

INDIAN COUNTRY SUPERVISION

JACOB SCHUMAN*

In 2023, the Department of Justice published its first-ever report on demographic disparities in revocations of community supervision, a critical yet under-studied part of the federal criminal justice system. The report revealed extreme and systematic disparities affecting American Indian defendants. Compared to other groups, American Indians were more likely to have their supervision revoked, more likely to be revoked for non-criminal technical violations, and more likely to be sentenced to additional supervision after revocation. Although the report acknowledged these disparities, it did little to explain them.

In this Article, I provide the first legal analysis of community supervision in Indian Country, identifying three unique features that may contribute to higher rates of revocation for American Indian defendants. First, the federal government is the primary prosecutor of violent crimes in Indian Country, which creates a population of defendants who are more likely to have their supervision revoked. Second, American Indians tend to live in rural areas, where complying with the conditions of supervision is more difficult. Finally, the federal supervision system reflects a legacy of conquest that continues to reenact past episodes of discrimination, displacement, and destruction.

To reform Indian Country supervision, I argue that the federal government should recognize the inherent authority of Indian tribes to supervise tribal members living in tribal territory. Community supervision is a core part of tribal sovereignty, because it is not just a form of punishment, but also a vehicle for important social services. Recently, tribal governments have developed their own formal supervision programs that both incorporate tribal values and send fewer people to prison. By following the principles of tribal governance, community cohesion, and cultural respect, federal probation officials can promote better outcomes for Indian defendants and fuller autonomy for Indian tribes.

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INTRODUCTION

“[T]he philanthropist will rejoice that the remnant of that ill-fated race has been at length placed beyond the reach of injury or oppression, and that the paternal care of the General Government will hereafter watch over them.”

—President Andrew Jackson, *Farewell Address*, Mar. 4, 1837¹

“I want him away from Hannahville . . . I want him in a place where he can be watched, where he can have once again the availability of even more resources to assist him [I]t’s for your good that I’m saying this . . . No more Hannahville associations whatever.”

—*United States v. Alexander*, 6th Cir. 2007²

In 2022, President Biden ordered the Department of Justice to publish its first-ever report on demographic disparities in revocations of community supervision,³ a critical yet under-studied part of the federal criminal justice system.⁴ Community supervision is a form

¹ President Andrew Jackson, *Farewell Address*, AM. PRESIDENCY PROJECT (Mar. 4, 1837), <https://www.presidency.ucsb.edu/documents/farewell-address-0> [<https://perma.cc/V48R-GYKP>] [hereinafter *Farewell Address*].

² *United States v. Alexander*, 509 F.3d 253, 255–56 (6th Cir. 2007).

³ See Exec. Order No. 14074, § 15(h), *Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety*, 87 Fed. Reg. 32945, 32951, 32958 (May 25, 2022) (directing DOJ to publish report on “the number of probationers and supervised releasees revoked . . . disaggregated by demographic data”).

⁴ The federal government uses two forms of community supervision: probation and supervised release. See Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. 1381, 1389–91 (2024). Probation is a term of supervision imposed in lieu of imprisonment, whereas supervised release is a term of supervision imposed to follow imprisonment. *Id.* In the past, the federal government used another form of community supervision called “parole,” which was a term of supervision imposed upon early release from prison. *Id.* The federal government abolished parole in 1984. *Id.*

of criminal punishment that requires the defendant to serve a term of conditional liberty in the community, subject to supervision by a probation officer, with violations punishable by imprisonment.⁵ There are about 120,000 people serving terms of community supervision in the federal system,⁶ of whom approximately one-third will eventually have their supervision revoked,⁷ sending 17,000 people to prison every year.⁸ Critics warn that “mass supervision” has become “overly burdensome, punitive and a driver of mass incarceration, especially for people of color.”⁹

Before President Biden’s executive order, unfortunately, demographic data on federal revocation proceedings was virtually non-existent.¹⁰ The only publicly available information was from a 2020 report by the United States Sentencing Commission, which broke defendants into four racial groups: “White,” “Black,” “Hispanic,” and “Other.”¹¹ The Commission’s report found no indication of racial disparities, reporting that revocation proceedings were “equally distributed” across “race categories.”¹² However, its use of the “Other” racial category obscured any disparities affecting American Indian and Alaska Native defendants.¹³

The DOJ’s report provided a more nuanced analysis, dividing defendants into five racial categories: “American Indians/Alaska

⁵ See *id.*

⁶ Table E-2—*Federal Probation System Statistical Tables for the Federal Judiciary (December 31, 2023)*, STATISTICS & REPORTS, UNITED STATES COURTS, <https://www.uscourts.gov/data-news/data-tables/2023/12/31/statistical-tables-federal-judiciary/e-2> [<https://perma.cc/2EWF-DCRB>].

⁷ U.S. SENT’G COMM’N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 63 (2010), <https://www.ussc.gov/research/research-publications/federal-offenders-sentenced-supervised-release> [<https://perma.cc/7FP4-HWPA>].

⁸ Table E-7A—*Federal Probation System Statistical Tables for the Federal Judiciary (December 31, 2023)*, STATISTICS & REPORTS, UNITED STATES COURTS, <https://www.uscourts.gov/statistics/table/e-7a/statistical-tables-federal-judiciary/2023/12/31> [<https://perma.cc/828P-UA8W>].

⁹ *Statement on the Future of Probation & Parole in the United States*, EXiT: EXECS. TRANSFORMING PROB. & PAROLE (Nov. 13, 2020), <https://www.exitprobationparole.org/statement> [<https://perma.cc/U3YX-UJTD>].

¹⁰ Cf. Stefan R. Underhill, *Supervised Release Needs Rehabilitation*, 10 VA. J. CRIM. L. 1, 12–16 (2024) (criticizing lack of data on federal revocation proceedings).

¹¹ See U.S. SENT’G COMM’N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS, at 19 tbl.4 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf [<https://perma.cc/4RWJ-ZFY7>] [hereinafter VIOLATIONS REPORT].

¹² *Id.*

¹³ See Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, PRISON POLY INITIATIVE (Oct. 8, 2021), <https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday> [<https://perma.cc/X572-HPW6>].

Natives; Asian/Pacific Islanders; Black, not Hispanic; Hispanic, any race; and White, not Hispanic.”¹⁴ The results revealed extreme and systematic disparities affecting American Indian and Alaska Native defendants.¹⁵ Compared to other groups, American Indian and Alaska Native defendants were twice as likely to have their supervision revoked, with 59% ultimately sent to prison for violations, compared to 27.5% of defendants overall.¹⁶ Not only did American Indians and Alaska Natives experience the “highest revocation rates,” but also they were the “only group” with a revocation rate above 50%.¹⁷ They were also by far the most likely group to have their supervision revoked for non-criminal conduct, with 82% of their revocations for technical violations, versus 67.5% of defendants overall.¹⁸ Finally, American Indian and Alaska Native violators were at the high-end of those likely to be sentenced to additional supervision after revocation, with 78% sentenced to an

¹⁴ U.S. DEP’T OF JUST., DEPARTMENT OF JUSTICE REPORT ON RESOURCES AND DEMOGRAPHIC DATA FOR INDIVIDUALS ON FEDERAL PROBATION OR SUPERVISED RELEASE 15 (2023), <https://www.justice.gov/d9/2023-05/Sec.%2015%28h%29%20-%20DOJ%20Report%20on%20Resources%20and%20Demographic%20Data%20for%20Individuals%20on%20Federal%20Probation.pdf> [<https://perma.cc/9PQL-TM4Y>] [hereinafter DOJ REPORT]. The report analyzed data from the years 2021 and 2022. According to the report, in 2021, there were a total of 16,237 revocations, including 1,327 American Indians/Alaska Natives, 215 Asians/Pacific Islanders, 5,529 Black people, 4,182 Hispanics, and 4,929 Whites. U.S. DEP’T OF JUST., DEPARTMENT OF JUSTICE REPORT ON RESOURCES AND DEMOGRAPHIC DATA FOR INDIVIDUALS ON FEDERAL PROBATION OR SUPERVISED RELEASE, APPENDIX A, at 5 (2023), <https://www.justice.gov/d9/2023-05/Sec.%2015%28h%29%20-%20Appendix%20A%20as%20pdf.pdf> [<https://perma.cc/HHV8-EPZU>] [hereinafter DOJ REPORT APPENDIX A]. In 2022, there were 17,201 revocations, including 1,369 American Indians/Alaska Natives, 198 Asians/Pacific Islanders, 5,977 Black people, 4,699 Hispanics, and 4,921 Whites. *Id.* at 6.

¹⁵ DOJ REPORT, *supra* note 14, at 15–18. Legally, American Indian identity is considered a political, not racial, category. *See* United States v. Antelope, 430 U.S. 641, 646–47 (1977); *see also* Kimberly TallBear, *DNA, Blood, and Racializing the Tribe*, 18 WICAZO SA REV. 81, 82 (2003) (arguing that “racialized ideas of ‘Indianness’ . . . undermine tribal political and cultural authority”). However, the DOJ Report did not mention this distinction. The report also did not make clear whether it counted Native Hawaiian defendants as American Indians or Asian/Pacific Islanders. For more on Native Hawaiians and the criminal justice system, *see generally* Lezlie Kī’aha, *Thinking Outside the Bars: Using Hawaiian Traditions and Culturally-Based Healing to Eliminate Racial Disparities within Hawai’i’s Criminal Justice System*, 17 ASIAN-PAC. L. & POL’Y J. 1 (2015).

¹⁶ *See* DOJ REPORT, *supra* note 14, at 15; DOJ REPORT APPENDIX A, *supra* note 14, at 9–10. The revocation rate was 31% for Hispanic defendants, 29.8% for Black defendants, 27% for White defendants, and 17% for Asian and Pacific Islander defendants. *See* DOJ REPORT, *supra* note 14, at 15; DOJ REPORT APPENDIX A, *supra* note 14, at 9–10.

¹⁷ DOJ REPORT, *supra* note 14, at 15.

¹⁸ *See id.* at 16; DOJ REPORT APPENDIX A, *supra* note 14, at 11. The rate of revocations for technical violations was 72.8% for Hispanic defendants, 56.5% Black, 71.2% White, and 79.3% Asian and Pacific Islander. *See* DOJ REPORT, *supra* note 14, at 16; DOJ REPORT APPENDIX A, *supra* note 14, at 6.

average seventy-one-month term of additional supervision, compared to an overall rate of 68% sentenced to an average forty-seven-month term of additional supervision.¹⁹ These results were consistent with prior studies of the federal supervision system, which found that as the population of American Indians in a district increased, there was “a statistically significant increase in revocations – i.e., districts with a larger proportion of Native Americans ha[d] higher revocation rates.”²⁰

The DOJ acknowledged these disparities, yet did little to explain them. Its report identified American Indians and Alaska Natives as “vulnerable communities” with “unique cultural practices and diverse geographic locations” who warranted “different consideration when considering strategies to facilitate successful reentry and positive probation experiences.”²¹ The report also recommended that the federal government develop “reentry and alternative to incarceration programs that are responsive to the unique cultural differences within federally recognized Tribes” and “the possible operational challenges of law enforcement and corrections efforts on Tribal lands.”²² However, the report did not address the obvious and urgent question raised by its results: *Why* do American Indians and Alaska Natives under federal supervision experience such higher rates of revocation?

The answer to that question cannot simply be that American Indians and Alaska Natives are more likely to violate their supervision. To the contrary, empirical research suggests that American Indians have *lower* rates of recidivism than other groups. For instance, a 2004 analysis of crime data by the Department of Justice found that 52.6% of American Indian offenders released from prison were rearrested for a new crime within three years, compared to 61.7% of

¹⁹ See DOJ REPORT, *supra* note 14, at 17–18; DOJ REPORT APPENDIX A, *supra* note 14, at 11–12. The numbers were 71% of Hispanic violators sentenced to supervision for an average of 31 months, 60% of Black violators for an average of 32 months, 72% of White violators for an average of 72 months, and 81% of Asian and Pacific Islander violators for an average of 35 months. See DOJ REPORT, *supra* note 14, at 17–18; DOJ REPORT APPENDIX A, *supra* note 14, at 11–12. American Indians also received the lowest average prison sentence for violations, but this disparity is likely explained by their higher rate of revocations for technical violations. See *supra* note 18.

²⁰ WILLIAM RHODES, CHRISTINA DYOUS, RYAN KLING, DANA HUNT & JEREMY LUALLEN, NAT'L CRIM. JUST. REFERENCE SERV., RECIDIVISM OF OFFENDERS ON FEDERAL COMMUNITY SUPERVISION 17 (2012), <https://www.ojp.gov/pdffiles1/bjs/grants/241018.pdf> [<https://perma.cc/LZ22-G5SG>]; see also Thomas H. Cohen & Jay Whetzel, *The Neglected “R” – Responsivity and the Federal Offender*, 78 FED. PROB. 11, 15 (2014) (finding that “a higher percentage of American Indian and Alaska Native (50 percent) offenders faced responsivity problems compared to Hispanics (31 percent), white non-Hispanics (27 percent), [B]lack[people] (26 percent), and Asian and Pacific Islanders (24 percent)”).

²¹ DOJ REPORT, *supra* note 14, at 23.

²² *Id.*

offenders overall.²³ Yet despite their lower rates of arrests, American Indians and Alaska Natives appear to experience higher rates of revocation. A 2013 study by the U.S. Office of Probation and Pretrial Services, for example, found that federal judicial districts with an “[i]ncreased percentage of Native Americans” were “associated with a statistically significant increase in revocations,” but with “no similar effect on arrests.”²⁴ The problem, it appears, is not with the behavior of individual defendants, but with the supervision system itself.

In this Article, I provide the first legal analysis of community supervision in Indian Country, identifying three unique features that may contribute to higher rates of revocation for American Indian defendants. I use the phrase “Indian Country” because it is a legal term of art officially defined by federal law to include any geographic areas subject to tribal jurisdiction, including all “Indian reservation[s]” and “dependent Indian communities.”²⁵ Following scholarly convention, I also use the terms “American Indian,” “Native American,” “Indian,” and “Indigenous,” although I recognize that there are important differences between American Indians and Alaska Natives, as well as between individual tribes, which I discuss later.²⁶

²³ Steven W. Perry, *American Indians and Crime: A BJS Statistical Profile, 1992–2002*, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., at 23 (Dec. 2004), https://www.justice.gov/sites/default/files/otj/docs/american_indians_and_crime.pdf [<https://perma.cc/4QG8-FXU8>]. Similarly, 21.3% of American Indians released from prison were convicted of a new crime within three years, compared to 25.4% of offenders overall. *Id.* at 24.

²⁴ Laura M. Baber & Mark Motivans, *Extending Our Knowledge About Recidivism of Persons on Federal Supervision*, 77 FED. PROB. 23, 27 (Sept. 2013).

²⁵ 18 U.S.C. § 1151. The history of the term dates back to the British Royal Proclamation of 1763. *See* Kirke Kickingbird, *The Jurisdictional Landscape of Indian Country After the McGirt and Castro-Huerta Decisions*, AM. BAR ASS’N (July 26, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-end-of-the-rule-of-law/jurisdictional-landscape-of-indian-country-after-mcgirt-and-castro-huerta-decisions/#:~:text=Generally%20speaking%2C%20only%20tribal%20governments,by%20or%20against%20an%20Indian [<https://perma.cc/ZL3Q-NH7K>].

²⁶ *See* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 558 n.6 (2021) (explaining how the interchangeable use of terms can reflect the scholarly divide on naming conventions); Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1566 n.3 (2016) (using terms for Indigenous people interchangeably). American Indian people “vary in their preferences among ‘Indians,’ ‘American Indians,’ ‘Native Americans,’ ‘[I]ndigenous peoples,’ and ‘First Nation Peoples,’” and “many prefer to be identified as members of their tribes.” Gregory B. Lewis & Jack F. Williams, *Indian Preference and the Status of American Indians and Alaska Natives in the Federal Service: Employment, Earnings, Authority, and Perceptions of Fairness*, 84 PUB. ADMIN. R. 1148, 1149 (2024); *see also* Angelique EagleWoman, *The Capitalization of “Tribal Nations” and the Decolonization of Citation, Nomenclature, and Terminology in the United States*, 49 MITCHELL HAMLINE L. REV. 623, 624 (2023) (critiquing English language conventions and terms referring to Native Americans).

While there is a large body of scholarship on criminal law in Indian Country²⁷ and a growing literature on community supervision,²⁸ this Article is the first to combine these two fields. I focus on community supervision in the federal system, because criminal law in Indian Country is primarily a federal affair. As I explain below in Section II.A, the federal government is responsible for most criminal law enforcement in Indian Country. Therefore, American Indians are significantly overrepresented in the federal criminal justice system. For example, while members of federally recognized Indian tribes make up less than 1% of the total U.S. population, they are 2.1% of federal prisoners, and 2.3% of federal supervisees.²⁹ The population of American Indians under federal supervision is also highly concentrated in certain judicial districts. In the District of North Dakota, for example, American Indians make up half of all defendants under federal supervision.³⁰ In the District of South Dakota, they are as many as *two-thirds* of all federally supervised defendants.³¹

The high rate of revocation for American Indian defendants is a major problem not only for federal criminal justice, but also for federal Indian policy more broadly. According to the Supreme Court, community supervision is intended to “improve the odds of a successful transition from the prison to liberty.”³² Given this goal, a rate of revocation of nearly two-thirds for American Indians—over twice the national average—is a significant failure of the federal supervision system. Furthermore, under a “quasi-constitutional” principle known as

²⁷ See, e.g., Angela R. Riley & Sarah Glenn Thompson, *Mapping Dual Sovereignty and Double Jeopardy in Indian Country Crimes*, 122 COLUM. L. REV. 1899, 1899 (2023); Alexandra Fay, *Tribes and Trilateral Federalism: A Study of Criminal Jurisdiction*, 56 ARIZ. ST. L.J. 53, 96 (2023); Riley, *supra* note 26, at 1576; Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 CALIF. L. REV. 1409, 1416 (2011); Troy A. Eid & Carrie Covington Doyle, *Separate But Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1071 (2010); Kevin Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 718 (2006) [hereinafter Washburn, *American Indians, Crime, and the Law*].

²⁸ See, e.g., Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 HARV. C.R.-C.L. L. REV. 1, 3 (2023); Eric Fish, *The Constitutional Limits of Criminal Supervision*, 108 CORNELL L. REV. 1375, 1375 (2023); Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 601–02 (2020); Michelle Phelps, *The Paradox of Probation*, 28 FED. SENT. REP. 283, 283 (2016); Tonya Jacobi, Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CALIF. L. REV. 887, 894 (2014); Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERK. J. CRIM. L. 180, 186 (2013); Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 958 (2013).

²⁹ Wang, *supra* note 13.

³⁰ Michael P. McGrath, *Making “What Works” Work for Rural Districts*, 72 FED. PROB. 50, 51 (2008).

³¹ Brenda Donelan, *The Unique Circumstances of Native American Juveniles Under Federal Supervision*, 63 FED. PROB. 68, 68 (1999).

³² *Johnson v. United States*, 529 U.S. 694, 708–09 (2000) (explaining goal of supervised release); see also *United States v. Murray*, 275 U.S. 347, 357 (1928) (same, for probation).

the “Indian trust doctrine,”³³ the federal government has a “fiduciary” relationship with the Indian tribes, which includes “moral obligations of the highest responsibility” to which “the national honor has been committed.”³⁴ The disparities in revocations suggest that the federal government has betrayed its legal obligations to the tribes.

Despite the importance of these issues, there is little public information available about either federal community supervision or modern American Indian life. The United States Sentencing Commission does not regularly gather or publish data about the supervision system,³⁵ and because the data that does exist is maintained by the federal judiciary,³⁶ it is not subject to the Freedom of Information Act.³⁷ Data on American Indians is also difficult to find. As Walter Echo-Hawk has observed, “[t]here is a serious information gap about Native Americans in the United States,” with the “lack of reliable information about Native issues” among “the most pressing problem confronting Native Americans in the United States today.”³⁸ Indeed, the only reason I was able to identify the disparities affecting American Indians under federal supervision is that the DOJ finally published a demographic analysis of revocation proceedings.³⁹ Nevertheless, the DOJ’s report only disclosed its top-line results, not the underlying data. For the sake of transparency, accountability, and further study, future government reports on the supervision system should include an anonymized database of information on individual offenders.⁴⁰ In particular, information about the districts where the violations occurred

³³ Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 99 (2023).

³⁴ *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (first quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); and then quoting *Heckman v. United States*, 224 U.S. 413, 437 (1912)).

³⁵ See Underhill, *supra* note 10, at 12–16 (explaining how the Sentencing Commission fails to collect, analyze, or publish annual statistics on supervised release).

³⁶ See Jacob Schuman, *Prosecutors in Robes*, 77 STAN. L. REV. 629, 629 (2025) (describing the location of U.S. Probation and Pretrial Services in the judicial branch).

³⁷ See Alan B. Morrison, *Balancing Access to Government-Controlled Information*, 14 J.L. & POL’Y 115, 116 (2006).

³⁸ WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 13 (2010).

³⁹ Cf. Ned Blackhawk, *The Iron Cage of Erasure: American Indian Sovereignty in Jill Lepore’s These Truths*, 125 AM. HIST. REV. 1752, 1754–55 (2020) (describing “omission” of American Indians from “American multiracial histories” as a “tomb of erasure”).

⁴⁰ Cf. COUNCIL ON CRIM. JUST., BETTER CRIME DATA, BETTER CRIME POLICY (2024), https://assets.folecon.com/eu-central-1/de-uploads-7e3kk3/41697/ccj_crime_trends_final_report_summary.42307bc7d5ff.pdf [<https://perma.cc/J2AX-NDCD>] (recommending Congress increase funding for the Bureau of Justice Statistics and other federal agencies to collect and publish better crime data).

and the tribal membership of the defendants would help to illuminate this dark corner of the federal criminal justice system.

Finally, my critique of federal community supervision in Indian Country should not be read to suggest that state governments would do a better job of supervising American Indian defendants. Just like the federal government, state systems also appear to subject American Indians to disparately high rates of supervision and revocation. For instance, a 2024 report found that “American Indian or Alaska Native people are . . . overrepresented in probation populations across the country: [F]or example, in North Dakota in October 2024, 24% of people on probation are Native compared to 5% of the statewide population.”⁴¹ A study of South Dakota’s parole system similarly discovered that American Indians “constituted 44 percent of those who were returned to prison for a parole violation, despite making up only 24 percent of the entire parole population.”⁴² As Justice Gorsuch has observed, state governments have “proven less than reliable sources of justice” for American Indians, and even “the federal government [has] warned of the ‘possibility of prejudice [against Native Americans] in state courts.’”⁴³ Rather than the federal government or the states, I contend that *tribal* governments should control the community supervision of their own members.

My argument in this Article proceeds in two parts. In Part I, I identify three distinctive features of Indian Country supervision that may contribute to higher rates of revocation for American Indian defendants. First, in Indian Country, the federal government is primarily responsible for prosecuting violent crimes by Indian defendants, which means that Indian defendants under federal supervision are more likely to have been convicted of violent crimes, and therefore are more likely to have their supervision revoked. Second, American Indians tend to live in rural areas and small towns, where longer travel times and limited access to social services make compliance with conditions of supervision more difficult. Finally, the federal community supervision system reflects a legacy of conquest that continues to reenact past episodes of discrimination, displacement, and destruction.

⁴¹ Emily Widra, *One Size Fits None: How ‘Standard Conditions’ of Probation Set People Up to Fail*, PRISON POL’Y INITIATIVE (Oct. 2024), https://www.prisonpolicy.org/reports/probation_conditions.html [<https://perma.cc/CPD6-5VHT>].

⁴² ALISON SHAMES & RAM SUBRAMANIAN, VERA INST. OF JUST., *BRIDGING THE DIVIDE: IMPROVING PAROLE OUTCOMES FOR NATIVE AMERICANS IN SOUTH DAKOTA 2* (Oct. 2016), <https://www.vera.org/downloads/publications/Bridging-the-Divide-Parole-Outcomes-Native-Americans-South-Dakota-V.2.pdf> [<https://perma.cc/YTE5-3LUR>].

⁴³ *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2468, 2523 (2022) (Gorsuch, J., dissenting) (citation omitted).

In Part II, I argue that to reform Indian Country supervision, the federal government should recognize the inherent authority of Indian tribes to supervise tribal members living in tribal territory. Community supervision is a core part of tribal sovereignty, because it is not just a form of criminal punishment, but also a vehicle for important social services, including healthcare, education, and family regulation. Recently, tribal governments have developed their own formal supervision programs, such as “wellness courts” and “peacemaking programs,” that both incorporate tribal values and send fewer people to prison.⁴⁴ By following the principles of tribal governance, community cohesion, and cultural respect, federal probation officials can promote better outcomes for Indian defendants and fuller autonomy for Indian tribes.

I

FEDERAL SUPERVISION IN INDIAN COUNTRY

Three unique features of federal community supervision in Indian Country may contribute to higher rates of revocation for American Indian defendants. In Indian Country, the federal government exercises primary jurisdiction for prosecuting violent crimes committed by Indians, defendants have more limited access to transportation or social services, and there is a long history of discrimination, displacement, and destruction. The result is a population of offenders who are more likely to have their supervision revoked, living in an environment where compliance with the conditions of supervision is more difficult, amid a history of mistrust and mistreatment. These features help drive higher rates of revocation for American Indian defendants.

A. *Criminal Jurisdiction*

The first distinctive characteristic of federal community supervision in Indian Country is jurisdictional. Outside of Indian Country, state governments exercise primary jurisdiction over local criminal conduct, including private interpersonal violence like murder, rape, robbery, and assault, while the federal government only prosecutes crimes with a national or interstate element, such as drug trafficking, immigration, or multi-jurisdictional fraud.⁴⁵ Inside Indian Country, by contrast, the federal government has primary jurisdiction for prosecuting local crimes committed by Indians.⁴⁶ As a result, American Indians under

⁴⁴ See *infra* Section II.B.

⁴⁵ See *infra* text accompanying notes 53–56.

⁴⁶ See *infra* text accompanying notes 57–70.

federal supervision are more likely than other defendants to have been convicted of violent crimes. Violent offenders, in turn, are more likely to have their supervision revoked.⁴⁷ Thus, the data showing higher rates of revocation for American Indian defendants may partly be an artifact of how the law allocates criminal jurisdiction in Indian Country.

1. *Jurisdiction in Indian Country*

The criminal justice system in Indian Country is a “jurisdictional maze,”⁴⁸ a “disjointed, multi-layered framework of criminal law enforcement.”⁴⁹ The system’s “Byzantine rules . . . reflect the unique nature of the federal-Indian relationship, a relationship ‘perhaps unlike that of any other two people[s] in existence.’”⁵⁰ In each criminal case, multiple levels of governments may have jurisdiction to prosecute the defendant, depending on “a range of factors, such as the type of offense alleged, the geographic location where the offense purportedly occurred, and whether the alleged perpetrator or victim is Indian.”⁵¹ The intricacy of this doctrine is the product of centuries of “federal Indian law and policy that have been, at times, utterly at odds with each other.”⁵²

To summarize briefly, outside of Indian Country, “criminal justice is a matter of overwhelmingly local concern and redress.”⁵³

⁴⁷ See *infra* text accompanying notes 92–102.

⁴⁸ Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 991 (1975).

⁴⁹ Riley & Thompson, *supra* note 27, at 1908–09.

⁵⁰ Richard W. Garnett, *Once More into the Maze: United States v. Lopez, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. REV. 433, 442 (1996) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831)).

⁵¹ Riley & Thompson, *supra* note 27, at 1908–09. Whether a defendant qualifies as Indian for purposes of criminal jurisdiction is a complicated legal question turning on multiple factors, including whether they are descended from Indians, are enrolled with a recognized Indian tribe, receive government benefits reserved only to Indians, enjoy the benefits of tribal affiliation, and experience social recognition as an Indian by living on a reservation and participating in Indian life. See Alexander Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV’T L. REV. 49, 56–64 (2017).

⁵² Riley & Thompson, *supra* note 27, at 1908. Legal scholars have criticized the complexity of these jurisdictional rules for contributing to “the comparatively high crime rates experienced on many Indian reservations.” *Id.* at 1909; see also Riley, *supra* note 26, at 1569 (“Federal law and policy is primarily responsible for deplorable reservation conditions, where crime rates generally are more than twice the national average.”). Scholars have also argued that the rules contribute to disparate treatment of Indian versus non-Indian defendants. See Samuel Winder, *Trial by Ambush: The Prosecution of Indians in Federal Court*, 57 LOY. L.A. L. REV. 469 (2024) (noting disparities in discovery procedures); Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723 (2008) (noting disparities in sentencing guidelines).

⁵³ Eid & Doyle, *supra* note 27, at 1071.

State governments have primary responsibility for most criminal law enforcement, including jurisdiction to prosecute local “street crimes” such as murder, rape, robbery, and assault.⁵⁴ The federal government, by contrast, is limited to prosecuting crimes within its constitutionally enumerated powers, which require a national or interstate element, such as drug trafficking, immigration, multi-jurisdictional fraud, political corruption, and terrorism.⁵⁵ Indeed, one of the few areas of criminal law that the Supreme Court has deemed *beyond* the reach of federal regulatory power is private, interpersonal violence.⁵⁶

Inside Indian Country, however, the rules are different. In all but six states, state governments have no power to prosecute Indian defendants for crimes committed in Indian Country.⁵⁷ Instead, the only Indian Country crimes that most states can prosecute are those committed by *non-Indian* defendants.⁵⁸ State probation officers cannot even enter tribal territory to search for or arrest Indian defendants under state supervision.⁵⁹ Instead, it is the federal government that has primary authority for criminal law enforcement against Indian

⁵⁴ LEONARD J. HIPPCHEN & YONG S. YIM, *TERRORISM, INTERNATIONAL CRIME, AND ARMS CONTROL* 5 (1982) (describing “street crimes”).

⁵⁵ See NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 1–2, 21–23 (7th ed. 2020).

⁵⁶ See generally *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress’s power to regulate intrastate activities with a substantial impact on interstate commerce is limited to activities that are economic in nature).

⁵⁷ See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (holding that under the terms of U.S. treaties with the Creek Nation, states cannot prosecute crimes in Indian Country committed by Indians). The six states authorized by Congress to prosecute Indian defendants for crimes committed in Indian Country are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. See CAROLE GOLDBERG & HEATHER VALDEZ SINGLETON, U.S. DEP’T OF JUST., *PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY – RESEARCH PRIORITIES* 3–4 (Dec. 2005), <https://www.ojp.gov/pdffiles1/nij/209839.pdf> [<https://perma.cc/Z2G8-4T9A>]. State criminal jurisdiction over Indian Country has “proved unpopular,” not only with the “affected Tribes,” but also with “[s]tates that view[] their . . . law enforcement responsibilities on tribal lands as unfunded federal mandates.” *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2508–09 (2022) (Gorsuch, J., dissenting); see also Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 711 (2006) (“Reservation residents on Public Law 280 reservations are significantly less satisfied with the availability and quality of law enforcement than reservation residents on non-Public Law 280 reservations.”). As a result, there has been a push to “retrocede” authority in these states back to the tribes. See Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915 (2012) (arguing that tribal governments should be empowered to limit or remove state jurisdiction over Indian Country).

⁵⁸ State jurisdiction over crimes by non-Indian defendants in Indian Country is exclusive when the victim is non-Indian, see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and concurrent with the federal government when the victim is Indian, see *Castro-Huerta*, 142 S. Ct. 2486.

⁵⁹ See *United States v. Anderson*, 857 F. Supp. 52 (D.S.D. 1994) (granting motion to suppress evidence that state parole agents seized during a warrantless search of defendant’s home on Indian land).

defendants for crimes committed in Indian Country.⁶⁰ According to the Supreme Court, this authority derives from a number of sources, including the Indian Commerce Clause, the Treaty Clause, and the federal government's power over military and foreign relations.⁶¹

There are three primary sources of statutory law governing federal prosecutions of Indian defendants in Indian Country. First, the Major Crimes Act of 1885 authorizes federal prosecutions of American Indians for "major crimes" committed in Indian Country, including violent crimes such as murder, rape, assault, robbery, etc., which would ordinarily fall within the state's bailiwick.⁶² Second, the Indian Country Crimes Act of 1817, also known as the General Crimes Act, authorizes federal prosecutions for any crimes committed against non-Indian victims in Indian Country if that conduct would be covered by the criminal laws applicable to federal enclaves (courthouses, military bases, etc.),⁶³ including additional violent offenses that would typically be handled by the state, such as simple assault and child abuse.⁶⁴ Finally, all generally applicable federal criminal statutes are enforceable in Indian Country, including laws against drug trafficking, gun possession, etc.⁶⁵ Given the broad range of possible charges, U.S. Attorneys effectively serve as the "local prosecutors or district attorneys" for Indian defendants in Indian Country.⁶⁶

⁶⁰ *United States v. Lara*, 541 U.S. 193, 200–01 (2004); see also Neil Fulton, *All Things Considered: The Effect on Tribal Sovereignty of Using Tribal Court Convictions in United States Sentencing Guideline Calculations*, 46 AM. J. CRIM. L. 241, 243 (2019) ("Indians are subject to federal court jurisdiction for a broad swath of crimes that would typically be left to state courts when committed by non-Indians.").

⁶¹ See *Lara*, 541 U.S. at 200–01; see also Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) (discussing debate over constitutional basis for federal power over Indian affairs).

⁶² 18 U.S.C. § 1153 (granting federal jurisdiction over Indian defendants for "major crimes," namely, "murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual [under 16 years], felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian Country").

⁶³ See 18 U.S.C. § 1152; *United States v. Markiewicz*, 978 F.2d 786, 797 (2d Cir. 1992); see also 18 U.S.C. § 7 (listing federal enclaves). The federal enclave laws also assimilate the criminal laws of the surrounding state when there is no federal offense covering the defendant's conduct. 18 U.S.C. § 13; see *Williams v. United States*, 327 U.S. 711, 713–14 (1946) (holding that 18 U.S.C. § 13 applies to Indian Country). There is an exception to federal jurisdiction if the Indian defendant has already been punished by the tribe. See 18 U.S.C. § 1152.

⁶⁴ See *Markiewicz*, 978 F.2d at 797 (explaining the case law and legislative history leading to this subset of parallel federal-tribal jurisdiction).

⁶⁵ See *United States v. Yannott*, 42 F.3d 999, 1003–04 (6th Cir. 1994) (reasoning that 18 U.S.C. § 1152's tribal punishment exception to federal enclave jurisdiction only applies if the situs of the crime is an element of the offense, which was not the case for defendant's federal firearms charges); *United States v. Begay*, 42 F.3d 486, 497–500 (9th Cir. 1994) (affirming defendants' conspiracy, robbery, assault, burglary, and kidnapping convictions in federal court based on the same reasoning); *United States v. Blue*, 722 F.2d 383, 384–86 (8th Cir. 1983) (affirming defendant's drug possession and distribution convictions in federal court based on the same reasoning).

⁶⁶ Eid & Doyle, *supra* note 27, at 1099.

Tribal governments also have the inherent power to prosecute Indian defendants for crimes committed in Indian Country.⁶⁷ However, the federal government has prohibited tribes from sentencing defendants to more than one year in prison unless they “guarantee in their proceedings additional protections and safeguards that are in line with the federal Constitution,” in which case the maximum sentence increases to three years of imprisonment.⁶⁸ Because of these restrictions on tribal sentencing authority, the federal government serves as the “de facto exclusive prosecuting authority for all serious crimes involving Indians.”⁶⁹ In other words, local crimes in Indian Country are “federalized,” with “[s]erious offenses, such as aggravated assaults, sex offenses, [and] homicides” almost always “prosecuted federally,” even though they are “local offenses with local harms” and “[a]bsent the Indian Country location of these offenses . . . would be prosecuted locally.”⁷⁰ Figure 1, below, summarizes the jurisdictional rules for Indian Country:

FIGURE 1: CRIMINAL JURISDICTION OVER INDIAN DEFENDANTS

Level of Government	Outside Indian Country	Inside Indian Country
<i>Federal</i>	National/interstate crimes (drugs, guns, immigration, fraud, etc.)	National/interstate crimes (drugs, guns, immigration, fraud, etc.) and local crimes (murder, rape, robbery, assault, etc.)
<i>State</i>	Local crimes (murder, rape, robbery, assault, etc.)	None
<i>Tribal</i>	None	Local crimes (murder, rape, robbery, assault, etc.) with limits on sentencing

⁶⁷ See *United States v. Lara*, 541 U.S. 193, 199, 204 (2004) (holding that Indian defendant’s tribal and federal charges for assaulting a police officer did not violate the Double Jeopardy Clause because the tribal charge came from a separate sovereign). Pursuant to recent legislation, tribal governments may also prosecute non-Indian defendants for domestic violence and sex offenses. See Riley & Thompson, *supra* note 27, at 1915–17.

⁶⁸ Riley & Thompson, *supra* note 27, at 1914.

⁶⁹ Reese, *supra* note 26, at 567.

⁷⁰ Kevin K. Washburn, *American Indians, Crime, and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1014 (2008) [hereinafter Washburn, *Five Years of Scholarship*]. For a poignant example of this contrast, see *United States v. Deegan*, 605 F.3d 625, 636 (8th Cir. 2010) (Bright, J., dissenting) (“This case concerns the crime of neonaticide . . . This crime is practically unknown in the federal courts. Neonaticide is a crime relating to family and domestic concerns and, thus, federal courts do not generally deal with these crimes. Indeed, excluding habeas cases, my research has disclosed only one other reported federal case discussing and deciding a neonaticide crime.”).

2. *Violent Offenders and Recidivism*

The reason that the unique allocation of criminal jurisdiction in Indian Country may drive higher rates of revocation for American Indian defendants is that it creates a population of supervisees who are more likely to have been convicted of violent crimes, which is a factor correlated with higher rates of revocation.⁷¹ Outside of Indian Country, most defendants sentenced to federal supervision are convicted of national or interstate crimes such as drug trafficking, gun possession, large-scale fraud, etc.⁷² Relatively few are convicted of local violent crimes.⁷³ Inside Indian Country, by contrast, “almost all” federal criminal prosecutions involve “common street crimes” that ordinarily “would not be investigated by federal officials,” including local crimes of interpersonal violence like murder, rape, assault, or robbery.⁷⁴ Because responsibility for prosecuting violent crimes in Indian Country shifts from the states to the federal government, the population of people sentenced to federal supervision also changes to include a higher proportion of violent offenders.

To be sure, not all defendants prosecuted for federal crimes committed in Indian Country are American Indian. The federal government also has jurisdiction to prosecute non-Indian defendants for crimes committed against Indian victims.⁷⁵ Furthermore, not all American Indians under federal supervision are convicted of violent

⁷¹ See *infra* notes 92–102.

⁷² Federal judges impose probation or supervised release in virtually all cases, including ninety percent of defendants convicted of non-immigration crimes. U.S. SENT’G COMM’N, 2023 ANNUAL REPORT 18 (2024), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023-Annual-Report.pdf> [https://perma.cc/VEM8-TCPL].

⁷³ Cf. Joseph Dule, David L. Myers & Jonathan Kringen, *Assessing the Impact of Federal Support Court Using Propensity Score Analysis*, 85 FED. PROB. 14, 14 (2021) (“Of the Federal Bureau of Prison population, nearly half (48 percent) exhibited a drug charge for their most serious offense. In comparison, about 6 percent were imprisoned for violent offenses, about 5 percent were incarcerated for property crimes, and around 18 percent were in federal prison for weapons crimes.”).

⁷⁴ Washburn, *American Indians, Crime, and the Law*, *supra* note 27, at 718. According to a 2010 report by the United States Government Accountability Office, of the “Indian Country cases” referred to U.S. Attorneys for prosecution, “77 percent were categorized as violent crimes and 24 percent as non-violent crimes.” JENNIFER FAHEY, CHRISTOPHER KING & MICHAEL KANE, CRIME & JUST. INST., CRIME AND JUSTICE IN INDIAN COUNTRY: A SUMMARY OF TALKING CIRCLE FINDINGS AND THE TRIBAL LAW AND ORDER ACT OF 2010, 17–18 (2011), https://www.crj.org/assets/2017/07/32_Talking_Circles_Report_Final_Jul11.pdf [https://perma.cc/KV82-9TZF].

⁷⁵ Cf. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that only states can prosecute crimes in Indian Country committed by non-Indians against non-Indians).

crimes.⁷⁶ Nevertheless, there is a strong correlation between Indian Country and American Indian identity. Although federally recognized tribal members make up just one percent of the total U.S. population, they comprise over half the population in Indian Country.⁷⁷ Approximately sixty-eight percent of American Indians in the United States “live on or near their tribal homelands,” and many of those who do not live within reservation boundaries are “still very much connected . . . culturally (by participating in rituals and traditions with community members), socially (living in close proximity and having interconnected social ties with friends and families), and politically (by voting in tribal elections and taking advantage of tribal community services).”⁷⁸

Empirical evidence demonstrates that federal criminal defendants who are American Indians are more likely to be prosecuted for violent crimes. For example, a 2013 study found that Native American defendants were at least three-and-half times more likely to be charged with a violent crime than non-Indian defendants, and less than half as likely to be charged with a drug or property crime.⁷⁹ The author of the study attributed this disparity to “[t]he unique federal jurisdiction” over crimes in Indian Country.⁸⁰ American Indians also make up a “huge proportion” of the “small violent slice of the federal docket.”⁸¹ While American Indian defendants are approximately 10 percent of all federal cases,⁸² they are “one quarter of [the] murders . . . and about 70 percent of [the] manslaughters.”⁸³ According to the Department of Justice, “[a]pproximately 80% of all closed Indian Country investigations [in 2017]

⁷⁶ Of the three million people enrolled in federally recognized tribes, approximately two-thirds live outside Indian Country. See Reese, *supra* note 26, at 558–59.

⁷⁷ See *id.*

⁷⁸ SARAH DEWEES & BENJAMIN MARKS, FIRST NATIONS DEV. INST., TWICE INVISIBLE: UNDERSTANDING RURAL NATIVE AMERICA 1, 6 (2017), <https://www.usetinc.org/wp-content/uploads/bvenuti/WWS/2017/May%202017/May%208/Twice%20Invisible%20-%20Research%20Note.pdf> [<https://perma.cc/P25E-6KCZ>].

⁷⁹ Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 FED. PROB. 13, 15 (2018). The breakdown of charges against Native American defendants was 37% violent, 19% drugs, 9% firearms/weapons, 7% property, 13% sex offenses, and 15% miscellaneous. *Id.* By contrast, the breakdown for U.S. citizens was 8% violent, 40% drugs, 18% firearms and weapons, 16% property, 6% sex offenses, and 12% miscellaneous. *Id.* Similarly, a report by the Bureau of Justice Statistics found that between 1994 and 2001, the breakdown of convictions for American Indians entering federal prison was 54.9% violent, 17.1% property, 12.2% drugs, and 15.8% other, whereas the breakdown for all defendants was 8.4% violent, 16.1% property, 40.1% drugs, and 35.4% other. Perry, *supra* note 23, at 21.

⁸⁰ Rowland, *supra* note 79, at 14.

⁸¹ Tredeau, *supra* note 27, at 1416.

⁸² Donelan, *supra* note 31, at 68.

⁸³ Tredeau, *supra* note 27, at 1416.

were violent crime related.”⁸⁴ The federal reporter is full of cases of American Indian defendants sentenced to supervision for violent crimes that would never have been prosecuted by the federal government outside of Indian Country.⁸⁵

A recent example illustrates the impact of violent crime on the federal government’s Indian Country docket. In 2020, the Supreme Court ruled that a large portion of the state of Oklahoma belonged by treaty rights to the Muscogee (Creek) Nation, which meant that it was Indian Country and that the state government could not prosecute American Indians for crimes committed within that territory.⁸⁶ Almost immediately thereafter, the national rate of federal prosecutions for violent crimes in Indian Country “spiked,” increasing from eighty prosecutions a month to over 150.⁸⁷ That increase was concentrated almost entirely in the state of Oklahoma.⁸⁸ The obvious explanation for this change is not that there was an “uptick in violent crimes” in Oklahoman Indian Country, but rather that there was a “change in who [wa]s prosecuting them”—federal, rather than state, officials.⁸⁹

To be clear: I am *not* arguing that American Indians under federal supervision are more likely to have been convicted of violent crimes because American Indians as a group are more likely to engage in violent behavior. While there are problems with violence on some

⁸⁴ U.S. DEP’T OF JUST., INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 11 (2017), <https://www.justice.gov/tribal/page/file/1113091/dl> [<https://perma.cc/29XE-538Y>].

⁸⁵ See, e.g., *United States v. Winter Rose Old Rock*, 76 F.4th 1314, 1316 (10th Cir. 2023) (voluntary manslaughter); *United States v. Condry*, No. 22-5058, 2023 WL 3994381, at *1 (10th Cir. June 14, 2023) (aggravated sexual abuse by force); *United States v. Steele*, 899 F.3d 635, 636–37 (8th Cir. 2018) (burglary); *United States v. Magnan*, 700 F. App’x 838, 839 (10th Cir. 2017) (arson and simple assault); *United States v. Singer*, 825 F.3d 1151, 1153–55 (10th Cir. 2016) (involuntary manslaughter); *United States v. Yazzie*, 566 F. App’x 711, 711 (10th Cir. 2014) (assault resulting in serious bodily injury); *United States v. Smith*, 681 F.3d 932, 933 (8th Cir. 2012) (burglary); *United States v. Black Bear*, 542 F.3d 249, 251 (8th Cir. 2008) (assault with a dangerous weapon); *United States v. Larrabee*, 436 F.3d 890, 890–91 (8th Cir. 2006) (second-degree murder); *United States v. Weiss*, 328 F.3d 414, 416 (8th Cir. 2003) (assault with a dangerous weapon); *United States v. Beston*, 76 F. App’x 116, 116 (8th Cir. 2003) (taking money from another person by force, violence, and intimidation); *United States v. Brings Plenty*, 188 F.3d 1051, 1052 (8th Cir. 1999) (arson of a dwelling). The federal government also prosecutes sexual abuse cases in Indian Country that would ordinarily fall within state jurisdiction. See, e.g., *United States v. Jenks*, 714 F. App’x 894, 896 (10th Cir. 2017); *United States v. Rantanen*, 467 F. App’x 414, 416 (6th Cir. 2012); *United States v. Webster*, 339 F. App’x 663, 664 (8th Cir. 2009); *United States v. Lomayaoma*, 86 F.3d 142, 143–44 (9th Cir. 1996).

⁸⁶ *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

⁸⁷ *Recent Spike in Federal Criminal Prosecutions on Indian Lands*, TRAC REPORTS (July 1, 2021), <https://tracreports.org/tracreports/crim/653> [<https://perma.cc/S57C-PKQF>].

⁸⁸ *Id.*

⁸⁹ *Id.*

reservations,⁹⁰ the empirical evidence suggests that American Indians commit violent crimes at the same or even lower rates than other groups.⁹¹ Instead, my argument is structural. Even if American Indians commit violent crimes at the same or a lower rate as non-Indians, the population of American Indians under federal community supervision will still tend to include more violent offenders, because the federal government does not prosecute many violent crimes outside of Indian Country. As a result, American Indians under federal supervision will be more likely than other federal criminal defendants to have been convicted of violent offenses.

Because American Indians under federal supervision are more likely to have been convicted of violent crimes, they are also more likely to have their supervision revoked. Convictions for violent offenses are correlated with higher rates of revocation in three respects. First, empirical research suggests that defendants convicted of violent crimes are more likely to violate their conditions of supervision. For example, a 2016 study by the Bureau of Justice Statistics found that federal criminal defendants convicted of violent crimes were the most likely to reoffend, with 58.1% of violent offenders rearrested within five years, compared to 39.5% of property offenders, 44% of drug offenders, and 36.7% of sex offenders.⁹² Similarly, a 2020 report by the federal Sentencing Commission found that the percentage of supervision violators originally convicted of violent crimes was “approximately twice as high” as the percentage sentenced for violent crimes.⁹³ These results are consistent with “previous findings in the [Sentencing] Commission’s recidivism research,”⁹⁴ which showed that “violent offenders generally recidivate more quickly and at a higher rate compared to most other offenders.”⁹⁵

⁹⁰ See N. Bruce Duthu, *Broken Justice in Indian Country*, N.Y. TIMES (Aug. 10, 2008), <https://www.nytimes.com/2008/08/11/opinion/11duthu.html> [<https://perma.cc/D7MY-BRVR>]; see also Fay, *supra* note 27, at 96 (“Native people, and Native women in particular, experience violent crime at higher rates than all other demographic groups.”).

⁹¹ Perry, *supra* note 23, at 16, 22.

⁹² JOSHUA A. MARKMAN, MATTHEW R. DUROSE, RAMONA R. RANTALA & ANDREW D. TIEDT, U.S. DEP’T OF JUST., *RECIDIVISM OF OFFENDERS PLACED ON FEDERAL COMMUNITY SUPERVISION IN 2005: PATTERNS FROM 2005 TO 2010*, at 6 (2016), <https://bjs.ojp.gov/content/pub/pdf/ropfcs05p0510.pdf> [<https://perma.cc/X2VK-FKWQ>].

⁹³ See VIOLATIONS REPORT, *supra* note 11, at 20.

⁹⁴ *Id.*

⁹⁵ U.S. SENT’G COMM’N, *RECIDIVISM AMONG FEDERAL VIOLENT OFFENDERS 2* (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf [<https://perma.cc/8SMM-Z56Q>]. Specifically, the Commission found that 63.8% of violent offenders “recidivated by being rearrested for a

Second, the research shows that defendants convicted of violent crimes are more likely to have their supervision revoked for minor violations. According to the Sentencing Commission's 2020 report, violent offenders made up 3.7% of the total population sentenced to supervision, but 6.3% of the Grade A violations (aggravated felonies), 3.5% of the Grade B violations (felonies), and 10.5% of the Grade C violations (misdemeanors and technical violations).⁹⁶ By contrast, drug offenders made up 34.3% of the supervised population, but 52% of the Grade A violations, 29.4% of the Grade B violations, and just 37.5% of the Grade C violations.⁹⁷ The report did not indicate whether this disparity was caused by violent offenders committing more minor violations, or by judges and probation officers punishing them more harshly for such conduct.⁹⁸ Either way, however, its findings demonstrate that convictions for violent crimes are correlated with higher rates of revocations for technical violations.

Finally, defendants convicted of violent crimes present "unique challenges" that require a specialized skillset and advanced understandings of the reentry process.⁹⁹ For example, according to the Center for Court Innovation, defendants convicted of domestic-violence offenses present "serious safety concerns that make monitoring compliance especially difficult," because they "may continue to harass, coerce, and abuse their intimate partners without the knowledge of the justice system," therefore requiring "special knowledge and training to monitor . . . safely and

new crime or for a violation of supervision conditions" compared to 39.8% of non-violent offenders. *Id.* at 3. Violent offenders also "recidivated more quickly," with a "median time from release to the first recidivism event" of eighteen months, compared to twenty-four months for non-violent offenders. *Id.*

⁹⁶ VIOLATIONS REPORT, *supra* note 11, at 21, 32; *see also* U.S. SENT'G GUIDELINES MANUAL § 7B1.1 (U.S. SENT'G COMM'N 2002) (defining grades of violations).

⁹⁷ VIOLATIONS REPORT, *supra* note 11, at 21, 32. The likely reason that the number of Grade B violations was so low for both groups is that a large number of these violations were for illegal reentries, which are concentrated among immigration offenders. *See* Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1868–83 (2022).

⁹⁸ *Cf.* U.S. SENT'G GUIDELINES MANUAL § 7B1.4(a) (U.S. SENT'G COMM'N 2010) (instructing judges in revocation proceedings to consider violators' criminal history); 8 GUIDE TO JUDICIARY POLICY, pt. E, ch. 4, § 420.70(a)(2) (2018), <https://www.uscourts.gov/file/78805/download> [<https://perma.cc/N9PE-TV7C>] (instructing probation officers to consider defendant's "risk of committing a violent act" when responding to "noncompliant behavior"); *id.* § 420.80(b)(2) (instructing probation officers that they may make exceptions to the generally recommended responses to noncompliant behavior given the defendant's "risk[] . . . to commit a violent act"); *id.* § 420.80.10(c)(1) (instructing probation officers that positive drug tests do not merit a revocation request unless the violator "has a chronic criminal history marked by violence").

⁹⁹ Faye S. Taxman, Raymond Chip Tafrate, Stephen M. Cox & Kimberly S. Meyer, *Violence and Gun Violence Among Justice-Involved Persons: Practice Guidelines for Probation Staff*, 86 FED. PROBATION 27, 27–28 (2022).

effectively.”¹⁰⁰ Although domestic-violence cases do not usually fall within the federal government’s enumerated powers and therefore are typically handled at the state level,¹⁰¹ they are a federal responsibility in Indian Country.¹⁰² If federal probation officials do not have the same training or experience in dealing with violent offenders, they may find these cases more difficult to manage.

Again, I am *not* arguing that American Indians under federal supervision are more likely to have their supervision revoked because American Indians as a group are more likely to violate their supervision. The empirical evidence suggests that despite experiencing higher rates of revocation, American Indians recidivate at the same rate as other groups.¹⁰³ Once more, my argument is structural: because American Indians under federal supervision are more likely to have been convicted of violent crimes, and because violent offenders are more likely to have their supervision revoked, American Indians under federal supervision are more likely to have their supervision revoked.¹⁰⁴ The unique jurisdictional rules that apply in Indian Country may help explain the data showing higher rates of revocation for American Indian federal criminal defendants.

B. Rural Geography

The second distinctive characteristic of federal community supervision in Indian Country is geographic. Indian reservations are often located in less densely populated areas, and American Indians are

¹⁰⁰ JENNA SMITH & JAMES HENDERSON, CTR. FOR CT. INNOVATION, WHAT COURTS SHOULD KNOW ABOUT PROBATION SUPERVISION OF DOMESTIC VIOLENCE OFFENDERS 1, 4 (2021), <https://ta2ta.org/wp-content/uploads/2023/01/981-monograph-dv-whatcourtsshouldknow-08032021-1-.pdf> [<https://perma.cc/7E3B-AGE>].

¹⁰¹ See generally *United States v. Morrison*, 529 U.S. 598, 601–02 (2000).

¹⁰² See, e.g., *United States v. Blackshire*, 98 F.4th 1146 (9th Cir. 2024); *United States v. Wells*, 38 F.4th 1246 (10th Cir. 2022); *United States v. Francis*, 588 F. Supp. 3d 1240 (D.N.M. 2022); *United States v. Iu*, 917 F.3d 1026 (8th Cir. 2019); *United States v. Seminole*, 865 F.3d 1150 (9th Cir. 2017); *United States v. Johnson*, 860 F.3d 1133 (8th Cir. 2017); *United States v. Iceman*, 821 F.3d 979 (8th Cir. 2016); *United States v. Lamott*, 831 F.3d 1153 (9th Cir. 2016); *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011); *United States v. Littlewind*, 595 F.3d 876 (8th Cir. 2010); *United States v. Azure*, 536 F.3d 922, 925 (8th Cir. 2008); *United States v. Bad Marriage*, 392 F.3d 1103 (9th Cir. 2004).

¹⁰³ See *supra* text accompanying notes 23–24.

¹⁰⁴ Like ordinary federal crimes, all crimes prosecuted by the federal government in Indian Country carry a potential penalty of community supervision. See *United States v. Eagle Chasing*, 965 F.3d 647, 650 (8th Cir. 2020) (revoking defendant’s supervised release in a federal enclave crime case); *United States v. Walter*, 223 F. App’x 810, 811–12 (10th Cir. 2007) (same); *United States v. Engelhorn*, 122 F.3d 508, 509 (8th Cir. 1997) (finding supervised release was “like punishment” for purposes of Assimilative Crimes Act); *United States v. Lomayaoma*, 86 F.3d 142, 143–44 (9th Cir. 1996) (revoking supervised release for conviction under Indian Major Crimes Act).

more likely than other groups to live in rural areas and small towns.¹⁰⁵ Because community supervision is based on the assumption that the defendant lives in a population-dense urban or suburban area with easy access to transportation and social services,¹⁰⁶ defendants who instead live in rural areas may find it harder to comply with their conditions of supervision, particularly conditions requiring routine travel, reporting, and drug testing.¹⁰⁷ The rural environments where American Indian defendants tend to live may therefore contribute to their higher rates of revocation.

1. *Rurality and Criminal Justice*

Population density has a major impact on the administration of criminal justice. Scholars of law and social geography have identified “rurality” as a form of “spatial inequality” that is “closely associated with uneven development—that is, place-to-place variations in degree and type of development.”¹⁰⁸ For example, sparsely populated rural areas, compared to cities and large towns, tend to “lack the infrastructure needed to support adequate social services, such as public transportation,” and are “challenged by a shortage of human service providers.”¹⁰⁹ In particular, rural areas “lack the concentration of human resources and institutional infrastructure that undergird

¹⁰⁵ See *infra* text accompanying notes 130–36.

¹⁰⁶ See *infra* text accompanying notes 112–15.

¹⁰⁷ See *infra* text accompanying notes 116–28, 137–57.

¹⁰⁸ See, e.g., Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 227 (2010). There is significant scholarly debate over the proper definition of “[r]ural,” which is a “multidimensional concept subject to multiple constructs depending on the metrics used and the purpose of a given inquiry.” Jordan Gross, *Pretrial Justice in Out-of-the-Way Places – Including Rural Communities in the Bail Reform Conversation*, 84 MONT. L. REV. 159, 170. I follow the lead of Lisa Pruitt and Maybell Romero by using the term to refer to “an inchoate concept of rurality, the general idea of sparsely populated areas, including small towns, and associated cultural aspects.” Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 808 (2020) (citing Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 136 n.2 (2009)).

¹⁰⁹ Tonya B. Van Deise, Gary S. Cuddeback, Amy Blank Wilson & Stacey E. Burgin, *Probation Officers’ Perceptions of Supervising Probationers with Mental Illness in Rural and Urban Settings*, 43 AM. J. CRIM. JUST. 267, 269 (2018); see also FAM. JUST. CTR., *Enhancing Rural Reentry Through Housing Partnerships: A Handbook for Community Corrections Agencies in Rural Areas* 14–15 (2009), <https://www.appa-net.org/eweb/docs/appa/pubs/ERRTHP.pdf> [<https://perma.cc/8PC3-42J3>] (noting that because “fewer people return to rural areas than to cities after incarceration, resources are often concentrated in urban centers . . . [p]eople residing in rural communities typically have less access to health and social services than people living in cities and suburbs”).

criminal justice systems,”¹¹⁰ including courts, lawyers, drug treatment facilities, and domestic violence shelters.¹¹¹

Rural areas struggle in particular to administer community supervision, which is based on a conceptual model designed for cities and suburbs. As Debra Lyn Bassett has observed, “[o]ur society’s bias is decidedly urban,” because its “focus, its programs, and its culture, are based on an urban, rather than rural, assumption.”¹¹² So too, the concept of supervising a criminal defendant in the community is based on the assumption that the defendant lives in an environment conducive to easy travel and access to services. The probation system itself originated during the 1800s in the city of Boston, Massachusetts,¹¹³ and although it later spread throughout the United States, it was “more typically located in large cities rather than in suburban and rural areas.”¹¹⁴ To this day, the supervision system is designed and funded according to the needs of urban and suburban communities, and then copied to “smaller rural counties (even though the smaller rural counties may have different needs or a different focus).”¹¹⁵

The urban bias of community supervision makes compliance with the conditions more difficult for rural residents.¹¹⁶ For example, conditions of supervision requiring regular meetings with a probation officer, home visits, drug testing, psychological treatment, community service, curfews, etc.,¹¹⁷ are all harder to obey in rural areas. Rural defendants not only must “travel long distances,” but also “secure transportation and child care in addition to having sufficient time to make the trip,” making it more challenging for them to “meet all the demands of work, family, and probation or parole.”¹¹⁸ The “lack of reliable and efficient transportation” also “significantly impedes” their

¹¹⁰ Gross, *supra* note 108, at 168.

¹¹¹ See Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 486–87 (2014) (explaining that residents must travel longer distances to access institutions, such as “courts,” and services, such as “those provided by lawyers, . . . drug treatment facilities, domestic violence shelters, and health and human services”).

¹¹² Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 276–78 (2003).

¹¹³ See Schuman, *supra* note 4, at 1391.

¹¹⁴ Charles Lindner, *Thacher, Augustus, and Hill—The Path to Statutory Probation in the United States and England*, 71 FED. PROB. 36, 39 (2007).

¹¹⁵ Daniel Scott & Jennifer L. Boyer, *How Probation Practices Vary Across Rural, Suburban, and Urban Contexts*, 32 RURAL SOC’Y 169, 177 (2023).

¹¹⁶ See Katherine LeMasters, Paul Delamater, Lauren Brinkley-Rubinstein, Jesse K. Edwards, Whitney R. Robinson & Brian Pence, *Mass Probation: Temporal and Geographic Correlation of County-Level Probation Rates & Mental Health in North Carolina*, 3 SSM – MENTAL HEALTH 1, 2 (2023) (explaining that documented rural-urban inequities exist in the probation system).

¹¹⁷ See, e.g., U.S. SENT’G GUIDELINES MANUAL § 5D1.3.

¹¹⁸ FAM. JUST. CTR., *supra* note 109, at 14–15.

“engagement with human services,” especially where the “providers may be located far from the homes and workplaces of their potential clients.”¹¹⁹ Finally, the expectation that the defendant will avoid bad influences in the community is less realistic in rural settings, where the number of social options is smaller than in a big city. These obstacles are particularly difficult for defendants with “alcohol and/or substance abuse issues.”¹²⁰ As Valena Beety observed, “[r]ecovering [drug] users in rural communities often falter due to insufficient treatment beds, a lack of treatment options, and sometimes insurmountable transportation issues.”¹²¹

Rurality also undermines the ability of probation officers to provide support to the defendants under their supervision.¹²² Not only do probation officers in rural areas receive fewer resources than their urban and suburban counterparts, but also they must travel further to do their work.¹²³ Indeed, “limited resources” and “travel time” are the most common problems reported by probation officers in rural areas, which “officers in larger counties did not even consider.”¹²⁴ As the federal Probation and Pretrial Services Office put it:

Working as a probation . . . officer in a big city is considerably different than doing that same job in a rural or sparsely populated area. Officers working in less populated areas sometimes must travel long distances to fulfill their supervision responsibilities. They may have access to fewer resources than their urban counterparts do, especially for substance abuse or mental health treatment or employment assistance.¹²⁵

Empirical evidence demonstrates how rurality impedes reentry. For instance, a Illinois study found that “rural probationers were less likely than urban probationers to have ever received treatment for

¹¹⁹ See CECILIA KLINGELE, U.S. DEP’T OF JUST., THE ROLE OF HUMAN SERVICE PROVIDERS DURING COMMUNITY SUPERVISION 5, 51 (2021), <https://www.ojp.gov/pdffiles1/nij/302099.pdf> [<https://perma.cc/5WBL-NNLF>].

¹²⁰ Cf. Scott & Boyer, *supra* note 115, at 170 (stating that adults in rural areas are more likely to have previous substance abuse issues).

¹²¹ Valena E. Beety, *Prosecuting Opioid Use, Punishing Rurality*, 80 OHIO ST. L. J. 741, 751 (2019).

¹²² See Van Deirse, Cuddeback, Wilson & Burgin, *supra* note 109, at 268 (stating the variations between rural and urban resources can impact an officer’s ability to supervise probationers).

¹²³ See Scott & Boyer, *supra* note 115, at 177–78.

¹²⁴ *Id.* at 179.

¹²⁵ *Probation and Pretrial Services – Mission*, U.S. CTS., <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission> [<https://perma.cc/FJ87-5EMY>]; see also DOJ REPORT, *supra* note 14, at 4 (stating the work of a federal probation officer in an urban area “varies considerably” from one in a rural area).

a substance use disorder despite being more likely to use [drugs].”¹²⁶ Similarly, a report by the Council of State Governments found that “[t]he lack of services for mentally ill parolees is especially acute in rural areas,” where parole officials had “little confidence that local community resources are available for this troubled population.”¹²⁷ A survey of criminal-justice practitioners in rural areas quoted a respondent who gave vivid testimony to the challenges faced in their small town: “Our rural community lacks many resources and options for those on probation or jail who need treatment services. The closest drug and alcohol providers are 45 minutes away. There are transportation issues, funding issues, and long wait times to get into one mental health provider.”¹²⁸ All these obstacles make it harder for criminal defendants in rural areas to comply with their conditions of supervision.

2. *Rurality and Reservations*

Because American Indian defendants are more likely than other groups to live in rural areas, it is also more difficult for them to comply with their conditions of supervision, which may result in higher rates of revocation.¹²⁹ Indian reservations are located in some of the most rural parts of the country,¹³⁰ and the largest reservations are in the most rural states.¹³¹ Although some American Indians live in urban and suburban

¹²⁶ LAUREN WEISNER, H. DOUGLAS OTTO, SHARYN ADAMS & JESSICA REICHERT, ILL. CRIM. JUST. INFO. AUTH., *CRIMINAL JUSTICE SYSTEM UTILIZATION IN RURAL AREAS 10* (2020), <https://researchhub.icjia-api.cloud/uploads/Rural1Complete-200320T19305319.pdf> [https://perma.cc/UC4N-5Z9D].

¹²⁷ Arthur J. Lurigio, Angie Rollins & John Fallon, *The Effects of Serious Mental Illness on Offender Reentry*, 68 FED. PROB. 45, 47 (2004).

¹²⁸ INST. FOR INTERGOVERNMENTAL RSCH., *Helping Rural Communities Thrive: How Federal Leaders Can Transform Federal Assistance to Support Rural Justice Practitioners* 7 (June 2023), https://www.cossup.org/Content/Documents/Publications/Helping_Rural_Communities_Thrive_How_Federal_Leaders_Can_Transform_Federal_Assistance_to_Support_Rural_Justice_Practitioners.pdf [https://perma.cc/H9D8-K6X8].

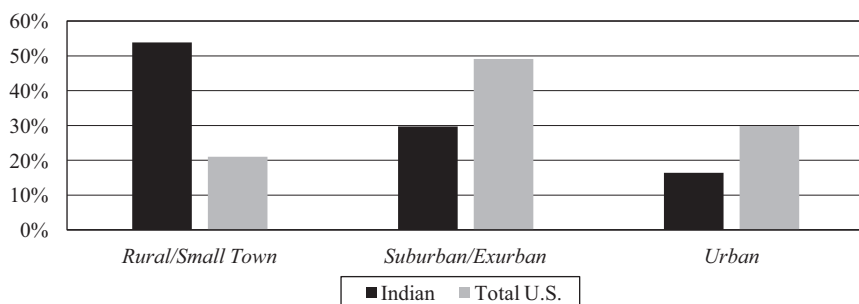
¹²⁹ Cf. Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. REV. 189, 213–14, 225–26 (2020) (describing “rurality” as an “intersectional concept” that helps explain the “marginalization” of American Indians).

¹³⁰ See Samantha Kailas, *Two Nations: Comparing Population Densities of the U.S. and American Indian Federal Reservations* (2013), <https://geography.wisc.edu/cartography/projects/G370/2013FA/Fall2013KailasSamantha.pdf> [https://perma.cc/AH6U-U67S] (showing that areas of American Indian Reservations have little overlap with high population density areas).

¹³¹ See Ana I. Sánchez-Rivera, Paul Jacobs & Cody Spence, *A Look at the Largest American Indian and Alaska Native Tribes and Villages in the Nation, Tribal Areas and States*, U.S. CENSUS BUREAU (Oct. 3, 2023), <https://www.census.gov/library/stories/2023/10/2020-census-dhc-a-aian-population.html> [https://perma.cc/XFW4-PG4G]; see also Washburn, *American Indians, Crime, and the Law*, *supra* note 27, at 748 (observing that the “federal districts that include Indian reservations are physically among the largest”).

areas, their population overall is still “disproportionately rural.”¹³² For example, while about 80% of the U.S. population lives in metropolitan areas, and 20% in rural areas,¹³³ “a majority (54%) of AIAN [American Indian and Alaska Native] people live in rural and small-town areas.”¹³⁴ In states “with large American Indian and Alaska Native communities,” such as Montana, Wyoming, and South Dakota, the numbers are even higher, with “more than 80% of the total AIAN population liv[ing] in rural and small town areas.”¹³⁵ Figure 2, below, illustrates the lower rates of urbanization for Indians compared to the U.S. population as a whole.¹³⁶

FIGURE 2: PERCENTAGE URBANIZATION OF INDIAN VERSUS TOTAL U.S. POPULATION



Rurality makes it harder for American Indian defendants to comply with their conditions of supervision because they must travel further to attend meetings and obtain social services. The “vast distances between some Indian reservations and the federal courts that serve them” pose “serious practical problems” to defendants forced to travel between them,¹³⁷ which Jannelle Doughty, Director of the Department

¹³² John Cromartie & Timothy Parker, *American Indians Remain Disproportionately Rural*, ECON. RSCH. SERV., U.S. DEP’T OF AGRIC. (Dec. 23, 2014), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=77893#:~:text=Despite%20rapid%20increases%20in%20their,rural%20compared%20with%20other%20groups> [https://perma.cc/M4KC-CMNF].

¹³³ Bassett, *supra* note 112, at 279 n.15.

¹³⁴ DEWEES & MARKS, *supra* note 78, at 1. For an example of a citation to the inaccurate statistic, see Timothy Williams, *Quietly, Indians Reshape Cities and Reservations*, N.Y. TIMES (Apr. 13, 2013), <https://www.nytimes.com/2013/04/14/us/as-american-indians-move-to-cities-old-and-new-challenges-follow.html> [https://perma.cc/VEW4-8V2K].

¹³⁵ DEWEES & MARKS, *supra* note 78, at 4.

¹³⁶ The data for this chart is taken from the HOUSING ASSISTANCE COUNCIL, RESEARCH RURAL BRIEF 9 (2012), https://ruralhome.org/wp-content/uploads/storage/research_notes/rtn-race-and-ethnicity-web.pdf [https://perma.cc/FME5-X546].

¹³⁷ Washburn, *American Indians, Crime, and the Law*, *supra* note 27, at 711.

of Justice for the Southern Ute Indian Tribe, once described as a “road block to justice.”¹³⁸ While traveling these distances would be “daunting to anyone,” they are particularly challenging to “residents of Indian reservations,” who “tend to have incomes well below the poverty level.”¹³⁹ According to a 2014 study of defendants under federal supervision, “about a quarter of American Indians and Alaska Natives (26 percent) lacked adequate transportation at initial assessment, while approximately a tenth of [B]lack[people] (10 percent) and whites (9 percent) had this . . . problem.”¹⁴⁰ Similarly, a report by the California Commission on Access to Justice found that “Native Americans living in rural areas experience many of the same barriers to access to justice that other rural [residents] do,” but that “other factors create additional barriers”—for example, “a larger percentage of Natives are poor compared to average rural statistics, and they have less access to the technology that can help to bridge the distances.”¹⁴¹

Limited access to drug and mental health treatment is another obstacle to reentry in Indian Country. For instance, a report by the Vera Institute found that “[r]eentry resources, such as substance use or mental health treatment or housing assistance, are scarce on reservations.”¹⁴² Given the “general lack of understanding of [American Indian and Alaska Native] populations, and the remote, rural, sparsely populated locations of many Indigenous homelands, these communities are frequently misunderstood or forgotten by funders and policymakers.”¹⁴³ Similarly, a focus group of criminal justice stakeholders in Indian Country related that “substance abuse treatment services were not accessible to a large proportion of its population,” and that while “some services were available in Indian Country, many were located off tribal lands

¹³⁸ *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 49 (2008), <https://www.govinfo.gov/content/pkg/CHRG-110shrg46198/html/CHRG-110shrg46198.htm> [<https://perma.cc/X6EQ-98SC>].

¹³⁹ Washburn, *American Indians, Crime, and the Law*, *supra* note 27, at 711.

¹⁴⁰ Cohen & Whetzel, *supra* note 20, at 15. A survey of community corrections practitioners similarly found that “transportation issues” were ranked as the “second-highest priority” for American Indian defendants. Ada Melton, Kimberly Cobb, Adrienne Lindsey, R. Brian Colgan & David J. Melton, *Addressing Responsivity Issues with Criminal Justice-Involved Native Americans*, 78 FED. PROB. 24, 26 (2014).

¹⁴¹ THE CALIFORNIA COMMISSION ON ACCESS TO JUSTICE, *IMPROVING CIVIL JUSTICE IN RURAL CALIFORNIA* 30 (2010), <https://www.familyjusticecenter.org/wp-content/uploads/2018/09/Improving-Civil-Justice-in-Rural-California.pdf> [<https://perma.cc/5JWM-XGJV>].

¹⁴² SHAMES & SUBRAMANIAN, *supra* note 42, at 2.

¹⁴³ SARAH DEWEES & BENJAMIN MARKS, *TWICE INVISIBLE: UNDERSTANDING RURAL NATIVE AMERICA* 3 (Apr. 2017), <https://www.usetinc.org/wp-content/uploads/bvenuti/WWS/2017/May%202017/May%208/Twice%20Invisible%20-%20Research%20Note.pdf> [<https://perma.cc/H563-2JT5>].

requiring long distance travel and few transportation options.”¹⁴⁴ When American Indian defendants must travel off tribal lands to obtain the services required by their conditions of supervision, they are “removed from their support systems” and become “more likely to fail.”¹⁴⁵

Probation officers working in Indian Country also face challenges. Just as American Indian defendants must travel further to attend meetings or drug treatment, so too must probation officers travel further to conduct home visits, check with workplaces, connect with providers, etc. A report on American Indian parolees in South Dakota, for example, noted that parole agents “may work 50, 100, or even 200 miles away” from the defendants under their supervision, “making it extremely challenging to establish a good working relationship or . . . effective and helpful supervision.”¹⁴⁶ A recent paper by two federal probation employees related how “[f]ederal officers supervising cases in Indian Country . . . grapple with geographical constraints, lack of adequate or available community resources, and local political climates, all of which may vary from non-Indian Country districts.”¹⁴⁷ The authors described their review of one probation officer’s work over a single “8-hour workday,” during which they “were scheduled to see two sex offenders and one sex offender treatment provider.”¹⁴⁸ To accomplish these tasks, they “had to drive approximately 240 miles, and [they] still were only able to make face-to-face contact with two of the three people [they] sought to see.”¹⁴⁹ While “this excursion may seem unimaginable or even far-fetched,” they explained, “for many officers supervising sex offenders in Indian Country . . . this is part of their ‘routine.’”¹⁵⁰

Michael P. McGrath, a federal probation officer in the District of North Dakota, gave a similar account of his work:

Rural districts such as North Dakota have characteristics and challenges that must be overcome when implementing effective programming. Obvious factors like physical distance and isolation, lack of resources and potentially unique cultural and social dynamics may affect not only the rural offenders but also those who work in their reentry. Nested within many of our most rural and isolated areas in North Dakota are Native American reservation communities where

¹⁴⁴ FAHEY, KING & KANE, *supra* note 74, at 20.

¹⁴⁵ Rachel King, *Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska*, 77 OR. L. REV. 1, 44 (1998).

¹⁴⁶ SHAMES & SUBRAMANIAN, *supra* note 42, at 2.

¹⁴⁷ Migdalia Baerga-Bufler & James L. Johnson, *Sex Offender Management in the Federal Probation and Pretrial Services System*, 70 FED. PROB. 14, 14 (2006).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

much of our supervision activity is done The lack of available treatment options is exacerbated the more “rural” one gets, and for many North Dakota communities, and the reservations in particular, treatment options in general simply do not exist.¹⁵¹

Cases from the federal reporter illustrate this dynamic, with American Indian defendants frequently punished for technical violations traceable to rurality, such as missed meetings, failed drug tests, incomplete treatment, etc.¹⁵² As one federal district judge observed, “the lack of employment and the long travel distances required to receive treatment” in Indian Country make defendants more likely to “return to . . . bad habits.”¹⁵³ Nevertheless, not all courts are receptive to these concerns. In *United States v. Bahe*, an American Indian defendant appealed a condition of supervised release requiring him to participate in sex offender treatment in Phoenix, Arizona,¹⁵⁴ which was 200 miles away from his home on the Navajo reservation.¹⁵⁵ He argued that he should instead be sent to a facility “either in Flagstaff, Arizona, which is closer to the Navajo Reservation, or at an outpatient treatment center on the Navajo Reservation itself.”¹⁵⁶ The district judge rejected this request, and the Ninth Circuit affirmed, holding that the judge properly

¹⁵¹ McGrath, *supra* note 30, at 1–2.

¹⁵² See, e.g., *United States v. Eagle Chasing*, 965 F.3d 647, 652 (8th Cir. 2020) (finding the defendant violated the conditions of his release when he fled after a violent encounter at his residential re-entry center and traveled 300 miles before telling his probation officer); *United States v. Clark*, No. 18-1983, 773 F. App’x 337, 337–38 (8th Cir. 2019) (affirming lower court’s decision to revoke supervised release after the defendant “failed to appear for court-ordered halfway house placements on multiple occasions”); *United States v. Hopkins*, No. 17-1752, 729 F. App’x 486, 488 (8th Cir. 2018) (affirming lower court’s decision to revoke defendant’s supervised release and imprisonment based on multiple factors, including his “repeated failure to abide” by his probation conditions); *United States v. Jones*, No. 17-2550, 730 F. App’x 404, 406 (8th Cir. 2018) (same); *United States v. McGhee*, 869 F.3d 703, 706 (8th Cir. 2017) (affirming lower court’s decision to revoke defendant’s supervised release, in part, because he may have been arrested and too intoxicated to remember); *United States v. Smith*, No. 14-2038, 588 F. App’x 829, 832 (10th Cir. 2014) (affirming lower court’s decision to revoke defendant’s supervised release after he terminated from his halfway house on multiple occasions and did not take advantage of reintegration opportunities and resources); *United States v. Shield*, No. 09-1634, 377 F. App’x 590, 591 (8th Cir. 2010) (affirming lower court’s decision to revoke defendant’s supervised release after he failed to reside in the community corrections facility, consumed alcohol, and assaulted a police officer); *United States v. White Face*, 383 F.3d 733, 735 (8th Cir. 2004) (upholding lower court’s decision to sentence defendants to a longer period than recommended in chapter 7 after revocation); *United States v. Matchopatow*, 202 F.3d 275 (7th Cir. 1999) (unpublished table decision) (upholding lower court’s unusually long sentencing length because it was below the statutory maximum).

¹⁵³ *United States v. Rantanen*, 684 F. App’x 517, 519 (6th Cir. 2017).

¹⁵⁴ 201 F.3d 1124, 1127 (9th Cir. 2000).

¹⁵⁵ See Washburn, *Five Years of Scholarship*, *supra* note 70, at 749.

¹⁵⁶ *Bahe*, 201 F.3d at 1127.

imposed the condition.¹⁵⁷ Rurality makes compliance harder for Indian defendants under community supervision, which may contribute to their higher rates of revocation.

C. *Legacy of Conquest*

The final distinctive feature of federal community supervision in Indian Country is its historical legacy. Over the past two hundred years, the federal government has repeatedly removed American Indians from their lands, separated them from their families, and destroyed their sovereignty, all while claiming that it was acting in their best interests.¹⁵⁸ To this day, the federal criminal justice system continues to alienate and disadvantage American Indians in the name of reform.¹⁵⁹ While legal scholars have previously described how the federal government justified its conquest of the Indian tribes based on its supposed “duty” to “civilize” them,¹⁶⁰ no one has yet demonstrated the connection between this civilizing mission and modern-day rehabilitative theories of community supervision. The legacy of conquest helps explain the higher rates of revocation for American Indian defendants, as the federal supervision system continues to employ rehabilitative rhetoric to justify the subordination of the Indian tribes.

1. *History of Federal Indian Policy*

Federal policy toward the Indian tribes has fluctuated wildly over the course of American history, sometimes aimed at protecting tribal sovereignty, and other times at eliminating it. One constant, however, is that the federal government has always claimed to be acting to uplift the Indians from a state of degradation, offering a rehabilitative justification for conquest. This justification is still evident in the “Indian trust doctrine,” according to which the federal government has “charged itself with moral obligations of the highest responsibility and trust” toward the Indian tribes, a “dependent and

¹⁵⁷ *Id.* at 1127–36.

¹⁵⁸ See *infra* text accompanying notes 163–91.

¹⁵⁹ See *infra* text accompanying notes 192–96, 200–13.

¹⁶⁰ Blackhawk, *supra* note 33, at 25; see also Bryan McKinley Jones Brayboy, *Toward a Tribal Critical Race Theory in Education*, 37 URB. REV. 425, 430 (2006) (“[T]he goal, sometimes explicit, sometimes implicit, of interactions between the dominant U.S. society and American Indians has been to change (‘colonize’ or ‘civilize’) us to be more like those who hold power in the dominant society.”); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* §§ 1.03–1.04 (Matthew Bender & Co. 2023) (describing civilizing mission of 19th and 20th century federal Indian policy).

sometimes exploited people.”¹⁶¹ While the government has occasionally fulfilled these obligations, it has also deployed them as a pretense for exploitation and subjugation.¹⁶²

At the Founding, it was federal policy to pursue trade and intercourse with the Indian tribes through negotiation and legislation,¹⁶³ reflecting the view that “Anglo-Saxon society” ought to gradually “absorb the Native Americans,” which they believed would take several generations.¹⁶⁴ To this end, President George Washington advocated for a plan for “promoting civilization among the friendly tribes and for carrying on trade with them upon a scale equal to their wants and under regulations calculated to protect them from imposition and extortion.”¹⁶⁵ Similarly, President Thomas Jefferson argued for “leading” the Indian tribes “to agriculture, to . . . manufacture, and civilization.”¹⁶⁶

Beginning with President Andrew Jackson in the 1820s, however, the federal government adopted a new policy of forcibly removing Indian tribes from their lands east of the Mississippi River and relocating them to reservations in Oklahoma and other western territories,¹⁶⁷ a process that became known as the “Trail of Tears.”¹⁶⁸ Arguably, Indian removal was an act of ethnic cleansing, even genocide, yet federal officials

¹⁶¹ *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942); see also Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 201 (2017) (“The obligations under the federal trust responsibility have evolved from a paternalistic model in which the federal government provides services and programs and makes decisions for impoverished Native Americans, to an understanding that . . . obliges the federal government to support and revitalize tribal governments . . .”).

¹⁶² See Eid & Doyle, *supra* note 27, at 1086 (“Congress’s plenary power over Indian affairs was tethered not to the Constitution, but to an amorphous federal trust responsibility that was supposed to act as a shield to protect tribes and their members. Not surprisingly, that shield was soon transformed . . . into ‘a destructive sword with which to cut up and dispose of the tribal land estate.’” (citation omitted)).

¹⁶³ See COHEN, *supra* note 160, § 1.03(1).

¹⁶⁴ David R. Wrone, *Indian Treaties and the Democratic Idea*, 70 WIS. MAG. HIST. 83, 98 (1986–1987).

¹⁶⁵ President George Washington, *Fourth Annual Address to Congress* (Nov. 6, 1792), <https://www.presidency.ucsb.edu/documents/fourth-annual-address-congress-0> [<https://perma.cc/78G3-TABU>].

¹⁶⁶ FRANCIS PAULA PRUCHA, *THE INDIANS IN AMERICAN SOCIETY: FROM THE REVOLUTIONARY WAR TO THE PRESENT* 12 (1985); see also *Johnson v. M’Intosh*, 21 U.S. 543, 573 (1823) (“The potentates of the old world found no difficulty in convincing themselves, that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity . . .”).

¹⁶⁷ COHEN, *supra* note 160, § 1.03(4)(a).

¹⁶⁸ *Id.*

described it as a way to help the American Indians.¹⁶⁹ President Jackson himself offered a rehabilitative justification for the policy:

It will separate the Indians from immediate contact with settlements of whites; free them from the power of the States; enable them to pursue happiness in their own way and under their own rude institutions; will retard the progress of decay, which is lessening their numbers, and perhaps cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community.¹⁷⁰

After the Civil War, the federal government set its sights on the western territories that it had just promised to the Indian tribes.¹⁷¹ In 1887, Congress voted to partition Indian reservations into “allotments” that would be distributed among tribal members, with the remainder to be sold to the general public.¹⁷² This plan was inspired not only by white settlers seeking tribal lands, but also by “influential reformers, known as Friends of the Indians, who felt that the Indians would be best served if the reservations were allotted”¹⁷³ Simultaneously, the federal government also established “Courts of Indian Offenses” that outlawed Indian cultural practices and sent Indian children to boarding schools around the country to assimilate them into white society, or as one schoolmaster put it, “Kill the Indian and Save the Man.”¹⁷⁴ It was during this period that the Supreme Court first justified the exercise of federal criminal jurisdiction over Indian Country, which violated many of the government’s treaty promises,¹⁷⁵ as a form of security for the

¹⁶⁹ See Nicky Michael, Beverly Jean Smith & William Lowe, *Reclaiming Social Justice and Human Rights: The 1830 Indian Removal Act and the Ethnic Cleansing of Native American Tribes*, 7 J. HEALTH AND HUM. EXPERIENCE 25, 26–27 (2021).

¹⁷⁰ President Andrew Jackson, *Message to Congress ‘On Indian Removal’* (Dec. 6, 1830), <https://www.archives.gov/milestone-documents/jacksons-message-to-congress-on-indian-removal> [https://perma.cc/8UQT-8946]; see also *Farewell Address*, *supra* note 1 (“[T]his unhappy race . . . are now placed in a situation where we may well hope that they will share in the blessings of civilization and be saved from that degradation and destruction to which they were rapidly hastening . . . the philanthropist will rejoice that the remnant . . . has been at length placed beyond the reach of injury or oppression, and that the paternal care of the General Government will hereafter watch over them”).

¹⁷¹ COHEN, *supra* note 160, § 1.04.

¹⁷² Wrone, *supra* note 164, at 99.

¹⁷³ *Id.* The reformers claimed that “private ownership of property and individualism” were “the only proven and acceptable paths to civilization,” and that the government needed to “crack the tribe’s cultural hold over its members,” which was “synonymous with paganism, poverty, and savagery.” *Id.* at 100.

¹⁷⁴ COHEN, *supra* note 160, § 1.04.

¹⁷⁵ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020).

tribes: “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”¹⁷⁶

In the 1930s, President Franklin Roosevelt finally recognized the harms that allotment and the boarding schools had done to tribal communities¹⁷⁷ and “dramatically” changed federal policy by trying to “protect[] Indian life and cultural institutions.”¹⁷⁸ In the “Indian New Deal,”¹⁷⁹ the federal government sought to “reestablish tribal governments while invigorating them with a number of innovative models, including the introduction into many of them of constitutional forms of political activity.”¹⁸⁰ Although these policies reconstituted tribal sovereignty,¹⁸¹ they still reflected assimilationist goals, aiming to move tribal law “closer toward the federal constitutional system and towards becoming ‘mirror images of the dominant society.’”¹⁸²

During the 1940s, federal Indian policy changed yet again, in a backlash against tribal sovereignty known as the “termination” era.¹⁸³ Congress voted to strip tribal governments in several states of their powers and transfer authority over their territories to state governments, effectively disestablishing them as independent political entities.¹⁸⁴ Federal officials also established programs to “remove[] individual Indians from their reservations and tribal society to large cities, where – sometimes after training and sometimes without – they were supposed to fuse with American society and cease to be Indians with cultural or political ties to their old nations.”¹⁸⁵ At the same time, state officials and private parties engaged in the “mass removal” of Indian children from their families, to be placed with “civilized people,” instead of their “tribal communities.”¹⁸⁶ Yet even as it was destroying tribal sovereignty,

¹⁷⁶ *United States v. Kagama*, 118 U.S. 375, 384 (1886).

¹⁷⁷ See COHEN, *supra* note 160, § 1.04 (describing how reservations turned into “checkerboards as the sale of surplus land to whites isolated individual Indian allotments” and “coercive attempts at assimilation were applied to almost all aspects of Indian’s lives”); Wrone, *supra* note 164, at 101 (noting how during this era Indian communities “disintegrated” and “individual tribesman sank into poverty and cultural decay”).

¹⁷⁸ Wrone, *supra* note 164, at 101.

¹⁷⁹ Eid & Doyle, *supra* note 27, at 1091.

¹⁸⁰ Wrone, *supra* note 164, at 101.

¹⁸¹ See COHEN, *supra* note 160, § 1.05.

¹⁸² Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 424 (2014) (citation omitted).

¹⁸³ See COHEN, *supra* note 160, § 1.06.

¹⁸⁴ Wrone, *supra* note 164, at 102–03.

¹⁸⁵ *Id.*; see also COHEN, *supra* note 160, § 1.06 (describing “Voluntary Relocation Program”).

¹⁸⁶ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1641, 1644 (2023).

Congress still claimed that it was acting to “free[]” the Indians and “end their status as wards of the United States.”¹⁸⁷

Finally, in the 1960s, the federal government awoke again to the damage it had done to Indian communities by trying to destroy tribal sovereignty.¹⁸⁸ President John Kennedy officially ended the termination policy and instead began a new approach called “self-determination,” which was “designed to use expanded social, economic, and political assistance as a ‘new trail to eventual assimilation,’” and continues to this day.¹⁸⁹ Like the Indian New Deal, self-determination aims to increase the authority of tribal governments, encourage the development of Indian land, and ensure each tribe’s cultural survival.¹⁹⁰ Through laws like the Indian Civil Rights Act, the Indian Child Welfare Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Tribally Controlled Schools Act, and the Tribal Law and Order Act, the federal government has sought to end child separation, protect Indian communities, and expand tribal authority over Indian Country.¹⁹¹

Current federal Indian policy is much more favorable to tribal sovereignty than in the past. But the legacy of conquest remains. As Maggie Blackhawk observed, the U.S. government continues to hold “hundreds of [tribal] governments in subordination . . . dominates these governments and their peoples, exploits their resources, prohibits political independence, withholds representation, and imposes its own laws, values, and norms upon these governments without consent.”¹⁹² Compared to other groups, American Indians are still “severely constrained in their interaction with mainstream society,” which is “largely the result of the numerous treaties between the U.S. government and the Native American tribes, which placed tribal members in subordinate positions,” and “in turn, had the effect of limiting their opportunities to secure life chances.”¹⁹³ Advocates also

¹⁸⁷ H. Con. Res. 108 (1953).

¹⁸⁸ See Wrone, *supra* note 164, at 103 (describing how termination “proved to be a disaster for the several ensnared tribes,” as the “Indians quickly succumbed to the cultural chaos wrought by the policy . . . [p]overty engulfed them, and vast amounts of the terminated lands, often rich in resources, gradually slipped into non-Indian hands”); *Haaland*, 143 S. Ct. at 1645 (noting that child separation, “[l]ike the boarding school system that preceded it” had “disastrous consequences . . . contribut[ing] to the precarious conditions that Indian parents and children already faced”).

¹⁸⁹ COHEN, *supra* note 160, § 1.07 (quoting Task Force on Indian Affairs, Report to the Secretary of the Interior 77 (July 10, 1961)).

¹⁹⁰ *Id.*

¹⁹¹ See *id.*

¹⁹² Blackhawk, *supra* note 33, at 2–3.

¹⁹³ Donelan, *supra* note 31, at 70; see also INDIAN L. AND ORD. COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES

note that American Indian children are “still more likely than non-Native children to enter the child welfare system and to be removed from their homes.”¹⁹⁴ The continuing threat to tribal sovereignty was made clear in 2022, when the Supreme Court held for the first time in American history that state governments had inherent jurisdiction to prosecute non-Indians for crimes in Indian Country.¹⁹⁵ The Court defended this new encroachment on tribal sovereignty by claiming that it would “help” the Indians, using “old paternalist overtones” that “are hard to ignore.”¹⁹⁶

2. *Supervision as Conquest*

The legacy of conquest is also evident in the federal supervision system, which continues to subjugate Indian tribes in the name of rehabilitation. Colonization, as Patrick Wolfe has argued, is a “structure rather than an event,” and thus “its history does not stop . . . when it moves on from the era of frontier homicide.”¹⁹⁷ Over time, the “logic that initially informed frontier killing transmutes into different modalities, discourses and institutional formations as it undergirds the historical development and complexification of settler society.”¹⁹⁸ For example, sociologists have observed that one reason for the disparities affecting American Indians in the criminal justice system “is the persistence of law enforcement practices embedded in settler colonial dynamics in which policing is not just a matter of enforcing laws, but also an instrument of maintaining settler colonial dominance

131 (2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [<https://perma.cc/EAL2-T75V>] [hereinafter A ROADMAP FOR MAKING NATIVE AMERICA SAFER] (“America’s historical Indian policies, which focused on colonial domination and dispossession, have led to economic, social, and political marginalization The conditions of marginalization have given rise to accumulated feelings of powerlessness, hopelessness, and lack of personal value—that, in turn, lead to substance abuse, anger, and violence.”).

¹⁹⁴ Hannah Ditzenberger, *Native American Children and Child Welfare Laws*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 16, 2023), <https://www.ncsl.org/human-services/native-american-children-and-child-welfare-laws> [<https://perma.cc/MH7T-P3N5>].

¹⁹⁵ *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022); see also W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1533 (2023) (criticizing *Castro-Huerta* for relying on “theory of state supremacy”).

¹⁹⁶ *Castro-Huerta*, 142 S. Ct. at 2522 (Gorsuch, J., dissenting).

¹⁹⁷ Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 402 (2006).

¹⁹⁸ *Id.*; see also NATSU TAYLOR SAITO, *SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS* 111 (2020) (arguing that “the settlers’ self-proclaimed prerogative to exercise dominion over ‘their’ land and ‘their’ people, and to profit therefrom, has ensured that a highly racialized dynamic of difference permeates all our social, economic, and political institutions”).

over Indigenous populations.”¹⁹⁹ So too, the federal government’s past patterns of discrimination, displacement, and destruction continue to manifest themselves in higher rates of revocation for American Indian defendants.

Originally, federal criminal jurisdiction served as a “buffer against state encroachment into tribal affairs” and provided a “certain measure of protection for tribal autonomy.”²⁰⁰ But over time, the system changed. During the 19th and 20th centuries, the federal government grew “increasingly committed to a policy of forced assimilation of Indian people into the broader American polity” and, to this end, aimed to “enhanc[e] its own control over Indian lands and people”²⁰¹ Ultimately, federal criminal law became an “instrument for enacting assimilationist policy and tipping the balance of powers within the tribal-federal framework further in the federal government’s favor.”²⁰²

Today, federal criminal jurisdiction not only infringes on tribal sovereignty, but also imposes linguistic and cultural assumptions that are biased against American Indian defendants. For example, approximately “[s]even percent of Native households speak a language other than English exclusively in the home and 25 percent of Native households speak English and another language in the home.”²⁰³ Yet in federal courts, “[n]either the judge, the court reporter, the prosecutor, the court security officers, the deputy marshals, nor the defense attorney or investigator are likely to be [Indian] or even understand or speak [their] language.”²⁰⁴ As a result, the system “operates in a language that is foreign” to many Indians, making it harder for them to defend their interests.²⁰⁵

¹⁹⁹ Brianna Marie Watters, Robert Stewart & Michele Statz, *Retribution for Tribal Sovereignty: Settler Colonial Policing and Civil Justice Impacts*, 26 PUNISHMENT & Soc’y 693, 694 (2024).

²⁰⁰ Riley & Thompson, *supra* note 27, at 1910.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ THE CALIFORNIA COMMISSION ON ACCESS TO JUSTICE, *supra* note 141, at 30.

²⁰⁴ Washburn, *American Indians, Crime, and the Law*, *supra* note 27, at 710–11. Of course, there are American Indian people who work for the federal government, but they are concentrated in the Bureau of Indian Affairs and the Indian Health Service. See Lewis & Williams, *supra* note 26, at 1159.

²⁰⁵ Washburn, *American Indians, Crime, and the Law*, *supra* note 27, at 710–11; see also United States v. Goode, Nos. CR-05-67-PHX-EHC, CIV 10-905-PHX-EHC (MHB), 2011 WL 1810136 (D. Ariz. Apr. 5, 2011) (“At Movant’s sentencing . . . it was determined that English was Movant’s second language, and sentencing was continued to allow for the appearance of an Apache interpreter at Movant’s request.”); United States v. Bahe, 201 F.3d 1124, 1126 (9th Cir. 2000) (“[A]t sentencing, Bahe asked for a downward departure because of his physical and mental conditions, his illiteracy, and his ability to speak Navajo only.”).

Differences between federal legal practice and Indian cultural norms may also result in unfairness to American Indian defendants. The lawyers and law enforcement agents who prosecute Indian defendants “rarely live in their communities, are often located far from Indian reservations, lack direct knowledge or experience with victims and defendants living and working there, and are largely unaccountable to their Native American constituents.”²⁰⁶ American Indian defendants are therefore “caught up in what is to them a ‘foreign’ justice system,” in which “prosecutors, public defenders and defense counsel, judges, and probation officers may be more likely to make inaccurate assumptions about defendants; system processes may not mesh with Indigenous world views; and myriad opportunities exist for miscommunication.”²⁰⁷ One federal prosecutor offered as an example the Navajo cultural norm against looking people in the eye, which may be considered “offensive, an affront, even a challenge to the other person,” as inconsistent with how they would be expected to behave in the courtroom.²⁰⁸ The result is “a system that is inherently discriminatory, both in terms of how individuals are often treated and in the adverse impacts to Native Americans and Alaska Natives as a group versus other offender categories”²⁰⁹

Many American Indian communities, moreover, are naturally suspicious of federal law enforcement officials, who they have been “resisting . . . off and on, for more than a hundred years.”²¹⁰ Federal criminal trials “often get little or no publicity on the reservation” and “people in the community have no idea what is happening in these cases”—they “may know that someone was arrested and taken away, but they often do not know what happened thereafter.”²¹¹ Law enforcement therefore happens “to the people” through “an external process run by outsiders.”²¹² Kevin Washburn offered a vivid metaphor to describe the colonialism inherent to the work of federal prosecutors in Indian Country:

Though experiences vary from tribe to tribe, the federal prosecutor in Indian Country is, in some respects, the direct lineal descendant of the

²⁰⁶ Eid & Doyle, *supra* note 27, at 1071.

²⁰⁷ A ROADMAP FOR MAKING NATIVE AMERICA SAFER, *supra* note 193, at 118–19.

²⁰⁸ Washburn, *American Indians, Crime, and the Law*, *supra* note 27, at 732–33.

²⁰⁹ A ROADMAP FOR MAKING NATIVE AMERICA SAFER, *supra* note 193, at 119.

²¹⁰ Washburn, *Five Years of Scholarship*, *supra* note 70, at 1021. Indian defendants may also feel suspicious of defense attorneys who come from outside the community and do not speak their language or know their culture. Washburn, *American Indians, Crime, and the Law*, *supra* note 27, at 721–22.

²¹¹ Washburn, *Five Years of Scholarship*, *supra* note 70, at 1016.

²¹² *Id.*

blue-coated, sword-wielding cavalry officer; the prosecutor represents the very same federal government that committed cruel and violent acts against Indian tribes for more than a century. He represents the government that has made and then broken sacred promises. . . . In a real sense, for many reservation Indians, the federal government continues to represent the enemy.²¹³

The same legacy of conquest is also evident in the federal community supervision system. Like past federal Indian policies, federal community supervision is justified as a way to “encourage rehabilitation.”²¹⁴ District judges impose supervision based on the defendant’s need for “educational or vocational training, medical care, or other correctional treatment.”²¹⁵ Many recommended conditions of supervision also reflect a rehabilitative mission, including mental-health counseling, drug treatment, job training, etc.²¹⁶ In an echo of federal Indian law, the connection between the federal judge and the defendant under supervision is even described as a “relationship of trust.”²¹⁷

Yet despite this lofty rhetoric, the reality for many American Indians under federal community supervision is one of alienation and exclusion. Federal probation officers are often “challenged by their lack of knowledge or interaction with the [Native American] supervisees’ communities,” and typically do not receive “training specific to [Native American] individuals.”²¹⁸ Many treatment centers do not have counselors who speak Indian languages,²¹⁹ and “[c]orrectional treatment approaches that attend to the specific customs and beliefs of Native American offenders are . . . rare.”²²⁰ Conditions of supervision may also interfere with the defendant’s participation in Indian cultural events

²¹³ Washburn, *American Indians, Crime, and the Law*, *supra* note 27, at 736.

²¹⁴ *United States v. Haymond*, 139 S. Ct. 2369, 2382 (2019).

²¹⁵ *See* 18 U.S.C. §§ 3553(a)(2)(D), 3562(a), 3583(c). By contrast, judges sentencing defendants to imprisonment are forbidden from considering rehabilitation. *See id.* § 3582(a); *see also* *Tapia v. United States*, 564 U.S. 319, 322 (2011).

²¹⁶ *See* U.S. SENT’G GUIDELINES MANUAL § 5D1.3.

²¹⁷ *United States v. Mejia-Sanchez*, 172 F.3d 1172, 1175 (9th Cir. 1999); *see also* U.S. SENT’G GUIDELINES MANUAL ch. 7, pt. A, introductory cmt. (U.S. SENT’G COMM’N 2024) (describing violation of supervision as a “breach of trust”); *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring) (same); *id.* at 2393 (Alito, J., dissenting) (same). *But see* Fiona Doherty, “Breach of Trust” and *United States v. Haymond*, 34 FED. SENT’G REP. 274, 274–79 (2022) (critiquing “breach of trust” theory); Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881, 907 (2021) (same).

²¹⁸ Melton, Cobb, Lindsey, Colgan & Melton, *supra* note 140, at 25, 27.

²¹⁹ *See United States v. Bahe*, 201 F.3d 1124, 1127 (9th Cir. 2000) (demonstrating the difficulty caused by a lack of treatment facilities providing services in Navajo); *see also* King, *supra* note 145, at 10–13 (describing language barriers for Native Alaskans in criminal justice system).

²²⁰ McGrath, *supra* note 30, at 69.

and religious rituals,²²¹ which “perpetuat[es] distrust and disillusionment with criminal justice authorities.”²²² Finally, district judges sometimes impose conditions that seem more motivated by cultural prejudice than the facts of the case—for instance, forbidding an Indian defendant from consuming alcohol even where there was “no allegation or evidence in the extensive record . . . to suggest that [he] had consumed any alcohol before [committing his crime] or indeed that [he] ever had problems related to alcohol,”²²³ or prohibiting an Indian defendant from contact with his own children, even in the absence of evidence suggesting that he was a danger to his family.²²⁴

Rachel King, a public defender who represented Alaska Native clients, poignantly described the bitterness and skepticism that the supervision system engendered in “a Tlingit client named James” facing revocation of his probation for not completing alcohol treatment:

White people control the criminal justice system in Alaska. In the three parts of the state where I worked, I did not meet an Alaska Native defense attorney, prosecutor, magistrate, judge, or probation officer. . . . Attorneys and judges with immense good will tried hard to be culturally sensitive but still remained outsiders imposing justice on a foreign culture. . . . I showed up in court a few minutes before [a] hearing, and there sat James on a bench right next to the D.A. and the probation officer, obviously intoxicated. This was my first time meeting James. As I tried to talk to him about what was going to happen in court, he was totally oblivious and obviously not able or willing to understand anything I was saying. Instead of agreeing that he needed treatment, which he had previously agreed to, he said that he didn’t understand why the White men’s laws were always trying to get him to do things that he didn’t want to do. He turned to some White people waiting outside the courtroom, pointed at them and said, “I hate White people, I hate you, I hate you, I hate you.” Although he did not say so, I suspect James hated me, too.²²⁵

As this story illustrates, the impact of community supervision is especially pernicious for American Indian defendants with substance-use disorder. American Indians suffer from “the highest rates of alcohol, marijuana, cocaine, inhalant, and hallucinogen use disorders compared

²²¹ See SHAMES & SUBRAMANIAN, *supra* note 42, at 5.

²²² FAHEY, KING & KANE, *supra* note 74, at 21.

²²³ United States v. Wisecarver, 644 F.3d 764, 775 (8th Cir. 2011).

²²⁴ See, e.g., United States v. Wolf Child, 699 F.3d 1082, 1087 (9th Cir. 2012); United States v. Lonjose, 663 F.3d 1292, 1295–96 (10th Cir. 2011).

²²⁵ King, *supra* note 145, at 14, 17 (internal citations omitted).

to other ethnic groups,”²²⁶ a problem that is “linked to the experience of colonialism, which has produced a great deal of the ‘misery and crime in Indian Country.’”²²⁷ Unsurprisingly, one of the main “responsivity issues” for American Indian defendants under community supervision is to “the impact of generational alcohol/substance abuse.”²²⁸ Yet many treatment programs are not geared toward American Indian culture.²²⁹ And because the federal supervision system is hyper-focused on surveilling, restricting, and punishing drug activity,²³⁰ including by mandating revocation for drug-related violations,²³¹ it can “trap some defendants, particularly substances abusers, in a cycle where they oscillate between supervised release and prison.”²³² The federal reporter is full of cases of American Indian defendants sent to prison for violating their supervision due to relapses into alcohol and drug addiction.²³³

A powerful example of how the legacy of conquest reverberates through federal community supervision is the Sixth Circuit’s 2007 decision in *United States v. Alexander*.²³⁴ The defendant in that case was a member of the Hannahville-Potawatomi Indian Community, a federally recognized Indian tribe in northwest Michigan.²³⁵ Following a “long history of alcohol abuse” and several convictions for alcohol-related crimes, he was convicted of assaulting his sister and sentenced to two-and-a-half months of imprisonment followed by three years of supervised release.²³⁶ While serving his term of supervised release, he violated his conditions by drinking alcohol and visiting his mother

²²⁶ Michael Kaliszewski, *Alcohol and Drug Abuse Among Native Americans*, NAT’L ALL. FOR DRUG ENDANGERED CHILD., (Feb. 19, 2020), <https://nationaldec.org/wp-content/uploads/288-Article.pdf> [<https://perma.cc/S5KW-DJZT>]; Amanda Lautieri, *Addiction Among Native Americans*, SUNRISE HOUSE TREATMENT CTR. (Apr. 11, 2025), <https://sunrisehouse.com/addiction-demographics/native-americans> [<https://perma.cc/3XXV-AABN>].

²²⁷ Riley, *supra* note 26, at 1629.

²²⁸ Melton, Cobb, Lindsey, Colgan & Melton, *supra* note 140, at 24–26.

²²⁹ *Id.* (“There are no widely known or used actuarial tools that have been developed or adapted specifically for the NA . . . supervisee population. This may be related to cost, or the lack of culturally informed and competent professionals to design culturally relevant tools, or the lack of training to implement such tools in largely non-Native justice systems by non-Native professionals.”).

²³⁰ See generally Jacob Schuman, *Drug Supervision*, 19 OHIO ST. J. CRIM. L. 431 (2022).

²³¹ See 18 U.S.C. § 3583(g) (2018).

²³² *United States v. Trotter*, 321 F. Supp. 3d 337, 339 (E.D.N.Y. 2018).

²³³ See, e.g., *United States v. Lee*, 147 F. Supp. 3d 1253 (D.N.M. 2015); *United States v. Cerre*, 510 F. App’x 728 (10th Cir. 2013); *United States v. Webster*, 339 F. App’x 663 (8th Cir. 2009); *United States v. Black Bear*, 542 F.3d 249 (8th Cir. 2008); *United States v. Marrow Bone*, 378 F.3d 806 (8th Cir. 2004); *United States v. Tsosie*, 376 F.3d 1210 (10th Cir. 2004).

²³⁴ 509 F.3d 253 (6th Cir. 2007).

²³⁵ See *United States v. Meshigaud*, 815 F. App’x 965, 966 (6th Cir. 2020).

²³⁶ *Alexander*, 509 F.3d at 254.

without notifying his probation officer.²³⁷ The district judge revoked his supervision and sentenced him to another twelve months of imprisonment followed by twenty-four months of supervised release.²³⁸ The judge also ordered, as a condition of his first twelve months of supervised release, that he attend Alcoholics Anonymous three times a week in Grand Rapids, Michigan, over 300 miles away from Hannahville, explaining that he needed to be removed from Hannahville for his own benefit:

I want him away from Hannahville. I want him away from his drinking friends. I want him in a place where he can be watched, where he can have once again the availability of even more resources to assist him down in Grand Rapids. . . . Mr. Alexander, you are 36 years old. Unless you get a handle on this situation and we give you the resources to get a handle on this situation, you don't have long to live, frankly. Your liver's going to give out. You're not going to make it. . . . [I]t's for your good that I'm saying this matter has to be resolved. . . . I want this to come to a halt. No more Hannahville associations whatever. No more associations with people who are assisting you in this drinking enterprise which is going to kill you.²³⁹

On appeal, the defendant argued that this condition was “greater than necessary to address his drinking problems” because it would “deprive him of ‘meaningful contact with his mother, his siblings, his child or other supportive family members,’ all of whom live in or near Hannahville.”²⁴⁰ The Sixth Circuit rejected these arguments and affirmed the sentence, holding that the condition was necessary to treat his alcohol addiction.²⁴¹ “No doubt,” the court of appeals acknowledged, “a district court should not lightly impose a geographical restriction as a condition of supervised release, and least of all one that takes a person several hundred miles from his family and community.”²⁴² Nevertheless, the defendant had “committed the underlying crime in Hannahville, and he violated his supervised release in Hannahville and neighboring areas,” which showed that “[w]hile this community may have been good to him, it ha[d] not been good for him.”²⁴³ Banning the defendant from the reservation would also “protect the community from future crimes[,] . . . if indeed it can help [the defendant] halt his

²³⁷ See *id.* at 255.

²³⁸ See *id.*

²³⁹ *Id.* at 255–56 (alterations in original).

²⁴⁰ *Id.* at 256, 258.

²⁴¹ See *id.* at 258.

²⁴² *Id.* at 256.

²⁴³ *Id.*

proclivity to backslide.”²⁴⁴ Although the restrictions would “assuredly be inconvenient for Alexander and his family,” the court of appeals saw no “other alternatives that would meaningfully address his prior failings,” concluding that “[i]t may well be . . . that this 12-month hiatus from the area will help all concerned.”²⁴⁵

The judges and probation officers involved in the *Alexander* case may have acted in good faith. They may have wanted to help the defendant abstain from alcohol and protect the Hannahville community from further crimes. Yet the reality is that in the name of rehabilitation, they were forcibly relocating an American Indian defendant hundreds of miles away from his family, barring him from returning to tribal territory, and requiring him to participate in a counseling program “based on a Judeo-Christian ideology.”²⁴⁶ In these facts, it is easy to hear echoes of older abuses, as the federal government orders yet another Indian to leave his homeland, supposedly for his own good.

The resonance with the past here is especially haunting given the history of the Hannahville-Potawatomi tribe, which descended from Potawatomi Indians “who refused to leave Michigan in 1834 during the great Indian Removal.”²⁴⁷ The ancestral lands of the Potawatomi “originally embraced all that portion of the State lying south of Grand River and extending from Lake Michigan to the waters which bound it on the east,” comprising roughly the southwest quarter of the state.²⁴⁸ In 1832, however, following decades of warfare and pressure from the federal government, the Potawatomi signed a treaty to “cede[] all their lands in Michigan south of the Grand River” and move south to a reservation in Kansas.²⁴⁹ When the government began to remove them forcibly at “the point of the bayonet,” a group broke off and fled north, away from the “continuing advance of white settlement.”²⁵⁰ They wandered Michigan for the next 50 years as “propertyless refugees,” with “nothing

²⁴⁴ *Id.* at 257.

²⁴⁵ *Id.* at 258.

²⁴⁶ Maryanne Diaz & Christine S. Scott-Hayward, *Correctional and Sentencing Law Commentary Requiring Religion in Recovery*, 60 CRIM. L. BULL. 94, 95 (2024); see also Kelly S. Croman, *One Size Does Not Fit All: The Failure of Washington's Licensing Standards for Alcohol and Drug Treatment Programs and Facilities to Meet the Needs of Indians*, 72 WASH. L. REV. 129, 138–43 (1997) (describing differences between “AA’s dominant culture roots” and “traditional Indian religious beliefs”).

²⁴⁷ *Hannahville History*, HANNAHVILLE POTAWATOMI: KEEPERS OF THE FIRE, <https://hannahville.net/history> [<https://perma.cc/V8J5-KWW8>].

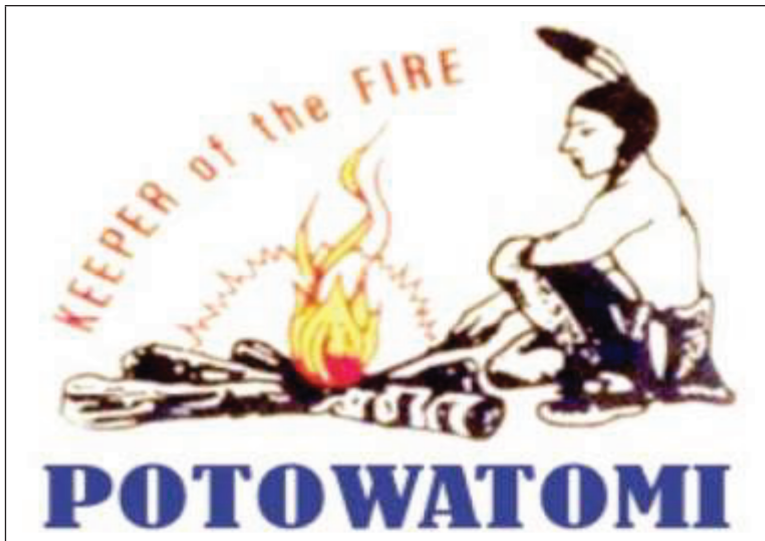
²⁴⁸ KENNETH E. TIEDKE, MICH. ST. COLL., AGRIC. EXPERIMENT STATION, DEP’T SOCIO. & ANTHROPOLOGY, A STUDY OF THE HANNAHVILLE INDIAN COMMUNITY (MENOMINEE COUNTY, MICHIGAN), SPECIAL BULL. 369, at 8 (1951).

²⁴⁹ *Id.* at 10.

²⁵⁰ *Id.* at 11.

but kinship ties to hold them together.”²⁵¹ Finally, in 1883, they settled on unoccupied land in Menominee County, calling their community “Hannahville” after the wife of a Chippewa missionary who helped them.²⁵² The Hannahville-Potawatomi were not officially recognized as a tribe by the federal government until 1936,²⁵³ and endured socio-economic marginalization and cultural repression for several decades afterward.²⁵⁴ The revocation proceedings in *Alexander* thus mark another chapter in a long history of dispossession and diaspora. The tribe’s flag is displayed in Figure 3, below.²⁵⁵

FIGURE 3: HANNAHVILLE-POTOWATOMI INDIAN COMMUNITY FLAG



²⁵¹ *Id.* at 13.

²⁵² *Id.* at 11–12.

²⁵³ *Hannahville History*, *supra* note 247.

²⁵⁴ See *Hannahville Potawatomi Tribal Profile*, HANNAHVILLE HEALTH CENTER, <https://hannahvillehealthcenter.com/history> [<https://perma.cc/5SD8-P69J>] (“Incidents of tuberculosis were high at Hannahville during the 40s & 50s, as well a short life expectancy, high rates of diabetes, alcoholism and inadequate educational and employment opportunities. The Tribal infrastructure could only barely be developed during these hard times.”); *How a Potawatomi Tribe Lost Its Culture and What It Takes to Bring It Back*, MICHIGAN PUBLIC (Aug. 14, 2014), <https://www.michiganpublic.org/arts-culture/2014-08-14/how-a-potawatomi-tribe-lost-its-culture-and-what-it-takes-to-bring-it-back> [<https://perma.cc/5PBW-JJ3Q>] (“For a Potawatomi tribe in the Upper Peninsula, tribal culture almost vanished around the 1940s.”).

²⁵⁵ Rob Raeside, *Figure 3: Hannahville-Potawatomi Indian Community Flag* (illustration), in HANNAHVILLE POTOWATOMI - MICHIGAN (U.S.), CRW FLAGS, (July 17, 2019), <https://www.crwflags.com/fotw/flags/xa-hanna.html#:~:text=The%20current%20flag%20depicts%20a,%22Keeper%20of%20the%20Fire%22> [<https://perma.cc/2G23-QTE2>].

Alexander is not an outlier. There are many more examples of federal judges punishing American Indian defendants who violated their supervision by imposing conditions that expel them from tribal territory, separate them from their families, and require them to participate in programs of cultural assimilation, all purportedly as a form of rehabilitation.²⁵⁶ As one court put it, “[e]xile is not a pleasant experience,” but may be justified “to promote effective treatment as well as to protect the public (and the defendant himself) from future crimes”²⁵⁷ This logic, however, does not appear to be applied consistently between Indian and non-Indian defendants. Although the court in *Alexander* claimed that banning the defendant from tribal territory was necessary because he had “committed the underlying crime in Hannahville, and he violated his supervised release in Hannahville,”²⁵⁸ non-Indian defendants often commit their initial crimes and subsequent violations in the same city, yet conditions of supervision typically prohibit them from “leaving their ‘community,’ county, or district,” not from remaining in it.²⁵⁹

To be sure, there may be American Indian defendants who pose a significant threat to their communities, yet tribal governments do not need the federal government’s assistance to remove dangerous or troublesome members from their territory. They already have the inherent power to “determine tribal membership, regulate domestic affairs among tribal members, and exclude others from entering tribal land.”²⁶⁰ They might also choose to wield this power differently than federal probation officials, given that “banishment from the community” in some American Indian cultures is considered the “worst punishment that could be handed out,” “rarely used,” and “reserved for those with little hope of redemption.”²⁶¹

Nevertheless, the federal courts have rejected Indian defendants’ claims that conditions of supervision banning them from tribal territory infringe on tribal sovereignty. In one case, a defendant argued that a condition of supervised release banning him from the town of Browning, Montana, on the Blackfeet Reservation, “usurp[ed]

²⁵⁶ See, e.g., *United States v. Many White Horses*, 964 F.3d 825, 829 (9th Cir. 2020); *United States v. Meshigaud*, 815 F. App’x 965, 968–69 (6th Cir. 2020); *United States v. Rantanen*, 684 F. App’x 517, 518, 521 (6th Cir. 2017).

²⁵⁷ *Rantanen*, 684 F. App’x at 518, 521.

²⁵⁸ *United States v. Alexander*, 509 F.3d 253, 256 (6th Cir. 2007).

²⁵⁹ *Widra*, *supra* note 41 (emphasis added); see also U.S. SENT’G GUIDELINES MANUAL § 5D1.3(c)(3) (recommending as standard condition of supervision that the “defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer”).

²⁶⁰ *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021).

²⁶¹ FAHEY, KING & KANE, *supra* note 74, at 22.

the Blackfeet Nation's authority to exercise control over its members through the power to banish or exclude tribal members.”²⁶² The Ninth Circuit acknowledged “the unique role a federal reservation holds in Indian life,” yet held that the “tribe’s authority does not preclude the federal government from exercising its own authority over [an Indian defendant],” including by “imposing geographic restrictions requiring that he not reside, or travel to, certain tribal lands without prior approval.”²⁶³ The legacy of conquest thus offers a final explanation for why American Indians experience higher rates of revocation under federal supervision.

II

SELF-DETERMINATION THROUGH TRIBAL SUPERVISION

To reform Indian Country supervision, the federal government should recognize the inherent authority of Indian tribes to supervise tribal members living in tribal territory. Community supervision is a core part of tribal sovereignty, because it is not just a form of criminal punishment, but also a vehicle for important social services, such as healthcare, education, and family regulation. Recently, several tribal governments have developed their own formal supervision programs that both incorporate tribal values and send fewer people to prison. To promote better outcomes for Indian defendants and fuller autonomy for Indian tribes, federal probation officials should follow the principles of tribal governance, community cohesion, and cultural respect.

A. *Supervision and Sovereignty*

Although many legal scholars have described the connection between tribal sovereignty and criminal justice,²⁶⁴ no one has ever considered how tribal sovereignty relates to community supervision. In fact, control over community supervision is an essential part of tribal sovereignty, because it is both a form of criminal punishment and an

²⁶² United States v. Many White Horses, 964 F.3d 825, 829 (9th Cir. 2020).

²⁶³ *Id.* at 830, 831 n.1.

²⁶⁴ See Riley, *supra* note 26, at 1635–36 (describing the connection between the Violence Against Women Act and tribal sovereignty); Riley & Thompson, *supra* note 27, at 1950–52 (proposing several criminal justice system reforms to support tribal sovereignty development); Fay, *supra* note 27, at 114–25 (employing various theories of federalism to understand concurrent American and Tribal criminal jurisdiction); Eid & Doyle, *supra* note 27, at 1108–16 (discussing equal protection issues within the criminal legal system as it relates to Indian tribes and nations); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 832–52 (2006) [hereinafter Washburn, *Federal Criminal Law*] (discussing theories of tribal self-determination in the context of criminal law).

attempt to reintegrate the offender back into the community.²⁶⁵ Shifting power over community supervision from the federal government to tribal governments would help to mitigate the three unique features of Indian Country supervision—criminal jurisdiction, rural geography, and the legacy of conquest—that drive higher rates of revocation for American Indian defendants.²⁶⁶ Just as the federal government has recognized tribal control over other important social services,²⁶⁷ it should also recognize tribal power over community supervision.

The power to inflict criminal punishment is a key aspect of sovereignty.²⁶⁸ To have true self-determination, “a community must be able to define its own moral code through its criminal laws and articulate a process for enforcing them.”²⁶⁹ Criminal law, in turn, helps to “socialize the community by reinforcing those norms that are reflected in the legal structure and help mold broader behavioral norms,” ensuring that “the community’s values will be honored either through compliance or enforcement,” and influencing “sensibilities, solidarities, and social relations . . . far beyond the offender in the dock or the inmate in the prison cell.”²⁷⁰ This relationship between sovereignty and punishment is one reason why the Constitution makes state governments responsible for most criminal law enforcement.²⁷¹

So too, the power to enforce criminal law is at the “heart of tribal sovereignty.”²⁷² Because Indian tribes are sovereign entities that pre-existed the United States Constitution as “self-governing sovereign political communities,”²⁷³ their power to punish is “inherent.”²⁷⁴ Although the federal government has imposed many limits on tribal sovereignty, the tribes still “retain their original natural rights” to regulate their own internal affairs.²⁷⁵ The tribe’s power to punish is not just a “core governmental duty” in American legal theory,²⁷⁶ but also in traditional Indian cultures. As a leader of the Pascua Yaqui explained, “tribal criminal jurisdiction is rooted in a Yaqui view of the world in

²⁶⁵ See *infra* text accompanying notes 268–88.

²⁶⁶ See *infra* text accompanying notes 289–91.

²⁶⁷ See *infra* text accompanying notes 304–08.

²⁶⁸ See Fay, *supra* note 27, at 59–60 (explaining why criminal justice is central to political self-determination).

²⁶⁹ Washburn, *Five Years of Scholarship*, *supra* note 70, at 1025.

²⁷⁰ Washburn, *Federal Criminal Law*, *supra* note 264, at 835 (citation omitted).

²⁷¹ See Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 6 (1940) (“[O]utside of federal law each locality has the right under our system of government to fix its own standards of law enforcement . . .”).

²⁷² *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2512 (2022) (Gorsuch, J., dissenting).

²⁷³ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1647 (2023) (Gorsuch, J., concurring).

²⁷⁴ *United States v. Lara*, 541 U.S. 193, 199, 204 (2004).

²⁷⁵ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

²⁷⁶ Riley, *supra* note 26, at 1619.

which the tribe has inherent authority and responsibility to protect and provide for the people.”²⁷⁷

Because imposing and revoking community supervision are both forms of criminal punishment, they too are essential to tribal sovereignty.²⁷⁸ Decisions about whether to sentence a defendant to community supervision, what the conditions of supervision should be, and how to respond to violations, all implicate the same basic moral questions that arise with the infliction of other kinds of criminal punishment. They also help to reinforce and mold community norms. By taking these decisions away from the Indian tribes, the federal government “assaults the notion of tribal self-determination,” acting as an “external authority” that unilaterally imposes “substantive criminal norms on separate and independent communities without their consent and often against their will.”²⁷⁹

Indeed, control over community supervision is arguably *more* vital to tribal sovereignty than control over prisons, because supervision is not just a part of the criminal law, but also a vehicle for other important social services, such as healthcare, education, and family regulation. While prisoners are removed from their communities, defendants serving terms of community supervision may return to tribal lands, giving the tribe a powerful incentive to ensure that they “receive treatment and/or rehabilitation so they can become well-functioning community members.”²⁸⁰ Services provided via supervision include mental-health counseling, drug treatment, education, job training, and family regulation,²⁸¹ all of which have been recognized as core parts of tribal sovereignty.²⁸²

²⁷⁷ *Id.* at 1600.

²⁷⁸ See KIMBERLY A. COBB, A DESKTOP GUIDE FOR TRIBAL PROBATION PERSONNEL: THE SCREENING AND ASSESSMENT PROCESS, BUREAU OF JUST. ASSISTANCE, OFF. OF JUST. PROGRAMS 34 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/APPA_TribalProbation.pdf [<https://perma.cc/DF8S-FQJZ>] (“Probation in Indian Country is a vital component of the criminal justice system.”).

²⁷⁹ Washburn, *Federal Criminal Law*, *supra* note 264, at 782, 836.

²⁸⁰ KIMBERLY A. COBB & TRACY G. MULLINS, TRIBAL PROBATION: AN OVERVIEW FOR TRIBAL COURT JUDGES, BUREAU OF JUST. ASSISTANCE, OFF. OF JUST. PROGRAMS 6 (2010) (citation omitted), <https://www.appa-net.org/eweb/docs/appa/pubs/tpotcj.pdf> [<https://perma.cc/NWV7-B547>].

²⁸¹ See U.S. SENT’G GUIDELINES MANUAL § 5D1.3 (recommending conditions requiring defendants to participate in mental-health counseling, obtain substance-abuse treatment, take classes, enroll in job training, maintain employment, report on their finances, or cease contact with a spouse or children).

²⁸² See, e.g., ANJA RUDIGER, TRIBAL EDUC. ALL., PATHWAYS TO EDUCATION SOVEREIGNTY: TAKING A STAND FOR NATIVE CHILDREN 16–17 (2020) (citation omitted), https://nabpi.unm.edu/assets/documents/tea-full-report_12-14-20.pdf [<https://perma.cc/2XQN-MNEZ>] (“[T]ribal sovereignty intertwines with education sovereignty.”); Aila Hoss, *A Framework for Tribal Public Health Law*, 20 NEV. L.J. 113, 120 (2019) (“Tribes have inherent authority

Denying tribal control over community supervision in Indian Country also undermines basic democratic values. For example, because state governments are typically responsible for criminal law enforcement, most prosecutors are accountable to their constituents through local elections, which allows the community to determine its own criminal justice policy. Yet because the federal government has primary authority for criminal prosecutions in Indian Country, Indian tribes exercise much less control over prosecutorial decisionmaking at the local level.²⁸³ The result, according to Washburn, is that federal prosecutors are “less likely to feel any pressure to be accountable” to the Indian communities where they work.²⁸⁴ Although Washburn has argued that this gulf of accountability has led to *under*-prosecution of ordinary crimes in Indian Country,²⁸⁵ I believe the data in the DOJ report shows that it results in *over*-enforcement of conditions of supervision.²⁸⁶

Tribal leaders have similarly called for expanding tribal power over community supervision in the name of tribal sovereignty. For example, a 2015 report by the Tribal Law and Order Commission, a government panel including representatives from several Indian tribes, advocated for the creation and maintenance of “fair, restorative, culturally compatible, and community healing . . . [t]ribal justice institutions that are directly accessible and accountable to local citizens,” with a specific focus on “alternatives to detention” and “community supervision.”²⁸⁷ Without tribal control over these programs, the report explained, “Tribal community members will consider their Tribal governments as failures and will tend not to freely collaborate,” and “[a]ssociated Federal- and State-managed justice systems will frequently be seen . . . as coercive, discriminatory, and self-serving.”²⁸⁸

Recognizing tribal power over community supervision would help to mitigate all three of the drivers of revocation for American Indian defendants. First, tribal probation officials would have more training

as sovereign nations to protect and promote the health and welfare of their citizens . . .” (internal quotation marks, brackets, and citation omitted)); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989) (“Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.” (internal quotation marks and citation omitted)).

²⁸³ Washburn, *American Indians, Crime, and the Law*, *supra* note 27, at 731–32.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 733–34 (arguing that federal “prosecutors who are not committed to Indian Country cases will simply not pursue them”).

²⁸⁶ DOJ REPORT, *supra* note 14.

²⁸⁷ A ROADMAP FOR MAKING NATIVE AMERICA SAFER, *supra* note 193, at 131, 133, 138.

²⁸⁸ *Id.* at 131, 133.

and experience with defendants convicted of violent crimes.²⁸⁹ Second, tribal probation officials would be more aware of and responsive to the challenges of rurality.²⁹⁰ Finally, tribal probation officials would be more familiar with the defendant's language and culture.²⁹¹ As Eugene White-Fish, Chief Judge of the Forest County Potawatomi tribe, observed, tribal courts, in contrast to federal courts, rarely impose "the most grievous of tribal 'punishments' – banishment from the tribe."²⁹²

The empirical evidence confirms that increasing tribal control over community supervision results in better outcomes for American Indian defendants. Although "45% of released prisoners are back in custody within a few years," success rates for American Indians who participate in "traditional Indigenous justice . . . tend to be in the 90% range."²⁹³ Criminal justice stakeholders similarly report that "when programs and services are tied to the culture or spiritual beliefs of their tribe, the interventions are more successful."²⁹⁴ Allowing Indian defendants "to return to Indian lands to participate in traditional practices may be promoting pro-social behavior that is key to long-term change."²⁹⁵

Unfortunately, culturally responsive reentry programs for American Indians in the federal supervision system are "rare."²⁹⁶ American Indian defendants who have been through the federal criminal justice system report "a significant lack of interaction with Native professionals."²⁹⁷ While there are some treatment facilities "based in traditional Native American practices,"²⁹⁸ they often find it difficult to obtain funding for

²⁸⁹ Cf. *supra* Section I.A (explaining how the unique rules of federal jurisdiction in Indian Country create a population of offenders under supervision who are more likely to have been convicted of violent crimes).

²⁹⁰ Cf. *supra* Section I.B (explaining how the challenges of rural geography make it more difficult for defendants in Indian Country to comply with their conditions of supervision).

²⁹¹ Cf. *supra* Section I.C (explaining how the legacy of conquest continues through a federal supervision system that alienates and represses American Indian defendants).

²⁹² Kimberly A. Cobb & Tracy G. Mullins, *Tribal Probation: An Overview for Tribal Court Judges*, AM. PROB. AND PAROLE ASS'N, 1, 2 (2010), <https://www.appa-net.org/eweb/docs/appa/pubs/TPOTCJ.pdf> [<https://perma.cc/BC57-S7NQ>].

²⁹³ Stephanie Woodard, *Unequal Before the Law*, IN THESE TIMES (Mar. 11, 2024), <https://inthesetimes.com/article/incarceration-crow-dog-deadwood-indigenous-peoples-federal-court-inequality> [<https://perma.cc/Q9QK-56PJ>]; see also Cohen & Whetzel, *supra* note 20, at 16 n.14 (reporting that American Indians participating in "inpatient drug and alcohol treatment" were more likely to continue the program and to abstain from drugs and alcohol when they receive "culturally responsive treatment interventions").

²⁹⁴ Melton, Cobb, Lindsey, Colgan & Melton, *supra* note 140, at 26.

²⁹⁵ FAHEY, KING & KANE, *supra* note 74, at 21.

²⁹⁶ McGrath, *supra* note 30, at 51.

²⁹⁷ FAHEY, KING & KANE, *supra* note 74, at 21.

²⁹⁸ *United States v. Martin*, No. 14-2106, slip op. at 3 (10th Cir. 2014).

“traditional remedies.”²⁹⁹ Even when culturally responsive programs are available, federal judges are not always convinced of their effectiveness. In *United States v. Ahidley*, for example, the defendant was a member of the Mescalero Apache Tribe who violated his supervised release by driving drunk with his children in the car.³⁰⁰ The recommended sentence was six to twelve months in prison.³⁰¹ He requested a sentence within the recommended range, pointing out that “substance abuse is at the root of his problems,” and asking for “the opportunity provided by the Mescalero Tribal Court to provide him with substance-abuse treatment ‘targeted toward Mescalero people.’”³⁰² The judge rejected his request and sentenced him to the maximum of twenty-four months of imprisonment, asking: “[W]hat’s different about Mescalero’s treatment versus all the treatment he’s walked away from in this case?”³⁰³

Finally, restoring tribal sovereignty over community supervision would be consistent with recent trends in federal Indian policy. Over the past several decades, the federal government has authorized tribal governments to assume authority over social-service programs³⁰⁴ such as the Indian Health Service, tribal schools, environmental programs, consumer protection, estates, and child welfare.³⁰⁵ In all these areas, tribal self-determination has “improved delivery of services to Indian people, partially by making the providers of those services more directly accountable to tribal leadership and thus to the tribal community, and partially by insuring that delivery of services occurs in a culturally appropriate manner.”³⁰⁶ More recently, the federal government loosened restrictions on tribal power over criminal law enforcement by permitting tribal governments to impose longer sentences as well as prosecute non-Indian defendants in certain domestic violence and sexual abuse cases.³⁰⁷ According to Ron Whitener, Chief Judge of the Tulalip Tribal Court, these reforms are “not perfect,” but have been met with “great success in almost every area.”³⁰⁸ Because community supervision

²⁹⁹ Riley, *supra* note 26, at 1626.

³⁰⁰ No. 23-2008, slip op. at 2 (10th Cir. 2023).

³⁰¹ *Id.*

³⁰² *Id.* at 5.

³⁰³ *Id.* at 2, 5.

³⁰⁴ Ennis & Mayhew, *supra* note 182, at 426–27.

³⁰⁵ See Reese, *supra* note 26, at 571–72; Washburn, *Five Years of Scholarship*, *supra* note 70, at 1024.

³⁰⁶ Washburn, *Federal Criminal Law*, *supra* note 264, at 847.

³⁰⁷ See Riley & Thompson, *supra* note 27, at 1913–18 (tracing the jurisdictional expansion of tribal criminal authority).

³⁰⁸ See Nicole Iaci, *Looking Ahead: The Tribal Law and Order Act Five Years Later and Beyond*, INDIAN L. RES. CTR. (Feb. 27, 2016), <https://indianlaw.org/safewomen/looking-ahead-tribal-law-and-order-act-five-years-later-and-beyond> [<https://perma.cc/6VRU-UHNG>].

sits at the intersection of criminal punishment and social services, the federal government should recognize it as a key part of tribal sovereignty.

B. Tribal Programs

Recently, several tribal governments have developed their own formal programs for community supervision based on traditional American Indian values.³⁰⁹ Unlike federal community supervision, these tribal supervision programs tend to prioritize restitution and reintegration, not coercion and control, and studies suggest that they send fewer people to prison for violations.³¹⁰ Although there is no single answer for how tribal governments should administer community supervision, these examples prove that tribes are capable of effectively supervising tribal members living in their territories and suggest how to promote better outcomes for American Indian defendants.

Generalizing about tribal law is difficult, because it includes “a great diversity of legal cultures and structures.”³¹¹ Nevertheless, within the past ten years, there has been a trend of tribal governments adding probation as a sentencing option for their justice systems.³¹² In particular, tribal governments have developed new “ideas and strategies that they can utilize in their community to promote healing, restore peace with victims, and still hold tribal offenders accountable.”³¹³ The federal Bureau of Indian Affairs has also created a “Diversion and Re-entry Division” to help tribes develop “comprehensive alternatives to incarceration,” including “alternative courts, increased treatment opportunities, [and] probation programs.”³¹⁴

Although formalized tribal supervision programs are relatively recent, there is a long history of tribal interest in the reentry process.³¹⁵ Traditionally, Indian tribes held criminal offenders accountable for “making the victim whole through restitution and reparations, while the community helped to make the offender whole through support and healing practices.”³¹⁶ While non-Indian communities have tended to favor a “punishment modality,” Indian communities historically

³⁰⁹ See *infra* text accompanying notes 326–36, 340–53, 355–58.

³¹⁰ See *infra* text accompanying notes 337–39, 354, 359.

³¹¹ Reese, *supra* note 26, at 570; see also FAHEY, KING & KANE, *supra* note 74, at 14 (describing diversity in tribal court systems).

³¹² Cobb, *supra* note 278, at 5 n.2.

³¹³ *Id.* at 2.

³¹⁴ *Diversion and Re-entry*, BUREAU OF INDIAN AFFS., <https://www.bia.gov/CFRCourts/diversion-and-re-entry> [<https://perma.cc/FVW7-FEFJ>].

³¹⁵ See Cobb, *supra* note 278, at 5.

³¹⁶ FAHEY, KING & KANE, *supra* note 74, at 22.

“put their faith in education, treatment, and medicine.”³¹⁷ According to Kimberly Cobb and Tracy Mullins, these traditions make “probation and community supervision programs” the “more culturally compatible approach to punishment for crime in Indian Country.”³¹⁸

Indeed, the Major Crimes Act itself was enacted in response to an exercise of tribal power over the reentry process. In 1881, a member of the Rosebud Sioux Indian Tribe named Kangi Sunka, or Crow Dog, murdered a rival tribal leader named Sinte Gleska, or Spotted Tail.³¹⁹ Afterward, the tribal government “directed Crow Dog to re-establish community harmony by giving Spotted Tail’s family horses, money and a blanket.”³²⁰ Although this resolution settled the matter “according to long-standing Lakota custom and tradition,”³²¹ the federal government was not satisfied and therefore prosecuted Crow Dog for murder in district court, hoping to use the case as leverage to obtain more control over tribal law enforcement.³²² Crow Dog was convicted and sentenced to death,³²³ but the Supreme Court reversed, holding that Congress had not clearly provided for the exercise of federal criminal jurisdiction over Indian defendants in Indian Country.³²⁴ In response, Congress passed the Major Crimes Act to authorize federal prosecutions of Indian defendants in tribal lands.³²⁵

Today, tribal leaders “overwhelmingly” support “greater use of alternatives to detention in Indian Country.”³²⁶ The most well-known tribal supervision programs are “[w]ellness [c]ourts,” which are an adaptation of the “drug court movement” to Indian Country.³²⁷ The drug court movement aims to “process substance abuse cases in a way that

³¹⁷ Donelan, *supra* note 31, at 68.

³¹⁸ KIMBERLY COBB & TRACY G. MULLINS, GOING BEYOND COMPLIANCE MONITORING OF DRUG/ALCOHOL-INVOLVED TRIBAL PROBATIONERS 1 (Feb. 2014), <https://www.appa-net.org/eweb/docs/APPA/pubs/GBCMDAITP.pdf> [<https://perma.cc/QR7W-CXVS>] (quoting Eileen M. Luna-Firebaugh, *Incarcerating Ourselves: Tribal Jails and Corrections*, 83 PRISON J. 51 (2003)); see also A ROADMAP FOR MAKING NATIVE AMERICA SAFER, *supra* note 193, at 131 (describing “strong similarity between alternative sentencing and Tribe’s traditional approaches to justice”).

³¹⁹ Woodard, *supra* note 293.

³²⁰ *Id.*

³²¹ A ROADMAP FOR MAKING NATIVE AMERICA SAFER, *supra* note 193, at 117.

³²² Woodard, *supra* note 293.

³²³ *Id.*

³²⁴ *Ex parte* Crow Dog, 109 U.S. 556, 571–72 (1883).

³²⁵ See Eid & Doyle, *supra* note 27, at 1072–82 (discussing the origins of the Major Crimes Act and its extension of federal jurisdiction to reservation crimes).

³²⁶ Riley, *supra* note 26, at 1624–25.

³²⁷ CARRIE GARROW, KORI CORDERO & LAUREN VAN SCHILFGAARDE, TRIBAL L. POL’Y INST., TRIBAL HEALING TO WELLNESS COURTS: CASE MANAGEMENT 2 (2018), https://www.home.tlpi.org/_files/ugd/1af47f_a7df932986c44b1f88654f3948a99714.pdf [<https://perma.cc/S9NM-78AX>].

systematically prioritizes treatment” by “tethering treatment to judicial authority, multidimensional input, and personal accountability.”³²⁸ Following this approach, several Indian tribes have created “[w]ellness [c]ourts” as a “special court docket for cases involving alcohol- or drug-using offenders through an extension supervision and treatment program.”³²⁹ Like drug courts, wellness courts bring together lawyers, judges, counselors, probation officers, social workers, and police to review the defendant’s reentry progress.³³⁰ In addition, wellness courts leverage “the unique strengths, circumstances, and capacities of each Native Nation,” through the participation of “traditional healers,” “tribal council member[s],” and “elders.”³³¹

One remarkable example of a wellness court is in South Dakota, where the state government recently began a Tribal Parole Pilot that gave the Sisseton-Wahpeton Oyate Tribe jurisdiction over tribal members on state parole who are living in tribal territory.³³² Under the Pilot, the tribal government has the “authority—and responsibility—to supervise parolees who returned to . . . tribal lands,” as well as an obligation to send them back to state custody if it determines that they violated a condition of their supervision and that revocation is necessary.³³³ The tribal parole office operates independently from the state, answering to “the tribal council and what’s called the Wellness Team—a multidisciplinary team of mostly tribal employees . . .”³³⁴ The Wellness Team meets with the parolee on an “as-needed basis” and “work[s] with the tribal parole agent to review and develop appropriate responses to [the] parolee’s behavior.”³³⁵ The team can also “draw on traditional and culturally relevant practices,” as a report on the program described:

For parolees who adhere to traditional Native American beliefs and practices, reinforcing those traditions can be quite effective. . . .

³²⁸ *Id.* at 2.

³²⁹ *Id.* at 3.

³³⁰ *Id.* at 3.

³³¹ *Id.* at 4, 3a–4a.

³³² SHAMES & SUBRAMANIAN, *supra* note 42, at 3; *see also* MAHA JWEIED, U.S. DEP’T OF JUST. AND THE INTERIOR, EXPERT WORKING GROUP REPORT: NATIVE AMERICAN TRADITIONAL JUSTICE PRACTICES 7 (2014), <https://www.justice.gov/sites/default/files/atj/legacy/2014/10/09/expert-working-group-report-native-american-traditional-justice-practices.pdf> [<https://perma.cc/NR2C-V5D4>] (describing Leech Lake Band of Ojibwe’s Wellness Court).

³³³ SHAMES & SUBRAMANIAN, *supra* note 42, at 4–5.

³³⁴ *Id.* at 4. The “Wellness Team” includes “representatives from Sisseton-Wahpeton Law Enforcement, Sisseton-Wahpeton College, Dakotah Pride (a provider of inpatient and outpatient substance use treatment services), the South Dakota Human Services Department, the SWO Tribal Court, the SWO Drug Treatment Court, and tribal health programs.” *Id.*

³³⁵ *Id.* at 4–5.

[T]he tribal parole director explained, “Not everybody practices his or her traditional ways. The ones that do—we’ll use that. We ask them, ‘What are you doing to hold on to those practices?’ If they need to do community service, we’ll recommend that [as a response]. We’ll excuse them from [mandatory appointments, such as drug testing] so that they can participate in Sun Dance, which lasts several days.” Meaningful responses may include cutting wood or doing other work for Sun Dance and collecting rocks and helping with the sweat lodge.³³⁶

Early evidence suggests that the Tribal Parole Pilot is a more effective alternative for Indian defendants. Before the Pilot, the success rate for tribal members on state parole was 43% (meaning 57% had violated the terms of their parole or were returned to prison), whereas after the project, the success rate increased to 72% (meaning the failure rate was 28%).³³⁷ The rate of absconding from parole also fell, from between 15 and 20% to between 3 and 12%.³³⁸ Other wellness courts have achieved similar results, reporting recidivism rates as low as 5%.³³⁹

While wellness courts are an adaptation of the drug court movement to Indian Country, other forms of tribal supervision have been developed out of unique Indigenous traditions. An important example is the Navajo Peacemaking Program, which is “an alternative to Anglo-American judicial methods” that “institutionalizes the longstanding Navajo Practice of peacemaking.”³⁴⁰ Peacemaking is a “talking out” process based in “Navajo Fundamental Law,” which “aims to achieve consensus between the parties,” who would be “commonly referred to in American state and federal . . . courts as the offender and the victim.”³⁴¹ A “key aspect of Navajo Peacemaking” is the “participation of family members,” reflecting “Navajo cultural notions of relationships and the nature of crime and dispute.”³⁴²

According to former Navajo Chief Justice Robert Yazzie, peacemaking involves six steps: “(1) prayer; (2) expressing feelings; (3) ‘the lecture’; (4) discussion; (5) reconciliation; and (6) consensus.”³⁴³ First, the participants pray and share their opinions of the situation. Next, the peacemaker gives a lecture about the dispute with reference

³³⁶ *Id.* at 5.

³³⁷ *Id.* at 6.

³³⁸ *Id.*

³³⁹ See Reese, *supra* note 26, at 572 n.89 (citation omitted).

³⁴⁰ Ennis & Mayhew, *supra* note 182, at 456.

³⁴¹ *Id.* at 457.

³⁴² *Id.* at 455, 457.

³⁴³ Robert Yazzie, *Healing as Justice: The Navajo Response to Crime*, in JUSTICE AS HEALING: INDIGENOUS WAYS 121, 125 (Wanda D. McLaskin ed., 2005).

to Navajo “creation lore,” which serves as a “form of precedent.”³⁴⁴ Then, all participants, including the families of the parties, engage in discussion about the incident.³⁴⁵ Finally, the participants work together on “identifying the root cause of [the] crime, so that cause can be meaningfully addressed,” and aim to reach consensus about a practical solution.³⁴⁶ In the end, “an official Peacemaking Agreement is written and signed by the parties,” typically including restitution as well as a promise from the offender’s family to “keep an eye on the offender to make certain that he or she will not offend again.”³⁴⁷

The Navajo peacemaking process is based on the concept of “nalyeeh,” which is a Navajo word that is roughly equivalent to Anglo-American notions of “restitution” or “reparation.”³⁴⁸ Yet *nalyeeh* also transcends these individualistic concepts by incorporating the broader goal of readjusting social relations in accordance with “k’e,”³⁴⁹ a Navajo idea that means trust, respect, good relationships, love, and group solidarity.³⁵⁰ *Nalyeeh* has been described as a form of “restorative justice,” because it aims to foster reconciliation between the victim and the offender, as well as the offender and the community.³⁵¹ In addition, the concept also appears to include an element of community supervision, as it places responsibility on the defendant’s family to “mak[e] sure that the nalyeeh is paid and that the wrong-doer does not re-offend.”³⁵² In other words, while Anglo-American community supervision is run by government officials, in the peacemaking process it is the “family of the wrong-doer” who serves as “traditional probation officers.”³⁵³ Empirical evidence suggests that this approach is effective, with recidivism rates of about 20% for program participants.³⁵⁴

In addition to wellness courts and peacemaking, Indian tribes have also developed many other distinctive approaches to community

³⁴⁴ Ennis & Mayhew, *supra* note 182, at 458.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 459.

³⁴⁷ *Id.* at 460–61.

³⁴⁸ *Id.*

³⁴⁹ ROBERT V. WOLF, CTR. FOR CT. INNOVATION, WIDENING THE CIRCLE: CAN PEACEMAKING WORK OUTSIDE OF TRIBAL COMMUNITIES? 7–8 (2012), https://www.innovatingjustice.org/sites/default/files/documents/PeacemakingPlanning_2012.pdf [<https://perma.cc/FRU8-L72Q>].

³⁵⁰ *Id.* at 12 n.38.

³⁵¹ J.R. Mueller, *Restoring Harmony Through Nalyeeh*, 2 TRIBAL L.J. 1, 5 (2018).

³⁵² Marianne O. Nielsen, *Navajo Nation Courts, Peacemaking and Restorative Justice Issues*, 31 J. LEGAL PLURALISM & UNOFFICIAL L. 105, 111 (2013); *see also* WOLF, *supra* note 349, at 8 (“In the Navajo and Grand Traverse Band tradition, extended and family friends play the role of probation officers, monitoring wrongdoers to make sure they cause no further harm.”).

³⁵³ Nielsen, *supra* note 352, at 111.

³⁵⁴ *See id.*

supervision.³⁵⁵ Some tribal courts impose conditions of supervision that require the defendant to meet with “elder panels” composed of “traditional healers, spiritual guiders, and council members” for help in “making reparations to victims and/or the community as a result of criminal/delinquent behavior.”³⁵⁶ Others use “justice circles” as “an alternative to prison for probation violators,”³⁵⁷ “including both tribal and state representatives” to “provide offenders support as well as hold them accountable for their actions.”³⁵⁸ Finally, several tribes have created alternative sentencing programs that bring together local social services agencies to support returning tribal members, in one case achieving a recidivism rate “20 percent lower than the county benchmark.”³⁵⁹ These programs suggest that tribal control over community supervision can reduce rates of revocation for American Indian defendants.

C. Principles for Reform

All three branches of the federal government can play a role in reforming community supervision in Indian Country.³⁶⁰ Congress is the best positioned to change the system by simply amending the governing statutes.³⁶¹ The judiciary can also have a major impact, as the courts not only impose and revoke supervision but also run the U.S. Probation and Pretrial Services Office.³⁶² Finally, federal prosecutors can adjust how they approach sentencing and revocation proceedings. To be clear, my intent here is not to “dictat[e] to Indian tribes and nations the path they should take to maintain order and enforce the rule of law in their

³⁵⁵ See AM. INDIAN DEV. ASSOCS., STRATEGIES FOR CREATING OFFENDER REENTRY PROGRAMS IN INDIAN COUNTRY 29–41 (2010), https://www.aidainc.net/uploads/1/3/5/7/135765361/full_prisoner_reentry.pdf [<https://perma.cc/4N54-A8JK>] (providing “case descriptions of successful reentry programs in Indian Country”).

³⁵⁶ KIMBERLY A. COBB, U.S. DEP’T OF JUST., ELDER PANELS: AN ALTERNATIVE TO INCARCERATION FOR TRIBAL MEMBERS 2 (2014), <https://www.appa-net.org/eweb/docs/APPA/pubs/EPAITM.pdf> [<https://perma.cc/Z84T-4XGL>].

³⁵⁷ FAHEY, KING & KANE, *supra* note 74, at 25.

³⁵⁸ *Id.*; see also JWEIED, *supra* note 332, at 5–6 (describing Lower Brule Sioux Tribe’s use of “talking circles”).

³⁵⁹ A ROADMAP FOR MAKING NATIVE AMERICA SAFER, *supra* note 193, at 128 (describing Tulalip Tribe’s Alternative Sentencing Program); see also CTR. FOR CT. INNOVATION, U.S. DEP’T OF JUST., PLANNING A REENTRY PROGRAM: A TOOLKIT FOR TRIBAL COMMUNITIES 28 (n.d.), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/Planning-Reentry-Program-Toolkit-for-Tribal-Communities.pdf> [<https://perma.cc/U7ES-RCJK>] (describing Warrior Down programs); AM. INDIAN DEV. ASSOCS, *supra* note 355, at 22–23 (same).

³⁶⁰ See generally Schuman, *supra* note 36, at 637–39 (describing separation of powers in federal community supervision).

³⁶¹ See Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2219–57 (2023) (summarizing historical role of Congress in creating federal Indian law).

³⁶² See Schuman, *supra* note 36, at 640–43.

communities.”³⁶³ Moreover, I do not suggest a one-size-fits-all approach. As Elizabeth Reese has observed, “[e]ach tribal government is a unique individual sovereign entity,” and a full understanding of each tribal legal system requires “specific experiences or expertise with particular tribes.”³⁶⁴ Instead, I propose three principles for federal probation officials to follow in their relationships with individual tribes that will expand the power of tribal governments to decide their own supervision policies: tribal governance, community cohesion, and cultural respect.

1. Tribal Governance

First, the federal government should promote tribal governance over the supervision of tribal members living in tribal territory. This means that, to the extent possible, tribal governments should have input into “[e]very aspect of supervision,” including by “developing the conditions of supervision . . . , enforcing compliance, monitoring . . . and reporting.”³⁶⁵ Kevin Washburn previously argued that the federal government should strive to empower “tribal prosecutor[s],” who “live within the community,” “represent the community,” and do not appear to the community as “an external authority.”³⁶⁶ So, too, should the federal government empower tribal probation officials, including both tribal judges and probation officers, who “come to the position as a member of the tribe they are serving” and therefore can “incorporate the values, beliefs, and teachings of their tribe into their supervision of tribal offenders.”³⁶⁷

How can the federal government expand tribal control over community supervision? The simplest approach would be to allow tribal governments more power over criminal prosecutions in general, which in turn would result in them having more power over defendants sentenced to supervision. For example, if the federal government loosened restrictions on the length of sentences that tribal governments may impose in criminal cases, then they would be able to prosecute more crimes, which also would allow them to take responsibility for the supervision of more offenders.³⁶⁸

In reality, the federal government is likely to maintain primary responsibility for criminal law enforcement in Indian Country, at least

³⁶³ Eid & Doyle, *supra* note 27, at 1109.

³⁶⁴ Reese, *supra* note 26, at 626–27.

³⁶⁵ King, *supra* note 145, at 55.

³⁶⁶ Washburn, *American Indians, Crime, and the Law*, *supra* note 27, at 738.

³⁶⁷ Cobb & Mullins, *supra* note 280, at 332.

³⁶⁸ Reese, *supra* note 26, at 567 (explaining that limits on tribal governments’ sentencing power have led the federal government to take lead role in prosecuting crimes in Indian Country).

for the foreseeable future. Even so, there are ways for it to provide tribal governments a bigger role in the supervision system. For example, Congress could pass a law requiring district judges to consult with tribal officials before sentencing Indian defendants living in tribal territory to community supervision or punishing them for violations.³⁶⁹ Following the example of the Tribal Parole Pilot in South Dakota, Congress could even pass a law allowing tribal probation officials to assume responsibility for tribal members sentenced to federal supervision who return to tribal territory.³⁷⁰

The Probation and Pretrial Services Office can also promote the principle of tribal governance over community supervision. For instance, the DOJ currently requires all U.S. Attorneys who work in Indian Country to consult annually with tribes within their districts and develop operations plans, as well as designate one Assistant U.S. Attorney as a tribal liaison.³⁷¹ Some U.S. Attorneys Offices have even “cross-commissioned” tribal prosecutors to serve as Special Assistant U.S. Attorneys in federal prosecutions arising out of their tribal communities.³⁷² So too, federal probation officials with Indian Country jurisdiction could consult with the tribes in their districts and designate tribal liaisons to coordinate their services. They could also seek to cross-commission tribal probation officers to serve as federal probation officers for tribal members living in tribal lands.³⁷³

Even without broad reform, individual probation officials can promote tribal autonomy by supporting American Indian defendants who express an interest in receiving treatment at a tribal facility. To

³⁶⁹ Cf. INDIAN L. & ORD. COMM’N, *supra* note 193, at 138 (offering a similar proposal for amending the Major Crimes Act, the General Crimes Act, and Public Law 280). For other examples of federal laws requiring consultation with tribal governments, see 25 U.S.C. § 3002(c)(2) (requiring federal agencies and institutions receiving federal funds to consult with tribal governments before intentionally removing or excavating Native American cultural items from tribal lands); *id.* § 3003(b)(1)(A) (requiring federal agencies and museums with possession of Native American human remains and funerary objects to inventory such items in consultation with tribal governments); 54 U.S.C. § 302706(b) (requiring federal agencies carrying out historic preservation reviews to consult with any tribal government that attaches religious or cultural significance to the property).

³⁷⁰ See *supra* Section II.B.

³⁷¹ Riley & Thompson, *supra* note 27, at 1953–54; see also U.S. DEP’T OF JUST., INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 18–19 (2021), https://www.justice.gov/d9/2023-08/2021_-_indian_country_investigations_and_prosecutions_report.pdf [<https://perma.cc/T834-TXLH>] (describing tribal liaisons).

³⁷² Riley & Thompson, *supra* note 27, at 1954.

³⁷³ See generally Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. REV. 65 (2019) (describing cross-deputization of state and tribal police officers); OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., CROSS-DEPUTIZATION IN INDIAN COUNTRY (2018), <https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-p363-pub.pdf> [<https://perma.cc/R8LH-EH8Z>] (same).

this end, federal probation officials should work to build relationships with “inpatient/outpatient treatment facilities operated by the Indian tribes.”³⁷⁴ Just as Ada Melton has argued for developing ties between tribal governments and “jail or correctional facilities located off tribal lands” in order to ensure “service integration” and “coordination” for defendants’ “transition needs,”³⁷⁵ so too should probation officials work to connect tribes with the off-reservation treatment facilities where tribal members may be sentenced.

Many Indian tribes are ready to take responsibility for community supervision. Although the tribes vary in their administrative capacity to “assume public safety functions” from the federal government, “a growing number of Indian tribes and nations have assumed many essential criminal justice and related functions,” such as “tribal police department[s], jail[s], and court system[s] that operate[] on par with those of comparable off-reservation communities.”³⁷⁶ Of course, some tribes may need additional financial support to take expanded authority over community supervision, but the federal government’s responsibility to the tribes includes the “obligation to allocate proper funding to support rights of tribal self-determination and to rebuild, revitalize, and support the tribal legal systems.”³⁷⁷ Just as Angela Riley and Sarah Thompson have argued that lawmakers should authorize “permanent, non-grant funding for tribal courts and tribal court personnel,”³⁷⁸ they should also provide additional funding for tribal probation systems. If lawmakers are unwilling to approve new spending on tribal probation systems, then they should reallocate existing funding from the federal supervision system, which will have fewer cases to manage once authority is shifted to tribal governments.

2. *Community Cohesion*

The second principle that the federal government should follow when administering supervision in Indian Country is community cohesion. Although federal supervision is usually intended to promote individual responsibility, with the “goal” being “lawful self-management,”³⁷⁹

³⁷⁴ Donelan, *supra* note 31, at 69.

³⁷⁵ ADA PECOS MELTON, U.S. DEP’T OF JUST., CONSIDERATIONS FOR DEVELOPING A PROGRAM OF REENTRY IN TRIBAL COMMUNITIES 4–5 (2013), <https://vrnclearinghousefiles.blob.core.windows.net/documents/Considerations%20for%20Developing%20a%20Program%20of%20Re-entry%20in%20Tribal%20Communities.pdf> [https://perma.cc/FD8A-LBJ2].

³⁷⁶ Eid & Doyle, *supra* note 27, at 1113–15.

³⁷⁷ Riley & Thompson, *supra* note 27, at 1948–49.

³⁷⁸ *Id.* at 1949.

³⁷⁹ DOJ REPORT, *supra* note 14, at 3; see also Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys*

American Indian legal traditions tend to be “heavily dependent upon serving the justice needs of the community.”³⁸⁰ To the extent possible, therefore, federal probation officials should strive to involve tribal communities in the reentry process, rather than exclude them. Indeed, under the “Indian trust doctrine,” federal probation officials arguably have a legal obligation to preserve these community bonds.³⁸¹

Any defendant separated from their family and barred from their community as a condition of supervision may experience “significant harm.”³⁸² In Indian Country, where tribes “are highly interconnected and dependent upon strong interpersonal relationships,”³⁸³ these conditions are especially destructive. As Robert Porter, former Attorney General for the Seneca Nation of Indians, explained, the “bitterness and hostility that litigation can produce . . . in an Indian community, particularly a small one . . . can be disastrous.”³⁸⁴ Although conditions of supervision restricting contact with family members may sometimes be necessary, federal judges should hesitate to impose them on Indian defendants, mindful of the history of child separation and, in Justice Gorsuch’s words, “the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history.”³⁸⁵ Similarly, although geographic restrictions might occasionally be justified, judges should resist the impulse to ban Indian defendants from tribal territories, and should do so only after soliciting input from tribal governments.

Rather than alienate American Indian defendants from their tribes, federal probation officials should follow the example of the Navajo Peacemaking Program by involving family members and friends in order

Indigenous Societies, 28 COLUM. HUM. RTS. L. REV. 235, 278 (1997) (“The American legal system, and Anglo-American society, is based upon the primacy of the individual and his or her rights.”).

³⁸⁰ Porter, *supra* note 379, at 278; *see also* Kevin K. Washburn, Lara, Lawrence, *Supreme Court Litigation, and Lessons from Social Movements*, 40 TULSA L. REV. 25, 37 (2004) (“A strong preference for a norm of individualism is reflected throughout liberal political philosophy and American law. In contrast, tribal legal strategists are focused on protecting communitarian values and the ‘group rights’ of Indian tribes.”); James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265, 265 (1984) (“The legal systems of Indian peoples were based upon the idea of maintaining harmony in the family, the camp, and the community.”).

³⁸¹ *See generally* Blackhawk, *supra* note 33, at 99 (describing the Indian trust doctrine as “translating the value of preservation of Native nations and Indian Country to law”).

³⁸² Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 649, 686 (2022).

³⁸³ Porter, *supra* note 379, at 279.

³⁸⁴ *Id.*

³⁸⁵ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1661 (2023) (Gorsuch, J., concurring).

to promote their successful reentry.³⁸⁶ For example, some tribal probation officers use “family mapping tools” to help the offenders under their supervision to “visualize the connections within [their] families and the connections families have to their community.”³⁸⁷ Creating these maps helps defendants to “identify solutions to barriers that [they] may face during the supervision process, such as difficulty getting to appointments due to a lack of transportation,” or “patterns of behavior in their family that they would like to change as well as . . . strengths in the family that can support them during their supervision.”³⁸⁸ Family mapping can also be “a source of pride, as probationers can chart changes to their maps, consolidate information about key contacts, and identify the supports they can access.”³⁸⁹ These tools show how maintaining social cohesion can both improve outcomes for Indian defendants and protect Indian communities.

3. *Cultural Respect*

Finally, federal probation officials should adopt a policy of cultural respect for American Indian defendants. Although not all Indians feel a strong connection to their history, tradition, or religion, many do,³⁹⁰ and acknowledging the importance of these ties is key to effective supervision. For example, most of the assessment tools that probation officers currently use to assess defendants under supervision “do not ask about experiences specific to American Indian and Alaska native populations,” such as their “levels of cultural engagement, community connectedness, or historical trauma.”³⁹¹ At the same time, several tribes have developed their own reentry assessment tools “specifically designed to be culturally responsive to returning citizens in their tribal jurisdiction.”³⁹² Federal probation officials working in Indian Country

³⁸⁶ See *supra* Section II.B.

³⁸⁷ MARGARET diZEREKA, U.S. DEP’T OF JUST., USING FAMILY MAPPING TOOLS TO ENHANCE OUTCOMES FOR TRIBAL MEMBERS UNDER COMMUNITY SUPERVISION 3 (2015), <https://www.appa-net.org/eweb/docs/appa/pubs/UFMTEOTMUCS.pdf> [<https://perma.cc/5VVN-4WEC>].

³⁸⁸ *Id.* at 5.

³⁸⁹ *Id.* at 3.

³⁹⁰ See, e.g., Eva Marie Garrouette, Heather Orton Anderson, Patricia Nez-Henderson, Calvin Croy, Janette Beals, Jeffrey A. Henderson, Jacob Thomas & Spero M. Manson, *Religio-Spiritual Participation in Two American Indian Populations*, 53 J. SCI. STUDY RELIGION 17, 29 (2015) (survey of two Southwest and Northern Plains Indian tribes finding that “[a]bout two-thirds of participants in both tribes reported participating in aboriginal traditions at least sometimes, with about 20 percent participating often/a lot” and concluding that “networks of participation associated with historic religio-spiritual traditions remain active in contemporary American Indian communities”).

³⁹¹ CTR. FOR CT. INNOVATION, *supra* note 359, at 19.

³⁹² *Id.*

should adapt these tribal tools for the Indian defendants under their supervision. They should also ensure “bilingual court reporters for transcription services,” mindful that “[r]esponses translated into English do not always appropriately reflect the meaning of the exchange that took place.”³⁹³

Federal probation officials should also familiarize themselves with the “traditions tribes use to solve problems, [or] deal with conflicts” in order to “understand these perspectives so they can apply them to design reentry policy and response systems.”³⁹⁴ In this vein, federal officials should use approaches to supervision, such as “motivational interviewing,” which “complement . . . Native American cultural values” like “listening, learning, and respect of others.”³⁹⁵ Similarly, Brenda Donelan, a federal probation officer for the District of South Dakota, has suggested that instead of “insisting on only AA [Alcoholics Anonymous] or NA [Narcotics Anonymous] attendance” for American Indian offenders, “probation officers should consider balancing the traditional sobriety requirements with those of the Native American culture,” for example, “voluntarily attending a sweat [lodge] or Sun Dance.”³⁹⁶

An anecdote illustrates the power of culturally responsive reentry programs to support Indian defendants and their communities. Rose and Manuel were “Sioux Indians . . . born and raised on Indian reservations.”³⁹⁷ They were both “in their 50s, sp[oke] their native language, and . . . [were] active in Sioux Indian cultural and traditional ceremonies.”³⁹⁸ They were also “convicted felons” who had served long prison terms.³⁹⁹ Upon their release from prison, they participated together in a supervision program rooted in tribal culture and tradition:

Shortly after reuniting, both were required to attend an intensive experiential treatment program held in the Black Hills, a land of sacred and spiritual significance to the Indian people. The program was specifically designed to meet the needs of Sioux Indian offenders. It focused on codependency issues and integrated Indian spiritual,

³⁹³ JWEIED, *supra* note 332, at 13.

³⁹⁴ MELTON, *supra* note 375, at 9.

³⁹⁵ McGrath, *supra* note 30, at 52.

³⁹⁶ Donelan, *supra* note 31, at 69; *see also* Melton, Cobb, Lindsey, Colgan & Melton, *supra* note 140, at 29 (describing probation officer training program to “bring[] in consultants to present American Indian history and trauma impacts” and “catalog[] culturally-relevant resources”).

³⁹⁷ Jay W. Shillingstad, *Supervision Can Make a Difference: Seven Success Stories*, 59 FED. PROB. 9, 9 (1995).

³⁹⁸ *Id.*

³⁹⁹ *Id.*

cultural, and traditional activities. The program staff included Indian counselors. Many of the participants and staff members slept in tipis and, before bedtime, would gather around a campfire for camaraderie and fun. . . .

After treatment, Rose and Manuel returned to the reservation. Manuel is a well-known spiritual leader whose services are often sought by others. He and Rose spent much time meeting these demands and helping others with cultural activities. They also began attending a treatment aftercare group that continued their intensive treatment experience. But they still had relationship problems and struggled to stay together. With the support of the group, they were able to keep the relationship intact. However, it was evident they needed more treatment.

Rose and Manuel again were referred to the experiential treatment program and given the chance to deal with unresolved issues. They responded well. Their relationship stabilized and they were married. They continued to attend the aftercare group and eventually assumed leadership roles in the group. Manuel's ability to teach the oral history of the Indian people, to communicate on a spiritual level, and to talk from the heart set a positive tone for the group. Rose's calm demeanor commanded respect. She participated in the aftercare group for nearly 2 years, Manuel for 15 months.

Manuel's parole recently expired, and Rose earned an early probation termination . . . Rose and Manuel now have sufficient foundations in recovery to maintain sobriety and address life's problems. They seem to be at peace with themselves and continue their cultural activities. Rose and Manuel now are role models and highly regarded elders in their community—two of the most respected positions among their people.⁴⁰⁰

Rose and Manuel's story demonstrates how tribal supervision can reintegrate Indian offenders, preserve Indian culture, and protect tribal sovereignty. Above all, federal probation officials working in Indian Country must remember that they are in the territory of a sovereign nation. They should involve the tribe in their decisionmaking in order to ensure that the reentry process is connected to the community, rather than imposed upon it.

CONCLUSION

The DOJ's report revealed that American Indians under federal community supervision are more likely than other groups to have

⁴⁰⁰ *Id.* at 9–10.

their supervision revoked, to be revoked for technical violations, and to receive longer terms of supervision after revocation. Yet the report neither explained these disparities nor suggested solutions. I contend that three distinctive features of Indian Country supervision may contribute to higher rates of revocation for American Indian defendants: criminal jurisdiction, rural geography, and a legacy of conquest. I also propose that the solution to these problems is for the federal government to empower tribal governments to take responsibility for the supervision of tribal members in their territories, based on the principles of tribal governance, community cohesion, and cultural respect.

The analysis in this Article is only the beginning. The conquest of the Indian tribes is part of a long history of American colonialism, which also includes the overseas territories of Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands.⁴⁰¹ In all these legal “borderlands,” the federal government “extended its jurisdiction unilaterally, often unlawfully and violently, on the grounds that the peoples within . . . require[d] civilization before they achieve[d] self-government.”⁴⁰² Just like in Indian Country, criminal law in the overseas territories is based on a “colonial framework” that creates a “paternalistic relationship . . . between the territories and the federal government.”⁴⁰³ So, too, the federal government runs probation offices in these territories, supervising their residents in the name of rehabilitation.⁴⁰⁴ Given the disparities affecting American Indians under federal supervision, the same problems may exist overseas. From Indian Country to beyond, federal community supervision helps to construct the legal borderlands, opening “spaces of both subordination and empowerment.”⁴⁰⁵

⁴⁰¹ See Blackhawk, *supra* note 33, at 76–77.

⁴⁰² *Id.* at 11.

⁴⁰³ Emmanuel Hiram Arnaud, *Dual Sovereignty in the U.S. Territories*, 91 FORDHAM L. REV. 1645, 1649 (2023).

⁴⁰⁴ See *Oficina de Probatoria Federal, Distrito de Puerto Rico*, U.S. COURTS, <https://www.prp.uscourts.gov> [<https://perma.cc/82S8-CN46>]; *United States Probation and Pretrial Services, District of Virgin Islands*, U.S. CTS., <https://www.vip.uscourts.gov> [<https://perma.cc/ADS9-EM74>]; *U.S. Probation and Pretrial Services Office, Districts of Guam and the Northern Mariana Islands*, U.S. CTS., <https://www.gup.uscourts.gov> [<https://perma.cc/649F-7TXD>].

⁴⁰⁵ Blackhawk, *supra* note 33, at 11.