

Tribal Control in Federal Sentencing

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On many Indian reservations throughout the country, the federal government is the only sovereign empowered to prosecute serious felonies. Consequently Native Americans are disproportionately exposed to lengthy federal sentences. Because the federal government controls these cases, tribal sovereigns lack the local control over criminal law and policy that states enjoy.

Under the federal sentencing guidelines, each federal crime has an offense level that can go up or down depending on the crime's circumstances. Combined with a defendant's criminal history, the final level determines the range of sentences recommended under the guidelines. I propose that tribes alone decide offense levels for crimes committed in Indian country. This proposal aims to (1) enhance tribal sovereignty over on-reservation violence and thereby provide tribes with experience regulating felonies; (2) increase respect among tribal governments and their members for federal criminal prosecutions; and (3) decrease the racial sentencing disparity between Indians and non-Indians.

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INTRODUCTION

In 2001, the U.S. Sentencing Commission convened a hearing in Rapid City, South Dakota, to hear suggestions for Indian country sentence reform from tribal leaders, victims' advocates, prosecutors, judges, defense attorneys, and legal scholars.¹ The speakers' perspectives differed, with prosecutors² and victims' advocates³ cautioning against sentence reductions and requesting more prosecutions, public defenders criticizing the length of federal sentences compared with state sentences,⁴ and judges venting frustration at the sentencing discretion they lacked⁵ at the time the hearing took place.⁶ Tribal leaders expressed the desire for more restorative, non-prison federal sentencing options.⁷

Near the end of the hearing, Professor Frank Pommersheim suggested a model for the U.S. Sentencing Guidelines' ("the guidelines") Indian country

1. Hearing Before the United States Sentencing Commission (opening statement of Chair Diana E. Murphy stating hearing's purpose and list of speakers) (June 19, 2001), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20010619/SD6-19-01.htm ("Rapid City Hearing").

2. For example, federal prosecutors stated that a sentence "adequate . . . [to] punish [] a particular defendant" may inadequately deter others, and that prison terms defer first time assault defendants better than probation. *Id.*

3. One victim witness advocate from a federal prosecutor's office commented that victims rarely feel "the [federal] sentence . . . is too harsh or too long." *Id.* Another panelist opined that "for our [abused] women and our children [federal prosecution] is just their only hope." *Id.*

4. Robert Van Norman, then Federal Public Defender for the District of South Dakota, argued that suspended sentences should be more available in the federal system "as a matter of mercy." *Id.*

5. Judge Larry Piersol, then Chief Judge of the District of South Dakota, proposed that sentencing judges obtain the discretion to consider comparable state court sentences. *Id.*

6. A few years after the hearing, the sentencing regime limiting this discretion was declared unconstitutional. *See infra* Part I.B.

7. Tribal representatives included elders and elected officials from the Oglala, Rosebud, Cheyenne River, Sisseton Wahpeton, Flandreau Santee, and Lower Brule Sioux Tribes. Rapid City Hearing, *supra* note 1. Rosebud President William Kindle, for example, called for "more drug counseling, alcohol counseling, anger management counseling to take place right back in Indian country" instead of off-reservation incarceration. *Id.*

operation based on tribal consent. Tribes thereby would choose between the guidelines and full judicial discretion for crimes committed within their territory.⁸ A temporary Native American advisory group grew out of the Rapid City hearing, which issued its final report to the commission in 2003.⁹ Unfortunately, rather than exploring how new sentencing models could work in Indian country, the advisory group focused on slight changes to the existing guidelines.¹⁰ The report did suggest in passing that the commission consult “on a tribe-by-tribe basis” before creating guidelines that would affect Indian country.¹¹

I argue that Congress should direct the commission to adopt a new model that goes beyond mere tribal consultation or tribal consent: tribal control. Tribes should have exclusive control over the offense levels prescribed in the guidelines, which continue to influence sentences heavily even though they are no longer mandatory. Unlike other proposals for guideline reform in Indian country, this model would enhance tribal sovereignty while preserving the guidelines’ administrability.

Part I of this Comment explains how Indian country criminal jurisdiction prevents tribes from regulating violence and the guidelines burden Indian defendants with disparately long sentences. Part II explains why judicial sentencing discretion cannot remedy tribal disempowerment and sentencing disparities. Part III proposes a tribal control model for federal sentencing and explains why it is necessary, feasible, and preferable to previous proposals for reform. Finally, Part IV anticipates legal challenges to the tribal control model and explores possible responses.

I.

JURISDICTION, SENTENCING, AND DISPARITIES IN FEDERAL INDIAN COUNTRY PROSECUTIONS

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

8. *Id.* Professor Pommersheim offered the example of the federal death penalty in Indian country, which can be imposed only “if the tribe consents to that.” *Id.*; 18 U.S.C. § 3598 (2006).

9. U.S. SENTENCING COMM’N, REPORT OF THE NATIVE AMERICAN ADVISORY GROUP (2003) (“ADVISORY GROUP REPORT”).

10. *See id.* at 16–19, 34 (recommending slight changes in manslaughter and aggravated assault guidelines to lessen disparity with state sentences).

11. *Id.* at 38.

A. Federal Indian Country Criminal Jurisdiction

Three different types of sovereign can prosecute crimes committed in Indian country¹²: tribes, states, and the federal government. Each sovereign's jurisdiction depends on the type of crime committed and the identities of both the defendant and any victim.

Tribes have jurisdiction over any crime, but only over Indian defendants.¹³ They can impose sentences of up to one year, three if they provide indigent counsel, but consecutive tribal sentences cannot exceed nine years total.¹⁴ As a practical matter, these jurisdictional restrictions mean that tribes cannot adequately prosecute the most serious crimes occurring in their territory.

Through a statute known as Public Law 280, about a dozen states also exercise concurrent criminal jurisdiction over all Indian country crimes within their borders.¹⁵ Though tribes theoretically have concurrent jurisdiction over Indian defendants in these states, in practice the tribal courts in such states tend to be less developed and less funded than elsewhere because of an expectation that the states police those reservations.¹⁶ In most states,¹⁷ the federal government also exercises concurrent criminal Indian country jurisdiction. It can prosecute any federal crime with an Indian defendant and a non-Indian victim (or vice versa)¹⁸ and most violent crimes if both victim and defendant

12. For criminal prosecution purposes, Indian country is defined in 18 U.S.C. § 1151. It includes all land within reservation boundaries (including individually owned parcels) and former reservation land allotted to individual Indians. *Id.*

13. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

14. 25 U.S.C. § 1302(a)(7).

15. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162). Passed in 1953, "PL 280" originally conferred Indian country criminal jurisdiction on California, Minnesota, Nebraska, Oregon, and Wisconsin, excluding certain reservations. § 1162(a). Those were apparently the five states willing to participate in the "compromise between wholly abandoning the Indians to the states and maintaining them as federally protected wards" that then marked federal Indian policy. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 537 (1975). Alaska joined these five in 1958. Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545. Other "optional" PL 280 states now include Nevada, Florida, Idaho, Iowa, Washington, the Dakotas, Montana, Arizona, and Utah. Some of these states' Indian country jurisdiction is limited by geography (e.g., state highways only), subject matter (e.g., water pollution only), or state laws requiring tribal consent. See Carole Goldberg, *Questions and Answers About Public Law 280*, available at <http://www.tribal-institute.org/articles/goldberg.htm> (a very helpful set of questions and answers by the leading PL 280 scholar).

16. See CAROLE GOLDBERG & DUANE CHAMPAGNE, UCLA AM. INDIAN STUD. CTR., *A SECOND CENTURY OF DISHONOR: FEDERAL INEQUITIES AND CALIFORNIA TRIBES* (1996), available at <http://www.aisc.ucla.edu/ca/Tribes8.htm> (describing how Public Law 280 has served as an excuse for underfunding California tribal courts).

17. The federal government has no criminal jurisdiction in the first six "mandatory" PL 280 states except at a tribe's request and with the Attorney General's consent. 18 U.S.C. § 1162(c), (d).

18. 18 U.S.C. § 1152. Sometimes called the "Interracial Crimes Act," this statute originally applied only to white-on-Indian crimes and was passed to protect Indians from "lawless whites on the frontier." FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 92 (1984).

are Indian.¹⁹ Notably it cannot prosecute non-Indian defendants with non-Indian victims.²⁰

For Indian defendants, this “jurisdictional maze”²¹ conceals a minotaur: prosecution under the federal guidelines for crimes that local authorities usually handle elsewhere in the United States. In prosecutions for the offenses on which the advisory group focused, manslaughter and sexual abuse, Indians make up over 70 percent of federal defendants.²² Non-Indian defendants are much likelier to end up in state courts for on-reservation crimes, sometimes through cooperation agreements with federal prosecutors.²³ Federal prosecutors cannot offer such bargains to Indian defendants in states that do not have concurrent jurisdiction.²⁴ To understand why an Indian country defendant would prefer state prosecution, one must understand the federal sentencing guidelines’ relative harshness.

B. The Federal Sentencing Guidelines

Two major sources of authority govern federal sentencing. First, there is the Sentencing Reform Act of 1984 (“SRA”), which laid out general factors for consideration in sentencing²⁵ and required the creation of a United States Sentencing Commission (“the commission”) to promulgate detailed sentencing guidelines.²⁶ The guidelines took effect in 1987.²⁷

The SRA itself requires that sentencing judges consider, among other things, a crime’s overall circumstances and the defendant’s life history; the availability of non-prison sentences and the guideline range suggested by the commission; the need for consistency among sentences; and traditional Western goals of punishment such as deterrence, retribution, incapacitation,

19. 18 U.S.C. § 1153. Violent crimes prosecutable under this statute, the Major Crimes Act, include murder, manslaughter, kidnapping, maiming, sexual abuse, incest, robbery, child abuse, and various types of assault. Other crimes include child neglect, arson, burglary, and theft. 18 U.S.C. § 1153(a). For more on the statute, see Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 809–11 (2006).

20. See *United States v. McBratney*, 104 U.S. 621, 624 (1881) (holding that Colorado federal courts had no jurisdiction over a “murder committed by a white man upon a white man within the Ute Reservation”).

21. See Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976).

22. Rapid City Hearing, *supra* note 1 (testimony of Jon M. Sands).

23. *Id.* (testimony of Judge Larry Piersol) (“[I]f you have a multiple-defendant drug bust, . . . the first thing they’ll say is, ‘I’ll turn,’ or in other words, cooperate, ‘if you’ll let me be handled in state court.’ . . . [O]f course, a Native American defendant doesn’t have that option.”).

24. The federal government can offer such deals to Indian defendants in non-mandatory PL 280 states if the state has concurrent jurisdiction over the charged conduct. See *supra* note 15 and accompanying text.

25. 18 U.S.C. § 3553(a).

26. 28 U.S.C. §§ 991, 992, 994.

27. U.S. SENTENCING COMM’N, GUIDELINES MANUAL ch. 1, pt. A (2010) [hereinafter USSG].

and rehabilitation.²⁸ The guidelines, meanwhile, contain a detailed series of factors and calculations that federal judges consider in sentencing every federal criminal defendant.²⁹ They consist of far more than a list of sentences, spanning hundreds of pages and containing much qualitative shading. For example, the aggravated assault guideline sets the base offense level for the crime and increases it based on the degree of injury caused. Accompanying commentary defines important terms (like “dangerous weapon” and “brandish”), explains how the commission intends that courts apply the guideline, and lays out the background and statutory authority that led to the guideline’s design.³⁰

In calculating a defendant’s sentencing range under the guidelines, courts first calculate the offense’s base offense level on a scale of one to forty-three.³¹ For example, involuntary manslaughter has a base offense level of twelve, or twenty-two if caused by reckless driving.³² Aggravated assault has a base offense level of fourteen,³³ increasing to seventeen with bodily injury³⁴ and to twenty-one with permanent or life-threatening injury.³⁵ Likewise, the offense level increases by three levels for hate crimes,³⁶ crimes against government officers,³⁷ and crimes during the defendant’s supervised release.³⁸ Assault’s offense level jumps from fourteen to twenty if the defendant knowingly assaulted a prison official.³⁹ Though most adjustments raise the offense level, pleading guilty lowers it by two or three.⁴⁰ This Comment will refer to all the offense level numbers as “offense levels,” including base offense levels, specific offense characteristics, and adjustments. Though technically distinct, these all go toward the final offense level number. That final number is one of two inputs that courts use to determine defendants’ guideline sentencing ranges.

After calculating the defendant’s offense level, a court calculates the defendant’s criminal history. It then refers to a table of numbers, appended to this Comment, that gives a range of months for every possible combination of offense level and criminal history. The ranges go from zero to six months for minor crimes and first-time offenders, all the way up to thirty years to life for the most serious crimes.⁴¹ Except for life sentences and relatively short

28. 18 U.S.C. § 3553(a).

29. See 18 U.S.C. § 3553(a)(4).

30. USSG § 2A2.2 cmt. nn.1–4.

31. At the end of this Comment is a copy of the table used in the guidelines to translate offense levels into sentences.

32. *Id.* § 2A1.4(a)(1), (2)(B).

33. *Id.* § 2A2.2(a).

34. *Id.* § 2A2.2(b)(3)(A).

35. *Id.* § 2A2.2(b)(3)(C).

36. *Id.* § 3A1.1(a).

37. *Id.* § 3A1.2(a)(1)(A).

38. *Id.* § 3C1.3.

39. *Id.* § 3B1.2(c)(2).

40. *Id.* § 3E1.1.

41. *Id.* ch. 5, pt. A.

sentences, a range's upper limit never exceeds the lower by more than 25 percent, reflecting Congress's desire for the guidelines to make federal sentences more uniform.⁴²

The guidelines explicitly exclude tribal-court convictions from criminal history.⁴³ Most recent scholarship about the guidelines in Indian country has focused on this policy.⁴⁴ The debate essentially concerns “whether according full dignity to tribal courts is worth the cost of increasing the severity of sentences to offenders with tribal court criminal histories.”⁴⁵ This Comment focuses instead on the other variable in sentence calculation—the offense level—which deserves at least as much attention for reasons discussed below.

Today the guidelines are only advisory.⁴⁶ In 2005 the Supreme Court held in *United States v. Booker* that the previously mandatory guidelines violated defendants' right to jury trial by requiring judges, not juries, to find facts increasing sentences.⁴⁷ In an unusual two-part opinion, Justice Stevens declared the guidelines unconstitutional,⁴⁸ while Justice Breyer stated that the provision making the guidelines mandatory could be severed from the rest of the statute creating them.⁴⁹ Post-*Booker*, judges still calculate guidelines sentencing ranges and must do so correctly, but they have discretion to depart above or below the guidelines as long as they give “reasonable” sentences.⁵⁰

Despite this new discretion, federal judges still sentence within guideline ranges in approximately three in four cases.⁵¹ Ninety-three percent of today's

42. 28 U.S.C. § 994(b)(2) (25 percent limit); 18 U.S.C. § 3553(a)(6) (identifying a “need to avoid unwarranted sentencing disparities among defendants”).

43. USSG § 4A1.2(i). The guidelines do allow federal judges to consider tribal convictions in deciding whether to depart upward from a guidelines sentence. USSG § 4A1.3(a)(2)(A).

44. See Kevin K. Washburn, *Reconsidering the Commission's Treatment of Tribal Courts*, 17 FED. SENT'G REP. 209, 213 (2005) (arguing that this policy “institutionalize[s] . . . disrespect for tribal courts” and that the guidelines should instead count tribal-court convictions in routine criminal-history calculations); Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403 (2004); Jon M. Sands & Jane L. McClellan, *Policy Meets Practice: Why Tribal Court Convictions Should Not Be Counted*, 17 FED. SENT'G REP. 215 (2005) (arguing that Professor Washburn's proposal is unnecessary and would undesirably lengthen sentences for Indian defendants); Charles Kormmann, *Commentary on Reconsidering the Commission's Treatment of Tribal Courts*, 17 FED. SENT'G REP. 222 (2005); Matthew L.M. Fletcher, *Sovereign Comity: Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts*, 45 CT. REV. 12, 19 (2009). The issue is constantly reopened whenever a federal district court considers an upward departure based on tribal priors. See, e.g., *United States v. Latone*, No. CR 08-1855 JB (D.N.M. Nov. 23, 2009).

45. William C. Canby, Jr., *Commentary: Treatment of Tribal Court Convictions*, 17 FED. SENT'G REP. 220, 220 (2005).

46. *United States v. Booker*, 543 U.S. 220, 245 (2005).

47. *Id.*

48. *Id.* at 226–45.

49. *Id.* at 245–68.

50. *Gall v. United States*, 552 U.S. 38, 41 (2007).

51. See U.S. SENTENCING COMM'N, FY2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl.N [hereinafter FY08 SOURCEBOOK]; U.S. SENTENCING COMM'N, FY2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl.N [hereinafter FY10 SOURCEBOOK]. In

active federal district judges came to the bench after the guidelines' creation and so have used them from the beginning.⁵² These demographics may explain a "legal and political culture [that] has made the federal sentencing system almost impervious to dramatic change."⁵³ Indeed, the Sentencing Reform Act continues to require judges to consider the guidelines in sentencing.⁵⁴

The "advisory" guidelines thus continue to anchor federal sentencing and therefore matter tremendously in Indian country prosecutions.

C. Racially Disparate Sentences

Indians receive prosecution "almost exclusively for violent offenses"⁵⁵ even though the federal criminal docket concerns mostly drug, firearm, immigration, and white-collar offenses.⁵⁶ Within the small violent slice of the federal docket, Indians make up a huge proportion of the defendants: one quarter of murders, over 75 percent of sexual abuse cases, and about 70 percent of manslaughters.⁵⁷ Indians disproportionately dominate the federal violent-crime docket because of the jurisdictional laws that channel non-Indians entirely from tribal courts and mostly from federal courts, keep most Indian

fiscal year 2008, 79.9 percent of federal sentences were within the guideline range. In fiscal year 2010, 73.7 percent of federal sentences were within the guideline range. This figure excludes cases in which the government stipulated to a below-guidelines sentencing range as part of a plea negotiation.

52. FED. JUDICIAL CTR., BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/public/home.nsf/hisj>. I arrived at this figure by searching for all currently sitting active district judges nominated on or after the guidelines' effective date of November 1, 1987 (yielding 557 judges) and for all currently sitting district judges (yielding 599 judges). These figures are current as of March 20, 2011.

53. Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 349 (2006). Berman cites post-*Booker* district court opinions expressing the view that deviations from the guidelines should be very rare. *Id.* at 349 n.28.

54. 18 U.S.C. § 3553(a)(4).

55. Rapid City Hearing, *supra* note 1 (testimony of Jon M. Sands); *see also* STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME 1992–2002, *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf> ("Just under 75% of suspects investigated in Indian country involved a violent crime, compared to the national total of 5%.")

56. FY08 SOURCEBOOK, *supra* note 51, fig. A (showing that 86 percent of federal sentences in 2008 were for white-collar, immigration, firearm, and drug offenses).

57. Rapid City Hearing, *supra* note 1 (testimony of Jon M. Sands); *see also* Perry, *supra* note 55, at vii, 21 (reporting that people from Indian country make up 25% of the suspects of federal violent crime and almost 55% of those entering prison for violent crimes in 2001). The gap between Sands's and Perry's figures shows how even though "crime data is a fundamental tool of law enforcement, . . . for decades the Bureau of Indian Affairs and the Department of Justice have not been able to coordinate or consistently report crime and prosecution rates in tribal communities." Tribal Law and Order Act, Pub. L. No. 111-211, § 202(a)(7), 124 Stat. 2258 (2010) (preliminary findings). By any of these estimates, Indians are thus grossly overrepresented in the federal criminal justice system. *See* U.S. CENSUS BUREAU, THE AMERICAN INDIAN POPULATION: 2000, at 1 (reporting that people self-identifying as American Indian or Alaskan Native made up 1.5% of the U.S. population in 2000).

defendants out of state courts, and prevent tribal courts from adequately punishing serious crimes like murder and aggravated assault.⁵⁸

Once in federal court, Indian defendants face guideline ranges significantly longer than most state-court sentences for the same conduct.⁵⁹ For example, the commission found that federal sexual abuse sentences in South Dakota averaged eight years, versus less than seven in local state courts.⁶⁰ The disparity was even greater in New Mexico, where such sentences in state court averaged just over two years.⁶¹ The PROTECT Act of 2003,⁶² enacted too late for the advisory group to study closely, has heightened this disparity.⁶³ Among other things, it imposes a “two-strikes” law on federal sexual abuse defendants with minor victims. Unlike the more general federal three-strikes law,⁶⁴ the PROTECT Act does not allow tribes to opt out of its operation on the reservation.

One federal judge with a heavy Indian country criminal docket has called the federal regime “sentences based on injustice rather than justice” because of this disparity.⁶⁵ Even though the advisory group found “no evidence that Native Americans are sentenced differently in material respect than non-Native Americans either in state or in federal courts,” it acknowledged that jurisdictional rules and the guidelines combine to “result[] in a disparate impact on Native Americans.”⁶⁶

II.

THE PROBLEM AND A FAILED RESPONSE

A. Tribal Disempowerment and Disillusion

Indian country’s “jurisdictional maze” and the federal guidelines’ comparative harshness create the perception and reality of racial sentencing disparity.⁶⁷ At the same time, tribal leaders and members generally feel

58. See *supra* Part I.A.

59. See Christine DeMaso, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker?*, 106 COLUM. L. REV. 2095, 2105–06 (2006) (noting that “federal penalties are almost always higher” in cases that both states and the federal government could prosecute); TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS’N, THE FEDERALIZATION OF CRIMINAL LAW 30 chart 7 (1998).

60. ADVISORY GROUP REPORT, *supra* note 9, at 21.

61. *Id.* at 22.

62. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18, 21, 28 and 42 U.S.C.)

63. *Id.* at 23.

64. 18 U.S.C. § 3559(c)(6) (2006).

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

66. ADVISORY GROUP REPORT, *supra* note 9, at 22.

67. Technically, as a matter of federal law, tribal membership is not “race.” *Morton v. Mancari*, 417 U.S. 535, 553–54 & n.24 (1974) (holding that a preference for hiring Indians in the

powerless to affect prosecutions and sentences.⁶⁸ During recent Senate hearings, one tribal chair from the Fort Hall reservation in Idaho lamented that tribal members could not understand federal prosecutors' decisions to decline serious cases—even homicides—and their plea bargaining decisions.⁶⁹ Federal law enforcement bears virtually no political accountability to tribes,⁷⁰ which have even less say in the sentences flowing from federal prosecutions.⁷¹ This lack of involvement in the federal prosecution and sentencing could understandably diminish tribal members' respect for the authorities that carry them out.⁷²

Part of the problem is that previous reform efforts considered only uniform guideline operation across all of Indian country. Indeed, the advisory group recommended changes that would affect all federal prosecutions, in Indian country and elsewhere.⁷³ The advisory group thus bore the burden of persuading the commission that its proposals—based on study of specific state sentences and conditions on specific reservations—should apply nationally.

By contrast, crime is a local issue in most of the United States.⁷⁴ The federal government traditionally has addressed only crimes in which it has a

Bureau of Indian Affairs is “political rather than racial in nature” and hence harmonious with the Civil Rights Act of 1964). Nevertheless, one tribal leader probably spoke for many when he told the commission that even though “race is not relevant . . . it’s hard to express the way people feel. It’s a disparity throughout their lives . . . [I]t almost seems that we feel that [sentencing] is [race-related].” Rapid City Hearing, *supra* note 1 (testimony of Oglala Sioux President John Yellow Bird Steele).

68. See Rapid City Hearing, *supra* note 1 (testimony of Frank Pommersheim that “people look . . . with a slightly jaundiced eye to the feds when they come [to Indian country],” because “very little change” followed earlier policymaking excursions).

69. See Alonzo Coby, Chairman of the Fort Hall Business Council for the Shoshone-Bannock Tribes, Statement at Hearings on S.797, the Tribal Law and Order Act of 2009 before the S. Comm. on Indian Affairs, 111th Cong. (June 25, 2009).

70. Tribal members influence federal law through participation in national elections that involve innumerable issues more prominent than crime in Indian country. Thus diluted, that influence is all but meaningless. This stands in stark contrast to the political accountability borne by directly elected state and county prosecutors. For a more detailed discussion of federal prosecutors' “accountability problem” in Indian country, see Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 730–31 (2006).

71. See *id.* at 728 (contrasting politically accountable state prosecutors with life-tenured federal judges).

72. Tribal government's often-antagonistic relationship with federal authorities may actively discourage tribal officials from assisting federal law enforcement. See *id.* at 739 (describing a “cavalry effect” that discourages tribal officials from siding against their own constituents by assisting federal prosecutors).

73. See, e.g., ADVISORY GROUP REPORT, *supra* note 9, at 16–17 (recommending an across-the-board increase in manslaughter's offense level in order to address drunk driving homicides in Indian country).

74. Washburn, *supra* note 70, at 713 (describing criminal justice as “an inherently local activity as a matter of constitutional design,” which “empower[s] local communities to solve internal problems and to restore peace and harmony in the community”); see also Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 993–94 (1995) (describing efficiency inherent in local crime control, which allows “criminal justice policy to be tailored to local conditions and policy preferences” and promotes political accountability and experimentation).

particular interest, such as narcotics trafficking, terrorism or firearms control, or for crimes crossing state lines like multi-jurisdiction fraud. As Professor Washburn has pointed out, “most felony prosecutions in this country are conducted under the direct authority of prosecutors who are elected by the community they serve.”⁷⁵ Among the United States’ civilian communities, only in Indian country is the federal government the predominant regulator of violent felonies. As a result, “the process of criminal justice on Indian reservations is neither an affirmation of community mores nor a formalized expression of community outrage.”⁷⁶ Without any tribal guideline control, tribes also cannot express restorative-justice mores or outrage over excessive sentences. Unfortunately, federal courts’ responses to the disparity problem have not addressed this second problem.

B. Departures Below the Guidelines

Increased judicial discretion cannot eliminate racially disparate sentences and tribal powerlessness. Sentencing judges rarely use their new discretion, as discussed above. They may hesitate to correct such disparities that stem from defendants’ Indian identity, either out of general equal-protection concerns or disagreement that the disparities are a problem. Instead, post-*Booker* studies show that sentences for Indian defendants are actually 10 percent *higher* than for others.⁷⁷ Defendants and tribes cannot expect judicial discretion alone to shorten federal sentences for Indian defendants any time soon.

One problem is that although the sentencing guidelines are now only advisory, the Sentencing Reform Act still sends contradictory sentencing messages. The statute instructs the commission to consider the role of defendants’ education, vocational skills, and family and community ties, then admonishes that those considerations are generally “inappropriate[.]”⁷⁸ This contradiction reflects the bipartisan compromise that allowed the Act’s passage.⁷⁹ At the same time, another statute—still fully effective after *Booker*—instructs judges to consider the circumstances of the offense, the defendant’s history and characteristics, and customary purposes of sentencing such as deterrence and incapacitation.⁸⁰ Before *Booker*, sentencing judges struggled to reconcile this statutory mandate with the then-mandatory guidelines’ policy statement that such considerations are usually

75. Washburn, *supra* note 70, at 777.

76. *Id.*

77. Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723, 776 & n.297 (2008).

78. 28 U.S.C. § 994(d), (e) (2006).

79. The Act was sponsored by Senators Kennedy, Thurmond, Biden, and Hatch. Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 292 n.5 (1993).

80. 18 U.S.C. § 3553(a).

inappropriate.⁸¹ Now, judges can disregard the latter exhortation but still must explain that they are doing so for legitimate statutory reasons.⁸² Judges with equal-protection concerns might not realize that tribal membership is legally different from race, creed, or ethnicity.⁸³ Although the statute's factors give judges some maneuverability, they are ill equipped to deal with the disparity and disempowerment problems discussed above.

Some federal judges have departed downward in Indian country cases based on the supposedly unique circumstance of a defendant's growing up on a reservation. In *United States v. Big Crow*,⁸⁴ the Eighth Circuit affirmed a downward departure for a defendant who grew up on the notoriously violent Pine Ridge reservation and made "consistent efforts to overcome [its] adverse living conditions."⁸⁵ Combined with Big Crow's employment history and strong community ties, his reservation background overcame then-mandatory guidelines' policy that a defendant's "employment record . . . and community ties" are generally inappropriate sentencing considerations.⁸⁶ Acknowledging that the Sentencing Reform Act requires neutrality toward defendants' "race, . . . national origin, creed, and socioeconomic status," the *Big Crow* majority distinguished "neutrality" from "blindness."⁸⁷ In spite of guidelines' policy statement about what courts may consider, the Eighth Circuit has affirmed the *Big Crow* approach in cases coming from other reservations.⁸⁸ Other circuits have declined to follow *Big Crow*'s "overcoming adversity" theory.⁸⁹ The Supreme Court has yet to review a *Big Crow*-style departure.

Big Crow and its progeny are not a promising solution to the problems with the guidelines in Indian country. First, *Big Crow*'s "tension" with the Sentencing Reform Act invites statutory challenge. Although Indian law exceptionalism⁹⁰ is not a new concept in federal common law, the current

81. See, e.g., Stewart Dalzell, *One Cheer for the Guidelines*, 40 VILL. L. REV. 317 (1995). Judge Dalzell was "in the minority of [district judges]" who preferred the guidelines to wholly discretionary sentencing. *Id.* at 317. However, even he found it "very difficult to look the particular defendant in the eye and tell him or her that these characteristics—which in any other context define the defendant's very identity—are 'not ordinarily relevant.'" *Id.* at 332.

82. 18 U.S.C. § 3553(a), (c).

83. See *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) (rejecting equal protection challenge to federal Indian country jurisdiction because it is not based "upon impermissible racial classifications," but rather a political classification). See also *Morton v. Mancari*, 417 U.S. 535, 53-54 (1974), discussed *supra* note 67.

84. 898 F.2d 1326 (8th Cir. 1990).

85. *Id.* at 1329. According to the court, when *Big Crow* was decided Pine Ridge had a 72 percent unemployment rate and an average annual income of only \$1,042. *Id.* at 1332.

86. *Id.* at 1329; 18 U.S.C. § 994(e); USSG ch. 5, pt. H, introductory cmt. (2010).

87. *Big Crow*, 898 F.2d at 1332 n.3.

88. See *United States v. Decora*, 177 F.3d 676 (8th Cir. 1999); *United States v. One Star*, 9 F.3d 60 (8th Cir. 1993).

89. See *United States v. Leiva-Deras*, 359 F.3d 183 (2d Cir. 2004); *United States v. Carter*, 122 F.3d 469 (7th Cir. 1997).

90. See Philip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 437-443 (2005). Professor Frickey described the exceptionalism

Supreme Court has signaled its reluctance to apply the traditional Indian-law interpretive canons that favor tribes and tribal sovereignty.⁹¹ Moreover, since the Eighth Circuit's interpretation of the Sentencing Reform Act focuses only on individual Indian defendants, not their communities,⁹² the Indian-law canons might not apply anyway.

Second, *Big Crow* departures are available only to defendants who grew up on reservations⁹³ and do not address the unique nature of federal Indian country jurisdiction. Non-Indian or non-reservation-Indian defendants might well ask why they should suffer long federal sentences when reservation-born defendants sometimes get relief. Few Supreme Court observers would disagree that now is a particularly risky time for tribal advocates to invite equal-protection challenges to different treatment for Indians.⁹⁴

Third, *Big Crow* departures are an ad-hoc, case-by-case response to a systemic problem. Indian country defendants face long sentences because of federal jurisdiction and the guidelines⁹⁵ regardless of where they grew up. *Big Crow* departures selectively pick out individuals based on their personal characteristics and perceived merit, which have nothing to do with the underlying cause of sentencing disparities—other than the fact that the defendants usually are Indians. *Big Crow* departures also require sentencing judges to pathologize reservation life, finding a defendant's background unusually deprived, or his peers more deprived, than a non-reservation defendant with otherwise similar characteristics.⁹⁶ However real the hardship that many Indian defendants have faced, other reservation residents could fairly object to federal judges' routinely denouncing their hometowns in an effort to reach reasonable sentences.⁹⁷

“foundational [in] federal Indian law.” *Id.* at 437. This overarching framework includes the principle that tribal “domestic dependent nations” are not subject to states’ authority or even the federal constitution, but rather enjoy “inherent, preconstitutional sovereignty.” *Id.* at 437, 441. It also encompasses the notion that Congress “possesse[s] a plenary power over Indian affairs.” *Id.* at 445.

91. See Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009) (describing and explaining tribal interests’ recent losing streak in the Supreme Court).

92. *Big Crow*, 898 F.2d at 1330 n.2 (listing factors for consideration under the Sentencing Reform Act, which include the defendant’s characteristics and history but nothing about the defendant’s community).

93. *Id.* at 1331.

94. See, e.g., Transcript of Oral Argument at 32, *Plains Commerce Bank v. Long*, 128 S. Ct. 2709 (2008) (No. 07-411) (“Chief Justice Roberts: [A]n Indian corporation, . . . that’s a concept I don’t understand. If Justices Scalia and Alito form a corporation, is that an Italian corporation? (Laughter).”)

95. See *supra* Part I.C.

96. See *Big Crow*, 898 F.2d at 1331–32 (reasoning that although employment, family ties, and so on are “not ordinarily relevant” in sentencing, Pine Ridge’s extreme poverty and unemployment justify an exception in *Big Crow*’s case).

97. In fieldwork at a South Dakota law firm, ethnographer Alexander V. Kozin observed a sentencing hearing in which the judge opined that “life on the reservation . . . perpetuates all sorts

Commentators have suggested other bases for departure that avoid some of *Big Crow*'s problems. One Indian country Federal Public Defender has suggested standard departures for "Dependent Sovereign Nation Status" and for "Culture."⁹⁸ The former would authorize departures based on a defendant's tribal membership, reaching most Indian country defendants.⁹⁹ But a culture departure would require the same case-by-case analysis and pathologizing of a defendant's background.¹⁰⁰ Moreover, given the heated debate around the so-called "cultural defense,"¹⁰¹ it is unlikely that a broad "culture" departure would avoid Congressional foreclosure or Supreme Court review for very long.¹⁰²

Another author has proposed a departure that attempts to avoid *Big Crow*'s problems. Timothy Droske has suggested a downward departure based purely on the federal/state sentencing disparity. The Supreme Court has approved similar departures correcting the crack/powder cocaine disparity and district-by-district disparities that sometimes arise in the immigration context.¹⁰³ Droske's proposal comes the closest to solving the disparity problem by empowering judges to eliminate disparities to the extent that statutory maxima and minima allow.

No departure, however precisely or consistently applied, can restore tribes' power to determine what punishment fits a crime. As long as the commission sets offense levels without involving tribes, and as long as judges must consider the guidelines before imposing sentences, tribal governments will have virtually no say over the punishment of crime in their communities. Even Droske's proposal has no role for tribes, but simply redistributes authority

of criminal behaviour, drug and alcohol abuse, [child abuse] and violence" Alexander V. Kozin, *Native American Identity and the Limits of Cultural Defence*, 22 L. & CRITIQUE 39, 50 (2011). However true the judge's observation, I agree with Kozin that it essentially "describes the defendant as a cultural subject who follows his cultural ways . . . toward lawlessness." *Id.* at 52. *Big Crow* departures require as much.

98. Jon M. Sands, *Departure Reform and Indian Crimes: Reading the Commission's Staff Paper with "Reservations"*, 9 FED. SENT'G REP. 144, 146-47 (1996).

99. Sands specifically suggests a guidelines policy statement noting that because of "the unique relationship of the Indian [tribes] as dependent sovereign nations, a departure from the guidelines to reflect the special status may be warranted in certain circumstances." *Id.* at 146. Presumably such circumstances would not include General Crimes Act cases with a non-Indian defendant and an Indian victim. See 18 U.S.C. § 1152 (2006).

100. See *supra* note 97 and accompanying text.

101. See, e.g., Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57, 100 (1994) (describing the controversy and arguing that "a formalized 'cultural defense' will result in fossilizing culture as a reductive stereotype, and lead to inquiries into whether a defendant's identity sufficiently matches that stereotype").

102. See Fletcher, *supra* note 91, at 935 (arguing that "the Supreme Court's certiorari process harshly discriminates against the interests of Indian tribes," granting certiorari opposed by tribal interests in an extraordinarily high number of cases).

103. Droske, *supra* note 77, at 725-26. Through "fast-track programs" the Attorney General can authorize lower sentences for immigration defendants who enter "rapid guilty pleas" in districts with large immigration dockets. *Id.* Immigration defendants in other districts thus sometimes serve much longer sentences than they would in districts with fast-track authorization. *Id.*

among the federal government's branches. Although some tribes might welcome relief from harsh federal penalties for Indian defendants, there is no principled reason why states should control reservation criminal policy any more than the commission. Indeed, given states' historic role as tribes' "deadliest enemies"¹⁰⁴ rather than their trustees,¹⁰⁵ it makes little sense for the federal government to ask states how to treat Indian country defendants.¹⁰⁶

III.

A SOLUTION: TRIBAL CONTROL OVER OFFENSE LEVELS IN FEDERAL INDIAN COUNTRY PROSECUTIONS

Rather than shift authority within the federal government or between the federal and state governments, the federal government should return to tribes some of the power they possessed before European contact and well into the nineteenth century. I propose that in federal Indian country prosecutions,¹⁰⁷ tribes determine the quantitative offense levels contained in the existing federal guidelines while keeping intact the guidelines' large body of qualitative definitions and commentary. Under this proposal, appellate courts' substantive interpretations of the guidelines would continue to control trial courts. The offense levels and resulting guideline ranges could change as much or as little as tribes choose.

An example: Tribe A feels that it loses too many young people to prison on assault charges and that tribal members who complete their sentences should have as much support as possible upon release. Accordingly, Tribe A lowers the base offense level for aggravated assault from fourteen under the standard guidelines¹⁰⁸ to ten on a scale of one to forty-three. Tribe A also feels that

104. *United States v. Kagama*, 118 U.S. 375, 384 (1886) (citing states' hostility toward vulnerable tribes as a reason for federal Major Crimes Act felony jurisdiction).

105. Tribes share a trust relationship with the federal government, *id.* at 384–85, the logic of which is highly paternalistic. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (“[Tribes] are in a state of pupilage. . . . Their relation to the United States resembles that of a ward to his guardian.”). In the twentieth century, however, the trust responsibility became a vehicle for protecting a wide range of tribal interests. *See, e.g., Cramer v. United States*, 261 U.S. 219, 229 (1923) (construing statute to protect Indian-occupied lands from third parties); *McNabb v. Bowen*, 829 F.2d 787, 793 (9th Cir. 1987) (finding federal responsibility to fund Indian child's medical care based on statute that was “brought into sharper focus by the trust doctrine”). Recently, the federal government's breach of its trustee duty to manage Individual Indian Money accounts has formed the basis for a \$3.4 billion settlement. *See Welcome to the Cobell v. Salazar Settlement Website*, INDIAN TRUST SETTLEMENT, <http://www.indiantrust.com> (last visited June 4, 2011).

106. *See also* Symposium, *Panel II: The Effects of Region, Circuit, Caseload and Prosecutorial Policies on Disparity*, 15 FED. SENT'G RPTR. 165, 175 (comments of Michael O'Hear) (“It is hard to see why the people of my home state of Wisconsin . . . should have a say in the sentencing of . . . a burglar on an Indian Reservation in Nevada.”).

107. By “federal Indian country prosecutions,” I mean federal prosecutions under the Major and General Crimes Acts, which predicate federal jurisdiction on geographic location in Indian country. I do not propose any change to the sentencing of federal crimes that happen to occur in Indian country, such as white-collar or narcotics crimes.

108. USSG § 2A2.2(a).

defendants who accept responsibility deserve more relief than the current guidelines provide, so Tribe A provides that all guilty pleas trigger a downward adjustment by four levels.

A defendant with one prior felony conviction¹⁰⁹ pleads guilty¹¹⁰ to aggravated assault on the Tribe A reservation, consisting of a fistfight that caused non-serious bodily injury.¹¹¹ He would have an offense level of nine¹¹² and would face a guidelines range of six to twelve months.¹¹³ Under the current guidelines, the same defendant would have an offense level of fifteen¹¹⁴ and face a guidelines range of twenty-one to twenty-two months.¹¹⁵ Most federal judges would be highly unlikely to give a sentence within Tribe A's range if the standard guidelines controlled.¹¹⁶

The point is not that Tribe A's regime is objectively better than the current guidelines for every defendant. Tribe A could as easily have increased the assault offense level, reflecting a decision that tribal members are inadequately deterred from fighting and that violence deserves harsh punishment. Rather, the example shows how my proposal could empower tribes to tailor sentencing outcomes to their values and policy preferences, even without enabling tribes to change any other aspect of the guidelines.

This proposal lies in the middle of a spectrum of sovereignty-based suggestions for reforming federal sentencing in Indian country. At the most conservative end lie proposals for the guidelines to account for tribal-court convictions in criminal-history calculations that ignore offense levels.¹¹⁷ Although those proposals are fine in themselves, this Part will explain why tribal control over offense levels matters more than criminal-history calculations and better addresses racially disparate sentencing. At the more radical end of the spectrum lie proposals for entirely separate tribal guidelines incorporating whatever factors tribes find appropriate and applying them as tribes instruct.¹¹⁸ As I explain below, such regimes would be fatally difficult for federal courts to apply, would risk aggressive Supreme Court review, and would invite intrusive and probably incompetent interpretation of tribal law by federal courts. Instead, my proposal balances tribal empowerment with administrative and political feasibility.

109. *Id.* § 4A1.1(a).

110. A guilty plea would reduce the offense level by two. *Id.* § 3E1.1(a).

111. Since Tribe A did not change this aspect of the guidelines, non-serious bodily injury would increase the offense level by 3. *Id.* § 2A2.2(b)(3)(A).

112. That is, 10 (base) – 4 (guilty plea) + 3 (bodily injury) = 9.

113. *Id.* ch. 5, pt. A (sentencing table).

114. That is, 14 (base) – 2 (guilty plea) + 3 (bodily injury) = 15. *Id.*

115. *Id.*

116. See FY08 SOURCEBOOK, FY10 SOURCEBOOK, *supra* note 51, at tbl.N and accompanying footnote.

117. See *infra* Part III.D.

118. See *infra* Part III.C.2.

Under this proposal, tribes could enjoy what every state and the District of Columbia already have: influence over the sentencing of serious crimes committed in their communities. Although tribes would benefit from the sentencing commission's assistance, it is the tribes who should consult with the commission in their decisions, not the other way around. Such a scheme would make the state/federal violent-crime sentencing disparity mostly irrelevant. Although a tribe might choose to keep or even raise an offense level, likely many tribes would choose lower sentences, reflecting a culturally appropriate approach to punishment that prioritizes restitution and healing.¹¹⁹

The following Sections lay out my proposal's advantages over other suggestions for reform.

A. Self-Determination

The power to punish wrongs is fundamental to a community's self-determination and identity. In probably the most famous description of the federal prosecutor's role in American law, then-Attorney General and future Justice Jackson explained to U.S. Attorneys that "outside of federal law each locality has the right under our system of government to fix its own standards of law enforcement and of morals."¹²⁰ Of course, the distinction Jackson referenced "between the federal and the local in law-enforcement activities"¹²¹ is more complex in Indian country.

In Indian country, it makes more sense to apply the same norm to a distinction between "the local" within federal law enforcement—as in Indian country violent crime—and the truly federal, as in narcotics, immigration and so on. Apart from its trust responsibility¹²² to police Indian country, the federal government has little interest in local violent crime unrelated to the drug trade, immigration, or other issues of national concern. In contrast, tribal leaders and advocates emphasize the need for greater tribal control and involvement in on-reservation criminal enforcement, including federal prosecutions.¹²³ Although Congress¹²⁴ and the Supreme Court¹²⁵ have largely stripped tribes' power to define and prosecute crime, tribes could still serve a major role in its

119. See, e.g., Robert Yazzie, "Hozho Nahasdlíi"—*We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 123–24 (1996) (describing the "healing effects of traditional Navajo justice," which incorporates *nalyeeh*, a payment that "transcends the usual definitions of 'restitution'").

120. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 6 (1940).

121. *Id.*

122. See *supra* note 105.

123. See, e.g., Coby, *supra* note 69, at 4, 9 (calling for "[g]reater coordination and cooperation" between the federal government and tribes and expressing a need for greater tribal sovereignty).

124. See 25 U.S.C. § 1302(7) (2006) (limiting tribal-court sentences to one year).

125. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (denying tribal-court jurisdiction over non-Indians).

punishment. In Indian country, the time-honored American norm of local control over everyday crime calls for heightening tribal control over federal prosecutions.¹²⁶ Tribal control over offense levels is a meaningful and administrable way to do so.

In the western tradition, criminal punishment is said to serve four basic purposes: deterrence, retribution, incapacitation and rehabilitation.¹²⁷ But weighing these competing interests is a subjective, value-laden process deeply informed by cultural norms and traditions. Who better to strike that balance than the community most affected by an offender's crime and by his subsequent absence? How can the federal legislature—or its delegate, the commission—possibly know better than a tribe of violent crime's effects on its residents? How can Congress better decide whether those effects justify long-term removal from a community? How can Congress get any of its Indian country criminal policy right if it does not even hear from tribal leaders before passing violent-crime legislation, under which the vast majority of defendants will be Indian?¹²⁸ And how can the federal government get the balance right with a single set of offense levels for all of Indian country, where politics and values are as diverse as in the rest of the United States?

Even if Congress could create sentencing guidelines meeting each tribe's policy preferences, electoral politics would prevent it from doing so. Almost no lobbying takes place against sentencing increases for violent crimes, because almost no one is willing to associate themselves with the cause.¹²⁹ This helps explain why Congress passed the PROTECT Act in 2003, which created mandatory life sentences for second-time child sexual abuse.¹³⁰ These sentences dwarf comparable state sentences, even though evidence suggests that in-custody treatment programs can be fairly successful in reducing sex offense recidivism.¹³¹ Congress needs political distance from lowered sentences. Across-the-board deference to tribal governments can provide that distance.

Restoring decision-making power to tribes can also improve the actual and perceived legitimacy of federal sentences. Victims, defendants, and their advocates would have infinitely greater access to the lawmakers guiding sentence outcomes. Unlike the distant and distracted federal legislature, tribal

126. Washburn, *supra* note 70, at 775–76.

127. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1890 (citing MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 106 (1972)).

128. Droske, *supra* note 77, at 794. Droske notes that Congress did not hear testimony from tribes before passing the PROTECT Act, which increased sentences for sexual abuse offenses. Three quarters of federal sexual-abuse defendants are Indian. Rapid City Hearing, *supra* note 1 (testimony of Jon M. Sands).

129. See, e.g., Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 30 (2010) (discussing why it is politically risky for legislators to attempt repeal or shortening of mandatory minimum sentences).

130. 18 U.S.C. § 3559(e) (2006).

131. ADVISORY GROUP REPORT, *supra* note 9, at 26–27.

governments have direct political accountability to those most affected by reservation felony sentences.¹³² Furthermore, unlike other suggestions for reform, such as the dramatic expansion of tribal criminal jurisdiction, this proposal is equally feasible regardless of a tribe's size, its resources, or outsiders' confidence in its legal institutions. Tribes with nascent or nonexistent tribal courts or police can still shape felony sentencing policy on their reservations. Even tribes that cannot or choose not to provide some of the procedural protections required in state and federal court, such as counsel for indigent defendants,¹³³ can exercise policy-making power through this proposal without facing the criticisms that dog uncounseled tribal-court convictions.¹³⁴

Tribal control over offense levels, then, would empower tribal sovereigns to balance retribution with rehabilitation, punishment with mercy, just like non-tribal sovereigns.

B. Ease of Administration

Setting up new base offense levels would be complex. Tribal leaders would need detailed information about the sentences that tend to result from different offense levels, which the commission already collects and publishes annually.¹³⁵ In addition to district-by-district data, tribes would likely need reservation-by-reservation data. The commission could collaborate with the Bureau of Justice Statistics to provide tribes that information. Representatives of the United States Attorneys and Federal Public Defenders could meet with the tribes located within the districts they serve, offering their perspectives just as they do when the commission creates or alters a guideline.¹³⁶ Should tribes

132. Most tribal governments are representative democracies organized pursuant to the 1934 Indian Reorganization Act, which provided a model constitution that many tribes adopted in full. See Mark J. Wolff, *Spirituality, Culture and Tradition: An Introduction to the Role of Tribal Courts and Councils in Reclaiming Native American Heritage and Sovereignty*, 7 ST. THOMAS L. REV. 761, 764 (1995).

133. The United States Constitution does not apply to tribal governments, *Talton v. Mayes*, 163 U.S. 376 (1896), including the Sixth Amendment right to counsel. In 1968 Congress passed a statute that mirrors the federal Bill of Rights, but specified that the right to counsel is only at a defendant's "own expense." 25 U.S.C. § 1302(a)(6). Recently Congress amended § 1302 to allow three-year sentences by tribal courts that provide "the right to effective assistance of counsel," including court-provided counsel for indigent defendants, "at least equal to that guaranteed by the United States Constitution." 25 U.S.C. § 1302(c)(1)–(2). "[T]he cost of counsel," however, "may inhibit the ability of tribes to fully exercise [this] new sentencing authority." Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 173 n.244 (2010).

134. See, e.g., Jon Sands & Jane McClellan, *Commentary: Policy Meets Practice: Why Tribal Court Convictions Should Not Be Counted*, 17 FED. SENT'G. REP. 215, 215 (2005) (opining that a "lack of rights" in tribal courts "is nowhere more apparent than in the right to representation").

135. See, e.g., FY08 SOURCEBOOK, FY10 SOURCEBOOK, *supra* note 51.

136. In addition to participating in public hearings like the one that spawned the Advisory Group, see *supra* note 9 and accompanying text, prosecutors and defense attorneys routinely comment on proposed changes to the U.S. Sentencing Guidelines. See, e.g., <http://www.>

require information about local state sentences, the commission could help them obtain that data, which the advisory group found surprisingly difficult to locate.¹³⁷ The commission should probably maintain this data anyway.

Once tribes have created new offense levels, applying them should be easy for judges and attorneys. No additional fact-finding would be necessary, since federal Indian country jurisdiction already requires proof of tribal status and of Indian country.¹³⁸ Once a court knows that a crime took place in Indian country, it will know which tribe's offense levels apply. The legal and factual issues in sentencing would be otherwise unchanged. Tribes' chosen offense levels could be published as an appendix to the guidelines, requiring courts and counsel only to look up the applicable numbers for a given case. In short, although implementing tribes' offense levels would require an upfront investment of federal resources, the regime should work smoothly once set up.

C. Greater Feasibility and Tribal Empowerment

Other ways to address the long sentences in federal Indian country cases either fail to promote tribal sovereignty as effectively as my proposal or lack feasibility.

1. Standard Indian Country Sentence Reduction

Rather than have individual tribes choose offense levels, the commission could create a set of reduced offense levels, applicable in every Major Crimes Act or General Crimes Act case. A similar outcome would result from a standard downward adjustment for all such crimes.

Such an across-the-board sentence reduction would not enhance tribal sovereignty or improve the accountability of sentencing policymakers to Indian communities. Although the commission could consult with tribal leaders in formulating a standard Indian country adjustment, no single set of offense levels could possibly meet all tribes' preferences and sentencing needs. Likewise, setting offense levels to match state averages would require a great deal of state sentencing data that the advisory group found surprisingly difficult to obtain.¹³⁹ Moreover, this approach would actually diminish tribal participation by subjugating federal sentencing policy to fifty state governments which tribes could not hope to influence. This approach also would not eliminate federal/state sentencing disparities in prosecutions arising

ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110321/index.cfm.

137. ADVISORY GROUP REPORT, *supra* note 9, at 12 ("Despite the efforts of commission staff to obtain sentencing data from other states with large Indian populations, such as Arizona and Montana, that data was unavailable for consideration, as it is not collected centrally in those states.").

138. See 18 U.S.C. § 1152 (2006) (Indian country location is an element of General Crimes Act jurisdiction); 18 U.S.C. § 1153(a) (Indian identity and Indian country location are elements of Major Crimes Act offenses).

139. ADVISORY GROUP REPORT, *supra* note 9, at 12.

from reservations surrounded by states whose sentences deviate from the national average.

2. *Wholly Separate Tribal Guidelines*

District Judge Black has proposed that tribes opt out of the guidelines completely and create their own sentencing systems, subject only to statutory maxima and minima.¹⁴⁰ He compares tribes to the District of Columbia, which has its own qualitatively and quantitatively different guidelines for cases brought by federal prosecutors in local DC courts. According to Judge Black, tribes should have the same option as this closest analogue to “domestic dependent sovereigns.”¹⁴¹ Judge Black’s proposal would grant tribes broader control over federal sentences than any other.

Although I agree that criminal policy should allow tribes to “make their own laws and be ruled by them,”¹⁴² Judge Black’s proposal would not work without additional reforms. Federal courts, federal prosecutors, and federally appointed counsel would administer tribal guidelines. Unlike tribes, DC’s local government has felony jurisdiction, and it is that court system that uses the separate DC guidelines,¹⁴³ whereas the U.S. District Court for the District of Columbia follows the standard federal guidelines. Even with their newly expanded sentencing authority,¹⁴⁴ tribes still rely on the federal government to prosecute the most serious crimes and most non-Indians. Without enhancing tribal courts’ own sentencing power and criminal jurisdiction, Judge Black’s proposal would affect only federal courts. In that forum, wholly tribal sentencing would probably fail for several reasons.

First, the administrative and political obstacles to implementing wholly separate guidelines are insurmountable. The federal guidelines took close to a decade for courts and counsel to understand.¹⁴⁵ Even now that repeat players have gained expertise, guidelines litigation takes up an enormous amount of federal courts’, prosecutors’, and defense attorneys’ time. State-court guideline systems operate in a wide range of ways, differing structurally and qualitatively as well as quantitatively.¹⁴⁶ Given the opportunity, tribes would likely enact

140. Bruce D. Black, *Commentary on Reconsidering the Commission’s Treatment of Tribal Courts*, 17 FED. SENT’G REP. 218, 218 (2005).

141. *Id.*

142. *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

143. DIST. OF COLUMBIA SENTENCING AND CRIMINAL CODE REVISION COMM’N, VOLUNTARY SENTENCING GUIDELINES MANUAL (2010).

144. 25 U.S.C. § 1302(b)–(c).

145. When the commission held its Rapid City hearing in 2001, witnesses requested that the commission send training delegates to federal districts containing Indian country, because the bar was still struggling with the guidelines fourteen years after they took effect. *See* Rapid City Hearing, *supra* note 1 (testimony of Robert Van Norman, Federal Public Defender for the District of South Dakota, that “the time is ripe to have another training session out here”).

146. *See* Rakesh N. Kilaru, *Guidelines as Guidelines: Lessons from the History of Sentencing Reform*, 2 CHARLOTTE L. REV. 101, 106–10 (2010) (describing the range of ways that

equally diverse guidelines. If scores of new guidelines sprang into existence, federal courts with large Indian country dockets would be in chaos. At best, those courts and their practitioners would take years to learn tribal guidelines. At worst, the administrative challenge would discourage Indian country prosecutions. The need to prove Indian country jurisdiction, sometimes without tribal assistance,¹⁴⁷ already burdens such prosecutions. At the same time, tribal guidelines might lead to malpractice by appointed counsel or scare them off entirely.

Tribal guidelines in federal courts would also present deeper problems. In applying them federal courts would essentially apply tribal law, unlike mere quantitative variations on the federal guidelines. Most federal judges do not know much about tribal cultural and political traditions, nor do most members of the federal bar. The problem is not any inherent obscurity or unpredictability in tribal law, as the Supreme Court has implied in cases restricting tribal jurisdiction,¹⁴⁸ but with the federal system's competence to apply any body of foreign law with the confidence and precision justifying incarceration.

In applying tribal sentencing guidelines federal courts would routinely decide questions of tribal law. "Our Federalism" counsels that federal courts should avoid deciding new questions of state law,¹⁴⁹ even though federal courts share most states' common-law heritage. Respect for tribal sovereignty and legal institutions counsel against a system in which federal courts would announce tribal laws' meaning. This is particularly true of law incorporating traditional notions of fairness, restitution, and justice that may differ fundamentally from those undergirding the common law.

In creating separate sentencing law, tribes would make policy decisions far more nuanced and meaningful than mere quantitative variation. But it would be better for tribes to do so through their own prosecutions, over which Congress could at any time restore tribes' inherent sovereignty.¹⁵⁰ As long as tribes depend on the federal government for most felony prosecutions, however, tribal offense levels are the better means of exercising sovereignty in sentencing.

sentencing guidelines operate in Minnesota, Washington, North Carolina, and Virginia courts).

147. Washburn, *supra* note 70, at 739 & n.131.

148. See *Nevada v. Hicks*, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring).

149. *Younger v. Harris*, 401 U.S. 37, 44 (1971). The case created an abstention doctrine prohibiting federal courts from hearing civil rights claims arising from a prosecution still pending in state court. *Id.* at 53. This is apparently the requirement of "Our Federalism," born in the early struggling days of our Union of States," which "occupies a highly important place in our Nation's history and its future." *Id.* at 44–45. In contrast, federal courts frequently set boundaries for tribal courts, "track[ing] closer to 'Our Colonialism' than to any authentic notion of 'Our Federalism.'" Frank Pommersheim, "Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. COLO. L. REV. 123, 175 (2000) (citing Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999)).

150. *United States v. Lara*, 541 U.S. 193, 199 (2004).

D. Compatibility with Tribal Criminal History Reform

Scholarship about the guidelines' Indian country operation has focused mainly on whether tribal-court prior convictions should count toward a defendant's criminal history calculation. The current guidelines explicitly exclude tribal-court convictions from criminal-history calculations, but authorize upward departures on the basis of under-represented tribal criminal history.¹⁵¹ Professor Kevin Washburn, a former federal prosecutor, has argued that tribal convictions should count in routine criminal-history calculations and that excluding them insults tribal courts.¹⁵² Several of the proposed reforms discussed above responded to Professor Washburn's proposal.¹⁵³ More recently, in testimony before the commission, Professor Washburn suggested that the federal government defer to tribes' views on the use of their own courts' convictions.¹⁵⁴ Professor Matthew Fletcher has called the provision of indigent counsel "critical" in considering this issue.¹⁵⁵

Counting tribal priors could make a big difference to federal sentences. For example, the difference between no criminal history and a long history of convictions with short sentences might make the difference between probation and two years' imprisonment for a crime with an offense level of eight.¹⁵⁶ For second-degree murder, a defendant with no priors would face a sentence of about twenty to twenty-four years, while a defendant with maximum criminal history would face thirty years to life.¹⁵⁷

For certain crimes, however, a few criminal history points matter less than a few offense levels. For example, for a very minor crime with an offense level of one, the guidelines advise a sentence of zero to six months for all defendants regardless of their criminal history.¹⁵⁸ At the opposite extreme, the guidelines advise life sentences for any crime with an offense level of forty-three regardless of criminal history.¹⁵⁹ The offense levels also matter quite a bit for mid-level crimes. For example, a mid-guidelines sentence for involuntary manslaughter¹⁶⁰ is thirteen months for a first-time offender or about three years for the most incorrigible recidivist.¹⁶¹ If the death occurred as a result of

151. USSG §§ 4A1.2(i), 4A1.3(a).

152. Washburn, *supra* note 44.

153. *See* Sands, *supra* note 44; Kormmann, *supra* note 44; Black, *supra* note 140.

154. Hearing Before the United States Sentencing Commission (Jan. 20–21, 2010) (testimony of Prof. Kevin K. Washburn), *available at* http://www.usc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100120-21/Washburn_Testimony.pdf.

155. Fletcher, *supra* note 44, at 19.

156. *See, e.g.*, USSG ch. 5, pt. A, l. 8.

157. *Id.* at ch. 5, pt. A, l. 38, § 2A4.2(a).

158. *Id.* at ch. 5, pt. A.

159. *Id.*

160. *See id.* § 2A1.4 (setting base offense level at 12).

161. *Id.* at ch. 5, pt. A.

reckless driving, however, the mid-range sentence more than doubles for each kind of defendant.¹⁶²

Tribal priors under the guidelines have attracted more scholarly attention than offense levels because they involve tribal courts, which are dynamic, controversial, and vitally important institutions.¹⁶³ For real-life defendants, however, offense levels matter just as much, and the reasoning behind tribal control over criminal history calls for tribal control over offense levels.

Unlike proposals to count tribal priors, my proposal would likely appeal to both tribes and the defense bar, since many tribes would likely lower offense levels. Although federal prosecutors might oppose the possibility of lower sentences, their ultimate duty to pursue justice should include respect for tribal communities' definitions of justice.

IV.

POSSIBLE LEGAL CHALLENGES TO A TRIBAL CONTROL MODEL

Challenges to my proposal would probably stem from common-law limits¹⁶⁴ on tribal criminal authority and from non-delegation doctrine, which broadly limits agencies' power to make federal law. For the reasons explained below, however, both types of challenge should ultimately fail.

A. *Oliphant- and Duro-Based Challenges*

Oliphant notoriously¹⁶⁵ forbade tribal criminal jurisdiction over non-Indians. To the majority, historic sources showed that Indian tribes had never enjoyed such jurisdiction and that the Indian Civil Rights Act made no difference.¹⁶⁶ Tribes thus lack criminal jurisdiction over non-Indians "absent affirmative delegation of such power by Congress."¹⁶⁷ Such jurisdiction

162. See *id.* at ch. 5, pt. A, § 2A1.4(a)(2)(B)

163. See, e.g., Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 2 (1997) (commenting that tribal courts are "developing in leaps and bounds," and are "essential to promote . . . sovereignty and self-governance").

164. See *Duro v. Reina*, 495 U.S. 676 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

165. Criticism of *Oliphant* abounds. See, e.g., Troy A. Eid, *Beyond Oliphant: Strengthening Criminal Justice in Indian Country*, FED. LAW., Apr. 2007, at 40; Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553 (2009); Marie Quasius, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN. L. REV. 1902 (2009); Judith V. Royster, *Oliphant and its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL'Y 59 (2003). A recent survey of the readers of Turtle Talk, a widely read Indian law blog, showed that 41 percent of its readers believed *Oliphant* frustrates tribal government more than any other federal Indian law doctrine. See *First Turtle Talk Poll Results—Oliphant Biggest Frustration*, TURTLE TALK (Mar. 9, 2009, 9:42 AM), <http://turtletalk.wordpress.com/2009/03/09/first-turtle-talk-poll-results-oliphant-biggest-frustration>.

166. *Oliphant*, 435 U.S. at 208.

167. *Id.*

evidently would be “inconsistent with [tribes’] status” as domestic dependent sovereigns and hence is prohibited.¹⁶⁸

The Supreme Court expanded on *Oliphant*’s reasoning in *Duro v. Reina*, which held that tribes likewise lack jurisdiction over Indians who are not members of the prosecuting tribe.¹⁶⁹ Unlike with state sovereigns, which can regulate everyone within their borders, the Supreme Court would not authorize tribal courts to conduct “trial by political bodies that do not include [the defendant].”¹⁷⁰ In other words, tribal jurisdiction over nonmember Indians is not warranted by the social contract that justifies tribes’ jurisdiction over its own consenting members.

Duro created a jurisdictional gap: for months, neither the federal government nor states¹⁷¹ nor tribes could prosecute crimes with Indian victims committed by nonmember Indians.¹⁷² Although Congress swiftly overrode *Duro* and authorized tribes to try nonmember Indians,¹⁷³ the Court recently articulated concerns about tribal courts that also seem to support *Duro*’s result. Concurring in *Nevada v. Hicks*, Justice Souter cautioned that

tribal law is still frequently unwritten, being based instead ‘on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,’ and is often handed down orally or by example from one generation to another. . . . The resulting law applicable in tribal courts is a complex ‘mix of tribal codes and federal, state, and traditional law’ . . . which would be unusually difficult for an outsider to sort out.¹⁷⁴

Through these opinions, the Supreme Court has signaled its suspicion of tribal courts and its concern that defendants in tribal courts face imprisonment by partial or even corrupt judicial bodies that the Court cannot hope to influence or understand.

If a tribe raises an offense level under my proposal, a federal defendant who is not a member of that tribe might challenge his sentence by analogizing from *Oliphant*, *Duro*, and *Hicks*. Such a defendant would face an increased guidelines range due to the actions of a government in which he has no direct voice. This

168. *Id.*

169. 495 U.S. at 685.

170. *Id.* at 693.

171. Public Law 280 states were the exception to the literal lawlessness *Duro* created. *See supra* note 15 and accompanying text.

172. *See* Eric B. White, *Falling Through the Cracks After Duro v. Reina: A Close Look at a Jurisdictional Failure*, 15 U. PUGET SOUND L. REV. 229, 230 (1991) (noting shortly after *Duro* came out that the opinion “needlessly create[d] a jurisdictional gap over nonmember Indians committing minor crimes against other Indians on reservation land”).

173. 25 U.S.C. § 1301(2) (1990).

174. *Nevada v. Hicks*, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring) (internal citations omitted). Professor Frickey pointed out that Justice Souter’s remarks aptly describe the common law as well as tribal law. *See* Philip P. Frickey, *Address, Tribal Law, Tribal Context, and the Federal Courts*, 18 KAN. J.L. & PUB. POL’Y 24, 30 (2008).

would seem to run afoul of *Duro*, which held that tribes could not punish defendants who had not consented via their membership to tribal authority.

My proposal should survive this challenge. The proposal would not enlarge the regulatory or adjudicatory jurisdiction of tribal governments. Instead, it would simply regulate an aspect of the federal government's trust relationship with tribes.

As a federal policy, my proposal is not susceptible to the social-contract concerns that *Duro* raised.¹⁷⁵ It could become policy only following bicameralism and presentment, like Congress's other instructions to the commission,¹⁷⁶ and presumably after congressional testimony by victims' advocates, prosecutors, and the defense bar. Realistically, this proposal would not diminish public notice of or involvement in guidelines policy, since most citizens—even most lawyers—have no idea how the guidelines work.

Finally, the above challenges would arise under what is essentially federal common law. A congressional mandate that the commission adopt tribal offense levels would trump the common-law principles that *Oliphant*, *Duro*, and *Hicks* announced. *Oliphant* held that “Indian tribes . . . necessarily give up their [criminal power over non-Indians] *except in a manner acceptable to Congress*.”¹⁷⁷ Likewise, *Duro* noted that Congress could supersede the Court, which it did in passing the “*Duro* fix.”¹⁷⁸

In sum, this proposal would survive common-law challenges because it would be statutory. Its legislative nature raises a separate set of problems, discussed below.

B. Non-Delegation Challenges

The federal constitution vests “all legislative [p]owers” in Congress.¹⁷⁹ In theory, that means that Congress cannot delegate its legislative powers to any other body. Today, numerous agencies exercise delegated legislative power to make policy too detailed, technical, or time-sensitive for Congress to legislate directly. Instead of forbidding all delegation, the Supreme Court requires only that Congress provide an “intelligible principle” that an agency can follow and by which the public can judge the agency's compliance with Congress's will.¹⁸⁰

175. *Duro*, 495 U.S. at 693 (“A tribe's . . . authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.”).

176. Congress cannot legislate without bicameralism and presentment. *See Chadha v. INS*, 462 U.S. 919, 953 (1983).

177. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (emphasis added).

178. *Duro*, 495 U.S. at 698; 25 U.S.C. § 1301(2) (2006) (codifying *Duro* fix). *See also Hicks*, 533 U.S. at 358–60 (discussing decisional law limiting tribal jurisdiction over nonmembers).

179. U.S. CONST. art. I, § 1.

180. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

The United States Sentencing Commission is among the agencies exercising delegated legislative power.¹⁸¹ Defendants challenged the guidelines under the non-delegation doctrine shortly after the guidelines took effect, arguing that Congress had unconstitutionally delegated its power to control sentences.¹⁸² The Supreme Court upheld the guidelines and observed that Congress had specified (1) overall goals of fairness, certainty, and uniformity in sentencing; (2) purposes of sentencing, including promoting respect for the law and deterring crime; (3) aspects of the offense and the defendant to consider in sentencing.¹⁸³ These were principles aplenty for eight justices.¹⁸⁴

A defendant facing a high tribal offense level might argue that Congress has impermissibly delegated its authority to tribes. Such a challenge could worry pro-tribe observers of the Supreme Court, since the Court's willingness to reopen seemingly settled questions of federal Indian law¹⁸⁵ might lead it to find a non-delegation violation for the first time since the 1930s.¹⁸⁶ However, my proposal should survive such a challenge for two reasons.

First, the principle that local governments should influence punishment of local crimes *is* an intelligible principle. Put similarly, sovereignty is an intelligible principle. At the same time, it would be consistent with this proposal for Congress to instruct tribes to consider deterrence, retribution, and so on as they settle on offense levels; it is likely that tribes would voluntarily focus on many of the areas with which Congress was concerned when it first delegated authority to the commission. So long as the statute gave tribes final authority to set offense levels regardless of those considerations' outcomes, tribes would enjoy the self-determination this proposal seeks to accomplish.

Second, this proposal would not be a delegation at all but rather a restoration of inherent tribal sovereignty. When Congress abrogates an element of tribal sovereignty, the abrogated right does not disappear; rather, the federal government holds that right in trust for the benefit of the tribe.¹⁸⁷ When Congress passed the *Duro* fix, reversing the Supreme Court's destruction of tribal criminal jurisdiction over nonmember Indians, it did not delegate federal authority but rather restored inherent tribal authority.¹⁸⁸ Although *Oliphant* has rendered the federal government the sole felony prosecutor in much of Indian

181. *Mistretta v. United States*, 488 U.S. 361, 374 (1989).

182. *Id.* at 370.

183. *Id.* at 374–75.

184. Justice Scalia dissented, “find[ing] no place . . . for an agency created by Congress to exercise no governmental power other than the making of laws.” *Id.* at 413 (Scalia, J., dissenting).

185. The grant of certiorari in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008), for example, surprised Indian law scholars in part because the petition for certiorari did not even allege a circuit split on the issue it raised. See Petition for Writ of Certiorari, *Plains Commerce Bank*, 128 S. Ct. 2709 (No. 07-411), 2007 WL 2809109.

186. The last time the Court struck down a statute for unlawful delegation was in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

187. Ennis, *supra* note 165, at 601.

188. *United States v. Lara*, 541 U.S. 193, 201 (2004).

country, that holding “reflect[ed] the Court’s view of the tribes’ retained sovereign status *as of the time* the Court made [it].”¹⁸⁹ Tribes’ power to influence appropriate punishments for violence on tribal lands could be retroceded—not delegated—by Congress, just like tribes’ power to prosecute nonmember Indians was under the *Duro* fix.

True, the new tribal authority that this Comment proposes would be only a fragment of the complete, preconstitutional sovereignty¹⁹⁰ tribes once enjoyed over conduct on their lands. And, true, tribes would exercise this restored power under the federal government’s terms, such as its procedures for communicating tribes’ offense level choices to the commission. But the element of sovereignty that the *Duro* fix restored was also highly encumbered by federal law.¹⁹¹ That restoration still mattered.

CONCLUSION

Indian country criminal jurisdiction and the federal sentencing guidelines are two of the most complex and confusing areas of American law. Unfortunately, their combined results are all too clear: Indians accused of violent crime are channeled into a crushingly harsh sentencing regime over which tribal governments have basically no influence. Within the current guidelines framework the sentencing commission could not meaningfully address these issues even when it formed an advisory group for that specific purpose. Judicial discretion probably will not solve the disparity problem and cannot solve the sovereignty problem.

Rather than futilely tinkering with offense levels and thinking up case-by-case departure justifications, the commission should turn to the experts on Indian communities’ criminal-justice needs: tribes themselves. By authorizing tribal control over offense levels, Congress would retrocede a small part of the tribal sovereignty that it now holds in trust. Tribes would have the power to balance punishment with mercy, just like local communities all over the United States. Federal/state sentencing disparities would become irrelevant. Federal courts and their bars would adjust with ease to a sentencing regime unchanged except in one respect: its outcomes. Defendants inevitably would challenge those outcomes, but unlike case-by-case departures that look like race-based sentencing, it would survive by turning on the source of federal jurisdiction rather than the defendant’s identity. And perhaps, by showing that tribes can craft just sentences, tribal offense levels could hasten restoration of tribes’ inherent sovereign power over violence in their communities.

189. *Id.* at 205 (emphasis added).

190. Frickey, *supra* note 90, at 440 (“[T]ribal sovereignty is understood as being retained from a tribe’s inherent, preconstitutional sovereignty.”).

191. 25 U.S.C. § 1302 (creating statutory restrictions on tribal prosecutions similar to federal Bill of Rights).

SENTENCING TABLE (in months of imprisonment), Nov. 1, 2010

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

