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Federal Incarceration and Native American Felon Disenfranchisement in the US West

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ABSTRACT

When Native Americans are arrested for felonies on most reservations, they are under the legal authority of the federal government and federal sentencing laws. They are subject to a convoluted system of jurisdiction in which they are held and tried off-reservation in federal courts. We ask how federal criminal justice policies have contributed to voting disenfranchisement of Native Americans in Western states. We document the role of federal government policies in the sentencing of Native Americans in Western states with felon disenfranchisement laws. We show that the path to disenfranchisement in these states flows through the federal government, which imposes longer sentences than most states for equivalent crimes. Federal felons are not eligible for parole, a key point when voting rights are restored in most states. The jurisdictional challenges, legal ambiguities, and concerns with voting violations strongly discourage Native felons from voting after their sentences.

Keywords: Felon disenfranchisement; Native Americans; criminal justice; tribal lands

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Introduction

Depending upon the nature of the offense, its location, and relevant laws, a Native American may be subject to charges in tribal, state, or federal court, all of which pose challenges to researchers wanting to understand the impact of felon disenfranchisement laws on American Indian and Alaska Native populations. Misdemeanor offenses committed on reservations are most often handled by tribal courts, while offenses committed off-reservation are prosecuted in state courts. Felony offenses committed on most reservations by Native Americans are prosecuted in federal courts. The federal criminal justice system thus plays an outsized role in the felon disenfranchisement of Native Americans. Convicted felons serve time in federal prisons and are subject to the federal system of parole and probation. States then remove residents with felony records (from any jurisdiction) from their voter rolls, with the details varying wildly across states. As we describe, this process results in a high rate of disenfranchisement and impedes voting for Native American felon populations on reservations.

The disenfranchisement of felons is an important issue for Native Americans because they have the highest rates of incarceration and felony conviction of any racial group, except possibly for African Americans.[1] In the current period, Native Americans are incarcerated and disenfranchised at far higher rates than their population sizes in Western states. According to Stephanie Woodard's (2018: 150–151) analysis of DOJ statistics, American Indian and Alaska Native populations are 38% more likely than other populations to be under correctional supervision and generally receive longer sentences for similar crimes.[2] Figure 1 shows prison populations per 100,000 in the states with the highest Native population shares in 2021.[3] The national average incarceration rate of Native Americans is very high, at around 850 incarcerated per 100,000. In comparison, the national rate of prison population for Black Americans is 1020 per 100,000, 228 per 100,000 white Americans, and 275 per 100,000 Hispanic Americans. In states with sizable Native populations the incarceration rate for Native people is often higher than the national rate of

[1] Woodard (2018: 150) argues that Native Americans have the highest rate of incarceration of any racial/ethnic subgroup and the greatest likelihood to die in lethal encounters with police.

[2] Roughly half of the Native population incarcerated in federal prison had minimal or no record of previous offenses, a rate significantly lower than that of previous offenses recorded in the general population in federal prison (Woodard, 2018: 150–151). Franklin (2013) shows that Native Americans receive the harshest sentences of any racial group in US federal courts.

[3] Table A1 in the Online Appendix shows Native American population share, population size, and reservation population for the highest Native population states. Figure 1 includes states with the highest population share, which are different from those with the largest population size. California has the highest Native population size, but a smaller share than the included states.

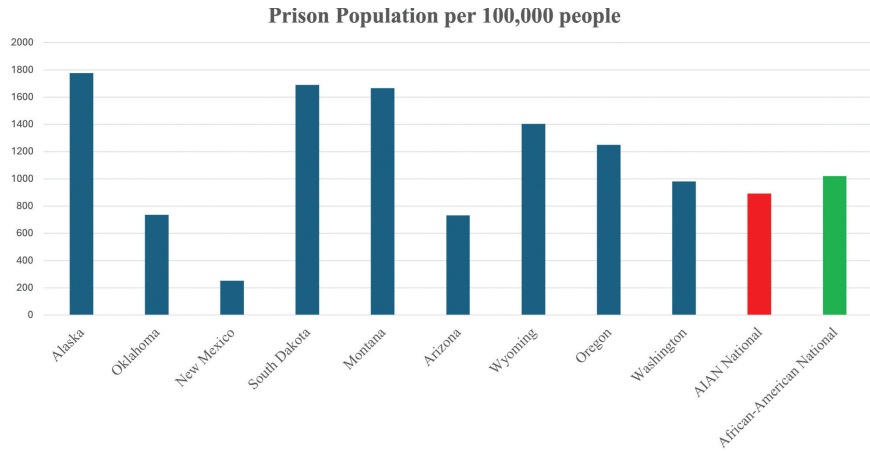

Figure 1: American Indians and Alaska Natives in Prison, 2021.
Notes: Data from Bureau of Justice Statistics, Prisoners in 2021

incarceration for African-Americans, and in some cases (Alaska, South Dakota, Montana, Wyoming) substantially higher. In Alaska, Native Americans are 40% of the total prison population, equivalent figures are 35% in South Dakota, 25% in North Dakota, and 24% in Montana (DOJ 2021).

States with high Native populations were particularly likely to enact and expand felon disenfranchisement laws in the late 19^{th} and early 20^{th} centuries (Keyssar, 2009: 356–362). Western states with sizable Native populations adopted the strictest felon disenfranchisement laws outside of the South, in which felon disenfranchisement laws were intensified in the Jim Crow era (Behrens *et al.*, 2003). Felon disenfranchisement was typically codified in Western states' constitutions and then reformed in the period after the Snyder Act of 1924 as Native Americans were given the right to vote in local, state, and federal elections (Rogers *et al.*, 2024). Felon disenfranchisement is thus an issue of particular salience in the US South and the US West, especially in states with high African American and Native populations.

While Native Americans have high incarceration rates throughout the nation, on and off reservations, we argue the role of the federal government is crucial to Native felon disenfranchisement for at least three reasons. First, individuals subject to federal sentencing have faced longer sentences and more felony counts, particularly in the period of mandatory sentencing guidelines from 1984 to 2005 (United States Sentencing Commission, 2004, 2011).[4] This has resulted in Native Americans having longer sentences, and thus excluded

[4]For example, estimates of prison sentences show that prison time doubled for federal prisoners after the 1984 reform (United States Sentencing Commission, 2011).

from voting for longer, than those convicted of equivalent crimes under state jurisdiction (Wright, 2006; Ulmer and Bradley, 2018). Even after the period of mandatory sentencing, sentences for federal crimes are still longer than sentences for equivalent state crimes, primarily due to minimum sentencing laws enacted by Congress (Nowacki, 2018). Second, federal prisoners are also ineligible for parole, meaning that they will wait longer to have voting rights restored in states that allow convicted felons to vote once they leave prison. Third, the legal ambiguity around the restoration of voting rights is extreme, particularly for federal prisoners, discouraging efforts to vote by a subpopulation (Native Americans and felons) with low rates of voting in the best of circumstances (Peterson, 1997; White and Nguyen, 2022). The risk-reward calculation in those circumstances falls heavily in favor of staying away from the ballot box.

In this article, we detail the role of the federal criminal justice system in the state-level disenfranchisement of Native American felons on reservations. First, we describe felony disenfranchisement statutes across the US states, focusing on the (on average harsher) laws in states with relatively large Native populations. Then we elaborate upon the convoluted justice system on reservations, with overlapping jurisdictions of tribal justice, states, and multiple, overlapping federal agencies. We describe this from the point of view of someone arrested on a felony charge, through the process in the courts, to sentencing, and release. Then we discuss the ways that felonies are treated differently by the federal government than state governments, particularly as regards sentencing policies, which result in much longer sentences and no parole, but also the incentives and priorities of federal law enforcement. Whether felonies are adjudicated harshly depends in part on the caseload and priorities of federal law enforcement in the relevant US court district. Native Americans also appear to receive harsher penalties for similar crimes in the federal system (Everett and Wojtkiewicz, 2002; Travis 2013). Finally, we take the perspective of a convicted felon who may now be eligible to vote. We point out how the low propensity to vote among this population, combined with the tremendous legal ambiguity of the federal system, interacting with murky state voting statutes, transforms voting from a low priority to a no-priority activity for most individuals in these circumstances.

Our study combines analysis from the American political development and political economy traditions. We bring together insights from criminal justice, legal, and political science scholarship on the adjudication of felonies on reservations, the incentives of federal agents, and the results of federal sentencing laws on sentencing outcomes. We draw upon scholarly research on the demography and economics of crime to show that federal sentencing laws lead to longer sentences, and thus longer periods without the right to vote. Our study contributes to research in political economy and race and ethnic politics on the origins and intentions of felon disenfranchisement policies. Our

focus on Native American incarceration is novel to this literature. We also add to that literature the role of federal policies and federal bureaucracies in the process of felon disenfranchisement. The limited political science research that exists on federal criminal justice policies has not considered implications for Native American populations.

Felony Disenfranchisement in the West

Felon disenfranchisement has been common in the United States since the colonial period. Most states had such laws in place before the Civil War. In the former Confederacy, these laws were codified in state constitutions during Reconstruction and expanded in the Jim Crow era (Schroedel *et al.*, 2024).[5] A significant literature in American politics argues that felon disenfranchisement laws in the United States were designed to reduce access to the ballot for African Americans (Behrens *et al.*, 2003; Manza and Uggen, 2008; Soss and Weaver, 2017). A complementary research agenda in demography shows that a disproportionate number of those disenfranchised by felon restrictions are African American, particularly in Southern states (Shannon *et al.*, 2017). Recent contributions have also demonstrated that rates of incarceration of African Americans increased when felon disenfranchisement laws were expanded following the passage of the Voting Rights Act (Eubank and Fresh, 2022).

Yet many states in the West such as Wyoming, Arizona, South Dakota, Idaho, Nebraska, or Alaska, also adopted and expanded felon disenfranchisement laws but did not (and in most cases still do not) have sizable African American populations.[6] In related research, we document the history behind these policies, arguing that reforms in these states, while not originally aimed to disenfranchise Native Americans, who were not yet citizens at the time of enactment, have been reformed and applied discriminately, resulting in disproportionate disenfranchisement of Native Americans (Rogers *et al.*,

[5]Of course, many Western states did not have felon disenfranchisement laws in place prior to the Civil War because they were not yet established as states.

[6]Idaho, for example, included felony disenfranchisement in its original 1889 constitution, a time when there were only 80 African Americans living in the entire state.

2024).[7] Five of the 13 states with the harshest categories of felon disenfranchisement laws according to the National Conference of State Legislatures are ones with sizable American Indian and Alaska Native populations. Of these, Alaska, Arizona, Oklahoma, South Dakota, and Wyoming, all states with very high Native populations relative to the national average, are in the strictest categories, in which felons cannot vote while incarcerated, on parole, or on probation.[8] Thus, many Native Americans on reservations live in states with strict felon disenfranchisement laws, and will lose their voting rights should they be convicted of a felony.[9]

Felony disenfranchisement policies vary across states. While there are a number of state-specific details, state laws can be placed in four broad categories, shown in Figure 2, ranging from the least restrictive to the most restrictive. In the most permissive category are Maine and Vermont, which place no restrictions on voting. Felons can vote while in prison and at every point of their adjudication and sentencing process. In category two, including the largest number of states, felons are restricted from voting while in prison, but can vote before sentencing and after leaving prison (including during parole

[7]When Western states gained statehood in the late 19th and early 20th centuries, nearly all included felon disenfranchisement in their initial state constitutions. At this time most Native Americans were not considered to be U.S. citizens. The Supreme Court in *Elk v. Wilkins*, 112 U.S. 94 (1884) ruled that American Indians had a civic status akin to children born to foreign diplomats and did not have birthright American citizenship. Also in 1887, Congress passed the Dawes Act, the first of a series of laws that provided "civilized" members of tribes willing to give up treaty-protected lands to Euro-American settlement with a pathway to citizenship (Schroedel and Hart 2015: 7). Full citizenship was not attained until Congress passed the Indian Citizenship Act in 1924. For the first time, American Indians were covered by the 15th Amendment which prohibited the use of race to disenfranchise voters. However, states in the West and Midwest passed a broad mix of laws that disenfranchised Native Americans. Some were akin to the Jim Crow laws in the South, but others focused on tribal identity to disenfranchise potential Native voters (Schroedel and Hart 2015: 9).

[8]The size of Native American population is controversial, with much higher Native figures reported when people self-report Native heritage compared to those who are registered members of tribes. Accounting for the Native population was further complicated by changes to the 2020 US Census, which allowed individuals to claim Native heritage from other countries (for example, indigenous heritage from Mexico). This led to a significant jump in the identified the Native population. According to the National Institute of Justice (2013), "many different definitions of AI [American Indian] and AN [Alaska Native] are used in health care, social service, government and academic contexts." The NIJ suggests utilizing enrolled membership in federally recognized tribes, but that number is less than half of what people report to the Census Bureau (Bureau of Indian Affairs, 2016).

[9]While it is hard to definitely prove that harsh felon disenfranchisement laws are specifically aimed at excluding Native people from the voting rolls, it certainly appears to be the case in South Dakota, which had a law allowing felons on probation to vote. The issue came up when two Lakota women tried to vote and were refused. ACLU attorneys took the case and won in *Janis v. Nelson* (2009) and the state legislature responded by disenfranchising anyone with felony convictions in any state or federal court. Only after serving their entire sentences, parole, and probation can felons in South Dakota regain voting rights (Schroedel, 2020: 67-68).

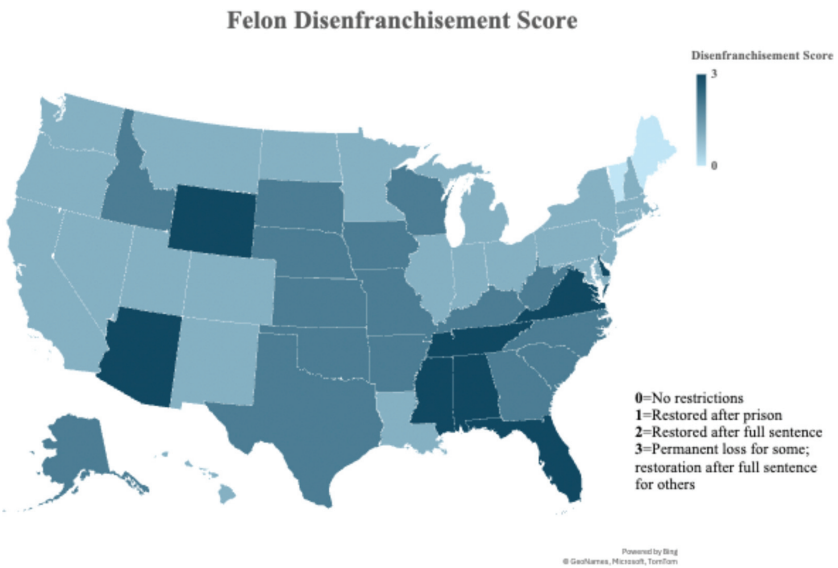

Figure 2: Felon Disenfranchisement Laws, by State (2024).
Notes: Data from the American Civil Liberties Union

and probation). In the third category are states that prohibit voting during any part of the sentence—prison, parole, or probation. In the harshest category are those that prohibit voting during any part of the sentence (prison, parole, probation), and permanently remove voting rights for some subpopulations. In Arizona, for example, those convicted of more than one felony, even for the same crime, lose their right to vote permanently unless they petition the court for restoration. In Wyoming, only first-time offenders for non-violent offenses may request restoration of voting rights after the completion of their full sentence. All others cannot vote unless pardoned by the governor. In several states, including Arizona, rights cannot be restored, even with a pardon, unless all court and sentencing fees are paid.[10]

The details of felon disenfranchisement statutes are important for Natives on reservations because of features of the federal justice system that result in longer sentences, no parole, and no clear legal path for rights restoration, which often goes through state judges. Importantly, convicted felons are not excluded from tribal elections, which are under tribal purview, not state law.

Ideally, we could provide estimates of Native Americans disenfranchised under state law, and related turnout figures. Estimates of disenfranchised populations are difficult because of the variation in state law and changes over

[10]Court and sentencing fees required for vote restoration are another important issue for Native Americans, on and off reservation, due to their low socioeconomic status.

time, such as at what point in the sentence a felon can vote, which makes it difficult to employ consistent methodology (Uggen *et al.* 2006). Existing estimates use demographic methods to approximate populations based on prison intake data, extrapolating who is likely to be ineligible to vote. Groups like The Sentencing Project, which provide estimates of disenfranchised populations, do not include federal prisoners in their state-by-state estimates, thus severely undercounting Native populations in states with reservations (Uggen *et al.*, 2022). To our knowledge, no current estimates of disenfranchised voters include counts of American Indians and Alaska Natives. One reason for this omission is that Bureau of Justice Statistics data that is used to calculate these estimates does not include an identifier for Native Americans, which are often misidentified as white or Latino (Chin and Schroedel 2017). As we discuss in the following sections, this is only one of the challenges to researching Native disenfranchisement.

The Jurisdictional Jungle

The criminal justice system for felons on reservations has been called a "jurisdictional jungle," a circumstance that is unique to Native defendants on reservations (Cardani, 2009). In particular, the federal government, not to mention state and tribal governments, has multiple, overlapping agencies involved in adjudicating criminal activity. We describe this legal quagmire in this section. Two key takeaways emerge from this account of the legal and bureaucratic environment for convicted felons on reservations. First, felons are likely to have longer sentences and no access to parole, meaning they are barred from the ballot box for longer than non-Natives and Natives off-reservation for equivalent crimes. The second is that a felon in this circumstance would be very reasonably confused about their legal status, in general, and regarding state voting law, which is outside of federal jurisdiction. State statutes on voting restoration for felons are poorly elaborated in most cases and none of them provide guidance on how federal felons might restore their voting rights, if eligible.

Background of Federal Jurisdiction

Dating back to at least the Major Crimes Act of 1885, the federal government has exclusive jurisdiction for felonies committed by Native Americans on reservations. The Major Crimes Act gave the federal government prosecution over crimes committed by Native people that we would now label as felonies, including murder, manslaughter, sexual abuse, aggravated assault, and child sexual abuse. On most reservations, tribal police and tribal courts handle criminal cases that would have sentences of less than 1 year, or as much as

3 years for repeat offenders. These crimes are typically what states would classify as misdemeanors.[11]

Importantly, the jurisdiction of the federal government on reservations depends on the identity of the accused (Major Crimes Act) and the victim (General Crimes Acts of 1817 and 1948). Felonies committed by Native Americans on reservations are prosecuted by the federal government, whether the victim is Native or non-Native. Many felonies committed by non-Natives on reservations are within the jurisdiction of the state justice system. The victim's identity is also relevant. The General Crimes Act gives the federal government jurisdiction to prosecute felonies committed by non-Natives against Native victims on reservations.[12]

Public Law 280 (PL 280) is another statute that is highly relevant to criminal justice in Indian Country.[13] Passed by Congress in 1953 and signed into law by President Dwight Eisenhower, PL 280 placed jurisdiction over criminal prosecution in six states under the state government, and divested the federal government of jurisdiction to prosecute under the Major and General Crimes Acts.[14] These "mandatory" states include Alaska (except the Metlakatla Indian Community on the Annette Island Reserve, which maintains criminal jurisdiction), California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. States were also allowed in some cases to opt into full or partial jurisdiction. Those "optional" states, along with their adoption date and end of agreement

[11]The Tribal Justice Act of 2010 expanded tribal jurisdiction to include repeated misdemeanor cases with sentences up to 3 years each, or up to 3 stacked charges of 3 years culminating in a 9-year sentence. Along with the Violence Against Women Act of 2013, the Tribal Justice Act of 2010 also permits tribes to establish jurisdiction, with federal funding and support, to adjudicate non-Native defendants in cases of domestic violence against Native victims Sidorsky and Schiller (2023). A recent (2022) Supreme Court ruling, *Oklahoma v. Castro-Huerta* established that states have jurisdiction over non-Native defendants in Indian Country, leaving the legal environment unclear.

[12]Existing scholarship argues that the lack of tribal control over prosecution of non-Natives on tribal land has resulted in lawlessness because these crimes are not federal government priority. Sidorsky and Schiller (2023), for example, point to extraordinarily high rates of violence against Native women on tribal lands that are not prosecuted. The Violence Against Women Act of 2013 (VAWA) gives tribes the option to prosecute non-Native defendants in domestic violence cases in tribal courts.

[13]Indian Country is the legal term for sovereign landholdings of Native American tribes, including reservations, pueblos, etc.

[14]Public Law 280 is highly controversial and unpopular amongst Native communities (Goldberg-Ambrose, 1996; Cline 2013). See footnote 5 in Goldberg and Champagne (2005). Public Law 280 was an initiative of the Eisenhower administration, which Congress passed during the 1953-1955 period when Republicans controlled both the Senate and House. The law was part of a move by Republicans and some Democrats to terminate tribes and end the government-to-government relationship between the federal government and tribes. Termination would end the federal government's responsibility to provide treaty-mandated resources and programs to federally recognized tribes and it would open up tribal lands and resources to non-tribal entities (Wilkins and Stark, 2017: 95-96).

date, where appropriate, include: Arizona (1967), Florida (1961), Idaho (1963, subject to tribal consent), Iowa (1967), Montana (1963), Nevada (1955), North Dakota (1963, subject to tribal consent), South Dakota (1957–1961), Utah (1971), and Washington (1957–1963). In all cases in "optional 280" states, the state has limited, specific jurisdiction for certain infrastructural features, such as crimes committed on state highways or interstates, or for certain classes of offense. The scope of authority in "optional 280" states have in most cases changed over time, typically to increase the tribal jurisdiction and limit state jurisdiction (Osborn 2019).[15] Public Law 280 is important to felon disenfranchisement because it further complicates the "jurisdictional jungle" for Native defendants, and because it means that the federal government is not involved in felonies in all states.

Even in the absence of interaction with federal criminal justice policy, it is likely that Native Americans would face high rates of disenfranchisement. This is the case in states subject to Public Law 280, in which the states, not the federal government, have the purview over criminal matters on reservations. With high rates of felony conviction of Native Americans flows high rates of felony disenfranchisement of Native Americans. The example of Alaska and Nebraska is instructive. In both states, felonies on reservations are adjudicated by the state,[16] and felons can vote only after completion of their sentence (prison, parole, probation). These states have the highest per capita prison populations of Native Americans in the nation.

What's Different under Federal Jurisdiction?

Federal jurisdiction on tribal lands is managed by multiple, overlapping, and not always cooperative agencies within the federal government: the Bureau of Indian Affairs (BIA) justice division, the Federal Bureau of Investigation (FBI), and the US Marshals Service. This setup results in a different set of incentives for officials than those working in the state criminal justice system.[17] Federal jurisdiction also implies a different legal environment than the state, especially differences in sentencing law and practice, most notably those introduced by the Federal Sentencing Act of 1984. The federal government has harsher penalties for equivalent crimes than most states, including longer sentences as established by US Sentencing Guidelines (Droske, 2007; Rehavi and Starr

[15]The Native American Rights Fund identifies 22 states with PL 280 or "PL 280-like" provisions.

[16]Except the Metlakatla Indian Community on the Annette Island Reserve in Alaska, where the federal government maintains criminal jurisdiction.

[17]Depending on the crime, it could also involve other federal agencies such as the Drug Enforcement Administration.

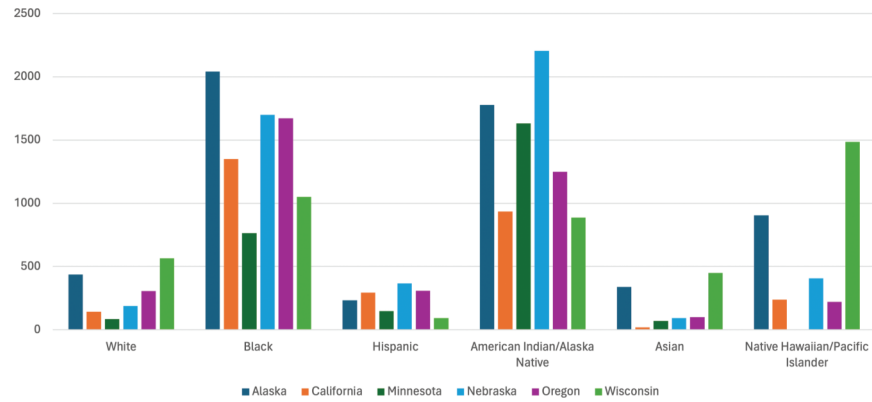

Figure 3: State Prison Population in Public Law 280 States, 2021.

Notes: Prison population per 100,000. Data from Bureau of Justice Statistics. MN does not collect data on Native Hawaiian/Pacific Islander populations.

2014; Hofer, 2015).[18] This means that a felon subject to federal jurisdiction is likely to serve a longer time in prison (Ulmer and Bradley, 2018). The state is a relevant reference point because Native Americans on tribal lands are prosecuted for crimes that, on non-tribal land and for non-Native people, would be prosecuted by states. Non-Native federal defendants are thus distinct from Native defendants in the federal court system because they are facing charges for crimes that are specific to federal jurisdiction, such as immigration offenses, cross-state offenses, organized crime, and drug trafficking.

Moreover, the federal parole system that allowed prisoners to leave prison early for parole was eliminated in 1987, meaning that federal prisoners in most cases do not have the possibility of early release. This is important for felony disenfranchisement in states that allow felons to vote once they leave prison (parole, probation, and beyond: states in light blue in Figure 2), which means that federal felons would have delayed access to voting in relative terms to state felons, not just due to longer sentences but also due to the longer period spent in prison.

The primary objective of the Federal Sentencing Reform Act of 1984 was to reduce judicial discretion in sentencing, with the goal of more consistent and equitable outcomes within the federal justice system (Stith 2008). This act created the United States Sentencing Commission (USSC), which established sentencing guidelines for federal prisons, abolished federal parole, and introduced mandatory minimum sentences for certain (often non-violent) offenses. The approach taken by the act, and the USSC, was to create more

[18]Rehavi and Starr (2014) demonstrate that the primary reason federal sentences are longer than state sentences is the initial decision to charge defendants with crimes that carry mandatory minimum sentences.

consistency through greater rigidity and severity in sentencing practice (Tonry, 2015). An extensive literature in criminology, law, and economics demonstrated that equivalent crimes committed in the federal system were punished more severely, including more charges subject to minimum sentences (Rehavi and Starr 2014), longer sentences (Droske, 2007; Wright, 2006), and lack of early release. Each aspect of this severity impacts felon disenfranchisement because, as discussed above, the length of the sentence, the number of charges, and the transition from prison to supervised release are all important details in determining whether a convicted felon may find their voting rights restored.

From 1984 to 2005, these USSC sentencing guidelines were mandatory for judges to apply to the cases on their docket. The sentencing disparities between equivalent federal and state government offenses led the federal government to be sued, and lose, in the US Supreme Court in *United States v. Booker* (2005). This ruling rendered the sentencing guidelines advisory rather than mandatory. Post-*Booker* research shows that sentences remain longer in the federal system, especially due to mandatory minimum sentencing.

Mandatory minimum sentences have been in place in some states since 1950s, but their use expanded for federal crimes following the Sentencing Reform Act of 1984. Mandatory minimums were added to a large range of federal crimes, especially those related to drug offenses. Congress continues to establish mandatory minimum sentences for specific crimes that are imposed regardless of the circumstances of the offense. The judge is obliged to impose the minimum or higher, even if that is a harsher sentence than the Sentencing Guidelines would suggest. For example, Congress established mandatory sentences for drug offenses through the Anti-Drug Abuse Act of 1986, in which trafficking amounts of heroin, cocaine, and methamphetamine above a certain threshold result in mandatory minimum sentences of 5 or 10 years depending on quantity. Similarly, the Armed Career Criminal Act imposes a mandatory 15 years for felons found with a firearm with three or more prior convictions for a violent felony or drug offense. These laws remain in place and have resulted in higher sentences, on average, for federal versus state crimes.[19]

As discussed below, prosecuting US Attorneys exercise their discretion by choosing whether to charge a defendant with a crime that falls under the mandatory minimum laws and by choosing how many charges to file. The choice to prosecute the federal crime (rather than decline or administratively close the case), the choice of which charge to file, whether those with minimum sentences or not, and how many charges to file strongly influences the likelihood and length of disenfranchisement for convicted felons. These details are crucial

[19]Following the 1984 Sentencing Reform Act, some states followed the example of the federal government to impose mandatory minimums for certain crimes. For example, Three Strikes laws imposed mandatory life sentences for drug offenses in some states.

because 97% of those charged with a federal felony plead guilty (US Sentencing Commission 2018; Hartley and Tillyer, 2018).

The Justice Process for Native Americans on Reservations

In this section, we describe what happens to a Native American accused of a felony on a reservation, from the process of arrest, incarceration pre-trial, the trial, and the sentence. A range of challenges are documented, including overlapping jurisdictions, distance between the reservation and the physical infrastructure of the federal justice system (jails, courts, prisons, parole offices), and the incentives of federal officers (judges, prosecutors, defense attorneys, arresting agencies). We highlight the confusion inherent in the process as specifically relevant to felony disenfranchisement.

What Happens When Natives are Accused of a Felony on Reservation

When a crime is committed by a Native American individual on a reservation, the first responders tend to be tribal police.[20] On a reservation not covered by Public Law 280, if the tribal police suspect that the crime is a felony, they will usually contact the FBI and the US Attorney's Office for the district (Vine and Little 1983: 183). Depending on the crime, the FBI, US Marshals, or the BIA may respond.[21] It is common for the tribal police to hold defendants, who are then transferred to federal custody. At times, multiple agencies respond simultaneously, with appropriate jurisdiction worked out once the defendant is transferred to a federal holding facility. Tribal authorities also have jurisdiction to charge the defendant with crimes that may have occurred in relation to the felony charge that are not subject to the Major or General Crimes Act. The defendant in that case could be subject to criminal proceedings in federal and in tribal court for the same criminal incident.[22]

Once the accused has been arrested by federal authorities, they are held in a federal jail and they are under the jurisdiction of the US Attorney in their district. Typically, the federal jail is in the same location as the federal courthouse. These courts tend to be in larger cities, such as Pierre, Rapid City, and Sioux Falls in South Dakota, which are not necessarily close to

[20] If the accused is not Native, the state police have jurisdiction over case, whether the charge is a misdemeanor or a felony.

[21] On a reservation that is subject to Public Law 280, tribal police will contact the law enforcement agency that has been assigned to handle felonies on reservations. Typically, this is the responsibility of county sheriffs.

[22] Native defendants on tribal lands can also receive charges from both the federal government and the tribal government without triggering "double jeopardy" rules under the ruling *US vs. Wheeler* (1978) because the charges are brought against two different sovereigns (Jackson, 2015).

reservations. For example, residents of the Pine Ridge Reservation in South Dakota would typically be held in Pierre or Rapid City, South Dakota. The Pine Ridge Reservation is nearly 3,500 square miles and includes the entirety of Oglala Lakota County and Bennett County, along with parts of Jackson County and Sheridan County. Depending on where the defendant lives, the distance from the place of arrest to a federal courthouse could be 200 miles or more, with a travel distance of greater than 3 hours, partially on unpaved roads. While Pine Ridge is a large reservation, it is not atypical of reservations in Western states, which tend to be geographically large, extremely rural, and remote.[23]

The location of the justice process in federal jails, courts, and prisons is important for several reasons. First, witnesses in the case must travel long distances to testify, both in pre-hearing convocations and at trial. Witnesses are most often from the reservation, so must also travel the long distance to the federal court. While this would be an inconvenience to someone with means, it is nearly prohibitive to the average resident of a reservation who is low income and likely does not have a vehicle or the money to pay for gas (Schroedel, 2020: pp. 75–76, 80; Schroedel *et al.*, 2020).[24] The distance and travel impedance, combined with the low SES and low car ownership, results in witnesses frequently failing to appear (Washburn, 2005). This contributes to high rates of prosecution declinations and administrative closures for cases on reservations, described in more detail below. Second, defendants are less likely to receive family support and visits while incarcerated, due to the prohibitive travel distance (Washburn, 2005). Third, the location of the trial off-reservation and far from reservations results in a non-representative jury pool in most cases (Gross, 2016). Most Native defendants face juries without Native members because the jury is compiled from a random selection of residents in the area surrounding the court facilities. In the case of South Dakota, the American Indian and Alaska Native population in Pierre is 9.6%, Rapid City is 8.5%, exactly the state average, and Sioux Falls at 1.6% is far below the state average.[25] A randomly selected jury in any of these cities, and especially Sioux Falls, would in most instances not include a Native American.

At the point in which defendants are held in federal jails, the incentives of federal prosecutors from the US Attorney's Office (USAO), called US Attorneys

[23]The Navajo Nation, which is the largest reservation, encompasses 27,413 square miles, most of which is in three Arizona counties, but it also includes parts of Utah and New Mexico.

[24]For example, in the federal court case of *Sanchez v. Cegavske* (2016), Judge Miranda Du ruled that the voters on the Pyramid Lake and Walker River Reservations in Nevada faced "abridgement" of their voting rights due to unequal access caused by travel distance combined with economic and socio-demographic factors, including poverty and low car ownership (Schroedel *et al.*, 2020).

[25]All population statistics taken from the Census Bureau's American Community Survey 2018-2022.

(USAs) and Assistant US Attorneys (AUSAs), and the judge hearing the trial become relevant. The prosecutor decides whether to charge the defendant and pursue prosecution. Should the case be pursued, a federal judge is involved in the outcome, whether it is resolved through plea bargains or a formal trial. Federal prosecutions are overwhelmingly (up to 98%) decided in plea bargains, which means that the Assistant US Attorneys have the most important impact on sentencing outcomes, resulting in "prosecutorial adjudication" (Americ an Bar Association, 2023; Lynch 1998).

In the next two sections, we describe the perspective of federal prosecutors and judges handling criminal cases from reservations. For criminal justice professionals in the federal system, adjudicating crimes in Indian Country tends to be a low-priority, low-reward activity. Moreover, it tends to involve facets of the law that are peripheral to their work as federal agents, which is focused on (especially) immigration crimes, drug trafficking, cross-state criminal activity, and organized crime. Federal officials in many cases may view this work as outside their area of specialty and in nearly all cases outside of their career incentives. One takeaway from this discussion is that felons may be less likely to be punished on reservations, but for those that are, the sentences are in many cases longer and more extensive.

Incentives of Federal Prosecutors

For most US Attorneys and their line prosecutors (AUSAs), crimes committed on reservations are a subset of their job, and one that likely does not yield them career rewards. Viewed from the perspective of career advancement, efforts spent on crimes on reservations does not tend to result in promotion (Banks and Curry 2019). AUSAs have geographic posts that vary in their prestige, opportunities for recognition, and access to higher-level posts. AUSAs are in most cases trying to move up the ladder to high-profile districts such as the Southern District of New York (New York City). Indian Country postings tend to be "bide your time" postings, with high turnover rates and low tenure for AUSAs.

To be sure, prosecuting crimes committed on reservations may be particularly difficult, especially because prosecutors are outsiders. The difficulties stem from several dimensions: insider-outsider dynamics, low trust in government authorities, limited technology, and socioeconomic factors. Research on cultural ties within Native American communities shows that social networks are particularly strong on reservations (Washburn, 2005). Outsiders interested in working with residents typically need endorsements from tribal contacts such as elders or community representatives. Thus, federal agents without working relationships on the reservation will find it very difficult to investigate crimes effectively, because they cannot assume victim or witness cooperation or an easy path to collecting evidence or background information.

A very long history of deadly, devastating, and exploitative interactions with federal, state, and local government authorities has led to very low trust in government officials among Native Americans on reservations, especially local and state governments (Schroedel *et al.*, 2020). Tribal police and in some cases reservation-specific BIA agents tend to have stronger community ties than US Attorneys, FBI, or US Marshals. US Attorneys, AUSAs, and their investigative teams may find it difficult to do their jobs well unless they form connections to the local community. This may be particularly unlikely for AUSAs looking to leave rural posts for jobs in higher-profile locations.[26]

The geography and economics of reservations are also relevant. We have already explained how the travel distance is prohibitive for many witnesses who might cooperate if the circumstances were easier. Travel distance is also a problem for federal officials. It may seem trivial to individuals with resources to travel to the reservation, but it is important to keep in mind just how rural and remote most locations are on reservations. Faced with a busy docket, a 3-hour drive to the reservation with washed-out roads and animals blocking passage may not seem the best use of time for many AUSAs. Low SES status and low technology access of many reservation residents may also mean that evidence collection is more difficult on reservations.

Research on criminal proceedings on reservations shows that these felonies tend to have high declination rates (GAO 2010) and high administrative closures (DOJ 2021).[27] Prosecutors consider "winnability" when prioritizing cases because this reflects well upon them and their agency (Banks and Miller 2019). AUSAs have prosecutorial discretion to pursue cases or to drop them. As Bibas (2009, p. 269) describes, "in a world of scarcity, prosecutors are the key gatekeepers who ration criminal justice." Notably, these high rates have caught the attention of officials in Washington, who now intervene in jurisdictions with abnormally high declination rates. As a result, declinations have fallen, down from 50% in 2010 to 18% in 2021 (DOJ 2021). Declinations are when USAs opt not to pursue charges in a case, typically because they view the evidence as too weak to withstand scrutiny, or they lack legal merit. Administrative closures are a procedural tool to remove a case from an active docket without issuing a final judgment. Given the difficulty of working cases

[26]All these factors have contributed to what the Bureau of Indian Affairs has labeled the "missing and murdered Indigenous people crisis." BIA estimates there are 4,200 unsolved cases of missing and murdered Indigenous people, most of whom are women. To address the lack of attention given to the problem, the Department of Interior under the leadership of Secretary Haaland, has established a Missing and Murdered Unit within the BIA's Office of Justice Services (Bureau of Indian Affairs No Date; United States Department of Interior No Date.)

[27]For example, between 2005 and 2009, federal prosecutors declined to prosecute 50% of 9,000 crimes referred to them, mostly by FBI and BIA, 77% of which were violent crimes. They declined 52% of violent crimes, 40% of non-violent crimes, 46% of sexual assault and 67% of sexual abuse matters (GAO 2010).

on reservations and incentives to decline Indian country cases over those that are more high profile, declinations, and administrative closures are high.

Incentives of Federal Judges

The caseload for judges in federal courts is mostly composed of federal crimes, not felonies that would typically be handled by state authorities. A federal district court judge on a general (not special district) court, will handle federal criminal cases such as drug trafficking, immigration offenses, mail and wire fraud, bank robbery, firearm offenses, and white-collar crimes like embezzlement and money laundering, federal civil law cases such as civil rights violations, employment discrimination (under federal laws like the Civil Rights Act, Americans with Disabilities Act), environmental law cases, patent and trademark cases, and antitrust litigation. They also manage cases when claimants are residents of different states, bankruptcy cases, cases in which the United States government is a party in the case, and a few other specific case types (such as maritime law, habeas corpus petitions, foreign sovereign immunity, and multi-district litigation). Cases with Native defendants are in most cases aspects of criminal law that are not handled by federal courts, and their adjudication happens in nearly all cases under state law and state jurisdiction. In many cases, judges hearing the cases of Native defendants are relatively inexperienced in these matters. Judges located near the largest reservations, such as those based in Flagstaff or Pierre, are likely to have far more experience with criminal cases on reservations that most federal judges.

Research on the federal judiciary has identified large inter-district variation in outcomes, including judge caseload, time to trial, and sentencing outcomes. For example, Kautt (2002) finds, controlling for district characteristics, sentencing outcomes differ significantly across the 94 federal district courts. Kautt shows that the most relevant factors affecting outcomes are case priority and caseload. Both factors are relevant to variation experienced by Native Americans. As discussed above, crimes on tribal lands are low priority for ambitious AUSAs. In the states with large Native populations on reservations, priorities differ depending on proximity to the US southern border. Immigration is the priority of states on the border, especially Arizona. Away from the border, in states such as South Dakota, Oklahoma, or Wyoming, drug trafficking and RICO crimes are the focus.

With higher caseloads per judge, it is more likely that AUSAs will decline to prosecute.[28] The caseloads are particularly acute in Arizona, where there are 875 federal case fillings per judge, compared to 538 in New Mexico, 446 in South Dakota, and 119 in Wyoming. Arizona's case numbers are the third highest in the nation, behind the New York Southern District (New York

[28]Although where AUSAs have higher caseloads of Native American defendants, they are less likely to decline to prosecute these cases (Ulmer and Bradley, 2018).

City) and Texas Southern District but their caseloads are far higher (875 per judge in Arizona compared to 475 in New York Southern District and 744 in Texas Southern).[29] The national average is 663, with Arizona having the second highest caseload per judge behind North Carolina's Eastern District. Arizona's caseload is dominated by immigration cases, accounting for 57% of all fillings. In comparison, New Mexico's is 41% immigration, while other states with significant Native populations not near the Southern border see far fewer immigration cases such as South Dakota (11%), Wyoming (8%), Idaho (24%), or Nevada (28%). These jurisdictions focus more of their time on drug and firearms offenses, especially, and violent and sex offenses.[30]

Barriers to effective prosecution have led to claims that Indian Country is a "maze of injustice," in which victims do not receive appropriate services and the accused are denied due process (Amnesty International 2007). Where cases make it to trial, however, criminology and economics of crime scholarship have found that Native defendants in the federal courts have faced tougher sentences than non-Native federal defendants (Ulmer and Bradley, 2018; Muñoz and McMorris 2010; Franklin, 2013).

Sentencing, Prison to Parole

The most significant difference across states' felon disenfranchisement policies is in the transition from prison to parole. Community supervision is a big part of the justice system, and highly relevant to felon disenfranchisement. Approximately 3.8 million people were under community supervision in 2021, with the majority on probation (80%), and 20% on active parole. This is more than double the approximately 1.1 million people imprisoned in 2021 (Bureau of Justice Statistics 2021).

All but two states (Maine and Vermont) take voting rights from those in prison. The more lenient states, shown in lighter blue colors in Figure 2, restore voting rights to felons once they leave prison. Granting of parole then becomes an important point in which voters in 23 states have their voting rights restored. The amount of time that a voter is disenfranchised in those states depends on how much of their sentence is served in prison versus parole or probation. In the states in dark blue colors in Figure 2, the distinction between prison and parole does not matter because voting rights are not restored until the end of the sentence.

[29] See Online Appendix Table A2 for caseloads for federal judges in district courts with large Native populations.

[30] See Online Appendix Table A3 for case composition in district courts with large Native populations. South Dakota has a particularly high rate of sex offenses filed in federal court, representing 11% of all cases filed. The national average caseload of sex offenses is 0.07% of all cases filed.

For felons adjudicated in the federal system, there is no possibility of parole. Parole was eliminated with the Sentencing Reform Act of 1984. All crimes committed on or after November 1, 1987, are not eligible for federal parole. These individuals will serve the entirety of their sentence, with some accommodation for "good conduct" credits toward early release 2014. This is important, because state prisoners often see their sentences reduced and around 80% are released into parole (BJS 2003), and this distinction would matter in the 23 states for which leaving prison is the point at which voting rights are restored.

Perspectives of Felons

The complications around federal felonies for Native Americans on reservations, combined with low overall voting rates of both felons (Miles, 2004) and Native Americans implies that this group would vote at very low levels in non-tribal elections even if the state did not take away their right to vote (Nguyen and White 2022).

Native Americans are the minority group with lowest voter turnout in the United States (Peterson, 1997; McCool *et al.*, 2007; De Rooji and Green, 2017). Several factors contribute to low turnout for Native Americans including low trust in government, high poverty and low levels of education, and physical distance from polling places (Schroedel *et al.*, 2020), and low levels of trust in mail-in voting and physical distance from post offices (Schroedel *et al.*, 2023; Rogers *et al.*, 2023). For most tribal members, tribal elections are more salient to daily life, and most Native Americans on reservations have higher levels of trust in tribal elections and tribal governance (Schroedel *et al.*, 2020).

A well-established literature shows that contact with the criminal justice system makes individuals far less likely to vote (Weaver and Lerman 2010; White 2018; White 2019). In the first place, those more likely to be incarcerated are less likely to vote, due to a variety of social and economic conditions (Gerber *et al.*, 2017). Incarceration compounds the reduced likelihood of participation in the political process, including voting (Lerman and Weaver 2014). The negative effect of justice system contact works through several mechanisms relevant to Native Americans with felony convictions. Interaction with the justice system reduces trust in government and social isolation (Justice and Meares, 2014).

Against the low odds that a felon or Native American felon would vote is the high level of legal ambiguity around felony disenfranchisement. Survey respondents report a great deal of confusion about whether they are eligible to vote following a criminal conviction (Meredith and Morse, 2015). The description of how felons may regain their voting rights on state voter registration

websites is limited. For example, for the state of South Dakota, the entire description of voting with a felony conviction is as follows:

> "Under South Dakota Codified Law § 12-4-18, a person currently serving a felony conviction in either federal or state court shall be removed from the voter registration records. A person so disqualified becomes eligible to register to vote upon completion of his or her sentence. A person who receives a suspended imposition of sentence does not lose the right to vote."

Felons who seek to restore voting rights in South Dakota must do so in person or by mail. There is more description of felon disenfranchisement on the website of the secretary of state for Arizona than for South Dakota, but the process to restore voting rights is much more difficult in Arizona, requiring restoration of voting rights by the convicting judge.

The legal ambiguity of voting eligibility at the state level following a criminal conviction in the federal system creates added confusion regarding voting access for felons. Take the example of federal supervised release. Supervised release is not the same as parole or probation, because it is added to the sentence rather than replacing the sentence. This is a legal gray area in states like South Dakota, which has a well-documented history of challenging Native voting (Schroedel, 2020). Supervised release is given in 75% of federal cases.

Overall, the incentives for individuals convicted of felonies to vote following restoration of voting rights in low in the best of circumstances. The circumstances for Native felons adjudicated in the federal system are extreme, and confusing, resulting in an even lower propensity to vote following restoration.

Conclusions

Felon disenfranchisement is an important voting rights issue for Native Americans who experience high rates of incarceration. For Native Americans living in Indian Country, felony conviction is adjudicated by the federal criminal justice system. Adjudication in the federal system results in longer sentences and no possibility of parole, meaning convicted Native American felons will lose the right to vote for longer than crimes adjudicated at the state level. This situation is compounded by the fact that states with large reservations are more likely to have harsh felon disenfranchisement laws.

Felons, regardless of race, ethnicity, or legal jurisdiction, report high degrees of uncertainty about whether they are legally able to vote. This legal ambiguity is extreme for Native Americans on reservations, who were prosecuted by the federal government, lose their voting rights from the state government, and must seek voting restoration (if eligible) at the local level. Native Americans, already the group with the lowest propensity to vote, are unlikely to seek

restoration of voting rights or to cast a ballot in local, state, and federal against these barriers.

Felon disenfranchisement for Native Americans on reservations also brings up questions of optimal justice outcomes. We have detailed a number of suboptimal outcomes for Native Americans in the process of felony adjudication on reservations. These outcomes may, on the one hand, result in disproportionate sentencing lengths and longer periods of disenfranchisement for convicted Native Americans. On the other hand, high levels of declinations and administrative closures imply under-provision of justice for many Native victims. Moreover, the lack of tribal sovereignty over crimes, both in PL 280 states and felonies by the federal government, may result in justice outcomes that are not aligned with tribal cultural and justice practices.

The research frontier for Native American voting rights and felony disenfranchisement is wide open. Future efforts can draw from disparate data points to estimate the number of Native voters who have lost the right to vote, either temporarily or permanently, overall, and in comparison, to other groups. Another fruitful area for research would be to compare voter turnout rates for convicted felons in tribal elections to turnout in local, state, and federal elections (Collingwood *et al.*, 2024; Stubben, 2005; Wilkins and Stark, 2017). We are not aware of any American Indian or Alaska Native Tribe that disenfranchises members based on criminal record. Felon disenfranchisement may be one of many examples of cultural mismatch between state policy and tribal policy (Anderson and Parker, 2023). Future research could trace voting in tribal and non-tribal elections for relevant populations to see whether state law is the driver of disenfranchisement or whether voting is less likely due to interaction with the carceral state.

Additional efforts could outline the variation in experience across US district courts, building on previous research showing district courts operate with a great deal of independence, resulting in divergent outcomes. The Violence Against Women Act of 2013, and its adjudication of Non-Native defendants in tribal courts is still another interesting area to examine differences in justice outcomes and the conditions under which tribal sovereignty is sustained.

The recent Supreme Court case, *McGirt v. Oklahoma* offers an opportunity to examine the federal role in justice in comparison to state-meted justice on felon disenfranchisement and other outcomes. With this unexpected court ruling, jurisdiction on criminal justice matters in a section of Oklahoma transferred from state to federal (and tribal) control. This provides an instance whereby federal and state adjudication can be directly compared over time. In future research, we intend to follow cases that were adjudicated by the state of Oklahoma and then retried in federal court to see whether the sentencing results were different.

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