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

E. The Indian New Deal

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

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

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

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

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

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

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

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

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

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

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

117. *Id.* at 84–87, 99.

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

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

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

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

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

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

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

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

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

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

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

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

to which times have changed—and how little the federal government's role in Indian country has not—is perhaps symbolized by the lingering absurdity of the so-called "Friendly Indian Statute."[127] Recodified by Congress as recently as 1994, this law provides:

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

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

II. THE DYSFUNCTIONAL ARCHITECTURE OF CRIMINAL JUSTICE TODAY

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

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

127. 18 U.S.C. § 1160 (2006).

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

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

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

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

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

130. 430 U.S. 641, 646–47 (1977).
131. *See id.*

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

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

- The imposition of comparatively harsher punishments under the federal system, particularly for juveniles, than occurs for offenses arising under state law off-reservation.

- Native Americans' systematic lack of access to the federal court system, including but not limited to service on trial and grand juries, to address crimes that would be handled locally almost anywhere else in the United States.

- A pervasive resource gap that has characterized the federal government's criminal justice role in Indian country since its inception.

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

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

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

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

A. Federal Roles and Responsibilities

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

1. When Federal Criminal Law Applies

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

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

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

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

2. Law Enforcement and Investigative Agencies

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

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

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

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

138. *Id.* at 763–64.

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

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

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

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

3. United States Attorneys and Their Offices

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

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

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

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

144. *Id.* at 211–12.

145. 28 U.S.C. § 547 (2006).

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

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

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

law enforcement investigation findings of a suspected federal case arising in Indian country.[149]

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

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

149. Eid, *supra* note 136, at 37–38.

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

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

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

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

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

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

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

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

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

156. *Id.*

157. *Id.* at 2.

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

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

4. Federal Prisons and Probation

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

158. *Id.*

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

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

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

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

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

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

B. Harsher Punishments for the Same Crimes

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

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

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

165. *Id.* at 34.

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

167. *Id.* at 34–35.

168. *Id.* at 36.

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

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

C. Lack of Federal Judicial Access

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

169. *Id.* at 37.

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

171. *Id.* at 37–38.

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

173. *Id.*

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

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

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

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

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

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

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

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

> And we have never had a federal grand jury in Western Colorado in my lifetime.[179]

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

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

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

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

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

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

some undoubtedly bring preconceptions or even prejudices about Native Americans to the courtroom.[184]

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

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

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

D. The Chronic Federal Resource Gap

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

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

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

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

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

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

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

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

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

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

190. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

196. *Id.* at 148–49.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

staff, and fund criminal justice systems tailored to their own needs.[211]

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

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

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

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

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

EPILOGUE: COMING FULL CIRCLE

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

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

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

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

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

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

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

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

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