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When Tribal Disenrollment Becomes Cruel and Unusual

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I. INTRODUCTION

Headlines expressing outrage over tribal disenrollment abound.[1] Most disenrollments are based on lineage[2]—evidence surfaces suggesting that a tribal member's ancestor was not actually enrolled or eligible for enrollment—or political controversies, such as when one faction within a tribe challenges the current leadership.[3] In these contexts, most scholars argue that the solution to the disenrollment problem is to provide greater due process protections.[4]

There is a growing trend, however, to punish tribal members by revoking their membership as a result of criminal convictions—or even criminal conduct absent a conviction.[5] Tribal disenrollment for

1. *See, e.g.*, Lee Allen, *Who Belongs? The Epidemic of Tribal Disenrollment*, INDIAN COUNTRY TODAY (Mar. 28, 2017), https://indiancountrymedianetwork.com/news/native-news/belongs-epidemic-tribal-disenrollment/ [https://perma.unl.edu/6FV7-FZKS]; Cecily Hilleary, *Native American Tribal Disenrollment Reaching Epidemic Levels*, VOICE AM. NEWS (Mar. 3, 2017), https://www.voanews.com/a/native-american-tribal-disenrollment-reaching-epidemic-levels/3748192.html [https://perma.unl.edu/7TT3-A4SD]; Johnnie Jae, *Tribal Disenrollment: The New Wave of Genocide*, NATIVE NEWS ONLINE (Feb. 11, 2016), https://www.nativenewsonline.net/opinion/tribal-disenrollment-the-new-wave-of-genocide/ [https://perma.unl.edu/PX4W-3VLQ]; Brooke Jarvis, *Who Decides Who Counts as Native American?*, N.Y. TIMES MAG. (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html (noting that Professor David Wilkins estimates that between 5,000 and 9,000 tribal members have been disenrolled over the past twenty years).
2. *See, e.g.*, Jeffredo v. Macarro, 590 F.3d 751, 755, 760 (9th Cir. 2009); DAVID E. WILKINS & SHELLY HULSE WILKINS, DISMEMBERED 108–14 (2017); Nina Shapiro, *Nooksack Tribe Boots Out 300 Members, Faces Showdown with Feds*, SEATTLE TIMES (Nov. 23, 2016), https://www.seattletimes.com/seattle-news/northwest/nooksack-tribe-disenrolling-hundreds-in-high-stakes-showdown-with-feds/ [https://perma.unl.edu/CAA5-3CU9].
3. *See, e.g.*, Quair v. Sisco (*Quair I*), 359 F. Supp. 2d 948, 955, 977 (E.D. Cal. July 26, 2004) (finding the court had jurisdiction to consider due process challenges by a tribal member who led a successful recall of tribal leaders and was subsequently disenrolled); Brown v. Garcia, 225 Cal. Rptr. 3d 910, 911, 917 (Ct. App. 2017) (dismissing on sovereign immunity grounds a suit challenging disenrollment of members involved in a "decades-long backdrop of disputes over Tribal leadership").
4. *See, e.g.*, WILKINS & WILKINS, *supra* note 2, at 60; Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1074, 1108 (2007); Deron Marquez, *Citizenship, Disenrollment & Trauma*, 53 CAL. W. L. REV. 181, 183, 196–97 (2017); *Formal Ethics Op. No. 1: Duties of Tribal Court Advocates to Ensure Due Process Afforded to All Individuals Targeted for Disenrollment*, NAT'L NATIVE AM. BAR ASS'N 1 (2015), http://www.nativeamericanbar.org/wp-content/uploads/2014/01/Formal-Opinion-No.-1.pdf [https://perma.unl.edu/8L3B-624E].
5. WILKINS & WILKINS, *supra* note 2, at 20. This trend may extend beyond Indian tribes; Britain apparently stripped citizenship from two ISIS fighters known as "the Beatles" who are accused of torturing and beheading several civilians, including Americans. *See* Adam Goldman et al., *Britain Presses U.S. to Avoid Death Penalty for ISIS Suspects*, N.Y. TIMES (Feb. 28, 2018), https://www.nytimes.com/2018/02/28/us/politics/britain-death-penalty-isis.html.

criminal conduct has not attracted the same attention and does not provoke the same ire as lineage-based or political-based disenrollment. Commentators and tribal members themselves seem to take for granted that it is proper for tribes to disenroll members for criminal convictions or "bad" conduct.[6]

This Article argues that tribal disenrollment for criminal conduct constitutes cruel and unusual punishment in violation of the Indian Civil Rights Act.[7] This Article proceeds in five parts. Part I traces the development of the cruel and unusual punishment doctrine, which established that the United States cannot revoke citizenship as a result of criminal conduct.[8] In *Trop v. Dulles*,[9] the Supreme Court held that the federal statute resulting in loss of citizenship was unconstitutional, even though the underlying criminal conviction was wartime desertion.[10] In the sixty years since *Trop*, the Court has found that a growing number of punishments qualify as "cruel and unusual" because they offend the "dignity of man" based on "evolving standards of decency."[11]

Part II explains that, although federal constitutional limitations are not generally applicable to American Indian tribes, the Indian Civil Rights Act extends certain Bill of Rights protections and makes them expressly applicable to tribes.[12] The prohibition on cruel and unusual punishment is one of those protections.[13]

The various methods used by tribes both historically and currently to punish members engaged in criminal activity are described in Part III. Historically, tribes responded to criminal (or other anti-social) conduct with peacekeeping and restorative justice mechanisms aimed at solving the underlying problem and restoring harmony.[14] In extreme cases, banishment—prohibiting a tribal member from being present on all or a portion of tribal lands—was used both to incapacitate and

6. *See, e.g.*, WILKINS & WILKINS, *supra* note 2, at 156; Marc Cooper, *Tribal Flush: Pechanga People "Disenrolled" en Masse*, L.A. WKLY. (Jan. 2, 2008), http://www.laweekly.com/news/tribal-flush-pechanga-people-disenrolled-en-masse-2151380 [https://perma.unl.edu/LQJ2-K3MJ] (arguing that disenrollment was improper and noting that the disenrolled members "were accused of no crime, no misbehavior, no wrongdoing, no disloyalty"); Jae, *supra* note 1 (asserting that tribal members should not be disenrolled "unless they are found to be dually enrolled or their criminal behavior poses an ongoing threat to their tribal communities" because these "are the only two instances in which the revocation of tribal membership should be tolerated").
7. 25 U.S.C. § 1302(a)(7)(A) (2012).
8. Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion).
9. *Id.*
10. *Id.* at 88.
11. *Id.* at 101; *see infra* notes 73–85 and accompanying text.
12. 25 U.S.C. § 1301 (2012).
13. 25 U.S.C. § 1302(a)(7)(A) (2012).
14. *See infra* notes 123–132 and accompanying text.

rehabilitate the offender.[15] However, banishment was almost always temporary. Many tribes have retained, or are returning to, historical methods of addressing crime in Indian country, but many also employ more traditional western responses to criminal conduct, such as arrest, trial (or plea bargaining), and sentencing in a formal court of law, with punishments including incarceration. Disenrollment—the permanent removal of a tribal member from tribal rolls—is a relatively recent response to criminal activity, and one that is growing in both consideration and use.[16]

Part IV argues that tribal disenrollment is equivalent to the loss of citizenship. Citizens of tribal nations share a national identity, just as Americans do. Citizenship entails significant tangible and intangible features in both the tribal context and the federal context, including providing individuals with a culture, an identity, and a community, and distinguishing citizens from outsiders.

This Article concludes that although membership is within tribes' sovereign powers, once a tribe decides to grant membership to an individual, disenrollment imposed in response to criminal behavior constitutes punishment forbidden by the Indian Civil Rights Act.[17] Revoking citizenship for reasons other than mistake, fraud,[18] or some voluntary act relinquishing citizenship goes beyond the sovereign power. Despite the reality that criminal conduct on most reservations is a significant problem, Congress has significantly limited the available tribal responses, and federal and state law enforcement has been woefully inadequate at addressing the problem. Historically, temporary banishment has been one option, but the trend to permanently disenroll tribal members (or consider disenrollment) as a means to deal with criminal conduct is problematic.

How can tribes effectively combat crime on their reservations? This Article suggests that consistent with their sovereign status, tribes ought to have expanded criminal jurisdiction—at least over their own members. This solution protects tribal members from cruel and unusual punishment and, at the same time, provides a mechanism for tribes to address the problem creating the impetus for disenrollment.

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15. *See infra* notes 133–140 and accompanying text.

16. *See infra* notes 164–172 and accompanying text.

17. 25 U.S.C. § 1302(A)(7)(a).

18. Sovereigns, including tribal governments, retain the limited implied right to revoke citizenship because of fraud or mistake; that right is part of the inherent right to grant citizenship. *See, e.g.*, Snowden v. Saginaw Chippewa Indian Tribe of Michigan, No. 04-CA-1017, 32 Indian L. Rep. 6047 (App. Ct. Saginaw Chippewa Indian Tribe of Mich. Jan. 7, 2005), *as reprinted in* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 253, 258 (Been et al. eds., 2011).

II. THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT

The text of the Eighth Amendment states simply that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[19] The U.S. Supreme Court has struggled to interpret this phrase. As noted by one scholar, "the Court's treatment of the Cruel and Unusual Punishments Clause" has been described "as 'embarrassing,' 'ineffectual and incoherent,' a 'mess,' and a 'train wreck.'"[20]

Despite this uncertainty, a few key principles are evident in the Court's Eighth Amendment jurisprudence. First, although retribution and deterrence are legitimate penal interests,[21] the prohibition on cruel and unusual punishment means that even convicted criminals are entitled to "civilized treatment" respecting the "dignity of man."[22] Second, punishments that were appropriate even fifty years ago may not be today, as the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[23] As communities (local, national, and international) come to view certain punishments as inappropriate under any circumstances, those punishments are deemed "cruel and unusual."[24] Third, drawing on these principles of civilized treatment respecting the dignity of man, using evolving standards of decency and recognizing some punishments are never proper, an individual cannot be stripped of his U.S. citizenship as a result of criminal conduct.[25]

The Supreme Court only declared one punishment cruel and unusual in violation of the Eighth Amendment before 1958.[26] Admittedly, the opportunities for the Court to consider the issue were limited, in large part because most punishments were meted out at the state and local level, and the Eighth Amendment was not held to apply to states until 1962.[27] But cruel and unusual was a difficult standard to meet.

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19. U.S. CONST. amend. VIII.
20. John F. Stinneford, *The Original Meaning of Unusual: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1740 (2008) (citations omitted).
21. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (upholding a death sentence for murder).
22. *See infra* notes 45–58 and accompanying text.
23. *See infra* notes 59–63 and accompanying text.
24. *See infra* notes 64–65 and accompanying text.
25. Trop v. Dulles, 356 U.S. 86, 103 (1958).
26. Weems v. United States, 217 U.S. 349, 381 (1910) (holding as cruel and unusual a punishment requiring twelve years in painful hand and feet irons at hard labor for a fraud conviction).
27. Robinson v. California, 370 U.S. 660, 666–68 (1962) (barring punishment under a state statute that criminalized being a narcotics addict because the Eighth Amendment's prohibition on cruel and unusual punishment was applicable to states via the Fourteenth Amendment), *overruling* Collins v. Johnston, 237 U.S.

In a 1910 case finding a punishment cruel and unusual, the facts were extreme: a Coast Guard disbursing officer entered two false amounts in the ship's cash book and was sentenced to fifteen years of hard labor with painful chains around his wrists and ankles.[28] The Court held, in *Weems v. United States*, that such a punishment was cruel and unusual.[29]

The Court in *Weems* acknowledged that it had not yet decided what punishments were cruel and unusual,[30] then discussed at length congressional intent,[31] dicta from earlier decisions,[32] the views of various commentators,[33] and state court decisions.[34] The Court noted that "inhuman and barbarous" treatment ("torture and the like") was implied in the prohibition but also considered the possibility of a disproportionate sentence constituting cruel and unusual punishment.[35] Ulti-

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502, 510 (1915) (pointing out that the Eighth Amendment's prohibition of cruel and unusual punishments "is a limitation upon the Federal government, not upon the states"). As noted by Professor Sigler, "the federal courts were generally not involved in regulating capital punishment, or much of local criminal justice practice of any kind." Mary Sigler, *Principle and Pragmatism in the Death Penalty Debate*, 37 CRIM. JUST. ETHICS 72, 73 (2018).

28. *Weems*, 217 U.S. at 364. He was also fined and ordered to pay court costs and subject to "(1) civil interdiction; (2) perpetual absolute disqualification; [and] (3) . . . surveillance during life." *Id.*
29. *Id.* at 381.
30. *Id.* at 368.
31. *Id.* at 368–69.
32. *Id.* at 368–71; *see, e.g.*, Wilkerson v. Utah, 99 U.S. 130, 134–36 (1878) (concluding that, despite the challenge being to a state punishment, execution by shooting—as opposed to hanging—was not a cruel and unusual punishment for murder "within the meaning of the Eighth Amendment" but "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden . . . ."); Pervear v. Massachusetts, 72 U.S. 475, 479–80 (1866) (declining to consider the merits because the Eighth Amendment applied only to the federal government but stating, with regard to a fine of $50 and three months imprisonment at hard labor for selling alcohol illegally, "[w]e perceive nothing excessive, or cruel, or unusual in this"); O'Neil v. Vermont, 144 U.S. 323, 337 (1892) (declining to consider the issue because the Eighth Amendment did not apply to state sentences but positing that being confined to hard labor for fifty-four years for 307 offenses of unlawful sale of liquor was not cruel and unusual).
33. *Weems*, 217 U.S. at 371–75.
34. *Id.* at 375–80 (noting that the federal constitutional limitation of cruel and unusual punishment was not before those state tribunals).
35. *Id.* at 368, 370, 380 (noting that as compared to the offense committed in *Weems*, there are "degrees of homicide that are not punished so severely," along with a number of other crimes). The Court added that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.* at 356–57, although proportionality is generally no longer considered in determining whether a punishment is cruel and unusual outside of the death penalty context. *See, e.g.*, Ewing v. California, 538 U.S. 11, 23 (2003) (upholding a twenty-five-year sentence for stealing three golf clubs under a recidivist statute); Rummel v. Estelle, 445 U.S. 263, 285 (1980) (upholding a mandatory life sentence for a recidivist despite his three non-violent crimes resulting in fraud of less than

mately, the Court determined that the sentence imposed "exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."[36] Significantly, the Eighth Amendment is not static but is "progressive" and "may acquire meaning as public opinion becomes enlightened by a humane justice."[37] The Court concluded that the punishment imposed in this case for fraud "amaze[s] those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths."[38]

Yet, despite finding only one violation of the Eighth Amendment in almost two centuries, in 1958, the Supreme Court held that loss of citizenship as punishment for a crime constitutes cruel and unusual punishment.[39] In *Trop v. Dulles*, the Supreme Court considered whether "forfeiture of citizenship" by a natural-born U.S. citizen, who was convicted by court-martial of wartime desertion, was constitutional.[40] In *Trop*, a soldier escaped from a stockade during World War II and was recaptured.[41] He was convicted of desertion, sentenced to hard labor for three years, and dishonorably discharged.[42] Eight years later, he applied for a passport and was denied based upon a federal statute that provided for loss of citizenship following conviction by court-martial of desertion and dishonorable discharge from the military.[43]

The Court's emphasis on civilized treatment was explicit: the power to punish must be "exercised within the limits of civilized standards."[44] The *Trop* Court focused on the *mode* of punishment imposed, concluding that fines and imprisonment—and even the death penalty—"may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."[45] It considered "whether this penalty subjects the individual to a fate forbidden by the *principle of civilized treatment* guaranteed by the Eighth Amendment."[46] The Court concluded that

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$250). And rather than being considered cruel, some harsh sentences were applauded, at least in dicta. *See, e.g.*, Howard v. Fleming, 191 U.S. 126, 136 (1903) (refusing to find prison sentences of seven and ten years for defendants convicted of fraud cruel, noting that if "the effect of this sentence is to induce like criminals to avoid its territory, North Carolina is to be congratulated, not condemned").

36. *Weems*, 217 U.S. at 381.
37. *Id.* at 378.
38. *Id.* at 356–57.
39. Trop v. Dulles, 356 U.S. 86, 101 (1958).
40. *Id.* at 87.
41. *Id.*
42. *Id.* at 88.
43. *Id.*; Nationality Act of 1940 § 401(g), 8 U.S.C. § 1481(a)(8) (1942) (repealed 1952).
44. *Trop*, 356 U.S. at 100.
45. *Id.*
46. *Id.* at 99 (emphasis added).

denationalization is a cruel and unusual punishment,[47] despite explicitly acknowledging that the crime for which the defendant was convicted, wartime desertion, could be punished by death.[48] Even though the death penalty is constitutional,[49] not every penalty short of death complies with the Constitution.[50]

The Court explained the severity of denationalization: "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."[51] "Civil death," whereby a person loses most or all civil rights and is "outside the law's protection,"[52] is simply unacceptable for criminal conduct.[53]

Furthermore, the "basic concept underlying the Eighth Amendment is nothing less than the *dignity of man*."[54] The Court concluded that denationalization is

> offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated.[55]

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47. *Id.* at 101.

48. *Id.*

49. *See, e.g.*, Johnson v. Texas, 509 U.S. 350, 373 (1993) (upholding the death penalty for an offender who was nineteen years old when he committed murder); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (finding that the death penalty is not per se cruel and unusual punishment). The constitutionality of the death penalty has, however, been limited in recent years. *See infra* notes 73–81 and accompanying text.

50. *Trop*, 356 U.S. at 99 ("[T]he existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.").

51. *Id.* at 103. For Native American tribal members, this "political existence" was in the making for even more centuries than for *Trop*.

52. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1821 (2012) ("*Trop* and *Weems* make clear that profound impairment of legal personality is constitutionally significant.").

53. *See, e.g.*, Mary Sigler, *Defensible Disenfranchisement*, 99 IOWA L. REV. 1725, 1738–39 (2014) (arguing in favor of voting rights exclusions for felons but rejecting permanent "civil death," acknowledging that "restored political participation" is essential to a liberal democracy).

54. *Trop*, 356 U.S. at 100 (emphasis added); *see also* Moore v. Texas, 137 S. Ct. 1039, 1048, 1053 (2017) (citations omitted) (vacating a death sentence because the Eighth Amendment "reaffirms the duty of the government to respect the dignity of all persons"); William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L.J. 403, 413 (2017) (noting that one facet of the "dignity requirement" is "humanness").

55. *Trop*, 356 U.S. at 102.

Denationalization may subject the individual "to banishment, a fate universally decried by civilized people,"[56] and resulted in Trop being rendered effectively "stateless."[57] The fact that a person might not be actually removed from the country is irrelevant; the threat alone "makes the punishment obnoxious."[58]

The Court also emphasized that the Eighth Amendment is not static;[59] it "must draw its meaning from the *evolving standards of decency that mark the progress of a maturing society*."[60] The Court determined these evolving standards of decency in part by reviewing international consensus[61] and noted that the "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime,"[62] and in the United States, "the Eighth Amendment forbids that to be done."[63] The Court more recently has described the need to consider "objective indicia"[64] of "contemporary

56. *Id.*

57. *Id.* (noting that Trop was left "stateless, a condition deplored in the international community of democracies"). The Court reached this conclusion despite the fact that Trop remained in the United States, ostensibly unaware that he had even lost his citizenship, for eight years after the conviction triggering that loss.

58. *Id.*

59. As noted by the Supreme Court more recently, courts are not limited to "those practices condemned by the common law in 1789." Ford v. Wainwright, 477 U.S. 399, 406, 418 (1986) (holding a prisoner sentenced to death was entitled to an evidentiary hearing in federal court to challenge his "competence to be executed").

60. *Trop*, 356 U.S. at 101 (emphasis added).

61. Domestic and international consensus have been criticized as a means of interpreting U.S. constitutional guarantees such as the Eighth Amendment, which was designed to guard against majority rule. *See, e.g.*, Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 67 (2007) (arguing that international consensus should not carry "any persuasive weight in judging whether the juvenile death penalty is unconstitutional under the Eighth Amendment"); Sigler, *supra* note 27, at 80–81; Stinneford, *supra* note 20, at 1754. Simply counting states (and countries) that permit or forbid certain practices and reviewing trends in those practices is problematic. Yet the Court continues to follow this approach and simply notes that its own "judgment"—whereby the Court asks whether there is reason to disagree with the judgment reached by the citizenry and its legislators sufficiently diminishes these risks. Enmund v. Florida, 458 U.S. 782, 801 (1982).

62. *Trop*, 356 U.S. at 102.

63. *Id.* at 103. As the Court noted,

> His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

Id. at 101–02.

64. Roper v. Simmons, 543 U.S. 551, 552 (2005) (holding that execution of juveniles was cruel and unusual).

values"[65] when determining whether a punishment comports with the evolving standards of decency such that it does not offend standards of civilized treatment.

Finally, Chief Justice Warren pointed out that even if the government had the *regulatory* power to divest individuals of their citizenship,[66] denationalization in this case was used as *punishment*.[67] It was thus distinguishable from statutes that, for example, create eligibility for voting and exclude felons.[68] The Court pointed out that Army soldiers were explicitly warned about this potential punishment,[69] and even though desertion is a serious offense, soldiers were regularly convicted of the crime.[70] Citizenship "is not subject to the general powers of the National Government and therefore cannot be divested

65. Ford v. Wainwright, 477 U.S. 399, 406 (1986) (noting that in addition to "the barbarous methods generally outlawed in the 18th century," the Court "takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects").

66. *Trop*, 356 U.S. at 94. The Court distinguished *Trop* from another loss of citizenship case decided by the Court the same day which permitted denationalization for voting in a foreign election. Perez v. Brownell, 356 U.S. 44, 62 (1958), *overruled by* Afroyim v. Rusk, 387 U.S. 253 (1967). The Court pointed out that "the fact that deportation and denaturalization for fraudulent procurement of citizenship may be imposed for purposes other than punishment affords no basis for saying that in this case denationalization is not a punishment." *Trop*, 356 U.S. at 98–99.

67. *Trop*, 356 U.S. at 96–97 (noting that the "purpose of taking away citizenship from a convicted deserter is simply to punish him" and "no other legitimate purpose," such as "solving international problems," could be served by the statute). As noted by the Court,

> Plainly legislation prescribing imprisonment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute. In fact, a dishonorable discharge with consequent loss of citizenship might be the only punishment meted out by a court-martial.

Id. at 97.

68. *Id.* at 96 (pointing out that "a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose"); *see also* Sigler, *supra* note 53, at 1726, 1728 (noting that in the United States, "felon disenfranchisement is formally regulatory, not punitive" and arguing that "regulatory disenfranchisement is not the 'civil death' of an earlier era or a modern mechanism for permanent political exclusion").

69. *Trop*, 356 U.S. at 97.

70. *Id.* at 90.

in the exercise of those powers."[71] In short, "[c]itizenship is not a license that expires upon misbehavior."[72]

Since *Trop*, the Court has continued to narrow the scope of acceptable punishments, especially in the death penalty context, insisting that "death is different."[73] For example, despite repeatedly upholding the death penalty until 1972,[74] the Court invalidated all mandatory capital sentencing schemes in 1976.[75] The Court then held that the death penalty constitutes cruel and unusual punishment when imposed for the non-fatal rape of an adult, even when the offender committed the crime after escaping from a correctional facility where he was incarcerated for a prior murder, rape, kidnaping, and aggravated assault.[76] Five years later, the Court held that the death penalty could not be applied when the offender was convicted of felony murder but "the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder"[77]—he was the getaway driver for a planned robbery.[78] In

71. *Id.* at 92. As aptly noted by one commentator:

> [E]ven if the state can legitimately punish the deserter, the Court concluded that expatriation was too harsh a punishment. Lurking in the background, of course, is the question as to why we should stop at desertion. Why not expatriate murderers? Or rapists? Or, more in tune with the current *zeitgeist*, drug dealers, or even drug users?

Leo Zaibert, *Uprootedness as (Cruel and Unusual) Punishment*, 11 NEW CRIM. L. REV. 384, 389 (2008).

72. *Trop*, 356 U.S. at 92.
73. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 606 (2002) (reversing a death sentence when the aggravating factors were found by judge, not jury); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117 (2004).
74. *See, e.g.*, McGautha v. California, 402 U.S. 183, 185–86 (1971) (affirming death sentences issued by juries in their "absolute discretion"). In 1972, the Court invalidated "all existing state capital sentencing schemes" because they "afforded decision makers too much discretion." Sigler, *supra* note 27, at 74 (citing Furman v. Georgia, 408 U.S. 238 (1972)). After states amended their statutes to address the Court's concerns, the Court upheld death penalty statutes that provided "guided discretion." Gregg v. Georgia, 428 U.S. 153, 199, 207 (1976).
75. Woodson v. North Carolina, 428 U.S. 280, 303, 305 (1976) (holding that the "character and record" of each defendant should be considered prior to imposing a death sentence). As noted by Professor Sigler, despite the fact that a "majority of justices rejected the notion that capital punishment was cruel and unusual per se, . . . 'fundamental respect for humanity . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense.'" Sigler, *supra* note 27, at 74–75 (quoting *Woodson*, 428 U.S. at 304).
76. Coker v. Georgia, 433 U.S. 584, 592, 599 (1977) (reversing a death sentence because it was "a disproportionate punishment for rape"). The Court reached this conclusion after denying certiorari on this exact issue fourteen years earlier in *Rudolph v. Alabama*, 375 U.S. 889 (1963), over the dissent of three justices who argued that only five countries permit the death penalty under these circumstances.
77. Enmund v. Florida, 458 U.S. 782, 795 (1982).
78. *Id.* at 797.

the last ten years, the Court has held that the death penalty cannot be imposed for any non-fatal offense, even the rape of an eight-year-old child.[79] In addition to the nature of the offense, an offender's diminished capacity is also relevant; the Court has held in the past twenty years that the death penalty cannot be applied to mentally incompetent[80] and juvenile[81] offenders.

Even in non-death penalty cases, the Court has signaled a greater willingness to find punishments cruel and unusual in violation of the Eighth Amendment. For example, the Court recently held that juveniles cannot be sentenced to life without parole for non-homicide offenses[82] and cannot be mandatorily issued that sentence, even for murder.[83] In each of these cases, the Court struck down the punishment imposed despite the seriousness of the crime.[84] Focusing on the "evolving standards of decency," the Court has found punishments cruel and unusual even when they were considered constitutionally acceptable only a decade or two earlier.[85]

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79. Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008) (concluding that the death penalty must be reserved, "at this stage of evolving standards . . . for crimes that take the life of the victim").

80. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that, in light of "evolving standards of decency," the Eighth Amendment prohibits executing a "mentally retarded offender"), *overruling* Penry v. Lynaugh, 492 U.S. 302, 335 (1989) (concluding that "at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment"). The death penalty also cannot constitutionally be applied to insane prisoners, even when competent at the time of the crime. Ford v. Wainwright, 477 U.S. 399, 417–18 (1986).

81. Roper v. Simmons, 543 U.S. 551, 568 (2005) (holding that the Eighth Amendment bars imposing the death penalty on all juvenile offenders), *overruling* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (explaining that because "we discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age," that punishment "does not offend the Eighth Amendment's prohibition against cruel and unusual punishment").

82. Graham v. Florida, 560 U.S. 48, 59, 69 (2010) (reversing a life sentence imposed for armed burglary and attempted armed robbery for a sixteen-year-old offender because "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability").

83. Miller v. Alabama, 567 U.S. 460, 479 (2012) (reversing life without parole sentences for two fourteen-year-old defendants because "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders").

84. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 592, 597 (1977) (noting that rape is a serious crime and "highly reprehensible").

85. *See, e.g.*, Stinneford, *supra* note 20, at 1741. Even with similar facts, and without generally overruling earlier cases holding the opposite, the Court reached a different result—arguably because the "evolving standards of decency" did not compel the finding of cruel and unusual punishment in the earlier cases but have done so in the newer cases.

In short, the Eighth Amendment requires that punishments comport with "civilized treatment" as determined through objective evidence of community standards that reflect the "evolving standards of decency." Punishments that do not comply with this standard—including stripping an individual of citizenship—are beyond the government's power to inflict. In this way, the "Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force."[86]

III. THE PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT APPLIES TO TRIBES VIA THE INDIAN CIVIL RIGHTS ACT

The Eighth Amendment does not directly apply to Indian tribes; as sovereign nations, they have general plenary power over their citizens.[87] However, because of the complex relationship between the U.S. government and tribes, tribes are subject to congressional power.[88]

Beginning in 1961, Congress's Senate Subcommittee on Constitutional Rights conducted a multi-year investigation focusing on the constitutional rights of Native Americans.[89] Pursuant to the 1924 Citizenship Act, federal citizenship was granted to Indians who had not already acquired citizenship via treaty or some other method.[90] The subcommittee acknowledged that Indian tribes are "quasi-sovereign entities possessing all the inherent rights of sovereignty except where

86. Hall v. Florida, 134 S. Ct. 1986, 1992 (2014) (reversing a death sentence when the state set an I.Q. floor based on outdated scientific evidence for mental incapacity).

87. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (acknowledging that tribes are "separate sovereigns pre-existing the Constitution" and as such, they "have historically been regarded as unconstrained by those Constitutional provisions framed specifically as limitations on federal or state authority"); Talton v. Mayes, 163 U.S. 376, 383 (1898) (recognizing the Cherokee tribe's "autonomous existence" and holding the Fifth Amendment was not applicable in tribal prosecutions of their own members, even after enactment of the Major Crimes Act); *see also* Riley, *supra* note 4, at 1050 (noting that tribes are "free to be illiberal" and federal constitutional limitations do not automatically apply to them).

88. United States v. Kagama, 118 U.S. 375, 384–85 (1886) (affirming, pursuant to congressional action, the federal criminal jurisdiction over an Indian who murdered a member of the same tribe); *Talton*, 163 U.S. at 384 ("[A]lthough possessed of these attributes of local self-government when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States.").

89. *Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations on S. Res. 265 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 88th Cong. 2 (1964) [hereinafter *Summary Report*].

90. Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924).

restrictions have been placed thereon by the United States itself,"[91] but at least some members believed that citizenship[92] should entitle Indians to "every protection and guarantee accorded to all other citizens of the United States."[93] Congress expressed two main concerns. First, the lack of a procedural remedy—including an effective appeal system—to challenge potential violations of tribal members' rights,[94] was troubling. Second, as noted by the Tenth Circuit, the "tribal administration of justice and imposition of tribal penalties and forfeitures"[95] was a significant concern, suggesting criminal penalties should be examined closely.

At the same time, as part of the broader civil rights movement, Congress struggled to battle discrimination against a variety of minority groups.[96] Despite making some progress while concentrating on inner-city minority groups, there was concern that "the original inhabitants of the North American continent"[97] were continuing to be deprived of foundational constitutional protections[98]—at least in part from their own tribal governments.[99] The congressional Subcommittee noted that the rights of Native Americans varied whether they

91. *Summary Report*, *supra* note 89, at 2 (quoting Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 92 (8th Cir. 1956)).

92. 8 U.S.C. § 1401(b) (2012).

93. *Constitutional Rights of the American Indian: Hearing on S. Res. 53 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. 2 (1961) [hereinafter *1961 Hearings*].

94. *Summary Report*, *supra* note 89, at 6, 16, 18.

95. Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971) (discussing the Indian Civil Rights Act). The court's perspective, however, was complicated at best; it claimed that "the Cherokee's high degree of civilization (compared with other Indian tribes) was probably due to their own inherent character and the fact that many of their purebloods intermarried with fine members of Scotch families, and pureblood Cherokees intermarried with half-blood or less than half-blood Cherokees." *Id.* at 676.

96. *1961 Hearings*, *supra* note 93, at 4 (statement of Sen. Keating).

97. *Id.*

98. The subcommittee made a number of proposals to Congress which were "designed to insure that Indian citizens receive the inalienable rights guaranteed to all citizens of this country," including that "the constitutional rights and protections conferred upon American citizens should be made applicable to American Indians in their relationship with their tribal governing bodies." *Summary Report*, *supra* note 89, at 23. The subcommittee also recommended that Native Americans who alleged violations of constitutional protections in criminal proceedings would be able to appeal the conviction to the federal courts, but that recommendation was not adopted. *Id.*

99. *Summary Report*, *supra* note 89, at 4; *see also* NAT'L AM. INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 12 (David H. Getches ed., 1978) [hereinafter Getches] ("Concern over some tribes' abuses led to imposition of most Bill of Rights requirements on all tribes.").

were on or off their reservation.[100] The work of the Senate Subcommittee was viewed as a significant step to rectify that by providing federal constitutional protection to Native Americans just a few years after the Civil Rights Act of 1964[101] attempted to level the playing field for racial minorities in the United States.[102]

In response to these concerns and after "a 'long-line' of federal court decisions exempting Indian tribes from constitutional constraints,"[103] in 1968, Congress enacted the Indian Civil Rights Act.[104] That Act incorporates some critical federal constitutional guarantees of individual liberty and applies them to tribes.[105] Although many Indians opposed enactment of the Indian Civil Rights Act for tribal sovereignty reasons,[106] the Supreme Court acknowledged that Congress passed the Act in part to provide tribal members with more protection from overreaching by their tribes.[107] The purpose of the Act was to

> protect individual Indians from arbitrary and unjust actions of tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government. *These limitations are the same as those imposed on the Government of the United States by the United States Constitution and on the States by judicial interpretation*.[108]

The Indian Civil Rights Act included a prohibition on cruel and unusual punishment.[109] The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[110] The corresponding provision in the Indian Civil Rights Act states that no Indian tribe "shall require excessive bail, impose excessive fines, or inflict cruel and unu-

100. *Summary Report*, *supra* note 89, at 5 (internal citations omitted); *see also* WILKINS & WILKINS, *supra* note 2, at 63 (noting that Native American rights may vary").

101. 41 U.S.C. §§ 2000e to 2000e-17 (2012).

102. *Constitutional Rights of the American Indian: Hearings on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968, and S.J. Res. 40 before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 1 (1965).

103. Tavares v. Whitehouse, 851 F.3d 863, 865 (9th Cir. 2017) (citations omitted); WILKINS & WILKINS, *supra* note 2, at 63.

104. 25 U.S.C. §§ 1301–1304 (2012).

105. 25 U.S.C. § 1302.

106. WILKINS & WILKINS, *supra* note 2, at 63.

107. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62, 72 (1978) (stating that "Congress' authority over Indian matters is extraordinarily broad," but holding that the Indian Civil Rights Act "does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers" when a tribal member challenged an ordinance prohibiting children from female members who married outside the tribe from being eligible for enrollment).

108. S. REP. NO. 90-841, 5–6 (1967) (emphasis added). For a description of the Indian Civil Rights Act's legislative history, see Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 881–84 (2d Cir. 1996).

109. 25 U.S.C. § 1302(a)(7)(A).

110. U.S. CONST. amend. VIII.

sual punishments."[111] When language in the Indian Civil Rights Act is "virtually identical" to that of the similar constitutional provision, the federal interpretations of that language control.[112] This suggests that federal court interpretations of the Eighth Amendment should require the same result when applied to tribal punishment being challenged as violating the Indian Civil Rights Act's prohibition on cruel and unusual punishment.

However, the Supreme Court also noted that one goal of the Indian Civil Rights Act was to further tribal self-government.[113] Courts have acknowledged that Congress passed the Indian Civil Rights Act to protect tribal sovereignty and cultural identity.[114] Furthermore, statutes should "be liberally construed in favor of the Indians and . . . all

111. 25 U.S.C. § 1302(a)(7)(A). At least one scholar has mentioned some of the "vexing issues" that the Indian Civil Rights Act (ICRA) has created, including whether framing banishment (not disenrollment) as "cruel and unusual punishment" might give federal courts jurisdiction to hear those cases. Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 107 (2007).

112. United States v. Fuentes, 800 F. Supp. 2d 1144, 1150–51 (D. Or. 2011) (noting that because "ICRA 'imposes an identical limitation on tribal government conduct as the Fourth Amendment,' courts analyze the reasonableness of tribal police activities under Fourth Amendment jurisprudence") (citing United States v. Becerra–Garcia, 397 F.3d 1167, 1171 (9th Cir. 2005); Tracy v. Superior Court, 810 P.2d 1030, 1047–48 (Ariz. 1991) (noting that although "certain provisions" of the Indian Civil Rights Act "do not mirror those of the federal constitution and have been interpreted somewhat differently from their federal counterparts," when the "provisions . . . clearly mirror the federal provisions in language and intent," they "have been interpreted under the federal standard and are generally held to be identical to their federal counterparts").

113. *Santa Clara*, 436 U.S. at 62 (noting that two "distinct and competing purposes are manifest in the provisions of the ICRA: in addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well established federal 'policy of furthering Indian self-government'") (citations omitted).

114. *See, e.g.*, O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1144 (8th Cir. 1973) (requiring Indian plaintiffs suing under ICRA to exhaust tribal remedies because it was clear "that Congress wished to protect and preserve individual rights of the Indian peoples, with the realization that this goal is best achieved by maintaining the unique Indian culture and necessarily strengthening tribal governments"); Janis v. Wilson, 385 F. Supp. 1143, 1150–51 (D. S.D. 1974), *remanded on other grounds* 521 F.2d 724 (8th Cir. 1975) (concluding that the plaintiffs' ICRA claims "must not be measured by the same standards imposed by the Bill of Rights on state and federal governments, but rather these limitations must be applied with recognition of the Oglala Sioux Tribe's unique cultural heritage, their experience in self government, and the disadvantages or burdens, if any, under which the defendant tribal government was attempting to carry out its duties"); McCurdy v. Steele, 353 F. Supp. 629, 633 (D. Utah 1973) (concluding that ICRA's "guarantees of individual rights should, where possible, be harmonized with tribal cultural and governmental autonomy").

ambiguities are to be resolved in their favor."[115] Following this line of reasoning, the federal constitutional protections made applicable to tribal citizens should be judged by traditionally tribal, not federal, standards.[116] Whether analyzing the prohibition on cruel and unusual punishment through federal interpretations or consistent with traditional tribal customs and practice, the result is the same: disenrollment as punishment for criminal conduct violates that prohibition.

IV. TRIBAL PUNISHMENT

Tribes historically focused on peacekeeping. Hence, their response to conflict was to address the underlying problem. The general practice was restorative justice, which "incorporates all stakeholders in a specific crime—the offender, the victim, family members, community representatives, and other interested parties—in a process of group decision-making on how to respond to the crime and its implications for the future."[117] Only in cases of extreme anti-social behavior that

115. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02(1), at 113 (Nell Jessup Newton et al. eds., 2012) (citations omitted).

116. *See, e.g.*, Riley, *supra* note 4, at 1050–51 (pointing out that tribes are free to be "illiberal" and defy "American civil rights norms"). As a practical matter, lack of a remedy under ICRA may pose a barrier to enforcing the protections it attempts to provide to tribal members. This discussion is beyond the scope of this Article, but ICRA provides only habeas relief. 25 U.S.C. § 1303. And although some courts have concluded that disenrollment constitutes a "detention" for habeas purposes, *see, e.g.*, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880 (2d Cir. 1996); *Quair I*, 359 F. Supp. 2d 948, 953–62 (E.D. Cal. July 26, 2004) (concluding that "disenrollment from tribal membership and subsequent banishment from the reservation constitutes detention in the sense of a severe restriction on petitioners' liberty not shared by other members of the Tribe"), a number of courts have held that disenrollment is not a "detention" for purposes of ICRA because it is not a "severe actual or potential restraint on liberty." *See, e.g.*, Tavares v. Whitehouse, 851 F.3d 863, 871–72 (9th Cir. 2017) (holding that "detention" under § 1303 of the Indian Civil Rights Act is more narrow than "custody," and "temporary exclusion is not tantamount to a detention" and hence, the plaintiff had no habeas remedy in response to a ten-year banishment order as discipline for circulating a petition to recall several Tribal Council members); Jeffredo v. Macarro, 590 F.3d 751, 758 (9th Cir. 2009); Quair v. Sisco (*Quair II*), No. 1:02-CV-5891 DFL, 2007 WL 1490571, at *4 (E.D. Cal. May 21, 2007). Arguably, when disenrollment is employed as punishment (as opposed to the result of a political dispute), that may suffice to create detention. And Professor Wilkins points out courts' "disturbing judicial logic," stating that "Disenrollment is far more detrimental than banishment alone, because disenfranchisement is an absolute denial of the legal, political, and cultural rights of a citizen; whereas banishment alone—unless it is joined with disenrollment—is a physical expulsion from the community but does not necessarily entail a loss of citizenship." WILKINS & WILKINS, *supra* note 2, at 138.

117. Erik Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of* Booker*?*, 37 MCGEORGE L. REV. 787, 789 (2006). Of course, some tribes (or at least some groups within tribes) were not always peacekeeping; yet they had their own justice systems, and those systems were aimed at addressing

threatened the community, such as murder or incest with a child, did tribes consider banishing a member from tribal lands.[118] But even these orders were generally temporary, imposed with the expectation that harmony would ultimately be restored. Over time, however, tribes adopted more traditionally western criminal justice systems, creating courts and jails to deal with criminal offenders.[119]

In recent years, in an attempt to address the recent drug epidemic and in response to the lack of federal criminal prosecutions in Indian Country,[120] many tribal communities are exploring creative ways to address crime on their reservations. One of the tools being adopted is disenrollment—permanently removing tribal members from the tribal rolls—for those involved in criminal activity.

A. Historical Methods of Addressing Criminal Conduct

Historically, tribes viewed anti-social conduct as a problem to be solved rather than a crime to be punished.[121] Tribes were generally close-knit communities that depended heavily on internal harmony to flourish[122] and addressed anti-social or criminal behavior in ways that best met their communities' needs.[123] Hence, their methods of addressing problematic behavior tended to be reconciliatory, including "peacemaking, mediation, restitution, ostracism, or negotiation."[124] Formal justice systems were uncommon.[125] Although vengeance was

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the underlying conflict. Western criminal justice systems were essentially thrust upon tribes. *See infra* note 146 and accompanying text.

118. *See, e.g.*, WILKINS & WILKINS, *supra* note 2, at 20–25.

119. *See, e.g.*, FLETCHER, *supra* note 18, at 67.

120. WILKINS & WILKINS, *supra* note 2, at 144.

121. VINE DELORIA JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 111 (1983) ("The primary goal was simply to mediate the case to everyone's satisfaction" rather than "to ascertain guilt and then bestow punishment upon the offender."); WILKINS & WILKINS, *supra* note 2, at 25 ("[T]he spiritually cohesive nature of tribal collectives and the assortment of informal sanctions that were in place . . . generally worked to ensure peace and social order in the society."); Kunesh, *supra* note 111, at 95 (noting that the distinction between "civil or private" wrongs on the one hand and "criminal or public" wrongs on the other were often irrelevant; "any wrongdoing concerned the whole community").

122. WILKINS & WILKINS, *supra* note 2, at 142 (noting that "Indigenous peoples had in place customs, values, and ceremonies that protected the integrity and personality of each member of the community" and the goal was to "restore community harmony").

123. FLETCHER, *supra* note 18, at 67.

124. WILKINS & WILKINS, *supra* note 2, at 142; *see also, e.g.*, Associated Press, *Disenrollment Leaves Natives "Culturally Homeless*," CBS NEWS (Jan. 20, 2014), https://www.cbsnews.com/news/disenrollment-leaves-natives-culturally-homeless/ [https://perma.unl.edu/42TQ-KPFB] (noting that historically, "ceremonies and prayers—not disenrollment—were used to resolve conflicts because tribes essentially are family-based, and 'you don't cast out your relatives'").

125. FLETCHER, *supra* note 18, at 67; WILKINS & WILKINS, *supra* note 2, at 20.

practiced,[126] restitution (as opposed to retribution) was the primary objective.[127] For example, in the 1880s, Crow Dog, a Lakota (Sioux) Indian, murdered Spotted Tail, another Lakota Indian.[128] No formal criminal proceeding occurred at the tribal level; restitution including eight horses and cash was paid to the victim's family.[129] In cases such as Crow Dog's, resolving disputes "amenably through consensus"[130] helped maintain harmony within the community.

In response to extreme criminal conduct (generally only murder or incest), tribes sometimes banished a member.[131] Banishment was "extremely rare"[132] and employed only "as a last resort after exhausting customary and traditional methods of social discipline and sanction,"[133] because it destroyed the fundamental bonds within a tribe.[134] A banished tribal member was prohibited from being present on all or a portion of tribal lands.[135]

Most significantly, banishment was historically imposed for a limited period of time in order to rehabilitate the offender and allow peaceful reunification within the community.[136] For example, when Cries Yia Eya, a Cheyenne tribal member, killed Chief Eagle, the remaining chiefs banished him.[137] Three years later, Cries Yia Eya returned with tobacco for the chiefs, asking to be allowed to return.

126. Getches, *supra* note 99, at 9. In this vein, restorative justice scholars have been criticized for "characterizing the relevant actors and cultures as imbued with profound powers of forgiveness and mercy." Douglas J. Sylvester, *Myth in Restorative Justice History*, 2003 UTAH L. REV. 471, 475 (2003).

127. DELORIA & LYTLE, *supra* note 121, at 111–12 ("The system attempted to compensate the victim and his or her family and to solve the problem in such a manner that all could forgive and forget and continue to live within the tribal society in harmony with one another").

128. *Ex parte* Crow Dog, 109 U.S. 556, 557 (1883); FLETCHER, *supra* note 18, at 383.

129. FLETCHER, *supra* note 18, at 383 (citations omitted).

130. Kunesh, *supra* note 111, at 94. Options available to Spotted Tail's family included killing Crow Dog, banishing him, or agreeing to restitution. FLETCHER, *supra* note 18, at 383.

131. *See, e.g.*, Kunesh, *supra* note 111, at 92–93; Riley, *supra* note 4, at 1103.

132. DELORIA & LYTLE, *supra* note 121, at 113.

133. Kunesh, *supra* note 111, at 92.

134. DELORIA & LYTLE, *supra* note 121, at 113.

135. WILKINS & WILKINS, *supra* note 2, at 4.

136. *See, e.g.*, Gabriel S. Galanda & Ryan D. Dreveskratch, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 395 (2015); David E. Wilkins, *Exiling One's Kin: Banishment and Disenrollment in Indian Country*, 17 W. LEGAL HIST. 235, 245 (2004). Some scholars argue that banishment, when applied "contextually as a traditional remedy for healing and restitution," is an "effective restorative justice technique because it can potentially return harmony to Native communities," especially as a way to combat crime that is often "unaddressed by the criminal justice system." Riley, *supra* note 4, at 1105.

137. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 12 (1941).

After each segment of the tribe debated the proper outcome, they decided to allow Cries Yia Eya to return and his behavior was markedly improved.[138]

As scholars have noted, many tribes were "culturally averse to formal systems of punishment."[139] Recognizing that modern justice systems are often insufficient, some tribes are returning to these historic methods of addressing problems.[140] In the last two decades, for example, in the Organized Village of Kake, "Circle Peacemaking" reappeared, which "heals the offender by addressing the underlying causes of the offending behavior and restores the rupture in community life by repairing the relationship between the offender and the victim."[141] A number of individuals, including the offender and the victim along with family and friends, "sit in a circle while a Keeper of the Circle facilitates discussion."[142] The meeting ends when "forgiveness and healing are apparent and consensus is reached about the offender's sentence."[143] Other tribes are returning to these more traditional mechanisms for resolving disputes, recognizing that failing to include the entire community is not an effective way to address wrongdoing.[144] In addition, some tribes have returned to using banishment either in an attempt to heal and reconcile their community or as "a reaction to the modern realities of tribal jurisdiction and reservation life," including the need to combat drug usage.[145]

B. Modern Methods of Addressing Criminal Conduct

Although tribes historically used conflict-resolution methods aimed at restoring harmony to address anti-social behavior, colonization and federal government control in Indian country have thrusted formal westernized criminal justice systems on most tribes over the past century.[146]

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138. *Id.* at 12–13.
139. Kunesh, *supra* note 111, at 96.
140. *See, e.g.*, FLETCHER, *supra* note 18, at 67, 85.
141. *Id.* at 85.
142. *Id.*
143. *Id.* Those in the circle are also "responsible for ensuring that offenders adhere to their sentence." *Id.*
144. *See generally* Jessica Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. DISP. RESOL. 517 (2007).
145. Riley, *supra* note 4, at 1103–05; *see also, e.g.*, Sarah Kershaw & Monica Davey, *Tribes Revive Ancient Penalty*, N.Y. TIMES (Jan. 18, 2004), http://www.nytimes.com/2004/01/18/us/plagued-by-drugs-tribes-revive-ancient-penalty.html (discussing the problems facing tribes today, including drug and alcohol use and gambling, which is why tribes have brought back banishment).
146. Getches, *supra* note 99, at 8 (noting that, as part of the process to "civilize" tribes, "destruction of the remaining authority of the traditional leaders and the systems

1. Adoption of Western Notions of Criminal Punishment

Tribes retained exclusive criminal jurisdiction over offenses committed by one Indian against another Indian within Indian country until 1885, but from early in our nation's history, the federal government became progressively more involved in criminal justice affecting tribes and tribal members. In 1817, Congress passed the Indian Country Crimes Act,[147] making federal criminal laws applicable in Indian country and subject to federal prosecution unless both the offender and victim were Indian or, if the victim was not Indian, the offending Indian was "punished by the law of the tribe."[148] In 1883, the Courts of Indian Offenses were created and the Bureau of Indian Affairs appointed police officers and judges to serve on reservations.[149] Despite this, many tribes continued to employ their traditional methods of dispute resolution outside these formal courts,[150] at least in part because, as some have argued, "the use of the Western adversarial process itself tends to breakdown relationships and community, thus compromising both persisting traditional ways and tribal sovereignty."[151]

But tribes' reliance on perceived "inadequate" remedies created a backlash from the federal government.[152] The federal prosecution and conviction of Crow Dog for murder resulted in a death sentence despite the tribe resolving the dispute in a manner that maintained harmony through restitution.[153] In 1883, the Supreme Court overturned his conviction, holding that an Indian who killed another Indian in Indian country was subject to the exclusive jurisdiction of the tribe and could not be prosecuted by the federal government.[154] In re-

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they represented" was essential, and hence, "the institution of a legal system—not just martial law—was necessary").

147. 18 U.S.C. § 1152 (2012); COHEN, *supra* note 115, § 1.03[4][b], at 51–53. This act originated as part of the Indian Trade and Intercourse Acts. Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction*, 10 ALB. GOV'T L. REV. 49, 51 (2017).

148. 18 U.S.C. § 1152. In addition to expressly extending federal laws and jurisdiction to Indian country, the Indian Country Crimes Act also incorporated the Assimilative Crimes Act, which incorporated state law into the federal code "when no federal crime has been defined." COHEN, *supra* note 115, § 9.02[1][c][ii], at 740.

149. Getches, *supra* note 99, at 7–8; *Summary Report*, *supra* note 89, at 14.

150. Getches, *supra* note 99, at 8–9.

151. Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319, 375 (2007) (citing Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997)).

152. Getches, *supra* note 99, at 9.

153. *See supra* notes 130–132 and accompanying text.

154. *Ex parte* Crow Dog, 109 U.S. 556, 556, 557–58, 570, 572 (1883) (holding that a tribal member was not subject to federal prosecution for murder because Congress had not enacted the statute punishing "crimes arising within the . . . terri-

sponse, Congress enacted the Major Crimes Act,[155] which granted the federal government jurisdiction to prosecute certain crimes occurring in Indian country, including when both the defendant and the victim were Indian.[156] Although states cannot generally criminalize conduct occurring on reservations,[157] Congress passed Public Law 280,[158] which delegated jurisdiction over "most crimes and many civil matters" in Indian country to several states, including California.[159] Tribes retained inherent, concurrent jurisdiction over Indians.[160]

As part of this overall transition, and in connection with passage of the Indian Reorganization Act in 1934,[161] many tribes developed formal "tribal justice systems,"[162] including tribal courts, which "are relatively new phenomena in Indian country."[163] Most tribal courts were

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torial jurisdiction of the United States" "expressly with reference to them as members of an Indian tribe").

155. 18 U.S.C. § 1153 (2012). As with passage of the Indian Civil Rights Act, Congress sought some standardization in terms of treatment for Indians. *See* COHEN, *supra* note 115, § 9.02[2][a], at 749–50.

156. This Act was held to be within the federal government's authority to legislate in Indian country:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.

United States v. Kagama, 118 U.S. 375, 384–85 (1886); *see also* United States v. Antelope, 430 U.S. 641, 649–50 (1977) (concluding that the Major Crimes Act did not violate the Indian defendants' due process rights).

157. Worcester v. Georgia, 31 U.S. 515, 559 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.'"); *see also* COHEN, *supra* note 115, § 9.03[1], at 763–64 (explaining the scope of authority that states have regarding criminal conduct that occurs on a reservation).

158. 18 U.S.C. § 1162 (2012).

159. COHEN, *supra* note 115, § 6.04[3], at 537. Those states initially were California, Minnesota, Nebraska, Oregon, and Wisconsin; Alaska was added later. *Id.* Other states had the "option of accepting the same jurisdiction," and some did. *Id.* Enactment of Public Law 280 led to "fear among Indian people [concerning] the transfer of law and order to the States. It has been interpreted quite generally as meaning termination." *Summary Report*, *supra* note 89, at 9; *see also* WILKINS & WILKINS, *supra* note 2, at 103 (discussing the complexities of Public Law 280).

160. COHEN, *supra* note 115, § 6.04[3][c], at 555.

161. *Tribal Courts*, BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=tp&tid=29 [https://perma.unl.edu/PBD3-JV6Y].

162. FLETCHER, *supra* note 18, at 67; *see also, e.g.*, MILLE LACS BAND OF OJIBWE STAT. ANN. tit. 24 §§ 1–4305 (2012), http://millelacsbandlegislativebranch.com/wp-content/uploads/2015/01/Title-24-Judicial-Proceedings.pdf [https://perma.unl.edu/LV5J-JMNC] (establishing a tribal judicial system).

163. FLETCHER, *supra* note 18, at 67.

modeled after American courts, but many had no appeal system.[164] In terms of criminal cases, by the 1970s, the vast majority of tribes did not have a formal criminal justice system.[165] About half of all tribes now have some form of a tribal justice system.[166]

The Indian Civil Rights Act of 1968 further curtailed tribal authority by not only requiring tribes to provide many federal constitutional guarantees but also by expressly limiting tribal courts' sentences in criminal matters to imprisonment not exceeding six months and a fine of $500.[167] In 1986, the Indian Civil Rights Act was amended to permit imprisonment for up to one year and a fine of up to $5,000.[168] As part of the Tribal Law and Order Act, the statute was amended again in 2010 to permit imprisonment for up to three years per offense (up to nine years total if three or more offenses) and a fine of up to $15,000,[169] provided the tribal prosecution meets certain federal standards, including free effective assistance of counsel and law-trained judges.[170] Despite these expansions, tribal remedies remain substantively limited.

2. The Trend to Disenroll for Conduct

In response to increasing crime, especially drug offenses,[171] and insufficient tools to address criminal conduct on reservations,[172] many tribes are turning to disenrollment. Tribal citizens who are convicted of or engage in criminal activity are being removed (or threatened with removal) from tribal rolls.[173] Disenrollment and banishment—

164. *Summary Report*, *supra* note 89, at 16.
165. FLETCHER, *supra* note 18, at 384 (noting that "only a few dozen Indian nations were in the business of prosecuting crimes" by the 1970s).
166. *Tribal Justice Systems: A Brief History of Tribal Courts*, NAT'L TRIBAL JUST. RESOURCE CTR., http://www.tribalresourcecenter.org/pages/justice.htm [https://perma.unl.edu/ML2P-VQKX]. Many tribes have no tribal courts. COHEN, *supra* note 115, § 4.04[3][c][iv][A], at 263–64.
167. Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 77 (1968); Getches, *supra* note 99, at 12.
168. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-146 (1986) (codified at 25 U.S.C. § 1302(a)(7) (2012)).
169. Indian Arts and Crafts Amendments Act of 2010, Pub. L. No. 111-211, 124 Stat. 2279 (2010) (codified at 25 U.S.C. § 1302(a)(7)(C)).
170. 25 U.S.C. § 1302(b). Since 2013, tribes have also been able to prosecute non-Indians for some domestic violence offenses, provided that the tribe provides certain constitutional protections. 25 U.S.C. § 1304.
171. Riley, *supra* note 4, at 1105.
172. *Id.* at 1104 (noting that federal law significantly limits "tribes' ability to police reservations," the sentences they can impose are limited, and "[a]lthough the federal government has jurisdiction to try major crimes, such crimes regularly escape the attention of federal prosecutors, who are often located hundreds of miles from the reservation"); *see also infra* notes 274–288 and accompanying text (discussing crime in Native American territory).
173. WILKINS & WILKINS, *supra* note 2, at 144.

when a tribal citizen is prohibited from being on tribal lands for a period of time—are distinct concepts; it is possible to have one without the other or to have both at the same time, but the effects differ.[174]

Disenrollment occurs when an enrolled tribal member is removed from the tribal rolls and results in the "loss of tribal citizenship."[175] In contrast to the historic practice of temporary banishment, disenrollment originated in the 1930s in connection with the Indian Reorganization Act.[176] Over the past forty years, however, disenrollment has become an "epidemic."[177] Even temporary banishment is often seen as "a far worse punishment than death because it cuts off a person's ability to be part of the community,"[178] yet disenrollment—the *permanent* loss of community and identity—is occurring more frequently because of criminal conduct.[179]

Many tribal code provisions are not readily accessible through online databases or generally available print sources.[180] Hence, compre-

174. *Quair II*, No. 1:02-CV-5891 DFL, 2007 WL 1490571, at *3 (E.D. Cal. May 21, 2007). Courts and commentators, however, often conflate the two. *See, e.g.*, Tavares v. Whitehouse, 851 F.3d 863, 874 (9th Cir. 2017); WILKINS & WILKINS, *supra* note 2, at 4. Terminology reflecting disenfranchisement more broadly is often imprecise, as noted by some scholars. *See, e.g.*, Leo Zaibert, *Uprootedness as (Cruel and Unusual) Punishment*, 11 NEW CRIM. L. REV. 384, 385 (2008) (arguing that "expatriation, denationalization, denaturalization, removal, exclusion, expulsion, banishment, relocation, transportation, extradition, [and] deportation" reflect "interesting differences between genuinely different phenomena, but there are similarities between most of these terms that tend to be overlooked").

175. WILKINS & WILKINS, *supra* note 2, at 4, 5.

176. *Id.* at 4.

177. *See, e.g.*, *supra* note 1 and accompanying text; WILKINS & WILKINS, *supra* note 2, at 67.

178. Felicia Fonseca & Russell Contreras, *Most American Indian Tribes Opt Out of Federal Death Penalty*, ASSOCIATED PRESS (Aug. 21, 2017) https://www.apnews.com/86b9734f456846e9b0df9faa0237122f [https://perma.unl.edu/8LEP-B54B].

179. WILKINS & WILKINS, *supra* note 2, at 144. At least one court acknowledged that "the coerced and peremptory deprivation of petitioners' membership in the tribe and their social and cultural affiliation" is "a *more* severe punishment than imprisonment." Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 895 (2d Cir. 1996).

180. COHEN, *supra* note 115, § 4.05[1], at 270; WILKINS & WILKINS, *supra* note 2, at 67 n.1. A few organizations make various tribal codes available, but they are not yet exhaustive. For example, the National Indian Law Library, a division of the Native American Rights Fund, "is a law library devoted to federal Indian and tribal law" that "maintains a unique and valuable collection of Indian law resources." *National Indian Law Library*, NATIVE AM. RTS. FUND, https://www.narf.org/nill/index.html [https://perma.unl.edu/7ABV-PQG9]. In addition, the Ross-Bakley Law Library at Arizona State University includes many tribal materials, *Indian Law: Home*, ARIZ. ST. U., http://libguides.law.asu.edu/indianlaw/home [https://perma.unl.edu/9KDC-XTHW] (last updated July 12, 2018), as does the Library of Congress, Indigenous Law Portal, *Indigenous Law Portal: United States*, LIBR. CONGRESS, http://www.loc.gov/law/help/indigenous-law-guide/americas/northamerica/united-states/index.php [https://perma.unl.edu/K59T-3PBY] (last updated Mar. 13, 2018). The Tribal Law and Order Act requires tribes seeking

hensive research to determine the extent of the problem is difficult. Yet at least seven tribes have enacted code provisions that expressly permit disenrollment for criminal conduct. For example, the Meskwaki Nation, Sac & Fox Tribe of the Mississippi in Iowa permits disenrollment when a tribal member is convicted of murder; rape; incest; more than one conviction for drug trafficking, manufacturing, or distribution; or treason.[181] The Lummi Nation permits disenrollment of tribal members "convicted under tribal, state or federal law of a crime which threatens the well-being, economic or social welfare, or culture of the Lummi Nation and its members."[182] The Wyandotte Nation's code provides that any "member/citizen, who is found guilty of a shocking or heinous crime against society or the Wyandotte Nation, shall also be subject to dis-enrollment."[183] And the Mashantucket Pequot Tribe allows their Elders Council to "hear and determine any matter concerning the banishment or exclusion of any person from the Mashantucket (Western) Pequot Reservation and tribal lands as necessary to preserve and protect the safety and well-being of the Tribe and the Tribal Community," including the "removal of any Tribal benefits and membership privileges."[184]

At least three tribes have code provisions that, via a two-step process, permit disenrollment for criminal conduct. In those instances, criminal conduct constitutes grounds for banishment, and banishment constitutes grounds for disenrollment. The Pueblo of Laguna, for example, permits banishment for murder, aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, sexual exploitation of children, and selling or buying of children.[185] That same general code section then expressly provides that "*banishment from the Reservation*

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greater criminal jurisdiction to make their codes publicly available. 25 U.S.C. § 1302(c)(4) (2012).

181. SAC & FOX TRIBAL CODE, tit. 10, art. 6, § 10-6101 (2017), https://drive.google.com/file/d/0B0BtqpQ32vW6SnI1WmRYLXpzb0U/view [https://perma.unl.edu/QT94-CSZ7].

182. LUMMI NATION CODE OF LAWS § 34.07.010(d) (1999), https://www.narf.org/nill/codes/lummi/34Enrollment.pdf [https://perma.unl.edu/3BX9-TWL4]. The Lummi Nation also permits exclusion, but not disenrollment, for certain conduct "*whether or not criminally charged.*" § 12.02.020 (emphasis added).

183. WYANDOTTE NATION TRIBAL ENROLLMENT ORDINANCE, § 8(B), http://www.wyandotte-nation.org/government/legal-documents/enrollment-ordinance/ [https://perma.unl.edu/YV3C-R5HS].

184. MASHANTUCKET (WESTERN) PEQUOT TRIBE CONST. art. XII, § 1(d), http://www.mptnlaw.com/laws/MPT%20CONSTITUTION%20%20BYLAWS%209%2019%2012.pdf [https://perma.unl.edu/G6M8-RLZR]. The targeted conduct includes illegal drugs, sexual offenses, domestic violence, and violent conduct; *see also* Kunesh, *supra* note 111, at 110 (discussing the rights incorporated by the Indian Civil Rights Act).

185. PUEBLO OF LAGUNA, N.M. TRIBAL CODE, § 15-3-6(A), https://library.municode.com/nm/pueblo_of_laguna/codes/tribal_code?nodeId=TITXVCRCO_CH3SE_S15-3-6BA [https://perma.unl.edu/RYL2-LPZW] (last visited Sept. 5, 2018).

may constitute the loss of membership and associated rights in the Pueblo."[186] Similarly, the Snoqualmie Tribe, providing in its constitution that "membership is a privilege that may be revoked,"[187] permits the General Council to "impose a penalty of full or partial banishment against any enrolled tribal member for good cause in accord with Snoqualmie Tribal tradition or the acts and resolutions of the tribe."[188] The Snoqualmie Tribe Code then provides that any enrolled member who is banished "*may be disenrolled*."[189] And the Tribal Council of the Organized Village of Kake "shall have the right to *remove persons from the tribal roll and revoke the privileges of citizenship*"[190] under certain conditions, including when "a member is permanently banished by the Keex' Kwaan Tribal Court from the community of Kake because of danger to the safety of village residents."[191]

Other tribes practice disenrollment for certain types of criminal conduct, although their code provisions are not generally accessible. For example, the Elem Indian Colony Pomo Tribe disenrolled two members based on a tribal ordinance that permitted the Council to "cull[ ] from the active membership voting list tribal members who are alleged to have conducted crimes against the Tribe."[192] Some tribes have also recently threatened to disenroll tribal members over criminal activity. The Shoshone-Bannock Tribes of Idaho, for example, recently threatened to disenroll a tribal member accused of murder and seven other tribal members, many of whom were related.[193]

In addition, a number of tribes are considering or have considered disenrollment for criminal activity,[194] often drug convictions.[195] Dis-

186. § 15-3-6(C) (emphasis added).
187. SNOQUALMIE TRIBE OF INDIANS CONST. art. II, § 3, http://www.snoqualmietribe.us/sites/default/files/linkedfiles/constitution.pdf [https://perma.unl.edu/3626-6FLL].
188. *Id.*
189. SNOQUALMIE TRIBAL CODE § 18.0(b) (2008) (emphasis added), http://www.snoqualmietribe.us/sites/default/files/enrollment_act.2.3.codified.pdf [https://perma.unl.edu/XT9H-PBKA].
190. KEEX' KWAAN TRIBE, ORGANIZED VILLAGE OF KAKE CITIZENSHIP & ENROLLMENT CODE § 8 (emphasis added), http://www.kakefirstnation.org/uploads/5/4/3/1/54316983/citizenship_and_enrollment_code.pdf [https://perma.unl.edu/J233-395U].
191. § 8(3).
192. Brown v. Garcia, 225 Cal. Rptr. 3d 910, 912 (Ct. App. 2017).
193. *Shoshone-Bannock Tribes Threaten Disenrollment in Murder Case*, INDIANZ.COM (Jun. 3, 2016), https://www.indianz.com/News/2016/06/03/shoshonebannock-tribes-threaten-disenrol.asp.
194. *See, e.g.*, Sarah Reith, *Pomo Protest: Elem Indian Colony Members Discuss Disenfranchisement and Disenrollment*, UKIAH DAILY J. (Apr. 15, 2016) http://www.ukiahdailyjournal.com/article/NP/20160415/NEWS/160419913 [https://perma.unl.edu/NU6T-CGVU] (explaining that tribal members were facing disenrollment from the tribe after receiving notices that they "committed all these crimes, of rape and assault . . . it was just a blanket accusation," as Elem Indian Colony has no tribal court).
195. *See, e.g.*, Press Release, Lac du Flambeau Band of Lake Superior Chippewa Indians Declares State of Emergency (Apr. 13, 2013), https://turtletalk.files.word

enrollment and permanent banishment for a second drug trafficking conviction, for example, was considered but rejected by members of the Fallon Paiute-Shoshone Tribe of Nevada.[196] Four members of the Allakaket in Alaska were banished because they were suspected of dealing methamphetamines, and the tribal chief stated that "[w]e can banish people. The tribal board can vote to disenroll a tribal member. We are willing to go that route."[197] At least one tribal councilmember believes that sexual predators should be disenrolled.[198] Furthermore, the phenomenon is likely to spread, as a significant number of tribal constitutions grant authority to the tribal council to enact code provisions governing disenrollment or loss of membership.[199]

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press.com/2013/04/2013-04-03-ldf-press-release-ldfstate-of-emergency-re-synthetic-and-illegal-drugs-final.pdf [https://perma.unl.edu/Y822-8ME7] (noting that the tribe was considering "Banishment, Disenrollment and/or Forfeiture of *Per Capita* payments for those caught using, selling and/or manufacturing synthetic cannabinoids and synthetic cathinones"); Scott McKie B.P., *Council Discusses Drug Problem, Possible Banishments*, CHEROKEE ONE FEATHER (Dec. 10, 2015), https://theonefeather.com/wp-content/uploads/2015/01/December-10.pdf [https://perma.unl.edu/P983-3XXX] (noting that one tribal representative is opposed to "disenrollment for drug offenders").

196. *No Banishment for Fallon-Paiute Shoshone Tribe*, INDIANZ.COM (Dec. 19, 2006), https://indianz.com/News/2006/017439.asp.

197. Kevin Baird, *Allakaket Banishes 4 People over Meth*, FAIRBANKS DAILY NEWS-MINER (Feb. 24, 2017), http://www.newsminer.com/news/local_news/tribe-banishes-people-over-meth/article_1f4d0e3a-fa72-11e6-87df-2f4855259331.html [https://perma.unl.edu/9R6C-8UUM]. Furthermore, at least one tribe prohibits tribal legal aid representation for members accused of various drug crimes. MILLE LACS BAND OF OJIBWE INDIANS, Joint Resolution 17-01-84-16 (May 26, 2016), http://millelacsbandlegislativebranch.com/wp-content/uploads/2016/05/17-01-84-16-Mandating-MLB-Legal-Aid-Office-cease-representation-on-1st-2nd-degree-drug-offenses.pdf [https://perma.unl.edu/QAM2-D5JR].

198. Garfield Steele, *Oglala Sioux Tribe Must Protect Our Children*, INDIANZ.COM (Nov. 17, 2014), https://www.indianz.com/News/2014/11/17/garfield-steele-oglala-sioux-t.asp (arguing that members of the Oglala Sioux Tribe of South Dakota on the Pine Ridge Reservation who are child sexual predators should be disenrolled and banished).

199. *See, e.g.*, KAW NATION CONST. art. IV, § 3(C)(3), http://kawnation.com/?page_id=3312#ARTICLE%20V:%20TRIBAL%20COUNCIL [https://perma.unl.edu/JNA6-QZ6X]; NATIVE VILLAGE OF CHANEGA CONST. art. II, § 3, http://thorpe.ou.edu/IRA/chancons.html [https://perma.unl.edu/A7UZ-CN3R]; NORTHWAY TRIBE CONST. art. III, § 5, http://www.aptalaska.net/~nicholr/Constitution%20of%20NVC.pdf [https://perma.unl.edu/HSJ2-VMQY]. At least 150 tribal constitutions discuss "loss of membership." Wilkins, *supra* note 136, at 247. Many of these provisions are identical or very similar, suggesting the language was included in Bureau of Indian Affairs drafts. *See* COHEN, *supra* note 115, § 404[3][a][i], at 257; *see also, e.g.*, SEMINOLE TRIBE OF FLA. CONST. art. II, § 5, http://thorpe.ou.edu/IRA/flsemcons.html [https://perma.unl.edu/74NV-VX57] (granting the Seminole Tribal Council "the power to pass ordinances . . . governing the future membership, *loss of membership* and the adoption of members . . . .") (emphasis added); TONKAWA TRIBE OF OKLA. CONST. art. II, § 2, http://www.tonkawatribe.com/Constitution%20of%20the%20Tonkawa%20Tribe%20of%20Indians%20of%20Oklahoma.pdf [https://perma.unl.edu/4B2D-52QX] (granting the Council the "power to prescribe

Despite significant movement toward disenrolling tribal members for criminal conduct, it appears that only two federal courts[200] have considered challenges to disenrollment on this basis; in each case, the underlying issue was political disagreement between various tribal factions rather than actual "criminal" conduct. In the first case, the Second Circuit Court of Appeals considered a challenge by tribal members who were disenrolled and permanently banished from the reservation.[201] The banishment orders indicated that their names were "removed from the Tribal rolls" and they were stripped of their "Indian citizenship and [would] permanently lose any and all rights afforded [to] members."[202] The court acknowledged that the issue was whether it had the authority to "examine the scope of and limitations on the [tribe's] power to strip the petitioners of their tribal membership"[203] and determined that habeas review was appropriate,[204] yet the court generally framed the issue in terms of banishment.[205] Even the petitioners asserted that the banishment (rather than disenrollment) violated the Indian Civil Rights Act's "cruel and unusual punishments" prohibition.[206]

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rules and regulations . . . covering future membership including adoptions and the *loss of membership*") (emphasis added); WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION CONST. art. II, § 2, http://www.wmat.nsn.us/Legal/Constitution.html [https://perma.unl.edu/L9EQ-7CJU] (granting the Council "the power to pass ordinances . . . governing future membership, *loss of membership*, and all other necessary procedures of enrollment") (emphasis added). In addition, some tribal constitutions imply that disenrollment is possible, although the reasons permitting disenrollment are not explicit. *See, e.g.*, SALT RIVER PIMA-MARICOPA INDIAN COMM. CONST. art. II, § 5, https://www.srpmic-nsn.gov/wp-content/uploads/2018/09/CodeOfOrdinances-Constitution.pdf [https://perma.unl.edu/55ZK-38GK] (providing that the "Community Council shall . . . provide for a fair hearing to any claimant to membership aggrieved by the omission *or deletion* of his or her name" to the tribal membership roll (emphasis added)). A handful of tribes, though, including the Federated Indians of Graton Rancheria and the Spokane Tribe, have amended their constitutions to expressly ban disenrollment. *See, e.g.*, Jarvis, *supra* note 1.

200. Challenges may, of course, proceed in tribal court. Those opinions are, however, often difficult to access. COHEN, *supra* note 115, § 4.05[1], at 270; Galanda & Dreveskratch, *supra* note 136, at 387.

201. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 876–77 (2d Cir. 1996).

202. *Id.* at 878.

203. *Id.* at 897. The court concluded that the tribal officials "imposed punitive sanctions" for "allegedly criminal conduct." *Id.* at 901.

204. *Id.* at 901. This conclusion has been criticized by some scholars. *See, e.g.*, Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 801, 814–15 (2007).

205. *Poodry*, 85 F.3d at 893–98. The court's reliance on banishment may stem from the parties' arguments.

206. *See generally* Brief for Petitioners-Appellants at 20, 29, 40, *Poodry*, 85 F.3d 874 (No. 492), 1995 WL 17214518.

In the second case, the Eastern District of California concluded that "disenrollment from tribal membership and subsequent banishment from the reservation" was a detention[207] but held that the tribal members—again, focusing on the banishment, not disenrollment—had no claim under the Indian Civil Rights Act's cruel and unusual punishments clause because they were not imprisoned for more than a year or fined more than $5,000.[208] Three years later, the court explicitly ruled that it had no jurisdiction to consider the claim that the petitioners' disenrollment violated the Indian Civil Rights Act.[209]

V. TRIBAL DISENROLLMENT IS EQUIVALENT TO REVOCATION OF CITIZENSHIP

All governments have the authority to decide—at the outset—who can become a citizen of their nation.[210] As sovereign nations, tribes have complete authority to decide who is eligible for enrollment.[211] But there is a distinction between eligibility for membership in the first instance (over which tribes have plenary authority) and the forced revocation of membership for criminal conduct after tribal membership has been granted.[212]

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207. *Quair I*, 359 F. Supp. 2d 948, 971 (E.D. Cal. July 26, 2004).

208. *Id.* at 978–79. The court concluded, however, that it had jurisdiction to consider whether the disenrollment and banishment violated due process or fair trial requirements. *Id.* at 977–78.

209. *Quair II*, No. 1:02-CV-5891 DFL, 2007 WL 1490571, at *3–4 (E.D. Cal. May 31, 2007) (granting the tribe's motion for summary judgment on this claim because the disenrolled tribal members "failed to show that disenrollment affects their physical freedom to a degree that it may be considered tantamount to detention," as required for habeas relief).

210. *See, e.g.*, Ekiu v. United States, 142 U.S. 651, 659 (1892). Despite significant limits on American citizenship for centuries, today "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. CONST. amend. XIV, § 1. Although not initially applicable to Native Americans, the 1924 Citizenship Act granted citizenship to Indians born in the United States who were not already citizens by treaty or through other means. Pub. L. No. 68-175, 43 Stat. 253 (1924). Interestingly, a "long politico-legal tradition labeled Native Americans aliens despite the fact that Americans claimed sovereignty over them." KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000, at 222 (2015). Professor Parker also made note of the exclusion of large groups of people based on "religion, race, national origin, health, sexuality, poverty, political ideology, and criminal or terrorist background, to name only a few . . . ." *Id.* at 3. In addition to historical exclusions, the Expatriation Act of 1907 articulated grounds for revoking citizenship, including when a woman married a non-citizen. Pub. L. No. 193, 34 Stat. 1228 (1907). The Act was limited in 1922 by the Cable Act and finally repealed in 1940. PARKER, *supra* note 210, at 176–78.

211. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978).

212. *See, e.g.*, Galanda & Dreveskratch, *supra* note 136, at 389, 444 (arguing that "*disenrollment . . . is not an exercise of inherent tribal sovereignty*").

Citizens are individuals joined in a society that shares a national identity.[213] Nationality includes three components: first, the members may see their nationality as a key part of their personal identity; second, the members have greater duties to others in the nation than to aliens/outsiders; and third, the members can claim a right to self-determination.[214] As with the United States, tribal nations are just that—nations. Even under their qualified status vis-à-vis the federal government, where tribes have been described as "domestic dependent nations,"[215] they are still nations.[216] As such, tribal membership is a *political classification*, not a racial one.[217] And as recognized by the Supreme Court, the "Indian nations had always been considered as distinct, independent political communities retaining their original natural rights . . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.'"[218]

Citizenship is a fundamental right[219] and has been described as "man's basic right, for it is nothing less than the right to have rights."[220] In his influential formulation of the social contract, John

213. DAVID MILLER, CITIZENSHIP AND NATIONAL IDENTITY 27 (2000). Miller asserts that national identity has five characteristics: (1) "national communities are constituted by belief: a nationality exists when its members believe that it does"; (2) it "embodies historical continuity"; (3) it is an "active identity," meaning the community is engaged and its members are participants in that community; (4) it connects its members to "a particular geographical place"; and (5) those sharing the national identity must believe that they "share certain traits that mark them off from other peoples." *Id.* at 28–30. For most people, their citizenship "forms a core part of their identity." *Id.* at 84. Citizenship "defines political identity" and citizenship laws "literally constitute—they create with legal words—a collective civic identity. They proclaim the existence of a political 'people' and designate who those persons are as a people, in ways that often become integral to individuals' senses of personal identity as well." ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VIEWS OF CITIZENSHIP IN U.S. HISTORY 30–31 (1999).

214. MILLER, *supra* note 213, at 27.

215. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

216. *See, e.g.*, WILKINS & WILKINS, *supra* note 2, at 4. Native people most commonly identify themselves as members or citizens, *id.* at 57, and scholars in this field often use the terms interchangeably. *See, e.g.*, FLETCHER, *supra* note 18, at 219.

217. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (justifying approval of Indian preference in BIA hiring by explaining that the preference "is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political, rather than racial in nature."); *see also, e.g.*, Terrill Pollman, *Double Jeopardy and Nonmember Indians in Indian Country*, 82 NEB. L. REV. 889, 895 (2004) (noting that because the federal government negotiated treaties with tribes as opposed to individuals, "tribal membership generally determined individual members' rights").

218. Worcester v. Georgia, 31 U.S. 515, 559 (1832).

219. Trop v. Dulles, 356 U.S. 86, 93 (1958).

220. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

Locke posited that "individuals and society joined together voluntarily to form social compacts and communities."[221] Citizenship is thus a matter of consent;[222] citizens voluntarily elect to become part of the community.[223] Individuals within this community surrender some of their power to the government, which in turn protects the citizens' "lives, liberties and property."[224] In this way, citizens become a "body politic."[225] Because of this voluntary relationship, the government cannot abridge the fundamental powers inherent in the individual; they pre-existed the established government.[226] This holds true in indigenous nations as well, which reflect overlapping traditions: "the people—the tribal community members themselves—are the sovereign."[227]

Furthermore, just as U.S. citizenship provides significant tangible and intangible benefits and "surrounds the individual" with "great immunities,"[228] tribal citizenship provides a variety of protections and benefits, including access to tribal and federal governmental services.[229] Healthcare, housing, employment preferences, and education benefits, just to name a few, all flow from tribal citizenship.[230] In addition, because of recent gaming wealth, tribal citizenship can have significant financial benefits including substantial per capita payments.[231]

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221. Josh Blackman, *Original Citizenship*, 159 U. PA. L. REV. PENNUMBRA 95, 104 (2010).

222. Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 708 (1997). In this vein, some Canadian tribes recognize that banishment for a period of time may be appropriate; as noted, when "a person's behaviour is destructive or disruptive, the band member is no longer consenting to being part of the greater community and its accepted values and must leave until he is ready to respect them." Katherine Harding & Dawn Walton, *Natives Try 'Banishment' to Fight Crime*, GLOBE & MAIL (Feb. 8, 2006), https://www.theglobeandmail.com/news/national/natives-try-banishment-to-fight-crime/article1094479/ [https://perma.unl.edu/2NYC-N5G6].

223. Blackman, *supra* note 221, at 111, 116.

224. Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J.L. & PUB. POL'Y 1095, 1150 (2002).

225. Smith, *supra* note 222, at 694, 706 (citations omitted). Although some tribal nations may not subscribe to the social compact theory, it is clear that tribal members are "citizens" and not "subjects" (contrasted from the early British settlers in the Americas).

226. *Id.* at 695–96.

227. WILKINS & WILKINS, *supra* note 2, at 6.

228. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 76 (1921).

229. COHEN, *supra* note 115, § 3.03[1], at 171 (identifying a number of benefits including exemption from state taxation and state criminal jurisdiction and rights to trust lands).

230. FLETCHER, *supra* note 18, at 219; *see also* Jeffredo v. Macarro, 590 F.3d 751, 756–57 (9th Cir. 2009) (discussing the benefits appellants were denied); Jarvis, *supra* note 1 (discussing the benefits associated with tribal citizenship).

231. FLETCHER, *supra* note 18, at 219 ("Tribal membership has acquired an economic value, sometimes making tribal members incredibly wealthy."); *see also* Hilleary,

The intangible benefits of citizenship are perhaps less obvious, but even more significant.[232] Participating in "a collective—*perhaps one of the deepest of all human needs*"—is a basic characteristic of citizenship.[233] Tribes are not merely "clubs";[234] tribal citizenship provides an individual with a culture, an identity, and a community.[235] As noted by one court when discussing tribal citizenship,

> It is the essence of one's identity, belonging to community, connection to one's heritage and an affirmation of their human being place in this life and world. In short, it is not an overstatement to say that it is everything. In fact, it would be an understatement to say anything less.[236]

Citizenship also creates aliens[237]—those not entitled to the benefits of citizenship.[238] Although all persons are entitled to some "absolute" rights, only citizens can benefit from the "relative" rights that exist by virtue of their social compact.[239] Most significantly, in addition to other disabilities placed upon aliens by virtue of their non-citizen status, they are "subject to the ubiquitous experience of borders: they might be formally excluded and removed in ways that citizens no longer experience."[240] Professor Riley powerfully articulated that dis-

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supra note 1 (explaining that the Pechanga tribe was distributing approximately $300,000 per year to each tribal member).

232. *See, e.g.*, WILKINS & WILKINS, *supra* note 2, at 4 ("[T]he right to belong and to rest assured of one's integral place in a particular Indigenous community is critical."); Jae, *supra* note 1 (describing the most significant component of tribal citizenship as the "connection that we all have as native people to our community, to our traditions and to each other").

233. Marquez, *supra* note 4, at 184.

234. *See, e.g.*, Galanda & Dreveskratch, *supra* note 136, at 451; Jarvis, *supra* note 1.

235. *See, e.g.*, Riley, *supra* note 4, at 1074, 1114–15; Hilleary, *supra* note 1 (quoting a disenrolled tribal member as saying the tribe has "desecrated the memory of our ancestors" and "ripped our history from us"); Jarvis, *supra* note 1; Associated Press, *Disenrollment Leaves Natives "Culturally Homeless*," CBS NEWS (Jan. 20, 2014), https://www.cbsnews.com/news/disenrollment-leaves-natives-culturally-homeless/ [https://perma.unl.edu/RJ6S-DPDQ].

236. WILKINS & WILKINS, *supra* note 2, at 133 (quoting Samuelson v. Little River Band of Ottawa Indians, No. 06-113-AP, 2007 WL 6900788, at *2 (Little River Ct. App. June 24, 2007)). Of course, the relationship between identity, nationality, and citizenship is very complicated; scholars debate these topics, yet the importance of citizenship is difficult to overstate.

237. PARKER, *supra* note 210, at 10–12 (describing "an intensifying substantive distinction between citizen and alien" and pointing out that although citizenship is usually "represented as a *positive* good, bringing with it a sense of communal membership, the ability to participate in the affairs of the community, and so on," citizenship has a negative aspect in that it makes individuals "*less* foreign," "*less* like the aliens with whom they once shared much").

238. MILLER, *supra* note 213, at 27 ("The duties we owe to our fellow-nationals are different from, and more extensive than, the duties we owe to human beings as such"); Smith, *supra* note 224, at 1154.

239. Smith, *supra* note 222, at 731–32.

240. PARKER, *supra* note 210, at 10; *see also* Monestersky v. Hopi Tribe, No. 01AP000015 (Hopi Tribal App. Ct. June 27, 2002), *as reprinted in* FLETCHER, *supra* note 18, at 355 ("It is well settled that the Hopi Tribe, and all Indian tribal

enrolled tribal citizens suffer a "particularly poignant loss" because they "are unlikely to be able to access a community outside the tribe where they will be able to speak their language, participate in religious ceremonies, commune with sacred sites, or engage with other Indians of the same (or similar) tribal affiliation."[241] Once disenrolled, many tribal members who initially might have been eligible for enrollment in another tribe may now be precluded from enrolling elsewhere.[242] And there are compounding generational impacts; when a parent's tribal membership is revoked, his or her children (and their children and their children) are also likely to lose their membership or eligibility for membership.[243]

Although disenrolled tribal citizens are technically not left "stateless"—for they retain their U.S. citizenship—they lose tribal citizenship[244] and their key identity.[245] Furthermore, because tribes retain the inherent authority to exclude non-members,[246] the former tribal member may remain on tribal lands only with the permission of tribal

governments, have the inherent power to exclude nonmembers as an exercise of their sovereign power in order to protect the health and safety of tribal members."); Wilkins, *supra* note 136, at 236–37.

241. Riley, *supra* note 4, at 1074; *see also* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 897 (2d Cir. 1996) (noting that "there is something distinct and important about Indian nationhood and culture" and that "deprivation of citizenship does more than merely restrict one's freedom to go or remain where others have the right to be: it often works a destruction of one's social, cultural, and political existence"); James Dao, *In California, Indian Tribes with Casino Money Case Off Members*, N.Y. TIMES (Dec. 12, 2011), http://www.nytimes.com/2011/12/13/us/california-indian-tribes-eject-thousands-of-members.html (arguing that disenrollment is "psychologically devastating" and destroys connections to ancestors, cultural heritage, and tradition).

242. For example, the Salt River Pima-Maricopa Indian Community, which permits enrollment by an individual who was enrolled in another tribe prior to age eighteen but meets their eligibility requirements, requires that the individual apply for enrollment within one hundred eighty days after turning eighteen; this option appears unavailable to a person disenrolled from a different tribe after that point. SALT RIVER PIMA-MARICOPA INDIAN COMM. CONST. art. II, § 2, https://www.srpmic-nsn.gov/wp-content/uploads/2018/09/CodeOfOrdinances-Constitution.pdf [https://perma.unl.edu/55ZK-38GK].

243. *See, e.g.*, Polly J. Price, *Stateless in the United States: Current Reality and a Future Prediction*, 46 VAND. J. TRANSNAT'L L. 443, 500, 506 (2013); Wilkins, *supra* note 136, at 244–45.

244. Riley, *supra* note 4, at 1114–15 (noting that "[t]ribal members who are exiled from their tribe will still have American citizenship, but unless they can satisfy eligibility for enrollment in another tribe or are adopted by another Indian nation, they will be permanently devoid of tribal citizenship").

245. Jeffredo v. Macarro, 590 F.3d 751, 765 (9th Cir. 2009) (Wilken, J., dissenting) (noting that although those disenrolled from their tribe "retain their United States citizenship and will not be physically stateless, they have been stripped of their lifelong citizenship and identity as Pechangans. This is more than just the loss of a label, it is a loss of a political, ethnic, racial, and social association").

246. *See supra* note 239 and accompanying text.

officials. Trop himself was not excluded from the United States following his conviction for wartime desertion.[247] He was sentenced to three years at hard labor and dishonorably discharged from the U.S. Army in 1944, but he remained in the United States with no indication he was not a citizen until he applied for a passport in 1952.[248] Even though he remained in the United States and even though another country might admit him,[249] the Supreme Court determined that stripping him of his citizenship as punishment for a crime was "more primitive than torture."[250]

Despite this, many courts and scholars rely on the Supreme Court's 1978 decision in *Santa Clara Pueblo v. Martinez*[251] and assert that tribes have plenary power over *all decisions* affecting membership and hence, non-tribal courts have no jurisdiction to address disenrollment disputes.[252] At issue in *Santa Clara*, however, was the tribe's authority to enact a membership ordinance that discriminated on the basis of gender: a decision by the tribe—on the front end—to decide membership requirements.[253] The Court held that the federal courts had no jurisdiction because Congress, when passing the Indian Civil Rights Act, did not expressly waive tribes' sovereign immunity for *civil* membership disputes.[254] Congress did, however, provide for federal court habeas review in *criminal* cases and the Indian Civil Rights Act expressly forbids "cruel and unusual punishments."[255] Because the issue addressed in *Santa Clara* was qualifications for becoming a member, *not* disenrollment and *not* punishment, it does not

247. Trop v. Dulles, 356 U.S. 86, 88 (1958).

248. *Id.*

249. *Id.* at 101.

250. *Id.*

251. 436 U.S. 49 (1978).

252. *See, e.g.*, Tavares v. Whitehouse, 851 F.3d 863, 876 (9th Cir. 2017); Jeffredo v. Macarro, 590 F.3d 751, 920–21 (9th Cir. 2009). *But see* Galanda & Dreveskratch, *supra* note 136, at 407. In addition, some scholars equate the right against forced removal as a right of *entry* (and see the right of *exit* as prohibiting voluntary departure). Riley, *supra* note 4, at 1072, 1074 (suggesting that due process should solve these issues). Rights of entry are admittedly broader than restrictions on exit, but there is a difference between admitting someone in the first instance and forcibly removing the person later.

253. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51–52 (1978).

254. *Id.* at 72.

255. 25 U.S.C. §§ 1302(a)(7)(A), 1303 (2012); *see also* Reply Brief for Petitioners-Appellants, at 4, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (1996) (No. 492), 1995 WL 17200250, at *4 (pointing out that *Santa Clara* and other authorities cited by the tribe do not "involve application of the criminal authority of a tribe to punish individuals, who, without question, meet general tribal membership requirements. The petitioners in this case undisputedly are members of the Tonawanda Seneca tribe by birth. Petitioner's citizenship rights were not bestowed upon them by the Council of Chiefs in the first place").

preclude a determination that disenrollment for criminal conduct violates the Indian Civil Rights Act.[256]

Citizenship can be voluntarily relinquished[257] or revoked because of a voluntary act by a citizen intending to relinquish nationality.[258] But it cannot be revoked,[259] even for misbehavior.[260] Once an individual is enrolled in a tribe, involuntarily extinguishing that membership for reasons other than fraud or mistake in the enrollment process—a reason that would negate the initial eligibility and commonly accepted grounds for revoking citizenship—violates the basic precepts of voluntary citizenship and is not mandated by the Court's holding in *Santa Clara*.[261]

256. The *Santa Clara* Court did state that a "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara*, 436 U.S. at 72 n.32. Whether that pronouncement is viewed as non-binding dictum or as part of the Court's reasoning in support of its judgment, and hence arguably as part of the case's holding, that language must be read in light of the ultimate issue before the Court: a civil challenge to a tribal ordinance denying membership to one class of people. As such, that language cannot be binding on future courts considering whether disenrolling members as the result of criminal conduct, in claimed violation of the prohibition on cruel and unusual punishments, violates the Indian Civil Rights Act. *See, e.g.*, Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 221, 223–24 (2010).

257. 8 U.S.C. § 1481(a) (2012); Trop v. Dulles, 356 U.S. 86, 93 (1958); *see also, e.g.*, Price, *supra* note 243, at 452–53 (citations omitted) (discussing the U.S. reservations to conventions on statelessness: namely because they "limit[ ] voluntary renunciation of nationality . . . that is recognized under U.S. law"). This contrasts with Lord Coke's early 1600s "perpetual allegiance theory," whereby "the allegiance a person acquires at birth to the sovereign is natural and immutable, and cannot be relinquished or abandoned." Blackman, *supra* note 221, at 103.

258. 8 U.S.C. § 1481(a); *see also* Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (holding that stripping citizenship from a naturalized citizen for voting in another country's elections violates the Fourteenth Amendment).

259. *Trop*, 356 U.S. at 90; *see also* Alan G. James, *Expatriation in the United States: Precept and Practice Today and Yesterday*, 27 SAN DIEGO L. REV. 853, 855 (1990) ("[T]he grant of citizenship . . . is absolute and was designed to protect every citizen against a forcible destruction of citizenship. After 200 years there is now in all branches of government a consensus that an American citizen, natural born or naturalized, has a constitutional right to remain a citizen unless he/she voluntarily assents to relinquish citizenship."); WILKINS & WILKINS, *supra* note 2, at 4 ("Tribal councils and other governing institutions . . . do not have or should not have the power to sever their relationship to their people by taking away the most important status, the status of belonging to, of having citizenship or membership in, an Indigenous nation.").

260. *Trop*, 356 U.S. at 92. Although citizenship imposes numerous obligations, failure to meet some of those obligations cannot result in loss of citizenship. *Id.* at 92–93.

261. The only time the Supreme Court expressly considered whether a tribal government could revoke citizenship the Court determined the tribe could, but that revocation cannot conflict with federal law or the federal Constitution. Roff v. Burney, 168 U.S. 218, 223 (1897) (holding that the plaintiff, who acquired Chickasaw membership by marrying a non-Native who had been legislatively granted Chickasaw membership, had a right to sue other Chickasaws in federal court

Sovereigns also have obligations to preserve the community,[262] as tribes historically did in keeping with their overriding goal of preserving harmony.[263] And "in traditional American indigenous society the casting out of one's own relatives did not occur."[264] The "deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be."[265] Even naturalized citizens, who may have the order admitting them to citizenship revoked and their certificate of naturalization cancelled for reasons such as fraud,[266] cannot lose their citizenship without substantial due process.[267] Revoking citizenship deprives the individual of "a right no less precious than life or liberty—indeed of one which today comprehends those rights and almost

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because the tribal court denied him access to their courts after the tribe revoked membership of the plaintiff's wife, and hence, his by marriage). The Court noted,

> The citizenship which the Chickasaw legislature could confer it could withdraw. The only restriction on the power of the Chickasaw Nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the constitution or laws of the United States, and we know of no provision of such constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred.

Id. at 222. The Indian Civil Rights Act's prohibition on cruel and unusual punishment is a law that would expressly conflict with a tribe's ability to disenroll a member.

262. *See, e.g.*, Snowden v. Saginaw Chippewa Indian Tribe of Michigan, No. 04-CA-1017, 32 Indian L. Rep. 6047, (App. Ct. Saginaw Chippewa Indian Tribe of Mich. Jan. 7, 2005) *as reprinted in* FLETCHER, *supra* note 18, at 259 (urging the parties to "place themselves in the heart of Native American jurisprudence by 'healing, restoring balance and harmony, accomplishing reconciliation, and making social relations whole again'") (citations omitted); Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 231, 276–79 (2005).

263. *See supra* notes 121–127 and accompanying text.

264. Galanda & Dreveskratch, *supra* note 136, at 394–95 (pointing out that much like current citizenship laws in the United States and other nations, for tribal nations, "the right of belonging or kinship has historically been permanent and could not be lost involuntarily").

265. *Trop*, 356 U.S. at 92–93.

266. 8 U.S.C. § 1451 (2012) (providing a number of grounds for revoking certificates of naturalization, including concealing material evidence, fraud, refusing to testify before congressional committees, and membership in subversive organizations within five years of becoming naturalized); *see also, e.g.*, United States v. Nunez-Garcia, 262 F. Supp. 2d 1073, 1077, 1088 (C.D. Cal. 2003) (granting summary judgment to the government and revoking citizenship based on fraud in the application process).

267. Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (holding that a statutory reference to a "crime of violence" was "impermissibly vague" and could not support the deportation of a lawful resident); Kungys v. United States, 485 U.S. 759, 763, 776, 783 (1988) (reversing an order to complete denaturalization proceedings when the naturalized citizen lied about his place and date of birth unless the federal government demonstrates "clearly, unequivocally, and convincingly" that misrepresentations in the application process influenced the naturalization decision).

all others."[268] In modern civilized nations, it is well established that although governments have the inherent authority to exclude aliens,[269] they have no corresponding authority to denationalize citizens.[270]

VI. CONCLUSION

Although tribes have the inherent authority to resolve disputes and address their members' conduct with sanctions, disenrolling tribal citizens for criminal conduct constitutes cruel and unusual punishment. The core protection against such punishment is—and should be—available to all citizens within the United States, including Native American citizens.[271]

In addition to the prohibition on cruel and unusual punishments, however, Congress also imposed significant restrictions on the length of time a tribe can incarcerate a convicted criminal and the amount of fines tribes can impose.[272] These latter restrictions create a significant problem—one that has resulted in many tribes "reluctantly" turning to disenrollment in an effort to combat increasing criminal activity on their reservations.[273]

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268. Klapprott v. United States, 335 U.S. 601, 616 (1949) (Rutledge, J., concurring) (reversing a default judgment that cancelled a certificate of naturalization).

269. *See, e.g.*, *Trop*, 356 U.S. at 98.

270. *Id.* As the Supreme Court recognized over fifty years ago:

> Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country, and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.

Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

271. U.S. CONST. amend. VIII; 25 U.S.C. § 1302(a)(7)(A) (2012). Although not specifically addressing disenrollment, Professor Angela Riley acknowledges that from "a U.S. perspective, banishment . . . may run afoul of the Eighth Amendment's ban on cruel and unusual punishment." Riley, *supra* note 4, at 1106.

272. 25 U.S.C. § 1302(a)(7).

273. WILKINS & WILKINS, *supra* note 2, at 20, 66–67, 144. Although many tribes expressed the need for alternatives to incarceration, they still acknowledged that it was appropriate and necessary in some cases. United States Dep't. of Justice and Dep't. of Interior, *Tribal Law and Order Act (TLOA) Long Term Plan to Build and Enhance Tribal Justice Systems* 2 (Aug. 2011), https://www.bop.gov/inmates/docs/tloa_long_term_plan.pdf [https://perma.unl.edu/7UTR-QPUT] [hereinafter DOJ] ("Tribal Leaders feel strongly that incarceration should be a last resort, but acknowledge that detention is appropriate for those offenders at high risk for recidivism and violence. This chapter explores Indian country needs for data, planning, and resources to address the critical needs for the construction, renovation, operations, and programming of detention facilities in Indian country.").

Crime in Indian country is a significant concern.[274] Crime rates on reservations are at least twice the national average,[275] and Native Americans suffer from violent crime at twice the rate of other racial groups.[276] Thirty-four percent of Native women are rape victims.[277] Drug abuse and the crime that accompanies it is rampant in Indian country.[278] And federal prosecutions for crime in Indian country (and state prosecutions in Public Law 280 states)[279] are woefully inadequate; although life sentences and even the death penalty are potential sentences, a variety of factors, including insufficient resources, geographical challenges, cultural differences, and priorities have resulted in the failure of non-tribal governments to address criminal conduct on reservations.[280] Even when federal and state law enforcement is operating at its best, the complicated criminal law jurisdiction involving tribes and tribal members creates problems[281] that can result in a "complete jurisdictional vacuum."[282]

Most tribes today can impose a maximum sentence of one year in jail and a $5,000 fine.[283] The Tribal Law and Order Act, passed by Congress in 2010 in recognition of the uphill battle that tribes face in combatting criminal activity,[284] increased those limits to three years in jail and a $15,000 fine[285] if tribes provide relatively extensive pro-

274. WILKINS & WILKINS, *supra* note 2, at 66, 144; Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1566–69 (2016).

275. Riley, *supra* note 274, at 1569. As noted by the Department of Justice, President Obama pointed out in 2010 that it is "unconscionable that crime rates in Indian country are more than twice the national average and up to 20 times the national average on some reservations." DOJ, *supra* note 273, at 7.

276. COHEN, *supra* note 115, § 9.01, at 736.

277. Riley, *supra* note 274, at 1569.

278. *Id.* at 1628–29.

279. *See supra* notes 158–160 and accompanying text.

280. *See generally*, *Summary Report*, *supra* note 89, at 7–8; Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006); Riley, *supra* note 4, at 1104.

281. COHEN, *supra* note 115, § 9.01, at 736.

282. Riley, *supra* note 4, at 6.

283. Pub. L. No. 99-570, 100 Stat. 3207-146 (1986) (codified at 25 U.S.C. § 1302(a)(7)(B)); Riley, *supra* note 274, at 1567–68; *see also Tribal Law & Order Resource Center*, NAT'L CONGRESS AM. INDIANS, http://tloa.ncai.org//tribesexercisingTLOA.cfm [https://perma.unl.edu/8M4W-C2G9]] (indicating that as of April 2018, only eight tribes have "implemented extended sentencing" under the Tribal Law and Order Act: Cherokee Nation (OK), Confederated Tribes of the Umatilla Indian Reservation (OR), Eastern Band of Cherokee Nation (NC), Fort Peck Tribes (MT), Hopi Tribe (AZ), Muscogee (Creek) Nation (OK), Salt River Pima-Maricopa Indian Community (AZ), and Tulalip Tribes (WA), and another twelve tribes are "close to implementing extended sentencing").

284. DOJ, *supra* note 273, at 2 (describing the goal of the Tribal Law and Order Act as "to improve public safety and justice systems in Indian country").

285. Pub. L. No. 111-211, 124 Stat. 2279 (2010), (codified at 25 U.S.C. § 1302(a)(7)(C) (2012)).

cedural protections.[286] That Act, however, did not go far enough; a maximum of three years in custody (up to nine years total for multiple offenses) is not enough to combat the serious crimes being committed on reservations.[287] Courts may be willing to interpret tribes' criminal jurisdiction over members broadly,[288] but courts are limited by Congress's express statutory language.

The solution is for Congress to remove the limits it imposed on the length of incarceration and the amount of fines tribes can impose, at least over members, so they can effectively combat crime on their reservations. Ultimately, tribal citizens convicted of a crime should have the option: submit to their tribe's inherent criminal jurisdiction, which could include prison sentences exceeding three years and fines exceeding $15,000 at the tribe's discretion, or voluntarily relinquish tribal citizenship and avoid tribal criminal penalties. This solution allows the *individual* to decide the significance of his or her tribal citizenship,[289] consistent with human dignity, civilized treatment, and the consensual nature of citizenship itself.[290] It also maintains the core protection against cruel and unusual punishment but removes significant barriers to effective criminal justice in Indian country.

This solution also promotes tribal sovereignty. Sovereigns have responsibilities to their citizens,[291] including an obligation to preserve

286. 25 U.S.C. § 1302(b) (2012).

287. Tribes have other tools at their disposal to address crime and other anti-social behavior, and many tribes are using them more frequently. *See, e.g.*, Sarah Kershaw & Monica Davey, *Tribes Revive Ancient Penalty*, N.Y. TIMES (Jan. 18, 2004), http://www.nytimes.com/2004/01/18/us/plagued-by-drugs-tribes-revive-ancient-penalty.html (discussing removal from tribal housing as one option).

288. *See, e.g.*, Kelsey v. Pope, 809 F.3d 849, 852 (6th Cir. 2016) (holding that a tribe had criminal jurisdiction to try and punish a tribal member for off-reservation conduct "because it has not been expressly or implicitly divested of its inherent sovereign authority to prosecute members when necessary to protect tribal self-government or control internal relations").

289. Wilkins, *supra* note 136, at 238 (citations omitted) ("Among Romans, prolonged, if not permanent, voluntary physical exile was one way to avoid the death penalty. Voluntary expatriation is, therefore, a unique case of emigration, 'where what is sought is not primarily the advantages of the place to which one goes, but essentially freedom from whatever disadvantages prevailed at home.'").

290. I argue that this would, to use Professor Riley's words, permit "illiberal groups" to exist in "liberal societies"—by recognizing tribes' inherent criminal jurisdiction over members, and at the same time, allowing tribal citizens to voluntarily relinquish that citizenship if they do not wish to be subject to this inherent power. Riley, *supra* note 204, at 816.

291. *See, e.g.*, Riley, *supra* note 4, at 1107 ("[T]he U.S. government continues, in a variety of ways, to undermine or altogether sabotage the survival of indigenous nations in America," yet "Indian tribes in a contemporary world are in a position to more fully consider their obligations to their citizens").

the community.[292] Sovereigns, including tribal nations, have no power to revoke citizenship;[293] to do so would be to impose a "form of punishment more primitive than torture."[294] At the same time, removing congressional limitations on incarceration and fines *directly* supports tribal sovereignty[295] by restoring tribes' inherent power to resolve problems internally.[296] It allows tribes to address criminal conduct in whatever manner they believe is most appropriate as long as the sanction is not a cruel and unusual punishment. This solution also exchanges a nuclear weapon in the fight against reservation crime—disenrollment—for a much more targeted and appropriate weapon: returning inherent tribal criminal authority over members and leaving it up to the individual tribal member to assess the relative value of tribal community.

292. Disenrolling a tribal citizen for criminal conduct would also divest tribes of the ability to prosecute that individual for future crimes, potentially exacerbating the problem. *See, e.g.*, WILKINS & WILKINS, *supra* note 2, at 135–36.

293. Galanda & Dreveskratch, *supra* note 136, at 389 (arguing that "disenrollment is antithetical to tribal sovereignty").

294. Trop v. Dulles, 356 U.S. 86, 101 (1958). As noted earlier, the "political existence" of Native Americans has been developing far longer than that of the colonists.

295. *See* Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 784–86 (2006) (pointing out that "real self-determination has not been—and cannot be—achieved until tribes can determine for themselves what is right and what is wrong on their own reservations and in human transactions involving their own members" and that "they must have the power to enact substantive criminal laws" rather than be bound "to rules and value judgments imposed on them by outsiders"—namely, the federal government).

296. Restoring tribes' inherent authority furthers tribal interests. *See, e.g.*, Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM & MARY L. REV. 539, 542 (1997) (arguing in the civil context that "refocusing the inquiry to require careful analysis of relevant tribal interests can produce a more reasoned allocation of adjudicatory jurisdiction," which will ensure "a more faithful adherence to well-established judicial doctrines respecting inherent tribal sovereignty and tribal self-determination"). In addition, removing disenrollment as an option affirms tribal sovereignty and should appeal to tribal leaders (in addition to those interested in protecting individual rights) because of the harms to tribal identity as a whole and governance that come with disenrollment.