

2016

Locked Up: Fear, Racism, Prison Economics, and the Incarceration of Native Youth

Addie C. Rolnick

University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: <http://scholars.law.unlv.edu/facpub>

 Part of the [Criminal Law Commons](#), [Indian and Aboriginal Law Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Rolnick, Addie C., "Locked Up: Fear, Racism, Prison Economics, and the Incarceration of Native Youth" (2016). *Scholarly Works*. Paper 991.

<http://scholars.law.unlv.edu/facpub/991>

This Article is brought to you by Scholarly Commons @ UNLV Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact david.mcclure@unlv.edu.

Locked Up: Fear, Racism, Prison Economics, and the Incarceration of Native Youth

Addie C. Rolnick

INTRODUCTION

In the national conversation about juvenile overincarceration and disproportionate minority contact within the juvenile justice system,¹ Native American youth are often statistically invisible.² Closer attention, however, reveals that Native youth who come into contact with the juvenile justice system are more likely to be locked in secure confinement than other youth,³ with disproportionality rates in some localities exceeding those experienced by Black and Latino youth.⁴ Many Native youth are incarcerated after they come into contact with federal or state courts, so one potential remedy for overincarceration is to move more Native youth out of federal and state courts and invest in tribal juvenile justice systems. Little is known, however, about whether youth adjudicated in tribal courts experience less incarceration and, more broadly, about the role of incarceration in tribally run systems and potential barriers to reducing incarceration there.

This article examines available information on Native youth in tribal juvenile justice systems during the fifteen-year period from 1998 to 2013. Although that information is limited, it suggests incarceration was a central feature of tribal juvenile justice systems and related federal policy. At least sixteen new juvenile facilities were built to house youth under the jurisdiction of tribal courts during this time,⁵ and many more juvenile facilities were upgraded, even though the total number of juveniles housed in incarceration facilities remained constant or declined.⁶ Incarceration appears to

ADDIE C. ROLNICK is an associate professor at the William S. Boyd School of Law, University of Nevada, Las Vegas.

have been a primary tool used to address drug, alcohol, and other nonviolent offenses. Various factors contributed to this investment in secure detention, and this article demonstrates that tribal governments are not immune from the forces that moved juvenile justice policy in a more punitive direction from the 1970s until very recently.

A chorus of voices has recognized the problem of overincarceration of Native youth, including the Indian Law and Order Commission and the Attorney General's Task Force on American Indian and Alaska Native Youth Exposed to Violence.⁷ In recent years, the pendulum of federal policy appears to be swinging back in a direction that favors decarceration and greater tribal control. The Obama Administration has been far more cautious about juvenile incarceration recently, reflecting a change in the national conversation.⁸

While this may represent a turning point, this article is intended as a note of caution. Lack of tribal control over juvenile justice is a problem in itself, but the fact that greater tribal authority is frequently offered as a solution to the particular problem of overincarceration relies on the assumption that tribal juvenile justice systems will automatically be less punitive than nontribal ones. The significant financial investment in the incarceration of Native youth under the jurisdiction of tribal systems during this fifteen-year period should raise doubts about this assumption.

The investment in juvenile incarceration occurred against the backdrop of a broader phenomenon of prison-building that occurred in jurisdictions across the United States beginning in the late 1970s and peaking in the 1990s. Although the precise historical trajectory and degree of the prison boom has varied among states and localities, across the United States it has been remarkably consistent.⁹ Building more prisons, of course, is closely tied to the phenomenon of mass incarceration—a term that describes shifts in criminal law and criminal justice policies, which have resulted in the imprisonment of a substantial proportion of the American population, particularly Black and Brown men and women,¹⁰ often for nonviolent offenses.¹¹

Hence, the story of Indian country juvenile incarceration during this time period must be situated in the context of a larger story about prison expansion and the relationship of prisons to minority populations. The choices to invest in prisons and to pursue criminal justice policies that center incarceration are not made in a vacuum. The unprecedented rise in incarceration rates in the United States “cannot simply be ascribed to a higher level of crime today compared with the early 1970s, when the prison boom began.”¹² Rather, the nationwide rise in incarceration resulted from a coalescence of factors that include legal changes that criminalized new behaviors and mandated longer sentences, making entire communities into potential prisoners, and also the role of prisons in generating jobs and revenue in communities that were starved for both. Although the vogue of imprisonment affected both the juvenile and adult systems, the shift in juvenile justice policy was particularly pronounced as the justification for juvenile confinement shifted from therapeutic rehabilitation to tough punishment.¹³

The critical literature on imprisonment and mass incarceration reveals three main themes that are important in the tribal context. First, prison construction cannot be explained simply as a response to skyrocketing violent crime rates. This is important to

understand because it highlights the need for tribal leaders to look closely at any claim that more secure juvenile facilities are needed because there are more violent juvenile offenders. Second, prison construction has been driven by fear, including racialized perceptions of crime, and the increase in the number of prisoners is largely attributable to the criminalization of nonviolent behaviors that were previously addressed through means other than incarceration. Indeed, the limited data available indicate that the majority of youth in tribal detention facilities are being held for low-level nonviolent offenses that are often linked to drug and alcohol abuse.¹⁴ These are exactly the types of offenses that experts agree are better addressed by alternatives to incarceration, and perhaps even by diversion out of the juvenile justice system. Third, economic incentives can be a significant factor in prison expansion. Most tribal communities have high unemployment rates and very little available funding for government infrastructure. Where federal money is available to support prison construction—and especially if tribal leaders envision those prisons becoming economically self-sufficient, creating jobs where there were none, or generating a profit—a tribe will have strong reasons to prioritize incarceration that have nothing to do with justice policy. In other words, secure juvenile facilities, like all prisons, can be part of a self-perpetuating system.

The purpose of this article is to critically examine the idea that self-determination is a solution to juvenile incarceration by considering the factors that contribute to overincarceration of Native youth *within* tribal systems. Tribes are not immune to the forces described here, especially given the influence of federal policies on tribal systems. Tribal leaders working to build their juvenile justice systems between 1998 and 2013 were making policy decisions in an era when incarceration was seen as a major piece of juvenile justice policy across the country, a view that shaped the federal policies affecting Indian country, the types of assistance available to tribes, and even the seemingly independent judgments of tribal communities.

The point is not to condemn tribes for engaging in a project of mass incarceration, or even to claim that the phenomenon of juvenile incarceration in Indian country is identical to mass incarceration elsewhere; it is undoubtedly different in important ways.¹⁵ Instead, I hope to link existing research from outside Indian country on imprisonment and mass incarceration with the policy conversation about building effective tribal justice systems, which until recently has tended to focus almost exclusively on law enforcement and the need for tribal governments to have *more* access to imprisonment as a tool of criminal and juvenile justice.¹⁶ Tribes are uniquely positioned to be able to learn from the mistakes of other jurisdictions, and this article is intended to encourage tribal leaders to engage with difficult questions surrounding criminal justice policy, and the role of incarceration, as they build and strengthen their juvenile justice systems. As tribes exert more control over their own systems, and express their policy choices more strongly to federal decision-makers, they will have more freedom to rebuild their juvenile systems in a way that doesn't reproduce the mistakes that state and local governments have made, but this can only happen if they understand the subtle factors that contribute to overincarceration and make a concerted effort to counteract them.

NATIVE YOUTH, OVERINCARCERATION, AND THE SELF-DETERMINATION SOLUTION

The juvenile justice system in Indian country has been the target of significant criticism in recent years.¹⁷ It has been referred to in media coverage as “antiquated” and “broken.”¹⁸ Federal reports condemn it as “expos[ing] the worse consequences of our broken Indian country justice system” and specifically conclude that it “retraumatizes [Native American] children” and is “failing the next generation.”¹⁹ Overreliance on incarceration, especially by federal and state authorities, is a primary aspect of this failure. Recommendations aimed at reducing incarceration and undoing some of the damage done to Native youth by the juvenile justice system have focused on the strategy of strengthening tribal justice systems, which are often assumed to be less likely to rely on incarceration to address juvenile delinquency. Yet a review of available data regarding incarceration facilities on tribal lands reveals an investment of federal and tribal money in building and operating secure juvenile facilities that dwarfs the investment in alternative models.

Incarceration Hurts Native Youth

Research has shown that Native youth as a group²⁰ are especially vulnerable and traumatized.²¹ Compared to other groups and compared to the general population, Native youth are especially vulnerable in almost every area identified as a risk factor for delinquency.²² They are poorer.²³ Many live in communities with few social safety net services.²⁴ They are likely to face physical²⁵ and mental²⁶ health problems. They are more likely to drop out of school²⁷ and less likely to attain higher education.²⁸ They are likely to struggle with drug and alcohol use.²⁹ They are likely to contemplate and commit suicide.³⁰ They are likely to be abused³¹ or to be victims of violent crime.³² 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 witnessing interpersonal violence in their communities.³³ Present-day trauma compounds the impact of historical traumas that Native communities have experienced, including 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,³⁴ all of which places Native youth at a greater risk of involvement in the juvenile justice system.

In spite of their incredible vulnerability, Native youth face overly harsh sanctions once they enter the legal system. They are overrepresented in foster care,³⁵ in arrests for certain offenses,³⁶ in petitions for status offenses,³⁷ especially liquor law violations,³⁸ in out-of-home delinquency placements,³⁹ in secure confinement,⁴⁰ and among youth prosecuted in the adult criminal system.⁴¹ In states and counties with relatively large Native American populations, where Native incarceration can best be compared to the incarceration rates for youth of other races, the data reveal stark disparities.⁴² For example, a 2014 report on the Wisconsin juvenile justice system found that Native youth are nearly twice as likely to be arrested and nearly twice as likely to be detained

following arrest compared to white youth, with little change in the disparity between 2006 and 2012. In certain counties, the disparity was even greater: Native youth were more than four times as likely to be arrested in Brown county and nearly seven times as likely to be detained in Milwaukee county.⁴³ A 2005 study found that, although only 1 percent of the Minnesota population is Native American, more than 15 percent of those confined in the state juvenile correctional facility were Native youth.⁴⁴

Yet research focused on juvenile justice policy “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.”⁴⁵ In state systems, juvenile justice policymakers now recommend replacing training schools and large incarceration facilities with smaller, regional therapeutic facilities as a model for improving juvenile justice and diverting non-dangerous offenders out of the system entirely.⁴⁶ A 2011 report by the Annie E. Casey Foundation presents a compelling case that incarceration is a bad policy for juvenile offenders because it is ineffective, unnecessary, and dangerous. According to the report, incarceration has little or no public safety benefit, wastes money, harms youth, and does not reduce recidivism.⁴⁷

In response to this building consensus, and to the voices of tribal leaders and Native juvenile justice professionals, both the Indian Law and Order Commission and the Attorney General’s Task Force on American Indian and Alaska Native Youth Exposed to Violence have strongly recommended that incarceration should be used only as a last resort for youth who pose a danger to themselves or the community, and that investments be made instead in alternatives to juvenile incarceration.⁴⁸ This approach recognizes that incarceration is “not effective as a deterrent to delinquent behavior” and that to center incarceration in the current approach to juvenile justice is “another infliction of violence” on Native children that reinforces their trauma.⁴⁹

Efforts to reduce overreliance on incarceration for Native youth have targeted nontribal governments as the primary culprits. Because of the tangled web of criminal jurisdiction over Indian lands, many Native youth who commit offenses within Indian country are prosecuted by federal or state governments with no regard to tribal government preferences.⁵⁰ Youth who commit offenses outside of Indian country are adjudicated in state or local systems with no requirement to notify the child’s tribe or involve it in the disposition.⁵¹ According to the 2013 report of the Indian Law and Order Commission, “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.”⁵²

Self-Determination as a Solution to Overincarceration

If Native youth are facing overincarceration in state and federal systems, one possible solution—one not available to other minority youth, who are also disproportionately

incarcerated—is to strengthen and expand tribal juvenile justice systems. This can be accomplished for Indian country youth without drastic changes to the law because tribes have either exclusive or concurrent jurisdiction over almost all Native youth who commit offenses within tribal territory.⁵³ Tribes were exercising governing authority over their people and their territory well before the state and federal governments were created. Like other nations, their right to govern is inherent in their status as nations. Federal law recognizes that the source of tribes' governing power is their inherent sovereignty, 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."⁵⁴ Although the form and precise nature of their governing authority has changed over time, they continue to exercise this authority.

Juvenile delinquency jurisdiction—disciplining, controlling, teaching, and caring for children—is a key aspect of this inherent authority. As a general rule, a tribe at least has juvenile delinquency jurisdiction in any case in which it would have criminal jurisdiction if the offender were an adult. Again as a general rule, this includes offenses committed by any Indian person, whether or not a member of that tribe,⁵⁵ on land that qualifies as tribal territory.⁵⁶ Except for a small subset of domestic violence offenders, tribes lack criminal jurisdiction over non-Indians.⁵⁷ Tribal youth who are adjudicated for status or delinquency offenses outside Indian country are generally subject to state jurisdiction, although they may also be subject to tribal jurisdiction if they are placed in foster care or for adoption as a result.⁵⁸ This means that the decisions made by tribal governments in constructing a juvenile justice system will affect mainly Native youth within the tribe's territory, and not Native youth living elsewhere or non-Native youth who commit offenses on tribal land.

With regard to Native youth who commit offenses in tribal territory, tribes have jurisdiction over a full range of criminal offenses as long as those offenses are defined as crimes under tribal law. However, tribal jurisdiction is no longer recognized as exclusive in some areas. Most notably, the federal government exercises concurrent jurisdiction over Native youth who commit major crimes in Indian country.⁵⁹ In addition, some states were granted concurrent criminal and/or juvenile delinquency jurisdiction over Indian country within their borders by federal statute: Public Law 280 is the primary such law,⁶⁰ but there are others.⁶¹ However, the existence of concurrent federal or state power does not strip the tribe of its inherent jurisdiction. Furthermore, tribes are the *only* sovereign with jurisdiction over minor offenses committed by Native youth in Indian country not subject to Public Law 280 or a similar law.⁶²

Federal law imposes minimal restrictions on tribal juvenile delinquency jurisdiction over Native youth. The main restriction that federal law imposes on tribal criminal courts is one of sentence length: tribes in most cases may not sentence an offender to more than one year in jail or prison, or up to three years if the tribe's laws comply with certain federal requirements.⁶³ Federal law requires that tribal criminal courts comply with most of the same basic due-process requirements applicable to federal and state courts, with greater protections required for longer sentences.⁶⁴ Because the term of incarceration arising from a delinquency adjudication is typically shorter than an adult sentence, and because delinquency jurisdiction may terminate when a juvenile reaches

eighteen or twenty-one years of age, the federal law restriction on sentence length doesn't constrain juvenile courts to the same extent it does adult criminal courts. Non-incarceration measures, like juvenile drug/wellness courts, may be able to operate free of some of the due-process requirements that federal law imposes in cases where incarceration may result. It can also be argued that certain juvenile delinquency laws, such as those addressing status offenses and those that do not rely on incarceration, are more appropriately categorized as a form of civil power, which would render even these restrictions irrelevant.⁶⁵

The precise scope of juvenile delinquency jurisdiction exercised by each tribe is a matter of tribal law. The important point is that federal law imposes very few restrictions on tribal power in this area. A tribe's juvenile delinquency jurisdiction is at least as broad as its criminal jurisdiction, and arguably broader. While it may exist concurrently with federal or state jurisdiction, the existence of broad tribal power means that federal and state jurisdiction could effectively be limited—and primary authority lodged with tribal governments—without a significant change in the law regarding tribal jurisdiction.⁶⁶

Indeed, the Law and Order Commission specifically recommends 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,” echoing the recommendations of other experts.⁶⁷ This approach is consistent with the policy of self-determination espoused by the executive and legislative branches of the federal government since at least 1970,⁶⁸ the nation-building model embraced by political scientists and economists,⁶⁹ and the sovereignty principle that forms the bedrock of federal Indian law.⁷⁰

There are several reasons to assume that tribes would rely less on incarceration. Tribal justice systems that incorporate tribal culture and tradition tend to be less focused on adversarial process and individualized punishment and more focused on restorative justice, community well-being, treatment, and healing.⁷¹ 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.⁷² All of these factors suggest that, given the freedom to design a juvenile justice system appropriate for their community, many tribal governments would choose one that emphasizes treatment, traditional approaches, and community-based intervention over incarceration and punishment.

Incarceration of Youth under Tribal Jurisdiction

Whether this vision of responsive tribal justice systems as a remedy for overincarceration will bear out in practice is a question that has received very little scholarly or political attention. In fact, however, during the fifteen-year period covered here, the number of secure juvenile correctional facilities in Indian country steadily increased, and tribes continue to push for funding to build even more. This section sets forth the

available federal data, supplemented by information collected informally by others, on Indian country facilities overall and Indian country juvenile facilities specifically.⁷³

Juvenile facilities are a subset of all detention/correctional facilities on tribal lands.⁷⁴ Unless a tribe contracts with a neighboring state or county facility to house youth, these facilities hold Native youth adjudicated in tribal courts.⁷⁵ A substantial portion of the construction funding comes from competitive grants administered by the Department of Justice (DOJ). Once they are built, some facilities are run directly by the Bureau of Indian Affairs (BIA). Others are operated by tribes but funded at least in part by the Bureau pursuant to self-determination contracts or self-governance compacts.⁷⁶ A few tribes operate correctional facilities without any assistance from the BIA, and these do not necessarily appear in the Bureau's inventory, which is the source of most of the data cited here.

As the following tables show, the number of facilities on tribal lands increased between 1998 and 2013, with about half of the net increase due to the construction of new juvenile facilities. The number of juveniles held in Indian country facilities, however, held steady or declined during the same time period, with a minority held for violent offenses. The following tables show this apparent trend. Subsequent sections provide further explanation and context.

TABLE 1
ADULT AND JUVENILE FACILITIES COMBINED

Year	Total # Of Facilities
1998	69
1999	69
2000	69
2001	68
2002	70
2003	70
2004	68 ⁷⁷
2005	— ⁷⁸
2006	—
2007	83
2008	82
2009	80 ⁷⁹
2010	75
2011	75
2012	80
2013	79

As shown in table 1, between 1998 and 2004 the number of correctional facilities located on tribal lands remained relatively steady at between sixty-eight and seventy. By 2007, there were eighty-three facilities, and the number has fluctuated between seventy-nine and eighty-three since then. In 2013, there were seventy-nine facilities. Two dozen new facilities were built during this time period, resulting in a net increase of ten facilities.⁸⁰

TABLE 2
INMATES IN JUVENILE AND ADULT FACILITIES COMBINED⁸¹

Year	Mid-Year Count
1998	1567
1999	1693
2000	1799 ⁸²
2001	2030
2002	2080
2003	1908
2004	1745
2005	— ⁸³
2006	—
2007	2163
2008	2135
2009	2176
2010	2119
2011	2239
2012	2364
2013	2287

As shown in table 2, the total number of inmates held in all facilities was 1,567 in 1998. That number rose to 2080 by 2002, then fell between 2003 and 2004. It increased substantially between 2004 and 2007, the same time period in which fifteen more facilities were added to the BIA's inventory. It is not clear from this data whether and how the investment in new facility construction is related to the increase in the inmate population in particular years, but the trends (more facilities and more inmates in those facilities) at least roughly correspond. The total number of people held in Indian country facilities has remained relatively level since, fluctuating between 2,100 and 2,300.

The number of facilities designed specifically to house juveniles increased as part of the investment in prison construction.

TABLE 3
JUVENILE FACILITIES

Year	Facilities Authorized to Hold Juveniles	Facilities Holding Juveniles at Mid-Year	Stand-Alone Juvenile Facilities
1998	43	22	7
1999	43	17	7
2000	—	32	— ⁸⁴
2001	—	35	—
2002	—	33	—
2003	—	29	—
2004	45 ⁸⁵	16	11 ⁸⁶
2005	—	—	— ⁸⁷
2006	—	—	—
2007	—	20	—
2008	—	24	—
2009	—	23	—
2010	—	21	—
2011	—	23	—
2012	—	26	—
2013	34 ⁸⁸	23	13 ⁸⁹

In 1998, twenty-two facilities held juveniles, seven of which were stand-alone juvenile facilities.⁹⁰ In 2004, sixteen facilities held juveniles; eleven of these were stand-alone juvenile facilities, and others had sections specifically designed for juveniles.⁹¹ In 2013 there were thirty-four operational facilities authorized to hold juveniles. Of those, thirteen were stand-alone juvenile facilities, eleven included adults and juveniles in the same building, but employed separate staff for juveniles,⁹² and ten housed adults and juveniles together.⁹³ Seven more juvenile facilities were slated to open in the coming years, and at least one of these was planned as a stand-alone juvenile facility.⁹⁴

Unlike the adult offender population, the number of juveniles held was lower in 2013 than it was fifteen years earlier. Indian country facilities held 303 juveniles in 1998 and 190 juveniles in 2013. Prior to 2003, the mid-year count of juveniles was over three hundred in three different years. The number of juvenile inmates has not been higher than 257 in any year since 2007. According to the Bureau of Justice Statistics, juveniles were 16 percent of the total inmate population in 2000, but only 8 percent in 2013.⁹⁷

The number of separate juvenile facilities in Indian country nearly doubled during the period covered here, while the number of juveniles being held in them decreased. In June 2013, counting only stand-alone juvenile facilities, there was a separate juvenile

TABLE 4
JUVENILE INMATES—ALL FACILITIES

Year	Mid- Year Count	Juvenile Held as Adults
1998	303	26
1999	267	20
2000	277	14
2001	312	22
2002	307	11
2003	278	5
2004	198	3
2005	— ⁹⁵	—
2006	—	—
2007	253	— ⁹⁶
2008	253	—
2009	257	—
2010	253	—
2011	237	—
2012	248	—
2013	190	—

facility for every fourteen youth being held in Indian country.⁹⁸ To the best of my knowledge, all of the facilities included in the federal inventory are built to the highest security level. In other words, they are functionally equivalent to juvenile prisons. In one sense, the growth in separate juvenile facilities is a positive development because it means that fewer youth are being incarcerated in facilities designed for adult incarceration.⁹⁹ However, the substantial financial investment required to construct and operate at least six new juvenile facilities, and upgrade or replace others, does not appear to be supported by a need for more bed space because the population of juveniles in facilities has decreased.

A minority of youth being held in these facilities are incarcerated as a result of violent offenses. More commonly, they are incarcerated for theft offenses and substance-abuse-related offenses such as driving under the influence, public intoxication, or other drug offenses. The following table shows a rough count of the number of juveniles held in Indian country facilities in June 2013 by type of offense.¹⁰⁰

Of a total of 164 juveniles held in sixteen designated juvenile facilities at mid-year, 23 percent (38) were being held for violent offenses¹⁰¹ and five percent (9) were being held for property offenses. Twenty percent (33) were being held for drug or alcohol-related offenses. If one justification for incarcerating juveniles is the public safety threat posed by violent offenders, it is noteworthy that less than one-quarter of the juveniles held in secure confinement as a result of tribal court involvement committed violent offenses.

TABLE 5
JUVENILE INMATES BY OFFENSE TYPE—2013

Offense Type	Number of Juveniles Inmates at Mid-Year
Total Violent	38
Domestic Violence	8
Assault	18
Rape/Sexual Assault	6
Other Violent	6
Total Property	9
Burglary	5
Larceny-Theft	4
Total Drug/Alcohol	33
Public Intoxication	27
DWI	0
Drug Offense	5
Other	84

By authorizing specific grant programs and funding streams, Congress sets the basic parameters for how money can be spent, and the direction of federal money certainly influences the character of tribal juvenile justice systems. These parameters constrain the agencies to some degree, but agencies have the discretion to make certain choices that can more subtly impact tribal systems, such as how to train correctional staff or what standards a facility must meet in order to qualify for operational funding.¹⁰²

Congress' investment of federal funds in improving and expanding incarceration facilities on tribal lands far exceeded its investment in other possible solutions, such as diverting youth out of the system entirely or investing in nonsecure facilities or alternative programs. Between 1997 and 2004, the DOJ provided over \$150 million in grants to tribes to build incarceration facilities.¹⁰³ During the same period, the BIA received \$637 million for law enforcement services (an umbrella category that includes policing and detention/corrections but also covers other aspects of tribal justice systems), plus an additional \$31.5 million specifically designated for operation, maintenance, and staffing of newly constructed facilities.¹⁰⁴ From 2005 to 2009, the Bureau's detention budget increased again by 48 percent.¹⁰⁵ By contrast, the Tribal Youth Program, the primary source of DOJ funding for nonincarceration alternatives for youth in tribal systems, has received annual funding between \$10 million and \$13 million every year from 1999 to 2008.¹⁰⁶

For youth who arguably require removal from home, little funding has been directed toward creating nonsecure placement options in tribal communities.¹⁰⁷ Tribal governments rely on these sources of federal funding to build their systems, so the

gross imbalance between the federal investments in incarceration versus non-incarceration alternatives necessarily constrains their ability to reduce reliance on incarceration. Moreover, tribes cannot necessarily reprogram funding between categories, so a tribe that elected to close its incarceration facility may not be permitted to redirect those funds toward alternative programs.¹⁰⁸ In 2014, the Attorney General's Task Force on Native Youth Exposed to Violence found 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."¹⁰⁹

THE LURE AND TRAP OF PRISONS

Given the many reasons we might expect tribally run systems to avoid reliance on incarceration, the focus on construction of secure confinement facilities is surprising. The following sections consider some of the structural factors that may help explain why incarceration has become such an important centerpiece of tribal juvenile justice systems during the past two decades.

Prisons, Crime, and Fear

Across the United States, the number of prisons and the number of people in prison have both increased dramatically over the past several decades,¹¹⁰ a shift that has been particularly acute with regard to juvenile offenders.¹¹¹ For juvenile justice, the general shift toward imprisonment that began in the 1970s was followed by a second push for more punitive policies in the 1980s and 1990s, in which a brief rise in violent juvenile crime fed public fear, which translated into a demand for even harsher sentences.¹¹² Tracking this shift, federal laws authorized increasingly harsh penalties for federal crimes and prioritized incarceration at the state and local level.¹¹³

It may seem easy to assume that this expansion has happened because communities have faced more and more crime: more people committing crimes, more crimes committed by those people, and/or an increase in violent or serious crime requiring imprisonment. Criminal justice scholars, however, have demonstrated that this is not the case. Violent crime did increase in the 1960s and 1970s, resulting in more violent offenders in prisons, but the far more dramatic increase in the prison population was among nonviolent offenders.¹¹⁴ Most were convicted of nonviolent offenses involving drug possession, sale, or use.¹¹⁵ Violent crime has since fluctuated, falling in the early 1980s, rising again in the late 1980s, and falling again in the early 1990s.¹¹⁶ The homicide rate among youth, however, rose in the mid-1980s and continued to rise until it reached its apex in 1994. Zimring has described this late-1980s spike in juvenile homicides and discusses how incorrect projections about worsening violent crime fed rhetoric about a coming generation of "juvenile killers," a massive increase in young "muggers, killers, and thieves," and a wave of juvenile "superpredators."¹¹⁷ Despite dire predictions, what followed was "the most sustained and substantial decline in youth homicide in modern US history," yet the impact of the resulting fear of crime resulted in an increase in incarceration that continued even after violent crime plummeted.¹¹⁸

Juvenile confinement rates outside Indian country increased steadily until 1997, when they began a decline.¹¹⁹

In the tribal context, an increase in violent crime on reservations in the 1990s triggered a 1997 report calling for more law enforcement resources in Indian country. After consultation with over two hundred tribes, the Executive Committee for Indian Country Law Enforcement Improvements released a report to the Attorney General and the Secretary of the Interior on Indian country law enforcement needs. According to the report, violent crime in general and homicide specifically “rose sharply” in Indian country between 1992 and 1996, when throughout the rest of the country homicide and other violent crime declined.¹²⁰ The report also cited a general lack of law enforcement resources in Indian country, and a number of jails and prisons that did not meet minimum safety and security standards. The report refers to “the rise in juvenile crime on Indian lands,” but only quantifies the increase for one tribe.¹²¹ It notes, however, that “[v]iolent Indian gangs, who model themselves after their urban counterparts, are a frightening new reality on many reservations” and offers anecdotes of apparent gang attacks, which may or may not have been carried out by juveniles.¹²² Juvenile justice was certainly affected by the resulting investment in law enforcement and detention resources. As Kevin Washburn has described it, tribes advocating for more law enforcement authority and resources “hopp[ed] aboard a moving train,” leveraging a national “War on Crime” to enhance tribal justice systems.¹²³

Following the 1997 report, the BIA centralized its law enforcement and public safety services, which meant that detention and corrections activities would be overseen by the national office, rather than by various regional offices.¹²⁴ The DOJ and the BIA collaborated on a major prison-construction initiative, investing over \$150 million throughout the next several years in building and upgrading correctional facilities on tribal lands, and the BIA received an additional \$31.5 million to operate the new facilities.¹²⁵ The DOJ provided construction grants to tribes on a competitive basis, and the BIA agreed to provide operational funding for these facilities. Between 1997 and 2003, BIA budget documents state that eighteen facilities were constructed or upgraded, including at least six juvenile facilities.¹²⁶ Building new prisons was framed as a critical step in upgrading and strengthening tribal justice systems, a way to keep inmates safe, and a response to violent crime.¹²⁷

In 2004, the Office of the Inspector General investigated Indian country detention and correctional facilities and released its results in a report titled “Neither Safe Nor Secure.” The investigation revealed an alarming number of fatalities, suicides, suicide attempts, injuries, and escapes, including several high-profile incidents involving juveniles,¹²⁸ and it criticized the BIA for poor oversight. The investigation also criticized the agency’s management of money, finding that several newly built facilities remained unopened and that the Bureau could not properly account for millions of dollars.¹²⁹ Since 2004, an additional twenty-one detention facilities have been added to the BIA’s inventory, including at least two juvenile facilities.¹³⁰ As of 2013, seven more juvenile facilities were slated to open in the next few years.¹³¹ Following the 2004 report,

Congress increased the Bureau's detention budget: it grew from \$43.8 million in 2005 to \$64.7 million in 2009.¹³²

The Inspector General followed up on its 2004 investigation in 2011 in order to determine how the BIA spent the increased funding.¹³³ According to that report, staffing shortages persisted and the BIA's financial management system made it difficult to track how the money was spent.¹³⁴ The report also noted the "egregious physical condition" of the facilities visited by inspectors.¹³⁵ By 2009, according to the 2011 report, the BIA's inventory included ninety-four facilities: twenty-three operated by the BIA, fifty-two operated by tribes under self-determination contracts, and nineteen operated by tribes under self-governance compacts.¹³⁶

Tribal juvenile incarceration facilities today house mostly nonviolent offenders, particularly because violent and serious offenders are more likely to be prosecuted in federal court.¹³⁷ Nationally, arrests of Native American youth for violent crimes have fallen since the mid-1990s, as have arrests for violent crime among all youth.¹³⁸ The Violent Crime Index rate for Native American youth was higher than it was for white youth in 1995, but by 2010 it had fallen below the rate for white youth.¹³⁹ Although national data does not include youth under tribal jurisdiction, it provides a picture of the overall trend, and the tribal data summarized here does not suggest that violent crime is any more common among youth under tribal jurisdiction. Yet, within tribal systems, the investment in juvenile incarceration continued throughout this period.

The specter of violent youth crime can provide an easy justification for the emphasis on incarceration.¹⁴⁰ For example, I represented a tribe seeking to compel the BIA to operate the newly constructed low-security juvenile facility on its reservation without requiring the tribe to retrofit the facility to meet the highest security standards. Explaining the BIA's policy at the time to operate only high-security, regional juvenile detention facilities, the official in charge of detention facility funding for the BIA explained that he needed a place to house all the "rapists and murders" from elsewhere in Indian country.¹⁴¹ According to national statistics, however, only five of the youth held in designated Indian country juvenile facilities at mid-year 2007 were being held for rape and only seven for "other violent" offenses.¹⁴² This was, of course, only a single statement by one official and may not have truly reflected agency policy, or even his personal beliefs. His invocation of an imagined violent juvenile criminal, however, echoes the academic and political rhetoric about a coming generation of violent juvenile offenders that drove nationwide investment in juvenile criminalization and incarceration during the 1990s.¹⁴³

More funding for incarceration has been put forth as the primary answer to almost every problem related to criminal justice in Indian country, including high crime rates, lack of general law enforcement infrastructure, unsafe facilities, and poor oversight of the detention program. As Mauer explains of nationwide prison population growth, "changes in criminal justice policy, rather than changes in crime rates, have been the most significant contributors" to the growth in prisons and the prison population.¹⁴⁴ It is significant in the tribal context, where crime rates and the number of juveniles in secure confinement have actually decreased, that not one of the federal

reports cited in this article called for a moratorium on building any new secure juvenile facilities in Indian country.

In order to build their justice systems, tribes rely on the federal government for financial, personnel and technical assistance, so Congressional and agency priorities drive tribal choices. If the goal is to reduce juvenile overincarceration, the story of this era suggests that the federal government has been leading tribes in the wrong direction.¹⁴⁵ To the extent that tribes continue to advocate for more funding to support incarceration, the available data raise questions about whether incarceration is a necessary or helpful intervention for Indian country youth. On the other hand, it is also possible that the declining population of juveniles in secure confinement may indicate a shift in tribal courts' willingness to incarcerate juveniles for nonviolent offenses. If this is the case, future federal funding policies should prioritize treatment and alternatives to incarceration, including construction of nonsecure facilities if they are needed.

Prisons and the Criminalization of Minority Groups

If imprisonment can't be entirely explained as a response to a violent crime wave, what factors explain its rise and persistence? Prisons have been a key feature of social control. Rules of criminal law are a primary means by which a sovereign prescribes rules of conduct and ensures a degree of safety, security, and interpersonal cooperation in a society composed of strangers.¹⁴⁶ The power to imprison is one way that governments can enforce compliance with these rules. The machinery of criminal justice, from police surveillance to the inside of the prisons themselves—characterized by controlled movement, austere conditions, lack of privacy and freedom, and the threat of violent discipline—serves to remind all people, and those in prison especially, of the government's power to control people.¹⁴⁷ In the European and American context, prisons have increased in importance as other methods of punishment, such as the death penalty, physical torture, banishment, and public humiliation, have declined.¹⁴⁸ Today, prisons are so central to American criminal justice that it's easy to forget that locking people in cages is neither the only, nor necessarily the best, way to ensure public safety, security, and interpersonal cooperation.

In the United States, imprisonment has also been a primary means of containing, controlling, and "reforming" oppressed classes, including poor people, immigrant groups, African Americans, and indigenous peoples.¹⁴⁹ Disempowered groups have been contained through other means as well, and the use of criminal imprisonment has increased in importance as the other methods of control have declined. For example, Alexander argues that mass incarceration replaced the Jim Crow laws that replaced slavery as a legal method of ensuring the continued subordination and control of African Americans.¹⁵⁰ Racial stratification provides a particularly compelling explanation for the most recent (post-1970) rise in imprisonment in the United States. The rise in the imprisoned population since the 1970s is largely attributable to a rise in the number of Black and Brown people in prison. People of color today are more likely to be imprisoned than white people for the same types of offenses, and they tend to be imprisoned for longer periods.¹⁵¹

Ross provides a pointed explanation of criminal justice as a mechanism of racial control over Native Americans.¹⁵² “We are reminded,” she writes, “that Indian country had no prisons” before colonization. Tribal communities administered criminal justice through methods like restitution and banishment.¹⁵³ Beginning with the Major Crimes Act of 1885, which authorized the federal government for the first time to prosecute criminal offenses that occurred within tribal communities, the federal government began the process of delegitimizing tribal criminal justice institutions and, through federal law and policy, pushing tribes to recreate their justice systems following a Western model, which has had imprisonment at its center since the early-twentieth century. Throughout the first half of the twentieth century, this process continued. Laws such as the Indian Reorganization Act encouraged tribes to remake their governments and rewrite their constitutions in the mold of a business council, and Public Law 280 gave certain state governments the authority to extend their criminal justice systems into Indian country. In Indian country, prisons and punitive criminal justice were very specifically introduced as methods of assimilation and containment.¹⁵⁴

The simple hypothesis is often offered that minorities face high rates of imprisonment due to high rates of criminality: these groups of people go to prison more often because they commit more crimes. This explanation presumes a neutral, static definition of crime that obscures the role that definitions of crime have played in determining who will be considered criminal. But in fact, the reasoning behind the decision to classify certain behaviors as illegal, and how to sanction them—that is, whether to subject them to criminal (as opposed to civil) sanctions, and whether to impose imprisonment for their violation—can vary dramatically.¹⁵⁵ For example, the rise in imprisonment of Black men since the 1970s can be largely explained by long prison sentences imposed for relatively low-level drug crimes.¹⁵⁶ Black women end up in jail in part because their reproductive and childrearing decisions are the target of criminal sanctions.¹⁵⁷ Early juvenile justice systems reached much more broadly than adult criminal systems, permitting children to be locked up for a range of common misbehaviors by labeling them incorrigible. A look behind the broad label reveals that children deemed in need of intervention (poor and minority children) were labeled as delinquent for typical childhood acts such as disobeying parents or being outside past curfew. Girls in particular were often locked up for behavior deemed too sexual.¹⁵⁸

In political and public rhetoric, “crime” can be made interchangeable with “violence.” When politicians and others invoke a fear of violent crime to justify a platform of tough-on-crime measures, or passage of a specific law, this rhetoric can mask the actual cause of any increase in crime: changes in laws that criminalize more behaviors and send people to jail for longer periods.¹⁵⁹ Gilmore, for example, has described how the initiative process, driven by rhetoric about fear of crime, was responsible for several key legislative changes that helped increase the population of prisoners in California, including a three-strikes law and sentence enhancements for gang members. These laws, together with a national-level trend toward recriminalization of drug offenses and the imposition of mandatory minimum sentences for drug offenders, ensnared

many more Black and Latino Californians in the net of the criminal law.¹⁶⁰ Although technically an “increase in crime,” rather than resulting from a more violent population, this increase was a consequence of laws that criminalized more behaviors and targeted specific communities.

Native people were categorized as deviant as a class by settlers who defined their cultures as dysfunctional, which rendered them vulnerable to a range of coercive forms of state intervention intended to fix those deviant cultures. During the same era as the Major Crimes Act, the BIA created the Courts of Indian Offenses. The first Western-style courts in Indian country, these courts were viewed as vehicles of education and assimilation.¹⁶¹ They were governed by regulatory codes that defined as criminal, and punished, a range of activities associated with being Native, such as plural marriage, certain religious dances, and the practices of medicine people.¹⁶² Native people were criminalized during this period for acts of resistance, arrested for vagrancy, grand larceny, and arson for burning down the jails that confined them or stealing horses and cattle from white settlers.¹⁶³

Today, many of the crimes committed by Native youth might similarly be explained as a result of the criminalization of trauma. Native youth face trauma that has been linked to the consequences of colonization, forced assimilation, and federal policies that have damaged tribal families, communities, and cultures. A look at the offenses committed by Native youth might suggest the need for a juvenile justice system focused on meeting the needs of low-level offenders and offenders with trauma, mental health, and substance abuse issues. It might incorporate trauma and mental health services, as well as alcohol and drug treatment services. Acknowledging historical trauma and its impact on family and child well-being, it might strive to keep youth connected to their families and communities wherever possible, rather than sending youth to faraway states or to non-Native systems. It might 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 might 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. More radically, a tribe might revise its juvenile delinquency laws so as not to criminalize relatively minor misbehavior, such as truancy or underage drinking, or behavior directly tied to addiction, such as certain drug offenses. Instead, behavior directly related to trauma often brings those youth under the jurisdiction of tribal juvenile delinquency laws, and the resulting juvenile crime statistics are put forth as evidence that more juvenile detention facilities are needed.

Prison Economics

Once they are built, prisons can be self-perpetuating. They create employment and revenue, and communities become dependent on them as profit generators and sources of jobs. Gilmore, in her study of prison expansion in California, highlighted the economic draw of a prison for the rural towns in which most were located.¹⁶⁴ Lynch, who wrote about Arizona’s prison boom, described the way that concerns about the

cost of prisons combined with tough-on-crime rhetoric in order to birth a particular kind of prison, one that favors security, punishment, and extraction of labor from prisoners.¹⁶⁵ Lichtenstein, writing about prison expansion in the southwestern United States, emphasized the role of economics and described the various players, from governmental entities to private firms, that profited from prison expansion.¹⁶⁶ The economic side of prisons, including the financial incentives to build them, the industries that profit from them, and the internal and external financial pressures that operate to keep them open, reveals that the choice to build prisons is never simply a matter of criminal justice policy. It also demonstrates that the enormous financial investment in prisons can obscure and even undercut other possible methods of addressing crime.

For Indian tribes, local poverty and federal funding shortages create an atmosphere in which economic development and finding funding for core government programs is an enormous concern. Tribal communities are thus particularly fertile ground for the idea that prison might provide its own ongoing funding and even generate additional jobs and revenue. During the time period covered in this article, more tribes requested funding for construction of incarceration facilities than could be accommodated even by Congress' authorization of new money for correctional facility construction and operation that peaked in 2003 to 2004. One strategy employed by BIA officials was to encourage tribal leaders to plan and build facilities with additional bed space that could be rented out to other jurisdictions, producing income that the tribe could use to operate its facility in the absence of available federal money. In particular, they encouraged tribes to pursue contracts with the US Marshals Service and US Immigration and Customs Enforcement. Relying on income from contract beds would mean building a larger facility than is required to meet tribal (or even regional) needs, and it may also require a facility built to accommodate and control more violent and serious offenders than the population under tribal jurisdiction. In this scenario, a focus on revenue can potentially obscure a focus on the public safety needs of the tribal community.

But the real effects on the community go far beyond jobs and revenue. A tribe seeking to maximize the economic impact of a prison may build it to accommodate the needs of a nonlocal population. For juveniles, this population is likely to be more violent than the youth in the local community. The size and security level may be much greater than what is needed to accommodate the local population. Once the prison is open, it may require specially trained staff, so the opportunities for local employment may be slim until local people can be trained in prison management. A tribe may even choose to hire a private company to run its prison. Bringing in outside offenders, staff, and even administrators can dramatically impact the community. One possible effect that has not been studied involves what happens once the offenders are released: might some offenders choose to remain in the community? Will the tribe (already lacking employment options) be responsible for providing reentry services?

It may also impact the way that a tribe treats its own youth. Because funding (whether from the federal government or from contract sources) is typically based

on the number of detainees held in the facility, tribes may feel pressure to keep the beds full, either through contracts or by placing youth from the community in the prison, whether or not their offenses actually require incarceration. The need to keep the prison full may also limit the resources available for alternative programs. Some of these issues are exacerbated for remote tribal communities. They may face the task of building an entire facility for a small number of juvenile offenders simply because there is nowhere else nearby to put them. Scarce funding for justice systems may make tribes even more likely to turn to prisons as revenue generators. Yet, once the facilities are open, they may consume most of the available justice system resources. For tribal communities with few private organizations providing services related to juvenile justice, this can leave courts with no other disposition options for juveniles. For example, I attended a recent meeting where a small group of people was asked to brainstorm options for reducing reliance on secure detention of juveniles. One member of the group, the head of a juvenile detention facility, explained how the existence of an investment in a detention facility could impact any effort to reduce juvenile incarceration. If the tribe placed more youth in alternative settings, his facility would not be filled, and the resulting drop in federal funding may mean that the tribe could no longer afford to operate the facility.

Prisons take on a life of their own in this cycle: once they are built, governments find prisoners to fill them, often creating criminals out of people who would have been dealt with through noncriminal laws in an earlier era, or incarcerating offenders who might be better served through alternative measures. Because they employ so many people and their operation is tied to ongoing funding, it can become politically difficult to close them. Once a jail or prison is operational, its administrators must find money to keep it open, preserving the building and the jobs. Because funding is often determined by the number of prisoners, there is pressure to keep prisons full. As Mauer observes, newly constructed prisons “can be expected to endure and imprison for at least 50 years, virtually guaranteeing a . . . commitment to a high rate of incarceration. The growth of the system itself serves to create a set of institutionalized lobbying forces that perpetuate a societal commitment to imprisonment through the expansion of vested economic interests.”¹⁶⁷

In the tribal context, this happens in the form of heavier reliance on incarceration as a solution to juvenile delinquency by Native youth and by entering into contracts with other jurisdictions to rent facility space. Sentencing policy may also be influenced, as expensive prisons become the centerpiece of most justice systems, drawing funding and attention away from other options, such as treatment facilities or community-based programs. Worse yet, efforts to keep prisons full can be too successful, resulting in overcrowding and necessitating the building of new prisons.

The confluence of factors leading to our current overreliance on incarceration is not simple, but the myth of a terrible crime wave necessitating a response of imprisonment has been convincingly discredited in the nontribal context. It is disconcerting, then, that the arc of tribal juvenile justice policy over the past fifteen years has continued to follow the path of highlighting crime statistics, building more facilities to accommodate this perceived need, finding problems with the facilities, and directing more

funding toward facilities in order to address the problems. The number of secure detention facilities in Indian country has grown during this time period, and there is evidence that the institutions themselves are more restrictive (although they may also be safer) than they were two decades ago. Yet, it is not clear that the perceived threat of violent crime has ever been true in the juvenile context. In that such a process can happen without any decision-maker explicitly intending to pursue it, overincarceration is a structural phenomenon. Tribes seeking to strengthen and reform their juvenile justice systems (both in 1998 and again in 2016) can easily inherit this cycle, so that tribal justice systems can accidentally perpetuate the incarceration bias even if the tribal leaders did not intend to increase juvenile incarceration.

Communities have a choice in how they respond to crime, and imprisonment, though sometime publicly favored, is not the only option for most. Only a small handful of offenders are so dangerous that they cannot be released into the community. In the juvenile context the number of offenders who might require imprisonment is even smaller, as even serious juvenile offenders may benefit from treatment and intervention services. Moreover, the most serious Indian country offenders are typically prosecuted in federal court. Given the scarce financial resources available in tribal communities, the limits on tribal incarceration imposed by federal law, and the types of offenses being committed by Native youth, directing money to secure facilities seems, at best, to be a poor choice of investment. And yet, the number of secure juvenile facilities in Indian country grew alongside the prison boom that was occurring elsewhere.

CONCLUSION

This article is intended to provide a critical look at how and why incarceration happens in Indian country and its effect on Native youth. Despite widespread agreement that incarceration does little to reduce juvenile crime, is not necessary for nonviolent offenders, and may even be harming Native juvenile offenders, incarceration continued to be a centerpiece of tribal juvenile justice policy during the period described here. This was partly a result of federal laws and policies, which limit the practical choices available to tribes and subtly influence the character of tribal juvenile justice systems.

There is reason to hope that things will change. The two agencies with primary responsibility for juvenile and criminal justice in Indian country recently collaborated on a Long Term Plan to Build and Enhance Tribal Justice Systems. Drawn from consultation with tribal leaders, a primary recommendation of this report was that alternatives to incarceration should be “the major focus” of any long-term plan; it also contained detailed recommendations related to decreasing the use of incarceration and increasing resources for rehabilitation and treatment for youth.¹⁶⁸ This means that tribes are speaking up about, and federal officials are listening to, their desire to depart from the mass incarceration model of criminal and juvenile justice that has dominated in jurisdictions across the United States for the past thirty to forty years. Recently, the Annie E. Casey Foundation’s Juvenile Detention Alternatives Initiative (JDAI), a major, privately funded effort to reduce reliance

on incarceration in juvenile justice systems, began a pilot Tribal JDAI project with the Mississippi Band of Choctaw.¹⁶⁹ In addition, the BIA is updating its Model Indian Juvenile Code to better incorporate alternatives to incarceration.¹⁷⁰ The combination of a shift in federal policy and the involvement of a major private foundation, both favoring a turn away from juvenile incarceration, may mean that over the next decade tribal justice systems will develop an increased focus on treating youth and minimize their reliance on imprisonment. Even if tribes remain at the mercy of shifts in federal policy, the immediate future, at least, may be shifting in a better direction.

However, as this article has pointed out, mass incarceration is also about a cycle that is structural: the powerful pull to invest in prisons, the efforts required to keep them open, and the way efforts to fill prisons can create a cycle that leads to the need for more prisons and brings more and more vulnerable people into the cycle of incarceration. What could be a solution to the overincarceration of Native youth—strengthening and expanding tribal juvenile justice systems—might actually be contributing to the problem. Changing this story will require going beyond the current rhetoric about self-determination. It will require tribal leaders willing to thoughtfully address the role of incarceration in their juvenile justice systems, and federal agencies willing to throw financial and advisory support behind the careful choices that tribes make.

Acknowledgments

The author thanks Neelum Arya and Kevin Washburn for comments and criticisms, Luana Ross for her vision in producing this volume, Jim Hoffman and the Weiner-Rogers Law Library staff for research assistance, and the staff of the *American Indian Culture and Research Journal* for editorial assistance.

NOTES

1. The federal Juvenile Justice and Delinquency Prevention Act requires that states monitor the “the disproportionate number of juvenile members of minority groups, who come in contact with the juvenile justice system;” see 42 USC §5633(a)(22). While the law originally referred to disproportionate minority “confinement” (see Juvenile Justice and Delinquency Prevention Act Amendments of 1988, H. Rep. No. 100-605, 10), it was amended in 2002 to expand the requirement from “confinement” to “contact”; see 21st Century Department of Justice Appropriations Authorization Act, Public Law No. 107-273, div. C, tit. II, §12209, 116 Stat. 1758, 1878 (2002). Abbreviated as “DMC,” disproportionate minority contact has become a term of art referring to any decision point at which racial minority youth receive the more punitive of available options at rates higher than their proportion in the general population. This might include arrest (as opposed to release), out-of-home placement (as opposed to in-home placement), placement in secure confinement (as opposed to in-home placement or placement in a nonsecure setting), and transfer to adult court (as opposed to remaining in the juvenile system). For a discussion of the history and implementation of the DMC requirement, see generally US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Disproportionate Minority Contact Technical Assistance Manual*, 4th ed. (July 2009), ojjdp.gov/compliance/dmc_ta_manual.pdf.

2. Native American people make up about 1% of the total national population. Some counts include 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 0.8% of the total population, and AI/AN+ are 1.7% of the total population; see US Census Bureau, *2014 American Community Survey 1-Year Estimates* (2014), http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_1YR/CP05. For this reason, data sets that compare disposition of juvenile offenders by racial group often do not include enough Native American youth to make the results statistically significant.

3. Throughout this article, I use *incarceration* and *secure confinement* as generic terms to describe any arrangement in which an offender is held in a locked facility for the primary purpose of deterrence, community safety, or retribution, including offenders serving short and long terms, offenders held pre- or post-adjudication, and facilities offering some treatment and rehabilitation services. Recognizing that the term *prison* in criminal justice literature refers to a specific type of post-adjudication facility for adult offenders, I nevertheless use the popular term “prisons” in this article as shorthand for all types of secure criminal justice facilities in discussions of general trends.

4. As described in notes 35–44 of this essay, Native youth experience disproportionately harsh sanctions at multiple decision points, including being more likely to be placed out of the home and more likely to be placed in secure confinement. Examples of disparities in particular state and county systems are collected in Neelum Arya and Addie C. Rolnick, “A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems” (Campaign for Youth Justice policy brief, 2008), 20–24, campaignforyouthjustice.org/documents/CFYJPB_TangledJustice.pdf.

5. This number refers to new facilities built to accommodate juvenile offenders, including stand-alone juvenile facilities and combined juvenile/adult facilities. To obtain it, I reviewed the Bureau of Justice Statistics’ annual “Jails in Indian Country” report, which provides information on facilities in the Bureau of Indian Affairs’ inventory, and compared the number of facilities designated (by name) as juvenile facilities in 1997 and 2013. As further described in this article’s subsection “Incarceration of Youth Under Tribal Jurisdiction,” this count is based on the best available federal data regarding Indian country facilities and supplemented with informal counts from reports and other sources. The lack of availability of Indian country crime and justice data has made it difficult for any entity to arrive at a definitive answer to questions that may seem simple in other jurisdictions, such as the number of facilities operational in any given year, how many of those include separate housing for juveniles, or what offenses were committed by the juveniles being held in them. A complete accounting will require visiting every facility in the Bureau of Indian Affairs’ inventory and gathering information from tribes about additional facilities, a task no one has yet accomplished. This article therefore relies on the best available information, recognizing that the information is incomplete and at times contradictory.

6. As described more fully in this article’s subsection “Incarceration of Youth Under Tribal Jurisdiction,” the total mid-year count of juveniles in all Indian country facilities, including any juveniles being held as adults or in adult holding facilities, was 303 in 1998 and 190 in 2014. In the intervening years, it has reached a high of 312, but has not been above 300 since 2004.

7. Indian Law and Order Commission, *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States* (November 2013), 157, 166–67, aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf; US Department of Justice, Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence so Children Can Thrive* (November 2014), 110–13, 119–21, justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf.

8. For example, the website for the Office of Juvenile Justice and Delinquency Prevention sets forth the agency’s current vision that young people’s contact with the justice system should be “rare,

fair, and beneficial." US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Vision Statement, ojjdp.gov/about/missionstatement.html. Outside of Indian country, the past two decades have seen a gradual shift from a punitive focus on juvenile justice to a belief that children should be treated differently from adults, including avoiding incarceration whenever possible. Addie C. Rolnick, "Untangling the Web: Juvenile Justice in Indian Country," *NYU Journal of Legislation & Public Policy* 19, no. 1, 75–77 (2016), nyujlpp.org/wp-content/uploads/2016/05/Rolnick-Juvenile-Justice-in-Indian-Country-19nyujlpp49.pdf.

9. Mona Lynch, *Sunbelt Justice: Arizona and the Transformation of American Punishment* (Stanford University Press, 2010), 9–16. At page 13, Lynch notes that, "although all 50 states in the United States have experienced massive growth in their imprisonment rates over this period, those rates vary dramatically from state to state and regionally, as do the qualitative aspects of punishment and the rates of minority overrepresentation relative to the general jurisdictional demographics."

10. I capitalize the terms *Black* and *Brown* (the latter referring to non-Black, nonwhite people, including Native Americans), as well as *Native*, in order to acknowledge that racial designations are not simply neutral descriptions of color, but refer to constructed and legally significant categories. For a detailed analysis of the construction of the Indian racial and legal category, see Addie C. Rolnick, "The Promise of *Mancari*: Indian Political Rights as Racial Remedy," *NYU Law Review* 86, no. 4 (October 2011), 965n31, nyulawreview.org/sites/default/files/pdf/NYULawReview-86-4-Rolnick.pdf. Moreover, the experience of people of color at the subordinated end of a constructed racial hierarchy has created social and political identities grounded in racial categories, identities that are best represented by capitalizing the terms Black, Brown, and Native. I use the term Native whenever possible, except that I use Indian to refer to a specific legal designation.

11. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010), 9–11. At page 13, Alexander explains that mass incarceration "refers not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison."

12. National Research Council Committee on Causes and Consequences of High Rates of Incarceration, "Growth of Incarceration in the United States: Exploring Causes and Consequences," ed. Jeremy Travis, Bruce Western, and Steve Redburn (Washington, DC: The National Academies Press, 2014), 47–55, nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes. As explained in the National Research Council report, changes in the rate of commitment and the length of sentences, especially for drug crimes, explain the rise in incarceration to a far greater degree than does any change in offense or arrest rates.

13. Rolnick, "Untangling the Web," 74–75.

14. US Department of Justice, *Ending Violence*, 119. Data is certainly lacking on this point, but see table 5 for available information on youth confined in June 2013 by type of offense.

15. Telling the precise story of juvenile incarceration in Indian country will require careful review of data on offense rates, population change, and disposition rates; investigation into the character of the new facilities in comparison to the old, comparing factors like size, staff training, programming, and physical structure; and interviews with the people involved to determine how decisions were made to build, close, or upgrade particular facilities. Because publicly available data on juvenile justice in Indian country is quite limited, missing information will have to be collected. This article, which sketches out the contours of a phenomenon I have observed but which cannot yet be carefully documented, is but one step in a much larger investigation of tribal juvenile justice systems.

16. For example, Congress recently expanded tribes' criminal power by restoring aspects of criminal jurisdiction that had previously been divested. The Tribal Law and Order Act of 2010 authorizes tribes to impose sentences for up to three years; see 25 USC §1302(b) (2014). The Violence Against Women Act of 2013 authorizes tribes to prosecute non-Indian domestic violence offenders; see

25 USC §1304 (2014). Both laws strengthen tribal criminal justice systems by enabling tribes to imprison more categories of people and to impose longer terms of imprisonment.

17. There is no single justice “system” that serves Native youth, nor is it limited to the regions legally designated as “Indian country.” I use these terms as shorthand, as other commentators do. This article focuses on tribal juvenile courts and facilities on tribal lands, but Native youth are also involved in federal and state courts and are held in facilities outside tribal territory.

18. Jim Trotter, “Native American Youth Face Antiquated Juvenile Justice System,” *Rocky Mountain PBS News*, January 24, 2014, inewsnetwork.org/media-partners/native-american-youth-face-antiquated-juvenile-justice-system/; Sari Horwitz, “From Broken Homes to a Broken System,” *Washington Post*, November 28, 2014, washingtonpost.com/sf/national/2014/11/28/from-broken-homes-to-a-broken-system/.

19. Indian Law and Order Commission, *Roadmap*, 149; US Department of Justice, *Ending Violence*, 24.

20. Just the act of counting Native youth as a nationwide group, while important, raises many potential complications. 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. 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). Among people who identify as Native alone or in combination with another race, only 22% live in a native area. Tina Norris, Paula L. Vines, and Elizabeth M. Hoeffel, *The American Indian and Alaska Native Population: 2010* (Washington, DC: US Census Bureau, January 2012), 12–13, census.gov/prod/cen2010/briefs/c2010br-10.pdf. 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.

21. Indian Law and Order Commission, *Roadmap*, 149–53; US Department of Justice, *Ending Violence*, 36–40, 121–22.

22. I first collected statistics on risk factors and disproportionality rates in Arya and Rolnick, “A Tangled Web,” 4–9 (2008). Updated statistics appear in my most recent article, “Untangling the Web,” 78–81. The following endnotes reproduce information from these articles, citing updated source material where possible.

23. In 2007–2011, the AIAN-only poverty rate was 27%, compared to 14.3% of the total population and 11.6% of whites. See Suzanne Macartney, Alemayehu Bishaw, and Kayla Fontenot, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011* (February 2013): US Census Bureau American Community Survey Brief ACSBR, 13, census.gov/prod/2013pubs/acsbr11-17.pdf. In 2014, the AI/AN-only poverty rate was estimated at 28.3%, versus 15.5% for the general population. See US Census Bureau, *2014 American Community Survey 1-Year Estimates* (2014), http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_1YR/S1701/0100000US.

24. Arya and Rolnick, “A Tangled Web,” 14; Rolnick, “Untangling the Web,” 54–55, 111.

25. Arya and Rolnick, “A Tangled Web,” 4.

26. Arya and Rolnick, “A Tangled Web,” 5; US Department of Justice, *Ending Violence*, 38; Indian Law and Order Commission, *Roadmap*, 151.

27. In the 2011–2012 school year, 68% of AI/AN students graduated, compared to 81% of the total population; see US Department of Education, National Center for Education Statistics, Common Core of Data (CCD), *NCES Common Core of Data State Dropout and Graduation Rate Data File*, School Year 2011–12, Preliminary Version 1a, nces.ed.gov/ccd/tables/AFGR0812.asp. In 2014,

20.7% of AI/AN-only people over the age of 25 lacked a high school diploma/GED, compared with 13.2% of the total over-25 population; see US Census Bureau, *2014 American Community Survey*, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_1YR/S0201//popgroup~006; http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S1501.

28. In 2012, 13.9% of AI/AN-only people over the age of 25 had a bachelor's degree or higher, compared to 29.3% of the general population; see US Census Bureau, *2014 American Community Survey*, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_1YR/S0201//popgroup~006; http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S1501.

29. In 2012, AI/AN-only people over the age of 12 experienced the highest rate of substance abuse, at 21.8%; see US Department of Health and Human Services, Substance Abuse Mental Health Services Administration, Center for Behavioral Health Statistics and Quality, *National Survey on Drug Use and Health, 2012*, ICPSR34933-v3, Table 5.5B (Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], November 23, 2015), doi: 10.3886/ICPSR34933.v3.

30. Compared to the general population, those served by the Indian Health Service are 60% more likely to die of suicide; see Indian Health Service Newsroom, "Disparities," ihs.gov/newsroom/factsheets/disparities/. Using 2011 statistics for people younger than 25 years, the AI/AN suicide rate was 13.06/100,000, which was more than double the white rate (6.11/100,000), almost quadruple the black rate (3.31/100,000), and more than quadruple the Asian rate (2.85/100,000); see Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, WISQARS dataset, <http://www.cdc.gov/injury/wisqars/>.

31. In 2014, the rate of child abuse among AIAN-only victims was 13.4/1,000, compared to 8.4/1,000 for white victims. 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 this rate is understated; see US Department of Health and Human Services, ACF Children's Bureau, *Child Maltreatment 2014*, Table 3.6 (December 17, 2015), acf.hhs.gov/sites/default/files/cb/cm2014.pdf.

32. In 2012, the violent victimization rate for American Indians and Alaska Natives was 46.9/k. This was 1.37 times the black rate (34.2/1,000), 1.86 times the white rate (25.2/100,000), and 2.86 times the API rate (16.4/1,000), excluding those who identify as mixed race; see Jennifer Truman, Lynn Langton, and Michael Planty, US Department of Justice, Bureau of Justice Statistics, *Criminal Victimization, 2012* (October 2013), NCJ 243389, Table 7, 7, bjs.gov/content/pub/pdf/cv12.pdf.

33. Indian Law and Order Commission, *Roadmap*, 151–53; US Department of Justice, *Ending Violence*, 37–39.

34. Indian Law and Order Commission, *Roadmap*, 149; US Department of Justice, *Ending Violence*, 39–40; Kathleen Brown-Rice, "Examining the Theory of Historical Trauma Among Native Americans," *The Professional Counselor* (October 2014), tpcjournal.nbcc.org/examining-the-theory-of-historical-trauma-among-native-americans/. 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." See American Academy of Pediatrics, "Adverse Childhood Experiences and the Lifelong Consequences of Trauma" (2014), 2, https://www.aap.org/en-us/Documents/ttb_aces_consequences.pdf.

35. US Department of Justice, *Ending Violence*, 87–88; National Center for Juvenile Justice for the Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 2014 National Report*, 34, ojjdp.gov/ojstarbb/nr2014/.

36. Native American youth are 1% of the nationwide juvenile populations, but they account for 2% of juvenile arrests for drunkenness and driving under the influence, and 3% of juvenile arrests for

liquor laws and “offenses against the family and children;” see National Center for Juvenile Justice, *Juvenile Offenders and Victims*, 118.

37. *Ibid.*, 180. Native youth are also less likely than white youth to be given probation and more likely to be detained and/or placed in a residential facility. See Coalition for Juvenile Justice and Tribal Law and Policy Institute, “American Indian/Alaska Native Youth & Status Offense Disparities: A Call for Tribal Initiatives, Coordination & Federal Funding” (June 2015), 1–2, files.ccrctcdn.com/31e4a892301/5e0511a9-1707-4ffa-83d0-082b339f9ad4.pdf.

38. Native youth had the highest case rate for liquor violations every year from 1995–2010. See National Center for Juvenile Justice, *Juvenile Offenders and Victims*, 181.

39. Arya and Rolnick, “A Tangled Web,” 8. In 2011, the residential placement rate per 100,000 for American Indian and Alaska Native youth across all states was second only to the residential placement rate for African American youth. As is the case in most national comparisons, youth in tribal facilities were not included. Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book, *Juveniles in Corrections, State Residential Placement Rates*, ojjdp.gov/ojstatbb/corrections/qa08203.asp?qaDate=2013&text=yes. The relative rate index for American Indian and Alaska Native youth placed outside the home for person offenses, which is a measure of how much more or less likely minority youth are to be placed out of home compared to white youth, has been above that of other minority groups from 1990–2010. See Charles Puzzanhera and Sarah Hockenberry, “An Interpretation of the National DMC Relative Rate Indices for Juvenile Justice System Processing in 2010,” *National Disproportionate Minority Contact Databook* (December 2013), prepared by the National Center for Juvenile Justice for the Office of Juvenile Justice and Delinquency Prevention, 4, ojjdp.gov/ojstatbb/dmcdm/pdf/dmc_interpretations.pdf.

40. According to data collected from state juvenile justice systems by the W. Haywood Burns Institute, Native youth across all states are incarcerated at a rate of 329 per 100,000. This rate is greater than the rate for white youth (98) and for all youth of color (263). In Nebraska, Native youth are incarcerated at a rate of 954 per 100,000, compared to 203/100,000 for all youth and 798/100,000 for youth of color. In South Dakota, Native youth are incarcerated at a rate of 1,239 per 100,000, compared with 373/100,000 for all youth and 935/100,000 for youth of color. The W. Haywood Burns Institute for Juvenile Justice Fairness and Equity, “Unbalanced Juvenile Justice: 2013 Incarceration Rates for Native American,” [sic], data.burnsinstitute.org/#comparison=2&placement=3&rac=1,4&offenses=5,2,8,1,9,11,10&year=2013&view=map. This is based on one-day count data from the Office of Juvenile Justice and Delinquency Prevention and includes the total number of youth in residential placement, including detention, post-adjudication commitment, and diversion numbers. According to the Burns Institute, the NCJRS defines diversion as “juveniles sent to a facility in lieu of adjudication as part of a diversion agreement;” see data.burnsinstitute.org/about#about-the-data. While Native youth are still disproportionately placed in secure confinement, confinement rates for all youth have fallen since 1997. In 1997, the confinement rate for Native youth was 490 per 100,000, compared to 356 per 100,000 for all youth. In 2011, the confinement rate for Native youth was 376 per 100,000, compared to 225 per 100,000 for all youth. See Annie E. Casey Foundation, *Youth Incarceration in the United States* (February 26, 2013), aef.org/resources/youth-incarceration-in-the-united-states/. The OJJDP Statistical Briefing Book, the Burns Institute, and the Annie E. Casey Foundation rely on data from the annual census of juveniles in residential placement conducted by the OJJDP. Variations in exact counts are likely attributable to differences in who is included in each organization’s count of “confined” or “incarcerated” juveniles.

41. In 2010, juveniles of all races were most likely to be waived into criminal court for person offenses; among those adjudicated for person offenses, Native American youth were more likely than youth of any other racial group to be waived in. See National Center for Juvenile Justice, *Juvenile Offenders and Victims*, December 2014, 174.

42. It is difficult to compare incarceration rates interracially among youth adjudicated in tribal courts or in federal court. Because of the law governing juvenile delinquency jurisdiction, more than half of the juveniles prosecuted in federal courts and nearly all of the juveniles prosecuted in tribal courts are Native American. These laws are discussed in detail in Rolnick, "Untangling the Web," 82–102.

43. Robin Lecoanet, Daphne Kuo, Stephanie Lindsley, and Sarah Seibold, *Disproportionate Minority Contact in Wisconsin's Juvenile Justice System* (University of Wisconsin Population Health Institute, September 2014), uwphi.pophealth.wisc.edu/publications/other/uw-phi-dmc-final-evaluation-report-september-2014.pdf. Wisconsin is home to eleven tribes, all but one of which are subject to Public Law 280. Carole Goldberg, Duane Champagne, and Heather Valdez Singleton, *Final Report: Law Enforcement and Justice Under Public Law 280* (2007), 9, ncjrs.gov/pdffiles1/nij/grants/222585.pdf. As a result, juveniles from all but one tribe may be adjudicated in the state system.

44. Arya and Rolnick, "A Tangled Web," 22, citing John Poupart, John Redhorse, Melanie Peterson-Hickey, and Mary Martin, "Searching for Justice: American Indian Perspectives on Disparities in Minnesota Criminal Justice System" (August 2005), 15–16, crimeandjustice.org/researchReports/American%20Indian%20Perspectives%20on%20Disparities%20in%20the%20Minnesota%20Criminal%20Justice%20System.pdf.

45. Benjamin Chambers and Annie Balck, "Because Kids Are Different: Five Opportunities for Reforming the Juvenile Justice System," (December 9, 2014), John D. and Catherine T. MacArthur Foundation Models for Change Resource Center Partnership: Systems Reform in Juvenile Justice, modelsforchange.net/publications/718.

46. Richard A. Mendel, "The Missouri Model: Reinventing the Practice of Rehabilitating Youthful Offenders" (The Annie E. Casey Foundation: 2010), 5, aecf.org/resources/the-missouri-model/; Youth Transition Funders Group, "Juvenile Justice Reform: A Blueprint" (2012), 15, ytf.org/2012/01/juvenile-justice-reform-a-blueprint/.

47. Richard A. Mendel, "No Place for Kids: The Case for Reducing Juvenile Incarceration" (The Annie E. Casey Foundation, 2011), aecf.org/resources/no-place-for-kids-full-report/.

48. Indian Law and Order Commission, *Roadmap* 166–67; Attorney General's Advisory Committee, *Ending Violence*, 119.

49. Attorney General's Advisory Committee, *Ending Violence*, 24, 27, 112, 119.

50. For a further discussion of the jurisdictional web and how it negatively affects juvenile justice and results in overincarceration, see Arya and Rolnick, "A Tangled Web," 10–27, and Rolnick, "Untangling the Web," 82–109.

51. Indian Law and Order Commission, *Roadmap*, 169–73.

52. *Ibid.*, 166–67.

53. A more detailed discussion of the scope of and limitations on tribal criminal jurisdiction is set forth in two recent articles: Addie C. Rolnick, "Tribal Criminal Jurisdiction Beyond Citizenship and Blood," *American Indian Law Review* 39, no. 2 (2016), digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1008&context=ailr; and Rolnick, "Untangling the Web," 88–96.

54. *United States v. Wheeler*, 435 US 313 (1978), 322–23. As stated on page 323 of the Court's opinion, "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."

55. 25 USC §1301(2); *United States v. Lara*, 541 US 193 (2004), 198.

56. Though it is infrequently exercised and has rarely been addressed by federal courts, tribes likely retain criminal jurisdiction over their members for certain offenses committed outside tribal territory. See *Kelsey v. Pope*, 809 F.3d 849 (6th Cir. 2016), upholding tribe's exercise of extraterritorial

criminal jurisdiction over a citizen; see also *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974), affirming extraterritorial criminal jurisdiction over citizens for offenses related to treaty rights occurring in treaty-defined territory.

57. *Oliphant v. Suquamish Indian Tribe*, 435 US 191, 210 (1978); 25 USC §1304(b).

58. Under the Indian Child Welfare Act, tribes have concurrent jurisdiction over any child custody proceeding, including foster placement, preadoptive placement, adoption, or termination of parental rights, and the Act applies to any juvenile court proceeding that result in such placements. Department of the Interior, Bureau of Indian Affairs Notice: Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, *Federal Register* 80, 10,146, 10, 151 (February 25, 2015), federalregister.gov/a/2015-03925.

59. Federal courts have jurisdiction over proceedings against juveniles who commit “a violation of a law of the United States” while under the age of 18 “which would have been a crime if committed by an adult.” 18 USC §5301. This includes youth (Indian or otherwise) who violate general federal criminal laws, and it also includes Indian youth in Indian country who commit an offense defined as a major crime in 18 USC §1153, or an offense with a non-Indian victim that is defined by criminal laws applicable to federal territories, as set forth in 18 USC §1152.

60. Public Law No. 83-280, 67 Stat. 588 (1953) (codified at 25 USC §§1162, 1360, 1321 (2006)). Public Law 280 (PL 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 AK, CA, MN (except the Red Lake Reservation), NE, OR (except the Warm Springs Reservation), and WI. Although PL 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. Carole Goldberg-Ambrose discusses shifts in state and federal jurisdiction over tribal lands under PL 280 in *Planting Tail Feathers: Tribal Survival and Public Law 280* (Los Angeles: American Indian Studies Center Press, 1997). States voluntarily accepting jurisdiction over some or all reservations pursuant to §1321 were AZ, FL, ID, IA, MT, NV, ND, SD, UT, and WA. In the voluntary states, the exact scope of state jurisdiction is defined by state statute.

61. Tribes in some states are subject to similar state-specific laws, precursors to Public Law 280. With one exception, Alaska tribes are subject to state jurisdiction because of a 1998 Supreme Court decision holding that their lands do not qualify as Indian country. *Alaska v. Native Village of Venetie*, 522 US 520, 532 (1998). Although Alaska was included in Public Law 280’s jurisdictional grant, the main barrier to jurisdiction today is the *Venetie* decision. Finally, a number of tribes, mostly in the Northeast, reestablished their reservations (and sometimes their federal recognition) during the second half of the twentieth century via legislation that settled pending land claims between the tribes and the states in which they are presently located. Nearly all of those settlement laws include a provision, the result of negotiation between the tribe and state, in which the tribe accepted state jurisdiction over its Indian country. Many tribes in ME, MA, RI, and CT are subject to state jurisdiction as a result of a land settlement.

62. I use the term “minor offense” here to refer to any offenses not listed in the federal Major Crimes Act, 18 USC §1153.

63. If tribal law provides that juvenile adjudications may result in incarceration (in which case they are appropriately characterized as criminal jurisdiction), federal law limits the length of sentence that may be imposed. Tribes in most cases may not sentence offenders to more than one year of imprisonment or impose a fine of more than \$5,000. 25 USC §1302(a). They can, however, stack sentences for multiple offenses for a total of up to nine years’ imprisonment. 25 USC §1302(a)(7)(d). If the tribe complies with certain additional requirements, it may incarcerate offenders to up to three years, and impose fines of up to \$15,000, per offense. 25 USC §1302(b).

64. For sentences of one year or less, tribal courts must provide a fair hearing and due process of law; see 25 USC §1302(a). If a defendant faces a potential sentence of one to three years, tribes must also provide indigent defendants with free defense counsel, they must make their laws publicly available, and they must have law-trained and certified judges, and a jury trial; see 25 USC §1302(c).

65. For a more detailed discussion of the distinction between criminal and civil jurisdiction and the significance of that distinction to the juvenile delinquency context, see Rolnick, "Untangling the Web," 96–99.

66. In the best scenario, Congress would amend federal law to require that federal prosecutors defer to tribal authorities who wish to address a particular youth's behavior in tribal court and to require that state courts adjudicating tribal youth for Indian country offenses provide tribes with notice, an opportunity to transfer jurisdiction, and/or the option to participate in individual cases. These recommendations are detailed in written testimony provided to the United States Senate Committee on Indian Affairs in July 2015. Testimony of Addie C. Rolnick before the United States Senate Committee on Indian Affairs, Oversight Hearing on Juvenile Justice in Indian Country: Challenges and Promising Strategies (July 15, 2015), at 9–11, available at <http://www.indian.senate.gov/sites/default/files/upload/files/Rolnick%20Testimony%207.15.15.pdf>; see also Rolnick, "Untangling the Web," 131–35. However, tribal courts already have concurrent jurisdiction over all the youth described here, and current federal law does not prevent federal and state authorities from voluntarily directing more youth to tribal courts.

67. *Roadmap*, 159, and 159–66; *Ending Violence*, 114–116, 122; Arya and Rolnick, "A Tangled Web," 32; 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," *Berkeley Journal of Criminal Law* 17, no. 1 (2012): 130, bjcl.org/articles/17_1%20seelau_formatted.pdf; 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," *American Indian Law Review* 37, no. 1 (2012–2103): 63–109, libredeterminacion.org/proldi/images/lawReview-remaking.pdf.

68. Carole Goldberg, Rebecca Tsosie, Kevin K. Washburn and Elizabeth Rodke Washburn, *American Indian Law: Native Nations and the Federal System, Cases and Materials*, 6th ed. (Newark, NJ: Lexis-Nexis, 2010), 37–42. Kevin Washburn has specifically called for greater tribal self-determination as a strategy to improve law enforcement and criminal justice in Indian country. Kevin K. Washburn, "Federal Criminal Law and Tribal Self-Determination," *North Carolina Law Review* 84, no. 4 (2006): 779, 834–35, papers.ssrn.com/sol3/papers.cfm?abstract_id=800828; Kevin K. Washburn, "American Indians, Crime, and the Law: Five Years of Scholarship on Criminal Justice in Indian Country," *Arizona State Law Journal* 40, no. 3 (2008): 1024–25, heinonline.org/HOL/Page?handle=hein:journals/arzjl40&div=39&g_sent=1&collection=journals#.

69. Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation Building: The Development Challenge in Indian Country Today," *American Indian Culture and Research Journal* 22, no. 3 (1998); Seelau, "The Kids Aren't Alright."

70. *Worcester v. Georgia*, 31 US (6 Pet.) 515, 557 (1832). The Court described 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."

71. Ada Pecos Melton, "Indigenous Justice Systems and Tribal Society," in *Justice as Healing: Indigenous Ways*, ed. Wanda D. McCaslin (St. Paul, MN: Living Justice Press, 2005), 108; Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1997); Justin B. Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (University of Chicago Press, 2008); Christine Zuni Cruz, "Tribal Law as

Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law,” *Tribal Law Journal* 1 (2000/2001), lawschool.unm.edu/tlj/tribal-law-journal/articles/volume_1/zuni_cruz/index.php; Carey N. Vicenti, “The Reemergence of Tribal Society and Traditional Justice Systems,” *Judicature: The Scholarly Journal for Judges* 79, no. 3 (1995): 134; Gloria Valencia-Weber, “Tribal Courts: Custom and Innovative Law,” *New Mexico Law Review* 24, no. 2 (1994): 225, lawschool.unm.edu/nmlr/volumes/24/2/04_valencia_weber_tribal.pdf; Maha Jweied, “Expert Working Group Report: Native American Traditional Justice Practices” (US Department of Justice and US Department of the Interior, September 2014), justice.gov/sites/default/files/atj/legacy/2014/10/09/expert-working-group-report-native-american-traditional-justice-practices.pdf.

72. Addie C. Rolnick, “Developing a Juvenile Justice System in the Native Village of Barrow, Alaska” (MA thesis, University of California, Los Angeles, 2007).

73. The following charts are based on the Office of Justice Programs, Bureau of Justice Statistics annual Survey of Jails in Indian Country series, available from the main webpage at bjs.gov/index.cfm?ty=dcdetail&iid=276. The survey includes “all known Indian country correctional facilities” operated by tribes under federal contracts or compacts or by the Bureau of Indian Affairs. It also includes some facilities operated by private contractors; see Todd D. Minton, *Jails in Indian Country, 2013*, NCJ 247017 (July 31, 2014), 8. It includes “jails, confinement facilities, detention centers, and other correctional facilities;” see Todd D. Minton, *Jails in Indian Country, 2007*, NCJ 223760 (November 7, 2008), 1. The survey excludes facilities that have closed, that are determined to be “out of scope,” or that are not included in the Bureau of Indian Affairs’ facility inventory; see Minton, *Jails in Indian Country, 2013*, 1. Additional information regarding the total number of facilities and the timing of construction comes from periodic federal reports, including investigations of the BIA’s detention program and the description of program accomplishments provided in the BIA’s budget justification. Finally, I rely on a recent unpublished list of Indian country juvenile facilities compiled by the Association on American Indian Affairs (AAIA). Where a particular number does not match the *Jails in Indian Country* count, I note the source of the information and any discrepancy between the two sources. While it may seem like a simple matter to count the number of correctional facilities in the BIA inventory in a given year, even the Inspector General was unable to obtain complete and reliable information in the course of its investigations. This article presents the best available information while acknowledging that significant gaps and discrepancies exist.

74. Unlike most adult state and county systems, which typically have jails and juvenile detention facilities to house pretrial offenders and prisons or youth correctional facilities to house offenders post-adjudication, facilities in Indian country do not necessarily segregate offenders in this manner. This data from the annual Survey of Jails in Indian Country includes detention centers, correctional facilities, and lockups, many of which house offenders pre- and post-adjudication. One reason for this may be the one-year sentence limitation that applied to all tribal prosecutions through 2010 and continues to apply in many cases; see 25 USC §1302 (2012). This means that tribal inmates are usually serving the equivalent of a misdemeanor sentence in another jurisdiction. One of the challenges in reviewing Indian country data is that it merges these two categories, frequently using the term “detention” and “jail” to refer to all facilities, while in other contexts these terms refer to a very specific facility types and populations. In order to avoid confusion, I use the terms “facility,” “secure facility,” and “incarceration facility” except when quoting or referring to a source that uses another term.

75. Although most Indian country facilities are federal facilities in the sense that they are operated, or at least funded, by the federal Bureau of Indian Affairs, Native youth adjudicated in federal courts are not held in these facilities. Instead, the federal Bureau of Prisons contracts with state or local facilities to house juveniles under its jurisdiction, including Native American youth. According

to a 2011 report on Native youth under federal jurisdiction, although “the BOP directory of juvenile facilities (2007) indicates [it] also contracts with tribal facilities,” [n]either the BOP nor the [US Marshals Service] . . . mentioned contracting with tribal facilities to house federal youth during our interviews;” see William Adams, Julie Samuels, Janeen Buck Willison, Hannah Dodd, Meredith Dank, Barbara Parthasarathy, Kamala Mallik-Kane, Jessica Kelly, Sybil Mendonca, and KiDeuk Kim, *Tribal Youth in the Federal Justice System Final Report (Revised)* (Washington, DC: Urban Institute Justice Policy Center, May 2, 2011), 23, urban.org/research/publication/tribal-youth-federal-justice-system.

76. These arrangements and the laws that structure them are described further in Rolnick, “Untangling the Web,” 114–15.

77. According to a report issued in September 2004 by the Department of the Interior, Office of the Inspector General, there were seventy-two facilities in the BIA’s inventory. However, the report also notes that BIA’s Law Enforcement Services was “unable to provide [the Inspector General] with an exact number of facilities under its control despite numerous requests for an accurate list” and that the list provided included facilities that had been closed or were no longer being used. US Department of the Interior Office of Inspector General, “Neither Safe Nor Secure”: *An Assessment of Indian Detention Facilities* (September 2004), 6n2.

78. The Survey of Jails in Indian Country was not conducted in 2005 or 2006; see Minton, *Jails in Indian Country*, 2007, 1.

79. Although the 2009 report provides data for eighty facilities, the 2010 report states that the 2009 numbers were based on data from only seventy-nine facilities; see Todd D. Minton, *Jails in Indian Country, 2010*, NCJ 236073 (December 2011), 1. A 2011 report by the US Department of the Interior, Office of Inspector General states that the Bureau’s 2009 inventory included ninety-four facilities. US Department of the Interior, Office of the Inspector General, *Bureau of Indian Affairs Detention Facilities* (2011), <https://www.doi.gov/sites/doi.gov/files/01-WR-EV-BIA-0005-2010Public.pdf>.

80. Between 1998 and 2004, three new facilities were built, six closed, two were abandoned, and two were combined into one; see Minton, *Jails in Indian Country, 2004*, 7. Between 2004 and 2013, twenty-one new facilities were built and eleven were closed; see Todd D. Minton, *Jails in Indian Country, 2014*, NCJ 248974 (October 2015), 1, bjs.gov/content/pub/pdf/jic14.pdf]. As described in the previous note, other sources suggest that this number might be low.

81. I used the mid-year count, rather than the number of admissions in a given year. Relying on the number of admissions in a given year would present a risk of overcounting because a single person would be counted multiple times if that person were admitted multiple times in a year.

82. The 2001 report gives a mid-year count for 2000 of 1,853. I have not been able to determine the source of the discrepancy; see Todd D. Minton, *Jails in Indian Country, 2001*, NCJ 193400 (May 2002), 1. For purposes of the survey, the inmate population includes all confined juveniles and adults, all persons in special programs administered by the facility (e.g., electronic monitoring), all persons on transfer to treatment facilities by under the jurisdiction of the facility, and all persons held for other jurisdictions. It excludes escaped inmates, AWOL inmates, and long term transfers. See Todd D. Minton, *Jails in Indian Country, 1998 and 1999*, NCJ 1734107 (July 2000), 7.

83. The Survey of Jails in Indian Country was not conducted in 2005 or 2006; see Minton, *Jails in Indian Country, 2007*, 1.

84. Between 1999 and 2014, the reports do not include information on the number of facilities authorized to hold juveniles and the type of authorization. Because the total number of facilities remained almost constant from 1999–2004, the number of stand-alone juvenile facilities likely remained constant at seven for each of these years.

85. *Ibid.* In addition to eleven juvenile-only facilities, the Inspector General’s report states that thirty-four facilities housed a combination of adults and juveniles.

86. Although information on the number of facilities authorized to hold juveniles and the type of authorization was not included in the 2004 survey, the Inspector General's 2004 report states that eleven facilities housed only juveniles; see US Department of the Interior Office of Inspector General, "Neither Safe Nor Secure," 6. The number of facilities that actually held juveniles was obtained by reviewing the mid-year count for each year, which lists juveniles separately.

87. The *Survey of Jails in Indian Country* was not conducted in 2005 or 2006. *Jails in Indian Country*, 2007, 1.

88. Information on the number of facilities authorized to hold juveniles was also collected informally by staff at the Association on American Indian Affairs (AAIA) and shared with me as part of my participation in a working group on reducing juvenile incarceration in tribal systems that is convened periodically by AAIA, the National Indian Child Welfare Association, and the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative. Association on American Indian Affairs, *List of Indian Country Juvenile Detention Facilities* (2014); draft on file with author. According to the AAIA list, four facilities authorized to hold juveniles are operated by tribes without assistance from the BIA, and so may not appear in federal counts.

89. AAIA, *List of Indian Country Juvenile Detention Facilities*. This number includes facilities either listed as juvenile-only, or reporting separate square footage and staff for adult and juvenile. Like the Bureau's list, the AAIA list includes facilities directly operated by the Bureau of Indian Affairs, and facilities operated by tribes pursuant to self-determination contracts or self-governance compacts. However, the AAIA list also includes facilities operated by tribes without funding from the Bureau of Indian Affairs, including two stand-alone juvenile facilities. These facilities may not appear in the Bureau's inventory and therefore may not be included in the annual *Jails in Indian Country* survey.

90. Twenty-nine facilities held juveniles at some point during 1998, and 43 were authorized to do so, but many of these youth were held in adult facilities that housed only one or two juveniles; see Minton, *Jails in Indian Country, 1998–1999*, 2, 12–13.

91. Minton, *Jails in Indian Country*, 2004, 15–16.

92. This number includes facilities reporting a single square footage number, but separate staff estimates. AAIA, *List of Indian Country Juvenile Detention Facilities*.

93. *Ibid.* This number includes facilities with no separate square footage or staff reported. Federal law requires sight and sound separation between adults and juveniles, but this could be accomplished without employing a separate staff or building a separate facility.

94. AAIA, *List of Indian Country Juvenile Detention Facilities*. According to the information collected by AAIA, four facilities authorized to hold both juveniles and adults were scheduled to become operational in FY 2014, and two adult/juveniles facilities and one juvenile-only facility were scheduled to become operational in the indeterminate future.

95. The *Survey of Jails in Indian Country* was not conducted in 2005 or 2006. *Jails in Indian Country*, 2007, 1.

96. Beginning in 2004, the reports do not state whether or how many juveniles were held as adults in Indian country facilities.

97. *Jails in Indian Country*, 2014.

98. *Jails in Indian Country*, 2013.

99. US Department of the Interior Office of Inspector General, "Neither Safe Nor Secure," 8. A 1997 federal report on Indian country law enforcement, for example, noted the lack of facilities suitable for juveniles. Executive Committee for Indian Country Law Enforcement Improvements, *Final Report to the Attorney General and the Secretary of the Interior* (1997), Appendix, Tab A.

100. To obtain these numbers, I reviewed Appendix, Table 2 of *Jails in Indian Country*, 2013, which sets forth the number of inmates in all facilities by offense type. Because the table does not

identify inmates by age status, I included only information for the sixteen facilities with names that clearly designate them as juvenile facilities. This group likely includes both stand-alone juvenile facilities as well as joint facilities with separate juvenile divisions. I excluded data from facilities that hold both adults and juveniles but did not report adult and juvenile offense data separately because I could not isolate juvenile offenses. Because I could rely only on facility names to determine which were juvenile facilities, this chart provides only a rough count.

101. Fifty-one percent (84) juveniles were being held for offenses categorized as “other.” While it is not clear which offenses constitute this category, the inclusion of a separate “other violent” category suggests that offenses included in the “other” category are nonviolent offenses.

102. For a more detailed discussion of the relationship between federal legislation, agency choices, and tribal juvenile justice systems, see Rolnick, “Untangling the Web,” 114–22.

103. US Department of the Interior Office of Inspector General, “*Neither Safe Nor Secure*,” 39. From 1999 until 2009, the Correctional Facilities on Tribal Lands grant 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. US Department of Justice and US Department of Interior, Tribal Law and Order Act: Long Term Plan to Build and Enhance Tribal Justice Systems 33 (2011), 23.

104. *Ibid.*, 37.

105. The Bureau’s budget for detention increased from \$43.8 million in 2005 to \$64.7 million in 2009, and the appropriations language did not specify how the funding was to be used. US Department of the Interior, Office of the Inspector General, Bureau of Indian Affairs Detention Facilities (2011), 2.

106. The Tribal Youth Program was established in 1999 and was funded at \$10 million in 1999, \$12.5 million in 2000 and 2001, and \$12.47 million in 2002; see Kay McKinney, “OJJDP’s Tribal Youth Initiatives,” *OJJDP Juvenile Justice Bulletin* (May 2003), ncjrs.gov/html/ojjdp/193763/pg1.html. The funding level remained at \$12 million annually in 2003 and 2004. For 2003 and 2004, the OJJDP’s annual report describe two other funding sources for juvenile justice in Indian country: the TYP Mental Health Initiative provided funding for substance abuse and mental health services, and the Tribal Juvenile Accountability Discretionary Grant Program, which was introduced in 2004 to promote reforms that “hold AI/AN youth accountable for their actions;” see US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *OJJDP Annual Report 2003–2004*, 45, ncjrs.gov/pdffiles1/ojjdp/206630.pdf. This program is a subset of the Juvenile Accountability Block Grant to states, which can be used to fund expansion, renovation, or staffing of incarceration facilities. US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, “Juvenile Accountability Block Grant Program: Program Purposes Areas,” ojjdp.gov/jabg/purpose.html. Appropriations for the Tribal Youth Program decreased to \$10 million for 2005, increased to \$14 million in 2008, increased again to \$25 million in 2009 and 2010 (although only \$12 million was awarded in grants in 2009), then fell again, with appropriations ranging from \$5 million to \$10 million in 2012–16. US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *FY 2005 Tribal Youth Program Announcement* (2005), <http://www.ojjdp.gov/funding/fy2005typ.pdf>; *OJJDP Annual Report 2009*, 26, ncjrs.gov/pdffiles1/ojjdp/229305.pdf; Kristin Finklea, “Juvenile Justice Funding Trends,” *Congressional Research Service* (Jan. 2016), 7, <https://www.fas.org/sgp/crs/misc/RS22655.pdf>. Previously a creature of the appropriations process, the program was authorized at \$25 million annually (though it did not necessarily receive the full authorized amount each year)

as part of the Tribal Law and Order Act, but that authorization ended in fiscal year 2015; see Public Law No. 11-211, §246.

107. Tribal youth who require residential treatment are often sent to state, local, or private programs.

108. Association on American Indian Affairs, “Federal Funding for Tribal Detention Facilities: Source of Funding & Limitations on Its Use” (2014), indian-affairs.org/uploads/5/4/7/6/54761515/fedfundtribaldetenfacdoc.pdf.

109. Attorney General’s Advisory Committee, *Ending Violence*, 119.

110. Lynch, *Sunbelt Justice*, 3; Marc Mauer, *Race to Incarcerate: The Sentencing Project* (New York: The New Press, 1999), 19–21. According to Mauer, until 1970 the prison population in the United States had remained relatively stable for decades. Policymakers had even proposed a moratorium on new prison construction, and several juvenile prisons were closed; see pages 15–40. Then, between 1972 and 1997, the United States prison population increased 500%, from 200,000 to 1.2 million; see page 19. Prisoner populations and prison construction went hand in hand; more than half the of the prisons operating today were built in the last 20 years; see page 9. Zimring compared the rate of imprisonment per 100,000 people in 1970 and 2007 and found a fivefold increase. 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.” Franklin E. Zimring, “The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects,” *The Journal of Criminal Law and Criminology*, vol. 100, no. 3 (2010), 1,230, scholarlycommons.law.northwestern.edu/jclc/vol100/iss3/17/.

111. 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. Barry C. Feld, “A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?,” *Northern Kentucky Law Review* 34, no. 2 (2007): 207, chaselaw.nku.edu/content/dam/chaselaw/docs/academics/lawreview/v34/nklr_v34n2.pdf.

112. Franklin E. Zimring, “American Youth Violence: A Cautionary Tale,” *Crime and Justice* 42 (2013), 9–11, doi: 10.1086/670399.

113. For example, the Violent Crime Control and Prevention Act of 1994, Public Law No. 103-322, lowered the age at which juveniles under federal jurisdiction could be transferred to adult court (with special tribal consent provisions applicable to Indian juveniles) and authorized funding for punitive measures.

114. The homicide rate, which is considered the most reliably reported, doubled. Mauer, *Race to Incarcerate*, 30–37; National Research Council Committee on Causes and Consequences of High Rates of Incarceration, “Growth of Incarceration in the United States,” 112. Gilmore explains in detail how criminalization of nonviolent and drug offenses drove the increase in the prison population in California. Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007), 107–13.

115. Alexander, *The New Jim Crow*, 59.

116. Mauer, 82. According to the most recent national report by the Bureau of Justice Statistics, juveniles of “all racial groups experienced large increases in their juvenile violent crime arrest rates in the late 1980s and early 1990s. Following their mid-1990s peak, the rates declined through 2010 for all racial groups.” See National Center for Juvenile Justice, *Juvenile Offenders and Victims*, 124.

117. Zimring, “American Youth Violence,” 8–11.

118. *Ibid.*, 13, 8.

119. National Research Council Committee on Causes and Consequences of High Rates of Incarceration, “Growth of Incarceration in the United States,” 173n10.

120. Executive Committee for Indian Country Law Enforcement Improvements, *Final Report to the Attorney General and the Secretary of the Interior* (1997).

121. *Ibid.*, Appendix, Tab A.

122. *Ibid.*, Part C; Appendix Tab A.

123. Kevin K. Washburn, "Tribal Self-Determination at the Crossroads," *Connecticut Law Review* 38, no. 4 (2006): 793–95, heinonline.org/HOL/Page?handle=hein:journals/conlr38&id=787&collection=journals&index=.

124. US Department of the Interior Office of Inspector General, "Neither Safe Nor Secure," 7–8.

125. *Ibid.*, 37, 39. While older facilities were built to hold 10–20 inmates for short periods of time, "the newer facilities have been designed to accommodate 60 inmates, with four new facilities having more than 100 beds . . . making the facilities more suitable for longer periods of incarceration;" see page 6.

126. Bureau of Indian Affairs Budget Justifications and Performance Information for Fiscal Year 2004, BIA-300. According to the *Jails in Indian Country, 2004* report, only three new facilities were constructed between 1997 and 2004. The 2004 Inspector General's Report suggests that 24 new facilities were opened during this time. The discrepancy between these three sources is significant and unexplained. One possibility is that the different counts are simply a result of counting separate facilities versus upgrades to, additional beds added to, or expansions of existing facilities. Another possibility is that the *Jails in Indian Country* reports undercount the number of facilities being constructed during this time.

127. The 1997 report blamed the dismal and dangerous state of Indian country incarceration facilities on lack of funding, including the failure of Congress to appropriate funding for new facility construction. Executive Committee for Indian Country Law Enforcement Improvements, *Final Report*, Tab E.

128. US Department of the Interior Office of Inspector General, "Neither Safe Nor Secure," 14–23.

129. *Ibid.*, 37–41.

130. Minton, *Jails in Indian Country, 2014*, 1. According to available sources, in 2013 there were two more stand-alone juvenile facilities than in 2004. In 2013, there were also eleven facilities with separate areas for juveniles, but the available information does not indicate how many of these were newly constructed. A follow-up report by the Inspector General issued just prior to this article's publication states that sixteen new juvenile facilities were added to the Bureau's inventory between 2004 and 2016. US Department of the Interior, Office of the Inspector General, *Bureau of Indian Affairs Funded and/or Operated Detention Programs* (2016), 4.

131. AAIA, *List of Indian Country Juvenile Detention Facilities*.

132. US Department of the Interior, Office of the Inspector General, Bureau of Indian Affairs Detention Facilities (2011), 2.

133. *Ibid.*

134. *Ibid.*, 3–7.

135. *Ibid.*, 1, 7–9.

136. *Ibid.*, 2. Again, the discrepancy between the *Jails in Indian Country 2009* count (80), and the count provided in the 2011 report (94) is significant and unexplained.

137. On reservations not subject to Public Law 280, the federal government has concurrent jurisdiction over major crimes committed by Indian youth regardless of the victim's identity. 18 USC §§1152, 1153, 5031.

138. See National Center for Juvenile Justice, *Juvenile Offenders and Victims*, 125–29.

139. *Ibid.*, 125.

140. Zimring, 9–11.

141. Teleconference with official from the Bureau of Indian Affairs, Office of Law Enforcement Services, 2008. This anecdote, as well as two anecdotes that appear in this article's subsection "Prison Economics," describes meetings I participated in as an attorney for tribal governments and an advocate for juvenile justice policy reform. In order to preserve confidentiality, neither the tribes nor the officials are named here.

142. Minton, *Jails in Indian Country*, 2007. Homicide is not listed separately as an offenses category. For a description of "designated juvenile facilities," see note 100.

143. Predictions about a coming juvenile crime wave carried out by a generation of "super-predators"—which turned out to be false—led to a nationwide investment in "get tough" laws and policies affecting juveniles. See Rolnick, "Untangling the Web," 74–75.

144. Mauer, 34.

145. For an in-depth examination of the role of federal agencies in driving tribal juvenile justice policy choices, see Rolnick, "Untangling the Web," 114–22.

146. Gilmore, *Golden Gulag*, 11; Kevin K. Washburn, "Federal Criminal Law and Tribal Self-Determination," 834–35.

147. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd ed. (New York: Vintage Books, 1995).

148. Mauer, *Race to Incarcerate*, 3. Mauer describes imprisonment as an "institutional response to potential disorder" necessitated by the decline in effectiveness of punishment methods like banishment, public approbation, and community shame. These other methods may have worked well in smaller, tight-knit communities, where they had the advantage of allowing the punished to continue to work and remain part of their community, but they were less effective in a larger industrialized society, where they had the corollary advantage of removing members of the underclass (many of whom may have been unemployed anyway) from society; see pages 2–7.

149. Randall G. Shelden, *Controlling the Dangerous Classes: A Critical Introduction to the History of Criminal Justice* (Allyn & Bacon 2000); Loic Wacquant, *Prisons of Poverty* (University of Minnesota Press 2010); Luana Ross, *Inventing the Savage: The Social Construction of Native American Criminality* (Univ. of Texas Press: 1998).

150. Alexander, *The New Jim Crow*, 12–15. The National Research Council Committee report describes the role of the "southern strategy" in politics beginning in the 1970s, in which racially coded appeals about getting tough on crime were used by politicians to reach white voters by invoking racial anxieties without expressly mentioning race. National Research Council Committee on Causes and Consequences of High Rates of Incarceration, "Growth of Incarceration in the United States," 115–116.

151. National Research Council Committee on Causes and Consequences of High Rates of Incarceration, "Growth of Incarceration in the United States," 91–97.

152. Ross, *Inventing the Savage*, 11–72.

153. *Ibid.*, 12–14.

154. Washburn, "Federal Criminal Law and Tribal Self-Determination," 790–815.

155. Gilmore, *Golden Gulag*, 12–13.

156. Alexander, *The New Jim Crow*, 59. Nonviolent and drug offenses also account for many of the women of color in prison. Ross, *Inventing the Savage*, 75–79, 87.

157. Kaaryn S. Gustafson, *Cheating Welfare: Public Assistance and the Criminalization of Poverty* (New York University Press, 2011); Priscilla A. Ocen, "The New Racially Restrictive Covenant: Race, Welfare and the Policing of Black Women in Public Housing," *UCLA Law Review* 59, no. 6 (2012), <http://www.uclalawreview.org/pdf/59-6-4.pdf>; Dorothy E. Roberts, "Prison, Foster Care, and the Systematic Punishment of Black Mothers," *UCLA Law Review* 59, no. 6 (2012), [uclalawreview.org/pdf/59-6-2.pdf](http://www.uclalawreview.org/pdf/59-6-2.pdf).

158. Meda Chesney-Lind and Randall G. Shelden, *Girls, Delinquency, and Juvenile Justice* (Wadsworth/Cengage Publishing, 1991).
159. Gilmore, *Golden Gulag*, 112.
160. Ibid.
161. Courts of Indian Offenses are described in *United States v. Clapox*, 35 F. 575 (D. Or. 1888), in which a federal court upheld their legality as quasi-judicial administrative instrumentalities.
162. Ross, *Inventing the Savage*, 18.
163. Ross, *Inventing the Savage*, 41–45. According to Ross, the Native women, who make up three to 4% of Montana’s overall population, accounted for 7% of women prisoners in Montana from 1911–1943, but that percentage “skyrocketed” to 25% between 1944 and 1966, “a period of racialized assimilationist federal and state policy;” see page 85.
164. Gilmore, *Golden Gulag*, 128–80.
165. Lynch, *Sunbelt Justice*, 140–43.
166. Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (New York: Verso Books, 1996).
167. Mauer, *Race to Incarcerate*, 9–10.
168. US Department of Justice and US Department of the Interior, “Tribal Law and Order (TLOA) Long Term Plan to Build and Enhance Tribal Justice Systems” (August 2011), 2, 13–21, 28–29, justice.gov/sites/default/files/tribal/legacy/2014/02/06/tloa-tsp-aug2011.pdf.
169. US Department of Justice and US Department of the Interior, “Tribal Law and Order (TLOA) Long Term Plan,” 17; 2014 Tribal Juvenile Justice Meeting, “Tribal Juvenile Detention Alternatives Initiative & the Mississippi Band of Choctaw Indians’ Experience,” indian-affairs.org/uploads/5/4/7/6/54761515/2014juvenilejusticemeeting.pdf.
170. *Federal Register* 81, no. 39 (February 29, 2016), 10,273, gpo.gov/fdsys/pkg/FR-2016-02-29/pdf/FR-2016-02-29.pdf.