

VIOLENCE AGAINST INDIGENOUS WOMEN: HOW A JURISDICTIONAL MAZE IS HINDERING CRIMINAL PROSECUTION AND PREVENTING JUSTICE

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I. INTRODUCTION

A. *Desireé Coyote*

Thirty years ago, Desireé Coyote, a member of the Confederated Tribes of the Umatilla Indian Reservation, reported to tribal police her account of the sexual and physical assault she had endured at the hands of her then-husband.¹ Following years of alleged abuse, Coyote divorced her husband.² Then, as the police report states, one evening, Coyote's ex-husband came to her house on the Umatilla reservation, kidnapped her, beat her, and sexually assaulted her.³

Coyote had previously reported her ex-husband's alleged abuse, but because Coyote is Indigenous, her ex-husband is not, and the reported assault occurred in 1991 on tribal land, federal law prevented the tribe from prosecuting him.⁴ According to the police report, tribal police forwarded the case to the FBI.⁵ Coyote's ex-husband was never charged for his alleged crimes.⁶

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¹ Bryce Dole & Zack Demars, *Justice Lags for Indigenous Survivors of Violence*, UNDERSCORE (July 16, 2022), <https://www.underscore.news/reporting/indigenous-victims-of-violence-have-faced-decades-of-systemic-failures> [<https://perma.cc/5JXA-SVRX>].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

More than 84% of Indigenous⁷ women in America have experienced violence in their lifetime.⁸ Indigenous women face murder rates more than ten times the national average in some counties and are almost two times as likely to experience rape as non-Hispanic white women over the course of a lifetime.⁹ In 1994, the Violence Against Women Act was enacted to

⁷ A note on terminology: the term “Indigenous” refers to “the descendants of the peoples who inhabited the Americas, the Pacific, and parts of Asia and Africa prior to European colonization.” *Resources on Native American and Indigenous Affairs*, UCLA OFF. OF EQUITY, DIVERSITY & INCLUSION, <https://equity.ucla.edu/know/resources-on-native-american-and-indigenous-affairs/native-american-and-indigenous-peoples-faqs/> [<https://perma.cc/UTL4-RKG3>] (Apr. 14, 2020). The term is widely inclusive as there are Indigenous populations on every continent throughout the world and therefore is not specific to Indigenous populations in the United States. *Id.*

Most often, in reference to Indigenous peoples from the geographic region now recognized as the United States, common terminology includes both Native American and American Indian (often used interchangeably). NATIVE AM. JOURNALISTS ASS’N (NAJA), REPORTING & INDIGENOUS TERMINOLOGY (2018), available at https://najaneewsroom.com/wp-content/uploads/2018/11/NAJA_Reporting_and_Indigenous_Terminology_Guide.pdf [<https://perma.cc/8V53-TQCN>]. While these terms are commonly used and are often viewed as acceptable, some feel the terms are disrespectful due to the origins of colonization and assimilation. Amanda Blackhorse, *Blackhorse: Do You Prefer ‘Native American’ or ‘American Indian’? 6 Prominent Voices Respond*, INDIAN COUNTRY TODAY, <https://indiancountrytoday.com/archive/blackhorse-do-you-prefer-native-american-or-american-indian-6-prominent-voices-respond> [<https://perma.cc/R5XF-X3HU>] (Sept. 13, 2018). Discussions regarding proper terminology are complex and evolving and there is no single answer. Indigenous peoples are those who had pre-existing sovereignty and who were living together as communities prior to contact with settler populations. UCLA OFF. OF EQUITY, DIVERSITY & INCLUSION, *supra*. Therefore, for purposes of this Note, and in keeping with the argument in favor of restored sovereignty, “Indigenous” will be used to refer to Indigenous peoples from the geographic region that is now the United States, including Alaska Natives. *See infra* text accompanying note 18. Whenever possible, this Note will identify people by their preferred tribal affiliation when discussing individuals or individual tribes.

⁸ NAT’L CONG. OF AM. INDIANS, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 1 (Feb. 2018), available at https://archive.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief_FINAL_2_1_2018.pdf [<https://perma.cc/G7S5-57RG>].

⁹ *Id.* at 1–2.

criminalize domestic violence but did not include Indigenous women until 2005 when the Act was reauthorized.¹⁰ The reauthorization provided funding for tribal governments to aid victims of violence and provided access to resources for tribal law enforcement agencies.¹¹ The vast majority of the crimes of violence against Indigenous women, however, are never prosecuted.¹²

The most profound barrier is referred to by scholars as a “jurisdictional maze,” which complicates prosecution or makes it unlikely altogether.¹³ In 1885, Congress passed the Major Crimes Act, giving the United States federal government jurisdiction over crimes such as rape and homicide that occurred on tribal land.¹⁴ In 1978, the United States Supreme Court ruling in *Oliphant v. Suquamish* limited tribal sovereignty further by granting the United States government federal jurisdiction over crimes committed by non-Indigenous offenders on tribal land, including cases where the victim is Indigenous.¹⁵

This ruling became increasingly problematic because a reported 96% of sexual violence against Indigenous women is committed by non-Indigenous offenders.¹⁶ According to the Census Bureau, non-Indigenous

¹⁰ Sheena L. Gilbert et al., *Federal Policy Has Failed to Protect Indigenous Women*, THE CONVERSATION (June 18, 2021, 8:32 AM), <https://theconversation.com/federal-policy-has-failed-to-protect-indigenous-women-159679> [<https://perma.cc/ZN8U-YRH8>].

¹¹ *Id.*

¹² *See id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

¹⁶ *Ending Violence Against Native Women*, INDIAN L. RES. CTR., <https://indianlaw.org/issue/ending-violence-against-native-women> [<https://perma.cc/ST2E-8X7C>].

people comprise 76% of the population on tribal lands¹⁷ and 68% in Alaska Native¹⁸ villages.¹⁹

This note addresses the legal barriers contributing to the disproportionate rates of crimes committed against Indigenous women on tribal land. Part II discusses the foundations and guidelines of tribal criminal jurisdiction through case precedent and federal and state legislation.

Part III opens with an examination of the legal framework that has shaped and defined tribal sovereignty. This includes modern case law at the heart of what currently defines tribal sovereignty. This Part concludes by determining that strengthening tribal sovereignty through expanded tribal criminal jurisdiction is essential to addressing crimes against Indigenous women.

Part IV explores a proposed two-prong approach to streamlining jurisdiction on tribal lands. This streamlined approach focuses on the key jurisdictional problems that often hinder criminal prosecution and weaken tribal sovereignty. This Part also addresses implementation of the two-pronged approach through a public policy and cultural perspective and tackles potential roadblocks and counterarguments.

II. THE FOUNDATIONS OF TRIBAL JURISDICTION

This Part begins by defining tribal lands. Whether a crime occurred on tribal land is the first factor used in determining who has criminal jurisdiction over a particular crime.²⁰ Once established that a crime

¹⁷ *Id.*; CONG. RSCH. SERV., TRIBAL LANDS: AN OVERVIEW 2 tbl.1 (Oct. 14, 2021), available at <https://sgp.fas.org/crs/misc/IF11944.pdf> [<https://perma.cc/SA6T-UBZS>] Not all federally recognized tribes have reservations. Some have lands held in a trust by the federal government; some own restricted fee land; and others are landless. This Note will use “tribal lands” to refer to restricted fee lands, trust lands, allotted lands, fee lands, Indian Country, see *infra* text accompanying note 22, and federal tribal reservations (unless specified otherwise).

¹⁸ Note: Indigenous peoples living in Alaska are collectively called Alaska Natives and are divided into five major groupings: (1) Aleuts, (2) Inupiat, (3) Yuit, (4) Athabascans, and (5) Tlingit and Haida. Steve Langdon, *Alaska Native Communities on Harriman’s Route*, PBS, <https://www.pbs.org/harriman/1899/native.html> [<https://perma.cc/BXQ6-DS6X>]. “These groupings are based on broad cultural and linguistic similarities of peoples living contiguously in different regions of Alaska.” *Id.*

¹⁹ INDIAN L. RES. CTR., *supra* note 16.

²⁰ See *United States v. Haggerty*, 997 F.3d 292, 298 n.2 (5th Cir. 2021).

occurred on tribal land, the second factor in determining criminal jurisdiction is the Indigenous status of the parties to the crime.²¹ This Part serves as a general guide to criminal jurisdiction on tribal lands by outlining the current status of criminal jurisdiction in situations where the offender is non-Indigenous and where the offender is an Indigenous non-member. Also outlined in this Part are the situations giving rise to federal criminal jurisdiction on tribal land, as well as the situations giving rise to state criminal jurisdiction on tribal land.

A. Tribal Lands

1. Defined

“Tribal lands”²² mean:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished. . . .²³

B. Criminal Jurisdiction over Non-Indigenous Offenders on Tribal Land

1. Oliphant v. Suquamish Indian Tribe

The 1978 case, *Oliphant v. Suquamish Indian Tribe*,²⁴ was a landmark case that set a precedent for courts to decide jurisdiction over a non-Indigenous individual who commits a crime on tribal land.²⁵ In this case, the United States Supreme Court determined that, as a general rule, tribal nations do not have criminal jurisdiction to prosecute non-Indigenous individuals on tribal land.²⁶

²¹ *Id.*

²² The legal name used frequently in statutes and case law is “Indian country,” but this Note refers to these lands as “tribal lands.”

²³ 18 U.S.C. § 1151.

²⁴ 435 U.S. 191 (1978).

²⁵ *Id.* at 195.

²⁶ *Id.*

Tribal authorities arrested Mark David Oliphant and Daniel B. Belgarde, both non-Indigenous residents of the Port Madison Reservation.²⁷ Oliphant was charged with assaulting a tribal officer and Belgarde with recklessly endangering another person.²⁸ Before trial, both petitioners filed separate *writs* of habeas corpus asserting that the tribal court did not have criminal jurisdiction over non-Indigenous individuals.²⁹ When the district and circuit courts denied relief, the case proceeded to the U.S. Supreme Court.³⁰

The appellate court here agreed with the Suquamish Tribe's argument and held that tribes, "though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress."³¹ According to the court of appeals, criminal jurisdiction over anyone committing an offense on a reservation³² is fundamental to those powers.³³ The Supreme Court reversed the court of appeal's decision and held that, absent affirmative delegation of criminal jurisdictional power by Congress, tribes did not have such power over non-Indigenous individuals.³⁴

The foundations of this case arise out of an 1855 treaty in which the Suquamish Tribe relinquished all rights to land they held in the state of Washington to the United States government and agreed to settle on the

²⁷ *Id.* at 194.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 194–95.

³¹ *Id.* at 196 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)).

³² DrupalMigration2017, *What is a Federal Indian Reservation?*, BUREAU OF INDIAN AFFS. (Aug. 19, 2017), <https://www.bia.gov/faqs/what-federal-indian-reservation> [<https://perma.cc/TEF9-82Y5>].

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.

Id.

³³ *Oliphant*, 435 U.S. at 196 (stating that the Ninth Circuit deemed "criminal jurisdiction over anyone committing an offense on the reservation a 'sine qua non' of such powers"); *Oliphant*, 544 F.2d at 1009.

³⁴ *Oliphant*, 435 U.S. at 208; *Oliphant*, 544 F.2d at 1010.

Port Madison Reservation.³⁵ The Supreme Court noted this effectively served as an acknowledgement of the tribe's dependence on the United States government, which extended to arresting and trying non-tribal members who acted within the reservation.³⁶ However, the Suquamish Tribe refuted this argument by using the Court's own language in previous decisions where the Court described tribes as "quasi-sovereign entities."³⁷

The Supreme Court also discussed a then-current trend in tribes claiming authority to try non-Indigenous individuals, citing their retained national sovereignty.³⁸ In the opinion, however, the Court explained the issue of granting jurisdiction to tribes over non-Indigenous individuals was, at the time, a relatively new phenomenon before the Court.³⁹ The Court stated that in the few instances when tribes had made an effort to assert criminal jurisdiction, "it [had] been held that the jurisdiction did not exist."⁴⁰ In denying tribes proper jurisdiction, the Court cites a lack of well-maintained "formal court system[s]" and a tendency for tribal members to handle offenses by other tribal members in accordance with social and religious practices rather than formal judicial processes.⁴¹ The Court recognized that some tribal court systems are becoming "increasingly sophisticated and resemble in many respects their state counterparts."⁴² This recognition, though, did not factor into its decision.⁴³

2. *The Violence Against Women Act: A Partial Oliphant Fix*

The Violence Against Women Act (VAWA), originally passed in 1994, was designed to "improve criminal justice and community-based

³⁵ Treaty between the United States and the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory, arts. I–II, Jan. 22, 1855, 12 Stat. 927.

³⁶ *Oliphant*, 435 U.S. at 207 ("By acknowledging their dependence on the United States, in the Treaty of Point Elliott, the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their Reservation.").

³⁷ *Id.* at 196.

³⁸ *Id.*

³⁹ *Id.* at 196–97.

⁴⁰ *Id.* at 197.

⁴¹ *Id.*

⁴² *Id.* at 211–12.

⁴³ *See id.* at 212.

responses to violence against women . . . in the United States.”⁴⁴ This Act served as a partial *Oliphant* fix, modifying the precedent by granting tribal criminal jurisdiction over non-Indigenous offenders in some situations.⁴⁵

VAWA consists of a collection of funding programs, initiatives, and actions centered around addressing violence against women.⁴⁶ The 2013 reauthorization of VAWA included Title IX, which was designed to respond to crimes committed by non-Indigenous offenders on tribal land.⁴⁷ In addition, Congress amended the Indian Civil Rights Act of 1968, extending Special Domestic Violence Criminal Jurisdiction (SDVCJ) to tribal courts over non-Indigenous offenders who commit certain crimes.⁴⁸ Tribal Nations who meet certain requirements may exercise this SDVCJ over non-Indigenous individuals who commit the following offenses: domestic violence, sexual assault, dating violence, or violation of a protection order.⁴⁹ This provision allowed tribes to exercise criminal jurisdiction over non-Indigenous offenders for the first time since *Oliphant*.⁵⁰ While the 2013 reauthorization of VAWA was an essential victory toward tribal sovereignty, this special jurisdiction was limited, granted only in situations that met stringent requirements.⁵¹ Importantly, criminal jurisdiction turned on the status of the tribal lands where a crime was committed, which only applied to one of the 229 federally recognized tribes⁵² located in Alaska.⁵³ Furthermore, tribes could only exercise

⁴⁴ *Introduction to the Violence Against Women Act*, TRIBAL L. & POL’Y INST.: TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/title_ix.htm [https://perma.cc/SBR6-A6EH].

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL L. & POL’Y INST.: TRIBAL CT. CLEARINGHOUSE, <https://www.tribal-institute.org/lists/jurisdiction.htm> [https://perma.cc/9CMH-GCSD].

⁴⁹ *Id.*

⁵⁰ *See 2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)*, U.S. DEP’T OF JUST., <https://www.justice.gov/tribal/2013-and-2022-reauthorizations-violence-against-women-act-vawa> [https://perma.cc/XS3Q-9VSP] (Apr. 7, 2023).

⁵¹ *See id.*

⁵² TRIBAL L. & POL’Y INST., *supra* note 44. The entire state of Alaska, which encompasses 180,000 tribal members of 228 federally recognized tribes, falls under the jurisdiction of the Alaska Region. *Alaska Region*, BUREAU OF INDIAN AFFS., <https://www.bia.gov/regional-office/alaska-region> [https://perma.cc/H4LG-WUGK]. A

(continued)

criminal jurisdiction over non-Indigenous offenders if the perpetrator had “significant ties to the tribe.”⁵⁴ In 2014, President Obama signed into law a repeal of the special rule for Alaska, thus ensuring all tribes in Alaska are authorized to exercise SDVCJ.⁵⁵

Amendments to the Act in 2022 extended SDVCJ to an expanded list of crimes.⁵⁶ This list includes “child violence, obstruction of justice, sexual violence, sex trafficking, and stalking.”⁵⁷ Further, the most recent version of the Act eliminated the former requirement that a non-tribal member defendant must have “ties to the participating tribe.”⁵⁸

3. United States v. Cooley

A recent case, decided in 2021, marked an important shift in tribal criminal jurisdiction case law.⁵⁹ Under review in this case was whether a tribal police officer has the authority to conduct criminal investigatory processes over a non-Indigenous individual.⁶⁰ The Supreme Court held tribal law enforcement does have this authority.⁶¹ The *Cooley* decision expanded the incredibly narrow jurisdictional authority established in

small exception to this jurisdiction is the Metlakatla Indian Community of the Annette Island Reserve, which falls under the Northwest Region. See TRIBAL L. & POL’Y INST., *supra* note 44. The Metlakatla Indian Country was the only one to receive the special domestic violence jurisdiction granted by the 2013 reauthorization of VAWA. *Id.* The remaining 228 tribes were exempt from the 2013 VAWA criminal jurisdiction expansion. *Id.*

⁵³ INDIAN L. RES. CTR., RESTORING SAFETY TO NATIVE WOMEN AND GIRLS AND STRENGTHENING NATIVE NATIONS: A REPORT ON TRIBAL CAPACITY FOR ENHANCED SENTENCING AND RESTORED CRIMINAL JURISDICTION 22 (2013), *available at* https://indianlaw.org/sites/default/files/TribalCapacityReport_Final_1.pdf [<https://perma.cc/XE2Z-EB2Q>].

⁵⁴ *Id.* at 87 (referring to the perpetrator having ties to the tribe of the victim).

⁵⁵ TRIBAL L. & POL’Y INST., *supra* note 44.

⁵⁶ U.S. DEP’T OF JUST., *supra* note 50.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *United States v. Cooley*, 141 S. Ct. 1638 (2021).

⁶⁰ *Id.* at 1641.

⁶¹ *See id.*

Oliphant and operates independently of the jurisdiction set forth by VAWA, which is crime-specific.⁶²

Late at night in February 2016, Officer James Saylor of the Crow Police Department drove on U.S. Highway 212 (a public right-of-way crossing through the Crow Reservation) in the state of Montana.⁶³ Officer Saylor saw a truck parked on the side of the highway and, concerned for the driver's safety, approached the truck and spoke to the driver.⁶⁴ Officer Saylor noticed the driver, Joshua Cooley, had "watery, bloodshot eyes," and saw two semiautomatic rifles laying on the front seat.⁶⁵ Saylor feared violence and ordered Cooley out of his truck before conducting a pat down search for weapons on Cooley's person.⁶⁶ While waiting for backup, Officer Saylor went back to the truck and, in plain view, "saw a glass pipe and plastic bag that contained methamphetamine."⁶⁷ After a grand jury indicted Cooley on drug and gun offenses, "the District Court granted Cooley's motion to suppress the drug evidence that Officer Saylor had seized," reasoning that, as a Crow Tribe officer, Saylor "lacked the authority to investigate nonapparent violations of state or federal law by a non-Indian on a public right-of-way crossing the reservation."⁶⁸ On appeal, "the Ninth Circuit affirmed the District Court's evidence-suppression determination."⁶⁹

The Supreme Court vacated the judgment, citing *Montana v. United States*.⁷⁰ In *Montana*, the Court held that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers"⁷¹ The

⁶² *But see* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that tribes did not have criminal jurisdiction over non-Indigenous individuals).

⁶³ *Cooley*, 141 S. Ct. at 1641–42.

⁶⁴ *Id.* at 1642.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*; *United States v. Cooley*, No. CR 16-42-BLG-SPW, 2017 U.S. Dist. LEXIS 17276, at *1, *7 (D. Mont. Feb. 7, 2017).

⁶⁹ *Cooley*, 141 S. Ct. at 1642.; *United States v. Cooley*, 919 F.3d 1135, 1148 (9th Cir. 2019).

⁷⁰ *Cooley*, 141 S. Ct. at 1646; *Montana v. United States*, 450 U.S. 544, 566–67 (1981) (holding that a tribe could not regulate hunting and fishing by non-Indigenous individuals on a reservation).

⁷¹ *Cooley*, 141 S. Ct. at 1643; *Montana*, 450 U.S. at 565 ("nonmember" referring to both non-Indigenous individuals and Indigenous non-members).

Montana Court, however, laid out “two important exceptions.”⁷² In the *Cooley* decision, the Court relied on the second exception: that tribes may retain inherent power to regulate nonmembers’ conduct that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁷³ The Court stated it has repeatedly acknowledged that “‘certain forms of nonmember behavior’ may ‘sufficiently affect the tribe as to justify tribal oversight.’”⁷⁴

The *Cooley* decision serves as an important victory for tribes and tribal law enforcement. In upholding tribal police officers’ authority to conduct investigatory stops and detentions of non-Indigenous and Indigenous non-members, the Court provided some clarity in the complex and, at times, conflicting tribal jurisdiction jurisprudence.

C. Criminal Jurisdiction Over Indigenous Non-Members

In the 1990 case *Duro v. Reina*,⁷⁵ the Supreme Court ruled that tribal courts did not have criminal jurisdiction over Indigenous non-members (Indigenous individuals who are members of a tribe different from the tribe associated with the tribal land on which the crime occurred).⁷⁶ In 1991, however, Congress amended the definition of “powers of self-government” in the Indian Civil Rights Act to include the language, “. . . means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”⁷⁷ This amendment effectively overturned the *Duro* decision and restored criminal jurisdiction to tribal courts over Indigenous non-members.⁷⁸

⁷² *Cooley*, 141 S. Ct. at 1643.

⁷³ *Id.* (quoting *Montana*, 450 U.S. at 566).

⁷⁴ *Id.* at 1645 (quoting *Plains Com. Bank v. Long Fam. & Cattle Co.*, 554 U.S. 316, 335 (2008)).

⁷⁵ 495 U.S. 676 (1990), *superseded by statute*, Department of Defense Appropriations Act, 1991, § 8077(b)–(d), 104 Stat. 1856, 1892–93, *as recognized in* *United States v. Lara*, 541 U.S. 193, 197–98 (2004).

⁷⁶ *Id.* at 679.

⁷⁷ The Indian Civil Rights Act of 1968, 25 U.S.C. § 1301(1); Department of Defense Appropriations Act, 1991, § 8077(b)–(d), 104 Stat. 1856, 1892–93.

⁷⁸ *Lara*, 541 U.S. at 197–98.

D. Federal Criminal Jurisdiction on Tribal Lands

Federal courts are courts of limited jurisdiction; they can only hear cases authorized by the United States Constitution or federal statutes.⁷⁹ Congress has granted the federal courts criminal jurisdiction in tribal lands via the following statutes: General Crimes Act and Major Crimes Act.⁸⁰

1. General Crimes Act

The General Crimes Act, originally passed by Congress in 1817, extended federal criminal jurisdiction over crimes committed on tribal lands in cases where the offender is non-Indigenous but the victim is Indigenous.⁸¹ The Act can also apply where the offender is Indigenous and the victim is non-Indigenous but the crime falls outside of the provisions of the Major Crimes Act, and the offender has not already been punished for the offense by tribal courts.⁸²

2. Major Crimes Act

In 1883, the Supreme Court held in *Ex parte Crow Dog*⁸³ that federal courts had no jurisdiction to try Indigenous defendants for the murder of an Indigenous victim.⁸⁴ In response to the court's holding in *Crow Dog*, Congress enacted the 1885 Major Crimes Act which grants criminal jurisdiction to federal courts over certain enumerated crimes if the defendant is Indigenous, even when the victim is also Indigenous.⁸⁵ Currently, there are sixteen "major crimes" that result in federal criminal

⁷⁹ *Introduction to the Federal Court System*, U.S. DEP'T OF JUST., <https://www.justice.gov/usao/justice-101/federal-courts> [<https://perma.cc/6FC9-8UAG>].

⁸⁰ See generally General Crimes Act, 18 U.S.C. § 1152; Major Crimes Act, 18 U.S.C. § 1153.

⁸¹ See General Crimes Act, 18 U.S.C. § 1152; *Tribal Law*, *infra* note 87.

⁸² *Id.*

⁸³ 109 U.S. 556 (1883), *superseded by statute*, Major Crimes Act, 18 U.S.C. § 1153.

⁸⁴ *Crow Dog*, 109 U.S. at 572 This decision was consistent with the standard practice prior to the enactment of the Major Crimes Act, where offenses committed by an Indigenous individual against another Indigenous individual were tried in tribal courts. See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 716–17 (“Congress never applied the General Crimes Act to offenses between Indians [until passage of the Major Crimes Act, which] gave federal prosecutors authority to prosecute certain ‘major’ crimes by Indians against Indians . . .”).

⁸⁵ Washburn, *supra* note 84, at 717; Major Crimes Act, 18 U.S.C. § 1153(a).

jurisdiction: murder, assault resulting in serious bodily injury, most sexual offenses, felony child abuse, and burglary.⁸⁶ Though this Act allows federal jurisdiction over crimes in which both the offender and the victim are Indigenous and the crime occurs on tribal lands, tribal courts still retain jurisdiction to prosecute the same offenses.⁸⁷ As such, an Indigenous defendant may be concurrently prosecuted in federal and tribal court jurisdictions for the same offense.⁸⁸

E. State Criminal Jurisdiction on Tribal Lands

Generally, states do not have jurisdiction over crimes that occur on tribal lands.⁸⁹ However, notable exceptions include Public Law 280 states and situations where wholly non-Indigenous crimes occur on tribal lands.⁹⁰

1. Public Law 280

Congress enacted Public Law 83-280 in 1953 to grant certain states criminal jurisdiction over tribal members on reservations and to allow state courts control over civil litigation arising under tribal law or federal court jurisdiction.⁹¹ Mandatory Public Law 280 states (states required to adopt civil and criminal jurisdiction over federal tribal lands) were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, with the exception of a few tribes.⁹² The states that assumed full or partial jurisdiction (optional Public Law 280 states) were Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington.⁹³ Thus, the federal government relinquished all special criminal jurisdiction in these states over Indigenous offenders and

⁸⁶ 18 U.S.C. § 1153(a).

⁸⁷ *Tribal Law*, U.S. DEP'T OF JUST. OFF. FOR VICTIMS OF CRIME, <https://www.ovcttac.gov/saneguide/legal-and-ethical-foundations-for-sane-practice/tribal-law/> [<https://perma.cc/2QNX-8UKL>].

⁸⁸ *Id.*

⁸⁹ TRIBAL CT. CLEARINGHOUSE, *supra* note 48.

⁹⁰ *Id.*

⁹¹ Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162); *see also American Indians and Alaska Natives – Public Law 280 Tribes*, U.S. DEP'T OF HEALTH & HUM. SERVS. ADMIN. FOR CHILD. & FAMS., <https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-public-law-280-tribes> [<https://perma.cc/FLQ2-Z42N>].

⁹² U.S. DEP'T OF HEALTH & HUM. SERVS. ADMIN. FOR CHILD. & FAMS., *supra* note 91.

⁹³ *Id.*

victims.⁹⁴ Notably, Public Law 280 altered the allocation of federal and state criminal jurisdiction but did not expand or reduce tribal criminal jurisdiction.⁹⁵

Indigenous Nations criticized and opposed Public Law 280 because the process was imposed on tribes who, in most cases, had not consented to exchange federal criminal jurisdiction for the much broader state criminal jurisdiction.⁹⁶ In 1968, Congress amended the law and thereby subjected future state jurisdiction to tribal consent and permitted states to withdraw from the Public Law 280 arrangement.⁹⁷ As of 2017, no tribes have agreed to state jurisdiction since the amendment and tribes within states already subject to Public Law 280 cannot remove themselves individually from the jurisdiction without the entire state doing so as well.⁹⁸

Problematically, state criminal justice is historically ineffective on reservations as a result of local authorities either failing to properly serve tribal communities or reacting with excessive harshness.⁹⁹ Further, in the 1970s (when tribal law enforcement and court systems were developing), many tribes in Public Law 280 states were denied federal funding support because the states had taken over criminal jurisdiction.¹⁰⁰

2. *Wholly Non-Indigenous Crimes Committed on Tribal Land*

Jurisdiction over offenses committed by non-Indigenous offenders against non-Indigenous victims on tribal lands are within the exclusive jurisdiction of the states.¹⁰¹ This narrow jurisdiction stems from the

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Carole Goldberg, *Unraveling Public Law 280: Better Late than Never*, A.B.A.: HUM. RTS. (Sept. 1, 2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol--43/vol--43--no--1/unraveling-public-law-280--better-late-than-never/ [https://perma.cc/H3NM-B5NZ].

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ General Crimes Act, 18 U.S.C. § 1152. The fourth exception to the General Crimes Act provides for exclusive state jurisdiction over wholly non-Indigenous crimes on tribal lands. *See United States v. Antelope*, 430 U.S. 641, 643 n.2 (1977) Otherwise, the Act grants only federal jurisdiction over a specific list of crimes. *See Major Crimes Act*, 18 U.S.C. § 1153.

Supreme Court's decision in *United States v. McBratney*,¹⁰² where the Court held that, absent treaty provisions to the contrary, it was the state court (not the federal courts) who had jurisdiction over "the crime of murder committed by a white man upon a white man within the Ute Reservation, and within the limits of the State of Colorado."¹⁰³ The Court in *Draper v. United States*¹⁰⁴ and later courts have upheld the rule established in *McBratney*.¹⁰⁵

III. TRIBAL SOVEREIGNTY

A. *Defined*

Sovereignty is legally defined as having "supreme political authority; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation."¹⁰⁶

B. *The Legal Framework for Defining Tribal Sovereignty*

In the 1823 case *Johnson v. M'Intosh*,¹⁰⁷ plaintiffs, mostly British citizens, claimed title to property in Illinois under a purchase and conveyance from the Piankeshaw Tribe prior to the American Revolution.¹⁰⁸ The defendants argued their claim to the contested property, granted to them by the United States government, was superior.¹⁰⁹ The Court recognized a transaction for the sale of land took place between the

¹⁰² 104 U.S. 621, 621–22 (1882).

¹⁰³ *Id.* at 624.

¹⁰⁴ 164 U.S. 240 (1896).

¹⁰⁵ *Id.* at 243, 247 (affirming *McBratney*); see also *United States v. Wheeler*, 435 U.S. 313, 324 n.21 (1978) (applying the rule in *McBratney*); *Antelope*, 430 U.S. at 643 n.2 (same); *Williams v. United States*, 327 U.S. 711, 714 n.9 (1946) (same).

¹⁰⁶ *Sovereignty*, BLACK'S LAW DICTIONARY (2nd ed. 1910), available at <https://thelawdictionary.org/sovereignty/> [<https://perma.cc/4F2Y-HP4Q>].

¹⁰⁷ 21 U.S. (8 Wheat.) 543 (1823).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 567.

Piankeshaw Tribe and the Plaintiffs, but the linchpin in this case turned on whether the transaction was considered valid.¹¹⁰

The Court ultimately found for the defendants, reasoning that the Piankeshaw Tribe was unable to convey land because the tribe never owned title to the land in the traditional sense understood by the Court at the time.¹¹¹ In some instances, the Court referenced the foregoing standard that some tribal lands were not recognized at all and were treated as legally “vacant.”¹¹² In other instances, the Court discussed the principle that Indigenous peoples’ interest in their own property was defined as a “right of occupancy,” effectively allowing whomever “discovered” the lands to obtain the exclusive right to extinguish “Indian title of occupancy, either by purchase or by conquest.”¹¹³

In 1831 and 1832, the Supreme Court of the United States presided over two additional landmark cases in tribal sovereignty precedent. In *Cherokee Nation v. Georgia*,¹¹⁴ the Cherokee Tribe sought an injunction to prevent the state of Georgia from taking tribal land and imposing burdensome regulations on the Tribe.¹¹⁵ The Cherokee Tribe also argued their unique status of self-government made it a foreign state rather than a state of the union.¹¹⁶ The Court disagreed, ruling the Cherokee Nation is not a foreign state in the sense of the federal Constitution and therefore the Court lacked jurisdiction to hear an original action brought by a tribe.¹¹⁷

Instead, the Court issued the following statement:

[T]ribes . . . may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of

¹¹⁰ *Id.* at 572 (“The inquiry therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.”).

¹¹¹ *Id.* at 604.

¹¹² *Id.* at 596.

¹¹³ *Id.* at 582–83, 587.

¹¹⁴ 30 U.S. (5 Pet.) 1 (1831).

¹¹⁵ *Id.* at 15.

¹¹⁶ *Id.* at 16.

¹¹⁷ *Id.* at 20.

pupilage. Their relation to the United States resemble that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.¹¹⁸

The majority and dissent acknowledged the Cherokee Nation's political existence capable of forming an independent government separate and distinct from the jurisdiction of states.¹¹⁹ However, by determining tribal nations are "domestic dependent nations" rather than true foreign states, the Court solidified the problematic fact that tribal communities remained subject to the authority of the United States government.¹²⁰ An important distinction arising from this concept is that tribes possess internal governmental power over all affairs within the tribe, yet they lack external authority to engage in foreign relations.¹²¹

In 1832, the Court revisited the state of Georgia's attempts to regulate the Cherokee Tribe.¹²² In *Worcester v. Georgia*,¹²³ the state of Georgia passed two laws; one prohibiting white persons from living on Cherokee land without a license, and another redrawing the boundaries of Cherokee territory.¹²⁴ This time, the Court invalidated Georgia's state law and reaffirmed the Cherokee Nation's sovereign rights under various treaties.¹²⁵ This ruling was surprising in light of the Supreme Court's previous ruling in *Cherokee Nation v. Georgia*, where the Court completely dismissed the Cherokee Nation's claim that they were a foreign state.¹²⁶

While the *Worcester* court confirmed what had already been established in *Cherokee Nation* (that tribal nations were free from the jurisdiction of the states), it did not expand tribal authority to something resembling actual sovereignty akin to what the United States federal government maintains.¹²⁷ In fact, the concurrence noted, "At no time has

¹¹⁸ *Id.* at 17.

¹¹⁹ *Id.* at 16; *Id.* at 71–72 (Johnson, J., dissenting).

¹²⁰ *Id.* at 17 (majority opinion).

¹²¹ *Id.* at 16.

¹²² *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

¹²³ *Id.*

¹²⁴ *Id.* at 577–78 (M'Lean, J., concurring).

¹²⁵ *Id.* at 562 (majority opinion).

¹²⁶ *Cherokee Nation*, 30 U.S. at 20.

¹²⁷ *Worcester*, 31 U.S. at 540.

the sovereignty of the country been recognized as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty.”¹²⁸ In the 1973 case *McClanahan v. Arizona State Tax Commission*,¹²⁹ the Supreme Court suggested that tribal sovereignty might not be inherent, but rather derived from federal power.¹³⁰ In the Supreme Court decisions following these foundational cases, the Court’s various rulings on tribal sovereignty remained inconsistent and complex. Yet, the principle that tribal nations’ authority entirely depended on the United States federal government persisted.

C. *McGirt v. Oklahoma: A Modern Victory in Tribal Sovereignty*

What constitutes tribal land and what factors determine the boundaries of criminal jurisdiction for tribes?

In *McGirt*, the Court looked to treaties dating back to the 1800s.¹³¹ The Court’s decision opens with, “On the far end of the Trail of Tears was a promise;” forced out of their ancestral lands, “the Creek Nation received assurances that their new lands in the West would be secure forever.”¹³² The question presented in this case was whether the land the treaties promised should remain a reservation for the purposes of federal criminal law.¹³³ The answer to this question would determine whether the state courts of Oklahoma originally lacked jurisdiction to prosecute Jimcy McGirt, a Seminole Tribe member, for three serious sexual offenses he committed against a Seminole girl in the 1990s.¹³⁴

In postconviction proceedings, McGirt appealed under the federal Major Crimes Act, which provides that “within ‘. . . Indian country,’ ‘[a]ny Indian who commits’ certain enumerated offenses ‘against the person or property of another Indian or any other person’ ‘shall be subject to the same law and penalties as all other persons committing any of the above

¹²⁸ *Id.* at 580 (M’Lean, J., concurring).

¹²⁹ 411 U.S. 164 (1973).

¹³⁰ *Id.* at 171–73; Peter d’Errico, *Sovereignty: A Brief History in the Context of U.S. “Indian Law”*, in THE ENCYCLOPEDIA OF MINORITIES IN AMERICAN POLITICS 691, 691–93 (Jeffrey D. Schultz et al. eds., 2000) available at <https://www.umass.edu/legal/derrico/sovereignty.html> [<https://perma.cc/S72N-8YM4>].

¹³¹ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

offenses within the exclusive jurisdiction of the United States.”¹³⁵ Under this statute and controlling precedent, most states generally do not have jurisdiction to try tribal members for conduct committed on tribal land.¹³⁶ Importantly, the Creek Nation joined *McGirt*, not because the tribe was interested in absolving him of his guilt, but because of the serious implications that this decision would have on tribal sovereignty.¹³⁷ Specifically, the state of Oklahoma asserted the land once “given” to the Creek Tribe had been disestablished as a reservation.¹³⁸ The Court rejected Oklahoma’s argument that Congress’ practices of diminishing reservation land and restricting tribal authority support a finding of disestablishment.¹³⁹ Instead, the Court branded those acts “unlawful” and reversed the judgment of the Court of Criminal Appeals of Oklahoma, holding that most of Oklahoma (including Tulsa) remains a reservation.¹⁴⁰

Prior to the *McGirt* decision, most felonies, even those involving tribal members, were prosecuted in Oklahoma state courts.¹⁴¹ Now, these types of crimes would be heard and decided in tribal courts. This decision not only solidified tribal court criminal jurisdiction on tribal lands (where the offender and/or victim is/are Indigenous) in Oklahoma, but it also protected tribes from the unlawful reach of Oklahoma state jurisdiction on sovereign tribal land. This triumph in the fight to restore tribal sovereignty provided a vital legal standard for cases involving the Muscogee (Creek) Nations and the Five Civilized Tribes which include the Cherokee, Choctaw, Seminole, and Chickasaw, since these Tribes had identical treaty

¹³⁵ *Id.* (alterations in original) (quoting Major Crimes Act, 18 U.S.C. § 1153(a)).

¹³⁶ *Id.* This is true if the state is not a Public Law 280 state and Congress has not authorized otherwise. See TRIBAL CT. CLEARINGHOUSE, *supra* note 48.

¹³⁷ *Id.* at 2460.

¹³⁸ See *id.* at 2463–74.

¹³⁹ *Id.* at 2468.

¹⁴⁰ *Id.* at 2482; see also *id.* at 2482 (Roberts, J., dissenting) (“Not only does the Court discover a Creek reservation that spans three million acres and includes most of the city of Tulsa, but the Court’s reasoning portends that there are four more such reservations in Oklahoma.”).

¹⁴¹ Graham Lee Brewer & Cary Aspinwall, *How the Supreme Court Upended a Century of Federal Indian Law*, HIGH COUNTRY NEWS (Aug. 4, 2020), <https://www.hcn.org/articles/indigenous-affairs-justice-how-the-supreme-court-upended-a-century-of-federal-indian-law> [<https://perma.cc/S7E2-E7S8>].

promises.¹⁴² Combined, the land of the Five Tribes and the Muscogee (Creek) Nations covers almost half of the state of Oklahoma.¹⁴³

While the *McGirt* decision provided necessary clarity regarding criminal jurisdiction in Oklahoma, profoundly, the decision also addressed a deeply rooted issue at the heart of tribal sovereignty: the effect of colonialism on the legal landscape in Indigenous communities.¹⁴⁴ The treaties relied on by the *McGirt* court promised the Creek Nation land for a permanent home, in what is today the state of Oklahoma, in exchange for the forced relocation of the Tribe from their ancestral lands in Georgia and Alabama.¹⁴⁵ The very foundations for the treaties upon which many Indigenous communities rely are deeply problematic, but sadly the promises contained therein are among the few sources of authority tribal communities have.

The state of Oklahoma's argument in *McGirt* illustrates a long history of the United States government failing to uphold promises to Indigenous communities.¹⁴⁶ The state of Oklahoma asserted that the Creek Reservation was disestablished because the tribal lands were fractured and sold to private parties during the "allotment era" where Congress pressured tribes into abandoning their communal lifestyles, instead parceling and selling their lands to individual owners.¹⁴⁷ By rejecting Oklahoma's argument, the Court essentially acknowledged that, given the forced relocation of Indigenous communities and repeated failure to treat Indigenous communities as true sovereign entities, the U.S. government was officially going to uphold its promises.¹⁴⁸ In response to Oklahoma's argument, Justice Gorsuch remarked:

A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian

¹⁴² Faye C. Elkins, *What Does a Recent Supreme Court Decision Mean for Tribal, State, and Federal Law Enforcement?*, OFF. OF CMTY. ORIENTED POLICING SERVS. (COPS): CMTY. POLICING DISPATCH (Jan. 2022), https://cops.usdoj.gov/html/dispatch/01-2022/McGirt_decision.html [<https://perma.cc/8T8Y-2EWA>].

¹⁴³ *Id.*

¹⁴⁴ *See McGirt*, 140 S. Ct. at 2481–82 (2020).

¹⁴⁵ *Id.* at 2459 (citing Treaty with the Creeks, arts. I, XIV, Creek Tribe-U.S., Mar. 24, 1832, 7 Stat. 366, 366, 368).

¹⁴⁶ *See id.* at 2468.

¹⁴⁷ *Id.* at 2463.

¹⁴⁸ *See id.* at 2462.

landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.¹⁴⁹

D. Oklahoma v. Castro-Huerta: A Devastating Blow to Tribal Sovereignty and a Major Disappointment in the Wake of the McGirt Decision Victory

In 2015, the state of Oklahoma charged Victor Manuel Castro-Huerta with child neglect.¹⁵⁰ Castro-Huerta lived in Tulsa, Oklahoma and is not Indigenous; his stepdaughter, whom he was charged with neglecting, is Cherokee.¹⁵¹ Castro-Huerta was convicted and sentenced to 35 years imprisonment.¹⁵² While appealing his conviction in Oklahoma state court, the Supreme Court decided in the *McGirt* case that the Creek reservation in eastern Oklahoma remained “Indian country” (tribal land) and therefore different jurisdictional rules apply for criminal prosecutions in that area.¹⁵³ Relying on the *McGirt* decision, Castro-Huerta argued that the federal government, not the state of Oklahoma, had exclusive jurisdiction to prosecute crimes committed by a non-Indigenous offender against a Cherokee girl in Tulsa, which in *McGirt* was reaffirmed as tribal land.¹⁵⁴

In its 2022 decision, the Court concluded the petitioner state of Oklahoma did have concurrent jurisdiction to prosecute crimes committed by a non-Indigenous offender against an Indigenous victim on tribal land.¹⁵⁵ Justice Kavanaugh, who delivered the majority opinion, stated, “the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is preempted.”¹⁵⁶ In this case, the majority held no federal law (including the General Crimes Act or Public Law 280; Oklahoma is not a Public Law 280 state) preempted the state’s exercise of

¹⁴⁹ *Id.* at 2474.

¹⁵⁰ *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2494 (2022).

¹⁵¹ *Id.* at 2491.

¹⁵² *Id.*

¹⁵³ *Id.*; *McGirt*, 140 S. Ct. at 2478.

¹⁵⁴ *Castro-Huerta*, 142 S. Ct. at 2492; *McGirt*, 140 S. Ct. at 2479.

¹⁵⁵ *Castro-Huerta*, 142 S. Ct. at 2504.

¹⁵⁶ *Id.* at 2503 (emphasis omitted).

jurisdiction over the crime committed.¹⁵⁷ Shockingly, the majority failed to acknowledge that the state of Oklahoma could have sought tribal consent pursuant to Public Law 280, which would have provided precisely the criminal jurisdiction Oklahoma sought in this case.¹⁵⁸ The Court also determined that no principle of tribal self-government, including prosecutorial authority, preempts the State's authority to prosecute.¹⁵⁹

The dissent cited *Worcester v. Georgia*, which held tribes retain their sovereignty and state law has no power on tribal lands unless Congress authorizes otherwise.¹⁶⁰ This foundational rule persisted for over 200 years.¹⁶¹ In response to the majority opinion disregarding the *Worcester* decision, the dissent wrote:

Where this Court once stood firm, today it wilts. After the Cherokee's exile to what became Oklahoma, the federal government promised the Tribe that it would remain forever free from interference by state authorities. . . . Where our predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's.¹⁶²

The dissent further explained:

The Court emphasizes that States normally wield broad police powers within their borders absent some preemptive federal law.

But the effort to wedge Tribes into that paradigm is a category error. Tribes are not private organizations within state boundaries. Their reservations are not glorified private campgrounds. Tribes are sovereigns. . . . After all, the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of

¹⁵⁷ *Id.* at 2502–04.

¹⁵⁸ *See id.* at 2509 (Gorsuch, J., dissenting).

¹⁵⁹ *Id.* at 2502–04 (majority opinion).

¹⁶⁰ *Id.* at 2505 (Gorsuch, J., dissenting) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)).

¹⁶¹ *Id.*

¹⁶² *Id.*

other authorities is and has always been among the most essential attributes of sovereignty.¹⁶³

The dissent is rightfully concerned that the majority decision in *Castro-Huerta* will have problematic implications on tribal sovereignty. The Court's decision sets a dangerous precedent of not only infringing on tribal sovereignty, but also blurring the status of the treaties made between the federal government and tribes across the country.

The dissent focuses on the Treaty of New Echota, which the Senate ratified with the Cherokee in 1836 in response to the Tribe's removal from Georgia and forced western relocation.¹⁶⁴ The treaty acknowledged the Cherokee's "past 'difficulties . . . under the jurisdiction and laws of the 'State Governments'" and ensured that the Cherokee tribe would remain "forever free from 'State sovereignties.'"¹⁶⁵ The treaty also guaranteed "[t]he United States and the Indian tribes [would be] the sole parties' with power on new western reservations"¹⁶⁶ Over time, Congress's revision of some of the arrangements set forth by the treaty, adoption of the Major Crimes Act, grant of authority for state criminal jurisdiction on tribal land in limited situations—like Public Law 280—and Supreme Court rulings in *McBratney* and *Draper* shifted the jurisdictional landscape.¹⁶⁷ However, Justice Gorsuch's dissent noted that through all of the developments, the treaty's promise that states could play no role in the prosecution of crimes by or against Indigenous individuals on tribal lands remained.¹⁶⁸

The *McGirt* Court ultimately upheld the treaties that both solidified the establishment of tribal lands and preserved tribal sovereignty within those lands.¹⁶⁹ Now, only a few years later, the *Castro-Huerta* majority prioritizes state sovereignty over tribal sovereignty, essentially

¹⁶³ *Id.* at 2511 (citations omitted).

¹⁶⁴ *Id.* at 2507.

¹⁶⁵ *Id.* at 2507–08 (quoting Treaty with the Cherokee, art. V, Cherokee Tribe-U.S., Dec. 29, 1835, 7 Stat. 478, 481).

¹⁶⁶ *Id.* at 2508 (citations omitted); see generally Treaty with the Cherokee, *supra* note 165.

¹⁶⁷ *Castro-Huerta*, 142 S. Ct. at 2508 (citations omitted); *United States v. McBratney*, 104 U.S. 621, 624 (1882) (holding that states have jurisdiction over wholly non-Indigenous crimes that occur on tribal lands); *Draper v. United States*, 164 U.S. 240, 242–43 (1896) (applying *McBratney*).

¹⁶⁸ *Castro-Huerta*, 142 S. Ct. at 2508 (citations omitted).

¹⁶⁹ *McGirt v. Oklahoma*, 140 S. Ct. 2452 *passim* (2020).

disregarding the *McGirt* Court's recognition that 43% of Oklahoma, including Tulsa, remains tribal land, and is therefore free from state criminal jurisdiction where either the offender or victim is Indigenous.¹⁷⁰ The arguments in the *Castro-Huerta* dissent show the dissenting justices would have ruled consistently with the *McGirt* decision with regard to upholding the integrity of the treaties that have long provided clarity on tribal sovereignty. The holding in *Castro-Huerta*, though, has cast doubt on the stability of tribal sovereignty and the strength of the promises contained within the treaties that have provided much of the foundation for federal, state, and tribal jurisdiction.

In response to the *Castro-Huerta* ruling, Keaton Sunchild, political director at Western Native Voice, said the following:

[The issue of tribal criminal jurisdiction is] something that we have long just assumed is settled on between state governments, federal governments and tribal governments I guess the five [J]ustices thought differently and now we have to worry about what happens next with tribal rights, who knows what else could be under attack and potentially stripped next.¹⁷¹

It is apparent that in this case, Victor Manuel Castro-Huerta is a named party, but the real party at interest is the Cherokee Tribe.¹⁷² With over 400,000 members and a fully functioning government, the Cherokee Tribe has much at stake in the outcome of this case, yet they have no voice as parties in the proceedings.¹⁷³

Since the early days of colonialism in what is now the United States of America, the concept of sovereignty has been and remains vitally important in tribal law. However, what Congress and the court systems in

¹⁷⁰ *Castro-Huerta*, 142 S. Ct. at 2499 (2022) (majority opinion).

¹⁷¹ Keith Schubert, *U.S. Supreme Court Ruling Expands States' Authority to Prosecute Crimes on Tribal Land*, IDAHO CAP. SUN (June 29, 2022, 5:35 PM), <https://idahocapitalsun.com/2022/06/29/u-s-supreme-court-ruling-expands-states-authority-to-prosecute-crimes-on-tribal-land/> [https://perma.cc/V2HR-MEU4].

¹⁷² Darcel Rockett, *Local Tribe Members React to Supreme Court Decision that Strikes at the Issue of Tribal Sovereignty*, CHI. TRIB. (June 30, 2022, 11:51 AM), <https://www.chicagotribune.com/people/ct-supreme-court-oklahoma-castro-huerta-tribal-sovereignty-tt-0630-20220630-4jepldqg3nabvpkcc2r5gbie6y-story.html> [https://perma.cc/RHK9-7GDU].

¹⁷³ *Id.*

the United States have shown is that tribal sovereignty is convoluted and concerningly unstable. Tribal sovereignty case law leading into the 21st century maintains that tribal authority is not stand-alone; rather, it is still subject to an overriding federal authority.¹⁷⁴ Additionally, the holdings in both *McGirt* and *Castro-Huerta* illustrate how inconsistently the Supreme Court may rule on a given issue regarding tribal sovereignty.¹⁷⁵ Therein lies the two most fundamental problems with tribal sovereignty: instability and dependence.

The legal definition of sovereignty includes the language “the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.”¹⁷⁶ Statutes and case law have established that tribal nations do not have the “international independence of a state,” and more complexly, they are viewed as existing within the bounds of the federal government and therefore are not free from foreign dictation.¹⁷⁷ Thus, what is modernly called tribal sovereignty is not true sovereignty, but rather a quasi-sovereignty that functions similarly on the surface but is more limited in its scope.

This quasi-sovereignty is deeply problematic in all facets of tribal law and is the crux of the jurisdictional maze that complicates criminal jurisdiction and hinders prosecution of crimes committed against Indigenous women on tribal lands. The logical solution is to strengthen tribal sovereignty by streamlining criminal jurisdiction on tribal lands.

IV. SOLVING THE JURISDICTIONAL MAZE BY STRENGTHENING TRIBAL SOVEREIGNTY: A STREAMLINED JURISDICTIONAL APPROACH

Streamlined jurisdiction means restoring tribal nations’ authority over all criminal affairs that occur on tribal lands. This includes tribal criminal jurisdiction over all types of crimes, crimes committed against or by non-Indigenous individuals, and even wholly non-Indigenous crimes occurring on tribal lands. Streamlining criminal jurisdiction on tribal lands can be achieved through the following proposed, two-prong approach.

¹⁷⁴ See U.S. CONST. art. I, § 8, cl. 3.

¹⁷⁵ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020); *Castro-Huerta*, 142 S. Ct. at 2504–05.

¹⁷⁶ See BLACK’S LAW DICTIONARY, *supra* note 106.

¹⁷⁷ *Id.*

A. Prong 1: Eliminating State Criminal Jurisdiction on Tribal Lands

The first step in enacting this more comprehensive tribal criminal jurisdiction is eliminating state criminal jurisdiction on all tribal lands. State infringement on tribal governance is problematic because as states gain power over tribal land, they effectively reorganize the tribal land as part of the state. Though the land is located within the borders of the modernly recognized state, the land is supposed to function independently from the state laws and governance.¹⁷⁸ When states gain jurisdictional power within tribal land, authority and resources are removed from tribal nations.¹⁷⁹

The *McGirt* decision raised an interesting question regarding the interplay between tribal criminal jurisdiction and state criminal jurisdiction: How will *McGirt* impact the millions of non-Indigenous individuals residing in the over three million acres of land in eastern Oklahoma now officially reaffirmed as tribal land?¹⁸⁰ The answer, from a criminal jurisdiction standpoint, is that when a non-Indigenous person commits a crime on that land, both tribal and federal jurisdiction would exist (but not state jurisdiction).. Tribal law expert Tadd Johnson notes:

[Tribal lands] are one of the few places in the world that don't have territorial jurisdiction over people who walk onto their lands . . . [w]hich is very odd[b]ecause if you go to France, you expect to get arrested by French authorities if you commit a crime there. If you go to Wisconsin, you expect the same thing.¹⁸¹

Absence of state criminal jurisdiction on tribal land, consistent with *McGirt*, would remedy that sentiment.

The *McGirt* decision also posed a secondary question regarding whether post-conviction relief must be granted to others on *McGirt*

¹⁷⁸ See *McGirt*, 140 S. Ct. at 2461–62.

¹⁷⁹ See *id.* at 2471.

¹⁸⁰ Jack Healy & Adam Liptak, *Landmark Supreme Court Ruling Affirms Native American Rights in Oklahoma*, N.Y. TIMES, <https://www.nytimes.com/2020/07/09/us/supreme-court-oklahoma-mcgirt-creek-nation.html> [<https://perma.cc/TQZ4-FDVK>] (July 11, 2020).

¹⁸¹ Eugene Sommers, Matthew Fletcher, & Tadd Johnson, *It's Time to End Public Law 280*, NATIVE GOVERN. CTR. (Aug. 9, 2021), <https://nativegov.org/news/its-time-to-end-public-law-280/> [<https://perma.cc/B5Q6-9R4G>].

grounds.¹⁸² The Oklahoma Court of Appeals held the *McGirt* decision does not apply retroactively to previous convictions.¹⁸³ All Five Tribes wrote in support of this decision, and the Choctaw Nation noted this ruling proved that convicted criminals would not immediately be released on the heels of the *McGirt* victory.¹⁸⁴

Some have suggested having more prosecutors with jurisdiction is better, however, following that rationale, “why not allow Texas to enforce its laws in California?”¹⁸⁵ Few would agree to such absurd jurisdiction and even fewer would view that system as beneficial. The *Castro-Huerta* majority said, “Because [Castro-Huerta’s] victim is an Indian, Castro-Huerta says that he is free from state prosecution. Castro-Huerta’s argument would require this Court to treat Indian victims as second-class citizens.”¹⁸⁶ The Court’s argument, positing state criminal jurisdiction on tribal lands is actually “helpful” to tribal nations and denying tribes the “help” would suggest “Indians” are “second-class citizens,” is horribly misguided. Congress has granted Oklahoma authority to acquire jurisdiction over crimes by or against tribal members with tribal consent, although to date, no tribes in Oklahoma have consented.¹⁸⁷ If state jurisdiction was “helpful” to tribes, tribal nations would consent to this authority. The reality, though, is that “throughout the Nation’s history, state governments have sometimes proven less than reliable sources of justice for Indian victims.”¹⁸⁸ The same concept of consent applies to all states that attempt to gain jurisdiction through Public Law 280.¹⁸⁹ Should tribal nations require prosecutorial “help” from a state, they may consent to the adoption of Public Law 280.¹⁹⁰

¹⁸² *McGirt*, 140 S. Ct. at 2501 (Roberts, J., dissenting) (“[T]here is no escaping that today’s decision will undermine numerous convictions obtained by the State . . .”).

¹⁸³ *State ex rel. Matloff v. Wallace*, 2021 OK Crim. App. 21, ¶ 6, 497 P.3d 686, 688.

¹⁸⁴ Ryan Love, *Oklahoma Court Rules McGirt Decision Doesn’t Apply to Previous Convictions*, 2 NEWS OKLA. (Aug. 13, 2021, 11:48 AM), <https://www.kjrh.com/news/local-news/oklahoma-court-rules-mcgart-decision-doesnt-apply-to-previous-convictions> [<https://perma.cc/4USP-W8D9>].

¹⁸⁵ *Rockett*, *supra* note 172.

¹⁸⁶ *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2502 (2022).

¹⁸⁷ *Id.* at 2509, 2522 (Gorsuch, J., dissenting).

¹⁸⁸ *Id.* at 2523 (emphasizing the history of mistreatment of Indigenous Peoples).

¹⁸⁹ U.S. DEP’T OF HEALTH & HUM. SERVS. ADMIN. FOR CHILD. & FAMS., *supra* note 91.

¹⁹⁰ *Id.*

Opponents of this view¹⁹¹ also share concern for a state's interest in ensuring public safety and criminal justice within its territory.¹⁹² The *Castro-Huerta* majority cited public safety as their third rationale for their decision: "The State also has a strong interest in ensuring that criminal offenders—especially violent offenders—are appropriately punished and do not harm others in the State."¹⁹³ To suggest, however, that only a State is equipped to meet public safety needs and to "appropriately punish" violent offenders is to say that tribal justice systems are less capable.¹⁹⁴

This is not so. Throughout history, "tribes have proven that they can best meet the public welfare and safety needs of communities on their [land]."¹⁹⁵ There are approximately 400 tribal justice systems throughout the United States.¹⁹⁶ Tribal courts, much like federal and state courts, deliver criminal punishments including imprisonment, payment of court costs, and fines.¹⁹⁷ Additionally, tribe-specific constitutions provide procedural rights to persons appearing before tribal courts, including the right to appointed counsel, the right to a jury trial, and other elements of due process guaranteed by the United States Constitution.¹⁹⁸ For tribes without their own criminal justice systems, the Court of Indian Offences (CFR Court) provides criminal court proceeding services on behalf of the tribe.¹⁹⁹ CFR Courts can be established by agreement between the Bureau of Indian Affairs and a tribe itself or when the Assistant Secretary of

¹⁹¹ Eliminating state criminal jurisdiction on tribal lands in all circumstances.

¹⁹² *Castro-Huerta*, 142 S. Ct. at 2501 (majority opinion).

¹⁹³ *Id.* at 2502.

¹⁹⁴ See Stacy L. Leeds, [*dis*] *Respecting the Role of Tribal Courts?*, A.B.A.:HUM. RTS. (June 1, 2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-3/dis-respecting-the-role-of-tribal-courts/ [<https://perma.cc/LLP3-2E6Z>].

¹⁹⁵ *Examining Oklahoma v. Castro-Huerta: The Implication of the Supreme Court's Ruling on Tribal Sovereignty Before the Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res.*, 117th Cong. (2022) [hereinafter *Examining Oklahoma v. Castro-Huerta*] (statement of Bryan Newland, Assistant Sec'y for Indian Affs., U.S. Dep't of the Int.), available at <https://www.doi.gov/ocl/tribal-sovereignty-ruling> [<https://perma.cc/CP9V-FYW5>].

¹⁹⁶ *Tribal Court Systems*, BUREAU OF INDIAN AFFS., <https://www.bia.gov/CFR Courts/tribal-justice-support-directorate> [<https://perma.cc/M8GW-DCA4>].

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

Indian Affairs determines there are significant concerns of health and safety that must be addressed.²⁰⁰ While it is true that tribal justice systems lack proper funding and resources, faulting tribal court systems for a lack of funding and infrastructure stemming from a misguided system founded on colonialism would be deeply flawed.

In reality, what is detrimental to public safety on tribal land is the unnecessary jurisdictional maze. Allowing state criminal jurisdiction on tribal land only adds to the confusion of who has jurisdiction, and that confusion ultimately creates gaps in prosecution for crimes on tribal land.²⁰¹ As such, when the issue of state criminal jurisdiction on tribal land inevitably comes under review before the United States Supreme Court, the Court must reverse the *Castro-Huerta* ruling.

B. Prong 2: Restructuring Federal Criminal Jurisdiction on Tribal Lands

The next step in enacting this more comprehensive tribal criminal jurisdiction is restructuring federal criminal jurisdiction on tribal lands. Precluding states from interfering with tribal self-governance is essential, but at the same time, the United States Congress “reserves plenary power to change the scope and definition of tribal sovereignty,” which includes criminal jurisdictional limits on tribal land.²⁰² When examining tribal jurisdiction, it becomes readily apparent that tribal law, in general, is influenced, shaped, and modified by federal government law.²⁰³ This is problematic because the fact the federal United States government is responsible for determining tribal nation jurisdiction undermines the entire purpose of tribal sovereignty. Further, this notion creates an endless sense of instability for Indigenous communities as they are constantly at risk of losing their rights.

²⁰⁰ *Id.*

²⁰¹ Wayne L. Ducheneaux, II, *Oklahoma v. Castro-Huerta: Bad Facts Make Bad Law*, NATIVE GOVERN. CTR. (July 14, 2022), <https://nativegov.org/news/castro-huerta/> [<https://perma.cc/S8WQ-BRYD>].

²⁰² *Tribal Sovereignty*, PAUMA BAND OF LUISEÑO INDIANS, <https://www.paumatribes.com/government/tribal-sovereignty/> [<https://perma.cc/WW55-UJKF>].

²⁰³ *American Indian Law: A Beginner's Guide*, LIBR. OF CONG., <https://guides.loc.gov/american-indian-law/Cases> [<https://perma.cc/87E8-AYRB>].

The federal government's plenary power over tribal justice systems stems from colonialism.²⁰⁴ Absent colonialism, the United States government would have no power over Indigenous nations whose communities and criminal justice systems predate its very founding.²⁰⁵ Ultimately, tribal sovereignty should allow tribal nations to operate completely independently from the United States government. However, because the United States government has treated tribal nations as "domestic dependents"²⁰⁶ since the early days of its founding, a system now exists where tribal law and federal law are somewhat interdependent, meaning disentangling them completely would contribute to concerns over the instability of tribal legal systems.

Therefore, federal criminal jurisdiction on tribal land should be restructured to include a tribal consent requirement in situations where the federal government would have concurrent criminal jurisdiction. For example, where federal jurisdiction is granted by the Major and General Crimes Acts, a tribe could consent to the federal government's handling of the case.²⁰⁷ This tribal consent requirement would work similarly to the consent requirement with state jurisdiction adoption in Public Law 280.²⁰⁸

Additionally, the jurisdictional restructuring should ensure the federal government never has exclusive criminal jurisdiction on tribal lands in any circumstance, even where the offender is non-Indigenous. Rather, tribal nations should have exclusive criminal jurisdiction over all crimes occurring on tribal lands, even those enumerated in the General and Major Crimes Acts, unless either tribal consent to federal criminal jurisdiction is granted by the tribe or the tribe has declined prosecution of the crime.

A discussion on tribal sovereignty and criminal jurisdiction on tribal land would not be complete without addressing concerns arising from the

²⁰⁴ See generally Carol Chiago Lujan & Gordon Adams, *U.S. Colonization of Indian Justice Systems: A Brief History*, 19 WICAZO SA REV. 9, 9-23 (2004) (discussing the history of U.S. colonization of tribal justice systems leading to current day structures).

²⁰⁵ *Id.* at 10, 20-21.

²⁰⁶ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that tribal nations are not foreign states but rather should more appropriately be referred to as "domestic dependent nations").

²⁰⁷ General Crimes Act, 18 U.S.C. § 1152; Major Crimes Act, 18 U.S.C. § 1153.

²⁰⁸ See Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162) (requiring states that seek to adopt criminal jurisdiction on tribal lands to obtain the consent of the tribe(s)).

Double Jeopardy Clause in the Fifth Amendment. This clause prohibits anyone from being prosecuted twice for the same crime.²⁰⁹ The United States Supreme Court held in *United States v. Wheeler*²¹⁰ that because the federal government and tribal nations are two separate sovereigns, for the purposes of criminal punishments, concurrent prosecutions do not violate the constitutional bar against Double Jeopardy.²¹¹ In 2022, the Supreme Court issued the same ruling in *Denezpi v. United States*,²¹² also citing the Dual-Sovereignty Doctrine.²¹³ Though the Supreme Court maintains that dual criminal prosecution in federal and tribal courts does not violate Double Jeopardy rights, dissenters still raise concern over criminal defendants' rights.²¹⁴ Expanding tribal criminal jurisdiction will allow tribal courts to prosecute a greater number of crimes and, subsequently, there may be a decreased need for federal prosecutions of the same crimes.

Prong 2's proposed modification to federal criminal jurisdiction on tribal land would address concerns regarding concurrent federal and tribal prosecutions and the implications on a defendant's constitutional bar against Double Jeopardy. It would also aid in untangling the jurisdictional maze and thus strengthen tribal sovereignty.

C. Implementing the Two-Pronged Approach to Criminal Jurisdiction on Tribal Land

1. Public Policy: Funding and Infrastructure

An important concern with extending and enhancing tribal criminal jurisdiction is ensuring that tribal communities have the tools necessary to function properly.²¹⁵ Two essential tools are funding and proper infrastructure.

²⁰⁹ U.S. CONST. amend. V.

²¹⁰ 435 U.S. 313 (1978).

²¹¹ *Id.* at 329–30.

²¹² 142 S. Ct. 1838 (2022).

²¹³ *Id.* at 1845.

²¹⁴ *The Supreme Court, 2021 Term—Leading Cases*, 136 HARV. L. REV. 350, 354–55 (2022).

²¹⁵ Rockett, *supra* note 172 (quoting Beth Redbird, member of the Oglala Lakota and Oklahoma Choctaw, on weaponized sovereignty) (“What we do with the legal system in the United States, is we say that a group of people is sovereign, and then we give them no power. We tell them they’re responsible for the problems and we give them no tools for solutions.”).

Following the *McGirt* decision, Congress allocated \$62 million in funds for the Bureau of Indian Affairs to support tribal law enforcement and tribal court systems in Oklahoma, which has increased tribal law enforcement capacity.²¹⁶ This increase in funding proved essential to the tribal justice systems in Oklahoma and should serve as an example of how an influx in federal funding to tribal communities can significantly support expansion of tribal criminal jurisdiction.

Unfortunately, a report to Congress in 2017 showed that the Bureau of Indian Affairs generally funded tribal law enforcement at about 20% of estimated need, tribal detention at about 40% of estimated need, and tribal courts at only 3% of estimated need.²¹⁷ Additionally, a major issue with Department of Justice (DOJ) funding is that in order to obtain this funding, tribes, on behalf of their justice systems, are forced to compete against each other.²¹⁸ In response to these issues, the National Congress of American Indians (NCAI) put together comprehensive proposals for reallocating funding to eliminate the DOJ competition-based funding.²¹⁹ Additionally, the NCAI proposed that the Department of the Interior allocate funds stemming from the 1993 Indian Tribal Justice Act, which have been repeatedly reauthorized but never appropriated to implement the Act.²²⁰ This proposed allocation would, over time, provide funding to fully meet the needs of tribal courts, including those in states that have adopted Public Law 280.²²¹ Other opportunities for funding arise from the Violence Against Women Act, Community Oriented Policing Services, and Native American Rights Fund.²²²

Equally essential is ensuring tribes have proper criminal justice infrastructure. While some tribes do have well established criminal justice systems they would be able to easily adopt more expansive criminal jurisdiction with proper funding. Programs like the Tribal Civil and Criminal Legal Assistance; Training, and Technical Assistance; and the National Association of Indian Legal Services provide important training

²¹⁶ *Examining Oklahoma v. Castro-Huerta*, *supra* note 195.

²¹⁷ NAT'L CONG. OF AM. INDIANS, FISCAL YEAR 2020 INDIAN COUNTRY BUDGET REQUEST 32 (2020), *available at* https://archive.ncai.org/04_NCAI-FY20-Public_Safety_-_Justice.pdf [<https://perma.cc/W9ZS-58BL>].

²¹⁸ *Id.* at 34.

²¹⁹ *Id.* at 33–37.

²²⁰ *Id.* at 33.

²²¹ *Id.*

²²² *Id.* at 36–37.

opportunities and must be widely implemented.²²³ Further, the Safe Women, Strong Nations project aids tribal nations in building the capacity to investigate, prosecute, and punish offenders who commit violence against Indigenous women.²²⁴

Another element of tribal justice infrastructure that must be addressed in conjunction with the proposed two-prong expansion of tribal criminal jurisdiction is the tribal sentencing limitation. In 2010, the Tribal Law and Order Act (TLOA) was signed into law and amended the Indian Civil Rights Act of 1978 to expand sentencing authority within tribal courts.²²⁵ “Under pre-existing law, tribes were restricted to sentences of up to one year imprisonment, a fine of up to \$5,000, or both.”²²⁶ Now, in criminal cases, tribes have the ability to impose sentences of up to three years imprisonment, fines of up to \$15,000, or both for qualifying crimes, but the tribe must meet specific requirements as set forth by the TLOA.²²⁷ The requirements are akin to those afforded to criminal defendants in both federal and state proceedings, including appointed effective assistance of counsel.²²⁸

Sentencing authority is important within the context of expanding tribal criminal jurisdiction because tribes must have the authority to sentence offenders based on the public welfare of the tribal community. Though tribal nations may have differing punitive methods based on their own history and customs, they must have the ability to impose harsher sentences if need be, given expanded jurisdiction over more serious crimes. While expanded sentencing authority requires additional funding support for incarceration facilities, this authority is one that is required in order to expand tribal jurisdiction.

²²³ *Id.* at 35.

²²⁴ INDIAN L. RES. CTR., *supra* note 16.

²²⁵ Michelle Rivard Parks, TRIBAL JUD. INST., TRIBAL LAW AND ORDER ACT: ENHANCED SENTENCING AUTHORITY 2 (2015), *available at* <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/TLOAESAQuickReferenceChecklist.pdf> [<https://perma.cc/82BK-EW9F>].

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

V. CONCLUSION

In sum, Indigenous women experience disproportionate rates of violence as compared to other populations throughout the United States.²²⁹ Understanding why this is the case requires acknowledging the colonial roots of this crisis.²³⁰ “Prior to European colonization, Indigenous women... were honored and were essential to maintaining tribal cultures,” violence against Indigenous women was rare.²³¹ However, during European colonization, violence against Indigenous women became a central element of the colonial strategy for conquest.²³²

Then, during the formation of the United States federal government, the use of treaties displaced tribes from their ancestral lands.²³³ Following this, the federal government developed court systems that formed case law based on colonial and racist ideology.²³⁴ All of this allowed the federal government to establish a legal system that removed power from tribes who are still at the mercy of the federal government’s court precedent and plenary authority.²³⁵

To properly address the violence crisis, investigative resources must be available on tribal lands and more of the crimes against Indigenous women need to be prosecuted. To do this, the confusing maze of criminal jurisdiction on tribal land that creates gaps in the prosecution must be eliminated. Restoring tribal criminal jurisdiction over all crimes occurring on tribal lands not only streamlines the jurisdictional mess, but also strengthens tribal sovereignty overall.

²²⁹ NAT’L CONG. OF AM. INDIANS, *supra* note 8, at 1–2.

²³⁰ Robin Whyatt, *Violence Against Native Women Has Colonial Roots*, THE PROGRESSIVE MAG. (Mar. 2, 2023, 9:35 AM), <https://progressive.org/magazine/violence-against-native-women-has-colonial-roots-whyatt/> [<https://perma.cc/ZF5X-RNH8>].

²³¹ *Id.*

²³² *Id.*

²³³ *Indian Treaties and the Removal Act of 1830*, U.S. DEP’T OF STATE: OFF. OF THE HISTORIAN, FOREIGN SERV. INST., <https://history.state.gov/milestones/1830-1860/indian-treaties> [<https://perma.cc/H7J6-UU3P>].

²³⁴ *Id.*

²³⁵ LIBR. OF CONG., *supra* note 203.