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AMERICAN INDIANS CRIME AND THE LAW: Five Years of Scholarship on Criminal Justice in Indian Country

Kevin K. Washburn[†]

It is a tremendous honor to serve as the inaugural William C. Canby, Jr., Scholar in Residence. I must begin by talking about the man that this post was created to honor. Judge Canby was a law professor on the Arizona State faculty when, in 1980, he was appointed by President Jimmy Carter to the U.S. Court of Appeals for the Ninth Circuit. Among other academic works, he is the author of *American Indian Law in a Nutshell*, now in its fourth edition.

Many of Judge Canby's former clerks will tell you that the year they spent working for him was the best year of their careers. Over the years, many of us have threatened to chain ourselves to our desks and refuse to leave. Indeed, although clerks usually leave around Labor Day, I managed to stretch my term until almost October of 1994 before I finally left for the Honors Program at the Department of Justice in Washington, D.C.

To be sure, clerking for any judge is a great job for a young lawyer. I have often thought it a little ironic that the most important work that many lawyers will ever perform occurs in their first year after graduating from law school. But while the job itself is an important one and can be very rewarding, one of the most valuable things many clerks take from the job is a role model, an example of the professional behavior we ought to model in our own careers. Thus, the identity of the judge is crucial to a clerk's development as a lawyer and I was particularly fortunate to clerk for Judge Canby.

Because of the weight of the responsibility and the solitary nature of the work, it is hard to be a judge, and I suspect that the weight increases as the level of the court increases. Judges make difficult decisions every day, and many of them take that to heart, recognizing the importance of this work. In

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an effort to show respect and perhaps in an effort to gain favor, many lawyers stop treating judges as fellow human beings and begin to treat them in a much more deferential manner. Judges often begin to internalize the importance of their work and their decisions, and grow accustomed to such deference. When this effect grows pronounced, members of the bar sometimes call it “black-robe-itis.”

Despite the power of these natural tendencies, Judge Canby was immune to them. In my practice, I have had the good fortune to meet a lot of federal judges and I believe that Judge Canby has worn his black robe lighter than any judge that I have ever encountered. And though Judge Canby never shirked the responsibility of being a federal circuit judge—and I know that he felt the weight of that tremendous responsibility, particularly in death penalty cases—he somehow avoided the sense of self-importance that often comes naturally with such an influential position and significant work. He is the rarest of judges, one who never lost his status as human being when he donned the black robes.

Does Judge Canby have faults? Well, yes, of course. His legendary sense of humor is as arid as the Arizona desert and it is sometimes far too subtle, a problem compounded by the fact that he never delivers a punch line with much of a sense of moment. Indeed, his humor sneaks up on you. It is sometimes so unexpected that one does not realize the judge is joking until several beats have passed.

The year I spent working with Judge Canby was an absolute joy. And for me, the experience lasted well beyond that year. Of all the former clerks for Judge Canby—and by now there must be seventy-five or more—none of them benefited more from the association with Judge Canby than I did. Because of his reputation in the field of Indian law, a clerkship with Judge Canby is the golden ticket for a career in the field of Indian law. Because of this background, I was given choice assignments at the Department of Justice. When I began to teach, I started at the University of Minnesota, a top-ranked law school that happened to be the Judge’s alma mater. By now, my curriculum vita has a lot of lines, including federal prosecutor, general counsel of a federal agency, and a visiting chaired professor at Harvard. Nevertheless, within my field, the line that draws the most interest is the one that draws the inevitable comment: “Wow, you clerked for Judge Canby?!” It is remarkable that American Indian law is little more than an avocation for Judge Canby. He has, of course, a full time “day job” that keeps him rather busy. Yet he is far more well known in the Indian law field, even within academia, than many of the scholars who make it their life’s principal work. This is truly a credit to Judge Canby’s wisdom and influence as a scholar, as well as a judge.

Much of my own Indian law scholarship has been at the nexus of criminal procedure. Judge Canby set me on the path of criminal procedure, and it was an unlikely path for me. I am probably violating the rules of “judicial clerkship confidentiality” to tell this story, but I have long carried with me an experience I had as Judge Canby’s clerk. When I began, I was a novice. The principal scholar on criminal procedure at Yale Law School seemed to have stopped paying attention to the field about the time the Warren Court started, so he had not focused much on the revolutionary changes that brought about most of the field of modern criminal procedure. And thus, I didn’t know very much about the field when I started clerking for Judge Canby. (Moreover, Indian law had not been offered at Yale during my time there, so I was unprepared in many areas of law.)

One of the cases Judge Canby assigned me was a fairly straightforward Fourth Amendment case dealing with the public safety exception to the Miranda rule.¹ The case involved a police officer who was about to search a suspect, in custody at the police station, incident to booking the suspect into jail, and the officer said, in essence, “Am I going to find any drugs or needles in your pockets?” The officer testified that he routinely asked that sort of question to protect himself from reaching into a pocket and getting poked by a needle. The suspect answered the question by volunteering a little more information than the question called for. “No,” he said, “I don’t use drugs, I sell them.”

The legal question arose because the facts indicated the suspect had not yet received a Miranda warning. The prosecution had used the suspect’s statement in the ensuing narcotics prosecution. The district court had admitted the statement. The question was whether the suspect’s statement was properly admitted under the public safety exception to the Miranda rule.

The leading case in the area,² which I found in my research since I had not learned it in law school, involved a suspect who had been arrested in a grocery store. Since the suspect had entered the store armed and did not have the gun in his possession when he was arrested, the police were desperate to find the gun to prevent a customer or a child from finding it. The police did not read the suspect a Miranda warning before demanding to know where the suspect had ditched the gun. And the suspect directed them to the gun. All’s well that ends well—the police officers retrieved the gun. But the gun was a key piece of evidence that the prosecution later

1. United States v. Carrillo, 16 F.3d 1046 (9th Cir. 1994).

2. New York v. Quarles, 467 U.S. 649 (1984).

introduced at trial. The Supreme Court upheld the admissibility of the gun and that created the so-called public safety exception to the Miranda rule.

As with any good case, the Supreme Court decision did not entirely answer the question in the case before the Ninth Circuit. The panel could either follow the case or distinguish it. Since the officer in this case had merely asked a “yes or no” question and did not seem to be doing it for purposes of investigation, I wrote up a draft opinion concluding that the statement was admissible under the public safety exception to Miranda. I then sent it up to the judge and, not long thereafter, Judge Canby filed an opinion in the case in which there was no dissent. I didn’t think about it much again until a few months later when the opinion had been published, and another judge, not on the panel, called for en banc review of the case. The memo, written by one judge, was quickly joined by a couple of other judges. Suddenly, there was a small movement to get the case reheard en banc.

As the law clerk who had worked on the opinion, I was mortified by such scrutiny. And the memo that these other judges had written was very compelling. As I recall, it focused on the issue of expediency. The argument in the judge’s memo—which was far better, by the way, than the defense counsel’s brief—was basically that there was no need for expeditious action that would justify the failure to read a Miranda warning before the search. Since the defendant was in custody, it would not cause any harm to wait another few seconds before conducting the search. In sum, the other judge’s memo explained that the officer should have stopped, read the Miranda warning, and then proceeded. No harm would come from waiting a few moments. And that simple fact effectively distinguished the grocery store case. I was mortified. In the draft opinion, I had focused almost entirely on the need for the information and the danger posed by the circumstances. In the case before the court, the need for the information—safety—was very similar and the Miranda warning might simply cause the defendant to avoid answering the question honestly and directly. But I found the judge’s memo fairly compelling.

Judging is not primarily a political activity, but on criminal procedure issues Judge Canby is usually on the left. He was appointed by a Democrat to the court, and he has a healthy respect for the Constitution as a restraint on police power and as a protection of ordinary citizens and suspects. And in a close case, he is probably more inclined to preserve the constitutional liberties at issue and rule for the defendant.

To make matters worse, the call for en banc review was from other Democratic appointees. We clerks, like some judges, have an inflated sense of our self-importance while we’re clerking. I thought, “Oh my God, what

did I do?!" I had never even spoken to Judge Canby about this case. I had just sent the draft opinion forward. And I had ignored what was really a key facet of the case that I should have seen and discussed more clearly. And I believed that, by failing to flag the issue, I had inadvertently transformed Judge Canby into some sort of right-wing, pro-law enforcement nut job.

I was feeling awful about the case and I felt that I had placed Judge Canby on the wrong side of the court by missing or ignoring this key issue in the case. But, in the midst of my agony, I actually found the slip opinion that Judge Canby had authored, and I read it closely. As I read, my heart began to sink even more. It seemed to follow the draft that I had given him. The statement of facts section was the same, as were the presentation of the issue and the first few paragraphs in the analysis section. A few of the sentences showed some light tinkering, but most were the same.

Soon, however, I reached a sentence that stuck out. The words, and I will never forget them, said, "A pressing need for haste is not essential." And I thought, "I didn't write that line." I read it again. "A pressing need for haste is not essential." The sentence was very simple and it went right to the heart of the issue that these other judges were raising. I realized that the importance of the issue may have eluded me, but it hadn't eluded Judge Canby. In those eight little words, Judge Canby made it clear that he had thought carefully about that issue, and he had simply and elegantly addressed it. I might not have fully appreciated the ramifications of each side's argument in the case, but he certainly had. Those eight glorious words gave me an enormous sense of relief. They proved that it was not me who had decided this case. I was a mere scribe. Judge Canby had seen the important issue and addressed it in "vintage Canby" manner: pithy, concise, and clear. More importantly, I had not put Judge Canby at cross-purposes with his colleagues—he had done it to himself! That day, I was relieved but humbled. I gained a keen appreciation for the bottomless well of wisdom that Judge Canby has. I also learned a bit about how lonely judging must be.

Hopefully someday there will be a "Canby Scholar in Residence" who is worthy of the name. You are not getting such a scholar today, but I am deeply honored to be here and I will address an issue that I think Judge Canby will appreciate. Though my introduction to criminal procedure with Judge Canby was hardly auspicious, I have become more acquainted with the subject over the years and I have spent much of the last five years examining more closely issues of criminal law and procedure on Indian reservations. It is to this subject that I will now turn. I will begin with some introductory remarks about the problem. I will then offer some anecdotes and observations of the practical problems in this area and attempt to ground those pragmatic concerns in criminal law and procedure theory.

Finally, I will suggest some directions for solving the practical and theoretical problems that exist in Indian country criminal justice.

Crime and criminal justice are among the most pressing problems in Indian country today. Amnesty International has accused the United States of human rights violations for failing to provide minimal protections for American Indian women in the United States.³ The Wall Street Journal has recently discussed the problem of criminal justice and public safety in Indian reservations.⁴ Other mainstream media outlets have also begun to cover the issue, including an award-winning series in the Denver Post.⁵ The media coverage has drawn significant Congressional attention to the issue. In a recent Senate hearing, I told the Indian Affairs Committee that the problem is that the so-called “thin blue line” that protects the ordinary citizen from crime is actually more like “a dotted line” in Indian country.⁶

When I became a professor in 2002, these subjects had not been addressed in any depth in several years. Professor Robert Clinton wrote the seminal articles in the field in 1974 and 1975.⁷ In the first of those articles, he promised *three* articles.⁸ He said that the first article would lay out the historical development of the Indian country criminal justice scheme; the second article would critique its current form; and the third article would provide solutions.⁹ Professor Clinton’s first two articles were masterpieces, but he never wrote the third article. For a young scholar interested in this area, this created an opportunity. So I used Professor Clinton’s path-breaking work as the foundation for my own work, drawing insight from my own professional experience, and I started to work.

3. AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 10 (2007), *available at* <http://www.amnesty.org/en/library/asset/AMR51/035/2007/en/dom-AMR510352007en.pdf>.

4. Gary Fields, *On US Indian Reservations, Criminals Slip Through Gaps*, WALL ST. J., June 12, 2007, at A1.

5. In November 2007, investigative reporter Mike Riley authored a four-part series in the Denver Post entitled “Lawless Lands” which discussed in-depth the problem of criminal justice in Indian country. The series won the American Bar Association’s prestigious 2008 Silver Gavel Award for newspaper reporting on pressing legal issues.

6. *Oversight Hearing on Law Enforcement in Indian Country before the S. Comm. on Indian Affairs*, 110th Cong., 1st Sess. (2007) (Testimony of Byron Dorgan, Chairman); *see also* Jerry Reynolds, *Law Enforcement is a "Dotted Blue Line" in Indian Country*, INDIAN COUNTRY TODAY, June 29, 2007, at A1.

7. *See generally* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976) [hereinafter Clinton, *Criminal Jurisdiction*]; Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975) [hereinafter Clinton, *Development*].

8. *See* Clinton, *Development*, *supra* note 7, at 952 n.9.

9. *Id.*

My interest in the field was sparked when I was serving as a federal prosecutor in Indian country. It was very important work, and I loved the job. I probably could have enjoyed it for an entire career, but I received an untimely promotion that ended my service as an Assistant United States Attorney. My experience as a prosecutor in this area was key, however, for my work helped me think about the problems with Indian country criminal justice. To provide context for the problem, I will begin by discussing a series of anecdotes, observations and data points from my life and my practice. Then, I will try to use these anecdotes to explain the broader theoretical problems for which they serve as symptoms. Finally, I will suggest a path toward solutions to the many problems of criminal justice in Indian country.

My first observation will allow me to tell another story about Judge Canby. One of my co-clerks, Michael Edson, once told me a funny story about his interview with Judge Canby. Michael was ten or fifteen years older than me, pursuing law as a second career. He was first or second in his class at the University of Michigan Law School, and he was bright and self-assured. During his interview with Judge Canby, he began to feel that the questions Judge Canby had asked him were not substantive. At the end of the interview, Judge Canby stood up and they shook hands. Michael paused and said, "You know, Judge, I'm just a little disappointed. All we did here was chit-chat for half an hour. You didn't ask me anything substantive. You didn't ask me any hard questions."

Apparently without missing a beat, Judge Canby looked at Michael and said, "Who was Millard Fillmore's vice-president?"

Michael shrugged and, dejected, said, "I don't know."

Such is the good humor of Judge Canby that I doubt that he even had to follow up with the obvious retort, "Are you now satisfied?"

Well, just to show that Judge Canby has been a rotten influence as often as he's been a good influence, I have a similar question: has anyone ever heard of Grover Cleveland? Grover Cleveland served two terms as president and the terms were non-consecutive.¹⁰ This makes him the answer to an American political trivia question. Despite this trivia, President Cleveland has had far greater significance in my life. My great-grandfather was prosecuted for murder, convicted of manslaughter and sentenced to death in Indian Territory in the 1890s. He was sentenced to hang by the notorious "hanging judge," federal Judge Isaac Parker of the District of

10. Michael Gerhardt, *The Constitutional Significance of Forgotten Presidents*, 54 CLEV. ST. L. REV. 467, 497 (2006).

Arkansas, who presided over offenses from the Indian Territory next door.¹¹ If my great-grandfather had swung from the gallows, he never would have had children with my great-grandmother. And I would never have been born.

But shortly before the execution was set to occur, Grover Cleveland pardoned my great-grandfather. If you don't like anything I have to say today, you can blame Grover Cleveland. While President Cleveland's pardon of my grandfather is just an interesting piece of trivia from my family history, it illustrates a larger problem with criminal justice in Indian country.

Think about what this story means. While most American citizens, who are routinely prosecuted in state courts, can obtain a pardon from the governor of the state in which the prosecution takes place, many American Indians on Indian reservations are subject to federal jurisdiction. A convicted Indian defendant must obtain a pardon, if at all, from the leader of the free world. One need not be particularly insightful to see the problem. It is simple mathematics. The President of the United States has a much larger responsibility than the average governor. And he has more than 300 million people under his jurisdiction.

If you are inclined to be concerned about disparity in the criminal justice system, this would seem to provide evidence of troubling disparity. Even if you think criminal sentencing is not too harsh as long as there are viable opportunities for the exercise of mercy opportunities, there may be no viable opportunity in these cases. This story cries out for greater scrutiny of pardon and clemency decisions in Indian country cases.

Now, let me offer an observation from my practice. In one of my first cases as an Assistant U.S. Attorney, I had a routine detention hearing in an Indian country case. In a detention hearing, the judge determines whether to release the suspect or order him detained until trial. And the question is whether the person is a flight risk or a danger to the community. I cannot remember how the case came out, but after the hearing, my supervisor, the First Assistant United States Attorney, came over and put his arm around me and offered me some advice. He said, "In the next detention hearing you

11. Judge Isaac Parker was portrayed in the movie "True Grit" and was apparently of great interest to Chief Justice William Rehnquist. Barton H. Thompson, Jr., *Chief Justice William H. Rehnquist: Prizing People, Place, and History*, 58 STAN. L. REV. 1695, 1700 (2006) (suggesting that this connection had a link to then-Justice Rehnquist's 1978 decision in *Oliphant v. Suquamish Tribe*). See also Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal ↔ Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 14 (2003) (discussing Judge Parker's views of the Cherokee courts).

have, I don't want you to say 'the defendant is a danger to *the* community.' Instead, I want you to say 'the defendant is a danger to *our* community,' because it makes the judge and all of us feel like we're in the same boat together."

I instantly saw that this was an excellent litigation trick, but it didn't really ring true to me. Most of the defendants I prosecuted in Indian country cases lived hundreds of miles from the courthouse. They were not part of a community that included me or the public defender or the judge. Indeed, Indian country wasn't the same community at all. It was an entirely different community. Often, the defendants even spoke a different language. Moreover, the federal government would not even have jurisdiction over these same offenses if they occurred in the judge's community, or the prosecutor's or defender's. The whole basis for federal jurisdiction in Indian country was, in effect, to prevent state law enforcement authorities from encroaching on reservations and thus to maintain the ability of these communities to remain separate and distinct.

During my service as an Assistant U.S. Attorney, I tried five or six cases that arose in Indian country, and I don't believe that a Native American was ever seated as a juror in one of my cases. Often, the venire from which the jury was selected had only a handful of American Indians. These few would routinely be excused for cause or struck, and would never end up serving. In other words, the Indian country community was absent from the cases arising in Indian country.

It was also very rare for an American Indian to serve on a grand jury. In the jurisdictions where I have worked, a federal grand jury tends to be seated for twelve or eighteen months and will meet for up to one week each month. As a federal prosecutor, I spent a lot of time in front of the grand jury, and we tended to appreciate their work. At the end of their term, we would have a small reception to thank them for serving as a grand juror. I remember talking to one of those grand jurors one day at such a reception, and I asked her what she learned while serving as a grand juror. This grand juror was a small Hispanic woman, older, probably in her 60s, who had lived her entire life in the south valley of Albuquerque, an impoverished, high-crime area. Her response: "I learned that Indian reservations are awful. I would never want to live there."

I was struck by her comment. This juror had lived all her life in a very tough barrio and she thought that Indian reservations were bad. Her impression was honest. For the past year, she had met regularly each month with other jurors to see the worst that was happening in Indian country. She'd seen scores of child sex assault cases, rapes and homicides. My guess was that she didn't fully understand the subtle jurisdiction pattern that was

at work to mold her evidence (only federal cases go to the federal grand jury). But I was certain about her conviction. And I was left with the feeling that she had developed a misimpression of Indian country, because she had only seen the worst. I fear that she went to family and church gatherings in her own community thereafter and reported her impressions of Indian country. Since the crimes that she had seen tend to track pretty closely with poverty, her own neighborhood likely had a similar crime rate. Yet, from her grand jury service, she had gained a particularly jaded impression of Indian country.

Another observation, this one about trial: one day I was sitting in the back of the courtroom in a very important Indian country double homicide case. There were only about three other people sitting in the gallery in the back of the courtroom: a Navajo woman and her two sons. And the boys were, roughly, ten to twelve years old. I was there to observe a colleague present a very important case. There was, by the way, no press in the room. It was a double homicide case, and there was no media attention. If this offense had occurred in Albuquerque or Phoenix, the press would have been there in force. In most cities, a double homicide is a subject of some attention. But this was an Indian country case, so no one was there to cover the case. But I digress.

There was a witness on the stand and there was an interpreter because the witness spoke only Navajo. When the interpreter would translate the witness's answer, the little boys would sometimes snicker. This happened three or four times in the course of a few minutes. During the next recess, I asked the boys why they were laughing sometimes. And they replied that they were laughing at the interpreter because she wasn't translating very accurately. These boys had grown up bilingual, and they believed that the witness was routinely being misinterpreted.

I had a sinking feeling as I realized that the interpreter may not be reliable. In a double murder case, the likely federal sentence is life imprisonment without parole. The magnitude of the *in*justice that "justice" can cause when the process is unreliable is striking. It makes one wonder whether a criminal justice system can ever be reliable when it routinely functions in a language that is foreign to the people and the land it is meant to serve. In sum, English is not the language in which many Navajo offenses occur. Many of these offenses transpire among Navajos with Navajo speakers, the native language of the Navajo Reservation. In translating these events into English, significant facts may be lost in translation, especially when the interpreting is unreliable.

Most of the violent cases in Indian country—upwards of ninety percent—involve abuse of alcohol or drugs. A common defense strategy in

those cases has two somewhat interrelated themes. First, who could possibly know what happened when every witness was intoxicated? How can anything be proven beyond a reasonable doubt in such circumstances? You usually can prove existence of a death, but beyond that, things become cloudy. The prosecution may be arguing premeditated and deliberate murder, but the defendant may be arguing perfect self-defense. And such a case may turn largely on the behavior of the deceased. The second theme that often arises is related to the first, but is a little more subtle: "This is a case involving drunken Indians on an Indian reservation far away from here. Why is it a federal case?" It always struck me that neither defense would work very well on the reservation if the case had been tried before Indian people, and thus they seemed, to some degree, like distractions from the issues in the case.

Within the United States Attorney's Office, Indian country cases often were not prioritized. While I was serving as an assistant U.S. attorney, several vehicles were vandalized at a Bureau of Indian Affairs school called the Torreon Day School.¹² The school principal kept calling my supervisor, the chief of the Violent Crimes Section, and imploring him to prosecute the suspects. It was a simple case with, as I recall, four adults and three juveniles, all teenagers. They had broken into several vehicles, by breaking out a side window, and tried to get each one started by jamming a screwdriver into the ignition switch. They finally succeeded in getting a van started and made it about a mile before hitting a curb hard and flattening three of the tires. In all, the suspects had caused about \$20,000 in damage.

This case was not the kind of case that federal prosecutors enjoy prosecuting. It would make most federal prosecutors yawn. And to make matters worse, since it involved both juveniles and adults, it was a little more complicated than the average case, requiring a split prosecution. As the most junior prosecutor, I was assigned the case. After a couple of conversations with the school principal, I thought, "You know, he's right; this case should be prosecuted. There ought to be some ramifications to this kind of vandalism or no one will learn." But I worried that my supervisors would not let me prosecute the case because there were much higher priorities. To bring a prosecution in that office, one had to draft a prosecution memo. In the subject line, I labeled the case "The Torreon Day School Massacre" and I made my best argument, and the management, probably somewhat reluctantly, approved the prosecution. In any other prosecutor's office, such a case would have been routinely prosecuted and

12. These events are drawn from personal recollections of the author.

there would be mechanisms for handling it through appropriate diversionary channels, but at a BIA school in Indian country, “making a federal case out of it” was the only way to ensure its prosecution.

To me, each of the preceding observations is a symptom of a basic problem criminal justice in Indian country. When I began to apply a theoretical lens to these problems, I realized that the core of each of these problems is the same. And the problem is better described from the realm of criminal procedure than through Indian law. The basic point is this: criminal justice in Indian country operates in a manner that is fundamentally inconsistent with our most basic values as to how criminal justice is supposed to work in the United States. Two of the values that I will discuss further are closely related: one of them relates to the community and the other relates to localism.

The first value, not discussed often, but implicit in much of the structure of our criminal justice system, is localism—the notion that criminal justice should be handled locally, especially for local crimes. Numerous scholars have engaged in handwringing about the increasing federalization of crime,¹³ and in some circumstances, local crimes have been federalized,¹⁴ but federal prosecutions remain exceptional. Only in the narcotics area are there significant numbers of cases prosecuted federally and those can be justified by the fact that narcotics distribution schemes are often international in scope. Even in the narcotics area, the vast majority of prosecutions occur at the state or local level.

In Indian country, however, local crimes are federalized. Serious offenses, such as aggravated assaults, sex offenses, homicides, and cases involving juveniles, are prosecuted federally. These cases are almost entirely local offenses with local harms. Many of them are disputes within very small communities. Often, the suspect and the victim know one another and, indeed, a very high number of them arise within a single home or family. Absent the Indian country location of these offenses, almost all of them would be prosecuted locally.

The other fundamental value worth discussing is related to the notion of community. Criminal justice in the United States is fundamentally designed to be a community endeavor. The United States Constitution has numerous

13. See, e.g., Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825 (2000); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 35–36 (2003); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 610 (2005).

14. See 18 U.S.C. § 2119 (2006) (making carjacking a federal crime).

constitutional provisions that demand that the community be involved in criminal justice. Consider the following examples. First, criminal trials are required to be not just "speedy," but also "public."¹⁵ One justification for this rule is that the community is entitled to know that its offenses are being prosecuted.¹⁶ It is essential to law and order that communities know that the crimes within their communities are being addressed.¹⁷ The publicity is also essential to the restorative process of justice. Since a crime is often viewed as a tear in the fabric of society, and it is through the criminal justice process that we mend that tear, criminal trials need to be public.¹⁸

Another purpose served by publicity is protection of the right of the defendant.¹⁹ In theory, the watchful eyes of the public help prevent judicial persecution of individuals.²⁰ However, the public must be interested in the trial and serving its watchdog role. The defendant's own community is likely to be best situated, and perhaps best *motivated*, to protect him from abusive prosecutions. Indeed, people from other communities are less likely to empathize with the defendant.

Publicity is also essential to some of the most important goals of criminal law and punishment, the deterrence of crimes. Utilitarian theorists assert that offenders are less likely to offend if they fear swift and certain prosecution. People need to see that there are ramifications for their offenses. Through public trials and convictions, public punishment telegraphs to offenders the message: "this could happen to you."²¹ There are also more subtle factors at work, including the general socializing and stigmatizing effects that criminal processes can have to change social norms.²²

15. U.S. CONST. amend. VI.

16. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571–72 (1980) (protecting the public right of access to criminal trials).

17. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (suggesting that when a community "begin[s] to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law").

18. This is a simple Rawlsian conception of the purposes of the criminal justice system. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

19. *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979).

20. *In re Oliver*, 333 U.S. 257, 270–71 (1948).

21. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1904–07 (1991).

22. See generally Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

The problem with many of the Indian country cases is that these values served by publicity are fundamentally absent.²³ These cases happen a hundred or more miles away from the communities where the offenses occurred. And these cases often get little or no publicity on the reservation. By and large, the press is absent. And many people in the community have no idea what is happening in these cases. The community may know that someone was arrested and taken away, but they often do not know what happened thereafter. And that's a problem, because the community may not feel that its crime was addressed, or does not know if it was addressed. Criminal justice is not a process in which the community is engaged. To explain it in more familiar terms, it is not a process that happens "of the people, for the people, or by the people." It happens "to the people" through an external process run by outsiders.

The protective purposes of criminal process for defendants are absent as well. The notion is that a defendant's community will be vigilant against oppressive actions by corrupt government officials. But in Indian country cases, this avenue for accountability is absent. The community just never sees the trial. They never know what's happening in these cases. The cases happen hundreds of miles away from where the crime occurred.

None of the valuable interests of publicity are served if the community doesn't know what's happening. If a tree falls in the forest, and nobody is there to hear it, does it make any sound? This logical conundrum should not arise in the context of a criminal trial. The trial serves a public function and it cannot serve that purpose fully without publicity.

While the trial is designed to be observable by interested members of the public, it is also designed very explicitly to involve members of the public. Through the members of the jury, who serve as proxies, the larger community is intimately involved in criminal justice in the United States. Indeed, the jury's very purpose is to represent the community. According to the Supreme Court, the Sixth Amendment requires the jury to be at least minimally representative of the community.²⁴ While the Court allows some variance to creep in during the jury selection process to address a different problem related to bias and prejudice, the venire must be drawn from a fair cross section of the community.²⁵

23. Some of these thoughts are explored in greater detail in Kevin K. Washburn, *American Indians, Crime and the Law*, 104 MICH. L. REV. 709, 764–72 (2006).

24. See, e.g., *Duren v. Missouri*, 439 U.S. 357, 358–59 (1979).

25. The principle is codified in the Jury Selection and Service Act, 28 U.S.C. §§ 1861–69 (2006).

A jury ensures that criminal justice is only partially controlled by government officials. It is the community itself, acting through the jury, who makes the most important decisions. Use of the citizens of the community in this key role is what gives the criminal justice system in the United States its very legitimacy. Putting the final decision in the hands of citizens ensures that no one is railroaded by government officials.²⁶ The notion that a person is entitled to a trial by a "jury of his peers" is fundamental, even though those words never actually appear in the constitutional text.²⁷

How well can the criminal justice system work, however, if the community in which the crimes arose is not represented on the jury? Routinely, in Indian country cases, the jury deciding the case lacks even a single member who is from Indian country. Venue is a large part of the problem. Imagine taking all the criminal cases in Maricopa County in Phoenix and trying them down in Tucson in Pima County. Imagine taking all of the serious crimes in Los Angeles and trying them in San Francisco. Those scenarios are absurd, right? But we do it routinely in Indian country cases. Many cases from the Navajo reservation are tried in Phoenix, and sometimes that's 350 miles away from where the crime occurred. Given the distance from Phoenix to the Navajo Reservation, any offense that occurs on the Navajo Reservation will be tried at least 200 miles from where the crime occurred. If it seems absurd in the previous example, why isn't it absurd in the circumstances of Indian country?

The point here is that, in the United States, we have a very elaborate, very stylized system of criminal justice. A key premise is that you must involve human beings in the process. And not just any human beings will do. With apologies to Thomas Friedman, in criminal justice, the world is not flat.²⁸ Though our elaborate American criminal justice regime is labor-intensive, we would no sooner outsource the criminal trials in Los Angeles to India, to Tijuana, or even to a different American city.

Now, because of local prejudices, of course sometimes a trial must be moved to a different venue where a fair and unbiased jury will be available. But change of venue is the exception that proves the rule. Under the American system, a change of venue is always exceptional and never

26. See *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968).

27. The Supreme Court has interpreted the Constitution as explicitly including "of his peers." See *id.* at 156.

28. See generally THOMAS FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005) (discussing globalization, the outsourcing of American jobs to foreign countries).

routine.²⁹ It happens only rarely and only when justified by other important values related to fairness to the defendant. And, by the way, changes in venue can have significant negative consequences. When the Rodney King defendants were tried outside of Los Angeles, for example, angry communities in Los Angeles rioted and caused more than \$1 billion worth of property damage in Los Angeles.³⁰ These negative ramifications presumably arose precisely because the affected community doubted the legitimacy of processes that did not involve it.

Citing Alexis de Tocqueville, some have suggested that the use of citizens on juries also helps to educate citizens and the community about how criminal justice works.³¹ If this is true, then people from Indian country aren't being educated very effectively as to how criminal justice works in their communities. And if one of the purposes is to educate, why would we leave out the newest members of the American citizenry?³² Thus, while political legitimacy is one of the casualties of the system that we have, educational outcomes are another.

The absence of citizens of Indian country on juries hearing Indian country offenses also undermines utilitarian theories justifying criminal law and punishment. The force of a jury's verdict in expressing moral condemnation is directly related to the jury's composition. The fact that the jury's verdict of guilty reflects an expression of moral condemnation by one's peers is crucial to the reformatory effect that the process is designed to have on the defendant. Having members of the defendant's own community say "we find you guilty" is likely to be far more weighty, powerful, and sobering than having strangers from a different community make such a pronouncement. Indeed, these problems may be exacerbated when race is involved, as it is so explicitly involved in Indian country cases.³³ The defendant who faces a jury full of strangers, who look different than he,

29. Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 667 (1991) ("Courts rarely employ such an extraordinary and expensive measure as a change of venue.").

30. See *Koon v. United States*, 518 U.S. 81, 88 (1996).

31. See, e.g., Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2055 (2008) ("[T]he jury, which is the most energetic form of popular rule, is also the most effective means of teaching people how to rule." (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 316–18 (Arthur Goldhammer trans., Library of America 2004) (1862))).

32. American Indians were not routinely admitted to American citizenship by birth until 1924 with enactment of the Indian Citizenship Act. See Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253.

33. See generally Bethany R. Berger, "Power over this Unfortunate Race": Race, Politics and Indian Law in *United States v. Rogers*, 45 WM. & MARY L. REV. 1957 (2004).

may cling to claims of unfairness and racism. He may not be forced to confront his own guilt directly.

Thus, though some may wonder why the crime rate is high in Indian country, we can hypothesize reasons from simple criminal law theory. First, offenders do not feel the weight of condemnation of their community and may be more likely to re-offend. Second, potential offenders are not deterred because they are not aware of the prosecutions and outcomes of cases against other offenders. Indeed, on Indian reservations, criminal justice is a mysterious, distant process with little local involvement. Thus, high Indian country crime rates may be inexplicable to those who do not understand criminal law theory and how criminal justice works, but any first-year law student who has taken criminal law ought to be able to see that simple concepts like general deterrence and rehabilitation are simply not working as they are meant to work in the Indian country context.

I mentioned earlier that a common defense in criminal trials is to suggest to the federal jury, at least implicitly, that Indian country cases involving intoxicated Indians should not be in federal court. When I was trying these cases, I sometimes became angry when this kind of defense was raised. I thought that there was something vaguely racist about it. But because these cases are routine offenses with primarily local effects, I now think that the defense attorneys who raise such defenses may actually have the right instincts. Defense attorneys may be correct in wondering why federal juries should be interested in these cases. It is now clear to me that it is wrong for Indian offenses to be tried before juries that are uninterested and unconnected to the communities where the offenses occurred. It is contrary to some of the most fundamental values of criminal justice in the United States.

Now, return to the anecdote that I used to begin the discussion. I have already suggested that the clemency procedures of the American system are unfair in light of the fact that they rely on uncertain action by the highest executive official in the United States, but this is merely the most extreme example. The entire federal law enforcement system is problematic. I do not question the integrity of federal law enforcement officials generally. These public servants are doing important work with the highest motives. They are trying to protect Indian communities, a very honorable goal. The problem is that they simply cannot be very good at it. A federal official is institutionally incompetent in this context, for several reasons.

First, there is the basic problem of democratic accountability. Most prosecutors in the United States are elected by the community they serve. U.S. Attorneys are an exception. U.S. Attorneys are appointed by the President. Because of the tremendous crime problem in Indian country,

there is arguably a much greater need for democratic accountability. Yet the officials involved there are the least accountable officials in the United States. If an Indian community does not like the way its offenses are being prosecuted, what action can it take? It can vote for a different president in the next quadrennial election and *hope* that the new president will have a policy more in line with the community's desires.

This democratic accountability issue is not only a practical problem; it also poses a theoretical problem. One of the reasons prosecutors are given wide discretion in the American model of criminal justice is related to the delegation of power from the legislature to the executive branch. The legislature enacts the laws and then delegates to the prosecutor the enforcement of those laws. The legislature enacts far more laws than could possibly be fully prosecuted. And far more crime occurs than prosecutors could ever prosecute. Legislatures are justified in granting the decisions as to which laws to enforce and which crimes to prosecute on the theory that the prosecutors are best at keeping their fingers on the pulse of the community and determining *which* crimes ought to be prosecuted.

In most American jurisdictions, that process works fine. Since, in most jurisdictions prosecutors are members of the community that they are serving, they are able to exercise such discretion. But U.S. Attorneys routinely are not members of the Indian country communities for which they prosecute.³⁴ I doubt that there is a U.S. Attorney or Assistant United States Attorney in the country who lives within Indian country. Arizona U.S. Attorney Diane Humetewa is a member of the Hopi Tribe.³⁵ For these purposes, she has greater legitimacy than perhaps any other U.S. Attorney in the entire United States. But keep in mind that she does not live on the Hopi Reservation and she was not appointed by the Hopi Tribe or the Navajo Nation or any of the Indian tribes in Arizona. She was appointed by George W. Bush and her oath binds her to the enforcement of the laws of the United States, not to the will of Indian communities.

The second major problem with the role of federal authorities in this area is the troubling dynamic that is created. My label for this dynamic—I have called it “the cavalry effect”³⁶—has drawn a lot of negative attention from my former colleagues in U.S. Attorneys’ Offices nationwide, but the dynamic itself is not really subject to question; it is well known to

34. See Washburn, *supra* note 23, at 729–30.

35. Press Release, U.S. Attorney’s Office, Diane Humetewa Sworn in as U.S. Attorney (Dec. 18, 2007), available at 2007 WLNR 25686341.

36. Washburn, *supra* note 23, at 735.

practicing federal prosecutors and they must deal with it regularly in Indian country cases.

Although the cavalry effect can happen in many different kinds of cases, the most tragic example is in prosecutions for sexual abuse of a child. What often happens in child sex abuse cases in Indian country when a child comes forward and reports the abuse, is it begins a federal investigative process. When federal law enforcement officials arrive, a predictable, though unfortunate, reaction by the community in many cases is to oppose the federal authorities. The community circles the wagons, so to speak, around the defendant, and turns against the outsiders, the federal prosecutors, who are threatening to disrupt the community. We can blame the community for this dysfunctional reaction to an allegation of child sex abuse, but we cannot deny these communities their cultural histories and those histories are bound to have some effect. Indian communities have been resisting federal authorities, off and on, for more than a hundred years. We should not be surprised when they do so in this context.

What should be apparent is that when Indian communities turn against victims, however, they do so precisely because of the dynamic created by making criminal justice in Indian country a federal responsibility. That dynamic is not inevitable in criminal cases; it exists precisely because of the *federal* identity of the law enforcement agency and prosecutors on the case.

The dynamic poses significant problems for victims. A victim might well be less likely to report an offense if the response is likely to be from federal officials outside the tribe. Because of this dynamic, a victim might rationally decide not to report a crime. Unlike the federal officials who will leave the reservation after the investigation, the victim may well need to live there the rest of her life.

A third problem with using federal officials is that the institutional advantages of federal law enforcement are absent in Indian country. In theory, federal officials are justified in exercising a limited role in American criminal justice because they are handling interjurisdictional crimes, such as the narcotics offenses discussed previously.³⁷ Federal officials have a seamless web of national authority that allows them to work throughout the United States without the need to negotiate for cooperation with local officials. This unique advantage of federal law enforcement agents is absent in Indian country where federal authority hinges on the race of the victims

37. See generally Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

and suspects.³⁸ Moreover, federal law enforcement officials are not necessarily well-suited to prosecuting violent crimes in Indian country. Many—and perhaps most—FBI recruits signed up and went to the FBI Academy in Quantico, Virginia, because they wanted to work on sophisticated types of offenses, and other exotic work such as counter-espionage and counter-terrorism. My experience is that few agents signed up because they wanted to be posted to rural offices and assigned to investigate child sex offenses.

In addition to the vast cultural gulf that exists between federal law enforcement agents and prosecutors and the communities they are tasked with serving is the potentially even more dramatic, and yet very pragmatic, problem of the significant geographic gulf. Because of the hundreds of miles that lie between federal courts and the communities where the crimes occurred, it is sometimes a matter of pure luck as to whether the prosecutor, or the defense attorney, will be able to marshal their witnesses at the appropriate place and time for a trial. And just as some reservation residents sometimes find it difficult navigating a hundred miles or more to the federal courthouses in downtown Albuquerque, Denver or Phoenix, or even Reno, Helena, or Grand Forks, the federal officials are equally uncomfortable investigating offenses on Indian reservations.

Even the best law enforcement agents work better in communities that they know and in which they can gain significant local cooperation.³⁹ This practical insight forms much of the basis for the community policing approaches that are among the leading prevention and investigative strategies in law enforcement in the last couple of decades.⁴⁰ FBI agents are not uniformed and they are not designed to engage in community policing. The most effective agents do get to know the Indian communities in which they work, but they are outsiders and, thus, they begin with an additional obstacle that local law enforcement officials do not ordinarily face. If community policing models work well enough to be among the dominant policing strategies in the United States, why must Indian country

38. It is generally recognized that the United States lacks authority over crimes by non-Indians against non-Indians in Indian country. *See* *United States v. McBratney*, 104 U.S. 621 (1881).

39. Partly this is because of the greater perception of the legitimacy of law enforcement in community policing. *See generally* Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1524–25 (2002) (“Citizens are more disposed to cooperate with police when . . . citizens perceive that they are receiving fair and respectful treatment by police and other decision makers.”).

40. *Id.* (seeking to provide a theory to explain the success).

communities continue to rely primarily on outsiders for the investigation of serious crimes?

Despite the increasing value of localism in criminal justice generally, and in policing specifically, the federal Indian country regime has been slow to adopt it. In myriad ways, the federal criminal justice regime ignores local institutions of criminal justice. The entire thrust of the federal Indian country regime is to impose federal norms on tribal communities.⁴¹ In the Major Crimes Act,⁴² Congress has chosen which serious offenses it wishes to impose on tribal communities. And even though tribal self-determination itself has become an important norm in federal policy, Congress continues to expand the Major Crimes Act and, thus, the reach of federal authority in Indian country.⁴³ At the same time, the federal regime often ignores the views of important tribal institutions. For example, although the federal sentencing guidelines place significant weight on an offender's state and federal criminal convictions in the important criminal history axis of the sentencing grid, the guidelines discourage federal courts from routinely considering an offender's *tribal* criminal convictions.⁴⁴ Such an approach not only undermines the rationale for accounting for an offender's past criminal record, it also does unnecessary violence to the (largely theoretical) partnership that exists between tribal and federal governing institutions on Indian reservations.

In sum, the institutions of criminal justice in Indian country are deeply flawed and are failing to function in a manner consistent with American criminal justice values or modern policing theory. While my criticism has a lot of different points, it has a consistent theme. Indeed, the important American values that are missing in the Indian country criminal justice system might be characterized as norms of self-determination. In the Constitution, the founders sought to vest ordinary communities with self-determination. Although American criminal justice is designed to work in a manner that intimately involves the affected community in criminal justice,

41. See Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 784–85 (2006).

42. 18 U.S.C. § 1153 (2006).

43. See, e.g., Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 215, 120 Stat. 587, 617 (2006) (adding “felony child abuse or neglect” to the enumeration of offenses that federal prosecutors can pursue in federal courts).

44. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 415–417 (2004). Another irony in the federal courts' failure to count tribal convictions is the fact that state courts more and more are showing respect for tribal criminal convictions, though in sometimes troubling ways. See Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. REV. 263, 271–78 (2004).

the federal criminal justice system in Indian country has tended to leave out the Indian community.

While it is often easier to criticize than to chart a path toward more constructive institutions, the problem identified here is not unique to criminal justice. If we look to other areas of American Indian policy, we can find guideposts to help us. Tribal governments have long suffered from what might be called a self-determination deficit. In virtually every other area of federal Indian policy in recent years, Congress has sought to increase tribal self-determination and tribal self-governance. It has happened in health care: tribes can now contract to provide the same services that the Indian Health Service once exclusively provided.⁴⁵ It has happened in schools and education: many tribes now run their own schools.⁴⁶ It has even happened in real estate, land and resources management,⁴⁷ and environmental programs.⁴⁸ In each of these areas tribes are taking primary roles in handling these important governmental functions. And in each of these areas, services have reportedly improved.⁴⁹

Ironically, though, Congress has not engaged in any significant measure in improving tribal self-determination in the area of criminal justice. I call this “ironic” because one can hardly imagine a more important area of law, policy, and government service than criminal law and procedure. Criminal law is the formal institution in which a community articulates and codifies its most sacrosanct values.⁵⁰ Some wrongful actions, of course, violate basic standards of behavior and our duties to our fellow citizens. In the American system, these are called “torts.” No one is ever imprisoned for merely committing a tort. Indeed, only if a misdeed is so wrongful that it offends

45. Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 134 (2004) (“Tribes and tribal groups, through contracts and compacts with the IHS operate 13 hospitals, 172 health centers, 3 school health centers, and 260 health stations (including 176 Alaska Native village clinics).”).

46. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450(a)–(n) (2000)).

47. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 231 (1996) (“[M]any Indian nations have contracted with the federal government to conduct forestry programs on their reservations, often leading to improved management of their timber resources.”).

48. See Douglas Luckerman, *Sovereignty, Jurisdiction, and Environmental Primacy on Tribal Lands*, 37 NEW ENG. L. REV. 635, 639–40 (2003) (suggesting ways in which tribes can “maintain environmental regulatory primacy”).

49. James Hamilton & Tadd Johnson, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251 *passim* (1995).

50. For elaboration of this argument see Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 834–36 (2006).

our deepest moral values do we label it a “crime” and threaten to punish it with incarceration or worse. Criminal laws are, thus, imbued with much greater moral authority than other laws.

For this reason, I would argue that criminal law and procedure is more fundamental than the delivery of other governmental services such as healthcare or education, or even environmental protection. To have *true* self-determination, a community must be able to define its own moral code through its criminal laws and articulate a process for enforcing them. And if a community does not have that power, then it does not have meaningful self-determination. In sum, although tribal self-determination has been a political slogan for a long time, and it has made some modest in-roads in federal policy, it does not truly exist in one of the most important and high-stakes activities of government. Tribal self-determination, despite a very promising start and a lot of support, is in its infancy.

With this in mind, I think that there are at least two different approaches available to improve criminal justice in Indian country. One approach would simply be to modify the existing federal criminal justice system so that it is more consistent with its own values.

There are many minor reforms that would go a long way toward restoring the legitimacy of this deeply flawed system. Let me offer just a few examples. First, the President could assign a pardon attorney solely to evaluate cases from Indian country to ensure that these purely local offenses are treated a little more evenly. Second, each federal district with substantial Indian country jurisdiction could assemble an “Indian country grand jury” constructed strictly for purposes of hearing the cases arising from Indian country.⁵¹ Third, the federal courts could begin to draw jury venires for federal Indian country cases strictly from the citizens who live within Indian country.⁵² Fourth, federal judges should regularly hold court in Indian country so that an Indian country community has greater access to its own criminal trials.⁵³ Better yet, perhaps a “circuit-riding” federal judge should be appointed who only hears cases in Indian country. Fifth, as has been done in the past, tribal prosecutors could be appointed to serve as special assistant U.S. attorneys to prosecute cases arising in Indian country.

51. For a broader application of this argument, see generally Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.* 2333 (2008).

52. For an argument that the Sixth Amendment requires this approach, see generally Washburn, *supra* note 23, at 761–62.

53. Chief Judge Martha Vasquez of the Federal District Court of New Mexico held a criminal trial at Shiprock on the Navajo Reservation in December of 2005. Bruce Daniels, *Historic Trial Begins*, *ALBUQUERQUE J.*, Dec. 14, 2005, available at <http://www.abqjournal.com/abqnews/content/view/294/2/>.

The problem with most of these approaches, however, is that they are at war with a basic fact on the ground, namely geography. Indian reservations tend to lie a long way from federal courthouses. As long as federal judges, prosecutors and defenders are housed primarily in the immediate vicinity of federal courthouses, it would require Herculean efforts to transport the mechanisms of federal criminal justice to the Indian country communities that this system is designed to serve.

The better approach is suggested in the discussion above on tribal self-determination. Federal policy should seek to restore tribal capacities for handling some or all of these functions. A tribal self-determination approach would credit the work that is happening in other areas of federal Indian policy. In short, rather than trying to transport a cumbersome federal justice system to distant Indian reservations, Congress and tribal governments should work to grow criminal justice systems on Indian reservations. Professors Lani Guinier and Gerald Torres once said that the solution to the problem facing the “miner’s canary” is not to affix an oxygen mask to the canary, but to rid the mine of the poison gas.⁵⁴

Law enforcement and criminal justice in Indian country ought to be primarily a tribal endeavor rather than a federal one, just as these functions in any American city or county would be handled by members of local governments there. Some tribes are ready, willing, and able to take greater responsibilities for criminal justice on their reservations. Over the long term, tribal criminal justice systems must be nurtured and developed, at least for the tribes that are large enough and/or wealthy enough to sustain them. Greater tribal involvement in criminal justice would be more legitimate and more effective. Where tribes wish for greater involvement, it should be facilitated.

Meanwhile, in the near term, we must re-align existing federal functions with federal constitutional values. The evidence set forth above suggests that the federal justice system has abandoned its own governing principles to work in Indian country. If a federal institution is not living up to the values set forth in the U.S. Constitution, it is fair to conclude that it has lost its way. In light of some of the arguments raised above, I would argue that many Indian country convictions have serious constitutional defects. These defects are structural and cannot be remedied without significant reform.

Thankfully, federal policy-makers are beginning to focus on several of these problems. Senators Dorgan, Johnson, Tester and Thune have released

54. Lani Guinier & Gerald Torres, *Excerpt from the Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy*, 27 N.Y.U. REV. L. & SOC. CHANGE 1, 2 (2001).

a draft of proposed legislation, tentatively entitled the "Tribal Justice Improvement Act of 2008."⁵⁵ The draft bill, which is intended to begin the consultation process with tribes, focuses on specific improvements in Indian country criminal justice and law enforcement in several ways.

First, the proposed bill would require better recordkeeping and reporting of crime rates, investigation and prosecution declinations, and tribal records. Having researched in Indian country for several years, one of the most difficult obstacles to improving the system is being able to pinpoint where the problems are worst. The data simply is not available. Then-Mayor Rudy Giuliani claimed that the dramatic improvement in the crime rate in New York City during the 1990s was due largely to his "CompStat" system in which police were able to monitor street-level crime on a daily basis, identify crime hotspots quickly and shift resources into those areas or near them.⁵⁶ Sadly, data on crimes in Indian country are often not even available annually because the data simply is not collected that way. Better information collected at the federal level will help interested observers to determine for themselves whether the problem is as severe as claimed by researchers like me, interest groups like Amnesty International, and media sources like the *Wall Street Journal*.

Second, the bill would improve communication and federal accountability by requiring federal officers to report declinations in investigations or prosecutions directly to tribal officers and to an office in Washington that would monitor Indian country crime. Under the proposal, tribal officials will be better informed of federal actions.

Third, the bill would create several institutional mechanisms designed to improve criminal justice in Indian country. It would establish the aforementioned Office of Indian Country Crime in the Department of Justice. While establishment of an office may sound like window-dressing, it can be an effective way to improve federal oversight of federal criminal justice efforts, and for bringing a greater high-level institutional focus to a problem. The bill would also establish a blue-ribbon panel called the Indian Law and Order Commission to investigate and produce a comprehensive study of Indian country criminal justice and to recommend modifications.

55. A copy of the draft bill was circulated to the public on June 12, 2008. Letter from the Senate Committee on Indian Affairs (June 12, 2008), available at http://www.indian.senate.gov/public/_files/Draftbillandcoverletter061208.pdf.

56. *Oversight Hearing on Law Enforcement in Indian Country Before the S. Comm. on Indian Affairs*, 110th Cong. 55-57 (2007) (Testimony of Kevin K. Washburn, Associate Professor, University of Minnesota Law School), available at <http://bulk.resource.org/gpo.gov/hearings/110s/36303.pdf>.

Fourth, the bill would begin the process of restoring tribal capacities for criminal justice. One of the proposals, likely to be controversial, involves a partial lifting of the one-year limit on tribal sentences imposed on tribes in the Indian Civil Rights Act.⁵⁷ The proposal will allow tribal governments to authorize their courts to impose criminal sentences of up to three years. Moreover, the Bureau of Prisons would be required to provide services to house tribally-sentenced criminal defendants, relieving the problem of lack of resources which has been the principal obstacle to effective use of incarceration by tribes. While perhaps tribes ought not be encouraged to rely more extensively on incarceration, this no-cost prison option may free tribes up to be more experimental in trying lesser sanctions with assurance that prison can be imposed freely if lesser sanctions are unsuccessful.

Fifth, the bill would promote state accountability in Public Law 280 states (states in which Congress has delegated power to states to exercise criminal jurisdiction in Indian country) by providing concurrent federal jurisdiction in mandatory Public Law 280 states where a tribe opts for resumption of federal involvement. In sum, where a state fails to meet its responsibilities to address crime in Indian country,⁵⁸ the federal government will be able to step in and prosecute.

Finally, the bill would authorize a host of new appropriations programs to improve tribal law enforcement programs, to encourage cooperation between tribal law enforcement and neighboring state and local agencies, and generally to increase the status of tribal police in the national community of law enforcement, such as by giving them access to national criminal information databases. Of course, the authorization of such programs is useful only if appropriations follow. Indian country has been disappointed often in the past when programs were authorized and yet not fully financed.⁵⁹ Still, the authorization of such programs is an excellent start.

57. For a discussion of the ICRA limitations on tribal sentences, and the pernicious effects of those limitations, see Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 822–28 & n.245 (2006).

58. For discussions on the failures of states and the federal government to meet their law and order responsibilities in Indian country, see CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997); Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1415–19 (1997) (discussing the effects of Public Law 280); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975) (noting that federal law enforcement has also been “neither well-financed nor vigorous”).

59. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L. J. 403, 408 n.17 (2004) (“Congress has been rather long on policy pronouncements, and short on actual

In some of the areas identified above, the proposal is fairly soft. It encourages U.S. Attorneys to work with U.S. District Courts to hold trials in Indian country, as appropriate. I would argue that this falls short of the constitutional minimum necessary to provide full criminal procedural rights to Indian defendants and to Indian communities, but it signals a recognition of the problem.

In conclusion, the last five years have shown that sustained scholarly attention to a serious problem can help to focus others on the problem and force the search for solutions. It is obvious that the problems in Indian country are somewhat easier to identify than they are to fix. No solution is perfect. No solution is inexpensive.

We can be sure, though, that Indian communities must be integral to any solution. Since crime is a community problem, it can never be fully addressed by outsiders. Nor should it be. If outsiders were capable of reducing the crime rate in a community to zero, one would have significant questions about the freedoms available to that community. We must place Indian communities in the center of any solutions we develop, just as the Constitution envisions, and just as the successful tribal self-determination policies prescribe.

appropriations"); see generally S. Bobo Dean & Joseph H. Webster, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 TULSA L.J. 349 (2000).
