://abs.sagepub.com/content/44/9/1515.full.pdf>.

55. *Id.* at 1520–21.

56. *Id.* at 1521.

57. WHITE, *supra* note 2, at 5.

that the abuse will take place and the likelihood that it may continue to go undetected.⁵⁸ This social isolation is apparent in the fact that twenty-five percent of elders live alone, and a large number of others interact only with immediate family members and few outsiders.⁵⁹ In this sense, elder abuse is even more difficult to identify than child abuse, as children are required by federal law to attend school, thus significantly reducing social isolation and increasing the chances of reporting or discovery.⁶⁰ Unsurprisingly, family members—who are the most common abusers—are the least likely to report cases of elder abuse, while medical professionals are the most likely.⁶¹

E. The Problem in Modern Native American Communities

Elder abuse across various ethnic groups is a widespread problem in the United States.⁶² According to the NCEA, the problem is hard to detect due to non-reporting but is recognizably widespread.⁶³ According to a 2003 study, between an estimated one and two million Americans over the age of sixty-five had been abused by a trusted caregiver.⁶⁴ The problem as it exists in Native American communities, however, differs significantly from the problem as it exists in mainstream American (i.e., non-Native American) communities due to differences in both culture and application of legal principles, thus requiring more narrowly-tailored solutions.⁶⁵ According to the NICOA, relatively little is known regarding the prevalence of elder abuse within Native American communities; although, “the existing literature

58. NAT'L CTR. ON ELDER ABUSE, THE NATIONAL ELDER ABUSE INCIDENCE STUDY: FINAL REPORT 5-3 (1998) [hereinafter INCIDENCE STUDY], available at http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABu seReport_Full.pdf.

59. *Id.*

60. *Id.*

61. *Id.*

62. See generally INCIDENCE STUDY, *supra* note 58 (presenting statistics and findings that indicate a substantial percentage of the nation's senior population has suffered from abuse and hypothesizing that a large percentage of cases go unreported).

63. NAT'L CTR. ON ELDER ABUSE, FACT SHEET 1 (2005), available at http://www.ncea.aoa.gov/ncearoot/main_site/pdf/publication/FinalStatistics050331.pdf.

64. *Id.*

65. See PREVENTING & RESPONDING, *supra* note 1, at 1 (“The experiences of Indian elders with abuse . . . and their attitudes about what should be done about it appear to differ from those of non-Indian elders, suggesting the need for new responses to prevention.”).

and accounts by Indian elders and their families, tribes and advocates suggest that it is a serious and pervasive problem."⁶⁶

A 2002 NICOA survey asking 236 Title VI⁶⁷ directors, who provide social services to a variety of tribes, to identify their impressions regarding the pervasiveness of elder abuse within their tribes yielded valuable, albeit informal, insight into the problem.⁶⁸ Sixty-three percent of respondents indicated that the most common form of abuse reported to them was financial abuse by family members and that this type of abuse occurs "often."⁶⁹ Neglect was reported by forty-eight percent of the respondents as occurring often, with only seven percent stating that it never occurs.⁷⁰ Forty-five percent of respondents indicated that self-neglect happens frequently, and only seven percent reported that it never happens.⁷¹ Over twenty-five percent of respondents reported that physical abuse by non-spouses occurs frequently, while twenty-one percent indicated that it never occurs.⁷² Only ten percent indicated that spousal abuse occurs often, while thirty percent indicated that it never happens.⁷³ Psychological abuse was reported by thirty-nine percent of respondents as occurring frequently, with eleven percent reporting that it never happens.⁷⁴ The least frequent type of elder abuse reported was sexual assault—none of the responding directors believed that this type of abuse occurs often.⁷⁵ However, nearly forty-six percent of the respondents believed that it happens "sometimes."⁷⁶

66. *Id.* It may be interesting to the reader that the problem of elder abuse within native cultures extends to the Aboriginal Canadian population. See Kari Brozowski & David R. Hall, *Aging & Risk: Physical and Sexual Abuse of Elders in Canada*, 25 J. INTERPERSONAL VIOLENCE 1183, 1193 (2010) ("[O]ur model discovered that by far the most prominent risk factors associated with elder assault or sexual assault were being a victim of a sexual assault prior to age 60 . . . and having an aboriginal ethnic background.").

67. Older Americans Act of 1965 § 602, 42 U.S.C. § 3057 (2006).

68. PREVENTING & RESPONDING, *supra* note 1, at 3.

69. *Id.* at 4.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

F. Jurisdiction of Tribal, State, and Federal Courts Generally

Various jurisdictional issues—including overlaps, conflicts, and sometimes gaps in court jurisdiction⁷⁷—affect criminal and civil responses to Native American elder abuse due to the unique position Native American tribes occupy in the American federalist system.

Tribal courts—numbering approximately 150 and funded by the federal government—hold jurisdiction over both criminal and civil matters.⁷⁸ Generally, tribal courts may only exercise jurisdiction over crimes involving members of the tribe and committed on the reservation.⁷⁹ If the perpetrator is a non-Native American, even when the victim is a member of the tribe, tribal courts have no jurisdiction.⁸⁰ Non-Native American offenders are prosecuted in federal court when the victim is a Native American and in state court when the victim is another non-Native American, even when the crime has been committed on the reservation.⁸¹ Federal courts also have jurisdiction over felonies (e.g., rape, murder, and aggravated assault), which are investigated by the Federal Bureau of Investigations, the U.S. Attorneys' Offices, and the Bureau of Indian Affairs.⁸² Federal law further limits tribal courts' jurisdiction by prohibiting tribes from imposing sentences in excess of one year in jail, causing felony charges to be handled in federal court.⁸³ Tribal court jurisdiction is broader with regard to civil matters, including marriage, adoption, and child custody.⁸⁴ Tribal courts may exercise jurisdiction over non-Native Americans in civil matters if the non-Native American has had a "serious impact on the tribe"; for example, in cases of domestic violence.⁸⁵

Public Law 83-280 (Public Law 280) largely governs state courts' authority in Native American legal matters, and was passed in 1953 in an effort to transfer a measure of federal jurisdiction over tribes to the state level and thus reduce federal spending while increasing the ef-

77. *Id.* at 25.

78. NAT'L INDIAN COUNCIL ON AGING, A REVIEW OF THE LITERATURE: ELDER ABUSE IN INDIAN COUNTRY—RESEARCH, POLICY, AND PRACTICE 16 (2004) [hereinafter A REVIEW OF THE LITERATURE], available at http://www.nicoa.org/Elder_Abuse/elderabuselitreview.pdf.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

fectiveness of law enforcement.⁸⁶ Public Law 280 shifted jurisdiction over Native American affairs from federal law enforcement to state law enforcement in six “mandatory” states, namely California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska.⁸⁷ Public Law 280 also gave other states the option to assume jurisdiction over criminal Native American affairs without the consent of the tribes themselves.⁸⁸ Ten states—known as the “Optional States” and comprised of Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington—elected to do so.⁸⁹ A 1968 amendment to Public Law 280 requires tribal consent before state implementation, but no tribe has yet consented.⁹⁰ Public Law 280’s effect on both the general jurisdictional rules mentioned above and the legal system will be discussed *infra*.

III. Analysis

Long recognized as a significant problem throughout the United States, though its extent remains largely a mystery due to non-reporting,⁹¹ elder abuse requires preventative measures to be taken at the tribal, federal, and state levels. The success of these measures depends on the amount of time, effort, and money spent by the various institutions at each level. The adoption of new methods, particularly those tailored to the various Native American tribes and utilizing their core values and traditions, should be combined with the existing methods employed by tribal, federal, and state organizations to finally find a solution adequate to suit the individual needs of the tribes.

86. *Id.* at 17; see also S. REP. NO. 83-699, at 4 (1953), reprinted in 1953 U.S.C.A.N. 2409, 2411–12 (noting that law enforcement had largely been reserved to the tribes themselves, but observing that many tribes were not “adequately organized to perform that function”).

87. A REVIEW OF THE LITERATURE, *supra* note 78, at 17.

88. U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY: RESEARCH PRIORITIES 4 (2005) [hereinafter RESEARCH PRIORITIES], available at <http://www.ncjrs.gov/pdffiles1/nij/209839.pdf>.

89. *Id.* at 4.

90. *Id.*

91. See *How Many People Are Suffering from Elder Abuse*, *supra* note 13 (“It is difficult to say how many older Americans are abused, neglected, or exploited, in large part because surveillance is limited and the problem remains greatly hidden.”).

A. Current Tribal Approaches

1. GENERAL CRIMINAL AND CIVIL OPTIONS

A report of elder abuse to tribal law enforcement or Adult Protective Services (APS) may result in criminal or civil proceedings at the tribal level.⁹² Civil proceedings may include guardianship proceedings, conservatorship proceedings, or filing for a protective order.⁹³

Guardianship proceedings result in the appointment of a guardian by the court for an elder who is unable to care for himself or herself on a day-to-day basis.⁹⁴ A court-appointed guardian is duty-bound to provide adequate care for the elder, including daily necessities (e.g., food, water, shelter); medication; and other necessities, such as interaction on a social level.⁹⁵ Guardians—who are most often family members—usually have the right to make legal decisions for the elder.⁹⁶ This frequently includes signing contracts and making important medical decisions on the elder's behalf.⁹⁷ The guardian also typically makes other life choices, including those affecting housing and social services.⁹⁸ Conservatorship differs from guardianship in that its scope is limited to the financial aspects of the elder's life.⁹⁹ A conservator manages the elder's finances, including debt payment and collection of debts owed to the elder.¹⁰⁰

In addition to guardianship and conservatorship proceedings, an elder or a legal guardian may obtain a protective order against "any person who has committed or attempted to commit domestic violence or elder abuse against the elder."¹⁰¹ Orders of protection frequently employ "stay away" provisions and other provisions for support and restitution, as well as penalties for violations.¹⁰²

92. WHITE, *supra* note 2, at 5.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 5–6.

97. *Id.* at 6.

98. *Id.*

99. *See id.*

100. *Id.*

101. *Id.*

102. *Id.*; *see, e.g.*, Law and Order Code of the Shoshone and Arapaho Tribes of the Wind River Indian Reservation, Code of Tribal Offenses § 7-3-12(3) (2003) (imposing a five day confinement and \$50 fine on first offenders, ten day confinement and \$100 fine on second-time offenders, and thirty day confinement for third-time

Guardianship and conservatorship proceedings fail to address the potential for future abuse from the court-appointed guardian or conservator. As noted above, studies have indicated that elder abuse in Native American communities is largely rooted in poverty and day-to-day stress.¹⁰³ Guardianship and conservatorship proceedings represent a step in the right direction by providing protection against known threats to elder safety. These proceedings do nothing, however, to address the underlying problems of poverty, stress, and overburdening that cause elder abuse in the first place—problems from which the court-appointed guardians and conservators may themselves suffer.¹⁰⁴

2. TRIBAL ELDER ABUSE CODES

Tribal courts across the United States have increasingly begun to adopt criminal codes that make elder abuse a specific crime.¹⁰⁵ Generally, these codes provide for harsher penalties when the victim is over the age of fifty-five.¹⁰⁶ Independent of these elder abuse codes, charges can be brought on other theories of criminal law (e.g., reckless endangerment, assault and battery, etc.).¹⁰⁷

One illustration of the increasing adoption of elder abuse codes by tribes is the Navajo Tribal Council's 1996 enactment of the "Dine Elder Protection Act."¹⁰⁸ The law defines an elder as anyone over the

or subsequent offenders), available at http://www.narf.org/nill/Codes/shoshonearapaho/title_vii.pdf.

103. See WHITE, *supra* note 2, at 4 ("A study of elder abuse on the Navajo Nation revealed poverty, unemployment, and family caretakers feeling overwhelmed by their responsibilities as primary causes of elder abuse and neglect."); see also Ramsey-Klawnsnik Interview, *supra* note 47 (identifying one typical class of abusers as "caregivers who are normal and capable of providing good care but who are chronically stressed and lash out through abuse and neglect").

104. See Tom Rodgers, *Native American Poverty*, SPOTLIGHT ON POVERTY & OPPORTUNITY: THE SOURCE FOR NEWS, IDEAS, & ACTION, <http://www.spotlightonpoverty.org/ExclusiveCommentary.aspx?id=0fe5c04e-fdbf-4718-980c-0373ba823da7> (last visited Oct. 6, 2011) ("American Indians and Native Alaskans number 4.5 million. According to the U.S. Census Bureau, these Americans earn a median annual income of \$33,627. One in every four (25.3%) lives in poverty and nearly a third (29.9%) are without health insurance coverage.").

105. WHITE, *supra* note 2, at 6. Many tribes have begun to enact elder abuse codes, including the Arapaho, Shoshone, various branches of the Sioux, Cherokee, Chickasaw, Nez Perce, Cheyenne, and Apache, among others. See generally *Elder Abuse Codes by Tribe*, CTR. FOR RURAL HEALTH, UNIV. OF N.D. SCH. OF MED. & HEALTH SCIENCES, <http://ruralhealth.und.edu/projects/nrcnaa/tribalcodes.php> (last visited Oct. 6, 2011) (providing links to various elder abuse codes online).

106. WHITE, *supra* note 2, at 6.

107. See *id.* at 5–6.

108. CTR. ON CHILD ABUSE & NEGLECT, *supra* note 40.

age of fifty-five and states as its purpose the “protect[ion of] elders within the jurisdiction of the Navajo Nation from abuse and neglect.”¹⁰⁹ The law enumerates the various forms of elder abuse and requires “Elder Protection Services” with the following provisions:

- (A) The responsibility of the Navajo Area Agency on Aging, “to meet the needs of the elder, the elder’s family and caregiver(s);”
- (B) “A petition seeking an Elder Protection Order” that can be filed by “the Navajo Division of Health or any other interested person or party;”
- (C) “The elder, the elder’s family or caregiver(s), if financially able to do so, will pay for some or all of the cost of services;” and
- (D) “The Navajo Division of Health will inform the elder of the protection services which will be provided.”¹¹⁰

The Navajo code also creates a “Duty to Report Abuse,” which applies to “any person who has good reason to suspect that an elder has been or is being abused or neglected.”¹¹¹ Reports are to be made to the Navajo Division of Health, which then has a responsibility to investigate the matter within seventy-two hours, after which it may ask the Navajo Nation Family Court for an “Elder Protection Investigation Warrant.”¹¹² The tribal court then has the option to deny or issue the warrant based on probable cause.¹¹³ Upon issuance, tribal law enforcement will execute the warrant and, if elder abuse is determined to have taken place, the following steps will be taken by Elder Protective Services: (1) remove the abused elder from the situation; (2) remove the abusing party; (3) restrain the abusing party from continuing the abuse; (4) impose a fiduciary duty on family members; (5) order the abusing party to pay restitution for any damages; (6) appoint a guardian; (7) name a “representative payee”; and (8) require the Division of Health to provide the requisite care to the elder.¹¹⁴

Tribal elder abuse codes, though a key measure in the prevention, punishment, and deterrence of elder abuse, are not without their problems.¹¹⁵ NICOA’s 2004 study revealed that many tribal councils have failed to consider elder abuse codes a priority.¹¹⁶ The study also indicated that one of the key shortcomings of existing model codes is their failure to address “tribe-specific jurisdictional issues and resources,” and further noted that most tribes lack personnel to tailor

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. PREVENTING & RESPONDING, *supra* note 1, at 12.

116. *Id.*

the codes to their tribe's individual needs.¹¹⁷ On a more basic level, service providers (i.e., caregiving institutions and individual caregivers) often do not know that tribal elder abuse codes exist.¹¹⁸ Implicitly, this might lead to inadequate or confused responses to reports of abuse made to service providers and a general lack of deterrent effect against potentially abusive caregivers.¹¹⁹

In addition to structural inadequacies, some codes suffer from substantive shortcomings, such as vagueness and lack of adequate responsibility placement with regard to departments or other tribal entities.¹²⁰ Jurisdictional issues further complicate this lack of clarity as to which government or tribal entities have a duty to resolve matters of abuse.¹²¹ As mentioned *supra* Part II.F., the parallel existence of Indian Nations within the United States means that crimes occurring on reservations may be handled at the tribal, local, state, or federal levels.¹²² Problems frequently attributed to this complex jurisdictional structure include gaps in jurisdiction, which often prevent tribes from exercising authority over crimes, such as those perpetrated by non-Native Americans; overlapping jurisdiction, thus creating confusion or inaction; and lack of clarity as to who should be responsible for intervention.¹²³

3. TRIBAL ELDER CENTERS

In addition to the various legal efforts made by tribal communities, elder centers have played an important role in providing much-needed care.¹²⁴ Elder centers exist to combat those factors contributing to elder abuse, particularly by decreasing social isolation and providing basic services to elders, including free or reduced-cost meals.¹²⁵ In addition to providing direct benefits to elders, these centers address problems faced by family caregivers.¹²⁶ Researchers have found that overburdened and overstressed family caregivers are more

117. *Id.*

118. *Id.*

119. *See id.* at 14 ("Among the problems identified by the [Navajo study] groups was lack of familiarity with the code by those most likely to observe abuse, including senior center staff and community help representatives.")

120. *Id.* at 12.

121. *Id.* at 25.

122. *Id.*

123. *See id.*

124. WHITE, *supra* note 2, at 6.

125. *Id.*

126. *Id.*

likely to engage in acts of abuse than others.¹²⁷ Elder centers—particularly those with elder day care programs—are integral in providing a break for overburdened caregivers.¹²⁸ By providing this much-needed respite, centers allow caregivers to maintain other employment, which is essential to home elder care, especially for those family caregivers who use their wages partially to support an elderly family member.¹²⁹

Tribes have also begun to employ tribal law enforcement officers at elder centers.¹³⁰ The officers' core duties include the prevention of negligence and elder abuse.¹³¹ In theory, the daily interaction between elders and a familiar law enforcement officer will promote a relationship of trust so that elders will feel more confident reporting cases of abuse or neglect.¹³² Further, an officer's presence would deter caregivers at elder centers from engaging in abusive or neglectful behavior. Tribes have also been successful in their utilization of an ombudsman in elder centers.¹³³ Ombudsmen are elder advocates dedicated to hearing complaints made by elders and voicing the elders' concerns.¹³⁴ They also can provide important assistance in planning safety measures and in connecting elders with welfare programs and other social services.¹³⁵

B. Federal Funding Under the Older Americans Act

The federal government's history of assimilation, both sociological and legal in nature, shaped current federal policy with regard to Native American tribes. According to some scholars, the federal government's efforts to appropriate Native American land in the 1800s, combined with its later efforts to break up tribal bonds to ensure Native American assimilation into "mainstream" American culture,

127. See *Ramsey-Klawnsnik Interview*, *supra* note 47 (identifying potential abusers as "caregivers who are normal and capable of providing good care but who are chronically stressed and lash out through abuse and neglect").

128. WHITE, *supra* note 2, at 6.

129. See *id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 7. See generally KIRSTEN J. COLELLO, CONG. RESEARCH SERV., R.S. 21297, OLDER AMERICANS ACT: LONG-TERM CARE OMBUDSMAN PROGRAM 1-8 (2009), available at <http://aging.senate.gov/crs/aging12.pdf> (outlining the background, function, funding, and findings of the Long-Term Care Ombudsman Program as authorized under the Older Americans Act).

134. WHITE, *supra* note 2, at 7.

135. *Id.*

eventually led to the “destruction of their traditional societies.”¹³⁶ Measures to regain effective tribal sovereignty after their relegation to a status of “domestic dependent nations” by the U.S. Supreme Court in *Cherokee Nation v. Georgia*¹³⁷ only led to more “mainstreaming” of Native institutions by modeling tribal infrastructures after municipal governments.¹³⁸ Within this framework tribal governments must now interact with the federal government in responding to elder abuse.

The overarching federal approach toward Native American problems, including elder issues such as abuse, differs from the state and tribal approaches in that the federal government has mainly provided money rather than substantive assistance.¹³⁹ This approach is due in part to the localized roles of tribal institutions, such as courts and elder centers, and the shift of nearly all federal criminal jurisdiction to the states via Public Law 280.¹⁴⁰ As discussed *infra*, allocating funds for Native American use is a positive development but helps little if misdirected or inadequate.

The principal federal effort to address elder abuse, and elder needs in general, occurred through the Older Americans Act of 1965 (OAA).¹⁴¹ Title VI of the OAA, entitled “Grants for Native Americans,” addresses the problems faced by tribal elders in modern tribal communities.¹⁴² Congress intended, in passing the OAA, to ensure that elder services be “provided in a manner that preserves and restores [elders’] respective dignity, self-respect, and cultural identities.”¹⁴³ Congress amended the OAA in 1978 to include Title VI,¹⁴⁴ and made specific findings outlining the poor living conditions of Na-

136. Baldrige, *supra* note 54, at 1520.

137. See generally *Cherokee Nations v. Georgia*, 30 U.S. 1 (1831).

138. Baldrige, *supra* note 54, at 1519–20. It is worth noting that these developments had special consequences for Native elders. “The roles of elders as key shapers of tribal policies began to erode. Decisions, once driven by the advice of elders, were now made by appointed or elected tribal officials.” *Id.* at 1520.

139. See 42 U.S.C. § 3001 (2006) (providing grants for Native Americans aimed at aiding problems faced by tribal elders).

140. See generally ADA PECOS MELTON & JERRY GARDNER, U.S. DEP’T OF JUSTICE, PUBLIC LAW 280: ISSUES & CONCERNS FOR VICTIMS OF CRIME IN INDIAN COUNTRY (2004) [hereinafter PL 280: ISSUES & CONCERNS], available at <http://www.oumedicine.com/workfiles/College%20of%20Medicine/ADPediatrics/CSCCAN/Public%20Law%20280-final.pdf>.

141. See generally 42 U.S.C. § 3001.

142. *Id.* § 3057.

143. *Id.* § 3057a.

144. *Historical Evolution of Programs for Older Americans*, ADMIN. ON AGING, DEPT. HEALTH & HUM. SERVS., http://www.aoa.gov/aoaroot/aoa_programs/oaa/resources/History.aspx (last modified Apr. 14, 2011).

tive Americans in the United States and the subsequent need for elder services.¹⁴⁵ These findings included rapid tribal population increases, high unemployment rates, high poverty rates, and reduced life expectancy as compared to the general American population.¹⁴⁶ Congress particularly noted the lack of sufficient nursing homes and agencies focused on Native American aging, “substandard and over-crowded housing,” and poor health care coverage.¹⁴⁷

Title VI authorizes grants for Native American tribal organizations to go toward “supportive services and nutrition services,”¹⁴⁸ which are closely tied to the causes of elder abuse (e.g., caregiver overburdening, stress, and lack of financial resources). Title VI then enumerates requirements that must be met by tribal organizations applying for grant money, including tribal evaluation of needs for supportive services, tribal compliance with the government’s requests for reports of the evaluations, periodic tribal evaluation of activities carried out under the application, and assurances that the tribal organization will effectively coordinate the federally provided services.¹⁴⁹

Title VI further provides for a specific program to extend grants to tribal organizations in accordance with Title III’s Caregiver Support Program.¹⁵⁰ Title III provides that “multifaceted systems of support services” shall be extended to “family caregivers” and “grandparents or older individuals who are relative caregivers.”¹⁵¹ These services, if utilized, lend themselves directly to curing the circumstances that may give rise to elder abuse,¹⁵² and include:

- (1) information to caregivers about available services; (2) assistance to caregivers in gaining access to the services; (3) individual counseling, organization of support groups, and caregiver training to assist the caregivers in the areas of health, nutrition, and financial literacy, and in making decisions and solving problems relating to their caregiving roles; (4) respite care to enable caregivers

145. 42 U.S.C. § 3057b.

146. *Id.* (estimating that sixty-one percent of the Native American population lives below the poverty line).

147. *Id.*

148. *Id.* § 3057d.

149. *Id.* § 3057e(a).

150. *Id.* § 3057k-11(a).

151. *Id.* § 3030s-1(a).

152. See WHITE, *supra* note 2, at 4 (describing “poverty, unemployment, and family caretakers feeling overwhelmed by their responsibilities as primary causes of elder abuse and neglect”); see also Ramsey-Klawnsnik Interview, *supra* note 47 (“[C]aregivers who are normal and capable of providing good care but who are chronically stressed and lash out through abuse and neglect” are one of five typical classifications of abusers.).

to be temporarily relieved from their caregiving responsibilities; and (5) supplemental services, on a limited basis, to complement the care provided by caregivers.¹⁵³

Title VII of the OAA, entitled "Allotments for Vulnerable Elder Rights Protection Activities," addresses the problem even more directly in its "Native American Organization and Elder Justice Provisions."¹⁵⁴ Section 751, amended in 2006, allows approval of grants to tribal organizations or nonprofit organizations working for the benefit of Native Americans to "support multidisciplinary elder justice activities."¹⁵⁵ These activities include establishing a "coordinating council" to identify and report the needs of individual tribes, to provide training and support, and to study and implement strategies for "elder fatality and serious injury review teams" based on the needs of tribes.¹⁵⁶

Section 752 of Title VII provides for "[g]rants to promote comprehensive state elder justice systems."¹⁵⁷ This section explicitly enumerates the uses for which the grant money shall be applied, such as establishing a "unified elder justice network" across the state, developing a "management information system," educating the public on elder justice, and providing training for elder justice professionals.¹⁵⁸ This section also prohibits states from using federal grant money to "supplant" other funds for this purpose, instead requiring that the money be used to "augment" existing funding from other sources.¹⁵⁹

The OAA was last reauthorized in 2006 and was due for reauthorization in 2011, giving Congress another chance to adequately provide for Native American communities.¹⁶⁰ The OAA's major flaw is not that it is written poorly or is otherwise inadequate on its face, but rather that Title VI (Grants for Native Americans) and Title VII (Vulnerable Elder Rights Protection Activities) only offer tribes meager funds.¹⁶¹ The importance of adequate funding for OAA programs

153. 42 U.S.C. § 3030s-1(b).

154. *See generally id.* § 3058aa.

155. *Id.* § 3058aa(a)(3).

156. *Id.* § 3058aa(a)(3)(A)-(C).

157. *Id.* § 3058aa-1.

158. *Id.* § 3058aa-1(e)(1)(A)-(D).

159. *Id.* § 3058aa-1(e)(2).

160. *See Historical Evolution of Programs for Older Americans, supra* note 144. Note that at the time this piece went to publication the OAA had not yet been reauthorized.

161. *Compare* Letter from Traci McClellan Exec. Dir., Nat'l Indian Council on Aging, to Sen. Health, Educ., Labor, & Pensions Comm. (Feb. 24, 2006), available at <http://www.nicoa.org/PDFs/NICOA%20Testimony%202-24-06%20on%20OAA%20Reauthorization.pdf> ("NICOA requests an authorized base funding level at \$100 million to be reached incrementally to address the lack of funding that has

is twofold: the OAA directly provides for protective services under Title VII and it indirectly eliminates the root causes of elder abuse by providing care services and reducing the burden on family caregivers under Title VI.

In 2006, Traci McClellan, Executive Director of NICOA, wrote a letter to the Senate Health, Education, Labor, and Pensions Committee requesting appropriation improvements under Title VI and Title VII for the upcoming 2006 reauthorization.¹⁶² In the letter, she outlined issues that continue to be problematic for tribal communities wishing to address elder issues, including abuse, exploitation, and neglect.¹⁶³ McClellan noted that Title VI funding has been the primary mode of providing OAA services to tribal communities, but the funding has nevertheless been “so inadequate that reservation services have never been ‘comparable to [services] provided under Title III [Grants for State and Community Programs on Aging]’” as Title VI requires.¹⁶⁴ She also argued that as more Native Americans are aging, the needs for the community are increasing exponentially, and those who become qualified for funding have received little to none due to appropriation limitations.¹⁶⁵ McClellan also indicated that funding intended to bolster the capacities of community-based caregiving organizations was “practically nonexistent.”¹⁶⁶

In 2005, \$6.3 million was appropriated for Native American caregivers through the National Family Caregivers Support Program under Title VI, but the lack of provisions for training service providers to effectively provide caregiving services decreased the sum’s effectiveness.¹⁶⁷ Further, the money that is allotted to Title VI providers is

plagued these programs, impeding the ability of Tribes and Tribal organizations to provide the necessary services for their Elders.”), with ANGELA NAPILI, CONG. RESEARCH SERV., RL 33880, OLDER AMERICANS ACT: FY2008 FUNDING AND FY2009 BUDGET REQUEST 9 (2008), available at <http://aging.senate.gov/crs/aging16.pdf> (illustrating that appropriations for Title VI and Title VII programs from 2000–2009 have seen only minor increases and showing that Ms. McClellan’s request for increased appropriations has gone unheeded in the years following her 2006 letter).

162. See generally McClellan, *supra* note 161.

163. *Id.*

164. *Id.*; see also 42 U.S.C. § 3057 (“It is the purpose of this subchapter to promote the delivery of supportive services, including nutrition services to American Indians, Alaskan Natives, and Native Hawaiians that are comparable to services provided under subchapter title III of this chapter.”).

165. McClellan, *supra* note 161.

166. *Id.*

167. *Id.*

spent with “little federal direction and technical assistance.”¹⁶⁸ In 2006, McClellan requested increased training for Title VI providers; increased efforts for facilitating elder access to social services on the tribal, state, and federal levels; and an overall increase in funding from a “grossly inadequate” \$26.4 million to \$100 million.¹⁶⁹ This “grossly inadequate” appropriation has hardly increased since 2006.¹⁷⁰ Total Title VI appropriations for supportive and nutrition services amounted to \$26.134 million for 2006, the same for 2007, \$26.898 million for 2008, and the same requested for 2009.¹⁷¹

McClellan also emphasized the need for Title VII Part B appropriations for the prevention of elder abuse and neglect.¹⁷² Part B authorizes programs for tribes, agencies, and nonprofit organizations to fund elder rights activities, but no funds have yet been appropriated for this purpose.¹⁷³ Funds have gone to the states for this purpose, but due to general “cultural, jurisdictional, and geographic barriers,” these beneficial programs often never reach Native American elders.¹⁷⁴ Aside from Part B, tribes have no other source of federal funding for such protection activities.¹⁷⁵ Finally, McClellan requested federally funded “outreach and demonstration programs” to increase elder abuse awareness and aid tribes in curing abusive behavior among their members.¹⁷⁶ She also requested an appropriation of \$10 million for fiscal year 2007.¹⁷⁷

McClellan’s request was unsurprisingly denied.¹⁷⁸ As of March 2008, neither the Native American elder rights program nor legal assistance programs have received appropriations.¹⁷⁹ On the plus side, Title VII appropriations for elder abuse prevention hover around \$5 million, while appropriations for the long-term care ombudsman program have remained at approximately \$15 million.¹⁸⁰ Tribes across the country have had “tremendous success” in their implementation

168. *Id.* (noting that “[m]ore than 100 Title VI providers struggle to operate these grant programs”).

169. *Id.*

170. See NAPILI, *supra* note 161, at 9 tbl.1.

171. *Id.*

172. McClellan, *supra* note 161.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. See NAPILI, *supra* note 161, at 9.

179. *Id.*

180. *Id.*

of ombudsman programs,¹⁸¹ no doubt partially due to federal money. Note, however, that the ombudsman programs receive the lion's share of Title VII funding.¹⁸²

The need remains great. In April 2010, Lynn Kellogg, president of the National Association of Area Agencies on Aging (commonly known as "n4a"), wrote a letter to the Administration on Aging emphasizing the need to "[s]trengthen the capacity" of Native American aging programs, particularly Title VI.¹⁸³ In suggesting closer cooperation between the two organizations during the upcoming OAA reauthorization in 2011, Kellogg stated: "The need is so great in Indian country, yet the structural and financial resources provided under the Act are very limited."¹⁸⁴ Hopefully, future years will see an appreciable increase in much-needed funding for these programs.

C. Jurisdictional Issues in Public Law 280 States

Jurisdiction refers to the government's authority to enforce laws.¹⁸⁵ Crimes and civil matters occurring on Native American reservations, including cases of elder abuse, may be subject to tribal, local, state, or federal courts.¹⁸⁶ The complexities of the federal system as it applies to Indian Nations creates gaps in jurisdiction, overlapping jurisdiction, and general lack of clarity as to where jurisdiction lies,¹⁸⁷ largely due to the effects of the controversial Public Law 280.¹⁸⁸

It is important to reiterate from the outset that Public Law 280 does not apply to all Indian Nations within the United States.¹⁸⁹ In

181. WHITE, *supra* note 2, at 7.

182. See NAPILI, *supra* note 161, at 9 tbl.1. Appropriations for the long-term care ombudsman program amounted to \$15 million (out of a total Title VI appropriation of \$20.142 million) in 2006, \$15.010 million (out of \$20.156 million) in 2007, and \$15.577 million (out of \$20.633 million) in 2008. *Id.* In each case, the remaining \$5 million per year was allotted to elder abuse prevention, with no appropriations for legal assistance and elder rights programs. *Id.*

183. Letter from Lynn Kellogg, President, Nat'l Ass'n of Area Agencies, to Kathy Greenlee, Assistant Sec'y for Aging, Admin. on Aging 3 (Apr. 14, 2010), available at http://www.n4a.org/pdf/n4a_OAA_Reauthorization_Memo_4.14.10.pdf. The Administration on Aging is a branch of the Department of Health and Human Services. *Organization*, ADMIN. ON AGING, <http://www.aoa.gov/AoARoot/About/Organization/index.aspx> (last modified Feb. 22, 2011).

184. Letter from Lynn Kellogg, *supra* note 183, at 4.

185. PREVENTING & RESPONDING, *supra* note 1, at 25.

186. *Id.*

187. *Id.*

188. See generally PL 280: ISSUES & CONCERNS, *supra* note 140.

189. See RESEARCH PRIORITIES, *supra* note 88, at 4 (outlining the so-called "mandatory" states and "optional" states, and further noting that "[t]hrough PL

2003, the U.S. Census Bureau estimated that there was a Native American population of 2,786,652 (i.e., 0.9% of the total population of the United States at the time).¹⁹⁰ Out of the total Native American population, almost fifty percent do not live on reservations, and thus do not fall within the subject matter of this Note.¹⁹¹ Of the total number of Native Americans living on reservations in the contiguous forty-eight states, approximately twenty-three percent fall within the scope of Public Law 280 by living in the so-called Public Law 280 states.¹⁹² In addition, all Alaskan Natives fall within Public Law 280 due to Alaska's status as a mandatory state.¹⁹³

It is also important to note that a state's status as a Public Law 280 state does not automatically place all tribes and reservations within the scope of the law.¹⁹⁴ The 1968 amendment to Public Law 280 allowed states to retrocede jurisdiction over tribes to the federal government, subject to the discretion of the Secretary of the Interior.¹⁹⁵ Further, even upon its implementation in the six mandatory states, there is no guarantee that all tribes within those states would be affected.¹⁹⁶ Indian Nations that the federal government determined had already established adequate law enforcement and judicial systems were exempted from Public Law 280's scope.¹⁹⁷ As of December 2005, several states, both mandatory and optional, had returned jurisdiction over approximately thirty tribes to the federal government.¹⁹⁸ Thus, whether a state has ceded authority over a particular tribe to the federal government is an important factor in determining exactly what measures must be taken to provide adequate judicial mechanisms for resolving elder abuse cases.

1. DISSATISFACTION WITH PUBLIC LAW 280

Generally, the passing of Public Law 280 represented a shift of jurisdiction from the federal government to various state governments, thus significantly upsetting the prior balance in legal authority

280's retrocession provision, several mandatory and optional States have returned jurisdiction over nearly 30 tribes to the Federal government.").

190. *Id.*

191. *See id.*

192. *Id.*

193. *Id.*

194. *See* PL 280: ISSUES & CONCERNS, *supra* note 140.

195. *Id.*

196. *Id.*

197. *Id.*

198. RESEARCH PRIORITIES, *supra* note 88, at 4.

between tribal, state, and federal organizations.¹⁹⁹ Public Law 280's implementation has led to a more significant state role in criminal matters arising on reservations, the disappearance of so-called "special federal criminal justice" efforts in tribal communities, the stunted development of many tribal criminal justice systems, and a confusing state role in civil affairs.²⁰⁰ In non-Public Law 280 states, this "special role" of federal law enforcement remains; major crimes involving Native Americans are investigated by the Federal Bureau of Investigation or Bureau of Indian Affairs, the defendant is prosecuted through the United States Attorney's Office, and federal victim-witness coordinators are involved.²⁰¹

As a result of its implementation, Public Law 280 remains a controversial measure in the eyes of both Indian Nations and state governments.²⁰² Since its 1953 adoption, Native American opposition has mostly centered on the wholly one-sided nature of Public Law 280's implementation.²⁰³ In other words, the federal government imposed the law on tribes in the mandatory states and subsequent optional states without obtaining tribal consent, which many Indian Nations view as a "failure to recognize tribal sovereignty and self-determination."²⁰⁴ Where tribes once had little interaction with the state regarding Native American affairs, after 1953, tribal legal matters were immediately subjected to state participation and control, thus costing tribes a large measure of autonomy in criminal and civil matters.²⁰⁵

Even the 1968 amendment requiring tribal consent for additional Public Law 280 states has proven useless to the tribes subject to the original 1953 law because the 1968 amendment does not apply retroactively.²⁰⁶ Further, the provision allowing state governments to apply for retrocession of jurisdiction to the federal government provides no avenue for tribal authorities to initiate the process on their own, though tribes have sometimes tried without success.²⁰⁷ The law's attractiveness to Native American tribes since 1968 is evident: since the

199. PL 280: ISSUES & CONCERNS, *supra* note 140.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

amendment's adoption, no tribes have yet consented to Public Law 280's adoption.²⁰⁸

State dissatisfaction has been largely based on the failure of the federal government to provide funding for the states assuming jurisdiction under Public Law 280.²⁰⁹ These states have an increased judicial and law enforcement workload, and the failure to provide funding seems to indicate a "we're done, you handle it" mentality, which left both states and tribes unequipped for the legal and infrastructural challenges ahead.²¹⁰

2. PROBLEMS CAUSED BY PUBLIC LAW 280

The implementation of Public Law 280 in these states has led to two significant problems. First, according to Professor Carole Goldberg of the University of California, Los Angeles, there exists a "jurisdictional vacuum[]." ²¹¹ Second, state law enforcement has abused its power under Public Law 280.²¹² The jurisdictional vacuum refers to gaps in jurisdiction that exist either because no government (tribal, local, state, or federal) has authority over a certain matter, or because the state government has authority, but not the funds, institutional support, or even incentive to exercise that authority.²¹³ A 1974 survey of Washington tribes aiming to uncover Native American perceptions of state jurisdiction revealed an "unusually high degree of uncertainty about agencies responsible for law enforcement in tribal territories."²¹⁴ A 1995 survey of California tribes also sought to shed light on tribal experiences and levels of satisfaction with state law enforcement efforts.²¹⁵ The study indicated that the most prevalent concerns among the tribes surveyed were jurisdictional confusion and inadequate law enforcement responses to complaints.²¹⁶ The study concluded that "limited and uncertain State jurisdiction under PL 280, coupled with

208. See RESEARCH PRIORITIES, *supra* note 88, at 4 ("In 1968, an amendment to PL 280 required tribal consent before additional States could extend jurisdiction to Indian country. Since 1968, no tribe has consented.").

209. PL 280: ISSUES & CONCERNS, *supra* note 140.

210. See *id.*

211. *Id.*

212. *Id.*

213. *Id.* The "jurisdictional vacuum" noted by Professor Goldberg occurs not only because no government has *actual* authority to intervene but also because the *perception exists* amongst Native Americans that no government has the authority to intervene. *Id.*

214. RESEARCH PRIORITIES, *supra* note 88, at 8.

215. *Id.* at 9.

216. *Id.*

the absence of tribal justice systems and law enforcement, created situations where no legal remedies existed.”²¹⁷ Although the utility of these studies is limited because both involve particular tribes and are dated, they are an important indicator of the shortcomings of Public Law 280 that have yet to be fixed. A 2005 report indicates continuing complaints by state and local law enforcement based on difficulties carrying out their duties on Native American lands because of uncertainty regarding the scope of their jurisdiction and the individual officers’ “unfamiliarity with tribal communities.”²¹⁸ In addition, both the federal and state governments have often misapplied Public Law 280, thus adding to the confusion.²¹⁹

A second problem caused by Public Law 280 has been the rise of abuses of power by state law enforcement authorities.²²⁰ Native Americans commonly complain that state law enforcement shirks its responsibility whenever the tribal community asks it to exercise its authority, but state law enforcement exercises its authority whenever the tribe does not want state intervention.²²¹ The 1974 Washington survey found that approximately fifty percent of the Native Americans surveyed felt they were either treated poorly or indifferently by state and local law enforcement.²²² The 1995 California survey also revealed “insensitive or discriminatory treatment” on the part of state and local law enforcement.²²³ Not only have Public Law 280’s shortcomings led to inadequate law enforcement, but evidence suggests they have also fostered a general mistrust and hostility between state and tribal officials and communities.²²⁴

The effects of Public Law 280 on criminal jurisdiction in particular have been extensive.²²⁵ By terminating the narrow special federal criminal jurisdiction over the most serious crimes, Public Law 280 has allowed states to assume a much broader role in criminal matters—a jurisdictional role equivalent to that exercised over any other citizen of

217. *Id.*

218. *Id.* at 8.

219. See PL 280: ISSUES & CONCERNS, *supra* note 140 (noting the misapplication of Public Law 280 by both the federal and state governments).

220. *Id.*

221. *Id.*

222. RESEARCH PRIORITIES, *supra* note 88, at 8.

223. *Id.* at 9. The study also revealed grave concerns expressed by Native Americans in the California communities regarding drug abuse, which has been linked (along with alcohol) to causes of elder abuse. WHITE, *supra* note 2, at 4.

224. PL 280: ISSUES & CONCERNS, *supra* note 140.

225. *Id.*

the state.²²⁶ In contrast, with respect to crimes occurring on reservations, non-Public Law 280 states only have criminal jurisdiction over those cases involving both non-Native American offenders and non-Native American victims.²²⁷

At the same time, courts have found that because Public Law 280 made no mention of tribal authority—instead referring only to a federal-to-state shift in jurisdiction—tribes still have jurisdiction over criminal matters.²²⁸ This results in concurrent jurisdiction between the tribal and state legal systems, thus adding to the general confusion.²²⁹ Unclear high court rulings further exacerbate the confusion. For example, in *California v. Cabazon Mission Band of Indians*, the U.S. Supreme Court held that “regulatory” state criminal laws fell outside the scope of authority transferred to the states by Public Law 280, while “prohibitory” state criminal laws fell within the scope.²³⁰ As noted in a recent report, “this distinction eludes clear definition and has generated considerable litigation.”²³¹

The level of participation by the federal government after passing jurisdiction to the states has remained low.²³² In a number of cases, the Bureau of Indian Affairs refused financial and technical support for tribal law enforcement in Public Law 280 states on the grounds that Public Law 280 “made tribal criminal jurisdiction unnecessary.”²³³ Lack of federal participation and funding for state and tribal law enforcement has led to stunted growth in tribal legal systems in Public Law 280 states.²³⁴ The high costs of necessary law enforcement and detention facilities must be borne by tribes with insufficient funds.²³⁵ When tribal criminal courts do exist in these states,

226. *Id.*

227. *Id.*

228. *Id.* In 2000, the Office of Tribal Justice (part of the U.S. Department of Justice) concluded that “Indian tribes retain concurrent criminal jurisdiction over Indians in PL 280 states.” RESEARCH PRIORITIES, *supra* note 88, at 7 (quoting U.S. DEP’T OF JUSTICE, OFFICE OF TRIBAL JUSTICE, CONCURRENT TRIBAL AUTHORITY UNDER PUBLIC LAW 83-280 (2000), available at http://www.tribal-institute.org/lists/concurrent_tribal.htm). Although this seems to be the general consensus among courts, the United States Supreme Court has not ruled on this issue. *Id.*

229. See PL 280: ISSUES & CONCERNS, *supra* note 140.

230. *California v. Cabazon Mission Band of Indians*, 480 U.S. 202, 210 (1987).

231. RESEARCH PRIORITIES, *supra* note 88, at 6.

232. See PL 280: ISSUES & CONCERNS, *supra* note 140.

233. *Id.* (citing CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 8–12 (U.C.L.A., Am. Indian Studies Ctr., 1997)).

234. *Id.*

235. *Id.*

they often maintain only limited resources.²³⁶ As of 2005, the Department of Justice had recently begun to provide small amounts of funding for tribal community policing and court development, but the problem still persists.²³⁷

IV. Resolution

A. Alternative Dispute Resolution and Other Measures at the Tribal Level

At the tribal level, the overarching goal must be to promote accountability for abusers while leaving elders protected and cared for, all while preserving tribal cultures and traditions. Implementation of restorative justice techniques would reduce the burdens on the court system and reach truly beneficial results.²³⁸ Originally based on Native American traditional approaches to dispute resolution, restorative justice has been increasingly used in Canada and New Zealand and has recently found support in the United States.²³⁹ The focus of restorative justice is not on abuse as a violation of criminal law, but rather as a violation of inter-tribal relationships.²⁴⁰ Generally, restorative justice approaches involve everyone affected by the abuse: victims, abusers, their respective families, and other members of the tribal community.²⁴¹

One common aspect of the restorative justice approach—sentencing circles—would be particularly useful in the elder abuse context.²⁴² This approach involves a criminal court judge referring a case to a group of tribal members—victims, offenders, family members, community members, and sometimes the parties' attorneys and the judge—which then makes sentencing recommendations.²⁴³ Sometimes the agreements reached are enforced as a binding sentence, while other times the agreements are presented before the court for

236. *Id.*

237. RESEARCH PRIORITIES, *supra* note 88, at 7.

238. See PREVENTING & RESPONDING, *supra* note 1, at 28 (outlining non-judicial techniques aimed at resolving abuse issues while promoting reconciliation and prevention).

239. *Id.*

240. *Id.*

241. *Id.*

242. See *generally id.* (detailing the conventions of the typical "sentencing circle").

243. *Id.*

approval.²⁴⁴ This process, like all restorative justice approaches, focuses on the causes of abuse and aims to reach an agreement by which all members of the circle agree on a just sentence.²⁴⁵ The process itself involves sitting in a circle and passing around a talking piece, often a feather, while the possessor speaks his or her mind in support of the victim or offender and offers his or her opinions on the appropriate measures to be taken.²⁴⁶

The adoption of traditional tribal courts has also proven successful and should be implemented on a more widespread basis.²⁴⁷ In 1982 the Navajo Nation established the Navajo Peacemaker Court based on ancient Navajo mediation techniques involving the *Naat'aanii* (headman), who resolves disputes among family and community members and attempts to reform offenders.²⁴⁸ The peacemaker court's success is rooted in its ability to meet the demands of certain types of cases—often marital disputes, disputes among family members or neighbors, and alcohol and drug abuse cases—that are not easily addressed in the tribal context using Anglo-European approaches.²⁴⁹ Again, community involvement is emphasized; court judges appoint a peacemaker and may order any member of the tribal community to take part in the mediation process.²⁵⁰ Attorneys are not part of this process, as peacemaker courts are based on “harmony rather than confrontation.”²⁵¹ Peacemakers not only resolve disputes but also teach traditional Navajo ways to the parties involved, including victims and offenders.²⁵² In the elder abuse context, this could prove particularly useful to prevent future occurrences of abuse because peacemakers can instruct younger members of the tribe on the traditional importance of their elders.²⁵³

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 26.

248. *Id.*

249. *Id.*

250. *Id.* at 27.

251. *Id.*

252. *Id.*

253. See WHITE, *supra* note 2, at 2 (“Under custom and tradition, native elders were seen as repositories of knowledge and as invaluable community resources. Elders traditionally held positions of power in their communities and were prized for their experience and wisdom. Many tribes, villages, and pueblos continue to hold elders in high esteem as a valuable link to their past and as a resource for future generations.”).

The implementation of peacemaker courts, or other methods of restorative justice by tribes across the country, would reduce the burden on tribal and state judicial systems while taking curative steps to eliminate future cases of abuse not only between the current parties but also within the community as a whole. As these restorative justice approaches rely heavily on community participation, they implicitly educate members of the tribe at large on the causes and circumstances of elder abuse on the reservation, thus increasing awareness and the chances for prevention. These approaches also do the tribes an immeasurable service by institutionalizing some of their traditional beliefs, ever important in the years following assimilationist federal policies.²⁵⁴

Implementation will take time. It will depend on the tribes' own initiatives, perhaps combined with federal monetary aid and a return of jurisdiction to tribal courts in Public Law 280 states. Procedures will need to be tailored by the tribes to fit and reflect their own traditions and values. Despite the hard work its implementation would require, restorative justice—combined with increased efforts to adopt tribal elder abuse codes tailored to tribe-specific rather than Anglo-American values²⁵⁵—would likely prove fruitful, while preserving Native American dignity and culture.

B. Resolving Jurisdictional Issues in Public Law 280 States

In cases involving unremorseful or uneducable abusers, legal intervention must be available to hold them accountable and protect their victims.²⁵⁶ In such cases, compensation for losses and injuries is

254. See Baldrige, *supra* note 54, at 1519–20.

By the end of the 1800s . . . the federal government had expanded its initiatives to assimilate Indians into the larger society. The Dawes Act of 1887, described by Teddy Roosevelt as “a great pulverizing engine, designed to break up the tribal mass,” dissolved tribal governments and institutions. . . . [T]he Dawes Act and subsequent attempts to assimilate Indians have effectively resulted in the destruction of their traditional societies. In the 1950s and 1960s, the federal government began the termination era, “with the ultimate goals of assimilating Indian people by breaking down tribal bonds.”

Id. (citation omitted).

255. See *id.* at 1520 (“[R]ather than allowing the establishment of governments that reflected Indian values and traditions, the Bureau of Indian Affairs drafted tribal constitutions that were tailored to Anglo-American standards.” (citation omitted)).

256. PREVENTING & RESPONDING, *supra* note 1, at 25.

necessary to make victims whole again.²⁵⁷ Due to the legal complexities of tribal existence in a federalist system, however, jurisdictional issues undermine efforts to attain these goals in Public Law 280 states.²⁵⁸ To fully resolve jurisdictional issues such as gaps, overlap, and general confusion, tribes and advocates must first determine which courts have actual jurisdiction.²⁵⁹ This will involve working closely with state officials and coordinating investigation and enforcement procedures that are clear and effective.²⁶⁰

After the problems are identified, they will need to be addressed in a unified manner. Tribes and state governments should put aside hostile differences in opinion and approach the problem together. As mentioned earlier, many cases of inadequate or nonexistent state enforcement are caused by the mere fact that the state lacks funds or directives to attend to tribal issues such as elder abuse.²⁶¹ Considering the present state of the economy, it would not be a surprise to learn that Native American issues are being placed on the back burner in many states.

Resolving state criminal justice funding issues will depend on the federal government, which has two options. First, it could provide states with adequate financial resources, which they never received upon implementation of Public Law 280 and which are necessary to effectively handle Native American issues. Second, it could reduce the standards for retrocession of jurisdiction to the federal government, which will depend on whether the tribe has an adequate legal system in place.²⁶² The problem is that the confusing nature of jurisdiction between tribe and state, combined with gaps and overlap, stunts the growth of Native tribal court systems. States that have neither the financial resources nor the capacity to exert effective jurisdiction over tribal matters must be allowed to return that authority to the federal government. The federal government could then improve direct funding for tribal court systems and resume the original method of exerting federal jurisdiction in the most serious cases while allowing tribal jurisdiction concurrently. This would serve to eliminate the confusion that arose from Public Law 280's original application. Also,

257. *Id.*

258. *See id.*

259. *Id.* at 26.

260. *Id.*

261. PL 280: ISSUES & CONCERNS, *supra* note 140.

262. *Id.*

out of respect for their heritage and their tribal sovereignty, tribes must be given the option of *initiating* this return to federal jurisdiction, regardless of a state's capacity to exercise jurisdiction.

C. Increased Appropriations from the Federal Government Under the OAA

Finally, funding under Title VI of the OAA (Grants to Native Americans, including appropriations for "supportive and nutrition services" and "Native American caregivers") must be increased significantly. The Senate Health, Education, Labor, and Pensions Committee must work closely with officials from tribal advocacy organizations like NICOA and n4a to arrive at a reasonable amount of federal funds that can be used to significantly improve conditions in poverty-stricken Native American communities. Overburdened and chronically stressed caregivers are some of the prime causes of elder abuse in Indian Country.²⁶³ Increased funding for nutrition services and the training and employment of professional caregivers would reduce the financial, psychological, and emotional burdens on ill-equipped caregivers who might have been disposed to abuse but would not if costs and stresses were reduced.

Funding under Title VII (Vulnerable Elder Rights Protection Activities) must also increase. Ombudsman programs have proven successful²⁶⁴ and should be maintained with adequate funding. Native American elder rights programs, however, have gone shamefully unaddressed by the federal government despite repeated requests for funding. The federal government has too long failed to appropriate money for tribal elder rights programs. The problem of elder abuse in Indian Country exists and must be addressed by the federal government in a serious manner. This includes building the resources of tribal communities that are too poor to fund elder rights programs themselves.

V. Conclusion

Elder abuse in Indian Country harms the cultural integrity of a people who have traditionally held their elders in high esteem for hundreds of years. Tribal, state, and federal governmental entities

263. See Ramsey-Klawnsnik Interview, *supra* note 47.

264. See NAPILI, *supra* note 161, at 7.

must act in a concerted, good faith, multi-pronged manner to successfully eliminate the abuse of Native American elders. Tribes should be encouraged and aided in implementation of traditional methods of dispute resolution aimed at curing the causes of elder abuse, providing remedies to victims, and fostering tribal cohesion. The federal and state governments should work with tribes to cure the jurisdictional issues caused by Public Law 280 while encouraging increased autonomy of tribes in Public Law 280 states. Finally, the federal government must use its powers of appropriation authorized under the Older Americans Act to provide adequate funding for programs that will directly impact the underlying causes of elder abuse and increase awareness and preventative measures within tribal communities.