THE EXECUTION OF LEZMOND MITCHELL: AN ANALYSIS OF FEDERAL INDIAN LAW, CRIMINAL JURISDICTION, AND THE DEATH PENALTY AS APPLIED TO NATIVE AMERICANS

by
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Capital punishment is controversial in American society. It is the junction where moral standards and punishment for the most severe crimes crash together head on. As society has evolved, so have the expectations, requirements, and norms for capital punishment. In the history of the United States, capital punishment, commonly referred to as the death penalty, has been plagued with continuous inequalities. Based on the evolving standards of decency that shift as society matures, certain practices affiliated with the death penalty have now been invalidated as cruel and unusual. One of the most concerning flaws surrounding the death penalty is its unequal and disproportionate application to people of color. The inequalities of the death penalty have resurfaced in society's discussion of the criminal justice system in the wake of the racial justice reckoning that exploded after the murders of George Floyd, Breonna Taylor, and Ahmaud Arbery. The morality of the death penalty has also been called into question in response to Attorney General William Barr's announcement in July 2019 that the federal government would restart federal executions. Between Barr's announcement and President Joseph Biden's inauguration, the federal government executed 13 people. In Attorney General Barr's initial announcement, five inmates were named to be executed. Lezmond Mitchell was one of the five initially named defendants. He was the only Native American on federal death row. Lezmond Mitchell was executed on August 26, 2020, by lethal injection. His sentencing and execution raise attention to the tumultuous, historically oppressive, and tarnished relationship between the federal government and the Native American Tribes. His execution stands as a symbol for the disregard the federal government has continuously practiced regarding tribal sovereignty and the related promises that it has made to the tribes. Mitchell's execution also elucidates the crossing point between unequal racial practices within the criminal justice system, criminal jurisdiction, and criminal justice under Federal Indian Law, and the loopholes the federal government has implemented in order to strip tribes of their sovereignty.

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I. INTRODUCTION

In the United States, criminal defendants who are charged with first-degree murder or aggravated murder may be sentenced to death.[1] Some may argue that the United States is trending towards abolishing the death penalty as 26 states have either stayed executions or have abolished the death penalty.[2] The death penalty is not a form of punishment unique to the states. The Federal Death Penalty Act authorizes the federal government to use the death penalty as a form of punishment for certain federal crimes.[3] From 1988, when the federal death penalty was reinstated, to 2003, only three federal death row inmates had been executed.[4] No federal

[1] Federal Death Penalty Act of 1994, 18 U.S.C. § 3591(a)(1)–(2) (2018). The federal government can also sentence someone to death for espionage and treason, homicide, and drug offenses, though homicide is the crime that offenders are sentenced to death for the most. *See* 18 U.S.C. § 794(a)–(b) (2018); 18 U.S.C. § 2381 (2018); *Death Penalty for Offenses Other than Murder*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/death-penalty-for-offenses-other-than-murder (last visited May 26, 2021). Some states have a similar regime, and each state can determine what counts as an aggravating factor to justify the implementation of the death penalty. *Id.*

[2] Currently, three states—Oregon, California, and Pennsylvania—have stayed executions through a gubernatorial moratorium and 23 states have abolished the death penalty. *See State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited May 26, 2021). In an historic move, Governor Ralph S. Northam signed a bill abolishing the death penalty in Virginia on March 24, 2021, making Virginia the first southern state to abolish the death penalty. Hailey Fuchs, *Virginia Becomes First Southern State to Abolish the Death Penalty*, N.Y. TIMES (Mar. 24, 2021), https://www.nytimes.com/2021/03/24/us/politics/virginia-death-penalty.html.

[3] Federal Death Penalty Act of 1994, 18 U.S.C. § 3591(a)(2).

[4] Francesca Giuliani-Hoffman, *The US Government Has Executed 10 People this Year—The*

death row inmate had been executed since 2003;[5] however, this changed under the Trump Administration when the federal government scheduled three executions to be held in December 2019.[6] Since Attorney General Barr's announcement, 13 death row inmates have been executed, meaning that 2020–2021 saw the largest number of inmates executed by the federal government since 1896.[7] Though the federal government has recently executed more people than it has in the past 124 years, the approach to the death penalty is in a period of change due to the juxtaposition between more states reviewing and abolishing the death penalty and the federal government under the Trump Administration enforcing death sentences by executing 13 inmates. Moreover, the unethical nature of the death penalty, its inherent inequality, its immorality, as well as international pressures regarding the death penalty, have resulted in the death penalty being viewed as draconian, outdated, and unjust.[8]

U.S. citizens and members of Native American tribes may be sentenced under the Federal Death Penalty Act.[9] Pursuant to the Federal Death Penalty Act, federally recognized Native American tribes must consent to the death penalty being applied

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Most Since 1896, CNN (Dec. 17, 2020, 5:34 PM), https://www.cnn.com/2020/12/17/politics/federal-death-penalty-2020-trnd/index.html; *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Jan. 19, 2021), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf.

[5] Giuliani-Hoffman, *supra* note 4.

[6] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, U.S. DEP'T JUST. (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse. These executions were delayed, and the first federal execution did not take place until July 14, 2020. *See* Giuliani-Hoffman, *supra* note 4.

[7] Giuliani-Hoffman, *supra* note 4 (also noting that the federal government executed more inmates than the seven state level executions that took place in 2020); *Facts About the Death Penalty*, *supra* note 4. It is unlikely we will see this number of executions in a single year at the federal level again under the Biden Administration, which openly campaigned on abolishing the death penalty. *See* Madeline Carlisle, *What Happens to the Federal Death Penalty in a Biden Administration?*, TIME (Jan. 25, 2021, 11:39 AM), https://time.com/5932811/death-penalty-abolition-joe-biden/ (discussing President Biden's campaign pledge to abolish the death penalty and what that means moving forward); Keri Blakinger, *How Biden Can Reverse Trump's Death Penalty Expansion*, MARSHALL PROJECT (Mar. 12, 2021, 6:00 AM), https://www.themarshallproject.org/2021/03/12/how-biden-can-reverse-trump-s-death-penalty-expansion (explaining various ways the Biden Administration can reverse some of the death penalty expansions that were made under the Trump Administration and how the Biden Administration can restrict or abolish the death penalty moving forward).

[8] *See The Case Against the Death Penalty*, ACLU (last visited May 26, 2021), https://www.aclu.org/other/case-against-death-penalty.

[9] For the purposes of this Comment, the phrase "Native Americans" will be used to refer to members of tribal nations; however, the term "Indian" is currently used by the federal government, federal law, Congress, and the courts to describe these individuals. The term "Indian" may be hurtful and may not be culturally appropriate, but it is the common name used in the federal government. Thus, there are a few instances where this Comment refers to "Native Americans" as "Indians" when citing these laws and cases.

to its tribal members as a possible criminal sentence.[10] Inherent in the relationship between the federal government, tribes, and the laws governing tribal sovereignty, there is a complex web detailing when the tribe or the federal government has criminal jurisdiction over a tribal member. There are loopholes in federal law, however, to work around this provision.[11] Specifically, the announcement by Attorney General William Barr resulted in the execution of Lezmond Mitchell, the only Native American on federal death row, which elucidates the federal government's use of these loopholes to execute a tribal member.[12]

This Comment explores the current nature of the federal death penalty as applied to Native Americans to understand how the executive decision by Attorney General Barr could affect Native Americans who might be sentenced to death row in the future and how this decision affected Lezmond Mitchell. Specifically, this Comment investigates the relationship between the federal government and tribal governments regarding criminal jurisdiction and the possible sentence of death for Native Americans. This Comment explores the systemic intrusions on tribal criminal sovereignty and the loopholes enacted by the federal government to restrict when tribes may practice their criminal jurisdiction. Section II of this Comment summarizes the history of the death penalty in the United States. Monumental cases like *Furman v. Georgia* and *Gregg v. Georgia* are explored to understand the modern framework of capital punishment in the United States as well as judicial precedents from more recent cases. Section II also discusses changes since the *Gregg* decision, which reflect society's evolving standards of decency. Section III summarizes key issues with the death penalty today, and specifically looks at international norms, wrongful convictions, the inequality and disproportionality of the death penalty, the effectiveness of the death penalty, and the implications of the COVID-19 pandemic on the death penalty. Section IV details Attorney General Barr's July 2019 decision and his subsequent decisions to expand executions to additional inmates. Section V explores the history of tribal sovereignty, the framework in which Congress may pass laws affecting the tribes, the history of tribal criminal jurisdiction, and the relationship with the United States regarding criminal jurisdiction. Section VI examines the Federal Death Penalty Act, tribal consent to the death penalty for their members, and the loophole that was the catalyst for Lezmond Mitchell's execution. Section VII discusses the effort to stay Mitchell's execution and his eventual execution on August 26, 2020.

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[10] *See* 18 U.S.C. § 3598 (2018).

[11] *See infra* Section VI.

[12] *See Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6. Lezmond Mitchell was one of the first five death row inmates executed since the federal government announced restarting executions in 2019.

II. HISTORY OF THE DEATH PENALTY IN THE UNITED STATES

As colonists arrived in America, they brought many traditions, customs, and laws that were common in England. For example, colonists brought common forms of criminal punishment with them as well.[13] Colonists often viewed the death penalty as the only appropriate form of punishment and "as the only way to deter serious crime, such as murder."[14] In Colonial America, crimes of manslaughter, rape, highway robbery, maiming, burglary, arson, witchcraft, sodomy, counterfeiting, squatting on tribal land, and prison-breaking were all punishable by death.[15] The first execution in the colonies took place in 1630.[16]

A. The Furman v. Georgia *Decision and Its Implications for Criminal Procedure Regarding Capital Punishment*

From the first execution in 1630 to 1972, the death penalty faced few constitutional challenges.[17] While the death penalty was challenged infrequently as a violation of due process under the Sixth and Fourteenth Amendments, these challenges were largely unsuccessful mainly because "disproportionate and arbitrary sentencing practices were not uncommon."[18] However, the death penalty faced its first major challenge in *Furman v. Georgia*.[19] The Court's decision in *Furman* dramatically changed criminal procedure regarding capital punishment, and as a result, required states to reevaluate and reimagine what the death penalty could look like in America.

In *Furman*, the court was tasked with deciding whether "the imposition and carrying out of the death penalty in [these cases] constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments[.]"[20] In a per curiam opinion, the Court held that imposing the death penalty in these cases was

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[13] *See generally* Dino E. Buenviaje, *The Death Penalty in the North*, *in* INVITATION TO AN EXECUTION: A HISTORY OF THE DEATH PENALTY IN THE UNITED STATES 215, 215 (Gordon Morris Bakken ed., 2010); Mary Margaret L. Kirchner, To Die or Not to Die: An Examination of Gubernatorial Clemency Powers Through a Case Analysis of Death Penalty Moratoriums 20 (May 25, 2018) (unpublished B.S. thesis, Portland State University) (on file with University Honors College, Portland State University).

[14] Buenviaje, *supra* note 13, at 215.

[15] Buenviaje, *supra* note 13, at 216; Kirchner, *supra* note 13, at 21.

[16] Stacy L. Mallicoat, *Politics and Capital Punishment: The Role of Judicial, Legislative, and Executive Decisions in the Practice of Death*, *in* INVITATION TO AN EXECUTION: A HISTORY OF THE DEATH PENALTY IN THE UNITED STATES, *supra* note 13, at 9, 9.

[17] *Id.* at 9–10.

[18] *Id.* at 9.

[19] Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam); Mallicoat, *supra* note 16, at 9–10.

[20] *Furman*, 408 U.S. at 239.

unconstitutional.[21] The majority opinion was made up of Justices Douglas, Brennan, Stewart, White, and Marshall.[22] Each Justice wrote separately, focusing on different issues regarding the application of the death penalty.

Justice Douglas reasoned that it was a form of cruel and unusual punishment "to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board."[23] Thus, a penalty would be considered cruel and unusual if it is "administered arbitrarily or discriminatorily."[24] Justice Douglas also discussed multiple studies that examined the unequal application of the death penalty.[25] For example, one study found that the majority of those executed under the death penalty were "poor, young, and ignorant."[26] Another study concluded that in instances where a white individual and Black individual were co-defendants, the white individual was sentenced to life imprisonment or a term of years, whereas the Black individual was more frequently sentenced to death.[27]

Similarly, Justice Brennan concluded that while the "cruel and unusual" provision of the Eighth Amendment cannot be precisely defined, the application of the death penalty here constituted cruel and unusual punishment.[28] Justice Brennan concluded that a punishment is "cruel and unusual" if it does not comport with human dignity.[29] To determine whether a form of punishment is so severe that it degrades human dignity, a court may look at things like the extreme severity of the punishment and the pain involved, the arbitrary application of the punishment, the acceptability of the punishment to contemporary society, and the excessiveness of the punishment to determine whether the punishment violates the Eighth Amendment.[30] Utilizing these factors, Justice Brennan analyzed whether the death penalty

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[21] *Id.* at 239–40.

[22] *Id.* at 240.

[23] *Id.* at 245 (Douglas, J., concurring) (citation omitted).

[24] *Id.* at 249.

[25] *See id.* at 250–52.

[26] *Id.* at 250 (citation omitted).

[27] *Id.* at 251 (citation omitted).

[28] *Id.* at 258, 286 (Brennan, J., concurring).

[29] *Id.* at 270.

[30] *Id.* at 271–80. Justice Brennan reasoned that the acceptability prong "is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use." *Id.* at 279. Justice Brennan also reasoned that a "punishment is excessive under [the excessiveness prong] if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive." *Id.*

as applied was a violation of the Eighth Amendment.[31] Justice Brennan concluded that the death penalty "is a denial of human dignity" in which "the State arbitrarily . . . subject[s] a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment."[32]

Justice Stewart analyzed the uniqueness of the death penalty and concluded that the death penalty is different "from all other forms of criminal punishment," because "[i]t is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."[33] The death penalty is different than all other forms of criminal punishment because it involves the government affirmatively and definitively taking someone's life. Although he found it unnecessary to "reach the ultimate question" of whether the death penalty is always unconstitutional, because petitioners were "among a capriciously random handful" of those convicted of reprehensible crimes, Justice Stewart concluded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[34]

Justice White also concluded that the death penalty in these cases was unconstitutional, but is not per se unconstitutional in all instances.[35] Justice White argued that the current process of (1) "the legislature authoriz[ing] the imposition of the death penalty for murder or rape;" (2) the legislature delegating authority to judges or juries to decide which cases will utilize the death penalty; and (3) the infrequency with which the death penalty is applied by judges and juries violated the Eighth Amendment.[36] This legislative and judicial procedure, as described by Justice White, resulted in broad inconsistencies and an arbitrary application of the death penalty. Additionally, Justice White acknowledged that the deterrent effect of the death penalty is defeated because the death penalty is so infrequently applied.[37] Justice White concluded "[b]ut common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted."[38] While the death penalty may not be "considered cruel and unusual punishment in the constitutional

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[31] *See id.* at 282–305.

[32] *Id.* at 286.

[33] *Id.* at 306 (Stewart, J., concurring).

[34] *Id.* at 306, 309–10.

[35] *Id.* at 310–11 (White, J., concurring).

[36] *Id.* at 311.

[37] *Id.* at 312.

[38] *Id.*

sense because it was thought justified by the social ends it was deemed to serve," it was unconstitutional in how infrequently it was applied.[39]

Justice Marshall analyzed the death penalty's constitutionality under the question of "whether capital punishment is 'a punishment no longer consistent with our own self-respect' and, therefore, violative of the Eighth Amendment."[40] Justice Marshall established his own framework for analyzing the constitutionality of various forms of criminal punishment:

> First, there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them . . . . Second, there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense. . . . Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. . . . Fourth, where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it.[41]

Before applying this analysis, Justice Marshall recognized that the death penalty serves six purposes: "retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy."[42] However, Justice Marshall found that the current application of the death penalty discredited all of the potential purposes that he had identified.[43] Justice Marshall also discredited the argument that executing a defendant is less expensive since a "disproportionate amount of money spent on prisons is attributable to death row."[44] Justice Marshall concluded that "the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment."[45]

Chief Justice Burger, Justice Blackmun, Justice Powell, and Justice Rehnquist all dissented in *Furman v. Georgia*.[46] Chief Justice Burger, in his dissenting opinion, argued that the Eighth Amendment's clause against "cruel and unusual" punishment does not "bar the imposition of the punishment of death."[47] The *Furman* decision changed the application of the death penalty in the United States for a

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[39] *Id.*

[40] *Id.* at 315 (Marshall, J., concurring) (quoting 268 Parl Deb HL (5th ser.) (1965) col. 703 (UK)).

[41] *Id.* at 330–32 (internal citations omitted).

[42] *Id.* at 342. Other Justices have recognized that retribution and deterrence are the only two legitimate reasons for the death penalty. *See infra* Section II.B.

[43] *See Furman*, 408 U.S. at 342–57 (Marshall, J., concurring).

[44] *Id.* at 357. For a modern-day example, see generally ALIZA B. KAPLAN ET AL., OREGON'S DEATH PENALTY: A COST ANALYSIS (Nov. 16, 2016), https://law.lclark.edu/live/files/22888-oregons-death-penalty-a-cost-analysis-2016 (exploring the costs associated with sentencing a defendant to death in Oregon).

[45] *Furman*, 408 U.S. at 358–59 (Marshall, J., concurring).

[46] *Id.* at 375 (Burger, C.J., dissenting).

[47] *Id.*

couple of years. However, many states opposed the *Furman* decision and built off the dissenting opinions to restructure their death penalty sentencing practices in hopes of finding a constitutional version of the death penalty.

B. Gregg v. Georgia *and the Implication of the Bifurcated Trial System*

The Court remained sharply divided when it changed its opinion four years later in *Gregg v. Georgia*.[48] The Court there considered "whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments."[49] Georgia had adopted a new procedure where courts would try death penalty cases in two stages, a guilt stage and a sentencing stage.[50] During the guilt stage, the jury would consider the facts to determine whether the defendant was guilty of the crimes with which they were charged.[51] If the jury found the defendant guilty, the prosecution and defense would present arguments so the jury could determine whether or not the death penalty was an appropriate sentence.[52] During the penalty stage of the trial, the jury would also consider mitigating and aggravating factors and "'would not be authorized to consider [imposing] the penalty of death' unless [the jury] first found beyond a reasonable doubt" that there was at least one aggravating circumstance.[53]

The Court first concluded that the death penalty in general is not a violation of the Eighth Amendment.[54] The Court rationalized that, based on precedent, "[a]

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[48] Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality opinion).

[49] *Id.* at 158.

[50] *Id.* This would later be known as a bifurcated trial system. Kathryn W. Riley, Note, *The Death Penalty in Georgia: An Aggravating Circumstance*, 30 AM. U. L. REV. 835, 838 n.24 (1981).

[51] *Gregg*, 428 U.S. at 163.

[52] *See id.* at 163–64.

[53] *Id.* at 161, 164 (citing the trial court's jury instructions). The Georgia procedure that the court was considering had the jury consider three potential aggravating circumstances in the *Gregg* case: (1) "That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies," (2) "That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment," or (3) "The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [*sic*] involved the depravity of [the] mind of the defendant." *Id.* Generally, aggravating factors must outweigh mitigating factors in order for the jury to impose a death sentence. *Cf.* Jamie Markham, *Weighing Aggravating and Mitigating Factors*, N.C. CRIM. L., (Mar. 29, 2016, 7:30 AM), https://nccriminallaw.sog.unc.edu/weighing-aggravating-mitigating-factors/ (discussing the various sentencing structures and how judges weigh mitigating and aggravating factors under each sentencing structure).

[54] *Gregg*, 428 U.S. at 169 ("We now hold that the punishment of death does not invariably violate the Constitution.").

penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'"[55] The Court further explained that punishment must not be excessive under the Eighth Amendment.[56] A punishment is excessive if it inflicts "unnecessary and wanton" pain or if it is "grossly out of proportion to the severity of the crime."[57] The Court then considered whether the punishment of death "comports with the basic concept of human dignity at the core of the [Eighth] Amendment."[58] In doing so, the Court concluded that the death penalty in general "serve[d] two principal social purposes: retribution and deterrence."[59] The Court finally concluded that the punishment of the death penalty for murder is not invariably disproportionate to the crime.[60]

Once the Court determined that the death penalty in general was constitutional, the Court then considered whether Georgia's death penalty procedure conformed with the requirements of the Eighth Amendment.[61] The Court recognized that jury sentencing is desirable in capital cases in order "to maintain a link between contemporary community values and the penal system" and to "reflect 'the evolving standards of decency'" in society.[62] Organizations, like the drafters of the Model Penal Code, previously concluded that a bifurcated procedure was the best answer for implementing the death penalty.[63] The Court, building off the Model Penal Code, concluded that:

> When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.[64]

The Court held that Georgia's new procedure was constitutional because the jury's decision was no longer arbitrary; in a structured two-part trial, the jury had to consider specific circumstances of the crime, characteristics of the defendant, and mitigating factors about the defendant.[65] The Court concluded that this required

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[55] *Id.* at 173 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

[56] *Id.*

[57] *Id.* (internal citations omitted).

[58] *Id.* at 182.

[59] *Id.* at 183.

[60] *Id.* at 187 ("[The death penalty] is an extreme sanction, suitable to the most extreme of crimes.").

[61] *Id.*

[62] *Id*. at 190 (citing Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).

[63] *Id.* at 191.

[64] *Id.* at 191–92.

[65] *Id.* at 195, 197–98. Under Georgia's new law, the jury had to consider specific circumstances of the crime like: "Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it

the jury to exercise discretion that is "controlled by clear and objective standards so as to produce non-discriminatory application."[66]

Georgia's new system built in another safeguard against the arbitrariness and capriciousness that concerned the Court in *Furman*—all death penalty decisions were automatically appealed to Georgia's Supreme Court.[67] This meant that Georgia's Supreme Court would review every capital conviction to:

> determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[68]

Thus, the Court concluded that with the inherent safeguards built into Georgia's new statutory provisions regarding capital punishment, the death penalty was not unconstitutional.[69] After the *Gregg* decision, many states adopted and modified Georgia's capital punishment procedure so that they could have a constitutional death penalty punishment in their state.[70]

C. Evolving Standards of Decency

The jurisprudence regarding the death penalty has evolved since the *Gregg* decision. Prior to *Gregg*, the Supreme Court recognized that criminal punishment must evolve as society evolves and the standards of decency change.[71] The Court in *Weems v. United States* first considered various societal factors to determine whether a punishment was cruel or unusual.[72] The Court recognized that the cruel and unusual punishment clause of the Eighth Amendment is "not fastened to the obsolete

committed in a particularly heinous way or in a manner that endangered the lives of many persons?" *Id.* at 197. The jury must also consider certain characteristics of the defendant like: "Does he have a record of prior convictions for capital offenses?" *Id.* The jury also had to consider mitigating factors like the defendant's age, their cooperation with the police, and the defendant's emotional state at the time of the crime. *Id.*

[66] *Id.* at 198 (quoting Coley v. State, 204 S.E.2d 612, 615 (Ga. 1974)).

[67] *Id.*

[68] *Id.* at 204 (internal quotations omitted).

[69] *Id.* at 207.

[70] Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After* Gregg*: Only "The Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 131–32 (1996); *see* Lewis F. Powell, Commentary, *Capital Punishment*, 102 HARV. L. REV. 1035, 1037–39 (1989).

[71] *See generally* Weems v. United States, 217 U.S. 349 (1910); Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion).

[72] *See Weems*, 217 U.S. at 366–67 (considering how mental and physical pain may make a punishment cruel and unusual).

but may acquire meaning as public opinion becomes enlightened by a humane justice."[73] Though the Court did not use the term "evolving standards of decency" directly in its opinion, the notion that the cruel and unusual punishment clause acquires meaning from public opinion that typically becomes enlightened by humane justice, established the foundation for the evolution of criminal punishment to become more humane over the years. The Court built off this decision in *Trop v. Dulles.*[74] In *Trop*, the Court maintained a similar position and held that the Eighth Amendment's "scope is not static," and that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[75] Since the *Trop* decision, the Court has often considered society's view of humane justice and the standards of decency to determine whether various criminal punishments, especially capital punishment, are cruel and unusual in various situations.

For example, the Court has considered what type of defendant could be sentenced to death.[76] In *Atkins v. Virginia*, the Court was asked to consider whether the execution of an intellectually disabled individual was a form of cruel and unusual punishment.[77] During the mitigation phase of Daryl Atkins' trial, psychologist Dr. Evan Nelson testified that Mr. Atkins had an IQ level of 59.[78] This testimony was contradicted by the state's witness, Dr. Stanton Samenow, who testified that Mr. Atkins was of average intelligence.[79] Mr. Atkins argued to the Virginia Supreme Court that "he is [intellectually disabled] and thus cannot be sentenced to death;" however, the Virginia Supreme Court was not willing to commute his sentence to life imprisonment solely because of his low IQ score.[80] Two Virginia Supreme Court justices dissented however, and concluded that "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive."[81] They further argued that:

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[73] *Id.* at 378.

[74] *Trop*, 356 U.S. at 100–01 (citing *Weems* generally).

[75] *Id.*

[76] *E.g.*, Atkins v. Virginia, 536 U.S. 304, 306 (2002).

[77] *Id.* at 307. At the time of the Court's opinion, those who are intellectually disabled were often referred to as being "mentally retarded." The phrase "mentally retarded," however, is outdated and no longer an accurate term for describing the intellectual difficulties faced by petitioner in *Atkins*. Therefore, the phrase "intellectually disabled" will be used in this Comment in lieu of the phrase "mentally retarded."

[78] *Id.* at 308–09. For the IQ test used by Dr. Nelson, the "cutoff IQ score" for intellectual function was 75, while a person scoring 100 was "considered to have an average level of cognitive functioning." *Id.* at 309 n.5.

[79] *Id.* at 309.

[80] *Id.* at 310.

[81] *Id.* (citing Atkins v. Commonwealth, 534 S.E.2d 312, 323 (Va. 2000) (Hassell, J., dissenting), *rev'd by* 536 U.S. 304 (2002)).

> [I]t is indefensible to conclude that individuals who are [intellectually disabled] are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.[82]

The United States Supreme Court, upon hearing the case, first looked at various state legislatures' views regarding the suitability of imposing the death penalty on intellectually disabled offenders to determine whether executing someone with an intellectual disability was a form of cruel and unusual punishment.[83] The Court recognized that numerous state legislatures had enacted laws banning the death penalty from being imposed on those with intellectual disabilities.[84] As a result, the Court concluded that the practice of executing individuals with intellectual disabilities had "become truly unusual" and that "a national consensus [had] developed against it."[85] The Court reasoned that those with intellectual disabilities may not be able to comprehend the justifications of retribution and deterrence for the death penalty.[86] Moreover, the Court concluded that those with intellectual disabilities may not be able to aid in their defense, are typically poor witnesses, and that "their demeanor may create an unwarranted impression of lack of remorse for their crimes."[87] Thus, the Court concluded that sentencing those with intellectual disabilities to death "[was] excessive and that the Constitution places a substantive restriction on the State's power to take the life of [an intellectually disabled] offender."[88]

Similarly, the Court has also considered whether juveniles may be sentenced to death.[89] In 1988, Justice Stevens wrote for the plurality in *Thompson v. Oklahoma* that society's standards of decency did not permit the execution of a defendant who was under the age of 16 at the time they committed the crime.[90] The *Thompson* decision, however, meant that defendants who were over the age of 16 but under the age of 18 at the time they committed their crime could still be sentenced to death. The Court faced their first challenge to whether someone between the ages

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[82] *Id.* (citing *Atkins*, 534 S.E.2d at 324 (Koontz, J., dissenting)).

[83] *Id.* at 313.

[84] *Id.* at 315. The Court specifically stated that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Id.*

[85] *Id.* at 316.

[86] *Id.* at 318–20.

[87] *Id.* at 320–21.

[88] *Id.* at 321 (internal citation omitted).

[89] *See generally* Roper v. Simmons, 543 U.S. 551 (2005); Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988).

[90] *Thompson*, 487 U.S. at 821–23 (plurality opinion).

of 16 and 18 could be sentenced to death in *Stanford v. Kentucky* when the Court decided "whether the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age constitutes cruel and unusual punishment under the Eighth Amendment."[91] In his majority opinion, Justice Scalia held that the death penalty could be applied to defendants over the age of 15.[92] Justice Scalia reasoned that public attitude did not indicate that sentencing someone who was 16 or 17 years old to death was cruel and unusual.[93] For the plurality, Justice Scalia also rejected the argument that because juveniles have less developed cognitive skills and are less likely to fear death, they will not be deterred by the death penalty.[94]

In 2005 the Court abrogated its *Stanford v. Kentucky* holding in *Roper v. Simmons* where the Court considered, for a second time, whether the Eighth and Fourteenth Amendments allowed for juveniles over the age of 15 but under the age of 18 to be sentenced to death.[95] There was no question that the defendant, Christopher Simmons, a 17-year-old, was the instigator of a chilling and gruesome murder.[96] Thus, the Court's decision focused solely on the implications of sentencing juveniles to death instead of on Simmons' conduct.[97] In *Roper,* the Court expanded the holding in *Thompson* and held that a juvenile, someone under the age of 18 at the time they committed their crime, could not be sentenced to death.[98] The Court first based its decision on the fact that there appeared to be a national consensus against the death penalty for juveniles because 30 states prohibited it.[99] In the

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[91] *Stanford*, 492 U.S. at 364–65.

[92] *Id.* at 380.

[93] *See id.* at 370–71. At the time, 37 states had laws permitting capital punishment. *Id.* at 370. Of those, 15 states did not apply the death penalty to 16-year-old offenders and 12 states did not apply the death penalty to 17-year-old offenders. *Id.* These statistics were not enough in the Court's eye to suggest that there was a "national consensus" that sentencing juveniles to death was cruel and unusual punishment. *Id.* at 371.

[94] *Id.* at 377–78 (Scalia, J.) (plurality opinion) (Part V of Scalia's opinion was joined only by Rehnquist, C.J., White & Kennedy, JJ.).

[95] Roper v. Simmons, 543 U.S. 551, 555–56, 578–79 (2005).

[96] *Id.* at 556. Simmons planned, callously, to commit a burglary and murder by breaking and entering into someone's home, tying the victim up, and throwing her off a bridge. *Id.* Simmons told his codefendants, who were also juveniles, that they would get away with the murder because they were juveniles. *Id.* Simmons broke into Mrs. Crook's home, duct taped her eyes and mouth, bound her hands, stole her minivan and drove her to the Meramec River where "they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge" into the river. *Id.* at 556–57.

[97] *See id.* at 555.

[98] *Id.* at 568 ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

[99] *Id.* at 564. Justice Kennedy also argued that there was a national consensus against the juvenile death penalty because only three states had executed juveniles in the past 10 years. *Id.* at 564–65. In Justice Scalia's dissent, he argues that 30 states do not make a national consensus. *See*

United States, "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[100] The Court recognized three differences between juvenile defendants and adult defendants that made it so juvenile offenders "cannot with reliability be classified among the worst offenders."[101] First, juveniles lack a level of maturity that makes them prone to engage in reckless behavior.[102] Second, juveniles are more vulnerable to negative influences and peer pressure, which may lead them to be swayed by external influences to commit serious crimes.[103] Third, juveniles do not have solidified personality traits and characteristics like adults do.[104] Considering these factors, the Court concluded that juvenile offenders do not fit into the worst of the worst category that would justify sentencing them to death.[105] Finally, the Court concluded that executing juvenile offenders does not conform with international norms and practices.[106]

The Court, under the principle of evolving standards of decency, has determined that there are certain crimes that are not punishable by death. For example, in *Coker v. Georgia*, the Court considered whether a defendant who was convicted of motor vehicle theft, armed robbery, rape, kidnapping, and escape can be sentenced to death.[107] The Court held "that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[108] In support of the Court's holding, the Court recognized that in 50 years, no majority of states had authorized the death penalty for those convicted of rape.[109] The punishment of

id. at 609–15 (Scalia, J., dissenting) (echoing his majority opinion in *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989)).

[100] *Id.* at 568 (majority opinion) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

[101] *Id.* at 569.

[102] *Id.*

[103] *See id.*

[104] *Id.* at 570.

[105] *See id.* at 570. These factors also indicate that the retributive and deterrent goals of the death penalty would not be achieved regarding juvenile offenders. *Id.* at 571–72.

[106] *Id.* at 575–78. Justice Kennedy's utilization of international law and practices was controversial and highly frowned upon by Justice Scalia in his dissent. *See id.* at 622–28 (Scalia, J., dissenting) (describing the utilization of international law as making the "views of our own citizens . . . essentially irrelevant . . . .").

[107] Coker v. Georgia, 433 U.S. 584, 586–87 (1977) (plurality opinion). Though the defendant in *Coker* was sentenced to multiple charges, the plurality opinion only focussed on his rape conviction since, under Georgia law, that was the only conviction he received that was punishable by death. *Id.* at 586.

[108] *Id.* at 592.

[109] *Id.* at 593. Similarly, the Court recognized "the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman." *Id.* at 597.

death is not proportionate to the crime of rape because, "in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life."[110] Therefore, the Court adopted a provision similar to "an eye for an eye";[111] the death penalty may be used as a punishment when someone's life is taken because the punishment, by its very nature, involves the taking of another's life by the government.

The Court expanded on its *Coker* decision in *Kennedy v. Louisiana* when the Court held that those convicted of raping minors could not be sentenced to death.[112] Patrick Kennedy, the defendant, was convicted of aggravated rape of his 8-year-old stepdaughter.[113] The Court reasoned that, based on a national consensus and the Court's own independent judgment, "a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments."[114] The Court's decision in *Kennedy* further established that the death penalty was only an appropriate sentence if it was proportionate to the crime that was committed. At the federal level, the death penalty can only be used for a crime that is listed in the Federal Death Penalty Act.[115]

Procedurally, the Court has also shaped the application of the death penalty. For example, a death penalty trial must go through a bifurcated process.[116] Pursuant to the Court's holding in *Gregg*, the culpability portion of the trial must be considered separately from the sentencing portion of the trial.[117] Similarly, the Court has

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[110] *Id.* at 598.

[111] *See Exodus* 21:23–25 (New Int'l Version) ("But if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise."); *Leviticus* 24:19–20 (New Int'l Version) ("Anyone who injures their neighbor is to be injured in the same manner: fracture for fracture, eye for eye, tooth for tooth. The one who has inflicted the injury must suffer the same injury.").

[112] Kennedy v. Louisiana, 554 U.S. 407, 413 (2008). Typically, a young child is someone under the age of 12 or 13. *Id.* at 423–24.

[113] *Id.* at 412–13. The facts of this rape are gruesome and horrifying. A summary of the facts can be found in the Court's majority opinion. *Id.* at 413–15. A pediatric forensic medical expert testified that the victim's injuries were the most severe he had seen from a sexual assault. *Id.* at 414. For a description of the victim's serious medical injuries and the medical procedures necessary to save her life, see *id.* If the Court was going to hold that child rapists could be punished by death, *Kennedy v. Louisiana* would have been the case to make that decision because the facts of the rape and the injuries the victim suffered were so severe and indicated such indifference for another human being, specifically a young child.

[114] *Id.* at 421.

[115] Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 (2018). These include treason, providing defense information to a foreign government, murder, and specific drug-related crimes. *Id.* §§ 794, 2381.

[116] *See* Gregg v. Georgia, 428 U.S. 153, 163 (1976) (plurality opinion).

[117] *Id.*

held that the jury must be the one to impose the sentence of death; it cannot be imposed by a judge.[118]

III. THE DEATH PENALTY CURRENTLY

While these changes have evolved the death penalty, the punishment still has many flaws, controversies, and is viewed by many as unethical. First, the United States death penalty does not conform to the rest of the western world or other democracies.[119] As one of the only western nations with a death penalty, the United States faces a substantial amount of international pressure and pushback.[120] The United States is often viewed as a world leader promoting democracy and western values, however, still uses a punishment system that to many is draconian, cruel, and contrary to the values the United States claims to uphold. Many European nations[121] are ambivalent about the United States death penalty, and are hesitant to support the implementation of the death penalty through supplying the drugs used for executions.[122] This has become an issue in the United States since the drug that is most commonly used for executions, pentobarbital, was often acquired from European nations and corporations and has not been supplied to the United States since 2011.[123] As a result, some states have sought alternative methods to execute an inmate, or have tried to make a similar version of the drug here.[124] Georgia, Missouri, and Texas all utilize pentobarbital for state executions.[125] Similarly, 14 states since 2010 have used pentobarbital to commit over 200 executions.[126] The

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[118] *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that a judge cannot find an aggravating circumstance for the imposition of the death penalty).

[119] Oliver Smith, *Mapped: The 53 Places that Still Have the Death Penalty—Including Japan*, TELEGRAPH (July 6, 2018, 12:00 PM), https://www.telegraph.co.uk/travel/maps-and-graphics/countries-that-still-have-the-death-penalty/.

[120] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 567, 576 (2005) (Justice Kennedy discussing international influence regarding the death penalty being applied to minors).

[121] This does not include Belarus, the only European nation that still uses the death penalty. *See* Smith, *supra* note 119.

[122] Teri Schultz, *Europe Fights the Death Penalty—with Drugs*, WORLD (May 13, 2011, 10:03 AM), https://www.pri.org/stories/2011-05-13/europe-fights-death-penalty-drugs.

[123] *See id.*; Susie Neilson, *Lethal Injection Drugs' Efficacy and Availability for Federal Executions*, NPR (July 26, 2019, 7:11 PM), https://www.npr.org/2019/07/26/745722219/lethal-injection-drugs-efficacy-and-availability-for-federal-executions.

[124] For example, Texas has used versions of pentobarbital made by compounding pharmacies, but the versions may be contaminated or too weak, leading to painful or botched executions. Neilson, *supra* note 123. Texas inmates that were injected with the locally made version writhed on the floor, screamed in pain, and said they felt themselves burning. *Id.*

[125] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6.

[126] *Id.*

federal government has presumably used pentobarbital to execute 13 inmates since 2019.[127] If true, this would mean that the federal government and other states have found a workaround to Europe's prohibition on providing pentobarbital to the United States in order to move forward with executions.[128]

Second, the death penalty is also controversial because many inmates have been proven innocent while either awaiting execution or have been proven innocent after they were executed.[129] Since 1973, 185 people who were wrongfully convicted have been exonerated because they were found to be innocent.[130] Of the 185 people who have been exonerated, 99 are African American, 67 are white, 16 are Latino, two are other races, and one is Native American.[131] The most exonerations have come out of Illinois and Florida.[132] Exonerations are still happening in recent years despite the evolution of the death penalty and the modernization of science and forensic evidence. For example, on November 20, 2019, a Texas appellate court stayed the execution of Rodney Reed because ample evidence was discovered to suggest another individual was a more likely suspect for the murder.[133] Furthermore, Governor George Ryan of Illinois in 2003 commuted the sentence of every inmate on death row because of the large number of inmates who were found to be wrongfully convicted and sentenced to death.[134] The appeals process and the criminal justice procedure regarding the death penalty does not ensure that innocent people will not be sentenced to death.[135] Additionally, it is estimated that at least 18 people who have been executed since 1976 are probably innocent.[136] However, there is no way

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[127] *See id.*; Giuliani-Hoffman, *supra* note 4; *Facts About the Death Penalty*, *supra* note 4.

[128] Neilson, *supra* note 123; *see* Jonathan Allen, *Special Report: How the Trump Administration Secured a Secret Supply of Execution Drugs*, REUTERS (July 10, 2020, 4:13 AM), https://www.reuters.com/article/us-usa-executions-specialreport/special-report-how-the-trump-administration-secured-a-secret-supply-of-execution-drugs-idUSKBN24B1E4 (explaining the process the Trump Administration went through to acquire pentobarbital).

[129] *Innocence*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence (last visited May 26, 2021).

[130] *Id.*

[131] *Id.*

[132] *Id.* Illinois has exonerated 21 inmates and Florida has exonerated 30 inmates. *Id.*

[133] Mr. Reed's case has been sent back to the trial court so the defense can present new evidence of Mr. Reed's innocence. Manny Fernandez & Richard A. Oppel Jr., *Court Stops Execution of Rodney Reed in Texas After Outcry*, N.Y. TIMES (Nov. 20, 2019), https://www.nytimes.com/2019/11/15/us/rodney-reed-texas-execution.html.

[134] Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES (Jan. 12, 2003), https://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html.

[135] *See Innocence*, *supra* note 129.

[136] *Executed but Possibly Innocent*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent (last visited May 26, 2021).

to know out of the 1,532 people that have been executed since 1976 how many were actually innocent.[137]

Third, the death penalty has also been criticized for its unequal application to people of color.[138] Systemically, prosecutors seek the death penalty at roughly equal rates for African Americans as whites,[139] though whites are arrested for 69% of crimes and African Americans are arrested for 27.4% of crimes.[140] Native Americans, by comparison, are only arrested for 2.1% of crimes.[141] Currently, there are 55 people on federal death row and of those, 25 are African American, 22 are white, 7 are Latino, and 1 is Asian.[142] Similarly, there are over 2,500 people on state death rows throughout the United States,[143] and of those, 24 are Native American.[144] Minorities have accounted for over 43% of executions since 1976.[145] The disproportionate application of the death penalty to minorities has been understood for decades.[146] For example, in 2000, the U.S. Department of Justice conducted a report which showed that the federal death penalty was used disproportionally against people of color.[147] This disproportionate application of the death penalty to persons of color—similar to other injustices within the criminal justice system—leads to concern over the death penalty's application and practice.

Fourth, the death penalty is not always applied to the more culpable defendant. For example, the federal government executed Brandon Bernard on December 10,

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[137] *Id.*

[138] *Race and The Death Penalty*, ACLU, https://www.aclu.org/other/race-and-death-penalty (last visited May 26, 2021).

[139] Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/#section5.

[140] *2018 Crime in the United States: Table 43A*, FBI: UNIFORM CRIME REPORTING, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43.

[141] *Id.* These statistics group Alaska Native with Native American, and Native Hawaiian with Other Pacific Islander.

[142] *Racial Demographics*, DEATH PENALTY INFO. CTR. (Oct. 1, 2020), https://deathpenaltyinfo.org/death-row/overview/demographics.

[143] *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Jan. 19, 2021), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf.

[144] *Native Americans on Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/native-americans/native-americans-on-death-row (last visited May 26, 2021).

[145] *Race and the Death Penalty*, *supra* note 138.

[146] *Id.*

[147] *Id.*

2020.[148] Bernard was convicted of murder along with four co-conspirators.[149] Bernard was not the gunman who actually killed the two victims, and recent evidence contradicted the original evidence used to convict Bernard.[150] New evidence suggested that Bernard only played a small role in the murders, however, he was still executed while his co-defendants serve a life sentence.[151] Similarly, this scenario was exemplified in the case of Gabriel Fernandez, which was depicted in the Netflix documentary *The Trials of Gabriel Fernandez*. Gabriel Fernandez was an 8-year-old boy who was brutally beaten and tortured by his mother Pearl Fernandez and her boyfriend Isauro Aguirre.[152] The documentary details the systemic failures that led to Gabriel's death in addition to his mother's torture of him through her manipulation and control over her boyfriend.[153] Though Aguirre was more often the one beating Gabriel, the documentary emphasizes that Gabriel's mother was truly the "mastermind" behind his torture and death.[154] Isauro Aguirre was sentenced to death for his role in Gabriel's murder, however, Pearl Fernandez, who many feel was more culpable than Aguirre, was able to plead guilty to murder and was sentenced to life in prison.[155] These cases are just two examples of the many instances where the death penalty is unfairly applied to someone who did not have a major role in the commission of the crime or is not applied to the mastermind behind the crime.

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[148] Christina Carrega, *Brandon Bernard Executed After Supreme Court Denies Request for a Delay*, CNN: POLITICS (Dec. 11, 2020, 3:27 PM), https://www.cnn.com/2020/12/10/politics/brandon-bernard-executed/index.html.

[149] *Id.*

[150] Paulina Smolinski & Clare Hymes, *Brandon Bernard Executed for Role in 1999 Murder of Couple*, CBS NEWS (Dec. 11, 2020, 3:49 PM), https://www.cbsnews.com/news/brandon-bernard-executed-federal-government/.

[151] *Id.* The actual gun man in this matter was also executed by the federal government. *Id.*

[152] *The Trials of Gabriel Fernandez* (Netflix 2020).

[153] *Id.*

[154] *Id.*

[155] Yvonne Villarreal & Matt Brennan, *Timeline: The Horrific Story Depicted in Netflix Doc 'The Trials of Gabriel Fernandez'*, L.A. TIMES (Feb 26, 2020, 1:53 PM), https://www.latimes.com/entertainment-arts/tv/story/2020-02-26/netflix-the-trials-of-gabriel-fernandez-docuseries-coverage. For a detailed documentary regarding the abuse and death of Gabriel Fernandez as well as the trial of Aguirre and Fernandez, see *The Trials of Gabriel Fernandez*, *supra* note 152. *See also* Soumya Karlamangla et al., *Boy's Alleged Abuse Described in Graphic Grand Jury Testimony*, L.A. TIMES (Aug. 18, 2014, 9:20 PM), https://www.latimes.com/local/countygovernment/la-me-gabriel-fernandez-20140819-story.html.

A unique concern has arisen regarding the housing of death row inmates during the COVID-19 pandemic.[156] Overall, more than 275,000 prisoners have been infected with COVID-19 and 1,700 have died from COVID-19.[157] Of those, 14 prisoners on the federal government's death row have contracted COVID-19.[158] Two of these inmates, Dustin Higgs and Corey Johnson, were executed in early January 2021.[159] Attorneys for both inmates had said they would be filing motions to postpone their executions because they had tested positive for the virus.[160] If these executions had been postponed past January 20, it is likely that their execution would not have taken place because President Biden has made it clear he will work to end federal capital punishment during his presidency.[161] There is concern about executing individuals who have tested positive with the virus. Not only are federal inmates contracting the virus but those who are performing executions are contracting the virus as well.[162] For example, after the November execution of Orlando Hall, eight members of the execution team tested positive for COVID-19.[163] Many are concerned about the impacts of COVID-19 in prisons because the infection has spread quickly in prisons and prisons have become incubators for the virus.[164] Inmates do not receive the care they need, are not tested frequently, and are at the bottom of the priority list when it comes to vaccinations.[165] Performing executions in an unsafe environment with multiple cases of COVID-19, bringing in outside individuals to perform the execution who have contracted COVID-19, and failing to provide care to the inmates who live in the prison is unjust.

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[156] *See, e.g.*, Hailey Fuchs, *Virus Hits Federal Death Row, Prompting Calls for Delays in Executions*, N.Y. TIMES (Jan. 15, 2020), https://www.nytimes.com/2020/12/21/us/politics/coronavirus-death-row-executions.html; Erik Ortiz, *Senators Ask Justice Department Watchdog to Investigate Federal Executions Under Trump*, NBC NEWS (Dec. 22, 2020, 8:52 AM), https://www.nbcnews.com/politics/justice-department/senators-ask-justice-department-watchdog-investigate-federal-executions-under-trump-n1252079; Rachel Sandler, *14 Federal Death Row Inmates Have Reportedly Tested Positive for Covid-19*, FORBES (Dec. 21, 2020, 8:03 PM), https://www.forbes.com/sites/rachelsandler/2020/12/21/14-federal-death-row-inmates-have-reportedly-tested-positive-for-covid-19/; Beth Schwartzapfel et al., *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020, 6:00 AM), https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19.

[157] Schwartzapfel et al., *supra* note 156.

[158] Sandler, *supra* note 156.

[159] Fuchs, *supra* note 156.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] Schwartzapfel et al., *supra* note 156.

[165] *Id.* (noting also that prisoners are sicker than the general population, and that their COVID-19 mortality rate is 45% higher than the general population's mortality rate).

IV. ATTORNEY GENERAL BARR'S EXECUTIVE DECISION

On July 25, 2019, Attorney General Barr announced that the federal government would start executing federal death row inmates again.[166] Attorney General Barr explained that the government, originally, would execute five different inmates who they considered to be the worst of the worst.[167] The inmates selected by Attorney General Barr had a commonality with each other regarding the crimes they committed because all had murdered some of the most vulnerable in society—either children or the elderly.[168] According to Attorney General Barr, these inmates had exhausted their appellate process and had no legal challenges left to prevent them from being executed.[169] Attorney General Barr also explained that the federal government was planning to start these executions because, "[t]he Justice Department upholds the rule of law—and we owe it to the victims and their families to carry forward the sentence imposed by our justice system."[170] Attorney General Barr's announcement directly affected Lezmond Mitchell, the only Native American inmate on federal death row.[171]

Attorney General Barr announced that the federal government would execute Daniel Lewis Lee, Wesley Ira Purkey, Alfred Bourgeois, Dustin Lee Hoken, and Lezmond Charles Mitchell.[172] Lee, whose execution was scheduled for December 9, 2019, was convicted on May 4, 1999 in the Eastern District of Arkansas for robbing

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[166] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6.

[167] *See id.*

[168] Miranda Faulkner, *Barr Orders Resumption of Federal Executions; Navajo Among Those Targeted*, CRONKITE NEWS (July 25, 2019), https://cronkitenews.azpbs.org/2019/07/25/navajo-federal-execution-scheduled/; *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6. Now, 13 inmates have been executed. *See supra* notes 4–7 and accompanying text.

[169] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6. This, however, was a false statement because at the time the announcement was made, inmate Lezmond Mitchell was in the middle of federal litigation and was granted a certificate of appealability. *See Stay of Execution Granted for Sole Native American on Federal Death Row*, DEATH PENALTY INFO. CTR. (Oct. 14, 2019), https://deathpenaltyinfo.org/news/sole-native-american-on-federal-death-row-attempts-to-stop-execution-opposed-by-navajo-nation.

[170] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6.

[171] *Id.*; Hailey Fuchs, *Justice Dept. Executes Native American Man Convicted of Murder*, N.Y. TIMES (Aug. 26, 2020), https://www.nytimes.com/2020/08/26/us/politics/lezmond-mitchell-executed.html.

[172] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6; *see also Capital Punishment*, FED. BUREAU PRISONS, https://www.bop.gov/about/history/federal_executions.jsp (last visited May 26, 2021).

and murdering a family of three.[173] Lee was executed on July 14, 2020.[174] Purkey was originally scheduled to be executed on December 13, 2019, for his November 5, 2003 conviction in the Western District of Missouri, for raping and murdering a minor while also having a state murder conviction for murdering an 80-year-old woman.[175] Purkey was executed on July 16, 2020.[176] Bourgeois was convicted of torturing, molesting, and beating to death his two-year-old daughter in the Southern District of Texas and his execution was originally scheduled for January 13, 2020.[177] Bourgeois was executed on December 11, 2020.[178] Honken was convicted of murdering five people in the Northern District of Iowa and was originally scheduled for execution on January 15, 2020.[179] Honken was executed on July 17, 2020.[180]

Most importantly for this Comment, Lezmond Charles Mitchell was the fifth named death row inmate scheduled for execution.[181] Mitchell was convicted of murdering a 63-year-old grandmother and then murdering her nine-year-old granddaughter after forcing the girl to sit next to her grandmother's dead body on a 30- to 40-mile drive.[182] After murdering the victims, Mitchell severed, decapitated, burned, and buried their bodies.[183] The District Court of Arizona convicted Mitchell and sentenced him to death.[184] Mitchell's execution is important in the context of Federal Indian Law and Indian Criminal Law because he was the only Native American on federal death row.[185] Mitchell was executed by the federal government on August 26, 2020.[186]

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[173] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6.

[174] *Execution Database*, DEATH PENALTY INFO. CTR. https://deathpenaltyinfo.org/executions/execution-database (last visited May 26, 2021).

[175] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6.

[176] *Execution Database*, *supra* note 174.

[177] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6.

[178] *Execution Database*, *supra* note 174.

[179] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6.

[180] *Execution Database*, *supra* note 174.

[181] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *See* Faulkner, *supra* note 168. His sentence and execution were achieved through a loophole in federal law that limits tribal rights. *See infra* Section V.

[186] *Execution Database*, *supra* note 174.

Between Attorney General Barr's announcement on July 25, 2019 and the end of 2020, 10 federal inmates were executed, including the five previously mentioned.[187] They are: Daniel Lewis Lee, Wesley Ira Purkey, Dustin Lee Honken, Lezmond Charles Mitchell, Keith Dwayne Nelson, William Emmett Lecroy Jr., Christopher Andre Vialva, Orlando Cordia Hall, Brandon Bernard, and Alfred Bourgeois.[188] Three more federal inmates were executed prior to President Joseph Biden's inauguration: Lisa Montgomery, Corey Johnson, and Dustin Higgs.[189]

V. HISTORICAL TRIBAL CRIMINAL JURISDICTION

In order to understand why Mitchell was sentenced to death even though he was a tribal member, it is important to understand the history of tribal criminal jurisdiction and the relationship the tribes have had with the United States government. Most tribal law was, originally, based on traditional law practices, which are "often based on values, duties, and responsibilities that are closely linked to spiritual beliefs."[190] These spiritual beliefs were the guide for how to respond to problematic behavior in the tribe.[191] Criminal conduct was determined based on social harms, but "some tribes rest more on community-based rights or duties and others more on individualized rights or duties."[192] Among the Osage, for example, if a tribal member was murdered, the victim's family would first be given peace gifts and if those gifts were not enough to compensate the family, the murderer would be banished from the tribe, which was the harshest possible punishment.[193] Many Native Americans viewed the "shame that the crime of murder brought upon the murderer and his family as well as the entire tribe" as a fate worse than death.[194] However, for Native communities such as the Iroquois Confederacy, crime was rare because "life revolved around the clans," and "wrongdoing was contrary to the interests of the individual."[195] Tribes focused more on restoring peace and harmony to the group than they did on punishment.[196]

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[187] Giuliani-Hoffman, *supra* note 4.

[188] *Capital Punishment*, *supra* note 172.

[189] *Execution Database*, *supra* note 174.

[190] *See* CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 14 (2d ed. 2015).

[191] *Id.*

[192] *Id.* at 15–20.

[193] *Id.* at 19–20.

[194] Vanessa Gunther, *Murder Most Foul: Native Americans and the Evolution of the Death Penalty*, *in* INVITATION TO AN EXECUTION: A HISTORY OF THE DEATH PENALTY IN THE UNITED STATES, *supra* note 13, at 61, 62.

[195] GARROW & DEER, *supra* note 190, at 19.

[196] Gunther, *supra* note 194, at 62. For a summary on traditional restorative justice practices across Native American tribes and the contrasting views of European colonialists, see *id.* at 61–

The establishment of the colonies, the Articles of Confederation, and the Constitution pushed aside the tribal practice of traditional law and instead mimicked Great Britain's system of public justice.[197] Once the federal government of the United States was established, legislation was developed that governed the relationship between the new nation and the Native American tribes. In order to understand the effect of legislation over the tribes it is important to understand the canons of construction regarding Federal Indian Law. The Supreme Court has adopted four canons of construction that must be used when interpreting legislation related to Native American tribes.[198] These canons are: (1) treaties and agreements should be construed as the Native Americans would have understood them; (2) treaties, statutes, and agreements should be liberally construed in favor of Native Americans; (3) ambiguities should be resolved in favor of Native Americans; and (4) Native American rights and sovereignty are retained unless congressional intent to diminish them is clear.[199]

These canons are supported by Chief Justice John Marshall's recognition of tribal sovereignty in three landmark cases known as the Marshall Trilogy.[200] In *Johnson v. M'Intosh*, Chief Justice Marshall established that tribal sovereignty was limited and subject to the federal supremacy of the United States government based on the doctrine of discovery.[201] Though the tribes' sovereignty was limited by federal supremacy, the tribes were recognized as "rightful occupants of the land and were permitted to use it at their own discretion."[202] In *Cherokee Nation v. Georgia*, Chief Justice Marshall determined that Native American tribes did not count as foreign states but did recognize that the tribes were a "distinct political society, separated from others, capable of managing its own affairs and governing itself."[203] The tribes

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[197] *Id.* at 64–66.

[198] Scott C. Hall, *The Indian Law Canons of Construction v. The* Chevron *Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 495 n.3 (2004).

[199] *Id.* (explaining that the first three canons were articulated in Felix S. Cohen's Handbook of Federal Indian Law, and that the fourth canon is established through an examination of Native American case law).

[200] Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, AM. B. ASS'N (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/short_history_of_indian_law/. The Marshall Trilogy is comprised of Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *Id.* Some also refer to the Marshall Trilogy as the *Cherokee Cases*. *See* Hall, *supra* note 198, at 499.

[201] *M'Intosh*, 21 U.S. at 572–73; *see also* Hall, *supra* note 198, at 499, Fletcher, *supra* note 200.

[202] Hall, *supra* note 198, at 499–500.

[203] *Cherokee Nation*, 30 U.S. at 16–17.

have since been defined as domestic dependent nations as a result of the restrictions on their sovereignty.[204] Chief Justice Marshall furthered the doctrine established in *Cherokee Nation v. Georgia* when the Court released its holding in *Worcester v. Georgia*.[205] There, the court affirmed that the Cherokee Nation was "a distinct community occupying its own territory" upon which state laws "can have no force."[206] It was further recognized that:

> The [Native American] nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer . . . .[207]

As a result of the *Worcester* decision, tribes were recognized as having sovereign power not only as a result of delegation from the federal government but also from their retained original sovereignty.[208] Tribes have power that is delegated to them by Congress as well as "all sovereign powers that have not been modified or limited by positive acts of the federal government."[209] The relationship between the Marshall Trilogy and the canons of construction provide a framework for Congress when it comes to passing legislation that will directly affect the tribes. This framework also affects how Congress passes legislation regarding criminal acts, criminal jurisdiction, criminal procedure, and sentencing parameters impacting Native American tribes and their members.

Congress passed the General Crimes Act in 1817 to address crimes committed between Native Americans and non-Native Americans.[210] The law states, "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian Country."[211] This meant that non-Native Americans committing crimes against Native Americans on tribal land were subject to federal prosecution.[212] Under the General Crimes Act of

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[204] *See id.* Marshall described the relationship between the federal government and the tribes as one of a guardian with his ward, thus establishing a trust relationship between the two. *Id.* at 17.

[205] *See Worcester*, 31 U.S. at 562–63.

[206] *Id.* at 561.

[207] *Id.* at 559.

[208] Hall, *supra* note 198, at 501.

[209] *Id.*

[210] 18 U.S.C. § 1152 (2018); GARROW & DEER, *supra* note 190, at 102.

[211] 18 U.S.C. § 1152.

[212] GARROW & DEER, *supra* note 190, at 102.

1817, tribes maintained exclusive jurisdiction over all crimes committed on tribal land by Native Americans, regardless of who the victim was.[213]

The Supreme Court interpreted the scope of the General Crimes Act of 1817 in *Ex parte Crow Dog*, where the Court was tasked with answering the question of whether the federal government had jurisdiction over violent crimes committed by one Native American against another Native American on tribal land.[214] Crow Dog was charged with murder and faced a death penalty sentence for killing another Native American, Spotted Tail, in Lakota territory.[215] The Court held that since there was no explicit legislation from Congress, the federal government did not have jurisdiction over this crime or the defendant.[216] The Court interpreted that the existing treaty between the government and Crow Dog's tribe "provide[d] for the punishment by the United States of any bad men among whites, or among other people subject to their authority, who shall commit any wrong upon the person or property of the Indians."[217] The government had argued that this treaty effectively repealed the General Crimes Act provision allowing tribes to prosecute their own members for crimes against other tribal members.[218] Based on the canons of construction, the Court determined that in order for the General Crimes Act to be applicable in this case, there needed to be express intent from Congress.[219] The canons of construction dictate that agreements between the tribes and the federal government should be read as the Native Americans would have understood them, and ambiguous legislation enacted by Congress must likewise be resolved in favor of Native Americans.[220] The Court concluded that because Crow Dog's tribe would not have understood the 1868 treaty as taking away their power to prosecute criminals, and because no other legislation clearly removed that power, Crow Dog was wrongfully convicted by the federal government.[221]

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[213] *Id.*

[214] *Ex Parte* Crow Dog, 109 U.S. 556, 570 (1883). This case is also known as *Ex parte Kangi-Shun-ca*, but is referred to in the United States Reports as *Ex parte Crow Dog*. *Compare id.* at 556, *with* Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 336 (2013).

[215] *Crow Dog*, 109 U.S. at 557, 559.

[216] *Id.* at 567–68, 572.

[217] *Id.* at 567.

[218] *Id.* at 562.

[219] *Id.* at 570. The Court found that neither the 1868 treaty nor the related legislation later passed by Congress expressly repealed the General Crimes Act's provision permitting exclusive tribal criminal jurisdiction over crimes by tribal members against other tribal members. *Id.* at 558, 570; *see also* 18 U.S.C. § 1152 (2018).

[220] *See* John Lentz, Special Feature, *When Canons Go to War in Indian Country, Guess Who Wins?* Barrett v. United States*: Tax Canons and Canons of Construction in the Federal Taxation of American Indians*, 35 AM. INDIAN L. REV. 211, 216–17, 217 n.33 (2010).

[221] *Crow Dog*, 109 U.S. at 570.

Tribal criminal jurisdiction and sovereignty was eroded away after *Ex parte Crow Dog* through subsequent legislation and judicial opinions. The public was very upset after the Court announced its decision, primarily because white society believed that the "lawless" nature of the tribes would lead to individuals getting away with violent crimes like this.[222] In response, Congress passed the Major Crimes Act in 1885.[223] The Major Crimes Act granted federal courts concurrent criminal jurisdiction with tribal courts over specific crimes listed in the statute.[224] The statute now reads:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.[225]

As a result of the Major Crimes Act, murder committed by a Native American on tribal land that rises to the level to justify a death penalty sentence falls under federal jurisdiction.

The Supreme Court, in *United States v. Kagama*, upheld the Major Crimes Act as constitutional because the tribes are wards of the United States and Congress had express intent to extend federal jurisdiction over the tribes in this way.[226] The Court stated, "the territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress."[227] The Court held that because the tribes were "communities *dependent* on the United States," the federal government could exercise jurisdiction over crimes on tribal land.[228] These laws were often viewed as one sided, however, because the laws were used "to confine indigenous people to reservations, but failed to protect them from harm . . . ."[229]

Tribal criminal jurisdiction went through an additional change in 1953, when Congress passed Public Law 280 (PL 280).[230] PL 280 transferred federal jurisdiction

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[222] *See* GARROW & DEER, *supra* note 190, at 103.

[223] *Id.*

[224] *Id.*

[225] 18 U.S.C § 1153(a) (2018).

[226] United States v. Kagama, 118 U.S. 375, 383–85 (1886).

[227] *Id.* at 379–80.

[228] *See id.* at 384–85.

[229] GARROW & DEER, *supra* note 190, at 37.

[230] *Id.* at 104.

over crimes on tribal land to certain named states—California, Minnesota, Nebraska, Oregon, Wisconsin, and to Alaska once it gained statehood.[231] These states were known as mandatory states because they were required to accept the transfer of jurisdiction.[232] Specifically, the law provided that:

> Each of the States listed in the following table shall have jurisdiction over offenses committed by or against [Native Americans] in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation[233]

This law specified that other tribal rights, like water rights or property ownership rights, would not be infringed upon.[234] Additionally, the codification of PL 280 established state civil jurisdiction over Native Americans.[235]

Other states have become "optional" PL 280 states.[236] Optional PL 280 states have increased criminal jurisdiction over certain reservations within their borders.[237] Optional states are able to be selective regarding which tribes state criminal jurisdic-

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[231] *Id.*

[232] *Id.*

[233] Act of Aug. 15, 1953, Pub. L. No. 280, § 2, 67 Stat. 588, 588 (codified as amended at 18 U.S.C. § 1162).

[234] *Id.* § 2, 67 Stat. at 589.

[235] *Id.* § 4, 67 Stat. at 589 (codified as amended at 18 U.S.C. § 1360). For the purposes of this Comment, the portion of PL 280 that established state civil jurisdiction will not be explored.

[236] *Frequently Asked Questions About Public Law 83-280*, U.S. DEP'T JUSTICE (May 1, 2015), https://www.justice.gov/usao-mn/Public-Law%2083-280.

[237] *Id.*

tion extends to, whereas mandatory PL 280 states' jurisdiction over tribes is established in the law.[238] The states that have opted into PL 280 include Florida, Idaho, and Washington, but only regarding certain reservations.[239] Other states have been able to extend state criminal jurisdiction over tribes through other means. For example, Kansas was granted concurrent jurisdiction on tribal lands in 1940.[240] New York was also granted concurrent criminal jurisdiction in 1948 and civil jurisdiction in 1950.[241] Some states were also able to claim concurrent criminal jurisdiction through various land claims settlement acts.[242] These acts were used to establish concurrent criminal jurisdiction over the Wampanoag Tribe of Gay Head, the Narragansett Indian Tribe, the Miccosukee Tribe of Indians of Florida, the Mashantucket (Western) Pequot Tribal Nation, the Mohegan Tribe, the Penobscot Indian Nation, the Passamaquoddy, Houlton Band of Maliseet Indians, the Aroostook Band of Micmacs, the Catawba Indian Nation, the Alabama and Coushatta Tribes of Texas, the Ysleta del Sur Pueblo, and the Paiute Indian Tribe of Utah.[243]

Though PL 280 did not take away criminal jurisdiction from the tribes, it complicated who had jurisdiction over what type of crime, based on who committed the crime, and where the crime was committed.[244] After PL 280 was passed, criminal jurisdiction over Native Americans was confusing because of its multi-layered nature, and led to defendants being unsure what their constitutional rights were. Mandatory PL 280 states are critical of the law because it did not provide the states additional funding or taxation opportunities.[245] Therefore, states had to operate with the same law enforcement and judiciary budget without any additional financial support from the federal government. PL 280 also had many negative consequences for the tribes.[246] First, the law was passed without tribal consent.[247] Second, PL 280 deprived tribes of their sovereignty by unilaterally giving states criminal jurisdiction over the tribes and their members.[248] Third, PL 280 is frequently cited as the reason for denying tribes in PL 280 states funding for law enforcement.[249]

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[238] *Compare Frequently Asked Questions About Public Law 83-280*, *supra* note 236, *with* Act of Aug. 15, 1953, § 2, 67 Stat. at 588. *See also* GARROW & DEER, *supra* note 190, at 104; *supra* notes 210–213 and accompanying text.

[239] *Frequently Asked Questions About Public Law 83-280*, *supra* note 236.

[240] GARROW & DEER, *supra* note 190, at 104–05.

[241] *Id.* at 105.

[242] *Id.*

[243] *Id.*

[244] *Id.* at 104.

[245] *Id.*

[246] *Tribal Crime and Justice: Public Law 280*, NAT'L INST. JUSTICE (May 19, 2008), https://nij.ojp.gov/topics/articles/tribal-crime-and-justice-public-law-280.

[247] GARROW & DEER, *supra* note 190, at 104.

[248] *Tribal Crime and Justice: Public Law 280*, *supra* note 246.

[249] *Id.*

Fourth, and of serious concern for tribal members, the law made it so minor crimes could be punished by both the tribal system and the state.[250]

Laws like the Major Crimes Act and PL 280 created double jeopardy concerns for defendants.[251] The Supreme Court considered the potential issue of double jeopardy in *United States v. Wheeler*.[252] In *Wheeler*, a Navajo tribal member was prosecuted in the Navajo Nation's tribal court and in federal court for similar crimes arising out of the same incident.[253] The Court ruled that because the tribal courts were separate sovereigns from the federal court system, double jeopardy was not infringed.[254] The Court recognized that, "[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each is exercising its own sovereignty, not that of the other."[255] Thus, the Court held that because these two prosecutions were conducted by two separate sovereigns, the prosecution by the Navajo Nation and the prosecution by the federal government did not violate the defendant's right against double jeopardy.[256] The Court's decision in *Wheeler* reaffirmed tribal criminal jurisdiction while asserting the concurrent nature of federal jurisdiction over certain crimes committed by Native Americans on tribal land.

This holding was largely based on the principles of federalism. For example, defendants can be tried for the same crime in state court and federal court.[257] The laws of the United States recognize that "a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign."[258] This means that a defendant can be charged in different jurisdictions for crimes resulting from the same criminal conduct. A defendant may be prosecuted by a state for the same criminal conduct for which another state or the federal government has prosecuted them.[259] The Court has long recognized that "an 'offence' is defined by a law, and each law is defined by a sovereign. . . . where there are two sovereigns, there are two laws, and two 'offences.'"[260] Moreover, Justice Alito points out in *Gamble* that an

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[250] *See id.*

[251] *E.g.*, United States v. Wheeler, 435 U.S. 313, 316 (1978).

[252] *Id.* at 314.

[253] *Id.* at 314–16. The defendant pled guilty to contributing to delinquency of a minor in tribal court, and over a year later the federal government indicted him for statutory rape. *Id.* at 315. He argued that because "the tribal offense of contributing to the delinquency of a minor was a lesser included offense of statutory rape," federal prosecution was barred. *Id.* at 316.

[254] *Id.* at 329–32.

[255] *Id.* at 320 (internal quotations omitted).

[256] *Id.* at 331–32.

[257] *See* Gamble v. United States, 139 S. Ct. 1960, 1964 (2019).

[258] *Id.*

[259] *See id.*

[260] *Id.* (citing Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting) ("[i]f the same conduct violates two (or more) laws, then each offense may be separately prosecuted");

individual may be tried in a foreign nation and in the United States for the same criminal conduct.[261] Justice Alito provides a hypothetical example of a U.S. national who was murdered in another country and discusses whether the defendant can be tried in both countries.[262] Based on this example, the foreign country "could rightfully seek to punish the killer for committing an act of violence within its territory," and the U.S. government could prosecute the defendant for killing an American abroad based on 18 U.S.C. § 2332(a)(1).[263] It is also customary that international law allows both nations to prosecute the defendant in this hypothetical situation.[264] Therefore, the court's decision in *Wheeler* conforms to the judicial precedents in the United States as well as international norms.

Tribal criminal jurisdiction has been eroded in recent years. Prior to 1978, tribal governments' power to exercise their criminal jurisdiction over non-Native Americans for crimes that happened on tribal land was unclear.[265] The Court addressed this exercise of criminal jurisdiction in *Oliphant v. Suquamish Indian Tribe.* Mark Oliphant was arrested by tribal police on the Port Madison Reservation and arraigned by the tribal court for assaulting a tribal officer and resisting arrest.[266] Oliphant was not a member of the Suquamish Indian Tribe nor was he a Native American.[267] Oliphant filed a writ of habeas corpus arguing that the tribe did not have jurisdiction over him since he was not a Native American.[268] The Court mistakenly concluded that tribes exercising criminal jurisdiction over non-Native Americans was a new phenomenon and therefore was not a historical practice of the tribes.[269] The Court also concluded that the tribes lost the right to have criminal jurisdiction over non-Native Americans when they submitted to the sovereignty of the United States.[270] *Oliphant* was a major step back for the tribal court system and

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Moore v. Illinois, 55 U.S. (14 How.) 13, 17 (1852) ("The constitutional provision is not, that no person shall be subject, for the same act, to be twice put in jeopardy of life or limb; but for the same *offence*, the same *violation of law*, no person's life or limb shall be twice put in jeopardy."). There have been many instances where defendants have been prosecuted for the same conduct that violates both federal and state law. *See Gamble*, 139 S. Ct. at 1990 (2019) (Ginsburg, J., dissenting) (critiquing the Court's use of the dual sovereignty doctrine).

[261] *Gamble*, 139 S. Ct. at 1967.

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196 (1978).

[266] *Id.* at 194.

[267] *Id.*

[268] *Id.*

[269] *See id.* at 196–99; Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 356–58 (2016) (discussing the inaccurate conclusion reached in *Oliphant* and explaining the historical instances when tribes did exercise jurisdiction over nonmembers).

[270] *Id.* at 210–12.

took away a key portion of tribal criminal jurisdiction since it meant that tribes could no longer prosecute non-Native Americans.

Similar to the *Oliphant* decision, in 1990, tribal courts were challenged on exercising their criminal jurisdiction over non-member Native Americans.[271] The Court held in *Duro v. Reina* that "the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership."[272] The Court rationalized that the holding in *Oliphant* led to the conclusion that tribes also did not have criminal jurisdiction over non-members.[273] As well, the Court argued that, based on the holding in *Wheeler*, "the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order."[274] Thus, the tribes did not have jurisdiction over non-members who committed crimes on Indian land.[275] After *Oliphant* and *Duro*, the tribes only had jurisdiction to prosecute Native Americans who were members of their tribes and committed crimes on tribal land.

The *Oliphant* and *Duro* decisions are counterintuitive regarding the normal exercise of criminal jurisdictions by sovereign entities. Federalism establishes a relationship between the federal government and the states where federal laws are supreme to state laws, though states are their own sovereign entities.[276] Both the federal government and states are able to make laws in the interests of their citizens.[277] The federal government has never overstepped its power to make it so a state cannot prosecute someone because they are not a resident of that state.[278] As sovereign nations, the tribes should be afforded the same rights that other sovereign governments are afforded from the federal government.

Congress, in response to the *Duro* decision, amended the language of the Indian Civil Rights Act of 1968 to define the powers of self-government as "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[279] This legislation was known as the "*Duro*-fix."[280]

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[271] GARROW & DEER, *supra* note 190, at 117. A non-member is a Native American who belongs—or is a member—of another tribe. A non-Native American is someone who does not belong to any tribe.

[272] Duro v. Reina, 495 U.S. 676, 679 (1990).

[273] *Id.* at 685.

[274] *Id.* at 685–86.

[275] *Id.* at 695–96.

[276] Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 785 (2014).

[277] *See id.* at 777, 780.

[278] *See* CONG. RESEARCH SERV., R44957, DUE PROCESS LIMITS ON THE JURISDICTION OF COURTS: ISSUES FOR CONGRESS 1, 1 n.7 (2017).

[279] GARROW & DEER, *supra* note 190, at 107 (quoting the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (2018)).

[280] *Id.*

The goal of the fix was to overturn the *Duro* decision. This fix was challenged by non-member Native Americans, who argued that the *Duro*-fix was a delegation of federal authority rather than a recognition of actual tribal sovereignty.[281] If the *Duro*-fix was a delegation of federal authority, then non-members who were tried for the same crime in tribal court and federal court would be able to bring a successful double jeopardy claim.[282]

The Court addressed this issue in *United States v. Lara*.[283] The Spirit Lake Tribe in North Dakota prosecuted Billy Jo Lara, who was a member of the Turtle Mountain Band of the Chippewa, for assaulting a police officer.[284] After Lara was convicted by the Spirit Lake Tribal Court, the federal government charged him with assaulting a federal officer.[285] Lara challenged the federal prosecution, arguing that since tribal jurisdiction over non-members was a delegation of authority from the federal government, he could not be prosecuted for the same crime in tribal court and federal court because it was a form of double jeopardy.[286] The Supreme Court reasoned that under the plenary powers of Congress granted by the Constitution, Congress can pass legislation that restricts or relaxes the boundaries of tribal sovereignty.[287] The Court concluded that "Congress has the power to relax the restrictions imposed by the political branches on the tribes' inherent prosecutorial authority."[288] The Court held that the prosecution of Lara by the tribal court was not an exercise of federal jurisdiction and did not violate double jeopardy.[289] Specifically, the court held that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember [Native Americans]."[290] Thus, the tribes have the inherent authority to prosecute their members as well as other non-member Native Americans.

To summarize, to determine which sovereign has jurisdiction over a crime, one must look at who the offender was, where the crime happened, and who the victim was. If the crime occurred in a non-PL 280 state and was committed by a Native American offender on tribal land, the tribe will have jurisdiction regardless of who the victim is.[291] If a major crime is committed or if the victim is a non-Native Amer-

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281 *Id.*

282 *Id.*

283 United States v. Lara, 541 U.S. 193, 196 (2004).

284 *See id.*

285 *Id.* at 197.

286 *Id.*

287 *Id.* at 202.

288 *Id.* at 205.

289 *See id.* at 210.

290 *Id.*

291 GARROW & DEER, *supra* note 190, at 102–04.

ican, the federal government has concurrent jurisdiction to prosecute the offender.[292] If the crime is committed in a PL 280 state and is committed by a Native American on tribal land, the state has concurrent jurisdiction with the tribe.[293] If the crime is committed by a non-Native American on tribal land, the state has sole jurisdiction over the crime.[294] In any event, tribal criminal jurisdiction may go through a dramatic change within the next couple years as a result of the Court's decision in *McGirt v. Oklahoma*, which recognized a large portion of Oklahoma as actually being tribal land.[295]

VI. TRIBAL CONSENT TO THE FEDERAL DEATH PENALTY

As has been discussed, the Federal government has jurisdiction over murder that is committed on tribal land, regardless of whether the victim is a Native American or a non-Native American.[296] Murder can qualify as a crime punishable by death if it meets the requirements of the Federal Death Penalty Act.[297]

Under 18 U.S.C. § 3591, the federal government can impose a death sentence for someone who:

> (A) intentionally killed the victim;
>
> (B) intentionally inflicted serious bodily injury that resulted in the death of the victim;
>
> (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or
>
> (D) intentionally and specifically engaged in an act of violence, knowing the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as the direct result of the act . . . .[298]

The jury must also consider the factors in Section 3592 to actually impose the sentence of death.[299] These factors are known as mitigating and aggravating factors;

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[292] *See id.* at 103.

[293] *Id.* at 104.

[294] *Id.*

[295] *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (holding that the federal government must be bound by its promise in the treaties it made with the Creek Nation and recognizing that the majority of Oklahoma is Creek tribal land).

[296] GARROW & DEER, *supra* note 190, at 103.

[297] Federal Death Penalty Act of 1994, 18 U.S.C. § 3591(a)(2) (2018).

[298] *Id.* There are other crimes that can be punished by death like treason and specific drug-related offenses. *Id.* § 3591(a)(1), (b).

[299] *Id.* § 3591(a); 18 U.S.C. § 3592.

mitigating factors are those that lessen the severity of the crime whereas aggravating factors increase the severity of the crime.[300] The aggravating factors must outweigh the mitigating factors in order for a jury to sentence a defendant to death.[301] Mitigating factors that the jury may consider are: impaired capacity; duress; minor participation; equally culpable defendant; no prior criminal record; disturbance; victim's consent; or other relevant factors including, but not limited to, the defendant's background, record, or character.[302] Aggravating factors that the jury may consider are broken up into different subcategories: aggravating factors for espionage and treason; aggravating factors for homicide; and aggravating factors for a drug offense.[303] Specifically, the aggravating factors for homicide the jury may consider are:

(1) Death during commission of another crime

(2) Previous conviction of violent felony involving firearm

(3) Previous conviction of offense for which a sentence of death or life imprisonment was authorized

(4) Previous conviction of other serious offenses

(5) Grave risk of death to additional persons

(6) Heinous, cruel, or depraved manner of committing offense

(7) Procurement of offense by payment

(8) Pecuniary gain

(9) Substantial planning and premeditation

(10) Conviction for two felony drug offenses

(11) Vulnerability of victim

(12) Conviction for serious federal drug offenses

(13) Continuing criminal enterprise involving drug sales to minors

(14) High public officials

(15) Prior conviction of sexual assault or child molestation

(16) Multiple killings or attempted killings[304]

The federal government can prosecute a Native American for a homicide that has an aggravating factor that would justify the death penalty because of the Major Crimes Act.[305]

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[300] 18 U.S.C. § 3592(a)–(b); *see* CHARLES DOYLE, CONG. RESEARCH SERV., R42095, FEDERAL CAPITAL OFFENSES: AN OVERVIEW OF SUBSTANTIVE AND PROCEDURAL LAW 5 (2011).

[301] *See* Gregg v. Georgia, 428 U.S. 153, 197–98 (1976).

[302] 18 U.S.C. § 3592(a).

[303] 18 U.S.C. § 3592(b)–(d).

[304] 18 U.S.C. § 3592(c).

[305] 18 U.S.C. § 1153(a).

Under a special provision of the Federal Death Penalty Act at 18 U.S.C. § 3598, it is up to the tribes to consent to the death penalty being used against Native Americans.[306] 18 U.S.C. § 3598 provides:

> [N]o person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country . . . and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction.[307]

Since 1994, only one tribe has "opted in" to the Federal Death Penalty Act—the Sac and Fox Nation of Oklahoma.[308] Thus, even though the Major Crimes Act grants the Federal government jurisdiction over crimes that would qualify for a death sentence committed by tribal members on tribal land, tribes retain the right to opt in to the death penalty as applied to their members.[309]

Tribal consent to the death penalty does not make it so no Native American can be sentenced to death—in fact 16 Native Americans have been executed since 1976 for crimes that have either happened off tribal land or in PL 280 states.[310] Tribes also do not have the option to "opt in" when a murder partnered with certain federal crimes like carjacking, kidnapping, or the killing of a federal officer occurs on tribal land because murder that results from these crimes is not listed in the Major Crimes Act, which is part of the same chapter as the "opt in" statute.[311] It was because of this loophole that the federal government was able to seek the death penalty against Lezmond Mitchell.[312] Mitchell was a member of the Navajo Nation, and was convicted of murdering a fellow tribal member, Alyce Slim, and her nine year-old granddaughter, Tiffany Lee, by beheading and mutilating their bodies.[313]

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[306] Ken Murray & Jon M. Sands, *Race and Reservations: The Federal Death Penalty and Indian Jurisdiction*, 14 FED. SENT'G REP. 28, 28 (2001).

[307] 18 U.S.C. § 3598 (2018).

[308] Murray & Sands, *supra* note 306, at 28. The tribe opted in to the death penalty because members felt that the decision would deter serious, violent crime on the reservation. Felicia Fonseca, *Most American Indian Tribes Opt Out of Federal Death Penalty*, AP NEWS (Aug. 21, 2017), https://apnews.com/article/86b9734f456846e9b0df9faa0237122f.

[309] Murray & Sands, *supra* note 306, at 29.

[310] *See* Fonseca, *supra* note 308. Prosecutors also do not need to consult with tribes before pursuing death penalty charges when these exceptions are present. *Id.*

[311] *Id.*

[312] *Id.*

[313] *Id.*; *supra* notes 182–183 and accompanying text. Lezmond Mitchell did not act alone and there was a co-defendant in this case. Barbara L. Creel, *Scheduled Federal Execution of Native American Is a Death Warrant for Tribal Sovereignty*, MEDIUM (Aug. 20, 2020), https://medium.com/@creelesq/scheduled-federal-execution-of-native-american-is-a-death-warrant-for-tribal-sovereignty-887e365798e4. The primary assailant was Mitchell's co-defendant,

Mitchell and his co-defendant buried them in a shallow grave after stealing the victim's car.[314] Tribal consent was not required to sentence Mitchell to death because of the carjacking that took place during the homicide.[315] The tribe objected to the death penalty sentence and argued that lack of notice that committing a carjacking while committing a homicide prevented the tribes from "opting in" to the death penalty.[316] Despite their objection, Mitchell was executed on August 26, 2020.[317]

There are many reasons why tribes do not want to "opt in" to the death penalty. First, the death penalty is contrary to many Native American tribes' cultures and religions.[318] For example, the Blackfeet in Montana believe that only the Creator has the right to take away a life, no exceptions.[319] Second, many tribes choose not to "opt in" because this would grant the federal government an extreme power—the power to determine when a Native American will die.[320] Historically, tribes have had a tumultuous relationship with the federal government because of the federal government's unjust treatment of Native Americans.[321] This distrust adds to many tribes' hesitancy to opt in to the death penalty.[322] Tribal consent also gives the tribe more control over their members; as Professor Robert Anderson, a member of the Bois Forte Band of the Minnesota Chippewa stated, "[m]ost Indian tribes were mistreated by the United States under past federal policies, and there can be historical trauma in cases associated with the execution of Native people . . . . [The opt in option] allows tribes to at least decide in those narrow circumstances when there should be a federal death penalty or not."[323] Third, many tribes feel that because Native Americans are not adequately represented on juries, the jury would not be

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but he did not face the same sentence Mitchell did because he was a juvenile when they committed the crime. Carl Slater, *Lezmond Mitchell's Death Sentence Is an Affront to Navajo Sovereignty*, N.Y. TIMES (Aug. 16, 2020), https://www.nytimes.com/2020/08/19/opinion/lezmond-mitchell-death-sentence-execution.html.

314 Fonseca, *supra* note 308.

315 *Id.*

316 *Id.* When prosecution in this case began, the Navajo Nation denounced the death penalty in this case as applied to Mitchell. Creel, *supra* note 313. The Navajo Nation specifically denounced the death penalty here based on a listening session that included elders, youth, current and future community leaders, sacred medicine people, religious and secular leaders, and experts from within and outside the community. *Id.* Family members of the victims were also present and asked the tribe and the federal government not to pursue the death penalty against Mitchell. *Id.*

317 *Execution Database*, *supra* note 174.

318 Murray & Sands, *supra* note 306, at 28. Navajo Nation, along with hundreds of other Native Americans, objected to the execution of Mitchell. Fuchs, *supra* note 171.

319 Fonseca, *supra* note 308.

320 Murray & Sands, *supra* note 306, at 28.

321 *See* Fonseca, *supra* note 308.

322 *Id.*

323 *Id.*

constituted of the defendant's peers.[324] Fourth, there is concern that the race of the defendant will affect the jury's decision on whether to apply the death penalty.[325] Fifth, opting in might create a discrepancy regarding when an individual would face the death penalty because a Native American could face the death penalty under federal jurisdiction, but a non-Native American might not face the death penalty under state jurisdiction.[326] Sixth, the death penalty does not have a proven deterrent effect on alcohol-related or intra-family homicides, which are the majority of homicides committed on tribal land.[327]

These factors come into play today as different tribes have come under public scrutiny for not "opting in" to the death penalty. In 2016, an 11-year-old Navajo girl was sexually assaulted and murdered by a Navajo man.[328] Though this crime was especially heinous, the victim was a vulnerable victim, and the victim's mother begged the tribe to "opt in" to the death penalty, the tribe did not "opt in" and as a result, the defendant did not receive a death sentence for this crime.[329]

VII. THE EXECUTION OF LEZMOND MITCHELL

Attorney General Barr's decision resulted in the execution of Mitchell, who was a Navajo member.[330] As previously discussed, Mitchell was one of the 13 death row inmates executed by the Trump administration.[331] The Navajo Nation did not have the opportunity to "opt in" to the death penalty for Mitchell's case because the specific crime for which he was convicted did not fall under the tribal consent statute.[332] If Mitchell had not been convicted of carjacking that resulted in murder, the tribe would have had to give consent for him to be executed.[333] Because Mitchell committed a heinous and violent homicide and committed a carjacking, his crime fell into the loophole that allows the federal government to execute tribal members.[334]

Navajo Nation's objections to Mitchell's death sentence and subsequent execution suggest that even if Navajo Nation was given the opportunity to opt in regarding Mitchell's case, they would not have. Moreover, the loophole that resulted

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[324] Murray & Sands, *supra* note 306, at 28.

[325] *Id.* at 28–29.

[326] *Id.* at 29.

[327] *Id.*

[328] Fonseca, *supra* note 308.

[329] *Id.*

[330] *See* Faulkner, *supra* note 168.

[331] Giuliani-Hoffman, *supra* note 4; *Facts About the Death Penalty*, *supra* note 4; *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *supra* note 6.

[332] Fonseca, *supra* note 308.

[333] *Id.*

[334] Faulkner, *supra* note 168.

in Mitchell being sentenced to death likely causes the distrust between tribes and the federal government to deepen. This distrust is also enhanced by prosecutors going on the record in other cases saying that they did not consult with a tribe before pursuing the death penalty and "[i]f they would have told me they don't want us to execute [the defendant], I would have done it anyway."[335] Furthermore, the fact that the federal government went through with the execution of Mitchell even though it was in direct conflict with the Navajo Nation's wishes is seen as another broken promise in centuries of injustices committed towards the tribes by the federal government.

Originally, according to Attorney General Barr's announcement, Mitchell was scheduled to be executed on December 11, 2019.[336] His execution was stayed because the U.S. Court of Appeals for the Ninth Circuit found additional time was needed to review if there was "anti-Native American bias" in his case.[337] After the court rejected Mitchell's appeal, Warden Watson of the Federal Correctional Complex at Terre Haute, Indiana,[338] issued another execution warrant for August 26, 2020.[339] Mitchell filed another motion on August 6, 2020 "to strike the Execution Warrant, vacate his execution date, and enjoin any violation of the Judgment."[340] Mitchell argued that "if the Bureau of Prisons follows its execution protocols his execution will not be 'implement[ed] . . . in the manner prescribed by the law of [Arizona]' and thus will be in violation of the Judgment and 18 U.S.C. § 3596(a)."[341] This appeal, however, was denied on August 19, 2020.[342] The Ninth Circuit Court of Appeals held that since Mitchell was unlikely to succeed in his lawsuit against the government, the court would not issue a stay of his execution.[343] The Court held that Mitchell did not meet "his burden of demonstrating either that he is likely to succeed on the merits or that it is probable that he would suffer an

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[335] Fonseca, *supra* note 308.

[336] *Stay of Execution Granted for Sole Native American on Federal Death Row*, *supra* note 169.

[337] *Id.*

[338] Terre Haute is where federal death row is housed, and executions take place. *See Federal Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty (last visited May 26, 2021); *see also* Danielle Haynes, *Appeals Court Denies Stay of Execution for Lezmond Mitchell in Indiana*, UNITED PRESS INT'L (Aug. 20, 2020), https://www.upi.com/Top_News/US/2020/08/20/Appeals-court-denies-stay-of-execution-for-Lezmond-Mitchell-in-Indiana/8561597953677/.

[339] United States v. Mitchell, 971 F.3d 993, 995 (9th Cir. 2020) (per curiam).

[340] *Id.*

[341] *Id.*

[342] Haynes, *supra* note 338. Daniel Lewis Lee, Dustin Lee Honken, and Wesley Purkey filed appeals raising identical defenses in July, however, all of their appeals were denied, and they were executed before Mitchell. *Id.*

[343] *Mitchell*, 971 F.3d at 995; Haynes, *supra* note 338.

irreparable injury in the absence of a stay."[344] On August 25, 2020, the Supreme Court denied Mitchell's pleas to stay his execution.[345] Mitchell was executed on August 26, 2020 without tribal consent to execution for a crime he committed on tribal land against another Native American. Navajo Nation was powerless to prevent Mitchell's execution because of a loophole that established if the murder took place during a carjacking, a Native American could be sentenced to death without tribal consent. Mitchell died at 6:29 pm on August 26, 2020. He was 38 years old.[346]

VIII. CONCLUSION

Throughout the years, tribes have had their criminal jurisdiction slowly chipped away. Laws like the Major Crimes Act and Public Law 280 have infringed on tribal jurisdiction by giving other sovereigns, either the state or the federal government, the power to prosecute Native Americans. Cases like *Oliphant* have stripped away tribal jurisdiction by prohibiting tribes from prosecuting non-Native Americans for crimes that happen on tribal land. In the instances where tribes have been granted the power to have more control over their people, through the "opt in" option in the Federal Death Penalty Act, there have been loopholes poked through that make it so Native Americans can still face the death penalty. It is as a result of these loopholes that Navajo Nation member, Lezmond Mitchell, was executed. His execution symbolizes another instance where the federal government has stripped Native American tribes of their sovereignty and imposed its own will. Mitchell's execution serves as another example of the death penalty being unequally applied to people of color and to defendants that are not the most culpable defendants in their case. Mitchell's execution is also an example of the federal government's long history of broken promises to the tribes that highlights the significant erosion of tribal criminal jurisdiction. As Judge Morgan Christen on the Ninth Circuit wrote, "The United States made an express commitment to tribal sovereignty when it enacted the tribal option. . . . And by seeking the death penalty in this case, the United States walked away from that commitment."[347]

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[344] *Mitchell*, 971 F.3d at 995.

[345] Fuchs, *supra* note 171.

[346] *Id.*

[347] *Id.*