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Sovereign Comity: Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts

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State and federal courts increasingly are being confronted with prosecutors moving the court to consider prior convictions in American Indian tribal courts during the sentencing phase, and sometimes earlier. For example, in *People v. Wemigwans*,[1] the Michigan Court of Appeals allowed the use of a defendant's two prior tribal court convictions to support a state-law felony charge for drunk driving, third offense. But in *United States v. Lente*,[2] a divided panel of the Tenth Circuit noted that prior tribal court convictions (that apparently were uncounseled) for drunk driving did not support an upward departure under the federal sentencing guidelines. If the conviction being introduced occurred in state or federal court, the instant court would be obligated to give full faith and credit to that conviction.[3] But if the prior conviction occurred in a tribal court, state and federal courts are often confronted with unforeseen complexities.

This article is intended to parse through much of the political baggage associated with recognizing tribal court convictions. To be frank, the law is unsettled, leaving little guidance for state and federal judges in these cases, while at the same time granting enormous discretion to judges on the questions involved. The first part of this article will provide a quick overview of the constitutional status of Indian tribes and tribal courts, as well providing a basic but sufficient introduction to relevant principles of federal Indian law. The second part will offer a summary of criminal jurisdiction in Indian Country and, in particular, what role tribes play – and how well they play it. The third part offers a short description of the key cases in the field, as well as relevant federal and state statutes, and state court rules. It also offers a short normative argument on the question of what state and federal court judges who are confronted with prior tribal court convictions should look for in these cases, especially where the defendants convicted in tribal court are not represented by counsel.

I. INDIAN TRIBES AS A THIRD SOVEREIGN IN THE AMERICAN CONSTITUTIONAL STRUCTURE

There are three kinds of sovereigns in the United States – federal, state, and tribal. The Constitution delineates the authorities, duties, and limitations of the United States in relation to the state governments, but the structure and text of the Constitution provide for two other kinds of sovereign entity – foreign nations and Indian tribes.[4] Foreign nations, of course, are not part of the American constitutional structure, but Indian tribes, which are located within the boundaries of the United States, are part of the American constitutional structure, albeit an unusual part. As Justice O'Connor once stated, they are the "third sovereign."[5]

The constitutional text, as provided for by the practice of Congress before the ratification of the Constitution, provides for two means by which Indian tribes and the United States will interact. First, the so-called Indian Commerce Clause provides that Congress has authority to regulate commerce with the Indian tribes. One of the first acts of the First Congress was to implement the Indian Commerce Clause in the Trade and Intercourse Act of 1790.[6] And the federal government's treaty power provides the second form by which the United States deals with Indian tribes – by treaty. One of the earliest treaties executed and ratified by the United States came during the Revolutionary War in a treaty with the Delaware Nation.[7] There are over 200 valid and extant treaties between the United States and various Indian tribes.

The Supreme Court interpreted the meaning of the Indian Commerce Clause and how the Clause interacts with Indian treaties in the so-called Marshall Trilogy of early Indian law cases. In *Johnson v. M'Intosh*,[8] an early Indian lands case, Chief Justice Marshall held that the federal government had exclusive dominion over affairs with Indian tribes – exclusive as to individual American citizens and, implicitly, as to state government. In *Cherokee Nation v. Georgia*,[9] Chief Justice Marshall's plurality asserted that while Indian tribes were not state governments as defined in the Constitution, nor were they foreign nations, they were something akin to "domestic … nations." And, finally, in *Worcester v. Georgia*,[10] Chief Justice Marshall confirmed that the laws of states have "no force" in Indian Country, and that the Constitution's Supremacy Clause gave powerful effect to Indian treaties as "the supreme law of the land." However, largely because Congress has authority to abrogate ratified treaties, Congress may also abrogate Indian treaty rights, as the Supreme Court recognized in *Lone Wolf v. Hitchcock*.[11]

Footnotes

1. No. 239736, 2003 WL 734257 (Mich. App. March 4, 2003) (per curiam).
2. No. 07-2035, 2009 WL 1143167 (10th Cir. April 29, 2009) (per curiam).
3. CONST., art. IV, § 1; 28 U.S.C. § 1738.
4. *See* CONST., art. I, § 8, cl. 3 (the Interstate, Foreign Nations, and Indian Commerce Clauses).
5. *See* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. J. 1 (1997).
6. *See* Matthew L.M. Fletcher, *Trade and Intercourse Acts*, *in* 2 ENCYCLOPEDIA OF UNITED STATES INDIAN LAW AND POLICY 762-64 (Paul Finkelman &Tim Alan Garrison eds., 2009).
7. *See* Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13.
8. 21 U.S. 543 (1923).
9. 30 U.S. 1 (1831).
10. 31 U.S. 515 (1832).
11. 187 U.S. 553 (1903).

The constitutional text, Indian treaties, acts of Congress, and the Supreme Court's jurisprudence can be reduced to three general, fundamental principles of federal Indian law:

- First, Congress's authority over Indian affairs is plenary and exclusive.
- Second, state governments have no authority to regulate Indian affairs absent express congressional delegation or grant.
- Third, the sovereign authority of Indian tribes is inherent, and not delegated or granted by the United States, but can be limited or restricted by Congress.[12]

The key element of these three principles is the legal term of art, "Indian Country," which is defined by act of Congress to include all reservation lands and other kinds of Indian lands.[13] These three principles, generally, are in strongest force within the boundaries of Indian Country.

It is useful to examine these three principles in detail to understand how they operate in modern federal Indian law and policy. First, Congress's plenary and exclusive power allows Congress to enact statutes defining the "metes and bounds" of tribal and state sovereignty in Indian affairs.[14] Congress has delegated enormous authority to implement federal Indian policy to the executive branch, particularly the Secretary of Interior.[15]

It is the federal government's plenary power over Indian affairs that provide the authority for the United States to recognize Indian tribes. There are 562 federally recognized Indian tribes.[16] Many of these tribes are signatories to treaties with the United States. Many of these tribes have been recognized by an act of Congress or federal court order. And still others have been recognized by the Department of Interior. There are many others – no one knows how many, but likely relatively few – that are not (but should be) federally recognized. The federal government recognizes the inherent sovereignty of these 562 Indian tribes.

This federal recognition has import in many, many ways. For example, Congress appropriates money to the Bureau of Indian Affairs, the Indian Health Service, and the Department of Housing and Urban Development, each of which then spend that money (or deliver that money) to federally recognized tribes, who use the money to operate tribal government services ranging from health care to public safety to housing to employment training and education, and many other services.[17] Indian tribes also use their own, independently generated revenues to fund these programs.[18] Key government services paid for by federal and tribal money includes courts of record developed and operated by the tribes, law enforcement departments, and jail facilities.

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Second, there is a long tradition of excluding state governments from Indian Country, dating back to the Constitution. According to James Madison, one of the serious flaws of the Articles of Incorporation was the failure of the Articles to exclude state governments from Indian affairs.[19] States began competing with the federal government for the right to acquire Indian lands and to control Indian commerce, creating tension among the states and with the United States government. The lack of federal control over Indian affairs weakened the nation's position in relation to Great Britain, France, and Spain, each of which had significant and powerful allies among the Indian nations. The Framers intended the so-called Indian Commerce Clause to exclude state governments from the field of Indian commerce, while the federal government's treaty power would be used to deal with Indian tribes as independent sovereign nations.[20] The First Congress enacted the Trade and Intercourse Act as a means to implement the Indian Commerce Clause. But states continued to assert authority to deal in Indian affairs, including executing treaties with Indian tribes, negotiating major Indian land purchases, and asserting their police powers on Indian lands, but they did so in violation of federal law.[21] The situation came to a head in the Cherokee cases, in which the Supreme Court finally declared the State of Georgia's efforts to legally and politically destroy the Cherokee Nation null and void. The Court held that state laws had "no force" in Indian Country.[22]

In the modern era, the notion that state laws have no force in Indian Country is riddled with exceptions, both statutory

12. Felix S. Cohen, Handbook of Federal Indian Law 122 (1941); *see also* Cohen's Handbook of Federal Indian Law 2 (Nell Jessup Newton et al. eds., 2005).
13. 18 U.S.C. § 1151.
14. United States v. Lara, 541 U.S. 193, 201 (2004).
15. *See, e.g.*, 25 U.S.C. §§ 2, 9.
16. *See* Department of Interior, Bureau of Indian Affairs, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18553 (April 4, 2008).
17. *See generally* Cohen's Handbook of Federal Indian Law § 22.02, at 1346-55 (Nell Jessup Newton et al., eds. 2005) (Indian Self-Determination and Education Assistance Act); *id.* § 22.04, at 1375-87 (Indian Health Service); *id.* § 22.05, at 1387-1400 (housing).
18. *E.g.*, Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the United States Attorney for the Western District of Michigan, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002).
19. *See* The Federalist No. 42, at 284-85 (Madison) (J.E. Cooke ed., 1961).
20. *See* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1149 (1995).
21. From these actions arose the so-called Eastern Land Claims that still cost Congress and the northeastern states enormous time and expense. *See generally* Robert N. Clinton & Margaret T. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17 (1979).
22. Worcester v. Georgia, 31 U.S. 515, 561 (1831).

State courts have no jurisdiction over civil cases brought against individual Indians for disputes arising in Indian Country, with limited exceptions

and in the common law, but the general rule remains.[23] States may not tax the on-reservation income,[24] the land,[25] or the property of individual Indians,[26] and have no authority over Indian tribes whatsoever.[27] States have no authority to regulate Indian lands, except in extremely narrow circumstances.[28] State courts have no jurisdiction over civil cases brought against individual Indians for disputes arising in Indian Country, with limited exceptions.[29] And states have no authority to prosecute on-reservation crimes committed by Indians, also with limited exceptions.[30]

The limited exception relevant here is a statute commonly referred to as Public Law 280, a 1953 congressional act extending state government civil and criminal jurisdiction over Indian Country in five states, and authorizing other states to assert jurisdiction if they chose.[31] Other than the six mandatory states – California, Minnesota, Wisconsin, Nebraska, and Wisconsin, with Alaska being added upon statehood in 1959 – several other states chose to assert jurisdiction over some classes of crimes. Congress removed federal jurisdiction in these areas at the same time. However, as a general matter, Public Law 280 was a failure on the ground. Congress did not appropriate money for the mandatory states to take over Indian Country criminal-law enforcement, and many areas of Indian Country literally became lawless as a result.[32] Recent and ongoing studies have concluded that Public Law 280 may actually have increased crime rates in Indian Country, and surely have decreased tribal-state cooperation.[33]

The third major federal Indian law principle is the inherent sovereignty of Indian tribes. It is a common misconception that Indian treaties were a grant of land and authority to Indian tribes, when the reverse is true. Indian treaties are *reservations* of land and authority by Indian tribes. If a tribe did not relinquish a sovereign right in the treaty, it remains.[34] The exception to this rule is that Congress has authority, according to the Supreme Court, to divest aspects of tribal sovereignty if it so wishes.[35] And finally, the Supreme Court has asserted in recent decades the authority to divest Indian tribes of authority.[36]

Because Indian tribes have independent and inherent sovereignty, tribes retain the authority to make laws and be ruled by them.[37] Since before the beginning of the American Republic, some Indian tribes have exercised their sovereignty to enact criminal codes, establish courts, and exercise criminal jurisdiction over individuals, Indian and non-Indian. Indian nations long have exercised non-Anglo-style law-enforcement authority, and some still do exercise this kind of governmental authority. It was the Cherokee Nation of Georgia in the 1820s that likely was the first Indian nation to establish a written constitution and criminal code, a court system, and a formalized law-enforcement mechanism. By the 1970s, only several dozen Indian nations exercised criminal jurisdiction over individuals.[38] And now, perhaps *three hundred* Indian nations exercise criminal jurisdiction, or soon will.[39]

II. TRIBAL LAW ENFORCEMENT AND TRIBAL CRIMINAL JURISDICTION

Relatively simple fundamental principles of federal Indian law tend to fall by the wayside on the ground. Often, it is not

23. The Supreme Court in 1973 stated, "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 172 (1973). But the Court still held, after parsing through the relevant treaties and Acts of Congress, that Arizona's taxation of the income of reservation Indians was invalid. *See id.* at 165.
24. *See* Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114, 124 (1993).
25. *See McClanahan*, 411 U.S. 164; Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).
26. *See* Bryan v. Itasca County, 426 U.S. 373, 377 (1978).
27. Indian tribes are immune from suit by state governments in any court, absent their consent or an act of Congress. *See* Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 509-10 (1991).
28. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983).
29. *See* Williams v. Lee, 358 U.S. 217, 220-21 (1959).
30. *See*, *e.g.*, Langley v. Ryder, 778 F.2d 1092, 1095 (5th Cir. 1985) (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 n.17 (1978)).
31. Act of August 15, 1953, 67 Stat. 588. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, §6.04[3], at 544-81. Before this statute, Congress had extended state criminal jurisdiction to Indian Country in Kansas and New York. *See id.* § 6.04[4][a], at 581-83 (New York); *id.* § 6.04[4][b], at 583-84 (Kansas, and some reservations in Iowa and North Dakota).
32. *See* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975).
33. *See* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006).
34. *See* United States v. Winans, 198 U.S. 371, 381 (1905) (holding that Indian treaties are "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.").
35. *E.g.,* Johnson v. M'Intosh, 21 U.S. 543 (1823) (holding in dicta that Congress can divest Indian tribes and individual Indians of the authority to alienate certain forms of Indian property).
36. *E.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that Indian tribes have no authority to prosecute non-Indians, even absent an Act of Congress stating so); Montana v. United States, 450 U.S. 544 (1981) (holding that Indian tribes have no civil regulatory authority over nonmembers unless non-member activity meets one of two limited exceptions).
37. *See* Williams v. Lee, 358 U.S. 217, 220-21 (1959).
38. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196 n.7 (1978).
39. *See* Bureau of Justice Assistance, Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America 6 (October 2005), *available at* http://www.law.und.edu/tji/web_assets/pdf/PathwaysReport.pdf.

easy to know where "Indian Country" begins and ends in every situation. Moreover, since many American Indians by blood are not enrolled with a federally recognized Indian tribe, it is often not clear who is an Indian victim or perpetrator. Congress has experimented with granting a few state governments criminal and civil jurisdiction over some areas of Indian Country. And there are three kinds of sovereigns charged with authority to investigate and prosecute crime in Indian Country. Indian Country criminal jurisdiction is accurately described as a "maze."[40]

In states where no act of Congress such as Public Law 280 has conferred criminal jurisdiction onto the state government, the primary sovereign with felony jurisdiction is the federal government. Under a mishmash of statutes, such as the Major Crimes Act,[41] the Indian Country Crimes Act,[42] and the Assimilative Crimes Act,[43] the United States has jurisdiction over all Indian Country crimes perpetrated against Indians or tribal property. Federal prosecutors have exclusive jurisdiction over Indian Country crimes committed by non-Indians. Unfortunately, local United States Attorneys' Offices often are ill-equipped to deal with Indian Country crime. Budgetary, political, and geographic difficulties impede federal law enforcement, especially in the government's misdemeanor docket. Very, very few misdemeanor crimes committed by non-Indians in Indian Country are ever seriously investigated, let alone prosecuted. In recent years, there has been an explosion of violence against Indian women as well as dramatic increases in methamphetamine dealing and possession in Indian Country that many have attributed at least partially to the lack of effective federal law enforcement.[44]

Indian tribes may assert jurisdiction over all crimes committed by Indians within Indian Country, but they have no jurisdiction over crimes committed by non-Indians.[45] Moreover, Congress has severely reduced tribal sentencing authority to one year in jail and a $5,000 fine, effectively limiting tribal criminal jurisdiction to misdemeanors.[46] And Congress's acquiescence in the Supreme Court's determination that Indian tribes cannot have criminal prosecution over non-Indians has allowed a veritable criminal loophole to grow over the past 30 years. Tribal police at least have the authority to detain suspects even if the tribe does not have criminal jurisdiction over them.[47]

Even in states that have criminal jurisdiction in Indian Country, Indian Country crimes rates remain high. State investigators and prosecutors have the same difficulties that the federal government has in prosecuting Indian Country crime. Local police often are not local to Indian Country, nor do local prosecutors have political incentives to spend state resources on Indian Country, which does not contribute much to the local tax base.

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However, in the past 30 years or so, the capacity of Indian tribes to investigate and enforce their own criminal laws is growing exponentially. Tribal gaming money, coupled with federal grants and appropriations, helped to fuel this growth. Moreover, congressional legislation such as the Indian Civil Rights Act and the various Indian Self-Determination Acts has encouraged tribal governments to become more capable of governing. Finally, several of the Supreme Court's Indian law decisions, even ones that are skeptical of tribal sovereignty, have helped to encourage Indian tribes to develop tribal court systems and law-enforcement departments.

The growth and development of tribal law-enforcement capacity has spurred, though often very grudgingly, cooperation between Indian tribes, states, and local units of government.[48] In many states, the State of Michigan being a prime example, Indian tribes routinely enter into law-enforcement cooperative agreements with municipal governments.[49] These intergovernmental agreements may take many forms, with the cross-deputization agreements being one of the most common. In areas of Indian Country where reservation boundaries are not well-defined or even are contested by the parties, intergovernmental agreements blur or even erase the jurisdictional lines and help to avoid the serious problem of criminal suspects getting off because of a jurisdictional technicality.

Coupled with law-enforcement cooperative agreements, tribal courts and state courts also are routinely entering into agreements, usually represented by tribal and state court rules, in which the courts will recognize the judgments of the other courts along the lines of the comity given to the courts of foreign nations.[50] However, in some states and in some areas of

40. *See* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).
41. 18 U.S.C. § 1153.
42. 18 U.S.C. § 1152.
43. 18 U.S.C. § 13.
44. *See* Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, American Constitutional Society Issue Brief 5-7 (March 2009), *available at* http://www.acslaw.org/files/Fletcher%20Issue%20Brief.pdf.
45. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
46. 25 U.S.C. § 1302(7).
47. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, § 9.07, at 764 n.235 (citing Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975); State v. Haskins, 887 P.2d 1189 (Mont. 1994); Ryder v. State, 648 P.2d 774 (N.M. 1982); State v. Pamperien, 967 P.2d 503 (Or. App. 1998); Primeaux v. Leapley, 502 N.W.2d 265 (S.D. 1993); State v. Schmuck, 850 P.2d 1332 (Wash. 1993)).
48. *See* Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 FED. LAW., March/April 2006, at 38; Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007).
49. *E.g.*, Deputization Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and Leelanau County, March 19, 1997, http://www.ncai.org/ncai/resource/agreements/mi_grand_traverse_deputization-3-19-1997.pdf.
50. *E.g.*, MICH. CT. RULE 2.615.

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law, the judgments of tribal courts must be given the same full faith and credit as state and federal courts give each other. The Violence Against Women Act and the Indian Child Welfare Act, for example, require state and tribal courts to give full faith and credit to each other's judgments and orders for purpose of enforcing those Acts.[51]

Finally, there is the likelihood in the coming years that Congress will see fit to expand current contours of tribal criminal jurisdiction to increase tribal sentencing capacity or even to restore tribal criminal jurisdiction over non-Indians for certain classes of crimes. Given the spectacular increase in Indian Country crime, it is likely that Congress will take some action, but it is not clear what Congress will choose to do. The leading discussion bill currently is the so-called Tribal Law and Order Act, which would expand tribal criminal-sentencing capacity to three years for some crimes.[52]

III. THE SPECIAL PROBLEM OF TRIBAL COURT CONVICTIONS AND COMITY

As Indian tribes develop the capacity to investigate and prosecute Indian Country crime, state and federal courts are increasingly faced with the question of how to handle prior tribal court convictions. As the two cases mentioned in the introduction suggest, there are multiple ways of handling these prior convictions. As some Michigan courts have done, the court could recognize the tribal court conviction for purposes of sentencing or establishing a prior criminal history. Or as some states and federal courts have done, the court could ignore those prior convictions. There are plusses and minuses to each path.

The United States Federal Sentencing Guidelines allow, but do not require, federal courts to consider prior tribal court convictions for purposes of sentencing.[53] As such, federal judges have significant discretion on the weight to place on tribal court convictions. Federal judges who know nothing about tribal courts, understandably, might be less inclined to give them much weight. The few federal judges who do know something about tribal courts have a great deal to teach other judges. Consider South Dakota federal district court Judge Charles Kornmann's commentary about criminal trials in the Rosebud Sioux Tribal Court:

> This Court respectfully disagrees with the statements in [*United States v.*] *Doherty* that tribal court proceedings are informal and not adversarial and that Congress did not wish to impose on such systems "an exclusionary rule that presumes the existence of an adversarial method of trying criminal cases." … I have no information as to how a tribal court serving a total tribal membership of 300 people works in the upper peninsula of Michigan. I do have knowledge how tribal courts dealing with thousands of Native Americans work in South Dakota. In particular, I have knowledge and take judicial notice as to how the tribal court in Rosebud works. I am also aware that federal courts are obligated to extend respect and act with principles of comity toward tribal courts. I decline to jump to the assumptions or conclusions advanced in *Doherty* that tribal courts, and by extension the tribal court on the Rosebud, operate as something of a family gathering and counseling session. The description of the tribal court in *Doherty* sounds, very frankly, like a description of "teen courts" now in vogue in various high schools. That is not the way the Rosebud Sioux Tribal Court works in South Dakota and it is clear that, at least in the present case, criminal adversarial judicial proceedings had been initiated. Red Bird, unlike Doherty, had more than "the mere existence of a statutory right to counsel…." Nor is there any evidence or argument to suggest that tribal court criminal prosecutions in South Dakota and particularly in Rosebud are not adversary proceedings. They are "adversary judicial criminal proceedings." … They are certainly adversarial in the eyes of the Rosebud Sioux Tribe or a public defender's office would not have been established and funded. While sentences resulting from tribal court convictions are not counted in computing the criminal history of a defendant who is later to be sentenced in federal court, they may be considered under U.S.S.G. § 4A1.3 (adequacy of criminal history category). *See* U.S.S.G. § 4A1.2 (i). The government sometimes argues for an upward departure based upon a defendant's previous convictions or even charges pending in tribal court. Such convictions are certainly matters to be considered by the sentencing judge.[54]

The Sixth Circuit in *Doherty* had cited to the legislative history of the Indian Civil Rights Act where "[w]itnesses … testified that a wholesale exportation of the Sixth Amendment to the tribes would be not be [sic] feasible; since many tribes do not have prosecutorial systems, but instead rely on informal and non-adversarial questioning from the tribal courts, the introduction of outside defense counsel could 'disrupt the entire court system.'"[55] Incidentally, Michigan's modern tribal

51. 25 U.S.C. § 1911(d) (Indian Child Welfare Act); 28 U.S.C. § 1738A (Violence Against Women Act).
52. S. 797, 111th Cong. (2009); H.R. 1924, 111th Cong. (2009).
53. *See* U.S.S.G. § 4A1.2(i).
54. United States v. Red Bird, 146 F. Supp. 2d 993, 998-99 (D. S.D. 2001) (discussing United States v. Doherty, 126 F.3d 769 (6th Cir. 1997); other citations omitted). Judge Kornmann later wrote that he opposed amending the United States Sentencing Guidelines to treat tribal court convictions in the same manner as state or local misdemeanor convictions. *See* Charles Kornmann, *Commentary on Reconsidering the Commission's Treatment of Tribal Courts,* 17 FED. SENTENCING RPTR. 222 (2005).
55. *Doherty*, 126 F.3d at 780 (citing *Hearings on S. 961-968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. (1965)).

courts are adversarial courts much like the South Dakota tribal courts described by Judge Kornmann.[56]

The critical question is the right to indigent counsel. As the Supreme Court long ago recognized in *Talton v. Mayes*,[57] Indian tribes are not subject to the Constitution, having not been party to the Convention nor having ratified the text. As such, at least until 1968, Indian tribes are not beholden to the Constitution's criminal-procedure duties. In 1968, Congress purported to apply the Bill of Rights to Indian tribes in the Indian Civil Rights Act, also known as the Indian Bill of Rights.[58] But the key question is the substantive deviations of the Indian Bill of Rights to the Constitution; namely, the fact that the Indian Bill of Rights does not contain a right to indigent legal defense.[59]

It is worth recalling the legal landscape in 1968 in Indian Country. In 1968, many tribal courts were creatures of the federal government, so-called Courts of Indian Offenses (CIOs) or CFR Courts created and regulated by the Department of Interior.[60] These courts enforced Law and Order Codes, also promulgated by the Department of Interior, and usually a local Bureau of Indian Affairs official dominated the proceedings. In many CIOs or CFR Courts, the tribal judge was not law-trained, the tribal prosecutor was also the tribal chief of police, and lawyers were not allowed in the tribal courtroom. In the hearings leading up to the Indian Civil Rights Act, many tribal witnesses complained of abuses by tribal judges and tribal police officers though, to be fair, these stories were anecdotal and outnumbered by complaints about abuses by federal and state officials.[61] In the lead up to the passage of the Act, the Department of Interior and Department of Justice complained that a right to indigent counsel would require the United States to foot the bill for public defenders, and so Congress did not mandate the right to indigent counsel.[62] Importantly, however, Congress did authorize the right to counsel, effectively wiping out tribal laws (often pushed through by federal officers) banning lawyers in tribal courts.

Modern tribal courts are nothing like the CIOs and CFR Courts. More and more tribal judges are lawyers, and those non-law-trained tribal judges often have lawyer clerks or consultants. More and more tribal governments provide for public defenders, although that number is still a distinct minority. More and more tribal courts are conducting jury trials with juries consisting of people representative of the tribal community, including non-Indians. And modern tribal courts are courts of record, with tribal court opinions being generated and published in periodicals like the *Indian Law Reporter*, and online on tribal court websites and on VersusLaw and Westlaw.

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Luckily, there are a few valuable cases from which state judges can draw upon to determine whether to give credence to a prior *uncounseled* tribal court conviction. The cases roughly follow two parallel tracks. In the first track, the court weighs the impact of assessing the prior conviction on the tribe's sovereignty. In the second track, the court applies the analysis of *Nichols v. United States*, a 1994 Supreme Court opinion.[63]

The first track tends to focus on the tribal sovereignty aspects of considering a prior uncounseled tribal court conviction. In *State v. Spotted Eagle*, for example, the Montana Supreme Court held that prior *uncounseled* misdemeanor tribal court convictions may be used in Montana courts for purpose of sentencing:

> Montana judicial policy avoids interfering with the tribal courts and the respective tribe's sovereignty. … This Court treats tribal court judgments with the same deference as those of foreign sovereigns as a matter of comity. … In most instances, comity requires this Court to give full effect to the judgments of foreign sovereigns.… Comity requires that a court give full effect to the valid judgments of a foreign jurisdiction according to that sovereign's laws, not the Sixth Amendment standard that applies to proceedings in Montana.
>
> To disregard a valid tribal court conviction would imply that Montana only recognizes the Blackfeet Tribe's right to self-government until it conflicts with Montana law. Moreover, it would suggest that Montana recognizes the legitimacy of the judgments of the tribal courts to the extent that the procedures mirror Montana procedure. Such a position would contradict the judicial policy of this state and indirectly undermine the sovereignty of the Blackfeet Tribe.[64]

There was a lone dissenter in the 4-1 decision, who rhetorically stated: "In true oxymoronic fashion, our Court has said to Mr. Spotted Eagle, 'Out of deference to your Tribe, we accord

56. *See* Michael D. Petoskey, *Tribal Courts*, 67 MICH. B. J. 366, 368-69 (1988); Matthew Fletcher & Zeke Fletcher, *A Restatement of the Common Law of the Grand Traverse Band of Ottawa and Chippewa Indians*, 7 TRIBAL L. J. 1 (2008).
57. 163 U.S. 376 (1896).
58. *See* 25 U.S.C. § 1302; Matthew L.M. Fletcher, *Indian Bill of Rights*, 2 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 806 (2006).
59. *See* 25 U.S.C. § 1302(6) ("No Indian tribe in exercising powers of self-government shall … deny to any person in a criminal proceeding the right … at his own expense to have the assistance of counsel for his defense….").
60. *See generally* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 82-89 (1983).
61. *See* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 247-48 (2004).
62. *See* JOHN R. WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 240 (1994); *see also* United States v. Doherty, 126 F.3d 769, 780 (6th Cir. 1997) ("In particular, tribal representatives testified that their governments could not afford to provide counsel to indigent defendants, and that a bill that required them to do so without providing for federal funding would be disastrous.").
63. 511 U.S. 738 (1994).
64. 71 P.3d 1239, 1245 (Mont.) (citations omitted), *cert. denied*, 540 U.S. 1008 (2003).

[S]tate courts should consider their own constitutional rights and rules.

you fewer protections than guaranteed to individual citizens by the Montana Constitution.'"[65] There is some scholarly dispute about whether deference to tribal sovereignty is sufficient to justify the consideration of prior uncounseled tribal court convictions in federal court for sentencing purposes,[66] but there are more sound constitutional reasons that will allow state and federal courts to set adequate standards for the consideration of tribal court convictions. To understand the argument, it is worth assessing how *Nichols v. United States* may affect the analysis.

The *Spotted Eagle* Court relied upon a Tenth Circuit decision, *United States v. Benally*, which reached the same conclusion without significant analysis, other than to note that tribes are not required to provide paid counsel to indigent defendants.[67] The Tenth Circuit also has held that guilty pleas before tribal courts may be introduced in federal courts for purposes of direct impeachment of defendant testimony.[68] A more recent Tenth Circuit opinion rejected a claim that to consider prior uncounseled tribal court convictions was a violation of the Equal Protection Clause, relying heavily on *Nichols*.[69]

In *Nichols*, the Court held that that prior uncounseled federal court convictions could be used for sentencing purposes if no prison term resulted from the prior conviction.[70] The Eighth Circuit refused to consider prior uncounseled tribal court convictions in *United States v. Norquay*,[71] but that opinion was later abrogated by the court in a non-Indian-law-related case.[72] In *Norquay*, the court (speaking without the benefit of the *Nichols* decision), stated:

> The Supreme Court has stated that misdemeanor convictions obtained in the absence of counsel for the defendant may not be used as a basis for enhancing a sentence of imprisonment to be imposed upon a defendant.… At least one appellate court has held, in addition, that where a defendant was not represented by counsel at tribal court proceedings, any consequent tribal court conviction may not be used as a basis for upward departure. *United States v. Brady*…. We believe this is to be a correct statement of the law.[73]

The Ninth Circuit in *United States v. Brady*, referenced in *Norquay*, held that prior uncounseled tribal court convictions resulting in imprisonment could not be used by federal courts for sentencing purposes.[74] The court wrote:

> [B]oth of Brady's convictions were obtained in uncounseled proceedings. The Sixth Amendment requires that "no indigent criminal defendant be sentenced to a *term of imprisonment* unless the State has afforded him the right to assistance of appointed counsel in his defense." ... We agree … that an "uncounseled misdemeanor conviction [may] not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction." ...
>
> The government's main argument is that the prior tribal convictions played only a small role in the departure. Because the sentencing court did not indicate the extent each factor played in the sentence departure, it is impossible to determine the precise sentence enhancement attributable to the court's reliance on the uncounseled convictions. Nonetheless, we hold that any term of imprisonment imposed on the basis of an uncounseled conviction where the defendant did not waive counsel violates the Sixth Amendment….[75]

The *Brady* opinion predates the *Nichols* decision and therefore may be suspect, but the reasoning should survive. In *Brady*, the court noted that the prior tribal court convictions resulted in jail terms, albeit shorter than 30 days.[76] But under *Nichols*, the key is whether the prior uncounseled convictions resulted in jail terms, and so the outcome in *Brady* would have been same even after *Nichols*.[77]

As such, while there is no definitive Supreme Court statement on the subject, it is likely that federal courts may use prior uncounseled tribal court convictions, so long as those convictions did not result in jail time.

How does this affect state courts? Well, it doesn't, because state courts should consider their own constitutional rights and rules. For example, in a case decided before *Nichols*, the New Mexico Court of Appeals in *State v. Watchman* refused to consider prior uncounseled tribal court convictions.[78] However, a later NM appellate court overruled *Watchman* after *Nichols* (a non-Indian law case); thus, *Watchman* may no longer be good law.[79]

65. *Id.* at 1246 (Leaphart, J., dissenting).
66. *Compare* Kevin K. Washburn, *Reconsidering the Commission's Treatment of Tribal Courts*, 17 FED. SENTENCING RPTR. 209 (2005), *with* Jon M. Sands & Jane L. McClellan, *Commentary: Policy Meets Practice: Why Tribal Court Convictions Should Not Be Counted*, 17 FED. SENTENCING RPTR. 215 (2005).
67. 756 F.2d 773, 779 (10th Cir. 1985).
68. *See* United States v. Denetclaw, 96 F.3d 454, 458 (10th Cir. 1996), *cert. denied*, 519 U.S. 1141 (1997). The court did not discuss whether the guilty pleas were made while being represented by counsel.
69. *See* United States v. Lonjose, No. 01-2303, 42 Fed. Appx. 177 (10th Cir. June 19, 2002) (citing Nichols v. United States, 511 U.S. 738 (1994)).
70. 511 U.S. at 746-47.
71. 987 F.2d 475 (8th Cir. 1993).
72. *See* United States v. Thomas, 20 F.3d 817 (8th Cir. 1994) (en banc).
73. *Norquay*, 987 F.2d at 482 (citing *Brady*, 928 F.2d 844, 853-54 (9th Cir. 1991); other citations omitted).
74. 928 F.2d at 854.
75. *Id.* (citations and quotations omitted).
76. *See id.* at 853.
77. Another Ninth Circuit case following *Brady* is United States v. Grey Hawk, No. 91-30385, 977 F.2d 592 (Table), 1992 WL 245979 (Sept. 30, 1992).
78. 809 P.2d 641 (N.M. App. 1991), *cert. denied*, 807 P.2d 221 (N.M. 1991).
79. *See* State v. Hosteen, 923 P.2d 595 (N.M. App. 1996).

That brings us to the Michigan Court of Appeals in *People v. Wemigwans*.[80] The court there, in an unpublished per curiam opinion, described the workings of a modern typical modern American tribal court:

> There are many significant similarities between the criminal procedure followed in the tribal court and the procedure followed in Michigan courts. The record establishes that defendant was informed of the following rights and opportunities: to be informed of the nature and the cause of the accusations against him; to be confronted with witnesses against him; to have a speedy and public trial in which he could present witnesses in his favor; to have a trial by jury, in which the government has the burden to prove defendant's guilt beyond a reasonable doubt; to be protected against self-incrimination and to be free from the threat of double jeopardy; to have counsel at his own expense; and to be protected against cruel or unusual punishment, excessive bails, or fines. Indian Civil Rights Act, 25 USC § 1302. These rights are substantially similar to rights afforded defendants in Michigan courts.
>
> The tribal court informed defendant of his rights prior to accepting each of his guilty pleas. In both prior cases before the tribal court, the tribal judge tested defendant's competency before accepting his pleas. The record establishes that defendant acted freely, made a knowing and voluntary waiver of the many rights that were enumerated to him prior to his pleas, and made an intelligent, informed and conscious decision to plead guilty in each case. In so doing, defendant received the benefit of sentencing agreements that eliminated the threat of long-term incarceration. In addition to the protections of the Indian Civil Rights Act, defendant had, among other things, the right to access the tribal appellate courts. Saginaw Chippewa Tribal Code §§ 1.513, 1.514. Defendant elected not to assert his right to seek appeal of the tribal convictions.[81]

Of import, while the tribal court in *Wemigwans* had sentenced the defendant to 60 days in jail, the sentence was suspended, bringing the case into the *Nichols* framework.[82] The Michigan appellate court reviewed the convictions under principles of comity, as would be used for any foreign court judgment, and concluded that despite the uncounseled character of the convictions, Michigan courts could use them:

> The only significant difference between the procedural process afforded in the two judicial systems, as pointed out by the trial court, relates to the appointment of counsel to indigent defendants. Under Michigan law, if defendant established indigency and the risk of incarceration, then he would have been entitled to the benefit of counsel. Under tribal law, a defendant receives no such guarantee. Instead, a defendant only receives the benefit of counsel at his own expense. Preliminarily we note that Michigan law does not require that all process be identical. Rather, we review in its entirety the process afforded defendant in the foreign jurisdiction for an intolerably high risk of unfairness. In the present case, the substantive laws in question are identical, the procedural protections afforded in the foreign jurisdiction are generally consistent with the procedural protections afforded under Michigan law and defendant was found to have made a knowing, free and voluntary waiver of the many rights that were expressly explained to him in order to tender a plea of guilty. Thus, it would not be without reason to conclude, regardless of defendant's indigency status, that defendant was afforded sufficient due process in the foreign jurisdiction to allow the use of the foreign convictions for purposes of enhancing the charge against defendant.[83]

A second issue involves the question of whether the tribe in a prior conviction has provided access to "lay advocates," or law-trained individuals who are not licensed attorneys. Judge Kornmann's flat rejection of the quality of lay advocates – they do not "cut it"[84] – seems reasonable for tribal court convictions resulting in jail time.

IV. CONCLUSION

In the coming years, state and federal judges will increasingly be confronted with prosecutors introducing prior tribal court convictions for sentencing and enhancement purposes. This article hopefully provides a sufficient overview of the reasons why tribal court convictions are becoming more prevalent, why tribal court convictions usually should be entitled to comity, and what kinds of tribal court convictions should be examined carefully (namely, uncounseled convictions).

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80. 2003 WL 734257 (Mich.App.) (per curiam).
81. *Id.* at *2-3.
82. *See id.* at *3 n.3.
83. *Id.* at *3. Of note, adult members of the Saginaw Chippewa Indian Tribe receive significant gaming-revenue per capita distributions, and it is unlikely that any of them would qualify as indigent. Lincoln v. Saginaw Chippewa Indian Tribe, 967 F. Supp. 966 (E.D. Mich. 1997).
84. Konmann, *supra* note 54, at 222.