

## NOTES

### COMING FULL CIRCLE: THE USE OF SENTENCING CIRCLES AS FEDERAL STATUTORY SENTENCING REFORM FOR NATIVE AMERICAN OFFENDERS

#### INTRODUCTION

In the United States, prosecuting Native American offenders with punitive criminal sentences is inappropriate because tribal sentences emphasize restorative justice instead of harsh punishments.<sup>1</sup> High incarceration and recidivism rates result from applying rigid federal sentencing rules to American Indian cases, because the underlying problem is unresolved for these specific types of offenders.<sup>2</sup> To combat these problems, Congress should enact a method of sentence reform for Native American offenders in U.S. jurisdictions, incorporating Canadian statutory approaches to Aboriginal offenders and tribal sentencing circles.

American courts frequently subject the American Indian offender to unfamiliar and intimidating legal experiences, which often fail to correct the underlying dispute.<sup>3</sup> American

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1. See generally Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 *HAMLIN J. PUB. L. & POL'Y* 419, 432 (1999) (discussing the goals of restorative harmony of the Navajo Nation's peacemaking process and distinguishing those objectives from punishment).

2. Cf. Janelle Smith, *Peacemaking Circles: The "Original" Dispute Resolution of Aboriginal People Emerges as the "New" Alternative Dispute Resolution Process*, 24 *HAMLIN J. PUB. L. & POL'Y* 329, 332 (2003) (explaining how the use of peacemaking circles can reduce recidivism, cut the costs of incarceration overburdening the justice system, and improve preventative measures within the community).

3. Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo*, 76 *JUDICATURE* 15, 15 (1992).

adversarial justice systems emphasize individuality and winning,<sup>4</sup> while tribal court systems promote community harmony and encourage the offender to take responsibility for his actions.<sup>5</sup> Tribal disputes focus on compromise so that everyone involved benefits and the offender learns from his wrongful conduct.<sup>6</sup> The discrepancy between the two justice systems leads to high incarceration rates for Native Americans, because they do not understand or value adversarial notions of justice.<sup>7</sup>

Native offenders, as well as the U.S. justice and prison systems, can benefit from a combination of American methods of adjudication and tribal sentencing circles. Alternatives to incarceration can be established if Congress adopted a statute requiring courts to take the special circumstances of Native Americans into account during sentencing. The statute can achieve this purpose by encouraging the judge to refer guilty Native American offenders to sentencing circles. Judges and attorneys would still be involved in the process to ensure that the goals of American justice are achieved, but the referral to a culturally-sensitive sentencing circle also guarantees that the federal courts satisfy the distinctive goals of Native American justice.<sup>8</sup>

The federal government is obligated to protect Native Americans under the Trust Relationship Doctrine (Trust Doctrine).<sup>9</sup> The United States has violated this duty to the tribes because the criminal justice system does not operate adequately

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4. See Robert Yazzie, "Life Comes From It": Navajo Nation Justice Concepts, 24 N.M. L. Rev. 175, 177-78 (1994).

5. See generally Tso, *supra* note 3, at 17 (discussing the first canon of the Navajo Nation's code of judicial conduct, which instructs a Navajo Nation judge to promote Navajo justice, based upon values of clan relations, harmony, traditional leadership, and taking care of victims).

6. Robert Yazzie, the Navajo Nation's Supreme Court Chief Justice, refers to adversarial justice systems as "vertical justice" and tribal methods as "horizontal justice." Yazzie, *supra* note 4, at 178.

7. In an April 2000 census, American Indians accounted for 1.5% of the entire United States population. Steven W. Perry, *American Indians and Crime*, NCJ 203097 at 1 (Dec. 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf>. In the fiscal year 2001, 2.4% of offenders entering federal prisons were American Indians. *Id.* at 21.

8. See Matt Arbaugh, *Making Peace the Old Fashioned Way: Infusing Traditional Tribal Practices into Modern ADR*, 2 PEPP. DISP. RESOL. L.J. 303, 313 (2002).

9. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); see also *infra* Part I.A.

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for Native American offenders who commit crimes on Indian country.<sup>10</sup> In order to fulfill its obligations under the Trust Doctrine, Congress should use its plenary power to enact protective legislation similar to that found in the Canadian Criminal Code.<sup>11</sup> The relevant Canadian Criminal Code provision instructs judges to take into account the special circumstances of Aboriginal offenders as a subjugated population, and to use prison sentences as a last resort sanction during sentencing.<sup>12</sup> Canadian case studies demonstrate the potential for reduced recidivism rates among Native offenders, which could emerge from a congressionally mandated use of sentencing circles for Native American offenders.<sup>13</sup>

Any possible Equal Protection and leniency counterarguments can be dispelled if Congress properly limited the proposed legislation. The statute should be limited to Native American offenders who commit less serious crimes within Indian country, who are still affiliated with their tribal community, and who have not been subjected to a previous sentencing circle for the same crime. This legislation would be an ideal way to solve the United States' violation of its trust obligations.

Part I of this Note summarizes the relationship between the United States government and the Native American tribes in regard to the regulation and oversight of tribal justice systems. Part II explores how the United States government has eroded that relationship by violating its obligations under the Trust Doctrine, leading to high rates of incarceration and recidivism among Native Americans as a group. Additionally, Part II compares how Canada actively responded to excessive rates of imprisonment among its Native peoples. Part III describes how the use of sentencing circles can restore the Trust Relationship by comparing the effective uses of the circles in Canada and within American Indian tribes. In addition, this Part illustrates Canada's further willingness to honor its own duty to its Aboriginal peoples through the implementation of a protective criminal statute. Part IV asserts that Congress has the power to

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10. *See infra* Part II.A.

11. CAN. CRIM. CODE, R.S.C. ch. C-46, § 718.2(e) (2006).

12. *Id.*

13. Smith, *supra* note 2, at 361-66.

enact similar legislation to amend existing federal sentencing laws, and proposes language for a statute intended to heal the Trust Relationship by protecting Native Americans from continued high rates of incarceration. Finally, Part V acknowledges potential counterarguments and limitations to a comparable federal law and refutes them.

## I. THE TRUST RELATIONSHIP DOCTRINE

The United States government and Native American tribes have a unique relationship, which grants the tribes sovereignty in some of their internal judicial affairs.<sup>14</sup> However, Congress has almost unlimited power to regulate Indian affairs whenever it deems necessary.<sup>15</sup> One of the major ways Congress has done so is through enactment of the Major Crimes Act, which subjects Native American offenders to federal jurisdiction for specific enumerated crimes committed within Indian country.<sup>16</sup> But, tribes still maintain some sovereignty through the exercise of tribal jurisdiction over Native American offenders who commit crimes within Indian country in certain situations.<sup>17</sup>

### A. Tribal Sovereignty

The Trust Relationship includes the “mixture of legal duties, moral obligations, understandings and expectancies that have arisen from the entire course of dealing between the federal government and the tribes.”<sup>18</sup> Essentially, the United States acts as a trustee and the tribes act as beneficiaries, a relationship which gives rise to legally enforceable duties and rights between the parties.<sup>19</sup> In 1790, the federal government

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14. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 34 (4th ed. 2004). Although some readers may not equate a “nutshell” series with other scholarly materials, Canby’s nutshell hornbook has been hailed as an illuminating analysis of federal American Indian law. *See generally* Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199, 1207 (1989) (praising Canby’s stimulating and intellectual analyses of federal American Indian law issues).

15. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-68 (1903) (holding that Congress could regulate in derogation of a Native American treaty as long as it acted in good faith and presuming legislative validity).

16. 18 U.S.C.A. § 1153 (2006).

17. *See infra* Part I.C.

18. CANBY, *supra* note 14, at 34.

19. *Id.*

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passed the Trade and Intercourse Act to effectuate this relationship.<sup>20</sup> The Act's underlying policy was to protect Indian tribes from encroachment by the States.<sup>21</sup> It established the boundaries of Indian country, subjected all Native American interactions with the United States to federal law, and prohibited federal regulation of entirely native affairs within Indian country.<sup>22</sup> The Act also stipulated that crimes committed in Indian country by non-Indian offenders would be prosecuted by federal courts to protect Indians from the possible prejudices of state governments.<sup>23</sup> The result was the emergence of Native American quasi-sovereignty, the "inherent right or power to govern" themselves within the confines of Indian country.<sup>24</sup>

*B. Federal Jurisdiction over Crimes Committed by Native American Offenders: Congress' Plenary Power and the Major Crimes Act*

Congress has plenary power to regulate tribal sovereignty.<sup>25</sup> The Indian Commerce Clause in the U.S. Constitution, the existence of tribal conquest, and case law have all been used to justify this power.<sup>26</sup> In 1817, the federal government exercised

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20. 1 Stat. 137, c. 33 (1790).

21. *Id.*

22. CANBY, *supra* note 14, at 14. The term "Indian country" has been codified in the United States, defined as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C.A. § 1151 (2006).

23. 1 Stat. 137, c. 33 (1790); *see also* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (explaining that Congress never granted the tribes the right to prosecute non-Indian offenders in tribal courts, even when the crime was committed within Indian country against a tribal member).

24. CANBY, *supra* note 14, at 72.

25. "Plenary power" refers to the United States government's almost unbridled rights to regulate Indian affairs. *See generally* *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (upholding a statute allowing for distribution of tribal lands to private parties without tribal consent, which was contrary to a prior treaty's provisions).

26. CANBY, *supra* note 14, at 93; *see also* *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

its plenary power and limited tribal sovereignty when Congress amended the Trade and Intercourse Act, and passed the Indian Country Crimes Act.<sup>27</sup> The Indian Country Crimes Act provides for federal jurisdiction over crimes committed in Indian country between Indians and non-Indians, regardless of who offended whom.<sup>28</sup>

In 1883, in *Ex Parte Crow Dog*, the Supreme Court held that there was no legal basis for extending federal jurisdiction to “aliens and strangers” who lack understanding of United States law in the case of Indian offenders.<sup>29</sup> The Court ruled that federal law does not control when an Indian commits a crime against another Indian in Indian country; instead, tribal law governs.<sup>30</sup> In response to the Supreme Court’s ruling, Congress further eroded tribal sovereignty by passing the Major Crimes Act of 1885.<sup>31</sup> This Act requires that certain enumerated, serious crimes committed in Indian country by Native Americans against other Indians or non-Indians be tried in a federal court instead of a tribal (or state) court.<sup>32</sup>

The federal government claimed that the power to regulate under the Major Crimes Act is a power granted to Congress through the Trust Relationship.<sup>33</sup> The federal government rationalized the passage of the Act under its duty to protect the tribes from the States.<sup>34</sup> The Supreme Court asserted that federal courts are the proper venues for prosecuting these crimes

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27. 18 U.S.C.A. § 1152 (2006).

28. *Id.*

29. *Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883) (holding that United States law is unfair as applied to Native American offenders who commit crimes against other Indians within Indian country).

30. *Id.*

31. The Major Crimes include murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of sixteen years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title. 18 U.S.C.A. § 1153 (2006).

32. CANBY, *supra* note 14, at 135.

33. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

34. *See id.* (holding that the people of the states in which the tribes are located have ill feelings toward the tribes, and the “weaknesses and helplessness” that tribes incur by dealing with the federal government necessitates more federal protection).

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because state governments are the tribes' "deadliest enemies."<sup>35</sup> As a result, the Major Crimes Act limited the sovereignty of tribes by eradicating their power to punish enumerated "major crimes" committed within tribal boundaries by their own members.<sup>36</sup>

### C. Tribal Court Jurisdiction

Tribal courts have exclusive jurisdiction over less serious crimes committed by tribal members against other tribal members, assuming the tribe has a justice system in place.<sup>37</sup> The Ninth Circuit has ruled that tribes may also exercise concurrent jurisdiction under the Major Crimes Act in the prosecution of at least one of the enumerated crimes.<sup>38</sup> Accordingly, Native American tribes have exclusive jurisdiction over lesser crimes committed on Indian country, and concurrent jurisdiction over certain more serious crimes when the federal government fails or refuses to act.<sup>39</sup> When Indians commit crimes outside Indian country, relevant state or federal laws apply as they would to any non-Indian offender.<sup>40</sup>

## II. EROSION OF THE TRUST RELATIONSHIP

Over time, the United States government severed its relationship with some tribes in violation of the Trust Relationship.<sup>41</sup> The government proclaimed that it was merely

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35. *Id.*

36. *See* CANBY, *supra* note 14, at 20.

37. Not every Native American tribe has its own justice system. The systems that exist vary greatly by tribe from the incredibly complex Navajo Nation system to very informal systems in the smaller tribes. *Id.* at 135.

38. *See generally* Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995) (holding that a tribal member found guilty of manslaughter could be prosecuted by the tribal court because the federal government refused or failed to prosecute, and that the defendant was not eligible for habeas corpus review in federal court because she had not appealed to higher tribal courts first). The United States Supreme Court and all other circuit courts have yet to address this issue.

39. *See id.* at 825-26 (noting that once the tribal offender has exhausted the tribe's judicial procedures for appeals, then he may be eligible for habeas corpus relief from the federal government).

40. CANBY, *supra* note 14, at 178. The jurisdictional rules surrounding state law and Native American offenders are complex. Because this Note proposes a change in federal law and not state law, the issue will not be further explored, as it is irrelevant to the federal statutory proposal.

41. After 1953, Congress terminated its relationship with over one hundred

granting tribes the liberation they had been seeking.<sup>42</sup> But, Congress has contradictorily regulated away much of the tribes' abilities to govern themselves and replaced tribal sovereignty with an ineffective criminal justice framework.<sup>43</sup> High incidences of Native American incarceration and recidivism have resulted. Thus, under the Trust Doctrine, Congress has a legal duty to provide improved criminal justice for American Indian offenders.

Likewise, the Canadian government violated its less formal duties to the Aboriginal peoples.<sup>44</sup> Extremely high incarceration and recidivism rates also abounded among native offenders.<sup>45</sup> However, instead of further eroding the relationship, the Canadian government acknowledged the problems and enacted legislation to effectively combat them.<sup>46</sup>

#### *A. Recidivism in the Native American Context*

The Major Crimes Act was an application of Congress' plenary power, which was justified by the nation's obligations under the Trust Relationship. However, the federal framework has not had the intended protective effect, and high crime rates abound on Indian reservations.<sup>47</sup>

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tribes, which resulted in tribal land reverting to private ownership by the Indians, subject to taxation and private management. Most tribes could not afford to or did not understand how to maintain the land and pay taxes, so they lost their land. Further, crimes committed on tribal territory fell under state jurisdiction instead of federal or tribal jurisdictions, and Indians lost access to beneficial federal services and treaty rights. After 1973, the Menominee and Klamath Indian tribes convinced Congress to restore the trust relationship by placing tribal land back into federal trust and restoring other federal benefits, which remain in place today. *Id.* at 58-61.

42. *Id.* at 26.

43. 18 U.S.C.A. § 1152 (2006); 18 U.S.C.A. § 1153 (2006).

44. *See Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 (Can.) (holding that the Canadian government owes a duty to its Aboriginal peoples under the "honour of the Crown"); *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550 (Can.) (same); *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388 (Can.) (same).

45. *R. v. Gladue*, [1999] 1 S.C.R. 688, ¶ 65 (Can.).

46. CAN. CRIM. CODE, R.S.C., ch. C-46, § 718.2(e) (2006); *see infra* Part II.B.

47. *See generally* Sarah M. Patterson, Note & Comment, *Native American Juvenile Delinquents and the Tribal Courts: Who's Failing Who?*, 17 N.Y.L. SCH. J. HUM. RTS. 801, 816 (2000) (describing a "crime epidemic" on Indian reservations).

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Incarcerations are expensive, especially when repeat offenders are common.<sup>48</sup> In 1997, Native Americans accounted for 1.5% of the population in federal prisons.<sup>49</sup> In a study of released prisoners from fifteen states conducted by the Bureau of Justice in 1994, Native Americans represented only 1% of the discharged inmates.<sup>50</sup> Within three years, 60% of the discharged Native American offenders were arrested again, and 46% were convicted of a repeat offense.<sup>51</sup> Over 50% of the released Native Americans were sent back to prison for another offense within this time period.<sup>52</sup> With appropriate sentence reform, the United States government can use its plenary power to reduce the costs associated with such high incarceration rates among Native American offenders.

Native American offenders recommit offenses because imprisonment does not result in rehabilitation in their cases.<sup>53</sup> A different, culturally-relevant sentence is necessary to restore harmony. Although preliminary results are limited, if American jurisdictions applied rehabilitative sentencing methods for American Indian offenders as they are applied in the tribal courts, it is likely that reduced recidivism would result.<sup>54</sup> Federal funds would be much better spent implementing a system to which Native Americans can relate, because it would rehabilitate

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48. *Cf.* Smith, *supra* note 2, at 329-31 (describing how some states have repealed minimum jail sentences and sent offenders into treatment programs instead of sending them to jail to try to cut the costs of incarceration and decrease state budget deficits); *see also* Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-09-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html) (stating that the cost of incarceration in the United States is forty billion dollars per year and arguing for the elimination of mandatory minimum jail sentences to combat the problem).

49. Lawrence A. Greenfield & Steven K. Smith, *American Indians and Crime*, NCJ 173386 at 26 (Feb. 1999), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf>.

50. Perry, *supra* note 7, at 22.

51. *Id.* at 23.

52. *Id.* at 24.

53. Patterson, *supra* note 47, at 823.

54. *See* Smith, *supra* note 2, at 332; *see also generally* State v. Pearson, 637 N.W.2d 845, 849 (Minn. 2002) (upholding a Minnesota restorative justice statute that allowed for a sentencing circle to decide an “appropriate sanction for the offender,” but questioning the scope of the circle’s authority based on lack of precedent).

the offender and prevent the criminal from re-offending.<sup>55</sup> However, in order for U.S. jurisdictions to adopt effective restorative methods, the legislature must enact a statute requiring courts to take the special circumstances of Native Americans into account during sentencing.

*B. Canada's Reaction to High Incarceration Rates among  
Aboriginal Peoples*

The Canadian government has also established an obligation to its Aboriginal peoples.<sup>56</sup> However, the duty is not nearly as formalized as that owed by the United States government to Native Americans.<sup>57</sup> The Canadian government refused to allow for Aboriginal self-government in the handling of internal judicial affairs; Aboriginal offenders are always subject to provincial or federal jurisdictions.<sup>58</sup> Regardless of the lack of a formalized protective relationship, the Canadian government has stepped forward and initiated a plan to protect its native people.<sup>59</sup>

To combat similar high rates of Aboriginal incarceration and recidivism,<sup>60</sup> Canada adopted a principle in its Criminal Code requiring a court to pay particular attention to the unique life circumstances of Aboriginal offenders before automatically enforcing imprisonment as a sanction.<sup>61</sup> Upon his discretion, the

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55. Cf. Patterson, *supra* note 47, at 827 (explaining the need for more and better allocation of federal funds to increase the effectiveness of a tribal justice system).

56. *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 (Can.); *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550 (Can.); *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388 (Can.).

57. See *Haida Nation*, 3 S.C.R. at ¶ 32 (holding that the duty flows from the government's assertion of sovereignty over the Aboriginal peoples and the "de facto control of land and resources that were formerly in the control of that people").

58. Catherine Bell, *Metis Constitutional Rights in Section 35(1)*, 36 ALBERTA L. REV. 180, 186 (1997).

59. CAN. CRIM. CODE, R.S.C., ch. C-46, § 718.2(e) (2006).

60. Aboriginal people compose approximately ten percent of the federal penitentiary population, while they only make up approximately two percent of the population nationally. *R. v. Gladue*, [1999] 1 S.C.R. 688, ¶ 65 (Can.). Native men were twenty-five times more likely to go to jail than their non-native counterparts. *Id.* An aboriginal boy is more likely to go to prison than to high school in his lifetime. *Id.*

61. "A court that imposes a sentence shall also take into consideration the following principles: all available sanctions other than imprisonment that are

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sentencing judge can refer the offender to a culturally-sensitive sentencing circle.<sup>62</sup> The court considers multiple criteria for determining whether the circle option is applicable to the particular facts and circumstances of the case.<sup>63</sup> The court can further exercise its discretion in deciding whether to enforce the recommendations from the sentencing circle or to impose its own sentence.<sup>64</sup> The process upholds traditional elements of adversarial adjudication throughout.<sup>65</sup>

### III. THE USE OF SENTENCING CIRCLES

Sentencing circles have been used in Native American tribal jurisdictions and with Aboriginal offenders in Canadian jurisdictions to emphasize rehabilitation and community restoration. The emphasis on rehabilitation has had promising results in decreasing incarceration and recidivism rates in Canada among Aboriginal offenders.<sup>66</sup> Accordingly, the Canadian government enacted legislation mandating that courts take into account the special circumstances of Aboriginal offenders in the sentencing process.<sup>67</sup> In so doing, the court may refer the offender to a sentencing circle composed of Aboriginal community members to decide the appropriate sentence instead of automatically imposing a certain prison sentence.<sup>68</sup>

#### *A. Sentencing Circles in the Native American Context*

Tribal court systems vary among tribes, but the use of “sentencing” or “peacemaking circles” is commonly employed to

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reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” CAN. CRIM. CODE, R.S.C. ch. C-46 § 718.2(e) (2006).

62. *R. v. Joseyounen*, [1995] 6 W.W.R. 438, ¶ 2 (Sask. Prov. Ct.); *see infra* Part III.B.

63. *Joseyounen*, 6 W.W.R. at ¶¶ 18-43; *see also* *R. v. Moses*, [1992] 11 C.R. (4th) 357, ¶¶ 126-68 (Yukon Terr. Ct.) (considering duration of criminal activity, kinds of offenses, utility of previous sentencing remedies, recidivism, and other influences when referring an offender to a sentencing circle).

64. *Moses*, 11 C.R. at ¶¶ 110-11.

65. *Id.*

66. *See infra* Part IV.C.

67. CAN. CRIM. CODE, R.S.C., ch. C-46, § 718.2(e) (2006).

68. *See generally Moses*, 11 C.R. at ¶¶ 21-31 (holding that the traditional justice system had failed the offender, so the case necessitated a more community-oriented sentencing approach to rehabilitate the criminal).

arrive at appropriate sanctions for Native American offenders.<sup>69</sup> Tribal courts utilize sentencing circles to “talk out” disputes in a culturally-relevant fashion by considering the context of the crime.<sup>70</sup> Typically, circles are composed of respected individuals from the offender’s community, who guide conversation among the victim, offender, and family and community members from both sides.<sup>71</sup> All members of the circle must achieve a consensus for how justice can best be restored, or else the recommendation cannot be adopted.<sup>72</sup> Sentencing circles personalize the sentencing process because they take into account the life circumstances of everyone involved, and both the victim and offender have a say in the resolution.<sup>73</sup>

Typically, the participants sit in a physical circle, which diminishes the hierarchal structure of a traditional court setting and represents the interconnected relationships of all the participants.<sup>74</sup> A talking piece is passed around, and the person holding the piece is the only one allowed to speak at that time, which facilitates active listening and participation.<sup>75</sup> Sentencing circles allow each person to speak freely about the facts, emotions, fears, and other feelings surrounding the crime, so that an appropriate sentence can be achieved for effective rehabilitation of the parties.<sup>76</sup>

### *B. Sentencing Circles in the Context of Aboriginal Peoples in Canada*

Sentencing circles are also used in Canada to serve the culturally-sensitive needs of Canada’s Aboriginal peoples when offenders are faced with the unfamiliar and daunting Canadian justice system.<sup>77</sup> The judge has broad discretion in deciding whether to refer an offender to a sentencing circle in the first

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69. *See generally* Ulrich, *supra* note 1, at 420-21 (referencing the widespread use of dispute resolution methods and sentencing circles in Native American tribes).

70. *Id.* at 432.

71. *See* Smith, *supra* note 2, at 352.

72. *Id.*

73. *Id.* at 355.

74. *See* Ulrich, *supra* note 1, at 433-34.

75. *Id.* at 433.

76. *Id.*

77. Smith, *supra* note 2, at 340-41.

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instance, but he must find seven criteria to be satisfied before he is allowed to do so.<sup>78</sup>

First, the offender must agree to the circle, which is usually achieved by a guilty plea.<sup>79</sup> Second, the offender must have strong connections to the community in which the circle is held so that everyone involved has a personal interest in striving for effective rehabilitation of the offender.<sup>80</sup> Third, to ensure political impartiality, there must be respected elders within the community who are willing to participate.<sup>81</sup> Fourth, the victim must be voluntarily willing to participate in the circle.<sup>82</sup> Fifth, if the victim is a subject of battered spouse syndrome, the victim should receive individual counseling and have a support team present at the circle to protect against the effects of learned helplessness.<sup>83</sup> Sixth, the disputed facts surrounding the case must be resolved at trial before the circle proceeds, because disputed issues would undermine the consensus-oriented goals of the circle.<sup>84</sup> Finally, the court must agree to the circle, taking into account the public's confidence in proper administration of justice.<sup>85</sup> These criteria operate to ensure that all Aboriginal cases are not arbitrarily sent to sentencing circles, resulting in illogical and unfair sentences.<sup>86</sup> The circle's final agreement is recommended to the judge who has discretion in deciding whether to make the recommendation the offender's binding

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78. R. v. Joseyounen, [1995] 6 W.W.R. 438, ¶ 4 (Sask. Prov. Ct.).

79. *Id.* at ¶ 18. If an offender is found guilty after trial or pleads guilty, there may be possible concerns with waiver of a formal sentencing hearing. As long as the waiver is knowing and voluntary, the offender should not be allowed to raise the issue on appeal. *See infra* Part V.C.

80. *Joseyounen*, 6 W.W.R. at ¶ 22.

81. *Id.* at ¶ 26.

82. *See id.* at ¶¶ 30-31 (noting exceptions to this requirement if the victim does not have the proper mental capacity to participate or if the victim is deceased, and allowing the family to be present on the victim's behalf, but emphasizing that the victim cannot be coerced into participating under any circumstances).

83. The court is concerned that the battered spouse may be coerced by her offender spouse into a sentencing agreement that she really does not believe will be appropriate or effective. *Id.* at ¶ 34.

84. *Id.* at ¶¶ 35-36.

85. *See generally id.* at ¶¶ 38-42 (noting that if the crime is of a serious and violent nature, the judge may not be willing to refer the case to a sentencing circle because sentencing circles may yield less incarceration sentences, and the public may equate proper justice with incarceration for those types of crimes).

86. *Id.* at ¶ 4.

sentence.<sup>87</sup>

*C. Canada Takes Effective Sentencing of Native Peoples  
Seriously: The Canadian Criminal Code*

Canada codified a culturally-sensitive attitude toward sentencing of Aboriginal people to try to reduce high incarceration rates among native groups.<sup>88</sup> The relevant Canadian Criminal Code provision reads: “[A] court that imposes a sentence shall also take into consideration the following principles: all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”<sup>89</sup> The particular circumstances of Aboriginal offenders to be considered include the unique social factors which may have caused the offender to commit the crime in the first instance and the appropriate sentencing procedures or sanctions for the offender due to his heritage or background.<sup>90</sup> The court should also consider the nature and gravity of the offense, the offender’s prior criminal record or lack thereof, the impact of the crime on the victim(s) and community, the need for deterrence, the desire to maintain uniformity of sentencing, and any aggravating or mitigating factors.<sup>91</sup>

Under the terms of the statute, prison is to be saved for a last resort sanction. But that does not necessarily mean that Aboriginal offenders will never be incarcerated or that punishment will consequently be more lenient, especially if the offender commits violent or other very serious crimes.<sup>92</sup> The

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87. The judge and attorneys may also be allowed to participate in the circle. Smith, *supra* note 2, at 349.

88. *But see* Renee Pelletier, *The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons*, 39 OSGOODE HALL L. J. 469, 470 (2001) (questioning whether the statute is being applied consistently in practice and advocating for more widespread use).

89. CAN. CRIM. CODE, R.S.C., ch. C-46, § 718.2(e) (2006).

90. *R. v. Gladue*, [1999] 1 S.C.R. 688, ¶ 39 (Can.).

91. These factors should ideally be considered for all offenders in the sentencing phase, whether or not the offender has an Aboriginal heritage. *See R. v. Wells*, [2000] 1 S.C.R. 207, ¶¶ 22-23 (Can.).

92. *See R. v. Moses*, [1992] 11 C.R. (4th) 357, ¶ 77 (Yukon Terr. Ct.) (asserting that punishment ensuing from members of the community that an Aboriginal offender has to face every day may be more harsh and shameful

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totality of the circumstances is meant to ensure that the sanction fits the crime committed for the particular criminal.<sup>93</sup> The statute emphasizes that sentencing should be a more personalized process for Aboriginal offenders, decided on a case by case basis.<sup>94</sup>

The goals of the Canadian Criminal Code provision correspond with the objectives of sentencing circles, already in effect in Canada. In determining whether a sentence is appropriate for an Aboriginal offender, some of the same circumstances are considered.<sup>95</sup> These factors include the duration and nature of the offender's criminal record, the utility of past sanctions, recidivism, appropriateness of incarceration in this instance, the unique impact jail may have on the offender, how rehabilitation can best be achieved, depth of first nation or tribal involvement, and other relevant influences.<sup>96</sup> Taking these factors into consideration helps serve the goals of the criminal justice system by collaborating with the community to prevent crime, protect society, and rehabilitate the criminal effectively.<sup>97</sup> If these processes are considered in the context of Native American offenders, some of the same harmonious results can be achieved.

#### IV. APPLICATION OF PLENARY POWER TO AMEND FEDERAL LAWS

Congress possesses the plenary power to regulate Indian affairs,<sup>98</sup> and the United States owes a duty to Native Americans to provide an adequate criminal justice system.<sup>99</sup> Federal sentencing law should be amended to apply a sentencing circle framework to Native American offenders in order to reduce high incarceration and recidivism rates. Given the positive

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than going to prison and facing strangers).

93. The court did not intend that Aboriginal offenders be punished less harshly than non-native offenders, but prison may not solve the underlying problem for Aboriginal offenders the way it might for criminals from other cultural backgrounds. *See generally Wells*, 1 S.C.R. at ¶ 24.

94. *Id.* at ¶ 87.

95. *See Moses*, 11 C.R. at ¶¶ 122-68.

96. *Id.*

97. *Id.* at ¶ 115.

98. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

99. *Id.*

results of the Canadian sentencing circle model and the already existing use among Native American tribes, there is nothing to prohibit Congress from enacting legislation mandating consideration of the unique cultural circumstances of Native American offenders.

The U.S. statute will be most successful if it is modeled after the Canadian Criminal Code to read as follows:

A court that imposes a sentence shall upon its discretion refer a Native American offender to a sentencing circle and enforce the recommended sanction if: (a) the offender, victim, and respected community members voluntarily agree to participate, (b) the offender has strong ties to his native community, (c) where the victim is a subject of battered spouse syndrome, the victim receives individual counseling and has a support team present at the circle,<sup>100</sup> (d) disputed facts have been completely resolved at trial, and (e) referral to a sentencing circle would not undermine the public's confidence in proper administration of justice. This provision shall be limited to less serious crimes<sup>101</sup> committed by Indians within Indian country (against both Indian and non-Indian offenders), who have not been previously referred to a sentencing circle for substantially the same type of crime.

#### *A. Congress' Plenary Power*

Congress should reform federal laws as proposed to allow for an alternative sentencing system for Indian offenders who commit crimes within Indian country. The approach should incorporate statutory provisions that require consideration of unique cultural values of Indian offenders, and allow for the use of culturally-relevant sentencing circles.

Congress has the ability to enact this proposed legislation because it possesses plenary power to regulate Indian affairs.<sup>102</sup> Plenary power gives Congress the near absolute right to regulate

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100. The specific reference to battered spouse syndrome is important because abused spouses may have learned helplessness. This means the victim may need extra support during the process in order to avoid being bullied by the abuser into agreeing to a sentence that she does not truly feel is the most appropriate. *Joseyounen*, 6 W.W.R. at ¶ 34.

101. The determination of which constitute "less serious crimes" is best left to the courts in light of their reason and experience.

102. *Id.*

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Native American tribes how it chooses.<sup>103</sup> Each time Congress regulates Indian affairs, it erodes tribal sovereignty because it revokes some of the tribes' abilities to govern themselves.<sup>104</sup> The Major Crimes Act is an example of Congress limiting tribal authority to punish members for serious crimes committed within Indian country.<sup>105</sup> The Act effectively intrudes upon the tribes' power of self-government over crimes by American Indians on their own land.<sup>106</sup> The Indian Country Crimes Act also effectively displaces the tribes' power to prosecute crimes committed within Indian country between Indians and non-Indians.<sup>107</sup> Because Congress is free to enact legislation regulating Native American self-government, it must also have the inherent power to uphold and restore that sovereignty.<sup>108</sup>

### *B. Fulfillment of the Trust Obligations*

The trust relationship between the United States government and the Native American tribes exists to protect the tribes from possible prejudicial treatment by the States, and to give Indians some control over their own tribal government.<sup>109</sup> It is illogical and unfair to allow Georgia law to control in Arizona. In much the same way, it is unreasonable for Arizona law to control within the Navajo Nation. The circumstances of the different sovereigns are too different for the same body of law to be relevant, and there is too much potential for inequitable application of the laws. Thus, the federal government has stepped in to prevent these undesirable consequences.<sup>110</sup> However, in reality, the government is promoting the aforementioned problems because its body of law also ignores

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103. *Id.*

104. *See generally* CANBY, *supra* note 14, at 93-94 (explaining that Congress is legally free to limit tribal sovereignty however it deems appropriate).

105. 18 U.S.C.A. § 1153 (2006).

106. *Id.*

107. 18 U.S.C.A. § 1152 (2006).

108. *See generally* United States v. White Mountain Apache Tribe, 537 U.S. 465, 468 (2003) (holding that the government's failure to maintain a trust property for the tribe was a breach of the fiduciary trust relationship and that the property must be reinstated as a trust for the tribe); *see also* CANBY, *supra* note 14, at 61 (discussing the restoration of tribal lands back into federal trust).

109. *Morton v. Mancari*, 417 U.S. 535, 541-42 (1974).

110. CANBY, *supra* note 14, at 37.

the specific circumstances of Native American offenders.<sup>111</sup>

The Trust Doctrine is still alive, but the protective goals behind the Major Crimes Act and Indian Country Crimes Act have not been adequately achieved. Crime still abounds on Indian reservations.<sup>112</sup> Congress has a duty to provide better criminal justice for American Indians to combat these high crime rates under the Trust Doctrine. Incorporation of culturally-relevant criminal justice, similar to the system for Aboriginal offenders in Canada, may achieve this desired effect.

*C. Successful Implementation of Sentencing Circles: A Case Study*

A case study of a Manitoba Ojibway tribe in the community of Hollow Water demonstrates a successfully implemented “holistic circle healing program.”<sup>113</sup> The Hollow Water community struggled with high rates of suicide, alcohol and drug abuse, and domestic violence, stemming from pervasive sexual abuse within the community.<sup>114</sup> Social service workers formed an “assessment team,” composed of sexual abuse workers, alcohol counselors, nurses, law enforcement officers, a church representative, child protection agency workers, and a local school principle.<sup>115</sup> The team encouraged the abusers to take moral responsibility for their actions and enter into a community-based “healing contract” to repair the damage caused by the abuse.<sup>116</sup> The healing contract developed within a sentencing circle where the parties, community members, attorneys, and presiding judge discussed a sanction to prevent recurring abuse.<sup>117</sup> In the Hollow Water program, a community-based sentence is usually imposed in conjunction with a suspended incarceration sentence in case that the offender violates his healing contract.<sup>118</sup> In the first ten years of the

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111. *Id.*

112. Patterson, *supra* note 47, at 816.

113. Melissa S. Williams, *Democracy and Punishment: Criminal Justice, Democratic Fairness, and Cultural Pluralism: The Case of Aboriginal Peoples in Canada*, 5 BUFF. CRIM. L. REV. (Special Issue) 451, 478-80 (2002).

114. *Id.* at 478.

115. *Id.*

116. *Id.* at 479.

117. *Id.*

118. *Id.*

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Hollow Water program, only four of forty-eight offenders had been reincarcerated for sexual abuse.<sup>119</sup>

Community-based sentencing is effective in the context of Aboriginal offenders because the proceedings are less confrontational, rehabilitation of the offender is emphasized, and Aboriginal values are recognized.<sup>120</sup> Because Canadian Aboriginal peoples and Native Americans share similar community values, sentencing techniques similar to those used in the Hollow Water community may also be successful in the United States to reduce incarceration and recidivism among American Indian offenders.

#### V. EQUAL PROTECTION & LENIENCY: POSSIBLE COUNTERARGUMENTS REFUTED

Opponents may raise equal protection and leniency counterarguments to this proposal, but the challenges can be quickly defeated. First, the proposal does not pose a problem for the Equal Protection Clause of the United States Constitution, because Native Americans have always been treated differently due to the well-established trust relationship with the U.S. government.<sup>121</sup> The Supreme Court has repeatedly held that Native Americans can lawfully receive disparate treatment, because the designation as an Indian is more akin to political status than to race.<sup>122</sup> Second, the sentencing circle sanctions are not necessarily more lenient than those implemented in a traditional sentencing hearing. Incarceration is still always an option.<sup>123</sup> Additionally, non-incarceration sentences may be more rehabilitative for Native American offenders,<sup>124</sup> which should be a goal of sentencing at the outset of judicial proceedings.

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119. *Id.* at 478-80.

120. Aboriginal people often live in close-knit, small communities where the offender must face the victim and other respected community members every day. Community service can help remove the shame and encourage the offender to take responsibility for his actions. *Id.* at 478-82.

121. *See generally* Morton v. Mancari, 417 U.S. 535, 541-42 (1974) (upholding a statute giving preferential treatment to Indian tribal members in hiring by the Bureau of Indian Affairs).

122. Political affiliation is not a constitutionally protected class. *Id.* at 554.

123. R. v. Moses, [1992] 11 C.R. 4th 357, ¶ 92 (Yukon Terr. Ct.).

124. *Id.* at ¶ 132.

Congress can place several restrictions on the legislation to make it fair and effective. The limitations include the use of sentencing circles only for American Indian offenders who commit crimes within Indian country (against either Indian or non-Indian victims), first time offenders or a repeat offender who has not yet utilized a sentencing circle, and those who commit less serious crimes. If the offender pleads guilty and requests referral to a sentencing circle, he must make a knowing and intelligent waiver of his right to trial, with the awareness that the judge can refuse to adopt the sentencing circle's recommendation. As long as Congress acknowledges these limitations and includes them in the statute, the legislation can be effectively applied.

#### *A. Equal Protection*

The use of tribal sentencing circles for Indian offenders who commit crimes within Indian country is constitutional. By nature of the history and relationship between the federal government and Indian tribes, Native Americans have always been entitled to special treatment.<sup>125</sup> Allowing for culturally-relevant sentence reform is not preferential treatment based on race, but is instead based upon quasi-sovereign tribal affiliation, which has been deemed a political characteristic.<sup>126</sup> If the United States Constitution does not allow preferential treatment for Indian tribes, an entire portion of the United States Code regulating American Indian affairs would need to be repealed because it would be unconstitutional.<sup>127</sup> As long as the legislation can be rationally tied to the federal government's unique obligation to Native Americans, the privileged treatment is lawful.<sup>128</sup>

By allowing Native Americans the option of facing a sentencing circle, the federal government is acting to fulfill its obligations to Indian tribes. Culturally-relevant sentencing circles are not meant to exclude offenders based on race. Instead, the proposed legislation is meant to protect Native

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125. *Morton*, 417 U.S. at 541.

126. *Id.* at 554.

127. The Native American provisions in the U.S. Code would be unconstitutional, because no other group has its own portion of the United States Code. *Id.* at 552.

128. *Id.* at 555.

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Americans from a failing criminal justice system to which they cannot relate. Thus, Equal Protection counterarguments must fail.

### *B. Leniency*

The exact same punishments for similar crimes among offenders from different cultural backgrounds are inappropriate and ineffective because they may not rehabilitate the criminal in order to prevent him from re-offending. Harsh incarceration may be the proper sentence for an offender from a cultural background that values individual, punitive punishments. But, that same punishment is not appropriate for a Native offender from a cultural background that values community-based rehabilitation.<sup>129</sup>

The sanction imposed on an offender should always fit the crime.<sup>130</sup> There are safeguards in place to ensure that sentencing circles are not used arbitrarily to arrive at illogical sanctions.<sup>131</sup> Furthermore, individual responsibility is not as great a concern as community harmony in native communities.<sup>132</sup> Because the victim and community members must participate in the circle, the shame that ensues from daily exposure to those involved is a harsh penalty for an offender who holds such communal values.<sup>133</sup> As another important safeguard, incarceration is still always an option to be discussed in a sentencing circle, especially for more serious types of crimes.<sup>134</sup> Finally, a suspended incarceration sentence may accompany the alternative sanction in case the offender violates the circle's recommended

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129. *Moses*, 11 C.R. at ¶ 92.

130. *R. v. Wells*, [2000] 1 S.C.R. 207, ¶ 33 (Can.).

131. *See R. v. Joseyounen*, [1995] 6 W.W.R. 438, ¶ 38 (Sask. Prov. Ct.) (enumerating criteria that must be satisfied before an offender is even recommended to a circle for sentencing and emphasizing that the judge is not obligated to accept the proposed sanctions); *see also Moses*, 11 C.R. at ¶¶ 103-5 (Yukon Terr. Ct.) (acknowledging that presumptive upper limits of lengths of prison sentences can be stated at the outset of the sentencing circle by the prosecution and discussed by circle members as sentencing options in order to ensure that the sanctions are appropriate for the crime committed).

132. *Moses*, 11 C.R. at ¶ 92.

133. *See generally Williams*, *supra* note 113, at 482 (explaining that Aboriginal communities are often small, so it is hard to separate victims from offenders without moving outside the community, and community service is often a component of the offender's sentence).

134. *Moses*, 11 C.R. at ¶ 132.

sentence.<sup>135</sup> This ensures that the offender is ultimately sanctioned in some way for his culpable conduct and upholds the integrity of the criminal justice system. Given these procedural safeguards, leniency counterarguments must also fail.

### *C. Possible Congressionally Mandated Limitations*

First, the proposed federal legislation should be limited to American Indian offenders who commit crimes within Indian country. Procedural problems will inevitably arise with offenders who have Indian bloodlines, but are not actively affiliated with the tribe in any way. Those offenders who do not have ties to reservations are much less likely to visit Indian country and commit crimes there. If an Indian commits a crime against a non-Indian within Indian country, a sentencing circle should still be an option as long as the victim is willing and able to participate in the circle. If the victim refuses to participate in any sentencing circle, the offender must then face the traditional sentencing judge.<sup>136</sup> Further, the non-affiliated offender can refuse referral to the circle at the outset of sentencing proceedings.

Second, major crimes such as murder, rape, manslaughter, deadly assault, and other violent crimes are most likely inappropriate topics for a sentencing circle because of their serious nature. To maintain confidence in judicial integrity, the federal justice system should be allowed to punish these types of criminals according to preexisting federal law, which will often mean harsh incarceration sentences.<sup>137</sup>

Third, if an offender has re-offended and sentencing circles have repeatedly failed to correct the underlying problem, he should not be allowed to abuse the sentencing circle system time and time again. A single offender should only be allowed to participate in a sentencing circle once for the same type of crime. If the offender commits one type of crime, goes through the sentencing circle process, successfully serves the recommended sentence, and then commits a substantially different and

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135. See Williams, *supra* note 113, at 479.

136. *Joseyounen*, 6 W.W.R. at ¶ 30.

137. As previously mentioned, it is important that the sanction fit the crime, so imprisonment may very well be appropriate under these circumstances.

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unrelated crime,<sup>138</sup> a sentencing circle should still be an option for the second crime.<sup>139</sup> As long as Native American offenders do not in bad faith take advantage of the sentencing circle system, the process may be utilized more than once by a single offender for different crimes.

Finally, if the offender pleads guilty to the crime and requests a sentencing circle, the court must take great care to ensure that the offender has made a knowing and intelligent waiver of his right to trial and possibly to a formal sentencing hearing. If the judge chooses to accept the circle's suggestion, it becomes binding against the accused. If the judge chooses to deny referral to the circle or to reject the circle's recommended sanction, he can exercise his discretion in imposing an appropriate sentence, which in turn binds the offender.<sup>140</sup> The same is true for the offender who pleads not guilty, stands trial, is found guilty, and then requests a sentencing circle.<sup>141</sup> As long as the offender is aware of his rights at all times, any potential waiver problems can be avoided.

## CONCLUSION

If proper procedural safeguards and limitations are implemented, Congress is free to enact a law that takes into account the special history and relationship between the federal government and Native Americans for the purposes of reducing high crime rates among that population. The use of culturally-

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138. In order to achieve the goals of reduced recidivism, the offender's ability to utilize the sentencing circle more than once depends significantly on the crimes being unrelated and substantially different.

139. As a further protection against abuse, the offender would still have to satisfy the other preliminary sentencing circle criteria before the judge could exercise his discretion and recommend the offender to a subsequent sentencing circle. However, the judge may be allowed to consider the prior sentencing circle in reaching his decision, depending on the facts and circumstances of the new case.

140. If the sentencing circle cannot reach a consensus about an appropriate sanction, then the offender may be subject to a traditional sentencing hearing.

141. Before a judge can refer an offender to a sentencing circle, the offender must consent to the circle and all of the disputed issues must be resolved. If the offender is found guilty at trial, but continues to deny his guilt, he cannot be recommended to a sentencing circle because the issue of his guilt is unresolved.

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relevant sentencing circles is a way for the United States to continue to fulfill its obligations to the tribes under the Trust Doctrine.

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\* B.A. Psychology, University of Wisconsin-Madison, 2005; J.D. candidate, Thomas Jefferson School of Law, May 2008. First, I wish to thank John McKenzie for his companionship, overwhelming support and patience, and all the laughter we shared in times I needed it the most. A special thanks must also go out to my parents and siblings for their encouragement over the years. But for their support, this Note would not exist. Thanks must also be extended to my editors, Erik Laakkonen and Danwill Schwender, and Professor Bryan H. Wildenthal, for all their invaluable assistance and mentorship during the writing process.