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ALL THINGS CONSIDERED: THE EFFECT ON TRIBAL SOVEREIGNTY OF USING TRIBAL COURT CONVICTIONS IN UNITED STATES SENTENCING GUIDELINE CALCULATIONS

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I. INTRODUCTION

Criminal justice in the United States is a balancing act between local and national enforcement, policies, and priorities. The common refrain "don't make a federal case out of it" is perhaps nowhere as palpable a consideration as in criminal prosecutions. Elevating a case into the courts of the United States is a serious consideration for the Department of Justice.[1] In addition to front-end decisions about investigation and prosecution of offenses, the federal and local criminal justice systems are deeply intertwined through the consideration of prior convictions in determining federal sentences.[2] Which local convictions are given weight in federal sentencing and under what circumstances are central questions[3]

Both of these questions are common and complicated in the relationship between the United States and Indian tribes. Indians are subject to federal court jurisdiction for a broad swath of crimes that would typically be left to state courts when committed by non-Indians.[4] Under the separate sovereigns doctrine, Indians may be prosecuted in tribal court and federal court for the same conduct.[5] Tribal court convictions are not automatically included in the calculation of criminal history for federal sentencing as are prior federal or state court convictions.[6]

A fundamental question in federal criminal sentencing is what convictions are counted to determine criminal history based on their type, age, court of origin, and other factors.[7] A fundamental question in federal Indian law is what level of tribal government sovereignty is recognized and accommodated.[8] This article explores the intersection of those questions. It does so in light of a recent reevaluation by the United States Sentencing Commission (U.S.S.C) of how tribal court convictions are factored into criminal history calculations in federal sentencing. It seeks to explore different visions of "sovereignty" attributed to tribal governments by scholars and how those visions are effectively or ineffectively advanced by federal sentencing policy.

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[1] *See e.g.*, U. S. DEP'T OF JUSTICE, JUSTICE MANUAL, 9-2.030 (addressing general provisions for authorizing federal prosecution), 9-2.031 ("Petite Policy") (addressing considerations for dual federal prosecution of crimes prosecuted in state courts).

[2] U.S.S.G. § 4A1.1. Criminal history points are assigned to prior convictions. A higher criminal history score results in a higher Sentencing Guideline range.

[3] U.S.S.G. § 4A1.2.

[4] *See e.g.*, 18 U.S.C. §§1152, 1153.

[5] *See United States v. Wheeler*, 435 U.S. 313, 329-30 (1978); *United States v. Lara*, 541 U.S. 193, 208-10 (2004). In both of these cases, a significant question was whether the authority of the Indian tribal government to prosecute was inherent or delegated federal power. What powers a government possesses and who, if anyone, may limit those powers are key aspects of sovereignty. This question of "what is sovereignty" runs throughout the background of this paper.

[6] *See* U.S.S.G. § 4A1.2(i).

[7] *See supra* note 3.

[8] *See e.g., Montana v. United States*, 450 U.S. 544, 565–66 (1997) (outlining the scope of tribal adjudicatory and regulatory jurisdiction).

Part I of this article briefly traces the development of the relationship between the governments of the United States and Indian tribes. Part II traces the history of the United States Sentencing Guidelines. In particular, it reviews the history of the debate regarding how to consider tribal court convictions in calculating criminal history scores for federal sentences and the work of the ad hoc Tribal Issues Advisory Group ("TIAG") appointed by U.S.S.C. in 2016 to consider sentencing issues relating to Indians and Indian Country. Part III considers how tribal sovereignty relates to federal sentencing policy. That section identifies and assesses competing views of tribal sovereignty and how those views relate to the consideration of tribal court judgments in federal sentencing. Part IV considers how the policy proposals recommended by TIAG and considered by the U.S.S.C. advance or fail to advance these visions of tribal sovereignty. Part V proposes a different vision of what tribal sovereignty can be in the context of federal sentencing and assesses whether the TIAG proposals effectively advance this vision of sovereignty. Lastly, it briefly discusses if this view of sovereignty is normatively superior.

It is an important caveat at the outset that this article includes both broad and highly specific considerations. Considering how tribal and federal courts interact and view their respective judgments goes to the heart of the right of tribes to self-determination and self-governance. In that sense, the article puts on the table the most fundamental questions of federal Indian law. However, these issues are assessed through the very specific lens of how prior convictions from tribal courts are, or are not, considered by federal courts in imposing sentences in criminal cases. In that sense, the article deals with a very discrete question.

But we must begin at the beginning. The current state of affairs is, inevitably, a product of history. The future requires some understanding of that history and, to a degree, a struggle against it.

II. A SHORT HISTORY OF TRIBAL AND FEDERAL GOVERNMENT RELATIONS

Indians and their mechanisms of self-governance and dispute resolution existed before Europeans arrived in North America.[9] This is a gross oversimplification of history and also a statement of what should be obvious. However, to evaluate any policy in light of tribal sovereignty, it is a necessary starting point. For those without regular contact with Indian Country, it can be far from obvious, and the resulting ignorance or lack of engagement can

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[9] *See generally* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 1, (3rd ed. 2002). In fact, some scholarship suggests that the existing governance structures of some Native American societies provided guidance and inspiration to the Founders as to some concepts they adopted in framing the Constitution. *See e.g.*, Bruce Johansen, *Forgotten Founders*, 102-06 (1982). That view is not unquestioned, however. *See* TIMOTHY J. SHANNON, IROQUOIS DIPLOMACY ON THE EARLY AMERICAN FRONTIER, 9 (2008).

produce policies that undercut tribal sovereignty. As a leading treatise notes, historical context matters when discussing Indian law issues.[10]

A. Contact, Co-Existence, and Colonization (1492-1789)

The relationships between Native American societies and Europeans began upon contact. These early relationships were nation-to-nation engagements between sovereign entities.[11] However, this was often as warring nations, driven by the belief of many European nations that they had a divine right to conquer non-Christian people.[12] Nonetheless, the predominant approach was sovereign-to-sovereign engagement, with crucial issues addressed through treaties.[13]

Sovereign-to-sovereign relations built around treaties remained the common approach early in the history of the United States after independence from England was achieved and until the Constitution was ratified.[14] Almost immediately, however, the United States Congress began to assert the ability to deal with Indians unilaterally through statutes, a process in which Indians and their governments had no voice.[15]

B. Constitution, Marshall Trilogy, and the Genesis of "Plenary Power" (1789-1832)

The United States Constitution viewed Indian nations as separate sovereigns, excluding them from apportionment of representation and direct taxation,[16] and granting Congress the power to regulate commerce with Indians much as with other nations.[17] So, at the time of framing the Constitution, the United States recognized Indian tribes as separate, sovereign, self-governing people. In practical terms, that view began to change in "the Marshall Trilogy."[18] This series of three Supreme Court decisions penned by Chief Justice John Marshall set key assumptions that

[10] *See* FELIX J. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 7, (Nell Jessup Newton et al. eds., 2005 ed.).

[11] *Id.* at 10–11. Again, somewhat ironically, upon arrival of the first Europeans in North America, Native American societies were the dominant cultures. Without their sharing of experience and technology tailored to and developed from experience of the local environment, early European settlements would have failed. The Iroquois Confederacy was sufficiently powerful at that time that their alliance with the English in war against the French altered the course of the Seven Years' War, and the future of North American history, in favor of the English. PEVAR, *supra* note 9, at 5.

[12] *Id.*

[13] *Id.* at 17.

[14] *Id.* at 26–28.

[15] *Id.* at 26.

[16] U.S. Const. Art. I, § 2, cl. 3.

[17] U.S. Const. Art. I, § 8, cl. 3.

[18] FRANK POMMERSHEIM, BRAID OF FEATHERS 39–40 (1995).

continue to affect federal Indian law and policy in the United States to this day.[19]

The first case, *Johnson v. M'Intosh*, resolved a land dispute based on competing patents issued by the United States and the Piankeshaw Tribe; the Court held that the tribally issued title was inferior.[20] Chief Justice Marshall based that holding on the premise that Indians were not "civilized" and thus not able to productively hold property rights.[21]

The next case, *Cherokee Nation v. Georgia*, required resolution of the question of whether Indian tribes were entitled to exercise original jurisdiction in the Supreme Court.[22] Chief Justice Marshall held that Indian tribes were "domestic dependent nations," rather than states or foreign sovereigns, and therefore original jurisdiction was not available.[23] While the opinion described Indian tribes as having many of the attributes of states or foreign nations, it placed them in an undefined position with neither the rights and protections of states of the Union nor the full sovereignty of foreign nations.

The final opinion, *Worcester v. Georgia*, considered the state of Georgia's attempt to prosecute an Indian under state law.[24] Chief Justice Marshall concluded that Indians had a right to self-governance independent of state law, but not independent of the laws of the United States.[25]

While these decisions did affirm some right to self-governance for Indians, the decisions were quite dismissive of Indians' equal status with the United States.[26] This condescending view of the relationship between Indian tribes and the United States culminated in the plenary power doctrine, which dictated that the power of Indian governments is subordinate to the unilateral power of the United States Congress.[27]

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[19] *Id.* They also were fittingly filled with contradictions because federal Indian law has continued to wrestle with contradictions and paradoxes ever since. *Id.* at 8–9.

[20] Johnson v. M'Intosh, 21 U.S. 543, 587–88 (1823).

[21] *Id.* at 590.

[22] Cherokee Nation v. Georgia, 30 U.S. 1, 19–20 (1831).

[23] *Id.* 30 U.S. at 17–20.

[24] Worcester v. Georgia, 31 U.S. 515, 558-60 (1832).

[25] *Id.*

[26] POMMERSHEIM, *supra* note 18, at 43.

[27] *Id.* at 46-47. *See also United States v. Kagama*, 118 U.S. 375, 376 (1886) (upholding the authority of Congress to enact the Major Crimes Act, 18 U.S.C. § 1153, which provided federal criminal jurisdiction over several violent offenses committed between Indian people within Indian Country, though the Court did not cite a specific provision of the Constitution as providing that authority); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564–65 (1903) (holding that Congress could unilaterally abrogate treaties with Indian tribes). Although the rationale of these cases that plenary power is inevitable because of the superiority of European culture and norms has ameliorated over time, the force of the plenary power doctrine continues unabated.

C. Removal to Self-Determination (1828-Present)

The successive history of relations between the United States and Indian people saw dramatic changes of purpose and practice.[28] Following the election of Andrew Jackson as President, westward expansion of non-Indians was facilitated by the policy of "removal," forcibly displacing Indians from their homelands to points further west not yet viewed as desirable by settlers.[29] Removal was firmly rooted in the Marshall Trilogy idea of Indians as uncivilized inferiors subject to the plenary power whims of the United States.

As the pressure for land expansion in the middle and western parts of North American increased in coming decades, removal gave way to the era of reservations and allotments.[30] Under this policy, Indians were to be allotted land as individuals to sustain them.[31] While less overtly hostile than removal, allotment was no less destructive in sentiment or fact; the description by President Theodore Roosevelt, ever pungent in his comments, was that allotment was "a mighty pulverizing engine to break up the tribal mass."[32]

Late in the 19th Century and into the early 20th, the policy of allotment was paired with the purpose of assimilation. This was the idea that Indians would adopt the "civilized" culture of the dominant society and assimilate into its culture and governance structure.[33] This policy also had the implicit goal to reduce the land use of Indian people, thus freeing more land for the occupation by non-Indians.[34]

The election of Franklin Roosevelt and appointment of John Collier as Commissioner of Indian Affairs ushered in a seismic shift.[35] Collier oversaw passage of the Indian Reorganization Act, which sought to shift power back to Indian people to govern themselves, restore title to the lands they had historically occupied, and promote economic development through programs making financial credit available.[36] Even this policy was not fully benign,

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[28] This survey provides but the briefest historical orientation. But some historical context, even brief, is needed to discuss the policy issues which come later.

[29] *See* PEVAR, *supra* note 9, at 7–8; COHEN, *supra* note 10, at 45–54. The most infamous single act of removal being the forced march of the Cherokee along the "Trail of Tears," upon which more than 4000 Cherokee died. COHEN, *supra* note 10, at 52.

[30] *Supra* note 9, at 8–9; *supra* note 10, at 64–65. In this era, the United States worked to contain Indian people within dedicated and contained geographic areas referred to as "reservations." This policy was rooted in the expectation that Indian people would "resort to agricultural labor or starve…." *Supra* note 2, at 64, quoting Comm'r Ind. Aff. Ann. Rep., S. Exec. Doc. No. 31–1 (1850). Contemporaneously, other land that was previously occupied by Indians as a group was allotted to individual Indians in fee title.

[31] POMMERSHEIM, *supra* note 18, at 19.

[32] *Id.*

[33] *See supra* note 10, at 75–77.

[34] *Id.*

[35] *Id.* at 85.

[36] *Id.* at 86–87; *supra* note 9, at 9–10.

however, as it effectively imposed "white man's way" governing structures on tribes.[37]

After World War II, this period of positive relationships and tribal development was succeeded by the policy of "termination."[38] This policy sought to eliminate the trust relationship between Indian tribes and the United States; it also cut off the corresponding benefits to Indian people and had a disastrous impact in Indian Country.[39]

With the arrival of the 1960s, the policy that endures to this day arrived: self-determination.[40] In a variety of policy settings and statutes, the central tenets of self-determination have been that Indian people should autonomously govern themselves and relate to the United States on a government to government basis.[41] How seriously the United States takes this obligation, and how much capacity to truly self-govern the tribes retain, continues to change, however.

D. History as Context for Present and Future

Two takeaways from this simplified synopsis of more than 500 years of complex history are important. First, current federal policy is that Indians should govern themselves and their lands, and that the United States and tribal governments should engage in true dialogue between separate sovereigns. Second, since European contact in North America, Indians have consistently not been allowed to independently govern themselves, and their society and governing structures have been seen as "other," inferior, or irrelevant.[42]

These observations are important because a push for tribal sovereignty is largely a push against history. Additionally, these periods of history are not neatly separated. Even in an era of self-determination, many of the negative impulses and policies of earlier periods still have significant impact on policies and engagement in Indian Country today. Efforts to understand and advance tribal sovereignty must be considered in light of the ongoing impact of history.

III. A SHORT HISTORY OF THE UNITED STATES SENTENCING

[37] POMMERSHEIM, *supra* note 18, at 22–23. The pressure to adopt Anglo-American governing structures is a critical and recurring theme herein. In fact, the question of how much tribes seek to replicate Anglo-American structures, and how voluntarily they do so, may be the central question of tribal sovereignty today.

[38] *Supra* note 10, at 89–90.

[39] *Id.* at 95; *supra* note 9, at 11–12.

[40] *Id.* at 97; *supra* note 9, at 12–13.

[41] *Supra* note 9, at 12–13.

[42] *See* Frank Pommersheim, *Liberation, Dreams and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 420–21 (1992).

GUIDELINES

To consider how the use of tribal court convictions in federal sentencing affects tribal sovereignty, it is also important to have a basic understanding of the history of the United States Sentencing Guidelines (U.S.S.G.). That history, somewhat like federal Indian policy, is more circuitous than linear and filled with competing, sometimes irreconcilable, policy goals and choices.

The Sentencing Guidelines were the product of a bipartisan effort to restrict the sentencing discretion of federal judges.[43] Prior to their enactment, federal sentencing was truly indeterminate.[44] Courts generally had full discretion between the statutory maximum and a non-custodial sentence, and there was little mandatory process to govern what evidence entered into the sentencing calculation, the court's explanation of the reasoning behind the sentence, or comparison of sentences across geography and time.[45] As a result, there was academic and political concern about sentencing disparity.[46] Empirical research and studies asking federal judges from across the country to determine the proper sentence based on a hypothetical case demonstrated wide disparities in sentences in comparable cases.[47] Research also indicated that race and gender significantly contributed to this disparity.[48]

Congressional intent coalesced around changing this paradigm.[49] But internal tensions that persist to this day infected the process. Some legislators viewed the crucial issues as a need for sentencing reform as well as improper disparity resulting from factors such as race and gender.[50] Others saw the primary problem as undue leniency.[51] To this day, perhaps no debate continues as forcefully around the design and application of the Sentencing Guidelines as whether they exacerbate unfairly punitive sentences on racial minorities or if they properly restrict the excessive leniency of some judges.[52]

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[43] KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING, 38–39 (1998).

[44] *See* Brent Newton & Dawinder Sidhu, *The History of the Original United States Sentencing Commission*, 1985-1987, 45 HOFSTRA L. REV. 1167, 1169–70 (2017).

[45] *Id.*

[46] STITH & CABRANES, *supra* note 43, at 35–39.

[47] Newton & Sidhu, s*upra* note 44, at 1179–80. One hypothetical generated a range of sentences between one and fifteen years with a mean of just over eight years. *Id*.

[48] *Id.* at 1180.

[49] STITH & CABRANES, *supra* note 43, at 39.

[50] Newton & Sidhu, *supra* note 44 at 1180–1181.

[51] STITH & CABRANES, *supra* note 43 at 38-39; *see also supra* note 44 at 1181–1182.

[52] *See e.g.*, Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1681–91 (2012) (arguing that racial disparities in sentencing were exacerbated by the mandatory sentencing regime created by the Sentencing Guidelines); William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 351-53 (2011) (arguing for broader sentencing ranges which are presumptively binding to constrain judicial discretion); United States Sentencing Commission, Intra-City Differences in Federal Sentencing Practices (2019) (studying sentencing variances among judges in 30 major cities); 82 Fed. Reg. 28381, (Federal Defender Sentencing Guidelines Committee, July 31, 2017

The product of this Congressional push was the United States Sentencing Commission.[53] The U.S.S.C. was tasked to develop guidelines that could apply across the United States to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."[54] Despite the call for uniformity, the Guidelines contained an invitation for judges to impose sentences that departed from the Guidelines when individual circumstances not taken into account called for it.[55] Judges were directed to formulate sentences that advanced a variety of purposes: the sentencing range called for by U.S.S.G. asked judges to consider the personal circumstances and history of the defendant, the nature and circumstances of the offense, the need for just punishment and deterrence, rehabilitation of the defendant, and protection of the public.[56]

Under the Guidelines two primary factors drive the sentence: first, the severity of the defendant's conduct as determined by an offense level assigned to the underlying offense and certain specific offense characteristics that either exacerbate or mitigate punishment;[57] second, greater criminal history of the defendant triggers a higher range of punishment for the same conduct.[58] A defendant has a greater criminal history score as they accumulate more, more severe, and more recent convictions.[59] The role and weight of criminal history has continued to be a key point of debate.[60]

The Guidelines were considered "mandatory" when they were created in that sentencing judges were required to comply with them except when

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comment letter regarding USSC Proposed Priorities, 2–4) (arguing for reduced reliance on recidivism and increased consideration of individual factors to decrease harsher sentencing outcomes for racial minorities).

[53] *See* Sentencing Reform Act of 1984, Title II of the Comprehensive Crime Control Act, 28 U.S.C. §994(a) (2019) (passage of Comprehensive Crime Control Act created the Sentencing Commission and outlined its duties).

[54] 28 U.S.C. § 994(f) (directing the Commission to promulgate guidelines achieving this purpose); *See* STITH & CABRANES, *supra* note 43, at 51–52 (the question of what disparities are "unwarranted" and what factors help distinguish warranted and unwarranted disparities was largely unresolved by the statute).

[55] *Id.; See also* Newton & Sidhu, *supra* note 44 at 1185-86.

[56] 18 U.S.C. § 3553(a) (2019); *See* Stith & Cabranes, supra note 43, at 51–55 (The complexity and internal tension inherent in federal sentencing practice after adoption of the Guidelines is obvious from this list of purposes that judges should consider. It will be a rare if not non-existent case when all these indicia point to the same sentence. Arguably, a fundamental flaw of the Sentencing Reform Act is that it does not adopt a theory of punishment, but instead asks judges to approach cases with several theories equally in their minds).

[57] *See* Newton & Sidhu, *supra* note 44 at 1208–09.

[58] *Id.; See also* Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 595-98 (2003) (From the beginning, not all convictions were counted in the criminal history score); Newton & Sidhu, s*upra* note 44 at 1287-91 (Some were excluded based on their age, others on their nature (e.g., public intoxication), still others on their origin (e.g., foreign and tribal court convictions).

[59] U.S.S.G. § 4A1.1- 4A1.2 (Not all convictions are counted. Many are excluded based on being too minor, too old, or other factors).

[60] *See e.g.*, United States Sentencing Commission, The Criminal History of Federal Offenders (2018); United States Sentencing Commission, Criminal History and Recidivism of Federal Offenders (2017); United States Sentencing Commission, Computation of Recent Criminal History Points under U.S.S.G. § 4A1.1(e) (2010).

"departing" based on certain criteria identified within the Guidelines themselves.[61] That changed in revolutionary fashion in 2005 when the Supreme Court held that the mandatory aspect of U.S.S.G. violated the Sixth Amendment right to trial by jury.[62] Following *Booker*, sentencing judges were free to consider the Guideline range as one of, but not the dominant, concern at sentencing.[63] Subsequent decisions freed judges to disagree with the Guidelines on policy grounds and held that sentences would be subject to appellate review only for substantive reasonableness, not some quantitative evaluation of their relationship to the applicable U.S.S.G. calculation.[64] This is the sentencing regime that continues to the current day.

Some observations about this historical arc are useful at this point. First, the Guidelines have evolved toward more individualized sentences while remaining anchored to sentencing ranges intended ameliorate disparity across time and geography. Second, criminal history has been and remains a central consideration, but exactly which convictions count and what weight they are given remains open to vigorous debate. Third, judges are free to make individual determinations about not only defendants and their conduct but also about the policies driving sentences. This creates an environment where judges can craft sentences individually tailored to local and individual circumstances. In short, federal sentencing has evolved to balance application of general policy with individual circumstances. From this general history we can turn to the specific history of how tribal court convictions have been incorporated into criminal history calculations.

IV. TRIBAL COURT CONVICTIONS UNDER U.S.S.G. AND THE TRIBAL ISSUES STUDY GROUPS

The Sentencing Guidelines have unique prominence in Indian Country. This is because offenses commonly handled in state courts for non-Indians (e.g., murder, kidnapping, arson, child abuse) are prosecuted in federal courts when they take place in Indian Country under the General Crimes Act and the Major Crimes Act.[65]

U.S.S.G. does not assign criminal history points to tribal court convictions.[66] Courts are invited to consider an upward departure if the defendant's criminal history score would under-represent their prior criminal conduct due to the volume or severity of those convictions, however.[67] This

[61] STITH & CABRANES, *supra* note 43, at 82–85.

[62] *United States v. Booker*, 543 U.S. 220, 258–59 (2005).

[63] *Id.* at 259-60; 28 U.S.C. § 3553(a).

[64] *Rita v. United States*, 551 U.S. 338, 347–48 (2007); *Gall v. United States*, 552 U.S. 38, 47–50 (2007); *Kimbrough v. United States*, 552 U.S. 85, 109 (2007); *Spears v. United States*, 555 U.S. 261, 263–65 (2009) (per curiam).

[65] 18 U.S.C. §§ 1152, 1153.

[66] U.S.S.G. § 4A1.2(i).

[67] U.S.S.G. § 4A1.3(a)(1).

is identical to the treatment of convictions from the courts of foreign nations.[68] It is unlike state and federal court convictions, which are automatically assigned criminal history points unless they fit within exclusions for offenses obtained without counsel, offenses older in time, or offenses among certain conviction types excluded on policy grounds.[69]

How to consider tribal court convictions in criminal history scoring was a question present when the Guidelines were adopted.[70] Commentators expressed concern that including tribal court convictions in the criminal history calculations could face practical problems such as the availability and reliability of tribal court records, violate due process since tribal courts are not required to provide counsel, and increase sentencing disparity by imposing harsher sentences on Indian defendants in federal court.[71] U.S.S.C. did not explain why it excluded tribal court convictions from the criminal history calculation.[72] It has never wavered from that decision, however, and the invited departure for under-representative criminal history has been regularly used.[73]

In 2002, U.S.S.C. created a committee to analyze the impact of the Guidelines on Indians and in Indian Country.[74] That committee took testimony and input from a variety of sources.[75] Several findings are of real interest here. First, only limited data existed regarding disparity of sentences for comparable crimes committed by Indians sentenced in state and federal courts.[76] Second, to the degree that data did exist about a limited number of crimes from a limited number of jurisdictions, there was evidence of some disparity, but it was a mixed record.[77] Lastly, the committee specifically

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[68] U.S.S.G. § 4A1.2(h).

[69] U.S.S.G. § 4A1.2(c).

[70] *See* Kevin Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 415-416 (2004) (summarizing the initial proposal to include tribal court convictions in criminal history calculations and eventual decision not to do so).

[71] *Id.* at 417–18 (summarizing testimony of Federal Public Defender Tova Indritz at U.S.S.C. public hearing regarding promulgation of the original sentencing Guidelines). Washburn dismisses these concerns in articles advocating that tribal court convictions be counted. *See e.g.*, *id*. Kevin Washburn, *Reconsidering the Commission's Treatment of Tribal Courts*, 17 FED. SENT'G REP. 209, 210 (2005). However, these concerns continue to be expressed by practitioners in federal courts which cover Indian Country, including prosecutors, public defenders, and judges. *See e.g.*, Jon Sands & Jane McClellan, *Policy Meets Practice: Why Tribal Court Convictions Should Not Be Counted*, 17 FED. SENT'G REP. 215, 216–217 (2005); Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37, 38-39 (2011); Charles B. Kornmann, *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*, 13 FED. SENT'G REP. 71, 73 (2000).

[72] Washburn, *supra* note 70, at 416.

[73] *See e.g.*, *United States v. Stoney End of Horn*, 829 F.3d 681, 688 (8th Cir. 2016); *United States v. Yates*, 22 F.3d 981, 988 (10th Cir. 1994).

[74] United States Sentencing Commission, Report of the Native American Advisory Group, 3 (2003).

[75] *Id.* at 10–13.

[76] *Id.* at 12.

[77] *Id.* at 11–12. In particular, the committee found that the available data suggested that an increase to the base offense level for involuntary manslaughter offenses arising from drunk driving was appropriate because it was an offense that overwhelmingly involved Indian defendants and that the base level was relatively low for a homicide offense. *Id.* at 16–17. Conversely, the Committee recommended that the

rejected changing the status quo to count tribal court convictions in criminal history calculations under the Sentencing Guidelines.[78]

The committee also recommended that U.S.S.C. engage in formal and regular consultation with tribal governments.[79] Different tribes take very different positions on the role of the federal government in prosecuting and punishing crime by Indians and within Indian Country.[80] The committee directed that U.S.S.C., "should consider tailoring federal policy to the wishes of the tribe" and that they, "cannot and should not indiscriminately bind all of the numerous individual Indian tribes which range dramatically in size of population and physical jurisdiction."[81] While U.S.S.C. adopted the committee's recommendation to increase the involuntary manslaughter guideline,[82] formal and regular consultation went nowhere.

Just over a decade later, U.S.S.C. formed the ad hoc Tribal Issues Advisory Group ("TIAG").[83] U.S.S.C. directed TIAG to study certain issues "relating to American Indian defendants and victims and to offenses committed in Indian Country".[84] TIAG was specifically tasked to evaluate inclusion of tribal court convictions in the criminal history calculation.[85]

TIAG was larger than the earlier study committee and more diverse in that, in addition to federal courts personnel, it included tribal court judges, practitioners, law enforcement officers, and one tribal chairman.[86] TIAG observed court hearings and met with officials in the courts of the Standing

base level for aggravated assault be lowered. *Id.* at 34. Again, this was an offense that was applied most commonly to Indians, and the sentences imposed where high when compared to comparable crimes sentenced in two state courts where data was available (New Mexico and South Dakota). *Id.* at 30–34.

[78] *Id.* at 13. Much of the public and scholarly discussion of whether to change this approach grew up around this committee study. *See* Washburn, *Reconsidering the Commission's Treatment*, *supra* note 71; Sands and McClellan, Policy Meets Practice, *supra* note 71 (both Washburn and Sands served on the committee). *See also* Kornmann, *Injustices*, *supra* note 71; Jon Sands, *Departure Reform and Indian Crimes: Reading the Commission's Staff Paper with "Reservations*," 9 FED. SENT'G REP. 144 (1996).

[79] *Id.* at 37–39.

[80] *Id.* at 38. The committee specifically contrasted tribes who may want a strong federal presence with those tribes, citing the Navajo Nation as an example, who had robust law enforcement and justice systems and would want to be the primary enforcers of criminal law within their territory. *Id.*

[81] *Id.* The force and unanimity of this recommendation should be considered in light of the Committee makeup. It included Article III judges who regularly heard cases from Indian Country, federal law enforcement officers and prosecutors, a victim advocate, an assistant federal public defender, and academics. *Id.,* at Appendix A (identifying Committee members and providing professional background information). While such a group had different experiences and policy preferences, they universally endorsed the need to hear, consider, and give weight to the opinions of Indians and tribal governments when fashioning policies that impact Indian Country.

[82] 67 Fed. Reg. 77532; U.S.S.G. Appendix C, Vol. II, Amd. 692.

[83] United States Sentencing Commission, Report of the Tribal Issues Advisory Group, 3-5 (2016).

[84] *Id.* at 3.

[85] *Id.*

[86] *Id.* at Appendix A.

Rock Sioux Tribe and Pacua Yaqui Tribe.[87] Additionally, TIAG conducted a formal consultation with tribal governments.[88]

TIAG made a series of recommendations to U.S.S.C.[89] They included support for better state criminal justice data collection so sentencing disparity could be evaluated, increased use of pretrial diversion by United States Attorneys' offices, and amending the Juvenile Delinquency Act, 18 U.S.C. § 5032, to require tribal consultation prior to initiating certain juvenile proceedings.[90] TIAG recommended that U.S.S.C. create a standing advisory group on tribal issues.[91] TIAG also recommended amendments to the Guidelines to define the term "court protection order," to include a policy statement regarding consideration of age for youthful offenders, to add an invited downward departure for juveniles and youthful offenders, and to change the departure based on under-represented criminal history in U.S.S.G. § 4A1.3.[92]

TIAG rejected the inclusion of tribal court convictions in U.S.S.G.'s criminal history calculation.[93] Within the statutory directive to impose sentences "sufficient but not greater than necessary" and to avoid unwarranted sentencing disparity, the use of individual departures based on under-represented criminal history under U.S.S.G. § 4A1.3 was deemed the best approach.[94] In reaching this conclusion, TIAG relied heavily on observations of its members (who possessed broad and deep experience in Indian Country) that, with more than 350 very different tribal courts across the United States, a one size fits all approach might increase disparity.[95]

TIAG expressed a commitment to sentencing practices tailored to individual defendants and which engaged with the realities of individual tribal courts. It recommended factors to provide some analytical rigor and consistency in determining which tribal court convictions would be given weight under U.S.S.G. § 4A1.3.[96] TIAG recommended five factors, none of which was to be determinative:

> (1) Whether the defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections

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[87] *Id.* at 3.

[88] Tribal Issues Advisory Group, October 10, 2017 comment letter and attached transcript of September 25, 2017 consultation.

[89] *Supra* note 83, at 1–2.

[90] *Id.* at 2.

[91] *Id.* at 1. The Commission responded to this recommendation more vigorously than in 2003. It created a standing TIAG which is consulted in the Guideline amendment process to assess how proposed amendments may affect Indian people and Indian Country cases. *Supra* note 88. The amendment promulgation process following TIAG's recommendations also affirmatively sought tribal input.

[92] *Id.* at 1.

[93] *Id.* at 12.

[94] *Id.*

[95] *Id.*

[96] *Id.*

consistent with those provided to criminal defendants under the United States Constitution;

(2) Whether the tribe was exercising expanded jurisdiction under the Tribal Law and Order Act[97] and the Violence Against Women Act Reauthorization of 2013[98];

(3) Whether the conviction arose from conduct giving rise to a conviction in another jurisdiction that is counted;

(4) Whether the conviction is for an offense that would otherwise be counted under § 4A1.2 based on the type and age of the offense;

(5) Whether the tribal government has formally expressed a desire that convictions from its courts should or should not be counted in determining federal court sentences.[99]

U.S.S.C. held a public hearing for TIAG to present its report and recommendations.[100] TIAG's Chairman, Judge Ralph Erickson of the District of North Dakota and its subcommittee chairs testified at the hearing.[101]

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[97] Pub. L. No. 111-211, 25 U.S.C. § 1302(a)(7)(C)-(d). TLOA authorized tribes to impose longer sentences, up to three years per offense and nine years total for a group of offenses, if certain procedural protections (e.g., law trained counsel is provided) are met.

[98] Pub. L. No. 113-4, 25 U.S.C. § 1304. The VAWA Reauthorization authorized tribes to exercise "special domestic violence criminal jurisdiction" to prosecute domestic violence offenders and violators of protection orders, both Indian and non-Indian. To exercise this jurisdiction, tribes must meet certain requirements including providing trial by jury and law trained counsel. It is important to note that Congress expressly recognized this as "inherent" authority of tribes. This is in contrast with Supreme Court cases which held that such inherent authority does not extend to non-Indians or non-members of the prosecuting tribe. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Duro v. Reina, 495 U.S. 696 (1990). Congress subsequently "fixed" the latter, by "granting" tribes jurisdiction over non-member Indians. *See* 25 U.S.C. 1301 (2). *See also* United States v. Cara, 541 U.S. 193, 200 (2004).

[99] *Id.* at 12–13. TIAG also included a recommended background statement about the suggested criteria:

> Tribal courts occupy a unique and valuable place in the criminal justice system. Tribal courts range in style from traditional justice systems to court systems that meet the standards under the Tribal Law and Order Act and the Violence Against Women Act Reauthorization of 2013 as providing due process rights, and all such courts deserve respect. Federally recognized Indian tribes to foreign nations than states in many respects. As United States citizens, tribal members are potentially subject to the jurisdiction of federal, state, or tribal courts depending on the circumstances of the offense. Convictions from tribal courts have not been included in the criminal history calculations under § 4A1.1 since the inception of the Guidelines, but have long been a basis for potential upward departures under this section. In considering a possible departure under § 4A1.3, none of the factors listed in Note 4 is intended to be determinative, but collectively they reflect important considerations for sentencing courts to balance the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences in light of disparate tribal court practices and circumstances, and the goal of accurately assessing the severity of any individual defendant's criminal history.

[100] *See* United States Sentencing Commission, Public Hearing on the Tribal Issues Advisory Group Report and Recommendations, July 21, 2016.

[101] *Id.* Judge Erickson was, at the time, Chief Judge for the District of North Dakota; he is now a Circuit Judge for the Eighth Circuit Court. Judge Roberto A. Lange, U.S. District Judge for the District of South Dakota testified as chair of the Drafting Subcommittee. Judge Jeffrey Viken, Chief U.S. District Judge for the District of South Dakota testified as Chair of the Sentencing Disparities Subcommittee. Brent

Introducing the proposed amendments, Judge Erickson related the concerns and reasoning that produced the list of factors to guide consideration of tribal court convictions under U.S.S.G. § 4A1.3.[102] He noted that tribal courts have very different circumstances, experiences, and approaches to criminal justice.[103] As a result, the proposed factors provided a way "to make it work for every single tribe because it gives the district judge the opportunity to really evaluate the tribal courts that have imposed those prior judgments and how they should be viewed."[104] Brent Leonhard, Tribal Attorney for the Confederated Tribes of the Umatilla Indian Reservation, noted that the factors collectively, and particularly the fifth factor, provided a holistic means to consider tribal court views on how their convictions should or should not be considered.[105] He also noted that TIAG intended that no one factor be determinative or given priority.[106] Judge Roberto Lange of the United States District Court for the District of South Dakota added his practical observation that of the several tribes whose members were routinely before him for sentencing, one refused to provide criminal history information to United States Probation officers.[107] In light of that reality, a system that automatically counts tribal court convictions would inevitably interject sentencing disparity into his courtroom.[108] Experiences like that caused the Article III judges on TIAG, all of whom routinely imposed sentences in cases arising from Indian Country, to unanimously reject the idea of automatically counting tribal court convictions in favor of the departure that, with the guidance provided by the proposed factors, allowed individual tailoring of sentences and the use of tribal court judgments.[109]

Leonhard, Tribal Attorney for the Confederated Tribes of the Umatilla Indian Reservation and Barbara Creel, Professor of Law at the University of New Mexico School of Law testified as Co-Chairs of the Tribal Court Convictions Subcommittee. Kathleen Biss Quasala, a private practice lawyer, testified as Chair of the Juvenile Offenders Subcommittee.

[102] *Id.* at 25–28.

[103] *Id.* at 25–26.

[104] *Id.* at 27.

[105] *Id.* at 41.

[106] *Id.*

[107] *Id.* at 28. Judge Lange noted that some tribes believed that their members received unduly harsh sentences in federal court. Professor Creel noted another practical reality that would lead to inevitable disparity that was observed in the Standing Rock Sioux Tribal Court. Drug offenders were routinely pleading guilty and sentences of more than thirty days were being imposed to facilitate getting drug treatment because Standing Rock did not have other mechanisms to provide inpatient treatment. *Id.* at 60-–61. Mr. Leonhard acknowledged similar observations in other courts. *Id.* at 62.

Including such convictions in the criminal history calculations caused unwarranted disparity because sentences in excess of sixty days receive more criminal history reports, based on their perceived severity, when the sole reason for the length of the sentence was to allow adequate time and resources for inpatient drug treatment. U.S.S.G. § 4A1.1. Increasing sentence length to facilitate treatment is specifically precluded in federal court. Tapia v. United States, 564 U.S. 319 (2011). This was another practical example of the lived experience of Indian Country practitioners that treating tribal courts the same across the board is inherently inequitable and unrealistic.

[108] *Id.*

[109] *Id.* at 28–29.

TIAG's holistic attempt to engage with tribal court judgments encountered confusion and resistance. Judge Patti Saris, then U.S.S.C. Chair, asked if due process should be a threshold requirement before any conviction could be considered.[110] TIAG members responded that "due process" should not be a threshold requirement for several reasons. Some tribal courts purposefully choose criminal justice models distinct from the Anglo-American adversarial system; under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304, tribal courts are not required to provide the same procedural protections as state and federal courts. Additionally, some tribes simply do not have sufficient personnel or financial resources to offer full "due process" protections.[111] TIAG members who testified also noted that the cultural notion of what process is "due" diverged among tribes and that many Indian societies focus more on identification of truth and reconciliation than process within an adversarial system.[112] Making provision of "due process" as envisioned in the Anglo-American system a threshold requirement inherently denigrates the work of tribal courts through a false comparison to the Anglo-American model and continues a tradition of de jure subjugation of Indian people and governments.[113]

Commissioners likewise struggled to engage with allowing formal tribal statements in support of or in opposition to consideration of their convictions in federal sentencing.[114] Both Mr. Leonhard and Judge Erickson emphasized the need for an individualized process that considers the structures and systems of individual tribes given their status as separate sovereigns.[115] TIAG members emphasized that the need for sentencing judges to know the practices of the tribes whose judgments they routinely encounter and their official policy preferences is fundamental and facilitated through the formal consultation process.[116] But Commissioners resisted giving tribal governments this level of control over how their judgments would be utilized.[117]

Lastly, Commissioners expressed concern that this holistic, individualized approach could lead to disparity in sentencing.[118] TIAG's proposal was rooted in transforming an existing departure which lacked application standards into one with identified and consistent factors that can be applied to individual circumstances, thus lessening disparity by creating some consistency of process among judges that did not currently exist.[119]

[110] *Id.* at 50.
[111] *Id.* at 50–52,
[112] *Id.* at 54–56.
[113] *Id.* at 52, 56–57.
[114] *Id.* at 67–68.
[115] *Id.* at 67, 70.
[116] *Id.* at 71–72.
[117] *Id.* at 67–68.
[118] *Id.* at 77.
[119] *Id.* at 77–78.

U.S.S.C. subsequently promulgated amendments consistent with TIAG's proposals.[120] Public comment was generally supportive.[121] Some commentators raised practical questions and suggestions for implementation of the fifth factor, formal tribal preference as to whether their convictions should or should not count.[122] Two groups commented on whether the provision of "due process" should be a threshold requirement for considering tribal court convictions. The standing TIAG recommended that it not be.[123] The Practitioners Advisory Group recommended that it should be.[124]

U.S.S.C. held a public hearing on the proposed amendments. At that hearing, there were contrasting views of the official position of tribes. One view saw this factor as allowing tribes to be meaningfully consulted and heard by district judges who are able to establish meaningful and ongoing relationships with local tribes.[125] The other saw an impractical requirement to understand the local practices of over 500 federally recognized tribes while adding little to the inherent sovereign powers of tribes.[126]

While assessing these proposals through the lens of tribal court sovereignty, perhaps the most interesting comments came from tribes. TIAG conducted a formal consultation with tribes and heard from several tribal government officials.[127] One tribe expressed a concern about opening its files to the United States government and that the reference to "lawyer" in the due process factor did not recognize that many tribes allow law advocates.[128] Another commentator echoed a concern about the mechanics of how tribal officials would provide their records to federal officials.[129] The Swinomish Indian Tribal Community noted that some tribes may be willing to provide

[120] 81 Fed. Reg. 92003, 92009-10 (December 19, 2016).

[121] *See e.g.*, National Association of Criminal Defense Lawyers, February 21, 2017 comment letter, 4 ("Departure authority…permits a more nuanced and flexible approach, cognizant of the disparities in tribal justice. We further support…that the proposed list of factors…be non-exhaustive with no one factor determinative."); Federal Defender Sentencing Guidelines Committee, February 20, 2017 comment letter, 19 ("we support the TIAG's recommendation that the factors identified in the commentary be non-exhaustive, and that no one factor be weighted more heavily than any other."); Victims Advisory Group, February 21, 2017 comment letter, 1–2 (the enumerated factors should be given equal weight if tribal court convictions are not counted in the same manner as state and federal convictions).

[122] *See e.g.*, Practitioners Advisory Group, February 20, 2017 comment letter, 6 (protocols should be developed to allow tribal governments to clearly express their position to parties and the court); Probation Officers Advisory Group, February 21, 2017 comment letter, 3–4 (fifth factor considering tribal court position should be eliminated absent clear standards and procedures of how a position may be "formally expressed).

Additionally, the new standing Tribal Issues Advisory Group commented (this group contained some members who had served on the ad hoc group and several who had not) that the fifth factor should not be adopted prior to formal consultation with tribes on how they might "formally express" their position on use of their criminal judgments. Tribal Issues Advisory Group, February 21, 2017 comment letter, 5.

[123] TIAG comment letter, *supra* note 122, at 4.

[124] POAG comment letter, *supra* note 122, at 6.

[125] *Supra* note 100. at 36, 38.

[126] *Id.* at 46.

[127] *Supra* note 88.

[128] *Id.* at 5–7 (comments of Jason D'Avignon of Colville Tribes).

[129] *Id.* at 12–14.

their court records to federal officials while others would refuse.[130] The Community also expressed concern that a focus on having a "lawyer" available ignored, or discounted, the wisdom and input of lay advocates who participate in many tribal courts.[131]

Kalispel Tribe of Indians objected to inclusion of the first factor, whether "due process" protections were provided, because tribes were not subject to all those requirements under ICRA.[132] Kalispel Tribe further noted that if a tribe had chosen to exercise the expanded sentencing authority or jurisdiction under TLOA or VAWA, it necessarily committed to providing the procedural guarantees those statutes require, obviating a separate "due process" assessment.[133]

Chief Jasper Bruner wrote on behalf of the Neah Bay Public Safety Department, part of the Makah Tribe.[134] His letter generally encouraged the consideration of tribal court criminal histories, both to aggravate and mitigate sentences, within the discretion of sentencing judges.[135]

Finally, two tribes took contrasting positions about the factor calling for consideration of the formally expressed positions of tribes. The Navajo Nation acknowledged all the proposed factors as appropriate.[136] However, the Nation opined that a threshold requirement of "due process" would effectively exclude the convictions of many tribes.[137] The Oneida Indian Nation highlighted that engagement with tribal court judgments was critical to respecting tribal sovereignty.[138] Oneida Nation objected to essentially creating an "opt in" for tribes by expressing their position (assuming that in the absence of an expression of tribal position, federal courts would assume tribes did not want their convictions considered).[139] Oneida Nation went further, suggesting that without an official expression of tribal preference, federal courts might be expressly precluded from considering those convictions under the factor as written.[140]

The various positions taken by those tribes who commented on the proposed amendments drive home key points. First, there is no "position of the tribes" because tribes occupy different circumstances and have different policy preferences. Second, tribes consistently view their exercise of criminal

[130] Swinomish Indian Tribal Community, October 9, 2017 comment letter, 1.

[131] *Id.* at 2.

[132] Kalispel Tribe of Indians, October 10, 2017 comment letter, 1.

[133] *Id.* at 2.

[134] Neah Bay Public Safety, October 2, 2017 comment letter.

[135] *Id.*

[136] The Navajo Nation, October 10, 2017 comment letter, 2–3.

[137] *Id.* at 3.

[138] Oneida Indian Nation, October 10, 2017 comment letter, 1.

[139] *Id.*

[140] *Id.* In this respect, Oneida was in line with the suggestion of at least one scholar who has recommended that tribes be given greater control in federal sentencing to determine to offense level for offenses occurring in Indian Country. *See* Emily Trudeau, *Tribal Control in Federal Sentencing*, 99 CALIF. L. REV. 1409, 1423–24 (2011).

jurisdiction and the imposition of criminal sentences as critical aspects of their sovereignty. Third, meaningful engagement with tribes in federal sentencing cannot arise from a one-size-fits-all approach.[141]

In the end, the U.S.S.C. chose to adopt the first four factors.[142] The formal expression of tribal position was omitted.[143]

The debate before U.S.S.C. about how to count or consider tribal court convictions turned largely on how tribal court judgments should be viewed and what impact they should be given in federal sentencing. That is an important federal sentencing policy question. But it also has significant implications for tribal courts and the sovereignty of tribal governments. To evaluate how federal sentencing policy can impact tribal sovereignty it is useful to consider the work of two scholars who have considered that question.

V. COMPETING VIEWS OF TRIBAL COURT CONVICTIONS IN FEDERAL SENTENCING: SOVEREIGNTY AS PARITY AND SOVEREIGNTY AS DIFFERENCE

How and when federal courts factor tribal court criminal judgments into sentences involves judgments about tribal court sovereignty and can advance or impede it. Two competing views merit consideration here. First, there is a view that tribal courts should be treated like state courts. This is the "sovereignty as parity" view. Secondly, there is a view that because tribal governments and courts are different than state courts, they must be viewed and considered differently. This is the "sovereignty as difference" view.

A. Sovereignty as Parity

One view of how to approach the use of tribal court convictions in federal sentencing is to treat them like state court convictions.[144] This view is "sovereignty as parity." Tribal court convictions would thus be counted in calculating criminal history scores under the Sentencing Guidelines.

[141] TIAG comment letter, *supra* note 122, at 5. Judge Erickson noted, as he had in several presentations and comments that seeking a universal approach to tribal court convictions simply subjected them to a Procrustean bed and ignored a meaningful and informed engagement between federal and tribal government officials.

[142] U.S.S.C. Appendix C, Amd. 805.

[143] *Id.*

[144] *See e.g.*, Washburn, s*upra* note 71.

1. Foundations of Sovereignty as Parity

This view sees value in treating state and tribal courts similarly.[145] Not surprisingly, it is premised on perceived similarities between state and tribal courts.[146]

First, there are observed similarities in the types of cases handled by state and tribal courts.[147] This conclusion rests on empirical data obtained in one study of the Navajo Nation Supreme Court in 1999.[148] That study found that a majority of the Navajo court criminal docket constituted driving under the influence and simple assault.[149] From that data point, a general conclusion is drawn that the tribal courts serving more than 570 federally recognized Indian tribes,[150] are "similar" to state courts.

Secondly, this view points to the provision of "virtually identical" protections to criminal defendants by state and tribal courts.[151] This conclusion is based on the Indian Civil Rights Act[152] which requires tribes to provide many of the basic safeguards found in the Bill of Rights to litigants.[153] In fact, ICRA was enacted before some portions of the Bill of Rights were held to be incorporated under the Fourteenth Amendment to apply to states.[154]

In evaluating the protections offered in tribal and state courts, it must be acknowledged that there is a real distinction in the right to counsel in those forums.[155] The Sixth Amendment has been incorporated against the states, providing a right to counsel at public expense in state prosecutions.[156] There is no such guarantee in tribal courts.[157] ICRA prevents tribes from excluding counsel from tribal court prosecutions, but there is no right to appointed defense counsel for indigent defendants.[158] Although acknowledged as a real

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[145] Washburn, *Tribal Courts and Federal Sentencing*, *supra* note 70, at 434.

[146] Washburn, *Reconsidering the Commission's Treatment*, *supra* note 71 at 209–10.

[147] Washburn, *Tribal Courts and Federal Sentencing*, *supra* note 70, at 426–28.

[148] *Id.* at 426–27.

[149] *Id.*

[150] *Id.* at 421 (acknowledging the number of federally recognized tribes in the context of diverse criminal justice systems). *See also,* U.S. Department of Interior, Indian Affairs, Frequently Asked Questions, What is a federally recognized tribe?, https://www.bia.gov/frequently-asked-questions (last visited Nov. 2, 2019) (noting that there are 573 federally recognized tribes as of August 2019).

[151] *Id.* at 425-26.

[152] 25 U.S.C. § 1301–03 (2019)

[153] Washburn, *Tribal Courts and Federal Sentencing*, at 424.

[154] *Id.* at 425. The Sixth Amendment right to trial by jury and Eighth Amendment right against excessive bail are cited as the examples.

[155] *Id.* at 428-34; Washburn, *Reconsidering the Commission's Treatment*, *supra* note 71, at 210.

[156] *Id.* at 429 (*citing Johnson v. Zerbst*, 304 U.S. 458 (1938), *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963)).. That right is limited in misdemeanor cases to proceedings that risk the actual loss of liberty, however. *See Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

[157] *Id.* at 429.

[158] 25 U.S.C. § 1302(a); Washburn, *Reconsidering the Commission's Treatment*, *supra* note 71, at 210. If a tribe seeks to impose a sentence in excess of one year, they must provide a right to effective counsel at least equal to that provided under the Sixth Amendment to the United States Constitution. Indigent

difference, Washburn dismisses this difference as a basis to exclude tribal court convictions from federal criminal history calculations because "many tribes routinely provide attorneys" to indigent defendants.[159] He also argues that it is possible to determine whether counsel was provided or not before tribal court convictions are considered in federal criminal history calculations.[160]

Third, there is a perceived cumulative similarity of state and tribal courts. Looking at tribal and state courts on balance, the perception is that "'[s]ome tribal courts operate as nearly exact replicas of state courts.'"[161] To the degree that criticisms of tribal courts are lodged, they are dismissed as shared with rural state courts.[162] In the end, this view, in spite of the differences in the right to counsel in state and tribal courts, concludes that tribal courts simply have more in common with state courts than foreign courts and their convictions should not be excluded from the criminal history calculation of the Sentencing Guidelines.[163]

It is necessary and appropriate to ask what sort of "sovereignty" this approach facilitates. The consistent theme is giving tribes a level of "respect" comparable to that provided to state courts.[164] Tribal sovereignty is thus advanced when tribal courts are treated more like state courts by having their judgments treated like criminal judgments from state courts.[165] If tribal courts operate like state courts in the type of cases they handle and the process they provide, they should be treated like state courts when federal courts evaluate criminal records—so the theory suggests.

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defendants must be provided, at tribal government expense, assistance of "a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility" of the lawyers licensed by that jurisdiction. 25 U.S.C. § 1302(c) (2019). This expanded sentencing authority and the concomitant heightened protections for criminal defendants came about with enactment of the Tribal Law and Order Act. *Supra* note 97.

Not all tribes have chosen to undertake these obligations in exchange for the heightened punishment options. The Violence Against Women Act of 2013 also provides increased punishment authority to tribes and allows expanded jurisdiction against non-Indians committing certain offenses against domestic partners if protections are provided beyond those in the Indian Civil Rights Act. *Supra* note 98. Again, not all tribes have undertaken this burden.

[159] Washburn, *Reconsidering the Commission's Treatment*, *supra* note 71, at 210.

[160] *Id.* The experience of many practitioners and judges routinely working with Indian Country is not in line with this conclusion, however. *See e.g.*, Sands & McClellan, *Policy Meets Practice*, *supra* note 71 (noting that obtaining records from tribal courts is frequently difficult and that, if obtained, records are not consistent or consistently accurate). *See also supra* note 101.

[161] *Id.,* at 210 (quoting Nell Jessup Newton, *Tribal Court Praxis, One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 294 (1998). This article goes far beyond simply criminal issues to discuss the operations of the twenty courts of the title on many fronts (e.g., criminal cases, civil cases, "political" cases)). It cannot be said that the article generally supports the premise that state and tribal courts are "similar," however. Newton specifically cites the reality that tribal courts operate in a variety of fashions from state court replicas to traditional "peacemaker" courts. Newton, 22 AM. INDIAN L. REV. at 291–94,

[162] Washburn, *Reconsidering the Commission's Treatment*, at 210.

[163] Washburn, *Tribal Courts*, *supra* note 70, at 434.

[164] *Id.* at 435; Washburn, *Reconsidering the Commission's Treatment*, *supra* note 71, at 210.

[165] *See* Washburn, *Tribal Courts*, *supra* note 70, at 435.

Implicit in this approach is the idea that federal courts can "trust" tribal courts[166]—the protections they provide defendants, the reliability and availability of their records, the consistency of their jurisprudence, and the comparability of their criminal justice system with the English common law derived state system.[167] Tribal courts look like the Anglo-American state court system, so they are "trustworthy." This view is fairly summarized as "sovereignty as parity" in that it envisions tribal courts being treated similarly to state courts because they are, in fact, similar.

This is the theory summarized. However, its merit must be considered. Does it provide an accurate description of tribal courts? Is it a normatively preferable view of how tribal courts should be engaged? In other words, with a description in hand, the question becomes whether there are problems with the theory itself.

2. *Problems with Sovereignty as Parity*

Sovereignty as parity presents two major problems.[168] First, it is based explicitly on the ability of tribal courts to "measure up" to the Anglo-American criminal justice model. Second, it does not maintain internal consistency, ultimately succumbing to the reality that real sovereignty only exists when courts get to define their values and approaches based on those values. Each is worthy of consideration in turn.

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[166] *See Id.* at 438–39. The idea that tribal court judgments can be "trusted" is made explicit by others. *See e.g.*, Alexander Birkhold, *Predicate Offenses, Foreign Convictions, and Trusting Tribal Courts*, 114 MICH. L. REV. Online 155, 158–59 (2016). This article deals with the reliance on uncounseled tribal court convictions as predicate offenses for prosecution of serial domestic abusers under 18 U.S.C. § 117. That context presents different questions than those presented here, but it does put front and center the question of "trust" for tribal courts. It argues that applying uncounseled tribal court domestic assault convictions is proper in federal court prosecutions because those convictions are consistently "trustworthy." It concludes so because the underlying tribal court convictions arise from "fair and reliable proceedings." They are considered "fair and reliable" because they adopt most of the procedures and protections of a state or federal prosecution. So "trustworthy" is yet again a proxy for "similar to state courts."

[167] With the admitted exception of Louisiana's code-derived system of justice.

[168] There are other significant critiques of this line of argument in favor of including tribal court convictions that are beyond the scope of this article. Among them are the realities that if parity to state court operations is the sine qua non of accepting tribal court convictions, the data demonstrating that compliance is incomplete and inconsistent. Certainly there is no empirical data supporting that argument in the articles considered here.

There is also the reality that, when considering the disparity of local practices, there is a massive difference in degree between fifty states and more than 570 federally recognized Indian tribes operating more than 300 courts. There is, again, no meaningful empirical data addressing the levels of difference or similarity among tribal courts comparable to that for state courts; the anecdotal evidence indicates that the differences are profound, however. Lastly, there is the both the perception and probable reality that counting tribal court convictions would increase the sentence length for Indians sentenced in federal courts. *See* Sands & McClellan, *supra* note 71, at 216–17.

As discussed more fully within, Indian people are subject to federal court prosecution for offenses that are typically state based prosecutions for non-Indians. Lengthening those sentences as a matter of course by including tribal court convictions is a legitimate critique of the proposal on its own.

The first problem is rooted in its premise: tribal courts are given "respect," with respect effectively acting as a proxy for sovereignty, when they are given treatment similar to state courts. Tribal sovereignty is respected if tribes are placed in a position on par with state courts. That parity comes when they align with the Anglo-American judicial model. That is the fundamental premise of the view.[169]

This view requires acceptance of the normative judgment that a "proper" court system looks like the Anglo-American model. As such, it dismisses systems like reconciliation courts, sentencing circles, or other forms of restorative justice. These approaches to criminal justice are fundamental traditions of some Indian communities.[170] These systems can reflect fundamental values of their community, such as viewing disputes as "disorder" within a community that it is the obligation of the community to repair through the restoration of harmony and strengthened bonds within the community.[171] Say what one wants about the Anglo-American criminal justice system and the values it advances, but reconciliation and restoration of cultural harmony are low on the list. Advancement of the Anglo-American system values, to the degree they exist, is not rooted in the values and shared culture of any Indian community in the way peacemaking courts often explicitly are.[172] While traditional approaches may be seen as less punitive than Anglo-American sentencing practices, they run the gamut from restoration and sentencing circles to banishment.[173] "Traditional" is no proxy for "non-punitive"—it simply means the practice is rooted in traditional Indian culture not the Anglo-American tradition.

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[169] Washburn, *Reconsidering the Commission's Treatment*, *supra* note 71 at 212–13.

[170] *See generally e.g.*, Howard Brown, *The Navajo Nation's Peacemaker Division: An Integrated Community-Based Dispute Resolution Forum*, 57 DISP. RESOL. J. 44 (2002) (describing the longstanding Navajo Nation commitment to a peacemaker division and its current operations to resolve both criminal and civil disputes). In fact, the Major Crimes Act has its roots in the unwillingness of Congress to accept a restorative justice model. Following his murder of another Indian, Crow Dog was ordered to make reparations to the victim's family under tribal custom. *Ex Parte Kan-Gi-Shunga (otherwise known as Crow Dog)*, 109 U.S. 556, 557 (1883); *see also* Creel, *Tribal Court Convictions*, *supra* note 71, at 58(citing SIDNEY HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 104–05 (1994)). Federal officials obtained a murder conviction and death sentence which the Supreme Court reversed, holding that there was not federal jurisdiction over Crow Dog. *Ex Parte Kan-Gi-Shunga*, 109 U.S. 556, 557 (1883). Congress enacted the Major Crimes Act, 18 U.S.C. § 1153 as a response. *United States v. Kagama*, 118 U.S. 375, 382–83 (1886).

[171] Brown, *The Navajo Nation's Peacemaker Division*, at 46–47.

[172] *Id.* at 46. In fact, leaders of the Navajo Nation peacemaking court explicitly disavow neutrality. Instead, their position is explicitly identified as one rooted in Navajo values and their role as one to advance those values through the course of resolving the pending dispute. *Id.* This bears no resemblance to the predominant view of judges in state or federal courts who neutrally "call balls and strikes" like an umpire and who ostensibly hew to a view as merely "applying" or at most "interpreting" the law rather than "saying what the law is."

[173] *See* CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 391–94, 400 (2004).

Sovereignty is, at the most basic level, the ability to define and regulate one's own community.[174] Fundamentally, any sovereign society must be able to define who they are, construct governing structures that advance their values, and live in a manner in which that definition of self and the governing structures align.[175] The impulse to bring tribal courts more into line with state courts does not advance their capacity for true sovereignty.[176] Instead, it imposes a normative preference for Anglo-American process, structure, and culture. Other scholars have correctly identified that this imposition is a continuation of the colonial approach to Indian Country that has been typical throughout the post-Columbian history of North American and certainly since the real move toward occupation by Europeans.[177] It is a first, and fundamental, flaw with the view of sovereignty as parity.

A second problem is that sovereignty as parity ultimately does not hold up as a practical matter. It must be admitted that tribal governments are different from states in fundamental ways.[178] A proponent of this view must then acknowledge that automatically including tribal court convictions in the criminal history calculation under the Sentencing Guidelines may not be the proper policy approach.[179] Tribes are ultimately more distinct from, than similar to, states, and theories rooted in their parity break down as a result.

Faced with that reality, the sovereignty as parity policy prescription for tribal court convictions is to include them within those convictions receiving criminal history points, but to allow tribes to "opt out" by indicating that their sentences should not be counted.[180] While this approach gives tribes a voice

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[174] *See e.g.*, Ryan Seelau, *The Kids Aren't Alright: An Argument to Use the Nation Building Model in the Development of Native Juvenile Justice Systems to Combat the Effects of Failed Assimilative Policies*, 17 BERKELEY J. CRIM. L. 97, 118–22 (2012) (describing the model of "nation building" as a crucial approach to the future of tribal communities).

[175] *Id.* at 127–30.

[176] *See* Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarship Community*, 71 U. COLO. L. REV. 123, 133–34 (2000); Pommersheim & Marshall, *Liberation, Dreams, and Hard Work*, *supra* note 42, at 420–21.

[177] *See* Pommersheim & Marshall, *Liberation, Dreams, and Hard Work*, *supra* note 22, at 420–24. An empirical observation of several tribal courts found an effective balancing of the Anglo-American model with traditional tribal values in daily operation. See Newton, *Tribal Court Praxis*, *supra* note 162, at 352. Even if balanced, striking that balance was acknowledged to be forced rather than freely chosen. *Id.* The reality that some tribes are able to maintain aspects of their own systems of justice within an imposed system is neither maintenance of real sovereignty nor an indication that this balancing is normatively preferable to Indian people.

[178] Washburn, *Reconsidering the Commission's Treatment*, *supra* note 71, at 212. Washburn's acknowledgement of this reality goes so far as to acknowledge that states voluntarily chose to enter the Union and have political power to resist imposition of disfavored policies which tribes simply do not. *Id.* at 212–13.

[179] *Id.* at 212.

[180] *Id.* at 212–13. In this respect, tribes would have an option similar to one that they have in being able to opt out of the death penalty and certain other penalties. *See* 18 U.S.C. § 3598 (2019); *see also* Washburn, *Tribal Courts and Federal Sentencing*, *supra* note 70, at 446–47 (noting the ability of tribes to opt out of federal "three strikes" provisions for sentencing and a lowered age threshold at which to try juveniles as

in how their judgments are considered in the federal courts, it still starts with a presumption that tribes should be (and should want to be) like states. True sovereignty allows tribes governments to make their own laws, be governed by them, and define in the first instance how they want their laws to interact with the laws of other nations (e.g., the United States). Pursuing "sovereignty as parity" through presumptive inclusion with an opt out still sees the default tribal court structure as the Anglo-American model. To that degree it does not advance a true sovereignty. These deficiencies become more clear when a competing vision of sovereignty is considered—sovereignty as difference.

B. Sovereignty as Difference

A second view of how tribal sovereignty is impacted by use of tribal court convictions in U.S.S.G. comes from Professor Barbara Creel.[181] Professor Creel argues that counting tribal court convictions does not advance tribal sovereignty, nor does it offer true respect to Indians or their courts.[182] She bases that conclusion on three principles. First, the American history of colonialism resulted in pre-existing tribal criminal justice systems being forcefully displaced in favor of the Anglo-American model.[183] Second, including tribal court convictions in the U.S.S.G. criminal history calculation would have an "asymmetrical impact" on Indians. This is because Indians are subject to successive prosecution for the same offenses under the separate sovereigns exception to the double jeopardy clause.[184] Third, evaluating tribal courts for their similarity to state and federal courts, and purporting that tribal courts are themselves sufficiently similar to generalize about, ignores their differences.[185] Ignoring or failing to look for difference is a fundamental failure to acknowledge and advance sovereignty because it continues the pressure on tribal governments to "comply," that underlies the policies of assimilation and termination.[186]

1. Foundations of Sovereignty as Difference

At the heart of this view of sovereignty is the idea of "difference."[187] Professor Creel identifies two critical aspects of the life of Indians and their governments that underlie this view.

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adults). Based on responses to TIAG's recommendations, any policy demanding that tribal government positions be given control of federal sentences seems likely to face headwinds. *See supra* note 142.

[181] *See* Creel, *Tribal Court Convictions*, *supra* note 71, at 38–39.

[182] *Id.* at 39.

[183] *Id.* at 53–54.

[184] *Id.* at 54. *See also Gamble v. United States*, 139 S.Ct. 1960, 1979–80 (2019) (declining to overrule the separate sovereigns doctrine as an exemption for the prohibition on double jeopardy).

[185] Creel, *Tribal Court Convictions*, *supra* note 71, at 56.

[186] *Id. See also* Cohen*, Cohen's Handbook of Federal Indian Law* 7, at 26, *supra* note 15., *See also*, Frank Pommersheim, *Braid of Feathers*, *supra* note 18, at 39–40 (1995).

[187] *Id.* at 76–78.

First, tribes stand apart from the federal government of the United States and individual states that have voluntarily ratified the Constitution.[188] Tribal governments are not part of this hierarchy and the resulting federal government structure.[189] As a result, tribal governments are not represented within the governing structure of the United States in the way states are. They are apportioned no electoral votes, nor senators, nor are they part of the Constitutional amendment process.[190] Tribal governments stand apart in a posture very different from states. In Professor Creel's view, attempting to pull tribal governments into treatment on par with that of states makes the normative judgment that tribal governments are somehow inferior when they are merely different[191]—but different in important ways that can run to the structural and personal disadvantage of Indians.[192]

Second, tribal courts have different foundations than state courts. Tribal courts reflect the internal norms and traditions of the Indians they serve.[193] In many instances those courts reflect norms, values, and priorities different from the criminal justice system of states or the United States.[194] A system of justice rooted in those traditions, specific to the people governing themselves through that system, is critical to maintaining a separate sphere that is free from the control of other sovereigns.[195] It allows tribal governments to adopt their own rules, even if they differ from those adopted by other sovereigns, including a dominant one such as the United States.[196] This ability to maintain difference, starting with cultural norms and priorities, is fundamental to the ability of Indians to define and govern themselves on their own terms.[197]

The conclusion that tribal court convictions should not be counted under U.S.S.G. in the same manner as state court convictions follows from this central view of difference—tribal courts are different from state courts, therefore their judgments are treated differently.[198] In the specific context of how tribal court criminal judgments affect subsequent federal court sentences, difference manifests in several ways. Because Indians are the only United States citizens subject to imprisonment without counsel, due process and equal protection concerns exist if those convictions are counted in

[188] *Id.* at 76.
[189] *Id.*
[190] *See* U.S. Const. Art. II, §1; Art. I, § 3; Art. V.
[191] *See* Creel, *Tribal Court Convictions*, *supra* note 71, at 76–78.
[192] *Id.* at 73–75.
[193] *Id.* at 77–78.
[194] *See supra* note 172.
[195] *See* Creel, *Tribal Court Convictions*, *supra* note 71, at 76–77.
[196] *Id.*
[197] *Id.* at 77. *See also* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671, 750–51 (1989) (noting that federal jurisprudence over Indian tribes is a question not of sovereignty but of the difference between Indian tribal norms and the federal government).
[198] *Id.* at 80.

criminal history calculations.[199] To the degree that tribal courts are "similar" to state courts, the adoption of Anglo-American structures has largely been because of the pressure to get funding and acceptance from the dominant system, not a societal adoption of the norms underlying that structure.[200] Even when adoption does occur, it crowds out traditional values like peacemaking and restorative justice, and not all tribal courts "replicate" the Anglo-American model in the same way—tribal courts are very different among themselves.[201]

If, in the context of using tribal court convictions in federal sentencing, according comparable to treatment to tribal courts with comparable structures and operations is "sovereignty as parity," the view Professor Creel articulates is "sovereignty as difference." Including tribal court convictions in criminal history calculations under U.S.S.G. does nothing to advance this view of sovereignty because doing so is "mere recognition of federal authority, not respect for the tribe itself or its unique position."[202] Coupled with what is perceived as a negative impact on individual Indians being sentenced in federal court, Professor Creel thus determines that the inclusion of tribal court convictions is bad policy for Indian people and Indian sovereignty.[203]

2. *Problems with Sovereignty as Difference*

This vision of sovereignty as difference can also be subjected to critiques. First, whether normatively preferable or not, it is inconsistent with the history of the relationship between the United States and tribal governments. Reaching back to the Marshall trilogy, tribal governments have been subject to control by the government of the United States.[204] A view in which tribes operate as equal sovereigns whose differences must be respected by the United States may be preferable, but it is largely ahistorical. In light of that history, actually treating sovereignty as difference may be practically challenging. Many existing structures in the courts of tribes, states, and the United States push against difference. A practical question for this vision is whether it can push back sufficiently to be viable.

Second, maintaining tribal courts not similar to the Anglo-American tradition may leave tribal courts "outside the mainstream." Rightly or wrongly, fair or not, skepticism exists and persists about court systems that

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[199] *Id*. at 80–82. The Supreme Court found no constitutional infirmity with the use of uncounseled tribal court convictions as qualifying predicate offenses under the serial domestic abuse statute, however. *See* United States v. Bryant, 136 S.Ct. 1954, 1964-–65 (2016). Critique of the issue presented in Bryant shows, yet again, the common impulse to evaluate the operation of tribal courts for "reliability." *See e.g.*, Nicholas LeTang, *United States. v. Bryant and the Subsequent Use of Uncounseled Tribal Court Convictions in State of Federal Prosecution*, 77 Mont. L. Rev., 211, 229 (2016) (critiquing the underlying Ninth Circuit Court of Appeals decision as not sufficiently focusing on the reliability of tribal court convictions).

[200] *Id.* at 82.

[201] *Id.* at 82.

[202] *Id.* at 86.

[203] *Id.* at 86–87.

[204] *Supra* notes 23, 25.

do not track the dominant model.[205] Perpetuating traditional court systems may impede tribal economic development as businesses remain skeptical about unfamiliar justice models. If sovereignty is being able to make choices about self-governance and policy, this may be a cost that tribes are willing to incur. It is, nonetheless, a potential negative impact of the sovereignty as difference approach.

Third, the question at hand is what convictions should be given what weight in the federal sentencing process. In other words, this is a question of sentencing policy within the federal criminal justice system and the sovereignty of tribes has little, if anything, to say about it. It can be argued that seeking to respect tribal court difference by respecting their alternate traditions and structures is asking the United States to subordinate its own sovereignty by doing with tribal court convictions only what tribes want.

Lastly, it can be argued that not treating tribal court convictions like those of state courts impedes law enforcement in Indian Country.[206] Not giving effect to tribal court criminal judgments may lower the moral force of those judgments, lead to systematically low sentences for some Indian offenders, and deny tribes the means to effectively police and govern themselves. Professor Creel disputes this notion,[207] but the critique exists.

C. Viewing TIAG's Proposals Through the Lenses of Sovereignty as Parity and Sovereignty as Difference

Having traced the development of TIAG's proposals on the use of tribal court convictions under U.S.S.G, the concerns expressed in response to them, and two views of how the inclusion of tribal court convictions in criminal history calculations can affect tribal sovereignty, it is time to assess how these amendments advance or inhibit tribal sovereignty. This section will consider how these amendments advance or inhibit the notions of "sovereignty as parity," and "sovereignty as difference."

The first criteria set out by the TIAG was whether the underlying tribal court conviction was obtained against a defendant who had a lawyer, a right to trial by jury, and "due process protections" that were "consistent with" those provided under the United States Constitution.[208] As discussed above,

[205] *See* Creel, *Tribal Court Convictions*, supra note 71, at 82 ("That tribal courts have had to replicate state courts in order to be 'sophisticated' and 'civilized,' and in order to be legitimate should not be mistaken for endorsement of the state court system.").

[206] Washburn, *Tribal Courts and Federal Sentencing*, *supra* note 70, at 443-44.

[207] Creel, *Tribal Court Convictions*, *supra* note 71, at 86-87.

[208] *Supra* note 88.

many but not all of the protections of the Constitution apply against tribal courts through the Indian Civil Rights Act.[209]

Whether tribal courts provide procedural protections comparable to those required of federal or state courts inevitably considers the parity of those courts within the Anglo-American criminal justice system. Presumptively, tribal court judgments will be given greater weight to the degree they more fully comply with the full panoply of Constitutional protections. Tribal courts that do not provide the full scope of protections (whether due to the absence of resources, policy choices to pursue reconciliation or traditional courts, or other reasons) will see their judgments be less likely to impact the federal court's decision as to the sentence to be imposed.

This factor is an exceptionally effective way to advance sovereignty as parity. If tribal courts resemble state courts, they are treated like state courts. If constitutional provisions comparable to state courts exist, the resulting criminal judgments receive comparable treatment in the criminal history calculus under U.S.S.G. As tribal courts "develop," in the sense of providing counsel (including counsel at public expense for indigent defendants), full jury trial rights, and other due process guarantees they will continue to accrue greater respect and use within the federal criminal sentencing process. Sovereignty as parity is steadily advanced through a reinforcing feedback loop whereby tribal courts get greater respect and reliance as they more fully adopt structures and processes like state courts. Greater parity of operations triggers greater parity of utilization. This factor is central, truly the most central, to advancing a view of sovereignty as parity.

This factor less effectively advances sovereignty as difference, however. It rewards tribal courts that resemble the Anglo-American model, so it inevitably allows little space to acknowledge difference. In fact, it affirmatively disadvantages difference. Tribal courts that are not like state or federal courts are not given weight or even meaningful acknowledgement of their legitimacy.

While it is the preeminent factor for the model of sovereignty as parity, the due process factor can operate antithetically to the sovereignty as difference model. Through its adoption of the Anglo-American model as a normative benchmark, it undermines the validity of traditional tribal justice models. Normative benchmarking of the predominant culture's system perpetuates the forces of colonization.[210] It also sets back the ability of tribes to engage in the sovereign act of implementing its own cultural mores through its criminal justice system.[211] If made a threshold requirement, this factor renders sovereignty as difference utterly impossible.

[209] 25 U.S.C. § 1302. As noted above, the Supreme Court has reaffirmed that tribes are not required to provide counsel and that their convictions can serve as predicate offenses for the federal habitual domestic offender statute, 18 U.S.C. § 117. *See* United States v. Bryant, 136 S.Ct. 1954, 1964-65 (2016).

[210] Pommersheim, *supra* note 177, at 423.

[211] *Supra* note 174, at 120–121.

Exercising expanded sentencing authority and jurisdiction under the Tribal Law and Order Act and Violence Against Women Act Reauthorization of 2013 respectively operates in a manner largely similar to the due process requirement. Both statutes generally require due process protections as a condition of exercising the authority they recognize.[212] But one additional aspect of both statutes must be considered to make a full assessment of their impact on both sovereignty as parity and sovereignty as difference. The key difference is that both statutes allow tribes to expand their criminal justice reach. Under TLOA, tribes are able to impose more stringent sentences than they otherwise could.[213] Under VAWA, tribes can pursue domestic violence prosecutions they otherwise could not, including of non-Indian defendants.[214]

It must be recognized that tribes implementing these provisions are purposefully seeking to expand their criminal justice reach. They are also seeking more punitive sentencing options and more powerful prosecutorial tools. They are, in short, attempting to assert more control over the prosecution and punishment of many offenses within their communities. In light of this, how does the factor advance or inhibit sovereignty of parity or acknowledgment of difference?

Sovereignty as parity is again advanced. Tribal courts complying with the statutory requirements of TLOA and VAWA are even more similar to state and federal courts. They provide an even more complete slate of procedural protections to defendants. They are also more similar to state and federal courts in that they can impose more severe sentences and are purposefully choosing to become more similar in that respect. The amount of incarceration imposed, particularly above or below one year, becomes more telling given that these tribes are not constrained by a one year ceiling for their sentences.[215] Thus, a sentence of one year from a non-TLOA tribe is possibly a different expression (given that it is the maximum possible sentence) than from a tribal court operating under TLOA (which could impose a longer sentence). So, giving consideration to tribal court convictions that arise from jurisdictions operating under TLOA and VAWA advances sovereignty as parity by giving fuller consideration to tribes that undertake additional non-mandatory, procedural obligations and substantive authority which more fully resemble state and federal courts in their operation.

This factor again does little to advance sovereignty as difference. It treats the Anglo-American model as a normative benchmark. It goes further from accommodating difference in that it more significantly focuses on incarceration as the primary tool of criminal justice rather than alternative approaches such as community reconciliation, peacemaking, or advancement

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[212] *See supra* notes 97, 98.

[213] *Supra* note 97.

[214] *Supra* note 98.

[215] *Compare* 25 U.S.C.§ 1302(a) *with* § 1302(c).

of traditional tribal values. Tribal courts that utilize TLOA and VAWA push ever more towards the Anglo-American model of process and incarceration and away from any traditional approach. Sovereignty as difference largely goes nowhere.

TIAG's third proposed factor, whether the conduct giving rise to the conviction was the basis of a conviction that is counted, requires some explanation. The same conduct can give rise to convictions in tribal court and another jurisdiction through the separate sovereigns doctrine.[216] For example, an assault that takes place in Indian Country could lead to a conviction in federal court and a sentence of 24 months. That sentence would be counted in criminal history for three criminal history points.[217] It could also result in a tribal court conviction for assault and a sentence of one year (or some longer period in a TLOA adoptive tribal court).[218] So, when a federal court assesses this tribal court conviction, it can recognize the reality that this conduct has been factored into the criminal history calculation already.[219]

This factor advances sovereignty as parity reasonably well. It again treats tribal courts much like state courts. The circumstance described above can also occur with state and federal courts and be resolved in a similar way.[220] Here again, tribal courts are treated akin to state courts when they operate like state courts. As such, they are given "respect" akin to state court convictions, advancing the sovereignty as parity model in the process.[221]

This is the first factor not affirmatively detrimental to the idea of sovereignty as difference. The focus is on whether the underlying conduct has already been accounted for in the criminal history calculation. Nothing inherently demands that tribal court practices track the Anglo-American model. The provision is simply an effort to avoid giving excessive weight to a prior conviction that has been given weight in the sentencing calculation or to inadvertently ignore a conviction that did not. It does not interfere with the implementation of structures different than the Anglo-American model, so the sovereignty as difference vision is not impeded. In fact, it can potentially be advanced when tribal courts reach conduct that other jurisdictions have not. In those instances the difference can be acknowledged and advanced by giving consideration to a conviction that is distinct from what state or federal courts recognize.

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[216] *See Gamble v. United States*, 139 S.Ct. 1960 (2019).

[217] U.S.S.G. § 4A1.1(a).

[218] *Supra* note 97.

[219] U.S.S.G. § 5G1.3 would, in fact, dictate that any time attributed to a state sentence arising from similar conduct be credited against the federal sentence. Although this section does not expressly address tribal convictions, it demonstrates that an accommodation of the overlapping conduct should be recognized for tribal convictions as well.

[220] Consider the example of a person convicted of distribution of controlled substances in federal court pursuant to 18 U.S.C. § 841. They could be convicted under a host of state statutes for similar conduct. *See e.g.*, SDCL 22–42. At the time of the federal court sentencing, that court would have the option to accommodate the state sentence, whether imposed or impending. *See* U.S.S.G. § 5G1.3; Setser v. United States, 566 U.S. 231 (2012).

[221] Washburn, *Reconsidering the Commission's Treatment*, *supra* note 71, at 212–213.

The next factor, whether the conviction would receive criminal history points under U.S.S.G. § 4A1.2 again benefits from some explanation before it is evaluated. Under that section of U.S.S.G., certain offenses are excluded from receiving criminal history points based on their age or their nature. For example, convictions receiving sentences in excess of thirteen months drop out of the calculations after fifteen years.[222] Many types of convictions are never counted, or counted only under limited circumstances.[223] This factor ultimately seeks to avoid increasing criminal history points based on convictions that would not be considered if they arose from a state or federal court rather than a tribal court.

Sovereignty as parity is again advanced reasonably well by this factor. Convictions not counted, regardless of the court they arose from, are not given consideration. In this sense, tribal courts are again given respect in line with that afforded to state courts. Convictions are counted or not based on their age or type, not the court from which they originated. Tribal courts are put into a position equal to that of state and federal courts, thus getting "respect" equal to that given to those courts. Sovereignty as parity, with tribal courts being treated like state courts when they are structured like state courts, is again given real effect.

This is another factor that does little to advance sovereignty as difference. Many of the types of convictions excluded under U.S.S.G. § 4A1.2 are common in tribal courts. This factor discourages giving weight to offenses that, while excluded under U.S.S.G., may be of consequence in tribal communities (e.g., public intoxication) either because they are viewed as important within the community or are proxies for more severe offenses that the tribe cannot pursue due to limited sentencing authority. The factor thus downplays consideration of tribal court offenses not in line with those typical to state and federal courts. Tribal court differences again suffer for their dissimilarity to state and federal courts.

The final factor recommended by TIAG, whether the tribal government has formally expressed an opinion on whether its convictions should be used in calculating federal criminal history scores, was not ultimately adopted by the Commission.[224] However, it remains a useful lens through which to assess how the relationship of federal sentencing and tribal court criminal judgments impacts tribal sovereignty. Arguably no factor is more critical in doing so.

This factor is interesting as a basis to assess sovereignty as parity because it puts tribal governments not simply on par with states, but actually gives them a preferred position in that their opinion on how their judgments should

[222] U.S.S.G. § 4A1.2(e).

[223] U.S.S.G. § 4A1.2(c). For example, public intoxication, vagrancy, and minor traffic violations are never given criminal history points. Other offenses such as careless or reckless driving, disorderly conduct, and resisting arrest only receive points if they are similar to the current offense of conviction or receive sentences of more than thirty days of custody or more than a year of probation.

[224] *Supra* note 142.

be utilized is considered, unlike with states.[225] But this "parity plus" position is warranted in light of the reality that tribes are sovereign entities that predate the United States that neither had a choice in joining the Union nor structural representation as states do.[226] Tribes are thus put in a parity position with states in that their policy judgments are heard, just not through standard political channels like Congress and the electoral college. Sovereignty as parity is advanced in that tribal governments are given an avenue to express their position on federal policy through a mechanism tailored to their unique position as separate sovereigns not structurally part of the federal system.

Creating an avenue for formal input into federal policy by tribal governments also advances parity by creating a form of "tribal federalism." Since the Marshall Trilogy, tribes have had imposed on them status as domestic dependent nations that occupy a position distinct from states.[227] Indians are also possessed of full citizenship status within the United States.[228] While tribes do not have structural representation within the political branches of government in the manner states do, it is possible to create opportunities for their input through mechanisms like this fifth factor.[229] Creating such avenues for tribal input, through formal structural channels, creates a meaningful version of "tribal federalism."[230] This powerfully advances sovereignty as parity. Tribes are given power, in this limited setting, that is similar to states but structured around their different status as pre-constitutional separate sovereigns.

This factor is the most powerful of the five in advancing sovereignty as difference. That is because it, alone of the five, seeks to consider what tribes want from the criminal justice system and how they seek to achieve those purposes. It also does not give normative preference to the Anglo-American model, instead placing primacy on the policy preferences of the tribes themselves. It respects the reality that some tribes may choose to actively participate in providing documents to United States Probation while others will not, that some tribes will want strong federal criminal law enforcement in Indian Country while others will not, and that some tribes will see federal sentences on Indian people as too severe while others may not. It places the

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[225] *See e.g.*, Washburn, *Tribal Courts*, *supra* note 70 at 445–47 (proposing to allow tribal governments to decide whether their sentences should be considered in federal sentencing decisions); Tredeau, *Tribal Control*, *supra* note 140 at 1423–24.

[226] Washburn, *Tribal Courts*, *supra* note 70 at 447–48. It certainly has some parallel to the opt-out Washburn ultimately recommends. *See supra* note 180.

[227] *See generally supra* notes 9–12.

[228] *See* Creel, *Tribal Court Convictions*, *supra* note 71 at 54 (noting the dual citizenship of Native Americans).

[229] As several scholars point out, that has been done for tribal governments in other settings such as death penalty and expanded juvenile prosecutions. *See* Washburn, *Tribal Courts*, *supra* note 70 at 446–47 (providing examples of the "tribal approach" option as used by Congress, such as for death penalty cases on Indian lands, among others); Tredeau, *Tribal Control*, *supra* note 171, at 1410–11 (citing public testimony of Professor Frank Pommersheim before the Sentencing Commission's field hearing in Rapid City, South Dakota in 2001 regarding tribal issues in federal sentencing).

[230] *See* Pommersheim, *"Our Federalism"* supra note 176 at 127–34 (exploring the relationship between tribal sovereignty and the American ideal of federalism).

differences among tribes at the forefront because it asks tribes what they want and allows different tribes to take different positions for different reasons.

This factor also effectively allows a variety of tribal court criminal justice systems to flourish and to be considered on their own terms. A tribe with an Anglo-American model, full TLOA and VAWA integration, and accordant criminal justice processes built around an adversarial system and incarceration may be strongly supportive of having its criminal judgments get full U.S.S.G. criminal history consideration. Alternatively, a tribe operating a reconciliation court may not want its judgements to be counted because doing so contravenes the underlying goals of reconciliation and healing. If tribes can express their policy judgments in the context of what federal courts subsequently do with those judgments, difference within tribal courts is meaningfully facilitated.

Alas, U.S.S.C. chose not to include this factor in the amendments it ultimately adopted.[231] While there is no requirement to provide a reason, certainly the publicly expressed concerns with this factor centered on a perceived lack of procedural clarity as to how tribes would express their formal opinions regarding how their judgments should be treated.[232] There were also concerns about possible increases of sentencing disparity.[233] Given how this factor advances both sovereignty as parity and sovereignty as difference, omitting it was a missed opportunity to respect and promote tribal sovereignty in the federal sentencing process.

Stepping back to assess both visions, we see that sovereignty as parity fairs quite well under the TIAG amendments, sovereignty as difference much less so. But are these the only ways to consider the question of sovereignty within the world of federal sentencing? The last section of this article proposes a third way which may better connect federal sentencing and tribal court sovereignty.

VI. SOVEREIGNTY AS ENGAGEMENT

Having traced the history of TIAG's proposals and their impact on two theories of how tribal sovereignty is affected by the federal criminal sentencing process, there remains one question to wrestle with: is there another way? Is there a way to consider the TIAG factors and how they might be used to advance tribal sovereignty that is different than either of these approaches? There is. It can be described as "sovereignty as engagement."

The idea of sovereignty as engagement can be framed through a few key ideas of how, at this point in history, state and federal relationships with tribal governments and their judgments can be structured. First, they must be constructed within a process of true government to government consultation.

[231] *Supra* note 142.
[232] *Supra* note 122.
[233] *Supra* note 100.

Second, they should be normatively neutral. Third, evaluation of the official actions of a separate sovereign should be focused on an effort to connect to that government and understand the structure and purpose behind its actions. Fourth, when those actions are being considered for use by one's own government, that consideration should be conducted as an effort to engage each government on its own terms, giving the greatest effect to each, while finding points of connection between them.

There is grounding for this view of sovereignty in a few places. First, it draws on key aspects of both sovereignty as parity and sovereignty as difference. It draws on the idea of sovereignty as parity in that it looks to provide both sovereigns equal standing—both are governments entitled to be engaged with similar levels of respect. Envisioning these relationships as true sovereign to sovereign engagements assumes a level playing field. It also asks each government to engage the other on its own terms and with the goal of finding points of commonality or cooperation rather than places of dominance and coercion. In this respect, parity is assumed as inherent to the bundle of traits a sovereign possesses, not earned through the similarity to a dominant sovereign. Sovereignty as engagement draws heavily on the idea of sovereignty as difference in that it builds from the idea that separate sovereigns will have separate purposes, goals, and approaches. By demanding normative neutrality, in viewing sovereignty as engagement, difference is simply acknowledged and responded to rather than assessed for normative superiority and control.

Second, sovereignty as engagement is rooted in the experiences of those practicing in Indian Country and their resulting opinions of how other sovereigns, particularly federal courts, can engage with tribal courts in meaningful ways. As an example, Judge Erickson noted at the outset of TIAG's public report to U.S.S.C. that, when engaging with tribal courts, "consultation and respect for their customs and traditions is inherent in any type of sentencing process that we want to consider and we think it's extremely important that those efforts continue to be of paramount importance to the Commission."[234] Long experience with Indian Country from his perspective as a state and federal court judge led Judge Erickson to conclude that the first step must be an effort to connect and engage with tribal courts.

Judge Lange noted in that hearing that any policy proposal regarding Indian Country needed to considered in light of a history, "where the [f]ederal [g]overnment has imposed its will for the most part on Native Americans and on tribes rather than working together and consulting together."[235] Absent meaningful engagement with tribes, the use of tribal court convictions in federal sentencing can simply perpetuate this inequity—the federal government dictates its terms; tribal governments then face the choice to accept, be ignored, be compelled, or some combination thereof. Sovereignty

[234] *Supra* note 100 at 17.
[235] *Id*. at 34.

as engagement would take an important step to move beyond that history to a more productive and equitable form of government relations.

Judge Erickson assessed TIAG's proposals in light of the type of government to government relationship that could and should be established, "if you're a federal judge, you know what the tribes' courts look like in the district where you're serving. At least you ought to. And I think that the tools that we put in place give us an opportunity to really honestly evaluate the process and to score those things in a way that makes sense." [236] He saw the fundamental role of a judge seeking to incorporate tribal judgments into sentencing decisions as getting to know the tribes whose judgments would be at issue. Only then can the judge see how those judgments were arrived at, their meaning within the tribal system, and the opinions of the tribal government as to how they should (or should not) be used by other governments. That type of experience, and the resulting foundation for open and ongoing relationships between governments with a goal of understanding each other, informs a vision of sovereignty that is organized around engagement. There is the possibility for real connection on agreed terms, not an imposed agenda by a dominant sovereign.

Lastly, this vision is consistently reflected in the view of other scholars. Both Washburn and Creel see meaningful engagement as a key mechanism to respect sovereignty. Dean Washburn views engagement through the assessment of tribal courts in comparison to the Anglo-American benchmark[237] and consideration of tribal preferences;[238] Professor Creel recommended that tribes be drawn into the investigation and charging process so that tribal values can be reflected in prosecution decisions[239] and that unique aspects of tribal experience and culture be given consideration in sentencing.[240] A focus on engagement is present in work suggesting that tribes themselves be allowed to set Guideline levels.[241] It is particularly prevalent in the thought and work of Frank Pommersheim, who powerfully calls for engagement with Indian people and tribal courts by scholars,[242] state and federal courts,[243] and other government officials.[244]

[236] *Id.* at 53-54.

[237] Washburn, *Reconsidering the Commission's Treatment*, *supra* note 71 at 212.

[238] *Id.* at 213.

[239] Creel, *Tribal Court Convictions*, *supra* note 71 at 90.

[240] *Id*. at 88–89.

[241] Tredeau, *Tribal Control*, *supra* note 140 at 1423-24.

[242] Pommersheim, *"Our Federalism," supra* note 176 at 180.

[243] Pommersheim & Marshall, *supra* note 42 at 411–12

[244] See Tredeau, *supra* note 140 at 1410 (arguing that Congress should direct the commission to adopt a new model of tribal control); Sioux Falls Argus Leader, Can Oglala Sioux Tribe ban Gov. Kristi Noem from reservation? Here's what the law says**:** https://www.argusleader.com/story/news/business-journal/2019/05/07/oglala-sioux-tribe-ban-gov-noem-pine-ridge-reservation/3661748002/ (in the context of discussing an order by the Oglala Sioux Tribe banning South Dakota Governor Kristi Noem from the reservation based on legislation passed relating to siting and construction of an oil pipeline, Professor Pommersheim pulls the lens back further, to the fundamental issue of respectful inter-governmental engagement: "To get caught up in whether the tribe can exclude someone or not, for me, misses the more

Seeing sovereignty as engagement is reflected in the two primary theories of how tribal court judgments should be considered in federal sentencing. It is supported by the experience of judges working with Indian Country. It is consistently reflected in the work of other scholars on tribal sovereignty. The theory has a solid foundation. But how does it play out in practice? To answer that question it is appropriate to consider how TIAG's proposed U.S.S.G. amendments advance the theory.

Viewed through a lens of engagement, the question of whether the tribe provided counsel and other due process protections is less a normative imposition of the Anglo-American model and more of a recognition of how a particular tribal court operates. The tribal choice to provide these protections, and adopt their corresponding normative preferences, provides insight into how that tribe wants to resolve criminal justice issues. It communicates that the tribe is focused less on community reconciliation and truth finding and more on an adversarial, process based, and (possibly) punitive system. It communicates a desire, or at least a willingness, to resemble state courts. Considering whether a tribe has made these policy choices and why (through willing adoption and robust funding or through effective compulsion and with minimal support) can provide meaningful insight to a federal court considering that conviction. It also develops a deeper understanding of the motives of the tribal court.

So too with the question of whether a tribe has exercised authority and jurisdiction under TLOA and VAWA. Viewed as an effort to engage with and understand tribal courts, implementation of TLOA and VAWA says a great deal. It says that not only is the tribe seeking to replicate Anglo-American process, it seeks the ability to impose more severe sentences and to exercise criminal jurisdiction over non-Indians in the important context of domestic violence. Exercising authority under these statutes reflects a tribe placing public protection in a priority position and adopting additional (and optional) tools in order to do so. Understanding this view may well lead a court to give greater weight to convictions arising from this circumstance. It may also call on the court to weigh the length of a particular sentence differently in light of the reality that a one-year sentence may mean something very different when it is the maximum than when it is only a portion of the available sentencing authority. Similarly, the prioritization of domestic violence prosecution, including of non-Indians, can show the tribe's judgment that domestic violence offenses are serious and deserving of real punishment. A federal court weighing convictions in those contexts can, and should, weigh out what to do with a conviction in light of these tribal policy decisions.

The third factor (whether the conviction covers conduct already assessed criminal history points) facilitates engagement by pushing federal sentencing courts to understand on the ground practice. To properly weigh the impact of

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major point about having the tribes and the state get together to show respect and try to resolve important issues.")

whether underlying conduct gave rise to a conviction which received points, a federal sentencing court needs to learn if it is common practice for tribes to serially prosecute misconduct that is also subject to federal prosecution. This suggests an intent of the tribe to add their own moral and cultural stamp of opprobrium. It also reinforces its ability to make and be governed by its own laws. It can also reflect dissatisfaction with federal law enforcement efforts and a desire to impose more severe punishment. Across all these motivations, there is an unavoidable call to ask "why?" Why was this conduct viewed worthy of serial prosecution by separate sovereigns and what would each like the ongoing consequences of those prosecutions to be? Getting to the bottom of that question requires a federal court to engage meaningfully with tribal courts to know why individual cases and classes of offenses are handled as they are.

Fourth, evaluating whether this is the type of conviction that would or would not have received points under the Guidelines, seen with engagement as the heart of sovereignty, calls on federal sentencing courts to learn the local initiatives of tribal courts. Some offenses that do not receive criminal history points may be crucial public health and safety concerns for tribes to address (e.g., public intoxication). Similarly, there may be offenses that are not so severe as to merit federal prosecution, but which are of real local consequence and thus prosecuted by the tribe (e.g., disorderly conduct). In either instance, a judge with an understanding of why this type of offense is charged and whether it is prosecuted to serve a law enforcement or a public health and welfare purpose learns a great deal about what sort of weight to give it in the federal sentencing process. By knowing this, the federal court advances the ability of the tribal sovereign to make and be governed by their own laws by treating them in the fashion the tribe does.

Lastly, the factor rejected by the Commission is the most critical factor for sovereignty as engagement: the formal position of the tribe on whether its convictions should count. It is, in short, engagement at its most basic level—asking the affected parties what they want. Seeking input from tribes on what federal courts should, or should not, do with their prior convictions in subsequent criminal sentencings is a fundamental act of engagement. Declining to do so is a fundamental refusal to engage. One can set aside the question of whether including tribal court convictions in the criminal history calculation or not shows fuller respect for tribal courts; if even asking is rejected, real engagement is rejected, and a belief in real sovereignty is rejected.

It is in this respect that TIAG's promise was most unfulfilled. One government cannot look at the other and call it "sovereign" if it refuses to even hear that government's policy preference on an issue of vital concern. This factor was critical to promoting engagement with sovereign tribal courts. The Commission was wrong to reject it and should revisit that decision as soon as possible.

Taken holistically, with none being given priority or threshold status, the TIAG factors promote sovereignty as engagement. Each allows and encourages engagement in its own way. They call on federal courts and practitioners to understand the operation of tribal courts on an individual level. They call for an understanding of the criminal justice initiatives and policies of tribes. They call for direct and ongoing communication between courts. They allow for tribal policies to push for more severe sentences in some circumstances and greater leniency, or the use of less punitive sentencing options, in others. They allow that engagement and understanding to be given effect in federal sentencing. And they provide a roadmap for open government to government relations to be replicated in other settings. In short, they are an invitation to engage, know, and work with tribal courts rather than to ignore, marginalize, and stereotype them.

For sovereignty to be real, it must begin with engagement. TIAG's proposed factors can be a meaningful starting place for that effort.

A final question about the idea of sovereignty as engagement is whether and why it is normatively preferable to other theories of sovereignty. It is easiest to take those questions in reverse order as the comparison demonstrates the superiority of this view.

Sovereignty as engagement is preferable to sovereignty as parity because it does not start with a normative preference. It is inescapable that the pursuit of parity with state courts begins from the view that state courts are the preferred model. Their normative superiority is the premise. And, even though tribes may choose the Anglo-American model now, that choice cannot be said to be "free" in the sense that it has been driven by the forces of colonization and assimilation. Coercion through force or funding has often driven the "choice." Sovereignty as engagement starts with the premise of mutual understanding. This is a better foundation for true government to government relations than one where one government is viewed as the model for the other to emulate.

Sovereignty as engagement has considerably more overlap with sovereignty as difference, but it too is somewhat wanting by comparison. Sovereignty as difference starts with a premise that tribes stand uniquely apart in America. Their status and history places them in a very different position than states; Indians enjoy, and endure, a dual citizenship status that is unique. Sovereignty as difference runs into practical problems of how Indians find unencumbered space to fully implement their difference. The historical remnants of colonization and assimilation have left structural marks. Pursuit of economic development may, as a practical matter, require embracing the dominant culture in significant ways. Different tribes have very different circumstances and pursue different policies, but are unlikely to sustain fully separate existences in modern society. Lastly, simply acknowledging that tribes are different is a starting point; it must be followed by engagement to effectuate actual policies. In the end sovereignty as difference is inferior to sovereignty as engagement because it is a preparatory

step—governments must acknowledge their differences, then find meaningful ways to engage through them.

Seeing tribal sovereignty as a requirement for engagement is a meaningful roadmap to productive intergovernmental relationships. It assumes inherent parity. It accepts differences. It facilitates productive interaction. It is facilitated by the federal sentencing process recommended by TIAG. It is a normatively superior way to envision sovereignty and to structure relationships between separate sovereigns.

VII. CONCLUSION

This history of relationships between tribal governments and state or federal analogs has largely been poor. Across time, forces of colonization, assimilation, marginalization, and lack of understanding have predominated. A meaningful way forward will require engagement and understanding.

The Sentencing Guidelines have significant impact in Indian Country due to the reach of federal criminal law to many "street crimes" by Indians. Cases commonly handled in state courts are common in federal courts when Indians in Indian Country are involved. As a result, federal sentencing policy has a significant impact on individual Indians and is a key intersection point of the courts of the United States and tribes. How to incorporate tribal criminal court judgments into the federal sentencing calculus has been a central question since the Guidelines were promulgated.

Competing views of how that equation should be resolved, and what the answer means for tribal sovereignty have been engaged. None is perfect. But, the best path forward seems to be a system which promotes sustained, practical, and respectful engagement between the two systems. The proposals of TIAG, considered as efforts to promote engagement, are meaningful ways to achieve that. A view of sovereignty as fundamentally rooted in respectful and equal intergovernmental engagement is critical to re-imagining what tribal sovereignty should mean and how those relationships can be sustained and grown for the future.