\THE ADMINISTRATION OF INJUSTICE: THE CONFLICT BETWEEN FEDERAL AND TRIBAL CRIMINAL JURISDICTION

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I. Introduction

The subjectivity of criminal justice often leaves the reform process slow moving, producing little results. Differing opinions about criminal justice progression often get in the way of progressive reform. Should we spend our time advocating for victims, or can society set its feelings aside about the notions of crime and advocate for the constitutional rights of the criminally accused? Are changing morals enough to change the law? Do we attack the system as a whole or do we provide tailored solutions to specific areas of injustice? This Comment is intended to advocate not only for a tailored approach to criminal justice reform, but also to highlight an often-overlooked source of criminal injustice: conflicting criminal jurisdiction.

American criminal justice reform discussion largely ignores American Indians. A major source of this ignorance is that much of the criminal injustice American Indians face results from conflicting federal and tribal criminal jurisdiction. By attacking not only the facial criminal injustice, but also the source of it, the chances of any reform having a lasting, positive impact on American Indians and tribes increases dramatically. In the grand scheme of criminal justice, the injustices felt by American Indians envelops only a small portion of criminal law wrongs. However, these wrongs provide for a massive departure of American Indians from any criminal justice reform that may be occurring. While many injustices faced by American Indians in the criminal context are not unique to American Indians, the source of these problems is. Because American Indian tribes are sovereign nations, there are legislative and mandated conflicts that create criminal justice misalignments uncommon to other minority groups who are subject only to state and federal jurisdiction. Thus, the unique conflict between federal and tribal criminal jurisdiction creates injustices on American Indians and tribes that leave the community facing specialized injustices and behind in criminal justice reform.

Part II of this Comment provides a historical review of the sources of federal and tribal criminal jurisdiction regarding crimes involving American

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Indians or occurring in Indian Country. The sources include legislative acts and landmark decisions from the Supreme Court of the United States. Part III of this Comment argues that the conflicting areas of criminal jurisdiction outlined in Part II have created systems that leave American Indians behind other communities in criminal justice reform. These systems include indigent defense, unjust outcomes, and problematic federal prosecution leading to bias, capital punishment, and a removal from a representative jury. Part IV of this Comment provides reform suggestions for each system outlined in Part III to help bring American Indians back into the criminal justice reform conversation, remove barriers creating unjust outcomes in the criminal law system, and create sustainable practices to ensure continued progression of American Indian criminal justice reform. Last, Part V of this Comment discusses the influence conflicting federal and tribal criminal jurisdiction has on American Indian criminal justice and provides closing remarks as to the importance and impact of American Indian-tailored reform.

II. Sources of Conflicting Criminal Jurisdiction

A. The Indian Country Crimes Act & Major Crimes Act

The Indian Country Crimes Act, also called the General Crimes Act,[1] was enacted in 1817 to create an expansive federal jurisdictional power over crimes involving American Indians.[2] The Act extended 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 . . . to the Indian country."[3] Federal law defines Indian Country as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, . . . and (c) all Indian allotments, [where] the Indian titles to which have not been extinguished . . . .[4]

However, the Indian Country Crimes Act did not "extend to offenses committed by one Indian against the person or property of another Indian,

1. 18 U.S.C. § 1152.
2. *Indian Country Criminal Jurisdiction*, NATIVE.LAW, https://tribaljurisdiction.tripod.com (last updated June 6, 2023).
3. 18 U.S.C. § 1152.
4. 18 U.S.C. § 1151.

nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe," or where exclusive tribal jurisdiction had been stipulated by treaty.[5] As such, federal courts had jurisdiction over certain offenses committed by American Indian defendants against non-American Indians on tribal lands and all offenses committed by non-American Indian defendants against American Indians.[6]

In 1883, the United States Supreme Court answered in *Ex parte Kan-gi-shun-ca (Crow Dog)* the question of federal jurisdiction over crimes committed on tribal land by American Indian defendants against American Indian victims.[7] After an American Indian man, Crow Dog, was accused of murdering another American Indian on tribal lands, Crow Dog was sentenced to death by a federal court in the Dakota Territory.[8] Crow Dog argued his conviction was invalid as the murder, committed on tribal land, was "not an offense under the laws of the United States."[9] Pursuant to section 2146 of the U.S. Revised Statutes, the Court agreed with Crow Dog, holding there was no federal criminal jurisdiction in the case.[10] The outcome in *Crow Dog* gave tribes exclusive criminal jurisdiction over all crimes committed by American Indian defendants against American Indian victims on tribal land, in Indian Country.[11] This change eliminated all federal jurisdiction for major and minor crimes committed on tribal land, in Indian Country, when both defendant and victim were American Indian.

To regain criminal jurisdiction over certain major crimes lost to tribal courts in *Crow Dog*, Congress passed the Major Crimes Act (MCA) in 1885.[12] The MCA authorizes federal jurisdiction over American Indians,

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5. 18 U.S.C. § 1152.
6. *Indian Country Criminal Jurisdiction*, *supra* note 2.
7. 109 U.S. 556, 557 (1883).
8. *Id.*
9. *Id.*
10. *Id.* at 571-72. The Court quoted section 2146 of the Revised Statutes, which stated that the Indian Country Crimes Act

> shall not be construed to extend to [crimes 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.

U.S. REV. STAT. § 2146 (2d ed. 1878) (brackets in original), *quoted in Crow Dog*, 109 U.S. at 558.

11. *See Crow Dog*, 109 U.S. at 571-72.
12. 18 U.S.C. § 1153; *see* Dominga Cruz et al., *The Oklahoma Decision Reveals Why Native Americans Have a Hard Time Seeking Justice*, WASH. POST (July 22, 2020, 6:00 AM

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regardless of the victim's tribal status, when certain crimes are committed on tribal land, in Indian Country.[13] The listed major crimes in subsection (a) of the MCA include, but are not limited to: murder, manslaughter, kidnapping, chapter 109A felonies, felony assault, felony child abuse, and burglary.[14] Subsection (b) of the MCA leaves crimes not defined in subsection (a) to be "defined and punished in accordance with the laws of the State in which such offense was committed," leaving open room for further removal of tribal jurisdiction.[15]

B. The Indian Civil Rights Act & Its Amendments

In 1968, Congress passed the Indian Civil Rights Act (ICRA) outlining (1) the rights of criminal defendants in tribal jurisdiction, (2) the sentencing authority of tribal courts, (3) tribal habeas corpus rights, and (4) tribal jurisdiction over domestic violence crimes.[16] The ICRA's passage was a result of congressional concern about "American Indian civil rights in Indian country" and tribal "concern[] about American Indian rights violations by federal and state authorities."[17] The purpose of the Act was to grant American Indians similar constitutional rights that are afforded to other Americans and to protect American Indians from abuses of power from tribal governments.[18] However, while it grants rights to all persons subject to tribal criminal jurisdiction, the ICRA authorizes the enforcement of these rights in federal courts.[19]

At its adoption, ICRA § 1302 generally limited the authority of tribal courts to impose sentences on criminal defendants.[20] Tribal courts were limited to imposing sentences up to one year of imprisonment and a $5,000

EDT), https://www.washingtonpost.com/politics/2020/07/22/oklahoma-decision-reveals-why-native-americans-have-hard-time-seeking-justice/.

13. *The Major Crimes Act – 18 U.S.C. § 1153*, U.S. DEP'T OF JUST. ARCHIVES, https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153 (last updated Jan. 22, 2020).

14. 18 U.S.C. § 1153(a); *see* 18 U.S.C. §§ 2241–2248 (including among chapter 109A felonies aggravated sexual abuse, sexual abuse, sexual abuse of a minor, abusive sexual contact, and 109A offenses resulting in death).

15. 18 U.S.C. § 1153(b).

16. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1304.

17. *Indian Civil Rights Act*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/icra.htm (last visited Apr. 2, 2022).

18. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 241 (2d ed. 1992).

19. *Id.* at 240.

20. *See generally* 25 U.S.C. § 1302.

fine, up to three offenses.[21] Thus, tribal courts had limited authority to impose only misdemeanor-level sentences for the most serious crimes they were able to prosecute.[22] In 2010, the Obama administration enacted the Tribal Law and Order Act of 2010 (TLOA)[23] to amend ICRA § 1302 and increase tribal courts' sentencing authority.[24] The goal of the TLOA was to "improve public safety and justice systems in Indian country" in reaction to high rates of violent crime occurring on tribal lands.[25] Additionally, the TLOA was enacted in response to pressure from tribal leaders who felt the restrictions of ICRA § 1302 provided tribal courts with an inadequate range of punishment.[26] Though slight, the TLOA expanded tribal criminal sentencing to allow certain crimes to be punishable by three years imprisonment and a $15,000 fine per offense.[27]

ICRA § 1303 imposes a one sentence-long right for criminal defendants sentenced in tribal court to file a writ of habeas corpus, stating that "[t]he 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."[28] While expanding a constitutional right to criminal defendants in tribal court, these habeas corpus petitions must be filed, argued, and decided in a federal court.[29] ICRA § 1303 serves as a limit on tribal criminal jurisdiction by providing a federal check on the tribal court system through "federal-court review of tribal criminal proceedings."[30]

Initially, ICRA § 1304 provided limited tribal jurisdiction over domestic violence cases.[31] It gave tribal courts no authority to prosecute domestic violence crimes committed on tribal land if both the defendant and victim were non-American Indians.[32] Prior to its amendment, ICRA § 1304 also

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21. *Id.* § 1302(a)(B).

22. *Tribal Law and Order Act Report on Enhanced Tribal-Court Sentencing Authority*, U.S. DEP'T OF JUST. 1, https://www.justice.gov/tribal/file/796981/download (last visited Nov. 4, 2022).

23. Pub. L. No. 111-211, tit. II, § 234, 124 Stat. 2261, 2279-81 (codified as amended at 25 U.S.C. § 1302).

24. *Tribal Law and Order Act*, U.S. DEP'T OF JUST., https://www.justice.gov/tribal/tribal-law-and-order-act (last updated Mar. 31, 2023).

25. *Indian Civil Rights Act*, *supra* note 17.

26. *Tribal Law and Order Act Report on Enhanced Tribal-Court Sentencing Authority*, *supra* note 22, at 1.

27. 25 U.S.C. § 1302(b); *accord* Tribal Law and Order Act, 25 U.S.C. § 1302.

28. 25 U.S.C. § 1303.

29. *Id.*

30. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66-67 (1978).

31. 25 U.S.C. § 1304.

32. *Id.* § 1304(b)(4)(A).

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prevented tribal criminal jurisdiction over domestic violence crimes committed against an American Indian victim by a non-American Indian defendant.[33] In 2013, the Violence Against Women Reauthorization Act (VAWA 2013) was reenacted to authorize special domestic violence criminal jurisdiction to tribal courts.[34] VAWA 2013 was utilized to partially overturn *Oliphant v. Suquamish Indian Tribe*, which held that tribal courts had no inherent criminal jurisdiction to punish non-American Indian defendants for crimes committed on tribal land, in Indian Country.[35] After VAWA 2013's enactment, ICRA § 1304 authorized special domestic violence criminal jurisdiction in tribal courts to defendants, American Indian or non-American Indian, who have "sufficient ties" to the prosecuting tribe.[36] Sufficient ties to the prosecuting tribe are present if the defendant "(i) resides in the Indian country of the participating tribe [or] (ii) is employed in the Indian country of the participating tribe."[37] Sufficient ties may also be present if the defendant "is a spouse, intimate partner, or dating partner of (I) a member of the participating tribe; or (II) an Indian who resides in the Indian country of the participating tribe."[38] In March of 2022, the Biden Administration reauthorized VAWA, changing the acts language of "special domestic violence jurisdiction" to "special Tribal criminal jurisdiction."[39] In doing so, the sufficient ties requirement was expanded to include a person who is being prosecuted for "assault of Tribal justice personnel; child violence; dating violence; domestic violence; obstruction of justice; sexual violence; sex trafficking; stalking; and a violation of a protection order."[40] The 2022 reauthorization increased the special domestic violence criminal jurisdiction for (1) acts of domestic and dating violence occurring in Indian Country and (2) violations of domestic violence protection orders to include "obstruction of justice, sexual

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33. Solicitation of Comments Notice, Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence, 78 Fed. Reg. 35961–35974, 35962 (June 14, 2013).

34. *Introduction to the Violence Against Women Act*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/title_ix.htm (last visited Apr. 1, 2022).

35. *Indian Civil Rights Act*, *supra* note 17; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); *see infra* Part II.C.

36. 25 U.S.C. § 1304(b)(4)(B).

37. *Id.* § 1304(b)(4)(B)(i)-(ii).

38. *Id.* § 1304(b)(4)(B)(iii).

39. *Compare Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)*, WHITE HOUSE (Mar. 16, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vawa/ *with* 25 U.S.C. § 1304.

40. 25 U.S.C. § 1304(a)(5) (internal numbering omitted).

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violence, stalking, sex trafficking, or assault of a law enforcement or corrections officer."[41] Tribal courts' use of the VAWA special domestic violence criminal jurisdiction is voluntary.[42] Insufficient ties and acts of domestic and dating violence that do not meet these requirements may not be prosecuted under tribal authority; instead, they are subject to existing federal and state criminal jurisdiction.[43]

C. Oliphant v. Suquamish Indian Tribe

In 1978, the Supreme Court decided in *Oliphant v. Suquamish Indian Tribe* that tribal courts lack the inherent authority to try or punish crimes committed by non-American Indian defendants on tribal land, in Indian Country.[44] Mark David Oliphant, a non-American Indian offender who was arrested on the Suquamish Tribe's Port Madison Reservation, was charged with "assaulting a tribal officer and resisting arrest."[45] Daniel B. Belgarde was also arrested for engaging in a high-speed automobile race that ended in a collision with a tribal police vehicle near a highway on the Reservation.[46] Both petitioners argued before the Supreme Court that the Suquamish Indian Provisional Court did not possess jurisdiction to try non-American Indian criminal defendants.[47]

The Suquamish Tribe urged the Court to accept that it possessed jurisdictional authority pursuant to the Tribe's retained governmental powers over the Port Madison Indian Reservation, which the Tribe obtained from an agreement with the United States—the 1855 Treaty of Point Elliot—allowing the Tribe to settle on the 7,276-acre area of land in the state of Washington.[48] However, the Supreme Court refused to accept this idea of Indian authority being created from governmental agreement when viewed outside the context of the "common notions of the day and the assumptions of those who drafted them."[49] Thus, the Court concluded that

41. *Id.* § 1304(c).
42. *VAWA 2013 and Tribal Jurisdiction Over Crimes of Domestic Violence*, U.S. DEP'T OF JUST., https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf (last revised June 14, 2013).
43. *Id.*
44. 435 U.S. 191, 212 (1978).
45. *Id.* at 194.
46. *Id.*
47. *Id.*
48. *Id.* at 192-96; *accord* Treaty of Point Elliott, Jan. 22, 1855, U.S.-Dwamish et al., 12 Stat. 927.
49. *Oliphant*, 435 U.S. at 206.

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while the agreement between the Tribe and the United States was silent on the matter of criminal jurisdiction over non-American Indian defendants, when viewed in a historical context, there is "substantial doubt upon the existence of such [tribal] jurisdiction."[50]

As tribes submit to the overruling authority of the United States government, they relinquish their power to try non-American Indian defendants, unless congressional action has approved such authority.[51] As such congressional action did not exist in *Oliphant*, the agreement with the United States alone was not enough to provide the Tribe with criminal jurisdiction to prosecute non-American Indian criminal defendants.[52] In addition, Congress previously extended federal jurisdiction to crimes committed by non-American Indian defendants on tribal land against American Indian victims in its passage of the Trade and Intercourse Act of 1790.[53] As a result, the Suquamish Tribe lacked the inherent authority to criminally prosecute the petitioners.[54] Thus, absent affirmative congressional authorization, tribal agreements with states to retain tribal criminal jurisdiction over crimes on reservation land carried little to no weight.

D. McGirt v. Oklahoma

In its 2020 landmark *McGirt v. Oklahoma* decision, the Supreme Court emphasized the validity of federal jurisdiction over major crimes in Indian Country as granted by the MCA.[55] Jimcy McGirt was prosecuted by an Oklahoma state court and convicted of "three serious sexual offenses."[56] McGirt argued that because he—an enrolled Seminole Nation member—committed the crimes on the Creek Reservation, proper criminal jurisdiction belonged in the federal court system, rather than the state court system.[57] However, the case turned not on if the crime was covered by the MCA, but on if the Creek Reservation was considered tribal land subject to the restraints of the MCA.[58]

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50. *Id.*
51. *Id.* at 208, 210.
52. *Id.* at 208.
53. *Id.* at 211; *accord* Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790).
54. *Oliphant*, 435 U.S. at 212.
55. 140 S. Ct. 2452, 2478 (2020); *see* 18 U.S.C. § 1153.
56. *McGirt*, 140 S. Ct. at 2459.
57. *Id.*
58. *Id.*

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Despite Oklahoma's efforts to persuade the Court that the land in question should not be considered tribal land or Indian Country, the Court concluded that the land became tribal land by a series of 1832 Treaties between Congress and the Creek Nation.[59] The Court was clear that tribal land is to remain as such unless Congress makes an explicit statement otherwise.[60] Further, it is within Congress's sole power, and under no state's authority, to determine the status of tribal land as a reservation and to define its borders as part of Indian Country.[61] Historical practices that might allude to the disestablishment of a reservation, absent explicit congressional action, are also not enough to prove disestablishment.[62] The Court notes that, under this theory, Oklahoma admittedly ignored the authority of the MCA and continued to try crimes under the proper jurisdiction of the federal court system in its own state courts.[63] While retaining federal criminal jurisdictional powers under the MCA, the Court notes that states are not completely out of the equation for criminal jurisdiction in Indian Country.[64] Outside of the limited crimes covered by the MCA and the Indian Country Crimes Act, "[s]tates are otherwise free to apply their criminal law in cases of non-[American] Indian victims and defendants, including within Indian Country."[65]

Thus, the Court concluded, unless Congress expressly withdraws a reservation's status, it is to remain Indian Country subject to the standing congressional acts that determine when crimes are under federal, tribal, or state jurisdiction.[66] Regardless of how long or hard state courts have tried, improper behavior by these courts does not grant them the authority to remove reservation status or obtain criminal jurisdiction previously granted to the federal court system.[67] While Congress has both expanded and restricted the boundaries of tribal and federal criminal jurisdiction over offenses occurring on tribal land, it has always been done through an explicit congressional act; as such, the reservation status of the Creek Nation remains intact.[68]

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59. *Id.* at 2460.
60. *Id.* at 2462, 2469.
61. *Id.* at 2462.
62. *Id.* at 2468.
63. *Id.* at 2471.
64. *Id.* at 2479.
65. *Id.*
66. *Id.* at 2482.
67. *Id.*
68. *Id.*

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E. Double Jeopardy Considerations

The Fifth Amendment protects criminal defendants from double prosecution through the Double Jeopardy Clause, which states no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[69] Generally, this means that a criminal defendant cannot be prosecuted and convicted of the same offense, stemming from the same factual occurrence. However, there is an exception to the clause when the prosecuting authorities are separate sovereigns.[70] When "an act denounced as a crime by [separate] sovereignties is an offense against the peace and dignity of both," a criminal defendant "may be punished by each."[71]

For Double Jeopardy, a tribe prosecutes as a separate sovereign from the federal government when the tribe is prosecuting under its inherent, rather than delegated authority to do so.[72] The power vested to tribes to prosecute under the ICRA is inherent authority, separate from power that may be delegated tribes from the federal government.[73] The ICRA § 1301 notes that the prosecuting power of tribes over crimes committed in Indian Country is under "the *inherent* power of Indian Tribes . . . to exercise criminal jurisdiction over *all Indians*."[74] Thus, when prosecuting both member and non-member American Indian criminal defendants for crimes committed in Indian Country, the tribes are acting as a separate sovereign from the federal government and the federal government's prosecuting power for purposes of the Separate Sovereign exception to the Double Jeopardy Clause.[75]

Thus, there exists a risk of double prosecution for American Indian criminal defendants alleged to have committed an act constituting both a tribal and federal criminal offense. What this means for American Indian criminal defendants is when the defendant is prosecuted under conflicting tribal and federal criminal jurisdiction, under a tribe's inherent authority to do so from sources such as the ICRA, they risk subsequent prosecution by the federal government. And should the federal government prosecute first, there may exist a possible subsequent tribal prosecution. This is not to say that all American Indian criminal defendants face double jeopardy under the Separate Sovereign exception, or that all who do will be subsequently

69. U.S. CONST. amend. V.
70. United States v. Lanza, 260 U.S. 377 (1922).
71. *Id.* at 382.
72. United States v. Lara, 541 U.S. 193, 199 (2004).
73. *Id.*; 25 U.S.C. § 1301.
74. 25 U.S.C. § 1301(2) (emphasis added).
75. *Lara*, 541 U.S. at 209.

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prosecuted by both sovereignties. However, depending on the nature of the offense, prosecuting ability, and interest in prosecution, an American Indian criminal defendant charged with committing a qualifying crime in Indian Country has the potential to face both tribal and federal prosecution for the offense, exposing the defendant to the harms that stem from both prosecuting authorities.

III. Resulting Criminal Injustices Faced by American Indians

A. Indigent Defense

The Supreme Court stated in its 1963 *Gideon v. Wainwright* decision that in federal prosecutions, the Sixth Amendment guarantees all persons accused the right "to have the Assistance of Counsel for his defense."[76] Additionally, the *Gideon* Court noted the same right was provided in state prosecutions by means of incorporation to the Fourteenth Amendment.[77] Justice Black's policy behind the decision to extend the scope of the right to counsel was that while "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries . . . it is in ours."[78] Justice Black continued to say that "[t]his noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[79] However, American Indian criminal defendants often have a guarantee of more regulated or qualified representation when prosecuted federally instead of tribally.

At its enactment, the ICRA's provisions were designed to stand as an "Indian Bill of Rights," mirroring much of the United States Bill of Rights.[80] However, noticeably missing was the right to appointed counsel in tribal criminal prosecutions.[81] The TLOA's passage sought to remedy this lack of protection, and required that "[i]n a criminal proceeding in which an Indian tribe . . . imposes a total term of more than 1 year on a defendant, the Indian tribe shall . . . provide to the defendant the right to effective assistance of counsel."[82] The tribal court must also provide indigent

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76. 372 U.S. 335, 339-40 (1963) (quoting U.S. CONST. amend. VI).
77. *Id.* at 342-43.
78. *Id.* at 344.
79. *Id.*
80. *Indian Civil Rights Act*, *supra* note 17. *Compare* 25 U.S.C. §§ 1301-1304 *with* U.S. CONST. amends. I-X.
81. *Indian Civil Rights Act*, *supra* note 17.
82. *Id.*; 25 U.S.C. § 1302(c)(1); *accord* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 234, 124 Stat. 2261, 2279-81 (codified as amended at 25 U.S.C. § 1302).

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defendants "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."[83] Tribal jurisdiction is included in the "any jurisdiction in the United States" language, should it meet the appropriate licensing standards. Thus, it appears that all criminal defendants are afforded the right to effective assistance of counsel, per (1) the Sixth Amendment in federal prosecutions, (2) the Fourteenth Amendment in state prosecutions, and (3) the TLOA amendment to the ICRA in tribal prosecutions. But lacking for American Indian criminal defendants, facing tribal criminal prosecution, are necessary definitions of "indigent status," "effective assistance of counsel," and "licensure."[84]

Both the TLOA and ICRA fail to provide a working definition for indigent status.[85] As a result, a criminal defendant—indigent or not—in tribal court may mistakenly believe they qualify for appointed counsel if they cannot afford private defense. To determine indigent status, states typically consider the defendant's income and debt levels, but, ultimately, developing the definition of indigent status in tribal jurisdiction is left to the implementing tribe.[86] This failure of the TLOA and ICRA leaves a potential group of tribal criminal defendants too poor to afford private counsel, but outside the scope of qualifying for appointed defense. In *Powell v. Alabama*, the Court noted that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law."[87] The Court continued that laypersons are "incapable, generally, of determining for [themselves] whether the indictment is good or bad."[88] Therefore, how does leaving a potential group of tribal defendants with no access to defense counsel afford them the right to effective counsel supposedly granted by the TLOA amendment to the ICRA and considered essential by the United States? Should tribes elect not to prosecute, indigent American Indian criminal defendants are guaranteed to enjoy the constitutional right and standards of appointed effective defense counsel in the federal prosecution they would face; yet, in failing to prosecute, tribes expose the defendant to the harms of non-tribal jurisdiction and prosecution. However, should tribes

83. 25 U.S.C. § 1302(c)(2).

84. MICHELLE RIVARD PARKS, TRIBAL JUDICIAL INST., TRIBAL LAW AND ORDER ACT: ENHANCED SENTENCING AUTHORITY 7 (2015).

85. *Id.*

86. *Id.*

87. 287 U.S. 45, 69 (1932).

88. *Id.*

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elect to prosecute, granting the American Indian defendant the benefits of tribal prosecution, the TLOA and ICRA failures to define indigent status may leave these same American Indian criminal defendants without the essential protections and benefits of defense counsel guaranteed in federal prosecution.

When a tribal criminal defendant hires their own counsel or qualifies for indigent defense, the effectiveness of that counsel may not be as "effective" as it may have been in other non-tribal jurisdictions. In non-tribal jurisdictions, the Supreme Court laid out a two-prong test for defendants to prove ineffective assistance of counsel: (1) "[the] counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[89] While tribes are encouraged to meet this standard, they are not bound by the Court's test.[90] In order to apply the enhanced sentencing allowed by the TLOA, tribal courts must "comply with enhanced procedural guarantees," including the right to effective counsel.[91] However, as noted by an Arizona federal district court, the ICRA's effective counsel standard does not require counsel to be held to the federal and state standard of objective reasonable effectiveness.[92] As a result, tribal defendants are not entitled to effective assistance of counsel, at least not to the standard they would be in state or federal criminal prosecutions.

The final failure of the TLOA and ICRA in guaranteeing indigent defense is failing to define the licensing standards of appointed counsel. In non-tribal criminal jurisdictions, appointed counsel must be a licensed attorney who is a member of the applicable state bar.[93] However, tribal jurisdiction is not bound by this same standard; instead, tribes may develop their own licensing standards.[94] While tribal courts should "ensure or measure both competence and professional responsibility" of appointed counsel, this counsel is not required to obtain a juris doctorate or pass a bar

89. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

90. PARKS, *supra* note 84.

91. Scott C. Idleman, *Effective Assistance of Counsel and Tribal Courts–A Different Standard?*, MARQ. UNIV. L. SCH. FAC. BLOG (Sept. 6, 2012), https://law.marquette.edu/facultyblog/2012/09/effective-assistance-of-counsel-and-tribal-courts-a-different-standard/.

92. *Id.*; *see* Jackson v. Tracy, No. CV 11-00448-PHX-FJM, 2012 WL 3704698, at *2 (D. Ariz. 2012).

93. Wheat v. United States, 486 U.S. 153, 159 (1988).

94. PARKS, *supra* note 84.

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examination.[95] One federal district court concluded that the standard in the ICRA does not require an attorney to be licensed, suggesting that the standard of effective counsel should be compared "to the standards for other non-lawyers appearing in tribal court."[96] However, if a lay criminal defendant cannot possess the knowledge to adequately represent themselves, as pointed out by the Court in *Powell*, neither can lay counsel.[97]

While the TLOA added a limited right to counsel for tribal criminal defendants that they did not have at the ICRA's enactment, the right to counsel is just that: limited. In many situations, tribal criminal defendants are guaranteed better representation when prosecuted federally as opposed to tribally. A tribal defendant that cannot afford to hire counsel may not be considered indigent in a tribal jurisdiction setting—where they might in a non-tribal setting—and risk receiving no representation at all. While tribal jurisdictions are likely to come close to the general constitutional standard of effective counsel, the legal ability for tribes to subscribe only to the required lay-counsel standard means that tribal criminal defendants risk receiving counsel that would be considered inadequate in any other court in the United States. In theory, tribal defendants could be appointed defense counsel that has only marginally more legal knowledge than the defendant possesses themselves. These risks allowed by the ICRA and TLOA leave tribal criminal defendants at odds with the benefits of tribal prosecution and the availability of better legal representation in non-tribal jurisdictions. If federal regulation sets the standard for the rights of tribal criminal defendants, that same regulation should define the requirements in a way that tribes are still free to set their own standards. In doing so, the regulation should require that criminal defendants are afforded the same minimum requirement of representation in any jurisdiction in which they may be prosecuted.

B. The TLOA Requirements Encourage Unjust Outcomes

Implementation of the TLOA's enhanced sentencing authority is voluntary for each tribe.[98] Five years after its enactment, only eight tribes had used the enhanced sentencing authority.[99] Though minimal, the

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95. *Id.*

96. Idleman, *supra* note 91; *Jackson*, 2012 WL 3704698, at *3.

97. Powell v. Alabama, 287 U.S. 45, 69 (1932).

98. CHRISTINE FOLSOM-SMITH, ENHANCED SENTENCING IN TRIBAL COURTS: LESSONS LEARNED FROM TRIBES 2 (2015).

99. *Tribal Law and Order Act at Five Years*, INDIAN L. RES. CTR., https://indianlaw.org/safewomen/tribal-law-and-order-act-five-years (last visited Apr. 3, 2022).

https://digitalcommons.law.ou.edu/ailr/vol47/iss2/4

enhanced sentencing authority granted to tribal criminal jurisdiction gave tribes the ability to impose felony sentencing for certain crimes.[100] However, to implement this enhanced authority, tribal courts must "make and adopt criminal codes and rules of evidence, make rules of criminal procedure available to the public, provide qualified legal counsel to defendants, have law-trained judges, and record any criminal proceeding."[101] Each tribe must interpret these largely undefined requirements and create systems to carry out each element.[102] Tribes that elect not to or fail to adopt the entities necessary to use the enhanced sentencing authority are limited to imposing up to one year imprisonment and fines up to $5,000; however, tribes that satisfy the requirement can impose sentences up to three years imprisonment, inflict fines up to $15,000, and have the ability to stack sentences.[103]

Many tribes believe the required changes to their justice systems are problematic in the sense that the "reforms are generally expensive to implement."[104] Grants to aid in funding are poorly advertised and generally hard to obtain, and the high remaining cost of reform puts poorly resourced tribes at a disadvantage.[105] For example, the cost of housing inmates for long-term sentences has proved to be problematic for tribes as many tribes do not "have the money for anything except jailing those that need recovery programs."[106] Additionally, tribes will have to incur the cost of hiring additional corrections staff to meet the needs of the longer incarceration terms and subsequently higher incarceration rates.[107] Not only will tribes incur these additional costs for those in confinement, tribes will also sustain costs for those who require supervised services post-conviction, such as probation officers.[108] The additional costs forced on tribes to take advantage of the TLOA's enhanced sentencing authority causes a point of conflict for tribes, asking tribes to determine if the costs associated with the enhanced

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100. FOLSOM-SMITH, *supra* note 98, at 1.

101. *Id.* at 2.

102. *Id.* at 7.

103. *Enhanced Sentencing Under TLOA: Ramifications for Implementing SORNA*, SMART WATCH DISPATCH (Off. of Sex Offender Sent'g, Monitoring, Apprehending, Registering & Tracking, Washington, D.C.), Jan. 2016, https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/smartwatchdispatch-tloa.pdf.

104. Sophia Helland, A BROKEN JUSTICE SYSTEM: EXAMINING THE IMPACT OF THE TRIBAL LAW AND ORDER ACT OF 2010 AND PUBLIC LAW 280 5 (2018).

105. *Id.*

106. *Id.* at 6.

107. FOLSOM-SMITH, *supra* note 98, at 5.

108. *Id.* at 6.

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sentencing are worth the benefits to the community and criminal parties, in light of the marginal improvements in sentencing capabilities.

When weighing the difficulties of meeting the enhanced sentencing authority requirements with the still relatively limited sentencing maximums allowed by the TLOA amendment, it may not be cost-efficient for tribes to impose the enhanced sentences. However, this leaves American Indian victims at odds with their communities, as tribes are either (1) unable to prosecute offenders or (2) may only imprison convicted American Indian defendants for a relatively short period of time.[109] One study showed that the recidivism rates of convicted American Indians was approximately thirty-three percent higher than non-American Indian offenders.[110] Recidivism leaves tribal communities at risk of higher rates of crime, partly due to the inability of tribes to adequately prosecute offenders. If tribes cannot impose just sentences—either due to not engaging in an enhanced sentencing authority or due to the limited sentencing allowed by the TLOA—tribal communities and American Indian victims are exposed to the dangers of repeat offenders sooner than they would be under state or federal prosecution.

The high costs associated with implementing the TLOA's enhanced sentencing authority create unjust outcomes for all parties to the criminal prosecution: the prosecution, defendant, victim, and community. The marginal increase in sentencing capabilities still may not allow the prosecution to seek punishment that fits the convicted crime. The American Indian criminal defendant may be forced to endure federal prosecution if tribes cannot meet the demands of the enhanced sentencing authority and elect not to prosecute. The low sentence imposed may not serve as adequate protection or fair reparation for the victim. The community could be subjected to recidivism sooner than necessary as the enhanced sentence may not allow for a just punishment. To overcome these adversities, increased funding and the ability to impose greater sentences are necessary to balance the costs and benefits of implementing the TLOA's enhanced sentencing authority.

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109. Cruz et al., *supra* note 12.

110. *Safer and More Resilient Communities in Indian Country*, PERFORMANCE.GOV, https://obamaadministration.archives.performance.gov/content/safer-and-more-resilient-communities-indian-country-0.html#overview (last visited Apr. 3, 2022) (defining recidivism as the likelihood and risk that a convicted criminal defendant will commit subsequent offenses).

C. The Conflict of Criminal Jurisdiction Allows Problematic Federal Prosecution

The MCA forces federal prosecution for certain major crimes that occur in Indian Country and the ICRA limits tribal sentencing, which both prohibits and discourages tribes from prosecuting major crimes themselves.[111] Further, the Supreme Court's decision in *Oliphant* puts tribes at odds with promoting criminal justice as they cannot prosecute most non-American Indian defendants, as the authority to do so is left in the hands of the federal government.[112] This conflict involuntarily opens both American Indian victims and defendants to trials in the federal court system, away from the comfort and benefits of their own tribal court system. In doing so, American Indian parties face prosecution in the federal court systems that are problematic for and intrusive to American Indians and tribal members. These problems include biased sentencing patterns, capital punishment, and removal from a jury of their peers.

1. Federal Sentencing Patterns and Bias

There are two distinct justice systems in America: one for wealthy individuals, one for poor and non-white individuals.[113] The latter group is more at risk of being subjected to negatively biased criminal justice systems, including biased use of prosecutorial discretion; policies disserving people of color and economically disadvantaged individuals; and more severe prison sentences.[114] One study showed that adults in poverty are three times more likely to be arrested and "15 times more likely to be charged with a felony" than adults not in poverty.[115] This finding is linked to data showing that being in poverty "does make a person more susceptible to being arrested and more likely to be charged with a harsher crime and to receive a longer sentence."[116] A study by the United States Sentencing

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111. Cruz et al., *supra* note 12; 18 U.S.C. § 1153; Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 234, 124 Stat. 2261, 2279-81 (codified as amended at 25 U.S.C. § 1302).

112. Cruz et al., *supra* note 12.

113. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT'G PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

114. *Id.*

115. Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/.

116. *Id.*

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Commission showed that in recent sentencing patterns, black males were given sentences 19.1% longer than similarly situated white male offenders.[117] The same study showed that, during the same period, Hispanic males were sentenced to incarceration terms 5.3% longer than similarly situated white males.[118] But what is lacking from these studies and others is data on the sentencing patterns of American Indians. Studies on American Indian incarceration rates are focused more on the number of American Indians incarcerated in state and federal prisons than they are on comparative sentencing patterns.[119] The limited data leaves scholars, activists, and reporters wondering why American Indian populations are largely left out of sentencing comparisons with other racial and ethnic groups.[120] What is largely known is that American Indians are overrepresented in prison populations and the criminal justice system generally.[121] This disparity is especially true in states with large American Indian populations, where incarceration rates may reach up to seven times that of their white counterparts.[122]

While data is largely lacking on the sentencing patterns of American Indian adults in federal prisons, there is significant data and studies on American Indian juveniles in federal prison systems. Therefore, American Indian adults are likely subject to relatively similar sentencing patterns as American Indian juveniles. One study showed that American Indian minors are three times more likely to be confined in a detention center.[123] The real disparity, however, appears in federal prison systems. In general, there are very few juveniles being held in federal detention centers because individuals are usually transferred to local and state prisons and jails, as federal prisons do not have appropriate programs and services for minors.[124]

117. U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 6 (2017).

118. *Id.*

119. Roxanne Daniel, *Since You Asked: What Data Exists About Native American People in the Criminal Justice System?*, PRISON POL'Y INITIATIVE (Apr. 22, 2020), https://www.prisonpolicy.org/blog/2020/04/22/native/.

120. *Id.*

121. *Id.*

122. *Indigenous Communities and Mass Incarceration*, JAILED FOR MELANIN, https://www.jailedformelanin.org/native-commuities (last visited Apr. 2, 2022).

123. *Id.* "Confined in detention centers" is inclusive of federal, state, and local detention systems.

124. Beth Schwartzapfel, *There Are Practically No Juveniles in Federal Prison – Here's Why*, MARSHALL PROJECT (Jan. 27, 2016, 7:13 AM), https://www.themarshallproject.org/2016/01/27/there-are-practically-no-juveniles-in-federal-prison-here-s-why.

https://digitalcommons.law.ou.edu/ailr/vol47/iss2/4

However, regardless of actual detention location, seventy percent of juvenile individuals serving federal prison sentences are American Indians.[125] This disparity in federal sentencing patterns is largely due to the legal standing created by the conflict between tribal and federal criminal jurisdiction.[126] For juveniles, the path to federal custody is dictated by the Federal Juvenile Delinquency Act.[127] The Act grants federal authorities the power to (1) refer the minor to state authorities where possible, (2) initiate federal delinquency proceedings, and (3) petition federal courts to try the juvenile as an adult.[128] The Act recommends referring juvenile delinquents to state authority when possible, but it allows "federal delinquency proceedings when state courts cannot or will not accept jurisdiction."[129] Because of this authority, most federal cases with a juvenile defendant arise when the case is beyond state jurisdictional limits.[130] There are generally only two paths for juveniles to be subject to federal sentencing and confinement: (1) commit a felony in Washington, D.C., or (2) commit a felony in Indian Country, subject to the Major Crimes Act and its amendments.[131] The limitations and the conflict between federal and tribal criminal jurisdiction has caused the majority of federal delinquency prosecutions to involve American Indian youth.[132]

Because the MCA, ICRA, and TLOA force prosecution of major offenses committed in Indian Country to be under federal jurisdiction, American Indians are subject to federal prosecution where other citizens are not. For other citizens, the same offenses fall under state jurisdiction. In general, punishments under state prosecution are typically less harsh than they are under federal prosecution for the same offenses.[133] Under federal prosecution, sentences are determined by statutory mandatory minimums

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125. *Indigenous Communities and Mass Incarceration*, *supra* note 122.

126. *Id.*

127. CHARLES DOYLE, CONG. RSCH. SERV., RL30822, JUVENILE DELINQUENTS AND FEDERAL CRIMINAL LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 1 (2018).

128. *See id.*

129. *Id.*

130. *Id.* at 3.

131. Schwartzapfel, *supra* note 124; *see Indigenous Communities and Mass Incarceration*, *supra* note 122.

132. DOYLE, *supra* note 127, at 3.

133. Jake Flanagin, *Native Americans Are the Unseen Victims of a Broken US Justice System*, QUARTZ (Apr. 27, 2015), https://qz.com/392342/native-americans-are-the-unseen-victims-of-a-broken-us-justice-system/.

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and discretionary sentencing guidelines.[134] This jurisdictional uncertainty and sentencing disparity means that American Indians are subject to varying ranges of punishment for the same crime, depending on (1) the severity of the crime and (2) if the crime was committed in Indian Country. Not only are American Indians subject to more inconsistent sentencing guidelines than non-American Indians, but they are also subject to the same racial and ethnic bias other minority populations must endure. Federal sentencing procedures allow race and ethnicity to have some amount of bearing on critical outcomes.[135] Federal sentencing guidelines have not evolved in a way that meaningfully eliminates racial and ethnic disparity.[136] The 1987 Sentencing Guidelines of the Sentencing Reform Act was unsuccessful in its attempts to reduce the ethnic and racial disparities created by allowing federal judges the discretion to impose sentences anywhere between probation to the statutory maximum.[137] In 2005, the Act's mandatory sentencing guidelines were found unconstitutional by the Supreme Court in *United States v. Booker*, which removed the language in the Act that required federal judges to impose sentences within the range allowed by the guidelines.[138] Now, American Indians are once again subject to flexible and potentially inconsistent and biased sentences, that they would not face in non-federal criminal jurisdictions.

2. Capital Punishment

Since capital punishment (the "death penalty") was reinstated in 1976, sixteen American Indians have been executed.[139] These executions were largely for crimes occurring outside of Indian Country, under state jurisdiction where the conflict between tribal and federal jurisdiction does

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134. *Sentencing 101*, FAMM, https://famm.org/our-work/sentencing-reform/sentencing-101/ (last visited May 23, 2022).

135. Travis W. Franklin, *Sentencing Native Americans in US Federal Courts: An Examination of Disparity*, 30 JUST. Q. 310, 336 (2013).

136. *Id.*

137. Alan Ellis & James H. Feldman, Jr., *Federal Sentencing Under the Advisory Guidelines*, LAW OFFS. OF ALANELLIS, https://alanellis.com/federal-sentencing-under-the-advisory-guidelines/ (last visited Apr. 1, 2022).

138. *Id.*; *see* United States v. Booker, 543 U.S. 220, 243-44 (2005) (emphasizing strongly that even though the ranges set by the USSG are now merely advisory, many crimes are still bound by statutory mandatory minimums).

139. *Most American Indian Tribes Opt Out of Federal Death Penalty*, AZCENTRAL (Aug. 21, 2017, 2:21 PM), https://www.azcentral.com/story/news/local/arizona/2017/08/21/most-american-indian-tribes-opt-out-federal-death-penalty/587636001/.

https://digitalcommons.law.ou.edu/ailr/vol47/iss2/4

not exist.[140] In general, the federal government does not have the authority to impose the death penalty for crimes committed in Indian Country on its own volition.[141] The Special Provisions for Indian Country of the Federal Death Penalty Act of 1994 (the "Federal Death Penalty Act") prohibits federal prosecution from imposing the death penalty "for any offense the Federal jurisdiction for which is predicated solely on Indian country . . . and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction."[142] In other words, the federal government must have tribal permission to impose the death penalty for crimes on Indian Country for which it has jurisdiction pursuant to the MCA and ICRA. Thus, the Federal Death Penalty Act effectively prohibits federal courts from imposing the death penalty for crimes committed in Indian Country by American Indians absent tribal consent.[143] The Federal Death Penalty Act is largely seen to be consistent with the ideals of American Indians and tribes.[144] For example, the Navajo Nation sent a letter to the U.S. Attorney stating "[a]s part of Navajo cultural and religious values [the tribe's members] do not support the concept of capital punishment."[145] Since the Federal Death Penalty Act was enacted, only once has a tribe consented to the possibility of the death penalty: the Sac and Fox Nation of Oklahoma.[146] The general and widespread reluctance for tribes to "opt-in" for the death penalty is largely based on "issues of sovereignty, implementation, and culture and world views."[147] Often, the decision not to consent to the death penalty "goes back to culture and tradition, past treatment of American Indians and fairness in the justice system."[148]

However, the federal court system has found a way to impose the death penalty on American Indian offenders by working around the Federal Death

140. *Id.*

141. Grant Christensen, *The Wrongful Death of an Indian: A Tribe's Right to Object to the Death Penalty*, 68 UCLA L. REV. DISCOURSE 404, 408 (2020).

142. 18 U.S.C. § 3598.

143. Christensen, *supra* note 141, at 408.

144. *See id.* at 414.

145. *Id.*

146. *Most American Indian Tribes Opt Out of Federal Death Penalty*, *supra* note 139.

147. Ken Murray & Jon M. Sands, *Race and Reservations: The Federal Death Penalty and Indian Jurisdiction*, 14 FED. SENT'G REP. 28, 28 (2001).

148. *Most American Indian Tribes Opt Out of Federal Death Penalty*, *supra* note 139.

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Penalty Act's restrictions.[149] American Indian Lezmond Mitchell was executed in August of 2020 and was the first American Indian to be put to death by the federal court system since the federal death penalty was reinstated in 1994.[150] In 2001, Mitchell was charged in federal court for murder, felony murder, and carjacking resulting in death.[151] While hitchhiking with sixteen-year-old Johnny Orsinger, twenty-year-old Mitchell murdered sixty-three-year-old Alyce Slim and her nine-year-old granddaughter after receiving a ride to their desired location.[152] Mitchell and the victims were all members of the Navajo Nation, and the crime was committed in Indian Country.[153] While being interrogated by the police, Mitchell made incriminating statements and agreed to assist investigators in locating the bodies he had buried in the woods.[154] A federal indictment was issued, transferring Mitchell into federal custody and jurisdiction.[155] Two months after charges were filed, the U.S. Attorney General filed notice of its intent to seek capital punishment for the carjacking resulting in death.[156] Mitchell was convicted on all counts and sentenced to death over the objection of the Navajo Nation.[157] The decision was upheld on appeal to the Ninth Circuit and the Supreme Court denied certiorari.[158]

On its face, Mitchell's execution seems contrary to the requirements of the Federal Death Penalty Act. An American Indian's murder conviction, for acts committed in Indian Country, is within the protection of the Federal Death Penalty Act as it falls under federal jurisdiction, per the MCA.[159] Thus, imposition of the death penalty should have required tribal consent. However, the death penalty was not attached to the murder charge and was

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149. Jessica Schneider, *US Government Executes Only Native American on Death Row, Despite Calls from Tribal Leaders to the President for Clemency*, CNN (Aug. 26, 2020, 8:46 PM), https://www.cnn.com/2020/08/26/politics/lezmond-mitchell-native-american-execution-supreme-court/index.html.

150. *Id.*

151. Christensen, *supra* note 141, at 407.

152. *Id.* at 406-07.

153. *Ignoring Tribal Sovereignty, Federal Government Executes Native American Death-Row Prisoner Lezmond Mitchell*, DEATH PENALTY INFO. CTR. (Aug. 27, 2020) [hereinafter *Ignoring Tribal Sovereignty*], https://deathpenaltyinfo.org/news/ignoring-tribal-sovereignty-federal-government-executes-native-american-death-row-prisoner-lezmond-mitchell.

154. Christensen, *supra* note 141, at 407.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 409-10.

159. *Id.* at 409.

https://digitalcommons.law.ou.edu/ailr/vol47/iss2/4

instead attached to the charge of carjacking resulting in death.[160] Per the MCA, carjacking is not a crime exclusively under federal jurisdiction when committed by an American Indian in Indian Country and is not subject to the restriction of the Federal Death Penalty Act.[161] Therefore, consent from the Navajo Nation to impose the death penalty on Mitchell was not required, even though it would have been if the death penalty was attached to the other crimes with which Mitchell was charged. In the words of Navajo Nation President Johnathan Nez and Vice President Myron Lizer, "The federal government charged a crime that was added in 1994 to the Federal Death Penalty Act and blindsided the Navajo Nation by using this to sidestep the Navajo Nation's position."[162]

The sidestepping of the federal government to punish Mitchell with death leaves one wondering how often this will occur in the future. Now that this legal loophole has been discovered, federal prosecutors may add additional charges under federal jurisdiction, but not subject to the Federal Death Penalty Act, to sentence American Indians to death without the tribe's consent. While this idea seems far-fetched, it has happened once, and the procedure exists for it to happen again. In Mitchell's case, the Navajo Nation stated that it did not consent to the death sentence, stating that the tribe "should be the one to decide these matters" and that the request to reduce his sentence to life without the possibility of parole "honors [the tribe's] religious and traditional beliefs [and] the Navajo Nation's long-standing position on the death penalty for Native Americans."[163] Mitchell's attorneys claimed this decision "added another chapter to [the federal government's] long history of injustices against Native American people" and "reflected the government's disdain for tribal sovereignty."[164] While recognizing the federal government complied with the technicalities of the law, Judge Morgan Christen wrote in concurrence to the Ninth Circuit's decision to affirm the outcome that imposing the death penalty in this case was a betrayal of promises made to the Navajo Nation and showed a disrespect to tribal sovereignty.[165] Judge Christen also

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160. *Id.* at 407.

161. *Id.* at 409.

162. *Ignoring Tribal Sovereignty*, *supra* note 153.

163. Schneider, *supra* note 149.

164. *Id.* (quoting a statement by Jonathan Aminoff and Celeste Bacch, attorneys for Mitchell).

165. *U.S. Plans to Execute Lezmond Mitchell Over Navajo Nation's Objections*, EQUAL JUST. INITIATIVE (Aug. 26, 2020), https://eji.org/news/u-s-plans-to-execute-lezmond-mitchell-over-navajo-nations-objections.

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stated that "the United States made an express commitment to tribal sovereignty when it enacted the tribal option [of the Federal Death Penalty Act], and by seeking the death penalty in this case, the United States walked away from that commitment."[166] Despite the disapproval from the Navajo Nation and legal professionals, the Department of Justice stated publicly that it felt justice had been served.[167] The federal government's opinion in Mitchell's case is not exclusive and was shared by others in cases where prosecutors are not required to obtain tribal consent for the death penalty. After a California jury sentenced American Indian, Cherie Rhoades, to death, Modoc County District Attorney Jordan Funk stated "[i]f [the Cedarville Rancheria Tribe] would have told me they don't want us to execute her, I would have done it anyway."[168]

In most cases where major crimes have been committed by American Indians in Indian Country, the federal government must seek tribal authority to impose the death penalty, pursuant to the Special Provisions for Indian Country of the Federal Death Penalty Act. As consent has been given in only one case, federal prosecutors are unlikely to succeed in this request. However, American Indians are still subject to the death penalty outside of crimes that are limited by the Federal Death Penalty Act or are within tribal jurisdiction. Twenty-seven states have the death penalty;[169] of these states, thirteen are home to a percentage of American Indians greater than the total national average population.[170] The newly discovered legal loophole around the Act leaves American Indians at risk of the death penalty should federal prosecutors bring additional charges outside the scope of the opt-in provision. The question and fear that arises from this new method is how often federal prosecutors will ignore the wishes of tribes, disregard the notions of tribal sovereignty, and impose the death penalty where consent is not required. Only time will tell.

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166. *Id.*

167. Schneider, *supra* note 149.

168. *Most American Indian Tribes Opt Out of Federal Death Penalty*, *supra* note 139.

169. *State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Apr. 2, 2022).

170. Adriana Rezal, *Where Most Native Americans Live*, U.S. NEWS (Nov. 26, 2021, 7:30 AM), https://www.usnews.com/news/best-states/articles/2021-05-21/these-are-the-states-where-the-most-native-americans-live.

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3. Jury of Your Peers

It is rumored that the concept of a jury of your peers originated in 1215, when King John signed the Magna Carta.[171] This right was granted to United States citizens through the ratification of the Bill of Rights in 1791. The Sixth Amendment of the United States Constitution guarantees criminal defendants "the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."[172] This guarantee requires that members of the jury reflect a cross section of the community where the crime is being prosecuted.[173] Further, discrimination is prohibited in the jury selection process, and "no distinct group in the community [may be] excluded."[174] These requirements apply in both state and federal courts, incorporated to states through the Fourteenth Amendment and codified into law binding federal courts through the Jury Selection and Service Act of 1968.[175]

In its 1968 *Duncan v. Louisiana* decision, the Supreme Court noted that "[t]he guarantees of jury trial in Federal and State Constitutions reflect a profound judgement about the way in which law should be enforced and justice administered."[176] The Court continued that "[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the government," claiming "a jury of his peers [gives the accused] an inestimable safeguard against the corrupt [and] overzealous prosecutor and against the compliant, biased, or eccentric judge."[177] In theory, these protections allow criminal defendants to be tried and protected by a jury that looks like the community they are used to seeing in their day-to-day lives. However, when an American Indian is tried by the federal government for a major crime committed in Indian Country, that familiarity and community largely disappears.

When tried under tribal jurisdiction, American Indians will receive a jury pool that largely looks like their tribal community in Indian Country. However, when the federal government asserts jurisdiction, American

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171. Bruce McKenna, *A Jury of One's Peers*, FED. LAW., Aug. 2010, at 4.

172. U.S. CONST. amend. VI.

173. Jordan Gross, *Let the Jury Fit the Crime: Increasing Native American Jury Pool Representation in Federal Judicial Districts with Indian Country Criminal Jurisdiction*, 77 MONT. L. REV. 281, 282 (2016).

174. *Id.*

175. *Id.*; *see* Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 101, 82 Stat. 53, 53-62 (codified as amended at 28 U.S.C. §§ 1861–1874).

176. 391 U.S. 145, 155 (1968).

177. *Id.* at 155-56.

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Indian defendants are removed from a jury of their tribal peers and are placed in a jury of their federal peers. A federal court draws its jury pool from individuals within the federal district, which extends beyond the boundaries of Indian Country, as used for jury selection in tribal courts.[178] A federal jury pool includes individuals from across the district's boundaries, which may include individuals from multiple counties and states, which could include an American Indian living in the same Indian Country as the defendant.[179] However, due to the expansive boundaries of many federal districts, the "representation of [American Indians] in that pool is naturally and inevitably diluted."[180] Even when a jury pool may represent an American Indian defendant in a federal prosecution, attorneys often take significant measures during voir dire to ensure that the final jury does not represent a defendant's peers.[181] Thus, if a trial is removed to federal court, an American Indian defendant is unlikely to receive a jury member from their local community, and even less likely to receive a jury member from their respective tribe.[182]

A representative jury of one's peers is beneficial for all accused, regardless of location, race, ethnicity, sexual orientation, or socioeconomic status. Different groupings of individuals often have vastly different attitudes towards the accused and perceptions about the credibility and reliability of the criminal trial process.[183] An important purpose of a jury is to voice the community's values in a system dominated by lawyers and judges who are largely non-representative of that same community.[184] When a juror is representative of the defendant's culture and community, the juror can produce an outcome that is representative of the community's values, cultures, and beliefs, over the often removed or out-of-touch-from-

178. Gross, *supra* note 173, at 282.

179. *Id.*

180. *Id.*

181. McKenna, *supra* note 171, at 5. Voir dire is the process in which potential jurors are questioned by the judge and used by parties to the case to determine suitability to serve as a juror.

182. Alana Paris, Note, *An Unfair Cross Section: Federal Jurisdiction for Indian Country Crimes Dismantles Jury Community Conscience*, NW. J. L. & SOC. POL'Y, Fall 2020, at 92, 94.

183. Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Consideration and the Prevalence of Majority-white Juries*, 39 J. CRIME & JUST. 75, 77 (2015).

184. John Paul Ryan, *The American Jury Trial: Current Issues and Controversies*, NAT'L COUNCIL FOR SOC. STUD., https://web.archive.org/web/20200224062954/http://www.socialstudies.org/sites/default/files/publications/se/6307/630711.html (last visited Apr. 3, 2022).

the-community ideals of legal professionals. Thus, when an accused American Indian is tried by a jury selected from a pool that is drawn from his own local community, he is more likely to be judged according to his own culture and beliefs, the beliefs from where the crime was committed, and potentially the beliefs of the victim.[185] However, when an American Indian is tried by a jury representative of an entire federal district, the beliefs of these same individuals and communities become far removed from those held by the jury. They are now subject to the values of cultures that may have historically been hostile to their own, or who do not understand or recognize the significance of a culture different than their own.

IV. The Next Step Forward

Criminal justice reform is most successful when those impacted by the criminal system's faults are the leading voice in its journey to improvement and equity. Importantly, all reform efforts should be made not only with American Indian and tribal history, values, and traditions in mind, but also by giving American Indians and tribes the loudest voices in what changes need to be made and how to make them. Therefore, all suggestions to improve the areas where the current criminal jurisdiction boundaries leave American Indians behind in criminal justice must be realized through American Indian-led discussion and reform.

A. Indigent Defense

In the late-1990s, eighty-two percent of state felony defendants and sixty-six percent of federal felony defendants were represented by appointed counsel.[186] Indigent defense is necessary to uphold the Sixth Amendment's guarantee of effective assistance of counsel in all criminal prosecutions. Further, tribal criminal defendants obtain similar rights through the ICRA's guarantees as an "Indian Bill of Rights."[187] Tribes electing to implement the enhanced sentencing authority granted by the TLOA amendment of the ICRA must meet its statutory standards, including providing licensed indigent defense counsel to American Indian defendants who cannot afford private counsel.[188] However, these statutes fail to define

185. Gross, *supra* note 173, at 305-06.
186. CAROLINE WOLF HARLOW, BUREAU OF JUST. STAT., DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000).
187. *Indian Civil Rights Act*, *supra* note 17.
188. PARKS, *supra* note 84, at 7.

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indigency, effectiveness of counsel, and licensure[189]—all critical terms necessary to assure American Indian defendants receive equitable counsel to that available in non-tribal jurisdictions. While the failure to define effectiveness of counsel and licensure impact all represented American Indian defendants prosecuted under tribal jurisdiction, those who cannot afford to hire their own counsel are at a greater disadvantage. This is because they are unable to implement personal screening tools when selecting counsel, as the choosing of counsel is out of their hands.

While American Indian defendants prosecuted under federal or state jurisdiction have codified systems of determining indigency, defendants prosecuted under an implementing tribe's enhanced sentencing authority do not have the same guarantees. This uncertainty leaves American Indian defendants at risk of not being found indigent in their own tribe, even if they would have been found indigent under federal jurisdiction. While this is true for all defendants that can be prosecuted under multiple jurisdictions, those not at risk of tribal jurisdiction have the guarantee of indigent status being determined under the guarantees of state and federal statutes and constitutions. Under federal prosecution, the indigency determination is guided by the Criminal Justice Act of 1964.[190] A Financial Affidavit is submitted to the relevant judicial authority and a person is deemed "financially unable to obtain counsel" through a careful review of the individual's personal finances and the expected cost of case-related fees and appointed counsel.[191] State and local courts use similar methods, following guidelines and statutes to make the indigency determination.[192] Under the TLOA, developing a definition for indigency is left to the implementing tribe.[193]

The Sixth Amendment guarantees effective assistance of counsel in all criminal prosecutions.[194] The TLOA requires implementing tribes to provide American Indian defendants with "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," but does not provide a baseline definition of effectiveness or

189. *Id.*

190. 18 U.S.C. § 3006A.

191. *Financial Affidavit*, U.S. CTS., https://www.uscourts.gov/forms/cja-forms/financial-affidavit (last visited Apr. 1, 2022).

192. *See generally* WASH. UNIV. SCH. OF L., PROJECT OF THE CRIMINAL JUSTICE CLINIC (Nov. 2012), https://perma.cc/S3Z7-JUL3 (providing a collection of indigency guidelines and statutes utilized by states to determine client eligibility).

193. PARKS, *supra* note 84, at 7.

194. U.S. CONST. amend. VI.

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an outlined test for defendants to challenge convictions on an ineffective assistance of counsel claim.[195] As implementing tribes are not bound by *Strickland v. Washington*'s two-pronged test for determining effectiveness,[196] American Indian defendants prosecuted under tribal jurisdiction are at risk of not being able to challenge this requirement with the same level of certainty they might otherwise have under federal jurisdiction. While the TLOA requires an equitable level of effectiveness of counsel, leaving tribes free to create their own means of upholding this standard allows for tribes to force American Indian defendants to make a greater showing of ineffective assistance than is required under federal prosecution.

Federal indigent defendants are guaranteed to be represented by a judicially approved, barred attorney.[197] However, while the TLOA requires implementing tribes to provide indigent American Indian defendants with counsel "licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards," the Act fails to define what makes a licensing standard appropriate.[198] By this definition, tribes are left free to create their own licensing standards, which may not include a juris doctorate or bar requirement.[199] This means indigent American Indian defendants are not guaranteed appointed counsel as qualified as they would receive if tribes elect not to prosecute. Put simply, while tribes must provide "licensed" attorneys for their indigent defendants, the licensure qualification may be at a level lower than that obtained through federal prosecution.

Since American Indian defendants accused of crimes committed in Indian Country are at risk of being prosecuted under both tribal and federal jurisdiction, the TLOA should be amended as a statutory minimum to define and determine indigency, effectiveness of counsel, and licensure. Indigency determination should be guided under the same terms as the Criminal Justice Act. This change will guarantee that all American Indian criminal defendants who would qualify for appointed counsel under federal prosecution to also qualify under tribal prosecution. By implementing the standard as a statutory minimum, implementing tribes could add their own qualifications for indigency, allowing more defendants—not less—to be found indigent in a tribe than they might under federal prosecution. The

195. 25 U.S.C. § 1302(c)(1).
196. PARKS, *supra* note 84, at 7; *see* Strickland v. Washington, 466 U.S. 668, 686 (1984).
197. Criminal Justice Act of 1964, 18 U.S.C. § 3006A(b).
198. 25 U.S.C. § 1302(c)(2).
199. PARKS, *supra* note 84, at 7.

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TLOA should be amended to add a codified means of determining effectiveness of counsel as a statutory minimum. This amendment would provide indigent defendants with the same minimum effectiveness of counsel no matter where they are prosecuted, which would allow tribes to impose higher levels of required effectiveness, but not less than that required under federal prosecution. To resolve the TLOA's failure to uphold true licensure standards, the Act should be amended to impose federally recognized standards, again as a statutory minimum.

Amending the TLOA would allow indigent defendants to have the same minimum level of licensed counsel, regardless of whether they are prosecuted federally or by an implementing tribe, with the allowance for there to be more strict standards for tribal indigent defense attorneys. This type of reform is not a new concept. States remain under the umbrella of rights that are constitutionally defined and have been implemented to state citizens. Overall, these rights stand as minimums that states are free to deviate from, so long as the deviation provides more protection—not less—than that which is constitutionally required. Thus, by amending the TLOA to serve as statutory minimums to meet the existing constitutional standard, American Indian criminal defendants are placed in the same position as non-American Indian criminal defendants, receiving at least the same minimum constitutional standard regardless of the prosecuting jurisdiction.

B. Correcting Unjust Outcomes from the TLOA

The ability for tribes to prosecute their own defendants for crimes committed in their own neighborhood is crucial to create more just outcomes for American Indian defendants and the communities impacted by crime. The enhanced sentencing authority granted by the TLOA expands the ability of tribes to prosecute, but at a cost. To utilize the enhanced authority, tribes must have qualified criminal codes, public procedures, recording mechanisms, and specially trained judges and counsel.[200] The costs associated with the enhanced sentencing authority force tribes to consider if the expense is worth enduring. Grants to aid in funding are not easily obtainable and the increased sentencing authority is marginal, which disincentivizes tribes to prosecute.

To incentivize tribes to prosecute under the enhanced sentencing authority, available grants should be presented to tribes. Meeting the minimum requirements of the sentencing authority should automatically qualify tribes for a minimum level of financial aid. While automatic

200. FOLSOM-SMITH, *supra* note 98, at 2.

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qualification would encourage more tribes to utilize the authority and increase the required related government spending, the cost of federal prosecution and detention that would have been spent if tribes elected not to prosecute would decrease in exchange. Further, training programs should be created to help tribes meet the necessary qualifications of the authority. These training programs will not only help to encourage tribes to put the necessary judicial system in place but will also train implementing tribes about how to create a sustainable system that matches the values and traditions of the tribe. By making existing funding readily available and creating a support system that encourages tribe-focused procedure that meets the TLOA's requirements, there will be a greater incentive for tribes to prosecute crimes that could have federal jurisdiction, which, in turn, creates a more just and tailored outcome for American Indian defendants, victims, court systems, and communities.

Aside from the financial concerns of implementing the enhanced sentencing authority, concerns about available punishment discourages tribes from prosecuting. Increasing the maximum sentence from three years imprisonment and fines of $15,000 to maximum numbers on par with the federal sentencing authority will encourage tribes to prosecute. Without this increase, tribes that believe a crime requires a greater punishment to be just are encouraged to let that sentence be imposed through federal prosecution. However, federal prosecution strips away from all parties of tribal prosecution the values and traditions of those impacted by the crime. By increasing the available tribal sentencing, tribes can hold these values through their prosecution of a crime that impacted that same community. While there may be concerns that equating the federal and tribal enhanced sentencing authority will strip all federal prosecution of these crimes, unless tribal funding is also equated to federal funding, tribes will not have the resources, time, and possibly desire to prosecute all possible crimes under the conflicting tribal and federal jurisdiction.

It is important to recognize that advocating for increased tribal sentencing capabilities is not advocating for the imposition of harsher sentences by tribal courts as well. However, the ability to impose only misdemeanor-level punishment for felony convictions is not adequate to incentivize tribes to prosecute crimes where they have the authority. By allowing courts within tribal criminal jurisdiction to sentence within guidelines comparable to federal sentencing ranges, however, tribes will be more likely to prosecute where they have authority. As sentencing guidelines are merely advisory, tribal courts are free to sentence below the recommended range, so long as the sentence remains within any applicable

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mandatory range. This allows tribal courts to apply sentences tailored to the needs and desires of the community; by using sentencing guidelines, imposed sentences could be relatively low should the values and traditions of the jurisdiction deem necessary. At the same time, these values will be able to be upheld through felony-level sentences, for the most serious of crimes, should that be in the best interest of the tribal jurisdiction's community.

C. Overcoming Problematic Federal Prosecution

1. Correcting the Bias in Federal Sentencing

Due to the complexities of human interactions, it is impossible to fully eradicate the many biases that occur in the criminal justice system, including how and where defendants are sentenced. However, adjustments to the way individuals are sentenced will help close the gap between the different justice systems that exist for wealthy or white criminal defendants and for poor or non-white defendants. Mandatory, inclusive reporting by the Department of Justice will help keep the disparities between American Indian and non-American Indian defendants at the forefront of discussions on criminal justice reform. Redirecting the pipeline of minors into the federal court system that targets, by design, American Indian juveniles will help remove the comparatively gross disproportion of American Indian juvenile federal convictions. And finally, a realignment of sentencing procedures and guidelines will return American Indian defendants to the more reliable, consistent punishment possibilities available to non-American Indian U.S. citizens.

One of the largest issues in the study of the sentencing patterns of American Indian defendants is the lack of relevant and available data on the topic. What is known is that American Indian populations are overrepresented and understudied in the criminal justice system; scholars note that "other information that could shed more light on the issue is sparse."[201] By increasing the information available on American Indian defendants, scholars and government officials alike can better evaluate the effectiveness of current criminal justice systems and create systems tailored to American Indians moving forward. However, for this reform to advance, a few things must occur. First, the concept of "othering" must be diminished. In many data collection efforts, American Indians are classified as "others" in reports outlining demographic-specific data, despite making

201. Daniel, *supra* note 119.

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up a significant portion of both the prison and United States population.[202] Othering prevents the staggering numbers of incarcerated American Indians from being easily seen when these reports are relied on in reform discussions. The reason for this lack of data does not solely rest in the hands of those analyzing and reporting the data. Tribes also play a role in this lack of information, as "[a] lack of reciprocity between the U.S. and tribal justice systems" creates a further divide between the information on incarcerated American Indians and what is actually reported.[203] Difficulties in "outreach, overlapping jurisdictions, and differences between tribal justice systems" are sources of this data gap.[204] By creating mandatory reporting of inmate demographics and imposed sentences by all prison systems, data collection will be able to provide a more accurate representation of the diverse make-up of inmates across prison systems nationwide. To succeed, a respect for the concerns voiced by different communities must be respected and considered, and mandatory reporting must be incentivized and easily complied with. By improving the availability of data and removing the "othering" of that gathered data, American Indians will be able to be at the front of reform conversation in the way Black and Hispanic communities are today.

A large source of disparity in the number of incarcerated American Indians, as compared to other non-American Indian communities, is the pipeline of American Indian juveniles into the federal court system, which does not exist for any other demographic. Dictated by the Federal Juvenile Delinquency Act and its desire to remove juvenile delinquents from the federal court system to the state court system, the path for a juvenile of any demographic to be subject to federal prosecution is generally to commit a crime in Washington, D.C. or to commit a crime subject to the MCA.[205] For crimes committed in Washington, D.C., juveniles of every demographic background are subject to federal prosecution. However, the MCA only applies to crimes committed in Indian Country by American Indian offenders. Thus, for certain crimes, American Indian juveniles are subject to federal prosecution, not only in Washington, D.C., but also across Indian Country.

To resolve this disparity, the Federal Juvenile Delinquency Act's recommendations must be altered to consider the alarming exposure that American Indian juveniles have to the federal court system that other

202. *Indigenous Communities and Mass Incarceration*, *supra* note 122.
203. *Id.*
204. *Id.*
205. DOYLE, *supra* note 127, at 3; Schwartzapfel, *supra* note 124.

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juveniles do not. The Act should encourage referral to tribal court systems in the way it readily refers to state court systems. Doing so will not only increase equity between the number of federally incarcerated juveniles—American Indian and not—but will also aid in repairing the relationship between the federal government and tribal communities. Referring juvenile defendants to tribal court systems will demonstrate not only a trust in the system but will also display a greater respect for tribal culture and the promised, but often taken-advantage-of, autonomy and sovereignty. While increasing tribal prosecutions will increase the economic burden on tribes, the ability to impose their own values on the accused and trial procedures, as states do, in some way makes up for the burden. By prosecuting their own juveniles, tribes can implement rehabilitation procedures, which are lacking in federal systems, to reduce recidivism and promote reintegration of convicted juveniles into their tailored communities.

The discrepancies between federal and non-federal sentencing guidelines and ranges impact all United States citizens, not just American Indians. Often, a defendant prosecuted in federal court will be subject to a greater range of punishment than they would in a state or tribal court. While the best way to reduce this discrepancy would be to impose mandatory sentencing guidelines in federal courts that mirror the guidelines of other courts, the Supreme Court already ruled this method as unconstitutional in *Booker*.[206] However, advisory sentencing guidelines remain constitutional in conjunction with any applicable statutory ranges. Thus, the next best way to realign the sentences available across the federal, tribal, and state court systems is to update federal sentencing guidelines to match those of the states and tribes in the federal district. While some crimes are exclusive to certain jurisdictions, many crimes are cross-jurisdictional, meaning a combination of state, federal, and tribal courts may have the authority to try the case or engage in plea bargaining. By equalizing the recommended sentences for this group of crimes, the benefit of being tried in one jurisdiction over another is removed.

Further, a complete removal of demographic consideration in sentencing would remove the gross discrepancies of sentencing between ethnic, racial, and cultural groups. By removing the racial consideration and equalizing the cross-jurisdictional range of punishment, American Indians will be less likely to receive sentences that are more severe than non-American Indians. Note, however, that these federal sentence guidelines would be merely advisory, so federal judges would not be required to comply with the efforts

206. *See* United States v. Booker, 543 U.S. 220, 243-44 (2005).

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to equalize sentencing. However, federal judges would likely continue to follow the guidelines as they do today, which would allow federal defendants of all demographics to realize the benefits of neutralized, cross-jurisdictional sentencing guidelines.

2. Capital Punishment Correction

In its 1972 *Furman v. Georgia,* one-page, per curiam decision, the Supreme Court ruled simply "that the imposition and carrying out of the death penalty . . . constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[207] While the Court has since reinstated the option of the death penalty in response to revised state statutes, capital punishment has remained a controversial topic among both the legal community and society as a whole.[208] Since reinstatement, twenty-seven states have authorized capital punishment, on par with the nearly fifty-five percent of Americans who support the death penalty.[209]

However, American Indians and tribes have a different opinion on capital punishment than the large percentage of Americans in favor of the death penalty. To many American Indians, the fight against capital punishment is "an ancestral fight," with the idea that "capital punishment is of particular concern for marginalized populations which, throughout American history, have been denied a full and fair measure of justice."[210] Only one tribe, the Sac and Fox Nation of Oklahoma, has opted to allow the death penalty to be imposed on an American Indian under federal prosecution per the Federal Death Penalty Act of 1994.[211]

If the goal of criminal punishment is deterrence of future crime, capital punishment is failing. Murder rates in states without the death penalty are as high as states with capital punishment.[212] But capital punishment is successful at disproportionally putting minorities, specifically African

207. Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (finding that the death penalty imposed for a rape conviction was in violation of the United States Constitution).

208. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976).

209. *National Polls and Studies*, DEATH PENALTY INFO. CTR, https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/national-polls-and-studies (last visited Apr. 2, 2022) (scroll to subheading, "The Evolution of Public Opinion on Capital Punishment").

210. Jana Hayes & Jessie Christopher Smith, *'An Ancestral Fight': Tribal Members Condemn Death Penalty Following Jones' Clemency*, OKLAHOMAN (Dec. 6, 2021, 5:36 AM), https://www.oklahoman.com/story/news/2021/12/06/julius-jones-clemency-executions-ok-native-american-tribes-mcgirt-land-sovereignty-rights-justice/8685780002/.

211. *Most American Indian Tribes Opt Out of Federal Death Penalty*, *supra* note 139.

212. *The Death Penalty: Questions and Answers*, ACLU (Apr. 9, 2007), https://www.aclu.org/other/death-penalty-questions-and-answers.

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Americans and American Indians, to death.[213] While abolishing any mode of punishment that is imposed disproportionally would eliminate most—if not all—modes of punishment, the finality of capital punishment is particularly concerning. Once a convicted defendant is executed, no amount of exculpatory evidence discovered later will allow for reconsideration, like a life sentence provides. The criminal justice system will never be perfect, and mistakes are made. While there are appeal procedures in place to help safeguard against these instances, conviction in the criminal courtroom is not based on one hundred percent certainty, while execution through capital punishment is one hundred percent final. The easiest solution, morally speaking, is abolishing the death penalty. Leaving no punishment available that cannot be reversed is more in harmony with a conviction system that accepts a small margin of error in its conviction procedure.

Alternatively, closing the legal loophole that allows federal prosecution to sidestep tribal authorization of imposing the death penalty is imperative, specific to American Indians prosecuted federally under the ICRA and the MCA. The imposition of the Federal Death Penalty Act's opt-in provision expresses an underlying congressional respect and honor of the longstanding traditions and values of American Indian defendants and their tribes. After a long history of disrespecting and disregarding the rich cultural values and practices of American Indians and tribes, it is essential that these values be upheld, not exclusively, but especially regarding an American practice so controversial and final as capital punishment. Thus, the legal loophole found recently by federal prosecutors to circumvent the tribal opt-in provision must be closed. If additional charges are brought outside of the provision with the intent of imposing the death penalty without required tribal consent, the motives of such practices must be questioned. Thus, if any charges are brought that fall under the opt-in provision, even if the death penalty is attached to charges outside the provision, tribal consent to impose the death penalty should be required. Amending the provision to require consent if any charges fall under the opt-in provision may incentivize federal prosecution to limit charges to be outside the scope of its ICRA and MCA jurisdiction. However, this largely limits the charges available to be brought, weakening prosecuting power and chances of conviction, and disincentivizing the desire to bring limited, non-ICRA/MCA charges. The result of amending the opt-in provision to require consent should any of the charges brought require consent, regardless of which charge the death penalty is attached to, not only limits

213. *Id.*

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the imposition of the death penalty on American Indian defendants, but also honors the underlying intent of the Federal Death Penalty Act to uphold tribal sovereignty and values.

3. A Jury of American Indian Peers

Correcting the process of jury selection and improving the guarantee of a jury of one's peers in federal prosecution is beneficial for all federal criminal defendants, not just American Indians. Due to the expansive geographic areas federal jury pools are drawn from, a defendant's particular demographics and socioeconomics are no longer the main source of potential jurors.[214] For American Indian criminal defendants, this means the values and traditions held by a tribal jury become largely diluted. However, a solution to this dilution is to draw a portion of the jury pool not only from the broader prosecuting jurisdiction, but also specifically and purposefully from the local community where the crime occurred. This way, the values of the broader prosecuting jurisdiction can be in balance with the values of those impacted by the crime itself. The addition of jurors from the location of the crime helps to balance the interest of all parties involved. The government can prosecute in front of jurors that hold the values of the prosecuting jurisdiction. The defense can plead their case to a panel that has similar life experiences and values to the defendant. And, as an informal party to the litigation, the victim can have a conviction brought by a community that experienced the crime alongside them.

It is important to recognize that the expansion of a federal jury pool to be more purposeful in including potential jurors from crime and prosecuting jurisdictions introduces new challenges to the jury selection process. First, there are potential economic barriers to juror travel if the community of the crime is far in distance from the prosecuting location. Trials are often lengthy, and crime-jurisdiction jurors may incur travel and housing costs that prosecution-jurisdiction jurors may not. By ensuring that all jurors' associated costs are covered, crime-jurisdiction jurors are less likely to attempt to get out of having to serve based on economic hardship. Second, increasing the diversity of the jury pool increases the factors that must be considered by litigators during voir dire. The selection of a jury is a critical stage in the outcome of a case, and, while increasing the factors to be considered may increase the difficulty of forming a strong trial strategy, the increased diversity will form the outcome of a case from a jury that is closer

214. *See* Gross, *supra* note 173 (stating that federal jury pools are drawn from the federal district in which the crime is being prosecuted).

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to the defendant's peers. Finally, obtaining a unanimous decision from a more diverse jury will be more difficult, regardless of the ultimate decision of the jury. More diversity brings more voices, values, and traditions to consideration. While the ultimate goal is to apply the facts of the case to the law, juries are largely free to consider their own beliefs when making their determination. The facts of the case may meet all elements of a crime, allowing a guilty verdict to arise, but a jury is free to acquit if they do not like the charges brought, or feel there is a justifiable reason outside of legal defenses for committing the crime. By bringing in greater diversity to the jury panel, the values of the American Indian parties can be balanced against the prosecuting jurisdiction's values, but that also brings greater difficulty in obtaining a unanimous decision from the jury box.

While increased difficulty may arise from purposefully selecting a federal jury from both the place of crime and prosecution, the benefits that arise are too great to overlook. When prosecuted locally, defendants are promised a closer cross section of their community than they are federally. There are still flaws in the local jury selection processes that allow final juries to trend away from the socioeconomic and demographic characteristics of the defendant, but there is a greater chance of a jury of one's true peers to be selected than there is in the current federal jury selection process. By adding in the values of the community of the defendant and victim to the federal jury pool, defendants can be judged by at least a few of their peers, rather than strictly by a panel of outsiders with few connections to the crime itself and the outcome of the conviction. By giving American Indian federal criminal defendants a jury that includes members of their own community, they can have an equitable opportunity to be judged by their own cultural values as non-American Indian federal criminal defendants.

V. Conclusion

The longstanding conflict between federal and tribal criminal jurisdiction prevents American Indians from realizing the benefits of national criminal justice reform and creates injustices that are unique to American Indians and tribes. The constant shifting of powers between the jurisdictions leaves the promotion of criminal justice on hold, and the increase of powers granted to tribal courts is often too small to allow American Indians to reach the level of justice held by the rest of the nation. Legislative and judicial attempts to rectify the injustices created by early Supreme Court decisions and the Major Crimes Act have created more confusion and

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injustices than likely intended. Largely, the Indian Civil Rights Act, the Tribal Law and Order Act, and recent United States Supreme Court decision-making has not only limited tribal ability to prosecute crimes committed in Indian Country but have also left key terms undefined and exposed American Indian criminal defendants not only to the harms of federal criminal prosecution, but to the additional harms created within tribal criminal prosecution.

Tailored criminal justice reform for the injustices created by the conflicting criminal jurisdiction are vital to granting American Indians and tribes with the change necessary to promote lasting criminal justice. Appropriate definition of terms will provide American Indian defendants with comparable defense counsel across jurisdictions. Resource promotion and sustainability training will encourage tribes to prosecute under the TLOA's enhanced sentencing authority. Correcting the bias in federal prosecution that occurs from a lack of data, juvenile prosecution, and sentencing guidelines will protect American Indians from the harms unique to federal jurisdiction. Ending capital punishment, or in the least closing the legal loophole around the Federal Death Penalty Act's opt-in provision, will guard American Indians from the finality of the punishment in a system that allows uncertainty. Finally, drawing from a federal jury pool that includes jurors from the location of the crime allows American Indian defendants to be tried by a jury more representative of their peers than found when drawing only from the prosecuting jurisdiction.

Ignorance of injustices that are not our own is one of the quickest ways to grow these injustices. Those facing injustices are often in the weakest position to rectify the problems themselves and require a movement much greater than themselves to create necessary, lasting change. Thus, while reforming American Indian criminal justice must be a national movement, it is vital to encourage, highlight, and listen to American Indian voices to create lasting, impactful reform.

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