NOTES

THE *GLADUE* APPROACH: ADDRESSING INDIGENOUS OVERINCARCERATION THROUGH SENTENCING REFORM

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In the American criminal justice system, individuals from marginalized communities routinely face longer terms and greater rates of incarceration compared to their nonmarginalized counterparts. Because the literature on mass incarceration and sentencing disparities has largely focused on the experiences of Black and Hispanic individuals, far less attention has been paid to the overincarceration of Native peoples. Yet there are clear indications that Native peoples are both overrepresented within the criminal justice system and subject to unique sentencing disparities as compared to other ethnicities. While these issues are partly motivated by traditional drivers of criminal behavior, including access barriers to housing, employment, and education, this Note argues that there is a greater systemic issue at play: the enduring legacy of colonialism. Accounting for—and correcting—this legacy in the criminal justice system is a complex task, though not an impossible one. For example, over the past twenty years, the Canadian criminal justice system has implemented a novel, remedial sentencing approach to address the overincarceration of Aboriginal offenders: the Gladue *approach. Recognizing the extent to which the Canadian legal system has failed to account for the unique needs, experiences, and circumstances of Aboriginal offenders, the* Gladue *approach mandates an individualized and contextualized approach to sentencing, one which prioritizes community-based alternatives to incarceration and emphasizes restorative justice. This Note proposes two legal pathways by which to transplant the* Gladue *approach to the American criminal justice system. In so doing, it offers the first comprehensive analysis of the normative and constitutional implications of applying the* Gladue *approach to the sentencing of Native peoples within the United States. While the approach has challenges and shortcomings, it is nevertheless a powerful tool by which the American criminal justice system can begin to reckon with its colonial past and present.*

* Copyright © 2023 by Nasrin Camilla Akbari. J.D., 2022, New York University School of Law; B.A., 2018, Johns Hopkins University. My thanks to Professor Erin Murphy for her guidance, feedback, and mentorship in the writing of this Note; Professor Maggie Blackhawk for sharing her expertise; the members of the *New York University Law Review*, particularly my editors, Tucker Ring and Aidan Langston, for their excellent editorial assistance; and my family—Suzanne, Eddie, Yasin, Sara, John, and Lily—for their love and encouragement.

Introduction

"[T]here is no greater inequality than the equal treatment of unequals."
—Justice Felix Frankfurter, 1950[1]

In the American criminal justice system, individuals from marginalized communities routinely face longer terms and greater rates of incarceration compared to their nonmarginalized counterparts.[2] Because the literature on mass incarceration and sentencing disparities has largely focused on the experiences of Black and Hispanic individuals, far less attention has been paid to the overin-

[1] Dennis v. United States, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting).

[2] *See, e.g.*, Ashley Nellis, Sent'g Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons (2021) (detailing the "staggering disparities among Black and Latinx people imprisoned in the United States"); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1320 (2014) (finding that Black populations receive prison sentences that are almost 10% longer than those of their white peers); Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, Daedalus, Summer 2010, at 8, 9–10 (detailing the cumulative social inequalities that stem from incarceration, with a focus on racial disparities).

carceration of Native peoples.[3] Despite making up less than 1% of the total U.S. population, Natives account for over 2% of all federally incarcerated people.[4] While this discrepancy may in part be due to the jurisdictional complexities surrounding criminal jurisdiction over Native peoples,[5] state-level incarceration rates indicate that additional factors are at play. For example, in Montana, Natives make up approximately 6% of the state population but account for 20% of the men's state prison population and 34% of the women's state prison population.[6] Similarly, in North Dakota, Natives comprise 5% of the total state population, but account for a staggering 29% of all incarcerated individuals.[7]

Native peoples are also overrepresented in comparison to other ethnic groups. Across all federal and state correctional authorities, Native peoples experience a higher incarceration rate than that of white, Hispanic, and Asian populations.[8] Additionally, Native men are four times more likely than white men to be sentenced to prison; this discrepancy is even higher for Native women.[9] Compared to other ethnicities, Native peoples are also routinely subject to longer and harsher sentences.[10] They are thus not merely overrepresented within the criminal justice system, but subject to unique sentencing dispari-

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[3] The terms "Native American," "Indigenous," "Aboriginal," and "Indian" are used throughout this Note, each for specific purposes. First, the term "Indigenous" is used in the international context to refer to all those who are native to a specific region. Second, the term "Aboriginal" is used to refer to Indigenous peoples in the Canadian context; although the term "First Nations" is more widely employed, Aboriginal is used in the legal context with which this Note is concerned. Finally, the term "Native American," or "Native peoples," is used to refer to those who are Indigenous to and reside in what is now known as the United States. When discussing aspects of Federal Indian Law, "Indian" is employed as a legal term of art. Elsewhere, however, "Native American" or "Native peoples" is used to encompass those who fall outside the legal definition of "Indian," but are nevertheless Indigenous to the United States. Where possible, specific tribes and Nations are also referenced by name.

[4] Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, PRISON POL'Y INITIATIVE (Oct. 8, 2021), https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday [https://perma.cc/5ZZF-96TK].

[5] *See infra* Section II.A.

[6] Sarah Mehta & SK Rossi, *Why Are So Many Indigenous People in Montana Incarcerated?*, AM. C.L. UNION (Sept. 11, 2018, 3:00 PM), https://www.aclu.org/blog/smart-justice/parole-and-release/why-are-so-many-indigenous-people-montana-incarcerated [https://perma.cc/Q4JN-BGLD].

[7] *North Dakota Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/ND.html [https://perma.cc/VF2H-2K6U].

[8] E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2020 – STATISTICAL TABLES 13–14 (2021) (providing incarceration statistics broken down by age, race, ethnicity, sex, jurisdiction, and offense type).

[9] LAKOTA PEOPLE'S L. PROJECT, NATIVE LIVES MATTER 1 (2015).

[10] *See infra* Section II.B.

ties. The reasons behind these issues are complex. Traditional drivers of criminal behavior play a role, including low socioeconomic status and access barriers to education, employment, and housing, which particularly afflict Native communities.[11] Yet additional factors contributing to the overincarceration of Native peoples, such as overt discrimination within the legal system itself, speak to a systemic issue at play: the enduring legacy of colonialism.[12] While colonialism is often implicated in debates concerning tribal sovereignty and land appropriation, its continued effect on the overincarceration of Native peoples is far less obvious.

The devastating consequences of colonialism on Indigenous peoples extend beyond the borders of the United States.[13] As nations have grappled with the persistence of colonial structures, practices, and beliefs, some have attempted to remedy these effects at the sentencing stage. In particular, over the past twenty years, the Canadian criminal justice system has implemented a unique, remedial sentencing approach for Aboriginal people: the *Gladue* approach. Statutorily grounded in section 718.2(e) of the Canadian Criminal Code, this approach directs judges at the sentencing stage to consider "[t]he unique systemic or background factors which may have played a part in bringing the particular [A]boriginal offender before the courts" as well as "[t]he types of sentencing procedures and sanctions which may be appropriate . . . because of [the offender's] particular [A]boriginal heritage or connection."[14] It thus imposes duties on both counsel and courts: Counsel is required to provide the case-specific information necessary for the court to undertake the two-pronged *Gladue* analysis at sentencing, while courts are bound to undertake such an analysis absent an Aboriginal individual waiving their right to such a process.[15]

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[11] *See infra* notes 132–34 and accompanying text.

[12] For the purposes of this Note, colonialism is defined not as an event, but a structure. As described by Wolfe, "elimination is an organizing principal of settler-colonial society rather than a one-off (and superseded) occurrence. . . . [T]he native repressed continues to structure settler-colonial society." Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388, 390 (2006); *see also* J. Kēhaulani Kauanui, *"A Structure, Not an Event": Settler Colonialism and Enduring Indigeneity*, LATERAL, Spring 2016, https://csalateral.org/issue/5-1/forum-alt-humanities-settler-colonialism-enduring-indigeneity-kauanui [https://perma.cc/H554-C3UT] (describing settler colonialism as "a structure that endures indigeneity").

[13] *See, e.g.*, Wolfe, *supra* note 12 (drawing on historical and contemporary examples from around the world to compare settler colonialism and genocide); Matthew Lange, James Mahoney & Matthias vom Hau, *Colonialism and Development: A Comparative Analysis of Spanish and British Colonies*, 111 AM. J. SOCIO. 1412 (2006) (comparing the impact of Spanish and British colonialism on the development of the non-European world).

[14] R. v. Gladue, [1999] 1 S.C.R. 688, para. 66.

[15] R. v. Ipeelee, [2012] 1 S.C.R. 433, para. 60.

Although the approach is not without flaws, it remains a powerful reform that enables courts to consider individualized and contextualized accounts of historical injustices in shaping sentences.

This Note considers the potential normative and legal implications of applying a *Gladue* approach to the sentencing of Native peoples within the United States. Part I reviews the development of the Canadian *Gladue* approach over the past twenty years. It builds on a growing body of literature analyzing this approach to inform its potential transplantation to the American legal system. Part II analyzes the overincarceration of Native peoples across the federal and state domains. By applying both an empirical and historical perspective, it uncovers a close connection between this issue and America's enduring legacy of colonialism. Part III presents two potential legal pathways for implementing the *Gladue* approach within the United States: amending the federal sentencing guidelines and pursuing congressional action. In so doing, it addresses potential constitutional issues regarding state sovereignty concerns and equal protection guarantees. Furthermore, it considers the practical impediments to both approaches. Crucially, this Note does not seek to discount efforts to recognize tribal sovereignty, repatriate Native lands, or expand the scope of tribal jurisdiction. Rather, it provides an additional method by which the United States may begin to address the ongoing impact of the settler-colonial state on Native communities.

I
CONCEPTUALIZING THE *GLADUE* APPROACH

Canada's *Gladue* approach applies to the sentencing of all Aboriginal individuals. While it is statutorily grounded in section 718.2(e) of the Canadian Criminal Code, it primarily developed through a series of cases before the Supreme Court of Canada.[16] It requires both the preparation of a specialized presentence report, known as a *Gladue* report, as well as the application of unique sentencing principles by the judiciary.[17] These principles instruct judges to conduct a distinct sentencing analysis that considers the systemic and background factors that may have contributed to an Aboriginal person's criminal behavior, and prioritizes alternative, community-

[16] *See infra* Sections I.A–B.

[17] Although the preparation of such a report is not statutorily mandated under section 718.2(e) of the Canadian Criminal Code, it is required in the sense that the utility of the *Gladue* approach strongly hinges on its production and use. *Ipeelee*, [2012] 1 S.C.R. 433, para. 60; *see also infra* Section I.B (noting how the reports are not technically required under section 718.2(e) but explaining why they are so essential).

based sanctions over incarceration.[18] The *Gladue* approach thus reflects an emphasis on restorative justice that responds to the unique needs, experiences, and perspectives of Aboriginal people and their communities. While the approach is not without its challenges and shortcomings,[19] it nevertheless remains a powerful tool to respond to the enduring legacy of colonialism.

A. R. v. Gladue

A historical analysis of the *Gladue* approach begins with section 718.2(e) of the Canadian Criminal Code. This section was enacted in 1996 in order to address increasing rates of incarceration and the over-representation of Aboriginal individuals in the Canadian carceral system.[20] As then-Minister of Justice Allan Rock noted before the Standing Committee on Justice and Legal Affairs in support of the statute, "Nationally [A]boriginal persons represent about 2% of Canada's population, but they represent 10.6% of persons in prison."[21] In regions with high concentrations of Aboriginal communities, the disparity was even more dramatic: In the Prairie Region, Aboriginal people made up approximately 5% of the total population, but over 30% of the federal prisoner population.[22] Section 718.2(e) instructs judges, at the time of sentencing, to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community . . . *with particular attention to the circumstances of Aboriginal offenders*."[23] The Supreme Court of Canada subsequently addressed the interpretation and application of section 718.2(e) in a series of cases beginning with *R. v. Gladue*.[24]

In *Gladue*, a nineteen-year-old Aboriginal woman pleaded guilty to manslaughter and was sentenced to three years' imprisonment.[25] At the time of sentencing, the trial judge took into account several miti-

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[18] *See infra* Section I.A.

[19] *See infra* Section I.C.

[20] *Gladue*, [1999] 1 S.C.R. 688, para. 87 ("[T]he aim of s. 718.2(*e*) is to reduce the tragic over-representation of [A]boriginal people in prisons.").

[21] *Minutes of Proceedings and Evidence of the Standing Comm. on Just. & Legal Affs.*, House of Commons, Issue No. 62 (Nov. 17, 1994), at 62:15 [hereinafter *Standing Committee Hearing*].

[22] Michael Jackson, *Locking Up Natives in Canada*, 23 U.B.C. L. Rev. 215, 215–16 (1989) (providing statistics on the overrepresentation of Aboriginal people in the carceral systems of several Canadian regions and provinces); *see also Standing Committee Hearing*, *supra* note 21, at 62:15 ("[A]lthough [A]boriginal persons make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates.").

[23] Criminal Code, R.S.C. 1985, c C-46, s. 718.2(e) (emphasis added).

[24] [1999] 1 S.C.R. 688.

[25] *Id.* paras. 7, 18.

gating factors; however, he did not consider Jamie Tanis Gladue's Aboriginal status after noting that she was living in an urban area off-reserve and therefore was not "within the [A]boriginal community as such."[26] Upon appeal, the British Columbia Court of Appeal found that the trial judge erred in failing to apply section 718.2(e) merely because Gladue was not living on a reserve.[27] Nevertheless, the court found that there was "no basis for giving special consideration to the appellant's [A]boriginal background" because "the particular circumstances could not reasonably support a conclusion that the sentence, if a fit one for a non-[A]boriginal person, would not also be fit for an [A]boriginal person."[28] Thus, the court concluded that the trial judge did not err in not giving effect to the principle set out in section 718.2(e).[29]

In a unanimous decision, the Supreme Court held that while the original sentence was reasonable, both lower courts had erred in their approach to section 718.2(e) by failing to consider several relevant factors concerning Gladue's Aboriginal heritage, which may have influenced her to engage in criminal conduct.[30] The Court interpreted section 718.2(e) as requiring judges to consider "the unique systemic or background factors which may have played a part in bringing the particular [A]boriginal offender before the courts."[31] These may include "low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation,"[32] all of which "have contributed to an excessive [A]boriginal incarceration rate."[33] Furthermore, the sentencing judge should evaluate "[t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular [A]boriginal heritage or connection."[34] Such procedures and sanctions should emphasize principles of restorative justice and may take the form of community-based sanctions.[35] Thus, the Court concluded that the lower courts also erred in failing to consider the "possibly distinct conception of sentencing

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[26] *Id.* para. 18 (internal quotation marks omitted).

[27] *Id.* para. 20.

[28] R. v. Gladue, 1997 CanLII 3015, para. 88 (Can. B.C. C.A.).

[29] *Id.*

[30] R. v. Gladue, [1999] 1 S.C.R. 688.

[31] *Id.* para. 66.

[32] *Id.* para. 67. These systemic factors are directly due to the "history of colonialism, displacement [of Aboriginal peoples], and residential schools." R. v. Ipeelee, [2012] 1 S.C.R. 433, para. 60.

[33] *Gladue*, [1999] 1 S.C.R. 688, para. 70.

[34] *Id.* para. 66.

[35] *Id.* paras. 70–74. These two requirements are often referred to collectively as the *Gladue* principles.

held by the appellant, by the victim Beaver's family, and by their community."[36] Finally, sentencing judges must affirmatively "attempt to acquire information regarding the circumstances of the offender as an [A]boriginal person" and "must be made aware of alternatives to incarceration that exist whether inside or outside the [A]boriginal community of the particular offender."[37] Such information may be presented in presentence reports or by witnesses who may testify about reasonable alternatives.[38] Moreover, counsel is expected to assist the judge in adducing relevant evidence in line with the *Gladue* principles.[39]

B. Subsequent Developments Relating to the Gladue *Approach*

Gladue laid the groundwork for, but did not mandate, *Gladue* reports. These reports depart from "the actuarial risk-based character" of presentence reports by adopting a "more contextualized approach" that seeks to characterize each Aboriginal individual's "needs, risk and community options."[40] They assist sentencing judges in effectuating the *Gladue* principles by addressing why an individual is before the court, in light of the unique systemic and background factors associated with their Aboriginal heritage; the degree to which rehabilitation may address these factors and their influence on the individual's criminal behavior; and appropriate alternative sentencing options that are available to the individual within their Aboriginal community.[41] Unlike a presentence report, which is prepared by a government organization such as Correctional Services, *Gladue* reports are often prepared by independent organizations and sub-

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[36] *Id.* para. 94.

[37] *Id.* para. 84.

[38] *Id.* Although the concept of a *Gladue* report did not emerge at the time of this case, the Court stressed that "the presence of an [A]boriginal offender will require special attention in pre-sentence reports." *Id.*

[39] *Id.* para. 83.

[40] Kelly Hannah-Moffat & Paula Maurutto, *Re-Contextualizing Pre-Sentence Reports: Risk and Race*, 12 PUNISHMENT & SOC'Y 262, 265 (2010).

[41] LEGAL SERVS. SOC'Y, B.C., GLADUE REPORT GUIDE 15 (2018). *Gladue* reports are also sometimes used in the bail context, though that application is beyond the reach of this Note. *See, e.g.*, PATRICIA BARKASKAS, VIVIENNE CHIN, YVON DANDURAND & DALLAS TOOSHKENIG, INT'L CTR. FOR CRIM. L. REFORM & CRIM. JUST. POL'Y, PRODUCTION AND DELIVERY OF GLADUE PRE-SENTENCE REPORTS: A REVIEW OF SELECTED CANADIAN PROGRAMS 34–36 (2019) (discussing ongoing confusion and inconsistency regarding the use of *Gladue* reports for bail hearings); Jillian Rogin, Gladue *and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada*, 95 CAN. BAR REV. 325 (2017) (arguing that courts are misinterpreting and misapplying *Gladue* in the bail context to the detriment of accused Aboriginal persons).

mitted to the court on behalf of the accused.[42] Provincial courts gradually began using these reports after the Supreme Court's *Gladue* decision.[43] By 2013, *Gladue* reports were available to Aboriginal individuals in five provinces and territories.[44] Three more joined the list by 2019, while Saskatchewan was in the process of wrapping up a *Gladue* pilot project.[45] Yet implementation and funding for these reports vary across the country.[46]

While *Gladue* remains the seminal case in interpreting section 718.2(e), subsequent cases elaborated the prescribed approach.[47] Perhaps the most important of these is *R. v. Ipeelee*,[48] in which the Supreme Court reaffirmed the dual requirements of section 718.2(e): Judges must consider systemic and background factors that may bear on the culpability of an Aboriginal individual, as well as alternatives to imprisonment that may more effectively achieve the objectives of sentencing while still adhering to the principles of restorative justice emphasized in *Gladue*.[49] The Court clarified that an accused person need not establish a causal link between those factors and the commission of the offense in question in order for them to be considered.[50]

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[42] SÉBASTIEN APRIL & MYLÈNE MAGRINELLI ORSI, CAN. DEP'T OF JUST., *Gladue* Practices in the Provinces and Territories 10 (2013) [hereinafter GLADUE Practices].

[43] Other jurisdictions, such as New Brunswick, provide this information through presentence reports with a "Gladue component" or from a "Gladue perspective." BARKASKAS ET AL., *supra* note 41, at 39.

[44] GLADUE Practices, *supra* note 42, at 9–10.

[45] *See* BARKASKAS ET AL., *supra* note 41, at 48, 57, 98; BENJAMIN RALSTON, UNIV. OF SASK. INDIGENOUS L. CTR., GLADUE AWARENESS PROJECT: FINAL REPORT 37–38 (2020).

[46] *See, e.g.*, BARKASKAS ET AL., *supra* note 41, at 45–58 (describing *Gladue* report delivery programs in several provinces); Alexandra Hebert, *Change in Paradigm or Change in Paradox?* Gladue *Report Practices and Access to Justice*, 43 QUEEN'S L.J. 149, 168–70 (2017) (discussing the effect of varied delivery models on disparities in access to *Gladue* reports). As these authors note, the slow (and in many ways, still limited) uptake of *Gladue* reports can be attributed to numerous factors, including the limited number of *Gladue* report writers, financial constraints on organizations providing *Gladue* report services, and lack of awareness among defendants and defense counsel about the availability of such reports.

[47] For a comprehensive analysis of these cases, see BENJAMIN A. RALSTON, UNIV. OF SASK. INDIGENOUS L. CTR., THE GLADUE PRINCIPLES: A GUIDE TO THE JURISPRUDENCE pt. B (2021).

[48] [2012] 1 S.C.R. 433. *Ipeelee* was heard alongside *R. v. Ladue*. *Id.* The cases involved the sentencing of two Aboriginal long-term offenders, Manasie Ipeelee and Frank Ladue, who had breached their long-term supervision orders. *Id.* para. 1. At trial, both individuals were sentenced to three years' imprisonment. *Id.* paras. 88, 94. Mr. Ladue's sentence was later reduced to one year's imprisonment by the Court of Appeal. *Id.* para. 94. The Supreme Court affirmed Mr. Ladue's modified sentence and reduced Mr. Ipeelee's sentence to one year's imprisonment, finding that the lower courts "gave only attenuated consideration to Mr. Ipeelee's circumstances as an Aboriginal offender." *Id.* paras. 90, 93, 97.

[49] *Id.* para. 72.

[50] *Id.* para. 81.

These factors are meant to "provide the necessary context to enable a judge to determine an appropriate sentence."[51] Finally, when incarceration is warranted, "the Aboriginal status of the long-term offender should be taken into account for the purpose of providing appropriate programs that are intended to *rehabilitate* the offender."[52]

Beyond affirming the *Gladue* approach, *Ipeelee* emphasizes that it is mandated regardless of the seriousness of the offense.[53] Moreover, the Court said that *Gladue* reports are "indispensable to a judge in fulfilling his duties under s. 718.2(*e*)."[54] Although the Court did not go so far as to state that *Gladue* reports are *required* under section 718.2(e), it underscored counsel's duty to bring the individualized information often contained in such reports—and required under section 718.2(e)—before the court in every case.[55]

C. Advantages and Disadvantages of the Gladue *Approach*

While there are downsides to the *Gladue* approach, the approach is commendable for its explicit recognition of the extent to which the legacy of colonialism contributes to the overincarceration of Aboriginal people. As Mohawk scholar Patricia Monture-Angus states, "[r]ecognizing colonialism as a central explanation—if not *the* central explanation—for Aboriginal overrepresentation in the justice system is essential."[56] At the same time, *Gladue*—as a remedial sentencing approach—can only go so far in remedying the long-lasting effects of colonization on the criminalization, dehumanization, policing, and surveillance of Aboriginal people.[57] The Canadian crim-

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[51] *Id.* para. 83. The Court, however, noted that "[u]nless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence." *Id.*

[52] *Id.* para. 131 (Rothstein, J., dissenting in part) (emphasis added).

[53] *Id.* paras. 84–87 (majority opinion). This clarification responded to the "irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences." *Id.* para. 84; *see, e.g.*, R. v. Carrière, 2002 CanLII 41803, para. 17 (Can. Ont. C.A.) (indicating that the *Gladue* approach was not warranted in cases of serious offenses).

[54] *Ipeelee*, [2012] 1 S.C.R. 433, para. 60.

[55] *Id.* The consideration of this information can, however, be waived by an Aboriginal person. *Id.* For a discussion of *Ipeelee*'s unique contributions to the development of the *Gladue* approach, see generally Jonathan Rudin, *Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in* R. v. Ipeelee, 57 SUP. CT. L. REV. 375 (2012).

[56] Patricia A. Monture-Angus, *Lessons in Decolonization: Aboriginal Overrepresentation in Canadian Criminal Justice*, *in* VISIONS OF THE HEART: CANADIAN ABORIGINAL ISSUES 361, 363 (David Long & Olive Patricia Dickason eds., 2d ed. 2000).

[57] *See* Carmela Murdocca, *Understanding* Gladue *from the Perspective of Indigenous People*, 69 CRIM. L.Q. 377, 381 (2021) ("No amount of reforming the criminal justice of system will address these fundamental, world-altering and ordinary life-making challenges.").

inal justice system, with respect to both policing and the judicial process, is itself a product of settler colonialism.[58] While the *Gladue* approach may contribute to a more just sentencing regime for Aboriginal people, it does so within a legal system that has consistently persecuted, alienated, and disproportionately incarcerated them.[59]

A recent survey of Aboriginal people who have firsthand experience with the *Gladue* process reveals the effects of this discrepancy on the perceived value of the approach. Although many participants explained that the legal process remained "a profoundly negative and alienating experience," they also reported "positive (and in some cases life-changing) experiences with their Gladue report writer."[60] Highlighting the healing effect of the *Gladue* approach, one participant noted that the process was "one of the foundations for my recovery . . . . [I]t was like a weight off of my shoulders. And it helped me . . . move forward."[61] Other participants described the transformative effect that a *Gladue* report can have on a judge's decisionmaking process and the ultimate determination of an appropriate sentence.[62] Overwhelmingly, participants emphasized the positive effect of having an Aboriginal *Gladue* report writer.[63]

A positive contribution of the *Gladue* approach is its emphasis on restorative, rather than retributive, justice.[64] This emphasis parallels the "priority given in [A]boriginal cultures to a restorative approach

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[58] *See id.* at 380 ("For Indigenous peoples, the structures, systems, policies, practices and procedures of the criminal justice system is a form of ongoing colonial and gendered racial state violence.").

[59] *See Ipeelee*, [2012] 1 S.C.R. 433, para. 77 ("The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism . . . ."); JONATHAN RUDIN, ABORIGINAL PEOPLES AND THE CRIMINAL JUSTICE SYSTEM 1–15, 20–40 (2005) (discussing the causes of overincarceration and trends in over- and under-policing among Aboriginal people).

[60] Murdocca, *supra* note 57, at 397. Murdocca notes that these conclusions are, however, constrained by the limited sample size of participants. *Id.* at 383.

[61] *Id.* at 397.

[62] *See id.* ("I think [the judge] really started to see things in a different light after he learned the history of my biography . . . ."); *id.* (discussing how a judge reduced a sentence of eighteen months' imprisonment to a conditional sentence after reading the accused's *Gladue* report).

[63] *See id.* at 389–90 (discussing how Aboriginal people feel more comfortable sharing their life history and experiences when paired with Aboriginal *Gladue* report writers and describing the additional support and mentoring services often provided by these individuals thanks to their understanding of the particularized circumstances of Aboriginal individuals and awareness of Aboriginal community resources).

[64] *See* R. v. Gladue, [1999] S.C.R. 1 688, paras. 70–73 (adopting a restorative justice perspective).

to sentencing."[65] The *Gladue* court characterized restorative justice as an approach which recognizes

> that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence . . . . The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime.[66]

This diverges from the traditional retributive justice model once embraced by the Canadian criminal justice system, which emphasized punishment and demanded an individualistic notion of criminal responsibility.[67] Proponents of restorative justice within Aboriginal communities view retributive justice systems as "at best, foreign and distanced from their communities and cultures, and at worst, overtly biased against and unduly punitive towards, Aboriginal people."[68] Although the *Gladue* approach does not go so far as to augment tribal authority in the criminal justice system, it begins to bridge the gap between Western legal systems and Aboriginal justice principles by shifting away from the retributive model.

Beyond its normative value, empirical evidence suggests that *Gladue* reports lead to fewer and shorter jail sentences for Aboriginal people. A report by the Legal Services Society of British Columbia analyzing sentencing outcomes of similarly situated Aboriginal individuals that did and did not receive *Gladue* reports found that non-*Gladue* clients were approximately 40% more likely to receive a jail sentence.[69] Furthermore, the median sentence length for *Gladue* clients was eighteen days, compared to forty-five days for non-*Gladue*

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[65] *Id.* para. 93. Restorative justice was recognized as a sentencing principle for the first time in section 718. Criminal Code, R.S.C. 1985, c C-46, s. 718; *see also Gladue*, [1999] 1 S.C.R. 688, para. 43 (describing how section 718 has a "focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgement of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender").

[66] *Gladue*, [1999] 1 S.C.R. 688, para. 71.

[67] *See, e.g.*, Patrick Kerans, *Distributive and Retributive Justice in Canada*, 4 Dalhousie L.J. 76, 88 (1977) (arguing that the disproportionate sentencing of powerless populations is only justifiable if "one's basic image of human freedom is individualistic" in that "each member receives basically the same opportunities for development and for responsible choice").

[68] *See* Jane Dickson-Gilmore & Carol La Prairie, Will the Circle Be Unbroken?: Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change 91 (2005) (describing the inspiration for restorative justice initiatives in Aboriginal communities).

[69] Legal Servs. Soc'y of B.C., Gladue Report Disbursement: Final Evaluation Report 22 (2013), https://legalaid.bc.ca/sites/default/files/2019-03/gladueReportDisbursementEvaluationJune2013.pdf [https://perma.cc/GEG9-PXTK]. *Gladue* clients were also "more likely to receive a probation order, time served or a conditional sentence order (CSO) than their non-Gladue counter-parts." *Id.*

clients.[70] Yet overincarceration continues on the provincial and federal levels. In fact, the imprisonment of Aboriginal people has increased in the twenty-two years since *Gladue* was decided.[71] This result implies two possible issues. First, the *Gladue* approach is not—and was never intended to be—a panacea for the complex effects of colonialism on Aboriginal people. Without addressing the root social and economic challenges faced by these communities, *Gladue* serves as a bandage for a hemorrhaging wound.[72]

Second, this may point to the documented challenges in implementing a comprehensive, uniform, and well-resourced *Gladue* approach at the provincial and federal levels. In particular, the diverging provincial approaches to *Gladue* reports have produced a disparity in access to *Gladue* reports, and thus undermined the impact of the *Gladue* approach.[73] *Gladue* reports are not available in all provinces—and presentence reports with a *Gladue* component generally do not fulfill *Gladue* and *Ipeelee*'s requirements.[74] Additionally, many provincial and territorial jurisdictions do not provide adequate financial and training mechanisms to support the preparation of

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[70] *See id.* at 22–23; *cf.* COUNCIL OF YUKON FIRST NATIONS, YUKON GLADUE: RESEARCH & RESOURCE IDENTIFICATION PROJECT 8 (2015), https://www.lawsocietyyukon.com/pdf/YukonGladueReport2015.pdf [https://perma.cc/46Z5-HZ6G] (suggesting that *Gladue* reports may reduce the risk of recidivism).

[71] *See* Harry S. LaForme, *The Over-Representation of Indigenous People in Prison*, FIRST PEOPLES L. (Nov. 24, 2021), https://www.firstpeopleslaw.com/public-education/blog/the-over-representation-of-indigenous-people-in-prison [https://perma.cc/7CJ5-5NTN] ("At the time of *Gladue*, Indigenous people represented about 3% of the Canadian population and about 17% of the prison population. . . . Today, while Indigenous people represent about 4% of the Canadian population, they represent about 37% of the prison population.").

[72] *See* Gillian Balfour, *Do Law Reforms Matter? Exploring the Victimization-Criminalization Continuum in the Sentencing of Aboriginal Women in Canada*, 19 INT. REV. VICTIMOLOGY 85, 93 (2013) (noting that the shift towards restorative justice practices is "confounded by the staggering rates of interpersonal violence and the lack of community capacity to address needs for education, employment, housing and social services such as shelters, rape crisis centres and addiction services").

[73] *See* Hebert, *supra* note 46, at 163–67 (discussing this disparity). Scholars have recognized that the provision of these reports is a key determinant of the effectiveness of the *Gladue* approach. *See, e.g.*, Jonathan Rudin, *Aboriginal Over-Representation and* R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going*, 40 SUP. CT. L. REV. 687, 702–04 (2008) (arguing that special training in report writing is necessary to provide judges with information about offenders and systemic factors playing a role in their behavior).

[74] *See* Hebert, *supra* note 46, at 168–69 (surveying provincial disparities and judicial assessments of the necessity of access to complete *Gladue* reports in all provinces). Presentence reports with a *Gladue* component often do not adequately contextualize potential risk factors within the experience of Aboriginal communities, thus enhancing the risk of discrimination and disproportionate sentences in direct conflict with the *Gladue* approach. *See* Debra Parkes, Ipeelee *and the Pursuit of Proportionality in a World of Mandatory Minimum Sentences*, 33 FOR THE DEFENCE 22, 24 (2012).

Gladue reports, leading to variations in both accessibility and quality.[75] In some cases, judges appear to lack the necessary awareness of the purposes and requirements of the *Gladue* approach.[76] Mandatory minimums present a further constraint on the application of this approach, as they limit judicial discretion.[77] At the plea bargaining stage, mandatory minimums also introduce a perverse incentive to plead guilty rather than risk a mandatory sentence at trial.[78]

A final critique that has been leveled against the *Gladue* approach deals with its failure to adopt a sufficiently intersectional perspective: one that accounts for the significantly higher number of Aboriginal women that are victims and perpetrators of violence compared with women in the general population.[79] There is a relationship between the prevalence of male-enacted violence against Aboriginal women and violence committed by Aboriginal women.[80] These effects are intimately tied to the unique consequences of colonialism on

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[75] *See* CAN. DEP'T OF JUST., SPOTLIGHT ON *Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System 27–28 (Sept. 2017) [hereinafter SPOTLIGHT ON *Gladue*], https://www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf [https://perma.cc/9WMY-4VLL] (describing some practical limitations). Some jurisdictions have remedied this problem by implementing specialized *Gladue* courts. For a discussion of the development and role of these courts, see Paula Maurutto & Kelly Hannah-Moffat, *Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts*, 31 CAN. J.L. & SOC'Y 451 (2016). *Gladue* report writer Mark Marsolais-Nahwegahbow (Ojibwe) has suggested a national standard for writing *Gladue* reports based on an Indigenous path to healing in order to respond to variations in training across *Gladue* report writers. *See* Sarah Niman, *The Healing Power of Gladue Reports*, POL'Y OPTIONS (May 1, 2018), https://policyoptions.irpp.org/magazines/may-2018/the-healing-power-of-gladue-reports [https://perma.cc/RSR5-ZM9G].

[76] *See* CAN. DEP'T OF JUST., OVERREPRESENTATION OF INDIGENOUS PEOPLE IN THE CANADIAN CRIMINAL JUSTICE SYSTEM: CAUSES AND RESPONSES (2020), https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/p5.html [https://perma.cc/5ZUQ-66LU] ("[W]hile the frequency of judges referencing *Gladue* increased from 2000 and 2010 to 2018, there were still many cases where *Gladue* received only a cursory mention.").

[77] *See* SPOTLIGHT ON *Gladue*, *supra* note 75, at 25–26; *see also* Christopher Sewrattan, *Apples, Oranges and Steel: The Effect of Mandatory Minimum Sentences for Drug Offences on the Equality Rights of Aboriginal Peoples*, 46 U.B.C. L. REV. 121, 143 (2013) (recognizing the tension between "statute[s] prescribing a mandatory minimum sentence, which stresses denunciation and deterrence, and [the *Gladue* approach], which stresses rehabilitation and restoration").

[78] *See* Maurutto & Hannah-Moffat, *supra* note 75, at 458 ("*Gladue* and *Ipeelee* do little to address the inherent problem of plea bargaining.").

[79] *See, e.g.*, Balfour, *supra* note 72 (suggesting that the *Gladue* approach insufficiently addresses the incarceration spiral of Aboriginal women); *see also* Charlotte Baigent, *Why* Gladue *Needs an Intersectional Lens: The Silencing of Sex in Indigenous Women's Sentencing Decisions*, 32 CAN. J. WOMEN & L. 1, 7–9 (arguing that this inadequate intersectional approach can be traced back to the Supreme Court's treatment of Jamie Gladue in *R. v. Gladue*).

[80] Balfour, *supra* note 72, at 98 ("There is a complicated relationship between the prevalence of gendered violence in Aboriginal communities and violence committed by Aboriginal women.").

Aboriginal women and should require specialized consideration under the *Gladue* approach.[81]

Since the remainder of this Note is concerned with the American criminal justice system, it would be remiss to ignore the question of whether *Gladue* can, or should, be extended to other marginalized populations that are disproportionately impacted by the criminal justice system, like Black people. While section 718.2(e) instructs judges to pay particular attention to the circumstances of Aboriginal offenders, it explicitly states that this sentencing principle should be applied to "all offenders."[82] Since the Canadian Supreme Court affirmed this position in *R. v. "X*,"[83] Canada has used Impact of Race and Culture Assessments (IRCAs) in the sentencing process for people of African descent. These assessments focus on the impact of racism on the individuals being sentenced.[84] Thus, while IRCAs are distinct from *Gladue* reports, they accomplish many of the same objectives.[85] Normatively, there is perhaps a strong case for extending this approach to the American criminal justice system, where a history of slavery as well as persistent racism and oppression has led Black people to be the most significantly overrepresented population in the criminal justice system.[86] This Note does not dismiss that argument; nevertheless, it focuses on Native offenders for two reasons. First, the judicial development, scope, and application of IRCAs to Black people is distinct from that of the *Gladue* approach to Aboriginal people.[87] Second, the transplantation of such an approach to the

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[81] For a description of the gendered experiences of colonialism, see Angela Cameron, R. v. Gladue*: Sentencing and the Gendered Impacts of Colonialism*, *in* MOVING TOWARD JUSTICE: LEGAL TRADITIONS AND ABORIGINAL JUSTICE 160 (John D. Whyte ed., 2008).

[82] Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(e).

[83] R. v. "X," 2014 NSPC 95.

[84] Maria C. Dugas, *Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders*, 43 DALHOUSIE L.J. 103, 106 (2020) (discussing how IRCAs provide the court "with necessary information about the effect of systemic anti-Black racism on people of African descent" and "connect this information to the individual's lived experience, articulating how the experience of racism has informed the circumstance of the offender, the offence, and how it might inform the offender's experience of the carceral state").

[85] *But see id.* at 148 (noting how "the underlying arguments from the Crown and reasoning from the judiciary read[] as though sentencing Black Canadians in a manner that takes our history into account somehow detracts from the remedial and unique approach to sentencing Aboriginal offenders").

[86] *See generally* ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/P5PD-6EQR] (describing the extent to which Black people are overrepresented in the American criminal justice system and how this issue is linked to a history of racism and oppression).

[87] For a comprehensive review, see Dugas, *supra* note 84.

American legal system would run into unique equal protection concerns.[88] This is not to say that these concerns should, or indeed do, foreclose such an approach, but rather that to tackle them exceeds the bounds of this Note.

The *Gladue* approach is undeniably imperfect, but rather than suggesting that *Gladue* cannot sufficiently respond to the overincarceration of Aboriginal people, criticisms present opportunities to enhance a promising sentencing reform. A successful adaptation of the *Gladue* approach to the American criminal justice system inevitably requires an understanding of its successes and challenges in responding to the needs, experiences, and perspectives of Aboriginal communities. It also demands consultation with Native Nations and Native communities, ensuring that it properly responds to the lived experiences of those whom it governs.[89]

II
The Experience of Native Peoples in the U.S. Criminal Justice System

Criminal jurisdiction over Native peoples in the United States is governed by a complex set of legislation that distributes responsibilities across tribal, state, and federal governments. This expands the reach of federal jurisdiction over crimes committed by Native individuals and risks subjecting them to two prosecutions for the same criminal act.[90] Moreover, although the existing literature on sentencing disparities has largely focused on Black and Hispanic populations rather than Native peoples,[91] there are clear indications that they are both overrepresented within the criminal justice system and subject to longer sentences as compared to other ethnicities.[92] Crucially for the purposes of this Note, both of these issues are tied to the legacy of

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[88] *See infra* Section III.B (discussing the unique application of equal protection to Native peoples).

[89] So too, the form and scope of these consultations should be determined in partnership with tribal governments.

[90] *See infra* Section II.A.

[91] Makenzie Aaby & Ryan M. Labrecque, *Assessing Sentencing Disparities Among American Indians Within the Eighth, Ninth, and Tenth Federal Circuit Courts*, 6 Corr. 337, 338 (2021). Federal sentencing reports and analytical tools, including the recently launched Interactive Data Analyzer, do little to fill this gap, as they generally include statistics on Native peoples within an "Other" category that also comprises individuals of Alaska Native, Asian or Pacific Islander, Multiracial, and "Other" origin. *See, e.g.*, U.S. Sent'g Comm'n, 2020 Annual Report and Sourcebook of Federal Sentencing Statistics (2020) [hereinafter 2020 Annual Report] (reporting data for white, Black, Hispanic, and "Other" individuals). *But see* Carson, *supra* note 8 (comparing incarceration rates of whites, Blacks, Hispanics, American Indians and Alaska Natives, and Asians).

[92] *See infra* Section II.B.

colonialism in multiple ways.[93] As such, a *Gladue* sentencing approach appears to be not only appropriate but necessary in order to mitigate the enduring effects of discriminatory colonial policies and practices on Native peoples.

A. Jurisdiction over Native Peoples: Disentangling Tribal, State, and Federal Responsibilities

Jurisdiction over a crime committed by an Indian[94] is generally determined by four factors: (1) the location of the crime (i.e., Indian country or elsewhere); (2) the nature of the offense; (3) the status of the victim as Indian or non-Indian; and (4) the existence of legislation conferring state jurisdiction. First, if a crime is committed outside of Indian country, then either a state or federal court will have jurisdiction over the matter just as it would for any non-Indian person.[95] If a crime is committed by an Indian in Indian country, jurisdiction is mainly determined by three federal statutes: the Major Crimes Act, the General Crimes Act, and Public Law 280.

The Major Crimes Act authorizes exclusive federal jurisdiction over fourteen classes of felonies when committed by an Indian in Indian country.[96] The General Crimes Act extends federal jurisdiction over all non-major crimes committed by an Indian in Indian country with two exceptions.[97] First, crimes committed by an Indian against another Indian within Indian country remain under tribal jurisdiction. Second, federal jurisdiction does not extend to an Indian who has committed an offense in Indian country and has been tried and pun-

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[93] *See infra* Section II.C.

[94] *See infra* Section III.B.3 (defining "Indian" in the criminal jurisdiction context).

[95] "Indian country" is statutorily defined as including reservations, dependent Indian communities, and Indian allotments held in trust. 18 U.S.C. § 1151. In 2020, the Supreme Court decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), a landmark case that effectively expanded the boundaries of Indian country in Oklahoma and thus limited the reach of state criminal jurisdiction over Indian defendants. The Court held that an Indian defendant could not be prosecuted by the state as his crimes were committed within the Muscogee (Creek) Reservation, the boundaries of which were established by an 1832 treaty between the Muscogee Nation and the federal government—despite Oklahoma's claim that the Reservation was disestablished by the 1901 Creek Allotment Agreement and subsequent actions by Congress which "intruded on the Creek's promised right to self-governance." *Id.* at 2459–66. The Court likewise rejected Oklahoma's arguments that the Oklahoma Enabling Act established state jurisdiction over the area, and that even if it did not, historical practices and practical considerations weighed in favor of disestablishment. *Id.* at 2468–81.

[96] 18 U.S.C. § 1153.

[97] *Id.* § 1152. "Non-major crimes" include federal crimes outside the purview of the Major Crimes Act. *Id.* (constituting violations of the "general laws of the United States").

ished by a tribal court.[98] Finally, Public Law 280 confers several states with jurisdiction over all offenses committed by or against Indians in Indian country;[99] however, the Tribal Law and Order Act added the possibility of concurrent federal criminal jurisdiction under specific conditions.[100] In the states and reservations excluded from Public Law 280 coverage, state courts have jurisdiction only over crimes committed by non-Indians against non-Indians in Indian country.

This complex patchwork of tribal, state, and federal jurisdiction directly contributes to sentencing disparities among Indians in two key respects. First, because most crimes on reservations are subject to federal jurisdiction, those who commit crimes on reservations typically receive much longer sentences than they would under state or tribal authority.[101] Second, the Supreme Court has held that an Indian tribe's power to punish Indians is an inherent part of tribal sovereignty, rather than a power delegated by the federal government.[102] As such, both tribal and federal prosecutions may be brought against an Indian for a single criminal act without violating the double jeopardy clause of the Fifth Amendment.[103]

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[98] *Id.* The reach of a tribal court is, however, limited, as sentencing lengths are constrained by the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18 and 25 U.S.C.), and the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (codified as amended in scattered sections of 25 and 42 U.S.C.). *See* Seth J. Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DISCOURSE 88, 90 (2013).

[99] 18 U.S.C. § 1162; *see also* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04 (Nell Jessup Newton et al. eds., 2019) (discussing the states and reservations affected by Public Law 280).

[100] *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 221, 124 Stat. 2258, 2271–72 (codified at 18 U.S.C. § 1162(d) and 25 U.S.C. § 1321(a)(2)); *see also* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 99, § 6.04 (describing the amendment of Public Law 280 by the Tribal Law and Order Act).

[101] *See* Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-*Booker, 91 MARQ. L. REV. 723, 728–33 (2008) (discussing the judicial and legislative basis for applying federal sentencing rules in Indian country, and noting that "[previously] the concern was that state sentences were longer than federal sentences, so Indians suffered harsher sentences," but that "[t]oday this concern is reversed, such that federal sentences are longer than corresponding state sentences"). For example, Native defendants convicted of aggravated assault typically receive federal sentences that are 62% longer than the corresponding state sentences. *Id.* at 793. Note that tribal courts are limited to sentences of three years' imprisonment per offense (which can cumulatively yield a maximum nine-year sentence), hence why they tend to be shorter than federal sentences. *See* 25 U.S.C. § 1302(b).

[102] United States v. Wheeler, 435 U.S. 313, 322–28 (1978).

[103] *See id.* at 329–30; *see also* Talton v. Mayes, 163 U.S. 376, 382–84 (1896).

B. Overrepresentation and Sentencing Disparities Between Native Peoples and the General Population

Though few empirical studies analyze heightened sentencing among Native peoples, there are strong indications that these individuals are overrepresented within the criminal justice system. For example, in 2020, the incarceration rate of American Indian and Alaska Native adults under the jurisdiction of state or federal correctional authorities (1.03%) exceeded that of Hispanic (0.64%), white (0.22%), and Asian (0.09%) adults.[104] In 2019, despite comprising only 0.7% of the total U.S. population,[105] American Indians and Alaska Natives represented 1.56% of all sentenced prisoners,[106] and 2.1% of all federally incarcerated individuals.[107] White individuals, by contrast, accounted for 30.64% of all sentenced prisoners, but 59.3% of the national population.[108] These disparities appear at the state level as well. The Prison Policy Initiative found the incarceration rate for American Indian and Alaska Natives across all states (1.29%) was more than double that of white Americans (0.51%).[109] Furthermore, in states with larger Native populations, incarceration rates were reported to be as high as seven times that of white individuals.[110] Although a 2016 report by the United States Sentencing Commission's Tribal Issues Advisory Group found that there is insufficient sentencing data to conduct a meaningful sentencing disparity analysis, it nevertheless noted that "there is a widespread perception among Native Americans, many federal prosecutors, federal

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104 CARSON, *supra* note 8, at 14. The imprisonment rate for Black adults was slightly higher (1.23%) than that of American Indian and Alaska Natives. *Id.*

105 William H. Frey, *The Nation Is Diversifying Even Faster than Predicted, According to New Census Data*, BROOKINGS INST. (July 1, 2020), https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted [https://perma.cc/3M9Z-C6QN] (analyzing 2020 census data on race-ethnic population estimates).

106 *See* CARSON, *supra* note 8, at 10 (providing data on the total number of sentenced adult prisoners by jurisdiction, sex, and race or ethnicity between the years of 2010 and 2020).

107 Wang, *supra* note 4.

108 CARSON, *supra* note 8, at 10; *QuickFacts: White Alone, Not Hispanic or Latino*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/RHI825221 [https://perma.cc/F3BM-4MU8] (summarizing 2021 data).

109 Roxanne Daniel, *Since You Asked: What Data Exists About Native American People in the Criminal Justice System?*, PRISON POL'Y INITIATIVE (Apr. 22, 2020), https://www.prisonpolicy.org/blog/2020/04/22/native [https://perma.cc/SR7G-NWGM] (analyzing aggregated state-level data from the 2010 Census that includes incarceration in both prisons and jails).

110 *Id.*

defenders, and some federal and state judges that Indians are subject to sentencing disparities."[111]

Native peoples appear to experience especially significant sentencing disparities compared to white individuals. For instance, an analysis of United States Sentencing Commission data revealed that American Indians were 36.5% more likely to be incarcerated than white individuals between fiscal years 2006 and 2008.[112] In addition, Native peoples received, on average, a 3.7% longer sentence than their white counterparts.[113] More recently, sentencing disparities were examined among individuals sentenced for a felony or misdemeanor in the federal district courts in the Eighth, Ninth, and Tenth Circuits.[114] Within these circuits, researchers found that American Indians are nearly twice as likely as whites to receive a sentence of incarceration, even when controlling for the influence of the legal and extra-legal factors commonly associated with sentencing decisions.[115]

Disproportionate sentencing also exists among Native youth, who are approximately three times more likely to be incarcerated compared to their white counterparts.[116] They are also 50% more likely to receive the two most punitive sanctions for juveniles—waiver to the adult system and out-of-home placement.[117] By contrast, Native youth are 10% less likely than white youth to receive the comparatively lenient measures of diversion or probation.[118] This issue is particularly acute because 42% of all American Indians and Alaska Natives are under the age of twenty-four.[119]

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111 U.S. SENT'G COMM'N, REPORT OF THE TRIBAL ISSUES ADVISORY GROUP 15 (2016) [hereinafter TIAG REPORT], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160606_TIAG-Report.pdf [https://perma.cc/PB4R-LM56].

112 *See* Travis W. Franklin, *Sentencing Native Americans in US Federal Courts: An Examination of Disparity*, 30 JUST. Q. 310, 326 (2013). This study controlled for offense type, the presumptive sentencing guidelines, age, gender, and education.

113 *Id.* at 329.

114 Aaby & Labrecque, *supra* note 91.

115 *Id.* at 345. However, they uncovered no statistically significant or substantively meaningful differences in sentence length between incarcerated American Indians and whites (controlling for legal and non-legal factors). *Id.*

116 *See United States of Disparities*, BURNS INST., https://usdata.burnsinstitute.org/#comparison=2&placement=1&races=2,3,4,5,6&offenses=5,2,8,1,9,11,10&year=2017&view=map [https://perma.cc/Q3NX-F4RJ] (summarizing 2017 data).

117 CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME & DELINQ., NATIVE AMERICAN YOUTH AND THE JUVENILE JUSTICE SYSTEM 5 (2008), https://search.issuelab.org/resource/native-american-youth-and-juvenile-justice-system-focus.html [https://perma.cc/DMC9-Z7CC].

118 *Id.*

119 *American Indian and Alaska Native (AI/AN) Youth*, YOUTH.GOV, https://youth.gov/youth-topics/american-indian-alaska-native-youth [https://perma.cc/FN34-QR3R].

C. *Colonialism's Impact on the Overincarceration of Native Peoples*

Understanding the extent to which sentencing disparities between Native and white individuals are tied to the legacy of colonialism and its continuing effects on Native peoples is a critical step in realizing the potential for a *Gladue* approach. Although the relationship between these factors is complex, this Section will attempt to illustrate it in three key respects. First, colonial atrocities directly contributed to an increased risk of criminal behavior among Native peoples by fostering a lack of familial ties, a loss of culture, and poor socioeconomic outcomes. Second, Native peoples face direct discrimination within the legal system as a result of colonialism. Finally, the types of crimes for which Native peoples are incarcerated at greater rates than other populations (e.g., alcohol-related offenses) speak to the intentional dysfunction created by colonial processes.

The legal doctrines of discovery and conquest, by which European powers and, subsequently, the American government asserted dominion over what is now known as the United States, assumed Native peoples were an "inferior species."[120] The deliberate subjugation and colonization of America's Native peoples was thus a violent, cruel process, characterized by centuries of genocide, slavery, land seizures, and forced relocations.[121] Congress enacted the Code of Indian Offenses, banning Native rites, dances, traditions, and ceremonies.[122] In the 1860s, the United States began to remove Native children from their communities and place them in boarding schools,

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120 *See* William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 8–9 (2005) (discussing how the invasion of the Americas was "predicated upon a jurisprudential assumption that the indigenous inhabitants were a distinctly inferior species"); Johnson v. M'Intosh, 21 U.S. 543, 590 (1823) ("[T]he tribes of Indians inhabiting this country were fierce savages . . . . To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible . . . .").

121 *See generally* DAVID E. STANNIARD, AMERICAN HOLOCAUST (1992) (describing the European domination of Native Americans as a deliberate and ideological process).

122 Violation of the Code was punishable by imprisonment or a withholding of rations. OFF. OF INDIAN AFFS., DEP'T OF THE INTERIOR, RULES GOVERNING THE COURT OF INDIAN OFFENSES (1883), https://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf [https://perma.cc/E6R3-EDB2]. Fifty years later, the Code was amended to remove the ban on customary cultural practices and dances, *see* ANN M. AXTMANN, INDIANS AND WANNABES: NATIVE AMERICAN POWWOW DANCING IN THE NORTHEAST AND BEYOND 50 (2013) (describing the emergence of the modern Powwow following the code's partial repeal), though the ban on traditional religious practices remained until the American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996). For a thorough discussion of the Code, the Courts of Indian Offenses, and the Indian Police, see generally WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL (1966).

beginning an era which lasted until 1978.[123] Upon arrival, these children's heads would be shaved, their traditional clothes would be traded for uniforms, and they could even be dispossessed of their Native names.[124] For many of these children, the immeasurable physical, psychological, and sexual abuse they endured caused them to sever ties with their Native culture and history.[125] For others, the abuse and neglect resulted in death.[126]

These factors directly contribute to the present overincarceration of Native peoples, as maintaining one's traditional language and culture is a protective influence against criminal behavior.[127] For Native youth in particular, knowledge of one's tribal language can provide a "sense of purpose and guidance," as well as a stronger sense of per-

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[123] *See* Melissa Mejia, *The U.S. History of Native American Boarding Schools*, THE INDIGENOUS FOUND., https://www.theindigenousfoundation.org/articles/us-residential-schools [https://perma.cc/4ZPG-R7TM] (noting that approximately 357 of these boarding schools operated during this era). Although the forcible removal of Native children ended in 1978 with the passage of the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963), four off-reservation boarding schools continue to be run by the federal government. Hilary Beaumont, *'We're Still Here': Past and Present Collide at a Native American Boarding School*, THE GUARDIAN (May 22, 2022), https://www.theguardian.com/us-news/2022/may/22/native-american-boarding-school-sherman-indian-high-school [https://perma.cc/WZ5V-ZTLE].

[124] *See* Mejia, *supra* note 123 (describing the assignment of Anglo-American names, provision of military style uniforms, and shaving of hair). *See generally* DENISE K. LAJIMODIERE, STRINGING ROSARIES: THE HISTORY, THE UNFORGIVABLE, AND THE HEALING OF NORTHERN PLAINS AMERICAN INDIAN BOARDING SCHOOL SURVIVORS (2019) (providing a detailed account of the boarding school experience based on sixteen interviews with boarding school survivors).

[125] *See* LAJIMODIERE, *supra* note 124, at 51–59, 67 (describing the traumatic experiences of a boarding school survivor who said that it "took [her] into [her] forties to have the power to win back [her] culture, to really be proud of being a Native person," and another who stated "I don't participate in community doings. . . . [B]eing in a boarding school probably had some effect on that. I kind of isolated myself. I have no sense of belonging. . . . The teachers made me feel ashamed of being Indian and that is still with me to this day.").

[126] *See id.* at 25 (recalling that a young classmate "died because [the nuns] didn't give her the care she needed and they abused her so much," such as "anytime she'd wet her bed, the nuns would rub her face in it, and she would be crying and screaming"). In response to the recent discovery of hundreds of children's unmarked graves at Canadian residential schools, the Secretary of the Interior announced an investigation "of the loss of human life and the lasting consequences of residential Indian boarding schools." Memorandum from Deb Haaland, Sec'y of the Interior, to Assistant Sec'ys, Principal Deputy Assistant Sec'ys & Heads of Bureaus & Offs., Federal Indian Boarding School Initiative (June 22, 2021), https://www.doi.gov/sites/doi.gov/files/secint-memo-esb46-01914-federal-indian-boarding-school-truth-initiative-2021-06-22-final508-1.pdf [https://perma.cc/C5QH-8Y4E].

[127] *See* Ed A. Muñoz & Barbara J. McMorris, *Misdemeanor Sentencing Decisions: The Cost of Being Native American*, 15 JUST. PRO. 239, 241 (2002).

sonal and communal identity.[128] There is also a significant correlation between affiliation with one's tribal culture and decreased substance use.[129] At the macro level, centuries of violent colonial oppression have resulted in historical and intergenerational trauma, fostering several risk factors for criminal behavior, including substance abuse, mental health issues, and an increased risk of violent behavior.[130]

Discriminatory colonial policies continue to contribute to the incarceration of Native peoples by fostering poor socioeconomic outcomes. Many of these policies directly targeted the destruction of traditional economies, dispossession of Native land and displacement of Native peoples, and forced relocation to tribal reservations.[131] The consequences of these practices on socioeconomic outcomes are severe. Today, individuals living on tribal reservations face significant access barriers to employment and education opportunities, as well as health services and housing.[132] Based on data from the 2018 Census, Natives experience the highest poverty rate of all minority groups: 25.4%.[133] A recent survey found that white adults are more than twice

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[128] *See* Kristin N. Mmari, Robert Wm. Blum & Nicolette Teufel-Shone, *What Increases Risk and Protection for Delinquent Behaviors Among American Indian Youth? Findings from Three Tribal Communities*, 41 YOUTH & SOC'Y 382, 396 (2010).

[129] *See* William Alex Pridemore, *Review of the Literature on Risk and Protective Factors of Offending Among Native Americans*, 2 J. ETHNICITY CRIM. JUST. 45, 56–57 (2004).

[130] *See* Lisa M. Poupart, *Crime and Justice in American Indian Communities*, 29 SOC. JUST. 144, 155 (2002).

[131] *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 114, 119–20, 135–44, 179–81 (1984) (describing various colonial policies geared towards economic control and the forced removal of Native peoples).

[132] *See Native American Living Conditions on Reservations*, NATIVE AM. AID, http://www.nativepartnership.org/site/PageServer?pagename=Naa_livingconditions [https://perma.cc/4EXE-QEWM] (describing the "scarcity of jobs and lack of economic opportunity" on tribal reservations, the "housing crisis in Indian country," and inadequate health services available on many tribal reservations); Alden Woods, *The Federal Government Gives Native Students an Inadequate Education, and Gets Away with It*, PROPUBLICA (Aug. 6, 2020, 9:00 AM), https://www.propublica.org/article/the-federal-government-gives-native-students-an-inadequate-education-and-gets-away-with-it [https://perma.cc/257S-FJQG] (discussing education access in Indian country).

[133] *See* Dedrick Asante-Muhammad, Esha Kamra, Connor Sanches, Kathy Ramirez & Rogelio Tec, *Racial Wealth Snapshot: Native Americans*, NAT'L CMTY. REINVESTMENT COAL. (Feb. 14, 2022), https://ncrc.org/racial-wealth-snapshot-native-americans [https://perma.cc/6MAQ-D884] ("The national poverty rate for Native Americans was 25.4%, while Black or African American poverty rate was 20.8%. Among Hispanics, the national poverty rate was 17.6%. The White population had an 8.1% national poverty rate during the same period."); Mary F. Findling, Logan S. Casey, Stephanie A. Fryberg, Steven Hafner, Robert J. Blendon, John M. Benson, Justin M. Sayde & Carolyn Miller, *Discrimination in the United States: Experiences of Native Americans*, 54 HEALTH SERVS. RSCH. 1431, 1434 (2019) (concluding that 39% of Native peoples live in households making less than $25,000 per year, compared to 23% of white individuals).

as likely to receive a college degree compared to Native adults.[134] Educational and economic factors can contribute to an increased risk of criminal behavior and therefore incarceration.[135] Pervasive discrimination against Native peoples contributes to the inability to access health services, housing, and employment.[136]

Discriminatory treatment also extends to Native peoples' experience within the legal system. In one study, roughly one third of Native adults reported being unfairly treated by the police and courts.[137] Even after adjusting for major socioeconomic differences, the authors found that Native adults are 5.51 times more likely than white individuals to report being unfairly treated by the courts because of their ethnicity.[138] Since a pervasive stereotype for Native peoples is that they are drunk, uncivilized, and behave as savages, judges could perceive these individuals to be a greater threat to society, and thus in need of harsher sentences.[139] In theory, the *Gladue* approach is particularly well-suited to correct this overt discrimination within the legal system.

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134 Findling et al., *supra* note 133, at 1434 (finding that 15% of Native adults receive a college degree, compared to 34% of white adults).

135 *See generally* Christopher R. Dennison, *The Crime-Reducing Benefits of a College Degree: Evidence from a Nationally Representative U.S. Sample*, 32 CRIM. JUST. STUD. 297 (2019) (illustrating the negative association between attaining a bachelor's degree and engaging in crime); David Fergusson, Nicola Swain-Campbell & John Horwood, *How Does Childhood Economic Disadvantage Lead to Crime?*, 45 J. CHILD PSYCH. & PSYCHIATRY 956 (2004) (discussing how socioeconomic status is a strong predictor of involvement in crime).

136 *See* Findling et al., *supra* note 133, at 1437 (discussing how Native peoples avoid seeking healthcare for themselves or family members due to anticipated discrimination or unfair treatment); All Things Considered, *Native Americans Struggle to Find Housing While Facing Discrimination*, NAT'L PUB. RADIO (Feb. 1, 2017), https://www.npr.org/transcripts/512887794 [https://perma.cc/42K3-4A3V] (describing the severe lack of housing on tribal reservations and racial discrimination experienced by tribal members seeking housing in nearby communities); NAT'L PUB. RADIO, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF NATIVE AMERICANS 16 (2017) (finding that roughly 45% of Natives say that Native peoples have fewer employment opportunities and are paid less for equal work compared to white people).

137 *See* Findling et al., *supra* note 133, at 1434. Unfair treatment was reported at a higher rate by Native peoples living in rural areas, tribal lands, or predominantly Native areas. *Id.* at 1439.

138 *Id.* at 1437.

139 Prucha, *supra* note 131, at 136; *see also* Muñoz & McMorris, *supra* note 127, at 240 ("[H]istorically antagonistic White/Native American relations on the Nebraska Great Plains continue to reinforce prevailing Native American criminal stereotypes that may place the indigenous population at an equally or increased risk in the criminal justice system in comparison to Whites and Latinos.") (citation omitted). These stereotypes are also a direct consequence of prevailing colonial narratives and practices. *Id.* at 240–41 (describing how the demonization of Native Americans has increased their risk of involvement in the criminal justice system).

Finally, the types of crimes that Native peoples are often arrested and incarcerated for at greater rates speaks to the enduring impact of colonialism: alcohol-related offenses and violent crimes. Native peoples have disproportionate rates of substance abuse[140] and alcohol-related criminal activity.[141] Prior to the colonization of the Americas, the consumption of alcohol and other drugs was primarily limited to spiritual ceremonies, religious rituals, and rites of passage.[142] However, its use quickly expanded as it became strategically utilized by colonists to facilitate trading and treaty negotiations with Indigenous peoples.[143] Alcohol usage was also driven by colonial policies and practices that fostered the acculturation of Indigenous peoples.[144] The present high rates of alcohol-related criminal activity are thus directly tied to the devastating effects of colonialism on the livelihood of Native peoples.[145]

Native peoples face disproportionately high rates of incarceration for violent offenses and are also disproportionately victims of that same violence. As of September 2020, 58% of federally incarcerated American Indians and Alaska Natives were serving a sentence for a violent offense, compared to 10% of Black people; 6% of whites; 5% of Asians, Native Hawaiians, and Other Pacific Islanders; and 3% of Hispanics.[146] Concurrently, Native peoples experience staggeringly high rates of violence—as many as four in five American Indian and

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[140] *See Alcohol and Drug Abuse Statistics (Facts About Addiction)*, AM. ADDICTION CTRS. (Aug. 29, 2022), https://americanaddictioncenters.org/rehab-guide/addiction-statistics [https://perma.cc/4DED-2428] (noting that the rate of substance abuse and dependence for Native peoples was 12.8% in 2017, compared to 7.7% of whites, 6.8% of Black people, 6.6% of Hispanics, 4.6% of Native Hawaiians and Pacific Islanders, and 3.8% of Asian Americans).

[141] On the well-documented disproportionate involvement of Native peoples in alcohol-related criminal activity, see, for example, Larry A. Gould, *Alcoholism, Colonialism, and Crime*, *in* NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM 87, 96–97 (Jeffrey Ian Ross & Larry Gould eds., 2006) ("Alcohol is involved in 75 percent of all fatal accidents (three times as many for [I]ndigenous peoples as for other racial groups), 80 percent of all suicides, and 90 percent of all homicides involving [I]ndigenous people.") (citation omitted); Sarah W. Feldstein, Kamilla L. Venner & Philip A. May, *American Indian/Alaska Native Alcohol-Related Incarceration and Treatment*, 13 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RSCH. 1, 2 (2006) (discussing the recognition between the relationship of alcohol use and abuse to crime among Indigenous people); Muñoz & McMorris, *supra* note 127, at 242 (explaining the unbalanced participation of Native Americans in alcohol-related crimes).

[142] *See* Gould, *supra* note 141, at 87–88 (describing the limited use of intoxication among the Papagos, Toas Pueblo, Diné (Navajo), and Western Apache peoples).

[143] *See id.* at 91–92.

[144] *See id.* at 93, 101.

[145] As previously discussed, substance abuse more generally may also be traced to issues of historical trauma. *See supra* note 130 and accompanying text.

[146] CARSON, *supra* note 8, at 32. This disproportion at the federal level may also in part be attributable to the jurisdictional complexities discussed above, which result in Native

Alaska Native adults will be victims of violence in their lifetime.[147] The connection between victimization and offending is well known.[148] However, the relationship between colonialism and present-day violence experienced by Native peoples is more complex. The discriminatory intent and effect of colonial policies and practices has led to high rates of racially motivated violence against Native peoples.[149] Colonialism has also fostered disturbingly high rates of violence against Native women.[150] This has a particularly devastating effect on Native youth, as increased exposure to violence makes them more likely to engage in criminal activity.[151] In fact, confinement rates for Native youth exceed that of all white, Hispanic, and Asian youth *combined*.[152] While this high incarceration rate cannot be solely attributed to increased exposure to violence, it is certainly influenced by it.[153]

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peoples being prosecuted by federal courts for some crimes that would otherwise be subject to state jurisdiction. *See supra* Section II.A.

147 André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 NAT'L INST. JUST. J. 38, 39 (2016). In a seminal 1999 study on Native peoples and crime, the Department of Justice reported that Native peoples experience per capita rates of violence which are more than twice those of the general population, and that rates of violence in every age group are higher among Native peoples than any other race. *See* U.S. DEP'T OF JUST., AMERICAN INDIANS AND CRIME, at v (1999). More recently, President Biden has acknowledged the "unacceptably high levels of violence" faced by Native peoples and noted that these individuals are "victims of violent crime at a rate much higher than the national average." Exec. Order No. 14,053, 86 Fed. Reg. 64,337 (Nov. 15, 2021).

148 *See generally* Wesley G. Jennings, Alex R. Piquero & Jennifer M. Reingle, *On the Overlap Between Victimization and Offending: A Review of the Literature*, 17 AGGRESSION & VIOLENT BEHAV. 16 (2012).

149 *See, e.g.*, BARBARA PERRY, SILENT VICTIMS: HATE CRIMES AGAINST NATIVE AMERICANS, 72–91 (2008) (describing the racial violence and harassment experienced by Native peoples); *id.* at 38–54 (explaining how colonialism promoted racial imagery and stereotypes that continue to contribute to anti-Indian sentiment and activity); *see also* U.S. DEP'T OF JUST., *supra* note 147, at vi (noting that over 70% of the violent victimizations experienced by Native peoples are committed by persons of another race—"a substantially higher rate of interracial violence than experienced by white or [B]lack victims").

150 *See, e.g.*, Roe Bubar & Pamela Jumper Thurman, *Violence Against Native Women*, 31 SOC. JUST. 70, 71–76 (2004) (summarizing the literature explaining how colonization and historical trauma contributes to high rates of violence against Native women).

151 *See* ATT'Y GEN.'S ADVISORY COMM. ON AM. INDIAN & ALASKA NATIVE CHILD. EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 6 (2014) (noting that Native youth suffer exposure to violence at greater rates than any other race in the United States, which leads to increased rates of altered neurological development, poor physical and mental health outcomes, poor educational performance, substance abuse disorders, and an overrepresentation in the criminal justice system). For a general overview on the link between exposure to violence and violent crime perpetration, see Deborah Baskin & Ira Sommers, *Exposure to Community Violence and Trajectories of Violent Offending*, 12 YOUTH VIOLENCE & JUV. JUST. 367 (2014).

152 *See* Wang, *supra* note 4.

153 *See id.* (noting that high incarceration rates among Native youth are also due to factors like disproportionate arrest rates for some offense types, the school-to-prison

D. How Gladue *Would Address the Link Between American Colonialism and Native Incarceration*

Colonialism is evidently linked to the overincarceration of Native peoples. This Section will briefly outline how the *Gladue* approach would address this link at the time of sentencing. At the outset, the *Gladue* approach would act as a form of recognition—that colonialism is not a bygone era, but a structure that continues to produce devastating consequences for Native peoples. Within the larger context of reparations, recognition speaks to "the importance of cultural ideas, rather than focusing on monetary reparations."[154] It requires institutions to not merely acknowledge present-day impacts of colonialism, but grapple with the ways in which they perpetuated—and continue to perpetuate—the ideas that foster these impacts.[155] And yet, within the wider reparations debate, many believe that recognition alone is an insufficient remedy. Thus, it's important to consider how the *Gladue* approach can reach further, by demanding a unique sentencing approach that, when properly employed, reduces sentencing rates and length for Native peoples.

The *Gladue* approach is particularly well-suited to correct overt discrimination within the legal system.[156] Additionally, the *Gladue* approach would demand sentencing judges to consider how colonialism contributes to a particular individual's criminal behavior. For example, consider how the *Gladue* approach would have factored into the case of *State v. Williams*.[157] In this case, a husband and wife, both members of the Shoshone Nation, were convicted of manslaughter after failing to seek medical treatment for the wife's infant son.[158] He had suffered from a cavity that became infected and ultimately died due to a lack of medical treatment.[159] The parents, believing that the child had a simple toothache, gave him aspirin but did not take him to the doctors because they feared that he would be taken away by Child

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pipeline, and untreated mental health and substance use issues that can be traced to centuries of historical trauma).

154 *See* Alfred L. Brophy, *Realistic Reparations*, 1 FREEDOM CTR. J. 1, 14 (2008).

155 *See id.* at 13–15; *supra* note 56 and accompanying text.

156 *See supra* notes 137–39 (describing Native experiences of discrimination within the legal system); *see also* NAT'L PUB. RADIO ET AL., *supra* note 136, at 2 ("75% of Native Americans believe there is discrimination against Native people in America today."); Findling et al., *supra* note 133, at 1434 ("[M]ore than one in five Native American adults reported personally experiencing discrimination across most domains of life examined, including employment, health care, and the police and courts.").

157 484 P.2d 1167 (Wash. Ct. App. 1971).

158 *Id.* at 1169.

159 *Id.* at 1170.

Protective Services.[160] The Williamses were ultimately sentenced to three years' imprisonment.[161] Yet had the *Gladue* approach been applied, their unique circumstances as Native individuals, including the impact of forced removals of Native children on their decision making, would have been considered at the time of sentencing.[162] Since *Williams* was decided, the circumstances around forced removals of Native children have changed dramatically, but this case nevertheless illustrates one way in which considering colonialism may impact sentencing decisions.

Finally, the *Gladue* approach would allow judges to consider the link between colonialism and the types of crimes for which Native Americans are often arrested and incarcerated. Rather than indicating that people guilty of these crimes are morally reprehensible, dangerous, and deserving of incarceration, the prior Section suggests that there is, in some cases, an underlying impact of colonialism on these individuals' actions.[163] Using the *Gladue* approach, judges would specifically consider this impact at the time of sentencing and how it fits into the broader purposes of punishment.

III
Transplanting the *Gladue* Approach to the American Criminal Justice System

On a normative basis, the *Gladue* approach appears to be a promising mechanism for addressing the lasting impact of colonialism on the overincarceration of Native peoples. The more difficult inquiry lies in how to implement this approach in the American criminal justice system. This Part presents two potential pathways to implement the *Gladue* approach. The first involves directly amending the federal sentencing guidelines. While this approach is limited in application to the federal criminal context, it may encourage a paradigm shift in the American criminal justice system. The second pathway involves relying on Congress's plenary and exclusive authority to legislate on matters concerning Indians and Indian tribes. As explained below,

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[160] *See id.* at 1174 ("Defendant wife testified that the defendants were 'waiting for the swelling to go down,' and also that they were afraid to take the child to a doctor for fear that the doctor would report them to the welfare department, who, in turn, would take the child away."); Poupart, *supra* note 130, at 155 (discussing the effect that historical trauma has had on cultivating risk factors for criminal behavior among Indigenous peoples).

[161] *See* Paul H. Robinson, Would You Convict? Seventeen Cases That Challenged the Law 228 (1999).

[162] Note that Washington does not apply mandatory minimums to convictions of manslaughter. *See* Wash. Rev. Code Ann. § 9.94A.540 (LexisNexis 2014).

[163] *See supra* notes 140–53 and accompanying text (analyzing this link in the context of alcohol-related offenses and violent crimes).

employing this power to implement the *Gladue* approach would not run afoul of the Equal Protection Clause considering the political classification rationale developed by the Supreme Court. Although the Court has not clearly answered whether the constitutional exercise of this power hinges on the furtherance of the "trust relationship" between the United States and Native Nations, this Part will explain how the *Gladue* approach accomplishes this goal by enhancing tribal authority, safeguarding tribal sovereignty, and protecting the welfare of Native peoples.

A. Amending the Federal Sentencing Guidelines

The first potential pathway to implementing the *Gladue* approach involves amending the federal sentencing guidelines. In 1984, Congress enacted the Sentencing Reform Act to address the lack of uniformity and proportionality in sentencing.[164] Among other things, the Act created the United States Sentencing Commission in order to "establish [new] sentencing policies and practices for the Federal criminal justice system" and "measure" their efficacy.[165] This has resulted in sentencing guidelines, policy statements, and official commentary, compiled in the Commission's *Guidelines Manual*.[166] Originally, district judges were required to formulate sentences in accordance with this sentencing framework, with few exceptions.[167] But in 2005, the Supreme Court made the guidelines merely advisory, and therefore district judges may deviate from them when necessary to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a).[168] Even so, the guidelines continue to influence federal sentencing decisions.[169] Con-

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[164] *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837 (codified as amended in scattered sections of 18 and 28 U.S.C.); U.S. SENT'G GUIDELINES MANUAL § 1A3 (U.S. SENT'G COMM'N 2021).

[165] 28 U.S.C. § 991(b)(1)–(2).

[166] *See generally* U.S. SENT'G GUIDELINES MANUAL § 1A (outlining the objectives of the sentencing guidelines).

[167] 18 U.S.C. § 3553(b)(1). The Commission has established several factors that the court may not consider as grounds for departure, as well as issued guidelines on circumstances in which a departure may be warranted. *See* U.S. SENT'G GUIDELINES MANUAL § 1A1.4(b).

[168] *See* United States v. Booker, 543 U.S. 220, 245–46 (2005) (holding that the guidelines are "effectively advisory"). The purposes of sentencing are that the sentence imposed "reflect the seriousness of the offense," "promote respect for the law," "provide just punishment for the offense," "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2).

[169] Since *Booker* was decided, the Supreme Court has continued to recognize the integral role played by the guidelines in federal sentencing decisions. *See, e.g.*, Peugh v. United States, 569 U.S. 530, 544 (2013) (recognizing the guidelines as the "lodestone of

sidering the extent to which jurisdictional complexities result in Indian defendants being disproportionately diverted into the federal criminal justice system, this approach merits consideration.

The first *Guidelines Manual* was published in 1987.[170] Since then, the Commission has collected and analyzed sentencing data on an annual basis, resulting in 813 amendments.[171] Congress intended these revisions to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[172] While the Sentencing Reform Act of 1984 instructs the Commission to consider several factors relevant to the formulation of offense categories and defendant categories for use in the guidelines and policy statements, the Commission's discretion is not limited to these considerations.[173] However, the Commission is statutorily mandated to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."[174] Sentencing judges are thus expressly prohibited from considering these factors as grounds for departure.[175] This does not, however, preclude the possibility of amending the guidelines to reflect the *Gladue* principles, as Indians are afforded a unique legal status in federal law not founded on race or national origin.[176]

The Tribal Issues Advisory Group, an ad hoc advisory group to the Commission, recognized as much in a 2016 report:

> The requirement of race and national origin neutrality in the Commission's organic act (28 U.S.C. § 994(d)) is not implicated by the adoption of guidelines, policy statements, and commentary addressing "Indians" and "Indian country." These terms express the

sentencing"); Molina-Martinez v. United States, 578 U.S. 189, 198 (2016) ("Today's holding follows from the essential framework the Guidelines establish for sentencing proceedings."). Empirical evidence supports this view: For example, in 2020, almost 75% of all federal offenders received sentences in accordance with the guidelines. This includes sentences within the applicable guidelines range, as well as those outside the applicable guidelines range based on a departure reason recognized in the *Guidelines Manual*. 2020 ANNUAL REPORT, *supra* note 91, at 7.

170 U.S. SENT'G GUIDELINES MANUAL § 1A.

171 *See id.* app. C (providing the cumulative amendments); *see also* 28 U.S.C. § 994(o)–(p) (providing the Commission with the authority to promulgate amendments to the guidelines).

172 28 U.S.C. § 991(b)(1)(C).

173 *See id.* § 994(c) (providing seven factors to be considered by the Sentencing Commission in establishing categories of offenses); *id.* § 994(d) (providing eleven factors to be considered by the Sentencing Commission in establishing categories of defendants). The Act permits the Sentencing Commission to consider additional factors at their discretion. *Id.* § 994(c)–(d).

174 *Id.* § 994(d).

175 *See* U.S. SENT'G GUIDELINES MANUAL § 5H1.10.

176 *See infra* Section III.B.3 (discussing the implications of the political classification rationale).

> legal status and jurisdictional realities resulting from the government-to-government relationship between the United States and Indian tribes. . . . As the Supreme Court of the United States recognized in *Morton v. Mancari*, it is the legal status of Indian people in treaties and federal law, and not their race or national origin, that separate them from the prohibitions of § 994(d).[177]

A key component of the *Gladue* principles is a preference for alternatives to incarceration and community-based sanctions. The Commission already recognizes that probation may be used as an alternative to incarceration, provided that "the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant."[178] Native Nation and Native community consultations demonstrating the extent to which traditional community-based sanctions achieve these sentencing purposes would provide a persuasive basis for the Commission to expressly recommend their application to Indians.

Although the Commission cannot mandate the production of a stand-alone *Gladue* report, its guidelines and policy statements significantly factor into the preparation of presentence reports, which are required from probation officers under Rule 32 of the Federal Rules of Criminal Procedure.[179] It expressly mandates that the presentence report must "identify all applicable guidelines and policy statements of the Sentencing Commission," including those relevant to "the appropriate kind of sentence" and "any basis for departing from the

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[177] TIAG REPORT, *supra* note 111, at 16–17 (citing Morton v. Mancari, 417 U.S. 535, 554–55 (1974)). The Tribal Issues Advisory Group (TIAG) was established in 2015 to "consider methods to improve the operation of the federal sentencing guidelines as they relate to American Indian defendants, victims, and tribal communities." Press Release, U.S. Sent'g Comm'n, United States Sentencing Commission Announces Formation of Tribal Issues Advisory Group (Feb. 27, 2015). In its first—and only—report to the Commission, the TIAG made several recommendations: Some of these included direct revisions to the guidelines, while others concerned broader changes in federal law and practice. *See* TIAG REPORT, *supra* note 111, at 1–2.

[178] *See* U.S. SENT'G GUIDELINES MANUAL § 5B1. This, however, remains limited by the Comprehensive Crime Control Act of 1984, which prohibits a sentence of probation if (1) the defendant is convicted of a Class A or Class B felony; (2) the offense is one for which probation has been expressly precluded by statute; or (3) the defendant is sentenced to a term of imprisonment for the same or a different offense that is not a petty offense. 18 U.S.C. § 3561(a).

[179] FED. R. CRIM. P. 32. *But see id.* 32(c)(1)(A)(i)–(ii) (providing that a presentence report need not be prepared when "18 U.S.C. § 3593(c) or another statute requires otherwise" or "the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record"). 18 U.S.C. § 3593(c) deals with special hearings to determine whether a death sentence is justified.

applicable sentencing range."[180] Thus, to the extent that the guidelines reflect the *Gladue* principles, these must not only be considered by the sentencing court, but also be reflected in presentence reports. While variations in the quality and content of *Gladue* reports hindered *Gladue*'s implementation in Canada, the Commission could directly address this by promulgating a policy statement establishing minimum standards for the *Gladue* analysis in presentence reports.[181] This could include considering specific systemic, background, and cultural factors of the accused and their tribal community. Furthermore, the Commission could recommend external consultations with the accused's Native community to provide further information concerning these factors and identify appropriate alternatives to incarceration.

Yet even if an amendment embodying the *Gladue* approach is legally permissible, key challenges remain in its implementation. Though there are numerous opportunities for public participation in the amendment process,[182] the Commission itself sets the initial policy priorities. While the establishment of the ad hoc Tribal Issues Advisory Group in 2015 suggests that the Commission was aware of—and concerned about—sentencing disparities among Indian defendants, no substantial steps have been taken to address this issue since the Advisory Group's 2016 report.[183] Guidelines would also not affect state prosecutions, which would be particularly problematic for Indians in Public Law 280 states. Nevertheless, the guidelines remain a feasible tool by which to apply *Gladue* principles to Indian defendants, and perhaps even motivate a paradigm shift in the American criminal justice system.

B. Legislating the Gladue *Approach*

A second pathway towards implementing the *Gladue* approach could utilize Congress's plenary and exclusive power to regulate Indian affairs to enact legislation that directs both federal and state courts to conduct a *Gladue* analysis in criminal cases concerning

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[180] FED. R. CRIM. P. 32(d)(1).

[181] Guidelines, policy statements, and official commentary regarding presentence reports are provided in section 6A1 of the *Guidelines Manual*. *See* U.S. SENT'G GUIDELINES MANUAL § 6A1.

[182] *See* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 34–35 (2020) (describing the guideline amendment cycle).

[183] Although the Commission announced that a standing Tribal Issues Advisory Group (TIAG) would be established in 2016, *see* Request for Applications; Tribal Issues Advisory Group, 81 Fed. Reg. 58003, 58003–04 (Aug. 24, 2016), no such group appears to have been formed. There also does not appear to have been any progress made on the TIAG's recommendation to collect additional data on the sentencing of Native defendants.

Indians. This approach would be advantageous as it applies to both state and federal criminal justice systems.[184] At the same time, the political will necessary for such an action is monumental and may be impractical in today's political climate.[185] Moreover, legislating the *Gladue* approach raises several legal questions, including whether such an action falls within Congress's plenary power over Indian affairs and conforms with the equal protection guarantees of the Fifth and Fourteenth Amendments. This Section will address these issues in turn.

To avoid one of the major shortcomings of the approach as implemented in Canada, Congress could set forth minimum standards for *Gladue* reports,[186] which could be folded into existing presentence reports. Doing so would avoid an issue found in Canadian presentence report *Gladue* analyses, which is that the resulting analysis is often incomprehensive or improperly contextualized within the experience of Aboriginal communities.[187] Finally, Congress could directly appropriate funds towards the production of such reports. These funds could be used to both train and compensate *Gladue* report writers, who could be either standalone actors or existing probation officers tasked with completing presentence reports.[188]

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[184] Such a mandate would not run afoul of the anticommandeering doctrine, as "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." New York v. United States, 505 U.S. 144, 178–79 (1992).

[185] *See, e.g.*, David A. Graham, *How Criminal-Justice Reform Fell Apart*, THE ATLANTIC (May 26, 2022), https://www.theatlantic.com/ideas/archive/2022/05/george-floyd-anniversary-police-reform-violent-crime/630174 [https://perma.cc/HTB7-AGW3] (discussing how the recent rise in crime, and in particular violent crime, has damaged present efforts to pursue criminal justice reform).

[186] *See supra* Section III.A (suggesting the types of minimum standards that could be established by the Sentencing Commission, which may also be mandated by Congress).

[187] *See supra* note 74 and accompanying text.

[188] State probation officers, although they are technically part of the judiciary and therefore may escape anticommandeering concerns, could also be characterized as officers of the states. In that case, directing them to complete a *Gladue* analysis would run afoul of the Tenth Amendment. *See* Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the Brady Act violated the Tenth Amendment by requiring state and local law enforcement officers to perform background checks on prospective handgun purchasers). However, Congress could still ensure, or at the very least encourage, their compliance by attaching the *Gladue* analysis requirement to federal funds directed towards their production. This is the approach of the recently proposed George Floyd Justice in Policing Act, which would leverage law enforcement funding to encourage states to ban the use of chokeholds and no-knock warrants. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. §§ 362, 363 (2020).

1. The Scope of Congressional Plenary Power

Congress's plenary power to regulate Indians and Indian tribes has been recognized by the Supreme Court in a long line of decisions dating back to 1886.[189] Although not unlimited,[190] the power grants Congress the authority to regulate the health, safety, morals, and general welfare of Indians, similar to the states' police power over non-Indians.[191] It is exclusive in the sense that states retain no authority to legislate in this area.[192] Finally, the power is expansive, in that it extends beyond the borders of tribal reservations: Within the subject-matter limits of the power itself, Congress may regulate Indians whether on or off reservations.[193] Despite the Supreme Court's long-standing recognition of Congress's plenary power, scholars remain deeply engaged in debates over its foundations and legitimacy.[194] Nevertheless, Congress has enacted hundreds of statutes concerning

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[189] *See* United States v. Kagama, 118 U.S. 375, 379–80, 383–85 (1886) (endorsing Congress's plenary power); Morton v. Mancari, 417 U.S. 535, 551–52 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); United States v. Lara, 541 U.S. 193, 200 (2004) (recognizing Congress's "plenary and exclusive power" based on the Commerce Clause, Treaty Clause, and structure of the Constitution).

[190] *See* United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) ("The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.").

[191] *See also* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 99, § 5.02 (discussing the scope of the plenary power doctrine).

[192] *See* United States v. Lara, 541 U.S. 193, 200 (2004) (recognizing Congress's "plenary *and exclusive*" power "to legislate in respect to Indian tribes") (emphasis added) (quoting Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 470–71 (1979))); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996) (noting that states "have been divested of virtually all authority over Indian commerce and Indian tribes").

[193] *See, e.g.*, Perrin v. United States, 232 U.S. 478, 482 (1914) (acknowledging Congress's power to prohibit the sale of alcohol to Indians "whether upon or off a reservation and whether within or without the limits of a State"); United States v. McGowan, 302 U.S. 535, 539 (1938) ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States . . . .") (quoting United States v. Ramsey, 271 U.S. 467, 471 (1926)).

[194] *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) (arguing that the Indian Commerce Clause is not the foundational source for Congress's plenary power); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007) (asserting that the Indian Commerce Clause, as originally understood, did not grant Congress plenary or exclusive power to regulate Indian tribes); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002) (claiming the Constitution does not authorize Congress to regulate Indian tribes without their consent by treaty); Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57 (1991) (arguing that the Constitution does not give Congress plenary power to regulate Indian tribes).

Indians and Indian tribes,[195] and the Supreme Court has never invalidated any on the grounds that it exceeded Congress's plenary power over Indian affairs. Thus, this Note presumes the constitutionality of the congressional plenary power over Indians and Indian tribes.

2. Rational Basis Review

Over the past fifty years, another constitutional challenge has been raised against legislation singling out Indians: that it creates a race-based classification in violation of the equal protection guarantees of the Fifth and Fourteenth Amendments. However, in each of these cases, the Supreme Court has applied a rational basis standard of review,[196] rather than the strict scrutiny standard applied to racial classifications,[197] and upheld the legislation or regulation in question. The seminal case on this point is *Morton v. Mancari*, in which the Supreme Court first held that Indians constitute a political classification[198] and that such a classification will survive rational basis review when it is tied to "Congress' *unique obligation* toward the Indians."[199]

In *Mancari*, the Supreme Court unanimously upheld an employment preference for Indians in the Bureau of Indian Affairs (BIA).[200] Congress had authorized a preference for Indians in the Indian Reorganization Act of 1934.[201] In order to be considered an "Indian," an individual had to "be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe."[202] However in 1972, the BIA expanded the preference to "situation[s] where an Indian and a non-Indian, both already employed by the BIA, were competing for a promotion within the Bureau."[203] A group of non-Indian BIA employees challenged the expanded preference under the Due Process Clause of the Fifth Amendment.[204] The Court applied a

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195 Much of this legislation is contained in Title 25 of the United States Code.

196 Under this standard, legislation is valid if it is "rationally related to a legitimate governmental interest." U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973). *But see* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 207 (1995) (applying a strict scrutiny standard to a federal program that gave contracting preferences to firms owned or controlled by "socially and economically disadvantaged" groups, including "[B]lack, Hispanic, Asian Pacific, Subcontinent Asian, *and Native Americans*" (emphasis added) (quotation marks omitted)).

197 *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (noting that racial classifications face strict scrutiny on judicial review).

198 Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

199 *Id.* at 555 (emphasis added).

200 *Id.* at 553–54.

201 Pub. L. No. 73-383, § 12, 48 Stat. 984, 986 (codified at 25 U.S.C. §§ 5116).

202 *Mancari*, 417 U.S. at 553 n.24 (quoting 44 BIAM 335, 3.1). This portion of the BIAM has since been amended. *See* 44 BIAM 302, 2.1.

203 *Id.* at 538.

204 *Id.* at 539.

rational basis standard of review, finding that the classification was "political rather than racial in nature" as "it applie[d] only to members of 'federally recognized' tribes."[205] The legal rule established by *Mancari* is that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[206] The BIA hiring preference met this standard as it was "reasonable and rationally designed to further Indian self-government."[207]

3. The Limits of the Political Classification Rationale

Whether *Mancari* permits classifications beyond formal tribal membership is an open question. While most statutes that provide unique treatment for Indians or Indian tribes depend on tribal membership or tribal status, there are outliers.[208] Perhaps most important, for the purposes of this Note, is the definition of "Indian" employed in the federal criminal jurisdiction context. Although several statutes govern this issue,[209] none explicitly defines the term. Instead, courts tend to apply a two-prong test that emerged from *United States v. Rogers*.[210] The first prong requires that the defendant have a sufficient degree of Indian blood, a measure of descendancy; the second requires recognition of the defendant as Indian by a federally recognized tribe.[211] Lacking specific guidance from the Supreme Court, lower courts applying this test have held the descendancy prong to be satisfied by various quantitative measures, including one-eighth

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[205] *Id.* at 553 n.24. For the remainder of this Note, this will be referred to as the "political classifications rationale."

[206] *Id.* at 555. For the remainder of this Note, this will be referred to as the "unique obligations rationale."

[207] *Id.*

[208] For example, the Indian Education Act defines the term "Indian" to include "a member of an Indian tribe . . . [that has been] terminated [by the federal government];" "a member of an Indian tribe . . . recognized by the State in which the tribe or band resides;" "a descendant, in the first or second degree, of [a member of an Indian tribe];" or an individual "considered by the Secretary of the Interior to be an Indian for any purpose." 20 U.S.C. § 7491(3).

[209] *See supra* Section II.A.

[210] United States v. Rogers, 45 U.S. 567, 572–73 (1846); *see, e.g.*, United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) ("The generally accepted test—adapted from *United States v. Rogers* . . . asks whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both."). The issue before the Court in *Rogers* was whether the criminal provision of what is now known as the Indian Country Crimes Act could apply to a white man adopted into an Indian tribe. *Rogers*, 45 U.S. at 571.

[211] *Rogers*, 45 U.S. at 572–73 (holding that a white man, though adopted into an Indian tribe, was not subject to the Indian Country Crimes Act on account of his race).

Indian ancestry[212] and 3/32 Indian ancestry.[213] What constitutes tribal recognition can also be unclear. While formal tribal membership clearly satisfies this requirement, it may also be satisfied by the receipt of government assistance reserved only to Indians, enjoyment of the benefits of tribal affiliation, or social recognition as an Indian, which may be implied by residence on a reservation, participation in Indian social life, and self-identification as an Indian.[214] The Supreme Court has yet to weigh in on whether legislation in this area—as applied—would survive an equal protection claim when the defendant is not a member of a federally recognized tribe.[215]

Whether descendancy in combination with eligibility for tribal membership may satisfy the political classification rationale is also an open question—though it will soon be answered. Outside of the criminal context, the Indian Child Welfare Act (ICWA) defines the term "Indian child" to mean "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[216] This legislation was challenged on the grounds that the latter definition violates the political classification rationale upheld in *Mancari*. While a federal district court declared the ICWA to be unconstitutional for this reason, the Fifth Circuit reversed the ruling in 2019.[217] The case is now pending before the Supreme Court.[218] Should the Supreme Court determine the classification to be constitutional, there is a strong argument that any legislation employing the *Gladue* approach could be made applicable to Indian youths who meet the definition employed by the ICWA. The question of whether this definition could be extended to adults is trickier, espe-

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[212] United States v. Bruce, 394 F.3d 1215, 1227 (9th Cir. 2005). *But see* Vialpando v. State, 640 P.2d 77, 80 (Wyo. 1982) (holding that an individual with one-eighth Indian ancestry is not an "Indian" for the purposes of federal criminal jurisdiction).

[213] *Stymiest*, 581 F.3d at 762, 766.

[214] *See, e.g.*, *Bruce*, 394 F.3d at 1224; *Stymiest*, 581 F.3d at 763; *see also* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 99, § 3.03[4] & nn.39–47 (describing various formulations of the tribal recognition test).

[215] *Cf.* United States v. Antelope, 430 U.S. 641, 646 (1977) (holding that the respondents were subject to federal criminal jurisdiction "because they are enrolled members of the Coeur d'Alene Tribe").

[216] 25 U.S.C. § 1903(4).

[217] *See* Brackeen v. Zinke, 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018), *aff'd in part, rev'd in part sub nom.* Brackeen v. Bernhardt, 937 F.3d 406, 428 (5th Cir. 2019) ("Conditioning a child's eligibility for membership, in part, on whether a biological parent is a member of the tribe is therefore not a proxy for race, as the district court concluded, but rather for not-yet-formalized tribal affiliation . . . ."), *aff'd in part, rev'd in part sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted*, 142 S. Ct. 1205 (2022).

[218] *See* Petition for Writ of Certiorari, Haaland v. Brackeen, 142 S. Ct. 1205 (2022) (No. 21-380) (granting certiorari).

cially considering the specific test employed against these individuals in the criminal context. It also raises a larger question: Should those who choose not to be affiliated with tribes be considered "Indian"? The *Gladue* approach suggests that a lack of current tribal affiliation does not negate the impacts of colonialism on such individuals. At the same time, embracing a broad definition risks subjecting these individuals to legislation that objectively harms Indians.[219] Ultimately, the classification limits of the *Gladue* approach should not only be dictated by the limits of the law, but by the wishes of those whom it governs.

4. Applying the Unique Obligation Rationale to the Gladue *Approach*

The unique obligation standard established in *Mancari* provides that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[220] The Court has found this unique obligation satisfied in numerous contexts. In *Mancari*, the BIA hiring preference met this standard as it was "reasonable and rationally designed to further Indian self-government."[221] Similarly, in *Fisher*, the Court upheld a tribal ordinance that subjected an Indian, but not a similarly situated non-Indian, to tribal-court jurisdiction for adoption proceedings because it "further[ed] the congressional policy of Indian self-government."[222] In *Moe*, the Court held that state cigarette sales taxes, personal property taxes, and vendor licensing fees did not apply to Indians on reservations.[223] In this way, the Court almost automatically deferred to Congress's intent rather than con-

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[219] Examples of these types of legislation include the Major Crimes Act and the General Crimes Act, which impose federal jurisdiction and therefore typically result in longer sentences for crimes committed by Indians on reservations. *See supra* Section II.A.

[220] Morton v. Mancari, 417 U.S. 535, 555 (1974); *see also Antelope*, 430 U.S. at 646–47 (discussing the political classification holding in *Mancari*); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 500–01 (1979) (restating the political classification holding from *Mancari*). The corpus of federal Indian law cases does not clearly answer the question of whether legislation that uniquely targets Indians even needs to benefit this population to be held constitutional. *See, e.g.*, Fisher v. Dist. Ct., 424 U.S. 382 (1976); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsrv., 425 U.S. 463 (1976); Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977); *Antelope*, 430 U.S. 641; *Confederated Bands & Tribes*, 439 U.S. 463; Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). It is beyond the scope of this Note to engage in a deeper examination of these cases, but they raise the question of whether a statute which adopts the *Gladue* approach must satisfy the unique obligation standard presented in *Mancari*.

[221] 417 U.S. at 555.

[222] 424 U.S. at 390–91.

[223] 425 U.S. at 479–81.

ducting a separate analysis on how this legislation fulfilled Congress's unique obligation toward the Indians. In *Weeks* and *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, the Court found that Congress fulfilled its obligation by honoring Indian treaty provisions.[224] In *Brackeen v. Bernhardt*, the Fifth Circuit upheld the constitutionality of the ICWA based on its stated purpose of "protect[ing] the best interests of Indian children and . . . promot[ing] the stability and security of Indian tribes."[225]

Based on this history, the *Gladue* approach appears to fulfill Congress's unique obligation in multiple ways. First, the *Gladue* approach enhances the respect for—and use of—alternative, community-based sanctions,[226] which would consequently strengthen the authority and use of traditional tribal justice mechanisms, such as peacemaking,[227] elder panels,[228] and sentencing circles.[229] Canada's Department of Justice has recognized the *Gladue* approach as "a first step towards greater Indigenous self-determination in the criminal justice system."[230]

Second, the *Gladue* approach, properly employed, could reduce incarceration rates and sentencing lengths among Indians, directly promoting the health and welfare of these individuals and their communities. The individual and communal health impacts of incarceration are well documented. For example, individuals with a history of

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[224] In *Weeks*, the Court upheld a distribution of federal funds to the Cherokee Delawares and the Absentee Delawares to redress a breach by the United States of an 1854 treaty which resulted in a loss of tribal property. 430 U.S. at 85. This holding did not extend to the Kansas Delawares as they were not a federally recognized tribe. *Id.* Likewise, in *Washington State Commercial Passenger Fishing Vessel Association*, the Court rejected an equal protection challenge to treaty provisions reserving fishing rights to Indians. 443 U.S. at 673 n.20.

[225] Brackeen v. Bernhardt, 937 F.3d 406, 430 (5th Cir. 2019) (alterations in original) (citing 25 U.S.C. §§ 1901–1902). As previously mentioned, this case is currently pending Supreme Court review. *See supra* note 220 and accompanying text.

[226] *See* R. v. Gladue, [1999] 1 S.C.R. 688, paras. 70–74 (Can.) (suggesting the use of community-based sanctions); SPOTLIGHT ON *Gladue*, *supra* note 75, at 45–48 (discussing various forms of community-based justice programs supported by the Department of Justice in light of *Gladue*).

[227] *See generally* ROBERT V. WOLF, CTR. FOR CT. INNOVATION, PEACEMAKING TODAY (2012) (summarizing a roundtable about the practice of and contemporary issues in peacemaking).

[228] *See generally* KIMBERLY A. KOBB & ANDREW CANNON, BUREAU OF JUST. ASSISTANCE, ELDER PANELS: AN ALTERNATIVE TO INCARCERATION FOR TRIBAL MEMBERS (2014) (providing an overview of the use of elder panels in existing justice systems).

[229] *See generally* Timothy H. Gailey, *Healing Circles and Restorative Justice: Learning from Non-Anglo American Traditions*, ANTHROPOLOGY NOW, Sept. 2015, at 1 (describing the use of Healing Circles in multiple communities).

[230] SPOTLIGHT ON *Gladue*, *supra* note 75, at 52.

incarceration are at an increased risk of experiencing chronic health problems, obesity, and mental health issues.[231] Incarceration can also significantly affect the health and well-being of family members, with particularly acute effects experienced by children in cases of parental incarceration.[232] Moreover, higher rates and lengths of incarceration directly threaten the survival of Native culture. For instance, incarcerated individuals have been denied the right to practice customary religious and spiritual ceremonies, such as smudging and sweat lodges.[233]

Furthermore, by reducing the gross overincarceration and accompanying higher risk of recidivism among Indian youth, the *Gladue* approach would directly address and reduce the removal of these individuals from their communities at a young age. It would enable them to retain their cultural and familial ties while engaging in traditional justice mechanisms. As acknowledged by the Tribal Chief of the Mississippi Band of Choctaw Indians in his testimony before Congress regarding the ICWA:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. . . . Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.[234]

Conclusion

The overincarceration of Native peoples in the United States is a devastating issue that too often goes unnoticed. Beyond public attention, tangible reforms are needed in this area—ones which not only aim to reduce disproportionate incarceration rates and sentence lengths for Native peoples but also confront the colonial underpinnings of America's past and present. Despite its shortcomings in implementation, the *Gladue* approach remains a powerful tool by

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231 *See* Michael Massoglia & William Alex Pridemore, *Incarceration and Health*, 41 Ann. Rev. Socio. 291, 293, 302–04 (2015) (discussing the effects of incarceration on chronic health issues and obesity and potential drivers for these outcomes); Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, Prison Pol'y Initiative (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts [https://perma.cc/XL5X-TZQV] (reviewing the literature on the impact of incarceration on incarcerated people's mental health).

232 *See* Massoglia & Pridemore, *supra* note 231, at 293–95.

233 *See* Native Am. Rts. Fund, Legal Protections for Native Spiritual Practices in Prison 5–8 (2016).

234 *Indian Child Welfare Act of 1977: Hearing on S. 1214 before the S. Select Comm. on Indian Affs.*, 95th Cong. 157 (1977) (statement of the National Tribal Chairmen's Association).

which to undertake this task. The United States legal system, just like its Canadian counterpart, has failed to account for the unique needs, experiences, and circumstances of Indigenous individuals. By applying an individualized and contextualized approach to sentencing, which prioritizes community-based alternatives to incarceration and emphasizes restorative justice, it can begin to remedy these wrongs. At the same time, any effort to implement the *Gladue* approach should be driven by the voices of those whom it governs: Consultations with Native Nations and Native communities must inform its content, structure, and very existence. In the interim, this Note offers two legal pathways by which to implement the *Gladue* approach that conform with the existing American constitutional structure. While the federal sentencing guidelines may be jurisdictionally limited in reach, they have the potential to bring about change in the criminal justice system broadly—perhaps one that does not stop at the injustices experienced by Native peoples. Additionally, while congressional action requires significant political will, it also holds significant promise. Congress has historically exercised its plenary power to the detriment of Native Nations and people in the criminal context. It is time for a new direction on the path to justice—the *Gladue* approach may be the first step.