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Correcting Native American Sentencing Disparity Post-Booker

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CORRECTING NATIVE AMERICAN SENTENCING DISPARITY POST-*BOOKER*

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I. INTRODUCTION

In South Dakota, a defendant convicted of assault in state court receives an average sentence of twenty-nine months.[1] However, if a Native American defendant were to commit that same offense within one of the Indian reservations in South Dakota, the defendant would be prosecuted in federal court and receive an average sentence of forty-seven months.[2] This glaring disparity, whereby Native Americans prosecuted for aggravated assault in Indian country receive sentences sixty-two percent higher than defendants convicted in state court for the same offense, is a product of the complex jurisdictional arrangement surrounding Indian country and the rigidity of the Federal Sentencing Guidelines.

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1. U.S. SENTENCING COMM'N, REPORT OF THE AD HOC ADVISORY GROUP ON NATIVE AMERICAN SENTENCING ISSUES 32 (2003), *available at* http://www.ussc.gov/naag/nativeamer.pdf [hereinafter NATIVE AMERICAN ADVISORY GROUP]. This Report also notes that, according to Richard Braunstein and Steve Feimer, the average state court sentence for a Native American convicted of assault is twenty-two months, compared to thirty-four months for white defendants. *Id.* at 32 n.60; *see also* Richard Braunstein & Steve Feimer, *South Dakota Criminal Justice: A Study of Racial Disparities*, 48 S.D. L. REV. 171, 194 (2003).

2. U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2005, DISTRICT OF SOUTH DAKOTA 12 tbl.7, 25 tbl.7 (2005), *available at* http://www.ussc.gov/JUDPACK/2005/sd05.pdf [hereinafter 2005 U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET] (reporting forty-nine-month mean sentence in South Dakota for assault during fiscal year 2005 pre-*Booker* and a forty-five-month mean sentence in South Dakota for assault during fiscal year 2005 post-*Booker*). This was higher than the national mean for assault during fiscal year 2005, which was thirty-seven months pre-*Booker* and forty-four months post-*Booker*. *Id.* In 2002, the average federal sentence for assault in South Dakota was 53.3 months, while the national mean was 38.7 months. U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2002, DISTRICT OF SOUTH DAKOTA 10 (2002), *available at* http://www.ussc.gov/JUDPACK/2002/sd02.pdf [hereinafter 2002 U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET].

Due to Native American tribes' unique status as "domestic dependent nations" within the United States, the federal government holds criminal jurisdiction over most crimes committed within Indian country. As a result, Native Americans are subject to federal jurisdiction for many offenses that are almost exclusively within states' criminal jurisdiction, such as manslaughter, assault, and sex offenses. For example, in Minnesota, South Dakota, and New Mexico—three states with large Native American populations—Native Americans accounted for only six percent of sexual abuse offenders in state courts but over ninety percent of sexual abuse offenders in federal court.[3]

As illustrated by sentences for aggravated assault in South Dakota, federal sentences are often harsher than their state counterparts.[4] As a result, for many crimes committed by Native Americans within Indian country,[5] these defendants suffer disproportionately harsher sentences than if they were non-Indian[6] or had committed their crimes off the reservation. Prior to the Federal Sentencing Guidelines, federal judges could minimize this disparity by reducing federal sentences to a level in line with corresponding state punishments. However, the Federal Sentencing Guidelines severely restrained judicial discretion, impairing judges' ability to respond to this disparity.

Despite the Federal Sentencing Guidelines' goal of promoting

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3. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 21 n.37. Note that in Minnesota, the federal government maintains criminal jurisdiction over only one of the eleven tribes in the state—the Red Lake Reservation. The other tribes are all under Public Law 280 jurisdiction, meaning the State of Minnesota has full criminal jurisdiction. 18 U.S.C. § 1162 (2000).

4. *See* Christine DeMaso, Note, *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, 2108 (2006) (citing Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 917–18 (2000); 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, 998–99 (1995)). Sex offenses are another example of this disparity. In New Mexico, for example, the average sentence for a sex offense was twenty-five months, compared to eighty-six months in federal court. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 21–22. Note that "[i]f only the more severe class 1 and 2 felony offenses in New Mexico are considered, the state mean sentence is 43 months." *Id.* at 22.

5. This is particularly true for manslaughter, assault, and sexual abuse. *See* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 13–34; *see also* Jon M. Sands, *Indian Crimes and Federal Courts*, 11 FED. SENT'G REP. 153, 153 (1998) (noting that in 1997, close to seventy-five percent of all manslaughter and sexual abuse cases in federal court were Indian offenses).

6. Crimes committed by non-Indians against non-Indians within Indian country are prosecuted in state courts according to state substantive law. *See infra* Part II.A.5.

uniformity and minimizing disparity,[7] the Guidelines have had the opposite effect with respect to Native Americans. As Judge Charles B. Kornmann, a United States District Court Judge in South Dakota, has said:

> Ask virtually any United States District Judge presiding over cases from Indian Country whether the Federal Sentencing Guidelines are fair to Native Americans; ask virtually any appellate judge dealing with cases from Indian Country the same question, and I believe the answer would largely be the same: No. Too often are we required to impose sentences based on injustice rather than justice, and this bothers us greatly.[8]

This Article, therefore, proposes a method by which federal judges can deviate downward from the Federal Sentencing Guidelines so that Native American defendants' sentences better align with corresponding state sentences. While this Article does not mark the first time the Federal Sentencing Guidelines' impact on Native Americans has been criticized, prior attempts to resolve this issue have been largely unsuccessful.[9] The Supreme Court's 2005 decision in *United States v. Booker*, however, changed the federal sentencing landscape by ruling that the Federal Sentencing Guidelines are advisory rather than mandatory.[10] This Article will show how district court judges can exercise this new-found post-*Booker* discretion to correct for Native American sentencing disparities.

Although correcting for Native American sentencing disparities post-*Booker* has not been a lively area of discussion among judges or legal academics, whether district courts have discretion to award non-Guidelines sentences to account for disparity caused by fast-track programs or Congress's crack-powder cocaine sentencing ratio have garnered a great deal of attention.[11] Courts' treatment of the disparity in these other contexts, therefore, serves as a useful proxy as to the

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7. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 1A1.1 (2005), *available at* http://www.ussc.gov/2005guid/gl2005.pdf [hereinafter 2005 GUIDELINES MANUAL]; *infra* Part III.A.1.

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

9. *See infra* Part III.B.

10. United States v. Booker, 543 U.S. 220, 259 (2005).

11. *See infra* Part V.

likelihood of district courts being able to account for Native American sentencing disparity under the post-*Booker* sentencing regime.

In many respects, the issue of fast-track disparity is the stronger comparator to Native American sentencing disparity. The disparity in such cases stems from the fact that in the 2003 PROTECT Act, Congress granted the Attorney General the power to authorize fast-track programs, whereby illegal aliens prosecuted in districts with a large docket of immigration cases are given a lower sentence than otherwise would be given under the Federal Sentencing Guidelines if they enter into a "rapid guilty plea."[12] Therefore, the disparity in both the fast-track and Native American contexts is geographically based, and in both circumstances Congress established the framework creating the disparity. Most circuit court decisions, however, with the exception of the Sixth Circuit's decision in *United States v. Ossa-Gallegos*,[13] had rejected arguments for non-Guidelines sentences being awarded to correct such disparity.[14] This Article, as originally drafted, had advanced a conservative approach to correcting Native American sentencing disparity based on this Sixth Circuit opinion, whereby district courts were advised to reduce, but not fully eliminate the disparity between federal and state sentences.

In December 2007, however, the Supreme Court decided *United States v. Kimbrough*,[15] in which the Court held that under *Booker*, district court judges were not bound to accept the 100:1 crack-powder sentencing ratio that existed in the Guidelines.[16] The Court determined that while courts were bound by the minimum and maximum sentences proscribed by Congress, "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack-powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes."[17] This holding significantly enhances district court judges' ability to award non-Guidelines sentences in the Native American and fast-track contexts.[18]

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12. *See infra* Part V.A.

13. 453 F.3d 371 (6th Cir. 2006). In this case, a defendant appealed his sentence to the Sixth Circuit, arguing that while the district court judge provided a two-step downward departure, in part to account for fast-track disparity, a four-step reduction was necessary to fully mitigate the disparity. *See infra* Part V.A.2.b.

14. *See infra* Part V.A.2.

15. 128 S. Ct. 558 (2007).

16. *See infra* Part V.B.2.

17. *Kimbrough*, 128 S. Ct. at 575.

18. *See* Second Circuit Sentencing Blog, *Non-Guidelines Sentences Based on Fast-Track Disparity Still Possible in the Second Circuit?*, http://federalsentencing.typepad.com/

This Article, therefore, will address district court judges' authority to correct for Native American sentencing disparity in light of *Kimbrough*, as well as what lessons can still be drawn from the debate surrounding fast-track disparity. Applying the same principles articulated by the Court in *Kimbrough*, it is evident that Congress has not barred sentencing courts from considering sentencing disparity as it relates to Native Americans. Moreover, the findings of the Native American Advisory Group reflect that the Guidelines fail to properly consider the impact federal sentences have on Native Americans. After establishing that district courts have the authority to consider Native American sentencing disparity when sentencing Native American defendants, this Article will then show how judges are to consider this issue in light of judges' instruction to sentence defendants in accord with the factors set forth in § 3553(a).

Admittedly, the approach advocated in this Article will not fully eradicate Native American sentencing disparity. If a district court chooses not to alter a sentence based on such disparity, circuit courts are permitted to treat a district court's decision to adhere to the Guidelines as presumptively reasonable,[19] and moreover, even non-Guidelines sentences will still be bound by the statutory minimums and maximums set by Congress.[20] Any attempt to fully eradicate the disparate sentences endured by Native American defendants, however, would require wide-sweeping reform of the Federal Sentencing Guidelines or major congressional changes to the Major Crimes Act.[21] This proposal offers two advantages to such an alternative. First, the proposal presented in this Article presents an immediate solution to Native American defendants. Any attempt to fundamentally modify the Guidelines or amend the Major Crimes Act would require a high degree of political capital to obtain, and so far, such attempts have fallen short.[22] Furthermore, with Native American sentencing disparity being a

developments_in_federal_s/sentencing_disparity/index.html (Jan. 3, 2008) (discussing, in light of *Kimbrough*, the Second Circuit's acknowledgment in *United States v. Liriano-Blanco*, 510 F.3d 168, 174 (2d Cir. 2007), that the reasonableness of non-Guidelines sentences to correct for fast-track disparity was not a settled question).

19. *See* Rita v. United States, 127 S. Ct. 2456 (2007).

20. *See Kimbrough*, 128 S. Ct. at 574 ("[P]ossible variations among district courts are constrained by the mandatory minimum Congress prescribed.").

21. The Supreme Court's recent decision in *Rita* virtually assures that it is not per se unreasonable for a district court to sentence a Native American to a within-Guidelines sentence because the Court held that circuit courts can presume that within-Guidelines sentences are reasonable. 127 S. Ct. at 2462.

22. *See infra* Part III.B.2.a.i.

byproduct of a jurisdictional issue, the courts, particularly post-*Booker*, are perhaps the branch best suited to resolve this concern.

This Article will proceed in seven parts. Following this introduction, Part II will discuss how criminal jurisdiction in Indian country works as well as the unique circumstances surrounding Indian crime. Next, Part III will provide an overview of the history of the Federal Sentencing Guidelines pre-*Booker* and discuss previous recommendations for eliminating sentencing disparity for Native Americans under the pre-*Booker* regime. Part IV will then look at *Booker* and the post-*Booker* landscape, with Part V analyzing the issue of fast-track and crack-powder disparity in the courts. Finally, Part VI will study how courts post-*Booker* can correct for Native American sentencing disparities, with Part VII offering the conclusion.

II. CRIME IN INDIAN COUNTRY

Indian crime is a unique subset of criminal law in the United States. Tribes' status as "domestic dependent nations"[23] has led to a complicated criminal jurisdictional arrangement over Indian country. This Part will begin by discussing the interplay between federal, state, and tribal criminal jurisdiction in Indian country. Next, this Part will briefly discuss the impact Indian culture and reservation life have on Indian crime. Finally, this Part will examine aggravated assault prosecutions in South Dakota to illustrate the jurisdictional complexities and resulting sentencing disparity surrounding crime in Indian country.

A. Criminal Jurisdiction in Indian Country

The United States' recognition of tribal sovereignty and the exclusive role of the federal government in dealing with Indian affairs has its roots in the United States Constitution.[24] In the early years of the country's history, the Supreme Court decided three cases, referred to as "The Marshall Trilogy," that set forth the bedrock principles of Indian law that persist to this day.[25] These cases established Indian tribes'

23. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

24. In the Constitution, Congress is given the power to "regulate Commerce . . . with the Indian tribes," U.S. CONST. art. I, § 8, cl. 3, and the President's treaty power extends to Indian affairs, *see* U.S. CONST. art. II, § 2, cl. 2.

25. Jennifer Butts, Note, *Victims in Waiting: How the Homeland Security Act Falls Short of Fully Protecting Tribal Lands*, 28 AM. INDIAN L. REV. 373, 375–76 (2003–2004). The three cases that comprise "The Marshall Trilogy" are *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation*, 30 U.S. (5 Pet.) 1, and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

unique status as "domestic dependent nations,"[26] whereby the United States serves as a "guardian" over Indian country,[27] but state laws "can have no force."[28] Based upon these core principles, tribes have inherent sovereignty over criminal matters, free from state interference, but subject to federal law.[29] The federal government has passed a series of laws that define the contours of criminal jurisdiction in Indian country, with "Indian country" including: (1) "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," (2) "all dependent Indian communities within the . . . United States," and (3) "all Indian allotments [where] the Indian title[]" to the allotment still exists.[30] The details of these laws are discussed below.

1. The General Crimes Act

a. History and Scope of the General Crimes Act

Soon after the Revolutionary War, Congress passed a series of laws providing federal jurisdiction over non-Indians committing crimes against Indians in Indian country, in order to provide a buffer between Indian and non-Indian populations.[31] These laws were expanded and took their current form in 1817, when Congress passed the General

26. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 (stating that Indian tribes should not be considered "foreign" states, but "[t]hey may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases."). The foundation for this definition of Indian status was established in *Johnson v. M'Intosh*, where Marshall recognized that Indians' legal right in their lands was good against all third parties, except the United States. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 14–15 (4th ed. 2004).

27. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 ("Meanwhile [tribes] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.").

28. *Worcester*, 31 U.S. (6 Pet.) at 561.

29. The Supreme Court has, on a series of occasions, affirmed Congress's legislative power over crime in Indian country. In *United States v. Rogers*, the Court held that "Congress may by law punish any offence [in Indian territory], no matter whether the offender be a white man or an Indian." 45 U.S. (4 How.) 567, 572 (1846). Similarly, in *United States v. Kagama*, the Court upheld Congress's authority to pass the Major Crimes Act based upon the federal government's duty to protect the Indian tribes. 118 U.S. 375, 384 (1886). More recently, in *United States v. Antelope*, the Court said, "Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian Country." 430 U.S. 641, 648 (1977); *see also* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 5.

30. 18 U.S.C. § 1151 (2000).

31. CANBY, *supra* note 26, at 133 (citing 1 Stat. 138 (1790); 1 Stat. 743 (1799); 2 Stat. 139 (1802)).

Crimes Act.[32] This law extended general federal criminal law applicable in areas of exclusive federal jurisdiction to Indian country.[33] Explicitly excluded by the General Crimes Act were: (1) crimes committed by one Indian against another Indian, (2) crimes committed by an Indian that had already been punished by the tribe, and (3) cases where federal jurisdiction is excluded by treaty.[34]

The practical effect of the General Crimes Act is that it applies to all offenses committed by non-Indians against Indians in Indian country. Subsequent interpretation by the Supreme Court held that the General Crimes Act does not apply to crimes committed by non-Indians against non-Indians in Indian country, and instead such defendants are subject to state jurisdiction.[35] This decision, however, is not constitutionally based, and therefore, it is within Congress's authority to amend the General Crimes Act to apply to crimes committed by non-Indians against non-Indians within Indian country.[36] With respect to the Act's applicability to Indians, as implied by the second exception to the General Crimes Act, the Act does apply to crimes committed by Indians against non-Indians in Indian country.[37] However, if, as discussed in the next section, the crime committed by the Indian against the non-Indian is a "major crime," then the prosecution must be brought pursuant to the Major Crimes Act.[38]

b. Relationship Between the General Crimes Act and the Assimilative Crimes Act

When the General Crimes Act was initially passed in 1817, defendants subject to the Act were prosecuted under federal criminal law. However, because criminal jurisdiction is traditionally the province

32. 18 U.S.C. § 1152 (2000); CANBY, *supra* note 26, at 156.

33. 18 U.S.C. § 1152.

34. 18 U.S.C. § 1152. While the first two exceptions still bear some significance, the third exception is largely insignificant today. CANBY, *supra* note 26, at 164.

35. Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1881).

36. *See* United States v. Antelope, 430 U.S. 641, 648–49 (1977); *see also* H.R. REP. NO. 94-1038, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1125, 1126; *infra* Part III.B.2.a.i.

37. *See* United States v. John, 587 F.2d 683 (5th Cir. 1979); United States v. Burland, 441 F.2d 1199 (9th Cir. 1971). There is mixed precedent as to whether the Act applies to victimless crimes by Indians, with the Eighth Circuit holding in 1997 that the General Crimes Act applies to an Indian arrested for driving under the influence of alcohol. *Compare* United States v. Thunder Hawk, 127 F.3d 705, 705 (8th Cir. 1997), *with* United States v. Quiver, 241 U.S. 602, 605–06 (1916).

38. Henry v. United States, 432 F.2d 114 (9th Cir. 1970), *modified by* 434 F.2d 1283 (9th Cir. 1971).

of the states, the United States lacked a comprehensive federal criminal code.[39] In order to fill these gaps, Congress passed the Assimilative Crimes Act in 1825,[40] which provided that in areas of federal jurisdiction, crimes not covered by federal law were to be prosecuted in federal court, but prosecuted and sentenced pursuant to state substantive law.[41]

A question arose as to whether the Federal Sentencing Guidelines applied to crimes defined under state substantive law but prosecuted in federal court.[42] The question revolved around which took priority—"uniform sentencing within the federal system"[43] or "'equal treatment for Indian and non-Indian offenders who commit certain offenses in Indian country.'"[44] The Eighth Circuit in *United States v. Norquay* decided this question in favor of federal sentencing uniformity, and Congress codified this decision by amending 18 U.S.C. § 3551(c) so as to make the Federal Sentencing Guidelines applicable to Assimilative Act offenses, thereby including the General Crimes Act, and the Major Crimes Act.[45] Under this arrangement, the Federal Sentencing Guidelines apply, but state law sets the minimum and maximum sentencing ranges.[46]

2. The Major Crimes Act

In 1885, Congress enacted the Major Crimes Act.[47] The law was passed in response to the Supreme Court's decision two years earlier in *Ex Parte Crow Dog*,[48] where the Court ruled that the federal government does not have "jurisdiction over the murder of an Indian by an Indian in Indian territory."[49] The Major Crimes Act grants the

39. *See* CANBY, *supra* note 26, at 157–58.

40. *Id.* at 158; *see also* Gregory D. Smith, Comment, *Disparate Impact of the Federal Sentencing Guidelines on Indians in Indian Country: Why Congress Should Run the* Erie Railroad *into the Major Crimes Act*, 27 HAMLINE L. REV. 483, 494 (2004).

41. 18 U.S.C. § 13(a) (2000).

42. *See* CANBY, *supra* note 26, at 166–67; *see also* Sands, *supra* note 5, at 155. *Compare* United States v. Bear, 932 F.2d 1279, 1283 (9th Cir. 1990), *with* United States v. Norquay, 905 F.2d 1157, 1161 (8th Cir. 1990).

43. *Norquay*, 905 F.2d at 1161.

44. *Id.* at 1163 (Gibson, J., dissenting) (quoting H.R. REP. NO. 94-1038 (1976), *reprinted in* 1976 U.S.C.C.A.N 1125, 1125).

45. Sands, *supra* note 5, at 155.

46. Jon M. Sands & Robert J. McWhirter, *Federal Sentencing Adventures in Jurisdictional Wonderland:* Blakely, Booker, *and Special Federal Jurisdiction Issues*, 18 FED. SENT'G REP. 102,102 (2005); *see infra* Part II.A.5.

47. Act of March 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (1885).

48. 109 U.S. 556 (1883).

49. CANBY, *supra* note 26, at 165. For a more complete description of the story behind

federal government jurisdiction over a specified set of major offenses committed by an Indian in Indian country.[50] Originally, the Major Crimes Act conferred federal jurisdiction over seven offenses,[51] but the Act has subsequently been expanded in scope and in its present form applies to fifteen classes of felonies.[52] The most recent addition to the list of enumerated crimes came in 2006, when Congress amended the Major Crimes Act to include "felony child abuse or neglect,"[53] due to concern "that a whole category of crimes against children [was] going unaddressed."[54]

"Felony child abuse or neglect," along with burglary and incest, are not federally defined offenses and are therefore prosecuted under state substantive law, subject to the Federal Sentencing Guidelines.[55] The Major Crimes Act's twelve other offenses, however, are federally defined and are therefore tried and sentenced under federal substantive law. This was not always the case, however. Prior to 1976, the Major Crimes Act mandated that four federally defined offenses still be tried according to state substantive law, but after two circuits held that this disparity with the General Crimes Act violated Indians' due process rights,[56] Congress amended the Major Crimes Act so that all twelve

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this case, see SIDNEY L. HARRING, CROW DOG'S CASE 108–10 (1994).

50. 18 U.S.C.A. § 1153 (West 2000 & Supp. 2007).

51. The original seven felonies were "murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny." § 9, 23 Stat. at 385.

52. The fifteen categories are: (1) "murder," (2) "manslaughter," (3) "kidnapping," (4) "maiming," (5) "a felony under chapter 109A" (also known as 18 U.S.C. §§ 2241–2248), (6) "incest," (7) "assault with intent to commit murder," (8) "assault with a dangerous weapon," (9) "assault resulting in serious bodily injury (as defined in section 1365 of [title 18])," (10) "an assault against an individual who has not attained the age of 16 years," (11) "felony child abuse or neglect," (12) "arson," (13) "burglary," (14) "robbery," and (15) "a felony under section 661 of [title 18]," (also known as 18 U.S.C. § 661 (theft)). 18 U.S.C.A. § 1153(a). It has also been held that the Major Crimes Act is applicable to firearms and conspiracy counts. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 7–8. Furthermore, it is important to note that, so long as the offense under which the defendant is brought to court falls under the Major Crimes Act, it is possible for the Indian defendant to be convicted of a lesser included offense not listed under the Major Crimes Act. *Id.* at 8 n.25 (citing Keeble v. United States, 412 U.S. 205 (1973)).

53. 18 U.S.C.A. § 1153(a).

54. S. REP. NO. 109-255, at 5 (2006). Prior to this amendment, "the federal government [did] not have jurisdiction to investigate or prosecute acts of child physical abuse or neglect unless they [rose] to the level of serious bodily injury or death." *Id.*

55. *See* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 8–9. The General Crimes Act, under the Assimilative Crimes Act, is also subject to the Federal Sentencing Guidelines although state law sets the minimum and maximum sentencing lengths. Sands & McWhirter, *supra* note 46, at 102.

56. United States. v. Big Crow, 523 F.2d 955, 959–60 (8th Cir. 1975); United States v.

federally defined offenses are prosecuted under federal substantive law.[57]

Despite Congress's amendment to the Major Crimes Act in 1976, the Major Crimes Act differs from the General Crimes Act in many important ways. First, the Major Crimes Act gives jurisdiction to offenses committed by an Indian against an Indian—jurisdiction that was explicitly excluded under the General Crimes Act.[58] Second, although the Major Crimes Act was passed in response to a crime by an Indian against an Indian, the Act also applies to crimes by an Indian against a non-Indian in Indian country.[59] This differs from the General Crimes Act, where offenses by non-Indians against non-Indians in Indian country are prosecuted in state court under state substantive law. This creates sentencing disparity because an Indian committing a "major" crime against a non-Indian in Indian country will be punished according to federal law, while a non-Indian committing the same offense in Indian country against a non-Indian is prosecuted under the state system. While the Supreme Court in *Antelope* held that such disparity is not unconstitutional,[60] as will be discussed later, that does not mean that such disparity is not "unwarranted" for purposes of the Federal Guidelines. In addition to creating disparate sentencing, this also results in Native Americans being disproportionately subject to federal jurisdiction. Indeed, the majority of federal prosecutions for offenses such as assault, manslaughter, and certain sex offenses are against Native Americans.[61]

Cleveland, 503 F.2d 1067, 1071 (9th Cir. 1974). At that time, the concern was that state sentences were longer than federal sentences, so Indians suffered harsher sentences. Today this concern is reversed, such that federal sentences are longer than corresponding state sentences.

57. H.R. REP. NO. 94-1038 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1125, 1125. Congress purposely limited its amendment to correct only what the courts had construed to be unconstitutional disparity. At the time, the Supreme Court was considering *United States v. Antelope*, 430 U.S. 641 (1977), to determine "the constitutionality of leaving to State jurisdiction non-Indian against non-Indian crimes that take place in Indian country." H.R. REP. NO. 94-1038, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1125, 1127 n.2. The Supreme Court ultimately held that such disparity was not unconstitutional, and Congress chose not to correct this disparity. *See* United States v. Norquay, 905 F.2d 1157, 1162 (8th Cir. 1990).

58. *Compare* 18 U.S.C. § 1153(a), *with* 18 U.S.C. § 1152.

59. United States v. Bruce, 394 F.3d 1215, 1221 (9th Cir. 2005). Also, it is important to note that jurisdiction under the Major Crimes Act exists if any part of the crime occurred in Indian country. United States v. Van Chase, 137 F.3d 579, 582 (8th Cir. 1998).

60. *Antelope*, 430 U.S. at 647–49.

61. *See* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at i (focusing on sentencing issues for these three offenses).

3. Public Law 280

In 1953, Congress passed Public Law 280,[62] which delegated criminal jurisdiction and limited civil jurisdiction in Indian country to six "mandatory" states—Minnesota,[63] Alaska, California, Nebraska, Wisconsin, and Oregon—thereby impacting twenty-three percent of Native Americans residing on reservations in the contiguous forty-eight states, and all Alaska natives.[64] This law was passed in an effort to combat lawlessness in Indian country during a period of time that has been termed the "Termination Period" with respect to the federal government's policy towards Indian tribes.[65] The effect of the law is that in states governed by Public Law 280, all crimes occurring in Indian country, regardless of whether the offender or victim is Native American, are prosecuted under state law in state court.

Prosecuting Native Americans under state law, free from the Federal Sentencing Guidelines, eliminates the inherent disparity discussed in this Article, but it comes at a heavy price—the impingement of tribal sovereignty. Public Law 280 has been heavily criticized by Indian law scholars,[66] and even President Eisenhower, when signing Public Law 280

62. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (2000)); *see also* Timothy J. Droske, Comment, *The New Battleground for Public Law 280 Jurisdiction: Sex Offender Registration in Indian Country*, 101 NW. U. L. REV. 897 (2007).

63. Public Law 280 exempted the Red Lake Reservation from Public Law 280. 18 U.S.C. § 1162(a). Later, through retrocession, the Bois Forte Reservation reassumed criminal jurisdiction.

64. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY—RESEARCH PRIORITIES 3–4 (2005), *available at* http://www.ncjrs.org/pdffiles1/nij/209839.pdf.

65. The "Termination Period" lasted from 1940–1962 and was characterized by the goal to assimilate Native Americans into United States society at large. Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1662–65 (1998); *see also* Emma Garrison, *Baffling Distinctions Between Criminal and Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty*, 8 J. GENDER RACE & JUST. 449, 452 (2004).

66. Carole Goldberg-Ambrose, the preeminent expert on Public Law 280, has taken a position that, despite Congress's intent that Public Law 280 reduce lawlessness in Indian country, it has actually had the opposite effect, because tribal courts' power was limited and tribes subject to Public Law 280 were cut out of significant federal funding opportunities. *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1415–19 (1997). Public Law 280 has also been criticized for stunting the development of tribal judicial systems and preventing tribal courts from being respected as they were developing. Kevin K. Washburn & Chloe Thompson, *A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the Recognition of Tribal Court Judgments with the Recent Arizona Rule*, 31 WM. MITCHELL L. REV. 479, 521 (2004).

into law, expressed "'grave doubts as to the wisdom of certain provisions.'"[67] President Eisenhower was particularly troubled by the law's lack of tribal consent, which he requested be added to the law the following year.[68] Congress finally added this clause in 1968, but it did not apply retroactively to tribes within the six mandatory states, or any of the nine other states[69] that had subsequently assumed partial Public Law 280 jurisdiction.[70] Public Law 280 is out of step with the federal government's current policy of favoring tribal sovereignty,[71] and tellingly, only one state has managed to assume Public Law 280 jurisdiction following the addition of the tribal consent clause.[72] This is unsurprising given that doing so would require tribes to acknowledge state authority over them and would also effectively eliminate any tribal criminal justice system previously in place.[73]

4. Tribal Jurisdiction

Despite Congress's heavy delegation of criminal jurisdiction in Indian country to federal or state governments, in the absence of such statutes, "tribal criminal jurisdiction over the Indian in Indian country is complete, inherent, and exclusive."[74] While Public Law 280 effectively

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67. Jiménez & Song, *supra* note 65, at 1657–58 (quoting Statement by the President upon Signing Bill Relating to State Jurisdiction over Cases Arising on Indian Reservations, PUB. PAPERS 564 (Aug. 15, 1953)).

68. *Id.* at 1658 n.172.

69. The nine states were Nevada in 1955, South Dakota in 1957 (jurisdiction over highways), Washington in 1957 (jurisdiction in eight subject areas), Florida in 1961, Idaho in 1963 (civil and criminal jurisdiction over seven subject matters, which can be expanded with tribal consent), Montana in 1963 (jurisdiction over the Flathead Reservation), North Dakota in 1963 (assuming civil jurisdiction, by tribal consent), Arizona in 1967 (jurisdiction over water quality, repealed in 2003, and jurisdiction over air quality, repealed in 1986), and Iowa in 1967 (civil jurisdiction over the Sac and Fox Tribe). After the 1968 Amendment, in 1971, Utah became the last state to accept Public Law 280 jurisdiction. Emily Kane, *State Jurisdiction in Idaho Indian Country Under Public Law 280*, ADVOCATE, Jan. 2005, at 10, 10–11.

70. Garrison, *supra* note 65, at 456.

71. *See* Goldberg-Ambrose, *supra* note 66, at 1415–19; *see also* Washburn & Thompson, *supra* note 66, at 521.

72. CANBY, *supra* note 26, at 253. Utah is the only state to have assumed Public Law 280 since the tribal consent clause was added. *Id.* In obtaining tribal consent, "Utah bound itself to retrocede . . . jurisdiction whenever a tribe requests it by a majority vote." *Id.* While the General Crimes Act and Major Crimes Act no longer apply in the "mandatory" Public Law 280 states, "optional" states that later adopt Public Law 280 assume criminal jurisdiction over Indian country, but the Major Crimes Act and the General Crimes Act also remain in effect. CANBY, *supra* note 26, at 235–36.

73. *See* CANBY, *supra* note 26, at 236–37.

74. CANBY, *supra* note 26, at 170 (citing *Ex Parte* Crow Dog, 109 U.S. 556 (1883)).

wipes out tribal criminal justice systems,[75] tribal criminal jurisdiction remains more robust for those tribes subject to the General Crimes Act and the Major Crimes Act. This is most strongly evidenced by the fact that tribes hold exclusive criminal jurisdiction over crimes committed by an Indian against an Indian that are not covered by the Major Crimes Act.[76] This effectively means that tribes hold exclusive jurisdiction over misdemeanors where an Indian is both the defendant and the victim.[77] This exclusive jurisdiction results in a large number of prosecutions being brought exclusively in tribal court.[78] Congress, however, has imposed a limit on tribal courts' sentencing ability. In 1968, Congress passed the Indian Civil Rights Act, which, in addition to extending many of the safeguards in the Bill of Rights to the tribes,[79] also limited tribal courts' sentencing authority to a maximum of one year's imprisonment, a fine of $5,000, or both.[80]

Tribes also share concurrent jurisdiction with the federal

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75. CANBY, *supra* note 26, at 236–37 (noting that the lack of tribal criminal justice systems is due to either a lack of need or a lack of resources); *see also* 18 U.S.C. § 1162(a) (2000).

76. *See* CANBY, *supra* note 26, at 170. This is because crimes committed by an Indian against an Indian in Indian country are specifically excluded under the General Crimes Act. 18 U.S.C. § 1152 (2000).

77. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 410–11 (2004).

78. For example, in 2003, the Navajo Nation's tribal courts heard 27,602 criminal cases compared to the United States Attorney's Office, which prosecuted 487 criminal cases arising on the Navajo Nation. *Id.* at 412.

79. In describing the Indian Rights Act, Washburn states,

> In addition to the freedoms of speech, assembly and exercise of religion set forth in the First Amendment, the Indian Civil Rights Act incorporated most of the criminal procedure protections found in the Bill of Rights, such as the Fourth Amendment's warrant requirements and the proscription against unreasonable searches and seizures, the Fifth Amendment's prohibition on double jeopardy, compelled self-incrimination, and deprivation of life, liberty or property without due process, the Sixth Amendment's rights to notice, a speedy and public trial, the right to confront witnesses, the right to compulsory process, and the right to counsel, the Eighth Amendment's proscriptions on excessive bail, excessive fines, or cruel and unusual punishment, and even the Fourteenth Amendment's requirement of equal protection. In addition, Congress provided the same remedy for deprivation of rights by tribal courts and tribal governments that are available against states for a state court's deprivation of rights, that is, petitioning the courts of the United States for a writ of habeas corpus.

Id. at 424–25 (citations omitted).

80. 25 U.S.C. § 1302(7) (2000).

government in a number of situations. For example, tribes have jurisdiction over non-major crimes committed by an Indian against a non-Indian, as does the federal government under the General Crimes Act, so long as the Indian defendant has not been punished by the tribe.[81] Tribes also share concurrent jurisdiction with the federal government over Indian defendants who have violated the Major Crimes Act although tribal courts are subject to the sentencing limitations imposed by the Indian Civil Rights Act.[82]

In sum, except in Public Law 280 states, tribes exercise exclusive criminal jurisdiction over all non-major offenses by an Indian against an Indian, and concurrent jurisdiction with the federal government over all non-major offenses by an Indian against a non-Indian, and all cases where the federal government has jurisdiction under the Major Crimes Act.

5. Criminal Jurisdiction Summary

The following is a summary of the interplay between federal, state, and tribal criminal jurisdiction as it relates to Indian issues:[83]

- *Crimes Occurring Outside Indian Country*: All crimes occurring outside Indian country, regardless of whether the offender or victim is Indian, are exclusively under state criminal jurisdiction.
- *Crimes Occurring in Public Law 280 States*: All crimes, regardless of whether the crime occurs in Indian country, or whether the offender or victim is Indian, are under state criminal jurisdiction.
- *Crimes Occurring Within Indian Country in Non-Public Law 280 States*: The intersection of federal, state, and tribal jurisdiction is set forth in the following chart:

81. CANBY, *supra* note 26, at 171; *see also* 18 U.S.C. § 1152 (2000).

82. CANBY, *supra* note 26, at 171–72; Jiménez & Song, *supra* note 65, at 1652.

83. For a helpful example of the jurisdictional relationship, see Smith, *supra* note 40, at 503–05. Also, for another chart, see U.S. ATTORNEYS' MANUAL, tit. 9, ch. 20, § 689 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm.

Crime & Parties	*Jurisdiction*	*Substantive Law*	*Federal Sentencing Guidelines*	*Statute*
"Major" crimes by Indians against Indians	Federal (concurrent tribal)	Federal [+]	Yes	Major Crimes Act, 18 U.S.C. § 1153
	Tribal (concurrent federal)	Tribal [*]	No	
Non-"Major" crimes by Indians against Indians (largely misdemeanors)	Tribal	Tribal	No	
"Major" crimes by Indians against non-Indians	Federal (concurrent tribal)	Federal [+]	Yes	Major Crimes Act, 18 U.S.C. § 1153
	Tribal (concurrent federal)	Tribal [*]	No	
Non-"Major" crimes by Indians against non-Indians (largely misdemeanors)	Federal (concurrent tribal)	State [#]	Yes [#]	General Crimes Act, 18 U.S.C. § 1152
	Tribal (concurrent federal)	Tribal [*]	No	
Victimless crimes by Indians	Tribal [**]	Tribal [*]	No	
Crimes by non-Indians against Indians	Federal	Federal [#]	Yes [#]	General Crimes Act, 18 U.S.C. § 1152
Crimes by non-Indians against non-Indians	State	State	No	
Victimless crimes by non-Indians	State	State	No	

* Tribal sentences are limited by the Indian Civil Rights Act to up to one year's imprisonment and a $5,000 fine.

+ Burglary and Incest are not federally defined offenses and therefore are prosecuted under state substantive law per the Assimilative Crimes Act.

State substantive law governs per the Assimilative Crimes Act when there is not a federally defined offense. The Federal Sentencing Guidelines apply, but state substantive law provides the maximum and minimum sentences.

** However, the Eighth Circuit held in *United States v. Thunder Hawk*,[84] that the General Crimes Act applied to an Indian arrested for driving under the influence of alcohol.

B. Socioeconomic and Cultural Influences on Criminal Justice in Indian Country

1. Broad Concerns

The administration of justice for Native Americans is unique for reasons beyond the jurisdictional arrangement over Indian country. For example, Native Americans as a whole, and particularly those living within Indian country, endure higher rates of poverty, unemployment, low education,[85] crime rates,[86] and alcoholism[87] than the rest of the

84. 127 F.3d 705, 705 (8th Cir. 1997).

85. According to data compiled from the 2000 census, American Indians are socioeconomically disadvantaged compared to the rest of the United States population in every area, and these substandard conditions are only magnified when limited to American Indians living in Indian country. *See generally* STELLA U. OGUNWOLE, U.S. CENSUS BUREAU, WE THE PEOPLE: AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES (2006), *available at* http://www.census.gov/population/www/socdemo/race/censr-28.pdf. The poverty rate among American Indians is more than double that of the total U.S. population. *Id.* at 12 (showing that the percentage of American Indians living below the poverty line in 1999 was 25.7%, compared with 12.4% for the total U.S. population). This rate can be even higher on reservations. For example, in 1999, 41.5% of Navajo Nation residents, 32.3% of Fort Peck Reservation residents, and 34.6% of Red Lake Reservation residents had incomes of less than $14,999. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 711 n.8 (2006) (citing U.S. CENSUS BUREAU, PROFILE OF SELECTED ECONOMIC CHARACTERISTICS: 2000: NAVAJO NATION RESERVATION AND OFF-RESERVATION TRUST LAND 3 (2000), *available at* http://censtats.census.gov/data/US/2502430.pdf; U.S. CENSUS BUREAU, PROFILE OF SELECTED ECONOMIC CHARACTERISTICS: 2000: GEOGRAPHIC AREA: FORT PECK RESERVATION AND OFF-RESERVATION TRUST LAND 3 (2000), *available at* http://censtats.census.gov/data/US/2501250.pdf). This is largely due to high rates of unemployment. For example, the overall Indian unemployment rate is forty-six percent, Center for Community Change, Native American Background Information, http://www.cccfiles.org/issues/nativeamerican/background/ (last visited Apr. 10, 2008), and the average unemployment rate on Montana's seven reservations is sixty-six percent, BUREAU OF INDIAN AFFAIRS, CALCULATION OF UNEMPLOYMENT RATES FOR MONTANA INDIAN RESERVATIONS (2005), http://dli.mt.gov/

country. These socioeconomic conditions, as well as many tribes' geographic isolation, Indian culture, and underlying racial tensions with the surrounding population, all spill over into the administration of justice for Native Americans. As Professor Kevin Washburn has described in a recent article, these factors result in the alienation of Native Americans within the criminal justice system, which often results in Native Americans failing to be accorded fundamental constitutional norms of criminal justice.[88] Judges and commentators have also spoken out on how these factors need to be accounted for in order to make the criminal justice system equitable for Native Americans.[89] While the Eighth Circuit has taken some steps to counter these factors by

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resources/Indianlabor market.pdf. However, employment alone is not enough to bring many Indians above the poverty line. On those same Montana reservations, thirty-six percent of people employed were still living below the poverty guidelines. *Id.* Across the country, the median earnings for American Indians working full-time, year-round ($28,890 for American Indian men, $22,762 for American Indian women) was substantially less than that for the rest of the population ($37,057 for men, $27,194 for women). OGUNWOLE, *supra*, at 11. Similarly, 27.2% of American Indians living outside Indian country, and 33.1% of those living in Indian country have not graduated from high school, compared to 19.6% of the total U.S. population. *Id.* at 17.

86. A recent study reported that American Indians are victims of violent crime at a rate more than double that of the rest of the nation. STEVEN W. PERRY, AMERICAN INDIANS AND CRIME iii (2004) (reporting that American Indians experienced violent crime at a rate of 101 violent crimes per 1,000 American Indians, compared to 41 per 1,000 persons for the total U.S. population). Similarly, Native American women report rape at a level twice that of white women, although it is not altogether clear to what degree this is due to a higher occurrence of rape or higher reporting rates. Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 575 (2002) (citing PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 5 (1998) (reporting rape rates of 17.7% for white women and 34.1% for American Native and Alaska Native women)).

87. Much of the crime in Indian country is attributable to high levels of alcohol abuse. For example, sixty-two percent of violent crimes experienced by American Indians involved alcohol, compared to forty-two percent overall for the nation. PERRY, *supra* note 86, at vi. Furthermore, the arrest rate of American Indians for alcohol violations is approximately double that for all races. *Id.* at 17. These violations include DUI, liquor law violations, and drunkenness. *Id.* American Indians were arrested for DUIs at a rate of 479 per 100,000 people, compared to 332 per 100,000 for all races. *Id.* Additionally, American Indians were arrested for liquor law violations at a rate of 405 per 100,000 compared to 143 per 100,000 for all races. *Id.* For drunkenness, American Indians were arrested at a rate of 356 per 100,000 compared to 148 per 100,000 for all races. *Id.*

88. Washburn, *supra* note 85, at 710–13.

89. *See, e.g.*, Kornmann, *supra* note 8, at 71. *See generally* S.D. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, NATIVE AMERICANS IN SOUTH DAKOTA: AN EROSION OF CONFIDENCE IN THE JUSTICE SYSTEM (2000), http://www.usccr.gov/pubs/sac/sd0300/main.htm.

affirming the use of downward departures in cases where Native American defendants have displayed a "consistent effort[] to overcome the adverse environment of [American Indian] reservation[s],"[90] the reasoning of these decisions has been questioned and has not been adopted by other circuits.

2. A Case Study in Native American Inequality—the South Dakota Criminal Justice System

South Dakota serves as a prime example of the obstacles facing Native Americans in the criminal justice system. In 1999, due to concerns over racial tension and unfair treatment of Native Americans in South Dakota's criminal justice system, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights undertook a project analyzing the administration of justice for Native Americans.[91] The South Dakota Advisory Committee held a public forum to gather information on this issue.[92] The Advisory Committee's published report said of the meeting that "[t]he expressed feelings of hopelessness and helplessness in Indian Country cannot be overemphasized."[93] Native Americans voiced feelings that racism "permeated" the federal and state levels of justice and that crimes committed by Indians against whites were prosecuted more vigorously than those committed by whites against Indians.[94] Furthermore, the complex maze of criminal jurisdiction led to problems of accountability and communication.[95] In addition, Native Americans were alienated from the criminal justice process because they were underrepresented in employment in the local, state, and federal criminal justice systems, and because they did not fully participate in local, state, and federal elections.[96] Compounding these problems was a lack of redress for Native Americans because general legal services, civil rights organizations, and government civil rights oversight were limited in the state as a whole, and for Native Americans

90. United States v. Big Crow, 898 F.2d 1326, 1331 (8th Cir. 1990).

91. *See generally* S.D. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, *supra* note 89.

92. *Id.* (meeting on Dec. 6, 1999, in Rapid City, South Dakota, where nearly one hundred individuals addressed the forum).

93. *Id.* The Report went on to say, "Despair is not too strong a word to characterize the emotional feelings of many Native Americans who believe they live in a hostile environment." *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

in particular.[97]

C. An Example of Criminal Jurisdiction in Indian Country and the Resulting Sentencing Disparity—Aggravated Assault in South Dakota

A close analysis of aggravated assault in South Dakota provides a useful illustration of the complexity surrounding criminal jurisdiction in Indian country and the accompanying sentencing disparity experienced by Native Americans. This example demonstrates the jurisdictional issues discussed already and previews the use of the Federal Sentencing Guidelines, which are discussed in depth in the next section.

In South Dakota, the city of Pierre is sixty miles away from Fort Thompson, the tribal headquarters of the Crow Creek Sioux Tribe. Assume that in both cities an Indian and a non-Indian are arrested for aggravated assault.[98] The situation set forth here is particularly salient because federal sentencing of Native American defendants for aggravated assault was the primary concern that gave rise to the South Dakota Advisory Committee meetings.[99] In 2002, for example, Native Americans nationally comprised 3.6% of all federal criminal defendants but 36.9% of federal criminal defendants that were prosecuted for assault.[100] In South Dakota, the percentage of assault defendants who are Native American is presumably much higher because Native Americans comprise approximately half of all defendants federally prosecuted in the state.[101]

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97. *Id.*

98. Aggravated assault is the most heavily prosecuted crime under the Major Crimes Act and therefore provides a good example for the impact of federal sentencing on Native Americans. Concern over disparate sentencing for aggravated assault in South Dakota is what gave rise to the formation of the Native American Advisory Group. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 30–31.

99. *Id.* at 31. This meeting was largely responsible for the formation of the Native American Advisory Group. Additionally, in response to the work by the South Dakota Advisory Committee, the Governor of South Dakota contracted with local empiricists to see if state criminal justice data supported the Advisory Committee's findings. Braunstein & Feimer, *supra* note 1, at 171. South Dakota is not a Public Law 280 state, so state criminal jurisdiction over American Indians is limited to crimes occurring outside Indian country. While the initial study on this data revealed disparities that validated the concerns raised by the South Dakota Advisory Committee, *id.* at 189, a later study, headed by the same author, concluded that the disparity was due to socioeconomic factors rather than race. Richard Braunstein & Amy Schweinle, *Explaining Race Disparities in South Dakota Sentencing and Incarceration*, 50 S.D. L. REV. 440, 474 (2005).

100. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, ANNUAL REPORT 15 tbl.4 (2002), *available at* http://www.ussc.gov/ANNRPT/2002/table4.pdf.

101. *See* U.S. SENTENCING COMM'N, PRE-*BOOKER* FISCAL YEAR 2005 GUIDELINE STATISTICS: SOUTH DAKOTA, *in* SOURCEBOOK OF FEDERAL SENTENCING STATISTICS,

1. Prosecuting the Indian Defendant for the Assault in Indian Country

Aggravated assault is one of the fifteen offenses enumerated under the Major Crimes Act.[102] Therefore, the Indian defendant committing the assault on the Crow Creek Reservation will be prosecuted in federal court for aggravated assault regardless of whether the victim was Indian or non-Indian.[103]

Once the Indian defendant is found guilty, he will be sentenced by the district judge according to the Federal Sentencing Guidelines. Under the 2005 Guidelines, the base offense level for aggravated assault is fourteen, with a three- to seven-level increase depending on the severity of the victim's bodily injury.[104] In South Dakota, federal sentences for assault during 2005 averaged forty-seven months.[105] This current base offense level for assault is one level lower than it was in 2002 when concerns were raised in South Dakota regarding assault convictions for Native Americans.[106] Under the 2002 Guidelines, the average federal sentence for assault in South Dakota was 53.3 months in length.[107]

The Crow Creek Sioux Tribe will also have concurrent jurisdiction

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ANNUAL REPORT (2005), *available at* http://www.ussc.gov/ANNRPT/2005/sd_pre05.pdf; POST-*BOOKER* FISCAL YEAR 2005 GUIDELINE STATISTICS: SOUTH DAKOTA, *in* SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, ANNUAL REPORT (2005), *available at* http://www.ussc.gov/ANNRPT/2005/sd_post05.pdf. It is not possible to find data on the race of federal defendants for particular crimes by state, nor is it possible to find data on the sentencing disparities for Native Americans by offense.

102. 18 U.S.C.A. § 1153(a) (West 2000 & Supp. 2007) (providing that the statute applies to "[a]ny Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . assault resulting in serious bodily injury").

103. The Indian defendant will be charged under 18 U.S.C. § 113(6) (2000) ("Assault resulting in serious bodily injury, [is punishable] by a fine under [Title 18] or imprisonment for not more than ten years, or both.").

104. 2005 GUIDELINES MANUAL, *supra* note 7, § 2A2.2.

105. 2005 U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, *supra* note 2, at 12, 25 (reporting forty-nine-month mean sentence in South Dakota for assault during fiscal year 2005 pre-*Booker* and a forty-five-month mean sentence in South Dakota for assault during fiscal year 2005 post-*Booker*). This was higher than the national mean for assault during fiscal year 2005, which was thirty-seven months pre-*Booker* and forty-four months post-*Booker*. *Id.*

106. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2A2.2 (2002) (base offense level fifteen for aggravated assault). The Native American Advisory Group in its 2003 report recommended reducing the base offense level by two, but only a one-level reduction was ultimately adopted. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 34; 2005 GUIDELINES MANUAL, *supra* note 7, § 2A2.2.

107. 2002 U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, *supra* note 2, at 10 (comparing the mean national sentence for assault that year, which was 38.7 months, to the mean federal sentence in South Dakota).

over the Indian defendant for the assault, regardless of whether the victim was Indian or non-Indian. However, tribes rarely exercise this concurrent jurisdiction, and its sentences are limited by the Indian Civil Rights Act to a maximum of one year's imprisonment, a fine of $5,000, or both.[108]

2. Prosecuting the Non-Indian Defendant for the Assault in Indian Country

Criminal jurisdiction over the non-Indian defendant who committed the crime on the Crow Creek Reservation is dependent upon whether the victim was Indian or non-Indian. If the victim was Indian, the defendant will be subject to federal jurisdiction under the General Crimes Act.[109] Because aggravated assault is a federally defined offense,[110] the defendant will be prosecuted under federal, rather than state, substantive law.[111] Under the 2005 Federal Sentencing Guidelines, the non-Indian defendant would face an average federal sentence of forty-seven months.[112]

Criminal jurisdiction over the non-Indian defendant switches from the federal government to the State of South Dakota if the assault victim was also non-Indian. The non-Indian defendant would then be prosecuted in South Dakota state court under South Dakota substantive law.[113] According to 2002 statistics, the average sentence for white defendants convicted of assault in South Dakota state courts was thirty-four months.[114]

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108. 25 U.S.C. § 1302(7) (2000).

109. 18 U.S.C. § 1152 (2000).

110. *See* 18 U.S.C. § 113 (2000).

111. If no federally defined offense exists, the defendant is prosecuted in federal court under state substantive law per the Assimilative Crimes Act. *See* 18 U.S.C. § 13 (2000).

112. 2005 U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, *supra* note 2, at 12, 25. Reports indicate that post-*Booker*, federal sentences for Native Americans are 10.8% higher than those for white defendants. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 84 (2006) [hereinafter U.S. SENTENCING COMM'N, FINAL REPORT], *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf (The 10.8% actually applies to the race classified as "other," which the Report states refers mostly to Native American offenders.).

113. The non-Indian defendant will be prosecuted under section 22-18-1.1 of the South Dakota Codified Laws, a class 3 felony. S.C. CODIFIED LAWS § 22-18-1.1 (2006). Note that it is within Congress's authority to amend the General Crimes Act so that non-Indian defendants committing crimes against non-Indians in Indian country would be subject to federal jurisdiction.

114. Braunstein & Feimer, *supra* note 1, at 194 (reporting that the mean actual sentence

3. Prosecuting the Indian Defendant for the Assault Outside Indian Country

The Major Crimes Act and General Crimes Act do not have any applicability outside Indian country. As a result, a crime committed by an Indian outside Indian country, such as assault, falls under state jurisdiction and outside the reach of the Federal Sentencing Guidelines. In 2002, the average South Dakota state sentence for Native Americans convicted of assault was twenty-two months.[115]

4. Prosecuting the Non-Indian Defendant for the Assault Outside Indian Country

In this case, the non-Indian defendant is subject to state jurisdiction and an average sentence of thirty-four months.[116]

5. Sentencing Disparity

As this example illustrates, under the 2002 Guidelines, Native Americans prosecuted in South Dakota federal court received average sentences thirty-one months longer than Native Americans prosecuted in state court and nineteen months longer than whites prosecuted in the South Dakota state courts. Despite recommendations by the Native American Advisory Group to reduce this disparity, under the current Guidelines, federal sentences for assault in South Dakota during 2005 were still twenty-five months longer than those for Native Americans sentenced in state court and thirteen months longer than those for whites sentenced by the state.[117]

Although the jurisdictional arrangement surrounding Indian country disproportionately impacts Native Americans, non-Indians subject to jurisdiction under the General Crimes Act also fall victim to this sentencing disparity. Therefore, an argument can be made that downward variances should also be permitted for these non-Indian defendants. However, due to the courts' interpretation of the General Crimes Act, non-Indians are only subject to federal jurisdiction for offenses committed in Indian country when the victim of the crime was Indian. In contrast, Indians may be prosecuted under the Major Crimes

length for whites convicted for assault in South Dakota state courts was 1,017.6961 days).

115. *Id.* (reporting that the mean actual sentence length for American Indians convicted for assault in South Dakota state courts was 672.9373 days).

116. *Id.*

117. *Compare* 2005 U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, *supra* note 2, at 12, 25, *with* Braunstein & Feimer, *supra* note 1, at 194.

Act regardless of whether the victim was Indian or non-Indian. While it is within Congress's authority to correct this disparity by holding non-Indian against non-Indian crime subject to federal jurisdiction, Congress has not taken this step in light of the fact that the Supreme Court has held that such disparity does not rise to the level of a constitutional violation.[118] As a result, Native American defendants, when sentenced for a crime involving a non-Indian victim, have an additional basis for arguing against disparity between federal and state sentences. Furthermore, although non-Indians may be federally prosecuted for offenses occurring in Indian country under the General Crimes Act, in actuality, crimes such as federal assault remain largely a Native American crime, with nearly a third of the federal prosecutions for assault in South Dakota involving a Native American defendant.[119]

III. THE FEDERAL SENTENCING GUIDELINES PRE-*BOOKER* AND THEIR IMPACT ON NATIVE AMERICAN DEFENDANTS

Prior to the Supreme Court's 2005 decision in *United States v. Booker*, federal judges were required to adhere to the Federal Sentencing Guidelines, which heavily cabined judicial discretion in sentencing. As a result, judges were largely unable to consider mitigating factors surrounding crime in Indian country when sentencing Native American defendants. This Part will trace the history of the Federal Sentencing Guidelines from their inception until *Booker*. At the same time, it will discuss the impact the Guidelines have had on Native American defendants and responses to this issue that have gained limited traction along the way. The Part will then conclude by discussing other proposed solutions to correcting the sentencing disparity experienced by Native American defendants under the pre-*Booker* regime.

A. The Sentencing Reform Act's Enactment and the Federal Sentencing Guidelines' Creation

1. The 1984 Sentencing Reform Act

Prior to the Sentencing Reform Act's enactment, judges had virtually unfettered discretion in imposing sentences below the statutory

118. United States v. Norquay, 905 F.2d 1157, 1162 (8th Cir. 1990) (citing United States v. Antelope, 430 U.S. 641 (1977)); H.R. REP. NO. 94-1038 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1125, 1126).

119. Braunstein & Feimer, *supra* note 1, at 194.

maximum penalty for a crime,[120] and the Parole Commission had immense discretion in determining the amount of time a defendant actually served in prison.[121] In response, in 1984 Congress passed the Sentencing Reform Act (SRA), which sought to achieve honesty, uniformity, and proportionality in sentencing.[122] The main features of the Act were to create the United States Sentencing Commission, which would promulgate federal sentencing guidelines,[123] and to abolish the federal parole system and replace it with a requirement that defendants serve at least eighty-five percent of their sentences before becoming eligible for release.[124]

The SRA set forth how district court judges were to use the Sentencing Guidelines that would be promulgated by the Sentencing Commission.[125] Under 18 U.S.C. § 3553(a), judges are to consider seven factors: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) "the need for the sentence imposed" in order to, among other things, "provide just punishment," serve as a deterrent, "protect the public," and provide the defendant with proper training, care, or treatment; (3) "the kinds of sentences available"; (4) the Federal Sentencning Guidelines; (5) "any pertinent policy statement . . . issued by the Sentencing Commission"; (6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) "the need to provide restitution to any victims of the offense."[126]

The SRA requires that district court judges sentence defendants in accord with the Federal Sentencing Guidelines but does provide under 18 U.S.C. § 3553(b) that judges may depart from the Guidelines when there is a circumstance "that the [Sentencing] Commission did not adequately consider when formulating the Guidelines."[127] In determining whether a circumstance was adequately taken into consideration, the SRA states that the court may only consider "the

120. Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 305 (1996).

121. Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After* Booker, 43 HOUS. L. REV. 279, 282 (2006).

122. 2005 GUIDELINES MANUAL, *supra* note 7, § 1A1.1.

123. Gelacak et al., *supra* note 120, at 308; *see* 28 U.S.C.A. § 994 (West 2006 & Supp. 2007).

124. Bowman, *supra* note 121, at 282–83.

125. Gelacak et al., *supra* note 120, at 310.

126. 18 U.S.C. § 3553(a) (2000 & Supp. V 2005).

127. Gelacak et al., *supra* note 120, at 310; *see* 18 U.S.C. § 3553(b)(1).

sentencing guidelines, policy statements, and official commentary of the Sentencing Commission,"[128] and if the court chooses to depart, it must provide its reason for doing so,[129] which then becomes the basis for appellate review.[130] With these standards in place, President Reagan signed the SRA into law in 1984, and the Sentencing Commission was then formed to promulgate the Federal Sentencing Guidelines.[131]

2. The United States Sentencing Commission's Creation

a. The SRA's Guideposts to the United States Sentencing Commission

The United States Sentencing Commission was charged with the task of creating the Federal Sentencing Guidelines.[132] The SRA provided guideposts for the factors the Commission should consider and incorporate into the Guidelines as they deemed appropriate.[133] These included a list of seven factors, "among others," related to the seriousness of the offense,[134] and a list of eleven factors, also "among others," related to "offender characteristics."[135] However, in considering

128. 18 U.S.C. § 3553(b)(1).

129. 18 U.S.C. § 3553(c)(2).

130. Gelacak et al., *supra* note 120, at 310.

131. *Id.* at 311.

132. 28 U.S.C.A. § 994 (West 2006 & Supp. 2007).

133. 28 U.S.C.A.§ 994(a).

134. U.S. Sentencing Comm'n, Simplification Draft Paper, The Sentencing Reform Act of 1984: Principal Features, *available at* http://www.ussc.gov/SIMPLE/sra.htm [hereinafter Simplification Draft Paper]; *see also* 28 U.S.C.A. § 994(c), which lists these seven factors:

> (1) the grade of the offense;
> (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
> (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
> (4) the community view of the gravity of the offense;
> (5) the public concern generated by the offense;
> (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
> (7) the current incidence of the offense in the community and in the Nation as a whole.

135. Simplification Draft Paper, *supra* note 134; *see also* 28 U.S.C.A. § 994(d) (listing the eleven factors as the following: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and

"offender characteristics," the SRA required "that the guidelines and policy statements [be] entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."[136] With these guiding principles in hand, the Commission then engaged in lengthy public hearings, research, and debate before the Guidelines went into effect on November 1, 1987.[137]

b. The Discussion of Departures for Indian Crime During the Sentencing Commission's Hearings

The circumstances surrounding the sentencing of Native Americans arose during the course of these public hearings.[138] Prior to the SRA, federal judges and the federal criminal justice system in general were able to take into account the unique circumstances surrounding Indian crime. For example, there is evidence that federal judges, prosecutors, and public defenders in the Southwest were sensitive to the Navajo Indians' sense of justice.[139] The importance for judges to be able to exercise discretion with respect to Indian crime was brought to the Commission's attention. This argument seemed to gain some traction with then-Commissioner (and now Justice) Breyer, who recognized the unique nature of these cases and appeared to urge trial courts to use their discretion to depart in cases involving Native American defendants.[140] Unfortunately, the concerns expressed in these public hearings and the response by then-Commissioner Breyer were not reflected when the Commission promulgated its Federal Sentencing Guidelines.[141]

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responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood).

136. 28 U.S.C.A. § 994(d).

137. Gelacak et al., *supra* note 120, at 311.

138. Jon M. Sands, *Departure Reform and Indian Crimes: Reading the Commission's Staff Paper with "Reservations,"* 9 FED. SENT'G REP. 144, 145 (1996) ("[T]he Commission heard testimony by Tova Indritz, Federal Defender, District of New Mexico, Michael Katz, Federal Defender, District of Colorado, and others, about the culturally different and unique context presented by Indian crimes in Indian Country.").

139. Palcido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 378 (1994).

140. *Id.* at 379 n.112 (quoting Tova Indritz, Testimony before the Committee on the Judiciary, Subcommittee on Criminal Justice 239, 240–42 (Denver, Colorado, November 5, 1986)).

141. Sands, *supra* note 138, at 144.

3. The Federal Sentencing Guidelines' Promulgation

The Federal Sentencing Guidelines went into effect on November 1, 1987.[142] The Guidelines operate by employing a sentencing matrix that looks at the defendant's "total offense level" and "criminal history category."[143] Once the court has calculated the guideline-specified sentence, the court is permitted to depart from this sentence length when it finds "an aggravating or mitigating circumstance . . . that was not adequately taken into consideration by the Sentencing Commission . . . ."[144] The Commission designed each guideline "as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes."[145] Therefore, when a case arises that falls outside the "heartland," the court may award a departure.[146]

The Commission has placed some limitations on what factors may be considered as grounds for departure. Importantly for Native Americans, the Guidelines Manual states that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence,"[147] although the Eighth Circuit has seemingly circumvented this restriction in the *Big Crow* line of cases.[148] The Guidelines also prohibit the consideration of "[l]ack of [g]uidance as a [y]outh,"[149] which individuals such as Judge Kornmann have criticized as prohibiting judges from considering the poor upbringing that many young Native American defendants receive.[150] Beyond these "specific exceptions, however, the Commission does not intend to limit

142. *See* Gelacak et al., *supra* note 120, at 311.

143. *Id.*; *see also* 2005 GUIDELINES MANUAL, *supra* note 7, at 376–77.

144. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 1A1.1 (2006) [hereinafter 2006 GUIDELINES MANUAL] (quoting 18 U.S.C. § 3553(b) (2000 & Supp. V 2005)) (omission in original).

145. *Id.*

146. For a discussion of the "heartland," see generally *Koon v. United States*, 518 U.S. 81 (1996). Although the holding that circuit courts are to apply an abuse of discretion standard of review, rather than de novo review, was ultimately overruled by Congress in the Feeney Amendment, the case provides a good summary of the application of the Guidelines and departing when a case falls outside the "heartland."

147. 2006 GUIDELINES MANUAL, *supra* note 144, § 5H1.10.

148. United States v. Big Crow, 898 F.2d 1326, 1331–32 (8th Cir. 1990). The ban on consideration of culture as a ground for departure has been met with much criticism. *See generally* Gomez, *supra* note 139. *But see generally* Kelly Diffily, Comment, *PROTECTing the Federal Sentencing Guidelines: A Look at Congress' Prohibition of Cultural Differences in Federal Sentencing Determinations in the Wake of the 2003 PROTECT Act*, 78 TEMP. L. REV. 255 (2005).

149. 2006 GUIDELINES MANUAL, *supra* note 144, § 5K2.0(d)(1).

150. Kornmann, *supra* note 8, at 72.

the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case."[151]

In 2003, Congress passed the PROTECT Act, and while the bill was pending, the Feeney Amendment was added to the legislation.[152] In its initial form, the amendment would have "eliminated all unenumerated downward departures and all downward departures for family ties, diminished capacity, aberrant behavior, educational or vocational skills, mental or emotional conditions, employment record, good works, or overstated criminal history."[153] The Amendment was narrowed in its final form, however, and these departure restrictions were limited to crimes of "pornography, sexual abuse, child sex, and child kidnapping and trafficking,"[154] although it did "impose[] a two-year moratorium on Guideline amendments . . . creat[ing] new downward departure grounds or loosen[ing] the amendment's restrictions" on downward departures.[155] While this two-year moratorium has passed, the departure restrictions placed on sex crimes persist. [156] This is particularly limiting for Native Americans because sex offenses are an area where Native Americans are disproportionately represented in federal court,[157] but the Feeney Amendment severely restricts courts' ability to provide downward departures for such defendants.

B. The Federal Sentencing Guidelines and Native Americans

The restrictions the Federal Sentencing Guidelines placed upon sentencing judges impacted Native American defendants in two key ways: (1) by failing to allow judges to downward depart to correct the inherent disparity between federal and state statutory sentence lengths, and (2) by prohibiting the consideration of race, national origin, and socio-economic status in providing a downward departure.[158] Despite these restraints, judges devised creative solutions to account for these

151. 2006 GUIDELINES MANUAL, *supra* note 144, § 1A1.1. This section also includes a summary of factors courts are not permitted to consider.

152. Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 295 (2004).

153. *Id.* at 295–96 (citing H. Amend. 19 to H.R. 1104, 108th Cong. (2003)).

154. *Id.* at 296 (citing PROTECT Act, Pub. L. No. 108-21, § 401(a)–(b), 117 Stat. 650, 667–68 (2003) (codified as amended at scattered statutes of 18 U.S.C. & 28 U.S.C.)).

155. *Id.* at 297 (citing PROTECT Act, Pub. L. No. 108-21, § 401(j)(2), 117 Stat. at 673).

156. 18 U.S.C. § 3553(b)(2) (2000 & Supp. V 2005).

157. *See* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 19–20.

158. *See* 2005 GUIDELINES MANUAL, *supra* note 7, § 5H1.10.

factors in sentencing Native Americans. However, the reach of these decisions is limited because it is difficult to justify these departures under the express language of the Guidelines Manual or the SRA. This, in turn, has led to a number of calls for reform of the Guidelines Manual or Congressional action. In 2000, largely in response to the United States Commission on Civil Rights' work analyzing the impacts of the criminal justice system on Native Americans in South Dakota, the Sentencing Commission created the Native American Advisory Group. This Group was charged with determining whether Native Americans are unfairly treated under the Federal Sentencing Guidelines, and if so, how that can be redressed.[159] This section will discuss these various proposed solutions and their relative merits.

1. Court-Based Solutions

a. Big Crow *and Its Progeny—the Eighth Circuit's Departures for the Unique Circumstances of Life on a Reservation*

Prior to the Federal Sentencing Guidelines' promulgation, the Sentencing Commission considered the unique circumstances surrounding crime in Indian country.[160] These considerations however, were not incorporated into the Federal Sentencing Guidelines promulgated by the Commission in 1987. Rather, the Sentencing Guidelines seemingly closed the door on departures based on "culture" because the Guidelines traced the language of the SRA that race, sex, sational origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence."[161] Despite this mandate, the Eighth Circuit, which deals regularly with Indian affairs, affirmed downward departures in a line of cases stretching from 1990 to 1999 where the district judge departed based upon the unique circumstances surrounding life on an Indian reservation.[162]

i. *United States v. Big Crow*[163]

In *United States v. Big Crow*, the Eighth Circuit affirmed a

159. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at i.

160. *See supra* Part III.A.2.b.

161. 2005 GUIDELINES MANUAL, *supra* note 7, § 5H1.10.

162. *See* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 9; *see also* United States v. Decora, 177 F.3d 676 (8th Cir. 1999); United States v. One Star, 9 F.3d 60 (8th Cir. 1993); United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). *But see* United States v. Weise, 128 F.3d 672 (8th Cir. 1997).

163. 898 F.2d 1326 (8th Cir. 1990).

downward departure for Big Crow, a resident of the Pine Ridge reservation in South Dakota.[164] Big Crow had been convicted of assault with a dangerous weapon and assault resulting in serious bodily injury.[165] Under the Guidelines, Big Crow's sentence was to be thirty-seven to forty-six months,[166] but the district court downward departed, giving Big Crow a sentence of twenty-four months imprisonment and two years supervised release, plus treatment for alcohol abuse.[167] The district court based this departure upon Big Crow's intoxication when the offense occurred, his lack of a criminal record, excellent employment history, "consistent efforts to overcome the adverse living conditions on the Pine Ridge reservation," and a number of letters written on Big Crow's behalf by leaders in the community.[168]

On appeal, Big Crow conceded that his intoxication and lack of a prior criminal record were not justifiable reasons for a departure, but the Eighth Circuit affirmed the downward departure on the other grounds provided by the district court.[169] The Eighth Circuit focused on "Big Crow's excellent employment record and his consistent efforts to overcome the adverse environment of the Pine Ridge reservation."[170] The court provided statistics on the widespread poverty on the Pine Ridge reservation[171] and contrasted that with Big Crow's steady employment, strong review from his employer, and consistent financial support of his family.[172] In sum, the court concluded that "Big Crow's excellent employment history, solid community ties, and consistent efforts to lead a decent life in a difficult environment are sufficiently unusual to constitute grounds for a departure from the Guidelines in this case."[173]

In a footnote following the discussion of conditions on the Pine Ridge reservation, the Eighth Circuit stated that the Guidelines' policy

164. *Id.* at 1332.

165. *Id.* at 1327–28 (noting that the incident occurred when Big Crow had a number of people over at his house, all of whom had been drinking, and Big Crow got in a fight with somebody and hit him with a piece of firewood).

166. *Id.* at 1329.

167. *Id.*

168. *Id.*

169. *Id.* at 1331.

170. *Id.*

171. The reservation had an unemployment rate of seventy-two percent and a per capita annual income of $1,042. *Id.* at 1331–32.

172. *Id.* at 1332 (noting that Big Crow had worked as a forestry aid and firefighter for the Bureau of Indian Affairs since 1985).

173. *Id.*

statement that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence"[174] exceeded the Sentencing Reform Act's requirement of "neutrality" regarding these factors.[175] The majority then justified its departure on the Senate Judiciary Committee's statement that "neutrality" regarding these factors "is not a requirement of blindness."[176] The dissenting judge pounced upon this footnote, stating that Guidelines section 5H1.10 is clear that "race, national origin, and socioeconomic status" cannot be considered.[177] The dissent further argued that the majority's reliance upon the Senate Judiciary Committee was misplaced because 18 U.S.C. § 3553(b) is clear that legislative history cannot be considered by the court.[178] Despite this disagreement with the majority's reasoning, the dissenting judge conceded that the district court had awarded a just sentence, stating that "[a]s a practical matter, one wonders why the government attacks [the sentence] here. There are some things that are better left alone, and Big Crow's sentence is one of them."[179]

ii. *Big Crow*'s Legitimacy Affirmed

Courts and commentators have noted the tension between *Big Crow* and Guidelines section 5H1.10,[180] but the Eighth Circuit's decision is not an anomaly. Three years later, in *United States v. One Star*, the Eighth Circuit again affirmed a downward departure where mitigating circumstances associated with life on an Indian reservation were "'of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.'"[181] The Eighth Circuit also affirmed *Big Crow* in *United States v. Decora*,[182] a 1999 case where an Indian defendant had pled guilty to assault with a dangerous weapon.[183] The district court judge downward departed from a

174. 2005 GUIDELINES MANUAL, *supra* note 7, § 5H1.10.

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

176. *Id.*

177. *Id.* at 1332 (Wollman, J., dissenting).

178. *Id.* at 1332–33 (indicating that 18 U.S.C. § 3553(b) allows "consider[ation of] sentencing guidelines, policy statements, and official commentary in determining whether the Sentencing Commission adequately took a circumstance into consideration").

179. *Id.* at 1333.

180. *See* Diffily, *supra* note 148, at 273–74; *see also* Smith, *supra* note 40, at 519–22.

181. 9 F.3d 60, 61 (8th Cir. 1993) (quoting 18 U.S.C. § 3553(b) (1990)).

182. 177 F.3d 676 (8th Cir. 1999).

183. *Id.* at 677. In *Decora*, the defendant pled guilty to assault with a dangerous weapon (shod feet) for kicking an officer after being arrested for speeding and failing to obey a stop sign while driving under the influence. *Id.*

recommended sentence of thirty-seven to forty-six months to three years probation and participation in a drug and alcohol treatment program.[184] The judge based this departure on the facts surrounding the case, which took it "out of the heartland of the assault with dangerous weapon cases that he usually saw in his courtroom" and that "there were unusual mitigating circumstances in the case, namely, the adversity defendant Decora had faced on the reservation and the 'remarkable resilience' he had nonetheless shown in his determination to succeed."[185] The Eighth Circuit affirmed this decision, stating it was within the judge's authority under Sentencing Guidelines section 5K2.0[186] and the court's prior decisions in *Big Crow* and *One Star*.[187]

iii. Limits on *Big Crow*

The Eighth Circuit's decisions in *Big Crow*, *One Star*, and *Decora* carve out a downward departure ground for Native Americans, but it is limited to Indian defendants whose situations are factually distinct. For example, in *United States v. White Buffalo*,[188] the Eighth Circuit did not affirm a downward departure when the defendant, unlike Big Crow and One Star, "ha[d] no dependents to support," "presented no evidence of his standing in the community," and did not have a solid work record.[189] The Eighth Circuit came to a similar conclusion in *United States v. Weise*,[190] where the record did not indicate that anything about the "reservation environment skewed Weise's opportunities," and, unlike the court in *Big Crow*, the *Weise* court did not receive any letters from community members on Weise's behalf.[191] Looking at the Eighth Circuit's opinions on this issue in their entirety, falling victim to the

184. *Id.*

185. *Id.* at 677–78 (internal quotation marks omitted). The court noted that when the incident occurred, Decora was only one semester away from earning his college degree. Furthermore, many of Decora's teachers sent letters stating that he was "well respected in his community and at the University and that he shows great promise as a community leader and a role model." *Id.* at 678.

186. *Id.* at 679 (quoting U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5K2.0 cmt. (1998) ("The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case.")).

187. *Id.*

188. 10 F.3d 575 (8th Cir. 1993).

189. *Id.* at 577.

190. 128 F.3d 672 (8th Cir. 1997).

191. *Id.* at 674.

conditions on an Indian reservation is insufficient to qualify for a downward departure, but overcoming these reservation conditions moves the case outside the "heartland" of cases contemplated by the Guidelines.

Although *Big Crow* and its progeny provide the only circuit court-approved method for taking the unique circumstances surrounding Native American defendants into consideration at sentencing, the decisions are a clear affront to the Guidelines' mandate that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence."[192] Therefore, although *Big Crow* is commendable in many ways from a strict policy perspective, the decision is in too great of conflict with the plain language of the SRA to be a defensible legal position.

b. Minimizing Disparity Through Narrow Statutory Interpretation

Big Crow, *One Star*, and *Decora* stand out as a unique set of cases in which a court openly admitted that reservation conditions were a relevant factor in providing a downward departure. Courts, however, have also minimized sentencing disparity by interpreting federal statutes narrowly so that they do not apply to Indian country. Judge Kornmann has provided an example of this in the public housing context. Congress requires that those "sell[ing] drugs from 'protected locations,' such as a 'housing facility owned by a public housing authority,'" are to be punished twice as harshly.[193] Congress based this increased penalty upon the issues surrounding drug dealing in urban public housing, where tenants have to deal with drug trafficking on a daily basis.[194] However, Congress failed to consider that most public housing in Indian country exists in rural areas and are single-family dwellings.[195] As a result, Judge Kornmann, of the District of South Dakota, has interpreted "public housing authority" under the statute to be distinct from an "Indian Housing Authority" so that Native Americans are not subject to the heightened penalties.[196] While this tactic is suitable in situations such as this one, its applicability is limited to those cases where it is reasonable for the court to construe the underlying statute narrowly.

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192. *See* 2005 GUIDELINES MANUAL, *supra* note 7, § 5H1.10.

193. Kornmann, *supra* note 8, at 71 (quoting 28 U.S.C. § 841(b) (2000)).

194. *Id.*

195. *Id.*

196. *Id.* at 72. At the time Judge Kornmann's essay was published, his interpretations had not been appealed.

c. *Candidly Correcting for Disparity Between State and Federal Sentences*

Attempts to openly correct for disparity between federal and state sentences have largely been rejected by the courts. This issue first arose prior to the SRA's passage and the Federal Sentencing Guidelines' creation. In the 1977 case *United States v. Antelope*, the Supreme Court addressed whether equal protection under the Fifth Amendment's Due Process Clause was violated "by subjecting individuals to federal prosecution by virtue of their status as Indians."[197] The Court first found that the laws subjecting Native Americans to federal criminal jurisdiction were "based neither in whole nor in part upon impermissible racial classifications."[198] Furthermore, the Court concluded that because Native Americans prosecuted pursuant to the Major Crimes Act "enjoy the same procedural benefits and privileges as all other persons within federal jurisdiction,"[199] the only remaining basis for the Native Americans' equal protection claim was the disparity between federal law and Idaho law.[200] The Court then rejected this argument, stating that "[u]nder our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter."[201]

While *Antelope* appears to strike a severe blow at courts' ability to correct for sentencing disparity experienced by Native Americans, it is important to recognize that the challenge in that case came in the form of an equal protection claim. Therefore, although the Court notes in a footnote that "state law does not constitute a meaningful point of reference for [Native Americans to] establish[] a claim of equal protection,"[202] variances from the Guidelines are permissible whenever a case falls outside the "heartland," not only when awarding a within-Guidelines sentence would be unconstitutional.[203] Therefore, *Antelope* by itself does not close the door on a federal court considering corresponding state sentences when sentencing a Native American defendant, although pre-*Booker* circuit courts squarely rejected

197. 430 U.S. 641, 642 (1977).
198. *Id.* at 647.
199. *Id.* at 647–48 (citing Keeble v. United States, 412 U.S. 205, 212 (1973)).
200. *Id.* at 648.
201. *Id.* at 649 (footnotes omitted).
202. *Id.* at 649 n.12.
203. *See, e.g.*, United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990).

departures outside the Indian law context based upon federal-state sentencing disparity.[204]

Antelope also provides useful support for arguing that Native Americans should be granted a unique ground for departure under the Guidelines. In another footnote in the case, the Court points out that it "has consistently upheld federal regulations aimed *solely* at tribal Indians, as opposed to *all* persons subject to federal jurisdiction."[205] While this statement provides justification for the jurisdictional system created by the Major Crimes Act, it also provides a basis for creating a ground for downward departure aimed specifically towards Native Americans, although such a departure would have to be reconciled with the bar on departures on the basis of national origin.[206]

2. Legislative and Administrative Solutions

a. Prior Congressional Responses to Sentencing Disparity for Native Americans

i. Congressional Decisions Not to Correct for Federal-State Sentencing Disparity

Prior congressional responses to Native American sentencing disparity have focused upon promoting uniformity for federal defendants. In 1976, for example, Congress amended the Major Crimes Act to eliminate disparity between that Act and the General Crimes Act.[207] At the time, the Major Crimes Act only applied to thirteen enumerated offenses, and the Act mandated that six of these crimes be defined under state substantive law,[208] even though four of these offenses

204. Smith, *supra* note 40, at 516 n.158.

205. *Antelope*, 430 U.S. at 649 n.11. The Court goes on to say, "Indeed, the Constitution itself provides support for legislation directed specifically at the Indian tribes. As the Court noted in *Morton v. Mancari*, the Constitution therefore 'singles Indians out as a proper subject for separate legislation.'" *Id.* (citing Morton v. Mancari, 417 U.S. 535, 552 (1974)) (internal citation omitted).

206. *Antelope* makes clear that "[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a '"racial" group consisting of "Indians."'" *Id.* at 646 (quoting *Morton*, 417 U.S. at 553 n.24). As a result, the ban on departures on the basis of "race" does not apply to American Indians. Instead, the issue would revolve around whether a departure based solely upon a defendant's status as an American Indian violates the bar on departures based upon "national origin."

207. Indian Crimes Act of 1976, Pub. L. No. 94-297, 90 Stat. 585.

208. H.R. REP. NO. 94-1038, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1125, 1126. Four of the offenses were to be "defined and punished" according to state law, while two were to be defined under state law but punished by imprisonment "at the discretion of the

were federally defined crimes.[209] In contrast, the General Crimes Act stated that federal substantive law should apply in all cases in which federal law exists; otherwise, state substantive law is applicable. The distinction between these acts meant that Indians would be prosecuted under state law, while non-Indians would be prosecuted under federal law.[210] Congress was spurred to action after the Eighth and Ninth Circuits held that this disparity "denie[d] Indians due process of law as guaranteed by the Fifth Amendment"[211] and amended the Major Crimes Act so that federal substantive law applied to all federally defined offenses.[212]

In contrast, Congress has not acted to eradicate federal-state disparity in sentencing for Native Americans.[213] While Congress could, for example, amend the General Crimes Act so that non-Indian defendants committing offenses against non-Indians are prosecuted under federal law, it has failed to do so.[214] This does not necessarily mean that such disparity is warranted. Instead, Congress's differing courses of action can be explained as reflecting that Congress is only willing to act in this area when such disparity rises to the level of a constitutional violation.[215]

Congress has also made it clear that the Federal Sentencing Guidelines are to apply to assimilative crimes and the Major Crimes

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court." *Id.*

209. *Id.* at 5, *reprinted in* 1976 U.S.C.C.A.N. at 1129. Note that incest and burglary are not federally defined offenses. *Id.* at 5 n. 10, *reprinted in* 1976 U.S.C.C.A.N. at 1129.

210. *Id.* at 3–4, *reprinted in* 1976 U.S.C.C.A.N at 1127.

211. *Id.* at 4, *reprinted in* 1976 U.S.C.C.A.N. at 1128. The two cases were *United States v. Big Crow*, 523 F.2d 955 (8th Cir. 1975), and *United States v. Cleveland*, 503 F.2d 1067 (9th Cir. 1974). Note that Congress focused on situations where an Indian faced the possibility of longer imprisonment than a non-Indian, H.R. REP. NO. 94-1038 at 4 n.5, *reprinted in* 1976 U.S.C.C.A.N. at 1128 n.4, although the Report noted that it can also work the other way, where an Indian will be treated more leniently. H.R. REP. NO. 94-1038 at 4, *reprinted in* 1976 U.S.C.C.A.N. at 1128.

212. H.R. REP. NO. 94-1038 at 5, *reprinted in* 1976 U.S.C.C.A.N. at 1129.

213. *See* United States v. Norquay, 905 F.2d 1157, 1162 (8th Cir. 1990) (noting that the Court's holding in *Antelope* "has not been of any apparent concern to Congress").

214. *See* H.R. REP. NO. 94-1038 at 2, *reprinted in* 1976 U.S.C.C.A.N. at 1126.

215. Indeed, this is supported by House Report 1038 regarding the Indian Crimes Act of 1976. There, Congress amended the Major Crimes Act in response to the Eighth and Ninth Circuits' holdings that the disparity at issue violated due process. *Id.* at 4, *reprinted in* 1976 U.S.C.C.A.N at 1128. Congress purposely avoided addressing the disparity that was being litigated at that time in *Antelope*, as the case was pending. *Id.* at 3 n.2, *reprinted in* 1976 U.S.C.C.A.N. at 1126. After the Court ruled in *Antelope* that such disparity did not violate equal protection, Congress did not respond to the matter.

Act.[216] While this does reflect a greater concern on Congress's part regarding disparity between defendants prosecuted in the federal system, rather than disparity between non-Indians prosecuted in state court and Indians prosecuted in federal court for the same offense, congressional intent in this regard is limited to those circumstances where Indians are prosecuted in federal court under state substantive law. Additionally, Congress's determination that the Federal Sentencing Guidelines should apply to assimilative crimes and the Major Crimes Act does not foreclose the possibility that downward departures may be granted to Native American defendants under the Guidelines.

ii. Congressional Decisions Accounting for Disproportionate Impacts on Native Americans

Congress, on at least two occasions, has displayed a willingness to carve out exceptions for Native American defendants when criminal legislation would have a disproportionate impact on them as a group.

(a) The Federal Death Penalty Act of 1994

The first example of this is with respect to the Federal Death Penalty Act of 1994, which made many federal crimes capital offenses.[217] This law had the potential to disproportionately impact Native Americans, but the Act included "[s]pecial provisions for Indian country":

> Notwithstanding sections 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in section 1151 of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction.[218]

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216. Crime Control Act of 1990, Pub. L. No. 101-647, § 1602, 104 Stat. 4789, 4843 (codified at 18 U.S.C. § 3551 (2000)). This amendment codified the Eighth Circuit's holding in *United States v. Norquay*. *See* 905 F.2d 1157, 1163 (8th Cir. 1990).

217. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at scattered sections of 18 U.S.C.).

218. 18 U.S.C. § 3598 (2000).

The effect of this provision is that Native Americans subject to federal jurisdiction, due to the jurisdictional scheme in Indian country, will not receive the federal death penalty unless the tribe has elected for the Act to have effect. The legislative history indicates that this provision's inclusion was premised on a concern for tribal sovereignty and was designed to permit tribes, like state governments, to be able to elect whether the death penalty applies within their jurisdiction.[219] While this exception for Indian country does not appear to be overtly motivated by concern about the law's disproportionate impact on Native Americans or resulting sentencing disparity,[220] an earlier attempt to pass federal death penalty legislation in 1990 did take into account the Act's impact on Native American defendants.

In 1990, the House considered the death penalty legislation that was not passed until 1994. At that time, the House Subcommittee on Crime engaged in lengthy hearings to determine for which crimes the death penalty should apply.[221] Testimony from Ms. Ada Deer and Ms. Tova Indritz, who reflected the interests of Native Americans, played a critical role in the Subcommittee's decision "that the death penalty should not be based on a geographic happenstance."[222] In particular, the Subcommittee determined that the death penalty should not apply to federal murder under 18 U.S.C. § 1111[223] after Ms. Indritz informed the

219. *See* 137 CONG. REC. 15,980, 15,981 (1991) (statement of Sen. Inouye) ("[T]his amendment accords to tribal governments a status similar to that of the State governments, namely that tribal governments, like State governments, can elect whether or not to have the death penalty apply for crimes committed within the scope of their jurisdiction."); *see also id.* (statement of Sen. Inouye) ("All we are asking by this amendment is to give the sovereign people in the sovereign governments of Indian country the same right [as states]."); *id.* at 15,982 (statement of Sen. Domenici) ("The Senator from New Mexico is for the death penalty, but I believe that you can be for the death penalty and be for something else, and I happen to be for something else, and that happens to be Indian sovereignty and Indian self-determination."). *See generally* United States v. Martinez, 505 F. Supp. 2d 1024, 1027 (D.N.M. 2007) (discussing the legislative history).

220. *See Martinez*, 505 F. Supp. 2d at 1027 ("There is no indication that Congress intended for the law to affect the prosecution of individual defendants for murder; rather, the enactment of 18 U.S.C. § 3598 seems to be focused on empowering the sovereign nations—not individual defendants.").

221. H.R. REP. NO. 101-681(I) at 86 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6490.

222. *Id.* at 88, *reprinted in* 1990 U.S.C.C.A.N. at 6492. Ms. Ada Deer was the Chairwoman of the Board of Directors of the Native American Rights Fund, and Ms. Tova Indritz was the Federal Public Defender for the District of New Mexico. *Id.* at 88, *reprinted in* 1990 U.S.C.C.A.N. at 6492.

223. 18 U.S.C. § 1111 (2000 & Supp. V 2005). This statute only applied to a murder committed "within the special maritime and territorial jurisdiction of the United States." *Id.*; H.R. REP. NO. 101-681(I) at 88, *reprinted in* 1990 U.S.C.C.A.N. at 6492.

Subcommittee of the disproportionate impact this would have on Native Americans, as illustrated by the fact that in 1988 and 1989, nearly sixty-four percent of all federal first degree murder prosecutions were of Indians for crimes occurring within Indian country.[224] Furthermore, the Subcommittee was also persuaded by "one of the anomalous results which could occur" if the death penalty was enacted for crimes stemming from federal lands jurisdiction:

> [Ms. Indritz] cited the example of a case involving a killing by an Indian and a non-Indian of another Indian on an Indian reservation. If the killing occurred in a State which does not have the death penalty, the Indian could face the death penalty under Federal law while the non-Indian would be tried in State court where he would not face the same penalty for the identical crime.[225]

Although the final federal death penalty legislation included the general provision for Indian country rather than specifically excluding the federal murder offense, it is still significant that the Subcommittee, in 1990, showed concern for the Act's disproportionate impact on Native Americans and corresponding sentencing disparity. Furthermore, while the final provision regarding Indian country appears to have been primarily motivated by concerns regarding tribal sovereignty, the ultimate reach of the enacted provision is more beneficial to Native American defendants because the exclusion is not limited solely to the federal murder offense.

(b) "Three Strikes and You're Out" Legislation

Congress created a similar "special provision for Indian country" in another piece of 1994 legislation—the "three strikes and you're out" act.[226] The bill contained a number of "specifically enumerated offenses that automatically qualify as a strike," as well as "general standards for

224. H.R. REP. NO. 101-681(I) at 88, *reprinted in* 1990 U.S.C.C.A.N. at 6492.

225. *Id.* Importantly, I think this "anomalous result" is incorrect. In terms of the jurisdiction, the example would be accurate if the victim were a *non-Indian*, but under the stated example, with the victim being *Indian*, the non-Indian offender would actually be tried under the same federal murder statute per the General Crimes Act. *See supra* Part II.A.5.

226. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 70001, 108 Stat. 1982, 1984; H.R. REP. NO. 103-463, at 3 (1994). This legislation was enacted due to concerns regarding high violent crime rates in America, recidivism, and an inadequate response by the criminal justice system. *Id.* at 3–4.

what other crimes, not specifically enumerated in the bill, also qualify as a strike."[227] Congress included a "[s]pecial provision for Indian country" nearly identical to that in the Federal Death Penalty Act:

> No person subject to the criminal jurisdiction of an Indian tribal government shall be subject to this subsection for any offense for which Federal jurisdiction is solely predicated on Indian country (as defined in section 1151) and which occurs within the boundaries of such Indian country unless the governing body of the tribe has elected that this subsection have effect over land and persons subject to the criminal jurisdiction of the tribe.[228]

The legislative history is sparse with respect to what motivated the inclusion of this provision, but the Subcommittee on Crime and Criminal Justice passed this provision approximately one month after hearing testimony regarding "disparity against Native-Americans."[229] Therefore, while the "special provision for Indian country" in both the Federal Death Penalty and "three strikes and you're out" Acts may have been primarily motivated by concerns for tribal sovereignty, at least the House Subcommittee on Crime and Criminal Justice was also motivated in part by concern regarding sentencing disparity and the disproportionate impact these pieces of legislation would have on Native Americans.

(c) A Limit on Tribal Exceptions—Child Protection Laws

Congress's willingness to provide such exceptions for Indian country is not absolute. Since the 1994 acts,[230] the House has expressed an unwillingness to provide similar exceptions for Native Americans with

227. *Id.* at 4.

228. 18 U.S.C. § 3559(c)(6) (2000); *see also* H.R. REP. NO. 103-463, at 14.

229. H.R. REP. NO. 103-463, at 6. The Record states that the testimony regarding disparity against Native Americans came in part from "Gerald Goldstein, president-elect of the National Association of Criminal Defense Lawyers; Marc Mauer, assistant director of The Sentencing Project in Washington, D.C.[;] and Reverend Bernard Taylor, Chairman of the civic group, Black Expo Chicago." *Id.*

230. Note that in 1994, Congress also provided a similar provision for Indian country with respect to the age at which a juvenile may be tried as an adult in the federal system. *See* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 830 n.279 (2006).

respect to crimes against children.[231] The Children's Safety Act of 2005 would have enacted a host of different provisions in order "to address the growing epidemic of sexual violence against children."[232] The House Committee on the Judiciary pushed this bill through without any exceptions for Native American defendants. Dissenters criticized this in the House Report, stating:

> H.R. 3132's creation of additional federal crimes will disproportionately affect Native Americans who are significantly over-represented in the federal criminal system. H.R. 3132 would add felony child abuse and neglect to the Major Crimes Act, and would impose a host of harsh new mandatory minimum sentences for existing offenses under the Major Crimes Act. This will have a disproportionate impact on Native Americans because they comprise the vast majority of people prosecuted in federal court for offenses listed in the Major Crimes Act, and their sentences are already significantly longer than the sentences imposed in state courts on others for the same conduct.[233]

The Children's Safety Act of 2005 passed the House by a vote of 371 to 52 but did not move through the Senate, with both houses instead adopting the Adam Walsh Child Protection and Safety Act of 2006, which contained many of the same provisions existing in the Children's Safety Act of 2005, including increased sentences for sex offenses.[234] Congress's failure to carve out an exception for Native Americans may reflect a congressional unwillingness to correct for Native American sentencing disparity as it applies to crimes against children, but it is noteworthy that unlike the death penalty and "three strikes and you're out" legislation, it appears that Congress, in this case, had "no deliberative consultation with the representatives from the group most

231. *See* H.R. REP. NO. 109-218(I) (2005).

232. *Id.* at 20. The Act was to do this by strengthening the Sex Offender Registration and Notification Act, enacting new DNA-related legislation, "adopt[ing] new mandatory minimum penalties for violent crimes committed against children," increasing mandatory penalties for sex offenses against children, and creating new foster care requirements. *Id.* at 20–21.

233. *Id.* at 256 (footnotes omitted).

234. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

affected by the legislation, Native Americans."[235] In sum, Congress has expressed a willingness to exempt Native Americans from certain federal criminal penalties in circumstances where the penalties' disparate impact on Native Americans has been brought to the legislature's attention.

b. Reducing Disparity by Increasing Departure Grounds Under the Sentencing Guidelines

A number of judges and commentators have recommended dealing with the issue of disparate sentencing for Native Americans by increasing the grounds for departure under the Sentencing Guidelines. Judge Kornmann, for example, has suggested including sentencing factors that permit judges to consider the poor upbringing many young Native American defendants receive, as well as the corresponding state sentence a Native American would receive if tried in state court.[236] Similarly, Jon M. Sands, an Assistant Federal Public Defender and frequent commentator on Indian law, has suggested implementing a departure for "Dependent Sovereign Nation Status,"[237] and, more broadly, for "Culture."[238] While such proposed modifications to the

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235. H.R. REP. NO. 109-218(I), at 256. Note that this was certainly true at the time the House Committee on the Judiciary recommended the Children's Safety Act of 2005. A review of the legislative history of the Adam Walsh Child Protection and Safety Act in Thomas and Westlaw did not yield any information regarding the impact this law would have on American Indians.

236. Kornmann, *supra* note 8, at 73.

237. Sands' proposed departure would read:

> 5K2.17 Dependent Sovereign Nation Status
>
> Recognizing the unique relationship of the Indian tries [sic] as dependent sovereign nations, a departure from the guidelines to reflect the special status may be warranted in certain circumstances. Such circumstances would relate to the cultural context that reduces or lessens culpability. A reduced sentence may be appropriate for the nature and character of the offense provided that the tribal interest in adequate punishment and deterrence is not reduced.

Sands, *supra* note 138, at 146–47.

238. The "Culture" departure would read:

> 5H1.13 Culture
>
> A defendant's cultural background or beliefs are not ordinarily relevant in determining whether a sentence should be within the applicable guideline range. There are limited circumstances where a defendant is plainly less culpable because motivation for the offense arises in a unique cultural context.

Sentencing Guidelines are over ten years old,[239] these additional grounds for departure have not been added to the Guidelines and would require an exception to the Sentencing Reform Act's requirement that the Guidelines be "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."[240]

c. Eliminating the Federal Sentencing Guidelines' Applicability to Indian Country

Rather than increasing the potential for judicial responsiveness to Native Americans under the Federal Sentencing Guidelines, at least two papers have proposed eliminating the Federal Sentencing Guidelines' applicability to Native American defendants altogether. In a comment in the *Hamline Law Review*, Gregory D. Smith proposed that Congress modify the Major Crimes Act so that all Indian defendants be prosecuted and sentenced under the corresponding state law, and that Congress amend the Sentencing Reform Act so that the Federal Sentencing Guidelines are inapplicable to the Major Crimes Act.[241] Like the proposed modifications to the Sentencing Guidelines, Smith's proposal would solve the disparity problem, but the proposal is unlikely to receive congressional support, as it is in conflict with the Guidelines' goal of uniformity in sentencing, and is unnecessary post-*Booker*.

Despite the surface appeal of Smith's proposal, there is no reason to think that it will be adopted by Congress. As discussed in the previous section, Congress has been unwilling to adopt sweeping legislative reform to correct federal-state sentencing disparity experienced by Native Americans.[242] Instead, Congress, in a 1990 amendment to the SRA, explicitly expressed its intent that the Federal Sentencing Guidelines apply to crimes prosecuted under the Major Crimes Act and Assimilative Crimes Act.[243] Although Congress has at times carved out

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Id. at 147.

239. Sands' paper was published in 1996.

240. *See* 28 U.S.C.A. § 994(d) (West 2006 & Supp. 2007).

241. Smith, *supra* note 40, at 529. The Major Crimes Act would be modified to read: "Any Indian who commits . . . [any of the enumerated offenses] . . . within Indian country, shall be subject to the same law and penalties as all other persons committing *like offenses outside Indian country, and within the boundaries of the state within which the offense arose.*" *Id.* (omissions in original). This would also require a slight modification to the Sentencing Reform Act, 18 U.S.C. § 3551(a) (2000), replacing the word "including" with the word "excluding," so that it would be clear that state substantive law would apply to the sentencing phase in such a circumstance. Smith, *supra* note 40, at 529.

242. *See supra* Part III.B.2.a.i.

243. Crime Control Act of 1990, Pub. L. No. 101-647, § 1602, 104 Stat. 4789, 4843 (1990)

exceptions for Native Americans from federal criminal penalties,[244] there is no indication that Congress has changed course from its intention that the Federal Sentencing Guidelines apply in Indian country.

Moreover, Smith's proposal conflicts with the SRA's purpose of fostering uniformity in federal sentencing.[245] Although the Federal Sentencing Guidelines have rightly been criticized for being overly rigid, federal judges' use of a standardized sentencing system fosters an important procedural uniformity distinct from any resulting alignment in actual sentence lengths between similarly situated defendants. This procedural uniformity would be defeated if Native American defendants were completely exempted from the Federal Sentencing Guidelines. Indeed, the Supreme Court in *Booker*, despite its repudiation of the Guidelines as a mandatory sentencing regime, clearly stated that judges are "require[d] . . . to consider the Guidelines" at sentencing, in addition to a host of other factors set forth in 18 U.S.C. § 3553(a).[246]

Despite these weaknesses in Smith's proposal, there were few other options pre-*Booker* available to combat Native American sentencing disparity. However, as will be discussed later in this Article, the Guidelines post-*Booker* are only advisory in nature, meaning that courts now have the discretion to downward depart to correct for Native American sentencing disparity. Furthermore, not only do courts now have the power to correct such disparity, they are also perhaps the branch best suited to address this issue as questions involving sentencing and jurisdiction are areas of judicial expertise.[247]

Judge Bruce D. Black, a district court judge in the District of New Mexico, has argued for a solution similar to Smith's, but where Native Americans would be sentenced under tribal sentencing guidelines rather than federal or state requirements.[248] Under this approach, tribes would be able to craft penalties based upon the unique concerns facing their reservations and would be subject to congressional oversight in the same

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(codifying United States v. Norquay, 905 F.2d 1157 (8th Cir. 1990)).

244. *Supra* Part III.B.2.a.ii.

245. *See* 2005 GUIDELINES MANUAL, *supra* note 7, § 1A1.1.

246. United States v. Booker, 543 U.S. 220, 259–60 (2005).

247. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 574 (1985) ("[C]ourts are functionally better adapted to engage in the necessary [jurisdictional] fine tuning than is the legislature."); *see also* Mistretta v. United States, 488 U.S. 361, 412 (1989) (noting that the "accumulated wisdom and experience of the Judicial Branch" in sentencing is "a matter uniquely within the ken of judges").

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

manner as the Federal Sentencing Guidelines.[249] While this approach would powerfully affirm tribal sovereignty,[250] its administrative burdens make it largely infeasible. There are over five hundred tribes in the United States, and there are wide disparities in the infrastructure of tribes' judicial systems. Furthermore, a significant administrative burden exists if Congress is to be expected to oversee over five hundred different sentencing guidelines. Therefore, while Judge Black's and Gregory Smith's proposals both carry some surface appeal, their adoption and effective implementation are unrealistic.

d. The Native American Advisory Group Report—Modifying the Recommended Sentencing Range in the Guidelines to Account for Native American Sentencing Disparity

Although much of the discussion over how to address sentencing issues for Native American defendants has been relegated to legal journals, the United States Sentencing Commission directly confronted this matter by forming the Native American Advisory Group in 2002.[251] The Group was formed in response to the allegations of discrimination in the criminal prosecution of Native Americans in South Dakota discussed earlier in this Article.[252] The Group's charge was to "'[c]onsider any viable methods to improve the operation of the Federal Sentencing Guidelines in their application to Native Americans under the Major Crimes Act.'"[253] In the Group's final report, it did not recommend increased departure opportunities but instead recommended modifying the recommended sentencing ranges to account for both sentencing disparity and the unique circumstances surrounding reservation life.[254]

i. The Group's Recommendations

The Group focused its attention on three offenses that disproportionately impact Native Americans—manslaughter, sexual abuse, and aggravated assault.[255]

249. *Id.*
250. *Id.*
251. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 10.
252. *Id.*; *supra* Part II.C.
253. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 11 (alteration in original).
254. *See id.* at ii–v.
255. *Id.* at i.

(a) Manslaughter

The Group chose to address involuntary manslaughter because nearly seventy-five percent of federally prosecuted cases for this charge involved Indian defendants, typically in cases of alcohol-related vehicular homicide.[256] Due to concerns over drunk driving in Indian country and requests by U.S. senators to increase penalties for homicides committed while driving drunk,[257] the Group recommended increasing the offense levels so that the sentencing range would be more than doubled.[258] Specifically, the Group recommended increasing the base offense level for involuntary manslaughter to eighteen, along with a four-level increase if alcohol or drugs were involved, a two-level increase if the actions involved multiple homicides, and a two-level increase if the offense involved a weapon.[259] Because the primary concern regarding manslaughter was related to drunk driving homicides, the Group did not have any sweeping recommendations for voluntary manslaughter.[260] Notably, the Group's recommendations for manslaughter were not informed by issues of sentencing disparity and instead were focused on the prevalence of drunk driving in Indian country. While drunk driving is admittedly a serious offense deserving of severe punishment, the punishment should be administered even-handedly. Prior to the Group's recommendation, federal-state disparity in this regard punished Native Americans more harshly,[261] but the

256. *Id.* at 14–15. Although most cases involved Indian defendants, the total number of prosecutions for this charge are relatively small. For example, in 2000 and 2001, the total number of involuntary manslaughter cases was less than eighty. *Id.* at 15.

257. *Id.* at 15.

258. *Id.* at 17. For example, under the recommendations, the base offense level for involuntary manslaughter for drunk driving, with a criminal history of category I, would be twenty-two and would be reduced by three levels for acceptance of responsibility. *Id.* This offense level of nineteen would lead to a sentence range of thirty to thirty-seven months, "which is more than double the range previously set for such cases." *Id.*

259. *Id.* at 16. When the Group first formed, the base offense for reckless involuntary manslaughter was fourteen, and it was ten for criminally negligent involuntary manslaughter. *Id.* at 15–16. Prior to the publication of the Group's Report, Congress amended the Guidelines to increase the base offense level for reckless involuntary manslaughter to eighteen and to twelve for criminally negligent involuntary manslaughter. *Id.* at 16. This amendment did not alter the Group's recommendations. *Id.*

260. *Id.* at 18–19. The Group did not recommend any change to the base offense level, and its only recommendation was to provide a two-level increase for the use of a weapon and a four-level increase for the use of a firearm. *Id.* at 18.

261. Judge Kornmann notes that under federal law, unlike South Dakota's state law, if death of a minor is caused during a drunk driving accident, the sentence can be increased by up to ten years. Kornmann, *supra* note 8, at 71. The impaired Native American is still subject to this additional penalty even if the driver of the other vehicle was at fault for the accident.

Group's recommendation only served to further that disparity rather than resolve it.

(b) Sexual Abuse Offenses

Unlike its recommendations for manslaughter, the Advisory Group's recommendations for sexual abuse offenses were informed by state and federal sentencing disparity.[262] The Group noted that this disparity was only compounded by the then-recently enacted PROTECT Act.[263] The PROTECT Act substantially increased the penalties for sex offenses[264] for the primary purpose of "restor[ing] the government's ability to prosecute child pornography offenses successfully."[265] The PROTECT Act was particularly unfair to Native Americans because it exacerbated the already existing federal-state sentencing disparity for the purpose of combating an issue that is not a prevalent problem in Indian country.[266]

Despite the Group's acknowledgment of the gross sentencing disparity that existed, particularly in light of the PROTECT Act, the Group "elected not to recommend any specific changes to the Guidelines that would directly reduce or eliminate the sentencing disparity identified."[267] Instead, the Group offered two recommendations. First, the Group recommended that the Sentencing Guidelines be modified to separate "travel offenses," which would uniformly be subject to federal jurisdiction, from those sex crimes that largely target Native American defendants.[268] Second, the Group recommended that a sex offender treatment program be established, where successful completion of the program would result in a sentence reduction.[269] While these recommendations, as the Group noted, "may indirectly reduce the sentencing disparity," it is somewhat troubling that

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Id. Judge Kornmann reflects the sentiment that while the penalty itself may be appropriately harsh, it needs to be equally administered. *Id.*

262. *See* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 19–20.

263. *Id.* at 23–24.

264. *Id.*; *see also* PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003).

265. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 24 n.42 (emphasis omitted).

266. *Id.*

267. *Id.* at 25.

268. *Id.* at 25–26. The Sentencing Commission at the time was already considering removing "travel offenses" from U.S. Sentencing Guidelines Manual section 2A3.2 and placing them in a new section, section 2G1.3. *Id.* Note that this recommendation did not include any specifics on how the relative offense levels under the Guidelines should be different.

269. *Id.* at 26–30.

the Group candidly acknowledged the existing disparity, and purposely "elected not to recommend any specific changes . . . that would directly reduce or eliminate the sentencing disparity identified."[270]

(c) Aggravated Assault

The Group was particularly concerned about federal-state sentencing disparity arising from aggravated assault prosecutions.[271] In South Dakota, for example, the average state sentence for assault was twenty-nine months but was thirty-nine months for federal assault sentences in the state.[272] Even more strikingly, in New Mexico, the average state sentence for assault was six months, while the average federal assault sentence in the state was fifty-four months.[273] The Group's recommendation to reduce the base offense level for assault by two levels was specifically designed to address this disparity, but it was admittedly "a conservative approach . . . guided by the South Dakota data" rather than the more disparate New Mexico data.[274] While this recommendation was certainly a step in the right direction, by the Group's own admission, it fell short of fully eliminating the sentencing disparity on this front.[275]

ii. Implementation of the Group's Recommendations

The Group's recommendations were an admittedly conservative approach to remedying the sentencing disparity experienced by Native American defendants in the federal system. While the Group's recommendations were, for the most part, implemented by the time the 2005 Sentencing Guidelines Manual was published, this was not uniformly the case. For example, with respect to involuntary manslaughter, the current base offense level for reckless conduct is at eighteen, which mirrors the Group's recommendation.[276] The

270. *See id.* at 25.

271. *See id.* at 30–31. This was partially due to the fact that assaults constitute the highest percentage of offenses prosecuted under the Major Crimes Act, and while Native Americans constitute less than two percent of the U.S. population, they represent about thirty-four percent of people in federal custody for assault. *Id.*

272. *Id.* at 32–33.

273. *Id.* at 33 (noting that the low sentencing average for New Mexico state sentences is partially based on low-level offenses that would not generally be prosecuted in federal court).

274. *Id.* at 34. The Group relied on the South Dakota data "because there was some concern that the sentences in New Mexico were not representative of those in other states." *Id.*

275. *Id.*

276. *Compare id.* at 16, *with* 2005 GUIDELINES MANUAL, *supra* note 7, § 2A1.4.

Sentencing Guidelines, however, provide a four-level increase for all "offense[s] involv[ing] the reckless operation of a means of transportation," while the Group recommended a four-level increase only for cases where the defendant was driving while under the influence of drugs or alcohol.[277] With respect to sexual abuse offenses, the 2005 Sentencing Guidelines do include a separate Guideline for "travel offenses," which carry a base offense level of twenty-four, as opposed to statutory rape under section 2A3.2, which has a base offense level of eighteen.[278] The recent enactment of the Adam Walsh Child Protection and Safety Act in 2006, however, has furthered sentencing disparity experienced by Native Americans.[279] Finally, while the 2005 Sentencing Guidelines reflect a reduction in the base level offense for aggravated assault, it was only reduced by one, from fifteen to fourteen, rather than the two-level reduction recommended by the Group.[280]

3. Summary

Since the Federal Sentencing Guidelines' inception, there have been a number of proposals to minimize the sentencing disparity experienced by Native Americans and to accommodate the unique circumstances surrounding life on a reservation. While *Big Crow* and its progeny represent the greatest inroad the courts have made in this regard, *Big Crow*'s holding is nearly impossible to legitimately reconcile with the Federal Sentencing Guidelines' prohibition on the consideration of race, sex, national origin, creed, religion, and socio-economic status,[281] and the decision fails to address the fundamental federal-state disparity affecting all Native American defendants tried in federal court under the Major Crimes Act. Congress has also taken action to correct criminal laws' disparate impact on Native Americans, but such concern has primarily focused on concern over tribal sovereignty and disparate sentencing for Native Americans compared to other federal defendants and has not extended to Congress's recently passed child safety legislation.

The Native American Advisory Group's Report is significant for

277. *Compare* 2005 GUIDELINES MANUAL, *supra* note 7, § 2A1.4, *with* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 16.

278. *Compare* 2005 GUIDELINES MANUAL, *supra* note 7, § 2G1.3, *with* 2005 GUIDELINES MANUAL, *supra* note 7, § 2A3.2.

279. *See* Pub. L. No. 109-248, 120 Stat. 587.

280. *Compare* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2A2.2 (2003), *and* 2005 GUIDELINES MANUAL, *supra* note 7, § 2A2.2, *with* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 34.

281. *See* 2005 GUIDELINES MANUAL, *supra* note 7, § 5H1.10.

seriously attempting to remedy the sentencing disparity experienced by Native Americans. Unfortunately, while the Group's efforts are commendable, its final recommendations fall far short of fully realizing this goal and were not fully implemented in the Sentencing Guidelines. The Group's recommendations still failed to account for sentencing variations from state to state, and furthermore, even in cases where the Advisory Group explicitly identified sentencing disparity as a significant concern, such as sexual abuse, it candidly admitted its recommendations were not designed to directly reduce or eliminate such disparity.

The only way to fully eradicate the current federal-state sentencing disparity for Native Americans would be for Congress to adopt Smith's proposal and modify the Major Crimes Act and SRA so that Native Americans would be tried and sentenced in federal court under state substantive law, without the Federal Sentencing Guidelines, or to follow Judge Black's recommendation and allow tribes to create their own sentencing guidelines. Such action, however, seems unlikely to occur given Congress's explicit intent that the Guidelines apply to the Major Crimes Act and the Assimilative Crimes Act. Furthermore, completely exempting Native American defendants from the Guidelines would frustrate the SRA's goal of uniformity. The courts, therefore, are the only immediately available avenue for correcting Native American sentencing disparity. Moreover, it is proper for the courts to take responsibility for correcting this disparity because the judiciary holds unique expertise in matters of sentencing and jurisdiction. Unfortunately, prior challenges to federal sentences based on federal-state disparity were soundly rejected by the circuit courts.[282] As the rest of this Article will discuss, however, the Supreme Court's landmark decision in *United States v. Booker* and recent downward variances by federal courts based on the disparity created by "fast track" programs breathe new life into the degree of discretion district court judges may be permitted to take in sentencing Native American defendants.

IV. *UNITED STATES V. BOOKER* AND THE POST-*BOOKER* LANDSCAPE—AN OPPORTUNITY FOR NATIVE AMERICAN DEFENDANTS?

On January 12, 2005, the Supreme Court decided *United States v. Booker*,[283] which, at first blush, appeared to undo the past twenty years of federal sentencing under the Federal Sentencing Guidelines. In the

282. *See* Smith, *supra* note 40, at 516–19.

283. 543 U.S. 220 (2005).

decision, the Court held that the Federal Sentencing Guidelines were unconstitutional as applied and remedied this by making the Guidelines "effectively advisory," rather than mandatory.[284] Some cheered this decision for freeing judges from the Guidelines while others viewed it critically as opening the door to unfettered judicial discretion.[285] With the Federal Sentencing Guidelines relegated to an advisory role, it would appear that post-*Booker* judges would be free to consider federal-state sentencing disparity and the uniqueness of life on a reservation to a greater degree in sentencing Native American defendants. However, while many commentators expected federal sentences to drastically change post-*Booker*, many studies have shown that the federal sentencing landscape has not changed significantly.

This Part will provide a brief overview of the *Booker* decision and how the Federal Sentencing Guidelines are to be applied in the decision's aftermath. It will then discuss the impact *Booker* has had on Native American sentencing. The final Part of this Article will then discuss the post-*Booker* debate over non-Guidelines sentences to remedy "fast-track" and crack-powder sentencing disparity and how the arguments for downward variances in those areas provide a basis for awarding non-Guidelines sentences to remedy the federal-state sentencing disparity experienced by Native Americans under the Major Crimes Act.

A. The Booker *Decision*

The *Booker* decision was sweeping in scope but hardly unexpected. In 2000 and 2004, the Supreme Court decided cases signaling that the constitutionality of the Federal Sentencing Guidelines was in doubt. In *Apprendi v. New Jersey*, a 2000 opinion, the Court ruled that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[286] While the decision dealt with a state judge and New Jersey statutes, the four dissenting judges expressed concern that the holding could be extended to undermine the Federal Sentencing Guidelines.[287] Four years later, in *Blakely v. Washington*,[288] the Court relied upon its

284. *Id.* at 245; *see also* Bowman, *supra* note 121, at 280.

285. Bowman, *supra* note 121, at 280.

286. 530 U.S. 466, 490 (2000).

287. *Id.* at 543–52 (O'Connor, J., dissenting); David Yellen, *Saving Federal Sentencing Reform After* Apprendi, Blakely *and* Booker, 50 VILL. L. REV. 163, 169–70 (2005).

288. 542 U.S. 296 (2004).

ruling in *Apprendi* to find the State of Washington's Sentencing Reform Act in violation of the Sixth Amendment because it required judicial fact-finding in order to apply an exception sentence.[289] This 5-4 decision once again signaled that the constitutionality of the Federal Sentencing Guidelines was in question.[290]

The next year, the Court decided *Booker* and held that the Federal Sentencing Guidelines were unconstitutional on the same grounds as *Apprendi* and *Blakely*.[291] Justice Breyer served as the critical swing vote in the case and saved the Federal Sentencing Guidelines from being completely invalidated. Although Breyer dissented from the majority opinion holding the Guidelines unconstitutional,[292] he fashioned a remedy for the majority's conclusion by modifying the Sentencing Reform Act so that the Federal Sentencing Guidelines were advisory rather than mandatory.[293] Although *Booker* made the Guidelines advisory, Justice Breyer emphasized that judges were still required to consider the Guidelines and Congress's goals and purposes in creating the Sentencing Commission when sentencing defendants.[294] Furthermore, while the decision stripped the Sentencing Reform Act of the section governing the standard of review for appealed sentences, Justice Breyer emphasized that the Act implicitly provided for an "unreasonableness" standard of review on this front.[295] Justice Breyer's remedy saved the Federal Sentencing Guidelines, but it was unclear after *Booker* exactly how the lower courts were supposed to respond to the decision.

*B. Native American Federal Sentencing Post-*Booker

Even though post-*Booker* sentences, in general, have not been radically different than those before the decision,[296] it would be

289. *Id.* at 305.

290. *See* Yellen, *supra* note 287, at 171.

291. United States v. Booker, 543 U.S. 220, 243–44 (2005); *see* Yellen, *supra* note 287, at 171.

292. *See Booker*, 543 U.S. 220, 326–34 (2005) (Breyer, J., dissenting in part).

293. *Id.* at 264 (Breyer, J., opinion of the Court in part). To do this, the Court eliminated 18 U.S.C. § 3553(b)(1), which mandated judges to sentence defendants in accordance with the Guidelines, and 18 U.S.C. § 3742(e), which included numerous references to § 3553(b)(1). *Id.* at 259.

294. *Id.* at 264.

295. *Id.* at 264–65.

296. Post-*Booker*, 85.9% of sentences are either within the sentencing range or are government-sponsored departures, which is not substantially different than the rate of 90.6% prior to the PROTECT Act or 93.7% after the PROTECT Act. U.S. SENTENCING COMM'N,

reasonable to hypothesize that the increased judicial discretion post-*Booker* would result in district court judges varying from the Guidelines more regularly when sentencing Native Americans, whether to account for federal-state sentencing disparity or the unique circumstances surrounding life on a reservation. Counterintuitively, however, multivariate analysis has shown that post-*Booker*, Native American offenders' sentences are 10.8% higher than those for white offenders.[297] This finding is difficult to reconcile with the attention the Native American Advisory Group and various judges have paid to the issue of unwarranted sentencing disparity experienced by Native Americans. Despite the trend of convicting Native Americans to longer sentences, as the next section will discuss, the post-*Booker* debate surrounding fast-track sentencing and the crack-powder sentencing disparity provides judges with a blueprint for awarding non-Guidelines sentences to account for the sentencing disparity endured by Native American defendants.

V. ACCOUNTING FOR "UNWARRANTED SENTENCING DISPARITIES" IN POST-*BOOKER* SENTENCING—FAST-TRACK PROGRAMS AND THE 100:1 CRACK-POWDER SENTENCING RATIO

While *Booker*'s actual impact on sentencing has thus far not been radical, and the issue of Native American sentencing disparity has received little attention, a fierce debate has arisen regarding the reasonableness of post-*Booker*, non-Guidelines sentences to account for disparity within select districts that provide early disposition programs and for the 100:1 crack-powder ratio.[298] The manner in which courts have handled sentencing in these areas, particularly the Supreme Court's recent pronouncement in *United States v. Kimbrough*[299] that the crack-powder sentencing ratio is not mandatory, provide valuable insight into the courts' ability to similarly correct for Native American sentencing disparity post-*Booker*. This Part will therefore discuss the treatment of both these issues in the courts.

FINAL REPORT, *supra* note 112, at 46.

297. *Id.* at 84 ("This association also was found in 2 of the 7 time periods from 1999 through the post-*Booker* period."). The 10.8% actually applies to the race classified as "other," which the Report states refers mostly to Native American offenders. *Id.*

298. *Id.* at 32–33. The Report focused on two issues in discussing key appellate sentencing issues post-*Booker*—early disposition programs and crack-cocaine sentencing disparity. *Id.*

299. 128 S. Ct. 558 (2007).

A. Fast-Track Sentencing Disparity

For certain federal districts close to the Mexico/U.S. border, over half the criminal docket is comprised of immigration cases.[300] Prior to the creation of fast-track programs, the administrative burden of these cases resulted in many defendants either being civilly deported or pleading to misdemeanors.[301] To address this burden on the system, in the mid-1990s many border districts created fast-track programs. The purpose of the programs was to induce defendants to plead guilty by offering below-Guidelines sentences to those who did so.[302]

1. Fast-Track Programs After the PROTECT Act

Fast-track programs were legitimized by the 2003 PROTECT Act.[303] The Act directed the Sentencing Commission to promulgate what is now United States Sentencing Guidelines section 5K3.1, whereby fast-track districts may provide up to a four-offense-level downward departure for participation in its early disposition program.[304] The PROTECT Act also required that, in order for a fast-track program to be approved in a district, the local United States Attorney must submit a proposal to the Attorney General for his approval.[305] As of March 2006, the Attorney General had approved fast-track programs in sixteen of the ninety-four federal districts in the country,[306] with many high-immigration districts not yet participating in the program.[307] Ironically, Congress's approval of these programs amounted to government-endorsed sentencing disparity, even though one of the "stated purpose[s] of the PROTECT Act was to reduce the number of downward departures."[308]

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300. Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 ARIZ. ST. L.J. 517, 520 (2006).

301. *Id.*

302. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1339 (2005).

303. *Id.*; *see* PROTECT Act, § 401(m)(2)(B), Pub. L. No. 108-21, 117 Stat. 667, 675 (2003).

304. U.S. SENTENCING COMM'N, FINAL REPORT, *supra* note 112, at 140–41.

305. McClellan & Sands, *supra* note 300, at 527.

306. U.S. SENTENCING COMM'N, FINAL REPORT, *supra* note 112, at 141.

307. McClellan & Sands, *supra* note 300, at 523 (stating that "the District of Nevada, the District of Utah, the New York districts, the Florida districts, and certain divisions in the Southern District of Texas" are not yet offering fast-track plea bargains.).

308. *See id.* at 526.

2. Fast-Track Disparity in the Courts

The existence of fast-track programs resulted in illegal immigrants being subject to vastly different sentences, depending upon whether they were arrested in a fast-track district like the District of Southern California or in a non-fast-track district like those in New York. In some cases, defendants in non-fast-track districts face sentences nearly twice as long as corresponding sentences under a fast-track program.[309] As a result, defendants in non-fast-track districts began arguing that this constituted "unwarranted sentenc[ing] disparit[y]" under § 3553(a)(6) and that they should receive a below-Guidelines sentence to account for this disparity.[310] Although district courts varied widely in their opinion as to whether downward variances to account for fast-track disparity were reasonable,[311] circuit courts severely limited the likelihood that downward variances based on fast-track disparity will be affirmed.

a. The Circuits Are Closing the Door on Departures Based on Fast-Track Disparity

There is a uniform consensus among the circuits that a district court judge's failure to provide a downward variance based on fast-track disparity is not unreasonable, although the underlying rationale for this conclusion varies. For example, the Tenth Circuit's decision in this regard was predicated on the fact that "unwarranted sentencing disparit[y]" was only one of the many factors a judge was to consider under § 3553(a), thereby leaving it unresolved whether fast-track disparity could be a proper ground for variance in a particular case.[312] Other circuits, such as the First and Eighth, based their determination on Congress's approval of fast-track programs in the PROTECT Act, strongly questioning, though leaving unresolved, whether it would ever be reasonable to depart on the basis of fast-track disparity.[313] The

309. *See, e.g.*, United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 960, 963 (E.D. Wis. 2005) (demonstrating that Galvez-Barrios's Guidelines sentence would have been forty-one to fifty-one months long, but if he had been prosecuted in a fast-track district, his sentence could have been as low as twenty-seven months); United States v. Perez-Chavez, 422 F. Supp. 2d 1255, 1259 (D. Utah 2005) (demonstrating that the defendant's Guidelines sentencing range was eighteen to twenty-four months, but his sentence under a fast-track program would have been ten to sixteen months).

310. *See, e.g.*, United States v. Martinez-Trujillo, 468 F.3d 1266, 1267 (10th Cir. 2006).

311. This subject was discussed on many legal blogs. *See, e.g.*, Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2005/03/eighth_circuit_.html (Mar. 16, 2005, 16:05 EST).

312. United States v. Morales-Chaires, 430 F.3d 1124, 1131 (10th Cir. 2005).

313. *See* United States v. Sebastian, 436 F.3d 913, 916 (8th Cir. 2006); United States v.

circuits that went the furthest in completely closing the door on fast-track disparity as an appropriate consideration are those that declared that fast-track disparity was not unwarranted sentencing disparity, thereby removing the issue from consideration under § 3553(a)(6).[314] These holdings, that a within-Guidelines sentence is not per se unreasonable, have recently been reinforced by the Supreme Court's decision in *Rita v. United States*, where the Court held that appellate courts may deem within-Guidelines sentences presumptively reasonable.[315]

While every circuit has held that it is reasonable to provide a within-Guidelines sentence, despite fast-track disparity, only three circuits, the Fourth, Seventh, and Eleventh, have explicitly held that it is unreasonable to provide a downward variance based on fast-track disparity.[316] The remaining circuits have not expressly ruled on the reasonableness of downward departure based on fast-track disparity.[317] As will be discussed in the next Part, the Supreme Court's decision in *Kimbrough* regarding crack-powder sentencing disparity will presumably have an impact going forward on how circuit courts evaluate the reasonableness of non-Guidelines sentences to account for fast-track disparity.[318] Prior to *Kimbrough* however, while the door on providing variances based on fast-track disparity appeared to be closing, the Sixth

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Martinez-Flores, 428 F.3d 22, 27–28, 30 n.3 (1st Cir. 2005); *see also* United States v. Jiménez-Beltre, 440 F.3d 514, 519 (1st Cir. 2006).

314. *See, e.g.*, United States v. Arevalo-Juarez, 464 F.3d 1246, 1250–51 (11th Cir. 2006); United States v. Perez-Pena, 453 F.3d 236, 243–44 (4th Cir. 2006).

315. 127 S. Ct. 2456, 2462 (2007). *Rita* states, however, that this presumption is only to apply "in the mine run of cases," leaving the question of whether the disparities addressed in this Article in fast-track, crack-powder, and Native American cases are, in fact, part of the "mine run of cases." *Id.* at 2458.

316. *Arevalo-Juarez*, 464 F.3d at 1250–51 (11th Cir. 2006); *Perez-Pena*, 453 F.3d at 243–44 (4th Cir. 2006); United States v. Galicia-Cardenas, 443 F.3d 553, 555 (7th Cir. 2006).

317. District courts, however, have not rushed to take advantage of the downward departure window left open by some circuits. A 2006 report by the Sentencing Commission showed that of the four non-fast-track districts that have sentenced more than one hundred immigration cases post-*Booker*, three of them had rates of non-government sponsored, below-Guidelines range sentences lower than the overall national average of 9.3%. U.S. SENTENCING COMM'N, FINAL REPORT, *supra* note 112, at 141–42. The four districts were the District of Utah (204 cases), the Northern District of Texas (172 cases), the Middle District of Florida (162 cases), and the Southern District of New York (106 cases). *Id.* The rate for the District of Utah was 6.9%, the Northern District of Texas was 1.7%, and the Middle District of Florida was 7.4%. *Id.* at 142.

318. *See infra* Part V.B.; United States v. Liriano-Blanco, 510 F.3d 168, 172 (2d Cir. 2007) (acknowledging that while it is not per se unreasonable for a district court judge to not correct for fast-track disparity, it remained an open question whether a judge could appropriately consider such disparity).

Circuit decided a case in 2006 affirming the use of fast-track disparity as a ground for a non-Guidelines sentence.

b. Ossa-Gallegos—*A Blueprint for Reasonable Variances Based on Fast-Track Disparity*

On June 30, 2006, a Sixth Circuit panel became the first circuit court to affirm a non-Guidelines sentence based in part upon fast-track disparity.[319] In *Ossa-Gallegos*, the defendant pled guilty in 1996 to sexual assault and was deported to Mexico.[320] He unlawfully returned to the United States in 1999, was arrested, and was charged with illegal reentry.[321] The district court calculated a Guidelines sentence of forty-one to fifty-one months based upon a sixteen-offense-level addition for having committed a "crime of violence," and then, the court reduced the sentence by two levels based on fast-track disparity and the "aberrational nature" of the defendant's prior crime compared to his conduct since returning to the United States, bringing the sentence to thirty-three months.[322] The defendant appealed, arguing that "the district court's sixteen-level enhancement violated his Sixth Amendment" right to a jury trial and that his sentence was unreasonable, in part, because the two-level reduction did not fully account for what his sentence would have been in a fast-track district.[323] The Sixth Circuit rejected the defendant's Sixth Amendment claim and turned to the sentence's reasonableness.[324]

With respect to the fast-track issue, Ossa-Gallegos argued that the two-level reduction did not fully eliminate the fast-track disparity.[325]

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319. United States v. Ossa-Gallegos, 453 F.3d 371, 375–76 (6th Cir. 2006), *on rehearing en banc at* United States v. Ossa-Gallegos, 491 F.3d 537 (6th Cir. 2007) (rehearing the issue of whether sentencing statutes permitted a tolling period for supervisory release as it applies to those to be deported and not addressing the court's decision on a non-Guidelines sentence on account of fast-track disparity). This decision stands, despite the fact that just three days after this decision was issued, a separate Sixth Circuit panel reasoned that "[fast-track] disparity does not run counter to § 3553(a)'s instruction to avoid unnecessary sentencing disparities." United States v. Hernandez-Fierros, 453 F.3d 309, 314 (6th Cir. 2006). Although the Sixth Circuit itself has not resolved this tension, at least one district court found the latter panel's arguments convincing and held that "fast track disparity is not an unwarranted disparity under § 3553(a)(6)." United States v. Carballo-Arguelles, 446 F. Supp. 2d 742, 744 (E.D. Mich. 2006).

320. *Ossa-Gallegos*, 453 F.3d at 372–73.

321. *Id.* at 373.

322. *Id.*

323. *Id.* at 373–74.

324. *Id.* at 374.

325. *Id.* The defendant presented evidence to the court to show that in three fast-track

The Sixth Circuit rejected this argument and affirmed the sentence.[326] The court stated that "[a]lthough the district court did not entirely eliminate the disparity between Ossa-Gallegos's sentence and the sentences of defendants with similar criminal histories in fast-track jurisdictions, its two-level downward departure was intended to reduce this disparity."[327] The circuit court then defended the district court's decision to not fully eliminate the disparity, noting the following: (1) that defendants receiving true fast-track sentences must give up their right to challenge their conviction—something Ossa-Gallegos did not have to do; and (2) that "'Congress seems to have endorsed at least some degree of disparity by expressly authorizing larger downward departures for defendants in "fast track" districts.'"[328] Furthermore, the court pointed out that "avoiding nationwide disparities in sentencing is only one factor to be considered under § 3553(a)."[329] Finding that the district court had considered several other factors, the appellate court held that the two-level reduction was reasonable.[330]

This reasoning set forth by the Sixth Circuit in *Ossa-Gallegos* provides a model for judges concerned about fast-track disparity that is similarly transferable to the Native American context. While the Supreme Court's *Kimbrough* decision in December 2007, regarding crack-powder sentencing disparity, provides a more authoritative basis for crafting non-Guidelines sentences for Native Americans, as will be discussed, the factors considered by the Sixth Circuit in *Ossa-Gallegos* are still relevant.

B. Crack-Powder Sentencing Disparity and Kimbrough

The disparity between crack and powder cocaine sentences is an issue that, perhaps even more so than fast-track sentencing disparity, has been explored post-*Booker*.[331] The disparity results from the fact that Congress and the Guidelines implement a 100:1 sentencing ratio

districts, the average sentence for defendants with five prior convictions and two prior deportations was thirty-two months. *Id.* at 375.

326. *Id.* at 375–76.

327. *Id.* at 375.

328. *Id.* (quoting United States v. Montes-Pineda, 445 F.3d 375, 379–80 (4th Cir. 2006)).

329. *Id.* (citing United States v. Martinez-Martinez, 442 F.3d 539, 543 (7th Cir. 2006)).

330. *Id.* at 375–76.

331. A search of United States law review articles through LexisNexis reveals that, in the past two years, at least ten articles have been published that address crack-powder sentencing disparity as a central part of the article (searched SUMMARY(crack /s (cocaine or powder) /s disparity) and date(geq (02/26/2006))).

between powder cocaine and crack cocaine, whereby those convicted of dealing crack cocaine are to receive the same sentence as those convicted of dealing one hundred times more powder cocaine.[332] Post-*Booker*, only two circuits had held that it was permissible for district court judges to consider this disparity at sentencing,[333] but the Supreme Court, in December 2007, decided *Kimbrough*, holding that a district court judge may consider this disparity as part of its determination that "in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing."[334] This Section will provide a brief overview of the crack-powder disparity and will then proceed to discuss the Supreme Court's decision in *Kimbrough*.

1. Crack-Powder Sentencing Overview

The 100:1 ratio between powder cocaine and crack cocaine came into existence in the Anti-Drug Abuse Act of 1986 (1986 Anti-Drug Act).[335] Congress, motivated by a concern that crack was more dangerous than powder cocaine,[336] implemented this ratio, whereby the

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332. Kimbrough v. United States, 128 S. Ct. 558, 564 (2007); Steven L. Chanenson, Booker *on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL'Y 551, 552 (2006). Other articles providing a summary of the crack-powder sentencing disparity issue include: Jacob Loshin, *Beyond the Clash of Disparities: Cocaine Sentencing After* Booker, 29 W. NEW ENG. L. REV. 619 (2007), and Eric Citron, Comment, United States v. Pho: *Reasons and Reasonableness in Post-*Booker *Appellate Review*, 115 YALE L.J. 2183 (2006).

333. As described in *Kimbrough*, 128 S. Ct. at 566 n.4, the D.C. and Third Circuits had held that this disparity could be considered at sentencing. United States v. Pickett, 475 F.3d 1347, 1355–56 (D.C. Cir. 2007); United States v. Gunter, 462 F.3d 237, 248–49 (3d Cir. 2006). The other circuits rejected the consideration of this disparity. *See* United States v. Kimbrough, 174 F. App'x 798, 799 (4th Cir. 2006); *see also* United States v. Leatch, 482 F.3d 790, 791 (5th Cir. 2007) (per curiam); United States v. Johnson, 474 F.3d 515, 522 (8th Cir. 2007); United States v. Castillo, 460 F.3d 337, 361 (2d Cir. 2006); United States v. Williams, 456 F.3d 1353, 1369 (11th Cir. 2006); United States v. Miller, 450 F.3d 270, 275–76 (7th Cir. 2006); United States v. Eura, 440 F.3d 625, 633–34 (4th Cir. 2006); United States v. Pho, 433 F.3d 53, 62–63 (1st Cir. 2006).

334. *Kimbrough*, 128 S. Ct. at 564 (quoting 18 U.S.C. § 3553(a) (2000 & Supp. V 2005)).

335. *Id.* at 566–67.

336. The Court in *Kimbrough* listed the five reasons Congress deemed crack more dangerous:

> (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers' drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack's potency and low cost were making it increasingly popular.

Id. at 567.

statute's five-year mandatory minimum sentence applies to defendants responsible for five grams of crack or five hundred grams of powder cocaine, and the ten-year minimum applies to defendants responsible for fifty grams of crack or five thousand grams of powder cocaine.[337] The Sentencing Commission, in crafting guidelines for these offenses, departed from its usual empirical approach of analyzing past sentences and instead applied Congress's 100:1 ratio across the board for the full range of crack or powder cocaine drug quantities.[338] The Commission, however, later determined that this disparity did not comport with Congress's sentencing objectives in the 1986 Anti-Drug Act or the SRA.[339] In particular, the Commission found that: (1) research did not support the assumptions regarding the degree of harm caused by the respective drugs that were used to justify the disparity; (2) the 100:1 ratio did not, as the 1986 Anti-Drug Act intended, punish major drug traffickers more severely, since under the ratio, "'retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced'";[340] and (3) the discrepancy between the sentences created a lack of faith in the criminal justice system due to the perception the ratio created "'unwarranted disparity based on race.'"[341] Based on these concerns, the Commission has made various attempts to reduce the crack-powder ratio. In 1995, the Commission proposed a 1:1 ratio, which Congress rejected, while at the same time, directing the Commission to propose a revision to the crack-powder ratio under the statutes and Guidelines.[342] The Commission followed this directive, recommending a 5:1 ratio in 1997 and "at least" a 20:1 ratio in 2002.[343] Congress, however, did not act on either of these proposals.[344] The Commission issued another report in 2007, again urging Congress to amend the 1986 Anti-Drug Act, but this time also independently changing the Guidelines by reducing the base offense level for quantities of crack such that sentences for crack were

337. *Id.* (citing 21 U.S.C. § 841(b)(1)(B)(ii)–(iii), (b)(1)(A)(ii)–(iii) (2000)).

338. *Id.*

339. *Id.* at 568.

340. *Id.* (quoting U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 159 (1995), *available at* http://www.ussc.gov/crack/exec.htm).

341. *Id.* (quoting U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 103 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf).

342. *Id.* at 569.

343. *Id.*

344. *Id.*

"between two and five times longer" than those for equal quantities of powder cocaine.[345] It is against this framework that the Supreme Court, in *Kimbrough*, addressed whether it was reasonable for district court judges to consider the crack-powder disparity in sentencing.

2. *Kimbrough*—Permitting District Court Judges to Consider the Crack-Powder Ratio at Sentencing

Despite the fact that most circuits to have addressed the crack-powder disparity held that this was not a valid sentencing consideration for district courts, the Supreme Court in *Kimbrough* held the opposite—that judges may consider the disparity under the Guidelines as part of their consideration as to whether a within-Guidelines sentence in a particular case is "'greater than necessary' to serve the objectives of sentencing."[346] The Court's reasoning behind its decision strongly indicates that sentencing disparity in the Native American context can also be considered by district court judges.

The Court's analysis in *Kimbrough* proceeded in three parts. First, the Court addressed the Government's arguments that Congress mandated that courts respect the ratio in all circumstances.[347] Second, the Court discussed the validity of a district court judge finding that a within-Guidelines sentence failed to reflect the sentencing considerations under § 3553(a).[348] Finally, the Court then articulated the reasons why the sentence given in this particular case was reasonable.[349] A discussion of each of these issues reveals why Native American sentencing disparity should also be deemed a permissible consideration for sentencing courts.

a. Congress's Directive to Apply the 100:1 Ratio

The Government focused its argument in *Kimbrough* on the contention that the 100:1 ratio represented a "'specific policy determinatio[n] that Congress has directed sentencing courts to observe,'"[350] thus making it "an exception to the 'general freedom that sentencing courts have to apply the [§ 3553(a)] factors.'"[351] The Court

345. *Id.*

346. *Id.* at 564 (quoting 18 U.S.C. § 3553(a) (2000 & Supp. V 2005)).

347. *Id.* at 570–72.

348. *Id.* at 574–75.

349. *Id.* at 575–76.

350. *Id.* at 570 (alteration in original) (quoting Brief for the United States at 25, Kimbrough v. United States, 128 S. Ct. 558 (2007) (No. 06-6330)).

351. *Id.* at 570 (alteration in original) (quoting Brief for the United States at 16, 25,

rejected all three of the arguments raised by the Government in this vein.

The Government first argued that although the 1986 Anti-Drug Act "'did not *expressly* direct the Sentencing Commission to incorporate the 100:1 ratio in the Guidelines,'" such a directive was implicit in the statute, since to do otherwise "would be 'logically incoherent'" in light of the mandatory minimum sentences premised on the 100:1 ratio.[352] The Supreme Court easily dismissed this argument, emphasizing that the plain terms of the statute only set minimum and maximum sentences. The Court stated, "The statute says nothing about the appropriate sentences within these brackets, and we decline to read any implicit directive into that congressional silence."[353]

The second argument made by the Government was that Congress, in rejecting the Commission's 1995 proposal of a 1:1 sentencing ratio, revealed its understanding that the 1986 Anti-Drug Act required the Commission, and correspondingly, sentencing courts, to respect the 100:1 ratio.[354] The Court also dismissed this argument, noting that Congress's rejection of a 1:1 ratio did not etch into stone application of the 100:1 ratio for all sentences.[355] To support this argument, the Court noted that the Guidelines, as amended by the Commission in 2007, did not strictly adhere to a 100:1 ratio, yet Congress had not acted to disapprove these amendments.[356]

The Government's third argument was premised on § 3553(a)(6)'s requirement that district courts consider "'the need to avoid unwarranted sentencing disparities.'"[357] First, the Government argued that permitting district courts to "deviat[e] from the [100:1] ratio could result in sentencing 'cliffs' around [the drug] quantities that trigger the mandatory minimum[]" sentences.[358] The Court dismissed this argument, noting that the Court had found a similar claim unpersuasive in an earlier sentencing decision.[359] The Government also contended

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Kimbrough, 128 S. Ct. 558 (No. 06-6330)).

352. *Id.* at 571 (emphasis in original) (quoting Brief for the United States at 33, *Kimbrough*, 128 S. Ct. 558 (No. 06-6330)).

353. *Id.*

354. *Id.* at 572.

355. *Id.* at 572–73.

356. *Id.* at 573.

357. *Id.* (quoting 18 U.S.C. § 3553(a)(6) (2000 & Supp. V 2005)).

358. *Id.* (quoting Brief for the United States at 33, *Kimbrough*, 128 S. Ct. 558 (No. 06-6330)).

359. *Id.* (discussing Neal v. United States, 516 U.S. 284 (1996)).

that if district courts were permitted to offer non-Guidelines sentences based upon their opinion of the crack-powder disparity, "'defendants with identical real conduct will receive markedly different sentences, depending on nothing more than the particular judge drawn for sentencing.'"[360] The Court was similarly dismissive of this argument, noting that although "uniformity remains an important goal of sentencing[,] . . . our opinion in *Booker* recognized that some departures from uniformity were a necessary cost of the remedy we adopted."[361] The Court further noted that such disparities were limited to the extent that Congress had set mandatory minimum sentences.[362] Finally, the Court observed that any concern about unwarranted sentencing disparities under § 3553(a)(6) did not weigh in favor of making the crack-powder ratio mandatory, but rather, that under the terms of § 3553(a)(6), district courts are the body directed to consider the issue of disparity.[363]

b. Deviating from the Guidelines

Having found that Congress had not imposed a per se bar on district courts considering the crack-powder disparity at sentencing, the question still remained under what circumstances, given that "district courts must treat the Guidelines as the 'starting point and the initial benchmark,'" it would be appropriate for a district court to deviate from a within-Guidelines sentence.[364] The Court rearticulated that the Guidelines' value was in "'reflect[ing] a rough approximation of sentences that might achieve § 3553(a)'s objectives,'"[365] while a district court judge's familiarity with the particular case before him places the judge "'in a superior position to find facts and judge their import under § 3553(a)' in each particular case."[366] Based upon this respective expertise, the Court stated that a variance from the Guidelines merited the "greatest respect when the sentencing judge finds a particular case 'outside the "heartland"'" of cases to which the Guidelines were intended to apply.[367] In contrast, despite the advisory nature of the

360. *Id.* (quoting Brief for the United States at 40, *Kimbrough*, 128 S. Ct. 558 (No. 06-6330)).

361. *Id.* at 573–74.

362. *Id.* at 574.

363. *Id.*

364. *Id.* at 574–75 (quoting Gall v. United States, 128 S. Ct. 586, 596 (2007)).

365. *Id.* at 574 (quoting Rita v. United States, 127 S. Ct. 2456, 2465 (2007)).

366. *Id.* (quoting *Gall*, 128 S. Ct. at 597).

367. *Id.* at 574–75 (quoting *Rita*, 127 S. Ct. at 2465).

Guidelines, "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case."[368]

With these principles in mind, the Court reasoned that, with respect to crack-cocaine disparity, a district court judge would be acting within his authority in determining that the 100:1 disparity "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."[369] This was premised on the fact that the Sentencing Commission, in simply adopting the ratio established by Congress, had not acted in accord with its institutional expertise of looking to national sentencing statistics.[370] Moreover, the Court observed that the Commission itself had noted that the crack-powder ratio resulted in sentences that did not meet the sentencing purposes in § 3553(a).[371]

c. Crafting a Reasonable Sentence

After determining that it is not per se unreasonable for a district court to consider the disparity under the crack-powder ratio at sentencing, the Court finally addressed whether the district court's consideration of this disparity in the particular case at hand was appropriate.[372] Here, the Court found the sentence reasonable, discussing in the process the proper manner for district court judges to proceed at sentencing.[373]

The Court began by stating that the district court first properly calculated and considered the Guidelines sentencing range.[374] Then, the district court looked to "'the nature and circumstances'" of the crime and the defendant's "'history and characteristics.'"[375] The Court then went on to address the district court's consideration of the crack-powder disparity. First, the district court, per § 3553(a)(5), referenced the Sentencing Commission's reports criticizing the disparity.[376] Next, the district court compared the Guidelines sentence for the defendant to the corresponding sentence for a comparable amount of powder, suggesting

368. *Id.* at 575 (quoting *Rita*, 127 S. Ct. at 2465).
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.* at 575–76.
373. *Id.*
374. *Id.* at 575.
375. *Id.* (quoting 18 U.S.C. § 3553(a)(1) (2000 & Supp. V 2005)).
376. *Id.*

that the resulting disparity was unwarranted under § 3553(a)(6).[377] Importantly, the Court emphasized that the district court did not make a policy determination as to what an appropriate crack-powder ratio would be.[378] Instead, the district court "appropriately framed its final determination in line with § 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)."[379]

The Court thus found that the district court based its sentence on proper considerations and "'committed no procedural error.'"[380] Turning then to the overarching question of whether the sentence was reasonable, the Court found that the district court did not abuse its discretion in giving this non-Guidelines sentence, concluding that "the District Court properly homed in on the particular circumstances of Kimbrough's case and accorded weight to the Sentencing Commission's consistent and emphatic position that the crack-powder disparity is at odds with § 3553(a)."[381] Accordingly, the Court concluded that "a reviewing court could not rationally conclude that the 4.5-year sentence reduction Kimbrough received [from the district court] qualified as an abuse of discretion."[382]

VI. CORRECTING FOR NATIVE AMERICAN SENTENCING DISPARITY

With the Guidelines now being advisory, correcting for Native American sentencing disparity is a prime issue to reexamine. Courts' treatment of disparity in the fast-track and crack-powder contexts provides a useful guide as to how judges can craft reasonable non-Guidelines sentences to account for this disparity for Native Americans. The limited success of non-Guidelines sentences to account for fast-track disparity seemingly meant that, at best, a conservative approach, tracking the reasoning in *Ossa-Gallegos*, of reducing rather than eliminating such disparity, had the greatest chance of withstanding appellate scrutiny. To the extent, however, that the Supreme Court's reasoning in *Kimbrough* regarding crack-powder sentencing disparity is similarly applicable in the Native American context, a much stronger case can be made that consideration of such disparity is not per se

377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.* at 575–76 (quoting Gall v. United States, 128 S. Ct. 586, 600 (2007)).
381. *Id.* at 576.
382. *Id.*

unreasonable.

This Part will use the Court's reasoning in *Kimbrough* as a model for showing why courts should not be barred as a per se matter from considering Native American sentencing disparity, and then proceed to look at how judges are to appropriately consider such disparity in a particular case. Through this analysis, this Part will compare and contrast the nature of the disparity in the Native American context with that surrounding the fast-track and crack-powder issues. With respect to whether district courts are permitted to consider Native American sentencing disparity, this Part will first examine why Congress has not barred courts from accounting for this disparity and will then explore why courts may depart from the Sentencing Commission and the Guidelines in this context. Once it is shown that judges may account for such disparity at sentencing, this Part will then look to the template provided in *Kimbrough* to show how judges may consider this disparity so as to craft reasonable non-Guidelines sentences for Native American defendants that will withstand appellate review.

A. District Court Judges Are Not Barred from Accounting for Native American Sentencing Disparity

The first issue to confront is whether district court judges are barred from considering Native American sentencing disparity at sentencing. Although in both the fast-track and crack-powder contexts, it is clear that district court judges are not required to correct for such disparity,[383] particularly in light of *Kimbrough*, it is also clear that such disparity may be a valid consideration. This is because, as in *Kimbrough*, Congress has not barred courts from taking such disparity into account, and the Sentencing Commission has acknowledged the unique nature of such sentences compared to other sentencing recommendations under the Guidelines.

1. Congress Has Not Required District Courts to Enforce Any Federal-State Sentencing Disparity for Native American Defendants

In *Kimbrough*, the Government's main argument against courts deviating from the 100:1 crack-powder ratio was that Congress had, at least implicitly, mandated that courts apply this ratio at sentencing.[384] In the fast-track context, courts often rested on similar arguments, with

383. *See supra* Part V.A.2.a. (fast-track); *supra* Part V.B.2 (crack-powder).

384. *Kimbrough*, 128 S. Ct. at 570–71.

more than one court noting that Congress's statutory directive that a departure for fast-track sentencing be promulgated in the Guidelines amounted to a Congressional endorsement of any resulting sentencing disparity.[385] For the same reasons discussed in *Kimbrough*,[386] however, such arguments do not carry weight in the context of Native American sentencing disparity. Furthermore, any seeming congressional endorsement of such disparity is much more explicit in the fast-track context than exists with respect to Native American sentencing. As an additional matter, any concerns that Native American sentencing disparity cannot be deemed "unwarranted" are also unavailing in light of *Kimbrough*'s reasoning, as well as the unique nature of the federal-state disparity in the Native American context.

a. Congress Has Only Bound Courts Through Statutory Minimum and Maximum Sentences

The first argument raised by the Government in *Kimbrough*, that the 100:1 ratio established in the mandatory minimum sentences must similarly be applied across the board for all sentences above the statutory minimum, is similarly unpersuasive in the Native American context.[387] Whether a Native American is being sentenced under federal law for manslaughter, sexual abuse, or aggravated assault, without a specific statutory directive to the contrary, courts are only required to respect the mandatory sentencing minimums and maximums established by Congress.[388] This provides a natural check on judges' abilities to fully correct for any federal-state disparity because the corresponding state sentence may fall beneath the federal statutory minimum,[389] but it does not prevent judges from using their discretion to sentence Native American defendants within the congressionally established minimums and maximums.

b. There Is No Implicit Congressional Mandate That Courts Adhere to Any Native American Sentencing Disparity

The Court, in *Kimbrough*, dismissed the Government's argument that Congress, in rejecting the Commission's proposed 1:1 crack-powder

385. *See supra* Part V.A.2.a.; *see also supra* notes 314–15 and accompanying text.

386. *See supra* Part V.B.2.

387. *See Kimbrough*, 128 S. Ct. at 570–72; *see also supra* notes 352–53 and accompanying text.

388. *See id.* at 571.

389. *Id.* at 574 ("[P]ossible variations among district courts are constrained by the mandatory minimums Congress prescribed in the 1986 Act.").

ratio, signaled its intention that courts be bound to the 100:1 ratio in sentencing.[390] In contrast, in the fast-track context, courts have placed considerable weight on Congress's implicit endorsement of some resulting disparity in the PROTECT Act.[391] Indeed, even the one appellate court to affirm a non-Guidelines sentence due to fast-track disparity noted that this congressional endorsement weighed in favor of reducing, rather than fully eliminating, any such disparity.[392] As was the case in *Kimbrough*, any congressional action with respect to Native American sentencing similarly falls short of serving as a congressional mandate that such disparity be left untouched.[393] Furthermore, any seeming endorsement on Congress's behalf of such disparity does not rise to the level of Congress's endorsement of the fast-track disparity in the PROTECT Act.[394]

Prior congressional actions to account for Native American disparity in the criminal justice system have focused on uniformity among federal defendants rather than on federal-state disparity for Native American defendants. These congressional actions, however, do not necessarily mean that Congress has endorsed Native American sentencing disparity stemming from the application of the Federal Sentencing Guidelines. In 1976, for example, Congress acted to eliminate disparity between Indians prosecuted under the Major Crimes Act and non-Indians prosecuted under the General Crimes Act for the same offense after two circuit courts found such disparity unconstitutional.[395] Congress's action in that circumstance to foster uniformity among federal defendants, however, can be understood as Congress's needed response to correct what courts had deemed to be unconstitutional disparity.[396] In contrast, as the Supreme Court's decision in *United States v. Antelope*[397] illustrates, disparity between state and federal defendants does not rise to constitutional proportions and therefore does not necessitate congressional action.[398] Just as in *Kimbrough*, where the Court was unwilling to interpret Congress's rejection of the Commission's

390. *Id.* at 572–73; *supra* notes 354–56 and accompanying text.

391. *See supra* Part V.A.2.a.

392. *See* United States v. Ossa-Gallegos, 453 F.3d 371, 374–76 (6th Cir. 2006); *see also supra* Part V.A.2.b.

393. *See Kimbrough*, 128 S. Ct. at 572–73; *see also supra* notes 355–56 and accompanying text.

394. *See supra* notes 303–08 and accompanying text.

395. H.R. REP. NO. 94-1038, at 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1125, 1125.

396. *See supra* notes 208–13 and accompanying text.

397. 430 U.S. 641 (1977).

398. *See supra* Part III.B.1.c.

proposed 1:1 crack-powder ratio as representing a codification of the 100:1 ratio's application across the board,[399] similarly, Congress's reluctance to act when Native American sentencing disparity does not reach constitutional proportions does not mean that such disparity is deemed mandated by Congress or warranted for purposes of § 3553(a)(6).

Congress has also acted by making clear that the Federal Sentencing Guidelines apply to assimilative crimes and the Major Crimes Act.[400] While this amendment to the SRA reflected a congressional concern with ensuring the application of the Federal Sentencing Guidelines in all federal criminal prosecutions, the amendment did not serve to bar district courts from considering any resulting Native American sentencing disparity. First, to the extent the 1990 amendment was merely a codification of the Eighth Circuit's decision in *Norquay*,[401] Congress's endorsement of any resulting disparity was limited to the narrowest possible disparity—that between federal and state defendants both prosecuted under state substantive law.[402] More importantly, Congress's intent that the Federal Sentencing Guidelines apply to federal prosecutions for crimes occurring in Indian country[403] does not signal a clear endorsement on Congress's part of any resulting sentencing disparity. Even understanding at the time the amendment was passed that the Guidelines were effectively mandatory, downward departures were permitted for cases falling outside the "heartland" of cases contemplated by the Guidelines. Furthermore, post-*Booker*, the Guidelines are only one of many factors district courts are to consider at sentencing, and therefore, the Guidelines' applicability to Native American defendants does not foreclose courts from considering any resulting sentencing disparity under the other relevant § 3553(a) factors.

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399. *See* Kimbrough v. United States, 128 S. Ct. 558, 572–73 (2007); *see also supra* notes 354–56 and accompanying text.

400. *See supra* note 217.

401. Crime Control Act of 1990, Pub. L. No. 101-647, § 1602, 104 Stat. 4789, 4843 (1990) (codifying United States v. Norquay, 905 F.2d 1157 (8th Cir. 1990)); *supra* note 217 and accompanying text.

402. *See Norquay*, 905 F.2d at 1161. The fact that Congress's intent was limited to assimilative crimes is clear by the title of the amendment, "Amendment to Clarify Application of Sentencing Reform Act to Assimilative Crimes." § 1602, 104 Stat. at 4843.

403. Although the 1990 amendment was directed at assimilative crimes, the plain text of the amendment makes clear that the SRA applies to all crimes prosecuted pursuant to the Major Crimes Act. § 1602, 104 Stat. at 4843. The Guidelines' application to federally defined crimes prosecuted under the Major Crimes Act does not seem to have been an issue debated in the courts.

Congress, in fact, has shown itself to be sympathetic to Native American defendants in circumstances where Native Americans are disproportionately impacted by a federal offense or where gross disparity exists between federal and state sentences. In both federal death penalty and "three strikes and you're out" legislation, Congress included a similar "special provision for Indian country," whereby Native Americans subject to federal jurisdiction, due to the jurisdictional scheme in Indian country, are not subject to either of these punishments, unless the tribe has elected for the act to have effect.[404] Although it appears that this "special provision," at least in the Federal Death Penalty Act, was motivated primarily by concerns regarding tribal sovereignty, subcommittee reports regarding earlier proposals for the death penalty statute and the "three strikes and you're out" legislation indicate that testimony on the disparate impact this legislation would have on Native Americans was heard by the subcommittee.[405]

Like Congress's policy with respect to crack-powder sentencing, none of Congress's actions or inactions in the Native American context serve as a congressional bar on courts' abilities to consider Native American sentencing disparity because Congress has not explicitly stated that such disparity cannot be a relevant consideration at sentencing. If, however, a court were to borrow from the fast-track debate and examine the degree to which Congress has endorsed any disparity,[406] this would be at its lowest ebb in the Native American context with respect to non-assimilative crimes where Native Americans are disproportionately represented in federal court and federal-state sentencing disparities are extreme. Based on these factors, Native Americans convicted of aggravated assault will have particularly compelling arguments because aggravated assault is a federally defined offense, with Native Americans comprising nearly thirty-four percent of those individuals in federal custody for assault[407] and receiving federal sentences averaging up to sixty-two percent longer than corresponding state sentences.[408]

There are other offenses, however, for which it appears Congress has endorsed at least some degree of Native American sentencing disparity.

404. *See supra* Part III.B.2.a.ii.

405. *See id.*

406. *See supra* Part V.A.2.

407. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 31.

408. *See supra* Part I.

This may be the case, for example, with respect to sex crimes against children, despite the fact that Native Americans comprised over half of the federal sex abuse convictions in 2001 and in some cases receive sentences over seventy percent greater than their state counterparts.[409] In recent years, Congress has taken an increasingly tough position on sex offenders, as evidenced by the 2003 PROTECT Act and the Adam Walsh Child Protection and Safety Act of 2006.[410] These statutes failed to consider their impact on Native Americans,[411] although Congress also amended the Major Crimes Act in 2006 to include jurisdiction over "felony child abuse or neglect."[412] Congress's clear intent in modifying the Major Crimes Act was to combat crime against children in Indian country,[413] lending support to a conclusion that Congress similarly endorses the harsh penalties in the PROTECT and Adam Walsh Acts for sex crimes committed by Native Americans against children, even though Congress did not hear testimony from Native Americans before passing those laws. Despite what might be considered congressional endorsement of sentencing disparity, the Court's framework in *Kimbrough* would not bar judges from considering such disparity. Instead, district courts' discretion in sentencing would just be limited to operating within the statutory minimums and maximums established by Congress, which as the Native American Advisory Group pointed out, are quite high with respect to sex offenses.[414]

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409. *See* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 21–22 & n.37.

410. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

411. *See* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 23–24 (stating that the PROTECT Act appeared to be passed "without having heard from those most impacted [Native Americans] nor giving any thought to that impact"). Similarly, dissenters criticized a bill in the House that largely mirrored the Adam Walsh Act and created "harsh new mandatory minimum sentences for existing offenses under the Major Crimes Act," without "deliberative consultation with the representatives from the group most affected by the legislation, Native Americans." H.R. REP. NO. 109-218(I), at 256 (2005). Further searches of the Adam Walsh Act's legislative history in Westlaw and Thomas did not indicate that such hearings were ever held.

412. *See* 18 U.S.C.A. § 1153(a) (West Supp. 2007) (amended on July 27, 2006); *see also* S. REP. NO. 109-255, at 5 (2006).

413. *See* S. REP. NO. 109-255, at 5 ("The [Senate] Committee [on Indian Affairs] is concerned that a whole category of crimes against children is going unaddressed. Therefore, an amendment is added to the Major Crimes Act to criminalize acts of child abuse and neglect in Indian Country. This amendment is intended to close the gap that exists in addressing the full range of crimes that may be inflicted on children.").

414. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 21.

c. Unwarranted Sentencing Disparity

i. Concerns About Sentencing "Cliffs" and Similar Defendants Receiving Different Sentences Are Not a Bar to Correcting for Native American Sentencing Disparity

The final argument raised by the Government in *Kimbrough* was that permitting district courts to deviate from the 100:1 crack-powder ratio would result in "unwarranted sentencing disparities" in violation of § 3553(a)(6).[415] The reasons offered by the Court to dismiss the Government's argument similarly address concerns that permitting district court judges to award non-Guidelines sentences to Native Americans frustrates the goal of federal uniformity in sentencing.[416] First, any concerns that consideration of Native American sentencing disparity would result in "cliffs" around statutory minimums is unavailing, based on the Court's express dismissal of the legitimacy of any such concerns in *Neal v. United States*.[417] Similarly, the argument that permitting non-Guidelines sentences to account for Native American sentencing disparity will result in similarly situated defendants receiving different sentences is also unpersuasive. The Court in *Kimbrough* emphasized that this is an inherent cost of the post-*Booker* sentencing scheme and that under § 3553(a)(6), district courts are the body charged with avoiding any unwarranted disparities.[418]

ii. The Underlying Nature of Native American Sentencing Disparity

While, as a general matter, the discussion in *Kimbrough* regarding unwarranted sentencing disparity is similarly applicable in the Native American context, at the same time, the underlying nature of the disparity is different with respect to the crack-powder and Native American issues. To some degree, the underlying cause of the disparity for Native Americans is more akin to fast-track disparity because both are linked by a common concern about the "equality of justice when sentences vary for people based on where they are sentenced."[419] A key

415. Kimbrough v. United States, 128 S. Ct. 558, 573 (2007) (quoting 18 U.S.C. § 3553(a)(6) (2000 & Supp. V 2005)).

416. *Id.* at 573–74.

417. *Id.* at 573 (citing Neal v. United States, 516 U.S. 284 (1996)).

418. *Id.* at 574.

419. United States v. Ossa-Gallegos, 453 F.3d 371, 373 (6th Cir. 2006) (quoting the district court). With respect to fast-track programs, the majority of these programs exist in Southwest border districts. As a result, illegal immigrants caught reentering the United States immediately upon crossing the border are able to take advantage of fast-track programs and

difference exists, however, between Native American sentencing disparity and both fast-track and crack-powder disparities in that, for Native Americans, the disparity is between federal and state sentences, while in the other two circumstances, the disparity is between federal defendants. Although on its face § 3553(a)(6) appears to permit judges to consider disparity between federal defendants, as well as that between federal and state defendants in sentencing,[420] circuit courts, both pre-*Booker*[421] and post-*Booker*,[422] have been nearly unanimous in holding that only a disparity between similarly situated federal defendants could be considered under § 3553(a)(6). This determination was largely premised on the notion that the purpose of the Guidelines, to "'promot[e] uniformity among federal courts when imposing

lighter sentences, while defendants that travel farther away from the border, usually to reunite with family, are slapped with much stiffer penalties. *See* McClellan & Sands, *supra* note 300, at 523–25. As for Native Americans, "major crimes" committed by Native Americans within Indian country are prosecuted in federal court under the Major Crimes Act, while the same crimes committed by Native Americans outside Indian country are under state jurisdiction and prosecuted under state substantive law in state court. *See supra* Part II.A.5. Although geography is the critical factor creating disparity in both cases, fast-track disparity occurs at more of a national level, while Native American sentencing disparity tends to be more local in nature. Federal districts are relatively large in size, with many, like the District of Arizona, encompassing the entire state. As a result, while a district's implementation of a fast-track program may vary district-by-district in the Southwest, for the most part, there is a large, contiguous bloc of the United States where fast-track programs are in place, and a much larger, contiguous bloc of the United States where fast-track programs do not exist. This is not the case for Indian country. With the exception of large reservations like the Navajo Nation, many reservations are relatively small in size and the borders can be relatively arbitrary in nature. *See* Nationalatlas.gov, South Dakota, Federal Lands and Indian Reservations, http://img.search.com/7/72/300px-National-atlas-indian-reservations-south-dakota.gif (last visited April 12, 2008) (showing the reservation borders in South Dakota). As a result, sentencing disparities can exist between local Native American residents, while for the fast-track issue, the disparity exists at a regional level. *See supra* Part II.C.

420. *See* Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 724 (2002).

421. *See id.*; *see also* Smith, *supra* note 40, at 516 n.158.

422. Post-*Booker*, the Sixth and Eighth Circuits have gone the furthest in expressly barring district courts from considering state sentences as a factor in federal sentencing. United States v. Malone, 503 F.3d 481, 486 (6th Cir. 2007) ("[I]t is impermissible for a district court to consider the defendant's likely state court sentence as a factor in determining his federal sentence."); United States v. Jeremiah, 446 F.3d 805, 808 (8th Cir. 2006) ("The District Court was neither required nor permitted under § 3553(a)(6) to consider a potential federal-state sentencing disparity."). The Second, Fourth, Seventh, and Tenth Circuits have all gone at least so far as to say that a district court judge is not required to consider federal-state sentencing disparity. United States v. Johnson, 505 F.3d 120, 124 (2d Cir. 2007); United States v. Wurzinger, 467 F.3d 649, 653–54 (7th Cir. 2006); United States v. Branson, 463 F.3d 1110, 1112–13 (10th Cir. 2006); United States v. Clark, 434 F.3d 684, 687–88 (4th Cir. 2006).

sentences for federal crimes,'" would be undermined if federal sentences were then altered to account for federal-state disparity.[423] This general bar on consideration of federal-state disparity under § 3553(a)(6), however, should not apply with respect to Native American sentencing disparity.

(a) Considering Federal-State Disparity in the Native American Context Does Not Question Prosecutorial Discretion

In addition to a broad concern about uniformity among federal sentences, one of the main reasons courts have been resistant to permitting consideration of federal-state disparity in federal sentencing is the concern that this conflicts with prosecutorial discretion. For example, the First Circuit, in *Snyder*, rejected federal-state disparity as a valid consideration under § 3553(a)(6), based upon the notion that doing so would "'impinge impermissibly upon the Executive Branch's discretion to prosecute defendants under federal law.'"[424] Although Native American sentencing disparity is the result of federal-state disparity, the issue does not raise the same concerns regarding impingement upon the Executive Branch's discretion cited by *Snyder*. The situation in *Snyder*, and nearly all challenges to federal-state disparity that do not involve Native American defendants, is that charges can be brought against the defendant in either state or federal court.[425] The court in *Snyder* ruled that, in such situations, it was inappropriate for a court to question a federal prosecutor's decision to prosecute rather than leaving the matter to state authorities.[426] These concerns do not arise with respect to Native American prosecution under the Major Crimes Act. When a Native American commits a major crime in Indian country, he is only subject to federal prosecution.[427] Therefore, if a court were to consider federal-state sentencing disparity in its sentencing of a Native American under the

423. O'Hear, *supra* note 420, at 738 (quoting United States v. Snyder, 136 F.3d 65, 69 (1st Cir. 1998)). In *Snyder*, the court also reasoned that the Commission had sufficient knowledge of overlapping state and federal jurisdiction, and that such departures would "impinge impermissibly upon the Executive Branch's discretion to prosecute defendants under federal law." *Snyder*, 136 F.3d at 70 (citation omitted).

424. *Snyder*, 136 F.3d at 70.

425. *See Snyder*, 136 F.3d at 66 (showing that Massachusetts authorities initially charged Snyder with unlawfully carrying a firearm but dropped the charge when a federal grand jury indicted Snyder).

426. *See id.* at 70.

427. Although tribes exercise concurrent jurisdiction, they are subject to the limitations of the Indian Civil Rights Act. *See supra* Part II.A.5.

Major Crimes Act, the court would not be calling into question the United States Attorney's decision to prosecute the defendant rather than leave the matter to state authorities. This fact sets Native American sentencing disparity apart from other cases of federal-state sentencing disparity by avoiding the concern that correcting for such disparity tramples upon prosecutorial discretion.[428]

(b) It Is Appropriate to Single out Native Americans for "Particular and Special Treatment"

It is also appropriate for district courts to consider federal-state sentencing disparity for Native Americans under § 3553(a)(6) because of Indian tribes' "unique legal status . . . under federal law."[429] The Constitution vests Congress with the authority to "single[] Indians out as a proper subject for separate legislation,"[430] with treaties and the "guardian-ward" relationship also permitting Congress to legislate on federally recognized tribes' behalf.[431] Because of this unique relationship, the Supreme Court, "[o]n numerous occasions . . . specifically has upheld legislation that singles out Indians for particular and special treatment."[432] In contrast to cases involving illegal aliens, as

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428. *See* DeMaso, *supra* note 4, at 2121–22. In this note, DeMaso contends that federal courts should consider federal-state disparity at sentencing, unless "the prosecution can offer legitimate reasons why the disparity in this case should not be considered, or if there is a uniquely federal injury that must be vindicated, or when the state courts cannot adequately prosecute." *Id.* at 2125 (footnote omitted). With respect to these issues, disparity should be considered when sentencing Native Americans because crimes under the Major Crimes Act are not uniquely federal crimes, and instead typically fall under the state's police powers; the injury is not a unique federal injury, rather, federal jurisdiction is a product of the crime occurring in Indian country and the defendant being Indian. Although the state courts cannot adequately prosecute the Indian defendant, states are adequately able to prosecute the offenses in the Major Crimes Act, and indeed do so in cases involving a non-Indian defendant and non-Indian victim in Indian country. Therefore, under this framework, courts should be permitted to consider federal-state disparity when sentencing Native American defendants.

429. Morton v. Mancari, 417 U.S. 535, 551 (1974).

430. *Id.* at 552 (citing U.S. CONST. art. I, § 8, cl. 3, which gives Congress authority to regulate commerce with Indian tribes.).

431. *Id.* at 551.

432. *Id.* at 554–55 (citing Bd. of County Comm'rs v. Seber, 318 U.S. 705 (1943) (federally granted tax immunity); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, (1973) (federally granted tax immunity); Simmons v. Eagle Seelatsee, 384 U.S. 209 (1966), *aff'g* 244 F. Supp. 808 (E.D. Wash. 1965) (statutory definition of tribal membership, with resulting interest in trust estate); Williams v. Lee, 358 U.S. 217, (1959) (tribal courts and their jurisdiction over reservation affairs); *cf.* Morton v. Ruiz, 415 U.S. 199, 228–29 (1974) (federal welfare benefits for Indians "on or near" reservations)). In *Morton*, the Court relied upon this unique relationship as the basis for upholding an employment preference in the Bureau

is the case with fast-track disparity, where the question is whether such aliens are entitled to the same rights and protections as other United States' citizens,[433] cases involving Native Americans' unique legal status have generally concerned whether Native Americans are entitled to special rights and protections beyond those provided to other citizens.[434] Therefore, while Congress's ability to single out Native Americans is used as a justification for the unique criminal jurisdiction arrangement over Indian country,[435] Native Americans' "unique legal status" also provides an additional basis for considering federal-state sentencing disparity with respect to Native American defendants.[436]

Tempering to some degree, however, the argument that such disparity should be considered due to Native Americans' "unique legal status" is the notion that Native American defendants must take the bitter with the sweet. Tribal sovereignty is a fundamental issue for Native American tribes, and the current criminal jurisdiction arrangement over Indian country is the result of tribes' status as "domestic dependent nations," whereby tribes are under the trust of the United States, but not subject to state laws.[437] Therefore, the federal government's exclusive criminal jurisdiction over major crimes committed by Native Americans in Indian country is a product of the United States' recognition of tribal sovereignty. It is important to

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of Indian Affairs for hiring Indians in the face of a challenge under the Equal Employment Opportunity Act of 1972. *See Morton*, 415 U.S. at 199, 238.

433. Although illegal aliens are "persons" entitled to due process under the Fifth and Fourteenth Amendments, Plyler v. Doe, 457 U.S. 202, 210 (1982) (citing Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953)), they are not a "suspect class" for equal protection purposes, *Mezei*, 345 U.S. at 219 n.19, and the Supreme Court has noted that "[p]ersuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct," *id.* at 219. Based on this categorization, cases concerning illegal aliens' rights often occur in the context of whether illegal aliens are to be afforded the same rights and privileges as other United States citizens. *See, e.g.*, *Plyer*, 457 U.S. at 210–11 (finding a Texas statute restricting educational access and funding for children of illegal aliens as violative of the Equal Protection Clause).

434. In *Morton v. Mancari*, 417 U.S. at 554–55, the Supreme Court discussed how "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment." *See supra* note 432.

435. *See* United States v. Antelope, 430 U.S. 641, 648–49 (1977).

436. It should be noted that past statements by the Supreme Court affirming Indian tribes' "unique legal status . . . under federal law" have been limited to upholding the permissibility of federal regulations and legislation "aimed solely at tribal Indians." *Id.* at 649 n.11 (emphasis omitted). As a result, it appears to be a somewhat open question as to whether a court, on its own, could "single[] out Indians for particular and special treatment." *See Mancari*, 417 U.S. at 554–55.

437. *See supra* Part II.A.

remember that due to Public Law 280, six states possess full criminal jurisdiction over crimes committed by Native Americans in Indian country.[438] In those states, Native Americans do not suffer any of the disparities discussed in this Article and they are instead subject to the same state sentences as any other defendant. Congress amended Public Law 280 to include a tribal consent clause, whereby states could assume Public Law 280 jurisdiction with tribal consent.[439] Although the federal government would maintain concurrent criminal jurisdiction in these "optional" states,[440] if tribes were overwhelmingly concerned with the federal-state sentencing disparity experienced by Native Americans under the Major Crimes Act, tribes could submit to concurrent state criminal jurisdiction. Tellingly, Public Law 280's expansion has been "largely halted" since tribal consent has been required.[441] This can largely be attributed to tribal resistance towards submitting to state jurisdiction,[442] likely coupled with tribal reluctance to cease operation of its own tribal criminal justice system.[443]

Therefore, while Native Americans convicted under the Major Crimes Act are generally subject to harsher sentences than similar defendants sentenced in state court, tribes have the option to reduce this disparity by submitting themselves to concurrent state criminal jurisdiction under Public Law 280. While it is unsurprising that tribes are unwilling to voluntarily surrender their sovereignty on this front, an argument can be made that Native Americans must then take the bitter with the sweet—in this case, higher sentences for violations of federal, rather than state, law. This does not mean that it becomes per se unreasonable for a judge to reduce such disparity in sentencing a Native American defendant. A similar issue, for example, has arisen in fast-track districts, where in order for defendants to qualify for a downward departure under the fast-track program, they must give up their right to challenge their conviction, something which the defendant in *Ossa-*

438. *See Supra* Part II.A.3.

439. CANBY, *supra* note 26, at 253 (citing 25 U.S.C.A. §§ 1321(a), 1322(a)).

440. *Id.* at 236. Concurrent federal and state jurisdiction is unique to the optional states. In the mandatory states, criminal jurisdiction is exclusively with the states. *See id.*

441. *Id.* at 253. The only state to obtain such consent was Utah, but Utah bound itself to retrocede Public Law 280 jurisdiction whenever requested by a tribe. *Id.* (citing UTAH CODE ANN. § 63-36-15 (renumbered as UTAH CODE ANN. § 9-9-207 (2007))).

442. *Id.* at 233.

443. *See id.* at 237. Although tribes may maintain their inherent criminal jurisdiction even when subject to Public Law 280, the practical effect of Public Law 280 is the end of tribal criminal jurisdiction, whether due to a lack of need or a lack of resources to maintain a separate criminal justice system. *Id.*

Gallegos did not have to do as part of his plea agreement. In that case, the Sixth Circuit determined that since Ossa-Gallegos was not "similarly situated" to those defendants pleading under a fast-track program, it was reasonable for the district court not to fully eliminate the sentencing disparity.[444] Similarly, this bitter with the sweet argument presents a reason why it may be reasonable for district courts to reduce, rather than fully eliminate, Native American sentencing disparity.

(c) The Courts Are the Proper Body to Address Native American Sentencing Disparity

An additional reason for permitting judges to account for Native American sentencing disparity is that the Judiciary is the branch of government best suited to address this issue. As the Court stated in *Kimbrough*, "Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities," including any potential disparities caused by deviation from a strict adherence to the crack-powder ratio.[445] Thus, similar concerns that non-Guidelines sentences for particular Native Americans would cause disparity among federal defendants is an issue for district courts to resolve. Moreoever, in light of the institutional strengths of the respective branches of government, the Judiciary is the proper branch to address and resolve Native American sentencing disparity. Unlike fast-track disparity, which arises from the Attorney General's authorization of fast-track districts, Native American disparity is the product of a quirk surrounding criminal jurisdiction in Indian country. To the extent this disparity can be characterized as a jurisdictional matter, courts have a special interest in the issue and are functionally well-adapted to resolving the matter.[446] Furthermore, not only does this issue fall within the Judiciary's expertise, but the matter does not create separation of powers concerns with the other branches. Congress properly set forth the general jurisdictional scheme for Indian country but has not authoritatively spoken to the resulting sentencing disparity.[447] In addition, Native American sentencing disparity is not intertwined with easing

444. United States v. Ossa-Gallegos, 453 F.3d 371, 375 (6th Cir. 2006).

445. Kimbrough v. United States, 128 S. Ct. 558, 574 (2007).

446. *See* Shapiro, *supra* note 247, at 574 (arguing that "courts are functionally better adapted to engage in the necessary fine tuning than is the legislature" regarding the question of whether a court must exercise jurisdiction, and that "questions of jurisdiction are of special concern to the courts because they intimately affect the courts' relations with each other as well as with the other branches of government").

447. *See supra* Part III.B.2.

prosecutorial administrative burdens, as it is in the fast-track case, nor as discussed, does it impinge upon prosecutorial discretion as do most cases of federal-state sentencing disparity.[448]

2. Deviating from the Sentencing Guidelines

In light of *Kimbrough*, it appears that Congress has not barred district court judges from considering Native American sentencing disparity. Although Congress has not put up such a bar, it is still necessary to explore under what circumstances it would be appropriate for a district court judge to deviate from the Guidelines when sentencing a Native American defendant.[449] This largely depends upon the degree to which the Guidelines accurately reflect the § 3553(a) sentencing factors in a given case.[450] Therefore, if the sentencing of Native American defendants falls "outside the 'heartland'" of cases for which the Commission intended the Guidelines to apply, a non-Guidelines sentence should be given more deference.[451]

The Eighth Circuit's *Big Crow* line of cases can largely be viewed in the context of this "outside the heartland" analysis. As discussed earlier, however, that line of cases, awarding downward departures solely on the basis of a Native American defendant's ability to show resilience in the face of the many obstacles associated with reservation life, is in clear conflict with the SRA's requirement of neutrality with respect to race, sex, national origin, creed, religion, and socio-economic status.[452] In contrast, this Article's approach, basing a non-Guidelines sentence on the peculiarities of criminal jurisdiction over Indian country, is also available to non-Indians and therefore does not run afoul of the Sentencing Reform Act's ban on considering race, sex, national origin, creed, religion, and socio-economic status.[453] This is because, while federal criminal jurisdiction over Indian country primarily impacts Native American defendants, non-Indians prosecuted under the General Crimes Act are subject to the same federal-state sentencing disparity as Indians prosecuted pursuant to the Major Crimes

448. *See supra* Part V.A.2.; DeMaso, *supra* note 4, at 2121–22 (discussing, and ultimately dismissing, criticism that judicial correction for federal-state disparity impinges upon unreviewable prosecutorial discretion).

449. *See Kimbrough*, 128 S. Ct. at 574–75.

450. *See id.*

451. *See id.*

452. *See* 2005 GUIDELINES MANUAL, *supra* note 7, § 5H1.10; *see also supra* Part III.A.3.; *supra* Part III.B.1.a.

453. *See* 2005 GUIDELINES MANUAL, *supra* note 7, § 5H1.10.

Act, and as such they can argue for downward departures to correct for this disparity.[454]

Similar to the circumstances in *Kimbrough*, it is relatively clear that district courts could reasonably determine that a within-Guidelines sentence for a defendant committing an offense within Indian country "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."[455] This is because, as was the case with respect to the crack-powder ratio, the Sentencing Commission has expressly voiced concerns over the Guidelines' impact on Native Americans. The Sentencing Commission formed the Native American Advisory Group, charging it to "'[c]onsider any viable methods to improve the operation of the Federal Sentencing Guidelines in their application to Native Americans under the Major Crimes Act.'"[456] Furthermore, the Group's formation was largely predicated upon "testimony . . . that there was a perception among members of the Native American community that they are sentenced more harshly under the Federal Sentencing Guidelines than they would be if prosecuted by their states."[457] The Group focused its attention on manslaughter, sexual abuse, and aggravated offense—three offenses that disproportionately affect Native Americans.[458]

Although the Group's recommendation with respect to manslaughter was premised on concerns regarding the prevalence of drunk driving in Indian country and was not informed by sentencing disparity,[459] the Group candidly addressed the disparity issue with respect to sexual abuse offenses and aggravated assault.[460] With respect to sexual abuse offenses, the Group directly acknowledged that Native Americans were disproportionately affected by the generally longer federal, as opposed to state, sentences for sexual abuse.[461] The Group

454. The arguments to correct for this sentencing disparity for non-Indians prosecuted pursuant to the General Crimes Act are not identical to those for Indians under the Major Crimes Act. For example, Congress has not expressed concern for disparate sentencing for non-Indians, and only Indians are permitted to be singled out for particularized treatment under federal law. Some arguments do cut in favor of reducing non-Indian sentencing disparity, namely that non-Indians cannot be criticized for needing to accept the bitter with the sweet.

455. *Kimbrough*, 128 S. Ct. at 575.

456. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 11 (alteration in original).

457. *Id.* at 10–11.

458. *Id.* at i.

459. *Id.* at 16–18.

460. *Id.* at 21–25.

461. *Id.*

further noted that the PROTECT Act, which had just been passed at the time, only increased this disparity, would "dramatically affect Native Americans more than other persons," and was passed without Congress considering the law's impact on Native Americans.[462] The Group's ultimate recommendation on this front was to separate in the Guidelines "travel offenses" from those that primarily target Native Americans.[463] Although it was intended that this approach would "indirectly reduce the sentencing disparity," the Group acknowledged that separating out travel offenses would "not decrease the present disparity between federal and state sentences."[464] In contrast to the approach taken for sexual abuse offenses, the Group's recommendation with respect to aggravated assault was aimed directly at reducing federal-state sentencing disparity, although the Group conceded that its proposed reduction under the Guidelines was "a conservative approach" based on the lesser disparity observed in South Dakota as opposed to New Mexico.[465]

These recommendations by the Group for sexual abuse offenses and aggravated assault, coupled with the Sentencing Commission's partial adoption of these recommendations, reflect an implicit acknowledgement on the Sentencing Commission's part that the Guidelines, when applied to Native Americans, do not reflect the purposes of sentencing under § 3553(a). Thus, as in *Kimbrough*, a district court judge, particularly with respect to these two offenses, would not be overstepping his authority in finding that a within-Guidelines sentence was "'greater than necessary' to achieve § 3553(a)'s purposes"[466] when sentencing a Native American defendant. This is particularly true since, even in cases such as aggravated assault, where the Group recommended[467] and the Commission partially adopted, a modest sentence reduction in the Guidelines to account for sentencing disparity, such a change in the Guidelines still fails to account for the specific disparity that varies from state to state. Therefore, while the Commission has acknowledged concern about Native American sentencing disparity, because such disparity varies on a state-by-state basis, district court judges, rather than the Commission operating at a

462. *Id.* at 23–24.
463. *Id.* at 25–26.
464. *Id.*
465. *Id.* at 33–34.
466. Kimbrough v. United States, 128 S. Ct. 558, 575 (2007).
467. NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 33–34.

national level, are best equipped to address this issue. As a result, just as with the crack-powder ratio, district courts are not barred per se from considering Native American sentencing disparity at sentencing.

B. Crafting Reasonable Sentences That Take Account of Native American Sentencing Disparity

Given that it is within a sentencing court's discretion to consider Native American sentencing disparity, for the reasons just discussed, the remaining issue is how district courts are to consider this disparity in crafting a reasonable sentence. Recent decisions by the Supreme Court in *Rita*, *Gall*, and *Kimbrough* helped clarify district and appellate courts' roles and responsibilities in sentencing, with *Kimbrough*'s discussion being most directly applicable to the issue of sentencing Native American defendants. By following these guideposts from the Supreme Court and noting some of the factors considered by the Sixth Circuit in the fast-track context, district courts can award reasonable sentences that account for Native American sentencing disparity.

The first step for any district court is to calculate the applicable Guidelines range.[468] After this, the district court is then to consider the relevant § 3553(a) factors in the case.[469] Under this approach, concern regarding Native American sentencing disparity is but one of many factors district court judges are to consider at sentencing,[470] with § 3553(a)(1), for example, instructing district courts to consider "the

468. *See Kimbrough*, 128 S. Ct. at 575; Gall v. United States, 128 S. Ct. 586, 596 (2007) (citing Rita v. United States, 127 S. Ct. 2456, 2465 (2007)).

469. *Kimbrough*, 128 S. Ct. at 575; *Gall*, 128 S. Ct. at 596–97.

470. District courts' charge to consider all relevant § 3553(a) factors also played a part in *United States v. Ossa-Gallegos*, where the Sixth Circuit emphasized that it was reasonable for the lower court departure not to fully eliminate the fast-track disparity because the court considered other factors in its departure, such as the "aberrational nature" of the defendant's prior crime in comparison to his conduct since reentering the United States. 453 F.3d 371, 373, 375 (6th Cir. 2006). Furthermore, many courts have relied on the fact that the need to avoid sentencing disparities is only one of the relevant factors under § 3553(a) as the basis for holding that a within-Guidelines sentence is not unreasonable solely due to the existence of fast-track disparity. In another Sixth Circuit case, for example, the court stated:

> The district court balanced the need to avoid sentencing disparities with those sentences in fast-track districts with the need, in this case, to protect the public and impress upon defendant and others the importance of obeying the laws of the United States. In so balancing the 18 U.S.C. § 3553(a) factors, the court appropriately addressed defendant's sentencing disparity concerns.

United States v. Hernandez-Fierros, 453 F.3d 309, 314 (6th Cir. 2006); *see also* Part V.2.b.

nature and circumstances of the offense and the history and characteristics of the defendant."[471] The issue of Native American sentencing disparity, however, can be directly addressed in § 3553(a)(6), and furthermore, § 3553(a)(5) instructs the court to consider Sentencing Commission reports, under which it may be permissible to reference the report by the Native American Advisory Group.[472]

Importantly, the Court in *Kimbrough* emphasized that a finding that unwarranted sentencing disparity exists with respect to the 100:1 crack-powder ratio did not give a district court the authority to make a policy determination as to what an appropriate ratio would be.[473] Thus, courts seem to be similarly barred from crafting a per se rule as to how federal-state disparity for Native American defendants should be resolved. Instead, the final sentence, bearing in mind the unwarranted sentencing disparity, is to be framed in accord with § 3553(a)'s general charge that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553(a)(2)]."[474]

In determining a defendant's sentence, § 3553(a)(2) requires a district court judge to consider:

> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[475]

A court seeking to reduce the disparity between federal and state

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471. 18 U.S.C. § 3553(a)(1) (2000 & Supp. V 2005).

472. *See Kimbrough*, 128 S. Ct. at 575 (discussing how the district court "alluded to the Sentencing Commission's reports criticizing the [100:1] ratio, noting that the Commission 'recognizes that crack cocaine has not caused the damage that the Justice Department alleges it has'") (citations omitted).

473. *See id.*

474. 18 U.S.C. § 3553(a) (2000 & Supp. V 2005); *see also Kimbrough*, 128 S. Ct. at 575.

475. 18 U.S.C. § 3553(a)(2) (2000 & Supp. V 2005).

sentences may therefore frame its discussion in terms of the state sentence's ability to adequately meet the requirements of § 3553(a)(2). Additionally, a lower court can also use § 3553(a)(2) to show that a within-Guidelines sentence fails to adequately consider the impact a particular offense has within the local Native American community.

This focus on the factors in § 3553(a)(2) raises an important question as to how much a district court judge's focus on issues such as promoting respect for the law, providing deterrence, and the like can be assessed in terms of the crime and the sentence's impact on the local Native American community, rather than the United States at large. The Second Circuit has addressed this issue directly, in light of sentences by Judge Sifton, a senior judge in the Eastern District of New York, who has written two opinions reflecting that this consideration of a crime's impact on the local community can justify a non-Guidelines sentence, even when a concern about unwarranted sentencing disparities is not at issue in a particular case.[476] In these cases, which concerned gun crimes in New York City, Judge Sifton agreed that "subjective considerations such as 'local mores' or feelings about a particular type of crime may not be an appropriate basis for granting a Guidelines departure or a non-Guidelines sentence," but he argued that it was appropriate, post-*Booker*, for courts to consider whether "the crime will have a greater or lesser impact given the locality of its commission" in sentencing a defendant.[477] He contended that this was distinct from accounting for unwarranted sentencing disparity under § 3553(a)(6).[478] In these cases, Judge Sifton concluded that he could consider departing upward to apply a harsher sentence, similar to that which existed for New York state defendants, not to correct for federal-state sentencing disparity, but rather based upon objective facts that gun trafficking has a more serious impact on New York City than is reflected under the Federal Sentencing Guidelines.[479]

The Second Circuit rejected Judge Sifton's analysis, holding "that the district court erred in its analysis under factor (a)(2) by sentencing [the defendant] on the basis of a policy judgment concerning the gravity of firearms smuggling into a heavily populated area, like New York City, rather than on circumstances *particular* to the individual defendant

476. United States v. Paul, CR-05-383 (CPS), 2006 U.S. Dist. LEXIS 31198, at *11-13 (E.D.N.Y. May 8, 2006); United States v. Lucania, 379 F. Supp. 2d 288, 293-96 (E.D.N.Y. 2005).

477. *Lucania*, 379 F. Supp. 2d at 296.

478. *See id.*

479. *Paul*, 2006 U.S. Dist. LEXIS 31198, at *16 n.4.

and his crime."[480] Despite this rebuke of Judge Sifton's methodology, the Second Circuit stated that "[w]e do not decide that consideration by a sentencing court of population density or similar community-based factors is impermissible in all cases," but noted that "the circumstances under which a district court can base a sentence on such factors in a manner that is both compatible with the § 3553(a) factors and in keeping with its judicial role will arise infrequently."[481]

Based on the Second Circuit's discussion of this issue, district courts will need to strike a careful balance between discussing the unique impact particular crimes and sentences have on Indian country, while at the same time, ensuring that such a discussion continues to focus on the particular defendant in that case, which is the area of the court's expertise. It is worth noting that the Eighth Circuit has already implicitly approved of this sentencing technique in the Native American context post-*Booker*. In *United States v. Plumman*,[482] the Eighth Circuit affirmed Judge Kornmann's[483] resentencing of a Native American defendant in the wake of *Booker* to 384 months imprisonment and five years supervised release for sexual abuse and aggravated sexual abuse of two minor females.[484] At resentencing, the Government asked the judge to reimpose a life sentence in accord with the Federal Sentencing Guidelines, while the defendant asked for 180 months imprisonment.[485] Judge Kornmann, although noting that "there was no basis for a traditional downward departure, . . . granted a variance to 384 months[] imprisonment, noting several 18 U.S.C. § 3553(a) factors."[486] Unfortunately, this sentencing transcript is unavailable, but the appellate court noted that, at sentencing, Judge Kornmann "commented about the level of violence and risks to Native American women and children on South Dakota reservations."[487] The Eighth Circuit affirmed

480. United States v. Cavera, 505 F.3d 216, 222 (2d Cir. 2007) (citation omitted).

481. *Id.* at 224.

482. 188 F. App'x 529 (8th Cir. 2006).

483. Judge Kornmann has been an outspoken critic of the Federal Sentencing Guidelines' impact on Native Americans. *See* Kornmann, *supra* note 8 and accompanying text.

484. Judge Kornmann originally sentenced the defendant to life imprisonment on some counts and 180 months on others. *Plumman*, 188 F. App'x at 529. The Eighth Circuit affirmed the convictions and the 180-month sentences, but vacated and remanded the life sentences due to *Booker*. *Id.* On remand, Judge Kornmann sentenced Plumman to 384 months imprisonment and five years supervised release, to be served concurrently. *Id.*

485. *Id.* at 530.

486. *Id.*

487. *Id.*

the sentence as reasonable, noting that the record indicated that the sentencing judge had considered the § 3553(a) factors, and furthermore, disagreeing with the defendant's contention that "the court's expression of concern about the violence on Indian reservations in South Dakota shows the court gave significant weight to an improper or irrelevant factor."[488]

The Eighth Circuit's approval of the impact of crime on a reservation being a relevant sentencing factor mirrors, to some degree, Judge Sifton's discussion of the use of § 3553(a)(2), and is distinct from the Eighth Circuit's departure ground in *Big Crow* and its progeny.[489] *Plumman*, however, underscores a tension between concern regarding Native American sentencing disparity and consideration of a crime's impact on the local Native American community—that because crime often has a greater impact on Native American reservations than the United States at large, § 3553(a)(2) may often cut in favor of an upward, rather than a downward, variance from the Guidelines.[490] In light of this fact, *Plumman* is interesting in that the judge expressed concern about the high level of violence on South Dakota reservations, but the ultimate sentence was below the Guidelines' range.[491]

In general, consideration of § 3553(a)(2) with respect to a particular Native American defendant in Indian country will most strongly favor a downward variance for that defendant when the underlying crime's effect on Indian country is less than that for the rest of the nation. For example, federal penalties for possessing child pornography, which were greatly enhanced under the PROTECT Act, could be lessened for Native American defendants because this is not a highly prosecuted crime in Indian country.[492] Furthermore, factors mitigating in favor of an upward variance may be offset to some degree by § 3553(a)(2)(A)'s requirement that the sentence "promote respect for the law,"[493] something that, according to the Native American Advisory Group, has been inhibited by disproportionately harsh federal sentences.[494] Moreover, § 3553(a)(2) may also be important independent of § 3553(a)(6)'s requirement to avoid "unwarranted sentencing disparities" in circuits that may reject the notion that federal-state

488. *Id.*
489. *See supra* Part III.B.1.a.
490. *Plumman*, 188 F. App'x at 529–30.
491. *See id.*
492. *See* NATIVE AMERICAN ADVISORY GROUP, *supra* note 1, at 24 n.42.
493. 18 U.S.C. § 3553(a)(2)(A) (2000 & Supp. V 2005).
494. *Id.* at 10–11.

sentencing disparity, even in the Native American context, is unwarranted. Although the tension between § 3553(a)(2) and § 3553(a)(6) is largely what caused the Second Circuit to vacate the sentence in *Cavera*,[495] *Plumman* itself is an example of the ability to use § 3553(a)(2) to run around § 3553(a)(6),[496] since the Eighth Circuit, which has a high number of Native American cases, has thus far placed a bar on considering federal-state disparity under § 3553(a)(6) post-*Booker*.[497]

While an emphasis on the factors listed in § 3553(a)(2) may seemingly, in some circumstances, call for an upward, rather than downward variance from the Guidelines, in light of *Gall*, it is clear that this determination is one for the district court to make. *Gall* held that regardless of the sentence imposed, appellate courts are to review the sentence under an abuse of discretion standard, "giv[ing] due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."[498] Despite the uniform application of the abuse of discretion standard, however, the Court also determined "that a major departure should be supported by a more significant justification than a minor one."[499] Therefore, arguments to eliminate Native American sentencing disparity will be most compelling when a consideration of § 3553(a)(2) also indicates that a particular crime is not an overly serious concern in Indian country. Likewise, in circumstances where a crime particularly plagues Native American communities, a minimal reduction in the sentence from that recommended in the Guidelines, in order to account for Native American sentencing disparity, will be more likely to withstand appellate scrutiny. By following the guideposts discussed in this section, district courts should be able to craft reasonable sentences that help correct, even if they do not fully reduce, Native American sentencing disparity.

VII. CONCLUSION

As a result of Indian tribes' unique status as "domestic dependent nations," crime in Indian country is governed by a complex intersection

495. United States v. Cavera, 505 F.3d 216, 221, 225 (2d Cir. 2007).

496. *Plumman*, 188 F. App'x at 530.

497. *See* United States v. Jeremiah, 446 F.3d 805, 808 (8th Cir. 2006) ("Unwarranted sentencing disparities among federal defendants remains the only consideration under § 3553(a)(6)—both before and after *Booker*.").

498. Gall v. United States, 128 S. Ct. 586, 597 (2007).

499. *Id.*

of federal, state, and tribal jurisdiction, with the end result that Native American defendants committing crimes in Indian country are prosecuted under federal, rather than state, law. One unintended consequence of this jurisdictional arrangement is that Native Americans are subjected to disproportionately harsher sentences because federal offenses typically carry stiffer penalties than corresponding state sentences. This sentencing disparity was only exacerbated by the Federal Sentencing Guidelines, which greatly restricted judicial discretion to correct for this disparity.

A wide range of solutions have been offered to address the unique issues surrounding the sentencing of Native American defendants under the Federal Sentencing Guidelines. Systemically reducing the level of sentencing disparity for Native Americans would require either substantial revision to the Federal Sentencing Guidelines or modification of the Major Crimes Act. Unfortunately, the Sentencing Commission's recent attempt to modify the Guidelines in response to concerns from the Native American community only marginally reduced the sentencing disparity for Native American defendants. Similarly, there does not appear to be any indication that Congress will amend the Major Crimes Act to eradicate this disparity anytime in the near future. While those avenues for eliminating Native American sentencing disparity appear closed, judges are able to correct for this disparity on a case-by-case basis, and because this disparity is the product of a jurisdictional quirk, the judiciary is the branch of government best suited to addressing this issue.

Just a few years ago, the likelihood of an appellate court upholding a downward departure to account for Native American sentencing disparity as reasonable would have been marginal at best. However, the Supreme Court's decision in *Booker* that the Federal Sentencing Guidelines are advisory, rather than mandatory, breathed new life into the potential viability of this argument. Although post-*Booker* statistics show that judges are not reducing their sentences for Native American defendants, the post-*Booker* debate surrounding fast-track sentencing disparity and the Supreme Court's recent decision in *Kimbrough* regarding deviation from the 100:1 crack-powder ratio provide a measuring stick by which to gauge the probable success of downward variances based on Native American sentencing disparity being upheld as reasonable.

Downward variances to account for fast-track and crack-powder disparities had largely been met with resistance by the circuit courts, although in the fast-track context, the Sixth Circuit's decision in *Ossa-*

Gallegos showed that such disparity could be a valid consideration at sentencing. While *Ossa-Gallegos* left a glimmer of hope that similar non-Guidelines sentences in the Native American context could similarly withstand appellate scrutiny, the Supreme Court's December 2007 decision in *Kimbrough* regarding the crack-powder disparity provides even greater promise that sentences accounting for Native American sentencing disparity will be upheld as reasonable. The same reasons offered in *Kimbrough* as to why it is not per se unreasonable to consider the crack-powder disparity are similarly applicable in the Native American context—Congress has not barred courts from using its discretion to sentence within the statutory mandatory minimums and maximums, and the Sentencing Commission has expressed concern regarding the Guidelines' treatment of both the crack-powder ratio and the sentencing of Native American defendants.

There is, however, one important characteristic of Native American sentencing disparity that is distinct from that in the fast-track or crack-powder context. This is that, for Native Americans, the disparity is between federal and state sentences, a consideration that has generally been held not to fall within the ambit of § 3553(a)(6)'s requirement that courts consider "unwarranted sentencing disparities." This general refusal by courts to consider such disparity, however, should be inapplicable in the Native American context, given Native Americans' "unique legal status . . . under federal law," the Sentencing Commission's admitted concern about such disparity, the fact that consideration of federal-state disparity in this context does not impinge upon prosecutorial discretion, and the courts' position as the body of government best suited to addressing this disparity.

In terms of how district courts are then to sentence Native Americans, the Supreme Court has made clear that courts are to consider the relevant § 3553(a) factors for that particular case, paying specific attention to the need for sentences to be no greater than necessary to achieve the goals in § 3553(a)(2). Some tension exists however, as to how much this focus on § 3553(a)(2) can stray from a consideration of the particular defendant to a broader consideration of a sentence's impact on the local Native American community, and moreover, whether in some circumstances, such a consideration would cut in favor of awarding an upward, rather than a downward variance from the Guidelines. While these tensions will need to be ironed out by the district and circuit courts, *Kimbrough* at least ensures that such issues are worthy of discussion in the Native American context. This is what makes this Article's proposal for correcting for Native American

sentencing disparity so compelling. While this proposal is not the most far-reaching solution that has been offered for correcting this disparity, it is the most realistic because it draws upon recent attempts by the Supreme Court and circuit courts to define the contours of federal judges' sentencing discretion in the aftermath of *Booker*. It also carries the additional benefits of recognizing that the courts are, in many respects, the proper body for resolving this issue, providing an immediate solution to the problem, and avoiding the judicial game-playing with the Guidelines that is readily apparent in decisions such as *Big Crow*.

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