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# Federal Criminal Law and Tribal Self-Determination

Kevin K. Washburn

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# FEDERAL CRIMINAL LAW AND TRIBAL SELF-DETERMINATION

KEVIN K. WASHBURN\*

*Under the rubric of "tribal self-determination," federal policymakers have shifted federal governmental power and control to tribal governments in nearly all areas of Indian policy. Normatively, this shift reflects an enlightened view about the role of Indian tribes in Indian policy. As a practical matter, it has also improved services to Indians on reservations by placing functions with tribal service providers who are more knowledgeable and more accountable than their federal counterparts. Despite broad adoption of self-determination as the dominant federal policy, felony criminal justice on Indian reservations has remained an exclusive federal function, and a highly ineffective enterprise, according to critics, because the crime rate is worse for American Indians than any other ethnic group. The failure to embrace self-determination in federal Indian country criminal justice is curious. Criminal law has a central role in shaping and expressing community values and identity. And a community that cannot create its own definition of right and wrong cannot be said in any meaningful sense to have achieved true self-determination. Tracing the history of the century-old Indian Major Crimes Act, it is clear that the Act's original purposes, increasing federal control and*

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*encouraging assimilation, are aimed at colonization and lack legitimacy in the modern era. Since the 1960s, mainstream federal Indian policy has become much more enlightened and the Major Crimes Act has become an embarrassing anachronism. Tribal self-determination strategies in criminal justice could help tribes get closer to true self-determination and help Indian country recover from the current criminal justice crisis.*

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## INTRODUCTION

Crime is a serious public safety crisis on American Indian reservations. Serious felonies occur at shocking rates and the crime rate for Indians has been steadily increasing even while urban crime rates have declined tremendously. One key difference between serious offenses in urban communities and felonies on Indian reservations is the government charged with addressing them. On more than a hundred Indian reservations across the United States, felony criminal justice is not a job for the local government, but a federal responsibility. As a result, though violent felonies tend to be local crimes affecting local communities, such offenses in Indian country tend to be adjudicated in federal courts.

Hundreds of miles of desert landscape and lonely highways often separate the small, mostly rural Indian communities where these federal crimes occur from the urban federal courts where they are eventually tried.<sup>1</sup> But even though this physical distance is tremendous, it is dwarfed by an even greater distance: the vast cultural gulf between the tribal communities and the federal courts.

In a recent article, this author argued that two key institutions of the federal Indian country criminal justice system—the federal prosecutors and federal juries—violate fundamental norms of American criminal justice.<sup>2</sup> First, American criminal justice policy and theory requires prosecutors to be “of the community” to exercise prosecutorial power over local offenses properly.<sup>3</sup> Echoing former

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1. See Christopher B. Chaney, *Victim Rights in Indian Country—An Assistant United States Attorney Perspective*, U.S. ATT’YS’ BULL., Jan. 2003, at 36, 36 (noting that it is 381 miles from the federal courthouse in Salt Lake City to the Navajo community of Monument Valley, Utah).

2. Kevin K. Washburn, *American Indians, Crime and the Law*, 104 MICH. L. REV. 709, 714–15 (2006).

3. *Id.* at 729–30.

Chief Justice Rehnquist's notion that "[f]ederal courts were not created to adjudicate local crimes,"<sup>4</sup> the article explained that the physical and cultural distances undermine the institutional competence of federal prosecutors.<sup>5</sup> Likewise, federal juries in Indian country cases are routinely constructed in violation of Sixth Amendment guarantees.<sup>6</sup> Because these juries do not represent fair cross-sections of the communities over which the federal courts have jurisdiction, the convictions they produce are illegitimate and unconstitutional.

Though these flaws in the structure of the Indian country criminal justice system are serious, they could be corrected. They are, after all, related primarily to process, not substance. If the role of Indian country federal prosecutor is adjusted to make prosecutors institutionally more competent, and if the federal courts begin selecting juries from within federal Indian country rather than using jurors who reside geographically outside those communities, the federal Indian country system could become aligned more closely with prevailing criminal justice and constitutional norms. The system might then be viewed as lawful from a federal constitutional perspective and rational from an American criminal justice policy perspective.

However, even with such corrections, a serious substantive problem remains. Thus, this Article addresses a far deeper problem with the federal Indian country criminal justice regime. The federal Indian country criminal justice regime reflects the unilateral imposition, by an external authority, of substantive criminal norms on separate and independent communities without their consent and often against their will. Thus, even if prosecutors performed their work in accordance with sensible criminal justice policy, and even if juries were selected in accordance with the Sixth Amendment, these actors would nevertheless be enforcing laws not made by Indian tribes. This is the essence of colonialism. And despite efforts to undo the harmful effects of American colonialism in Indian country, the imposition of federal criminal norms upon tribes has never been addressed.

The federal laws that give rise to federal jurisdiction over felony offenses have their most important roots in the Major Crimes Act,

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4. William H. Rehnquist, *Federalization of Crimes: Chief Justice Rehnquist on Federalization of Crimes*, PROSECUTOR, Mar./Apr. 1999, at 9, 9.

5. Washburn, *supra* note 2, at 729-40.

6. *Id.* at 741-64.

enacted by Congress in 1885.<sup>7</sup> The Major Crimes Act federalized prosecutions of serious crimes between Indians on reservations, a subject that had theretofore been considered an exclusive matter for internal tribal governance.<sup>8</sup> By thrusting the federal government into the adjudication of offenses between tribal members, the Major Crimes Act was a monumental encroachment on the sovereign powers of Indian tribal governments and a tremendous expansion of federal authority over Indian tribes and Indian people.<sup>9</sup> At the time, official federal policy was to destroy tribal governments and encourage assimilation of individual Indians into the larger society.<sup>10</sup>

In the 120 years since the enactment of the Major Crimes Act, the assimilationist policies that motivated its passage have been largely rejected,<sup>11</sup> and most of the contemporaneous laws that sought to facilitate assimilation have been repealed.<sup>12</sup> Indeed, during the last thirty-five years, Congress, the courts, and the executive branch have established a new federal Indian policy in favor of the preservation and reinvigoration of tribal governments.<sup>13</sup> The federal government now respectfully recognizes Indian nations as sovereigns and celebrates its “government-to-government” relationship with tribes.<sup>14</sup> Rather than seeking to destroy tribal governments, expand federal power over tribes, or assimilate individual Indians, the United States

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7. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (current version at 18 U.S.C. § 1153 (2000)).

8. See *Ex parte* Crow Dog, 109 U.S. 556, 571–72 (1883).

9. See 2 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 679 (1984) (describing the Major Crimes Act as “revolutionary,” and noting that it was a “major blow at the integrity of the Indian tribes”).

10. See *id.* at 609 (“The drive to acculturate and assimilate the American Indians culminated in the last two decades of the nineteenth century.”).

11. See, e.g., Richard Nixon, *Special Message on Indian Affairs* (July 8, 1970), in *DOCUMENTS OF UNITED STATES INDIAN POLICY* 256, 256–58 (Francis Paul Prucha ed., 3d ed. 2000) (explaining that the United States must reject the approach that “[t]ribal property [sh]ould be divided among individual members who would then be assimilated into the society at large” and indicating that “[s]elf-determination among the Indian people can and must be encouraged”).

12. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 14 (1983) (discussing the Indian Reorganization Act of 1934 and its dismantling of the allotment policies and imposing restrictions on further losses of Indian lands).

13. See *infra* Part III.D–E.

14. See Memorandum from George W. Bush to Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments (Sept. 23, 2004), available at <http://www.whitehouse.gov/news/releases/2004/09/20040923-4.html>.

now officially encourages "tribal self-determination"<sup>15</sup> and "tribal self-governance."<sup>16</sup>

Yet, as other major areas of federal Indian policy have been transformed, the Major Crimes Act has stubbornly persisted in its original form. Indeed, while other federal initiatives aimed at assimilation were dismantled, the Major Crimes Act has actually been *expanded*—repeatedly.<sup>17</sup> As a consequence, even though it seems to represent an anachronistic legal regime from a bygone era, the Major Crimes Act is an even greater obstacle to tribal self-governance in the twenty-first century than when it was first enacted in the nineteenth century. Indeed, while its mere existence is anachronistic in light of prevailing policy, its steady expansion means that it undermines tribal self-governance today more than ever.

The omission of felony criminal justice from federal initiatives favoring tribal self-determination is curious. Indeed, criminal law is perhaps the most important formal institution through which a community defines itself.<sup>18</sup> In the words of criminal law scholar Dan Kahan, criminal law is "suffused with meaning."<sup>19</sup> Whether one considers the substantive conduct that a community chooses to punish, the procedures that the community uses to adjudicate offenses, or even the types of punishment that the community authorizes the courts to mete out, such decisions reflect important values that help the community define itself and its moral vision.<sup>20</sup>

One need only look at substantive provisions in state criminal codes to understand the power of this fundamental truth. Consider that, in Texas, a person is privileged to kill a thief to prevent the person from successfully stealing property.<sup>21</sup> In contrast, in California and in many other states, one may never use deadly force to defend mere property and may use such force only to prevent grave physical

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15. For an understanding of this term, see *infra* notes 286–95 and accompanying text.

16. See Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, tit. II, 108 Stat. 4250 (codified at 25 U.S.C. §§ 458aa–458hh (2000)).

17. See *infra* Part III.G (discussing amendment and expansion of the Major Crimes Act).

18. See EMILE DURKHEIM, *DIVISION OF LABOR IN SOCIETY* 73 (George Simpson trans., MacMillan Co. 1933) (1893).

19. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 362 (1997).

20. See *id.*

21. See TEX. PENAL CODE ANN. §§ 9.41–.42 (Vernon 1994) (allowing, generally, one to use force to protect one's property and even allowing the use of deadly force against a burglar, robber, or night time thief during flight if one reasonably believes that the property cannot be recovered any other way).

harm or death to a person.<sup>22</sup> These laws express far more than their respective communities' views about crime; they constitute key expressions of the relative value of property and human life in those communities. All criminal laws express value judgments of one kind or another. At bottom, criminal laws are perhaps the most important community expressions of social norms and community values. They are thus fundamental to community identity and self-determination.

It is no accident that many of the most important and controversial principles of federal Indian law have been established in criminal cases. In *Ex parte Crow Dog*,<sup>23</sup> *United States v. Kagama*,<sup>24</sup> *Oliphant v. Suquamish Indian Tribe*,<sup>25</sup> *Duro v. Reina*,<sup>26</sup> and even as recently as *United States v. Lara*,<sup>27</sup> the Supreme Court struggled with the extent of tribal sovereignty and federal authority over criminal justice. The facts and legal issues in these criminal cases have been compelling to the Supreme Court at least in part because of the stakes involved when a government seeks to impose its criminal laws—its most important social norms—on people of another community.

While Indian law scholars and others occasionally voice criticism of federal Indian country criminal justice,<sup>28</sup> no scholar has ever seriously examined federal Indian criminal justice in light of the norms animating modern federal Indian law and policy. This Article

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22. See *People v. Ceballos*, 526 P.2d 241, 249 (Cal. 1974); see also N.J. STAT. ANN. § 2C:3-6 (West 1987) (placing limitations on the use of deadly force in the defense of property). See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 20.02[3] (3d ed. 2001) (analyzing the legal doctrines regarding the defense of property); WAYNE R. LAFAVE, CRIMINAL LAW § 10.6 (4th ed. 2003) (same).

23. 109 U.S. 556 (1883) (holding that the federal government lacks general authority to enforce federal criminal laws in Indian country).

24. 118 U.S. 375 (1886) (finding that federal criminal law specifically enacted for Indian country is not justified by congressional authority under the Commerce Clause but nevertheless holding that such power is legitimate).

25. 435 U.S. 191 (1978) (holding that an Indian tribe lacks jurisdiction to enforce its criminal laws against a non-Indian).

26. 495 U.S. 676 (1990) (holding that an Indian tribe lacks jurisdiction to enforce its criminal laws against an Indian who is not a member of that tribe).

27. 541 U.S. 193 (2004) (holding that the congressional act overruling *Duro v. Reina* was a lawful exercise of congressional plenary authority over Indian tribes and properly allowed the tribe to assert criminal authority over Indians who are not tribal members).

28. Professor Robert Clinton's work at the dawn of the self-determination era in the 1970s remains the best resource on the federal Indian country criminal jurisdictional scheme. See generally Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976) [hereinafter Clinton, *Criminal Jurisdiction*]; Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975) [hereinafter Clinton, *Development*]. Professor Robert Odawi Porter has also offered insights into the problems with federal criminal justice. Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 993–98 (1998).



seeks to remedy that oversight. At a time when Congress and the federal courts have demonstrated frustration with the existing criminal justice regime in Indian country, this Article evaluates this federal regime against the prevailing normative standard of "tribal self-determination."

Part I describes the contours of the existing system and notes some of the perceived problems. Part II explores the history and doctrinal foundations of the Major Crimes Act, tracing the historical context of federal criminal jurisdiction leading up to its enactment. Part III places the Major Crimes Act in the broader context of Indian law and policy in the century that has followed its enactment and concludes that the Indian country criminal justice regime is anachronistic and inconsistent with the modern norm of tribal sovereignty and self-governance. Part IV explains why criminal law is fundamentally important in achieving tribal self-determination and, in turn, why the absence of tribal self-determination undermines the legitimacy of the federal Indian country criminal justice system. Finally, Part V identifies broad approaches to reform and begins the discussion of how to implement tribal self-determination in this most important area of law and community life.

## I. THE EXISTING CRISIS AND THE NEED FOR RE-EVALUATION

Though Congress has often justified imposition of the federal criminal justice system in Indian country on the theory that federal laws are necessary to protect public safety, numerous statistical surveys suggest that the federal Indian country criminal justice regime has not achieved any such purpose.

Indeed, crime statistics involving American Indians are stunning. For decades, crime rates involving Indians have been higher than any other racial or ethnic group in the United States.<sup>29</sup> During the 1990s, when violent crime was rapidly declining throughout the United States to levels not seen in thirty years,<sup>30</sup> violent crime was quickly *rising* on Indian reservations.<sup>31</sup>

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29. In addition to those reports cited in greater detail below, for an overview of the crime rates and violence sustained among Indians, see generally RONET BACHMAN, DEATH AND VIOLENCE ON THE RESERVATION: HOMICIDE, FAMILY VIOLENCE, AND SUICIDE IN AMERICAN INDIAN POPULATIONS (1992); L.J. DAVID WALLACE ET AL., HOMICIDE AND SUICIDE AMONG NATIVE AMERICANS, 1979-1992, VIOLENCE SURVEILLANCE SUMMARY SERIES NO. 2 (1996), available at <http://www.cdc.gov/ncipc/pub-res/hombook.pdf>; and Sidney Harring, *Native American Crime in the United States, in INDIANS AND CRIMINAL JUSTICE* 93 (Laurence French ed., 1982).

30. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SERIOUS VIOLENT CRIME LEVELS DECLINED SINCE 1993, <http://www.ojp.usdoj.gov/bjs/>

Department of Justice researchers have concluded, incredibly, that 34.1% of American Indian women will be raped during their lifetimes,<sup>32</sup> reflecting the fact that sexual offenses against women and children are especially serious problems in Indian country.<sup>33</sup> This rate is approximately twice the rate for white women.<sup>34</sup> The problem has spawned a robust academic literature focused solely on this aspect of the Indian country crime problem.<sup>35</sup>

While these data are not linked solely to Indian reservations and thus tend to blur our understanding of the problem, federal crime statistics also demonstrate that Indians are far more likely than members of all other minority groups to be victims of violent crime. An American Indian or Alaska Native is two-and-a-half times more likely than a member of the general public to be a victim of violent crime and twice as likely as an African American.<sup>36</sup> From 1992 through 2001, the average annual rate of violent victimizations among Indians was 101 per 1,000 residents twelve years of age and older,<sup>37</sup>

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glance/cv2.htm (last modified Oct. 17, 2005) (reporting that serious violent crime declined beginning in 1993, and for the rest of the 1990s); see also *United States Department of Justice's Executive Office for U.S. Attorneys, Environment and Natural Resources Division, and Executive Office for U.S. Trustees: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 105th Cong. 20 (1998) [hereinafter *Judiciary Hearing*] (testimony of Donna A. Bucella) ("Homicides have risen 87 percent in Indian Country since 1992 while, nationwide, homicides have declined by roughly 16 percent during that time.").

31. *The Administration's Proposed Indian Law Enforcement Initiative: Hearing Before the S. Comm. on Indian Affairs*, 105th Cong. 44 (1998) [hereinafter *Indian Affairs Hearing*] (statement of Sen. Inouye, Vice Chairman, Committee on Indian Affairs) ("[A]t a time when, nationally, the violent crime rate has dropped almost 17 percent since 1992, and the homicide rate has declined about 22 percent[,] the rates of violent crimes and homicides have continued to rise on Indian reservations." (original in all capital letters)).

32. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT ON THE PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22 (2000), available at <http://www.ncjrs.org/pdffiles1/nij/183781.pdf>.

33. *Id.* at 22, Exhibit 7.

34. *Id.* According to Tjaden and Thoennes, 17.7% of white women will be raped in their lifetime. Cumulative statistics indicate that the figure is 18.2% for all women, and 18.8% for African American women, making American Indian women (at 34.1%) far more vulnerable than other women. *Id.*

35. Larry Echohawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 83, 100-01 (2001); Sumayyah Waheed, *Domestic Violence on the Reservation: Imperfect Laws, Imperfect Solution*, 19 BERKELEY WOMEN'S L.J. 287, 288-89 (2004); Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1278 (2004).

36. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 5-6 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf>.

37. *Id.*

compared to 50 violent victimizations per 1,000 blacks, 41 per 1,000 whites, and 22 per 1,000 Asians.<sup>38</sup>

To showcase a specific Indian reservation, during a recent nine month period on the Red Lake Chippewa Reservation (population 5,000) in northern Minnesota, five separate homicides occurred.<sup>39</sup> The school shooting on the same reservation in March 2005 that left ten people dead brought extraordinary media attention,<sup>40</sup> but that tragic event occurred against the backdrop of an already severe baseline homicide rate. And Red Lake's population, geographic isolation, poverty level, and other demographic and socioeconomic indicia are not atypical of rural American Indian reservations across the West.<sup>41</sup>

Outside academia, reservation crime has prompted extraordinary reactions from the federal judges who regularly preside over Indian country cases. The federal reporters contain unusual social commentary from federal judges, highlighting both the seriousness of the problem and reflecting tremendous frustration among the federal officials who are charged with perhaps the single most important responsibility in addressing it.<sup>42</sup>

Consider this introduction to a recent Ninth Circuit opinion: "This case is a powerful indictment of the criminal justice system. Our social and penal policies are failing to alleviate alcohol abuse on Indian reservations and the crime to which it gives rise."<sup>43</sup>

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38. *Id.*

39. See Margaret Zack, *State-Federal Project Fights Reservation Violent Crime*, MINNEAPOLIS STAR TRIB., Aug. 30, 2002, at B2.

40. Jodi Wilgoren, *Shooting Rampage by Student Leaves 10 Dead on Reservation*, N.Y. TIMES, Mar. 22, 2005, at A1.

41. *Cf.* PERRY, *supra* note 36, at 42 (quantifying the known statistics and explaining that such statistics are nevertheless incomplete in light of the failure to obtain relevant statistics from the Bureau of Indian Affairs and tribal law enforcement agencies).

42. See *Hubelling v. United States*, 288 F.3d 363, 368–69 (8th Cir. 2002) (Heaney, J., concurring) ("While [investigation and prosecution of sexual abuse cases and treatment of victims] are necessary, I would suggest that . . . federal funds and policies must be directed towards alleviating the conditions which give rise to such abuse. Living conditions on the reservations must be improved, and alcoholism must be effectively treated, or future generations of Native American children will continue to be scarred by the trauma of this crime."); *United States v. Miner*, 131 F.3d 1271, 1275 (8th Cir. 1997) (Bright, J., concurring) (lamenting the increase in sexual abuse cases on reservations and calling for action to improve the conditions on reservations to prevent such cases).

43. *United States v. Bad Marriage*, 392 F.3d 1103, 1104 (9th Cir. 2004). The court reversed a decision by the district court to depart from official guidelines for assault resulting in serious bodily injury to increase the sentence for Bad Marriage, a member of the Blackfeet tribe with an extensive history of substance abuse and criminal behavior. *Id.*

The tremendous discomfort that federal judges have shown with the cases may suggest, as Chief Justice Rehnquist has strongly implied, that federal courts lack institutional competence for this kind of work.<sup>44</sup> One federal judge formally expressed his chagrin in a published opinion, "I did not realize, prior to taking office as an Article III judge, that I would be presiding over drunk driving cases."<sup>45</sup> The unusual reaction by federal judges ought to be a warning sign about the crime problem.

Indeed, the problem seems to have worsened even while Congress has dramatically increased federal attention to Indian country criminal justice. In 1997, the FBI reassigned thirty agents to Indian country units to address violent crime.<sup>46</sup> In 1998, Congress and the Department of Justice proposed the appointment of twenty-six new Assistant United States Attorneys to address Indian country issues.<sup>47</sup> And in late 2004, Congress created twenty-seven new positions in "the Indian Country Unit of the FBI to investigate crimes in Indian Country."<sup>48</sup>

If staffing levels in United States Attorney's Offices and the FBI are any measure, the federal Indian country criminal justice regime has been operating more aggressively than ever before. To provide a representative example from one busy district with substantial Indian country jurisdiction, federal prosecutors in the state and federal judicial district of Arizona had more than 1,000 felony Indian country prosecutions open in a recent year.<sup>49</sup> More than 500 of those were homicides or sex offenses.<sup>50</sup>

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44. See Rehnquist, *supra* note 4, at 9 ("Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, can, and should handle such problems. While there certainly are areas in criminal law in which the federal government must act, the vast majority of localized criminal cases should be decided in the state courts which are equipped for such matters.").

45. *United States v. Swift Hawk*, 2000 DSD 52 ¶ 1, 125 F. Supp. 2d 384, 384–85. United States District Court Judge Charles Kornmann continued: "Congress has seen fit to impose altogether different penalties on Native Americans driving under the influence in Indian Country as compared with those who drive under the influence elsewhere. Thus, a person of German or Norwegian descent driving under the influence in Aberdeen, SD, would not face nearly the same penalties as a Native American driving on one of the reservations in South Dakota. Why Congress would have done this is beyond me." *Id.*

46. *Indian Affairs Hearing*, *supra* note 31, at 63 (statement of Janet Reno, Attorney General of the United States).

47. See *Judiciary Hearing*, *supra* note 30, at 30 (testimony of Karen E. Schreier).

48. H.R. REP. NO. 108-792, at 727 (2004) (Conf. Rep. to Accompany H.R. 4818—Consolidated Appropriations Act of 2005).

49. PAUL CHARLTON, UNITED STATES ATTORNEY, DISTRICT OF ARIZONA, 2003 INDIAN COUNTRY REPORT [hereinafter 2003 INDIAN COUNTRY REPORT]. The numbers included all cases that were active during the one-year reporting period ending June 30, 2003, though some of them may have been referred during a previous year. Recently, the

In addition to increasing the number of prosecutors and FBI agents working Indian country cases, Congress has begun to show interest in other ways as well. In November 2004, Congress directed the Department of Justice to “provide quarterly reports to Congress detailing efforts to reduce the violent victimization of Native Americans, including efforts to reduce murder rates, serious assaults, violence against women, and child abuse.”<sup>51</sup> While learning more about the problem is surely important, at least one study has cautioned federal policymakers against increasing resources for Indian country policing until the federal government has engaged in a comprehensive “rethinking” of the policy in the area.<sup>52</sup> Congressional and executive department policymakers have failed so far to follow that advice.<sup>53</sup>

Congress has also justified expansion of criminal authority on the seriousness of the crime problem. Yet as federal authority slowly expands, the problem only continues to grow. In light of the inability of the federal government to address this critical problem successfully, this Article hypothesizes that the solutions may not lie in greater resource allocation and broader federal authority. It looks for ways to address the problem that are consistent with our contemporary understanding of good government and successful federal Indian policy. To understand the context, it is useful to trace the history of federal activity in this area.

## II. HISTORY LEADING TO THE ENACTMENT OF THE MAJOR CRIMES ACT

### A. *Early Federal Recognition of Tribal Criminal Justice Autonomy*

Before and during the formation of the United States, Indian tribes were powerful and independent sovereign communities. The

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United States Attorney's Office in Arizona changed its reporting methodology so that it includes only cases referred and excludes those that were referred in a previous year but remain active during the reporting period. PAUL CHARLTON, UNITED STATES ATTORNEY, DISTRICT OF ARIZONA, 2004 INDIAN COUNTRY REPORT, *available at* <http://www.usdoj.gov/usao/az/indrpt04.html>. Under the new reporting method, the United States Attorney's Office reported that more than 500 cases were referred to the United States Attorney's Office from July 1, 2003, through June 30, 2004. *Id.*

50. 2003 INDIAN COUNTRY REPORT, *supra* note 49.

51. H.R. REP. NO. 108-792, at 714.

52. STEWART WAKELING ET AL., POLICING ON AMERICAN INDIAN RESERVATIONS 11 (2001).

53. The National Institutes of Justice have, however, begun to issue requests for proposals for grants to study some of these problems, though only in narrow areas.

British, the French, and the colonists each tried to ally with tribes in the sporadic warfare that accompanied the political struggle for control of North America.<sup>54</sup> From the inception of the Articles of Confederation through the adoption of the Constitution, the fledgling United States lacked the resources to wage war against the Indian tribes.<sup>55</sup>

In the early years of the Republic, the United States used diplomacy and appeasement as well as negotiation and treaties to deal with tribes.<sup>56</sup> Diplomatic approaches were inherited from the British who learned hard lessons in the French and Indian War and in Pontiac's Rebellion in the 1750s–60s, culminating in appeasement provisions in the Proclamation of 1763.<sup>57</sup> Following Britain's tradition of noninterference with internal tribal affairs, early federal officials respected virtually exclusive tribal control over Indian lands.<sup>58</sup> It is from this baseline that federal criminal jurisdiction related to Indian country began to develop.<sup>59</sup>

As agreements between sovereigns, treaties defined the early relationships between the United States and the tribes.<sup>60</sup> Statutes executed those treaties within the domestic law of the United States. A series of federal statutes called the Trade and Intercourse Acts<sup>61</sup> modeled a British policy created in the Proclamation of 1763 by consolidating federal authority over commerce with Indian tribes.<sup>62</sup>

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54. Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329, 369–71 (1989).

55. 2 PRUCHA, *supra* note 9, at 679.

56. *See, e.g., 1 id.* at 29–33 (discussing treaty councils and other diplomatic meetings).

57. *See* ROBERT WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 236–37 (1990); Clinton, *supra* note 54, at 349–55, 371–72.

58. *See* Clinton, *Development*, *supra* note 28, at 953.

59. *See* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 118–38 (2002).

60. *See* 1 PRUCHA, *supra* note 9, at 57 (noting that the United States “treated Indian tribes with the same legal procedures used for foreign nations, a practice that acknowledged some kind of autonomous nationhood of the Indian tribes” and that “[m]any of the basic relations between the United States and the tribes were determined by treaties, and the obligations incurred endured after the treaty-making process itself ended”).

61. The first Congress enacted the first Trade and Intercourse Act in 1790. *See* Act of July 22, 1790, § 3, 1 Stat. 138 (1790). It was re-enacted with modifications on several subsequent occasions, including 1796, 1802, 1817, and 1834, with other revisions occurring at other times. *See generally* John Edward Barry, Comment, *Oneida Indian Nation v. County of Oneida: Tribal Rights of Action and the Indian Trade and Intercourse Act*, 84 COLUM. L. REV. 1852 (1984) (discussing the impact of the Trade and Intercourse Act on Oneida tribal concepts of land rights).

62. WILLIAMS, *supra* note 57, at 229–32; Clinton, *supra* note 54, at 354–60.

Such laws safeguarded federal prerogatives vis-à-vis states in relations with Indian tribes and prevented transactions and events that might erupt into conflict.<sup>63</sup>

American treaties with Indians varied among the tribes and evolved over time, but common to many treaties in the late 1700s were provisions on law enforcement.<sup>64</sup> In many treaties, the tribes and the United States acknowledged the power of Indian tribes to punish non-Indian offenders who intruded on Indian lands,<sup>65</sup> and tribes agreed to surrender to the United States for punishment any Indians who committed serious crimes against non-Indians.<sup>66</sup> These "provisions for the extradition of criminals within Indian tribes" were found as early as 1785.<sup>67</sup>

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63. See 1 PRUCHA, *supra* note 9, at 89–114 (discussing the Trade and Intercourse Acts and noting that they were intended and necessary to regulate white people in order to avoid conflicts with the Indians).

64. Clinton, *Development*, *supra* note 28, at 953–54. The United States entered into its first treaty with the Delaware Nation in 1778. *Id.* That treaty contemplated that both the tribe and the United States, as sovereign nations, would cooperate in law enforcement, so that "crimes would be tried in 'a fair and impartial trial . . . had by judges or juries of both parties, as near as can be to the laws, customs, and usages of the contracting parties and natural justice . . .'" *Id.* Many of the early treaties provided that Indian tribes had jurisdiction over their lands, regardless of whether the parties were Indian or non-Indian. *Id.* However, a 1789 treaty with the Wyandot, Delaware, Ottawa, Chippewa, Pottawatomi, and Sac Nations explicitly limited tribal criminal jurisdiction. *Id.* It provided that non-Indians who committed robbery or murder on Indian land and Indians who committed robbery or murder against non-Indians, whether on Indian land or not, would be prosecuted in the state or territorial courts, rather than the tribal courts. *Id.* Despite such intrusions on tribal jurisdiction, most treaties between 1855 and 1871 (such as those with the Choctaw, Chickasaws, Creeks, and Seminoles which recognized nearly unrestricted rights of self-government over matters affecting tribal members on tribal land) at least guaranteed tribes jurisdiction over intra-tribal reservation crimes. *Id.* at 956.

65. The Treaty of Greenville with the Wyandots and Other Tribes stated:

If any citizen of the United States, or any other white person or persons, shall presume to settle upon lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit . . . .

Treaty of Greenville with the Wyandots and Other Tribes, Aug. 3, 1795, 7 Stat. 49; see also Clinton, *supra* note 59, at 123 n.22 (stating that "almost every treaty the United States signed immediately before and after the drafting of the United States Constitution" contained similar language).

66. See Clinton, *Development*, *supra* note 28, at 954 n.19 (citing provisions of various treaties).

67. *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883) (citing Treaty of Hopewell, Nov. 28, 1785, 7 Stat. 18).

In the Trade and Intercourse Act of 1817,<sup>68</sup> Congress first authorized the federal government to prosecute Indians who committed crimes against non-Indians on Indian lands and vice versa,<sup>69</sup> expanding federal power over Indians and tribes.<sup>70</sup> In keeping with the understanding that tribes were separate and distinct self-governing entities, the Act contained two exceptions. First, the law did not expand federal jurisdiction to crimes committed by one Indian against another.<sup>71</sup> There simply was no federal interest in such cases,<sup>72</sup> and Congress did not seek to displace tribal jurisdiction or authority over tribal offenses. Second, the law disclaimed jurisdiction over Indians who had already been punished by the tribe.<sup>73</sup> Thus, federal prosecution was the last resort to be used in cases where the Indian tribe refused to provide justice.<sup>74</sup> Federal cases were not intended to be routine.

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68. Trade and Intercourse Act, §§ 1–2, 3 Stat. 383, 383 (1817) (providing that “any Indian, or other person” who commits a crime on an Indian reservation “shall suffer the like punishment as is provided by the laws of the United States for the like offences” and that the federal courts “shall have, and are hereby invested with, full power and authority to hear, try, and punish” these crimes).

69. The 1817 Act expressly provided that it should not be interpreted to abrogate any allocations of jurisdiction previously determined in specific Indian treaties. Clinton, *Development*, *supra* note 28, at 959. This law, called the General Crimes Act or the Indian Country Crimes Act, is currently codified at 18 U.S.C. § 1152 (2000) and still contains these exceptions. The General Crimes Act is often considered a sister statute to the Major Crimes Act because the two statutes form the basis of all federal criminal prosecutions within Indian country. The General Crimes Act is much broader than the Major Crimes Act because it allows federal prosecutors to use any applicable federal law, and if none, any state criminal law. The General Crimes Act extends the “general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . to the Indian country.” *Id.* The General Crimes Act thus incorporates many of the offenses in the Major Crimes Act, such as arson, 18 U.S.C. § 81; assault, *id.* § 113; maiming, *id.* § 114; larceny, *id.* § 661; murder, *id.* § 1111; manslaughter, *id.* § 1112; and sexual offenses, *id.* §§ 2241–2248. Perhaps more importantly, it incorporates the Assimilative Crimes Act, codified at 18 U.S.C. § 13, a statute that allows federal prosecutors to borrow state law if there is no federal statute on point. However, the General Crimes Act explicitly does not apply to offenses committed by one Indian against the person or property of another Indian. 18 U.S.C. § 1152.

70. See Clinton, *Development*, *supra* note 28, at 959.

71. See 18 U.S.C. § 1152.

72. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 42 (2002).

73. See 18 U.S.C. § 1152.

74. See Trade and Intercourse Act, § 3, 3 Stat. 383, 383 (1817). This law was repealed by a later law enacted in 1834 that made even more clear that Congress was not arrogating to the United States the power to prosecute “crimes committed by one Indian against the person or property of another Indian.” Act of June 30, 1834, 4 Stat. 729, 733 (1834); see Clinton, *Development*, *supra* note 28, at 959.



Since the Trade and Intercourse laws had limited effect, through most of the 1800s, treaties defined the respective roles of Indian tribes and the United States as to law enforcement.<sup>75</sup> Many treaties included "bad man clauses" which created an extradition process that allowed the United States to extradite Indian or non-Indian criminals who sought haven on Indians lands.<sup>76</sup>

### B. *A Gradual Shift in Power*

As time wore on, the political desire for appeasement of the Indians began to wane and the balance of power between the United States and tribes began to shift in favor of the United States.<sup>77</sup> Indian treaties became less favorable to tribes.<sup>78</sup> Moreover, as settlers became more politically powerful, even the less favorable treaties were often ignored. In many cases, the federal government did not bother affirmatively abrogating treaties. Rather, it simply remained passive and ignored its own treaty obligations to protect Indians and tribes from unlawful incursions by increasingly aggressive settlers.<sup>79</sup> The mounting pressure from settlers took a toll. Tribes became much more willing to negotiate toward their own removal from their homelands. Ultimately, through negotiation and treaties with the Indian tribes, the federal government succeeded in removing Indian tribes from most eastern lands.<sup>80</sup>

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75. See Clinton, *Development*, *supra* note 28, at 955-58.

76. See Clinton, *supra* note 59, at 122 n.21 (collecting examples of bad man clauses from treaties in the 1860s and explaining that the provisions were designed to facilitate extradition of Indian offenders wanted by state officials for crimes committed off the reservation); Clinton, *Development*, *supra* note 28, at 954. Another example is set forth in *Ex parte Crow Dog*, 109 U.S. 556, 562-64 (1883) (quoting provisions of the 1868 Treaty of Fort Laramie).

77. See 1 PRUCHA, *supra* note 9, at 527-33 (discussing the increasing imbalance in power between tribes and the United States, the accompanying attitude that tribes should not be treated as equals in the treaty-making process, and the resulting end to the treaty era).

78. See *id.*

79. See *id.*

80. For example, the negotiations over removal between the Chickasaw Nation and the United States lasted more than a decade beginning in the 1820s. After federal officials asked a delegation of Chickasaws to travel from their home in present-day Mississippi to visit the Indian territory in present-day Oklahoma in the fall of 1828, the tribal leaders rejected the offer of a new homeland: "The country in which we now live, is one that pleases us . . . . We cannot consent to remove to a country destitute of a single corresponding feature of the one in which we at present reside." ARRELL M. GIBSON, *THE CHICKASAWS* 169 (1971) (quoting Report of Chickasaw Chiefs on Expedition to West, June 19, 1829, Letters Received, Office of Indian Affairs, 1824-81, Chickasaw Agency, National Archives, Microcopy 234, Roll 135). Ultimately, of course, the tribe capitulated and moved westward in 1837. *Id.* at 182. Having been raised in Oklahoma, I

Many tribes left lands that they had known for centuries and were relocated to new lands where they had to re-establish themselves.<sup>81</sup> Although removal primarily affected eastern tribes, western tribes also faced dislocations as the nineteenth century wore on.<sup>82</sup> Though some western tribes remained on or near their original homelands, they ceded millions of acres, reserving from the cessions only small fractions of their original lands, which came to be known, of course, as Indian reservations.<sup>83</sup> Removal and the reservation policies produced similar effects. The large cessions, small reservations, increasing settlement by non-Indians, and social upheaval left Indians vulnerable. As a result, the tribes negotiated and renegotiated promises for cash payments; for goods and services; such as rifles, blankets, and teachers; and for federal protection from encroaching settlers.<sup>84</sup>

Though dislocation of Indian communities exacted heavy tolls on tribal governing institutions, many customary tribal law enforcement and criminal justice systems continued during this time.<sup>85</sup> Given the tribal political instability and increased dependence on federal goods and services, however, tribal law enforcement officials were not necessarily independent of federal authority. Federal officials had tremendous power and sometimes created *de facto* tribal "leaders"

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have often been amused at my Chickasaw ancestors' first thoughts on seeing our new homeland.

81. ANGIE DEBO, *A HISTORY OF THE INDIANS IN THE UNITED STATES* 117–27 (7th prtg. 1983) (discussing removal of the Choctaws, Creeks, Cherokees, Chickasaws, and Seminoles to the Indian Territory—present-day Oklahoma—in the 1830s).

82. Efforts were made to remove some western tribes, but these efforts were not as successful from the federal perspective. The Navajos were moved to Fort Sumner in an episode commonly called the "Long Walk" in 1864, but the move was a disaster and the Navajos were allowed to return to their homes for a short time years later in 1868. See 1 PRUCHA, *supra* note 9, at 452–57. Moreover, federal commitment to removal for Navajos likely was not as great because settlers did not clamor for the arid homeland of the Navajo in the same way that they yearned for Indian lands in the eastern United States.

83. See *id.* at 354–409 (discussing in detail the processes of moving Indian tribes in Texas, New Mexico, Utah, California, Oregon, and Washington to reservations). For a more general overview, see *id.* at 562–81.

84. See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 16 (1987).

85. When the Cherokees embarked on their "Trail of Tears" to Oklahoma, for example, their government survived the journey. See Grant Foreman, *Introduction to JOHN HOWARD PAYNE, INDIAN JUSTICE: A CHEROKEE MURDER TRIAL IN TAHLEQUAH IN 1840*, at xxiv–xxv (Grant Foreman ed., Univ. Okla. Press 2002) (1933). Their criminal court system, which had already been adapted to model state and federal systems, was active in the 1840s even after removal. See PAYNE, *supra*, *passim* (describing in detail a jury trial in the Cherokee Nation); see also WILLIAM T. HAGAN, *INDIAN POLICE AND JUDGES* 21 (1966) (discussing the building of a Cherokee prison in Tahlequah in 1874).

simply by being strategic in whom they recognized for purposes of negotiations with the tribe and who they allowed to assist in the distribution of treaty goods.<sup>86</sup> Even while federal officials abused their power,<sup>87</sup> dramatic societal upheaval forced greater dependence on the federal government.<sup>88</sup> This dependence emerged as the norm that would plague tribes for generations.

The area of law enforcement was an area in which tribal dependence on federal authority was acute. In the latter half of the nineteenth century, federal frontier law enforcement officials focused on preventing violence between Indians and non-Indians.<sup>89</sup> The federal Indian Department hired officials called "Indian agents," who coordinated the provision of government services and oversaw each Indian reservation.<sup>90</sup> Unfortunately, many Indian agents worked for their own gain instead of the good of the tribes, and some were later found to be corrupt.<sup>91</sup>

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86. See Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 206 (1989). The federal officials' power to create tribal leaders is evident in Harring's description of Spotted Tail:

[His] power was no longer derived from the traditional consensus model of the selection of Brule chiefs, but, at least in part, derived from the army and the Indian agent. Lacking complete legitimacy, Spotted Tail had to rely on a great deal of coercion and political maneuvering to maintain his authority.

*Id.*; see also 1 PRUCHA, *supra* note 9, at 309 (describing how, when annuities were paid to chiefs, they did not always reach all members of the tribe). Thus, government agents could easily influence the power dynamics within a tribe according to how they distributed annuities and rations.

87. In an example recently noted by Justice O'Connor in her majority opinion in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), one effort by federal Indian officials to force relocation of Indians

ended in disaster. The Chippewa were told they were required to be present at Sandy Lake by October 25 to receive their 1850 annuity payment. By November 10, almost 4,000 Chippewa had assembled at Sandy Lake to receive the payment, but the annuity goods were not completely distributed until December 2. In the meantime, around 150 Chippewa died in an outbreak of measles and dysentery; another 230 Chippewa died on the winter trip home to Wisconsin.

*Id.* at 180 (citations omitted).

88. See 2 PRUCHA, *supra* note 9, at 676 ("[T]he formal end of treaty making [in 1871] and the conscious intention thereby to denigrate the power of the chiefs resulted in a loss of old systems of internal order without the substitution of new ones in their place.").

89. See HAGAN, *supra* note 85, at 123. Plains tribal law enforcement systems, which were organized largely around the hunt, were no longer as meaningful in a society that was no longer able to hunt. *Id.* at 12-13.

90. See 1 PRUCHA, *supra* note 9, at 328-32 (discussing the expansion and overhaul of the Indian Department in the second half of the 1800s).

91. For example, one of the primary activities of the Indian Department was to distribute annuities. *Id.* at 171. Yet, the Department's system of distribution was often

Perhaps reflecting the diminished power of tribes as independent sovereign governments and increasing federal dependency, Congress indicated in 1871 that it would no longer handle Indian affairs through treaty-making with Indian tribes but would proceed by statute.<sup>92</sup> Notwithstanding the separation-of-powers questions that might be posed by such legislation,<sup>93</sup> the law was never effectively challenged. Thus, the treaty-making era abruptly ended and federal Indian policy started proceeding through legislation.<sup>94</sup>

Meanwhile, the settlers' insatiable hunger for Indian land grew unabated throughout the 1870s and 1880s. The economic motive for obtaining Indian land coincided with a developing moral imperative to "civilize" and "assimilate" the Indians.<sup>95</sup> As Indian dependence

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corrupt. Even the head of the Department described the system as "slipshod," and one long-time Indian agent spoke of extreme "derangements" in the system to the point that "[o]ne would think that appropriations had been handled with a pitchfork." *Id.* at 172-73; see also *id.* at 586 (describing fraud in provision of Indian goods).

92. See 25 U.S.C. § 71 (2000) ("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.") (originally enacted as Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566).

93. See, e.g., *United States v. Lara*, 541 U.S. 193, 214-16 (2004) (Thomas, J., concurring) (discussing constitutional questions regarding congressional and presidential authority in dealings with Indian tribes). The problem is that Congress and the President had effectively amended the Constitution by providing that treaties with Indian nations would now involve review and approval by the House of Representatives, a structural system strikingly different than the one envisioned at the time the Constitution was drafted. Cf. U.S. CONST. art. II, § 2, cl. 2 (placing power to make treaties in the hands of the President, with review and approval by the Senate).

94. In large measure, legislative action after 1871 continued to resemble a bilateral treaty negotiation model; the United States negotiated agreements (rather than treaties) with tribes that it then took to the entire Congress (rather than only the Senate) for ratification. See 1 PRUCHA, *supra* note 9, at 529-33 (discussing the transition from treaty-making to agreement-making, and the fact that the latter included both Houses of Congress). From the tribal perspective, the difference was hardly noticeable, at least at first. *Id.* at 532-33 (noting that there was little practical difference between treaty-making and agreement-making). However, the United States House of Representatives now had a role in Indian affairs. *Id.* For legislation dealing with a particular tribe, Congress still routinely seeks the assent of the tribal membership or tribal leadership. See Ann Laquer Estin, Lone Wolf v. Hitchcock: *The Long Shadow, in THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S*, 215-34 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984) (discussing the negotiation of the Jerome agreement, where officials tried to obtain tribal support for the allotment acts).

95. By 1884, the federal government was operating eighty-one boarding schools and seventy-six day schools for Indian children. *Annual Report of the Secretary of the Interior*, I ANN. REP. OF THE SECRETARY OF THE INTERIOR, Nov. 1, 1884, at III. Approximately forty other schools were being operated by various church denominations, some with contracts from the federal government. *Id.* at III-IV. By 1895, the United States was spending more than \$2 million per year to educate over 18,000 students in more than 200 institutions. FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920*, at 189-90 (1984).

had increased, official contempt toward tribal governments and traditional ways of life among Indian people also increased.<sup>96</sup> Indian Department officials sought even greater control over Indians, including extending federal authority over traditional areas of internal tribal governance.<sup>97</sup>

### C. *The Pursuit of Federal Criminal Jurisdiction on Indian Lands*

Throughout most of the nineteenth century, the United States did not presume the authority to prosecute an Indian who committed a crime against another Indian on Indian lands.<sup>98</sup> No federal interest was perceived in such cases, and tribes had traditionally handled such matters through internal governance mechanisms.<sup>99</sup> Indian treaties at least implicitly confirmed these baseline expectations.<sup>100</sup> As federal Indian agents obtained more and more power over the weakening tribes through positive sanctions such as favoritism, they were frustrated by the lack of the negative coercive power, such as the power to prosecute or imprison tribal dissidents. The Secretary of the Interior explained the challenges perceived by the federal Indian agents: "It is impossible to properly govern a barbarous people like our wilder Indians without being able to inflict some punishment for wrong-doing that shall be a real punishment to the offender."<sup>101</sup> Thus, the Secretary argued, the United States should assert authority to prosecute offenses between Indians, at least in serious cases.<sup>102</sup>

In 1874, a bill was introduced in Congress that attempted to extend federal jurisdiction to Indians who committed serious crimes

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96. In 1881, the Commissioner of Indian Affairs, the principal Indian affairs official, indicated in a report to Congress that

the system of gathering the Indians in bands or tribes on reservations and carrying to them victuals and clothes, thus relieving them of the necessity of labor, never will and never can civilize them . . . .

. . . .

If the Indians are to be civilized and become a happy and prosperous people, . . . they must learn our language and adopt our modes of life.

*Annual Report of the Commissioner of Indian Affairs*, II ANN. REP. OF THE SECRETARY OF THE INTERIOR, Oct. 24, 1881, at 1-2.

97. See *infra* Part II.C-D.

98. See Clinton, *supra* note 59, at 135.

99. See *id.* at 122-23, 133-37.

100. See *id.* at 122-23.

101. *Annual Report of the Commissioner of Indian Affairs*, 1 ANN. REP. OF THE SECRETARY OF THE INTERIOR, Nov. 1, 1879, at 71.

102. See Harring, *supra* note 86, at 223-24.

against other Indians.<sup>103</sup> The Senate committee with jurisdiction expressed serious reservations about the bill:

The Indians, while their tribal relations subsist, generally maintain laws, customs, and usages of their own for the punishment of offenses. They have no knowledge of the laws of the United States, and the attempt to enforce their own ordinances might bring them in direct conflict with existing statutes and subject them to prosecution for their violation.<sup>104</sup>

Though the bill failed to gain passage at that time, federal officials overseeing Indian affairs continued to seek laws that would give the United States jurisdiction over serious offenses by Indians against other Indians.<sup>105</sup>

Federal officials made a variety of arguments in favor of such a law. One of the arguments sounds oddly familiar in contemporary debate regarding the treatment of American citizens charged with terrorist acts. The Secretary of the Interior cited confusion as to whether Apache Indians who had committed "outrages" in New Mexico and Arizona ought to be treated as "prisoners of war or criminals."<sup>106</sup> The problem was a practical one for the federal government and its Indian agents. While federal criminal defendants could lawfully be tried and executed, the law of war requires that prisoners of war captured in battle must generally be held until the end of hostilities and then released.<sup>107</sup> The Indian agents wanted prosecutions that would lead to serious but lawful punitive measures, such as execution, rather than simply engaging in a process that

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103. *See id.*

104. Clinton, *Development*, *supra* note 28, at 964 n.75 (quoting S. REP. NO. 43-367 (1874)).

105. The bill eventually passed the House in 1884, as an amendment to the Indian Appropriations Bill, but was stricken by the Senate. *See* 16 CONG. REC. 928, 935 (1885). According to Haring, virtually every annual report of the Secretary of the Interior in the late 1870s advocated passage of a "major crimes" act. Haring, *supra* note 86, at 224.

106. *Annual Report of the Secretary of the Interior*, 1 ANN. REP. OF THE SECRETARY OF THE INTERIOR, Nov. 1, 1881, at VII-VIII.

107. *See* Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 71-74, 84-90 (1990) (discussing the law of nations as to prisoners of war in 1862 and questioning the legality of execution of numerous Dakota Indians following trials by military commissions); *see also* EMERICH DE VATTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 353-57 (Joseph Chitty ed., T. & J.W. Johnson & Co. 1859) (1758) (discussing the treatment of prisoners during and after war). "Prisoners may be secured; and for this purpose they may be put into confinement." *Id.* at 353. But, "on the termination of the war [the nation] has no longer any reason for detaining them." *Id.* at 355.

probably seemed like "catch and release."<sup>108</sup> Other federal arguments for the law coalesced following a key federal criminal case that reached the Supreme Court while federal officials lobbied Congress.

#### D. Ex parte Crow Dog

As Indian agents continued, year after year, to lobby Congress, they also sought such authority in the courts. Such an opportunity arose in 1881 when Crow Dog, a Sioux Indian, killed Spotted Tail, a Sioux Chief, within the Brule Sioux reservation.<sup>109</sup> When the crime occurred, Indian agents pressed federal authorities to prosecute, even while they apparently believed that they lacked clear authority.<sup>110</sup>

Though the underlying reason for the ill will between Crow Dog and Spotted Tail remains contested to this day and may have been political, economic, or even personal,<sup>111</sup> Crow Dog never denied

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108. See Harring, *supra* note 86, at 202–03, 223 (discussing how, after the murder of Spotted Tail by Crow Dog, the Indian agent assigned to Crow Dog's Tribe—as well as other Bureau of Indian Affairs officials—decided without real authority that Crow Dog could be prosecuted under U.S. laws and proceeded to arrest other Indians, only stopping reluctantly after being ordered by the Secretary of Interior to follow the precedent of the Supreme Court's ruling in *Ex parte Crow Dog* that prohibited such actions).

109. *Id.* at 198–99.

110. *Id.* at 204.

111. A variety of narratives have been offered, few with citation to any original sources. According to Professors Deloria and Lytle,

Spotted Tail had been a pliant and peaceful chief who acted as a buffer between the United States and the more aggressive Sioux leaders, such as Red Cloud, Sitting Bull and Crazy Horse. He always counseled for peace and provided the pro [federal] government faction within the tribe. Spotted Tail was amply rewarded for his efforts on behalf of the government, receiving a nice two-story house at the agency named after him on the Rosebud Creek . . . . But this demonstration of favoritism greatly angered the traditional Sioux and, when Spotted Tail extended his chiefly privileges to include the wives of some of the traditional leaders, there was no question that he was a marked man even with the aura of federal protection around him.

DELORIA & LYTLE, *supra* note 12, at 168; see also LEONARD CROW DOG & RICHARD ERDOES, CROW DOG: FOUR GENERATIONS OF SIOUX MEDICINE MEN 32–35 (1995) [hereinafter CROW DOG & ERDOES, CROW DOG] (suggesting that a simmering political dispute between the government friendly Spotted Tail and the more traditional Crow Dog erupted into a gunfight after Spotted Tail took the wife of Medicine Bear, who was a crippled traditional elder and close friend of Crow Dog); MARY CROW DOG & RICHARD ERDOES, LAKOTA WOMAN 10 (1990) (noting that Crow Dog "became famous for killing a rival chief, the result of a feud over tribal politics"); VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 9 (1969) (characterizing the killing as an "assassination"); GEORGE E. HYDE, SPOTTED TAIL'S FOLK: A HISTORY OF THE BRULE SIOUX 281–82 (1961) (noting that some of the accounts suggest that the dispute began when Crow Dog tried to "shake down" white ranchers for money for grazing on tribal land, only to learn that Spotted Tail had already taken their money and given the tribe's

killing Spotted Tail and promptly owned up to the act.<sup>112</sup> A customary tribal proceeding followed soon after the offense to address the killing in traditional tribal fashion.<sup>113</sup> As a result of the tribal proceeding, Crow Dog and his family ultimately paid to Spotted Tail's family what must have been a small fortune at the time: \$600 in cash, eight horses, and one blanket.<sup>114</sup> Despite the fact that the tribe had addressed the offense in its traditional manner,<sup>115</sup> and tribal "law effectively and quickly redressed the killing and restored tribal harmony,"<sup>116</sup> federal officials began a prosecution of Crow Dog in federal court.<sup>117</sup> Crow Dog was indicted and claimed that he acted in self-defense.<sup>118</sup>

The motive for prosecuting Crow Dog became clear during the ensuing jury trial. According to historical research by Professor Sidney Harring, the United States Attorney argued to the jury that Spotted Tail was a "friendly" Indian who had been made a tribal chief by General Crook of the United States Army.<sup>119</sup> In contrast, Crow Dog was portrayed "as a member of a faction favoring a continuation of the wars."<sup>120</sup> If "hostile" Indians could kill "friendly" Indians with impunity, the argument presumably went, it would be more difficult to obtain cooperation.<sup>121</sup> Federal control would become more chaotic and hostilities might resume. Thus, the argument contained a strong undercurrent about the need for strong federal power over Indians. Crow Dog was convicted and sentenced to hang.<sup>122</sup> Crow Dog sought

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permission); WILCOMB E. WASHBURN, *RED MAN'S LAND/WHITE MAN'S LAW: THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* 170 (2d ed. 1995) ("Crow Dog had killed Spotted Tail after the latter had appropriated the wife of a friend on the Sioux reservation.").

112. See CROW DOG & ERDOES, CROW DOG, *supra* note 111, at 37.

113. See Harring, *supra* note 86, at 199.

114. See *id.* at 199 n.17. This account of the tribal proceeding is also set forth in the August 9, 1881 edition of the *Black Hills Daily Times*.

115. While the tribe had resolved the matter through tribal custom, an Anglo-American with a dualistic notion of criminal/civil justice might say that a civil claim had been addressed but that criminal responsibility had not been determined in the property settlement that was reached. While the tribe did have various kinds of punishments, it is uncertain whether the tribal system divided civil and criminal wrongs in the highly formalized artificial fashion that western justice systems have adopted.

116. Harring, *supra* note 86, at 199.

117. *Id.* at 204.

118. *Id.* at 208.

119. *Id.* at 207 (citing BLACK HILLS DAILY TIMES, Mar. 17, 1882).

120. *Id.*

121. Cf. *id.* (noting how the prosecutor's opening statement portrayed Crow Dog as a supporter of continued war and Spotted Tail as an enforcer of treaties).

122. *Id.* at 191.



habeas relief, and his case eventually reached the United States Supreme Court.<sup>123</sup>

In its ruling in *Ex parte Crow Dog*, the Supreme Court reversed the conviction for lack of jurisdiction and ordered Crow Dog released.<sup>124</sup> In reaching its decision, the Court interpreted the Sioux treaties and the Trade and Intercourse Acts as preserving to the Indians the fundamental right of "self-government, the regulation by themselves of their own domestic affairs, [and] the maintenance of order and peace among their own members by the administration of their own laws and customs."<sup>125</sup> In an opinion that has since represented a high point for the recognition of tribal self-government, the Court reviewed federal criminal laws during the century prior to the decision and indicated that crimes committed "by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs. The policy of the government in that respect has been uniform."<sup>126</sup>

The immediate effect of the Court's ruling was to assure tribal control over tribal criminal matters between Indians. The Court's extravagant description of the case betrays arrogance, prejudice, and yet even sympathy. It also reflects discomfort with the application of federal norms to Indian people:

It is a case of life and death. It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It 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

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123. See *Ex parte Crow Dog*, 109 U.S. 556, 557 (1883).

124. *Id.* at 572.

125. *Id.* at 568.

126. *Id.* at 571-72.

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>127</sup>

The Supreme Court, however, also opened a door. In holding that Congress had not explicitly abrogated existing federal treaties, the Court invited Congress to enact law creating such jurisdiction.<sup>128</sup>

### E. *Enactment of the Major Crimes Act*

Armed with the defeat in the Supreme Court, federal Interior Department officials promptly returned to Congress.<sup>129</sup> In seeking a law to allow them to punish "major crimes," federal officials claimed that tribal laws were inadequate.<sup>130</sup> In a report to Congress in 1884, the Secretary of the Interior cited *Crow Dog* in portraying Indian country as a lawless place.<sup>131</sup> The Secretary argued that if the courts of the United States could not hear this murder case, then no court could hear it, and that Indian custom was that the next of kin was duty-bound to avenge the murder, a concept known as "blood revenge."<sup>132</sup> The Secretary's argument was fictional on both counts: the tribe addressed *Crow Dog's* actions swiftly in the traditional tribal

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127. *Id.* at 571. In recognizing the importance of criminal laws in enforcing social norms, the Court demonstrated an appreciation for ideas that would later be reflected in Emile Durkheim's pathmarking work. See, e.g., DURKHEIM, *supra* note 18, at 80–82 (discussing how criminal acts are defined by the "common conscience").

128. *Ex parte Crow Dog*, 109 U.S. at 572.

129. Some controversy exists as to the immediate cause for passage of the Major Crimes Act. Several accounts attribute enactment of the Act to public outrage following the Supreme Court's decision. See, e.g., WASHBURN, *supra* note 111, at 170 (stating that Congress viewed the *Ex parte Crow Dog* decision as "outrageous"); Clinton, *Development*, *supra* note 28, at 963 (noting that the "decision aroused the ire of Congress, the Department of the Interior, and the public," leading to a "groundswell of support"); Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendant's Rights in Conflict*, 22 U. KAN. L. REV. 387, 390 (1974) (describing Congress's indignation at the *Crow Dog* decision as quick). Professor Harring has challenged the popular conception that Congress was motivated by popular outrage following the *Crow Dog* decision. Harring, *supra* note 86, at 223. Harring finds little evidence of public attention to the issue and notes that the Indian agents had sought legislation for more than ten years. If anything, the *Crow Dog* decision should more probably be seen as a final blow after a long campaign by the executive branch. The prosecution's theory of the case—that a hostile Indian had killed a "friendly" one—and the fear of an uprising likely spurred Congress to act. *Id.* at 223–27.

130. See Harring, *supra* note 86, at 224–25.

131. See *id.* at 225–26 (noting the lack of jurisdiction of state courts means that no existing tribunal has the power to punish a murder committed within Indian territory).

132. See *id.* (quoting the *Annual Report of the Secretary of the Interior*, *supra* note 95, at 9).

manner by requiring a substantial payment from the perpetrator's family to the victim's family and, moreover, "blood revenge" was not part of the Lower Brule tribe's customs.<sup>133</sup> The Secretary's description of the practice of blood revenge loosely matched a traditional Cherokee tribal practice that had long since been abandoned in favor of a formal court system.<sup>134</sup> Nevertheless, the Secretary's argument effectively raised the specter of an unending cycle of violence.<sup>135</sup>

Motivated by the Secretary's entreaties, Congress soon enacted the Major Crimes Act.<sup>136</sup> The Act created federal jurisdiction over seven serious crimes in Indian country: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.<sup>137</sup> In expressly allowing the federal government to prosecute offenses between Indians within Indian country, the Act constituted an avulsive change in federal Indian policy.

Because the Major Crimes Act was enacted as a rider on the annual appropriations legislation for the Department of the Interior, direct legislative history is thin.<sup>138</sup> However, three motives are apparent. Likely the paramount motive was enlargement of federal power over Indian tribes.<sup>139</sup> This justification is suggested within the facts of *Crow Dog*,<sup>140</sup> particularly if one accepts the narrative presented by the federal prosecutor that Crow Dog was a hostile traditional Indian who killed an Indian friendly to the federal government.<sup>141</sup>

The second key motive, apparent in the limited legislative history and in the broader historical context, is assimilation. Extending American laws over Indians was seen as a step toward assimilating them, a policy that was gaining nationwide acceptance in the 1880s.<sup>142</sup>

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133. See *supra* note 113 and accompanying text.

134. See RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* 52-65 (1975).

135. See Harring, *supra* note 86, at 199.

136. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1948)).

137. See *id.*

138. The sparse legislative record implies that Congressmen were primarily relying on the statement of necessity by the Secretary of the Interior. See Harring, *supra* note 86, at 224. See generally 16 CONG. REC. 933, 935-36 (1885) (debating the Indian Appropriations Bill, including the amendment adding the Major Crimes Act).

139. See Harring, *supra* note 86, at 224.

140. See *Ex parte Crow Dog*, 109 U.S. 556, 557 (1883).

141. See *supra* note 111.

142. In the House floor debate on the Indian Appropriations Bill, one Member of Congress indicated that he believed that the Indians "will be civilized a great deal sooner

During those years, even Indian sympathizers believed that assimilation was the only way for Indians to survive.<sup>143</sup> Federal lawmakers expected that the application of federal criminal laws would hasten assimilation.<sup>144</sup>

The Secretary's fanciful account of a never-ending cycle of violence offers the third motivation: public safety on Indian reservations.<sup>145</sup> Though this justification was based on false and misleading information, it has proven the most durable.

The tone of the *Crow Dog* opinion and the arguments that the Secretary made to Congress present an irony that is striking today. The "savages" addressed Crow Dog's offense using a traditional approach to criminal justice that today would be characterized as restorative justice.<sup>146</sup> The "civilized" federal approach involved an adversarial trial followed by a public execution by hanging.

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by being put under such laws and taught to regard life and the personal property of others." 16 CONG. REC. 933, 936 (1885).

143. Harring notes that even the presumably reform-minded members of the Indian Rights Association, a Philadelphia-based group that lobbied against the paternalistic policies of the federal government, were strongly advocating in favor of assimilation of Indian people. SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 134 (1994); see also 2 PRUCHA, *supra* note 9, at 676–80 (discussing the formation and intentions of the Indian Rights Act). A key component of assimilation was allotment of Indian lands. The goal was to force Indians to leave their collective land holdings and communal existence and to become "small-time capitalists with individual stakes in the American system." Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 6 (2002). Under the federal allotment laws, the federal government unilaterally divided tribal land into parcels and distributed each parcel to individual tribal members, allowing "surplus" lands to be settled by non-Indians. See, e.g., General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (1887) (repealed 2000). See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (providing a broad analysis of the history and effects of the allotment era).

144. In debate on the Major Crimes Act, one member of Congress repeatedly cited the Secretary of the Interior's arguments that such a law was needed for the "civilization of the Indian tribes." 16 CONG. REC. 934 (1885).

145. See *supra* note 129.

146. See generally Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 206 (defining restorative justice as allowing "distinct voices to contribute to an appropriate outcome without necessarily assenting to the same theory" and therefore "better serv[ing] the diversity of perspectives on criminal sanctioning than the general application of any one substantive theory of punishment").

F. *Kagama: A Challenge to the Constitutionality of the Major Crimes Act*

Soon after enactment, the Major Crimes Act was used in a murder prosecution involving a member of the Hoopa tribe in northern California. In *United States v. Kagama*,<sup>147</sup> which reached the Supreme Court in 1886, the defendant challenged the Act's constitutionality, arguing that Congress lacked authority to extend its laws over Indians unilaterally.<sup>148</sup> The opinion has produced a good deal of scholarly consternation.<sup>149</sup>

The federal government based its defense of congressional authority in the Constitution's Indian Commerce Clause.<sup>150</sup> The Court, however, was not convinced. The Court found that grounding this congressional power in the Indian Commerce Clause would constitute a "very strained construction" of that clause.<sup>151</sup> It found the Constitution "almost silent" as to the issue of congressional authority,<sup>152</sup> and, after considering several other likely candidates for such authority within the text of the Constitution, the Court

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147. 118 U.S. 375 (1886).

148. *Id.* at 376.

149. See, e.g., Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 542-43 (1996) (noting that the Supreme Court has moved away from the suggestion of extra constitutional powers and has since grounded Congress's power over Indians in the Indian Commerce Clause); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1176-77 (1995) (considering *Kagama*'s place in the context of Indian law constitutionality); Clinton, *supra* note 59, at 172 (stating that *Kagama* was a "tour de force in judicial constitutional creativity and marked a major departure from established norms of constitutional interpretation"); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 35 (1996) (describing its theoretical justification as "an embarrassment of constitutional theory" and its holding as "an embarrassment of humanity"); L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 95 n.82 (1994) ("The *Kagama* Court, for example, considered and rejected the Indian Commerce Clause when deciding that Congress had power to impose the Major Crimes Act on tribes. Instead, it invented the plenary power doctrine with near-explicit recognition that the doctrine is extraconstitutional."); Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 664-65 (1994) (considering *Kagama*'s constitutional grounding in the Indian Commerce Clause); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 237-39 (1984) (detailing Professor Clinton's thoughts on sources of federal power over Indians); Comment, *Federal Plenary Power in Indian Affairs After Weeks and Sioux Nation*, 131 U. PA. L. REV. 235, 246-48 (1982) (characterizing the *Kagama* Court's creation of an extraconstitutional power over Indians as the "it-must-be-somewhere" doctrine).

150. See *Kagama*, 118 U.S. at 378.

151. *Id.*

152. *Id.*

concluded it was "not able to see in . . . the Constitution and its amendments any delegation of power to enact a code of criminal law for the punishment of [major crimes between Indians]." <sup>153</sup>

But then the Court took a startling turn. It upheld the Major Crimes Act, not on the basis of any explicit constitutional authority, but on the theory that Congress's authority to enact such a law must exist by virtue of the federal government's geographic dominion over the United States and the federal responsibility in light of the dependent status of tribes. <sup>154</sup> In other words, contrary to the well-known doctrine of enumerated powers, <sup>155</sup> the Court held that the power to enact the Major Crimes Act was extraconstitutional yet entirely legitimate, <sup>156</sup> justifying this power using a theory that one commentator has denominated the " 'it-must-be-somewhere' doctrine." <sup>157</sup>

In cases since *Kagama*, Congress's power to enact the Major Crimes Act has never been seriously challenged. <sup>158</sup> In more recent

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153. *Id.* at 379.

154. *See id.* at 379–85. This notion of responsibility was borrowed from an early John Marshall Indian law opinion, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 516 (1832). *See Kagama*, 118 U.S. at 382.

155. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–25 (1819) (holding that the establishment of a national bank does not exceed congressional authority). In this respect, *Kagama* is difficult to square with modern decisions. *See, e.g., United States v. Morrison*, 529 U.S. 598, 613–27 (2000) (holding that a federal civil remedy provision of the Violence Against Women Act exceeded Congress's authority under both the Commerce Clause and the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 551–68 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded the scope of Congress's Commerce Clause authority).

156. *Kagama*, 118 U.S. at 131. Professor Philip Frickey has argued that congressional power over Indian affairs can be viewed in a manner more consistent with prevailing constitutional norms if one employs a more structural approach to the Constitution and views international relations and colonization as important backdrops to the interpretation. Frickey, *supra* note 149, at 67–70. Under this view, the congressional power discussed in *Kagama* was an exercise, in essence, of the inherent power to control aliens on American soil, including Indians who were already in this country before the country was founded but were strangers to the state and federal politics. Professor Frickey's argument is somewhat more nuanced than the Court's was in *Kagama* and certainly more coherent. For evaluations of Professor Frickey's approach, see Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1104–05 (2004); Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 TULSA L. REV. 247, 252 (2003); *see also United States v. Lara*, 541 U.S. 193, 201–02 (2004) (seemingly adopting Professor Frickey's approach).

157. Comment, *supra* note 149, at 247.

158. *Cf. Lara*, 541 U.S. at 196 (holding that Congress does have the power to relax restrictions on the inherent legal authority of tribes). *But see* Warren Stapleton, Note, *Indian Country, Federal Justice: Is the Exercise of Federal Jurisdiction Under the Major Crimes Act Constitutional?*, 29 ARIZ. ST. L.J. 337, 338 (1997) (arguing that the Major Crimes Act lacks any legitimate basis, constitutional or extraconstitutional).

cases, the Supreme Court has back-pedaled on the notion that this power is extraconstitutional,<sup>159</sup> but it has never repudiated the broad conception of federal authority over Indians that serves as the foundation of the Major Crimes Act.<sup>160</sup>

The *Kagama* opinion is useful for identifying two points relevant for further discussion of public safety and criminal justice in Indian country. First, as part of the justification for congressional power, the Court recognized that the United States has a "duty of protection" toward the Indians, and from this duty arises "the power" to exercise criminal jurisdiction.<sup>161</sup> This theory, that power arises by necessity from federal responsibility, is the inverse of the more common aphorism, "with power comes responsibility."

Second, the responsibility is peculiarly federal. According to the Court, tribes "owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."<sup>162</sup> As a result, the power recognized in *Kagama* is a clear manifestation of federalism.

As the Court's opinions in *Crow Dog* and *Kagama* recognize, at the time of the enactment of the Major Crimes Act, Indians were not yet citizens of the United States.<sup>163</sup> The law constitutes an extension

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159. See *United States v. John*, 437 U.S. 634, 652–53 (1978) (implicitly characterizing the Major Crimes Act as "federal supervision [of Indians] under the Commerce Clause"); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."); cf. *United States v. Antelope*, 430 U.S. 641, 648 (1977) (citing *Kagama* for the proposition that "Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country").

160. In numerous cases, the Court has quoted with approval much of the broad language in *Kagama* describing federal power. See *Nevada v. Hicks*, 533 U.S. 353, 364 (2001); *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 192 (1989); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–57 (1978); *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978); see also *Lara*, 541 U.S. at 224 (Thomas, J., concurring in judgment) (doubting that the Indian Commerce Clause confers on Congress plenary power over Indian affairs and noting that this doctrine should be revisited).

161. *Kagama*, 118 U.S. at 384.

162. *Id.*

163. See *id.* at 378; *Ex parte Crow Dog*, 109 U.S. 556, 568–69 (1883). Indians were not made citizens by the Fourteenth Amendment. *Elk v. Wilkins*, 112 U.S. 94, 109 (1884); see also Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 56–58 (2002) (discussing *Elk v. Williams* and the legal basis for asserting that Indians were not American citizens). Citizenship was not conferred on all Indians until the General (or Indian) Citizenship Act of 1924. See Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 179–80 (1999).

of federal authority over non-citizens lawfully residing on their lands. Because the extension of authority was not through bilateral treaties with individual tribes, but a general (and unilateral) federal law, the Major Crimes Act lacked any claim of actual or democratic consent.<sup>164</sup> It was an extension of authority over a subjugated people at the time of their greatest weakness and political dependence on the United States. In other words, it was a simple and straightforward act of colonization.

### III. HISTORY OF THE MAJOR CRIMES ACT SINCE ENACTMENT AND IN THE BROADER CONTEXT OF INDIAN POLICY

The Major Crimes Act is best understood in the context of general federal Indian policy. It was enacted during the Assimilation Era,<sup>165</sup> but federal policies have shifted dramatically and repeatedly in the ensuing 120 years.

#### A. *Allotment, Assimilation, and the Major Crimes Act*

Just after the Major Crimes Act, Congress enacted the General Allotment Act,<sup>166</sup> another key law directed toward Indian assimilation. The stated goal of allotment was the assimilation of Indians through their transformation into individual farmers and ranchers.<sup>167</sup> The allotment policies broke up large tribal communal landholdings and converted the lands into numerous individual agricultural or grazing parcels that were distributed to individual Indians and families.<sup>168</sup> Surplus lands were sold to settlers.<sup>169</sup> The allotment policy was pursued with vigor through the early 1900s.<sup>170</sup> And the sale of surplus lands was not the only source of loss of Indian lands. Once federal restrictions on Indian lands disappeared, many Indians lost their individual allotment lands.<sup>171</sup> As a result, the tribal

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164. For irony, see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197–212 (1978), and *Duro v. Reina*, 495 U.S. 676, 684–98 (1990), in which the Supreme Court denied tribal criminal jurisdiction over non-Indians and nonmembers respectively, at least partially on the theory that it would be improper to subject citizens to the criminal authority of governments in which they lack any right of political participation or theoretical democratic consent.

165. See *supra* Part II.E.

166. General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (1887) (repealed 2000).

167. *Id.* § 1, 24 Stat. at 388.

168. See *supra* note 143 and accompanying text.

169. *Id.*

170. Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 11–12 (1995).

171. FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 137–38 (Rennard Strickland ed., 1982).



land base in the United States shrank from approximately 138 million acres in 1887 to approximately 48 million acres in 1934.<sup>172</sup>

During the Allotment Era, the *reach* of the Major Crimes Act to individuals decreased as Indian lands were parceled out and reservations were disestablished. Allotted lands that passed out of Indian hands were no longer subject to federal criminal jurisdiction.<sup>173</sup> However, in keeping with the assimilationist motives, the *scope* of the Act's subject matter gradually increased. Although it originally enumerated seven major offenses, it was expanded in 1909 when Congress added an additional offense, assault with a dangerous weapon,<sup>174</sup> bringing the apparent number of major crimes to eight. In 1932, Congress added incest and robbery to the enumerated offenses, raising the number of offenses to ten.<sup>175</sup>

### *B. The Indian New Deal and a Subtle Shift in the Purpose of the Major Crimes Act*

By the mid-1930s, the assimilation approach was having disastrous effects on Indians, causing federal policymakers to doubt its efficacy; allotment had been effective primarily in stripping Indian tribes, and eventually individual Indians, of their lands and leaving Indians in a state of poverty.<sup>176</sup> In light of this unfortunate outcome and the severe depression that held America in its grips, the notion that Indians should work to assimilate and become like other Americans must have been less than compelling, both to Americans and to Indian themselves. At the same time, Roosevelt's New Deal reflected a renewed faith in government. Federal policymakers officially extended this faith in government to tribal governments, which federal policymakers began to see as viable entities for serving impoverished Indian peoples, with proper assistance from the federal government.<sup>177</sup> Thus, allotment and, to a lesser extent, its assimilationist intent, were rejected. A new law, the Indian

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172. *Id.*

173. See 18 U.S.C. § 1151 (2000) (defining Indian country as inclusive of only those allotments that are still owned by Indians).

174. Act of Mar. 4, 1909, Pub. L. No. 60-350, § 321, 35 Stat. 1151 (1909); see also Jo-Nell Silvestro, Note, *The Indian Crimes Act of 1976: Another Amendment to the Major Crimes Act—But How Many More To Come?*, 22 S.D. L. REV. 407, 408-10 (1977) (discussing the history of amendments to the Major Crimes Act).

175. Act of June 28, 1932, Pub. L. No. 72-199, ch. 284, 47 Stat. 336, 337 (1932).

176. See 2 PRUCHA, *supra* note 9, at 895 (concluding that the allotment policy "failed miserably").

177. See generally *id.* at 917-1012 (discussing the "Indian New Deal").

Reorganization Act,<sup>178</sup> was enacted to help revitalize tribal governments.<sup>179</sup> This law assisted tribal governments in developing constitutions and economic development structures.<sup>180</sup>

In seeking to revitalize tribal governments, one approach might have involved the repeal of the Major Crimes Act and restoration of tribal preeminence in criminal justice matters on Indian reservations. However, the Major Crimes Act was not revisited during the New Deal Era. It is doubtful that relinquishment of federal criminal jurisdiction seemed viable to federal officials who viewed tribes as broken, dependent, as poor as ever, and still in need of tremendous federal assistance. Thus, although the United States continued to exercise jurisdiction over serious crimes between Indians, beliefs about the continuing purpose for the federal role in Indian country prosecutions likely began to shift. One positive outcome of Indian Reorganization was the strengthening of tribal institutions and ultimately tribal courts.<sup>181</sup> Still, federal officials likely developed a view of criminal justice as a federal responsibility, as expressed in *Kagama*, and a useful form of federal assistance to tribes.

It was not long, however, before federal policy turned away from the Indian New Deal and Reorganization and shifted back toward an assimilationist approach.

### C. *Termination and the Threatened Obsolescence of the Indian Country Regime*

In a time now known as the "Termination Era" for the numerous laws enacted by Congress seeking to terminate the federal government's unique relationship with particular Indian tribes, the United States turned in the late 1940s and through the 1950s toward a policy of destroying tribal existence and assimilating Indians. The United States was brimming with post-war confidence, and it was perhaps unimaginable to many Americans that Indians living within the borders of this country would wish to maintain separate and independent tribal identities.<sup>182</sup>

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178. Indian Reorganization Act of 1934, Pub. L. No. 73-576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (2000)).

179. 2 PRUCHA, *supra* note 9, at 919.

180. 25 U.S.C. § 470 (2000) (economic development); *id.* § 476 (constitutions).

181. HAGAN, *supra* note 85, at 150-52.

182. See generally DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960 (1986) (discussing the federal policies of the Termination Era). To some degree, assimilationist policies in the United States during the twentieth century seem to run with American national confidence. Thus, during the Great Depression, when confidence in America and its ideals was low, policymakers rejected the

In the late 1940s, Congress created the Indian Claims Commission, an entity designed primarily to address the long festering claims that Indian tribes had against the United States.<sup>183</sup> The Indian Claims Commission Act was in some ways a prelude to termination of tribal governments.<sup>184</sup> Some thought that the bitter feelings held by many Indians were the principal obstacle to successful assimilation of Indians.<sup>185</sup> The theory was that if the United States addressed these historical wrongs, perhaps Indians would let go of the bitterness that helped bind them to tribal communities and against the United States. The Indian Claims Commission awards also facilitated termination in that eighty percent of each judgment awarded by the Commission was generally paid not to tribes as tribes but in per capita shares to individual tribal members in order to place the individual Indian in a firmer financial position vis-à-vis the community.<sup>186</sup> In other words, tribal communal assets (legal claims against the government) were converted to individual property, in a fashion not unlike allotment.

In the 1950s, Congress enacted statutes terminating its relationship with various individual Indian tribes.<sup>187</sup> When Congress "terminated" the federal relationship with a tribe, the federal government lost federal criminal authority, and jurisdiction over the affected Indian people devolved to states. Thus, the termination acts had the practical effect of diminishing the reach of federal criminal

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assimilation policy. See *supra* Part III.B. In the aftermath of World War II, when American confidence and optimism were unbridled, American policymakers returned to assimilation. In the 1960s, when American confidence waned, policymakers again began to reject assimilationist tendencies. See *infra* Part III.D.

183. See Nell Jessup Newton, *Compensation, Reparations & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 468 (1994).

184. See H.D. ROSENTHAL, *THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION* 166 (1990) (noting that the termination movement "became linked with the movement for the Indian Claims Commission").

185. *Id.* at vii, 170.

186. See 25 U.S.C. § 1403 (2000).

187. For a summary of termination laws, including a table of terminated tribes, see 2 PRUCHA, *supra* note 9, at 1046-59; see also Act of Sept. 5, 1962, Pub. L. No. 87-629, 76 Stat. 429 (terminating the Ponca); Act of Sept. 21, 1959, Pub. L. No. 86-322, 73 Stat. 592 (terminating the Catawba); Act of Aug. 3, 1956, Pub. L. No. 84-943, 70 Stat. 963 (terminating the Ottawa); Act of Aug. 2, 1956, Pub. L. No. 84-921, 70 Stat. 937 (terminating the Peoria); Act of Sept. 1, 1954, Pub. L. No. 83-762, 68 Stat. 1099 (terminating various tribes in Utah); Act of Aug. 27, 1954, Pub. L. No. 83-671, 68 Stat. 868 (terminating the Ute); Act of Aug. 23, 1954, Pub. L. No. 83-627, 68 Stat. 768 (terminating the Alabama and Coushatta); Act of Aug. 13, 1954, Pub. L. No. 83-588, 68 Stat. 724 (terminating various tribes in western Oregon); Act of Aug. 13, 1954, Pub. L. No. 83-587, 68 Stat. 718 (terminating the Klamath); Act of June 17, 1954, Pub. L. No. 83-399, 68 Stat. 250 (terminating the Menominee).

jurisdiction over Indians in the same way that the allotment policies did. Tribal lands that had theretofore been considered federal "Indian country" became ordinary private property subject to state jurisdiction; members of the terminated tribe lost their unique federal and tribal legal status and simply became ordinary state citizens.<sup>188</sup>

Aside from the termination acts, the hallmark of the Termination Era was Public Law 280.<sup>189</sup> Enacted in 1953, Public Law 280 radically changed the criminal justice system in certain parts of Indian country. Having heard repeated criticism of federal officials for high crime rates on Indian reservations, Congress decided to withdraw federal criminal jurisdiction in certain states and transfer jurisdiction to state governments.<sup>190</sup> As a result, Public Law 280 law further decreased the geographic reach of federal criminal jurisdiction in Indian country.<sup>191</sup> Moreover, it gave states more authority than the federal government had exercised. Under Public Law 280, states may enforce virtually all of their criminal laws, including misdemeanors.<sup>192</sup> Thus, Public Law 280 was an even more aggressive encroachment on tribal sovereignty than was the existing federal system.

Following the enactment of Public Law 280, the federal government no longer possessed jurisdiction to prosecute major crimes in Indian country in California or in significant portions of Alaska, Minnesota, Oregon, and Washington, and parts of some other states.<sup>193</sup> Professor Carole Goldberg, the leading expert on Public Law 280, estimates that, in real terms, Public Law 280 diminished the reach of federal jurisdiction by reducing by one-

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188. See 2 PRUCHA, *supra* note 9, at 1048-49.

189. Act of Aug. 15, 1953, Pub. L. No. 83-280, 82 Stat. 78 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, and 28 U.S.C. § 1360).

190. See CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997); Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1415-19 (1997) (discussing the effects of Public Law 280); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975) (noting that federal law enforcement was "neither well-financed nor vigorous" and citing congressional materials).

191. Several other federal statutes have had some of the same effect as Public Law 280 but have been limited to specific states or specific reservations. For example, in 1948, Congress conferred on the state of New York criminal jurisdiction over offenses by or against Indians on Indian reservations within that state. 25 U.S.C. § 232 (originally enacted as Act of July 2, 1948, Pub. L. No. 80-881, ch. 804, 62 Stat. 1224). Congress enacted similar acts that covered portions or all of other states, including Kansas, North Dakota, and Iowa. See COHEN, *supra* note 171, at 372-76.

192. See Goldberg-Ambrose, *supra* note 190, at 1415-17.

193. Several states have "retroceded" portions of their Public Law 280 jurisdiction back to tribes and the federal government. See 25 U.S.C. § 1323(a) (authorizing the United States to accept retrocession of criminal and/or civil jurisdiction from states).

quarter to one-half both the geographic reach of federal jurisdiction and the number of people subject to federal jurisdiction.<sup>194</sup> Though Public Law 280 diminished the federal law enforcement role in certain parts of the United States, the federal Indian country criminal justice regime prevails in Arizona, Idaho, Michigan, Montana, Nevada, New Mexico, North and South Dakota, Utah, and Wyoming, as well as certain Indian lands in Minnesota, Nebraska, Oregon, Washington, and Wisconsin.

Although Public Law 280 has not been repealed, optional expansions of state criminal jurisdiction in Indian country were halted by a later amendment requiring tribal consent for any increase in Public Law 280 authority over Indian reservations,<sup>195</sup> and tribes maintain vigilant opposition to any new assumption of state criminal jurisdiction on Indian lands.<sup>196</sup> As a reform of the Indian country criminal justice scheme, Public Law 280 has suffered blistering criticism for undermining tribal justice systems.<sup>197</sup> It has had a tremendous impact on criminal justice issues for Indian tribes, changing the debate from whether the federal government or tribes should possess primary jurisdiction over serious Indian offenses to whether the federal government or *states* should possess primary jurisdiction over these offenses.

When the Termination Era began, the federal government had pervasive control on Indian reservations: the Bureau of Indian Affairs controlled tribal forestry and agriculture, real property leasing and management, law enforcement, education, social services, and numerous other functions and services that are normally handled by local or state governments outside Indian country.<sup>198</sup> Likewise, the

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194. DUANE CHAMPAGNE & CAROLE GOLDBERG, *EMPIRICAL ANALYSIS OF PUBLIC LAW* (forthcoming 2006).

195. See 25 U.S.C. § 1322(a).

196. See Goldberg-Ambrose, *supra* note 190, at 1408 (noting that no tribes have voluntarily consented to state jurisdiction since 1968, when the tribal consent provision was added to Public Law 280).

197. In transferring criminal jurisdiction to states, the United States displaced existing tribal systems by cutting off federal support that might otherwise have been offered. GOLDBERG-AMBROSE, *supra* note 190, at 8–10. Thus, Professor Goldberg-Ambrose argues that enactment of Public Law 280 created lawlessness on Indian reservations: though tribal systems are now neglected, the states are no more aggressive than the federal government in enforcing laws there. *Id.* At the same time, Goldberg-Ambrose asserts that the law has given states a power over Indian tribes that is used for illegitimate purposes. *Id.* Public Law 280 thus presents the same “agency problems” that federal Indian country authority presents: criminal justice is handled not by tribal governments but by state and federal “agents” with their own independent motives.

198. See generally ALAN L. SORKIN, *STUDIES IN SOCIAL ECONOMICS: AMERICAN INDIANS AND FEDERAL AID* (1971) (describing and evaluating the strengths and

Indian Health Service handled Indian hospitals and healthcare.<sup>199</sup> As the federal government gradually withdrew financial support and terminated its relationship with specific tribes, Indians no longer had the federal government or the tribal governments to rely on. Providing education and other services to impoverished American Indians suddenly became the responsibility of state governments.<sup>200</sup> Cash-strapped states that initially favored increased state authority in Indian country began to see Public Law 280 and the termination acts as unfunded mandates.<sup>201</sup> As a result, Indian people were poorly served, and civil rights issues flared.

Due largely to the persistence of Indians and Indian tribes in resisting termination, Congress eventually changed course. The termination policies were rejected, just as the allotment policies had been rejected thirty years earlier.<sup>202</sup> In recent decades, the legislative agenda of the Termination Era has largely been reversed. Some of the tribes that were “terminated” were later restored to federal recognition through legislation<sup>203</sup> or litigation.<sup>204</sup> After restoration, however, most of these restored tribes were subject to state criminal jurisdiction under Public Law 280, so state authority remains intact and federal criminal authority remains diminished. Aside from markedly decreasing the geographic reach of federal Indian country authority through termination acts and Public Law 280, however, the Termination Era occasioned no change in the Major Crimes Act.

#### *D. The Era of Self-Determination and Self-Governance*

The refusal of terminated Indian tribes to go quietly into the night was a powerful symbol of Indian resistance and resilience. Indian activists organized around this issue and others to try to forge

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weaknesses of the Bureau of Indian Affairs programs that administered health, agricultural, and industrial development, property and income management, Indian education, and welfare services).

199. *Id.* at 51–65.

200. See DEBO, *supra* note 81, at 378.

201. See Goldberg, *supra* note 190, at 551–58 (discussing the controversy over financing state jurisdiction).

202. See *supra* Part III.B.

203. See, e.g., 25 U.S.C. §§ 903–903f (2000) (restoring the Menominee); *id.* §§ 566–566(h) (restoring the Klamath).

204. Numerous California rancherias were restored through the decision in the *Tillie Hardwick* litigation. See *Hardwick v. United States*, No. 79-1710 SW, 1994 WL 721578 at \*1 (N.D. Cal. Dec. 22, 1994) (discussing the *Tillie Hardwick* decision and denying a motion to re-open the *Hardwick* case). *Tillie Hardwick* itself was resolved by settlement in which the federal government stipulated that certain California Indian rancherias had never been effectively terminated and the district court accepted that stipulation in an unpublished decision. See *id.*

a new federal Indian policy. Indian people took several highly visible stands for their rights including the occupation of Alcatraz in November 1969, the occupation of the Bureau of Indian Affairs headquarters in Washington, D.C. in 1972, and the occupation of the Sioux village of Wounded Knee in 1973.<sup>205</sup> To be sure, not all of the actions by Indian civil rights advocates sought to increase tribal governmental authority. Some activists viewed tribal governments as just another potential source of government oppression.<sup>206</sup> However, their highly visible activities drew broad attention to Indian issues.

As a result, among the developments that occurred at the close of the Termination Era and at the beginning of a new policy era was a law that gave voice to concerns of civil rights advocates. In 1968, Congress enacted the Indian Civil Rights Act,<sup>207</sup> which recognized tribal criminal jurisdiction, but substantially limited it by requiring tribal governments to provide their citizens most of the protections that the federal government provides through the Bill of Rights and that states also must provide through incorporation of many of those provisions in the Fourteenth Amendment.<sup>208</sup> In addition to prohibiting tribal governments from interfering with the freedoms of speech, assembly and free exercise of religion set forth in the First Amendment,<sup>209</sup> the Indian Civil Rights Act incorporated most of the criminal procedure protections found elsewhere in the Bill of Rights, such as the Fourth Amendment's warrant requirements and the proscription against unreasonable searches and seizures;<sup>210</sup> the Fifth Amendment's prohibition on double jeopardy,<sup>211</sup> compelled self-incrimination,<sup>212</sup> and deprivation of life, liberty or property without

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205. See 2 PRUCHA, *supra* note 9, at 1115–20 (discussing some of the stands taken by Indian people in the 1960s and 1970s). For a colorful account of the occupation of Alcatraz, see HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 517–19 (1980).

206. A significant source of litigation against tribal governments has, since at least the 1960s, been tribal members themselves who are affected by tribal governmental actions. Cf. Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field*, 21 VT. L. REV. 7, 21–23 (1996) (discussing civil rights litigation in tribal courts).

207. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 25 U.S.C. §§ 1031–1303).

208. Tribes have not necessarily interpreted these protections identically with interpretations by state and federal courts. See Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 906–08 (2003) (discussing legislative attempts to alter the Indian Civil Rights Act and the subsequent effect of those attempts on tribal sovereignty).

209. See 25 U.S.C. § 1302(1).

210. See *id.* § 1302(2).

211. See *id.* § 1302(3).

212. See *id.* § 1302(4).

due process;<sup>213</sup> the Sixth Amendment's rights to notice, a speedy and public trial, confrontation of witnesses, compulsory process, and counsel;<sup>214</sup> the Eighth Amendment's proscriptions on excessive bail, excessive fines, or cruel and unusual punishment;<sup>215</sup> and even the Fourteenth Amendment's requirement of equal protection.<sup>216</sup>

To enforce these new rules, Congress provided the same remedy for deprivations of liberty by tribal courts and tribal governments that is available for such deprivations by states—that is, a petition in federal court for a writ of habeas corpus.<sup>217</sup> In applying these rules to tribal governments, the Indian Civil Rights Act rejected termination and endorsed the continued existence of tribal governments. But it did so at great cost to tribal sovereignty: in many respects, these rules imposed uniformity by requiring tribal governments to look and act like other American governments.

In 1970, President Richard Nixon called for “tribal self-determination,” a concept which he understood would give tribal governments an increased role in implementing federal Indian programs.<sup>218</sup> The first major law to implement the new “self-determination” policy was the Indian Self-Determination and Education Assistance Act of 1975.<sup>219</sup> Under this law, also known as Public Law 93-638, Indian tribes could contract with the Bureau of Indian Affairs (“BIA”) for federal funding to provide certain specific services, such as education.<sup>220</sup> Under such contracts, known as “638 contracts,” tribes negotiate with the BIA to perform the BIA's functions, using the BIA's funding.<sup>221</sup> The contracting of federal

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213. *See id.* § 1302(8).

214. *See id.* § 1302(6).

215. *See id.* § 1302(7).

216. *See id.* § 1302(8).

217. *See id.* § 1303; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–70 (1978) (holding that habeas relief is the only relief authorized by Congress); *see also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 879–80 (1st Cir. 1996) (holding that federal habeas review extends beyond mere imprisonment to the tribal punishment of banishment from reservation).

218. Special Message to the Congress on Indian Affairs, PUB. PAPERS 564–76 (July 8, 1970).

219. 25 U.S.C. §§ 450 to 458bbb-2 (2000).

220. *See id.* § 450f.

221. *See id.* § 450(l); 25 C.F.R. § 273 (2005). Neither BIA officials nor the tribes were fully happy with practical implementation of the 638 contract program. In fact, the regime was hampered by the Byzantine bureaucracy of the BIA, which compartmentalized functions in a manner that frustrated flexibility among those providing services. Because tribes appreciated the general approach, however, there were significant efforts to expand and improve the system. *See Tadd M. Johnson & James Hamilton, Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1264–66 (1995).



functions on Indian reservations by Indian tribes was widely hailed as an improvement in federal Indian policy and a meaningful step toward self-determination.<sup>222</sup> While it did not eliminate federal oversight, it improved the delivery of federal services to tribes.<sup>223</sup>

Law enforcement issues were key in ushering in the Self-Determination Era.<sup>224</sup> Indian tribes and others had long complained about the quality of federal law enforcement and criminal justice on Indian lands.<sup>225</sup> To provide one compelling example of such criticism, the Salt River Pima-Maricopa Indian Community near Phoenix suffered more than twenty unsolved homicides in the 1970s.<sup>226</sup> Tribes thus agitated for and received law enforcement authority under 638 contracts. According to a tribal official from Salt River, after the

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222. See S. Bobo Dean & Joseph H. Webster, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 TULSA L.J. 349, 350 (2000) (quoting a Miccosukee tribal leader describing the self-determination policy “as the most successful Indian policy [ever] adopted by the United States” (alteration in original)).

223. *Id.*

224. In New York, members of the Oneida tribe refused to allow state police onto reservation land, sparking an armed standoff that lasted for days. Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT’L L. & POL. 531, 559–60 (1994).

225. See GOLDBERG-AMBROSE, *supra* note 190, at 162 (“In practical application, federal law enforcement agents, particularly the Federal Bureau of Investigation and the U.S. Attorney’s Office, have demonstrated a history of declining to investigate or prosecute violations of the Major Crimes Act.”); Echohawk, *supra* note 35, at 99–100 (“U.S. Attorneys often decline to prosecute Major Crimes Act cases on the reservation because of a mixture of factual, legal, practical, or logistical problems.”); B.J. Jones, *Welcoming Tribal Courts into the Judiciary Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 513 (1998) (“Federal prosecutors, busy with prosecuting a variety of more serious crimes, perhaps have been remiss in devoting the necessary attention to the problems that arise when non-Indians commit offenses in Indian country . . . .”); Peter Nicolas, *American-Style Justice in No Man’s Land*, 36 GA. L. REV. 895, 963 (2002) (stating that “U.S. Attorneys, unlike state prosecutors, typically decline to prosecute in a far greater percentage of cases result[ing] in the underenforcement of criminal laws in Indian country”); Larry Cunningham, Note, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2188 (2000) (noting that “many United States Attorneys have abdicated their responsibility to prosecute crimes in Indian country committed by non-Indians”); Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1278 (2004) (“Because federal prosecutors decline to prosecute [domestic violence] crimes, the law provides no deterrent effect . . . .”); cf. Laurence Davis, *Criminal Jurisdiction over Indian Country in Arizona*, 1 ARIZ. L. REV. 62, 72–73 (1959) (noting reluctance of federal prosecutors and federal courts to handle petty offenses over which they have jurisdiction in Indian country, with the result that “petty frauds and simple assaults” by non-Indians against Indians “which are fairly numerous—usually escape prosecution entirely”).

226. Gary Tahmahkera, Chief of Police at the Salt River Pima-Maricopa Indian Community, Discussion with U.S. Dep’t of Just. and the Nat’l Congress of Am. Indians in Washington D.C. (Mar. 18, 2004) (notes on file with the North Carolina Law Review).

tribal government entered a 638 contract for law enforcement services and began investigating its own offenses, the tribal police solved each of the ensuing homicides, and unsolved cases have not been a serious problem on the reservation since that time.<sup>227</sup>

Having established that tribal administration of Indian programs was workable, self-determination was broadened dramatically in 1988 and recast as "self-governance."<sup>228</sup> Rather than negotiating for individual functions, the new law allowed tribes to negotiate broad "compacts" with the Department of the Interior that covered virtually all of the federal services on a reservation. Instead of discreet contracts for individual programs, tribes with self-governance compacts received large block grants and obtained broad discretion over allocation of those resources, giving tribes the ability to prioritize the services they found important.<sup>229</sup> With these laws, federal Indian policy evolved toward the preservation and reinvigoration of tribal governments.<sup>230</sup>

#### E. Federal Indian Policy Today

Today, the federal government expressly recognizes Indian tribes as sovereign nations with whom the United States has a government-to-government relationship.<sup>231</sup> Rather than seeking to destroy tribal

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227. *Id.*

228. Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, 102 Stat. 2285, 2296 (1988); see also John Tahsuda, *Economic Self-Determination: Federal Policies Promoting Development of Reservation Economies*, 37 NEW ENG. L. REV. 559, 561 (2002) (discussing self-governance as a refinement of self-deterministic policies).

229. See Johnson & Hamilton, *supra* note 221, at 1267-68.

230. See, e.g., Nixon, *supra* note 11, at 256-58 (recognizing "a new era [of self-determination] in which the Indian future is determined by Indian acts and Indian decisions"); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (signed into law by President Ford); George H.W. Bush, *Statement on Indian Policy*, in DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 11, at 335-36 (same); William Jefferson Clinton, *Remarks to Native American and Alaska Native Tribal Leaders*, in DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 11, at 343-45 (same); Memorandum from George W. Bush, *supra* note 14 (same); William Jefferson Clinton, *Presidential Memorandum for the Heads of Executive Departments and Agencies*, in DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 11, at 343-46 (same); Ronald Reagan, *Statement by the President: Indian Policy*, in DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 11, at 301-02 (pledging a commitment to tribal self-government).

231. See, e.g., Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, tit. II, 108 Stat. 4250 (1994) (recognizing a right to self-government arising from the inherent sovereignty of tribes and calling for government-to-government relations with tribal governments); Memorandum from George W. Bush, *supra* note 14 ("My Administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis . . ."); William Jefferson Clinton, *Government-to-Government*

governments or assimilate individual Indians, the United States now repeatedly expresses support for tribal "self-determination" and "self-governance."<sup>232</sup>

These policies now enjoy overwhelming support among federal policymakers<sup>233</sup> and among Indian tribes. Under the federal policies of self-determination and self-governance, the tribal role in implementing governmental responsibilities has broadened beyond the programs of the Bureau of Indian Affairs to those of the Indian Health Service.<sup>234</sup> In recent years, nearly half of the budgets of both the Bureau of Indian Affairs and the Indian Health Service have been distributed directly to tribes under self-determination or self-governance programs.<sup>235</sup> Congress has also promoted the ideal of tribal self-governance in a variety of other Indian programs.<sup>236</sup>

At the same time, Congress has aggressively pursued tribal self-governance initiatives in general governmental programs, with the result that tribal self-governance has been "mainstreamed," even outside traditional "Indian programs." Nearly all of the major federal environmental laws enacted by Congress and administered by the

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Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994) (advocating government-to-government relationships with Indian tribes).

232. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, § 1017, 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 450a (2000)) (authorizing contracts and grants for tribes to provide various federal services); Nixon, *supra* note 11, at 258 ("Federal government needs Indian energies and Indian leadership if its assistance is to be effective . . .").

233. See Memorandum from George W. Bush, *supra* note 14 ("My Administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States."); see also Press Release, Senator John McCain, McCain, Daschle and Johnson Introduce "Discussion" Bill to Advance Tribal Participation in Reform of Indian Trust Funds and Assets (Apr. 19, 2002) (self-determination is a "bedrock principle[]" of federal policy), available at [http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content\\_id=634](http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=634).

234. See Johnson & Hamilton, *supra* note 221, at 1268. In 1991, seven tribes entered self-governance compacts that constituted around \$27 million of federal appropriations shifted to the tribes through funding agreements. It has since grown to involve more than 226 tribes in more than eighty-five funding agreements. Henry M. Buffalo, Jr., *Implementing Self Determination and Self Governance*, in FED. BAR ASS'N, TRIBAL SELF-DETERMINATION AND THE FEDERAL TRUST RESPONSIBILITY: COLLABORATION OR CONFLICT 173, 174 (2003) (materials of the 28th Indian Law Conference).

235. See Dean & Webster, *supra* note 222, at 349-50.

236. See, e.g., Indian Gaming Regulatory Act, 25 U.S.C. § 2702(1) (2000) (stating that the Indian Gaming Regulatory Act is concerned with "promoting tribal economic development, self-sufficiency and strong tribal governments"); see also Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (regarding tribes' jurisdiction over child custody issues); Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4243 (allowing tribal agencies to run federal public housing programs).

Environmental Protection Agency have been amended to create a distinct governmental role for Indian tribes.<sup>237</sup> Likewise, Congress has amended key public lands and natural resource laws to promote self-governance values.<sup>238</sup> In some of these programs, the self-governance reforms represent attempts to develop "capacity" among Indian tribal governments, implying that tribal governments currently lack a full responsibility, but will earn greater authority and responsibility when the capacity grows.<sup>239</sup> In others, adequate tribal authority allows tribes to function as sovereign decisionmakers with little or no oversight.<sup>240</sup>

With tribal self-governance, the federal government has moved away from unilateral federal action on Indian reservations toward a policy favoring a government-to-government relationship with Indian

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237. Several of these, including the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (also known as "CERCLA" or the "Superfund" law), treat tribal governments in a manner similar to state governments for key purposes. See Clean Water Act, 33 U.S.C. § 1377(e) (2000) (stating that "Indian tribes shall be treated as States"); Safe Drinking Water Act, 42 U.S.C. § 300j-11(b)(1) (2000); Clean Air Act, 42 U.S.C. § 7601(d)(2)(1) (stating that the "Administrator is authorized to treat Indian tribes as States"); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9626(a) (stating that "[t]he governing body of an Indian tribe shall be afforded substantially the same treatment as a state"). Likewise, the Resource Conservation and Recovery Act ("RCRA") recognizes tribes in the same category as municipal governments. Resource Conservation and Recovery Act, 42 U.S.C. § 6903(13) (including Indian tribes in the definition of "municipality"). Executive department actions have proceeded apace with congressional actions. See, e.g., Sandra Zellmer, *Tribal People and Environmentalists: Friends or Foes?*, 7 GREAT PLAINS NAT. RESOURCES J. 9, 12-13 (2002) (describing Interior/Commerce Secretarial Order 3206, American Indian Tribal Rights, Federal Tribal Trust Responsibility and the Endangered Species Act (June 5, 1997), that directed the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration to be sensitive to tribal interests in implementing the Endangered Species Act); see also Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species*, 43 S.D. L. REV. 381, 384, 405-16 (1998) ("The Order provides a mechanism for prioritizing the interests of Indian tribes . . . consistent with the trust responsibility and tribal sovereignty.").

238. See National Historic Preservation Act (NHPA), 16 U.S.C. § 470a(d)(2) (2000) (setting forth the circumstances under which a tribe "may assume all or any part of the functions of a State Historic Preservation Officer"); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1235(k) (2000) (setting forth circumstances under which Indian tribes "shall be considered as a 'State'"); see also Archaeological Resources Protection Act, 16 U.S.C. § 470cc (providing that archaeological projects require the notification and/or consent of Indian tribes, depending on the circumstances; also providing that tribes do not need authorization for any archaeological projects on their land).

239. See *supra* note 237 (discussing the RCRA).

240. See, e.g., *supra* notes 237-38 (discussing the Clean Air Act, Clean Water Act, and NHPA).

tribes.<sup>241</sup> Apparently because these developments have improved governmental services in Indian country, little criticism of this general policy shift appears in the literature. Perhaps the best evidence of the success is the policy's endurance; the approach has endured as long as any major federal Indian policy and shows no signs of coming to an end.

#### F. *The Unlikely Persistence of the Major Crimes Act*

Despite the broad move toward tribal self-governance across the federal spectrum, the Major Crimes Act has been curiously resistant to the trend. Indeed, in what may involve the most intrusive aspect of federal power in Indian country, tribal governmental power over criminal justice has in many respects gradually diminished and federal hegemony has actually expanded, even while all other federal programs have embraced self-determination. To understand the reasons for this unlikely expansion, one must return to the beginning of the Self-Determination Era.

In 1968, when Congress enacted the Indian Civil Rights Act,<sup>242</sup> Congress limited tribal criminal justice authority in two key ways. First, Congress required tribes to provide all the criminal procedural protections noted above, making tribal courts look and behave more like federal and state courts. Second, the Indian Civil Rights Act limited tribal court sentences to six months of imprisonment and a \$500 fine.<sup>243</sup> In limiting tribes to petty misdemeanors, Congress made felony jurisdiction under the Major Crimes Act effectively exclusive.<sup>244</sup> Under the Indian Civil Rights Act, a tribal government may still conceivably prosecute an Indian for murder, but federal law limits the tribal sentence that may be imposed, rendering the offense a misdemeanor if prosecuted by the tribe.<sup>245</sup> Both the substantive and

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241. See, e.g., Dean B. Suagee, *Historical Storytelling and the Growth of Tribal Historic Preservation Programs*, 17 NAT. RESOURCES & ENV'T 86, 86-88 (2002) (stating that "federal law recognizes that Indian tribes have the right to tell their own stories as part of the federal decision-making process established pursuant to Section 106 of the National Historic Preservation Act" and describing the process set forth in 16 U.S.C. § 470a(d)(6)).

242. Pub. L. No. 90-284, 82 Stat. 77 (1968) (now codified at 25 U.S.C. §§ 1301-1303).

243. These limits were raised in 1986 to imprisonment up to one year and a fine of up to \$5000. See 25 U.S.C. § 1302(7).

244. In Public Law 280 states, tribes continued to have some level of concurrent jurisdiction, but tribal jurisdiction was suddenly a lot less robust than the state's jurisdiction in those states. See generally Soo C. Song & Vanessa J. Jimenez, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627 (1998).

245. Some would disagree with the characterization of tribal criminal jurisdiction as limited to misdemeanors by noting that tribes may, for example, prosecute very serious offenses such as murder. See Clinton, *Development*, *supra* note 28, at 971 (characterizing

the procedural components of the Indian Civil Rights Act have profoundly intruded on tribal self-government. The substantive component limited tribal authority markedly over the most serious offenses on Indian reservations. The procedural component effectively squelched many traditional ways of addressing criminal justice by requiring tribal governments to adjudicate criminal justice in a manner nearly identical to the federal and state governments.<sup>246</sup>

To the extent that the federal government has a responsibility to administer criminal justice in Indian country, as the Supreme Court indicated in *Kagama*, the Indian Civil Rights Act dramatically increased that responsibility by making felony criminal justice exclusive to the federal government. The Indian Civil Rights Act's strict new limits on tribal jurisdiction obstructed tribes from addressing new offenses themselves. If an offense deserved a serious term of imprisonment, only the federal government could provide it. Thus, there was pressure to expand the Major Crimes Act to address each new crime problem on Indian reservations, producing a curious institutional effect on tribal self-determination in the area of criminal justice.

While the Major Crimes Act expanded by only three enumerated offenses from the time of its enactment in 1885 to the end of the Termination Era in the 1960s (from seven to ten listed offenses), the substantive scope of the Major Crimes Act expanded dramatically during the Self-Determination Era.<sup>247</sup> In 1966, Congress added certain additional sex offenses, including statutory rape and assault

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the Indian Civil Rights Act of 1968 ("ICRA") as limiting tribal jurisdiction over Indians lands and noting that one provision, "while not expressly limiting the crimes cognizable in tribal courts, limited the punishments which the tribal courts could impose to six months' imprisonment or a \$500 fine"). The ICRA, 25 U.S.C. § 1301-1303, has been amended such that it limits tribal criminal jurisdiction to a maximum sentence of one year for any given offense. Thus, although a tribe may indeed have the authority to prosecute one of its members for murder, federal law limits the tribal sentence to one year. Because federal law classifies crimes primarily by reference to their maximum term of imprisonment authorized for the crime, and explicitly defines a crime punishable by one year or less as a misdemeanor, *see* 18 U.S.C. § 3559(a), then it is fair to characterize the criminal jurisdiction of tribal courts, at least under federal law, as limited to misdemeanors. In other words, when murder is prosecuted and punished in a tribal court, it is a misdemeanor.

246. *See generally* Kirke Kickingbird, *In Our Image . . . After Our Likeness: The Drive for Assimilation of Indian Court Systems*, 13 AM. CRIM. L. REV. 675 (1976) (discussing the federal effort to shape tribal courts to fit more familiar American models).

247. For earlier scholarship discussing the history of the Major Crimes Act, *see* Charles T. DuMars, Comment, *Indictment Under the "Major Crimes Act"—An Exercise in Unfairness and Unconstitutionality*, 10 ARIZ. L. REV. 691, 695 (1968); Silvestro, *supra* note 174, at 408-10.

with intent to commit rape, bringing the putative number of offenses to twelve.<sup>248</sup> In enacting the Indian Civil Rights Act itself in 1968, Congress again expanded the reach of the Major Crimes Act by adding "assault resulting in serious bodily injury" for a total of thirteen offenses then encompassed within the Major Crimes Act.<sup>249</sup> Congress reasoned that, because of the newly imposed limits on tribal jurisdiction, federal prosecution of such assaults would sometimes be needed to insure that the punishment would match the gravity of the offense.<sup>250</sup>

In the Indian Crimes Act of 1976, Congress amended the Major Crimes Act to add the crime of kidnapping to the enumerated crimes. This new offense, together with the assault offense that had been added as part of the Indian Civil Rights Act itself, raised the total number of major crimes to fourteen.<sup>251</sup>

In the next round of expansion of the Major Crimes Act, in an appropriations law in 1984, Congress added maiming and involuntary sodomy, increasing the number of offenses to sixteen.<sup>252</sup> Two years later, in May of 1986, Congress amended the Major Crimes Act to include "felonious sexual molestation of a minor,"<sup>253</sup> increasing the number of enumerated offenses to seventeen.

Before the ink was dry on this amendment, however, Congress enacted a general federal criminal law called the Sexual Abuse Act of

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248. Act of Nov. 2, 1966, Pub. L. No. 89-707, § 1, 80 Stat. 1100, 1100-01.

249. Act of Apr. 11, 1968, Pub. L. No. 90-284, tit. V, § 501, 82 Stat. 73, 80.

250. S. REP. NO. 90-721 (1967), as reprinted in 1968 U.S.C.C.A.N. 1837, 1841.

251. *Id.* In the 1976 legislation, Congress also addressed problems that had arisen through the incorporation of state definitions of crimes. Because the Major Crimes Act adopted state law definitions for six of the offenses then enumerated in the Act, an Indian convicted under the Act was subject to state penalties for several of the major crimes. See H.R. REP. NO. 94-1038, pt. 3, at 5 (1975). A non-Indian offender who was prosecuted under a related federal statute, however, would be subjected to a less severe penalty defined in federal law. Because the United States Courts of Appeals for the Eighth and Ninth Circuits had held such circumstances to violate due process and equal protection, see *United States v. Big Crow*, 523 F.2d 955, 959 (8th Cir. 1975); *United States v. Cleveland*, 503 F.2d 1067, 1071 (9th Cir. 1974); see also James Winston King, Note, *The Legend of Crow Dog: An Examination of Jurisdiction over Intra-Tribal Crimes Not Covered by the Major Crimes Act*, 52 VAND. L. REV. 1479, 1490-93 (1999) (discussing cases), Congress amended the Act to apply federal law definitions and penalties to rape, assault with intent to commit rape, assault with a dangerous weapon, and assault resulting in serious bodily injury. Indian Crimes Act of 1976, Pub. L. No. 94-297, § 2, 90 Stat. 585, 585 (1976). Congress continued to allow burglary and incest to be defined and punished according to state laws since neither was defined in federal law. *Id.*

252. Joint Resolution of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2141.

253. Act of May 15, 1986, Pub. L. No. 99-303, § 1, 100 Stat. 438, 438.

1986<sup>254</sup> that defines a wide range of sexual offenses, ranging from misdemeanors<sup>255</sup> to death-eligible offenses.<sup>256</sup> Congress amended the Major Crimes Act to incorporate all felony provisions of this entire new chapter of the criminal code and removed references to the individual sexual offenses that had previously been listed, save incest.<sup>257</sup> This dramatically increased the number of offenses encompassed within the Major Crimes Act.<sup>258</sup> Then, in 1994, in omnibus crime legislation,<sup>259</sup> Congress sought to address the rising incidence of child abuse in Indian country by adding "assault against an individual who has not attained the age of 16 years" as one of the major crimes.<sup>260</sup> The Act has not been amended since that time.<sup>261</sup>

254. Pub. L. No. 99-646, § 87, 100 Stat. 3620; Pub. L. No. 99-654, 100 Stat. 3660 (codified at 18 U.S.C. § 2241-2245 (2000)).

255. See 18 U.S.C. § 2243(b) (2000) (categorizing sexual abuse of a ward as a Class A misdemeanor); *id.* § 2244(a)(4) (categorizing abusive sexual contact of a ward as a Class B misdemeanor); *id.* § 2244(b) (categorizing abusive sexual contact of any other person as a Class B misdemeanor); Diane H. Mazur, *Sex and Lies: Rules of Ethics, Rules of Evidence, and Our Conflicted Views on the Significance of Honesty*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 679, 720 n.151 (2000) (speculating that the drafters included even relatively minor sex offenses only because they wished to establish a complete system of graded offenses "so that the more serious the conduct, the more serious the punishment" (quoting 132 CONG. REC. 2598 (1986))).

256. See § 2245 (providing that sexual abuse resulting in death is punishable by imprisonment, life imprisonment, or death).

257. Prior to the Sexual Abuse Act, the Major Crimes Act criminalized the following sex crimes: "rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female, not [the defendant's] wife, who has not attained the age of sixteen years, assault with intent to commit rape [and] incest." See *id.* § 1153(a). Following the Sexual Abuse Act, major crimes included "incest" and "any felony under chapter 109A" which contains the substantive provisions of the Sexual Abuse Act, now codified at *id.* §§ 2241-2248.

258. With the caveat about the death penalty described above, it also dramatically increased sentences for such offenses. The new chapter explicitly and separately listed many conceivable variants of the known sex crimes. For example, the statute separately catalogues aggravated sexual abuse by force, *id.* § 2241(a)(1); aggravated sexual abuse by threat, *id.* § 2241(a)(2); aggravated abuse by other means, such as through rendering the victim unconscious, *id.* § 2241(b)(1), or administering a drug, *id.* § 2241(b)(2); and aggravated sexual abuse with children, *id.* § 2241(c). The statute takes a similar approach with other sexual offenses, broadly catalogued as sexual abuse, *id.* § 2242; sexual abuse of a minor or ward, *id.* § 2243; abusive sexual contact, *id.* § 2244; and sexual abuse resulting in death. It also criminalizes attempts to commit most of these offenses. *Id.* § 2241(a). For those interested in such errands, Chapter 109A includes five different code sections defining substantive offenses, *id.* §§ 2241-2245, and at least sixteen offenses that are distinguishable enough that they would be indicted differently.

259. See *infra* notes 277-79 and accompanying text.

260. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2043. The law also created a definition for serious bodily injury to give greater clarity to the major crime, "assault resulting in serious bodily injury." *Id.*

261. Also in the Violent Crime Control and Law Enforcement Act of 1994, Congress created a tribal option for capital punishment for serious crimes. See *id.* § 60002(a), 108



As a result of these changes, and particularly the inclusion of nearly an entire chapter of the federal criminal code, it is now something of a fool's errand to attempt to count the number of offenses enumerated by the Major Crimes Act. For example, Chapter 109A on sex offenses includes five different code sections defining substantive offenses and at least sixteen offenses that are distinguishable enough that they would be indicted differently.<sup>262</sup> The Major Crimes Act thus now encompasses three to four times as many offenses as in 1885.<sup>263</sup>

While the Indian Civil Rights Act has stymied tribal efforts to address more serious offenses and effectively forced tribes to ask Congress to give federal prosecutors greater authority,<sup>264</sup> the overall impact of the Major Crimes Act has also dramatically increased because of a trend that has nothing to do with tribes. Mandatory minimum sentence laws enacted by Congress and other "tough on crime" legislation has tended to increase the sentences imposed in Major Crimes Act cases without any particular regard for their peculiar impact in Indian country.<sup>265</sup>

### G. *The Role of the Major Crimes Act Today*

To contemporary policymakers in Congress and the executive branch, the key motivations behind the original enactment of the Major Crimes Act—expanding federal control over Indian tribes and facilitating the assimilation of Indians—are anathema today. Congress has taken extraordinary steps to embrace a policy of tribal self-determination.

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Stat. at 1968 (codified at 18 U.S.C. § 3598); see also *infra* notes 277–79 and accompanying text.

262. See §§ 2241–2245.

263. Murder, which has historically been counted as one offense in common enumerations of the Major Crimes Act, actually encompasses first-degree murder and second-degree murder, all in a single subsection in the criminal code. See *id.* § 1111(a). Because these are separate offenses that must be indicted differently, it is fair to conclude that numerical descriptions of the offenses in the Major Crimes Act, which have commonly counted murder as a single offense, have *always* been somewhat misleading.

264. See, e.g., H.R. REP. NO. 99-528, at 5–8 (1986), as reprinted in 1986 U.S.C.C.A.N. 1298, 1301–05 (noting that tribes asked Congress to adopt the 1986 amendments to expand federal jurisdiction under the Major Crimes Act to address the problem of an increase of sexual abuse of Indian children which cannot be addressed adequately by tribes because of the jurisdictional limitations in the Indian Civil Rights Act).

265. See, e.g., 18 U.S.C.A. § 924 (2003) (providing mandatory minimum sentences for armed career criminals); *id.* § 1111(b) (providing death or life in prison for first-degree murder). Prior to *United States v. Booker*, 125 S. Ct. 738 (2005), the federal sentencing guidelines were mandatory. *Mistretta v. United States*, 488 U.S. 361, 367–68 (1989).

Yet, somewhat paradoxically, Congress has repeatedly amended and thereby implicitly reaffirmed its commitment to the Major Crimes Act, a law that seems anachronistic in the current era. How can it be explained that the most aggressive growth of the most intrusive type of federal power—the power to jail Indians who commit crimes on Indian reservations—occurred during a time widely hailed as the Era of Self-Determination? How can it be that a law that was enacted to facilitate assimilation and increase federal power over on-reservation Indians has been expanded at a time when the norms of assimilation and federal control have been widely rejected?

The answers to these questions are complex. In amending the Major Crimes Act in recent decades, Congress has expressed different motives that are both much more modest and far less anti-tribal than in 1885. First, Congress has embraced the notion recognized in *Kagama* that it is a federal responsibility to provide public safety in Indian country.<sup>266</sup> Second, in limiting tribal authority in the Indian Civil Rights Act, Congress handicapped tribal efforts to address criminal justice. Tribes must now support greater federal authority if they want serious crime problems addressed.<sup>267</sup> Thus, while most of the original intentions of Congress in the Major Crimes Act reflected hostility to tribal sovereignty, government, and culture, recent expansions of the Major Crimes Act have had some tribal support.

Yet, this tribal support is difficult to understand. A key purpose of the Major Crimes Act was to achieve assimilation.<sup>268</sup> Though assimilation may no longer be a positive norm, the Act does not reflect this dramatic shift in federal policy. It functions in the same manner as it did in 1885, when assimilation was among its goals.<sup>269</sup> And perhaps ironically, it now has a broader scope. The only saving grace in an age when assimilation is out of fashion is that the Act was never very effective in achieving assimilation. In any event,

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266. See, e.g., H.R. REP. NO. 99-528, at 2 (noting that amendment of the Major Crimes Act “is necessary and crucial to effective law enforcement on Indian reservations and to protect the mental health and physical well-being of Indians”); S. REP. NO. 1770, at 4 (1966) (noting that the amendment “will clarify the law in several areas of criminal jurisdiction and thereby provide for a more logical and fair administration of criminal justice”).

267. Tribes may also see the federal criminal justice system as preempting state authority in the field of criminal law and thus protecting their freedom from state criminal authority. See *United States v. Kagama*, 118 U.S. 375, 383–85 (1886).

268. See *supra* Part II.E.

269. See *supra* Part II.E.

assimilation is no justification for this law and never was a reason for tribal support.

The public safety motives behind the law are somewhat less hostile to tribal existence, but they do reflect a paternalistic responsibility that both the federal government and tribes find less and less appealing in an era of "self-determination." The public safety justification also begs other very important questions. If federal programs in virtually every other area of government work better when tribes operate the programs themselves, then what makes criminal justice unique? Why ought criminal justice be an exception to the general policy favoring self-determination and self-governance manifest in almost all other areas of federal Indian policy? Perhaps the most fundamental question is this one: if one strips away the federal government's repudiated policies of assimilating Indians and consolidating federal power over Indian tribes, why should it remain a federal responsibility, and not a tribal one, to provide public safety and criminal justice in Indian country?

One answer is clear. If the asserted purpose of expanding the Major Crimes Act is to provide and improve public safety on Indian reservations, as Congress has indicated,<sup>270</sup> then Congress has provided a rough performance standard against which we can measure the Major Crimes Act.<sup>271</sup> That is, Congress seems to be saying that the Major Crimes Act is valuable because it serves crime prevention and public safety. But measuring the Indian country criminal justice system's performance against Congress's asserted purpose of providing public safety produces a sorry conclusion. Crime against American Indians nationwide seems to have risen dramatically even

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270. Such clearly has been Congress's intention. See, e.g., H.R. REP. NO. 99-528, at 2 (indicating that felonious sexual molestation of a minor in Indian country must be added to the Major Crimes Act to give Indian children "the same protections as other American children"); *Criminal Jurisdiction in Indian Country: Hearing Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary, House of Representatives*, 94th Cong. 10 (1973) (describing amendments as helping to "alleviate a serious legal obstacle to federal efforts to reduce the major crime rate on Indian reservations").

271. The logic of using public safety statistics as a standard for measuring the quality of the federal Indian country criminal justice system is certainly dubious. Many of my colleagues have been troubled by my willingness to discuss them in that context. I have no illusions that a perfect criminal justice system can lower crime rates. I discuss the statistics in this context only because public safety is the only justification Congress has offered for expanding federal authority in an area in which federal authority seems highly anachronistic. When Congress offers a different justification, I will evaluate the results against that standard.

as Congress has steadily expanded the substantive scope of the Major Crimes Act.<sup>272</sup>

And the crime rate seems worst in precisely the areas in which the federal government has been the most aggressive. For example, despite the federal government's extensive expansion of Indian country sex crimes in the Major Crimes Act in 1986, the Department of Justice's own study in the mid-1990s showed that Indian children under twelve are raped or sexually assaulted at a rate three-and-a-half times higher than the average child under age twelve.<sup>273</sup>

The Major Crimes Act has become unmoored from its original purposes<sup>274</sup> and yet it is failing, in dramatic fashion, to meet these new public safety purposes that Congress has described for it.<sup>275</sup> Indeed, Congress may have set for itself an impossible task. Federal laws, at least if they are based on a theory of deterrence, may not be able to provide a safer environment anywhere, much less on Indian reservations. In the social science literature, there is a growing dissatisfaction with deterrence as a viable foundation for the particular rules formulated in criminal justice systems.<sup>276</sup> Yet, if crime

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272. For many tribes before significant contact with non-Indians, "the cohesiveness and intimacy of tribal society resulted in a low crime rate." HAGAN, *supra* note 85, at 18–19. Crime has become a very serious problem among Indians. See generally LAWRENCE A. GREENFELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, AM. INDIANS & CRIME 5 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf> (presenting an array of statistics profiling the impact of crime on Indians).

273. GREENFELD & SMITH, *supra* note 272, at 38. During the years 1992–96, Indian children under twelve were raped or sexually assaulted at a rate of seven incidents per thousand children. *Id.* The aggregate rate for children of all races was only two rapes or sexual assaults per thousand children. *Id.* While the Department of Justice figures are aggregated for the whole country and not only Indian reservations, and it is difficult to draw clear causation from any set of facts, the indicia suggest that the problem is serious.

274. See *supra* Part III.G.

275. See generally GREENFELD & SMITH, *supra* note 272 (providing statistics that demonstrate the prevalence of crime and the impact of crime on Indians).

276. See generally Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Best when Doing Its Worst*, 91 GEO L.J. 949 (2003). Robinson and Darley raise a number of concerns about deterrence arguments, some of which apply with particular force in Indian country. For example, they strongly doubt that criminal defendants generally have a clear knowledge of the law when they act. Likewise, they doubt whether, even if the defendants have such general knowledge, they will bring it to bear in their decisionmaking process regarding their actions at any relevant time before they act. Given that a substantial number of federal Indian country defendants are intoxicated when they commit offenses, Robinson and Darley's thesis might be particularly damning to federal Indian country laws that are justified under a deterrence theory. See Kathy Helms, *Navajo Nation No. 1 in Crime*, GALLUP INDEP. NEWSPAPER, Nov. 1, 2004, at 1 (quoting Assistant United States Attorney Diane Humetewa as stating that "[n]inety-nine percent of the cases referred to [the Arizona United States Attorney's Office] involve alcohol or substance abuse"), available at <http://redwebz.org/modules.php?name=News&file=article&sid=762>; see also U.S. SENTENCING

deterrence and public safety are not being served by the Act, then the only purposes it may serve are preservation of federal control over Indians and coercion of Indians into assimilating federal norms. But both of these purposes are long out of fashion and indeed incompatible with modern policy norms. In other words, the Act may now be lacking any viable theoretical foundation.

#### *H. Modest Steps Toward Tribal Self-Determination in Federal Criminal Justice*

Despite the expansion of the Major Crimes Act, a small but important development toward tribal self-determination occurred in 1994 when Congress enacted omnibus "tough on crime" legislation which included three measures designed to align federal criminal justice with contemporary Indian policy by instilling a greater level of autonomy in Indian government. This legislation reinvigorated the death penalty for federal crimes,<sup>277</sup> created a federal "three strikes law" that provides for life sentences for repeat offenders,<sup>278</sup> and lowered from fifteen years to thirteen years the age at which a juvenile may be prosecuted as an adult in the federal system.<sup>279</sup> In each of these provisions, however, Congress treated Major Crimes Act offenses specially.<sup>280</sup> As a result, the federal death penalty now

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COMM'N, REPORT OF THE NATIVE AMERICAN ADVISORY GROUP 42 (Nov. 4, 2003), <http://www.usssc.gov/NAAG/NativeAmer.pdf> ("Across the board, alcohol plays a significant role in all violent crime arising in Indian country.").

277. Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. VI, § 60002(a), 108 Stat. 1796, 1968 (1994) (codified at 18 U.S.C. § 3598 (2000)).

278. *See id.* tit. VII, § 70001, 108 Stat. at 1984 (codified at 18 U.S.C. § 3559(c)(6)) (providing for mandatory life imprisonment for persons convicted of their third serious violent felony or drug offense, but providing each tribe with criminal jurisdiction the option as to whether the provision will apply to Indian country offenses occurring within the tribe's jurisdiction).

279. *See id.* tit. XIV, § 140001, 108 Stat. at 2031 (codified at 18 U.S.C. § 5032). Federal law generally provides that a juvenile at least fifteen years old may be treated as an adult under the federal criminal laws under certain circumstances. This section of the 1994 amendments provides that a juvenile thirteen years old may be treated as an adult if he commits particular crimes of violence or possesses a firearm during the commission of an offense. The tribal option provision allows the relevant tribal government to determine whether the juveniles can be transferred at age thirteen or whether the age fifteen serves as the absolute floor for federal juvenile transfers for cases arising in Indian country.

280. Perhaps in recognition of what a tremendous intrusion it is to tribal sovereignty, the death penalty has always been treated specially in Indian country. In 1897, Congress abolished the death penalty for all federal crimes except murder, rape, and treason, thereby decreasing from sixty to three the number of federal crimes for which an offender could be put to death. *See* Act of Jan. 15, 1897, ch. 29, § 1, 29 Stat. 487, 487 (1897); *Furman v. Georgia*, 408 U.S. 238, 339 (1972); *see also* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 367 (1999) (describing the history of capital punishment in the

applies to an Indian prosecuted for murder under the Major Crimes Act only if the tribal government with jurisdiction over the reservation has opted in to the system.<sup>281</sup> Under this "tribal option" provision, a tribal government wishing the federal death penalty to apply in applicable federal major crimes prosecutions on its reservation must affirmatively so elect.<sup>282</sup> Apparently, only one tribe, the Sac and Fox Nation of Oklahoma, has done so.<sup>283</sup> The tribal option also applies to the federal "three strikes" law<sup>284</sup> and the provision allowing thirteen-year-olds to be treated as adults in the federal system.<sup>285</sup>

As a result of these changes, the federal system now allows a very limited tribal voice to be heard in a criminal justice system that is run not by Indian tribes but by outsiders. In this respect, the tribal option approach represents a clear recognition by Congress that what is appropriate policy for the rest of the country may not be appropriate for each Indian reservation. By giving tribes a choice, it creates some measure of self-determination within the narrow, but important, area of criminal justice. But if self-determination makes sense here, why limit it?

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United States). For rape under the Major Crimes Act, the abolition law went further; it specifically prohibited imposition of the death penalty against an Indian prosecuted for rape and instead directed federal courts to sentence such a defendant to a term of imprisonment. See Act of Jan. 15, 1897, § 5, 29 Stat. at 487 ("[A]ny Indian who shall commit the offense of rape within the limits of any Indian reservation shall be punished by imprisonment at the discretion of the court."). Thus, after 1897, an Indian prosecuted for a major crime could be put to death only if the offense was murder.

281. See Federal Death Penalty Act of 1994, Pub. L. No. 103-322, tit. VI, § 60002(a), 108 Stat. 1959, 1968 (codified at 18 U.S.C. § 3598). This law provides that the federal death penalty will apply to crimes arising under the federal Indian country criminal statutes only if the Indian tribe with misdemeanor criminal jurisdiction opts to allow the capital sentences. In arguing for this provision on the Senate floor when it was first introduced in a previous Congress, Senator Daniel Inouye, co-chairman of the Senate Indian Affairs Committee, indicated that this amendment "accords to tribal governments a status similar to that of the State governments, namely that tribal governments, like State governments, can elect whether or not to have the death penalty apply for crimes committed within the scope of their jurisdiction." 137 CONG. REC. 98, 982-83 (1991).

282. Federal Death Penalty Act of 1994, tit. VI, § 60002(a).

283. See Sac and Fox Nation Resolution SF-95-50 (adopted Feb. 23, 1995) (on file with author). In the same document, the Sac and Fox Nation also "opted in" to the three strikes provision and the provision that allows thirteen-year-olds to be prosecuted as adults, both of which are discussed *infra*.

284. See *supra* note 278.

285. See *supra* note 279.

## IV. SELF-DETERMINATION AND CRIMINAL LAW

While the absence of tribal self-determination in criminal justice may offer insight into the reasons for the federal government's failure to achieve the public safety results anticipated by Congress, in contrast to the success shown in federal programs that have embraced tribal self-determination, these federal laws present another problem from the perspective of tribal governments and communities. Given the fundamental importance of criminal justice systems and the overwhelming power over individuals and the community that these systems represent, one might assert that no real measure of tribal self-determination can be achieved if self-determination is absent in the provision of criminal justice for serious offenses. Moreover, federal criminal laws may simply not work well when applied to a community whose values they do not represent. This Part explores these questions.

A. *The Theory of Tribal Self-Determination*

Self-determination springs from prominent theories of liberal political philosophy that dominated the twentieth century.<sup>286</sup> In both its general form and its specific application to tribes, it recognizes that human liberty and equality are served when people and communities can freely shape their own governing institutions and align these institutions with the will of the people. The theoretical justifications for tribal self-determination are related to government agency: "Self-determination has had the predictable effect of improving the accountability of government officials to their citizens across many dimensions."<sup>287</sup>

Internationally, self-determination has been a key facet of redress for the harmful legacy of colonization.<sup>288</sup> Similar inclinations animate the move toward self-determination in the United States. Colonization has an important legacy that the United States may well have to endure as long as Indian tribes continue to exist. This may well be a very long time. As the Supreme Court has recognized,

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286. See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 103-08 (2d ed. 2004) (describing the development of notions of self-determination for indigenous peoples).

287. Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, at 37 (Joint Occasional Papers on Native Affairs, 2004-03, Harvard Project on American Indian Economic Development, Kennedy School of Government, Harvard University (2004)), available at [http://jopna.net/pubs/JOPNA06\\_MythsandRealities.pdf](http://jopna.net/pubs/JOPNA06_MythsandRealities.pdf).

288. ANAYA, *supra* note 286, at 105-06.

Indian tribes were here for centuries before the United States came into being.<sup>289</sup> And as tribal leaders have recognized so often that it has become cliché, Indian tribes plan to occupy this land long after the United States is gone.

Given the utter failure of numerous federal initiatives to assimilate Indians and terminate tribal governments during the last two centuries, the persistence of Indian tribes as separate communities no longer seems subject to doubt. The genius of the tribal self-determination rhetoric for federal policymakers is that it recognizes the inevitability of Indian tribes and allows policymakers to embrace Indian tribes. It thus avoids the inexorable failure that past assimilationist policies have faced.

Self-determination, as a federal policy, has also apparently been good for tribes. Through tribal self-determination-oriented amendments to federal laws, tribes now have the opportunity to define the standards that apply to the air that the tribal community breathes.<sup>290</sup> Tribes can set the water quality standards for the waters that run through the reservation, even when those standards create tremendous economic costs for upstream, off-reservation users.<sup>291</sup> The tribes' school boards, rather than federal education officials, make the key decisions about the curriculum that will be offered in Indian schools.<sup>292</sup> And tribes can make their own decisions about how to allocate health care and many other social services among its members.<sup>293</sup> Tribes even provide their own policing organizations and can adjudicate misdemeanor criminal cases.<sup>294</sup>

These initiatives have improved the ability of each Indian tribe to further its own tribal values and ultimately to map its own cultural

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289. *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (recognizing that Indian tribes predate the United States Constitution and therefore are not subject to the Bill of Rights).

290. See Clean Air Act, 42 U.S.C. § 7601(d) (2000).

291. Clean Water Act, 33 U.S.C. §§ 1370, 1377(d); see *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996); see also *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) (upholding the EPA's approval of water quality standards adopted by the Confederated Salish and Kootenai tribes of the Flathead Reservation).

292. Allison M. Dusias, *Let No Indian Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 862-64 (2001); Eileen M. Luna, *Seeking Justice: Critical Perspectives of Native People*, 4 GEO. PUB. POL'Y REV. 129, 130 (1999).

293. Rose L. Pfefferbaum et al., *Providing for the Health Care Needs of Native Americans: Policy, Programs, Procedures, and Practices*, 21 AM. INDIAN L. REV. 211, 223 (1997).

294. See, e.g., *United States v. Lara*, 541 U.S. 193, 199 (2004) (holding that the congressional act overruling *Duro v. Reina* was a lawful exercise of congressional plenary authority over Indian tribes and properly allowed tribe to assert criminal authority over Indians who are not tribal members).



destiny. According to self-determination proponents, these initiatives have also improved the quality of service to Indian communities in each of these areas.<sup>295</sup>

Yet tribes lack the right to define or punish serious criminal offenses. In light of the adoption of principles of self-determination in so many other areas, the lack of tribal control over felony criminal justice stands out as an unusual exception. Indeed, the power to prosecute and imprison an Indian for an on-reservation crime against another Indian is perhaps the single most aggressive use of federal power against an Indian that routinely occurs in the modern era. It thus simultaneously works one of the greatest existing federal intrusions on internal tribal affairs. The question then, is whether criminal law is central to the achievement of tribal self-determination.

### *B. Criminal Law and Community Norms*

The notion that substantive criminal law is important to community self-determination has long been settled as a matter of criminal law theory. Unlike laws that regulate mere civil interaction, criminal laws are implicated only when the community has identified conduct so serious that it harms the community as a whole.<sup>296</sup> Harmful activity constitutes a crime and not merely a civil wrong only if it is serious enough to be worthy of the most formal and solemn pronouncement of the community's moral condemnation.<sup>297</sup> In that respect, through criminal laws, the community defines what it values and what it abhors.<sup>298</sup> In essence, criminal laws codify the moral foundations of the community. Criminal law is, in that sense, critical to community identity. One could argue that criminal law is thus more fundamental than civil or regulatory laws to community identity and community self-determination.

The importance of criminal law in articulating norms presents itself in a myriad of ways. From the Introduction, recall the differing laws of Texas and California on use of deadly force in defense of

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295. Cf. Stephen Cornell & Joseph P. Kalt, *Where Does Economic Development Really Come From? Constitutional Rule Among Contemporary Sioux and Apache*, 33 ECON. INQUIRY 402, 402 (1995) (theorizing that a tribe is likely to be much more successful when the governance structure "matches" its cultural heritage).

296. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 402-06 (1958).

297. *Id.*

298. See Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 537 (2000) ("Law expresses the values and expectations of society; it makes a statement about what is good or bad, right or wrong.").

property.<sup>299</sup> In codifying and reifying each state's decision as to whether to privilege the use of deadly force against a trespasser, each state reflects as much or more about its respective norms as to the relative value of private property and human life as it does about "crime." That is what criminal laws do—they help communities prioritize evils and assert, protect, and defend their core values.

Classical scholars since at least Emil Durkheim have recognized a clear and strong relationship between community values and criminal law.<sup>300</sup> As Durkheim described, criminal laws are the tangible embodiment of the community's sacred moral values.<sup>301</sup> Criminal laws help socialize the community by reinforcing those norms that are reflected in the legal structure and help mold broader behavioral norms.<sup>302</sup> Though criminal laws immediately ensure that the community's values will be honored either through compliance or enforcement, criminal law and punishment also have a broader social "impact on sensibilities, solidarities, and social relations . . . far beyond the offender in the dock or the inmate in the prison cell."<sup>303</sup>

In addition to mere instrumental functions, criminal laws also have an expressive function—they declare and describe community values—and in that context have a broader and more diffuse effect on societal norms.<sup>304</sup> In asserting that criminal law is infused with "social meaning," for example, Professor Kahan cites the federal law criminalizing flag burning as expressing important community values about "the virtue of patriotism and the relative status of veterans and dissidents in our society."<sup>305</sup> To be more explicit, a flag-burning law regulates expression by limiting what a society views as civil discourse and free speech. Criminal laws express what the community values and what it will—and will not—tolerate. In this way, criminal laws constitute an important window on the community and are an important means of community self-expression and self-definition.<sup>306</sup>

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299. See *supra* notes 21–22 and accompanying text.

300. See, e.g., DURKHEIM, *supra* note 18, at 80–81 ("We can, then . . . , say that an act is criminal when it offends strong and defined states of the collective conscience.").

301. *Id.*

302. *Id.*

303. David Garland, *Sociological Perspectives on Punishment*, in 14 CRIME AND JUSTICE: A REVIEW OF RESEARCH 115, 118 (Michael Tonry ed., 1991).

304. See MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 95–96 (1995) (citing the sociology works of Emil Durkheim and Norwegian scholar Johannes Andenaes).

305. Kahan, *supra* note 19, at 363.

306. One scholar has characterized these "expressive functions of criminal law" as including a lot of different tasks, such as changing the meaning of certain actions, changing the sanctions and rewards for certain actions and behaviors, causing actors to internalize

Criminal law affects and reinforces societal norms by producing public discourse about those same norms when the laws are enacted and when they are enforced.<sup>307</sup> Indeed, Durkheim believed that the process of criminal law and punishment was designed less as a measure to reform the individual offender and more as a means of reinforcing the social order among the broader community.<sup>308</sup>

### C. *Federal Criminal Justice and Tribal Values*

The notion that criminal law has a strong effect on community norms was, at least to some degree, understood by federal lawmakers when the Major Crimes Act was enacted in 1885. Policymakers explicitly sought to use federal prosecutions under federal criminal laws to change the social norms of Indian tribes; indeed, that policy initiative was a stated motivation for the law.<sup>309</sup> Now that self-determination is the dominant normative principle in federal Indian policy, such policy initiatives are out of favor. But the legal and sociological dynamics of the Major Crimes Act continue to operate as in 1885. In other words, though the stated justifications for the Major Crimes Act may have changed, many of its normative effects have not.

The Major Crimes Act regime assaults the notion of tribal self-determination in several important ways. First, it creates a scheme in which a community alien and external to the tribal communities defines the local offenses within the tribal community.<sup>310</sup> Second, it serves as the substantive mechanism of a criminal justice system in which the alien community adjudicates the everyday violations of the alien norms, thereby reifying the alien norms on a daily basis through the process of criminal justice.<sup>311</sup> Third, in setting and then

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avored norms and to reject disfavored ones, and thus changing the behaviors and the preferences of actors. Ted Sampsell-Jones, *Culture and Contempt: The Limitations of Expressive Criminal Law*, 27 SEATTLE U. L. REV. 133, 134 (2003).

307. And some forms of enforcement speak louder than others. See Eric Posner & Dan Kahan, *Shaming White Collar Criminals: A Proposal for Strengthening the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 382 (1999) (noting the “expressive superiority” of imprisonment to mere fines).

308. Garland, *supra* note 303, at 123.

309. See *supra* notes 138–45 and accompanying text.

310. See Christine Zuni Cruz, *Four Questions on Critical Race Praxis: Lessons from Two Young Lives in Indian Country*, 73 FORDHAM L. REV. 2133, 2152 (2005) (questioning the results of a justice system in which “the parameters are being set by those who come from outside the community”).

311. *Id.* at 2150 (“The Major Crimes Act not only takes the individual out of the community but places the judgment of the wrongdoing in a framework outside the community that experienced the wrong.”).

reinforcing through prosecutions the norms of an alien community, it effectively preempts the Indian communities' own opportunity to formally articulate their norms about serious offenses and to have them reinforced through a criminal justice system. Each of these harms should be considered separately because each has its own pernicious effects.

Consider first the extension of federal norms to Indian country. The Major Crimes Act was an explicit attempt to replace tribal norms and processes with federal norms and processes that Congress deemed to be superior. In that sense, the very existence of the Major Crimes Act—normative standards set by outsiders—is the antithesis of tribal self-determination.

Many of the harms are not intentional and are, in fact, inadvertent. The Major Crimes Act is not a law of general applicability; it has only limited geographic coverage and only authorizes prosecutions of Indians.<sup>312</sup> Yet, rather than addressing the unique circumstance that might prevail in such cases, the scheme borrows from the general federal penal framework. Thus, when significant changes are made to the general federal law, such as adoption of the federal sentencing guidelines, for example,<sup>313</sup> Indians are often directly affected. Yet Congress is unlikely to have considered the particular effect of these laws in Indian country and on Indian tribes and Indian defendants<sup>314</sup> (or Indian country crime victims, for that matter).

The negative effects of federal law on Indian communities are perhaps most troubling when Congress enacts laws during a "moral panic"<sup>315</sup> to address a serious perceived problem, such as those related

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312. See 18 U.S.C. §§ 1151, 1153 (2000).

313. See U.S. SENTENCING COMM'N, *supra* note 276, at 16 (discussing apparent failure of the Sentencing Commission to consider the views and concerns of tribal governments and Native American offenders in drafting the original sentencing guidelines); see also *United States v. One Star*, 9 F.3d 60, 61 (8th Cir. 1993) (concluding that the Commission had not considered the circumstances involving life on Indian reservations in setting sentence guidelines).

314. Cf. *United States v. Goodface*, 835 F.2d 1233, 1238 (8th Cir. 1987) (holding that a count with a mandatory sentencing enhancement not mentioned within the Major Crimes Act for use of a firearm during a crime of violence was lawfully included in an Indian country indictment because there was no indication that Congress intended to exempt Indians from this "924(c)" sentence enhancement provision).

315. "Moral panic" generally refers to circumstances in which public passions, and sometimes, hysteria, are stirred in reaction to troubling events. Several scholars have recently focused on laws produced in response to moral panics. See generally PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 6-8 (1998) (discussing social policy related to sex crimes from the 1890s to the 1990s); MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN*

to violent crimes, like carjacking or sex offenses, without specifically considering the effect of the law in Indian country. In the PROTECT Act of 2003,<sup>316</sup> for example, Congress enacted a law to deal with child pornographers and those who commit so-called “travel offenses”—that is, predators who meet children (often through the Internet) and then travel to meet with the child to commit a sex offense.<sup>317</sup> In Congress’s zeal to increase penalties for such conduct,<sup>318</sup> it created several new provisions that may also have significant effects in Indian country, which lies on the opposite side of the digital divide.<sup>319</sup> Yet, Congress failed to consider Indian country cases specifically to evaluate whether the provisions were appropriate for tribal communities.<sup>320</sup> Like innocent bystanders inadvertently hit by a stray bullet during a drive-by shooting, Indian country communities and defendants are sometimes impacted by federal initiatives that have nothing to do with Indian reservations.<sup>321</sup> As a result, an Indian defendant who has never had access to a computer may serve a lengthier sentence because Congress is attempting to target defendants who use computers to commit sex offenses.

Despite the absence of the Indian country community in the process of articulating the normative values that go into such laws, the Indian country community must endure imposition of the norms through their inclusion in the background rules of federal criminal law that are applied in Indian country cases.<sup>322</sup> These federal norms

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AMERICAN PENAL CULTURE 93–95 (2004) (discussing gun control laws stemming from the King and Kennedy assassinations of the 1960s).

316. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 & 28 U.S.C.A.).

317. *Id.* § 105, 117 Stat. at 654; *id.* § 501, 117 Stat. at 676.

318. Among other substantive provisions, the PROTECT Act changed the statute of limitations for any offense involving the sexual or physical abuse, or kidnapping, of a child under the age of eighteen by providing that the limitations period shall not preclude prosecution during the life of the child. *Id.* § 202 (codified as amended at 18 U.S.C.A. § 3283 (2003)). It also created a “two strikes you’re out” provision creating a mandatory life imprisonment sentence for child sex offenders convicted of a second serious offense. *Id.* § 106 (codified as amended at 18 U.S.C.A. § 3559(e) (2003)).

319. Leonard Baynes, *Deregulatory Injustice and Electronic Redlining: The Color of Access to Telecommunications*, 56 ADMIN. L. REV. 263 *passim* (2004) (describing the widespread lack of access on Indian reservations to telecommunications—including the Internet—and even personal computers).

320. U.S. SENTENCING COMM’N, *supra* note 276, at 22–24.

321. *Cf.* TONRY, *supra* note 315, at 215 (noting that minority defendants are often adversely affected by policies that are not intentionally directed at minority groups but which have a disparate impact on them).

322. *Cf. id.* (demonstrating the disparate impact certain laws have on black and Hispanic criminal defendants).

become, in effect, enforceable rules on the reservation without any tribal adoption of the norms or values that justify them.

While the Major Crimes Act and the general federal laws with which it interfaces impose formal criminal norms, consider just one example of informal norm application that also arises in such a system. In the federal system, the President of the United States can issue a pardon to a convicted defendant.<sup>323</sup> Whether to issue such a pardon is a matter of discretion, or in other words, a matter of informal application of executive grace, presumably based on the President's belief in whether a defendant is deserving of mercy.<sup>324</sup> Here, the President will not decide whether to exercise mercy based on tribal norms, but based on his own norms about mercy, which may be quite different than tribal beliefs. Discretionary decisions, such as decisions by prosecutors as to whether to prosecute, which may have a tremendous impact upon everyone involved in the crime, are often driven by informal norms. Impositions of such informal alien norms on tribal communities are thus no less harmful than imposition of formal ones through law.

In contrast to the assaultive nature of applying outside norms to tribal communities, turn now to the converse problem, the retardation of the tribe's own development and preservation of its norms. In effect, federal felony criminal justice law preempts tribes from addressing serious offenses themselves. To be sure, in the absence of the Major Crimes Act, Indian tribes would likely criminalize each of the offenses currently listed in the Major Crimes Act. Tribes would surely criminalize murder, for example.<sup>325</sup> But in doing so, tribes might define the offenses differently. They might prioritize the offenses differently. Moreover, they would be able to make their own choices as to the relative value of, for example, private property, trespassing and trespassers, human life, and free speech.<sup>326</sup> Tribes might also adjudicate the cases differently and

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323. U.S. CONST. art. II, § 2.

324. *But see* TONRY, *supra* note 315, at 212–13 (describing President Clinton's midnight pardons of 2001 as notorious because of appearances that they were driven by concerns other than mercy, such as political cronyism and campaign contributions).

325. *See* Talton v. Mayes, 163 U.S. 376, 385 (1896) (refusing to disturb Cherokee murder conviction).

326. Declaration of these values comes both in substantive offenses and in defenses. In the federal system, common legal defenses such as self-defense, defense of others, and defense of property are not codified, but develop as a matter of federal common law. In other words, federal judges tend to fashion the legal rules, often by borrowing from state law. *See* United States v. Brown, 287 F.3d 965, 974 (10th Cir. 2002) (citing cases and discussing the substantive content of the defense of self-defense); United States v. Keiser, 57 F.3d 847, 852–53 (9th Cir. 1995) (wrestling with different state formulations on one of

create dramatically different punishment or sentencing regimes.<sup>327</sup> And a criminal code that “fail[s] to mesh with the moral consensus of the regulated community will lack credibility.”<sup>328</sup>

Perhaps the most striking example of the imposition of federal norms and the intentional disregard of tribal community norms occurs in the area of sentencing. Under the federal sentencing guidelines, federal authorities not only impose their own values in Indian country, including mandatory minimum sentences for certain crimes, they also purposely ignore legitimate tribal expressions of tribal values. Indeed, as explained in greater detail in another article,<sup>329</sup> the federal sentencing guidelines require federal judges to count state and federal criminal convictions to assess an Indian offender’s criminal history for purposes of determining the severity of a federal sentence.<sup>330</sup> Yet, federal judges are instructed to ignore convictions rendered by the Indian offender’s own tribal courts.<sup>331</sup>

From the normative viewpoint presented here, the federal sentencing guidelines are not only wrong, but also perverse. For reasons previously articulated,<sup>332</sup> the convictions rendered by a tribal court in the offender’s own community would seem to have far greater legitimacy than federal convictions levied under the laws of an external community. Thus, tribal convictions ought to be treated with *greater* respect than state and federal convictions, not less.

To put it more plainly, criminal law is critical. Given its key place in defining a community, it is far more important for a tribe to define its felonies than its water quality standards. Yet, under current

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the self-defense elements and ultimately declining to adopt any of them); *United States v. Iron Shield*, 697 F.2d 845, 847–48 (8th Cir. 1983) (deciding whether it is appropriate to instruct on involuntary manslaughter and self-defense on the same facts in an Indian country case).

327. There is a large body of literature in restorative justice based on the practices of Indian tribes and other indigenous cultures. See generally Robert Yazzie, “*Hozho Nahasdlıi*”—*We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117 (1996).

328. Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. L. REV. 1, 15 (2000).

329. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403 *passim* (2004).

330. *Id.* at 413–16; see also Kevin Washburn, *Reconsidering the Commission’s Treatment of Tribal Courts*, 17 FED. SENT. REP. 209, 209, 215–17 (2005) (arguing that tribal court dispositions are more legitimate for Indian defendants than state or federal convictions). The *Federal Sentencing Reporter* article is followed by short comments from several federal judges evaluating the argument. *Id.*

331. Washburn, *supra* note 329, at 442.

332. See *supra* notes 265–72 and accompanying text.

federal law, a tribe can do the latter, but not the former.<sup>333</sup> Because of the importance of the criminal law in defining community values and demarcating the boundaries of allowable conduct, the community's absence in these key areas of criminal justice necessarily calls into question the legitimacy and the effectiveness of the criminal laws. When the law fails to mirror the community's values, this lack of alignment undermines the law's moral credibility and "weakens the law's ability to dictate proper conduct."<sup>334</sup> People will not conform to laws that they do not view as morally credible.<sup>335</sup> This theory, more than any other, may explain the problems that the federal government has encountered in applying federal laws in Indian country. Federal laws in Indian country simply have a legitimacy problem.

In addition to denying self-determination to Indian communities, the current federal structure also speaks loudly about the status of tribes as governments. In a slightly different context, Indian law expert Sam Deloria has noted that the limited authority of tribes to incarcerate criminal offenders is one of the clearest commentaries on the existence and scope of tribal sovereignty.<sup>336</sup> It is quite limited as to some very serious matters.<sup>337</sup> Indeed, though the Supreme Court has regularly affirmed that Indian tribes are a good deal more than "private voluntary organizations,"<sup>338</sup> the structure of Indian country criminal justice might raise doubts in some quarters.

Classical sociologist Max Weber once made a statement similar to Deloria's. Weber postulated that one of the key distinctions between a "state," that is, a government, and other kinds of social organizations is that a state "monopolizes the legitimate application of violence for its coercive apparatus."<sup>339</sup> If the use of various forms of coercive violence, such as incarceration and the death penalty, is

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333. See *supra* note 237 and accompanying text.

334. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 201-02 (1995).

335. *Id.* at 202.

336. Sam Deloria is the Director of the American Indian Law Center and made this assertion at a Federal Bar Association Indian law conference in the context of the lack of tribal authority to jail non-Indians, commenting indirectly, in other words, on *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

337. *Id.*

338. See *Duro v. Reina*, 495 U.S. 676, 688 (1990); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 892 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982); *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

339. MAX WEBER ON LAW IN ECONOMY AND SOCIETY 342-47 (Max Rheinstein ed., Max Rheinstein & Edward Shils trans., 1954). Professor Carole Goldberg graciously recommended review of Weber's work in this context.



one of the indicators of "statehood," then the limitations on tribal coercive power, such as those set forth in the Indian Civil Rights Act, must raise questions as to whether tribal governments are sovereigns at all. Using Weber's theory, and as reflected in Supreme Court opinions, tribes lack this key indicator of "statehood" or sovereignty and are, at best, only "quasi-sovereign" states.<sup>340</sup> In other words, just as full self-determination is not achievable under the existing scheme, tribal sovereignty is necessarily substantially limited as long as the federal scheme and its norms predominate.

In short, the imposition of the federal laws not only implicates the effectiveness of the federal criminal justice system; it effectively denies the Indian community an important outlet for self-determination and self-definition. While this Article does not necessarily argue that the Major Crimes Act must be abolished, it is important to understand the ramifications of the Act for the Indian country communities that it regulates. Rather than exercising self-determination, tribes now live with criminal laws that reflect the values—and relative value judgments—of an external community. In that respect, the Major Crimes Act represents a vestige of colonialism, or at least of policies favoring federal control and forced assimilation. In other words, it embodies the outmoded values and erroneous federal policies that tribal self-determination initiatives seek to remedy.

## V. "DECOLONIZING" FEDERAL INDIAN COUNTRY CRIMINAL JUSTICE

While the foregoing discussion has measured the federal Indian country criminal justice regime against the norms of modern federal Indian policy and found it utterly inconsistent with those prevailing norms, the logical next step is to determine the solution, a task that some of my colleagues might describe as "decolonizing" Indian country criminal justice.

### A. *The Rhetoric of Decolonization*

The rhetoric of "colonization" and "decolonization" has been used widely and colorfully in the discourse of American Indian law and policy,<sup>341</sup> but it has recently come under attack by Professor

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340. *Oliphant*, 435 U.S. at 196.

341. Professor Rob Williams may have pioneered the use of such rhetoric at least in the context of American Indian law scholarship. See Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence*, 1986 WIS. L. REV. 219, 222–23 [hereinafter Williams, *Algebra*];

Robert Laurence.<sup>342</sup> Professor Laurence argues that the rhetoric of colonization ill suits the modern American experience.<sup>343</sup> Laurence argues that “colonialism” is more appropriate for circumstances in which the invaders are only temporarily “in country,” or, at a minimum, consider themselves ex-patriots from the motherland which they still view as “home.”<sup>344</sup> Under this view, the rhetoric of colonialism ceased being accurate when the then-colonists decided that they were not going back to England, declared independence, and recast themselves as “Americans.”<sup>345</sup> In other words, the American experience is not one of colonization, but one of invasion.

To some scholars, the rhetoric of de-colonization connotes some sort of radicalism, but the term is no more radical than current mainstream federal Indian policy. Consider the rhetoric in context: presumably, each tribe had full self-determination prior to European contact (and the only interference in a tribe’s ability to self-govern came from other tribes). Each tribe gradually lost much of its independence and authority to self-govern as the American continent was colonized and then settled.<sup>346</sup> Modern federal efforts to restore tribal self-determination are really designed to address the ill effects of colonization and to restore to tribes some of the governmental powers that existed prior to colonization. In that sense, the federal policy which has been cast in the affirmative as “increasing tribal self-

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Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1135 (1994). And many others have adopted it as well. See Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 85–86 (1993); Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL’Y 121, 124, 132, 143 (2004) (discussing the similarities between rape and colonization); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 381–85 (1993); Robert B. Porter, *Legalizing, Decolonizing and Modernizing New York State’s Indian Law*, 63 ALB. L. REV. 125, 136–43 (1999).

342. Robert Laurence, *Antipodean Reflections on American Indian Law*, 20 ARIZ. J. INT’L & COMP. L. 533, 539–43 (2003). Professor Laurence’s critique of the use of rhetoric in Indian law is not entirely different from Professor Randall Kennedy’s criticism of the use of highly charged rhetoric such as “lynching” and “genocide” by African American advocates. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 9 (1997).

343. Laurence, *supra* note 342, at 542.

344. *Id.* at 539–40.

345. *Id.* at 539–43; see also Robert Laurence, *Don’t Think of a Hippopotamus*, 40 TULSA L. REV. 137, 140–45 (2004) (generally contrasting the invasions of Iraq and America).

346. See, e.g., *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 544–45 (1823) (discussing the doctrine of discovery and the loss of exclusive tribal authority over tribal lands).

determination" might just as easily be cast in a more negative sense as "addressing colonization" or "decolonizing."<sup>347</sup>

Whether Professor Laurence's thoughtful opposition to rhetoric of colonization is based on its perceived radicalism or simply its historical inaccuracy, it rings hollow in the context of the federal Indian country criminal justice system. Federal law enforcement officials and prosecutors do not view Indian country as their "home," but as a place that they visit only from time to time to exercise outside authority.<sup>348</sup> Indeed, Indian country is not a place where these federal officials have settled permanently and intend to remain.<sup>349</sup> Much of Indian country constitutes separate territory that federal authorities visit only to take suspects into custody to try them under laws not of the Indian communities' own design. Accordingly, even under Professor Laurence's narrow view of what "colonization" ought to mean,<sup>350</sup> this Article argues that the rhetoric fits the circumstances of federal Indian country criminal justice. Colonization continues to exist, at least in some respects, in this corner of the world.

Nevertheless, while decolonization might itself seem to suggest the solution to the colonization problem, this too is only rhetoric. The rhetoric may help describe and understand the problem in a normative manner, but it is not very helpful in identifying a solution.

Indian country criminal justice is an area in which solutions are notoriously difficult to find. The best evidence may be the work by Professor Robert Clinton. Writing on the federal Indian country criminal justice system in the mid-1970s, Professor Clinton published an initial article that carefully surveyed the history and the formation of the federal Indian country jurisdictional scheme.<sup>351</sup> He then published a second article describing the scheme in its current form, famously characterizing it as a "jurisdictional maze."<sup>352</sup> And he promised a third article on "possible reforms in the structure of

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347. Cf. Catherine Brown, *Are Indigenous People Entitled to International Juridical Personality?*, 79 AM. SOC'Y INT'L L. PROC. 189, 196 (1985) (reporting remarks by Hurst Hannum, indicating that "self-determination, legally speaking, is little more than a code word for decolonization").

348. FBI agents that investigate the most serious Major Crimes Act offenses are almost always located in Resident Agency offices outside the reservation in border towns such as Bemidji, Minnesota, or Farmington or Gallup, New Mexico. See Washburn, *supra* note 2, at 719.

349. Certainly this is a key part of the argument that their exercise of authority is illegitimate.

350. See *supra* note 342 and accompanying text.

351. Clinton, *Development*, *supra* note 28, *passim*.

352. Clinton, *Criminal Jurisdiction*, *supra* note 28, *passim*.

criminal jurisdiction on criminal lands.”<sup>353</sup> Though Clinton’s work has since been regarded as the most important work in this area and has been cited by the Supreme Court,<sup>354</sup> Clinton’s third article on possible reforms never materialized.

Now thirty years after Clinton’s work, the crime problems have become even more serious, and the jurisdictional maze has become even more complicated with the fall and then partial resurrection of tribal criminal jurisdiction over nonmembers in *Oliphant*, *Duro* and *Lara*.<sup>355</sup> But, in an era of vigorous tribal self-government, solutions to some of the problems may be more obvious now than in 1975.

### *B. Self-Determination in Criminal Law?*

One key question is whether criminal law is an appropriate subject in which to pursue tribal self-determination. A common concern is that criminal law is different than other governmental programs services—it involves imprisonment of human beings. In other words, some might say that the stakes are simply too high to allow tribes to have control over criminal justice.

Such an argument is based on mistrust of tribal governments and it is, thus, antithetical to the tribal self-determination norm. The high stakes involved in criminal justice represent an even greater justification for self-determination. For if tribes do not have self-determination in this most important of areas, they do not have meaningful self-determination. Defining good and evil is simply more central to self-determination than virtually any other governmental endeavor. Indeed, other than education, it is hard to imagine a government function or service more vital to self-determination.

Indeed, this question was answered long ago in American criminal jurisprudence when the United States adopted the Bill of Rights and made crystal clear the important role that the community plays in American criminal justice.<sup>356</sup> In other words, while the self-determination norm has animated Indian law and policy only for the last thirty years or so, the principle has animated American criminal justice since even before the American Revolution. Arguments

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353. See Clinton, *Development*, *supra* note 28, at 952 n.9.

354. See *Duro v. Reina*, 495 U.S. 676, 680 (1990); *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 154 (2d Cir. 2003).

355. See *United States v. Lara*, 541 U.S. 193, 210 (2004); *Duro*, 495 U.S. at 679; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

356. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 111–14 (1998) (arguing that the Sixth Amendment guarantee of public trials was intended to protect the accused and the public itself).

favoring self-determination in criminal justice were presented in a clear and firm voice in the Declaration of Independence<sup>357</sup> and were later enshrined in the U.S. Constitution.<sup>358</sup> Indeed, it was concern for principles of community self-determination that drove the organization of American criminal justice system around the use of grand and petit juries.<sup>359</sup>

In the modern era, self-determination has taken hold in the mainstream of criminal justice in other ways, too. The “community policing” revolution is premised on the notion that public safety improves when local communities are involved in the basic instruments and institutions designed to provide criminal justice.<sup>360</sup> In poor communities, law enforcement and criminal justice may offer the most common interaction between regular citizens and the government.<sup>361</sup>

The notion that criminal justice is an inappropriate venue for self-determination initiatives is thus contrary to the theories of self-determination that animate modern Indian policy, constitutional criminal justice, and modern notions of policing and good government in general. The notion that criminal justice is fundamentally different from other important government services seems simply arrogant.

### C. *Is Self-Determination the Appropriate Norm?*

Another key question is whether tribal self-determination is the appropriate standard against which to measure a criminal justice system or an appropriate norm to address dysfunction in such a system. Indeed, criminal law theorists might say that the crucial inquiry is not how to increase self-determination for Indian tribes but how to improve criminal justice or increase public safety for tribal communities. Two responses and a disclaimer follow.

First, rather than approach these questions from the perspective of crime or criminal justice policy, this Article seeks to treat criminal justice as an aspect of federal Indian policy and to ask why this single subject matter should be treated strikingly differently than other

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357. See Washburn, *supra* note 2, at 742.

358. *Id.*

359. See AMAR, *supra* note 356, at 105–10.

360. See James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 2–3 (2004); Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1531–39 (2002); Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1600 (2002).

361. See Jonathan Simon, *Introduction: Crime, Community, and Criminal Justice*, 90 CAL. L. REV. 1415, 1416 (2002).

federal Indian policies and programs. In all other areas of federal Indian policy, self-determination initiatives seem to have improved delivery of services to Indian people,<sup>362</sup> partially by making the providers of those services more directly accountable to tribal leadership and thus to the tribal community, and partially by insuring that delivery of services occurs in a culturally appropriate manner.<sup>363</sup> In other words, if criminal justice and public safety are viewed as public goods that governments provide, we can conclude from existing studies that self-determination will facilitate the provision of such public goods. We may simply not need to choose between self-determination, on the one hand, and public safety or criminal justice, on the other.

Second, as discussed previously,<sup>364</sup> American criminal justice theory and jurisprudence and modern notions of good government policy are premised on broad principles of self-determination. Public trust in the criminal justice system, and therefore the legitimacy of that system, are likely to increase when self-determination is realized.

Now, the disclaimer: from a criminal justice standpoint, it would be highly useful to conduct an extensive comparative analysis of the institutional competency of the federal, the state, and the tribal governments and their respective suitabilities for the task of providing criminal justice in Indian country. Eminent criminal law scholar Frank Zimring, for example, has encouraged me to conduct a comparative analysis of federal, tribal, and state governments to try to determine which government could best address the problems I have identified and meet the needs of Indian country. Surely such an analysis would be useful to determine where best to locate certain functions, a level of detail that I will take up another time. Such an analysis would be fruitful and may well be key to understanding how to improve the existing system, especially if it carefully surveyed the options as to each key function. The disclaimer is that this Article will save such a review for a later time and uncritically accept the notion that tribal self-determination has been viewed as a positive norm by Indian policymakers in virtually all other areas of Indian policy and simply assume that the application of such a norm to the

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362. Stephen Cornell & Joseph P. Kalt, *Where's the Glue? Institutional and Cultural Foundations for American Indian Economic Development*, 29 J. SOCIO-ECON. 443, 446-47 (2000).

363. Joseph Kalt and Stephen Cornell have pioneered much of the academic work supporting this notion. See *id.* at 462-67.

364. See *supra* notes 356-61 and accompanying text.

criminal justice regime could only lead to improvement above the status quo.

#### *D. Applying Self-Determination Principles in Indian Country*

How could the norms of tribal self-determination and tribal self-governance be applied in the criminal justice arena? In its purest form, the theory of tribal self-determination is that Indian tribes themselves should design, operate, and provide the normative standards for their governing institutions. In federal Indian policy, however, reality sometimes deviates from this ideal, and self-determination often tends to be embraced in a more circumscribed fashion. In light of this dichotomy between principle and reality, two general approaches are worthy of consideration.

In its purest ideal, self-determination would militate toward outright repeal of the Major Crimes Act and the Indian Civil Rights Act. A more practical approach might involve careful review of the existing federal institutions of criminal justice and amendment of those systems to make strategic modifications that would increase meaningful tribal involvement. Some thoughts are set forth below, though these thoughts are intended only to begin the discussion, not end it.

##### 1. Decolonization as "Defederalization": Repeal of the Major Crimes Act

Though numerous academic commentators outside of Indian law have criticized recent efforts to "federalize" crime in general,<sup>365</sup> Indian tribes suffered from federalization long before most Americans began to give the issue any attention. Moreover, Congress has rarely attempted to arrogate elsewhere anything approaching the scope of authority it exercises in Indian country.<sup>366</sup> The most obvious solution would involve repeal of the Major Crimes Act, taking the

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365. See, e.g., Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 51 (1996) (noting that federalization of crime has affected the federal courts by "tak[ing] up a disproportionate share of total federal judicial resources"); Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 79-82 (1997) (arguing that the Constitution's domestic violence clause prohibits the federal government from wielding "federal authority" over crime); Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 837-40 (2000) (arguing that federalization of crime upsets the allocation of power between the state and federal governments mandated by federalism).

366. Cf. Frickey, *supra* note 149, at 14 (noting that Congress can abrogate treaties with Indian tribes and seize Indian land).

federal government out of the business of adjudicating local crime between Indians on Indian reservations, and repeal of the Indian Civil Rights Act, liberating tribes from federal limitations imposed upon their own management of internal affairs. Thus, defederalization may represent an attractive option.

In light of the fact that most of the Major Crimes Act's key purposes have been discredited and rejected and indeed are inconsistent with current federal policy, it is difficult to understand how Congress would justify passage of the Major Crimes Act if presented with the Act for the first time today. Exclusive federal jurisdiction over serious offenses between Indians in Indian country seems fundamentally inconsistent with both the rhetoric and theory of tribal self-determination and at odds with modern notions of good government.

From the standpoint of federal Indian law and policy, however, a host of difficult issues would arise as to repeal of the Act. First, as often occurs in Indian country, questions regarding financial resources loom large.<sup>367</sup> Second, the Major Crimes Act is merely one component of a broader federal Indian country criminal justice regime that also includes federal jurisdiction over offenses by Indians against non-Indians, or non-Indians against Indians. Given the Supreme Court's unwillingness to recognize tribal criminal jurisdiction over non-Indians,<sup>368</sup> some sort of external criminal justice system would need to be retained, at least for certain purposes. One question would be whether that system should be federal, state, or tribal, or some sort of hybrid. One could imagine Indian defendants being tried in tribal courts and non-Indian defendants being tried in state courts with removal to federal courts in the event of a legitimate fear of discrimination. Or perhaps federal authority should remain intact in full for such crimes. In some ways, it is far easier to justify federal jurisdiction when a non-Indian is involved as a victim or perpetrator. In such cases, the non-Indian provides a federal nexus in that there is an actor who is somewhat outside the scope of internal tribal governance.<sup>369</sup> Indeed, many of the early treaties with tribes

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367. Because of resource issues, few of the tribes with the most serious public safety and criminal justice problems would be able to undertake this important responsibility in one fell swoop. Yet, any solution that would involve substantially increasing appropriations to Indian tribes or shifting substantial resources from a federal cabinet level, such as the Department of Justice, might face significant political opposition.

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

369. This area is, however, ripe for argument. Though it is somewhat simpler to justify federal involvement in cases in which a tribal member and a nonmember are involved in a dispute on an Indian reservation, it is by no means clear that the federal government,



provided for extradition in such cases.<sup>370</sup> This kind of federal involvement is not nearly as intrusive in tribal governance. Nevertheless, splitting responsibilities between governments is inelegant and remains one of the most complicated aspects of the current system. Indeed, it is what allowed Clinton to correctly characterize the current regime as a "jurisdictional maze."<sup>371</sup>

Third, to a substantial degree, federal jurisdiction serves as a dam that prevents state jurisdiction from flowing on to Indian reservations. Repeal might implicitly involve removal of the preemptive force of federal law, giving state authority the ability to creep in insidiously and assert itself on Indian lands. As a result, repeal of the Major Crimes Act and retrocession of federal jurisdiction to tribes might ultimately cause greater erosion of tribal authority, frustrating the very purpose of repeal. Indeed, disputes between states and the federal government about jurisdiction over Indian lands might become disputes between tribes and states. It is hard to believe that tribes would have the same success in holding back state jurisdiction as the federal government has had. Tribes simply lack the prestige and power in American courts that the United States has.

In other words, while the ideal of tribal self-determination might suggest that repeal of the Major Crimes Act is the obvious solution, reality dramatically complicates the picture. Federal Indian law has rarely developed according to careful and principled application of theory to fact but rather has followed a much more practical approach.<sup>372</sup> Accordingly, it is worth briefly considering more modest approaches.

## 2. Reform of the Federal Indian Country Regime

In Indian country, incrementalism often triumphs over vast paradigm shifts in federal policy.<sup>373</sup> Indeed, unilateral repeal of a

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rather than the tribal government, ought to have primary jurisdiction. In attempting to limit this discussion to the Major Crimes Act, this broader question must remain beyond the scope of this analysis.

370. See Clinton, *supra* note 59, at 122.

371. See Clinton, *Criminal Jurisdiction*, *supra* note 28, at 504-05.

372. Professor Frickey has convincingly argued that practical reasoning often trumps theory and doctrine in the Supreme Court's Indian law jurisprudence. See Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1201-03 (1990).

373. A well-known sudden shift in Indian policy was Public Law 280. See *supra* notes 189-97 and accompanying text. Indian tribes have chafed at the unilateral imposition of state jurisdiction and the failure to recognize an exclusive role for tribal sovereignty and tribal self-determination. Likewise, states have been dissatisfied with Public Law 280 because the law failed to provide federal funding for the states that assumed 280

federal program has rarely been the key mechanism for increasing tribal self-determination. The prevailing approach has been to allow tribes to apply to run those programs. In many contexts, the legal structure remains the same, but the tribal governments are given contracts or “compacts” to stand in the shoes of the federal government. Even despite the strong official rhetoric of self-governance, the United States has maintained an active governmental role in the affairs of Indian tribes as they undertake federal programs.<sup>374</sup>

In the environmental area, for example, Congress has not simply forfeited complete responsibility and authority over reservation environments to Indian tribes. Rather, the United States has enlisted tribes in a shared and carefully defined (and some might even say circumscribed) role in implementing federal policies and programs.<sup>375</sup> Statutes such as the Clean Water Act have not been *repealed* as to tribes; rather, they have been amended to give Indian tribes the opportunity to exercise limited governmental roles under the supervision of the Environmental Protection Agency.<sup>376</sup> In several statutes, tribes are offered the opportunity to be treated in the same manner as states in implementing federal environmental programs.<sup>377</sup> Under the Department of the Interior’s self-determination and self-governance programs, Interior has retained the power to reclaim federal programs from Indian tribes implementing them in a manner not deemed acceptable to federal officials.<sup>378</sup>

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jurisdiction. Thus, Public Law 280—and state jurisdiction—is not likely to be a promising model for reform. *See generally* GOLDBERG-AMBROSE, *supra* note 190 (discussing the problems associated with Public Law 280 and Indian tribes).

374. In some circumstances, tribal participation is justified by the notion that the tribal involvement will help the tribe “build capacity.” See, for example, the Safe Drinking Water Act, 42 U.S.C. § 6903(13) (2000), which defines “municipality” to include an Indian tribe, presumably to allow Indian tribes to apply for federal grants available to municipalities.

375. *See supra* notes 231–41 and accompanying text.

376. *See* Clean Water Act, 33 U.S.C. § 1377 (2000 and Supp. II 2002).

377. *Id.*

378. *See* 25 U.S.C. § 458aa (2000); *see also* Elizabeth Lonah Homer, Implementing the Self-Determination and Self-Governance Act, Course Materials for the 28th Annual Federal Bar Association Indian Law Conference, Albuquerque, New Mexico (Apr. 10, 2003), at 177, 187 (addressing retrocession to the United States of tribally contracted or compacted programs and services).

Thus, in deference to the “actual state of things”<sup>379</sup> in Indian policy, repeal of the Major Crimes Act is unlikely. Envisioning reforms and improvements in a manner more consistent with self-determination norms is likely to be much more productive. Even modest reforms might improve the provision of criminal justice in Indian country. A careful reform agenda ought to involve a comprehensive and methodical review of each of the key institutions of federal criminal justice and a creative approach toward creating—or improving—tribal involvement in each of those institutions.

For example, consider the federal prosecutor. The federal prosecutorial function could be reformed to improve self-determination in Indian communities. One scholar has suggested deputization of tribal prosecutors in federal courts.<sup>380</sup> Perhaps the Indian communities should have the responsibility of drafting the guidelines that federal prosecutors use to determine whether to exercise their discretion to indict Indian country cases. Or maybe federal Indian country prosecutors should be subjected to routine formal evaluation by the tribal community. Or possibly tribal communities should be able to select which federal prosecutors are assigned to their reservations. Or perhaps there should be a separate presidentially-appointed “United States Attorney for Indian Country” within each district or even an Assistant Attorney General for Indian country with nationwide responsibility at the national level. In sum, there are myriad potential reforms.

### 3. A Third Way

In the final analysis, it is difficult to evaluate how well tribes would provide criminal justice if the Major Crimes Act was repealed.

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379. For two contrasting viewpoints on the “actual state of things” in Indian country, see Robert Laurence, *Learning To Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 413, 435–37 (1988); Williams, *Algebra*, *supra* note 341, at 291–94; Robert A. Williams, Jr., *Learning Not To Live with Eurocentric Myopia: A Reply to Professor Laurence’s Learning To Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439, 456–57 (1988).

380. Larry Cunningham, Note, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2188–89 (2000). Such appointments have been common since at least the mid-1990s. Christopher Chaney, while serving as a tribal prosecutor for the Jicarilla Apache Tribe, was designated as a “Special Assistant United States Attorney” in the District of New Mexico, for example, before becoming an Assistant United States Attorney in Utah in 1997. Interview with Christopher B. Chaney (Sept. 10, 2002) (notes on file with the North Carolina Law Review). Such appointments have largely been matters of courtesy, however, and the experiment has not been pursued aggressively enough to determine whether they might actually make a substantive impact in improving criminal justice in Indian country.

Since tribes simply have not had the chance to demonstrate their capacities, we have no empirical way, *ex ante*, of determining whether tribal systems would actually function better or worse than the federal system.<sup>381</sup> And on the other hand, even substantial reforms to the existing federal system would not address the fundamental normative problem involved when Congress sets the rules that govern within Indian country.

A middle ground between outright repeal and reforming the existing system might involve a limited number of pilot programs, or an “opt out” approach in which tribes with appropriate capacities could leave the federal system and undertake their own felony criminal justice systems.<sup>382</sup> The mere existence of choice represents improved self-determination. By merely having the policy discussion at the tribal level, some of the goals of self-determination are served, even though the tribes are not the primary actors as they are when they compact for the federal functions to undertake these responsibilities themselves.

Given the seriousness of the crime problem in Indian country and the persistence of the dissatisfaction with the quality of the federal system, more creative thinking ought to be brought to bear on these problems.

### CONCLUSION

The enactment of the Major Crimes Act constituted a sudden and dramatic avulsion of federal authority into an area formerly within exclusive tribal control. Yet, the gradual accretion of the substantive scope of the Act during the era of tribal self-determination has been far more significant in expanding the reach of federal authority. The result has been steady erosion of tribal power over internal tribal affairs and tremendous accretion of federal authority occurring precisely at the time when the federal

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381. My colleague Phil Frickey has cautioned me about the nirvana fallacy in this context: comparing a flawed federal system to an idealized tribal system. In keeping with such caution, I would expect to find occasional gross deviations from justice in tribal systems, just as we see similar deviations occasionally in state and federal systems. Given that state and federal courts have occasionally issued death sentences to defendants who were later determined to be factually innocent, *see* Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185, 1215–18 (2005), it is fair to say that tribal courts likely cannot do anything more extreme or irreparable than state and federal courts.

382. *Cf.* Vollman, *supra* note 129, at 411 (citing the sophisticated legal infrastructure of the Navajo tribe as evidence that some tribes should be allowed to “piecemeal expan[d] . . . criminal authority”).

government purports to be revitalizing tribal authority and restoring tribal power.

In making felony criminal jurisdiction in Indian country a federal responsibility, the United States undertook an important responsibility that it has never effectively discharged. Simultaneously, it has left tribal governments, and consequently tribal communities, with little or no involvement in the felony criminal justice systems on their own reservations. By its very design, the federal criminal justice regime alienates, rather than embraces, the communities that it is intended to serve, leaving tribal governments disconnected from some of the key institutions of governance. In that respect, the Major Crimes Act represents an unfortunate anachronism in an era of tribal self-determination. And each prosecution under that Act, to some degree, furthers an anachronistic policy that is designed to displace and destroy tribal governments.

Since the federal government long ago discarded intentions of increasing federal power over Indians or of assimilating them, the original purposes of the Major Crimes Act are no longer legitimate. In this respect, the Indian country criminal justice regime seems to be the last living sprig on a branch of federal Indian law and policy that has withered and died.

Congress no longer speaks in terms of assimilation or furthering federal control over Indians. Congress in recent years has suggested that the Major Crimes Act regime is designed to help provide safe reservations. If improving public safety and criminal justice in Indian country is the goal, however, the Major Crimes Act is an abject failure. Many parts of Indian country are more dangerous than ever, and in some places the crime problem seems to be growing direr.

The federal Indian policies and programs that have flourished in recent years have been those that have embraced the more modern notions of tribal self-determination and self-governance. Indeed, tribal self-determination may provide the normative foundation of a solution. Not only has self-determination improved the delivery of federal services in many other areas of Indian policy, it represents a core value running through American criminal jurisprudence. Indeed, it is tragically ironic that criminal justice is the only important area of federal Indian policy in which tribal self-determination has not been embraced.

To function properly, criminal justice in Indian country must be decolonized. Policymakers should embrace the values of self-determination and work to give Indian communities meaningful access and control of the instruments of criminal justice. Moreover, if

tribal self-determination is an end in itself, criminal law is absolutely crucial to its achievement.

