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SENTENCING AND CULTURAL DIFFERENCES: BANISHMENT OF THE AMERICAN INDIAN ROBBERS

INTRODUCTION

In Everett, Washington, two teenage Tlingit[1] American Indian boys brutally beat and robbed a pizza deliveryman.[2] The boys pled guilty to committing robbery in the first degree.[3] On July 13, 1994, a Snohomish County, Washington state judge referred the sentencing of the two boys to the Tlingit American Indian tribal court.[4] At the request of an American Indian tribal judge[5] on behalf of the boys, the Washington state judge postponed official sentencing and agreed to refer sentencing to an American Indian tribal court for the traditional American Indian procedure of trial and banishment.[6]

The tribal judges sentenced the American Indian teenagers to banishment for up to two years on separate, uninhabited islands in Alaska.[7] In addition to the banishment sentence, the tribal

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1. Tlingit is pronounced Klink-et. Michael Sangiacomo, *A Different Kind of Justice: Alaskan Indian Court May Open Door to Alternatives*, PLAIN DEALER, Sept. 11, 1994, at 1A.

2. The two boys smashed the victim's skull with a baseball bat, leaving him deaf in one ear; they also robbed him of $50. Timothy Egan, *Tribal Justice for Robbers Called Hoax: Boys to be Banished Have Skipped Town*, N.Y. TIMES, Aug. 31, 1994, at A1.

3. Brian S. Akre, *Indian Teens Await Banishment Hearing on Alaska Fishing Boat*, CHI. DAILY L. BULL., Sept. 1, 1994, at A2. In Washington, "[a] person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he: . . . (c) inflicts bodily injury." WASH. REV. CODE ANN. § 9A.56.200 (West 1988).

4. *Modern Court Adopts Ancient Tribal Justice: 2 Teenagers Banished to Islands for Year*, WASH. POST, July 16, 1994, at A3 [hereinafter *Modern Court*].

5. Rudy James is the head judge of the Kuye Di Kuiu Kwaan, a Tlingit tribal court. Sangiacomo, *supra* note 1, at 1A. One of the boys' grandfathers asked James to intervene on behalf of the boys. *Id.*

6. Akre, *supra* note 3, at A2. The prosecutor objected to the referral, arguing that "I have . . . difficulty in accepting the idea that we treat people differently under the law because they come from different cultural backgrounds. I can see now I'll be facing all kinds of motions and arguments based on someone's cultural background." *Modern Court*, *supra* note 4, at A3.

7. Akre, *supra* note 3, at A2. The tribal court sent the two American Indian boys into the harsh wilderness armed with only basic necessities, a dog to warn them of bears and wolves and a 12 by 12 foot wooden shelter. Sangiacomo, *supra* note 1, at 1A. They will have to fish and catch animals for food. *Id.*

court awarded the victim $5,000 and a house that the tribe would build to compensate for his injuries.[8] If after the banishment sentence, the Washington judge finds tribal punishment failed to rehabilitate the boys, the Washington court may still impose prison sentences of two and one-half to five and one-half years.[9]

This Note examines the constitutionality of the Washington judge's referral of sentencing to the American Indian tribal court. Part I of this Note sets forth a history of American Indian sovereignty in the United States and the alterations to the American Indians' special legal status throughout the years. Part II describes how, by referring sentencing of the American Indian felons to an American Indian tribal court, the State of Washington denied the boys equal protection of the laws under the Fourteenth Amendment. Part III explains how, by allowing the tribal court's banishment sentence, the state violated the boys' Eighth Amendment right to be free from cruel and unusual punishment. Finally, Part IV of this Note explains why state judges should not be allowed to refer sentences to American Indian tribal courts.

I. HISTORICAL BACKGROUND OF AMERICAN INDIAN SOVEREIGNTY IN THE UNITED STATES: THE GRADUAL DIMINUTION OF AMERICAN INDIANS' SPECIAL LEGAL STATUS

Since the earliest years of this nation, the United States has recognized that American Indian tribes have a legal existence separate from that of non-American Indians.[10] This special legal status granted American Indians the power of self-government.[11] Part I will trace the historical development of the American Indians' special legal status in the United States. Specifically Part I describes the absolute sovereignty American Indians once retained and shows the gradual diminution of American Indians' special legal status in the United States.

A. American Indians Possessed Absolute Sovereignty

Of all the minority groups in the United States today, American Indian tribes alone possess a special legal status.[12] The United States recognizes the American Indian tribes as a third sovereign, in addition to the federal and state governments.[13] Al-

8. Sangiacomo, *supra* note 1, at 1A.

9. Akre, *supra* note 3, at A2.

10. Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1312 (1993).

11. Christina D. Ferguson, Comment, Martinez v. Santa Clara Pueblo: *A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275, 276 (1993).

12. Teresa La Fromboise & Richard La Fromboise, *Critical Legal and Social Responsibilities Facing Native Americans, in* INDIANS AND CRIMINAL JUSTICE 22 (Laurence French ed., 1982).

13. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.

though the American Indians are citizens of the United States,[14] by virtue of their tribal affiliations they also possess "special rights which emanate from their special legal status of 'internal sovereignty.'"[15]

In the late 1700's, when American Indian tribes first began their relationship with the federal government, American Indians attained their status as self-governing entities through treaty negotiations with whites.[16] These early treaties basically established that the United States government would hold in trust the American Indian land Americans now enjoy.[17] In return, American Indians could live autonomously, free from external control, and maintain their own authority within the limits of their own reservation lands.[18] Congress, with its plenary powers, could enact laws concerning trust property and tribal government powers which would regulate and modify the sovereignty of the tribes.[19]

L. REV. 225, 232 (1994).

14. 8 U.S.C. § 1401(b) (1988). The Citizenship Act of 1924 made all non-citizen American Indians born within the territorial limits of the United States "citizens of the United States irrespective of their desire in the matter. . . ." Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 854 (1990).

15. Fromboise & Fromboise, *supra* note 12, at 22. Sovereignty may be defined as "the self-sufficient source of political power, from which all specific political powers are derived . . . supreme, absolute, uncontrollable power, the absolute right to govern." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

16. *See, e.g.*, Treaty with the Cherokees, Dec. 29, 1835, art. 5, 7 Stat. 478, 481. The treaty provides that:

> [t]he United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them. . . .

Id.

The federal government had a mutual trust relationship in which it provided the American Indians protection from the states so that the American Indian tribes could achieve self-government and self-sufficiency. Connie K. Haslam, Note, *Indian Sovereignty: Confusion Prevails*, 63 WASH. L. REV. 169, 178 (1988).

17. *See* William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 4 (1987) (explaining the territorial test that was the basis of federal American Indian law at the time the United States made treaties with the American Indians).

18. *Id.*

19. *Id.* at 1. Congress derives its broad power to deal with American Indian tribes from two sources. The Commerce Clause provides that Congress shall have the power "[t]o regulate commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. (cited in Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 596 (1979)). Second, the guardian-ward relationship between the federal government and the American Indian tribes came about as a result of the conquest of the American Indians which left them "an uneducated,

Because American Indians' sovereignty did not emanate from the Constitution, constitutional restraints and federal laws did not apply to them unless Congress expressly limited tribal power.[20]

Chief Justice Marshall's ruling in *Worcester v. Georgia*[21] provided an initial basis for American Indian tribal sovereignty.[22] In 1832, the Supreme Court in *Worcester* recognized American Indians as having exclusive jurisdiction within their territorial boundaries.[23] The Court held that American Indian nations retained the inherent sovereign power of self-government, and that state laws did not apply within American Indian country.[24]

B. American Indian Tribal Sovereignty — The Erosion Begins

Tribal sovereignty has undergone considerable degeneration since the making of the treaties and the *Worcester* decision.[25] Initially, states could not intervene in tribal affairs unless Congress expressly delegated the power to them.[26] Congress was the only governmental body that was able to limit, alter, or dissolve any powers of self-government which the American Indians possessed.[27] The American Indians had the right to full jurisdiction over all matters that took place within the reservation.[28]

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helpless and dependent people, needing protection against the selfishness of others and their own improvidence." *Id.* at 596-97. *See, e.g.*, Major Crimes Act, 18 U.S.C. § 1153 (1994) (illustrating how Congress usurped jurisdiction from tribal courts by conferring federal jurisdiction over 14 major crimes involving American Indian perpetrators). *See generally* Chriss Wetherington, Note, *Criminal Jurisdiction of Tribal Courts over Nonmember Indians: The Circuit Split*, 1989 DUKE L.J. 1053, 1059-64 (1989) (explaining the current statutory scheme for criminal jurisdiction in American Indian country).

20. Talton v. Mayes, 163 U.S. 376, 382 (1896).

21. 31 U.S. (6 Pet.) 515 (1832).

22. Charles F. Wilkinson, *Basic Doctrines of American Indian Law, in* INDIANS AND CRIMINAL JUSTICE 76 (Laurence French ed., 1982).

23. *Worcester*, 31 U.S. (6 Pet.) at 557. The Court held that American Indian reservations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States." *Id.*

24. *Id.* at 561. The Court in *Worcester* held that state law does not apply to American Indian tribes. *Id.* Later cases make it clear that Congress has superior legislative authority over American Indian tribal sovereignty or self-government. Wilkinson, *supra* note 22, at 76.

25. Canby, *supra* note 17, at 6.

26. *Worcester*, 31 U.S. (6 Pet.) at 561. States could not deal with American Indian tribes unless Congress expressly delegated power to the states. *Id.* The Court's attitude towards the American Indian tribes' legal status was clearly expressed for the first time in 1831 by Chief Justice John Marshall. In *Cherokee Nation*, the Supreme Court invalidated a series of state laws that extended over the Cherokee territory. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 1 (1831).

27. Ferguson, *supra* note 11, at 282.

28. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (recognizing that

It was not until 1881, in *United States v. McBratney*,[29] that the Supreme Court granted state courts the power to deal with non-American Indian crimes that took place in American Indian country.[30] *McBratney* gave state courts jurisdiction over certain matters that took place within American Indian territory, depending on the nature of the subject matter and the identity of the parties involved, so long as no interest of the tribe was affected.[31] Not only did *McBratney* cloud Chief Justice Marshall's tidy jurisdictional view in *Worcester*,[32] the case divested the American Indian tribes of their absolute sovereignty over matters that took place in their territory.[33]

C. *Congress Diminishes American Indian Sovereignty*

In addition to the courts, Congress also diminished the American Indians' power of self-government while it increased the power of the states over the American Indians.[34] In general, states lacked jurisdiction over American Indian matters on American Indian reservations until the federal government granted

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American Indian nations were "distinct communit[ies], occupying [their] own territory [within which their authority is exclusive]. . . . The laws of [a state] can have no force" within reservation boundaries). Chief Justice Marshall's division of power was purely geographical. This "territorial test" inherently empowered tribes to govern everything that happened within their territorial borders. Canby, *supra* note 17, at 3.

29. 104 U.S. 621 (1881).

30. *See id.* at 624. It was not until *McBratney* that the Supreme Court ruled that Congress could not have intended the total exclusion of state power over completely non-American Indian crimes that just happen to take place in American Indian country. Haslam, *supra* note 16, at 171. *McBratney* held that "[t]he courts of the United States . . . have no jurisdiction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remain in force." 104 U.S. at 624. *See also* Draper v. United States, 164 U.S. 240 (1896) (holding that the state had jurisdiction over a crime committed by a non-American Indian in American Indian territory).

31. Haslam, *supra* note 16, at 171. Where a case involves no American Indian parties and does not affect tribal self-government, the state courts do have jurisdiction. *Id.* When American Indians or American Indian interests are involved, states do not have power unless it is conferred by a federal statute or treaty. Canby, *supra* note 17, at 5. *See, e.g.*, Williams v. Lee, 358 U.S. 217 (1959) (rejecting state court jurisdiction over a civil claim by a non-American Indian against an American Indian, involving a transaction that occurred on an American Indian reservation, because state jurisdiction would affect matters of American Indian interests and infringe on the right of American Indians to govern themselves). *See also* Wetherington, *supra* note 19, at 1055, 1060-64 (explaining the criminal jurisdiction rules for crimes committed on American Indian reservations).

32. Canby, *supra* note 17, at 4.

33. *Id.* However, American Indian tribes probably had very little interest in dealing with crimes involving only non-American Indians when the occurrence of the crime on the reservation was largely a matter of chance. *Id.*

34. Haslam, *supra* note 16, at 174.

jurisdiction.[35] However, in 1953, to address lawlessness on the reservations,[36] Congress granted some states jurisdiction over criminal and some civil matters by a federal statute, Public Law 280.[37] Public Law 280 does not mention tribal criminal law.[38] Tribal criminal law appears to have no operation in those areas covered by state law because the state law would control in cases of conflict.[39]

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35. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973) (holding unlawful Arizona's state individual income tax when applied to reservation American Indians with respect to income derived wholly from reservation sources).

36. S. REP. NO. 699, 83rd Cong., 1st Sess. 5 (1953). *See also* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975) (discussing why Congress enacted Public Law 280).

37. 18 U.S.C. § 1162(a) (1994). In 1953, Congress enacted Public Law 280 which transferred criminal jurisdictional power from the federal government to the territorial or state government in five states: California, Minnesota, Nebraska, Oregon and Wisconsin as well as the Alaskan territory. The Act provides:

> Each of the States or Territories . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere with the State or Territory. . . .

Id.

Currently, a total of 16 states have assumed jurisdiction over reservations by statute or state constitutional amendment. There has been either total or partial assumption of jurisdiction by Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington. Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 362-63 n.125 (1982 ed.). *See* Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 AM. INDIAN L. REV. 319, 336 n.124 (1991)). *See also* ARIZ. REV. STAT. ANN. § 36-1865 (1994); FLA. STAT. ANN. § 285.16 (West 1991); IDAHO CODE § 67-5101 to -5103 (1989); IOWA CODE ANN. §§ 1.12-1.14 (West 1989); MONT. CODE ANN. §§ 83-801 to -806 (1993); NEV. REV. STAT. § 41.430 (1986); N.D. CENT. CODE §§ 27-19-01 to -13 (1974 & Supp. 1989); S.D. CODIFIED LAWS ANN. §§ 1-1-12 to -21 (1985); UTAH CODE ANN. §§ 63-36-9 to 63-36-21 (1989); WASH. REV. CODE ANN. §§ 37.12.010 to .070 (West 1988).

38. *See* Goldberg, *supra* note 35, at 545-51 (discussing American Indian opposition to Public Law 280 which ousted functioning tribal courts and gave certain states jurisdiction over American Indian criminal matter).

39. Goldberg, *supra* note 35, at 545-51. Public Law 280 extends general criminal jurisdiction over all crimes committed in American Indian country to those states to which it applies. Otherwise, tribal criminal jurisdiction is exclusive for non-major crimes committed by American Indians against American Indians in American Indian country. Tribes also retain concurrent jurisdiction (with the federal government) over non-major crimes committed by American Indians against non-American Indians in American Indian country. H. BARRY HOLT & GARY FORRESTER, DIGEST OF AMERICAN INDIAN LAW 74-75 (1990).

D. Congress Places Constitutional Restraints on American Indian Tribal Governments

Due to their special legal status, American Indian tribal governments did not have to follow the provisions of the Constitution.[40] Specifically, even when the Citizenship Act of 1924 made American Indians citizens of the United States,[41] tribal governments continued to violate the constitutional rights of American Indians.[42] However, Congress enacted the Indian Civil Rights Act of 1968,[43] giving American Indians protections similar to the Bill of Rights in the Constitution.[44] The Act provided that "any Indian tribe in exercising its powers of local government shall with certain exceptions, be subject to the same limitations and restraints as those which are imposed on the government of the United States by the Constitution."[45] Congress enacted the statute to "protect Indians from arbitrary and unjust actions of tribal governments."[46]

The Indian Civil Rights Act of 1968 emphasized the rights of American Indians as United States citizens by mandating that American Indian governments uphold the individual rights granted in the United States Constitution.[47] As a result, the Act naturally diminishes American Indian sovereignty and self-government.[48] By attempting to protect American Indians from their

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40. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (stating that constitutional restraints limit actions of the federal government and the states but not the tribes).

41. See *supra* note 14 and accompanying text for a discussion of the Citizenship Act of 1924.

42. *See, e.g., Talton*, 163 U.S. at 384.

43. 25 U.S.C. §§ 1301-41 (1988). This Act placed constitutional-like restrictions on tribal governments that are similar to the Bill of Rights and the Fourteenth Amendment. G. Kenneth Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617, 617 (1968). Specifically, the Act states that "[n]o Indian tribe in exercising powers of self-government shall . . . (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, . . . (8) deny to any person within its jurisdiction the equal protection of its laws. . . ." 25 U.S.C. § 1302 (1988 & 1995 Supp.).

44. *Hearings on S. 961-68 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 1 (1965) [hereinafter *Senate Hearings*]. Congress felt that absent imposition by statute, the fundamental guarantees of the Constitution did not protect American Indians, as United States citizens, in tribal court actions. *Id.*

45. Reiblich, *supra* note 43, at 621 (quoting *Senate Hearings*, *supra* note 43, at 1-6).

46. S. REP. NO. 841, 90th Cong., 1st Sess. 6 (1967).

47. Fromboise & Fromboise, *supra* note 12, at 23.

48. Reiblich, *supra* note 43, at 644. *See also* Alvin J. Ziontz, Note, *After* Martinez*: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 25-34 (1970) (discussing the potential threat to tribal autonomy arising from the enactment of

own people, the Indian Civil Rights Act further eroded their special status as sovereign entities.[49] The Act now subjects American Indian tribal governments to the same limitations and restraints imposed on federal, state and local governments by the Constitution of the United States.[50]

II. FOURTEENTH AMENDMENT — EQUAL PROTECTION ANALYSIS

American Indians today are entitled to the same rights and privileges as any other citizens.[51] One crucial guarantee American Indians enjoy is the right to equal protection under the laws. The state of Washington violated this right by referring the boys to the tribal court for sentencing. Indeed, it is too plain to argue that if the boys were white, they would never have received this singular sentence. The Equal Protection Clause[52] forbids this sort of discriminatory behavior.

A. The Purpose Behind Equal Protection

Governments sometimes necessarily have to classify special groups or classes of individuals.[53] However, the government cannot classify individuals on an arbitrary basis.[54] The Equal Protection Clause requires equal enforcement of the laws.[55] It guarantees that the government will treat similarly situated individuals in a similar manner.[56] Equal protection concerns may thus

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the Indian Civil Rights Act).

49. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) (recognizing that Congress had not intended to infringe upon tribal sovereignty when enacting the Indian Civil Rights Act). Thus, the Supreme Court refused to find a cause of action under the Indian Civil Rights Act until Congress makes clear that such an intrusion into tribal sovereignty is permissible. *Id.* at 72.

50. Fromboise & Fromboise, *supra* note 12, at 23. However, the responsibility for enforcing the provisions of the Act remains with tribal governments and tribal courts. Ferguson, *supra* note 11, at 293.

51. HOLT & FORESTER, *supra* note 38, at 36 (1990). See *supra* notes 43-50 and accompanying text for a discussion of American Indians' rights.

52. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment commands that "[n]o *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws." (emphasis added). *Id.*

53. *See, e.g.*, Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 346 (1949) (describing the standards of review under the equal protection analysis).

54. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

55. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (demanding that in addition to fair or equal enforcement of laws, that the law itself be "equal").

56. 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.2, at 317 (1986). *See also* Reed v. Reed, 404 U.S. 71, 75 (1971) (stating that in order not to violate the Equal Protection Clause, the statutory classification must be reasonable, not arbitrary and must rest on some ground of difference having a fair and substantial relation to the object of legisla-

arise when governmental actions classify individuals for different benefits or burdens under the law.[57]

Under the equal protection analysis, courts may apply one of two tests to determine whether a classification is constitutional. When the classification involves a "suspect classification," courts apply strict scrutiny.[58] Courts will not defer to the legislature when it intentionally confers burdens and benefits on a class of individuals based on a suspect classification.[59] Suspect classes, which often include victims of discrimination, need judicial protection since the ordinary political processes for redressing injury are inaccessible to them because of prejudice.[60] Classic examples of suspect classes include minority groups based on race or national origin.[61]

The Fourteenth Amendment traditionally requires a very heavy burden of justification for statutes drawn according to race.[62] Courts apply a strict scrutiny analysis to such classifications. The classification must necessarily further a compelling state interest, independent of racial discrimination, and courts must find that the legislature could not accomplish its goal by the least restrictive means.[63] In most circumstances, courts will find racial classifications irrelevant to any constitutionally acceptable

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tion, so that all persons of similar circumstances shall be treated alike).

57. ROTUNDA, *supra* note 56, § 18.1 at 314.

58. *See, e.g.*, Loving v. Virginia 388 U.S. 1, 10-11 (1967) (holding that where a statute rests solely upon distinction drawn according to race, the Equal Protection Clause demands that a court subject the racial classifications to the "most rigid scrutiny"); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (applying strict scrutiny to determine whether the systematic exclusion of a class of persons based on national origin from jury service violates equal protection). *See generally* ROTUNDA, *supra* note 56, § 18.5, at 363 (discussing the standard of review for legislation that discriminates against a suspect class).

59. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432 (1984). Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns. *Id.*

60. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-13, at 1012 (2d ed. 1988). "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for a correspondingly more searching judicial scrutiny." United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

61. TRIBE, *supra* note 60, § 16-14, at 1012.

62. *Loving*, 388 U.S. at 9. All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. Korematsu v. United States, 323 U.S. 214, 216 (1944). *See also* Graham v. Richardson 403 U.S. 365, 372 (1971) (explaining that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny).

63. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 227 (1984); Loving v. Virginia, 388 U.S. 1, 11 (1967). *See also Korematsu*, 323 U.S. at 217-18 (sustaining a military order excluding Americans of Japanese origin from designated West Coast areas following Pearl Harbor).

legislative purpose.[64]

On the other hand, in a situation that does not operate to the peculiar disadvantage of a suspect class, courts often use the rational basis test.[65] This test merely requires some rational basis or legitimate public purpose for the legislation which draws a certain classification.[66] Under the rational basis test, courts usually defer to the wisdom of the legislature and finds a legitimate purpose.[67]

The purpose of the Equal Protection Clause of the Fourteenth Amendment is to eliminate all official *state* sources of invidious racial discrimination.[68] Thus, there needs to be state action in order to trigger equal protection analysis.[69] State action exists when the court "exercise[s] coercive power or . . . provide[s] such significant encouragement . . . that the choice must in law be deemed to be that of the State."[70] Actions of judicial officers in their official capacity clearly constitute state action governed by the Fourteenth Amendment.[71]

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64. Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Courts rarely sustain statues in the face of strict scrutiny. Strict scrutiny review is "strict" in theory but usually "fatal" in fact. *Bernal*, 467 U.S. at 219 n.6. *But see Korematsu*, 323 U.S. at 214 (holding that it was within the war power of Congress to exclude Japanese-Americans from certain areas to prevent espionage and sabotage).

65. *E.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 444 (1985); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). In some instances, courts apply heightened scrutiny. *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (applying heightened scrutiny to illegitimacy-based classifications); Craig v. Boren, 429 U.S. 190, 197-98 (1976) (applying heightened scrutiny to gender-based classifications).

66. *See, e.g.*, *Murgia*, 427 U.S. at 314 (employing the relatively relaxed rational basis standard).

67. *E.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Railway Express Agency v. New York, 336 U.S. 106 (1949).

68. Loving v. Virginia, 388 U.S. 1, 10 (1967). The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful. *Id.* at 13.

69. Claude v. Collins, 507 N.W.2d 452, 457 (Minn. Ct. App. 1993). Private conduct abridges no individual rights unless there is state involvement in that conduct. Burton v. Wilmington Parking Auth., 365 U.S. 715, 721 (1961).

70. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). *See* Peterson v. City of Greenville, 373 U.S. 244, 248 (1963) (holding that a city ordinance constituted state action). *See also Ex parte* Virginia, 100 U.S. 339, 344 (1879) (stating that "no agency of the State, or of the offices or agents by whom its powers are exerted, shall deny to any person within her jurisdiction the equal protection of the laws"). *But see* Chavous v. Brown, 302 S.E.2d 98, 99 (S.C. 1990) (concluding that the trial judge's involvement did not constitute state action because it did not require any judicial discretion).

71. *See* Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (deciding that actions of state courts and judicial officers in their official capacity constitute state action subject to the restraints of the Constitution); *Ex parte* Virginia, 100 U.S. at 347 (stating that "[a] State acts by its legislative, its executive or its judicial authorities"). *See also* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (illustrating an overt state judicial

If all legal restrictions which apply racial classifications are immediately suspect, it would appear that courts must apply strict scrutiny to all state action which singles out American Indians for special treatment. Indeed, much "Indian" legislation would be unconstitutional if it had to undergo strict scrutiny.[72] Courts have not, however, always agreed that legislation which singles out American Indians must be subject to the strict scrutiny test.[73] The next section discusses how the courts have decided equal protection challenges in American Indian-related cases.

B. American Indians and the Equal Protection Clause

Equal protection analysis in American Indian-related cases differs from the analysis in other equal protection cases.[74] This section will show the historical basis for applying the American Indians' unique equal protection standard. This section then will examine cases that have analyzed the constitutionality of treatment that gives American Indians differential treatment. Finally, this section will explain why a court should apply strict scrutiny to the Washington court's referral of sentencing to the American Indian tribes.

Despite the fact that American Indians are a separate "race," courts have been reticent to apply strict scrutiny to laws which confer special benefits or burdens upon American Indians. In fact, courts generally apply the rational basis test to American Indian related cases.[75] Federal courts especially have been hesitant to impose equal protection limitations on laws affecting American Indians.[76] This is due to the fiduciary relationship between the

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action which violated the Equal Protection Clause). A Florida trial court awarded custody of a child to the respondent because the petitioner was cohabitating with an African-American. *Id.* The trial court reasoned that raising a child in a racially mixed household would have a damaging impact on the child. *Id.* The Supreme Court applied strict scrutiny and reversed, holding that a state court's overt consideration of community racial bias in determining child custody violated equal protection. *Id.*

72. David C. Williams, *The Borders of the Equal Protection Clause: Indians As Peoples*, 38 UCLA L. REV. 759, 760 (1991).

73. *E.g.*, United States v. Antelope, 430 U.S. 641 (1977); Morton v. Mancari, 417 U.S. 535 (1974); Livingston v. Ewing, 455 F. Supp. 825 (D.N.M. 1978).

74. Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 589 (1979).

75. *See, e.g.*, United States v. Antelope, 430 U.S. 641 (1977) (upholding legislation which operated to disadvantage American Indians because it is in furtherance of the federal government's unique obligation to American Indian tribes); Morton v. Mancari, 417 U.S. 535 (1974) (recognizing that federal regulations singling out American Indians has repeatedly been sustained against claims of racial discrimination).

76. Johnson, *supra* note 74, at 589. Courts have upheld several laws challenged as creating racial classifications as being rationally related to the government's

federal government and American Indian tribes which gives Congress the power to enact laws that treat American Indians differently.[77]

The Supreme Court's 1974 decision in *Morton v. Mancari*[78] is a cornerstone of modern American Indian equal protection doctrine.[79] In *Morton*, non-American Indian employees of the Bureau of Indian Affairs (BIA) challenged a federal statute which provided for an employment preference for qualified American Indians in the BIA.[80] The Court applied only minimal scrutiny, stating that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the American Indians, such legislative judgments will not be disturbed."[81] Thus the Court refused to interfere with Congress' legislation that gave American Indians special treatment.[82]

In *Morton*, the Court justified its use of the rational basis test by distinguishing that discrimination singling out American Indians is unlike discrimination singling out other racial minorities; the classification of American Indians is of a political, not racial, nature.[83] Federal regulation of American Indian tribes is rooted in the unique status of American Indians as "a separate people" with their own political institutions, and is not to be viewed as legislation of a "'racial group' consisting of 'Indians'. . . ."[84] Thus, the Supreme Court stated that the equal

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"unique obligations toward the Indians." Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1228 (E.D.N.Y. 1993).

77. Johnson & Crystal, *supra* note 74, at 589-90. See *supra* note 19 and accompanying text for a discussion of the power Congress has to deal with American Indian tribes.

78. 417 U.S. 535 (1974).

79. Johnson & Crystal, *supra* note 74, at 595. Although *Morton* was decided on Due Process rather than Equal Protection grounds, "the Court's determination regarding the nature of the discrimination is applicable to Equal Protection analysis." Tafoya v. City of Albuquerque, 751 F. Supp. 1527, 1529 n.3 (D.N.M. 1990).

80. *Morton*, 417 U.S. at 535.

81. *Id.* at 555.

82. *Id.* at n.24 (reasoning that the preference is not directed toward a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. Thus, preference is political rather than racial in nature). The Court decided that a statute which granted an employment preference to American Indians did not unconstitutionally discriminate against non-American Indians. *Id.* at 554. The court analogized the preference as similar to a United States Senator who employs members of his own constituent group. *Id.* The employment preference for American Indians grants American Indians, as members of quasi-sovereign tribal entities, the ability to further the cause of American Indian self-government and to make the Bureau of Indian Affairs more responsive to the needs of its constituent groups. *Id.*

83. *Id. See generally* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 786 (1991) (criticizing the Supreme Court's political/racial distinction made in *Morton*).

84. *Morton*, 417 U.S. at 553.

protection review need not entail the strict scrutiny which it usually applies to racial classifications.[85]

However, in 1977, the Supreme Court did not rely on the political/racial distinction when it applied the rational basis test in *United States v. Antelope*.[86] Instead, the Court justified its application of the rational basis standard on the federal government's unique obligation to American Indian tribes.[87] In *Antelope*, the American Indian defendants, convicted of felony murder in federal court, contended that had they been non-American Indian, they would have been subject to Idaho law which required a greater burden of proof on the prosecution.[88] Instead, because they were American Indian, the Major Crimes Act[89] subjected the defendants to federal law for first-degree felony murder.[90]

The Supreme Court held that although the federal regulation did not further American Indian self-government, as in *Morton*, the regulation in *Antelope* involved federal regulation of criminal activity in American Indian country.[91] Courts defer to Congress'

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85. *Id.* at 555. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the American Indians, the court will not disturb such legislative judgments. *Id.* In *Morton*, the court found that the preference is reasonable and rationally designed to further Indian self-government. *Id. See also* Booker v. Special Sch. Dist. No. 1, 585 F.2d 347, 354 (8th Cir. 1978) (recognizing that even after *Morton*, "in certain contexts separate classification and treatment of American Indians as a race are constitutionally permissible in the light of the unique status of American Indians in this country, and in the light of history and policy"). *But see* Carole E. Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples"*, 39 UCLA L. REV. 169 (1991) (criticizing Williams' support of distinguishing between political and racial classifications and arguing for a different approach to racial classifications of American Indians and equal protection).

86. 430 U.S. 641 (1977). In *Antelope*, through the Major Crimes Act, which gives the federal courts jurisdiction over American Indians who commit a major crime, the federal court prosecuted and convicted the American Indian defendants of first-degree felony murder of a non-American Indian woman. *Id.* at 644. The defendants appealed their convictions, arguing that if the defendants had been non-American Indian, they would have been subject to Idaho law. *Id.* Idaho law contained no felony murder provisions and required proof of premeditation and deliberation for a conviction of first-degree murder. *Id.* Prior to reaching the Supreme Court, the Court of Appeals had reversed the convictions by applying strict scrutiny reasoning that the federal guardianship of American Indians could not justify a criminal statute that worked to the disadvantage of the American Indians. *United States v. Antelope* 523 F.2d 400, 406 (9th Cir. 1975), *rev'd*, 430 U.S. 641 (1977).

87. *See generally*, Johnson & Crystal, *supra* note 74, at 603 (discussing how the Supreme Court applied equal protection analysis to legislation which disadvantaged American Indians).

88. *Antelope*, 430 U.S. at 644.

89. See *supra* note 19 for a discussion of the Major Crimes Act.

90. *Antelope*, 430 U.S. at 644 n.4.

91. *Id.* at 646.

regulation of American Indian affairs[92] because it is rooted in the unique status of American Indians as "a separate people" with their own political institutions.[93] The term "Indian" in the Major Crimes Act, however, applied to all American Indians on the basis of race or ancestry and did not require enrollment in a tribe.[94] Thus, *Antelope* allowed special federal American Indian legislation to be applied to individual American Indians, regardless of tribal affiliation.[95]

Thus, the Court apparently defers to any federal *legislation* enacted which singles out American Indians regardless of detriment or benefit to American Indians.[96] Courts will not disturb *statutes* providing special treatment for American Indians as long as the legislation can be tied rationally to the fulfillment of Congress' unique obligation towards American Indians.[97] However, this reason, to further the trust relationship designed to protect American Indians, loses its strength when utilized to uphold prejudicial rather than beneficial treatment of American Indians.[98] Indeed, without strict scrutiny, American Indians cannot strike down laws that harm them.[99]

The need for strict scrutiny is even more crucial with regard to states because states do not have the same trust relationship toward American Indians as the federal government does.[100]

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92. *E.g.*, United States v. Kagama, 118 U.S. 375 (1886); Gray v. United States, 394 F.2d 96, 98 (9th Cir. 1967). "It has long been acknowledged that Congress has recognized and established for the American Indian people a peculiar and protected status as wards of the Federal government." *Id.* at 98. The Court has repeatedly stated that the power to regulate the American Indians rests with Congress. *Id.*

93. *Antelope*, 430 U.S. at 646.

94. Johnson & Crystal, *supra* note 74, at 604.

95. *Id.*

96. *Id.* at 605.

97. *Morton*, 417 U.S. at 555. "If the Court deemed the laws, derived from historical relationships and explicitly designed to help only American Indians, as invidious racial discrimination, it would effectively erase an entire Title of the United States Code (25 U.S.C.), and the solemn commitment of the Government toward the American Indians would be jeopardized." *Id.* at 552.

98. Johnson & Crystal, *supra* note 74, at 606. Congress created the United States Sentencing Commission to eliminate unwarranted sentencing disparities among defendants with similar records, who have been found guilty of similar criminal conduct. Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?* 64 U. COLO. L. REV. 781, 792 (1993).

99. Williams, *supra* note 72, at 769.

100. Johnson & Crystal, *supra* note 74, at 609. *Cf.* Tafoya v. City of Albuquerque, 751 F. Supp. 1527, 1530 (D.N.M. 1990) (holding that although Congress has a unique obligation toward American Indians, a city does not have comparable power to treat members of tribes differently). *But see* Livingston v. Ewing, 455 F. Supp. 825, 830-32 (D.N.M. 1978) (holding that a state owned museum's policy that singles out American Indians for preferential treatment furthers the special federal relationship towards American Indians).

Thus, courts should apply stricter scrutiny to any state law or administrative action which disadvantages American Indians.[101] *Morton* and *Antelope* stress the unique status of American Indians in the context of federal action.[102] The same basis for permitting differential treatment of tribal American Indians is not present in this case. This case does not involve a federal statute. It does not involve Congress. It does not involve any federal action whatsoever. Therefore, because the referral is not in furtherance of Congress' unique obligation to American Indian tribes, as in *Morton* or *Antelope*, a court should apply a stricter equal protection analysis.

C. Application of Equal Protection Analysis to State Court Sentencing Judge's Actions

Strict scrutiny should apply where the purpose for the distinctive treatment does not further the unique obligation towards the American Indians.[103] Thus, any state action directed at persons of the American-Indian race as members of a racially-defined class must undergo strict scrutiny to prevent invidious discrimination.[104] This section will apply strict scrutiny to the Washington judge's actions and show how the judge's ruling discriminated against the two American Indian boys, and thus, denied them the equal protection of the laws.

In general, state discrimination can withstand strict scrutiny only if the classification advances a compelling state interest by the least restrictive means available.[105] Since referral of tribal American Indians to their own court subjects American Indians to unconventional sentences, it may be difficult to find a compelling state interest which justifies distinguishing American Indians in sentencing.

One possible compelling state interest in referring sentencing to the tribal court is to further American Indian self-government.[106] Courts generally consider legislation that gives differ-

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101. *Cf.* Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 781 F. Supp. 1385, 1393 (W.D. Wis. 1992) (recognizing that while the federal government may establish special preferences in favor of American Indians without running afoul of the requirements of the Constitution, private persons are not free to discriminate against American Indians for the same reason).

102. Johnson & Crystal, *supra* note 74, at 609-10. See *supra* note 78-99 and accompanying text for a discussion of *Morton* and *Antelope*.

103. *E.g.*, United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1975). *Cf.* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (deciding that the Court must apply strict scrutiny since race is a suspect classification).

104. TRIBE, *supra* note 60, § 16-14, at 1017.

105. Bernal v. Fainter, 467 U.S. 216, 219 (1984).

106. See *supra* notes 78-109 and accompanying text for a discussion of furthering

ential treatment to American Indians to be constitutional because such legislation promotes tribal self-government and supports the trust relationship that was made long ago.[107] Another possible compelling state interest is to rehabilitate the American Indian boys.[108]

Regardless of whether either of these state interests are sufficiently "compelling," the Washington court's actions fail to substantially advance either one of them by the least restrictive means. In order to pass the strict scrutiny test, the classification must be necessary to achieve the compelling state interest.[109] Referring the American Indian boys to the tribal court for sentencing does not advance the compelling state interest through the least restrictive means.

If the state's goal is to further tribal self-government, it is highly unlikely that the judge's distinctive treatment of the American Indian boys achieves it. Allowing an American Indian tribal court to sentence the boys to a historically "Indian" punishment does not promote general tribal self-government. Furthermore, the state judge's referral is limited to this one isolated instance. It is difficult to see how the compelling state interest of tribal self-government is furthered by sentencing two teenage boys to a bizarre punishment that is worse than what non-American Indians convicted of the same crime would have received.

The state judge's distinctive treatment of the American Indian defendants also fails to accomplish another possible state interest, rehabilitation, through the least restrictive means. The judge could easily rehabilitate the defendants in a way that would not call for classifying American Indians. The court could have imprisoned the boys or required them to undergo treatment. Indeed, there is nothing about these modern American Indian boys that makes rehabilitation more likely through the traditional punishment of banishment. The judge's classification will not withstand strict scrutiny and therefore it violates the Equal Protection Clause of the Fourteenth Amendment.

Previous cases have held that detrimental treatment in the sentencing of American Indians violates the Equal Protection Clause.[110] In *United States v. Cleveland*,[111] the Ninth Circuit

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American Indian self-government in *Morton* and *Livingston*.

107. *Morton*, 417 U.S. at 552. See *supra* notes 16-20 and accompanying text for a discussion of the trust relationship between the American Indians and the federal government.

108. *Tribe Banishes Duo to Alaskan Islands*, WASH. POST, Sept. 4, 1994, at A30 [hereinafter *Tribe Banishes Duo*].

109. ROTUNDA, *supra* note 56, § 18.3, at 324.

110. *E.g.*, United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1975). *See also* Piper v. Big Pine Sch. Dist., 226 P. 926, 928-29 (Cal. 1924). An American Indian child sought a court order compelling a state public school to admit her. *Id.* The

analyzed the interplay between two statutes; the result of which subjected American Indians to more severe punishment than non-American Indians who committed the same crime.[112] The Court found that the statutes violated Equal Protection because they created substantial disparities between American Indian defendants and non-American Indian defendants who are charged with committing identical offenses.[113]

Similarly, the Washington judge's referral to the tribal courts resulted in sentencing the American Indian defendants to a worse punishment than what non-American Indian defendants charged with committing the same offense would have received. The only reason for the disparity in sentences is due to the defendants' race. In *Pace v. Alabama*,[114] the Supreme Court stated, in dicta, that any person, "whatever his race . . . shall not be subjected, for the same offense, to any greater or different punishment."[115] Thus, not only does the state judge's referral fail strict scrutiny, courts have specifically stated that defendants cannot receive different punishments for identical offenses based solely on their race.[116]

III. CRUEL AND UNUSUAL PUNISHMENT

Through the Fourteenth Amendment, the Eighth Amendment protection against cruel and unusual punishments applies to state prosecutions.[117] By referring sentencing to tribal court for banishment, the state court violated the defendants' Eighth Amendment right against cruel and unusual punishment. Furthermore, the banishment sentence violates the boys' rights under

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Supreme Court of California held that denying children admittance to common schools solely because of racial differences violated the Fourteenth Amendment. *Id.*

111. 503 F.2d 1067 (9th Cir. 1975).

112. *Id.* at 1072 n.5. It also reduced the prosecutor's burden of proof. *Id.* at 1072. The sole distinction between the defendants subjected to state law and those to whom federal law applies was the race of the defendant. *Id.* The court applied strict scrutiny and found no federal or state interest. *Id.*

113. *Id.* The Supreme Court distinguished *Cleveland* from *Antelope* in that *Cleveland* is concerned with instances in which American Indians tried in federal court are subjected to differing penalties and burdens of proof from those applicable to non-American Indians charged with the same offense. United States v. Antelope, 430 U.S. 641, 649 (1971). In *Antelope*, the Supreme Court found that the challenged federal legislation did not violate equal protection since it applied evenhandedly to both American Indians and non-American Indians, regardless of the laws of States with respect to the same offense. *Id.*

114. Pace v. Alabama, 106 U.S. 583 (1882).

115. *Id.* at 584.

116. *E.g., id.*

117. Robinson v. California, 370 U.S. 660, 666 (1962). The Court held that a state law which imprisons a person for having a narcotic addiction is cruel and unusual punishment in violation of the Fourteenth Amendment. *Id.*

the Indian Civil Rights Act.

First, this Part describes banishment as a traditional form of American Indian punishment. This Part then sets forth the standards used to determine cruel and unusual punishment and shows how banishment constitutes cruel and unusual punishment in our society today. Next, this Part examines how the tribal court also violated the boys' rights under the Indian Civil Rights Act. Finally, this Part shows that regardless of the fact that the defendants consented to the banishment sentence, the state judge should not have allowed the banishment sentence.

A. Banishment as Traditional American Indian Punishment

Banishment as a punishment has existed throughout the world since ancient times.[118] American Indians used this traditional form of punishment for rehabilitative purposes.[119] Although the American Indians employed banishment, public ridicule and restitution also played large roles in traditional American Indian dispute resolution and behavior control.[120] The absence of prisons prior to Columbus's arrival called for these forms of punishment.[121] The American Indian approach to criminal justice called for rehabilitation of the criminal and assistance for the victim in order for the tribe to accept the criminal back into their tribal group.[122]

The aim of the sentence is in accord with tribal values: it seeks to rehabilitate the boys and requires them to reflect on their crime.[123] Specifically, the tribal court banished the defendants for one year to separate, uninhabited islands.[124] Although banishment is a traditional form of American Indian punishment, it is not acceptable in our courts today.[125] Courts have held that

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118. Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979).

119. *Modern Court*, *supra* note 4, at A3.

120. Samuel J. Brakel, *American Indian Tribal Courts*, *in* INDIANS AND CRIMINAL JUSTICE 145, 149 (Laurence French ed., 1982). Retaliatory (private) and retributive (public) death and mutilation were also known forms of punishment. *Id.*

121. *Modern Court*, *supra* note 4, at A3. Whipping and hanging became the accepted forms of public punishment among the Cherokees and remained so until the 1870's when the national jail was constructed at Tahlequah. RENNARD STRICKLAND, FIRE AND THE SPIRITS 168 (1975).

122. *See* RENNARD STRICKLAND, FIRE AND THE SPIRITS 168-74 (1975) (discussing the development of criminal punishments, from clan revenge to public reform, and how they reflect the emergence of new Cherokee standards and values).

123. *Tribe Banishes Duo*, *supra* note 108, at A30. Two documentary filmmakers, who visited the banished defendants and recorded 18 hours of film, reported that the defendants are spending their time carving wood, writing poetry and contemplating their crime. Wayne Wurzer, *Filmmakers Spend Four Days with Teens Banished in Alaska*, SEATTLE TIMES, Oct. 13, 1994, at B3.

124. *Modern Court*, *supra* note 4, at A3.

125. See *infra* notes 126-157 and accompanying text for a discussion of banish-

banishment is cruel and unusual punishment. The next section will show why this is so.

B. Banishment as Cruel and Unusual Punishment

A court may impose fines, imprisonment and even execution, depending upon the enormity of the crime, but any punishment "outside the bounds of these traditional penalties is constitutionally suspect."[126] Since the Eighth Amendment fails to provide a list of what punishments are cruel and unusual,[127] the Supreme Court has developed several tests to determine whether a punishment violates the cruel and unusual punishment clause.[128] One test questions whether the punishment is inherently cruel.[129] Another test examines whether the state can accomplish its legitimate aim in a less intrusive manner.[130] If the punishment fails either one of these tests, it will be deemed cruel and unusual and thus, unconstitutional.

The first test questions whether the punishment is inherently

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ment as cruel and unusual punishment.

126. Trop v. Dulles, 356 U.S. 86, 100 (1958). Although some jurisdictions employ the death penalty, a punishment which does not violate the constitutional concept of cruelty with regard to murderers, the existence of the death penalty does not license the government to devise any punishment short of death within the limit of its imagination. *Id.* at 99. In support of the cruel and unusual punishment clause, Justice Brennan stated that "even the vilest criminal remains a human being possessed of common human dignity." Furman v. Georgia, 408 U.S. 238, 272 (1971).

127. *Trop*, 356 U.S. at 99. While the State has the power to punish, the purpose of the Amendment is to assure that this power be exercised within the limits of civilized standards. *Id.* Thus, adhering to the purpose of the Eighth Amendment, the Court often defines cruel and unusual punishment by the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

128. This Note will not examine a third test because it is inapplicable to banishment. A court rarely applies a third test other than in the context of long term sentences that might be so disproportionate to the offense as to constitute cruel and unusual punishment. Weems v. United States, 217 U.S. 349, 368 (1910) (holding that confinement of a prisoner for 12 to 20 years of hard and painful labor for falsifying a public document violated the protection against cruel and usual punishment in the Philippine Constitution). Courts usually apply this test to assess whether the length of a sentence is disproportionate to the offense. *Id.* This test examines whether the punishment fits the crime or whether the punishment is excessive in relation to the crime. *Id.* In applying this test, the court examines the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction and the sentences imposed in other jurisdictions for the same crime. *Id.*

129. *See Trop*, 356 U.S. at 99 (holding that denationalization as a punishment is barred by the Eighth Amendment). The Court in *Trop* explained that denationalization "subjects the individual to a fate of ever-increasing fear and distress. . . . He may be subject to banishment, a fate universally decried by civilized people." *Id.* at 98-99.

130. *See Furman*, 408 U.S. at 279 (determining whether the imposition and carrying out of the death penalty constitutes cruel and unusual punishment).

cruel. Because there are no precise definitions of what is inherently cruel, we must look to what the courts have previously held as inherently cruel.[131] A punishment need not involve the infliction of bodily pain or mutilation in order for it to constitute cruel and unusual punishment.[132]

In this case, the banishment sentence to separate, uninhabited Alaskan islands is inherently cruel in that the boys, armed with only basic necessities, have to hunt and fish for their own food.[133] Conditions depriving convicts of basic human necessities such as food, medical care and physical safety trigger Eighth Amendment scrutiny.[134] The State has a duty to provide food, shelter, clothing and medical care.[135] Courts have found that continual deprivation of adequate food may inflict cruel and unusual punishment.[136] Since the boys will starve if they are unsuccessful in hunting and fishing, their sentence is inherently cruel.

The State also has an unquestioned duty to provide for the reasonable safety of its incarcerated prisoners.[137] The fact that the defendants are not incarcerated should not relieve the State of its duty to hold criminals in safe conditions. If it is cruel and unusual to hold convicted criminals in unsafe conditions, it must follow that banishing someone to unsafe conditions also is cruel and unusual.[138] Banishment to uninhabited islands subjects the boys to unsafe conditions; they must fend for themselves in a harsh wilderness where bears, wolves and other wild animals may attack them.[139]

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131. *E.g., id.*; Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910). The court has not detailed "[t]he exact scope of the constitutional phrase 'cruel and unusual'." *Id.* at 354.

132. *Trop*, 356 U.S. at 101-02.

133. *Tribe Banishes Duo*, *supra* note 108, at A30.

134. DeShaney v. Winnebago County Dept. of Social Serv., 489 U.S. 189, 198-200 (1989).

135. Youngberg v. Romeo, 457 U.S. 307, 324 (1982). *But see* Lunsford v. Bennett, 17 F.3d 1574, 1580 (1994) (holding that serving prisoners poorly-prepared food did not constitute cruel and unusual punishment when the prisoners received three square meals a day in compliance with nutritional guidelines).

136. *See* Dearman v. Woodson, 429 F.2d 1288, 1289 (1970) (stating that prisoner's complaint against prison officials alleging infliction of cruel and unusual punishment when officials refused to provide food for him during a period of fifty and one-half hours stated a cause of action); Jones v. Wittenberg, 323 F. Supp. 93, 98 (N.D. Ohio 1971) (holding that the conditions in the county jail which subjected the prisoners to slow starvation and deprived the prisoners of most human contacts violated the constitutional prohibition against cruel and unusual punishment).

137. *Youngberg*, 457 U.S. at 324.

138. *Cf. id.* at 315-16 (explaining that if it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, committing someone involuntarily to confinement in unsafe conditions is similarly unconstitutional).

139. *See also* Trop v. Dolles, 356 U.S. 86, 102 (1958) (recognizing that banish-

Also, banishment is inherently cruel because in the event that one of the boys becomes ill, he will not receive medical attention. The government has an obligation to provide medical care for those whom it incarcerates.[140] Indeed, the withholding of medical attention may actually produce physical torture or lingering death.[141] Solitary banishment surely deprives the defendants of the ability to obtain adequate medical attention.[142]

A second test the Supreme Court uses, examines whether the State can accomplish its legitimate aim in a less intrusive manner; that is, whether the punishment is excessive in relation to the achievement of legitimate state goals.[143] The American Bar Association recommends using the "least restrictive" means of punishment that would to accomplish the state's goal.[144]

Courts clearly hold that banishment from the United States is cruel and unusual punishment.[145] In *State v. Sanchez*,[146] the Fifth Circuit held that a sentence which imposes banishment from the United States, as a special condition of probation, is unconstitutional.[147] In *Dear Wing Jung v. United States*,[148] the Ninth Circuit found that a suspended sentence on the condition that the defendant leave the United States was either cruel and unusual punishment, or a denial of due process.[149] Thus, a sentence forc-

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ment, a fate universally decried by civilized people, is cruel and unusual because it subjects the individual to a fate of ever-increasing fear and distress).

140. Estelle v. Gamble, 429 U.S. 97, 103 (1976). The banishment sentence should not release the state's duty to provide medical care. See *supra* note 138 and accompanying text for reasons why banishment should be treated the same as unsafe conditions.

141. *Estelle*, 429 U.S. at 103. Denial of medical care does not serve any penological purpose. *Id.* Both boys have had health problems during their banishment. Michael Sangiacomo, *"Banishment" of Indian Teens Under Review: Lead Tribal Judge Says Process Has Been Corrupted*, PLAIN DEALER, Aug. 9, 1995, at 13A. One was helicoptered off the island with appendicitis and also suffered from an infected toe and scabies. *Id.* The other was taken off the island to have a wisdom tooth removed. *Id.* Afterwards, he still had problems with another tooth that needs to be removed. *Id.*

142. It is true that the tribal court supplied the defendants with two-way radios in the event of an emergency. Sangiacomo, *supra* note 1, at 1A. However, a two-way radio may prove inadequate if the defendants need immediate medical attention.

143. Furman v. Georgia, 408 U.S. 238, 279 (1972).

144. AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE SENTENCING § 18-2.4 (1994).

145. *See* United States v. Abushaar, 761 F.2d 954, 964 (3rd Cir. 1985) (holding that a district court may not impermissibly impose a condition that a defendant serve probation time outside the country).

146. State v Sanchez, 462 F.2d 1304, 1309 (5th Cir. 1985). The judge suspended the defendant's sentence on the condition that the defendant permanently return to Honduras. *Id.*

147. *Id.*

148. 312 F.2d 73 (9th Cir. 1962).

149. *Id.* at 76. The court held the condition unconstitutional and remanded the

ing the defendant out of the country is unconstitutional.

Most courts adhere to the reasoning in *People v. Baum*[150] and hold that banishment to another state in the United States is an unacceptable form of punishment.[151] Although banishment was not cruel and unusual punishment at common law,[152] such a method of punishment is not allowed today.[153] If the power to banish exists at all, it is with the legislature; and when the legislature does not authorize such methods of punishment, public policy impliedly prohibits it.[154] Thus, unless a state statute allows banishment, the court cannot use banishment to punish a criminal.

Notwithstanding the substantial weight of authority finding banishment as cruel and unusual punishment, some courts have upheld certain forms of banishment. In *Bagley v. Harvey*,[155] the conditions of the defendant's parole banished the defendant to Iowa where his parents resided, and forbade him from returning to Washington until the end of his parole term.[156] Although the banishment of the boys in this case and in *Bagley* are somewhat similar in that both banishment sentences are to another state, and both allow the defendants to return after the sentence, the circumstances of the banishments differ substantially. Solitary banishment to the uninhabited wilderness of an Alaskan island is not comparable to banishment to Iowa where the defendant's parents reside. Therefore, the kind of banishment that a court has

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case to the District Court for sentencing in accordance with the law. *Id.*

150. 231 N.W. 95 (Mich. 1930). In *Baum*, the Michigan Supreme Court held that a sentence banishing the accused from the state was void as unauthorized and contrary to public policy. *Id.* The Court stated that "[t]o permit one state to dump its convicted criminals into another would . . . incite dissension . . . among the several states." *Id.* at 96. Many states' criminal codes list *Baum* in the notes as their policy against banishment. *See* ALA. CONST. art. I, § 15; MISS. CONST. art. III, § 28; MONT. CONST. art. II, § 22; N.M. CONST. art II, § 13; WASH. CONST. art. I, § 14.

151. *See, e.g.*, Rutherford v. Blankenship, 468 F. Supp. 1357, 1363 (W.D. Va. 1979) (recognizing that banishing a criminal to another state was prohibited by public policy and not in the interest of safety and welfare); State v. Doughtie, 74 S.E.2d 922, 923 (N.C. 1953) (stating that North Carolina courts have no power to pass a sentence of banishment; if they do pass one, the sentence is void). Some states expressly prohibit banishment. *See* ARK. CONST. art. 2, § 21; GA. CONST. art. I, § I, para. XXI.

152. *Baum*, 231 N.W. at 96.

153. *E.g.*, *Rutherford*, 468 F. Supp. at 1360-61; *Doughtie*, 74 S.E.2d at 923.

154. *Baum*, 231 N.W. at 96. *But see* State v. Collett, 208 S.E.2d 472, 473 (Ga. 1974) (allowing banishment from seven counties in Georgia due to the broad discretion given to trial judges, even though state policy prohibits banishment, and even though the Georgia Constitution expressly prohibits "[b]anishment beyond the limits of the state, as a punishment for crime").

155. 718 F.2d 921 (9th Cir. 1983).

156. *Id.* at 922-23.

upheld is distinguishable from this banishment sentence to Alaska.

Moreover, since the State's goal in punishment is to protect the public from the criminal, it is far more prudent to incarcerate the defendants, rather than risk the chance that they may escape from the island.[157] Although the State hopes to rehabilitate the defendants with the banishment sentence, society takes a risk because the defendants may leave the island. The "least restrictive" means of punishing the defendant is incarceration rather than banishment. Therefore, because there is a less restrictive alternative, the banishment sentence qualifies as cruel and unusual punishment. Since the Washington court's sentence fails both proper tests for cruel and unusual punishment the banishment of the boys is unconstitutional.

C. Banishment Violates the American Indian Civil Rights Act

The Washington judge's action not only violated the U.S. Constitution, but plainly violated the American Indian Civil Rights Act[158] as well. The Act restricts tribal courts from imposing a punishment greater than imprisonment for a term of six months, or a fine of $500, or both.[159]

Moreover, the Act prohibits sentences which are cruel and unusual. As has been shown,[160] the banishment punishment is indeed cruel and unusual. Thus, the Washington judge's sentence violates the express dictates of the American Indian Civil Rights Act, as well as the commands of the United States Constitution.

D. Banishment is not a Valid Sentence even with the Defendants Consent

Another issue that arises in this case is the argument that the defendants consented to the banishment sentence, and thus, waived the violation of their constitutional rights. However, even when given a choice, defendants cannot choose banishment as a

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157. *See, e.g., Rutherford*, 468 F. Supp. at 1360.

158. 25 U.S.C. §§ 1301-41 (1988 & 1995 Supp.). The Indian Civil Rights Act specifically states that:

> [n]o Indian tribe in exercising powers of self-government shall . . . require excessive bail, impose excessive fines, inflict cruel and unusual punishment, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of $5,000, or both.

25 U.S.C. § 1302.

159. See *supra* notes 40-50 and accompanying text for a discussion of the Indian Civil Rights Act.

160. See *supra* notes 126-57 and accompanying text for a discussion of why banishment is cruel and unusual.

sentence. In *Dear Wing Jung v. United States*,[161] the court rejected the government's argument that it had given the defendant a choice between imprisonment or leaving the United States; the court found that the banishment condition of the sentence was either a denial of due process or a cruel and unusual punishment.[162] Under the American Bar Association Standards for Criminal Justice, courts almost uniformly hold certain probation conditions, most notably those involving banishment from the jurisdiction of the conviction, invalid.[163] Generally, courts reach these decisions on statutory grounds by interpreting probation statutes as permitting only conditions that are proportionate to the offense or which promote public safety or rehabilitation.[164] Thus, even when courts give defendants the choice in suspending their imprisonment sentences with banishment, the banishment condition is not an acceptable form of punishment.

IV. STATE COURTS SHOULD NOT HAVE THE AUTHORITY TO REFER SENTENCES TO AMERICAN INDIAN TRIBAL COURTS

This case marked the first time a state court judge referred sentencing to an American Indian tribal court.[165] However, on May 1, 1995, the Court of Appeals of Washington ruled that the two teenage American Indians still must face the standard-range prison sentence once the banishment ended.[166] Although the Court of Appeals found that the trial court's referral in this instance was improper, the Court of Appeals should rule further and eliminate the state trail courts' authority to refer sentences to American Indian tribal courts. This Part raises issues concerning

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161. 312 F.2d 73 (9th Cir. 1962).

162. *Id.* at 76. The lower court suspended the prison sentence for six months on the condition that the defendant depart from the United States. *Id.* at 75.

163. AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE SENTENCING § 18-3.13 (1994).

164. *Id.*

165. Akre, *supra* note 3, at A3.

166. State v. Roberts, 894 P.2d 1340, 1345 (Wash. Ct. App. 1995). The Court of Appeals allowed the boys to finish their banishment sentences and failed to order the boys to immediate sentencing according to sentencing guidelines. *Prison Term Looms for Banished Teens*, PORTLAND OREGONIAN, May 2, 1995, at B7. Consequently, however, on October 3, 1995, the same state judge who had referred sentencing to the American Indian tribal court, ended the tribal punishment and sentenced the boys to prison according the Washington's sentencing guidelines with credit for about a year already served. *Judge Ends Experiment with Tribal Justice*, CHI. TRIB., Oct. 4, 1995, § 1, at 6. The judge found the tribal punishment had flaws which "threatened its credibility and integrity." *Id.* For example, one of the boys took a trip to the mainland and applied for a driver's license. George Tibbits, *Banishment of Teens in Question: Judge Angry About Visits from Tlingits' Relatives*, MORNING NEWS TRIB. (Tacoma, Wash.), Aug. 6, 1995, at B4. They have also received repeated visits from their relatives. *Id.*

tribal court referrals and ultimately concludes that state courts should not possess the power to refer such sentences.

This Part first discusses Washington's Sentencing Reform Act of 1981, which prescribes the proper sentence for the two boys. Secondly, this Part analyzes the bases for the Court of Appeal's decision in concluding that the trial court must sentence the American Indian boys in accordance with the Act. Then, this Part discusses inherent problems with the American Indian criminal justice system; specifically, pointing out the unfortunate consequences which may result if other state courts follow the Washington court's lead in referring sentencing of American Indians to tribal courts. Finally, this Part proposes that the Court of Appeals of Washington should divest state courts of the power to refer sentences to American Indian tribal courts.

A. The Court of Appeals Ordered Sentencing in Accordance With the Sentencing Guidelines

Washington's Sentencing Reform Act of 1981 provides the proper guidelines for sentencing the two boys.[167] Washington enacted these guidelines in an effort to avoid unwarranted sentencing disparities among defendants with similar records who are guilty of similar criminal conduct.[168] Sentencing guidelines rate the gravity of offenses on one axis of a sentencing grid and the offender's record of convictions on the other.[169] The intersection of these two variables determines the "presumptive sentence range."[170] Under the Sentencing Act, the standard sentence for the boys is between thirty-one to sixty-five months.[171]

The Sentencing Reform Act "requires a trial court to sentence a criminal offender within a presumptive, or standard range."[172]

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167. *See* WASH. REV. CODE ANN. § 9.94A.010 (West 1988) (Sentencing Reform Act of 1981).

168. *E.g.*, Mota v. State 788 P.2d 538, 544 (Wash. 1990). One of the goals of standardized sentencing is equality of incarceration time depending upon the crime. *Id. See also* WASH. REV. CODE ANN. § 9.94A.340 (West 1988) (stating that the guidelines and prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant).

169. John M. Junker, *Guidelines Sentencing: The Washington Experience*, 25 U.C. DAVIS L. REV. 715, 719 (1992). Sentencing guidelines give the greatest weight to current and past offenses and the circumstances of the crime committed. *Id.* at 718. Within that framework, they endeavor to impose proportionality and uniformity in sentencing. *Id.* The guidelines give the least weight to reforming the offender. *Id.*

170. *Id.* at 719.

171. State v. Roberts, 894 P.2d 1340, 1341 (Wash. Ct. App. 1995). The standard sentence is between 31 and 41 months of total confinement; however, the standard range for using a deadly weapon is between 55 and 65 months. *Id.*

172. State v. Estrella, 798 P.2d 289, 291 (Wash. 1990). The sentencing commis-

However, to accommodate an atypical case, the guidelines afford the court the ability to postpone a sentencing hearing "for good cause shown."[173] Nevertheless, the court abuses its discretion when it bases the delay on untenable grounds.[174] It is the responsibility of the appellate courts to ensure that trial courts do not abuse their discretion, and moreover, that the trial courts follow the guidelines as proscribed in the Sentencing Reform Act.[175]

The Court of Appeals of Washington focused on whether the trial court had good cause to postpone sentencing.[176] The Court identified two of the trial court reasons for delayed sentencing and correctly held that neither constituted good cause.[177] The Court of Appeals found that: 1) the trial court improperly implied that a successful rehabilitation during the banishment could result in an avoidance of a prison sentence, and 2) the trial court abused its discretion by delaying criminal sentencing in the hope that by the end of the banishment sentence, the legislature or appellate courts will have given the courts authority to deviate from the state sentence.[178]

Thus, the Court of Appeals correctly ruled that following the period of banishment, a standard range prison sentence inescapably awaits the defendants.[179] However, the Court of Appeals should have ruled further and eliminated the state courts' ability to refer sentences to tribal courts. This next section shows why state courts should never consider sentencing by the American Indian tribal courts as a viable sentencing option.

B. Dangers in Allowing the American Indian Tribal Courts to Sentence Their own Members

If the Court of Appeals of Washington had allowed the sentencing judge's referral, the ruling may have emboldened other

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sion designed the laws in Washington to limit discretion from the judges and put criminals in jail as long as possible. Sangiacomo, *supra* note 1, at 1A.

173. *Roberts*, 894 P.2d at 1344 n.16 (citing WASH. REV. CODE ANN. § 9.94A.110 (West 1988)).

174. *Id.* at 1344.

175. *Id.* at 1345.

176. *Id.* at 1344.

177. *Id.* at 1345.

178. *Roberts*, 894 P.2d at 1344-45. The Court specifically stated that "[a] defendant's good conduct following the commission of a crime is not a factor which relates to the crime itself or the defendant's criminal record. Therefore, it is not an appropriate factor to consider in sentencing." *Id.* at 1345. It was also not appropriate to delay sentencing with the expectation that the prescribed standard sentencing ranges will change and in essence, "treat[ing] sentencing law like a stock market, waiting for the opportune moment to get in." *Id.*

179. *Id.*

courts to refer sentencing of American Indian convicts to tribal courts.[180] Such an action would present many problems. Many of these problems are due to the unfortunate aspects of the American Indian tribal justice system.

The American Indian tribal court system is an inherently unfair and informal one.[181] Although American Indians may encounter serious prejudice in the state or federal courts, a considerable amount of prejudice finds its way into their own tribal courts.[182] American Indian tribal courts are exceedingly personal.[183] The tribal judges usually know the people who appear before them,[184] and show favoritism toward council members or their interests, their friends and other "influential groups."[185] Moreover, most judges lack sufficient training, stature, support, or experience to insulate themselves from tribal cliques and dissensions.[186]

Due to the bias in tribal courts, criminals with dual citizenship, American Indian and United States, will weigh the possible punishments, and then choose either tribal court or state court.[187] American Indians with friends who are tribal judges will choose the tribal court, while others will stay in the state court. This type of forum shopping erodes the whole purpose behind the sentencing referral and can lead to a situation where American Indians who elect to have sentencing referred to tribal courts uniformly receive more lenient sentences than American Indians who rely on state courts for sentencing. Thus, the state court should not entrust sentencing to the American Indian tribal court because such referrals result in an inconsistent, inadequate and unfair judicial system.

Another problem with the American Indian tribal justice system is that the American Indian culture administers some punishments which our modern society would regard as barbaric. If Washington allows the tribal court's banishment sentence, this may encourage other tribal courts to impose other forms of tradi-

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180. Rudy James, a Tlingit American Indian judge, said, "I would like to see the tribal courts further recognized as a viable sentencing option." Sangiacomo, *supra* note 1, at 1A.

181. SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE 93 (1978).

182. *Id.*

183. BRAKEL, *supra* note 181, at 94.

184. *Id.* at 94.

185. *Id.* If the offender were a tribesman of no particular consequence, and he offended a headman, the punishment would likely be immediate and severe. WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 13 (1966).

186. BRAKEL, *supra* note 181, at 94. Tribal judges usually lack formal legal training. *Id.* at 94-95. Also, there is little or no case law restricting their discretionary power. *Id.*

187. Sangiacomo, *supra* note 1, at 1A.

tional American Indian punishments which are not recognized in our justice system as acceptable forms of punishment.

Several examples will serve to illustrate the barbaric nature of American Indian punishment. A traditional American Indian punishment for sexual crimes is "cropping" or defacing.[188] This practice involved removing an ear or slashing the nose.[189] Another traditional American Indian punishment involves whipping the offender with horse quirts.[190] Such methods of punishment are not acceptable in our justice system.[191] Instead of risking the possibility of these bizarre sentences, state courts should altogether eliminate the referral of sentencing to tribal courts.

These undesirable consequences dictate that the Court of Appeals should have also ruled that state courts cannot refer sentences to American Indian tribal courts. Without this ruling, there is a danger that other courts will follow the Washington judge's lead. There was no need for this unique sentence, especially in light of Washington's Sentencing Reform Act, which provides specific sentencing guidelines. The Court of Appeals should ensure that state courts comply with the guidelines instead of avoiding them by referring sentences to tribal courts.

CONCLUSION

The Washington judge's sentencing referral to the American Indian tribal court was clearly unconstitutional. The banishment sentence violated the Equal Protection Clause and the Cruel and Unusual Punishment Clause. Furthermore, it violated the American Indian Civil Rights Act. Although the Court of Appeals of Washington ruled that the trial court must sentence the defendants in accordance with Washington's Sentencing Reform Act, the Appellate Court should rule further and eliminate the courts' authority to refer sentences to American Indian tribal courts;

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188. STRICKLAND, *supra* note 122, at 170. Often, unfaithful wives had the tips of their noses sliced off by jealous husbands. HAGAN, *supra* note 185, at 16.

189. STRICKLAND, *supra* note 122, at 170.

190. HAGAN, *supra* note 185, at 15. These barbaric punishments continue to this day. For example, in Oregon, an American Indian woman complained to officials of the Confederated Tribes of the Warm Spring Reservation about her daughter's rebellious and uncontrollable conduct. *Id.* The teenage daughter socialized with gangs, drank liquor and was failing school. *Id.* The tribal justice system administered a ceremonial whipping of the girl, despite the mother's protests. *Id.* Whipping is a tradition still allowed by some tribal courts. *Tribal Officials Whip Girl Despite Mother's Protests*, N.Y. TIMES, Oct. 30, 1994, at A11.

191. *See, e.g.*, GA. CONST. art. I, § I, para. XXI. (1994) (whipping not allowed as a punishment). *But cf.* Cannon v. State, 190 A.2d 514, 517-18 (1963) (finding that, although whipping a mentally unstable prisoner might well have far reaching and unwarranted adverse affects upon him as an individual, any change in the state statute allowing the impositions of lashes must come from the legislature).

thus, preventing future sentencing judges from considering tribal court referrals as valid sentencing options.

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