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Trial by Ambush: The Prosecution of Indians in Federal Court

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TRIAL BY AMBUSH: THE PROSECUTION OF INDIANS IN FEDERAL COURT

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This Article addresses the Federal Rules of Criminal Procedure's unjust impact in the prosecution of Indians in federal court. As the rules of engagement used by federal prosecutors and defense attorneys in federal court when prosecuting Indians under the Major Crimes Act and the General Crimes Act, the Federal Rules of Criminal Procedure differ from those of Civil Procedure with regard to discovery procedures. Specifically, the Federal Rules of Criminal Procedure are unjust because they do not allow defense attorneys to conduct pretrial interviews or depositions of prospective witnesses whose evidence the United States will introduce at trial or use in the process of plea negotiations. Pretrial interviews and depositions prevent a party from being caught by surprise or ambushed in federal court.

Unlike federal courts, several tribes in New Mexico provide the mechanism for conducting pretrial interviews of trial witnesses. New Mexico state courts require pretrial interviews. New Mexico's criminal procedural rules are similar to the procedural rules in Florida state courts. The states of Indiana, Missouri, and Vermont require depositions in criminal proceedings. In addition, military courts require depositions.

Indians were not involved in the enactment of the Major Crimes Act or the Federal Rules of Criminal Procedure, which have had a significant impact on the lives of Indians, both victims and defendants. This Article argues that the Federal Rules of Criminal Procedure should be modified to require pretrial interviews or depositions to ensure that Indians prosecuted in federal court are not unjustly ambushed.

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> *It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters. In other words, where money is involved, all parties receive all relevant information from their adversaries upon request, but where individual liberty is at stake, such information can be either withheld by the prosecutor or parceled out at a time when it produces the least benefit to the accused.*[1]

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INTRODUCTION

The Federal Rules of Criminal Procedure are the rules of engagement in federal court.[2] They permit federal prosecutors to ambush Indians[3] in federal court during a trial. Ambushes may occur based upon the inability of defense attorneys to conduct pretrial interviews or depositions,[4] which are not provided for by the Federal Rules of Criminal Procedure. Specifically, an ambush occurs when federal prosecutors introduce testimony at trial that may have never been previously provided to the defense.[5] When this new evidence is introduced at trial, the defense attorney is unable to effectively impeach the witness or challenge a prior inconsistent statement.[6] There would be no ambush if a defense attorney had the ability to conduct a pretrial interview or a deposition.

The inability to conduct pretrial interviews or depositions is *unjust*. It is also unjust because Indian defendants cannot effectively launch a defense to conduct investigations, as a civil litigant is able to do in civil cases. In contrast, the possibility of an ambush or a blind side attack is avoided under the procedures provided by several tribes

1. Hon. H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1089 (1991) (citing William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U. L.Q. 279 (1963); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Barry Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C. L. REV. 437 (1972)).

2. FED. R. CRIM. P. 1.

3. I use the term "Indian" based upon the nomenclature used in federal statues and federal cases. *See infra* note 24.

4. The Federal Rules of Criminal Procedure allow depositions. However, the use of depositions is limited to several purposes, but does not include the use of depositions for impeachment purposes or use for cross-examination for a prior inconsistent statement. FED. R. CRIM. P. 15.

5. *Id.* r. 16.

6. *Id.*

in New Mexico, as well as the state courts of New Mexico.[7] In the hundreds of cases tried in federal court against Indians, there is a chance that there might be testimony from a witness at trial that was never presented through discovery.[8] Consequently, this Article is entitled *Trial by Ambush: The Prosecution of Indians in Federal Court.*

My conclusion that pretrial interviews or depositions should be required by the Federal Rules of Criminal Procedure is based upon my experience as a former Assistant United States Attorney and a criminal defense attorney.[9] I have prosecuted and defended numerous Indians in federal court, and I have been ambushed in federal court by federal prosecutors.[10]. In addition, my experiences as a tribal attorney, state district court judge,[11] and Director of the Southwest Indian Law Clinic[12] also affirm my view that the Federal Rules of Criminal Procedure are unjust as currently written.[13] The Federal Rules of Criminal Procedure are distinct from the procedures in several tribal courts—including the largest tribe in the United States—where pretrial interviews are required. New Mexico state courts also require pretrial interviews.[14] If the pretrial interview does not occur, the testimony of the witness can be suppressed.[15] The states of Florida, Indiana,

7. New Mexico v. Eloy Jerry Orona, 589 P.2d 1041, 1044 (N.M. 1979).

8. Sheldon Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 NEB. L. REV. 127, 132 (1962). Discovery in tribal and federal courts necessarily includes witness "statements" that are conducted by tribal or federal investigators. The statements are typically memorialized in narrative summaries. The summaries are disclosed to the defense attorney based upon discovery orders. Based upon the discovery received, a defense attorney will conduct an investigation. The investigation involves pretrial interviews.

9. As a criminal defense attorney, I have personal experience of encountering potential witnesses for the first time in federal court, without the benefit of a pretrial interview.

10. Both the prosecutor and defense attorney can be ambushed in federal court. I have been ambushed by a criminal defense attorney when I was a federal prosecutor. However, I believe the majority of ambushes will occur from a prosecutor based upon the fact that their investigations are proactive and not reactive.

11. As a state district judge, I required pretrial interviews and instructed the prosecution that a motion to suppress testimony might be granted if the government witnesses were not interviewed. I also instructed defense attorneys that they might be subject to the same sanctions if pretrial interviews did not occur with the witnesses they would call at trial.

12. During the past five semesters that I have taught in clinic, I saw the importance of conducting pretrial interviews. The two pueblo courts required pretrial interviews upon request of the defense. I have also spoken to tribal judges who have discussed the importance of pretrial interviews.

13. I wrote this paragraph before the *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), decision. The unfairness of the Federal Rules of Criminal Procedures towards Indian defendants is underscored based upon the distinct fact that a non-Indian will have the opportunity to conduct all interviews of the witnesses the District Attorney's Office will introduce at trial. A defense attorney who represents an Indian will not have the same opportunity.

14. *Eloy Jerry Orona*, 589 P.2d at 1044.

15. *See id.*

Missouri, and Vermont similarly require depositions.[16] In Florida, if the deposition does not occur, the witness could be held in contempt of court.[17] Military courts also require depositions.[18]

The Federal Rules of Civil Procedure differ from the Federal Rules of Criminal Procedure, which provide procedures that allow civil practitioners to investigate cases and avoid ambush during trial.[19] In this way, the inability of a criminal defense attorney to conduct pretrial interviews or depositions for their clients can be equated to *a civil practitioners' inability to conduct depositions of witnesses*—an attorney representing a party in a federal civil matter would never walk into trial without conducting a deposition of a witness who will testify at trial.

The Federal Rules of Criminal Procedure allow depositions based upon specific requirements.[20] In contrast, the Federal Rules of Civil Procedure provide a full array of discovery tools, including interrogatories, requests for production of documents, and depositions.[21] Why do these rules differ? When first drafted in 1941, there was a possibility the Federal Rules of Criminal Procedure could have included discovery rules similar to the Federal Rules of Civil Procedure, however, that plan was abandoned.[22] Over the past eighty-three years, amendments have been made to the Federal Rules of Criminal Procedure, but none require pretrial interviews or depositions.

Before addressing the Federal Rules of Criminal Procedure's impact on the prosecution of Indians in federal court, this Article explains why the Federal Rules of Criminal Procedure apply to Indians.[23]

16. FLA. R. CRIM. P. 3220(h)(1); IND. R. TRIAL P. 30; MO. R. CRIM. P. 25.12; VT. R. CRIM. P. 15.

17. FLA. R. CRIM. P. 3.220(h)(1).

18. 10 U.S.C. § 849.

19. FED. R. CIV. P. 27.

20. FED. R. CRIM. P. 15(a)(1). Pursuant to Rule 15 of the Federal Rules of Criminal Procedure, a party "may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice." *Id.*

21. Civil practitioners "tend to be stunned and often outraged by [a criminal defense attorney's] inability to depose government witnesses or even to file interrogatories or requests for admissions." David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 714–15 (2006).

22. Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 698 (2017).

23. Part I of this Article presents an overview of the basics of criminal jurisdiction in Indian country for the benefit of those who have no familiarity with such rules. It is necessary to have a full understanding of the basics of criminal jurisdiction in Indian country to understand the view

Specifically, Part I addresses the Federal Rules of Criminal Procedure's impact on the prosecution of Indians,[24] based upon the Major Crimes Act (MCA)[25] and the General Crimes Act (GCA).[26] The MCA and GCA are triggered when an alleged crime occurs in "Indian country."[27] Congress passed the MCA in 1885when the United States was at war with many tribes or may have recently concluded peace negotiations.[28] This Article addresses how the MCA was hastily written and has racist origins.[29] The GCA was passed in 1834, extending federal jurisdiction to crimes committed in Indian country.[30] The last

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that the Federal Rules of Criminal Procedure should be modified with regard to the prosecution of Indians in federal court.

24. I use the term "Indians" because the United States Code uses the term "Indian." 18 U.S.C. § 1153. The Major Crimes Act is targeted at the prosecution of Indians. *Id.*

25. *Id.*

26. *Id.* § 1152.

27. "Indian country" is a term of art used in the United States Code. *Id.* § 1151.

28. *See infra* Section I.A.2. I am a citizen of the Southern Ute Indian Tribe.

> On December 30, 1849, a peace treaty was signed between the United States and the Utes at Abiquiu, New Mexico. The treaty forced the Utes to officially recognize the sovereignty of the United States and established boundaries between the U.S. and the Ute Nation.
>
> In 1863 another treaty was signed at Conejos terminating the Ute claims to mineral rights and lands in the San Luis Valley that had been settled by the Europeans.
>
> In 1868 the U.S. government began another treaty to terminate the rights of the Confederated Ute Indians to other lands . . . and a new commission was appointed by the Interior in 1873 to enter into negotiations for a new agreement. The Brunot agreement of 1873 was negotiated with the Confederated Utes and the U.S. government, represented by Felix R. Brunot, at the Los Pinos Agency on September 13, 1873. Ute chiefs, headmen and other members of the Tabeguache, Mouache, Caputa, Weennuchiu, Yampa, Grand River and Uintah bands of the Ute Indians were present when the Agreement was signed.
>
> The Brunot Treaty was ratified by the United States in 1874, and is most remembered by Utes as the agreement when their land was fraudulently taken away. The Utes were led to believe that they would be signing an agreement that would allow mining to occur on the lands located only in the San Juan Mountain area, the site of valuable gold and silver ore. About four million acres of land not subject to mining would remain Ute territory under ownership of the tribe. However, they ended up forcibly relinquishing the lands to the U.S. government. Many years later, and after meeting with the state of Colorado, a successful negotiation of a Memorandum of Agreement was signed in 2009. The MOA assured the tribe with hunting and fishing rights in the off-reservation Brunot area, including rare game species. Tribal hunters participate in the hunt with special permits.

History, SO. UTE INDIAN TRIBE, https://www.southernute-nsn.gov/history/ [https://perma.cc/2PX4-HSZE].

29. I do not use the term "racism" lightly. The dictionary defines racism as "prejudice, discrimination, or antagonism, directed against a person or people on the basis of their membership in a particular racial or ethnic group, typically one that is a minority or marginalized." *Racism*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/racism_n?tab=meaning_and_use [https://perma.cc/9BGL-APQZ].

30. 18 U.S.C. § 1152.

conflicts between tribes and the United States continued past the enactment of the MCA and GCA.[31] Consequently, Indians were not involved in the development of the MCA and GCA or in the development of the Federal Rules of Criminal Procedure.[32] Despite this lack of representation, the MCA, GCA, and the Federal Rules of Criminal Procedure have had a significant impact on the lives of Indians, both victims and defendants.[33]

Part I also provides an overview of the U.S. Supreme Court's decisions that have impacted tribal sovereignty. In 1978, the Supreme Court ruled in *Oliphant v. Suquamish Indian Tribe*[34] that tribal courts do not have jurisdiction to prosecute non-Indians for alleged crimes committed in Indian country.[35] *Oliphant* has had a devastating impact on tribal sovereignty.[36] In 1991, the Supreme Court also held in *Duro v. Reina*[37] that tribal courts do not have jurisdiction to prosecute non-member Indians,[38] although Congress later overruled that decision.[39] I will also discuss the June 29, 2022, Supreme Court decision, *Oklahoma v. Castro-Huerta*,[40] which will directly impact the prosecution of non-Indians who commit crimes against Indians in Indian country[41]

31. *See supra* note 28 and accompanying text; *see also* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

32. *See* discussion *infra* Section 1.A.2. Federal judges play a critical role in the development of the Federal Rules of Civil and Criminal Procedure. *See* discussion *infra* Part V; discussion *infra* Sections I.A.2, I.B. There are only six federal judges who are Indian. *American Indian Judges on the Federal Courts*, FED. JUD. CTR., https://www.fjc.gov/history/judges/search/american-indian [https://perma.cc/23MA-338C]. Hopefully, these federal judges will play a role in future amendments to the Federal Rules of Criminal Procedure.

33. Indians have been prosecuted for alleged felony crimes since the Major Crimes Act was enacted in 1885. *See infra* Part I. First, I must make this point clear—I do not believe a person who has committed crimes should not be punished for the crimes they have committed. I state this based upon my background as a federal prosecutor, who prosecuted hundreds of defendants. As a state district court judge, I sentenced dozens of defendants. I have also defended hundreds of defendants in federal court, with over 98 percent accepting their responsibility for committing crimes and entering a plea agreement with the federal government. A person who commits a crime should be punished. However, there should be fairness in the system that leads to punishment. The rules in federal court are unfair and unjust. My intent is to point out the truth and hope that those who are in power will see that the rules of engagement must and should be changed.

34. 435 U.S. 191 (1978).

35. *Id.* at 211–12.

36. *Id.* ; *see* discussion *infra* Section I.C.1.; Russel L. Barsh & James Y. Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979).

37. 495 U.S. 676 (1990).

38. *Id.* at 679.

39. 25 U.S.C. § 1301(2) (1968) (amended 1991).

40. 142 S. Ct. 2486 (2022).

41. *Id.*

and overturned two-hundred-year-old precedent.[42] Part I also addresses how tribal courts have concurrent jurisdiction with federal courts to prosecute crimes allegedly committed by Indians in Indian country for the same offense.[43]

Part II provides a brief review of the discovery process in civil and criminal cases.[44] Part III addresses the history of the Federal Rules of Civil and Criminal Procedure.[45] The methods of obtaining discovery under these two regimes are starkly different.[46] The differences have had a detrimental impact on criminal defendants prosecuted in federal courts throughout this country.[47] With the exception of the states of Florida, Indiana, Missouri, New Mexico, and Vermont, other states have followed the federal rules.[48]

Part IV sets forth the current status of the Federal Rules of Criminal Procedure. Over the past eighty-three years, there have only been minor amendments to the Federal Rules of Criminal Procedure.[49] These amendments do not require pretrial interviews or depositions similar to the criminal procedural rules in Florida, Indiana, Missouri, New Mexico, Vermont, and military courts.[50] Part V briefly describes the amendment process for the Federal Rules of Criminal Procedure and the persons that are involved with deciding how these rules are developed or amended.[51] To my knowledge, there has never been an Indian who has sat on any committees responsible for proposing amendments to the Federal Rules of Criminal Procedure.

Part VI discusses how several tribes, including the largest tribe in the nation, allow or require pretrial interviews to be conducted.[52] New Mexico state courts *require* the parties to conduct pretrial interviews. In New Mexico, if the parties do not provide pretrial interviews, the

42. *See* Worcester v. Georgia, 31 U.S. 515 (1832).
43. *See* United States v. Wheeler, 435 U.S. 313, 332 (1978).
44. See discussion *infra* Part II.
45. *See* discussion *infra* Part III.
46. *Compare* FED. R. CIV. P. § 26(b), *with* FED. R. CRIM. P. 16. *See* discussion *infra* Part III.
47. *See* discussion *infra* Part III.
48. See discussion *infra* Section VI.B.
49. Fed. R. Crim. P. 16 advisory committee's notes. These amendments do not include pretrial interviews.
50. *Compare* FED. R. CRIM. P. 15, *with* FLA. R. CRIM. P. 3.220, IND. R. TRIAL P. 30, MO. R. CRIM. P. 25.15, VT. R. CRIM. P. 15, *and* U.S. MANUAL FOR CTS.-MARTIAL R. 702 (2019). *See* discussion *infra* Part IV; *infra* Section VI.B.
51. *See* discussion *infra* Part V.
52. *See* discussion *infra* Section VI.A.

testimony may be suppressed.[53] The state of Florida requires depositions.[54] A potential witness can be held in contempt of court if the deposition does not occur.[55] The states of Indiana, Missouri, and Vermont require depositions with specific requirements and sanctions may occur if a deposition is not conducted.[56] Military courts may also require depositions with different procedures and sanctions.[57]

Part VII addresses *Castro-Huerta*'s direct impact on the investigation of cases. Specifically, in an investigation of an alleged crime, a non-Indian defendant will have a distinct advantage over an Indian defendant who commits a similar crime in Indian country.[58] Prior to the Supreme Court's overruling of two hundred years of precedent, the state of New Mexico did not have authority to prosecute a non-Indian who allegedly committed a crime against an Indian in Indian country; the federal government had exclusive jurisdiction.[59] Based on *Castro-Huerta*, the federal government and states have concurrent jurisdiction to prosecute non-Indians for committing an alleged crime against an Indian.[60] Consequently, if the state of New Mexico chooses to prosecute a non-Indian, the defense attorney will have a chance to conduct pretrial interviews.[61] An Indian who is prosecuted by the federal government for a similar crime will not have a chance to conduct pretrial interviews.[62] The Court's decision in *Castro-Huerta* created a disparity in how cases are investigated based upon the race of the defendant and victim.[63]

Part VIII discusses the ramifications for Indians based on the absence of pretrial interviews or depositions. I will address a case where my client could have been unfairly convicted. The Federal Rules of Criminal Procedure's impact on the federal prosecution of Indians may have resulted in unfair convictions of thousands of Indian defendants since Congress passed the Major Crimes Act in 1885.[64] Part IX

53. *See* New Mexico v. Eloy Jerry Orona, 589 P.2d 1041 (N.M. 1979); discussion *infra* Section IV.B.5.

54. *See* FLA. R. CRIM. P. 3.220.

55. *Id.*

56. IND. R. TRIAL P. 37; MO. R. CRIM. P. 25.18; VT. R. CRIM. P. 16.2.

57. 10 U.S.C. § 849.

58. *See* discussion *infra* Part VII.

59. *See* General Crimes Act, ch. 161 § 25, 4 Stat. 729, 733 (1834) (codified as amended at 18 U.S.C. § 1152).

60. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022).

61. N.M. R. CRIM. P. 5-503.

62. *See infra* note 171 and accompanying text; *see also* discussion *infra* Section VII.A.

63. *Castro-Huerta*, 142 S. Ct. at 2490.

64. *See* discussion *infra* Part VIII.

will also briefly discuss how the absence of pretrial interviews may have an impact on tribal courts.[65]

Finally, this Article concludes that it is imperative to amend the Federal Rules of Criminal Procedure. Without pretrial interviews or depositions, federal prosecutors will continue to ambush Indians in federal court. The federal prosecution process is based on laws and rules that Indians were never involved in creating. It has been over 137 years since the MCA was passed, and it is time to address these unjust rules.

I. THE FEDERAL RULES OF CRIMINAL PROCEDURE'S IMPACT ON THE PROSECUTION OF INDIANS BASED UPON THE MAJOR CRIMES ACT AND GENERAL CRIMES ACT

A. The Major Crimes Act's Impact on Indians

The Federal Rules of Criminal Procedure are the rules of engagement used by federal judges, prosecutors, and defense attorneys when Indians are prosecuted in federal court. They are directly linked to the MCA and the GCA.[66] Accordingly, before addressing the Federal Rules of Criminal Procedure, it is important to provide the history regarding why the MCA and the GCA were enacted and the roots of U.S. Supreme Court jurisprudence that has impacted Indians.

1. *Ex parte Crow Dog*

Prior to 1885, criminal offenses committed in Indian country were tried in tribal courts.[67] Specifically, tribal courts exercised jurisdiction over both non-Indians and Indians.[68] However, that would change. On August 5, 1881, Crow Dog shot Spotted Tail, "killing him ending a longstanding feud between the two leaders of Sicangu, or Brule', band of Lakota."[69] The Lakotas had addressed the killing, bringing Crow Dog before a council, "not to decide his guilt or innocence but to determine which gifts he should offer the murdered man's

65. *See* discussion *infra* Part IX.

66. *See* discussion *infra* Section I.A.3.

67. *See Ex parte* Crow Dog, 109 U.S. 556, 572 (1883) (finding the federal court had no jurisdiction to try an Indian for the murder of another Indian).

68. Richmond L. Clow, *A Dream Deferred: Crow Dog's Territorial Trials and the Push for Statehood*, 37 S.D. HIST. SOC'Y 46, 46 (2007), https://www.sdhspress.com/journal/south-dakota-history-37-1/a-dream-deferred-crow-dogs-territorial-trials-and-the-push-for-statehood/vol-37-no-1-a-dream-deferred.pdf [https://perma.cc/5KMX-VJU8].

69. *Id.*

family in order to bring about a reconciliation."[70] Crow Dog gave Spotted Tail's family eight horses, fifty dollars in cash, and a blanket worth forty dollars.[71] "Despite the fact that Lakota justice had been served,"[72] Crow Dog was arrested. Once in custody, only a U.S. official could release him.[73] Crow Dog was represented by court-appointed Adoniram J. Plowman, who objected to the indictment, arguing the United States had no jurisdiction over Crow Dog.[74]

With Crow Dog's Rosebud enemies having the upper hand at home and statehood supporters controlling the trial court, Plowman had few weapons in his fight for his client.[75] The acting U.S. Attorney General, however, refused to support Crow Dog's defense "unless some law can be pointed out requiring such actions."[76] Plowman responded that the Sixth Amendment to the U.S. Constitution provided that anyone accused of a crime would have "compulsory process of obtaining witnesses in his favor."[77]

Plowman refused compensation for his services and appealed to the acting U.S. Attorney General "in the name of humanity and justice . . . that the defendant have an opportunity to make his defense before the court."[78] He wrote that a denial to provide Crow Dog a means to make his defense would be contributing to "a judicial murder."[79] The judge denied the objection and the case proceeded to trial.[80] In March 1882, Crow Dog was convicted and sentenced to death.[81]

The case was appealed and ended up at the Supreme Court.[82] In *Ex parte Crow Dog*, the Court ruled that the federal government *does*

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70. *Id.*

71. *Id.* One commentator believed that this satisfied "Spotted Tail's shade [his soul], his family and justice." ESTELLINE BENNET, OLD DEADWOOD DAYS 252 (1935).

72. Clow, *supra* note 68, at 47.

73. *Id.*

74. *Id.* at 51.

75. *Id.* at 54.

76. *Id.*

77. *Id.*

78. *Id.* (quoting Letter from A. J. Plowman, Att'y, to Hon. S.S. Philips, Acting U.S. Att'y Gen. 5 (Dec. 12, 1881) (on file with the Nat'l Archives & Recs. Admin.)).

79. *Id.* (quoting Letter from A. J. Plowman, *supra* note 78, at 5).

80. *Id.* at 55. Jury selection began on March 17, 1882, despite "the fact that several potential jurors were Indian haters, a panel was quickly seated." *Id.* One prospective juror said, "he would not believe the testimony of one hundred Indians over that of a white man." *Id.* "By noon, twelve white men were empanelled [sic] . . . ." *Id.*

81. *Id.* at 61.

82. *Id.* at 46.

not have jurisdiction over the killing of an Indian by an Indian in Indian country.[83] The Supreme Court reasoned:

> [The federal government] tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[84]

2. Enactment of the MCA to Reverse *Ex parte Crow Dog*

Non-Indian lawmakers would then take steps to overturn the Supreme Court's decision.[85] In 1885, Congress enacted the MCA.[86] The MCA was passed when the United States was in battle with Indian tribes, and Indians were precluded from engaging in the political process.[87] It was "hastily written, drafted, and reviewed" as the last section of the annual appropriations bill for 1885.[88] Specifically, the MCA was passed as "an appropriations rider—a piece of substantive or 'authorizing' legislation that was simply appended to a Congressional funding bill, and which never received a public hearing by the appropriate authorizing committee."[89]

The MCA grants jurisdiction to federal courts, exclusive of the states, over Indians who commit any of the listed offenses, regardless

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> As the case was working its way through the courts, negotiations were being conducted with the Indians for purchase of lands that many territorial boosters claimed was a necessary step toward statehood for southern Dakota. The Lakota's voted down the land sale, in part, as a reaction to the violation of tribal sovereignty that the federal prosecutor of Crow Dog represented. Astute territorial leaders came to understand too late that Crow Dog's life was more valuable to their dreams of statehood that his death.

Id. at 46–47. The boosters believed this case was a means for statehood for South Dakota by asserting jurisdiction over the Lakota "and open their reservation lands to non-Indian settlement and development." *Id.* at 47.

83. *Ex parte* Crow Dog, 109 U.S. 556, 558, 572 (1883).

84. *Id.* at 571 (1883).

85. Indians did not have the right to vote until 1924. Indian Citizenship Act, Pub. L. No. 68-176, 43 Stat. 253 (1924).

86. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (1885).

87. Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 617, 628–29 (2009); Troy A. Eid & Carrie C. Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1076–80 (2010).

88. Eid & Doyle, *supra* note 87, at 1077–76.

89. *Id.* at 1079.

of whether the victim is an Indian or non-Indian.[90] Accordingly, the federal government has jurisdiction over a specified set of major offenses committed by an Indian in Indian country.[91]

The MCA was passed at a time when there was an "Indian Problem."[92] Let's be candid. The MCA has "racist origins"[93] and those racist origins should be "review[ed]."[94] "Congress's decision to extend federal jurisdiction to Indian reservations was ill-considered and meant to be a temporary expedient."[95] The MCA would never be passed today in the twenty-first century.[96] It was passed when the United States did not envision tribes being in existence in 2022,[97] and "the general consensus in Congress was that . . . the federal government would shortly be getting out of the Indian business."[98]

Although this Article focuses on the need to modify the Federal Rules of Criminal Procedure, there is also a need to reform, modify, or eliminate the MCA.[99] There have been attempts to overturn the

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90. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (1885).

91. "Indian country" is defined in the United States Code as reservation lands or areas on allotment lands where control is limited to the lands in federal trust. 18 U.S.C. § 1151. Indian country encompasses reservations established by treaties or in allotments. *Id.* In addition, Indian country is defined as a dependent Indian community within the limits of the United States, where the original or subsequently acquired territory are native-used lands. *Id.* § 1151(b). There is a test courts have used to determine a dependent Indian community under subsection 1151(b). *See* Alaska v. Native Village of Venetie Tribal Gov., 522 U.S. 520, 527 (1998). The test has two prongs: the first measures federal lands set aside for the explicit use of Indian nations; the second looks for federal superintendence to show an Indian dependence on the federal government. *Id.*

92. Eid & Doyle, supra note 87, at 1074; *see* Berger, *supra* note 87, at 632 ("Historians also increasingly identified triumph over the Indian tribes as the formative racial and national experience of White America.").

93. Eid & Doyle, supra note 87, at 1071.

94. *Id.* ("A careful review of the MCA and its *racist origins is long overdue* and relevant to today's discussion about the future of the federal criminal justice system in Indian country because the extension of federal jurisdiction to Indian reservations was a key component of assimilation." (emphasis added)).

95. *Id.* at 1070–71.

96. Congress hastily passed the MCA in 1885, which had a direct impact on Indians. *See id.* In the twenty-first century, there is a need to honestly review the consequences of this law and the Supreme Court's decisions. The epidemic of missing or murdered indigenous persons (MMIP) is arguably a direct consequence of the MCA and *Oliphant v. Suquamish Indian Tribe*.

97. Eid & Doyle, *supra* note 87 at 1084.

98. *Id.* at 1081.

99. In *Separate but Unequal*, the authors argue:

> [T]here is a constitutional imperative to end the federal government's role in Indian country as it currently exists. The remedy for this lingering injustice is for the President, Congress, and Supreme Court to return to constitutional first principles. Indian tribes and nations should be provided with greater freedom to choose how to design and run their own criminal justice systems within the federal constitutional scheme. This includes letting Indian tribes and nations wishing to do so to exit the MCA entirely so long as they protect defendants' federal constitutional rights on par with the state

MCA, but without success. Consequently, the rules of engagement in federal court, the Federal Rules of Criminal Procedure, remain.

3. The Plenary Power of Congress over Indians

After the passage of the MCA, the plenary power of Congress over Indians was put to the test. The Supreme Court affirmed Congress's power to enact the MCA.[100] In *United States v. Kagama*,[101] the Court upheld the MCA, which designated as federal crimes certain offenses committed by Indians in Indian Country.[102] The Court stated:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights . . . . [S]o largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.[103]

Thus, the 1885 MCA stands today as one of the barriers preventing tribes from prosecuting persons for felonies committed in Indian country. The MCA, the foundation of the Federal Rules of Criminal Procedure, should be eliminated or modified to lift this barrier. The Federal Rules of Criminal Procedure can then enable the intentional or unintentional ambush of Indians in federal court. Regardless of the prosecution's motive, if it is successful, the punishment for federal crimes can be severe, resulting in a very real impact on Indians.

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governments. It also means freeing tribes that so choose from concurrent federal jurisdiction for what would otherwise be purely local crimes, while retaining federal criminal laws of general application. For those tribes that choose to retain the MCA and concurrent federal jurisdiction on their lands, the federal government goal must be to ensure that Native Americans consistently receive the minimum level of civil-rights protections to which all U.S. citizens are guaranteed.

Id. at 1072.

100. *See* United States v. Kagama, 118 U.S. 375, 385 (1886).

101. 118 U.S. 375 (1886).

102. *Id.* at 376–77, 385.

103. *Id.* at 383–84 (emphasis added).

B. The General Crimes Act: A Basis for Federal Prosecution

The GCA[104] was passed two years after the Supreme Court issued a monumental decision in *Worcester v. Georgia*.[105] The GCA extended federal criminal jurisdiction to tribal lands for certain crimes for "two apparent purposes."[106] First, as a "courtesy" to the tribes, it represented a promise by the federal government "to punish crimes . . . committed . . . by and against our own [non-Indian] citizens."[107] "Second, because *Worcester* held that States lacked criminal jurisdiction on tribal lands, Congress sought to ensure a federal forum for crimes committed by and against non-Indians."[108]

In 1948, Congress reenacted the GCA with minor amendments.[109] The GCA is rarely used to prosecute Indians because the majority of federal prosecutions involve Indian defendants who have allegedly committed crimes enumerated in the MCA.[110] However, the GCA will likely be reexamined by scholars and litigators in the coming years because the Supreme Court recently analyzed it in determining if the state of Oklahoma could exercise jurisdiction in Indian country.[111] The Supreme Court held the state of Oklahoma could.[112]

The constitutionality of 18 U.S.C. sections 1152 and 1153 has been challenged. However, the Supreme Court ultimately found both acts were constitutional.[113]

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104. 18 U.S.C. section 1152 was section 25 of the Indian Intercourse Act, ch. 161, 4 Stat. 729 (1834). U.S. Dep't of Just., Crim. Res. Manual § 679 (2020).

105. 31 U.S. 515 (1832).

106. *See, e.g.*, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2507 (2022) (Gorsuch, J., dissenting).

107. *Id.* (citing to H.R. REP. NO. 23-474, at 13 (1834)).

108. *Id.* (citing to H.R. REP. NO. 23-474, at 13). "Otherwise, Congress understood non-Indian settlers would be subject to tribal jurisdiction alone." *See id.* (citing to H.R. REP. NO. 23-474 at 13, 18; Barsh & Henderson, *supra* note 36, at 625–26).

109. *Castro-Huerta*, 142 S. Ct. at 2507 (Gorsuch, J., dissenting).

110. I have defended one Indian prosecuted pursuant to the GCA and the Assimilated Crimes Act.

111. *Castro-Huerta*, 142 S. Ct. at 2499 (majority opinion).

112. *Id.* at 2504–05.

113. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 385 (1886); United States v. Antelope, 430 U.S. 641, 644 (1977). In *United States v. Antelope*, the Supreme Court in essence upheld the constitutionality of the plan contained in 18 U.S.C. sections 1152 and 1153 by rejecting a challenge on equal protection grounds raised against section 1153. *Id.* It was held that the Constitution was not violated by federal prosecution of an Indian for the murder of a non-Indian on the reservation under a theory of felony murder. *Id.* The defendant argued that had he been prosecuted in state court under Idaho state law for the same act, the felony murder doctrine would not have applied because Idaho does not recognize it. *Id.* The Court acknowledged the disparity in treatment but nonetheless reasoned that the Major Crimes Act, like all federal regulation of Indian affairs, is not based upon an impermissible racial classification, but "is rooted in the unique status of Indians as

C. The Impact of the Supreme Court's Decisions on Tribal Sovereignty

Over the past 185 years, the Supreme Court has issued opinions both good and bad with respect to Indian tribes. In this Article, I will focus on three cases involving criminal jurisdiction. These cases *have had* and *will have* devastating impacts on Indian sovereignty. They are *Oliphant*, *Duro*, and *Castro-Huerta.*

1. *Oliphant v. Suquamish*'s Devastating Impact on Tribal Sovereignty

Oliphant changed the landscape of criminal jurisdiction in Indian country. Mark David Oliphant, a non-Indian, lived as a permanent resident on the Port Madison Indian Reservation.[114] He was arrested and charged by tribal police with assaulting a tribal officer and resisting arrest during a tribal event.[115] Oliphant applied for a writ of habeas corpus in federal court challenging the tribe's exercise of criminal jurisdiction.[116] He argued that he was not subject to tribal authority because he was non-Indian.[117]

Oliphant's application for a writ of habeas corpus was rejected by the lower courts.[118]The Ninth Circuit upheld tribal criminal jurisdiction over non-Indians on Indian land because the ability to keep law and order on tribal lands was an important attribute of tribal sovereignty that had been neither surrendered by treaty nor removed by Congress based upon its plenary power over tribes.[119]

The Supreme Court ruled that Indian tribal courts do not have criminal jurisdiction over non-Indians for conduct occurring on Indian land and reversed the Ninth Circuit's decision.[120] The Court held that Indian tribes cannot exercise powers "expressly terminated by Congress" or "inconsistent with their status" as domestic dependent nations.[121]

'a separate people' with their own political institutions." *Id.* at 646 (quoting Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974)). Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is "not to be viewed as legislation of a '"racial" group consisting of "Indians."'" *Id.* (quoting Morton v. Mancari, 417 U.S. 535 (1974)).

114. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 194–95.
119. Oliphant v. Schlie, 544 F.2d 1007, 1009–12 (9th Cir. 1976).
120. *Oliphant*, 435 U.S at 212.
121. *Id.* at 196 (citing to *Schlie*, 522 F.2d at 1009).

Justice Rehnquist wrote:

> [F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.[122]

The Court revived the doctrine of implicit divestiture.[123] It considered criminal jurisdiction over non-Indians an example of the "inherent limitations on tribal powers that stem from their incorporation into the United States," similar to tribes' abrogated rights to alienate land.[124]

By incorporating into the United States, the Court found that tribes "necessarily [gave] up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[125] The Court was of the view that non-Indian citizens should not be subjected to another sovereign's "customs and procedure."[126] The Court found exclusive tribal jurisdiction over tribe-members because it would be unfair to subject tribe-members to an "unknown code" imposed by people of a different "race [and] tradition" from their own.[127]

Although the Court found no inherent tribal criminal jurisdiction, it acknowledged the "prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians" and invited "Congress to weigh in" on "whether Indian tribes should finally be authorized to try non-Indians."[128] Justice Thurgood Marshall also wrote a dissenting opinion in *Oliphant*, reasoning that, "[i]n the absence of affirmative withdrawal by treaty or statute," the right to punish all individuals who commit crimes under "tribal

122. *Id.*

123. Andrew K. Fletcher, *Suffocating Sovereignty: Implicit Divestiture and the Violation of First Principles*, 5 DART. L.J. 31, 43 (2007).

124. *Oliphant*, 435 U.S at 209.

125. *Id.* at 210.

126. *Id.* at 211.

127. *Id.* at 210 (citing *Ex-parte* Crow Dog, 109 U.S. 556, 571 (1883)).

128. *Id.* at 212.

law within the reservation" is a "necessary aspect" of the tribe's sovereignty.[129]

At the Supreme Court oral argument, the late Slade Gorton, Attorney General for the state of Washington, argued against tribal authority to prosecute felony crimes in Indian country.[130] Later, he would become a member of the U.S. Senate and also of the Senate Select Indian Affairs Committee.[131] Senator Gorton's continuous oppositions to tribal jurisdiction while he served on the committee greatly affected Indian tribes.

Without the ability to prosecute felony crimes in Indian country against criminal perpetrators, there are enormous consequences for tribes.[132] I reside in Albuquerque, New Mexico. The City of Rio Rancho is to the west of Albuquerque. Imagine for a moment the Supreme Court suddenly decided that the District Attorney's Office in Bernalillo County (Albuquerque) would no longer have jurisdiction to prosecute felony crimes. Let's go further—what if the state of Texas to the east of New Mexico no longer had the authority to prosecute felony crimes? I would assume that the rate of crimes would increase in Albuquerque and Texas as a result. Once again, this Article is not focused on the need to modify or overturn the MCA. However, the discussion is relevant, since the MCA and the decision in *Oliphant* are inextricably intertwined with the Federal Rules of Criminal Procedure.

2. *Duro v. Reina*'s Further Impact on Tribal Sovereignty and Ability to Prosecute Nonmember Indians

To understand the context of pretrial interviews in tribal court, it is important to recognize that tribal courts can exercise criminal jurisdiction over those persons who are enrolled members of the tribe.[133] Prior to the *Duro v. Reina* decision, it was understood that tribes could exercise criminal misdemeanor jurisdiction over those persons who are not members of that particular tribe.[134] However, the Supreme

129. *Id.* (Marshall, J., dissenting).

130. Transcript of Oral Argument at 19–30, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (No. 76-5729).

131. *Slade Thomas Gorton III*, C-SPAN, https://www.cspan.org/person/4381/SladeThomas GortonIII [https://perma.cc/3X3L-SEKH].

132. Jonathan Riedel, *Mirrored Harms: Unintended Consequences in the Grant of Tribal Court Jurisdiction over Non-Indian Abuser*s, 45 AM. INDIAN L. REV. 211, 211–12 (2021).

133. 25 U.S.C. § 3601(4).

134. Duro v. Reina, 495 U.S. 676, 679 (1990).

Court then limited the authority of tribes to prosecute nonmember Indians.[135]

In *Duro*, the Court held in accordance with *Oliphant* that tribes had been divested of criminal jurisdiction or lacked jurisdiction over nonmember Indians who commit crimes in Indian country.[136] Albert Duro was not a member of the Salt River Pima Maricopa Indian Community, but was instead a member of the Torres-Martinez Desert Cahuilla Indians.[137] Duro was living on the Salt River Indian Reservation when he allegedly killed a fourteen-year-old boy inside the boundaries of the reservation.[138] Initially, he was charged with murder and aiding and abetting murder in federal court, but the prosecution dismissed those charges without prejudice.[139] Duro was released to the Salt River tribal authorities and charged with illegally firing a weapon, a misdemeanor crime.[140] The tribal court denied Duro's motion to dismiss for lack of jurisdiction.[141] Duro filed a petition for a writ of habeas corpus in federal court in Arizona.[142] The district court granted the writ and released Duro, holding under *Oliphant* that the tribal court had no jurisdiction over non-Indians.[143] The district court reasoned that the tribal prosecution would violate the equal protection guarantee of freedom from discrimination based on race.[144] The Ninth Circuit reversed[145] and held that the tribe had jurisdiction over all Indians, not simply its own members.[146] The Court noted that holding tribes lacked criminal jurisdiction over nonmembers would create a "jurisdictional void," since only the state might have the power to prosecute the nonmember, and the state may lack the power or resources to do so.[147]

The case was appealed to the Supreme Court.[148] In an opinion by Justice Kennedy, the Court described this case as falling at the "intersection" of its prior decisions[149] in *Oliphant* and *United States v.*

135. *Id.*
136. *Id.* at 684–85.
137. *Id.* at 679.
138. *Id.*
139. *Id.* at 679–80.
140. *Id.* at 681.
141. *Id.*
142. *Id.* at 681–82.
143. *Id.* at 682; *see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 201 (1978).
144. *Duro*, 495 U.S at 682.
145. *Id.*
146. Duro v. Reina, 851 F.2d 1136, 1138 (9th Cir. 1987).
147. *Id.* at 1146.
148. *Duro*, 495 U.S. at 684.
149. *Id.*

Wheeler.[150] In *Oliphant*, the Court held that the inherent sovereignty of Indian tribes did not allow them to have criminal jurisdiction over non-Indians who commit crimes on the reservation.[151] In *Wheeler*, the Court held that tribes retain jurisdiction to prosecute their members for crimes committed on the reservation.[152] The issue in *Duro* was whether "the sovereignty retained by the tribes in their dependent status within our scheme of government includes the power of criminal jurisdiction over nonmembers."[153] The Court found that the holdings of *Oliphant* and *Wheeler* compelled a negative answer to this question.[154]

Justice Kennedy reasoned that the sovereignty retained by the Indian tribes is "of a unique and limited character."[155] A fully sovereign government would have the power to prosecute all crimes that take place within its territorial boundaries, but the Indian tribes were no longer sovereign in that sense, and tribal members may participate in tribal governance, while nonmembers do not participate in tribal governance.[156] Consequently, the Court concluded that it was too great an intrusion to allow tribes to prosecute nonmembers.[157] The Court concluded that if the tribes still believed that there remained a "jurisdictional void," despite these options, they could persuade Congress to give it to them.[158]

Within six months, Congress abrogated and effectively overturned the *Duro* decision by amending the Indian Civil Rights Act of 1968[159] to affirm that tribes had inherent criminal jurisdiction over

150. 435 U.S. 313 (1978).

151. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

152. In *Wheeler*, the Court held that a tribe could prosecute an Indian for an alleged crime where the Indian is a member of that particular tribe. The Court held that no double jeopardy would attach. United States v. Wheeler, 435 U.S. 313, 313 (1978).

153. *Duro*, 495 U.S. at 684.

154. *Id.* at 685.

155. *Id.* (citing *Wheeler*, 435 U.S. at 313).

156. *Id.*

157. *Id.* at 688.

158. *Id.* at 697–98.

159. The Indian Civil Rights Act of 1968 (ICRA) was enacted by Congress as Title II of the 1968 Civil Rights Act and is a source for individual rights. *Golden Opportunity: A Contemporary Perspective on the Indian Civil Rights Act of 1968*, FED. BAR ASS'N (Feb. 27, 2018), https://www.fedbar.org/blog/golden-opportunity-a-contemporary-perspective-on-the-indian-civil-rights-act-of-1968/ [https://perma.cc/2PER-X7FM]. The goal of the ICRA is to ensure that Indians are "afforded the broad constitutional rights secured to other Americans to protect individual Indians from arbitrary and unjust actions of tribal governments." *Id.* As codified in 25 U.S.C. section 1302, the ICRA sets forth that:

> No Indian tribe in exercising powers of self-government shall—

nonmember Indians.[160] Congress amended a section of the Indian Civil Rights Act, 25 U.S.C. section 1301, to include the power to "exercise criminal jurisdiction over all Indians" as one of the powers of self-government.[161] This congressional "*Duro*-Fix" restored tribal

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(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the rights of the people peaceably to assemble and petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and his own expense to have the assistance of counsel for his defense.

25 U.S.C. § 1302(a)(1)–(6) (1968). Sentencing is limited to misdemeanors in most situations: section 1302(a)(7) sets forth that no Indian tribe may "impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000 or both," except where:

the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for any offense comparable to any offense that would be punishable by more than 1 year of imprisonment if prosecuted the United States or any of the States.

Id. § 1302(a)(7), (b). In those cases, sentencing is "not to exceed 3 years for any 1 offense, or a fine greater than $5,000, but not to exceed $15,000, or both," and a criminal proceeding may not result in "punishment greater than imprisonment for a term of 9 years." *Id.* § 1302(a)(7)(C)–(D). The ICRA further addresses the rights of defendants:

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant that assistance of a defense attorney licensed to practice by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings;

(B) is licensed to practice law by any jurisdiction in the United States . . . .

Id. § 1302(c)(1)–(3).

160. 25 U.S.C. § 1301 (1968) (amended 1991).

161. *Id.*

court criminal jurisdiction over all Indians, members and nonmembers alike.[162] Importantly, the *Duro*-Fix recognized the inherent sovereignty of tribes.[163]

Fourteen years later, the Supreme Court ruled on the constitutionality of the amendment to 25 U.S.C. section 1301. In *United States v. Lara*,[164] the Supreme Court upheld the amendment to the ICRA and addressed the issue as to whether the federal government conferred power on tribes to prosecute nonmember Indians.[165] Because the Court held Congress did not delegate federal jurisdiction to the tribes to prosecute nonmember Indians, the Fifth Amendment provision against double jeopardy was not violated by the tribe and the federal government's prosecution of a defendant for offenses arising out of the same conduct.[166] Both independent sovereigns are entitled to vindicate their identical public policies.[167]

Thus, the Court has found that tribes have misdemeanor jurisdiction over both Indians who are members and nonmembers of the tribe.[168] There is no double jeopardy when the tribe and federal government prosecute an Indian for the same alleged crime.[169] However, tribes have felony jurisdiction over non-Indians under very limited circumstances.[170]

3. *Oklahoma v. Castro-Huerta* Reverses Two-Hundred-Year Precedent

On June 29, 2022, the Supreme Court held that the state can intrude into Indian country by prosecuting non-Indians who allegedly

162. JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 256 (2d ed. 2010).

163. 25 U.S.C. §1301(2) (amended 1991); RICHLAND & DEER, *supra* note 162, at 160.

164. 541 U.S. 193 (2004).

165. *Id.* at 196.

166. *Id.* at 210.

167. *Id.*; s*ee also* Gamble v. United States, 139 S. Ct. 1960, 1980 (2019) (upholding the concept of dual sovereignty in the case of state and federal prosecutions, without mention of tribal prosecutions).

168. *Lara*, 541 U.S. at 199; *see* Michael J. Bulzomi, *Indian Country and the Tribal Law and Order Act of 2010*, FBI LAW ENF'T BULL.: LEGAL DIGEST (May 1, 2012), https://leb.fbi.gov/articles/legal-digest/legal-digest-indian-country-and-the-tribal-law-and-order-act-of-2010 [perma.cc/CU6N-LCT6].

169. *Lara*, 541 U.S. at 193, 197.

170. Faye C. Elkins, *What Does a Recent Supreme Court Decision Mean for Tribal, State, and Federal Law Enforcement?*, 15 DISPATCH 1 (Jan. 2022), https://cops.usdoj.gov/html/dispatch/01-2022/McGirt_decision.html [perma.cc/5VWA-B8TW].

commit crimes against Indians.[171] *Castro-Huerta* reversed a two-hundred-year precedent that traces back to one of the three cases characterized as the Marshall Trilogy, *Worcester v. Georgia*,[172] that the federal government had exclusive criminal jurisdiction to prosecute non-Indians who allegedly commit crimes against Indians.[173] The Supreme Court instead held that states have, "as a matter of state sovereignty," the power to prosecute non-Indian crimes within Indian country.[174]

Castro-Huerta changed the landscape of the prosecution of non-Indians who allegedly commit crimes in Indian country.[175] The Supreme Court incorrectly opined that "Indian country is part of the

171. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022). The federal trust relationship is one that has been characterized broadly as a "mixture of legal duties, moral obligations, understandings and expectancies" since the federal government and the tribes began their relationship. Lisa Shellenberg, *Enlightening Journalist John Stossel*, LAKOTA TIMES (Apr. 20, 2011), https://www.lakotatimes.com/articles/enlightening-journalist-john-stossel/ [perma.cc/W62F-JQY5]. Chief Justice John Marshall indicated in *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831), that tribes are "domestic dependent nations" and, in *Worcester v. Georgia*, 31 U.S. 515, 519 (1832), "distinct, independent political communities," thus validating their sovereign power and recognizing how treaties entitled tribes to services in exchange for the cession of land. Matthew L.M. Fletcher, *Failed Protectors: The Indian Trust and Killers of the Flower Moon*, 117 MICH. L. REV. 1253, 1256–57 (2019). These treaties initiated the relationship between the federal government and tribes. As a domestic sovereign, a tribe has the authority "to negotiate and execute treaties with the United States." *Id.* at 1257. In this negotiated relationship, the federal government agreed to and acquired certain obligations that fall within the scope of the duty of protection. In short, the federal government "has an obligation to protect those treaty rights." *Id.* at 1258.

The relationship has been analogized to "that of trustee and beneficiary," where the United States is the trustee. *Id.* at 1267. Chief Justice John Marshall's description has become entrenched in the law—in characterizing tribes as "domestic dependent nations," he further stated that "they are in a state of pupilage[;] [t]heir relation to the United States resembles that of a ward to his guardian." *Cherokee Nation*, 30 U.S. at 2; Fletcher, *supra*, at 1256 n.17. This story of guardianship and dependency persisted at least until the 1970s when self-determination became national policy. *Id.* at 1263 n.56. As a result, Congress began to liken the general trust relationship to that of a "trust obligation," or a mere moral obligation which is unenforceable. *Id.* at 1265. Enforceable trust duties or obligations, however, refer "to the obligations to manage tribal or American Indian assets that the United States has imposed on itself by statute or regulation—in other words, an enforceable trust or fiduciary duty." *Id.* at 1267.

172. 31 U.S. 515 (1832). In a scathing dissent in *Castro-Huerta*, Justice Gorsuch wrote: "*Worcester* proved that, even in the '[c]ourts of the conqueror,' the rule of law meant something." *Castro-Huerta*, 142 S. Ct. at 2505 (Gorsuch, J., dissenting) (quoting Johnson v. M'Intosh, 21 U.S. 543, 588 (1823)). In his conclusion, Justice Gorsuch wrote: "One can only hope that political branches and future courts will do their duty to honor the Nation's promises even as we have failed today to do our own." *Id.* at 2527.

173. *Castro-Huerta*, 142 S. Ct. at 2491–94.

174. *Id.* at 2493.

175. *See* Gregory Ablavsky & Elizabeth Hidalgo Reese, *The Supreme Court Strikes Again - This Time at Tribal Sovereignty*, WASH. POST (July 1, 2022), https://www.washingtonpost.com/opinions/2022/07/01/castro-huerta-oklahoma-supreme-court-tribal-sovereignty/ [http://perma.cc/553L-YFME] ("To put it bluntly, this decision is an act of conquest. And it could signal a sea change in federal Indian law, ushering in a new era governed by selective ignorance of history and deference to state power.").

State, not separate from the State."[176] Under its holding in *Castro-Huerta,* the state and federal government have concurrent jurisdiction to prosecute non-Indians who allegedly commit crimes against Indians.[177]

The result *of Castro-Huerta* is in direct opposition to the eloquent words of Justice Gorsuch in *McGirt v. Oklahoma*,[178] where he wrote, "on the far end of the Trail of Tears was a promise."[179] Specifically, the application of state and federal procedural rules will impact how discovery is provided and the tools that the parties may use to conduct investigations prior to trial. The Federal Rules of Criminal Procedure will apply to the cases where federal prosecutors choose to exercise jurisdiction.[180] There will be no pretrial interviews for cases prosecuted by the federal government involving Indian defendants.[181]

Castro-Huerta's significant impact will extend to cases that arise in parts of Indian country in New Mexico as a result of the application of New Mexico's criminal procedural rules, which require pretrial interviews. The New Mexico Rules of Criminal Procedure for Magistrate, Metropolitan and District Courts require that, upon order of the court or if requested by either party, any person other than the defendant with information that is subject to discovery must give a pretrial interview.[182] Further, the New Mexico Rules of Criminal Procedure for District Courts include that "a party may obtain the interview by conferring in good faith with opposing counsel and the person to be examined regarding scheduling of the interview."[183] Failure to comply with these rules may result in the court prohibiting a party from calling the witness who refused to submit to pretrial interviews or prohibiting the introduction into evidence of any material not disclosed in pretrial interview.[184]

Castro-Huerta underscores how the application of the federal government's criminal system in Indian country has created a mess

176. *Castro-Huerta*, 142 S. Ct. at 2502.
177. *Id.* at 2481.
178. 140 S. Ct. 2452 (2020).
179. *Id.* at 2459.
180. *See* FED. R. CRIM. P. 1.
181. *See id.* r. 15. Depositions under the Federal Rules of Criminal Procedure may be taken only by order of the court, not as a matter of right by the parties. *Id.* (A party *may* move that a prospective witness be deposed in order to preserve testimony for trial. The court *may* grant the motion because of exceptional circumstances and in the interest of justice." (emphasis added)).
182. *See* N.M. R. CRIM. P. 5-503(A), 6-504(D), 7-504(C)(1).
183. *See* N.M. R. CRIM. P. 7-504(C).
184. *See* N.M. R. CRIM. P. 6-504(F), 7-504(H).

based upon federal policies and two decisions from the U.S. Supreme Court: *Oliphant*, which has been wreaking havoc in Indian country for the past forty-four years; and now *Castro-Huerta*. The result is disparate treatment for Indians as opposed to non-Indians.

D. Tribal Courts' Exercise of Criminal Jurisdiction

As described above**,** tribal courts can prosecute members of that particular tribe, as well as non-members. In addition, tribal courts can exercise criminal jurisdiction over both tribal and non-tribal members for the same alleged criminal offense that the federal government prosecutes that defendant.[185] However, tribal courts are bound by the ICRA,[186] which did not incorporate all provisions of the Bill of Rights.[187]

In *Wheeler*,[188] the Supreme Court held that the double jeopardy provision of the Fifth Amendment was not violated when an Indian was convicted in federal court after having been convicted of a lesser included offense in tribal court.[189] A tribe retained sovereignty even as it became a domestic, dependent nation.[190] Included in that retained sovereignty is the tribe's ability to prosecute its own members under its own authority.[191] If the federal government had delegated to tribes the authority to prosecute tribal members, a second prosecution would offend the double jeopardy clause.[192] Instead, "tribal and federal prosecutions are brought by separate sovereigns" and "they are not 'for the same offence.'"[193] The double jeopardy clause "does not bar one when the other has occurred."[194]

185. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022).

186. Pursuant to the ICRA, tribal court sentences are limited to maximum sentences of up to three years in prison and a monetary fine. *See* 25 U.S.C. § 1302(b) (1968).

187. *See* Talton v. Mayes, 163 U.S. 376, 383–84 (1896). In *Talton*, the Supreme Court held that because tribes are "distinct, independent political communities" their governments and courts were not subject to Fifth Amendment limitations. *Id.* at 383 (quoting *Worcester v. Georgia*, 31 U.S. 515, 519 (1832)).

188. 435 U.S. 313 (1978).

189. *See id.*

190. *Id.* at 323.

191. *Id.* at 326.

192. *See id.* at 328–30.

193. *Id.* at 329–30.

194. *Id.* at 330.

II. THE EARLY HISTORY OF CIVIL AND CRIMINAL DISCOVERY

In the following four sections, I will make a fast switch from "Indian cases" to the rules of engagement: the Federal Rules of Criminal Procedure. It may seem odd to make such a switch midstream. However, I believe it is important to know the context of how the Federal Rules of Criminal Procedure are applied to the prosecution of Indians in federal court. The prosecution of Indians is tied to the tools that the United States will use to support the prosecution: discovery.

There was no criminal discovery that existed at the time of the American Revolution, except in cases of treason or extrajudicial confession.[195] The concept of discovery began in the English Courts,[196] where trial preparation was initially limited to review of written pleadings.[197] The purpose of the pleadings was to limit the case to a single triable issue of fact.[198] The expectation was that the opposing party would deny every allegation in the pleadings issued by the opponent that would be challenged at trial.[199]

The system was inadequate, and as a result, lawmakers and courts developed more complicated and technical rules for obtaining pretrial discovery.[200] To promote disclosure of relevant information before trial, the English Courts of Chancery used a bill in equity.[201] The bill in equity set forth all relevant facts and circumstances of the case, which included questions addressed to the defendant, although there was no constructive admission for failure to deny the questions.[202] This system also proved to be inadequate. In the mid-nineteenth century, the law was changed by acts of parliament and developments in professional practice.[203]

Discovery came to involve the prosecutor's disclosure to the defense attorney of names and addresses of persons who had information that might be useful to the defense.[204] However, rules granting civil or criminal litigants the tools for obtaining evidence before trial were

195. Jerry E. Norton, *Discovery in the Criminal Process*, 61 J. CRIM. L. & CRIMINOLOGY 11, 12 (1970).
196. *See* Hickman v. Taylor, 329 U.S. 495, 515 (1947) (Jackson, J., concurring).
197. *See* GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 1–2 (1932).
198. *Id.* at 1.
199. *Id.*
200. *Id.* at 5.
201. *Id.* at 6.
202. *Id.*
203. *Id.* at 7.
204. *See* Hickman v. Taylor, 329 U.S. 495, 518 (1947) (Jackson, J., concurring).

minimal at common law and in statutory law until the mid-twentieth century.[205] Civil litigation required factual specificity in complaints asserting causes of action, or "fact pleading,"[206] but the law did not provide plaintiffs authority to uncover those facts.[207] Accordingly, facts could be gathered through an independent investigation, but there was no means to compel disclosure from opposing parties or to examine potential witnesses under oath. The means to compel evidence was centered on the trial process.[208] With this limited pretrial discovery, some witnesses set forth what they knew for the first time in their trial testimony.[209]

III. HISTORY OF THE FEDERAL CIVIL AND CRIMINAL RULES

The Rules Enabling Act, enacted on June 19, 1934, is a congressional act giving the judicial branch the power to promulgate the Federal Rules of Civil Procedure.[210] Amendments to the Rules Enabling Act then allowed for the creation of the Federal Rules of Criminal Procedure.[211] The Committee on Rules of Practice and Procedure (the Standing Committee) carries out the revision of the rules.[212] The Standing Committee and its advisory committees are part of the Judicial Conference of the United States,[213] which is the policymaking body of the U.S. federal courts.[214]

In 1938, the Federal Rules of Civil Procedure were reformed with civil litigation moving from a model of fact pleading to one of notice pleading, which gave parties new and powerful tools for pretrial investigation.[215] Congress opened the door to an era of pretrial

205. Darryl K. Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 AM. CRIM. L. REV. 155, 164 (2018). In 1938, the modern power for litigants to obtain discovery began with the adoption of the Federal Rules of Civil Procedure. *See* John H. Langbein, *The Disappearance of Civil Trial in the United States,* 122 YALE L.J. 522, 542–45 (2012).

206. Brown, *supra* note 205, at 164.

207. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1142 (1982); Langbein, *supra* note 205, at 525, 543.

208. *See generally* Langbein, *supra* note 205, at 522 (explaining how "pretrial process left trial as the only occasion at which it was sometimes possible to investigate issues of fact").

209. *See id.* at 525.

210. Burbank, *supra* note 207, at 1023 n.33, 1024.

211. *Id.* at 1169 n.664.

212. *Id.* at 1021 n.17.

213. *Id.*

214. 28 U.S.C. § 331.

215. *See generally* Burbank, *supra* note 207, at 1027 (explaining "the adequacy of the Rules Enabling Act of 1934, reinterpreted in the light of its history, for the needs of the nation today").

development and testing in civil litigation.[216] Previously, a plaintiff had to conduct an informal investigation to corroborate the complaint.[217] After meeting this burden, the plaintiff could petition the court to compel pretrial information.[218] Accordingly, before trial, civil parties could depose witnesses under oath, compel answers to interrogatories, and compel access to documents.[219]

In February 1941, the Supreme Court appointed an Advisory Committee on Rules of Criminal Procedure with the goal of drafting the first Federal Rules of Criminal Procedure.[220] This action was prompted by the movement toward "reform of federal civil procedure that transformed litigation in 1938."[221] "Over the next six months, committee Reporter James J. Robinson and his staff sifted through public commentary and existing law to create a new set of rules governing criminal disputes."[222]

During the early meetings, transcripts show a divergence of opinion between the views of Reporter Robinson and Alexander Holtzoff, the committee's secretary.[223] "Robinson's proposal would have retained the parallelism between civil and criminal procedure that had persisted for centuries at common law."[224] However, Holtzoff persuaded others on the committee of his view that there should be no reform to the rules of criminal procedure.[225] "The repercussions [of Holtzoff's approach] were enormous, as many states adopted the federal template as their own."[226]

As a consequence, the first draft "was ultimately forgotten," "[c]onfidential and never publicly circulated."[227] Significantly, "the original conception of the Federal Code of Criminal Procedure

216. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010).

217. *Id.* at 554.

218. *Id.* at 554–55.

219. Langbein, *supra* note 205, at 545.

220. Meyn, *supra* note 22, at 698.

221. *Id.*

222. *Id.*

223. *Id.* Alexander Holtzoff was a former assistant to the Office of Attorney General of the United States of the United States Department of Justice from 1924 to 1945. In September 1945, he was nominated by President Harry S. Truman to Associate Justice on the United States District Court of the United States for the District of Columbia. *Alexander Holtzoff*, HIST. SOC'Y D.C. CIR., https://dcchs.org/judges/holtzoff-alexander/ [https://perma.cc/ZZ4V-24TX].

224. Meyn, *supra* note 22, at 699.

225. *Id.*

226. *Id.*

227. *Id.* at 698.

integrated the rules of *civil* procedure."[228] Specifically, "[t]he advisory committee had drafted a unified code of procedure that would have governed all litigation in federal courts, civil and criminal, and which would have influenced reform in the majority of states."[229] In 1944, the committee submitted a final product that fundamentally differed from its original draft.[230] Consequently, "criminal litigation [has been] placed on a vastly different course than civil litigation."[231]

On December 26, 1944, the Court adopted the first Federal Rules of Criminal Procedure that permitted a defendant the post-complaint and pretrial right to inspect materials the government had impounded.[232] Then, on February 8, 1946, the 1946 Federal Rules of Criminal Procedure were reformed containing *none of the discovery procedures adopted into the Federal Rules of Civil Procedure.*[233]

IV. CURRENT STATUS OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Currently, the Federal Rules of Criminal Procedure are set forth in nine sections containing sixty-one rules. This Article will focus on Title IV, Arraignment and Preparation for Trial, Rule 16, entitled Discovery and Inspection.[234] Rule 16 of the Federal Rules of Criminal Procedure was adopted by order of the Supreme Court on December 26, 1944.[235] In criminal cases, formal discovery did not exist until the adoption of Rule 16;[236] and prior to the rule's creation, defense attorneys struggled to apply civil discovery rules in criminal proceedings.[237] The extent to which pretrial discovery should be permitted in

228. *Id.*
229. *Id.*
230. *Id.*
231. *See supra* notes 223–224 and accompanying text.
232. FED. R. CRIM. P. 16 advisory committee's note to 1944 amendment.
233. *See id.*
234. FED. R. CRIM. P. 16.
235. Whether under existing law discovery may be permitted in criminal cases is doubtful. FED. R. CRIM. P. historical note.
236. FRANK MILLER ET AL., CRIMINAL JUSTICE ADMINISTRATION CASES AND MATERIALS 750 (3d ed. 1986). In *United States v. Rosenfeld*, the court wrote that whether discovery may be permitted in criminal cases may be doubtful under existing law. 57 F.2d 74, 76–77 (2d Cir. 1932). *See* Sarokin & Zuckerman, *supra* note 1, at 1092 (citing MILLER ET AL., *supra*, at 750).
237. *See, e.g.*, United States v. Rosenfeld, 57 F.2d 74, 76 (2d Cir. 1932) (refusing defendant's request for the court to require the district attorney to turn over for inspection by defense counsel and possible use on cross-examination certain written statements made by government witnesses prior to trial). "To allow an opposing party to use such written statements merely for exploratory purposes in the hope that he may find some contradiction in the witness' testimony is a doctrine with which the writer of this opinion has little sympathy." *Id.*

criminal cases is a complex and controversial issue,[238] and it took years to develop Rule 16.[239] The early version of the rule conferred only limited duties to disclose.[240]

Rule 16 of the Federal Rules of Criminal Discovery is the primary tool for discovery in the criminal context. Rule 16 is principally designed to "minimize the undesirable effects of surprise at trial" and to "otherwise contribute to the fair and efficient administration of justice."[241] In its earliest versions, Rule 16 conferred only limited disclosure obligations;[242] in contrast to discovery in the civil context, Rule 16 only provides minor disclosure of pretrial information.[243] Rule 16 provides disclosure of the following discovery matters: the oral or recorded statement of the defendant, the defendant's prior record, documents and tangible objects, reports of examinations and tests, and expert witnesses.[244] A defendant must request the information from the government in order to receive discoverable material in the government's care, custody, or control.[245]

Subsequent amendments were made to Rule 16, with the most significant changes made in 1966 when the scope of pretrial discovery was expanded, permitting a defendant access to his own statement, grand jury testimony, and reports of scientific tests.[246] In 1974, the rules changed to provide greater discovery to both the prosecution and the defense.[247] The 1975 amendment discussed adding more rules

238. Pretrial discovery in criminal cases has been addressed in legal literature advocating for increasing the range of discovery. *See, e.g.*, Brennan, *supra* note 1, at 279, 285; Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 293–94 (1960); Goldstein, *supra* note 1, at 1149, 1192; Krantz, *supra* note 8, at 144; Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 228–29 (1964).

239. FED. R. CRIM. P. 16. Historical note.

240. MILLER ET AL., *supra* note 236, at 750.

241. Smith v. United States, 491 A.2d. 1144, 1147 (D.C. Cir. 1985).

242. Sarokin & Zuckerman, *supra* note 1, at 1092.

243. *Compare* FED. R. CRIM. P. 16, *with* FED. R. CIV. P. 26(b) (calling for more expansive discovery and permitting parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action").

244. FED. R. CRIM. P. 16.

245. *Id.* Rule 16 is silent on the issue of when the discovery right of a defendant vests. *See id.*; s*ee also* Clifford v. United States, 532 A.2d 628, 634 n.5 (D.C. Cir. 1987) (noting that Rule 16 "applies only to pretrial discovery"). Although the general practice might be for the government to provide formal discovery in a felony matter only after indictment, the rule does not inhibit "the court's potential discovery powers." *Clifford*, 532 A.2d at 634 n.5; *see also* United States v. Richter, 488 F.2d 170, 173 (9th Cir. 1973).

246. FED. R. CRIM. P. 16 advisory committee's note to 1966 amendment.

247. *Id.* r. 16 advisory committee's note to 1974 amendment (stating that "[t]he rule is intended to prescribe the minimum amount of discovery to which the parties are entitled"). Significantly, the 1974 Advisory Notes set forth that: "[t]he requirement that the [defendant's] statement be disclosed

regarding the government turning over witness lists to the defendants in the Committee Action section.[248] Section B of the amendment proposed the court become involved only when necessary to resolve a dispute or issue an order regulating compliance with discovery.[249] In 1991, an amendment "slightly" expanded government disclosure to the defense of statements made by the defendant.[250] In 1993, the rules expanded criminal discovery by requiring disclosure of the intent to rely on expert opinion testimony.[251] The amendment was intended to minimize surprise that often results from unexpected expert testimony.[252] Rule 16 was then subsequently amended in 1994,[253] 1997,[254] 2002,[255] and 2013.[256]

In summary, Rule 16 is the primary means of obtaining discovery in criminal matters in federal court. There have been no amendments to the Federal Rules of Criminal Procedure regarding pretrial interviews.[257] Each federal district court provides its own individual "Discovery Orders" and local criminal rules.[258]

V. HOW ARE AMENDMENTS MADE, AND WHO ARE THE INDIVIDUALS THAT ARE INVOLVED?

Congress authorized the federal judiciary "to prescribe rules of practice, procedure and evidence" for the federal courts, subject to the ultimate legislative right of the Congress "to reject, modify or defer

prior to trial, rather than waiting until trial, also contributes to efficiency of administration. It is during the pretrial stage that the defendant usually decides whether to plead guilty." *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. FED. R. CRIM. P. 16 advisory committee's note to 1966 amendment.

252. *Id.*

253. FED. R. CRIM. P. 16. "The amendment [was] intended to clarify that the discovery and disclosure requirements of the rule apply equally to individual and organizational defendants." *Id.* r. 16 advisory committee's note to 1994 amendment.

254. *Id.* This amendment was intended to be a parallel reciprocal disclosure requirement from the 1993 amendment. In this amendment, the defendant must disclose information of defense expert witnesses regarding the defendant's mental condition. *Id.*

255. *Id.* This amendment involved restyling the Criminal Rules to make them more understandable. There were no substantive changes. *Id.*

256. *Id.* This amendment clarified that the 2002 restyling of Rule 16 did not change the protection afforded to government work product. *Id.*

257. FED. R. CRIM. P. 16 advisory committee's notes.

258. FED. R. CRIM. P. 57.

any of the rules."[259] The authority and procedures for promulgating rules are set forth in the Rules Enabling Act.[260]

Over time, the Supreme Court delegated the work and oversight of the rulemaking process to the committees of the Judicial Conference, the principal policy-making body of the U.S. courts.[261] The Judicial Conference is also required by statute to "carry on a continuous study of the operation and effect of the general rules of practice and procedure."[262] "As part of this continuing obligation, the Conference is authorized to recommend amendments and additions to the rules to promote: simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[263] In 1988, amendments to the Rules Enabling Act formalized this committee process.[264] Today, the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Committee") and its five advisory rules committees "carry on continuous study of the operation and effect" of the federal rules as directed by the Rules Enabling Act.[265] That process is described below:

> The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule.[266]

If an advisory committee pursues a proposal, it may seek permission from the Standing Committee to publish a draft of the contemplated amendment.[267] Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated by the Standing

259. *Overview for the Bench, Bar, and Public*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [http://perma.cc/TFU2-D9WN].
260. 28 U.S.C. §§ 2071–77 (2018).
261. 28 U.S.C. § 331.
262. *Id.*
263. *Overview for the Bench, Bar, and Public*, *supra* note 259.
264. *See* 28 U.S.C. § 331.
265. *Overview for the Bench, Bar, and Public*, *supra* note 259.
266. *Id.*
267. *Id.*

Committee.[268] The Standing Committee independently reviews the findings of the advisory committees and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court.[269]

The Chief Justice of the Supreme Court appoints the advisory committee members, and the terms are limited to no more than six years.[270] In contrast to the Judicial Conference committees, the advisory committees include "not only federal judges, but also practicing lawyers, law professors, state chief justices, and high-level officials from the Department of Justice and federal public defender organizations."[271] The advisory committee includes a reporter—a position typically filled by prominent law professors, who are leading experts in their respective fields.[272]

The criteria used to select advisory committee members is based upon their professional legal experiences and life experiences.[273] I assume there has never been an indigenous woman or man who has ever been a part of any rule-making committees. It is doubtful that the committee members in charge of the Federal Rules of Criminal Procedure have ever stepped into a tribal court or into Indian country. There is

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268. *Id.*

269. *Id.* The Court considers the proposals and, if it occurs, officially promulgates the revised rules by order before May 1, to take effect no earlier than December 1 of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* The "reporters research the relevant law and draft memoranda analyzing suggested rule changes, develop proposed drafts of rules for committee consideration, review and summarize public comments or proposed amendments, and generate the committee notes and other materials documenting the rules committees' work." *Id.*

Currently, the Honorable James C. Dever III, United States District Court, Raleigh, North Carolina, is the Chair of the Advisory Committee on Criminal Rules. Professor Sara Sun Beale, Duke School of Law is the "Reporter." Professor Nancy J. King, Vanderbilt University School of Law is the "Associate Reporter." *Membership of the Committee on Rules of Practice and Procedure and Advisory Rules Committees*, U.S. CTS., https://www.uscourts.gov/file/57985/download [http://perma.cc/BE7Z-PJNB]. The members are: Honorable Nicole M. Argentieri, Acting Assistant Attorney General (ex officio), United States Department of Justice, Washington, DC; Honorable Andre Birotte, Jr., United States District Court, Los Angeles, California; Honorable Jane Boyle, United States District Court, Dallas, Texas; Honorable Timothy Burgess, United States District Court, Anchorage, AK; Honorable Robert J. Conrad, Jr., United States District Court, Charlotte, North Carolina; Dean Roger A. Fairfax, Jr., American University, Washington College of Law, Washington, DC; Honorable Michael J. Garcia, New York State Court of Appeals, Albany, New York; Honorable Michael Harvey, United States District Court, Washington, DC; Marianne Mariano, Esq., Office of the Federal Public Defender, Buffalo, New York; Honorable Jacqueline H. Nguyen, United States Court of Appeals, Pasadena, California; Catherine M. Recker, Esq., Welsh & Recker PC, Philadelphia, Pennsylvania; Susan M. Robinson, Esq., Thomas Combs & Spann PLLC, Charleston, West Virginia. *Id.*

273. *See id.*

no Supreme Court justice or possibly any federal judge who has defended an Indian in U.S. District Court.[274]

Any change to the Federal Rules of Criminal Procedure will depend upon the Standing Committee's recommendation to the Judicial Conference.[275] The Supreme Court would need to appoint persons with relevant experience in this complex area. Otherwise, Indians will continue to be impacted disproportionately.

VI. TRIBAL COURTS, STATE COURTS, AND MILITARY COURTS' USE OF PRETRIAL INTERVIEWS AND DEPOSITIONS

A. Tribal Courts

This portion of the Article will highlight three tribal courts in New Mexico that require pretrial interviews, as well as the tribal court where *Oliphant* arose: the Pueblo of Laguna, the Navajo Nation, the Suquamish Indian Tribe, and the Pueblo of Zuni.[276]

1. The Pueblo of Laguna

The Pueblo of Laguna created rules that provide defendants fair rights in criminal cases.[277] Specifically, Rule 14 of the Laguna Pueblo Rules of Criminal Procedure gives defendants numerous rights before trial, including the right to confront and cross-examine all witnesses against them.[278] Rule 22, titled Disclosures and Inspection, provides that both parties need to file a list of witnesses they plan to use with the court at least fourteen days before the trial.[279] The witnesses are to be made available to the opposing party for pretrial interviews.[280]

The Honorable Bruce Fox was a judge in Laguna Pueblo in 2010 when the tribe changed its rules of criminal procedure and chief judge when the amended rules were implemented into the Pueblo of Laguna's Tribal Code in 2014.[281] Judge Fox explained what brought on

274. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PENN. L. REV. 195, 195 (1984).

275. *Overview for the Bench, Bar, and Public*, *supra* note 259.

276. There is another Pueblo in New Mexico that requires pretrial interviews. The Pueblo does not have a written code. However, as Director of the Southwest Indian Law Clinic, I have supervised students who have conducted pretrial interviews.

277. LAGUNA PUEBLO R. CRIM. P. 14.

278. *Id.*

279. *Id.* r. 22.

280. *Id.*

281. Telephone Interview with the Honorable Bruce Fox, Div. X 2d Jud. Dist. Ct. N.M., (Mar. 14, 2022) (notes on file with author).

the change to the rules and how they altered the tribe's criminal procedural rules.[282] Before the amended rule was created, criminal cases were somewhat frustrating without a formal process for pretrial interviews—the parties would talk and negotiate the occurrence of pretrial interviews between themselves. The court wanted to formalize the process to ensure that parties in the future conducted pretrial interviews.[283] The Pueblo of Laguna was trying to balance traditional procedures with making the tribal courts more westernized.

The rulemaking process took the committee about four years, and after the changes were implemented there was no backlash from parties.[284] It helped the Pueblo of Laguna's court system by creating a formal structure that everyone needed to follow. The Pueblo of Laguna is an excellent example of what all tribal courts should look like; all courts in this country need to be fair and give the parties the rights they deserve.

Based upon an interview with Judge Fox, he believes that pretrial interviews serve valuable purposes, such as determining whether the witness will continue to be available for trial and whether witness statements have changed since originally given to the police.[285] He opined that those pretrial interviews assist the attorneys in determining fair and appropriate terms of a pretrial plea agreement, and having pretrial interviews of the opposing side's experts will allow the parties to determine if they need to call experts of their own at trial.[286]

Judge Fox noted that there are cons to pretrial interviews, such as alleged victims feeling humiliated and harassed when pretrial interview questions stray into areas that are not admissible at trial.[287] He has also observed intimidation and harassment during pretrial proceedings in domestic violence cases.[288] Sometimes defendants will intimidate victims over the phone while being held in jail; such defendants can face felony charges if they are caught intimidating a witness.

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282. The Pueblo of Laguna contracted with a law firm to develop a draft of the Rules of Procedure and Evidence. *Id.* The rule changing process involved a committee that held numerous meetings. Within those meetings, they adopted or changed one rule at a time. *Id.* The process for the changes considered input from judges, prosecutors, public defenders, staff attorneys, and contract attorneys. *Id.* The committee examined the State and Federal Rules of Criminal Procedure, as well as the criminal codes of other tribes, such as the Pueblo of Nambe.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

However, the pros outweigh the cons here, as defendants need to have their rights protected, especially when facing criminal charges. Just as with all other rules, some people will not follow them and will choose to create problems; that is inevitable.[289]

I also spoke with a former prosecutor for the Pueblo of Laguna, who affirmed that pretrial interviews are impactful.[290] The prosecutor believed that the pretrial interviews are important to identify facts in dispute and to reach a negotiated settlement.[291]

2. The Navajo Nation

The Navajo Nation has rules that govern witness discovery.[292] Rule 25 of the Navajo Nation Rules of Criminal Procedure was created to make it mandatory for the prosecution to provide the defense with a list of witnesses that the prosecution intends to use at trial.[293] Witnesses cannot testify unless the defendant is given prior notice.[294] There is no stated time limit in this rule, but the prosecutor needs to file a statement no less than twenty days before trial representing that they fulfilled all duties contained in Rule 25.[295] This rule requires the prosecution to disclose the names of witnesses who will testify at trial.[296]

Rule 27 provides for depositions.[297] Specifically, it requires that depositions be conducted in accordance with the Navajo Nation Rules of Civil Procedure and Rules of Evidence.[298] In addition, Rule 26 of the Rules of Civil Procedure states that its purpose is to "allow parties

289. The majority of the tribal courts in New Mexico do not make their tribal code or rules available to the general public. *See Comparative Indigenous Law*, UNIV. MELBOURNE (Sept. 8, 2023), https://unimelb.libguides.com/c.php?g=960328&p=6971238 [https://perma.cc/4QX2-FYKA]. There is another judge who presides over matters at two Pueblos in New Mexico. There are no provisions in the rules of criminal procedure that require pretrial interviews. However, the judge has allowed pretrial interviews so that the parties are able to assess the strengths and weaknesses of the cases and resolve the matter.

290. Telephone Interview with Lyman Paul, former Laguna Tribal Prosecutor (Mar. 20, 2023) (notes on file with author).

291. *Id.* I supervise clinicians in the Southwest Indian Law Clinic. We have conducted pretrial interviews in four other tribal courts. There are no written criminal codes in these tribal courts. However, the tribal judges have seen the benefits of pretrial interviews and ordered that they be conducted.

292. NAVAJO NATION R. CRIM. P. 24–28.

293. *Id.* r. 25(a).

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* r. 27.

298. *Id.*

to prepare for trial, 'to limit a party being surprised at trial, and to define and limit the facts and issues in dispute.'"[299] The Navajo Nation Rules of Criminal Procedure and Rules of Evidence support the proposition that no party should be "surprised at trial."[300]

Based upon my interview with, Ms. Kathleen Bowman, the Director of the Office of Navajo Public Defender, pretrial interviews are an important part of the tribal court process.[301] In speaking with Ms. Bowman, who has worked for the Navajo Nation and handled many pretrial interviews, it seems that the requirement of pretrial interviews has proven successful.[302] Ms. Bowman affirmed that pretrial interviews are required; she also mentioned that cases are dismissed based upon the interviews.[303] This commentary raises several questions: Do federal prosecutors oppose pretrial interviews based upon the possibility of cases being dismissed? Is this a game to increase the number of successful prosecutions, or is the goal to see that justice is served?

3. The Pueblo of Zuni

The Zuni Pueblo's tribal code contains a specific rule regarding pretrial proceedings.[304] Rule 18 of the Zuni Pueblo Rules of Criminal Procedure was created to "settle criminal disputes in a traditional, customary Indian manner by discussion between the parties before a trusted, impartial trial authority" before resorting to a formal trial.[305] The rule also provides that in non-jury trials, the court must schedule a customary pretrial conference.[306] The parties may reach an agreement, and the case will be settled.[307] Per Rule 21, titled Disclosure by Zuni Tribe, the defendant can request a written list of all the witnesses' names, addresses, and any statements made by the witnesses.[308] The prosecution has ten days to comply with the defendant's request.[309] If the prosecutor does not comply, they may be held in contempt.[310] The

299. NAVAJO NATION R. CIV. P. 26.
300. NAVAJO NATION R. CRIM. P. 20, 29.
301. Telephone Interview with Kathleen Bowman, Director/Attorney, Office of Navajo Public Defender (Sept. 22, 2022) (notes on file with author).
302. *Id.*
303. *Id.*
304. *See* ZUNI PUEBLO R. CRIM. P. 18.
305. *Id.* r. 18(A).
306. *Id.* r. 18(B).
307. *Id.* r. 18(F).
308. *Id.* r. 21(A)(4).
309. *Id.*
310. *Id.* r. 21(E).

parties are required to attend a pretrial conference, the defendant can specifically request witness information, and the prosecutor must comply with their request.[311]

4. The Suquamish Tribe

Rule 5.1 of the Suquamish Tribal Court Rules of Criminal Procedure, pertaining to depositions, provides that "[a] deposition may be taken" where "[t]here might otherwise for any reason, be a failure of justice."[312] Although this provision of rule 5.1 only contains eleven words, they are powerful. Depositions are required to avoid a "failure of justice."[313] Contrast these with the 5,908 words contained in the New Mexico Local Rules of Criminal Procedure.[314]

The three tribes highlighted above require depositions be taken to avoid surprises at trial.[315] Specifically, the position of the largest tribe in the country, the Navajo Nation, is that depositions "allow parties to prepare for trial, [and] 'to limit a party being surprised at trial, and to define and limit the facts and issues in dispute.'"[316] Should this not be the same goal of the Federal Rules of Criminal Procedure?

B. State Courts

In contrast to the Federal Rules of Criminal Procedure applied in New Mexico federal courts, several tribes and the state courts of New Mexico require pretrial interviews of witnesses. There are four additional states that require depositions: Florida, Indiana, Missouri, and Vermont.[317] Military courts also require depositions of trial witnesses.[318]

1. Florida

Rule 3.220(h) of the Florida Rules of Criminal Procedure provides generally that "[a]t any time after the filing of the charging document, any party may take the deposition upon oral examination of

311. *Id.* r. 18, 21.
312. SUQUAMISH TRIBE R. CRIM. P. 5.1.
313. *Id.*
314. *See* NAVAJO NATION R. CIV. P.
315. *See supra* Sections VI.A.1–3.
316. *Id.* r. 26(a).
317. FLA. R. CRIM. P. 3.220; IND. R. CRIM. P. 30(A); MO. R. CRIM. P. 25.15(a); VT. R. CRIM. P. 15(a).
318. 10 U.S.C. § 846.

any person authorized" by the rule.[319] However, the rule provides that "[n]o deposition shall be taken in a case in which the defendant is charged only with a misdemeanor or a criminal traffic offense . . . unless good cause can be shown to the trial court."[320] The parties taking the deposition must give reasonable notice; after such notice, "the court may, for good cause shown, extend or shorten the time and may change the location of the deposition."[321] The rule contemplates that a deposition "may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness."[322]

For the most part, "the procedure for taking the deposition, including the scope of the examination, and the *issuance of a subpoena for deposition* by an attorney of record in the action, shall be the same as that provided in the Florida Rules of Civil Procedure."[323] "A witness who refuses to obey a duly served subpoena may be adjudged in contempt of the court . . . ."[324]

In Florida state court criminal proceedings, there are three categories of witnesses: A, B, and C. These categories have separate procedures. Category A witnesses include those "listed by the prosecutor as a Category A witness or listed by a co-defendant as a witness," "any unlisted witness who may have information relevant to the offense," and "any witness listed by the defendant to be called at trial or hearing."[325] The defense may take deposition of this category without the court's leave.[326]

In contrast, Category B witnesses, as identified by the prosecutor, may not be deposed "except upon leave of court with good cause shown."[327] The court will assess good cause by "consider[ing] the consequences to the defendant, the complexities of the issues involved, the complexity of the testimony of the witness (e.g., experts), and other opportunities available to the defendant to discover information

319. FLA. R. CRIM. P. 3.220(h)(1).
320. *Id.* r. 3.220(h)(4).
321. *Id.* r. 3.300(h)(1).
322. *Id.*
323. *Id.*
324. *Id.*
325. *See id.* r. 3.200(h)(1)(A).
326. *Id.*
327. *Id.* r. 3.220(h)(1)(B).

sought by deposition."[328] Finally, Category C witnesses are not subject to deposition at all, unless recategorized by the court.[329]

Rule 3.220(h)(4) addresses the deposition of sensitive witnesses, providing that depositions of children under the age of eighteen may not be videotaped unless otherwise ordered by the court.[330] The court may order the videotaping or taking of a deposition of a witness with "fragile emotional strength" to be in the presence of the trial judge or a special magistrate.[331] Law enforcement officers can also be deposed.[332]

I have spoken with an attorney who has been a licensed attorney since 1994 and has spent the vast majority of her legal career as a public defender in Broward County in Florida.[333] She affirmed that the rules requiring depositions have been very helpful.[334] Although there was a movement for the requirement for depositions to be changed or abolished,[335] the practicing of taking depositions in state criminal prosecutions is common practice for both defense attorneys and prosecutors in Florida.[336] She also told me that with depositions both parties are able to assess the strengths and weaknesses of their cases.[337] Defense attorneys are able to point out such weaknesses to prosecutors, which helps to resolve cases and avoid trials.[338] Efforts to reduce depositions based on cost and to limit depositions in felony cases proved unsuccessful, just like the movement to end the practice of conducting depositions.[339]

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328. *Id.*

329. *Id.* r. 3.220(h)(1)(C).

330. *Id.* r. 3.220(h)(4).

331. *In re* Amend. to Fla. Rule of Crim. Proc. 3.220, 550 So.2d 1097 (Fla. 1989).

332. FLA. R. CRIM. P. 3.220(h)(5). "[L]aw enforcement officers shall appear for deposition, without subpoena, upon written notice of taking deposition . . . . Law enforcement officers who fail to appear for deposition after being served notice as required by the rule may be adjudged in contempt of court." *Id.*
Id.

333. Telephone Interview with Lisa S. Lawlor, Chief Assistant Pub. Def., Broward Cnty., Fla. (June 25, 2024) (notes on file with author).

334. *Id.*

335. *Id.*

336. *Id.*; *see also In re* Amend. to Fla. Rule of Crim. Proc. 3.220, 550 So. at 1098 ("[T]he records and transcripts in these proceedings lead to a single inevitable conclusion. Discovery depositions are a necessary and valuable part of our criminal justice system, and they are clearly worth the risk of some minor abuse.").

337. Telephone Interview with Lisa S. Lawlor, *supra* note 333.

338. *Id.*

339. *Id.*

2. Indiana

Section 3 of Title 35, Article 37, Chapter 4 of the Indiana Code provides that "[t]he state and the defendant may take and use depositions of witnesses in accordance with the Indiana Rules of Trial Procedure."[340] Rule 30 of the Indiana Rules of Trial Procedure sets forth the process for depositions by oral examination.[341] "After commencement of the action, any party may take the testimony of any person, including a party, by deposition by oral examination."[342] The court's leave is not required to take a deposition unless "the plaintiff seeks to take a deposition prior to the expiration of twenty [20] days after service of the summons and complaint upon any defendant," with a few exceptions.[343] Rule 31 then addresses the deposition of witnesses upon written questions.[344] Finally, Rule 32 addresses how depositions can be used: "for the purpose of contradicting or impeaching the testimony of deponent as a witness."[345]

3. Missouri

Section 25.15 of the Missouri Supreme Court Rules provides that "[a] prosecuting attorney in any criminal case may obtain the deposition of any person or oral examination after an indictment or the filing of an information."[346] The same rules governing the manner in which depositions may be taken in civil actions apply in criminal cases.[347]

Depositions are to "be taken in the county where the witnesses live" unless otherwise "agreed upon by the parties, or . . . designated by the court," and the deposition of an imprisoned person "shall be taken where the person is confined, unless otherwise ordered by the court."[348] The defendant cannot be "physically present" at such a pretrial deposition unless agreed upon by the parties or as ordered by the court where there is good cause shown.[349] Finally, pretrial depositions of expert witnesses may occur to enable discovery of "the facts and opinions to which an expert is expected to testify," but the party taking

340. IND. CODE § 35-37-4-3 (2023).
341. *See* IND. R. TRIAL P. 30.
342. *Id.* r. 30(A).
343. *Id.*
344. *Id.* r. 31.
345. *Id.* r. 32.
346. MO. SUP. CT. R. 25.15(a).
347. *Id.*
348. *Id.* r. 25.15(b).
349. *Id.* r. 25.12(c).

the deposition must pay the expert a reasonable hourly fee for that time.[350]

4. Vermont

Rule 15 of the Vermont Rules of Criminal Procedure provides that "[a] defendant or the state, at any time after the filing of an indictment or information charging a felony, or charging a misdemeanor . . . , may take the deposition of a witness subject to such protective orders and deposition schedule as the court may impose."[351] The rule limits when deposition may be taken to before the date set by the court or not later than ninety days after the arraignment, unless the court allows it for good cause.[352]

The party taking the deposition must give all other parties "reasonable written notice of [its] time and place," after which, upon a party's motion, the court can alter the time and place of the deposition, again for good cause.[353] In addition, "[t]he defendant shall not be physically present at the deposition except by agreement of the parties or upon the court order for good cause shown."[354] The determination of good cause rests on whether it is "reasonably likely that the deposition will be used as substantive evidence."[355]

The use of depositions is outlined in subsection 15(h) of the rule: "[a]ny deposition may be used by any party as substantive evidence in the case" if the deponent is unavailable for trial or the witness gives testimony at trial or a hearing inconsistent with that witness's deposition.[356] In addition, "[a]ny deposition may also be used for the purpose of contradicting or impeaching the testimony of the deponent as a witness."[357]

Rule 15 also contains numerous provisions meant to protect the deponent while preserving the defendant's rights throughout the deposition process. For example, "the court may impose conditions under which the defendant may be present," such as requiring the "use of screening or alternative methods of taping or recording which allow defendant limited observation of the deponent and the ability to confer

350. *Id.* r. 25.15(d).
351. VT. R. CRIM. P. 15(a).
352. *Id.*
353. *Id.* r. 15(b).
354. *Id.*
355. *Id.*
356. *Id.* r. 15(h).
357. *Id.*

with counsel."[358] A defendant has the right to be present at a deposition taken to preserve witness testimony to be used at trail, but may be "subject to protective orders . . . , including holding the deposition before a judge."[359]

Generally, depositions in criminal cases in the state of Vermont are taken in the "manner provided in civil actions except as otherwise provided in [the Vermont Rules of Criminal Procedure]," so long as no party defendant is deposed without the defendant's consent and the scope and manner of the deposition itself—the examination and cross-examination—do not exceed what would be allowed at trial.[360] The prosecution must provide the defense with "any relevant written or recorded statement of the witness being deposed which is in the possession . . . of the state and to which the defendant would be entitled at trial."[361] The provision governing how depositions are taken concludes: "Attorneys shall avoid discourteous, disrespectful, argumentative, repetitive, and irrelevant questioning and shall not harass or intimidate a deponent."[362]

Finally, there are several limitations to the ability to depose witnesses under the Vermont Rules of Criminal Procedure. Depositions of law enforcement officers cannot be conducted unless the parties agree or the court approves with good cause shown.[363] Depositions of minors in sexual assault cases are not permitted except by agreement of the parties or approval of the court.[364]

Discovery is the process of information (evidence) exchange between the prosecution and the defense. As the rules governing criminal procedure in Florida, Indiana, Missouri, and Vermont show, depositions are "evidence." They can be used to impeach or contradict a deponent who is a witness at trial. If a witness provides additional

358. *Id.* r. 15(b).
359. *Id.*
360. *Id.* r. 15(d)(1).
361. *Id.*
362. *Id.*
363. *Id.* r. 15(e)(3).
364. *Id.* r. 15(e)(5)(A). Subsection (e)(5)(B) provides:

> The court shall not approve a deposition under this subdivision unless the court finds that the testimony of the child is necessary to assist at trial, that the evidence sought is not reasonably available by other means, and that the probative value of the testimony outweighs the potential detriment to the child of being deposed. In determining whether to approve a deposition under this subdivision, the court shall consider the availability of recorded statements of the victim and the complexity of the issues involved.

Id. r. 15(e)(5)(B).

testimony at trial, that "evidence" can be challenged. An ambush is avoided. This is not the case in federal court, where witnesses who have not been deposed pretrial make the courtroom proceedings an open game for surprises and attacks. As demonstrated by the New Mexico Rules of Criminal Procedure discussed below, rules that result in such a scenario are unjust to defendants.

5. New Mexico

In *State v. Harper*,[365] the prosecutors failed to "abide by an order of the district court to complete witness interviews by a certain deadline."[366] The district court set a discovery deadline by which all witness interviews had to be completed.[367] The prosecution refused to schedule an interview with one of its expert witnesses whose "materiality to its case [was] undisputed until the defense affirmed payment of her fees for the interview.[368] The discovery deadline passed and the defendant moved to exclude the expert witnesses' testimony from trial; the district court granted the motion.[369]

On appeal, the reviewing court wrote that the "right of defendants to interview witnesses without prosecutorial interference is grounded in the constitutional guarantee of due process and notions of elemental fairness."[370] This principle was adopted by the New Mexico Supreme Court in *State v. Orona*,[371] where a "district court's order prohibiting defense access to witnesses was held to be an impediment to the defendant's right to due process, and the [New Mexico] Supreme Court held that 'there was unquestionably a suppression of the means by which the defense could obtain evidence.'"[372] In *Harper*, the court relied on *Orona*, writing, "[i]t should be no different when the district court imposes an obligation to make an essential witness available to the defense for a pretrial interview."[373]

365. 235 P.3d 625 (N.M. Ct. App. 2010).
366. *Id.* at 626.
367. *Id.* at 626–27.
368. *Id.* at 627.
369. *Id.*; *see* N.M. R. CRIM. P. 5-503.
370. *Harper*, 235 P.3d at 632 (quoting State v. Guzman, 71 P.3d 468, 470 (Idaho Ct. App. 2003)).
371. *Id.* at 632 (citing State v. Orona, 589 P.2d 1041, 1043 (N.M. 1979) (holding that witnesses "to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them") (internal quotation marks and citation omitted)).
372. *Id.* (quoting *Orona*, 589 P.2d at 1043).
373. *Id.*

C. Military Courts

The U.S. military has one of the fairest systems in the legal system, allowing for depositions of witnesses.[374] The Military Code provides that—after the counsel for the accused has been notified of the alleged victim's name and the government's intent to call the alleged victim as a witness—the alleged victim can be interviewed at the request of the counsel for the accused.[375] Then, if the alleged victim to be interviewed requests it, the interview must "take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, a victim advocate."[376]

The Manual for Courts-Martial also provides the counsel for the accused access to witnesses to have an "adequate opportunity to prepare its case and equal opportunity to interview witnesses," subject to specific limitations.[377] Those limitations provide that when the prosecution intends to call a victim as a witness, defense counsel must make any request to interview the victim through the "special victim's counsel or other counsel for the victim, if applicable."[378] The interview "shall take place only in the presence of counsel for the Government, counsel for the victim, or if applicable, a victim advocate."[379]

Contrast this scenario with that in federal court, where defense attorneys will meet the alleged victim for the first time at trial.[380] Any litigator knows the challenges of cross-examining an alleged victim. Any question is asked with risk, and if the right question is not asked, the defendant's case could be severely damaged. Imagine for a moment a civil defense litigator meeting the allegedly injured party in federal court for the first time, without ever having deposed them as a witness. This would never happen. If it did, the defense lawyer would face consequences from the client and the federal judge. Is the reason why this does not happen because the loss of money for civil defense attorneys' clients is at risk?

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374. *See* 10 U.S.C. § 849 ("[A] convening authority or a military judge may order depositions at the request of any party.").

375. *Id.* § 806b(f).

376. *Id.*

377. U.S. MANUAL FOR CTS.-MARTIAL r. 701(e) (2019). "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence, subject to the limitations in paragraph (e)(1) of this rule. No party may unreasonably impede the access of another party to a witness or evidence." *Id.*

378. *Id.* r. 701(e)(1)(A).

379. *Id.* r. 701(e)(1)(B).

380. *See supra* note 9.

The deposition process outlined in the Military Code is premised on fairness, and it is ironic that the Federal Rules of Criminal Procedure do not afford defense attorneys the same right to interview alleged victims. This disparity is highlighted by the fact that Indians are subject to a federal law that was enacted 135 years ago and federal rules that Indians had absolutely no role in developing.

The common theme for the tribes, five states,[381] and military courts' use of depositions and pretrial interviews described above is *fairness*. Why then do tribal and state courts provide pretrial interviews? What are the factors? Are the defendants' rights in federal court less important than the defendants' rights in tribal or state court? Do federal judges want the prosecutors to have the upper hand over the defendants? Does justice have a different spectrum in federal court than it does in tribal, state, or military court?

VII. OKLAHOMA V. CASTRO-HUERTA'S IMPACT ON INVESTIGATIONS AND PRETRIAL INTERVIEWS AND A HYPOTHETICAL

A. A Non-Indian Defendant Will Have an Unfair Advantage Over an Indian

As set forth in Part I, the U.S. Supreme Court issued an opinion that could have a devastating impact on Indian tribes, particularly those in New Mexico.[382] On June 28, 2022, if a non-Indian committed a crime on the Navajo Indian Reservation, the federal government would have exclusive jurisdiction to prosecute that person in federal court.[383] As the result of *Castro-Huerta*, the federal government and state government have concurrent jurisdiction to prosecute non-Indians.[384] Now, non-Indians can be prosecuted by the District Attorney's Office in Bernalillo County for alleged crimes that occur in Indian country.

For example, a portion of the Navajo Nation, Tohajilee, is about thirty minutes from Albuquerque, New Mexico.[385] If an alleged crime

381. Ironically, the states of Florida and New Mexico have political leanings in different directions. Notwithstanding, these two occupy the same position that matters of criminal procedure should have a core of fairness, with the idea that no party should be caught by surprise. *See supra* Part VI.

382. *See supra* Part I.

383. *See supra* Part I.

384. *See supra* Part I.

385. *About To'Hajiilee*, NAVAJO NATION DIV. CMTY. DEV., https://tohajiilee.navajochapters.org/ [https://perma.cc/557L-M5K6].

occurs on Tohajilee where the victim is Indian and the defendant is non-Indian, the District Attorney's Office in Bernalillo County and the federal government will have concurrent jurisdiction to prosecute the non-Indian.[386] It cannot be assumed that the state will prosecute the non-Indian for the alleged criminal offense. And my experience shows that, in all likelihood, the state authorities might defer to the federal government for the prosecution of the case.

Let's assume the federal government defers to the state for prosecution. The New Mexico Rules of Criminal Procedure will apply. The defense attorney will have the ability to interview all potential witnesses prior to trial. Assuming the case goes to trial or the defendant enters a guilty plea, the defendant will not be subject to the U.S. Sentencing Guidelines. There is a distinct possibility that the defendant might receive a conditional discharge, deferred sentence, or suspended sentence depending on the alleged offense and the defendant's criminal history. Now, let us assume an Indian commits the *same crime* in Indian country. The defendant will not have the opportunity to interview any potential witnesses and will be subject to the U.S. Sentencing Guidelines. The defendant will be charged with a federal felony and will never have the chance to obtain a conditional discharge, deferred sentence, or suspended sentence. Is this fair?

In the New Mexico state criminal process, the defense has the right to conduct pretrial interviews of witnesses.[387] If a similar crime occurs involving an Indian defendant, the felony prosecution will be subject to exclusive federal jurisdiction.[388] The Federal Rules of Criminal Procedure will apply, and the defense will have no right to conduct pretrial interviews.[389] The non-Indian will have the distinct advantage of interviewing witnesses who will testify at trial in state court for a similar crime charged against the Indian. Is it just for one defendant to have tools to defend herself or himself when another does not? In addition, if both defendants enter guilty pleas to the same offense, the non-Indian will have a chance of receiving a suspended sentence, deferred sentence, or a conditional discharge from a state court judge, but a federal judge will likely impose a felony sentence upon the Indian defendant. This disparity in outcome is unjust.

386. *See supra* Section I.C.3.
387. *See supra* Section VI.B.5.
388. *See supra* Part VI.
389. *See supra* Part VI.

In the city of Albuquerque, if a crime occurs, it follows that the state will prosecute the one who performed the criminal act under a criminal statute. The prosecution will not be based upon whether the defendant is Indian or non-Indian. The opportunities for discovery—with pretrial interviews—will not be based upon whether the defendant is Indian or non-Indian. The sentence will not be based upon whether a person is Indian or non-Indian.

The difference in the scenarios described above illustrates how a 185-year-old law impacts the outcome of crimes committed in Indian country. These unjust circumstances will be a consequence of *Castro-Huerta*.

B. Hypothetical

The following is a hypothetical that could occur on the Navajo Reservation in New Mexico.[390] Imagine an Indian and non-Indian are drinking alcohol with another Indian. Earlier in the day, one of the Indians was wielding a gun and had threatened the other Indian and non-Indian. The person with the gun leaves. Later that night during a party, the person who had the gun walks into the home and starts yelling and pointing an unloaded weapon at everyone in the home. The two people who had seen him earlier tackle him and beat him until he releases the gun. The person has non-life-threatening injuries and is taken to the hospital.

The U.S. Attorney's Office charges the Indian with assault resulting in serious bodily injury. The person goes to trial and is convicted. Based upon the holding of *Castro-Huerta*, the non-Indian will be prosecuted by either the federal or state government. Let's assume the state prosecutes. The defense will have a chance to conduct pretrial interviews, per state criminal procedure. During the pretrial interviews, it is disclosed that the alleged victim possessed a weapon and had threatened several persons before the incident. The non-Indian alleges self-defense based upon these interviews, and the District Attorney dismisses the case.[391] The Indian prosecuted by the U.S. Attorney's Office will not have a chance to conduct any pretrial interviews. The defense attorney will have no chance to investigate whether there are any

390. *See supra* note 385 and accompanying text.

391. Let's assume both defendants enter guilty pleas. The Native American will have a felony conviction, for most of her life. The non-Native will have a chance of receiving a conditional discharge, suspended, or deferred sentence.

viable defenses, and the Indian defendant is convicted and will be a felon.

This hypothetical scenario may be unique to New Mexico. However, the foundation of New Mexico's rules is fairness—should this not also be the objective of the federal system? The sad reality is that Indian defendants lack the opportunity to conduct pretrial interviews due to federal rules that Indians had no role in developing. These rules have an impact on plea negotiations and trials and may result in an Indian defendant being ambushed with unexpected witness testimony and arguments at trial. This in turn could be a reason why so many Indians are incarcerated.[392]

VIII. RAMIFICATIONS FOR INDIAN DEFENDANTS

Here is an example of a case that would have resulted in an unfair conviction due to lack of access to pretrial interviews if my individual investigation had not uncovered exculpatory evidence. In all likelihood, the exculpatory evidence would have been uncovered if I could have conducted a pretrial interview.

I represented a client who had been charged in a two-count indictment for involuntary manslaughter. My client had consumed a couple alcoholic drinks in a New Mexico small town, then he "slept off" the drinks prior to driving back to his home. He was driving northbound on a highway on the Navajo Reservation when a southbound car drove into his lane and collided with his vehicle. Sadly, the driver and the passenger in the oncoming vehicle did not survive the collision.

During litigation, I received "all the discovery" the government provided. The two federal prosecutors and I fought vigorously throughout the litigation on a number of fronts. I urged the federal prosecutors to dismiss the charges based upon the fact the alleged victims drove into my client's lane on the highway. The police reports confirmed this fact. Despite this, the government continued to litigate Prior to trial, I noticed that the autopsy reports provided by the government did not appear to be complete, and I suspected that the government had not provided the full autopsy report of the driver. On the eve of trial, through the defense's investigative efforts, we were able to obtain the full autopsy report. Prior to receiving the full autopsy report, the federal prosecutors informed me that, if my client did not

392. *Native Incarceration in the U.S.*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/native.html [https://perma.cc/KM7l-2D3D].

plead guilty prior to trial, they would be asking for a sixteen-year imprisonment term. I informed the prosecutors that I was in the process of obtaining the autopsy report on the Friday before trial, and they agreed to a continuance.

Upon receipt of the autopsy report, I learned that the driver of the vehicle who drove into my client's lane was diagnosed as being "legally blind." I called the prosecutors and informed them of this devastating fact. I had the discovery Bates stamped and provided it to the government. Despite this fact, the government pursued litigation for several more weeks until it was finally persuaded to dismiss the charges without prejudice. Today, my client is a free man when he would have most likely been convicted and still serving time in prison.

If pretrial interviews were required, I would have deposed the physician who performed the autopsy. I would have received all of his documents months before trial. If I had not been fortunate to uncover exculpatory evidence that the federal prosecutors had not provided in the autopsy report, my client would have been greatly disadvantaged in federal court, and I have little doubt that a federal jury would have convicted him. This is precisely why pretrial interviews and depositions are desperately needed in federal criminal proceedings. Imagine, for a moment, a civil plaintiff or defense attorney cross-examining a physician in federal district court without the benefit of the attorney having previously deposed the witness—a civil practitioner would never be placed in the position of cross-examining a key witness without a deposition.

IX. Potential Impacts on Tribal Courts

In the spring of 2023, I was supervising students in the Southwest Law Indian Law Clinic (SILC) in a matter where the tribe and the United States were prosecuting a person for the same underlying offense. The alleged federal charges were significant. The underlying facts involved a fight of several people who were intoxicated. The incident occurred in the dark. A firearm was discharged, and one person was severely injured. Based upon the federal criminal complaint, no person could identify who discharged the firearm. However, a firearm was tied to one person who was present at the altercation.

The clinical students from SILC represented that individual. During the course of representation, the students requested pretrial interviews. Their goal was to interview the alleged victim and two of the

alleged victim's relatives. It was their belief that these three people would state that they did not see who discharged the firearm. The tribal court ordered pretrial interviews to be conducted.

The federal prosecutor for the District of New Mexico learned that SILC was representing the alleged defendant and that the clinicians intended to interview several witnesses. The Assistant U.S. Attorney informed the tribal prosecutor who had filed charges in tribal court not to conduct any pretrial interviews of any witnesses. To ensure that no interviews would be conducted, the tribal prosecutor dismissed the charges while the federal case proceeded.

The above scenario demonstrates how the lack of required depositions in federal criminal proceedings could have direct impact on tribal courts. Federal prosecutors should not influence a tribal judge's rulings. But wherever there is concurrent jurisdiction, there is a potential for federal prosecutors to intrude into the affairs of tribal prosecution and tribal court orders relating to required pretrial interviews.

CONCLUSION

The first federal prosecution of an Indian resulting in a death sentence occurred in 1883 when Crow Dog was sentenced to death by a jury of non-Indians.[393] There were no rules of discovery. The defendant had two options: plead guilty to murder or go to trial. Sadly, not much has changed over the course of the past 140 years. The government provides "discovery," and a defendant has two options, plead guilty or go to trial; guilty pleas represent 97 percent of felony convictions.[394] With such a high conviction rate, one might ask why we need pretrial interviews. But the necessary follow-up question is how many Indians have entered a guilty plea or been tried and convicted based upon the lack of pretrial interviews or depositions?

Tribal, state, and military judges believe that pretrial interviews are important. The states of Florida, Indiana, Missouri, and Vermont, as well as military courts require depositions. The purpose of these

393. Clow, *supra* note 68

394. RICK JONES ET AL., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT, NAT'L ASS'N CRIM. DEF. LAWS. 14 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/5HLS-H2MN] (14 ("Year after year, the trend has seen the percentage of federal defendants pleading guilty continuing to rise. In 2016, 97.3% of defendants in the federal criminal justice system opted to concede their guilt. And in 2017, that number held steady at 97.2%.").

pretrial interviews and depositions is to avoid trials by ambush, to allow defendants to fully explore the facts before entering a guilty plea, and for defendants to exercise due process rights. If one asks why we need pretrial interviews or depositions in criminal cases, then I think it's fair to ask why civil litigants in federal court have depositions. Is it because money is the driving force in civil cases? Sadly, I think so.

Why do some tribal courts have pretrial interviews or depositions? Why do five states have pretrial interviews or depositions? Why do military courts have pretrial depositions? The answer: to promote fairness and justice.

Outside the federal court system, much has changed since Crow Dog was convicted by a jury not of his peers and sentenced to death. There are vibrant tribal courts throughout the country. These tribal courts include experienced judges, defense attorneys, and prosecutors. These tribal courts administer justice with the goal of doing so fairly, despite small budgets on which to operate. In contrast, federal courts have large budgets with well-paid prosecutors and defense attorneys. However, one thing has not changed since 1883—federal prosecutors have control over the evidence. Crow Dog did not have the right to conduct pretrial interviews or depose witnesses, and neither do defendants 140 years later. The defense risks being ambushed by unexpected testimony at trial for one simple reason: there are no pretrial interviews or depositions in federal court. Federal prosecutors can move forward with a trial despite the possibility that evidence will be introduced at trial without the defense attorney having a chance to impeach the witness testifying. A defense attorney will never have a chance to talk with witnesses to discover if there is additional evidence that a government investigator did not include in the investigative report, including exculpatory evidence. The possibility of conducting a full investigation of the facts is at a standstill during trial.

The contours of criminal jurisdiction in Indian country are elementary knowledge for Indian law scholars and law students who have taken a course in federal Indian law. However, my intent in writing this Article was to set forth the history for those who are unfamiliar with it, whether they be federal judges, prosecutors, or defense attorneys engaged in the judgment, prosecution, and defense of Indians in federal court. History is important, and it is necessary to address the history of the Federal Rules of Criminal Procedure in particular because they were developed by people with little, if any, experience working with Indian victims or defendants.

In all likelihood, the writers of the MCA did not believe that tribal nations and indigenous people would be in existence in the twenty-first century. The MCA was passed without a public hearing in 1885,[395] before Indians had the right to vote, at a time when the federal government and tribes were at war. Federal lawmakers in the criminal justice arena have never fully considered the quagmire created by the racist policy at the core of the MCA. The remedy would be to repeal the MCA and pass new, equitable legislation; at a minimum, the rules of engagement should be changed. As I set forth earlier, this is an obscure issue that may not elicit widespread attention.[396] However, if one's daughter or son or any relative is subject to the severe sentencing penalties in federal court—it matters. *Trials are demanding. Trials are battles for the truth. Trials should be fair. They are not a game.*

In *Castro-Huerta*, the U.S. Supreme Court opened the door to non-Indians who will have distinct advantages when prosecuted in the State of New Mexico where they have the use of pretrial interviews.[397] Meanwhile, Indians prosecuted in New Mexico federal courts for similar crimes will not have the same right to discovery in the form of interviews or depositions. The legacy of *Castro-Huerta* will be law that allows Indians to be treated differently from non-Indians. This is unjust.

As a former federal prosecutor and state district court judge, I believe there should be a level playing field in the course of prosecuting a person who will lose their freedom and their constitutional right to vote—and will carry the label of a felon for the rest of that person's life, except if the person receives a pardon from the President of the United States. No one should be ambushed in federal court because the consequences are severe. Let these words sink in:

> The purpose is to "allow parties to prepare for trial, 'to limit a party being surprised at trial, and to define and limit the facts and issues in dispute."[398]
>
> The "right of defendants to interview witnesses without prosecutorial interference is grounded in the constitutional guarantee of due process and notions of elemental fairness."[399]

395. *See supra* Part I.
396. *See supra* Sections 1.A–B.
397. *See supra* Section I.C.3.
398. *See supra* Part VI.
399. *See supra* Part VI.

"There might otherwise, for any reason, be a failure of justice."[400]

The Federal Rules of Criminal Procedure permit a party to be "surprised" or ambushed at trial and do not allow the facts and issues in dispute to be limited. The Federal Rules of Criminal Procedure do not guarantee due process and notions of fairness. The Federal Rules of Criminal Procedure permit a failure of justice.

The lack of pretrial interviews or depositions for Indians prosecuted in federal court may never change. This may be because the majority of federal judges and prosecutors do not see a need. The view may be that we have an efficient system that has worked over the past 140 years, this is "the way it is," and there is no need to change.[401] But Indians who are prosecuted in federal court are prosecuted based only upon the facts that are investigated, and to allow litigants to have the full range of discovery when money is at issue in federal civil cases while limiting the range of discovery in federal criminal cases creates an unjust disparity. I realize that the odds are against change happening, but I will continue to set forth the facts with the hope that those who have power will be moved to do justice.

400. *See supra* Part VI.

401. This attitude also alludes to the larger issue of the Major Crimes Act. My hope is that if there is a movement for fairness in the context of requiring pretrial interviews, the public might also see the need for a change in this archaic federal law that has been imposed on Indians for the past 140 years.