# SERVING (IN)JUSTICE: THE ILLS OF A FEDERAL AMERICAN INDIAN PROSECUTORIAL POWER

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> It is a pity that so many Americans today think of the Indian as a romantic or comic figure in American history without contemporary significance. In fact, the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.[1]

There have been countless debates on criminal justice, yet American Indian[2] criminal justice is typically a minor topic in the national conversation.[3] This Note examines the American Indian criminal justice system within the larger, paternalistic United States' criminal justice system. These two systems can be analogized to two trains on the same track facing collision—throwing their coach passengers off the train in the process, hopelessly waiting to be saved by those spared in first class. A historical approach, as used in this Note, is a common methodology to comprehend this catastrophic, modern-day injustice. American Indian victims live in sharp contrast to John Locke's theories on democratic governance—theories that inspired the founding generation. Hypocrisy and democracy seemingly go hand in hand.

Section I depicts early constitutional and legal theories on the relationship between American Indians and the federal government. Section II evidences the evolution of federal American Indian criminal jurisdiction. Section III denotes modern jurisprudence that expanded the federal American Indian prosecutorial power. Section IV discusses mid-twentieth

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1. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

2. Throughout this Note, I use "American Indian" to refer to indigenous peoples that have lived or are living within the United States. I acknowledge that this term may be considered either offensive and/or antiquated, but within the legal context it is common to refer to this group as "Indians."

3. Rennard Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling with Ape on Tropical Landscape: An Afterword*, 31 ME. L. REV. 213, 213 (1979) (noting that in the Kennedy Presidential Papers, of the 3,351 total linear feet of papers, only one linear foot is about American Indians).

century legislation that tugged and pulled at American Indian self-governance. Section V discusses more recent legislation that keenly focuses on various sources of power to administer justice in American Indian Country. Lastly, Section VI revisits Lockean social democratic theory to present the deficiencies of a non-consenting, homogenous criminal justice system.

Historically, Congress and the courts have notoriously grasped at straws—colonist straws at best—to denounce and trivialize American Indian criminal jurisdiction. By forcing alien criminal norms onto these communities, American Indians are often given *one* version of justice that is almost entirely irreconcilable with their values.

This imposition of a foreign criminal justice framework has adversely affected tribal nations. Unfortunately, increasing crime in American Indian Country can be attributed to historical theories of assimilation, formulated into unilateral legislation and policymaking.[4] Moreover, by failing to improve public safety and deter crime, these paternalistic laws and policies then serve the sole purpose of perpetuating colonialism.[5] To that end, the federal system continues to act in blatant opposition to democratic values. Specifically, the system contravenes the Lockean theory of governance through voluntary consent.[6]

John Locke famously outlined this social contract theory in *Two Treatises of Government*, a widely influential book. His theory rests upon the premise that the people (or majority of the people) consent to be governed by the presiding government.[7] Therefore, the majority does not owe political allegiance to said government if it violates the people's will. Simply, the government may only exist if the people consent to it.[8]

There is no legitimate social contract to adjudge and prosecute crimes in American Indian Country. Rather, through unilateral legislation such as the Major Crimes Act (MCA) and Public Law 280 (PL-280), the American Indian victim may likely be in a situation where the tribe may not have authority or adequate resources to prosecute *and/or* the state or federal government may forego prosecution altogether.[9] The U.S. Department of

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4. *See generally* Lawrence A. Greenfield & Steven K. Smith, *American Indians and Crime*, U.S. DEP'T OF JUSTICE (1999), https://bjs.ojp.gov/content/pub/pdf/aic.pdf [https://perma.cc/99MX-GGWU].

5. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 830 (2006).

6. *Id.* at 782 ("The federal Indian country criminal justice regime reflects the unilateral imposition, by an external authority, of substantive criminal norms on separate and independent communities without their consent and often against their will.").

7. *See generally* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. McPherson ed., Hackett Publishing Co. 1980) (1690), https://www.gutenberg.org/files/7370/7370-h/7370-h.htm [https://perma.cc/57FG-RHYL].

8. *Id.*

9. *See* Sumayyah Waheed, *Domestic Violence on the Reservation: Imperfect Laws, Imperfect Solution*, 19 BERKELEY WOMEN'S L.J. 287, 293 (2004); *see also* Caroline E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975)

Justice reported that U.S. attorneys' offices declined to prosecute 37% of American Indian cases in 2017.[10] The Justice Department cited that a quarter of those declined cases were reported sexual assaults.[11]

Simply, because American Indians have not *consented* to this extension and scheme of justice and are hampered in executing their own scheme of justice, it has led to inadequate crime deterrence, intervention and resources.[12] For example, in 2016, 55.5% of American Indian and Alaska Native women suffered from physical violence by an intimate partner, and 56.1% suffered from sexual violence.[13] American Indian and Alaska Native women are in dire need of certain legal services, but over a third have a hard time accessing or receiving them.[14] In simplest terms, it is a break down of law and order because of prosecutorial declination, jurisdictional tripwires, and meager local resources.

Nonetheless, the Supreme Court of the United States has ironically recognized American Indian self-determination as *the* force to counteract paternalistic treatment and subjugation. As articulated in *Ex parte Crow Dog,* the Court held that if American Indians are adjudged by those beyond their communities and norms, then prejudice and injustice will permeate the social and legal landscape:

> 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.[15]

Just as the Court predicted more than a century ago, it is the very erosion of self-governance that has significantly harmed American Indians,

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(describing federal law enforcement as "neither well-financed or vigorous").

10. Mary Hudetz, *Federal Report: Indian Country Criminal Prosecutions Plateau*, AP NEWS (Nov. 21, 2018), https://apnews.com/article/f027ebe42d1d4bedb56994de78fc25e0 [https://perma.cc/4RML-LEKW].

11. *Id.*

12. *See generally* U.S. DEP'T OF JUSTICE., FIVE THINGS ABOUT VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN (2016), https://www.ojp.gov/pdffiles1/nij/249815.pdf [https://perma.cc/HW7S-TFRZ]; *see also* Carol Goldberg & Heather Valdez Singleton, *Research Priorities: Law Enforcement in Public Law 280 States*, NAT'L CRIM. JUS. REFERENCE SYS. (Oct. 1998), https://www.ojp.gov/pdffiles1/nij/grants/209926.pdf [https://perma.cc/N8RA-9NK6].

13. *See generally Five Things About Violence Against American Indian and Alaska Native Women and Men*, U.S. DEP'T OF JUSTICE (May 2016), https://www.ojp.gov/pdffiles1/nij/249815.pdf [https://perma.cc/T5S6-7VPU].

14. *Id.*; *see also* Waheed, *supra* note 9, at 290 (noting that if a non-American Indian commits an intimate violent crime against an American Indian, as is the case for around 75% of such crimes, tribes are essentially powerless and must seek federal prosecution).

15. *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883).

especially women, in maintaining public safety.[16] Furthermore, the unilateral imposition of laws—a system that "tries them not by their peers"—gnaws at the functionality and viability of attempted self-governance.[17]

## I. THEORY THEN PRACTICE: AN EARLY HISTORY OF THE FEDERAL AMERICAN INDIAN POWER

Most school-age children learn that federalism consists of a dichotomous distribution of constitutional power—that is, between the federal government and the states. However, there is a third group—tribes—which have occupied a controversial space in this arrangement. From early on, American Indians maintained an unconventional position because "they were not citizens of the states or of the federal political entity."[18]

However, in an attempt to articulate their place within the federalist scheme, Chief Justice John Marshall in *Cherokee Nation v. Georgia* held that American Indians are "domestic dependent nations" but do not have the qualities of sovereign, foreign nations.[19] Further, although the Court recognized an "exclusive right to self-government," it did not create a bright line doctrine delineating American Indian rights and protections as non-citizens.[20] Therefore, American Indian self-governance fell into an abyss of confusion. Nonetheless, the nineteenth century Marshall Court ushered in a paternalistic federal order.[21]

Earlier cases and policies vacillated between the right to self-determination *and* forced assimilation.[22] That is, there has been semantic messiness from the beginning: "Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law

16. *See generally* RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE (AIAN) WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN, NAT'L CRIM. JUS. REFERENCE SYS. (2008), https://www.ojp.gov/pdffiles1/nij/grants/223691.pdf [https://perma.cc/6C8U-7MDD].

17. *Ex parte* Crow Dog, 109 U.S. at 571; *see also* Goldberg & Singleton, *supra* note 12, at 1 (describing Public Law 280 as "adopted and implemented without the consent of the affected tribes, raising serious questions about the proper discharge of the federal trust responsibility and the scope of Congressional authority in Indian affairs"); *see also* Washburn, *supra* note 5, at 817 (denoting that "Indian self-determination is to be viewed functionally—in terms of the purposes for which people desire to govern themselves").

18 . Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 347 (2004).

19. Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 60–61 (1991); Cherokee Nation v. Georgia, 30 U.S. 1, 14 (1831) ("The Cherokee nation is not a foreign state, in the sense in which the term 'foreign state' is used in the constitution of the United States. . . The Cherokees are a state. They have been uniformly treated as a state since the settlement of our country.").

20. *Cherokee Nation*, 30 U.S. at 4.

21. *See* BACHMAN ET AL., *supra* note 16, at 68.

22. *See* Valencia-Weber, *supra* note 18*,* at 342.

and our cases."[23] In trying to find a legal rational basis for American Indian policies, one is bound to become even more confused but will find answers that notably ignore American Indian consent. For one, the "rules have changed, often for reasons that have little do with Indian concerns or needs."[24] Moreover, authorities have tried to legislate and promulgate programs upon a general assumption that there is *one* American Indian issue, when in fact American Indians are widely diversified, with various traditions and customs.[25]

Two legal theories have formed the basis for the federal subordination of American Indians. First, the Supreme Court held that federal common law makes tribes the "beneficiary of the federal trustee's power over tribal resources, the res or corpus."[26] The Marshall Court relied on this theory in *Cherokee Nation*: the relation of the United States and American Indians "resembles that of a ward to his guardian."[27] Second, the Supreme Court recognized Congress's "plenary power" over American Indian affairs, an extremely expansive power.[28] For example, despite the Citizenship Act of 1924, which granted citizenship to American Indians born in the United States, Congress could theoretically alter their status vis-à-vis the plenary power.[29]

Simply, these two theories dehumanize American Indians. They define American Indians as less than competent humans and yet, as antiquated as it may be, these theories continue to remain at the core of many Amercian Indian policies. Despite *Cherokee Nation*'*s* talk of self-governance, legal scholarship facilitated the idea that American Indians *needed* the benevolent guidance of the Government.[30]

Beyond extraconstitutional, theoretical reasoning, the Court has long wielded the Commerce Clause as a *constitutional* weapon to subjugate American Indians to federal control. It is often depicted as giving Congress broad, unbridled power over American Indians.[31] For instance, in *United States v. Lara,* the Court, nearly two centuries after *Cherokee Nation*, wrote that the "central function of the . . . Commerce Clause . . . is to provide

23. United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J. concurring); *see generally* Strickland, *supra* note 3, at 220–21 ("The past two hundred years of American Indian policy has really been no policy; it too has been an absurd ballet – a great lateral arabesque best captured in Rousseau's painting of the American Indian struggling with an ape on a tropical landscape.").

24. Strickland, *supra* note 3, at 218.

25. *Id.*

26. Valencia-Weber, *supra* note 18, at 343.

27. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

28. Valencia-Weber, *supra* note 18, at 343.

29. *Id.* at 350; *see* 8 U.S.C. § 1401(b).

30. Nathan Geotting, *The Marshall Trilogy and the Constitutional Dehumanization of American Indians*, 65 GUILD PRAC. 207, 212 (2008).

31. *See* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 132 (2002).

Congress with plenary power to legislate in the field of Indian affairs."[32] This power is "preconstitutional" and "necessary" to regulate American Indian affairs.[33]

However, this is an improper and unconstitutional interpretation of the Clause. Congressional representation, expanded through suffrage, should protect against federal infringement of states' rights vis-à-vis the Clause, as argued by James Madison in the Federalist Papers.[34] However, American Indians do not enjoy these same protections, as "there are no Indian delegations to Congress (and none, more importantly, to the Senate)."[35] With no political process protections, American Indian communities are entirely powerless in curbing federal power vis-à-vis the Clause. Such an interpretation that the Clause grants Congress power to govern American Indians is completely inconsistent "with the basic Lockean popular delegation notions that animated the drafting of the [Constitution]."[36]

During the earlier years, Congress relied on the Treaty Power to execute its authority over American Indians.[37] However, in 1871, Congress formally ended American Indian treatymaking.[38] Once treatymaking became obsolete, it made any pretensions of coordination and cooperation with American Indians obsolete. Congress presumed it could *legislate over* rather than *negotiate with* American Indians. It emasculated the concept of consent, compounded by the fact that American Indians were not then citizens and formed no part of the political process.[39] Put best, "there is no requirement that an Indian 'agreement' be an agreement at all."[40] Standing alone, the Treaty Power is a relatively feeble source of unbridled power, and the Court did not give it much substance. For example, *Lara* opined that although the Treaty Power may not "literally authorize Congress to act legislatively," this does not impact "Congress' plenary power to legislate on

32. United States v. Lara, 541 U.S. 193, 200 (2004) (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)); *see also* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 50 (1996) (quoting County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 234 (1985)).

33. *Lara*, 541 U.S. at 201 (quoting Antoine v. Washington, 420 U.S. 194, 203 (1975)) ("Congress' legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'").

34. Steven Paul McSloy, *American Indians and the Constitution: An Argument for Nationhood*, 14 AM. INDIAN L. REV. 139, 148-49 (1988).

35. *Id.* at 151.

36. Clinton, *supra* note 31, at 133.

37. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1040–41 (2015); The Treaty Power is found at U.S. CONST. art. II, § 2, cl. 2: "[The Executive] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." The Supremacy Clause provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." *Id.* art. VI, cl. 2.

38. McSloy, *supra* note 34, at 153; 25 U.S.C. § 71 (1982).

39. McSloy, *supra* note 34, at 157.

40. *Id.*

the problem of Indians."[41]

Because American Indians have hardly been recognized as the "third sovereign," it has created insurmountable issues for self-governance. Further, it has induced numerous legal holes, especially as it concerns criminal jurisdiction: *Who is to exercise jurisdiction? Who should administer resources? Who should investigate crimes?* American Indian communities, in many instances, are unable to maintain public safety for their members because of antiquated, colonialist power distribution theories. Beyond the endless jurisdictional complexities to maintain public order, the two justice systems are completely incompatible in perspective: the United States' criminal justice system focuses on deterrence, and retribution, while American Indian communities focus on healing and community harmony.[42]

The national conversation must honor self-determination, or else continue to face the horrific statistics of intimate violence against American Indians.[43] Moreover, laws and policies must operate in tandem. If there is no intrinsic, moral commitment to improve the situation of American Indians and engender adequate enforcement and prosecution, then the law alone is meaningless.[44] There must be a shift in attitude and discussion—earlier constitutional theories that American Indians are incapable of self-governance must be outed as unconstitutional *and* unconscionable.

## II. LOUD AND PROUD: THE RISE OF THE FEDERAL AMERICAN INDIAN PROSECUTORIAL POWER

In the nation's earlier years, Congress and American Indian communities negotiated treaties that included public safety mechanisms. For the most part, Congress recognized the right to self-government, and the sovereign execution of law and order. In fact, the United States agreed that communities could punish trespassing offenders, and some communities agreed to extradite members that committed serious crimes against non-American Indians.[45]

However, Congress did not have a large interest in asserting jurisdiction over crimes committed by one American Indian against another. This had been mostly left to American Indian communities themselves because of double jeopardy concerns and an underlying recognition that jurisdiction

41. *Lara*, 541 U.S. at 201.

42. *See* BACHMAN ET AL., *supra* note 16, at 68.

43. *See generally* Nancy Carol Carter, *American Indians and Law Libraries: Acknowledging the Third Sovereign*, 94 L. LIBR. J. 7 (2002).

44. *Id.*

45. Throughout this Note, I use "non-American Indian" to refer to those that are not members of any federally-recognized Amercian Indian tribe, and under the protection of the United States by virtue of their citizenship, permanent resident status, or non-citizen status*; see* Washburn, *supra* note 5, at 792.

over these crimes belong to American Indians themselves.[46] If federal prosecution found itself asserting criminal jurisdiction, it typically was because the member committed a crime against a non-American Indian (and/or its property) *and* the tribe resigned from resolving the case. However, federal assertions of authority were far from routine.[47]

By 1817, the relationship began to shift when the forerunner to the MCA, the General Crimes Act of 1817, became law.[48] The statute applied federal criminal law to non-American Indians who committed crimes against American Indians. However, it explicitly did not include prosecutorial authority over crimes committed by one American Indian against another.[49] Indeed, "the 1817 statute preferred a tribal response to the issue."[50] American Indians often handled and resolved criminal matters through internal self-governance mechanisms.[51]

However, as the century wore on, the federal government began to assert greater colonial hegemony and power over American Indian criminal affairs. In the late nineteenth century, the federal government became eager to control the issue of criminal jurisdiction. Two main motives collided to lay the foundation for a rising interest in extending federal authority:

> The economic motive for obtaining Indian land coincided with a developing moral imperative to "civilize" and "assimilate" the Indians. As Indian dependence had increased, official contempt toward tribal governments and traditional ways of life among Indian people also increased.[52]

Racism and colonialism transcended economic gain, and now infiltrated internal governance mechanisms. This perspective-shift reached Congress in 1874, as it unsuccesfully attempted to pass a bill to extend federal criminal jurisdiction to American Indians who committed felonious crimes against other American Indians. The Senate rejected the bill, stating:

> The Indians, while their tribal relations subsist, generally maintain laws, customs, and usages of their own for the punishment of offenses. They have no knowledge of the laws of the United States, and the attempt to enforce their own ordinances might bring them in direct conflict with existing statutes and subject them to prosecution for their violation.[53]

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46. *Id.* at 793.
47. *See* Clinton, *supra* note 31, at 135.
48. 18 U.S.C. § 1152 (2012).
49. *See* Clinton, *supra* note 31, at 135.
50. *Id.* at 135–36.
51. *See* Washburn, *supra* note 5, at 798.
52. *Id.* at 797–98.
53. S. REP. NO. 43-367, at 1 (1874).

Although this bill failed to gain congressional approval, Congressmen continued to argue for extended criminal jurisdiction over American Indians. However, coincidentally or not, the Supreme Court found itelf with a ripe opportunity to settle the issue.

In *Ex parte Crow Dog*, the Supreme Court found for the Sioux Indians, and held that the federal government lacked jurisdiction to prosecute Crow Dog, a Sioux Indian, for the murder of another Sioux Indian, Spotted Tail.[54] The Sioux Indians instituted a criminal proceeding against Crow Dog and resolved the matter, yet the federal government elected to prosecute Crow Dog itself. Federal prosecutors put forth a racist narrative in the ensuing jury trial. They portrayed Crow Dog as an ill-tempered, barbaric figure that had murdered the civilized Spotted Tail, an ordinary American Indian made tribal chief by the United States Army.[55] At the jury trial, the Government teed up the argument that if "uncivilized" American Indians could murder "nice" American Indians, then there is imminent need for greater intervention in American Indian criminal affairs. This is indicative of the pro-assimilationist federal disposition toward American Indians.

However, the Court did not agree with the federal government. It reasoned that the federal government could not prosecute Sioux Indians because of their political status. Ironically, the opinion wielded the Marshall Court's ward-guardianship principle to denounce expanded federal prosecutorial power over American Indians:

> They were nevertheless to be subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards, subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor, and by education, it was hoped might become a self-supporting and self-governed society.[56]

Simply, the Sioux Indians did not owe political allegiance to the Government because they did not give their political consent to it. [57] *Ex parte Crow Dog* tracks the Lockean argument that government legitimacy derives from the consent of the people.[58] Indians were not then citizens and

54. *Ex parte* Crow Dog, 109 U.S. 556 (1883).
55. *See* Washburn, *supra* note 5, at 801.
56. *Ex parte* Crow Dog, 109 U.S. at 568–69.
57. *See* Clinton, *supra* note 31, at 145 ("The relationship upon which such agreements were premised was a government-to-government relationship between Indian tribes and the federal government, not an authority to directly govern Indian people or any overriding federal power.").
58. *Id.*

had no "voice in the selection of representatives and the framing of laws."[59] This opinion should be recognized as a high point in federal recognition of American Indian self-determination, as the Court indicated that American Indians must be left to their own devices in prosecuting crimes committed by American Indians against each other.

Congress disagreed with the Supreme Court's decision in *Ex parte Crow Dog* and continued to cite the "lawless" character of American Indians, often crafting fictional stories about "blood revenge" in American Indian communities.[60] Finally, Congress succeeded in their quest to expand federal power in 1885 when it enacted the MCA, a statute that originally granted federal criminal jurisdiction over seven felonious crimes: murder, manslaughter, rape, assault with the intent to kill, arson, burglary, and larceny.[61] Consequentially, the federal government could prosecute these seven major crimes when committed by one American Indian against another. Congress has since expanded the MCA to include multiple different code sections and dozens of enumerated crimes. [62]

This tremendous expansion of federal criminal jurisdiction has caused major ramifications in administering justice for American Indians. It severely restricts American Indian communities from prosecuting serious crimes committed against their members. This restriction is because of the great ambiguity surrounding whether the MCA grants exclusive federal jurisdiction *or* if tribes can exercise concurrent jurisdiction.[63] There is also some confusion as to *what* constitutes an enumerated "major crime."[64] Beyond these serious ambiguities, the MCA "represented a major turning

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59. *Ex parte* Crow Dog, 109 U.S. at 516.

60. Washburn, *supra* note 5, at 803 ("The Secretary argued that if the courts of the United States could not hear this murder case, then no court could hear it, and that Indian custom was that the next of kin was duty-bound to avenge the murder, a concept known as 'blood revenge.'").

61. *Id.* at 804.

62. 18 U.S.C. § 1153. The statute as amended now states:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States 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.

63. Jasmine Owens, *"Historic" in a Bad Way: How the Tribal Law and Order Act Continues the American Tradition of Providing Inadequate Protection to American Indian and Alaska Native Rape Victims*, 102 J. CRIM. L. & CRIMINOLOGY 497, 504 (2012).

64. *Id.* at 504, 506 (citing confusion as to whether "rape" included statutory rape and carnal knowledge).

point in American approaches toward Indians, legitimizing assertion of governing authority over non-consenting peoples."[65] It reinforced this paternalistic relationship, accompanied by "decreased political sovereignty for the tribes and a corresponding increase in tribal dependence on the federal government."[66]

Following the enactment of the MCA, the Supreme Court heard *United States v. Kagama,* a case involving the murder prosecution of a member of the Hoopa Indians. [67] The main question presented was whether the Government could extend unilateral prosecutorial power over American Indians. The Court answered in the affirmative but did not ground its answer in convoluted constitutional theories like the Marshall Court.[68] Rather, it found the Constitution silent on the matter, and the Government's Commerce Clause defense failed:[69]

> But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.[70]

Although the Court rejected the idea that the crimes enumerated in the MCA impacted interstate commerce, it could not find *any* explicit constitutional clause or theory to justify this hegemonic criminal jurisdictional power over American Indians. The Court failed to "see in . . . the Constitution and its amendments any delegation of power to enact a code of criminal law for the punishment of [major crimes between Indians]."[71]

Nonetheless, it upheld the MCA on the basis of the federal government's geographic dominion over American Indians:

> But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exists within the broad domain of

65. Clinton, *supra* note 31, at 170.
66. S. Lee Martin, *Indian Rights and the Constitutional Implications of the Major Crimes Act*, 52 NOTRE DAME L. REV. 109, 115 (1976).
67. United States v. Kagama, 118 U.S. 375, 378–79 (1886).
68. *See generally* Washburn, *supra* note 5, at 806.
69. *Id.*
70. *Kagama*, 118 U.S. at 378–79.
71. *Id.* at 379.

> sovereignty but these two.[72]

The Court further reasoned that American Indians were dependent on the federal government, and restated the ward-guardianship principle:

> These Indian tribes are the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Rather than citing to or relying on a textual constitutional explanation, the Court rationalized expanding colonialism *because* of the ward-guardianship principle: "Under this construct, the federal government supplies governance to a dependent and inferior people whose very dependence and inferiority somehow creates, *without any textual constitutional delegation,* expansive paternalistic federal authority."[73] Some argue that *Kagama* turned the ward-guardianship principle on its head. Indeed, the idea of trusteeship to *protect* American Indians completely poisoned the sovereignty well.[74]

*Kagama* represents a shift from the Marshall Court's early nineteenth century jurisprudence because of its blatant emphasis on colonialist theories, such as possession and ownership, and its walk back of the Commerce Clause.[75] It did not attempt to disguise racism in a textual constitutional analysis. It instead justified the MCA as extraconstitutional yet legitimate, relying on the ward-guardianship prism.

More importantly for this analysis, the Court in *Kagama* shifted its focus from political allegiance toward unilateral laws that institute governance through *non-consent*. Congress and the Court forced *and* enforced the MCA short of *any* actual democratic consent. It imposed ill-fitting criminal norms and perspectives on American Indian Country contra to the founding generations Lockean prerogative.

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72. *Id.* at 380.
73. Clinton, *supra* note 31, at 176.
74. *Id.* at 175.
75. *See* discussion *supra* Section I.

## III. DIMMING THE LIGHTS: MODERN JURISPRUDENCE ON THE FEDERAL AMERICAN INDIAN PROSECUTORIAL POWER

Some may wonder, what would have resulted had the roles been reversed in *Kagama*, and the question, instead, was whether American Indians could prosecute non-American Indians. Nearly a century after *Kagama*, this exact issue reached the Supreme Court in *Oliphant v. Suquamish Indian Tribe*.[76]

Ironically, but unsurprisingly, the Court found that American Indian courts could not exercise criminal jurisdiction over non-American Indians because it would be illegitimate to subject non-American Indians to a government for which they had given no actual democratic consent.[77] The Court rattled off due process concerns for non-American Indians, such as the fact that because non-American Indians are excluded from Suquamish jury pools, it would be unconstitutional for American Indians to prosecute non-American Indians.[78] However, fears of non-American Indians not having a fair trial because of American Indians' execution of justice is nowhere mentioned in *Kagama*. At the core of this opinion, the Court reasoned that American Indians could not exercise jurisdiction because of the ward-guardianship principle. Specifically, American Indians cannot exercise criminal jurisdiction over non-American Indians because it is "inconsistent with their [dependent] status."[79]

To justify the significant limitations on American Indian power, "later cases explained *Oliphant* on the grounds that tribal powers of self-government were merely internal and did not include external powers, by which they meant that tribes could govern their members but not others."[80] Plainly, self-government truly meant *themselves* and no one else, no matter how egregiously non-American Indians harmed them.

In *Duro v. Reina*, around a decade after *Oliphant*, the Court again addressed American Indian criminal jurisdiction but in the context of intra-tribal dynamics: can a tribal court prosecute an American Indian from a different tribe?[81] The Court erred on the side of caution and did not draw sharp jurisdictional lines. Rather, the Court found that regardless of the petitioner's status, American Indians, like all other citizens, "are embraced within our Nation's 'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.'"[82]

Relying on *Oliphant*, the Court found that "its exercise over non-Indian

76. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
77. *Id.*
78. *Id.* at 194.
79. *Id.* at 208.
80. Clinton, *supra* note 31, at 216.
81. Duro v. Reina, 495 U.S. 676 (1990).
82. *Id.* at 692 (quoting *Oliphant*, 435 U.S. at 210).

citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States."[83] However, the Salt River Maricopa Community involved in *Duro* did not consent, either through treaty or otherwise, to this "overriding sovereignty."[84] Yet again, the Court relied on the ward-guardianship principle—a principle grounded neither in fact nor textual constitutional analysis—to maintain federal criminal jurisdiction without Amercian Indian consent.[85] Eventually, in 1991, the Indian Civil Rights Act (ICRA) overturned *Duro* (the so-called "*Duro*-Fix") and granted American Indian tribes criminal jurisdiction over *all* federally-recognized American Indians.[86]

The *Kagama/Oliphant/Duro* jurisprudence massacred any hamstrunged definition of sovereignty. The Court's unfounded and baseless conclusions pervade federal jurisprudence, as some academics describe the federal American Indian prosecutorial power as "chaotic" and "confused," and known for its "[c]onflicting lines of precedent and conflicting philosophies."[87] If federal American Indian prosecutorial power is this difficult to define, is the labyrinthine of federal power a mere falsity in and of itself?

## IV. PUSHING BACK: THE SELF-DETERMINATION ERA

Many tribes grew frustrated by their "status as subjects of the federal government," thus unable to prosecute serious crimes commited by non-American Indians against their members.[88] Tribes could not rely on the Government either; federal prosecutors have notoriously declined to prosecute crimes in Indian Country.[89] This criticism was not baseless; as one example, the Salt River Pima-Maricopa Community had more than twenty unresolved homicide cases in the 1970s.[90] Congress heard these communities loud and clear and pushed for a change. However, mid-twentieth century legislation—Public Law 280 and the ICRA—determined to change course but failed to do so. Moreover, the MCA's drastic

83. *Id.* at 693.

84. *Id*; *see also* Clinton, *supra* note 31, at 224.

85. *See Duro*, 495 U.S. at 693.

86. 25 U.S.C. §§ 1301–1304.

87. Joseph William Singer, Remembering What Hurts Us Most: A Critique of the American Indian Law Deskbook, 24 N.M. L. REV. 315, 318 (1994); see also McSloy, *supra* note 34, at 220.

88. B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-state and Tribal-federal Court Relation*, 24 WM. MITCHELL L. REV. 457, 513 (1998).

89. *Id*. ("Federal prosecutors, busy with prosecuting a variety of more serious crimes, perhaps have been remiss in devoting the necessary attention to the problems that arise when non-Indians commit offenses in Indian country, oftentimes with apparent impunity."); Larry Cunnigham, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 Geo. L.J. 2187, 2188 (noting that "many United States Attorneys have abdicated their responsibility to prosecute crimes in Indian country committed by non-Indians.").

90. Washburn, *supra* note 5, at 818.

expansion in the mid-twentieth century compounded trends of violence ravaging American Indian communities.

Enacted in 1953, PL-280 transformed the federal criminal jurisdiction landscape.[91] Congress withdrew criminal jurisdiction over American Indians in certain states and transferred jurisdiction to other states. Originally, the statute transferred criminal jurisdiction to six "mandatory" states—Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin—while all other states maintained the choice to assume part or total criminal and civil jurisdiction over American Indians.[92] American Indians had no choice but to accept this reorganization of criminal jurisdiction.

Reminiscent of the past, American Indians fiercely opposed PL-280 because it unilaterally applied state law to American Indians without their consent. Congress purposefully omitted any consent requirement for economic reasons, as Congress feared a hold-out—some, or most, American Indian communities would not agree to this transfer of power—and "federal expense dictated immediate transfers of jurisdiction to the states."[93] Mandatory PL-280 states did not have the option to condition their jurisdiction on consent, and some optional PL-280 states assumed this power unilaterally, without any regard for the affected communities.[94]

Beyond blatant disregard for independence, American Indians feared that state jurisdiction could harm their communities even more than federal jurisdiction. Some reasons included fear of discrimination and longer prison sentences by state courts, state law enforcement's disregard for American Indian victims, and the possible inability to cooperate with state officials because of elder community leaders' insufficient fluency in the English language. While the federal government may not have been the perfect solution, despite its faults, it "at least perceived the Indians as its special responsibility and concern."[95] Moreover, the Bureau of Indian Affairs (BIA) granted federal funding to these communities but PL-280 states often were unfunded or underfunded.[96] The issue of funding became a source of contention because it negatively impacted the adequacy of law enforcement.[97]

In 1968, Congress amended PL-280 to strengthen the American Indian right to self-determination. First, and most importantly, no additional state could acquire PL-280 jurisdiction *unless the affected American Indian tribes expressed their consent*.[98] However, this consent provision had not

91. Pub. L. No. 83-280.
92. BACHMAN ET AL., *supra* note 16, at 74–75; *see also* Goldberg, *supra* note 9, at 537–38.
93. Goldberg, *supra* note 9, at 544.
94. *Id.* at 546–47.
95. *Id.* at 545.
96. BACHMAN ET AL., *supra* note 16, at 75.
97. *Id.*
98. *Id.*

been made retroactive, and therefore, earlier unilateral state assertions of jurisdiction could not be altered.[99] Second, states could accept jurisdiction over some subject matters but not others.[100] This provision encouraged states and tribes to "negotiate for the extension of state jurisdiction in those situations where it was to their mutual advantage." [101] Third, states could return their jurisdictional function to the federal government. However, American Indians did not have a choice in this retrocession of jurisdiction.[102] Further, American Indians could not initiate or force retrocession on their own.[103] Yet again, the Government couched their pro-assimilationist decisions in superficial democratic delegation.

Simultaneously, as Congress amended PL-280, it enacted the ICRA in the same year. Specifically, the ICRA came into focus because members of Congress were concerned about violations of American Indian civil rights.[104] The law noticeably included most of the Constitution's Bill of Rights but excluded certain rights that might "interfere with the culturally-based governence or would burden the limited financial resources of tribes."[105] Despite the ICRA's culturally-sensitive modalities, some argue that it ignored existing, competent forms of indigenous justice.[106]

*Santa Clara Pueblo v. Martinez* captures the ICRA's strained dual purpose of protecting individual members' rights while preserving customary systems of government.[107] The facts of the case concerned Julia Martinez, a Santa Clara Pueblo member, who alleged a violation of equal protection under the ICRA because of gender discrimination according to the tribe's customary membership laws.[108] The tribe denied enrollment and inheritance rights to the children of female tribe members who marry outside the tribe, "while extending membership to children of male members who marry outside the tribe."[109]

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99. Goldberg, *supra* note 9, at 551.

100. *Id.* at 549–50.

101. *Id.* at 551.

102. BACHMAN ET AL., *supra* note 16, at 75.

103. Goldberg, *supra* note 9, at 559.

104. *Indian Civil Rights Act*, TRIBAL L. AND POL'Y INST., https://www.tribal-institute.org/lists/icra.htm [https://perma.cc/KMR4-PRKB] (last visited Feb. 6, 2023).

105. Valencia-Weber, *supra* note 18, at 361; *see also id*. ("The equivalent of the establishment clause, right to appointed counsel, grand jury indictment requirement, and civil jury trial were all excluded.").

106. Donald J. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. LEGIS. 557, 601 (1972) (describing the Pueblo comunities "in no way convinced that the values which their system embodied were inferior to those of White America"); *see also* Valencia-Weber, *supra* note 18, at 361–62.

107. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); *see also* Valencia-Weber, *supra* note 18, at 363.

108. *Santa Clara Pueblo*, 436 U.S. at 51; *see also* Valencia-Weber, *supra* note 18, at 362.

109. *Santa Clara Pueblo*, 436 U.S. at 51; *see also* Concetta R. Tsosie de Haro, Dine Nation, *Federal Restrictions on Tribal Customary Law: The Importance of Tribal Customary Law in Tribal Courts*, 17 TRIBAL L.J. 1, 6 (2017).

*Martinez* presented an obvious tension inherent in the ICRA, one that the Court had not opined on before, but that was ripe for decision: "individual claims to the communal land, often by non-members, in challenge to the tribal government's cultural system to protect resources for the community."[110] *Martinez* challenged the political sovereignty of the Santa Clara Pueblo community. Agreeing with the respondent, the Court emphasized the importance of culturally-based self-governance and customary membership laws, finding that most rights guaranteed under the ICRA, including equal protection, must be adjudicated by the responsible tribe.[111] During the late twentieth century, this recognition for separate justice systems bled into modern political discourse. In 1995, U.S. Attorney General Janet Reno acknowledged that "tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities" because "[t]hey are local institutions, closest to the people they serve."[112]

Despite the Attorney General's endorsement of self-determination, the Court in *Martinez* engaged in normative Euro-American discourse: "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess . . . Title I of the ICRA represents an exercise of that authority."[113] This is a remarkable announcement of power considering *Martinez's* "hands-on" approach to curb federal encroachment in American Indian matters. Perhaps, according to the Court, tribes can and should have sovereignty *as long as it is on Congress's terms.*

No matter the ICRA's well-intentioned objectives, in reality it made American Indians even *more* dependent on the federal government and corroded tribal self-governance. First, while tribes could prosecute American Indians for felonious crimes, such as murder, the ICRA severely restricted tribes' abilities to punish offenders.[114] Under the original statute, a tribal court could only fine up to $5,000, grant a term of imprisonment of up to one year, or both.[115] This has since modestly improved.[116] These restrictions effectively created pressure to expand the scope of the MCA, totaling thirteen offenses.[117] The Government's self-justifying rationale being that "federal prosecution . . . would sometimes be needed to ensure

110. Valencia-Weber, *supra* note 18, at 362.

111. *Martinez*, 436 U.S. at 59 (quoting Fisher v. District Court, 424 U.S. 382, 387–88 (1976)); *see also Indian Civil Rights Act*, *supra* note 104.

112. Janet Reno, A Federal Commitment to Tribal Justice Systems, 79 JUDICATURE 113, 114 (1995).

113. *Martinez,* 436 U.S. at 56–57 (citations omitted).

114. *See* Washburn, *supra* note 5, at 822.

115. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

116. *See infra* notes 125–126 and accompanying text.

117. *See* Indian Civil Rights Act of 1968, *supra* note 115; *see also* Washburn, *supra* note 5, at 824.

that the punishment would match the gravity of the offense" because tribes were constrained by the sentencing and fine restrictions.[118]

Powerless to fight pervasive felonious crime, American Indians therefore had one option: contact Congress to grant federal prosecutors greater power to address increases in serious crime.[119] However, if a federal prosecutor declined to prosecute, and the tribe had concurrent jurisdiction to prosecute, it was still constrained by narrow sentencing and fine restrictions imposed by the ICRA.[120]

Reminiscent of the past, the ICRA morphed Congress into their familiar guardianship role, claiming to act in the tribes' best interest.[121] However, *how can the Government act in their best interest if it restricts their ability to protect themselves from and punish recidivistic offenders of serious crimes?*

## V. MODEST STEPS AHEAD: BUILDING A BETTER RELATIONSHIP

President Obama signed into the law the Tribal Law and Order Act of 2010 (TLOA), an amendment to the ICRA, to address crime in American Indian communities.[122] The legislation created a lot of buzz because it enlarged American Indian criminal jurisdiction. However, the buzz did not necessarily translate into decreased criminal activity.[123] Despite placing a greater emphasis on American Indian victims of domestic violence by authorizing guidelines to assess and collect evidence, rapes reported on California reservations increased from 2009 to 2012.[124]

The TLOA also established more robust sentencing and punishment guidelines, and recognized alternatives to retributive responses to crime.[125] It increased the maximum sentence to a $15,000 maximum fine, a term of imprisonment of up to three years, or both.[126] Tribes can also "sentence

118. Washburn, *supra* note 5, at 824; *see also* Bj Jones et al., *Intersecting Laws: the Tribal Law and Order Act and the Indian Civil Rights Act*, TRIBAL JUST. INST. (Oct. 2016), https://law.und.edu/npilc/tji/_files/docs/iltloaicra.pdf [https://perma.cc/PAB7-LBJA].

119. *See id.* at 826.

120. Owens, *supra* note 63, at 507–08.

121. Warren Stapleton, *Indian Country, Federal Justice: Is the Exercise of Federal Jurisdiction under the Major Crimes Act Constitutional?*, 29 ARIZ. ST. L.J. 337, 348 (1997).

122. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

123. *See generally* Sophia Helland, *A Broken Justice System: Examining the Impact of the Tribal Law and Order Act of 2010 and Public Law 280*, ROSE INST. OF STATE AND LOCAL GOV'T (Apr. 2018), https://s10294.pcdn.co/wp-content/uploads/2018/10/Tribal-Courts-White-Paper_FINAL.pdf [https://perma.cc/U94A-ZX9C].

124. *Indian Civil Rights Act*, *supra* note 104; Helland, *supra* note 123.

125. Christine Folsom-Smith, *Enhanced Sentencing in Tribal Courts: Lessons Learned From Tribes,* THE NAT'L TRIBAL JUD. CTR. (Jan. 2015), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/TLOA-TribalCtsSentencing.pdf [https://perma.cc/6TXW-GNGS].

126. 25 U.S.C.§ 1302(b).

stack" up to nine years for separate offenses.[127] However, the required resources to implement these changes are scarce, as federal grants are hard to obtain and state tax laws can eliminate resources.[128] The TLOA did *not* increase the jurisdictional reach of American Indians but continued to thrust Euro-American centric ideas about retribution onto tribes.

Additionally, the TLOA did not assign mechanisms to increase federal prosecutorial accountability, especially for major crimes. Despite increased training and standardization of investigation practices, the TLOA does not hold prosecutors accountable if they refuse to prosecute certain crimes. If a prosecutor declines to prosecute, he or she must give notice. However, there is no procedure to incentivize prosecution or to limit the number of declinations.[129] Due to this, victims may be disinclined to report offenses. If their perpetrator may not face the wrath of the system, then what incentive is there to report the crime and risk their own safety? Indeed, this is a dysfunctional byproduct of the TLOA—in 2012, 93 percent of domestic violence crimes by non-American Indians against American Indians went unreported.[130]

Lastly, the TLOA created a jurisdictional maze because it allows tribes to request concurrent jurisdiction, alongside federal and state jurisdiction. However, the tribe must request this three-sided concurrent jurisdiction framework, and it may unintentionally create more bureaucratic headache and force the victim to relive her trauma in more than one court.[131] It may also create a standstill in both prosecuting the offender and protecting the victim from future, imminent interactions or threatened communications.

In light of these administrative complexities and failures to stymie violence, Congress enacted the Violence Against Women Reauthorization Act of 2013 (VAWA).[132] Specifically in attempt to combat domestic violence, for the first time, tribes could exercise jurisdiction to prosecute non-American Indians in the limited context of domestic violence. This special provision takes the form of specific domestic violence criminal jurisdiction (SDVCJ).[133] This has sometimes been referred to as the "partial-*Oliphant* fix" because it recognized American Indian sovereignty to prosecute and adjudicate domestic violence crimes committed by non-American Indians.[134]

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127. *Id.*

128. Helland, *supra* note 123, at 5.

129. Owens, *supra* note 63, at 520.

130. M. Brent Leonhard, *Implementing VAWA 2013*, A.B.A. (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/implementing-vawa-201/ [https://perma.cc/U235-FP9S].

131. Owens, *supra* note 63, at 520.

132. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

133. *Id.* ("The term 'special domestic violence criminal jurisdiction' means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.").

134. Joshua B. Gurney, *"An SDVCJ Fix"—Paths Forward in Tribal Domestic Violence*

However, the VAWA came with limitations. Tribes could only prosecute an offender that had demonstrative "ties to the tribe or its members," defined as someone who: "(i) resides within the Indian country of the participating tribe; (ii) is employed in the Indian country of the participating tribe; or (iii) is a spouse, intimate partner, or dating partner of (I) a member of the participating tribe; or (II) an Indian who resides in the Indian country of the participating tribe."[135] The VAWA also imposed procedural protections, such as effective assistance of counsel and the right to a jury that represents a "fair cross section of the community."[136] However, if tribes have sovererign authority to exercise SDVCJ, then why are tribes made to provide constitutional protections? Some scholars argue that tribes are *not* wielding a constitutional power, but a novel power that emanates from no constitutional source.[137] The Government's strong concerns for procedural fairness can be seen as mere disrespect for and belittlement of other perspectives on *how justice should play out*. However, if the tribes choose to forego these procedural and penal requirements, then they may have no other effective means to administer justice.

After the VAWA's enactment, it "prevent[ed] any tribe from exercising SDVCJ jurisdiction for the Act's first two years unless the tribe was accepted to participate in the 'pilot project' administered by the United States Department of Justice."[138] Notably, the Pascua Yaqui Tribal Court of Arizona became the first tribe to successfully prosecute a non-American Indian under SDVCJ.[139] Between February 2014 and March 2015, out of the combined three pilot programs, 27 SDVCJ cases arose involving 23 defendants.[140] Consequentially, more victims of domestic violence are reporting these crimes.[141] Despite contentious constitutional issues and quasi-assimilationist policies, the VAWA is a large step forward in fixing a steeped paternalistic order.

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*Jurisdiction*, 70 HASTINGS L.J. 887, 899 (2019).

135. Violence Against Women Reauthorization Act of 2013, *supra* note 132.

136. *Id.*

137. Gurney, *supra* note 134, at 901.

138. *Id.*

139. Cf. Cassity Reed, Are We There Yet: An Analysis of Violence against Native American Women and the Implementation of Special Criminal Domestic Violence Jurisdiction, 10 J. RACE GENDER & POVERTY 1 (2018-2019); Debra Utacia Krol, Pascua Yaqui Tribe First to Use VAWA to Prosecute Non-Indian, INDIAN COUNTRY TODAY MEDIA NETWORK (June 9, 2017), https://indiancountrymedianetwork.com/news/politics/pascua-yaqui-tribe-first-usevawa-prosecute-non-indian/.

140. Gurney, *supra* note 134, at 901.

141. *See* Reed, *supra* note 139, at 13–14.

## VI. PERFECTING UNSAFETY: THE DEMOCRACTIC SOCIAL CONTRACT

As discussed thus far, the United State is notorious for selecting self-serving democratic processes to serve its assimilationist polices. Yet, the Government has consistently asserted that these policies are not to force assimilation, but to ensure the safety of American Indians. *However, safe according to whom? How should safety be defined? Who is exactly safe?*

Instead of the mosaic of democratic processes the federal government has relied on to define safety, we should instead look to John Locke's social contract theory on democratic governance to determine what it means to be safe. In *Two Treatises of Government*, Locke mentions that humans must consent to the political order to remain safe and secure against those that do not consent:

> Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. . . . [This is done only] by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.[142]

Consequentially, those that consent to the political systems of the United States, often non-American Indian offenders, are adjudged by federal and state systems of criminal justice. They are, in theory, protected by these systems, often in the form of the Bill of Rights, because of their implied political consent to them. However, American Indians are subject to these same systems absent consent. This imposition absent consent requires us to question not whether these systems are good or bad for American Indians, but whether they should be thrusted upon them at all:

> [E]ven if prosecutors performed their work in accordance with sensible criminal justice policy, and even if juries were selected in accordance with the Sixth Amendment, these actors would nevertheless be enforcing laws not made by Indian tribes.[143]

As Locke opined, if some do not consent, then they cannot be safe from the outset. The policies may be improved; but if they have not been consented to, the policies are not as credible as those that have been entered into via consent. People are less likely to pipe up in support, and even may discourage enforcement, because no one consulted them in the first place.

The hyperfocus on due process is an obvious byproduct of democracy.

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142. LOCKE, *supra* note 7, at ch. VIII, § 95.
143. Washburn, *supra* note 5, at 782.

In fact, Lockean concepts on popular delegation inspired the Constitution.[144] However, these Lockean theories, in favor of the non-American Indian offender, deeply impact American Indian communities; communities that have neither consented to the Constitution, nor to unilateral legislative policies.

However, some may argue that it is a mere impossibility to satisfy the Lockean social contract theory for both the American Indian victim and non-American Indian offender. *How do we afford constitutional and customary/traditional protections to both at the same time? Do we administer different procedural and substantive rules for the victim and offender? Would doing so create more inequities in a system that is already scarred by discrimination and racism?*

The answers to these questions may not provide a clear path, but it is, at the very least, important to consider them. This Note does not propose a balancing test or a specific policy initiative. It is more concerned by the process itself, and more specifically, in creating criminal justice rules and laws that are consented to by all affected parties. If there is a focus on consent, then later decisions about retribution, punishment, deterrence and the like may be met with respect, or at least credibility.

Drawing on the safety-consent rationale, there is a clear and strong relationship between consent and values. If rules or laws are the embodiment of *what* a community values, then these rules or laws inspire consent to them. Plainly, people are happy to consent to rules or laws that define what they can and cannot tolerate. To that end, a homogenous criminal justice system cannot impose rules and laws on a group if that group does not believe it embodies their perspectives on justice. The system must then be reconfigured and redesigned to resonate with and complement this agreement. By demonstrating an understanding of and tolerance to this set-up, through conversations and double-sided consent, both communities can then feel safer throughout the process itself and in its aftermath.

144. *See* Clinton, *supra* note 31, at 133.