Correcting Native American Sentencing Disparity Post-Booker

Timothy J Droske
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I. Introduction

In South Dakota, a defendant convicted of aggravated assault in state court receives an average sentence of 29 months. However, if a Native American defendant were to commit that same offense within one of the Indian reservations in South Dakota, the defendant would be prosecuted in federal court and receive an average sentence of 47 months. This glaring disparity, whereby Native Americans prosecuted for assault in Indian country receive sentences 62% higher than defendants convicted in state court for the same offense, is a product of the complex jurisdictional arrangement surrounding Indian country and the rigidity of the Federal Sentencing Guidelines.

Due to Native American tribes’ unique status as “domestic dependent nations” within the United States, the federal government holds criminal jurisdiction over most crimes committed within Indian country. As a result, Native Americans are subject to federal jurisdiction for many offenses that are almost exclusively within states’ criminal jurisdiction, such as manslaughter, assault, and sex offenses. For example, in Minnesota, South Dakota, and New Mexico – three states with large Native American populations – Native Americans accounted for only 6% of sexual abuse offenders in state courts, but over 90% of sexual abuse offenders in federal court.

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1 Report of the Native American Advisory Group, United States Sentencing Commission, 32 (Nov. 4, 2003) (hereinafter Native American Advisory Group). This Report also notes that according to Richard Braunstein & Steve Feimer, South Dakota Criminal Justice: A Study of Racial Disparities, 48 S.D. L. Rev. 171, 194 (2003), the average state court sentence for a Native American convicted of aggravated assault is 22 months, compared to 34 months for white defendants.

2 USSC Statistical Information Packet, Fiscal Year 2005, District of South Dakota, 12, 25 (reporting 49 month mean sentence in South Dakota for assault during Fiscal Year 2005 pre-Booker and a 45 month mean sentence in South Dakota for assault during Fiscal Year 2005 post-Booker). This was higher than the national mean for assault during Fiscal Year 2005, which was 37 months pre-Booker and 44 months post-Booker. Id. In 2002, the average federal sentence for aggravated assault in South Dakota was 53 months, USSC, South Dakota Report, 2002, pg 10, while the national mean was 38.7 months. Id.; see also Native American Advisory Group, supra note 1 at 32.

3 Native American Advisory Group, supra note 1, at 21, note 37. Note that in Minnesota, the federal government only maintains criminal jurisdiction over one of the eleven tribes in the state – the Red Lake Reservation. The other tribes are all under Public Law 280 jurisdiction, meaning that the State of Minnesota has full criminal jurisdiction.
As illustrated by sentences for aggravated assault in South Dakota, federal sentences are often harsher than their state counterparts. As a result, for many crimes committed by Native Americans within Indian country, these defendants suffer disproportionately harsher sentences than if they were non-Indian or had committed their crime off the reservation. Prior to the Federal Sentencing Guidelines, federal judges could minimize this disparity by reducing federal sentences to a level in line with corresponding state punishments. However, the Federal Sentencing Guidelines severely restrained judicial discretion, impairing judges’ ability to respond to this disparity.

Despite the Federal Sentencing Guidelines’ goal of promoting uniformity and minimizing disparity, the Guidelines have had the opposite effect with respect to Native Americans. As Judge Charles B. Kornmann, a United States District Court Judge in South Dakota has said:

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

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4 See also Christine DeMaso, Note: Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker? 106 Colum. L. rev. 2095, 2108 (2006), citing Michael A. Simons, Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization, 75 N.Y.U. L. Rev. 893, 917-18 (2000), Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979, 998-99 (1995); Sex offenses are another example of this disparity. In New Mexico for example, the average sentence for a sex offense was 25 months, compared to 86 months in federal court. Native American Advisory Group, supra note 1, at 22. Note that “[i]f only the more severe class 1 and 2 felony offenses in New Mexico are considered, the state mean sentence is 43 months.”

5 This is particularly true for manslaughter, assault, and sexual abuse. See Native American Advisory Group, supra note 1; see also Jon M. Sands, Indian Crimes and Federal Courts, 2 Fed. Sent. R. 153 (1998) (In 1997, close to 75% of all manslaughter and sexual abuse cases in federal court were Indian offenses).

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


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

In order to increase the likelihood that such departures are upheld as reasonable by the appellate courts, sentencing judges can take a lesson from the parallel post-Booker debate over departures to correct for sentencing disparities caused by fast-track programs. In the 2003 PROTECT Act, Congress granted the Attorney General the power to authorize fast-track programs, whereby defendants who enter into a “rapid guilty plea” are given a lower sentence than otherwise would be given under the Federal Sentencing Guidelines.11 This results in sentencing disparity for illegal aliens prosecuted in non-fast-track jurisdictions,12 which many district courts sought to correct through downward departures.

There are many similarities between fast-track and Native American sentencing disparity. Most significantly, the disparity in both cases is geographically based, and in both circumstances Congress established the framework creating the disparity. Due to these parallels, circuit court

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9 See infra Part III(B).
11 See infra Part V.
12 For example, in one case, the lack of a fast-track program meant that a defendant would be sentenced to 18-24 months instead of 10-16 months United States v. Perez-Chavez, 422 F.Supp.2d 1255, 1259 (D. Utah 2005). In another case, the lack of a fast-track program meant the defendant would be sentenced to 18-24 months instead of 4-10 months. United States v. Delgado, Case No. 6:05-cr-30-Orl-31KRS, 2005 U.S. Dist. LEXIS 29966, *2, *7 (M.D.Fla June 7, 2005).
opinions on the “reasonableness” of departures to account for fast-track disparity serve as a useful proxy as to the likely success of departures to account for Native American sentencing disparity.

Although circuit courts have rejected most arguments for downward departures based on fast-track disparity,\(^\text{13}\) the Sixth Circuit, in *United States v. Ossa-Gallegos*,\(^\text{14}\) affirmed a sentence where the district judge downward departed to reduce, but not fully eliminate, fast-track sentencing disparity. In light of the Sixth Circuit’s opinion in *Ossa-Gallegos* and the similarities between fast-track and Native American sentencing disparity, downward departures based on Native American sentencing disparity are more likely to be upheld as reasonable when the departure reduces, but does not eliminate the disparity. This is premised in part upon the fact that Congress has “endorsed at least some degree of disparity” in both the fast-track and Native American contexts, although this endorsement is much clearer with respect to the fast-track issue. Furthermore, a notion that the defendant must take the bitter with the sweet underlies both situations. For defendants in non-fast track districts, they receive the benefit of not giving up their right to challenge their convictions. Similarly, if Native American tribes were overly

\(^{13}\) All circuits that have addressed this issue, have rejected the argument that it is unreasonable for a judge to fail to provide a downward departure based on fast-track disparity. *See e.g.* US v. Martinez-Florez, 428 F.3d 22, (1st Cir 2005); US v. Mejia, 461 F.3d 158 (2nd Cir. 2006); US v. Montes-Pineda, 445 F.3d 375 (4th Cir. 2006); US v. Hernandez-Fierros, 453 F.3d 309 (2006); US v. Martinez-Martinez, 442 F.3d 539 (7th Cir. 2006); US v. Sebastian, 436 F.3d 913 (8th Cir. 2006); US v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006). The Fourth, Seventh, and Eleventh Circuits have gone one step further and held that it is unreasonable for a judge to provide a downward departure based upon fast-track disparity. US v. Perez-Pena, 453 F.3d 236 (4th Cir. 2006) (“We therefore conclude that the need to avoid such disparities did not justify the imposition of a below-guidelines variance sentence.”); US v. Galicia-Cardenas, 443 F.3d 553 (7th Cir. 2006) (“We cannot say that a sentence imposed after a downward departure is by itself reasonable because a district does not have a fast-track program.”); US v. Arevalo-Juarez, 464 F.3d 1246 (11th Cir. 2006) (“[I]t was impermissible for the district court to consider disparities associated with early disposition programs in imposing Arevalo-Juarez's sentence, because such disparities are not "unwarranted sentencing disparities" for the purposes of § 3553(a)(6).”). However, in the remaining Circuits, it remains a possibility that judges may provide a downward departure due to fast-track disparity.

\(^{14}\) 453 F.3d 371 (6th Cir. 2006) (decided on June 30, 2006). In this case, a defendant appealed his sentence to the Sixth Circuit, arguing that while the district court judge provided a two-step downward departure, in part to account for fast-track disparity, a four-step reduction was necessary to fully mitigate the disparity.
concerned with sentencing disparity, they could choose to surrender their tribal sovereignty and submit to concurrent state criminal jurisdiction pursuant to Public Law 280.

This is not to say that every court will agree with the reasonableness of such a departure. Indeed, the splintered decisions surrounding fast-track disparity indicate that this may not be the case. The arguments for permitting downward departures for Native American defendants however, is in many ways more compelling than that regarding fast-track disparity. This is due to Native Americans’ “unique legal status” under federal law,15 the Supreme Court’s affirmance of regulations and legislation aimed solely at Indian tribes,16 and Congress’ expressed concern over criminal penalties’ disproportionate and disparate impact on Native Americans. Furthermore, while attempts to correct for federal/state disparity in other contexts has been met with resistance, in large part due to concerns that such departures conflict with prosecutorial discretion, no such conflict exists in the Native American context, since prosecutorial jurisdiction is limited to the federal government.17

Although any attempt to fully eradicate the disparate sentences endured by Native American defendants requires wide-sweeping reform of the Federal Sentencing Guidelines18 or Congressional changes to the Major Crimes Act, this proposal offers two advantages to such an alternative. First, the proposal presented in this article presents an immediate solution to Native American defendants. Any attempt to modify the Guidelines or amend the Major Crimes Act would require a high degree of political capital to obtain, and so far, such attempts have fallen short.19 Furthermore, with Native American sentencing disparity being a byproduct of a

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17 Although the tribal government typically holds concurrent jurisdiction. See infra Part II(A)(e).
18 The Supreme Court’s recent decision in United States v. Rita, No. 06-5754 (June. 21, 2007), virtually assures that it is not per se unreasonable for a district court to sentence a Native American to a within-Guidelines sentence, since the case held that circuit courts can presume that within-Guidelines sentences are reasonable.
19 See infra Part III(B)(b).
jurisdictional issue, the courts, particularly post-
Booker,
are perhaps the branch best suited to resolving this concern.

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

I. **Crime in Indian Country**

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

A. **Criminal Jurisdiction in Indian Country**

The United States’ recognition of tribal sovereignty and the exclusive role of the federal government in dealing with Indian affairs has its roots in the United States Constitution. In the early years of the country’s history, the Supreme Court decided three cases, referred to as “The
Marshall Trilogy,” which set forth the bedrock principles of Indian law that persist to this day.\textsuperscript{21} These cases established Indian tribes’ unique status as “domestic dependent nations,”\textsuperscript{22} whereby the United States serves as a “guardian” over Indian country,\textsuperscript{23} but state laws “can have no force.”\textsuperscript{24} Based upon these core principles, tribes have inherent sovereignty over criminal matters, free from state interference, but subject to federal law.\textsuperscript{25} The federal government has passed a series of laws that define the contours of criminal jurisdiction in Indian country, with “Indian country” including 1) “all land within any Indian reservation under United States jurisdiction,” 2) “all dependent Indian communities within the … United States,” and 3) “all Indian allotments [where] the Indian title” to the allotment still exists.\textsuperscript{26} The details of these laws is discussed below.

\textbf{a. The General Crimes Act}

\textit{1. History and Scope of the General Crimes Act}

Soon after the Revolutionary War, Congress passed a series of laws providing federal jurisdiction over non-Indians committing crimes against Indians in Indian country, in order to

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\item \textit{Cherokee Nation}, 30 U.S. at 17 (“Stating that Indian tribes should not be considered “foreign” states, but “They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases.”); The foundation for this definition of Indian status was established in \textit{Johnson v. McIntosh}, 21 U.S. 543 (1823), where Marshall recognized that Indians’ legal right in their lands was good against all third parties, except that of the United States. William C. Canby, Jr., \textit{American Indian Law}, 14-15, 1998.
\item \textit{Cherokee Nation}, 30 U.S. at 17 (“Meanwhile, [tribes] are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.”).
\item \textit{Worcester}, 31 U.S. at 561. See Canby, \textit{supra} note 26, at 17.
\item The Supreme Court has, on a series of occasions, affirmed Congress’ legislative power over crime in Indian country. In \textit{United States v. Rogers}, 45 U.S. 567 (1846), the Court held that “Congress may be law punish any offense [in Indian territory], no matter whether the offender be a White man or an Indian.” Similarly, in \textit{United States v. Kagama}, 118 U.S. 375 (1886) the Court upheld Congress’ authority to pass the Major Crimes Act based upon the federal government’s duty to protect the Indian tribes. More recently, in \textit{United States v. Antelope}, 430 U.S. 641 (1977), the Court has said “Congress had undoubted constitutional power to prescribe a criminal code applicable in Indian Country.” See Native American Advisory Group, \textit{supra} note 1, at 5.
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provide a buffer between Indian and non-Indian populations. These laws were expanded and
took their current form in 1817, when Congress passed the General Crimes Act. This law
extended general federal criminal law applicable in areas of exclusive federal jurisdiction to
Indian country. Explicitly excluded by the General Crimes Act were 1) crimes committed by
one Indian against another Indian, 2) crimes committed by an Indian that had already been
punished by the tribe, and 3) cases where federal jurisdiction is excluded by treaty.

The practical effect of the General Crimes Act is that it applies to all offenses committed
by non-Indians against Indians in Indian country. Subsequent interpretation by the Supreme
Court held that the General Crimes Act does not apply to crimes committed by non-Indians
against non-Indians in Indian Country, and instead such defendants are subject to state
jurisdiction. This decision however, is not constitutionally based, and therefore it is within
Congress’ authority to amend the General Crimes Act to apply to crimes committed by non-
Indians against non-Indians within Indian country. With respect to the Act’s applicability to
Indians, as implied by the second exception to the General Crimes Act, the Act does apply to
-crimes committed by Indians against non-Indians in Indian country. However, if, as discussed

27 Canby, supra note 26, at 133, citing 1 Stat. 138 (1790); 1 Stat. 743 (1799); and 2 Stat. 139 (1802).
29 Id.; see Canby, supra note 26, at 156-157.
30 18 U.S.C. § 1152. While the first two exceptions still bear some significance, the third exception is largely
insignificant today. Canby, supra note 26, at 164.
31 Canby, supra note 26, at 159, citing United States v. McBratney, 104 U.S. 621 (1881), and Draper v. United
States, 164 U.S. 240 (1896).
32 See United States v. Antelope, 430 US 641 (1977); see also H.R. Rep. 94-1038, 1976 USCCAN 1125, 1126; see
33 Canby, supra note 26, at 164, citing United States v. John, 587 F.2d 683 (5th Cir. 1979), United States v. Burland,
441 F.2d 683 (9th Cir. 1971). There is mixed precedent as to whether the Act applies to victimless crimes by
Indians, with the Eighth Circuit holding in 1997 that the General Crimes Act applied to an Indian arrested for
driving under the influence of alcohol. Compare United States v. Thunder Hawk, 127 F.3d 705 (8th Cir 1997), with
United States v. Quiver, 241 U.S. 602 (1916); Canby, supra note 26, at 160-162.
in the next section, the crime committed by the Indian against the non-Indian is a “major crime,” then the prosecution must be brought pursuant to the Major Crimes Act.³⁴

2. **Relationship Between the General Crimes Act and the Assimilative Crimes Act**

When the General Crimes Act was initially passed in 1817, defendants subject to the Act were prosecuted under federal criminal law. However, since criminal jurisdiction is traditionally the province of the states, the United States lacked a comprehensive federal criminal code.³⁵ In order to fill these gaps, Congress passed the Assimilative Crimes Act in 1825,³⁶ which provided that in areas of federal jurisdiction, crimes not covered by federal law were to be prosecuted in federal court, but prosecuted and sentenced pursuant to state substantive law.³⁷

A question arose as to whether the Federal Sentencing Guidelines applied to crimes defined under state substantive law prosecuted in federal court.³⁸ The question revolved around which took priority – “uniform sentencing within the federal system”³⁹ or “equal treatment for Indian and non-Indian offenders who commit certain offenses in Indian country.”⁴⁰ The Eighth Circuit in *United States v. Norquay* decided this question in favor of federal sentencing uniformity, and Congress codified this decision by amending 18 U.S.C. § 3551(c) so as to make the Federal Sentencing Guidelines applicable to Assimilative Act offenses (thereby including the

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³⁴ Canby, supra note 26, at 164, citing Henry v. United States, 432 F.2d 114 (9th Cir. 1970), modified 434 F.2d 1283 (1971).
³⁵ See Canby, supra note 26, at 157-158.
³⁸ Compare United States v. Bear, 932 F.2d 1279 (9th Cir 1990), with United States v. Norquay, 905 F.2d 1157 (8th Cir. 1990); Canby, supra note 33, at 166-67; Sands, supra note 6.
³⁹ Norquay, 905 F.2d at 1161.
General Crimes Act) and the Major Crimes Act. Under this arrangement, the Federal Sentencing Guidelines apply, but state law sets the minimum and maximum sentencing ranges.

b. The Major Crimes Act

In 1885, Congress enacted the Major Crimes Act. The law was passed in response to the Supreme Court’s decision two years earlier in *Ex Parte Crow Dog*, where the Court ruled that the federal government did not have jurisdiction over the murder of an Indian by an Indian in Indian country. The Major Crimes Act grants the federal government jurisdiction over a specified set of major offenses committed by an Indian in Indian country. Originally, the Major Crimes Act conferred federal jurisdiction over seven offenses, but the Act has subsequently been expanded in scope, and in its present form applies to fifteen classes of felonies. The most recent addition to the list of enumerated crimes came in 2006, when

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41 Sands, *supra* note 6; Canby, *supra* note 26, at 167.
44 109 U.S. 556 (1883)
45 Canby, *supra* note 26, at 165. For a more complete description of the story behind this case, see Smith, *supra* note 41, at 496, n. 54.
47 The original seven felonies were murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. Smith, *supra* note 41, at 496, *citing* Act of March 3, 1885, § 9, Ch. 341, 23 Stat. 385.
48 The fifteen categories are: 1) murder, 2) manslaughter, 3) kidnapping, 4) maiming, 5) a felony under chapter 109A [18 USCS §§ 2241 et seq], 6) incest, 7) assault with intent to commit murder, 8) assault with a dangerous weapon, 9) assault resulting in serious bodily injury (as defined in section 1365 of this title [18 USCS § 1365]), 10) an assault against an individual who has not attained the age of 16 years, 11) felony child abuse or neglect, 12) arson, 13) burglary, 14) robbery, and 15) a felony under section 661 of this title [18 USCS § 661] (theft). 18 U.S.C. § 1153(a); see Canby, *supra* note 25, at 165. It has also been held that the Major Crimes Act is applicable to firearms and conspiracy counts. Native American Advisory Group, *supra* note 1, at 7-8. Furthermore, it is important to note that, so long as the offense that the defendant is brought to court under falls under the Major Crimes Act, it is possible for the Indian defendant to be convicted of a lesser included offense not listed under the Major Crimes Act. Id. at 8, *citing* Keeble v. United States, 412 U.S. 205 (1973).
Congress amended the Major Crimes Act to include “felony child abuse or neglect,” due to concern “that a whole category of crimes against children [was] going unaddressed.”

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

Despite Congress’ amendment to the Major Crimes Act in 1976, the Major Crimes Act differs from the General Crimes Act in many important ways. First, the Major Crimes Act gives jurisdiction to offenses committed by an Indian against an Indian; jurisdiction which was explicitly excluded under the General Crimes Act. Second, although the Major Crimes Act was passed in response to a crime by an Indian against an Indian, the Act also applies to crimes

50 S. Rep. 109-255, 109th Cong., 2nd Sess. 2006, 2006 WL 1403201 (Leg. Hist.) Prior to this amendment, “the federal government [did] not have jurisdiction to investigate or prosecute acts of child abuse or neglect unless they [rose] to the level of serious bodily injury or death.” Id.
51 See 18 U.S.C. § 3551(c); see also Native American Advisory Group, supra note 1, at 8-9. The General Crimes Act, under the Assimilative Crimes Act, is also subject to the Federal Sentencing Guidelines, although state law sets the minimum and maximum sentencing lengths
52 U.S. v. Big Crow, 523 F.2d 955 (8th Cir. 1975) and US v. Cleveland, 503 F.2d 1067 (9th Cir. 1974). At this time, the concern was that state sentences were longer than federal sentences, so that Indians suffered harsher sentences. Today this concern is reversed, such that federal sentences are longer than corresponding state sentences.
53 H.R. Rep. 94-1038, 1976 U.S.C.C.A.N. 1125. Congress purposely limited its amendment to only correct what the courts had construed to be unconstitutional disparity. At the time, the Supreme Court was considering United States v. Antelope, 430 US 641 (1977) to determine “the constitutionality of leaving to State jurisdiction non-Indian against non-Indian crimes that take place in Indian country.” H.R. Rep. 94-1038, 1976 U.S.C.C.A.N. 1125, 1126 n.5. The Supreme Court ultimately held that such disparity was not unconstitutional and Congress chose not to correct this disparity. See United States v. Norquay, 905 F.2d 1157, 1162 (8th Cir. 1990).
by an Indian against a non-Indian in Indian country.\textsuperscript{55} This differs from the General Crimes Act, where offenses by non-Indians against non-Indians in Indian country are prosecuted in state court under state substantive law. This creates sentencing disparity since an Indian committing a “major” crime against a non-Indian in Indian country will be punished according to federal law, while a non-Indian committing the same offense in Indian country against a non-Indian is prosecuted under the state system. While the Supreme Court in \textit{Antelope} held that such disparity is not unconstitutional,\textsuperscript{56} as will be discussed later, that does not mean that such disparity is not “unwarranted” for purposes of the Federal Guidelines. In addition to creating disparate sentencing, this also results in Native Americans being disproportionately subject to federal jurisdiction. Indeed, the majority of federal prosecutions for offenses such as assault, manslaughter, and certain sex offenses are against Native Americans.\textsuperscript{57}

c. Public Law 280

In 1953, Congress passed Public Law 280,\textsuperscript{58} which delegated criminal jurisdiction and limited civil jurisdiction in Indian country to six “mandatory” states – Minnesota,\textsuperscript{59} Alaska, California, Nebraska, Wisconsin, and Oregon – thereby impacting 23\% of Native Americans residing on reservations in the contiguous 48 states, and all Alaska natives.\textsuperscript{60} This law was passed in an effort to combat lawlessness in Indian country during a period of time which has been termed the “Termination Period” with respect to the federal government’s policy towards

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\textsuperscript{55} Canby, \textit{supra} note 26, at 166, \textit{citing} United States v. Bird, 342 F.3d 1045 (9\textsuperscript{th} Cir. 2003). Also, it is important to note that jurisdiction under the Major Crimes Act exists if any part of the crime occurred in Indian country. \textit{Id.} at 165, \textit{citing} United States v. Van Chase, 137 F.3d 579 (8\textsuperscript{th} Cir. 1998).


\textsuperscript{57} See Native American Advisory Group, \textit{supra} note 1, at i (the Report focused on sentencing issues for these three offenses).


\textsuperscript{59} Public Law 280 exempted the Red Lake Reservation from Public Law 280. \textit{See} 18 U.S.C. 1162(a); \textit{Later, through retrocession, the Bois Forte Reservation reassumed criminal jurisdiction.}

\textsuperscript{60} \textit{NATIONAL INSTITUTE OF JUSTICE, U.S. DEP’T OF JUSTICE, PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY – RESEARCH PRIORITIES 3} (2005), \url{www.ojp.usdoj.gov/nij} [hereinafter \textit{U.S. DEP’T OF JUSTICE REPORT}]
Indian tribes. The effect of the law is that in Public Law 280 states, all crimes occurring in Indian country, regardless of whether the offender or victim is Native American, are prosecuted under state law in state court.

Prosecuting Native Americans under state law, free from the Federal Sentencing Guidelines, eliminates the inherent disparity discussed in this article, but it comes at a heavy price – the impingement of tribal sovereignty. Public Law 280 has been heavily criticized by Indian law scholars, and even President Eisenhower, when signing Public Law 280 into law, expressed “grave doubts as to the wisdom of certain provisions.” President Eisenhower was particularly troubled by the law’s lack of tribal consent, which he requested be added to the law the following year. Congress finally added this clause in 1968, but it did not apply retroactively to tribes within the six “mandatory” states, or any of the nine other states that had subsequently assumed partial Public Law 280 jurisdiction. Public Law 280 is out of step with

61 The “Termination Period” lasted from 1940-1962 and was characterized by the goal to assimilate Native Americans into United States’ society at large. Vanessa J. Jimenez & Soo C. Song, Concurrent Tribal and State Jurisdiction under Public Law 280, 47 Am. U.L. Rev. 1662, 1664 (1998); see also Emma Garrison, Baffling Distinctions Between Criminal and Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty, 8 J. Gender Race & Just. 449, 452 (2004).

62 Carole Goldberg, the preeminent expert on Public Law 280, has taken a position that despite Congress’ intent that Public Law 280 reduce lawlessness in Indian country, it has actually had the opposite effect, since tribal courts’ power was limited and tribes subject to Public Law 280 were cut out of significant federal funding opportunities.. See Carole Goldberg-Ambrose, Public Law 280 and the Problem of Lawlessness in California Indian Country, 44 USCLA L. Rev. 1405, 1415-20 (1997); Public Law 280 has also been criticized for stunting the development of tribal judicial systems and preventing tribal courts from being respected as they were developing. See Kevin K. Washburn & Chloe Thompson, A Legacy of Public Law 280: Comparing and Contrasting Minnesota’s New Role for the Recognition of Tribal Court Judgment’s with the Recent Arizona Rule, 31 Wm. Mitchell L. Rev. 479, 521 (2004).


64 Id. at 1658 n.172.

65 The nine states were Nevada in 1955; South Dakota in 1957 (jurisdiction over highways); Washington in 1957 (jurisdiction in eight subject areas); Florida in 1961; Idaho in 1963 (civil and criminal jurisdiction over seven subject matters, which can be expanded with tribal consent); Montana in 1963 (jurisdiction over the Flathead Reservation); North Dakota in 1963 (assuming civil jurisdiction, by tribal consent); Arizona in 1967 (jurisdiction over water quality, repealed in 2003 and jurisdiction over air quality, repealed in 1986); and Iowa in 1967 (civil jurisdiction over the Sac and Fox Tribe). After the 1968 Amendment, in 1971, Utah became the last state to accept Public Law 280 jurisdiction. Emily Kane, State Jurisdiction in Idaho Indian Country under Public Law 280, 48-JAN Advocate (Idaho) *11 n. 17-26, (2005).

66 Garrison, supra note 55, at 456.
the federal government’s current policy favoring tribal sovereignty, and tellingly, only one state has managed to assume Public Law 280 jurisdiction following the addition of the tribal consent clause. This is unsurprising given that doing so would require tribes to acknowledge state authority over them and would also effectively eliminate any tribal criminal justice system previously in place.

d. Tribal Jurisdiction

Despite Congress’ heavy delegation of criminal jurisdiction in Indian country to federal or state governments, in the absence of such statutes, “tribal criminal jurisdiction over the Indian in Indian country is complete, inherent, and exclusive.” While Public Law 280 effectively wipes out tribal criminal justice systems, tribal criminal jurisdiction remains more robust for those tribes subject to the General Crimes Act and Major Crimes Act. This is most strongly evidenced by the fact that tribes hold exclusive criminal jurisdiction over crimes committed by an Indian against an Indian that are not covered by the Major Crimes Act. This effectively means that tribes hold exclusive jurisdiction over misdemeanors where an Indian is both the defendant and the victim. This exclusive jurisdiction results in a large number of prosecutions

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67 See Goldberg-Ambrose, supra note 56, at 1415-20; see also Washburn & Thompson, supra note 56, at 521.
68 Canby, supra note 26, at 253 (Utah is the only state to have assumed Public Law 280 since the tribal consent clause was added. In obtaining tribal consent, Utah bound itself to retrocede jurisdiction whenever a tribe requests it by a majority vote); Smith, supra note 41, at 500, citing Carol Goldberg-Ambrose, Public Law 280 and the Problem of Lawlessness in California Indian Country, 44 UCLA L. Rev. 1405, 1408 (1997); While the General Crimes Act and Major Crimes Act no longer apply in the “mandatory” Public Law 280 states, “optional” states that later adopt Public Law 280 assume criminal jurisdiction over Indian country, but the Major Crimes Act and General Crimes Act also remain in effect. Canby, supra note 26, at 235-36 (citing Negonsott v. Samuels, 507 US 99 (1993).
69 Canby, supra note 26, at 236-37.
70 Canby, supra note 26, at 170, citing Ex Parte Crow Dog, 109 U.S. 556 (1883).
71 Canby, supra note 26, at 236-37 (lack of tribal criminal justice systems due to either lack of need or lack of resources); See 18 U.S.C. § 1162(a)
72 Canby, supra note 26, at 170. This is because crimes committed by an Indian against an Indian in Indian country are specifically excluded under the General Crimes Act, 18 U.S.C. § 1152.
being brought exclusively in tribal court.\textsuperscript{74} Congress however, has imposed a limit on tribal courts’ sentencing ability. In 1968 Congress passed the Indian Civil Rights Act, which, in addition to extending many of the safeguards in the Bill of Rights to the tribes,\textsuperscript{75} also limited tribal courts’ sentencing authority to a maximum of one year’s imprisonment, a fine of $5000, or both.\textsuperscript{76}

Tribes also share concurrent jurisdiction with the federal government in a number of situations. For example, tribes have jurisdiction over non-major crimes committed by an Indian against a non-Indian, as does the federal government under the General Crimes Act so long as the Indian defendant has not been punished by their tribe.\textsuperscript{77} Tribes also share concurrent jurisdiction with the federal government over Indian defendants who have violated the Major Crimes Act, although tribal courts are subject to the sentencing limitations imposed by the Indian Civil Rights Act.\textsuperscript{78}

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

\textsuperscript{74} For example, in one recent twelve month period, the Navajo Nation’s tribal courts heard 27,602 criminal cases, compared to the United States Attorney’s Office in 2003, which prosecuted 487 criminal cases arising on the Navajo Nation. \textit{Id.} at 412.

\textsuperscript{75} “In addition to the freedoms of speech, assembly and exercise of religion set forth in the First Amendment, the Indian Civil Rights Act incorporated most of the criminal procedure protections found in the Bill of Rights, such as the Fourth Amendment's warrant requirements and the proscription against unreasonable searches and seizures, the Fifth Amendment's prohibition on double jeopardy, compelled self-incrimination, and deprivation of life, liberty or property without due process, the Sixth Amendment's rights to notice, a speedy and public trial, the right to confront witnesses, the right to compulsory process, and the right to counsel, the Eighth Amendment's proscriptions on excessive bail, excessive fines, or cruel and unusual punishment and even the Fourteenth Amendment's requirement of equal protection. In addition, Congress provided the same remedy for deprivation of rights by tribal courts and tribal governments that are available against states for a state court's deprivation of rights, that is, petitioning the courts of the United States for a writ of habeas corpus.” \textit{Id} at 424-25.

\textsuperscript{76} 25 U.S.C. § 1302(7).

\textsuperscript{77} Canby, \textit{supra} note 26, at 171; 18 U.S.C. § 1152.

\textsuperscript{78} Canby, \textit{supra} note 26, at 171-72; Jimenez & Song, \textit{supra} note 55, at 1652.
e. **Criminal Jurisdiction Summary**

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

- **Crimes Occurring Outside Indian Country** - All crimes occurring outside Indian country, regardless of whether the offender or victim are Indian, are exclusively under state criminal jurisdiction.

- **Crimes Occurring in Public Law 280 States** - All crimes, regardless of whether the crime occurs in Indian country, or whether the offender or victim are Indian, are under state criminal jurisdiction.

- **Crimes Occurring within Indian County in Non-Public Law 280 States** – The intersection of federal, state, and tribal jurisdiction is set forth in the following chart:

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<tr>
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<tbody>
<tr>
<td>“Major” crimes by Indians against Indians</td>
<td>→ Federal (concurrent tribal)</td>
<td>Federal +</td>
<td>Yes</td>
<td>Major Crimes Act, 18 U.S.C. § 1153</td>
</tr>
<tr>
<td></td>
<td>→ Tribal (concurrent federal)</td>
<td>Tribal *</td>
<td>No</td>
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<tr>
<td>Non-“Major” crimes by Indians against Indians (largely misdemeanors)</td>
<td>→ Tribal</td>
<td>Tribal</td>
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<td>→ Tribal (concurrent federal)</td>
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<tr>
<td>Non-“Major” crimes by Indians against non-Indians (largely misdemeanors)</td>
<td>→ Federal (concurrent tribal)</td>
<td>State #</td>
<td>Yes #</td>
<td>General Crimes Act, 18 U.S.C. § 1152</td>
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<tr>
<td></td>
<td>→ Tribal (concurrent federal)</td>
<td>Tribal *</td>
<td>No</td>
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<tr>
<td>Victimless crimes by Indians</td>
<td>→ Tribal **</td>
<td>Tribal *</td>
<td>No</td>
<td></td>
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<tr>
<td>Crimes by non-Indians against Indians</td>
<td>→ Federal</td>
<td>Federal #</td>
<td>Yes #</td>
<td>General Crimes Act, 18 U.S.C. § 1152</td>
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<tr>
<td>Crimes by non-Indians against non-Indians</td>
<td>→ State</td>
<td>State</td>
<td>No</td>
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<tr>
<td>Victimless crimes by non-Indians</td>
<td>→ State</td>
<td>State</td>
<td>No</td>
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</tr>
</tbody>
</table>

* Tribal Sentences are limited by the Indian Civil Rights Act to up to one year’s imprisonment and a $5000 fine.
+ Burglary and Incest are not federally defined offenses and therefore are prosecuted under state substantive law per the Assimilative Crimes Act.
# State substantive law governs per the Assimilative Crimes Act when there is not a federally defined offense. The Federal Sentencing Guidelines apply, but state substantive law provides the maximum and minimum sentences.
** Although the Eighth Circuit held in United States v. Thunder Hawk, 127 F.3d 705 (8th Cir 1997), that the General Crimes Act applied to an Indian arrested for driving under the influence of alcohol.
B. Socioeconomic and Cultural Influences on Criminal Justice in Indian Country

a. Broad Concerns

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

80 According to data compiled from the 2000 census, American Indians are socioeconomically disadvantaged compared to the rest of the United States population in every area, and these substandard conditions are only magnified when limited to American Indians living in Indian country. See generally Stella U. Ogunwole, We the People: American Indians and Alaska Natives in the United States, Census 2000 Special Reports, Feb. 2006, available at http://www.census.gov/population/www/socdemo/race/indian.html (last visited on Nov. 16, 2006). The poverty rate among American Indians is more than double that of the total U.S. population. Id. at 12 (The percentage of American Indians living below the poverty line is 25.7%, compared with 12.4% for the total U.S. population). This rate can be even higher on reservations. For example, in 1999, 41.5% of Navajo Nation residents, 32.3% of Fort Peck Reservation residents, and 34.6% of Red Lake Reservations residents had incomes less than $14,999. Kevin K. Washburn, American Indians, Crime, and the Law, 104 Mich. L. Rev. 709, 711, n8, citing U.S. Census Bureau, Profile of Selected Economic Characteristics: Navajo Nation Reservation and Off-Reservation Trust Land 3 (2000), available at http://censtats.census.gov/data/US/2502430.pdf, and U.S. Census Bureau, Profile of Selected Economic Characteristics: 2000: Geographic Area: Fort Peck Reservation and Off-Reservation Trust Land 3 (2000), available at http://censtats.census.gov/data/US/2501250.pdf. This is largely due to high rates of unemployment. For example, the overall Indian unemployment rate is 46%, Center for Community Change, Native American Background Information, available at http://www.communitychange.org/issues/nativeamerican/background/ (last visited on Nov. 16, 2006), and the average unemployment rate on Montana’s seven reservations is 66%. Bureau of Indian Affairs, Calculation of Unemployment Rates for Montana Indian Reservations, updated June, 2006, available at http://dl.mt.gov/resources/indianlabormarket.asp (last visited on Nov. 16, 2006). However, employment alone is not enough to bring many Indians above the poverty line. On those same Montana reservations, 36% of people employed were still living below the poverty guidelines. Id. Across the country, the median earnings for American Indians working full-time, year-round ($28,919 for American Indian men, $22,762 for American Indian women) was substantially less than that for the rest of the population ($37,057 for men, $27,194 for women). Ogunwole, supra note 84, at 11. Similarly, 27.2% of American Indians living outside Indian country, and 33.1% of those living in Indian country have not graduated from high school, compared to 19.6% of the total U.S. population. Id. at 17.

81 A recent study reported that American Indians are victims of violent crime at a rate more than double that of the rest of the Nation. Steven W. Perry, A Bureau of Justice Statistics Profile, 1999-2002: American Indians and Crime, at cover (Dec. 2004) (reporting that American Indians experienced violent crime at a rate of 101 violent crimes per 1,000 American Indians, compared to 41 per 1,000 persons for the total U.S. population.). Similarly, Native American women report levels of rape twice that of white women, although it is not altogether clear to what degree this is due to a higher occurrence of rape or higher reporting rates. Nora V. Demleitner, First Peoples, First Principles: The Sentencing Commission’s Obligation to Reject False Images of Criminal Offenders, 87 Iowa L. Rev. 563, 575 (2002), citing Patricia Tjaden & Nancy Thoennes, U.S. Dep’t of Justice, Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey 5 (1998) (reporting rape rates of 17.7% for White women and 34.1% for American Native/Alaska Native women).

82 Much of the crime in Indian country is attributable to high levels of alcohol abuse. For example, 62% of violent crimes experienced by American Indians involved alcohol, compared to 42% overall for the nation. Perry, supra note 85, at vi. Furthermore, the arrest rate of American Indians for alcohol violations is approximately double that for all races. Id. at 17. These violations include DUI, liquor law violations, and drunkenness. American Indians
socioeconomic conditions, as well many tribes’ geographic isolation, Indian culture, and underlying racial tensions with the surrounding population, all spill over into the administration of justice for Native Americans. As Professor Kevin Washburn has described in a recent article, these factors result in the alienation of Native Americans within the criminal justice system, which often results in Native Americans failing to be accorded fundamental constitutional norms of criminal justice.\textsuperscript{83} Other judges and commentators have also spoken out on how these factors need to be accounted for in order to make the criminal justice system equitable for Native Americans\textsuperscript{84} While the Eighth Circuit has taken some steps to counter these factors by affirming the use of downward departures in cases where Native American defendants have displayed a “consistent effort[] to overcome the adverse environment of [American Indian] reservation[s],”\textsuperscript{85} the reasoning of these decisions has been questioned and has not been adopted by other circuits.

\textbf{b. A Case Study in Native American Inequality – the South Dakota Criminal Justice System}

South Dakota serves as a prime example of the obstacles facing Native Americans in the criminal justice system. In 1999, due to concerns over racial tension and unfair treatment of Native Americans in South Dakota’s criminal justice system, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights undertook a project analyzing the administration of justice for Native Americans.\textsuperscript{86} The South Dakota Advisory Committee held a

\begin{table}
\small
\begin{tabular}{|c|c|}
\hline
Violation & Rate per 100,000 for Native Americans vs. All Races \\
\hline
DUI’s & 470 vs. 332 \\
\hline
Liquor Law Violations & 405 vs. 143 \\
\hline
Drunkenness & 356 vs. 148 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{83} Washburn, American Indians, supra note 84.
\textsuperscript{84} See e.g. Judge Kornmann, supra note 8; see also South Dakota Advisory Committee to the United States Commission on Civil Rights, Native Americans in South Dakota: An Erosion of Confidence in the Justice System (March 2000), available at http://www.usccr.gov/pubs/sac/sd0300/main.htm, (last visited on Nov. 16, 2006).
\textsuperscript{85} United States v. Big Crow, 898 F.2d 1326, 1331 (8th Cir. 1990).
\textsuperscript{86} South Dakota Advisory Committee to the United States Commission on Civil Rights, supra note 88, at http://www.usccr.gov/pubs/sac/sd0300/ch1.htm
public forum to gather information on this issue. The Advisory Committee’s published report said of the meeting, that “[t]he expressed feelings of hopelessness and helplessness in Indian Country cannot be overemphasized.” Native Americans voiced feelings that racism “permeated” the Federal and State levels of justice and that crimes committed by Indians against whites were prosecuted more vigorously than those committed by whites against Indians. Furthermore, the complex maze of criminal jurisdiction led to problems of accountability and communication. In addition, Native Americans were alienated from the criminal justice process since they were underrepresented in employment in the local, state, and federal criminal justice systems, and because they did not fully participate in local, state, and federal elections. Compounding these problems was a lack of redress for Native Americans, since general legal services, civil rights organizations, and government civil rights oversight were limited in the state as a whole, and for Native Americans in particular.

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

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

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87 Id. (the meeting was held on Dec. 6, 1999 in Rapid City, SD and nearly 100 individuals addressed the forum).
88 Id. The Report went onto say, “Despair is not too strong a word to characterize the emotional feelings of many Native Americans who believe they live in a hostile environment.”
89 Id.
90 Id.
91 Id.
92 Id.
In South Dakota, the city of Pierre is sixty miles away from Fort Thompson, the tribal headquarters of the Crow Creek Sioux Tribe. Assume that in both cities an Indian and a non-Indian are arrested for aggravated assault. The situation set forth here is particularly salient, since federal sentencing of Native American defendants for aggravated assault was the primary concern that gave rise to the South Dakota Advisory Committee meetings. In 2002 for example, Native Americans nationally comprised 3.6% of all federal criminal defendants, but 36.9% of those defendants prosecuted for assault. In South Dakota, the percentage of assault defendants that are Native American is presumably much higher, since Native Americans comprise approximately half of all defendants federally prosecuted in the state.

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

Aggravated assault is one of the fifteen offenses enumerated under the Major Crimes Act. Therefore the Indian defendant committing the assault on the Crow Creek Reservation

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

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


96 See UCCS Reports for South Dakota in 2005 (pre and post Booker). It is not possible to find data on the race of federal defendants for particular crimes by state, nor is it possible to find data on the sentencing disparities for Native Americans by offense.

97 18 USCA § 1153(a) (“Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely … assault resulting in serious bodily injury …”); Canby, supra note 26, at 166.
will be prosecuted in federal court for aggravated assault regardless of whether the victim was
Indian or non-Indian.98

Once the Indian defendant is found guilty, he will be sentenced by the district judge
according to the Federal Sentencing Guidelines. Under the 2005 Guidelines, the base offense
level for aggravated assault is 14, with a three to seven level increase depending on the severity
of the victim’s bodily injury.99 In South Dakota, federal sentences for assault during 2005
averaged 47 months.100 This current base offense level for assault is one level lower than it was
in 2002 when concerns were raised in South Dakota regarding assault convictions for Native
Americans.101 Under the 2002 Guidelines, the average federal sentence for assault in South
Dakota was 53 months in length.102

The Crow Creek Sioux Tribe will also have concurrent jurisdiction over the Indian
defendant for the assault, regardless of whether the victim was Indian or non-Indian. However,
tribes rarely exercise this concurrent jurisdiction and its sentences are limited by the Indian Civil
Rights Act to a maximum of one year’s imprisonment, a fine of $5000, or both.103

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

Criminal jurisdiction over the non-Indian defendant who committed the crime on the
Crow Creek Reservation is dependent upon whether the victim was Indian or non-Indian. If the

98 The Indian defendant will be charged under 18 USCS § 113(6) (covers “[a]ssault resulting in serious bodily
injury,” punishable by a fine under this title [Title 18] or imprisonment for not more than ten years, or both”).
100 USSC Statistical Information Packet, supra note 2, at 12, 25 (reporting 49 month mean sentence in South Dakota
for assault during Fiscal Year 2005 pre-Booker and a 45 month mean sentence in South Dakota for assault during
Fiscal Year 2005 post-Booker). This was higher than the national mean for assault during Fiscal Year 2005, which
was 37 months pre-Booker and 44 months post-Booker. Id.
American Advisory Group in its 2003 report recommended reducing the base offense level by two, but only a one-
level reduction was ultimately adopted. Native American Advisory Group, supra note 1, at 34.
102 USSC, South Dakota Report, 2002, pg 10. The mean national sentence for assault that year was 38.7 months.
victim was Indian, the defendant will be subject to federal jurisdiction under the General Crimes
Act.\textsuperscript{104} Since aggravated assault is a federally defined offense,\textsuperscript{105} the defendant will be
prosecuted under federal, rather than state substantive law.\textsuperscript{106} Under the 2005 Federal
Sentencing Guidelines, the non-Indian defendant would face an average federal sentence of 47
months.\textsuperscript{107}

Criminal jurisdiction over the non-Indian defendant switches from the federal
government to the State of South Dakota if the assault victim was also non-Indian. The non-
Indian defendant would then be prosecuted in South Dakota state court under South Dakota
substantive law.\textsuperscript{108} According to 2002 statistics, the average sentence for white defendants
convicted of assault in South Dakota state courts was 34 months.\textsuperscript{109}

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

The Major Crimes Act and General Crimes Act do not have any applicability outside
Indian country. As a result, a crime committed by an Indian outside Indian country, such as
assault, falls under state jurisdiction and outside the reach of the Federal Sentencing Guidelines.
In 2002, the average South Dakota state sentence for Native Americans convicted of assault was
22 months.\textsuperscript{110}

\textsuperscript{104} 18 USCA § 1152.
\textsuperscript{105} See 18 USCS § 113.
\textsuperscript{106} If no federally defined offense exists, the defendant is prosecuted in federal court under state substantive law per
\textsuperscript{107} Note that reports indicate that post-Booker, federal sentences for Native Americans are 10.8% higher than those
\textsuperscript{108} The non-Indian defendant will be prosecuted under \textit{SD Codified Laws § 22-18-1,1(1)} (2006), a class 3 felony.
\textsuperscript{109} Note that it is within Congress’ authority to amend the General Crimes Act so that non-Indian defendants
committing crimes against non-Indians in Indian country would be subject to federal jurisdiction.
\textsuperscript{110} Braunstein & Feimer, \textit{supra} note 1, at 194 (reporting that the mean actual sentence length for whites convicted
for assault in South Dakota state courts was 1017.6961)
\textsuperscript{110} \textit{Id.} (reporting that the mean actual sentence length for American Indians convicted for assault in South Dakota
state courts was 672.9373 days).
d. Prosecuting the Non-Indian Defendant for the Assault Outside Indian Country

In this case, the non-Indian defendant is subject to state jurisdiction and an average sentence of 34 months.\textsuperscript{111}

e. Sentencing Disparity

As this example illustrates, under the 2002 Guidelines, Native Americans prosecuted in South Dakota federal court received average sentences 31 months longer than Native Americans prosecuted in state court and 19 months longer than whites prosecuted in the South Dakota state courts. Despite recommendations by the Native American Advisory Group to reduce this disparity, under the current Guidelines, federal sentences for assault in South Dakota during 2005 were still 25 months longer than those for Native Americans sentenced in state court and 13 months longer than those for whites sentenced by the state.

Although the jurisdictional arrangement surrounding Indian country disproportionately impacts Native Americans, non-Indians subject to jurisdiction under the General Crimes Act also fall victim to this sentencing disparity. Therefore, an argument can be made that downward departures should also be permitted for these non-Indian defendants. However, due to the courts’ interpretation of the General Crimes Act, non-Indians are only subjected to federal jurisdiction for offenses committed in Indian country when the victim of the crime was Indian. In contrast, Indians may be prosecuted under the Major Crimes Act regardless of whether the victim was Indian or non-Indian. While it is within Congress’ authority to correct this disparity by holding non-Indian against non-Indian crime subject to federal jurisdiction, Congress has not taken this step in light of the fact that the Supreme Court has held that such disparity does not

\textsuperscript{111} Id.
rise to the level of a constitutional violation. As a result, Native American defendants, when sentenced for a crime involving a non-Indian victim, have an additional basis for arguing against disparity between federal and state sentences. Furthermore, although non-Indians may be federally prosecuted for offenses occurring in Indian country under the General Crimes Act, in actuality, crimes such as federal assault remain largely a Native American crime, with over half the federal prosecutions for assault in South Dakota involving a Native American defendant.

II. **The Federal Sentencing Guidelines pre-Booker and Their Impact on Native American Defendants**

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

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112 United States v. Norquay, 905 F.2d 1157 (8th Cir. 1990), citing Antelope and legislative history.

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

a. The 1984 Sentencing Reform Act

Prior to the Sentencing Reform Act’s enactment, judges had virtually unfettered discretion in imposing sentences below the statutory maximum penalty for a crime, and the Parole Commission had immense discretion in determining the amount of time a defendant actually served in prison. In response, in 1984 Congress passed the Sentencing Reform Act (SRA), which sought to achieve honesty, uniformity, and proportionality in sentencing. The main features of the Act were to create the United States Sentencing Commission, which would promulgate Federal Sentencing Guidelines, and to abolish the federal parole system and replace it with a requirement that defendants serve at least 85% of their sentence before becoming eligible for release.

The SRA set forth how district court judges were to use the Sentencing Guidelines that would be promulgated by the Sentencing Commission. Under 18 U.S.C. § 3553(a), judges are to consider seven factors:

1) “the nature and circumstances of the offense and the history and characteristics of the defendant;
2) “the need for the sentence imposed” in order to, among other things, “provide just punishment,” serve as a deterrent, “protect the public,” and provide the defendant with proper training, care, or treatment;
3) “the kinds of sentences available;”
4) the Federal Sentencing Guidelines;
5) “any pertinent policy statement” … “issued by the Sentencing Commission…”;
6) “the need to avoid unwarranted sentence disparities among defendants with

118 Bowman, supra note 120, at 282-83.
119 Gelacak, supra note 119, at 310.
similar records who have been found guilty of similar conduct; and"
7) “the need to provide restitution to any victims of the offense.”

The SRA requires that district court judges sentence defendants in accord with the Federal Sentencing Guidelines, but does provide under 18 U.S.C. § 3553(b) that judges may depart from the Guidelines when there is a circumstance “not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”

In determining whether a circumstance was “adequately taken into consideration” the SRA states that the court may only consider “the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission,” and if the court chooses to depart, must provide its reason for doing so, which then becomes the basis for appellate review. With these standards in place, President Reagan signed the SRA into law in 1984 and the Sentencing Commission was then formed to promulgate the Federal Sentencing Guidelines.

b. The United States Sentencing Commission’s Creation

1. The SRA’s Guideposts to the United States Sentencing Commission

The United States Sentencing Commission was charged with the task of creating the Federal Sentencing Guidelines. The SRA provided guideposts for the factors the Commission should consider and incorporate into the Guidelines as they deemed appropriate. This included a list of seven factors, “among others,” related to the seriousness of the offense, and a

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124 Gelacak, supra note 119, at 310.
125 Id. at 311.
127 Id. at § 994(a).
   (1) the grade of the offense;
   (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness
list of eleven factors, also “among others,” related to “offender characteristics.”\textsuperscript{129} However, in considering “offender characteristics,” the SRA required “that the guidelines and policy statements [be] entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”\textsuperscript{130} With these guiding principles in hand, the Commission then engaged in lengthy public hearings, research, and debate before the Guidelines went into effect on November 1, 1987.\textsuperscript{131}

2. The Discussion of Departures for Indian Crime During the Sentencing Commission’s Hearings

The circumstances surrounding the sentencing of Native Americans arose during the course of these public hearings.\textsuperscript{132} Prior to the SRA, federal judges and the federal criminal justice system in general were able to take into account the unique circumstances surrounding Indian crime. For example, there is evidence that federal judges, prosecutors, and public

\begin{itemize}
  \item of the offense;
  \item the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
  \item the community view of the gravity of the offense;
  \item the public concern generated by the offense;
  \item the deterrent effect a particular sentence may have on the commission of the offense by others; and
  \item the current incidence of the offense in the community and in the Nation as a whole.
\end{itemize}

\textsuperscript{129} United States Sentencing Commission Staff, \textit{supra} note 133; 28 U.S.C. § 994(d) lists these eleven factors:

\begin{itemize}
  \item age;
  \item education;
  \item vocational skills;
  \item mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
  \item physical condition, including drug dependence;
  \item previous employment record;
  \item family ties and responsibilities;
  \item community ties;
  \item role in the offense;
  \item criminal history; and
  \item degree of dependence upon criminal activity for a livelihood.
\end{itemize}

\textsuperscript{130} 28 U.S.C. § 994(d).

\textsuperscript{131} Galacak, \textit{supra} note 119, at 311.

defenders in the southwest were sensitive to the Navajo Indians’ sense of justice.133 The importance for judges to be able to exercise discretion with respect to Indian crime was brought to the Commission’s attention. This argument seemed to gain some traction with then-Commissioner, and now Justice, Breyer, who recognized the unique nature of these cases and appeared to urge trial courts to use their discretion to depart in cases involving Native American defendants.134 Unfortunately, the concerns expressed in these public hearings and the response by then-Commissioner Breyer were not reflected when the Commission promulgated its Federal Sentencing Guidelines.135

c. The Federal Sentencing Guidelines’s Promulgation

The Federal Sentencing Guidelines went into effect on November 1, 1987.136 The Guidelines operate by employing a sentencing matrix that looks at the defendant’s “total offense level” and “criminal history category.”137 Once the court has calculated the guideline-specified sentence, the court is permitted to depart from this sentence length when it finds “an aggravating or mitigating circumstance…that was not adequately taken into consideration by the Sentencing Commission…”138 The Commission designed each guideline “as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes.”139 Therefore, when a case arises that falls outside the “heartland,” the court may award a departure.140

134 Id.
136 Sands, Departure Reform, supra note 137.
137 Gelacak, supra note 119, at 311.
138 Id.; Guidelines Manual, supra note 7, at 376-77.
140 Id.
141 For a discussion of the “heartland,” see Koon v. US, 518 US 81 (1996). Although the holding that circuit courts are to apply an abuse-of-discretion standard of review, rather than de novo review was ultimately overruled by Congress in the Feeney Amendment, the case provides a good summary of the application of the Guidelines and departing when a case falls outside the “heartland.”
The Commission has placed some limitations on what factors may be considered as grounds for departure. Importantly for Native Americans, the Guidelines Manual states that “race, sex, national origin, creed, religion, and socio-economic status…are not relevant in the determination of a sentence,” although the Eighth Circuit has seemingly circumvented this restriction in the Big Crow line of cases. The Guidelines also prohibit the consideration of “lack of guidance as a youth,” which individuals such as Judge Kornmann have criticized as prohibiting judges from considering the poor upbringing many young Native American defendants receive. Beyond these “specific exceptions, however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.”

In 2003 Congress passed the PROTECT Act, and while the bill was pending, the Feeney Amendment was added to the legislation. In its initial form, the amendment would have “eliminated all unenumerated downward departures and all downward departures for family ties, diminished capacity, aberrant behavior, educational or vocational skills, mental or emotional conditions, employment record, good works, or overstated criminal history.” The Amendment was narrowed in its final form however, and these departure restrictions were limited to crimes of pornography, sexual abuse, child sex, and child kidnapping and trafficking, although it did impose a two-year moratorium on Guideline amendments creating new downward departure

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143 Id.
144 Id. at §1A1.1. This section also includes a summary of factors courts are not permitted to consider.
grounds or loosening the amendment’s restrictions on downward departures.\textsuperscript{148} While this two-year moratorium has passed, the departure restrictions placed on sex crimes persists.\textsuperscript{149} This is particularly limiting for Native Americans, since sex offenses are an area where Native Americans are disproportionately represented in federal court,\textsuperscript{150} but the Feeney Amendment severely restricts courts’ ability to provide downward departures for such defendants.

\textbf{B. The Federal Sentencing Guidelines and Native Americans}

The restrictions the Federal Sentencing Guidelines placed upon sentencing judges impacted Native American defendants in two key ways: 1) by failing to allow judges to downward depart to correct the inherent disparity between federal and state statutory sentence lengths, and 2) by prohibiting the consideration of race, national origin, and socio-economic status in providing a downward departure.\textsuperscript{151} Despite these restraints, judges devised creative solutions to account for these factors in sentencing Native Americans. However, the reach of these decisions is limited, since it is difficult to justify these departures under the express language of the Guidelines Manual or the SRA. This in turn has led to a number of calls for reform of the Guidelines Manual or Congressional action. In 2000, largely in response to the United States Commission on Civil Rights’ work analyzing the impacts of the criminal justice system on Native Americans in South Dakota, the Sentencing Commission created the Native American Advisory Group. This Group was charged with determining whether Native Americans are unfairly treated under the Federal Sentencing Guidelines and if so, how that can

\begin{footnotesize}
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\item \textsuperscript{148} \textit{Id.} at 297, \textit{citing} PROTECT Act, 401(j)(2), 117 Stat. at 673.
\item \textsuperscript{149} See 2006 Guidelines Manual, \textit{supra} note 145.
\item \textsuperscript{150} See Native American Advisory Group, \textit{supra} note 1.
\item \textsuperscript{151} See 2005 Guidelines Manual, \textit{supra} note 7, at § 5H1.10
\end{itemize}
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be redressed. This section will discuss these various proposed solutions and their relative merits.

a. Court Based Solutions

1. Big Crow and Its Progeny – The Eighth Circuit’s Departures for the Unique Circumstances of Life on a Reservation

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

i. United States v. Big Crow

In United States v. Big Crow, the Eighth Circuit affirmed a downward departure for Big Crow, a resident of the Pine Ridge reservation in South Dakota. Big Crow had been convicted of assault with a dangerous weapon and assault resulting in serious bodily injury. Under the

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152 Native American Advisory Group, supra note 1, at i.
153 See supra Part III(A)(b)(2) and accompanying text.
154 Id.; see 2005 Guidelines Manual, supra note 7, at § 5H1.10.
155 See Native American Advisory Group, supra note 1, at 9; see United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990); see also United States v. One Star, 9 F.3d 60 (8th Cir. 1993); see also United States v. Decora, 177 F.3d 676 (8th Cir. 1999); but see United States v. Weise, 128 F.3d 672 (8th Cir. 1997).
157 Id. at 1327-28 (The incident occurred when Big Crow had a number of people over at his house, all of whom had been drinking, and Big Crow got in a fight with somebody and hit him with a piece of firewood).
Guidelines, Big Crow’s sentence was to be 37-46 months, but the district court downward departed, giving Big Crow a sentence of 24 months imprisonment and two years supervised release, plus treatment for alcohol abuse. The district court based this departure upon Big Crow’s intoxication when the offense occurred, his lack of a criminal record, excellent employment history, “consistent efforts to overcome the adverse living conditions on the Pine Ridge reservation,” and a number of letters written on Big Crow’s behalf by leaders in the community.

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

In a footnote following the discussion of conditions on the Pine Ridge reservation, the Eighth Circuit stated that the Guidelines’ policy statement that “race, sex, national origin, creed, 

\[158\] Id. at 1329.
\[159\] Id.
\[160\] Id. at 1331.
\[161\] Id.
\[162\] An unemployment rate of 72% and a per capita annual income of $1,042. Id.
\[163\] Id. at 1332 (Big Crow had worked as a forestry aid and firefighter for the Bureau of Indian Affairs since 1985).
\[164\] Id.
religion, and socio-economic status…are not relevant in the determination of a sentence.” Exceeded the Sentencing Reform Act’s requirement of “neutrality” regarding these factors. The majority then justified its departure upon the Senate Judiciary Committee’s statement that “neutrality” regarding these factors “is not a requirement of blindness.” The dissenting judge pounced upon this footnote, stating that Guidelines § 5H1.10 is clear that race, sex, national origin, creed, religion, and socio-economic status cannot be considered. The dissent further argued that the majority’s reliance upon the Senate Judiciary Committee was misplaced, since 18 U.S.C. § 3553(b) is clear that legislative history cannot be considered by the court. Despite this disagreement with the majority’s reasoning, the dissenting judge conceded that the district court had awarded a “just” sentence, stating that, “as a practical matter, one wonders why the government attacks [the sentence] here. There are some things better left along, and Big Crow’s sentence is one of them.”

**ii. Big Crow’s Legitimacy Affirmed**

Courts and commentators have noted the tension between *Big Crow* and Guidelines § 5H1.10, but the Eighth Circuit’s decision is not an anomaly. Three years later, in *United States v. One Star*, the Eighth Circuit again affirmed a downward departure where mitigating circumstances associated with life on an Indian reservation were “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the

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167 *Big Crow*, 898 F.2d at 1332, n.3.
168 *Id.* at 1332-33
169 *Id.* at 1332-33 (“[18 U.S.C. § 3553(b) permits courts to consider only the sentencing guidelines, policy statements, and official commentary in determining whether the Sentencing Commission adequately took a circumstance into consideration.”).
170 *Id.* at 1333.
171 See Diffily, *supra* note 148, at 273-74; see also Smith, *supra* note 41, at 519-22.
The Eighth Circuit also affirmed *Big Crow* in *United States v. Decora*, a 1999 case where an Indian defendant had pled guilty to assault with a dangerous weapon. The district court judge downward departed from a recommended sentence of 37-46 months to three years probation and participation in a drug and alcohol treatment program. The judge based this departure on the fact that the facts surrounding the case took it “out of the heartland of the assault cases he usually saw in his courtroom,” and that “there were unusual mitigating circumstances in the case, namely, the adversity defendant Decora had faced on the reservation and the ‘remarkable resilience’ he had nonetheless shown in his determination to succeed.”

The Eighth Circuit affirmed this decision, stating it was within the judge’s authority under Sentencing Guidelines § 5K2.0 and the court’s prior decisions in *Big Crow* and *One Star*.

**iii. Limits on Big Crow**

The Eighth Circuit’s decisions in *Big Crow*, *One Star*, and *Decora* carve out a downward departure ground for Native Americans, but it is limited to Indian defendants whose situation is factually distinct. For example, in *United States v. White Buffalo*, the Eighth Circuit did not affirm a downward departure when the defendant, unlike Big Crow and One Star, “had no dependent to support,” “presented no evidence of his standing in the community,” and did not

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172 United States v. One Star, 9 F.3d 60, 61 (8th Cir. 1993).
173 United States v. Decora, 177 F.3d 676 (8th Cir. 1999).
174 *Id.* at 677. In *Decora*, the defendant pled guilty to assault with a dangerous weapon (shod feet), for kicking an officer after being arrested for speeding and failing to obey a stop sign while driving under the influence. *Id.*
175 *Id.*
176 *Id.* at 677, 678. The court noted that when the incident occurred, Decora was only semester away from earning his college degree. Furthermore, many of Decora’s teachers sent letters stating that he was “well respected in his community and at the University and that he shows great promise as a community leader and a role model.”
177 *Id.* at 679, quoting U.S.S.G. § 5K2.0 comment (“The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the ‘heartland’ cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case.”).
178 *Id.*
179 10 F.3d 575 (8th Cir. 1993).
have a solid work record. The Eighth Circuit came to a similar conclusion in United States v. Weise, where the record did not indicate anything about the “reservation environment” which “skewed Weise’s opportunities,” and, unlike Big Crow, the court did not receive any letters from community members on Weise’s behalf. Looking at the Eighth Circuit’s opinions on this issue in its entirety, falling victim to the conditions on an Indian reservation is insufficient to qualify for a downward departure, but overcoming these reservation conditions moves the case outside the “heartland” of cases contemplated by the Guidelines.

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

2. Minimizing Disparity Through Narrow Statutory Interpretation

Big Crow, One Star, and Decora stand out as a unique set of cases in which a court openly admitted that reservation conditions were a relevant factor in providing a downward departure. Courts however, have also minimized sentencing disparity by narrowly interpreting federal statutes so that they do not apply to Indian country. Judge Kornmann has provided an example of this in the public housing context. Congress requires that those selling drugs from “protected locations,” such as a “housing facility owned by a public housing authority,” are to be

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180 Id. at 577.
181 128 F.3d 672 (8th Cir. 1997).
182 Id. at 674.
183 Id.; see 2005 Guidelines Manual, supra note 7, at § 5H1.10.
punished twice as harshly.\textsuperscript{184} Congress based this increased penalty upon the issues surrounding drug dealing in urban public housing, where tenants have to deal with drug trafficking on a daily basis.\textsuperscript{185} However, Congress failed to consider that most “public housing” in Indian country exists in rural areas and are single family dwellings.\textsuperscript{186} As a result, Judge Kornmann of the District of South Dakota, has interpreted “public housing authority” under the statute to be distinct from an “Indian Housing Authority,” so that Native Americans are not subject to the heightened penalties.\textsuperscript{187} While this tactic is suitable in situations such as this one, its applicability is limited to those cases where it is reasonable for the court to construe the underlying statute narrowly.

3. \textit{Candidly Correcting for Disparity Between State and Federal Sentences}

Attempts to openly correct for disparity between federal and state sentences have largely been rejected by the courts. This issue first arose prior to the SRA’s passage and the Federal Sentencing Guidelines’ creation. In the 1977 case \textit{United States v. Antelope}, the Supreme Court addressed whether equal protection under the Fifth Amendment’s Due Process Clause was violated “by subjecting individuals to federal prosecution by virtue of their status as Indians.”\textsuperscript{188} The Court first found that the laws subjecting Native Americans to federal criminal jurisdiction were “based neither in whole nor in part upon impermissible racial classifications.”\textsuperscript{189} Furthermore the Court concluded that because Native Americans prosecuted pursuant to the Major Crimes Act “enjoy the same procedural benefits and privileges as all other persons within

\textsuperscript{184} Judge Kornmann, \textit{supra} note 8.
\textsuperscript{185} \textit{id.}
\textsuperscript{186} \textit{id.}
\textsuperscript{187} \textit{id.} (at the time Judge Kornmann’s essay was published, his interpretations had not been appealed.).
\textsuperscript{189} \textit{id.} at 647.
federal jurisdiction,” the only remaining basis for the Native Americans’ equal protection claim was the disparity between federal law and Idaho law. The Court then rejected this argument, stating that “[u]nder our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter.”

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

191 Id. at 648.
192 Id. at 649.
193 Id. at 649, n.12.
194 Smith, supra note 41, at 516, n.158 (“See, e.g., United States v. Smith, 289 F.3d 696, 714 (11th Cir. 2002) (holding as a matter of law that it is inappropriate for a district court to depart on the basis of sentencing disparity between co-defendants); United States v. Williams, 282 F.3d 679, 683 (9th Cir. 2002) (holding that the district court's departure on the grounds of federal-state sentencing disparity was an abuse of discretion); United States v. Snyder, 136 F.3d 65, 70 (1st Cir. 1998) (holding that "federal/state sentencing disparity is not a feature that can justify a departure."); United States v. Gallegos, 129 F.3d 1140, 1143-44 (10th Cir. 1997) (concluding that the district court erred when it reduced the defendant's sentence based upon a disparity with the co-defendant's sentence, where the co-defendant received a thirty month sentence and the defendant, who played an equally or less culpable role in the crime, was faced with a 120-month sentence); United States v. Wong, 127 F.3d 725, 728 (8th Cir. 1997) (holding that "the District Court's reliance on disparate sentences as a justification for departing from the Guidelines was erroneous."); United States v. Haynes, 985 F.2d 65, 70 (2d Cir. 1993) (holding that since defendants "often face different state and federal sentences on equivalent charges, this disparity is not the sort of atypical or unusual factor meriting departure," and that "a prosecutor's choice of forum is not a reason for downward departure."); United States v. Dockery, 965 F.2d 1112, 1118 (D.C. Cir. 1992) (Circuit Judge Ruth Bader Ginsburg, writing for the court that a departure based on jurisdictional disparity "would conflict irreconcilably with the prosecutor's discretion,"
Antelope also provides useful support for arguing that Native Americans should be granted a unique ground for departure under the Guidelines. In another footnote in the case, the Court points out that it “has consistently upheld federal regulations aimed solely at tribal Indians, as opposed to all persons subject to federal jurisdiction.” While this statement provides justification for the jurisdictional system created by the Major Crimes Act, it also provides a basis for creating a ground for downward departure aimed specifically towards Native Americans, although such a departure would have to be reconciled with the bar on departures on the basis of national origin.

b. Legislative/Administrative Solutions

1. Prior Congressional Responses to Sentencing Disparity for Native Americans

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

Prior Congressional responses to Native American sentencing disparity have focused upon promoting uniformity for federal defendants. In 1976 for example, Congress amended the
Major Crimes Act to eliminate disparity between that Act and the General Crimes Act. At the
time, the Major Crimes Act only applied to thirteen enumerated offenses, and the Act mandated
that six of these crimes be defined under state substantive law, even though four of these
offenses were federally defined crimes. In contrast, the General Crimes Act stated that federal
substantive law should apply in all cases in which federal law exists, otherwise state substantive
law is applicable. The distinction between these acts meant that Indians would be prosecuted
under state law, while non-Indians would be prosecuted under federal law. Congress was
spurred to action after the Eighth and Ninth circuits held that this disparity “denie[d] Indians due
process of law as guaranteed by the Fifth Amendment,” and amended the Major Crimes Act so
that federal substantive law applied to all federally defined offenses.

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

198 H.R. Rep. 94-1038, 1976 USCCAN 1125, 1126. Four of the offenses were to be “defined and punished”
according to state law, while two were to be defined under state law, but imprisoned “at the discretion of the court.”
199 Id. at 1127-28. Note that incest and burglary are not federally defined offenses. Id. at 1129, n. 14.
200 Id. at 1127-28. Note that incest and burglary are not federally defined offenses. Id. at 1129, n. 14.
201 Id. at 1128. The two cases were U.S. v. Big Crow, 523 F.2d 955 (8th Cir. 1975) and US v. Cleveland, 503 F.2d
1067 (9th Cir. 1974). Note Congress focused on situations where the Indian faced the possibility of longer
imprisonment than the non-Indian, although the Report noted that it can also work the other way, where the Indian
will be treated more leniently. Id. at 1127-28; n. 8.
202 Id. at 1129.
203 See United States v. Norquay, 905 F.2d 1157, 1162 (8th Cir. 1990) (noting that the Court’s holding in Antelope
“has not been of any apparent concern to Congress”).
205 Indeed, this is supported by H.R. No. 94-1038 regarding the Indian Crimes Act of 1976. There, Congress
amended the Major Crimes Act in response to the 8th and 9th Circuits’ holding that the disparity at issue violated due
process, Id. at 1128, while Congress purposely avoided addressing the disparity that was being litigated at that time.
Congress has also made it clear that the Federal Sentencing Guidelines are to apply to assimilative crimes and the Major Crimes Act.\textsuperscript{206} While this does reflect a greater concern on Congress’ part regarding disparity between defendants prosecuted in the federal system, rather than disparity between non-Indians prosecuted in state court and Indians prosecuted in federal court for the same offense, Congressional intent in this regard is limited to those circumstances where Indians prosecuted in federal court are done so under state substantive law. Additionally, Congress’ determination that the Federal Sentencing Guidelines should apply to assimilative crimes and the Major Crimes Act does not foreclose the possibility that downward departures may be granted to Native American defendants under the Guidelines.

\textit{ii. Congressional Decisions Accounting for Disproportionate Impacts on Native Americans}

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

\textit{A. The Federal Death Penalty Act of 1994}

The first example of this is with respect to the Federal Death Penalty Act of 1994, which made many federal crimes into capital offenses.\textsuperscript{207} This law had the potential to disproportionately impact Native Americans, but the Act included “[s]pecial provisions for Indian country”:

Notwithstanding sections 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as

\textsuperscript{206} \textit{P.L.} 101-647, Sec. 1602. (1990). This amendment codified the 8th Circuit’s holding in \textit{United States v. Norquay}, 95 F.2d 1157 (8th Cir 1990).

\textsuperscript{207} Public Law 103-322; 108 Stat. 1796.
defined in section 1151 of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction.\textsuperscript{208}

The effect of this provision is that Native Americans subject to federal jurisdiction due to the jurisdictional scheme in Indian country will not receive the federal death penalty unless the tribe has elected for the Act to have effect. The legislative history indicates that this provision’s inclusion was premised on a concern for tribal sovereignty, and was designed to permit tribes, like State governments, to be able to elect whether the death penalty applies within their jurisdiction.\textsuperscript{209} While this exception for Indian country does not appear to be overtly motivated by concern about the law’s disproportionate impact on Native Americans or resulting sentencing disparity,\textsuperscript{210} an earlier attempt to pass federal death penalty legislation in 1990 did take into account the Act’s impact on Native American defendants.

In 1990, the House considered the death penalty legislation that was not passed until 1994. At that time, the House Subcommittee on Crime engaged in lengthy hearings to determine for which crimes the death penalty should apply.\textsuperscript{211} Testimony from Ms. Ada Deer and Ms. Toya Indritz, who reflected the interests of Native Americans, played a critical role in the Subcommittee’s decision “that the death penalty should not be based on a geographic

\textsuperscript{208} 18 USC § 3598.
\textsuperscript{209} See 137 Cong. Rec. S8488, S8490 (daily ed. June 24, 1991)(statement of Sen. Inouye)(“[T]his amendment accords to tribal governments a status similar to that of the State governments, namely that tribal governments, like State governments, can elect whether or not to have the death penalty apply for crimes committed within the scope of their jurisdiction.”); see also 137 Cong. Rec. at S8491 (statement of Sen. Inouye)(“All we are asking by this [statute] is to give the sovereign people in the sovereign governments of Indian country the same right [as states].”); see also id. (statement of Sen. Domenici)(“The Senator from New Mexico is for the death penalty, but I believe that you can be for the death penalty and be for something else, and I happen to be for something else, and that happens to be Indian sovereignty and Indian self-determination.”); see United States v. Martinez, No CR 02-1055 JB, 2007 WL 709015 (Dist. N.M. 2007) (discussing the legislative history and providing the quotes above)
\textsuperscript{210} See Martinez, 2007 WL 709015, *3, (Dist. N.M. 2007) (“There is no indication that Congress intended for the law to affect the prosecution of individual defendants for murder; rather, the enactment of 18 U.S.C. § 3598 seems to be focused on empowering the sovereign nations-not individual defendants.”).
happenstance.”212 In particular, the Subcommittee determined that the death penalty should not apply to federal murder under 18 USC § 1111,213 after Ms. Indritz informed the Subcommittee of the disproportionate impact this would have on Native Americans, as illustrated by the fact that in 1988 and 1989, nearly 64% of all Federal first degree murder prosecutions were of Indians for crimes occurring within Indian country.214 Furthermore, the Subcommittee was also persuaded by “one of the anomalous results which could occur” if the death penalty were enacted for crimes stemming from Federal lands jurisdiction:

[Ms. Indritz] cited the example of a case involving a killing by an Indian and a non-Indian of another Indian on an Indian reservation. If the killing occurred in a State which does not have the death penalty, the Indian could face the death penalty under Federal law while the non-Indian would be tried in State court where he would not face the same penalty for the identical crime.215

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

212 Id. at 6492. The Subcommittee heard testimony from Ms. Ada Deer, the Chairwoman of the Board of Directors of the Native American Rights Fund, and Ms. Tova Indritz, the Federal Public Defender for the District of New Mexico.

213 18 USC § 1111. This offense only applied to to murder committed “within the special maritime and territorial jurisdiction of the United States.” 1990 USCCAN 6472, 6492 (1990).

214 Id. at 6492.

215 Id. at 6493. Importantly, I think this “anomalous result” is incorrect. In terms of the jurisdiction, the example would be accurate if the victim were a non-Indian, but under the stated example, with the victim being Indian, the non-Indian offender would actually be tried under the same Federal murder statute per the General Crimes Act.
B. “Three Strikes and You’re Out” Legislation

Congress created a similar “special provision for Indian country” in another piece of 1994 legislation - the “three-strikes and you’re out” act. The bill contained a number of “specifically enumerated offenses that automatically qualify as a strike,” as well as “general standards for what other crimes, not specifically enumerated in the bill, also qualify as a strike.” Congress included a “special provision for Indian country” nearly identical to that in the Federal Death Penalty Act:

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

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

216 H.R. REP. 103-463, H.R. Rep. No. 463, 103RD Cong., 2ND Sess. 1994, 1994 WL 107574 (Leg.Hist.), at *4. This legislation was enacted due to concerns regarding high violent crime rates in America, recidivism, and an inadequate response by the criminal justice system. Id.
217 Id. at *5.
219 The Record states that the testimony regarding disparity against Native-Americans came in part from Gerald Goldstein, president-elect of the National Association of Criminal Defense Lawyers; Marc Mauer, assistant director of The Sentencing Project in Washington, D.C., and Reverend Bernard Taylor, Chairman of the civic group, Black Expo Chicago Id. at *7.
C. A Limit on Tribal Exceptions – Child Protection Laws

Congress’ willingness to provide such exceptions for Indian country is not absolute. Since the 1994 acts, the House has expressed an unwillingness to provide similar exceptions for Native Americans with respect to crimes against children. The Children’s Safety Act of 2005 enacted a host of different provisions in order to “address the growing epidemic of sexual violence against children.” The House Committee on the Judiciary pushed this bill through without any exceptions for Native American defendants. Dissenters criticized this in the House Report, stating:

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

The Children’s Safety Act of 2005 passed the House by a vote of 371-52, but did not move through the Senate, with both houses instead adopting the Adam Walsh Child Protection Act of 2006, which contained many of the same provisions existing in the Children’s Safety Act of 2005, including increased sentences for sex offenses. Congress’ failure to carve out an exception for Native Americans may reflect a Congressional unwillingness to correct for Native

222 Id. at *25-27. The Act was to do this by strengthening the Sex Offender Registration and Notification Act, enacting new DNA-related legislation, “adopt[ing] new mandatory minimum penalties for violent crimes committed against children,” increasing mandatory penalties for sex offenses against children, and creating new foster care requirements.
223 Id. at *90.
American sentencing disparity as it applies to crimes against children, but it is noteworthy that unlike the death penalty and “three-strikes and you’re out” legislation, it appears that Congress in this case had “no deliberative consultation with the representatives from the group most affected by the legislation, Native Americans.”\textsuperscript{225} In sum, Congress has expressed a willingness to exempt Native Americans from certain federal criminal penalties in circumstances where the penalties’ disparate impact on Native Americans has been brought to the Legislature’s attention.

\textit{2. Reducing Disparity by Increasing Departure Grounds Under the Sentencing Guidelines}

A number of judges and commentators have recommended dealing with the issue of disparate sentencing for Native Americans by increasing the grounds for departure under the Sentencing Guidelines. Judge Kornmann for example, has suggested including sentencing factors that permit judges to consider the poor upbringing many young Native American defendants receive,\textsuperscript{226} as well as the corresponding state sentence a Native American would receive if tried in state court.\textsuperscript{227} Similarly, Jon M. Sands, an Assistant Federal Public Defender and frequent commentator on Indian law, has suggested implementing a departure for “Dependent Sovereign Nation Status,”\textsuperscript{228} and more broadly, for “Culture.”\textsuperscript{229} While such

\textsuperscript{225} See H.R. REP. 109-218(I)), 2005 WL 2210642, at *91. Note that this was certainly true at the time the House Committee on the Judiciary recommended the Children’s Safety Act of 2005. A review of the legislative history of the Adam Walsh Child Protection Act in Thomas and Westlaw did not yield any information regarding the impact this law would have on American Indians.

\textsuperscript{226} Judge Kornmann, supra note 8. For Judge Kornmann’s statement, see supra note 149:

\textsuperscript{227} Id.

\textsuperscript{228} Sands, Departure Reform, supra note 137. Sands’ proposed departure would read:

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

\textsuperscript{229} Id. The “Culture” departure would read:

5H1.13 Culture
proposed modifications to the Sentencing Guidelines are over ten years old, these additional grounds for departure have not been added to the Guidelines and would require an exception to the Sentencing Reform Act’s requirement that the Guidelines [be] entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”

3. Eliminating the Federal Sentencing Guidelines’ Applicability to Indian Country

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

Despite the surface appeal of Smith’s proposal, there is no reason to think that it will be adopted by Congress. As discussed in the previous section, Congress has been unwilling to

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

230 Sands’ paper was published in 1996.
232 Smith, supra note 41, at 529. The Major Crimes Act would be modified to read:

"Any Indian who commits ... [any of the enumerated offenses] ... within Indian country, shall be subject to the same law and penalties as all other persons committing like offenses outside Indian country, and within the boundaries of the state within which the offense arose."

This would also require a slight modification to the Sentencing Reform Act, 18 U.S.C. § 3551(a), replacing the word “including” with the work “excluding,” so that it would be clear that state substantive law would apply to the sentencing phase in such a circumstance. Id.
adopt sweeping legislative reform to correct federal/state sentencing disparity experienced by Native Americans.233 Instead, Congress, in a 1990 amendment to the SRA, explicitly expressed its intent that the Federal Sentencing Guidelines apply to crimes prosecuted under the Major Crimes Act and Assimilative Crimes Act.234 Although Congress has at times carved out exceptions for Native Americans from federal criminal penalties, there is no indication that Congress has changed course from its intention that the Federal Sentencing Guidelines apply in Indian country.

Moreover, Smith’s proposal conflicts with the SRA’s purpose of fostering uniformity in federal sentencing.235 Although the Federal Sentencing Guidelines have rightly been criticized for being overly rigid, federal judges’ use of a standardized sentencing system fosters an important procedural uniformity distinct from any resulting alignment in actual sentence lengths between similarly situated defendants. This procedural uniformity would be defeated if Native American defendants were completely exempted from the Federal Sentencing Guidelines. Indeed, the Supreme Court in *Booker*, despite its repudiation of the Guidelines as a mandatory sentencing regime, clearly stated that judges were “require[d]…to consider the Guidelines” at sentencing, in addition to a host of other factors set forth in 18 U.S.C. § 3553(a).236

Despite these weaknesses in Smith’s proposal, pre-*Booker* there were few other options available to combat Native American sentencing disparity. However, as will be discussed later in this article, post-*Booker* the Guidelines are only advisory in nature, meaning that courts now have the discretion to downward depart to correct for Native American sentencing disparity. Furthermore, not only do courts now have the power to correct such disparity, but they are also

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233 See supra Part III(B)(b)(1).
perhaps the branch best suited to address this issue, since questions involving sentencing and jurisdiction are areas of judicial expertise.237

Judge Bruce D. Black, a district court judge in the District of New Mexico has argued for a solution similar to Smith’s, but where Native Americans would be sentenced under tribal sentencing guidelines, rather than federal or state requirements.238 Under this approach, tribes would be able to craft penalties based upon the unique concerns facing their reservation, and would be subject to Congressional oversight in the same manner as the Federal Sentencing Guidelines.239 While this approach would powerfully affirm tribal sovereignty, its administrative burdens make it largely unfeasible.240 There are over 500 tribes in the United States, and there are wide disparities in the infrastructure of tribe’s judicial systems. Furthermore, a significant administrative burden exists if Congress is to be expected to oversee over 500 different sentencing guidelines. Therefore, while Judge Black’s and Gregory Smith’s proposals both carry some surface appeal, their adoption and effective implementation is unrealistic.


Although much of the discussion over how to address sentencing issues for Native American defendants has been relegated to legal journals, the United States Sentencing Commission directly confronted this matter by forming the Native American Advisory Group in

237 See David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U.L. Rev. 543, 574 (1985) (stating that “courts are functionally better adapted to engage in the necessary [jurisdictional] fine tuning than is the legislature.”); Mistretta v. United States, 488 U.S. 361, 412 (1989) (noting the “accumulated wisdom and experience of the Judicial branch” in sentencing, “a matter uniquely within the ken of judges.”).
239 Id.
240 Id.
The Group was formed in response to the allegations of discrimination in the criminal prosecution of Native Americans in South Dakota discussed earlier in this article. The Group’s charge was to “[c]onsider any viable methods to improve the operation of the Federal Sentencing Guidelines in their application to Native Americans under the Major Crimes Act.” In the Group’s final report, it did not recommend increased departure opportunities, but instead recommended modifying the recommended sentencing ranges to account for both sentencing disparity and the unique circumstances surrounding reservation life.

i. The Group’s Recommendations

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

A. Manslaughter

The Group chose to address involuntary manslaughter since nearly 75% of federally prosecuted cases for this charge involved Indian defendants, typically in cases of alcohol-related vehicular homicide. Due to concerns over drunk driving in Indian country and requests by U.S. Senators to increase penalties for homicides committed while driving drunk, the Group recommended increasing the offense levels so that the sentencing range would be more than doubled. Specifically, the Group recommended increasing the base offense level for involuntary manslaughter to 18, along with a four level increase if alcohol or drugs were

241 Native American Advisory Group, supra note 1, at 10.
242 Id.; supra Part II(C).
243 Native American Advisory Group, supra note 1, at 11.
244 See id., at ii-v.
245 Id. at 1.
246 Id. at 14-15. Although most cases involved Indian defendants, the total number of prosecutions for this charge are relatively small. For example, in 2000 and 2001 the total number of involuntary manslaughter cases was less than 80. Id. at 15.
247 Id. at 17.
248 Id. (For example, under the recommendations, the base offense level for involuntary manslaughter for drunk driving, with a criminal history of category I, would be 22, and reduced by three levels for acceptance of responsibility. This offense level of 19 would lead to a sentence range of 30-37 months, “which is more than double the range previously set for such cases.”)
involved, a two level increase if the actions involved multiple homicides, and a two level increase if the offense involved a weapon.\textsuperscript{249} Since the primary concern regarding manslaughter was related to drunk driving homicides, the Group did not have any sweeping recommendations for voluntary manslaughter.\textsuperscript{250} Notably, the Group’s recommendations for manslaughter were not informed by issues of sentencing disparity and instead were focused on the prevalence of drunk driving in Indian country. While admittedly, drunk driving is a serious offense deserving of severe punishment, the punishment should be administered even-handedly. Prior to the Group’s recommendation, federal state disparity in this regard punished Native Americans more harshly,\textsuperscript{251} but the Group’s recommendation only served to further that disparity rather than resolve it.

\textit{B. Sexual Abuse Offenses}

Unlike its recommendations for manslaughter, the Advisory Group’s recommendations for sexual abuse offenses was informed by state and federal sentencing disparity.\textsuperscript{252} The Group noted that this disparity was only compounded by the then-recently enacted PROTECT Act.\textsuperscript{253} The PROTECT Act substantially increased the penalties for sex offenses\textsuperscript{254} for the primary purpose of “restor[ing] the government’s ability to prosecute child pornography offenses

\textsuperscript{249} \textit{Id.} at 16. When the Group first formed, the base offense for reckless involuntary manslaughter was 14 and was 12 for criminally negligent involuntary manslaughter. \textit{Id.} at 15. Prior to the publication of the Group’s Report, Congress amended the Guidelines to increase the base offense level for reckless involuntary manslaughter to 18 and to 12 for criminally negligent involuntary manslaughter. This amendment did not alter the Group’s recommendations. \textit{Id.} at 16.

\textsuperscript{250} \textit{Id.} at 18-19 (The Group did not recommend any change to the base offense level, and its only recommendation was to provide a two level increase for the use of a weapon and a four level increase for use of a firearm.).

\textsuperscript{251} Judge Kornmann notes that under federal law, unlike South Dakota’s state law, if death of a minor is caused during a drunk driving accident, the sentence can be increased by up to ten years. The impaired Native American is still subject to this additional penalty even if the driver of the other vehicle was at fault for the accident. Judge Kornmann reflects the sentiment that while the penalty itself may be appropriately harsh, it needs to be equally administered. Judge Kornmann, \textit{supra} note 8.

\textsuperscript{252} See Native American Advisory Group, \textit{supra} note 1, at 19-20.

\textsuperscript{253} \textit{Id.} at 23-24.

\textsuperscript{254} \textit{Id.; See} Public Law 108-21.
The PROTECT Act was particularly unfair to Native Americans, since it exacerbated the already existing federal/state sentencing disparity for the purpose of combating an issue that is not a prevalent problem in Indian country.\textsuperscript{256}

Despite the Advisory Group’s acknowledgment of the gross sentencing disparity that existed, particularly in light of the PROTECT Act, the Advisory Group “elected not to recommend any specific changes to the Guidelines that would directly reduce or eliminate the sentencing disparity identified.”\textsuperscript{257} Instead, the Advisory Group offered two recommendations. First, that the Sentencing Guidelines be modified to separate “travel offenses,” which would uniformly be subject to federal jurisdiction, from those sex crimes that largely target Native American defendants.\textsuperscript{258} Second, the Advisory Group recommended that a Sex Offender Treatment Program be established, where successful completion of the program would result in a sentence reduction.\textsuperscript{259} While these recommendations, as the Advisory Group noted, “may indirectly reduce the sentencing disparity,” it is somewhat troubling that the Group candidly acknowledged the existing disparity, and purposely “elected not to recommend any specific changes…that would directly reduce or eliminate the sentencing disparity identified.”\textsuperscript{260}

\textit{C. Aggravated Assaults}

The Advisory Group was particularly concerned about federal/state sentencing disparity arising from aggravated assault prosecutions.\textsuperscript{261} In South Dakota for example, the average state

\textsuperscript{255} Native American Advisory Group, \textit{supra} note 1, at 24, n. 42.
\textsuperscript{256} \textit{Id.}
\textsuperscript{257} \textit{Id.} at 25.
\textsuperscript{258} \textit{Id.} at 25-26. The Sentencing Commission at the time was already considering removing “travel offenses” from U.S.S.G. § 2A3.2 and placing them in a new, U.S.S.G. § 2G1.3. \textit{Id.} Note that this recommendation did not include any specifics on how the relative offense levels under the Guidelines should be different.
\textsuperscript{259} \textit{Id.} at 26-30.
\textsuperscript{260} \textit{Id.} at 25.
\textsuperscript{261} This was partially due to the fact that assaults constitute the highest percentage of offenses prosecuted under the Major Crimes Act, and while Native Americans constitute less than 2\% of the U.S. population, they represent 34\% of people in federal custody for assault. \textit{Id.} at 30-31.
sentence for assault was 29 months, but was 39 months for federal assault sentences in the state.\textsuperscript{262} Even more strikingly, in New Mexico, the average state sentence for assault was six months, while the average federal assault sentence in the state was 54 months.\textsuperscript{263} The Advisory Group’s recommendation to reduce the base offense level for assault by two levels was specifically designed to address this disparity, but was admittedly “a conservative approach…guided by the South Dakota data” rather than the more disparate New Mexico data.\textsuperscript{264} While this recommendation was certainly a step in the right direction, by the Advisory Group’s own admission, it fell short of fully eliminating the sentencing disparity on this front.

\textit{ii. Implementation of the Advisory Group’s Recommendations}

The Advisory Group’s recommendations were an admittedly conservative approach to remedying the sentencing disparity experienced by Native American defendants in the federal system. While the Advisory Group’s recommendations were for the most part implemented by the time the 2005 Sentencing Guidelines Manual was published, this was not uniformly the case. For example, with respect to involuntary manslaughter, the current base offense level for reckless conduct is at 18, which mirrors the Advisory Group’s recommendation.\textsuperscript{265} The Sentencing Guidelines however, provide a four level increase for all offenses involving “the reckless operation of a means of transportation,” while the Advisory Group recommended a four level increase only for cases where the defendant was driving while under the influence of drugs and alcohol.\textsuperscript{266} With respect to sexual abuse offenses, the 2005 Sentencing Guidelines do include a separate Guideline for “travel offenses,” which carries a base offense level of 24, as

\begin{footnotes}
\item[262] Id. at 32-33.
\item[263] Id. at 33 (the Report notes that the low sentencing average for New Mexico state sentences is partially based on low level offenses that would not generally be prosecuted in federal court).
\item[264] Id. at 34. The Advisory Group relied upon the South Dakota data since “there was some concern that the sentences in New Mexico were not representative of those in other states.” Id.
\end{footnotes}
opposed to statutory rape under § 2A3.2, which has a base offense level of 18. The recent enactment of the Adam Walsh Child Protection Act in 2006 however, has furthered sentencing disparity experienced by Native Americans. Finally, while the 2005 Sentencing Guidelines reflect a reduction in the base level offense for aggravated offense, it was only reduced by one, from fifteen to fourteen, rather than the two level reduction recommended by the Advisory Group.

c. Summary

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

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

The only way to fully eradicate the current federal/state sentencing disparity for Native Americans would be for Congress to adopt Smith’s proposal and modify the Major Crimes Act and SRA so that Native Americans would be tried and sentenced in federal court under state substantive law, without the Federal Sentencing Guidelines, or to follow Judge Black’s recommendation and allow tribes to create their own sentencing guidelines. Such action however, seems unlikely to occur given Congress’ explicit intent that the Guidelines apply to the Major Crimes Act and the Assimilative Crimes Act. Furthermore, completely exempting Native American defendants from the Guidelines would frustrate the SRA’s goal of uniformity. The courts therefore, are the only immediately available avenue for correcting Native American sentencing disparity. Moreover, it is proper for the courts to take responsibility for correcting this disparity, since the judiciary holds unique expertise in matters of sentencing and jurisdiction. Unfortunately, prior challenges to federal sentences based on federal/state disparity were soundly rejected by the circuit courts.271 As the rest of this article will discuss however, the Supreme Court’s landmark decision in *United States v. Booker* and recent downward departures by federal courts based on the disparity created by “fast track” programs, breathe new life into the degree of

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discretion district court judges may be permitted to take in sentencing Native American defendants.

**IV. United States v. Booker and the Post-Booker Landscape – An Opportunity for Native American Defendants?**

On January 12, 2005 the Supreme Court decided *United States v. Booker*, which at first blush appeared to undo the past twenty years of federal sentencing under the Federal Sentencing Guidelines. In the decision, the Court held that the Federal Sentencing Guidelines were unconstitutional as applied, and remedied this by making the Guidelines “effectively advisory,” rather than mandatory. Some cheered this decision for freeing judges from the Guidelines, while others viewed it critically, as opening the door to unfettered judicial discretion. With the Federal Sentencing Guidelines relegated to an advisory role, it would appear that post-Booker judges would be free to consider state/federal sentencing disparity and the uniqueness of life on a reservation to a greater degree in sentencing Native American defendants. However, while many commentators expected federal sentences to drastically change post-Booker, many studies have shown that the federal sentencing landscape has not significantly changed. This section will provide a brief overview of the Booker decision and how the Federal Sentencing Guidelines are to be applied in the decision’s aftermath. It will then discuss the impact Booker has had on Native American sentencing. The final part of this article will then discuss the post-Booker debate over downward departures to remedy “fast-track” disparity, and how the arguments for downward departures in that regard provide a basis for downward departures to remedy the state/federal sentencing disparity experienced by Native Americans under the Major Crimes Act.

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274 *Id.*
\[A. \quad \textbf{The Booker Decision}\]

The \textit{Booker} decision was sweeping in scope, but hardly unexpected. In 2000 and 2004, the Supreme Court decided cases signaling that the constitutionally of the Federal Sentencing Guidelines was in doubt. In \textit{Apprendi v. New Jersey}, a 2000 opinion, the Court ruled that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."\textsuperscript{275} While the decision dealt with a state judge and New Jersey statutes, the four dissenting judges expressed concern that the holding could be extended to undermine the Federal Sentencing Guidelines.\textsuperscript{276} Four years later in \textit{Blakely v. Washington},\textsuperscript{277} the Court relied upon its ruling in \textit{Apprendi} to hold the State of Washington’s Sentencing Reform Act violated the Sixth Amendment, since it required judicial fact finding in order to apply an exception sentence.\textsuperscript{278} This 5-4 decision once again signaled that the Constitutionality of the Federal Sentencing Guidelines was in question.\textsuperscript{279}

The next year the Court decided \textit{Booker} and held that the Federal Sentencing Guidelines were unconstitutional on the same grounds as \textit{Apprendi} and \textit{Blakely}.\textsuperscript{280} Justice Breyer served as the critical swing vote in the case and saved the Federal Sentencing Guidelines from being completely invalidated. Although Breyer dissented from the majority opinion holding the Guidelines unconstitutional,\textsuperscript{281} he fashioned a remedy for the majority’s conclusion by modifying the Sentencing Reform Act so that the Federal Sentencing Guidelines were advisory.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{275} \textit{Apprendi v. New Jersey}, 530 U.S. 466, 490 (2000)
\item\textsuperscript{277} \textit{Blakely v. Washington}, 124 S. Ct. 2531 (2004)
\item\textsuperscript{278} \textit{id.} at 2538; Chiu, \textit{supra} note 284, at 1325.
\item\textsuperscript{279} Yellen, \textit{supra} note 284, at 171; Chiu, \textit{supra} note 284, at 1325-27.
\item\textsuperscript{280} Chiu, \textit{supra} note 284, at 1329; Yellen, \textit{supra} note 284, at 171.
\item\textsuperscript{281} \textit{Booker}, 125 S.Ct. 802 (Breyer, J., dissenting) (joined by Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy).
\end{enumerate}
\end{footnotesize}

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rather than mandatory.\textsuperscript{282} Although \textit{Booker} made the Guidelines advisory, Justice Breyer emphasized that judges were still required to consider the Guidelines and Congress’ goals and purposes in creating the Sentencing Commission when sentencing defendants.\textsuperscript{283} Furthermore, while the decision stripped the Sentencing Reform Act of the section governing the standard of review for appealed sentences, Justice Breyer emphasized that the Act implicitly provided for an “unreasonableness” standard of review on this front.\textsuperscript{284} Justice Breyer’s remedy saved the Federal Sentencing Guidelines, but it was unclear after \textit{Booker} exactly how the lower courts were supposed to respond to the decision.

\textbf{B. Native American Federal Sentencing Post-Booker}

Even though post-\textit{Booker} sentences in general have not been radically different than those before the decision,\textsuperscript{285} it would be reasonable to hypothesize that the increased judicial discretion post-\textit{Booker} would result in district court judges downward departing more regularly when sentencing Native Americans, whether to account for federal/state sentencing disparity or the unique circumstances surrounding life on a reservation. Counterintuitively however, multivariate analysis has shown that post-\textit{Booker}, Native American offenders’ sentences are 10.8\% higher than those for white offenders.\textsuperscript{286} This finding is difficult to reconcile with the attention the Native American Advisory Group and various judges have paid to the issue of unwarranted sentencing disparity experienced by Native Americans. Despite the trend of

\textsuperscript{282} Chiu, \textit{supra} note 284, at 1334-36. To do this, the Court eliminated 18 U.S.C. § 3553(b)(1), which mandated judges to sentence defendants in accordance with the Guidelines, and 18 U.S.C. § 3742(e), which included numerous references to § 3553(b)(1). \textit{Id.} at 1335.

\textsuperscript{283} \textit{Id.}

\textsuperscript{284} \textit{Id.}

\textsuperscript{285} Post-\textit{Booker}, 85.9\% of sentences are either within the sentencing range or are government-sponsored departures, which is not substantially different than the rate of 90.6\% prior to the PROTECT Act or 93.7\% after the PROTECT Act. United States Sentencing Commission, \textit{Final Report, supra} note 111, at 46.

\textsuperscript{286} \textit{Id.} at 84 (The 10.8\% actually applies to the race classified as “other,” which the Report states refers mostly to Native American offenders.; “This association also was found in 2 of the 7 time periods from 1999 through the post-\textit{Booker} period.”).
convicting Native Americans to longer sentences, as the next section will discuss, the post-
Booker debate surrounding fast-track sentencing provides judges with an analog for downward
departing to account for the sentencing disparity endured by Native American defendants.

V. Accounting for “Unwarranted Sentencing Disparities” in Post-Booker Sentencing

– Fast-Track Programs

While Booker’s actual impact on sentencing has not been radical, a fierce debate has
arisen regarding the reasonableness of post-Booker downward departures to account for disparity
with select districts that provide early disposition programs. The issues surrounding the “fast-
track” sentencing debate shed light on the likelihood of downward departures to account for
Native American sentencing disparity being upheld. This section will therefore discuss fast track
programs, the Booker debate that has surrounded these programs, and what this can contribute to
correcting for Native American sentencing disparity.

A. An Introduction to Fast Track Sentencing

For certain federal districts close to the Mexico/United States border, over half the
criminal docket is comprised of immigration and drug cases. Prior to the creation of “fast-
track” programs, the administrative burden of these cases resulted in many criminal charges
being dropped or defendants pleading to misdemeanors. In order to address this burden on the
system, in the mid-1990’s many border districts created fast track programs. The purpose of the
program was to induce defendants to plead guilty by offering below-Guidelines sentences to
those who did so.

287 Id. at 32-33. (The Report focused on two issues in discussing key appellate sentencing issues post-Booker – early
disposition programs and crack/cocaine sentencing disparity.).
288 Jane L. McClellan, Jon M. Sands, Federal Sentencing Guidelines and the Policy Paradox of Early Disposition
289 Id.
Rev. 1315, 1349 (2005).
a. Fast-Track Programs After the PROTECT Act

Fast-track programs were legitimized by the 2003 PROTECT Act.291 The Act directed the Sentencing Commission to promulgate what is now U.S.S.G. § 5K3.1, whereby fast-track districts may provide up to a four offense-level downward departure for participation in its early disposition program.292 The PROTECT Act also required that in order for a fast-track program to be approved in a district, the local United States Attorney must submit a proposal to the Attorney General for his approval.293 As of March 2006, the Attorney General had approved fast-track programs in 16 of the 94 federal districts in the country,294 with many high-immigration districts not yet participating in the program.295 Ironically, Congress’ approval of these programs amounted to government-endorsed sentencing disparity, even though one of the stated purposes of the PROTECT Act was to reduce the number of downward departures.296

b. Fast-Track Disparity in the Courts

The existence of fast track programs resulted in illegal immigrants being subject to vastly different sentences, depending upon whether they were arrested in a fast track district like the District of San Diego, or in a non-fast-track district like those in New York. In some cases, defendants in non-fast track districts face sentences nearly twice as long as corresponding sentences under a fast-track program.297 As a result, defendants in non-fast-track districts began arguing that this constituted “unwarranted sentencing disparit[y]” under § 3553(a)(6) and that

291 Id.; PROTECT Act, § 401(m)(2)(B).
293 McClellan & Sands, supra note 300, at 527.
294 United States Sentencing Commission, Final Report, supra note 111, at 141.
295 McClellan & Sands, supra note 300, at 523 (The District of Nevada, District of Utah, New York districts, Florida districts, and certain divisions in the Southern District of Texas are not yet offering fast-track plea bargains).
296 Id. at 526.
297 See eg United States v. Galvez-Barrios, 355 F.Supp.2d 958 (E.D. Wis. 2005) (In this case, Galvez-Barrios’ Guidelines sentence would have been 41-51 months long, but if he had been prosecuted in a fast-track district, his sentence could have been as low as 27 months.); see eg United States v. Perez-Chavez, 422 F.Supp.2d 1255 (D. Utah 2005) (Here the defendant’s Guidelines sentencing range was 18-24 months, but his sentence under a fast-track program would have been 10-16 months).
they should receive a below-Guidelines sentence to account for this disparity. The early division between district courts as to whether such a departure was reasonable underscored a larger debate over how the Guidelines were to be used post-

Following Booker, sentencing courts still must first calculate the appropriate sentencing range under the Federal Sentencing Guidelines. Then, the court must consider the Sentencing Commission’s policy statements in determining appropriate departure factors under the Guidelines. Next the court must consider the seven factors set forth in 18 U.S.C. § 3553(a) before imposing its sentence. What was unresolved in Booker was what weight the Sentencing Guidelines were to be given in determining whether a sentence is “reasonable.” In particular, the question was whether the Guidelines were only to be considered as one factor among the many factors included in § 3553(a), or whether the Guidelines already considered the full list of § 3553(a) factors to such a degree that the Guidelines’ recommended sentence should be given “heavy weight” and departures should only occur in unusual circumstances.

With district courts going in opposite directions with respect to whether downward departures to account for fast-track disparity were reasonable, there was a great deal of anticipation as to what position the circuit courts would take on the matter. Much of this uncertainty has been resolved, with circuits severely limiting the likelihood that downward departures based on fast-track disparity will be affirmed.

298 See McClellan & Sands, supra note 300, at 537-46.
300 Id. at 23.
301 Id.; 18 U.S.C. § 3553(a).
303 Id. at 540-41, citing United States v. Wilson, 355 F.Supp.2d 1269 (D. Utah 2005).
304 This subject was discussed on many legal blogs. For an example, search http://sentencing.typepad.com/.
1. The Circuits are Closing the Door on Departures Based on Fast-Track Disparity

There is a uniform consensus among the circuits that a district court judge’s failure to provide a downward departure based on fast-track disparity is not unreasonable. The underlying rationale for this conclusion however, varies from circuit to circuit and plays a crucial role in the circuit’s position as to whether any sentences accounting for fast-track disparity could be upheld as reasonable. For example, the Tenth Circuit’s decision in this regard was predicated on the fact that “unwarranted sentencing disparity” was only one of the many factors a judge was to consider under § 3553(a), thereby leaving it unresolved whether fast-track disparity could be a proper ground for departure in a particular case.305 Other circuits, such as the First and Eighth, based their determination on Congress’ approval of fast-track programs in the PROTECT Act, strongly questioning, though leaving unresolved, whether it would ever be reasonable to depart on the basis of fast-track disparity.306 The circuits that went the farthest in completely closing the door on fast-track disparity as an appropriate consideration are those circuits that declared that fast-track disparity was not “unwarranted sentencing disparity,” thereby removing the issue from consideration under § 3553(a)(6).307

While every circuit has held that it is reasonable to provide a within-Guidelines sentence despite fast-track disparity, only three circuits, the Fourth, Seventh, and Eleventh, have explicitly held that it is unreasonable to provide a downward departure based on fast-track disparity.308 The remaining circuits have not expressly ruled on the reasonableness of departing based on fast-

305 United States v. Marales, 430 F.3d 1124 (10th Cir. 2005).
306 See United States v. Martinez-Flores, 428 F.3d 22, (1st Cir. 2005); see also United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006); see also United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006).
307 See United States v. Perez-Pena, 453 F.3d 236 (4th Cir. 2006); see also United States v. Arevalo-Jaurez, 464 F.3d 1246 (11th Cir. 2006).
308 Supra note 336; United States v. Galicia-Cardenas, 443 F.3d 553 (7th Cir. 2006).
track disparity. While the door on departures based on fast-track disparity appears to be closing, the Sixth Circuit stopped the door from closing completely when it decided a case in 2006 affirming the use of fast-track disparity as a ground for departure.

2. The Sixth Circuit – Departures Based on Fast-Track Disparity Permitted?

On June 30, 2006, a Sixth Circuit panel became the first to affirm a downward departure based in part upon fast-track disparity. The celebration for supporters of such departures however, was short-lived. Just three days later, on July 3, a separate Sixth Circuit panel cast doubt on that decision, reasoning in its case that fast-track disparity “does not run counter to § 3553(a)’s instruction to avoid unnecessary sentencing disparities.” The Sixth Circuit itself has not resolved this tension, but at least one district court found the latter panel’s arguments convincing and held that “fast-track disparity is not an unwarranted disparity under § 3553(a)(6).” However, with the first panel’s decision in Ossa-Gallagos still good law, it is important to analyze the decision, since it is the only case affirming a departure based in part upon fast-track disparity.

309 District courts however, have not rushed to take advantage of the downward departure window left open by some circuits. A 2006 Report by the Sentencing Commission showed that of the four non-fast-track districts that have sentenced more than 100 immigration cases post-Booker, three of them had rates of non-government sponsored, below Guidelines range sentences lower than the overall national average of 9.3%. United States Sentencing Commission, Final Report, supra note 111, at 141-42. The four districts were the District of Utah (204 cases), Northern District of Texas (172 cases), Middle District of Florida (162 cases), and Southern District of New York (106 cases). The overall national average of non-government sponsored, below-range sentences post-Booker is 9.3%. The rate for the District of Utah was 6.9%, the Northern District of Texas was 1.7%, and the Middle District of Florida was 7.4%.

310 United States v. Ossa-Gallagos, 453 F.3d 371 (6th Cir. 2006).
313 The Sixth Circuit heard this case en banc, but limited its review to “resolv[ing] the narrow question of whether the practice of tolling a period of supervised release for a deported offender is authorized by the sentencing statutes.” The judgement of the district court was affirmed. United States v. Ossa-Gallegos, No. 05-5824 (6th Cir. June 21, 2007).
In *Ossa-Gallagos*, the defendant had pled guilty in 1996 to sexual assault and had been deported to Columbia.³¹⁴ He unlawfully returned to the United States in 1999 and was arrested when police stopped him while he was placing advertisements in mailboxes with his wife and daughter.³¹⁵ He was charged with illegal reentry and the district court judge found that Ossa-Gallagos’ prior sexual assault conviction constituted a “crime of violence” under the guidelines, resulting in a 16 offense level addition to his Guidelines sentencing range.³¹⁶ The district court reduced this by three levels for acceptance of responsibility, bringing Ossa-Gallagos’ Guidelines sentence to 41-51 months. The district court then reduced the sentence by another two levels based on fast-track disparity and the “aberrational nature” of the defendant’s prior crime compared to his conduct since returning to the United States, bringing the sentence to 33 months.³¹⁷ The defendant appealed, arguing that the district court’s 16 level enhancement violated his Sixth Amendment right to a jury and that his sentence was unreasonable, in part because the two-level reduction did not fully account for what his sentence would have been in a fast-track district.³¹⁸ The Sixth Circuit rejected the defendant’s Sixth Amendment claim and turned to the sentence’ reasonableness.

With respect to the fast-track issue, Ossa-Gallegos argued that the two-level reduction did not fully eliminate the fast-track disparity.³¹⁹ The Sixth Circuit rejected this argument and affirmed the sentence. The court stated that, “[a]lthough the district court did not entirely eliminate the disparity between Ossa-Gallego’s sentence and the sentences of defendants with similar criminal histories in fast-track jurisdictions, its two-level downward departure was

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³¹⁴ *Ossa-Gallagos*, 453 F.3d at 372-73.
³¹⁵ *Id.* at 373.
³¹⁶ *Id.*
³¹⁷ *Id.*
³¹⁸ *Id.* at 373, 374.
³¹⁹ *Id.* at 375 (The defendant presented evidence to the court that in three fast-track districts, the average sentence for defendants with five prior convictions and two prior deportations was 32 months).
intended to reduce this disparity.”\textsuperscript{320} The circuit court then defended the district court’s decision to not fully eliminate the disparity, noting: 1) that defendants receiving true fast-track sentences must give up their right to challenge their conviction – something Ossa-Gallegos did not have to do; and 2) that Congress “had endorsed at some degree of disparity by expressly authorizing larger downward departures for defendants in fast-track districts.”\textsuperscript{321} Furthermore, the court pointed out that “avoiding nationwide disparities in sentencing is only one factor to be considered under § 3553(a).”\textsuperscript{322} Finding that the district court had considered several other factors, the appellate court held that the two-level reduction was reasonable.\textsuperscript{323}

c. The Lessons from Fast-Track Cases

The debate in the courts regarding fast-track disparity presents insights into how courts will respond to arguments that downward departures for Native American defendants are appropriate. Unfortunately, circuit courts have been closing the door on downward departures based on fast-track disparity, with Ossa-Gallegos standing alone among circuit court decisions for holding a departure based partially upon fast-track disparity was reasonable. Despite this resistance to departures based on fast-track disparity, only the Fourth, Seventh, and Eleventh circuits have held that such a departure is per se unreasonable, meaning that the lessons from Ossa-Gallegos can be transferred to other circuits that have not expressly ruled on the matter.

Looking at the Sixth Circuit’s decision, certain factors were particularly important in affirming the departure. First, a common theme in Ossa-Gallegos and other circuit court decisions is the notion that unwarranted sentencing disparity due to fast-track programs is only one of a number of relevant factors to be considered under § 3553(a). Although in Ossa-

\textsuperscript{320} Id., quoting United States v. Montes-Pineda, 445 F.3d 375, 379-80 (4th Cir. 2006).
\textsuperscript{321} Id.
\textsuperscript{322} Id.
\textsuperscript{323} Id. at 376-77.
Gallegos this fact was used to defend the district court’s decision not to entirely eliminate the sentencing disparity, it also stands to reason that a sentence is more likely to be upheld when it does not rest on a single, contentious issue, like fast-track disparity. A second important insight from Ossa-Gallegos is that it may be reasonable for a court to minimize fast-track disparity, but unreasonable to eliminate it. In Ossa-Gallegos this notion was supported on two bases. First, since Congress endorsed fast-track programs in the PROTECT Act, Congress also endorsed at least some degree of sentencing disparity from this program and therefore not all fast-track disparity can be considered “unwarranted.” Second, Ossa-Gallegos contained a notion that a defendant must take the bitter with the sweet, noting that defendants taking advantage of fast-track programs must give up their right to challenge their conviction, while Ossa-Gallegos was able to maintain that right under his plea. Based on that fact, the Sixth Circuit concluded that the district court did not need to fully account for the fast-track disparity. As the rest of this article will discuss, these factors are critically important for Native American defendants asking judges to account for their sentencing disparity.

VI. Correcting for Native American Sentencing Disparities Post-Booker

Just as certain judges and commentators have argued that sentencing courts should be permitted to correct for fast-track disparity post-Booker, departures for Native Americans is also a prime issue to revisit now that the Guidelines are advisory. So far, the promise held by Booker on these issues has not been realized, with the rate of non-government sponsored downward departures in non-fast-track districts largely falling below the national average of 9.3%324 and Native American sentences post-Booker being 10.8% higher for Native Americans than for white offenders.325 Despite these figures, courts’ response to the fast-track issue, and particularly the

324 See supra note 336.
325 See supra note 296.
Sixth Circuit’s decision in *Ossa-Gallegos*, provide critical insight into how courts may reasonably consider unique factors surrounding Native American defendants in sentencing.

A. Comparing Native American and Fast-Track Sentencing Disparity

Numerous similarities exist between fast-track and Native American sentencing disparities. In particular, the disparity in both circumstances is geographically based and arises in part from Congressional action. While these similarities allow the debate in the courts over fast-track sentencing disparity to serve as a useful guide in crafting reasonable downward departures to correct for Native American disparity, as this section will explain, the arguments for allowing such departures in the Native American context is more compelling in a number of respects.

a. Similarities Between Fast-Track and Native American Sentencing Disparity

1. The Source of the Disparity

   i. The Disparity in Both Circumstances is Geographically-Based

Fast-track and Native American sentencing disparity is linked by a common concern about the “equality of justice when sentences vary for people based on where they are sentenced.”

   326 *Ossa-Gallegos*, 453 F.3d at 373.

With respect to fast-track programs, the majority of these programs exist in southwest border districts. As a result, illegal immigrants caught reentering the United States immediately upon crossing the border are able to take advantage of fast-track programs and

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326 *Ossa-Gallegos*, 453 F.3d at 373.
lighter sentences, while defendants that travel further away from the border, usually to reunite with family, are slapped with much stiffer penalties.\textsuperscript{327}

Sentencing disparity for Native Americans under the Major Crimes Act is also the result of geography. Under Indian country’s complex criminal jurisdiction arrangement, “major crimes” committed by Native Americans within Indian country are prosecuted in federal court under the Major Crimes Act, while the same crimes committed by Native Americans outside Indian country are under state jurisdiction and prosecuted under state substantive law in state court.\textsuperscript{328} Since federal crimes often carry harsher sentences, Native American defendants’ sentences can vary widely depending on whether the crime occurred just-on, or just-off, tribal land.

Although geography is the critical factor creating disparity in both cases, fast-track disparity occurs at a more national level, while Native American sentencing disparity tends to be more local in nature. Federal districts are relatively large in size, with many, like the District of Arizona, encompassing the entire state. Furthermore the bulk of fast-track districts are in the southwest of the United States. As a result, while a district’s implementation of a fast-track program may vary district by district in the southwest, for the most part, there is a large, contiguous block of the United States where fast-track programs are in place, and a much larger, contiguous block of the United States where fast-track programs do not exist. This is not the case for Indian country. With the exception of large reservations like the Navajo Nation, many reservations are relatively small in size and the borders can be relatively arbitrary in nature.\textsuperscript{329}

\textsuperscript{327} For a useful example of the luck involved in fast-track sentencing, see McClellan & Sands, supra note 300, at 523-25.

\textsuperscript{328} See supra Part II(A)(e). Note that the Major Crimes Act controls for crimes committed by Native Americans within Indian country, regardless of whether the victim was also Native-American.

As a result, sentencing disparities can exist between local, Native American residents, while for the fast-track issue, the disparity exists at a regional level.330

The fact that Native American disparity is local makes it even more disconcerting than the regional disparity that exists due to fast-track programs.331 To some degree, this may be offset by the fact that Native Americans may be more aware that crimes committed on the reservation have different consequences than those committed off the reservation. However, while this argument may have some merit for assault crimes occurring in a Native American’s home on a reservation, it is largely inapplicable for crimes such as involuntary manslaughter while driving under the influence, where it is happenstance where the accident occurs.

ii. A Key Distinction – Fast-Track Disparity is Between Federal Districts While Native American Disparity is Between Federal and State Sentences

While both fast-track and Native American sentencing disparity is geographically based, a key difference between the two is that under the fast track program the disparity is between different federal defendants, while with Native Americans the disparity is between state and federal defendants. Post-Booker, judges are required to consider, as part of their sentencing, “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”332 Notably, this sentencing factor is agnostic as to what form of disparity the rule applies to, so long as the comparison is between defendants with similar records convicted of similar conduct. As a result, on its face, § 3553(a)(6) appears to

330 See supra Part II(C).
331 See The Philip D. Reed Lecture Series: Panel Discussion: Federal Sentencing Under “Advisory” Guidelines: Observations by District Judges, 75 Fordham L. Rev. 1, 28 (2006) (Judge Lynch stated, “I am for regional disparity. I think one of the foolishnesses of the Guidelines is the notion that because we are one federal system, we are one sovereignty, the United States of America, everybody in the country should be sentencing in the same way.”).
permit judges to consider disparity between federal defendants as well as that between federal and state defendants in sentencing. \footnote{See Michael M. O'Hear, Legal Issues and Sociological Consequences of the Federal Sentencing Guidelines: National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities, 87 Iowa L. Rev. 721, 724 (2002).} Despite this plain language however, circuit courts, at least pre-\textit{Booker}, were nearly unanimous that only disparity between similarly situated federal defendants could be considered under § 3553(a)(6). \footnote{Id.; see Smith, supra note 41, at 516, n. 157, 158 (Cases include: United States v. Williams, 282 F.3d 679, 683 (9th Cir. 2002) (holding that the district court's departure on the grounds of federal-state sentencing disparity was an abuse of discretion); United States v. Snyder, 136 F.3d 65, 70 (1st Cir. 1998) (holding that "federal/state sentencing disparity is not a feature that can justify a departure."); United States v. Wong, 127 F.3d 725, 728 (8th Cir. 1997) (holding that "the District Court's reliance on disparate sentences as a justification for departing from the Guidelines was erroneous."); United States v. Haynes, 985 F.2d 65, 70 (2d Cir. 1993) (holding that since defendants "often face different state and federal sentences on equivalent charges, this disparity is not the sort of atypical or unusual factor meriting departure," and that "a prosecutor's choice of forum is not a reason for downward departure."); United States v. Dockery, 965 F.2d 1112, 1118 (D.C. Cir. 1992) (Circuit Judge Ruth Bader Ginsburg, writing for the court that a departure based on jurisdictional disparity "would conflict irreconcilably with the prosecutor's discretion, which we upheld as lawful in Mills, to go for the sterner federal sentences."); United States v. Hall, 977 F.2d 861, 864 (4th Cir. 1992) (rejecting "sentencing disparity as a basis for departure when confronted with disparate sentences among both codefendants and coconspirators and with disparities in sentences imposed in both federal and state courts.").} This determination was largely premised on the notion that the purpose of the Guidelines, to “promote uniformity among federal courts when imposing sentences for federal crimes,” would be undermined if federal sentences were then altered to account for federal/state disparity. \footnote{O'Hear, supra note 363, at 738, quoting United States v. Snyder, 136 F.3d 65, 69 (1st Cir. 1998). In Snyder, the court also reasoned that the Commission had sufficient knowledge of overlapping state and federal jurisdiction and that such departures would “impinge impermissibly upon the Executive Branch’s discretion to prosecute defendants under federal law.”}

Based on this precedent, the fact that federal/state disparity is at issue for Native American defendants is a blow to the likelihood that an appellate court would find a downward departure to correct for this disparity reasonable. However, the issue of whether it is appropriate to consider federal/state disparity has been revisited by the circuit courts post-\textit{Booker}. While most circuits have merely reiterated their pre-\textit{Booker} positions on the matter, \footnote{See United States v. Wilson, 2006 U.S. App. LEXIS 27179 (3rd Cir. 2006) (“In view of the advisory function of the Guidelines, we assume that the Guidelines advise on the parity of sentences which fall within the Guidelines' range and that the "sentencing disparity" referred to in § 3553(a)(6) is relevant to a comparison of federal to federal sentences -- not federal to state sentences -- so long as the federal sentences fall within the Guidelines' range.”); United States v. Wurzinger, 467 F.3d 649 (7th Cir. 2006) (“Reducing a federal prisoner's sentence to accord with that
these cases has been heard under the context of a defendant’s argument on appeal that it was unreasonable for a judge not to consider federal/state disparity at sentencing. Although some circuits’ decisions, like the Eighth’s, included language that district courts were not permitted to consider such disparity at sentencing, many circuits did not go that far. Furthermore, some circuits have expressly left the door open for challenges on this front. The First Circuit for example, stated in a recent decision that it “express[es] no opinion at this time about whether federal-state sentencing disparities may be considered under the post-Booker advisory guidelines.” Similarly, in the only case to expressly consider a lower court’s consideration of federal/state disparity, the Fourth Circuit vacated the sentence as unreasonable, but two of the justices held views that consideration of such disparity could be appropriate in certain cases,
such as when the federal offense is somehow shaped or defined by state law. Therefore, while some circuits, including the Eighth, have apparently closed the door on consideration of federal/state disparity in sentencing under § 3553(a)(6), the disparity experienced by Native Americans may still gain traction in most other circuits. Additionally, a recent note in the Columbia Law Review contends that post-Booker, judges are not limited to considering only the § 3553(a) factors at sentencing and thus, federal/state disparity may still be considered by all circuits, including the Eighth, so long as it is done outside the context of § 3553(a)(6).

iii. Not All Native American Sentencing Disparity is Geographically Based - Sentencing Disparity when the Victim is Non-Indian

Sentencing disparity for Native Americans is not solely geographically-based. It also arises when the victim of a crime occurring in Indian country is non-Indian. Under the Major Crimes Act, Native Americans are subject to federal prosecution regardless of whether the victim of the crime is Indian or non-Indian. Similarly, the plain language of the General Crimes Act can be read as creating federal jurisdiction for non-Indians committing crimes in Indian country, regardless of whether the victim is Indian or non-Indian. The Supreme Court however, has held that states hold jurisdiction over crimes committed by non-Indians against non-Indians

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340 United States v. Clark, 434 F.3d 684 (4th Cir. 2006), concurring in the judgment: Judge Motz; concurring in the judgment Judge King.
341 Specifically, the First Circuit has expressly kept this an open issue; the Fourth Circuit in concurring opinions has indicated that a consideration of such disparity may be appropriate in certain instances; the Ninth Circuit has only held that “neither § 3553(a) nor the Guidelines require consideration of state-federal sentencing disparities,” United States v. Wideman, 187 Fed. Appx 758 (9th Cir. 2006); and the Second, Fifth, Sixth, Eleventh, and DC Circuits have not addressed this issue in any manner post-Booker.
342 DeMaso, supra note 4, at 2113-15.
343 See supra Part II(A)(b).
344 See supra Part II(A)(a)(1).
within Indian country,\textsuperscript{345} although Congress could amend the Act to include non-Indian against non-Indian crime.\textsuperscript{346} While the Supreme Court has held that disparity created by this distinction between Indians and non-Indians does not violate equal protection,\textsuperscript{347} that does not necessarily mean that such disparity is “warranted.”\textsuperscript{348} Indeed, although Congress has not amended the General Crimes Act to eliminate this disparity, Congress in certain circumstances has expressed concern about federal/state disparity created by this distinction.\textsuperscript{349} As a result, while disparity arising in this context also implicates state/federal sentencing disparity, Native American defendants prosecuted for crimes against non-Indians have an additional basis for arguing that the disparity is unwarranted.

It is also noteworthy that non-Indians prosecuted under the General Crimes Act for offenses against Indians in Indian country face the same sentencing disparity as Native Americans prosecuted under the Major Crimes Act. While past attempts to correct for sentencing disparity in the Indian law context has focused exclusively on Native American defendants, the arguments presented in this article are for the most part also available to non-Indian prosecuted under the General Crimes Act.

\begin{itemize}
\item \textsuperscript{345} Canby, \textit{supra} note 26, at 159, \textit{citing} United States v. McBratney, 104 U.S. 621 (1881), and Draper v. United States, 164 U.S. 240 (1896).
\item \textsuperscript{346} See H.R. Rep. 94-1038, 1976 USCCAN 1125, 1126.
\item \textsuperscript{347} United States v. Antelope, 430 US 641, 648-49 (1977).
\item \textsuperscript{348} In \textit{Antelope}, the Court stated “[s]ince Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country, … it is of no consequence that the federal scheme differs from a state criminal code otherwise applicable within the boundaries of the State.” \textit{Id}. However, in the next sentence the Court made clear that is was discussing such disparity in the context of equal protection, stating “[U]nder our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter.” There is nothing in 18 USC § 3553(a)(6) indicating that disparity has to rise to the level of constitutional proportions in order to be deemed “unwarranted” and it is also important to note that the \textit{Antelope} decision came down in 1977, well before the SRA’s passage and the Federal Sentencing Guidelines’ implementation.
\item \textsuperscript{349} See \textit{supra} Part III(B)(b)(1)(ii) (discussing how Congress exempted the Federal murder offense as a crime qualifying for the federal death penalty due in part to federal/state sentencing disparity for Indians and non-Indians in circumstances where the murder victim was non-Indian).
\end{itemize}
2. *Disparity Created by Congressional Action*

One of the main reasons downward departures based on fast-track disparity have gained such limited traction in the circuit courts is because after the PROTECT Act, it is questionable whether the resulting disparity can be categorized as “unwarranted” under § 3553(a)(6).\(^{350}\) By approving the fast-track program in the PROTECT Act, Congress made a policy determination that the benefits of the program in easing the administrative burden on certain federal districts outweighed any accompanying disparity it created.\(^{351}\) Congress’ endorsement of this disparity is even more apparent given that one of the stated purposes of the PROTECT Act was to “reign in” federal judges and limit their ability to depart from the Sentencing Guidelines.\(^{352}\) Based on Congress’ approval in the PROTECT Act, many circuits reasoned that fast-track disparity could not be considered “unwarranted” for purposes of § 3553(a),\(^{353}\) and in *Ossa-Gallegos*, the court referenced Congress’ endorsement of “at least some degree of disparity” as a justification for the district court failing to completely eliminate the fast-track disparity.\(^{354}\)

Similarly, Native American sentencing disparity is the result of Congressional action, since Congress established federal criminal jurisdiction over Indian country and created the Federal Sentencing Guidelines. However, as the next section discusses, Congressional endorsement of any disparity stemming from this jurisdictional arrangement is far less clear than the explicit endorsement of disparity in fast-track sentencing.

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\(^{350}\) *See supra* Part V(b)(a).

\(^{351}\) *See* McClellan & Sands, *supra* note 300 at 525-28.

\(^{352}\) *Id.* at 525-26.

\(^{353}\) *See supra* Part V(b)(a).

\(^{354}\) *Ossa-Gallegos*, 453 F.3d at 375.
b. Why the Case for Correcting Native American Sentencing Disparity is More Compelling

1. It is Unclear Whether Congress has Endorsed Native American Sentencing Disparity

The degree to which Congress has endorsed the disparity experienced by Native Americans under the Federal Sentencing Guidelines is less clear than Congress’ endorsement of fast-track disparity in the PROTECT Act. Prior Congressional actions to account for Native American disparity in the criminal justice system have focused on uniformity among federal defendants, rather than on federal/state disparity for Native American defendants. In 1976 for example, Congress acted to eliminate disparity between Indians prosecuted under the Major Crimes Act and non-Indians prosecuted under the General Crimes Act for the same offense after two circuit courts had found such disparity unconstitutional.355 Similarly, in 1990 Congress codified the Eighth Circuit’s decision in Norquay, clarifying that the Federal Sentencing Guidelines were to apply to assimilative crimes prosecuted under the Major Crimes Act or Assimilative Crimes Act.356 This amendment reflected a higher Congressional concern with ensuring the application of the Federal Sentencing Guidelines in all federal criminal prosecutions over accounting for any disparity between Indian defendants prosecuted in federal court and non-Indian defendants prosecuted under state substantive law for the same offense.

These Congressional actions however, do not necessarily mean that Congress has endorsed Native American sentencing disparity stemming from the application of the Federal Sentencing Guidelines. Part of the reason Congress has seemingly placed a higher premium on uniformity for federal defendants is that in some cases, Congress has been forced to correct what

the courts have deemed to be unconstitutional disparity.\(^{357}\) In contrast, as Antelope illustrates, disparity between state and federal defendants does not rise to constitutional proportions and therefore does not necessitate Congressional action. Congress therefore, has been more reluctant to act when the disparity does not reach constitutional proportions. However, just because such disparity is not unconstitutional, does not mean that it is warranted for purposes of 18 USC § 3553(a)(6).

Congress’ 1990 amendment to clarify that the Federal Sentencing Guidelines were applicable to assimilative crimes and the Major Crimes Act is Congress’ most explicit endorsement of any resulting sentencing disparity. It is important to note however, that to the extent the 1990 amendment was merely a codification of the Eighth Circuit’s decision in Norquay, Congress’ endorsement of any resulting disparity was limited to the narrowest possible disparity – that between federal and state defendants both prosecuted under state substantive law.\(^{358}\) Furthermore, even though the 1990 amendment to the Sentencing Reform Act made clear that Congress intended the Federal Sentencing Guidelines to apply to federal prosecutions for crimes occurring in Indian country,\(^{359}\) this alone does not signal a clear endorsement of any resulting sentencing disparity, since even under the Guidelines, downward departures are permitted for cases falling outside the “heartland” of cases contemplated by the Guidelines.

Congress in fact, has shown itself to be sympathetic to Native American defendants in circumstances where Native Americans are disproportionately impacted by a federal offense or

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\(^{357}\) See H.R. Rep. 94-1038, 1976 U.S.C.C.A.N. 1125, 1128. The two cases in which such disparity was held unconstitutional were U.S. v. Big Crow, 523 F.2d 955 (8th Cir. 1975) and US v. Cleveland, 503 F.2d 1067 (9th Cir. 1974).

\(^{358}\) The fact that Congress’ intent was limited to assimilative crimes is clear by the title of the amendment, “Amendment to clarify application of Sentencing Reform Act to Assimilative Crimes,” 101 P.L. 647.

\(^{359}\) Although the 1990 amendment was directed at assimilative crimes, the plain text of the amendment makes clear that the SRA applies to all crimes prosecuted pursuant to the Major Crimes Act. The Guidelines’ application to federally-defined crimes prosecuted under the Major Crimes Act does not seem to have been an issue debated in the courts.
where gross disparity exists between federal and state sentences. In federal death penalty and “three-strikes and you’re out” legislation, Congress in both cases included a similar “special provision for Indian country,” whereby Native Americans subject to federal jurisdiction due to the jurisdictional scheme in Indian country are not subject to either of these punishments unless the tribe has elected for the Act to have effect.\textsuperscript{360} Although it appears that this “special provision,” at least in the Federal Death Penalty Act, was motivated primarily by concerns regarding tribal sovereignty, Subcommittee Reports regarding earlier proposals for the death penalty statute and “three-strikes and you’re out” legislation indicate that testimony on the disparate impact this legislation would have on Native Americans was heard by the Subcommittee.\textsuperscript{361}

Based upon Congress’ prior actions, although it is clear that Congress intends the Federal Sentencing Guidelines to apply to prosecutions under the Major Crimes Act, it is decidedly less obvious whether Congress has endorsed any subsequent sentencing disparity as it relates to a particular offense. Congress’ 1990 amendment to the Sentencing Reform Act only indicated that Congress intended the Federal Sentencing Guidelines to apply to prosecutions brought under the Major Crimes Act, and still left open the possibility for judges’ to downward depart for Native American cases outside the “heartland” of cases contemplated under the Guidelines. Furthermore, Congress has carved out exceptions for Native American defendants in cases where a federal penalty would disproportionately impact Native Americans and result in disparate sentencing. Although Congress’ reasons for providing such an exception may be limited to concerns over tribal sovereignty, these Congressional actions still cut against an argument that Congress has endorsed Native American sentencing disparity.

\textsuperscript{360} See supra Part III(B)(b)(1)(ii).
\textsuperscript{361} Id.
It appears therefore, that Native American defendants’ arguments that Congress has not endorsed such disparity will be most compelling when it pertains to a non-assimilative crime where Native Americans are disproportionately represented in federal court and federal/state sentencing disparities are extreme. Based on these factors, Native Americans convicted of aggravated assault will have particularly compelling arguments, since aggravated assault is a federally defined offense, with Native Americans comprising nearly 35% of those individuals in federal custody for assault\textsuperscript{362} and receiving federal sentences averaging up to 62% longer than the state counterpart.\textsuperscript{363}

There are some offenses however, where it appears Congress has endorsed at least some degree of Native American sentencing disparity. This may be the case for example, with respect to sex crimes against children, even though Native Americans comprised over half the federal sex abuse convictions in 2001 and in some cases receive sentences over 70% greater than their state counterparts.\textsuperscript{364} In recent years, Congress has taken an increasingly tough position on sex offenders, as evidenced by the 2003 PROTECT Act and 2006 Adam Walsh Child Protection and Safety Act. While it is possible to argue that downward departures for these crimes are still appropriate since it appears Congress failed to consider the impact these sentences would have on Native Americans,\textsuperscript{365} this argument loses force based upon Congress’ amendment of the Major Crimes Act in 2006 to include jurisdiction over “felony child abuse or neglect.”\textsuperscript{366} This is

\textsuperscript{362} Native American Advisory Group, supra note 1, at 31.
\textsuperscript{363} See supra Part (I)
\textsuperscript{364} See Native American Advisory Group, supra note 1, at 21-22.
\textsuperscript{365} Native American Advisory Group, supra note 1, at 23-24 (The Report states that the PROTECT Act appeared to be passed “without having heard from those most impacted [Native Americans] not giving any thought to that impact”); Similarly, dissenters criticized a bill in the House that largely mirrored the Adam Walsh Act and created “harsh new mandatory minimum sentences for existing offenses under the Major Crimes Act,” without “deliberative consultation with the representatives from the group most affected by the legislation, Native Americans.” H.R. Rep. 109-218(I) *90-91. Further searches of the Adam Walsh Act’s legislative history in Westlaw and Thomas did not indicate that such hearings were ever held.
because Congress’ clear intent in modifying the Major Crimes Act is to combat crime in Indian country against children, lending support to a conclusion that Congress similarly endorses the harsh penalties for sex crimes committed by Native Americans against children in the PROTECT and Adam Walsh Acts, even though Congress did not hear testimony from Native Americans before passing those laws.

2. Correcting for Native American Sentencing Disparity does not Give Rise to Separation of Powers Concerns with the Executive Branch

Closely linked to whether fast-track or Native American sentencing disparity is “unwarranted” under § 3553(a)(6) is the executive branch’s role in prosecuting criminal offenses.

i. Downward Departures to Correct for Fast-Track Disparity Conflicts with the Attorney General’s Authority to Designate Fast-Track Districts to Ease Administrative Burdens

The PROTECT Act gave the Attorney General the power to authorize fast-track programs, upon application by a federal district’s U.S. Attorney, in districts overwhelmed by the large docket of immigration cases. Some courts have raised the argument that awarding a downward departure based on fast-track disparity “would effectively overturn the Attorney General’s decision that [the sentencing district] does not qualify for a fast-track program.”

367 also S. Rep. 109-255, 2006 WL 1403201 (‘‘The [Senate Committee on Indian Affairs] is concerned that a whole category of crimes against children is going unaddressed. Therefore, an amendment is added to the Major Crimes Act to criminalize acts of child abuse and neglect in Indian country. This amendment is intended to close the gap that exists in addressing the full range of crimes that may be inflicted on children.’’).

These concerns however, are not implicated in the case of downward departures to correct for Native American sentencing disparity. Unlike fast-track districts, which are authorized by the Attorney General, Native American sentencing disparity is the byproduct of a jurisdictional quirk created by the Major Crimes Act and Sentencing Reform Act. These Acts are laws of Congress, free from Executive influence, other than the President’s signing them into law.

\[ ii. \quad \text{Considering Federal/State Disparity in the Native American Context does not Question Prosecutorial Discretion} \]

One of the main reasons courts have been resistant to permitting consideration of federal/state disparity in federal sentencing is out of concern that this conflicts with prosecutorial discretion. For example, the First Circuit in *United States v. Snyder* rejected federal/state disparity as a valid consideration under § 3553(a)(6), based upon the notion that doing so would “impinge impermissibly upon the Executive Branch’s discretion to prosecute defendants under federal law.”\(^{369}\) Although Native American sentencing disparity is the result of federal/state disparity, the issue does not raise the same concerns regarding impingement upon the Executive Branch’s discretion cited by *Snyder*. The situation in *Snyder*, and nearly all challenges to federal/state disparity that do not involve Native American defendants, is that charges can be brought against the defendant in either state or federal court.\(^{370}\) The court in *Snyder* ruled that in such situations, it was inappropriate for a court to question a federal prosecutor’s decision to prosecute rather than leaving the matter to state authorities.\(^{371}\) These concerns do not arise with respect to Native American prosecution under the Major Crimes Act. When a Native American


\(^{370}\) *Snyder*, 136 F.3d at 66 (Massachusetts authorities initially charged Snyder with unlawfully carrying a firearm, but dropped the charge when a federal grand jury indicted Snyder.).

\(^{371}\) *Id.* at 70.
commit a major crime in Indian country, he is only subject to federal prosecution. Therefore, if a court were to consider federal/state sentencing disparity in its sentencing of a Native American under the Major Crimes Act, the court would not be calling into question the U.S. Attorney’s decision to prosecute the defendant rather than leave the matter to state authorities. This fact sets Native American sentencing disparity apart from other cases of federal/state sentencing disparity by avoiding the concern that correcting for such disparity tramples upon prosecutorial discretion.

3. The Courts are the Proper Body to Address Native American Sentencing Disparity Because the Disparity is Derived from a Jurisdictional Issue

Another argument in favor of permitting downward departures to account for Native American sentencing is that the judiciary is the branch of government best suited to addressing this issue. Unlike fast-track disparity, which arises from the Attorney General’s authorization of fast-track districts, Native American disparity is the product of a quirk surrounding criminal jurisdiction in Indian country. To the extent this disparity can be characterized as a jurisdictional matter, courts have a special interest in the issue and are functionally well-adapted to resolving

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372 Although tribes exercise concurrent jurisdiction, subject to the limitations of the Indian Civil Rights Act. See supra Part II(A)(e).
373 See DeMaso, supra note 4, at 2121-22. In this Note, DeMaso contends that federal courts should consider federal/state disparity at sentencing unless “the prosecution can offer legitimate reasons why the disparity in this case should not be considered, or if there is a uniquely federal injury that must be vindicated, or when the state courts cannot adequately prosecute.” Id. at 2125. With respect to these issues, disparity should be considered when sentencing Native Americans since crimes under the Major Crimes Act are not uniquely federal crimes, and instead typically fall under the state’s police powers; the injury is not a unique federal injury, rather federal jurisdiction is a product of the crime occurring in Indian country and the defendant being Indian; and although the state courts cannot adequately prosecute the Indian defendant, states are adequately able to prosecute the offenses in the Major Crimes Act, and indeed do so in cases involving a non-Indian defendant and non-Indian victim in Indian country. Therefore under this framework, courts should be permitted to consider federal/state disparity when sentencing Native American defendants;
the matter. Moreover, not only does this issue fall within the judiciary’s expertise, but as has been discussed, the matter does not create separation of powers concerns with the other branches. Congress properly set forth the general jurisdictional scheme for Indian country, but has not authoritatively spoken to the resulting sentencing disparity. In addition, Native American sentencing disparity is not intertwined with easing prosecutorial administrative burdens as it is in the fast-track case, nor does it impinge upon prosecutorial discretion as do most cases of federal/state sentencing disparity.

4. It is Appropriate to Single Out Native Americans for “Particular and Special Treatment”

Fast-track and Native American sentencing disparity are similar in that they both impact a specific class of individuals. Fast-track programs specifically target illegal aliens while Native American sentencing disparity obviously affects Native Americans. Although illegal aliens are “persons” entitled to due process under the Fifth and Fourteenth Amendments, they are not a “suspect class” for equal protection purposes and the Supreme Court has noted that “[p]ersuasive arguments support the view that a State may withhold its beneficience from those whose very presence within the United States is the produce of their own unlawful conduct.” Based on this categorization, cases concerning illegal aliens’ rights often occur in the context of

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374 See Shapiro, supra note 245, at 574 (arguing that “courts are functionally better adapted to engage in the necessary fine tuning than is the legislature” regarding the question of whether a court must exercise jurisdiction, and that “questions of jurisdiction are of special concern to the courts because they intimately affect the courts’ relations with each other as well as with the other branches of government.”).

375 See supra Part III(B)(b).

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

377 McClellan & Sands, supra note 300, at 217-18.


379 Id. at 219, n.19.

380 Id.
whether illegal aliens are to be afforded the same rights and privileges as other United States citizens.381

In contrast, Indian tribes hold a “unique legal status … under federal law.”382 The Constitution vests Congress with the authority to “single[] Indians out as a proper subject for separate legislation,”383 with treaties and the “guardian-ward” relationship also permitting Congress to legislate on federally recognized tribes’ behalf.384 Because of this unique relationship, the Supreme Court, “on numerous occasions … specifically has upheld legislation that singles out Indians for particular and special treatment.”385 In contrast to cases involving illegal aliens, where the question is whether such aliens are entitled to the same rights and protections as other United States’ citizens, cases involving Native Americans’ unique legal status have generally concerned whether Native Americans are entitled to special rights and protections beyond those provided to other citizens.386 Therefore, while Congress’ ability to single out Indians is used as justification for the unique criminal jurisdiction arrangement over Indian country,387 Native Americans’ “unique legal status” also provides a basis for carving out a specific downward departure ground for Native Americans.

381 See e.g. Plyler v. Doe, 457 US 202, (1982) (Texas statute restricting educational access and funding for children of illegal aliens held to violate equal protection clause).
383 Id. (this authority is derived from Art. I, § 8, cl. 3 which gives Congress authority to regulate commerce with Indian tribes).
384 Id.
386 See supra note 412 and accompanying text.
Past statements by the Supreme Court however, have been limited to affirming the permissibility of federal regulations and legislation “aimed solely at tribal Indians.”\textsuperscript{388} As a result, it is questionable whether a sentencing court could, without any legislative or administrative support, “single[] out Indians for particular and special treatment.”\textsuperscript{389} To the extent however, that a sentencing court could infer such intent from Congress or the Sentencing Commission, there is strong precedent suggesting that a departure aimed solely at Native Americans would be permissible, although this would seemingly conflict with the Sentencing Reform Act’s ban on departures based on race, sex, national origin, creed, religion, and socio-economic status.\textsuperscript{390}

\textbf{B. Ossa-Gallegos as a Framework for Administering Reasonable Sentences that Account for Native American Sentencing Disparity}

As discussed above, compelling arguments exist for allowing courts to issue downward departures in order to correct for Native American sentencing disparity. These claims however, remain untested in the courts post-\textit{Booker}, unlike the debate regarding fast-track disparity, which has been addressed by nearly every circuit. As a result, although the arguments for departing to account for Native American sentencing disparity are in many ways more persuasive than those for departures in the fast-track context, the fast-track debate provides a useful blueprint for ensuring that departures in Native American sentencing are upheld as reasonable.

Based on the Supreme Court’s recent decision in \textit{United States v. Rita},\textsuperscript{391} as well as courts’ treatment of fast-track disparity and factors unique to Native American defendants, it is fairly certain that it would not be per se unreasonable for a district court judge to fail to consider

\textsuperscript{388} \textit{Id.} at 649, n.11.
\textsuperscript{389} See Macari, 417 US at 554-55.
\textsuperscript{390} 2005 Guidelines Manual, \textit{supra} note 7, at § 5H1.10.
\textsuperscript{391} United States v. Rita, No. 06-5754 (June. 21, 2007) (holding that that circuit courts can presume that within-Guidelines sentences are reasonable).
federal/state disparity when sentencing a Native American defendant, although this is not a
given.\textsuperscript{392} While this means that Native American sentencing disparity cannot be systematically
resolved by the courts, this does not prevent judges from exercising their newfound post-
Booker discretion to correct for such disparity on a case by case basis. Due to Native Americans’ unique
status under federal law and the relative lack of separation of powers concerns implicated by the
judiciary correcting for Native American sentencing disparity, downward departures in the
Native American context could be quite sweeping in nature. However, in order to ensure that
such departures are upheld as reasonable by the circuit courts, the Sixth Circuit’s reasoning in
\textit{Ossa-Gallegos} serves as a useful template to district court judges in fashioning departures that
will withstand appellate scrutiny.

\begin{itemize}
  \item[\textbf{a.}] \textbf{It May Be Reasonable to Reduce, But Unreasonable to Eliminate the
Disparity Between Native Americans and Those Tried in State Court}

While \textit{Ossa-Gallegos} stands by itself as the only case in which a circuit court has
affirmed a sentence based on fast-track disparity, it is noteworthy that the appeal did not come
from the government, but from the defendant, arguing that the district court had not eliminated
the disparity caused by the district’s lack of a fast-track program. It is unsurprising that
departures to reduce, rather than eliminate, sentencing disparity are more likely to be upheld as
reasonable, given that “[h]ow compelling [a judge’s justification for a departure under the §

\textsuperscript{392} Circuit courts have unanimously rejected the claim that it is per se unreasonable for a federal judge to fail to
consider fast-track disparity at sentencing. On the Native American front, \textit{United States v. Antelope}, although it
precedes the Federal Sentencing Guidelines’ implementation, also indicates that it is not per se unreasonable to not
consider such disparity for Native Americans. Additional support for this claim lies in the fact that circuit courts
post-\textit{Booker} have uniformly rejected claims that it is unreasonable for judges not to consider federal/state disparity
at sentencing. This is not necessarily a given however. In \textit{United States v. Lazenby}, 439 F.3d 928 (8th Cir. 2006),
the Eighth Circuit reversed and remanded sentences for two defendants that were given very disparate sentences for
the same conduct. What is notable about this decision is that the Eighth Circuit did not just remand the case where
the court downward departed, but also reversed and remanded the within-Guidelines sentence to rectify the disparity
between them. This decision therefore indicates that a “reasonable” sentence for Native Americans could become
one where federal/state disparity has been considered by the sentencing court.
3553(a) factors] must be is proportional to the extent of the difference between the advisory range and the sentence imposed. In addition to appellate courts applying less scrutiny to more restrained departures, the court in Ossa-Gallegos provided two reasons why a departure to fully eliminate fast-track disparity may be unreasonable, both of which are applicable to the issue of Native American sentencing disparity.

1. Congressional Endorsement of “at Least Some Degree of Disparity”

In Ossa-Gallegos, the appellate court noted that the disparity caused by fast-track districts was not completely unwarranted, since “Congress seems to have endorsed at least some degree of disparity by expressly authorizing larger downward departures for defendants in fast track districts.” Indeed, Congress’ authorization of fast-track programs in the PROTECT Act is the most cited reason why the resulting disparity caused by the fast-track programs are not “unwarranted” and therefore fall outside of consideration under the 3553(a) factors. As discussed in the prior section, Congress similarly “seems to have endorsed at least some degree of disparity” with respect to the sentencing of Native Americans under the Major Crimes Act, although this Congressional endorsement is much less pronounced in the Indian law context.

While it is certainly clear that Congress intended the Federal Sentencing Guidelines to apply to Indian country, this does not preclude judges from downward departing for cases falling outside the “heartland” of those cases contemplated by the Guidelines. In fact, there is some support for inferring that Congress approves of such departures in cases where Native Americans are disproportionately represented and extreme sentencing disparity exists. There are some specific

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393 United States v. Lazenby, 439 F.3d 928, 932 (8th Cir. 2006), quoting United States v. Johnson, 427 F.3d 423, 426-27 (7th Cir. 2005).
offenses however, such as crimes against children, where Congress appears to have endorsed such disparity. In these cases in particular, it may be reasonable for a sentencing judge to reduce, but not eliminate any sentencing disparity experienced by Native American defendants.\textsuperscript{395}

2. \textit{Defendants Must Take the Bitter with the Sweet}

In fast-track districts, in order for a defendant to qualify for a downward departure under the program, they must give up their right to challenge their conviction, something which Ossa-Gallegos did not have to do as part of his plea agreement. Based upon this fact, the appellate court determined that it was reasonable for the district judge not to fully eliminate the disparity, since Ossa-Gallegos was not “similarly situated” to those defendants pleading under a fast-track program.\textsuperscript{396} Unlike \textit{Ossa-Gallegos}, Native Americans would not have to surrender any of their due process rights if sentenced in a state court, but a notion that Native American defendants must accept the bitter with the sweet does underscore the issue of federal/state sentencing disparity.

Tribal sovereignty is a fundamental issue for Native American tribes. The current criminal jurisdiction arrangement over Indian country is the result of tribes’ status as domestic dependent nations, whereby tribes are under the trust of the United States, but not subject to state laws.\textsuperscript{397} Therefore, the federal government’s exclusive criminal jurisdiction over major crimes committed by Native Americans in Indian country is a product of the United States’ recognition of tribal sovereignty. It is important to remember that due to Public Law 280, six states possesses full criminal jurisdiction over crimes committed by Native Americans in Indian country. In those states, Native Americans do not suffer any of the disparity discussed in this article, and are instead subject to the same state sentences as any other defendant. Congress

\textsuperscript{395} \textit{See supra} Parts III(B)(b)(1) and VI(A)(b).
\textsuperscript{396} \textit{Ossa-Gallegos}, 453 F.3d at 375.
\textsuperscript{397} \textit{See supra} Part II.
amended Public Law 280 to include a tribal consent clause, whereby states could assume Public Law 280 jurisdiction with tribal consent.\textsuperscript{398} Although the federal government would maintain concurrent criminal jurisdiction in these “optional” states,\textsuperscript{399} if tribes were overwhelmingly concerned with the federal/state sentencing disparity experienced by Native Americans under the Major Crimes Act, the tribe could submit to concurrent state criminal jurisdiction. Tellingly, Public Law 280’s expansion has been “largely halted” since tribal consent has been required.\textsuperscript{400} This can largely be attributed to tribal resistance towards submitting to state jurisdiction,\textsuperscript{401} likely coupled with tribal reluctance to cease operation of its own tribal criminal justice system.\textsuperscript{402}

Therefore, while Native Americans convicted under the Major Crimes Act are generally subject to harsher sentences than similar defendants sentenced in state court, tribes have the option to reduce this disparity by submitting themselves to concurrent state criminal jurisdiction under Public Law 280. While it is unsurprising that tribes are unwilling to voluntarily surrender their sovereignty on this front, an argument can be made that Native Americans must then take the bitter with the sweet – in this case, higher sentences for violations of federal, rather than state, law. This does not mean that it is unreasonable for a judge to reduce such disparity in sentencing a Native American defendant, but like in \textit{Ossa-Gallegos}, provides a reason why it may be unreasonable to eliminate such disparity.

\textsuperscript{398} Canby, \textit{supra} note 26, at 253.
\textsuperscript{399} \textit{Id.} at 236. Concurrent federal and state jurisdiction is unique to the optional states. In the mandatory states, criminal jurisdiction is exclusively with the states.
\textsuperscript{400} \textit{Id.} at 253. The only state to obtain such consent was Utah, but Utah in that case bound itself to retrocede Public Law 280 jurisdiction whenever requested by a tribe. \textit{Id.}, citing Utah Code Ann. § 63-36-15.
\textsuperscript{401} \textit{Id.} at 233.
\textsuperscript{402} \textit{Id.} at 237. Although tribes may maintain their inherent criminal jurisdiction even when subject to Public Law 280, the practical effect of Public Law 280 is the end of tribal criminal jurisdiction, whether due to a lack of need or lack of resources to maintain a separate criminal justice system.
b. The More § 3553(a) Factors that are Considered, the More Likely the Sentence is Reasonable

Post-Booker, judges are required to consider seven factors under § 3553(a) in determining a defendant’s sentence. The Sixth Circuit in Ossa-Gallegos emphasized that it was reasonable for the lower court departure to not fully eliminate the fast-track disparity since the court considered other factors in its departure, such as the “aberrational nature” of the defendant’s prior crime in comparison to his conduct since re-entering the United States.\footnote{Ossa-Gallegos, 453 F.3d at 373, 375.} Furthermore, many courts have relied on the fact that the need to avoid sentencing disparities is only one of the relevant factors under § 3553(a) as the basis for holding that a within-Guidelines sentence is not unreasonable solely due to the existence of fast-track disparity.\footnote{See United States v. Hernandez-Fierros, 453 F.3d 309 (6th Cir. 2006) (“The district court balanced the need to avoid sentencing disparities with those sentences in fast-track districts with the need, in this case, to protect the public and impress upon defendant and others the importance of obeying the laws of the United States. In so balancing the 18 U.S.C. § 3553(a) factors, the court appropriately addressed defendant's sentencing disparity concerns.”).} Therefore, lower court decisions that reduce unwarranted sentencing disparity will be more likely to be upheld as reasonable if § 3553(a)(6) is not the sole basis for the departure.

1. Using § 3553(a)(2) as an End-Run Around § 3553(a)(6)

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

(2) the need for the sentence imposed--
   (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
   (B) to afford adequate deterrence to criminal conduct;
   (C) to protect the public from further crimes of the defendant; and
   (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
Courts sentencing Native Americans can attempt to utilize these § 3553(a)(2) factors in one of two ways to justify a departure from the Guidelines. First, a court seeking to reduce the disparity between federal and state sentences may refer to the state sentence’s ability to meet the requirements of § 3553(a)(2) as a justification for the downward departure. Perhaps more importantly, a lower court can also use § 3553(a)(2) in an attempt to get around an argument from an appellate court that correcting for federal/state sentencing disparity is unreasonable under § 3553(a)(6).

Judge Sifton, a senior judge in the Eastern District of New York, has written two opinions reflecting this end-run around § 3553(a)(6). Judge Sifton, in sentencing defendants for gun charges in New York, argued that the impact a certain offense has in a particular locality is relevant in determining the appropriate sentence to be imposed in accordance with the factors in § 3553(a)(2). While Judge Sifton agreed that “subjective considerations such as ‘local mores’ or feelings about a particular type of crime may not be an appropriate basis for granting a Guidelines departure or a non-Guidelines sentence,” he argued that it was appropriate post-

*Booker* for courts to consider whether “the crime will have a greater or lesser impact given the locality of its commission in sentencing a defendant.” The judge contended that this was distinct from accounting for unwarranted sentencing disparity under § 3553(a)(6). In these cases, Judge Sifton concluded that he could consider departing upward to apply a harsher sentence, similar to that which existed for New York state defendants, not to correct for state/federal sentencing disparity, but rather based upon objective facts that drug trafficking has a

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407 Id. at 296.
408 Id.
more serious impact on New York City than is reflected under the Federal Sentencing Guidelines.\footnote{Paul, 2006 U.S. Dist. LEXIS 31198, at *16, n.4.}

The validity of Judge Sifton’s arguments have not yet been tested by the Second Circuit, but similar arguments under § 3553(a)(2) can certainly be made for the impact of crime in Indian country. The unique living conditions that exist on reservations have already been documented by courts, and there is ample literature documenting the unique impact certain crimes have on tribes. Following Judge Sifton’s argument, because the Sentencing Guidelines reflect appropriate sentences for the nation as a whole and largely fail to reflect the unique impact these offenses have in Native American communities, district court judges should be able to depart in sentencing Native American defendants so that the sentence corresponds with § 3553(a)(2).

The Eighth Circuit has already implicitly approved of this sentencing technique in the Native American context post-\textit{Booker}. In \textit{United States v. Plumman},\footnote{188 Fed.Appx. 529 (8th Cir 2006).} the Eighth Circuit affirmed Judge Kornmann’s\footnote{Judge Kornmann has been an outspoken critic of the Federal Sentencing Guidelines’ impact on Native Americans. \textit{See supra} note 8, and accompanying text.} resentencing of a Native American defendant in the wake of \textit{Booker} to 384 months imprisonment and 5 years supervised release for sexual abuse and aggravated sexual abuse of two minor females.\footnote{The Eighth Circuit actually affirmed a resentencing. Judge Kornmann originally sentenced the defendant to life imprisonment on some counts and 180 months on others. \textit{Plumman}, 188 Fed.Appx at 529. The Eighth Circuit affirmed the convictions and the 180 month sentences, but vacated and remanded the life sentences due to \textit{Booker}. \textit{Id.} On remand, Judge Kornmann sentenced Plumman to 384 months imprisonment and 5 years supervised release, to be served concurrently. \textit{Id.}} At resentencing, the government asked the judge to reimpose a life sentence in accord with the Federal Sentencing Guidelines, while the defendant asked for 180 months imprisonment.\footnote{Id. at 530.} Judge Kornmann, although noting that “there was no basis for a traditional downward departure … granted a variance to 384 months’
imprisonment, noting several 18 USC § 3553(a) factors.”414 Unfortunately, this sentencing transcript is unavailable, but the appellate court noted that at sentencing, Judge Kornmann “commented about the level of violence and risks to Native American women and children on South Dakota reservations.”415 The Eighth Circuit affirmed the sentence as reasonable, noting that the record indicated that the sentencing judge had considered the § 3553(a) factors and disagreeing with the defendant’s contention that “the court’s expression of concern about the violence on Indian reservations in South Dakota shows the court gave significant weight to an improper or irrelevant factor.”416

The Eighth Circuit’s approval of the impact of crime on a reservation being a relevant sentencing factor mirrors Judge Sifton’s use of § 3553(a)(2) at sentencing and is distinct from the Eighth Circuit’s departure ground in Big Crow and its progeny. Plumman however, underscores the potential risk of using this approach - since crime often has a greater impact on Native American reservations than the United States at large, this factor supports an upward, rather than a downward departure. In light of this fact, Plumman is interesting in that the judge expressed concern about the level of violence on South Dakota reservations, but the ultimate sentence was below the Guidelines’ range.

In general, this factor will be most beneficial in supporting a downward departure for a Native American defendant with respect to crimes whose effect on Indian country is less than that for the rest of the nation. For example, federal penalties for possessing child pornography, which were greatly enhanced under the PROTECT Act, could be lessened for Native American defendants, since this is not a major concern in Indian country.417 It is also particularly useful to

414 Id.
415 Id.
416 Id.
417 See Native American Advisory Group, supra note 1, at 24, n. 42.
Native American defendants that this factor has been approved in the Eighth Circuit, since this circuit has a high number of Native American cases and has seemingly closed the door on considering federal/state disparity under § 3553(a)(6).  

2. **Big Crow and Its Progeny**

   From an advocacy perspective, the Eighth Circuit’s decision in the *Big Crow* line of cases serves as an additional basis for downward departing in circumstances where a Native American defendant has shown resilience in the face of the many obstacles associated with reservation life. Unfortunately, despite the decision’s surface appeal from a policy perspective, it is in clear conflict with the Sentencing Reform Act’s requirement of neutrality with respect to “race, sex, national origin, creed, religion, and socio-economic status.”

   While pre-*Booker*, courts may have been forced to engage in this type of game-playing in order to account for the unique circumstances surrounding Indian crime, continuing to rely on such arguments undermines the legitimate grounds for correcting for Native American sentencing disparity that exist post-*Booker*.

   In contrast to *Big Crow*, this article’s proposed departure to correct for sentencing disparity is also available to non-Indians, and therefore does not run afoul of the Sentencing Reform Act’s ban on considering “race, sex, national origin, creed, religion, and socio-economic status.”

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


same federal/state sentencing disparity as Indians prosecuted pursuant to the Major Crimes Act, and as such, can argue for downward departures to correct for this disparity.421

3. **Emphasizing Other Factors Unique to Federal Prosecution of Native Americans Under the Major Crimes Act**

As discussed in the previous sections, there are many factors that make the case for correcting for Native American sentencing disparity more compelling than that in the fast-track context. Although these additional factors do not directly correspond to § 3553(a) factors, they provide an additional basis for affirming a downward departure as reasonable. First, Native Americans are uniquely suited to being granted an exception to the Federal Sentencing Guidelines’ goal of uniformity among federal defendants, since Indian tribes hold a “unique legal status” under federal law, although this is admittedly in tension with the Guidelines’ ban on considering national origin as a ground for departure.422 Second, downward departing to correct for Native American sentencing disparity does not raise the same separation of powers concerns with the Executive branch that exist in correcting for fast-track or other instances of federal/state disparity. Finally, because Native American sentencing disparity is the result of a jurisdictional quirk, the courts are particularly well-suited to correcting for this disparity due to their expertise in jurisdictional matters.

**C. Summary**

The suitability of downward departures to account for Native American sentencing disparity is ripe for reconsideration post-Booker, but so far has been left untested in the courts.

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

422 See supra Part VI(A)(c).
Instead, courts and commentators have focused a great deal of attention on resolving the issue of fast-track disparity. Although circuit courts have been skeptical as to whether departures correcting for such disparity are reasonable, the Sixth Circuit’s decision in *Ossa-Gallegos* shows that modest departures to reduce, rather than eliminate such disparity are proper. Because of the similarities between Native American and fast-track disparity, Native American defendants and federal district court judges can draw upon the decisions surrounding the fast-track issue in order to construct reasonable downward departures to account for Native American sentencing disparity.

Although the arguments for departures to account for Native American sentencing disparity are in many regards more compelling than those in the fast-track context, the reasoning behind the *Ossa-Gallegos* decision provides an effective base-line template for ensuring that such departures are upheld as reasonable. The *Ossa-Gallegos* framework calls for judges to reduce, rather than eliminate sentencing disparity, due to Congressional endorsement of “at least some degree” of disparity and a notion that criminal defendants must accept the bitter with the sweet. Another key component of *Ossa-Gallegos* is that departures are more likely to be upheld when they are based on multiple sentencing factors. To this end, Native American defendants can take advantage of § 3553(a)(2) to look at the unique impact crime has in Indian country and can draw upon soft factors such as Native Americans’ unique status under federal law, the courts’ suitability for resolving this issue, and the fact that such departures do not conflict with the Executive Branch’s duties or discretion. By using *Ossa-Gallegos* as a model and drawing upon the additional arguments favoring Native American downward departures, district court decisions correcting for Native American sentencing disparity should be upheld as reasonable by the appellate courts.
VII. Conclusion

As a result of Indian tribes’ unique status as “domestic dependent nations,” crime in Indian country is governed by a complex intersection of federal, state, and tribal jurisdiction, with the end result that Native American defendants committing crimes in Indian country are prosecuted under federal, rather than state law. One unintended consequence of this jurisdictional arrangement is that Native Americans are subjected to disproportionately harsher sentences since federal offenses typically carry stiffer penalties than corresponding state sentences. This sentencing disparity was only exacerbated by the Federal Sentencing Guidelines, which greatly restricted judicial discretion to correct for this disparity.

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

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

Downward departures to account for fast-track disparity have been met with resistance by the circuit courts, although the Sixth Circuit’s recent decision in *Ossa-Gallegos* shows that it is reasonable for judges to consider fast-track disparity in certain contexts at sentencing. The arguments for correcting for Native American sentencing disparity are in many regards stronger than those for doing so in the fast-track context, but with no post-*Booker* precedent in the Native American context to draw upon, the reasoning in *Ossa-Gallegos* can serve as a useful base-line template for ensuring that such departures are upheld as reasonable. Under this framework, downward departures that reduce, rather than eliminate Native American sentencing disparity are reasonable, particularly when the departure also draws upon additional sentencing factors beyond § 3553(a)(6). While this proposal is not the most far-reaching solution that has been offered for correcting this disparity, it is the most realistic, since it draws upon circuit courts’ attempts to define the contours of federal judges’ sentencing discretion in the aftermath of *Booker*. It also carries the additional benefit of recognizing that the courts are in many respects the proper body for resolving this issue, providing an immediate solution to the problem, and avoiding the judicial game-playing with the Guidelines that is readily apparent in decisions such as *Big Crow*. 