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### Untangling the Web: Juvenile Justice in Indian Country

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## UNTANGLING THE WEB: JUVENILE JUSTICE IN INDIAN COUNTRY

Addie C. Rolnick\*

*The juvenile justice system in Indian country is broken. Native youth are vulnerable and traumatized. They become involved in the system at high rates, and they are more likely than other youth to be incarcerated and less likely to receive necessary health, mental-health, and education services. Congressional leaders and the Obama administration have made the needs of Indian country, especially improvement of tribal justice systems, an area of focus in recent years. The release of two major reports—one from a task force convened by the Attorney General to study violence and trauma among Native youth and the other from a bipartisan commission appointed to recommend improvements to criminal justice in Indian country—has further trained this focus on improving juvenile justice. Two recommendations appear again and again in every report and article: give tribes more control over their juvenile justice systems and reduce the reliance on secure detention. Yet, implementing these recommendations seems next to impossible.*

*Taking as its starting point these two devastating reports, this Article provides a thorough description and diagnosis of the reasons that the Indian country juvenile justice system continues to fail Native youth, one that has been missing from the legal and policy literature. It provides a careful analysis of the law governing juvenile delinquency jurisdiction in Indian country. While it echoes others' observations that the confusing jurisdictional web is part of the reason Native youth remain neglected and invisible in federal and state systems, and ill-served by tribal systems, this Article's detailed analysis of the law reveals much greater potential for tribal control*

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\* Associate Professor, University of Nevada, Las Vegas, William S. Boyd School of Law. This article draws from nearly two decades of academic, policy, and tribal institution-building work on juvenile justice in Indian country. The comprehensive legal analysis provided here is part of a long-term research project on Native youth and juvenile justice undertaken in collaboration with Neelum Arya, who along with Kevin Washburn and Virginia Davis, offered helpful comments and criticism. Jim Hoffman provided excellent research assistance.

I thank the Indian Law and Order Commission, Attorney General Eric Holder, Assistant Secretary for Indian Affairs Kevin Washburn, OJJDP Administrator Robert Listenbee, members of the Senate Indian Affairs Committee, the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative, the Association on American Indian Affairs, the National Congress of American Indians, and the National Indian Child Welfare Association for bringing these important issues to the forefront in recent years. I am even more grateful to Neelum Arya, Pat Sekaquaptewa, Mary Pavel, Carole Goldberg, Doug Endreson, Kyle Prior, Michael Guilfoyle, Jack Trope, and Diana Bob for encouraging me to focus on this issue when others were not, and to the tribal leaders, lawyers, policymakers, and tribal justice staff across Indian country who have continued to make juvenile justice a priority whether it gets national attention or not.

*under current laws than others assume exists. More importantly, the Article moves beyond the familiar complaint about the jurisdictional web to examine the inner workings of each sovereign's approach to Indian country justice, providing the fuller picture necessary to identify and implement both large-scale and small-scale solutions. As federal and tribal leaders debate legal and policy changes to the Indian country juvenile justice system, including potential amendments to the Federal Juvenile Delinquency Act, the Juvenile Justice and Delinquency Prevention Act, federal criminal laws, and Public Law 280, this Article's timely investigation of barriers to improvement will elucidate a better path to healing, not harming, Native youth.*

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#### INTRODUCTION

The juvenile justice system in Indian country is broken.<sup>1</sup> It serves youth that by almost any measure would qualify as the most vulnerable, and yet the conditions faced by these youth are deplorable, the treatment options few, and the rates of over-incarceration high. While perhaps not a new revelation, the critique of juvenile justice in Indian country has received renewed attention in recent years after the release of two federal reports. Although differing in focus, both reports include a substantial indictment of the juvenile justice system's failure as a tool of law enforcement and as a mechanism for rehabilitating and treating at-risk youth. The reports identify many of the same problems, and they set forth similar recommendations.

The first is a 2013 report to Congress and the President from an independent commission tasked with studying criminal justice in Indian country. The Indian Law and Order Commission's ("Commis-

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1. There is no single justice "system" that serves Native youth, nor is the governing framework limited to the regions legally designated as "Indian country." I use the term "system" to refer to the various governmental entities encountered by Native youth who commit offenses in tribal communities. While this Article focuses primarily on areas that do qualify as "Indian country," more than half of all Native youth live outside of these areas, where they are subject to state court jurisdiction for any offenses they may commit.

sion”) final report covers all aspects of criminal justice,<sup>2</sup> but the chapter on juvenile justice is particularly scathing. The Commissioners found that a focus on juvenile justice “exposes the worst consequences of our broken Indian country justice system.”<sup>3</sup> The report describes American Indian and Alaska Native youth as “vulnerable and traumatized” and finds that the juvenile justice system serving those youth is “failing the next generation.”<sup>4</sup>

The second is a 2014 report to the Attorney General by a specially appointed Task Force on American Indian and Alaska Native Children Exposed to Violence (“Task Force”).<sup>5</sup> The Task Force was formed in response to an earlier report that identified American Indian and Alaska Native children’s “exceptional degree of unmet needs for services and support to prevent and respond to the extreme levels of violence they experience.”<sup>6</sup> The Task Force report focuses not on criminal justice, but on a broad range of institutions affecting Native youth at home, in the community, and in the courts.<sup>7</sup> Like the Law and Order Commission Report, it includes an entire chapter on the involvement of violence-exposed children in the juvenile justice system and the system’s response to those children, finding that the juvenile justice system tends to re-traumatize, rather than heal, youth who come in contact with it.<sup>8</sup>

Both reports call for a system that prioritizes treatment and rehabilitation over punishment and incarceration.<sup>9</sup> The Commission’s report recommends that a legal preference be established for community-based treatment over secure confinement and describes the damaging effects of incarceration on traumatized youth, noting that “[d]etention is often the wrong alternative for Indian country youth, yet it is often the rule rather than the exception.”<sup>10</sup> The Task

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2. INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER (2013) [hereinafter ROADMAP]. The bipartisan commission was created by the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 235, 124 Stat. 2258, 2282 (codified at 25 U.S.C. § 2812 (2014)).

3. ROADMAP, *supra* note 2, at 149.

4. *Id.*

5. ATTORNEY GEN.’S ADVISORY COMM’N ON AM. INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE (2014) [hereinafter ENDING VIOLENCE].

6. ATTORNEY GEN.’S NAT’L TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, FINAL REPORT (2012).

7. ENDING VIOLENCE, *supra* note 5.

8. *Id.* at 24, 28.

9. ROADMAP, *supra* note 2, at vi; ENDING VIOLENCE, *supra* note 5, at 118.

10. ENDING VIOLENCE, *supra* note 5, at 166–67. I use the term “secure confinement” to describe the phenomenon of confining youth in locked facilities for any amount of time, including pre-adjudication detention, post-adjudication correctional

Force report concludes that incarceration is “not effective as a deterrent to delinquent behavior” and that the current incarceration-centered approach to juvenile justice “retraumatizes [American Indian and Alaska Native] children.”<sup>11</sup> It therefore recommends secure confinement only as a last resort for youth who pose a danger to themselves or the community, and investments in alternatives to juvenile incarceration.<sup>12</sup>

The authors of both reports also agree that much of the blame for the terrible state of juvenile justice in Indian country lies at the feet of non-tribal governments.<sup>13</sup> Outside of Alaska, many tribes share juvenile delinquency jurisdiction with the federal government, and juvenile justice on those reservations is partly or wholly administered by the federal Department of Justice,<sup>14</sup> which is guided by policies that may have little to do with tribes’ concerns and which has only recently begun to collaborate with tribal leaders at an institutional level. When young offenders face federal prosecution, they are pulled into a criminal justice system that does not have a juvenile component and that is staffed by personnel who do not specialize in juvenile justice, and they are processed under laws written with adult criminals in mind. Youth prosecuted in the federal system spend more time locked up than do their counterparts in state systems, because federal sentences are longer and the federal system does not include diversion, parole, and

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facilities, and locked treatment facilities. I avoid using the term “detention,” which is the preferred term of many Indian country actors, including the Bureau of Indian Affairs (“BIA”), because in other contexts detention refers only to pre-adjudication or short-term confinement.

11. *Id.* at 24, 28.

12. *Id.* at 119.

13. See ROADMAP, *supra* note 2, at 166–67 (“Data show that Federal and State juvenile justice systems take Indian children, who are the least well, and make them the most incarcerated. When they do incarcerate them, it is often far from their homes, diminishing prospects for positive contacts with their communities. Furthermore, conditions of detention often contribute to the very trauma that American Indian and Alaska Native children experience.”).

14. Federal jurisdiction extends to reservations, tribal trust land, individual trust allotments, and certain fee land held by tribes if they qualify as a “dependent Indian community” under federal law. See 18 U.S.C. § 1151 (2014) (defining “Indian country” for purposes of federal criminal jurisdiction). I use the term “reservation” to refer to all of these types of territory. Because the Indian country statute is primarily concerned with differentiating between lands that fall under federal versus state jurisdiction, some tribes assert territory-based jurisdiction over tribal territory that does not qualify as Indian country. See, e.g., CONF. TRIBES OF THE WARM SPRINGS RESERVATION CODE § 200.030 (2011) (providing that criminal jurisdiction over members extends to land outside the reservation that is held in trust, owned by the tribe, or subject to tribal treaty rights).

other services.<sup>15</sup> Because the federal government does not run any juvenile facilities, Native youth are placed in state or local facilities under contract agreements, often far from home.<sup>16</sup>

Other tribes share delinquency jurisdiction with state governments under federal laws that give states jurisdiction over Indian country within their borders. This includes over half the tribes in the lower 48 states and all 229 Alaska Native villages.<sup>17</sup> In these communities, state authorities may ignore the view of tribal authorities in individual cases and rarely consult with tribes when setting policy and funding priorities that affect tribal youth as a group. Native youth end up submerged in state juvenile justice systems, where they are often treated more harshly, but are rarely provided programs or support tailored to their unique needs.<sup>18</sup> In light of the poor outcomes for Native youth in federal and state systems, both reports recommend strengthening and expanding tribal juvenile justice systems and correspondingly narrowing the role of non-tribal governments in Indian country.<sup>19</sup>

The reports confirm what tribal leaders have been saying and what previous federal reports have found: tribal governments prioritize juvenile justice, yet they struggle to build systems and programs that effectively address the needs of their youth.<sup>20</sup> In order to access funding and resources, tribes must navigate multiple federal agencies with changing and ill-defined policy goals, and a complicated network of potential funding streams.<sup>21</sup> Many tribal communities lack the kinds of community services often integrated into state and local juvenile justice systems, such as mentoring programs, Boys and Girls

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15. NEELUM ARYA & ADDIE C. ROLNICK, CAMPAIGN FOR YOUTH JUSTICE, A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS 25 (2008); ROADMAP, *supra* note 2, at 155, 160; ENDING VIOLENCE, *supra* note 5, at 120.

16. ROADMAP, *supra* note 2, at 160; ENDING VIOLENCE, *supra* note 5, at 120.

17. DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 14–15 (2012).

18. ARYA & ROLNICK, *supra* note 15, at 20–24; ROADMAP, *supra* note 2, at 157; *see also* ENDING VIOLENCE, *supra* note 5, at 116 (“Programming offered in state juvenile justice systems is not meeting the needs of AI/AN youth and in some cases is harming these youth.”).

19. ROADMAP, *supra* note 2, at 159 (recommending removing Native children from federal and state jurisdiction whenever possible with the goal of “releasing Tribes from dysfunctional Federal and State controls and empowering them to provide locally accountable, culturally informed self-government”); ENDING VIOLENCE, *supra* note 5, at 111 (criticizing the “complex jurisdictional system” and describing a vision for a “more effective, tribally driven juvenile justice system”).

20. U.S. DEP’T OF JUSTICE, REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS 1–3 (1997).

21. *See infra* Section III.A (describing federal funding for tribal juvenile justice).

Clubs, and scouting organizations.<sup>22</sup> Some also face a scarcity of professionals trained in areas relevant to juvenile justice, including psychiatrists, counselors, law enforcement professionals, lawyers, judges, teachers, and leaders with expertise in juvenile justice planning.<sup>23</sup> Compared to states, tribes generally have to build more infrastructure with fewer resources, and they must do it against a far more confusing legal backdrop.

Developing and refining solutions that work for tribes requires a comprehensive analysis of the current legal structure that governs juvenile justice in Indian country, including statutes, case law, and

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22. ARYA & ROLNICK, *supra* note 15, at 14; *see also* NAT'L CONG. OF AM. INDIANS, NATIVE CHILDREN'S POLICY AGENDA: PUTTING FIRST KIDS 1ST 6–7, 15 (2015) (noting the lack of mental and behavioral health services, intermediate sanctions, and alternatives to incarceration). *But see* Rebecca A. Clay, *Circles of Care: Creating Models of Care for American Indian and Alaska Native Youth*, SAMHSANews (Substance Abuse & Mental Health Servs. Admin., Rockville, Md.), Nov./Dec. 2010, at 1, 4–5 (describing a federal grant program supporting the development of community-based systems of care for children in tribal communities); BOYS & GIRLS CLUBS AM.'S NATIVE SERVS. UNIT, <https://www.naclubs.org/index.php/about-us/native-services-unit> (last visited Feb. 1, 2016). One factor contributing to the dearth of community services is that private foundations provide relatively little financial support to Native communities or causes. *See* COMMON COUNSEL FOUND. & NATIVE AMS. IN PHILANTHROPY, NATIVE VOICES RISING: A CASE FOR FUNDING NATIVE-LED CHANGE 19–20 (2013). In addition, funders may prefer to support evidence-based programs, and the lack of research and evaluation of programs for Native youth or in tribal communities makes it difficult to demonstrate the effectiveness of a particular program. *Accord* Puneet Chalwa Sahota & Sarah Kastelic, *Culturally Appropriate Evaluation of Tribally Based Suicide Prevention Programs: A Review of Current Programs* 27 WICAZO SA REV. 99, 105–13 (2012).

23. *See, e.g.*, U.S. DEP'T OF INTERIOR, OFFICE OF INSPECTOR GEN., BUREAU OF INDIAN AFFAIRS' DETENTION FACILITIES 4–7 (2011) (reporting on an audit of BIA-funded detention facilities, which found that “staffing shortages exist for a variety of reasons, such as a lack of proactive management and direction; socioeconomic challenges, such as remote locations, unavailable housing, and low salary; applicants frequently fail background checks; or human resources processing delays related to hiring new employees”); ROADMAP, *supra* note 2, at 67 (describing the shortage of law enforcement officers in Indian country); Etienne Benson, *Psychology in Indian Country*, 34 MONITOR ON PSYCHOL. 56 (2003) (describing the under-representation of Native people among doctoral-level psychologists and the difficulty of recruiting and retaining psychologists to work in Indian country); Brenda Freeman et al., *Contextual Issues for Strategic Planning and Evaluation of Systems of Care for American Indian and Alaska Native Communities: An Introduction to Circles of Care*, 11 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 1, 89 (2004) (describing the scarcity of mental health professionals working in Indian country and/or trained to work with Native youth); *see also* AMANDA CROSS-HEMMER, EVERGREEN STATE COLL., SYSTEMS OF CARE IN TRIBAL COMMUNITIES CASE STUDY 2 (2011) (same); NAT'L INDIAN CHILD WELFARE ASS'N, AMERICAN INDIAN CHILDREN'S MENTAL HEALTH FUNDING AND A REVIEW OF TRIBAL MENTAL HEALTH PROGRAMS 4–7 (2005) (reporting that the Indian Health Service funded only one youth-trained mental health provider per 23,250 adolescents in Indian country).

agency policy; the fundamental shortfalls plaguing each sovereign's provision of juvenile justice services to Native youth; and major roadblocks to improvement. This Article provides such an analysis. Its basic thesis is that each community must design a system with an eye to the needs of its youth, the resources available in the community, and the particular limitations with which it must contend.<sup>24</sup> Once the community determines what it needs, it must be able to mobilize partners (other governments, agencies, academics and consultants with expertise, technical assistance providers) to support that vision. Instead of being driven by this inside-out planning process, modern tribal systems are the result of an outside-in process in which tribes must build their systems to meet the needs and demands of non-tribal entities. Tribal criminal and juvenile courts are too often viewed as necessary only to fill the gaps where federal or state courts lack the jurisdiction, resources, or political will to effectively meet public safety needs. The Article brings together principles from juvenile justice, federal Indian law, and tribal law to consider what a model tribal juvenile justice system might look like and why the current system on many reservations looks so different. It relies heavily on the findings of the two recent reports because, notwithstanding any shortcomings in their methodology and the political nature of their conclusions, they represent the most recent official investigations into the current state of juvenile justice in Indian country.

Part I illustrates the problem by juxtaposing recent descriptions of juvenile justice in Indian country with generally agreed-upon principles for building effective and responsive juvenile systems. The chasm between the vision of a well-run juvenile justice system, one that is informed by best practices in federal Indian law and juvenile justice and is responsive to the needs of Native youth, and the reality of the systems currently operating in Indian country demonstrates that something is wrong. The primary barrier to creating a better system is a lack of coherent policy at either the tribal or the national level. The

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24. The Attorney General's Task Force stressed the importance of local control and planning, finding:

The current system does not support . . . local participation and develop the capacity of the local community. It does not support local practices that work, but rather supports evidence-based practices that worked in Europe or some non-Indian community . . . . A reformed juvenile justice system should be tribally operated or strongly influenced by tribes within the local region.

ENDING VIOLENCE, *supra* note 5, at 113. The Law and Order Commission likewise outlined a clear overall goal of "enabling Tribal communities to know where their children are and to be able to determine the proper assessment and response" for children who enter the juvenile justice system. ROADMAP, *supra* note 2, at 159.

first culprit is the familiar jurisdictional web of criminal justice authority, in which offense type, offense location, and offender and victim identity determine which of multiple sovereigns will have authority to address the crime.

To clarify the legal landscape governing juvenile justice, Part II describes the sources and scope of each sovereign's power, identifying where they overlap and diverge. This Article's treatment of jurisdiction moves beyond the standard analysis of Indian country criminal jurisdiction. First, it doesn't assume that juvenile delinquency jurisdiction is a subset of criminal jurisdiction; instead, it inquires into the specific nature of juvenile jurisdiction in light of the rules governing Indian country. Second, it identifies unsettled legal questions related to juvenile jurisdiction. It suggests that tribal delinquency jurisdiction may be much broader than is often assumed and draws distinctions between legal barriers (of which there are few) and practical barriers (of which there may be many) to the exertion of tribal authority in this area.

Multiple sovereigns are only part of the problem, though. Within each jurisdiction, additional factors contribute to an internal lack of policy. Part III provides a more in-depth diagnosis of the problem by focusing on each jurisdiction separately. The federal courts do not have a separate juvenile justice system, and the laws governing federal juvenile jurisdiction reflect the assumption that only the most serious, multi-jurisdictional offenders will fall under federal jurisdiction. Indian juveniles make up the largest portion of juveniles under federal jurisdiction, but they are prosecuted and incarcerated as part of a non-system designed with a very different kind of offender in mind. Despite comprising a majority of juveniles under federal jurisdiction, Native youth are all but invisible once they enter Bureau of Prisons custody: a lack of transparency makes it difficult to track where they are held and what their outcomes are. Where states have jurisdiction over Indian country youth, that jurisdiction generally has been authorized without the consent or over the objection of the affected tribes. Making matters worse, states are not required to consult directly with tribes, either on general policies affecting Native youth or in individual cases. Many states have been reluctant to involve tribes in policymaking, to invest in data collection, or to offer specialized services for Native youth.

While strengthened tribal jurisdiction is usually offered as a promising solution, the obstacles facing tribal juvenile systems have not been the focus of sustained attention. First, tribes do not fully control even their own justice systems. Many tribes rely on federal agen-

cies for financial, personnel, and technical assistance, so agency priorities drive tribal choices, not vice versa. The involvement of multiple agencies in funding and operating various aspects of tribal justice systems means that tribes are often caught between conflicting policy choices. The systems are built around the policy choices, as reflected in the funding opportunities, of federal actors. Second, tribal justice systems are seriously under-funded. This is true for all tribes, but the lack of resources is especially acute for tribes subject to Public Law 280 because the transfer to state jurisdiction was accompanied by a cessation of federal funding for many tribal justice systems. Moreover, the federal funding that is available to support tribal juvenile systems comes most often in the form of short-term grants focused on specific programs or activities.

The goal of this Article is to synthesize and summarize the primary barriers to improving juvenile justice in Indian country. Effective solutions depend on a thorough understanding of the problem and the particular structures and obstacles that create it; in the case of Indian country juvenile justice, this kind of thorough diagnosis is missing from the conversations about reform. Drawing on the description presented in Parts II and III, Part IV offers preliminary thoughts about specific reforms. A comprehensive overhaul of the entire system, including a recalibration of the jurisdictional balance, will require major legislative and agency-level changes, as well as a significant infusion of financial resources. However, certain relatively easy interventions can make a measurable difference in the short term. To that end, the conclusion identifies both long- and short-term strategies for reform at each level.

## I.

### UNMET PROMISE

American Indian tribes have a unique opportunity to create effective and humane juvenile justice systems. If tribes want to break from the dominant model of imprisonment, they do not have to deconstruct an intricate existing system, as most states would have to do. Tribal justice systems also have a legally protected right to be different from Western justice systems.<sup>25</sup> They are able to build and administer justice systems that reflect traditional values.<sup>26</sup> Finally, tribal communi-

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25. See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 839–42 (2007).

26. See generally Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, in JUSTICE AS HEALING: INDIGENOUS WAYS 108 (Wanda D. McCaslin ed., 2005); FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPO-

ties have smaller populations than do states. Tribal leaders usually have strong ties, including kinship, religious, and personal ties, with members of their communities, making tribal juvenile justice a matter of personal concern.<sup>27</sup>

Yet, youth in Indian country are by all accounts faring far worse than their non-Indian counterparts.<sup>28</sup> They are disproportionately affected by nearly every risk factor linked to delinquency.<sup>29</sup> In particular, they experience disproportionately high levels of trauma and violence, including violent victimization.<sup>30</sup> When Indian country youth become involved in the juvenile justice system, as many do, it is most often for low-level, alcohol- or substance-related offenses.<sup>31</sup> Despite the near-consensus view that incarceration is more likely to damage than rehabilitate these youth,<sup>32</sup> they are likely to spend at least some time in a locked facility, and in some cases are likely to spend a longer time locked up than their non-Indian counterparts.<sup>33</sup> Enmeshed in a confusing web of tribal, state, and federal courts and detention facilities, they are also likely to end up far from home and without access to treatment and education services.<sup>34</sup> Even when the tribe favors community-based treatment and rehabilitation, a juvenile may be placed elsewhere without access to her family, culture, or appropriate treatment, over the objections of the tribe.<sup>35</sup>

Tribes ought to be making decisions about policy, infrastructure, and resource allocation, but many are following decisions made by others. Most juvenile offenders in Indian country would benefit from substance-abuse or mental-health treatment and community-based

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RARY TRIBAL LIFE (1997); JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT (2008); Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. (2001); Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134 (1995); Gloria Valencia Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994); Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).

27. In contrast, state juvenile justice systems are criticized as manifestations of state control over marginalized youth. See RANDALL G. SHELDEN, *CONTROLLING THE DANGEROUS CLASSES: A HISTORY OF CRIMINAL JUSTICE* ch. 5 (2d ed. 2008).

28. See *infra* Section I.B.

29. See *infra* notes 119–30 and accompanying text.

30. See *infra* notes 128–30 and accompanying text.

31. See *infra* note 114.

32. See *supra* text accompanying notes 10–12; see also *infra* notes 105–11, 138–39 and accompanying text.

33. See *infra* notes 134–35, 140–42 and accompanying text.

34. See *infra* notes 141–42 and accompanying text.

35. See *infra* Sections III.B, III.C (explaining how federal and state authorities are not required to heed tribal preferences).

programming, but many are locked up instead, where they are not even receiving basic educational and health services. Youth who need to be healed are being harmed. The following Section brings the problem into sharper relief by contrasting vision and reality.

*A. The Vision: Tribally Controlled Systems that Heal*

This Article begins from the premise that it is possible to create a humane and effective system to address juvenile crime. Such a system must reflect community values and respond to the needs of youth and other community members. Tribes are uniquely poised to create better systems because many are in the process of fashioning or refashioning their justice systems.<sup>36</sup> Without the baggage of an already-entrenched system, tribes would ideally be able to make carefully considered policy decisions about what they need and how best to meet that need. They could benefit from the lessons of over a century of trial and error in federal Indian law and juvenile justice, as well as sophisticated record-keeping and statistical analysis about juvenile crime, offender characteristics, and risk factors.

It is possible to put together a rough blueprint of a tribal juvenile justice system that reflects the principles of tribal self-determination, best practices for effective juvenile justice systems, and responsiveness to the needs of Indian country juvenile offenders. The information available in each of these areas runs deep, and all of it suggests the following: tribes must be able to assess the needs of their own communities in a manner that incorporates public safety concerns, knowledge about the unique risk and protective factors faced by Native youth in their communities, and knowledge (both scientific and traditional) about how to care for and correct children. When they do, it is reasonable to believe that many tribes will elect to address juvenile delinquency through a system that emphasizes treatment, community involvement, and rehabilitation, with incarceration—if it is used at all—forming a very small component of the system.

*1. Tribal Self-Determination*

The sovereignty principle that forms the bedrock of federal Indian law,<sup>37</sup> the federal policy of self-determination,<sup>38</sup> and the nation-

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36. For many tribes, concerns about child welfare and juvenile justice were major catalysts for reforming or improving the entire justice system.

37. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (describing tribes as “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States”).

building model posited by political scientists and economists<sup>39</sup> are each rooted in the ideas that Indian tribes are governments, that governments do best when they are able to craft and carry out policy solutions that reflect the priorities and beliefs of their people with minimal interference from other governments or super-governmental structures, and that it is the exercise of core governmental powers (e.g., taxation, criminal justice, political reorganization) that will best enable tribes to do this. These commitments undergird both the Law and Order Commission and the Attorney General's Task Force recommendations regarding strengthening tribal control and limiting federal and state jurisdiction over juvenile delinquency.<sup>40</sup>

The importance of community-driven solutions is a relatively recent point of agreement when it comes to American policy regarding indigenous peoples. Beginning in the late 1800s, federal Indian policy was animated by the push to forcibly assimilate Indian people,<sup>41</sup>

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38. Since the late 1960s, the federal government has followed a policy of supporting tribal self-determination and dealing with tribes on a government-to-government basis. This policy was first set forth in President Nixon's message to Congress on Indian affairs. Special Message to Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970). President Nixon's statement rejected the policies pursued in the past by which an "Indian community is almost entirely run by outsiders" and directed Congress to "create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." *Id.* at 565–66. Every subsequent President has reaffirmed the policy. Tribal Consultation: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881 (Nov. 5, 2009) (President Obama); Proclamation No. 7500, 66 Fed. Reg. 57,641 (Nov. 12, 2001) (President Bush); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000) (President Clinton), *reprinted in* 25 U.S.C. § 450 note (2014); Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998) (President Clinton), *reprinted in* § 450 note; Memorandum No. 85, 59 Fed. Reg. 22,951 (Apr. 29, 1994) (President Clinton); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662 (June 14, 1991) (President Bush); Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983) (President Reagan). *See generally* CAROLE GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM, CASES AND MATERIALS 37–42 (6th ed. 2010).

39. *See* Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J. 187 (1998); Ryan Seelau, *The Kids Aren't Alright: An Argument to Use the Nation-Building Model in the Development of Native Juvenile Justice Systems to Combat the Effects of Failed Assimilative Policies*, 17 BERKELEY J. CRIM. L. 97 (2012).

40. ROADMAP, *supra* note 2, at 159–66; ENDING VIOLENCE, *supra* note 5, at 114–16, 122. The reports echo recommendations made by academics. *See* ARYA & ROLNICK, *supra* note 15, at 32; Seelau, *supra* note 39, at 130; *see also* Ryan Seelau, *Regaining Control over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice that Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63 (2012).

41. The Allotment and Assimilation Era lasted from approximately 1871 until 1934. Congress ended the policy of making treaties with Indian tribes in 1871, putting new emphasis on legislation geared toward civilization and assimilation. The Indian

driven by the hope that once individual Indian people were disconnected from their tribes and “civilized,” they could be absorbed into the American polity, leaving formerly tribal lands open for white settlement.<sup>42</sup> While land transfer was at the core of the assimilation policy, the two key mechanisms through which assimilation was to be achieved were the imposition of an external criminal justice system to suppress Native traditions and removal and indoctrination of Native children.

In 1885, the Major Crimes Act extended—for the first time ever—federal-court jurisdiction over certain crimes committed by Indians against other Indians on reservations.<sup>43</sup> This involuntary imposition of federal criminal power was premised on the belief that traditional tribal justice systems were inferior and incapable of effectively addressing serious crimes.<sup>44</sup> A federal Code of Indian Offenses prohibited many tribal cultural and religious activities.<sup>45</sup> The Code was enforced by local agency-run courts that employed criminal law and punishment as instruments of education and assimilation.<sup>46</sup>

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General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.), authorized a policy of allotting tribal lands and opening up the “surplus” land to non-Indians. The goal of the policy included detribalization through the division of communally held tribal land and indoctrination into a Western, capitalist way of life through individualized property ownership. CHRISTINE BOLT, *AMERICAN INDIAN POLICY AND AMERICAN REFORM: CASE STUDIES OF THE CAMPAIGN TO ASSIMILATE THE AMERICAN INDIANS 95–97* (1987) (discussing government policies and programs to assimilate Indians). *See generally* ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 30–36* (2005); COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* § 1.04 (Neil Jessup Newton et al. eds., 2012 ed.) (referring to 1928 as the end of the Allotment and Assimilation Era); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 959, 980 n.96 (2011) (describing assimilation policy).

42. Tribal land holdings were broken up into individual allotments, which allowed for “surplus” lands to be made available for sale to white settlers and facilitated a transition for Indians to the American system of individual property ownership and agricultural land use. *See generally* Helen M. Bannan, *The Idea of Civilization and American Indian Policy Reformers in the 1880s*, 1 J. AM. CULTURE 787 (2004) (discussing 1880s policy reformers’ focus on “civilizing” Indians).

43. 18 U.S.C. § 1153 (2014).

44. *See* SIDNEY L. HARRING, *CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* (1994).

45. *See* LUANA ROSS, *INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY* 18, 41–45 (1998) (describing how the codes criminalized religious activities, plural marriage, and the practices of medicine people were used along with more typical criminal laws to punish acts of resistance by Native people against settlers).

46. *See* *United States v. Clapox*, 35 F. 573, 577 (D. Or. 1888) (holding that these so-called “CFR courts” did not violate Article I of the U.S. Constitution because they functioned “as mere disciplinary and educational instrumentalities” and were thus within the power of the Bureau of Indian Affairs, and noting that the reservation itself

Another cornerstone of the era was the advent of federally run boarding schools designed to “kill the Indian in him and save the man,”<sup>47</sup> where Native children were forced to cut their hair and were punished for speaking Native languages.<sup>48</sup> Narratives of kidnapping and loss are central to the history of Indian boarding schools: parents were sometimes forced or coerced into giving up their children, who were sent to far away schools and not permitted to return home for long periods of time.<sup>49</sup> Boarding schools introduced the American educational and child-welfare systems to Native children as brutal instruments of acculturation designed to produce subservient Americans.<sup>50</sup> The boarding school philosophy linked the idea of rehabilitation with the practices of removal, education, and punishment, leaving a shadow that looms large over the use of juvenile courts and facilities for Native youth today.

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“is in the nature of a school” that gathers Indians “under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man”).

47. This phrase was coined by Captain Richard Pratt, founder of the first Indian boarding school in Carlisle, Pennsylvania, to describe his assimilationist solution to the conflict between the presence of Indian tribes and the expanding U.S. nation’s need for land. See Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, 19 SOC. WELFARE F. 1, 45 (1892); see also Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 397 (2006) (describing Pratt’s assimilationist philosophy).

48. See generally BOLT, *supra* note 41; K. TSIANINA LOMAWAIMA, *THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL* (1994) (relating the Indian experience of assimilation through the boarding school program); MARGARET CONNELL SZASZ, *EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION SINCE 1928* (1999) (discussing educational programs as a vehicle for the assimilation of Indians).

49. See KENNETH LINCOLN, *NATIVE AMERICAN RENAISSANCE* (1985) (referring to stories of kidnapping); Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 150–55 (2007) (detailing a history of government boarding schools for Indian children); Maureen Smith, *Forever Changed: Boarding School Narratives of American Indian Identity in the U.S. and Canada*, 2 INDIGENOUS NATIONS STUD. J. 57 (2001) (analyzing boarding school narratives).

50. See MARGARET D. JACOBS, *A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD*, at xxxi (2014) (referring to the use of “military force to wrest children away” from their parents and “military-style regimens” and “manual labor” as instruments of acculturation within the schools); see also *Native Americans File Lawsuit Against Boarding School Abuses*, VOICE AM. NEWS (Oct. 30, 2009) (describing litigants’ claims of physical abuse and neglect in a lawsuit against government-sponsored, church-run boarding schools); Gretchen Millich, *Survivors of Indian Boarding Schools Tell Their Stories*, WKAR (Jan. 11, 2012), <http://wkar.org/post/survivors-indian-boarding-schools-tell-their-stories> (recounting stories of abuse from various schools).

In the 1950s, after two decades of federal policy favoring tribal self-government,<sup>51</sup> the federal government revived its strategy of forced assimilation during what is known as the Termination Era.<sup>52</sup> During this period, Congress again embarked on a campaign to dismantle tribal sovereignty and to end the separate political status of tribes and the special tribal-federal relationship, this time employing the rhetoric of racial equality to support forced assimilation.<sup>53</sup> The name of the era refers to a series of statutes unilaterally terminating the relationship between Congress and certain tribal governments.<sup>54</sup> A federal relocation program was also established to move Indian people

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51. The Indian Reorganization (Wheeler-Howard) Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2014)), officially ended the policy of allotment and reaffirmed the importance of tribal governments and tribal land bases. This change was precipitated by a 1928 report that criticized assimilation policy and documented the harms it had inflicted on Native people. INST. FOR GOV'T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* 3–21 (1928). This era, often referred to as the Indian New Deal, lasted from approximately 1934 until the early 1940s. Although the federal government during this era recognized and affirmed tribal self-government, it did so with an assimilationist hand. The IRA provided resources and support for tribes seeking to formalize their laws and revamp their governing systems to more closely fit the Western model, encouraging tribes to replace traditional institutions with business councils, Western court systems, and boilerplate constitutions and laws. *See generally* CLINTON ET AL., *supra* note 41, at 36–39; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 41, § 1.05 (discussing the period of Indian Reorganization from 1928 to 1942); Rolnick, *supra* note 41, at 983 n.111 (same). Bethany Berger has characterized the Indian Reorganization era as a “short respite” of less than two decades between eras dominated by assimilation policy. *See* Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 639 (2009).

52. The Termination Era lasted from approximately 1940 until 1962. *See* CLINTON ET AL., *supra* note 41, at 39–41; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 41, § 1.06 (describing the Termination era as spanning from 1943 to 1961); Rolnick, *supra* note 41, at 984–86 (same).

53. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (declaring it the policy of Congress “as rapidly as possible to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens . . . and to grant them all of the rights and prerogatives pertaining to American citizenship”); *see also* Berger, *supra* note 51, at 642 (highlighting the equality rhetoric used by advocates of the termination policy); Bethany R. Berger, *Williams v. Lee and the Debate over Indian Equality*, 109 MICH. L. REV. 1463 (2011) (discussing the arguments about Indian equality used by both supporters and opponents of the termination policy).

54. Approximately 109 tribes and bands were affected by termination legislation. Although this number represents a small percentage of federally recognized Indians, the effects of termination on those tribes were devastating. *See* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of Termination Policy*, 5 AM. INDIAN L. REV. 139, 151–54 (1977) (listing terminated tribes and discussing the effects of termination legislation); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 41, § 3.02[8][b] (discussing the immediate and long-term effects of termination legislation on the tribal statuses of specific tribes).

from reservations to urban areas.<sup>55</sup> Again, imposition of external criminal justice systems and removal of children were the important themes during this era. This time, however, the state (as opposed to federal) justice systems were the primary tools.

Public Law 280 delegated civil and criminal jurisdiction on reservations to a handful of states, effectively handing over federal responsibility for law enforcement to those states.<sup>56</sup> On reservations subject to Public Law 280, state criminal (and some civil) laws suddenly applied to the acts of Native people in Indian country, even if the state law conflicted with tribal law.<sup>57</sup> The law represented a sharp left turn in over two hundred years of federal policy in which one of the only consistent threads had been recognition of exclusive federal power over Indian affairs and the concomitant limitation of state power in Indian country.<sup>58</sup> There is no evidence that increased state power in Indian country improved reservation public safety overall,<sup>59</sup> but it did

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55. The relocation program began in 1931 as a voluntary program to move returning veterans to cities, but by the 1950s, relocation of reservation residents to urban areas had become the BIA's highest priority, resulting in a withdrawal of funding from other priorities. Participants received limited federal assistance—usually a one-way ticket and a subsistence allowance until they received their first paycheck. Once relocated, they were cut off from the federal services that had been available on reservations. The transition was financially and personally difficult, and many Indians eventually returned to reservations. *See generally* DONALD F. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960* (1986) (examining the motives behind the relocation program and discussing the program's effects on Indians).

56. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2014), 28 U.S.C. §§ 1321–1326, 1360 (2014)). Public Law 280 automatically transferred Indian country jurisdiction to six states and permitted other states voluntarily to assume jurisdiction over Indian country within the state. The mandatory states were Alaska, California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon (except for the Warm Springs Reservation), and Wisconsin. Although Public Law 280 passed *federal* jurisdictional responsibilities on to states, it did not expressly terminate inherent tribal jurisdiction, with the result that tribal jurisdiction continued over many matters concurrently with state jurisdiction. *See* CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997) (discussing the shifts in state and federal jurisdiction over tribal lands under Public Law 280). States voluntarily accepting jurisdiction over some or all reservations pursuant to § 1321 were Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. In the voluntary states, the exact scope of state jurisdiction is defined by state statute. § 1321.

57. GOLDBERG-AMBROSE, *supra* note 56, at 10, 165.

58. CAROLE GOLDBERG & HEATHER VALDEZ SINGLETON, *FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280*, at 2–3 (2007).

59. Where the effects have been studied, it appears that Public Law 280 worsened the public-safety crisis. Goldberg and Singleton were unable to compare crime data between Public Law 280 and non-Public Law 280 tribes, but they found that reservation residents in Public Law 280 jurisdictions rated the availability and police services lower than in non-Public Law 280 jurisdictions, and they also reported crimes less frequently. *Id.* at 474–76, 478–79; *see also* Vanessa J. Jiménez & Soo C. Song, *Con-*

open state courts, jails, and prisons to a new population of Indian country offenders, including juveniles.

State foster-care systems removed Native youth from their homes at astoundingly high rates,<sup>60</sup> premised on the assumption that Native families and communities were dysfunctional.<sup>61</sup> Children were removed based on vague allegations of neglect or deprivation with very little to back them up besides misunderstandings of tribal cultures, devaluation of extended family structures, and racist assumptions about Indian people.<sup>62</sup>

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*current Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1636 (1998) (asserting that because of confusion about the continued existence of tribal jurisdiction and the consequent lack of federal funding to those tribes, “Public Law 280 actually serves to increase lawlessness in Indian country”); Sarah N. Cline, *Sovereignty Under Arrest?: Public Law 280 and Its Discontents* 14 (2013) (unpublished M.P.P. thesis, Oregon State University) (on file with author) (reviewing studies of Public Law 280 jurisdictions and noting that the literature provides “proof that the current regime does not enhance reservation public safety”).

60. See Addie C. Rolnick & Kim H. Pearson, *Racial Anxieties in Adoption: A Response to Bethany Berger’s In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. FORUM (forthcoming 2016). See generally LAURA BRIGGS, *SOMEBODY’S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION* (2012); JACOBS, *supra* note 50.

61. Brian D. Gallagher, *Indian Child Welfare Act of 1978: The Congressional Foray into the Adoption Process*, 15 N. ILL. U. L. REV. 81, 85 (1994) (“Congress was especially critical of the general standards employed by the child welfare system in determining the necessity of intervention. One survey cited found that ninety-nine percent of the cases involving the removal of Indian children from their families were predicated ‘on such vague grounds as “neglect” or “social deprivation” and on allegations of the emotional damage the children were subjected to by living with their parents.’ Congress was altogether dismayed at the lack of understanding non-Indian child welfare workers had of Indian family society.” (footnotes omitted) (quoting H.R. REP. NO. 95-1386, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7530)). Just this year, South Dakota child-welfare officials were found to have adopted procedures facilitating easy removal of Indian children from their homes, violating the ICWA and denying Indian parents their rights to due process prior to removal. See *Oglala Sioux Tribe v. Van Hunnicks*, 100 F. Supp. 3d 749 (D.S.D. 2015) (granting partial summary judgment).

62. Gallagher, *supra* note 61, at 85 n.27 (“Indian communities are often shocked to learn that parents they regard as excellent caregivers have been judged unfit by non-Indian social workers . . . . For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights. Because in some communities the social workers have, in a sense, become a part of the extended family, parents will sometimes turn to the welfare department for temporary care of their children, failing to realize that their action is perceived quite differently by non-Indians.” (quoting H.R. REP. NO. 95-1386, at 8)).

Given the history of efforts to forcibly assimilate Native people, it is significant that since the 1970s, the federal government has consistently adhered to an official position that has been supportive of tribal self-determination and self-government.<sup>63</sup> Self-determination policy is at once a rejection of past assimilation policies that resulted in an “Indian community [that] is almost entirely run by outsiders,” a commitment to “a new era in which the Indian future is determined by Indian acts and Indian decisions,” and a pledge by the federal government to undo the former by adhering to the latter.<sup>64</sup> During the self-determination era, Congress has implemented this strategy repeatedly by passing legislation intended to strengthen tribes’ control over Native children.

One of the first landmark laws passed during the self-determination era was the Indian Child Welfare Act (“ICWA”), which recognized and reaffirmed Indian tribes’ primary authority over child-welfare matters.<sup>65</sup> This affirmation of jurisdiction did not occur in a vacuum: Congress specifically acknowledged the role of federal<sup>66</sup> and state<sup>67</sup> governments in breaking up Native families and harming Native children. The ICWA affirms the existence of tribal jurisdiction even off the reservation,<sup>68</sup> and it recognizes that tribal authority over children within Indian country is exclusive.<sup>69</sup> Although the ICWA is limited to dependency matters, its philosophical underpinnings regarding the importance of tribal control over children apply to juvenile delinquency as well.<sup>70</sup>

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63. This policy was first set forth in President Nixon’s Message to the Congress on Indian Affairs. Special Message to Congress on Indian Affairs, *supra* note 38, at 564. Every subsequent President has reaffirmed the policy. *See supra* note 38.

64. Special Message to Congress on Indian Affairs, *supra* note 38, at 565–66.

65. Pub. L. No. 95-608, 93 Stat. 3071 (1978) (codified at 25 U.S.C. §§ 1901–1963 (2014)).

66. Reestablishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes, H.R. REP. NO. 95-1386, at 9 (1978) (“The Federal boarding school and dormitory programs also contribute to the destruction of Indian family and community life. . . . In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social or cultural environment much different than their own.”), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

67. 25 U.S.C. § 1901(4)–(5) (2014).

68. § 1911(a)–(b).

69. § 1911(a).

70. *See* Stacie S. Polashuk, *Following the Lead of the Indian Child Welfare Act: Expanding Tribal Court Jurisdiction over Native American Juvenile Delinquents*, 69 S. CAL. L. REV. 1191, 1209–15 (1996). As Polashuk explained, the specific injuries and interests cited by Congress to support passage of the ICRA, including the importance of self-determination in general and the particular significance of retaining con-

Support for tribal justice systems has been another hallmark of the era. Since 1968, Congress has affirmed and expanded tribal courts' inherent criminal jurisdiction.<sup>71</sup> Congress has also reiterated the federal government's commitment to protecting tribal sovereignty, recognized the importance of tribal courts to sovereignty, and directed significant fiscal and administrative resources toward supporting the very tribal justice systems that in previous eras the federal government had actively sought to dismantle.<sup>72</sup>

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trol over children, also apply in the context of delinquency proceedings. *Id.* at 1210 (“Because child-rearing includes punishment, the same reasons apply equally to children being separated for juvenile proceedings as for custody.”).

71. *See* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 201, 82 Stat. 73, 77 (codified as amended at 25 U.S.C. §§ 1301–1302 (2014)) (affirming tribal “powers of self-government” and imposing certain due process requirements on tribal criminal courts). Subsection 1301(2) was amended in 1990 to clarify that “powers of self-government” include “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” *See* Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (amending 25 U.S.C. § 1301); Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (removing the sunset date to make the prior amendment permanent). The Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified in scattered sections of 25 U.S.C.), amended the ICRA to increase the length of sentences and the amount of fines that tribal criminal courts may impose. The Violence Against Women Act, Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1796, 1902–55 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.), restored tribes' power to prosecute and imprison certain non-Indian domestic-violence offenders.

72. The Indian Tribal Justice Act recognized that tribal justice systems “are an essential part of tribal governments,” established a federal Office of Tribal Justice Support, and authorized the Secretary of Interior to enter into self-determination contracts “for the development, enhancement, and continuing operation of tribal justice systems and traditional tribal judicial practices by Indian tribal governments.” Pub. L. No. 103-176, § 2, 107 Stat. 2004, 2004 (1993) (codified at 25 U.S.C. § 3601 (2014)). The Indian Tribal Justice and Technical and Legal Assistance Act of 2000 recognized that “enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency,” created the Department of Justice's Office of Tribal Justice, and authorized grants to tribes and non-profit organizations to improve tribal courts and provide legal services to civil and criminal litigants in tribal courts. Pub. L. No. 106-559, 114 Stat. 2778 (codified at 25 U.S.C. §§ 3651–3682 (2014)). Notably, the Act specifically provided that it should not be construed to “encroach upon or diminish in any way the inherent sovereign authority of each tribal government to determine the role of the tribal justice system within the tribal government or to enact and enforce tribal laws,” to “impair the rights of each tribal government to determine the nature of its own legal system or the appointment of authority within the tribal government,” or to “alter in any way any tribal traditional dispute resolution fora.” The Tribal Law and Order Act and the Violence Against Women Act also increased funding to support tribal criminal justice systems. *See* Tribal Law and Order Act of 2010 § 214 (codified as amended at 25 U.S.C. § 3665a (2014)); Violence Against Women Act § 2001 (codified as amended at 42 U.S.C. § 3796gg (2014)).

Renewed support has been accompanied by congressional acknowledgement of tribal sovereignty in this area as well. Tribal consent to external exercises of criminal jurisdiction has been an important concern for Congress in the self-determination era. Public Law 280 was amended in 1968 to require tribal consent for future assumptions of state jurisdiction and to allow states to retrocede jurisdiction to the federal government, stemming and beginning to reverse the expansion of state jurisdiction over reservations.<sup>73</sup> The Federal Death Penalty Act of 1994 prevents federal courts from imposing the death penalty on an Indian country defendant unless the local tribal government requests it.<sup>74</sup> Perhaps most tellingly, Congress has acted twice this century to restore previously divested criminal powers to tribal courts.<sup>75</sup>

Another cornerstone of the Self-Determination Era was the passage of the Indian Self-Determination and Education Assistance Act of 1975 (“ISDEAA”),<sup>76</sup> which requires the Bureau of Indian Affairs (“BIA”) to contract with tribes if requested for the management of Indian programs, and the Tribal Self-Governance Act,<sup>77</sup> which authorizes certain tribes to receive federal funding in the form of block grants in order to increase tribal budgeting authority. The ISDEAA changed the balance of authority between tribes and federal agencies by allowing tribes to manage their own programs, including those that address law enforcement, justice, and health, while receiving federal agency funding as a contractor. The Indian Tribal Justice Act of 1993 specifically authorized the Secretary of the Interior to enter into contracts to allow tribes to carry out all aspects of tribal justice systems

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73. Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 401, 403, 82 Stat. 73, 78–79 (codified at 25 U.S.C. §§ 1321(a), 1323 (2014)).

74. Pub. L. No. 103-322, tit. VI, 108 Stat. 1959 (codified as amended at 18 U.S.C. §§ 3591–3599 (2014)). The Violent Crime and Law Enforcement Act of 1994 similarly required that tribes opt in before two new sentencing provisions would apply to Indian country offenders: a “three strikes” law providing for a mandatory life sentence upon conviction of a third violent or serious felony or drug offense, and provision lowering the age that juveniles can be transferred to adult court for certain offenses from fifteen to thirteen. *See* 18 U.S.C. §§ 3559(c)(6), 5032 (2014).

75. Tribal Law and Order Act of 2010 § 234 (codified at 25 U.S.C. § 1302(b) (2014)) (restoring the power of tribal courts to impose sentences of incarceration for up to three years per offense); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120 (codified at 25 U.S.C. § 1304 (2014)) (restoring the power of tribal courts to prosecute certain non-Indian offenders for crimes of domestic violence).

76. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in scattered titles of the U.S.C.).

77. Pub. L. No. 103-413, 108 Stat. 4270 (1994) (codified as amended at 25 U.S.C. § 458 (2014)).

and directed the Secretary to consult with tribes in establishing a base funding formula for tribal justice contracts.<sup>78</sup> Self-determination policy is widely viewed as the most successful and correct approach to federal Indian policy.<sup>79</sup> The federal government's commitment to self-determination has remained strong for nearly fifty years and shows no signs of shifting again toward assimilation. With the help of this policy, tribes have revitalized their justice systems.<sup>80</sup>

This explains why both the Task Force report and the Commission report focus mainly on removing the federal and state jurisdictional overlays and increasing tribal control.<sup>81</sup> Both assimilation and termination policies have been resoundingly rejected by current federal policy,<sup>82</sup> and the laws involuntarily extending federal and state jurisdiction to Indians in Indian country (the Major Crimes Act and Public Law 280) have been heavily criticized as both ineffective and in tension with modern-day policies favoring tribal control over tribal programs, particularly justice programs, in Indian country.<sup>83</sup>

Federal and state juvenile justice systems have specific problems that make them particularly dangerous for Native youth, as described *infra* Part III; but even if they functioned perfectly, outsider legal sys-

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78. 25 U.S.C. § 3613 (2014).

79. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 220–24, 239–42 (6th ed. 2011) (describing how tribal sovereignty has been strengthened during the self-determination era and observing that “[t]ribes today possess greater economic and political power than they have had at any time in our history since before the early treaties were negotiated”). *See generally* Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy* (Joint Occasional Papers for Native Affairs, Working Paper No. 2010-1, 2010).

80. GETCHES ET AL., *supra* note 79, at 408; *see, e.g.*, George D. Watson, Jr., *The Oglala Sioux Tribal Court: From Termination to Self-Determination*, 3 GREAT PLAINS RES. 61, 90 (1993).

81. *See supra* note 19 and accompanying text; *see also* Kevin K. Washburn, *American Indians, Crime, and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1024–25 (2008) (calling for tribal self-determination in criminal law); Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 794–95 (2006) (same).

82. *See* GETCHES ET AL., *supra* note 79, at 188 (“The underlying premise of the reformers who designed and administered the IRA was that the forced assimilation of Indians through the Allotment Act legislation and related policies worked to destroy Indians as individuals and Indian communities.”); *see also* Indian Reorganization (Wheeler-Howard) Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2014)) (prohibiting future allotment); Special Message to Congress on Indian Affairs, *supra* note 38 (asking Congress to “repudiate and repeal” termination policy).

83. *See* CHAMPAGNE & GOLDBERG, *supra* note 17, at 3–4 (describing anecdotal evidence of “discontent” with Public Law 280); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 41, § 9.01 (describing criticism of federal jurisdiction).

tems will never reflect local values, ensure accountability to the community, and exhibit the “cultural match” that gives a legal system its legitimacy.<sup>84</sup> Furthermore, self-determination is an independently desirable outcome: even if tribal policy choices seem unwise, they embody legitimacy and reflect tribal community values in a way that outsider-imposed policy choices never can. Bad policy choices made from within can be changed from within, while bad policy choices imposed from outside can and do linger for decades, even centuries.

## 2. *Treatment, Not Incarceration*

Separate juvenile justice systems have existed in most American jurisdictions for nearly a century.<sup>85</sup> The ideas behind and policies governing these systems have shifted several times over the past century. As is the case with federal Indian policy, understanding the historical shifts in thinking about childhood and criminal responsibility that have guided juvenile justice policy is essential to assessing contemporary choices. At a minimum, this history can help tribal governments learn from the mistakes made by other jurisdictions. One lesson from the field of juvenile justice is clear: state and local systems today are struggling with over-incarceration, especially of minority youth.<sup>86</sup>

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84. See generally Cornell & Kalt, *supra* note 39, at 201–02 (defining “cultural match”); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 784, 832–53 (2006) (explaining how federal criminal institutions lack legitimacy and undermine tribal authority); Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 409–23 (2015) (describing the role of criminal laws in ensuring public safety, holding individuals accountable, and communicating values, and explaining why tribal jurisdiction is essential to each of these functions).

85. See generally David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction* (citing 1899 as the year the first juvenile court was established and noting that forty-six out of forty-eight states had passed laws establishing separate juvenile courts by 1920), in *A CENTURY OF JUVENILE JUSTICE* 42, 67 (Margaret K. Rosenheim et al. eds., 2002).

86. ANNIE E. CASEY FOUND., *NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION* 3 (2011) (noting that “incarceration in secure congregate-care youth corrections facilities has persisted as the signature characteristic and the biggest budget line item of most state juvenile justice systems across the nation,” with minority youth over-represented among those incarcerated despite “overwhelming evidence showing that wholesale incarceration of juvenile offenders is a counterproductive public policy”). For history and criticism of punishment-centered juvenile justice policy, see generally Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or Revolution that Failed?*, 34 N. KY. L. REV. 189 (2007) [hereinafter Feld, *A Century of Juvenile Justice*]; Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Social Structure, Race, and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327 (1999); Franklin Zimring, *Opinion, Myths of Get-Tough Law*, TAMPA BAY TIMES (Nov. 1, 2009), <http://www.tampabay.com/opinion/columns/myths-of-get-tough-law/1048326>.

Separate juvenile courts were first established in the early twentieth century based on the idea that young people were more deserving of and amenable to rehabilitation, and so should not be treated like adult criminals.<sup>87</sup> These courts were founded by activists called “child savers,” who viewed crime as a result of incomplete moral and social development and shared a goal of rescuing and rehabilitating poor and minority children.<sup>88</sup> Separate institutions for youth began to appear in the middle of the nineteenth century.<sup>89</sup> These institutions housed dependent and delinquent youth, and children could be committed by parents, police, or others. Called training or reform schools, they were subject to minimal judicial oversight, which allowed caretakers to experiment with discipline, physical punishment, isolation, manual labor, and even resettlement of children in other communities.<sup>90</sup> For Native youth, it is significant that the dominant policy approaches to both misbehaving children and Indian people in the late 1800s favored removing children from their homes, sending them far away, and subjecting them to programming intended to mold them into race- and gender-specific roles.<sup>91</sup> This emphasis on “fixing” children by training them in what was viewed as race- and gender-appropriate roles foreshadowed the use of federally sponsored boarding schools to “fix” Native children by training them in a gender-coded version of whiteness.<sup>92</sup> Courts upheld the legality of these “houses of refuge,” af-

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87. Separate institutions for young offenders began to appear around the middle of the nineteenth century, supported by court decisions recognizing that states could treat children’s crimes differently. See DAVID L. PARRY, *ESSENTIAL READINGS IN JUVENILE JUSTICE* 41–42 (2005). Legislation providing for a separate court system did not appear until passage of the Illinois Juvenile Court Act of 1899, which established the first juvenile court in Chicago. *Id.* at 43.

88. See generally ANTHONY PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 15–100 (2009). Platt’s study emphasized the paternalistic roots of the child-saving movement, noting that it “was essentially a middle-class movement, launched by the ‘leisure class’ on behalf of those less fortunately placed in the social order.” *Id.* at 77. During this same period, federal Indian policy focused explicitly on “saving” Indian people, and a central tool of this was a network of federally sponsored boarding schools for Native children.

89. See generally PARRY, *supra* note 87; Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, in *A CENTURY OF JUVENILE JUSTICE*, *supra* note 85, at 3, 3–41.

90. PARRY, *supra* note 87, at 42; Grossberg, *supra* note 89, at 201–21 (describing the practice of sending East Coast offenders to live with families in the Midwest).

91. Grossberg, *supra* note 89, at 17.

92. See *supra* notes 47–50 and accompanying text (discussing the boarding school policy); see also Katrina A. Paxton, *Learning Gender: Female Students at the Sherman Institute, 1907–1925* (discussing the gendered nature of the training and indoctrination experienced by Native youth), in *BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES* 174 (Clifford E. Trafzer et al. eds., 2006). While certain poor and minority children were sent to training schools because

firming the latitude given to the caretakers and the lack of procedural protections, reasoning that the goal was “reformation, not punishment,” and invoking the doctrine of *parens patriae*, or the idea that the state has a role as guardian of all children.<sup>93</sup>

The theoretical emphasis on rehabilitation continued to guide juvenile justice through most of the twentieth century, but the paternalism and lack of oversight has been tempered by procedural reforms. The first legislatively established juvenile courts included some procedural protections,<sup>94</sup> but juvenile courts were still viewed as clearly non-criminal, and their rehabilitative goal left judges, probation officers, and treatment facilities with a great deal of latitude to intervene in the lives of young people, often for behavior that would not have been a crime if done by an adult.<sup>95</sup> While formal courts introduced more oversight, nascent juvenile justice systems still struggled with balancing the values of flexibility and oversight.<sup>96</sup>

Further substantive and procedural protections were extended to youth in juvenile courts in the second half of the century, stemming in part from a 1967 report recognizing that, while the goal of a separate juvenile system was to rehabilitate rather than punish, the reality fell far short of the rehabilitative goal, often resulting in children receiving the worst of both worlds: punitive sanctions without the protections

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they were deemed dependent or delinquent, Native children sent to boarding schools were deemed deficient solely on the basis of their Indianness. The doctrine of *parens patriae* was not necessary to intervene in the lives of Native children because the legal status of American Indians is premised in part on the *ward-guardian relationship*, in which the federal government functions as a guardian vis-à-vis its Indian wards. See Gavin Clarkson & Jim Sebenius, *Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective*, 76 Mo. L. REV. 1045, 1051–56 (2011). Although narrowly interpreted in its earliest iterations, and more limited today, this doctrine was broadly construed in the late nineteenth and early twentieth centuries to justify massive intrusions into the lives of Indian people, most in the name of assimilation. *Id.*

93. *Ex parte Crouse*, 4 Whart. 9 (Pa. 1839).

94. Tanenhaus, *supra* note 85, at 55–65 (describing the tension between the ideal and reality in the first juvenile court and the gradual implementation of procedural hallmarks such as the probation and complaint systems).

95. See, e.g., *Lindsay v. Lindsay*, 100 N.E. 892 (Ill. 1913) (upholding the Illinois Juvenile Act which gave the state the authority to intervene in a child’s care when such was in the child’s best interest—as constitutional); DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 100–06 (2004) (describing the *Lindsay* decision).

96. See U.S. DEP’T OF LABOR, *CHILDREN’S BUREAU, JUVENILE COURT STANDARDS* (1923) (promulgating model juvenile-court standards but subscribing to the fundamental principles that the juvenile court “should be clothed with broad jurisdiction” and treatment “adapted to individual needs”). *But see* BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 77 (1999) (suggesting that early juvenile courts nearly always favored flexibility, leading them to reject requests for procedural safeguards).

accorded to adult offenders.<sup>97</sup> Courts and policymakers began to recognize that children in these systems endured significant deprivations of liberty that could not be wholly justified by good intentions, culminating in a series of Supreme Court decisions extending various due process protections to juvenile courts.<sup>98</sup> These decisions were grounded in the American constitutional framework, and in extending certain protections to juveniles, the Court in effect acknowledged that the juvenile system, like the adult criminal justice system, was characterized by a state-power-versus-individual-rights framework.

Juvenile imprisonment soared in the 1980s and 1990s,<sup>99</sup> part of a nationwide boom in incarceration that began in the 1970s<sup>100</sup> and

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97. PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, JUVENILE DELINQUENCY AND YOUTH CRIME: REPORT ON JUVENILE JUSTICE AND CONSULTANTS' PAPERS (1967). See generally Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141 (1984).

98. See *infra* notes 184–90 and accompanying text (discussing Supreme Court decisions extending various procedural protections to juvenile courts); see also FELD, *supra* note 96, at 79–108 (describing the legal and social contexts for the Court's due process decisions).

99. Feld describes how, in the 1960s and 1970s, the justification for juvenile confinement shifted away from the idea of indeterminate sentences with a goal of rehabilitation and began to favor the kind of fixed, punitive sentences used in the adult criminal justice system. Feld, *A Century of Juvenile Justice*, *supra* note 86, at 207.

100. See MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 9–16 (2010) (noting that all states experienced “massive growth” in imprisonment rates from the 1970s through the 1990s, although regional variation in incarceration rates, minority over-representation, and punishment style remained significant). According to Marc Mauer, the prison population in the United States as of 1970 had remained relatively stable for decades. MARC MAUER, RACE TO INCARCERATE 19–21 (1999). Policymakers had even proposed a moratorium on new prison construction, and several juvenile prisons were closed. *Id.* at 15–40. Then, between 1972 and 1997, the United States prison population increased 500 percent, from 200,000 to 1.2 million. *Id.* at 19. Prisoner populations and prison construction went hand in hand; more than half of the prisons operating today were built in the last twenty years. *Id.* at 9. Zimring compared the rate of imprisonment per 100,000 people in 1970 and 2007 and found a fivefold increase. Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1228 (2010). He describes this increase as “a growth in rates of imprisonment that has never been recorded in the history of developed nations” and points out that the 2007 imprisonment rate was “four times the highest level of imprisonment in the four decades prior to 1970.” *Id.* at 1230. Violent crime increased in the 1960s and 1970s. See MAUER, *supra*, at 30–37. Juvenile crime increased again in the 1980s and 1990s. See FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE: A CAUTIONARY TALE 7–12 (2012). However, the incarceration boom was the result of policy changes that brought more offenders into the system and made incarceration the preferred option, not simply a consequence of greater numbers of violent offenders. See GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 47–55 (Jeremy Travis et al. eds., 2014); see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (noting the national increase in prison popu-

nearly derailed the theory of the juvenile system as separate from the adult system and supported by principles of rehabilitation. Guided by narratives about high levels of juvenile violent crime, vicious gangs, and a generation of “super-predators,”<sup>101</sup> new federal and state legislation mandated a more punitive response to juvenile crime and blurred the boundaries between juvenile and adult courts and corrections.<sup>102</sup> The shift toward punitive policies was especially dramatic for juveniles when compared to the previously dominant rehabilitative justification for the juvenile system.

The past two decades, by contrast, have yielded a budding consensus that juvenile offenders should be treated differently than adult offenders,<sup>103</sup> that punitive sanctions should be reserved for the most

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lations due to nonviolent drug offenses); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 107–13 (2007) (discussing how the criminalization of nonviolent drug offenses drove the prison population increase in California). Indeed, the focus on incarceration continued even after rates of youth violence fell dramatically. See ZIMRING, *supra*, at 7–12.

101. John DiIulio coined the term “superpredator” in the mid-1990s. John DiIulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), <http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160>. The same year, James Wilson forecast a coming wave of juvenile crime, based largely on a projected increase in the number of African American male adolescents. James Q. Wilson, *Crime and Public Policy*, in CRIME AND PUBLIC POLICY 507, 507 (James Q. Wilson & Joan Petersilia eds., 1st ed. 1995); see also DiIulio, *supra*, at 23–24 (describing a “demographic time bomb” of “super crime-prone males”). Researchers today have largely dismissed this phenomenon as a “myth.” See BARRY KRISBERG, JUVENILE JUSTICE: REDEEMING OUR CHILDREN 5–6 (2004) (“The short answer is that the large cadre of superpredators that DiIulio described never existed, and the growth of this mythical group never happened.”); ZIMRING, *supra* note 100, at 2 (“[T]his . . . increase in youth homicide touched off . . . a moral panic in the media and government inspired by Ph.D.s warning that ‘a bloodbath’ was on the horizon that would be the result of an emerging generation of ‘juvenile super-predators.’ While the ink was still wet on these dire predictions, rates of youth homicide were already dropping—the beginning of an era of declining rates of lethal violence by youth unprecedented in magnitude in the modern era.”).

102. See Elizabeth S. Scott, *The Legal Construction of Childhood* (“In contrast to Progressive reformers who described young offenders as innocent children, conservative reformers today describe them as adults who should be held fully accountable for their crimes.”) in A CENTURY OF JUVENILE JUSTICE, *supra* note 85, at 132. For example, the Violent Crime Control and Law Enforcement Act of 1994 lowered the age at which juveniles under federal jurisdiction could be transferred to adult court, and also authorized funding for punitive measures. Pub. L. No. 103-322, § 140001, 108 Stat. 1796, 2031 (1994) (codified as amended at 18 U.S.C. § 5032 (2014)).

103. See MACARTHUR FOUND., MODELS FOR CHANGE, BECAUSE KIDS ARE DIFFERENT: FIVE OPPORTUNITIES FOR REFORMING THE JUVENILE JUSTICE SYSTEM 5–7 (2014) [hereinafter MACARTHUR FOUND., BECAUSE KIDS ARE DIFFERENT]; MACARTHUR FOUND., MODELS FOR CHANGE, THE FOURTH WAVE: JUVENILE JUSTICE REFORMS FOR THE TWENTY-FIRST CENTURY 20–25 (2013) [hereinafter MACARTHUR FOUND., THE FOURTH WAVE].

serious offenders,<sup>104</sup> and that communities should reduce their reliance on jails, prisons, and other secure facilities.<sup>105</sup> This focus is accompanied by a recognition that different populations of youth have specific needs, and that interventions should be tailored to those needs whenever possible.<sup>106</sup> Drawing on the constitutional rights framework developed in the mid-twentieth century, scholars and policymakers today also emphasize the importance of procedural rights such as access to counsel and a fair trial.<sup>107</sup>

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104. MACARTHUR FOUND., *THE FOURTH WAVE*, *supra* note 103, at 26–31. This has been driven in part by scientific research on the differences between adult and adolescent brains, which suggests that adolescent brains are not capable of forming criminal intent or appreciating the consequences of their actions in the same way that adult brains are, and that children are more responsive to rehabilitation and treatment. *See id.* at 21–22. The Supreme Court has repeatedly cited this research as a basis for holding that certain severe, permanent forms of punishment are inappropriate for youth, even when they are prosecuted in the adult system. *See Miller v. Alabama*, 132 S. Ct. 2455, 2464–65 (2012) (relying on brain research to abolish mandatory life without parole for all juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 68–69 (2010) (relying on the same research to abolish life without parole for juveniles convicted of non-homicide offenses); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (relying on brain research to abolish the death penalty for juvenile offenders); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 732–34 (2016) (holding that *Miller* is retroactive because it established a new substantive rule premised on the idea that children are different). *See generally* ELIZABETH SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (2010) (setting forth a “developmental” theory of juvenile justice); Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 127 (2010) (applying *Graham*’s holdings that juveniles are less deserving of retribution and constitutionally entitled to rehabilitation, in part because of their developmental difference, to support arguments against juvenile transfer laws); Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 782–83 (2010) (“[A]fter *Graham*, the diminished capacity/enhanced potential theory of juvenile justice appears to have become not just the near-consensus academic view, but the operative jurisprudential one . . . . [T]here is no reason why [the principles of lesser culpability, lesser responsiveness to deterrence, and greater amenability to rehabilitation] should not inform all determinations reflecting categorical assessment of those same phenomena.”); Laurence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions About Adolescents’ Criminal Culpability*, 14 NATURE REV. NEUROSCIENCE 513, 513–18 (2013).

105. MACARTHUR FOUND., *THE FOURTH WAVE*, *supra* note 103, at 14–18, 28; MACARTHUR FOUND., *BECAUSE KIDS ARE DIFFERENT*, *supra* note 103, at 3 (“[A] growing body of research demonstrates that the current system of intensive oversight and placement of youth in large prison-like facilities has, at best, only a modest positive effect on recidivism, and can actually have negative effects, while therapeutic programs focused on youth development have very positive effects, even for youth who commit serious offenses.”).

106. MACARTHUR FOUND., *THE FOURTH WAVE*, *supra* note 103, at 30–32, 35–36; *see also* MACARTHUR FOUND., *BECAUSE KIDS ARE DIFFERENT*, *supra* note 103, at 3–4; YOUTH TRANSITION FUNDERS GRP., *JUVENILE JUSTICE REFORM: A BLUEPRINT 20* (2012).

107. MACARTHUR FOUND., *THE FOURTH WAVE*, *supra* note 103, at 33–37; Gary B. Melton, *Taking Gault Seriously*, in *READINGS IN JUVENILE JUSTICE ADMINISTRATION*

Juvenile justice policymakers have presented the State of Missouri—which replaced all of its training schools and large incarceration facilities with smaller, regional therapeutic facilities—as a model for improving juvenile justice.<sup>108</sup> Other states have reduced their populations of incarcerated youth by diverting non-dangerous offenders out of the system entirely.<sup>109</sup> Juvenile justice policy organizations generally recommend that youth be diverted out of the legal system where possible, and suggest that for those in the system, smaller, community-based rehabilitation and treatment programs are preferable to massive, faraway institutions.<sup>110</sup> Most importantly, prison—especially adult-style prison—must be a last resort.<sup>111</sup>

### 3. *Best Practices for Indian Country Youth*

There are many reasons to assume that tribes would implement alternatives to juvenile incarceration if given greater self-determination. Although both tribal and state systems vary widely, tribal justice systems that incorporate tribal culture and tradition tend to be more focused on restorative justice, community well-being, and treatment and healing, and correspondingly less focused on the adversarial process and individualized punishment.<sup>112</sup> In addition to culturally specific beliefs about justice, a tribal system might also be guided by culturally specific beliefs about youth. For many tribes, these include beliefs about the importance of respect and guidance for youth who have gotten into trouble.<sup>113</sup>

Native youth would be at the center of a tribally designed system, rather than an afterthought. Such a system might focus on meeting the needs of low-level offenders<sup>114</sup> and offenders with trauma, mental-

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343, 351–54 (Barry Feld ed., 1999); Barry Feld, *The Criminalization of the Juvenile Court*, in READINGS IN JUVENILE JUSTICE ADMINISTRATION, *supra*, at 356, 359–61.

108. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS (2010).

109. *Id.* at 5.

110. *See, e.g.*, YOUTH TRANSITION FUNDERS GRP., *supra* note 106, at 15.

111. *Id.* at 16; *see also* RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 2–4 (2011).

112. *See generally* sources cited *supra* note 26.

113. Addie C. Rolnick, *Developing a Juvenile Justice System in the Native Village of Barrow, Alaska* (2007) (unpublished M.A. thesis) (on file with author).

114. In 2010, Native juveniles were arrested primarily for property, theft, and nonviolent offenses. They were overrepresented among arrests for liquor law violations and offenses against the family, proportionally represented among arrests for drunkenness and driving under the influence, and underrepresented among arrests for all other offenses. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 118 (2015). Native youth have had the highest case rate for liquor law violations every year from 1995 to 2010. *Id.* at

health, and substance-abuse issues.<sup>115</sup> It might incorporate trauma and mental-health screening and services, as well as alcohol and drug treatment. Acknowledging historical trauma and its impact on family and child well-being,<sup>116</sup> it would strive to keep youth connected to their families and communities wherever possible, rather than sending youth to faraway states or non-Native systems. It would avoid the military-style discipline that was a hallmark of assimilative boarding schools and is especially damaging to youth who have experienced abuse and trauma. It would employ incarceration as the last possible option; and given the infrequent occurrence of serious violent crimes among Native youth, most tribal systems may not use it at all.<sup>117</sup> More broadly, it would not employ criminalization as a remedy for delinquency caused by trauma.

### B. *The Reality: Vulnerable and Over-Punished*

The gloomy statistical picture of Native youth is by now well rehearsed. In the past decade, several scholarly and government publications have described how Native youth, as a group,<sup>118</sup> suffer dispro-

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181; see also ARYA & ROLNICK, *supra* note 15, at 8 (noting that the top offenses for which Native youth were arrested included low-level and alcohol- and drug-related offenses).

115. See ROADMAP, *supra* note 2, at 149; ENDING VIOLENCE, *supra* note 5, at 39–40, 111.

116. See Kathleen Brown-Rice, *Examining the Theory of Historical Trauma Among Native Americans*, 3 PROF. COUNS. 117 (2014). Genetic and health researchers have confirmed that the effects of adverse childhood experiences “can be magnified through generations if the traumatic experiences are not addressed.” AM. ACAD. OF PEDIATRICS, ADVERSE CHILDHOOD EXPERIENCES AND THE LIFELONG CONSEQUENCES OF TRAUMA 2 (2014).

117. For example, the Commission’s report recommended using secure detention only as a last resort. ROADMAP, *supra* note 2, at 149.

118. Just the act of counting Native youth as a nationwide group, while important, raises many potential complications. Some counts include only people who identify as American Indian or Alaska Native only (“AI/AN-only”), while others also include those who identify as American Indian or Alaska Native in combination with another race (“AI/AIN+”). AI/AN-only are 0.73% of the total population and 0.86% of the youth population. U.S. CENSUS BUREAU, POPULATION DIV., ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, AGE, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES AND STATES: APRIL 1, 2010 TO JULY 1, 2013 (2014). AI/AN+ are 2.04% of the total population and 2.69% of the youth population. *Id.* Statistics on Native people as a racial group (including most that compare Native outcomes with those of other groups) include people who live on and off reservations. TINA NORRIS ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 12–13 (2012). To the extent that the reader imagines “Native” as synonymous with “reservation-based,” these numbers may be misleading because the majority of Native people do not live on reservations. According to the 2010 census, only 33% of people who identify solely as AI/AN live in a “native area” (federal or state reservations or trust lands and designated statistical areas). *Id.* Among people

portionately (compared to other groups and compared to the general youth population) in almost every area identified as a risk factor for delinquency. They are poorer.<sup>119</sup> Many live in communities with few social-safety-net services.<sup>120</sup> They are likely to face physical<sup>121</sup> and mental<sup>122</sup> health problems.<sup>123</sup> They are more likely to drop out of school<sup>124</sup> and less likely to attain higher education.<sup>125</sup> They are likely to struggle with drug and alcohol use.<sup>126</sup> They are likely to contemplate and commit suicide.<sup>127</sup> They are likely to be abused<sup>128</sup> or to be

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who identify as Native alone or in combination with another race, only 22% live in a native area. *Id.* For purposes of juvenile justice issues, other important differences may be obscured by nationwide data on Native youth: these statistics include youth in all fifty states and under the jurisdiction of federal, tribal, and state courts. They include tribal members, unenrolled people, and some who self-identify as Native but do not have strong connections to a tribal community. *See id.* at 2. Where possible, I identify who is included or excluded in each of the datasets described here.

119. Between 2007 and 2011, the AI/AN-only poverty rate was 27%, compared to 14.3% of the total population and 11.6% for whites. SUZANNE MACARTNEY ET AL., U.S. CENSUS BUREAU, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011 (2013), <https://www.census.gov/prod/2013pubs/acsbr11-17.pdf>.

120. ARYA & ROLNICK, *supra* note 15, at 14.

121. *Id.* at 4.

122. *Id.* at 5; ENDING VIOLENCE, *supra* note 5; ROADMAP, *supra* note 2, at 151.

123. Recent descriptions of Native youth often highlight their high rates of post-traumatic stress disorder, which many sources describe as being “as high as the rate among returning Iraq War veterans.” The source of this comparison seems to be a 1997 study of youth on one particular reservation. Spero M. Manson et al., *Social Epidemiology of Trauma Among Two American Indian Reservation Populations*, 95 AM. J. PUB. HEALTH 851, 851–59 (2005); *see also* R.W. Robin et al., *Prevalence and Characteristics of Trauma and Posttraumatic Stress Disorder in a Southwestern American Indian Community*, 154 AM. J. PSYCHIATRY 1582 (1997). While I do not doubt that Native youth as a group suffer from PTSD at high rates, it is not provably accurate to state that Native youth as a group have a rate on par with Iraq War veterans—this is not something that has yet been documented.

124. In the 2011–2012 school year, 68% of AI/AN students graduated, compared to 81% of the total population. U.S. DEP’T OF EDUC., NCES COMMON CORE OF DATA STATE DROPOUT AND GRADUATION RATE DATA FILE, SCHOOL YEAR 2011–12 (2012). In 2012, 21.2% of AI/AN-only people over the age of twenty-five lacked a high school diploma/GED, compared with 13.6% of the total over-twenty-five population. U.S. CENSUS BUREAU, 2012 AMERICAN COMMUNITY SURVEY (2012) [hereinafter 2012 AMERICAN COMMUNITY SURVEY].

125. In 2012, 13.5% of AI/AN-only people over the age of twenty-five had a bachelor’s degree, compared to 29.1% of the general population. 2012 AMERICAN COMMUNITY SURVEY *supra* note 124.

126. In 2012, AI/AN-only people over the age of twelve experienced the highest rate of substance abuse, at 21.8%. U.S. DEP’T OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NATIONAL SURVEY ON DRUG USE AND HEALTH 82 (2012).

127. Compared to the general population, those served by the Indian Health Service are 60% more likely to die of suicide. U.S. DEP’T OF HEALTH & HUMAN SERVS., INDIAN HEALTH SERV., INDIAN HEALTH DISPARITIES (2015), <https://www.ihs.gov/>

victims of violent crime.<sup>129</sup> Native youth are particularly likely to be exposed to some form of violence in their lives, including being victims of child abuse, witnessing domestic violence, and observing interpersonal violence in their communities.<sup>130</sup>

The flip side of their high risk factors is that Native youth disproportionately experience the harshest sanctions for their misbehavior and the most draconian interventions in the name of helping them. They are over-represented in foster care,<sup>131</sup> in arrests for status offenses<sup>132</sup> and alcohol-related offenses,<sup>133</sup> in out-of-home delinquency

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newsroom/includes/themes/newihsttheme/display\_objects/documents/factsheets/Disparities.pdf. Relying on 2009 census data, researchers at the Aspen Institute's Center for Native American Youth concluded that the AI/AN suicide rate among youths ages fifteen to twenty-four is more than double the national rate for that age group. ASPEN INST., CTR. FOR NATIVE AM. YOUTH, FAST FACTS: NATIVE AMERICAN YOUTH AND INDIAN COUNTRY (2014).

128. In 2012, the rate of child abuse among AI/AN-only victims was 12.4/1000, compared to 8.0/1000 for white victims. U.S. CHILDREN'S BUREAU, CHILD MALTREATMENT 2012, at 20 (2013). This document is based on reports from state child protective services, and does not include child abuse cases handled exclusively by tribal child protective services, so it likely is understated. *See id.*

129. In 2012, the violent victimization rate for American Indians and Alaska Natives was 46.9/1000. JENNIFER TRUMAN ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 243389, CRIMINAL VICTIMIZATION, 2012, at 7 tbl.7 (2013), <http://www.bjs.gov/content/pub/pdf/cv12.pdf> (excluding those who identify as mixed race). This was 1.37 times the black rate (34.2/1000), 1.86 times the white rate (25.2/1000), and 2.86 times the API rate (16.4/1000). *Id.*

130. ROADMAP, *supra* note 2, at 151–53; ENDING VIOLENCE, *supra* note 5, at 37–39.

131. ENDING VIOLENCE, *supra* note 5, at 87; OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 114, at 34.

132. COAL. FOR JUVENILE JUSTICE & TRIBAL LAW & POLICY INST., AMERICAN INDIAN/ALASKA NATIVE YOUTH & STATUS OFFENSE DISPARITIES: A CALL FOR TRIBAL INITIATIVES, COORDINATION & FEDERAL FUNDING 1 (2015); OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 114, at 180. Native youth are also less likely than are white youth to be given probation and more likely to be detained and/or placed in a residential facility for a status offense. COAL. FOR JUVENILE JUSTICE & TRIBAL LAW & POLICY INST., *supra*, at 2.

133. *See supra* note 114.

placements,<sup>134</sup> in secure detention,<sup>135</sup> and among youth prosecuted in the adult criminal system.<sup>136</sup>

The two recent reports underscore these points, linking present trauma (such as child abuse, domestic violence, and community violence) with the impact of historical traumas experienced by Native communities (forced removal from homelands, targeted killing, wars, disease outbreaks, brutal boarding schools designed to forcibly disconnect Native children from their cultures, and family ties broken or damaged through adoption and relocation).<sup>137</sup> Both reports contrast the incredible vulnerability of Native youth with the overly harsh sanctions to which they are subjected once they enter the legal system.<sup>138</sup> The Commission report describes the juvenile justice system in Indian country as “compromis[ing] traumatized, vulnerable young lives, ruptur[ing] Native families, and weaken[ing] Tribal communities.”<sup>139</sup>

Despite widespread agreement in the juvenile justice community and among many in Indian country that incarceration is more likely to harm vulnerable youth, Native juveniles continue to be locked up at remarkably high rates.<sup>140</sup> Youth who are prosecuted in federal court are more likely to be incarcerated, usually far from home, and less likely to receive treatment or rehabilitation services than are their counterparts in other systems.<sup>141</sup> Native youth are also over-repre-

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134. ARYA & ROLNICK, *supra* note 15, at 8; Addie C. Rolnick, *Locked Up: Fear, Racism, Prison Economics, and the Incarceration of Native Youth*, 40 AM. INDIAN CULTURE & RES. J. (forthcoming 2016) [hereinafter Rolnick, *Locked Up*] (citing studies based on nationwide data—excluding data from tribal facilities—finding that the residential placement rates for Native youth across all states are second only to the residential placement rate for African American youth, and that the residential placement rates for status offenses have consistently been highest for Native youth for two decades).

135. ARYA & ROLNICK, *supra* note 15, at 8; Rolnick, *Locked Up*, *supra* note 134, at n.40 (discussing national and state-specific data analyses showing that Native youth have some of the highest rates of incarceration—and sometimes the highest rate—among all groups).

136. ARYA & ROLNICK, *supra* note 15, at 8; OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 114, at 174 (reporting that among juveniles adjudicated for person offenses, Native youth were more likely than were youth of any other racial group to be waived into criminal court).

137. *See generally* ROADMAP, *supra* note 2; ENDING VIOLENCE, *supra* note 5.

138. ROADMAP, *supra* note 2, at 153–57; ENDING VIOLENCE, *supra* note 5, at 112, 119.

139. ROADMAP, *supra* note 2, at 159.

140. *See generally* Rolnick, *Locked Up*, *supra* note 134.

141. ARYA & ROLNICK, *supra* note 15; ROADMAP, *supra* note 2, at 155, 160.

sented in many state juvenile justice systems, especially among those who are placed in secure confinement.<sup>142</sup>

Less frequently discussed but equally concerning is the fact that the number of juvenile confinement facilities under tribal jurisdiction has steadily increased over the past fifteen years, and tribes continue to push for funding to build even more.<sup>143</sup> Only a small minority of the youth in these facilities are violent offenders.<sup>144</sup> Substance-abuse related crimes such as driving under the influence, public intoxication, and other drug offenses are far more common.<sup>145</sup> Yet, resources for alternatives to incarceration have not increased at the same pace as resources for incarceration.<sup>146</sup> Indeed, the Attorney General's Task Force found that many tribal systems incorporate a "heavy reliance on detention," and opined that tribes' "continued common use of detention for children having such extreme rates of exposure to violence is another infliction of violence on these children."<sup>147</sup>

Instead of creating a self-determined juvenile justice system designed to meet local needs, which for most tribes would mean a treatment-based system, tribes must work around a patchwork of external policies and authorities. The result has been a lopsided focus on incarceration and sparse (at best) resources for treatment and rehabilitation services. In other words, juvenile justice in Indian country is the reverse of what it should be. The following Parts examine the reasons for this disjuncture and demonstrate that fixing the system will require more than simple exhortations to increase tribal control and help vulnerable youth.

## II.

### THE MULTIPLE SOVEREIGN PROBLEM

Nothing in Indian country is a purely local matter. Under modern principles of federal Indian law, tribal, federal, and state governments all exercise some authority within Indian country. The rules concerning which sovereign has power over which matters are notoriously

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142. ROADMAP, *supra* note 2, at 157.

143. *See generally* Rolnick, *Locked Up*, *supra* note 134 (documenting and critiquing the over-reliance on incarceration in tribal juvenile justice systems over the past two decades).

144. ROADMAP, *supra* note 2, at 10–11.

145. *Id.*

146. *Id.* at 11. The Attorney General's Task Force found that most Native youth in the juvenile justice system are charged with low-level offenses that "normally would not be subject to detention," but that "the lack of alternatives and diversion programs force the system to use detention as shelter." ENDING VIOLENCE, *supra* note 5, at 119.

147. ENDING VIOLENCE, *supra* note 5, at 112.

confusing. They are also in flux: in the last forty years, federal statutes or judicial decisions have resulted in express changes or major reinterpretations of existing principles, shifting the boundaries of tribal, federal, and state jurisdiction in significant ways.<sup>148</sup> Most importantly, they result in a lack of local control over juvenile justice that is unmatched anywhere else in the United States.<sup>149</sup>

In order to determine how the justice system works on any given reservation, one must first discern the precise extent of federal, tribal, and state authority there, and identify any rules governing the interaction between them. Indian country criminal jurisdiction is commonly described as a “maze.”<sup>150</sup> This criticism, and the corresponding idea that greater tribal control is the most important solution to practical problems, is a central theme in the two federal reports indicting juvenile justice in Indian country<sup>151</sup> and in scholarly articles on criminal and juvenile justice.<sup>152</sup> While this is an accurate metaphor for the experience of trying to determine who has authority when a specific

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148. See CHAMPAGNE & GOLDBERG, *supra* note 17, at 49–54, 165–95, 208–10 (describing amendments to the primary federal law authorizing state criminal jurisdiction over Indian country); Rolnick, *supra* note 84, at 348–86 (describing changes to the rules governing tribal criminal jurisdiction since 1977); see also Rolnick, *supra* note 84, at 351 n.49 (describing changing judicial and academic opinion regarding the existence of concurrent tribal authority where the federal and state governments also have jurisdiction).

149. Juvenile justice is primarily a state and local matter, with federal law imposing few limitations, and even those limitations are the product of state input. There are other places where local control is hampered by a greater federal authority, including the District of Columbia, Puerto Rico, and the U.S. territories. However, these areas are not also within the territorial boundaries of any state. The added tension between state and tribal authority has had significant ramifications for the degree of tribal autonomy that exists today.

150. See, e.g., ROADMAP, *supra* note 2, at 9; Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976); Richard W. Garnett, *Once More into the Maze: United States v. Lopez, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. REV. 433, 441–42 nn.57–60 (1996) (citing articles that use the maze analogy or similar terms of comparison).

151. ROADMAP, *supra* note 2, at 1, 159–66; ENDING VIOLENCE, *supra* note 5, at 111–16.

152. See, e.g., Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 707–29 (2006) (presenting data highlighting the shortcomings of state criminal jurisdiction in Indian country and proposing options for minimizing or repealing such jurisdiction); Seelau, *supra* note 39, at 130; Seelau, *supra* note 40, at 63–109; Washburn, *supra* note 84, at 832–53 (describing problems with the application of federal criminal law in Indian country and suggesting ways to minimize or repeal federal laws). These critiques center not just on the problem of confusion, but also on the detrimental impacts of external governments that control justice policy in tribal territory.

crime has been committed, the term “web” better captures the top-down picture described in this Article.

Although the web of criminal jurisdiction is the subject of every basic course in federal Indian law, the manner in which jurisdictional rules relate to juvenile jurisdiction has not been clearly set forth by either courts or scholars.<sup>153</sup> A careful explication of the legal rules is important. Solutions to the problem of juvenile justice in Indian country tend to center around increasing tribal autonomy and ensuring that federal and state authorities supplement, rather than overpower, tribal institutions, so it is especially important to understand which laws need to be changed (and which don’t) to make this happen. Furthermore, an incomplete understanding can lead courts and legislators to rely on generalizations and may present a particular risk of underestimating the extent of tribal power.<sup>154</sup> Even those articles and reports focused specifically on juvenile justice tend to treat it as a subset of criminal jurisdiction, assuming that the same rules, criticisms, and solutions apply.<sup>155</sup> As described below, criminal and juvenile jurisdiction are not necessarily identical, and the differences have important implications.

Tribes, as sovereign governments, have jurisdiction over their territory and their people, but that jurisdiction has been limited in certain respects by federal law. Generally speaking, tribes retain any power that has not been taken away by federal law, which includes criminal and civil jurisdiction over members of the tribal community.<sup>156</sup> Federal law restricts tribal jurisdiction over certain matters involving non-Indians and also sets some limits on how tribes may

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153. See, e.g., CLINTON ET AL., *supra* note 41, at 527 (“The handling of juvenile offenders under the basic jurisdictional scheme established for Indian country by [federal statute] rarely has surfaced in decided federal cases.”); see also Seelau, *supra* note 40, at 104–08 (briefly summarizing the way that criminal jurisdictional rules apply to juvenile offenders without extensive legal analysis).

154. See Rolnick, *supra* note 84, at 351 n.49 (describing how the suggestion that the Major Crimes Act and Public Law 280—which authorized federal and state jurisdiction over crimes committed by Indians in Indian country—may have divested tribes of jurisdiction over the same offenders has given way to judicial and scholarly consensus that tribes retain concurrent jurisdiction under both laws).

155. See *supra* note 40 and accompanying text.

156. *United States v. Wheeler*, 435 U.S. 313, 323 (1978); see also Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 *YALE L.J.* 1, 8–13 (1999). While the Supreme Court has held that certain powers “involving the relations between an Indian tribe and nonmembers of the tribe” were “implicitly lost by virtue of [tribes’] dependent status,” this doctrine of implicit divestiture does not apply to tribes’ power over their own members. *Wheeler*, 435 U.S. at 326.

choose to exercise their jurisdiction.<sup>157</sup> Individual tribes may exercise this jurisdiction very differently in practice in light of factors such as the respect that the state accords tribal jurisdiction, the governing tribal law, and financial or other resource-related considerations.

The federal government, on the other hand, is one of limited power, so its jurisdiction only extends as far as is authorized by federal statute.<sup>158</sup> Congress, in the exercise of its plenary power over Indian affairs, has enacted two major statutes that authorize federal authorities to investigate and prosecute crimes occurring in Indian country.<sup>159</sup> Because Indian lands are considered federal lands,<sup>160</sup> federal criminal law applies to Indian lands in the same way it applies to other places where there is no intervening state government, such as national parks and the District of Columbia.<sup>161</sup> However, tribal governments serve a role that is analogous to that of a state government, so the statute extending federal jurisdiction to Indian country contains several exceptions intended to ensure space for the exercise of tribal jurisdiction over local matters.<sup>162</sup> A law granting federal authority over certain matters does not necessarily divest tribes of their inherent authority over the same matters, so federal and tribal jurisdiction are often concurrent.

Absent a specific federal law enlarging their authority, states have criminal jurisdiction in Indian country only over matters involv-

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157. See *infra* notes 179, 183–208 and accompanying text.

158. Federal statutes, of course, may be unconstitutional if they exceed the federal government's authority. Federal authority over Indian issues is plenary, so the Court has thus far upheld every law affecting criminal justice on Indian lands. See, e.g., *United States v. Kagama*, 118 U.S. 375 (1886) (upholding the Major Crimes Act, which granted federal criminal courts jurisdiction over intra-Indian crimes in Indian country); *United States v. Lara*, 541 U.S. 193 (2004) (upholding “*Duro fix*” legislation, which restored inherent tribal criminal jurisdiction over nonmember Indians after the Supreme Court held that such power had been implicitly divested); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56–57, 72 (1978) (characterizing the Indian Civil Rights Act, which limited tribal courts’ sentencing authority and imposed certain procedural requirements on them, as an exercise of Congress’s “plenary authority to limit, modify or eliminate” inherent tribal powers but interpreting the ICRA as not authorizing civil actions against tribes to enforce its provisions, on the ground that such an intrusion on tribal self-government was not expressly included in the statute). However, the exercise of criminal authority outside what is authorized by statute is illegal. See *Ex parte Kan-gi-shun-ca* (Crow Dog), 109 U.S. 556 (1883) (holding that federal jurisdiction over intra-Indian crimes was not authorized prior to passage of the Major Crimes Act).

159. 18 U.S.C. §§ 1151–1153 (2014).

160. Title to most of these lands is held by the federal government in trust for tribes. § 1151.

161. § 1152.

162. *Id.*

ing exclusively non-Indian offenders and non-Indian victims<sup>163</sup> and civil jurisdiction over some of the activities of non-Indians,<sup>164</sup> exceptions that are not relevant to the question of how Native juvenile delinquents are handled. Otherwise, the states' jurisdiction ends at the reservation border.<sup>165</sup> More important for purposes of this discussion, certain states are authorized by federal law to exercise criminal and some civil jurisdiction over tribal lands within their borders.<sup>166</sup> For those tribes, the state effectively stands in for the federal government, although the precise scope of state jurisdiction under these laws differs from the scope of federal jurisdiction that would exist in their absence.

This Part begins with a discussion of tribal power because tribes are the primary sovereigns in Indian country. It then describes the scope of federal and state power, which may overlay and/or supplant tribal power in particular areas. It departs from other analyses in that it

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163. New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1881); *see also* Clinton, *supra* note 150, at 524–27 (describing the judicially created exception to § 1152 for crimes involving only non-Indians).

164. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) (holding that state regulatory law is generally inapplicable to on-reservation conduct involving only Indians but noting that “[m]ore difficult questions arise” regarding state authority over the conduct of non-Indians on the reservation, in which cases state jurisdiction may exist if supported by a “particularized inquiry into the nature of the State, Federal, and tribal interests at stake”). *But see* Williams v. Lee, 358 U.S. 217, 220–23 (1959) (holding that where not specifically granted by Congress, state civil adjudicatory jurisdiction is preempted if it “infringe[s] on the right of reservation Indians to make their own laws and be ruled by them,” and applying this test to hold that the state lacked jurisdiction over a civil suit involving a non-Indian plaintiff).

165. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 520 (1832) (“The Cherokee [N]ation . . . is a distinct community, occupying its own territory . . . in which the [criminal] laws of Georgia can have no force . . .”).

166. The most significant of these is Public Law 280, in which Congress delegated Indian country criminal (and some civil) jurisdiction to certain states and authorized others states to voluntarily assume the same. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2014), 28 U.S.C. § 1360 (2014)); *see also infra* Section II.C. Congress has also passed laws subjecting specific tribes to state jurisdiction in much the same manner. *E.g.*, Connecticut Indian Land Claims Settlement Act, 25 U.S.C. § 1755 (2014); Maine Indian Land Claims Settlement Act, 25 U.S.C. § 1725 (2014); Rhode Island Indian Land Claims Settlement Act, 25 U.S.C. § 1708(a) (2014). Although the effect of those laws—bringing Native juveniles on those reservations under the jurisdiction of state courts—was similar, judicial interpretation of the precise contours of state jurisdiction under each law may not be identical to the interpretation of Public Law 280 jurisdiction described *infra* Section II.C. A unique situation is also presented by the State of Alaska: while Public Law 280 applies to Alaska by its terms, 18 U.S.C. § 1162(a) (2014), the state premises its exertion of criminal jurisdiction over Alaska Natives on the Supreme Court’s decision in *Alaska v. Native Village of Venetie*, 552 U.S. 520, 523 (1998), that Alaska Native settlement lands do not qualify as “Indian country” as that term is defined in federal law. *See* ROADMAP, *supra* note 2, at 45.

doesn't assume the existence of a rule or limit that hasn't been clearly determined by Congress or the federal courts. Juvenile delinquency jurisdiction implicates several contested or unresolved legal questions, which means that tribes may venture into uncharted legal territory as they reform their systems. If one goal of reform efforts is to strengthen and support tribal control, it is important to know where changes in federal law will be required, where tribes have room to make changes under the current structure, and where legal questions remain about whose law governs and what limits apply.

#### A. Tribal Jurisdiction

Despite the long shadow of federal and state power in Indian country, the tribe is the primary sovereign. Federal law recognizes that the source of tribes' governing power is their inherent sovereignty,<sup>167</sup> and that tribes consequently retain "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."<sup>168</sup> Although the form and precise nature of

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167. See, e.g., *United States v. Lara*, 541 U.S. 193, 200 (2004) (naming inherent sovereignty as the source of tribal prosecutorial power); *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978) ("Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws." (citation omitted)); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (observing that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"); *Worcester*, 31 U.S. (6 Pet.) at 557 ("[Tribes are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.").

168. *Wheeler*, 435 U.S. at 323. Divestment via treaty or statute is relatively straightforward because both treaties and statutes are interpreted in favor of retaining tribal rights. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–03 (1999) (interpreting treaties liberally to favor Indians); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) (holding that statutes should be interpreted to minimize infringement on tribal sovereignty with a clear expression of legislative intent required for divestment, and that an express statement must appear in a treaty or statute in order to have the effect of divesting a tribe of its inherent power). Implicit divestment is more difficult to discern. The theory behind the rule is that certain sovereign powers are incompatible with tribes' unique status as nations within nations, and so tribes necessarily lost those powers as a result of their relationship to the United States. Prior to 1978, the only powers that were understood to be inconsistent with this "domestic dependent" status were those powers relating to interaction with foreign nations, including the power to enter into treaties with foreign nations, the power to raise an army, and the power to dispose of land without restrictions. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 46 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 595 (1823). In 1978, the Supreme Court held that tribes were also implicitly divested of the power to criminally prosecute non-Indians within their territory. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978). This decision changed the scope of tribes' retained powers in the area of criminal jurisdiction, making tribal

their governing authority has changed over time, they continue to exercise this authority. While tribal jurisdiction is no longer recognized as exclusive in many areas,<sup>169</sup> the existence of concurrent federal<sup>170</sup> or state<sup>171</sup> power does not strip the tribe of its inherent jurisdiction.

Juvenile delinquency jurisdiction—disciplining, controlling, teaching, and caring for children—is a key aspect of this inherent authority.<sup>172</sup> Tribes today retain their jurisdiction to address juvenile delinquency unless they have been divested of this authority. Whether juvenile jurisdiction has been divested, and to what extent, is complicated by the fact that the scope of modern tribal criminal jurisdiction is different from the scope of modern tribal civil jurisdiction, and juvenile jurisdiction falls in a grey area between criminal and civil regulatory jurisdiction.

### 1. *Juvenile Delinquency as a Subcategory of Criminal Jurisdiction*

Juvenile jurisdiction is most often analogized to adult criminal jurisdiction,<sup>173</sup> so if a tribe retains the power to criminally punish adults, it is safe to assume that it also retains the power to adjudicate delinquents absent some express language to the contrary. Tribal criminal jurisdiction extends to enrolled members of that tribe.<sup>174</sup> It also extends to a category of people commonly called “nonmember Indi-

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sovereignty very different than the sovereignty of other nations in this regard. It also opened the door for future arguments that tribes were implicitly divested of other powers. Each of these issues is discussed in detail below with respect to their implications for juvenile-court jurisdiction.

169. *Compare Worcester*, 31 U.S. (6 Pet.) at 557 (“[Tribes are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.”), *with Williams*, 358 U.S. at 219–20 (“Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained. . . . Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” (citations omitted)).

170. The scope of federal jurisdiction is discussed *infra* Section II.B.

171. The scope of state jurisdiction is discussed *infra* Section II.C.

172. See SCOTT & STEINBERG, *supra* note 104, at 116 (describing the *parens patriae* power of the state over children as the source of American state authority over juvenile delinquency); see also Margaret K. Rosenheim et al., *Preface to A CENTURY OF JUVENILE JUSTICE*, *supra* note 85, at xiii (“[The juvenile court] plays an important role in the governments of most developed nations.”).

173. See *supra* note 155 and accompanying text (describing commentators’ tendency to view juvenile jurisdiction as a species of criminal jurisdiction).

174. *United States v. Wheeler*, 435 U.S. 313, 323–24 (1978); *Talton v. Mayes*, 163 U.S. 376, 382 (1896).

ans.”<sup>175</sup> This category is often assumed to include Indians enrolled in other tribes who reside or commit a crime in another tribe’s territory.<sup>176</sup> Federal courts, however, have held that formal enrollment is not necessary to establish Indianness for purposes of federal criminal prosecution,<sup>177</sup> meaning that an unenrolled person (whether from that tribe or from another tribe) may also be considered an Indian such that a tribal government may prosecute her for a crime committed in that tribe’s territory. I have argued elsewhere for an interpretation of federal law—one that is embodied in the law of several tribes—that reflects a more flexible definition of the term “Indian” which would emphasize membership in and responsibility to the community, but would not require formal enrollment in any tribe.<sup>178</sup> Tribes generally lack jurisdiction over non-Indians,<sup>179</sup> except that under certain circumstances they can prosecute non-Indians who commit domestic-violence crimes against Indian victims.<sup>180</sup>

In short, it is clear that tribes have criminal jurisdiction over juvenile offenders who are Indians, including youth who are not enrolled in that tribe, but it is not completely clear how federal law defines the boundaries of the Indian category for purposes of tribal jurisdiction. An assertion of tribal jurisdiction over a juvenile who is enrolled in

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175. A 1990 law affirms tribal criminal jurisdiction over “all Indians.” See 25 U.S.C. § 1301(2) (2014). The law was passed in direct response to a Supreme Court decision limiting tribal criminal jurisdiction to enrolled members of the prosecuting tribe, so it is clear that Congress meant to include more than just enrolled members of that tribe in the definition of “all Indians.” See *Duro v. Reina*, 495 U.S. 676 (1990).

176. See *United States v. Lara*, 541 U.S. 193, 198 (2004) (holding, in a case involving a member of one tribe who was prosecuted by the court of another, that tribal prosecution of a non-member Indian is an exercise of restored inherent tribal power, not a delegation of federal power); *Means v. Navajo Nation*, 432 F.3d 924, 927 (9th Cir. 2005) (upholding the Navajo Nation’s prosecution of an enrolled Oglala Sioux tribal member against an equal protection challenge); *Morris v. Tanner*, 288 F. Supp. 2d 1133, 134–35 (D. Mont. 2003) (same).

177. *E.g.*, *United States v. Zepeda*, 792 F.3d 1101, 1118 (9th Cir. 2015). See generally Rolnick, *supra* note 84, at 380–86 (discussing federal circuit court tests for Indianness).

178. Rolnick, *supra* note 84, at 390–29. One federal district court has raised questions about whether it is consistent with due process principles for a tribe to prosecute someone who was formerly enrolled in that tribe but was involuntarily disenrolled. See *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F. Supp. 3d 1221, 1237 (D. Nev. 2014). No other federal court has squarely addressed the question of tribal power over unenrolled community members, though the *Phebus* decision suggests that it is not a problem outside of the specific circumstances presented in that case.

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

180. 25 U.S.C. § 1304 (2014). This Article focuses on Native juveniles, but this law could authorize a tribe to exercise delinquency jurisdiction over a non-Native youth who abuses his Native partner. See *id.*

another tribe would likely withstand a challenge in federal court,<sup>181</sup> and there is a strong argument that jurisdiction over a member of the community who is not enrolled anywhere, but who otherwise meets the tribe's definition of Indian, would also be legal.<sup>182</sup>

Even where tribal courts retain criminal jurisdiction over defendants, their exercise of this authority is limited in three important ways. The first limitation is procedural. The Indian Civil Rights Act ("ICRA") requires tribal courts to comply with most of the same basic due process requirements applicable to federal and state courts.<sup>183</sup> If a juvenile defendant in tribal court faces adversarial proceedings and a potential deprivation of liberty on par with that faced by an adult criminal, as juveniles do in non-tribal systems, the tribe must guarantee most of the same rights that are required in its criminal court. In the context of state juvenile courts, the Supreme Court has held that nearly all of the procedural rights guaranteed to adults are also required in juvenile proceedings, including the right to notice of charges,<sup>184</sup> the privilege against self-incrimination,<sup>185</sup> the right to confront and cross-examine witnesses,<sup>186</sup> the right to proof beyond a reasonable doubt,<sup>187</sup> and the protection against double jeopardy.<sup>188</sup> A significant exception is that, for sentences of one year or less, tribes are not required to provide indigent defendants with free attorneys.<sup>189</sup> Additionally, neither states nor the federal government are required to

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181. See Rolnick, *supra* note 84 (discussing cases in which tribal criminal prosecutions of Indians enrolled in other tribes have been upheld).

182. See *Phebus*, 5 F. Supp. 3d at 1229–30. See generally Rolnick, *supra* note 84, at 370–86.

183. The Bill of Rights does not apply to tribal governments. *United States v. Wheeler*, 435 U.S. 313, 329 (1978); *Talton v. Mayes*, 163 U.S. 376, 383 (1896). However, the Indian Civil Rights Act, a federal law passed in 1968, requires tribal courts to comply with most of the limitations applicable to federal and state courts. Pub. L. No. 90-284, § 202, 82 Stat. 73, 77 (codified at 25 U.S.C. § 1302 (2014)). The law was directed primarily at concerns about potential unfairness to Native defendants in tribal criminal proceedings. Although it applies to all actions by tribal governments, it is most important as a limitation in criminal cases, where it can be enforced through a habeas corpus petition brought in federal court by any tribal defendant. See 25 U.S.C. § 1304 (2014). While states had more than a century to develop a robust jurisprudence of due process in their courts, tribal governments had to implement the full range of due process rights at once when the ICRA was enacted and have had less than fifty years to consider how these apply in tribal courts. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 423–27 (2004).

184. *In re Gault*, 387 U.S. 1, 33–34 (1967).

185. *Id.* at 47.

186. *Id.* at 56.

187. *In re Winship*, 397 U.S. 358, 368 (1970).

188. *Breed v. Jones*, 421 U.S. 519, 541 (1975).

189. § 1302(a)(6).

guarantee the right to a jury trial in juvenile proceedings.<sup>190</sup> Thus, although the ICRA guarantees the right to a jury trial in tribal court for any offense that could result in imprisonment,<sup>191</sup> it can be argued that this right does not extend to tribal juvenile proceedings. Juveniles appearing before tribal courts, then, have all the rights enjoyed by adults in state criminal systems except that they do not necessarily have a right to a jury trial or to free legal counsel. However, tribes may have more freedom to design procedurally unique juvenile justice systems if youth do not face an adversarial proceeding and a deprivation of liberty.<sup>192</sup> In other words, if a tribe chooses to approach juvenile delinquency as a species of child welfare (instead of as a species of criminal law), the ICRA may not impose the same procedural limits.

The second limitation restricts sentence length. Tribes in most cases may not sentence offenders to more than one year of imprisonment or impose a fine of more than \$5000.<sup>193</sup> However, tribes may elect in some situations to sentence offenders to up to three years imprisonment and impose fines of up to \$15,000 per offense.<sup>194</sup> Tribal courts may also “stack” sentences for multiple offenses for a total of up to nine years’ imprisonment.<sup>195</sup> In order to impose a total sentence of more than one year, they must ensure that their laws and procedures mirror those of non-tribal systems even more closely. Specifically, they must provide free public defenders, ensure that judges are law-trained and certified, make criminal laws publicly available, and main-

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190. *McKeiver v. Pennsylvania*, 403 U.S. 528, 550–51 (1971) (“The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court’s assumed ability to function in a unique manner.”).

191. § 1302(10) (providing that tribes may not “deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons”).

192. Because federal court review is only authorized via a writ of habeas corpus, the ICRA is most powerful when a defendant has been incarcerated or otherwise deprived of liberty. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). At least one federal court, however, has extended the writ to defendants who were disenrolled and banished as punishment for treason. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 876–78 (2d Cir. 1996).

193. § 1302(a)(7)(B).

194. § 1302(b). In order to be eligible for a sentence of more than one year, the defendant must have been convicted of a crime that would subject him to more than one year of incarceration in state court, § 1302(b)(2), or must have a prior conviction for the same or a comparable offense in any court, § 1302(b)(1). This change was implemented by the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified in scattered sections of 25 U.S.C.).

195. § 1302(a)(7)(D). This provision codified a Ninth Circuit case upholding the Pascua Yaqui Tribe’s practice of sentence stacking. *Miranda v. Anchando*, 654 F.3d 911 (9th Cir. 2011).

tain a record of the proceeding, including an audio recording of the trial.<sup>196</sup>

The effect of the sentence limitation on juvenile adjudications is not entirely clear, as juveniles are not always sentenced to terms of years. Instead, some juvenile courts employ indeterminate sentencing, by which a juvenile may be sentenced to a broad range of years or is placed under the juvenile court's jurisdiction for the duration of his or her minority.<sup>197</sup> If a young offender in tribal court faces potential incarceration of up to one year for a single offense, either because tribal law specifies a term of one year or because the juvenile will age out of juvenile court jurisdiction within a year, there is no question that the sentence would comply with the ICRA. If a juvenile faces a determinate sentence of greater than one year, or if he is remanded to tribal custody for an indeterminate period (and will not age out of juvenile court jurisdiction for many years), however, the ICRA may require that the tribal court specify an outside limit on any term of incarceration in a way that a state court would not be required to do.<sup>198</sup> Of course, a tribe that has opted into the enhanced sentencing provisions

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196. § 1302(c). The Supreme Court in *Gault* declined to require state juvenile courts to keep a trial transcript of confidential juvenile proceedings, and similarly refused to hold that juveniles have a right to appeal adverse judgments, because the Court had not held that the Constitution guaranteed even adult criminal defendants a right to appellate review. *In re Gault*, 387 U.S. 1, 58 (1967). Thus, although the ICRA requires a trial recording when defendants face more than a year of incarceration, this requirement may not apply to juvenile proceedings, even in cases in which the juvenile faces more than a year of incarceration.

197. In early juvenile courts, "[d]ispositions were indeterminate, nonproportional, and continued for the duration of the child's minority. The delicts that brought the child before the court affected neither the intensity nor the duration of intervention because each child's 'real needs' differed, and no limits could be defined in advance." Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 477 (1988); see also Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment, and Why It Matters*, 68 B.U. L. REV. 821, 825, 848-50 (1988) [hereinafter Feld, *Punishment, Treatment, and Why It Matters*] (describing the role of indeterminate sentencing in the early juvenile court and the structure of indeterminate and/or flexible sentencing laws across states). *But see* Feld, *Punishment, Treatment, and Why It Matters*, *supra*, at 851-62 (noting a growing trend among states toward determinate sentencing laws in juvenile court); Barry C. Feld, *Abolish the Juvenile Court, Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 83 (1997) (finding, a decade later, that nearly half of all states had adopted determinate or mandatory minimum sentencing laws).

198. This could be done by using determinate sentencing or by using indeterminate juvenile court jurisdiction with the qualification that the juvenile court may not include in its disposition more than one year of confinement in a locked facility. However, a juvenile who violated probation could potentially be sentenced anew for the violation.

would have more flexibility to retain jurisdiction over a juvenile who has been adjudicated delinquent without running afoul of federal law.

Because of the sentence limit, tribes are often described as having “misdemeanor jurisdiction” or jurisdiction only over minor crimes.<sup>199</sup> This is not entirely accurate. Tribes have jurisdiction over a full range of criminal offenses as long as those offenses are defined as crimes under tribal law. As a practical matter, however, the restrictions on sentence length, as well as personnel or resource limitations, mean that tribes may prefer to let the federal or state prosecutor, one or the other of which will have concurrent jurisdiction over at least major crimes,<sup>200</sup> take the lead for serious offenses. As described *infra* in the discussion of federal jurisdiction, many tribes are the *only* sovereigns with jurisdiction over Indians who commit non-major crimes,<sup>201</sup> so they may choose to focus their resources on those crimes.

Moreover, federal courts appear to have assumed for many years that tribes did not have jurisdiction over major crimes because of a federal statute from the late 1800s that authorized federal prosecution over those same crimes.<sup>202</sup> In 1995, however, the Ninth Circuit addressed tribal jurisdiction over major crimes and held that nothing in the federal law operated to divest tribes of their inherent jurisdiction.<sup>203</sup> This interpretation is in keeping with principles of retained

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199. *E.g.*, TRIBAL COURT HANDBOOK FOR THE 26 FEDERALLY RECOGNIZED TRIBES IN WASHINGTON STATE (Ralph W. Johnson & Rachael Paschal eds., 2d ed. 1992) (referring to the restoration of “tribal criminal misdemeanor jurisdiction over all Indians”); Sheila Stogsdill, *Oklahoma Crime: Jurisdiction in Indian Country Involves Federal, Tribal, State Governments*, NEWSOK (Apr. 22, 2012), <http://newsok.com/article/3668428> (“Tribal law enforcement departments have jurisdiction over victimless and misdemeanor crimes committed on tribal land.”).

200. The extent of concurrent federal and state jurisdiction is described *infra* Sections II.B and II.C. Generally speaking, in non-Public Law 280 states, federal courts have concurrent jurisdiction over major crimes committed by Indians in Indian country. If Public Law 280 applies, state courts have concurrent jurisdiction over all crimes committed by Indians in Indian country.

201. I use the term “non-major crime” to refer to all crimes that are not specifically enumerated in the federal Major Crimes Act, 18 U.S.C. § 1153 (2014). I do not intend it as a commentary on the relative seriousness of any offense. I avoid use of the terms “misdemeanor” and “felony” because those terms are circular in definition, with the length of resulting sentence determining whether something is a misdemeanor or a felony. Because tribal court sentencing authority is restricted for all crimes, the sentence-length distinction is a useless point of reference.

202. *E.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n.14 (1978) (assuming that the Major Crimes Act extinguished tribal jurisdiction over listed offenses but declining to address the question directly); *see also* *United States v. John*, 437 U.S. 634, 651 n.21 (1978) (referring to this question as “disputed” and declining to resolve it); *United States v. Wheeler*, 435 U.S. 313, 325 n.22 (1978) (declining to resolve this issue).

203. *Wetsit v. Stafne*, 44 F.3d 823, 825–26 (9th Cir. 1995).

sovereignty, which require an express statement in order to divest tribes of inherent powers, especially in areas that traditionally were the province of tribal governments, such as internal criminal prosecutions.<sup>204</sup> Authorities today largely agree with the Ninth Circuit's view.<sup>205</sup>

The final potential limitation concerns territory. Criminal jurisdiction is most often described as an aspect of a sovereign's control over territory.<sup>206</sup> A tribe's territory is usually understood to mean the "Indian country" controlled by that tribe, which includes land within the boundaries of that tribe's reservation; lands held in trust for the tribe or its members, including individual allotments; and lands that qualify as "dependent Indian communities," which include a very limited category of lands owned by tribes in fee, but does not include most Alaska Native lands and does not include land (even land adjacent to the reservation) that a tribal government might buy on the open market and own outright.<sup>207</sup> Two federal circuit courts, however, have held that a tribe may also exercise extra-territorial jurisdiction, at least over citizens who commit certain crimes outside of tribal territory.<sup>208</sup>

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204. See *supra* notes 168–74 and accompanying text.

205. See, e.g., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 41, § 9.04 (noting earlier statements to the contrary but concluding that the *Wetsit* court's conclusion is the correct one); see also *Westit*, 44 F.3d at 825–26 (noting that the holding in the case reflected the "conclusion already reached by distinguished authorities on the subject").

206. ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT 56 (2010) ("The territorial scope of a state's criminal law is commonly regarded as a manifestation of its sovereignty."). Because of this, most sovereigns are recognized as having criminal jurisdiction over anyone who commits a crime within that sovereign's territory, regardless of that person's citizenship or residence. Because the Supreme Court has held that tribes were divested of jurisdiction over certain people who commit crimes within their territory, it is difficult to square this with a territory-based justification for criminal jurisdiction.

207. Indian country is a term defined by federal law to describe the limits of federal criminal jurisdiction, 18 U.S.C. § 1151 (2014), and it is also significant as a limit on state jurisdiction because it describes land within the boundaries of a state over which the federal government has authority. No specific federal statute defines "Indian country" as a limit on *tribal* jurisdiction, although tribal criminal jurisdiction is often assumed to exist only in Indian country. It is possible, for example, that tribally owned fee land adjacent to a reservation could be considered part of that tribe's territory for purposes of defining the scope of the tribe's criminal jurisdiction, but not qualify as Indian country under the federal criminal statute.

208. The Ninth Circuit has held that a tribe may prosecute members who violate hunting and fishing laws in off-reservation territory on which the tribe enjoys treaty-protected hunting and fishing rights. *Settler v. Lameer*, 507 F.2d 231, 238 (9th Cir. 1974). More recently, the Sixth Circuit upheld a tribe's prosecution of a tribal official for conduct that occurred on tribal land outside the tribe's reservation. *Kelsey v. Pope*, 809 F.3d 849 (6th Cir. 2016). Sovereigns are generally recognized as having the power to prosecute people for extra-territorial offenses based on the offender's con-

When tribal juvenile delinquency adjudications involve young people who commit offenses on land that is within a tribe's territory and also qualifies as Indian country, territorial limits on jurisdiction do not pose a significant barrier. However, certain tribes could be substantially constrained in their exercise of delinquency jurisdiction if a court were to hold that this jurisdiction was limited to tribal lands that also qualify as Indian country. Over two hundred Alaska Native governments exercise authority over regions that are not considered Indian country under federal law.<sup>209</sup> Other tribes have only very small pockets of trust land,<sup>210</sup> still others retain traditional rights to lands outside of their reservations,<sup>211</sup> and many tribal communities cover geographical expanses that are much larger than their official reservations or trust land.<sup>212</sup> Limiting these tribes' juvenile delinquency jurisdiction to lands that qualify as Indian country could significantly restrict their ability to deal with young offenders. In addition, some tribes may wish to exercise jurisdiction over young people who commit offenses outside of their territory, parallel to the way tribes exercise jurisdiction over member (or member-eligible) children who are involved in state child welfare proceedings.<sup>213</sup>

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nection to the prosecuting sovereign (the nationality principle) or the effect of the crime on the sovereign (the protective principle). See Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in 3 INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 108, 116 (M. Cherif Bassiouni ed., 3d ed. 2008).

209. *Alaska v. Native Vill. of Venetie*, 552 U.S. 520, 523 (1998). *But see* Geoffrey D. Strommer et al., *Placing Land into Trust: Issues and Opportunities*, 3 AM. INDIAN L.J. 508, 511–17, 520–23 (2015) (describing proposed regulations as permitting the Secretary of the Interior to take land in trust for Alaska Native villages and the consequences of this for “Indian country” status and criminal jurisdiction).

210. See, e.g., Delen Goldberg & Jackie Valley, *Las Vegas' Smallest Sovereign Nation*, LAS VEGAS SUN (July 20, 2015), <http://lasvegassun.com/news/2015/jul/20/las-vegas-smallest-sovereign-nation/> (describing the initial reservation of Las Vegas Paiute tribes as a “31-acre plot”).

211. See GREAT LAKES INDIAN FISH & WILDLIFE COMM'N, A GUIDE TO UNDERSTANDING OJIBWE TREATY RIGHTS 6 (2014) (providing a map of ceded lands, outside reservation boundaries, within which Ojibwe signatory tribes reserve the right to hunt, fish, and gather).

212. See, e.g., JAMES M. McCLURKEN, OUR PEOPLE; OUR JOURNEY: THE LITTLE RIVER BAND OF OTTAWA INDIANS 271–72 (2009) (describing the Band's service area, where half its members live, as encompassing parts of nine Michigan counties).

213. 25 U.S.C. § 1911(b) (2014) (requiring state courts to transfer jurisdiction over any child-welfare proceeding involving Indian children *not* domiciled on the reservation to the tribal court). That jurisdiction is specifically affirmed by statute, but courts have held that tribal jurisdiction over certain civil matters, such as domestic relations, probate, and membership, is not limited to tribal territory. *E.g.*, *John v. Baker*, 982 P.2d 738 (Alaska 1999) (holding that tribes retain member-based jurisdiction, regardless of territory, over child-custody disputes between tribal members). If juvenile delinquency jurisdiction is more closely related to those powers, as described in the next Section, it may extend beyond territorial boundaries.

Even if characterized as criminal jurisdiction, tribal juvenile delinquency jurisdiction is broader than many assume. In his influential article on criminal jurisdiction in Indian country, Robert Clinton described tribal jurisdiction as limited in practice, but potentially much broader in scope, highlighting several grey areas in which tribes sometimes have asserted jurisdiction that federal law neither expressly affirmed nor prohibited.<sup>214</sup>

Where the scope of tribal jurisdiction is still an open legal question, it is important for tribes not to prematurely assume that federal law limits their power. Tribal policy—including decisions about the best allocation of tribal resources and the wisdom of provoking challenges that may implicate undecided federal legal issues—is the main factor in determining how far a specific tribe wishes to extend the reach of its juvenile laws. In matters related to juvenile delinquency among Native youth in Indian country (the focus of this Article), the main limit imposed by federal law is one of sentence length, and even this limit may prove not to be a significant barrier in juvenile proceedings. Compared to other areas of law, tribes have a great deal of flexibility to make and implement their own decisions via tribal law without running afoul of federal limits.

## 2. *Juvenile Delinquency as Civil Jurisdiction*

On the other hand, juvenile jurisdiction is *not* criminal jurisdiction.<sup>215</sup> In fact, it is expressly non-criminal. American juvenile courts are rooted in the idea that children are less culpable and more open to reform, and therefore require a system focused on rehabilitation and treatment, rather than retribution and punishment.<sup>216</sup> Juvenile justice policy has at times favored a more criminal approach,<sup>217</sup> but the past two decades have seen courts and legislatures re-emphasize the idea

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214. Clinton, *supra* note 163, at 557–60.

215. Many juvenile systems include a provision to permit or require that certain youth cases be tried in adult court instead of adjudicated in juvenile court. In a tribe with such a law, youth in the adult system would clearly present an issue of criminal jurisdiction and would be subject to the limitations described here. However, tribes are not required to try any youth as adults, and tribal laws may not even include such a provision.

216. *See supra* notes 87–93 and accompanying text (describing the early history of American juvenile courts).

217. *See supra* notes 99–102 and accompanying text (describing the turn toward punitive approaches in the 1980s and 1990s). Even when juvenile courts have most resembled criminal courts, the fact that all states have continued to operate separate juvenile court systems under different rules suggests that they do not view juvenile justice as simply a subset of criminal justice.

that children are different.<sup>218</sup> While juvenile courts today share many similarities with criminal courts,<sup>219</sup> historical practice and current thinking at least raise questions about whether it is appropriately categorized as criminal or civil regulatory jurisdiction. Outside of the tribal context, this is more of a policy debate than a legal issue. Juveniles are entitled to most of the same due process protections during their adjudication as adults, and all that remains is the question of how best to address their offenses. For tribes, though, this question is much more significant because civil regulatory jurisdiction is not limited by the same statutes and cases that constrain tribes' exercise of criminal jurisdiction.

The question of whether a tribe's exercise of juvenile delinquency jurisdiction will be considered criminal or civil hinges mainly on how the tribe conceives of and exercises its power over children. Delinquency is in many ways an extension of child welfare: many of the same children who are involved in the child welfare system end up in the delinquency system.<sup>220</sup> A tribe could choose to treat its young people in this manner by placing young offenders in rehabilitative, educational, or treatment programs and by eliminating or significantly reducing the criminal aspects of delinquency adjudications (e.g., incarceration or other deprivations of liberty, use of juvenile records to enhance adult sentences, and collateral consequences involving the loss of rights). A system like this is more likely to be viewed as an exercise of a tribe's power to *care for* its children. That power is an exercise of civil jurisdiction, and it is not governed by the same rules that govern tribal criminal power.

If all, or most, of a tribe's exercise of juvenile jurisdiction can be categorized as civil regulatory jurisdiction, a tribe may retain jurisdiction over juvenile justice even if it lacks such jurisdiction over adult criminals. The limits described above would not apply. Sentence length is not a limitation in a system that doesn't involve incarceration or a similar deprivation of liberty. Indian status may matter, but there is no categorical rule against a tribe's exercise of power over non-

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218. *See supra* notes 103–11 and accompanying text (describing the recent “developmental” approach).

219. *See supra* note 107 and accompanying text.

220. CTR. FOR JUVENILE JUSTICE REFORM, ADDRESSING THE NEEDS OF MULTI-SYSTEM YOUTH: STRENGTHENING THE CONNECTION BETWEEN CHILD WELFARE AND JUVENILE JUSTICE 1 (2012) (“[C]hildren involved in the child welfare system are at risk of ‘crossing over’ to the juvenile justice system and . . . many juvenile justice-involved youth later become involved in the child welfare system.”).

Indians within their territory.<sup>221</sup> Territorial limits would not apply. Indeed, courts have specifically recognized that tribes retain civil jurisdiction over certain matters involving their members, including domestic relations and child custody, probate, and membership, even in the absence of Indian country.<sup>222</sup> Moreover, Congress has specifically confirmed tribes' extraterritorial power over their children in child-welfare matters.<sup>223</sup>

While it is not entirely clear how a court would view a tribe's argument that delinquency jurisdiction over youth who commit offenses that would be crimes if committed by adults is non-criminal, there is one area of delinquency jurisdiction that is clearly non-criminal. Status offenses are acts for which youth may be found delinquent but that would not be illegal if they were committed by adults.<sup>224</sup> These include: running away, some offenses involving sexual activity by a minor, possession or consumption of alcohol by a minor, and catch-all offenses like "incurability" or a "child in need of supervision."<sup>225</sup> Federal law prohibits locking up youth for these offenses, and they are generally treated today as non-criminal matters.<sup>226</sup> A

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221. The rule in the civil context, even when stated in its broadest form, is that tribes may regulate and adjudicate civil matters involving non-Indians (and non-member Indians) as long as the non-member entered into a consensual relationship with the tribe or its members or his or her actions have a direct effect on the health, welfare, political integrity, or economic security of the tribe or its members. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001); *Nevada v. Hicks*, 553 U.S. 353, 359 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997); *Montana v. United States*, 450 U.S. 544, 566 (1981). While it is not easy to meet these criteria, a non-Indian juvenile's commission on tribally owned land of an offense that would be a crime if committed by an adult, particularly if the victim is a member of the tribe, is something that the tribe could potentially regulate under this standard. As of the writing of this Article, a case that could alter this rule governing civil jurisdiction over nonmembers is under consideration by the U.S. Supreme Court. *See* Opening Brief for the Petitioners, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496 (U.S. Aug. 31, 2015).

222. *E.g.*, *John v. Baker*, 982 P.2d 738, 744–59 (Alaska 1999) (discussing member-based jurisdiction over internal matters and holding that Alaska tribes retain jurisdiction to adjudicate child-custody matters regardless of whether these occurred in Indian country); *see also* *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1475 (9th Cir. 1989) (holding that the federal court lacked jurisdiction to consider a case involving enforcement of tribal property law against a tribal member because it was as an exercise of "internal jurisdiction").

223. *See* 25 U.S.C. § 1911 (2014).

224. Thalia González, *Reclaiming the Promise of the Indian Child Welfare Act: A Study of State Incorporation and Adoption of Legal Protections for Indian Status Offenders*, 42 N.M. L. REV. 131, 132 n.7 (2012).

225. *See id.*

226. 42 U.S.C. § 5633(a)(13) (2014) (conditioning federal juvenile justice assistance on a state's agreement not to incarcerate status offenders).

tribe's adjudication of status offenses should be governed by the rules concerning civil regulatory jurisdiction, not criminal power.

### 3. *Concurrent Jurisdiction and Cooperation*

The question of primary jurisdiction does not necessarily determine who will actually provide the policing, lawyering, judging, probation, treatment, intervention, or detention services to youth in a particular community. Tribes can and do choose to exercise their jurisdiction by delegating power to officials of another government via cooperative agreements, and vice versa.<sup>227</sup> For example, a tribe may choose to contract with a neighboring state- or county-run juvenile detention facility instead of building an entirely new facility on tribal lands.<sup>228</sup> Such an arrangement should not be confused with a lack of tribal jurisdiction over those offenders. In this scenario, the tribe is responsible for designing the juvenile justice system, including the process that governs it and the services that make it up, but it chooses to carry out select services using existing infrastructure from another jurisdiction.

Where concurrent jurisdiction exists between a tribe and the federal or state authorities, a tribe may choose to let certain offenders be handled by federal or state courts. For example, a tribe may choose to allow the Assistant United States Attorney to file charges against violent or serious offenders in federal court,<sup>229</sup> reserving tribal court resources for less serious offenders. This would permit the tribe to ensure it is able to reach delinquent youth over whom the federal courts lack jurisdiction, and would also give the tribe greater flexibility to pursue rehabilitation and treatment options for low-level offenders. The most important element here is tribal control over the decision of who is charged where. As described further in Sections II.B and II.C and Part III, current law does not require federal or state prosecutors to consult with tribes at all before determining whether to proceed against juvenile offenders.

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227. ROADMAP, *supra* note 2, at 103–05 (describing the Special Law Enforcement Commissions, which permit tribal police to enforce federal law, and detailing several similar cross-deputization agreements between tribes and states).

228. See U.S. DEP'T OF JUSTICE & U.S. DEP'T OF INTERIOR, TRIBAL LAW AND ORDER ACT: LONG TERM PLAN TO BUILD AND ENHANCE TRIBAL JUSTICE SYSTEMS 33 (2011) (describing contractual arrangements to share bed space in correctional facilities).

229. Tribal prosecutors may also be deputized as Special Assistant United States Attorneys, allowing tribal officials to proceed directly against a juvenile in federal court without having to request a federal prosecution. ROADMAP, *supra* note 2, at 72–73 (describing the Special Assistant United States Attorney program).

### B. Federal Jurisdiction

On most reservations, the federal government has concurrent jurisdiction over certain crimes committed in Indian country. Various federal criminal statutes, including the Major Crimes Act, the Indian Country Crimes Act, and the Assimilative Crimes Act, establish this jurisdiction. These statutes, however, do not cover non-major crimes committed by Indians against other Indians<sup>230</sup> or crimes committed by non-Indians against other non-Indians.<sup>231</sup> The federal courts thus have jurisdiction only over interracial crimes (Indian against non-Indian and vice versa) and over major crimes between Indians. In the federal courts, juvenile delinquency jurisdiction is derivative of criminal jurisdiction. The federal government generally does not have civil regulatory jurisdiction over internal tribal matters in Indian country.<sup>232</sup> Federal courts thus only have jurisdiction over a limited subset of juvenile offenders, and juveniles handled in a non-criminal system fall outside the scope of federal power.

#### 1. Sources of Federal Power

The Federal Juvenile Delinquency Act (“FJDA”) establishes federal jurisdiction over acts of juvenile delinquency and sets forth the procedures for prosecuting juveniles “alleged to have committed” a “violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.”<sup>233</sup> Without the FJDA, the federal courts would have no juvenile delinquency jurisdiction and could try juveniles only if they were charged with adult crimes in district court. The FJDA does not create any separate substantive offenses, so in order for a juvenile to be prosecuted under it, he must have committed an offense defined elsewhere by federal criminal law.

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230. Depending on the offense and its circumstances, a victimless crime committed by an Indian offender may also be exempt from federal jurisdiction under the same exception. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 41, § 9.02[1][c][iii].

231. This is a judicially created exception. *See* United States v. McBratney, 104 U.S. 621 (1882).

232. *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 41, § 7.04 (describing the bases for federal civil jurisdiction in Indian country, not including general regulatory power).

233. 18 U.S.C. § 5032 (2014) (referring to “a juvenile alleged to have committed an act of juvenile delinquency”); *see also* § 5301 (defining “juvenile delinquency” as a “violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult”).

The primary basis for federal criminal jurisdiction in Indian country is territorial. Federal jurisdiction over adult crimes in Indian country is premised on three statutes: the General Crimes Act,<sup>234</sup> the Major Crimes Act,<sup>235</sup> and the Assimilative Crimes Act.<sup>236</sup> Together, these statutes provide for federal jurisdiction over all major crimes committed by Indians, all crimes committed by Indians against non-Indians, and all crimes committed by non-Indians against Indians. The federal government also exercises criminal jurisdiction over anyone anywhere who commits a limited category of federal crimes,<sup>237</sup> and so an Indian who commits a federal crime on a reservation may be prosecuted without the use of Indian country statutes.<sup>238</sup> Prosecution of a juvenile alleged to have committed any of these offenses would still be governed by the FJDA.

The General Crimes Act (“GCA”) extends federal enclave law to Indian country, clarifying that Indian country is considered federal lands for purposes of criminal prosecutions. The law was intended primarily to permit federal prosecution of crimes between Indians and whites occurring within the boundaries of a tribe’s territory.<sup>239</sup> Recognizing tribes’ sole authority over internal criminal matters on their reservations,<sup>240</sup> however, Congress included three exceptions to federal jurisdiction in the statute: it does not apply to crimes committed by an

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234. § 1152.

235. § 1153. *See infra* note 245 and accompanying text (listing major crimes).

236. § 13.

237. The basis for this type of federal criminal jurisdiction is not territorial; jurisdiction exists because the crimes affect constitutionally defined federal interests. For most offenses, the basis for the exercise of federal power is the Interstate Commerce Clause. *See generally* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *YALE L.J.* 1012 (2015); Colin V. Ram, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What Is Truly National and What Is Truly Local*, 65 *WASH. & LEE L. REV.* 767 (2008). Examples include mail fraud, wire fraud, and crimes involving the interstate or international transport of drugs.

238. If federal jurisdiction is not premised on the fact that the offense occurred in Indian country, federal prosecutors are not bound by any of the Indian country-specific limitations. For example, federal law prohibits capital punishment in cases in which jurisdiction is based on Indian country unless the tribe has opted into the federal death penalty. § 3598. A defendant prosecuted under general federal criminal laws for an offense that occurred in Indian country, however, may be sentenced to death over the objection of the defendant’s tribe. *See, e.g.*, Soyenixe Lopez, *Conviction, Death Sentence Upheld in 2001 Navajo Double Murder*, *TUCSON SENTINEL*, June 20, 2015, at 30 (describing the case of Lezmond Mitchell, the only Native American on federal death row, who was sentenced to death despite the Navajo Nation’s stated opposition to capital punishment).

239. Clinton, *supra* note 163, at 521 n.88.

240. *Talton v. Mayes*, 163 U.S. 376, 384 (1896); SIDNEY L. HARRING, *CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* (1994).

Indian against the person or property of another Indian, it does not apply to Indian offenders who have already been punished by the local law of tribe, and it does not apply where a treaty has reserved exclusive jurisdiction to the tribe.<sup>241</sup>

The Assimilative Crimes Act (“ACA”) fills a gap that is left in federal enclaves when federal law does not define a particular substantive offense. It simply provides that state-law definitions should be incorporated to define any offenses not spelled out by federal law.<sup>242</sup> Although not specific to Indian country, it is made applicable through the General Crimes Act,<sup>243</sup> and permits prosecution of a full range of crimes where jurisdiction is otherwise authorized by the General Crimes Act.

The Major Crimes Act (“MCA”) addresses a different gap, providing for the prosecution of Indian offenders who commit certain major crimes.<sup>244</sup> In its current form, it permits federal prosecution of Indians who commit murder, manslaughter, kidnapping, maiming, felony sexual abuse, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against a minor under the age of sixteen, felony child abuse or neglect, arson, burglary, robbery, and felony theft (where the property taken is worth over \$1000 or where the property is taken directly from the person of another).<sup>245</sup> The MCA does not contain the same statutory exceptions as the GCA, so federal jurisdiction over the enumerated crimes exists even if the victim is an Indian. There is also no bar against prosecuting offenders who have already been tried in tribal court or offenders over whom the tribe has treaty-recognized jurisdic-

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241. § 1152. There is also a fourth, judicially created exception. Under *United States v. McBratney*, states have exclusive jurisdiction over crimes committed within Indian country by non-Indians against the person or property of other non-Indians. 104 U.S. 621 (1882); accord *Draper v. United States*, 164 U.S. 240 (1896). Although the reasoning of *McBratney*—which relied largely on the equal footing doctrine to hold that upon Colorado’s admission to statehood, the federal government lost sole and exclusive jurisdiction over the reservations within its borders, at least with respect to non-Indian on non-Indian crimes—has been rejected, the rule continues to be acknowledged. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 41, § 9.03[1]. 242. § 13.

243. The GCA extends the “general laws of the United States as to the punishment of crimes” in federal enclaves to Indian country, which include title 18, section 13, of the United States Code. *See id.*

244. For crimes against a non-Indian victim, MCA jurisdiction duplicates GCA jurisdiction: the GCA covers all crimes except those committed by one Indian against another, § 1152, and the MCA covers all crimes committed by Indians, even those committed against non-Indians, § 1153. The MCA is most significant because it created federal jurisdiction over Indian-on-Indian crimes, when such jurisdiction did not exist before its passage.

245. § 1153.

tion. The law was intended to reach intra-Indian crimes that had previously fallen under sole tribal jurisdiction, so it applies irrespective of whether the tribe has jurisdiction.<sup>246</sup>

## 2. *Concurrent Federal and Tribal Jurisdiction in Practice*

Concurrent federal-tribal jurisdiction is not coextensive. Only tribes have jurisdiction over one category of offenses: those involving an Indian offender and an Indian victim and that are not listed in the Major Crimes Act. Tribes also have concurrent jurisdiction over all other offenses committed by Indians (regardless of the victim).<sup>247</sup> Indeed, according to the terms of the GCA, the federal government lacks jurisdiction over a particular non-major crime committed by an Indian once the juvenile has already been punished by the tribe, even where the victim is non-Indian.<sup>248</sup> The statutory language of the GCA suggests that tribes should be the first movers, with the federal government prosecuting only those whom the tribes choose not to prosecute. The MCA, premised on the idea that tribal justice is insufficiently punitive and therefore inadequate, was clearly intended to override the decisions of tribal justice systems, and it contains no similar language prohibiting overlapping prosecutions.<sup>249</sup> Given the shortage of law enforcement resources at both the federal and tribal levels, however, it would be practical and consistent with tribal self-determination policy for federal prosecutors to defer to tribal prosecutors who wish to deal

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246. The MCA is far more controversial than the General Crimes Act, as it provides for federal jurisdiction over purely internal criminal matters that had previously been left to the exclusive jurisdiction of the tribes. Immediately prior to its passage, the Supreme Court held that federal law did not provide federal courts with jurisdiction over a murder of one Brule Lakota (Sioux) Indian by another. *Ex Parte Crow Dog*, 109 U.S. 556, 571–72 (1883). The MCA was enacted in 1885, at the height of the Allotment and Assimilation Era. See *supra* Part I (describing the Allotment and Assimilation Era). In advocating for the passage of the law, federal officials derided internal tribal justice systems as lawless and savage, and insisted that federal jurisdiction was necessary to bring a measure of civilized justice to Indian country. See HARRING, *supra* note 240, at 136–37.

247. Despite earlier suggestions to the contrary, the MCA did not divest tribes of their jurisdiction over Indian-on-Indian major crimes. See *supra* note 154; see also U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 687 (2006) (noting recent decisions holding that tribes have concurrent jurisdiction). The law is silent on tribal jurisdiction, so tribes retain their inherent power to prosecute serious crimes. See *supra* notes 167–68, 174–82.

248. See U.S. DEP'T OF JUSTICE, *supra* note 247, § 678 (acknowledging that the GCA does not extend to Indian offenders who have been punished under tribal law).

249. *United States v. Juvenile Male*, 280 F.3d 1008, 1013, 1020 (9th Cir. 2002); U.S. DEP'T OF JUSTICE, *supra* note 247, § 682; see also HARRING, *supra* note 240, at 136–37.

with certain offenders.<sup>250</sup> In practice, however, juveniles can be prosecuted in both tribal and federal courts for offenses covered by the MCA, sometimes resulting in more time incarcerated or in conflicting dispositions.<sup>251</sup>

Under the procedure set forth in the FJDA, a juvenile may not be tried in federal court until the Attorney General certifies that the state lacks or is unwilling to take jurisdiction over the case, the state does not have adequate programs or services for the juvenile in question, the juvenile has committed a serious violent offense or a drug-related offense, or there is a substantial federal interest involved.<sup>252</sup> Despite the strong preference for state jurisdiction embodied in this requirement, it has not been interpreted to require the Attorney General to defer to *tribal* prosecution.<sup>253</sup> Instead, the certification requirement is met in Indian cases by a certification that the state lacks jurisdiction over Indian country.<sup>254</sup>

### 3. *Juveniles in Adult Court*

The FJDA permits a juvenile who is at least fifteen years old to be transferred to adult court after a hearing.<sup>255</sup> For certain violent and drug-related crimes, the minimum age of transfer is thirteen.<sup>256</sup> Here,

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250. The *United States Attorneys' Manual* suggests that duplicative prosecution is not the preferred approach:

Although departmental approval is not required before a subsequent federal prosecution is undertaken, one should not be undertaken unless there is a compelling federal interest . . . . In determining whether federal interests have been satisfied, consideration should be given to the limitations on tribal sentencing power measured against the seriousness of the offense.

U.S. DEP'T OF JUSTICE, *supra* note 247, § 682 (citations omitted). It is not clear from the case law that this policy imposes any meaningful limitation. *See infra* note 251.

251. ARYA & ROLNICK, *supra* note 15, at 25–26 (citing *Juvenile Male*, 280 F.3d at 1012, in which a juvenile prosecuted for burglary and theft was sentenced to twenty-four months by a federal court after a tribal court had already sentenced him to six months, and *United States v. Juvenile Female*, 869 F.2d 458, 459, 461 (9th Cir. 1989), in which a juvenile was prosecuted in federal court for vehicular manslaughter despite an agreement between federal tribal officials that the tribe would assume jurisdiction and despite the tribal court's decision to order probation and treatment).

252. 18 U.S.C. § 5032 (2014). There is an exception for offenses that carry maximum terms of six months or less when committed within the special maritime or territorial jurisdiction of the United States. *Id.*

253. *United States v. Allen*, 574 F.2d 435, 438–39 (8th Cir. 1978); ARYA & ROLNICK, *supra* note 15, at 27; *see also* Amy J. Standefer, *The Federal Juvenile Delinquency Act: A Disparate Impact on Native American Juveniles*, 84 MINN. L. REV. 473, 483–85 (1999).

254. *Allen*, 574 F.2d at 438–39.

255. § 5032.

256. *Id.*

the Act makes specific provisions for Indian juveniles, who may not be transferred if they are younger than fifteen unless the tribe has elected to have the adult-transfer provisions of the FJDA apply to their children.<sup>257</sup> Transfer to adult court is mandatory, however, for *all* juveniles over the age of sixteen who are alleged to have committed certain crimes of violence or drug-related offenses and who already have records that include at least one drug-related or violent offense.<sup>258</sup>

Once in the custody of the Bureau of Prisons (“BOP”), a juvenile may be placed on probation or committed to a contract facility under the supervision of the Bureau. Indian youth prosecuted in the federal system are more likely than other federally prosecuted youth to be placed in secure confinement, but they may be less likely to be charged as adults.<sup>259</sup> On the whole, Indian youth in the federal system tend to spend more time in secure confinement than do their counterparts in state systems.<sup>260</sup>

### C. State Jurisdiction

State jurisdiction on reservations is much more limited. With respect to Native youth, state jurisdiction is significant in three situations. First, if an offense occurs outside of Indian country, the juvenile will fall under state-court jurisdiction and likely will be treated the same as other youth.<sup>261</sup> Indeed, many states have significant populations of Native youth within their systems.<sup>262</sup> Some of these youth do not live on reservations and may not have any connection to local

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257. *Id.*

258. *Id.*

259. WILLIAM ADAMS ET AL., URBAN INST., TRIBAL YOUTH IN THE FEDERAL SYSTEM, at x–xi, 68 (2011) (citing BOP data). This may be due in part to the broader reach of federal jurisdiction over Indian country and the fact that the FJDA makes it easier to transfer non-Indian juveniles into adult court. *Id.* (providing that a prosecutor may move to transfer juveniles who are at least thirteen years old to adult court for certain offenses, but Indian country juveniles may only be transferred on the prosecutor’s motion if they are at least fifteen years old unless the tribe has opted in to the younger age of transfer); *see also supra* note 74 and accompanying text. *But see* ADAMS ET AL., *supra*, at x, 77 (citing federal court data that presents a different picture and noting the difficulty in tracking transfers).

260. ARYA & ROLNICK, *supra* note 15, at 25; *see also* ADAMS ET AL., *supra* note 259, at 35 (noting that the average time served in prison for juveniles in BOP custody increased between 1999 and 2008).

261. According to census data, more than half the people who identify as American Indian or Alaska Native do not live in Indian country. *See* NORRIS ET AL., *supra* note 118, at 12–13.

262. *See* ARYA & ROLNICK, *supra* note 15, at 19–24 (describing the experiences of Native youth in several state systems).

tribes, while others may live in or be connected to a tribal community, but be subject to state jurisdiction on the ground that the offense in question occurred outside Indian country.<sup>263</sup> Second, if an offense is committed by a non-Indian juvenile in Indian country (and does not involve any Indian victims), the state will have sole jurisdiction.<sup>264</sup> Because this Article is concerned with Native youth in Indian country,

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263. There is evidence that Native youth fare poorly in state systems and that strengthening tribal systems will make no difference for those youth who do not fall under tribal jurisdiction. For these youth, two major obstacles emerge. First, at least in states or counties with sizable Native populations, Native youth appear to experience “disproportionate minority contact” (“DMC”) at least as much, if not more, than other racial minority youth. *See id.*; *see also* Rolnick, *Locked Up*, *supra* note 134 (describing disproportionality effects on Native youth according to DMC data from state systems). DMC is a description of the data in state juvenile justice systems, which demonstrate that minority youth are more likely to come into contact with the system and more likely to suffer the harshest sanctions at each point of decision. While the term is most often used to describe disproportionate confinement in secure facilities, it may refer to disproportionately harsh sanctions of any kind. Addressing this concern will require, at a minimum, better data-collection practices by states and eventually a shift in state juvenile justice policy to reduce or counteract any bias that may cause DMC.

The second major obstacle is lack of communication with, and lack of respect for tribal governments and Native culture. States routinely ignore the unique concerns of Native youth when setting policy. *See* ENDING VIOLENCE, *supra* note 5, at 26. They rarely consult with tribal governments when determining how to allocate juvenile justice funding, and they sometimes override tribal officials outright in determining what should happen to a particular child in a particular case. *Id.* Federal law requires state child welfare officials to notify a child’s tribe when an Indian child comes into the system, 25 U.S.C. § 1912(a) (2014), and imposes special requirements on state child-welfare officials making decisions about Indian children, §§ 1912(d)–(f), 1915, but it does not require the same notice for Indian children in state juvenile justice systems. *See* § 1903(1) (excluding delinquency placements from the definition of “child custody proceeding”). The experience of Native youth outside Indian country is reserved for another article. However, Part IV of this Article sets forth recommendations for better state-tribal cooperation that could potentially affect non-Indian country Native youth as well.

264. In *United States v. McBratney*, the Supreme Court held that states have exclusive criminal jurisdiction over offenses between non-Indians committed in Indian country. 104 U.S. 621 (1882). Although the reasoning of *McBratney* has been rejected, the rule remains intact and has not been criticized or challenged to the same extent that criminal jurisdiction rules have been. Of course, if juvenile delinquency jurisdiction were to instead be classified as an exercise of civil regulatory jurisdiction, whether tribes retain jurisdiction over non-Indian youth in Indian country would depend on a different test: whether the non-Indian’s behavior had a significant impact on the health, welfare, political integrity, or economic security of the tribe. *Montana v. United States*, 450 U.S. 544 (1981). Although some exercises of regulatory jurisdiction pass this test, the Court’s narrow interpretation of the doctrine in recent years raises questions about whether an offense by a non-Indian that affected only non-Indian victims would give rise to tribal jurisdiction. *See, e.g., Merrion v. Jicarilla Apache*, 430 U.S. 130 (1982) (upholding tribal authority to tax a non-Indian company doing business on the reservation, without relying on the *Montana* test). *See supra* note 221.

the situations of non-Indian country Native youth and non-Native youth in Indian country are not explored further here.

Third, certain states exercise broader criminal and civil power within Indian country under federal laws, such as Public Law 280, that effectively shifted most federal law enforcement responsibilities to states. A product of the Termination era, Public Law 280 granted certain states jurisdiction over all criminal and some civil matters arising in Indian country within their borders.<sup>265</sup> It also extinguished federal jurisdiction over these lands, passing the jurisdictional baton from federal to state officials.<sup>266</sup> This decision was unilateral: tribes did not ask Congress to open their lands up to state jurisdiction, and many actively fought the law.<sup>267</sup>

Upon its passage, Public Law 280 changed the jurisdictional structure applicable to reservations in six states: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.<sup>268</sup> Another provision of the law permitted other states to opt into the same arrangement without tribal consent, a course of action undertaken by a number of states, including Florida, Washington, and Idaho, between 1953 and 1968.<sup>269</sup> A 1968 amendment added a requirement that states seek and receive tribal consent before opting in,<sup>270</sup> but did not affect the situations of tribes already under state jurisdiction. The same law authorized a state to retrocede its jurisdiction to the federal government, but did not require the state to retrocede at a tribe's request.<sup>271</sup> Since the passage of the consent amendment, no state has assumed jurisdiction over any additional Indian country lands.<sup>272</sup> Several states have retroceded their jurisdiction.<sup>273</sup> In 2010, Congress finally passed an amendment authorizing tribes to request that federal authorities reassert jurisdiction.<sup>274</sup>

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265. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2014), 28 U.S.C. § 1360 (2014)).

266. GOLDBERG-AMBROSE, *supra* note 56, at 1; CHAMPAGNE & GOLDBERG, *supra* note 17, at 6–7.

267. GOLDBERG-AMBROSE, *supra* note 56, at 62.

268. Public Law 280 embodies a broad legislative implementation of jurisdictional transfer, but it is not the only law that results in state jurisdiction on reservations. *See supra* note 166.

269. CHAMPAGNE & GOLDBERG, *supra* note 17, at 6.

270. *Id.* at 12.

271. *Id.* at 14.

272. *Id.* at 12.

273. States have retroceded jurisdiction over thirty-one tribes, including five tribes located in mandatory Public Law 280 states, but no tribes in California or Alaska. *Id.* at 166.

274. 18 U.S.C. § 1162(d) (2014); 25 U.S.C. § 1321(a)(2) (2014). If the federal government reassumes jurisdiction at the tribe's request, all three governments would

Among both mandatory and optional states, there are geographic exceptions to state jurisdiction. For example, the grant of jurisdiction to the State of Minnesota excludes the Red Lake Reservation.<sup>275</sup> Washington, an optional state, chose to assert jurisdiction over certain areas without regard to tribal consent, but sought tribal consent for others.<sup>276</sup> The boundaries of, and exceptions to, each state's jurisdiction can be found in the state laws implementing Public Law 280's new jurisdictional arrangement.<sup>277</sup>

In addition, the precise substantive scope of the jurisdiction varies by state. All mandatory states were granted criminal jurisdiction, but the scope of civil jurisdiction was less clear. In *Bryan v. Itasca County*, the Supreme Court held that generally, the law gave states jurisdiction to adjudicate civil matters in their courts (adjudicatory jurisdiction), but did not give states the power to regulate non-criminal matters arising on reservations (regulatory jurisdiction).<sup>278</sup> Optional states chose to assume jurisdiction over specific substantive areas, which are set forth in each state's implementing statute.<sup>279</sup>

In some states, the assumption of jurisdiction over juvenile delinquency matters is set forth clearly in the state's implementing law.<sup>280</sup> Where it is not, the question of whether the state assumed jurisdiction over juvenile delinquency may hinge on the criminal/civil regulatory distinction articulated in *Bryan* and described *supra* Section II.A. If juvenile delinquency jurisdiction is a subset of criminal jurisdiction, it is included in the grant to states of criminal jurisdiction. If, however, it can be characterized as a species of regulatory jurisdiction, it would not be included in the grant to mandatory states or necessarily included in a voluntary state's assumption of criminal jurisdiction.

As with federal power, states share concurrent jurisdiction with tribes.<sup>281</sup> However, the implications for tribes of sharing jurisdiction

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exercise criminal jurisdiction concurrently. CHAMPAGNE & GOLDBERG, *supra* note 17, at 209.

275. GOLDBERG & SINGLETON, *supra* note 58, at 9.

276. *Id.* at 10.

277. CHAMPAGNE & GOLDBERG, *supra* note 17, at 14–15 (citing state statutory and case law).

278. 426 U.S. 373, 388–90 (1976).

279. CHAMPAGNE & GOLDBERG, *supra* note 17, at 17–18.

280. *E.g.*, WASH. REV. CODE § 37.12.010 (2015).

281. *See* Walker v. Rushing, 898 F.2d 672, 675 (8th Cir. 1990); Booth v. State, 903 P.2d 1079, 1084 (Alaska Ct. App. 1995); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 41, § 6.04[3][c] (describing the “nearly unanimous view” but noting that this “consensus . . . has developed relatively recently”); GOLDBERG ET AL., AMERICAN INDIAN LAW 535–38 (6th ed. 2010); GOLDBERG-AMBROSE, *supra* note 56, at 157–63; U.S. DEP'T OF JUSTICE, OFFICE OF TRIBAL JUSTICE, CONCURRENT TRIBAL AUTHORITY UNDER PUBLIC LAW 280, at 83 (2000); Jiménez & Song, *supra* note 59,

with states, as opposed to with the federal government, have been significant. State criminal jurisdiction over Indians is not limited to major crimes, so state authorities have full criminal authority.<sup>282</sup> Although the law did not divest tribes of concurrent jurisdiction as a legal matter, it made the exercise of that jurisdiction practically difficult for several reasons.

First, many tribes subject to Public Law 280 have little or no resources to support their law enforcement efforts. The lack of federal jurisdiction means that there is no budget to support federal investigation and prosecution of crimes. For some tribes, Public Law 280 has also meant no federal funding to support tribal justice systems. The Law and Order Commission found that, although Public Law 280 did not divest tribes of criminal jurisdiction, “the Department of the Interior often used it as a justification for denying funding support for Tribes in the affected States.”<sup>283</sup>

Second, states largely ignored the existence of concurrent tribal jurisdiction for decades, with many refusing to work with the tribes as partner governments and instead treating tribal land as additional state land. Tribes in these states were often treated as though they lacked jurisdiction and judicial institutions,<sup>284</sup> even when this was not legally the case. Reflecting its Termination Era genesis, Public Law 280 does not require states to consult or cooperate with tribes at all in their exercise of criminal jurisdiction over Native people on reservations.<sup>285</sup>

Yet, tribes in Public Law 280 states do exercise juvenile delinquency jurisdiction, and their engagement with juvenile justice is especially critical in view of the pattern of under-enforcement by many states. As the Law and Order Commission found, states by and large have proven “less responsive and predictable than the Federal govern-

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1667–91 (demonstrating that Public Law 280 did not divest tribes of criminal jurisdiction).

282. GOLDBERG-AMBROSE, *supra* note 56, at 165.

283. ROADMAP, *supra* note 2, at 69.

284. See B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 472 (1998).

285. 18 U.S.C. § 1162 (2014) (extending state criminal laws to Indian country without any requirement of consultation or cooperation); see Jiménez & Song, *supra* note 59, at 1700–05 (describing the role of voluntary inter-jurisdictional agreements in facilitating tribal-state cooperation); see also GOLDBERG & SINGLETON, *supra* note 58, at 378–408 (describing the extent, impact, successes, and failures of voluntary cooperative agreements in the law enforcement context). Although successive prosecutions by separate sovereigns would not violate the constitutional prohibition against double jeopardy, see *United States v. Wheeler*, 435 U.S. 313, 323 (1978), some state implementing laws prohibit the state from prosecuting a person who has already been prosecuted by another sovereign. See ROADMAP, *supra* note 2, at 15.

ment in their exercise of authority,"<sup>286</sup> with many states assuming authority and then delivering minimal services to reservation lands. These tribes may find themselves ignored by or in conflict with the states when it comes to both macro-level decisions about juvenile justice policy that affect reservation youth and disposition decisions in specific cases.

### III.

#### STRANDS OF THE WEB

Existing critiques focus on the problem of overlapping jurisdiction: they advocate for a simpler system and present increased tribal power as the primary solution to the poor outcomes faced by Native youth.<sup>287</sup> Increasing tribal power is important, but it is an incomplete answer. First, increasing tribal power in practice requires much more than a change in the legal rules about jurisdiction. As described in the previous Part, tribes retain relatively broad jurisdiction over juvenile-delinquency matters. In practice, however, their exercise of this jurisdiction is cabined by their reliance on federal agency officials to provide services and funding critical to juvenile justice. Failure to address this aspect of tribal justice systems would render any other intervention inadequate. Second, tribal authority is not always exclusive, so it is important to carefully consider areas for improvement in the treatment of Native juveniles in state and federal courts and how best to ensure that tribes are treated as the primary authority, with federal and state authority supplementing, rather than undermining, tribal authority. The Law and Order Commission is correct to recommend that youth be redirected into tribal systems whenever practicable,<sup>288</sup> but changes are still required to ensure that the youth who remain in federal or state systems are treated fairly. This Section moves beyond the jurisdictional web critique to examine each sub-system separately, identifying the fundamental issues and obstacles unique to each.<sup>289</sup>

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286. ROADMAP, *supra* note 2, at 11.

287. *Id.* at 159–66; ENDING VIOLENCE, *supra* note 5, at 111–16, 122; Seelau, *The Kids Aren't Alright*, *supra* note 40, at 130; Seelau, *supra* note 39, at 63–109.

288. ROADMAP, *supra* note 2, at 159.

289. Because this Article focuses on Native youth in Indian country, the discussion of state jurisdiction in this Section is limited to Public Law 280. The issues faced by off-reservation Native youth, whose cases are primarily adjudicated in state systems, are reserved for a separate paper.

### A. Tribal

Tribes interested in juvenile justice reform face two primary obstacles: lack of control and lack of resources, especially resources for treatment, rehabilitation, and detention alternatives. The lack of control is not necessarily a consequence of jurisdictional limitations. As explained in Part II, the perceived legal limits on tribes' ability to exercise juvenile delinquency jurisdiction are actually far less substantial than is often assumed. The problem is a lack of primacy: assertions of concurrent federal and state jurisdiction, while legal, can seriously undermine the philosophy and goal of a tribal system. Under current law, federal and state governments have significant authority over juveniles in Indian country, and they are not required to defer to or consult with tribes. Federal law should be amended to change that.

A more intractable obstacle, however, is the degree of control that federal agencies exert over nominally tribal systems. Because of the central role played by the BIA in local reservation affairs, federal agency officials may directly run components of local justice systems, such as police or detention services.<sup>290</sup> At least four other federal agencies provide services or funding that tribes rely on to run aspects of their juvenile justice systems.<sup>291</sup> Instead of answering to tribal governments, these agency officials answer to the heads of their respective agencies. In some cases, the agencies are carrying out directions from Congress (for example, a requirement that funds be spent on a particular activity) or adhering to a regulation. In other cases, agency actions and decisions reflect sub-regulatory policies discernible only from handbooks, internal memoranda, or oral statements by agency personnel. These may be changed without formal input from tribes; changes may occur with each new administration, and the policies may be more reflective of the priorities of different administrations than the needs of tribes.<sup>292</sup> In other words, tribal jurisdiction does not

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290. See generally *Who We Are*, BUREAU INDIAN AFF., OFF. JUST. SERVS., <http://www.bia.gov/WhoWeAre/BIA/OJS/who/index.htm> (last visited Feb. 1, 2016), (describing the Bureau's law enforcement and justice-related activities). The Bureau's responsibility for the provision of local law enforcement services is in addition to the government's investigative, prosecutorial, and penal roles (carried out by the Department of Justice) in addressing crimes that fall under federal jurisdiction. Further complicating the jurisdictional web, Bureau programs may be used by tribes to facilitate the exercise of *tribal* jurisdiction.

291. See *infra* notes 308, 312–14 and accompanying text.

292. Although the Obama administration has consulted with tribes on even minor changes, previous administrations have not done so consistently. The Administrative Procedure Act, which subjects a range of agency actions to public notice and comment requirements, does not apply to "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553

necessarily translate into the ability of tribes to freely set their own juvenile justice policy. These federal agency strings must be cut, but the delicate interrelationship between tribes and federal agencies make this easier said than done.

Tribal juvenile justice systems are under-funded. Many tribal communities are rural, isolated, and poor.<sup>293</sup> They lack the non-governmental community infrastructure, such as churches and youth groups, that state and local jurisdictions rely on to fill gaps in their systems.<sup>294</sup> Tribal governments cannot rely on taxes to raise revenue for governmental services to the same extent that state and local governments can.<sup>295</sup> As a consequence, tribal juvenile justice systems are far more reliant on federal funding than are their state and local counterparts. Federal funding devoted specifically to tribal justice systems is scarce, however, and tribal governments are not eligible for all the same formula grants that states rely on. With greater control must come more money, and this will require a greater investment in fund-

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(2014). As such, decisions regarding grant and contract funding can be changed without input from those affected. In addition, while the federal government has a specific obligation to consult with Indian tribes on a government-to-government basis regarding actions that affect them, *see* Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 5, 2009) (entitled Consultation and Coordination with Indian Tribal Governments), agencies may only consult with tribes on regulations or regarding broad issue areas; they have not always consulted with tribes on every minor change, and they are not required to follow the input received in a consultation. *See, e.g., Policy on Consultation with Indian Tribes*, DEPT. INTERIOR (last visited Feb. 1, 2016), <https://www.doi.gov/tribes/Tribal-Consultation-Policy>. This Article does not address the question whether any action described *should* have been subject to public notice-and-comment requirements, or whether tribes *should* have been consulted directly about any change in specific tribal consultation sessions. *See* ROADMAP, *supra* note 2, at 85 (“Grants [available to tribal justice systems] reflect the federal government’s ideas about what kinds of investments and programs make sense in Tribal communities.”).

293. *See generally* HOUS. ASSISTANCE COUNCIL, HOUSING ON NATIVE AMERICAN LANDS (2013) (describing reservations as rural communities with high rates of poverty and unemployment).

294. *See supra* notes 20–23 and accompanying text (describing the death of community infrastructure and qualified professionals); *see also* ENDING VIOLENCE, *supra* note 5, at 112 (describing the lack of “supporting service delivery system,” lack of a tax base to fund juvenile justice infrastructure, and “lack of training in best practices”).

295. ENDING VIOLENCE, *supra* note 5, at 112; *see* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 771 (2004); Robert A. Williams, *Small Steps on the Long Road to Self-Sufficiency for Indian Nations, The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 385 (1985); *see also* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (observing that tribal business operations are critical to tribal sovereignty because, while states can raise revenue through taxation, tribes face “insuperable” barriers to doing so).

ing for tribal governments, plus amendments to some federal laws to ensure that tribes are eligible for a full range of funding.

Simply increasing funding, however, is not enough. Grants available for juvenile justice are often targeted for specific uses<sup>296</sup> or are time-limited.<sup>297</sup> In this funding landscape, tribes must make policy decisions that follow the changing winds of federal preferences, and they cannot be sure that the funding for any program will be available in the next grant cycle. Even formula funds cannot necessarily be reprogrammed across agencies or between budget categories. For example, a tribe is not necessarily free to move federal funding from its corrections budget to alternative and early intervention programs, or substance-abuse and mental-health treatment because funding for each type of program comes from a different agency or budget category within that agency.<sup>298</sup>

### 1. *Tribal Jurisdiction as an Afterthought*

Although tribes retain jurisdiction over a broad range of juvenile-delinquency matters, the existence of overlapping federal and state jurisdiction without any requirement of cooperation with tribes significantly undermines tribal jurisdiction. As discussed in Part II, federal and state jurisdiction over juvenile justice matters affecting Native youth in Indian country are remnants of rejected federal policies that sought to dismantle tribal institutions and assimilate Native people. At the most basic level, continued federal and state jurisdiction over the internal affairs of tribes is incompatible with self-determination policy and modern judicial interpretations of tribal sovereignty.

Yet, federal and state jurisdiction are by now well established in Indian country, and tribal justice systems have in some cases evolved

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296. For example, many of the juvenile incarceration facilities currently operated by tribes were built using funding from the Department of Justice's Correctional Facilities on Tribal Lands ("CFTL") grant program. From 1999 until 2009, the CFTL program provided funding only for construction of and upgrades to locked tribal facilities, meaning that a tribe could not access any of this funding for juvenile justice unless it planned to invest in incarceration. After 2009, the program was reauthorized and renamed the Correctional Systems and Correctional Alternatives on Tribal Lands program. Grants can now be used to fund planning, construction, and upgrades for multi-purpose justice facilities and alternative facilities. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF INTERIOR, *supra* note 228, at 23.

297. The Department of Justice's Tribal Youth Program, the primary source of DOJ funding for juvenile diversion and early intervention services, provides grants that expire after three years. Kay McKinney, *OJJDP's Tribal Youth Initiatives*, JUV. JUST. BULL. (U.S. Dep't of Justice, Washington, D.C.), May 2003, at 3.

298. ASS'N ON AM. INDIAN AFFAIRS, *FEDERAL FUNDING FOR TRIBAL DETENTION FACILITIES: SOURCES OF FUNDING AND LIMITATIONS ON ITS USE* (2014).

in reliance on them. While nearly all tribes would likely welcome greater control over the vision and administration of juvenile justice in their territories, it is not at all clear that all (or even most) tribes would welcome sudden and complete removal of federal and state authority.<sup>299</sup> At a minimum, tribes rely on other governments to prosecute and punish very serious crimes that may call for longer prison sentences than tribes are permitted to impose under the Indian Civil Rights Act.

The problem is not the existence of federal and state jurisdiction over Indian country juvenile justice; rather, it is the fact that tribal governments have been treated as afterthoughts that exist only to fill the gaps left by jurisdictional limitations on or under-enforcement by these other governments. This balance must be recalibrated in order for tribes to be able to effectively reform their juvenile systems. Although the Law and Order Commission presents several options for changes that would restore primary authority to tribal governments, simply requiring that federal and state authorities consult with tribes and defer to concurrent tribal jurisdiction when it has been exercised would recognize tribes as the primary local sovereigns and would more effectively distribute resources by reserving federal and state jurisdiction for those cases that tribes cannot or do not wish to handle.

## 2. *Lack of Tribal Authority over Tribal Systems*

The federal government, through the Bureau of Indian Affairs, provides law enforcement services in Indian country. This means that the BIA funds, and in some cases directly operates, reservation criminal justice systems to a degree that far exceeds the role of federal funding in state and local systems.<sup>300</sup> In the default arrangement, the Bureau pays for the operation of, and directly operates, the major components of a criminal justice system for both juveniles and adults including courts, police, jails, and prisons.<sup>301</sup> Tribes have the option to administer these programs themselves, in which case the federal fund-

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299. *Accord* ROADMAP, *supra* note 2, at 25 (recommending that tribes be able to opt out of federal or state jurisdiction but noting that “[t]he Commission does not envision that every Tribe with the opportunity to choose which criminal jurisdiction arrangements will govern its territory will choose to operate a system entirely on its own” and various reasons a tribe might prefer to collaborate with other governments).

300. *See* ROADMAP, *supra* note 2, at 82–85 (describing the central role of federal funding in tribal justice systems).

301. *See* Darren Cruzan, *Working with Tribal Partners to Reduce Crime and Recidivism on American Indian Reservations*, 81 POLICE CHIEF 20–21 (2014) (stating that 43 out of 208 law enforcement programs are “direct service”). Cruzan refers here to the number of tribes with police departments that are directly operated by the Bureau of Indian Affairs. The number of direct-service court or corrections programs may be

ing is passed through to the tribe via a self-determination contract, usually on a program-by-program basis.<sup>302</sup>

Alternatively, tribes can operate their programs under self-governance compacts, in which tribes take responsibility for entire categories of tribal programs and receive combined streams of funding that can more easily be redistributed.<sup>303</sup> Finally, some tribes self-fund their criminal justice systems using revenue generated from economic development or taxation.<sup>304</sup> In general, the degree of tribal autonomy tracks the order of options described here, with direct-services tribes having the least autonomy, contracting tribes having more, compacting tribes having even more, and self-funding tribes having the most. However, many tribes use a combination of these approaches, supplementing federal money with tribal money or operating some programs through a contract, but leaving others to be administered directly by the BIA.

In addition, many tribes rely on competitive grants from the Department of Justice (“DOJ”) to run particular programs or build new facilities. For example, facilities construction funding typically comes from the DOJ,<sup>305</sup> often through federal grants for specific facilities, while money for operation and maintenance of newly constructed fa-

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different, and a particular tribe may rely on a mix of direct-service and contract/compact arrangements for different components of its justice system.

302. The Indian Self-Determination and Education Assistance Act directs agencies to enter into contracts, at a tribe’s request, enabling the tribe to “plan, conduct, and administer” any program that the agency is authorized to administer for the benefit of Indians. 25 U.S.C. § 450f (2014). That law specifically provides that “[t]he amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract.” § 450j-1; *see also* Cruzan, *supra* note 301 (stating that 165 tribes operate their own law-enforcement programs pursuant to contracts or compacts).

303. Amendments to the ISDEAA require the Secretary of the Interior to enter into funding agreements with selected tribes that “authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior through the Bureau of Indian Affairs.” § 458cc. For a detailed discussion of the difference between self-determination contracts and self-governance compacts, and barriers to both, see generally Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1 (2015).

304. *See, e.g.*, U.S. DEP’T OF JUSTICE & U.S. DEP’T OF INTERIOR, *supra* note 228, at 23 (“A small number of Indian country jails are operated strictly by tribes without BIA fiscal support.”).

305. *See id.* (describing DOJ construction funding).

cilities comes from the BIA.<sup>306</sup> Tribes therefore must adhere to the requirements of two separate agencies to actually build and open correctional facilities. In order to receive a construction grant, tribes must meet DOJ grant requirements. Once a facility is built, the BIA must agree to add the facility to its inventory, which means the tribe must comply with the BIA's specific requirements.<sup>307</sup> Further complicating the picture, education, health, and mental-health funding—all of which may be used to fund ancillary programs that make up part of a tribe's juvenile system—are administered by other federal agencies.<sup>308</sup>

Federal agency rules influence tribal policymaking at many levels. Grants may be available to build only a particular type of facility. Agencies may require that all police or correctional officers receive a particular type of training before they can receive federal funding. They may link tribes with technical assistance providers that support a particular type of juvenile justice system. A tribe's vision of its juvenile justice system is filtered through these layers of federal policy and may emerge looking very different. But because many of these policies exist at the sub-regulatory level, their impact can be difficult to trace. Some policies may be the result of a collection of rules and decisions, rather than a guiding principle, and those rules may change with each administration or even more frequently.

Because the BIA disburses most of the ongoing funding, with the DOJ providing competitive grants for construction and specific programs, the Bureau has historically exerted the most influence over law-enforcement and justice policy in Indian country. This has been a recurrent issue for tribes, and several reports have criticized the Bu-

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306. *Id.* at 23–24 (describing BIA funding for operations, maintenance, staffing, and facility repair).

307. *See ROADMAP, supra* note 2, at 87 (noting a recurring scenario in which facilities constructed with DOJ money could not be staffed or opened because they had not been added to the BIA's inventory).

308. Education is administered by the Department of the Interior's Bureau of Indian Education. Health-care services are administered by the Indian Health Service within the Department of Health and Human Services ("DHHS"), and grants for particular health programs may be administered by other DHHS agencies, such as the Substance Abuse and Mental Health Services Administration. *See infra* notes 312–14. Juvenile incarceration facilities provide one illustration of how coordination between different agencies is essential to tribal justice systems: the DOJ provides funding to build the facilities; the BIA provides funding for operation, maintenance, and staffing; education of incarcerated youth is the responsibility of the Bureau of Indian Education; medical care is the responsibility of the Indian Health Service; and counseling or substance-abuse treatment programs may be funded by grants from SAMSHA and the DOJ's Office of Juvenile Justice and Delinquency Prevention, perhaps supplemented by private grants or assistance from state and local governments. *See U.S. DEP'T OF JUSTICE & U.S. DEP'T OF INTERIOR, supra* note 228, at 23–24.

reau's oversight, data collection, and policy priorities regarding juvenile and criminal justice.<sup>309</sup>

Recognizing the difficulties tribes have faced in trying to navigate two separate federal agencies, the Law and Order Commission recommends centralizing federal authority over Indian country justice in a single agency, and specifically recommends that the agency be the Department of Justice.<sup>310</sup> This recommendation follows the implementation of the Tribal Law and Order Act, which mandated greater inter-agency cooperation between the BIA and the DOJ.<sup>311</sup>

The Commission's recommendation does not address the essential roles of other agencies, such as the Indian Health Service and the Substance Abuse and Mental Health Services Administration, in funding and administering juvenile justice in Indian country. Moreover, while centralizing authority in a single agency would undoubtedly improve matters, it does not address the fundamental problem that tribes are forced to build their systems in response to federal policy when the agencies should instead be carrying out tribes' policy visions.

### 3. *Lack of Flexible Funding*

As described in the previous Section the core elements of tribal juvenile justice systems (police, buildings, jails, correctional facilities, and some youth intervention programs) are funded primarily by a combination of formula funds administered by the Bureau of Indian Affairs and targeted grants administered by the Department of Justice. A well-functioning juvenile justice system, however, would provide adequate health care and education to youth under its jurisdiction and would incorporate a network of outpatient and inpatient treatment options for mental illness and addiction. Funding for each of these pro-

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309. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., BUREAU OF INDIAN AFFAIRS' DETENTION FACILITIES 1 (2011) ("We could not determine how BIA spent the increased funding it received because in fiscal years 2005 through 2010. . . . The bureau does not have a financial management system that identifies, accumulates, and reports on how funds are spent agency-wide by activity or cost category.").

310. ROADMAP, *supra* note 2, at 82–91.

311. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified in scattered sections of 25 U.S.C.). For example, the TLOA required the BIA and the DOJ to work together, in consultation with tribes, to create a long-term plan for detention and alternatives to incarceration. § 211(B) (codified as amended at 25 U.S.C. § 2802 (2014)); *see also* DEP'T OF JUSTICE & U.S. DEP'T OF INTERIOR, *supra* note 228, at 2. It also required the BIA, the DOJ, and the DHHS to work together to address alcohol and substance abuse in Indian country. *See* § 2802; U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., INDIAN ALCOHOL AND SUBSTANCE ABUSE MEMORANDUM OF AGREEMENT 2 (2011). The DOJ, however, lacks the Bureau's knowledge of tribal government operations and experience with self-determination and self-governance compacts.

grams is administered or funded by a separate federal agency: tribal health care is funded by the Indian Health Service and the Centers for Medicare and Medicaid Services, both within the Department of Health and Human Services;<sup>312</sup> grants for addiction and mental health treatment are administered by the Substance Abuse and Mental Health Administration, also within the Department of Health and Human Services;<sup>313</sup> and education services are administered by the Bureau of Indian Education, an agency within the Department of the Interior but separate from the Bureau of Indian Affairs.<sup>314</sup>

The most obvious obstacle that tribes face is the overall lack of funding. Both the Law and Order Commission and the Attorney General's Task Force recognize that tribes are handicapped by the low level of funding available to tribal governments to fund juvenile justice systems.<sup>315</sup> The lack of funding is a problem of both authorization and appropriation. Tribes lack direct access to some of the main sources of federal money, particularly formula grants, that states use to fund their juvenile justice systems. Even where tribes are authorized to access funds, or where funds are specifically available to fund tribal programs, the amounts appropriated for both Indian country and juvenile justice are consistently low.<sup>316</sup> Increased funding is an essential ingredient for improved tribal juvenile justice systems, and this will

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312. The IHS is responsible for all hospitals and health facilities, for paying via contract for Indian people to receive health care elsewhere if necessary, and for any outpatient services connected to its hospitals and health facilities. INDIAN HEALTH SERV., INDIAN HEALTH MANUAL § 1-3.3 (2016). Tribes may also enter into contracts or compacts to administer IHS programs. *See supra* notes 76–80 and accompanying text (describing self-determination contracts and self-governance compacts between tribes and the Department of the Interior). Many tribal members are eligible for Medicaid and Medicare, and IHS and tribal health programs may bill these programs, which are administered by the Centers for Medicare and Medicaid Services, for covered services. *See* CTRS. FOR MEDICARE & MEDICAID, TRIBAL CONSULTATION POLICY 3 (2011).

313. *See generally* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., SAMHSA GRANTS FUNDING TO TRIBES (2015).

314. *See* 25 C.F.R. § 32.3 (2015); *The Bureau of Indian Education (BIE)*, U.S. DEP'T INTERIOR, <http://www.bia.gov/WhatWeDo/ServiceOverview/IndianEducation/> (last updated Feb. 23, 2016).

315. ROADMAP, *supra* note 2, at 161–63; ENDING VIOLENCE, *supra* note 5, at 115.

316. *See generally* U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY (2003) (documenting the persistent under-funding of tribal programs); Gary Gately, *Federal Juvenile Justice Funding Declines Precipitously*, *Juvenile Justice Information Exchange*, JUV. JUST. INFO. EXCH. (Feb. 12, 2015), <http://jjie.org/federal-juvenile-justice-funding-declines-precipitously/> (noting that federal spending on juvenile justice as of early 2015 was half of what it was in 2002). While the Indian Affairs budget has increased in recent years, under-funding remains a persistent problem. *See supra* note 315.

likely require amending some laws to allow tribes to receive funds as well as allowing sufficient appropriations for tribal programs.

More money alone will make little difference, however, if funding is administered in the same manner that federal funds are currently managed. The Bureau of Indian Affairs provides three important categories of funding related to juvenile justice—facility operation and maintenance, correctional staff, and program funding.<sup>317</sup> Operation and maintenance funding refers to what is needed to keep a building open and running once it has been constructed, including utilities and some repairs and upgrades. Staff funding covers the salaries and benefits for those people working in juvenile facilities. Program funding is a term I use to describe the money provided by the Bureau to support the programs themselves, including courts, probation, intervention, treatment, and in-facility programs. BIA funds are typically distributed according to a formula, which means fewer constraints on the use of funds. However, the Bureau does have limits on whether funding from different categories can be reprogrammed into other categories. Because detention funding falls under a different category than non-detention program funding, a tribe that wishes to reduce its use of incarceration is not necessarily free to use any savings to fund alternatives to incarceration.<sup>318</sup>

In general, the Department of Justice has provided grants for facility construction and separate competitive grants for certain programming affecting juveniles. Department policies and limits in authorizing statutes therefore determine the facility standards that must be met and the types of programming that will receive grant support, and these may vary according to congressional or executive priorities. The types of projects funded by DOJ grants, and the particular requirements for each grant, vary with each administration. For example, until 2009, facility construction grants were only available for incarceration facilities and could not be used to fund mixed-use justice facilities or facilities to house alternatives to incarceration.<sup>319</sup> A

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317. ASS'N ON AM. INDIAN AFFAIRS, *supra* note 298.

318. *Id.*

319. The American Recovery and Reinvestment Act of 2009 authorized \$225 million in new funding for Indian country facility construction. In addition to construction and renovation of correctional facilities, this new funding could be used for multi-purpose justice centers or alternative sentencing facilities. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE AWARD PROCESS FOR THE BUREAU OF JUSTICE ASSISTANCE AMERICAN RECOVERY AND REINVESTMENT ACT CORRECTIONAL FACILITIES ON TRIBAL LANDS GRANT PROGRAM 1, 12 (2010) [hereinafter REVIEW OF THE AWARD PROCESS] (describing categories of funding authorized by the ARRA and noting that pre-2009 funding could be used only for planning and renovation of correctional facilities); *Overview of Correctional Facilities on Tribal Lands Grants*, U.S.

tribe could obtain a grant from the DOJ to build a jail, but not for a building that would house both a jail and a courtroom.

The 2009 change in allowable uses for federal money impacted the character of tribal justice systems. The Navajo Nation received an award in 2008 to “upgrade and expand the security system and to extend the electronic fence and security lights” around its adult incarceration facility in Tuba City. In 2009, the Nation was awarded \$35 million to build a new multi-purpose justice center. The old adult detention facility was demolished, and federal officials allowed the Nation to repurpose its 2008 money to support temporary jail housing in order to support construction of the new center.<sup>320</sup> Similarly, the Chipewewa Cree Tribe received funding in 2008 to “reconfigure [the Rocky Boy Detention Facility] to provide an appropriate, adequate, and secure detention space.” In 2009, the tribe received \$12 million under the new program to build a multi-purpose justice center. The tribe planned to relocate its detention program into the new facility and repurpose the old building “for an alternative criminal justice purpose.”<sup>321</sup>

Bifurcated agency authority has meant that frequent changes in the policies of either agency can affect the viability and character of an entire project. When the two agencies embarked on a joint construction initiative in 1998, during which the DOJ funded thirty-five new facilities,<sup>322</sup> the BIA’s policies permitted tribes to run a range of facility types, including halfway houses and treatment facilities, so some tribes planned and began to build juvenile facilities geared toward holding low-level, nonviolent offenders and focused on treatment.<sup>323</sup> By the time construction on these facilities was completed,

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DEP’T JUST. BUREAU JUST. ASSISTANCE, [https://www.bja.gov/Programs/Tribal\\_corrections/index.html](https://www.bja.gov/Programs/Tribal_corrections/index.html) (last visited Feb. 1, 2016) (showing only correctional facilities funded before fiscal year 2009 and both correctional and mixed-use facilities funded in subsequent years); U.S. DEP’T OF JUSTICE & U.S. DEP’T OF INTERIOR, *supra* note 228, at 23.

320. REVIEW OF THE AWARD PROCESS, *supra* note 319, at 14–15.

321. *Id.* at 16–17.

322. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF INTERIOR, *supra* note 228, at 23 (stating that the DOJ funded the construction of thirty-five new facilities and provided thirty-nine grants for renovation or completion of construction projects under the Correctional Facilities on Tribal Lands/Correctional Systems and Correctional Alternatives on Tribal Lands programs).

323. Conversation with Official from Bureau of Indian Affairs, Office of Law Enforcement Servs. (2008). The Office of Law Enforcement Services was later renamed the Office of Justice Services. This statement reflects the policy communicated to me during a conversation with a high-ranking BIA official. To protect the privacy of those individuals with whom I met, I have provided as many details as possible about the conversations without revealing these individuals’ identities.

however, leadership in the BIA's Office of Justice Services had changed, and the policy had changed, too. The BIA insisted that all the juvenile facilities run by the Bureau, at least under a direct services arrangement, be built to the highest security standards.<sup>324</sup>

Requiring that all facilities meet high security standards could have been a strategy to remedy security concerns.<sup>325</sup> Building high-security facilities can offset low staffing levels because architectural features like locks, glass, and cameras mean less reliance on direct visual surveillance by staff. However, this policy change also reflected the Bureau's new regionalization strategy for juvenile justice.<sup>326</sup> Enforcing a common security standard would enable the Bureau to accommodate the most violent offenders in any facility, which means it could house violent juvenile offenders from other reservations as needed in any newly constructed facility. The BIA also took the position that treatment services, including services for detained youth, were under the jurisdiction of the Indian Health Service, and therefore could not be funded by Bureau money.<sup>327</sup>

Rolling back federal and state authority and strengthening tribal jurisdiction, even if supported by a commitment of financial resources, can have only a limited effect if tribal juvenile justice systems remain subject to shifting federal priorities. Correcting this situation requires more delicate intervention than in other areas, where a simple change in federal law might suffice. It is, however, essential. For at least fifteen years, federal policies have imperceptibly shaped tribal priorities by pushing tribes to favor investments in large-scale, high-security juvenile detention facilities over other aspects of their justice systems.<sup>328</sup> This subtle shift has crippled tribes by concentrating limited financial resources at the most severe end of the disposition spectrum and leav-

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324. *Id.* During this period, several newly built juvenile facilities across Indian country sat empty because of disputes between tribes and the Bureau of Indian Affairs regarding juvenile detention facility standards. *See, e.g., The State of Facilities in Indian Country: Jails, Schools, and Health Facilities: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 106–10 (2008) (statement of Kyle Prior, Chairman, Shoshone Paiute Tribes of Duck Valley); Jordon Niedermeier, *Dreaming of Detention: Overcoming the Limits of Federal Funding on the Rocky Boy's Reservation*, 2014 NATIVE NEWS 3; Tom Robertson, *Red Lake Tribal Officials Frustrated by Dispute that Keeps Detention Center Empty, Unused*, MPRNEWS (Apr. 26, 2012), <http://www.mprnews.org/story/2012/04/26/red-lake-juvenile-center>.

325. *See* REVIEW OF THE AWARD PROCESS, *supra* note 319 (finding safety and security violations and poor staffing at juvenile facilities).

326. *Id.*; *see also* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF INTERIOR, *supra* note 228, at 27 (describing a regional approach to incarceration facility construction).

327. Conversation with Official from Bureau of Indian Affairs, Office of Law Enf't Servs. (2008); *see also supra* note 323.

328. *See generally* Rolnick, *Locked Up*, *supra* note 134.

ing them with few alternatives. If this cycle is not interrupted, tribal juvenile systems will continue to be driven by the need to fill these juvenile prisons with new offenders.

### B. Federal

Because of the unique jurisdictional structure that governs Indian country crime, Native juveniles may be prosecuted in federal court and remanded to federal custody for purely local offenses. More than half of the juveniles in federal custody are Native American.<sup>329</sup> Despite this, juveniles under federal jurisdiction encounter institutions whose primary mission has little to do with either Indian people or juvenile offenders, and that certainly are not calibrated to meet the specific needs of Native youth. Perhaps as a result of this absence of responsive or coherent policy, there is little information available about Native youth in the federal system, and the services and options available to them are sparse compared to those available to youth under state jurisdiction. Reforming the federal juvenile justice system for Native youth will require improvement of the governing statutes, regulations, and agency policies in order to specifically address the needs of Native youth, including greater transparency toward and responsiveness to tribes.

#### 1. An Accidental System

Although a network of federal enclave laws and specific federal criminal provisions provide for federal court jurisdiction over any juvenile who violates these laws, and although the Federal Juvenile Delinquency Act establishes special procedures for federal prosecution of juvenile offenders, there is officially no federal juvenile justice system.<sup>330</sup> Instead, the FJDA envisions federal juvenile jurisdiction as a

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329. From 1999 until 2008, Indian country juveniles made up between forty-three and sixty percent of all juveniles in the custody of the Bureau of Prisons, for an average of fifty-four percent. During this same period, Native juveniles made up only thirty-eight percent of all juveniles arrested for violations of federal law. ADAMS ET AL., *supra* note 259, at 31. This suggests that Native juveniles may be more likely than are other juveniles under federal jurisdiction to end up committed to secure facilities.

330. *See, e.g.*, ADAMS ET AL., *supra* note 259, at vi (“There is no federal juvenile justice system, and juveniles account for a very small proportion of all federal prosecutions handled by U.S. Attorneys across the country.”); BUREAU OF JUSTICE STATISTICS, JUVENILE DELINQUENTS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1997) (“Unlike State-level criminal justice systems, the Federal system does not have a separate juvenile justice component.”). Indeed, a 1997 article in *Federal Probation*, an administrative publication of the federal courts, began with the revelation that, in addition to the thousands of adults on probation in the federal system, “there are also

last ditch option when juveniles who violate federal laws cannot be turned over to state juvenile justice systems.<sup>331</sup> Even when juveniles are prosecuted in federal courts and remanded to federal custody, there are no federal facilities in which to house them. The Bureau of Prisons houses youth under its jurisdiction in rented beds in public and private juvenile facilities.<sup>332</sup> Scholars have raised questions about whether the federal government, lacking a general police power, can act as *parens patriae* to juveniles under federal jurisdiction in the same way that states can.<sup>333</sup> Without this power, a primary justification for a separate juvenile justice system is missing, raising questions about whether the federal government can or should establish such a separate system.

Although the juvenile justice movement described in Part I was national in character, most of the advocacy took place on the state level because most children were coming under the jurisdiction of state criminal courts. By 1920, forty-six states had passed laws establishing separate juvenile court systems, and by the late 1920s, only the federal government lacked specific provisions for juvenile offenders.<sup>334</sup>

The reformers succeeded in making the case that juveniles in the federal system should not be treated as adults while their state counterparts were processed through a separate system, but there was some disagreement as to how to make this happen in practice.<sup>335</sup> In 1932, Congress passed the first law that was designed to address juvenile offenders in the federal system.<sup>336</sup> That law provided that youth who violated federal laws were to be transferred to the appropriate state

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338 juvenile offenders under federal supervision nationally.” Staff of the U.S. Prob./Pretrial Servs. Office, Dist. of S.D., *Federal Juvenile Corrections in South Dakota*, 61 FED. PROB. 38, 38 (1997). That the general public might not know this is understandable, but that the readers of *Federal Probation* needed to be reminded of the existence of juvenile offenders under federal jurisdiction almost seventy years after passage of the Federal Juvenile Delinquency Act provides a distressing reminder of the invisibility of the federal juvenile justice system.

331. 18 U.S.C. § 5032 (2014); see also ADAMS ET AL., *supra* note 259, at 5 (stating that the only bases for federal jurisdiction over juveniles involve states’ inability or refusal to assume jurisdiction, or the substantial federal interest involved in some violent or drug-related offenses).

332. ADAMS ET AL., *supra* note 259, at 8–9.

333. David S. Tanenhaus, Prof., Univ. of Nev., Las Vegas, Address to the Law and Society Association: Can the Nation Be a Parent? Delinquency, Federalism, and the Limits of Progressive Juvenile Justice (June 5, 2005) (transcript on file with author).

334. David S. Tanenhaus, *The Elusive Juvenile Court: Its Origins, Practices, and Re-Inventions*, in THE OXFORD HANDBOOK ON JUVENILE CRIME AND JUSTICE 419, 427–28 (Barry C. Feld & Donna M. Bishop eds., 2012).

335. Tanenhaus, *supra* note 333, at 9.

336. Act of June 11, 1932, ch. 243, 47 Stat. 301; see also Tanenhaus, *supra* note 334, at 428.

system whenever possible.<sup>337</sup> In other words, it dealt with the problem of juveniles under federal jurisdiction by trying to move as many of them as possible out of the federal system. Those who remained, however—including Indians—continued to be prosecuted in adult justice systems.<sup>338</sup>

In practice, only a small percentage of young offenders were actually transferred to state courts, so in 1938 Congress passed the precursor to the Federal Juvenile Delinquency Act. The Act provided for the federal prosecution of young offenders in proceedings that resembled those in state juvenile courts (fewer procedural guarantees, less formality, more judicial discretion), but still took place in the same federal courts in which adults were prosecuted.<sup>339</sup> The law was intended to apply only to juveniles who were not transferred to state jurisdiction under the earlier law, and this general structure (preference for state jurisdiction with federal juvenile procedures for those that remained in the federal system) also characterizes the current version of the FJDA.<sup>340</sup>

The history of juvenile justice is in many ways a history of state-level reforms that sometimes trickled up to the federal system. Indeed, efforts to reform the federal system involved shifting juveniles back into the more fully developed state systems.<sup>341</sup> The effect of the focus on state systems is twofold. First, large-scale policy shifts tend to hit the federal system last, as demonstrated by the late introduction of the juvenile court model into the federal system. Only after pursuing reforms successfully at the state level do reformers seem to remember that youth under federal jurisdiction have not benefitted from the reforms. Second, despite the presence of juveniles under federal jurisdiction, there is a reluctance to see the federal courts as comprising a separate “system.”<sup>342</sup> This translates into very little effort spent track-

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337. Act of June 11, 1932; *see also* Tanenhaus, *supra* note 333, at 8.

338. Tanenhaus, *supra* note 333, at 9. Tanenhaus notes that although special juvenile procedures were not established in the federal system until 1938, the courts did sometimes rely on “extra-legal” means in order to process juveniles in a more flexible and less punitive manner. Tanenhaus, *supra* note 334, at 428.

339. Tanenhaus, *supra* note 333, at 9–10.

340. *See* U.S. DEP’T OF JUSTICE, *supra* note 247, § 116 (“The intent of federal laws concerning juveniles are to help ensure that state and local authorities would deal with juvenile offenders whenever possible, keeping juveniles away from the less appropriate federal channels since Congress’ desire to channel juveniles into state and local treatment programs is clearly intended in the legislative history of [the FJDA].”).

341. *See supra* notes 336–40 and accompanying text.

342. *Accord* ADAMS ET AL., *supra* note 259, at vi (stating that “[t]here is no federal juvenile justice system”).

ing or analyzing the juveniles coming under federal jurisdiction or the types of interventions best suited for those youth.

More to the point, there is no federal body charged with overseeing a separate juvenile system. The federal Office of Juvenile Justice and Delinquency Prevention oversees grant funding disbursed to the states and guides state-level policies through conditions on those grants.<sup>343</sup> Youth in the federal system are prosecuted by United States Attorneys. Prior to trial or sentencing, they are in the custody of the United States Marshals Service and, upon disposition, they are remanded to the custody of the Bureau of Prisons. Because most of the offenders handled by these three agencies are adults,<sup>344</sup> the agency-level policy is focused primarily on adult offenders, and the officials are more likely to have expertise in adult crime and adult detention. The Offices of the United States Attorneys do not have juvenile divisions.<sup>345</sup> The Bureau of Prisons does not have a juvenile division, nor does it have any designated juvenile facilities; juveniles are instead housed in state, local, and private facilities through corrections contracts.<sup>346</sup>

## 2. *Invisible Children*

Even without a formal system, about two hundred juvenile cases are adjudicated in federal courts each year.<sup>347</sup> The largest subset of these youths are Native Americans who come into the court by virtue of the federal government's jurisdiction over offenses that occur in

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343. See *Vision and Mission*, OFF. JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/about/missionstatement.html> (last visited Feb. 1, 2016) (“OJJDP supports states and communities in their efforts to develop and implement effective and coordinated prevention and intervention programs and to improve the juvenile justice system so that it protects public safety, holds justice-involved youth appropriately accountable, and provides treatment and rehabilitative services tailored to the needs of juveniles and their families.”).

344. ADAMS ET AL., *supra* note 259, at vi (observing that “juveniles account for a very small proportion of all federal prosecutions handled by U.S. Attorneys across the country”).

345. U.S. DEP'T OF JUSTICE, OFFICES OF THE U.S. ATTORNEYS, U.S. ATTORNEYS' MANUAL § 9-8.001 (2009).

346. See ADAMS ET AL., *supra* note 259, at 9; see also *Inmate Legal Matters*, FED. BUREAU PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/legal\\_matters.jsp](https://www.bop.gov/inmates/custody_and_care/legal_matters.jsp) (last visited Feb. 1, 2016). Although the BOP could in theory contract with the BIA or tribal facilities, the available information suggests that this has never been done, see ADAMS ET AL., *supra* note 259, at 9, 65–66 (describing the placement of Native youth in BOP custody without making any mention of contracts with tribal facilities), and that most contract facilities are run by private companies. See U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE DEPARTMENT OF JUSTICE'S RELIANCE ON PRIVATE CONTRACTORS FOR PRISON SERVICES 3–4 (2001).

347. ADAMS ET AL., *supra* note 259, at 31.

Indian country. In the past decade, about half of the juveniles under federal jurisdiction (at any stage) were Native American, as were more than half of the juveniles in Bureau of Prisons custody.<sup>348</sup> The federal juvenile justice system exists as a practical matter, and it is largely a system for reservation Indians.

Despite the statistical reality that the federal juvenile justice system, such as it is, is populated mainly by Native American youth, changes in law and policy that affect the federal juvenile system have not been driven by a focus on Native juvenile offenders. Instead, the laws seem to be constructed to address the offenses of an imagined non-Native offender. The first statutes that were passed to address the situation of juveniles under federal jurisdiction did not even mention Native youth.<sup>349</sup> Early federal juvenile justice legislation sought to address the lack of juvenile justice infrastructure in the federal system by transferring youth back to state jurisdiction wherever possible,<sup>350</sup> a preference still embodied in the FJDA.<sup>351</sup>

The current version of the Federal Juvenile Delinquency Act requires that, before proceeding in federal court, federal prosecutors first certify that the juvenile's home state is unable or unwilling to accept jurisdiction over the juvenile.<sup>352</sup> Congress could have created a parallel option for Native youth by remanding their cases to the custody of tribal governments where feasible, or at least by deferring to tribal courts where both sovereigns chose to exert jurisdiction, but the FJDA does not contain a provision to this effect. Instead, it bypasses tribal governments entirely in the certification process, viewing Indian youth only as youth over which no state has jurisdiction. Similarly, Title XIV of the Violent Crime Control and Law Enforcement Act of 1994, which lowered the age at which juveniles under federal jurisdiction can be transferred to adult court for certain offenses, includes lengthy

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348. *Id.*

349. Act of June 11, 1932, ch. 243, 47 Stat. 301; Act to Provide for the Care and Treatment of Juvenile Delinquents, Pub. L. No. 75-666, 52 Stat. 764 (1938).

350. *See supra* notes 334–40 and accompanying text.

351. 18 U.S.C. § 5032 (2014); *see also* CHARLES DOYLE, CONG. RESEARCH SERV., RL30822, JUVENILE DELINQUENTS AND FEDERAL CRIMINAL LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 1 (2004) (“Juvenile offenders of federal criminal law are primarily the responsibility of state juvenile court authorities. The Federal Juvenile Delinquency Act permits federal delinquency proceedings where state courts cannot or will not accept jurisdiction. . . .”).

352. § 5032. It does not require a similar finding of a lack of tribal jurisdiction. *See id.*

provisions designed to address criminal street gangs, but Native youth are only mentioned once, as an exception.<sup>353</sup>

Despite more than a century of federal jurisdiction over Native offenders, Native juveniles under federal jurisdiction languish in a space that is better defined as a jurisdictional accident than as a fully formed system. Even where the laws, policies, facilities, and personnel that impact juveniles under federal jurisdiction arguably make up a loosely defined “system,” the over-arching purposes of that system have little to do with Native youth. Instead, a population that has frequently constituted the majority of youths under federal jurisdiction appears as no more than an afterthought. Many changes to federal law have been driven by an image of a serious, violent offender who comes under federal jurisdiction by virtue of having committed a federally enumerated crime of violence or drug trafficking.<sup>354</sup> These laws may then disproportionately affect Native youth, who come under federal jurisdiction for committing what would otherwise be local offenses in a federal enclave.

By the end of the twentieth century, more than fifty years since the first laws were passed addressing the disposition of juveniles in the federal system, those who worked in the field were just beginning to make preliminary suggestions about how the federal system could better accommodate the Native offenders who made up the core of its population. For example, a 1999 article in *Federal Probation* argued that federal juvenile probation officers should recognize certain cultural and social realities of reservations and suggested that authorities consider relaxing certain rules and policies to accommodate these differences.<sup>355</sup> Specifically, the article suggested permitting youth with drug and alcohol issues to mix culturally specific remedies—such as a sweat lodge or sun dance ceremony—with traditional federal remedies such as Alcoholics Anonymous, and recommended that Native youth be allowed to attend funerals of extended family members (in view of the cultural significance of extended kin relationships).<sup>356</sup>

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353. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 140001–140008, 108 Stat. 1796, 2031.

354. For example, the Violent Crime Control and Law Enforcement Act of 1994 facilitated the transfer of more youth into adult court, and the change to the age of transfer eligibility applied only to juveniles charged with violent gun crimes or certain drug-related offenses. *See id.*; *see also supra* notes 74, 255 and accompanying text (noting that Indian country youth were exempted from this change but are subject to other transfer rules).

355. *See* Brenda Donelan, *The Unique Circumstances of Native American Juveniles Under Federal Supervision*, 63 FED. PROB. 69 (1999).

356. *Id.* at 68, 69.

The primary problem faced by juveniles in the federal system is that their cases are being adjudicated in courts that are designed neither for juveniles in general nor for Native juveniles in particular. One solution would be to remove all juveniles from federal jurisdiction, but this may not be feasible or even desirable for all tribes. Where tribes would prefer to adjudicate juveniles' cases in tribal courts, however, there is no apparent reason to permit federal prosecutors to override that choice by pursuing parallel federal prosecution against these tribes' wishes, and the law should be changed to require greater deference to tribes and a preference for tribal jurisdiction where it is desired. This would be consistent with the way the federal and state systems interact with respect to juveniles. For those juveniles who remain under federal authority, improving outcomes will mean increasing accountability and transparency between the federal agencies responsible for Indian country juvenile offenders and the tribal communities that are home to those youth, as well as expanding options for treatment and rehabilitation for youth held under federal authority.

### C. State

Where Native youth are subject to state jurisdiction for offenses committed in Indian country, they are at least part of a system designed specifically for juveniles. All states today administer separate juvenile justice systems. Although the approaches vary greatly and some may look functionally indistinguishable from the adult criminal justice systems, they are least premised on the idea that juveniles are a unique population.<sup>357</sup> Unlike their counterparts charged in federal court, Native youth charged in state courts are likely to encounter attorneys, judges, and probation officers with experience in juvenile matters. The state system may also offer a range of disposition options, including treatment and rehabilitation. On the other hand, the experiences of Native youth are determined by state policy, and many states continue to treat youth—particularly minority youth—quite harshly.<sup>358</sup>

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357. See *supra* Section I.A.2 (describing the evolution of a separate juvenile justice system).

358. ARYA & ROLNICK, *supra* note 15, at 20–24 (collecting examples of the disproportionate contact and confinement faced by Native youth in particular states). See generally JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL AND ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM (2008).

### 1. *State Jurisdiction Without Tribal Consent*

There is little to say in defense of state juvenile jurisdiction in Indian country because tribes in general have been so vocal in opposing the involuntary imposition of state jurisdiction pursuant to Public Law 280.<sup>359</sup> It seems clear at least that Congress should change the law to give tribes a say over whether juveniles should remain subject to state jurisdiction by providing for tribally initiated retrocession, and by requiring states to honor tribes' requests.<sup>360</sup> However, tribe-state dynamics have changed over time. As Matthew Fletcher has argued, some tribes and states have developed cooperative relationships that work well for them, suggesting that states may not always be the roadblocks to tribal success that they generally have been perceived to be.<sup>361</sup> For example, some reservations in Public Law 280 states directly abut major non-tribal urban areas. These tribes have had to work hand in hand with state, county, and local law enforcement officials for decades because of Public Law 280 and because of the checkerboard nature of the land. Some have developed good working relationships with non-tribal officials, and they may not favor federal jurisdiction over state jurisdiction if given the choice.

As a solution to problems of state jurisdiction, retrocession also has at least one overlooked potential consequence that matters for purposes of delinquency policy. A tribe may seek to replace state with federal jurisdiction because federal authorities may be more likely to provide responsive law enforcement services and funding to tribes if the tribes are not under state jurisdiction. However, the effect of this transfer would be to subject the population of Native offenders on the reservation to federal, rather than state, jurisdiction. Depending on the state, the application of federal criminal law may result in harsher consequences than does state criminal law.<sup>362</sup> For example, the Federal Sentencing Guidelines require longer minimum sentences than do

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359. See CHAMPAGNE & GOLDBERG, *supra* note 17, at 12.

360. In 2010, Congress amended the law to permit tribes in the six mandatory states to request reassumption of federal jurisdiction, which would exist concurrently with tribal and state jurisdiction. See 18 U.S.C. § 1162(d) (2014); 25 U.S.C. § 1321(a)(2) (2014); see also *supra* note 274 and accompanying text. Two years later, Washington passed a state law permitting (but not requiring) the state to seek retrocession at the request of any tribe. See Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 951–56 (2012); M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 720 (2012). Federal law still does not require states to retrocede jurisdiction at a tribe's request.

361. Matthew Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2008).

362. ROADMAP, *supra* note 2, at 160.

some states.<sup>363</sup> Federal law includes a provision for felony murder, while not every state has a similar law.<sup>364</sup> Similarly, federal law may require that juveniles be prosecuted as adults in cases in which the state would not.<sup>365</sup> The risk of harsher consequences does not, of course, present a legal barrier to the reassumption of federal jurisdiction, nor does it necessarily mean that state jurisdiction is better. It is, however, an important policy consideration that should be weighed by tribes considering a request for federal jurisdiction.

## 2. *Lack of Tribal Consultation*

Where state systems fail Native children more spectacularly, though, is in their refusal to respect concurrent tribal authority and in their related failure to account for the specific needs of Native youth. Public Law 280 states are not required to consult with tribal governments on any matter related to Indian country law enforcement.<sup>366</sup> Although some states voluntarily communicate with tribes today,<sup>367</sup> they historically have chosen not to do so. Tribes subject to Public Law 280 are not usually invited to the table when a state makes large-scale juvenile justice policy decisions or determines how the state's financial resources will be allocated. Moreover, there is evidence that tribal officials who wish to be involved in particular cases are routinely brushed aside. One tribal official in Wisconsin, whose tribe operated a juvenile services division despite being subject to state jurisdiction, described concern for a young offender.<sup>368</sup> Tribal officials, who were familiar with this young man and had worked with him on many occasions, urged the state probation officer to recommend alcohol and drug treatment in a tribal setting.<sup>369</sup> The tribe offered its services as a com-

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363. *See, e.g.*, David B. Muhlhausen, Heritage Found., Testimony Before the U.S. Sentencing Commission: Theories of Punishment and Mandatory Minimum Sentences (May 27, 2010), <http://www.heritage.org/research/testimony/theories-of-punishment-and-mandatory-minimum-sentences>; *see also* ARYA & ROLNICK, *supra* note 15, at 25.

364. *See* United States v. Antelope, 430 U.S. 641, 649 (1977) (upholding the federal prosecution of a Native offender in Indian country, despite the differences in the federal and state approaches to felony murder, against a constitutional challenge).

365. *See supra* notes 255–58 and accompanying text (describing the FJDA's provisions for transfer to adult court).

366. *See supra* note 285 and accompanying text (discussing the lack of tribal consultation requirements in Public Law 280).

367. *See, e.g.*, CHAMPAGNE & GOLDBERG, *supra* note 17, at 142–63 (describing voluntary cooperative agreements between tribes and states under Public Law 280).

368. Conversation with Wisconsin Tribal Official (2008). While I participated in this conversation in person, the circumstances under which it occurred require that the tribal official's identity remain confidential. *See supra* note 323.

369. *Id.*

ponent of diversion.<sup>370</sup> State officials, however, determined that the young man should instead be placed in secure detention off the reservation.<sup>371</sup> The tribal official described feeling frustrated and powerless to help the young man.<sup>372</sup>

This kind of scenario is especially troubling because the most common refrain concerning Indian country juvenile justice is about the lack of resources. Here, two sovereigns had jurisdiction over a single offender. The tribe was willing to devote its resources to relieve the state of some of its financial burden, and the proposed outcome would have reduced the state's secure detention population. In the end, the state's decision to remove the young man made it impossible for the tribe to continue providing services, severing an important tie between child and tribe and undermining the tribe's decision to favor treatment over incarceration for its youth.

Even accepting the continued reality of state jurisdiction over Indian country youth, the manner in which states have exercised this jurisdiction has infringed upon, rather than supported, concurrent tribal authority. For Native youth who remain under state jurisdiction, it is critical to ensure that states consider tribes and Native youth both at the policy level and in individual cases.

States should be required to create formal avenues for tribal input and consultation on funding and policy decisions affecting Native youth. State juvenile justice officials should also be required to notify, consult with, and defer to tribal officials in individual cases involving youth from that tribe. At minimum, this should apply to cases arising in Indian country. Congress should consider, however, extending the notification requirement to all tribal youth whether or not their cases arise in Indian country.

#### IV. TOWARD REFORM

The problem of “juvenile justice in Indian country” is multi-layered, so the solutions must be as well. Reform requires (a) strengthening tribal authority and correspondingly dialing back federal and state authority whenever possible, and (b) making targeted changes to address the issues specific to each system. In this Part, I briefly describe particular legislative and policy solutions that would measurably improve certain aspects of the system.

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370. *Id.*

371. *Id.*

372. *Id.*

### A. *Increasing Tribal Control*

Amending federal law to recalibrate the balance of power between tribes and outside authorities is undoubtedly an important part of any reform effort. Tribes must be the first line of authority when it comes to local juvenile delinquency matters. Indian country youth should only be prosecuted in federal or state court when the tribe consents to such an arrangement and when the proceeding would not duplicate or undermine a tribal proceeding. Such an approach is consistent with the way that federal law treats states with regard to juvenile delinquency matters, and the importance of primary tribal authority is something that Congress has long recognized when it comes to child welfare.<sup>373</sup>

#### 1. *Amend the Federal Juvenile Delinquency Act*

For tribes subject to concurrent federal jurisdiction, the solution is remarkably simple: the Federal Juvenile Delinquency Act should be amended to require federal prosecutors to obtain a waiver of tribal jurisdiction before prosecuting a juvenile for an Indian country offense. Under current law, a federal prosecutor may not file charges against a juvenile in federal court unless the state certifies either that it does not have jurisdiction over the juvenile or that it does not have the resources to provide effective services. The statute should be amended to require that the federal prosecutor obtain a similar waiver from tribal officials for youth who fall under tribal, rather than state, jurisdiction.

The Commission report includes this recommendation, but complicates matters by suggesting it as a third option after more paradigm-shifting suggestions like allowing tribes to opt out of federal jurisdiction entirely.<sup>374</sup> Amending the FJDA would accomplish the desired

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373. Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (2014).

374. ROADMAP, *supra* note 2, at 159–61, 171–73. The Commission report covers all aspects of criminal justice, not simply juvenile justice, and the recommendation to permit tribes to opt out of federal jurisdiction entirely are drawn from other sections of the report. They are accompanied by recommendations that tribal criminal courts agree to provide full due process rights to defendants and that the federal government restore the full range of criminal jurisdiction to those courts (eliminating limits on sentencing and jurisdiction over non-Indians). *Id.* at 23. Because this Article is concerned with Native juveniles only, sentencing limits and jurisdiction over non-Indian people are not significant issues here. Juvenile jurisdiction is unique, however, in that federal prosecutors must follow a process set forth in the FJDA before taking jurisdiction over any juvenile case. 18 U.S.C. § 5032 (2014). Amending the Act to require that federal prosecutors defer to tribal officials in the same manner they defer to federal officials provides a simple solution to the jurisdictional web problem that is not applicable to adult criminal matters.

result—Native youth only prosecuted in federal court with the tribe’s consent—with minimal fanfare. It requires a relatively simple change to the existing statute, a change that would bring the FJDA in line with myriad other legal regimes in which tribes are treated the same as states.

## 2. *Amend Public Law 280*

For tribes subject to state jurisdiction, a clean legislative solution is harder to identify. Just as tribes subject to concurrent federal jurisdiction should be permitted to opt out of federal jurisdiction, tribes subject to concurrent state jurisdiction under Public Law 280 should be permitted to opt out as well.<sup>375</sup> The 2010 law permitting certain tribes to request federal reassumption of jurisdiction is an important tool of tribal control, but it does not permit tribes to reject state jurisdiction. Instead, it layers federal jurisdiction on top of tribal and state jurisdiction, an approach that may help with under-enforcement but will not likely help force states to consult with tribes.

Amending Public Law 280 to enable tribes to opt out of state jurisdiction is likely to be a politically contentious proposal. Furthermore, tribes that enjoy better working relationships with their states may choose to continue current jurisdictional arrangements. Absent a repeal of Public Law 280, states are likely to retain jurisdiction over juvenile delinquency matters in Indian country within their borders, so the way states exercise this jurisdiction will affect the lives of many Native youth. Where concurrent tribal/state jurisdiction continues, federal law must be amended to require those states to cooperate with tribes on matters affecting tribal youth.

## 3. *Amend the Juvenile Justice and Delinquency Prevention Act*

One possible legal tool would be an amendment to the federal Juvenile Justice and Delinquency Prevention Act (“JJJPA”), which conditions federal funding for juvenile justice programs on states’ adherence to certain requirements.<sup>376</sup> Congress could add a requirement that states—at least those with jurisdiction over Indian country, but

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375. *See supra* note 360 (discussing a Washington state law providing for tribally initiated retrocession).

376. Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 88 Stat. 5 (1975) (codified as amended at 42 U.S.C. §§ 5601–5792a (2014)). Although it does not mention the JJJPA specifically, the Task Force report recommends conditioning state funding on “meaningful and consensual consultation with tribes on the design, content, and operation of juvenile justice programs.” ENDING VIOLENCE, *supra* note 5, at 116.

perhaps all states—must create a formal avenue for tribal input and consultation on funding and policy decisions affecting Native youth. At a minimum, states should be required to engage in some consultation with tribal governments, include tribal representatives in their State Advisory Groups,<sup>377</sup> and report on funding provided to tribal governments. The JJDPa could also be amended to require states to pass a certain amount of funding through to tribal governments within their borders or, for those with Indian country jurisdiction, to allocate a portion of funding to Native youth programs.

#### 4. *Extend the Indian Child Welfare Act*

Congress should also require states to consult directly with tribal officials in each case arising in Indian country, or even require deference to tribal jurisdiction in the same manner as is mandated under the Indian Child Welfare Act.<sup>378</sup> Both the Law and Order Commission and the Attorney General’s Task Force recommend amending the Indian Child Welfare Act to require state juvenile justice agencies to provide tribes with notice, intervention, and transfer rights for every case that arises in Indian country.<sup>379</sup>

At a minimum, notice and transfer procedures should apply to youth who appear in state court for offenses that occurred in Indian country. It could also, however, extend to youth who come into the juvenile system for offenses committed outside Indian country, just as the ICWA currently applies to children who are not domiciled on the reservation.<sup>380</sup> New Mexico currently requires state courts to notify and consult with affected tribes when petitions involving tribal youth are filed in state court.<sup>381</sup> The National Indian Child Welfare Associa-

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377. 42 U.S.C. § 5633 (2014).

378. 25 U.S.C. § 1911(b) (2014).

379. ROADMAP, *supra* note 2, at 173; ENDING VIOLENCE, *supra* note 5, at 122–24. Congress could also require notice to tribes as a condition of state funding under the JJDPa.

380. § 1911(b). In contrast to the current approach to juvenile justice, the ICWA confirms that tribes have exclusive jurisdiction over children domiciled on the reservation. § 1911(a). Tribes affected by Public Law 280 have the option of reassuming exclusive jurisdiction over Indian country matters. § 1918. Because Public Law 280 did not grant states civil regulatory jurisdiction, and because it also did not extinguish tribal jurisdiction at all, there is an argument that this provision is unnecessary. *See* CAROLE GOLDBERG-AMBROSE & DUANE CHAMPAGNE, UCLA AM. INDIAN STUDIES CTR., A SECOND CENTURY OF DISHONOR: FEDERAL INEQUITIES AND CALIFORNIA TRIBES 47–59 (1996).

381. N.M. STAT. ANN. § 32A-2-5 (2015). The law provides that the juvenile probation and parole department has the “duty” to identify an Indian child who falls under its jurisdiction and “contact an Indian child’s tribe to consult and exchange information for the purpose of preparing a predisposition report when commitment or place-

tion and the Association on American Indian Affairs recently studied the implementation of that law, and their findings and recommendations for improvement should inform any federal notification law.<sup>382</sup>

*B. Improving Outcomes for Native Youth in Federal and State Systems*

Even with these reforms, it is likely that some Indian country youth will remain under federal or state jurisdiction for the foreseeable future, and additional efforts will be required to ensure that the unique needs of Native youth are met by those systems.

*1. Data Collection*

The first step in this process is to improve data collection. At the federal level, agencies must improve tracking of juveniles in the federal system to track data such as tribal affiliation, location of offense, charge, disposition, location of placement, and conditions of placement.<sup>383</sup> Federal data collection has improved significantly in recent years as a result of the Tribal Law and Order Act, and particularized data on tribal youth in the federal system will provide important baseline information for improvements to the federal system. States should also be required to collect and publish data about Native youth in their systems in a manner that distinguishes between Indian country and other Native youth and tracks their outcomes for purposes of assessing whether they face disproportionately harsh sanctions at any stage in the system.<sup>384</sup>

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ment of an Indian child is contemplated or has been ordered.” § 32A-2-5(B)(9). New Mexico law also provides that “cultural needs shall be considered in the dispositional judgment and reasonable access to cultural practices and traditional treatment shall be provided.” § 32A-2-19(C).

382. See N.M. CHILDREN, YOUTH & FAMILIES DEP’T, STATE-TRIBAL COLLABORATION ACT app. C (2015) (reproducing the final report by the National Indian Child Welfare Association and the Association on American Indian Affairs); *Tribal Notification Research Findings Shared with NM Partners and Constituents*, NAT’L INDIAN CHILD WELFARE ASS’N, <http://www.nicwa.org/newsletter/Tribal-Notification-Research-Findings-Shared-with-NM-Partners.asp> (last visited Feb. 1, 2016).

383. See ROADMAP, *supra* note 2, at 165 (recommending improved data collection requirements “[b]ecause Tribal communities deserve to know where their children are”).

384. This can be accomplished by amending the JJDP to require states to collect this data. As a condition of receiving federal funds under the JJDP, states agree to comply with certain core protection requirements for youth. 42 U.S.C. § 5633 (2014). To monitor and evaluate compliance with these core protections, states collect data to provide to the federal Office of Juvenile Justice and Delinquency Prevention. See U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, OJJDP

## 2. *Bureau of Prisons Policies*

For those youth who do remain in the custody of the Bureau of Prisons, policy changes should be made to encourage transparency and better meet the unique needs of Native youth. The Bureau should be required to consult with tribes to formulate policies specific to Native youth, adhere to those policies, and make information on offenses, outcomes, and policies available to the public. For example, the Bureau might consider contracting with tribal or BIA-run juvenile facilities to house Native youth whenever possible. Existing policies requiring that youths be housed as close as possible to their home communities could be more strongly enforced, and additional changes may be considered to support continued contact between the young person and his or her tribal community. Improving probation, reentry services, community-based options, alternatives to incarceration, and treatment for all juveniles in the federal system would also benefit Native youth.

## 3. *Federal Sentencing Guidelines*

Improving outcomes for Native youth in the federal system will require attention to how they are affected by the Federal Sentencing Guidelines. In general, juvenile sentences differ from adult sentences because the decision to incarcerate may be based on a need for rehabilitation or treatment, as opposed to a term-of-years punishment. Juvenile jurisdiction typically ends at age eighteen or twenty-one, so young offenders cannot necessarily be sentenced to long terms of incarceration. Confidentiality rules may also affect how prior juvenile adjudications are counted in terms of criminal history. Careful attention should be paid to how the Federal Sentencing Guidelines are applied to Native juveniles and whether their application leads to negative outcomes (for example, longer incarceration terms). The U.S. Sentencing Commission's Tribal Issues Advisory Group has appointed a subcommittee to study juvenile issues. The recommendations of this subcommittee should inform potential changes to federal law and policy.

### *C. Improving Outcomes for Native Youth in Tribal Systems*

Improving the reality of tribally run juvenile justice systems is partly a matter of tribal law. As described in Part II, tribes have a great deal of flexibility, as a matter of law, to determine how they would

like to address delinquency. The more difficult problem is how to ensure that federal agencies support tribes in their efforts to pursue innovations and improve their systems. Both the Law and Order Commission and the Attorney General's Task Force recognize the need for significant reforms in the relationships between tribal governments and the various federal agencies with which juvenile justice funding originates.<sup>385</sup>

### 1. *Promote Interagency Collaboration*

As the Law and Order Commission report and the Attorney General's Task Force report emphasize, the split in authority between the Bureau of Indian Affairs and the Department of Justice over tribal justice issues is cause for concern. The Commission report strongly favors the Department of Justice, while the Task Force report simply asks Congress to pick one.<sup>386</sup> Both reports make clear, however, that even recent improvements in interagency community and collaboration are not sufficient; a single agency should have primary authority for criminal justice issues. That agency would likely also have authority over juvenile justice, but juvenile justice involves unique concerns that may not lead to the same answer. For example, the Department of Justice may have greater expertise in the full range of criminal justice issues, but few DOJ divisions treat juvenile issues as distinct from those affecting adult criminals. Increasing the authority of a department with primary expertise in adult criminal justice policy could potentially result in Native juvenile offenders being treated too much like adult criminals.

Regardless of which agency takes the lead on Indian country juvenile justice funding, it must collaborate closely with the Department of Health and Human Services to ensure that juvenile justice is closely linked to treatment and that adequate funding is directed to mental health and substance abuse treatment, including both early intervention programs and inpatient facilities. If tribes are to be able to build juvenile justice systems with significant treatment components, DHHS

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385. ROADMAP, *supra* note 2, at 89–91 (recommending transferring all Indian country law enforcement authority to the Department of Justice, establishing an across-the-board tribal set-aside for all justice-related federal funding, and ending all grant-based funding to tribes in favor of flexible formula funds); ENDING VIOLENCE, *supra* note 5, at 114–17 (recommending an across-the-board ten-percent set-aside for tribes from all funding sources and that Congress direct the BIA and DOJ to determine which agency should have primary authority).

386. *See supra* note 385 (discussing the recommendations); *see also* notes 309–11 and accompanying text (discussing the pros and cons of each agency's administration of tribal justice funds).

must be as closely involved in juvenile justice as the BIA and the DOJ are now.

## 2. *Increase Access to Adequate and Flexible Funding*

Tribes need direct access to funding for juvenile courts, corrections, prevention, and related services. Under current law, tribes are directly eligible for funding under only three of the main funding streams that states use to support their juvenile justice systems.<sup>387</sup> Without direct eligibility, tribes are forced to apply through states for funding, which makes it more difficult to secure funding and may mean that the tribes will be asked to comply with additional state requirements. As described *supra* Section IV.A.3, pass-through funding can incentivize tribal-state cooperation. Ideally, however, tribes would receive federal funding directly for their programs, and states would consult with tribes regarding state programming that affects Native youth.

In addition to direct eligibility, the Task Force recommends that tribes receive a ten-percent set-aside under all Department of Justice grant programs, including juvenile justice.<sup>388</sup> Current law provides for only a one-percent tribal set-aside for grants under the Title II Delinquency Prevention Block Grant,<sup>389</sup> and no guaranteed set-aside under either Title V or the Juvenile Accountability Block Grant Program.<sup>390</sup> Since 1999, some juvenile justice funding has been earmarked for tribes during the appropriations process under the label of the Tribal Youth Program,<sup>391</sup> but because the funding is a creature of the appro-

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387. See § 5656 (Title II Juvenile Delinquency Prevention Block Grant); § 5783 (Title V Incentive Grants for Local Delinquency Programs); § 3796(e)(e)(1) (Juvenile Accountability Block Grants).

388. See *supra* note 385. The Commission recommends a minimum seven-percent set-aside. ROADMAP, *supra* note 2, at 91. This is consistent with the seven-percent set-aside for all justice programs that the Obama administration and the National Congress of American Indians requested in fiscal year 2016. See NAT'L CONG. OF AM. INDIANS, FISCAL YEAR 2016 BUDGET REQUEST, PUBLIC SAFETY AND JUSTICE 36 (2015).

389. § 5652(b).

390. See Jeff Slowikowski, *Juvenile Accountability Block Grants Program*, IN FOCUS (U.S. Dep't of Justice, Office of Justice Programs, Washington, D.C.), Oct. 2009 (describing the Juvenile Accountability Block Grant Program); see also U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT DIV., AUDIT REP. 09-24, PROCEDURES USED BY THE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION TO AWARD DISCRETIONARY GRANTS IN FISCAL YEAR 2007 (2009) (discussing Title V).

391. See *Tribal Youth Programs and Services*, OFF. JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/programs/ProgSummary.asp?pi=52#Funding> (last visited Feb. 1, 2016). Since 2004, OJJDP has also administered the Tribal Juvenile Assistance Discretionary Grant Program. *Id.*

priations process rather than a particular statutory set-aside, it is vulnerable to cuts every year, and tribes have had to lobby forcefully to avoid having the Tribal Youth Program cut entirely.<sup>392</sup>

Amending the law that authorizes tribes to enter into self-governance compacts with the Bureau of Indian Affairs is a solution that could significantly increase tribal control over juvenile justice. Self-governance compacts give tribes the most flexibility to determine policy priorities and reprogram funding accordingly, and compacts between tribes and the Indian Health Service have vastly improved the quality of health services for many tribes. Tribes have long maintained that the self-governance program within the Indian Health Service functions far better than Interior's program,<sup>393</sup> and they have proposed amendments to Title IV of the Indian Self-Determination and Education Assistance Act (which governs Interior programs) to bring it better in line with Title V (which governs health programs).<sup>394</sup> Self-governance and economic development offer the greatest promise for freeing tribes from the strings that bind federal funding.

### 3. *Improve Agency Accountability*

Greater transparency and accountability between agency officials and tribes are essential. Even without a significant change in agency authority, federal agencies should better fulfill the federal government's trust responsibility by taking steps such as establishing an advisory group on juvenile justice policy, partnering with juvenile justice organizations on research regarding best practices for Native youth, and making all funding and policy decisions publicly available in a written format.

While this Part has identified major areas in need of reform and suggested potential legislative vehicles through which specific reforms could be accomplished, each change must be undertaken with a careful review of existing and proposed laws and consideration of whether and how related laws or programs might be affected. Some reforms, such as restructuring the entire federal funding framework, may take time to accomplish. Others, such as amending the FJDA to require tribal certification, amending the JJDPA to require states to consult

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392. NAT'L CONG. OF AM. INDIANS, *supra* note 388, at 37. The Tribal Youth Program was finally authorized at \$25 million annually as part of the Tribal Law and Order Act, but the authorization ended in fiscal year 2015. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 246, 124 Stat. 2295.

393. *See* Strommer & Osborne, *supra* note 303, at 42–45 (describing the advantages of Title V's self-governance model).

394. *See id.* at 61–63.

with tribes, and relaxing some of the restrictions on how funds may be spent, are straightforward and supported by nearly all commentators.<sup>395</sup> Congress should respond to the resounding indictment in the Commission and Task Force reports by prioritizing at least these basic reforms. Federal agencies should follow suit by immediately making changes that will impact Native youth, such as allowing funding to be reprogrammed where permitted by Congress and enforcing the existing BOP policy that favors housing youth near their homes, including through contracts with tribal juvenile facilities.

#### CONCLUSION

Juvenile delinquency jurisdiction in Indian country is indeed a tangled web. Instead of controlling the overall philosophy, specific procedures, and disposition options that affect Native youth in Indian country, tribes are laboring under layers of outside authorities, often resulting in approaches that are either incoherent or in tension with tribal priorities. The product of this web has been a juvenile justice system that seems to be hurting, rather than helping, Native youth. Yet, when tribes and policymakers try to improve the situation of these youth, little changes.

This Article is part of a much larger project on Native youth and juvenile justice, a long-term effort to understand the particular issues faced by Native youth in juvenile systems and identify promising recommendations for improving those systems. In order to accomplish this goal, it is essential to determine the state of existing knowledge regarding Native youth and the systems that serve them, clarify the legal rules that govern those systems, study promising tribal approaches, identify and perform additional research needed to complete the picture, build bridges between juvenile justice experts and those working in Indian country, recommend ways to make federal agencies more responsive, and ultimately support tribes in developing systems that embody the best principles of juvenile justice, Indian law, and tribal law. The ultimate goal, a humane juvenile justice system through which tribes can take the lead in healing vulnerable youth, is within reach. Getting there will require careful attention to the legal and policy details of tribal, federal, and state authority and crafting solutions aimed directly at those details.

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395. See, e.g., NAT'L RESEARCH COUNCIL, COMM. ON A PRIORITIZED PLAN TO IMPLEMENT A DEVELOPMENTAL APPROACH IN JUVENILE JUSTICE REFORM, IMPLEMENTING JUVENILE JUSTICE REFORM: THE FEDERAL ROLE (2014); U.S. DEP'T OF JUSTICE & U.S. DEP'T OF INTERIOR, *supra* note 228; Seelau, *supra* note 39; see also *supra* notes 376–77 and accompanying text.