

# SEPARATE BUT UNEQUAL: THE FEDERAL CRIMINAL JUSTICE SYSTEM IN INDIAN COUNTRY

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*In this Article, Troy Eid, a former United States Attorney for the District of Colorado, and Carrie Covington Doyle conclude that the federal criminal justice system serving Indian country today is "separate but unequal" and violates the Equal Protection rights of Native Americans living and working there. That system discriminates invidiously because it categorically applies only to Native Americans and then only to crimes arising on Indian lands. It is unequal because it is largely unaccountable, needlessly complicated, comparatively under-funded, and results in disproportionately more severe punishments for the same crimes, especially for juveniles.*

*This Article traces the historical foundations of criminal justice in Indian country with emphasis on the Major Crimes Act of 1885 ("MCA") to demonstrate that Congress's decision to extend federal jurisdiction to Indian reservations was ill-*

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*considered and meant only as a temporary expedient. Imposed by Congress with racist intentions in the late nineteenth century, that system still fails to satisfy even the minimum standards of fairness and equality that the Constitution is commonly understood to afford to all U.S. citizens under the Fourteenth Amendment.*

*A careful review of the MCA and its racist origins is long overdue and relevant to today's debate over the future of the federal criminal justice system in Indian country. Congress's extension of federal jurisdiction to Indian reservations was central to the federal government's forced-assimilation policy and the destruction of traditional tribal institutions, values, and culture in the late 1800s. Yet even as national policies toward Indians have changed dramatically in recent decades, the architecture of the federal criminal justice system in Indian country has remained stubbornly frozen in time and poses a serious obstacle to tribal sovereignty and self-determination.*

*Eid and Doyle explore how this "separate but unequal" federal criminal justice system systematically discriminates against Native American crime victims and offenders alike. There is a constitutional imperative, they argue, to end the federal government's role in Indian country as it currently exists. The remedy for this lingering injustice is for the President, Congress, and Supreme Court to return to constitutional first principles.*

*Eid and Doyle recommend that Indian tribes and nations be provided with far greater freedom to choose when and how to design and run their own criminal justice systems within the federal constitutional scheme. This includes the option of abandoning the MCA and exiting federal criminal jurisdiction entirely for offenses that would otherwise be purely local in nature, substituting tribal law and institutions in place of federal command-and-control policies.*

## INTRODUCTION

As the United States Supreme Court heard oral arguments in *Brown v. Board of Education*,<sup>1</sup> Justice Robert H. Jackson asked petitioners' counsel, Thurgood Marshall, if his clients' challenge to state-supported school segregation would also ap-

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1. 347 U.S. 483 (1954).

ply to Native Americans.<sup>2</sup> Marshall said he thought so, but “the biggest trouble with the Indians is that they just have not had the judgment or the wherewithal to bring lawsuits.”<sup>3</sup>

“Maybe you should bring some up,” Justice Jackson suggested.<sup>4</sup>

Marshall replied, “I have a full load now, Mr. Justice.”<sup>5</sup>

Marshall never did bring up such a case.<sup>6</sup> His exchange with Justice Jackson in *Brown* is all but forgotten today, along with Jackson’s description of the federal government’s official policy toward Native Americans living and working on Indian reservations as “the segregation of the Indians.”<sup>7</sup> *Brown* overturned *Plessy v. Ferguson*,<sup>8</sup> in which the Court had endorsed racial discrimination against African-Americans in public facilities under the so-called “separate but equal” doctrine.<sup>9</sup> Congress and the President went on to pass the Civil Rights Act<sup>10</sup> and the Voting Rights Act<sup>11</sup> to provide anti-discrimination enforcement tools to protect rights promised a century earlier by the Fourteenth<sup>12</sup> and Fifteenth Amendments,<sup>13</sup> but were suppressed against African-Americans in much of the country.

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2. Transcript of Oral Argument at 17, *Brown*, 347 U.S. 483, (No. 101), available at <http://www.lib.umich.edu/brown-versus-board-education/oral/Marshall&Davis.pdf>.

3. *Id.*

4. *Id.*

5. *Id.*

6. Marshall later authored several foundational opinions of modern Indian law as a Supreme Court Justice. CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 248 (2005). See, e.g., *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164 (1973). Although the modern tribal sovereignty movement benefited from the momentum of the Civil Rights movement, its goal of reversing forced assimilation was distinct from the Civil Rights goal of ending segregation. WILKINSON, *supra* note 6, at 129.

7. Transcript of Oral Argument at 17, *Brown*, 347 U.S. 483, (No. 101), available at <http://www.lib.umich.edu/brown-versus-board-education/oral/Marshall&Davis.pdf>. Jackson, a former U.S. attorney general, served as the chief prosecutor in the Nuremberg trials against Nazi Germany and was no stranger to human rights issues. See generally GAIL JARROW, ROBERT H. JACKSON: NEW DEAL LAWYER, SUPREME COURT JUSTICE, NUREMBURG PROSECUTOR (2008).

8. 163 U.S. 537 (1896).

9. *Brown*, 347 U.S. at 495 (1954) (“We conclude that . . . ‘separate but equal’ has no place.”).

10. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C. (2006)).

11. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

12. U.S. CONST. amend. XIV.

13. U.S. CONST. amend. XV.

*Brown* catalyzed a Civil Rights Movement that finally exposed “separate but equal” for what it really was: separate but *unequal*. Yet, more than a half-century later, the federal criminal justice system in Indian country<sup>14</sup> still often fails to satisfy even the minimum standards of fairness and equality that the Constitution is commonly understood to afford to all U.S. citizens under the Fourteenth Amendment.<sup>15</sup> That system is *segregated* because it categorically applies only to Native Americans and then only to crimes allegedly committed on Indian lands.<sup>16</sup> It is *unequal* because it is largely unaccountable, needlessly complicated, comparatively under-funded, and results in disproportionately more severe punishments for the same crimes, especially for juveniles.

This Article traces the segregationist roots of the federal criminal justice system in Indian country to the *Plessy* era of racial and ethnic intolerance and examines how this separate but unequal system of justice endures in Indian country today.<sup>17</sup> Part I outlines the historical foundations of criminal justice in Indian country with emphasis on the Major Crimes Act (“MCA”)<sup>18</sup> to demonstrate that Congress’s decision to ex-

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14. “Indian country” here refers to Indian lands held in trust by the U.S. government and subject to federal jurisdiction. 18 U.S.C. § 1151 (2006).

15. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”). See also *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”).

16. According to a July 2005 U.S. Census Bureau report, an estimated 4 million people, or 1.5 percent of the total U.S. population, list themselves as being Native American or Alaska Native; about one-third live in Indian country. Marianne O. Nielson, *Introduction to the Context of Native American Criminal Justice Involvement*, in *CRIMINAL JUSTICE IN NATIVE AMERICA* 1, 2 (Marianne O. Nielson and Robert A. Silverman, eds., 2009).

17. By “separate but unequal,” we refer to the comparatively harsher sanctions that the federal criminal justice system systematically imposes on adult and juvenile offenders on tribal lands subject to its jurisdiction, as compared to what ordinarily occurs when state and local governments mete out punishments for the same or similar offenses arising on non-tribal lands, and to the comparatively limited, less accountable, and often inferior criminal justice services that the federal government generally provides there. This concept obviously differs in degree and kind from what Charles Wilkinson has called “measured separatism,” the policy by which the federal government has sometimes encouraged the separate development of tribal governance and institutions to strengthen tribal self-determination. CHARLES WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 14 (1987).

18. Major Crimes Act, ch. 341, § 9, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2006)).

tend federal jurisdiction to Indian reservations was ill-considered and meant to be a temporary expedient. A careful review of the MCA and its racist origins is long overdue and relevant to today's discussion about the future of the federal criminal justice system in Indian country because the extension of federal jurisdiction to Indian reservations was a key component of assimilation.

A century later, the federal government's policies had eventually come to encourage tribal sovereignty and self-determination. Yet the MCA and the federal institutions that divested local control and accountability from the justice system in Indian country at the end of the Indian Wars remain strikingly unchanged today. In virtually all other communities in the United States, criminal justice is a matter of overwhelmingly local concern and redress. The federal government's role is carefully restricted to enforcing modern day "major crimes," such as anti-terrorism laws, international drug-trafficking operations, and large-scale criminal enterprises. Yet, by what may well be a historical accident, the federal government's role in criminal justice in Indian country is almost entirely unrestricted. The federal attorneys and law enforcement officers who serve these areas rarely live in their communities, are often located far from Indian reservations, lack direct knowledge or experience with victims and defendants living and working there, and are largely unaccountable to their Native American constituents. The federal criminal justice system in Indian country was simply never supposed to be a set of permanent laws and institutions. Even as national policies toward Indians changed, the architecture of that system has remained stubbornly frozen in time and poses a serious obstacle to tribal sovereignty and self-determination.

Part II explores some of the ways that the separate but unequal federal criminal justice system that emerged from the MCA—and which unexpectedly persists to this day—systematically discriminates against Native American crime victims and offenders alike. It perpetuates a degree of daily injustice that would be unthinkable to the vast majority of Americans who have little or no contact with it. Most disturbing of all is the treatment of Native American juvenile offenders; they are disproportionately sentenced as adults, they receive relatively longer sentences of incarceration, and they have comparatively restricted access to diversion and other programs designed to promote rehabilitation. Perversely, the only way for

Native Americans to avoid this unjust system is to leave the very homelands that the federal government has permanently set aside for Indian tribes and their members.

Part III suggests that there is a constitutional imperative to end the federal government's role in Indian country as it currently exists. The remedy for this lingering injustice is for the President, Congress, and Supreme Court to return to constitutional first principles. Indian tribes and nations should be provided with greater freedom to choose how to design and run their own criminal justice systems within the federal constitutional scheme. This includes letting Indian tribes and nations wishing to do so to exit the MCA entirely so long as they protect defendants' federal constitutional rights on par with state governments. It also means freeing tribes that so choose from concurrent federal jurisdiction for what would otherwise be purely local crimes, while retaining federal criminal laws of general application. For those tribes that choose to retain the MCA and concurrent federal jurisdiction on their lands, the federal government's goal must be to ensure that Native Americans consistently receive the minimum level of civil-rights protections to which all U.S. citizens are guaranteed.

I. THE MAJOR CRIMES ACT: FEDERAL BAND-AID TO THE "INDIAN PROBLEM"

*Plessy* attests to the late nineteenth century belief that the races were inherently different:

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.<sup>19</sup>

Not long before *Plessy*, in *Ex parte Kan-gi-Shun-ca*<sup>20</sup> (*Crow Dog*), the Supreme Court refused to extend federal jurisdiction

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19. *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896).

20. 109 U.S. 556 (1883). Known as the "*Crow Dog* case," the decision uses the defendant's Brulé Sioux name rather than its English translation. The events that gave rise to *Crow Dog* began in 1881 with Crow Dog murdering Spotted Tail on the Great Sioux Reservation. White officials at the time dismissed the killing as a quarrel between two Indians over a woman, but Red Cloud and others saw it as an assassination of a leader who had defied Indian agents. "This was charged

to crimes involving solely Native Americans in Indian country, only to be overturned by Congress. But even in *Crow Dog*, the Justices were less circumspect about the differences they perceived between whites and Indians:

It [federal criminal law] tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.<sup>21</sup>

The late nineteenth century was a period of extreme violence in the history of ethnic relations in the United States. The rise of the Ku Klux Klan and the Chinese Exclusion Act<sup>22</sup> are but two examples of the way that industrialization and western expansion tended to marginalize and demonize many ethnic and racial minorities.<sup>23</sup> The period was no less insidious for the tribal members who survived disease and war only to be removed to Indian reservations.<sup>24</sup>

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upon the Indians because an Indian did it," Red Cloud said, "but who set on the Indian?" DEE BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* 420 (Owl Books 1991) (1971). Ironically, and as discussed in Section I(B), *infra*, this was the case that triggered a Congressional backlash leading to the passage of the Major Crimes Act.

21. *Crow Dog*, 109 U.S. at 571.

22. Chinese Exclusion Act of 1882, ch. 60, 27 Stat. 25 (repealed 1943). *See generally*, Virginia Martinez, Jazmin Garcia, & Jasmine Vasquez, *A Community Under Siege: The Impact of Anti-Immigrant Hysteria on Latinos*, 2 DEPAUL J. SOC. JUST. 101, 105–06 (2008).

23. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2521 (2009) (briefly describing the rise of Klan violence in response to the Fifteenth Amendment's enfranchisement of blacks).

24. *See* Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 632 (2009) ("Historians also increasingly identified triumph over the Indian tribes as the formative racial and national experience of white America."). For instance, writing in 1885—the same year Congress passed the Major Crimes Act—former president Ulysses S. Grant defended the United States' war with Mexico, in which he had fought as a young man. 2 ULYSSES S. GRANT, *PERSONAL MEMOIRS OF U. S. GRANT* 545–46 (New York, Charles L. Webster & Co. 1885). The Mexican War had been tied into the antebellum debate over slavery; many prominent leaders, including former president John Quincy Adams and then little-known Congressman Abraham Lincoln, had strongly opposed it as an unconstitutional vehicle for extending slavery. *See* JOHN STAUFFER, *GIANTS: THE PARALLEL LIVES OF FREDERICK DOUGLASS & ABRAHAM LINCOLN* 172–75 (2008). Tellingly, Grant defends the war on the basis that it accelerated the pace by which Indian tribes were destroyed and their members removed from the formerly

What would later be called “federal Indian law” was dramatically altered during this same period to enable forced Indian removal, divestiture of remaining tribal lands, and continued western expansion.<sup>25</sup> In the mid-nineteenth century, Indian tribes were widely acknowledged to be legally sovereign within their own ancestral homelands.<sup>26</sup> Yet that virtual legal consensus all but evaporated a few decades later as the law was radically changed to justify forced assimilation, with Indian tribes consigned mostly to distant and geographically isolated reservations and legally transformed from nations into “wards” of the federal government.<sup>27</sup> It was at the height of this extremist era that Congress extended federal criminal jurisdiction over otherwise purely local crimes involving only Indians by enacting the MCA, in support of what had become the final solution to the “Indian problem”: forced assimilation.<sup>28</sup>

This Part begins with an overview of the General Allotment Act, which is generally recognized as the key vehicle for assimilation.<sup>29</sup> Next, it details the legislative history behind and passage of the MCA in order to demonstrate that this law, which has governed Indian country crime since 1885 and served as the foundation for other federal institution-building there, was intended to be temporary. If the MCA established federal jurisdiction over criminal law in Indian country, then *U.S. v. Kagama*, addressed in Section C, ensured the federal government’s predominance there even as the Court struggled to explain the constitutionality of its presence. Finally, to round out the foundational history of criminal justice in Indian country, Section D gives an overview of the earliest efforts to bring federal notions of non-Indian law and order to the reservations, and Section E sketches relevant developments in the twentieth century.

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Mexican lands that had been ceded to the United States in 1848. 2 GRANT, *supra* note 24, at 551. “It is probable,” Grant concludes, “that the Indians would have had control of these lands for a century yet but for the war. We must conclude, therefore, that wars are not always evils unmixed with some good.” *Id.*

25. See, e.g., Berger, *supra* note 24, at 628–29.

26. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–61 (1832); *Crow Dog*, 109 U.S. at 571.

27. *United States v. Kagama*, 118 U.S. 375, 383–84 (1886).

28. See, e.g., Berger, *supra* note 24, at 629.

29. See FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 136 (2009); see generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10 (1995).

A. *The Backdrop of Allotment*

Congress enacted the MCA,<sup>30</sup> which extended federal criminal jurisdiction to crimes committed by Native Americans on Indian reservations, at the same time it was embracing the so-called “allotment program” that would guide federal policy toward Indian tribes and their members until the New Deal.<sup>31</sup> The legal architecture of the federal criminal justice system in Indian country is rooted in both the MCA and the federal government’s overarching policy of forced assimilation, which is epitomized by the General Allotment Act.

Congress passed the General Allotment Act in 1887, which, together with individual allotment acts that applied to individual tribes, impacted nearly every federally recognized Indian tribe in the United States.<sup>32</sup> The Act generally established a process whereby federal Indian trust land was to be divided into individual homestead parcels and converted into private (fee simple) property that could be sold after twenty-five years, at which time Indian families received a patent to the land and could become U.S. citizens.<sup>33</sup> During this time, Native Americans were to be assimilated as farmers and ranchers and converted to Christianity, primarily through federally supported missionaries and boarding schools.<sup>34</sup>

Rather than establish a system of individual land ownership within the reservation system, Congress intended land ownership by allotment to be the means to phase out and elim-

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30. 18 U.S.C. § 1153 (2006).

31. “The basic idea of the Allotment Act was to make the Indian conform to the social and economic structure of rural America by vesting him with private property.” VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 46 (1969). At the time the original act was passed, Indian tribes controlled nearly 138 million acres, almost 90 million acres of which was subsequently lost. POMMERSHEIM, *supra* note 29, at 130. Almost half the remaining 48 million acres consisted of desert lands. JOHN R. WUNDER, “RETAINED BY THE PEOPLE”: A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 33 (1994). Professor Wunder chronicles the often tortured implementation of the General Allotment Act and what he calls the “forced acculturation” of Native Americans, a policy finally halted by the so-called “Indian New Deal,” specifically the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–79 (2006)). *Id.* at 31–78.

32. Indian General Allotment (Dawes) Act, 24 Stat. 388 (1887); *see also* DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 165–66 (5th ed. 2005).

33. Royster, *supra* note 29, at 10.

34. *See id.* at 9; *see also* WILKINSON, *supra* note 17, at 20–21.

inate the reservation system altogether.<sup>35</sup> In 1896, the Supreme Court most clearly articulated the ultimate goal of allotment in *Draper v. United States*: “The [General Allotment Act of 1887] contemplated the gradual extinction of Indian reservations and Indian titles by the allotment of such lands to the Indians in severalty.”<sup>36</sup> Allotment, the Court said, was intended to bring individual Indians under state jurisdiction through ownership of a fee patent.<sup>37</sup> As section six of the General Allotment Act of 1887 stated, once individual Native Americans received their land patents, they would “have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.”<sup>38</sup>

Allotment was a tribal land divestiture system in that the remaining excess or “surplus” lands from the Indian reservations that had previously been held in trust for tribes were opened to non-Indian settlement.<sup>39</sup> In this way, trust lands originally set aside permanently by the federal government for the benefit of Indian tribes and their members were expected to be “pulverized,” in Theodore Roosevelt’s appropriate phrase,<sup>40</sup> and sold as private property, primarily to non-Indian homesteaders and land speculators. Roughly 65 percent of Indian lands passed out of Native American hands between 1887 and 1934.<sup>41</sup>

### B. *Passage of the Major Crimes Act*

The MCA, an ambitious title for the last section of the annual appropriations bill for 1885,<sup>42</sup> was the product of the same

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35. “[A]dvocates of the [allotment] policy believed that individual ownership of property would turn the Indians from a savage, primitive, tribal way of life to a settled, agrarian, and civilized one. Assimilation was viewed as both humanitarian and inevitable.” Royster, *supra* note 29, at 9.

36. 164 U.S. 240, 246 (1896).

37. *Id.*

38. *Id.* (quoting the Indian General Allotment (Dawes) Act, § 6, 24 Stat. 388 (1887)).

39. G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”: Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 576–77 (2009).

40. President Theodore Roosevelt described the federal government’s allotment policy as “a mighty pulverizing engine to break up the tribal mass.” POMMERSHEIM, *supra* note 29, at 131 (quoting President Theodore Roosevelt, First Annual Message to Congress (Dec. 3, 1901)).

41. POMMERSHEIM, *supra* note 29, at 130.

42. The full language of what would come to be known as the MCA-Appropriations Act for Indian Department:

lawmaker whose name was given to the General Allotment Act, Senator Henry Dawes of Massachusetts.<sup>43</sup> The MCA was Dawes's response to the Supreme Court's decision in the *Crow Dog* case, in which the Supreme Court upheld tribal criminal jurisdiction where one tribal member murdered another.<sup>44</sup> To an extent breathtaking even for the time, Dawes, chair of the Senate Committee on Indian Affairs, almost single-handedly spearheaded the passage of the MCA, manipulating Senate and House rules to get it enacted into law quickly without a single Congressional hearing by an authorizing committee.<sup>45</sup> The MCA extended federal jurisdiction over seven major crimes in Indian country<sup>46</sup> and thereby effectively removed criminal jurisdiction from all tribal courts except those of the Five Civilized Tribes.<sup>47</sup>

To say that the MCA was hastily written, drafted, and reviewed would be a profound understatement. It is not clear

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[A]ll Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

Ch. 341, § 9, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2006)).

43. Honorable Ross O. Swimmer, *Modern Tribal Government: Social and Economic Opportunities and Realities*, 7 ST. THOMAS L. REV. 479, 484 n.29 (1995).

44. *Ex parte Kan-gi-Shun-ca (Crow Dog)*, 109 U.S. 556, 571 (1883).

45. *See, e.g., infra* notes 60, 62, 70.

46. The modern MCA covers 15 major crimes. 18 U.S.C. §1153(a) (2006) (“[N]amely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.”).

47. 16 CONG. REC. 2385–86 (1885) (the proposed section that would have brought the Five Civilized Tribes under the jurisdiction of the United States District Court for the Western District of Arkansas was removed by the Senate).

from the limited legislative record that Congress intended for Indians to be brought under exclusive federal rather than concurrent federal and state jurisdiction. Dawes and his colleagues were focused on reducing the cost of the Indian reservation system to the federal government and opening new lands for white settlement.<sup>48</sup> Given their overarching focus on extending and accelerating the allotment process, they almost certainly did not intend to establish a long-term federal presence in Indian country, let alone a permanent system of federal criminal jurisdiction and institutions.<sup>49</sup> On the contrary, Dawes and his supporters were bullish on the potential of allotment to, in the jargon of the era, “kill the Indian to save the man,”<sup>50</sup> and to do so quickly. For some, the whole process of assimilation-by-allotment would be completed in only a matter of years, not decades. As one of Dawes’s supporters put it:

I believe that in the course of ten or twelve years the Congress of the United States would not be called upon to sit in Committee of the Whole for the purpose of considering a bill for the support of any Indian tribe. I believe that Indians would become self-supporting.<sup>51</sup>

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48. See *infra* notes 74–76.

49. The text of the MCA itself reflects the inherent racism of the era in which it was designed as a temporary expedient. By insisting on striking a provision that would have brought the Five Civilized Tribes under federal jurisdiction, Congress was effectively distinguishing between tribes that were ready to handle their own jurisdiction—the “civilized” tribes—and those that were not yet ready. See 16 CONG. REC. 2385–86 (1885). The key word here is “yet”; through assimilation, the logic went, Indians would become civilized. Once civilized, the logic continued, Indian people would either come under state jurisdiction (thanks to allotment) or tribes would organize into territories, and then into states. In this way, the federal role would be limited and short-term.

50. The phrase was popularized by Captain Richard H. Pratt, who, with federal support in 1879, founded the Carlisle Indian Boarding School at Carlisle Barracks, Pennsylvania. As Captain Pratt explained in an 1892 speech:

A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.

Richard H. Pratt, *The Advantages of Mingling Indians with Whites, in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880–1900*, at 260–61 (Francis Paul Prucha ed., 1973).

51. 16 CONG. REC. 863 (1885) (statement of Rep. Ellis). Ellis proposed a Northwest Indian Territory, which would go through the statehood process and then be admitted as a state on equal footing. *Id.* at 895 (statement of Rep. Rogers: “Sir, I believe the Indian people would consent, if a fair expression could be had, to an equal division of their lands among them and to the establishment of a Ter-

Importantly, what became the MCA was an appropriations rider—a piece of substantive or “authorizing” legislation that was simply appended to a Congressional funding bill, and which never received a public hearing by the appropriate authorizing committee. As early as 1882, a bill “to extend the jurisdiction of the district and circuit courts of the United States, for the punishment of crimes on Indian reservations within the limits of any State or organized Territory,” had been introduced in the House of Representatives.<sup>52</sup> The House did not include the provision in its first draft of the appropriations bill for 1885,<sup>53</sup> but Representative Byron M. Cutcheon of Michigan added the provision as an amendment on January 22, 1885.<sup>54</sup> A few congressmen objected to the measure being introduced as an appropriations rider,<sup>55</sup> but they were assured that the House had passed similar legislation (also as an appropriations rider) the year before that the Senate had rejected only because it also included misdemeanors.<sup>56</sup> The House then passed the bill and sent it to the Senate.<sup>57</sup>

The Senate’s discussion of the bill went quickly to the problem of appropriations riders generally, although its chief concern was with addressing settlers’ claims for federal compensation for Indian “degradations” rather than concerns about protecting tribes or their members.<sup>58</sup> The Senate’s procedural

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ritorial government. . . . Going hand in hand with this is citizenship, courts, and laws. It is coming to this. We know it. They know it. It is in their interest to accept the situation. It is our duty to protect them by humane laws.”)

52. REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EX. DOC. 47-1, pt. 5, at 15 (1882) (quoting H.R. 755, introduced by Rep. Willits).

53. See 16 CONG. REC. 863 (1885).

54. *Id.* at 934–36 (introduction and discussion of “Sec. 11”, the major crimes provision amendment).

55. *Id.* at 935 (statement of Rep. Holman: “I regret that this legislation comes year after year upon appropriation bills, without taking the voice of a committee who are especially familiar with the subject.”); *id.* at 934 (statement of Rep. Rogers: “This amendment is so long and the subject so important, that unless I can have an opportunity to investigate the proposition I must insist on the point of order.”); *id.* at 936 (statement of Rep. Warner: “[I]n view of the large number of amendments that are proposed it seems to me we have proof enough that this whole question should go to the Committee on Indian Affairs and be reported from that committee. Some of these amendments are evidently crude, being suggested on the spur of the moment.”).

56. *Id.* at 935 (statement of Rep. Budd).

57. *Id.* at 938 (passage of bill).

58. *Id.* at 1716 (with regard to a rider including a limited number of settlers seeking depredation claims against the federal government, Sen. Miller introduced the larger concern about appropriation riders: “[T]he action of the committee on this clause brings up the whole question of what the Senate is to do in respect of what is termed general legislation in this Indian appropriation bill.”); *id.*

rules limited it to either approving or striking appropriations riders, but not amending them, so the major crimes rider was struck out of the Senate bill on February 16, 1885.<sup>59</sup> Senator Dawes charted a new path through Senate procedure by effectively proposing an amendment to the House's major crimes appropriations rider.<sup>60</sup> He did this by proposing an amendment to the House's amendment—to get it into the *Congressional Record*—and then declaring that he would vote *against* his own amendment because it was against procedure.<sup>61</sup> The senator himself advocated for the measure on the Senate floor, and he in fact was able to promote and amend the legislation—his own bill—despite Senate rules preventing him from doing either.<sup>62</sup>

As the Congressional session was coming to a close, the two houses agreed to compromise legislation (still in the form of appropriation riders) on March 3, 1885.<sup>63</sup> The final version of the MCA contained the language proposed by Dawes. Jurisdiction over Indian crimes was given to territories or the Unit-

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at 1717 (statement of Sen. Plumb: “There is a rule of the Senate that no legislation shall appear upon the appropriation bills, and that has been properly construed to mean that the Senate can not amend the House legislation sent to us on such bills. . . . That enforces what I have said about the improvidence of inserting measures of this kind or claims of this character on an appropriation bill; where they have not undergone such scrutiny no careful person can say whether more or less may not be necessary.”). Here, Sen. Plumb was speaking about depredateions claims, but the concern of a “careful person” would certainly also extend to legislation added to the appropriation bill that had nothing whatever to do with appropriations or money generally.

59. *Id.* at 1748–50; *see also id.* at 2385 (statement of Sen. Dawes, recapping the progress of the legislation on March 2, 1885: “[The bill] came over from the House with the ordinary appropriations for the Indian service loaded with a large amount of what are called depredateion claims and burdened with a large amount also of general legislation upon important matters. The Senate at that time sustained the Committee on Appropriations in stripping the bill of everything except what pertained to the appropriations.”).

60. *Id.* at 2385–86 (statement of Sen. Plumb regarding Sen. Dawes's experience).

61. *Id.* at 2385.

62. *Id.* (statement of Sen. Dawes) (the Senator advocated for the first part of the major crimes provision, but insisted that the second part of the provision, which would override the established jurisdiction of the Five Civilized Tribes with that of the U.S., was unjust and against treaty agreements.).

63. *Id.* at 2466, 2533; *see also id.* at 2387 (statement of Sen. Beck regarding the concern over the inevitably rushed nature of passing appropriations legislation: “Five of the most important appropriation bills that have come over to us have come laden down, some of them, with legislation, within the last week of the session. We come at once to look at them; we can not examine them without sitting up all night, as our Committee on Appropriations has had to do for a week past.”).

ed States and taken away from states and tribes, and the Five Civilized Tribes were not mentioned and so managed to maintain their jurisdiction.<sup>64</sup> A third section holding that Indians in civil trials “shall not be rejected as witnesses on account of race or nation” was inexplicably removed as well.<sup>65</sup> The final Act imposed exclusive federal jurisdiction on Indians within reservations, although there were two different schemes: Indians on reservations within Territories would be subject to the territorial law, and Indians on reservations in states would be subject to federal law.<sup>66</sup>

A close read of the MCA’s legislative history is warranted for two reasons. First, it is crucial to understand the policy reasons for a law that continues to govern federal criminal jurisdiction in Indian country today, and these reasons can really only be found in the legislative record because the measure was passed as an appropriations rider. Second, the wide-ranging discussion that members of both houses engaged in regarding the 1885 Indian appropriations bill demonstrates that the general consensus in Congress was that, thanks to assimilation-by-allotment, the federal government would shortly be getting out of the Indian business.

Representative Cutcheon introduced what became the MCA to the appropriations bill in the House on January 22, 1885.<sup>67</sup> Cutcheon described the situation of revenge on Indian reservations as an emergency situation: “I would not offer this amendment at the present time and in connection with this appropriation bill if I thought there existed the least chance or

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64. *Id.* at 2385. Dawes seemed to regret the removal of state concurrent jurisdiction, but not enough to change the language: “[The MCA is an] important provision and one which the demands of the Indian service are very urgent for; and yet the provision, which is section 11 of this House bill, proposes in the first place—unfortunately in its phraseology, not in its intent—to take away from the State courts . . . jurisdiction over the commission of an offense . . .” *Id.*

65. The third section was included when the major crimes rider was first introduced in the House, *id.* at 934, but it was gone without any discussion in Dawes’s proposed amendment, *id.* at 2385. Dawes offers no explanation for the third section’s removal, and no one questions its absence. Time seemed to be of the essence by March because the congressional session was nearing an end, and all parties seemed much more interested in Dawes’s unique procedural wranglings than in protecting the right of Native Americans to serve as witnesses in civil trials.

66. *Id.* at 935 (statement of Rep. Cutcheon that this had been the Secretary of the Interior’s suggestion). Additionally, Senator Dawes said that there was never the intent to take jurisdiction away from state courts, although the wording of the “amendment” fails to make jurisdiction clear. *Id.* at 2385.

67. *Id.* at 934.

opportunity of its becoming law in any other way.”<sup>68</sup> He continued:

Under our present law there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that the ‘blood avenger’—that is, the next of kin to the person murdered—shall pursue the one who has been guilty of the crime and commit a new murder upon him. . . . [T]here is now no law to punish the offense except, as I have said, the law of the tribe, which is just no law at all.<sup>69</sup>

Senator Dawes described public support for the rapid exertion of either federal or state jurisdiction over crimes on Indian reservations: “The [MCA] attracted attention in the other body and throughout the country as one of vital importance . . . . [It is] a very important provision and one which the demands of the Indian service are very urgent for.”<sup>70</sup>

Although Cutcheon’s rider was rushed through as part of what amounted to a last-minute appropriations bill, Senator Dawes and his supporters were able to make two interesting changes. First, the amendment was modified so as to preserve concurrent jurisdiction with the federally funded Indian Police and Bureau of Indian Affairs (“BIA”) Courts of Indian Offenses, used by many Indian agents to enforce law and order on reservations.<sup>71</sup> Second, reservation crimes were assigned to federal, rather than state or territorial, jurisdiction.<sup>72</sup> It is unclear when or why this decision was made, but what seems unmistakable is that only a relative handful of lawmakers—those involved in the appropriations process itself—could have even been aware of it. This is because the Secretary of the Interior had asked for state or territorial jurisdiction but not federal jurisdiction:

[I]t will hardly do to leave the punishment of the crime of murder to a tribunal that exists only by the consent of the

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68. *Id.*

69. *Id.*

70. *Id.* at 2385 (statement of Sen. Dawes).

71. *Id.* at 934 (statement of Rep. Budd: “I desire to suggest another modification of the amendment—to strike out the words ‘and not otherwise.’ The effect of this modification will be to give the courts of the United States concurrent jurisdiction with the Indian courts in the Indian country. But if these words be not struck out, all jurisdiction of these offenses will be taken from the existing tribunals of the Indian country.”). *See also* Section D, *infra*.

72. Major Crimes Act, ch. 341, § 9, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C.A. § 1153 (2006)).

Indians of the reservation. . . . The laws of the State or Territory wherein the reservation is situated ought to be extended over the reservation, and the Indians should be compelled to obey such laws and be allowed to proclaim the protection thereof.<sup>73</sup>

There is apparently no evidence in the legislative history to suggest that anyone in Congress disputed the Secretary of Interior's position, and yet the MCA emerged as an appropriations rider doing just the opposite. We may never know if this was intentional or accidental—the result of sloppy drafting and last-minute changes.<sup>74</sup>

What is known is that the federal government was more keenly interested in extricating itself from its responsibility to Indian tribes than in creating a permanent role in Indian country. To begin with, the Secretary of the Interior had recommended that the states and territories be given jurisdiction over Indians on reservations; nowhere did he advocate for federal jurisdiction.<sup>75</sup> Some representatives proposed relocating remaining Indian tribes to a second “Indian Territory” (pre-

73. 16 CONG. REC. 935 (1885) (statement of Rep. Cutcheon, quoting the Secretary of the Interior).

74. Although the legislative history does not contain a clear explanation or articulation of Congress's rationale for passing the Major Crimes Act, an exchange in the House of Representatives gives some color to the realities of Congress's efforts to “civilize” the Indians:

Mr. Hiscock. I would like to inquire of the gentleman from Michigan if he believes that all of these Indian tribes are in such a condition of civilization as that they should be put under the criminal law?

Mr. Cutcheon. I think if they are not in that condition they will be civilized a great deal sooner by being put under such laws and taught to regard life and the personal property of others.

Mr. Budd. This provision is as much for the benefit of the Indians as it is for the whites; because now, as there is no law to punish for Indian depredations, the bordermen take the law into their own hands, which would not be the case if such provision as this was enacted into law.

Mr. Hiscock. That may all be true; but when we bring in a bill here year after year appropriating many millions of dollars to support and care for these Indians, and treat them as irresponsible persons, it seems to me that policy is not in the line of the policy indicated by this amendment, which proposes to extend to them the harsh provisions of the criminal law.

Mr. Budd. We would like to change the policy of the Government in that respect. . . .

Mr. Cutcheon. We want to change the law a little in the direction of law and order. . . . Yes, and the civilization of the Indians.

*Id.* at 936.

75. *Id.* at 935.

sumably in the Dakotas) and that those territories be allowed to enter the union on equal footing once they met the requirements for statehood.<sup>76</sup> In this way, tribes would pass from territorial to state jurisdiction for both criminal and civil matters.

The legislative history demonstrates that many congressmen believed that the reduction of the tribal land base and assimilation of tribal members rendered legislation of tribes a short-term concern. As one representative put it:

We are upholding these rotten [tribal] governments there under the pretense of civilizing the Indians. We justify our conduct by clinging to treaties that have served their purpose, and were never intended as anything but temporary expedients. . . . We knew by past history that in the march of civilization these Indian governments must give way.<sup>77</sup>

While Congress's reasons for choosing federal as opposed to territorial or state jurisdiction were unclear, its conviction that Indian tribes would eventually cease to exist as sovereign nations is unmistakable and was widely held at the time. This, too, is consistent with the *Crow Dog* decision that originally upheld tribal jurisdiction from federal intrusion:

[Indians] were nevertheless to be subject to the laws of the United States . . . as a dependent community who were in a state of pupillage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governed society.<sup>78</sup>

The language of the MCA and its legislative history demonstrate that the 1885 Congress did not anticipate that it would be establishing the federal criminal justice scheme that Native Americans would endure well into the twenty-first century. The assimilation and allotment policies offered the hope that the federal government would be able to get out from under treaty obligations within, at most, a couple of decades. Se-

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76. *Id.* at 863.

77. *Id.* at 895 (statement of Rep. Rogers). In contrast to this view, Representative Keifer was the rare Congressional voice that highlighted the continuing injustice done to the Indians: "There is no time here, it seems, for anybody to say a word in behalf of these tribes of people who have no voice in the Congress of the United States and yet are being continually legislated about and to their great injury." *Id.* (statement of Rep. Keifer).

78. *Ex parte Kan-gi-Shun-ca* (*Crow Dog*), 109 U.S. 556, 568-69 (1883).

condly, Congress's protection of the Five Civilized Tribes' jurisdiction demonstrated that policymakers distinguished between tribes that were ready to accept jurisdictional responsibility and those that were not. Using the language of the time, it appears Congress seemed willing to hand jurisdiction over to tribes who had proven some measure of "civilization." At most, the underlying assumption of Senator Dawes and his legislative allies was that the federal government would simply transfer its criminal justice responsibilities quickly to newly created states, counties, and municipalities as the General Allotment Act converted Indian trust lands out of federal jurisdiction and into private property.

*C. Constitutional Contortions and the Dubious Roots of Plenary Power*

The MCA's test case, *United States v. Kagama*,<sup>79</sup> is most famous for announcing Congress's plenary power over tribal sovereignty.<sup>80</sup> The main constitutional question in *Kagama* was whether the MCA could extend federal jurisdiction to Indians on reservations in states and, in so doing, restrict states' rights to self-government.<sup>81</sup> The Court easily answered this question, not by reference to the Constitution, but the status quo: "Congress *has* done this, and *can* do it, with regard to all offences relating to matters to which the Federal authority extends."<sup>82</sup>

In *Crow Dog*, the Supreme Court had balked at the idea of such an unprecedented federal intrusion on tribal sovereignty. But, as passage of the MCA illustrates, Congress practiced no such restraint.<sup>83</sup> The *Kagama* Court was then forced to find a valid constitutional reason—or indeed, *any* basis—to uphold the MCA, ultimately rejecting the Indian Commerce Clause of Article I of the Constitution.<sup>84</sup> Rather than grounding this ex-

79. 118 U.S. 375 (1886).

80. See generally VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 76–79 (1999).

81. *Kagama*, 118 U.S. at 383.

82. *Id.*

83. See, e.g., *supra* notes 64, 66.

84. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce with foreign Nations . . . and with the Indian Tribes"); see generally WILKINSON, *supra* note 17, at 12 n.27. In rejecting the Indian Commerce Clause, the Court frankly observed:

[W]e think it would be a very strained construction of [the Indian commerce] clause, that a system of criminal laws for Indians living peacea-

pansion of federal authority over Indian affairs on the Constitution, the Court substituted the status quo for legal analysis:

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.<sup>85</sup>

This was an entirely new concept in American law: Congress's so-called "plenary power" over Indian affairs, which was essentially an unrestricted license to assimilate Native Americans and legally take away their lands despite the solemn assurances otherwise in treaties and earlier court decisions.<sup>86</sup> This remains a dubious legal proposition for a country whose government was based on constitutionally limited powers. Congress's plenary power over Indian affairs was tethered not to the Constitution, but to an amorphous federal trust responsibility that was supposed to act as a shield to protect tribes and their members.<sup>87</sup> Not surprisingly, that shield was soon transformed, in Frank Pommersheim's words, into "a destructive sword with which to carve up and dispose of the tribal land estate."<sup>88</sup>

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bly in their reservations . . . was authorized by the grant of power to regulate commerce with the Indian tribes. . . . [Or] to see, in either of these clauses of the constitution and its amendments, any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians . . . .

*Kagama*, 118 U.S. at 378–79.

85. *Kagama*, 118 U.S. at 384–85.

86. See generally WILKINSON, *supra* note 17, at 78 (explaining that *Kagama* and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), "expostulated on the untrammelled, 'plenary' nature of federal constitutional power over Indian affairs.").

87. POMMERSHEIM, *supra* note 29, at 138–39.

88. *Id.* (analyzing *Lone Wolf*, 187 U.S. at 567). For an enlightening discussion of *Lone Wolf* and the unconstitutional roots of the plenary power doctrine, see WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 161–86 (2010). The doctrine, Echo-Hawk observes,

was seemingly plucked out of thin air by the Supreme Court against the backdrop of federal guardianship of a dependent, supposedly inferior race of people—a dubious basis upon which to sanction the rule of Native people by unlimited power, a despotic power aimed at no other Ameri-

*Kagama* also marks a crucial shift in the federal government's role in Indian country. In reasoning that the murder of one Indian by another on a reservation was entirely outside the purview of their state of residence, the Court explained that such a crime had no effect on the "operation of State laws upon white people found there."<sup>89</sup> The tension that had grown between states and tribes by this time was working in the background of the decision: "Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."<sup>90</sup>

Hence, the *Kagama* Court declared that the Indians "owe no allegiance to the States, and receive from them no protection."<sup>91</sup> Perhaps this was true: settlers interested in farmable land and extractable minerals were certainly no friends of the Indians, and territories seeking statehood needed the Indians out and the settlers in.<sup>92</sup> However, by declaring Indians entirely under the protection of the federal government, *Kagama* had also released states from legal responsibility to Indians, and established the precedent of exclusive (albeit begrudging) federal jurisdiction over Indians that continues today.<sup>93</sup>

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cans in U.S. history.

*Id.* at 163. Echo-Hawk's analysis reveals that *Lone Wolf*, like *Kagama*, has no basis in the Constitution:

Writing for the unanimous Court, Justice Edward Douglas-White explained that Congress possesses paramount power over Indian tribes and their property because it is their guardian. Strangely, this plenary power is not found in the Constitution, but was implied by the Court from the trusteeship doctrine. The Court declared that Congress's plenary political power over Indians is absolute—that is, beyond the rule of law—because it is not subject to judicial review, and it includes the raw power to abrogate treaties. The sole check on that unlimited power was a bare presumption that Congress will exercise it in "perfect good faith."

*Id.* (quoting *Lone Wolf*, 187 U.S. at 568).

89. *Kagama*, 118 U.S. at 383.

90. *Id.* at 384.

91. *Id.*

92. See, e.g., HELEN JACKSON, A CENTURY OF DISHONOR: A SKETCH OF THE UNITED STATES GOVERNMENT'S DEALINGS WITH SOME OF THE INDIAN TRIBES 343–58 (Little, Brown, & Co. 1903) (describing the Sand Creek Massacre and reprinting a letter to the editor of the New York Tribune by William Byers stating that "Sand Creek saved Colorado").

93. It has even been expansively suggested that *Kagama* marks the moment at which, in regard to Indian tribes, federal power triumphed over states' rights:

Thus, the most important jurisdictional result of *Crow Dog* . . . was implicitly incorporated into *Kagama* to give the tribes protection against the states. This interpretation, coupled with the plenary power doctrine, greatly strengthened federal jurisdiction over the Indian tribes. This was the first time since *Worcester* that the Court had acknowledged that

*D. Federalization of Criminal Justice in Indian Country Takes Shape*

In the wake of the MCA and *Kagama*, the federal government's presence in Indian country subverted and eventually supplanted tribal laws and institutions dealing with what had traditionally been considered community or family matters. The end of the Indian treaty-making<sup>94</sup> during this era coincided with the federal takeover of law and order on Indian reservations in the years immediately prior to and following *Kagama*. Treaties with the federal government had often recognized tribes' inherent ability to resolve local disputes and address infractions of traditional law and custom, but in a constitutionally suspect move, Congress in 1871—legislating on yet another appropriations rider—abolished the President's power to make treaties with Indian nations.<sup>95</sup> Commissioner of Indian Affairs Ely Parker had suggested a primary rationale behind ending the treaty-making power in 1869: “[B]ecause treaties have been made with them, . . . they have been falsely impressed with the notion of national independence. It is time that this idea should be dispelled and the government cease the cruel farce of thus dealing with its helpless and ignorant wards.”<sup>96</sup> The end of Indian treaty-making, which presidents beginning with George Washington had always understood to

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there was a serious conflict between the tribes and the states that required federal intervention.

SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 149 (1994).

94. U.S. CONST. art. II, § 2, cl. 2 (“[The President] . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

95. See *Kagama*, 118 U.S. at 382 (quoting Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2006))), where Congress ended the President's treaty-making power: “No Indian nation or tribe, within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty . . . .”). Before Congress ended Indian treaty-making, more than 380 treaties were negotiated with tribes. CHARLES WILKINSON, *INDIAN TRIBES AS SOVEREIGN GOVERNMENTS* 91 (2d ed. 2004). In his concurrence in *United States v. Lara*, Justice Clarence Thomas argues that the treaty-making power is an executive rather than legislative function located in Article II, Section 2, Clause 2, which enumerates the president's powers and could not be unconstitutionally delegated to Congress by statute in 1871. 541 U.S. 193, 225–26 (2004) (Thomas, J., concurring).

96. DIV. OF LAW ENFORCEMENT SERVS., BUREAU OF INDIAN AFFAIRS, *INDIAN LAW ENFORCEMENT HISTORY* 2 (1975) (quoting Ely S. Parker, Comm'r of Indian Affairs in *ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS* 6 (1869)).

be required by the Constitution,<sup>97</sup> helped set the stage for the Court's announcement in *Kagama* that Congress could exercise constitutionally unfettered power over Indian affairs because it was already doing so.<sup>98</sup>

The federal government's foray into Indian country criminal justice expanded rapidly as the military occupation of many tribal lands began to recede. Eileen Luna-Firebaugh has found that "[b]y 1880, two-thirds of the reservations in the United States had Indian police forces under the auspices of the federal government."<sup>99</sup> A decade later, federally supported Indian police were established on nearly every reservation, reporting directly to the Indian agents who controlled them.<sup>100</sup>

Meanwhile, the federal Office of Indian Affairs, which would later become the BIA,<sup>101</sup> gained expansive new power over Native Americans living on reservations when the Courts of Indian Offenses were created in 1883.<sup>102</sup> These courts were established administratively in response to Secretary of the Interior Henry Teller's belief that "[c]ivilization and savagery cannot dwell together."<sup>103</sup> In calling for the establishment of the Courts of Indian Offenses, Secretary Teller explained that

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97. Washington, who had presided over the Constitutional Convention in 1787, set the precedent by insisting that the 1784 Fort Harmer Treaty with the Six Nations be formally ratified in the same manner as treaties with European nations. WILKINSON, *supra* note 95, at 93.

98. 118 U.S. at 384–85.

99. Eileen Luna-Firebaugh, *More than Just a Red Light in Your Rearview Mirror*, in CRIMINAL JUSTICE IN NATIVE AMERICA, *supra* note 16, at 134, 136. There were 900 federally authorized Indian police on reservations that year. *Id.* at 138. Individual Indian agents had begun to establish Indian police forces as early as 1869. *See, e.g.*, DIV. OF LAW ENFORCEMENT SERVS., BUREAU OF INDIAN AFFAIRS, *supra* note 96, at 2 (quoting ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 356 (1869) (describing the first Indian police force, established by Agent Thomas Lightfoot of the Iowa and Sac and Fox of Nebraska agency in 1869)). However, Congressional appropriations directed to Indian police were not approved for another decade. *Id.* at 6–7 (describing the San Carlos Apache police forces that helped to peaceably arrest Geronimo).

100. Luna-Firebaugh, *supra* note 99, at 137.

101. The department was not officially renamed the Bureau of Indian Affairs until 1947. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 1227–29 (1984).

102. *See* HARRING, *supra* note 93, at 175 (discussing the “near-absolute administrative powers” of the BIA’s Indian Police and Courts of Indian Offenses: “These were ‘police’ and ‘courts’ in name only. They could claim no legal status under either U.S. or tribal law. Rather, they were designed to perform important social control functions to force assimilation of the tribes under the authority of the BIA, through its Indian agents.”).

103. REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EX. DOC. NO. 48-1, pt. 5, at III (1883).

“[i]f it is the purpose of the Government to civilize the Indians, they must be compelled to desist from the savage and barbarous practices that are calculated to continue them in savagery . . . .”<sup>104</sup> The Commissioner of Indian Affairs, Hiram Pierce, promulgated the rules of the Courts of Indian Offenses in 1883,<sup>105</sup> though Congress did not appropriate any funds for the program until 1888.<sup>106</sup> The rules of the Court of Indian Offenses directly attacked Native American cultural practices that undermined federal efforts at “civilizing,” such as prohibiting sun dances and consulting with medicine people.<sup>107</sup>

In the next few decades, other federal agencies would extend their reach into Indian country as the federal government replaced tribal law and institutions. The primary federal institution dominating day-to-day life on Indian reservations, including criminal justice responsibilities for all but the most serious crimes, remained the BIA, which was originally part of the War Department but was transferred to the U.S. Department of the Interior in 1849.<sup>108</sup> Yet other federal agencies—including the U.S. Marshal’s Service,<sup>109</sup> and what is now the Federal Bureau of Investigation (“FBI”), established in 1908<sup>110</sup>—supplemented that authority and, in some circumstances, replaced it. United States Attorneys and their offices have been prosecuting Indian country cases in the federal courts involving Native Americans since the MCA was enacted.<sup>111</sup> These institutions, which, along with the federal courts, constitute the federal criminal justice system in Indian

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104. *Id.* at X.

105. OFFICE OF INDIAN AFFAIRS, DEP’T OF THE INTERIOR, RULES GOVERNING THE COURT OF INDIAN OFFENSES (1883), *available at* <http://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf>. A federal district court in 1888 held it was not unconstitutional for these courts to decide what amounted to criminal charges despite their being “mere educational and disciplinary instrumentalities” because they were created administratively by the executive branch rather than Congress. *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888).

106. DIV. OF LAW ENFORCEMENT SERVS., BUREAU OF INDIAN AFFAIRS, *supra* note 96, at 26.

107. OFFICE OF INDIAN AFFAIRS, DEP’T OF THE INTERIOR, *supra* note 105.

108. Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 357–58 (1997).

109. *See* U.S. Marshals Serv., History—A Pirate, a Marshal, and the Battle of New Orleans, <http://www.usmarshals.gov/history/duplessis/03.html> (last visited Aug. 10, 2010).

110. *See* Fed. Bureau of Investigation, History of the FBI, Origins: 1908–1910, <http://www.fbi.gov/libref/historic/history/origins.htm> (last visited Aug. 10, 2010).

111. 28 U.S.C. § 547 (2006) (“[E]ach United States attorney, within his district, shall—(1) prosecute for all offenses against the United States”).

country today, were established well before Congress passed a statute in 1924 declaring all Native Americans to be U.S. citizens regardless of whether they belonged to a particular tribe or lived on- or off-reservation.<sup>112</sup> With the federal criminal law and enforcement mechanism firmly in place by the turn of the last century, all that remained was to stand back while assimilation proceeded apace and the mighty pulverizing engine allotted the remaining tribes out of existence.<sup>113</sup>

### *E. The Indian New Deal*

By the time President Franklin D. Roosevelt took office, the consensus among New Deal reformers was that the federal government's policy of forced assimilation and the dismantling of tribal culture and institutions had failed.<sup>114</sup> Native Americans and their family ties, cultures, and beliefs had proved far more resilient than Henry Dawes or his contemporaries had expected. Tribal governance persevered, despite pervasive federal intrusion, even if often in shadow form, or only within the hearts and minds of the Native American people. By the time of the New Deal, public attitudes shifted to the point where it actually became thinkable for some federal officials to admit

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112. Act of June 2, 1924, ch. 233, 43 Stat. 253. Prior to the passage of the Act, some Native Americans had already been naturalized as U.S. citizens as provided by certain treaty provisions or by tribal-specific legislation.

113. Even the Wounded Knee Massacre in 1890 apparently did not shake the Interior Department's confidence in the ultimate success of its assimilationist policies. In response to the killings of perhaps 300 men, women, and children, some in Congress suggested that the Sioux Indian Agencies, if not the entire Department of Indian Affairs, be returned to the War Department. But the Commissioner of Indian Affairs held firm:

The one great and all-important object which the nation has set before itself is to civilize and make of them intelligent, self-supporting, self-respecting American citizens. This is essentially a civil process, to be brought about by civil measures and agencies. . . . [The Army] never can be a civilizing force. All that can be claimed for the Army in this connection is that it crushes, or holds in check, forces antagonistic to civilization, and renders it possible for the real up-lifting agencies—education, industry, religion—to operate. To turn the Indians, or any considerable number of them, over to absolute military control, would be to take a great step backward in the humane work which the Government has undertaken.

REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EX. DOC. 52-1, pt. 5, at 144 (1892). See also BROWN, *supra* note 20, at 439–45.

114. See WILKINSON, *supra* note 6, at 60.

publicly that the allotment policy had been a failure.<sup>115</sup> Congress finally ended the program in the Indian Reorganization Act of 1934 (“IRA”), reversing the break-up of the reservation system and adopting a modest policy of tribal self-governance, albeit still tightly controlled by the Bureau of Indian Affairs.<sup>116</sup> Notably, the original version of the IRA included a restructuring of the criminal justice system in Indian country, but these proposed reforms were never enacted and the original bill was slashed from forty-eight pages to five.<sup>117</sup>

Modest though it may seem today, the IRA was in fact extraordinary when compared to the federal government’s assimilationist policies that preceded it, epitomized by the General Allotment Act and the MCA. In the decades that followed, Congress veered sharply away from self-determination in the Termination Era of the 1950s—abolishing many tribal governments entirely and transferring others to state criminal jurisdiction without their consent<sup>118</sup>—only to return to it by enacting the Indian Civil Rights Act in 1968.<sup>119</sup>

What is perhaps even more remarkable, given the federal government’s public embrace of tribal sovereignty four decades ago in the IRA,<sup>120</sup> is that Congress has never seriously reconsidered its 1885 appropriations rider creating the MCA and its temporary federal enforcement regime. The allotment program

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115. Scott A. Taylor, *State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation and Leech Lake Band of Chippewa Indians v. Cass County*, 23 AM. INDIAN L. REV. 55, 87–88 (1998). See generally INST. FOR GOV’T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928), available at <http://www.eric.ed.gov/PDFS/ED087573.pdf> (commonly known as the Meriam Report). Around the same time Washington’s official attitude toward Indian policy began grudgingly to accept a modicum of tribal self-determination, popular culture was beginning to see Native Americans not as “savages” to be eliminated or tamed, but as freedom-fighters. For instance, it was 1927 when Edgar Rice Burroughs, creator of *Tarzan*, published the first of his two novels romanticizing what had previously been the penultimate Native American anti-hero, Geronimo. See C. L. Sonnichsen, *From Savage to Saint: A New Image for Geronimo*, in GERONIMO AND THE END OF THE APACHE WARS 5, 16–17 (C. L. Sonnichsen ed., 1986).

116. See DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM 80–84, 99 (2007).

117. *Id.* at 84–87, 99.

118. WILKINSON, *supra* note 6, at 57. Meanwhile, the number of federally supported Indian police working for the BIA on reservations continued to fall. Luna-Firebaugh, *supra* note 99, at 138. By 1948, the federal budget authorized just forty-five Indian police officers nationwide. *Id.*

119. See 25 U.S.C. §§ 1301–1303 (2006).

120. WILKINSON, *supra* note 6, at 62–63.

was discredited and ended. Yet the legislative branch has largely abdicated to the federal bureaucracy it originally created to mete out justice in Indian country—occasionally adding to the list of MCA offenses,<sup>121</sup> or clarifying bureaucratic roles and responsibilities for federal agencies,<sup>122</sup> but never seriously questioning the continued existence of the machinery itself.<sup>123</sup>

For his part, Justice Clarence Thomas has questioned the continued constitutional viability of *Kagama*, but the Supreme Court has not overturned it.<sup>124</sup> Faced with continued Congressional inaction, the Court has increasingly inserted itself in Indian affairs. The trend began in *Oliphant v. Suquamish Indian Tribe* when the Court held that tribes lack any criminal jurisdiction over non-Indians, not because of the text of the Constitution, or Congress's exercise of its federal trust responsibility, but due to unspoken Congressional assumptions about the "dependent status" of tribes.<sup>125</sup>

The federal government's continuing operation of the federal criminal justice system in Indian country for well over a century, asserting plenary power over an entire category of U.S. citizens through complex enforcement machinery that is opaque to many Native Americans and the outside world, can seem Kafkaesque.<sup>126</sup> Congress's refusal to recognize the extent

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121. See 18 U.S.C. § 1153 (2006), Amendments (for example, adding felonious sexual molestation of a minor in 1986; adding assault resulting in serious bodily injury in 1968).

122. See, e.g., Kevin K. Washburn, *American Indians Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1028 (2008).

123. Even the recently passed Tribal Law and Order Act of 2010, discussed in Part III, did not make any major structural revisions in the federal criminal justice system apart from an important but modest relaxation of federally imposed restrictions on tribal courts' criminal sentencing authority. See Tribal Law and Order Act of 2010, Pub. L. No. 111-211 (signed by President Obama on July 29, 2010).

124. For instance, Justice Thomas has questioned the very notion of Congressional plenary power over Indian affairs. In his concurrence in *United States v. Lara*, Justice Thomas argues that the treaty-making power is an executive rather than legislative function located in Article II, Section 2, Clause 2, which enumerates the president's powers and could not be unconstitutionally delegated to Congress by statute in 1871. 541 U.S. 193, 225–26 (2004) (Thomas, J., concurring). See generally POMMERSHEIM, *supra* note 29, at 253.

125. 435 U.S. 191, 204 (1978). For a discussion of the judicial co-option of the plenary power doctrine, see POMMERSHEIM, *supra* note 29, at 297–301.

126. In *In the Penal Colony*, novelist Franz Kafka—who never visited an Indian reservation—describes an automated criminal justice device. The character operating this machine, called "the Officer," believes in its infallibility—and in the bureaucracy that created it—to deliver just punishments. The machine, whose

to which times have changed—and how little the federal government’s role in Indian country has not—is perhaps symbolized by the lingering absurdity of the so-called “Friendly Indian Statute.”<sup>127</sup> Recodified by Congress as recently as 1994, this law provides:

Whenever a non-Indian, in the commission of an offense within the Indian country takes, injures or destroys the property of any friendly Indian the judgment of conviction shall include a sentence that the defendant pay to the Indian owner a sum equal to twice the just value of the property so taken, injured, or destroyed.<sup>128</sup>

Meanwhile, the same Supreme Court, which would never mention *Plessy* today without expressing shame or reassurance given its demise, cites *Kagama* and other decisions based on blatantly racist assumptions from the same era instead of returning to constitutional first principles as it did in *Brown v. Board*.<sup>129</sup> As if the system’s racist roots were not enough, the even greater evil is that the system continues to operate in a manner that is not just separate, but decidedly unequal. Over time, as the next Part explains, the disparities facing Native Americans in the federal criminal justice system have metastasized as Congress has expanded the same broken system in fits and starts to serve a growing reservation population.

## II. THE DYSFUNCTIONAL ARCHITECTURE OF CRIMINAL JUSTICE TODAY

A generation ago, in *United States v. Antelope*, the Supreme Court rejected the notion that the federal government’s system for protecting Native American criminal defendants’ rights in a case arising under the MCA on an Indian reserva-

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blueprints only the Officer is permitted to see, keeps running day in and out until it ultimately kills the Officer when it breaks down. See FRANZ KAFKA, *In the Penal Colony*, in THE GREAT SHORT WORKS OF FRANZ KAFKA: THE METAMORPHOSIS, IN THE PENAL COLONY, AND OTHER STORIES 189, 189–230 (Joachim Neugroschel, trans., Scribner Paperback Fiction 2000) (1914).

127. 18 U.S.C. § 1160 (2006).

128. *Id.* Co-author Troy Eid is indebted to Jim Allison, chief of the Criminal Division of the U.S. Attorney’s Office for the District of Colorado, for pointing out this statute to an incredulous class of law students.

129. See, e.g., *Hagen v. Utah*, 510 U.S. 399, 404 (1994) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)); *Nevada v. Hicks*, 533 U.S. 353, 363–64 (2001) (citing *United States v. Kagama*, 118 U.S. 375 (1886)).

tion violates the Equal Protection Clause of the Fourteenth Amendment.<sup>130</sup> However, the Court in *Antelope* did not address any legal arguments as to the structural disparities that persist within Indian country as a result of the MCA and the federal institutions that enforce it.<sup>131</sup> This is a crucial distinction. The fact remains that Native Americans living and working on Indian reservations must endure a separate but unequal justice system that discriminates perniciously against them solely based on race and ethnicity.

Accordingly, our focus here is to explore Equal Protection issues that were never presented to the Supreme Court in *Antelope* by briefly illustrating how the federal criminal law and institutions serving Indian country have become systemically dysfunctional, and often lead to comparatively harsher punishments, especially for juvenile offenders. It is imperative to return to constitutional first principles in order to address such questions, and indeed such a case has never been directly before the Supreme Court. But unless and until that happens, it is time to consider as a matter of public policy how much longer the United States should continue to tolerate the federal government's segregationist legacy in Indian country. *Brown* repudiated for all time the myth of "separate but equal." Yet that myth stubbornly endures in much of Indian country today, and in so doing undermines the constitutional rights of all Americans. The real question is whether *this* generation is willing to accept that our Constitution actually permits Congress and the federal courts to wield plenary power over the criminal justice needs of an entire class of U.S. citizens—even when that power comes at Native Americans' expense.

The MCA, and the institutions built and maintained to carry it out, envisioned that crime in Indian country would temporarily be policed, prosecuted, adjudicated, and punished by the federal government. Yet despite these nineteenth-century assurances that this stopgap measure would end once tribal lands were finally allotted away and criminal jurisdiction thereby transferred to the states, the federal presence endures as a permanent force throughout much of Indian country. And there can be no serious doubt that this system discriminates invidiously in how it is currently funded and in the way it dispenses justice—if not for perpetrators, as in *Antelope*, then for

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130. 430 U.S. 641, 646–47 (1977).

131. *See id.*

Native American victims of violent crime.<sup>132</sup> These victims suffer from disproportionately high rates of violent crime throughout much of Indian country—sometimes by several orders of magnitude—despite even extensive empirical evidence that many such crimes against Native Americans go unreported.<sup>133</sup>

This Part identifies three distinct ways in which the architecture of federal criminal justice in Indian country produces disparate results for Native Americans which, when considered collectively, raise serious Equal Protection concerns:

- The imposition of comparatively harsher punishments under the federal system, particularly for juveniles, than occurs for offenses arising under state law off-reservation.
- Native Americans' systematic lack of access to the federal court system, including but not limited to service on trial and grand juries, to address crimes that would be handled locally almost anywhere else in the United States.
- A pervasive resource gap that has characterized the federal government's criminal justice role in Indian country since its inception.

These are by no means the only disparities that Native Americans living and working in Indian country experience. Jurisdictional confusion—the direct result of classifying criminal suspects and victims as “Indian” or “non-Indian” as re-

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132. Our focus here is on the ways in which the federal criminal justice system in Indian country adversely discriminates against Native Americans. This contrasts with various programs in which the federal government, exercising its trust responsibility, has sought to *strengthen* tribal governments themselves. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 553 (1974) (employment preference for Indians in the Bureau of Indian Affairs does not constitute racial discrimination and is analyzed under a rational basis test). Our concern is rather that the constitutional rights of Native American crime victims should receive protection from the federal government equal to those of all U.S. citizens.

133. The U.S. Department of Justice reports that, from 1992 to 2001, the average rate of violent crime among Native Americans (age twelve and over) was two-and-one-half times the national rate. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, NCJ 203097, AMERICAN INDIANS AND VIOLENT CRIME 4 (2004). Amnesty International popularized these findings in an influential report. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), available at <http://www.amnesty.org/en/library/info/AMR51/035/2007> (follow “PDF” hyperlink).

quired by the MCA—is another.<sup>134</sup> Yet the collective impact of just these three factors demands that the President, Congress and the federal courts interpret the Equal Protection Clause in a manner that recognizes how the federal criminal justice system fails to provide Native American crime victims and defendants on a level commensurate outside Indian country.

### A. *Federal Roles and Responsibilities*

Before analyzing how the federal criminal justice system fails to satisfy even minimum standards for Native Americans' Equal Protection rights, this section summarizes the criminal law that applies and the roles that the different jurisdictions play in Indian country cases.

#### 1. When Federal Criminal Law Applies

Substantive criminal offenses and punishments in Indian country cases are determined according to two federal statutes: the MCA and the Indian Country Crimes Act, both of which apply only to Indian country and solely in cases where Indians are involved.<sup>135</sup> In practice, this means that a Native American who is accused of committing serious crime on a reservation is subjected to a separate set of criminal laws and enforcement mechanisms based on his or her ethnicity. So too, then, are Native American crime victims.

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134. For instance, in a recent case handled by the U.S. Attorney's Office in Colorado, it was impossible to tell at the crime scene whether the victim of an apparent vehicular homicide by a non-Indian on the Southern Ute Reservation was an Indian or non-Indian for purposes of federal law. Jamie L. Wood, a non-Indian man from Aztec, New Mexico, was indicted by the U.S. Attorney's Office for the District of Colorado in January 2007 for causing the automobile crash on a state right-of-way within the external boundaries of the Southern Ute Indian Reservation. That crash claimed the lives of tribal member Lorraine Duran, who was sixty-nine, and her eight-year-old granddaughter, Jacklyn. Lorraine Duran's non-Indian husband, Jack Duran, survived the tragedy. Wood, who admitted to police that he had smoked marijuana on the morning of the accident, later pled guilty to a federal charge of involuntary manslaughter for causing Lorraine Duran's death, which was prosecuted while co-author Troy Eid served as Colorado's U.S. Attorney. However, the case involving Jacklyn Duran was ultimately referred to the district attorney's office in Durango after many months of delay when the Tribal Council of the Southern Ute Indian Tribe determined she should not be considered an Indian for jurisdictional purposes. Lisa Meerts, *Grand Jury Indicts Aztec Man for Role in Car Wreck*, FARMINGTON DAILY TIMES, Jan. 24, 2007, at A1.

135. 18 U.S.C. § 1152 (2006). See generally Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 715–17 (2006).

Importantly, the term “Indian” appears throughout the U.S. Criminal Code, but Congress has never defined it. This can result in court challenges causing confusion and delay when a victim or perpetrator initially appears to be a Native American for federal jurisdictional purposes, but is later determined to be a non-Indian or vice-versa.<sup>136</sup> In federal court, a defendant’s Indian status is considered both as it pertains to federal jurisdiction and as an element of the crime.<sup>137</sup> The variation in jury instructions on Indian status demonstrates the potential confusion of asking predominately non-tribal jurors to weigh any number of factors to determine whether the defendant is Indian.<sup>138</sup>

## 2. Law Enforcement and Investigative Agencies

When it comes to investigating Indian country cases, federal law enforcement—usually the FBI and, depending on the reservation, the BIA—have lead responsibility for investigating and prosecuting violent crimes on reservations subject to federal jurisdiction.<sup>139</sup> Federal jurisdiction may be exclusive or concurrent with tribal governments depending on whether the alleged perpetrator is an Indian or not.<sup>140</sup> Other federal agencies, such as the Drug Enforcement Administration, the U.S. Postal Inspection Service, and the Bureau of Alcohol, Tobacco, Firearms and Explosives, may get involved in MCA cases and sometimes also enforce federal laws of general application in Indian country.<sup>141</sup>

Yet, even this nominal division of labor is misleading because the federal government severely restricts the ability of Indian tribes and nations to enforce their own criminal laws.

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136. Troy A. Eid, *The Tribal Law and Order Act: An “Aggressive Fight” Worth Winning*, FED. LAW., Mar.–Apr. 2010, at 34, 35–36 (providing examples).

137. See, e.g., *United States v. Stymiest*, 581 F.3d 759, 763 (8th Cir. 2009).

138. *Id.* at 763–64.

139. See Fed. Bureau of Investigation, Indian Country Crime, <http://www.fbi.gov/hq/cid/indian/about.htm> (last visited July 28, 2010); Bureau of Indian Affairs, What We Do, <http://www.bia.gov/WhatWeDo/index.htm> (last visited July 28, 2010).

140. See 18 U.S.C. §§ 1152, 1153 (2006). This Article does not address those Indian tribes and nations that are currently subject to state jurisdiction under 18 U.S.C. § 1162 (2006), a Termination Era statute enacted in 1953 that extended state criminal jurisdiction to selected Indian tribes without their consent. See Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588.

141. See U. S. Dep’t of Justice, Department of Justice Agencies, <http://www.justice.gov/agencies/index-org.html> (last visited July 28, 2010).

Congress in 1968 sharply limited the penalties that tribal courts may impose when Native Americans commit crimes on tribal lands; fines are now statutorily capped at \$5,000 and terms of incarceration are restricted to not more than one year.<sup>142</sup> A decade later, the Supreme Court in *Oliphant*<sup>143</sup> added yet another layer of confusion by holding that tribes lack criminal jurisdiction over non-Indians even when they commit crimes against tribal members on Indian lands.<sup>144</sup>

### 3. United States Attorneys and Their Offices

Federal prosecutors handle cases under the MCA and other federal statutes arising in Indian country.<sup>145</sup> Specifically, United States Attorneys—federal officials appointed by the President with the advice and consent of the U.S. Senate—and their assistant attorneys, all of whom belong to the federal civil service, perform as non-elected local prosecutors or district attorneys in Indian country.<sup>146</sup> Each U.S. Attorney's Office serving Indian country has a designated attorney, known as a Tribal Liaison, to help support reservation cases involving Indians and coordinate federal and, when applicable, state law enforcement services.<sup>147</sup>

As with other federal officials serving Indian country, the vast majority of U.S. Attorneys and their staff are very well-qualified and perform their duties admirably within the existing criminal justice system.<sup>148</sup> However, one symptom of the inequalities between Indian country criminal justice and much of the rest of nation are the reportedly high case-declination rates of these federal prosecutors in reservation cases involving Native Americans. The term “declination” in this context means a decision by a U.S. Attorney's Office not to seek criminal charges after having been presented with the confidential

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142. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. § 1302(7) (2006)).

143. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

144. *Id.* at 211–12.

145. 28 U.S.C. § 547 (2006).

146. U. S. Dep't of Justice, United States Attorneys Mission Statement, <http://www.justice.gov/usao> (last visited July 28, 2010).

147. *See, e.g.*, U. S. Attorney's Office W. Dist. of Mich., Native American Tribes and Tribal Liaison, <http://www.justice.gov/usao/miw/programs/native.html> (last visited Sept. 21, 2010).

148. Co-author Troy Eid draws on his experience as a former United States Attorney for Colorado, *see infra* note 214.

law enforcement investigation findings of a suspected federal case arising in Indian country.<sup>149</sup>

Michael Riley, a reporter for *The Denver Post* who is currently chief of the newspaper's Washington Bureau, wrote an award-winning series in November 2007 that dealt in part with this issue.<sup>150</sup> Riley attempted to quantify the disparity between U.S. Attorneys' handling of federal cases arising in Indian country, on the one hand, and comparable off-reservation cases declined by local district attorneys on the other.<sup>151</sup> The focus on U.S. Attorneys' declination-reporting by Riley and others prompted U.S. Senator Byron Dorgan (D-North Dakota), chair of the Committee on Indian Affairs, to introduce legislation that, among other things, would mandate declination-reporting for all U.S. Attorney's Offices serving Indian country.<sup>152</sup>

While declination-reporting certainly does not tell the whole story—there can be many reasons why a criminal investigation never results in viable prosecution—it can still be a very useful measure for making the federal criminal justice system more accountable. For that reason, many local district attorneys' offices routinely make such information available, either through public reports or on request, while protecting individuals' confidentiality and the privacy of sensitive law enforcement information. More generally, an on-the-ground perspective helps illustrate just how little federal law enforce-

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149. Eid, *supra* note 136, at 37–38.

150. Michael Riley, *Lawless Lands: Promises, Justice Broken*, THE DENVER POST, Nov. 11, 2007, at A1, available at [http://www.denverpost.com/ci\\_7429560](http://www.denverpost.com/ci_7429560); Michael Riley, *Lawless Lands: Justice: Inaction's Fatal Price*, THE DENVER POST, Nov. 12, 2007, at A1, available at [http://www.denverpost.com/ci\\_7437278?source=pkg](http://www.denverpost.com/ci_7437278?source=pkg); Michael Riley, *Lawless Lands: Principles, Politics Collide*, THE DENVER POST, Nov. 13, 2007, at A1, available at [http://www.denverpost.com/ci\\_7446439?source=pkg](http://www.denverpost.com/ci_7446439?source=pkg); Michael Riley, *Lawless Lands: Path to Justice Unclear*, THE DENVER POST, Nov. 14, 2007, at A1, available at [http://www.denverpost.com/ci\\_7454999?source=pkg](http://www.denverpost.com/ci_7454999?source=pkg).

151. Riley later collaborated with the PBS television show *Bill Moyers Journal*, which summarized some of his findings: "Justice Department statistics show that the rate of violent crime per every 100,000 residents of Indian country is 492; for the United States as a whole, 330." Bill Moyers Journal, EXPOSÉ on THE JOURNAL: Broken Justice (Nov. 14, 2008), <http://www.pbs.org/moyers/journal/11142008/profile2.html> (last visited Aug. 10, 2010); "The Department of Justice's own records show that in 2006, prosecutors filed only 606 criminal cases in all of Indian country. With more than 560 federally recognized tribes, that works out to a little more than one criminal prosecution for each tribe." N. Bruce Duthu, Op-Ed., *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 10, 2008, at A17.

152. Eid, *supra* note 136, at 38 (discussing the declination-reporting provisions of the Tribal Law and Order Act).

ment officers and prosecutors often share with their tribal counterparts in Indian country cases.

For example, the chief prosecutor for the Navajo Nation, Bernadine Martin, recently told several members of Congress in a letter that, while there were 367 total reported sexual assaults on the reservation in 2009, federal records showed that just twenty-eight arrests were made in those cases.<sup>153</sup> The FBI typically serves as the lead law enforcement agency in such investigations.<sup>154</sup> But because no uniform reporting protocols exist, Martin—a veteran former state prosecutor—wrote that she could not determine from these records how many of the twenty-eight arrests were actually presented to the respective U.S. Attorney's Offices in the three different states serving the Navajo Nation.<sup>155</sup> While tribal law investigators sometimes work sexual assault cases, often alongside the FBI, Martin explains that “Navajo prosecutors are rarely involved in cases that involve the federal government,” adding, “[i]t could be years before the Navajo Nation is notified of either a filing of charges or decline in these cases.”<sup>156</sup> This systematic lack of communication and coordination has tragic consequences:

I received a letter from an Arizona Assistant U.S. attorney [sic], dated December 16, 2009, who informed me that she was declining to prosecute an individual for a sex assault on a 6-year-old child which had occurred in 2004. One of the reasons they gave for declining the case was because “the suspect was never interviewed.” Be that as it may, there is absolutely no excuse to wait 5 years to decline a case, especially given that the Navajo Nation has a sex assault statute that this offender could have been charged with. Obviously, the statute of limitations had run out on the Navajo Nation hence the child victim received no justice and that sex offender was free to apply for jobs in our school systems placing other 6-year-olds at risk! This particular offender has since been charged with sex assault on another 6-year old child in Maricopa County (Phoenix, Arizona).<sup>157</sup>

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153. Letter from Bernadine Martin, Chief Prosecutor, The Navajo Nation, to United States Representatives John Conyers, Lamar Smith, Bobby Scott, & Louis Gohmert 1 (Apr. 15, 2010) (on file with *University of Colorado Law Review*).

154. See Federal Bureau of Investigation, *supra* note 139.

155. Letter from Bernadine Martin, *supra* note 153, at 1.

156. *Id.*

157. *Id.* at 2.

Martin noted that since taking office as chief prosecutor for the Navajo Nation in September 2009, she “received 19 decline letters from the Arizona U.S. attorney’s office [sic], none from New Mexico and none from Utah.”<sup>158</sup>

Experiences like this are all-too familiar for tribal prosecutors like Martin, yet it took until the fall of 2009—and only after substantial public outcry—for U.S. Attorney General Eric Holder to reverse the Justice Department’s longstanding policy and agree to accept at least some form of case-declination reporting.<sup>159</sup> The Department carefully monitors many other categories of investigations, ranging from terrorism to drug-trafficking, regardless of whether they result in actual prosecutions.<sup>160</sup> Case-declination reporting of Indian country cases was always a matter of internal executive branch policy. Under these circumstances, it is only reasonable to wonder whether legislation would be required if these particular declination decisions did not involve Indian country crimes.

#### 4. Federal Prisons and Probation

Finally, in addition to the federal court system, which is discussed in more detail in Section II(C), the federal penal system plays the dominant role in punishing violent crimes committed in Indian country. The Bureau of Prisons (“BOP”), part of the U.S. Department of Justice, is responsible for incarcerating criminal defendants convicted and sentenced by the federal courts and for handling probation services.<sup>161</sup> In addition to the BOP, the BIA Office of Justice Services maintains its own network of detention facilities.<sup>162</sup> Importantly, there is no parole for offenders sentenced to the federal prison system.<sup>163</sup> As a result of this and the relatively more severe sentences often imposed by the Federal Sentencing Guidelines, federal sen-

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158. *Id.*

159. Eid, *supra* note 136, at 38.

160. See, e.g., *Declination Reporting: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. U.S. Senate (2008) (statement of Drew H. Wrigley, U.S. Attorney for the Dist. of N.D.) available at [http://indian.senate.gov/public/\\_files/DrewWrigleytestimony.pdf](http://indian.senate.gov/public/_files/DrewWrigleytestimony.pdf).

161. Fed. Bureau of Prisons, About the Bureau of Prisons, <http://www.bop.gov/about/index.jsp> (last visited Aug. 8, 2010).

162. Dep’t of Interior Office of Law Enforcement, Sec., and Emergency Mgmt. Watch Office, BIA Office of Justice Services: Deputy Director, [http://www.doi.gov/watch\\_office/bia/dd\\_ojs.html](http://www.doi.gov/watch_office/bia/dd_ojs.html) (last visited Sept. 21, 2010).

163. *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 7 (1979).

tences of incarceration are on average twice as long as those imposed by state courts for the same or similar offenses.<sup>164</sup> While an exhaustive review of the treatment of Native Americans in the federal correctional system is beyond the scope of this Article, we examine some of those disparities now, particularly with reference to juveniles.

*B. Harsher Punishments for the Same Crimes*

Due to the absence of parole and the operation of the sentencing guidelines, punishments for federal crimes committed by Native Americans in Indian country are systematically harsher for adult offenders as compared to the punishments doled out for identical offenses committed off-reservation. Yet, this systemic disparity pales in comparison to the gap between Native American juveniles who enter the federal justice system and those who do not. As most recently documented by Jon'a Meyer, nearly two-thirds (61 percent) of juveniles held in federal detention are Native American.<sup>165</sup> This is a result of the MCA, the Federal Juvenile Delinquency Act of 1938, and other statutes that automatically transfer jurisdiction over serious felonies from Indian tribes and nations to the federal government.<sup>166</sup> Tribal youth form the majority of the juvenile caseload in federal court, yet the BOP fails to provide juvenile diversion programs, alternative-sentencing, restorative justice, or other rehabilitative programs that are comparable to services available at the state level.<sup>167</sup> In Professor Meyer's words, "the BOP cannot control the type or quality of programs to which juveniles are exposed."<sup>168</sup>

Another inequity concerns the number of Native American youth sentenced by the federal courts as adult offenders. Only between 1 and 2 percent of juveniles processed in the state

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164. Jon'a Meyer, *Ha'álchíní, haadaah náásdah* / "They're Not Going to Be Young Forever:" *Juvenile Criminal Justice*, in CRIMINAL JUSTICE IN NATIVE AMERICA, *supra* note 16, at 32, 38.

165. *Id.* at 34.

166. *Id.* This means that Native American youth age fifteen or older who commit serious crimes on reservations such as murder, sexual assault, or robbery enter the federal court system, "as do youth aged thirteen and fourteen whose tribes consent to the transfer." *Id.* However, Professor Meyer notes that the legal requirements that would ordinarily apply to juveniles being transferred to the BOP "do not seem to apply if the juvenile is Native American." *Id.* at 35.

167. *Id.* at 34–35.

168. *Id.* at 36.

courts are waived to the adult system.<sup>169</sup> Yet, in the federal prison system—with its majority Native American juvenile inmate population—approximately *one-third* of juveniles are sentenced as adult offenders.<sup>170</sup> Once in the adult federal system, juveniles are obviously exposed to harsher sanctions than those who remain in youth detention. Youth adjudicated in the state-level adult courts can earn significant amounts of “good time” credit toward early release or avail themselves of parole for earlier release. In contrast, Native American delinquents sentenced as adults in the federal system have no access to good time or parole, and they must serve nearly their entire sentences under the federal sentencing guidelines.<sup>171</sup>

Such discrimination against Native Americans is plainly of constitutional dimension. For instance, Native American juvenile offenders tried as adults cannot benefit from the Supreme Court’s recent decision in *Graham v. Florida* that sentencing juveniles who have committed crimes other than homicide to life without parole is cruel and unusual punishment in violation of the Eighth Amendment.<sup>172</sup> Although the question was not before the Justices, the *Graham* majority’s suggestion that other unduly severe punishments for juveniles might be unconstitutional<sup>173</sup> may offer a path to challenge the constitutionality of the disproportionate sentencing of Native American juveniles as adults in the federal system.<sup>174</sup>

### C. *Lack of Federal Judicial Access*

Not one federal courthouse in the United States is located on an Indian reservation.<sup>175</sup> This is in sharp contrast to the judicial access available off-reservation, where almost all

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169. *Id.* at 37.

170. *Id.* In contrast, tribal governments are comparatively advanced when it comes to providing sentencing alternatives such as peacemaking to many juvenile delinquents. *Id.* at 42.

171. *Id.* at 37–38.

172. 130 S.Ct. 2011, 2033 (2010).

173. *Id.*

174. Native American juveniles sentenced to the BOP are also far less likely to be incarcerated close to home. *See, e.g.*, BOP: Fed. Bureau of Prisons Web Site, <http://www.bop.gov/> (last visited Sept. 21, 2010) (follow “WXR”, “NCR”, and “SCR” hyperlinks embedded in U.S. map) (North Dakota, Montana, Idaho, Nevada and Alaska have no federal detention facilities; South Dakota, New Mexico and Utah each have only one).

175. *See* U. S. Courts, Court Locator, [http://www.uscourts.gov/Court\\_Locator.aspx](http://www.uscourts.gov/Court_Locator.aspx) (last visited Aug. 29, 2010).

crimes are investigated, prosecuted, and adjudicated by state and local officials. On December 13, 2005, Chief Judge Martha Vázquez literally took the U.S. District Court for the District of New Mexico on the road by convening a federal criminal trial in Shiprock, on the Navajo Nation.<sup>176</sup> This trial marked the first time federal court had been held on the Navajo reservation.<sup>177</sup> It appears this may have been the first federal trial ever conducted in Indian country. Incidentally, the Navajo Nation covers an area nearly the size of West Virginia, a state with nine separate federal courthouses.<sup>178</sup>

The lack of federal judicial access for Native Americans living on Indian lands is one of the least-known civil rights challenges of our time. American citizens rightly value *localism*: having government officials who are accountable and accessible to them, and who live and work in their communities. It would be unthinkable off-reservation for a crime victim to travel hundreds of miles just to participate in a criminal case. Yet this is commonplace in Indian country, as is the lack of jury pools with meaningful Native American representation. Testifying before the Senate Committee on Indian Affairs, Janelle Dougherty of the Southern Ute Indian Tribe recently remarked on this structural injustice in the federal court system:

It is also totally unacceptable that the nearest U.S. District Court Judge in Colorado is 350 miles away from the Southern Ute Indian Reservation, and even farther from our sister tribe to the west, the Ute Mountain Ute Reservation. [We] . . . have been pushing for a federal courthouse and judgeship in our area. Trying cases that meet the elements of the Major Crimes Act 350 miles from the jurisdiction in which they occur stands as a road block to justice and must be resolved. Federal juries in Colorado rarely include a single American Indian, yet they decide purely local crimes.

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176. Rhys Saunders, *Historic Trial Begins in Shiprock*, FARMINGTON DAILY TIMES, Dec. 14, 2005, at 1A.

177. *Id.* It appears that at least one other federal judge has followed her example. *Federal Judge to Hold Court on Hopland Indian Reservation*, LAKE COUNTY NEWS (Lakeport, CA), June 24, 2010, <http://lakeconews.com/content/view/14651/919/> (“This is the first time that a federal court has arranged to hold regular court sessions [for misdemeanor citations] on an Indian reservation in California, officials reported.”).

178. See U. S. Courts, Court Locator, [http://www.uscourts.gov/court\\_locator/CourtMapDetails.aspx?state=WV](http://www.uscourts.gov/court_locator/CourtMapDetails.aspx?state=WV) (last visited Aug. 8, 2010).

And we have never had a federal grand jury in Western Colorado in my lifetime.<sup>179</sup>

When a Native American defendant, victim, or witness testifies before a federal jury, the likelihood that he or she will perceive that justice is really being decided by a group of his or her peers is extremely remote. In an attempt to help compensate for this within the federal District of Colorado, both the grand jury and trial (petit) jury pools may be drawn from a local division that is closer to the reservations.<sup>180</sup> Nonetheless, as a practical matter—and given the large volume of cases originating in Indian country—it is extremely rare for Native Americans living on Indian reservations to serve on federal juries in Colorado or other states, even when local division policies are used.<sup>181</sup> It is perhaps just as rare for federal trial judges to accept Native American criminal defendants' objections that they have been denied a jury of their peers<sup>182</sup> in violation of the Sixth Amendment.<sup>183</sup> And while non-Indian jurors may have no real-world experience with Indian country,

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179. *Examining Federal Declinations to Prosecute Crimes in Indian Country, Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 49 (2008) (statement of Janelle F. Doughty, Director, Dept. of Justice and Regulatory, Southern Ute Indian Tribe), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_senate\\_hearings&docid=f:46198.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:46198.pdf).

180. Under the leadership of U.S. District Court Chief Judge Wiley E. Daniel, the court is also making a determined effort to hold trials and other criminal proceedings in Indian country cases in an existing federal courtroom facility in Durango. Shortly after his appointment as chief judge in 2009, Judge Daniel also made a point of visiting both the Southern Ute and Ute Mountain Ute Indian Reservations, and meeting with their respective tribal councils. See *Federal Judges Visit Tribe*, S. UTE DRUM (Ignacio, Colo.), Apr. 10, 2009, at 2, available at [http://www.southern-ute.nsn.us/DRUM/DrumPDF/20090410DRUM/090410DRUM\\_PDF.pdf](http://www.southern-ute.nsn.us/DRUM/DrumPDF/20090410DRUM/090410DRUM_PDF.pdf).

181. For an excellent discussion of Native Americans' jury rights in the federal criminal justice system, see Washburn, *supra* note 135, at 748. ("The federal districts that include Indian reservations are physically among the largest in the United States. Because of the tremendous size of the districts, each judicial district is divided into multiple divisions. Most federal courts are located in larger cities, and they tend to assemble jury venires from the division in which they sit.")

182. For an example of the obstacles to mounting a successful legal challenge to a jury of one's peers, see *United States v. Taylor*, 663 F. Supp. 2d 1157, 1161–68 (D.N.M. 2009).

183. U.S. CONST. amend. VI; see also 28 U.S.C. § 1861 (2006) ("It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.")

some undoubtedly bring preconceptions or even prejudices about Native Americans to the courtroom.<sup>184</sup>

By comparison, in *Strauder v. West Virginia*,<sup>185</sup> in an era of pervasive racial intolerance that is nearly unthinkable today, the Court spoke eloquently about the true meaning of the Sixth Amendment in striking down a West Virginia statute that operated to exclude African-Americans from jury service:

The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons have the same legal status in society as that which he holds. . . . It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.<sup>186</sup>

It bears reflecting on what the virtual absence of Native Americans serving on federal juries does for respect for justice and the rule of law in communities that must depend on that system in what would be handled locally almost anywhere else in the United States.

#### *D. The Chronic Federal Resource Gap*

Another issue is the serious and perpetual lack of resources made available to Indian country under the federal criminal justice system. Despite many decades of federal promises, parity remains elusive today. According to the U.S. Department of Justice's own estimates, in 1997, Indian country was served by only half as many law enforcement officers per

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184. See, e.g., *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) (jury foreman's derogatory statements about Native Americans during jury deliberations are not reversible error).

185. 100 U.S. 303 (1879).

186. *Id.* at 308–09. Against this standard, trying a federal criminal case in the community where it allegedly occurred, with a jury who knows and understands reservation life, seems only the least that can be expected. Yet without massive restructuring that includes an increase in education about Indian country for federal judges and magistrates and a court-building program across Indian country, such expectations are manifestly unreasonable. Co-author Troy Eid is indebted to Nicholas H. Gower, a third-year law student in his federal Indian law seminar at the University of Colorado Law School last fall, for this observation.

capita as similarly situated rural communities.<sup>187</sup> A decade later, the Bureau of Indian Affairs' Office of Law Enforcement Services hired a private consultant to determine what it might take to put tribal law enforcement and corrections on an equal footing with similarly situated off-reservation communities.<sup>188</sup> The consultant's report found that, as a whole, Indian country had an unmet need of more than 2,600 law enforcement officers for policing functions, plus a total unmet need of more than 867 detention staff.<sup>189</sup> The report further recommended that the BIA, at a minimum, hire 1,067 new employees to achieve parity in criminal justice and correctional programs.<sup>190</sup> According to the consultant's findings, the BIA had a 69 percent unmet staffing need for sworn law enforcement officers,<sup>191</sup> and a 61 percent unmet need for correctional facilities and programs in the vast majority of states where the agency directly operates detention facilities.<sup>192</sup> The systematic resource gap seriously undercuts the federal government's fundamental criminal justice responsibilities in Indian country and widens when viewed within the broader context of the comparatively limited federal institutions based off-reservation, including federal enforcement, prosecutors, courts, and prisons.

### III. ELIMINATING "SEPARATE BUT UNEQUAL" JUSTICE IN INDIAN COUNTRY

This Part discusses how the federal government can move beyond its separate but unequal criminal justice system by em-

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187. *Impact of Supreme Court Rulings on Law Enforcement in Indian Country: Hearing Before the Comm. on Indian Affairs*, 107th Cong. 14 (2002) (statement of Tracy Toulou, Director, Office of Tribal Justice, U.S. Dep't of Justice).

188. See TECHNOLOGY & MANAGEMENT SERVICES, INC., GAP ANALYSIS (April 18, 2006) (on file with *University of Colorado Law Review*) [hereinafter GAP ANALYSIS]. A later supplemental report by the same consultant also determined that tribes should hire 1,059 new law enforcement officers, based on a staffing gap of 33 percent in that category, and 341 correctional officers based on a 24 percent staffing gap. See TECHNOLOGY & MANAGEMENT SERVICES, INC., TRIBAL SUPPLEMENT TO THE GAP ANALYSIS ii–iii (June 2, 2006) (unpublished) (on file with *University of Colorado Law Review*) [hereinafter TRIBAL SUPPLEMENT TO GAP ANALYSIS], cited in Eid, *supra* note 136, at 40.

189. GAP ANALYSIS, *supra* note 188, at 24.

190. *Id.*

191. *Id.* at iii. A U.S. Civil Rights Commission report, *A Quiet Crisis*, found in July 2003 that law enforcement per capita spending in American Indian communities was roughly 60 percent of the national average. Luna-Firebaugh, *supra* note 99, at 139.

192. GAP ANALYSIS, *supra* note 188, at iv.

powering Indian tribes and nations in a manner that reinforces tribal sovereignty and self-determination instead of undermining them. There can be no serious doubt that more than a half-century after *Brown*, the Equal Protection Clause guarantees Native Americans a level of civil rights protection commensurate with their fellow citizens. This is what we mean by returning to constitutional first principles: acknowledging once and for all, much like what the Supreme Court did in *Brown*, that the federal government cannot continue to maintain a separate system of criminal justice solely for one group or subset of Americans that is inferior to criminal justice systems elsewhere in the United States.

Before proceeding further, a caveat: there is a pronounced tendency even for well-intentioned reformers to invent their own policy “solutions” for Indian country, then dictate how tribal governments should implement them. We won’t play that game. This Article has no intention of dictating to Indian tribes and nations the path they should take to maintain order and enforce the rule of law in their communities.

Instead, our watchword is freedom. We think much of what ails the federal criminal justice system in Indian country can and should be addressed by interpreting and enforcing the U. S. Constitution based on its text, structure, and the meaning that the Supreme Court has given in invalidating invidious racial and ethnic discrimination since *Brown*. As the three branches of the federal government reinterpret their constitutional responsibilities in this way, the result should be increasing freedom for tribal governments to maintain order and preserve the rule of law in their own communities. This is because the Constitution itself recognizes three distinct sources of sovereign authority: federal, state, and tribal.<sup>193</sup> The U.S. Supreme Court has often struggled with how much power tribes retain *vis-à-vis* the other two sovereigns.<sup>194</sup> But *none* of these sove-

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193. See U.S. CONST. art. I, § 8, cl. 3 (identifying “the Indian Tribes” as a separate political entity).

194. Compare *Worcester v. Georgia*, 31 U.S. (6. Pet) 515, 519 (1832) (“The very term ‘nation’ . . . means ‘a people distinct from others.’ The constitution . . . has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties.”), and *Williams v. Lee*, 358 U.S. 217, 220 (1959) (“[T]he question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”), with *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . .”), and *Nevada v. Hicks*,

reigns, including the federal government, may discriminate systematically and perniciously against an entire category of U.S. citizens based on race or ethnicity. Once the federal government accepts this reality and acts accordingly, tribes will have greater freedom to chart their own destinies, as state and local governments do.

The Constitution itself holds the key to correcting this injustice. Within the federal government, each of the three branches should dare to see the federal criminal justice system in Indian country for what it is—separate but unequal—and then do its job. Emphatically, this must start with the President and Congress. There is a precedent for this. President Nixon in 1970 stunned many observers by embracing tribal self-determination and sovereignty as cornerstones of a new national policy.<sup>195</sup> There was hardly a consensus on Capitol Hill at the time for such a bold shift, yet even years after his death, Nixon's willingness to lead on this issue still confounds supporters of the tribal sovereignty tidal wave that has since surged forward.<sup>196</sup>

President Obama now has an opportunity to create his own path-breaking legacy in Indian country. This should include restoring the inherent criminal jurisdiction of Indian tribes and nations over non-Indians, a power stripped from them by the *Oliphant* Court in 1978.<sup>197</sup> This would give Indian tribes and nations the flexibility to enforce their own laws on their own lands regardless of the race or ethnicity of the alleged victim or perpetrator, so long as they respect the federal constitutional rights of both, just as state and local governments elsewhere currently do.<sup>198</sup> Each tribe would also be free to decide whether the federal criminal justice system should still exercise concurrent jurisdiction on its land. Federal laws of general application, such as those addressing anti-drug trafficking and terrorism, and other federal statutes that apply to all persons

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533 U.S. 353, 361 (2001) (“State sovereignty does not end at a reservation’s border.”).

195. WUNDER, *supra* note 31, at 127, 145–46.

196. *Id.* at 148–49.

197. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

198. See Troy A. Eid, *Point: Beyond Oliphant: Strengthening Criminal Justice in Indian Country*, FED. LAW., Mar.–Apr. 2007, 40, at 45–46 (outlining possible requirements for a post-*Oliphant* “roadmap” that respects tribal sovereignty and protects criminal defendants’ civil rights). For a contrasting outlook, see Elizabeth Ann Kronk, *Counterpoint: Promoting Tribal Self-Determination in a Post-Oliphant World: An Alternative Road Map*, FED. LAW., Mar.–Apr. 2007, 41, at 41–43.

in the United States regardless of land status, would of course continue to apply to Indian country. But tribes otherwise would be free to innovate and implement their own criminal justice systems with or without continued federal concurrent jurisdiction, if they so choose, and at their own pace. Monies currently expended by the federal government on its criminal justice responsibilities in Indian country should, at a bare minimum, be remitted in perpetuity to Indian tribes and nations electing to undertake this velvet divorce. At the same time, the wishes of tribes that want to retain federal criminal justice systems must be respected.<sup>199</sup>

Congress likewise should embrace the movement for greater tribal freedom, following the President or bringing him along as the case may be. Again, this demands fresh thinking; but it is hardly unthinkable, as evidenced by the recent passage of the Tribal Law and Order Act (the "Act").<sup>200</sup> The Act enhances tribal courts' sentencing authority to permit stronger punishments for many tribal offenses.<sup>201</sup> Certainly much more work would need to be done to garner the necessary support for a meaningful tribal choice agenda that includes the restoration of criminal justice authority. Yet enforcing the Constitution's civil-rights guarantees often demands reforms that are initially thought to be unachievable, such as the passage of the Voting Rights Civil Rights Acts after *Brown*.

This brings us to the Supreme Court. It is virtually an article of faith among several respected commentators that the current Court majority does not decide Indian law issues in a manner that respects the role of tribal governments as sources of legitimate governmental power in the constitutional

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199. While an analysis of Pub. L. 280 tribes is beyond the scope of this Article, greater freedom should be the watchword for these tribes as well: liberty to build their own justice systems, form partnerships with state jurisdictions, or embrace federal jurisdiction tailored to their unique circumstances as they decide.

200. Co-author Troy Eid joined forces with former United States Attorney Thomas B. Heffelfinger of Minnesota at the request of the bill's sponsors, co-writing a letter to House members urging the bill's passage. Troy, who had previously testified on the bill in the Senate Committee on Indian Affairs, also traveled to Washington, DC to support the bill when it was considered on the House floor. *See generally Congress Passes First Significant Indian Country Crime Bill in Years*, INDIANZ.COM, (July 22, 2010), <http://64.38.12.138/News/2010/020834.asp> (despite some Republican opposition, the House voted 326 to 91 to pass the bill).

201. Troy A. Eid, *Bringing Justice to Indian Country*, THE DENVER POST, Aug. 3, 2010, at B11, available at [http://www.denverpost.com/search/ci\\_15661714?source=email](http://www.denverpost.com/search/ci_15661714?source=email). *See also* Eid, *supra* note 136, at 38.

scheme.<sup>202</sup> There is also a practical consideration: the Court can only consider cases that come to it. Any review of the MCA or of broader federal criminal justice questions might not come for many years, if at all, and would still almost certainly be discretionary.<sup>203</sup>

There is still an urgent priority for the Court in the meantime: judicial education. This is not a criticism of any of the justices or the Court as an institution. But the fact remains that no U.S. Supreme Court Justice has ever been an enrolled member of a federally recognized Indian tribe, and no current Justice has lived or worked extensively in Indian country. It is imperative that those who have lived or worked on Indian reservations and experienced the federal criminal justice system redouble their collective efforts to acquaint the federal judiciary with its on-the-ground realities. Only then can we reasonably expect an awareness of the separate but unequal federal criminal justice system in Indian country, which in turn may influence judicial decisions over time—all the way to the highest court in the land.

It may be difficult to imagine today that the current U.S. Supreme Court will invalidate the segregationist federal criminal justice system in Indian country—as their predecessors did in *Brown*—and provide a suitable judicial remedy to correct that injustice.<sup>204</sup> But the analogy to *Brown* is still critically

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202. Marcia Coyle, *Indians Try to Keep Cases Away from High Court*, LAW.COM, (March 30, 2010), available at [www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202447092378](http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202447092378) (quoting Richard Guest, Senior Trial Attorney for NARF). See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001). See also Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009). In his analysis of Supreme Court cases on Indian law, Professor Fletcher found that from 1959 until 1987, Indian tribes won nearly 60 percent of cases decided by the Court, compared to winning less than 25 percent since 1987. *Id.* at 942–44.

203. Professor Fletcher, who studied more than 160 certiorari petitions filed between 1986 and 1994, concluded that the Court's discretionary review process is itself a barrier to justice for tribes and individual Indians. *Id.* at 978–79. Certiorari pool memos by the Court's law clerks indicated that clerks often overstate the merits and importance of petitions filed by state governments against tribal interests, while understating the merits and importance of tribal certiorari petitions. *Id.* at 967.

204. The academy is almost universally skeptical about the Court's ability to transform its role in Indian affairs, given how its justices have shaped its own precedents and doctrines. The late Philip Frickey captured the mood: "The Court has transformed itself from the court of the conqueror into the court as the con-

important because the case has come to symbolize that it is never too late to redefine and enforce constitutional rights that have been systematically denied to an entire population of U.S. citizens for generations.

Regardless of how the interplay among the three branches unfolds, the time has come for a national conversation about comprehensive policy reform that gives Indian tribes and nations more freedom to chart their own destinies with the federal government acting as an enabler rather than impediment to the process. Federal policy should strongly encourage tribal governments to design and implement criminal justice systems that are more directly accountable and responsive to the people who actually live and work in Indian country, just as off-reservation communities do. This should happen even if some tribes decide to exit the federal criminal justice system, opting instead for essentially local law enforcement, prosecution, judicial, and correctional services.

Far too much of the federal criminal justice system that serves Indian country—designed as it was to keep Native Americans isolated on reservations with the real political power elsewhere—remains trapped in a segregationist mentality. Substantially increased federal funding would undoubtedly help in many areas, but there is also a critical need to address the basic structural flaws inherent in the outmoded federal criminal justice system itself, such as the built-in lack of accountability of federal law enforcement officers, prosecutors and judges, and their respective agencies and institutions, to tribal communities. The system, as it currently exists, may never be able to deliver the quality, quantity, and consistency of politically accountable services that Native Americans living and working on reservations should rightly expect, and which are comparable to those available to off-reservation communities.

The ability of tribes to assume public safety functions previously handled by the Bureau of Indian Affairs varies widely. Several vestiges from the segregationist era still severely restrict the practical ability of many tribal governments to assert

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queror.” Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Non-Members*, 109 YALE L.J. 1, 73 (1999). Yet it also bears remembering that such sentiments, if true, do not necessarily predict the Court’s future direction. *Brown* attests that the Court can and often does change course dramatically, and in unexpected ways, as public attitudes shift—much like they did in response to the Civil Rights Movement. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

their own sovereignty on public safety matters: especially the federal government's reluctance to allow tribal governments to create and manage their own credible and sustainable tax bases.<sup>205</sup> Despite these inequities, a growing number of Indian tribes and nations have assumed many essential criminal justice and related functions previously handled by Washington, as provided by the Indian Self-Determination and Education Assistance Act,<sup>206</sup> popularly known as "638," and the Tribal Self-Governance Act.<sup>207</sup> These provisions enable tribal governments to reassume many of their traditional functions under contract with the BIA. One thing is clear about overcoming the separate but unequal status of criminal justice in Indian country: each tribe must be free to chart its own course.<sup>208</sup>

An able cadre of scholars and advocates has already trained its intellectual firepower on clarifying the proper relationship between the federal government and tribes.<sup>209</sup> This is no small challenge, for as the late Vine Deloria, Jr., and Professor David E. Wilkins put it: "Unlike other areas of jurisprudence, federal Indian law has little logical consistency in its substance."<sup>210</sup> Fundamentally, the remedy to separate but equal justice must be rooted in comprehensive public policy reform, with Indian tribes and nations themselves charting their own destiny, each according to its specific needs and timetables. There is no one-size-fits all solution, and the federal government should not attempt to drive or dictate a particular policy outcome or result. But instead of "the segregation of the Indians," the federal government's new policy should be to provide the maximum array of credible options for tribes to design,

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205. See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (permitting duplicative state taxation of oil and gas resources on tribal trust lands even when tribal governments already impose their own severance taxes).

206. Pub. L. No. 93-638, 88 Stat. 2203 (1975).

207. Pub. L. No. 103-413, 108 Stat. 4270 (1994).

208. Again, freedom is the watchword here, out of basic respect for tribal sovereignty and Native Americans themselves. The late Vine Deloria, Jr. said it well: "Indians are like the weather. Everyone knows all about the weather, but none can change it. . . . Likewise, if you count on the unpredictability of Indian people, you will never be sorry." DELORIA, JR., *supra* note 31, at 1.

209. Among several other distinguished experts, Frank Pommersheim summarizes some of the recent scholarship while proposing several intriguing ideas of his own. See POMMERSHEIM, *supra* note 29, at 303-12 (exploring a federal-tribal compacting process, possibly by constitutional amendment, that reinvigorates tribal sovereignty on a federalism model).

210. DELORIA, JR. & WILKINS, *supra* note 80, at 158.

staff, and fund criminal justice systems tailored to their own needs.<sup>211</sup>

Some tribes might want to negotiate a partial or full withdrawal from the federal criminal justice system on tribal lands for crimes that would be handled locally were they state offenses. For instance, the Southern Ute Indian Tribe—under the leadership of former Chairman Clement Frost, Chief Judge Phyllis Newton, and the Tribe's former Justice Department Director, Janelle Doughty—maintained a tribal police department, jail, and court system that operated on par with those of comparable off-reservation communities.<sup>212</sup> If and when an Indian nation decides it is ready, exploring how to exit all or parts of the federal system that otherwise applies to Indian country—and ensuring the tribe has the necessary freedom, tools, and means to do so—should definitely be on the table for discussion. This conversation could discuss roles and responsibilities, resource requirements, and the necessary modifications to federal law needed to make it happen. Modifications to federal law and jurisdiction needed to create this option would necessarily include a partial or full repeal of the *Oliphant* prohibition against tribal criminal jurisdiction over non-Indians.<sup>213</sup> Importantly, this approach need not apply to federal laws of general application, such as anti-terrorism or racketeering statutes, which apply to all U.S. citizens regardless of where they live or work. Rather, the federal-tribal conversation would address federal laws, personnel, and institutions in Indian country that are currently providing what would otherwise be essentially local criminal justice services, and which

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211. For instance, Deloria and Wilkins call for the restoration of the President's treaty-making power with Indian tribes and nations, which—in what can only be considered a blatantly unconstitutional act—was unceremoniously stripped by Congress in 1871 as part of yet another appropriations rider. Act of March 8, 1871, 16 Stat. 544, 566–71; DELORIA, JR. & WILKINS, *supra* note 80, at 62–63, 161. See also *United States v. Lara*, 541 U.S. 193, 215 (2004) (Thomas, J., concurring). Even if the treaty power is not restored, another idea is to rely on compacts—inter-governmental agreements intended to be legally enforceable contracts between tribes and the United States. POMMERSHEIM, *supra* note 29, at 303–12. Long used in areas such as water law, compacts depend on the parties' willingness and ability to honor their agreements, which become judicially enforceable, but are often administered by “special masters” or other monitors committed to achieving an equitable result for parties. See, e.g., John H. Davidson, *Indian Water Rights, the Missouri River, and the Administrative Process: What are the Questions?*, 24 AM. INDIAN L. REV. 1, 2 (1999–2000).

212. Troy A. Eid, *Making Indian Country Safer: Colorado's “Admirable” Experiment*, 38 COLO. LAW., Oct. 2009, at 21, 24–28.

213. See Eid, *supra* note 198, at 45–46.

might be more appropriately handled by tribes, either by themselves or in voluntary partnerships with state or local entities.

#### EPILOGUE: COMING FULL CIRCLE

It may be that this latter-day civil rights tragedy stems mostly from a lack of education, as most members of Congress and federal judges have little real-world experience with the federal criminal justice system in Indian country. If so, those who have actually been part of that system have a special duty—and, as lawyers, an ethical obligation—to speak out.<sup>214</sup> As so often happens in Indian country, there are signs that matters may finally have come full circle. Among those speaking out boldly on the need for fundamental change is Chief Judge Martha Vázquez of the U.S. District Court for the District of New Mexico.

On April 8, 2010, at the Federal Bar Association's annual Indian Law Conference at the Pueblo of Pojoaque, the chief judge of a district that includes 23 federally recognized Indian nations delivered a measured public critique of the federal criminal justice system in Indian country.<sup>215</sup> This is the same judge who had joined forces five years earlier with the president of the Navajo Nation, Dr. Joe Shirley, Jr., and convened the first-ever federal criminal trial on an Indian reservation.<sup>216</sup> This time, Vázquez patiently spoke before an audience of more

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214. As a former United States Attorney for the District of Colorado appointed by President George W. Bush and unanimously confirmed by the U.S. Senate, co-author Troy Eid has spent more than two decades working in and near Indian country. His career includes service in the U.S. Department of Justice; as a legislative staff member to former U.S. Representative Jim Kolbe (R-Ariz.), as the chief legal counsel and later a cabinet secretary to former Governor of Colorado Bill Owens (R), and in private law practice representing various Indian tribes and nations as well as organizations and individuals doing business with them. Both authors greatly respect the vast majority of federal public servants who provide justice-related services to the roughly 300 Indian reservations and communities currently subject to federal criminal jurisdiction. In nearly every case, these are fine people doing their best to work with—and who must often work *around*—an outmoded system of laws and institutions designed at an earlier stage of U.S. history. This is no fault of anyone serving in the field of federal criminal justice today, and we honor the thousands of men and women, including many Native Americans, who dedicate their careers to doing justice and keeping the peace throughout Indian country. Many of these professionals are friends, and more than a few are personal heroes.

215. The chief judge's remarks from the FBA conference, which co-author Troy Eid attended, are not published but summarized very generally here with her permission.

216. See Saunders, *supra* note 176, at 1A.

than 500 attorneys and tribal leaders. She offered her personal observations about how the federal criminal justice system in Indian country is falling short, carefully insisting that Native Americans, especially crime victims, must gain full access to the same civil rights that other U.S. citizens enjoy.

Chief Judge Vázquez has not yet published her remarks from that conference or written an article on the subject. But her public candor may prove to be a milestone for awareness of the segregationist vestiges that unexpectedly endure through the federal criminal laws and institutions serving Indian country. The unexpected passage of the Tribal Law and Order Act by both houses of Congress last July could be yet another marker. At stake is nothing less, in the Supreme Court's stirring phrase, than "the right of reservation Indians to make their own laws and be governed by them."<sup>217</sup> Most U.S. citizens live far from Indian reservations and have no opportunity to discover how the federal criminal justice system operates there. Those with first-hand knowledge and experience must keep speaking out until what Justice Jackson called "the segregation of the Indians"<sup>218</sup> gives way to an informed and serious discussion about constitutional first principles. First among these principles—now and for all time—is that *all* men and women, including Native Americans, are created equal, and can no longer be sacrificed on an altar of federal neglect, indifference, or expediency.

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217. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

218. Transcript of Oral Argument at 17, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), (No. 101), *available at* <http://www.lib.umich.edu/brown-versus-board-education/oral/Marshall&Davis.pdf>.