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A HIERARCHY OF SOVEREIGNS THROUGH THE LIMITATION OF TRIBAL CRIMINAL JURISDICTION

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I. INTRODUCTION

Currently, tribal nations have limited authority concerning their jurisdictional control over criminal proceedings.[2] Two principles limit Tribal courts' power to adjudicate criminal acts: "Might Makes Right"[3] and "Indians cannot be trusted to treat non-Indians fairly."[4] These two principles have created a "national policy of 'separate but unequal' for tribal nations and their courts[5].

The first principle, "Might Makes Right," is rooted in the

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[2] *See e.g.*, In Re Coughlin, 33 F.4th 600 (1st Cir. 2022) & Riggie v. State, 151 N.E.3d 766, 772 n. 4 (Ind. Ct. App. 2020).
[3] E. Band of Cherokee Indians v. Torres, 4 Cher. Rep. 9, 12 (E. Cher. Sup. Ct. 2005) (Concurring opinion written by Justice Steven E. Philo liking the current national policy of "separate but unequal" to the "separate but unequal" conditions addressed in Brown v. Board of Education).
[4] *Id*.
[5] *Id.*

Doctrine of Discovery.[6] Under the Doctrine of Discovery, the victor controls the conquered and their lands, people, and culture.[7] This does not fit within the principles of "equal protection of laws." [8] "The United States Supreme Court has [often] referred to [tribal nations] as 'dependent sovereign nations.'" [9] This dependence of tribal nations on the United States government creates a duty for stricter adhesion by the United States federal government to the concept of "equal protection of laws."[10]

The second principle, "Indians cannot be trusted to treat non-Indians fairly," [11] is rooted in fear of reprisal by tribal nations. "There is no justification for saying that [tribal] courts cannot be fair to non-[tribal] criminal defendants, any more than there is justification for saying the courts of [one state] cannot be fair to [other state] residents charged with crimes for acts committed in [that state court]."[12] This fear of reprisal has been the basis of the "separate but unequal" handling of Tribal affairs by the federal government.[13]

Congress has the power to create a federal district court to sit within the reservation.[14] This would allow defendants to answer for their alleged crimes before the tribal community.[15] As residents of the reservation, tribal members and non-

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[6] William Bradford, *Tribal Sovereignty and United States v. Lara: 'Another Such Victory and WE are Undone': A Call to an American Indian Declaration of Independence*, 40 TULSA L. REV. 71, 109 (2004).

[7] *Id*.

[8] U.S. CONST. amend. XIV, §1.

[9] E. Band of Cherokee Indians v. Torres, 4 Cher. Rep. 9, 7 (E. Cher. Sup. Ct. 2005).

[10] Cherokee Nation v. Georgia, 30 U.S. 1, 8 (1831) (characterizing the relationship between Indian tribes and the United States as "a ward to his guardian"). The United States Supreme Court has "recognized a general trust relationship since 1831"; *See also*, United States v. Mitchell, 463 U.S. 206, 225 (1983) (discussing "the undisputed existence of a general trust relationship between the United States and the Indian people.").

[11] *E. Band of Cherokee Indians*, 4 Cher. Rep. at 12.

[12] *Id*.

[13] *Accord*, Los Coyotes Band of Cahvilla & Cupeno Indians v. Jewell, 729 F.3d 1025, 1030 (9th Cir. 2013).

[14] Proposed solution to ending the separate but unequal treatment of tribal nations through the creation of a federal district court to exercise federal jurisdiction within tribal reservation boundaries

[15] *Id*.

members would serve as the triers of fact in these newly created federal district courts. These actions would begin to return value to the tribal community and the individual tribe members who are victims of crimes. This should be the first step in ending the "separate but unequal" national policy concerning tribal nations.

II. THE INHERENT SOVEREIGN POWERS OF TRIBAL NATIONS

Generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[16] However, there have been two exceptions to that general rule in *Montana*.[17] The second exception applies to questions concerning the criminal jurisdiction of tribal nations and their courts. The exception states: "A tribe retains inherent authority over the conduct of [non-tribe members] on the reservation 'when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"[18] Criminal actions against the tribal nations and individual tribal members represent a threat to the health and welfare of the tribe.[19]

Since the infancy of the United States, treaties with tribal nations have included provisions stating that "neither party to the treaty could 'proceed to the infliction of punishments on the citizens of the other.'"[20] These treaties laid the groundwork for a national policy of "separate but unequal" when Congress exercised its plenary power over the tribal nations.[21]

The current holding from the United States Supreme Court on tribal authority is that "the sovereign power of inherent jurisdiction of [tribal nations] to try and punish [non-tribal] aliens[22] of the United States has not been expressly terminated by Treaty, Act of Congress, or specifically prohibited by a binding decision of the Supreme Court of the

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[16] Montana v. United States, 450 U.S. 544, 565 (1981).
[17] *Id*.
[18] *Id*. at 566.
[19] *Id*.
[20] E. Band of Cherokee Indians v. Torres, 4 Cher. Rep. 9, 7 (E. Cher. Sup. Ct. 2005).
[21] *Plenary Power*, BLACK'S LAW DICTIONARY (11th ed. 2019). Plenary Power – power that is broadly construed; esp. a court's power to dispose of any matter properly before it.
[22] Regarding non-citizens of the United States.

United States or the United States Court of Appeals."[23] When a "defendant exhausts all of his remedies in the [tribal] court, he may petition the United States District Court for a writ of *habeas corpus* and federal appellate review."[24] If this doesn't prejudice a non-tribal alien of the United States, then it will also not prejudice a citizen of the United States.[25]

Under federal statute, Tribal courts have limited jurisdiction and are only supposed to hear less severe misdemeanors and ordinance crimes.[26] This leaves the major violent crimes[27] to the federal courts' sole jurisdiction. This results in the accused defendants not having to stand before the tribal community while receiving the constitutionally mandated fair trial.[28] This continued injustice devalues the tribal community and the individual tribal members.[29]

III. LIMITATIONS ON TRIBAL NATIONS' CRIMINAL JURISDICTION

Historically, "[t]he general 'object' of Congressional statutes regarding Indian Country was to 'to reserve to the courts of the United States criminal jurisdiction of all actions to which its citizens are parties on either side.'" [30] Congress's inherent distrust for tribal nations to fairly adjudicate criminal trials involving non-Tribal members continued into the passage of the Indian Civil Rights Act.[31] As a result, the Indian Bill of Rights limited the criminal jurisdiction of tribal nations.[32]

No other similar limitation exists in any recognized sovereign by the United States Constitution,[33] specifically when

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[23] *E. Band of Cherokee Indians*, 4 Cher. Rep. at 9.
[24] *Id*. at 10.
[25] *Id*.
[26] 25 U.S.C. § 1302(7).
[27] Major Crimes Act, 18 U.S.C. § 1153.
[28] U.S. CONST. Amend. V.
[29] 25 U.S.C. § 1302; 18 U.S.C. § 1153. Results from the passage of the "Indian Civil Rights Act" and "Indian Major Crimes Act."
[30] Oliphant v. Suquamish Tribe, 435 U.S. 191, 204 (1978) (quoting In re Mayfield, 141 U.S. 107, 115-116 (1891)).
[31] 25 U.S.C. § 1302 (7) (A-D). The limitation of criminal punishment was directly inserted into the "Indian Bill of Rights."
[32] 25 U.S.C. § 1302(7).
[33] MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 164 (2017) (referencing U.S. CONST. art. I, § 8, cl. 3). The United States Commerce Clause recognizes three types of sovereigns – states,

it involves state criminal jurisdiction.[34] The federal government has never limited state criminal jurisdiction to state-only citizens.[35] Although tribal nations and individual states are considered separate sovereigns under the United States Constitution, tribal nations are not viewed as equal to individual state sovereigns.[36] Instead, it views Tribal nations in a position lower than the respective state governments.[37] The federal government excludes state jurisdictions from interfering with tribal authority except under the "Major Crimes Act,"[38] which the United States Supreme Court explained as:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine of the tribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves. It is immaterial that respondent is not an Indian. He [or she] was on the reservation and the transaction with an Indian took place there. [39]

This limitation on the criminal jurisdiction of tribal nations is not entirely political.[40] In 1834, Congress created an exception to section 25 of The Indian Intercourse Act to exclude "crimes committed by one Indian against the person or property of another Indian." [41] The United States Supreme Court's ruling in *Rogers* created an apparent racial disparity among Tribal members.[42] Speaking through Chief Justice Roger B. Taney, the

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foreign nations, and Indian Tribes.

[34] E. Band of Cherokee Indians v. Torres, 4 Cher. Rep. 9, 12 (E. Cher. Sup. Ct. 2005).

[35] *Id*.

[36] Oliphant v. Suquamish Tribe, 435 U.S. 191, 208 (1978).

[37] *Id*.

[38] 18 U.S.C. § 1153.

[39] Williams v. Lee, 358 U.S. 217, 223 (1959).

[40] United States v. Rogers, 45 U.S. 567, 572-573 (1846).

[41] *Id*. at 572.

[42] *See* prior history, United States v. Rogers, 45 U.S. 567, 572-73 (1846) ("A white man who at mature age is adopted in an Indian tribe does not thereby become an Indian and was not intended to be embraced in the exception above mentioned." ("That no white man can rightfully become a citizen of [any] tribe of Indians, either by

Court determined that section 25 of The Indian Intercourse Act did not include non-Indians adopted by the tribal nations.[43]

"[T]he treaty of New Echota[44] [should] have [had] some influence . . . [to] extend the exception to all adopted members of the tribe."[45] The Court pointed to a later provision of The Indian Intercourse Act to include the racial disparity in the criminal jurisdiction to non-Indians adopted by the tribe.[46] The Taney opined, "[w]hatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He is still a white man, of the white race, and therefore not within the exception in the act of Congress." [47]

The political and racial disparity in how Native Americans are treated is based on the same principles used in many federal appellate opinions. "Might makes right," [48] and "That Indians cannot be trusted to treat non-Indians fairly."[49] These principles have been the basis for limiting the criminal jurisdiction of tribal nations to exercise the might of the federal government and limit the power of Tribal nations.[50]

"After [a] defendant exhausts all . . . remedies in the [tribal] court, [the defendant] may petition the United States Federal District Court for a writ of *habeas corpus* and federal appellate review."[51] The access to the federal courts for a writ of *habeas corpus* is not limited to only non-tribal aliens. Non-tribal United States citizens, or Indians in criminal cases, would also have the same access to the federal courts after exhausting all appeals with the tribal courts.[52] If "any alien is not prejudiced

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marriage, residence, adoption, or any other means unless the proper authority of the United States shall authorize such incorporation.").

[43] *Id*.

[44] *Id*. at 573. "[M]ade with the Cherokees in 1835."

[45] *Id*.

[46] *Id*. "[T]hat such laws shall not be inconsistent with the Constitution of the United States."

[47] *Id*.

[48] E. Band of Cherokee Indians v. Torres, 4 Cher. Rep. 9, 12 (E. Cher. Sup. Ct. 2005).

[49] *Id*.

[50] *Id*.

[51] *Id*. (referencing non-Indian alien's right to federal review after being tried before a tribal court).

[52] *Id*.

by receiving a trial in tribal court," neither would a United States citizen be prejudiced.[53]

IV. CONGRESSIONAL AVOIDANCE OF UNBINDING TRIBAL CRIMINAL JURISDICTION

Congress has routinely failed to recognize the "inherent sovereignty" [54] of tribal nations by refusing to grant full criminal jurisdiction to tribal nations.[55] Instead of allowing tribal nations to enforce and adjudicate their criminal codes fully, Congress chose to allow a limited number of states to have criminal "jurisdiction over offenses committed by or against [tribal members] in [tribal] country."[56] Currently, the statute is limited to six states or territories. [57]

Congress gave criminal jurisdiction to Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.[58] Congress created further statutory exceptions for half of these states.[59] For example, the statute does not include the Red Lake Reservation in Minnesota but includes other Minnesota tribes.[60] The same applies to the Warm Springs Reservation in Oregon.[61] Furthermore, Alaska contains the most exceptions.[62] Aside from specified exceptions, such as California and Nebraska, Congress gave these states full criminal jurisdiction over offenses that take place on tribal territory.[63]

The states within the statute listed in the table[64] retain "jurisdiction over offenses committed by or against Indians in the areas of Indian Country."[65] These states may exercise the same criminal jurisdiction on tribal reservations as they would

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[53] *Id.*
[54] Montana v. United States, 450 U.S. 544, 565 (1981).
[55] See 18 U.S.C. § 1162; 18 U.S.C. § 1302.
[56] 18 U.S.C. § 1162. Entitled "State Jurisdiction Over Offenses Committed by or Against Indians in the Indian Country."
[57] 18 U.S.C. § 1162(a).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] The Annette Islands and the Metlakatia Indian Community are exempt so that they may exercise jurisdiction over offenses.
[63] 18 U.S.C. § 1162(a).
[64] 18 U.S.C. §1162(a). See attached "Table A."
[65] *Id.*

any other offenses committed "elsewhere within the state or territory."[66] The intent of this statute[67] was to fully assimilate tribal members as full and equal citizens of the states where their reservations reside.[68]

Congress stated three goals for enacting this statute.[69] First, Congress intended to end the wardship of federal government over tribal affairs[70] wherever it was practical.[71] Secondly, Congress wanted to remove any subjugation of tribes to any federal laws applicable to the tribes[72] in favor of state criminal jurisdiction.[73] Finally, Congress acknowledged a need for more effective law and order[74] and recognized that the Tribes had not been allowed to provide it for themselves.[75]

Congress's attempts to end the federal government's wardship over tribal nations was a constitutionally valid action through Congress's plenary powers over tribal affairs.[76] However, Congressional attempts at ending the wardship over tribal nations in favor of state jurisdiction eroded the constitutionally recognized status of tribal nations as sovereigns under the United States Constitution.[77] This erosion of tribal nations' recognized status as sovereigns under the United States Constitution[78] created a hierarchy of sovereigns.[79] Tribal nations now occupy the lowest level of this hierarchy.[80]

Furthermore, the states listed in the P.L. 280 statute do not have exclusive criminal jurisdiction over any federal offense

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[66] *Id.*

[67] *See* 18 U.S.C. § 1162; 28 U.S.C. § 1360; 28 U.S.C. § 1362.

[68] *See* Rincon Band of Mission Indians v. Cnty. of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971).

[69] *See* Donahue v. Just. Ct., 15 Cal. App. 3d 557 (Cal. App. 1st Dist. 1971).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] Robinson v. Wolff, 468 F.2d 438, 439 (8th Cir. 1972). Appellant argued that the state of Nebraska did not have jurisdiction to prosecute a crime committed by an Indian against another Indian.

[77] U.S. CONST. art. I, § 8, cl. 3.

[78] *Id.*

[79] *Id.*

[80] 18 U.S.C. § 1162. Congress' demonstrated its preference to state criminal jurisdiction over tribal jurisdiction by enacting this statute.

committed on tribal land.[81] States share criminal jurisdiction with the federal government and tribal nations.[82] The hierarchy of sovereigns places the state's jurisdiction above the tribal nations. States not listed in §1162 can assert their position higher on the hierarchy than the tribal nations or, in the alternative, voluntarily assume P.L. 280 status.[83] The assistance by other agency's statutes gives states not listed in P.L 280 a physical presence on tribal land.

State law enforcement agencies can enter into federal-state agreements so that they may act as police on reservations.[84] These agreements give state law enforcement agencies the ability "to aid in the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe."[85] These federal-state agreements also give cooperating state law enforcement agencies access to the Bureau of Justice Assistance (BJA) training sessions[86] that occur on Tribal land.

Special law enforcement commissions must hold "regional training sessions [on tribal land], not less than biannually, in order to educate and certify candidates for the special law enforcement commissions."[87] These regional training sessions, along with the federal-state aid agreements,[88] give state law enforcement agencies a physical presence on tribal lands.[89] This physical presence continues to erode the sovereignty of tribal nations and devalue the social status of tribal members because it tends to appear as a military occupational force rather than mutual aid assistance to keep law and order.[90]

V. FEDERAL CRIMINAL JURISDICTION AND PROPER VENUE

The United States' general federal laws give "sole and

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[81] United States v. Anderson, 391 F.3d 1083, 1085 (9th Cir. 2004).
[82] *See* United States v. Anderson, 391 F.3d 1083 (9th Cir. 2004).
[83] 25 U.S.C. § 2804.
[84] *See* Nevada v. Hicks, 533 U.S. 353 (2001).
[85] 25 U.S.C. § 2804(a).
[86] 25 U.S.C. § 2804(a)(3)(A).
[87] 25 U.S.C. § 2804(a)(3)(A)(ii).
[88] 25 U.S.C. § 2804(a).
[89] 25 U.S.C. § 2804 *et seq.*
[90] Montana v. United States, 450 U.S. 544, 565 (1981).

exclusive jurisdiction" to the United States.[91] The statute further states, "[e]xcept as otherwise expressly provided by law." [92] The United States gave up its sole and exclusive criminal jurisdiction that extended to tribal land with the enactment of statutes, giving some state governments jurisdiction and allowing federal-state aid agreements for Indian Country.[93] Although Congress gave up its sole and exclusive criminal jurisdiction to Indian Country, Congress did not give up complete jurisdiction over the punishment of offenses occurring in the tribal nations.[94] The federal government still may expand or forego its criminal jurisdiction over tribal nations even considering these statutes.[95] "Federal law may preempt that state jurisdiction in certain circumstances, [b]ut otherwise as a matter of state sovereignty, a [s]tate has jurisdiction over all of its territory, including Indian country."[96]

In exercising its Indian Country jurisdiction, the federal government must decide on the proper venue to adjudicate offenses committed on tribal land.[97] The Rules of Federal Criminal Procedure provides a road map for the federal government to ascertain the proper venue to adjudicate crimes committed on tribal land.[98] This rule states:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and

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[91] 18 U.S.C. §1152.
[92] *Id*.
[93] 18 U.S.C. § 1162; 25 U.S.C.S. § 2804.
[94] Roth v. State, 499 P.3d 23, 24 (Okla. Crim. App. 2021) (holding that the State of Oklahoma did not have criminal jurisdiction of Appellant. Has been overruled by Oklahoma v. Castro-Huerta); *See also*: McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (overruling previous cases in favor of concurrent criminal jurisdiction between the federal government and state government).
[95] *Castro-Huerta*, 142 S. Ct. at 2491.
[96] *Id*.
[97] FED. R. CRIM. P. 18.
[98] *Id*.

the prompt administration of justice[99].

"The constitutional requirement is as to the locality of the offense and not the personal presence of the offender."[100] There is debate over "whether [the] constitutional provisions on venue were designed primarily to insure that an accused not be forced to stand trial far from where from where he resides, or . . . far from where the crime was committed."[101] More evidence suggests that Congress designed the constitutional provisions on venue so that the accused is not forced to stand trial far from where the crime was committed.[102] "Rule 18 has been interpreted to mean that as long as the trial takes place within the district where the offense took place, no error occurs since there is no constitutional right to trial within a certain division."[103]

Congress gave the federal government exclusive jurisdiction over certain crimes "defined and punished by Federal law."[104] Crimes with exclusive jurisdiction are murder, manslaughter, and kidnapping.[105] If the crime is not defined and punished by federal law, then the federal government will "define and punish the crime in accordance with the laws of the State in which the offense was committed."[106] There are two issues with the statute controlling offenses committed within Indian country: (1) the statutory language refers to Indians, and (2) it removes jurisdiction for tribal nations to hold offenders accountable for crimes committed within the reservation.[107]

First, the statutory language refers only to Indians.[108] This means that the statute would not apply to non-Indians. Instead, additional laws within the United States Code cover crimes committed by non-Indians.[109] The distinction between

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[99] *Id*.
[100] Armor Packing Co. v. United States, 209 U.S. 56, 76 (1908).
[101] United States v. Passodelis, 615 F.2d 975, 977 (3rd Cir. 1980).
[102] *Id*.
[103] United States v. Young, 618 F.2d 1281, 1288 (8th Cir. 1980). *Accord,* United States v. Mase, 556 F.2d 671, 675 (2d Cir. 1977); United States v. Cates, 485 F.2d 26 (1st Cir. 1974).
[104] 18 U.S.C. § 1153(a).
[105] *Id*.
[106] 18 U.S.C. § 1153(b).
[107] *Passodelis*, 615 F.2d at 977.
[108] *Id*.
[109] 18 U.S.C. §§1-601

Tribal and non-Tribal members is no longer necessary, according to Justice Steven E. Philo.[110] Tribal members hold dual citizenship with the United States;[111] therefore, this racial and political distinction never served any purpose but to segregate the tribal members as lower-class American citizens.[112] The Major Crimes Act[113] was enacted in 1948,[114] and the latest updated in 2013.[115] The update occurred after all tribal members gained United States citizenship.[116]

Secondly, the Act removes tribal courts' criminal jurisdiction over major crimes committed on the tribal reservation.[117] Congress limited tribal courts' criminal jurisdiction through its ability to abrogate or supersede Indian treaties unilaterally.[118] As stated by the Ninth Circuit, "Congress, in exercising . . . its constitutional power, has recognized and established for Indian people peculiar and protected status as wards of [the] Federal Government."[119] This peculiar and protected status as wards of the federal government has never diminished or been determined to be obsolete; however, it has been urged that the wardship theory is outdated.[120] As wards of the federal government, the tribal nations are often mistrusted and restrained from adjudicating offenders for major crimes in Indian Country, particularly non-Indians.[121]

When Congress passed the Indian Bill of Rights (ICRA),[122] it included a limitation on the tribal nations' ability

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[110] E. Band of Cherokee Indians v. Torres, 4 Cher. Rep. 9, 7 (E. Cher. Sup. Ct. 2005).
[111] 8 U.S.C. § 1401(b).
[112] "The end result will continue to be a national policy of 'separate but unequal,' for Indian tribes, and their courts.").
[113] 18 U.S.C. § 1153.
[114] *Id*.
[115] *Id.*
[116] 8 U.S.C. § 1401(b).
[117] 18 U.S.C. § 1153.
[118] 25 U.S.C. § 71.
[119] Gray v. United States, 394 F.2d 96, 98 (9th Cir. 1967). *See also*, United States v. Kagama, 118 U.S. 375, 382 (1886).
[120] *Gray*, 394 F.2d at 98.
[121] E. Band of Cherokee Indians v. Torres, 4 Cher. Rep. 9, 12 (E. Cher. Sup. Ct. 2005) ("Indians cannot be trusted to treat non-Indians fairly.").
[122] 25 U.S.C. § 1302(a). This statute is also called the Indian Civil Rights Act or ICRA.

to prosecute major crimes fully.[123] The tribal nations were initially unable to impose a conviction for more than one year, a fine of $5,000, or both.[124] However, the statute does not explicitly indicate that this section applies only to misdemeanors.[125] The language, "for more than one year,"[126] can be argued to apply only to misdemeanors as there are similar punishment restraints in both federal and state criminal codes, but this is only implied.[127] Misdemeanor crimes do not represent a significant threat to the tribal community as the severity of the crime requires an equally severe punishment.[128] Felony crimes significantly impact the community, but the ICRA limits punishments for both.

Felony convictions represent the most significant limitation on the criminal jurisdiction of tribal nations.[129] Not only does the federal government have exclusive jurisdiction over major crimes, the ICRA also limits the incarceration and fines of felony offenders.[130] Since the term of imprisonment is greater than one year, this section would apply to single felony convictions.[131] The most significant limitation of sentencing authority comes from the conviction of multiple misdemeanors and felonies in a single trial.[132]

Tribal nations have been limited in imposing imprisonments for multiple offenses by an offender.[133] This limitation of criminal jurisdiction, along with the restriction of tribal courts, allows offenders to avoid standing trial before the tribal community for their alleged crimes.[134] The federal

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[123] Based on conditions that must be met in under 25 U.S.C. § 1302(c).
[124] 18 U.S.C. § 1302(7)(B) ("Except as provided in subparagraph (c), impose for conviction of any [one] offense any penalty or punishment greater than imprisonment for a term of [one] year or a fine of $5000, or both.").
[125] *Id*.
[126] 25 U.S.C. § 1302(7)(B).
[127] 18 U.S.C. § 19; VA. CODE ANN. § 18.2-11.
[128] U.S. CONST. amend. VIII.
[129] 18 U.S.C. § 1153.
[130] 25 U.S.C. § 1302(a)(7)C). ("Subject to subsection (b), impose for conviction of any [one] offense any penalty or punishment greater than imprisonment for a term of [three] years or a fine of $15,000, or both[.]").
[131] 25 U.S.C. § 1302(a)(7)(C).
[132] *Id*.
[133] 18 U.S.C. § 1153.
[134] *Id.*

government's allowance of this avoidance devalues the tribal community.[135] The avoidance also indicates that not every citizen of the United States is created equal.[136]

The United States Congress has the sole power to end the "separate but unequal" national policy concerning tribal nations.[137] First, Congress must amend the Major Crimes Act[138] to have concurrent jurisdiction with the Tribal nations.[139] Secondly, Congress has the power to create special provisions concerning proper venue through legislation. Congress should include this special venue provision for a federal district court created within the tribal reservation, like Courts of Indian Offenses (CFR Courts).[140] Finally, Congress should amend the Indian Bill of Rights[141] to omit the limitations on imprisonment terms for single and multiple offenses committed within the Tribes' sole exclusive jurisdiction.[142]

VI. CONGRESSIONAL POWER TO CREATE JUDICIAL COURTS

"Congress may from time to time ordain and establish [inferior courts]."[143] The "[m]anner and condition . . . which judicial powers [are] exercised are matters of legislative discretion."[144] With Congress having the power to establish an inferior court in the form of a district court, it can create an

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[135] Cf. Holloway v. City of Va. Beach, 531 F. Supp. 3d 1015, 1035 (E.D. Va. 2021) ("agreeing that Virginia Beach has a history of racial discrimination and that people in [m]inority communities still endure downstream effects of long-term discrimination.").

[136] 42 U.S.C. § 1981.

[137] E. Band of Cherokee Indians v. Torres, 4 Cher. Rep. 9, 12 (E. Cher. Sup. Ct. 2005) ("As long as Congress stands by and doing nothing to reverse [the separate but unequal] policy, then wrong will continue to triumph over right.").

[138] 18 U.S.C. § 1153.

[139] *Concurrent Jurisdiction*, BLACK'S LAW DICTIONARY, (11th ed. 2019) ("Jurisdiction shared by two or more [sovereigns].").

[140] *Court of Indian Offenses*, BIA, http://www.bia.gov/CFRCourts (last visited July 1, 2022). A CFR Court is a trial court where parties present their cases before a Magistrate judge.

[141] 25 U.S.C. § 1302(a)(7)(B-D).

[142] 25 U.S.C. § 1302(b)

[143] U.S. CONST. art. III, § 1; *See e.g.*, Bonner v. City of Prichard, 661 F.2d. 1206, 1207 (11th Cir. 1981) (first case before newly created Eleventh Circuit).

[144] Railway Co. v. Whitton's Adm'r, 80 U.S. 270, 288 (1871).

inferior court or expand the authority of pre-existing courts, such as the Court of Indian Offenses,[145] within the tribal reservation for the primary purpose of hearing cases that occur on the reservation.[146] Congress is not restricted from making "appropriations as its judgment dictates 'for the health, education, and industrial advancement of said Indians.'"[147] The mental health of tribal members falls within the need for appropriations for the health of the tribe and the tribal members.[148]

The proposal of a newly created federal district court would allow the federal government to follow its own rules of criminal procedure.[149] Specifically, it would allow the federal government to set "the place of trial within the district with due regard for . . . any victim, and the witnesses, and the prompt administration of justice,"[150] and also ensure that the factors used to consider the proper venue of a criminal trial are best viewed from a totality of the circumstances. The rule is intended to "safeguard against unfairness and hardship involved when an accused is prosecuted in a remote place."[151] Rule 18 does not provide the defendant with a "right to trial in his home district."[152] In fact, "Rule 18 does not confer any absolute right on [a] defendant" to dictate a trial location of any sort.[153] Since the defendant does not have a right to have the trial in his home district, more regard for the victim and witnesses could be used to determine the proper venue.[154]

A United States District Court located inside a tribal nation's reservation could serve the tribal community in four different ways. First, the tribal community would be able to serve in judicial staff or support positions within the federal

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[145] Denezpi v. United States, 142 S. Ct. 1838, 1843 (2022) ("CFR courts have jurisdiction over two sets of crime."); *see* 25 C.F.R. § 11.114 (2008); 25 C.F.R. §§ 11.400-11.454 (1993).

[146] *Denezpi v. United States*, 142 S. Ct. at 1838.

[147] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289 (1955).

[148] Montana v. United States, 450 U.S. 544, 565 (1981).

[149] FED. R. CRIM. P. 18.

[150] *Id*.

[151] United States v. Cores, 356 U.S. 405, 407 (1958).

[152] United States v. Mt. Fuji Japanese Steak House, Inc., 435 F. Supp. 1194, 1199 (E.D.N.Y 1977).

[153] United States v. Burns, 662 F.2d 1378, 1382 (11th Cir. 1981).

[154] *Mt. Fuji Japanese Steak House,* 435 F. Supp. at 1199.

district court if qualified;[155] this includes, but is not limited to, acting as officers of the court.[156] Secondly, transparency in the court's function would aid in rebuilding a level of trust with the federal government within the tribal community.[157] Thirdly, the defendant would have to answer to the criminal complaint before the tribal community within the reservation.[158] Finally, tribal members would be in a position to serve as jurors for the criminal trials that occur at the new federal district court.[159]

However, creating a federal district court within a tribal reservation is not without drawbacks.[160] First, creating a new federal district court venue within a reservation would only work in the larger reservations. Smaller reservations could be better served by expanding the preexisting Court of Indian Offenses.[161] Secondly, creating a new federal district court venue would not give tribal nations the full effect of criminal jurisdiction to serve their criminal codes and proceedings.[162] Only the amendments suggested to the Indian Bill of Rights, and the Major Crimes Act could give tribal nations the autonomy to govern their territory as they deem fit.

While there are negative drawbacks to creating a new federal district court venue, the positive aspects outweigh any negative drawbacks the creation may bring. If the current statutes remain as law, then the first step to ending the "separate but unequal" status of tribal nations is to create a

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[155] 25 U.S.C. § 1302(c)(3)(A-B).

[156] *See id.*

[157] Rushton v. Dep't. of Corr., 123 N.E.3d 1171, 1175 (4th Cir. Ct. App. 2019) ("[W]hen governmental functions are privatized, there is a risk of decreased accountability and transparency.").

[158] United States v. Flaxman, 304 F. Supp. 1301, 1303 (S.D.N.Y. 1969) ("[T]he more stringent requirements of the VI Amendment which guarantee trial before 'an impartial jury of the State or district wherein the crime shall have been committed.'").

[159] *Id.*

[160] River Schatz v. Commonwealth, 191 P.R. Dec. 791 (P.R. 2014) (quoting Colegio de Abogados de P.R. v. Schneider, 112 P.R. Dec. 540, 549 (1982)) ("The public interest in the creation of a strongly pluralistic society, in furtherance of the practice of law and of the good operation of the judicial system, outweighs the personal inconveniences that compulsory membership might entail.").

[161] Denezpi v. United States, 142 S. Ct. 1838 (2022).

[162] Only amendments to ICRA's limitations on punishments and 18 U.S.C. § 1153 allowing tribal nations to try major crimes will have a full effect on tribal criminal jurisdiction.

federal district court within the reservation.[163]

VII. CONCLUSION

The criminal jurisdiction of the tribal nations has steadily been eroded over the history of the United States.[164] This erosion of Indian sovereignty created a hierarchy of sovereigns recognized by the United States Constitution.[165] Currently, tribal nations occupy the lowest tier of this hierarchy.[166] Because of this low position, the inherent sovereignty of tribal nations has steadily been disregarded.[167]

Furthermore, Congress regularly gives states access to tribal land.[168] This occurs through federal-state agreements that allow state law enforcement agencies to enter onto tribal land under the guise of mutual aid and training sessions.[169] Additionally, six states currently hold complete criminal jurisdiction to enforce their criminal codes on tribal land just as they would any other area within their state boundaries.[170] Congress has chosen to relinquish the federal government's sole and exclusive jurisdiction to these states instead of giving tribal nations additional criminal jurisdiction to enforce and adjudicate the tribal nation's criminal code.[171] This limitation hinders the tribes' ability to protect the safety and welfare of tribal members.

For the above reasons, the "separate but unequal" treatment of tribal nations and their tribal members should come to an end.[172] It is rare for non-tribal criminal defendants to go before the tribal court for violent crimes committed that require more than three to nine years of incarceration in Indian territory.[173] Congress has the power to take action to begin to eliminate this injustice by creating additional United States

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[163] River Schatz v. Commonwealth, 191 P.R. Dec. 791 (P.R. 2014).
[164] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).
[165] U.S. CONST. art. I, § 8, cl. 3.
[166] *See Castro-Huerta*, 142 S. Ct. at 2500.
[167] Montana v. United States, 450 U.S. 544, 565 (1981).
[168] 18 U.S.C. § 1162; 25 U.S.C. § 2804.
[169] 25 U.S.C. § 2804
[170] 18 U.S.C. § 1162.
[171] *Id*.
[172] E. Band of Cherokee Indians v. Torres, 4 Cher. Rep. 9, 12 (E. Cher. Sup. Ct. 2005).
[173] 25 U.S.C. § 1302(a)(7)(B-D).

District Courts within the tribal reservations.[174] This proposal will build trust between the federal government and the tribal members, who hold dual citizenship with the tribal nations and the United States.[175] Once this injustice is eliminated, non-tribal criminal defendants will have to receive a fairly adjudicated trial before the community in which they have allegedly wronged.[176]

[174] Railway Co. v. Whitton's Adm'r, 80 U.S. 270, 288 (1871).
[175] Rushton v. Dep't. of Corr., 123 N.E.3d 1171, 1175 (4th Cir. Ct. App. 2019).
[176] United States v. Flaxman, 304 F. Supp. 1301, 1303 (S.D.N.Y. 1969).

VIII.EXHIBITS

IX.

TABLE A:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.