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Tribal Self-Determination at the Crossroads

KEVIN K. WASHBURN*

The tribal self-determination initiative that began transforming federal Indian policy thirty years ago has reached a crossroads. Despite its transformative effects on tribal governments and the widespread belief that self-determination has been a successful federal approach to Indian affairs, no significant new self-determination program has been initiated at the congressional level in several years.

This Article looks to the tribal self-determination initiative's past to gain insights about its future. It also briefly surveys existing tribal self-determination programs and concludes that far more work needs to be done to achieve tribal self-determination. Drawing on the author's broader work, it finds one glaring gap in tribal self-determination to be the area of tribal criminal law and criminal justice.

I. INTRODUCTION

Most students of Indian law learn that American history can be divided into several distinct "eras" of federal Indian law and policy.1 While this kind of summary analysis is necessarily contrived and ultimately somewhat

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artificial, it serves as a useful shorthand for understanding the vicissitudes of American Indian policy. Though the time periods are difficult to demarcate with great precision, scholars tend to fix these eras by describing a particular legislative or executive action that sets a clear direction.²

In most cases, it is far simpler to identify the beginning point of such an era than an end point. Presidents and legislators tend to be more clear in declaring the birth of a new policy and less so in declaring the death of an old one. Often, the new “era” begins with a clear declaration of policy and a flurry of new legislative initiatives.³ After the initial flurry of activity, momentum eventually begins to wane as specific legislative initiatives dwindle. Eventually, enthusiasm gives way to ennui and, ultimately, a new approach takes its place.

Take, for example, the so-called allotment/assimilation era.⁴ This era is usually characterized as beginning as early as 1871, when Congress declared its refusal to deal further with Indian tribes as separate nations through treaties in the Appropriations Act,⁵ and as starting in earnest in 1887 with adoption of the General Allotment Act,⁶ which created a framework for the allotment of parcels of reservation lands to individual Indians to convert them to independent farmers.⁷ The end date of the era is often characterized as 1928, when the Meriam Report was published.⁸ The Meriam Report excoriated the allotment policies by exposing the fact that under the policy, individual Indians tended to receive lands “of little value for agricultural operations” and that “the better sections of the land originally set apart for the Indians [tended to fall] into the hands of the whites[.]”⁹ It concluded that the individual allotment policy failed and resulted in much loss of lands for Indians and Indian tribes,¹⁰ and it detailed numerous suggested reforms.

The Meriam Report is a useful ending point for the allotment/assimilation era because it represented a clarion call for rejection of allotment policies as it forecasted a radical new federal approach to Indian tribes. As a formal legal

² See, e.g., AMERICAN INDIAN LAW DESKBOOK, supra note 1, at 13, 18.
⁴ See COHEN’S HANDBOOK, supra note 1, at § 1.04; PRUCHA, supra note 1, at 609.
⁸ INST. FOR GOV’T RESEARCH, supra note 3, at x.
⁹ Id. at 5.
¹⁰ Id. at 41.
matter, however, important aspects of the federal allotment initiative had begun to dwindle as much as a decade or so earlier.\footnote{11}

Though the issuance of the Meriam Report in 1928 formally sealed the coffin on the allotment/assimilation era, President Herbert Hoover, who was elected that year, made little progress on reform of Indian policy.\footnote{12} Informal federal action toward a new "era" in federal Indian policy began after Roosevelt was elected in 1932 and significant legislation did not appear until 1934, when Congress enacted the Indian Reorganization Act as part of the Indian New Deal.\footnote{13}

As a result, the period between the early 1920s and 1932 could be characterized as a crossroads for federal Indian policy. Allotment initiatives had begun to wane even before the Meriam Report was published, and yet new policies had not been formally adopted or even formally formulated until well after its publication.

To bring this kind of analysis into the current era of federal Indian policy, one must fast forward to the 1960s. Scholars generally agree that the era of tribal self-determination began to form as early as the administration of President John F. Kennedy,\footnote{14} and was formalized, at least in the Executive Branch, with Richard Nixon's significant 1970 statement on federal Indian policy.\footnote{15} Shortly thereafter, Congress followed along.

The first major piece of legislation to implement the "self-determination" policy was Public Law 93-638, the Indian Self-Determination Act of 1975.\footnote{16} Under this law, Indian tribes could identify federal government services that they wished to provide to their own tribal members and contract for federal funding to provide those services themselves.\footnote{17} Under such a contract, known as a "638 contract," a tribe would negotiate a contract for a specific service with the Bureau of Indian Affairs (BIA), under which the tribe would perform the federal government's functions under specific performance standards and record-keeping requirements imposed by law and federal regulations.\footnote{18} Although

\footnote{11}{Royster, supra note 1, at 15 ("In 1921, the liberal policy of granting forced fee and other premature patents was officially abandoned . . . ").}

\footnote{12}{See KENNETH R. PHILP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM, 1920–1954, at 92–112 (1977).}


\footnote{14}{See GEORGE PIERRE CASTILE, TO SHOW HEART: NATIVE AMERICAN SELF-DETERMINATION AND FEDERAL INDIAN POLICY, 1960–1975, at 5–7 (1998); PRUCHA, supra note 1, at 1085–86.}

\footnote{15}{President Richard Nixon, Special Message on Indian Affairs (July 8, 1970), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 256–58 (Francis P. Prucha ed., 3d ed. 2000).}


\footnote{17}{88 Stat. at 2206–07.}

neither BIA officials nor the tribes were particularly happy with the implementation of the 638 contracts program, the contracting of federal functions on Indian reservations by Indian tribes was widely hailed as an improvement in federal Indian policy and a meaningful step toward self-determination.

Having established that tribal administration of Indian programs was workable, the self-determination program was broadened dramatically in 1994 and recast as "self governance." Instead of requiring tribes to negotiate for individual functions, the new law allowed tribes to negotiate broad compacts with the Department of the Interior that covered virtually all federal services on a reservation. Instead of discrete outlays for individual programs, tribes received large block grants to address a range of services and were given discretion as to how to allocate those federal funds. This discretion allowed far greater flexibility and allowed tribal governments to determine program priorities across a range of activities and services. Under the federal policies of self-determination and self-governance, the tribal role in implementing federal responsibilities was broadened beyond the Department of the Interior and the Indian Health Service (IHS), to the Environmental Protection Agency (EPA), and even the Department of Housing and Urban Development (HUD). Today, a significant portion of the annual federal appropriation for Indian tribal programs, including more than half of the BIA budget and nearly

19 The regime was hampered by the Byzantine bureaucracy of the BIA, which compartmentalized functions in a manner that frustrated flexibility among those providing services. Tadd M. Johnson & James Hamilton, Self-Governance for Indian Tribes: From Paternalism to Empowerment, 27 CONN. L. REV. 1251, 1264-66 (1995).

20 S. Bobo Dean & Joseph H. Webster, Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination, 36 TULSA L. REV. 349, 350 n.6 (2000) (quoting a Miccosukee tribal leader describing the self-determination policy "as the most successful Indian policy [ever] adopted by the United States").


half of the IHS budget, is distributed to tribes under the self-determination or self-governance programs.\textsuperscript{26}

Although the rhetoric of self-determination remains strong on Capitol Hill and in the Executive Branch, and there have been some modest improvements to existing tribal programs, the last major legislative initiative aimed at self-determination was enacted in 1996.\textsuperscript{27} No significant new legislative initiatives have been enacted since that time.

The lack of further legislative initiatives related to self-determination is surprising for a couple of reasons. First, the existing tribal self-determination initiatives are widely believed successful,\textsuperscript{28} and it is difficult to find criticism of them in any literature. Second, tribal political power is perhaps stronger than ever. Third, no major piece of substantive federal Indian legislation has been enacted in the face of significant tribal opposition at least since the Indian Gaming Regulatory Act of 1988.\textsuperscript{29}

The lack of recent initiatives may reflect that the era of tribal self-determination itself is now at a crossroads. Given the increasing financial power and political access enjoyed by some tribes, it is curious that no new legislative initiatives toward tribal self-determination have been enacted in recent years. Has the momentum for tribal self-determination stopped? Have all possible self-determination initiatives already been accomplished? If not, what is the future of tribal self-determination? How can the self-determination policies be restarted or resuscitated?

This Article will not fully answer these important questions—indeed, some of them can be fully answered, if at all, only in future decades once the lens of hindsight can be brought into focus. This Article will, however, offer some thoughts and, hopefully, some insights. This search for understanding will focus in two key directions. First, the current status of tribal self-determination will be measured in a brief argument that concludes that federal policymaking has far to go before tribal self-determination will be fully realized. Second, on the theory that the story of the birth of tribal self-determination programs may help illuminate the

\textsuperscript{26} Dean & Webster, supra note 20, at 349–50.


\textsuperscript{28} Dean & Webster, supra note 20, at 349, 352 (noting that “the policy has been remarkably successful” but quibbling with federal government provision of “contract support” costs); Johnson & Hamilton, supra note 19, at 1278–79 (characterizing the Self-Governance Act as an “imperfect, incremental step,” but “a strong beginning”); Elizabeth Lohah Homer, Implementing the Self-Determination and Self-Governance Act 177, 188 (2003) (course materials for the 28th Annual Federal Bar Association Indian Law Conference, Albuquerque, N.M., Apr. 10–11, 2003) (on file with the Connecticut Law Review) (“To date, there is every reason to believe that the Self-Governance process has been extremely successful.”).

era’s life span, lessons for the future of tribal self-determination will be sought from its early development.

II. REALIZING SELF-DETERMINATION

One hypothesis for the lack of forward momentum in Congress toward tribal self-determination is that full tribal self-determination has already been achieved and no more federal legislative initiatives are needed. Among the possible explanations, however, this one is the least likely. Across the wide range of academic commentary on American Indian policy, it is difficult to find any scholar who is fully satisfied with "the actual state of things" in Indian country today.

Determining whether "tribal self-determination" has been accomplished requires a more careful consideration of what this term means. While the rhetoric of self-determination is used widely in American Indian policy, it is rarely defined. At a fundamental (and theoretical) level, "tribal self-determination" must denote the ability of an Indian tribe to "determine" its identity, or in other words, to create its own identity through defining and affirming its cultural values. It might also include the right of a tribe to pursue its own destiny.

At a more practical level, tribal self-determination might encompass the ability of a tribe to determine its own governmental structure and implement the policies that will effectuate its broader tribal values. So, how would a tribe define and communicate its values and how would it effectuate those values in governmental structures and actions?

One of the most important ways in which sovereign political communities define and communicate their values and implement them in government is through criminal law. Criminal law is the formal legal institution in which communities express important collective decisions as

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32 See S. JAMES ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW 103-08 (2d ed. 2004) (discussing the content of self-determination); see also Sabysachi Ghoshray, Revisiting the Challenging Landscape of Self-Determination Within the Context of Nation's Right to Sovereignty, 11 ILSA J. INT'L & COMP. L. 443, 449-50 (2005) (citing an international treaty indicating that "self-determination" includes a people's right "to freely determine their political status and freely pursue their economic, social and cultural development") (internal quotations omitted).
to what is right and what is wrong within their communities.\textsuperscript{33} In sum, it is where jurisdictions systematize, order and codify wrongs.

Most criminal acts involve a small number of people and the immediate effects of the harm are borne by only a single person. We label such an act a "crime" because this act against a single individual is nevertheless worthy of condemnation of the entire community.\textsuperscript{34} It is deemed to offend the community's moral code.

Criminal law is also one of the key institutions through which the community works to change the way the community thinks about certain activities.\textsuperscript{35} Through criminal law, a community can privilege some behavioral norms and discourage others. It can do so passively through the force of the expressive value of law, or it can do so more aggressively, by enforcing the same law.\textsuperscript{36}

Defining right and wrong is simply one of the most important things that governments do. Indeed, with the possible exception of education, it is difficult to think of another formal institution that is as important in defining, reinforcing and thus preserving community values.

Criminal law is the institution in which communities set out their most important values about how people should treat one another. (Criminal procedure is important, too—it is the legal institution in which communities develop and set out their values as to how the state should treat people in circumstances in which criminal laws may apply.) By formally institutionalizing community values in the criminal laws, communities preserve and reinforce those values.

One need only look at substantive provisions in state criminal codes to understand the power of this fundamental truth. Consider that in Texas, a person is privileged to kill a thief to prevent the thief from successfully absconding with personal property.\textsuperscript{37} In contrast, in California and in many other states, one may never use deadly force to defend mere property and may use such force only to prevent grave physical harm or death to a person.\textsuperscript{38} These laws express far more than their respective communities’

\textsuperscript{33} See Erik Luna, \textit{Principled Enforcement of Penal Codes}, 4 B.U.F.F. CRIM. L. REV. 515, 537 (2000) ("Law expresses the values and expectations of society; it makes a statement about what is good or bad, right or wrong."); see also \textit{Emile Durkheim, The Division of Labor in Society} 80–81 (George Simpson trans., Free Press 1933) (1893).

\textsuperscript{34} Henry Hart, \textit{The Aims of Criminal Law}, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).


\textsuperscript{36} See \textit{id.} at 363.

\textsuperscript{37} TEX. PENAL CODE ANN. §§ 9.41–.42 (2003) (generally allowing one to use force to protect one's property and even allowing the use of deadly force against a burglar, robber, or nighttime thief during flight if one reasonably believes that the property cannot be recovered any other way).

\textsuperscript{38} E.g., N.J. STAT. ANN. § 2C:3-6 (2005); People v. Ceballos, 536 P.2d 241, 246 (Cal. 1974); see also \textit{Joshua Dressler, Understanding Criminal Law} 261 (3d ed. 2001); \textit{Wayne R. LaFave, Criminal Law} 553 (4th ed. 2003).
views about crime; they constitute key expressions of the relative value of property and human life in those communities. By codifying those values in the criminal laws, these communities thereby internally reinforce these important value judgments.

All criminal laws express value judgments of one kind or another. The development of criminal laws is vital in helping communities define themselves. Not only is the definition of criminal law important at the outset, but the everyday application of criminal law through the courts reinforces the existing value structure in a very formal and concrete manner. It also contributes to the broader informal conversation within the community about those values. In sum, the activities of defining right and wrong in a criminal code are bound up in a fundamental way with self-determination. In that respect, criminal laws are perhaps the most important community expressions of social norms and community values. They are thus fundamental to community identity and self-determination.

Now consider Indian tribes. Indian tribes have been largely preempted from discussing, defining and reinforcing their important values in this manner because felonies on Indian reservations are not defined by Indian tribes.69 Felonies on Indian reservations are defined by Congress and, to a lesser extent, state legislatures.40 In fact, Congress has prohibited Indian tribes from defining felony offenses.41 Indian tribes are thus shut out of this key aspect of self-determination in two important ways. First, a tribe is formally denied the power to determine right and wrong for itself. Second, the value judgments of another community are imposed upon the tribe, and indeed, imposed forcibly; these outside norms are violable only on pain of incarceration. While the former denies the tribe the ability to determine its own identity, the latter forces tribal members to adopt an identity defined by outsiders.

To be sure, Indian tribes do have the power to define and prosecute misdemeanors.42 But because of the very nature of limitation to misdemeanors, a tribe cannot address issues of great importance except in very limited and perhaps symbolic ways. Tribes also have a very limited power of self-determination as to certain provisions in federal law. Consider, for example, the death penalty. The Federal Death Penalty Act of 1994 provides that the federal death penalty will apply to crimes arising on

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41 The Indian Civil Rights Act, 25 U.S.C. § 1302(7) (2000), prohibits Indian tribes from levying sentences greater than one year in prison or fines in excess of $5000.
Indian reservations under the federal Indian country criminal statutes only if the relevant Indian tribe chooses the death penalty and recognizes federal authority to pursue capital sentences.\(^4^3\)

In recent years, serious offenses on the Navajo Reservation have led to extensive debate within the tribe about whether the Navajo Nation should opt in to the federal death penalty.\(^4^4\) In that debate, the Navajo Nation’s vice president asserted that the death penalty “goes against everything Navajos stand for” while the Navajo Nation’s president supported the death penalty for heinous offenses, such as the triple murder that ignited the most recent debate.\(^4^5\)

The Navajo federal death penalty debate demonstrates that fundamental public safety issues are exceedingly important on Indian reservations, just as they are important everywhere else. Because of Congress’s adoption of the tribal option for the federal death penalty, these debates can now occur, but the debate is necessarily limited by the fact that opting in to the federal death penalty requires a tribe to place the lives of its members in the hands of another sovereign. This places a substantial limitation on the debate.

In many other areas, Congress has recognized tribal governmental authority to set normative standards, even where that authority affected non-Indians. For example, Congress has delegated authority to Indian tribes\(^4^6\) or recognized inherent tribal authority to set certain substantive standards in the environmental context, such as air and water quality standards.\(^4^7\) For some tribes, these environmental issues can be exceedingly important to tribal culture.\(^4^8\) Setting such standards allows a tribe to obtain an environmental standard that is higher than the federal baseline and thus allows a tribe to marginally improve reservation environmental quality over state or federal standards. While environmental standards are sometimes important, they generally do not go directly to the heart of community identity in the fundamental way that criminal laws do.

Thus, while it is widely agreed that the last thirty-five years have


\(^4^5\) Hall, \textit{supra} note 44.


\(^4^8\) See City of Albuquerque v. Browner, 97 F.3d 415, 428–29 (10th Cir. 1996) (upholding tribal water quality standards that preserve the Pueblo of Isleta’s ability to use water in the Rio Grande for ceremonial purposes).
constituted "the era of tribal self-determination," real self-determination has not been—and cannot be—achieved until tribes can determine for themselves what is right and what is wrong on their own reservations and in human transactions involving their own members. If tribes are to achieve any real measure of self-determination, they must have the power to enact substantive criminal laws. In the absence of this power, Indian people must conform their actions to rules and value judgments imposed on them by outsiders. Such a scheme is a tremendous obstacle to true self-determination.

The high-stakes nature of this argument may offer some insight into the lack of further progress toward tribal self-determination on the congressional front in the last decade. Most of the self-determination initiatives of the last thirty-five years primarily involved shifting appropriated federal monies and federal responsibilities from federal agencies to tribal governmental agencies. Such programs reduced administrative burdens at the federal level. While these efforts have been enormously positive, these initiatives were, to some degree, low-hanging fruit that was easily plucked from the tree.

That is not to say that they were not important. Given the poverty on many Indian reservations, decisions on where and how to use federal appropriations are exceedingly important. But while tribal governments now exercise greater day-to-day control in using these funds, the federal government retains the ability and indeed the responsibility to supervise tribal activities. Ultimate control remains within the federal government. In that sense, the existing tribal self-determination initiatives thus far have been relatively modest efforts that do not disrupt the allocation of power between the federal government and the tribes.

To advance tribal self-determination further may require tribal leaders and federal policy makers to reach much higher. Increasing meaningful tribal self-determination almost necessarily requires restoring a greater measure of tribal autonomy and reducing federal control on Indian reservations. In sum, furthering self-determination in this manner involves trusting tribes to take responsibility over matters that will have tremendous impact on the lives of Indian defendants and Indian victims. How could it be possible for Indian tribes to increase tribal autonomy in such a high-stakes manner and in such exceedingly important matters as substantive criminal law? One insight might be gleaned from the early days of the era of tribal self-determination.

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49 Homer, supra note 28, at 187 (describing an "annual trust evaluation" of the tribe's implementation of trust programs and providing for "secretarial reassumption of trust programs" from the tribe).

50 Id. at 184.
III. THE BIRTH OF THE CURRENT ERA OF TRIBAL SELF-DETERMINATION

The federal policy favoring “self-determination” is taken for granted by many American Indians today because it is the only policy most tribal citizens have ever known. Given the now-obvious normative force of the argument for tribal self-determination, some might assume that the current era in federal policy came about because enlightened federal policymakers in Congress and the BIA finally gave in to the exhortations of tribal leaders and gradually loosened the reins of federal control over Indian reservations. The truth, however, is much more complicated. The self-determination era in Indian policy really began not as an independent policy initiative related to American Indians, but as a component of a much broader national initiative. And this particular truth offers some exceedingly important insights into the development of federal Indian policy.

In some respects, tribal self-determination as an affirmative federal policy began in the 1930s during the New Deal era under the legal auspices of the Indian Reorganization Act (IRA). The IRA preserved, empowered and transformed modern tribal governments, but it did not assist them to become particularly sophisticated governing institutions and it made only modest efforts at increasing tribal self-governance. The real value of the IRA was that it recognized the continuing legal status of tribal governments and thus helped to hold back the forces that wished to sweep American Indians into the great American melting pot. To the extent that tribal governments retain some of their authority through the grace of the federal government, the IRA is less significant to tribes today.

The vitality and sophistication of tribal governments today stems to a
much greater extent from the self-determination policies that have developed in the last three decades from the policies implemented in the IRA. It is these more recent initiatives that transformed Indian self-government and earned this period of Indian policy the title "era of tribal self-determination." This era was originally not about tribal self-determination, though. Congress originally had a different and much broader target.

Early in his presidency in 1964, Lyndon B. Johnson declared "unconditional war on poverty in America." President Johnson proposed a broad social initiative that culminated in substantial new legislation and the creation of a new federal office, the Office of Economic Opportunity (OEO), which was located directly within the Executive Office of the President.

The War on Poverty was a bold initiative and a signature policy for President Johnson. It embodied far more than appropriations; it also involved substantive control. The policymakers who worked under the auspices of the OEO in the White House attempted an innovative approach to the problem of poverty that avoided elitism and embraced grassroots community organizations. Key federal policymakers believed that local governments were part of the problem of poverty, not part of the solution. Yet, these policymakers were hopeful about the promise of grassroots community organizers. The program that developed came to reflect a cynical view of past public efforts to address the problem of poverty and skeptical view of local governments. At its core, the OEO's philosophy reflected a progressive mindset that the poor should be centrally involved in addressing the problem of poverty.

The centerpiece of the OEO's antipoverty initiative was the community action program, which Congress charged with developing antipoverty programs at the local level. These initiatives were to be developed with public or nonprofit "community action" agencies that were to be operated "with the maximum feasible participation of residents of the areas and members of the groups served[.]."

The federal legislation

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containing these requirements left tremendous discretion with the OEO to define the substantive meanings of these instructions. Given their prejudices against local governments, the OEO officials who implemented the law generally sought to bypass state and local governments and work directly with community groups.

Though the War on Poverty seemed primarily directed at the urban poor, Indian tribes and their representatives actively lobbied Congress when it considered the Economic Opportunity Act, seeking to be included in the Act’s antipoverty provisions. While the Act was pending in Congress, senators and House members exacted promises from the Administration that tribes would be allowed to participate. Thus, the broader goals of the War on Poverty came to Indian country.

Though the OEO’s decision to fund tribal governments was certainly beneficial in financial terms, it was far more powerful in another respect. In the words of commentator Sam Deloria, the OEO’s “decision to fund tribes directly, bypassing the Bureau, implicitly recognized the Bureau’s historic role as the de facto municipal government of Indian reservations.” Within the federal government, tribal governments were thus treated more like grassroots community action organizations. Consistent with the more mainstream OEO policy of mistrust toward municipal governments, the grassroots tribal governments were thought to be better suited than the BIA regime to assist members of reservation communities.

Though tribal governments had difficulty establishing community action programs in the earliest days of the OEO, tribes eventually became successful in obtaining OEO grants. From 1965 to 1967, community action program grants to Indian tribes increased from $3.6 million to $20.1 million.

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62 James L. Sundquist, Origins of the War on Poverty, in ON FIGHTING POVERTY, supra note 60, at 6, 29.
66 Deloria, supra note 63, at 197.
67 See id.
69 Id. at 124.
Meanwhile, the OEO’s general bias in favor of community groups and antipathy toward municipal governments began to anger state and local officials, causing them to lobby for greater local government control over community action programs. In 1968, Congress acted on the concerns of state and local officials by amending the Economic Opportunity Act to require community action agencies to operate under the aegis of state or local governments and gave state and local officials much greater management control. By this time, however, Indian tribes were part of the fabric of the OEO programs. To preserve the key role of tribal governments, tribes successfully lobbied to insure that the amendments made tribal governments equivalent to state or local governments for purposes of obtaining—and participating in—community action grants.

In that sense, Indian tribes accomplished a very successful act of shape shifting during this period. When local governments were thought to be obstacles to antipoverty programs, tribes portrayed themselves as grassroots organizations. Because OEO policymakers seemed to view Indian tribes as de facto local community groups that were “governments” in formal terms only, they were willing to adopt this fiction and work with tribes. Three years later, when tribes needed to be considered legitimate governments to retain direct access to OEO grants, Congress was willing to treat them as such. The OEO legislation foreshadowed important future legislative efforts in treating tribes like state and local governments for a wide range of substantive policy areas, most notably in the environmental arena.

Thus one important insight from the birth of the tribal self-determination movement is this: Tribes were successful in achieving public policy objectives in the 1960s by downplaying their governmental status and emphasizing the BIA’s dominant role on Indian reservations, thereby successfully tapping into official cynicism about the effectiveness of governments as instruments of change. At the time, tribal governments

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70 See Frances Fox Piven & Richard A. Cloward, Regulating the Poor 271 (1971) (discussing the desire of local politicians to gain more control over the community action programs).


73 See Deloria, supra note 63, at 197 (discussing the efforts to bypass city governments).


75 See supra notes 59–60.
were rhetorically flexible enough to be able to distance themselves from state and local governments. The strategy was to de-emphasize the governmental status of tribes and to present themselves as grassroots community organizations living under the thumb of a local BIA superintendent who was ill-equipped and unmotivated to address the problem of reservation poverty.

Tribes pursued the more formal status of "governments" only when they needed it to remain eligible for the OEO programs. As a practical matter, the early OEO grants did not have the effect of helping tribes formalize their governmental leadership and provided modest resources for governing. When the time to be considered local governments came, because of the early assistance from the OEO, they were able to act more like governments.

If tribes had been unwilling to compromise their status—if they had, for example, aggressively asserted their sovereign status at the outset—then they might not have achieved successes with the OEO. Militant and inflexible assertions of tribal sovereignty may be emotionally satisfying, and they may, frankly, be more consistent with fundamental notions of truth and justice. But strong expressions of "sovereignty" seem to come up hollow in so many Supreme Court cases at a time when even mild and well-founded legal assertions of tribal sovereignty seem to produce judicial divestiture of sovereignty. Indeed, a flexible and more practical approach may sometimes be useful as long as Congress yields plenary power and the Court wields the doctrine of implicit divestiture.

Another important insight from the birth of tribal self-determination lies in the fact that, as Indian policy, tribal self-determination developed accidentally and in spite of official federal Indian policy, not because of it. The War on Poverty was not an "Indian program" and neither the Department of the Interior nor the BIA participated in drafting the legislation.

Despite the fact that it was not an Indian program, the inclusion of

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76 See, e.g., Deloria, supra note 63, at 200 ("[T]he role of tribes as relatively permanent governments . . . was strengthened by the use of governments as the local delivery system for the programs designed to implement the nation's concern for poverty . . . "); Alfonso Ortiz et al., The War on Poverty, in INDIAN SELF-RULE, supra note 63, at 219, 219 ("Initially, Oklahoma was not eligible for OEO funds, because the state did not have Indian reservations.").

77 See David H. Getches, Beyond Indian Law: The Rehnquist's Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values, 86 MINN. L. REV. 267, 267-69, 278-85 (2001) (noting that Indian tribes have had little success in recent Supreme Court cases).

78 See City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. ___, 125 S. Ct. 1478, 1489-93 (2005) (holding that the tribe, even by purchasing land that had been illegally alienated from it, could not successfully restore its aboriginal title to the land).

79 See id.

80 See CLARKIN, supra note 68, at 111.
tribes in the OEO programs had dramatic ramifications for American Indian policy. The OEO's community action grants enabled Indian tribes to become governments in a much more meaningful sense than before—they now had an alternative financial source that would work to help them accomplish governmental purposes by themselves and independent of the BIA. This alternative funding stream to tribes ultimately broke the BIA's chokehold on policymaking on Indian reservations and allowed tribal governments to come into their own as governments. Through the War on Poverty, the OEO simultaneously made the BIA less relevant on Indian reservations and empowered tribal governments to work toward goals that the BIA had never accomplished.

The irony is that though the War on Poverty failed to end poverty, it dramatically affected future federal Indian policy. This broader social initiative may have had more positive effects for Indian tribes than any federal "Indian policy" initiative has ever had. Indeed, to a significant extent, modern tribal governments were born from the War on Poverty programs. With OEO support, tribes became more politically organized, more sophisticated, and better able to demand that the BIA itself find ways to adopt self-determination policies. And, in the OEO, the tribes suddenly had advocates in the White House who agreed with such approaches.

Tribes eventually obtained the right to contract federal services to be provided by tribes themselves through 638 contracts and self-governance compacts. As a result, tribal governments developed in an extraordinary fashion and Indian reservations are very different places today than they were in the 1960s. Today, on many Indian reservations, tribal governments are the primary providers of all government services.

While the War on Poverty was indeed animated by a notion of self-determination, it was not a notion of tribal self-determination or self-determination for indigenous peoples. Rather, it reflected a much broader principle of human, citizen or community self-determination. It reflected the notion that the poor are likely to have significant insight into the problems of poverty and may be best motivated to find the solutions. It recognized that paternalism to the poor was anachronistic and that the poor should be empowered to address the problems which they felt most keenly.

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81 See Cobb, supra note 64, at 75.
82 Cf. Deloria, supra note 63, at 196–98 (indicating that while the OEO may have made the BIA less relevant to Indian reservations, the BIA remains "an old-line established agency").
83 See Cobb, supra note 64, at 85, 91–92 (noting that the community action program "breathed life into tribal governments" and helped develop a generation of tribal leaders with political skills and federal bureaucratic savvy).
84 See supra notes 16–20 and accompanying text.
86 See Legal Services and the War on Poverty, 13 CATH. LAW. 272, 277 (1967).
In that respect, self-determination reflected a very generalized principle of good government; that is, that constituents ought to be placed in the key roles in devising solutions to the problems that affect them.

Thus conceived, the notion of self-determination that now animates federal Indian policy was not indigenous to American Indians. And it was not invented as an Indian policy. American Indians did not invent the concept and it was not adopted in Indian country because of the power of American Indian rhetoric or even the moral force of addressing the injustice committed against American Indians. Self-determination first came to Indian country as a by-product of a general public policy. Moreover, it was years after the War on Poverty that American Indian nations became involved in international efforts to further self-determination for indigenous peoples.

One important lesson here is that, despite the rhetoric of self-determination, Indian tribes do not drive federal Indian policy. Much larger and wider considerations tend to drive federal policy. In the 1960s, the War on Poverty was a significant federal policy initiative, figuratively a fast-moving freight train, with the highest levels of political support. Indeed, it was ultimately one of the most important federal policies of that decade; many of its successful programs are still alive today.87 Tribal leaders were able to hop aboard the War on Poverty freight train and ride that initiative successfully to a better political place for Indian tribes. But tribes and tribal leaders were not the engineers; they were merely along for the ride.88

Thus, the key question for tribal advocates is: How can Indian tribes identify and climb aboard the public policy initiatives today that are equivalent to the War on Poverty and ride those new initiatives toward real self-determination for tribal governments?

IV. HOPPING ABOARD A MOVING TRAIN

If self-determination came to Indian tribes only because the larger body politic was interested in self-determination for the poor, then the goal for current tribal advocates ought to be to find other broad policy initiatives in American government that can also benefit Indian tribes. When President Johnson declared war on poverty, tribal governments essentially volunteered as foot soldiers in that war, even downplaying their governmental authority and presenting themselves as community organizations so that they could meet the enlistment qualifications.

Such an approach is not unique to Indian policy. Joining broader

87 Examples are the Head Start program, legal services, and Upward Bound. See generally SAR A. LEVITAN, THE GREAT SOCIETY'S POOR LAW 133–89 (1969) (discussing these and other programs).
88 Tribal leaders and advocates do deserve credit for pushing policymakers to include tribes in the initiative.
initiatives is a good way for a politically small group to change national policy in its favor.\(^8^9\) Tribal advocates must be innovative. Tribes joined a broader national initiative in the 1960s and it was largely responsible for bringing us the modern notion of tribal self-determination\(^9^0\) in which tribal governments provide services to tribal citizens. Indian tribes are very small and lack the financial resources and the constituencies that create significant power in the political realm. Tribes do not set national agendas. Indeed, tribes cannot create the freight trains that move federal policy. The challenge to tribal leaders is to try to gain tribes berths as passengers on those trains and, at the same time, to avoid being hit by these trains.

If tribal self-determination has stalled out and the question is how to resume forward momentum, the answer is to find a useful federal initiative that Indian tribes can climb aboard. Today is a different time than the 1960s. In many respects, it is a darker and less idealistic time. The United States no longer wages the War on Poverty.\(^9^1\) While a few successful poverty

\(^8^9\) As Professor William Eskridge, Jr., has explained, African Americans, women, gays, and other social movements achieved progressive change in American policy using such strategies. See generally William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 MICH. L. REV. 2062 (2002) (describing how lawyers helped to further the interests of women and minorities by translating their problems and aspirations into a broader constitutional discourse); William N. Eskridge, Jr., Channeling: Identity-Based Social Movements and Public Law, 150 U. PA. L. REV. 419 (2001) (describing how the civil rights and women's liberation movements helped to formulate the modern meaning of the Equal Protection Clause); William N. Eskridge, Jr., Destabilizing Due Process and Evolutive Equal Protection, 47 UCLA L. REV. 1183 (2000) (arguing against the thesis that the Equal Protection Clause is always forward-looking, but rather that it can often defer to past practices; also arguing that the Equal Protection Clause can potentially offer minorities wholesale level protections once the courts recognize their legitimacy as "partners in American pluralist democracy"). In briefing Lawrence v. Texas, 539 U.S. 558, 562, 578–79 (2003), Eskridge forwarded the gay rights movement by tying the case to a libertarian agenda. And Eskridge's theory was successful, ultimately co-opting a conservative Court in an argument that convinced the swing vote, Justice Kennedy, to write an opinion striking down a Texas law as unconstitutional.

In a new work, Eskridge is attempting to take the gay rights movement further. William N. Eskridge, Jr., Three Lessons After Thirty-Five Years of the Same-Sex Marriage Debate, 91 MINN. L. REV. (forthcoming 2006) (presented as the annual Lockhart Lecture at the University of Minnesota). In this new work, Eskridge explains that it is not gays, but straight couples who present the real threat to traditional marriage, by legalizing cohabitation, sex outside of marriage and promoting legal reforms such as no-fault divorce laws that have undermined the norm of marriage as a mandatory lifetime commitment. Eskridge argues that advocates of traditional marriage ought to be decrying these "reforms," not crusading against gays who are alarmed at the devaluation of the institution of marriage. Because many in the gay marriage movement are committed to many of the traditional elements of marriage, Eskridge implies that traditional family values conservatives should embrace gay marriage. Eskridge's reasoning is clever and suggests that he is not content at co-opting the conservative libertarians, but is now setting his sights on the religious right. In short, Eskridge successfully secured gays a seat on the privacy/libertarian bandwagon, and is now trying to sneak them aboard the "family values" freight train that has rumbled along with tremendous inertia during the last decade. Eskridge's example is an important lesson about how marginal political movements like the gay rights movement can leverage their power.

\(^9^0\) See CASTILE, supra note 14, at 24, 68–69.

\(^9^1\) The War on Poverty slowly died from political stalemate and budget problems. See ROBERT F. CLARK, THE WAR ON POVERTY, 265–70 (2002) (describing how funds for American Indian programs were large after initial passage of the War on Poverty legislation, and how these funds have
programs live on, many of them have been cut dramatically. But the last fifteen to twenty years have brought several other "wars," including a "War on Crime" and a "War on Terror."

Though these new policy initiatives are characterized far more by cynicism than idealism, the playbook for Indian tribes could be very similar. Just as Indian tribes were effective soldiers in the War on Poverty and their participation paid great dividends (other than poverty reduction) for tribes, Indian tribes may be able to present themselves as foot soldiers in the War on Crime and the War on Terror.

One way for tribes to be a part of the federal effort against crime and to simultaneously promote tribal self-determination is to promote more respect for existing tribal institutions of criminal justice and to present themselves as partners in achieving public safety and criminal justice on Indian reservations. A potential reform at the federal level is federal recognition of tribal court convictions in federal sentencing.

Such an approach may pay dividends beyond criminal law. On the civil side, tribal courts have been taking a beating in recent years at the federal level. The Supreme Court's decisions in Iowa Mutual and National Farmers Union, decided at the height of tribal self-determination initiatives, evinced tremendous respect for tribal judicial systems, but their promise has been limited in more recent cases. If federal judges in the federal sentencing context are instructed to respect routine criminal convictions from tribal courts, federal courts are much subsequently dried up in recent years); JAMES T. PATTERSON, AMERICA'S STRUGGLE AGAINST POVERTY IN THE TWENTIETH CENTURY 193–94, 196–97, 200–03 (2000) (discussing how budgetary issues contributed to the problems of implementing the War on Poverty programs).


94 See CASTILE, supra note 14, at 26–33.


96 Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (requiring exhaustion of tribal court review to federal diversity cases before they can be heard in federal court).


98 See Nevada v. Hicks, 533 U.S. 353 (2001) (holding that tribal courts lack jurisdiction to hear tort claims arising from a state police officer's execution of a state search warrant on reservation land relating to an off-reservation crime); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (holding that tribes do not have the authority to tax nonmember activity that occurs on non-Indian land within a reservation); Strate v. A–I Contractors, 250 U.S. 438, 442, 453 (1997) (holding that tribal courts may not hear tort claims against nonmembers "arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question," and stating that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction").
more likely to develop a deeper appreciation of tribal courts and of tribes as governments. The habitual acceptance by federal courts of tribal convictions might help federal courts to see tribal courts as sisters and might work implicitly to facilitate federal acceptance of tribal civil judgments.

The strategy suggested here is not novel. In 1986, tribes effectively joined the War on Drugs and succeeded in increasing their criminal jurisdictional limitations from six months of imprisonment to one year of imprisonment, or effectively from petty to gross misdemeanor authority. That reform came in omnibus anti-drug legislation and was expressed by Congress as an effort to "enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics in Indian reservations[.]" Likewise, the success in creating the block-grant style approach in the "tribal self governance" initiatives in 1994 was no doubt assisted by the focus on "devolution" of federal social welfare programs to states in the 1980s and early 1990s. Finally, similar instincts have been apparent in recent years in the War on Terror, animating an attempt to secure a role for Indian tribes in the new homeland security efforts.

V. CONCLUSION

In a long history of federal Indian policy that has swung like a pendulum toward and then against federal support for Indian tribes, tribal governments may be at the crossroads of a new policy era. If tribes want federal efforts toward tribal self-determination to expand rather than contract, tribes must find ways to breathe new life into this important policy. Because the absence of self-determination in the area of criminal justice may fundamentally represent the absence of any real self-determination for Indian tribes, criminal justice is an obvious place to begin.

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100 100 Stat. 3207.