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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* Law Clerk to the Honorable Diana E. Murphy, United States Court of Appeals for the Eighth Circuit. J.D., Berkeley Law 2010. This piece benefited tremendously from the insight of James McNamara, Christine Malumphy, and the staff of CLR; any mistakes are my own. This Comment is dedicated to the memory of Phil Frickey, my mentor, hero, and friend.

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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 sentences⁴ 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.

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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).
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 country: 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. They can impose sentences of up to one year, three if they provide indigent counsel, but consecutive tribal sentences cannot exceed nine years total. 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. 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. In most states, 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) and most violent crimes if both victim and defendant

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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.
16. 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).
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. 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,
and rehabilitation. The guidelines, meanwhile, contain a detailed series of factors and calculations that federal judges consider in sentencing every federal criminal defendant. 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.

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. For example, involuntary manslaughter has a base offense level of twelve, or twenty-two if caused by reckless driving. Aggravated assault has a base offense level of fourteen, increasing to seventeen with bodily injury and to twenty-one with permanent or life-threatening injury. Likewise, the offense level increases by three levels for hate crimes, crimes against government officers, and crimes during the defendant’s supervised release. Assault’s offense level jumps from fourteen to twenty if the defendant knowingly assaulted a prison official. Though most adjustments raise the offense level, pleading guilty lowers it by two or three. 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. Except for life sentences and relatively short

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).


47. Id.

48. Id. at 226–45.

49. Id. at 245–68.


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

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” even though the federal criminal docket concerns mostly drug, firearm, immigration, and white-collar offenses. 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." 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.


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
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

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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.” 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.” 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. 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.” This contradiction reflects the bipartisan compromise that allowed the Act’s passage. 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. 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.
inappropriate. Now, judges can disregard the latter exhortation but still must explain that they are doing so for legitimate statutory reasons. Judges with equal-protection concerns might not realize that tribal membership is legally different from race, creed, or ethnicity. 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, 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.” 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. 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.” 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. Other circuits have declined to follow Big Crow’s “overcoming adversity” theory. 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 exceptionalism is not a new concept in federal common law, the current

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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).


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.


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).

Supreme Court has signaled its reluctance to apply the traditional Indian-law interpretive canons that favor tribes and tribal sovereignty.\footnote{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).} Moreover, since the Eighth Circuit’s interpretation of the Sentencing Reform Act focuses only on individual Indian defendants, not their communities,\footnote{See supra Part I.C.} the Indian-law canons might not apply anyway.

Second,\footnote{See 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).} \textit{Big Crow} departures are available only to defendants who grew up on reservations\footnote{Id. at 1331.} 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.\footnote{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).”)}

Third,\footnote{See supra Part I.C.} \textit{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 guidelines\footnote{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).} regardless of where they grew up. \textit{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. \textit{Big Crow} departures also require sentencing judges to pathologize reservation life, finding a defendant’s background unusually deprived, or his peers more depraved, than a non-reservation defendant with otherwise similar characteristics.\footnote{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.


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.
TRIBAL CONTROL IN FEDERAL SENTENCING

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

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, 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 conviction pleads guilty to
aggravated assault on the Tribe A reservation, consisting of a fistfight that
carried non-serious bodily injury. He would have an offense level of nine
and would face a guidelines range of six to twelve months. Under the current
guidelines, the same defendant would have an offense level of fifteen
and face a guidelines range of twenty-one to twenty-two months. Most federal
judges would be highly unlikely to give a sentence within Tribe A’s range if the
standard guidelines controlled.

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. 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. 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.\textsuperscript{119}

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

\textit{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.”\textsuperscript{120} Of course, the distinction Jackson referenced “between the federal and the local in law-enforcement activities”\textsuperscript{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 responsibility\textsuperscript{122} 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.\textsuperscript{123} Although Congress\textsuperscript{124} and the Supreme Court\textsuperscript{125} have largely stripped tribes’ power to define and prosecute crime, tribes could still serve a major role in its

\textsuperscript{119}. See, e.g., Robert Yazzie, “Hozho Nahasdili”—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’”).


\textsuperscript{121}. Id.

\textsuperscript{122}. See supra note 105.

\textsuperscript{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).


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).
131. ADVISORY GROUP REPORT, supra note 9, at 26–27.
governments have direct political accountability to those most affected by reservation felony sentences. 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, can exercise policy-making power through this proposal without facing the criticisms that dog uncounseled tribal-court convictions.

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. 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. Should tribes

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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).


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.\textsuperscript{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.\textsuperscript{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.

\textit{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.

\textit{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.\textsuperscript{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

\textsuperscript{137} \textit{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.”).

\textsuperscript{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).

\textsuperscript{139} \textit{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. 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.” 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,” 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, whereas the U.S. District Court for the District of Columbia follows the standard federal guidelines. Even with their newly expanded sentencing authority, 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. 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. Given the opportunity, tribes would likely enact

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”).
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, 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, 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, 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. 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.
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; Kornmann, supra note 44; Black, supra note 140.
155. Fletcher, supra note44, 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.\textsuperscript{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.\textsuperscript{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.

\section*{IV. POSSIBLE LEGAL CHALLENGES TO A TRIBAL CONTROL MODEL}

Challenges to my proposal would probably stem from common-law limits\textsuperscript{164} 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.

\textit{A. Oliphant- and Duro-Based Challenges}

\textit{Oliphant} notoriously\textsuperscript{165} 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.\textsuperscript{166} Tribes thus lack criminal jurisdiction over non-Indians “absent affirmative delegation of such power by Congress.”\textsuperscript{167} Such jurisdiction

\begin{footnotesize}
\begin{enumerate}
\item[162.] See \textit{id.} at ch. 5, pt. A, § 2A1.4(a)(2)(B)
\item[163.] See, e.g., Sandra Day O’Connor, \textit{Lessons from the Third Sovereign: Indian Tribal Courts}, 33 \textit{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”).
\item[166.] \textit{Oliphant}, 435 U.S. at 208.
\item[167.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
evidently would be “inconsistent with [tribes’] status” as domestic dependent sovereigns and hence is prohibited.\(^{168}\)

The Supreme Court expanded on \textit{Oliphant}’s reasoning in \textit{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.

\textit{Duro} created a jurisdictional gap: for months, neither the federal government nor states\(^{171}\) nor tribes could prosecute crimes with Indian victims committed by nonmember Indians.\(^{172}\) Although Congress swiftly overrode \textit{Duro} and authorized tribes to try nonmember Indians,\(^{173}\) the Court recently articulated concerns about tribal courts that also seem to support \textit{Duro}’s result. Concurring in \textit{Nevada v. Hicks}, Justice Souter cautioned that

\begin{quote}
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.\(^{174}\)
\end{quote}

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 \textit{Oliphant}, \textit{Duro}, and \textit{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

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\(^{168}\) \textit{Id.}

\(^{169}\) 495 U.S. at 685.

\(^{170}\) \textit{Id.} at 693.

\(^{171}\) Public Law 280 states were the exception to the literal lawlessness \textit{Duro} created. \textit{See supra} note 15 and accompanying text.


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. It could become policy only following bicameralism and presentment, like Congress’s other instructions to the commission, 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.” Likewise, Duro noted that Congress could supersede the Court, which it did in passing the “Duro fix.”

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. 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.

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.”).
The United States Sentencing Commission is among the agencies exercising delegated legislative power. 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. 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. These were principles aplenty for eight justices.

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 law might lead it to find a non-delegation violation for the first time since the 1930s. 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 tribe. 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. Although Oliphant has rendered the federal government the sole felony prosecutor in much of Indian

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182. Id. at 370.
183. Id. at 374–75.
184. Justice Scalia dissented, “find[jing] 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.
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 sovereignty 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.

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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.”).
### Tribal Control in Federal Sentencing

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

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<tr>
<th>Offense Level</th>
<th>Criminal History Category (Criminal History Points)</th>
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*Note: All sentences of life imprisonment, in federal court, in the United States will not exceed 360 years.*