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October 20, 2014

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Via Electronic Mail: pubaffairs@ussc.gov

Attention: Public Affairs - Tribal Issues Comment

Dear Commission,

Thank you for accepting the following comments and attachments in favor of the formation of a Tribal Issues Advisory Group. I support forming such a group on a continuing basis to address foundational questions and complex issues arising from the application of federal laws to Native American Indians, resulting sentencing disparities, and the over-representation and over-incarceration of Native peoples.

As set out in the request for public comment, in the years since the Native American Advisory Group issued the ad hoc report in 2003, there have been significant changes in criminal law and prosecution in Indian Country. The passage of the Tribal Law and Order Act of 2010 (TLOA), brought with it serious questions regarding the application and implementation of the Act in Tribal courts and sentencing, and impacts and consequences in federal sentencing.

The jurisdictional expansion under Violence Against Women Act Reauthorization of 2013, raises additional questions about sentencing under the TLOA, and the right to counsel for Native defendants in those tribal courts. The right to counsel in tribal courts has a direct impact for Indian defendants in prosecution and sentencing in federal court. See, *United States v.. Bryant*, No. 12-30177 (9th Cir., September 30, 2014). Despite the federal laws in place, Indian defendants in different parts of the country are subject to differing and/or conflicting decisions in cases involving concurrent (stacked) sentences; the right to counsel and the use/consequences of uncounseled convictions, and access to habeas corpus relief under the Indian Civil Rights Act, 25 U.S.C. § 1303. I hope that you will find the attached articles and Congressional testimony on the above issues helpful.

Continuous and thoughtful oversight of the sentencing guidelines and their application to Native defendants is necessary to address disparities and prevent injustice. A continuing group should include Tribal defenders and advocates, and Native people. In light of the long history of prosecuting Native people in federal courts, and the unique treatment of Native in the United States, I recommend persons who have a background and experience

working directly with Native people and defending Native men, women and children in state, tribal and federal courts. If you have any questions regarding my work or if I may be of any assistance, please do not hesitate to contact me. I can be reached at (505) 277-5265 or via electronic mail at: creel@law.unm.edu

Respectfully,

Barbara L. Creel
Professor of Law and Director of the Southwest Indian Law Clinic

Enclosure (3)
cc: Jeanne Doherty, Public Affairs Officer
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UNM SCHOOL of LAW
CLINICAL LAW PROGRAMS

November 16, 2010

Via Electronic and United States Mail

The Honorable John Conyers, Jr.
House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

RE: Subcommittee on Crime Terrorism, and Homeland Security, Committee on the Judiciary
December 10, 2009 Hearing on H.R. 1924 "Tribal Law and Order Act of 2009"
Written Answers to Questions Submitted

Dear Chairman Conyers:

Greetings! I would like to thank you for the earlier opportunity to testify at the hearing concerning H.R. 1924, the Tribal Law and Order Act. I appreciate your initiative and efforts in this important and under-served area of criminal law, Indian law and individual rights. Following the hearing, you asked for written answers to two questions to supplement my testimony. The questions presented and my answers are as follows:

Question:

1) **Is a federal writ of habeas corpus, as provided in 25 U.S.C. § 1303, sufficient to prevent and remedy civil rights and due process violations relating to the prosecution, conviction or detention by an Indian Tribe of Indian defendants? Please explain your position.**

Answer: No.

Explanation: The writ, made applicable to tribes in 1968, does nothing to prevent and very little to remedy civil rights and due process violations in tribal courts. The writ is seldom used by Indian defendants to test the legality an order of detention by an Indian Tribe. After Supreme Court decision in *Santa Clara v. Martinez*, 436 U.S. 49 (1978), limited the federal review to only tribal court orders of detention, there have been very few petitions filed in federal court. The paucity of petitions filed masks the severity and extent of civil rights and due process violations in tribal courts, and is itself the result of inadequate protections.

The under-use and inaccessibility of the federal writ is related to several practical and theoretical factors: 1) lack of defense counsel in tribal court; 2) lack of knowledge, and; 3) lack of a sufficient record or process for tribal post-conviction. Because there is no right to appointed

counsel in tribal courts, 25 U.S.C. §1303(6), there is no person preserving a record in the tribal court below and no one to advise of the right to seek federal court review for violations.

In each of three recent habeas cases filed pursuant to 25 U.S.C. §1303, a federal public defender represented the Indian individual in the dual prosecution in federal court under the Major Crimes Act, 18 U.S.C. § 1153, and was responsible for filing the petition to challenge the illegal tribal court order in federal court. See, *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005); *Miranda v. Nielson*, No. CV 09-8065 PCT PGR, WL 148218 (D. Ariz. 2010); *Bustamante v. Valenzuela*, et al., 715 F. Supp. 2d 960 (D. Ariz. 2010). Without an attorney, the Indian defendant is left defenseless and without any knowledge of or access to federal court review of an illegal conviction or sentence. Unfortunately, under the Criminal Justice Act, federal public defenders are not permitted to appear or practice in tribal courts, and there is no system of appointment for tribal defendants seeking the civil remedy of habeas corpus in absence of a federal prosecution. 18 U.S.C. 3006A.

The federal writ habeas corpus is an imported post-conviction remedy made applicable to tribes under the Indian Civil Rights Act of 1968. The writ is not known in either theory or in practice among tribal people. Nor is it consistent with tribal sovereignty to seek outside review. In 1978, the Bureau of Indian Affairs engaged the National American Indian Court Judges Association (NAICJA) to undertake a yearlong project to assess tribal courts and develop systems for improvement. At that time, ten years after imposition of the ICRA, the assessment found that "[m]ost people on the reservations surveyed do not perceive recourse to federal courts as a means of reviewing Indian court judgments."[1] This was true among the tribal judiciary as well as tribal members. The report indicated, "[j]udges interviewed said the concept of federal review is too new and too complicated for most tribal members who are only starting to understand the avenues of relief available to them under the Indian Civil Rights Act."[2] This is no less true today than it was thirty-two years ago.

Federal habeas is rarely used because there are no known rules or process to access the federal courts. There has been no training or system to promote federal review of a tribal court order of detention. In addition, tribal community members are taught within their own culture not to argue, complain or question authority. When they do, they are met with a lack of support. Indian individuals will have to return home to their reservation community, and do not want to rock the boat or create problems for themselves or their family by a federal challenge to tribal court authority.

Additionally, even among those trained in federal habeas law and procedure, the process for access federal court is daunting. There is no standard practice or procedure that allows for access to federal courts under 25 U.S.C. §1303. There are statutory provisions and rules governing collateral review of state and federal court actions under 28 U.S.C §§ 2241, 2254 and 2255. There are no such rules to govern or guide actions under 25 U.S.C. §1303, and the former (2241, 2254 and 2255) do not apply on their face to Indian tribal orders of detention.[3]

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[1] Indian Courts and the Future, Report of the NAICJA Long Range Planning Project, (1978), Page 76.

[2] *Id*.

[3] Nor should these rules governing review of state and federal orders apply to actions seeking post-conviction review of tribal court orders in federal court.

Although post-conviction or civil remedies provided under §§2241, 2254 and 2255, are complex and esoteric, lawyers and law trained personnel, such as civil rights, criminal defense attorneys, and private practice attorneys, are available to assist in the representation of individuals seeking review of state and federal actions. In addition, there are private entities and public offices, such as the American Civil Liberties Union, and the Office of Civil Rights to provide advice, consultation, investigation and even representation for individuals to address constitutional violations. There is no such resource for the Native American Indian imprisoned by his own tribe. And none of the above named persons nor entities is qualified to assist in a post-conviction tribal or federal remedy without the requisite knowledge of the tribal process, Indian law, tribal sovereignty and federal habeas corpus law.

Even if the Indian tribe provides a right to counsel or approves the retention of outside counsel to represent an Indian defendant in tribal court, that defense counsel may not have the requisite knowledge to access federal court review; or even identify is a due process violation. Competent defense counsel in Indian country requires specialized knowledge.

If access to federal courts as a specialized practice is difficult and complicated for the law-trained person, it is even more so for the tribal person convicted in Indian country under a local tribal practice and incarcerated in a remote tribal or county jail. Tribal jails on the reservation have no access to information on federal remedies to address a violation of tribal law or the Indian Civil Rights Act (ICRA). 25 U.S.C. §§ 1301-1303. County facilities used to house Indian prisoners from those reservations without a tribal jail, will not have any information on how to challenge a tribal sentence. The Bureau of Indian Affairs (BIA) and Department of Justice (DOJ), pursuant to the trust responsibility, are tasked with the responsibility and authority to provide training and assistance to tribal courts. However, until recently there has been no training for tribal defense and currently there exists no known training or guidance for individual rights, especially the right to seek federal review. The BIA and DOJ may actually have a conflict of interest in this responsibility to the individual Indian. Without defense counsel, there is no one to protect an individual's rights under tribal law or ICRA. In the process of funding and training the tribal court system and personnel, the BIA and DOJ provide no oversight of the tribal justice system and no ability to counsel or direct the Indian individual regarding abuses or violations of that system.

In addition, there is no standard of due process among the 565 federally recognized tribes.[4] This means there is no standard for prosecution, trial, plea-bargaining or sentencing. To fill the void, tribal courts have routinely have engaged in a hybrid process of informal hearings that vary widely or fail completely in the protection of the individual rights guaranteed under the Indian Civil Rights Act.

Without written codes or procedures, there is no notice of the law under which the individual Indian is being prosecuted. There is no written notice of the charges and the elements of the crime to counter or defend against. There is no law trained person to challenge the charges or mitigate the tribal sentence.

4 See 74 Fed. Reg. 40,218 (August 11, 2009); 75 Fed. Reg. 34,760 (June 18, 2010).

Tribal Courts are not required to provide Indian defendants with a list of qualified counsel; they do not have any way of finding out who would be willing and qualified to defend them. Although the Office of tribal justice provides trainings for judges and prosecutors, there is no parity for defense. In summary, without qualified defense counsel in tribal courts, and without the knowledge of and training in the right to federal review of tribal court orders of detention, civil rights and due process violations will occur and continue unchecked.

Question:

2) **Current law limits a Tribe's sentencing authority to a maximum of one-year incarceration. In spite of this law, are circumstances today where a defendant could be convicted in a tribal court without representation of counsel and receive a prison sentence of more than one year for a single course of conduct? Please explain.**

Answer: Yes.
Explanation: Despite the statutory maximum, tribal court judges routinely impose prison sentences greater than one year for a single course of conduct of by way consecutive sentences or 'stacking.'

Imposition of lengthy sentences to address crime and recidivism on Indian reservations is routine. Tribes take the position that because the federal government has failed to prosecute cases in federal court, the tribal court is left to impose greater sentences to deter crime.

In an amicus curiae brief submitted to the Ninth Circuit Court of Appeals, one tribe described the reasoning and ability to circumvent the one-year limit:

> When the federal government [ ] declines to prosecute serious crimes, the burden falls to the Indian tribes to prosecute violent offenders in tribal courts. Knowing this, many tribes have adopted criminal codes designed to allow the charging of multiple offenses. The Gila River Indian Community's Criminal Code was adopted, in part, to 'define the act or omission which constitutes each offense.' And it did so because federal law enforcement agencies often decline prosecution of cases.
>
> Given the inherent jurisdictional limitations and the ICRA limitation of one year for each offense, consecutive sentencing is one tool available to Indian tribes to handle violent criminals.[5]

The 'stacking' of multiple one-year sentences in connection with a single course of conduct was struck down in a federal court decision in 2005, as inconsistent with Congressional intent in ICRA. *Spears*, 363 F. Supp. 2d at 1180-81. Tribes, however, continue to employ the practice of imposing consecutive sentences.[6]

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[5] See *amicus curiae* brief submitted by the Gila River Indian Community in *Miranda v. Nielson*, No. CV 09-8065 PCT PGR, WL 148218 (D. Ariz. 2010) at Page 15.

[6] A habeas decision has no precedential value and is only binding on the parties. See Clinton, Robert N., *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113, n. 443 (2002) (Habeas jurisdiction

Once a tribal court judge imposes a sentence, that sentence will stand unless and until the Indian individual challenges it internally through a tribal appellate process or externally through the federal writ. The sentence may or may not comport with tribal law or the Indian Civil Rights Act, but there is no way to track or review the imposition of sentences in general to find which are illegal or improper. The BIA conducts a review or audit of tribal courts, but that work only reports on needs assessed by the review. There is no mechanism to track and remedy illegal or improper sentences that may come to light in an audit. The only way to bring the issue to attention is to file a petition for a writ of federal habeas corpus. Tribal due process varies widely, and the Indian individual may not even be informed of any appeal process.

To incarcerate a person subject to tribal court jurisdiction, the process has been made simplified by the BIA. A tribal court or simply fills out a pre-printed form identifying the Indian individual and the sentence imposed, and submit it through the process to hold the person in a Bureau of Indian Affairs approved jail or a tribally operated jail.

In 2009, the Southwest Indian Law Clinic filed a Federal Petition for a Writ of Habeas Corpus pursuant to 25 U.S.C. §1303 on behalf of Native American Indian to challenge his conviction and eight-year sentence imposed by a tribal court in New Mexico after a bench trial. The defendant was not represented by counsel. The tribal court judge that imposed the eight-year sentence was not law trained, not a member of the tribe and a non-Indian. Although the Indian tribe wholly adopted the New Mexico Criminal Manual that included the New Mexico State Constitution and the United States Constitution as tribal law, the hearing was not conducted in accordance with state and federal protections. The tribal judge did not appoint counsel, and the defendant was unable to obtain contact anyone to retain counsel while in jail. On, March 9, 2010, the Magistrate Judge issues proposed findings and a recommended disposition to grant the Petition, and vacate and set aside the sentences. See *Romero v. Goodrich*, *Romero v. Goodrich*, No. 1:09-cv-232 RB/DJS (D.N.M.2010).[7]

In a separate case, an Indian individual was prosecuted in both tribal court and in federal court under the Major Crimes Act, 18 U.S.C. 1153, for the same course of conduct. This case was a serious crime of arson resulting in homicide. Before the case was prosecuted in federal court, and thus before the Indian man was appointed counsel under the Sixth Amendment, the defendant was prosecuted in tribal court. He pleaded guilty without the benefit of counsel. The tribal court failed to adhere to the fundamental requirements of its own tribal code or ICRA, and ultimately imposed a sentence of four consecutive one-year terms (1460 days). The court also imposed a $20,000, and then converted the fine to additional jail time in violation of tribal law and the ICRA, for a total sentence of 3460 days in jail, nearly nine and one-half years. After a

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created by § 1303 provides limited means by which tribal orders limiting liberty can be reviewed in federal court, and such actions do not constitute appeals. Petitions for writs of habeas corpus constitute independent civil actions. *Oneal v. McAninch*, 513 U.S. 432, 440, 449 (1995). Thus, tribes are no more bound as a matter of stare decisis by the outcome of such cases than the highest court of a state is by a federal district court grant of a writ of habeas corpus under 28 U.S.C. § 2254. While of no value as precedent, such cases clearly are binding on the parties as a matter of res judicata so long as the issuing court had lawful jurisdiction.)

[7] The Tribe issued an order to commute the sentence and release the prisoner prior to the writ issuing. The case is pending federal review on the issue of mootness and collateral consequences.

federal Petition for Writ of Habeas Corpus was filed, the tribal court vacated the tribal sentence and re-imposed a sentence to address the violations. The federal habeas petition was dismissed without a decision, as a result of an agreement sought by the Indian's federal public defender. *Spino v. Confederated Tribes of Warm Springs, et al.*, 09 CV -934-KI.

Recently, the Federal District Court for the District of New Mexico issued the Writ of Habeas Corpus and released an Indian prisoner who was incarcerated on a two-year sentence imposed by a tribal court. The Indian prisoner was serving his sentence in a private jail in Albuquerque pursuant to a contract administered by the Bureau of Indian Affairs and made between the tribe and the private jail. This Writ and Order of Release would not have issued without the assistance of several attorneys and months of work to seek relief from the tribe and exhaust tribal court remedies prior to federal review. *Pacheco v. Massingill*, No. 1:10-cv-00923 RB-WDS (D. N.M. 2010).

In addition, the Southwest Indian Law Clinic recently filed another case on behalf of an Indian prisoner serving an 18-month sentence in the same private jail pursuant to a tribal court order of detention. That Petition is now pending and there are several more that are in the process of being filed, including one on behalf Indian prisoner serving a four-year sentence imposed by an Arizona tribe. Because the Indian prisoner has been incarcerated for years and is without any information or paperwork on his tribal sentence, federal habeas review has been delayed pending an investigation.

In 1961-1968, during the extensive investigation that lead to the imposition of the Indian Civil Rights Act, incarceration was a little used tool of the tribal court, and when used only short sentences were imposed.[8] That has changed. But even short sentences can be imposed in violation of due process or the ICRA.

Shorter sentences or pre-trial detention orders as a result of due process or civil rights violations may go undetected if the person is released after a few months or weeks in jail. The lack of knowledge and length of time to get information out of a jail or prison means that the person may be released before any violation can be documented or addressed. By the time anyone finds out, the prisoner is out of jail, and habeas corpus may no longer be a remedy. Under standard federal habeas corpus law, the federal court has no jurisdiction, unless the petitioner is 'in custody' or suffers some collateral consequences. *Carafas v. LaVallee*, 391 U.S. 234 (1968).

I hope that this information is response to your questions. As set out above, in the absence of qualified defense counsel, the Indian individual is without the knowledge of any available post-conviction remedy internally or externally in federal court. The existence of the federal writ of habeas corpus does nothing to protect the Indian defendant from civil rights or due process violations.

[8] Hearings on the Constitutional Rights of the American Indian Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 87th Cong., 1st Sess., at 384-484; Pursuant to federal regulations six-months was the longest maximum sentence that could be imposed in the BIA Courts of Indian Offenses. 25 C.F.R.§§ 11.33-11.87NH (1967).

If you have further questions, or need additional information on the above, please contact me. Again, thank you for your time and the chance to provide some answers these important questions.

Sincerely,

/s/ Barbara Creel

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Articles

*37 TRIBAL COURT CONVICTIONS AND THE FEDERAL SENTENCING GUIDELINES: RESPECT FOR TRIBAL COURTS AND TRIBAL PEOPLE IN FEDERAL SENTENCING

Barbara **Creel** [FNa1]

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 [FN1] to count **tribal court convictions** in calculating an Indian defendant's criminal history score to determine a federal prison sentence. [FN2] Currently, **tribal court convictions*38** 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. [FN3]

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. [FN4] 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.

***39** It is from this perspective that I focus the lens of **respect** on the work of **tribal courts** and criminal justice in Indian Country, [FN5] 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. [FN6] 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 ***40** 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, [FN7] or; (2) tribal courts are essentially the same as the American state and federal court models, triggering expectations of similar treatment. [FN8]

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. [FN9] 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 ***41** 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 [FN10] 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 [FN11] applies to tribal court orders, and the constitutional support for such recognition or the lack thereof, [FN12] to whether comity [FN13] should be the guiding principle, [FN14] and if so, ***42** whether principles of domestic or international comity should be applied. [FN15] Included in the debate is whether symmetry or asymmetry is appropriate in the cross-border recognition problem, [FN16] and whether to incorporate tribal courts into the federal court system. [FN17]

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, [FN18] 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. Recognition***43** (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 [FN19] enters the discussion from the perspective of a "seasoned former Indian country federal prosecutor." [FN20] From this perspective, Washburn suggests the increased recognition of **tribal court** criminal **convictions** by foreign state and federal courts. [FN21] The treatment and effect of internal **tribal court convictions** by these foreign courts becomes central to the question of **tribal court** legitimacy. [FN22]

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. [FN23] He favors artificially placing **tribal court** orders within the foreign state/federal hierarchy as a standard way to elevate and legitimize the ***44 tribal court**. [FN24] 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. [FN25]

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" [FN26] begins with a comparison between **tribal courts** and state courts in order to establish legitimacy of the former. [FN27] 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. [FN28] 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." [FN29]

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 ***45** 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. [FN30] The article ultimately advocates for states to adopt a fully symmetrical approach to the treatment of both tribal criminal and civil decisions. [FN31] If a state recognizes tribal court convictions, the same state should provide symmetrical treatment of civil adjudications and vice-versa. [FN32] 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." [FN33] After calling for reflexive symmetry between civil and criminal judgments, with only minimal attention to important differences between the two types of determinations, [FN34] he ventures a step further in a second article, directing attention to the recognition of tribal court convictions in federal court sentencing. [FN35]

Building on the idea that tribal courts deserve respect through recognition, in Tribal Courts and Federal Sentencing, [FN36] Washburn argues that tribal court convictions should be taken into account when calculating [FN37] the length of a Native American defendant's sentence under the Federal Sentencing Guidelines. [FN38] 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. [FN39] 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 ***46** court convictions out of the calculation for an Indian defendant's prior criminal history. [FN40] Washburn rejects the Sentencing Commission's treatment of tribal court convictions as a failure to recognize tribal courts. [FN41] 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. [FN42] 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." [FN43]

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, [FN44] Washburn argues that tribal courts are, for the most part, subject to the same substantive and procedural due process requirements as state courts. [FN45] In support of this conclusion, he points to the Indian Civil Rights Act ("ICRA"), [FN46] and notes that ICRA incorporates "virtually identical" protections as compared with the fundamental rights and responsibilities conferred on the states via the Fourteenth Amendment. [FN47]

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." [FN48] 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." [FN49] He advocates amending the Sentencing Guidelines to require federal courts to routinely recognize **tribal*47** criminal **convictions** when sentencing Native people for crimes committed in Indian Country. [FN50]

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**. [FN51] He argues that "in refusing to count

tribal convictions for purposes of routine calculation of criminal history, the [Sentencing] Commission has disrespected **tribal courts**." [FN52] 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. [FN53] 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." [FN54] 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." [FN55] 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 [FN56] and pointedly directs the Sentencing Commission to change the rule. [FN57] He advocates honoring **tribal court convictions** to effectively***48** increase the federal prison sentences of Native American defendants. [FN58]

In Federal Criminal Law and **Tribal** Self-determination, [FN59] Washburn continues to define **respect** for **tribal court convictions** in terms of recognition of the **conviction** in federal sentencing. [FN60] 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." [FN61] 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. [FN62] 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. [FN63]

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. [FN64] 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. [FN65]

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." [FN66] Again, Washburn places the counting of convictions ***49** 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. [FN67]

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, [FN68] out of step with the explicit goals of the Sentencing Guidelines to bring honesty, proportionality, and equality to federal sentences, [FN69] and fails to mete out justice in Indian Country. [FN70] 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" [FN71] that states and cities are entitled to respect, but tribal courts and communities are not. [FN72] 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." [FN73]

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 ***50** the same manner that state convictions are incorporated into the Federal Sentencing Guidelines. [FN74] In his Commentary, Judge William C. Canby, [FN75] 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. [FN76] 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. [FN77]

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." [FN78] 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. [FN79]

The federal defender Commentary recognized the "real consequence of such counting would be longer sentences" for Native Americans. [FN80] The defenders opposed the proposal to treat tribal sentences like state sentences under the Sentencing Guidelines as unnecessary ***51** to accurately assess criminal history for Indians in federal cases, [FN81] and questioned the existence and adequacy of due process in tribal courts. [FN82] In support of the status quo, the federal defender Commentary pointed out the marked differences among tribal justice systems. [FN83] 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. [FN84] 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. [FN85]

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. [FN86]

***52** 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. [FN87] 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**." [FN88] Recognition **respect** refers to the acknowledgement that an individual is a separate, unique, free, and independent human being. [FN89] 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. [FN90] In contrast, appraisal **respect** is not owed to all persons but is offered ***53** only in recognition of excellence. [FN91] In this sense, **respect** is a verb, meaning to treat with honor, high-esteem, and admiration. [FN92] 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. [FN93] 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. [FN94]

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, [FN95] includes the evolution of disrespect. Congressional action, ***54** 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. [FN96] 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. [FN97] After Ex parte Kan-gi-shun-ka, the disrespect developed over time, blow-by-blow, beginning with the creation of Courts of Indian Offenses [FN98] 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, [FN99] 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. [FN100]

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. [FN101] The ***55** 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. [FN102] 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 [FN103] and explained in greater detail below, [FN104] in terms of direct costs, Indians are overrepresented as defendants in federal court and in federal prison and face disproportionately longer prison sentences. [FN105] In terms of collateral consequences, Native communities, families, and juveniles are all impacted by the stigmatic and practical impacts of incarceration. [FN106] 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. [FN107] Native juveniles are brought into the criminal justice system at higher rates. [FN108] 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. [FN109]

***56** 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. [FN110] A competing internal pressure exists to produce traditional justice systems reflective of internal tribal norms, traditions, and values. [FN111] 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. [FN112]

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.

***57** A. A Brief History of Criminal Law in Indian Country

Criminal jurisdiction in Indian Country has been aptly called a complex "jurisdictional maze." [FN113] 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. [FN114]

Tribal power to govern the people within the territory predates the U.S. Constitution. [FN115] Prior to the United States' assertion of jurisdiction over Indians, tribal power to govern within its recognized boundaries was established. [FN116] Although there could be physical struggles related to the power externally, the terms were determined within and among the tribes. [FN117] Tribes followed indigenous ways of knowing, ***58** including their own legal traditions and "systems" reflecting tribal values and norms. [FN118] 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. [FN119]

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. [FN120]

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 [FN121]--three cases decided by the Supreme Court in ***59** 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, [FN122] or trade and intercourse acts designed to allow for lawful trade with tribal nations. [FN123] The General Crimes Act, [FN124] 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. [FN125] Over time, Congress and the Supreme Court's concerted efforts limited inherent tribal sovereignty in legitimate tribal internal criminal matters ***60** on the reservation. [FN126] 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) [FN127] 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. [FN128] 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. [FN129] 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. [FN130] 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." [FN131]

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. [FN132] The United States then convicted Crow ***61** Dog of murder under federal law and condemned him to death, the applicable federal punishment in the territories for murder. [FN133] 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. [FN134] 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. [FN135] 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. [FN136]

The use of tradition and custom in handling such a case was seen as "primitive" by those outside the local law of the tribes. [FN137] 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). [FN138] 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. [FN139] Tribes retained concurrent jurisdiction, but tribal powers to impose sentences were limited under the Indian Civil Rights Act. [FN140]

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. [FN141] Congress received ***62** 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. [FN142]

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. [FN143] 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. [FN144]

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 ***63** 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. [FN145] 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 [FN146] and imposed tribal adminis-

trative court systems to punish the newly outlawed civil "crimes" of being a practicing Indian, among other things. [FN147] These administrative courts introduced and imposed ***64** western justice and civil laws to address and control unwanted behaviors by Indians within their own lands. [FN148] 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. [FN149]

Later, during the Termination era of the 1950s, Congress enacted Public Law 280, [FN150] 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." [FN151] The statute transferred jurisdiction over criminal matters from the federal government to certain states. [FN152] 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. [FN153] In 1961, Senator Sam Ervin of North Carolina initiated a series of hearings and field investigations in response to an independent report [FN154] and a Department of Interior report [FN155] examining civil ***65** rights problems of individual Indians and the question of how Indian tribal governments relate to the federal Constitution and its protections. [FN156] 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. [FN157] 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." [FN158] At issue was the fact that "Indian tribes are not subject to Federal constitutional limitations in the Bill of Rights." [FN159]

The resulting legislation, the Indian Civil Rights Act ("ICRA"), [FN160] 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. [FN161] 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. [FN162]

The ICRA has been interpreted as a deliberate intrusion on tribal sovereignty but with a decidedly limited right of federal court review. [FN163] With the exception of habeas corpus, the ICRA did not authorize***66** suits against tribes or tribal officials without congressional consent. [FN164] 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. [FN165] The ICRA has been both criticized as an imposition of foreign notions of rights and justice on Indian tribes [FN166] and hailed as a recognition of the tribe's ability to protect its own citizenry. [FN167]

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. [FN168] 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. [FN169] A decade later, in Duro v. Reina, [FN170] 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. [FN171] 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." [FN172]

Other amendments to the ICRA limited tribal court jurisdiction to prosecute and punish even the tribe's own membership. [FN173] Tribal power to sentence was limited to imposition of sentences up to one ***67** year and a fine of $5000, or both. [FN174] 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. [FN175] 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. [FN176] 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. [FN177] 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. [FN178]

Because Natives face federal sentencing authority, the Sentencing Guidelines remain a fixture for tribes and Indian individuals. [FN179] 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. [FN180]

***68** The introduction of the Sentencing Guidelines in 1984 abruptly changed two hundred years of practice in criminal sentencing. [FN181] Prior to the Sentencing Guidelines, federal trial judges were entrusted with broad discretion to impose a sentence on a federal offender. [FN182] Federal definition of the crime and the punishment imposed were separate. [FN183] Congress prescribed a maximum penalty for each crime. [FN184] Constrained only by the statutory maximum, a federal judge could impose whatever sentence he believed appropriate based upon the circumstances of the case. [FN185]

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. [FN186] Federal judges were not required to explain their sentencing decisions on the record, and appellate review of those decisions was not available. [FN187]

This changed profoundly with Sentencing Reform Act ("SRA") of 1984. [FN188] 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. [FN189] 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 ***69** justice system; its mission was to achieve uniformity and proportionality in sentencing. [FN190]

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. [FN191] The Sentencing Guidelines proclaimed--without citing any support-- that many sentences did not fit the seriousness of the crime. [FN192] 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). [FN193]

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. [FN194] 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. [FN195] Statutory mandatory minimums gave judges even less flexibility in sentencing than the Sentencing Guidelines. [FN196]

The SRA abolished federal parole. [FN197] Those defendants convicted and sentenced prior to the sentencing reform remain under the “old” law or pre-existing parole scheme. [FN198] The SRA requires defendants to serve their court-imposed sentences, minus approximately fifteen percent***70** for good behavior, if applicable. [FN199] Such sentence reductions may not exceed fifty-four days per year. [FN200]

1. The Federal Sentencing Table

The heart of the Federal Sentencing Guidelines is the sentencing table. [FN201] 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. [FN202]

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. [FN203] 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). [FN204] The higher the level (or criminal history), the longer the possible sentence that may be imposed on the defendant. [FN205]

a. Offense Level [FN206]

The vertical axis consists of forty-three offense-level categories and is determined by selecting the appropriate offense level from the ***71** 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 [FN207]

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. [FN208] As mentioned, tribal court convictions and foreign nation convictions are not coun-

ted. 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 [FN209]

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 [FN210]

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. [FN211]

There are specific offender characteristics prohibited by Congress, such as race, sex, national origin, creed, religion, and socio-economic***72** status, as well as lack of youthful guidance. [FN212] 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. [FN213] The Sentencing Commission has also determined that even drug and alcohol addiction or dependency is not grounds for a downward departure. [FN214] 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. [FN215]

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. [FN216] Only the prosecution can move for a reduced sentence based on the substantial assistance clause of the Sentencing Guidelines. [FN217] 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. [FN218]

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)." [FN219] Tribal convictions are thus treated like convictions from foreign nations. [FN220]

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 ***73** 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. [FN221]

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. [FN222] 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. [FN223] 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. [FN224] In 2002, the Sentencing Commission***74** created a Native American Advisory Group to address the perceived racism against and disparate effects on Native Americans in federal sentencing. [FN225] The group determined a disparity in sentencing exists [FN226] 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. [FN227] Despite small numbers in the general population, Native Americans have the second highest incarceration rate of all races and ethnicities. [FN228] The over-representation of Natives in penitentiaries is especially prevalent in states with larger Native American populations. [FN229]

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. [FN230] 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. [FN231] Historically, the federal juvenile ***75** prison population has been predominantly Native American males. [FN232] A 2000 study found that seventy-nine percent of all juveniles in federal custody are Native American. [FN233] 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. [FN234] A majority of the total population of incarcerated Indian youth comes from Arizona, Montana, New Mexico, South Dakota, and North Dakota. [FN235] 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. [FN236] 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. [FN237] Unlike tribal court convictions, these juvenile convictions are counted in the criminal history calculation. [FN238]

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 ***76** 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." [FN239] 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," [FN240] 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." [FN241]

***77** To Christine Zuni Cruz, the link between tribal "traditional law, self-determination and sovereignty is clear." [FN242] 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." [FN243] 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." [FN244]

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. [FN245]

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, [FN246] the tribes' ability to develop and interpret a body of tribal law must be protected. [FN247] 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." [FN248] Instead, it is the distinctive legal principles derived from tribal law and applied in the ***78** 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. [FN249]

The argument that the Sentencing Commission should "recognize that tribal courts are substantially more like state than foreign courts" [FN250] 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 [FN251]

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 ***79** 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. [FN252] 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." [FN253] 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, [FN254] 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. [FN255]

***80** Exploring the dilemma of difference from within federal Indian law, Pommersheim identifies a "measured separatism." [FN256] Pommersheim suggests that necessary differences in tribal courts are a matter of pure survival. [FN257] According to Pommersheim, "pride of difference" and "Indianness" [FN258] are at the heart of Indian claims of tribal sovereignty. [FN259]

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," [FN260] 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. [FN261] Only a relatively small number of tribes provide counsel at the tribe's expense. [FN262]

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. [FN263] The Sixth Amendment to United States Constitution, however, guarantees the right to counsel to persons unable to afford counsel. [FN264] This guarantee, made applicable***81** to the states through the Fourteenth Amendment, applies to misdemeanors. [FN265] In addition, any counsel, whether court-appointed or retained, must provide effective assistance, in order for this constitutional requirement to be satisfied. [FN266]

To argue in favor of counting tribal convictions because, theoretically, tribal courts "operate as nearly exact replicas of state courts," [FN267] or because "tribes routinely hear the same kinds of misdemeanor crimes as state courts" [FN268] 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. [FN269] To include uncounseled convictions resulting in imprisonment for only ***82** 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," [FN270] 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." [FN271]

***83** C. All Tribes Are Not All Alike [FN272]

There are 565 federally recognized tribes [FN273] in this country, which has never extinguished aboriginal rule. [FN274] 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. [FN275] This number does not include over 160 tribal courts in Native Alaskan villages and communities. [FN276] 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. [FN277]

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. [FN278] 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 ***84** 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, [FN279] 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,"' [FN280] "promot [e] respect for [federal] law," [FN281] and "provid[e] just punishment" [FN282] 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 [FN283]--reflect internal tribal goals, tribal sovereign power is not implicated at all, much less respected. [FN284]

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.

***85** 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. [FN285] 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. [FN286] 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." [FN287]

***86** 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. [FN288] 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.

***87** 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.” [FN289] Because the egregious and unconscionable sentencing disparities suffered by Native Americans are well-documented, [FN290] 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 ***88** 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. [FN291] 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." [FN292] Quoting Williams v. Lee, [FN293] Judge Black provides that a **tribal** sentencing scheme would truly allow Native Americans to "make their own laws and be ruled by them." [FN294]

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." [FN295] "It would also provide Native Americans the opportunity to fashion their own 'credit' system for prior **tribal convictions**." [FN296]

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 ***89** 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. [FN297]

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. [FN298] 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. [FN299]

Current rules preventing the court from considering race and socio-economic status, substance abuse problems, and lack of youthful guidance as grounds for departure [FN300] need to be amended to add a "measure of mercy and understanding." [FN301] 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. [FN302] 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.

***90** 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. Al-

lowing 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. [FN303] 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. [FN304] 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 transactions***91** involved in a prior state or federal proceeding." [FN305] 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. [FN306]

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," [FN307] 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," [FN308] 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 com-

munity, 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.

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[FN1]. 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.

[FN2]. 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, Federal Criminal Law and Tribal Self-Determination, 84 N.C. L. Rev. 779, 840 (2006) [hereinafter Washburn, Criminal Law and Tribal Self-Determination].

[FN3]. 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.

[FN4]. 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.

[FN5]. 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).

[FN6]. 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).").

[FN7]. 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).

[FN8]. 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.").

[FN9]. 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).

[FN10]. 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.

[FN11]. 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 mat-

ter of obligation but out of deference and mutual respect. See infra note 13.

[FN12]. 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).

[FN13]. 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.

[FN14]. 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).

[FN15]. See, e.g., Stacy L. Leeds, Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective, 76 N.D. L. Rev. 311 (2000).

[FN16]. 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).

[FN17]. 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).

[FN18]. See discussion supra note 9.

[FN19]. 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.

[FN20]. 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).

[FN21]. 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.).

[FN22]. 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.”).

[FN23]. Washburn, Tribal Courts, supra note 2, at 443-45.

[FN24]. Id. at 450 (calling for the abolishment of the current Guidelines' treatment of tribal court orders of conviction).

[FN25]. 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.

[FN26]. Washburn, Reconsidering the Commission's Treatment, supra note 2, at 209.

[FN27]. Washburn, Tribal Courts, supra note 2, at 421-28.

[FN28]. 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.”).

[FN29]. Id.

[FN30]. Washburn, Different Kind, supra note 2, at 288-89.

[FN31]. Id. at 285-88.

[FN32]. Id. at 288-89.

[FN33]. Id. at 288.

[FN34]. Id. at 272-78.

[FN35]. Washburn, Tribal Courts, supra note 2.

[FN36]. Id.

[FN37]. 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.

[FN38]. Washburn, Tribal Courts, supra note 2, at 450.

[FN39]. Id. at 406, 415-17.

[FN40]. Washburn, Tribal Courts, supra note 2, at 416.

[FN41]. Id. at 415-18.

[FN42]. Id. at 435-39.

[FN43]. Id. at 406-07.

[FN44]. Id. at 421-28.

[FN45]. Id. at 428-35.

[FN46]. Id.

[FN47]. Id. at 426.

[FN48]. Id. at 426, 429-30.

[FN49]. Id. at 430.

[FN50]. 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.”).

[FN51]. 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).

[FN52]. Id. at 209.

[FN53]. Id. at 209, 213.

[FN54]. Id. at 209.

[FN55]. 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.”).

[FN56]. 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.”).

[FN57]. 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.”).

[FN58]. Id.

[FN59]. Washburn, Criminal Law and Tribal Self-Determination, supra note 2.

[FN60]. Id. at 840 (“Thus tribal convictions ought to be treated with greater respect than state and federal convictions, not less.”).

[FN61]. Id. at 790-806.

[FN62]. Id. at 779-80.

[FN63]. Id. at 837-42.

[FN64]. Id. at 840.

[FN65]. Id. at 840 n.329 (citing his 2004 article, Washburn, Tribal Courts, supra note 2).

[FN66]. Id.

[FN67]. Id. (citations omitted).

[FN68]. Washburn, Tribal Courts, supra note 2, at 445; Washburn, Reconsidering the Commission's Treatment, supra note 2, at 211.

[FN69]. 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).

[FN70]. Id. at 447-50.

[FN71]. Id. at 442.

[FN72]. Id.

[FN73]. Id.

[FN74]. 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).

[FN75]. Judge Canby disclosed that Washburn was his judicial law clerk from 1993 to 1994. Canby, supra note 74, at 221 n.1.

[FN76]. Id. at 220.

[FN77]. Id.

[FN78]. Id.

[FN79]. Id.

[FN80]. 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.

[FN81]. See id. at 215 (discussing the adequacy of the current rules in the section titled “If It Ain't Broke Don't Fix It”).

[FN82]. 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).

[FN83]. 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 sys-

tems.”).

[FN84]. 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.”).

[FN85]. Id. at 216.

[FN86]. Kornmann, supra note 74, at 222.

[FN87]. 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.”).

[FN88]. 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).

[FN89]. Darwall, Two Kinds of Respect, supra note 88, at 38, 45-47.

[FN90]. 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.”).

[FN91]. Id.

[FN92]. Id. at 38-39.

[FN93]. Washburn, Tribal Courts, supra note 2, at 426.

[FN94]. See supra Part I.

[FN95]. See infra Part II.A-B.

[FN96]. 18 U.S.C. § 1153 (2006).

[FN97]. 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.

[FN98]. 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.

[FN99]. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); see discussion infra Part I.A.4.

[FN100]. 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).

[FN101]. 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 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).

[FN102]. See discussion infra Part II.C.

[FN103]. See discussion supra Part I.C.

[FN104]. See discussion infra Part II.C.

[FN105]. 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.

[FN106]. 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).

[FN107]. 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)).

[FN108]. See discussion infra Part II.C.

[FN109]. 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 American Juveniles, 84 Minn. L. Rev. 473, 483, 495-500 (1999) (describing the negative impact of federal jurisdiction and concomitant federal sentencing).

[FN110]. 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).

[FN111]. 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).

[FN112]. 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).

[FN113]. 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.

[FN114]. 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).

[FN115]. 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.”).

[FN116]. 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.

[FN117]. 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).

[FN118]. 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, TribalLaw as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and TraditionsintoTribalLaw, 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 Soci-

ety, 79 Judicature 126 (1995); Philmer Bluehouse & James W. Zion, The Navajo Justice and Harmony Ceremony, 10 Mediation Q. 327 (1993).

[FN119]. Harring, supra note 117, at 10 (citing works of traditional law of Indian people).

[FN120]. 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.'").

[FN121]. 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 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.

[FN122]. 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)).

[FN123]. 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.

[FN124]. 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).

[FN125]. 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.

[FN126]. 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.").

[FN127]. 109 U.S. 556 (1883).

[FN128]. Harring, supra note 117, at 1.

[FN129]. Id.

[FN130]. 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.").

[FN131]. Id. at 1.

[FN132]. Id. at 110.

[FN133]. Ex parte Crow Dog (Ex parte Kan-gi-shun-ka), 109 U.S. 556, 558 (1883).

[FN134]. Id. at 572.

[FN135]. Id.

[FN136]. Id.

[FN137]. See Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice 11 (1983).

[FN138]. See Harring, supra note 117, at 1, 132.

[FN139]. 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.

[FN140]. Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (2006).

[FN141]. 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 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.").

[FN142]. Ex parte Gon-shay-ee, 130 U.S. 343, 350 (1889).

[FN143]. 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.

[FN144]. Otherwise, the tribal restorative punishment imposed would have served as a model for federal justice, instead of the imposition of federal court jurisdiction.

[FN145]. 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).

[FN146]. 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.”).

[FN147]. 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-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”).

[FN148]. 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).

[FN149]. See 25 C.F.R. § 11.100 (2010).

[FN150]. 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).

[FN151]. Goldberg-Ambrose, supra note 150, at 1406.

[FN152]. 18 U.S.C. § 1163.

[FN153]. 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].

[FN154]. Comm'n on the Rights, Liberties & Responsibilities of the Am. Indian, A Program for Indian Citizens (1961).

[FN155]. 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).

[FN156]. 1961 Hearings--Part 1, supra note 153.

[FN157]. 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).

[FN158]. 1961 Hearings--Part 1, supra note 153, at 5 (remarks of Sen. Kenneth Keating).

[FN159]. 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).

[FN160]. 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.

[FN161]. 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.

[FN162]. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

[FN163]. See id. at 51 n.1 for an overview of the legislative history of the ICRA.

[FN164]. 25 U.S.C. § 1303.

[FN165]. Santa Clara Pueblo, 436 U.S. at 71-72.

[FN166]. 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).

[FN167]. Santa Clara Pueblo, 436 U.S. at 71-72 (holding that federal courts have no jurisdiction over internal tribal matters).

[FN168]. 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).

[FN169]. Id. at 212.

[FN170]. Duro v. Reina, 495 U.S. 676, 692 (1990).

[FN171]. Id. at 693-96.

[FN172]. See 25 U.S.C. § 1301(2) (2006) (emphasis added).

[FN173]. Id. § 1302(7).

[FN174]. 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)).

[FN175]. Tribal Law and Order Act of 2010, Pub. L. No. 111-211 § 234 (2010).

[FN176]. See generally Lawrence A. Greenfeld & Stephen K. Smith, U.S. Dep't of Justice, American Indians and Crime (1999).

[FN177]. United States v. Antelope, 430 U.S. 641 (1977) (holding that federal prosecution presented no equal protection problem).

[FN178]. Id.; United States v. Wheeler, 435 U.S. 313 (1978) (holding that federal prosecution presented no double jeopardy problem).

[FN179]. In addition, United States v. Booker, 543 U.S. 220 (2005), is limited to all but prior convictions.

[FN180]. 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.

[FN181]. 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.”).

[FN182]. 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.”).

[FN183]. See Stith & Cabranes, supra note 181, at 9.

[FN184]. Id.

[FN185]. Id.

[FN186]. 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.

[FN187]. See Stith & Cabranes, supra note 181.

[FN188]. 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).

[FN189]. See Stith & Cabranes, supra note 181, at 1, 2-3.

[FN190]. Id. at 2.

[FN191]. Id. at 42.

[FN192]. Id. at 60.

[FN193]. Id. at 40.

[FN194]. Id. at 125.

[FN195]. Id.

[FN196]. 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.).

[FN197]. 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).

[FN198]. "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.

[FN199]. 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).

[FN200]. 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%C20Time%C20FAQs%206.7.10.pdf (last visited Sept. 13, 2011).

[FN201]. USSG, supra note 1, § 5A; Stith & Cabranes, supra note 181, at 3.

[FN202]. USSG, supra note 1, ch. 1, pt. A.

[FN203]. Id. ch. 2; see, e.g., id. § 2B3.1.

[FN204]. Id. § 5A.

[FN205]. See generally id. ch. 5, pt. A (displaying the Sentencing Table showing increasing sentencing ranges up to life in prison).

[FN206]. Id. ch. 5, pt. A, cmt. n.1.

[FN207]. Id. ch. 4, pt. A.

[FN208]. Id. ch. 5, pt. A, cmt. n.3.

[FN209]. Id. §§ 3A-E.

[FN210]. Id. § 1A4(b).

[FN211]. Id. § 5H (commentary on Special Offender Characteristics).

[FN212]. Id. §§ 5H1.10, 5H1.12; 28 U.S.C. § 994(d) (2006).

[FN213]. USSG, supra note 1, §§ 5H1.2, 5H1.5-1.6, 5H1.11-1.12; 18 U.S.C. § 994(e).

[FN214]. USSG, supra note 1, § 5H1.4.

[FN215]. 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).

[FN216]. USSG, supra note 1, § 5K.

[FN217]. Id.

[FN218]. 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)").

[FN219]. Id. § 4A1.3.

[FN220]. Id. § 4A1.2(h).

[FN221]. Id.

[FN222]. Id. § 5H1.10.

[FN223]. Id. § 5H1.1; 28 U.S.C. § 994(d) (2006).

[FN224]. 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 Native Americans."); see generally Native American Advisory Group Report, supra note 19, at 9; S.D. Advisory Comm., Nat-

ive Americans in South Dakota: An Erosion of Confidence in the Justice System (2000), available at http://www.usccr.gov/pubs/sac/sd0300/main.htm.

[FN225]. Native American Advisory Group Report, supra note 19, at 10-11.

[FN226]. 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).

[FN227]. See generally Steven W. Perry, U.S. Dep't of Justice, A BJS Statistical Profile, 1992-2002: American Indians and Crime (2004).

[FN228]. Id.

[FN229]. Id.

[FN230]. Id.

[FN231]. 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=Symposium:%20Native%C20Americans%C20and%C20Alaska%C20Natives:%C20The%C20Forgotten%M inority ("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.

[FN232]. See generally Perry, supra note 227.

[FN233]. 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).

[FN234]. Urban Inst. Justice Policy Ctr., Tribal Youth in the Federal Justice System 34 (2011).

[FN235]. Id. at 32; see also Perry, supra note 227, at 37-38.

[FN236]. 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.").

[FN237]. USSG, supra note 1, § 4A1.2(d) (counting federal juvenile convictions under the federal sentencing guidelines).

[FN238]. 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).

[FN239]. Washburn, Tribal Courts, supra note 2, at 426; Washburn, Different Kind, supra note 2, at 288.

[FN240]. Frank Pommersheim, Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence, 1992 Wis. L. Rev. 411, 421 (1992) [hereinafter Pommersheim, Liberation].

[FN241]. Id.

[FN242]. Zuni Cruz, Customs and Traditions, supra note 118, at Conclusion.

[FN243]. Id. at Introduction.

[FN244]. Id.

[FN245]. Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. Chi. L. Rev. 671, 750-51 (1989).

[FN246]. 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)).

[FN247]. 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).

[FN248]. Pommersheim, Liberation, supra note 240, at 420.

[FN249]. Id. at 422-23.

[FN250]. Washburn, Reconsidering the Commission's Treatment, supra note 2, at 212.

[FN251]. 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).

[FN252]. Pommersheim, Liberation, supra note 240, at 423.

[FN253]. Id. at 424.

[FN254]. 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").

[FN255]. 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.

[FN256]. Pommersheim, Liberation, supra note 240, at 415.

[FN257]. Id. at 420.

[FN258]. 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).

[FN259]. Pommersheim, Liberation, supra note 240, at 424.

[FN260]. Washburn, Tribal Courts, supra note 2, at 426 ("Currently, the nature of those [ICRA and U.S. Constitutional] protections is virtually identical.").

[FN261]. See 25 U.S.C. § 1302(6) (2006) (affording Indian defendants "at his own expense the right to assistance of counsel for his defense").

[FN262]. It is difficult to determine the number of tribes that provide indigent defense counsel.

[FN263]. 25 U.S.C. § 1302(6).

[FN264]. 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 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.

[FN265]. Gideon, 372 U.S. 335; Argersinger, 407 U.S. at 37.

[FN266]. 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).

[FN267]. 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").

[FN268]. Washburn, Tribal Courts, supra note 2, at 426.

[FN269]. 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).

[FN270]. 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.").

[FN271]. 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.").

[FN272]. Id.

[FN273]. 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).

[FN274]. For an explanation of aboriginal title, see Felix S. Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947).

[FN275]. 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).

[FN276]. See Schwartz & Hunter, supra note 275.

[FN277]. 25 C.F.R § 11.100 (2010) (listing twenty-one Courts of Indian Offenses, also known as CFR Courts).

[FN278]. 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.

[FN279]. See supra Part II.C.

[FN280]. Washburn, Tribal Courts, supra note 2, at 414.

[FN281]. USSG, supra note 1, at ch. 5, pt. B1.1.; see also Washburn, Tribal Courts, supra note 2, at 414.

[FN282]. USSG, supra note 1, at ch. 5, pt. B1.1.; see also Washburn, Tribal Courts, supra note 2, at 414.

[FN283]. The term “just desserts” refers to retributive justice and making the punishment fit the crime.

[FN284]. See supra Part III.

[FN285]. Washburn, Criminal Law and Tribal Self-Determination, supra note 2, at 848-50 (2006).

[FN286]. Id. at 840.

[FN287]. 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. Thomas Perrelli) (“The federal government has a distinct legal, trust, and treaty obligation to provide for public safety in tribal communities ....”).

[FN288]. See Native American Advisory Group Report, supra note 19, at 1.

[FN289]. Bruce Black is a U.S. District Court Judge for the District of New Mexico. Black, supra note 74, at 218.

[FN290]. Native American Advisory Group Report, supra note 19, at 32.

[FN291]. Black, supra note 74, at 218.

[FN292]. Id.

[FN293]. 358 U.S. 217 (1959).

[FN294]. 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).

[FN295]. 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").

[FN296]. Id.

[FN297]. Id.

[FN298]. 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.

[FN299]. 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.").

[FN300]. 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).

[FN301]. Kornmann, Injustices, supra note 299, at 73.

[FN302]. Id.

[FN303]. 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.).

[FN304]. 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.htm9-2.031.

[FN305]. 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)).

[FN306]. Id. § 9-2.031A.

[FN307]. Id.

[FN308]. Id.
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Article

THE **RIGHT** TO **COUNSEL** FOR **INDIANS** **ACCUSED** OF **CRIME**: A TRIBAL AND CONGRESSIONAL IMPERATIVE

Barbara L. **Creel** [a1]

***318** Native American **Indians** [1] charged in tribal court criminal proceedings are not entitled to court appointed defense counsel. Under well-settled principles of tribal sovereignty, **Indian** tribes are not bound by Fifth Amendment due process guarantees or Sixth Amendment **right** to **counsel**. Instead, they are bound by the procedural protections established by Congress in the **Indian** Civil Rights Act of 1968. Under the **Indian** Civil Rights Act (ICRA), **Indian** defendants have the **right** to **counsel** at their own expense. This Article excavates the historical background of the lack of counsel in the tribal court arena and exposes the myriad problems that it presents for **Indians** and tribal sovereignty.

While an **Indian** has the right to defense counsel in federal criminal court proceedings, he does not in tribal court. This distinction makes a grave difference for access to justice for Americans **Indians** not only in tribal court, but also in state and federal courts. The Article provides in-depth analysis, background, and context necessary to understand the **right** to **counsel** under the ICRA and the U.S. Constitution. Addressing serious civil rights violations that negatively impact individual **Indians** and a tribe's right to formulate due process, this Article ultimately supports an unqualified right to defense counsel in tribal courts.

Defense counsel is an indispensable element of the adversary system without which justice would not "still be done." Tribes, however, were forced to embrace a splintered system of justice that required the adversary system but prohibited an adequate defense. The legacy of colonialism and the imposition of this fractured adversary system has had a devastating impact on the formation of tribal courts. This legacy requires tribal and congressional leaders to rethink the issue of defense counsel to ensure justice and fairness in tribal courts today. The Article concludes that tribes should endeavor to provide counsel to all indigent defendants appearing ***319** in tribal courts and calls upon Congress to fund the provision of counsel to reverse the legacy of colonialism and avoid serious human rights abuses.

"[L]awyers in criminal courts are necessities, not luxuries."

- Justice Hugo Black, 1963 [2]

INTRODUCTION

The full panoply of rights and due process protections afforded to criminal defendants in this country do not apply to Native American **Indian** defendants prosecuted in tribal court. [3] **Indians** routinely face criminal prosecution, incarceration, and receive prison terms--sometimes lengthy--all without the benefit of defense counsel. [4]

Tribal governments and, by extension, tribal courts are not bound by the Fifth Amendment due process guarantees, the Sixth Amendment **right** to **counsel**, or any of the Bill of Rights requirements. [5] Instead, tribes are required to follow the **Indian** Civil Rights Act of 1968 (ICRA). [6] The statutory protections established by Congress in ICRA apply only to **Indian** tribal governments. [7]

Under ICRA, an **Indian** has the **right** to **counsel** in a criminal proceeding in tribal court, but only "at his own expense." [8] The reality is that most American **Indians** cannot afford or find competent retained counsel ***320** to appear in tribal court. [9] This fact is often met with surprise by non-**Indian** lawyers and the general public. [10]

Few federal **Indian** law scholars have recognized the important differences of federal power over **crime** and punishment of **Indians**. Instead, they have collapsed the analysis of purported federal plenary power of **Indian** affairs in civil and criminal matters, without regard to the individual **Indian**. [11] They have failed to adequately decipher criminal law and the distinct impact that federal power has over the defenseless **Indian**. [12] **Indian** scholars and practitioners have also overlooked the fact that, whether absolute ***321** or qualified, a "**right** to **counsel**" arises from a foreign adversarial model based upon the retributive justice system. [13] The United States imposed this adversary system on tribes to displace tribal traditional justice based upon restorative principles. [14] The displacement occurred without concern for rights of the **accused**. [15]

This Article explores the role of and **right** to **counsel** for Native American defendants under the **Indian** Civil Rights Act and the U.S. Constitution. In doing so, the Article exposes the potential for serious human rights violations. The tensions present

in this issue negatively implicate not only the individual **Indian** defendant, but the tribe's right to define the nature and extent of internal tribal due process. [16]

An indigent **Indian** defendant's **right** to **counsel** in a tribal criminal case (whether appointed or retained) has become inextricably intertwined with tribal sovereignty. [17] In this context, tribal sovereignty means the right of tribes to determine their own internal court practices and procedures. [18] The idea of self-governance has become the right to not have required counsel as a matter of right. Tribes and tribal governing bodies viewed this issue as a sovereign prerogative that may or may not be funded, depending on fiscal and administrative responsibilities and resources. [19] Therefore, it is simply not acceptable to address the problem by announcing that **Indian** people deserve the same rights as a person coming before state or federal court. While such a stance might be a viable rallying point to ultimately fight for the right to indigent defense counsel in tribal courts, a sovereign tribe's right to define due process under the tribal internal system must also be acknowledged.

The role of defense counsel in tribal court and in tribal sovereignty must be examined, not only in response to the encroachment of tribal sovereignty by requirements of a "**right**" to **counsel** made by renewed congressional efforts, but also through the lens of tribal values and deeply held beliefs of what constitutes justice and fairness. Declining to provide counsel for defendants may be an act of tribal sovereignty, but it may come at the expense of the same sovereign power.

To understand the role of and **right** to **counsel** in tribal courts, it is important to examine the development of the doctrine in state and federal ***322** court as a matter of constitutional interpretation as well as the **Indian** Civil Rights Act. Only in understanding the differences can one understand the potential for serious civil rights violations that negatively impact an individual **Indian** defendant, tribal due process, and the public's view of tribal sovereignty.

The role of defense counsel and the concept of an **accused's** right to assistance of counsel developed from English common law and are now encompassed under the Fifth and Sixth Amendments to the U.S. Constitution. [20] Tribal courts, on the other hand, have a different relationship and history under the Constitution, but they are expected to have the same jurisprudence to be legitimate. [21] Despite this requirement, defense counsel in tribal courts (or the lack thereof) evolved from an elaborate struggle between tribal sovereignty and federal encroachment. [22] To understand the nature of the **right** to **counsel**, an examination of the **right** to **counsel** as it was presented to **Indians** and tribal courts from the American colonists is imperative.

Part I of this Article reviews the historic development of the **right** to **counsel** under the U.S. Constitution. This Part provides a comparative backdrop and illuminates the nature and impact of the disparities that exist between prosecutions of those facing charges in state or federal court and individual tribal members who face charges in tribal court. Part II excavates the historical antecedents to the prohibition against counsel in tribal court, which is rooted in the federal government's imposition of the adversary system and the creation of Courts of **Indian** Offenses. The history follows the tribes' subsequent acquiescence and adoption of the prohibition against counsel as a sovereign act intended to reject federal control and reassert control over their own legal systems. Part III shows the development of the **right** to **counsel** at the **Indian's** own expense under the **Indian** Civil Rights Act as compared to the Sixth Amendment right guaranteed for all **accused** under the Constitution. Part IV illuminates the serious problems for the United States, tribal governments, and the individual **Indian** based upon the separate and disparate treatment of tribal people when they are charged with **crimes** within their own legal systems. Failing to provide defense counsel in tribal court effectively bars access to justice for **Indians** in tribal, state, and federal courts. Finally, Part V calls upon tribal and congressional leaders to analyze the **right** to **counsel** as it currently exists and reconsider their respective positions. The Article proposes solutions that encompass and uphold tribal sovereignty while also protecting the Native American **Indian** in the **right** to **counsel** debate. Access to justice is achieved through the establishment and funding of indigent defense systems in adversarial tribal courts and support of the sovereign right to ***323** implement tribal justice systems that represents an alternative to prosecution and incarceration.

I. The Evolution of the Constitutional Right to Counsel as a Fundamental Right Afforded Criminal Defendants in American Courts

> "Originally, in England a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest."

--Justice George Sutherland, 1932 [23] The role of defense counsel in tribal court cannot be evaluated without an overview of the evolution of the right to counsel under the U.S. Constitution and American jurisprudence more generally. The right to assistance of counsel in criminal proceedings in American courts has gradually evolved, and it has eventually expanded to encompass the fundamental role that defense counsel plays in the adversarial system. Such an idea was grafted from the English justice system, but it took root and grew based upon the ideals of the American colonists. Under the U.S. Constitution, the nature of the right to counsel developed to embody a fundamental character in American law, despite the fact that the English common law did not support such a lofty ideal.

A. The Right to Counsel Under English Common Law and in the American Colonies

English common law severely limited an accused's right to consult with counsel at trial. [24] Only parties in civil actions and persons charged with misdemeanors or petty offenses were provided assistance of legal counsel. [25] Defendants charged with a felony or other serious offense, including those punishable by death, had no legal right to appear with counsel. [26] Those accused of felonies could seek to have counsel speak to legal questions only. [27] This legal system reflected the common law precept that ***324** in serious criminal matters, the defendant should not get away with something or avoid punishment just because he had the professional service of a skilled lawyer. [28]

Eventually, in 1695, Parliament carved out an exception to allow counsel for those accused of political crimes. [29] But it was not until 1836 that the practice of prohibiting access to counsel was abandoned and access to counsel was expanded to permit defense counsel for a defendant charged with a felony. [30]

Rejecting the English common law, the American colonies considered the right to counsel in criminal cases anew. [31] At least twelve of the thirteen colonies recognized a right to counsel, at minimum, in criminal prosecutions involving capital offenses or other serious crimes. [32] Within this formative milieu, the states adopted the federal constitutional right to counsel embodied in the Sixth Amendment. [33] James Madison proposed the current Sixth Amendment in 1789, and it passed both houses with little or no debate in 1791. [34] However, at this point, the Sixth Amendment only applied against the federal government and not the states. [35] In 1868, Congress passed the Fourteenth Amendment, to declare, inter alia, ***325** that "[no] state shall make or enforce any law which shall abridge the privileges or immunities" of U.S. citizens, and shall not "deny to any person . . . the equal protection of the laws." [36] The Fourteenth Amendment, thus, opened the door to judicial interpretation of the right to counsel as a fundamental human right, and extension of the Sixth Amendment right to counsel protections to state criminal defendants. [37]

B. The Nature of the Right to Counsel in State and Federal Courts "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

--Justice Hugo Black, 1963 [38] In a commanding line of cases that include Powell v. Alabama, [39] Johnson v. Zerbst, [40] and Gideon v. Wainwright, [41] the U.S. Supreme Court defined the Sixth Amendment **right** to **counsel** as the fundamental right to a fair trial. [42] While the Constitution guarantees a fair trial through the Due Process Clauses, [43] the basic elements of a fair trial in a criminal proceeding are defined in the Sixth Amendment, which includes 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 ***326** process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. [44]

Thus, the Constitution dictates that a fair trial is one in which evidence, subject to adversarial testing, is presented to an impartial tribunal for resolution of elements or issues defined in advance of the proceeding. [45] Certain safeguards are essential to criminal justice, [46] and the **right** to **counsel** is one of those safeguards.

The Supreme Court has construed the Counsel Clause to mean that in federal courts, counsel must be provided for defendants unable to employ counsel, unless the right is competently and intelligently waived. [47] Counsel's presence is essential because attorneys are the means through which all other rights of a person on trial are secured. [48] As the Supreme Court has repeatedly recognized, without counsel, the right to be heard would be meaningless:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with **crime**, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. [49]

In Powell v. Alabama, the Court dealt with a defendant's **right** to **counsel**. This was the infamous case of the "Scottsboro boys"--nine Black youths charged with capital rape charges in Alabama. [50] Specifically, the case involved ***327** an alleged gang rape of two White girls by nine Black teenagers. A trial of the boys, which began twelve days after their arrest and without adequate representation or preparation, resulted in capital convictions for all on trial. In that case, the Supreme Court unequivocally declared that "the right to the aid of consideration of counsel is of this fundamental character." [51] Powell was the first major case to address the meaning and extent of the Sixth Amendment right in criminal cases under the U.S. Constitution. [52] The Supreme Court's examination reveals an American tragedy, reversed only by the Court's affirmance of a due process the **right** to **counsel**.

While limited to the facts and circumstances of the case, [53] the Powell holding took on enormous meaning, prompting the Court to later comment that "its conclusions about the fundamental nature of the **right** to **counsel** are unmistakable." [54] Powell did not establish a rule, but as a practical matter, it began to be cited "as an automatic rule requiring counsel in every capital case" [55] at the state level.

In 1936, the Court again reaffirmed the fundamental nature of the **right** to **counsel** in another case. Relying on Powell, the Court stated:

> We concluded [in Powell] that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the **accused** to the aid of counsel in a criminal prosecution. [56]

Then, just two years later, the Supreme Court in Johnson v. Zerbst held that not only was there a right to retain counsel under the Sixth Amendment, but that in federal courts, an attorney must be appointed if the defendant could not afford one. In that case, the Court remarked:

> (The assistance of counsel) is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' [57]

***328** In a remarkable departure from this solid reasoning, the Supreme Court, in Betts v. Brady, [58] refused to extend the Sixth Amendment's guarantee of indigent defense counsel to those in the state courts. The Court decided that the federal right was not "made obligatory upon the states by the Fourteenth Amendment." [59]

However, in Gideon v. Wainwright, [60] the watershed case announcing a new constitutional rule, the **right** to **counsel** was extended to require court appointed counsel in state criminal prosecutions for felony charges. There, the high court proclaimed that counsel was a fundamental right, necessary for a fair trial. [61]

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with **crime** to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." [62]

The Court held that the appointment of counsel for an indigent criminal defendant was a "fundamental right, essential to a fair trial" [63] and that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires it in federal court. [64] The Gideon Court recognized that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." [65]

In 1972, nine years after Gideon v. Wainwright and four years after the enactment of ICRA, the Supreme Court extended the right to court appointed counsel to all persons, including Native Americans, facing the possibility of imprisonment in state or

federal court. [66] The **right** to **counsel** plays an important role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to ***329** accord defendants ample opportunity to meet the prosecution's case. [67] Thus, a just system cannot exist without the **right** to **counsel**. Because of the vital importance of assistance of counsel, the Supreme Court has held that, with certain exceptions, a person **accused** of a federal or state **crime** has the **right** to **counsel** appointed if retained counsel cannot be obtained. [68]

C. Effective Assistance of Counsel

The presence of a warm body who happens to be a lawyer is not enough to meet the demands of the Sixth Amendment, according to the Supreme Court in Strickland. [69] The Court in Strickland held, "the [C]onstitution's guarantee of appointment of counsel cannot be satisfied by mere formal appointment." [70] The Sixth Amendment's recognition of the right to assistance of defense counsel, including indigent defense counsel appointed by a court, envisions counsel playing a role that is critical to the adversarial system and its ability to produce just results. [71] An **accused** is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that a trial is fair. [72] For this reason, the Court has long recognized that the **right** to **counsel** is the right to effective assistance of counsel. [73] In Strickland v. Washington, the Supreme Court settled the debate regarding the proper standard to be utilized in evaluating ***330** effective assistance of counsel and formally recognized the critical role of defense counsel in criminal cases. [74]

Effective assistance of counsel is not simply a trial right. It also applies at the pretrial phase and especially during plea bargaining, when most cases are resolved. [75] In 2012, the Supreme Court decided two cases, which emphasized the importance of competent legal counsel in the plea bargaining process by informing defendants of plea offers and accurately advising a defendant of the risks and benefits of going to trial or admitting guilt. In Missouri v. Frye, the Court held that defense counsel has an affirmative duty to communicate formal offers from the prosecution and that defense counsel's failure to communicate a written plea offer to his client before it expires constitutes deficient performance. [76] The Court took this principle a step further in Lafler v. Cooper, finding ineffective assistance of counsel where a defendant was prejudiced by his counsel's defective advice that led him to reject a plea offer and go to trial. [77]

Thus, under the Sixth Amendment jurisprudence made applicable to all state and federal prosecutions, the constitutional guarantee of effective assistance of counsel applies to all critical stages of representation where the defendant cannot be presumed to make critical decisions without the sound advice of competent counsel. [78] This advice includes the counseling phase prior to trial, the trial itself, sentencing, and appeal. [79] Additionally, the nature of effective assistance of counsel and the critical role of defense counsel is still evolving. These recent cases clarify the scope of the Sixth Amendment and underscore the importance of defining "the duty and responsibilities of defense counsel" throughout the criminal proceeding.

II. The Right to Counsel in Tribal Court and the Myth of the Sovereign Prerogative

> "It is hardly necessary to say that the **right** to **counsel** being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."

--Justice George Sutherland, 1932 [80]

***331 A. Background: The Right To Counsel in Tribal Court Does Not Begin with the Indian Civil Rights Act, or Does It?**

As citizens of the United States, Native American **Indians** are entitled to constitutional protections, including the right to defense counsel when facing criminal prosecution in state or federal courts. However, the **Indian** defendant is without the benefit of those constitutional protections in tribal court where the U.S. Constitution has no application. [81] Thus, the landmark Supreme Court holdings of Powell, Gideon, Argersinger, and their progeny, guaranteeing the right to court appointed counsel for indigent defendants and protecting assistance of counsel at all critical stages in a criminal proceeding, simply do not apply to **Indians** in tribal court. [82]

But that is not the manifest injustice in this scenario. The real injustice lies in the fact that the federal government prohibited the presence of defense counsel in tribal courts from the beginning, when it first imposed the adversarial system on tribes, and this prohibition has persisted through time because it is misinterpreted as a sovereign right. To understand the full nature of this injustice and its development, it is necessary to review the sovereign relationship between tribes and the United States and to examine the history and formation of tribal courts under the influence and coercion of the federal government.

1. Tribal Inherent Power Pre-Dates Contact and the Constitution

Indian nations pre-existed the formation of the United States and the drafting of the U.S. Constitution. [83] It is axiomatic, then, that inherent tribal sovereignty predates the Constitution and the existence of the United States itself. [84] **Indian** law scholars have long recognized this principle. [85] Even the Supreme Court, which has never included an **Indian** law ***332** scholar among the distinguished jurists on the bench, has consistently acknowledged the existence of a separate tribal sovereignty. [86]

The Court's formal recognition of the extraconstitutionality status of tribal governments dates back to 1896, when the Supreme Court in Talton v. Mayes declared that tribal powers of self-government do not spring forth from the U.S. Constitution but from the inherent powers tribes enjoyed prior to colonization. [87] In Santa Clara Pueblo v. Martinez, [88] the seminal case announcing the limits of federal review of **Indian** civil rights, the Court propounded, "As separate sovereigns preexisting the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." [89] Thus, the U.S. Constitution and Bill of Rights do not apply to federally recognized **Indian** Tribes. [90] As sovereign political bodies, tribes possess inherent power to determine their own makeup and membership and to enact and enforce laws within their own boundaries of jurisdiction. [91] Thus, **Indian** tribes have "retained the right to try and punish individuals who transgress their laws." [92] The right originates not from the federal government, but from the tribes' inherent sovereignty.

After the formation of the Constitution, treaty making became the primary means of handling **Indian** affairs. [93] Treaties between the sovereigns were nation-to-nation agreements and included recognition of tribal power and authority to govern the community through local tribal values, norms, and justice on the lands. [94] Treaties negotiated between the tribes ***333** and the United States specified the jurisdictional boundaries and parameters for addressing unwanted behavior and peoples within the borders of reservation lands, in terms consistent with international diplomacy. [95] Such criminal justice provisions delineated the parties' power to punish wrongdoers based upon considerations of territory and citizenship or membership of the **accused** and the victim. [96]

A treaty with the Delaware Nation was the first agreement negotiated between the U.S. government and the **Indians**. It included the proviso that "neither party shall proceed to the infliction of punishments on the citizens of the other." [97] Thus, the United States and the Delaware Nation agreed to refrain from unilateral action to punish citizens of the other's nation "till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice. . . ." [98]

Treaty making became the basis for the primacy of the federal government in dealing with **Indian** affairs. [99] This practice followed that of the Dutch, English, and Spanish governments in their relationships with indigenous tribes in present day North America and continued until 1871. [100] In that year, the House of Representatives successfully included a provision in the **Indian** Appropriations Act to end formal acknowledgement or recognition ***334** of **Indian** nations by the United States. [101] The end of treaty making did not, however, end congressional efforts to secure agreements with tribes, which were then ratified by statute. [102]

2. The **Indian** Trade and Intercourse Acts and General **Crimes** Act Dealt with Punishment and Process

Overlapping with its treaty-making powers, Congress dealt with **Indian** **crime** and punishment through a series of Trade and Intercourse Acts from 1790 to the late 1800s. [103] Passed to effectuate movement of non-**Indian** traders throughout the territories by establishing licensing regulations and to protect tribal lands secured by treaty, [104] the Acts were revised to define criminal offenses and applicable sentences. They also defined the jurisdiction over **Indians** and non-**Indians** for such **crime** and punishment. [105] The temporary Trade and Intercourse Acts became permanent with the passage of the Trade and Intercourse Act of 1834, which provided the basis of the General **Crimes** Act or the **Indian** Country **Crimes** Act. [106]

The General **Crimes** Act expressly granted federal jurisdiction over interracial **crimes** (**crimes** involving **Indian** and non-**Indian** victims or perpetrators) committed in **Indian** Country. However, it included two important exceptions. [107] First, the Act did not apply to "any offence committed ***335** by one **Indian** against another, within any **Indian** boundary." [108] It thus respected inherent tribal authority over internal affairs. Second, the Act specifically exempted from federal prosecution any "**Indian** committing any offense in **Indian** country, who has been punished by the local law of the tribe," or any case where exclusive jurisdiction had already been secured by an **Indian** tribe. [109] These provisions implicitly supported inherent sovereignty and upheld tribal control and authority over **crime** and punishment on reservations or within defined **Indian** territory, especially in dealing with tribal members and internal affairs. [110] Those coming before the traditional tribal system would be afforded the protections and procedures provided for by tribal custom, which constituted the "local law of the tribe." [111]

3. Major **Crimes** Act Displaced Tribal Authority over **Crime** and Punishment on **Indian** Lands

The idea of respect for tribal sovereign authority over criminal matters persisted until Congress seized control over serious **crimes** on reservations with the passage of the Major **Crimes** Act in 1885. [112] Prior to 1885, the federal government had the power to prosecute only those cases permitted under the Trade and Intercourse Acts or rightfully pursuant to the specific terms of applicable treaties. [113] Tribes handled offenses on the reservation under their own internal law and custom, exercising inherent authority to resolve disputes and to sanction those transgressing community norms. [114]

***336** Prior to the Major **Crimes** Act, statute and treaty provisions interacted to uphold internal tribal sovereign authority, as exemplified in Ex parte Kan-gi-shun-ca. [115] In that case, the United States arrested and prosecuted a member of the Great Sioux Nation, Kan-gi-shun-ca, in federal territorial court for the murder of another Sioux **Indian**, Sin-ta-ga-le-Scka, on the Great Sioux reservation in the Dakota Territory. [116] The federal court found Kan-gi-shun-ca guilty and sentenced him to death. [117] Kan-gi-shun-ca, though, had already been brought to justice for the same **crime** under Sioux tradition. [118] Later, the congressional enactment imposed the adversary system in **Indian** Country and supplanted this tribal traditional restorative justice. [119]

Upon a petition for the writ of habeas corpus, the Supreme Court reversed the federal conviction in 1883, holding that the federal government lacked jurisdictional authority over the **crime** because it was committed against another **Indian** within **Indian** country. Thus, the prosecution was exempt under the treaties and the applicable federal law regarding criminal jurisdiction in **Indian** territory. [120] In Ex parte Kan-gi-shun-ca, the Supreme Court upheld the limits of federal jurisdiction and protected tribal sovereign authority to punish offenses within tribal boundaries in light of the absence of an explicit congressional measure to the contrary. [121]

***337** In direct reaction to the Supreme Court's decision, Congress quickly passed the Major **Crimes** Act. [122] This Act requires prosecution of **Indians** **accused** of certain **crimes** on reservations in federal court, and fundamentally changed the criminal justice regime for **Indians** from that point on. [123] The Major **Crimes** Act intruded into the otherwise exclusive criminal jurisdiction of **Indian** tribes, previously circumscribed by geography, tradition, and culture. [124] Thus, Congress extended federal jurisdiction to **crimes** committed by **Indians** on **Indian** land with the explicit purpose that many an **Indian** would "be civilized a great deal sooner by being put under [[federal criminal] laws and taught to regard life and the personal property of others." [125] Under the Major **Crimes** Act, tribal people **accused** of committing serious **crimes** on the reservation defined by the statute are bound to the federal courts for prosecution and punishment, according to the laws and U.S. Constitution, including laws governing the **right** to **counsel**. [126] Once in federal court, the rights of an **Indian** defendant track those of all non-**Indian** defendants facing federal criminal prosecution. [127]

However, tribal justice systems on reservations suffered. With the Major **Crimes** Act, the United States began a wholesale displacement of tribal governments, governing internal affairs regarding **crime** and punishment in a tribe's own community. This displacement continues with the **Indian** Civil Rights Act of 1968 and the more recent Tribal Law and Order ***338** Act of 2010. [128] The Major **Crimes** Act, thus, began the imposition of the U.S. Constitution over the **Indian** in federal court, and the concomitant history of **right** to **counsel** included the **Indian** defendant.

The development of assistance of counsel as a right, however, did not follow in the tribal courts. Tribal courts, as formal systems distinct from internal tribal ways of addressing unwanted behavior, represent **Indian** subjugation in the nineteenth century and the imposition of the adversary criminal justice system on **Indians**. First, this happened by the creation of an **Indian** police force and the Courts of **Indian** Offenses. [129] Tribal police and tribal courts have never been "tribal." [130] Rather the courts and police force were sponsored first by the U.S. Army and later came under the **Indian** Affairs Department sponsorship and control. [131] After the Courts of **Indian** Offenses, tribes formed their own tribal courts as judicial entities under the **Indian** Reorganization Act. Under the control of the United States policy, tribal courts began with the presupposition that attorneys were not necessary.

B. Imposition of Courts of Indian Offenses and Prohibition Against Attorneys

Congress exercised authority over **Indian** jurisdiction through the Trade and Intercourse Acts as well as through treaty making. The War Department, Department of the Interior, and the Bureau of **Indian** Affairs also had a hand in dealing with the "**Indian** Problem." [132]

In the later part of the 1800s, in addition to congressional encroachment on criminal jurisdiction by the Major **Crimes** Act, tribes suffered the imposition of the adversarial court system to displace or supplant indigenous justice systems by the Department of Interior. The first court system, ***339** Courts of **Indian** Offenses, began administratively by the Commissioner of **Indian** Affairs under a broad but tenuous line of authority.

In 1824, the Secretary of War established the Bureau of **Indian** Affairs (BIA) and housed it in the War Department, the agency responsible for the operation of the United States Army. [133] Congress established the Office of the Commissioner of **Indian** Affairs in 1832. [134] **Indian** affairs remained under the War Department for twenty-five years, until 1849, when the federal government transferred the BIA to the newly created Department of the Interior (DOI). [135] The statute entrusted the management of all **Indian** affairs and all matters arising out of the **Indian** relations to the Commissioner and the BIA. [136] Presumably then, Congress and the executive delegated federal power over **Indian** affairs to the Interior and the BIA. The Department and the Bureau, without any express power or authority, created the Courts of **Indian** Offenses.

Courts of **Indian** Offenses operated to establish and impose an adversarial justice system. The courts were the brainchild of Secretary of the Interior Henry Moore Teller, a former Colorado Senator, appointed to the post on April 17, 1882. [137] Shortly after his appointment, Teller alerted his Commissioner of **Indian** Affairs, Hiram Price, of "a great hindrance to the civilization of the **Indians**," involving **Indian** tribal ceremony and custom. [138] Teller's December 3, 1882, letter to Price called for active measures to put an end to "the old heathenish dances, such as the sun-dance, scalp-dance," and other feasts and dances of the same character on reservations. [139] Describing what he viewed as "wicked conduct" he also despaired of the state of **Indian** marriage relations, the influence of medicine men, and lamented on the need to instill private property ownership as a societal value. [140] Teller opined, "It will be extremely difficult to accomplish much towards the civilization of the **Indians** while these adverse influences are allowed to exist," [141] and he set out to abolish Native practice, custom, and rites through a new court system:

> I therefore suggest whether it is not practicable to formulate certain rules for the government of the **Indians** on the reservations that shall restrict and ultimately abolish the practices I ***340** have mentioned. I am not ignorant of the difficulties that will be encountered in this effort; yet I believe in all tribes there will be found many **Indians** who will aid the Government in its efforts to abolish rites and customs so injurious to the **Indians** and so contrary to the civilization that they earnestly desire. [142]

In response to this request, Commissioner Price obligingly proposed the Court of **Indian** Offenses to "well accomplish the ultimate abolishment of the evil practices," and promulgated a set of rules for the courts. [143] Expediently approved by Secretary Teller on April 10, 1883, the rules organized courts and procedure and established a criminal and civil code. [144] The Courts of **Indian** Offenses sprung forth within the span of four months, as imagined by the **Indian** Commissioner, with the mission to keep **Indians** from being **Indian**. At the same time, the Courts of **Indian** Offenses introduced and mandated the adversary system on the reservation for criminal matters.

As blatant federal instrumentalities, one would assume that the Courts of **Indian** Offenses provided a **right** to **counsel** at least consistent with the federal Constitution and provide for Sixth Amendment jurisprudence. [145] In fact, the opposite was true.

Courts of Indian Offenses prohibited the appearance of attorneys.[146] The Indian agent selected or recruited judges from among the reservation Indians.[147] When none could be recruited, the Indian police force served as the judge.[148] Under rules and list of crimes defined by the Office of the Indian Affairs, the courts operated simply to achieve their mission as "[n]o lawyers perplex the judges."[149] Unencumbered by defense attorneys, "[n]o guilty party ever escape[d] punishment on account of a technicality of the law."[150]

The Indian agent or the selected judge imposed standard punishments, including imprisonment, withholding of rations, forced labor, and fines.[151] In 1892, the rules authorized imprisonment of "up to five days imprisonment for failure to do road work and up to six months for medicine men convicted a second time of interfering with the civilization programs."[152] Thus, the reservation Indian was placed in jeopardy without ***341** a defense, which was consistent with the purpose of the reservation and the court system to educate and civilize the Indian.[153]

The "civilization" of the Indian occurred for almost eighty years without any regard for the rights of the accused. The Code of Federal Regulations prohibited attorneys in tribal court until 1961.[154] Moreover, Congress never authorized the Courts of Indian Offenses and did not authorize payment for the Indian judges until 1888.[155] These early Federal Indian Courts enjoyed, "at best a shaky legal foundation" based upon this oppressive beginning.[156] Nonetheless, the Commissioner and local Indian agents established Courts of Indian Offenses in every Indian agency that they themselves saw fit, with the exception of the Five Civilized Tribes, the Indians of New York, the Osage, the Pueblos, and the Eastern Cherokees.[157] By the 1900s, Courts of Indian Offenses operated in two-thirds of the Indian agencies,[158] and they persist to operate as the law and order court on more than twenty reservations or Indian trust lands to this day.[159]

The adversary system was a foreign system imposed on tribes. Further, it was designed by the federal government to bring about the "civilization" of the Indian.[160] The laws designed to stop "heathenish practices" were met with as little opposition as possible because attorneys were prohibited in the Courts of Indian Offenses.[161] Although judges and police were recruited from among the tribal people, there was incentive to follow the system put in place by the BIA and the Indian agent.[162] The Indian ***342** who resisted was met with more punishment.[163] There was no need for a right to assistance of counsel in one's defense The prohibition against counsel began with the Courts of Indian Offenses and took hold as an important part of the tribal system. Thus, there existed no preexisting "right to counsel" in the new tribal courts created by the U.S. government. Tribes extended and continued this precedent of "no right to counsel" in the courts formed by their own tribal governments.

C. Indian Reorganization Act Courts Continued the Prohibition of Attorneys

During the advent of tribal self-determination as a federal policy, Congress initiated the Indian Reorganization Act of 1934 (IRA). The IRA represented the new federal Indian policy designed to reverse the damaging effects of the termination of Indian reservations and devastating divestiture of lands under the Indian General Allotment Act of 1887, also known as the Dawes Act.[164] The IRA sought to repair poverty, but it shattered Indian governments, and lowered morale caused by allotment by reaffirming inherent tribal sovereignty and supporting tribal self-government.[165] Returning to the principles of tribal self-determination and self-governance, which had characterized the pre-Dawes Act era, Congress halted further allotments and authorized Indian tribes to incorporate and adopt tribal constitutions as a way to reestablish formal tribal internal self-government.[166] Pursuant to this recognition, tribes formed constitutional governments and organized tribal courts as models or replicas of state and ***343** federal courts.[167] Any tribe adopting or enacting a tribal constitution had to seek and acquire

BIA approval to do so. [168] Tribes enacting a model constitution commonly adopted a "Law and Order Code" promulgated by the BIA, as BIA approval was also required of tribal codes, ordinances, and resolutions passed under the constitution. [169] Each constitution adopted under the IRA contained a provision allowing the Secretary of Interior to "rescind [any] ordinance or resolution for any cause. . . ." [170]

Pervasive federal control over tribal governance was achieved through this statutorily required review and approval. The BIA's practice of formulating model constitutions, codes, and resolutions for passage by tribes created a BIA stranglehold over tribal actions. [171] Tribes, formulating and adopting formal governments under the **Indian** Reorganization Act, adopted standard constitutions prepared by the BIA "patterned after the United States Constitution rather than tribal custom." [172] Emerging tribal courts followed the preexisting pattern for Courts of **Indian** Offenses. The pattern was derived from the Code of Federal Regulations that tribunals shall enforce the pertinent U.S. statutes, the rulings of the DOI, and any ordinance or custom of a tribe not prohibited by federal legislation. [173] Tribal constitutions adopted under the **Indian** Reorganization Act of 1934 included the prohibition against attorneys, which began in the Interior Department's Courts of **Indian** Offenses and was codified in the Code of Federal Regulations. [174]

***344** Secretary of Interior Stewart Udall finally amended the regulations in 1961 to allow the presence of professional lawyers in the courts of **Indian** offenses, based upon the concern that the prohibition might be unconstitutional. The reversal did not affect the more than fifty independent tribal governments which prohibited professional attorneys in their own tribal courts. [175] Each of those tribes was free to amend tribal constitutions to allow or regulate attorneys in tribal courts. [176] Again, tribes did so only with the approval of the Secretary of the Interior. [177]

III. The Indian Civil Rights Act of 1968 and the Right to Counsel Debate

During the civil rights era, Congress embarked upon an investigation into the civil rights of Native American **Indians** on and off reservation lands. [178] In 1961, the Senate Subcommittee on Constitutional Rights, headed by Senator Sam Ervin of North Carolina initiated a series of hearings and field investigations following an independent report [179] and a DOI report [180] examining civil rights problems of individual **Indians**. Congress struggled with the question of how **Indian** tribal governments relate to the U.S. Constitution and the protections it afforded all citizens. [181] The Congressional investigation reflected the widespread concern that "the preservation of tribal rights and cultures has seemed in some areas to come in conflict with the constitutional rights of individual **Indians** as American citizens." [182] At issue was the fact that "**Indian** Tribes are not subject to the federal constitutional limitations of the Bill of Rights." [183] Senator Ervin's ostensible objectives were to investigate the civil rights gap for tribal people due to the inapplicability of the Bill of Rights to tribal governments. [184]

***345** Congressional leaders sought to correct what it viewed as a double standard of justice. [185] As a result Congress enacted the **Indian** Civil Rights Act of 1968 (ICRA) [186] to afford the "individual **Indian** protection of his rights as a citizen in the face of tribal practices." [187] The Act established ten enumerated rights "constitutional Rights," mimicking the Bill of Rights with some important exceptions. [188]

***346** ICRA did not prohibit the establishment of religion, provide for an automatic right to a jury trial, or require the appointment of counsel for indigents in criminal cases. [189] The restraint in these areas reflected the need to recognize tribal sovereign authority in due process and government. [190] The final version of the Act reflected a compromise between the original

intention to bring tribes fully under the umbrella of the U.S. Constitution and the recognition of independent tribal sovereignty. Thus, the ICRA may have "secured for the American **Indian** the broad constitutional rights afforded to other Americans" to "protect individual **Indians** from arbitrary and unjust actions of tribal governments," [191] but it did so in word only. Without counsel to understand the protections afforded and object to transgressions, any such arbitrary and unjust actions of the government remain unchecked. While Congress explicitly granted habeas corpus in federal court to remedy violations under ICRA, [192] it is available only in criminal proceedings and rendered virtually meaningless without the benefit of counsel. [193]

A. The Indian Right to Counsel "At His Own Expense"

Ultimately concerned with the individual rights of **Indians** in their own tribal court systems, Congress enacted the ICRA, but failed to require the right to court appointed counsel. The right to defense counsel provided by tribal expense was opposed by the BIA for several reasons, including that such a provision would be costly to the BIA and that defense counsel would create an imbalance as tribes are not usually represented and judges are not always legally trained. [194]

In addition, the Courts of **Indian** Offenses operated to prohibit attorneys under the Code of Federal Regulations, which set the standard for the ***347** BIA and tribal governments to follow. [195] The DOI and BIA officials argued that the presence of attorneys in tribal court would unnecessarily complicate an otherwise simple process and because of attorneys' superior knowledge, would likely control proceedings in tribal court. [196] As a compromise, the DOI introduced a substitute bill which provided **Indians** the **right** to **counsel**, but only at their own expense. [197]

Importantly, ICRA included for the first time a limit on tribal sentencing authority. In no event could tribes impose any penalty or punishment greater than imprisonment for term of 6 months or a fine of $500, or both. [198] Thus, the anemic view of a **right** to **counsel** partially reflected the norm in state court for misdemeanor charges in 1968.

While the debate regarding tribal members' **right** to **counsel** under the ICRA ensued, the indigent defendant's **right** to **counsel** in state and federal court was still unfolding. Senator Ervin began his investigative hearings in 1961, before Gideon had been decided. [199] During the seven years of Senate hearings from 1961 and continuing after the passage of ICRA in 1968, the Supreme Court had not yet extended the **right** to **counsel** to defendants facing jail time for misdemeanor offenses. At that time, the Sixth Amendment guaranteed a criminal defendant the **right** to **counsel** in federal court, [200] but that right was not made applicable to state court trials until 1963; even then, it was only for felonies, not misdemeanors. [201] Thus, with regard to the **right** to **counsel** debate of the time, ICRA's provision of a **right** to **counsel** at the **Indian's** own expense was equivalent to the **right** to **counsel** in the states. Tribes were in synchronicity with the state and federal judicial interpretation of the late 1960s and early 1970s.

Tribal sentencing authority was limited to a maximum of six months imprisonment, the equivalent of a misdemeanor in state court. [202] The states were not required to provide counsel for misdemeanor offenses at ***348** ICRA's passage in 1968, so why should tribes be so required? [203] Not until nine years after Gideon and four years after the passage of the ICRA, did the Supreme Court extended the **right** to **counsel** to all defendants, including indigent persons, facing jail time for offenses in state and federal courts. [204]

Unfortunately, after the expansion of the **right** to **counsel** in state and federal courts, Congress undertook no subsequent review of an **Indian** tribal defendant's access to an adequate defense in tribal court. Instead, in 1986, Congress expanded sentencing authority of the ICRA from six months to one year without reviewing, assessing or altering the **right** to **counsel** or the resources

for tribal defense. [205] Congress acted to increase tribal sentencing power in reaction to the Supreme Court's denigration of tribal criminal justice and failed to apply the civil rights lens of the original law. [206] It was not until 2010, that Congress reconsidered the **right** to **counsel** for tribal court defendants, and then only to increase tribal court sentencing authority to a total of nine years. [207]

B. The Tribal Law and Order Act of 2010 Requires Appointed Counsel to Impose a Sentence Greater Than One Year

Congress enacted the Tribal Law and Order Act to allow, inter alia, an increase in tribal sentencing jurisdiction under ICRA in certain cases, provided that tribes ensure certain individual rights to an **Indian** criminal defendant, including the **right** to **counsel** as guaranteed by the U.S. Constitution. [208] The 2010 amendments to tribal sentencing authority demonstrate ***349** Congress's intent to provide enumerated rights and standards to defendants facing a term of imprisonment of more than one year. [209]

The Act expanded tribal sentencing authority and installed procedural safeguards to address lengthy tribal incarceration without the aid of legally trained defense counsel. No tribe may "impose . . . any penalty or punishment greater than imprisonment for a term of one year or a fine of $5000, or both." [210] However, the new law increases sentencing authority for those certain cases, provided that the tribe seeking to enhance sentencing authority secures certain rights of defendants. [211] A tribal court may impose a "term of imprisonment greater than 1 year but not to exceed 3 years," if the defendant has been previously convicted of the same or comparable offense in any jurisdiction in the United States and would be subject to imprisonment of greater than one year if prosecuted in state or federal courts. Specifically, the Act increases the maximum sentence under the ICRA from one year to three years and increases the maximum fine to fifteen thousand dollars. The expanded sentencing authority applies only when a defendant has been provided "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution." ***350** [212] In addition to affording indigent defense counsel the right to effective assistance, tribes seeking to implement the greater sentencing scheme under the TLOA must afford a whole host of additional rights and safeguards not enumerated in ICRA, including a legally trained judge to preside over the criminal proceeding; [213] public access to tribal laws, rules of evidence, rules of criminal procedure, including rules governing recusal of judges; [214] and a record of tribal criminal proceedings. [215]

However, as explained above, the Fifth Amendment due process guarantees and the Sixth Amendment **right** to **counsel** have no application to tribal court proceedings. The statutory provisions of ICRA provide the sole protections available for **Indian** defendants in tribal courts. Though the 2010 Act tried to increase protections for **Indians**, it failed to do so because it did not address the underlying issue that there is no **right** to **counsel**. At present, for the vast majority of prosecutions in tribal court, **Indians** have only the **right** to **counsel** at their own expense, the equivalent of the English statutory rule after 1836 and the pre-Gideon case law in the United States.

When passed in 1968, ICRA continued in the vein of federal attempts to mold tribal systems to conform to the adversary system found in the Western-Anglo criminal justice model. Consistent with the Bill of Rights, the ICRA afforded **Indians** guarantees of free exercise of religion, freedom of speech, freedom of press, peaceable assembly, [216] and other protections. It also gave **Indians** the criminal procedural protections known to defendants in state and federal courts through due process, [217] including a prohibition on double jeopardy and self-incrimination [218] and the right to a jury trial for offenses punishable by jail. [219]

While the **Indian** version of guaranteed civil rights mirrored the Bill of Rights, the notable exception, the **right** to **counsel**, is an especially egregious oversight, especially in light of the purpose of ICRA. [220] The ***351** irony is that Congress investigated civil rights abuses in tribal courts because the courts did not include the constitutional guarantees afforded by the Fifth and Sixth

Amendments, imposed a set of rights, and then failed to include the one factor that could protect those rights: the fundamental human right of access to defense counsel. [221]

IV. Failure in Access to Justice in United States Courts Based on the Lack of Counsel for Criminal Defendants in Tribal Courts

The absence of a right to free defense counsel in tribal court harms the **Indian** in state and federal court. The **Indian** defendant suffers dual investigation and double jeopardy punishment, uncounseled guilty pleas, and waiver of his ICRA rights in tribal court only to face extensive collateral consequences and direct use of his prior uncounseled convictions by the state and federal court systems that allegedly uphold the **right** to **counsel** as fundamental.

The dual sovereignty doctrine provides for prosecution in both federal and tribal courts for the same offense. Because **Indian** tribes are separate sovereigns with inherent powers of self-government predating the existence of the United States, the Supreme Court has upheld dual prosecution for the same offense. Under these principles, the Double Jeopardy Clause is not violated, and the **Indian** may legally be punished twice: once in tribal court and in federal court for the same offense. [222] Additionally, **Indians** face harsher punishment in federal court because of their status as **Indians** under the Major **Crimes** Act, and the courts have consistently held that this treatment does not violate the Equal Protection Clause. [223] Federal prosecutions can follow tribal prosecution for the same offense, and the ***352** federal investigation may overlap with that of a tribe's. [224] The fact that prosecution in tribal court may proceed without defense counsel also impacts an **Indian** defendant's Fifth and Sixth Amendment guarantees under the U.S. Constitution in a subsequent prosecution in federal court. Under differing tribal laws, the **right** to **counsel** as defined by internal tribal law may trigger whether the Sixth or Fifth Amendment **right** to **counsel** attaches in a federal prosecution. [225] This allows for overreaching in federal criminal investigations. [226] When tribal prosecution is initiated under ICRA, a defendant is not entitled to counsel under the Fifth or Sixth Amendments. [227] Under subsequent federal investigation and prosecution, an **Indian** enjoys those constitutionally protected rights. However, federal prosecutions ignore federal constitutional protections by initiating investigation in tribal court and using that information and evidence in the subsequent federal proceeding. [228]

Additionally, prior tribal court convictions are routinely used against **Indian** defendants in the federal sentencing scheme. The federal sentencing guidelines provide for a favored upward departure based upon prior tribal court convictions. [229] For example, in United States v. Romero, [230] the U.S. District Court for the District of Colorado relied on an allegedly unlawful prior tribal court conviction as the basis for lengthening a tribal member's subsequent federal sentence by almost three years. The court cited to the prior uncounseled conviction to grant the U.S. Attorney's motion for an upward departure. The court upwardly departed from the applicable Criminal History Category II to Category VI to increase the sentence by thirty months. [231] The federal consequences of a prior tribal uncounseled conviction are irrefragable and include impeachment in future proceedings. [232]

More disturbing, however, is the federal court's use of a prior uncounseled tribal court conviction as an element of a federal offense. [233] Under 18 U.S.C. § 117, a federal habitual offender statute, it is a felony offense for a person who has had two or more prior domestic assault convictions ***353** to commit a domestic assault within **Indian** country. The law provides that state tribal or federal prior convictions are eligible. Two Federal Courts of Appeals have held that uncounseled tribal convictions, resulting in incarceration, can be used as a predicate offense under the habitual offender statute. [234]

The issues presented on appeal before the Eighth Circuit in United States v. Cavanaugh consisted of whether the Fifth or Sixth Amendments to the U.S. Constitution precluded the use of these prior tribal-court misdemeanor convictions as predicate

convictions to establish the habitual-offender elements of § 117. Cavanaugh's prior convictions resulted in actual incarceration that, pursuant to Gideon, [235] would have been a constitutional violation of his Sixth Amendment right to appointed counsel had the convictions originated in a state or federal court.

The district court, recognizing that the Sixth Amendment imposes no duty on **Indian** tribes to provide counsel for indigent defendants, noted that prior convictions were valid at their inception and that the prior terms of incarceration were not in violation of the U.S. Constitution, tribal law, or the **Indian** Civil Rights Act. [236] The lower court, nevertheless, held that the uncounseled convictions were infirm for the purpose of proving the habitual-offender, predicate conviction elements of the § 117 offense in these subsequent federal court proceedings. [237]

On appeal, the Eighth Circuit reversed, finding the Sixth Amendment inapplicable to the analysis. [238] In doing so, the court recognized an inconsistency in several cases dealing with the use of arguably infirm prior judgments to establish guilt, trigger a sentencing enhancement, or to determine a sentence for a subsequent offense. [239] Ultimately, the Eighth Circuit dispensed with any **Indian** law analysis and held that use of such convictions did not violate the federal defendant's **right** to **counsel** because the federal constitutional right to appointed counsel did not apply against a tribe. Thus, absent any "allegations of irregularities or claims of actual innocence" concerning the tribal convictions, the court failed to preclude the use of the convictions to establish the predicates for the § 117 charge. [240] In a subsequent case, the Tenth Circuit held the same. [241]

***354** The spurious reasoning of the circuit courts failed to take into account two undeniable aspects of **Indian** law: (1) the rights **Indians** enjoy as U.S. citizens under the United States Constitution differ from their civil right under ICRA, and (2) tribal sovereign power in **crime** and punishment in **Indian** country by federal law and policy. These two aspects taken together require federal judges to uphold the U.S. Constitution. While the judicial reasoning turned on the fact that the Sixth Amendment to the U.S. Constitution did not apply in tribal court, the decision should have recognized something more obvious: namely, that ICRA does not apply in federal court. [242]

In the American criminal justice system, judges sit as an impartial observer and are sworn to uphold the Constitution and the law. Thus, federal judges reviewing criminal convictions, either to enhance sentencing or as an essential element of a **crime** under 18 U.S.C. § 117, are required to uphold the over two hundred years of Anglo-American jurisprudence interpreted and developed by the Supreme Court and applied by lower federal courts. The Supreme Court has held that the **right** to **counsel** is guaranteed to all persons **accused** of **crimes** in state and federal courts. [243] While it is true that those decisions do not apply in tribal court, they most certainly do apply in federal courts. The Tenth and Eighth Circuit Courts of Appeal shirked their responsibilities to uphold the Constitution when applied to Native Americans in federal court. The failure to do so produced the wrong result.

The Major **Crimes** Act subjects an **Indian** defendant to federal prosecution for serious **crimes**, but an **Indian** is also subject to harsher treatment in state court as a result of a conviction in tribal court. An **Indian** defendant's uncounseled conviction in tribal court also induces further penalties or disabilities under state laws. [244] Currently, both Kansas [245] and Oregon [246] allow for prior tribal convictions, without regard to the appointment of counsel, to be included in an offender's criminal history during a subsequent ***355** state court sentencing. Thus, **Indians** face an increased possibility of harsher punishment based on uncounseled tribal convictions.

While it is true that lack of counsel in tribal court is not an infirmity of tribal courts so as much it is the direct result of ICRA, it cannot be consistent with U.S. jurisprudence regarding the fundamental **right** to **counsel** to use these convictions in federal court against an **Indian**. The result is that **Indians** are left defenseless in tribal country, and then their federal rights are violated in the federal court system, when it imports the foreign judgment where the U.S. Constitution has no application.

It is ridiculous and contrary to notions of access to justice that such uncounseled tribal court convictions are relied upon in federal court in the name of tribal sovereignty. It is equally repugnant that the Assistant U.S. Attorneys seek to distort their own bedrock principle of the **right** to **counsel**, guaranteed by the Constitution, in the name of protecting **Indian** people or communities. The line drawn in federal court between individual freedom and tribal sovereignty has evolved into a perverted view of the U.S. Constitution as applied only to **Indians**.

V. Reconsideration of the Right to Counsel in Tribal Court: A Tribal and Congressional Imperative

Tribes should explore the **right** to **counsel** in tribal court, looking at access to justice and the assistance of counsel as a "fundamental right" in the adversary system. Tribal traditional systems of justice included fairness; no less should be afforded under those systems that emerged as a result of pervasive federal control or adopted by a tribe. For congressional and executive leaders, the role of the government in fashioning tribal courts and the historical prohibition of a defense should be reviewed as a whole to determine the response to **crime** and punishment. For federal judges who sit to review underlying tribal court convictions, it is simply unacceptable to dispense with any analysis regarding the uncounseled tribal court convictions and simply point to the fact that the **Indian** Civil Rights Act does not require counsel. Justice and fairness in the American judicial court system requires more in each of these considerations. It is imperative that tribal and congressional leaders reconsider their positions and take up the mantel to provide true access to justice through the establishment of indigent defense systems in adversarial tribal courts or support the sovereign right to a suitable alternative. Tribes operating an adversarial court system should be required to provide defense counsel, and Congress should help provide resources to establish this element critical to a functioning justice system. Those tribes implementing non-adversarial justice systems based on custom and tradition should be allowed to develop without federal interference. In either case, the tribal actions should be respected in foreign courts.

*356 A. Tribal Imperative

Though the **Indian** Civil Rights Act did not prescribe a tribal right to indigent defense, neither does it prohibit the right to defense counsel. [247] Tribes are free to provide counsel as a matter of practice, providing fairness and justice beyond the limited protections required by statute or the U.S. Constitution. [248] Citing lack of resources and cost, tribes have rejected defense counsel's role in the adversary model of justice. Importantly, tribes did not appreciate being expected to provide those rights determined to be fundamental by an entity outside of and not subject to tribal authority. [249] Tribal sovereign authority was undercut and truncated with the implementation of the adversarial court in the first instance. [250] Once a tribe agreed to accept the adversary system and engage in prosecutions that mimic the state and federal criminal justice system, defense counsel became fundamental to justice. Without indigent defense counsel, tribes have only a hobbled adversary system of injustice.

Viewing assistance of counsel through the lens of the foreign criminal justice system as a fundamental human right is imperative, especially when that foreign system has displaced traditional justice. Tribes have the opportunity to reconsider the impact on tribal people and the tribal community of the failure to allow or provide a necessary part of the justice system they ***357** adopted. It is important to reconsider the background and history that led to a prohibition of professional attorneys under tribal courts and a right to retained counsel under ICRA.

Tribes should reevaluate whether defense counsel is consistent with their justice plan. This means an indigent defense is essential to the adversary system of justice. If tribes have implemented the system, indigent defense counsel is a necessary and proper requirement for a fair and just system. On the other hand, tribes do not have to implement the adversary system in all matters. The sovereign prerogative allows tribes to induce justice and fairness through their own systems. [251] Should tribes have another

system, like a restorative justice system based upon native tribal tradition or custom or other principles, there would be no need to provide defense counsel. Instead, tribes should review and utilize their own methods for restoring the tribe or tribal members to balance. Any arguments in favor of providing counsel must be responsive to the needs of tribes, tribal people, and take into account the expense.

Addressing the cost of an indigent defense system is important. One suggestion is to provide tribal defense counsel through a pro bono requirement. [252] Attorneys admitted to the tribal bar, such as the Navajo Nation bar, are required to accept criminal defense cases and represent clients pro bono. [253] However, in testimony before the **Indian** Law and Order Commission, Chairman Troy Eid asked the Navajo Nation Public Defender to comment on this pro bono requirement as a practical solution for tribes. Kathleen Bowman, the Director of the Navajo Nation Office of the Public Defender, testified as to the very real problems of effective assistance of counsel under the tribal requirement. She maintained that she often has to employ other counsel because of a conflict. [254] Unfortunately, outside counsel often do not have the requisite training or advocacy skill necessary for a competent criminal defense because the practice of criminal law and **Indian** law are highly specialized. No matter how competent an attorney ***358** may be in his or her field, there is no guarantee of transferable skills to provide competent assistance in a criminal proceeding. [255]

Furthermore, this practice is only available to tribes with an extensive tribal bar membership and would not be helpful for the vast majority of tribes. For smaller tribes, in the absence of a dedicated defense system, there simply would not be enough attorneys to meet the needs of the tribal criminal court. [256] Such a requirement reflects the 1880s view of defense counsel in American courts. [257] During that time, judges expected that lawyers would represent defendants in criminal cases as a professional obligation or duty and did not consider payment as necessary.

Instead of a blanket requirement for all members of the bar, a second option is for a tribe to create a specialized defense bar. Those attorneys with requisite expertise and experience could be kept in a pool and receive appointment by the court in criminal cases. Short of providing defense counsel for every member who comes before the court, tribes could appoint counsel for those facing charges with a risk of penalty of incarceration or simply reserve appointed counsel for the most serious offenses. Under these systems, however, the question of payment for the attorney still exists. In addition, criminal defense attorneys require payment funds for travel, adequate investigation, experts, fees for subpoenas, and other costs to the attorney incurred as part of the vigorous defense. In the absence of a fully functioning volunteer criminal defense bar, the question remains: Who pays?

To solve this problem, tribes should look to Congress. Tribes operating an Anglo-American adversary system should insist on training opportunities and funding for court personnel as essential to a just system. Practitioners, whether lawyers or lay advocates, should insist on access to justice for all. **Indian** community members deserve access to an attorney and appointment of free legal counsel for those who cannot afford an attorney. Training, funding, and an independent tribal defense organization are all requirements of a just system, [258] and all are perspicuously encompassed under the federal trust responsibility.

*359 B. Congressional Imperative

Congress and the executive have a responsibility to review the federal role in shaping tribal justice and to navigate a solution to address the historical deficiency in tribal defense. The first responsibility of federal leadership is to engage in tribal consultation on the issue. Congress has yet to undertake serious consultation on the **right** to **counsel**; it should do so in order to assess the needs and rights of the tribe and the needs and rights of the individual **Indian** who can be prosecuted in any tribal court for criminal offenses within that tribe's jurisdiction. [259]

The nation-to-nation relationship requires consultation between the sovereign prerogative and the nation. This question of who pays for defense counsel arose in the 1961 hearings, and discussion led to the decision not to require defense counsel in tribal court. [260] The answer that Congress ignored at that time should be embraced today. Congress should fund indigent defense systems for tribal courts, if chosen by the tribes. Unambiguously encompassed under the federal tribal trust responsibility, [261] Congress has funded training and access to personnel for tribal courts in the form of judges, clerks, prosecutors, police, probation officers, and other positions. [262] Justice requires, at the very least, parity in any funds allocated for tribal prosecutors and defense counsel. [263]

Parity in funding between the prosecution and defense is also essential. The adversary system places the burden of proof on the prosecution to prove its case beyond a reasonable doubt. The system presupposes that the ***360** two opposing sides will have access to information, including the investigation and evidence culled by the government. In addition, the defense must have access to its own independent research, investigation, and experts to refute the evidence of guilt offered by the prosecution. [264] A study to determine the resources made available to tribal court systems, including funding for tribal police, judges, personnel, and jails over the years, without the requisite funding for a defense bar, is an essential starting point. A portion of past funding should be allocated to those tribes who seek to implement indigent defense system as a necessary part of their tribal court system.

In addition to consultation, congressional, and executive leaders should endeavor to create and staff a tribal liaison to serve between the Office of the Federal Public Defender (FPD) and **Indian** tribes. The FPD is the office responsible for indigent defense in federal courts under 18 U.S.C. § 3006a. The court appoints the FPD to represent **Indians** facing federal criminal charges under the Major **Crimes** Act, yet there is no communication or coordination between tribal leaders and the federal courts. There is a tribal liaison in the Office of the United States Attorney designed to serve the prosecution, yet no one is provided to assist the tribe and **Indian** community in defense. [265]

Justice, fairness, and judicial economy in the federal system require the creation of a dual and successive prosecution policy to establish guidelines for prosecutorial discretion in determining where to bring a prosecution. [266] Through implementation of a "Petite" policy, tribes and the federal government can enter into a true partnership. This would authorize the two sovereigns to decide and determine at the outset whether a particular case will be prosecuted in federal court and allow **Indians** to have access to the full panoply of rights afforded them under the Constitution. The support and furtherance of tribal sovereignty is met with a proviso that tribal traditional values and practices can be considered in the federal sentencing phase. In the alternative, forgoing federal prosecution and providing the tribe the resources to investigate and prosecute an individual under the tribal adversary system can allow for creative approach to dealing ***361** with the **Indian** defendant at sentencing. The tribal liaison and a tribal "Petite" policy can work in tandem toward the worthy goals of justice and fairness in both systems.

CONCLUSION

The lack of defense counsel in tribal courts arises from the historical imposition of a foreign system that displaced sovereign forms of inherent justice. As such, the issue is inextricably entangled with tribal sovereignty and the sovereign right to determine due process. These issues that tribes see as a sovereign prerogative have broad, and sometimes devastating, impacts on individual **Indians** and their civil rights. The magnitude of the challenges has yet to be met by the measure of our actions to solve them. Sovereignty is what sovereignty does. Acting out of sovereign right to withhold an adequate defense impacts tribal members' individual rights and a tribe's overall sovereign goals in the tribal court and beyond. Exploring this issue leads to specialized factors, the balancing of interests, and resource allocation issues of impoverished nations. Revisiting the role of counsel in tribal courts provides an opportunity to strengthen sovereign interests by protecting distinct rights.

Tribes have an obligation to review the role of counsel in tribal courts and history of the right in the adversary system. With the history at hand, tribes now have an opportunity to undertake a review of their own values regarding defense, imprisonment, and fairness in light of the federal government's prohibition of counsel and use of prior uncounseled convictions. In light of the trust responsibility and the fundamental human rights at stake, Congress should undertake to directly fund tribal defense systems.

Footnotes

a1 Enrolled member of the Pueblo of Jemez, a federally-recognized Tribe in New Mexico; Associate Professor of Law and Co-Director of the Southwest **Indian** Law Clinic, University of New Mexico School of Law; J.D., University of New Mexico School of Law; B.A., University of Colorado, Boulder. I would like to thank Christine Zuni Cruz and Margaret Montoya for encouraging me to speak with an authentic voice on this topic; Antoinette Sedillo Lopez and Andrea Seielstad for believing in my work when everyone else was discouraging; and especially thank Adam Turk for helping me bring it home. Thank you to Leah Stevens-Block for research and technical assistance, and to my editors at the Michigan Journal of Race & Law, especially Dorie Chang and Elizabeth Lamoste for their lovely guidance, hard work, and inspiring dedication.

1 This Article uses the terms “Native American **Indian**” and “**Indian**” interchangeably to refer to indigenous tribal people who inhabit the present-day United States. While it is true the term “**Indian**” was never accurate, it has become a term of art from historical use in Federal **Indian** law, history, and statutes.

2 Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (“That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.”)

3 U.S. Const. amends. IV-VI, VIII, and XIV. As explained below in Parts II-III, inherent tribal sovereignty predates the Constitution and the existence of the United States itself. Thus, the Constitution and Bill of Rights do not apply to federally recognized tribes. See Talton v. Mayes, 163 U.S. 376, 383-84 (1896) (holding that the Fifth Amendment grand jury requirement did not apply to tribes, as the U.S. Constitution had no application to **Indian** tribes).

4 See, e.g., Romero v. Goodrich, 480 F.App'x 489 (10th Cir. 2012) (challenging a tribal court order of imprisonment for eight years without counsel); see also Bustamante v. Valenzuela, 715 F. Supp. 2d 960 (D. Ariz. 2010) (upholding an eighteen-month prison term based upon a guilty plea without counsel).

5 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”); Talton, 163 U.S. at 384.

6 **Indian** Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1970).

7 The ICRA provides that “[n]o **Indian** tribe in exercising powers of self-government shall” abridge a number of enumerated rights aimed at protecting individuals facing criminal prosecution in tribal court. Id. § 1302.

8 Prior to the Tribal Law and Order Act amendments, the statute read: “No **Indian** tribe exercising powers of self-government shall--... (6) deny to any person in a criminal proceeding the right to a speedy and public trial, 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 at his own expense to have the assistance of counsel for his defense.” Id. As shown below, this provision was enacted prior to Gideon and Argersinger.

9 See infra Part III.

10 See, e.g., Gary Fields, Defense Reservations: Native Americans on Trial Often Go Without Counsel; Quirk of Federal Law Leaves a Justice Gap in Trial Court System, Wall St. J., Feb. 1, 2007, at A1. Quoting a former federal public defender, Fields described what he saw as an absence of fundamental constitutional safeguards: “The Constitution acts as a floor beneath you that no state can go below...

For Native Americans, that floor doesn't exist." Id. (quoting Popko). Understanding the reasoning and basic tenants of **Indian** law that surround this issue, proved to be more difficult for the reporter. Fields wrote, "[T]he right of defendants to legal counsel is guaranteed by the Constitution. But due to a little-known quirk in federal law, Native Americans aren't assured this protection. That's because under U.S. law, **Indian** Tribes are considered sovereign nations and are not subject to all privileges afforded by the Bill of Rights." Id.

11 Some **Indian** law scholars object to the discussion of **Indian** civil rights as misplaced and separate the positions into two groups: tribal rights and individual rights. See, e.g., Frank Pommersheim, Braid of Feathers: American **Indian** Law and Contemporary Tribal Life 73 (1995) (noting that tribal leaders must balance respect for individual rights with the possibility of civil rights suits "grind[ing] tribal activity to a halt"); Carole Goldberg, Individual Rights and Tribal Revitalization, 35 Ariz. St. L.J. 889, 937 (2003) (viewing "the injection of Anglo-American [individual] rights as a threat to tribal revitalization"). A number of **Indian** law scholars addressed civil rights issues after the passage of the **Indian** Civil Rights Act, including one article on the **right** to **counsel**. See Robert T. Coulter, Federal Law and **Indian** Tribal Law: The **Right** to **Counsel** and the 1968 **Indian** Bill of Rights, 3 Colum. Surv. Hum. Rts. L. 49 (1970-71). There is, however, little else written on the subject of the **right** to **counsel**. See, e.g., Nell Jessup Newton, Tribal Court Praxis: One Year in the Life of Twenty **Indian** Tribal Courts, 22 Am. **Indian** L. Rev. 285 (1998). Some scholars fear that discussing individual rights with outsiders allows opponents of tribal sovereignty to attack tribal justice systems. See, e.g., Mathew Fletcher, **Indian** Courts and Fundamental Fairness, 84 U. Colo. L. Rev. 59 (2003) (citing to attacks on tribal ability to administer justice in the Violence Against Women Act reauthorization hearings); Violence Against Women Reauthorization Act of 2011: Hearing on S. 1925 Before the S. Comm. on the Judiciary, 112th Cong. 40-41, 51-55 (2012) (reporting minority views of senators arguing against expansion of tribal court jurisdiction); Violence Against Women Reauthorization Act of 2012: Hearing on H.R. 4970 Before the H. Comm. On the Judiciary, 112th Cong. 58-59 (2012) (reporting House majority views that tribal courts will not provide adequate due process to nonmembers).

12 This Article is the second in a series of articles that explores the heretofore nonexistent defense perspective in criminal law in **Indian** country. See Barbara **Creel**, Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing, 46 U.S.F. L. Rev. 37 (2011) (rejecting a proposal to count tribal court convictions in federal sentencing as a way to promote or respect tribal sovereignty). This Article provides the history, context, and analysis necessary to question the role of and right to defense counsel in tribal court. A forthcoming article will explore the **right** to **counsel** as a due process requirement and an examination of the writ of habeas corpus review as the mechanism of justice to protect **Indian** civil rights.

13 As described in Part II. B infra, the Bureau of **Indian** Affairs ("BIA") created Courts of **Indian** Offenses ("CIO courts") to impose the adversary system on reservations in an effort to bring law and order where federal officials thought none existed.

14 The displacement included the imposition of CIO courts and the Major **Crimes** Act as explained in Part II. B infra.

15 The evolution of the **right** to **counsel** in American courts described in Part I, infra, did not include **Indian** country. Part II describes the background and history of the prohibition of counsel in tribal courts.

16 See infra Parts III and IV.

17 Id.

18 Id.

19 Id.

20 See U.S. Const. amends. V-VI.

21 See, e.g., Oliphant v. Suquamish **Indian** Tribe, 435 U.S. 191, 211-12 (1978) (suggesting that tribal courts that look like state and federal courts are legitimate).

22 See infra Parts II and III.

23 Powell v. Alabama, 287 U.S. 45, 60 (1932) (describing the practice in English law of denying counsel to those **accused** of the most serious **crimes**).

24 William M. Beaney, The **Right** To **Counsel** In American Courts 8-9 (1955); Powell, 287 U.S. at 61.

25 Beaney, supra note 24, at 8-9; Powell, 287 U.S. at 61.

26 Bruce R. Jacob, Memories of and Reflections about Gideon v. Wainwright, 33 Stetson L. Rev. 181, 186 n.8 (2004) (citing 5 William Blackstone *355 ("It is a settled rule at common law, that no counsel shall be allowed to a prisoner, upon his trial upon the general issue, in any capital **crime**, unless some point of law shall arise proper to be debated.") and 3 Sir Edward Coke, Institutes *137 ("Where any person is indicted of Treason or Felony, and pleadeth to the Treason or Felony, not guilty... it is holden that the party in that case shall have no councell")); Powell, 287 U.S. at 63 n.1.

27 Jacob, supra note 26, at 186.

28 Id.

29 Treason Act, 1695, 7 & 8 Will 3, c.3, § 1 (Eng.). The Treason Act permitted not only the right to retain counsel but required the court to appoint counsel, not exceeding two, upon the request of the **accused**. Id. For more on the background of English law in this area, see Francis H. Heller, The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development (1951).

30 Powell, 287 U.S. at 61 (citing 1 Thomas M. Cooley, Constitutional Limitations 698 (8th ed. 1927)).

31 See Beaney, supra note 24, at 25 (noting that "[t]he **right** to **counsel** in the American colonies deviated from the English right in certain respects"). In the colonies, a statutory provision was generally the rule, as opposed to judicial discretion under the English rules. In the colonies that only permitted the privilege of retaining counsel, however, the colonial courts seemed to provide no greater protection than the English courts. Id.

32 Powell, 287 U.S. at 61 (citing 1 Thomas M. Cooley, Constitutional Limitations 698 (8th ed. 1927)).

33 Comment, An Historical Argument for the **Right** to **Counsel** During Police Interrogation, 73 Yale L. J. 1000, 1031 (1964) [hereinafter An Historical Argument] ("Madison proposed the present sixth amendment in the House on July 2, 1789, and it passed both Houses almost without debate. It was ratified in late 1791.").

34 Id. See also Beaney, supra note 24, at 27 (examining that "the data available indicate that no comment or controversy accompanied Congressional proposal of the Sixth Amendment to the Constitution, and the proceedings at the three state ratifying conventions in which counsel provisions were demanded reveal nothing concerning the contemporary meanings of the **right** to **counsel**").

35 In Barron v. Baltimore, 32 U.S. 243 (1833), the Court held that the Bill of Rights constrained only the power of the federal government. ("[The first ten] amendments contain no expression indicating an intention to apply them to State governments. This court cannot so apply them."). Interestingly, it has been noted that "[f]rom 1791 until 1932 state and federal courts saw practically no cases on the **right** to **counsel**." An Historical Argument, supra note 33, at 1031.

36 U.S. Const. amend. XIV, § 1.

37 See Gideon v. Wainwright, 372 U.S. 335 (1963) (extending the right to a court-appointed attorney to those defendants facing felony charges in state court who cannot afford to retain counsel); Johnson v. Zerbst, 304 U.S. 458 (1938) (establishing the Sixth Amendment **right** to **counsel**); Powell, 287 U.S. 45 (upholding the **right** to **counsel** under the Due Process Clause of the Fourteenth Amendment when the state provides a statutory **right** to **counsel**); see also Scott v. Illinois, 440 U.S. 367, 374 (1977) (holding that the Sixth and Fourteenth Amendments require that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to the assistance of appointed counsel in his defense); Argersinger v. Hamlin, 407 U.S. 25 (1972) (establishing the **right** to **counsel** for misdemeanors).

38 Gideon, 372 U.S. at 344. For an interesting review of Gideon, see Jacob, supra note 26.

39 287 U.S. at 64-65.

40 304 U.S. at 458.

41 372 U.S. at 344.

42 Strickland v. Washington, 466 U.S. 668, 686 (1984).

43 "No person shall be held to answer for a capital, or otherwise infamous **crime**, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V; see also U.S. Const. amend. XIV, § 1.

44 U.S. Const. amend. VI.

45 Strickland, 466 U.S. at 685.

46 Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942).

47 Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).

48 United States v. Cronic, 466 U.S. 648, 653 (1984).

49 Powell v. Alabama, 287 U.S. 68-69 (1932).

50 See generally Hollace Ransdell, Report on the Scottboro, Ala. Case (1931), available at http:// law2.umkc.edu/faculty/projects/FTrials/scottsboro/Scottsbororeport.pdf.

51 Gideon, 372 U.S. at 342-43 (internal quotation marks omitted) (citing Powell, 287 U.S. at 68).

52 287 U.S. at 65.

53 Id.

54 Gideon, 372 U.S. at 343 (citing Powell, 287 U.S. at 68).

55 Jacob, supra note 26, at 191.

56 Grosjean v. Am. Press Co., 297 U.S. 233, 243-44 (1936).

57 Johnson v. Zerbst, 304 U.S. 458, 462 (1938); see also Smith v. O'Grady, 312 U.S. 329 (1941); Avery v. Alabama, 308 U.S. 444 (1940).

58 316 U.S. 455 (1942).

59 Id. at 465.

60 372 U.S. 335 (1963).

61 Id. at 344.

62 Id.

63 Id. at 335.

64 Id. (overruling Betts, 316 U.S. 455).

65 Id. at 344.

66 Argersinger v. Hamlin, 407 U.S. 25 (1972).

67 See Adams v. United States ex rel. McCann, 317 U.S. 269 (1942); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

68 Argersinger, 407 U.S. at 37; Gideon, 372 U.S. at 344; Johnson v. Zerbst, 304 U.S. 458, 462 (1938). In Scott v. Illinois, 440 U.S. 367, 374 (1979) the Supreme Court limited the **right** to **counsel** in trial misdemeanor to those cases where actual imprisonment was imposed (finding "that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense"). For example, another exception is that the Sixth Amendment **right** to **counsel** does not apply to prison disciplinary hearings. Wolff v. McDonnell, 418 U.S. 539 (1974).

69 466 U.S. 668 (1984).

70 Avery v. Alabama, 308 U.S. 444, 446 (1940).

71 Strickland, 466 U.S. at 685.

72 Id.

73 See McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955) ("The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard."); Glasser v. United States, 315 U.S. 60, 69-70 (1942); Avery, 308 U.S. at 446 ("The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."); Powell v. Alabama, 287 U.S. 45, 58 (1932) (citing state court cases on effective assistance and time to investigate and prepare for trial) (repeating the language of the district court to ultimately uphold a denial of the **right** to **counsel** in a capital case the Supreme Court opined, "The record indicates that the appearance [of counsel] was rather pro forma than zealous and active... Under the circumstances disclosed, we hold that defendants were not accorded the **right** of **counsel** in any substantial sense.").

74 466 U.S. at 668.

75 Lafler v. Cooper, No. 10-209, slip op. at 11 (U.S. 2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); see also Missouri v. Frye, No. 10-444, slip op. at 7 (U.S. 2012) ("[O]urs 'is for the most part, a system of pleas, not trials,'... it is insufficient to simply point to fair trials as a backdrop that inoculates any errors in the pre-trial process.").

76 Frye, No. 10-444, slip op. at 9.

77 Lafler, No. 10-209, slip op. at 4-11.

78 Id. at 6.

79 Id.

80 Powell v. Alabama, 287 U.S. 45, 53 (1932).

81 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978); Talton v. Mayes, 163 U.S. 376, 383 (1896).

82 Id.

83 See, e.g., Talton, 163 U.S. at 383 ("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.").

84 Id.

85 See, e.g., Andrea M. Seielstad, The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect Of American **Indian** Sovereignty, 37 Tulsa L. Rev. 661, 683 (2002) ("A

fundamental attribute of the sovereignty of American **Indian** nations, including many of its theoretical premises under federal law, is that the concept of tribal sovereignty predates the ratification of the Constitution and formation of the United States."); Ann E. Tweedy, Connecting the Dots Between the Constitution, the Marshall Trilogy and the United States v. Lara: Notes Toward A Blueprint For the Next Legislative Restoration of Tribal Sovereignty, 42 U. Mich. J.L. Reform 651, 654 (2009) ("It was European contact and the eventual establishment of the United States, at least under the Supreme Court's understanding of tribal sovereignty, that disrupted and fundamentally changed the numerous ancient systems of tribal governance.").

86 See, e.g., Santa Clara Pueblo, 436 U.S. at 55 ("**Indian** tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government.") (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832)); Talton, 163 U.S. at 383 (holding that the U.S. Constitution had no application to **Indian** tribes); Worcester, 31 U.S. (6 Pet.) at 519 ("The **Indian** nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial"); see also Sandra Day O'Connor, Lessons from the Third Sovereign: **Indian** Tribal Courts, 33 Tulsa L.J. 1, 1 (1997) ("Today, in the United States, we have three types of sovereign entities--the Federal government, the States, and the **Indian** tribes.").

87 163 U.S. at 385.

88 436 U.S. at 56.

89 Id.

90 See Talton, 163 U.S. at 384 (holding that the Fifth Amendment did not operate upon the powers of local self-government enjoyed by tribes). The holding in Talton has been extended to other provisions of the Bill of Rights as well as to the Fourteenth Amendment. See Santa Clara Pueblo, 436 U.S. at 56 n.7.

91 See Talton, 163 U.S. at 384 (citing Kagama v. United States, 118 U.S. 375, 381 (1886)).

92 United States v. Bird, 287 F.3d 709, 713 n.5 (8th Cir. 2002) (citing United States v. Wheeler, 435 U.S. 313, 323 (1978)).

93 Felix Cohen, Handbook of Federal **Indian** Law 33-67 (1942). The United States negotiated a treaty with nearly every tribe in the nation.

94 For a detailed account of the complexities of criminal jurisdiction over **Indians**, including the historical development of jurisdiction and examination of early treaty arrangements, see Robert N. Clinton, Development of Criminal Jurisdiction over **Indian** Lands: The Historical Perspective, 17 Ariz. L. Rev. 951, 952-60 (1975) [hereinafter Clinton, Development]; this article, along with his second article, Robert N. Clinton, Criminal Jurisdiction Over **Indian** Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503 (1976), remains the most comprehensive guide on the history of the subject.

95 See Clinton, Development, supra note 94, at 953-60 (1975) (citing treaties).

96 Id. at 953.

97 Treaty with the Delawares, Sept. 17, 1778, art. IV, 7 Stat. 14.

98 The entire article provides:
For the better security of the peace and friendship now entered into by the contracting parties, against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice: The mode of such trials to be hereafter fixed by the wise men of the United States in Congress assembled, with the assistance of such deputies of the Delaware nation, as may be appointed to act in concert with them in adjusting this matter to their mutual liking. And it is further agreed between the parties aforesaid, that neither shall entertain or give countenance to the enemies of the other, or protect in their respective states, criminal fugitives, servants or slaves, but the same to apprehend, and secure and deliver to the State or States, to which such enemies, criminals, servants or slaves respectively belong.

Id.

99 Clinton, Development, supra note 94, at 953, 957-58.

100 Id.

101 Act of Mar. 3, 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2006)). "[N]o **Indian** nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such **Indian** nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." Id.

102 Clinton, Development, supra note 94, at 958; see, e.g., Ex parte Kan-gi-shun-ca (Ex parte Crow Dog), 109 U.S. 556, 564-70 (1883) (describing the February 28, 1877, agreement with the Sioux **Indians** that was enacted after treaty-making ended). In United States v. Sioux Nation of **Indians**, 448 U.S. 371 (1980), the Supreme Court found that the 1877 Act effected an unconstitutional taking of tribal property set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868, requiring payment of just compensation for the Black Hills.

103 Clinton, Development, supra note 94, at 958-60.

104 The first of these acts, the Act to Regulate Trade and Intercourse with the **Indians**, prohibited any U.S. citizen or inhabitant from entering **Indian** lands and provided for federal prosecution of any who committed **crime** or trespass against "the person or property of any peaceable and friendly **Indian** or **Indians**." Act of July 22, 1790, ch. 33, §§ 5-6, 1 Stat. 137, 138.

105 See, e.g., Act of May 19, 1796, ch. 30, §§ 4-6, 1 Stat. 469, 470-73 (rendering it a **crime** to settle on or survey any lands secured by treaty for the **Indians**, and requiring the death for murder of **Indians** in **Indian** Country by non-**Indians**.); Act of Mar. 3, 1817, ch. 92, §§ 1-2, 3 Stat. 383 (providing for a federal forum for **crimes** committed by an **Indian** in **Indian** country for the first time, with exceptions).

106 Clinton, Development, supra note 94, at 959-60; see Act of June 30, 1834, ch. 161, 4 Stat. 729. The General **Crimes** Act is also known as the **Indian** Country **Crimes** Act. See **Creel**, supra note 12, at 59 n.124.

107 The General **Crimes** Act provides in its entirety:
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.
18 U.S.C. § 1152 (2006).

108 Id.; see also Act of Mar. 3, 1817, Ch. 92 § 1, 3 Stat. 383, 383.

109 18 U.S.C. § 1152. The deferential reference to tribal law in the federal statutes implicitly supports a respect for tribal court power over members and even over non-members within the tribal territory.

110 See e.g., Ex parte Kan-gi-shun-ca (Ex parte Crow Dog), 109 U.S. 556, 571-72 (1883) (acknowledging the federal law and policy that supported tribal authority over its own internal affairs).

111 See 18 U.S.C. § 1152.

112 Major **Crimes** Act, Pub. L. No. 80-772, 62 Stat. 683 (codified at 18 U.S.C. § 1153 (2006)).

113 See Ex parte Kan-gi-shun-ca, 109 U.S. at 571-72.

114 Though historically underappreciated by the non-**Indian** observer, **Indian** societies developed their own methods and internal societal structures to deter unwanted behavior, to restore a member after a wrong, and to otherwise maintain law and order. These systems incorporated tribal values and acknowledged the role of the individual within the whole community. For descriptions of differing world views, laws, customs and traditions, see, for example, Christine Zuni Cruz, Strengthening What Remains, 7 Kan. J. L. & Pub. Pol'y 17 (describing the operation of native and non-native societies from different world views and in the context of law and order). See also Sidney L. Harring, Crow Dog's Case: American **Indian** Sovereignty, Tribal Law, and United States Law in the Nineteenth Century 10 n.22 (1994) (citing ten full-length monographs or dissertations on the traditional law of **Indian** people); Philmer Bluehouse & James W. Zion, Hózhqqjí Naat' áanii: The Navajo Justice and Harmony Ceremony, 10 Meditation Q. 327 (1993) (describing the Navajo peacemaking process of applying internal law and principles); Ada Pecos Melton, Indigenous Justice Systems and Tribal Society, 79 Judicature 126 (1995) (describing how indigenous law and justice is incorporated into everyday life and is based upon restorative principles of healing).

115 109 U.S. at 571-72.

116 Id. at 557-58.

117 Id. at 557.

118 Under the Brule tradition, the tribal council met to resolve the murder, ordered an end to the disturbance, and arranged a peaceful reconciliation of the families involved through offered or accepted gifts. Harring, supra note 114, at 104-05 (explaining that the restorative process applied by the tribe in the case was just “one of a number of conflict resolution mechanisms available to the Sioux,” and was “used only after the most serious of tribal disturbances”). For the murder, Kan-gi-shun-ca's family was ordered under tribal law to compensate Spotted Tail's family for the loss by offering “$600 in cash, eight horses, and one blanket”). Id. at 1.

119 See Major **Crimes** Act, 18 U.S.C. § 1153 (2006).

120 Ex parte Kan-gi-shun-ca, 109 U.S. at 571-72.

121 Id.

122 Francis Paul Prucha, Documents of United States **Indian** Policy 166 (1975).

123 The Major **Crimes** Act provides in its main part:
Any **Indian** who commits against the person or property of another **Indian** or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the **Indian** country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
18 U.S.C. § 1153.

124 Over time, the Major **Crimes** Act has been expanded to encompass more than twenty enumerated felony offenses. Specific offenses under the Major **Crimes** Act include murder, manslaughter, kidnapping, maiming, felony child sex abuse, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against a person under sixteen, arson, burglary, robbery, and felony theft. Id.

125 Keeble v. United States, 412 U.S. 205, 211-12 (1978) (quoting 16 Cong. Rec. 936 (1886) (remarks of Rep. Cutcheon)).

126 See 18 U.S.C. § 1153.

127 Id. § 3242 (“All **Indians** committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within **Indian** country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.”).

128 See 25 U.S.C.A. §§ 1301-1341 (West 2012) (imposing a version of the Bill of Rights on **Indian** tribal governments); id. § 1302 (expanding tribal court sentencing authority contingent upon specific requirements of the tribal court, including the right to appointed counsel, in the Tribal Law and Order Act of 2010); see also 18 U.S.C. § 1162 (2006) (granting unilateral authority to states to assume criminal and civil jurisdiction over reservations within their boundaries).

129 William T. Hagan, **Indian** Police and Judges: Experiments in Acculturation and Control 107-08 (1966). The **Indian** police force and tribal courts were both components of the assimilation plan. Id.

130 See Sydney Harring, Native American **Crime** in the United States, in **Indians** and Criminal Justice 98-102 (Laurence French ed. 1982).

131 Id. at 101.

132 The term "**Indian** problem," found throughout the discussion of **Indian** law and policy, is used without specific definition to identify a variety of issues (usually from the colonizer's point of view) in dealing with the indigenous peoples inhabiting the lands that would later become the United States. See, e.g., Northwest Band of Shoshone **Indians** v. United States, 324 U.S. 335, 355 (1945) (Jackson, J., concurring) (opining that "[t]he **Indian** problem is essentially a sociological problem, not a legal one"); The **Indian** Problem, H. R. Misc. Doc. No. 149 (1924); see also Robert Hays, Editorializing "The **Indian** Problem": The New York Times on Native Americans, 1860-1900 1 (describing the forty years of news stories in the paper addressing what was commonly referred to as the "**Indian** problem").

133 See Superintendency of **Indian** Affairs, H.R. Doc. No. 146, at 6 (1824).

134 25 U.S.C. §§ 1-2 (2006).

135 Act of Mar. 3, 1849, ch. 108, § 5, 9 Stat. 395, 395.

136 25 U.S.C. § 1a (2006).

137 Appointed by President Chester Arthur, Teller served from 1882 to 85. The dates of Teller's nomination and confirmation are unknown. Past Secretaries of the Department of Interior, U.S. Department of Interior, http:// www.doi.gov/whoweare/past_secretaries.cfmteller (last visited Apr. 1, 2013).

138 Prucha, supra note 122, at 160; see also Hagan, supra note 129, at 107-08.

139 Prucha, supra note 122, at 159.

140 Prucha, supra note 122, at 160; Hagan, supra note 129, at 108-09.

141 Prucha, supra note 122, at 160.

142 Id.

143 Hagan, supra note 129, at 109.

144 Id.

145 See supra Part I.B.

146 25 C.F.R. § 11.9 (1958) (repealed by 26 Fed. Reg. 4360-61 (May 19, 1961)).

147 Hagan, supra note 129, at 109.

148 Id. at 111.

149 Id. at 120.

150 Id.

151 Id. at 120-21.

152 Id.

153 See United States v. Clapox, 35 F. 575 (D. Or. 1888). In Clapox, Judge Deady described and defended the courts as a necessary tool to educate and civilize the **Indian**:
These "courts of **Indian** offenses" are not the constitutional courts provided for in section 1, art 3, Const., which congress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to who it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the **Indians** are gather 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.
Id. at 577.

154 See 25 C.F.R. § 11.9 (1958) (repealed by 26 Fed. Reg. 4360-61 (May 19, 1961)).

155 Hagan, supra note 129, at 110-11.

156 Id. at 120.

157 Id. at 109.

158 Id. at 109.

159 See 25 C.F.R. § 11.100 (2012) (listing twenty-one such courts currently in existence).

160 See United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

161 See Hagan supra note 129, at 120-21; Prucha, supra note 122, at 159; supra notes 146-152.

162 Clapox, 35 F. 575; Hagan, supra note 129, at 108-09; Prucha, supra note 122, at 160. Since the goal was to educate and civilize the **Indian**, the incentives were to comply by foregoing involvement in "**crimes**" of being a practicing **Indian**, among other things, or submit to prosecution and punishment in Courts of **Indian** Offenses. See also **Creel**, supra note 12, at 63.

163 See, e.g., Clapox, 35 F. 575. In that case, an **Indian** woman was arrested, without written warrant by the **Indian** police on the Umatilla reservation on a charge of adultery, and committed to the **Indian** jail for trial before the Court of **Indian** Offenses; she was rescued by other **Indians**. Those involved in her rescue were prosecuted for a **crime** against the United States. Id. Upholding the prosecution Judge Deady found:
But, pleasantry aside, and in conclusion, the act with which these defendants are charged is in flagrant opposition to the authority of the United States on this reservation, and directly subversive of this laudable effort to accustom and educate these **Indians** in the habit and knowledge of self-government. It is therefore appropriate and needful that the power and name of the government of the United States should be invoked to restrain and punish them.
Id. at 579.

164 Dawes Act, 25 U.S.C. § 331 (1928). The Act had the same coercive intent to civilize and assimilate **Indians** as the Courts of **Indian** Offenses of the same time period. Divesture of **Indian** reservation lands was promised and protected by treaty. The Act allotted tribal landholdings and opened lands reserved for **Indians** by treaty or other documents to non-**Indian** settlement, cutting tribal lands from approximately 138 million to 48 million acres. Cohen, supra note 93, at 216.

165 Cohen, supra note 93, at 395-98. See generally Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L.J. 1, 10-18, 63-67 (1995).

166 25 U.S.C. §§ 476-77 (2006).

167 Some tribes had written constitutions, which were adopted prior to the Reorganization Act. Cohen, supra note 93, at 128.

168 25 U.S.C. § 476. Section 16 of the Act provides:
Any **Indian** tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult **Indians** residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

169 Coulter, supra note 11, at 55.

170 William A. Brophy & Sophie D. Aberle, The **Indian**: America's Unfinished Business 70-71 (1966).

171 Coulter, supra note 11, at 54-56.

172 Kenneth R. Philp, John Collier's Crusade for **Indian** Reform 1920-1954 164 (1977) (describing how the Bureau "tried to impose rigid white political and economic concepts in a situation that called for flexibility") Most constitutions contained boilerplate language consisting of a preamble, followed by articles which set forth powers to employ legal counsel, negotiate with federal state and local governments, and regulate tribal lands. Id.

173 Brophy & Aberle, supra note 170, at 58.

174 Id. ("[P]rofessional lawyers are excluded from most of the tribunals.").

175 Id.

176 See 48 Stat. 984, 987 (1934) (codified with some differences in language at 25 U.S.C. § 476 (2006)).

177 Id.

178 The Constitutional Rights of the Am. **Indian**: Hearing Before the Subcomm. on the Constitutional Rights of the S. Comm. on the Judiciary, 87th Cong. 1-2 (1961) [hereinafter 1961 Hearings, Part 1].

179 Fund for the Republic, Report of the Commission on the Rights, Liberties and Responsibilities of the American **Indian** (William A. Brophy & Sophie D. Aberle eds., 1961).

180 Task Force on **Indian** Affairs, Bureau of **Indian** Affairs, A Program for **Indian** Citizens (1961).

181 1961 Hearings, Part 1, supra note 178, at 1-2.

182 1961 Hearings, Part 1, supra note 178, at 5 (Remarks of Sen. Kenneth B. Keating).

183 1961 Hearings, Part 1, supra note 178, at 8 (Remarks of Sen. Frank Church) (commenting that the U.S. Constitution does not apply to tribal governments). See generally Talton v. Mayes, 163 U.S. 376 (1896).

184 For a comprehensive analysis of the ICRA and Senator Ervin's interests, see Donald L. Burnett, An Historical Analysis of the 1968 **Indian** Civil Rights Act, 9 Harv. J. on Legis. 557 (1972).

185 U.S. Comm'n on Civil Rights, American **Indian** Civil Rights Handbook 9 (1972).

186 **Indian** Civil Rights Act, Pub. L. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-1303 (1970)). The ICRA was also referred to as the "**Indian** Bill of Rights." See Note, The **Indian** Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343 (1969).

187 1961 Hearings, Part 1, supra note 178, at 6 (Remarks of Sen. Roman Hruska).

188 ICRA did not prohibit the establishment of religion, provide for an automatic right to a jury trial, or require the appointment of counsel for indigents in criminal cases. Specifically, the Act provided:
§ 1302 Constitutional Rights
No **Indian** tribe in exercising powers of self-government shall--
1. make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
3. subject any person for the same offense to be twice put in jeopardy;
4. compel any person in any criminal case to be a witness against himself;
5. take any private property for a public use without just compensation;
6. deny to any person in a criminal proceeding the right to a speedy and public trial, 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 at his own expense to have the assistance of counsel for his defense;
7. require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of 6 months or a fine of $5,00, or both;
8. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
9. pass any bill of attainder or ex post facto law; or
10. deny to any person **accused** of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.
§ 1303. Habeas corpus
The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an **Indian** tribe.
25 U.S.C. §§ 1302-1303.

189 Id.

190 See also American **Indian** Civil Rights Handbook, supra note 185, at 11. (“In passing the Act, Congress attempted to guarantee individual rights to reservation **Indians** without severely disrupting traditional tribal culture.”)

191 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 90-841, 5-6).

192 25 U.S.C. § 1303.

193 Santa Clara Pueblo, 436 U.S. at 62; see also Tribal Law and Order Act of 2009: Hearing on H.R. 1924 Before the Subcomm. on **Crime**, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 111 Cong. 162-68 (2010) (written response of Barbara **Creel** to post-hearing questions posed from the subcommittee regarding federal habeas as an adequate remedy to protect **Indians** from unjust actions in tribal courts and attributing the lack of civil rights cases under ICRA to the fact that **Indian** defendants have no counsel to protect their rights); United States v. Swifthawk, 125 F. Supp. 2d 384, 387 (D.S.D. 2000) (finding that there is virtually no case law on ICRA). This lack of case law is disturbing given that Judge Charles B. Kornman, author of the Swifthawk opinion, presides over the U.S. District Court for the District of South Dakota and has only reviewed two ICRA cases (using the Westlaw case database).

194 1961 Hearings, Part 1, supra note 178, at 13.

195 Secretary of the Interior Stewart L. Udall amended the code in 1961 to remove the prohibition, which served no reasonable purpose. See 25 C.F.R. § 11.9 (1958) (repealed by 26 Fed. Reg. 4360-61 (May 19, 1961)).

196 Secretary of the Interior Stewart Udall amended the Code to lift the prohibition against professional attorneys appearing in tribal courts in May 1961. Fed. Reg., Vol. 26, No. 96 (May 19, 1961); 1961 Hearings, Part 1, supra note 178, at 54.

197 Burnett, supra note 184, at 591.

198 **Indian** Civil Rights Act, 25 U.S.C. § 1302(7) (1970).

199 Gideon v. Wainwright, 372 U.S. 335 (1963).

200 See, e.g., Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

201 Gideon, 372 U.S. at 345.

202 **Indian** Civil Rights Act, 25 U.S. § 1302(7) (1970). As originally enacted, ICRA provided the following restraint on tribal authority to punish: "[A]nd in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both." Id.

203 **Indians** were subject to imprisonment under the Courts of **Indian** Offenses. 25 C.F.R. § 11.114 (2012); Hagan, supra note 129, at 120. In addition, the legislative history shows that the discussion on the **right** to **counsel** did not include a concern for lengthy incarceration. BIA reports revealed that tribes were not routinely imposing jail sentences. Of the 435 tribal governments supervised by the BIA, only twenty-three had contracts with BIA administered jails and nineteen other tribes administered their own tribal jail facility. 1961 Hearings, Part I, supra note 178, at 247-50.

204 Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

205 **Indian** Civil Rights Act, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 25 U.S.C. § 1302(7) (1988)).

206 Duro v. Reina, 495 U.S. 676 (1990) (finding that tribal courts had no jurisdiction over non-member **Indians** who committed offenses within the reservation boundaries); Oliphant v. Suquamish **Indian** Tribe, 435 U.S. 191 (1978) (finding that tribes had no jurisdiction to prosecute non-**Indians** who committed **crimes** within the reservation boundaries). These two decisions were, at least in part, an outgrowth of the fact that tribal courts did not have to guarantee rights commensurate with the United States Constitution. See Oliphant, 435 U.S. at 211-12; Duro, 492 U.S. 693-96. In response to Duro, Congress amended ICRA to recognize inherent tribal criminal jurisdiction over all **Indians**. **Indian** Civil Rights Act, 25 U.S.C. § 1301(2) (2006). This amendment was also made without the civil rights lens of protection for the **Indian** defendant subject to tribal court.

207 The Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258 (codified at 25 U.S.C § 1302).

208 Id.

209 Id.

210 Id.

211 The Tribal Law and Order Act of 2010 changed the maximum sentence a tribe may impose from one year to three years and increased the maximum fine from $5000 to $15,000, but only with the permission and approval to ensure that the tribe or tribal court process meets the extensive requirements. The Act provides in pertinent part:
(c) RIGHTS OF DEFENDANTS.--In a criminal proceeding in which an **Indian** tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the **Indian** tribe shall--
(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
(3) require that the judge presiding over the criminal proceeding--
(A) has sufficient legal training to preside over criminal proceedings; and
(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.
Even where all these requirements are met, the "total penalty or punishment" cannot exceed nine years. If these requirements are not met, even under the 2010 amendments to ICRA, the tribe is limited to one year and $5,000 fine. Id.

212 Id.

213 The Act provides that the **Indian** tribe shall,
"require that the judge presiding over the criminal proceeding--
(A) has sufficient legal training to preside over criminal proceedings; and
(B) is licensed to practice law by any jurisdiction in the United States."
Id.

214 Id.

215 Id.

216 **Indian** Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. § 1302(1) (1970)).

217 Id. § 1302(6).

218 Id. § 1302(3)-(4).

219 Id. § 1302(10).

220 In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Supreme Court determined that the Act does not permit members of a tribe to pursue legal action against the tribe for violating any provisions of the act. In other words, it is a law without teeth, without any enforcement mechanism. The exception to the rule is federal habeas corpus review for criminal proceedings.

221 See 25 U.S.C. § 1302.

222 United States v. Wheeler, 435 U.S. 313 (1978) (holding that federal prosecution in addition to tribal prosecution for the same offense under the dual sovereignty doctrine did not violate the prohibition against double jeopardy).

223 United States v. Antelope, 430 U.S. 641 (1977) (holding that federal prosecution presented no equal protection problem even where the federal jurisdiction applied only to **Indians**, and non-**Indians** prosecution in state court resulted in lighter sentence); see U.S. Sentencing Comm'n Native Am. Advisory Grp., Report of the Ad Hoc Advisory Group on Native American Sentencing Issues 9, 17-27, available at http://www.ussc.gov/Research/Research_ Projects/Miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf; Troy Eid, Separate But Unequal: The Federal Criminal Justice System in **Indian** Country, 81 U. Colo. L. Rev. 1067 (2010); see, e.g., United States v. Swifthawk, 125 F. Supp. 2d. 384, 384-85 (D.S.D. 2000) ("Congress has seen fit to impose altogether different penalties on Native Americans.... 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 [off the reservation]. This is without taking into account the harshness of the Federal Sentencing Guidelines in their treatment of Native Americans.").

224 See United States v. Doherty, 126 F.3d 769 (6th Cir. 1997).

225 United States v. Red Bird, 146 F. Supp. 2d 993 (2001). For further explanation of the dual sovereignty doctrine and how it works to the detriment of the **Indian** see, Alex M. Hagen, From Formal Separation to Functional Equivalence: Tribal-Federal Dual Sovereignty and the Sixth Amendment **Right** to **Counsel**, 54 S.D. L. Rev. 129 (2009).

226 Swifthawk, 125 F. Supp. 2d. at 386-90.

227 Id.

228 Id.

229 U.S. Sentencing Guidelines Manual §§ 4A1.2(i), 4A1.3 (2003).

230 442 F.App'x. 399(10th Cir. 2011).

231 Id. at 401.

232 See, e.g., United States v. Denetclaw, 96 F.3d 454, 457 (10th Cir. 1996) (noting that a trial court is permitted to use a guilty plea in tribal court to impeach a criminal defendant).

233 The (mis)use of prior uncounseled tribal court convictions in federal court and the proper constitutional analysis is the subject of a forthcoming article.

234 United States v. Shavanaux, 647 F.3d 993, 1000 (10th Cir. 2011); United States v. Cavanaugh, 643 F.3d 592, 594 (8th Cir. 2011).

235 See Gideon v. Wainwright, 372 U.S. 335 (1963); see also Scott v. Illinois, 440 U.S. 367 (1979).

236 United States v. Cavanaugh, 680 F. Supp. 1062, 1075-76 (D.N.D. 2009), rev'd 643 F.3d 592, cert. denied, 132 S. Ct. 1542 (2012).

237 Id. at 1075.

238 Cavanaugh, 643 F.3d 592.

239 Id. at 601-02.

240 Id. at 605.

241 United States v. Shavanaux, 647 F.3d 993 (10th Cir. 2011), cert. denied, 132 S. Ct. 1742 (2012).

242 See **Indian** Civil Rights Act, 25 U.S.C. §§ 1301-1302 (2006).

243 The Sixth Amendment **right** to **counsel** mandates the provision of counsel to indigent defendants sentenced to any amount of prison time for criminal felonies or misdemeanors absent a knowing and intelligent waiver. Scott v. Illinois, 440 U.S. 367, 373-74 (1979); see also Farretta v. California, 422 U.S. 806, 835 (1975).

244 See, e.g., State v. Spotted Eagle, 71 P.3d 1239, 1245 (Mont. 2003) (holding that prior uncounseled tribal court convictions may be used in the sentencing proceedings in Montana courts); State v. Stensgar, No. 14627-8-III, 1996 WL 460262 (Wash. Ct. App. Aug. 13, 1996) (upholding a state court's imposition of an exceptional sentence under state law based on prior convictions, including a guilty plea to indecent liberties in Colville Tribal Court). For a chart detailing state civil and criminal uses of tribal court convictions against **Indians**, see Kevin K. Washburn, A Different Kind of Symmetry, 34 N.M. L. Rev. 263, 290-96 (2004).

245 Kan. Stat. Ann. § 21-4711(e) (West 2007).

246 See State v. Graves, 947 P.2d 209, 210-11 (Or. Ct. App. 1997) (concluding prior convictions assessed for sentencing purposes “include federal, tribal court, military and foreign convictions.”) (quoting Oregon Sentencing Guidelines Implementation Manual 57 (1989)).

247 See **Indian** Civil Rights Act, 25 U.S.C. § 1302(6) (2006). Prior to the Tribal Law and Order Act of 2010, the guarantee of “the assistance of counsel for his defense” existed but only at the defendant's own expense. Due to the Tribal Law and Order Act, tribes are now required to provide defense counsel to indigent defendants at the expense of the tribal government in order to impose an authorized sentence over one year. **Indian** Civil Rights Act, 25 U.S.C.A. § 1302 (West 2012).

248 Indeed, tribes have always had the right to provide defense counsel in tribal court at the tribe's own expense as a sovereign prerogative. The problem is finding the resources to fund tribal public defense. For example, the Tulalip Tribe, a tribe in the mid-Puget

Sound area of Washington provides for indigent defense in their tribal code. See Tulalip Tribal Code 2.25.070, available at http:// www.codepublishing.com/wa/Tulalip/. The Tulalip Tribes collaborated with a law school to assist in providing public defense. Since 2002, the Tribal Court Defense Clinic at the University of Washington School of Law has partnered with the Tulalip, Squaxin Island, Port Gamble S'Klallam, and Puyallup Tribes to serve as their public defender on these reservations. See Tribal Court Public Defense Clinic, U. Wash. Sch. Law, http:// www.law.washington.edu/Clinics/Tribal/Default.aspx (last visited Mar. 18, 2013). The Pueblo of Laguna has employed, at times, a tribal public defender to provide legal defense services to defendants in criminal actions. For a description of the Pueblo of Laguna's judicial services, see Judicial Services, Pueblo Laguna, http://www.lagunapueblo-nsn.gov/ Judicial_Services.aspx (last visited Mar. 18, 2013). The Navajo Nation operates a public defense system. See Navajo Nation Code Ann. tit. 2, § 1991 (2010). The White Earth Nation Rules of Criminal Procedure provide: "[T]hat a defendant has a **right** to **counsel** in all subsequent proceedings...and if the defendant appears without counsel and is financially unable to afford counsel, that counsel will forthwith be appointed without out cost to the defendant," if charged with a **crime** punishable by incarceration. White Earth Nation R. Crim. P. 5.01, available at http:// www.narf.org/nill/Codes/wearthcode/codecriminalrule5.pdf.

249 Burnett, supra note 184, at 589-90.

250 See supra Parts II and III.

251 The intent of the **Indian** Reorganization Act was to promote tribal self-determination.

252 For example, the State of New York recently implemented a pro bono requirement for all members of the state bar "to address the state's urgent access to justice gap." Press Release, N.Y. State Unified Court Sys., Chief Judge Names Advisory Comm. on Pro Bono Bar Admission Requirements (May 22, 2012), available at http://www.nycourts.gov/press/pr2012_03.shtml. Rule 520.16 of Rules of the Court of Appeals requires all applicants who successfully pass the bar examination after 2015, to perform fifty hours of qualifying pro bono service before applying for admission to practice at the appellate level. 22 NYCRR 520.16.

253 As a general rule, all members of the Navajo Nation Bar Association are required to accept pro bono assignments from the Navajo Nation courts, including representation of indigent defendants in criminal cases. Navajo Nation Pro Bono R. II, III, available at http:// www.navajolaw.org/2007_ PDF/Bono.pdf.

254 Kathleen Bowman, Testimony Before the **Indian** Law and Order Commission (Apr. 19, 2012).

255 Id.

256 Id.

257 Federal and state courts took the position that they had the inherent power to appoint counsel for indigent defendants in any criminal case. It was seen as the responsibility of every lawyer to accept appointment without fee. This was the privilege of being allowed to practice law. Beaney, supra note 24, at 77; see Powell v. Alabama, 287 U.S. 45, 73 (1932).

258 Professional organizations have established clear standards for an effective criminal defense system and the ABA has adopted a number of standards and created a document listing ten fundamental principles. See ABA, The Ten Principles of a Public Defense Delivery System (2002), available at http:// www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_ defendants/ ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

259 As described in Part III.B, supra, when enacted in 1968, ICRA imposed the first proscription on tribal court sentencing authority, limiting tribal court sentences to six months or a fine of $500, or both (the equivalent of a misdemeanor in state court). In 1986, Congress amended ICRA by the **Indian** Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-137, 3207-146 (codified at 25 U.S.C. § 1302(7) (2006)) to allow harsher penalties of up to one year imprisonment and a $5,000 fine. There was no change in the **right** to **counsel** provision until 2010. Id. § 1302(6). From 1968 until 2010, ICRA provided for the **Indian**, "at his own expense to have the assistance of counsel for his defense." Id. In 2010, Congress expanded tribal sentencing power to include a potential to impose up to three years in prison, and fines of $15,000, or both, provided certain rights and requirements are met. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258 (codified at 25 U.S.C §

1302). The TLOA authorized the power to stack individual three year sentences up to a maximum of nine years, again only if the rights and requirements are met. Id.

260 1961 Hearings, Part 1, supra note 178, at 13, 54.

261 For an overview of the federal trust responsibility in **Indian** law, see generally, Cohen, supra note 93; Reid Payton Chambers, Judicial Enforcement of the Federal Trust Responsibility to **Indians**, 27 Stan. L. Rev. 1213, 1214 n.8 (1975).

262 42 U.S.C. § 3796gg-1(a) (regarding funding to **Indian** tribal government to develop and strengthen law enforcement and prosecution in the context of combatting **crimes** of violence against women).

263 One of the fundamental principles of a just public defense system is parity. See ABA, supra note 258, at 1 (“There is parity between defense counsel and the prosecution with respect to resources and defense counsel is include as an equal partner in the justice system.”).

264 Id.

265 Section 213 of the Tribal Law and Order Act of 2010 amended the **Indian** Law Enforcement Reform Act, 25 U.S.C. §§ 2801-2814 (2006) to require the U.S. Attorney for each district that includes **Indian** country to “appoint no less than 1 assistant United States Attorney to serve as tribal liaison for the district.” 25 U.S.C.A. § 2810(a) (West 2012). The law established purpose and duties of the Tribal Liaison and also authorized and encouraged the appointment of a Special U.S. Attorney to prosecute **crimes** in **Indian** Country. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 213, 124 Stat. 2258 (codified at 25 U.S.C § 1302).

266 The U.S. Attorney's office has long had a policy that precludes the initiation or continuation of a federal prosecution after a prior state or federal prosecution based on the same or similar acts. U.S. Dep't. of Justice United States Attorneys' Manual § 9-2.031. It is also known as the “Petite” policy. See Petite v. United States, 361 U.S. 529 (1960); Barbara **Creel**, Respect for Tribal Courts, 46 U.S.F. L. Rev. 37, 90-91 (2012).

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