

2009

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Recommended Citation

Matthew Handler, *Tribal Law and Disorder: A Look at a System of Broken Justice in Indian Country and the Steps Needed to Fix It*, 75 Brook. L. Rev. (2009).

Available at: <http://brooklynworks.brooklaw.edu/blr/vol75/iss1/5>

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NOTES

Tribal Law and Disorder

A LOOK AT A SYSTEM OF BROKEN JUSTICE IN INDIAN COUNTRY AND THE STEPS NEEDED TO FIX IT*

I. INTRODUCTION

On a typical spring night in 2004, Alex Apichito, a young construction worker, and some friends were walking home from a party when they ran into Alex's older cousin, Leonard.¹ Even though the two had a sometimes turbulent relationship, Leonard invited the group back to his house for drinks.² At some point later that night, Alex and Leonard began to argue, eventually provoking Leonard to exit the room.³ A few minutes later, he reemerged with a combat knife in his hand and attacked Alex, slashing his throat from his neck to his ear.⁴ Luckily for Alex, he was able to escape without further injury.⁵ Soon after arriving home, Alex sought medical attention and was quickly airlifted to the nearest hospital, where he would spend the next two days recovering.⁶ Four months later,

* A version of this Note was previously published as *Tribal Law and Disorder: A Look at the System of Broken Justice in Indian Country and the Steps Needed to Fix It*, OKLA. SUP. CT. SOVEREIGNTY SYMP. COMPENDIUM, at XI (June 2009).

¹ This account is taken from the PBS program, "EXPOSÉ on *THE JOURNAL: Broken Justice*" and an article from the Denver Post, *Justice: Inaction's Fatal Price*. See Bill Moyers's *Journal: EXPOSÉ on THE JOURNAL: Broken Justice* (PBS television broadcast Nov. 14, 2008) (transcript available at <http://www.pbs.org/moyers/journal/11142008/transcript2.html>) [hereinafter *Broken Justice*]; Michael Riley, *Justice: Inaction's Fatal Price*, DENVER POST, Nov. 12, 2007, at A1.

² *Broken Justice*, *supra* note 1; Riley, *supra* note 1.

³ Riley, *supra* note 1.

⁴ *Id.*; see also *Broken Justice*, *supra* note 1 ("I turned, once he grabbed me, and I just felt that cold slice.").

⁵ Riley, *supra* note 1.

⁶ See *Broken Justice*, *supra* note 1; Riley, *supra* note 1.

Leonard Apachito would stab another young man, Arthur Schobey.⁷ However, this time, Leonard's victim would not survive the attack.⁸

One of the main reasons why Leonard Apachito was not detained prior to Arthur Schobey's murder is that both Leonard and Alex Apachito are American Indians who live on the Navajo reservation.⁹ While it may seem perplexing that an individual's race would affect the quality of law enforcement that individual receives, this race-based system of justice is an unpleasant reality for those living on Indian reservations.¹⁰ Due to antiquated laws that severely limit the tribal governments' ability to maintain criminal justice, Indians rely exclusively on the federal government to investigate and prosecute felonies committed within tribal lands.¹¹ However, when the federal agencies responsible for policing Indian country do not have the

⁷ See *Broken Justice*, *supra* note 1; Riley, *supra* note 1.

⁸ See *Broken Justice*, *supra* note 1; Riley, *supra* note 1.

⁹ For crimes committed in Indian country, the race of the offender and race of the victim both affect the criminal jurisdiction of a case. See Greg Guedel, *Why Are Tribal Courts the Last Race-Based Jurisdiction in the United States?*, <http://www.nativelegalupdate.com/2008/12/articles/why-are-tribal-courts-the-last-racebased-jurisdiction-in-the-united-states/> (last visited Sept. 17, 2009); see also *Broken Justice*, *supra* note 1 (“[A]s Americans, . . . we have a strong expectation of the way our justice system ought to function; . . . we live in a society where, if you commit a crime, especially a serious crime, people will investigate that crime, people will arrest you and people will try and convict you. What happens actually on reservations doesn't look at all like that picture.”); *infra* Part II. According to the United States Department of Justice, an “Indian” is a person who has Indian ancestry and belongs to a federally recognized Indian tribe. U.S. DEPT OF JUSTICE, OFFICE OF TRIBAL JUSTICE, FAQs ABOUT NATIVE AMERICANS, <http://www.usdoj.gov/otj/nafaqs.htm#otj20> (last visited Sept. 8, 2009); see also *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996) (citing *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979) (“The test . . . generally followed by the courts [to determine whether a person is ‘Indian’], considers (1) the degree of Indian blood; and (2) tribal or government recognition as an Indian.”). While the use of the word “Indian” may seem archaic, it is commonly used by all government agencies and is generally recognized to refer to both “American Indians” and “Native Americans.” See Christina Berry, *What's in a Name? Indians and Political Correctness*, ALL THINGS CHEROKEE, http://www.allthingscherokee.com/articles_culture_events_070101.html (last visited Jan. 30, 2009); see also Peter d'Errico, *Native American Studies—A Note On Names*, <http://www.umass.edu/legal/derrico/name.html> (last visited Oct. 8, 2009). For the purposes of this Note, the term “Indian” refers to American Indians, Native Americans, and Alaskan Natives.

¹⁰ See Guedel, *supra* note 9 (“In no other area of American jurisprudence is race—in this case ‘Indian’ or ‘non-Indian’—a factor in determining whether a court has jurisdiction over a criminal defendant. Decades ago the Civil Rights Movement helped sweep away race-based segregation and ‘Jim Crow’ laws, but seemingly had no impact on the use of race as a jurisdictional consideration in the realm of Tribal Courts.”); see generally U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 203097, A BJS STATISTICAL PROFILE, 1992-2002: AMERICAN INDIANS AND CRIME (2004) [hereinafter AMERICAN INDIANS AND CRIME], available at http://www.usdoj.gov/otj/pdf/american_indians_and_crime.pdf.

¹¹ See *infra* Part II.

resources to adequately enforce the law, cases are delayed and criminals like Leonard Apachito remain free.¹²

As a result of this broken system of justice, the prevalence of violent crime within Indian communities is formidable.¹³ Indians endure violent crimes at an average rate of 101 victims for every 1000 persons, almost two and a half times the national rate.¹⁴ In addition, while Indians make up only 0.5% of the population, they make up 1.3% of all victims of violence in the United States.¹⁵ Despite these high levels of crime, federal prosecutors decline 65% of criminal cases referred to them, largely due to problems with tribal investigations.¹⁶ In areas where the federal government does not maintain exclusive jurisdiction over criminal matters within Indian country, tribal governments are severely limited in their ability to punish offenders.¹⁷

In response to the “staggering” crime rates in Indian country, Senator Byron Dorgan of North Dakota introduced the Tribal Law and Order Act of 2008 (the “Bill”) on July 23, 2008, which, among other things, aims to increase law enforcement presence on tribal lands, improve communication between the various agencies responsible for policing Indian country, and

¹² See *infra* Part III.B.2. In the case of Alex Apachito, FBI agents did not apprehend Leonard Apachito despite receiving witness testimony identifying him as the assailant. See Riley, *supra* note 1. Instead, the FBI arrested the wrong man, and subsequently dropped the case, presumably to pursue more serious crimes due to the FBI's overbearing case load in Indian country. See *id.* (noting the costs of letting federal law enforcement ignore lesser crimes on Indian reservations).

¹³ See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 2(a)(12) (2008); AMERICAN INDIANS AND CRIME, *supra* note 10, at 4.

¹⁴ See AMERICAN INDIANS AND CRIME, *supra* note 10, at 4. Among all races, the rate of victimization is 41 per 1000 persons. *Id.* However, this rate of victimization may be deflated when compared to the number of instances of violence which go unreported to police. See U.S. DEP'T OF JUSTICE, NCJ 176354, VIOLENT VICTIMIZATION AND RACE, 1993-1998, at 8 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vvr98.pdf>. According to an earlier report from the Department of Justice on the relationship between crime and race, American Indians tend to report only 46% of cases to the police. *Id.* at 1. Among the reasons for not reporting these cases, “Police will not bother” accounted for 12% of victims declining to report violence, around twice the percentage for this reason among other races. *Id.* at 8. In addition, for the purposes of this note, “violent crime” refers to rape, sexual assault, robbery, aggravated assault, and simple assault, based on the abundance of data on these crimes compared to other violent crimes. See generally AMERICAN INDIANS AND CRIME, *supra* note 10, at 4.

¹⁵ See AMERICAN INDIANS AND CRIME, *supra* note 10, at 4-5. Viewed from a different perspective, Indians experience violence at a rate of approximately one victim for every ten residents in comparison to the national rate of approximately one victim for every twenty-four residents. *Id.*

¹⁶ See Michael Riley, *Promises, Justice Broken*, DENVER POST, Nov. 11, 2007; *Broken Justice*, *supra* note 1; *infra* Part III.

¹⁷ See *infra* Part II.C.

increase prosecutorial accountability.¹⁸ While the Bill marks an important and necessary step in the fight to lower crime levels and amend the current relationship between various law enforcement agencies in Indian country, it falls short of providing much needed robust infrastructural remedies.

This Note will argue that, in light of the many shortcomings of the current scheme of Indian law, several changes need to be made to federal law in order to allow tribal governments to take charge of the crime-related problems in Indian country. These changes would empower tribes by expanding criminal jurisdiction to all offenders in Indian country regardless of race, increasing tribal sentencing authority, and unifying the tribal and federal law enforcement agencies to provide more efficient policing on Indian reservations. This Note will also argue that, despite the positive suggestions proposed in the Bill, the Tribal Law and Order Act does not go far enough to make the necessary fundamental changes to Indian law. Part II will examine the current scheme of Indian law in the United States in order to provide a legal background for the complexities that have led to the current criminal problems in Indian country. Part III will discuss the difficulties that law enforcement officials and prosecutors face as a direct result of the tribal/federal dichotomy. Lastly, Part IV will analyze the Tribal Law and Order Act of 2008, assessing the Bill's compelling propositions and noting its weaknesses. Part IV will also advance several suggestions that should be adopted in order to most effectively deal with crime in Indian country.

¹⁸ See News Release, Senator Byron L. Dorgan, Dorgan Introduces Legislation Aimed at Giving Boost to Law & Order in Indian Country (July 23, 2008), available at <http://dorgan.senate.gov/newsroom/record.cfm?id=301170>. The Tribal Law and Order Act was co-sponsored by Senator Baucus (MT), Vice President Biden (former Senator, DE), Senator Bingaman (NM), Senator Cantwell (WA), Senator Domenici (NM), Senator Johnson (SD), Senator Kyl (AZ), Senator Lieberman (CT), Senator Murkowski (AK), Senator Smith (OR), Senator Tester (MT), and Senator Thune (SD). *Id.* Following the end of the 110th Congress's term, the bill was reintroduced on April 2, 2009 in the 111th Congress. Tribal Law and Order Act of 2009, S. 797, 111th Cong. (2009). For the purposes of this Note, all references to the Bill are meant to correspond with the Tribal Law and Order Act of 2008, which aside from minor and mainly pagination-based differences, is substantially identical to the Tribal Law and Order Act of 2009.

II. OVERVIEW OF INDIAN LAW

A. *The Marshall Trilogy; The Federal Trust Responsibility*

In order to best understand the current scheme of Indian law,¹⁹ it is important to look at how the relationship between the federal government and the Indian tribes developed.²⁰ A set of cases decided by the Marshall Court, commonly dubbed the “Marshall Trilogy,” addressed many unanswered questions regarding the status of the Indian tribes and ultimately established the legal framework for Indian law that persists today.²¹ In the first of these cases, *Johnson v. McIntosh*, the Marshall Court dealt with the question of whether tribes could convey land to private individuals.²² The Court held that, while Indians enjoyed occupancy rights to their lands, the ultimate title was held by the United States, and thus, the tribes had no basis for transferring that title to private individuals.²³

¹⁹ “Indian Law” primarily refers to the overarching field of law that designates “the rights and obligations” of Indians and Indian tribes within the United States. GARY A. SOKOLOW, *NATIVE AMERICANS AND THE LAW: A DICTIONARY* 1 (2000). Further, Indian Law does not cover all legal disputes involving Indians. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 2-3 (5th ed. 2004) (1981). Indian Law comes into play only when the end result of a dispute is influenced by the Indian status of any of the involved actors. *Id.* at 1-2. If an Indian were to commit a traffic infraction in Brooklyn, the case would not be influenced by the violator’s Indian status and would therefore not fall under Indian Law. *See id.* at 2-3. However, if an Indian commits a traffic infraction within an Indian reservation in upstate New York, the case would be influenced not only by the violator’s Indian status, but also by the location of the infraction, and would therefore fall under the field of Indian Law. *See id.*

²⁰ According to the Federally Recognized Indian Tribe List Act of 1994, the Bureau of Indian Affairs must publish an annual list of federally recognized Indian Tribes. 25 U.S.C. § 479a-1 (2006). As of August 11, 2009, the Bureau of Indian Affairs recognizes 564 Indian tribes eligible for “funding and services.” *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. 153, 40,218, 40,218-23 (Aug. 11, 2009). Federally unrecognized tribes meeting common law requirements such as sufficient duration, territoriality, organization, and cultural identity have also been successful in securing the same legal rights as federally recognized Indian tribes. *See* CANBY, *supra* note 19, at 5; *see also* Koke v. Little Shell Tribe of Chippewa Indians of Montana, Inc., 68 P.3d 814, 816 (Mont. 2003). *See generally* Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723 (2008).

²¹ The “Marshall Trilogy” refers to three cases, *Johnson & Graham’s Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), decided under the Marshall Court, which dealt with land disputes between early Americans and the Indian tribes. *See* SOKOLOW, *supra* note 19, at 229; Droske, *supra* note 20, at 728-29.

²² *See generally* *McIntosh*, 21 U.S. (8 Wheat.) 543.

²³ *See id.* at 592 (“The absolute ultimate title has been considered as acquired [by the United States] by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.”).

The second case of the trilogy, *Cherokee Nation v. Georgia*,²⁴ shed additional light on the role of Indian tribes within the federal regulatory scheme. In *Cherokee*, the Cherokee Nation sued the state of Georgia under Article III, Section 2 of the Constitution as a “foreign State[],”²⁵ asking the Court to void Georgia legislation “intending to force . . . the Indians from their territory.”²⁶ The Court dismissed the case for lack of original jurisdiction on the grounds that the Cherokee Nation was not a foreign nation, but rather a “domestic dependent nation[].”²⁷ Justice Marshall likened the Indians’ relation to the United States not to that of two individual sovereigns, but instead to that of “a ward to his guardian.”²⁸ In the third case of the Marshall Trilogy, *Worcester v. Georgia*, the Court explicitly exempted Indian tribes from the jurisdiction of state laws,²⁹ and, in doing so, established a federal “trust responsibility” by the United States over the Indian tribes.³⁰

²⁴ 30 U.S. (5 Pet.) 1 (1831).

²⁵ U.S. CONST. art. III, § 2.

²⁶ See *Cherokee Nation*, 30 U.S. (5 Pet.) at 9.

²⁷ See *id.* at 17. In the Marshall Trilogy, the Supreme Court often described the trustee relationship between the Indians and United States with lengthy narrative. For example, in *Cherokee Nation*, the court noted:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relations to the United States resemble that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.

Id.

²⁸ See *id.*

²⁹ *Worcester*, 31 U.S. (6 Pet.) at 561. In *Worcester*, the Court ruled that a state law, requiring the appellant to obtain a license from the governor to live with the Cherokee Tribe, was invalid on the basis that Congress had the exclusive power to legislate matters of Indian Law. *Id.*

³⁰ CANBY, *supra* note 19, at 34-39. The federal trust responsibility refers to the “special relationship” between the United States and the Indian tribes, by which the federal government resembles a trustee to its beneficiary Indians. The government’s fiduciary duty covers a broad range of legal obligations established throughout the history of the United States. *Id.*; see also Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1220 (1975) (describing in detail the federal trust responsibility starting from its origins in the Marshall Trilogy: “[It] recognizes a sort of ‘protectorate’ status in the

The Marshall Trilogy deemed Indian tribes independently sovereign and free from state rule, but nevertheless subject to the laws of the United States.³¹ At the time, the Marshall Court's decisions marked victories for Indian tribes who were being systematically forced out of their land as a young America expanded.³² However, the President and Congress largely ignored the ideological underpinnings of the Marshall Trilogy during the subsequent Jacksonian era.³³ Instead of yielding to the law established by the Marshall Court, the federal government³⁴ and various individual states³⁵ continued to implement a policy of removal as American frontiers claimed new lands to the West.³⁶ The blatant disregard for the Marshall Trilogy rulings marked one of the earliest examples of the difficulties of enforcing protective Indian law in the United States and demonstrated a substantial clash between the three branches of government.³⁷ One of the few sources of refuge from the government's misuse of power was the federal system.³⁸ Indian tribes often cited the federal trust responsibility established in the Marshall Trilogy as their chief argument in attempting to enjoin public and private actors from infringing upon their rights as domestic sovereigns.³⁹

tribes, securing to them the power of managing their internal affairs in an autonomous manner except for a congressional power to regulate trade. Moreover, tribal autonomy is supported by a federal duty to protect the tribe's land and resource base.").

³¹ See Droske, *supra* note 20, at 729 n.29.

³² See CANBY, *supra* note 19, at 18-19.

³³ While not verifiable, President Jackson is notably quoted in reference to the Marshall Trilogy as saying, "John Marshall has made his decision; now let him enforce it." *Id.*

³⁴ BRUCE E. JOHANSEN, *THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION* 274 (1998). The Indian Removal Act of 1830 was passed by Congress with the purpose of removing those Indians who had not assimilated into the American way of life to Indian Territory, now Oklahoma. Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830).

³⁵ JOHANSEN, *supra* note 34, at 326-27. In response to the discovery of gold on Cherokee land, Georgia passed laws in 1829 prohibiting Indians from surveying its land or mining for gold. *Id.* Despite the surge of thousands of Americans onto Cherokee land, Georgia state courts dismissed any suits based on Cherokee testimony as incompetent. *Id.*

³⁶ See *id.* at 326-30.

³⁷ See *infra* Part III; see also *supra* note 32-33 and accompanying text.

³⁸ CANBY, *supra* note 19, at 40-41.

³⁹ See *id.* at 40-51. For instance, in *Lane v. Pueblo of Santa Rosa*, the Supreme Court enjoined the Secretary of the Interior from selling tribal lands on the basis that such an action "would not be an exercise of guardianship, but an act of confiscation." See *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919).

B. Criminal Jurisdiction Over Indians; Statutory Changes

Crimes committed within Indian Territory, whether by Indians or non-Indians, are subject to an overlapping jurisdictional matrix of federal, state, and tribal law created largely by statute over the past 200 years.⁴⁰ The first of these statutes, the General Crimes Act of 1817, was passed by Congress to establish a legal framework for prosecuting crimes committed in Indian country.⁴¹ The General Crimes Act relinquished the power of the states in prosecuting crimes committed on Indian lands, and instead bestowed exclusive criminal jurisdiction to the federal government.⁴² An exception to this federal jurisdiction was created for crimes committed by Indians against other Indians, which Congress left to be governed by tribal law and tried in tribal courts.⁴³

While the General Crimes Act was pivotal in establishing federal criminal jurisdiction over Indian country, at this point in history there was not an extensive body of federal criminal law from which to prosecute criminals in federal lands.⁴⁴ In addition, while federal criminal statutes governing Indians did exist,⁴⁵ comprehensive criminal codes

⁴⁰ See *infra* Part II.C; see also CANBY, *supra* note 19, at 200.

⁴¹ CANBY, *supra* note 19, at 148; see General Crimes Act of 1817, ch. 92, 3 Stat. 383 (1817) (current version at 18 U.S.C. § 1152 (2006)).

⁴² See General Crimes Act, 18 U.S.C. § 1152. The original General Crimes Act established that any person who commits a crime, Indian or non-Indian, within Indian Country, shall be subject to the laws of the United States if in its exclusive jurisdiction, and shall be tried in the courts of the United States. *Id.* The current statute reads:

Except as otherwise expressly provided by law, 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, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Id.

⁴³ See CANBY, *supra* note 19, at 148; see General Crimes Act, 18 U.S.C. § 1152.

⁴⁴ See Droske, *supra* note 20, at 730-31.

⁴⁵ See CANBY, *supra* note 19, at 174. In the case of murder, the first federal statute came out of the First Congress of the United States in 1790. See Act of Apr. 30, 1790, ch. 9, § 3, 1 Stat. 112-13 (1790). The statute provided that any person in a place “under the sole and exclusive jurisdiction of the United States, [who] commit[s] the crime of wilful murder . . . shall suffer death.” See *id.* The earliest murder statute meant to specifically protect Indians came from the Fourth Congress and similarly

were traditionally created by the states and not the federal government.⁴⁶ “In order to fill the . . . gaps [in federal criminal law at the time], Congress passed the Assimilative Crimes Act in 1825.”⁴⁷ This Act required that crimes committed in Indian country, which were not federally codified, were to be prosecuted according to the criminal laws of the state in which the crime took place.⁴⁸ For instance, if an Indian or non-Indian commits a traffic-related offense within Indian land and there is no federally codified statute prohibiting such an offense, that individual may still be prosecuted under the Assimilative Crimes Act for violating the laws of the state in which the Indian land is located.⁴⁹

The next development in an already complex jurisdictional scheme occurred in 1883 with the Supreme Court’s decision in *Ex Parte Crow Dog*.⁵⁰ On August 5, 1881, an Indian named Crow Dog fatally shot another Indian on the Great Sioux Reservation in what is now South Dakota.⁵¹ Local Indian police arrested Crow Dog and held him in jail in a military cell at Fort Niobrara, Nebraska.⁵² In accordance with tribal law, members of the victim’s family met with Crow Dog’s family and resolved the matter for “\$600 in cash, eight horses, and one blanket.”⁵³ The following year, murder charges were brought against Crow Dog in the Dakota territorial court under

mandated the capital punishment for those who killed an Indian. Act of May 19, 1796, ch. 30, § 6, 1 Stat. 469, 470-71 (1796).

⁴⁶ CANBY, *supra* note 19, at 174; *see also* Droske, *supra* note 20, at 730-31.

⁴⁷ Droske, *supra* note 20, at 731; *see also* 18 U.S.C. § 13(a).

⁴⁸ 18 U.S.C. § 13(a); *see also* Droske, *supra* note 20, at 731.

⁴⁹ Such was the case in *United States v. Billadeau*, where the Eighth Circuit Court of Appeals held that a non-Indian motorist traveling within Indian country was subject to the traffic laws of North Dakota via the Assimilative Crimes Act. *See United States v. Billadeau*, 275 F.3d 692, 694 (8th Cir. 2001) (“A BIA officer has a statutory duty to arrest a suspect who commits an offense in Indian country in the officer’s presence. The General Crimes Act, 18 U.S.C. § 1152, creates federal jurisdiction over crimes committed by non-Indians against Indians in Indian country. It incorporates the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, which provides that when conduct which would violate state law occurs on federal land, the relevant state law is assimilated into federal law unless there is already applicable federal law.” (citation omitted)); *see also* *United States v. Ashley*, 255 F.3d 907, 909-10 n.3 (8th Cir. 2001).

⁵⁰ *Ex Parte Crow Dog*, 109 U.S. 556, 557-58 (1883). The Indian named Kangi-shun-ca was commonly known as Crow Dog and is referred to as Crow Dog by the Supreme Court in *Crow Dog*. *See* SIDNEY L. HARRING, CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 1 (1994).

⁵¹ *Crow Dog*, 109 U.S. at 557; *see* HARRING, *supra* note 50, at 1.

⁵² HARRING, *supra* note 50, at 1.

⁵³ *Id.*

the General Crimes Act.⁵⁴ At trial, Crow Dog was convicted of murder and sentenced to death under a federal murder statute.⁵⁵

In 1883, the U.S. Supreme Court reversed Crow Dog's conviction, finding that under the tribal law exception of the General Crimes Act,⁵⁶ the Dakota Court did not possess criminal jurisdiction over a matter involving two Indian participants.⁵⁷ In Justice Matthews' compassionate, yet condescending opinion, the court noted the importance of maintaining the tribal way of governing criminal activity within Indian country in accordance with the General Crimes Act.⁵⁸

Crow Dog appeared to stand for the preservation of tribal sovereignty as articulated by the Marshall Court.⁵⁹ However, the Supreme Court's decision in *Crow Dog* did not fit well with congressional Indian policy.⁶⁰ In order to resolve this discrepancy, Congress passed the Major Crimes Act in 1885,

⁵⁴ *Id.*

⁵⁵ *Id.*; *Crow Dog*, 109 U.S. at 557.

⁵⁶ See General Crimes Act § 2, 3 Stat. at 383, 18 U.S.C. § 1152 (2006) (“[N]othing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offence committed by one Indian against another, within any Indian boundary.”).

⁵⁷ See *Crow Dog*, 109 U.S. at 569-72.

⁵⁸ The Court noted:

[This] is a case involving the judgment of a court of special and limited jurisdiction, not to be assumed without clear warrant of law. 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 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.

Id. at 571.

⁵⁹ See *supra* notes 21-39 and accompanying text.

⁶⁰ See HARRING, *supra* note 50, at 3-4 (“[T]he United States was rapidly proceeding with a policy of forced [Indian] assimilation, destroying the tribes as political units and incorporating individual Indians into the states as small farmers . . .”).

which extended federal jurisdiction to seven “major crimes” committed in Indian country, regardless of the actor’s or the victim’s ethnicity.⁶¹ The immediate impact of the Major Crimes Act after *Crow Dog* was a large influx of Indian-criminal cases in federal courts.⁶² Close to one hundred of these cases were heard by the U.S. Supreme Court, creating the first set of unified Indian criminal law.⁶³ In the long-run, however, the spirit of *Crow Dog* was ultimately lost with the passage of the Major Crimes Act and subsequent legislation, and the force of tribal governments over the next hundred years continued to diminish.⁶⁴

C. *Post-Crow Dog; Additional Legal Complexities*

By the mid-1900s, several problems had arisen due to flaws in the federally established legal framework over crimes

⁶¹ See CANBY, *supra* note 19, at 159-50; Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, (1885) (current version at 18 U.S.C. § 1153 (2006)). The 1885 statute read:

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

Id. at 385 (emphasis added). The modern statute, codified as 18 U.S.C. § 1153, adds eight crimes to the original list,

kidnapping, maiming . . . incest, . . . assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect . . . and [theft] under section 661 of this title within the Indian country.

The modern statute also mandates that where any of these crimes are not federally defined, they “shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.” *Id.*

⁶² See HARRING, *supra* note 50, at 5.

⁶³ *Id.*

⁶⁴ For an interesting discussion of the effect of the *Crow Dog* decision on modern Indian Law, see HARRING, *supra* note 50.

committed in Indian country.⁶⁵ The largest problem was the apparent “lawlessness” on Indian reservations.⁶⁶ Both federal and tribal law enforcement agencies had the responsibility of controlling the overlapping jurisdictional systems.⁶⁷ However, instead of this dual-responsibility resulting in double-coverage within Indian country, tribes were left with “a hiatus in law-enforcement authority.”⁶⁸

The federal government’s opinion of the Indian “situation” was equally depressing.⁶⁹ In stark contrast to the national prosperity that followed World War II, Indians continued to live in sub-standard conditions.⁷⁰ Congress was not pleased with the state of affairs given the amount of money it was allocating to Indian programs at the time; in 1951, the federal government spent close to \$75 million to implement the system of Indian-law it had created.⁷¹

As a result, the nation ushered in a period, now known as the “Termination Period,” of forced assimilation, and attempted to end federal responsibilities in Indian country.⁷² This period included commissioned reports on the apparent “Indian Problem”⁷³ and the passage of Congressional

⁶⁵ Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1658-59 (1998).

⁶⁶ *Id.* at 1659.

⁶⁷ See CANBY, *supra* note 19, at 200-01.

⁶⁸ See S. REP. NO. 83-699, at 5 (1953), as reprinted in 1953 U.S.C.C.A.N. 2409, 2411-12 (“As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function. . . . [This gap] could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.”); see also Jiménez & Song, *supra* note 65, at 1659.

⁶⁹ See Jiménez & Song, *supra* note 65, at 1662-65.

⁷⁰ See *id.* at 1663 n.200.

⁷¹ See *id.* at 1661. In the hearings prior to Public Law 280’s enactment, one representative noted that this budget had “expanded tremendously” in comparison to the \$31 spent on Indian Affairs in 1800. See 99 CONG. REC. 9263 (1953) (statement of Rep. Harrison). Using a comparison to the consumer price index of a given year, \$31 from 1800 is approximately the equivalent to \$548 in today’s dollars, and \$75 million is approximately the equivalent to \$1.33 billion in today’s dollars. See Measuring Worth, <http://www.measuringworth.com/uscompare/> (last visited Oct. 1, 2009).

⁷² See Jiménez & Song, *supra* note 65, at 1662 n.197; see also Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992*, in EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION 317, 321 (Oren R. Lyons et al. eds., 1992).

⁷³ See COMM’N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV’T, INDIAN AFFAIRS, H.R. DOC. NO. 81-129, at 63 (1949); see also Jiménez & Song, *supra* note 65, at 1663.

resolutions⁷⁴ aimed at codifying the Termination Period's purposes.⁷⁵ The most significant of these government actions was Public Law 280, enacted in 1953, which "delegated criminal jurisdiction" in Indian country to five states: California, Minnesota, Nebraska, Oregon, and Wisconsin.⁷⁶

The effect of Public Law 280 was that the five states would now have exclusive criminal jurisdiction over crimes committed in Indian country, regardless of the race of the actor or the victim.⁷⁷ Not surprisingly, state and tribal governments took offense to the new legislation.⁷⁸ States were now tasked with ruling over territory that was previously the exclusive province of the federal government.⁷⁹ These states were not provided any additional funds from the federal government or the ability to tax Indian lands.⁸⁰ Likewise, tribes were now subject to a body of criminal law that they neither consented to nor were familiar with.⁸¹

⁷⁴ H.R. Con. Res. 108, 83d Cong. (1953) ("Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States [I]t is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes . . . should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians").

⁷⁵ See Jiménez & Song, *supra* note 65, at 1663.

⁷⁶ Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006) and 28 U.S.C. § 1360 (2006)). When Alaska became a state, it was added to the list of "mandatory" states under Public Law 280, bringing the total to six states. See 28 U.S.C. § 1360. The act also expanded civil jurisdiction, however, for the purposes of this Note, this expansion will not be discussed. In addition, some exceptions were made to territories within the states. See CANBY, *supra* note 19, at 258-63; Droske, *supra* note 21, at 734. Public Law 280 now reads:

(a) [Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section

18 U.S.C. § 1162.

⁷⁷ See Droske, *supra* note 21, at 734-37.

⁷⁸ See CANBY, *supra* note 19, at 259.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

As a result of the complete dissolution of tribal sovereignty⁸² and the elimination of the federal government's "guardianship" over the tribes,⁸³ Public Law 280 faced heavy criticism.⁸⁴ Even as it was being signed into law, President Eisenhower articulated "grave doubts as to the wisdom of certain provisions,"⁸⁵ specifically a lack of tribal consent to the transfer of criminal jurisdiction.⁸⁶ The passage of the Indian Civil Rights Act of 1968 eventually addressed these concerns by inserting a tribal consent requirement before any new states could assume criminal jurisdiction in Indian country.⁸⁷

In addition to the consent amendment, the Indian Civil Rights Act also incorporated many of the provisions of the Bill of Rights into tribal law.⁸⁸ However, while this Act was likely intended to improve the lives of Indians by limiting the potential for abuse by tribal governments, it ultimately took away one of the most important pieces of tribal sovereignty

⁸² *Cf.* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.")

⁸³ *Cf.* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

⁸⁴ *See Droske, supra* note 21, at 734.

⁸⁵ *See* Statement by the President upon Signing Bill Relating to State Jurisdiction over Cases Arising on Indian Reservations, 166 PUB. PAPERS 564, 564 (Aug. 15, 1953).

⁸⁶ *See Droske, supra* note 21, at 734-35; Jiménez & Song, *supra* note 65, at 1657-58; *see also* Statement, *supra* note 85, at 565 ("The failure to include in these provisions a requirement of full consultation in order to ascertain the wishes and desires of the Indians and of final Federal approval, was unfortunate.")

⁸⁷ *See* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 25 U.S.C. §§ 1301-1303 (2006)). By 1968, nine other states had assumed criminal jurisdiction in some form over Indian territory:

The nine states were Nevada in 1955, South Dakota in 1957 (jurisdiction over highways), Washington in 1957 (jurisdiction in eight subject areas), Florida in 1961, Idaho in 1963 (civil and criminal jurisdiction over seven subject matters, which can be expanded with tribal consent), Montana in 1963 (jurisdiction over the Flathead Reservation), North Dakota in 1963 (assuming civil jurisdiction, by tribal consent), Arizona in 1967 (jurisdiction over water quality, repealed in 2003, and jurisdiction over air quality, repealed in 1986), and Iowa in 1967 (civil jurisdiction over the Sac and Fox Tribe). After the 1968 Amendment, in 1971, Utah became the last state to accept Public Law 280 jurisdiction.

Droske, *supra* note 21, at 735 n.69 (citations omitted).

⁸⁸ 25 U.S.C. § 1302. The Indian Civil Rights act in theory grants rights to Indians by prohibiting their ability to "exercis[e] powers of self-government." For instance, "[n]o Indian tribe . . . shall . . . subject any person for the same offense to be twice put in jeopardy." *Id.*

that Indians still retained: the ability to punish native criminals according to tribal law.⁸⁹ Under the Act, Indians were given the “right” against “cruel and unusual punishments” by preventing tribal courts from imprisoning convicted criminals for more than one year or imposing fines over \$5000.⁹⁰ This effectively limited tribal governments’ criminal jurisdiction to misdemeanors, leaving all felonies in the hands of either the states or the federal government.⁹¹

As for the remaining power that Indian tribes maintained over criminal matters, the Supreme Court severely diminished the already limited scope of tribal authority in *Oliphant v. Suquamish Indian Tribe*, holding that tribal governments do not possess inherent criminal jurisdiction over non-Indians.⁹² In *Oliphant*, a tribal police officer from the Suquamish Indian Tribe arrested non-Indian Mark David Oliphant for assaulting a tribal officer and resisting arrest during an annual tribal celebration.⁹³ After Oliphant twice unsuccessfully sought *habeas corpus* relief, the Supreme Court found that affording Indian tribes the right to try non-Indians in tribal courts would be inconsistent with the Indian tribes’ role as “domestic dependent nations,” and reversed the lower courts’ decision upholding the arrest.⁹⁴ This “unspoken

⁸⁹ Prior to the enactment of the Indians Civil Rights Act of 1968, and under the power of the General Crimes Act and Major Crimes Act, Indians had the ability to prosecute criminals for non-“major” crimes according to tribal law. *See generally supra* Part II.B.

⁹⁰ *See* 25 U.S.C. § 1302(7) (“No Indian tribe in exercising powers of self-government shall . . . (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both.”).

⁹¹ Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, § 2, 67 Stat. 588, 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2006) and 28 U.S.C. § 1360 (2006)). Whether the state or the federal government dealt with felonious crimes depends on whether the state practices Public Law 280 criminal jurisdiction.

⁹² *See* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). This limitation in jurisdiction applied even to those non-Indians living within Indian Country. *Id.*

⁹³ *Id.* at 194-95. After being arraigned and charged under Tribal Code, Oliphant applied for a writ of habeas corpus in the Western District of Washington, which was denied. He appealed this denial in the Ninth Circuit Court of Appeals, but the denial was upheld. The Supreme Court granted certiorari to determine whether tribal courts had inherent criminal jurisdiction over non-Indians, and the tribal court proceedings were halted, pending the Court’s decision. *See id.* At the time of the case, the Suquamish Tribe was not alone in asserting criminal jurisdiction over non-Indians through its Tribal Code of Law. 33 out of 127 Indian tribes claimed to extend criminal jurisdiction to non-Indians and twelve others had enacted ordinances that established the assumption of criminal jurisdiction over non-Indians. *See id.* at 196.

⁹⁴ *See id.* at 210-12.

presumption” against criminal jurisdiction over non-Indians was strongly based on the federal common law principles established in the Marshall Trilogy, and not on prior treaties or statutes.⁹⁵ Nevertheless, the Court noted that, in light of the prevalence of crime on Indian reservations, Congress retained the power to grant Indian tribes criminal jurisdiction over non-Indians.⁹⁶ *Oliphant* effectively eliminated the Indians’ ability to protect themselves from crimes committed by non-Indians, thus reaffirming the United States’ role as “guardian” over the Indian tribes.⁹⁷

With the enactment of Public Law 280 in 1953 and the Supreme Court’s decision in *Oliphant*, the scheme of criminal jurisdiction within Indian country is substantially up-to-date.⁹⁸ To summarize, the following chart sets forth who has criminal jurisdiction for crimes committed within Indian territory based on offender, victim, and crime:

⁹⁵ See *id.* at 203-12 (“By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”).

⁹⁶ See *id.* at 212. At the end of Justice Rehnquist’s majority opinion, he noted that some Indian court systems had become “increasingly sophisticated.” In addition, Rehnquist acknowledged that the protections of the Indian Civil Rights Act of 1968 extended to both Indians and non-Indians being tried in Tribal Court. These advances to the tribal justice system have, according to Rehnquist, eliminated many of the perceived dangers inherent with Indian tribes exercising criminal jurisdiction over non-Indians. *Id.* Thus, Rehnquist’s acquiescence demonstrates the Court’s deference to the legislature on the question of whether tribal authorities may possess criminal jurisdiction over non-Indians.

⁹⁷ *Id.* at 209-12. Justice Marshall, with whom Chief Justice Burger joined, dissented, noting the lack of any treaty or statute limiting the Indian’s criminal jurisdiction over non-Indians. *Id.* at 212; see also *Duro v. Reina*, 495 U.S. 676, 685 (1990) (restating that in criminal matters, tribal sovereignty extends to other tribal members and not to “outsiders.”); *United States v. Weaselhead*, 156 F.3d 818, 825 (8th Cir. 1998) (Arnold, J., dissenting) (“Congress has the power to expand and contract the inherent sovereignty that Indian tribes possess because it has legislative authority over federal common law.”). See generally *supra* notes 21-31 and accompanying text.

⁹⁸ See generally CANBY, *supra* note 19, at 200.

Offender	Victim	Crime	Criminal Jurisdiction*	Substantive Law*	Statutory Authority
Indian	Indian	"Major" crime	Federal and Tribal (concurrent jurisdiction)**	Federal and Tribal+	Major Crimes Act
		Non-"Major" crime	Tribal	Tribal	
	Non-Indian	"Major" crime	Federal and Tribal (concurrent jurisdiction)**	Federal and Tribal+	Major Crimes Act
		Non-"Major" crime	Federal and Tribal (concurrent jurisdiction)	State#	General Crimes Act
Non-Indian	Indian	Any crime	Federal	Federal	General Crimes Act
	Non-Indian	Any crime	State	State	

* This chart assumes that the crime is not committed within a Public Law 280 state.

** While Tribal courts may technically have jurisdiction over these matters, they cannot imprison convicted offenders for more than one year or fine them more than \$5000, largely rendering these courts' jurisdiction obsolete in cases of "Major" crimes.⁹⁹

+ Burglary and incest have not been federally codified by criminal statute and thus are governed by state substantive law via the Assimilative Crimes Act.¹⁰⁰

Non-"Major" crimes are largely misdemeanors. Thus, where these crimes are not federally defined, they are governed by state substantive law via the Assimilative Crimes Act.¹⁰¹

⁹⁹ See 25 U.S.C. § 1311 (2006); *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995) ("That the tribes retain jurisdiction over crimes within the Major Crimes Act is the conclusion already reached by distinguished authorities on the subject."); CANBY, *supra* note 19, at 190 ("Even before the passage of the [Indian] Civil Rights Act, most tribes had left major crimes other than larceny entirely to the federal government; with the Act's sentencing limit they have little incentive to change that pattern. Here as elsewhere tribes may choose to exercise less than their maximum jurisdiction.").

¹⁰⁰ See *Droske*, *supra* note 21, at 738-39.

¹⁰¹ *Id.*

III. PROCEDURAL PROBLEMS UNDER MODERN INDIAN CRIMINAL LAW

A. *The Arrest and Investigation*

Since 1824, the “primary instrument” for implementing the federal government’s fiduciary obligations to the Indian tribes has been the Bureau of Indian Affairs (“BIA”), located within the United States Department of Interior.¹⁰² In accordance with the tenets of the federal trust responsibility established in the Marshall Trilogy,¹⁰³ the Bureau’s current mission is to “enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives.”¹⁰⁴

In terms of criminal jurisdiction, the BIA operates a law enforcement division in accordance with the Indian Law Enforcement Reform Act of 1990.¹⁰⁵ Under this Act, the BIA is responsible for policing Indian country according to federal law, and, with an Indian tribe’s consent, tribal law as well.¹⁰⁶ However, the arrest and investigative duties of the BIA are not exclusive.¹⁰⁷ Tribal, state, and other federal agencies play different roles in policing Indian country depending on a number of circumstances.¹⁰⁸

1. Tribal Authority

Despite the limits imposed on tribes in ruling over non-Indians,¹⁰⁹ Indian tribes have gained general police powers over both Indians and non-Indians in several ways.¹¹⁰ In 1975,

¹⁰² See CANBY, *supra* note 19, at 52.

¹⁰³ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

¹⁰⁴ About Us, Bureau of Indian Affairs, http://www.doi.gov/bia/about_us.html (last visited Sept. 10, 2009); see also LAURENCE ARMAND FRENCH, NATIVE AMERICAN JUSTICE 182-87 (2003).

¹⁰⁵ See 25 U.S.C. §§ 2801(8), 2802(b) (2006). The agency is called the “Division of Law Enforcement Services.” *Id.* § 2801(b).

¹⁰⁶ *Id.* § 2803(4).

¹⁰⁷ Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 718-20 (2006).

¹⁰⁸ See STEWART WAKELING ET AL., NAT’L INST. OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS (2001) at 5-11, available at <http://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

¹⁰⁹ See generally *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

¹¹⁰ See Wakeling, *supra* note 108, at 7-8; see also AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN

Congress enacted the Indian Self-Determination and Education Assistance Act, also known as Public Law 93-638, which provided tribes with the opportunity to administer federal programs by making arrangements with the BIA.¹¹¹ Under this Act, Indian tribes have contracted with the BIA to establish tribal police departments maintaining the “organizational framework and performance standards” of the Bureau’s Division of Law Enforcement Services.¹¹² These federally funded “638 contracts” are administered by tribal governments and employ tribal officers.¹¹³ According to the U.S. Department of the Interior, this type of law enforcement arrangement is the most common form of police presence within Indian country.¹¹⁴

A second way that Indian tribes have gained arrest and investigative powers is through “self-governance compacts” with the BIA.¹¹⁵ Unlike “638 contracts,” “self-governance

THE USA 4 (2007), available at <http://www.amnestyusa.org/women/maze/Jurisdiction-Focussheet.pdf>.

¹¹¹ Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, § 2, 83 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450 (2006)); WAKELING, *supra* note 108, at 7; Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 210 (2008); see also CANBY, *supra* note 19, at 32.

¹¹² See WAKELING, *supra* note 108, at 7. These types of arrangements, under the Indian Self-Determination and Education Assistance Act are known as “638 contracts.” See Washburn, *supra* note 107, at 719-20. Several agencies offer programs to acquaint tribal police officers with federal law enforcement standards. These programs are described by Lawrence Armand French, a Psychology Professor and Chair of the Department of Social Sciences at Western New Mexico University, in his book, NATIVE AMERICAN JUSTICE:

The Indian Police Academy offers a fourteen-week Basic Police Training Program as well as four weeks of Basic Detention Training; one week of Basic Radio Dispatcher Training; ten weeks of Basic Criminal Investigator Training; one week of Criminal Investigation and Police Officer In-service Training; one week of Chiefs of Police In-service Training as well as Outreach Training (Indian country criminal jurisdiction; community policing, gangs, and domestic violence; use of force; patrol tactics and procedures; investigative techniques; and range officer safety and survival); and multiple advanced training programs. A twelve-week training program at the FBI National Academy is also available, as is one week of training at the Law Enforcement Executive Command College. The U.S. Attorney’s Office and the Office of Victims of Crime (OVC) also provide five one-week Regional Training Conferences yearly. Graduation data indicate that 33 percent of the officers trained at the IPA come from the Great Plains; 31 percent from the Southwest; 20 percent from the Northeast; 7 percent from Oklahoma tribes; and 6 percent from the southeastern tribes.

FRENCH, *supra* note 104, at 133.

¹¹³ See WAKELING, *supra* note 108, at 7. Funding for “638 contracts” often includes a tribal contribution. *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 8; see Washburn, *supra* note 107, at 719-20.

compacts” are based on several amendments to the Indian Self-Determination and Education Assistance Act of 1975¹¹⁶ and provide a much broader degree of Indian control over an adopted federal program such as federal law enforcement.¹¹⁷ Tribal police departments operating under “self-governance compacts” receive block grant financing as opposed to itemized budgets, allowing them to disperse funds efficiently and operate independently.¹¹⁸

A third method by which tribal police are able to participate in law enforcement within Indian country is by grant or agreement with states that have criminal jurisdiction under Public Law 280.¹¹⁹ However, unlike “638 contracts” or “self-governance compacts,” tribal/state agreements vary greatly in scope and force, and are not governed by a single statutory body.¹²⁰

Lastly, some tribal police departments are wholly funded and operated by Indian tribes, without state or federal

¹¹⁶ These amendments include the Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, the Indian Self-Determination and Education Assistance Act Amendments of 1990, Pub. L. No. 101-644, 104 Stat. 4662, the Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, 108 Stat. 4250, the Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, 108 Stat. 4250, Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250, and the Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711.

¹¹⁷ See WAKELING, *supra* note 108, at 8.

¹¹⁸ Under section 403 of the Tribal Self-Governance Act of 1994, funding agreements:

[A]uthorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior through the Bureau of Indian Affairs, without regard to the agency or office of the Bureau of Indian Affairs within which the program, service, function, and activity, or portion thereof, is performed, including funding for agency, area, and central office functions in accordance with subsection (g)(3) of this section, and including any program, service, function, and activity, or portion thereof, administered under the authority of...

25 U.S.C. § 458cc(b)(1) (2006). See WAKELING, *supra* note 108, at 8.

¹¹⁹ See AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 5 (2007), available at <http://www.amnestyusa.org/women/maze/Jurisdiction-Focussheet.pdf>.

¹²⁰ *Id.* at 4 n.10 (“Depending on the particular state, tribal police may have full arrest authority over non-Indian individuals. For example, the State of Arizona recognizes tribal police and has through legislation commissioned them with State Peace Officer authority once a tribal police officer completes a State Police Academy. At the other end of the spectrum the State of California does not recognize tribal police officers at all. Throughout the USA tribal police authority to make arrests of non-Indian perpetrators often depends on the whim of a county sheriff and or other delegating authority.”).

assistance.¹²¹ However, due to restraints in criminal jurisdiction over non-Indians and the limited resources in Indian country, tribally funded departments remain the least common and least robust form of law enforcement within tribal lands.¹²²

2. State Authority

Under Public Law 280, a number of states exercise criminal jurisdiction over Indian tribes located within the states' borders.¹²³ As a result, a large number of tribes depend on state and local authorities for their law enforcement needs.¹²⁴ These departments are funded by state and local taxes and are usually subsidized by the state's non-Indian community.¹²⁵ While Public Law 280 states often provide services in areas where tribal policing is difficult due to limited tribal resources, critics believe that the tribal governments themselves should choose the method of law enforcement that serves them best.¹²⁶ In addition, state law enforcement often fails to meet the demands of the tribes, resulting in overwhelming dissatisfaction with state policing under Public Law 280.¹²⁷

3. Federal Authority

Along with the BIA's Division of Law Enforcement Services, the other major federal agency responsible for enforcing and investigating criminal law within Indian country

¹²¹ WAKELING, *supra* note 108, at 8.

¹²² *Id.* at 7-8.

¹²³ See 18 U.S.C. § 1162 (2006); see also *supra* notes 76-81 and accompanying text.

¹²⁴ See WAKELING, *supra* note 108, at 8.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country* (2004), <http://www.aidainc.net/Publications/pl280.htm> (last visited Dec. 1, 2008); see also CAROLE GOLDBERG-AMBROSE & TIMOTHY CARR SEWARD, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280*, at 12 (1997) (noting the dissatisfaction that tribes have with Public Law 280 states' policing powers in tribal lands and the two main sources of Indians' frustrations: "First, jurisdictional vacuums or gaps have been created, often precipitating the use of self-help remedies that border on or erupt into violence. Sometimes these gaps exist because no government has authority. Sometimes they arise because the government(s) that may have authority in theory have no institutional support or incentive for the exercise of that authority. I will call this kind of lawlessness the 'legal vacuum' type. Second, where state law enforcement does intervene, gross abuses of authority are not uncommon. In other words, power is uncabined by the law that it is supposed to constrain it. I will call this kind of lawlessness the 'abuse of authority' type.").

is the FBI.¹²⁸ Under a “Memorandum of Understanding” between the Department of Justice and the Department of the Interior, the FBI and BIA share investigative jurisdiction according to guidelines set out in the United States Attorney’s Manual.¹²⁹ A major difference between the FBI and BIA is in the BIA’s preference for utilizing tribal policing through “638 contracts” and “self-governance compacts.”¹³⁰ These contracts are exclusively the province of the BIA.¹³¹ Hence, because tribes are not permitted to exercise criminal jurisdiction over felonies, the BIA (including contracted tribal police departments) has largely taken the role of investigating misdemeanors, while the FBI generally handles more serious offenses such as felonies under the Major Crimes Act.¹³²

¹²⁸ See Washburn, *supra* note 107, at 718-19.

¹²⁹ See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY MANUAL § 9-20.220 (1997) [hereinafter ATTORNEY MANUAL] (“In 1993, the Department of Justice and the Department of the Interior entered into a memorandum of understanding (MOU) that established guidelines regarding the respective jurisdictions of the Bureau of Indian Affairs (BIA) and the Federal Bureau of Investigation (FBI). See the Criminal Resource Manual at 675. Part IV of the MOU requires each United States Attorney whose criminal jurisdiction includes Indian country to develop local written guidelines outlining the responsibilities of the BIA, FBI, and the Tribal Criminal Investigators, if applicable. See the Criminal Resource Manual at 676, for the full text of MOU.”).

¹³⁰ See Washburn, *supra* note 107, at 719-20.

¹³¹ *Id.*

¹³² *Id.*; see also ATTORNEY MANUAL, *supra* note 129, § 9-675 (“The FBI has investigative jurisdiction over violations of 18 U.S.C. §§ 1152 and 1153 as well as most other crimes in the Indian country. Frequently, by the time the FBI arrives on the reservation, some investigation will have been undertaken by tribal or Bureau of Indian Affairs (BIA) police. It is recognized that the ability of the tribal and BIA police can vary from reservation to reservation, and United States Attorneys are free to ask for FBI investigation in all cases where it is felt that this is required. However, United States Attorneys are encouraged and authorized to accept investigative reports directly from tribal or BIA police and prepare a case for prosecution without FBI investigation in all cases where it is felt a sufficient investigation can be undertaken by BIA or tribal law enforcement officers. The Indian Law Enforcement Reform Act (ILERA), Pub. L. 101-379, August 18, 1990, codified at 25 U.S.C. §§ 2801-2809, established within the BIA of the Department of the Interior, a Division of Law Enforcement Services (DLES) to carry out the Secretary’s responsibility to provide and assist in the provision of law enforcement services in Indian country. The ILERA directed the Secretary to establish a Branch of Criminal Investigations within the DLES with responsibility for the investigation and presentation for prosecution of violations of 18 U.S.C. §§ 1152 and 1153, under agreement with the Department of Justice, and subject to guidelines to be adopted by the United States Attorneys. A Memorandum of Understanding (MOU) has been signed by the Attorney General and the Secretary of the Interior. United States Attorneys are free to assign investigative responsibilities in accordance with guidelines previously issued, or which they now care to issue. The ILERA also authorizes the Secretary of the Interior, after consultation with the Attorney General, to promulgate regulations relating to the exercise of this law enforcement authority and relating to the consideration of applications for law enforcement contracts under the Indian Self Determination Act, P.L. 93-638, 25 U.S.C. § 450 *et seq.*”).

For example, under the current scheme, if a non-Indian male were to commit an act of sexual violence against an Indian female, the matter would be exclusively federal per the Major Crimes Act.¹³³ As a result, the FBI would likely commence an investigation, assuming tribal, state, or federal authorities had not already apprehended the perpetrator.¹³⁴ However, unlike most cases in which the FBI holds jurisdiction, crimes committed in Indian country are unique in several ways, making them problematic to deal with.¹³⁵

Most investigations of criminal activity in Indian country are commenced after a particular crime has occurred.¹³⁶ While this may seem relatively common for state law enforcement, the FBI specializes in prolonged investigations of criminal enterprises as opposed to quick responses to individual crimes.¹³⁷ Additionally, investigations within Indian country usually do not command the specialized training that FBI agents receive.¹³⁸

Crimes committed within Indian country are also considered relatively minor in comparison to the class of criminal matters with which the FBI is familiar.¹³⁹ The FBI concentrates on “terrorism prevention,” “organized crime,” drug trafficking, and “counterintelligence.”¹⁴⁰ Thus, while a “major

¹³³ See N. Bruce Duthu, Op-Ed, *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 11, 2008, at A17 (author is a professor of Native American studies at Dartmouth and published author on Indian law). See generally *supra* Parts II.B-C.

¹³⁴ See Washburn, *supra* note 107, at 718. *American Indians, Crime, and the Law* is a Michigan Law Review article written by Kevin K. Washburn, an associate professor at the University of Minnesota Law School and former federal prosecutor in an Indian country district. Much of the information described in his section on federal investigations and prosecutions is taken from his own experience in combination with a long list of “former and current Indian country federal prosecutors,” “federal public defenders,” and “FBI agents.” *Id.* While Washburn admits his own subjectivity based on his personal experience, he also stresses the numerous sources from which he has gathered his information. All in all, Washburn’s account offers a uniquely personal look into the world of federal law enforcement within Indian country. *Id.* at 718 n.30.

¹³⁵ *Id.* at 718.

¹³⁶ *Id.* These investigations are referred to as “reactive,” meaning in response to a singular event such as a rape or murder. This is in contrast to the bulk of the FBI’s investigative work on “proactive” cases, in which an ongoing investigation leads to arrests prior to a particular crime. *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* The FBI is well-known for its “sophisticated law enforcement tools” used in investigating criminal activity. These tools include using “wiretaps, . . . [executing] trap and trace or pen register subpoenas on phone companies, or . . . [working] with informants who have infiltrated a criminal organization.” *Id.* The relative simplicity of the criminal cases committed in Indian country do not require the use of these investigative tools. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

crime” committed in Indian country may have a significant local impact, it carries little relative weight in the eyes of the Bureau and is not typically the province of federal law enforcement agencies such as the FBI.¹⁴¹

FBI agents may also feel overworked and under-motivated due to the unique circumstances presented by investigating crimes within Indian country.¹⁴² Not only do agents deal largely with cases that are repetitive and relatively simple in character, but also often work alone in “rural settings,” requiring large driving commitments.¹⁴³ Further, federal agents endure unusually high caseloads due to the high crime rates in Indian country.¹⁴⁴ The combination of these circumstances has inevitably lessened the desirability of working in the Indian Law division of the FBI.¹⁴⁵

B. *The Prosecution*

In contrast to the diverse bodies of law enforcement that police Indian country, the “single most important” prosecutor is

¹⁴¹ *Id.* Washburn notes the irony in semantics of the term “Major Crimes” from a federal law enforcement perspective:

[T]hough the offenses are “major” and often tremendously important in the communities where these crimes occur, almost all of the crimes are routine, local and simple cases involving violent crimes that, in another context, would be characterized as “common street crimes” and that would not be investigated by federal officials but for the Indian country nexus. . . . As a result, the moniker “major” is somewhat misleading as an expression of FBI interest and prioritization.

Id.

¹⁴² *Id.* at 718-19.

¹⁴³ *Id.* (noting that agents “may travel hundreds of miles of reservation roads in the course of a week’s work”). To address this and the other problems of the FBI in governing criminal law within Indian country mentioned, the FBI developed the “Safe Trails Task Force” in 1994 to promote collaboration between various government agencies on the federal, state, and tribal level. *See* FBI, Safe Trails Task Force, <http://www.fbi.gov/hq/cid/indian/safetrails.htm> (last visited Oct. 1, 2009).

¹⁴⁴ *See* Washburn, *supra* note 107, at 719 n.33; Remarks Prepared for Delivery by Grant D. Ashley, <http://www.fbi.gov/pressrel/speeches/ashley102804.htm> (last visited Jan. 30, 2009) (“Over 100 Special Agents are currently working full-time in support of Indian Country investigative matters. In 2004, those agents initiated nearly 1,900 cases.”).

¹⁴⁵ *See* Washburn, *supra* note 107, at 719 (“Because Indian country tends not to be a prestigious posting, the agents in the RAs are often rookies or ‘first office agents’ who seek transfer as soon as they are eligible, leading to sometimes high turnover among the FBI personnel dealing with Indian country offenses.”). In addition, “[a]ccording to federal law enforcement lore, Indian country RAs once served a punitive role as places to exile FBI agents that fouled up important cases or were otherwise the subject of disfavor within the Bureau.” *Id.* at 719 n.36.

the United States Attorney.¹⁴⁶ In order to evaluate the consequences of having a sole federal entity responsible for prosecuting crimes within Indian country, it is important to examine the balance between the tremendous power that federal prosecutors have over the administration of criminal justice,¹⁴⁷ and the lack of accountability that they have for their decisions.¹⁴⁸

1. Prosecutorial Discretion

When it comes to prosecutorial accountability for an unwarranted indictment, the reviewing power of a grand jury is constitutionally protected.¹⁴⁹ A declination to prosecute, on the other hand, is “entirely unreviewable.”¹⁵⁰ Nevertheless,

¹⁴⁶ See *id.* at 725; AMERICAN INDIANS AND CRIME, *supra* note 10, at vii (“The U.S. attorney’s office is the principal prosecutor of criminal cases for violation of Federal laws in Indian country.”). The United States Attorney acts as the “sole” prosecutor in non-Public Law 280 states for major crimes committed by Indians against Indians, and all crimes committed by non-Indians against Indians within Indian country. While tribal courts also play a role in prosecuting minor crimes committed by Indians against other Indians and state attorneys prosecute state offenses in Public Law 280 states, for the purposes of this note, it is unnecessary to discuss the role of tribal and state prosecutors within Indian country. See generally *supra* Part II.

¹⁴⁷ An argument can be made that the prosecutor has a larger influence on the administration of criminal justice than that of a judge or jury. See Washburn, *supra* note 107, at 725 n.59 (noting that since ninety-one percent of adjudicated felons plea bargain and judges follow mandatory minimum sentence guidelines, the discretion of a prosecutor in deciding what charge to bring leaves very little flexibility in the hands of the judge or potential jury).

¹⁴⁸ In *Wayte v. United States*, the Court described the unchecked powers of federal prosecutors:

In our criminal justice system, the Government retains “broad discretion” as to whom to prosecute. *United States v. Goodwin*, 457 U.S. 368, 380, n. 11, 102 S. Ct. 2485, 2492, n. 11, 73 L.Ed.2d 74 (1982); accord, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248, 100 S. Ct. 1610, 1616, 64 L.Ed.2d 182 (1980). “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 668, 54 L.Ed.2d 604 (1978). This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.

470 U.S. 598, 607 (1985).

¹⁴⁹ Under the Fifth Amendment, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury.” U.S. CONST. art. V. A criminal defendant does, however, have the option to waive this indictment and move forward by means of an information. FED. R. CRIM. P. 7(b); see also Washburn, *supra* note 107, at 722-24.

¹⁵⁰ Washburn, *supra* note 107, at 726.

before a declination is made, prosecutors are guided by the standards of the United States Attorney's Manual.¹⁵¹

Under section 9-27.220 of the United States Attorney's Manual, prosecutors are to seek an indictment if a potential offender's "conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction."¹⁵² Further, a United States Attorney may decline to prosecute a federal offense if it is against a federal interest, the alleged offender would be more appropriately tried in a different jurisdiction, or there is an alternative non-criminal means to resolve the case.¹⁵³ Despite these guidelines, the federal prosecutor still has "tremendous latitude" in deciding whether to pursue an indictment.¹⁵⁴ United States Attorneys independently and subjectively weigh numerous factors such as the federal priority of enforcing a given crime, the type and gravity of the crime, and the likely sentence upon conviction, without any form of mandated review.¹⁵⁵ This broad range of discretion presents problems when a federal prosecutor does not act in accordance with the values of a given tribal community.¹⁵⁶

In order to best prosecute a crime committed within Indian country, a United States Attorney needs both local knowledge of the Indian communities and their values, and the trust of the people whom the prosecutor protects.¹⁵⁷ This knowledge and trust is difficult to obtain if a federal prosecutor is detached from the community she represents.¹⁵⁸ Indian communities are typically closed and suspicious of outsiders,

¹⁵¹ ATTORNEY MANUAL, *supra* note 129, §§ 9-27.001, 9-27.110.

¹⁵² *Id.* § 9-27.220 (A).

¹⁵³ *Id.* § 9-27.220 (A)(1)-(3). These three reasons to decline a prosecution are discussed, by subject, in detail within the U.S. Attorneys' Manual at § 9-27.230, § 9-27.240, and § 9-27.250.

¹⁵⁴ *See* Washburn, *supra* note 107, at 727.

¹⁵⁵ *See id.* Washburn also notes that "[s]uch decisions are notoriously difficult to second-guess, and no other institutional actor has constitutional standing to do so." *Id.*

¹⁵⁶ *Id.* at 729-30. Under the regime of criminal jurisdiction within Indian country, federal prosecutors have the duty to "represent—and protect—the Indian country community." *Id.* at 729. Further, unlike when a federal prosecutor brings charges in the interest of the United States at large, where Indian country is involved, the federal trust responsibility mandates that actions be taken with the Indian tribe's best interest in mind. *See supra* notes 21-30 and accompanying text; *cf.* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 866 ("At its root, the emphasis on objectivity stems from the notion that the prosecutor's client is the public, not any individual constituent whose interests the prosecution might affect.").

¹⁵⁷ *See* Washburn, *supra* note 107, at 729-33.

¹⁵⁸ *See id.*

and federal prosecutors often do not speak the native language and live several hundred miles from tribal villages.¹⁵⁹ This detachment may impair the ability of United States Attorneys to perform tasks essential to successful prosecutions, such as deposing key Indian witnesses, conducting additional investigations, or deciding whether to commence or decline a prosecution based on community prerogative.¹⁶⁰ Further, this detachment may also discourage Indian victims from coming forward with criminal charges altogether.¹⁶¹

A prosecutor's detachment from her respective tribes is additionally frustrating to Indians due to the lack of accountability over a United States Attorney's actions.¹⁶² Unlike many state prosecutors, United States Attorneys are appointed by the President, and are thus free from political pressure to act in accordance with the community's will.¹⁶³ Moreover, when a United States Attorney decides to decline a prosecution, that prosecutor, while authorized, is *not required* to submit reports to the tribes stating the reasons for the declination.¹⁶⁴

¹⁵⁹ *Id.* at 729-30.

¹⁶⁰ *Id.* at 732-33; see also Christopher Chaney, Victim Rights in Indian Country—An Assistant United States Attorney Perspective, 51 U.S. ATTY'S BULL. 36, 38-39 (2003), available at <http://www.tribal-institute.org/download/Chaney.pdf>. These difficulties are highlighted by the risks of being unfamiliar with a tribe's culture, which may lead to offending a victim or potential key witness:

In most American cultures, looking someone in the eye is a sign of confidence, sincerity, and honesty. However, among traditional Navajo people, looking someone in the eye is considered to be offensive, an affront, even a challenge to the other person. . . . An AUSA can unwittingly damage a prosecution by innocently offending a victim or witness. . . . [I]t is . . . important to know your witness so that you can tailor your approach to their beliefs, needs, and practices. By showing respect to native people and their unique sensibilities, an AUSA may be able to gain, not lose, and important witness.

Id.

¹⁶¹ See Ralph Blumenthal, *For Indian Victims of Sexual Assault, a Tangled Path*, N.Y. TIMES, April 25, 2007 (noting that since women cannot seek the help of tribal courts, they often feel discouraged from approaching outside prosecutors). Jami Rozell, a "Cherokee woman charging rape by a non-Indian," describes her preliminary hearing in front of a district attorney in Oklahoma as "the hardest thing I've ever done." In addition, this discouragement is intensified by a cultural stigma against reporting crimes. "Culturally, some advocates said, Indians, fearing humiliation, are often reluctant to press a complaint, seeing it as a test of faith or preferring to 'let the creator take care of it,' as one said." *Id.*

¹⁶² See Washburn, *supra* note 107, at 730-31.

¹⁶³ See *id.*

¹⁶⁴ Indian Law Enforcement Reform Act, 25 U.S.C. § 2809(b) (2008). In addition, federal prosecutors are not required to "transfer or disclose any confidential or privileged communication, information, or sources to the officials of any Indian tribe. Federal agencies authorized to make reports pursuant to this section shall, by

2. Lack of Resources in Indian Country

Many of the practical problems involved with the administration of criminal justice in Indian country may be attributed to a lack of adequate resources.¹⁶⁵ From a policing standpoint, typical departments are considerably underfunded.¹⁶⁶ This lack of financial assistance has resulted in a shortage of officers, paucity of twenty-four hour patrolling capabilities, outdated equipment and facilities, and reliance on a limited operating budget.¹⁶⁷ In addition, these problems are exacerbated by the vastness of tribal lands compared to the relatively small resident populations.¹⁶⁸ For example, the tribally operated San Carlos Tribal Police Department in Arizona employs twenty-five full-time sworn personnel, and polices a population of 10,834 living on a 2911 square mile reservation.¹⁶⁹ This equates to an assignment of only two full-time sworn officers for every 1000 residents, and only one full-time sworn officer for every 100 square miles.¹⁷⁰

However, these ratios alone may not explain the full extent of the policing problem, nor the resources required.¹⁷¹ The Department of Justice, in a 2001 report to the National Institute of Justice, explained that statistics based on ratios of police for a given population and area must be adjusted to reflect the level of crime in that location.¹⁷² Thus, areas of low crime may only require one or two officers for every 1000

regulations, adopt standards for the protection of such communications, information, or sources." 25 U.S.C. § 2809(d).

¹⁶⁵ See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 2(a)(4), (6), (14), (21) (2008); Hart & Lowther, *supra* note 111, at 210.

¹⁶⁶ See WAKELING, *supra* note 108, at vii (noting that "tribes have between 55 and 75 percent of the resource base available to non-Indian communities"); see also Hart & Lowther, *supra* note 111, at 210.

¹⁶⁷ See WAKELING, *supra* note 108, at 9-10; see also Hart & Lowther, *supra* note 111, at 210-11.

¹⁶⁸ Hart & Lowther, *supra* note 111, at 210-11.

¹⁶⁹ See U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 197936, TRIBAL LAW ENFORCEMENT, 2000, at 2 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tle00.pdf>. At 2911 square miles, this Indian reservation is larger, in area, than the state of Delaware by over 400 square miles. See NationMaster.com, Encyclopedia: Delaware, <http://www.nationmaster.com/encyclopedia/Delaware> (last visited Jan. 30, 2009).

¹⁷⁰ See HICKMAN, *supra* note 169, at 2. This problem in coverage is not limited to policing Indian Country. In some districts, the nearest United States Attorney is several hundred miles away. See Troy A. Eid, *Point: Beyond Oliphant: Strengthening Criminal Justice In Indian Country*, 54 FED. LAW., Mar-Apr. 2007, at 40, 42.

¹⁷¹ See WAKELING, *supra* note 108, at vii.

¹⁷² *Id.*

residents, while places of high crime, such as Indian country, may require a significantly larger police presence.¹⁷³

IV. THE TRIBAL LAW AND ORDER ACT OF 2008; ALTERNATIVE STATUTORY PROPOSALS

In order to combat overwhelming levels of crime in Indian country, Senator Byron Dorgan introduced the Tribal Law and Order Act of 2008, which aims to boost policing efforts, develop more comprehensive systems of communication and data collection, and raise prosecutorial accountability standards.¹⁷⁴

A. *Declination Reports; Taking Steps to Foster Prosecutorial Accountability*

The first problem that the Bill attempts to remedy is the high percentage of criminal cases declined by United States Attorneys every year.¹⁷⁵ Section 102 of the Bill proposes that enforcement officials and United States Attorneys submit

¹⁷³ *Id.* Wakeling explains how police-to-citizen ratios may vary:

The appropriate police coverage (police officers per thousand residents) comparison may not be between Indian departments and departments serving communities of similar size, but between Indian departments and communities with similar crime problems. Given that the violent crime rate in Indian Country is between double and triple the national average comparable communities would be large urban areas with high violent crime rates. For example, Baltimore, Detroit, New York City, and Washington, D.C., feature high police-to-citizen ratios, from 3.9 to 6.6 officers per thousand residents. Few, if any, departments in Indian Country have ratios of more than 2 officers per thousand residents.

Id. (citations omitted). Academics also attribute the “lack of enthusiasm” by federal law enforcement agencies and prosecutors as a leading cause of high crime rates within Indian country. *See Washburn, supra* note 107, at 714. According to N. Bruce Duthu, a professor of Native American studies at Dartmouth and published author in the field of Indian law, this situation presents a problem based on prosecutorial declinations for rape cases. N. Bruce Duthu, *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 1, 2008, at A17 (“[L]aw enforcement in sexual violence cases in Indian country is haphazard at best, recent studies show, and it rarely leads to prosecution and conviction of non-Indian offenders 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.”).

¹⁷⁴ Press Release, Byron L. Dorgan, U.S. Senator for N.D., Dorgan Introduces Legislation Aimed At Giving Boost To Law & Order In Indian Country (July 23, 2008), available at <http://dorgan.senate.gov/newsroom/record.cfm?id=301170>. *See generally* Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 2(b) (2008).

¹⁷⁵ Tribal Law and Order Act of 2008, S. 3320, S. 3320, 110th Cong. § 102, 2(a)(10) (2008).

detailed reports to both tribal justice officials¹⁷⁶ and the Office of Indian Country Crime¹⁷⁷ when a case is declined or terminated.¹⁷⁸ These declination reports must include the type of crime alleged, the ethnicity of the victim and the accused (Indian/non-Indian), and the reasons for declining the investigation or prosecution.¹⁷⁹ United States Attorneys who decline cases are also required to communicate with tribal officials, in a timely fashion to avoid running a tribal statute of limitations, the details of a declined case to allow for tribal prosecution in tribal court.¹⁸⁰ Lastly, under the Bill, the Director of the newly created Office of Indian Country Crime is responsible for collecting information on these declination reports and submitting an annual report to Congress.¹⁸¹

This section is particularly effective in two ways. First, the mandatory coordination between United States Attorneys and Tribal officials occurring after federal cases are declined greatly increases the chances that tribal prosecutors will be able to subsequently bring a successful case in tribal court.¹⁸² The requirement of timely coordination between federal and tribal officials also significantly diminishes the likelihood that cases will be brought after the statute of limitations has run.¹⁸³ In cases involving serious offenses, delays in prosecution can result in grave consequences.¹⁸⁴ Increased communication under

¹⁷⁶ A “tribal justice official” is a defined term in the Bill meaning either a tribal prosecutor, tribal law enforcement officer, or any other person responsible for investigating or prosecuting an alleged criminal offense in tribal court. *Id.* § 3(b)(10).

¹⁷⁷ The Office of Indian Country Crime would be a new criminal division of the Department of Justice. *See id.* § 12.

¹⁷⁸ *See id.* § 102. The Indian Law Enforcement Reform Act of 1990 previously “authorized” law enforcement officials or United States Attorneys to submit declination reports, but did not require them to do so nor did it establish any standards as to what information should be included in such reports. Indian Law Enforcement Act of 1990, 25 U.S.C. § 2809 (1990).

¹⁷⁹ Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 102(a)(1) (2008). In addition, the declination report may include a case file, “including evidence collected and statements taken that could support an investigation or prosecution by the appropriate tribal justice officials.” *Id.* § 102(c).

¹⁸⁰ *Id.* § 102(a)(2).

¹⁸¹ *Id.* § 102(b).

¹⁸² *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. On Indian Affairs*, 110th Cong. 42-43 (2008) [hereinafter *Federal Declinations Hearing*] (statement of M. Brent Leonard, Deputy Att’y Gen. for the Confederated Tribes of the Umatilla Indian Reservation).

¹⁸³ *Id.* at 43.

¹⁸⁴ For example, on Montana’s Crow reservation, in the case of the alleged rape of a 6-year-old girl by a family member, the FBI had taken up an investigation that lasted over three years. When a tribal prosecutor eventually tried to bring the case to tribal court, he was unable to move forward due to the FBI’s delay, which had

Section 102 of the Bill also requires that United States Attorney's share case details, work-product, and evidence with tribal justice officials.¹⁸⁵ This coordination is essential to ensure that tribal prosecutors are able to bring the most effective prosecution in a case that has been declined by a United States Attorney.¹⁸⁶

Second, the mandatory submission of declination reports to tribal justice officials and the Office of Indian Country Crime expands the collection of data and flow of information between various law enforcement agencies, greatly increasing the accountability of United States Attorneys.¹⁸⁷ Ideally, these reports will identify the reasons why cases are being declined and prompt a more efficient allocation of resources.¹⁸⁸ However, Indian tribes might benefit if several changes were made to Section 102.

With regard to the declination reports, it would be advantageous if each case were at least referred to a federal prosecutor for evaluation on the merits.¹⁸⁹ By doing so, officers would gain legal insight that would be used to combat crime in Indian country more efficiently.¹⁹⁰ In addition, the Bill does not explicitly take into consideration the confidential nature of these declination reports and their potential discoverability in

caused the tribal statute of limitations to run. *See Riley, supra* note 16; *Federal Declinations Hearings, supra* note 182, at 43 (statement of M. Brent Leonard).

¹⁸⁵ *Id.*; *see* Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 102:

Section 10 of the Indian Law Enforcement Reform Act [] is amended by striking subsections (a) through (d) and inserting the following: . . . (2) UNITED STATES ATTORNEYS . . . the United States Attorney shall—(A) coordinate and communicate with the appropriate tribal justice official, sufficiently in advance of the tribal statute of limitations, reasonable details regarding the case to permit the tribal prosecutor to pursue the case in tribal court . . . (c) Inclusion of Case Files—A report submitted to the appropriate tribal justice officials . . . may include the case file, including evidence collected and statements taken that could support an investigation or prosecution by the appropriate tribal justice officials.

Id.

¹⁸⁶ *See Federal Declinations Hearings, supra* note 182, at 43 (statement of M. Brent Leonard).

¹⁸⁷ *Id.* at 37, 39 (statement of Thomas B. Heffelfinger, Partner, Best and Flanagan, LLP).

¹⁸⁸ *See id.* at 35-36.

¹⁸⁹ This and the subsequent proposals were discussed in a number of testimonies made during the Senate Committee on Indian Affairs hearing on the Tribal Law and Order Act on September 18, 2008. *See id.* at 35.

¹⁹⁰ *Id.* at 9 (statement of Drew H. Wrigley, U.S. Att'y for the District of North Dakota).

subsequent criminal cases.¹⁹¹ By making declination reports available to the public, not only would private information regarding victims and witnesses be available to the sometimes very small Indian communities, but the reasons for declining a case against a particular defendant may be used against the prosecution in subsequent cases involving the same defendant.¹⁹² In order to avoid these potential problems, Section 102 should be amended to make all declination reports confidential, and include an indemnification clause to prohibit federal officials' civil liability based on the information contained in these reports.¹⁹³

Even though declination reports would likely provide a wealth of information that could be used in the future to improve criminal justice in Indian country, some worry that these reports may be misconstrued if taken out of context, suggesting that United States Attorneys are not working hard enough.¹⁹⁴ In reality, there are many reasons why a case may be

¹⁹¹ *Id.* at 36 (statement of Thomas B. Heffelfinger); *id.* at 9 (statement of Drew H. Wrigley).

¹⁹² *Id.* at 9-10. Drew Wrigley, the United States Attorney for the District of North Dakota, testified as to a case out of the District of South Dakota that was compromised due to the discovery of a declination letter. According to Mr. Wrigley, the District of South Dakota declined to prosecute a case based on "weak or insufficient admissible evidence and a potential witness problem." *Id.* at 9. In a subsequent case involving the same accused individual, the victim from the declined case was called as a witness and the defense entered the declination letter into evidence. During summation, the defense attorney suggested that the witness's testimony was not credible based on the reasons stated in the previous case's declination letter. Mr. Wrigley did not state the ultimate outcome of the case in his example. *See id.*

¹⁹³ *See id.* at 36 (testimony of Thomas B. Heffelfinger). In terms of confidentiality, while such an amendment would prevent public disclosure, there is no explicit requirement that declination reports be made publicly available. To the contrary, under Section 102, declination reports are only required to be sent to the Office of Indian Country Crime (a proposed division of the Department of Justice), a tribal justice official, and as an annual report to Congress. While tribal justice officials may disclose these reports to a tribe, there is no requirement that they do so. *See Tribal Law and Order Act of 2008*, S. 3320, 110th Cong. § 102 (2008); *see Federal Declinations Hearings*, *supra* note 182, at 42 (testimony of M. Brent Leonard). In addition, under the Freedom of Information Act, declination reports may be exempt from public disclosure if "compiled for law enforcement purposes . . . [and if they] could reasonably be expected to interfere with enforcement proceedings." *See* 5 U.S.C. § 552(b)(7)(A) (2006); *see Federal Declinations Hearings*, *supra* note 182, at 42 (testimony of M. Brent Leonard). Lastly, the annual submission of declination reports to Congress does not waive any disclosure exemptions under the Freedom of Information Act. *See Kanter v. Internal Revenue Service*, 433 F. Supp. 812, 825 n.22 (N.D. Ill. 1977).

¹⁹⁴ *See Federal Declinations Hearings*, *supra* note 182, at 37 (testimony of Thomas B. Heffelfinger). In his testimony in front of the Senate Committee on Indian Affairs, former United States Attorney for the District of Minnesota Thomas B. Heffelfinger described how misconceptions regarding declination rates in Indian Country could not be farther from the truth:

declined irrespective of individual job performance. The most common of these reasons being that there is insufficient evidence to prosecute.¹⁹⁵ In light of this misconception, it is important to next look at how the Bill addresses the problems that law enforcement officials have with obtaining sufficient evidence to prosecute a criminal case in Indian country.

B. Insufficient Evidence to Prosecute; Fixing Investigative and Policing Systems

Declining a case for a lack of sufficient evidence stems from problems with the infrastructure or the implementation of policing systems in Indian country.¹⁹⁶ One way the Bill attempts to remedy these problems is by improving the overall communication between federal and tribal officials.¹⁹⁷ Section

I am concerned that the requirement for declination reports could create the incorrect implication that declinations in the United States Attorneys' Offices are due to a lack of commitment and effort by federal law enforcement and prosecutors working in Indian Country. In reality, federal agents and prosecutors who address crimes in Indian Country are among the most dedicated and hard-working prosecutors and agents in the federal law enforcement system. These men and women work under difficult conditions with extremely large case loads and deal with some of the most emotionally-charged cases that federal prosecutors and agents can face. It is my experience, based upon approximately 13 years as a federal prosecutor, that cases are not declined because the agents and the Assistant United States Attorneys lack commitment to justice in Indian Country.

Id.

¹⁹⁵ *Id.* While the most common reason that cases are declined is due to a lack of sufficient evidence to prove beyond a reasonable doubt a violation of the law, there are a number of other reasons that have no relation to a prosecutor's job performance. These reasons include jurisdictional barriers, limited resources, and a lack of confidence in obtaining a conviction. *See id.* at 37-38 (testimony of Thomas B. Heffelfinger); *id.* at 42 (testimony of M. Brent Leonard); *see also Broken Justice, supra* note 1 ("You gotta look at what is actually brought to the prosecutor in terms of a case that provides a viable prosecution. We, ethically, can't do anything that is not brought to us that establishes probable cause in a court. So, if we don't get a quality investigation, you know we're not gonna be able to do anything.").

¹⁹⁶ *See Federal Declinations Hearings, supra* note 182, at 37-39 (testimony of Thomas B. Heffelfinger).

¹⁹⁷ *See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. §§ 104, 303 (2008).* Section 101 of the Bill adds to the list of duties of the Bureau of Indian Affairs' Division of Law Enforcement Services:

(10) communicating with tribal leaders, tribal community advocates, tribal justice officials, and residents of Indian land on a regular basis regarding public safety and justice concerns facing tribal communities; (11) conducting meaningful and timely consultation with tribal leaders and tribal justice officials in the development of regulatory policies and other actions that affect public safety and justice in Indian country.

See id. § 101.

104 of the Bill expands the duties of the Office of Tribal Justice, deeming it the chief “point of contact” for tribal/federal correspondence regarding “public safety and justice” in Indian country.¹⁹⁸ In addition, Section 303 allows Indian law enforcement agencies to “directly access” national criminal information databases.¹⁹⁹

The Bill also increases investigative efforts in Indian country by empowering tribal law enforcement agencies.²⁰⁰ One way the Bill does this is by permitting tribal law enforcement officials to obtain training at available state and local police academies, so long as those training facilities meet the standards established by the Secretary of the Interior.²⁰¹ Another way the Bill empowers tribal officials is by encouraging the use of cooperative teams of federal, state, and tribal officials to work together in the policing of Indian country.²⁰² In order to promote cooperation between the various agencies, the Bill offers incentives such as federal grants, technical assistance, and regional training.²⁰³ This team-based method of policing will likely reduce investigative delays²⁰⁴ and increase law enforcement enthusiasm by including officials

¹⁹⁸ See *id.* § 104. The Office of Tribal Justice exists as part of the Department of Justice and serves as the “primary channel of communication for Native Americans with the Department of Justice.” See Office of Tribal Justice, <http://www.usdoj.gov/otj/> (last visited Jan. 30, 2009). The Tribal Law and Order Act would make this office a “permanent division of the Department” by providing “such personnel and funds as are necessary.” See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 104(a) (2008). Further, the Bill provides that the Office of Tribal Justice coordinate with federal agencies within the Department of Justice to oversee that tribal leaders have a role in developing law enforcement policies. See *id.*

¹⁹⁹ See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 303 (2008).

²⁰⁰ *Id.* §§ 301-305.

²⁰¹ *Id.* § 301(a).

²⁰² The Bill includes three main sources of these cooperative teams: Under Section 202, State, tribal, and local governments are encouraged to enter into “Cooperative Assistance Programs,” which relate to “mutual aid, hot pursuit of suspects, and cross-deputatization.” See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 202 (2008). Secondly, under Section 301(b), the Secretary of the Interior is responsible for overseeing the implementation of “Special Law Enforcement Commissions,” which involve federal, state, and tribal officials working together to police Indian Country. See *id.* § 301(b). Lastly, Sections 302(c) and (d) amend the Controlled Substance Act (21 U.S.C. § 873) to allow tribal officials to enter into cooperative arrangements with state and federal drug enforcement agents. See *id.* § 302(c)-(d).

²⁰³ See *id.* §§ 202, 301.

²⁰⁴ See *Federal Declinations Hearings*, *supra* note 182, at 38 (testimony of Thomas B. Heffelfinger) (“Delay is, unfortunately, a frequent factor in Indian Country investigations and prosecutions. This delay may be attributable to jurisdictional considerations, lack of resources, remote location or difficulties in obtaining witnesses or witness cooperation.”).

from local tribal communities.²⁰⁵ Similar programs have been successfully implemented in areas of rural America to provide better policing coverage.²⁰⁶

These cooperative programs may greatly help to close some of the law enforcement gaps in Indian country, but would only be effective if utilized extensively.²⁰⁷ Further, the use of incentives such as “technical assistance” and federal “grants” to encourage these programs do not sufficiently ensure that these programs will be implemented.²⁰⁸ If the Bill were able to provide for concrete monetary funding commitments, these programs would have the resources they need in order to expand the total police presence in Indian country.²⁰⁹ As the situation stands today, the BIA would have to triple its current working force in order to police Indian country with coverage and efficiency comparable to other rural communities.²¹⁰

²⁰⁵ See WAKELING, *supra* note 108. When Indian reservations receive inadequate federal policing, and tribal governments are legally unable to participate, communities are left with poor expectations and low morale. See Riley, *supra* note 16 (“Many people on reservations no longer expect justice.”). Thus, by encouraging the use of special law enforcement commissions, tribal governments will be able to become more involved with federal investigative efforts while simultaneously improving law enforcement coverage in Indian Country. Such commissions would be valuable by unifying policing efforts instead of promoting separate overlapping agencies like many current criminal jurisdictions in Indian Country.

²⁰⁶ See *Federal Declinations Hearings*, *supra* note 182, at 39 (testimony of Thomas B. Heffelfinger) (“Cooperative law enforcement services, such as Child Advocacy Centers, drug task forces and crime labs . . . can effectively enhance law enforcement in both Indian Country and non-Indian Country. Current cooperative efforts, such as the FBI’s Safe Trails Task Forces and the Family Advocacy Center of Northern Minnesota, have proven the effectiveness of this strategy.”); see *supra* note 143.

²⁰⁷ These cooperative agreements are similar to the 638 contracts and self-governance compacts by means of their ability to empower tribal officials. See Eid, *supra* note 170, at 40 (“Ute Mountain has become a haven for all kinds of criminals—Indian and non-Indian alike—who confront a capable but chronically short-staffed law enforcement presence. Only five police officers—all from the U.S. Department of the Interior’s Bureau of Indian Affairs (BIA)—patrol a reservation about the size of Rhode Island. Sometimes just one BIA police officer is available on call, resulting in response times of more than one hour.”); *supra* notes 16-17, 19.

²⁰⁸ See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 202 (2008).

²⁰⁹ See Eid, *supra* note 170, at 42 (“According to the consultant’s estimate, BIA had a 69 percent unmet staffing need for law enforcement officers and a 61 percent unmet need for correctional facilities and programs. In addition, the report concluded 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.”).

²¹⁰ See *id.* at 42 (“The consultant’s report recommended that the BIA hire 1,097 new employees to achieve parity in criminal justice and corrections programs. By comparison, the BIA’s Office of Justice Services currently has about 450 total employees on its payroll.”).

C. *Fundamental Problems Not Addressed by the Bill;
Solutions for the Future*

Notwithstanding the positive changes to Indian law, the Bill does not address some of the more fundamental problems with law enforcement in Indian country. For instance, the Bill does not address the fact that the FBI is simply not geared to deal with “reactive” cases.²¹¹ Reactive cases, such as rape, domestic violence, and assault, require an actively patrolling police network “on the ground” because of the problems associated with investigative delay.²¹² While the Bill successfully expands the powers of tribal and BIA police,²¹³ it does not attempt to unite these groups with the FBI or other law enforcement agencies dealing with Major Crimes in Indian country.²¹⁴ Unifying law enforcement and prosecution would

²¹¹ See *Federal Declinations Hearings*, *supra* note 182, at 53 (statement of Thomas W. Weissmuller, Chief Judge, Mashantucket Pequot Tribal Nation); Washburn, *supra* note 107, at 718; *supra* Part III.A.3; *supra* note 129 and accompanying text.

²¹² See *Federal Declinations Hearings*, *supra* note 182, at 53 (testimony of Thomas W. Weissmuller); *supra* Parts III.A.3, III.B.2. For most major crimes committed within Indian Country, a case changes hand several times. A case report may travel from the initial hands of tribal or Bureau of Indian Affairs police officers, to those officers’ supervisors, who refer the case to tribal prosecutors. If that case is a Major Crime, it is referred to federal investigators such as the FBI. After FBI officials conduct their own investigations, they may meet with Assistant United States Attorney Indian Law Liaisons to refer the matter to a number of other criminal divisions within the Department of Justice, such as the Organized Crime and Racketeering Division or Child Exploitation and Obscenity division. This entire exchange of information is done before the case reaches the hands of a United States Attorney for prosecution, assuming there is enough evidence to prosecute in the first place. *Federal Declinations Hearings*, *supra* note 182, at 53 (testimony of Thomas W. Weissmuller). According to Thomas W. Weissmuller, Chief Judge of the Mashantucket Pequot Tribal Nation, “[t]his system is not designed to handle reactive cases.” *Id.*; see also *id.* at 11 (testimony of Drew H. Wrigley).

²¹³ See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. §§ 301-305 (2008).

²¹⁴ Under the current arrangement between the BIA and the FBI, the FBI handles Major Crimes while the BIA handles less serious crimes. See Washburn, *supra* note 107, at 719-20; see also *supra* note 132 and accompanying text. Instead of consolidating the various law enforcement agencies, the Bill mandates the use of additional levels of bureaucracy, such as Assistant United States Attorney Tribal Liaisons. See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 103(b) (2008). These Tribal Liaisons would serve as a communication link between tribal leaders and United States Attorneys in a given district and coordinate federal prosecutions of Indian Country crime. *Id.* While Tribal Liaisons are an important means to bridge the gap in communication between United States Attorneys and tribal leaders, the Bill does not address the reasons why this gap exists in the first place. Further, in districts where the United States Attorney interacts with tribal leaders on a regular basis, this communication gap does not exist. Rather, a trust relationship is formed between federal prosecutors and tribal officials. *Federal Declinations Hearings*, *supra* note 182, at 48 (statement of Janelle F. Doughty, Director, Department of Justice and Regulatory, Southern Ute Tribe) (“It is my belief that actual personal interaction is

effectively streamline Indian country policing efforts and reduce complications associated with delay.²¹⁵ Under the current dual system of investigation, federal investigators often become involved after tribal and BIA police conduct preliminary investigations.²¹⁶ Due to this overlap in law enforcement duties, FBI agents may commence their investigation after outdoor evidence is destroyed, memories faded, and some witnesses became unavailable or uncooperative, thus jeopardizing the success of a given case.²¹⁷ Therefore, in order to alleviate the difficulties associated with the current divide in law enforcement duties, the Bill should unify efforts in Indian country so that resources are used more efficiently and all officers are prepared to deal with the unique challenges of policing Indian country.²¹⁸

Another area of Indian law that the Bill fails to adequately address is tribes' inability to effectively punish those who commit crimes within Indian country.²¹⁹ In terms of

irreplaceable in developing strong working relationships. With isolation from the prosecutorial system, we drastically limit common understanding.”); *see id.* at 53 (testimony of Thomas W. Weissmuller).

²¹⁵ *See generally Federal Declinations Hearings, supra* note 182, at 50-55 (testimony of Thomas W. Weissmuller). In cases of rape or domestic abuse, these complications from delay can be devastating. For example, in under-funded tribal jurisdictions, while a Major Crimes case is in the process of changing hands between federal law enforcement officials, the alleged perpetrator may remain free until federal charges are brought and an arrest is made. In cases involving domestic violence or child abuse, this may result in an abusive parent continuing to live in the same home as the victim. *See id.* at 52 (testimony of Thomas W. Weissmuller). Michael Riley, a reporter for the Denver Post, describes how the divided system of law enforcement affects federal prosecutions:

It's a triage situation where the FBI has a certain amount of resources, so they depend on the tribal police investigators to do a lot of the investigation, which creates some problems because the tribal investigators are not as well trained, often make mistakes. They can contaminate evidence. It creates a problem for the U. S. attorneys, who will complain that many of the cases they receive simply are poorly investigated and part of it has to do with that combination between the duties of tribal police and the FBI and how those are split.

See Broken Justice, supra note 1.

²¹⁶ *See Federal Declinations Hearings, supra* note 182, at 53 (testimony of Thomas W. Weissmuller) (“When a case dove-tails into two jurisdictions, efforts are frequently duplicated and the several levels of discretion are revisited.”); *id.* at 8-9 (testimony of Drew H. Wrigley).

²¹⁷ *Id.* (testimony of Drew H. Wrigley); *see also Washburn, supra* note 107, at 719-20; *see also supra* note 132 and accompanying text.

²¹⁸ *See supra* notes 135-145, 165-175 and accompanying text.

²¹⁹ This specifically refers to the inability of tribal governments to exercise criminal jurisdiction over non-Indians and the inability of tribal courts to punish any criminals with a sentence of over 1 year in jail or a \$5000 fine. *See Christopher B. Chaney, Overcoming Legal Hurdles in the War Against Meth in Indian Country*, 82

the sentencing authority of tribal courts, the Bill does amend the Indian Civil Rights Act of 1968 to increase maximum sentencing limits from one year to three years and increase maximum fines from \$5000 to \$15,000.²²⁰ However, while this increase in sentencing authority is commendable, it would serve tribes better if they were permitted to punish criminals at comparable levels to state or federal jurisdictions.²²¹

The primary reason for increasing tribal sentencing authority is that the current one-year limit is grossly inadequate when compared to the average sentencing limits for states' *lowest* level felonies, let alone more serious crimes such as rape and murder.²²² For example, in one tribal case in which the federal statute of limitations had run (presumably from delay), an Indian man was successfully convicted in tribal court for drugging and raping a thirteen-year old girl.²²³ Even though the trial was conducted in accordance with the procedural standards imposed in federal court,²²⁴ the defendant was sentenced to only one year imprisonment and fined \$5000, the statutory maximum under the Indian Civil Rights Act of

N.D. L. REV. 1151, 1158-1164 (2006) ("There are two types of legal hurdles to effective law enforcement in Indian country. The first is the ban on tribal criminal jurisdiction over non-Indians as set forth in the antiquated Oliphant decision. The second hurdle is the sentencing restrictions imposed on tribal courts by the Indian Civil Rights Act."); *supra* notes 90, 94.

²²⁰ See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 304 (2008). The three-year maximum sentencing authority was initially chosen based on the fact that assault was the most common federally prosecuted crime, and the most common sentence was 34 months. See *Federal Declinations Hearings*, *supra* note 182, at 45 (testimony of M. Brent Leonhard).

²²¹ See *Federal Declinations Hearings*, *supra* note 182, at 44-45.

²²² See *id.* ("[A]ccording to a memo previously submitted into the Senate record by [M. Brent Leonhard] and Cisco Minthorn, of the states that define felonies, the majority define their lowest level felony as having a maximum sentence of 5 years."). This notion is particularly upsetting given that Indians lay victim to violent crime at more than twice the rate of other racial groups and declination rates in Indian Country are at 65%. See AMERICAN INDIANS AND CRIME, *supra* note 10, at 5; see also *Broken Justice*, *supra* note 1.

²²³ See *Federal Declinations Hearings*, *supra* note 182, at 52 (testimony of Thomas W. Weissmuller). The offender in this case was in his late twenties. After the girl was reportedly missing, two family members went searching for her. They found her unconscious in a bedroom of a friend's house, "laid over a pile of blankets, face down so her bottom was elevated." A "team of cross-commissioned law enforcement officers" investigated the scene using a forensic "rape kit" to collect samples from the victim and offender's bodies. *Id.*

²²⁴ *Id.* ("The trial was managed pursuant to the federal rules of evidence and the tribal rules of procedure, which basically mirrored the federal rules. All witnesses were cross examined by defense counsel and the defense called supporting witnesses.").

1968.²²⁵ A lack of adequate tribal sentencing authority in situations such as these is unacceptable.²²⁶ If tribal governments were able to punish criminals with reasonable sentences instead of the current one-year limit imposed by the Indian Civil Rights Act of 1968, communities would be able to take better charge of their own criminal prosecutions, thus boosting overall confidence in tribal justice.²²⁷

The Bill also fails to address the inability of tribes to punish non-Indian offenders, as opined by the Court in *Oliphant v. Suquamish Indian Tribe*.²²⁸ Allowing tribal governments to prosecute non-Indian offenders would close a jurisdictional loophole that has attracted non-Indian criminals to tribal lands.²²⁹ One area of crime where this gap in jurisdiction has been greatly exploited in recent decades is in drug trafficking, specifically in methamphetamine.²³⁰ However, the consequences of prohibiting tribal governments from exercising criminal jurisdiction over non-Indian offenders

²²⁵ *Id.* Had the matter been adjudicated in federal court, “the defendant might have received 18 years.” *Id.*; see Indian Civil Rights Act, PUB. L. NO. 90-284, 82 Stat. 73 (1968) (current version at 25 U.S.C. §§ 1301-1303 (1986)).

²²⁶ See *Federal Declinations Hearings*, *supra* note 182, at 52 (testimony of Thomas W. Weissmuller). In the current example, the offender only ended up serving nine months out of the one year sentence due to overcrowding in local prisons. *Id.* Also consider that for some offenses, such as those involving drug or alcohol abuse, longer sentences are primarily meant to rehabilitate an offender. See Chaney, *supra* note 219, at 1162-63. For example, in cases of convicted methamphetamine addicts, treatments usually require several months for placement and over a year of treatment to be effective. Thus, offenders’ sentences tend to expire before treatment is completed. *Id.* This problem is exacerbated by the unusually high prevalence of drug and alcohol abuse among offenders and recidivism in Indian Country. See AMERICAN INDIANS AND CRIME, *supra* note 10, at 10, 22-24.

²²⁷ It is important to note that the current system divides misdemeanor and felony prosecution between tribal and federal officials not by the Major Crimes Act, but by the practicality of prosecuting felonies through tribal courts with sentencing limits of only one year. The Major Crimes Act simply gives the United States concurrent jurisdiction over most felonies committed on federal lands, including Indian Country. See *supra* Part II.C; see also *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995); Eid, *supra* note 170, at 42-44.

²²⁸ See generally *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

²²⁹ See Eid, *supra* note 170, at 46. Due to this jurisdictional loophole and other problems with law tribal law enforcement, Indian reservations have come to be known as, “lawless lands.” See Riley, *supra* note 16; Michael Riley, *Principles, Politics Collide*, DENVER POST, Nov. 13, 2007, available at http://www.denverpost.com/lawlesslands/ci_7446439 (“Tribal police in Nevada, eastern Michigan and elsewhere complain that federal prosecutors consistently decline cases of employees who embezzle from tribal casinos, in some instances stealing tens of thousands of dollars. Because those employees often are non-Indian, they are beyond the jurisdiction of tribal courts, making the crime virtually risk free.”).

²³⁰ See Chaney, *supra* note 219, at 1151 (“Methamphetamine is ‘public enemy number one’ for many tribes within the United States.”).

stretch beyond merely creating a jurisdictional safe haven for drug traffickers.²³¹ Non-Indian methamphetamine dealers have actually developed tribal “business plans” by producing drugs on Indian lands and subsequently targeting the tribes’ native population for clientele.²³²

Methamphetamine addiction in Indian country has resulted in horrific consequences to the welfare of tribal populations.²³³ Aside from the well-known health problems associated with methamphetamine addiction,²³⁴ those addicted are also more likely to commit violent crimes such as assault, child abuse, and domestic violence.²³⁵ One way that the Bill deals with these substance abuse problems is by expanding the use of educational programs for tribal youth and rehabilitation programs for drug abusers.²³⁶ While these programs will likely

²³¹ *Id.* at 1152; see also *The Problem of Methamphetamine in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. 97-98 (2006) (statement of Kathleen W. Kitcheyan, San Carlos Apache Chairwoman).

²³² See Chaney, *supra* note 219, at 1156 (internal citation omitted). This “business plan” has become popular for two chief reasons: First, drug dealers have the perception that Indian Country is indeed a “lawless land” where they can conduct illegal activities with little worry. Second, Indians are known as having alcohol and drug addictions, making them a vulnerable population for methamphetamine dealers. These two factors make Indian Country a prime target for drug traffickers. *Id.* at 1155-56 (“Native Americans have the highest rate of methamphetamine abuse of any ethnicity in the United States.”); see Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 2(a)(17) (2008) (“[T]he Department of Justice has reported that drug organizations have increasingly targeted Indian country to produce and distribute methamphetamine, citing the limited law enforcement presence and jurisdictional confusion as reasons for the increased activity . . .”).

²³³ See Chaney, *supra* note 219, at 1164 (“The impact of methamphetamine is devastating and has an unacceptably high cost on lives, families, and tribal cultures.”).

²³⁴ See DEA Factsheet, <http://www.usdoj.gov/dea/pubs/pressrel/methfact02.html> (last visited Oct. 8, 2009). Methamphetamine has been associated with a large number of health dangers including increased heart rate, blood pressure, body temperature, and rate of breathing. Methamphetamine may also cause brain damage, paranoia, and psychosis like that found in schizophrenics. These psychological symptoms may result in hallucinations and self-mutilation. Further, the withdrawal process usually is accompanied by severe depression. *Id.*; see Chaney, *supra* note 219, at 1152 (“Recent testimony before the United States Senate Indian Affairs Committee noted that on the San Carlos Apache reservation, twenty-five percent of babies born on the reservation were born addicted to methamphetamine.”).

²³⁵ See DEA Factsheet, <http://www.usdoj.gov/dea/pubs/pressrel/methfact01.html> (last visited Jan. 30, 2009) (“There is a direct relationship between methamphetamine abuse and increased incidents of domestic violence and child abuse.”); Chaney, *supra* note 219, at 1154.

²³⁶ See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 401(a)(2)(E) (2008) (extending grants for tribal action substance abuse plans through 2013); see also *id.* § 401(b)(a)(1) (creating pilot programs to educate youth on the dangers of alcohol and substance abuse); *id.* § 401(c) (increasing funding for emergency shelters and half-way houses for youth substance abusers who have been arrested for drug or alcohol abuse related offenses); *id.* § 401(g) (extending funding for juvenile detention centers).

provide much needed assistance for tribal members seeking help and hopefully reduce tribal demand for methamphetamine, tribal governments are still left without the legal authority to confront the suppliers of these drugs themselves.²³⁷

Non-Indian participation in crimes involving Indian victims is not limited to trafficking methamphetamine.²³⁸ This problem is most pronounced in cases of rape and sexual assault, where eighty-six percent of offenders are non-Indian.²³⁹ This statistic is particularly unsettling given that sexual violence committed against Indian women has reached disturbing levels.²⁴⁰ According to the Department of Justice, one in three Indian women will be raped in her lifetime, most likely by a complete stranger, as opposed to an intimate partner, family member, or acquaintance.²⁴¹ Due to the gravity of the problems associated with non-Indian crime in Indian country, it is unclear why this Bill does not propose expanding tribes' criminal jurisdiction over non-Indians.²⁴²

The Supreme Court in *Oliphant* noted that one reason for this limitation in criminal jurisdiction was to protect the constitutional civil liberties of non-Indians in tribal court.²⁴³ However, since the *Oliphant* decision in 1978, many tribal governments have advanced their justice systems, protecting constitutional rights such as ensuring due process and

²³⁷ See Chaney, *supra* note 219, at 1155-60 (noting the success of drug prevention and rehabilitation programs in reducing methamphetamine demand while simultaneously addressing the legal hurdles to confronting non-Indian offenders).

²³⁸ See AMERICAN INDIANS AND CRIME, *supra* note 10, at 8-9.

²³⁹ See *id.* at 9. This trend can be seen across all crimes involving Indian victims. Indian victims of violent crime reported that 66% of offenders were non-Indian. *Id.*

²⁴⁰ See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 2(a)(13)(A) (2008); see also Amnesty International, USA: Authorities Fail to Protect Indigenous Women From Shocking Rates of Rape, <http://www.amnesty.org/en/library/info/AMR51/071/2007> (follow "PDF" link) (last visited Oct. 24, 2009).

²⁴¹ See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 2(a)(13)(B) (2008). In addition, approximately two out of five Indian women will be subject to domestic violence. *Id.* § 2(a)(13)(C); see also AMERICAN INDIANS AND CRIME, *supra* note 10, at 8; N. Bruce Duthu, Opinion, *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 10, 2008, at A17.

²⁴² This notion is also odd considering that the Bill addresses the lack of tribes to prosecute non-Indians in its "Findings" section. See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 2(a)(9) (2008); see *supra* note 96 and accompanying text.

²⁴³ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) ("The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty."); see also Eid, *supra* note 170, at 45-46.

providing an unbiased jury pool.²⁴⁴ Thus, Congress should permit tribal governments to exercise criminal jurisdiction over non-Indians, so long as tribal courts are held to the same procedural standards as federal courts.²⁴⁵ By repealing *Oliphant*, Congress would effectively close the jurisdictional loophole that has enticed non-Indian criminals to tribal lands, while simultaneously granting tribal governments the judicial independence necessary to take command over the problems caused by drug trafficking and violent crime.²⁴⁶

V. CONCLUSION

If violent crime occurred in any other community at the levels at which it occurs on Indian reservations, it would be reasonable to expect a local anti-crime movement or increased enrollment in the local police academy. However, when the power to take responsibility for the problems within a community is severely weakened by federal laws that are as

²⁴⁴ Eid, *supra* note 170, at 45-46 (“Building on President Richard M. Nixon’s Indian self-determination policy, many tribal governments are undergoing what has been compared to a renaissance, gaining substantially increased governmental sophistication and economic development.”); See Chaney, *supra* note 219, at 1158-59 (“Navajo Nation law used to only allow Navajo tribal members to sit on tribal court juries. In *Navajo Nation v. MacDonald*, the Navajo Nation Supreme Court adopted the ‘fair cross section of the community’ concept. In addition, the Navajo Nation Code has been amended to no longer require tribal membership as a juror qualification. In fact, today . . . many tribal courts offer criminal defendants greater rights than the federal Indian Civil Rights Act requires.”). On some reservations, the United States already uses tribal facilities as federal detention centers. These detention centers operate under the supervision of federal government, thus preserving criminal defendants’ constitutional rights. See *Federal Declinations Hearings*, *supra* note 182, at 49 (testimony of Janelle F. Doughty) (“I strongly support a repeal of *Oliphant* as a common-sense way to strengthen public safety on our reservation.”); see *id.* at 50-55 (testimony of Thomas W. Weissmuller).

²⁴⁵ See Eid, *supra* note 170, at 42 (discussing the importance of guaranteeing constitutional due process protections by providing a “full and fair forum by an independent, neutral arbiter”).

²⁴⁶ See Chaney, *supra* note 219, at 1164 (“Congress has the power to make tribal communities safer by crafting permanent and appropriate updates to remove these unnecessary and dangerous legal hurdles. By making these adjustments, Congress would improve public safety to all Americans who live, work, travel, or recreate within or near Indian country.”); See Eid, *supra* note 170, at 45-46 (indicating that if non-Indians were subject to criminal proceedings in tribal court, they would have a far greater stake in the future development of Indian country). If Congress is not ready for such a drastic change, perhaps it may consider granting tribes the ability to practice criminal jurisdiction over non-Indians in the same way that tribes have been granted the ability to police non-Indians through “638 contracts” or “self-governance compacts.” Agreements such as these would effectively increase criminal prosecution of non-Indians within Indian country while maintaining congressionally imposed standards for criminal procedure. See Guedel, *supra* note 10 (noting the anachronistic nature of the *Oliphant* decision).

defective as they are antiquated, communities are left feeling hopeless and understandably frustrated. The problems on Indian reservations are not in any regards minor, but they often involve avoidable violent crimes. These crimes destroy lives and tear apart tribal communities. Thus, it is greatly encouraging when a bill like the Tribal Law and Order Act attempts to make real changes to the status quo by enhancing overall coordination between the various law enforcement agencies, demanding greater accountability from federal prosecutors, and investing in a number of tribal programs aimed at educating and rehabilitating affected Indian populations. Notwithstanding these positive proposals, the Bill nevertheless treats the symptoms of crime in Indian country when it should be targeting the disease. Increasing overall funding to the current system may very well solve these problems. But when this is not an option, perhaps it is time to reassess some of the legal barriers to empowering tribal governments to take charge of their own destiny. Dated legal models such as the “federal trust responsibility” and “dual sovereignty” may work well in theory, but there is no doubt that the arrangement that tribes have had with the United States over the past 200 years has not worked well in practice. By making the fundamental changes to Indian law that this Note suggests, tribal governments will be able to challenge traditional ways of fighting crime and hopefully embrace a safer and more optimistic future.

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