

ADDRESSING SENTENCING DISPARITIES FOR TRIBAL CITIZENS IN THE DAKOTAS: A TRIBAL SOVEREIGNTY APPROACH

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ABSTRACT

Native Americans in the Dakotas can receive criminal sentences in federal courts that are harsher than sentences meted out for similar conduct in state courts. The reason for this is the historical role the federal government has played in determining justice issues in tribal communities. Although the federal government oftentimes sought tribal input into justice issues in tribal communities, that input has not been sought in the area of sentencing of natives for offenses in federal courts, with some limited exceptions (death penalty and career offender sentencing). This Article argues a need to change this practice and that Indian tribes, through an opt-in provision similar to other tribal opt-in provisions in the criminal justice arena, should have a right to dictate more equitable sentencing for their members when the sentencing disparity is stark and exists only because federal jurisdiction lies. Such a remedy to disparate sentencing would not impact the prosecution of crime in tribal communities, but instead would ensure that native persons do not receive more punitive sentences merely because of their status as American Indians. Because of the unique trust relationship between the United States and American Indian tribes, the United States has a legal and moral imperative to address this issue, similar in regards to the disparity in federal sentences for crack

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versus powder cocaine offenses, which had a disproportionate impact upon African-Americans. In particular, this Article examines the sentencing of a young native woman on the Fort Berthold reservation who was prosecuted for the death of an infant child and sentenced in accordance with federal guidelines that appear to be far out of proportion to similar sentences in state courts. This Article suggests that a remedy for prior sentences be considered by Congress in light of the hesitancy of the executive branch to utilize its clemency powers to correct Native American sentencing injustices.

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I. INTRODUCTION

This Article draws attention to the disparate sentences of Native Americans in the Dakotas for crimes prosecuted by the United States under the Major Crimes Act¹ and federal subject matter jurisdiction statutes,² as

1. 18 U.S.C. § 1153 (2006).

2. The United States Department of Justice announced a policy of not referencing the quantity of drugs in federal indictments to ameliorate the impact of mandatory minimums in certain drug offenses, although it is not clear that this policy will be implemented in crimes occurring in Indian Country. Many drug crimes are potentially subject to federal court jurisdiction, but the United States, on many occasions, declines to prosecute those crimes when concurrent state and federal jurisdiction exists, unless there is some interstate component to the distribution scheme, while they are more frequently prosecuted in tribal communities. This may be because the United States Department of Justice has a policy, called the Petite policy, which directs it not to prosecute crimes subject to state jurisdiction if the potential penalties are comparable. However, the Petite policy is rarely utilized in Indian Country, perhaps because of artificial limitations upon tribal sentencing authority imposed by Congress in the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1306 (2006). *See* United States v. Lester, 85 F.3d 1409, 1413 (9th Cir. 1996). A rare example of tribal-federal prosecution occurred on the Standing Rock Reservation, where the United States and the Standing Rock Sioux Tribe collaborated to arrest and prosecute a drug distribution ring. *See* Press Release, United States Attorney's Office, District of North Dakota, *Operation Prairie Thunder Results In Drug Trafficking Charge*, (June 5, 2012), available at <http://www.justice.gov/usao/nd/news/2012/06-05-12-Operation%20Prairie%20Thunder.html> (last accessed Jan. 7, 2014).

compared to sentences for similar offenses under state law. The United States has jurisdiction, concurrent with tribal governments, over certain enumerated offenses committed by Indians,³ some of which are ironically defined under state law.⁴ Because of congressional initiatives to exact harsher penalties for certain crimes as well as the impact of the federal sentencing guidelines—which in most situations forecloses sentence mitigation schemes such as parole—some Indian persons receive criminal sentences far out of proportion to what a non-Indian or Indian person would receive for similar criminal conduct prosecuted in a state forum. This reality may, in certain situations, deter the prosecution of crimes prosecutable in federal courts because of a federal perception of unfairness,⁵ but also in many cases, result in criminal sentences that are far out of proportion to the “actual” sentence that would be served under a state court conviction.⁶

Recently, this reality was most poignantly addressed by United States Court of Appeals Senior Judge Myron Bright, who vividly depicted the

3. See 18 U.S.C. § 1153, which enumerates fifteen offenses if committed by Indian persons in Indian Country, as defined by 18 U.S.C. § 1151 (2006), would subject that person to federal court jurisdiction. Most of the offenses contained therein are defined under federal law, but some, including burglary and felony child abuse or neglect, are actually defined under the substantive law of the state in which the crime occurs.

4. See, e.g., Adam Walsh Child Protection and Safety Act, 42 U.S.C. §§ 16901 to 16962 (2006), which includes a fifteenth crime, felony child abuse or neglect, subject to federal jurisdiction. The underlying substantive crimes, however, are defined under state laws, which have no applicability to Indians in Indian Country, yet the sentences received are the product of more draconian federal sentencing schemes.

5. The United States has been the subject of much criticism from both tribal leaders and international rights organizations for the relatively low rates of prosecution for certain crimes under United States jurisdiction in Indian Country. See Steven W. Perry, U.S. Dept. of Justice, NCJ 239077, *Tribal Crime Data Collection Activities* (2012), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4493>. However, there are situations where the United States could assert its authority to prosecute crime, but may stay its hand out of concern that the potential penalty may be out of proportion to the crime and instead permit tribal officials to prosecute. This does not appear to be an illegitimate use of its authority and in some circumstances may be the more “just” option.

This may have proved the impetus for the Tribal Law and Order Act of 2010, which expands the sentencing authority of tribal governments from one year to three years and also requires the United States to provide more information to tribal governments when it declines to prosecute a crime. Tribal Law and Order Act of 2010, Pub. L. No. 111–211, 124 Stat. 2258. Some would contend that although the United States certainly has a responsibility to prosecute crime within its jurisdiction, when the exercise of that jurisdiction would result in a sentence far out of proportion to what the tribe would impose and the tribe is willing to provide a sentence permitting the offender to remain within the tribal community, then justice is achieved when the United States stays its hand.

6. Of course, one reason for this is that prison sentences in the Dakotas are rarely served out in absolute time but are reduced by operations of parole, good time, and other sentence amelioration schemes that are not available for federal sentences because of the oftentimes harsh impact of the Sentencing Reform Act, passed in 1984 as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

injustices occasioned by these disparities in *United States v. Deegan*.⁷ The *Deegan* case involved a young Native woman, who was a victim of lifelong, horrific abuse. She was prosecuted for second-degree murder under 18 U.S.C. § 1153, and received a sentence of 121 months for the crime of neonaticide, which Judge Bright pointed out tended to be punished far less severely in North Dakota state court. The federal court judge, who imposed the ten-year-plus sentence upon Ms. Deegan, failed to fully factor into the sentencing equation her life experiences and the mitigating factors which may have called for a lesser sentence because he was essentially deprived of that ability by federal law and sentencing guidelines. Judge Bright's dissent in *Deegan* has re-energized the discussion among many tribal leaders, federal judges, and prosecutors concerned about the tribal justice systems in Indian Country. This examination includes sentencing disparities, how tribal and federal systems can work together to prosecute crime, and imposing appropriate penalties that do not result in the unnecessary displacement of Native persons from tribal communities when tribal options exist. This is the inspiration for the authors' critique of federal sentencing contained herein.

This critique must not be confused with sympathy for criminals who commit crimes in tribal communities or for any call to lessen prosecution efforts. Crime in tribal communities remains a pernicious problem,⁸ detracting from the peace and quiet Native persons were promised in treaties and federal enactments designed to carry out the United States' trust responsibility to Native persons. Contradictory voices, however, perhaps send the wrong message to federal officials who are oftentimes criticized for not prosecuting enough crime in tribal communities, all the while receiving the brunt of criticism when tribal members are taken from their communities and sent hundreds of miles away to federal prisons where they lose all contacts with their families, traditions, and sometimes spiritual practices. Native persons are not only disproportionately victims of crime,⁹

7. 605 F.3d 625 (8th Cir. 2010), *reh'g en banc denied*, 634 F.3d 428 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 2094 (2011).

8. According to recent statistics, crime in Indian Country remains stubbornly resistant to federal and tribal efforts to combat it. See Laurel Morales, *From Cops to Lawyers, Indian Country Copes with High Crime*, NATIONAL PUBLIC RADIO, <http://www.npr.org/2013/08/05/207067518/from-cops-to-lawyers-indian-country-cope-with-high-crime> (last visited Jan. 7, 2014) (for a recent National Public Radio series on crime in Indian communities).

9. See LAWRENCE A. GREENFIELD AND STEVEN K. SMITH, U.S. DEPT. OF JUSTICE, NCJ 173386, *AMERICAN INDIANS AND CRIME* iii (1999). This study revealed that Native persons experience violent crime at rates more than twice the national average and that one out of every four Native persons between the ages of eighteen and twenty-four had been the victims of crime.

but are also incarcerated at rates far out of proportion to other persons.¹⁰ Statistically speaking, Native persons who commit crimes were more likely themselves to have been victims of crime at one time and their criminality is arguably related to their victimization.¹¹ However, Native persons, because of the impact of the Major Crimes Act, are the only persons, with the exception of persons who commit violent crimes in federal enclaves, who bear the brunt of congressional acts designed to get tough on violent crimes. These include such crimes as child abuse and sexual assaults, because the vast majority of those crimes are prosecuted by state prosecutors in state forums utilizing state law.

When Congress acts to impose a mandatory minimum sentence upon sexual offenders or individuals who commit crimes while possessing firearms, Indian persons feel the brunt of such federal sentences more than other defendants. Federal sentencing of Native offenders is oftentimes carried out based on a sentencing scheme which gives no consideration to the unique nature of the Indian Country jurisdiction of the federal courts. As this Article demonstrates, the wholesale adoption of federal criminal laws to crimes committed by Native persons in tribal communities was effectuated as the result of one isolated murder in Indian Country, in what is now South Dakota. Congress intervened to extend federal court criminal jurisdiction over Indian Country because of a perception that Indian tribes were ill-equipped to deal with crime in their communities in a sufficiently punitive manner.¹² Congress has moved forward since that time, with a few notable exceptions,¹³ to legislate in the crime arena with little to no regard for the tribal voice. This needs to change.

10. In South Dakota, the rate of incarceration for Native Americans is twenty-nine percent of all incarcerations, and thirty-eight percent of juvenile offenders in 2011, while only making up 8.9 percent of the population. Lisa Desjardins & Emma Lacey-Bordeaux, *Problems of Liberty and Justice on the Plains*, CNN, Dec. 13, 2012, <http://www.cnn.com/2012/08/10/us/embed-america-tribal-justice>.

11. Although there have been no studies documenting the correlation between victimization, and later in life criminality in Indian communities, the connection has been documented in other non-tribal communities. For example, a National Institute of Justice study found that a child who was the victim of abuse or neglect had a twenty-eight percent higher chance of being arrested as an adult and a thirty percent chance of being arrested for a violent crime as an adult. See CATHY S. WIDOM & MICHAEL G. MAXFIELD, NAT'L INST. JUST., AN UPDATE ON THE "CYCLE OF VIOLENCE," RESEARCH IN BRIEF (2001).

12. See *Ex parte Kan-Gi-Shun-ca*, 3 S. Ct. 396 (1883) (holding that the territorial court was without jurisdiction and that Crow Dog's conviction and sentence was void and his imprisonment illegal). "It is a case where . . . the law itself . . . judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions . . ." *Id.* at 406.

13. Those exceptions include, *inter alia*, the federal death penalty opt-in provision. See 18 U.S.C. § 3598 (2006) (requiring an Indian tribal government to opt in to the imposition of the death penalty in a case premised upon 18 U.S.C. § 1153 or § 1152), and for the career offender opt-in provision, see 18 U.S.C. § 3559(c)(6) (2006).

This Article, like others written on the subject,¹⁴ calls for a reasonable solution to the disparities problem by permitting Indian tribes the right to opt in to a federal sentencing scheme where a federal court could depart downward to impose sentences upon Native persons more in line with state sentences, when such action would not violate federal law. There are already provisions of federal law where tribal governments and their citizens are permitted a voice in the sentencing of Native offenders in federal court—including the imposition of the federal death penalty¹⁵ and the imposition of sentencing enhancement for career offenders¹⁶—so modifying the federal sentencing scheme to address state-federal disparities is not a radical departure from existing federal law. The Major Crimes Act itself, at §1153(b), directs a federal court to utilize state substantive laws to determine the elements of certain criminal offenses.¹⁷ For other crimes prosecuted by the United States, under what is referred to as the Assimilative Crimes Act,¹⁸ the federal court is commanded to impose a sentence that is “likened” to the state sentence if the substantive crime is not defined under federal law.¹⁹ In such proceedings, a federal court is already required to determine what sentence a state would impose and order a similar federal sentence.

Nor would a tribal opt-in impose an unreasonable burden upon federal judges and federal probation officers. Sentencing in the federal system is already so mechanical that requiring the use of state sentences in Indian Country prosecutions, when an Indian tribe has opted in to such a system, only results in the comparison of state statistics for comparable crimes to the sentence resulting from the application of the federal sentencing guidelines—something the federal judiciary is surely equipped to handle. Nor would it impose any equal protection issues because only Natives are receiving the potential benefits or detriments of state sentencing in the federal courts. The United States Supreme Court has reiterated numerous times that federal criminal jurisdiction is based upon the United States’ plenary relationship to Indian tribes, and differences in sentences based

14. See generally Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723 (2008); see also, Gregory D. Smith, *Disparate Impact of the Federal Sentencing Guidelines on Indians in Indian Country: Why Congress Should Run the Erie Railroad into the Major Crimes Act*, 27 HAMLINE L. REV. 483 (2004).

15. See 18 U.S.C. § 3598.

16. See 18 U.S.C. § 3559(c)(6).

17. 18 U.S.C. § 1153(b).

18. 18 U.S.C. § 13 (2006) (requiring that a person prosecuted in federal court for an offense assimilated by this provision be subject to state law “shall be guilty of a like offense and subject to a like punishment.”).

19. *Id.*; see also, *United States v. Engelhorn*, 122 F.3d 508, 510 (8th Cir. 1997).

upon that plenary authority between Indian and non-Indian offenders do not implicate the equal protection rights of either.²⁰

Before examining a possible solution to the disparities problem, the problem itself must be defined. In this regard, some of the evidence is statistical and some is anecdotal. Because the United States Supreme Court made the federal sentencing guidelines discretionary rather than mandatory in *United States v. Booker*,²¹ the United States Attorney's Office in North Dakota, for example, has prosecuted and gained convictions in 377 criminal cases for the ten most common crimes prosecuted in Indian Country, with an average sentence of sixty months.²² The average sentence for the crime of sexual assaults against children and adults under the Major Crimes Act has been 133 months, while the average sentence for manslaughter has been seventy-three months. With average statistics, obviously some defendants are serving a much greater amount of jail time than the average and some are serving less than the average. Again, because the federal system has no provision for parole or "good time," these sentences are hard sentences—nearly all of which are being served in their entirety. State sentences are somewhat more difficult to glean information from because in both Dakotas a criminal sentence is rarely served out to its term. A typical five-year prison sentence imposed in a state court in North or South Dakota, may result in a defendant actually serving less than twenty-five percent of the sentence because of good time accrued in prison, as well as the availability of parole, something eliminated in the federal system under the Comprehensive Crime Control Act of 1984.²³

Current literature suggests that the Dakotas produce great disparities in sentences. For example, in a recent article published in the *Marquette Law Review*, the author wrote:

In South Dakota, a defendant convicted of assault in state court receives an average sentence of twenty-nine months. However, if a Native American defendant were to commit that same offense within one of the Indian reservations in South Dakota, the defendant would be prosecuted in federal court and receive an average sentence of forty-seven months. This glaring disparity, whereby Native Americans prosecuted for aggravated assault in

20. See *United States v. Lara*, 541 U.S. 193, 209 (2004); see also *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005).

21. 543 U.S. 220 (2005).

22. *Id.* at 245. This information was provided to the authors by Wade Warren, Chief Probation Officer for the United States District Court for the District of South Dakota; see also, Appendix A.

23. Pub. L. 98-473, 98 Stat. 1976 (1984).

Indian country receive sentences sixty-two percent higher than defendants convicted in state court for the same offense, is a product of the complex jurisdictional arrangement surrounding Indian country and the rigidity of the Federal Sentencing Guidelines.²⁴

While this article relates primarily to North and South Dakota, the issue is germane to all states in which Indian reservations are located, and where the result is the federal prosecution of Native defendants. Droske observes, “In New Mexico, for example, the average sentence for a sex offense was twenty-five months, compared to eighty-six months in federal court.”²⁵ That article quotes Judge Charles B. Kornmann, a South Dakota federal district judge, as follows:

Ask virtually any United States District Judge presiding over cases from Indian Country whether the Federal Sentencing Guidelines are fair to Native Americans; ask virtually any appellate judge dealing with cases from Indian Country the same question, and I believe the answer would largely be the same: No. Too often are we required to impose sentences based on injustice rather than justice, and this bothers us greatly.²⁶

That article proposes a method by which federal judges can downwardly depart from the Federal Sentencing Guidelines established by the United States Sentencing Commission. Native American defendants’ sentences can better align with corresponding state sentences in cases in which an Indian tribe exercises jurisdiction over the territory where the crime occurred. The tribe may choose to permit the federal court to sentence in accordance with state law if a substantial disparity is shown.²⁷ The most recent law reference is entitled “Tribal Control of Federal Sentencing,” wherein the author explains in an opening statement the following:

Federal Indian country prosecutions bring together two very complicated areas of law: Indian country criminal jurisdiction and federal sentencing. This Part explains which Indian country defendants the federal government prosecutes and how they are sentenced. This background will show how federal jurisdiction

24. Droske, *supra* note 16, at 723.

25. *Id.* at 724 n.4.

26. *Id.* at 725 (quoting Charles B. Kornmann, *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*, 13 FED. SENT’G REP. 71, 71 (2000)).

27. *Id.*

and sentencing systematically create harsher sentences for Indian defendants than for non-Indian defendants.²⁸

Another periodical of importance carries the title “Disparate Impact of the Federal Sentencing Guidelines on Indians in Indian Country: Why Congress Should Run the Erie Railroad into the Major Crimes Act.”²⁹ Some comments are appropriate. The author in the introduction writes:

Why Congress would have done this is beyond me. There is apparently a never ending trail of Congress making almost everything a federal crime. The vast majority of members of Congress apparently give no thought to what they are doing to Native Americans who are then made subject to these federal crimes, carrying penalties out of all proportion to penalties found outside Indian Country.³⁰

Each of these scholarly articles refers to the Report of the Native American Advisory Group, issued in November 2003.³¹ The Advisory Group Report will be discussed in greater detail later in this Article.³²

In summary, the sentencing of Native Americans in federal courts in this country has not kept pace with the overriding federal policy regarding the treatment of Indian tribes as sovereign nations whom the United States deals with on a nation-to-nation relationship. Congress has moved toward Indian self-determination in numerous areas since the previous era of federal policy known as tribal termination.³³ However, federal sentencing laws and practices of the federal government have been a glaring example of anti-tribal sovereignty and thus are in sore need of re-examination.

28. Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 CALIF. L. REV. 1409, 1411 (2011).

29. Smith, *supra* note 16, at 483.

30. *Id.* at 484.

31. U.S. SENTENCING COMM’N, REPORT OF THE NATIVE AMERICAN ADVISORY GROUP (2003), available at www.uscc.gov/ResearchProjects/Miscellaneous/20031104NativeAmericanAdvisory_Group_Report.pdf. [hereinafter “ADVISORY GROUP REPORT”].

32. *See infra* Part III.

33. In the Indian Self-Determination and Education Assistance Act of 1975 (“ISDEAA”), Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 450), Congress directed federal agencies to contract directly with Indian tribes to run functions of the federal government that deal directly with tribes such as, *inter alia*, benefits, human services, and child protection. This law laid the foundation for numerous other laws passed since then treating Indian tribes as sovereign nations, including the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963) (“ICWA”); and the Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. § 2701) (“IGRA”).

II. FEDERAL CRIMINAL JURISDICTION AND THE SENTENCING GUIDELINES

The imposition of criminal sentences upon tribal citizens for committing crimes in Indian Country has its antecedents in a particularly anti-tribal climate. Congress, by passage of the Indian Civil Rights Act of 1968 (“ICRA”),³⁴ with little to no tribal input, artificially restricted tribal courts to maximum one-year sentences for crimes as serious as rape and murder. The United States Supreme Court conjured up various reasons to deny Indian tribes the right to prosecute all persons who commit crimes in tribal communities.³⁵ Federal prosecutors and the judiciary have gone about sentencing Indians for federal crimes with little to no restraint or concern for tribal interests. This history is important because it demonstrates that, unlike other areas of the law where Indian tribes and their citizens have been consulted by the federal government before serious decisions are made by the United States, acting as the trustee for tribal citizens,³⁶ decisions on what punishments the federal courts should mete out

34. Pub. L. No. 90-284, 32 Stat. 77 (codified at 25 U.S.C. §§ 1301-1303). This law originally restricted tribal courts to the imposition of six month sentences. Later it was amended to permit a maximum tribal sentence of one year. It was amended anew by the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified at 25 U.S.C. § 2801).

35. The Supreme Court has, on two occasions, held that Indian tribes are implicitly divested of authority to prosecute crimes committed by certain persons in Indian Country, including non-Indians. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 195 (1978) (holding Indian tribal courts do not have jurisdiction over non-Indians); *Duro v. Reina*, 495 U.S. 676, 688 (1990) (“tribal power does not extend beyond internal relations among members.”). The latter decision resulted in the intolerable situation where certain crimes committed by Indian persons against other Indian persons that did not rise to the level of Major Crime under 18 U.S.C. § 1153 were not subject to prosecution by any entity because of the divestiture of state jurisdiction under the General Crimes Act, 18 U.S.C. § 1152. Congress responded by superseding the decision by amending the Indian Civil Rights Act to recognize the inherent authority of Indian tribes to prosecute all Indians who commit criminal offenses in Indian Country. *See Lara*, 541 U.S. at 199.

36. *See* ISDEAA, 88 Stat. 2203 (Authorizing the Secretaries of the Departments of the Interior, Health and Human Services, and Education, *inter alia*, to enter into contracts with, and make grants directly to, federally recognized Indian tribes, giving tribes authority for how they administer the program and funds, and thus greater control over their welfare generally. The ISDEAA made self-determination the focus of government action. The Act reversed a thirty-year effort by the federal government under its preceding termination policy to sever treaty relationships with and obligations to Indian tribes); ICWA, 92 Stat. 3069 (Congress finding “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and that the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families); IGRA, 102 Stat. 2467 (“The Congress finds that—(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue; (2) Federal courts have held that [Section 81] . . . of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts; (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands; (4) a principal goal of Federal Indian policy is to promote

to Native Americans have largely been the by-product of the United States' attempts to "get tough on crime."

The authors have written extensively on how the United States came to exercise criminal jurisdiction in tribal communities.³⁷ Suffice it to say, it was not in response to requests from tribal nations. This history can be traced to *Ex parte Crow Dog*,³⁸ a case where a Lakota Indian, Crow Dog, killed another Lakota man, Spotted Tail, in the early 1880s, on what is now the Rosebud Sioux Indian Reservation in South Dakota. At the time of the killing, the Tribe did not have a formalized court system to resolve disputes that were traditionally resolved by the *tiospayes*, or extended families, that respected each side in a conflict. Nor at the time was there federal statutory support for the invocation of federal jurisdiction, as the only law in place at the time—the General Crimes Act—did not permit federal jurisdiction when one Indian committed a crime against another Indian, the situation in Crow Dog's case. The Tribe, invoking traditional custom and practice, required Crow Dog to provide certain necessities for Spotted Tail's family, a type of restitution that restored the loss of Spotted Tail.

Into this fray stepped the Dakota territorial government, who prosecuted Crow Dog for murder in a territorial court and convicted and sentenced him to death. The United States Supreme Court reversed the conviction and held that the territorial courts of the United States had not been vested with the jurisdiction over criminal offenses committed by one Indian against another within an Indian reservation.³⁹ The Fort Laramie Treaty of 1868 also did not give the federal government such authority. The result of this decision was that the Sicangu Band of the Lakota was left to its own principles of justice when determining punishments for those Band members who committed crimes against other Indians—a form of justice the Lakota and many other tribal nations had practiced since time immemorial.

Although the decision was, in its result, a somewhat haphazard endorsement of tribal sovereignty, it was clearly based upon the notion that tribal citizens were inferior to non-Indians and thus could not fully understand the sense of justice meted out in the non-Indian courts.

tribal economic development, tribal self-sufficiency, and strong tribal government; and (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.”).

37. See generally B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457 (1998).

38. See *Ex parte Kan-Gi-Shun-ca*, 3 S. Ct. at 396.

39. *Id.* at 407.

According to the United States Supreme Court, it was unfair to try Crow Dog in a federal court for the following reason:

[That court] tries them not by their peers, nor by the custom of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one of which measures the red man's revenge by the maxims of the white man's morality.⁴⁰

The federal government enacted the Major Crimes Act to fill what was perceived as a void in the enforcement of law created by the *Crow Dog* decision.⁴¹ The Major Crimes Act specifies certain felonies, now fifteen, committed by an Indian person in Indian Country and vests the federal (then territorial) courts with jurisdiction over such offenses. This jurisdiction is not exclusive, however, since tribal courts can exercise concurrent authority over such crimes;⁴² though the right of Indian tribes to handle serious crimes committed by their members was largely emasculated in 1968 when Congress limited tribal sentencing authority to six months, but later expanded that authority to twelve months. While this sentencing authority has once again been expanded granting tribes the right to impose sentences of up to three years per offense and nine years for the same criminal transaction,⁴³ the quid pro quo for the exercise of such jurisdiction has been an almost complete acceptance of the western system of justice that Crow Dog supposedly could not understand because of his savagery.⁴⁴

40. *Id.* at 406. The Supreme Court used these supposed different paradigms of justice Natives and non-Natives utilize in their systems later in *Oliphant* to strip Indian tribes of criminal jurisdiction over non-Indians who commit crimes in Indian Country, postulating that it was unfair for Indian tribes to mete out their inferior form of justice to non-Indians who, citing its decision in *Crow Dog*, could not possibly understand Native justice.

41. It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. Under our present law, there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that of the blood avenger that is, the next of kin of the person murdered shall pursue the one who has been guilty of the crime and commit a new murder upon him.

48th Cong. 2d Sess. 16 Cong. Rec. 934 (1885) (statement of Congressman Byron Cutcheon).

42. *See generally* *Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995) (holding that even though the Major Crimes Act references the "exclusive" jurisdiction of the United States over the crimes enumerated therein, Congress did not preempt inherent tribal court jurisdiction over those crimes).

43. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261.

44. One of the requirements for tribes to enhance their sentencing authority is to provide to defendants law-trained legal counsel, at the tribe's expense, and judges trained in the western legal

The Major Crimes Act was thus a law premised upon a notion of Anglo superiority and tribal naiveté, and this paternalistic attitude, evident even in the latest federal forays into tribal justice systems in the Tribal Law and Order Act, sees its most punitive impact in the application of the federal sentencing laws and guidelines to tribal communities. Even when upholding its constitutionality in the face of a legal challenge to the Major Crimes Act applying to tribal citizens in *United States v. Kagama*,⁴⁵ the Supreme Court gave little consideration to any argument that the law should be sensitive to the unique condition of Native persons and was not countenanced by any power granted to the federal government in the United States Constitution.⁴⁶ The Court in *Kagama* held:

[T]he power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else . . . and because it has never been denied, and because it alone can enforce its laws on the tribes.⁴⁷

This tautological rationale for upholding federal court authority over Native crime—it exists because the federal government says it exists—is now referred to as the “plenary power doctrine” and has resulted in both positive and negative legislative enactments for tribal communities. In the criminal jurisdiction arena, it has been exercised with little to no regard for how federal laws and policies will impact Native persons. When Congress enacted 18 U.S.C. § 3242, essentially assimilating all of federal procedural and sentencing law into Indian Country offenses, it did not solicit input from elected tribal leaders or tribal citizens. In 1984, when Congress passed the Sentencing Reform Act—passed as part of the Comprehensive Crime Control Act of 1984⁴⁸—there was no attempt to gather tribal input into how the law would impact the prosecution of Native persons in tribal communities; though, it may be naive to believe that, had Indian tribes voiced some objections to the law, the legislation would have been altered in any meaningful way. However, given the atmosphere in which the country found itself at that time, it would have been appropriate to at least have consulted with tribal leaders and their citizens, especially in light of

system. Therefore, tribes that utilize traditional systems of justice (including non-law-trained elders and traditional spokespersons for citizens) are not entitled to seek enhanced sentences.

45. 118 U.S. 375 (1886).

46. *Id.* at 378-83.

47. *Id.* at 384-85.

48. Pub. L. No. 98-473, 98 Stat. 1976 (1984).

the passage of the ISDEAA only nine years earlier. Subsequent federal laws have resulted in enhanced sentencing of Native offenders in federal courts, oftentimes passed as the result of some crime committed against a child not related in any way to Indian Country. For example, both the Adam Walsh⁴⁹ and Jacob Wetterling Acts⁵⁰ were passed in a bi-partisan manner with congressional speeches proclaiming that the country would be rendered safer by the Acts of Congress, when in reality the overwhelming majority of prosecutions occur only in Indian Country cases.⁵¹

Tribal leaders and members have perhaps been reticent about these developments because they fear the alternative to federal court jurisdiction even more. Tribal leaders are also concerned about crime in their communities and may hesitate to criticize federal efforts to strengthen law enforcement and prosecution activities in tribal communities. After all, criminals are not a popular constituency. However, when Indian persons receive harsher sentences in federal court than those who commit similar crimes in state courts—whether non-Indian or Indian—the plenary power doctrine is not a sufficiently moral explanation of why this is occurring.

III. THE ADVISORY GROUP REPORT

The problem of disparate sentencing inflicted upon Native persons has been the subject of recent attention. The notion to form an Advisory Group on Native American Sentencing Issues grew out of a United States Sentencing Commission meeting held in Rapid City, South Dakota, in June 2001.⁵² The Advisory Group consisted of fourteen distinguished members, including federal district judges, a federal magistrate judge, a federal probation officer, and a distinguished group of men and women with Native American backgrounds, including now Assistant Secretary-Indian Affairs Kevin Washburn.⁵³ The chair of the Advisory Group was Chief Judge Lawrence L. Piersol of the District of South Dakota.⁵⁴ The Advisory Group Report is in effect the parent of the three law review articles cited earlier herein.

49. Adam Walsh Child Protection and Safety Act, 42 U.S.C. §§ 16901-16962.

50. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 4071 (2006).

51. The Adam Walsh Act added a new felony to the Major Crimes Act—felony child abuse—and due to the fact that only Indians can be prosecuted under the MCA, this law only applies to native offenders.

52. ADVISORY GROUP REPORT, *supra* note 33, at 3.

53. *Id.* at 3.

54. *Id.* at 2. Judge Piersol had earlier recommended to the Sentencing Commission that in sentencing, federal judges be permitted to consider comparable state court sentences. *See generally* Tredeau, *supra* note 30. That option is presently not part of authorized sentencing procedures in the federal courts.

Relying upon available data, the Advisory Group limited its study to federal offenses most often prosecuted under the Major Crimes Act,⁵⁵ and while second-degree murder was not examined, other types of homicide were considered.⁵⁶ In involuntary manslaughter cases, almost seventy-five percent of those cases related to Native Americans and many related to the offender's use of alcohol in a motor vehicle.⁵⁷ The statistics upon which the Advisory Group relied came mostly from South Dakota and New Mexico.⁵⁸

In addition, the Advisory Group noted that Indians were the largest demographic of defendants prosecuted in voluntary manslaughter cases.⁵⁹ However, the largest area of concern relates to sexual abuse cases, which represents a very serious and pervasive problem on many reservations.⁶⁰ The Advisory Group Report stated, "sentences for sexual abuse offenders in the federal courts are more severe than state sentences,"⁶¹ mentioning federal sentences of Indians in South Dakota and New Mexico as much more severe than comparable state sentences for similar crimes.⁶²

With respect to serious assaults, Indians are more likely than any other ethnic group to be incarcerated for assault as observed in the Advisory Group Report: "While Indians represent less than 2% of the U.S. population, they represent about 34% of individuals in federal custody for assault."⁶³ In later statistics, the Droske article shows that for assault in South Dakota, an Indian offender receives a much more severe sentence: the state court average sentence in 2002 was twenty-two months,⁶⁴ while the federal court average sentence in 2005 was forty-seven months, or nearly four years.⁶⁵ The disparity gap appears to be getting wider as the years go by. The Advisory Group Report requested that action be taken by the Sentencing Commission to lower the base offense for assault to diminish the sentencing impact on Native American defendants.⁶⁶

55. 18 U.S.C. § 1153.

56. ADVISORY GROUP REPORT, *supra* note 33, at i.

57. *Id.* at V.B.1, 14-15.

58. *Id.* at 31.

59. *Id.* at 18.

60. *Id.* at 20-21.

61. *Id.* at 21.

62. *Id.* at 21-22.

63. *Id.* at 30-31.

64. Droske, *supra* note 16, at 745.

65. *Id.* at 743.

66. ADVISORY GROUP REPORT, *supra* note 33, at 34 ("[T]he Ad Hoc Advisory Group strongly recommends that the Commission lower the base offense level for assault to lessen the disparity between federal and state sentences, thus diminishing the impact on Indian defendants.").

These and other important recommendations of the Advisory Group Report, however, were not ultimately adopted by the Sentencing Commission. Other recommendations included mitigation for the role alcohol plays in prosecuting Native Americans in most crimes and urging the Sentencing Commission to engage in meaningful consultation with tribal governments.⁶⁷ The Sentencing Commission seemingly considered the Advisory Group Report, but the Commission ultimately failed to take any meaningful action on its findings.

More than ten years have passed since the Advisory Group Report was published. Since then, countless Native Americans have been and will continue to be sentenced in federal court pursuant to federal law and sentencing guidelines. For more accurate and current data, the Sentencing Commission should form a new advisory group on Native American sentencing disparity issues with the charge to prepare an updated report. Such a report could demonstrate whether, post-*Booker*, the disparity in sentences meted out to Native Americans has declined with the exercise of judicial discretion. Unfortunately, our review of a handful of cases within the Eighth Circuit suggests that the status quo has been maintained post-*Booker*.⁶⁸ Of course, even if a new report were to be published, much work would remain to get the Sentencing Commission to act upon the report's recommendations the next time around. In any event, however, such a report would be valuable to reference in drafting a legislative fix.

IV. DISPARATE SENTENCING OF NATIVE AMERICANS

The disparate sentences imposed on Native Americans compared to similar crimes committed nearby in the same state, or even town, cry out for relief. These disparate sentences may be seen as just one more example of a well-documented history of discrimination against Native Americans, though perhaps in this instance the discrimination is more backhanded than explicit. Two fairly recent federal cases, one in North Dakota and one in South Dakota, serve as vivid examples of basic unfairness in the sentencing of Native Americans in federal court, and may suggest a remedy.

First, an examination of the South Dakota federal case, *United States v. Boneshirt*,⁶⁹ is warranted. The crime of second-degree murder committed by the defendant, Boneshirt, was indeed serious and called for both swift and firm justice. Boneshirt, age seventeen, while in the process of having consensual sex with a nineteen-year-old female Native American woman,

67. *Id.* at 37-38.

68. *See infra* Part IV.

69. 662 F.3d 509 (8th Cir. 2011).

choked her to death after an argument had ensued. In a plea agreement with the government, the defendant pleaded guilty to second-degree murder after he reached the age of eighteen. While awaiting sentencing, he participated in a plan to escape from county jail. Although the plan to escape was ultimately thwarted by prison officials, his participation in the plan necessarily impacted his sentencing. The probation officer calculated a guideline sentence of thirty years to life.⁷⁰

The court in sentencing Boneshirt considered the sentencing guidelines as well as 18 U.S.C. § 3553(a). In addition, the court was presented with a chart detailing sentences for murder in the federal courts of South Dakota and the Eighth Circuit, with an alleged median of twenty-eight and a half years or less.⁷¹ Those sentences were considerably less harsh than the sentence of forty-eight years that the judge actually imposed upon Boneshirt, even when considering additional time for Boneshirt's participation in the plan to escape from county jail. While the South Dakota state sentences were not in the record, this sentence greatly exceeds any state sentence for second-degree murder. In fact, the record in *Boneshirt* disclosed that the forty-eight year sentence was more than double the mean sentence for murder in the Eighth Circuit over the previous five years,⁷² which at the time amounted to slightly less than twenty-one years (250 months).⁷³

This discussion is not to criticize the sentence or its affirmance by the Eighth Circuit panel, with one dissenting vote, but rather to observe and draw attention to the severity under federal sentencing practices and procedures affecting an Indian defendant who committed his crime on an Indian reservation in South Dakota. A non-Indian, or even an Indian committing a similar offense just outside of the reach of Indian Country jurisdiction, would not receive such a harsh penalty under state law. Thus, it is no wonder the dissent in *Boneshirt* questioned the sentence as “unreasonable.”⁷⁴

A second and equally important sentencing disparity case is the North Dakota federal case, *United States v. Deegan*.⁷⁵ This case is the most striking example of harsh disparity between a federal sentence for a crime as compared to a state sentence for a similar crime. In the *Deegan* case, a

70. *Id.* at 512.

71. *Id.* at 514 n.2.

72. *Id.* at 522 n.5.

73. *Id.*

74. *Id.* at 521 (Bright, J., dissenting) (stating “[B]oneshirt’s forty-eight-year sentence is substantively unreasonable because the district court unreasonably weighed the facts at issue in the case.”).

75. 605 F.3d 625.

Native American woman on the Fort Berthold Reservation, located in western North Dakota, gave birth at her home and then allowed her newborn to die within twenty-four hours of birth. Ms. Deegan, as a defendant, pleaded guilty to second-degree murder and pursuant to the guidelines for sentencing received a federal sentence of more than ten years (121 months).⁷⁶

As explained in the record of *Deegan*, this sort of crime is known as “neonaticide.”⁷⁷ An expert on the crime, Dr. Phillip Resnick explained during his testimony in the *Deegan* case:

[N]eonaticide is simply the killing of a newborn infant on the first day of life. It’s actually a term that I coined in an article I wrote in 1969 where I was distinguishing that type of killing of a baby, which has very different characteristics, from the killing of a baby who is older or a child. And so neonaticide has universally been accepted now as a particular phenomenon when the baby is killed the first day of life.⁷⁸

Judge Bright contended in his dissenting opinion that “no basis exists to place neonaticide within the mine-run guidelines for second-degree murder.”⁷⁹ The dissent argued that the district court erred in imposing the 121 month sentence, noting that the Sentencing Reform Act allows the district court to depart from the sentencing guidelines in cases which present “atypical features,” such as in Ms. Deegan’s case.⁸⁰

Dr. Resnick offered testimony at Ms. Deegan’s sentencing hearing about women who commit the crime of neonaticide.⁸¹ Applicable to Ms. Deegan, the following was testified to by Dr. Resnick:

Such a mother is often in an overwhelming state of desperation at the time of her infant’s birth and lacks adequate resources to mentally handle the situation of delivering a child. She often conceals and denies her pregnancy, lacks insight into the situation, shows poor judgment, is cognitively immature with limited intelligence, and lacks sufficient coping skills. [The] commonly

76. *Id.* at 637.

77. For a discussion of this act and its criminalization, see K. Drescher-Burke, J. Krall, and A. Penick, *Discarded Infants and Neonaticide: A Review of the Literature*, NAT’L ABANDONED INFANTS RES. CTR. (2004) <http://aia.berkeley.edu/media/pdf/discardedinfantsliteraturereview.pdf> (last visited Jan. 7, 2014). This article examines the average sentence for the crime and finds that most sentences were light in comparison to murders of adults running from probation to thirty years in prison.

78. *Deegan*, 605 F.3d at 642-43 (citation omitted).

79. *Id.* at 646

80. *Id.* at 645 (citation omitted).

81. *Id.* at 642-43.

reported profile [of a homicidal mother] describes a woman usually in her twenties, who grew up or currently lives in poverty, is under-educated, has a history of abuse (both physical and sexual), remains isolated from social supports, has depressive and suicidal tendencies, and is usually experiencing rejection by a male lover at the time of the murders.⁸²

Prior to testifying, Dr. Resnick conducted an interview with Ms. Deegan and reviewed medical, psychiatric, and other relevant records pertaining to her. Upon completion of his review, Dr. Resnick diagnosed Ms. Deegan with suffering or having suffered from the following three psychiatric disorders: Major Depressive Disorder, Posttraumatic Stress Disorder, and Dysthymic Disorder.⁸³ Dr. Resnick noted in his report “that at the time Ms. Deegan delivered her infant, she was severely depressed, overwhelmed by the state of her life, and ‘simply did not have the psychological resources to care for a fourth child.’”⁸⁴

According to the opinion, Ms. Deegan had suffered severe abuse both as a child and later as an adult. She was twenty-five years old on the day her baby was born. She thought that by allowing the infant to die, she would be protecting her three daughters. She lived in abject poverty with a common law-type spouse who was an alcoholic and a drug user and who frequently abused her. Dr. Resnick’s testimony explained that neonaticide is typical of persons like Ms. Deegan.

Around the same time Ms. Deegan committed her offense, in the City of Fargo at a sorority house at North Dakota State University (“NDSU”), a young student similarly allowed her newborn to die in the first twenty-four hours.⁸⁵ The student experienced extreme emotional pressure because she feared her mother would discover her sexual activities.⁸⁶ The defendant NDSU student was prosecuted in North Dakota state court pursuant to state law and received a sentence of three years probation with time suspended, after pleading guilty to negligent homicide.⁸⁷

In another example, several years later, a woman from Bismarck, North Dakota, gave birth at her home and subsequently drowned the newborn shortly thereafter.⁸⁸ The woman was diagnosed with a number of mental

82. *Id.* at 643.

83. *Id.*

84. *Id.* (citation omitted).

85. *See* N.D. v. N.D. State Univ. Student, Case No. 09-00-K-01202-1 (2000) (on hand with the authors).

86. *Id.*

87. *Id.* at 656.

88. *See*, N.D. v. Glum, Case No. 08-07-K-02741 (2007) (on hand with the authors); *see also* Jenny Michael, *Glum to Serve Two Years for Infant Death*, THE BISMARCK TRIBUNE (Dec. 16,

health problems, including, *inter alia*, depression, posttraumatic stress disorder, and schizoaffective disorder.⁸⁹ The defendant Bismarck woman pleaded guilty to felony manslaughter and was sentenced in North Dakota state court to two years in prison with time suspended.⁹⁰

The disparity in these sentences is stark. Ms. Deegan was sentenced to more than ten years hard time in federal prison, while the other women who committed very similar offenses were sentenced under state law to probation and two years in prison, respectively. In the *Deegan* case, Dr. Resnick informed the court that women who pleaded guilty to neonaticide are “infrequently sentenced to more than three years in prison.”⁹¹ Dr. Resnick’s statement appears to be fairly accurate with respect to defendants who plead guilty to the crime of neonaticide, unless the defendant is subject to federal law and sentencing guidelines.

The authors note, however, the dissent’s observation in *Deegan*, that the crime of neonaticide is almost unknown in the federal courts.⁹² Thus perhaps the unknown nature of the crime itself caused the district court to adopt the prosecution’s recommendation regarding where Ms. Deegan’s offense fit within the guidelines sentencing range. Whether this supposition is correct, it’s clear the sentencing court could have benefitted from a review of neonaticide case sentences in state court.

Again, it is not the intent of the authors of this article to criticize the sentences of either Ms. Deegan, the NDSU student, or the Bismarck woman. However, the authors do seek to bring to light the similarity of the offenses and the grossly disparate sentences imposed upon the defendants.

V. REMEDYING THE DISPARATE SENTENCING OF NATIVE AMERICANS

Federal courts should be granted the authority, upon the exercise of an opt-in by an Indian tribe which exercises governmental authority over the Indian Country where a particular crime occurs, to depart downward and impose a sentence upon a Native offender comparable to a typical sentence imposed in a state court for a similar offense if the disparity in state and federal law is of a certain significance. The degree of significance is open to debate, as is the issue of whether federal courts should be able to depart upward in cases where the federal sentence is significantly less than that

2009), available at http://bismarcktribune.com/news/local/glum-to-serve-two-years-for-infant-death/article_9b1332a2-ea7a-11de-a460-001cc4c002e0.html (last visited Jan. 7, 2014).

89. *Id.*

90. *Id.*

91. *Id.* at 657.

92. *Id.* at 636.

typically imposed by state law. Arguments could be made that such an upward departure would be the logical extension of giving Indian tribes some input into federal sentencing decisions. A federal probation officer could furnish the information pertaining to a comparable state court system, factoring in parole eligibility and good time computation, in a pre-sentence report, which would then permit a federal judge to determine whether his discretion to depart downward (or upward) is triggered.

A similar argument could be made for non-Indian offenders who are prosecuted in federal court under the provisions of the General Crimes Act,⁹³ but it is politically as well as constitutionally dubious whether an Indian tribe could be given an opt-in that may determine a non-Indian's sentence. However, Congress may see fit to permit a downward or upward departure in those cases if the Indian tribe with jurisdiction over the particular territory where the crime occurred has chosen to opt in.

Permitting such tribal authority is not unheard of. Currently, under federal law, if a tribal citizen commits a crime that is prosecutable under either the Major Crimes Act or the General Crimes Act, and a potential penalty could be death under federal law, the death penalty is not an option unless the Indian tribe with jurisdiction over the territory where the crime occurred has opted in to the death penalty by tribal resolution.⁹⁴ If the imposition of the death penalty for crimes in Indian Country is contingent upon some tribal input, why not the disparity issue raised by this article? Similarly, the federal career offender rule—which mandates the imposition of harsher sentences in federal courts upon those persons who have committed prior crimes—does not apply in Indian Country unless a tribe has opted in.⁹⁵ Nor does the law permitting a federal court to treat a minor under sixteen as an adult for purposes of a criminal prosecution in federal court apply to youthful Indian offenders unless there is an opt-in.⁹⁶

All of these models can be utilized in drafting legislation to permit an opt-in to address the sentencing disparity issue. Some have suggested that the tribal opt-in should permit a tribe to require state sentencing in all cases involving tribal citizens prosecuted in that tribe's jurisdiction.⁹⁷ Although

93. 18 U.S.C. § 1152.

94. *See* 18 U.S.C. § 3598 (“Notwithstanding sections 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in § 1151 of this title) 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.”).

95. *See* 18 U.S.C. § 3559(c)(6).

96. *See* 18 U.S.C. § 5032.

97. *See generally* Jones, *supra* note 39.

this is certainly an option, the authors do not believe that the opt-in should be triggered unless there is a significant disparity in sentences. Indian tribes may be disinclined to opt in to state sentencing schemes because of the mistrust of state laws and institutions and the law will therefore never be utilized. Additionally, there is no moral imperative to apply state sentencing law in cases where the federal sentence imposed is similar to the state sentence, taking parole and early release into consideration. The problem that this article addresses is not the fact that Indian citizens are sentenced to federal prison for significant time, but that sometimes the sentences they receive are so far out of proportion to what a person would receive in state court that an injustice occurs. This problem does not exist with regard to other federal crimes because it is only in Indian Country that the United States prosecutes certain crimes generally left to state jurisdictions everywhere else in the United States.

Some may suggest that the United States Sentencing Commission can simply add another ground to downwardly depart from a presumptive sentence under the sentencing guidelines to address these disparities, as opposed to Congress enacting legislation that includes a tribal opt-in provision. This approach, however, ignores the fact that some tribal governments may be supportive of the imposition of harsher sentences upon those who commit crimes within their communities, especially since most victims of those crimes are other tribal citizens. It would be presumptuous to believe that all tribes would be supportive of the ability of a federal court to depart downward, or upward for that matter, on a sentence when a disparity issue exists. The tribal opt-in, in certain cases in which the disparity is substantial, is the friendlier solution to respecting tribal sovereignty.

Of course, some problems will have to be addressed. Suppose for example, a tribal citizen is operating a motor vehicle while under the influence and has an accident resulting in the death of a passenger. This crime is prosecuted as involuntary manslaughter under federal law, while the state may define it as vehicular homicide. The presumptive sentence under the federal sentencing guidelines is forty-eight months, while the standard sentence for a first-time offender in the state system is eight months—after giving good time credit and parole eligibility consideration. This disparity should be significant enough to trigger the tribal opt-in and the right of the federal sentencing judge to depart downward. The state sentence, however, is premised upon certain factors that the federal court cannot yet predict, including the likeliness of the defendant to behave himself in prison in order to become eligible for parole. This issue will have to be addressed in some manner.

Just as with the remedy for the disparities in sentencing for crack cocaine and powder cocaine,⁹⁸ resentencing should be an option for those tribal citizens whom have felt the brunt of the disparities and are currently serving federal sentences. Certainly for Ms. Deegan and Mr. Boneshirt, if the Three Affiliated Tribes and the Rosebud Sioux Tribe exercise the opt-in then resentencing may be available to them under federal law. In short, the sentences imposed upon these defendants and other Native defendants should be revisited. Absent some legislative fix, their cases certainly cry out for some clemency or resentencing.

VI. CONCLUSION

It has been more than ten years since the United States Sentencing Commission received the Advisory Group Report detailing the disparate federal sentencing of Native Americans, an issue the Report notes existed well before its issuance. However, despite the Report's findings and recommendations, Native Americans continue to be disparately sentenced when compared to others similarly situated, who are sentenced for similar conduct under state law. Let the United States do justice for Native Americans by enacting legislation that will allow all Americans in this instance to be treated equally by permitting a tribal voice in the imposition of criminal sentences upon tribal citizens. Such legislation would be both just and a demonstration of the United States fulfilling its trust responsibility to Indian nations and their citizens.

98. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (The law reduced the disparity between the amount of crack cocaine and powder cocaine needed to trigger certain United States federal criminal penalties from a 100:1 weight ratio to an 18:1 weight ratio and eliminated the five year mandatory minimum sentence for simple possession of crack cocaine, among other provisions. It also required resentencing of offenders who were impacted by the broad disparities in sentences).

APPENDIX A

Average Sentence for the Ten Most Common Offense Types For Native American Offenders in the District of North Dakota Post-Booker (January 12, 2005 through September 30, 2012).

	Offense type	Number	Percent	Average Sentence (months)
All Native American Offenders		377	100.0	60
	Assault	77	20.4	32
	Sexual Abuse	71	18.8	133
	Drug Trafficking	64	17.0	76
	Firearms	36	9.5	47
	Manslaughter	24	6.4	73
	Admin.of Justice	18	4.8	19
	Burglary/Breaking and Entering	17	4.5	13
	Larceny	12	3.2	10
	Embezzlement	12	3.2	6
	Arson	11	2.9	37
	Prison Offenses	10	2.7	9