Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing

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Introduction

THIS ARTICLE CRITIQUES A PROPOSAL to include tribal court criminal convictions and sentences in the federal sentencing scheme. The proposal, as articulated by Kevin Washburn, calls for an amendment to the Federal Sentencing Guidelines[1] to count tribal court convictions in calculating an Indian defendant's criminal history score to determine a federal prison sentence.[2] Currently, tribal court convic-

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1. U.S. SENTENCING GUIDELINES MANUAL (2009) [hereinafter USSG]. Promulgated in 1987, with the express goals of uniformity in sentencing, and just punishment, the USSG were passed as part of the Sentencing Reform Act of 1984 and replaced judicial discretion in federal sentencing with a set of guidelines, outlining the six-month sentencing range for the defendant based upon his criminal history and the seriousness of the offense. The Guidelines are advisory only after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *See infra* Part II.

2. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 426 (2004) [hereinafter Washburn, *Tribal Courts*]; Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. REV. 263, 288–89 (2004) [hereinafter Washburn, *Different Kind*]; Kevin K. Washburn, *Reconsidering the Commission's Treatment*, 17 FED. SENT'G REP. 209, 213 (2005) [hereinafter Washburn, *Reconsidering the Commission's Treatment*]; Kevin K. Washburn, *Fed-*

tions are not directly counted in criminal history, but may be used to support an "upward departure" to increase the Native defendant's overall federal sentence.[3]

Washburn's proposal seeks to gain "respect" for tribal courts, based upon a premise that tribal convictions must be afforded the same weight and treatment as federal and state criminal convictions under the Federal Sentencing Guidelines.[4] This Article explores the idea of respect for tribal courts and convictions in the context of their history and connection to tribal peoples and communities. Ultimately, this Article concludes that respectful treatment would not tolerate placing a tribal defendant in such a powerless position within the federal sentencing hierarchy.

A proposal that would negatively impact only Native American defendants in a foreign justice system in the name of respect warrants critical review. As an Assistant Federal Public Defender, I had the opportunity to view the application of federal criminal laws from the front and the back end of the criminal justice system, from trial to post-conviction. As a Native woman, I have seen the impact of crime, justice, and federal sentencing on tribal people, families, and whole communities.

eral Criminal Law and Tribal Self-Determination, 84 N.C. L. REV. 779, 840 (2006) [hereinafter Washburn, *Criminal Law and Tribal Self-Determination*].

3. USSG § 4A1.2(i) ("Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category)."). This means that if a sentencing judge considers an Indian defendant's criminal history score to be inadequate to reflect the seriousness of his past criminal history, the judge may use tribal court records to increase the defendant's sentence above and beyond the applicable federal sentencing range. *See* United States v. Drapeau, 110 F.3d 618, 620 (8th Cir. 1997) (concluding that the district court appropriately applied an upward departure to reflect the defendant's tribal offenses); United States v. Cavanaugh, 68 F. Supp. 2d 1062, 1074 (D.N.D. 2009) ("Today, the Sentencing Guidelines allow for consideration of tribal court convictions when determining the adequacy of criminal history and courts have the discretion to consider uncounseled tribal convictions when sentencing a defendant in federal court."). Washburn puts it this way: "Under the guidelines as enacted, tribal and foreign court sentences are not routinely counted in criminal history computations, but constitute a "favored" basis for upward departure." Washburn, *Tribal Courts*, *supra* note 2, at 416.

4. Washburn, *Tribal Courts*, *supra* note 2, at 405, 418, 444, 450 ("The Commission should change its tribal courts policy and recognize that the sentences of tribal courts are entitled to the same respect as state courts sentences in the federal sentencing regime."); Washburn, *Different Kind*, *supra* note 2, at 288–89; Washburn, *Reconsidering the Commission's Treatment*, *supra* note 2, at 213; Washburn, *Criminal Law and Tribal Self-Determination*, *supra* note 2, at 780.

It is from this perspective that I focus the lens of respect on the work of tribal courts and criminal justice in Indian Country,[5] and ultimately oppose any amendment in federal sentencing to count tribal court convictions to increase federal sentences for Native criminal defendants. A review of the historical diminishment of tribal authority over crime and punishment on the reservation, as well as the disparate impact of crime and punishment on Native peoples, leads to a rejection of counting tribal court convictions in federal sentencing. This Article proposes an alternative view that both respects Native American individuals caught in the criminal justice system and elevates tribal sovereignty.

I. Towards Respect for Tribal Court Criminal Judgments: A Prosecutorial View

The current sentencing scheme for federal defendants treats tribal court convictions and foreign country convictions differently than state and federal convictions. Prior convictions a defendant received in state and federal court—but not tribal court—are routinely counted for the purpose of assessing criminal history and ultimately determining the length of a sentence.[6] Counting tribal court convictions would not demonstrate respect for tribal courts or peoples. Rather, in light of the historical framework of Native American criminal defendants and the resulting incarceration disparity, such a deviation from the status quo would be harmful. Before presenting the historical framework and the disparate outcomes for Native criminal defendants, it is important to explore the place of tribal courts and recognition of orders in recent scholarship.

A. Introduction to Tribal Courts and Recognition of Orders

Tribal courts are basically unknown entities in the American legal system. Because people are uneducated or undereducated about tribal court authority and procedures, a misconception and suspicion of

5. The term "Indian Country" is a term of art, defined in 18 U.S.C. § 1151 (2006), for the purposes of criminal jurisdiction and interpreted in case law to apply in civil cases. *See* United States v. John, 437 U.S. 634, 648–49 (1978) (federal trust land was Indian Country); Alaska v. Native Village of Venetie, 422 U.S. 520, 527 (1998); United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999) (stating that an assault occurring in a tribal building held in trust for Indian tribe was defined as Indian Country for the purposes of federal prosecution even though not formally declared a reservation).

6. USSG § 4A1.2(i) ("Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).").

tribal courts and their decisions has developed over time. Uninformed suspicion has led to a certain defensive response by those working in tribal courts and tribal communities.

Scholarship in defense of tribal courts has basically taken two conceptual approaches: (1) tribal courts are different from American state and federal court models, and these differences are fundamental to understanding a tribal court system,[7] or; (2) tribal courts are essentially the same as the American state and federal court models, triggering expectations of similar treatment.[8]

The problem with comparing tribal courts with federal and state courts, however, is the use of the state and federal court model as the norm and the legitimate standard. Tribal justice systems are unique to the sovereign nation. The independence of a tribe means that each tribe has the sovereign prerogative to design its own justice system. Once defined, tribal courts lie uniquely outside of the state and federal court system.[9] Tribal justice systems can differ markedly from tribe to tribe and from state and federal courts in jurisdiction, applicable law, legal process, sentencing authority, and more. Measuring any tribal court system against a normative standard of federal and state

7. *See, e.g.*, Gloria Valencia-Weber, *Tribal Courts, Custom and Innovative Law*, 24 N.M. L. REV. 225, 225–26, 256 (1994) [hereinafter Valencia-Weber, *Innovative Law*] (describing the creative capacity of tribal courts through the use of tribal custom and tradition, "law produced in tribal . . . courts does not necessarily retain the discrete elements from Anglo-American legal culture with the same meaning and value as the contributor culture or jurisprudence"); Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 175 (1994) ("Navajo justice is unique, because it is the product of experience of Navajo people."); Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229, 264–66 (2000) (discussing the "marked difference[s]" in Anglo-American and tribal courts); Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17, 28 (1997) (comparing and contrasting Anglo-American and tribal courts).

8. *See, e.g.*, Nell Jessup Newton, *Tribal Court Praxis: A Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 294 (1998) ("[S]ome tribal courts operate as nearly exact replicas of state courts."); Washburn, *Tribal Courts*, *supra* note 2, at 426 ("Though tribal courts and state courts traveled different paths, they reached the same destination; both courts must today provide most of the protections set forth in the Bill of Rights.").

9. Tribal courts are not federal instrumentalities or "inferior [c]ourts" under Article III of the United States Constitution. U.S. CONST. art. III, § 1. The power to prosecute tribal members for crimes is a retained tribal power and not delegated federal authority. *See* United States v. Wheeler, 435 U.S. 313, 322–23 (1978). Nor are tribal courts instruments of the states. Worcester v. Georgia, 31 U.S. 515, 561 (1832). The term "tribal courts" encompasses all "Indian court(s)" as defined under 25 U.S.C. § 1301(3), including traditional and modern tribal courts created through the exercise of sovereign power and self-government, and Courts of Indian Offenses established by the Bureau of Indian Affairs. *See* 25 C.F.R. §§ 11.100–.209 (2010) (establishing the Courts of Indian Offenses, listing the currently operating courts, and setting forth application regulations).

courts presents a false dilemma and discounts the sovereign independence and difference among Indian tribes that has proven vital to Native survival.

In the process of debating the legitimacy and defending the role of tribal courts, the recognition of tribal court judgments remains fixed on the horizon. Whether a foreign[10] court recognizes or refuses to recognize a tribal court order is an act of great importance, especially if the tribal court is viewed as a subordinate in the state and federal court hierarchy. Thus, a debate within the debate has emerged: What measure of recognition should be afforded to tribal courts by foreign courts? The answer has become equated with the measure of respect for the tribal court itself.

Scholars, academicians, and judges have debated the issue of recognition of tribal courts and their decisions. The debate has ranged from whether full faith and credit[11] applies to tribal court orders, and the constitutional support for such recognition or the lack thereof,[12] to whether comity[13] should be the guiding principle,[14] and if so,

10. The word foreign here connotes the state or federal court with jurisdiction outside of the tribal court; it does not refer to an international court.

11. The Full Faith and Credit Clause of the Constitution applies on its face only to states and requires each to extend full "Faith and Credit" to one another's "public Acts, Records, and judicial Proceedings." U.S. CONST. art. IV, § 1. Full faith and credit differs from comity, which connotes recognition of foreign orders, not as a matter of obligation but out of deference and mutual respect. *See infra* note 13.

12. *See, e.g.*, Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123, 133–34 (2001); Robert Laurence, *The Off-Reservation Garnishment of an On-Reservation Debt and Related Issues in the Cross-Boundary Enforcement of Money Judgments*, 22 AM. INDIAN L. REV. 355, 358–62 (1998); P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 367–73 (1994); B.J. Jones, *Tribal Considerations in Comity and Full Faith and Credit Issues*, 68 N.D. L. REV. 689, 690 (1992); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 897–925, 936 (1990); William V. Vetter, *Of Tribal Courts and "Territories": Is Full Faith and Credit Required?*, 23 CAL. W. L. REV. 219 (1987); Gordon K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397 (1985); John T. Moshier, Comment, *Conflicts Between State and Tribal Law: The Application of Full Faith and Credit Legislation to Indian Tribes*, 1981 ARIZ. ST. L.J. 801; Note, *The Application of Full Faith and Credit to Indian Nations*, 20 ARIZ. L. REV. 1064 (1978); Fred L. Ragsdale, Jr., *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133 (1977).

13. Comity differs from full faith and credit.

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163–64 (1895); *see supra* note 11.

whether principles of domestic or international comity should be applied.[15] Included in the debate is whether symmetry or asymmetry is appropriate in the cross-border recognition problem,[16] and whether to incorporate tribal courts into the federal court system.[17]

Underlying the debate is the question of proper placement of tribes among other sovereigns. All engaged in the discussion are desperately trying to discern whether and where tribes "fit" within a federal/state hierarchy as interpreted through the Constitution. Because tribal court power does not derive from the Constitution,[18] legal arguments that neglect to address the historical difference, or try to mask the constitutional gap, between tribal and federal or state decisions fall victim to imperfect analogies, uneven parallels, and haphazard logic that creates negative impacts in Indian Country. Given the complexity of competing factors involved in recognition of tribal court judgments, including the development of tribal courts over time, the perception of tribal nations, and the legitimate exercise of sovereign powers, this debate will undoubtedly continue into the future.

Recognition of tribal court decisions has become equated with recognition of sovereignty itself. Through the regulation of the day-to-day internal affairs of individual tribal members, tribal justice systems impact the survival of the whole community. Recognition of tribal court orders implicates tribal power and decision-making authority over the internal and external workings and affairs of the tribe. Recog-

14. *See, e.g.*, Clinton, *supra* note 12; Jones, *supra* note 12; Frank Pommersheim, "*Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123, 128, 144–49 (2000) (describing the state/federal relationship as "a credo of respect and comity," that is equally apropos as a pertinent doctrine to describe and to define the "fit" of tribal courts within the federal system," and citing instances of federal courts doctrine and practice in Indian law cases that depart excessively from this doctrine).

15. *See, e.g.*, Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311 (2000).

16. Drawing on terminology borrowed from other disciplines, Indian law scholars have explored the recognition problem, under the rubric of symmetry and asymmetry. Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861, 863 (2000) (identifying "[c]onstitutional full faith and credit [as] the prototypical symmetric doctrine" and proclaiming himself the principle proponent of the asymmetrical approach, Laurence advocates the need for a different set of legal principles for states and tribal courts in determining recognition of the other's judgments); Robert Laurence, *The Bothersome Need for Asymmetry in Any Federally Dictated Rule of Recognition for the Enforcement of Money Judgments Across Indian Reservation Boundaries*, 27 CONN. L. REV. 979 (1995).

17. R. Stephen McNeil, Note, *In a Class by Themselves: A Proposal to Incorporate Tribal Courts into the Federal Court System Without Compromising Their Unique Status as "Domestic Dependent Nations,"* 65 WASH. & LEE L. REV. 283, 311 (2008).

18. *See* discussion *supra* note 9.

nition (or lack of recognition) ultimately affects tribal people and whole communities, and reflects how the outsider jurisdictions view tribal authority. In framing the question of recognition in terms of respect—respect for tribal court power, authority, and autonomy—recognition becomes synonymous with inherent tribal sovereignty.

In an attempt to bring respect to tribal courts beyond the reservation border, one scholar asks for recognition of tribal criminal convictions in state and federal courts. Kevin Washburn[19] enters the discussion from the perspective of a "seasoned former Indian country federal prosecutor."[20] From this perspective, Washburn suggests the increased recognition of tribal court criminal convictions by foreign state and federal courts.[21] The treatment and effect of internal tribal court convictions by these foreign courts becomes central to the question of tribal court legitimacy.[22]

Perceiving a problem of respect for tribal courts and tribal court adjudications, Washburn advocates "counting" tribal court convictions against Native individuals under the Federal Sentencing Guidelines.[23] He favors artificially placing tribal court orders within the foreign state/federal hierarchy as a standard way to elevate and legitimize the

19. Kevin K. Washburn, a former Assistant United States Attorney in Albuquerque (1997 to 2000), former law professor at the University of Minnesota and University of Arizona, and currently the Dean of the UNM School of Law, is frequently relied upon as a leading expert in the field of crime and punishment in Indian Country. For example, Washburn served as a member of the Native American Advisory Group which later issued a report the report on Native American sentencing disparity under the federal guidelines in 2003. U.S. SENT'G COMM'N, REPORT OF THE AD HOC ADVISORY GROUP ON NATIVE AMERICAN SENTENCING ISSUES app. A at 3 (2003) [hereinafter NATIVE AMERICAN ADVISORY GROUP REPORT], *available at* http://www.ussc.gov/Research/Research_Projects/Miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf; *see infra* notes 222, 284.

20. As referred to by friend and former Assistant United States Attorney, Troy Eid. *See* Troy Eid, *Beyond Oliphant, Strengthening Criminal Justice in Indian Country*, 54 FED. LAW. 40, 46 (2007) (referring to Washburn, *Tribal Courts*, *supra* note 2).

21. Washburn, *Different Kind*, *supra* note 2, at 289 ("State courts should endeavor to adopt rules that accord with the notion of symmetry" as between tribal criminal and civil judgments.).

22. *Id.* at 288–89 ("A state that is willing to respect a tribal court enough to use its criminal convictions to place a convicted tribal defendant in greater jeopardy in a later state proceeding ought to be willing to respect the civil judgments by the same tribal court."); Washburn, *Tribal Courts*, *supra* note 2, at 445 (rejecting the Sentencing Commission's decision to treat tribes like foreign nations under the Guidelines as "disrespectful" to the work that tribes are doing); Washburn, *Reconsidering the Commission's Treatment*, *supra* note 2, at 213 (concluding that the Sentencing Commission fosters an official policy of disrespect for tribal courts: "By ignoring tribal sentences, the Guidelines have institutionalized a policy of disrespect for tribal courts and the important work that they do addressing public safety issues in tribal communities.").

23. Washburn, *Tribal Courts*, *supra* note 2, at 443–45.

tribal court.[24] In a series of articles, Washburn takes the position that respect for tribal court decisions is measured by the deference afforded by the foreign power to the tribal court decisions in criminal matters.[25]

The proposal to amend the Federal Sentencing Guidelines to "reflect the principle that misdemeanor convictions from tribal courts are entitled to the same level of respect as misdemeanor convictions from state, county and municipal courts"[26] begins with a comparison between tribal courts and state courts in order to establish legitimacy of the former.[27] According to Washburn, treating tribal court convictions and sentences the same as state convictions under the Sentencing Guidelines is proper because tribal court sentences are entitled to at least the same respect as state court sentences.[28] Thus, he has called for the Sentencing Commission to "abolish Section 4A1.2(i), which prevents tribal court sentences from being used in the routine calculation of criminal histories."[29]

This Article seeks to create a more nuanced view of the meaning of "respect" when applied to the concept of tribal sovereignty and tribal court decisions. In scholarship and colloquial usage, the words "respect" and "recognition" are used interchangeably to describe the proper credit that a foreign court should afford a tribal court order, and evaluate legitimacy or esteem reflected in tribal authority.

The goal of this Article is to unpack Washburn's overly simplistic view of respect, and to challenge his notion of increased "respect" for tribal courts through lengthening the federal sentences of individual

24. *Id.* at 450 (calling for the abolishment of the current Guidelines' treatment of tribal court orders of conviction).

25. Washburn, *Different Kind*, *supra* note 2, at 279 ("In the civil context, state approaches to recognition of tribal judgments can be plotted on a spectrum from highly respectful to relatively ambivalent to not respectful at all."); *id.* (demonstrating some states treat tribal court judgments "in the same manner as the state's own" that is with great assumed respect); Washburn, *Tribal Courts*, *supra* note 2, at 420 ("[T]reating tribal courts like foreign courts may reflect something other than respect for tribal sovereignty."); *id.* at 442 ("[T]he implication of the guidelines [in not counting tribal convictions] is that tribal courts lack legitimacy."); Washburn, *Reconsidering the Commission's Treatment*, *supra* note 2, at 213 ("The Commission should change its tribal courts policy and recognize that the sentences of tribal courts are entitled to the same respect as state court sentences in the federal sentencing regime."); Washburn, *Criminal Law and Tribal Self-Determination*, *supra* note 2, at 780.

26. Washburn, *Reconsidering the Commission's Treatment*, *supra* note 2, at 209.

27. Washburn, *Tribal Courts*, *supra* note 2, at 421–28.

28. *Id.* at 450 ("The Commission should change its tribal courts policy and recognize that the sentences of tribal courts are entitled to the same respect as state courts sentences in the federal sentencing regime.").

29. *Id.*

Indian defendants. Washburn's articles are briefly summarized and critiqued below.

B. Summary of Washburn Articles

In *A Different Kind of Symmetry*, Washburn proposes a mirror image or reflexive symmetry for tribal civil and criminal judgments within a state's jurisdiction.[30] The article ultimately advocates for states to adopt a fully symmetrical approach to the treatment of both tribal criminal and civil decisions.[31] If a state recognizes tribal court convictions, the same state should provide symmetrical treatment of civil adjudications and vice-versa.[32] Despite serious negative ramifications of recognition of tribal criminal convictions upon individual Indians, Washburn concludes that it is entirely appropriate for states to "respect" the criminal convictions of tribal courts because tribal courts are "very much like the state and federal court systems."[33] After calling for reflexive symmetry between civil and criminal judgments, with only minimal attention to important differences between the two types of determinations,[34] he ventures a step further in a second article, directing attention to the recognition of tribal court convictions in federal court sentencing.[35]

Building on the idea that tribal courts deserve respect through recognition, in *Tribal Courts and Federal Sentencing*,[36] Washburn argues that tribal court convictions should be taken into account when calculating[37] the length of a Native American defendant's sentence under the Federal Sentencing Guidelines.[38] The subject of the article is USSG Rule 4A1.2(i), the rule that specifically exempts tribal court convictions in the calculation of a defendant's criminal history for federal sentencing purposes.[39] The article admonishes the U.S. Sentencing Commission, the body created in 1987 with the express responsibility of drafting the Sentencing Guidelines, for leaving tribal

30. Washburn, *Different Kind*, *supra* note 2, at 288–89.
31. *Id.* at 285–88.
32. *Id.* at 288–89.
33. *Id.* at 288.
34. *Id.* at 272–78.
35. Washburn, *Tribal Courts*, *supra* note 2.
36. *Id.*
37. The word calculate refers to the method of determining a criminal sentence in federal court by counting prior convictions and ascribing each conviction criminal history points under the elaborate set of rules laid out in the United States Sentencing Guideline Manual. *See infra* Part II.B.
38. Washburn, *Tribal Courts*, *supra* note 2, at 450.
39. *Id.* at 406, 415–17.

court convictions out of the calculation for an Indian defendant's prior criminal history.[40] Washburn rejects the Sentencing Commission's treatment of tribal court convictions as a failure to recognize tribal courts.[41] He views the decision not to count tribal criminal convictions and sentences in calculating the length of a federal sentence as inconsistent with general federal policy upholding and supporting tribal self-governance.[42] Equating the exemption of tribal convictions with a level of disrespect, Washburn writes, "unlike state courts, whose convictions and sentences are given due respect by the United States Sentencing Commission . . . in sentencing for subsequent federal offenses, past offenses adjudicated by tribal courts are ignored in the federal sentencing process."[43]

Importantly, the lack of a right to counsel for the Indian defendant is raised, and dispensed with here. In finding that tribal courts are more like state courts than they are like foreign courts for the purposes of federal sentencing,[44] Washburn argues that tribal courts are, for the most part, subject to the same substantive and procedural due process requirements as state courts.[45] In support of this conclusion, he points to the Indian Civil Rights Act ("ICRA"),[46] and notes that ICRA incorporates "virtually identical" protections as compared with the fundamental rights and responsibilities conferred on the states via the Fourteenth Amendment.[47]

Acknowledging the lack of a right to appointed counsel for those who cannot afford to hire an attorney, Washburn nevertheless argues that "the modus operandi of tribal courts is not fundamentally different than that of state courts."[48] Although the lack of indigent defense counsel in tribal courts is a "serious flaw," Washburn counters that this flaw should "not prohibit counting of tribal courts [sic] sentences in the federal sentencing context."[49] He advocates amending the Sentencing Guidelines to require federal courts to routinely recognize tri-

40. Washburn, *Tribal Courts*, *supra* note 2, at 416.
41. *Id.* at 415–18.
42. *Id.* at 435–39.
43. *Id.* at 406–07.
44. *Id.* at 421–28.
45. *Id.* at 428–35.
46. *Id.*
47. *Id.* at 426.
48. *Id.* at 426, 429–30.
49. *Id.* at 430.

bal criminal convictions when sentencing Native people for crimes committed in Indian Country.[50]

In a third article, *Reconsidering the Commission's Treatment of Tribal Courts*, Washburn continues to equate counting tribal court convictions with a form of respect.[51] He argues that "in refusing to count tribal convictions for purposes of routine calculation of criminal history, the [Sentencing] Commission has disrespected tribal courts."[52] As a cure for the disrespect shown tribal courts, Washburn recommends counting an Indian defendant's prior tribal court convictions in calculating the defendant's federal sentence.[53] He views the Sentencing Commission's treatment of tribal courts as "impossible to reconcile with other modern federal polices of respect for tribal self-determination and self-governance."[54] Reasoning that the U.S. Sentencing Commission should afford tribal courts and their sentences at least the same "respect" in the federal sentencing scheme as it does those of state courts, he labels the policy decision "not to credit the legitimate work of tribal courts" as "indefensible."[55] Measuring tribal courts against a state court standard and finding that tribes are more like states than foreign nations, Washburn takes issue with the exemption[56] and pointedly directs the Sentencing Commission to change the rule.[57] He advocates honoring tribal court convictions to effec-

50. *Id.* at 445–50 ("In keeping with the analysis herein, the Commission should first abolish Section 4A1.2(i), which prevents tribal court sentences from being used in the routine calculation of criminal histories.").

51. Washburn, *Reconsidering the Commission's Treatment*, *supra* note 2. Washburn explained that *Reconsidering the Commission's Treatment* was published in 2005 as the third article but written prior to his *Tribal Courts and Federal Sentencing*, which was published in 2004. Conversation with Kevin K. Washburn, in Albuquerque, N.M., (March 7, 2010).

52. *Id.* at 209.

53. *Id.* at 209, 213.

54. *Id.* at 209.

55. *Id.* at 213 ("By ignoring tribal sentences, the Guidelines have institutionalized a policy of disrespect for tribal courts and the important work that they do addressing public safety issues in tribal communities. . . . [T]he Commission's decision not to credit the legitimate work of tribal courts in adjudicating misdemeanor sentences is indefensible.").

56. *Id.* at 212 ("The Commission should recognize that tribal courts are substantially more like state courts than foreign courts and should accord tribal courts the same respect that they receive from the rest of the federal government.").

57. *Id.* at 213 ("The Commission should reconsider Section 4A1.2(i) which prevents tribal court sentences from being used in the routine calculation of criminal histories. The Commission should change its tribal courts policy and recognize that the sentences of tribal courts are entitled to the same respect as state court sentences in the federal sentencing regime.").

tively increase the federal prison sentences of Native American defendants.[58]

In *Federal Criminal Law and Tribal Self-determination*,[59] Washburn continues to define respect for tribal court convictions in terms of recognition of the conviction in federal sentencing.[60] The article begins with an in depth view of "the history and doctrinal foundations of the Major Crimes Act, tracing the historical context of federal criminal jurisdiction leading up to its enactment."[61] Placing the Major Crimes Act in the broader context of Indian law and policy, Washburn decries the Act's original purposes of increasing federal control and assimilation of the Indian as lacking legitimacy in the modern era of tribal self-determination.[62] He finds that the displacement of tribal jurisdiction and imposition of outside norms have denied tribes an important expression of self-determination and self-definition in their own tribal justice systems.[63]

Unfortunately, immersion in the historical context of federal encroachment on Indian criminal justice and jurisdiction does not dissuade Washburn from the position espoused in the earlier set of articles—namely that the Federal Sentencing Guidelines should be changed to count prior tribal convictions to lengthen an Indian's sentence in a subsequent federal criminal proceeding.[64] Instead, he clings to the idea and reiterates the point that the current federal sentencing scheme is the problem:

> [A]s explained in greater detail in another article, the federal sentencing guidelines require federal judges to count state and federal criminal convictions to assess an Indian offender's criminal history for purposes of determining the severity of a federal sentence. Yet, federal judges are instructed to ignore convictions rendered by the Indian offender's own tribal courts.[65]

He denounces the federal sentencing scheme as contrary to the accepted norm, asserting, "from the normative viewpoint presented here, the federal sentencing guidelines are not only wrong, but also perverse."[66] Again, Washburn places the counting of convictions

58. *Id.*

59. Washburn, *Criminal Law and Tribal Self-Determination*, *supra* note 2.

60. *Id.* at 840 ("Thus tribal convictions ought to be treated with *greater* respect than state and federal convictions, not less.").

61. *Id.* at 790–806.

62. *Id.* at 779–80.

63. *Id.* at 837–42.

64. *Id.* at 840.

65. *Id.* at 840 n.329 (citing his 2004 article, Washburn, *Tribal Courts*, *supra* note 2).

66. *Id.*

against Indian individuals as indicative of the legitimacy and respect of their issuing courts:

> For reasons previously articulated, the convictions rendered by a tribal court in the offender's own community would seem to have far greater legitimacy than federal convictions levied under the laws of an external community. Thus, tribal convictions ought to be treated with *greater* respect than state and federal convictions, not less.[67]

Overall, Washburn argues that the current status of the Federal Sentencing Guidelines, which fails to treat tribes and tribal court judgments as those of the states for the purpose of sentencing, is inconsistent with current federal polices in favor of tribal self-governance,[68] out of step with the explicit goals of the Sentencing Guidelines to bring honesty, proportionality, and equality to federal sentences,[69] and fails to mete out justice in Indian Country.[70] Since courts, in general, serve as the primary instruments of criminal justice for a community, the concern is that excluding tribal court convictions in federal sentencing conveys a "demoralizing message"[71] that states and cities are entitled to respect, but tribal courts and communities are not.[72] According to Washburn, the Sentencing Commission's exclusion of tribal court convictions "at best" sends the "paternalistic and demeaning" message that "tribal courts may be lawful but they are not relevant in federal Indian country criminal justice," and "[a]t worst, the implication of the guidelines is that tribal courts lack legitimacy."[73]

C. Commentary on the Proposal to Count Tribal Court Convictions

Interestingly, this radical and recurrent proposal to change the Sentencing Guidelines to count tribal convictions provoked no comments from tribal courts, tribal governments, or tribal people. The first two Washburn articles described above generated no direct response. However, the third article, *Reconsidering the Commission's Treatment of Tribal Courts*, was published along with brief commentary from the bench and bar on the wisdom of "counting" tribal convictions in

67. *Id.* (citations omitted).

68. Washburn, *Tribal Courts*, *supra* note 2, at 445; Washburn, *Reconsidering the Commission's Treatment*, *supra* note 2, at 211.

69. Washburn, *Tribal Courts*, *supra* note 2, at 439–40 (tracking the language of 28 U.S.C. § 991(b)(1)(B) defining the purpose of the Sentencing Commission).

70. *Id.* at 447–50.

71. *Id.* at 442.

72. *Id.*

73. *Id.*

the same manner that state convictions are incorporated into the Federal Sentencing Guidelines.[74] In his Commentary, Judge William C. Canby,[75] Senior Court Judge for the Ninth Circuit Court of Appeals, agreed with the "major proposition" that there exists "a clear inconsistency between the federal Indian law policies supporting the authority and dignity of the tribal courts and the Sentencing Commission's Guideline § 4A1.2(i)," and viewed the proposal as a way to address the severe law enforcement problem in Indian Country.[76] Judge Canby, however, recognized the undeniable negative impact of the proposal, providing:

> Because the federal government plays such a large role in Indian country law enforcement, the effect of counting tribal convictions in criminal history will be to subject Indian offenders to increasingly harsh sentences that may not apply to the comparable non-Indian offender whose case is handled by the state courts.[77]

This harsh treatment of Natives under the Sentencing Guidelines appropriately caused Judge Canby to question "whether according full dignity to tribal courts is worth the cost of increasing the severity of sentences to offenders with tribal court criminal histories."[78] According to Canby, Washburn sufficiently makes the case that it is worth the cost because of the severe law enforcement problems faced by many tribes.[79]

The federal defender Commentary recognized the "real consequence of such counting would be longer sentences" for Native Americans.[80] The defenders opposed the proposal to treat tribal sentences like state sentences under the Sentencing Guidelines as unnecessary

74. Jon M. Sands & Jane L. McClellan, *Commentary: Policy Meets Practice: Why Tribal Court Convictions Should Not Be Counted*, 17 FED. SENT'G REP. 215, 215–18 (2005); Bruce D. Black, *Commentary on* Reconsidering the Commission's Treatment of Tribal Courts, 17 FED. SENT'G REP. 218, 218 (2005); Charles Kornmann, *Commentary on* Reconsidering the Commission's Treatment of Tribal Courts, 17 FED. SENT'G REP. 222, 222 (2005); William C. Canby, Jr., *Commentary: Treatment of Tribal Court Convictions*, 17 FED. SENT'G REP. 220, 220–21 (2005).

75. Judge Canby disclosed that Washburn was his judicial law clerk from 1993 to 1994. Canby, *supra* note 74, at 221 n.1.

76. *Id.* at 220.

77. *Id.*

78. *Id.*

79. *Id.*

80. Sands & McClellan, *supra* note 74, at 216 ("The Proposal Would Drastically Lengthen Sentences."). The authors noted that they served along with Washburn on the Ad Hoc Advisory Committee on Native American Sentencing Issues and Indian Crime that recognized a sentencing disparity for Natives. *Id.* at 217 n.4.

to accurately assess criminal history for Indians in federal cases,[81] and questioned the existence and adequacy of due process in tribal courts.[82] In support of the status quo, the federal defender Commentary pointed out the marked differences among tribal justice systems.[83] Recognizing that "tribes, through their tribal courts, are seeking to implement tribal values and cultures," the federal defender Commentary acknowledged that tribal systems may seek to perform different functions for the tribal community than state courts provide for their citizenry.[84] According to the Commentary, "[w]hile it is laudable that the tribes are resolving criminal matters differently than the states, it is all the more reason to treat the convictions differently" under the federal Sentencing Guidelines.[85]

Also rejecting the proposal to count tribal court convictions in federal sentencing, Judge Charles Kornmann provides the most succinct assessment:

> The guidelines already act in a racist manner. Indians are subjected to very harsh penalties in federal court. A non-Native American sentenced in state court for a comparable crime will receive a much shorter sentence and qualify for parole. Congress almost routinely makes everything a federal crime, thus continuing to "pile it on" in Indian Country.
>
> I simply cannot favor anything that mandates further increases in the length of sentences for Native Americans.[86]

81. *See id.* at 215 (discussing the adequacy of the current rules in the section titled "If It Ain't Broke Don't Fix It").

82. *Id.* at 216 (citations omitted in original). The Commentary mostly denigrates tribal courts, providing the following description:

> While undoubtedly there are many tribes that have sophisticated court systems, the fact is that many, if not most, do not. Even in the tribal court systems which Professor Washburn points to, such as the Navajo Nation's criminal justice system, neither judges nor prosecutors nor defense counsel are required to be lawyers. Frequently the defendant is unrepresented, and is not afforded the same constitutional rights that defendants are given as a matter of course "off the reservation." As recognized by the United States Supreme Court in *Duro v. Reina*, tribal courts do not afford the same level of protection and rights as state jurisdictions.

Id. (citations omitted in original).

83. *Id.* at 217 ("The varieties of criminal justice systems are remarkable. Some large tribes have extensive tribal criminal justice systems while other small tribes may have rudimentary or nonexistent criminal justice systems.").

84. *Id.* at 216 ("[C]oncepts of community responsibility, duty and even religious obligation . . . differ from the aims of federal and state prosecutions, which focus on punishment and deterrence.").

85. *Id.* at 216.

86. Kornmann, *supra* note 74, at 222.

II. Anatomy of Respect: Unraveling the Meaning of Respect for Tribal Court Criminal Convictions in the Context of Crime and Punishment of Indians in Federal Court

Washburn is not the only scholar to describe issues of Indian identity and sovereignty in terms of respect. Although the term is often used in scholarship, it is rarely defined.[87] Instead, the word "respect" is commonly accepted to connote vague and complex concepts from regard or consideration to esteem and high honor or admiration. An operational definition of such an important word is indispensable to a thorough understanding of the powers given, and duties and actions owed to, and withheld from, tribes and tribal courts.

In philosophical terms, philosophy professor Stephen Darwall identified two different kinds of respect applicable to persons: "recognition respect" and "appraisal respect."[88] Recognition respect refers to the acknowledgement that an individual is a separate, unique, free, and independent human being.[89] Under this form of respect, no admiration is required. Recognition respect is based upon the idea that proper consideration or weight to persons, as persons, is owed to all.[90] In contrast, appraisal respect is not owed to all persons but is offered

87. *See, e.g.*, Korey Wahwassuck, John P. Smith & John R. Hawkinson, *Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdictions*, 36 WM. MITCHELL L. REV. 859, 876 (2010) ("The period of Indian Reorganization (1928–1942) marked a transition to increased tolerance and respect for traditional Indian culture."); Steven J. Gunn, *The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of our National Consensus*, 36 WM. MITCHELL L. REV. 503, 506–07 (2010) (describing the Native American Graves Protection and Repatriation Act of 1990, 25. U.S.C. §§ 3001–3010 (2006) in terms of impact: "It has led, more often than not, to greater communication and collaboration between museums, scientists, and American Indians, and to a heightened respect for the sanctity of Indian art, cultural property, and human remains."); Gloria Valencia-Weber & Antoinette Sedillo Lopez, *Stories in Mexico and the United States About the Border: The Rhetoric and the Realities*, 5 INTERCULTURAL HUM. RTS. L. REV. 241, 309 (2010) ("Respect for tribes' authority to define their membership to continue their culturally distinct way of life should be manifested in how U.S. procedures at its southern border actually operate."); Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENVTL. L. 437, 472–73 (2010) ("Avoiding environmental paternalism requires expanding the understanding of environmental justice to include respect for sovereignty when it comes to Indians.").

88. *See* Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 38 (1977) [hereinafter Darwall, *Two Kinds of Respect*]; *see also* Stephen L. Darwall, *Kant on Respect, Dignity and the Duty of Respect*, *in* KANT'S ETHICS OF VIRTUE 179 (Monika Betzler ed., 2008).

89. Darwall, *Two Kinds of Respect*, *supra* note 88, at 38, 45–47.

90. *Id.* at 38 ("To say that persons as such are entitled to respect is to say that they are entitled to have other persons take seriously and weigh appropriately the fact that they are persons in deliberating about what to do.").

only in recognition of excellence.[91] In this sense, respect is a verb, meaning to treat with honor, high-esteem, and admiration.[92] Adapting Darwall's two different kinds of respect to address tribes and tribal courts reveals an inherent ambiguity and inconsistency in Washburn's use of the word respect as it pertains to the treatment of tribal courts as state courts under the Sentencing Guidelines.

Reduced to its syllogistic components, the idea of respect for prior state convictions and disrespect for tribal convictions is simple. Two syllogisms emerge to form the basis of Washburn's respect equation:

First syllogism: Federal courts count prior criminal convictions of state courts. Tribal courts are "very much like" state courts.[93] Therefore, federal courts should count tribal court criminal convictions.

Second syllogism: A criminal conviction is respected, if and only if it is counted as a prior court conviction in the federal sentencing scheme. The Sentencing Commission does not count tribal court convictions. Therefore, the Commission does not respect tribal court decisions.

At first glance this "recognition means respect" equation and its converse "respect requires recognition" make sense. If the extension of comity or full faith and credit to tribal judgments is the same as recognizing tribes as sovereign and independent, then recognizing the decisions of tribal nations is appropriate. By using Darwall's two kinds of respect, however, Washburn confuses recognition respect with appraisal respect by equating the counting of tribal court convictions with elevation or legitimacy of the issuing courts.[94]

As discussed below, a myriad of problems emanate from the thesis presented in Washburn's proposal of symmetry, which is to either treat tribal criminal convictions as civil judgments within a state or treat them the same as state convictions in federal sentencing, in order to gain respect. First, the proposed symmetry in criminal adjudications is not true symmetry. Tribal courts and state courts do not share a symmetrical jurisdiction. Nor do they share a history.

The history of displacement of tribal criminal justice and the imposition of federal criminal laws, discussed in Parts II.A. and II.B. below,[95] includes the evolution of disrespect. Congressional action,

91. *Id.*
92. *Id.* at 38–39.
93. Washburn, *Tribal Courts*, *supra* note 2, at 426.
94. *See supra* Part I.
95. *See infra* Part II.A–B.

executive agency policy and rules, and Supreme Court decisions failed in Darwall's first kind of respect—recognition respect. The federal government and courts failed to recognize tribes' unique sovereign capacity to address crime within the exterior boundaries of the reservation. The disrespect began with the enactment of the Major Crimes Act, which required federal prosecution of serious crimes in Indian Country.[96] The Major Crimes Act repudiated the *Ex parte Kan-gi-shun-ka* decision, which had acknowledged tribes' local authority to administer traditional justice, and found that federal courts had no jurisdiction over crimes by Indians in Indian Country.[97] After *Ex parte Kan-gi-shun-ka*, the disrespect developed over time, blow-by-blow, beginning with the creation of Courts of Indian Offenses[98] in 1883, which resulted in displacement of traditional justice systems. As explained below, these courts imposed western concepts and courts on Indian Country, where there was thought to be no internal justice. The disrespect continued to deepen, from the enactment of the Major Crimes Act to the Supreme Court's decision in *Oliphant v. Suquamish*,[99] resulting in the current landscape in Indian Country criminal justice where federal courts have jurisdiction over serious crimes committed by Native Americans on the reservation, yet tribal courts have no jurisdiction over crimes committed by non-Indians on the reservation.[100]

Part II.C. addresses the asymmetrical impact of the proposed respect of tribal court convictions as between Indian defendants and non-Indian defendants. As dual citizens, Native Americans are subject to successive prosecution in tribal court and federal court for the same conduct. Because double jeopardy does not attach, the federal system does not recognize tribal prosecution and sentencing in prosecuting the same conduct or mitigating the federal sentence.[101] The

96. 18 U.S.C. § 1153 (2006).

97. *Ex parte* Crow Dog (*Ex parte Kan-gi-shun-ka*), 109 U.S. 556, 569, 571 (1883). The Supreme Court noted the English name Crow Dog in the title of the case.

98. A current list of Courts of Indian Offenses are found in the Code of Federal Regulations at 25 C.F.R. § 11.100 (2010). These courts, distinct from other tribal courts or traditional justice systems, and are also known as "C.F.R." courts in reference to these governing procedures.

99. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); *see discussion infra* Part I.A.4.

100. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. § 1153 (2006)) (congressional act denigrating and diminishing tribal criminal jurisdiction by removing jurisdiction over serious crimes committed by Indians to federal court); *Oliphant*, 435 U.S. 191 (denying inherent tribal criminal jurisdiction over non-Indians and inventing the doctrine of implied limits on tribal powers).

101. *See* United States v. Wheeler, 435 U.S. 313 (1978) (holding that federal prosecution for rape of a Navajo Tribal member did not violate double jeopardy prohibition even

proposed change in the Sentencing Guidelines would only exacerbate the existing disparity faced by individual Native American defendants in federal court and the tribal community at large.[102] By adding more tribal criminal convictions to the sentencing calculation, Tribal defendants will be subject to even longer sentences.

As pointed out in the brief Commentary on the proposal, from only a few invited judges and a single federal defender, discussed above[103] and explained in greater detail below,[104] in terms of direct costs, Indians are overrepresented as defendants in federal court and in federal prison and face disproportionately longer prison sentences.[105] In terms of collateral consequences, Native communities, families, and juveniles are all impacted by the stigmatic and practical impacts of incarceration.[106] Native families are placed in a cycle of over-incarceration. For example, children with a parent in jail are more likely to be incarcerated themselves.[107] Native juveniles are brought into the criminal justice system at higher rates.[108] Under the Major Crimes Act, Native American juveniles face federal prosecution instead of juvenile court adjudication, and thus far graver consequences than those proceeding in state court.[109]

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though the defendant had already been tried and convicted in tribal court based on the same incident, because of the separate sovereigns doctrine (tribal and federal courts being the two separate sovereigns).

102. *See* discussion *infra* Part II.C.

103. *See* discussion *supra* Part I.C.

104. *See* discussion *infra* Part II.C.

105. *See* TODD MINTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: JAILS IN INDIAN COUNTRY, 2008, at 1–2 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jic08.pdf. In 2008, "[t]he incarceration rate for American Indians was about 21% higher than the overall national incarceration rate of 759 per 100,000 persons other than American Indians or Alaska Natives . . . . Between 2000 and 2008, the number of American Indians confined in jails and prisons nationwide grew on average by about 4.4% annually." *Id.*; *see also infra* Part II.C.

106. *See generally* John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999) (discussing the collateral effects of incarceration on individuals and their communities).

107. *See, e.g.*, CHARLENE WEAR SIMMONS, CAL. RES. BUREAU, CHILDREN OF INCARCERATED PARENTS 6 (2000), *available at* www.library.ca.gov/crb/00/notes/v7n2.pdf (citing California statistics finding that: "Children of offenders are five times more likely than their peers to end up in prison themselves. One in 10 will have been incarcerated before reaching adulthood." (internal quotation marks omitted)).

108. *See* discussion *infra* Part II.C.

109. Because there is no separate federal system for juveniles, children who commit major crimes in Indian Country are also subject to federal court prosecution under 18 U.S.C. § 1153 (2006). *See* United States v. Jerry Paul C., 929 F. Supp. 1406, 1407–08 (D.N.M. 1996) (finding Native American Juveniles face disproportionately longer sentences under the Sentencing Guidelines, citing cases and listing reports and studies); Amy J. Standefer, Note, *The Federal Juvenile Delinquency Act: A Disparate Impact on Native*

Finally, treating all tribes and tribal justice systems as if they were the same to achieve uniformity in federal sentencing fails to respect the fullness of difference owned by each tribal community. Respect in this context means acknowledging and understanding that tribes and tribal justice systems are different from state and federal entities and are different from each other. A proposal to count all tribal court convictions (like all state court convictions) does not effectively differentiate among tribes and their justice systems. Instead, such a proposal is grounded in the misguided assumption that all tribal courts operate as images of state and federal models. Thus, the first syllogism—that federal courts should count tribal convictions because all tribal courts are "very much like" state courts—can also be characterized as reflecting a normative component and qualitative standard imposed by outsider courts.

Federal policies—designed to terminate or assimilate tribal governments and tribal people—displaced tribal justice systems and pressured tribal governments into importing foreign concepts of justice and process in order elevate or legitimize the justice systems in Indian Country, which were seen as savage.[110] A competing internal pressure exists to produce traditional justice systems reflective of internal tribal norms, traditions, and values.[111] This pressure creates differences in the internal workings of tribal courts and due process among tribes, and yet results in assimilative tribal court systems with concomitant gaps in structure or process.[112]

The proper recognition and respect owed to tribal court decisions in the criminal context cannot be understood without a review of historical underpinnings and a brief history of crime and jurisdiction to punish. In addition, a review of the federal framework for sentencing Native Americans in federal court is necessary to understand the negative disparate impact. This history and the concomitant disparity refute the argument that respect for tribes comes from recognizing tribal court sentences. Each is thoroughly discussed below.

American Juveniles, 84 MINN. L. REV. 473, 483, 495–500 (1999) (describing the negative impact of federal jurisdiction and concomitant federal sentencing).

110. *Ex parte* Crow Dog (*Ex parte Kan-gi-shun-ka*), 109 U.S. 556, 569, 571 (1883). The Supreme Court noted the English name Crow Dog in the title of the case (referring to a "savage tribe," "savage life," and "savage nature" in reference to the Sioux Tribe and Natives in general and Crow Dog, in particular).

111. *See, e.g.*, Valencia-Weber, *Innovative Law*, *supra* note 7 (describing the legitimacy of tribal courts and the use of tribal customary law, as viewed by foreign courts).

112. *See* Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110, 111 (1995) (discussing the two-fold challenge of maintaining credibility and legitimacy).

A. A Brief History of Criminal Law in Indian Country

Criminal jurisdiction in Indian Country has been aptly called a complex "jurisdictional maze."[113] Dual federal and tribal sovereignty to prosecute Indians within Indian Country requires Indian law practitioners to refer to a familiar, but nevertheless complex and confusing, chart or matrix to sort out: (1) which sovereign may prosecute in a particular case given the identity variables of the site, the perpetrator, and the victim; (2) whether that prosecutorial power is partial or complete; (3) whether the prosecutorial power is exclusive or concurrent; and (4) whether that power is inherent or conferred by the other sovereign.[114]

Tribal power to govern the people within the territory predates the U.S. Constitution.[115] Prior to the United States' assertion of jurisdiction over Indians, tribal power to govern within its recognized boundaries was established.[116] Although there could be physical struggles related to the power externally, the terms were determined within and among the tribes.[117] Tribes followed indigenous ways of knowing,

113. *See* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976) (credited with coining the term in his "second in a series of three articles surveying the jurisdictional maze surrounding the problems of law enforcement on Indian lands" to describe the rules of tribal criminal jurisdiction developed piecemeal over a span of 200 years); *see also* Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975). The promised and much-anticipated third article suggesting reform in this area has not yet emerged.

114. Such a chart is reprinted in WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 199–200 (5th ed. 2009). *See also* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, TITLE 9: CRIMINAL RESOURCE MANUAL § 689, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm; Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-*Booker, 91 MARQ. L. REV. 723, 737–39 (2008).

115. Talton v. Mayes, 163 U.S. 376, 383 (1896) ("It cannot be doubted . . . that prior to the formation of the Constitution treaties were made with the Cherokee tribes by which their autonomous existence was recognized.").

116. Tribal law and power constitutes the internal law of a tribe as distinguished from federal Indian law, which consists of treaties, statutes, and common law governing the federal government's relationship with tribes and the states. *See* Treaty of Hopewell with the Choctaw Nation art. IV, Jan. 3, 1786, 7 Stat. 21; *see also* Treaty of Hopewell with the Chickasaw Nation art. IV-V, Jan. 10, 1786, 7 Stat. 24; Treaty on the Great Miami with the Shawnee art. VII, Jan. 31, 1786, 7 Stat. 26; Treaty of Fort Harmar with the Wyandot Nation and Other Tribes art. IX, Jan. 9, 1789, 7 Stat. 28; Treaty of New York with the Creek Nation art. VI, Aug. 7, 1790, 7 Stat. 35; Treaty of Holston with the Cherokee Nation art. VIII, July 2, 1791, 7 Stat. 39; Treaty of Greenville with the Wyandots and Other Tribes art. VII, Aug. 3, 1795, 7 Stat. 49.

117. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 10 (1994) (citing works of traditional law of Indian people).

including their own legal traditions and "systems" reflecting tribal values and norms.[118] In his book, *Crow Dog's Case*, Sidney L. Harring describes the federal treatment of indigenous legal tradition:

> The Indian tribes had their own laws, evolved through generations of living together, to solve the ordinary problems of social conflict. This legal tradition is very rich, reflecting the great diversity of Indian peoples in North America. Yet this law was seldom analyzed in U.S. [federal] Indian law, even when it was recognized. When it was discussed, as in Crow Dog, i[t] was often treated contemptuously, dismissed there as "a case of Red man's revenge," a racist and false description of Sioux law.[119]

Although acknowledged explicitly in treaties and implicitly in concepts of tribal self-governance, self-determination, and sovereignty, tribal legal tradition was not incorporated into the federal laws governing relations with Indian tribes.[120]

1. Beyond the Marshall Trilogy: The Courts and Congress on Crime in Indian Country

In any overview of Indian law, federal Indian law scholars typically skip indigenous legal tradition or internal tribal "law" and begin with the Marshall Trilogy[121]—three cases decided by the Supreme Court in

118. For explications on tradition law in legal scholarship, see Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319 (2008) (Hopi customary law); Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law*, TRIBAL L.J. (2000) [hereinafter Zuni Cruz, *Customs and Traditions*], *available at* http://tlj.unm.edu/tribal-law-journal/articles/volume_1/zuni_cruz/content.php (exploring adoption of tribal law that reflects indigenous traditional law and values); Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997) (describing traditional Seneca dispute resolution and other traditional Native dispute resolution mechanisms); Yazzie, *supra* note 7 ("Navajo justice is unique, because it is the product of experience of Navajo people."); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995); Philmer Bluehouse & James W. Zion, *The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993).

119. HARRING, *supra* note 117, at 10 (citing works of traditional law of Indian people).

120. *See, e.g.*, *id.* at 292 ("[T]his rich legal tradition does not exist because it was recognized by the courts, . . . but rather because the tribes never ceased to act as sovereign peoples and never gave up their 'old law.'").

121. The Marshall Trilogy refers to "the three famous opinions of Chief Justice John Marshall that expounded for the first time in the halls of the United States Supreme Court the bases for federal Indian common law." Matthew L. M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 627 (2006). The cases are: *Johnson v. M'Intosh*, 21 US (8 Wheat) 543 (1823) (introducing the Doctrine of Discovery into federal Indian law, and finding that Indians retained rights in the lands they occupied, but limiting those rights by prohibiting alienation of such land to non-Indians); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (finding Indian tribes not a "foreign state" as that term is defined by

the early years of the 19th century. These cases provide an introduction to the federal view of criminal jurisdiction in Indian Country, and without exception, they are touted as the foundational precedent in a chain of case law describing and developing federal power over Indian tribes.

Before the Supreme Court decided those cases in the 1830s, the delegation of authority to prosecute criminal offenses in certain territories was governed by treaty,[122] or trade and intercourse acts designed to allow for lawful trade with tribal nations.[123] The General Crimes Act,[124] enacted in 1817, provided for federal court jurisdiction over interracial crimes committed in Indian Country, but protected the tribes' exclusive jurisdiction over Indian offenses in Indian Country "under the local law of the tribes" or by treaty stipulation.[125] Over time, Congress and the Supreme Court's concerted efforts limited inherent tribal sovereignty in legitimate tribal internal criminal matters

Article III, section 2, paragraph 1 of the Constitution for jurisdictional purposes, and instead characterizing tribes as "domestic, dependent nations," and comparing the tribes' relationships to the United States as that of a "ward to his guardian"); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557, 561 (1832) (describing the "Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive," and within those boundaries, the laws of the state can have no force). Fletcher credits Charles Wilkinson with first describing these seminal cases as a trilogy in CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW, NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 24 (1987); *see* Fletcher, *supra*, at 627 n.2.

122. Treaties between the United States and the tribal nations were nation-to-nation documents and some included recognition of tribal power within the confines of the reservation to govern the community through tribal values, norms, and forms of justice. This recognition was based on the tribes themselves living, working, and warring and resolving issues within the tribe, and with other tribes. The treaty era of federal Indian policy formally ended in 1871. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2006)).

123. The Indian Trade and Intercourse Act of 1790 was one of the first Acts of Congress. Ch. 33, 1 Stat. 137 (1790). Replaced and amended over time, it is now codified at 25 U.S.C. § 177.

124. 18 U.S.C. § 1152. The General Crimes Act is also referred to as the "Indian Country Crimes Act." *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.02[1] (Nell Jessup Newton et al. eds., 2005).

125. The General Crimes Act provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, shall extend to the Indian Country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian Country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

19 U.S.C. § 1152.

on the reservation.[126] The pressure to assimilate and the pressure to produce traditional justice systems that reflected external federal and state court norms is apparent in the history of crime and punishment, and that legacy is evident today.

2. *Ex parte Kan-gi-shun-ka* and the Major Crimes Act

The much-examined case of *Ex parte Crow Dog* (otherwise known as *Ex parte Kan-gi-shun-ka*)[127] illustrates a tribal restorative justice remedy in the criminal context. During the 1880s and the period preceding the Crow Dog prosecution, the murder of an Indian by an Indian in the Dakota Territory of Indian Country was treated exclusively under tribal traditional law.[128] *Ex parte Kan-gi-shun-ka*, decided in 1881, involved a murder on the Great Sioux Reservation in Dakota Territory in which Kan-gi-shun-ka, or Crow Dog in English, a Brule Sioux Indian, shot and killed Sin-ta-ga-le-Skca, or Spotted Tail in English, a Brule Sioux chief.[129] Crow Dog was brought to justice under Sioux tradition. Under the Brule tradition, the tribal council met to resolve the murder, order an end to the disturbance, and arrange a peaceful reconciliation of the families involved through offered or ordered gifts.[130] For the murder, Crow Dog's family was ordered to compensate Spotted Tail's family by offering $600, eight horses, and one blanket under tribal traditional "law."[131]

After the Brule settled the matter under local tribal authority, Crow Dog was arrested two days after the murder to be tried in the federal territorial court.[132] The United States then convicted Crow

126. *See, e.g.*, *id.* § 1153 (congressional diminishment of tribal criminal jurisdiction by removing jurisdiction over serious crimes to federal court.); Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Tit. II–VII, §§ 201–701, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301–1341) (imposing a version of the Bill of Rights on Tribal governments); Oliphant v. Suquamish, 435 U.S. 191 (1978) (divesting tribes of tribal court jurisdiction over non-Indians in criminal cases); Nevada v. Hicks, 533 U.S. 353 (2001) (diminishing tribal court jurisdiction over non-members in civil tort actions); *see also* Angela Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 827 (2007) ("Although the treaty relationship, the federal Constitution, Supreme Court precedent, and congressional action have worked together to repeatedly reaffirm the inherent sovereignty of Indian nations, in many important respects, they have also limited it.").

127. 109 U.S. 556 (1883).

128. HARRING, *supra* note 117, at 1.

129. *Id.*

130. *Id.* at 104–05 (The process utilized in the case was "one of a number of conflict resolution mechanisms available to the Sioux," and "used only after the most serious of tribal disturbances.").

131. *Id.* at 1.

132. *Id.* at 110.

Dog of murder under federal law and condemned him to death, the applicable federal punishment in the territories for murder.[133] In an 1883 decision, the Supreme Court issued the writ of habeas corpus, reversed the Dakota Territorial court's conviction, and ordered Crow Dog's release from prison, finding that the federal district court did not have jurisdiction over the crime.[134] The U.S. federal courts had no jurisdiction to prosecute because the crime occurred within the exclusive jurisdiction of the Sioux Tribe, based on the existing federal statutes and the Treaty of 1868 between the United States and the Sioux.[135] Under these laws, Indians were not subject to federal prosecution for Indian against Indian offenses and could only be punished by the law of their tribe.[136]

The use of tradition and custom in handling such a case was seen as "primitive" by those outside the local law of the tribes.[137] The Supreme Court decision removed Crow Dog from the federal death penalty and was perceived as an acquittal for the murder of Spotted Tail, a Brule Sioux chief (and federal agent).[138] Federal outrage prompted a swift congressional response. In 1885, Congress passed the Major Crimes Act, mandating prosecution in federal court of enumerated "major" crimes committed by Indians within Indian Country.[139] Tribes retained concurrent jurisdiction, but tribal powers to impose sentences were limited under the Indian Civil Rights Act.[140]

Ex parte Kan-gi-shun-ka represented an important recognition by the Supreme Court of the existence and the efficacy of traditional tribal justice to address a serious offense. The Court, however, was less interested in upholding traditional justice than it was in providing a strict interpretation of the jurisdictional lines, and signaling to Congress that a legislative enactment was necessary to complete the subjugation of tribal Indians via federal punishment.[141] Congress received

133. *Ex parte* Crow Dog (*Ex parte Kan-gi-shun-ka*), 109 U.S. 556, 558 (1883).

134. *Id.* at 572.

135. *Id.*

136. *Id.*

137. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 11 (1983).

138. *See* HARRING, *supra* note 117, at 1, 132.

139. Major Crimes Act, 18 U.S.C. § 1153 (2006). Currently, tribes retain concurrent jurisdiction, but tribal process and sentencing authority are limited under the Indian Civil Rights Act.

140. Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303 (2006).

141. *Ex parte Kan-gi-shun-ka*, 109 U.S. at 558–67, 572 ("To give to the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many

the message and quickly enacted the Major Crimes Act within the next two years. A later Supreme Court decision described the hasty nature of the Major Crimes Act and its obvious purpose:

> This is the last section of the Indian appropriation bill for that year, and is very clearly a continuation of the policy upon which Congress entered several years previously, of attempting, so far as possible and consistent with justice and existing obligations, to reduce the Indians to individual subjection to the laws of the country and dispense with their tribal relations.[142]

The murder of the Indian federal agent Spotted Tail by Crow Dog perpetuated an idea of lawlessness on the reservation that pervades criminal law in Indian Country to this day.[143] The undeniable premise of the reactive Major Crimes Act legislation was that a serious crime had to be dealt with in a serious federal court in order to mete out a legitimate punishment.[144]

The assumption that Crow Dog was not sufficiently punished in accordance with tribal understandings of justice, however, is flawed. The death of one Brule Sioux at the hands of another would have been significant—the loss of life given to the whole would have been something akin to a spiritual matter, not taken lightly. The direct and collateral effects of the loss of leadership, companionship, support, community—even the sheer loss of numbers, even if only one—would have been felt by some, if not all. The statuses of the victim and perpetrator, in addition to the political implications and the threat to the balance of federal and tribal authority, played an important role in the internal struggle, as it did in the congressional response.

The fact that families settled the matter internally with money, horses, food, and tangible goods as reparations for the physical and intangible loss may have been seen by outsiders as denigrating the major importance of a human life. Perhaps Congress, as an outsider from the Indian justice perspective, misinterpreted the offer and acceptance of material goods as repayment for the loss of life. The offer

decisions of this court, from the beginning to the present time. To justify such a departure, in such a case, requires a clear expression of the intention of Congress, and that we have not been able to find. It results that the First District Court of Dakota was without jurisdiction to find or try the indictment against the prisoner, that the conviction and sentence are void, and that his imprisonment is illegal.").

142. *Ex parte* Gon-shay-ee, 130 U.S. 343, 350 (1889).

143. The Major Crimes Act in effect today continues to give effect to this idea of lawlessness, by uniquely subjecting Native American adults and children to far graver consequences than others sentenced under state court systems.

144. Otherwise, the tribal restorative punishment imposed would have served as a model for federal justice, instead of the imposition of federal court jurisdiction.

of goods under local tradition and reconciliation would have been essential to survival in the plains, though, from the lens of an outsider looking to punish the untimely death of a federal agent, the traditional reparations could have been seen as a token amount.

Congressional desire to punish the Indian was exceeded only by the need to extinguish a direct threat to federal authority. The fact that the victim was a federal agent threatened federal power and authority in Indian Country. It is not an overstatement to say that the congressional reaction to Crow Dog was fueled by the federal government's desire to bring Indians into the federal arena to make sure that Indians were punishable by the death penalty. From the tribal point of view, the Major Crimes Act was not a "partnership" between the Sioux, tribal family, and the federal government. Rather, the Major Crimes Act constituted a sea change for tribal federal relations: a stripping away of tradition, and a shift in power from that of tribal community to self-govern under "local law of the tribe" to the federal government. This was a direct displacement of tribal right to govern crime and punishment and a denouncement of tribal traditional justice.

3. Courts of Indian Offenses and Public Law 280

Courts of Indian Offenses, created and administered by the Bureau of Indian Affairs, imposed a western-style court to administer justice where the non-Indian outsiders believed none existed.[145] After the *Ex parte Kan-gi-shun-ka* decision and the enactment of the Major Crimes Act, the Bureau of Indian Affairs continued in this vein to assimilate tribes and direct them away from their native practices.

In 1892, Congress outlawed the practice of Indian traditional ceremony[146] and imposed tribal administrative court systems to punish the newly outlawed civil "crimes" of being a practicing Indian, among other things.[147] These administrative courts introduced and imposed

145. *See* Valencia-Weber, *Innovative Law, supra* note 7, at 232–37 (providing an overview of Courts of Indian Offenses, also known as BIA courts or CFR courts).

146. *See, e.g.*, Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (10th Cir. 1999) ("By the late 19th Century federal attempts to replace traditional Indian religions with Christianity grew violent. In 1890 for example, the United States Calvary shot and killed 300 unarmed Sioux men, women and children en route to an Indian religious ceremony called the Ghost Dance . . . . In 1892, Congress outlawed the practice of traditional Indian religious rituals on reservation land. Engaging in the Sun Dance . . . was punishable by withholding 10 days' rations or 10 days' imprisonment.").

147. *Id.*; *see also* United States v. Clapox, 35 F. 575, 576 (D. Or. 1888) (involving an underlying prosecution for adultery and referred to statutes prescribing "the punishment for certain acts called therein 'Indian offenses,' such as the 'sun,' the 'scalp,' and the 'war-

western justice and civil laws to address and control unwanted behaviors by Indians within their own lands.[148] In this way, the federal government criminalized facets of Indian life. Tribal sovereign "law" and mechanisms of dispute resolution withered and died in some communities. Courts of Indian Offenses continue to operate today as the sole justice system on some reservations.[149]

Later, during the Termination era of the 1950s, Congress enacted Public Law 280,[150] which "withdrew federal criminal jurisdiction on reservations in six designated states . . . and authorized those same states to assume criminal jurisdiction and to hear civil cases against Indians arising in Indian country."[151] The statute transferred jurisdiction over criminal matters from the federal government to certain states.[152] Historically, from the Commerce Clause and treaty provisions, the power to deal with Indian affairs rested with Congress, and states had no power over the affairs of Indians. Public Law 280 took civil and criminal jurisdiction from the tribes and from the auspices of federal control and authority.

4. Indian Civil Rights and the *Oliphant* Decision

During the era of civil rights legislation, Congress set out to investigate the civil rights of Native Americans, on and off reservation lands.[153] In 1961, Senator Sam Ervin of North Carolina initiated a series of hearings and field investigations in response to an independent report[154] and a Department of Interior report[155] examining civil

dance,' polygamy, 'the usual practices of so-called "medicine men,"' the destruction or theft of Indian property, and buying or selling Indian women for the purpose of cohabitation").

148. *See Clapox*, 35 F. at 576–78 (Clapox involved an underlying prosecution of a tribal member for adultery, even though adultery was not a crime under the federal regulations or tribal rules or law. Instead, adultery was a moral transgression based upon imposed values, which was prosecuted as a crime in the Umatilla Court of Indian Offenses).

149. *See* 25 C.F.R. § 11.100 (2010).

150. 18 U.S.C. § 1163 (2006). For an in depth discussion on Public Law 280 and its impacts, see generally Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. 1405 (1997).

151. Goldberg-Ambrose, *supra* note 150, at 1406.

152. 18 U.S.C. § 1163.

153. *The Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. pt. 1, 1–2 [hereinafter *1961 Hearings*—Part 1].

154. Comm'n on the Rights, Liberties & Responsibilities of the Am. Indian, A Program for Indian Citizens (1961).

155. Task Force on Indian Affairs, Annual Report of the Commissioner of Indian Affairs (1961), *as reprinted in* Documents of United States Indian Policy (Francis Paul Prucha ed., 1975).

rights problems of individual Indians and the question of how Indian tribal governments relate to the federal Constitution and its protections.[156] Senator Ervin sought to investigate and address the civil rights gap existing for tribal people due to the inapplicability of the Bill of Rights to tribal governments.[157] The investigation reflected the widespread concern that "the preservation of tribal rights and customs has seemed in some areas to come in conflict with the constitutional rights of individual Indians as American citizens."[158] At issue was the fact that "Indian tribes are not subject to Federal constitutional limitations in the Bill of Rights."[159]

The resulting legislation, the Indian Civil Rights Act ("ICRA"),[160] applied a modified version of the Bill of Rights to tribal governments, imposed a limitation on the sentencing authority of tribes, and explicitly allowed federal habeas review for tribal court orders.[161] The final version of the ICRA reflected a compromise between the original intention to bring tribes fully under the umbrella of the federal Constitution and the recognition of tribal sovereignty.[162]

The ICRA has been interpreted as a deliberate intrusion on tribal sovereignty but with a decidedly limited right of federal court review.[163] With the exception of habeas corpus, the ICRA did not au-

156. *1961 Hearings*—Part 1, *supra* note 153.

157. For a comprehensive analysis of the ICRA and Senator Ervin's interests, see Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557 (1972).

158. *1961 Hearings*—Part 1, *supra* note 153, at 5 (remarks of Sen. Kenneth Keating).

159. *1961 Hearings*—Part 1, *supra* note 153, at 8 (remarks of Sen. Frank Church). The United States Constitution does not apply to Tribal governments. Talton v. Mayes, 163 U.S. 376 (1896).

160. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Tit. II–VII, §§ 201–701, 82 Stat. 77, 77–81 (codified in part as amended at 25 U.S.C. §§ 1301–1303 (2006)). Signed into law as Titles II through VII of the Civil Rights Act of 1968, the act provided sweeping change addressing aspects of the underlying extensive investigation. Title II, 25 U.S.C. §§ 1301–1303, included the "Indian Bill of Rights"; Title III, *id.* §§ 1311–1312, directed the Secretary of the Interior to publish a model code for Courts of Indian Offenses and to provide training for the judges of these courts; Title IV, *id.* §§ 1321–1326, provided that states may not assume civil or criminal jurisdiction over Indian Country without the prior consent of the tribe; Title V, 18 U.S.C. § 1153, made a minor amendment to federal criminal law applicable to Indian Country; Title VI, 25 U.S.C. § 1331, lessens Bureau of Indian Affairs ("BIA") control over tribal employment of legal counsel; Title VII, *id.* § 1341, authorized the Secretary of the Interior to revise and republish Felix Cohen's Handbook of Federal Indian Law, the landmark treatise on Federal Indian law.

161. *See* 25 U.S.C. § 1302(7) (originally limiting sentencing authority to six months and a fine of $500, later expanded to one year); *id.* § 1303 (the writ of habeas corpus for federal review of tribal court orders of detention); *infra* note 172.

162. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

163. See *id.* at 51 n.1 for an overview of the legislative history of the ICRA.

thorize suits against tribes or tribal officials without congressional consent.[164] In *Santa Clara v. Martinez*, the Supreme Court held that, as a matter of statutory construction, the ICRA did not abrogate the sovereign immunity of the tribe to allow an individual to sue the tribe in federal court for an alleged civil rights violation.[165] The ICRA has been both criticized as an imposition of foreign notions of rights and justice on Indian tribes[166] and hailed as a recognition of the tribe's ability to protect its own citizenry.[167]

Subsequently, the Supreme Court unambiguously eroded tribal jurisdiction with its decision in *Oliphant*. In 1978, the Court held that tribes had no jurisdiction to prosecute non-Indians in criminal matters, despite the fact that the crimes occurred on tribal lands.[168] The Court reasoned that although Indian tribes retained certain "quasi-sovereign" authority, tribes were prohibited from exercising sovereign powers "inconsistent with their status" as domestic-dependent nations.[169] A decade later, in *Duro v. Reina*,[170] the Court further eroded tribal sovereign powers in criminal matters. In *Duro*, the Supreme Court held that Indian courts had no jurisdiction over non-member Indians who committed an offense within the reservation boundaries.[171] The *Duro* decision added to the complex jurisdictional quagmire and created a jurisdictional gap for certain crimes. Six months after the Court's decision in *Duro*, Congress amended the ICRA to recognize and affirm "the inherent power of Indian tribes" in order "to exercise criminal jurisdiction over *all* Indians."[172]

Other amendments to the ICRA limited tribal court jurisdiction to prosecute and punish even the tribe's own membership.[173] Tribal power to sentence was limited to imposition of sentences up to one

164. 25 U.S.C. § 1303.

165. *Santa Clara Pueblo*, 436 U.S. at 71–72.

166. Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495 (1994) (questioning whether there is an unspoken assumption that tribal jurisdiction is inherently violative of individual rights and whether that is justified or racist).

167. *Santa Clara Pueblo*, 436 U.S. at 71–72 (holding that federal courts have no jurisdiction over internal tribal matters).

168. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978) (finding Indian tribal courts lacked criminal jurisdiction over non-Indians, absent congressional authorization).

169. *Id.* at 212.

170. Duro v. Reina, 495 U.S. 676, 692 (1990).

171. *Id.* at 693–96.

172. *See* 25 U.S.C. § 1301(2) (2006) (emphasis added).

173. *Id.* § 1302(7).

year and a fine of $5000, or both.[174] Congress recently expanded the sphere of tribal power to sentence to a maximum of three years, a fine of $15,000, or both, providing substantial conditions are met.[175] The erosion of tribal criminal authority and autonomy and the encroachment of federal and state power has led to outcomes that include an over-representation of Natives in the federal criminal justice system.[176] To understand the effects, a review of the federal sentencing scheme is necessary.

B. A Brief History of the Federal Sentencing Guidelines

Because of the Major Crimes Act and their political status as Indians, individual Native Americans face criminal charges in federal court instead of state court. Prosecution of Indians in federal courts has survived an equal protection claim of invidious discrimination based upon race and a double jeopardy challenge.[177] This is true even though federal prosecution would remove a defense and would, arguably, allow an easier conviction under a federal felony murder statute or subject the Indian to dual or successive prosecutions in tribal and federal courts.[178]

Because Natives face federal sentencing authority, the Sentencing Guidelines remain a fixture for tribes and Indian individuals.[179] Assessing the role of the Sentencing Guidelines in the modern history of crime and punishment thus becomes an indispensable part of understanding Indian criminal justice.[180]

174. *Id.* § 1302(7)–(8). Originally limiting tribal courts to sentences of six months or fines of $500, or both, the ICRA was amended to allow harsher penalties in 1986 by the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, Tit. IV, § 4217, 100 Stat. 3207-137, 3207-146 (codified at 25 U.S.C. § 1302 (2006)).

175. Tribal Law and Order Act of 2010, Pub. L. No. 111-211 § 234 (2010).

176. *See generally* LAWRENCE A. GREENFELD & STEPHEN K. SMITH, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME (1999).

177. United States v. Antelope, 430 U.S. 641 (1977) (holding that federal prosecution presented no equal protection problem).

178. *Id.*; United States v. Wheeler, 435 U.S. 313 (1978) (holding that federal prosecution presented no double jeopardy problem).

179. In addition, *United States v. Booker*, 543 U.S. 220 (2005), is limited to all but prior convictions.

180. In 2005, the Supreme Court held in *Booker*, 543 U.S. 220, that mandatory application of the Federal Sentencing Guidelines violated the Sixth Amendment, applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004). In light of this holding, the Court concluded that the two provisions of the Sentencing Reform Act that make the Guidelines mandatory must be severed and excised, rendering the Federal Sentencing Guidelines advisory only. Federal courts are required to consider the Guidelines' ranges, but are permitted to tailor the sentence in light of other statutory concerns.

The introduction of the Sentencing Guidelines in 1984 abruptly changed two hundred years of practice in criminal sentencing.[181] Prior to the Sentencing Guidelines, federal trial judges were entrusted with broad discretion to impose a sentence on a federal offender.[182] Federal definition of the crime and the punishment imposed were separate.[183] Congress prescribed a maximum penalty for each crime.[184] Constrained only by the statutory maximum, a federal judge could impose whatever sentence he believed appropriate based upon the circumstances of the case.[185]

The parole system, introduced in 1910, served to reduce judicial control over the length of the sentence served, but left the judge with significant authority through the power to grant or deny eligibility for parole.[186] Federal judges were not required to explain their sentencing decisions on the record, and appellate review of those decisions was not available.[187]

This changed profoundly with Sentencing Reform Act ("SRA") of 1984.[188] The SRA stripped federal judges of the authority to determine the factors relevant to sentencing and the range of punishment in most cases, and transferred these powers to a newly created federal agency, the U.S. Sentencing Commission.[189] The task of this nine-member panel, working as an independent agency of the federal judiciary, was to overhaul the sentencing policies of the federal criminal

181. *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 1 (1998) (Describing the long history of judicial discretion in sentencing from the beginning of the Republic until enactment of the Federal Sentencing Guidelines in 1987, Stith and Cabranes explain that "[o]n November 1, 1987, two centuries of sentencing practice in the federal courts came to an abrupt end.").

182. *See, e.g.*, David Fisher, *Fifth Amendment—Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not To File Substantial Assistance Motions*, 83 J. CRIM. L. & CRIMINOLOGY 744, 745 (1993) ("Prior to the passage of the Sentencing Reform Act, federal judges enjoyed extremely broad discretion in sentencing. A judge could impose any sentence she thought was proper as long as it did not exceed the statutory maximum.").

183. *See* STITH & CABRANES, *supra* note 181, at 9.

184. *Id.*

185. *Id.*

186. Congress mandated in 1910 that each federal prison have its own parole board, constituting the superintendent of prisons of the Department of Justice, the warden, and physician of each penitentiary. Act of June 25, 1910, ch. 387, 36 Stat. 819. The parole board had discretion to release any prisoner after one-third of his original sentence was served, upon a board determination of "reasonable probability that [the prisoner] will live and remain at liberty without violating the laws," and release "is not incompatible with the welfare of society." *Id.* § 3, 36 Stat. at 819–20.

187. *See* STITH & CABRANES, *supra* note 181.

188. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, sec. 212, 98 Stat. 1837, 1988 (codified at 18 USC §§ 3551–3673 (2006)) (including the SRA).

189. *See* STITH & CABRANES, *supra* note 181, at 1, 2–3.

justice system; its mission was to achieve uniformity and proportionality in sentencing.[190]

The final version of the SRA, which was part of the Comprehensive Crime Control Act, reflected the desire of reformers to toughen their position on crime.[191] The Sentencing Guidelines proclaimed—without citing any support—that many sentences did not fit the seriousness of the crime.[192] The stated objectives were to avoid "unwarranted sentencing disparity" among defendants "with similar records who have been found guilty of similar conduct" (by providing Sentencing Guidelines and appellate review), and promote "honesty in sentencing" (by providing for the elimination of parole).[193]

As part of the same legislation that created the U.S. Sentencing Commission, Congress established mandatory minimum sentences for certain federal crimes, including drug offenses.[194] Mandatory minimum penalties limit the discretion of federal judges by requiring that sentences be based solely on the type and amount of drugs involved, the criminal history of the defendant, and other aggravating circumstances, such as possession of a weapon during the crime.[195] Statutory mandatory minimums gave judges even less flexibility in sentencing than the Sentencing Guidelines.[196]

The SRA abolished federal parole.[197] Those defendants convicted and sentenced prior to the sentencing reform remain under the "old" law or pre-existing parole scheme.[198] The SRA requires defendants to serve their court-imposed sentences, minus approximately fifteen per-

190. *Id.* at 2.

191. *Id.* at 42.

192. *Id.* at 60.

193. *Id.* at 40.

194. *Id.* at 125.

195. *Id.*

196. *But see* USSG, *supra* note 1, § 5C1.2 (Also known as the Safety Valve provision, codified at 18 U.S.C. § 3553(f) (2006), this section was designed to ameliorate the effects of harsh mandatory minimum provisions as to the least culpable offenders.).

197. The legal powers of the Parole Commission as it existed immediately before the adoption of the Sentencing Guidelines are set out at 18 U.S.C. §§ 4201–4218 (1982) (repealed 1984).

198. "Old" law is a term of art referring to the parole act that existed prior to the SRA. Thus, there exists a parallel system of "old" parole and "new" non-parole sentences being served by convicts today.

cent for good behavior, if applicable.[199] Such sentence reductions may not exceed fifty-four days per year.[200]

1. The Federal Sentencing Table

The heart of the Federal Sentencing Guidelines is the sentencing table.[201] Under the Sentencing Guidelines, the judicial function is transformed from exercising discretion to select a particular sentence from a very broad range to making those factual findings that dictate the particular sentencing range.[202]

At sentencing, the judge employs the preponderance-of-evidence standard to make those findings advised by the Sentencing Guidelines, and establishes the defendant's sentencing range on a 258-box sentencing grid or table. The Sentencing Guidelines attempt to list and define every offense and offender characteristic that might play a role in sentencing.[203] Using a two-dimensional grid, the table categorizes offenses according to the seriousness of the crime (levels one through forty-three) and the defendant's criminal history (categories one through six).[204] The higher the level (or criminal history), the longer the possible sentence that may be imposed on the defendant.[205]

a. Offense Level[206]

The vertical axis consists of forty-three offense-level categories and is determined by selecting the appropriate offense level from the

199. 18 U.S.C. § 3624(b)(1) (2006) (providing a federal prisoner serving a sentence of more than one year, with credit of up to fifty-four days for "exemplary compliance with institutional disciplinary regulations" as determined by the Bureau of Prisons).

200. However, based upon the Bureau of Prison's formula used to calculate good time, the *most* an inmate can earn is forty-seven days. U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28, at 1–45 (1999), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf; *see* Barber v. Thomas, 130 S. Ct. 2499 (2010) (upholding the BOP's method of calculating good time credit under 18 U.S.C. 3624(b) resulting in a maximum of forty-seven days credit); Pacheco-Camacho v. Hood, 272 F.3d 1266 (9th Cir. 2001) (also upholding the BOP's method of calculating good time credit). For an explanation of the calculation, see Frequently Asked Questions on Mandatory Minimums, FAMILIES AGAINST MANDATORY MINIMUMS, http://www.famm.org/Repository/Files/Federal%20Good%20Time%20FAQs%206.7.10.pdf (last visited Sept. 13, 2011).

201. USSG, *supra* note 1, § 5A; STITH & CABRANES, *supra* note 181, at 3.

202. USSG, *supra* note 1, ch. 1, pt. A.

203. *Id.* ch. 2; *see, e.g.*, *id.* § 2B3.1.

204. *Id.* § 5A.

205. *See generally id.* ch. 5, pt. A (displaying the Sentencing Table showing increasing sentencing ranges up to life in prison).

206. *Id.* ch. 5, pt. A, cmt. n.1.

Sentencing Guidelines. The offense level can then be adjusted upward or downward depending on factual findings of those aggravating and mitigating circumstances listed in the manual, such as whether the defendant brandished a weapon or accepted responsibility for the offense. The maximum offense mandates a life sentence. Lower figures represent the minimum a defendant with no criminal history would receive.

b. Criminal History Category[207]

The horizontal axis is determined by the defendant's criminal history. The defendant's applicable criminal history category, from I to VI, is determined by counting the prior qualifying convictions and calculating a criminal history score.[208] As mentioned, tribal court convictions and foreign nation convictions are not counted. Under this rather mechanical process, the judge's discretion is limited to selecting the sentence within the very narrow range offered by the defendant's place in the grid.

c. Adjustments[209]

The Sentencing Guidelines factor in the particular role the defendant played in the criminal endeavor and aggravating or mitigating circumstances that warrant an increase or decrease in the sentence. The Sentencing Guidelines provide for adjustments in cases where, for example, the defendant obstructs justice, physically restrains the victim, and/or plays a major or minor role in the crime.

d. Departures[210]

There are recognized upward and downward departures under the Sentencing Guidelines, allowing for arguments for a longer or shorter sentencing range. In the SRA, Congress included several provisions directing the Sentencing Commission to determine the relevance, appropriateness, and extent that special characteristics of the defendant might be considered in sentencing.[211]

There are specific offender characteristics prohibited by Congress, such as race, sex, national origin, creed, religion, and socio-eco-

207. *Id.* ch. 4, pt. A.
208. *Id.* ch. 5, pt. A, cmt. n.3.
209. *Id.* §§ 3A–E.
210. *Id.* § 1A4(b).
211. *Id.* § 5H (commentary on Special Offender Characteristics).

nomic status, as well as lack of youthful guidance.[212] Also deemed generally inappropriate or irrelevant, and therefore "discouraged" as grounds for any downward departure in sentencing, are important personal characteristics of the defendant, such as education, vocational skills, employment record, community ties, and family ties and responsibilities.[213] The Sentencing Commission has also determined that even drug and alcohol addiction or dependency is not grounds for a downward departure.[214] Other factors, such as age, mental condition, and physical condition, can be relevant to sentencing if they are present to an unusual degree so as to distinguish the case as outside the "heartland" of typical cases.[215]

Federal criminal defendants can receive a shorter sentence if they provide substantial assistance to authorities, defined as providing investigators and prosecutors with information leading to the indictment of other offenders.[216] Only the prosecution can move for a reduced sentence based on the substantial assistance clause of the Sentencing Guidelines.[217] The possibility of receiving a reduced sentence often provides a powerful incentive for defendants to cooperate.

2. Application to Native American Defendants

For the purpose of computing an Indian defendant's sentence in federal court, tribal court convictions and sentences are not counted in criminal history computations, but can be a basis for an upward departure.[218]

Specifically, USSG §4A1.2(i) provides that "[s]entences resulting from tribal court convictions are not counted but may be considered under §4A1.3 (Adequacy of Criminal History Category)."[219] Tribal convictions are thus treated like convictions from foreign nations.[220]

The exemption of tribal convictions and sentences from the federal criminal history calculation may be seen as an unfair advantage or a windfall for the Indian defendant. One may worry that an Indian

212. *Id.* §§ 5H1.10, 5H1.12; 28 U.S.C. § 994(d) (2006).

213. USSG, *supra* note 1, §§ 5H1.2, 5H1.5–1.6, 5H1.11–1.12; 18 U.S.C. § 994(e).

214. USSG, *supra* note 1, § 5H1.4.

215. *Id.* §§ 5H1.1, 5H.1.3–1.4; 18 U.S.C. § 994(d); *see also* USSG, *supra* note 1, ch. 1, pt. A(1)(4)(b).

216. USSG, *supra* note 1, § 5K.

217. *Id.*

218. *Id.* § 4A1.2(i) (providing that "[s]entences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category)").

219. *Id.* § 4A1.3.

220. *Id.* § 4A1.2(h).

defendant would be free to commit numerous crimes on the reservation without impacting his federal criminal history score once he finally lands in federal court under the Major Crimes Act. This, however, is not the case. The federal sentencing guidelines are not blind to the existence of a tribal court record, and, in fact, include specific provisions to incorporate Indian criminal history.

Should the defendant have an extensive criminal history that is not captured by the criminal history score (either because the sentences are too "old" to be counted, are part of a juvenile record, or are from a tribal or foreign court), there is a recognized upward departure that allows the unrepresented criminal history to be taken into account, thereby offering a longer sentence.[221]

It is important to note that departure from the Sentencing Guidelines based on race and socio-economic status is explicitly forbidden in the Sentencing Guidelines.[222] In keeping with the goal of uniformity of sentencing, Congress prohibited the Sentencing Commission from including any consideration of "race, sex, national origin, creed, and socioeconomic status" of the defendant in the Sentencing Guidelines' factors.[223] As a result, Natives can receive longer sentences under the Sentencing Guidelines for a tribal criminal record, but they cannot seek to mitigate their federal sentence based upon the factors that might apply to them either racially or politically.

C. Impact on Native Americans

Lest the federal sentencing scheme be misunderstood to favor Natives, based on the exemption of tribal court convictions, empirical experience shows the impact of federal criminal authority on Native Americans to be severe. Through the Major Crimes Act, Congress has federalized a large number of criminal offenses, all of which apply in Indian Country. In addition, because of the Major Crimes Act's jurisdictional requirement, a disproportionate number of Natives are subject to federal criminal prosecution, and once in the penal system, they tend to remain indefinitely.[224] In 2002, the Sentencing Commis-

221. *Id.*

222. *Id.* § 5H1.10.

223. *Id.* § 5H1.1; 28 U.S.C. § 994(d) (2006).

224. *See, e.g.*, United States v. Swift Hawk, 125 F. Supp. 2d 384, 384–85 (D.S.D. 2000) ("Congress has seen fit to impose altogether different penalties on Native Americans driving under the influence in Indian Country . . . . Thus, Swift Hawk faces up to five years more time in prison and a much higher fine than a similarly situated Norwegian or, for that matter, another Native American driving in Sioux Falls. This is without taking into account the terrible harshness of the Federal Sentencing Guidelines in their treatment of

sion created a Native American Advisory Group to address the perceived racism against and disparate effects on Native Americans in federal sentencing.[225] The group determined a disparity in sentencing exists[226] and that Native Americans serve longer sentences in federal custody under the Sentencing Guidelines.

Incarceration rates of Native Americans are thirty-eight percent higher than the rest of the population.[227] Despite small numbers in the general population, Native Americans have the second highest incarceration rate of all races and ethnicities.[228] The over-representation of Natives in penitentiaries is especially prevalent in states with larger Native American populations.[229]

In addition, Native American children are disproportionately impacted by the current sentencing scheme. There are generally few juveniles in the federal prison system; however, a large proportion of the juveniles that are incarcerated are Indian.[230] Because of the Major Crimes Act, and the federal proscription on tribal court sentencing, children who commit serious offenses are prosecuted in federal court and face harsher federal penalties.[231] Historically, the federal juvenile

Native Americans."); *see generally* NATIVE AMERICAN ADVISORY GROUP REPORT, *supra* note 19, at 9; S.D. ADVISORY COMM., NATIVE AMERICANS IN SOUTH DAKOTA: AN EROSION OF CONFIDENCE IN THE JUSTICE SYSTEM (2000), *available at* http://www.usccr.gov/pubs/sac/sd0300/main.htm.

225. NATIVE AMERICAN ADVISORY GROUP REPORT, *supra* note 19, at 10–11.

226. *Id.* at 17–27. The Native American Advisory Group discussed the results of its eighteen-month study reviewing Sentencing Guidelines' sentences for manslaughter, sexual abuse, and aggravated assault at a public hearing with the U.S. Sentencing Commission, stating that it had found a "significant negative disparity in sentencing of Native American people," but arriving at the opinion that the disparity was "a jurisdictional thing . . . not a racial matter." *Public Hearing of the Native American Advisory Group and U.S. Sentencing Commission* 9 (Nov. 4, 2003) (statement of C.J. Lawrence L. Piersol, Chair of the Native American Advisory Group), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20031104-5/NAAGhear.pdf; *see also* Droske, *supra* note 114, at 723–26, 741–46 (providing case studies); Gregory D. Smith, *Disparate Impact of the Federal Sentencing Guidelines on Indians in Indian Country: Why Congress Should Run the Erie Railroad into the Major Crimes Act*, 27 HAMLINE L. REV. 483, 509–11 (2004).

227. *See generally* STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, A BJS STATISTICAL PROFILE, 1992–2002: AMERICAN INDIANS AND CRIME (2004).

228. *Id.*

229. *Id.*

230. *Id.*

231. *See* Standefer, *supra* note 109, at 489 ("As a result of federal criminal jurisdiction over major felonies in Indian Country, many Native Americans are sentenced according to the federal Sentencing Guidelines. This is problematic because individuals convicted in federal court are generally subject to harsher penalties than those convicted in state or tribal courts."); *see also* Terry L. Cross, *Native Americans and Juvenile Justice: A Hidden Tragedy*, POVERTY & RACE RES. ACTION COUNCIL, Nov.–Dec. 2008, at 19, *available at* http://www.prrac.org/full_text.php?text_id=1205&item_id=11356&newsletter_id=102&header=Sym-

prison population has been predominantly Native American males.[232] A 2000 study found that seventy-nine percent of all juveniles in federal custody are Native American.[233] Eighty-nine percent of the Indian Country juvenile cases prosecuted in federal court resulted in convictions, and the average sentence imposed was thirty-nine months.[234] A majority of the total population of incarcerated Indian youth comes from Arizona, Montana, New Mexico, South Dakota, and North Dakota.[235] Particularly disturbing is the fact that the Federal Bureau of Prisons fails to own or operate any detention or treatment center for the juvenile population, relying instead on state or private facilities.[236] Housed far from home and without culturally appropriate treatment, or, in some cases, without treatment altogether, the likelihood of recidivism grows. If a Native juvenile returns to federal court as an adult, he returns with a federal juvenile record.[237] Unlike tribal court convictions, these juvenile convictions are counted in the criminal history calculation.[238]

The historical background of tribal jurisdiction and of the federal sentencing scheme provide a broader analytical framework for criminal law in Indian Country. From this perspective, the lens of respect tells a different story. The idea that the Sentencing Guidelines should be changed to count tribal convictions does not adequately address the historical disadvantages Native Americans face in the federal criminal justice system. Nor does it restore a modicum of respect to tribal

posium:%20Native%20Americans%20and%20Alaska%20Natives:%20The%20Forgotten%20Minority ("American Indian youth are grossly over-represented in state and federal juvenile justice systems and secure confinement. Incarcerated Indian youth are much more likely to be subjected to the harshest treatment in the most restrictive environments and less likely to have received the help they need from other systems."). Cross, the Executive Director of the National Indian Child Welfare Association in Portland, Oregon, is an enrolled member of the Seneca Nation of Indians.

232. *See generally* PERRY, *supra* note 227.

233. *See* Cross, *supra* note 231, at 19 (indicating that as of October 2000, seventy-nine percent of youth in custody in the Federal Bureau of Prisons were Native American).

234. URBAN INST. JUSTICE POLICY CTR., TRIBAL YOUTH IN THE FEDERAL JUSTICE SYSTEM 34 (2011).

235. *Id.* at 32; *see also* PERRY, *supra* note 227, at 37–38.

236. *See* FED. BUREAU OF PRISONS, DIRECTORY OF BUREAU OF PRISONS: CONTRACT JUVENILE FACILITIES 2 (2011), *available at* http://www.bop.gov/locations/cc/Juvenile_Dir.pdf ("The Bureau enters into agreements with tribal, state, and local governments, and into contracts with private organization, to provide for secure and non-secure services.").

237. USSG, *supra* note 1, § 4A1.2(d) (counting federal juvenile convictions under the federal sentencing guidelines).

238. *See id.* § 4A1.2(d)(1)–(2) (adding one to three points for juvenile convictions depending on the length and timing of the juvenile sentence).

sovereigns suffering the erosion of tribal criminal justice authority over time.

III. Difference and Respect

Despite serious ramifications of the proposed recognition of tribal criminal convictions, Washburn concludes that it is entirely appropriate for states to "respect" the criminal convictions of tribal courts mainly because tribal courts are "very much like the state and federal court systems."[239] Because his argument requires congruence between tribal and state courts, Washburn goes to great lengths to demonstrate that the tribal convictions are the same as and equal to state convictions and should be so treated by the federal government. This argument reflects a misunderstanding of the role of difference in tribal sovereignty, judicial systems, and practice in the community.

The proposal to treat tribal courts as state courts rather than as foreign courts for the purpose of federal sentencing, in order to promote respect for tribal sovereignty, is misguided. The proposal is based on a comparison of tribal systems with federal and state court systems. This comparison acknowledges but attempts to discount difference as not important, or at least not as important, as the similarities between tribal and state court systems.

As separate sovereigns, tribes are not part of the system of federal/state hierarchy. One cannot equate tribal and state sovereigns without the inherent value judgment that the federal/state system is superior or that tribal courts should be incorporated into the hierarchy. Understanding the cultural judgments involved in the comparison requires an understanding of the political and moral assumptions involved in the assessment of difference and sameness.

Other scholars have explored concepts of difference and sameness in an effort to define Indian sovereignty. As suggested by Frank Pommersheim, a separate sovereign implicates two main components: (1) the recognition of "a government's proper zone," meaning, "zones of authority free from intrusion by other sovereigns,"[240] and (2) "the understanding that within these zones the sovereign may enact substantive rules that are potentially divergent or 'different' from that of the other—even dominant—sovereigns within the system."[241]

239. Washburn, *Tribal Courts*, *supra* note 2, at 426; Washburn, *Different Kind*, *supra* note 2, at 288.

240. Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 421 (1992) [hereinafter Pommersheim, *Liberation*].

241. *Id.*

To Christine Zuni Cruz, the link between tribal "traditional law, self-determination and sovereignty is clear."[242] Writing about the development of internal law, Zuni Cruz offers, "an indigenous nation's sovereignty is strengthened if its law is based upon its own internalized values and norms."[243] This understanding applies with equal force to outsiders standing in review of a tribal court system. As suggested by Zuni Cruz, "consideration must be given to what the underlying values and norms of tribal society are, how they differ or coincide with the values and norms of enacted law and when they differ, what internal (traditional) law will be displaced by the enacted law and why."[244]

Difference is a defining element of sovereignty, notes Professor Judith Resnick:

> At the core of federal courts' jurisprudence is a question that has often gone under the name of "sovereignty" but may more fruitfully be explored in the context of difference. If the word "sovereign" has any meaning in contemporary federal courts' jurisprudence, its meaning comes from a state's or a tribe's ability to maintain different modes from those of the federal government.[245]

Once conferred, the power of the tribe, a separate sovereign with its own zone of influence, to enact its own judicial system that reflects internal norms—even if different or divergent from others—becomes paramount to survival as a distinct self-governing body. If tribal courts are to have the "vital role in tribal self-government" that the Supreme Court envisioned,[246] the tribes' ability to develop and interpret a body of tribal law must be protected.[247] Pommersheim's point clarifies this important concept. "Tribal courts do not exist solely to reproduce or replicate the dominant canon appearing in state and federal courts. If they did, the process of colonization would be complete and the unique legal cultures of the tribes fully extirpated."[248] Instead, it is the distinctive legal principles derived from tribal law and applied in the

242. Zuni Cruz, *Customs and Traditions*, *supra* note 118, at Conclusion.

243. *Id.* at Introduction.

244. *Id.*

245. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 750–51 (1989).

246. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987) (acknowledging the importance of tribal courts and upholding the tribal court exhaustion requirement announced in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)).

247. Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241 (1998) (discussing, in part, the importance of tribal court findings of fact and conclusions of law and limits of federal court review to prevent tribal courts from being relegated to inferior position).

248. Pommersheim, *Liberation*, *supra* note 240, at 420.

tribal courts that both justify and distinguish separate tribal court jurisprudence.

The problem with using the same/different analysis to produce legitimacy is that it does not take into account the inherent tension between the pressure to assimilate in order to be seen as legitimate and the pressure to produce systems that reflect internal tradition in order to be authentic. Pommersheim's view of difference supplies important missing pieces. Differences are socially constructed, and their evaluation as good or bad depends on who is interpreting them and what norm is used. Pommersheim writes:

> An exploration of the dilemma of difference, while very helpful in understanding the quandary of tribal courts, contains its own paradoxes. These include considerations of the definition of difference, the meaning of difference, and the treatment of difference. Differences, for example, are not inherent, but rather, are social creations based on some kind of comparison to an often unstated norm. For example, notions about the qualities of women, minorities, and the handicapped are often based on an unstated comparison to white, able-bodied makes. Societies inevitably assign people to categories in order to organize reality and to provide a framework for economics, politics and government. The important question, of course, becomes how the differences are assigned and how they are treated in terms of power and opportunity.[249]

The argument that the Sentencing Commission should "recognize that tribal courts are substantially more like state than foreign courts"[250] and that the Sentencing Guidelines should accord tribal courts the same respect as state and federal courts, presumes that tribal courts are inferior and must be elevated to equate with state courts.

A. The Dilemma of Difference[251]

A proposal for symmetrical treatment of civil and criminal adjudications within a state's jurisdiction does not acknowledge the difference between civil and criminal orders. Likewise, the call for similar treatment between states and tribes in federal court fails to acknowledge the differences among state and tribal court systems, requiring different treatment to meet differing concerns and goals. The tribal

249. *Id.* at 422–23.

250. Washburn, *Reconsidering the Commission's Treatment*, *supra* note 2, at 212.

251. Pommersheim, *Liberation*, *supra* note 240, at 420 (Drawing richly from the work of Martha Minnow, Pommershiem explores the meaning of the term coined by Minnow.); *see also* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE (1995).

court is not in the same judicial hierarchy as the state or municipal court. The impact of tribal criminal adjudications differs in certain ways from those of the states. Tribes are diverse in their criminal justice systems or orders. Such a comparison is offensive to tribal sovereignty and serves as a shortcut to recognition of tribal courts, inconsistent with principles of tribal self-government and at odds with American constitutional protections.

Acknowledging difference, however, is not enough. The manner in which difference is treated in terms of power, authority, and opportunity becomes important in terms of respect.[252] As set forth by Pommersheim, "[t]his is true not only within the language of sovereig[nty] itself, but also as a means of honoring and respecting cultural differences."[253] Ultimately, the ability to understand and articulate the *basis of difference* becomes critical. It is the articulation and understanding of difference that most fundamentally implicates respect for tribes and their orders.

Martha Minnow described the dilemma of difference in the context of individual treatment,[254] postulating that treating different people identically to avoid stigmatization becomes insensitive to the very differences that may be held dear, yet treating different people differently risks emphasizing the differences and hindering relationships. In her book *Making All the Difference: Inclusion, Exclusion and American Law*, Minnow argues that categories of difference and sameness, central to legal reasoning, rely on tacit assumptions that often obscure their political and moral effects.[255]

252. Pommersheim, *Liberation*, *supra* note 240, at 423.

253. *Id.* at 424.

254. MARTHA MINNOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990) [hereinafter MINNOW, MAKING ALL THE DIFFERENCE]; *see also* Martha Minnow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 72 (1987) (discussing the need to take the perspective of the person you have called "different").

255. MINNOW, MAKING ALL THE DIFFERENCE, *supra* note 254, at 9, 21, 33–49. Minnow further states:

> [L]aw ends up contributing to rather than challenging assigned categories of difference that manifest social prejudice and misunderstanding. Especially troubling is the meaning of equality for individuals identified as different from the norm. What should equality mean when . . . public institutions make decisions about people who differ by race, . . . language proficiency, [and] ethnic identity . . . ? Does equality mean treating everyone the same, even if this similar treatment affects people differently? Members of minorities may find that a neutral role, applied equally to all, burdens them disproportionately.

Id. at 9.

Exploring the dilemma of difference from within federal Indian law, Pommersheim identifies a "measured separatism."[256] Pommersheim suggests that necessary differences in tribal courts are a matter of pure survival.[257] According to Pommersheim, "pride of difference" and "Indianness"[258] are at the heart of Indian claims of tribal sovereignty.[259]

B. Tribal Criminal Court Decisions Are Different from State and Federal Criminal Decisions

Not counting tribal court convictions does not inherently determine that tribal courts are deficient, but rather that they are inherently different. When comparing the state and federal government, the difference may be slight because they share the same origin story. Tribes, however, do not share that story with states, nor with each other.

That the due process protections in state and tribal courts are "virtually identical,"[260] as Washburn posits, may be true in theory, but not in practice. The right to court appointed defense counsel for those members without the means to hire an attorney is not a requirement in tribal court.[261] Only a relatively small number of tribes provide counsel at the tribe's expense.[262]

Whether the right to counsel is a difference that should matter requires consideration. Under the ICRA, defendants have the right to counsel at the defendant's own expense.[263] The Sixth Amendment to United States Constitution, however, guarantees the right to counsel to persons unable to afford counsel.[264] This guarantee, made applica-

256. Pommersheim, *Liberation*, *supra* note 240, at 415.

257. *Id.* at 420.

258. Indianness involves a complex interplay of race, culture, sovereignty, membership, and tribal- and self-identity, among other things. For more on the complexities of defining Indianness in literary scholarship and teaching, see Deborah L. Madsen, *Contemporary Discourses on Indianness*, in NATIVE AUTHENTICITY 1, 1–18 (Deborah L. Madsen, ed., 2010).

259. Pommersheim, *Liberation*, *supra* note 240, at 424.

260. Washburn, *Tribal Courts*, *supra* note 2, at 426 ("Currently, the nature of those [ICRA and U.S. Constitutional] protections is virtually identical.").

261. *See* 25 U.S.C. § 1302(6) (2006) (affording Indian defendants "at his own expense the right to assistance of counsel for his defense").

262. It is difficult to determine the number of tribes that provide indigent defense counsel.

263. 25 U.S.C. § 1302(6).

264. In a well-established line of cases, the U.S. Supreme Court has recognized that the Sixth Amendment right to counsel exists, and is required to protect the fundamental right to a fair trial. Powell v. Alabama, 287 U.S. 45, 63 (1932) ("[T]he right to the aid of counsel

ble to the states through the Fourteenth Amendment, applies to misdemeanors.[265] In addition, any counsel, whether court-appointed or retained, must provide effective assistance, in order for this constitutional requirement to be satisfied.[266]

To argue in favor of counting tribal convictions because, theoretically, tribal courts "operate as nearly exact replicas of state courts,"[267] or because "tribes routinely hear the same kinds of misdemeanor crimes as state courts"[268] disregards the fundamental nature of the right to counsel under the Sixth Amendment.

Similar treatment, meaning counting convictions in federal court, cannot be based upon the subject matter, but rather must depend upon the due process afforded in federal court. As a matter of upholding the U.S. Constitution, the federal court system cannot recognize prior convictions that violate due process protections based on the Constitution's ideas of fundamental human and civil rights.[269] To include uncounseled convictions resulting in imprisonment for only

is of this fundamental character."); Johnson v. Zerbst, 304 U.S. 458 (1938) (holding the Sixth Amendment guaranteed a criminal defendant the right to counsel in federal court); Gideon v. Wainwright, 372 U.S. 335 (1963) (applying the right to indigent defense counsel to the states). The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. Importantly, in *Argersinger v. Hamlin*, 407 U.S. 25, 33, 37 (1972), the Supreme Court held that no person can be imprisoned for any offense, whether it be classified as petty, misdemeanor or felony, unless he had the assistance of counsel at trial.

265. *Gideon*, 372 U.S. 335; *Argersinger*, 407 U.S. at 37.

266. Strickland v. Washington, 466 U.S. 668, 686 (1984) (recognizing that the right to counsel includes the effective assistance of counsel, finding that "[c]ounsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance'" and setting forth the standard for effective assistance).

267. Washburn, *Tribal Courts*, *supra* note 2, at 426; *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978) (noting that "some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts").

268. Washburn, *Tribal Courts*, *supra* note 2, at 426.

269. A prior uncounseled state conviction may be counted as part of the criminal history, if no imprisonment was imposed. USSG, *supra* note 1, § 4A1.2; *see* Nichols v. United States, 511 U.S. 738, 748–49 (1994) (defendant sentenced under Sentencing Guidelines properly assessed additional criminal history point for uncounseled state misdemeanor conviction for which defendant was fined, but not incarcerated).

Native Americans creates due process and equal protection problems between Indian and non-Indian U.S. citizens.

Even assuming that some tribal courts are replicas of state and federal courts, this is not true for all tribal courts, nor should it be. Despite the historical impacts, proscriptions, and impositions on tribal justice systems, tribal courts still represent an exercise of inherent tribal sovereignty, sovereignty that predates the formation of the United States and its Constitution. Operation and application of inherent sovereignty requires recognition of tribal justice systems as separate and distinct. The pressure to replicate state court structures is significant and comes with incentives that are impossible to resist when packaged in the form of funding, training, technical assistance, law enforcement, safety, and ultimately, legitimacy.

That tribal courts have had to replicate state courts in order to be "sophisticated" and "civilized,"[270] and in order to be legitimate should not be mistaken for endorsement of the state court system. This formal replication does not take into account tribal indigenous knowledge, peacemaking, or restorative justice principles that predate any state or federal court system and which tribes have the right to provide. Any debate about the similarities between state and tribal jurisdiction, procedure, and adjudications misses the mark. As Max Minzner asserts, "whatever tribes are *like*, they are not all *alike*."[271]

270. *See, e.g.*, United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) ("[T]he reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man."). In *Oliphant v. Suquamish*, Justice Rehnquist describes this requirement of look-alike justice. 435 U.S. at 211–12 ("We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts."); *id.* at 179 ("For example, the 1830 Treaty with the Choctaw Indian Tribe, which had one of the most sophisticated of tribal structures, guaranteed to the Tribe.").

271. Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L. J. 89, 90 (2005). ("[J]udges and commentators have debated extensively, about whether tribes are like states, the federal government or like foreign countries. The debate misses the point that whatever tribes are *like*, they are not all *alike*.").

C. All Tribes Are Not All Alike[272]

There are 565 federally recognized tribes[273] in this country, which has never extinguished aboriginal rule.[274] In light of the right to inherent tribal sovereignty, this means that 565 tribal entities could potentially present 565 different justice systems. In reality, there are close to 200 tribal court systems in existence.[275] This number does not include over 160 tribal courts in Native Alaskan villages and communities.[276] In addition, twenty-one C.F.R. courts (a colloquial name for the Courts of Indian Offenses codified in the Code of Federal Regulations at 25 C.F.R. 11.100) serve to administer justice in Indian Country on those reservations where tribes have retained exclusive jurisdiction over Indians, but have not established a tribal court to exercise that jurisdiction.[277]

As previously described, tribes range in size from tremendous to tiny. Some have gaming operations, oil and gas holdings, timber, land, or commercial enterprises that lead to tribal revenues or per capita payments.[278] Others have none. Tribes are located in border areas, within major metropolitan areas, or stretched across isolated areas, inaccessible during certain times of the year. Some tribes can afford to

272. *Id.*

273. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218 (Aug. 11, 2009) (listing federally recognized Indian tribes). The Secretary of the Interior is required to keep, publish and regularly update a list of all federally recognized tribes pursuant to 25 U.S.C. §§ 479a, 479a-1 (2006). Tribes that maintain a legal relationship with the federal government through a treaty, act of Congress, executive order or are acknowledged under 25 C.F.R. § 83 are recognized by the federal government. In June 2010, the Shinnecock Indian Nation was acknowledged by the Department of Interior and became the 565th tribe. *See* Final Determination for Federal Acknowledgment of the Shinnecock Indian Nation, 75 Fed. Reg. 34,760 (June 18, 2010).

274. For an explanation of aboriginal title, see Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947).

275. *See generally* APRIL SCHWARTZ & MARY JO B. HUNTER, UNITED STATES TRIBAL COURTS DIRECTORY (3d ed. 2008) (compiling a list of tribal courts); *see also Tribal Justice Systems*, NAT'L TRIBAL JUSTICE RES. CTR., http://web.archive.org/web/20010603122231/http://www.tribalresourcecenter.org/pages/justice.htm (last visited July 11, 2011) (outlining a brief history of and listing tribal courts).

276. *See* SCHWARTZ & HUNTER, *supra* note 275.

277. 25 C.F.R § 11.100 (2010) (listing twenty-one Courts of Indian Offenses, also known as CFR Courts).

278. *See generally* U.S. DEP'T OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT (2005), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc-001719.pdf (listing reservation population, tribal enrollment, employment, and other economic factors); Patrice H. Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times*, 19 KAN. J.L. & PUB. POL'Y 8 (2009) (describing tribal economic instability); Minzner, *supra* note 271.

replicate state and federal court systems. Others have no means or desire. Despite these differences, however, all tribal courts, big and small, have the same jurisdiction. Resources, both human and financial, are spread thinly, and the criminal justice system represents sovereignty in practice that each tribe has to manage on its own terms. Judging by the dismal statistics,[279] replication of state and federal systems has not served tribes well.

The arguments in favor of counting tribal court convictions to achieve federal sentences that "'reflect the seriousness of the offense,'"[280] "promot[e] respect for [federal] law,"[281] and "provid[e] just punishment"[282] based on western notions of justice, represent the explicit goals of the Sentencing Commission. Supporting these goals by incorporating tribal convictions, however, does not promote sovereignty or internal power of the tribe. Unless the Sentencing Commission's goals—uniformity in federal sentencing throughout the nation, predictability in federal sentencing, and just desserts[283]—reflect internal tribal goals, tribal sovereign power is not implicated at all, much less respected.[284]

IV. Respect for Tribal Sovereignty, Tribal Court Decisions, and Tribal People

Because tribes are unlike state courts and unlike one another, incorporating tribal court convictions into a uniform federal sentencing regime to achieve a federal objective not shared by all tribes fails to confer respect. Using the states and federal courts as the explicit standard of true legitimacy comes at a great cost. Displacing autonomy and tribal values that may not be shared fails to recognize the legacy of independence and difference that has meant survival to Natives from time immemorial. Placing a tribal court's decision inside the state and federal hierarchy to be used against Native individuals fails to honor all that the tribe has achieved to regain or retain sovereignty.

279. *See supra* Part II.C.

280. Washburn, *Tribal Courts*, *supra* note 2, at 414.

281. USSG, *supra* note 1, at ch. 5, pt. B1.1.; *see also* Washburn, *Tribal Courts*, *supra* note 2, at 414.

282. USSG, *supra* note 1, at ch. 5, pt. B1.1.; *see also* Washburn, *Tribal Courts*, *supra* note 2, at 414.

283. The term "just desserts" refers to retributive justice and making the punishment fit the crime.

284. *See supra* Part III.

A. Not Counting Tribal Court Convictions Is Respectful

Should tribal court convictions count in federal sentencing? Is counting a tribal order of conviction in a foreign sovereign's sentencing authority the best way to "honor" what remains of a tribe's criminal jurisdiction over its own people? I support an amendment to the Federal Sentencing Guidelines that takes into account history, difference, and "Indianness." This Article proposes a unique collaboration reflecting tribal-federal dual sovereignty in order to allow only one prosecution in either court for the same course of conduct.

Recognizing difference is respectful. Understanding unique political, geographical, and historical factors, and taking those factors into account when evaluating criminal justice in Indian Country, is consistent with respectful treatment. Given the history of denigration of tribal sentencing authority, which has a long history stemming from the aftermath of *Crow Dog*, enhancing federal power to sentence Indians is not consistent with respect. Despite the Supreme Court's original intention, the *Crow Dog* decision represents a type of respect for tribal sovereign authority, for a tribe's exclusive jurisdiction to punish a crime uniformly recognized as unacceptable within the Indian Territory, and for the power or right to hand down an appropriate punishment of the perpetrator consistent with tribal values. Once Congress decided to encroach on traditional tribal jurisdiction and supplant tribal decision-making with the federal government's view of the appropriate process and punishment, the degradation of tribal sovereignty was complete. This process of disrespect began with the Major Crimes Act and continued through the degradation of jurisdiction in *Oliphant* and *Duro*. Counting tribal court convictions in the federal sentencing scheme cannot restore tribes or tribal courts to a respected position.

Washburn himself considered a restoration of tribal criminal jurisdiction to its pre-1880s status through repeal or the abolishment of the Major Crimes Act and mostly rejected it.[285] In addition to the fact that a repeal of the Major Crimes Act is highly unlikely, Washburn points out the other major problems with such an idea.[286] One of the most important factors is that the United States has a federal trust responsibility "to maintain peace and protect Indian women, children and families on the reservation."[287]

285. Washburn, *Criminal Law and Tribal Self-Determination*, *supra* note 2, at 848–50 (2006).

286. *Id.* at 840.

287. *Tribal Law and Order Act of 2009: Hearing on H.R. 1924 Before the Subcomm. of Crime, Terrorism, and Homeland Security*, 111th Cong. 38–39 (2009) (testimony of Assoc. Att'y Gen.

Given the encroachment on tribal power to govern in criminal matters, counting an Indian defendant's tribal convictions in the subsequent federal case does not buttress tribal sovereignty. Tribes exist as separate sovereigns within the federal Indian law framework for the purpose of dual prosecution and double jeopardy interests. Respect for inherent tribal power and authority cannot be accorded to tribes by incorporation into the federal sentencing scheme.

The obvious reason is that counting a prior conviction in tribal court against the Indian defendant would only serve to impact the Indian individual negatively. Counting tribal court convictions only means that additional criminal history points will be added solely for the Native criminal defendant, ultimately translating into a longer federal prison sentence. This form of respect fails in its application. The result is especially harsh given that Natives are already incarcerated in greater numbers in state and federal custody, and once incarcerated, they serve longer sentences than those of other races.[288] Therefore, counting tribal court sentences for the purpose of achieving uniformity in federal prosecution adds insult to injury.

B. Counting Tribal Convictions Does Not Respect Tribal Authority

Counting a prior tribal court conviction in the federal sentencing scheme becomes mere recognition of federal authority, not respect for the tribe itself or its unique position. Consider that recognition of tribal court sentences under the federal guidelines can operate only to subject Indian defendants to external enhanced punishment, and never to mitigate it. Counting a prior tribal court conviction in federal sentencing does not register the fact that the tribal court and community itself has already addressed the same conduct and may very well have imposed a punishment or other appropriate redress. This kind of recognition fails to take into account a tribe's unique exercise of local power and authority that could better serve the needs of the Indian individual and the community. Counting a tribal court conviction also does not regard all of the unique factors faced by the Indian individual and the historical constraints on tribal authority that may have caused the criminal behavior. The prior tribal action and the unique factors, in some cases, could provide valid reasons to mitigate, rather than enhance, a federal sentence.

Thomas Perrelli) ("The federal government has a distinct legal, trust, and treaty obligation to provide for public safety in tribal communities . . . .").

288. *See* NATIVE AMERICAN ADVISORY GROUP REPORT, *supra* note 19, at 1.

Counting tribal court convictions in federal courts fails to satisfy the threshold of respect because it would negatively impact Indians. More importantly, it fails to protect tribal court sentencing authority in any meaningful way. Recognition in federal court of a tribal conviction to increase punishment of only Indian tribal members of the separate sovereign does not directly promote tribal rights. Instead, it promotes federal power.

A tribal criminal conviction is not automatically accorded respect simply by being counted as a prior court conviction in the federal sentencing scheme. As Judge Bruce Black summarized, "in light of the constitutional and historical anomalies of federal, state, and tribal criminal jurisdiction in Indian Country, merely assigning criminal history points to prior tribal court sentences appears as likely to exacerbate, as to ameliorate, sentencing disparity."[289] Because the egregious and unconscionable sentencing disparities suffered by Native Americans are well-documented,[290] approaches taking aim at the disparate sentences are well-taken.

Understanding that the proposed lens of respect is not workable is not enough. There must be a suitable alternative that allows for deferential treatment of tribal court criminal convictions, yet also considers and incorporates the impact on Native individuals and communities. The conclusion to follow recognizes some alternative approaches that may be workable in part and rests upon a novel approach that incorporates more respect for tribes, sovereignty, and individual rights.

Conclusion

Acknowledging the inherent limitations of the Federal Sentencing Guidelines to deal with tribal courts as a culturally distinct sovereign exercising powers outside the Constitution leads to acceptance of USSG Rule 4A1.2(i), recognizes this distinction and as a result, does not count tribal court convictions. Whether the Sentencing Commission's initial reasoning for not counting tribal court convictions in the Indian defendant's prior criminal history was to protect federal constitutional principles or to question tribal court process, the rule has merit. The Sentencing Commission's resolution of treating tribal court convictions as that of a foreign nation remains the best solution

289. Bruce Black is a U.S. District Court Judge for the District of New Mexico. Black, *supra* note 74, at 218.

290. NATIVE AMERICAN ADVISORY GROUP REPORT, *supra* note 19, at 32.

under the current Sentencing Guideline scheme. As applied, this rule at least respects the difference between criminal and civil orders of tribal courts, the difference between tribal court systems and the federal and state systems, as well as differences among tribes themselves. Defaulting to the current rule of not counting tribal court convictions, at least, does not exacerbate the current problem of disparate sentencing and incarceration of Natives. Therefore, the status quo offers more than Washburn's proposed "respect" can offer.

Others have suggested, as another option, an end to the application of the Sentencing Guidelines to Native Americans being sentenced in federal court.[291] This approach may be the most respectful to tribal sentencing, the historical anomalies, and the direct hits that tribes have taken in the criminal arena. Judge Black proposed that "we honor self-determination by following Chief Justice Marshall's vision of 'domestic dependent sovereigns' by permitting tribal governments to opt out of the Guidelines and create their own sentencing system."[292] Quoting *Williams v. Lee*,[293] Judge Black provides that a tribal sentencing scheme would truly allow Native Americans to "make their own laws and be ruled by them."[294]

Replacing federal sentencing with tribal sentencing would promote tribal power by granting tribal courts the authority "to consider the crimes that cause the greatest disruption of reservation life and penalize them appropriately."[295] "It would also provide Native Americans the opportunity to fashion their own 'credit' system for prior tribal convictions."[296]

Recognizing that a unilateral federal decision to count tribal court convictions without tribal buy-in would not be consistent with self-determination, Washburn originally proposed the "tribal option" to allow tribes to determine whether their convictions should be counted under the Sentencing Guidelines. However, allowing tribes to participate after the fact in the punishment phase may not directly

291. Black, *supra* note 74, at 218.

292. *Id.*

293. 358 U.S. 217 (1959).

294. Black, *supra* note 74, at 218 (quoting *Williams*, 358 U.S. at 220 ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.")) (internal quotation marks omitted).

295. *Id.* at 218 (noting that granting tribes the authority to create their own sentencing scheme as is the case in the District of Columbia would "allow the tribes to consider the crimes that cause the greatest disruption of reservation life and penalize them appropriately," and "to fashion their own 'credit' system for prior tribal convictions").

296. *Id.*

address sentencing disparity or self-determination. Instead, respect for tribal courts is most apparent when tribes have exclusive jurisdiction over the individual and subject matter of the crime.[297]

Short of abolishing the Sentencing Guidelines, another approach suggests a solution from the standpoint of sentencing mitigation, namely that once the Sentencing Guidelines apply, they should fit the individual circumstances of the defendant.[298] A suggested amendment to the Federal Sentencing Guidelines would allow for a sentencing decision to take into account economic and social factors found as a part of reservation life, such as geographical, cultural, and political hardships suffered by the individual Indians, that led to the crime.[299]

Current rules preventing the court from considering race and socio-economic status, substance abuse problems, and lack of youthful guidance as grounds for departure[300] need to be amended to add a "measure of mercy and understanding."[301] The idea is that Natives facing sentences in federal court should be allowed to bring in the negative impacts of colonial and assimilationist policies, as well as their personal history, in order to request a reduction in the calculated federal sentencing range.[302] This option provides the federal court an additional opportunity to depart from the Sentencing Guidelines to fashion a just sentence based upon circumstances that exist in Indian Country that are to the detriment of the Indian defendant. The amendments should be adopted by the United States Sentencing Commission as a respectful approach to tribal sovereignty and individual Indians standing before the federal bench.

297. *Id.*

298. *See* United States v. Decora, 177 F.3d 676 (S.D. 1999) (upholding a downward departure to probation under the Sentencing Guidelines based on mitigating circumstances faced by Native American defendant); *see also* Droske, *supra* note 114, at 751–56.

299. Charles B. Kornmann, *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*, 13 FED. SENT'G REP. 71, 73 (2000) ("Sentencing judges are largely prohibited from taking into account the realities in Indian Country. Under § 5H1.10 we can neither consider race or national origin nor the fact that we took away the culture, the language, the religion, the land, the buffalo, the pride, and the very freedom of Native Americans years ago. It is not only Blacks who have suffered greatly in America but also Native Americans.").

300. *See* USSG, *supra* note 1, § 5K2.0(d)(1) (listing circumstances specifically prohibited as departures to include USSG § 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), § 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), and § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction, all of which impact Natives disproportionately).

301. Kornmann, *Injustices*, *supra* note 299, at 73.

302. *Id.*

Instead of searching for respect in the federal sentencing scheme, respect for the tribe, tribal sovereignty, and jurisdiction should begin at the investigation and prosecution phase of any criminal proceeding. Allowing a tribe to participate in addressing crime and punishment within its own jurisdiction prior to or separate from a federal prosecution, conviction, and sentence is key to addressing crime on the reservation. Because jurisdiction was usurped by the Major Crimes Act and denigrated over time, beginning with restoring respect at the shared jurisdictional level is an appropriate response.

In the interest of tribal autonomy and recognizing differences among tribes, tribal criminal decisions should be respected by the Department of Justice and the federal courts. Such a decision begins with incorporating or factoring in the community and the tribal approach to investigation, identification, and ultimately, resolution of crime and safety matters. Those tribes that have the resources and structure to prosecute and punish crime on the reservation, and choose to do so, should be allowed to, from the onset of the crime and investigation. In those cases, the U.S. Attorney's Office would be able to then decline a successive federal prosecution for the same conduct that has been resolved appropriately by the Indian community impacted.

Those tribes that have fewer resources to address crime and safety matters could determine the appropriate circumstances to work cooperatively with the federal officials in the enforcement, investigation, and prosecution of crime on the reservation.

The U.S. Attorney's Office has long had such a policy that precludes the initiation or continuation of a federal prosecution after a prior state or federal prosecution based upon the same or similar acts.[303] Known as the dual and successive prosecution policy or "Petite Policy," it precludes a federal prosecution where the defendant's conduct has formed the basis of a state prosecution.[304] The federal "Petite Policy" establishes guidelines for the exercise of prosecutorial discretion by the Department of Justice "in determining whether to bring a federal prosecution based on substantially the same act(s) or transac-

303. *See* Petite v. United States, 361 U.S. 529, 530 (1960) ("[S]everal offenses arising out of a single transaction . . . should not be the basis of multiple [federal] prosecutions" in different federal districts.).

304. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.031, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031.

tions involved in a prior state or federal proceeding."[305] As explained by the Department of Justice, the purpose of the policy is to:

> [V]indicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors.[306]

Similarly, the development of a tribal policy to determine jurisdiction in tribal or federal court prior to issuance of a federal indictment would serve the several relevant and important purposes listed above and address the respect problem at its core: jurisdiction and resources. Importantly, the Petite Policy's explicit goal "to insure the most efficient use of [limited] law enforcement resources, whenever a matter involves overlapping . . . jurisdiction,"[307] applies with equal force to the federal and tribal relationship. The Department of Justice's explicit policy directing "federal prosecutors [to], as soon as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and, if possible, to resolve all criminal liability for the acts in question,"[308] applies to Indian Country more so than to the states.

A decision on which interests are most affected (tribal or federal) and which entity has the best resources to address the crime, according to tribal needs and values, would restore tribes to the position of being able to participate in their own sovereignty, to protect the rights of the accused, and to define the process afforded to criminal defendants.

Under any scenario, once a tribe has addressed a matter in tribal court, such a decision should be entitled to deference by the federal courts. The federal prosecutor should take note of the resolution by the tribal community, whether in court or by a traditional method, and factor that into a decision to prosecute, as well as in final sentencing. Incorporating tribal input and resolution in addressing crime on the reservation into the federal sentence is the beginning of respect.

305. *Id.* § 9-2.031A (citing Rinaldi v. United States, 434 U.S. 22, 27 (1977) and Petite v. United States, 361 U.S. 529 (1960)).

306. *Id.* § 9-2.031A.

307. *Id.*

308. *Id.*