TRIBAL SOVEREIGNTY AND THE RIGHT TO LIFE

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On August 26, 2020, the only Native American on federal death row, Lezmond Mitchell was executed by the federal government for the murder of two Navajo citizens on Navajo Nation land. Federal law typically gives Tribal Nations the right to determine whether the death penalty is used against their citizens for crimes committed between Tribal citizens on Tribal land. Yet here, the federal government utilized a loophole to seek the death penalty against the Navajo Nation's wishes. Lezmond Mitchell was not a sympathetic man by any means; indeed, he brutally killed a grandmother and her young granddaughter to steal their car as a part of a larger robbery scheme. Under other circumstances, his execution may have been less controversial, yet his case exemplifies the long colonial legacy of federal overinvolvement in Tribal Nation affairs.

This paper examines the colonial legacy of federal overinvolvement in Tribal Nation criminal justice affairs and exemplifies how that history still manifests in the present through Lezmond Mitchell's case. Further, this paper explores two questions: first, whether the Constitution truly empowers the federal government to intervene in criminal law matters that involve only Tribal citizens and occur entirely on Tribal land; and second, whether such involvement in Lezmond Mitchell's case, as well as more broadly, is consistent with the United States' obligations under international law, namely the self-determination and cultural rights of Tribal Nations under the International Covenant on Civil and Political Rights and the United Nations Charter.

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I. INTRODUCTION

On August 26, 2020, the only Native American on federal death row, Lezmond Mitchell, was executed by the federal government for the murder of two Navajo citizens on Navajo Nation land.[1] The Major Crimes Act (MCA) gives the federal government jurisdiction over enumerated crimes committed between Tribal citizens on Tribal land.[2] Under the Federal Death Penalty Act of 1994 (FDPA),[3] Tribal Nations may opt into the federal government's implementation of the death penalty against their citizens for crimes enumerated in the MCA.[4] The Navajo Nation has a policy against the death penalty and has not opted into the death penalty provision.[5] However, in this case, "[t]he United States circumvented the tribal option by also charging Mitchell with carjacking resulting in death and seeking the death penalty for that charge."[6] Carjacking resulting in death does not fall within the MCA, but is rather a federal law of general applicability, the

1. Hailey Fuchs, *Justice Dept. Executes Native American Man Convicted of Murder*, N.Y. TIMES (Aug. 26, 2020), https:// www.nytimes.com/ 2020/ 08/ 26/ us/ politics/ lezmond-mitchell-executed.html; United States v. Mitchell, 502 F.3d 931, 942–44 (9th Cir. 2007).

2. Indian Major Crimes Act, 18 U.S.C. § 1153.

3. Federal Death Penalty Act, 18 U.S.C. §§ 3591–3599.

4. 18 U.S.C. § 3598.

5. Matthew L.M. Fletcher & Tamera Begay, *The U.S. Shouldn't Get to Decide if a Navajo Man Dies*, ATLANTIC (Aug. 21, 2020), https:// www.theatlantic.com/ideas/ archive/ 2020/08/us-shouldnt-get-decide-if-lezmond-mitchell-dies/615367/.

6. United States v. Mitchell, 958 F.3d 775, 793 (9th Cir. 2020) (Christen, J., concurring).

jurisdictional basis of which comes from the Indian Commerce Clause in the U.S. Constitution.[7]

While Lezmond Mitchell's execution may have been less controversial under other circumstances, given the severity of his crimes, the federal government's utilization of a loophole to pursue the death penalty stands as a prime example of the long colonial legacy of the federal government's overinvolvement in Tribal Nation affairs. Indeed, whether the Indian Commerce Clause provides the federal government with sufficient justification for its involvement in intra-Tribal affairs at all is debated.[8] In addition to the domestic questions posed by the federal government's overinvolvement in Tribal Nation affairs and the execution of Lezmond Mitchell, it also raises questions under international law.

As this paper will argue, international law provides Tribal Nations with substantive and procedural rights, including: the recognition and maintenance of their own legal systems; the recognition of their cultural beliefs and languages in judicial processes; self-governance;[9] the right to participate in the central government; and the protection of their religious beliefs.[10] Therefore, international law recognizes the right of the Navajo Nation to control its intra-Tribal affairs. When a people has been subject to colonialism, this right to self-determination is more expansive and includes rights of external self-determination, including the right to secede.[11] While historically there has been resistance to recognizing Indigenous Peoples as colonized under international law, there has been advocacy to recognize

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7. United States v. Mitchell, 502 F.3d 931, 946–48 (9th Cir. 2007); U.S. CONST. art. I, § 8, cl. 3 ("To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").

8. *See generally* Warren Stapleton, *Indian Country, Federal Justice: Is the Exercise of Federal Jurisdiction under the Major Crimes Act Constitutional?*, 29 ARIZ. ST. L.J. 337, 338 (1997) (arguing that the Indian Commerce Clause is not a sufficient basis upon which to render the Major Crimes Act constitutional). Note that the constitutionality of the carjacking statute under the Commerce Clause is itself debated, without even considering its use to circumvent Tribal sovereignty. U.S. Dep't of Just., Crim. Res. Manual § 1112 (2020), https:// www.justice.gov/ archives/ jm/ criminal-resource-manual-11 12-constitutionality-carjacking-statute.

9. *See infra* Parts IV.B, V.

10. *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, 3 LEAGUE OF NATIONS O.J., SPEC. SUPP. 3, 6 (1920) [hereinafter *Report of the International Committee on Aaland Islands*] ("This principle . . . must . . . assure to some national Group the maintenance and free development of its social, ethnical or religious characteristics."); *The Aaland Islands Question*, 2 LEAGUE OF NATIONS O.J. 691, 699 (1921) ("The new guarantees to be inserted in the autonomy law should [include] . . . the maintenance of the landed property in the hands of the Islanders . . . and . . . ensuring the appointment of a governor who will possess the confidence of the population.").

11. Reference re Secession of Quebec, [1998] 2 S.C.R 217, 284–85 (Can.) (noting the right of colonial peoples to secede).

Indigenous Peoples within the United States as colonized peoples entitled to external self-determination.[12] Regardless of whether the Navajo Nation's right to self-determination is interpreted as only internal or external, however, the Navajo Nation had the right under international law to determine whether Lezmond Mitchell would receive the death penalty.[13] By disregarding the Navajo Nation's decision on the matter, the United States violated the Navajo Nation's right to self-determination.[14]

In addition to violations of the Navajo Nation's collective rights, Lezmond Mitchell's individual human rights were violated through the prosecutor's use of racially violent language that went uncorrected by the U.S. justice system.[15] While this paper primarily focuses on the violations of the Navajo Nation's rights, it is important to recognize the violations of the individual—Lezmond Mitchell—that cannot be undone. The United States violated Lezmond Mitchell's right to life, his right to adequate representation, his right to be free from cruel, infamous, or unusual punishment, and his right to equality before the law.[16] Although this paper focuses on the violations of the collective, the Navajo Nation, those violations occurred through the violations of Lezmond Mitchell's rights.

Thus far, literature on the overinvolvement of the federal government in Tribal Nation criminal justice affairs has primarily focused on the validity of the United States' exercise of criminal jurisdiction over Native America through the lens of domestic law and theory.[17] This paper will illustrate how Lezmond Mitchell's case serves as a prime example of the federal overinvolvement presented in the literature and argue that in addition to presenting domestic questions, such overinvolvement also violates international law. This paper proceeds in five parts. Part II provides an

12. *See infra* Parts IV.B, V.

13. *See infra* Parts IV.B, V.

14. *See infra* Parts IV.B, V.

15. International Convention on the Elimination of All Forms of Racial Discrimination art. 5(a), *opened for signature* Mar. 7, 1966, 660-14 U.N.T.S. 195 [hereinafter ICERD] ("The right to equal treatment before the tribunals and other organs administering justice."); United States v. Mitchell, 502 F.3d 931, 995–96 (9th Cir. 2007) (holding that the prosecutor's references to lynching were not prejudicial).

16. Inter-Am. Comm'n H.R. [IACHR], *Mitchell v. United States*, ¶¶ 10, 120, 135, Report No. 211/20, OEA/Ser.L/V/II, doc. 225 (Aug. 24, 2020) [hereinafter IACHR, *Mitchell*]; *see also* ICERD, *supra* note 15.

17. *See, e.g.*, Stapleton, *supra* note 8 (arguing that the Major Crimes Act is unconstitutional); Nathan Speed, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. REV. 467 (2007) (concluding that both the Indian Commerce Clause and Interstate Commerce Clause should be read narrowly); Kevin Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 784 (2006) (discussing "[t]he omission of felony criminal justice from federal initiatives favoring tribal self-determination").

overview of the domestic law history of federal overinvolvement in the criminal law of tribal nations; Part III outlines the facts of Lezmond Mitchell's case and illustrates how his execution cannot be supported by the U.S. Constitution; Part IV explains the international law relevant to his case; and Part V examines how the federal government's overinvolvement in Tribal Nation criminal justice affairs generally, and in Lezmond Mitchell's case specifically, violate international law. And finally, Part VI concludes.

II. FEDERAL OVERINVOLVEMENT IN INTRA-TRIBAL CRIMINAL LAW: 1817–2004[18]

As the Supreme Court recognized in *United States v. Wheeler*, Tribal sovereignty in general, and over internal matters specifically, predates the United States.[19] Criminal law and the administration of criminal processes existed on Tribal lands long before the imposition of American criminal processes by the United States.[20] Early criminal law relations between the United States and Tribal Nations involved treaties, which provided for the punishment of those who committed crimes against the other.[21] But internal affairs were the exclusive jurisdiction of the Tribal Nations as "[f]ollowing Britain's tradition of noninterference with internal tribal affairs, early federal officials respected virtually exclusive tribal control over Indian lands."[22] Then in 1817, Congress made its first incursion into criminal jurisdiction on Tribal lands through the Trade and Intercourse Act of 1817.[23] This act allowed the United States to prosecute crimes committed by Indigenous individuals, even when those crimes occurred on Tribal lands.[24] However, the United States still did not assert jurisdiction over crimes that occurred between Tribal citizens on Tribal lands.[25]

18. For a more thorough discussion of the history of criminal law and Federal Indian Law in the United States, see generally Washburn, *supra* note 17.

19. United States v. Wheeler, 435 U.S. 313, 328 (1978).

20. KEITH RICHOTTE, JR., FEDERAL INDIAN LAW AND POLICY: AN INTRODUCTION 15–16 (2020) (noting that arguments for colonialism often included the erroneous assertion that Indigenous Peoples lacked legal frameworks and political governance).

21. *See* Washburn, *supra* note 17, at 792 ("[T]he tribes and the United States acknowledged the power of Indian tribes to punish non-Indian offenders who intruded on Indian lands, and tribes agreed to surrender to the United States for punishment any Indians who committed serious crimes against non-Indians.").

22. *Id.* at 791.

23. *Id.* at 793 (citing the Trade and Intercourse Act §§ 1–2, 3 Stat. 383, 383 (1817)).

24. *Id.*

25. *Id.*

As the United States stole more and more Indigenous land,[26] and encroached further into Tribal territory, attitudes towards Tribal sovereignty shifted.[27] In 1871, Congress published a rider stating that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[28] While the United States continued to create "agreements" with Tribal Nations that had similar power to treaties,[29] the "rider marked a significant shift in how the federal government decided to approach Indian affairs" and "was a major blow to tribal sovereignty."[30]

This policy change towards Native Americans is seen perhaps most starkly in the attempts by the United States to gain criminal jurisdiction over Tribal Nations in the 1880s.[31] Officials from the Bureau of Indian Affairs (BIA) "had been attempting to acquire [criminal jurisdiction] since at least 1874, because they needed the coercive power of the criminal law as one means to force the assimilation of the Indians."[32] Thus, "[t]he BIA decided to initiate a test case" and found one in *Ex parte Crow Dog*.[33] Crow Dog, a Brule Lakota citizen, murdered another Brule Lakota citizen, Spotted Tail, in 1881, for various reasons including perhaps "the federal government's interference in tribal politics."[34] In response to the murder, the Brule Lakota

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26. *See generally* Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 381 (1998) ("It is not wrong for Native Americans to raise criticism of American's heritage of land theft because America is still committing that crime.").

27. Washburn, *supra* note 17, at 794–97 (outlining the shift in U.S. policy as well as the beginning of the use of U.S. law enforcement on tribal lands). Washburn also discusses how U.S. law enforcement became more involved with Tribal Nations in part because of the need to prevent violence between Indigenous and non-Indigenous individuals. *Id.* at 796; *see generally* RICHOTTE, *supra* note 20 (discussing the background and development of federal laws as related to Tribal Nations).

28. Future Treaties with Indian Tribes, Pub. L. 100-647, 102 Stat. 3641 (codified as amended at 25 U.S.C. § 71 (2018)).

29. Antoine v. Washington, 420 U.S. 194, 204 (1975) (holding that agreements concluded since the end of treaty making had the same effect as treaties).

30. RICHOTTE, *supra* note 20, at 117–19.

31. *Id.* at 122.

32. *See id.* (quoting SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 102 (1994)). See generally *id.* for a discussion of the United States' "pendulum" moving between assimilationist and separatist policies.

33. *Id.* at 122; *Ex parte* Crow Dog, 109 U.S. 556 (1883).

34. RICHOTTE, *supra* note 20, at 122. Crow Dog's motive for murdering Spotted Tail is contested and while a number of accounts have been given, there are "few with citation to any original sources." Washburn, *supra* note 17, at 800 n.111. One account portrays Crow Dog as having made a "deliberate effort to portray himself as the champion of traditional Brules against the arbitrary power of Spotted Tail, an 'agency chief' installed by the U.S. Army." HARRING, *supra* note 32, at 108–09. Sidney L. Harring

engaged in a criminal justice procedure that involved "the council, the peacemakers, and negotiation."[35] Crow Dog was not sentenced to spend any time in confinement, which would have been the likely sentence according to a Western criminal tradition, but instead his family agreed to pay Spotted Tail's family "$600, eight horses, and a blanket."[36]

Although the Brule Lakota had already concluded their own criminal justice procedures, the federal government nonetheless arrested Crow Dog, convicted him of murder, and sentenced him to death.[37] However, the Supreme Court found that the federal government did not have criminal jurisdiction over Crow Dog, recognizing the Brule Lakota's power of "self-government, the regulation by themselves of their own domestic affairs, [and] the maintenance of order and peace among their own members by the administration of their own laws and customs."[38] The Court also recognized as troubling, and as an infringement, that the federal government sought to impose its own criminal laws on Tribal Nations.[39] While the Supreme Court found for Crow Dog[40] and the Brule Lakota, the case was utilized as a justification for providing the federal government criminal jurisdiction over crimes committed between Tribal citizens on Tribal lands.[41] Calling upon racist claims that Tribal Nations lacked a legal system and, thus, that incursions were justified,[42] the Secretary of the Interior argued that Congress had to rectify what it saw as a mistake in *Ex parte Crow Dog*.[43] Therefore, in 1885 Congress enacted the MCA, giving the federal government jurisdiction over enumerated crimes committed between Indigenous

notes in his book that this account is "an example of traditional tribal histories, which rely primarily on white sources to create an 'Indian history.'" *Id.* at 108 n.27 (citing GEORGE E. HYDE, SPOTTED TAIL'S FOLK: A HISTORY OF THE BRULE SIOUX 308–36 (1961)). For a detailed description of Crow Dog's case see HARRING, *supra* note 32, at 100–41.

35. RICHOTTE, *supra* note 20, at 122.

36. *Id.*

37. *Id.*

38. *Crow Dog*, 109 U.S. at 568.

39. *Id.* at 571 ("It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended [over Indigenous Peoples] . . . separated by race, by tradition . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it.").

40. *See* RICHOTTE, *supra* note 20, at 129 ("Crow Dog was not hanged and continued to exercise great influence on the reservation for the rest of his lengthy life.").

41. *See id.*

42. *See id.*

43. Washburn, *supra* note 17, at 803.

individuals on Tribal lands.[44]

In 1886, the Supreme Court heard a challenge to the MCA in *United States v. Kagama*.[45] In this case, the Supreme Court maintained that the Indian Commerce Clause did not provide a constitutional basis for the MCA.[46] Instead, the Supreme Court upheld the MCA based upon "the federal government's geographic dominion over the United States and the federal responsibility in light of the dependent status of tribes."[47] Statutes in the United States require that Congress have some sort of Constitutional authority to enact them.[48] Yet, when the Supreme Court "first enunciated the plenary power doctrine" in *Kagama*, it could not find a constitutional basis for the power it held Congress to possess.[49] Instead, the Court relied on arguments external to the Constitution.[50] Notably, the Supreme Court has since utilized the Indian Commerce Clause to support plenary power, in spite of the *Kagama* Court's rejection of that argument, including in the 2004 *United States v. Lara* decision.[51] As will be discussed *infra*, the court in Lezmond Mitchell's case also found the Indian Commerce Clause provided jurisdiction over his case.[52]

In the present day, the United States has for the most part moved in a direction of supporting Tribal self-determination and governance, with the notable exception of criminal law.[53] Current practice is generally characterized by "a number of efforts by Congress to provide opportunities for Tribal governments and peoples to exercise greater control over their own lives, lands, families and other resources."[54] For instance, Tribal Nations can set their own water quality standards and determine how to allocate social service resources.[55] But felony criminal law has been left out of these Congressional initiatives.[56] In fact, Congress has repeatedly expanded federal powers over criminal law through the MCA and other legislation.[57]

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44. Major Crimes Act, ch. 341, 23 Stat. 362 (1885) (codified as amended at 18 U.S.C. § 1153).

45. United States v. Kagama, 118 U.S. 375 (1886); Washburn, *supra* note 17, at 806.

46. *Kagama*, 118 U.S. at 378–79; Washburn, *supra* note 17, at 806–07.

47. *Kagama*, 118 U.S. at 378–79; Washburn, *supra* note 17, at 806–07.

48. RICHOTTE, *supra* note 20, at 139.

49. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1015 (2015). *See also* RICHOTTE, *supra* note 20, at 139.

50. *See* RICHOTTE, *supra* note 20, at 139.

51. United States v. Lara, 541 U.S. 193, 200 (2004).

52. *See infra* Part III.A.

53. Washburn, *supra* note 17, at 820, 822.

54. RICHOTTE, *supra* note 20, at 193.

55. Washburn, *supra* note 17, at 833.

56. *Id.* at 784.

57. *Id.*

In 1968, Congress passed the Indian Civil Rights Act (ICRA), which "limited tribal criminal justice authority" by capping the sentences Tribal courts could impose to "six months of imprisonment and a $500 fine."[58] While a later amendment raised the limits to one year and a $5,000 fine, it remains a significant restriction on Tribal sovereignty.[59] In addition, Congress has expanded federal control over criminal law on Tribal lands through various amendments to the MCA, including, for example, the addition of "statutory rape and assault with intent to commit rape" to the list of enumerated crimes falling within its scope.[60]

Parallel to the expansion of federal powers, the courts have also reduced the powers of Tribal Nations over criminal law within their territory. In 1978, the same year the Supreme Court recognized that the sovereignty of Tribal Nations gives them the "inherent authority to criminally prosecute their own citizens[,]" it also ruled in *Oliphant v. Suquamish Indian Tribe* that Tribal Nations have no authority to prosecute anyone who is not Native American.[61] Thus, according to the Supreme Court's ruling, Tribal Nations could no longer hold non-Native American individuals accountable for crimes committed on Tribal Nation land.[62] As a result, the issues Tribal Nations already faced with non-Native American offenders were exacerbated as non-Native American individuals recognized "that reservations could be spaces without formal consequences for their actions."[63] This was especially the case given the failure of the federal government to consistently prosecute non-Native American offenders, with consequences falling disproportionately on Native American women.[64]

In response to advocacy around the victimization of Native American women, Congress reauthorized the Violence Against Women Act (VAWA) in 2013.[65] This reauthorization permitted Tribal Nations to prosecute non-Native American individuals for "domestic and dating violence and violations of protection orders."[66] However, the reauthorization also "creates more federal oversight for tribal nations" and still does not permit Tribal governments to prosecute other crimes committed by non-Native American

58. *Id*. at 822; Indian Civil Rights Act, 25 U.S.C. §§ 1301–1304.
59. RICHOTTE, *supra* note 20, at 244.
60. Washburn, *supra* note 17, at 823–24.
61. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); RICHOTTE, *supra* note 20, at 375.
62. RICHOTTE, *supra* note 20*,* at 383.
63. *Id.*
64. *Id.*
65. *See id.* at 383; Violence Against Women Act, 25 U.S.C. § 1304(b)–(d).
66. *See* RICHOTTE, *supra* note 20, at 386.

offenders on Tribal lands.[67]

In a later case, *Duro v. Reina*, the Supreme Court confronted whether or not *Oliphant's* bar on Tribal Nation authority over non-Native American individuals extended to Native Americans who were citizens of other Tribal Nations.[68] In *Duro*, the Supreme Court, following *Oliphant*, found that Tribal Nations only had jurisdiction over their own citizens.[69] The following year, Congress overrode this opinion by enacting the "Duro Fix," which states that Tribal Nations have criminal jurisdiction over all Native Americans.[70]

Thirteen years later, in *United States v. Lara*, the Supreme Court was asked to determine whether the "Duro Fix" was a delegation of federal power, thus implicating the Constitution's double jeopardy protections, or an exercise of the inherent sovereignty of Tribal Nations.[71] The Supreme Court held that it was an exercise of the inherent sovereignty of Tribal Nations and stated that Congress has the power to both restrict and relax restrictions on Tribal sovereignty.[72] Thus, while the result of the case was the affirmation of the inherent sovereignty of Tribal Nations to prosecute "Natives, regardless of their tribal affiliation[,]" the reasoning implies that Congress has plenary power over the bounds of this inherent sovereignty.[73] Moreover, taken together, *Oliphant*, the "Duro Fix," and *Lara* all result in the requirement that a racial classification is made in order to discern whether a Tribal Nation has jurisdiction.[74]

Nevertheless, there have been some moves by the United States in the area of criminal law that are in line with self-determination, including notably, an amendment to the MCA that allows Tribal Nations to opt into the death penalty.[75] "Only one U.S. tribe, the Sac and Fox Nation of

67. *Id.*

68. *Id.*; Duro v. Reina, 495 U.S. 676 (1990).

69. *Duro*, 495 U.S. at 684–85; *see also* RICHOTTE, *supra* note 20, at 386–87.

70. Criminal Jurisdiction Over Indians, Pub. L. No. 102-137, 105 Stat. 646 (codified as amended at 25 U.S.C. § 1301); *see also* RICHOTTE, *supra* note 20, at 387.

71. U.S. v. Lara, 541 U.S. 193 (2004); RICHOTTE, *supra* note 20, at 387–88.

72. *Lara*, 541 U.S. at 199, 204–05.

73. *See id.* at 214–15 (Thomas, J., concurring) ("As this case should make clear, the time has come to reexamine the premises and logic of our tribal sovereignty cases. It seems to me that much of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. . . . Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members."); see also RICHOTTE, *supra* note 20, at 393.

74. RICHOTTE, supra note 20, at 38.

75. Washburn, *supra* note 17, at 830–31.

Oklahoma, has opted in."[76] What the Tribal option means is that the federal government cannot seek the death penalty in cases against Tribal citizens without the Tribal government's affirmative consent.[77] As will be discussed later, the MCA is not the only mechanism the United States has utilized to assert criminal jurisdiction over intra-Tribal crimes occurring on Tribal lands.[78]

Nor is it perhaps the mechanism most important to this paper. However, the MCA is important for understanding the history of the infringements by the federal government on Tribal nations' criminal jurisdiction. Its amendment is also significant evidence of the United States' recognition of the importance of respecting Tribal government decision-making when it comes to whether its citizens live or die.

III. THE CASE OF LEZMOND MITCHELL

In his book, Dr. Keith Richotte asks whether "there [is] something troubling about American courts continuing to rely upon precedent from a time in which the federal government was seeking to destroy tribalism."[79] The continued imposition of U.S. criminal law on Tribal Nations, particularly when, as in the case of Lezmond Mitchell, it goes against the express wishes and beliefs of the sovereign nation,[80] is the direct result of this precedent.[81] Even if this precedent is not directly invoked, it is still the silent foundation upon which this criminal jurisdiction is built.[82] These precedents are also reinforced through the rhetoric and biases employed in the prosecution of Indigenous Peoples in the United States.[83]

As discussed, *supra*, the policy of the United States towards Tribal sovereignty over criminal law has transformed dramatically since its founding, from respecting Tribal jurisdiction over intra-Tribal affairs and over the crimes of non-Tribal citizens towards Tribal members to respecting neither.[84] Still, even with these significant erosions of Tribal sovereignty

76. Christie Thompson, *The Navajo Nation Opposed His Execution. The U.S. Plans to Do It Anyway*, MARSHALL PROJECT (Sept. 17, 2019, 6:00 AM), https://www.themarshallproject.org/ 2019/09/ 17/the-navajo-nation-opposed-his-execution-the-u-s-plans-to-do-it-anyway.

77. Washburn, *supra* note 17, at 831.

78. *See infra* Part III.B.

79. RICHOTTE, *supra* note 20, at 283.

80. *See supra* Part II.

81. *See supra* Part III.

82. *See supra* Parts II, III.

83. Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, MARQ. L. REV. 723, 740–41 (2008).

84. *See supra* Part II.

over criminal law, the United States appeared to leave intact Tribal sovereignty when it came to the death penalty and crimes not enumerated in the MCA.[85] Yet, as demonstrated by Lezmond Mitchell's case, even these two carveouts are no longer guaranteed.[86] Part A of this section sets out the facts of Lezmond Mitchell's case and illustrates how his case both exemplifies the prior history of overinvolvement and continues that history through the further erosion of sovereign rights. Part B then demonstrates how the Indian Commerce Clause did not provide sufficient jurisdiction over his case.

A. The Facts

In 2001, at the age of 20, Lezmond Mitchell along with Johnny Orsinger murdered two people, including a child, as part of a plan to rob a trading post.[87] All involved were Navajo Nation citizens, and the crime occurred on land of the Navajo Nation.[88] In order to rob the trading post, the perpetrators needed a car.[89] And so Lezmond Mitchell and Johnny Orsinger, after being picked up by one of their victims, 63-year-old Alyce Slim, stole her car and murdered her and her granddaughter.[90] Alyce Slim was stabbed 33 times and her granddaughter's throat was slit two times, after which her head was bashed in with a rock.[91] Their bodies were then mutilated and buried.[92]

This paper emphasizes these facts because of the perfect victim theory under international human rights law.[93] While in international human rights advocacy, there is some strategic merit to choosing a "perfect victim" in order to advance human rights claims, the fact is that human rights apply to all and should be measured not by the supposedly most deserving victim, but perhaps by the victim one might consider to be the most undeserving.[94] For if their rights cannot be protected, that undermines the bases for these rights in the first place. Therefore, this paper highlights these facts because the

85. *See supra* Part II.

86. *See supra* Part III.

87. United States v. Mitchell, 502 F.3d 931, 943 (9th Cir. 2007).

88. *Id.* at 942–44.

89. *Id.* at 942.

90. *Id.* at 943.

91. *Id.*

92. *Id.*

93. Steffen Jensena et al., *Torture and Ill-Treatment Under Perceived: Human Rights Documentation and the Poor*, 39 HUM. RTS. Q. 393, 411–13 (2017) (discussing the tendencies of human rights movements to valorize survivors and choose "good victims").

94. *Id.* (highlighting how the emphasis on "good victims" results in lower income victims being under-supported because it is easier to promote the rights of "good victims").

crimes Lezmond Mitchell and Johnny Orsinger committed were undeniably despicable and worthy of condemnation. Yet, despite the nature of the crimes, his case nonetheless illustrates the human rights issues and the U.S. history of overinvolvement in Tribal Nation affairs.

After the murder, Alyce Slim's truck was found with a "purple latex glove and Halloween masks inside the truck, as well as Mitchell's fingerprints and Slim's blood."[95] When they received a warrant, two FBI agents, an evidence technician, and a Navajo criminal investigator searched Mitchell's home and found a butterfly knife with Slim's blood on it as well as her phone.[96] Mitchell was highly compliant with investigators and repeatedly signed waivers of his Miranda Rights.[97] In agreeing to talk, however, he engaged in strange behavior such as flipping a coin to decide whether or not he would engage.[98] On November 7, 2001, Mitchell appeared before a Tribal judge, and on November 21, a federal indictment was issued.[99] However, "[o]n July 2, 2002, a superceding indictment was returned charging Mitchell and Orsinger with murder; felony murder, robbery; carjacking resulting in death; several robbery-related counts; kidnapping; and felony murder, kidnapping."[100] Then two months later "[o]n September 12, 2002, the government filed a notice of intent to seek the death penalty as to Mitchell, based on the 18 U.S.C. § 2119 charge of carjacking resulting in death."[101]

Commentators have noted that superseding indictments have increasingly become common practice, where previously the charges brought against a defendant would rarely change.[102] Additionally, Lezmond Mitchell's trial occurred during a period that was characterized by a federal government policy, under Attorney General John D. Ashcroft, of aggressively promoting the death penalty.[103] Ashcroft reportedly reversed

95. *Mitchell*, 502 F.3d at 931, 944.

96. *Id.*

97. *Id.* at 944–45.

98. *Id.* at 944.

99. *Id.* at 945.

100. *Id.*

101. *Id.*; *see* 18 U.S.C. § 2119 (explaining that if death results from the carjacking, the defendant may be sentenced to death).

102. Joel Cohen, *Can the Superseding Indictment Process Be Abused?*, N.Y.L.J. (Feb. 9, 2016, 3:00 AM), https://www.law.com/newyorklawjournal/almID/1202749145996/Can-the-Superseding-Indictment-Process-Be-Abused/. Whereas in 1976, a survey of 11 districts reported that between 0 and 7% of defendants had superseding indictments, depending on the district. Robert L. Misner, *District Court Compliance with the Speedy Trial Act of 1974: The Ninth Circuit Experience*, 1977 ARIZ. ST. L.J. 1, 31 (1977).

103. Dan Eggen, *Ashcroft Aggressively Pursues Death Penalty*, WASH. POST (July 1, 2002),

the decisions of federal prosecutors not to seek the death penalty 12 times between 2001 and 2002, including where there was a tentative plea agreement.[104] He also approved the death penalty in almost half of all death penalty eligible cases, with a significant racial bias.[105]

Ashcroft's time as Attorney General was also marked by the beginning of a federal practice of seeking the death penalty "for a crime that could not be punished by death in the state where it occurred."[106] But while the incursion on federalism is in some ways analogous to the incursion on Tribal sovereignty, they diverge in the human rights violations specific to Indigenous Peoples that characterize Lezmond Mitchell's case, and the different histories of how states and Tribal Nations became a part of the United States. Infringements on federalism do not inherently raise questions of self-determination and cultural rights. Additionally, states opted into the federal system by ratifying the Constitution,[107] whereas Tribal Nations did not consent to the application of federal criminal law against their citizens.[108]

At trial, only one member of Lezmond Mitchell's jury was Native American—the other eleven jurors were white.[109] These circumstances were partly due to the fact that the trial occurred over 300 miles away from the capital of the Navajo Nation.[110] Other barriers included the court's failure to provide translation services and the systematic removal of Native Americans from the venire based on their "Navajo languages and/or beliefs."[111] In fact, the only reason even one Native American was on the jury was due to a successful *Batson* challenge by Lezmond Mitchell.[112]

In closing arguments, the prosecutor repeatedly used racist language and references.[113] For example, the prosecutor stated that "[p]erhaps years ago, Tombstone, he would have been taken out back, strung up. He would have gotten a trial, nothing like this. We have been at this for seven

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https://www.washingtonpost.com/archive/politics/2002/07/01/ashcroft-aggressively-pursues-death-penalty /09855058-4080-44f8-ae9e-57cbd1d8b6cf/.

104. *Id.*

105. *Id.*

106. Michael J. Zydney Mannheimer, *The Coming Federalism Battle in the War over the Death Penalty*, 70 ARK. L. REV. 309, 312 (2017).

107. U.S. CONST. art. VII.

108. *See supra* Part II.

109. Petition for a Writ of Certiorari at 5, Mitchell v. United States, 971 F.3d 993 (2020) (No. 18-17031).

110. *Id.* at 4.

111. *Id.* at 4, 23.

112. *Id.* at 23.

113. *See* United States v. Mitchell, 502 F.3d 931, 995 (9th Cir. 2007) ("[T]he government's closing argument was riddled with comments that should not have been made.").

weeks."[114] And the Ninth Circuit, while acknowledging that the "closing argument was riddled with comments that should not have been made[,]" determined that these repeated invocations of racial biases and racial violence were not sufficient to merit an error.[115] Rather, the court maintained that the crimes, and the weight of the evidence, were so egregious that these derogatory statements could not have impacted the jurors enough to have made any difference in his case.[116] It is also important to note that Lezmond Mitchell was not present, as he requested to be absent, and the court granted his request.[117] And so as the dissent put it, "the jury was not required to face him in the immediate period before it decided that he should die."[118]

In his 2007 appeal, Mitchell challenged his conviction of carjacking resulting in death, as well as the application of the FDPA[119] to "carjackings committed by one Indian against other Indians in Indian country."[120] His argument was in part based on the fact that "the Navajo Nation never opted into the federal capital punishment scheme."[121] Additionally, he argued that the MCA was the only basis for "federal criminal jurisdiction over intra-Indian crimes" and that he therefore could not be convicted of this crime as it is not included in the MCA.[122] But the court, following its own precedents, dismissed this argument, finding that federal crimes of general applicability could be applied to intra-Indian crimes.[123] Mitchell also pointed to *Ex Parte Crow Dog*[124] to argue that because the carjacking statute did not specifically provide for intra-Indian criminal jurisdiction, the jurisdiction was lacking.[125] The court dismissed this argument as well, asserting that statutes that are silent on their applicability are presumptively applicable in these cases.[126] The basis for jurisdiction here is the Indian Commerce Clause.[127] In *United*

114. *Id.*; *see also* Petition for a Writ of Certiorari at 5, Mitchell v. United States, 971 F.3d 993 (2020) (No. 18-17031).

115. *Mitchell*, 502 F.3d at 995–96.

116. *Id.* Note that the dissent agreed that the racist statements did not amount to an error on their own, but believed that in connection with other errors, including Lezmond Mitchell's absence from the trial, that an error should have been found. *Id.* at 1010–14 (Reinhardt, J., dissenting).

117. *Id.* at 985–86.

118. *Id.* at 1013.

119. Federal Death Penalty Act, 18 U.S.C. §§ 3591–3599.

120. *Mitchell*, 502 F.3d at 946.

121. *Id.*

122. *Id.* at 946–47.

123. *Id. (citing United States v. Juvenile Male,* 118 F.3d 1344, 1350–51 (9th Cir. 1997)).

124. 109 U.S. 556 (1883).

125. *Mitchell*, 502 F.3d at 946.

126. *Id.*

127. *Id.*

States v. Kagama, the case through which the constitutionality of the MCA was affirmed, the Supreme Court dismissed the Indian Commerce Clause as a basis for criminal jurisdiction.[128] However, in Mitchell's case, it was used in exactly that way.

The Navajo Nation itself vehemently opposed the imposition of the death penalty against Lezmond Mitchell.[129] The Navajo Nation held hearings after the trial to determine whether or not to support the death penalty and concluded that it would not.[130] In addition to the Navajo Nation's collective commitment to opposing the death penalty, the victims' family members also testified individually against the death penalty.[131] In 2001, "the U.S. Attorney's Office for the District of Arizona inquired whether the Navajo Nation would support" the death penalty for Lezmond Mitchell.[132] The Attorney General for the Navajo Nation and the Chief Justice of the Supreme Court of the Navajo Nation both replied in the negative.[133] The Attorney General for the Navajo Nation, moreover, "formally requested that the U.S. Attorney's Office not seek the death penalty against Mitchell."[134] Based on these communications, the local U.S. Attorney's Office recommended that the death penalty should not be sought in this case.[135] However, given Ashcroft's aggressive policy of promoting the death penalty, he overrode this recommendation.[136]

Following Lezmond Mitchell's 2007 appeal, there were 16 more court actions, including where the Supreme Court denied two petitions for a writ of certiorari and his request for a Stay of Execution.[137] Particularly

128. 118 U.S. 375, 378–79 (1886).

129. Fletcher & Begay, *supra* note 5.

130. Appellant's Replacement Opening Brief at 95, United States v. Mitchell, No. CA-03-99010 (9th Cir. Aug. 7, 2006), 2006 WL 2951921.

131. *Id.*

132. IACHR, *Mitchell*, *supra* note 16, ¶ 45.

133. *Id.*

134. *Id.*

135. *Id.* ¶ 46.

136. Fletcher & Begay, *supra* note 5; Eggen, *supra* note 103.

137. Mitchell v. United States, 553 U.S. 1094 (2008); Mitchell v. United States, No. CV–09–8089–PCT–MHM, 2009 WL 4694010 (D. Ariz. Dec. 4, 2009); Mitchell v. United States, No. CV–09–8089–PCT–MHM, 2009 WL 3219297 (D. Ariz. Oct. 6, 2009); Mitchell v. United States, No. CV–09–8089–PCT–MHM, 2009 WL 2905958 (D. Ariz. Sept. 04, 2009); Mitchell v. United States, Nos. CV–09–8089–PCT–MHM, CR–01–1062–PCT–MHM, 2010 WL 3895691 (D. Ariz. Sept. 30, 2010); Mitchell v. United States, No. CV–09–8089–PCT–MHM, 2010 WL 5342960 (D. Ariz. Dec. 21, 2010); Mitchell v. United States, 790 F.3d 881 (9th Cir. 2015); Mitchell v. United States, 137 S. Ct. 38 (2016); Mitchell v. United States, No. CV-09-08089-PCT-DGC, 2018 WL 4467897 (D. Ariz. Sept. 18, 2018); Mitchell v. United States, No. CV-09-08089-PCT-DGC, 2019 WL 4141063 (D. Ariz. Aug. 30, 2019); Mitchell v. United States, 140 S. Ct. 2624 (2020); Mitchell v. United States, No. CV 20-8217-PCT-DGC, 2020 WL 4940909

noteworthy is that Lezmond Mitchell's case was heard by the Inter-American Commission on Human Rights (IACHR), which issued a Report on Admissibility and the Merits on July 14, 2020 and then issued its Final Report on August 12, 2020.[138] The IACHR found in relevant part that the United States had violated the Navajo Nation's sovereignty in sentencing Lezmond Mitchell to death;[139] that he was not afforded adequate assistance of counsel;[140] that his right to life had been violated;[141] and that he had been subject to cruel, infamous or unusual punishment,[142] as a result of being held on death row for 18 years.[143] But the District Court determined that IACHR decisions did not bind it, but were purely "recommendations for human rights improvements."[144] Four days after the District Court dismissed the IACHR's decision as nonbinding, the Supreme Court issued a late-night denial of his request for a Stay of Execution.[145] The next day, Lezmond Mitchell was put to death.[146]

(D. Ariz. Aug. 22, 2020); Mitchell v. United States, 971 F.3d 1081 (9th Cir. 2020); Mitchell v. United States, 2020 WL 4921988 (D. Ariz. Aug. 21, 2020); United States v. Mitchell, 971 F.3d 993 (9th Cir. 2020); United States v. Mitchell, No. CR-01-01062-001-PCT-DGC, 2020 WL 4698056 (D. Ariz. Aug. 13, 2020); Mitchell v. United States, 141 S. Ct. 216 (2020); Mitchell v. United States, 958 F.3d 775 (9th Cir. 2020).

138. *See* Mitchell v. United States, No. CV 20-8217-PCT-DGC2020, WL 4921988, at *2 (D. Ariz. Aug. 21, 2020); IACHR, *Mitchell*, *supra* note 16, ¶¶ 139, 141.

139. IACHR, *Mitchell*, *supra* note 16, ¶ 106.

140. *Id.* ¶ 120.

141. *Id.* ¶ 138.

142. O.A.S. Res. XXX, American Declaration on the Rights and Duties of Man arts. XXV, XXVI (May 2, 1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser./L/V/I.4 rev. 7 (Feb. 2, 2000) [hereinafter American Declaration].

143. IACHR, *Mitchell*, *supra* note 16, ¶ 135. The Commission also quoted the UN Special Rapporteur on Torture, who stated that

> Individuals held in solitary confinement suffer extreme forms of sensory deprivation, anxiety and exclusion, clearly surpassing lawful conditions of deprivation of liberty. Solitary confinement, in combination with the foreknowledge of death and the uncertainty of whether or when an execution is to take place, contributes to the risk of serious and irreparable mental and physical harm and suffering to the inmate. Solitary confinement used on death row is by definition prolonged and indefinite and thus constitutes cruel, inhuman or degrading treatment or punishment or even torture.

Id. (quoting Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Report*, ¶ 48, U.N. Doc. A/67/279 (Aug. 9, 2012)).

144. *See* Mitchell v. United States, No. CV 20-8217-PCT-DGC2020, WL 4921988, at *6 (D. Ariz., Aug. 21, 2020). This attitude by the United States is not surprising, as this has been the view taken on by the United States in other cases as well. *See* IACHR, *Dann v. United States*, ¶ 176, Report No. 75/02, doc. 1, rev. 1 (Dec. 27, 2002) ("[T]he United States stated that it 'respectfully declines to take any further actions to comply with the Commission's recommendations'"). Note that in its statement, the United States used the word "recommendation" rather than a more authoritative word like "order," showing its treatment of the nature of the Commission's decisions. *Id.*

145. Fuchs, *supra* note 1.

146. *Id.*

B. The Extra-(Un)Constitutional Imposition of the Death Penalty on Indigenous Peoples in the United States

In Lezmond Mitchell's case, the District Court found support for jurisdiction over the carjacking charge from the Indian Commerce Clause.[147] Since the enactment of the MCA,[148] the United States has asserted the right to exercise criminal jurisdiction over intra-Indian crimes on tribal lands,[149] yet there is no real constitutional basis for doing so.[150] In Lezmond Mitchell's case, however, the federal government did not rely on a crime enumerated in the MCA at all, but instead charged him with carjacking resulting in death, a crime of general applicability.[151]

Courts have differed on whether the MCA is limited to the crimes enumerated in the statute.[152] This is in part because the General Crimes Act (GCA), which immediately precedes the MCA in the United States Code, provides that general federal laws would not apply to intra-Indian crimes committed on Tribal lands, where "the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."[153] The Fourth Circuit has interpreted the MCA and GCA to provide for criminal jurisdiction in these cases only over crimes enumerated by the MCA, whereas the Second and Seventh Circuits presume Tribal authority in the case of an unenumerated crime, with a carve-out for federal jurisdiction for "peculiarly federal crimes."[154] These "peculiarly federal crimes" include assaulting a federal officer or "defrauding the U.S. government."[155] But the Sixth, Eighth, Ninth, and Tenth Circuits presume federal jurisdiction in the case of generally applicable crimes.[156] Here, they have interpreted the MCA/GCA to only have a "situs" requirement, which would be irrelevant in a case involving generally applicable statutes.[157]

Regardless of how the scope of the MCA is interpreted, the question remains as to where federal power over Tribal Nations derives from. Without a legitimate basis for such authority, Congress would be without power to

147. United States v. Mitchell, 502 F.3d 931, 946–48 (9th Cir. 2007).

148. Indian Major Crimes Act, 18 U.S.C. § 1153 (2018).

149. *See supra* Part II.

150. *See supra* Part II.

151. James Winston King, *Legend of Crow Dog: An Examination of Jurisdiction over Intra-Tribal Crimes Not Covered by the Major Crimes Act*, 52 VAND. L. REV. 1479, 1481 (1999).

152. *Id.*

153. *Id.* at 1482; General Crimes Act, 18 U.S.C. § 1152 (1994).

154. King, *supra* note 151, at 1482.

155. *Id.* at 1499.

156. *Id.* at 1481.

157. *Id.* at 1503.

impose federal criminal jurisdiction on Tribal Nations, including the MCA and GCA. Indeed, as discussed *supra*, the federal government has not always seen itself as having plenary power over Tribal Nations.[158] And when courts began following the modern plenary power doctrine, they read it as deriving from "tribes' dependent status" and the Indian Commerce Clause.[159] Yet, the Court that established this doctrine supported only the first and not the second basis for plenary power and found no justification within the Constitution itself.[160] While some scholars posit that the "tribes' dependent status" could have been seen as legitimate in the context of a lack of Tribal resources to maintain their own criminal justice system,[161] this answer is unsatisfactory as it leaves room for the "racialist paradigm that denigrated Native peoples and their claims to nationhood."[162]

This concept of "dependent status" is completely absent from the Constitution, "grounded not in text but in problematic readings of history."[163] Yet, "dependent status" is still utilized by the courts, including notably in *United States v. Lara*, where Justice Breyer found Congressional power due to Tribal Nations' status as "dependent sovereign[s] that . . . [are] not. . . State[s]."[164] But racism, and extraconstitutional interpretations of history, are not sufficient or legitimate bases for plenary power over another sovereign. And here again it is important to question whether "there [is] something troubling about American courts continuing to rely upon precedent from a time in which the federal government was seeking to destroy tribalism."[165]

The argument that the Indian Commerce Clause provides plenary power is only slightly distinct from the "dependent status" basis. In *United States v. Kagama*, the case wherein the Supreme Court first upheld the MCA, it

158. *See* discussion *supra* Part II.

159. Stapleton, *supra* note 8, at 339.

160. RICHOTTE, *supra* note 20, at 139; United States v. Kagama, 118 U.S. 375, 378–79 (1886) (holding that the Indian Commerce Clause did not support the MCA but that plenary power could instead be supported by factors outside of the constitution including dependent status).

161. Stapleton, *supra* note 8, at 341.

162. Ablavsky, *supra* note 49, at 1081. Also note that under the Declaration on the Granting of Independence to Colonial Countries and Peoples, using the concept of dependent status to subjugate Tribal Nations could be interpreted as a violation of self-determination rights, assuming that Tribal Nations are read to fall under this Declaration. G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, ¶ 3 (Dec. 14, 1960) [hereinafter Independence to Colonial Countries and Peoples]. This is because the dependent status argument for plenary power is equivalent to arguing for plenary power on the basis of the "[i]nadequacy of political, economic, social or educational preparedness." *Id.*

163. Ablavsky, *supra* note 49, at 1086. For example, readings of history that utilize racist theories, by characterizing Tribal Nations as structurally subordinate "wards" of the U.S. *Id.* at 1079.

164. United States v. Lara, 124 S. Ct. 1628, 1635 (2004).

165. RICHOTTE, *supra* note 20, at 283.

rejected the Indian Commerce Clause as a basis for plenary power, instead relying on the racist classifications of Tribal Nations as "wards" of the United States.[166] The subsequent move by the modern Supreme Court to rely on the Indian Commerce Clause is not grounded in history or originalist readings of the Constitution,[167] but is instead "tenuous at best and disingenuous at worst."[168] Rather, the reliance on the Indian Commerce Clause is utilized as a mechanism through which to distance the Court from the doctrine's racist roots, while it "implicitly continues to embrace the extra-constitutional principles of *Kagama* and its progeny."[169] Therefore, the Indian Commerce Clause is not a true source of power, but instead a convenient shadow justification for the underlying colonialist history that has led to the modern conception of plenary power. And without a source of power to support the imposition of criminal law, the United States was without power to prosecute Lezmond Mitchell at all. While this paper is focused primarily on federal overinvolvement in the criminal justice affairs of Tribal Nations, the lack of legal basis for plenary power has far greater implications. In fact, it calls into question the legitimacy of any nonconsensual regulation of Tribal Nations' internal affairs.

IV. THE RIGHT TO TRIBAL SOVEREIGNTY UNDER INTERNATIONAL LAW AND OTHER U.S. HUMAN RIGHTS OBLIGATIONS

The persistent overinvolvement of the federal government in Tribal Nation affairs as exemplified in Lezmond Mitchell's case is questionable domestically.[170] But as will be illustrated in the next two sections, the federal government's actions also have significant implications under international law. As outlined *supra*,[171] in the United States, Tribal Nations are not considered foreign entities but rather are seen as "quasi-sovereign,"[172] as "domestic dependent nations,"[173] or existing as "distinct political communities"[174] that have the right of self-government with a number of

166. Speed, *supra* note 17, at 481.

167. *See* Ablavsky, *supra* note 49, at 1084 (noting that the Indian Commerce Clause was not read by the founders to confer plenary power).

168. Speed, *supra* note 17, at 485.

169. *Id.*; Ablavsky, *supra* note 49, at 1084.

170. *See supra* Part III.

171. *See supra* Part II.

172. Morton v. Mancari, 554 U.S. 417, 417 (1974).

173. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831).

174. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

restrictions.[175] However, under international law, Tribal Nations are afforded rights and their sovereign authority is recognized in a number of treaties and documents.[176] These include three pieces of international law that are binding on the United States: the United Nations Charter, ICCPR, and ICERD.[177] These pieces of international law also guarantee the human rights of the individuals within Indigenous communities, including the right to life and the right to be free from racial discrimination.[178]

This section briefly discusses the ICCPR and ICERD, and then concludes with a discussion of the relevant international law on the right to self-determination. In looking to these frameworks, this paper will also note their intersections and the gaps they leave. The following section considers these laws in the context of Lezmond Mitchell's case and the overinvolvement of the federal government in Tribal Nation affairs.

A. Foundations: ICERD and the ICCPR

Two foundational international treaties relevant to this paper include the ICCPR and the ICERD.[179] In the ICCPR, the most relevant provisions are articles 6(1), 10(1), 14(1), 26, and 27.[180] Article 6(1) states that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[181] Further, article 10(1) provides that, "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[182] Article 14(1) states that:

> [a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by

175. *See* United States v. Lara, 541 U.S. 1628, 1630 (2004) (noting that Tribal Nations have a right to self-government, but that Congress has the plenary power to restrict "tribal sovereign authority.").

176. *See generally* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007) [hereinafter UNDRIP]; *e.g.*, U.N. Charter art. 1, ¶ 2 (declaring the right to self-determination); G.A. Res. 2625 (XXV), annex, Declaration on Principles of International Law Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter Friendly Relations].

177. U.N. Charter art. 1, ¶ 2; ICERD, *supra* note 15; International Covenant on Civil and Political Rights art. 27, *opened for signature* Dec. 16, 1966, 80 Stat. 271, 999 U.N.T.S. 171 [hereinafter ICCPR].

178. ICERD, *supra* note 15; ICCPR, *supra* note 177, art. 6, ¶ 1.

179. ICCPR, *supra* note 177; ICERD, *supra* note 15.

180. ICCPR, *supra* note 177, art. 6, ¶ 1, art. 10, ¶ 1, art. 14, ¶ 1, art. 26, art. 27.

181. *Id.* art. 6, ¶ 1.

182. *Id.* art. 10, ¶ 1.

law.[183]

Article 26 provides that:

> [a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[184]

And finally, article 27 protects the linguistic, religious, and cultural rights of minority groups.[185]

ICERD defines "racial discrimination" as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[186]

Additionally, ICERD requires that states "not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."[187] It also provides for "[t]he right to equal treatment before the tribunals and all other organs administering justice" and requires states to provide for "effective protection and remedies."[188]

B. Self-Determination and the Rights of Indigenous Peoples

The UN Charter, binding on all UN member nations (including the U.S.), states that one of its purposes is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[189] Beyond the UN Charter, the right to self-determination is included in a number of other treaties including the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[190] This right to self-determination has been developed over time

183. *Id.* art. 14, ¶ 1.

184. *Id.* art. 26.

185. *Id.* art. 27.

186. ICERD, *supra* note 15, art. 1, ¶ 1.

187. *Id.* art. 4(c).

188. *Id.* arts. 5(a), 6.

189. U.N. Charter art. 1, ¶ 2, art. 2.

190. ICCPR, *supra* note 177, art. 1, ¶ 1; International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 2, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. Note that while the United Nations Charter and ICCPR are binding on the United States, the U.S. has not ratified the ICESCR. *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY

to create a set of international rules and mechanisms on the rights of peoples,[191] although its precise content is still subject to debate.[192] A people can include citizens of a former colony, of a state subject to "foreign conquest" or "alien subjugation," or religious, ethnic, social, and other minority groups.[193]

As applied to Indigenous Peoples, the nature of self-determination has been a subject of significant debate, particularly because self-determination has been read to provide secession rights to colonial and non-self-governing territories.[194] In 1960, the United Nations General Assembly passed the Declaration on the Granting of Independence to Colonial Countries and Peoples stating that the UN Charter prohibits "[t]he subjection of peoples to alien subjugation, domination, and exploitation," and that these acts violate fundamental human rights.[195] The Declaration went on to define self-determination as including the right to determine political status and ordered states to take "immediate steps" to transfer all power to "trust" and other non-self-governing territories.[196] Indigenous Peoples were excluded from this conception utilizing the "so-called blue-, or salt-water, thesis[,]" which required that there be a "blue- or salt-water between the colonizing country and the colony or at least a geographically discrete set of boundaries."[197]

COLLECTION, https://treaties.un.org/Pages/ ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter= 4& clang=_en (last visited Dec. 20, 2020); *Status of the International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4& chapter=4&clang=_en (last visited Dec. 20, 2020) [hereinafter Status of the ICCPR].

191. *See* Independence to Colonial Countries and Peoples, *supra* note 162, ¶¶ 1, 5; Friendly Relations, *supra* note 176, ¶ 1 (reaffirming the right to self-determination and describing modes of political status); *Aaland Islands Question*, *supra* note 10; *Expert Mechanism on the Rights of Indigenous Peoples*, OHCHR, https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenous-peoples (last visited Mar. 20, 2022); *Special Rapporteur on the Rights of Indigenous Peoples*, OHCHR, https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples (last visited Mar. 20, 2022).

192. *See, e.g.*, Christine Bell & Kathleen Cavanaugh, *'Constructive Ambiguity' or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement*, 22 FORDHAM INT'L L. REV. 1345, 1351 (1998) ("The 'lacunae, ambiguities and loopholes' in the current legal regulation of self-determination leave it open to other groups, such as ethnic or national minority groups within state territories, to claim a right to self-determination.").

193. Independence to Colonial Countries and Peoples, *supra* note 162, ¶ 1; *Report of the International Committee on Aaland Islands*, *supra* note 10, at 6.

194. *See, e.g.*, JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 49 (1996); Ernest Duga Titanji, *The Right of Indigenous Peoples to Self-Determination versus Secession: One Coin, Two Faces*, 9 AFR. HUM. RTS. L.J. 52, 61 (2009); Hurst Hannum, *Minorities, Indigenous Peoples, and Self-Determination*, 26 STUD. TRANSNAT'L LEGAL POL'Y 1, 9 (1994).

195. Independence to Colonial Countries and Peoples, *supra* note 162, ¶ 1.

196. *Id.* ¶¶ 2, 5.

197. Andrew Erueti, *The Politics of International Indigenous Rights*, 67 U. TORONTO L.J. 569, 578–79 (2017).

Therefore, Indigenous Peoples were not considered within this self-determination framework, in spite of histories of colonialism impacting Indigenous Peoples.[198]

Indigenous Peoples of Canada, Australia, New Zealand, and the United States (CANZUS states) have advocated for a reading of self-determination within an anti-colonization context, which would entitle them to claim self-determination rights in line with those afforded to previously colonized states.[199] As noted by Professor Andrew Eruiti, the anti-colonialism context is particularly relevant to Indigenous Peoples within these states due to the history of "treaty making and treaty breaking, and international law's refusal to recognize their sovereign status."[200] The alternative reading of self-determination, which is more accepted as related to Indigenous Peoples, is internal self-determination which includes "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."[201]

Emerging doctrine, moreover, does not restrict a right to secession to colonial territories, but rather supports the idea of remedial secession.[202] Remedial secession is the idea that serious human rights infringements or denials of internal self-determination can provide for the right to secession.[203] This emerging doctrine is supported in part by a 1970 UN Declaration which further elaborated on the rights encapsulated within the right to self-determination.[204] This 1970 Declaration does not authorize secession as applied to states that are "in compliance with the principle of equal rights and self-determination of peoples, and thus possessed of a government representing the whole people belonging to the territory, without distinction as to race, creed or colour."[205] This paragraph has been read to imply a right to remedial secession where "a government does not represent the whole population, or discriminates on the grounds of 'race, creed or

198. *Id.* at 570, 579 ("These advocates pointed to their first peoples' status and historical experience of colonization and intensive settlement.").

199. *Id.* at 570, 580–81 ("As state-like peoples subject to colonization, equality demanded that indigenous peoples be entitled to self-determination alongside other peoples.").

200. *Id.* at 591.

201. Reference re Secession of Quebec, [1998] 2 S.C.R 217, 282 (Can.).

202. *Id.* at 285.

203. *Id.*; *see also* Glen Anderson, *A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession?*, 49 VAND. J. TRANSNAT'L L. 1183, 1221 (2016).

204. Friendly Relations, *supra* note 176.

205. *Id.*

colour.'"[206] Further, according to this Declaration, any interference with such an exercise of self-determination would constitute a violation of the UN Charter.[207]

In 2007, the UN General Assembly moved to create a set of protections specific to Indigenous Peoples by adopting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[208] While it is not legally binding, the Special Rapporteur on the Rights of Indigenous Peoples has asserted that "[UNDRIP] is a standard setting resolution of profound significance as it reflects a wide consensus at the global level on the minimum content of the rights of indigenous peoples."[209] Along with reaffirming the right to self-determination, UNDRIP notes that the right to self-determination includes "the right to autonomy or self-government in matters relating to their internal and local affairs."[210] UNDRIP also emphasizes that "indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedure, as well as to maintain and develop their own indigenous decision-making institutions."[211] And while UNDRIP is not itself considered binding, the Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples has stated that the Declaration should be used to interpret other human rights treaties.[212] Accordingly, the Expert Mechanism has found the duty to "include indigenous peoples in decisions that affect them" to be a requirement under article 27 of the ICCPR.[213] Furthermore, cultural rights, as elaborated on in UNDRIP, were found to be a core component of self-determination.[214] Note that while the views of the Expert Mechanisms are not binding, they

206. Anderson, *supra* note 203, at 1215–17 (citing Friendly Relations, *supra* note 176).

207. Friendly Relations, *supra* note 176, ¶ 1.

208. UNDRIP, *supra* note 176; RICHOTTE, *supra* note 20, at 660.

209. Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Report to the General Assembly*, ¶ 9, U.N. Doc. A/72/186 (July 21, 2017).

210. UNDRIP, *supra* note 176, arts. 3–4.

211. *Id.* art. 18.

212. Hum. Rts. Council, Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples, ¶ 11, U.N. Doc. A/HRC/EMRIP/2013/2 (Apr. 29, 2013) [hereinafter Access to Justice]; Hum. Rts. Council, Role of Languages and Culture in the Promotion and Protection of the Rights and Identity of Indigenous Peoples, ¶ 9, U.N. Doc. A/HRC/21/53 (Aug. 16, 2012) [hereinafter Role of Languages and Culture].

213. Role of Languages and Culture, *supra* note 212, ¶ 10; *see also* Food and Agricultural Organization [FAO], *Free Prior and Informed Consent Manual*, at 14, I6190E/1/10.16 (2016) (noting that a right to participation is rooted in the right to self-determination and individual autonomy); Poma Poma v. Peru, U.N. Hum. Rts. Comm., ¶ 7.7, U.N. Doc. CCPR/C/95/D/1457/2006 (2009) (finding that art. 27 of the ICCPR requires the inclusion of minority groups in decisions that affect them).

214. Role of Languages and Culture, *supra* note 212, ¶ 20.

constitute authoritative statements on the content of international law.[215]

In the realm of criminal law, the United States is not alone in its disregard for Indigenous norms and criminal justice systems.[216] Internationally, Indigenous Peoples "struggle to have their institutions and systems, including legal systems, traditional laws and approaches to justice, recognized."[217] Additionally, even where they are recognized they are often subject to limitations or are overridden by a country's laws when there is a conflict.[218] And where both Indigenous and state systems govern, Indigenous individuals may be subject to prosecution under two systems, particularly "where the State-based system does not recognize the indigenous peoples' system."[219] A 2013 Expert Mechanism study found that self-determination provides Indigenous Peoples with the right to "maintain and strengthen indigenous legal institutions[] and to apply their own customs and laws."[220] It also found that cultural rights include "recognition and practice of [Indigenous] justice systems . . . [and a] recognition of [Indigenous] traditional customs, values and languages by courts and legal procedures."[221] The study also provided a number of examples of states making positive strides in implementing these norms, including Greenland and Malaysia, which have codified Indigenous laws, and Canada, which requires courts to recognize and consider customary laws and traditions when applying the Canadian Human Rights Act.[222]

However, as hinted at by the Expert Mechanism, significant gaps are created by the intersection of domestic and international law in their treatment of Indigenous Peoples, given, for instance, that an Indigenous

215. Hum. Rts. Council Res. 33/25, U.N. Doc. A/HRC/RES/33/25, at 2 (Oct. 5, 2016) ("[W]ithin its mandate, the Expert Mechanism shall determine its own methods of work, although the Expert Mechanism may not adopt resolutions or decisions."); *see also* MARKUS VORDERMAYER-RIEMER, NON-REGRESSION IN INTERNATIONAL ENVIRONMENTAL LAW 41–42 (2021) ("At the least, such pronouncements by nontreaty based human rights organs may come close to 'judicial decisions and teachings of the most highly qualified publicists of the various nations' in the sense of Article 38(1)(d) of the Statute of the ICJ and thus qualify as 'subsidiary means for the determination of rules of law.'").

216. Access to Justice, *supra* note 212, ¶ 53 (citing Gabriela Carina Knaul de Albuquerque e Silva (Special Rapporteur on the Independence of Judges and Lawyers), *Mission to Mexico*, ¶¶ 80–81, A/HRC/17/30/Add.3, annex (Apr. 18, 2011)).

217. *Id.* ¶ 55.

218. *Id.*

219. *Id.* ¶ 57.

220. *Id.* ¶ 12. The Inter-American Commission has made similar findings on the duty of a state to respect Indigenous laws, legal systems, and cultural practices under the right to self-determination and cultural rights. IACHR, *Mitchell*, *supra* note 16, ¶ 85.

221. *Id.* ¶ 28.

222. *Id.* ¶¶ 54, 60–61.

Person could be subject to two sovereigns for one crime.[223] And when considering how ICERD interacts with the rights of Indigenous Peoples, a right to equality based on race[224] does not necessarily cover discrimination based on Indigenous status. It would not, for instance, seem to cover the exclusion of Native Americans from a jury based on their cultural beliefs on the death penalty.[225] It is also not clear that Indigenous Peoples are provided with any effective remedies through these mechanisms. On the domestic level, as was discussed *supra*, while even domestic law cuts against the implementation of the death penalty against Lezmond Mitchell,[226] courts still had the power to enforce the death penalty. And, on an international level, even when Indigenous Peoples are able to access an international mechanism, states may choose to ignore the decisions of the international bodies, as the United States did in the case of Lezmond Mitchell.[227] Finally, to the extent that human rights treaties can be interpreted through UNDRIP, because it is not itself binding, the provisions for the creation of new enforcement mechanisms and positive obligations are likely not enforceable.[228]

The United States was notably one of four countries to vote against UNDRIP.[229] While the United States eventually changed its position, it continues to emphasize that UNDRIP is not legally binding and has only "moral and political force."[230] The rights proposed by UNDRIP are numerous.[231] And while bold, as UNDRIP states in closing, "[t]he rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[232]

V. THE DEATH OF LEZMOND MITCHELL: A VIOLATION OF THE RIGHT OF SELF-DETERMINATION AND OTHER INNUMERABLE

223. Access to Justice, *supra* note 212, ¶ 57.

224. ICERD, *supra* note 15, arts. 4, 5(a), 6.

225. Petition for a Writ of Certiorari at 23, Mitchell v. United States, 971 F.3d 993 (2020) (No. 18-17031).

226. *See supra* Part III.B.

227. *See* Mitchell v. United States, No. CV 20-8217-PCT-DGC2020, 2020 WL 4921988, at *6 (D. Ariz., Aug. 21, 2020).

228. UNDRIP, *supra* note 176, arts. 2, 11, 27, 39.

229. RICHOTTE, *supra* note 20, at 664.

230. *Id.*; U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 1 (2011), https://2009-2017.state.gov/documents/organization/184099.pdf.

231. UNDRIP, *supra* note 176.

232. *Id.* art. 43. And as Justice Gorsuch stated in Washington v. Cougar Den, Inc., 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring), "[i]t is the least we can do."

HUMAN RIGHTS VIOLATIONS

Under international law, the Navajo Nation has full authority over its own political status and criminal justice affairs.[233] In contrast, in the United States, the courts and Congress have both defined the status and powers of Tribal Nations, without consulting with the Tribal Nations themselves.[234] According to Supreme Court caselaw, Congress's power over Tribal Nations is plenary, leaving it to Congress to expand the "inherent sovereignty" of Tribal Nations.[235] However, the constitutionality of this power is suspect. International law also cuts against such plenary power, as it provides Tribal Nations, including the Navajo Nation, with the authority to determine their own political status.[236] As will be discussed in this section, international law gave the Navajo Nation the power to decide whether Lezmond Mitchell received the death penalty. The United States' disregard for the sovereign's will, and actions taken in accordance with this disregard, amounted to violations of the Navajo Nation's right to self-determination and other provisions of human rights law.

The Navajo Nation, as a people, has the right to self-determination that is binding on the United States under the UN Charter and the ICCPR.[237] Under black letter international law, this includes the right to determine its political status, though falls short of a right to secede.[238] However, under the anti-colonialism theory of Indigenous rights, the Navajo Nation arguably has self-determination rights in line with those of colonial territories, meaning they are both internal and external in nature.[239] Thus, at its strongest invocation, the rights of the Navajo Nation could also include the ability to secede entirely from the United States.[240] Under both black letter international law and the anti-colonialism theory, any interference with the Navajo Nation's right to self-determination is a violation of the UN Charter.[241]

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233. *See supra* Part IV.B.

234. RICHOTTE, *supra* note 20, at 382.

235. *Id.*; United States v. Lara, 451 U.S. 182, 199, 204–05 (1981).

236. ICCPR, *supra* note 177, art. 1, ¶ 1; Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Report to the General Assembly*, ¶¶ 35, A/73/176 (July 17, 2018) ("[Self-determination] is considered a foundational right of indigenous peoples, because it affirms their right to freely determine their political status and freely pursue their economic, social and cultural development."); UNDRIP *supra* note 176, art. 3.

237. *See supra* Part IV.B.

238. *See supra* Part IV.B.

239. *See supra* Part IV.B; Independence to Colonial Countries and Peoples, *supra* note 162, ¶ 1.

240. *See supra* Part IV.B.

241. *See supra* Part IV.B.

Moreover, unlike ICESCR, the Declaration on the Granting of Independence to Colonial Countries and Peoples does not appear to be limited to progressive realization.[242] Many of the rights included in ICESCR are subject to progressive realization, meaning that they require that "steps be taken" to fulfill them though the rights can be fulfilled over time.[243] In contrast, the Declaration says that states must take "immediate steps . . . to transfer all powers to the peoples of [colonial] territories, without any conditions or reservations."[244] The United States under the anti-colonialism theory then was under an obligation to transfer all power to the Navajo Nation, and a failure to do so would constitute a violation of the UN Charter.[245]

Under black letter international law, the United States is also barred from derogating from the right to self-determination absent communication to the Secretary-General of the UN that such a derogation has been made because of a "public emergency which threatens the life of the nation" under article 4 of the ICCPR.[246] Arguably, once the United States has instituted measures to realize the self-determination rights of the Navajo Nation, it cannot act in ways that constitute a derogation of that transfer, absent the circumstances outlined in article 4 of the ICCPR. There do not appear to be any relevant derogation communications. Under the MCA,[247] the United States did engage in an act that further realized the Navajo Nation's self-determination rights by providing an opt-in provision to the death penalty. This act is in line with the right to self-determination, given that it provides the Navajo Nation with autonomy over its internal affairs.[248] The Navajo Nation chose definitively to opt-out of the death penalty.[249] And just as the MCA can be seen as a step forward in realizing the Navajo Nation's right to self-determination, the execution of Lezmond Mitchell,[250] against the express wishes of the Navajo Nation, can be seen as a derogation from the right. Therefore, in its decision in this case, the United States walked back

242. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), ¶¶ 9, 14, U.N. Doc. E/1991/23 (1990), https://www.refworld.org/docid/4538838e10.html (last visited Dec. 21, 2020).

243. *Id.*; ICESCR, *supra* note 190, art. 2, ¶ 1.

244. Independence to Colonial Countries and Peoples, *supra* note 162, ¶ 5.

245. *Id.* ¶ 1.

246. ICCPR, *supra* note 177, art. 4.

247. Indian Major Crimes Act, 18 U.S.C. § 1153.

248. UNDRIP, *supra* note 176, arts. 3–4.

249. *See supra* Part III. The provision provides for Tribal Nations to opt-in rather than opt-out, though here the Navajo Nation also definitively opted out through their hearings and communications to the U.S. Attorney's Office. *See supra* Part III; *see also* 18 U.S.C. § 3598.

250. Fuchs, *supra* note 1.

power that it had transferred, in violation of the right to self-determination and the prohibition from derogating from rights absent a public emergency.

Like the anti-colonialism theory, UNDRIP is also not itself binding.[251] However, the Expert Mechanism has stated that it should be used to interpret other human rights treaties.[252] While the views of the Expert Mechanism are not binding, they remain authoritative statements of the content of international law.[253] Thus, while the new rights UNDRIP enumerates may not yet be legally binding, the rights contained in the Declaration that simply expand on rights contained in legally binding instruments are arguably binding or strongly authoritative.[254] Specifically, UNDRIP expands on the content of the right to self-determination. For example, self-determination as interpreted using UNDRIP encompasses the right for Indigenous Peoples to be included "in decisions that affect them."[255] Further, self-determination and cultural rights have been read to require the recognition of and respect for Indigenous legal bodies, languages, and traditions.[256]

As a result, the Navajo Nation's right to self-determination includes the right to determine its political status, whether as a state or in any other political form it chooses.[257] This right to determine political status on its own, but also in connection with the specific rights in the realm of criminal law, requires that the Navajo Nation have the final word in determining the criminal justice destiny of its citizens.[258] It also implies that the Navajo Nation has the right, if not the duty, as a sovereign to ensure the human rights of its people, including the right to life. Therefore, the Navajo Nation has the right to determine whether its citizens live or die. For that reason, the imposition of the death penalty on Lezmond Mitchell, expressly against the wishes of the Navajo Nation,[259] violated its right to self-determination. And this violation is in turn a violation of the UN Charter and ICCPR, given that such a violation constitutes an interference with the Navajo Nation's exercise of self-determination.[260]

The United States committed additional violations of the Navajo Nation's self-determination and language and cultural rights throughout the

251. *See supra* Part IV.B.
252. *See supra* Part IV.B.
253. *See supra* note 219.
254. *See supra* Part IV.B.
255. Role of Languages and Culture, *supra* note 212, ¶ 10; UNDRIP, *supra* note 176, art.18.
256. *See supra* Part IV.B.
257. *See supra* Part IV.B.
258. *See supra* Part IV.B.
259. *See supra* Part II.
260. *See supra* Part IV.B.

process of Lezmond Mitchell's trial. The Navajo Nation has a right to be part of "decisions that affect them."[261] A criminal trial, especially one carrying the possibility of the death penalty, constitutes a decision-making process that implicates the rights of the Navajo Nation under ICCPR articles 2 (self-determination) and 27 (language and cultural rights).[262] At stake in Lezmond Mitchell's case was whether the United States could impose the death penalty on a citizen of the Navajo Nation against the Navajo Nation's wishes and do so using a crime that falls outside of the MCA. An affirmative answer expanded the power the federal government has over the Navajo Nation. These circumstances are not simply an issue of sovereignty and self-determination but also of cultural rights given the Navajo Nation's beliefs against the death penalty. Without Navajo Nation participation on the jury the government and Navajo individuals could not adequately represent their cultural beliefs or sovereign and self-determination interests. Thus, the Navajo Nation and its citizens had participation rights in the trial under international law.

The fact that only one juror was Native American, while the rest were white,[263] is a clear violation of the right to participate in the decision-making process when considered in the context of the racialized strategies the prosecution employed.[264] Although the makeup of the jury alone does not invalidate the judgement, one Native American on the jury is not sufficient to constitute participation by the Navajo Nation or its citizens, particularly where the prosecution was relying on racial biases to advance its case.[265] Moreover, in cases that exclusively implicate intra-Tribal affairs, such as this one, the Tribal Nation should arguably have input on the jury selection process.

Additionally, the United States violated the UN Charter, because it not only failed[266] to facilitate the involvement of the Navajo Nation: the prosecution actively worked against such involvement by striking jurors based on their Navajo language or beliefs.[267] In fact, if the prosecution had had its way, there would not have been any Native American jurors at all, as the one Native American juror who remained was prevented from being

261. Role of Languages and Culture, *supra* note 212, ¶ 10.

262. *Id.*; ICCPR, *supra* note 177, arts. 2, 27.

263. *See supra* Part III.A.

264. *See supra* Part III.A.

265. *See supra* Part III.A.

266. As discussed *supra*, the Declaration on Friendly Relations states that an interference with self-determination is a violation of the UN Charter. *See supra* note 176 and accompanying text.

267. *See supra* Part III.A; United States v. Mitchell, 502 F.3d 931, 998 (9th Cir. 2007) (declining to grant a new trial based on the claims of racial discrimination).

struck through a Batson challenge.[268] Further, the Navajo Nation's attempts at participation in the process, through letters and other pleas to the court asserting that the Nation disagreed with the imposition of the death penalty on its citizens, were disregarded, evidenced most acutely by the administration of the sentence.[269]

The prosecution's exclusion of Native Americans from the jury was part of a broader racialized prosecutorial strategy. Indeed, violations of Lezmond Mitchell's rights to be free from racial discrimination pervaded his proceedings. While one Native American juror was preserved through the Batson challenge, the court sustained the striking of the only Black juror who made it to the peremptory stage, on grounds that Lezmond Mitchell maintained were clearly erroneous.[270] The racial discrimination inherent in his case pervaded not only the striking of jurors, but also his treatment at trial. As discussed *infra*, the prosecution used racially derogatory language to describe Mitchell, and the case overall,[271] including using such violent language as to invoke the memory of the lynching of Native Americans, as a means to persuade the jury.[272] The court determined that the nature of his crime was such that this violent language could not have amounted to an error worthy of reversal.[273] But the evidence indicates that the prosecutor surely believed that the tactic of invoking racial biases would be persuasive in swaying the jury, especially when considered alongside the attempts to strike every Native American and Black juror. Indeed, these attempts to strike Native American and Black jurors suggest that the prosecutor sought

268. *See supra* Part III.A.

269. *Mitchell*, 502 F.3d at 998 (Reinhardt, J., dissenting).

270. *Id.* ("In assessing the prima facie case of discrimination with respect to juror # 30, the trial court gave no weight to its previous finding that the prosecution violated *Batson* by striking . . . the only Native American remaining on the panel. However, . . . the prosecution's strikes of jurors of one race are relevant in assessing strikes of jurors of another race. This is particularly true when the absolute number of jurors of a particular racial group is small, and the use of challenges against that group may be insufficient to support an inference of discrimination.").

271. The use of such language violated Lezmond Mitchell's rights under the ICCPR and CERD. The use of racially violent and discriminatory language violated his right to be equal before the court. ICCPR, *supra* note 177, art.14, ¶ 1; ICERD, *supra* note 15, art. 5. And it violated the duty of the United States, under CERD, to prevent its officials from promoting or inciting racial discrimination. ICERD, *supra* note 15, art. 4. In fact, when this issue was raised before the court, the United States dismissed it as "not affect[ing] Mitchell's substantial rights." *Mitchell*, 502 F.3d at 996. Additionally, the right to dignity of the person includes the right to be free of such abuse as the use of racially violent language at one's trial. Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1599 (2010) (arguing that freedom from "abuse, defamation, humiliation, discrimination, and violence on grounds of race" is an aspect of dignity).

272. *Mitchell*, 502 F.3d at 996; *see supra* Part III.A.

273. *Mitchell*, 502 F.3d at 996.

to intentionally excluded Native Americans and other non-white jurors in order to establish a venire that would be receptive to such racialized arguments, and thus more likely to side with the prosecution.[274]

Finally, the cultural rights of the Navajo Nation and its citizens were violated given the disregard for their cultural beliefs and language.[275] By ignoring the cultural beliefs of the Navajo Nation and its citizens on the death penalty the United States did not pay due regard to their culture; and it violated the language requirement by failing to provide language services to potential Navajo jurors.[276]

VI. CONCLUSION

The United States has violated the rights of Indigenous Peoples from its beginning.[277] And like the encroachment on Tribal lands, the rights of Tribal Nations were chipped away. The acts of the United States in the case of Lezmond Mitchell cannot be supported by international or domestic law. And beyond only lacking legal support, the exercise of federal jurisdiction over criminal law on Tribal lands constitutes a violation of the Navajo Nation's right to self-determination, and in this case, the violation of Lezmond Mitchell's human rights. As Judge Hurwitz stated in his concurrence:

> [w]hen the sovereign nation upon whose territory the crime took place opposes capital punishment of a tribal member whose victims were also tribal members because it conflicts with that nation's 'culture and religion,' a proper respect for tribal sovereignty requires that the federal government not only pause before seeking that sanction, but pause again before imposing it.[278]

He also advised that the Executive Branch reexamine the policy of applying the death penalty to Tribal citizens.[279] And indeed, it is imperative that the United States reexamines its understanding of federal plenary power, in

274. *See supra* Part III.A (describing the striking of Navajo jurors based on their "Navajo language/and beliefs").

275. *See supra* Part III.A.

276. *See supra* Part III.A.

277. *See generally* Brook Colley, *A Nation Founded on Genocide*, 32 WOMEN'S REV. BOOKS 19 (2015) (reviewing ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES (2014)).

278. Mitchell v. United States, 958 F.3d 775, 794 (9th Cir. 2020) (Hurwitz, J., concurring).

279. *Id.*

order to avoid further violations of self-determination and human rights, as well as to provide proper remedies for the violations already committed.