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Tribal Courts, The Violence Against Women Act, and Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction to Improve Public Safety in Indian Country

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TRIBAL COURTS, THE VIOLENCE AGAINST WOMEN ACT, AND SUPPLEMENTAL JURISDICTION: EXPANDING TRIBAL COURT JURISDICTION TO IMPROVE PUBLIC SAFETY IN INDIAN COUNTRY

Adam Crepelle*

I. INTRODUCTION

In Indian country,[1] non-Indians are essentially above the law. Non-Indians cannot be prosecuted by Indian tribes;[2] consequently, the United States Commission on Civil Rights has declared that Indians "have become easy crime targets."[3] In particular, Indian women have become prime victims for non-Indian sexual predators.[4] Rape rates skyrocket when non-Indians enter reservations in large numbers.[5] Non-Indians know they are above the law in Indian country—they even go so far as to call the cops on themselves after beating their Indian wives and taunt law enforcement with chants of "[y]ou can't do anything to me anyway."[6] Lisa Brunner, an

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1. 18 U.S.C. § 1151 (2019) (defining Indian country as all land within an Indian reservation that is under federal jurisdiction and Indian allotments that have not been extinguished). Further, this article uses the term "Indian" rather than "Native American" because it is the proper legal term as well as the preferred term of most Indians. *See*, *e.g.*, Mississippi Band of Choctaw Indians; Southern Ute Indian Tribe; Colorado River Indian Tribes.

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

3. U.S. Comm'n on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 68 (2003), https://perma.cc/X65W-U4MH.

4. Cecily Hilleary, *Sex Traffickers Targeting Native American Women*, VOA NEWS, Nov. 18, 2015, https://perma.cc/YC98-HXMT (quoting Professor Sarah Deer, "If you are a trafficker looking for the perfect population of people to violate, Native women would be a prime target."); Jessica Rizzo, *Native American Women Are Rape Targets Because of a Legislative Loophole,* VICE, Dec. 16, 2015, https://perma.cc/E4BR-GX4D; Jacinta Render, *A Matter of 'Life and Blood': REDress Project Seeks to Highlight Violence Against Native American Women*, ABC NEWS, Mar. 20, 2019, https://perma.cc/L9BH-TTN8.

5. Kathleen Finn, Erica Gajda, Thomas Perin & Carla Fredericks, *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J. L. & GENDER 1, 2–3 (2017); Louise Erdrich, *Rape on the Reservation*, N.Y. TIMES, Feb. 26, 2013, https://perma.cc/PHJ8-DCUB; Garet Bleir & Anya Zoledziowski, *Murdered and Missing Native American Women Challenge Police and Courts*, THE CENTER FOR PUBLIC INTEGRITY, Aug. 27, 2018, https://perma.cc/5WT6-WR34; Lailani Upham, *Oil Booms, So Does Violence*, CHAR-KOOSTA NEWS, Dec. 20, 2018, https://perma.cc/YEH8-DW6J.

6. Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1603 (2016). *See also* Lorelei Laird, *Indian Tribes are Retaking Jurisdiction Over Domestic Violence on Their Own Land*, ABA JOURNAL, Apr. 1, 2015, https://perma.cc/7Y88-TNR7; Emily Weitz, *Native American Women Have Been Saying a Lot More Than #MeToo for Years*, VICE, Nov. 23, 2017, https://perma.cc/4Y9H-SKF6.

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Ojibwe survivor of sexual assault, aptly summarizes the tragic reality Indian women endure: "We have always known that non-Indians can come onto our lands and they can beat, rape and murder us and there is nothing we can do about it."[7]

Congress finally took action to protect Indian women by passing the Violence Against Women Reauthorization Act of 2013 ("VAWA").[8] VAWA is landmark legislation because it recognizes tribes' inherent authority to prosecute domestic violence, dating violence, and protective order violations when a non-Indian is the offender.[9] Nevertheless, the law leaves much to be desired as VAWA only extends tribal criminal jurisdiction over these three crimes and only when the non-Indian has a prior relationship with the tribe.[10] This puts tribes in the odd position of having "special domestic violence criminal jurisdiction" over non-Indians with Indian spouses, intimate partners, or dating partners, while being unable to prosecute non-Indians for child abuse, drug use, and other crimes that commonly ensue during the course of domestic violence events.[11]

Full restoration of tribal criminal jurisdiction is the ideal solution to this problem but appears unlikely to occur in the immediate future. Tribes, however, can attempt to unilaterally expand VAWA beyond its plain text. Indeed, federal courts have independently expanded their own subject matter jurisdiction since the early days of the United States.[12] Federal courts accomplished this by inventing the common law doctrines of ancillary and pendent jurisdiction, ultimately giving rise to congressionally created supplemental jurisdiction.[13] Tribal courts should consider using the principles underlying supplemental jurisdiction to prosecute the myriad of additional crimes non-Indians may commit alongside an act of domestic violence.

This article proceeds in the following order. Part II presents data on Indians and crime. Part III discusses the reasons Indians suffer violence at higher rates than non-Indians. Part IV provides an overview of the Tribal Law and Order Act of 2010 and VAWA. Part V examines tribes' use of VAWA to date and legislative attempts to expand VAWA's tribal jurisdiction provisions. Part VI analyzes the arguments against enlarging tribal

7. Weitz, *supra* note 6. *See also*, *Violence Against Women Reauthorization Act One-Year Anniversary*, 160 CONG. REC. S942 (daily ed. Feb. 12, 2014) (Kimberly Norris Guerrero stating, "[o]ver the years, what happened is that white men, non-native men, would go onto a Native American reservation and go hunting—rape, abuse, and even murder a native woman, and there's absolutely nothing anyone could do to them"). **R**

8. Pub. L. No. 113-4, 127 Stat. 54 (2013).

9. 25 U.S.C. § 1304(c).

10. 25 U.S.C. § 1304(b)(4)(B).

11. *Id.*

12. *See infra* Part VII.

13. *See infra* Part VII.

court jurisdiction. Finally, Part VII provides an overview of the development of supplemental jurisdiction and then explores how tribes can apply supplemental jurisdiction to expand their criminal jurisdiction under VAWA.

II. Crime in Indian country

Indian women suffer the highest rates of rape and domestic violence in the United States.[14] On some reservations, it is estimated that every single Indian woman has experienced sexual violence.[15] Indian mothers are forced to discuss with their daughters what to do when—not if—they are raped.[16] However, Indian women are victims of more than rape and domestic violence; they are assaulted at the highest rate of all women in the United States[17] and are stalked at twice the rate of women from any other racial group.[18] Indian women are going missing at crisis levels.[19] Women in some

14. André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, U.S. Dep't of Justice, Nat'l Inst. of Justice 2 (June 1, 2016), https://perma.cc/KE8M-QGKC; *Policy Insights Brief: Statistics on Violence Against Native Women*, Nat'l Cong. of Am. Indians (Feb. 6, 2013), https://perma.cc/KT58-CR99 (stating that Indian women "are 2.5 times as likely to experience violent crimes – and at least 2 times more likely to experience rape or sexual assault crimes – compared to all other races.").

15. Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 Suffolk U. L. Rev. 455, 456 (2005) (stating "When I travel to Indian country, however, advocates tell me that the Justice Department statistics provide a very low estimate, and rates of sexual assault against Native American women are actually much higher. Many of the elders that I have spoken with in Indian country tell me that they do not know any women in their community who have not experienced sexual violence."); Sarah Deer, The Beginning and End of Rape: Confronting Sexual Violence in Native America 5 (2015) ("Through my work in Native communities, I heard more than once, *I don't know any woman in my community who has not been raped.*") (emphasis in original); Rachel Cain, *Supreme Court Upholds Tribal Court Ruling in Domestic Violence Case*, Think Progress, June 15, 2016, https://perma.cc/FQ3S-964Z (discussing the prevalence of sexual violence against American Indian women and quoting American Indian sexual assault victim's advocate Lisa Brunner stating, "[o]ur reality is not if [a Native woman is] raped, but when."); Kavitha Chekuru, *Sexual Violence Scars Native American Women*, Al jazeera, Mar. 6, 2013, https://perma.cc/X9RU-5VY4.

16. Maren Machles, et. al., *1 in 3 American Indian and Alaska Native women will be raped, but survivors rarely find justice on tribal lands*, USA Today, Oct. 18, 2019, https://perma.cc/YN7U-CYY9 (quoting Professor Sarah Deer, "Native women have told me that what you do when you raise a daughter in this environment is you prepare her for what to do when she's raped— not if, but when."); Sydney Parker, *Native American Mothers Ask: 'What do I tell my daughter when she is raped?'*, The Guardian, Mar. 17, 2016, https://perma.cc/8EJK-AWRL.

17. NCAI, *supra* note 14, at 2. **R**

18. *Id*. at 3. *See also* Rosay, *supra* note 14, at 2. **R**

19. *Missing and Murdered Indigenous Women & Girls*, Urban Indian Health Inst. (Feb. 28, 2019), https://perma.cc/XD3T-7ZEJ; *The Search: Missing and Murdered Indigenous Women*, Al Jazeera, May 8, 2019, https://perma.cc/B67K-57DD; *Tester's Bill to Study Missing & Murdered Indigenous Women Crisis Clears House & Moves to Senate*, U.S. Sen. for Mont., Jon Tester, Apr. 9, 2019, https://perma.cc/R2PH-R34P; *Cortez Masto, Murkowski Reintroduce Savanna's Act*, Catherine Cortez Masto, U.S. Sen. for Nev., Jan. 28, 2019, https://perma.cc/XMW2-KGJM.

tribes are murdered at a rate ten times the national average.[20] Distressingly, due to lack of law enforcement responsiveness and data collection issues, the data that is available likely underrepresents the true level of violence Indian women experience.[21]

Regardless of sex or gender, Indians are victims of violent crime at more than twice the rate of any other race;[22] in fact, Indian males are victims of violent crime at the highest rate in the United States.[23] Indian children are not spared either, as they experience violence at the highest rate of any children in the United States.[24] Heartbreakingly, due to the violence they endure, Indian children suffer from post-traumatic stress disorder ("PTSD") at the same rate as American combat veterans from the Iraq and Afghanistan Wars.[25] Being a victim of violence and experiencing PTSD are strongly linked to drug and alcohol abuse;[26] hence, substance abuse is a severe problem for Indians as well.[27]

The violence experienced by Indians is unique not only for its high rate but also because of the race relationships common between the victims and the offenders. Crimes committed in the general United States population are usually intra-racial.[28] For example, recent Department of Justice data show that eighty-four percent of white murder victims are killed by

20. Savanna's Act, S. 227, 116th Cong. § 2(a)(1) (2019); S. REP. NO. 112-13, at 7–8 (2012).

21. Adam Crepelle, *Concealed Carry to Reduce Sexual Violence Against Indian Women,* 26 KAN. J.L. & PUB. POL'Y 236, 238 (2017) ("The true figure is likely much, much higher because Indian victims often do not report violent crimes."); Lyndsey Gilpin, *Native American Women Still have the Highest Rates of Rape and Assault*, HIGH COUNTRY NEWS, June 7, 2016, https://perma.cc/E4TG-LFM9 ("Experts say these record numbers still underestimate the number of women affected by violence, and the infrastructure for women to report and handle incidents is underfunded."); Deer, *supra* note 15, at 5. R

22. Jennifer L. Truman & Lynn Langton, *Criminal Victimization, 2013*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 6 (Sept. 2014), https://perma.cc/Y72X-7BD7.

23. Steven W. Perry, *A BJS Statistical Profile, 1992–2002 American Indians and Crime*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 7 (Dec. 2004), https://perma.cc/C4DQ-YEMF.

24. *Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence: Ending Violence so Children Can Thrive*, U.S. DEP'T OF JUSTICE 6 (Nov. 2014), https://perma.cc/5TG7-MUUX.

25. Ending Violence so Children Can Thrive, *supra* note 24, at 6. R

26. Sarah E. Ullman, Mark Relyea, Liana Peter-Hagene & Amanda Vasquez, *Trauma Histories, Substance Use Coping, PTSD, and Problem Substance Use Among Sexual Assault Victims*, 38(6) ADDICT BEHAVIORS 2207, 2219–23 (June, 2013), https://perma.cc/FM6N-PQQF (internal citations omitted); *Traumatic Stress and Substance Abuse Problems*, INTERNATIONAL SOCIETY FOR TRAUMATIC STRESS STUDIES 2-3, https://perma.cc/6KVZ-U4G6; Editorial Staff, *Understanding the Connection Between Drug Addiction, Alcoholism, and Violence*, AMERICAN ADDICTION CENTERS, Dec. 19, 2019, https://perma.cc/855Q-PCPV.

27. Erin Bagalman & Elayne J. Heisler, *Behavioral Health Among American Indian and Alaska Natives: An Overview*, CONG. RESEARCH SERV. 2 (Sept. 16, 2016), https://perma.cc/6MML-VPAH; *Alcohol & Substance Abuse*, NAT'L CONG. AM. INDIANS, https://perma.cc/KY2M-L35Q (last visited Oct. 8, 2019); *Higher Rate of Substance Use Among Native American Youth on Reservations*, NAT'L INST. DRUG ABUSE (May 31, 2018), https://perma.cc/4Z52-EF7M.

28. Rachel E. Morgan, *Race and Hispanic Origin of Victims and Offenders, 2012–15*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 1 (Oct. 2017), https://perma.cc/4BKM-WFNQ; Alexia

whites, and ninety-three percent of black murder victims are killed by blacks.[29] However, most Indian victimizations are committed by non-Indians.[30] Indians are only about one and half percent of the United States population;[31] moreover, non-Indians comprise the majority population on some reservations.[32] This, at least partially, explains the tremendous level of interracial violence Indians experience.[33] Regardless of any explanation, the high rate of interracial violence is troubling, as is every Indian country criminal justice statistic. Describing Indian country crime rates, Senator Byron Dorgan (D-ND) stated, "I think it is sufficient to state that the statistics are staggering, the current state of affairs can merely be described as a national disgrace and one that we must address."[34]

III. Why American Indians Experience High Rates of Crime

It should be no surprise that Indians experience outrageous levels of crime. Indian country's nonsensical jurisdictional scheme makes it an ideal place for non-Indian predators to perpetrate their misdeeds. The lack of law enforcement resources in Indian country further worsens the problems caused by the convoluted jurisdictional framework. Dire socioeconomic conditions throughout much of Indian country further exacerbate these problems. This section explores how jurisdictional confusion, insufficient law enforcement resources, and socioeconomics contribute to crime in Indian country.

Cooper & Erica L. Smith, *Homicide Trends in the United States, 1980-2008*, U.S. Dep't of Justice, Bureau of Justice Statistics 13 (Nov. 2011), https://perma.cc/2LC6-VCH9.

29. Cooper *supra* note 28, at 13. **R**

30. Lawrence A. Greenfield & Steven K. Smith, *American Indians and Crime*, U.S. Dep't of Justice, Bureau of Justice Statistics 7 (Feb. 1999), https://perma.cc/NW6C-NZ3F; Rosay, *supra* note 14, at 4. **R**

31. Tina Norris, Paula L. Vines & Elizabeth M. Hoeffel, *The American Indian and Alaska Native Population: 2010*, U.S. Census Bureau 4 (Jan. 2012), https://perma.cc/5K3Z-84XD.

32. *Violence Against Women Reauthorization Act of 2013*, 159 Cong. Rec. S488 (2013) (speech by Sen. Udall) ("Yet over 50 percent of Native women are married to non-Indians, and 76 percent of the overall population living on tribal lands is non-Indian."); Joe Mitchell, *Forest Service National Resource Guide to American Indian and Alaska Native Relations*, U.S. Forest Service App. D (Dec. 5, 1997), https://perma.cc/2H8Z-VEAM ("A few reservations are 100 percent occupied by Indians, and others are almost entirely occupied by non-Indians."); NCAI Policy Research Center, *Population and Land Area of Cities/Towns Within Reservations or Oklahoma Statistical Areas*, Nat'l Cong. Am. Indians 4 (Dec. 18, 2015), https://perma.cc/RRD7-3AJD.

33. Rosay, *supra* note 14, at 4. **R**

34. *Law Enforcement in Indian Country: Hearing Before the Comm. on Indian Affairs*, 110th Cong. 2 (2007).

A. Jurisdiction

Criminal jurisdiction is usually a straightforward matter of territory in the United States; that is, the crime is prosecuted under the laws of the place where the crime occurred.[35] However, Indian country criminal jurisdiction is more tortuous.[36] Every Indian country prosecution requires a determination of whether the victim is an Indian, whether the perpetrator is an Indian, and whether the scene of the crime qualifies as Indian country.[37] This jurisdictional escapade is the result of two hundred plus years of United States Indian policy and is described below.

1. How Tribal Court's Lost Jurisdiction Over Non-Indians

Indian tribal justice systems long predate European arrival.[38] Tribes exercised jurisdiction over all persons within their territory even during the early years of the United States.[39] The United States definitively recognized tribal criminal jurisdiction over non-Indians in early treaties with tribes,[40]

35. American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (internal citation omitted) ("But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); Julie R. O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1031 (2018) (noting that subjective territorial jurisdiction "has long enjoyed the Supreme Court's full-throated support."); *Prosecuting Crime in Indian Country*, MOTHER JONES (last accessed Jan. 16, 2020), https://perma.cc/JD63-6D8J.

36. *Fresh Pursuit from Indian Country: Tribal Authority to Pursue Suspects onto State Land*, 129 HARV. L. REV. 1685, 1686 (2016) (calling Indian country criminal jurisdiction a "jurisdictional maze") *A Roadmap for Making Native America Safer, Report to the President & Congress of the United States*, Indian Law & Order Commission, 18 (2013), https://perma.cc/ZAA8-4X3H (describing Indian country jurisdiction an "indefensible maze of complex, conflicting, and illogical commands"); Crepelle, *supra* note 21, at 239 (calling it a "bewildering mess"). R

37. Arvo Q. Mikkamen, *Indian Country Criminal Jurisdiction Chart*, DEP'T OF JUSTICE, U.S. ATTORNEY'S OFFICE (Dec. 2010), https://perma.cc/HA2Y-G9KH; Riley, *supra* note 6, at 1575. R

38. Eugene K. Bertman, *Tribal Appellate Courts: A Practical Guide to History and Practice*, 84 OKLA. B.J., 2115, 2116 (2013) (noting that Indian tribes had fora for dispute resolution prior to the arrival of Europeans); B.J. Jones, *Role of the Indian Tribal Courts in the Justice System*, 4 (2000), https://perma.cc/C93Z-7PE3 (acknowledging that America's indigenous people had dispute resolution systems before Europeans arrived on the continent); Robert V. Wolf, *Widening the Circle: Can Peacemaking Work Outside of Tribal Communities?*, CENTER FOR COURT INNOVATION 1 (2012), https://perma.cc/Z3PK-W8DB (noting tribal justice systems existed before European arrival in America).

39. WILLIAM C. CANBY, JR., *American Indian Law In a Nutshell* 149 (6th ed. 2015) ("In colonial days, the Indian territory was entirely the province of tribes, and they had jurisdiction in fact and theory over all persons and subjects present there."); G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty"*, 76 MARQ. L. REV. 401, 420 (1993) (noting that tribes could exercise criminal jurisdiction over non-Indians prior to the Supreme Court's decision in *Oliphant*).

40. *See e.g.*, Treaty With the Chickasaw art. IV, Chickasaw Nation-U.S., Jan. 10 1786, https://perma.cc/ES82-7NKQ ("If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands hereby allotted to the Chickasaws to live and hunt on, such person shall forfeit the protection of the United States of America, and the Chickasaws may punish him or not

but the United States also acquired some jurisdiction over crimes committed in Indian territory when a United States citizen was the victim.[41] The United States further extended its jurisdictional reach into Indian country with the passage of the Indian Trade and Intercourse Act.[42] In addition to regulating commercial interactions between Indians and non-Indians, the Act regulated the behavior of non-Indians while in Indian country.[43] The General Crimes Act of 1817 furthered the United States' jurisdictional intrusion into tribal territory by granting the federal government authority over criminal activity between Indians and non-Indians.[44] The United States maintains criminal jurisdiction over non-Indians in Indian country under this Act.[45]

Federal power over Indian country crimes came into question during the 1880s. When Crow Dog, a Sioux Indian, murdered another Sioux on the Great Sioux Reservation, the families of the murderer and the victim met to restore harmony to the community.[46] The case was successfully resolved according to the Sioux;[47] however, the United States was dissatisfied with the Sioux's restorative justice.[48] Thus, the United States prosecuted Crow Dog, convicted him, and sentenced him to hang.[49] Crow Dog's appeal reached the Supreme Court, which ruled in his favor—holding the United

as they please."). *See also* Treaty With the Creeks art. VI, Creek Nation of Indians-U.S., Aug. 7, 1790, https://perma.cc/6TQE-ZJHE; Treaty With the Cherokee art. VIII, Cherokee Nation of Indians-U.S., July 2, 1791, https://perma.cc/2YZ6-UC7M.

41. *See e.g.*, Treaty With the Chickasaw, *supra* note 40, at art. V ("If any Indian or Indians, or persons residing among them, or who shall take refuge in their nation, shall commit a robbery or murder, or other capital crime, on any citizen of the United States, or person under their protection, the tribe to which such offender or offenders may belong, or the nation, shall be bound to deliver him or them up to be punished according to the ordinances of the United States in Congress assembled: Provided, that the punishment shall not be greater, than if the robbery or murder, or other capital crime, had been committed by a citizen on a citizen."). *See also* Treaty With the Creeks, *supra* note 40, at art. VIII; Treaty with the Cherokee, *supra* note 40, at art. X. R R

42. Indian Trade and Intercourse Act, Pub. L. No. 1-137, 1 Stat. 137 (1790).

43. *Id.* § 5.

44. Currently codified in 18 U.S.C. § 1152 (2019).

45. *Id.*

46. Daniel L. Rotenberg, *American Indian Tribal Death–A Centennial Remembrance*, 41 U. MIAMI L. REV. 409, 413 (1986) (stating that the families of the disputants resolved the matter according to tribal custom); John Rockwell Snowden & David J. Wishart, *Ex Parte Crow Dog*, ENCYCLOPEDIA OF THE GREAT PLAINS (2011), https://perma.cc/VUV9-MZ4K; Indian Law & Order Commission, *supra* note 36, at 117, https://perma.cc/97UE-ZW4V. R

47. James Winston King, *The Legend of Crow Dog: An Examination of Jurisdiction Over Intra-Tribal Crimes Not Covered by the Major Crimes Act*, 52 VAND. L. REV. 1479, 1486 (1999) ("As far as the tribe was concerned, the matter was settled."); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 801 (2006).

48. Anthony G. Gulig & Sidney L. Harring, "*An Indian Cannot Get a Morsel of Pork. . . .*" *A Retrospective on Crow Dog, Lone Wolf, Blackbird, Tribal Sovereignty, Indian Land, and Writing Indian Legal History*, 38 TULSA L. REV. 87, 89 (2002); Indian Law & Order Commission, *supra* note 36, at 117, https://perma.cc/97UE-ZW4V; Rotenberg, *supra* note 46, at 413. R R

49. Ex parte Crow Dog, 109 U.S. 556, 557 (1883).

States had no jurisdiction over Indian country crimes involving only Indians.[50]

Congress latched onto Crow Dog's acquittal to pass the Major Crimes Act of 1885 ("MCA").[51] An Indian was indicted under the MCA a year later, and he argued that Congress lacked constitutional authority to pass the MCA.[52] The Court rejected the Commerce Clause as a source of power for the MCA;[53] nonetheless, the Court affirmed the statute because the Indians were considered a weak, helpless, and dependent people.[54] In doing so, the Court created the plenary power doctrine that is not rooted in the Constitution's text,[55] but rather, in a belief of Indian racial and cultural inferiority.[56] Despite its dubious constitutionality,[57] the MCA remains the source of federal criminal jurisdiction over Indian-on-Indian crime in Indian country.[58]

In contrast to federal jurisdiction, state jurisdiction was presumed to be inapplicable to Indian country during the early years of the United States.[59] This began to change in 1881, when the Court ruled that the equal footing doctrine provided Colorado with criminal jurisdiction over crimes involving only non-Indians "throughout the whole of the territory within its limits, including the Ute Reservation."[60] Through this ruling, states were granted criminal jurisdiction over Indian country within their geographical limits when the crime involves only non-Indians.[61] Additionally, some states exercise criminal jurisdiction over Indian country crimes involving Indians through federal legislation[62] or gaming compacts.[63]

50. *Id*. at 572.

51. Keeble v. United States, 412 U.S. 205, 209 (1973).

52. United States v. Kagama, 118 U.S. 375, 375–76 (1886).

53. *Id*. at 378–79.

54. *Id*. at 383–84.

55. Gregory Ablavsky, *Beyond the Indian Commerce Clause,* 124 YALE L. J. 1012, 1015 (2015); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 35 (1996); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations,* 132 U. PA. L. REV. 195, 196 (1984).

56. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 163 (2002); FRANK POMMERSHEIM, BROKEN LANDSCAPE 46 (2009); ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON, THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 72 (2005).

57. United States v. Bryant, 136 S.Ct. 1954, 1968 (2016) (Thomas, J., concurring) (internal citations omitted); s*ee also* Washburn, *supra* note 47, at 807; POMMERSHEIM, *supra* note 56 at 62.

58. 18 U.S.C. § 1153 (2019); *see also* Justice Manual 679, UNITED STATES DEPARTMENT OF JUSTICE (last visited Jan. 16, 2020), https://perma.cc/RL9C-HCNV.

59. Worcester v. Georgia, 31 U.S. 515, 561 (1832).

60. United States v. McBratney, 104 U.S. 621, 624 (1881).

61. New York ex rel. Ray v. Martin, 326 U.S. 496, 499 (1946); Draper v. United States, 164 U.S. 240, 247 (1896); McBratney, 104 U.S. at 624.

62. *E.g.,* 18 U.S.C. § 1162 (2019); Maine Indian Claims Settlement Act, Pub. L. No. 96-420, § 6(a), 94 Stat. 1785 (1980).

63. National Council of Legislators from Gaming States, *Information Concerning Tribal-State Gaming Compacts* 51, https://perma.cc/2DNE-KX4M (listing state-tribal jurisdiction compacts).

Throughout the years, tribal criminal jurisdiction was presumed to remain intact through the guide star of federal Indian law—tribes possess all sovereign powers they have not overtly surrendered.[64] Some tribes relinquished criminal jurisdiction over non-Indians through treaties,[65] but no blanket legislation had ever stripped tribes of their criminal powers.[66] Nonetheless, tribal courts had their sentencing power greatly restricted by the Indian Civil Rights Act of 1968 ("ICRA").[67] ICRA originally limited tribal courts to a maximum penalty of six months in jail and a $500 fine.[68]

The question of tribal court jurisdiction over non-Indians was answered in *Oliphant v. Suquamish Tribe*.[69] Mark Oliphant was a non-Indian resident of the Port Madison Indian Reservation.[70] While on the reservation, Oliphant got drunk, punched a tribal law enforcement officer, and was prosecuted in tribal court.[71] Oliphant's defense was simple—he was not an Indian, and therefore the tribal court lacked jurisdiction to prosecute him.[72] The federal district court found this argument unconvincing, and the Ninth Circuit Court of Appeals affirmed.[73] In fact, the Ninth Circuit found it imperative that the tribe have criminal jurisdiction over non-Indians because both the state and federal government openly refused to police the tribe's reservation at the time the crime was committed.[74] The Supreme Court reversed.[75] Although the Court acknowledged that tribes had never been explicitly divested of criminal jurisdiction over non-Indians, the Court nevertheless determined that tribes had been implicitly divested of this power.[76]

The Court's *Oliphant* opinion is loaded with errors and misleading statements. For example, the Court claims: "The effort by Indian tribal

64. United States v. Wheeler, 435 U.S. 313, 323 (1978) ("But until Congress acts, the tribes retain their existing sovereign powers."); United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted."); Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 104 (2017).

65. Treaty of Dancing Rabbit Creek art. IV, Mississippi Band of Choctaw Indians-U.S., Sept. 27, 1830, https://perma.cc/RTP5-U3R2.

66. *E.g.*, Walker v. Rushing, 898 F.2d 672, 675 (8th Cir. 1990) (internal citation omitted) ("Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority."); State v. Schmuck, 121 Wash. 2d 373, 396 (Wash. 1993).

67. 25 U.S.C. § 1302(b), (d) (2019).

68. Indian Law & Order Commission, *supra* note 36, at 21. **R**

69. 435 U.S. 191 (1978).

70. *Id.* at 194.

71. *Id.*; Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of* Oliphant v. Suquamish Indian Tribe, INDIAN LAW STORIES 264 (Philip P. Frickey, Carole E. Goldberg & Kevin K. Washburn eds., 2010).

72. *Oliphant*, 435 U.S. at 194.

73. Oliphant v. Schlie, 544 F.2d 1007, 1014 (9th Cir. 1976).

74. *Id.* at 1013.

75. *Oliphant*, 435 U.S. at 212.

76. *Id.* at 204.

courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon."[77] This is flatly wrong. In addition to the treaties wherein the United States plainly recognizes tribal criminal jurisdiction over non-Indians, the United States turned over white fugitives to Indian tribes for prosecution as late as the mid-1840s.[78] The Court could only find one opinion to support its holding,[79] and by the Court's own admission, the author of the opinion was an inept judge whose "views as to the ultimate destiny of the Indian people are not in accord with current thinking on the subject."[80] The Court also relied upon a withdrawn opinion from the Solicitor of the Department of the Interior[81] and an old Senate Report that had recently been contradicted by a congressionally created policy review commission.[82] Despite the opinion's factual errors and racist undertones, the Court's holding in *Oliphant* remains binding precedent. Following *Oliphant*, the Court further diminished tribal court jurisdiction holding that tribal courts lack criminal jurisdiction over Indians who are not citizens of the prosecuting tribe in *Duro v. Reina*.[83]

Nonetheless, in recent years tribal jurisdiction has been on an upward swing. Congress overturned *Duro*, and the Court subsequently affirmed the "*Duro* fix," holding that tribal courts can criminally prosecute crimes committed by any Indian.[84] The Court also affirmed that tribal prosecutions are performed under a tribe's inherent sovereignty rather than as an extension of federal power.[85] A federal court of appeals has upheld tribal criminal jurisdiction over one of the tribe's citizens for a crime the citizen committed off of the tribe's reservation.[86] Tribal courts have also successfully asserted criminal jurisdiction over non-United States citizens.[87] During the past dec-

77. *Id*. at 196–97.

78. Paul Spruhan, *"Indians, in a Jurisdictional Sense": Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, AM. INDIAN L. J. (2017) (noting Jacob West, a white man, was sentenced to hang by a Cherokee court, and the federal court refused to grant West habeas corpus in 1844); MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 349 (2016); Ablavsky, *supra* note 55, at 1086, n.400. **R**

79. Ex parte Kenyon, 14 F. Cas. 353 (W.D. Ark. 1878).

80. *Oliphant,* 435 U.S. at 200, n.10 (also noting Judge Parker was frequently overturned). *See also* David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293, 298 (2000); Mark Boardman, *Beginning of the End: How Famed "Hanging Judge" Isaac Parker Lost his Power*, TRUEWEST MAGAZINE (Feb. 11, 2014), https://perma.cc/D2UT-WU9V.

81. *Oliphant*, 435 U.S. at 201, n.11.

82. *Id.* at 205, n.15.

83. 495 U.S. 676, 679 (1990).

84. United States v. Lara, 541 U.S. 193, 215–16 (2004).

85. *Id.* at 210.

86. Kelsey v. Pope, 809 F.3d 849, 852 (6th Cir. 2016).

87. *See, e.g.,* Eastern Band of Cherokee Indians v. Martinez, 15 AM. TRIBAL LAW 45 (Eastern Cherokee Sup. Ct. 2018); Eastern Band of Cherokee Indians v. Torres, 4 Cher. Rep. 9 (Eastern Cherokee

ade, Congress passed the Tribal Law and Order Act, enhancing tribal sentencing authority, and VAWA, partially overturning *Oliphant*.[88]

2. *Who Is an Indian?*

"Who is an Indian?"—this question remains the root cause of many problematic jurisdictional questions facing Indian country today. It must be noted at the outset of this discussion that basing criminal jurisdiction on someone's Indian status does not violate the Equal Protection Clause because "Indian" is a political classification as well as a racial classification.[89] Tribes have long been recognized as nations by the United States and other colonial powers;[90] therefore, enrollment in a tribe[91] makes the individual a citizen of that tribal nation rather than merely a member of some private club.[92] Nonetheless, in Indian country criminal cases, tribal citizenship is not enough for one to be considered an "Indian."[93]

To be considered an "Indian" for the purpose of Indian country criminal jurisdiction, an individual must possess Indian blood and be recognized as Indian.[94] Whether someone has Indian blood can usually be established fairly simply,[95] but courts often struggle when deciding whether a person is

Sup. Ct. 2005); s*ee also* National Congress of American Indians (hereinafter "NCAI"), VAWA 2013's Special Domestic Violence Criminal Jurisdiction (SDVCJ) Five-Year Report, https://perma.cc/5XDZ-8WYM (2018) (noting tribes implementing VAWA have prosecuted eight non-U.S. citizens).

88. *See infra*, Part IV.

89. United States v. Antelope, 430 U.S. 641, 646–47 (1977); United States v. Zepeda, 792 F.3d 1103, 1111 (9th Cir. 2015); Means v. Navajo Nation, 432 F.3d 924, 930 (9th Cir. 2005).

90. Worcester v. Georgia, 31 U.S. 515, 542–43 (1831); Stephanie Gamble, *Treaty Negotiations with Native Americans*, The Encyclopedia of Greater Philadelphia, https://perma.cc/6YED-EFJG (last visited Oct. 29, 2019); National Museum of the American Indian, *Nation to Nation: Treaties Between the United States and American Indian Nations*, Smithsonian, https://perma.cc/AT53-9AAU (last visited Oct. 29, 2019).

91. Determining which indigenous groups constitute a "tribe" is an equally difficult question. *See* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 588 (1st Cir. 1979) ("We think it appropriate that the definition of 'tribe' remain broad enough and flexible enough to continue to reflect the inevitable changes in the meaning and importance of tribal relations for the tribal members and the wide variations among tribal groups living in different parts of the country under different conditions."); Adam Crepelle, *Standing Rock in the Swamp: Oil, the Environment, and the United Houma Nation's Struggle for Federal Recognition*, 64 Loyola L. Rev. 141, 147–53 (2018).

92. United States v. Mazurie, 419 U.S. 544, 557 (1975); Vann v. Kempthorne, 534 F.3d 741, 744 (C.A. D.C. 2008); *see also* Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 Cal. L. Rev. Circuit 23, n. 1 (2013).

93. Alberty v. United States, 162 U.S. 499, 500–01 (1896); United States v. Rogers, 45 U.S. 567, 573 (1846).

94. Rogers, 45 U.S. at 572–73; United States. v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005); State v. Reber, 171 P.3d 406, 409–10 (Utah 2007); State v. LaPier, 790 P.2d 983, 986 (Mont. 1990); Goforth v. State, 644 P.2d 114, 116 (Okla. Crim. App. 1982).

95. Mohn v. Zinke, 688 F. App'x 554, n. 2 (10th Cir. 2017); Davis v. United States, 192 F.3d 951, 956 (10th Cir. 1999) ("Certificates of Degree of Indian Blood ('CDIBs') are issued by the BIA and are the BIA's certification that an individual possesses a specific quantum of Indian blood."); Paul Spruhan,

recognized as an Indian. Different federal circuits use different tests, so an individual may qualify as an Indian in one circuit but fail to be an Indian in another.[96] The debate over who is an Indian is one of the most controversial topics in Indian country today.[97]

3. What Is Indian Country?

Deciphering the status of Indian land may be even trickier than discerning who is an Indian. In 1823, Chief Justice John Marshall issued a landmark decision proclaiming that Indians do not own their land—they merely occupy it.[98] However, tribes were able to maintain land rights through treaties and various other federal acts that created reservations.[99] The United States engineered the reservation system to "civilize" the Indians by destroying their traditional cultures.[100] As part of the effort to civilize the Indians, Congress passed the General Allotment Act of 1887.[101] The Act wholly disregarded the United States' treaty vows to respect tribal lands by dividing reservations into parcels of up to 160 acres for each Indian head of household.[102] The remaining lands were opened for non-Indian

CDIB: The Role of the Certificate of Degree of Indian Blood in Defining Native American Legal Identity, 6 AM. INDIAN L. J. 169, 170 (2018).

96. *Compare* United States v. Stymiest, 581 F.3d 759, 763–64 (8th Cir. 2009), *with* United States v. Cruz, 554 F.3d 840, 845–46 (9th Cir. 2009); s*ee also* ANGELIQUE TOWNSEND EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 49 (2013) (stating that "the Eighth Circuit test is much broader, allowing the inclusion of a person for federal criminal prosecution as an Indian when the same person may not be eligible as an Indian for tribal citizenship or federal services.").

97. *E.g.,* Jaime Dunaway, *The Fight Over Who's a "Real Indian*," SLATE (Jun 12, 2018), https://perma.cc/4JPG-Z4VF; Jacqueline Keeler, *The Real Problem with Susan Taffe Reed and Fake Indian Tribes*, DAILY BEAST (Apr. 13, 2017), https://perma.cc/4RF8-X39P; Erik Ortiz and Angel Torres, *Elizabeth Warren's DNA Test Raises Fraught Questions of Native American Identity, Tribes Say*, NBC NEWS (Oct. 20, 2018), https://perma.cc/Y5CJ-9WK2.

98. Johnson v. McIntosh, 21 U.S. 543, 584–85 (1823).

99. Indian Affairs, *Frequently Asked Questions*, U.S. DEPT. OF INTERIOR (last visited Oct. 29, 2019), https://perma.cc/S5H3-9DKN ("A federal Indian reservation is an area of land reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the tribe.").

100. Adam Crepelle and Walter Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country,* 23 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 315, 322 (2017) ("The reservations tribes were placed on by treaties proved ruinous for Amerindians. Desperate poverty snared many tribal economies, and traditional tribal culture withered.").

101. 25 U.S.C. § 331, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, Title I, § 106(a)(1), 114 Stat. 2007.

102. Squire v. Capoeman, 351 U.S. 1, 3 (1956); Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History,* 49 IDAHO L. REV. 519, 521 (2013); *see also* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 336 (1998) ("In accordance with the Dawes Act, each member of the Yankton Tribe received a 160-acre tract from the existing reservation, held in trust by the United States for 25 years.").

settlement.[103] Allotment is widely regarded as the most harmful piece of legislation in the history of United States Indian policy.[104]

Although Congress ended the process of allotment in 1934,[105] the impact of allotment continues to haunt present day Indian law.[106] In addition to depriving tribes of 90 million acres of land,[107] allotment produced "checkerboarding" on reservations—alternating interwoven tracts of fee and trust land.[108] This is troublesome because tribes and the federal government usually have jurisdiction over trust land; whereas, non-Indian owned fee land within a reservation is often under state control.[109] The web woven by allotment is so tangled that a single tract of land can be under tribal, state, and federal jurisdiction.[110]

The mixing of jurisdictions results in a law enforcement nightmare and prompted Justice Douglas to opine that checkerboarding aids "those who benefit from confusion and uncertainty."[111] Blurred jurisdictional lines force police to patrol reservations with a GPS in hand in order to determine whether they have the authority to arrest criminals.[112] But even a GPS is not

103. Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 493 (2017); *History,* INDIAN LAND TENURE FOUNDATION (last visited Oct. 29, 2019), https://perma.cc/2TC9-PJUR.

104. Steven J. Gunn, *Indian General Allotment Act (Dawes Act) (1887)*, ENCYCLOPEDIA.COM (last updated Oct. 23, 2019), https://perma.cc/2PGD-C6MS ("Historians and other observers agree that the Dawes Act was disastrous for the Indians."); History, *supra* note 103; Pommersheim, *supra* note 102, at 522. **R**

105. Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 16 (1995); Christian Dippel & Dustin Frye, *The Effect of Land Allotment on Native American Households During the Assimilation Era* (2019), https://perma.cc/6LBR-FG6W.

106. *Issues,* INDIAN LAND TENURE FOUNDATION (last visited Oct. 29, 2019), https://perma.cc/PCH9-2X9E. Royster, *supra* note 105, at 17–18.

107. Pommersheim, *supra* note 102, at 525; History, *supra* note 103. Royster, *supra* note 105, at 16, n.59. **R**

108. *See* Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358 (1962) (discussing the jurisdictional problems caused by the "impractical pattern of checkerboard jurisdiction"); Ute Indian Tribe of the Uintah v. Myton, 835 F.3d 1255, 1262 (10th Cir. 2016) (discussing the same); Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENVTL. L.J. 195, 200 (2015) (noting the Dawes Act "resulted in 'checkerboard' patterns of landownership within many Indian reservations in the western United States.").

109. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001) (holding the Navajo could not tax "nonmembers on non-Indian fee land within the reservation. . ."); Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997) (holding that absent congressional direction, tribes lack civil authority over nonmember conduct on non-Indian land within a reservation); Montana v. United States, 450 U.S. 544 (1981) (holding that tribes generally lack civil jurisdiction over non-Indians on fee lands located within a reservation).

110. *See, e.g.*, Bryan T. Anderson, *South Dakota v. Yankton Sioux Tribe: Sewing a Patchwork Quilt of Jurisdiction*, 3 GREAT PLAINS NAT. RESOURCES J. 99, 112–13 (1998) (discussing the "patchwork quilt" jurisdiction of Charles Mix County, South Dakota).

111. DeCouteau v. District Cnty. Court For the Tenth Judicial District, 420 U.S. 425, 467 (1975) (Douglas, J., dissenting).

112. Angela Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1731 (2012); s*ee also* Melissa L. Tatum, *Law Enforcement Authority in Indian Country: Challenges Presented by the Full Faith and Credit*

enough to answer which sovereign has jurisdiction, as lawsuits frequently arise over whether land qualifies as Indian country.[113] Criminal cases hinge upon the status of land, and determining whether land is under tribal jurisdiction can take years.[114]

B. Lack of Law Enforcement Resources

Lack of law enforcement resources compounds the jurisdictional conundrum and is a cause of the increased crime rates facing Indian country. Indian country totals fifty-six million acres, yet there are only approximately 3,000 tribal and federal officers patrolling the entire area.[115] In fact, the prototypical tribal police force is responsible for protecting 500,000 acres of land with approximately two police officers.[116] Indian country's jurisdictional scheme often requires non-Indian law enforcement to participate in policing reservations; however, the nearest non-Indian law enforcement agency is often over 100 miles away from Indian country, increasing potential response time.[117] Police response times are further delayed by the poor roads and lack of physical infrastructure in Indian country.[118]

Furthermore, state and federal prosecutors seldom prioritize Indian country law enforcement. A 2010 Government Accountability Office report found that federal prosecutors declined to prosecute sixty-seven percent of Indian country sex crimes,[119] though steps have been taken to remedy the

Provisions of the Violence Against Women Acts, 4 TRIBAL L.J. 2, 16 (2004); Michael Riley, *1885 Law at Root of Jurisdictional Jumble*, DENVER POST (last updated Nov. 13, 2007), https://perma.cc/2D4Q-5XVJ; *Tribal Court-State Court Forum Meeting*, JUDICIAL COUNCIL OF CALIFORNIA 3 (June 11, 2015), https://perma.cc/KAV6-EASV.

113. *E.g.*, Nebraska v. Parker, 136 S. Ct. 1072, 1078–79 (2016); United States v. Joseph Joshua Jackson, 853 F.3d 436, 438 (8th Cir. 2017); Cayuga Indian Nation of New York v. Seneca Cnty., 260 F. Supp. 3d 290 (W.D.N.Y. 2017).

114. *See, e.g.* Sharp v. Murphy, 875 F.3d 896, 903 (10th Cir. 2017), cert. granted, 138 S. Ct. 2026 (2018). *See also* Sharp v. Murphy Petition for a Writ of Certiorari 24, Feb. 6, 2018, No. 17-1107 ("On August 28, 1999, Patrick Murphy mutilated and murdered his girlfriend's former lover, a man named George Jacobs." The only issue is whether the land qualifies as Indian country).

115. Band of Cahuilla & Cupeno Indians v. Jewell, 729 F.3d 1025, 1030 (9th Cir. 2013); Tribal Law and Order Act of 2010, Pub. L. No. 111–211, § 202(a)(3), 124 Stat. 2261.

116. Stewart Wakeling et al., *Policing on American Indian Reservations*, U.S. DEP'T OF JUSTICE 9 (2001), https://perma.cc/2PA7-VVNA.

117. Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 115 (1995); Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, AM. CONSTITUTION SOCIETY 6 (Mar. 2009), https://perma.cc/QM6Y-WHER; *Journey Through Indian Country Part 1: Fighting Crime on Tribal Lands*, FBI (June 1, 2012), https://perma.cc/L6XB-UNZM.

118. *Enhancing Tribal Self-Governance and Safety of Indian Roads: Hearing Before the Comm. on Indian Affairs*, 116th Cong. 21 (2019); *Highways and Highway Safety on Indian Lands*, CONG. RESEARCH SERV. Summary (Feb 2, 2016), https://perma.cc/G7NC-S5UJ.

119. *U.S. Dep't of Justice Declinations of Indian Country Criminal Matters*, U.S. GOV'T ACCOUNTABILITY OFFICE 9 (Dec. 13, 2010), https://perma.cc/C4KB-W2DT.

high federal declination rate.[120] State prosecutors also decline to prosecute crimes in Indian country at high rates.[121] The vast distance between non-Indian courthouses and Indian country certainly make Indian country prosecutions less appealing to non-Indian prosecutors because these prosecutors could solve a crime that occurred across the street from their office by the time they drive to Indian country.[122] Additionally, cultural differences between Indians and non-Indian law enforcement lead to trust and communication issues, making prosecutions more difficult.[123] Communication problems make evidence collection more challenging, leading to a lack-of-evidence being the number one reason why federal prosecutors decline to prosecute cases in Indian country.[124]

C. Socioeconomics

Though the relationship between crime and poverty is complex,[125] poverty is likely a significant factor in the high rates of violence experienced by Indians. Data show that persons who live at or below the poverty level are more than twice as likely to be the victims of violent crime as individuals who live in high-income households.[126] Indians have the highest rate of poverty in the United States[127] and live in overcrowded households at the highest rate in the United States.[128] Indians are the majority popula-

120. *Department of Justice Releases Annual Report to Congress on Indian Country Investigation and Prosecutions*, U.S. DEP'T OF JUSTICE (Nov. 21, 2018), https://perma.cc/FK8R-N9CC.

121. Maire Corcoran, *Rhetoric Versus Reality: The Jurisdiction of Rape, the Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L. 415, 426 (2009); Carole Goldberg & Heather Valdez Singleton, *Final Report: Law Enforcement and Criminal Justice Under Public Law 280*, DEP'T. OF JUSTICE 329 (May 2008), https://perma.cc/8BHL-C7B2;Crepelle, *supra* note 21, at 243; Law & Order Commission, *supra* note 36, at 69. R

122. Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 20, 2012), https://perma.cc/33TZ-WSEA; Fletcher, *supra* note 117, at 6; Reno, *supra* note 117, at 115.

123. Andrew G. Hill, *Another Blow to Tribal Sovereignty: A Closer Look at Cross-Jurisdictional Law-Enforcement Agreements Between Indian Tribes and Local Communities*, 34 AM. INDIAN L. REV. 291, 301 (2010); Ian MacDougall, *Should Indian Reservations Give Local Cops Authority on Their Land?*, THE ATLANTIC (July 19, 2017), https://perma.cc/64G2-J3LK; Riley, *supra* note 6, at 1584. R

124. U.S. Dept. of Justice, *Indian Country Investigations and Prosecutions* 32–33 (2017), https://perma.cc/MZ85-XKBT.

125. Office of Policy Development and Research, *Neighborhoods and Violent Crime*, U.S. DEP'T OF HOUSING AND URBAN DEV. (2016), https://perma.cc/3VW3-XMYC; Bradford Plumer, *Crime Conundrum*, THE NEW REPUBLIC (Dec. 21, 2010), https://perma.cc/J79Q-NFVQ; Kevin Shird, *Violence Is a Symptom of Poverty, Not a Cause*, THE HILL (Mar. 6, 2017), https://perma.cc/EN9C-2J46.

126. Erika Harrell et al., *Household Poverty and Nonfatal Violent Victimization, 2008-2012*, U.S. Dep't of Justice 1 (2014), https://perma.cc/5D9C-LZ5G.

127. Suzanne Macartney et al., *Poverty Rates for Selected Groups Detailed Race and Hispanic Groups by State and Place: 2007-2011*, U.S. CENSUS BUREAU 3 (2013), https://perma.cc/6ZJF-DAGB; *American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU NEWSROOM (Oct. 6, 2017), https://perma.cc/2WP3-EKTY.

128. Craig Harris & Dennis Wagner, *HUD: Housing Conditions for Native Americans Much Worse than Rest of U.S.*, THE REPUBLIC (Jan. 19, 2017), https://perma.cc/WVV5-K6KT; *Housing & Infrastruc-*

tion in seven of the eight poorest counties in the United States,[129] despite composing only about one-and-a-half percent of the United States' population.[130] High unemployment is also associated with elevated crime rates,[131] which is troubling as the unemployment rate on reservations can exceed fifty percent.[132] For perspective, the United States highest national unemployment rate, at almost twenty-five percent, occurred during the Great Depression in 1933.[133]

Generations of colonial United States Indian policy are the cause of poverty in Indian country today. Prior to European contact and for many years after, tribes had vibrant, free-market economies.[134] The entire reservation system was designed to crush the Indian spirit and create dependency on the United States.[135] The Indians' dependency upon the federal government was a means to control the Indians as glaringly illustrated during the Yankton Sioux Tribe's negotiations with Commissioner John Cole in 1892:

> I want you to understand that you are absolutely dependent upon the Great Father to-day for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes . . . Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result? Not one-fourth of your people could live through the winter, and when the grass

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ture, NAT'L CONGRESS OF AM. INDIANS, https://perma.cc/9PRP-E8GD (last visited Feb. 3, 2019); Natural Resources Committee Democrats, *Water Delayed is Water Denied: How Congress Has Blocked Access to Water for Native Families*, DEMOCRATIC STAFF OF THE HOUSE COMM. ON NAT. RES. 1 (Oct. 10, 2016), https://perma.cc/LW2D-NELP.

Housing & Infrastructure, NAT'L CONGRESS OF AM. INDIANS, https://perma.cc/9PRP-E8GD (last visited Feb. 3, 2019) ("Forty percent of on-reservation housing is considered substandard (compared to 6 percent outside of Indian Country) and nearly one-third of homes on reservations are overcrowded.").

129. *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country*, *Hearing before the S. Comm. on Indian Affairs*, 111th Cong. 2 (2010).

130. Tina Norris, et al., *The American Indian and Alaska Native Population: 2010*, U.S. CENSUS BUREAU 4 (Jan. 2012), https://perma.cc/WZ84-T6K9.

131. Brian Bell, Anna Bindler & Stephen Machin, *Crime Scars: Recessions and the Making of Career Criminals,* 100 REV. OF ECON. AND STAT. 392 (2018); Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J.L. & ECON. 259 (2000).

132. *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 1 (2010); Ariana Bustos, *Despite Gains, Native American Unemployment Still Lags Behind Nation*, CRONKITE NEWS (May 9, 2018), https://perma.cc/K3ES-N599; Vincent Schilling, *Terrible Statistics: 15 Native Tribes with Unemployment Rates Over 80 Percent*, INDIAN COUNTRY TODAY (Aug. 29, 2013), https://perma.cc/M3K7-H7XC.

133. Kimberly Amadeo, *Unemployment Rate by Year Since 1929 Compared to Inflation and GDP*, THE BALANCE (last updated Oct. 2, 2019), https://perma.cc/DXZ7-VNRR.

134. Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTRP., AND L. 129, 148 (2019); ROBERT J. MILLER, RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 3 (2013); Crepelle, *supra* note 104, at 341. **R**

135. Fletcher, *supra* note 78, at 82; Crepelle, *supra* note 134. **R**

> grows again it would be nourished by the dust of all the balance of your noble tribe.[136]

The ensuing lack of opportunity and personal freedom on reservations created hopelessness,[137] which in turn contributes to the substance abuse epidemic that continues to plague Indians.[138]

The socioeconomics of Indian country are closely linked to crime in Indian country, and federal laws based upon long outdated beliefs continue to prevent Indian country economic development. The colonial "guardian ward relationship" remains a hallmark of federal Indian law;[139] consequently, layers and layers of federally imposed bureaucracy make doing business in Indian country unduly complicated.[140] For example, an act as simple as executing a mortgage on Indian trust land requires the approval of the Secretary of the Interior.[141] Additionally perplexing is the state of Indian tax jurisprudence, which has essentially deprived tribes of the ability to tax, contributing to the lack of tribal funds to hire police and repair infrastructure.[142]

IV. Congressional Efforts to Address Crime in Indian Country

During the past decade, Congress has taken action to address crime in Indian country. Congress passed, and President Obama signed, the Tribal Law and Order Act of 2010 ("TLOA")[143] to improve public safety in Indian country. The TLOA requires United States Attorneys with Indian country in

136. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 346–347 (1998).

137. Tressa Berman, Circle of Goods 1 (2003) ("[M]ore than 150 years of structured dependency that began when the first parcel of Native American land was exchanged for ration tickets dispensed by government agents to obedient Indian subjects."); History.com Editors, *Indian Reservations*, History (Mar. 18, 2019), https://perma.cc/UWU7-NEMB (noting Indians were forced adopt American attire, abandon their traditional religions, and could not leave the reservation without approval of the federal Indian agent).

138. Crepelle, *supra* note 134, at 148–50.

139. Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. Ill. U. L. Rev. 115, 115–16 (1997); Heather Whitney-Williams & Hillary M. Hoffmann, *Fracking in Indian Country: The Federal Trust Relationship, Tribal Sovereignty, and the Beneficial Use of Produced Water*, 32 Yale J. on Reg. 451, 474 (2015); Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources through Claims of Injunctive Relief against Federal Agencies*, 39 Tulsa L. Rev. 355, 358 (2013). The guardian-ward relationship has its roots in the Marshall Trilogy. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

140. *E.g.,* 25 C.F.R. §§ 140.1–140.26 (2019); Shawn Regan & Terry L. Anderson, *The Energy Wealth of Indian Nations*, 3 L.S.U. J. Energy L. and Res. 195, 208 (2014) ("On Indian lands, companies must go through four federal agencies and 49 steps to acquire a permit to drill, compared with only four steps when drilling off of the reservation").

141. 25 U.S.C. § 5135 (2019); 25 C.F.R. § 152.34 (2019).

142. *See e.g.*, Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 189 (1989); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 151 (1980).

143. Pub. L. No. 111–211, 124 Stat. 2262.

their district to appoint a tribal liaison[144] and requires United States Attorneys to collect data relating to crime in Indian country.[145] Tribal law enforcement agencies were provided with greater access to national criminal databases by the TLOA.[146] Pursuant to the TLOA, the Attorney General of the United States was required to establish and fund the Office of Tribal Justice.[147] Most significantly, the TLOA amended ICRA by increasing the maximum sentence tribal courts can impose from one year to three years, with the ability to stack sentences for a maximum sentence of nine years in jail along with a $15,000 fine.[148]

However, tribes must comply with certain procedural safeguards before implementing the TLOA's enhanced sentencing provisions. Tribes must guarantee defendants the right to effective assistance of counsel and provide indigent defendants with an attorney licensed by a United States jurisdiction that "applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys."[149] Judges in proceedings under the TLOA must be licensed and sufficiently trained.[150] Prior to charging a defendant, TLOA requires that the tribe publish its laws.[151] The tribal court must also maintain a record of the trial in order to administer a TLOA sentence.[152] Notwithstanding, tribes can only impose enhanced sentences on defendants with a prior conviction for a "comparable offense," or if the defendants could be subjected to a sentence of one year or more for the offense by a state or the federal government.[153] But the TLOA did nothing to fix the jurisdictional gap.

VAWA addressed the jurisdictional gap, making it a monumental step for public safety in Indian country.[154] VAWA partially reversed *Oliphant* by authorizing tribes to prosecute non-Indians who commit domestic violence, dating violence, or violate protection orders.[155] However, tribes must satisfy the TLOA's procedural safeguards and ensure that non-Indians are

144. 25 U.S.C. § 2810 (2019).
145. *Id.* § 2809
146. 28 U.S.C. § 534(d).
147. 25 U.S.C. § 3665a.
148. *Id.* § 1302.
149. *Id.* § 1302(c)(1)–(2).
150. *Id.* § 1302(c)(3).
151. *Id.* § 1302(c)(4).
152. *Id.* § 1302(c)(5).
153. *Id.* § 1302(b).
154. Tom Cole, *Violence Against Women Act Achieves Important Tribal Reforms*, WEEKLY COLUMNS (Mar. 4, 2013), https://perma.cc/P9C9-UGXA; Jodi Gillette & Charlie Galbraith, *President Signs 2013 VAWA*, THE WHITE HOUSE BLOG (Mar. 7, 2013), https://perma.cc/D5LG-78G5; NCAI, *supra* note 87, at 1. **R**
155. 25 U.S.C. § 1304(c).

not systematically excluded from the jury before the tribe can prosecute non-Indians under VAWA.[156] Under VAWA, tribes can only prosecute non-Indians who reside in the tribe's Indian country, are employed in the tribe's Indian country, are in a relationship with a citizen of the tribe, or in a relationship with an Indian enrolled in another tribe who resides in the prosecuting tribe's Indian country.[157] Therefore, non-Indians who have no direct connection to the prosecuting tribe, other than their violent behavior, remain beyond the tribe's prosecutorial power.[158]

V. Tribal VAWA Implementation to Date

In 2018, the National Congress of the American Indian published a comprehensive report on tribal VAWA implementation.[159] The report found eighteen tribes exercising VAWA's special domestic violence criminal jurisdiction over non-Indians.[160] At the date of the report's publication, there were 143 arrests made under VAWA, with seventy-four convictions.[161] Defendants pleaded guilty in seventy-three of these cases, which is comparable to the plea rate throughout the United States.[162] Additionally, there were twenty-one dismissals and nineteen declinations.[163] Six cases went to trial, resulting in one conviction.[164] However, it must be noted that tribal VAWA convictions are more difficult to obtain than convictions in other jurisdictions, because tribes must prove not only the crime but also the prior relationship between the tribe and the defendant.[165] Domestic and dating violence comprised 125 cases brought under VAWA.[166] Most of the defendants in VAWA cases had prior contacts with tribal police.[167] The vast majority of the defendants were men—115 out of 128—and the vast major-

156. *Id.* § 1304(d).

157. *Id.* § 1304(b).

158. Adam Crepelle, *Shooting Down* Oliphant: *Self–defense as an Answer to Crime in Indian Country*, 22 Lewis & Clark L. Rev. 1283, 1320 (2018); Maura Douglas, *Sufficiently Criminal Ties: Expanding VAWA Criminal Jurisdiction for Indian Tribes*, 166 U. Penn. L. Rev. 745, 773 (2018); M. Brent Leonhard, *Implementing VAWA 2013*, 40 Human Rights Magazine 4 (Oct. 1, 2014), https://perma.cc/Z2FK-ZXHA.

159. NCAI, *supra* note 87. R

160. *Id.* at 5.

161. *Id.* at 10.

162. *Id.* at 19 ("Just like across the rest of the U.S. judicial system, most convictions happen through plea bargains.").

163. *Id.*

164. *Id.*

165. 25 U.S.C. § 1304(b)(4)(B) (2019); *Pascua Yaqui Tribe VAWA Implementation*, Nat'l Cong. of Am. Indians 1 (2015), https://perma.cc/PT7H-7GJD (noting the "mixed jury of tribal members & non-Indians found insufficient evidence of dating relationship, thus no jurisdiction/acquittal.").

166. NCAI, *supra* note 87, at 11. R

167. *Id.* at 14.

ity of victims were female.[168] During the period covered in the report, tribes encouraged non-Indian defendants to file petitions for habeas corpus in federal court to challenge the tribal court's fairness, but the non-Indian defendants declined.[169] Hence, tribal VAWA implementation is widely considered a tremendous success.[170]

Despite the positives, VAWA has substantial issues. Namely, only 25 of the 573 federally recognized tribes have implemented special domestic violence criminal jurisdiction under VAWA so far.[171] Some tribes have not implemented VAWA because they view the federal requirements to implement VAWA as an attempt to further colonize Indian nations.[172] Though the United States has a long history of using criminal law to assimilate Indians,[173] VAWA need not be viewed in this light. Tribes choose whether to implement VAWA, and the ability to choose respects tribal sovereignty. Plus, many tribes traditionally provided due process type protections to those accused of a crime, so VAWA can align with tribal values.[174]

Regarding VAWA as an assimilationist tool, Professor Angela Riley has concluded that VAWA actually enhances tribal sovereignty.[175] Professor Riley notes that the lack of criminal jurisdiction over non-Indians creates a sense of lawlessness on reservations.[176] VAWA partially fills the jurisdictional gap. Since VAWA enables tribes to prosecute non-Indians, VAWA incentivizes tribal citizens to the call the police and available data suggest domestic violence reporting has increased among VAWA-

168. *Id*. at 12-13.

169. Riley, *supra* note 6, at 1616–17; NCAI, *supra* note 87, at 19. **R**

170. *Reauthorization of the Violence Against Women Act: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security*, 116th Cong. 1 (2019); Joshua B. Gurney, *An "SDVCJ Fix"—Paths Forward in Tribal Domestic Violence Jurisdiction*, 70 HASTINGS L.J. 887, 901–02 (2019) ("These results were generally seen as a resounding success for the tribal communities, particularly those involved in the program."); NCAI, *supra* note 87, at 2 ("This examination of the tribes' early exercise of SDVCJ suggests that VAWA 2013 has been a success."). **R**

171. National Congress of American Indians, *SDVCJ Today: Currently Implementing Tribes*, NAT'L CONG. OF AM. INDIANS (Feb 2, 2020), https://perma.cc/MH52-AAAA; Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs, 83 Fed. Reg. 1200 (Feb. 1, 2019).

172. Jessica Allison, *Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures*, 90 U. COLO. L. REV. 225, 246 (2019); Mary K. Mullen, *The Violence Against Women Act: A Double-Edged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence*, 61 ST. LOUIS U. L.J. 811, 812 (2017); Catherine M. Redlingshafer, *An Avoidable Conundrum: How American Indian Legislation Unnecessarily Forces Tribal Governments to Choose Between Cultural Preservation and Women's Vindication*, 93 NOTRE DAME L. REV. 393, 410 (2017).

173. United States v. Clapox, 35 F. 575, 576 (D. Or. 1888) (describing "Indian offenses"); Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 353–54 n.55 (2015) ("The federal Code of Indian Offenses employed a criminal justice model to forcibly assimilate Indian people by criminalizing tribal cultural and religious activities.").

174. Laird, *supra* note 6; *Pascua Yaqui*, *supra* note 165, at 5. **R**

175. Riley, *supra* note 6, at 1597. **R**

176. *Id*. at 1602.

implementing tribes.[177] Accordingly, Professor Riley observes that VAWA-implementing tribes view VAWA "as an absolute necessity for sovereignty."[178]

Another major issue with VAWA is cost. The expense of public defenders and judges with sufficient legal training hinders the adoption of VAWA among financially strained tribes.[179] Cost will remain an issue until the federal government provides increased funding to tribal justice systems or tribal economies improve.

Without question, VAWA's biggest problem is the limited situations that it applies. Tribal VAWA jurisdiction is limited to non-Indians with a prior connection to the tribe for three offenses: domestic violence, dating violence, and protective order violations.[180] Tribes are not even allowed to prosecute crimes that frequently occur in conjunction with domestic violence.[181] This is troubling because children were involved in many of the reported VAWA cases,[182] as were intoxicants.[183] Indeed, the jurisdictional gap is so extreme that a non-Indian who assaults his Indian partner can slap, stab, and even shoot the tribal police officers detaining him, and the tribe can do nothing about it.[184] The lack of authority to prosecute non-Indians who assault tribal law enforcement is disconcerting because domestic violence incidents are particularly dangerous for police officers.[185] Ironically, a non-Indian assault of a tribal police officer led to the deprivation of tribes' criminal jurisdiction in the first place.[186] Tribes need greater jurisdiction in order to adequately protect their citizens, as well as others, in Indian country.

Due to tribal success with VAWA, Congress has made efforts to expand tribal court jurisdiction. The Native Youth and Tribal Officer Protection Act would have authorized tribes to prosecute non-Indians for violence

177. *Id*. at 1605.

178. *Id*. at 1602.

179. Maureen L. White Eagle, Melissa L. Tatum & Chia Halpern Beetso, *Tribal Legal Code Resource: Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction*, Tribal Law & Policy Institute 21 (2015), https://perma.cc/P8CC-K6HS; Riley, *supra* note 6, at 1631; NCAI, *supra* note 87, at 29. **R** **R**

180. *VAWA 2013 and Tribal Jurisdiction over Crimes of Domestic Violence*, U.S. Dep't Of Justice (June 2013), https://perma.cc/6MTC-ELLY; NCAI, *supra* note 87, at 22. **R**

181. NCAI, *supra* note 87, at 22.

182. *Id.* at 24.

183. *Id.* at 26.

184. 165 Cong. Rec. S2672 (daily ed. May 7, 2019) ("VAWA doesn't cover crimes committed against Tribal law enforcement officers charged with responding to domestic violence. If an officer is responding to a domestic violence case and he or she is assaulted, they aren't covered under the law."); NCAI, *supra* note 87, at 23 (noting assault on a law enforcement officer is not covered by VAWA). **R**

185. 165 Cong. Rec. H2945 (daily ed. Apr. 2, 2019); Native Youth and Tribal Officer Protection Act, S. 2233, 115th Cong. § 2(8) (2017).

186. Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).

against Indian children or tribal law enforcement officers when a VAWA nexus exists and the procedural requirements of VAWA are satisfied.[187] Also during this session, the Justice for Native Survivors of Sexual Violence Act proposed expanding tribal court jurisdiction over non-Indians for crimes of sexual violence, sex trafficking, and stalking.[188] Neither bill ultimately became law.[189]

VI. Rebutting Arguments Against the Expansion of Tribal Criminal Jurisdiction

The arguments against expanding tribal court jurisdiction through legislation are the same as those offered when tribal VAWA jurisdiction was originally proposed. One argument against tribal courts prosecuting non-Indians is that non-Indians have allegedly never been subjected to tribal criminal jurisdiction.[190] Similarly, it has been argued that tribal self-government only includes tribal authority over Indians.[191] Along these lines, it has been asserted that tribal court jurisdiction over non-Indians violates the social contract because non-Indians have not consented to tribal court jurisdiction.[192] The Bill of Rights does not apply of its own force to Indian tribes,[193] so some opponents of tribal jurisdiction claim that non-Indians will be denied their constitutional rights in tribal courts.[194] Opponents of tribal court jurisdiction over non-Indians also contend that tribal juries can-

187. S. 2233 § 3(11)(B)(i).

188. Justice for Native Survivors of Sexual Violence Act, S. 1986, 115th Cong. §§ 7–8, 11 (2017).

189. *See* S. 1986 §§ 7–8, 11; S. 2233 § 3(11)(B)(i).

190. S. Rep. No. 112-153, at 37 (2012) ("'[A]ll persons' includes non-Indians. S. 1925, for the first time in the nation's history, would extend to tribal courts criminal jurisdiction over non-Indians."); Thomas F. Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Criminal Authority Under VAWA?*, 13 Engage: Federalist Soc'y 40, 41 (2012).

191. S. Rep. No. 112-153, at 38 ("Self-government is not government over 'all persons'–including non-Indians. Because tribes lack this power, it is untrue to say that Congress can recognize and affirm it."); *id*. at 55 ("[W]e also have concerns about a section of this bill that allows a tribal court to have jurisdiction over non-Indians who commit a domestic violence crime in Indian country or against an Indian. The language explicitly provides that the self-governance of a tribe includes the right 'to exercise special domestic violence criminal jurisdiction over all persons.'").

192. United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring); Plains Commerce Bank v. Long, 554 U.S. 316, 337 (2008) (Kennedy, J., concurring).

193. Blatchford v. Native Vill. of Noatak and Circle Vill., 501 U.S. 775, 782 (1991) (noting that tribes surrendered no powers at the Constitutional Convention); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Talton v. Mayes, 163 U.S. 376 (1896) (holding the Bill of Rights does not apply to Indian tribes).

194. S. Rep. No. 112-153, at 38, 50, 55–56.

not treat non-Indians fairly,[195] and some contend tribal law itself is incomprehensible to non-Indians.[196] These arguments all fail.

The most easily rebutted claim is the argument that tribes never exercised jurisdiction over non-Indians. In fact, tribes historically applied their criminal laws to *any person* who perpetrated a crime within their territory.[197] Early treaties between the United States and Indian tribes expressly recognized tribal criminal authority over non-Indians.[198] The United States even turned over white fugitives to tribes for criminal prosecutions during the early and mid-1800s.[199] Accordingly, the congressionally created American Indian Policy Review Commission concluded in 1977 that "[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians."[200] *Oliphant v. Suquamish Tribe* is the only source that says otherwise.[201] As discussed above, *Oliphant* has been the subject of immense scholarly criticism for its factual errors and the racism underlying its reasoning.[202]

The constitutional arguments against tribal courts prosecuting non-Indians lack force. Of course, it is true that Indian tribes have never consented to the Constitution and therefore are not constrained by it.[203] This means

195. Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury after the 2013 Reauthorization of VAWA*, 39 Am. Indian L. Rev. 311 (2014); Scott Keyes, *Top GOP Senator: Native American Juries Are Incapable of Trying White People Fairly*, Think Progress (Feb. 21, 2013), https://perma.cc/F9X2-MAHR.

196. *E.g.*, Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J., concurring) (claiming tribal law is anomalous because it is based traditional tribal values "would be unusually difficult for an outsider to sort out."); *see also infra* note 228. R

197. Sarah Deer & Mary Kathryn Nagle, *Return to Worcester: Dollar General and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 Harv. J.L. & Gender 179, 201 (2018); Canby, *supra* note 39, at 149; Crawford, *supra* note 39, at 420. R

198. *E.g.*, Treaty With the Chickasaw, *supra* note 40; Treaty With the Creeks, *supra* note 40, at art. IX; Treaty With the Cherokee, *supra* note 40. R R

199. Ablavsky, *supra* note 55, at n.400 ("It also ignores historical evidence suggesting that the federal government not only permitted, but oversaw, tribal court jurisdiction exercising tribal sovereignty over non-Natives."); Fletcher, *supra* note 78, at 349 ("Moreover, federal officials were aware that the Cherokee courts asserted jurisdiction over non-Indians, and in at least on instance in 1824 turned over an American citizen to the Cherokees for prosecution."); Spruhan, *supra* note 78 (noting Jacob West, a white man, was hanged sentenced to hang by a Cherokee court, and the federal court refused to grant West habeas corpus in 1844). R R R

200. Am. Indian Policy Review Comm'n, 95th Cong., Final Report 114, 117, 152–54 (Comm. Print 1977).

201. 435 U.S. 191, 204 (1978) ("While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.").

202. M. Brent Leonhard, *Closing a Gap in Indian Country Justice:* Oliphant*,* Lara*, and DOJ's Proposed Fix*, 28 Harv. J. on Racial & Ethnic Just. 117, 122–46 (2012); Williams, *supra* note 56, at 100–101; Deer, *supra* note 197, at 238. R R

203. Blatchford v. Native Vill. of Noatak and Circle Vill., 501 U.S. 775, 782 (1991); Talton v. Mayes, 163 U.S. 376 (1896).

the Bill of Rights does not apply in tribal court proceedings.[204] Nonetheless, Indian tribes are bound by ICRA, and ICRA's provisions afford defendants in tribal court proceedings protections that are nearly identical to the Bill of Rights.[205] Indeed, the Court in *Oliphant* admitted ICRA extirpates fears of tribes trampling non-Indian rights.[206] Furthermore, the plain text of VAWA mandates that tribal courts provide non-Indians with full constitutional rights.[207] Based upon ICRA and the language of VAWA, a group of law professors wrote in support of VAWA that "no defendant in tribal court will be denied Constitutional rights that would be afforded in state or federal courts."[208] Concerns that non-Indians will be denied constitutional rights in tribal courts should be allayed by the fact that tribes have been prosecuting non-Indians for over five years, and no non-Indian has alleged that a tribal court has violated his rights.[209]

Many people fear that non-Indians will not be able to receive a fair trial in the tribal court system. Concern over unjust treatment in "foreign courts" is embedded in the United States Constitution; hence, the Constitution permits federal courts to hear state claims involving citizens of different states.[210] Although diversity jurisdiction does not exist in criminal cases, defendants in state criminal proceedings can remove their cases to federal court.[211] No analogous removal mechanism exists in tribal court.[212] Nevertheless, any person who believes she has been wrongfully detained by an Indian tribe may seek habeas corpus review of her custody in federal court.[213] Habeas corpus serves to safeguard individuals from arbitrary violations of liberty in tribal court just the same as it does in other courts.[214]

Fears that non-Indians will be unable to receive a fair trial before a tribal jury lack foundation and are sardonic. The unease about tribal courts prosecuting non-Indians seems to be predicated on the belief that Indians

204. United States v. Bryant, 136 S. Ct. 1954, 1962 (2016).

205. *Id.*; *Duro*, 495 U.S. at 681, n. 2.

206. 435 U.S. at 212.

207. 25 U.S.C. § 1304(d)(4) (2019).

208. Letter from Kevin Washburn, Dean and Professor of Law, Univ, of N.M. School of Law, et al., to Patrick Leahy, U.S. Sen, from Vt., et al. 4 (Apr. 21, 2012), https://perma.cc/D6UV-S8TF.

209. *See* NCAI, *supra* note 87, at 19. **R**

210. U.S. CONST. art. III, § 2.

211. 28 U.S.C. § 1455 (2019).

212. Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J., concurring) ("It is generally accepted that there is no effective review mechanism in place to police tribal courts' decisions on matters of nontribal law, since tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts.").

213. 25 U.S.C. § 1303.

214. Boumediene v. Bush, 553 U.S. 723, 739 (2008); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66–67 (1978).

will seek revenge for historic injustices if given the chance.[215] Evidence for this proposition is scant; in fact, research shows that tribal courts treat non-Indians fairly.[216] Many reservations are majority non-Indian, and some tribes allow non-Indians to participate in juries in all cases.[217] Significantly, tribes prosecuting non-Indians under VAWA are expressly forbidden from excluding non-Indians from jury pools.[218] And, when Indians are the defendant in state and federal court, seldom is a single Indian on the jury, yet Indian pleas for a jury of their peers have been uniformly rejected in this scenario.[219] According to Professor Judith Royster, "[t]o the extent that distrust of tribal authority over non-Indians is rooted in ethnocentrism, the country simply ought to get over it."[220]

Assertions that tribal laws are unknowable to non-Indians are equally without basis and absurd. This claim is usually predicated on the belief that tribal laws are unwritten, but even so, unwritten laws have long been enforced in state and federal courts.[221] The unwritten laws argument is moot in VAWA cases because tribes must publish their laws in order to implement VAWA in the first place.[222] In any event, as Thomas Jefferson stated, "ignorance of the law is no excuse in any country."[223] The same should be true of Indian country.

Tribal laws are no great mystery—tribes criminalize conduct that damages people[224] and property.[225] Thus, non-Indians cannot in good faith ar-

215. Sierra Crane-Murdoch, *Is the Violence Against Women Act a Chance for Tribes to Reinforce Their Sovereignty?*, HIGH COUNTRY NEWS (June 12, 2013), https://perma.cc/JYM8-C3ZB; Royster, *supra* note 105, at 73. R

216. In addition to the NCAI VAWA report discussed *supra* note 87, *see e.g.*, *Tribal Courts and the Administration of Justice in Indian Country: Before the S. Comm. on Indian Affairs*, 110th Cong. 28 (2008) (statement of Hon. Theresa M. Pouley, J., Tulalip Tribal Court); Nell J. Newton, *Tribal Court Praxis: One Year in the Life of Twenty Tribal Courts*, 22 AM. INDIAN L. REV. 285, 352 (1998). R

217. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 761 (2006); Castillo, *supra* note 195, at 312. R

218. 25 U.S.C. §§ 1304(d)(3)(A)–(B) (2019).

219. Gede, *supra* note 190, at 42 (admitting "the irony that Indians themselves hauled into federal court often fail to have this right respected."); Castillo, *supra* note 195, at 312; Washburn, *supra* note 217, at 761. R R R

220. Royster, *supra* note 105, at 73. R

221. Black & White Taxicab v. Brown & Yellow Taxicab, 276 U.S. 518, 533 (1928); Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 YALE J.L., ECON. & ORG. 83, 85 (1989); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1267 (1996); Fletcher, *supra* note 78, at 390 ("to say that tribal common law is unwritten is ironic, given that federal common law is unwritten as well, until it is announced by the Supreme Court"). R

222. 25 U.S.C. § 1304(d)(4).

223. Letter from Thomas Jefferson to André Limozin (Dec. 22, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 451 (Julian P. Boyd ed., 1995).

224. *E.g.,* 9 Grand Traverse Band Code § 107(c)(3)(A) (battery); 17 Navajo Code § 316(A) (same); 7 Shoshone & Arapaho Tribes of the Wind River Indian Reservation Tribal Code § 7-3-2 (same); 03-400-03 Little River Band of Ottawa Indians Ordinance Art. VIII, § 8.02 (same).

gue that tribal law is incomprehensible when their conduct—such as rape, battery, or robbery—violates universal principles of human behavior.[226] For example, in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*,[227] Dollar General argued it could not understand Choctaw law in an effort to evade Choctaw tribal court jurisdiction.[228] The Fifth Circuit Court of Appeals shot down this argument stating: "Doe has brought two specific claims, both of which are based on the alleged sexual molestation of a child by a store manager. We suspect that Dolgencorp could have easily anticipated that such a thing would be actionable under Choctaw law."[229] It is difficult to imagine how a lawyer can make a straight-faced argument that her client did not know rape or battery was a crime. Such preposterous assertions should be grounds for sanctions[230] and are an incredibly weak argument against tribal court jurisdiction over violent non-Indian criminals.

The claim that tribal governments' right to self-government is limited to Indians is irrational. Tribes are governments and have functioned as self-governing entities long before the founding of the United States,[231] and a core function of every government is the provision of public safety.[232] Crime has an adverse impact on business development, healthcare, and other government concerns.[233] Denying tribes the ability to hold non-Indi-

225. *E.g.*, 17 Navajo Code § 380 (2019) (criminal damage); 500 White Earth Nation Code (2019) (Prohibited Conduct); 14 Eastern Band Cherokee Indians Code § 10.9 (2019) (criminal mischief to property).

226. Saint Thomas Aquinas, On Law, Morality, and Politics 67 (William P. Baumgarth & Richard J. Regan, ed., 1988) ("[T]hus, human laws prohibit murder, theft, and the suchlike."); Lysander Spooner, *Vices are Not Crimes in* 5 *The Collected Works of Lysander Spooner (1834-1886)* 1 (Liberty Fund, Inc., ed. 2018) ("*Crimes* are those acts by which one man harms the person or property of another.") (emphasis in original); John Mikhail, *Evidence from Comparative Criminal Law*, 75 Brook. L. Rev. 497, 515 (2009); *Malum in se*, Law.com Legal Dict. https://perma.cc/U8TJ-MHVZ (conduct as intrinsically wrong, whether criminalized or not).

227. 136 S. Ct. 2159 (2016).

228. *See* Reply Br. Pet'rs 21–22, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496). *See also* Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d. 167, 181 (5th Cir. 2014) (Smith, J., dissenting) ("The elements of Doe's claims under Indian tribal law are unknown to Dolgencorp and may very well be undiscoverable by it.").

229. Dolgencorp, 746 F.3d at 174, n.4.

230. *See* Model R. Prof'l Conduct 3.1 (Am. Bar Ass'n 2019).

231. United States v. Wheeler, 435 U.S. 313, 322–23 (1978); McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 172 (1973); Worcester v. Georgia, 31 U.S. 515, 542–43 (1832).

232. United States Dep't of Justice, Bureau of Justice Assistance, *The Role of Local Government in Community Safety* 10 (Apr. 2001), https://perma.cc/W5EA-CSCQ; Paul Romer & William J. Bratton, *Public Safety and Democracy*, City Journal (2014), https://perma.cc/D32X-38NS; Riley, *supra* note 6, at 1606. **R**

233. Robert J. Shapiro & Kevin A. Hassett, *The Economic Benefits of Reducing Violent Crime: A Case Study of 8 American Cities*, Center For American Progress 1 (June 2012), https://perma.cc/9ABS-4B7J; Jessie Welton, *Ending Violence Against Native Women: Moving to Action*, Center for Indian County Development 3, https://perma.cc/N5GA-GH3N ("High rates of violence and economic

ans accountable for the crimes they commit in Indian country undermines the tribal right of self-government.[234] Indeed, the United States and other governments routinely criminally prosecute individuals who are non-citizens.[235] Allowing tribes to prosecute non-citizens is merely treating tribes like the sovereign governments they are. Thus, the non-partisan, congressionally created Indian Law and Order Commission recommended that tribes be granted criminal jurisdiction over all persons in their territories.[236]

Forbidding tribal courts from exercising jurisdiction over non-Indians based upon non-Indians' inability to participate in tribal governments is curious for two reasons. First, Congress possesses plenary power over Indian tribes[237] despite the Court's acknowledgment of the suspect constitutional basis for the plenary power doctrine itself.[238] The only reason the plenary power doctrine persists is because non-Indians control Congress;[239] that is, non-Indians have a voice in tribal governance. Second, tribes historically incorporated non-Indians into their political bodies.[240] The United States mandated "Indian blood" as a requirement for tribal citizenship during the

outcomes are not independent."); Riley, *supra* note 6, at 1583; *The Role of Local Government in Community Safety*, *supra* note 232, at 10 ("The social and economic consequences of crime are enormous."). **R**

234. *Tribal Justice: Prosecuting Non-Natives for Sexual Assault on Reservations* (PBS NewsHour Weekend broadcast Sept. 5, 2015), https://perma.cc/Z994-8RTN; Serena Marshall, *Battered Indian Tribal Women Caught in Legal Limbo*, ABC News (May 17, 2012) https://perma.cc/RJ8G-TGS4; Indian Law & Order Commission, *supra* note 36, at 17. **R**

235. Laird, *supra* note 6; Washburn, *supra* note 208, at 6–7. **R**

236. Indian Law & Order Commission, *supra* note 36, at 17. **R**

237. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); Winton v. Amos, 255 U.S. 373, 391 (1921); Marchie Tiger v. W. Inv. Co., 221 U.S. 286, 316 (1911); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

238. United States v. Kagama, 118 U.S. 375, 378–79 (1886) (noting that to construe the commerce clause to authorize criminal laws in Indian country "would be a very strained construction of this clause"). *See also* United States v. Bryant, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring) ("Congress' purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power—not Congress' power to 'regulate Commerce . . . with Indian Tribes,' not the Senate's role in approving treaties, nor anything else—gives Congress such sweeping authority."); United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring).

239. The United States electorate is overwhelmingly non-Indian, and Congress reflects this. There are 435 members of the United States House of Representatives. As of publication, there are four American Indian members: Deb Haaland, Sharice Davids, Tom Cole, and Markwayne Mullin. No American Indian holds a seat in the Senate. Mark Trahant, *A Tribute to Those who Always Imagined Native Women in the Congress*, Indian Country Today (Jan. 3, 2019), https://perma.cc/MW65-LSBW.

240. Robert M. Utley & Wilcomb E. Washburn, *Indian Wars* 75 (1985) (noting, in the early 1700s, the Mohawk made Englishman William Johnson a blood brother and the Iroquois made him a chief); Christopher Klein, *7 Things You May Not Know About Sam Houston*, History (last updated Mar. 5, 2019), https://perma.cc/J3ML-FF6D (noting Sam Houston became an adopted citizen of the Cherokee Nation after living with the tribe, marrying a Cherokee woman, and mastering the Cherokee language); Spruhan, *supra* note 78, at 82–83; Rolnick, *supra* note 173, at 442 ("Before formal enrollment rules, membership in a tribal community was based on kinship, residence, and sometimes choice of affiliation. Kinship sometimes included non-blood ties such as those gained via marriage, adoption, or naturalization."). **R**

late 1800s and was implemented, "[s]o that over time, Indians would literally breed themselves out and rid the federal government of their legal duties to uphold treaty obligations."[241] However, the Court first ruled that Indian blood was required to be an Indian in 1846.[242] Chief Justice Roger Taney, author of the infamously racist *Dred Scott v. Sanford*,[243] conjured the race based criteria for Indian status.[244] Nevertheless, Justice Taney's Indian blood requirement remains an essential component used to qualify as an Indian in Indian country criminal cases.[245]

VII. Supplemental VAWA Jurisdiction

Tribal courts are currently in the strange predicament of being able to prosecute non-Indians for some but not all of the crimes they commit. For example, a non-Indian who resides on a reservation and assaults his Indian wife can be prosecuted by the tribe for domestic violence but not for the substance abuse that fueled the violence, nor the child abuse that occurred during the event, nor the non-Indian's assault of the intervening tribal law enforcement officer. These offenses must be prosecuted separately, often in a far-off court. Assuming a federal prosecutor even takes the case, some federal judges express dismay at having to deal with Indian country crimes that should be an exclusively local matter in federal court.[246]

Prosecuting an offense in the locality where it occurred and by the jurisdiction where it occurred is the ideal law enforcement practice. Tribes, like all governments, should be able to protect their citizens from violent criminals. Prosecuting a crime where it occurred makes obtaining witnesses easier as well. More importantly than which government prosecutes the

241. Kat Chow, *So What Exactly Is 'Blood Quantum'?*, National Public Radio (Feb. 9, 2018), https://perma.cc/H95L-GE29. ("Blood quantum first became important as a determinant of when an individual Indian would be allowed to alienate an allotment of land acquired under the Dawes Severalty Act."); Keneisha M. Green, *Who's Who: Exploring the Discrepancy Between the Methods of Defining African Americans and Native Americans*, 31 Am. Indian L. Rev. 93, 94 (2007).

242. United States v. Rogers, 45 U.S. 567, 573 (1846).

243. 60 U.S. 393, 407 (1857).

244. *Rogers*, 45 U.S. at 572 (describing Indians as an "unfortunate race").

245. *E.g.,* Martin v. United States, 2017 WL 976928, at *6 (D. Minn. Mar. 13, 2017); State v. George, 422 P.3d 1142, 1143–44 (Idaho 2018); State v. LaPier, 790 P.2d 983 (Mont. 1990); State v. Reber, 171 P.3d 406, 409–10 (Utah 2007); State v. Nobles, 818 S.E.2d 129, 135–36 (N.C. Ct. App. 2018).

246. United States v. Swift Hawk, 125 F. Supp. 2d 384 (D.D.C. S.D. 2000) ("As I have stated previously in other cases, I did not realize, prior to taking office as an Article III judge, that I would be presiding over drunk driving cases."); Philip P. Frickey, *Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1, n.305 (1999) (quoting "reported remarks from Justices about how federal Indian law disputes are 'peewee' cases, even 'chickenshit cases' ").

crime, having victims undergo cross-examination twice is cruel.[247] Dual trials for the same event serve no purpose other than to further clog already backlogged federal dockets when the tribal court has—or at least—should have the capacity to prosecute the entire event.[248]

Federal courts once faced a similar conundrum when cases involved closely related matters of state law. To enhance the administration of justice and promote judicial economy, federal courts created the doctrines of ancillary and pendent jurisdiction, which enabled jurisdictionally insufficient claims to be tacked onto jurisdictionally sufficient claims.[249] The Court curtailed these doctrines in *Finley v. United States*.[250] However, Congress swiftly reinstated them by passing the Judicial Improvements Act of 1990.[251] The remainder of this section provides an overview of the development of supplemental jurisdiction in federal courts and discusses how supplemental jurisdiction may work in tribal courts.

A. History of Supplemental Jurisdiction

Supplemental jurisdiction has its origins in Chief Justice John Marshall's 1824 opinion in *Osborn v. Bank of United States*,[252] wherein the Court held that federal courts may decide questions not independently within their jurisdiction.[253] Over the years, the Court read Article III of the Constitution expansively, hearing claims that otherwise lacked an independent jurisdictional basis.[254] The Court sought to set parameters for the exer-

247. DomesticShelters.org, *6 Tips for Facing An Abuser in Court*, DOMESTICSHELTERS.ORG (Apr. 10, 2017), https://perma.cc/89GQ-GZZB; Government of Nw. Territories, *Going to Court as a Witness or Victim in a Criminal Matter*, GOVERNMENT OF NORTHWEST TERRITORIES (last visited Oct. 31, 2019), https://perma.cc/2UYP-J87J; Rape, Abuse, & Incest National Network, *What to Expect at a Criminal Trial*, RAINN (last visited Oct. 31, 2019), https://perma.cc/EY4P-3F7B.

248. *See* American Bar Ass'n, *Judicial Vacancies*, AM. BAR ASS'N (Oct. 18, 2019), https://perma.cc/PT3D-JUTW; Sudhin Thanawala, *Wheels of Justice Slow at Overloaded Federal Courts*, CHI. TRIBUNE (Sep. 28, 2015), https://perma.cc/K7AT-DEHM; Lydia Wheeler, *Courts Wade Through Post-Shutdown Backlog of Cases*, THE HILL (Jan. 30, 2019), https://perma.cc/K6UN-SK5A.

249. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 120 (1984); JACK FRIEDENTHAL, MARY KAY KANE, ARTHUR R. MILLER, CIVIL PROCEDURE 66 (5th ed. 2015); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 116 (1999).

250. 490 U.S. 545 (1989).

251. Pub. L. No. 101-650, 104 Stat. 5089 (1990); 28 U.S.C. 1367 (2019) (codified). *See* Arthur D. Wolf, *Comment on the Supplemental-Jurisdiction Statute: 28 U.S.C. § 1367*, 74 IND. L.J. 223 (1998); Pfander, *supra* note 249, at 119. **R**

252. 22 U.S. 738 (1824).

253. *Id* at 823 ("[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.").

254. Moore v. New York Cotton Exch., 270 U.S. 593, 609–10 (1926); Lincoln Gas & Elec. Co. v. City of Lincoln, 250 U.S. 256, 264 (1919); Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 191 (1909); Freeman v. Howe, 65 U.S. 450, 457–58 (1861); Peck, v. Jenness, 48 U.S. 612, 624–25 (1849).

cise of supplemental jurisdiction by ruling supplemental jurisdiction may be exercised when the federal and state claims comprise "a single cause of action."[255] Judicial economy was further enhanced by the adoption of the Federal Rules of Civil Procedure in 1938 which set forth rules for the expansive joinder of claims and parties.[256]

United Mine Workers of America v. Gibbs[257] is the landmark case on supplemental jurisdiction. The case arose from a labor dispute wherein Gibbs lost his job and other business.[258] Gibbs filed suit in federal court against United Mine Workers of America for violating the Federal Labor Management Relations Act of 1947 as well as a state law conspiracy claim.[259] The jury ruled in Gibbs's favor on both the state and federal claims, but the trial court set aside the damages award and dismissed the federal claim.[260] The court of appeals affirmed, and the Court granted certiorari.[261]

The Court held the federal court's jurisdiction over the state claim was proper.[262] The Court reasoned if the state and federal claims "derive from a common nucleus of operative fact," then federal courts have the capacity to adjudicate the entire case.[263] However, the Court declared that the exercise of jurisdiction over state law claims is within the federal court's discretion rather than a right of the litigants.[264] The Court noted federal courts should not hear state claims if the federal claims are dismissed before the trial begins.[265] Likewise, the Court advised that federal courts should not exercise jurisdiction over state claims when the state claim is novel or when the state claims "substantially predominate" over the federal cause of action.[266] As justification for the exercise of jurisdiction over jurisdictionally insufficient claims, the Court cited "judicial economy, convenience and fairness to litigants."[267]

A decade after *Gibbs*, the Court began to abridge supplemental jurisdiction. The Court held that sharing a "common nucleus of operative fact"

255. Hurn v. Oursler, 289 U.S. 238, 246 (1933).

256. Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1212 (1966); Daniel C. Hopkinson, *The New Federal Rules of Procedure as Compared with the Former Federal Equity Rules and the Wisconsin Code*, 23 MARQ. L. REV. 159, 169 (1939); Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. NEW ENG. L. REV. 1, 7 (1992).

257. 383 U.S. 715 (1966).

258. *Id.* at 719–20.

259. *Id.* at 717–20.

260. *Id.* at 720.

261. *Id.* at 721.

262. *Id.* 383 at 728.

263. *Id.* at 725.

264. *Id.* at 726.

265. *Id.* at 726.

266. *Id.* at 726.

267. *Id.* at 726.

was not enough to create supplemental jurisdiction when a nonfederal claim is the nexus to a party the federal court would otherwise lack subject matter jurisdiction over.[268] Similarly, the Court has held that diversity jurisdiction could not be circumvented by suing only diverse defendants, then waiting for the defendants to implead parties who would destroy diversity.[269] And in *Finley v. United States,*[270] the Court held a statute requiring that claims against the United States be brought in federal court did not confer jurisdiction over related state law claims.[271] The *Finley* Court noted that Congress could authorize federal jurisdiction over claims that lack jurisdiction.[272]

Congress responded to the Court's *Finley* decision by enacting 28 U.S.C. § 1367 one year later.[273] The first part of the statute authorizes district courts supplemental jurisdiction over all claims in an action that form part of the same case or controversy under Article III,[274] and this is widely understood to be a codification of *Gibbs*.[275] Supplemental jurisdiction is limited by 28 U.S.C. § 1367(b)'s prohibition against plaintiffs asserting claims against parties when the plaintiff's claim would violate the diversity of citizenship requirements of 28 U.S.C. § 1332.[276] This is a codification of *Owen Equipment & Erection Company v. Kroger*.[277] Even when supplemental jurisdiction is possible, 28 U.S.C. § 1367(c) allows courts to decline supplemental jurisdiction if: (1) the claim involves a complex issue of state law; (2) the state claim substantially predominates over the question which the federal court has original jurisdiction over; (3) the jurisdictionally sufficient claims are dismissed; or for (4) "other compelling reasons."[278] These are the same factors sets forth in *Gibbs*.[279] Despite some criticism of the

268. Aldinger v. Howard, 427 U.S. 1, 14–15 (1976) ("But the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.").

269. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978) ("But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case. Congress has established the basic rule that diversity jurisdiction exists under 28 U. S. C. § 1332 only when there is complete diversity of citizenship.").

270. 490 U.S. 545 (1989).

271. *Id.* at 555–56.

272. *Id*. at 556.

273. James E. Pfander, *The Simmering Debate Over Supplemental Jurisdiction*, 2002 U. ILLINOIS L. REV. 1209, 1214 (2002); Friedenthal, et al., *supra* note 249, at 74. R

274. 28 U.S.C. § 1367(a) (2019).

275. SAMUEL ISSACHAROFF, CIVIL PROCEDURE 151 (4th Ed. 2017); Friedenthal, *supra* note 249, at 75; Pfander, *supra* note 269, at 1214.

276. Friedenthal, *supra* note 249, at 75.

277. 437 U.S. 365 (1978); Friedenthal, *supra* note 249, at 75; Issacharoff, *supra* note 275, at 151.

278. *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726–27 (1966).

279. Joseph N. Akrotirianakis, *Learning to Follow Directions: When District Courts Should Decline to Exercise Supplemental Jurisdiction Under 28 U.S.C. 1367(c)*, 31 LOY. L.A. L. REV. 995, 1004 (1998); Friedenthal, *supra* note 249, at 75; Pfander, *supra* note 249, at 158. R

statute, no serious effort has been made to eliminate supplemental jurisdiction.[280]

B. Tribal Courts, Supplemental Jurisdiction, and VAWA

Tribal courts asserting supplemental jurisdiction over VAWA-related claims is a solution to the jurisdictional gap. Supplemental jurisdiction in federal court sprung from the common law.[281] Tribal courts apply common law;[282] thus, tribal courts should consider extending their reach through jurisprudence. Indeed, tribal courts are in a stronger position to grow their reach than federal courts. Federal court jurisdiction is constitutionally limited,[283] but tribal court jurisdiction is not limited by the United States Constitution.[284] The limits on tribal court jurisdiction are the result of over 200 years of racist federal Indian policy.[285] Peel away the racism, and the rationale for limiting tribal court jurisdiction vanishes.[286] This alone bodes heav-

280. Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute,* 40 EMORY L.J. 445, 446 (1991); Thomas D. Rowe, Jr., *1367 and All That: Recodifying Federal Supplemental Jurisdiction*, 74 IND. L.J. 53, 54 (1998); Issacharoff, *supra* note 275, at 151. R

281. Friedenthal, *supra* note 249, at 66. R

282. RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 18 (2009); Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited,* 84 U. COLO. L. REV. 59, 74 (2013) ("[T]ribal courts are developing their own common law."); Matthew L.M. Fletcher, *Toward A Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 721 (2006) ("Despite the dearth of theorization behind the use of intertribal common law, the wide majority of tribal courts apply intertribal common law in almost every decision involving nonmembers.").

283. U.S. CONST. art. III, § 2.

284. Blatchford v. Native Village of Noatak, 501 U.S. 775, 781–82 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Talton v. Mayes, 163 U.S. 376, 384 (1896).

285. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978) (" 'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."); Sarah Deer & Mary Kathryn Nagle, *Return to* Worcester*:* Dollar General *and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 HARV. J. L. & GENDER 179, 238 (2018); Williams, *supra* note 56, at 72; Deer, *supra* note 197, at 238. R R

286. Eastern Band of Cherokee Indians v. Torres, 2005 WL 6437828, at *8 (E. Cherokee Sup. Ct. Apr. 12, 2005) (Philo, J., concurring) ("The federal appellate opinions holding that Indian tribal courts may not try non-Indians for criminal acts committed on then reservations are founded on only two principles, and those two principles are: 1. Might makes right, and 2. Indians cannot be trusted to treat non-Indians fairly."); FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 46 (2009) ("Plenary authority in Indian affairs is not rooted in the text or history of the Constitution but in the text and history of colonialism—a colonialism in which a 'conquered people' only has authority at the 'sufferance' of the 'conqueror.' "); Williams, *supra* note 56, at 100–101 ("According to the racially recidivist paradigm of Indian rights laid out in *Oliphant,* the beliefs and attitudes of the past, no matter how hostile or racist, must always be given controlling force in interpreting Indian rights in the present day."). R

ily in favor of tribal courts exercising supplemental jurisdiction over non-Indians in VAWA cases.

In *Oliphant*, the Court acknowledged tribes can prosecute non-Indians "in a manner acceptable to Congress."[287] VAWA authorizes tribes to prosecute non-Indians for three crimes *and* establishes certain procedural requirements that tribes must comply with in order to do so.[288] When tribes apply the procedural requirements of VAWA during prosecutions of non-Indians, tribes are prosecuting non-Indians "in a manner acceptable to Congress."[289] VAWA also recognizes "the inherent power" of tribes to exercise criminal jurisdiction "over all persons."[290] Furthermore, the Senate opponents of VAWA's tribal jurisdiction provision admitted, "[w]hile the present bill's jurisdiction is limited to domestic-violence offenses, once such an extension of jurisdiction were established, there would be no principled reason not to extend it to other offenses as well."[291] Supplemental VAWA jurisdiction agrees with VAWA opponents' argument—logic demands that tribal court jurisdiction include offenses that stem from a common nucleus of operative facts as VAWA offenses.

The effectiveness of tribal courts is another reason tribal courts should unilaterally expand their jurisdiction under VAWA. Approximately 150 arrests of non-Indians under VAWA have occurred, and not a single non-Indian has challenged the fairness of the tribal court.[292] Studies of tribal courts have consistently shown that tribal courts treat non-Indians fairly.[293] International law recognizes the legitimacy of indigenous justice systems as well.[294] Hence, the Supreme Court has declared that tribal court convictions in compliance with ICRA are valid convictions.[295] On top of ICRA's requirements, tribes implementing VAWA must include non-Indians in the jury pool and provide all "necessary" constitutional rights to defendants.[296] If ICRA's procedural safeguards satisfy the Supreme Court's due process concerns, VAWA's heightened standards certainly should.

287. *Oliphant*, 435 U.S. at 210.

288. 25 U.S.C. § 1304(b)(4) (2019).

289. *See Oliphant*, 435 U.S. at 210.

290. 25 U.S.C. § 1304(b)(1).

291. S. Rep. 112–153, at 48.

292. NCAI, *supra* note 87, at 10. **R**

293. Bethany Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Alexander S. Birkhold, *Predicate Offenses, Foreign Convictions, and Trusting Tribal Courts,* 114 MICHIGAN L. R. ONLINE 155, 159 (2016); M. Gatsby Miller, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction over Nonmembers in Civil Cases,* 114 COLUM. L. REV. 1825, n.85 (2014).

294. American Declaration on the Rights of Indigenous Peoples, Organization of American States, June 15, 2016, https://perma.cc/HYH6-TL78; U.N. Declaration on the Rights of Indigenous Peoples, GAOR, 61st Sess Suppl. no. 49, A/Res/61/295 (2007), https://perma.cc/RPT2-95P8.

295. United States v. Bryant, 136 S. Ct. 1954, 1966 (2016).

296. 25 U.S.C. § 1304(d) (2019).

Although supplemental jurisdiction does not apply in criminal cases,[297] federal courts may exercise ancillary jurisdiction over jurisdictionally insufficient claims in criminal matters.[298] State law claims can be heard in federal criminal cases when the state law claim is factually interdependent upon the federal claim—essentially the "common nucleus of operative fact" standard.[299] Criminal defendants are often charged with multiple offenses;[300] therefore a tribe charging a non-Indian defendant with domestic violence and child abuse for a single transaction would be completely ordinary. In fact, the TLOA's stacking provision seems perfectly suited for multiple tribal court charges arising from a common nucleus of operative facts.[301]

Victims' rights and judicial economy are also improved by supplemental VAWA jurisdiction. Prosecuting the entire criminal transaction in a single tribal court proceeding enhances victims' rights by allowing the victim to receive closure in a single case rather than forcing the victim to painfully relive her experiences in two separate court cases.[302] Additionally, supplemental VAWA jurisdiction furthers the purpose of 28 U.S.C. 1367(c) which was designed to keep issues that are not truly federal in nature outside of federal court, and domestic violence has long been considered a local matter.[303] Thus, supplemental VAWA jurisdiction benefits the United States justice system as a whole.

Significantly, tribes suffer no penalty for going beyond the boundaries of *Oliphant.* Tribes have sovereign immunity absent a clear expression of

297. Campbell v. Dewalt, No. 1:09-0814, 2010 WL 2901874, at *3 (S.D. W. Va. 2010) ("The statute says nothing about conferring jurisdiction over a state criminal case."); STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK § 2.13, 83 (2017) ("It appears settled that 1367 has no applicability to the jurisdiction of federal courts when they exercise ancillary jurisdiction in criminal cases.").

298. Garcia v. Teitler, 443 F.3d 202, 207 (2d Cir. 2006); United States v. Polishan, 19 F. Supp. 2d 327, 330 (M.D. Pa. 1998); Gabriel T. Thornton, *Criminal Law – First Circuit Holds Federal Courts Lack Jurisdiction to Expunge Criminal Records on Equitable Grounds* – United States v. Coloian, 480 F.3d 47 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 377, 41 Suffolk U. L. Rev. 395, 397 (2008).

299. United States v. Bui, 674 F. App'x. 114, 116–117 (3d Cir. 2017); Doe v. United States, 833 F.3d 192, 198 (2d Cir. 2016); United States v. Lysaght, No. 97-CR-644, 2018 WL 5928461, at *1 (S.D.N.Y.).

300. *E.g.,* United States v. Watts, 519 U.S. 148, 168, (1997) (Stevens, J., dissenting); Ohio v. Johnson, 467 U.S. 493 (1984).

301. *See* 25 U.S.C. § 1302(a)(7)(C)–(D).

302. *See* Dawn M. Johnson & Caron Zlotnick, *HOPE for Battered Women with PTSD in Domestic Violence Shelters,* PROF PSYCHOL RES PR. 234–241 (Feb. 2010), https://perma.cc/J5C7-83J2; National Center on Domestice Violence, Trauma & Mental Health, *Preparing For Court Proceedings with Survivors of Domestic Violence: Tips for Civil Lawyers and Legal Advocates* 1–2 (Mar. 2013), https://perma.cc/XT9L-Y4M9.

303. United States v. Morrison, 529 U.S. 598, 618 (2000); Office of the Vice President, *1 is 2 Many: Twenty Years Fighting Violence Against Women and Girls*, THE WHITE HOUSE 13 (Apr. 29, 2014), https://perma.cc/RR3S-LBWS.

Congress or tribal consent to suit,[304] and nothing in VAWA waives tribal sovereign immunity. The defendant's sole remedy for tribal overreach is a habeas corpus petition to federal court.[305] Since tribes have already been stripped of criminal jurisdiction over non-Indians, tribes seem to have little to lose by risking possible overreach.[306]

Although tribes may have nothing to lose, supplemental VAWA jurisdiction does go against the grain in criminal cases. Supplemental VAWA jurisdiction applies an expansive reading of a criminal statute; whereas, criminal laws should ordinarily be construed narrowly.[307] The rule of lenity arose in old English common law courts to protect defendants from harsh punishments, like the death penalty, and for arbitrary offenses, like being in the vicinity of gypsies.[308] Supplemental VAWA jurisdiction is applied in a wholly different context. VAWA deals with *malum in se* offenses, so a defendant should not be able to aver that it is unfair to prosecute him for crimes of violence. Extending tribal court authority in VAWA cases to include substance abuse would not contradict the rule of lenity either. The United States has been at war with drugs for half a century;[309] therefore, tribes prosecuting drug use in VAWA cases comports with mainstream United States law.

Tribes employing a broad jurisdictional reading of VAWA are less threatening than a state or the federal government applying the same interpretation because imprisonment is often a last resort for tribes. Indigenous justice systems traditionally focus on restoring harmony to the community

304. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001) (citations omitted).

305. 25 U.S.C. § 1303 (2019); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66–67 (1978).

306. However, it is possible that a federal court reviewing a tribe's exercise of supplemental VAWA jurisdiction could launch into an attack on other aspects of tribal sovereignty. The Court has been hostile to tribal interests in recent years; nevertheless, it is difficult to conceive of a principled reason to punish a tribe that is enforcing public safety laws and simultaneously providing strong rights protections to defendants.

307. United States v. Davis, 139 S. Ct. 2319, 2333 (2019); Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 769–70 (2013).

308. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 714 (2017) ("The rule's genesis occurred, like those of many American laws, in England, where the death penalty was imposed in the fourteenth century for a multitude of crimes without regard for their severity. Some death-eligible crimes were quite trivial, such as being in the company of gypsies."); Zachary Price, *The Rule of Lenity As A Rule of Structure*, 72 FORDHAM L. REV. 885, 897 (2004); *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421–22 (2006).

309. *A Brief History of the Drug War*, DRUG POLICY ALLIANCE (last visited Oct. 31, 2019), https://perma.cc/24SH-MK3P; History.com Editors, *War on Drugs,* HISTORY (June 7, 2019), https://perma.cc/9NWV-CX4G; Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INSTITUTE POLICY ANALYSIS 811 (Apr. 12, 2017), https://perma.cc/DB9R-S2EQ.

rather than retribution.[310] Indeed, many tribes have "peacemaker courts" where dispute resolution and restitution are the goals of the proceeding rather than "winning the case."[311] Peacemaker courts apply alternative sentencing methods, a practice authorized by both VAWA[312] and the TLOA.[313] In VAWA cases, tribes are currently sentencing non-Indians to behavior therapies instead of jail.[314] When tribes deem incarceration appropriate, the maximum penalty a tribal court can impose is nine years in jail.[315] Tribes have been able to impose this sentence since 2010, and there is no evidence that tribes have abused this power, indeed it seems that no non-Indian has yet to even receive a nine year sentence.[316] Thus, an expansive reading of tribal VAWA is not likely to result in arbitrary incarcerations.

Supplemental VAWA jurisdiction would be a major step towards improving public safety and increasing tribal sovereignty, but it still has shortcomings. Despite significantly expanding tribal court jurisdiction, non-Indians with no prior connection to the tribe or Indian victim would remain beyond tribal jurisdiction. Lack of resources will continue to be an issue for many tribes as well; hence, it may be financially untenable for many tribes to prosecute more crimes and impose longer sentences.[317] Greater criminal jurisdiction does not equate to more law enforcement resources either. Nevertheless, supplemental VAWA jurisdiction increases the number of crimes

310. Adam Crepelle, *Tribal Lending and Tribal Sovereignty,* 66 DRAKE L. REV. 1, 26 (2018); Suvi Hynynen Lambson, *Peacemaking Circles,* CENTER FOR COURT INNOVATION (last visited Oct. 31, 2019), https://perma.cc/MS67-ZJRV; Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 257 (1997).

311. Matt Arbaugh, *Making Peace the Old Fashioned Way: Infusing Traditional Tribal Practices into Modern ADR*, 2 PEPP. DISP. RESOL. L.J. 303, 309 (2002) ("The peacemaking process focuses on truly resolving the issues rather than adjudicating them. It focuses on solving the problem causing the dispute rather than on remedial retribution or punishment being handed down for injuries, thus offering the parties a deeper resolution."); Juliana E. Okulski, *Complex Adaptive Peacemaking: How Systems Theory Reveals Advantages of Tribal Dispute Resolution Methods,* 5 AM. INDIAN L.J. 263, 264 (2017) ("More recently, however, m3any tribes have rediscovered or formally instituted traditional tribal methods of dispute resolution, generally referred to as 'peacemaking,' and are now also resolving interpersonal civil disputes pursuant to traditional tribal justice principles as well."); Little Traverse Bay Bands of Odawa Indians Tribal Court, *Peacemaking Models and Examples*, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS (last visited Jul 30, 2019), https://perma.cc/CG8F-TDLE (discussing different methods of peacemaking currently in use among tribes).

312. 25 U.S.C. § 1304(f)(1)(F)–(G) (2019).

313. 25 U.S.C. § 1302(d)(D)(2).

314. Riley, *supra* note 6, at 1617. **R**

315. 25 U.S.C. § 1302(a)(7)(D).

316. NCAI, *supra* note 87, at 8

317. *Id.* at 31 (One of the SDVCJ defendants at Eastern Band of Cherokee Indians, for example, required extensive medical care while in tribal custody, which ended up costing the tribe more than $60,000.); White Eagle, *supra* note 179, at 149 ("[C]omplying with the federal prerequisites to exercising enhanced sentencing authority is time consuming and expensive. Some tribes cannot afford to satisfy the requirements, other tribes have decided the extra authority is not worth the expense, and other tribes are still working through the process."). **R**

that tribes can hold non-Indians accountable for perpetrating. Indian country will be a safer place with supplemental VAWA jurisdiction.

VIII. Conclusion

Supplemental VAWA jurisdiction is an opportunity for tribal courts to help decolonize federal Indian law. VAWA authorizes tribal courts to prosecute non-Indians for dating violence, domestic violence, and protective order violations; thus, it is logical for tribal courts to prosecute these defendants for all of the offenses they commit during the criminal event. Tribal courts are courts of general jurisdiction, and prosecutions of non-Indians conducted in compliance with VAWA guidelines protect the rights of defendants in tribal courts. Indeed, there is no constitutional basis for tribes being unable to prosecute non-Indians in the first place. The only obstacle is *Oliphant*, a common law creation that rests on shaky moral and logical grounds. Supplemental VAWA jurisdiction circumvents *Oliphant* because tribal court prosecutions of non-Indians under VAWA are performed in accordance with the language of *Oliphant*. Supplemental VAWA jurisdiction is a method for tribes to take greater control of Indian country law enforcement and a practical solution to improve safety in Indian country.

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