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Elder Wisdom: Adopting Canadian and Australian Approaches to Prosecuting Indigenous Offenders

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ELDER WISDOM: ADOPTING CANADIAN AND AUSTRALIAN APPROACHES TO PROSECUTING INDIGENOUS OFFENDERS

I. INTRODUCTION

Life can be difficult for members of the United States' Indigenous population.¹ American Indians suffer from substantial socioeconomic hardships,² resulting in disproportionately high rates of crime, victimization, and incarceration.³ When prosecuted in federal and state courts, Indians are often tried by non-Indian juries with a poor understanding of Indian culture.⁴ The trial process is foreign and counter-intuitive to many Indians.⁵ Once in prison, their hair is often cut

¹ SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES, THE CONCEPT OF INDIGENOUS PEOPLES 2 (2004), available at http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc. The United Nations defines Indigenous individuals and communities as "those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them." *Id.*

² "The term 'Indian'" is statutorily defined as "any person who is a member of an Indian tribe." 20 U.S.C. § 4402(4) (2006). An "'Indian tribe'" is "any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or regional corporation . . . , which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 3703(10) (2006). Upon arrival in the Americas, Christopher Columbus called the people he encountered "*una gente in Dios*," which translates to "people of (in) God." Marianne O. Nielsen, *Introduction to the Context of Native American Criminal Justice Involvement*, in CRIMINAL JUSTICE IN NATIVE AMERICA 2, 2 (Marianne O. Nielsen & Robert A. Silverman eds., 2009) [hereinafter Nielsen, *Introduction*] (emphasis omitted). The Spanish word "Indios" comes from this phrase, and the English "Indian" is derived there from. *Id.* Among the American Indian population, most prefer to be called "American Indians" over "Native American[s]." U.S. CENSUS BUREAU, A STATISTICAL ANALYSIS OF THE CPS SUPPLEMENT ON RACE AND ETHNIC ORIGIN 18 (1995), available at <http://www.census.gov/prod/2/gen/96arc/ivatuck.pdf>.

³ See *infra* notes 40–41 and accompanying text (establishing the dismal socioeconomic status of many American Indians).

⁴ See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 747–48 (2006) [hereinafter Washburn, *American Indians*] (asserting that because the Indian population in most state and federal selection districts is small, and because juries are selected from voter registration lists, which seldom contain the names of Indians, the Indian population is poorly represented in juries).

⁵ See Little Rock Reed, *Introduction to THE AMERICAN INDIAN IN THE WHITE MAN'S PRISONS: A STORY OF GENOCIDE* vi, viii (Little Rock Reed ed., 1993) ("When an Indian defendant walks into court, he faces almost an entirely white system. Communication, even with his own counsel, often poses great obstacles." (quoting David Hilligoss, *Racism, Cultural Genocide and the Case of Native American Religious Freedom: Oklahoma State Penitentiary* viii (1987) (unpublished paper))); Megan Lynn Johnson, Note, *Coming Full Circle: The Use of Sentencing Circles as Federal Statutory Sentencing Reform for Native American*

and their freedom to practice their religion is curtailed.⁶ Further, incarcerated Indians are popular targets for discrimination, violence, and hatred.⁷ These circumstances make American Indians poorly suited for participation in the United States' criminal justice system as it currently exists.⁸ As acknowledged by an Indian spiritual leader reflecting upon his experiences with Indians in the criminal justice system, "the needs of Indians are totally different" from the needs of non-Indians.⁹

In contrast with the United States' system of prosecuting Indigenous offenders, the mainstream criminal justice systems of Canada and Australia accord careful consideration to the unique cultural attributes of Indigenous offenders.¹⁰ Sentencing circles utilized by the Canadian government and Indigenous sentencing courts utilized by the Australian

Offenders, 29 T. JEFFERSON L. REV. 265, 265 (2007) ("American courts frequently subject the American Indian offender to unfamiliar and intimidating legal experiences . . .").

⁶ See Oowah Nah Chasing Bear et al., *Glimpses of the Prison Struggle, in THE AMERICAN INDIAN IN THE WHITE MAN'S PRISONS: A STORY OF GENOCIDE*, *supra* note 5, at 73, 73-104 (describing the cutting of incarcerated Indians' hair, which has deep cultural implications for many Indians, and the difficulties faced by incarcerated Indians in practicing their religion). While Christian clergymen are welcome in state and federal prisons, Indian spiritual leaders are often not allowed access to Indian prisoners. *Id.* at 77. This is problematic because spirituality is an integral part of Indian culture and, accordingly, incarcerated Indians "need Native spiritual leaders to talk with." *Id.* Unfortunately, these cultural problems are not going away. See Marianne O. Nielsen, *Canadian Aboriginal Healing Lodges: A Model for the United States*, 83 PRISON J. 67, 86 (2003) [hereinafter Nielsen, *Canadian*] ("Native American culturally based programming is still hard to obtain in many prisons.").

⁷ Chasing Bear et al., *supra* note 6, at 78. At Leavenworth Federal Prison in the 1990s, the prison administration put six Indian prisoners into solitary confinement without providing a reason. *Id.* When the prisoners were released four days later, the administrators still provided no justification for the punishment. *Id.* Then, the administration cancelled the prison's Indian cultural and religious group meetings, once again without reason. *Id.* Discrimination is also a problem in Canadian prisons, where studies in the provinces of Manitoba and Alberta proved that racism was not an isolated incident, "but was endemic in the system itself as it is currently functioning." Bradford W. Morse, *Aboriginal Peoples, the Law, and Justice, in ABORIGINAL PEOPLES AND CANADIAN CRIMINAL JUSTICE* 45, 56 (Robert A. Silverman & Marianne O. Nielsen eds., 1994).

⁸ Chasing Bear et al., *supra* note 6, at 73. American Indians suffer from many of the same disadvantages as do other groups who are at high risk for incarceration, but they also suffer from disadvantages unique to American Indians, including loss of cultural identity, spirituality, and language, and also the loss of self-esteem spurred by the lack of a respected place in American history. Nielsen, *Canadian*, *supra* note 6, at 69. The attributes making American Indians, as well as Canadian and Australian Aboriginals, poor candidates for incarceration are predominantly religiously and culturally based. Chasing Bear et al., *supra* note 6, at 73; see also *R. v. Gladue*, [1999] 1 S.C.R. 688, ¶ 74 (Can.) ("It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders.").

⁹ Chasing Bear et al., *supra* note 6, at 76.

¹⁰ See *infra* Part II.C (discussing the criminal justice systems of Canada and Australia as applied to Indigenous offenders).

government achieve this cultural sensitivity by incorporating cultural advice, guidance, and wisdom from tribal Elders into the prosecutorial process.¹¹ Because of the cultural sensitivity stemming from this practice, the Canadian and Australian methods of prosecuting Indigenous offenders generate positive effects upon not only the offenders, but also upon society as a whole.¹²

The Tribal Law and Order Act of 2010 (“TLOA”) is indicative of the United States’ preference for providing its Indigenous population with high degrees of independence and autonomy.¹³ Indeed, the TLOA increases funds for tribal law enforcement bodies and increases the ability of tribal courts to prosecute Indigenous offenders.¹⁴ The United States’ approach stands counter to the Canadian and Australian approaches to Indigenous prosecution, which assimilate aspects of Indigenous culture into mainstream governmental courts.¹⁵ None of the approaches present a perfect solution; instead, they each offer unique advantages and disadvantages.¹⁶

By incorporating the most beneficial aspects of the Canadian and Australian systems into the TLOA, the resulting Indigenous prosecutorial system would be greatly improved.¹⁷ The most lauded and effective aspect of the Canadian and Australian Indigenous prosecutorial system is the participation of tribal Elders.¹⁸ The most criticized aspect of the United States’ system is the cultural gap inherent in prosecutions

¹¹ See *infra* notes 175–77 and accompanying text (discussing the benefits reaped through the participation of tribal Elders in the prosecutions of Indigenous offenders).

¹² See, e.g., Richard Guillatt, *Justice in Black and White*, WEEKEND AUSTRALIAN MAG. (Oct. 22, 2010), <http://www.theaustralian.com.au/news/features/justice-in-black-and-white/story-e6frg8h6-1225942356421> (reporting that Steelie Morgan, a notoriously violent Aboriginal offender in the Australian state of Victoria, was inspired by his culturally-sensitive sentencing process to completely give up drugs, express remorse for his actions, and travel across the Australian countryside as a drug and alcohol outreach worker).

¹³ See *infra* notes 5–62 and accompanying text (discussing the United States’ historical and modern preference for partial tribal sovereignty).

¹⁴ See *infra* Part II.B.2 (explaining the functionality of the TLOA).

¹⁵ See *infra* notes 98–100 and accompanying text (discussing the assimilation of traditional Indigenous cultural practices into the mainstream judicial processes of Canada and Australia).

¹⁶ See *infra* Part III.A–B (exploring the advantages and disadvantages of the United States’, Canadian, and Australian systems of prosecuting Indigenous offenders).

¹⁷ See *infra* Part IV (proposing amendments to the TLOA designed to incorporate the best aspects of the Canadian and Australian systems of prosecuting Indigenous offenders).

¹⁸ See *infra* notes 175–77 and accompanying text (asserting that the incorporation of tribal Elders into the Indigenous prosecutorial systems of Canada and Australia is the systems’ greatest achievement).

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falling under the jurisdiction of the federal government.¹⁹ Therefore, the TLOA could be substantially improved by the incorporation of provisions allowing tribal Elders to participate in the federal prosecution of American Indians.²⁰

In advocating for the incorporation of such provisions into the TLOA, Part II of this Note explores the legal history and background of the criminal justice systems in the United States, Canada, and Australia as applied to Indigenous offenders.²¹ Then, Part III analyzes the advantages and disadvantages of the American, Canadian, and Australian systems.²² Next, Part IV proposes amendments to the TLOA designed to incorporate the best features of the Canadian and Australian systems.²³ Finally, Part V provides a brief conclusion.²⁴

II. BACKGROUND

Before analyzing the effectiveness of the different Indigenous prosecutorial systems utilized in the United States, Canada, and Australia, a working knowledge of each system is needed.²⁵ First, Part II.A highlights the reasons these three nations prosecute Indigenous offenders differently from non-Indigenous offenders.²⁶ Then, Part II.B examines the criminal justice system in the United States as applied to Indigenous offenders.²⁷ Lastly, Part II.C examines the criminal justice systems in Canada and Australia as applied to Indigenous offenders.²⁸

¹⁹ See *infra* notes 202-07 and accompanying text (asserting that this cultural gap is the most significant problem with the United States' system of prosecuting Indigenous offenders).

²⁰ See *infra* Part IV (proposing amendments to the TLOA based upon the Canadian and Australian practices of allowing tribal Elders to advise judges on the prosecution of Indigenous offenders).

²¹ See *infra* Part II (discussing the United States' system of prosecuting Indigenous offenders, Canada's use of sentencing circles, and Australia's use of Indigenous sentencing courts).

²² See *infra* Part III (analyzing the United States' system of prosecuting Indigenous offenders, Canadian sentencing circles, and Australian Indigenous sentencing courts).

²³ See *infra* Part IV (advocating for the incorporation of the Australian and Canadian practices of allowing tribal Elders to advise judges on culturally-appropriate prosecutions for Indigenous offenders).

²⁴ See *infra* Part V (providing final concluding remarks).

²⁵ See *infra* Part II (providing the framework for the Indigenous prosecutorial systems utilized in the United States, Canada, and Australia).

²⁶ See *infra* Part II.A (providing the reasoning for prosecuting Indigenous offenders differently from non-Indigenous offenders).

²⁷ See *infra* Part II.B (discussing the United States' system of prosecuting Indigenous offenders).

²⁸ See *infra* Part II.C (discussing the Canadian and Australian systems of prosecuting Indigenous offenders).

A. *Reasoning Behind the Unique Indigenous Prosecutorial Systems of the United States, Canada, and Australia*

The United States, Canada, and Australia are comparable in that they are wealthy and highly developed democracies founded by European settlers upon land already inhabited by Indigenous people.²⁹ Today, each nation still maintains significant populations of Indigenous people.³⁰ While each nation relies upon different methods of prosecuting Indigenous criminal offenders, the preferred method of prosecuting Indigenous offenders in each nation is rooted in a desire to preserve and respect Indigenous culture.³¹ This current level of respect for unique Indigenous rights developed as a result of the plight that these nations caused and continue to cause their Indigenous inhabitants.³²

²⁹ See *United States v. Lara*, 541 U.S. 193, 210 (2004) (Stevens, J., concurring) (acknowledging that Indigenous people “governed territory on this continent long before Columbus arrived”); *Mitchell v. Minster of Nat’l Revenue*, [2001] 1 S.C.R. 911, ¶ 9 (Can.) (“Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures.”).

³⁰ See U.S. CENSUS BUREAU, NEWSROOM: FACTS FOR FEATURES AND SPECIAL EDITIONS: FACTS FOR FEATURES: AMERICAN INDIAN AND ALASKA NATIVE HERITAGE MONTH: NOVEMBER 2011 (Nov. 1, 2011), available at http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff22.html (last visited Apr. 11, 2012) (according to the most recent available data from the U.S. Census Bureau, 2,475,956 people in the United States identify as American Indian or Alaska Native). The United States’ vast Indigenous population is spread out over 550 distinct tribes and native villages. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 421 (2004) [hereinafter Washburn, *Tribal Courts*]; see also *Chart 1: Population Counts by Aboriginal Identity, 2006*, STAT. CAN., <http://www.statcan.gc.ca/pub/89-645-x/2010001/c-g/c-g001-eng.htm> (last modified June 21, 2010) (according to the 2006 Canadian census, 1,172,785 Canadians identify as Indigenous Canadians); *National Aboriginal and Torres Strait Islander Social Survey, 2008, Population Context*, AUSTRALIAN BUREAU STAT., <http://www.abs.gov.au/ausstats> (last visited Apr. 9, 2012) (follow “Title” Hyperlink; then select “N” hyperlink; then select “National Aboriginal and Torres Strait Islander Social Survey” hyperlink; then select “Population context” hyperlink) (according to the most recent available statistics from the Australian government, 520,350 individuals, or between two and three percent of the general Australian population, are Indigenous Australians).

³¹ See *R v Fernando* [1992] 76 A Crim R 58, 62 (Austl.) (establishing a series of environmental and socioeconomic factors which Australian courts are to consider when prosecuting Indigenous offenders); *R. v. Gladue*, [1999] 1 S.C.R. 688, ¶ 75 (Can.) (requiring Canadian judges to consider the attributes unique to Indigenous culture when prosecuting and sentencing Indigenous offenders); Washburn, *Tribal Courts*, *supra* note 30, at 411 (pointing out that the U.S. Congress entrusts Indian tribes with the authority to prosecute many crimes committed by Indians or upon Indian land).

³² See *R. v. Vanderpeet*, [1996] 2 S.C.R. 507, ¶ 44 (Can.) (holding that current recognition of special rights for Indigenous people exists for “the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions”); Louis F. Claiborne, *The Trend of Supreme Court Decisions in Indian*

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Colonial governments in each nation subjugated many aspects of Indigenous culture.³³ First, the colonizers marginalized the Indigenous population.³⁴ Then, they stereotyped Indigenous people as incompetent and incapable of managing their own affairs.³⁵ Following marginalization and stereotyping, “it became not just the right, but the duty, of such ‘advanced’ Europeans to claim and then exploit [Indigenous] land and all that it had to offer in the way of resources.”³⁶ The colonial governments then enacted justice systems at odds with traditional Indigenous systems of justice.³⁷

Cases, 22 AM. INDIAN L. REV. 585, 587 (1998) (proclaiming that Americans are aware that their government has, for “over two centuries, killed and starved and robbed and cheated the Indian” and that “white Americans feel guilty about the past”).

³³ See Steven J. Gunn, *Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples*, 19 WASH. U. J.L. & POL’Y 155, 158 (2005) (asserting that historically, colonizers have claimed dominion over Indigenous people, land, and resources); Lisa Strelein, *From Mabo to Yorta Yorta: Native Title Law in Australia*, 19 WASH. U. J.L. & POL’Y 225, 227 (2005) (maintaining that superior technology and “the ‘right’ of civilized peoples to cultivate the land” provided justification for the then-British colony of Australia to assert dominion over Aboriginal people and resources); Chief Justice Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 231 (1989) (“[B]efore the [U.S.] federal government imposed its system on [the Navajo Nation], we had no need to lock up wrongdoers.”).

³⁴ BARBARA PERRY, SILENT VICTIMS: HATE CRIMES AGAINST NATIVE AMERICANS 14 (2008). By relegating American Indians to reservations, some commentators argue that the U.S. government marginalized and exploited its Indigenous population more than any other nation:

Related to the exploitation of American Indians and their lands is the marginalization of Native Americans—the process of pushing them to the political and social edges of society. More so than any other American community, American Indians have even been geographically marginalized, first through expulsion into the western frontier, and subsequently by relocation onto reservations or fragmented urban communities.

Id. (emphasis omitted).

³⁵ *Id.* at 15. Once a population is stereotyped, that population can be easily exploited and mistreated by the dominant group: “It is the long-lasting images of Native Americans as savages, as backward, as uncivilized, or as unintelligent that have facilitated the injustice and oppression experience by American Indians.” *Id.*

³⁶ *Id.* at 31.

³⁷ See *R. v. Gladue*, [1999] 1 S.C.R. 688, ¶ 73 (Can.) (holding that European-style criminal prosecution is often inappropriate for Aboriginal offenders because it fails to respond to the needs and perspectives of Aboriginals); U.S. COMM’N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 69 (2003), available at <http://www.usccr.gov/pubs/na0703/na0204.pdf> (maintaining that unlike European systems of justice, “[t]he goal of the Native justice system is to achieve harmony in the community and make reparations”); Nielsen, *Introduction*, *supra* note 2, at 6 (“[Indigenous peoples’] understanding of ‘justice’ was distinctly different from that of the European colonists.”).

A distinct rift continues to exist between Indigenous culture and the culture of the settlers.³⁸ The socioeconomic and criminal justice hardships commonly associated with Indigenous populations are directly linked to this cultural rift.³⁹ Statistical data indicates that the

³⁸ See *R. v. Moses*, [1993] 71 C.C.C. 3d 347, ¶ 91 (Y. Terr. Ct. Can.) (holding that within Canada's criminal justice system, the widespread assumption that Indigenous people share the same values and culture as their European colonizers "has had a disastrous [sic] impact on aboriginal people and their communities"); Bridget McAsey, *A Critical Evaluation of the Koori Court Division of the Victorian Magistrates' Court*, 10 DEAKIN L. REV. 654, 667 (2005) (asserting that Indigenous offenders commonly feel more alienated and fearful than non-Indigenous offenders who come into contact with European systems of justice). When an offender is alienated and confused, the prosecutorial process is ineffective at reforming the offender, and thus becomes "a meaningless exercise." *Id.*; see also Rashmi Goel, *No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases*, 15 WIS. WOMEN'S L.J. 293, 299 (2000) (asserting that much of the socioeconomic strife experienced by Aboriginals and their communities "is generally attributable to [European] colonialism and its effects"); Luke McNamara, *The Locus of Decision-Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines*, 18 WINDSOR Y.B. ACCESS JUST. 60, 61 (2000) (maintaining that the goal of Canada's sentencing circles is "to reverse the colonial pattern of excluding Aboriginal people and values from important decision-making functions with respect to the administration of justice"). Regarding the incarceration of Indigenous offenders:

[Indigenous] prisoners are different from other prisoners at a very basic level because their history is different. Many suffer from disadvantages similar to other prisoners', but they also suffer from additional conditions that they do not often share: the loss of cultural identity, spirituality, language, and the loss of self-esteem that is based in not having a respected place in the history of the colonized country.

Nielsen, *Canadian*, *supra* note 6, at 69.

³⁹ See *Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 5 (2007) (statement of Hon. Jon Tester, U.S. Sen. from Montana) (asserting that the high crime rate, jurisdictional problems, and socioeconomic hardships experienced by American Indians all have the same root cause, and they represent the "crux" of modern Indigenous societal turmoil); S. REP. NO. 111-93, at 1-2 (2009) (reporting that neglect from the federal government and a lack of economic resources "serve to foster reservation violence and disrupt the peace and public safety of tribal communities"); Daniel Kwochka, *Aboriginal Justice: Making Room for a Restorative Paradigm*, 60 SASK. L. REV. 153, 155 (1996) (asserting that socioeconomic distress is "the major cause of [Indigenous peoples'] over-involvement with the [Canadian] criminal justice system"); McAsey, *supra* note 38, at 668 ("[T]he devastating loss of spiritual and cultural identity is a root cause of many problems within [Australia's] Indigenous communities."); PERRY, *supra* note 34, at 54 (asserting that the negative stereotypes of American Indians spurred by European colonization often result in violence and hate crimes). There is a distinct and tangible need to minimize this cultural rift in order to keep Indigenous people out of prison:

[T]he task remains to ensure that the momentum of the Aboriginal courts transforms the relationships that exist between Indigenous and non-Indigenous Australians both in the criminal justice system and also in the broader context of society itself. Failure to do so will perpetuate the cycle of over-representation of Aboriginal offenders in the nation's jails and will certainly spell the end of any dreams for true reconciliation.

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economic development and quality of life of the American Indian population lags behind the general American population in most measurable areas.⁴⁰ Criminal justice among American Indians is also in a state of disarray.⁴¹ Canada's Aboriginal population also suffers from extreme and disproportional socioeconomic hardships in relation to Canada's general population.⁴² These hardships lead to inadequacies in

Mark Harris, *From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?*, 16 CURRENT ISSUES CRIM. JUST. 26, 39 (2004).

⁴⁰ See *Examining S. 797, The Tribal Law and Order Act of 2009: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 11 (2009) (statement of Troy A. Eid, Partner, Greenberg Traurig, LLP) (recognizing the significant public safety gap between Indian country and comparable rural areas in the United States). Only about ten percent of American Indians over the age of twenty-five possess a bachelor's degree or higher. CENSUS 2000 DEMOGRAPHIC PROFILE HIGHLIGHTS: SELECTED POPULATION GROUP: AMERICAN INDIAN AND ALASKA NATIVE. Compare this to over a quarter of the general population. NICOLE STOOPS, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2003, at 1 (2004), available at <http://www.census.gov/prod/2004pubs/p20-550.pdf>. A quarter of American Indians earn an income that places them below the poverty line. U.S. CENSUS BUREAU, *supra* note 30. Compare this to a poverty rate of only about fourteen percent for the general population. Carol Morello, *About 44 Million in U.S. Lived Below Poverty Line in 2009*, *Census Data Show*, WASH. POST, Sept. 16, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/16/AR2010091602698.html>. Additionally, the arrest rate among American Indians for alcohol violations—including drunk driving and public drunkenness—is double that of the general population. STEVEN W. PERRY, U.S. DEP'T OF JUST., NCJ 203097, A BJS STATISTICAL PROFILE, 1992–2002: AMERICAN INDIANS AND CRIME 17 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf>.

⁴¹ See *Examining S. 797, supra* note 40, at 3 (statement of Alonzo Coby, Chairman, Fort Hall Business Council, Shoshone-Bannock Tribes) (“The present status of Indian Country law enforcement has resulted in unsafe communities, victimization of Reservation families, promoted drug trafficking, and has deterred economic development.”). The number of federal and Indian law enforcement officers patrolling Indian country reflects less than half of the officers patrolling comparable rural communities nationwide. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(3), 124 Stat. 2261, 2262 (2010). Consequently, American Indians are the victims of violent crime at a rate over double that of the general population. PERRY, *supra* note 40, at cover page. Additionally, at some point in their lifetimes, over one-third of American Indian women will be raped and over one-third will be the victims of domestic violence. Tribal Law and Order Act § 202(a)(5)(B)–(C). Further, despite representing less than one percent of the American population, American Indians represent well over two percent of the general prison population. PERRY, *supra* note 40, at 21.

⁴² See Canada Act, 1982, c. 11 § 35(2) (U.K.), reprinted in R.S.C. 1985, app. II, no. 44 (Can.) (explaining “[A]boriginal” in Canada is an umbrella term encompassing three main groups of Indigenous people: the First Nations, the Inuit, and the Metis); *Terminology Guide – Indian and Northern Affairs Canada*, LIBR. & ARCHIVES CAN., http://www.collectionscanada.gc.ca/webarchives/20071114225541/http://www.ainc-inac.gc.ca/pr/pub/wf/trmrslt_e.asp?term=12 (last visited Jan. 2, 2011) (stating the use of the term “Indian” is falling out of favor in Canada; and Aboriginal people formerly referred to as “Indian[s]” are now increasingly referred to as “First Nation[s]”); see also *Chart 13: Projected Life Expectancy at Birth by Sex, by Aboriginal Identity, 2017*, STAT. CAN., <http://www.statcan.gc.ca/pub/89-645-x/2010001/c-g/c-g013-eng.htm> (last modified June 21, 2010) (illustrating that the life

the Canadian criminal justice system.⁴³ Even more so than the Indigenous people of the United States and Canada, Indigenous Australians lag far behind their country's general population by all social and economic indicators.⁴⁴ In light of these socioeconomic hardships

expectancy of the Canadian general population is seventy-nine for men and eighty-three for women). However, the life expectancy for the Inuit is sixty-four for men and seventy-three for women, while the life expectancy for the Metis and First Nations is seventy-three for men and seventy-eight for women. *Id.* A quarter of non-Aboriginal Canadian adults between the ages of twenty-five and fifty-four have earned a university degree, compared to only nine percent of the Metis, seven percent of the First Nations, and four percent of the Inuit. *Chart 9: Postsecondary Educational Attainment by Aboriginal Identity, Population Aged 25 to 54, 2006*, STAT. CAN., <http://www.statcan.gc.ca/pub/89-645-x/2010001/c-g/c-g009-eng.htm> (last modified June 21, 2010). In 2006, the employment rate of Aboriginals between the ages of twenty-five and fifty-four was sixty-six percent, compared to eighty-two percent for non-Aboriginals. *Chart 10: Employment Rate by Aboriginal Identity, Population Aged 25 to 54, 2006*, STAT. CAN., <http://www.statcan.gc.ca/pub/89-645-x/2010001/c-g/c-g010-eng.htm> (last modified June 21, 2010). Those Aboriginals who were working had a median annual income eleven thousand dollars less than that of non-Aboriginals. *Chart 11: Median Total Income in 2005 by Aboriginal Identity, Population Aged 25 to 54*, STAT. CAN., <http://www.statcan.gc.ca/pub/89-645-x/2010001/c-g/c-g011-eng.htm> (last modified June 21, 2010). Rates of suicide in Aboriginal communities are roughly two to four times that of the general population. Goel, *supra* note 38, at 297. Stuningly, suicide rates among young Aboriginal people in the province of British Columbia are five times that of the general population. *Id.*

⁴³ See *R. v. Gladue*, [1999] 1 S.C.R. 688, ¶ 67 (Can.) (iterating factors contributing to high Indigenous crime rates as “low income, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation”); see also Hadley Friedland, *Different Stories: Aboriginal People, Order, and the Failure of the Criminal Justice System*, 72 SASK. L. REV. 105, 111 (2009) (asserting that Canada's Aboriginal population is “under-protected and over-policed,” as well as over-incarcerated); Nielsen, *Canadian*, *supra* note 6, at 71 (reporting that Aboriginal Canadians as a group suffer from disproportionately high rates of incarceration).

⁴⁴ See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2009: OVERCOMING BARRIERS: HUMAN MOBILITY AND DEVELOPMENT 12 (2009), available at http://hdr.undp.org/en/media/HDR_2009_EN_Summary.pdf (ranking Australia second in the United Nations' latest Quality of Life Index). Despite Australia's high ranking in the index, the health among Indigenous Australians is worse than that of the people of most Third World countries. Ari Sharp & Tom Arup, *UN Says Aboriginal Health Conditions Worse than Third World*, SYDNEY MORNING HERALD (Dec. 5, 2009), <http://www.smh.com.au/national/un-says-aboriginal-health-conditions-worse-than-third-world-20091204-kay8.html>. Reasons cited by the United Nations for this disparity include discrimination in health care facilities, low levels of education, poor housing and sanitation, and lack of clean drinking water. *Id.* The Aboriginal unemployment rate is triple that of the general Australian population. *National Aboriginal and Torres Strait Islander Social Survey, 2008: Labour Force Status*, AUSTRALIAN BUREAU STAT. (Oct. 30, 2009), <http://www.abs.gov.au/ausstats/abs@nsf/Latestproducts/4714.0Main%20Features92008?opendocument&tabname=Summary&prodno=4714.0&issue=2008&num=&view=.Apr.9> Less than a third of Aboriginals between the ages of twenty and twenty-four have completed secondary school, compared to over three-quarters of non-Aboriginals. *National Aboriginal and Torres Strait Islander Social Survey, 2008: Education*, AUSTRALIAN BUREAU STAT. (Oct. 30, 2009),

and the experience in the United States and Canada, it is not surprising to learn that Australia's Indigenous population is significantly more represented in the Australian criminal justice system than its non-Indigenous population.⁴⁵

Because of the unique circumstances and history of Indigenous populations, laws designed specifically for the benefit of Indigenous people generally do not violate anti-discrimination laws.⁴⁶ The U.S. Supreme Court expressly held that systems singling out and benefiting American Indians do not violate equal protection law.⁴⁷ Additionally, the Supreme Court of Canada allows laws favoring its Aboriginal

<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4714.0Main%20Features82008?opendocument&tabname=Summary&prodno=4714.0&issue=2008&num=&view=Apr.9>

⁴⁵ See Richard Edney, *Opportunity Lost?: The High Court of Australia and the Sentencing of Indigenous Offenders*, 2 INT'L J. PUNISHMENT & SENT'G 99, 120 (2006) (proclaiming that Australia's Indigenous population is "one of the most imprisoned in the world"). In 2008, the national Australian incarceration rate for Aboriginal adults was over two percent, compared to slightly over a tenth of a percent for non-Aboriginal adults. *Indigenous Imprisonment Rates*, AUSTRALIAN INST. CRIMINOLOGY, <http://www.aic.gov.au/publications/current%20series/cfi/181-200/cfi195.aspx> (last modified July 17, 2009). The national Australian incarceration rate for Aboriginal adults was 2,223 prisoners per 100,000 compared to 129 per 100,000 for non-Aboriginal adults. *Id.* In other words, Aboriginals were roughly twenty times as likely to be incarcerated as non-Aboriginal Australians. *Id.* Further, despite representing between two and three percent of the Australian general population in 2008, Aboriginals represented nearly a quarter of the total Australian prison population. *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia: 2008*, AUSTRALIAN HUM. RTS. COMM'N, http://www.hreoc.gov.au/social_justice/statistics/index.html (last visited Apr. 9, 2012).

⁴⁶ See *infra* notes 48-50 and accompanying text (discussing the United States', Canadian, and Australian allowance for laws, which exclusively benefit their Indigenous populations).

⁴⁷ See *Morton v. Mancari*, 417 U.S. 535, 555 (1974) ("[W]here the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process."). *Morton* stands for the proposition that legislation affecting Indians does not constitute racial discrimination in violation of equal protection law. *Id.* at 554. Indeed, *Morton* expressly holds:

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the [Bureau of Indian Affairs], single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Id. at 552.

population.⁴⁸ Australia also allows special treatment for its Indigenous population.⁴⁹

B. The United States' Criminal Justice System as Applied to Indigenous Offenders

Recognizing the need to provide laws tailored to fit the distinct needs of American Indians, the United States utilizes a unique and complicated system of prosecuting Indigenous offenders.⁵⁰ In explaining this system, Part II.B.1 examines the legal history and background of the traditional law regarding Indigenous criminal prosecution in the United States.⁵¹ Part II.B.2 then examines Indigenous prosecution in light of the TLOA.⁵²

1. History and Background of the United States' Criminal Justice System as Applied to Indigenous Offenders

In lieu of the assimilation policies utilized in Canada and Australia,⁵³ the U.S. government allows American Indians and tribes a great deal of independence and autonomy.⁵⁴ Many tribes even maintain their own

⁴⁸ See *R. v. Vanderpeet*, [1996] 2 S.C.R. 507, ¶ 20 (Can.) (recognizing that the Indigenous people of Canada maintain special rights because of their unique place in Canadian history and modern Canadian society). In *Vanderpeet*, the Court held:

[T]he doctrine of aboriginal rights exists, and is recognized and affirmed by [the Canadian Constitution], because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

Id. ¶ 30.

⁴⁹ See McAsey, *supra* note 38, at 683 (explaining that Australia's Indigenous sentencing court system "has been established because Aboriginal people have suffered such a persistent and extended history of abuse, misunderstanding and alienation from the criminal justice system and they are still suffering the ramifications of this today in their overrepresentation in the system").

⁵⁰ See *infra* Part II.B (explaining the United States' system of criminal justice as applied to Indigenous offenders).

⁵¹ See *infra* Part II.B.1 (providing the traditional state of the law regarding Indigenous prosecution in the United States).

⁵² See *infra* Part II.B.2 (explaining the functionality and purposes of the TLOA).

⁵³ See *infra* notes 98-100 and accompanying text (discussing the ways in which Indigenous culture is assimilated into the Canadian and Australian Indigenous prosecutorial systems).

⁵⁴ See *Nat'l Farmers Union Ins. Cos. of Indians v. Crow Tribe*, 471 U.S. 845, 856 (1985) ("Congress is committed to a policy of supporting tribal self-government and self-determination."); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832) ("The Indian nations

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credible and respected judicial systems.⁵⁵ In fact, there are over 250 distinct tribal courts in the United States today.⁵⁶ According to former U.S. Supreme Court Justice Sandra Day O'Connor, tribal courts are valuable tools for the United States' criminal justice system and, "while relatively young, are developing in leaps and bounds."⁵⁷ Tribal court systems are so revered because they maintain distinct advantages over mainstream governmental courts in several areas: They exist in close proximity to the people served; they act quickly, flexibly, and with less formality than state or federal courts; they reflect tribal values; and tribal judges deliberately infuse tribal cultural values into the judicial process.⁵⁸

The United States' preference for a high degree of tribal sovereignty can be seen in several areas.⁵⁹ For example, the U.S. Supreme Court

had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.").

⁵⁵ Washburn, *Tribal Courts*, *supra* note 30, at 420. The U.S. Supreme Court expressly supports tribal justice systems. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987) ("Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." (citation omitted)); see also Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 6 (1997) ("[Tribal] courts have an increasingly important role to play in the administration of the laws of our nation."). Tribal courts are respected because they function as "important mechanisms for protecting significant tribal interests." *United States v. Wheeler*, 435 U.S. 313, 332 (1978); see also COLVILLE TRIBAL CODE 1-2-11 (2008) (mandating that state and federal law should be applied by tribal courts only when tribal law does not provide a remedy); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 287 (1998) (asserting that even when scrutinized, tribal courts "have survived the test"); Tony Mauro, *Justices Tour Tribal Courts: Sandra Day O'Connor and Stephen Breyer Accept Invitation to Visit Two Tribal Courts*, CONN. L. TRIB., Aug. 6, 2001, at 2 (pointing out that not only did Supreme Court justices visit tribal courts, but they also exhibited a "respectful" tone during their visit).

⁵⁶ Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 119 (2001). Because of their pervasiveness, tribal courts are a major primary source of justice in Indian country. See *id.* ("[T]ribal courts are now the primary forum for adjudication . . . on nearly 260 [Indian] reservations.).

⁵⁷ O'Connor, *supra* note 55, at 2. Even Congress expressly acknowledges in the TLOA that "tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country." Tribal Law and Order Act § 202(a)(2)(B).

⁵⁸ O'Connor, *supra* note 55, at 3.

⁵⁹ See Gale Courey Toensing, *Obama Signs 'Historic' Tribal Law and Order Act*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 30, 2010), <http://indiancountrytodaymedia.network.com/2010/07/30/obama-signs-%e2%80%98historic%e2%80%99-tribal-law-and-order-act-57502> (establishing that the TLOA, with its provisions allowing for increased criminal sentencing authority for tribal courts, represents the most recent development favoring tribal independence and autonomy). Additionally, Congress expressly requires federal and state courts to grant full faith and credit to tribal court decisions. See, e.g., 18 U.S.C. § 2265(a) (2006) (requiring states to give full faith and credit to tribal court decisions); 25 U.S.C. § 1911(d) (2006) (requiring states and the federal government to give

recently referred to the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians, regardless of whether or not they are official tribal members.⁶⁰ Indeed, Indian tribes maintain such a high level of authority that in a case over which tribal courts would otherwise maintain jurisdiction, claiming Indian status can potentially function as an affirmative defense.⁶¹

However, tribal sovereignty is not absolute.⁶² Both Congress and the federal courts place limits on the ability of tribes to exercise governmental authority in Indian country.⁶³ In so doing, the U.S.

full faith and credit to tribal court decisions). *But see* Rebecca A. Hart & M. Alexander Lowther, Comment, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 197 (2008) (arguing that the United States only recognizes tribal sovereignty in Westernized areas of tribal government).

⁶⁰ *United States v. Lara*, 541 U.S. 193, 210 (2004). Exactly who qualifies as an “Indian” is debatable. *See* Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 241, 241 (2010) (illustrating the long-present difficulty in deciding who qualifies for Indian status and who does not). The U.S. Supreme Court established the general test for determining Indian status in the mid-1800s. *See United States v. Rogers*, 45 U.S. (4 How.) 567, 572–73 (1846) (establishing a two-part test for determining Indian status). To qualify as an Indian, one must: (1) possess at least a drop of Indian blood; and (2) be recognized as an Indian by either a tribe or the federal government. Lewis, *supra*, at 245. While the factors relied upon in establishing Indian blood or Indian tribal recognition vary from court to court, the general principals underpinning the *Rogers* test are still applicable after over 150 years. *Id.* at 285.

⁶¹ *See United States v. Bruce*, 394 F.3d 1215, 1222–23 (9th Cir. 2005) (holding that a resident of Fort Peck Indian Reservation could claim an affirmative defense to federal prosecution by proving her Indian status).

⁶² *See Bd. of Comm'rs of Creek Cnty. v. Seber*, 318 U.S. 705, 715 (1943) (“From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference . . . has been recognized.”); *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (holding that the federal government has a duty to care for and protect “all dependent Indian communities within its borders”); *United States v. Thomas*, 151 U.S. 577, 585 (1894) (referring to Indians as “wards of the [United States]”); *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) (“These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States,—dependent [sic] largely for their daily food; dependent for their political rights.”); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that Indians nations are domestic dependents of the United States); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 568 (1823) (holding that because their land had been colonized by Europeans, Indian nations surrendered some degree of their sovereignty); Claiborne, *supra* note 32, at 596 (“[T]ribal sovereignty is a precarious thing subject to diminution, even perhaps destruction, at the will of Congress.”).

⁶³ *See infra* notes 66–72 and accompanying text (discussing limitations placed by Congress on tribal sovereignty in Indian country). “Indian country” is defined by statute as encompassing “all land within the limits of any Indian reservation under the jurisdiction of the [U.S.] Government . . .” 18 U.S.C. § 1151 (2006). This is a vast amount of land encompassing over fifty-six million acres. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(3), 124 Stat. 2261, 2262 (2010).

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government created for itself a degree of responsibility for the safety and administration of justice in Indian country.⁶⁴ One limitation on tribal sovereignty is that although tribal courts maintain jurisdiction over Indians and tribal members, they do not maintain jurisdiction over non-Indians.⁶⁵ Consequently, the state or federal government usually maintains jurisdiction in crimes where the offender is non-Indian, even if the victim is Indian and the crime took place in Indian country.⁶⁶ It is important to note that federal jurisdiction over non-Indians is not exclusive, and in many situations, a state may also exercise jurisdiction.⁶⁷

⁶⁴ See S. REP. NO. 111-93, at 4 (2009) (“[A]long with the authority that the United States imposed over Indian tribes, it incurred significant legal and moral obligations to provide for public safety on Indian lands.”); 156 CONG. REC. H5863 (daily ed. July 21, 2010) (statement of Rep. Tom Cole) (“[T]he Federal Government has a new unique obligation to ensure that these Americans, the first Americans, are granted the same public safety rights and protections that other American citizens enjoy.”); Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723, 724 (2008) (referring to Indian tribes as “domestic dependent nations”); Larry Cunningham, Note, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2187 (2000) (“Indian tribes are under the trust protection of the federal government.”).

⁶⁵ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that, because tribes lack absolute sovereignty, tribal courts cannot maintain jurisdiction over non-Indians). The TLOA does not change this. See Tribal Law and Order Act § 206 (“Nothing in this Act confers on an Indian tribe criminal jurisdiction over non-Indians.”).

⁶⁶ Matthew Handler, *Tribal Law and Disorder: A Look at a System of Broken Justice in Indian Country and the Steps Needed to Fix It*, 75 BROOK. L. REV. 261, 299 (2009). Chief among the problems created by the *Oliphant* jurisdictional split is the creation of “a jurisdictional loophole” that attracts non-Indian criminals to Indian country. *Id.* One major consequence of the *Oliphant* loophole is a great increase in recent years of drug trafficking in Indian Country. Christopher B. Chaney, *Overcoming Legal Hurdles in the War Against Meth in Indian Country*, 82 NOTRE DAME L. REV. 1151, 1160 (2006). Acknowledging this, one of the major reasons behind the adoption of the TLOA was Congress’ recognition that the federal, state, and tribal jurisdictional division in Indian country is increasingly exploited by criminals. Tribal Law and Order Act § 202(a)(4)(B).

⁶⁷ See 18 U.S.C. § 1162(a) (2006) (granting exclusive jurisdiction over crimes “committed by or against Indians” to Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin). For those states, which do not maintain exclusive jurisdiction, federal statute provides:

Any offense . . . that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the [s]tate in which such offense was committed as are in force at the time of such offense.

18 U.S.C. § 1153(b) (2006). However, many of the same inequalities, which arise in the context of federal prosecution of Indian crime also arise in the context of state prosecution of Indian crime. Richard Braunstein & Steve Feimer, *South Dakota Criminal Justice: A Study of Racial Disparities*, 48 S.D. L. REV. 171, 172-73 (2003). For example, the South Dakota government conducted a study in the early 2000s regarding the treatment of Indians by the South Dakota criminal justice system. *Id.* at 172. That study confirmed that Indians, expecting harsh treatment from the criminal justice system, are significantly more likely to

For example, when an Indian offender commits a crime outside of Indian country, the offender is generally subject to state jurisdiction unless his crime was a either a felony or a federal offense.⁶⁸

A second limitation on tribal sovereignty lies in the types of crimes that tribal governments can prosecute. A provision of the Major Crimes Act of 1885 (“MCA”) separates crimes over which the federal government has jurisdiction and crimes over which tribal courts have jurisdiction.⁶⁹ In accordance with the MCA, tribal courts generally have the power to prosecute most misdemeanors committed in Indian country.⁷⁰ However, the MCA forbids tribal courts from exercising jurisdiction over most felonies committed in Indian country, thereby leaving the prosecution of the most severe crimes under the exclusive

accept plea bargains than non-Indians. *Id.* at 178. The study concluded that South Dakota Indians were discriminated against in over seventy percent of the analyzed relationships between the South Dakota criminal justice system and the Indians. *Id.* at 189.

⁶⁸ Little Rock Reed, *Alien Jurisdiction, Cultural Clash and a Look at Some American Indian Political Prisoners*, in *THE AMERICAN INDIAN IN THE WHITE MAN’S PRISONS: A STORY OF GENOCIDE*, *supra* note 5, at 23, 27.

⁶⁹ See *infra* notes 71–72 and accompanying text (discussing the applicability of the jurisdictional split created by the MCA). The impetus for the MCA was the *Crow Dog* case from the late 1800s. Lewis, *supra* note 60, at 247. In that case, Crow Dog, a Brule Sioux Indian, was sentenced to death by a federal district court for murdering a fellow Brule Sioux Indian. *Ex Parte Crow Dog*, 109 U.S. 556, 557 (1883). The U.S. Supreme Court held that Indian-on-Indian crimes lacked federal jurisdiction, and therefore rendered Crow Dog’s conviction void. *Id.* at 572. Alarmed by this result, Congress passed the MCA. Lewis, *supra* note 60, at 247–48. Former Indian rights activist Little Rock Reed maintained an especially eloquent version of the circumstances giving rise to the MCA:

After discussion between the families of Crow Dog and Spotted Tail, everyone concerned was satisfied that the matter was resolved. Everyone, that is, except for non-Indians who neither lived among the Lakota nor had any legitimate interest in Lakota affairs. The non-Indians were simply outraged that their own “morally correct” philosophy of an eye for an eye and a tooth for a tooth was not being exercised by the Indian people. And so it is today Indians are tried in the white man’s courts.

Little Rock Reed, *A Jury of Peers and All that Bull (With a Sprinkling of Conscientious Objection)*, in *THE AMERICAN INDIAN IN THE WHITE MAN’S PRISONS: A STORY OF GENOCIDE*, *supra* note 5, at 45, 45. Little Rock Reed was not far from the truth; the legislative history of the MCA reveals that Congress believed Indians would “be civilized a great deal sooner by being put under [federal criminal] laws and taught to regard life and the personal property of others.” 16 CONG. REC. 936 (1885) (statement of Rep. Byron Cutcheon).

⁷⁰ See 18 U.S.C. § 1152 (2006) (exempting from federal jurisdiction those crimes (misdemeanors) whose jurisdiction has been ceded to Indian tribes); see also Washburn, *Tribal Courts*, *supra* note 30, at 411 (“The fact that Congress has left the tribes with exclusive jurisdiction over misdemeanor offenses is evidence that it *expects* tribal courts to exercise misdemeanor jurisdiction.”).

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jurisdiction of state and federal governments.⁷¹ Despite improvements made by the TLOA, this jurisdictional split between governmental courts and tribal courts continues to present difficulties for American Indians.⁷²

2. New Developments in the United States' Criminal Justice System as Applied to Indigenous Offenders: The TLOA

President Barack Obama signed the TLOA into law on July 29, 2010.⁷³ The TLOA is designed predominantly to improve criminal justice and law enforcement measures in Indian country.⁷⁴ Additionally, the TLOA seeks to improve the overall poor quality of life in Indian country stemming from the pre-TLOA system of Indian country criminal justice.⁷⁵

The TLOA provides several mechanisms for improving the United States' relationship with the Indian tribes.⁷⁶ First, it seeks to clarify the responsibilities of federal, state, tribal, and local governments regarding

⁷¹ 18 U.S.C. § 1153 (2006). Those crimes left under the exclusive jurisdiction of state and federal governments include:

[M]urder, manslaughter, kidnapping, maiming . . . incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury . . . an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, [and] robbery

Id. Generally, the federal government maintains jurisdiction over the more severe crimes because tribal courts lack the resources and expertise to effectively prosecute long, complicated, and expensive felony trials. *Lawyers: Tribal Courts Ill-Equipped for New Felony Trials*, NW. PUB. RADIO (Feb. 1, 2011), <http://www.nwpr.org/07/HomepageArticles/Article.aspx?n=8318>. If tribal courts cannot reliably and effectively prosecute felonies, the public safety of Indians and non-Indians alike would be jeopardized. *See United States v. Kagama*, 118 U.S. 375, 384 (1886) (holding that the power of the federal government to maintain a level of control in Indian country is necessary not only for Indians, but also for "the safety of those among whom they dwell").

⁷² *See infra* notes 202–06 and accompanying text (discussing the problems caused by the jurisdictional split between governmental courts and tribal courts).

⁷³ Lynn Rosenthal, *The Tribal Law and Order Act of 2010: A Step Forward for Native Women*, COUNCIL ON WOMEN & GIRLS (July 29, 2010), <http://www.whitehouse.gov/blog/2010/07/29/tribal-law-and-order-act-2010-a-step-forward-native-women>.

⁷⁴ *See Tribal Law and Order Act of 2010*, Pub. L. No. 111-211, § 202(b)(4), 124 Stat. 2261, 2262 (2010) (stating that one of the purposes of the TLOA is "to reduce the prevalence of violent crime in Indian country").

⁷⁵ *See Law Enforcement in Indian Country*, *supra* note 39, at 66 (statement of Thomas Heffelfinger, Partner, Best and Flanagan, LLP) (proclaiming that under the pre-TLOA system of Indian country criminal justice, "[t]he losers [were] the people of Indian Country" (internal quotation marks omitted)).

⁷⁶ *See infra* notes 78–82 and accompanying text (discussing the ways in which the TLOA improves the relationship between Indian tribes and the federal government).

Indian country crime.⁷⁷ Second, it strives to increase coordination and communication between tribal and governmental law enforcement agencies.⁷⁸ Third, it endeavors to provide tribal governments with the authority, resources, and information needed for effective law enforcement.⁷⁹ Fourth, it attempts to reduce violent crime rates in Indian country, specifically targeting violent sexual crime and domestic abuse.⁸⁰

⁷⁷ Tribal Law and Order Act § 202(b)(1). To ensure that federal prosecutors are not shirking their responsibilities, the TLOA requires the prosecutors to provide justification for choosing not to prosecute crimes in Indian country. *Id.* § 212. Each year, the U.S. Attorney must submit to the Native American Issues Coordinator a report of alleged federal criminal violations occurring in Indian country not prosecuted. *Id.* This report must contain information on the type of crime alleged, as well as justification for declining to prosecute. *Id.*

⁷⁸ *Id.* § 202(b)(2). To accomplish this, the TLOA establishes a “Native American Issues Coordinator” at the Executive Office for the United States Attorneys of the Department of Justice. *Id.* § 214(b). The Native American Issues Coordinator is to coordinate with the U.S. Attorneys who prosecute crimes in Indian country and is also to coordinate the prosecutions of “crimes of national significance in Indian country, as determined by the Attorney General.” *Id.* Also, as a means of increasing communication between Indian tribes and the federal government, the TLOA establishes the Office of Tribal Justice as a component of the Department of Justice. *Id.* § 214(a). The functions of the Office of Tribal Justice are to advise the U.S. Attorney General regarding the legal relationship between the federal government and the Indian tribes, to serve as the governmental point of contact for Indian tribes, and to coordinate with other governmental institutions regarding the relationship between the federal government and the Indian tribes. *Id.* Finally, as a further means of improving communication between Indian tribes and the federal government, the TLOA requires the U.S. Attorney for each district, which encompasses Indian country to appoint at least one assistant U.S. Attorney to serve as the district’s tribal liaison. *Id.* § 213(b). The tribal liaison is to assist and coordinate in the prosecution and prevention of federal crimes occurring in Indian country. *Id.* The tribal liaisons are also charged with the responsibility of “serving as a link between Indian country residents and the federal justice process.” *Id.*

⁷⁹ *Id.* § 202(b)(3). One of the most significant ways in which the TLOA accomplishes this goal is by increasing the maximum sentence, which can be handed down by tribal courts from one year of incarceration and a five thousand dollar fine to three years of incarceration and a fifteen thousand dollar fine. *Id.* § 234(a). This provision is, however, only a trial program. *Id.* § 234(b). After four years, the Attorney General and the Secretary of the Interior are to provide a report to Congress regarding the effectiveness of the increased tribal court sentencing authority. *Id.* § 234(b)(1). In that report, the Attorney General and the Secretary of the Interior are to present a recommendation as to whether the increased sentencing authority should be discontinued, further enhanced, or remain at the level outlined by the TLOA. *Id.* § 234(b)(2).

⁸⁰ *Id.* § 202(b)(4). To accomplish this goal, the TLOA requires Indian country officials to be trained to properly interview victims of domestic and sexual violence. *Id.* § 262. The officials are also to be trained in methods of effectively presenting the evidence to prosecutors in order to increase the conviction rate for domestic and sexual violence offenses. *Id.* The TLOA also requires the Director of the Indian Health Service to develop standardized policies and protocol for dealing with instances of sexual assault. *Id.* § 265. Additionally, the TLOA requires the Comptroller General of the United States to conduct a study of the ability of the Indian Health Service to effectively collect and maintain evidence

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Finally, it seeks to mitigate the disastrous effects of widespread drug and alcohol abuse in Indian country.⁸¹

Both Indians and non-Indians lauded the TLOA following its adoption.⁸² However, although the TLOA accomplishes a number of significant and long-sought goals, it still has room for improvement because it fails to provide a culturally-sensitive approach to prosecuting American Indians in federal court.⁸³ As discussed previously, tribal courts do not maintain jurisdiction over Indian offenders convicted of felonies or Indian offenders who commit crimes outside of Indian country.⁸⁴ Consequently, these offenders are prosecuted through an adversarial-based European system of criminal justice at odds with traditional Indigenous systems of justice.⁸⁵ By contrast, the culturally-

of sexual assaults and domestic violence. *Id.* § 266(a)(1). The Comptroller General is then to recommend ways of improving that capability. *Id.* § 266(a)(2).

⁸¹ *Id.* § 202(b)(5). The TLOA expressly proclaims: "Indian tribes have faced significant increases in instances of domestic violence, burglary, assault, and child abuse as a direct result of increased methamphetamine use on Indian reservations." *Id.* § 202(a)(6). The TLOA attempts to reduce drug and alcohol abuse among Indians by establishing the Office of Indian Alcohol and Substance Abuse ("Office"). *Id.* § 241. The function of the Office, not surprisingly, is to minimize alcohol and drug abuse among American Indians. *Id.* The Administrator of the Substance Abuse and Mental Health Services Administration is to appoint employees and "provide such funding, services, and equipment" as is necessary for the Office to achieve its goal. *Id.* In addition to the establishment of the Office, the Secretary of the Interior is to ensure that Bureau of Indian Affairs, tribal law enforcement, and judicial personnel have access to training regarding drug and alcohol abuse investigation, prevention, and treatment. *Id.* § 241(f).

⁸² See Michael W. Savage, *Obama to Sign Bill Targeting Violent Crime on Indian Reservations*, WASH. POST, July 29, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072805794.html> (proclaiming that the passage of the TLOA is "a significant and historic moment for tribal nations and federal law enforcement officials across the country" (internal quotation marks omitted)); Toensing, *supra* note 59 (indicating that U.S. senators and American Indians alike are pleased with the passage of the TLOA). But see Rob Capriccioso, *Tribal Law and Order Act to Become Law at Cost to Tribes*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 22, 2010), <http://www.Indiancountrytoday.com/politics/Tribal-Law-and-Order-Act-to-become-law-at-cost-to-tribes-99016714.html> (criticizing provisions of the TLOA for their financial expense).

⁸³ See Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 185 (2010) ("Although an extremely important reform, the TLOA is merely a first step.").

⁸⁴ See *supra* notes 66-72 and accompanying text (explaining that mainstream governmental courts prosecute Indian offenders convicted of felonies or of any crime outside of Indian country).

⁸⁵ See *United States v. Wheeler*, 435 U.S. 313, 332 n.34 (1978) ("Traditional tribal justice tends to be informal and consensual rather than adjudicative, and often emphasizes restitution rather than punishment."); Janelle Smith, *Peacemaking Circles: The "Original" Dispute Resolution of Aboriginal People Emerges as the "New" Alternative Dispute Resolution Process*, 24 HAMLINE J. PUB. L. & POL'Y 329, 341 (2003) (recognizing that significant cultural

sensitive Indigenous prosecutorial systems utilized in Canada and Australia, while not perfect, take the unique attributes of Indigenous offenders into consideration and, accordingly, provide these offenders with effective and culturally-appropriate prosecutions.⁸⁶

C. *The Canadian and Australian Criminal Justice Systems as Applied to Indigenous Offenders*

While the United States relies upon expanded tribal autonomy under the TLOA to ameliorate socioeconomic and criminal justice inadequacies experienced by its Indigenous population, Canada and Australia rely more heavily upon the principles of restorative justice for solutions. Part II.C.1 considers the reasoning and philosophy behind restorative systems of criminal justice.⁸⁷ Part II.C.2 then examines the criminal justice system in Canada as applied to Indigenous offenders.⁸⁸ Finally, Part II.C.3 examines the criminal justice system in Australia as applied to Indigenous offenders.⁸⁹

1. Restorative Justice

Modern systems of restorative justice are rooted in the high cost of traditional societal punishments, such as incarceration.⁹⁰ Because of this high cost, many scholars advocate alternatives to incarceration.⁹¹ Of

and linguistic differences make it difficult for many Indigenous people to relate to mainstream governmental systems of justice).

⁸⁶ See *infra* Part II.C.2-3 (describing the cultural-sensitivity inherent in the Canadian and Australian criminal justice systems as applied to Indigenous offenders).

⁸⁷ See *infra* Part II.C.1 (discussing the justifications for restorative systems of criminal justice).

⁸⁸ See *infra* Part II.C.2 (discussing Canada's criminal justice system as applied to Indigenous offenders).

⁸⁹ See *infra* Part II.C.3 (discussing Australia's criminal justice system as applied to Indigenous offenders).

⁹⁰ See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592 (1996) [hereinafter Kahan, *Alternative Sanctions*] (asserting that incarceration is an "extraordinarily expensive" form of sentencing); Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1388 (2007) (maintaining that there are currently over two million incarcerated individuals in the United States); Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1 (pointing out that the United States, although it contains less than five percent of the world's population, nonetheless houses twenty-five percent of the world's prisoners).

⁹¹ See Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2077 (2006) [hereinafter Kahan, *What's Really Wrong*] (stating that many criminal experts agree that alternative, restorative methods of criminal justice are more effective deterrents than incarceration); Markel, *supra* note 90, at 1388 (maintaining that many alternative methods of criminal sentencing are cheaper and more effective than incarceration).

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course, for alternative approaches to Indigenous prosecution to be a true boon for society, Indigenous offenders must be curtailed from committing further crime.⁹² Systems of restorative justice are a means of achieving the dual goals of reducing Indigenous incarceration rates and deterring crime.⁹³

Restorative justice is predominantly a community-based system of justice.⁹⁴ For this reason, restorative justice generally focuses on the needs of the victim and the community as opposed to the desire to punish the offender.⁹⁵ Thus, the key concept of restorative justice is the

Alternative methods of prosecution for Indigenous offenders are especially relevant in light of the disproportionately high Indigenous incarceration rate in the United States, Canada, and Australia. *See supra* notes 41, 44, 46 (illustrating the disproportionately high incarceration rate for Indigenous offenders in the United States, Canada, and Australia). Alternative methods of sentencing range from mandatory detox programs and fines to chain gangs, community service, and shaming punishments. Markel, *supra* note 90, at 1389. Shaming punishments are the most controversial type of alternative sentencing. *Id.* At play in both Canada's sentencing circles and Australia's Indigenous sentencing courts, shaming punishments are designed to publicly humiliate the offender. *Id.* In so doing, shaming sanctions may involve posting offenders' names and faces in public forums or even forcing a shoplifter to wear a t-shirt proclaiming that he is a convicted felon and thief. *Id.* As applied to Indigenous offenders in Canada and Australia, shaming punishments often consist of verbal reprimand from Indigenous tribal Elders. *See infra* notes 161-63 and accompanying text (establishing shaming from tribal Elders as a powerful and effective tool for punishing Indigenous offenders).

⁹² *See R. v. Joseyounen*, [1995] 6 W.W.R. 438, ¶ 41 (Sask. Can. P.C.) (holding that the goal of Canada's sentencing circles is "the protection of society by curtailing the commission of the crime by this offender and others"). At this early stage, there is an overall lack of empirical evidence regarding the effectiveness of restorative systems of justice in lowering crime rates. Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235 (2000). However, scholars assert that the lack of evidence reflects the inadequacies of available research tools, and not the effectiveness of the systems themselves. *Id.* Additionally, the evidence that does exist suggests that restorative systems are cost-efficient and effective in lowering rates of recidivism. *See infra* note 165 (discussing the research on the effectiveness of Canada's Hollow Water First Nation Community Holistic Healing Circle program).

⁹³ *See* Elena Marchetti & Kathleen Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model*, 29 SYDNEY L. REV. 415, 422 (2007) (proclaiming that Australia's Indigenous sentencing courts were created to alleviate Australia's disproportionately high Indigenous incarceration rate and to provide a culturally appropriate means of sentencing Indigenous offenders).

⁹⁴ *See* David Milward, *Making the Circle Stronger: An Effort to Buttress Aboriginal Use of Restorative Justice in Canada Against Recent Criticisms*, 4 INT'L J. PUNISHMENT & SENT'G 124, 127 (2008) (asserting that restorative justice focuses on reestablishing "harmony among those affected by the conflict"); Robert Weisberg, *Restorative Justice and the Danger of "Community"*, 2003 UTAH L. REV. 343, 343 (2003) (maintaining that the institution, which restorative justice seeks to restore is not the individual, but is rather the community as a whole).

⁹⁵ *See* Michael S. King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096, 1102 (2008) (stating that themes

idea that the prosecutorial process should be based on the victim's and community's needs, and not solely on the offender's culpability.⁹⁶ Principles of restorative justice resonate deeply in traditional Indigenous justice systems.⁹⁷ Indeed, these principles are reflected in the sentencing

within restorative justice include dialogue between the victim and the offender as well as community reconciliation); Kurki, *supra* note 92, at 239 ("Restorative justice . . . views crime as a rupture in relationships and attempts to restore victims and communities, mend relationships, and build communities."); Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667, 668 (2005) (maintaining that restorative justice seeks to hold offenders accountable not only to the victim, but also to the community). The Supreme Court of Canada developed a particularly eloquent definition of restorative justice:

[R]estorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime.

R. v. Gladue, [1999] 1 S.C.R. 688, ¶ 71 (Can.).

⁹⁶ See Kurki, *supra* note 92, at 266 ("[T]he primary goals [of restorative justice] should be to restore the victim and the community, repair harms, and rebuild relationships among the victim, the offender, and the community.>").

⁹⁷ Milward, *supra* note 94, at 128. Indeed, Indigenous people have traditionally relied upon methods of restorative justice for dispute resolution. See *United States v. Wheeler*, 435 U.S. 313, 332 n.34 (1978) ("Traditional tribal justice tends to be informal and consensual rather than adjudicative, and often emphasizes restitution rather than punishment."). For this reason, the use of restorative justice "is more effective, more in keeping with Indigenous traditions," and is therefore better suited for prosecuting Indigenous offenders and alleviating the disproportionately high Indigenous incarceration rate. Milward, *supra* note 94, at 128. Former Chief Justice Tom Tso of the Navajo Supreme Court wrote:

If a person injured another or disrupted the peace of the community, he was talked to, and often ceremonies were performed to restore him to harmony with his world. There were usually no repeat offenders. Only those who have been subjected to a Navajo 'talking' session can understand why this worked.

Tso, *supra* note 33, at 231. Indian civil rights activist Little Rock Reed echoed this sentiment:

When there was a need for corrective action to be taken because an Indian committed some act that was unacceptable to the tribe or band, the matter was resolved through cooperation between those individuals and their immediate family members involved or affected by the unacceptable action. The ultimate goal of the process—a process tempered with mercy—was reconciliation, not punishment.

Reed, *supra* note 69, at 45. Emphasizing the Indigenous cultural preference for restorative systems of justice, former U.S. Supreme Court Justice O'Connor wrote:

In contrast with the Anglo-American system's emphasis on punishment and deterrence, with a "win-lose" approach that often drives parties to adopt extreme adversarial positions, some tribal judicial systems seek to achieve a restorative justice, placing emphasis

circles of Canada,⁹⁸ the Indigenous sentencing courts of Australia,⁹⁹ and even sentencing circles utilized in Minnesota.¹⁰⁰

2. The Canadian Criminal Justice System as Applied to Indigenous Offenders

Like the United States' Indigenous population, Canada's Indigenous population suffers from extreme socioeconomic and criminal justice hardships.¹⁰¹ As a means of mitigating these societal injustices, Canada relies upon alternative methods of prosecution for Indigenous offenders.¹⁰² Instead of a partial reliance upon tribal courts like in the United States, all Aboriginals in Canada fall under the jurisdiction of the

on restitution rather than retribution and on keeping harmonious relations among the members of the community.

O'Connor, *supra* note 55, at 3. Justice O'Connor also points out that by focusing on traditional Indigenous cultural values, tribal courts in the United States successfully utilize restorative alternatives to European-style adversarial justice. *Id.*

⁹⁸ See Goel, *supra* note 38, at 313 (asserting that because Canadian sentencing circles are "aimed at restoring harmony within the community," they embody the principles of restorative justice).

⁹⁹ See JACQUELINE FITZGERALD, NSW BUREAU OF CRIME STATISTICS & RESEARCH, DOES CIRCLE SENTENCING REDUCE ABORIGINAL OFFENDING? 1 (2008), available at [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb115.pdf/\\$file/cjb115.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb115.pdf/$file/cjb115.pdf) (asserting that Australia's Indigenous sentencing courts are derived from Canadian sentencing circles, and that sentencing circles represent systems of restorative justice).

¹⁰⁰ See MINN. STAT. ANN. § 611A.775 (West 2010) (allowing for the creation of sentencing circles). This statute provides that the offender can meet with government officials, lawyers, community members, and family members to:

- (1) discuss the impact of the offense on the victim and the community;
- (2) provide support to the victim and methods for reintegrating the victim into community life;
- (3) assign an appropriate sanction to the offender; and
- (4) provide methods for reintegrating the offender into community life.

Id. In a recent Minnesota Supreme Court case considering the relevancy and applicability of that statute, defendant Pearson negotiated a plea bargain which allowed her to utilize a "sentencing circle," essentially a group sentencing discussion, at her trial sentencing. *State v. Pearson*, 637 N.W.2d 845, 846 (Minn. 2002). The purpose of the circle was to encourage a healing process for the victim, the offender, and the community. *Id.* at 847. The Court stated that "[b]ringing victims and offenders together provides an opportunity for offenders to better understand the impact of their conduct, and gives victims a clear voice in the resolution of the offense." *Id.* The Court ultimately upheld the ruling and authority of the sentencing circle because its use was within the scope of Minnesota statutory law and because both the State of Minnesota and the defense agreed to its use. *Id.* at 849.

¹⁰¹ See *supra* notes 43-44 and accompanying text (illustrating that Canada's Aboriginal population suffers from significant socioeconomic and criminal justice hardships).

¹⁰² See McNamara, *supra* note 38, at 61 (establishing that Canada's sentencing circles represent Canada's efforts to "improve the quality of justice which the mainstream justice system [delivers] to Aboriginal communities").

Canadian federal government.¹⁰³ Although it fails to provide Aboriginal tribes and people with a degree of independence and autonomy comparable to that provided to American Indians by the U.S. government, the Canadian government is nonetheless sympathetic toward Aboriginal rights.¹⁰⁴ As part of the Canadian government's recognition of unique Aboriginal rights, Canada utilizes sentencing circles in prosecuting Aboriginal offenders.¹⁰⁵

A sentencing circle is a group meeting where the defendant, lawyers, judge, and various members of the community sit in a circle and decide upon a proper sentence for the defendant.¹⁰⁶ By emphasizing

¹⁰³ Morse, *supra* note 7, at 53. However, because of sparse federal legislation regarding Aboriginal legal rights, common law and provincial legislation are relied upon to fill in the gaps. *Id.*

¹⁰⁴ See *R. v. Vanderpeet*, [1996] 2 S.C.R. 507, ¶ 20 (Can.) (“The task of this [c]ourt is to define aboriginal rights in a manner which recognizes that aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by aboriginal people because they are *aboriginal*.”). Current recognition of Aboriginal rights exists for “the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions.” *Id.* ¶ 44. Those rights protected as Aboriginal rights must represent “a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.” *Id.* ¶ 46. To prove the existence of an Aboriginal right:

The claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, tradition or custom was one of the things which made the culture of the society distinctive—that it was one of the things that truly *made the society what it was*.

Id. ¶ 55.

¹⁰⁵ See McNamara, *supra* note 38, at 61 (discussing Canadian sentencing circles and how they relate to Aboriginal rights). Not only does Canada utilize sentencing circles in the prosecutions of many of its Aboriginal offenders, it is also pioneering the use of healing lodges in place of traditional prison incarceration. Nielsen, *Canadian*, *supra* note 6, at 73. Healing lodges are an alternative means by which the Canadian government sentences Aboriginal offenders. *Healing Lodges for Aboriginal Federal Offenders*, CORRECTIONAL SERVICE CAN., <http://www.csc-scc.gc.ca/text/prgrm/abinit/challenge/11-eng.shtml> (last visited Apr. 11, 2011). Like sentencing circles, healing lodges allow the needs unique to Aboriginal inmates to be addressed during the sentencing process. Nielsen, *Canadian*, *supra* note 6, at 73. Accordingly, nature, contact with tribal Elders, and Aboriginal teachings and ceremonies are an integral part of the healing lodge correctional system. *Id.* at 73–74.

¹⁰⁶ See RENE DUSSAULT & GEORGES ERASMUS, ROYAL COMMISSION ON ABORIGINAL PEOPLES, BRIDGING THE CULTURAL DIVIDE: A REPORT ON ABORIGINAL PEOPLE AND CRIMINAL JUSTICE IN CANADA 110 (1996) (stating that a sentencing circle is a procedure in which “individuals are invited to sit in a circle with the accused and discuss together what sentences should be imposed” (internal quotation marks omitted)); McNamara, *supra* note 38, at 73 (asserting that a sentencing circle usually requires the participation of the defendant, lawyers, the judge, the victim, family members, and community members). The simple change from a European-style confrontational courtroom arrangement to a circular

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collectivism, discussion, and the need to restore harmony among the community, Canadian sentencing circles closely mimic the restorative approach inherent in traditional Aboriginal systems of justice.¹⁰⁷ Minor variations aside, the common thread linking all sentencing circles “is the opportunity for the community to participate and assume responsibility.”¹⁰⁸

Other common characteristics of Canadian sentencing circles include: (1) the defendant must willingly agree to the use of the sentencing circle; (2) the defendant must be deeply rooted in the community represented in the sentencing circle; (3) Aboriginal Elders must be willing to participate; (4) disputed facts must be resolved prior to the use of the sentencing circle; and (5) the court must be willing to allow the use of the sentencing circle.¹⁰⁹ Despite the element of group participation encouraged in Canadian sentencing circles, the presiding judge nonetheless retains the ultimate authority to hand down a

arrangement of participants creates a “profound[] change[]” in the dynamics of the sentencing process. *R. v. Moses*, [1993] 71 C.C.C. 3d 347, ¶ 38 (Y. Terr. Ct. Can.). Not only does this modification encourage participants to interact with the judge without intimidation, it also enhances the availability of information about the defendant and the crime, promotes consideration of unorthodox sentencing methods, and allows the input of victims. *Id.* ¶¶ 42-73.

¹⁰⁷ See *Moses*, 71 C.C.C. 3d 347, ¶ 92 (holding that sentencing circles reflect Aboriginal culture because most Aboriginal cultures place a high value on collective responsibility and seldom resolve conflicts by the confrontational, adversarial approach preferred in European systems of justice); McNamara, *supra* note 38, at 75 (maintaining that sentencing circles necessarily involve incorporation of Aboriginal cultural values).

¹⁰⁸ *R. v. Webb*, [1993] 1 C.N.L.R. 148, ¶ 34 (Y. Terr. Ct. Can.). Additionally, all sentencing circles exist with the intention of placing a lesser emphasis “on deterrence and more on re-integration into society, rehabilitation, and a restoration of harmony within the community.” *R. v. Joseyounen*, [1995] 6 W.W.R. 438, ¶ 42 (Sask. Can. P.C.).

¹⁰⁹ *Joseyounen*, 6 W.W.R. 438, ¶¶ 17-38. The participation of tribal Elders in the circle is especially pertinent because “face-to-face meetings [with community leaders] are more humane and emotionally intensive than trials dominated by legal professionals.” Kurki, *supra* note 92, at 240. The use of tribal Elders also minimizes the significant cultural and linguistic gap between Indigenous culture and the mainstream Canadian government. Smith, *supra* note 85, at 341. Although the sentencing circle process is time-consuming, the Canadian government believes that it is worthwhile because it empowers and develops communities. Kurki, *supra* note 92, at 280-81. Additionally, available evidence suggests that restorative systems of justice, as seen in sentencing circles, can be more cost-effective than mainstream prosecution, and may result in lower rates of recidivism. See *infra* note 165 (discussing the research on Canada’s Hollow Water First Nation Community Holistic Healing Circle program). Quantitative assessments aside, sentencing circles are also successful on a more intangible level. See Kurki, *supra* note 92, at 282 (“When one talks with people who are actively involved in circle processes, something happens. One cannot avoid being affected by their passion, dedication, and sincere belief that what they are doing is good. There are many touching stories of success.”).

sentence.¹¹⁰ This is important because Canada's sentencing circles are generally not limited to minor crimes.¹¹¹ The significant role of the judge in sentencing is also indicative of the judicial role in creating the circles.¹¹² Although some may decry the circles as examples of judicial activism, they are nonetheless a well-established practice throughout Canada.¹¹³

3. The Australian Criminal Justice System as Applied to Indigenous Offenders

Like Canada, Australia seeks to improve the quality of life of its Indigenous people by relying upon a progressive and restorative approach to prosecuting Indigenous offenders.¹¹⁴ As discussed previously, Indigenous Australians suffer greatly from socioeconomic

¹¹⁰ Goel, *supra* note 38, at 316. For this reason, scholars consider sentencing circles to be an amalgam of Aboriginal and European culture. *Id.*

¹¹¹ See Kurki, *supra* note 92, at 282 (maintaining that "crimes ranging from underage drinking to sexual assault and manslaughter" can warrant the use of sentencing circles). Although punishments handed down in sentencing circles are usually house arrest, community service, or rehabilitation, the presiding judge maintains the authority to incarcerate offenders. *Id.*

¹¹² See *R. v. Nicholas*, [1996] 449 A.P.R. 124, ¶ 5 (N.B. Can. P.C.) ("In fact, the *Criminal Code* makes no provision for any particular type of sentencing hearing: [T]he foundation for the conventional sentencing hearing as well as for the use of a sentencing circle . . . is case law."). Despite a lack of legislative authority for sentencing circles, the Canadian Criminal Code directs criminal courts to pay "particular attention to the circumstances of aboriginal offenders." Canada Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(e). This provision also provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered . . ." *Id.* As interpreted by the Supreme Court of Canada, section 718.2(e) applies to Aboriginal offenders regardless of whether or not they live on a reservation. *R. v. Gladue*, [1999] 1 S.C.R. 688, ¶ 74 (Can.). The court's interpretation of Section 718.2(e) not only requires prosecuting judges to take into account the unique cultural circumstances of Aboriginal offenders regardless of where they live, but also serves to ameliorate the overrepresentation of Aboriginals in prison. Sanjeev Anand, *The Sentencing of Aboriginal Offenders, Continued Confusion and Persisting Problems: A Comment on the Decision in R. v. Gladue*, 42 CANADIAN J. CRIMINOLOGY 412, 412 (2000). Reflecting the Indigenous cultural-sensitivity embraced by Canadian statutory law, the Supreme Court of Canada holds that even in situations where sentencing circles are not utilized, "The role of the judge who sentences an aboriginal offender is, as for every offender, to determine a fit sentence taking into account all the circumstances of the offence, the offender, the victims, and the community." *Gladue*, 1 S.C.R. 688, ¶ 75.

¹¹³ Anand, *supra* note 112, at 412.

¹¹⁴ See Marchetti & Daly, *supra* note 93, at 415 ("[I]ndigenous sentencing courts . . . emerged to reduce the over-representation of Indigenous people in the criminal justice system . . . and [to] increas[e] the participation of Indigenous people in the justice system as court staff or advisors.").

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and criminal justice hardships.¹¹⁵ Australia's Indigenous sentencing courts are designed to alleviate these hardships by bridging the gap between Indigenous and non-Indigenous culture.¹¹⁶

The courts are a relatively recent development.¹¹⁷ Their creation is rooted in the 1991 Report of the Royal Commission into Aboriginal Deaths in Custody ("RCIADIC").¹¹⁸ The Australian government established the RCIADIC to investigate "the disturbing rise in the number of deaths" of incarcerated Aboriginals in Australia.¹¹⁹ The

¹¹⁵ See *supra* notes 45–46 and accompanying text (illustrating that Australia's Aboriginal population suffers from severe socioeconomic and criminal justice inequalities).

¹¹⁶ See Marchetti & Daly, *supra* note 93, at 422 (proclaiming that Indigenous sentencing courts were created to alleviate Australia's disproportionately high Indigenous incarceration rate and to provide a culturally appropriate means of dealing with offenders); McAsey, *supra* note 38, at 665 (asserting that a major aim of Australia's Indigenous sentencing courts "is the incorporation of Koori people in the legal process"); *Shepparton's Koori Court*, LAW REP. (Feb. 3, 2004), <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1035995.htm> (remarking that Indigenous sentencing courts are "a fascinating attempt to blend Aboriginal custom and culture with the white legal system"). The stated goals of the Koori Court—the Indigenous sentencing court for the Australian state of Victoria—are heavily reflective of the need to bridge the gap between the Australian government and Aboriginal culture. The goals of the Koori Court are to:

1. Improve defendants' understanding of the court.
2. Encourage defendants to take responsibility for their actions and recognise the consequences of their behaviour.
3. Create a court system that is culturally responsive.
4. Ensure greater participation of the Aboriginal community in the sentencing process.

VICT. DEPT OF JUSTICE, KOORI COURT 1 (2006), available at http://www.justice.vic.gov.au/resources/3/c/3c57f78047e410848aeafef9e312c0fe/overview_of_koori_court.pdf; see also Peter Faris, *Kooris' Court a Waste of Money*, AUSTRALIAN (May 9, 2008), <http://www.theaustralian.com.au/business/legal-affairs/kooris-court-a-waste-of-money/story-e6frg986-111116285918> (asserting that Victoria's Koori Indigenous sentencing courts are designed to meet the cultural needs of Indigenous offenders); Debbie Guest, *Funding Found Despite Indigenous Court's Failings*, AUSTRALIAN (Apr. 10, 2010), <http://www.theaustralian.com.au/news/nation/funding-found-despite-Indigenous-courts-failings/story-e6frg6nf-1225852030615> (reporting that Indigenous sentencing courts represent "a culturally appropriate way of helping Aboriginal people understand the justice system"). But see LARISSA BEHRENDT, *ACHIEVING SOCIAL JUSTICE: INDIGENOUS RIGHTS AND AUSTRALIA'S FUTURE* 27 (2003) (arguing that changes within the criminal justice system might not be enough to improve the poor social and economic status of Aboriginal Australians).

¹¹⁷ See Marchetti & Daly, *supra* note 93, at 416 (reporting that the first Indigenous sentencing court was created in Port Adelaide in the province of South Australia in 1999). Currently, all Australian states with the exception of Tasmania have established Indigenous sentencing courts. *Id.*

¹¹⁸ NATALIE PARKER & MARK PATHE, STATE OF QUEENSL. DEPT OF JUSTICE & ATTORNEY-GENERAL, REPORT ON THE REVIEW OF THE MURRI COURT 13 (2006); Harris, *supra* note 39, at 26.

¹¹⁹ Harris, *supra* note 39, at 30. Regarding the quality of the RCIADIC, the Australian government maintains: "The investigation into the deaths was extremely thorough. No

RCIADIC found that the disproportional death rate for Aboriginals in prison was a direct result of the highly disproportional number of incarcerated Aboriginals.¹²⁰ Accordingly, the RCIADIC discouraged incarceration of Indigenous offenders.¹²¹ The RCIADIC also suggested “consultation with ‘discrete’ or ‘remote’ Aboriginal communities in relation to appropriate sentencing.”¹²² Carrying out this suggestion, Australia’s Indigenous sentencing courts allow tribal Elders to participate in the prosecutions of Indigenous offenders.¹²³

Notwithstanding minor variations, the courts maintain core similarities.¹²⁴ First, most of the courts are limited in the types of offences they are allowed to prosecute.¹²⁵ Second, the court venues

effort was spared to get to the truth.” *National Report Volume 1 – The Over-All Findings*, INDIGENOUS L. RESOURCES, <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/9.html> (last visited Mar. 2, 2011).

¹²⁰ PARKER & PATHE, *supra* note 118, at 13.

¹²¹ MARK HARRIS, VICT. DEP’T OF JUSTICE, “A SENTENCING CONVERSATION”: EVALUATION OF THE KOORI COURTS PILOT PROGRAM OCTOBER 2002–OCTOBER 2004, at 87 (2006), available at http://www.justice.vic.gov.au/wps/wcm/connect/744b3d00404a67158a14fbf5f2791d4a/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf?MOD=AJPERES. Following the RCIADIC, the Australian government committed itself to reducing the disproportional representation of Aboriginals in its criminal justice system. *Id.* However, despite the reform spurred by the RCIADIC, the percentage of Aboriginal prisoners as compared to the general prison population increased between 1993 and the advent of the Australian Indigenous sentencing courts. Megan A. Winder, Comment, *Disproportionate Disenfranchisement of Aboriginal Prisoners: A Conflict of Law that Australia Should Address*, 19 PAC. RIM L. & POL’Y J. 387, 410 (2010). Early reports suggest that the Koori Court, the State of Victoria’s Indigenous sentencing court system, is successful in regard to lowering the Indigenous incarceration rate. HARRIS, *supra*, at 15. Nonetheless, proponents of Indigenous sentencing courts assert that whether or not the Koori Court is successful in lowering incarceration and recidivism rates, “the major achievement of the Koori Court will be the manner in which it has served to increase Indigenous community participation in the justice system and recognised [sic] the status of Elders and Respected Persons.” *Id.*

¹²² Harris, *supra* note 39, at 30.

¹²³ Marchetti & Daly, *supra* note 93, at 420. The incorporation of tribal Elders into the prosecutorial process guarantees that the Aboriginal community has an opportunity to influence the way cases are handled. *Id.* at 436. The result of the Elders’ presence is that the process is informal enough to allow discussion and communication, but still reflective of the gravity of a criminal prosecution. *Id.*; see also CNTY. COURT VICT., OPERATION AND MANAGEMENT OF THE COUNTY KOORI COURT 1 (2009), available at [http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/\\$file/PNCR_1-2010_County_Koori_Court.pdf](http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/$file/PNCR_1-2010_County_Koori_Court.pdf) (“The objective of the Koori Court is to ensure greater participation of the Aboriginal community in the sentencing process of the County Court through the role played in that process by the Aboriginal Elders or Respected Persons and others such as the Koori Court officer.”).

¹²⁴ See Marchetti & Daly, *supra* note 93, at 421 (discussing the common characteristics of Australia’s Indigenous sentencing courts).

¹²⁵ See *id.* (reporting that Victoria, New South Wales, Western Australia, the Northern Territory, and the Australian Capital Territory limit the offenses that can be heard). The types of offenses that are beyond the jurisdictional realm of these courts are usually family

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aesthetically reflect Aboriginal culture.¹²⁶ Third, the offender must be Aboriginal, his or her participation in the Indigenous sentencing court must be voluntary, and he or she must have pleaded guilty.¹²⁷ Fourth, the judge sits at eye level with the offender during the sentencing discussion.¹²⁸ Finally, tribal Elders advise the presiding judge on a proper sentence—taking into consideration the offender’s unique cultural attributes—and verbally reprimand the offender.¹²⁹

violence and sexual assault cases. *Id.* at 422. Judges perceive those offenses as being too complex and potentially too tumultuous for the Indigenous sentencing courts. *Id.*

¹²⁶ *Id.* at 436. All Indigenous sentencing courts maintain elements of Indigenous insignia. *Id.* Some jurisdictions hold the courts in facilities with special meaning and importance for the Aboriginal community. *Id.* Other jurisdictions hold the courts in mainstream governmental courtrooms, but display Aboriginal paintings and artwork. *Id.* While this may seem like unwarranted pandering, the goal of the process is to ensure that the offender develops a greater level of and understanding and respect for the prosecutorial process. *Id.* The ultimate aim is to achieve a more effective and meaningful punishment than would be possible in a traditional European-style courtroom. See McAsey, *supra* note 38, at 660 (asserting that the main goal of the Indigenous sentencing courts is to ensure that the offender and the Indigenous community have a say in the prosecutorial process, and that this input will allow the courts to effectively carry out their unique prosecutorial approach); Guillatt, *supra* note 12 (“The intention was to make the [Indigenous sentencing court] more culturally attuned to Aboriginal ways, less intimidating and therefore more meaningful.”).

¹²⁷ Marchetti & Daly, *supra* note 93, at 421.

¹²⁸ *Id.* This practice of having all the participants, including the judge, sit at eye level with each other is important because of its symbolic value. McAsey, *supra* note 38, at 659. Essentially, this practice is:

[A] response to the intimidation commonly felt by Aboriginal people at court, which has been linked to the physical structure of the court, the adversarial nature of court proceedings and the legalistic language used in court, as well as larger issues such as the natural opposition felt when attending a court which is an instrument of a system that has robbed Aboriginal families of their children and subjected Aboriginal people to human rights deprivations for so long.

Id. at 659–60 (footnotes omitted).

¹²⁹ Marchetti & Daly, *supra* note 93, at 420. Because the presiding judge applies Australian law, the sentences imposed upon Indigenous offenders tend to be “within the realm of the mainstream criminal and sentencing laws” as opposed to the realm of the more extreme Aboriginal punishments of spearing and banishment. *Id.* However, one aspect of traditional Aboriginal punishment that is incorporated into the Indigenous sentencing courts is cultural shaming. *Id.* at 437. The process of cultural shaming from a respected tribal Elder is especially confronting, positive, and constructive for Aboriginal offenders. *Id.* The effectiveness of shaming in the Indigenous sentencing courts stems from the realization imposed upon the offender that he has not only broken Australian law, but has dishonored and embarrassed the Aboriginal community. *Id.* at 436. Additionally, cultural shaming strengthens the perception of the acceptance of Aboriginal culture. See McAsey, *supra* note 38, at 677 (reporting that shaming is “considered by some Elders involved in [Indigenous sentencing courts] as a partial recognition of Aboriginal law”).

Even when the Indigenous sentencing courts are inapplicable for a particular offender or crime, Australia's mainstream courts still take a defendant's aboriginality into consideration.¹³⁰ For example, in its famous 1992 *Fernando* decision, the Supreme Court of New South Wales held that judges should consider the socioeconomic and environmental factors inherent in Aboriginal culture when prosecuting Aboriginal offenders.¹³¹ Further, Australian courts recognize that the aboriginality of an offender may profoundly affect the harshness of a particular sentence in a way that would not occur if the offender were non-Aboriginal.¹³² This culturally-sensitive approach to prosecuting Indigenous offenders is also evident in the Canadian system, and is arguably the two systems' strongest feature.¹³³ Before we can arrive at a way to improve the TLOA by incorporating aspects of the Canadian and Australian approaches to Indigenous prosecution, we must analyze the strengths and weaknesses of each nation's Indigenous prosecutorial system.¹³⁴

¹³⁰ See *infra* notes 132–33 and accompanying text (discussing the cultural sensitivity of Australia's mainstream courts). This is not done as a means of guaranteeing an Aboriginal defendant a light sentence, but is instead done as a way to fairly evaluate the defendant in a holistic manner. See also *R v Fernando* [1992] 76 A Crim R 58, 62 (Austl.) (“The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.”). This level of cultural-sensitivity of the Australian judiciary remains the norm, as recently exemplified by the Supreme Court of Victoria; *R v McCartney* [2006] VSCA 35, ¶ 7 (Austl.) (“[T]he mere fact of Aboriginality does not bear upon sentence, but the Aboriginal descent of an offender may be relevant to an understanding of an offender's history of offending and of the obstacles to rehabilitation which he or she has had to overcome.”).

¹³¹ *Fernando*, 76 A Crim R at 62. A *Fernando* analysis includes consideration of the negative influences plaguing Aboriginal culture:

It is proper for the court to recognise [sic] that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment. . . . While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor.”

Id.

¹³² See *R v Kulla Kulla* [2010] VSC 60, ¶ 68 (Austl.) (holding that because an Aboriginal convict had no one in prison with whom she could converse, incarceration would be an especially harsh punishment).

¹³³ See *infra* Part III.A.2 (asserting that the ability of the Canadian and Australian systems to provide a culturally-appropriate prosecutorial process for Indigenous offenders are these systems' greatest attributes).

¹³⁴ See *supra* Part III (analyzing the advantages and disadvantages of the United States', Canadian, and Australian criminal justice systems as applied to Indigenous offenders).

III. ANALYZING THE EFFECTIVENESS OF THE INDIGENOUS PROSECUTORIAL SYSTEMS OF THE UNITED STATES, CANADA, AND AUSTRALIA

The Indigenous prosecutorial systems of the United States, Canada, and Australia reflect each nation's respective approaches to minimizing Indigenous socioeconomic and criminal justice inequalities. However, each nation's approach has room for improvement. Part III.A analyzes the strengths and weaknesses of the Canadian and Australian systems.¹³⁵ Next, Part III.B analyzes the strengths and weaknesses of the United States' system.¹³⁶ Finally, Part III.C discusses the need to incorporate the defining characteristic of the Canadian and Australian systems—the participation of tribal Elders—into the United States' federal prosecutions of Indigenous offenders.¹³⁷

A. *Advantages and Disadvantages of the Canadian and Australian Indigenous Prosecutorial Systems*

The Canadian and Australian governments, instead of providing tribal courts with a degree of prosecutorial authority as in the United States, prosecute all Indigenous offenders through their mainstream criminal justice systems. However, the Canadian and Australian governments go to great lengths to carry out Indigenous prosecutions in a culturally-appropriate manner. Part III.A.1 first analyzes the negative aspects of the Canadian and Australian Indigenous prosecutorial systems.¹³⁸ Part III.A.2 then analyzes the positive aspects.¹³⁹

1. *Negative Aspects of the Canadian and Australian Approaches to Prosecuting Indigenous Offenders*

Many of the disadvantages of the Canadian and Australian systems of prosecuting Indigenous offenders stem from the fact that Indigenous tribes in those nations maintain no degree of sovereignty or autonomy.¹⁴⁰

¹³⁵ See *infra* Part III.A (discussing the advantages and disadvantages of the Canadian and Australian systems of prosecuting Indigenous offenders).

¹³⁶ See *infra* Part III.B (discussing the advantages and disadvantages of the United States' system of prosecuting Indigenous offenders).

¹³⁷ See *infra* Part III.C (discussing the need to incorporate tribal Elders into the United States' system of prosecuting Indigenous offenders).

¹³⁸ See *infra* Part III.A.1 (examining the negative aspects of Canada's sentencing circles and Australia's Indigenous sentencing courts).

¹³⁹ See *infra* Part III.A.2 (examining the positive aspects of Canada's sentencing circles and Australia's Indigenous sentencing courts).

¹⁴⁰ See Strelein, *supra* note 33, at 268 (asserting that a lack of sovereignty contributes to assumptions of superiority, which contributes to subordination of Indigenous society); *supra* Part II.C.2-3 (explaining how Indigenous offenders in Canada and Australia do not

Generally, Canada recognizes neither inherent sovereignty nor the right to self-determination of its Aboriginal population.¹⁴¹ Similarly, Australia's history of refusing to recognize a degree of autonomy for its Indigenous tribes is reflected in contemporary Australia where "Indigenous sovereignty is excluded from the scope of rights that can be claimed before the courts."¹⁴² This complete lack of Indigenous sovereignty in Canada and Australia contributes to bigotry and the belief that characteristics of the dominant culture are "right" while characteristics of the dominated culture are "wrong."¹⁴³ The ultimate result of this belief of cultural superiority is an extinguishment of the unique aspects of Indigenous culture.¹⁴⁴

In addition to the moral failure of refusing to recognize a degree of sovereignty for their Indigenous populations, there are also more tangible problems with the Canadian and Australian practice of prosecuting Indigenous offenders through the mainstream court system. For example, one of the most significant motivations for the establishment of Canada's sentencing circles and Australia's Indigenous sentencing courts was an ambition to reduce the disproportionately high Indigenous incarceration rate.¹⁴⁵ Yet in Canada, the effectiveness of the use of sentencing circles in lowering incarceration rates is disputed.¹⁴⁶

fall under tribal jurisdiction, but are instead prosecuted by mainstream Canadian and Australian judges).

¹⁴¹ Gunn, *supra* note 33, at 158. With few exceptions, Canada's Indigenous people do not have their own governmental systems or courts. *Id.* Even disputes and claims related to tribal matters are heard in governmental courts maintained by the Canadian government. *Id.*

¹⁴² Strelein, *supra* note 33, at 268. Despite improvements made by the Indigenous sentencing courts, there still exists tension between Australia's Indigenous and non-Indigenous populations. *See id.* ("While the tenor of recent judgments appears respectful of Indigenous peoples, the law they set down still contains vestiges of the assumptions of superiority.").

¹⁴³ *See id.* at 226 ("The initial justification for the acquisition of sovereignty was the superiority of the colonizers over the inhabitants, particularly in relation to political organization, but also with respect to religion, land use, social institutions and skin color.").

¹⁴⁴ *See id.* at 252-53 (explaining that one group of Australian Indigenous people, the Yorta Yorta, lost their culture and the unique aspects of their society, including their language, after a mere forty years of colonization and assimilation).

¹⁴⁵ *See supra* notes 103, 115 and accompanying text (explaining that the Indigenous prosecutorial systems in Canada and Australia were at least partially established to lower the Indigenous incarceration rate). However, the reduction of the Indigenous incarceration rate is far from the sole reason for the use of alternative means of prosecuting Indigenous offenders. *See* Guilliat, *supra* note 12 ("Much more relevant, it's now said, is the [Indigenous prosecutorial system's] role in empowering elders and re-engaging Aborigines with the justice system.").

¹⁴⁶ Nielsen, *Canadian*, *supra* note 6, at 67. However, many critics fail to consider the underlying socioeconomic problems among Canada's Aboriginal population that encourage criminal conduct, and thereby incarceration. *See* Anand, *supra* note 112, at 418

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Critics are quick to point out that Aboriginals are still Canada's largest incarcerated minority group.¹⁴⁷ However, the idea that this statistic would be significantly altered just a few years after the widespread implementation of sentencing circles is an overly optimistic expectation.¹⁴⁸

Aside from disputes over the effectiveness of Canada's sentencing circles in lowering the Aboriginal incarceration rate, there are other potential problems with sentencing circles. One reality of sentencing circles is that they are ineffective tools for cases of domestic violence or sexual abuse.¹⁴⁹ In fact, when used for such cases, sentencing circles may harm some of the people whom they are supposed to aid.¹⁵⁰ However, judges recognize this and exercise caution before allowing the use of sentencing circles in such situations.¹⁵¹

Other perceived inadequacies with the sentencing circles are easily deflated. Critics argue that governmental sentencing circles are not the creations of Indigenous Canadians, but are instead the creations of

("[H]ousing shortages, substance abuse, unemployment, and education deficiencies among aboriginal people . . . [are] the real causes of aboriginal crime and the main basis of their overrepresentation in Canadian prisons."); Nielsen, *Canadian*, *supra* note 6, at 71 (asserting that while non-Aboriginals are also affected by socioeconomic hardships, Aboriginals as a group are generally more heavily affected by modern societal plagues, including substance abuse, lack of spiritual and cultural activities, loss of pride and identity, lack of education, and lack of vocational skills).

¹⁴⁷ See Nielsen, *Canadian*, *supra* note 6, at 67 (asserting that despite improvements in the Canadian criminal justice system as applied to Indigenous offenders, Aboriginals are still Canada's largest incarcerated minority group).

¹⁴⁸ See HARRIS, *supra* note 121, at 30 (stating that alternative methods of Indigenous prosecution with limited jurisdiction and operation cannot realistically be expected to have a drastic and immediate effect on the incarceration rates of Indigenous offenders).

¹⁴⁹ See Goel, *supra* note 38, at 295 (arguing that Aboriginal women who are the victims of domestic violence do not attain any of the "gains in healing, reconciliation, or respect" that others may gain from the use of a sentencing circle). Further, domestic violence in Indigenous communities was traditionally not the problem that it is today, and was therefore not dealt with in Aboriginal healing circles. See *id.* at 300 (asserting that, based upon oral Aboriginal history relayed by Elders, family violence was a rarity in Aboriginal communities prior to European colonization).

¹⁵⁰ See *id.* at 323 (reporting that in cases of domestic violence, because the abuser is often present at the sentencing circle, the abused often becomes non-assertive and potentially accepting of a less-than-adequate sentence for the abuser). The abused may even be ostracized by her community, effectually resulting in the punishment of the abused instead of the abuser. *Id.* at 326. The same problems are also potentially inherent in Australia's Indigenous sentencing court system. Guillatt, *supra* note 12. For this reason, Australia's Indigenous sentencing courts are forbidden from hearing matters of family violence. *Id.*

¹⁵¹ See *R. v. Joseyounen*, [1995] 6 W.W.R. 438, ¶¶ 29-34 (Sask. Can. P.C.) (encouraging judges to consider whether the victim suffers from battered spouse syndrome or has been coerced or pressured into agreeing to the use of the sentencing circle).

mainstream Canadian judges.¹⁵² However, the mere fact that the circles are judicially-created institutions does not preclude their function as Indigenous-driven institutions.¹⁵³ Another criticism lies in the lingering suspicion that sentencing circles encourage lenient sentences for Aboriginals and are ultimately an ineffective deterrent to crime.¹⁵⁴ Although this criticism is difficult to debunk or support with empirical evidence, widespread support for sentencing circles from institutions ranging from academia to the Supreme Court of Canada to Aboriginal tribes themselves suggests that the circles are effective means of justice for Aboriginal offenders.¹⁵⁵

Critics also attack Australia's Indigenous sentencing court because strong and uncontroverted statistics do not yet exist to show that Australia's new courts are working in regard to lowering the recidivism and incarceration rates among Indigenous offenders.¹⁵⁶ Because of a lack of empirical evidence, some believe that the courts are not working at

¹⁵² See McNamara, *supra* note 38, at 76–79 (asserting that the judicial roots of Canada's sentencing circles are often a focal point of criticisms against sentencing circles).

¹⁵³ See *id.* at 76 (“This criticism assumes, rather simplistically, that judicial *initiation* [of sentencing circles] is necessarily inconsistent with community *ownership*.”).

¹⁵⁴ See *R. v. Gladue*, [1999] 1 S.C.R. 688, ¶ 72 (Can.) (recognizing that since imprisonment is often considered to be the ultimate punishment, a sentence, which seeks to avoid imprisonment is necessarily considered by many people to be a lighter punishment); Goel, *supra* note 38, at 328 (arguing that sentencing circles do little to rectify the effect of colonial policies, which created the current state of Aboriginal social and economic disarray).

¹⁵⁵ See *Gladue*, 1 S.C.R. 688, ¶ 72 (positing that when restorative justice is combined with probationary conditions, as occurs in sentencing circles, the punishment may in fact be greater than incarceration); Goel, *supra* note 38, at 316–17 (asserting that Aboriginal culture lauds the Canadian government's use of sentencing circles in prosecuting Indigenous offenders); Kwochka, *supra* note 39, at 165 (“Facing [the] victim and community is for some more frightening than the possibility of a term of imprisonment and yields a more beneficial result in that the offender may become a healed and functional member of the community rather than a bitter offender returning after a term of imprisonment.”).

¹⁵⁶ See PARKER & PATHE, *supra* note 118, at 25 (pointing out that Queensland's Murri Court system is too young to generate reliable statistical data); McAsey, *supra* note 38, at 672 (asserting that Victoria's Koori Court system is too novel to generate reliable statistical data). In fact, the Australian government no longer releases information on Indigenous imprisonment rates. HARRIS, *supra* note 121, at 87–88. Further, even if the data were available, it might be misleading because most crimes serious enough to result in incarceration are heard in higher courts. *Id.* at 88. However, the Magistrates of the Murri Courts—the Australian State of Queensland's Indigenous sentencing courts—believe that many of the offenders would have received imprisonment sentences had they not had the Murri Court option. PARKER & PATHE, *supra* note 118, at 24. Additionally, judges, Elders, and Australian governmental officials intimately involved in the courts proclaim that regardless of the availability of empirical data, Indigenous recidivism and incarceration rates are significantly reduced by the use of Indigenous sentencing courts. Guilliat, *supra* note 12.

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all.¹⁵⁷ However, the real success of the Indigenous sentencing courts cannot be reduced to numbers and statistics, but should instead be evaluated by the ability of the courts to bridge the gap between Indigenous and non-Indigenous culture.¹⁵⁸ In this regard, the courts, as well as Canada's sentencing circles, are definitely working.¹⁵⁹

Reflecting a common criticism of Canada's sentencing circles, detractors of Australia's Indigenous sentencing courts also disparage the courts as means by which an Indigenous offender can receive a soft sentence.¹⁶⁰ However, many critics fail to consider the powerful effect of shaming from tribal Elders from the viewpoint of an Indigenous offender.¹⁶¹ People with first-hand experience with the Indigenous sentencing courts are quick to assert that the public shaming of an Indigenous offender by a tribal Elder is far from a lenient punishment.¹⁶²

¹⁵⁷ See Faris, *supra* note 116 (arguing that the Indigenous sentencing courts are an ineffective waste of government resources); Guest, *supra* note 116 (echoing Faris' sentiment that the Indigenous sentencing courts are ineffective and a waste of government resources).

¹⁵⁸ See FITZGERALD, *supra* note 99, at 7 (pointing out that Indigenous sentencing courts may have a crime prevention value, which goes beyond numbers and statistics); HARRIS, *supra* note 121, at 133 (arguing that the success of the Indigenous sentencing courts should be "measured in the possibility [they] offer[] for defendants to be part of a justice process that is not totally alienating and that may deliver significant changes to their patterns of behaviour"). *But see* BEHRENDT, *supra* note 116, at 7 (arguing that no matter what changes occur in the criminal justice system, the relationship between Aboriginals and the Australian government will still be negatively affected by the historical injustices imposed upon Aboriginals by European colonizers).

¹⁵⁹ See *infra* notes 169, 174 and accompanying text (discussing the ability of Canadian and Australian methods of prosecuting Indigenous offenders to close the gap between Indigenous and non-Indigenous culture).

¹⁶⁰ See Anand, *supra* note 112, at 414 (arguing that when prosecuting judges are forced to give credence to the unique cultural characteristics of Aboriginal offenders, there will be an "automatic reduction" of the severity of sentences imposed upon those offenders); Faris, *supra* note 116 (arguing that Indigenous sentencing courts unfairly provide Indigenous offenders with soft punishments).

¹⁶¹ See Goel, *supra* note 38, at 326 (asserting that cultural shaming provides a powerful motivation for an Indigenous offender to change his ways); Marchetti & Daly, *supra* note 93, at 437 (maintaining that shaming from an Elder can be more confronting, constructive, and positive for an Indigenous offender than a mainstream sentence).

¹⁶² See HARRIS, *supra* note 121, at 75 ("[A]nyone who has attended a sitting of the Koori Court view it as anything but a soft option, having observed firsthand the manner in which the defendants are confronted by the Elders to take responsibility for their actions."); Guilliatt, *supra* note 12 (reporting that judges presiding over Indigenous sentencing courts vehemently insist that the courts are not lenient). Comments by offenders prosecuted in Indigenous sentencing courts reflect the belief that Indigenous sentencing courts are not a soft option. See *Shepparton's Koori Court*, *supra* note 116 ("Well in the Koori Court like you feel like the size of an ant. When they talk to you, you do, you start getting a lump in your throat, you feel like you know, crying, I've cried even in there..."). When a questionnaire was sent to thirty Koori Court defendants, only one of the responders agreed with an assertion that the Koori Court was a soft sentencing option. HARRIS, *supra* note

Unfortunately, as with evidence reflecting the effect of the courts on the Indigenous incarceration and recidivism rates, there is also a lack of empirical evidence supporting or contradicting the effectiveness of cultural shaming.¹⁶³

2. Positive Aspects of the Canadian and Australian Approaches to Prosecuting Indigenous Offenders

Despite the aforementioned problems, the Canadian and Australian approaches to Indigenous prosecution maintain many positive aspects. In Canada, while there is an overall lack of empirical research on the impact of sentencing circles, the research that does exist suggests that the circles are cost-efficient and are effective in lowering rates of recidivism.¹⁶⁴ Because they incorporate traditional Aboriginal values,¹⁶⁵ Canada's sentencing circles are widely lauded by Aboriginal leaders for signaling governmental respect for Indigenous systems of justice.¹⁶⁶ Not only do Aboriginals support the circles, but the circles also have non-Aboriginal governmental support, as evidenced by the fact that they are

121, at 90. Among a survey of the Elders who participate in the sentencing process, none of them believed that defendants sought sentencing in the Koori Court as a means of receiving a softer sentence. *Id.* at 93.

¹⁶³ See Guilliatt, *supra* note 12 (asserting that any evidence supporting the effectiveness of the method of justice established by the Indigenous sentencing courts is anecdotal).

¹⁶⁴ See Smith, *supra* note 85, at 361-66 (discussing the effectiveness of one of Canada's healing circle programs). One of the few existing empirical studies examines the Hollow Water First Nation Community Holistic Healing Circle program. *Id.* at 362. This program, funded by the Canadian government and maintaining many of the same features of sentencing circles, is an alternative to traditional mainstream criminal punishment. *Id.* at 366. The government contributed between two and three million dollars to the program over a ten-year period. *Id.* at 364. Without the program, the government during that same time frame would have spent between six and fifteen million dollars on trials, incarceration, parole, and probation. *Id.* This means that for every dollar the government spent on the program, it would have had to have spent between two and thirteen dollars on traditional methods of European criminal justice. *Id.* Not only is the program cost-effective, but participants had a recidivism rate of two percent, compared to a typical Canadian recidivism rate of thirty-six percent. *Id.* at 365. Additionally, while the research on the effectiveness of sentencing circles is not as prevalent as would be desirable, there is absolutely no evidence suggesting that traditional systems of criminal justice do a better job at lowering costs and recidivism rates. Kurki, *supra* note 92, at 286.

¹⁶⁵ See Goel, *supra* note 38, at 316 ("Because it incorporates and returns to traditional Golden Age values of healing, respect, and reconciliation, use of the sentencing circle is also seen by many as a long-overdue recognition of the sophistication and practical value of Aboriginal dispute resolution methods."); O'Connor, *supra* note 55, at 2 ("[T]he placement of litigants and court personnel in a circle [as in traditional Aboriginal justice systems] aspires to minimize the appearance of hierarchy and highlight the participation and needs of the entire group in place of any one individual.").

¹⁶⁶ See Goel, *supra* note 38, at 316-17 (asserting that those praising the use of sentencing circles include prominent Aboriginals in the political, academic, and tribal arenas).

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created by Canadian judges and are funded by the Canadian government.¹⁶⁷ This widespread support from both Aboriginals and non-Aboriginals indicates that the circles are improving life for Aboriginals by bridging the cultural gap between Aboriginal culture and the mainstream Canadian government.¹⁶⁸

Australia's Indigenous sentencing courts are also popular, and are expanding both numerically and in terms of jurisdictional power.¹⁶⁹ Early reports regarding the effectiveness of the Koori Court Indigenous sentencing program in the Australian State of Victoria indicated that the program successfully lowered rates of re-offending.¹⁷⁰ The Indigenous sentencing courts are accepted among Australia's Indigenous people.¹⁷¹ Additionally, Victoria's Magistrates—intimately familiar with the relationship between Indigenous people and the Australian criminal justice system—maintain unanimous support for the Indigenous sentencing courts.¹⁷² As in Canada, widespread support among Aboriginals and non-Aboriginals for Australia's Indigenous prosecutorial system indicates that the system is narrowing the gap between Aboriginal and non-Aboriginal culture, and is thereby

¹⁶⁷ See *id.* at 317 (pointing out that sentencing circles are funded, approved of, and supported by the Canadian government).

¹⁶⁸ See *id.* at 313–18 (establishing that sentencing circles, through their incorporation of Aboriginal values, benefit not only Aboriginal offenders, but also their communities).

¹⁶⁹ See CNTY. COURT VICT., *supra* note 124, at 1 (reporting that based upon the success of the Koori Court Division of the low-level Magistrate's Court of Victoria, the mid-level County Court of Victoria implemented its own Koori Court pilot program in 2008).

¹⁷⁰ HARRIS, *supra* note 123, at 85. Two Koori Court programs evaluated in the early 2000s had re-offending rates of twelve-and-a-half percent and fifteen-and-a-half percent, compared to a general re-offending rate throughout Victoria of nearly thirty percent. *Id.* Further, because substantial numbers of Indigenous people sentenced in the Koori Courts were addicted to alcohol or drugs, the low rate of re-offending as compared to the general population is especially impressive. *Id.* at 87. However, studies in Queensland found that the Murri Courts, Queensland's Indigenous sentencing courts, were still too novel to provide reliable data on Indigenous re-offending rates. PARKER & PATHE, *supra* note 118, at 25.

¹⁷¹ See HARRIS, *supra* note 121, at 90 (reporting that based on interviews, discussions, and meetings with Aboriginal people and other stakeholders in the success of the Indigenous sentencing courts, "it seems clear that there is a very high level of support for the [Indigenous sentencing court] model"). Indeed, when a questionnaire was sent to thirty Koori Court defendants, all thirty of them were in agreement in their support for the concept of an Indigenous sentencing court. *Id.*

¹⁷² See *id.* (reporting that the Magistrates interviewed for a governmental review on the Indigenous sentencing courts were unanimous in their belief that the program was successful).

addressing the crux of Indigenous societal hardships: the gap between Indigenous and non-Indigenous culture.¹⁷³

Arguably, the presence and input from Indigenous Elders represents the distinguishing achievement of the Canadian sentencing circles and the Australian Indigenous sentencing courts.¹⁷⁴ The guidance of the Elders in deciding upon a culturally-appropriate sentence for Indigenous offenders is essential to the establishment of a restorative and progressive approach to justice.¹⁷⁵ Further, the credence given to Elder advice and wisdom closes the gap between Indigenous culture and European culture, and thereby allows a sentencing circle or an Indigenous sentencing court to achieve its goal of providing Indigenous people with a prosecutorial process that expertly and unwaveringly takes the unique attributes of Indigenous offenders into consideration.¹⁷⁶

B. Advantages and Disadvantages of the United States' System of Prosecuting Indigenous Offenders

In contrast with the Canadian and Australian systems of prosecuting Indigenous offenders, the United States' system entrusts the Indian tribes with a significant level of discretion and power. This high degree of tribal autonomy is both "beneficial and detrimental."¹⁷⁷ Part III.B.1 analyzes the advantages of the quasi-sovereign status of the United States' Indian tribes in relation to criminal prosecution.¹⁷⁸ Part III.B.2

¹⁷³ See *supra* note 39 and accompanying text (establishing that most of the socioeconomic problems experienced by Indigenous populations are rooted in the cultural gap between Indigenous culture and non-Indigenous culture).

¹⁷⁴ See McAsey, *supra* note 38, at 676 ("The very presence of the Elders . . . has huge significance in terms of recognition and therefore community building and is clearly one of the most progressive and effective elements of the [Indigenous sentencing courts].").

¹⁷⁵ See Goel, *supra* note 38, at 313 (maintaining that the incorporation of Indigenous values into the sentencing process encourages "healing and closure to the offender and his community, thereby reducing recidivism among Aboriginal offenders"); McAsey, *supra* note 38, at 676 (asserting that the presence of tribal Elders "is integral in fulfilling [a] [c]ourt's aims of community building, involvement and control").

¹⁷⁶ See *R. v. Moses*, [1993] 71 C.C.C. 3d 347, ¶ 94 (Y. Terr. Ct. Can.) (holding that Canada's sentencing circles encourage the development of "a genuine partnership between aboriginal communities and the justice system by according the flexibility for [Aboriginal] values to influence the decision-making process in sentencing"); McAsey, *supra* note 38, at 666 (asserting that the most significant problem faced by Indigenous people when they come into contact with mainstream criminal justice systems is "lack of understanding" (internal quotation marks omitted)). Additionally, the use of tribal Elders accords status and respect to Aboriginal culture, and contributes to a system where a non-Indigenous judge can and should ask a tribal Elder for advice. *Id.* at 679.

¹⁷⁷ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 37, at 3.

¹⁷⁸ See *infra* Part III.B.1 (discussing the advantages of the United States' system of Indigenous prosecution).

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then addresses the shortcomings of the system utilized by the United States.¹⁷⁹

1. Advantages of Tribal Autonomy

The major benefit of the federal government's preference for tribal autonomy is the trust and respect accorded to the Indian tribes to manage their own affairs.¹⁸⁰ While the sovereignty of Canadian and Australian Indigenous tribes is all but lost, the United States' Indigenous tribes still maintain a substantial degree of self-determination.¹⁸¹ The U.S. government allows the Indian tribes such a high degree of autonomy because doing so is the best way to protect Indian interests.¹⁸² The United States should be applauded for recognizing that forcing a complete coup d'état upon a people who already have their own society and culture leads to discrimination, bigotry, and societal inequality.¹⁸³

¹⁷⁹ See *infra* Part III.B.2 (discussing the disadvantages of the United States' system of Indigenous prosecution).

¹⁸⁰ See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 37, at xiii ("To the extent possible, programs for Native Americans should be managed and controlled by Native Americans.").

¹⁸¹ See *United States v. Lara*, 541 U.S. 193, 210 (2004) (holding that, "as an exercise of their inherent tribal authority, [Indian tribes can] prosecute nonmember Indians"); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832) (holding that Indian tribes were and always had been distinct and independent communities); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 37, at 31 ("Self-determination and . . . self-governance are goals of both the federal government and Native Americans."); *O'Connor*, *supra* note 55, at 1 (referring to American Indian tribes as the "third sovereign").

¹⁸² See *United States v. Wheeler*, 435 U.S. 313, 331 (1978) ("[Indian tribes] have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation."); *Morton v. Mancari*, 417 U.S. 535, 553 (1974) ("Congress . . . determined that proper fulfillment of its trust [relationship with the Indian tribes] required turning over to the Indians a greater control of their own destinies. The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests."); *Examining S. 797*, *supra* note 40, at 39 (statement of Troy A. Eid, Partner, Greenberg Traurig, LLP) (stating that a lack of respect for tribal sovereignty ultimately makes Indian country less safe); see also *Wheeler*, 435 U.S. at 332 ("Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests.").

¹⁸³ See *Strelein*, *supra* note 33, at 237 ("[T]he imposition of an alien legal system on peoples who had no comprehension of it [is] simply discriminatory."). Nonetheless, a degree of cultural discrimination and marginalization is still at the root of the high crime rates and low socioeconomic status inherent in Indian country. See *supra* note 39 and accompanying text (establishing that the cultural gap created by European colonizers is the root cause of current Indigenous societal strife).

Tribal courts are at the heart of American tribal autonomy.¹⁸⁴ The great advantage of tribal courts is that they are well-equipped to deal with the unique cultural attributes of Indian offenders.¹⁸⁵ In tribal court prosecutions, judges, lawyers, and juries tend to be more closely connected to tribal culture than to the culture of the mainstream United States.¹⁸⁶ Because of this, the cultural gap that occurs when Indian offenders are prosecuted in mainstream governmental courts is non-existent in many tribal courts.¹⁸⁷ This lack of a cultural gap in tribal courts provides valuable inspiration for ways to minimize the cultural gap when Indians are prosecuted in federal courts.¹⁸⁸ However, despite the many positive aspects of the United States' preference for high degrees of tribal sovereignty, there are also negative aspects.¹⁸⁹

¹⁸⁴ See *Examining S. 797*, *supra* note 40, at 62 (statement of Hon. Anthony J. Brandenburg, C.J., Intertribal Court of Southern California) ("There is no greater compliment to the sovereignty or autonomy of any tribe than an independent tribal justice system."); *Law Enforcement in Indian Country*, *supra* note 39, at 45 (statement of Hon. Joe A. Garcia, President, National Congress of American Indians; Accompanied by John Dosssett, General Counsel, NCAI) ("Tribal courts are very important to ensuring a fair system."); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 37, at 78 ("[I]n addition to ensuring order and justice, tribal courts are a key to economic development and self-sufficiency."). Generally, any weaknesses in tribal courts stem from a lack of funding. See *id.* at xii (describing poor funding of tribal governmental systems as nothing short of a crisis); Newton, *supra* note 55, at 289 ("[T]hose who examine what is actually occurring in tribal courts cannot help but be impressed with how well the courts function with the few resources at their disposal.").

¹⁸⁵ See *Examining S. 797*, *supra* note 40, at 32 (statement of Alonzo Coby, Chairman, Fort Hall Business Council, Shoshone-Bannock Tribes) ("[T]ribal justice systems are best at handling law and order in their own communities."); Newton, *supra* note 55, at 306 (asserting that tribal courts provide "sensitivity to tribal traditions").

¹⁸⁶ See Joh, *supra* note 56, at 123 (asserting that tribal court judges are often American Indians themselves, and that in many tribal courts, European-style prosecutors are nonexistent).

¹⁸⁷ See *Nat'l Farmers Union Ins. Cos. of Indians v. Crow Tribe*, 471 U.S. 845, 857 (1985) (holding that tribal courts have expertise in tribal matters). Former Indian rights activist Little Rock Reed argued that Indigenous people inevitably experience prejudice and discrimination in mainstream governmental courts:

Many jurors presiding over the cases of Indian defendants, and prosecutors and investigators involved in Indian cases, have a deep-seated hatred for Indians because of the cultural conflict that exists around reservation boundaries caused in great part by the non-Indians' belief that Indians should not have "special rights" (aboriginal rights, treaty rights, etc.) in the first place, and should be treated like "any other citizen."

Reed, *supra* note 68, at 27–28.

¹⁸⁸ See *infra* Part IV (proposing amendments to the TLOA designed to minimize the gap between Indigenous and non-Indigenous culture when Indians are prosecuted in federal court).

¹⁸⁹ See *infra* Part III.B.2 (discussing the consequences of high degrees of tribal autonomy).

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2. Disadvantages of Tribal Autonomy

As a result of a number of treaties, laws, and judicial decisions, the United States' Indian tribes are caught in limbo between sovereignty and non-sovereignty.¹⁹⁰ While the tribes have a high degree of autonomy relative to Canadian and Australian Indigenous tribes, the federal government nonetheless acts as a trustee of tribal lands and maintains partial responsibility for their protection.¹⁹¹ One consequence of this trust relationship is that the federal government occasionally displays an attitude of superiority and arrogance as it exercises paternalistic authority over the Indian tribes.¹⁹²

A second consequence of the trust relationship is that in circumstances where the federal government has control, it often drops the ball.¹⁹³ As testament to the failure of the federal government to

¹⁹⁰ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that the Indian tribes not only did not qualify as sovereign entities, but were "domestic dependent nations"); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 568 (1823) ("Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so. A nation that has passed under the dominion of another, is no longer a sovereign state.").

¹⁹¹ See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 37, at 2 (referring to the relationship between the federal government and the Indian tribes as a special "trust relationship").

¹⁹² See *Bd. of Comm'rs of Creek Cnty. v. Seber*, 318 U.S. 705, 715 (1943) ("[Indians are] an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence."); *United States v. Sandoval*, 231 U.S. 28, 46 (1913) ("[A]n unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders."); *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection . . ."). According to one commentator:

It was supposedly in the best interest of Natives and colonists alike to separate Native Americans from their lands and folkways. On the one hand, relieving Native Americans of their savage ways would protect settlers. On the other hand, it would also provide Natives with the "civilized" ways that would ensure their survival.

PERRY, *supra* note 34, at 29.

¹⁹³ See 156 CONG. REC. H5863 (daily ed. July 21, 2010) (statement of Rep. Tom Cole) ("Law enforcement in Indian Country . . . has been woefully underfunded and mismanaged over decades, resulting in a drastic situation for many of our fellow Americans."); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 37, at xii ("The conditions in Indian Country could be greatly relieved if the federal government honored its commitment to funding, paid greater attention to building basic infrastructure in Indian Country, and promoted self-determination among tribes."). As an example of the poor federal financial support of Indian country, from 1975 to 2000, funding for the Bureau of Indian Affairs declined six million dollars annually after inflation adjustments. *Id.* at ix. As a direct result of this insufficient funding, there is a "severe shortage of crime prevention, victim assistance, public safety, and correctional programs on tribal lands." *Id.* at 67.

provide adequate criminal justice in Indian country, federal prosecutors fail to prosecute over half of all violent crimes in Indian country.¹⁹⁴ The federal prosecution rate is even lower for Indian sexual assaults.¹⁹⁵ Stunningly, these statistics may be underinflated; Congress admits that for decades federal agencies failed to reliably report crime and prosecution rates in Indian country.¹⁹⁶

C. *The Need to Incorporate Tribal Elders into the Federal Prosecutions of Indigenous Offenders*

Despite the aforementioned problems arising from mismanagement of the trust relationship, the relationship itself is justified by public safety concerns.¹⁹⁷ Indeed, the federal government must maintain partial control and responsibility over Indian country because it would be a hindrance to public safety to grant the Indian tribes complete sovereignty and control.¹⁹⁸ Most of Indian country simply lacks the resources for effective law enforcement, and must depend on federal resources to provide public safety and services.¹⁹⁹ Further, public safety

¹⁹⁴ See Toensing, *supra* note 59. Because of this lax prosecution rate, offenders often get away with offenses committed against Indians in Indian country. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 37, at 67.

¹⁹⁵ See Toensing, *supra* note 59; see also Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(5)(A), 124 Stat. 2261, 2262 (2010) (“[D]omestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions.”).

¹⁹⁶ See *id.* § 202(a)(7) (“[C]rime data is a fundamental tool of law enforcement, but for decades the Bureau of Indian Affairs and the Department of Justice have not been able to coordinate or consistently report crime and prosecution rates in tribal communities.”).

¹⁹⁷ See *id.* § 202(a)(1) (“[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country.”); *Examining S. 797*, *supra* note 40, at 7 (prepared statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice) (asserting that the federal government is charged with a “mission of fostering public safety in Indian country”).

¹⁹⁸ See *United States v. Wheeler*, 435 U.S. 313, 331 (1978) (“Were the tribal prosecution held to bar the federal one, important [public safety] interests in the prosecution of major offenses on Indian reservations would be frustrated.” (footnote omitted)); *Examining S. 797*, *supra* note 40, at 2 (opening statement of Hon. Byron L. Dorgan, U.S. Senator from North Dakota) (explaining that Congress believes it is necessary to partially usurp tribal authority in order to adequately provide public safety to Indian country).

¹⁹⁹ See S. REP. NO. 111-93, at 3 (2009) (“[The United States’ criminal justice] system . . . forces tribal communities to rely on federal officials to investigate and prosecute all reservation crimes committed by non-Indians against Indian victims and most serious crimes committed by Indians.”); *Examining S. 797*, *supra* note 40, at 24 (statement of Hon. John Barrasso, U.S. Senator from Wyoming) (“We all know that you can’t have public safety in a community that lacks a sufficient law enforcement presence.”); 156 CONG. REC. H5867 (daily ed. July 21, 2010) (statement of Rep. Nick Rahall) (“[R]esidents of reservations . . . have to rely principally on sometimes underfunded [s]tate and local law enforcement authorities to prosecute reservation crimes.”); *Lawyers: Tribal Courts Ill-*

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lapses in Indian country do not exclusively affect Indian country; they also impact surrounding areas and anyone passing through Indian country.²⁰⁰

Although the trust relationship merits some governmental control over Indian country, the federal government fails its trust relationship to the Indian tribes in the instance of the criminal jurisdictional split between tribal governments and the federal government.²⁰¹ The most significant problem created by this split is that tribal courts lack the power to prosecute felonies, and the federal government fails to provide culturally-appropriate and effective prosecutions for Indian offenders.²⁰² Ultimately, those who suffer most under this system are American Indians.²⁰³ In fact, the jurisdictional split between the federal government and the Indian tribes directly causes societal hardships for American Indians.²⁰⁴ Considering the scope of these hardships, it is

Equipped for New Felony Trials, *supra* note 71 (arguing that tribal courts lack the resources and expertise to conduct expensive and complicated felony trials).

²⁰⁰ See *United States v. Thomas*, 151 U.S. 577, 585 (1894) (holding that the government not only has a moral duty to punish offenses committed against Indians, but also has a public safety duty to punish offenses committed by Indians); *Law Enforcement in Indian Country*, *supra* note 39, at 53 (prepared statement of Hon. Joe A. Garcia, President, National Cong. of American Indians) (asserting that improvements to public safety in Indian country will benefit not only Indian communities, but also communities neighboring Indian communities).

²⁰¹ See S. REP. NO. 111-93, at 1-4 (asserting that the jurisdictional split is better phrased as a jurisdictional mess, and that the result of this mess is ultimately a breach of the United States' duty to provide adequate criminal justice for its Indigenous population).

²⁰² See *id.* at 3 (maintaining that the current system of Indian country criminal justice "limit[s] tribal government authority to combat reservation crime, and place[s] significant responsibility to investigate and prosecute reservation crimes in the [f]ederal [g]overnment and some state governments"); Cunningham, *supra* note 64, at 2188 (maintaining that federal prosecutors often shirk their responsibility to provide justice in Indian country so that they can prosecute "more important federal crimes").

²⁰³ See Droske, *supra* note 64, at 733 (asserting that the jurisdictional split created by the MCA negatively affects American Indians and results in their disproportional subjection to federal jurisdiction); Washburn, *American Indians*, *supra* note 4, at 711 (pointing out that Indian witnesses and defendants often must travel great distances to be present in federal district courts). Because of the "jurisdictional maze" inherent in Indian country criminal justice, justice and safety alike are hampered. S. REP. NO. 111-93, at 3. Indeed, "[i]n some investigations, it can be difficult or even impossible to determine at the crime scene whether the victim, the suspect, or both is an 'Indian' or a 'non-Indian' for purposes of deciding which jurisdiction—federal and/or tribal, or state—has responsibility and which criminal laws apply." *Examining S. 797*, *supra* note 40, at 40-41 (statement of Troy A. Eid, Partner, Greenberg Traurig, LLP). This crucial and difficult determination inevitably impedes the ability of the government to enforce the law and to provide justice and safety. *Id.* at 41. As recognized in the 2009 hearing on the TLOA, "[t]his is the antithesis of effective government." *Id.*

²⁰⁴ See S. REP. NO. 111-93, at 9 ("Consistent with previous federal reports, testimony before the Committee pointed to the jurisdictional divide among tribal, state, and [f]ederal

unsurprising that Indians have little faith in the federal government.²⁰⁵ Just as Canada and Australia recognized that they have a duty to provide culturally-appropriate criminal justice to their Indigenous populations, the trust relationship between the United States and the American Indian tribes suggests that the federal government should strive to provide culturally-appropriate criminal justice for American Indians when they are prosecuted in federal court.²⁰⁶

Aside from a trust relationship duty to provide culturally-appropriate prosecutions for Indian offenders, and aside from international precedent from two countries comparable to the United States, there is also American precedent for the use of progressive and unorthodox approaches to prosecuting Indigenous offenders.²⁰⁷ As discussed in Part II.C.1 of this Note, Minnesota statutory law allows for

governments as a major contributing factor to reservation violence.”); Tso, *supra* note 33, at 231 (“[B]efore the federal government imposed its system on [Navajos], [they] had no need to lock up wrongdoers.”); *see also supra* note 39 and accompanying text (explaining that most of the socioeconomic and criminal justice hardships inherent in Indian country are rooted in the gap between Indigenous culture and non-Indigenous culture).

²⁰⁵ *See Examining S. 797, supra* note 40, at 66 (statement of Hon. Anthony J. Brandenburg, C.J., Intertribal Court of Southern California) (iterating this lack of faith in the federal government). As recognized by Chief Judge Brandenburg:

You have to remember that there is an inherent distrust of not only the court system, . . . but law enforcement, with tribal members. They just don’t trust them. And it is because of all the things we have been talking about here today.

Just for a moment think of every atrocity that has ever been committed in Indian Country, whether it is the taking of land, whether it is genocide, whether it is the taking of children, whether it is the taking of natural resources—every wrong that has ever been committed in Indian Country has been somehow approved by the Congress, by the courts, or by law enforcement.

Id.; *see also* U.S. COMM’N ON CIVIL RIGHTS, *supra* note 37, at 69 (asserting that a lack of familiarity with a European-style criminal justice system creates cultural division and mistrust among Indigenous people); Braunstein & Feimer, *supra* note 67, at 189–90 (asserting that because of the ways in which they are continually placed at a disadvantage, “American Indians seem to neither trust the system nor be effective in advocating their interests in it”).

²⁰⁶ *See* *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (holding that the trust relationship encourages special treatment for the Indian tribes based upon their unique cultural and historical background and relationship with the federal government); *Examining S. 797, supra* note 40, at 66 (statement of Hon. Anthony J. Brandenburg, C.J., Intertribal Court of Southern California) (asserting that the TLOA and any legislation affecting Indian country should be designed to rebuild the trust relationship); Hart, *supra* note 83, at 165 (proclaiming that the federal government has a “duty to provide basic social services to tribal members”).

²⁰⁷ *See supra* note 101 and accompanying text (discussing Minnesota’s use of sentencing circles).

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the creation of sentencing circles.²⁰⁸ In 2002, the Minnesota Supreme Court defended a trial judge's use of a sentencing circle.²⁰⁹ While acknowledging that the work of a sentencing circle can be "arduous, emotional and time-consuming," the Court nonetheless recognized that in many situations, the end result is worth the effort.²¹⁰

IV. CONTRIBUTION

Although Minnesota utilizes sentencing circles, their approach would be an insufficient solution if adopted by the federal government for two reasons. First, many of the Indian crimes prosecuted in federal court are heinous and complicated felonies requiring a level of expertise and resources not well-suited for communal sentencing circles. Second, if sentencing circles are adopted and limited to more minor crimes, then their use would usurp the role of tribal courts. This would undermine the independence and autonomy of tribal courts, which is one of the major strengths of the United States' system of prosecuting Indigenous offenders.²¹¹ Therefore, instead of an outright implementation of sentencing circles, this Note proposes that the United States should adopt a key element inherent in Canada's sentencing circles and Australia's Indigenous sentencing courts: the incorporation of a system of tribal Elders to act as a cultural buffer between Indigenous culture and non-Indigenous culture on those occasions when Indians are prosecuted in federal court.

As made evident by the United States' tribal courts, Canada's sentencing circles, and Australia's Indigenous sentencing courts, mainstream governmental courts are far removed from traditional Indigenous systems of justice and culture. To compensate for this cultural gap, Elders representing the tribes of the Indian defendant should play a significant role in aiding federal judges in the culturally-appropriate prosecution of Indian offenders. While the establishment of the TLOA presented an excellent opportunity for the United States to incorporate guidance from tribal Elders into the federal prosecutions of Indian offenders, it failed to take advantage of the opportunity.

²⁰⁸ See MINN. STAT. ANN. § 611A.775 (West 2010) (allowing for the creation of sentencing circles).

²⁰⁹ See *State v. Pearson*, 637 N.W.2d 845, 849 (Minn. 2002) (upholding Minnesota's use of a sentencing circle).

²¹⁰ *Id.*; see also Johnson, *supra* note 5, at 266 ("Native offenders, as well as the U.S. justice and prison systems, can benefit from a combination of American methods of adjudication and tribal sentencing circles.").

²¹¹ See *supra* Part III.B.1 (asserting that one of the most positive aspects of the United States' system of sentencing Indigenous offenders is the latitude given to tribal governments and tribal judicial systems).

Accordingly, Part IV proposes amendments to three main sections of the TLOA.²¹² Part IV.A proposes an amendment to the “Findings and Purposes” section of the TLOA. Part IV.B proposes an amendment to the “Prosecution of Crimes in Indian Country” section of the TLOA. Finally, Part IV.C proposes an amendment to the “Administration” section of the TLOA. Each proposed amendment is followed by commentary from the Author reflecting the merits of and need for the amendment.

A. Findings and Purposes Amendment

In order to lay a foundation for the use of tribal Elders in the federal prosecution of Indian offenders, section 202 of the TLOA should be expanded as follows:

SEC. 202. FINDINGS; PURPOSES.

(a) FINDINGS. – Congress finds that –

- (1) the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country;
- (2) Congress and the President have acknowledged that –
 - (A) tribal law enforcement officers are often the first responders to crimes on Indian reservations; and
 - (B) tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country;
- (3) less than 3,000 tribal and [f]ederal law enforcement officers patrol more than 56,000,000 acres of Indian country, which reflects less than half of the law enforcement presence in comparable rural communities nationwide;
- (4) the complicated jurisdictional scheme that exists in Indian country –
 - (A) has a significant negative impact on the ability to provide public safety to Indian communities;
 - (B) has been increasingly exploited by criminals; and
 - (C) requires a high degree of commitment and cooperation among tribal, [f]ederal, and [s]tate law enforcement officials;
- (5)(A) domestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions;
- (B) thirty-four percent of American Indian and Alaska Native women will be raped in their lifetimes; and

²¹² The bold, capitalized, and small-caps fonts represent the language of the TLOA. The text that appears in italics is the proposed language that the Author is contributing. The strikethrough font represents language from the TLOA that the Author proposes to remove. Ellipses represent language from the TLOA omitted by the Author.

- (C) thirty-nine percent of American Indian and Alaska Native women will be subject to domestic violence;
- (6) Indian tribes have faced significant increases in instances of domestic violence, burglary, assault, and child abuse as a direct result of increased methamphetamine use on Indian reservations; ~~and~~
- (7) crime data is a fundamental tool of law enforcement, but for decades the Bureau of Indian Affairs and the Department of Justice have not been able to coordinate or consistently report crime and prosecution rates in tribal communities;
- (8) *Indians and the Indian tribes maintain a cultural identity distinct from that of the general population;*
- (9) *the unique attributes of an Indian offender have a profound effect on the suitability of European systems of justice;*
- (10) *there exists a significant gap between Indian offenders and the federal government when an Indian offender is prosecuted in federal court;*
- (11) *there is a disproportionately high incarceration rate for Indian offenders compared to the general population;*
- (12) *traditionally, incarceration was seldom a punishment imposed by American Indian tribes; and*
- (13) *incarcerated Indians –*
- (A) *are often discriminated against; and*
- (B) *often suffer from cultural and religious isolation.*
- (b) PURPOSES. – The purposes of this title are –
- (1) to clarify the responsibilities of [f]ederal, [s]tate, tribal, and local governments with respect to crimes committed in Indian country;
- (2) to increase coordination and communication among [f]ederal, [s]tate, tribal, and local law enforcement agencies;
- (3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country;
- (4) to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women;
- (5) to prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country; ~~and~~
- (6) to increase and standardize the collection of criminal data and the sharing of criminal history information among [f]ederal, [s]tate, and tribal officials responsible for responding to and investigating crimes in Indian country;

- (7) *To provide culturally appropriate prosecutions for Indians prosecuted in federal court;*
- (8) *To bridge the cultural gap between the Indian tribes and the federal government; and*
- (9) *To allow tribal Elders to provide guidance and input in the federal prosecution of Indian offenders.*

Commentary

The reasons behind the need to allow tribal Elders to participate in prosecution of Indian offenders must be clearly expressed in order to prevent ambiguity and confusion. There is no justification for failure to disclose such information. Further, an honest statement from the federal government admitting that it cannot effectively address the cultural needs of Indian offenders without input from tribal Elders would go a long way toward bridging the cultural gap between the federal government and the Indian tribes. This in turn would improve the trust relationship between the tribes and the federal government.

In bridging this gap, this amendment stresses the need for federal courts to take into account the unique cultural identity of Indian offenders. In so doing, the amendment recognizes the problems inherent in incarcerating Indian offenders. The amendment does not forbid the incarceration of Indian offenders, but merely requires judges to recognize that, because of cultural barriers, incarceration is often a harsher sentence for an Indian offender than it is for a non-Indian offender. Most importantly, the amendment provides the added purpose of incorporating tribal Elders into the prosecution of Indian offenders. The participation of tribal Elders will minimize bias against Indian offenders and will help to bridge the cultural gap between traditional American Indian systems of justice and the European-style adversarial system of justice utilized in the federal court system.

Critics may argue that the participation of tribal Elders constitutes special treatment for Indigenous offenders, and that such special treatment is unfair. However, those critics should remember that the criminal justice system in the United States is not fair in the first place. It places heavy emphasis on plea bargaining and the ability of prosecutors to exercise discretion regarding whether and to what extent to prosecute. Because cultural gaps often immediately place Indigenous offenders at a disadvantage, the incorporation of tribal Elders would help to level the playing field, not further skew it. Ultimately, the use of tribal Elders would result in a more fair prosecutorial process.

B. *Prosecution of Crimes in Indian Country Amendment*

In order to allow the federal government to incorporate the insight of tribal Elders into the prosecution of Indian offenders, section 213 of the TLOA should be expanded as follows:

SEC. 213. PROSECUTION OF CRIMES IN INDIAN COUNTRY.

- (a) APPOINTMENT OF SPECIAL PROSECUTORS. —
 - (1) IN GENERAL. —
...
- (b) TRIBAL LIAISONS. —
...
- (c) PROSECUTION OF INDIAN OFFENDERS IN FEDERAL COURT. —
 - (1) *In General.*—*The court is to accommodate for the federally-recognized Indigenous status of the offender. When an Indian is prosecuted in a federal court, the duties of the federal court shall be to:*
 - (A) *Consult with tribal Elders, provided by Sec. 214 of this Act, at all steps during the prosecution of the Indian offender.*
 - (i) *The tribal Elders are to provide the court with insight regarding the offender's community and background. This information is to be considered during prosecution as a means of providing a culturally-appropriate and effective prosecutorial process.*
 - (ii) *The tribal Elders are to be accorded a minimum of a one-hour time allotment with each judge before the judge sentences the Indian offender.*
 - (B) *Recognize that while incarceration of an Indian offender may be warranted, such a judgment may not be a culturally-appropriate or effective sentence for Indian offenders, especially those convicted of non-violent crimes.*

Commentary

This amendment addresses the most glaring problem with the United States' system of sentencing Indigenous offenders—the fact that while Indian offenders indicted of misdemeanors are prosecuted in tribal court, Indian offenders indicted of felonies or who committed crimes outside of Indian country are generally prosecuted in federal court. Those offenders prosecuted in federal court are immersed in an adversarial system of justice that stands at odds with the restorative, communal systems of justice practiced by most tribal cultures.

Because tribal courts lack the resources and expertise of the federal government, it is not practicable to allow them to prosecute complicated felonies or the vast number of crimes committed by Indians outside of

Indian country. Therefore, to bridge the cultural gap, this proposed amendment draws from the systems of Indigenous criminal prosecution utilized in Canada and Australia, in which the presiding mainstream governmental judge consults with tribal Elders before handing down his or her sentence. This consultation with the Elders ensures that the unique cultural attributes of Indigenous offenders are accounted for and that the offenders' prosecution will be culturally-appropriate and effective. While some may be skeptical about the ability of the bureaucratic federal government to adopt such a progressive approach to justice, sentencing circles in Canada and Minnesota and Australia's Indigenous sentencing courts are proof that such a system is more than feasible.

This amendment would survive equal protection analysis because of the unique relationship between the Indian tribes and the United States government and because of the quasi-sovereign status of Indian tribes. By protecting only those Indians with "federally recognized Indigenous status," proposed section 213(c)(1) of this amendment draws a distinct line between racial discrimination, seldom allowed under equal protection law, and discrimination based on political affiliation, which need only be rationally related to strengthening the trust relationship between the United States government and the Indian tribes. Because of the unique nature of this trust relationship, this amendment does not create a slippery slope whereby courts would eventually be required to consult representatives from all cultures.

Proposed section 213(c)(1)(B) encourages judges to exercise restraint when sentencing Indian offenders to incarceration. Importantly, this amendment recognizes that incarceration of Indian offenders may be necessary in many circumstances, and therefore does not bar judges from exercising that option. However, judges must recognize that although incarceration is a painful and powerful punishment for any offender, it is often an especially harsh punishment for Indian offenders.²¹³ Encouraging judges to consider alternatives to incarceration for Indian offenders will also serve to decrease the financial drain on the federal government caused by incarceration and parole costs. The money saved by limiting incarceration of Indian offenders to those circumstances where it is absolutely necessary could ultimately be used to fund the system of tribal Elders established in Section IV.C of this Note.

²¹³ See *supra* notes 6-7 and accompanying text (discussing the ways in which incarcerated Indians are separated from key aspects of their cultural identity, from their hair to their religion, and the ways in which incarcerated Indians are often lightning rods for discrimination and hatred).

This amendment differs from the approach of the Canadian sentencing circles and the Australian sentencing courts in one major area: cultural shaming. Although Canada and Australia use shaming from tribal Elders as a partial punishment for Indigenous offenders, the U.S. federal government should not adopt this practice for two reasons. First, there is not enough empirical evidence to convince Congress that cultural shaming is a punishment that can effectively deter Indians from committing crime. Second, most of the Indians prosecuted in federal courts are in the federal system because they committed felonies beyond the scope of tribal criminal jurisdiction. Regardless of first-hand anecdotes about the powerful effect of cultural shaming upon Indigenous offenders, the tough-on-crime American public is unlikely to find that shaming is an adequately severe punishment for serious felonies. In order to gain widespread support, the incorporation of tribal Elders into the Indigenous prosecutorial system of the United States should not draw unnecessary criticism by adopting a controversial approach to criminal punishment. Therefore, cultural shaming should be put on the backburner until strong and uncontroverted evidence proves it to be an effective means of deterrence for crimes committed by Indians.

C. *Administration Amendment*

In order to create and maintain a system of tribal Elders to advise federal judges on culturally appropriate prosecutions for Indian offenders, section 214 of the TLOA should be expanded as follows:

SEC. 214. ADMINISTRATION.

(a) OFFICE OF TRIBAL JUSTICE. —

...

(b) NATIVE AMERICAN ISSUES COORDINATOR. —

...

(c) ADVISING ELDERS. —

(1) *In General.* — Elders representing each large tribe in the United States are to be employed by the Department of Justice in sufficient quantities for the purpose of providing federal judges with cultural guidance and insight regarding the cultural practices of the tribe.

(2) *“Large tribes”* are those tribes maintaining memberships which:

(A) Are registered with the federal government; and

(B) Contain more than 10,000 members.

(3) *In the event that an Indian offender is a member of a tribe which does not qualify as a “large tribe” and the Department of Justice therefore does not retain an Elder representative from that tribe, the*

Department of Justice is to recruit and temporarily employ an Elder representative from that tribe for the limited purpose of prosecuting that offender.

Commentary

It is not enough to mandate that federal judges consult with tribal Elders during the prosecution of Indian offenders. There must be an established system by which federal judges can maintain easy and ready access to the Elders. This same system must also function as a direct communication channel from tribal Elders to the federal government. To accomplish these goals, Elders must be retained and employed by the Department of Justice. Considering the vast number of Indian tribes in the United States, it would be impractical to require the Department of Justice to retain an Elder representative of each tribe. Accordingly, the proposed amendment draws a line at tribes with memberships of under ten thousand members. However, an Indian offender from a numerically smaller tribe should not be left without recourse. For that reason, section 214(a)(3) of the proposed amendment allows a process by which Elders from smaller tribes can be temporarily retained and employed by the federal government as the need arises.

Implementing and maintaining a system of tribal Elders will cost the government money, at least in the short-term. However, this expense is minor compared to the costs of the programs already established by the TLOA, such as increased funding for tribal law enforcement, the system of tribal liaisons, and the Office of Tribal Justice. Moreover, the amendment is designed to be as cost-effective as possible. Again, the amendment requires the government to retain Elders only from large tribes, and the portion of the amendment discussed in Part V.B of this Note will minimize incarceration and parole costs.

In the long-term, this Note's proposed amendments have the potential to save the government money. As discussed in Part II.A of this Note, high crime rates and high levels of socioeconomic hardships among American Indians are directly connected to the cultural gap between the federal government and the Indian tribes. Decreasing the cultural gap will improve the societal well-being of Indians. By minimizing socioeconomic and criminal justice inequalities, the governmental cost of providing food, shelter, and medical care to poverty-stricken Indians would decrease, as would the need to spend money on tribal law enforcement measures. Further, whether the government would ultimately save money or not, it still has an obligation under the trust relationship to ensure that Indians,

discriminated against and marginalized by the government for centuries, are treated adequately and fairly in the federal court system.

V. CONCLUSION

As a result of European colonization, life for the Indigenous people of the United States, Canada, and Australia is difficult. This difficulty is made all the more apparent by the fact that these three nations are among the most highly developed and prosperous nations in the world. And yet, despite their prosperity, they are nonetheless filled with millions of Indigenous people destined to struggle through life with low incomes and life expectancies and high chances of inopportune encounters with the criminal justice system. The United States through the TLOA, Canada through sentencing circles, and Australia through Indigenous sentencing courts are making progress toward ameliorating the socioeconomic and criminal justice hardships experienced by their Indigenous populations. These systems attack the root of these hardships, which is the gap between Indigenous and non-Indigenous culture.

While no nation's system of Indigenous criminal prosecution is perfect, blending the best aspects of the United States' system with the best aspects of the Canadian and Australian systems would result in a greatly improved system of Indigenous prosecution. The most significant problem with the United States' system occurs when Indian offenders—either because they committed a felony or because they committed a crime outside of Indian country—are prosecuted in federal court. To ensure that federal courts take the unique cultural attributes of Indian offenders into account, the TLOA should be amended to adopt the Canadian and Australian practice of allowing tribal Elders to advise and consult with the presiding judge. The incorporation of this practice would ensure culturally-appropriate prosecutions for Indian offenders, thereby honoring the United States' responsibility to ensure that its Indian tribes are treated appropriately.

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