
COMMENT

SUFFICIENTLY CRIMINAL TIES: EXPANDING VAWA CRIMINAL JURISDICTION FOR INDIAN TRIBES

MAURA DOUGLAS†

*The commitment to bring safety and justice and restore the sacredness of women has only just begun; the sovereignty of women has always been sacred.*¹

*American Indian and Alaska Native women face the highest rates of sexual assault of any group in the United States, and most often such attacks are by non-Indian offenders. Since *Oliphant v. Suquamish Indian Tribe*, tribes cannot exercise criminal jurisdiction over non-Indians, even for crimes committed against an Indian victim in federally recognized Indian country. A history of complex jurisdictional and intergovernmental issues between federal, state, and tribal authorities further impede the investigation and prosecution of these crimes. In the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Congress extended criminal jurisdiction to tribes in a limited context over non-Indian defendants—so long as they possess ties to the tribe and to the victim as a domestic or dating partner. The requirement that a defendant must have a relationship with the victim, tribe, and land is novel. Indeed, during the VAWA 2013 legislative debates weighing the jurisdictional grant,*

† Executive Editor, Volume 166, University of Pennsylvania Law Review. J.D. Candidate, 2018, University of Pennsylvania Law School; B.A. (2011), M.S.E. (2013), University of Pennsylvania. My sincere gratitude to Professors Catherine Struve and Serena Mayeri for their thoughtful guidance on developing this idea and feedback on earlier drafts. Thanks also to Professors Seth Kreimer, Greg Ablavsky, and Zain Lakhani for helpful conversations and suggestions throughout. A special thank you to Comments Editor Justine Chiu, Executive Editor Dan Roberts, and the rest of the Volume 166 editors for their hard work and dedication in bringing this Comment to print. Most of all, thank you to my friends and family for their constant support and encouragement. All errors are my own.

¹ JACQUELINE AGTUCA, SAFETY FOR NATIVE WOMEN: VAWA AND AMERICAN INDIAN TRIBES 18 (2015) (excerpting Tillie Black Bear's speech in 2013, the day the Violence Against Women Act Reauthorization of 2013 was signed into law).

even Senate opposition conceded that once jurisdiction was extended to crimes of domestic violence, “there would be no principled reason not to extend it to other offenses as well.” Federal Indian law affirms Congress’s plenary authority to recognize tribal sovereignty, but does the law require special domestic violence criminal jurisdiction for tribes to be so restricted? I argue it does not. This Comment first investigates the history of jurisdiction in Indian country and recognition of inherent tribal sovereignty by Congress. Second, it considers the problem of sexual violence in Indian country. Third, it assesses the main arguments in opposition to the current jurisdictional grant in VAWA 2013 to determine whether Congress can and should recognize tribal authority to prosecute all non-Indian crimes of sexual violence, as well as concurrent crimes of domestic and dating violence, committed against Indian victims in Indian country. In light of these oppositional arguments, this Comment argues that Congress can and should recognize such jurisdictional authority of tribal governments, and proposes specific language to affirm the inherent powers of tribes to further protect their land and their people.

INTRODUCTION	747
I. TRIBAL–FEDERAL RELATIONS AND JURISDICTION	
IN INDIAN COUNTRY.....	751
A. <i>Early Tribal–Federal Relations</i>	753
B. <i>Criminal Jurisdiction in Indian Country Pre–Oliphant</i>	755
1. Tribal Jurisdiction	755
2. Concurrent Tribal, State and/or Federal Jurisdiction	758
C. <i>Policy, Jurisdiction, and Oliphant in Indian Country</i>	761
II. THE JURISDICTIONAL MAZE AND SEXUAL ASSAULT	
IN INDIAN COUNTRY.....	764
A. <i>Data on Violence Against American Indians/Alaska Natives</i>	764
B. <i>Investigating and Prosecuting Crimes in Indian Country</i>	767
C. <i>Congressionally–Authorized Studies in VAWA 2005</i>	770
III. CONGRESSIONAL RESPONSE: VAWA 2013.....	772
A. <i>Twenty–First Century Legislative Action</i>	772
B. <i>Concern for Defendants’ Rights</i>	775
C. <i>Inherent Tribal Sovereignty and Sources of Power</i>	778
IV. IMPLEMENTING AND EXPANDING TRIBAL	
CRIMINAL JURISDICTION	781
A. <i>Implementation of Current VAWA Tribal Jurisdiction</i>	782
B. <i>Expanding Tribal Criminal Jurisdiction</i>	783
CONCLUSION.....	786

INTRODUCTION

Victims of sexual assault suffer one of the greatest attacks on their human rights: the right to be free from violence and to maintain their own bodily sovereignty. American Indian² women face the highest rates of sexual assault of any group in the United States, and indigenous feminism recognizes the intersectional impact of race, gender, and colonization on those lived experiences.³ Vice President Biden—who originally introduced the Violence Against Women Act (VAWA) to Congress in 1990⁴—received a letter in 2011, right before the Act’s reauthorization was being considered, from Assistant Attorney General Ronald Weich stating that violence against American Indian and Alaska Native women was and should be considered an “epidemic.”⁵ Non-Indian perpetrators in particular feel, and seemingly can be, immune from prosecution due to the complexities of jurisdictional authority between tribal, state, and federal governments over non-Indian defendants in Indian country.⁶

² I will use the term “American Indian” or “Indian” to describe indigenous women living in the lower forty-eight states, as this is the most common terminology used in scholarship. *See generally* ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 134 (7th ed. 2015).

³ *See* SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* 88 (2015) (“Like intersectional feminism, indigenous feminism considers gender and race—but also the role of colonization in the lives of Native women.”). More than one in three American Indian women are raped in their lifetime, at least according to reported data. PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, *FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY* 22 (Nov. 2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf> [<https://perma.cc/A7VB-XTWB>]; *see also* Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES (May 22, 2012), <http://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html?mcubz=0> [<https://perma.cc/TKF9-67EA>]. This is very likely to be a significant underestimation of the actual statistics. For a discussion of the challenges of collecting data related to sexual violence against Indian women, and added complications due to questions of jurisdiction, such as siphoning results between on-reservation violence and off-reservation violence, *see generally* DEER, *supra* note 3, at 7-9; *infra* note 92 and accompanying text.

⁴ *About Vice President Biden’s Efforts to End Violence Against Women*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/uis2many/about> [<https://perma.cc/P8ZD-N5JR>].

⁵ Letter from Ronald Weich, Asst. Att’y Gen. to Sen. Joseph A. Biden, President of the U.S. Senate 1 (Jul. 21, 2011), <https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/legislative-proposal-violence-against-native-women.pdf> [<https://perma.cc/4VCR-LX9W>].

⁶ The term “Indian country” is defined under federal Indian Law as:

- (a) [A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government . . .
- (b) [A]ll 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) [A]ll Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2012).

After the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*, tribal governments could not criminally prosecute non-Indian defendants, even for committing a crime against an Indian victim in Indian country.⁷ The Bureau of Justice Statistics has reported previously that in over eighty percent of reported incidents of rape or sexual assault of American Indian victims, the perpetrator was identified as white (nearly four in five cases) or black (nearly one in ten).⁸ Only the federal government—or in some limited circumstances, state governments⁹—could exercise jurisdiction over cases involving a non-Indian and Indian party.¹⁰ But with scant resources, and where sometimes a federal prosecutor or police agency could be hundreds of miles away, these incidents are frequently under-investigated, under-reported, and under-enforced.¹¹ Jurisdictional deficiencies and tribes' inability to prosecute non-Indian offenders created a system where, according to Amnesty International, non-Indians could rape American Indian women with near impunity.¹²

Congressional response to this epidemic culminated in Title IX of the VAWA Reauthorization Act of 2013 (VAWA 2013). Congress recognized what was coined special domestic violence criminal jurisdiction to participating tribes for a “very narrow set of cases over non-Indians who voluntarily and knowingly established significant ties to the tribe.”¹³ While predominantly viewed as a tremendous victory for tribal communities, and for tribal

⁷ See 435 U.S. 191, 194, 212 (1978) (finding a tribe did not have jurisdiction over two non-Indian residents who were charged with assaulting tribal officers and resisting arrest and engaging in a high-speed chase, respectively, in Indian country).

⁸ STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, A BJS STATISTICAL PROFILE, 1992-2002: AMERICAN INDIANS AND CRIME 9 (Dec. 2004), <https://bjs.gov/content/pub/pdf/aico2.pdf> [<https://perma.cc/QJ7Y-Q7S2>]; see also DEER, *supra* note 3, at 6 (“The original 1999 Bureau of Justice Statistics report concluded that about nine in ten American Indian victims of rape or sexual assault had white or black assailants.”).

⁹ See *infra* notes 58–61 and accompanying text (discussing Public Law 280, which provided for the transfer of federal jurisdiction to states in certain cases).

¹⁰ See *infra* Section I.C.

¹¹ See Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 21, 2012), <http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html?mcubz=0> [<https://perma.cc/M7M9-8F5D>] (“Tao Etpison, former chief judge of the Tonto Apaches in Arizona, said federal prosecutors typically live, work and try cases hundreds of miles from Indian Country.”); see also Sari Horwitz, *New Law Offers Protection to Abused Native American Women*, WASH. POST (Feb. 8, 2014), https://www.washingtonpost.com/world/national-security/new-law-offers-a-silver-of-protection-to-abused-native-american-women/2014/02/08/0466d1ae-8f73-11e3-84e1-27626c5ef5fb_story.html [<https://perma.cc/MY2F-D6PW>] (“U.S. attorneys . . . are often hundreds of miles away from rural reservations. It can take hours or days for them to respond to allegations, if they respond at all, tribal leaders say.”).

¹² See AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 5 (2007) (“Indigenous women described to Amnesty International how they experience contemporary sexual violence as a legacy of impunity for past atrocities.”).

¹³ S. REP. NO. 112-153, at 10 (2012).

sovereignty since *Oliphant*, VAWA 2013 intentionally qualified the jurisdictional power of tribal governments with several limitations. First, to lawfully exercise the jurisdiction, tribal governments must afford defendants certain constitutional and procedural rights that Congress had not otherwise required tribes to provide.

Second, the tribal prosecution must show that the non-Indian defendant has a connection to both the tribe—through employment, residence, and/or intimate relationship with an Indian—and to the Indian victim, because the statute only recognizes tribal jurisdiction over crimes of domestic and dating violence, as well as violations of protective orders. Thus, the “sufficient ties” jurisdictional requirement here extends beyond the common understanding of a sovereign’s criminal jurisdictional authority to (at minimum) prosecute crimes by any party within its territorial bounds.¹⁴ Tribal jurisdiction over logically connected or similar crimes, identified below, is not recognized:

Crimes between two non-Indians; [c]rimes between two strangers, including sexual assaults; [c]rimes committed by a person who lacks sufficient ties to the tribe, such as living or working on its reservation; and [c]hild abuse or elder abuse that does not involve the violation of a protection order.¹⁵

The legislative record of these VAWA 2013 provisions reflects the ongoing tension between Congress’s plenary power¹⁶ to recognize tribal authority and whether the exercise of such recognized authority stems from *federal* authority or from the tribe’s inherent sovereignty—the bounds of which have yet to be adequately defined by Congress or the Court.

Ultimately, the substantial limitations of special domestic violence tribal jurisdiction do not find support in the historical recognition of tribal sovereignty and power. Specifically, that a defendant must have a relationship with the victim, the tribe, *and* the land (with the crime committed thereon) is novel. Even Senate opposition to the legislation conceded that once the jurisdiction was extended to crimes of domestic violence, “there would be no

¹⁴ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 & cmt. c (1987) (recognizing a sovereign’s jurisdiction to prescribe law to “conduct that wholly or in substantial part, takes place within its territory,” and that the “territorial principle is by far the most common basis for the exercise of jurisdiction to prescribe”); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 23 (2002) (“Territoriality was integral to nineteenth century concepts of sovereignty because, under international law principles, a sovereign’s jurisdiction to legally regulate conduct was coterminous with its territory.”); cf. Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 975-76 (2002) (noting that a state’s criminal authority is, in general, “territorially limited,” with the controversy being extraterritorial reach, not authority within a state’s own borders).

¹⁵ *VAWA 2013 and Tribal Jurisdiction over Crimes of Domestic Violence*, U.S. DEP’T OF JUSTICE (June 2013), <https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf> [<https://perma.cc/A9MN-MMLG>].

¹⁶ See *infra* notes 36–40, 57 and accompanying text.

principled reason not to extend it to other offenses as well.”¹⁷ While tribes were unable to prosecute non-Indians at all after *Oliphant* and before VAWA 2013, the express limitations of the jurisdictional grant require further examination in light of history, policy, and congressional intent to determine whether further extending tribal jurisdictional authority is lawful and warranted.

If Congress was constitutionally able to recognize inherent tribal sovereignty to prosecute some non-Indians for certain enumerated crimes committed in Indian country, subject to additional restrictions, then should it follow that tribes possess the same sovereignty to exercise jurisdiction over non-Indians committing *any* sexually violent crime or applicable concurrent crime against an Indian within Indian country? That is the focus of this Comment—considering the issue of jurisdiction over crimes committed within, not outside of, Indian country. Part I will review the historical underpinnings to the jurisdictional landscape in Indian country and the relationship between federal and tribal governments before and after *Oliphant*. Part II provides an empirical overview of the issue of sexual violence in Indian country, which will shed light on why Congress chose to recognize tribal authority to prosecute some non-Indian crimes within Indian country under VAWA 2013 in the first place.¹⁸ Part III outlines the text of VAWA 2013 as enacted, and then considers the main arguments against the Act’s limited jurisdictional grant for tribes: first, that such a grant would violate the constitutional rights of non-Indian defendants; and second, that even if those rights could be protected, Congress cannot constitutionally recognize inherent tribal sovereignty over non-Indians, and as such, exercising this jurisdiction would be use of congressionally delegated authority subject to the Constitution. These arguments, which ultimately failed in Congress, will be applied to a hypothetical law extending tribal criminal jurisdiction to crimes of sexual violence by non-Indian defendants with no identifiable connection to an Indian victim in Indian country, and all concurrent crimes of domestic and dating violence, such as child abuse and endangerment. Part IV provides information on current implementation of the special domestic violence criminal jurisdiction in participating tribes, and proposed language for extending tribal criminal jurisdiction over all non-Indian defendants who commit crimes of sexual assault/rape, domestic violence (including concurrent crimes such as child or elder abuse), and dating violence against Indians in Indian country.

¹⁷ S. REP. NO. 112-153, at 48 (2012). Then-Senator Jeff Sessions, who is the sitting Attorney General, was one of the four drafters of the Minority Views.

¹⁸ A point of clarification is needed regarding male victims. Despite the law’s title, VAWA is gender-neutral; thus, any modifications to the jurisdictional grant in Indian country would also cover male victims. Although much of the statistics discussed in this Comment focus specifically on female victims, proposed amendments and additional grants of tribal jurisdictions are intended to cover male victims as well.

Before considering the legislative record and language of VAWA 2013 (as well as proposed amendments), it is important to briefly review the history of tribal criminal jurisdiction and the evolution of relations between tribes and federal and state governments.

I. TRIBAL–FEDERAL RELATIONS AND JURISDICTION IN INDIAN COUNTRY

The relationship between the federal government, states, and Indian tribes is colored by an incredibly complicated history. Criminal jurisdiction within Indian country has been particularly fractured during this history. It has been concurrently or exclusively exercised to varying degrees by and between tribal, state, and federal governments depending on the type of crime and the identities of both the victim and perpetrator. And despite the universal right to be free from bodily harm,¹⁹ actions by both Congress and the federal courts have systematically damaged the means by which tribes can protect the health, safety and welfare of their tribal members, which is a fundamental attribute of sovereignty.²⁰ Of course, early European colonization also substantially threatened tribal sovereignty and established the use of both physical and sexual violence of Indians as a means of conquest and territorial expansion.²¹

Traditional procedural and legal doctrine provides that a sovereign may exercise criminal jurisdiction over crimes committed in its own territory.²²

¹⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

²⁰ Cf. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140–42 (1982) (discussing the taxing power as an inherent attribute of tribal sovereignty to protect people, self-govern, and manage territory).

²¹ See, e.g., ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE, AND AMERICAN INDIAN GENOCIDE* 7–33 (2005) (describing sexual violence as a tool of genocide, used by early colonists against American Indian women); see also, e.g., Letter from Michele de Cuneo to Christopher Columbus dated Oct. 28, 1495, in *JOURNALS AND OTHER DOCUMENTS ON THE LIFE AND VOYAGES OF CHRISTOPHER COLUMBUS* 212 (Samuel Eliot Morison trans., 1963) (“I wanted to put my desire [for a Carib girl] into execution but she did not want it . . . I took a rope and thrashed her well, for which she raised such unheard of screams that you would not have believed your ears. Finally we came to an agreement . . .”); Letter from Christopher Columbus to Dona Juana de Torres, Nurse of Prince John, in *AMERICAN JOURNEYS COLLECTION* 378 (George F. Barwick trans., Wisc. Historical Soc’y Dig. Library and Archives ed., 2003) (Fall 1500) (“A hundred castellanos are as easily obtained for a woman as for a farm . . . and there are plenty of dealers who go about looking for [American Indian] girls; those from nine to ten are now in demand, and for all ages a good price must be paid.”). For a more detailed consideration of the colonial period and early treatment of American Indians, see generally ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES* (2015). For consideration of how colonialism and loss of cultural affiliation is connected to the high rates of victimization of and violence against American Indians, or what Barbara Perry calls “ethnoviolence,” see generally Barbara Perry, *From Ethnocide to Ethnoviolence: Layers of Native American Victimization*, 5 *CONTEMP. JUST. REV.* 231 (2002).

²² See, e.g., 13 WALTER MALINS ROSE & W.A. SUTHERLAND, *INDEX TO THE TWELVE VOLUMES OF NOTES ON THE UNITED STATES REPORTS*, 909 (1901) (“[A] State has jurisdiction of all things within its territorial boundaries.”); see also *supra* note 14 and accompanying text.

Indeed, a “basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign’s territory, whether citizens or aliens.”²³ This general premise does not, however, apply to tribal jurisdiction or to claims arising in Indian country. In order for a tribal court to lawfully exercise jurisdiction over a case, there must be both subject matter jurisdiction, established under federal and tribal law, as well as personal jurisdiction.²⁴ Currently, a tribe may exercise criminal jurisdiction over actions involving exclusively Indian parties, but not non-Indians, unless authorized by federal statute.²⁵ Otherwise, any crime—including domestic and sexual violence—committed by a non-Indian against an Indian on tribal land can only be prosecuted by the federal government or the state authorized to do so under what is known as Public Law 280.²⁶

This “jurisdictional maze” of tribal criminal jurisdiction created gaps in the deterrence of criminal behavior and the protection of vulnerable victims.²⁷ Scholar Angela Riley explains the jurisdictional dilemmas in Indian country:

[T]he remaining gaps in criminal jurisdiction left exclusively under the authority of the federal government have never been adequately filled. The bizarre result is that criminal jurisdiction over Indian country crimes is governed by shifting and sometimes contradictory variables, including where the crime was committed, whether both the defendant and victims are Indians, and the classification of the alleged crime, among other considerations.²⁸

A brief, though by no means exhaustive, historical overview of the jurisdiction, policy, and intersovereign tensions in Indian country will help inform the specific challenges of investigating and prosecuting crimes of sexual violence committed by non-Indians against Indian victims in Indian country.

²³ *Duro v. Reina*, 495 U.S. 676, 685 (1990).

²⁴ FELIX S. COHEN, *COHEN’S HANDBOOK OF FEDERAL INDIAN LAW*, §§ 7.02(1)–(2) (Nell Jessup Newton ed., 2005) [hereinafter *COHEN’S HANDBOOK*].

²⁵ See Angela R. Riley, *Crime and Governance in Indian Country*, 63 *UCLA L. REV.* 1564, 1587 (2016) (“[W]hen a non-Indian commits a crime against an Indian in Indian country—absent a unique statutory modification—the only sovereign with jurisdictional authority is the federal government.”).

²⁶ In enacting Public Law 280, the federal government transferred its jurisdictional powers in Indian country to some states, leaving it an option for states to exercise jurisdiction. See Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 2, 7, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162) [hereinafter *PL-280*]. State jurisdiction in Indian country under *PL-280* was later amended to require tribal consent. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1321–23. For an overview of the jurisdictional triad of crimes in Indian country, see AMNESTY INT’L, *supra* note 12, at 31; *infra* note 78.

²⁷ Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 *ARIZ. L. REV.* 503, 504 (1976).

²⁸ Riley, *supra* note 25, at 1575.

A. Early Tribal–Federal Relations

Though tribes existed well before the Constitution and the federalist structure of the U.S. government were established, the history of federal Indian policy underscores the substantial erosion of tribal sovereignty and the individual rights of Indians at the hands of Congress and the federal courts.²⁹ Before European colonization and the development of the United States, some American Indian tribes had already established systems of law and governance.³⁰ When tribes entered into treaties with the United States in the eighteenth and early nineteenth centuries, they were considered sovereign entities, distinct from states.³¹ Further, federal courts interpreted treaties with a “full appreciation of the Indian understanding of the deal” because

²⁹ See, e.g., *Montana v. United States*, 450 U.S. 544, 556-67 (1981) (holding that tribes presumptively lacked authority to regulate non-Indian hunting and fishing on non-Indian-owned land within a reservation, subject to certain exceptions); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (denying tribal criminal jurisdiction over non-Indian defendants). The executive branch has also, at times, undermined the inherent sovereignty of Indian tribes. See, e.g., CLINTON ET AL., *supra* note 2, at 20-22 (discussing the influence of President Andrew Jackson during the Removal Era, whose federal Indian policy forcibly removed thousands of Indians from their land and pushed them westward).

³⁰ See Gavin Clarkson & David DeKorte, *Unguarded Indians: The Complete Failure of the Post-Oliphant Guardian and the Dual-Edged Nature of Parens Patriae*, 2010 U. ILL. L. REV. 1119, 1127-28 (2010) (“Prior to European colonization of the Americas, many tribes had developed systems of law and justice, contrary to myths that no such systems existed.”). Indeed, the oral constitution of the Iroquois Confederacy, known as the “Great Law of Peace,” was used as a model of effective government for the early American colonists. See H.R. Con. Res. 331, 102 Stat. 4932 (1988) (“[T]he confederation of the original Thirteen Colonies into one republic was influenced by the political system developed by the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself . . .”). See generally DONALD A. GRINDE, JR., & BRUCE E. JOHANSEN, *EXEMPLAR OF LIBERTY: NATIVE AMERICA AND THE EVOLUTION OF DEMOCRACY* (1991) (providing an extensive overview of evidence and arguments to support the “Iroquois Influence Thesis”).

³¹ See, e.g., Thomas Jefferson, *Notes on the Proceedings (Feb. 26, 1793)*, in *THE WRITINGS OF THOMAS JEFFERSON* 340-41 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905) (“The Indians had the full, undivided and independent sovereignty as long as they chose to keep it, and this might be forever.”). This view of tribal sovereignty changed in the nineteenth century. See 6 REG. DEB. 1035 (1830) (quoting the same passage from Jefferson, a congressman then reasoned: “Sir, there is no man who has a higher reverence for the opinions of Mr. Jefferson . . . but if he intended to be understood as advancing the opinion that the Indian tribes possess entire and unlimited sovereignty over the country which they claim, I cannot yield my assent”). Compare *Treaty of Hopewell*, art. 5, Nov. 28, 1785, 7 Stat. 18 (noting that if a U.S. citizen settled on recognized Indian land, “such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please”), with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 580 (1832) (“At no time has 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.”). But even in the twenty-first century, tribal sovereignty is incredibly difficult to define. See President George W. Bush, Remarks at the UNITY Journalists of Color Conference (Aug. 6, 2004), <https://www.youtube.com/watch?v=kdimK1onR4o> [<https://perma.cc/9GJQ-7GWB>] (answering a question about what tribal sovereignty means: “Tribal sovereignty means that: it’s sovereign You’ve been given sovereignty and you’re viewed as a sovereign entity. And, therefore, the relationship between the federal government [and American Indian tribes] is one between sovereign entities.”).

they were considered separate sovereigns, and thus deserved the comity afforded other sovereigns.³²

However, throughout the nineteenth century, significant shifts in federal–Indian relations altered the landscape of tribal powers and inherent tribal sovereignty. In *Cherokee Nation v. Georgia*, decided in 1831 and the first Supreme Court case involving a tribe as a named party, Chief Justice Marshall referred to tribes as “domestic dependent nations” rather than wholly sovereign nations.³³ He held that the Supreme Court could not maintain jurisdiction over the tribe as a party because they were neither a state nor a foreign nation.³⁴ Tribal sovereignty was still recognized, but federal guardianship over tribes was formally acknowledged and justified by the Court. Only one year later, in *Worcester v. Georgia*, Chief Justice Marshall emphasized that the Cherokee Nation was a distinct community with inherent sovereignty and authority to make and enforce laws within their own lands, and that the federal government, not states, managed tribal relationships.³⁵ *Worcester* stood for the proposition that tribes did have inherent sovereignty, but it became evident that the federal government was asserting more control than ever before.

The text of the Constitution did not provide express power to the federal government to regulate “internal Indian affairs” of the (once-considered extremely autonomous) tribes, but the gradual encroachment into such affairs was quickly affirmed by “plenary congressional power.”³⁶ This power—a new phenomenon in the mid-nineteenth century, but later deemed a power “from

³² See CLINTON ET AL., *supra* note 2, at 204 (citing Marshall’s majority opinion in *Worcester* and Justice McLean’s concurring opinion in *Worcester* as evidence that the Justices were trying to interpret the treaty as the Indian party were to understand it, not just how the federal government would). For a discussion of shifting historical models of treaties between tribes and the federal government, see generally *id.* at 4–12.

³³ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

³⁴ See *id.* at 27 (“The argument is that they were states; and if not states of the union, must be foreign states. But I think it very clear that the [C]onstitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes.”). Three opinions handed down by Chief Justice Marshall became pivotal cases in federal Indian law, known as “The Marshall Trilogy”: *Worcester*, 31 U.S. 515; *Cherokee Nation*, 30 U.S. 1; *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

³⁵ See 31 U.S. at 520 (finding unconstitutional a state law that prosecuted white individuals for not having a license to be in Indian country because it would “interfere forcibly with the relations established between the United States and the Cherokee nation”).

³⁶ Cleveland, *supra* note 14, at 25–26; see also *id.* at 46 (discussing *United States v. Rogers* and arguing that the Supreme Court found that “discovery, and the resulting presence of [an Indian] tribe within U.S. boundaries, gave Congress plenary authority to legislate a criminal code for the Indians”).

The Constitution mentions Indians or Indian tribes in the Commerce Clause, U.S. CONST. art. I, § 8 (delineating Congress’ power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”), and in U.S. CONST. art. I, § 2 and U.S. CONST. amend. XIV, § 2 (excluding Indians not taxed from consideration of how to apportion representation).

the beginning”³⁷—grew teeth primarily during the so-called Removal Period.³⁸ In 1871, Congress passed the Indian Appropriations Act, which ended formal treaty-making with Indian tribes.³⁹ Further, the Supreme Court found Congress possessed the power to unilaterally abrogate treaty provisions.⁴⁰ While this congressional action ended a form of external tribal sovereignty, it did not suggest that tribes lost their power of self-government and *internal* sovereignty.

As shifts in federal policy towards Indian tribes evolved dramatically in the nineteenth century, so too did federal recognition of tribal jurisdiction in Indian country—but some evidence suggests that exercising broad criminal jurisdiction in its territory was historically an inherent power of a tribe.

B. Criminal Jurisdiction in Indian Country Pre-Oliphant

The historically recognized metes and bounds of tribal criminal jurisdiction, especially over non-Indians, are relatively unsettled, and such an investigation falls outside the scope of this Comment. This Section shows that the historical record reflects evidence of at least some tribal criminal jurisdiction over non-Indians in Indian country, and that the federal government recognized this power as inherent in tribal sovereignty.

1. Tribal Jurisdiction

Conflicting arguments exist as to whether tribes ever possessed authority to prosecute non-Indian crime committed in Indian country, and if so, whether it was concurrent with federal authority, or at times exclusive. Frequently, the same primary source can be interpreted to make contrary conclusions regarding the power of tribes to exercise criminal jurisdiction over non-Indians. Take, for example, an 1834 House Report recommending the enactment of the “Western Territory Bill.”⁴¹ Justice Rehnquist in *Oliphant*

³⁷ *Infra* note 40.

³⁸ See CLINTON ET AL., *supra* note 29, at 20-22; see also Cleveland, *supra* note 14, at 42-44 (noting that the first half of the nineteenth century was marked by tribal control over “conduct between Indians in Indian territory,” but that a clear shift occurred throughout the century where the federal government asserted more control).

³⁹ See Indian Appropriations Act of Mar. 3, 1871, 16 Stat. 466 (codified at 25 U.S.C. § 71) (“[H]ereafter no Indian nation or tribe . . . shall be recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .”).

⁴⁰ See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . .”). The plenary power of Congress over Indian affairs, recognized in *Lone Wolf*, was not actually referred to as “plenary” before then, but now is part of general federal Indian law doctrine. See, e.g., *United States v. Lara*, 541 U.S. 193, 194 (2004) (“The Constitution . . . grants Congress ‘*plenary and exclusive*’ powers to legislate in respect to Indian tribes.” (emphasis added)).

⁴¹ H.R. REP. NO. 23-474, 18 (1834).

buttressed his argument that tribal courts were not historically recognized to possess “criminal jurisdiction over United States officials and citizens traveling through the area” by quoting language in this Report.⁴² Viewed in a different light, however, this 1834 Report supports an opposing argument. Russel Lawrence Barsh and James Youngblood Henderson highlighted several flaws in Rehnquist’s reliance on this primary source:

To begin with, the bill was tabled; a fact which Justice Rehnquist reserved for the footnotes. The bill therefore reflects the views of a single committee, not Congress. Furthermore, Justice Rehnquist stopped short of quoting all of the 1834 report’s “practical reasons.” What he omitted is enlight[e]ning: “[A]s to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting to the laws of the tribes. . . . [t]he right of self-government is secured to each tribe, with jurisdiction over all persons and property within its limits, subject to certain exceptions, founded on principles analogous to international laws among civilized nations.” . . . In another footnote he admits that the Western Territory Bill “did not extend the protection of the United States to non-Indians who settled without Government business in Indian territory.” This technique has been seen before. In the text, facts are presented and a strong conclusion is drawn: “Indian tribal courts were without jurisdiction to try non-Indians.” Then, in the footnotes, contradictions in the facts are admitted. The product is a kind of half-truth.⁴³

While only one example, the 1834 House Report reflects the disparate treatment of primary resources to determine the historical views, practices, and policies of tribal criminal jurisdiction over crimes committed on tribal lands.

In any event, there is evidence beyond this Report suggesting that it was early federal policy to recognize tribal jurisdiction over offenses by non-Indians if they were committed on tribal land—evidence of both exclusive and concurrent tribal jurisdiction.⁴⁴ Early versions of tribal

⁴² *Oliphant*, 435 U.S. at 202. Rehnquist quoted the Report in multiple parts of the opinion, writing in sum the Report demonstrated that “Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without jurisdiction to try non-Indians.” *Id.* at 203.

⁴³ Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 625-26 (1979) (footnotes and citations omitted).

⁴⁴ See Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 400 & n.31, 403 n.43 (1993) (describing supporting evidence for tribes possessing the authority to exercise criminal jurisdiction in certain capacities over non-Indians after the founding of the Republic, including among others several treaties, and findings by the Department of Interior and the American Indian Policy Commission); cf. Barsh & Henderson, *supra* note 43, at 620 (criticizing Justice Rehnquist for citing in *Oliphant* only 6 of 366 ratified U.S.–Indian treaties to “conclude[] that tribal treaties acquiesced in a historical federal policy against tribal criminal jurisdiction over non-Indians”). For a more detailed review

criminal authority over non-Indians existed through consent of the non-Indian party—traditionally through citizenship, naturalization or intermarriage. For example, the Cherokee Nation, recognized in a treaty with the United States in 1866, maintained “exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity *or adoption*, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation.”⁴⁵ Paul Spruhan identified through his research similar provisions in treaties with the Seminoles⁴⁶, the Creeks⁴⁷, and the Choctaw and the Chickasaw Nations.⁴⁸ Even if a treaty recognized federal jurisdiction in Indian country, it was not necessarily addressing the scope of tribal jurisdiction, and frequently, such “protection” of federal laws was not for non-Indians who lived in Indian country.⁴⁹ At minimum, these treaties highlight some recognition from the federal government that certain tribes possessed jurisdiction over non-Indians in Indian country as part of their inherent power to govern their own land.

of the evidence of tribal jurisdiction in the colonial era, see generally LISA FORD, *SETTLER SOVEREIGNTY* 55-85 (2010); see also *id.* at 59-60 (“[T]he reach of indigenous jurisdiction is most apparent in the very paucity of settler law in and around Indian country The status of settler-sojourners under law and treaty confirms that Indian Country was both a place of territorial exception and a place of overlapping jurisdictions.”).

⁴⁵ Treaty with the Cherokee Nation, art. 13 July 19, 1866; see Paul Spruhan, “Indians, in a Jurisdictional Sense”: *Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, 1 AM. INDIAN L.J. 79, 84 & n.44 (2012) (quoting the same treaty passage, and referencing other treaties illustrating tribal criminal authority over naturalized white persons). Spruhan argues that the 1866 treaty with the Cherokee Nation—because it granted “exclusive” criminal jurisdiction over adopted or naturalized citizens—overturned *United States v. Rogers*, 45 U.S. 567 (1846), which had earlier held that the federal government could exercise criminal jurisdiction over a white man who married into the Cherokee Nation. *Id.* at 85.

Citizenship through consent, adoption, or intermarriage is rarely seen currently, and tribal citizenship for federal law purposes most often turns on a combination of factors that include blood quantum. See *id.* at 91; U.S. DEP’T OF INTERIOR, *A GUIDE TO TRACING AMERICAN INDIAN & ALASKA NATIVE ANCESTRY* 2, https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/public/pdf/Guide_to_Tracing_AI_and_AN_Ancestry.pdf [<https://perma.cc/PC4V-L9QJ>] (determining eligibility for tribal membership requires, according to the Bureau of Indian Affairs, that an individual first “establish that you have a lineal ancestor—biological parent, grandparent, great-grandparent and/or more distant ancestor—who is an American Indian or Alaska Native person from a federally recognized tribe in the U.S.”).

⁴⁶ See Spruhan, *supra* note 45, at 85 (“The Seminoles similarly stated in their treaty that ‘the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe.’” (quoting Treaty with the Seminoles, art. 2 Mar. 21, 1866)).

⁴⁷ See *id.* (noting that “[t]he Creeks included an almost identical provision in their [1866] treaty” as the Seminoles).

⁴⁸ See *id.* at 84 (“In their collective 1866 treaty, the Choctaws and Chickasaws similarly reserved such right over intermarried white persons residing on tribal lands or who had been adopted by legislative action.”).

⁴⁹ See FORD, *supra* note 44, at 60 (citing treaties, such as the Treaty of Holston and the Treaty of New York, where non-Indians, who “shall settle on any of the [Cherokee or Creek] lands,” forfeited protection); see also Treaty of Hopewell, *supra* note 31 and accompanying text.

The records of Benjamin Hawkins, the principle Indian agent to the Creek Tribe in the early nineteenth century, also reflect the occurrence of trials by the Creek National Council, whereby the Tribe exercised jurisdiction over non-Indians.⁵⁰ Hawkins “supervised the trials of a number of settlers by the Creek National Council,” including the whipping of a white man who attempted to steal a slave.⁵¹ And as scholar Lisa Ford notes, even with potential elements of “federal imperialism” infused into the Creek National Council, “it nevertheless dispensed, and was *understood by settlers to dispense*, Creek jurisdiction over settlers.”⁵²

In addition to certain limited authority over non-Indians, whether concurrent or exclusive with the federal government in Indian country, tribes maintained *exclusive* criminal jurisdiction over Indian-on-Indian crime in Indian country until the late nineteenth century.⁵³ This recognition of tribal criminal jurisdiction (as inherent tribal sovereignty) was acknowledged in *Ex Parte Crow Dog*, where it was determined that federal courts did not have jurisdiction to prosecute an Indian accused of murdering another Indian in Indian country.⁵⁴ The *Crow Dog* decision was made at a time when federal Indian policy was drastically stretching federal power into Indian country, and it was not long before Congress reacted.

2. Concurrent Tribal, State and/or Federal Jurisdiction

By 1817, the federal government had already extended federal criminal jurisdiction to Indian country for non-Indian crime, unless a treaty said otherwise.⁵⁵ Then, almost immediately following the decision in *Crow Dog*, Congress passed the Major Crimes Act of 1885, which extended federal criminal jurisdiction over certain major crimes committed by *Indians* in Indian country—thus eliminating tribe’s once exclusive jurisdiction over

⁵⁰ See FORD, *supra* note 44, at 61 (citing Hawkins’ letters to Thomas Jefferson and James Jackson).

⁵¹ *Id.*

⁵² *Id.* (emphasis added).

⁵³ See General Crimes Act of 1817, 18 U.S.C. § 1152 (extending federal criminal jurisdiction to all crimes committed in Indian country, except for Indian-on-Indian crime, or where an Indian was already punished by tribal law, or if a legitimate treaty said otherwise); *infra* note 56 and accompanying text (discussing how the Major Crimes Act limited exclusive tribal criminal jurisdiction over certain crimes involving only Indian parties).

⁵⁴ See 109 U.S. 556, 572 (1883) (extending jurisdiction to federal courts would, according to the Court, “reverse . . . the general policy of the government towards the Indians” and would require a clear expression of intent from Congress). This is in stark contrast to Justice Rehnquist’s reasoning in *Oliphant*. See *infra* note 72 and accompanying text.

⁵⁵ 18 U.S.C. § 1152.

Indian-on-Indian crime.⁵⁶ The Major Crimes Act did not, however, reference the scope of exercising tribal jurisdiction.

By the twentieth century, as federal Indian policy reverted back to recognizing inherent tribal sovereignty, this shift was colored by the expanded recognition of congressional “plenary” powers over Indian affairs.⁵⁷ These conflicting principles particularly exacerbated jurisdictional shifts. In 1953, Congress passed Public Law 280 (PL-280), allowing for the transfer of federal civil and criminal jurisdiction in Indian country to states—though it did not preempt tribal jurisdiction.⁵⁸ Publicly, congressional intent behind PL-280 was to address the “lawlessness on the reservations and the accompanying threat to non-Indians living nearby.”⁵⁹ Functionally, however, its passage led the federal government to withdraw significant funding from those states exercising PL-280 jurisdiction.⁶⁰ After the law was enacted, the Bureau of Indian Affairs dramatically reduced federal funding to tribes to support law enforcement activities before PL-280 states had put in place systems to assert jurisdiction in Indian country.⁶¹

⁵⁶ Major Crimes Act of 1885, 18 U.S.C. § 1153. Congressional authority to enact such legislation was not found in any positive source of law, but rather in Congress’s general “ownership of the country,” including the territory occupied by Indian tribes, and the need to protect tribes themselves due to the federal trust relationship. *United States v. Kagama*, 118 U.S. 375, 380, 384 (1886). The *Kagama* Court did not address the scope of *tribal* jurisdiction, however.

⁵⁷ Compare *Lone Wolf v. Hitchcock*, 187 U.S. 553, 553 (1903) (“Congress has always exercised plenary authority over the tribal relations of the Indians and the power has always been deemed a political one not subject to be controlled by the courts.”), with *The Indian Reorganization Act of 1934*, 25 U.S.C. §§ 476–78 (authorizing the Secretary of the BIA to approve tribal constitutions and charters of incorporation for tribes, reinvigorating a policy of tribal self-determination). In a Bureau of Indian Affairs Report from the same year the IRA was passed, the Solicitor of the Interior acknowledged the plenary powers of Congress, but noted that tribes maintain jurisdiction over non-Indians “save as it has been expressly limited by” Congress. *Powers of Indian Tribes*, 55 Interior Dec. 57 (1934); see also Brief for Historians and Legal Scholars Supporting Respondents at 7, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496) (quoting the same passage).

⁵⁸ PL-280, *supra* note 26; see also *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990) (“Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority.”).

Before PL-280 was passed, states possessed some jurisdictional authority in Indian country: for crimes where both parties were non-Indian. See *United States v. McBratney*, 104 U.S. 621, 623-24 (1882) (holding that Colorado, not the federal government, had criminal jurisdiction over a murder committed on an Indian reservation between non-Indians); see also COHEN’S HANDBOOK, *supra* note 24, § 9.02(10)(a).

⁵⁹ Clarkson & DeKorte, *supra* note 30, at 1137.

⁶⁰ CLINTON ET AL., *supra* note 2, at 541 (“[T]he major point of Public Law 280 was to divest the federal government of fiscal responsibility for such policing, not to curtail the long-recognized inherent sovereignty of the tribes over such matters.”).

⁶¹ See *infra* text accompanying note 109 (quoting a report that found tribal police forces have 55-75 percent of the resources available to non-Indian communities); Catherine T. Struve, *The Story of Santa Clara Pueblo v. Martinez: Tribal Sovereignty, Sex Equality, and the Federal Courts*, in FEDERAL COURTS STORIES 301, 306 (Vicki Jackson & Judith Resnik eds., 2009) (“A widespread problem that surfaced under Public Law 280 was that states lacked resources and perhaps inclination to provide adequate law enforcement on many reservations.”).

When PL-280 was originally passed, Congress did not require tribal consent for states to assert jurisdiction in Indian country. The Indian Civil Rights Act of 1968 (ICRA) was a step taken by Congress to require such consent, and in addition, permit states to return jurisdiction back to the federal government.⁶² However, the ICRA concomitantly reflected the tension between recognition of inherent tribal sovereignty and congressional plenary power over Indian tribes. While the ICRA mandated tribal consent for new state assumptions of PL-280 jurisdiction in Indian country, it also enforced the guarantee of certain constitutional rights in tribal courts and limited tribal sentencing authority to maximum terms of imprisonment and fines.⁶³ This included rape, which normally carries a sentence of between eight and twelve years in state or federal courts.⁶⁴ After being amended by the Tribal Law and Order Act in 2010, the ICRA now provides for a maximum term of three years for any one offense, such as rape.⁶⁵

Further, the ICRA imposed restraints on tribal governments to recognize certain constitutional rights of defendants—restraints not previously placed upon them, since tribes are not bound by the Bill of Rights or the Fourteenth Amendment.⁶⁶ At the time, there was concern⁶⁷ that tribal courts would be unable to afford non-Indian individuals the same constitutional protections and due process that state or federal courts could, instilling a notion of tribal government as a “second-class system of justice that encourages law breaking.”⁶⁸

⁶² Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202(7), 82 Stat. 77 (codified at 25 U.S.C. §§ 1301–03).

⁶³ See 25 U.S.C. § 1302 (2012) (discussing limits on tribal power). When the ICRA was first enacted in 1968, Congress limited tribal government’s sentencing authority to imposing sentences of up to six months and five hundred dollars. Pub. L. No. 90-284, § 202(7), 82 Stat. 77 (1968) (prior to 1986 amendment). In amendments to the ICRA, Congress limited tribes to imposing sentences of up to one year and five thousand dollars. Pub. L. No. 99-570, § 4217, 100 Stat. 3207-146 (1986). The Tribal Law and Order Act expanded tribal sentencing power in 2010, limiting tribes to imposing sentences of up to three years and fifteen thousand dollars for any one offense (with a total sentencing limit of nine years). 25 U.S.C. §§ 1302(a)(7), 1302(b) (2012).

⁶⁴ See AMNESTY INT’L, *supra* note 12, at 8 (“The average prison sentence for rape handed down by state or federal courts is between eight years and eight months and 12 years and 10 months respectively.”).

⁶⁵ 25 U.S.C. §§ 1302(a)(7), 1302(b).

⁶⁶ § 1302; see Struve, *supra* note 61, at 301-03 (describing a case where the plaintiffs sued an Indian tribe under the Equal Protection clause of ICRA, rather than the Fourteenth Amendment, because tribes “are not bound by the Constitution’s Bill of Rights or by the Fourteenth Amendment”); see also *infra* note 155 and accompanying text (discussing Supreme Court precedent holding that tribes are not bound by the Constitution except where a provision applies universally, such as the Thirteenth Amendment).

⁶⁷ For a more detailed overview of the hearings and concerns expressed in Congress before the ICRA was enacted, see Struve, *supra* note 61, at 306-11.

⁶⁸ Williams, *supra* note 11. The ICRA was amended in 1990 to recognize tribal inherent sovereignty to prosecute nonmember Indians who commit crimes on their land. 25 U.S.C. § 1301(2). This was known as the *Duro* fix following a Supreme Court opinion that held tribes could not exercise criminal jurisdiction over nonmember Indians. *Duro v. Reina*, 495 U.S. 676 (1990).

C. Policy, Jurisdiction, and Oliphant in Indian Country

In the latter half of the twentieth century, federal courts began developing common-law doctrine regarding jurisdiction that limited the exercise of tribal sovereignty. This was most evident in the Court's decision in *Oliphant v. Suquamish Indian Tribe*.⁶⁹ Two non-Indians were charged with resisting arrest, assaulting a tribal officer, and recklessly endangering another person after colliding with a tribal police car during a high-speed chase.⁷⁰ While the tribe argued they had jurisdiction, stemming from their retained inherent powers, the Court rejected inherent tribal sovereignty to exercise criminal jurisdiction over non-Indians.⁷¹ Justice Rehnquist, writing for a majority of the Court, believed that historical evidence suggested there was no such jurisdiction without an express grant from Congress, but noted that Congress had the power to enact legislation providing for such jurisdiction.⁷²

Two justices on the *Oliphant* Court felt the analysis should be flipped: the tribe maintains jurisdiction in Indian country as part of their inherent sovereignty *unless* it was affirmatively taken away by Congress.⁷³ The dissent foreshadowed practical problems with the Court's decision to reject tribal criminal jurisdiction over non-Indians in Indian country, which effectively compounded enforcement challenges in Indian country.⁷⁴ Eliminating the inherent sovereign right to exercise jurisdiction over all crimes committed within their own land stripped tribes of a core sovereign prerogative to protect their people and promote order within their borders.⁷⁵ The *Oliphant* majority revealed the little faith held by the federal government—through judicial common law-making—in tribes to protect their own citizens. It also emphasized the unique state of jurisdictional play in Indian country: “the only place within the United States where the racial and political status of the

⁶⁹ 435 U.S. 191 (1978). Decided only weeks after *Oliphant*, the *Wheeler* opinion found that the Double Jeopardy Clause of the Fifth Amendment did not apply to a tribe's prosecution and federal prosecution of the same Indian defendant for the same crime because the tribal exercise of its power to punish member offenses was a “continued exercise of retained tribal sovereignty.” 435 U.S. 313, 323-24 (1978). Thus, the principle of inherent tribal sovereignty was not lost at the time of *Oliphant*, even if it was substantially threatened.

⁷⁰ *Oliphant*, 435 U.S. at 194.

⁷¹ *Id.* at 196-97.

⁷² *See id.* at 208 (“Indians do not have criminal jurisdiction over non-Indians *absent affirmative delegation of such power by Congress.*” (emphasis added)); *see also* United States v. Lara, 541 U.S. 193, 207 (2004) (“[W]e do not read any of these cases [including *Oliphant*] as holding that the Constitution forbids Congress to change ‘judicially made’ federal Indian law through this kind of legislation.”).

⁷³ 435 U.S. at 212 (Marshall, J., dissenting).

⁷⁴ *See infra* Section II.B.

⁷⁵ *See* Riley, *supra* note 25, at 1581 (discussing the effect of *Oliphant* on crime and justice in Indian country).

perpetrator and victim bear on the question of which sovereign may exercise jurisdiction in a given instance.”⁷⁶

After *Oliphant*, criminal jurisdiction in Indian country rests on three key factors, divided or shared among tribal, state, or federal entities: (i) the nature of the offense; (ii) whether jurisdiction has been conferred on the state; and (iii) whether the victim and/or the perpetrator is an Indian.⁷⁷ Investigators and prosecutors alike must know where a crime occurred, who the victim was, and who the perpetrator was before determining the appropriate means of legal redress.⁷⁸

⁷⁶ *Id.*

⁷⁷ U.S. DEP’T OF JUSTICE, OFFICE OF U.S. ATTORNEYS, CRIMINAL RESOURCE MANUAL § 674, <https://www.justice.gov/usam/criminal-resource-manual-674-indian-country-introduction> [<https://perma.cc/Q9GB-2ZCC>].

⁷⁸ The Department of Justice published a chart, reprinted below, in its Criminal Resource Manual to U.S. attorneys, to summarize the complexities of jurisdiction in Indian country depending on the source of jurisdiction:

OFFENDER	VICTIM	JURISDICTION (NOT CONFERRED ON STATE)
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Federal jurisdiction under 18 U.S.C. § 1152 is exclusive of state and tribal jurisdiction. If listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated.
Indian	Non-Indian	If not listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but not of the tribe, under 18 U.S.C. § 1152. If the offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state law is assimilated under 18 U.S.C. § 13. If the offense is listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. See section 1153(b). If not listed in 18 U.S.C. § 1153, tribal jurisdiction is exclusive.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if an impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be both federal and tribal jurisdiction. Under the Indian Gaming Regulatory Act, all state gaming laws, regulatory as well as criminal, are assimilated into federal law and exclusive jurisdiction is vested in the United States.

In sum, since the founding of the United States, Indian tribes have lost much of their land, sovereign rights, and powers, but that reality cannot conceal the history of tribal jurisdiction in Indian country and tribes' existence as sovereigns. Gaps in jurisdiction, in particular, left an already vulnerable population even more susceptible to abuse. Ultimately, the jurisdictional complications in Indian country, which created a sense of lawlessness, pushed Congress to reconsider the disproportionate impacts of this procedural anomaly on victims, specifically Indian women.

OFFENDER	VICTIM	JURISDICTION (UNDER PUB. L. 280, 18 U.S.C. § 1162)
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	“Mandatory” state has jurisdiction exclusive of federal and tribal jurisdiction. “Option” state and federal government have jurisdiction. There is no tribal jurisdiction.
Indian	Non-Indian	“Mandatory” state has jurisdiction exclusive of federal government but not necessarily of the tribe. “Option” state has concurrent jurisdiction with the federal courts.
Indian	Indian	“Mandatory” state has jurisdiction exclusive of federal government but not necessarily of the tribe. “Option” state has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach in an option state if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, tribal, and in an option state, federal jurisdiction. There is no state regulatory jurisdiction.
OFFENDER	VICTIM	JURISDICTION (CONFERRED BY ANOTHER STATUTE)
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Unless otherwise expressly provided, there is concurrent federal and state jurisdiction exclusive of tribal jurisdiction.
Indian	Non-Indian	Unless otherwise expressly provided, state has concurrent jurisdiction with federal and tribal courts.
Indian	Indian	State has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, federal and tribal jurisdiction. There is no state regulatory jurisdiction.

U.S. DEP'T OF JUSTICE, OFFICES OF THE U.S. ATTORNEYS, CRIMINAL RESOURCE MANUAL 689, <https://www.justice.gov/usam/criminal-resource-manual-689-jurisdictional-summary> [<https://perma.cc/DCJ6-QSB7>].

II. THE JURISDICTIONAL MAZE AND SEXUAL ASSAULT IN INDIAN COUNTRY

The historical erosion of tribal authority illustrated in Part I left Indian women living in Indian country significantly under-protected from strangers and even from their own bedfellows. After *Oliphant* but before VAWA 2013, tribes could not exercise criminal jurisdiction over non-Indian defendants committing crimes against Indians in Indian country.⁷⁹ This left the federal government (and sometimes states) as the sovereign to prosecute and investigate non-Indian crime against Indians. In practice, the federal government declined to prosecute nearly half of reported cases of sexual assault in Indian country between 2005 and 2009, due to “weak or insufficient admissible evidence.”⁸⁰ Further, reports show that attackers would even call “the tribal police themselves, knowing there would not be a response, arrest, or prosecution.”⁸¹ This sense of lawlessness directly contributed to deeply troubling statistics of sexual and physical violence against Indian victims.

A. Data on Violence Against American Indians/Alaska Natives

Although rape and sexual violence against Indian victims are not new phenomena,⁸² media attention and recent studies have attempted to shed light on the extent and severity of the problem, for policymakers, police, and the broader public.

Studies highlight the problem of sexual assault against Indian victims, and, in particular, the high rates of violent crimes committed against Indians as compared to victims who do not identify as Indian. For example, a 2003 National Institute of Justice (NIJ) Research Report presented findings from the National Violence Against Women (NVAW) Survey to better understand violence against women in the United States, and to review key findings for women of color’s experiences with violence in particular.⁸³ The NVAW Survey data reported that 34.1 percent of respondents who identified as American Indian/Alaska Native women reported being raped, compared to 17.7 percent of respondents who identified as white, 18.8 percent who identified as black,

⁷⁹ See *supra* Section I.B (detailing the Court’s decision in *Oliphant* and its effect on criminal jurisdiction in Indian country).

⁸⁰ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-167R, DECLINATIONS OF INDIAN COUNTRY MATTERS 3 (2010).

⁸¹ Riley *supra* note 25, at 1582; see also Horwitz, *supra* note 11 (“One time after her husband beat her, [the victim] said, he picked up the phone and called the sheriff to report the incident himself to show that he couldn’t be arrested . . . He knew, she said, there was nothing the sheriff could do.”).

⁸² See *supra* note 21 and accompanying text (noting the prevalence of sexual violence against American Indians since the early colonial period).

⁸³ TJADEN & THOENNES, *supra* note 3, at iii.

and 6.8 percent who identified as Asian/Pacific Islander.⁸⁴ In fact, according to the data, American Indian/Alaska Native respondents (both male and female) had the highest rates across each type of victimization: rape, physical assault, and stalking.⁸⁵ Another report, published by the U.S. Department of Justice's Bureau of Justice Statistics (BJS) in 1999, found that, while seventy percent of all American Indian victims described their attacker as white (sixty percent) or black (ten percent), victims of rape or sexual assault "most often reported that the victimization involved an offender of a different race. About ninety percent of American Indian victims of rape or sexual assault were estimated to have had assailants who were white or black."⁸⁶

The 1999 BJS Report also found that the rate of violent victimizations for American Indians was more than double the rate for the U.S. resident population.⁸⁷ The 2003 NIJ Report on the NVAW findings concluded that American Indian/Alaska Natives were at high risk of being violently victimized, but "how much of the variance in violent victimization that may be explained by demographic, social, and environmental factors remains unclear and requires further study."⁸⁸

While recent data is not ultimately conclusive on the exact percentage of offenders who are strangers, acquaintances, family members, or intimate partners, it is evident that Indian victims experience violence at the hands of perpetrators who are not just spouses or dating partners. For example, the data analyzed in the 1999 BJS Report reflected that forty-six percent of violent victimizations of American Indian victims, including but not limited to

⁸⁴ *Id.* at 22; *see also* Clarkson & Dekorte, *supra* note 30, at 1119 ("American Indian females are victims of violence more than two and a half times the national average . . . What is even more troublesome is that in more than 90% of these cases, the offender is a non-Indian.").

⁸⁵ TJADEN & THOENNES, *supra* note 3, at 22.

⁸⁶ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 7 (Feb. 1999), <https://www.bjs.gov/content/pub/pdf/aic.pdf> [<https://perma.cc/M7D6-JK46>]. The BJS Report also found that

Most striking among American Indian victims of violence is the substantial difference in the racial composition of offenders in intimate violence incidents when contrasted with family violence. Among violence victims of all races, about 11% of intimate victims and 5% of family victims report the offender to have been of a different race; however, among American Indian victims of violence, 75% of the intimate victimizations and 25% of the family victimizations involved an offender of a different race.

Id. at 8.

⁸⁷ *Id.* at v.

⁸⁸ TJADEN & THOENNES, *supra* note 3, at 23. Congress recognized this problem when the Violence Against Women Act was being reauthorized in 2005, requiring the NIJ to "conduct a national baseline study to examine violence against Indian women in Indian country" and create a Task Force to develop and implement the study and its recommendations. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 904(a), 119 Stat. 2960, 3078-79 (2006); *see also infra* note 113 and accompanying text (explaining Congress's purpose in enacting VAWA 2005).

rape/sexual assault, were committed by a stranger, thirty-eight percent by an acquaintance, seven percent by a family member, and eight percent by an intimate partner.⁸⁹ Amnesty International found that of the reported sexually violent attacks against American Indian or Alaska Native women, only twenty-five percent were committed by an intimate partner.⁹⁰ And a study funded in part by the NIJ, which analyzed data collected by the National Crime Victimization Survey from 1992 to 2005, determined that thirty-eight percent of reported rapes/sexual assaults of American Indian/Alaska Native women were committed by an intimate partner, and twenty-nine percent by a stranger.⁹¹

Data collection for violence within Indian country and against Indian victims can be challenging, and generalizations regarding Indian country and tribes should be made with extreme caution, given variations in size, demographics, geographic remoteness, and local and state relations.⁹² The Ten Tribes Study was a collaborative effort between the University of Arizona, the National Institute on Alcohol Abuse and Alcoholism, and several tribes to overcome some of these challenges by gathering data from diverse tribes. The goals of the Ten Tribes Study were,

- (a) to determine the prevalence rates of adulthood physical assault and rape among men and women across six tribes, (b) describe victim–perpetrator relationships, and (c) identify the contributions of demographic characteristics, adverse childhood experiences, lifetime alcohol dependence, and cultural and regional factors to risks of adult victimization.⁹³

The Study asked respondents to categorize their offender as (i) male and female relatives, (ii) other known persons, (iii) romantic partners, and (iv) strangers.⁹⁴ In cases of physical assault, adult female victims reported the

⁸⁹ BUREAU OF JUSTICE STATISTICS, *supra* note 86, at 6.

⁹⁰ *Id.*

⁹¹ RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 38 (Aug. 2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf> [<https://perma.cc/7699-BG5P>].

⁹² See generally Nicole P. Yuan et al., *Risk Factors for Physical Assault and Rape Among Six Native American Tribes*, 21 J. INTERPERSONAL VIOLENCE 1566, 1568 (2006) (“Although violence research with Native Americans is growing, there are limited empirical data on the multiple vulnerabilities experienced by this population.”). This Study noted limitations in its own data collection: “prevalence rates might have been underestimated due to reporting bias and that bias might have varied by tribe. Participants might have adapted their responses because of shame and guilty, concerns about confidentiality, and limited anonymity . . .” *Id.* at 1584. For more general reasons for differences across studies, not just within—such as sampling differences, screening questions, and cultural sensitivity of interviewers—see BACHMAN ET AL., *supra* note 91, at 61–66. For a detailed overview of relevant studies conducted at the local level before 2007, including information on data collection methods, sample demographics, and results, see *id.* at 157–67.

⁹³ Yuan et al., *supra* note 92, at 1568.

⁹⁴ *Id.* at 1572. Ninety-six percent of the sample reported “living within tribal lands or boundaries.” *Id.* at 1575.

most common offender was a romantic partner (eighty percent).⁹⁵ In cases of sexual assault, “the most frequently reported perpetrator was a male relative (55%), followed by romantic partner (46%), other known person (29%), stranger (28%), and female relative (4%).”⁹⁶ While these categories clearly overlap, the drop in reporting perpetrators as a romantic partner from eighty percent in physical assault cases, to forty-six percent in sexual assault cases, is quite notable.

In addition to methodological challenges in data collection, the number of assaults are likely underreported.⁹⁷ Thus, available statistics likely are a gross underestimate.⁹⁸ Some victims and advocates of sexual assault in Indian country report that women growing up among the violence in Indian country normalize it, expecting it to occur and even preparing for it.⁹⁹ This may also be due to strained relations between victims of sexual assault and law enforcement, and in the case of Indian victims, who the appropriate enforcement agency is.

B. *Investigating and Prosecuting Crimes in Indian Country*

The problem of sexual violence against Indian victims is compounded by delays and declinations for investigation units and prosecutors—in many ways due to the fractured jurisdictional plane in which Indian country resides.¹⁰⁰

Data collected from the federal government, academic institutions, and other advocacy organizations all reflect the glaring problem that crimes of sexual violence in Indian country occur at much higher rates and are prosecuted at lower rates than similar crimes in state territory, and even at

⁹⁵ *Id.* at 1577.

⁹⁶ *Id.*

⁹⁷ This is not unique to American Indian victims. See PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 32 (Jan. 2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf> [<https://perma.cc/94GL-NJEJ>] (“Survey findings confirm previous research that shows rape is a seriously underreported crime. Only 19.1 percent of the women and 12.9 percent of the men who were raped since their 18th birthday said their rape was reported to the police.”).

⁹⁸ See, e.g., Riley *supra* note 25, at 1605 (noting that tribes engaged in the VAWA pilot project pointed to a “sharp increase in reporting of domestic violence as another sign that the laws are having a positive impact. . . . Those working in tribal criminal justice posit that this is because victims believe they are safer than before, and that their abusers will not automatically walk free due to jurisdictional loopholes.”); AMNESTY INT’L, *supra* note 12, at 33 (discussing an interview with a support worker in Oklahoma who said, “of her 77 active cases of sexual and domestic violence involving Native American women, only three women had reported their cases to the police”).

⁹⁹ See, e.g., Williams, *supra* note 3 (“[Rape is] more expected than unexpected. It has become the norm for young women” (quoting a women’s health advocate in South Dakota)).

¹⁰⁰ See *infra* notes 101–104 and accompanying text.

lower rates than other serious crimes committed in Indian country.¹⁰¹ For example, federal prosecutors did not file charges in fifty-two percent of the “most serious crimes” committed on tribal land in 2011, but declined to pursue sixty-five percent of alleged rapes and sixty-one percent of cases involving sexual abuse of children.¹⁰² This data should also be considered with the background of the jurisdictional history and forced assimilation that took place on federally recognized tribal land. Higher rates of poverty, less access to law enforcement, and the remoteness of the land are in many ways a direct result of that history of colonization.¹⁰³

Given the complexity of jurisdiction in Indian country, depending on the nature of the offense, the location of the crime, and the race and ethnicity of the parties, there can be several different offices involved in the investigation of one crime: Bureau of Indian Affairs (BIA) officers, Federal Bureau of Investigation (FBI) officers, tribal government officials, and state police officers.¹⁰⁴ Given these different players, some reports have found respective agencies could be slower to investigate crimes in Indian country because they feel another agency should be the primary enforcer.¹⁰⁵ Unique questions of

¹⁰¹ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 80, at 8-11 (noting the lower prosecution rate of sexual abuse matters compared to assault matters).

¹⁰² Williams, *supra* note 11. Some scholars argue that tribal authorities (who exercise appropriate criminal jurisdiction) are more effective at investigating and charging such crimes. See, e.g., AMNESTY INT'L, *supra* note 12, at 64 (noting that in 2002, the Navajo Nation Department of Public Safety Officers investigated 99 rape cases and made charges in 58 of them). For a critical response to the argument that federal prosecutors are more likely to decline sexual assaults involving Indian women in Indian country, see Gretchen C.F. Shappert, *Justice in Indian Country*, L.A. TIMES (Aug. 15, 2007), <http://www.latimes.com/opinion/la-oevshappert16aug16-story.html> [https://perma.cc/EBL3-3N57]. Shappert argued that the U.S. Attorney's Office for the Western District of North Carolina “does not []decline to prosecute violent crimes committed in Indian country, particularly those perpetrated by non-Indians against Indians that lack state or tribal court jurisdiction.” *Id.*

¹⁰³ See, e.g., AGTUCA, *supra* note 1, at 28 (“The answer that links these responses together is the nature and circumstance of U.S. colonization of the indigenous peoples of North America.”); BACHMAN ET AL., *supra* note 91, at 67 (“Historical and ongoing marginalization in terms of social, economic and political rights places American Indian and Alaska Natives at greater risk for victimization than other groups who did not share similar historical inequalities.”).

¹⁰⁴ BACHMAN ET AL., *supra* note 91, at 78-79. Bachman identified in 2006 that there were “over 170 law enforcement agencies operated by tribal law enforcement, and 37 operated by the Bureau of Indian Affairs.” *Id.* at 80. These agencies face significant challenges to enforcing the law:

Like many rural law enforcement agencies, these officials suffer from departmental and administrative problems in addition to geographical, social and economic barriers to connect with victims. Although these issues are not unique to American Indian and Alaska Native women, scholars frequently argue that problems are intensified on tribal lands due to cultural insensitivity, jurisdictional confusion and the extreme isolation of many reservations.

Id.

¹⁰⁵ *Id.* at 81-82; see also AMNESTY INT'L, *supra* note 12, at 44-46 (highlighting delays from multiple enforcement agencies in Alaska: “Because of delays in response by State Troopers, [village police officers] are often the first to respond to reports of crimes Although they may be the

enforcement create significant delays, which, while a concern for addressing any crime, particularly impacts the investigation of sexually violent crimes, where review of evidence such as rape kits is required as soon as possible following the crime.¹⁰⁶ To illustrate how jurisdictional confusion impacts investigation, Bachman and her colleagues excerpted the Final Report of the Ninth Circuit Gender Bias Task Force which identified:

The first enforcement officials called to the scene may be tribal police of [sic] BIA . . . officers, and these officers may initiate investigation and/or detain a suspect. Then a decision has to be made whether the crime is of the type warranting federal intervention, and then federal law enforcement officials (usually the FBI) need[] to be notified. These officers then decide if they will refer the case to the U.S. Attorney's office. After referral, the U.S. Attorney may call for further investigation, pursue prosecution, or dismiss the case.¹⁰⁷

In addition to delays due to jurisdictional questions, funding is also a significant problem for agencies responsible for investigating crimes in Indian country. Limited funding may result in inadequate training, understaffed agencies, lower salaries for officers, and poor data collection tools.¹⁰⁸ In a 2001 report published by the National Institute of Justice (NIJ), Wakeling and his colleagues found that tribal police forces have “between 55 and 80 percent of the resource base available to non-Indian communities,” despite higher rates of violent crime and other unique challenges.¹⁰⁹

Amnesty International's 2007 “Maze of Injustice” Report became one of the most influential studies that led to greater national attention toward the problem of sexual violence in Indian country.¹¹⁰ The Report discussed the specific challenges of prosecuting crimes in Indian country because of

first or only officers to respond, [they] cannot serve arrest warrants or investigate serious crimes such as rape without the approval of State Troopers.”); STEWART WAKELING ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS 43-45 (July 2001), <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf> [<https://perma.cc/K3C9-V7DG>] (discussing how jurisdictional complexities and “multiple lines of authority decrease accountability and create tribal capacity vacuums”).

¹⁰⁶ Investigations of sexual assault, particularly rape kits, generally require examination of the victim immediately following the alleged attack to determine the likelihood of an assault and preserve biological materials that could be used as evidence. See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 33-34 (2017) (“A rape kit, or forensic sexual assault examination, collects and preserves evidence obtained through an invasive physical examination of the victim, including hair, fibers, semen, saliva, skin cells, and blood.”).

¹⁰⁷ BACHMAN ET AL., *supra* note 91, at 82.

¹⁰⁸ WAKELING ET AL., *supra* note 105, at 26.

¹⁰⁹ *Id.* at 27.

¹¹⁰ AMNESTY INT'L, *supra* note 12, at 1; see CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 166 (2d ed. 2015) (“Th[e] Amnesty International] report brought national and international attention to high crime rates on Indian reservations. Soon thereafter, several legislative initiatives were launched.”).

jurisdictional deficiencies, the history of colonization, as well as the immense dearth of law enforcement resources, training, and funding for criminal investigations in Indian country.¹¹¹

It became more and more evident that the system of policing was not effective in Indian country, and was not protecting those most vulnerable. As Wakeling and his colleagues found:

Strong evidence points to longstanding, cumulative negative effects of Federal policy on the practice of policing in Indian Country. The historical record shows how Federal policy created a system that served the interests of the U.S. government and nontribal citizens and failed to promote the ability of Indian nations to design and exert meaningful control over their own policing institutions. Departments administered by the BIA are not agents of tribes but of the Federal Government and, as such, have limited incentive to look to the communities they serve for legitimacy or for authorization of the police function. Over time, this arrangement has created a significant gap between tribal police and the communities they serve, a gap that is reflected in mismatches between police and community priorities and between police methods and tribal norms and values.¹¹²

The statistics on crime and the challenges to policing in Indian country provoked an evident need for legal reform of related federal policies in Indian country, and Congress took notice.

C. *Congressionally-Authorized Studies in VAWA 2005*

Concern related to sexual violence in Indian country began to percolate in Washington, D.C. and across the country. In the 2005 Reauthorization of the Violence Against Women Act (“VAWA 2005”), Congress made direct reference to the need for more federal resources to “assist tribal governments in safeguarding the lives of Indian women,” yet was not prepared to hand back the reins (even concurrently) of criminal prosecution of non-Indians to the tribal governments themselves.¹¹³ Instead, VAWA 2005 authorized a taskforce

¹¹¹ See, e.g., AMNESTY INT’L, *supra* note 12, at 43 (noting that as of 2006, the Standing Rock Police Department consisted of up to nine patrol officers and investigators overseeing 2.3 million acres of land, with sometimes only one officer on duty for the entire Reservation).

¹¹² WAKELING ET AL., *supra* note 105, at viii.

¹¹³ Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §§ 901(5)-(6), 119 Stat. 3078 (2005) [hereinafter VAWA 2005]; see also Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J.L. & SOC. CHALLENGES 1, 2 (2009) (discussing Congress’s recognition of extremely high sexual assault statistics); cf. § 905(d) (granting tribal access to national criminal databases and creating a national tribal sex offender registry in hopes of enhancing transparency and security for Indian women). The national studies were also intended to specifically examine not only

to support NIJ in conducting a study to establish a baseline assessment of violence against American Indian and Alaska Native women, not limited solely to domestic or dating violence.¹¹⁴ Publishing their 2010 findings from the National Intimate Partner and Sexual Violence Survey, NIJ concluded that 56.1 percent of American Indian/Alaska Native women experienced sexual violence, and 96 percent of those victims experienced these attacks at the hands of non-Indian perpetrators.¹¹⁵

Increased attention on crime within Indian country may also have improved responses by law enforcement to investigate reported offenses. For example, the DOJ reported in 2014 that between 2009 and 2012, the number of cases filed in Indian country against defendants increased by approximately fifty-four percent, though the overall declination rate remained steady.¹¹⁶

Though the statistics paint varying pictures of the state of sexual assault in Indian country, and how often those crimes are committed by non-Indians and by domestic partners, relatives, or strangers, it is evident that sexual violence is rampant in Indian country, regardless of the identity of the perpetrator and relationship to the victim. And jurisdictional fragmentation of this land, coupled with victim silence and under-enforcement, has created what a tribal judge called a “perfect storm.”¹¹⁷ Thus, Congress incorporated a partial *Oliphant* fix to address some of these concerns by enacting VAWA 2013, because congressional action was “required to eliminate the possibility that complex jurisdictional rules and legislation in practice may deny survivors of sexual violence access to justice.”¹¹⁸

the violence against women, but also the effectiveness of federal, state and tribal enforcement responses to such violence. *Id.*

¹¹⁴ VAWA 2005, *supra* note 113, §§ 901–04.

¹¹⁵ ANDRÉ B. ROSAY, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 11 (May 2016).

¹¹⁶ U.S. DEP’T OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 4, 23 (2014), <https://www.justice.gov/tribal/file/796976/download> [<https://perma.cc/67TB-D2MZ>]. Of the cases that the DOJ declined to prosecute, nearly sixty percent were due to insufficient evidence, but over seventy-three percent of sexual assault cases were declined due to insufficient evidence. *Id.* at 29–30, 37. The next most common reason for declining to prosecute was “referral to diff[erent] jurisdiction.” *Id.*

¹¹⁷ *Tribal Justice: Prosecuting Non-Native for Sexual Assault on Reservations*, (PBS NewsHour broadcast Sept. 5, 2015), <http://www.pbs.org/newshour/bb/tribal-justice-prosecuting-non-natives-sexual-assault-indian-reservations/> [<https://perma.cc/U2EL-TPD9>] (statement of Theresa Pouley, Chief Judge, Tulalip Tribal Court).

¹¹⁸ AMNESTY INT’L, *supra* note 12, at 8.

III. CONGRESSIONAL RESPONSE: VAWA 2013

Congress has the authority to recognize aspects of tribal sovereignty, which includes affirming jurisdiction on tribal lands.¹¹⁹ While *Oliphant* divested tribes of their right to prosecute non-Indian crime in Indian country, Justice Rehnquist noted that the Court was “not unaware of the prevalence of non-Indian crime on today’s reservations But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.”¹²⁰ Janet Reno, the U.S. Attorney General during the Clinton Administration, remarked that even though federal authorities had a responsibility to enforce the law, “tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities.”¹²¹

A. Twenty-First Century Legislative Action

Congress recognized in VAWA 2005 that more funding, resources, and research were required to address the problem of sexual assault of Indians in Indian country.¹²² With increased reporting and recognition that tribes could be a more effective means of protecting Indian victims in Indian country than any other sovereigns, Congress became pressed to expressly act.

First, Congress passed in 2010 the Tribal Law and Order Act, which enhanced the sentencing authority of tribal courts and required “reporting of federal declination rates, and [the] creation of the Indian Law and Order Commission.”¹²³ Second, Congress included Sections 904 and 905¹²⁴ in VAWA 2013, recognizing the sovereign right of tribes, so long as they met certain criteria, to exercise criminal jurisdiction over non-Indians committing acts of domestic or dating violence against Indian victims in Indian country. VAWA 2013 further required that the offender live in or work on that tribe’s land, or that the offender was otherwise sufficiently tied to the tribe as a spouse or dating

¹¹⁹ See *supra* notes 36, 40, 57 and accompanying text (discussing congressional plenary power in Indian affairs); see also, e.g., *United States v. Lara*, 541 U.S. 193, 210 (2004) (“[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians.”). *Lara* affirmed Congress’s ability to recognize tribal criminal jurisdiction over nonmember Indians, which the Court had previously found invalid. See *Duro v. Reina*, 495 U.S. 676, 692 (1990), *superseded by statute*, Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, as recognized in 541 U.S. 193.

¹²⁰ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

¹²¹ Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE, 113, 114 (1995).

¹²² VAWA 2005, *supra* note 113, § 901(5).

¹²³ Riley, *supra* note 25, at 1585; see also Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 212, 124 Stat. 2258, 2267 (2010) (“The United States Attorney shall submit to the Native American Issues Coordinator to compile . . . information regarding all declinations of alleged violations of Federal criminal law that occurred in Indian Country that were referred for prosecution by law enforcement agencies . . .”).

¹²⁴ These sections are codified in 25 U.S.C. § 1304, but I will refer to the sections in the Act for purposes of this Comment.

partner of the victim.¹²⁵ In Section 904, Congress declared that “the powers of self-government of a participating tribe include the *inherent* power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.”¹²⁶ While tribal courts retain concurrent jurisdiction with the federal government, VAWA 2013 was a step towards recognizing that the usurpation of tribal sovereignty was a contributor to lawlessness in Indian country, and that a functional solution is to start transferring back to, or sharing prosecutorial power with the tribes.

The language of the special domestic violence criminal jurisdiction provisions in Section 904 was largely taken from a 2011 Senate bill introduced by Senator Daniel Akaka called the Stand Against Violence and Empower Native Women Act (SAVE Native Women Act).¹²⁷ The original intent of this legislation was to provide tribes with adequate resources for prosecuting offenders who committed violent crimes against Indian women.¹²⁸ A background report submitted to accompany the bill acknowledged the focus on the “crisis of violence against women in tribal communities,” remarking that rates of both domestic violence and sexual assault against Indian women were significantly higher than the national average.¹²⁹ After recognizing the inclusion of concurrent tribal jurisdiction over non-Indians only for crimes of domestic and dating violence in Indian country, the report goes on to consider that “tribal nations may be best able to address violence in their own communities.”¹³⁰

Despite the victory for tribal sovereignty evident in the language within VAWA 2013 as enacted, prosecution of certain crimes of physical and sexual violence by non-Indians committed in Indian country remains fractured. The jurisdictional grant was originally intended only in “very limited circumstances,”¹³¹ and currently it can only be exercised if tribes meet certain procedural criteria and if the prosecution can establish the requisite connections between the tribe, non-Indian offender, and the victim. There is no tribal jurisdiction over crimes involving two non-Indians¹³² or if the “defendant

¹²⁵ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904(b)(4)(B), 127 Stat. 122 (Mar. 7, 2013) [hereinafter VAWA 2013].

¹²⁶ *Id.* § 904(b)(1) (emphasis added).

¹²⁷ See S. REP. NO. 112-153, at 8 (2012) (“[S]ections 904 and 905 of [VAWA] are taken almost entirely from S. 1763, the . . . SAVE [Stand Against Violence and Empower] Native Women Act . . . which is based on a Department of Justice proposal submitted to Congress on July 21, 2011 in anticipation of the reauthorization of the Violence Against Women Act.”).

¹²⁸ S. REP. NO. 112-265, at 7 (2012); see also *VAWA Reauthorization Legislation Unveiled in Senate*, ABA WASH. LETTER (Dec. 2011) (describing the purpose of the VAWA reauthorization to expand support services for victims and provide resources to those who prosecute violent crimes).

¹²⁹ S. REP. NO. 112-153, at 7 (2012).

¹³⁰ *Id.* at 8.

¹³¹ *Id.* at 9.

¹³² VAWA 2013 § 904(b)(4)(A)(i).

lacks ties to the Indian Tribe.”¹³³ In addition, the jurisdiction only applies to criminal conduct that constitutes domestic violence, dating violence, or defined violations of protection orders.¹³⁴ Thus, there are multiple dimensions to the “contacts” requirement beyond the identities of the parties because the defendant must have some sort of relationship to the tribe *and* to the victim.

VAWA 2013 also made clear that tribes may only be able to exercise special domestic violence jurisdiction when non-Indian defendants’ rights are properly taken into account. Thus, any non-Indian defendant tried under Section 904 jurisdiction must have, for example, the right to a trial by an impartial jury.¹³⁵ Congress also included a catch-all provision for defendants’ rights: tribes exercising special domestic violence criminal jurisdiction must provide for “all other rights whose protection is necessary under the Constitution . . . in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.”¹³⁶

Given these jurisdictional limitations and qualifications, policymakers may have reasoned during VAWA 2013’s drafting that reaffirming inherent tribal sovereignty to prosecute certain non-Indian crimes committed in Indian country could only be done incrementally. Or, that despite the limitations, the Act as written would still significantly address the problem of sexual violence, or that without incorporating more stringent requirements of the perpetrator’s connections to an Indian tribe and victim, due process would be threatened. Whatever considerations motivated the limitations in VAWA 2013, one may argue (as I do here) that by not covering all non-Indian crimes of sexual violence or all crimes ancillary to dating and domestic violence in Indian country, the jurisdictional grant did not go as far as it lawfully could or should have gone.¹³⁷

Still, support for the narrow jurisdictional grant even with these limitations was by no means universal. Some questioned the constitutionality of recognizing such jurisdiction at all.¹³⁸ Opponents in Congress also felt

¹³³ See *id.* §§ 904(b)(4)(B)(i)–(iii) (limiting tribal jurisdiction over only defendants who reside and/or are employed in the Indian country of the participating tribe, or who are spouses or intimate or dating partners of a member of the participating tribe or an Indian who resides in the Indian country of the participating tribe).

¹³⁴ See *id.* §§ 904(c)(1)–(2).

¹³⁵ *Id.* § 904(d)(3).

¹³⁶ *Id.* § 904(d)(4).

¹³⁷ See DEER, *supra* note 3, at 105 (noting that Senator Dorgan, the former Chair of the Senate Indian Affairs Committee, publicly reported the need to extend the jurisdiction to include all violent crimes of rape and child abuse, but it never became a part of any proposed VAWA legislation).

¹³⁸ See H.R. REP. NO. 112-480, at 58 (2012) (responding to criticism over a House bill version that did not include the special domestic violence criminal jurisdiction provision: “It is an unsettled question of constitutional law whether Congress has the authority under the Indian Commerce Clause to recognize inherent tribal sovereignty over non-Indians”).

there were better alternative avenues to address sexual violence in Indian country than to recognize tribal sovereign power to do so, such as increased funding for federal prosecution efforts.¹³⁹ The two key legal arguments in opposition to the limited jurisdiction found in the legislative record were concerns for defendants' individual rights and belief that Congress lacked the constitutional power to recognize tribal sovereignty over non-Indians. The next two sections of this Part will outline these arguments and responses in VAWA 2013, and then consider their application to an extension of tribal jurisdiction to additional crimes in Indian country perpetrated by non-Indians who do not have a relationship to the victim beyond the crime itself.

B. Concern for Defendants' Rights

Many opponents of the special domestic violence criminal jurisdiction were concerned for defendants' rights and the inability of tribal courts to afford necessary protections. This is not a new argument, and was put forth in *Oliphant*.¹⁴⁰ Then-Senator Sessions argued if a non-Indian were subject to tribal jurisdiction, the individual "would enjoy few meaningful civil-rights protections" due to the "racially-exclusive nature" of tribal governments.¹⁴¹ And speaking at a town hall about the Senate bill, Senator Charles "Chuck" Grassley reasoned that "under the laws of our land, you got to have a jury that is a reflection of society as a whole, and on an Indian reservation, it's going to be made up of Indians, right? So the non-Indian doesn't get a fair trial."¹⁴²

Despite reassurances (and requirements) that non-Indian defendants be tried by an impartial jury, there was consistent opposition during the congressional debates regarding the potential bias against non-Indians in tribal courts, as well as other procedural avenues available in state and federal courts.¹⁴³ Other senators opposing the Senate bill argued during hearings that

¹³⁹ See S. REP. NO. 112-153, at 37 (2012) (opposition decrying § 904 as "shockingly cursory" about the grant of jurisdiction); *id.* at 37-38 (improving law enforcement in Indian country, instead of extending jurisdiction to tribal courts, can be done by allowing the federal government to retain jurisdiction and "to provide the appropriate resources necessary to fulfill those important responsibilities").

¹⁴⁰ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978) (citing *Crow Dog* for the proposition that non-Indians should not be subject to the customs and procedures of a "different race" in tribal courts, even for crimes committed against Indians in Indian country).

¹⁴¹ S. REP. NO. 112-153, at 48-49 (2012).

¹⁴² Scott Keyes, *Top GOP Senator: Native American Juries Are Incapable of Trying White People Fairly*, THINKPROGRESS (Feb. 21, 2013), <http://thinkprogress.org/justice/2013/02/21/1619501/chuck-grassley-native-americans/> [<https://perma.cc/Q3Y5-U3P2>].

¹⁴³ See 159 CONG. REC. S614 (daily ed. Feb. 12, 2013) (statement of Sen. Lee) ("I believe we must seek to minimize the potential for bias against non-Indian defendants under such circumstances While many tribal courts have proven to be as consistent and fair as traditional courts, the possibility of removal and appeal is key to the oversight that U.S. citizens rightfully expect.").

the majority “cites no evidence of need for the change. It does not explain why its proposed solution is the right one, will effectively address the problem and will not raise additional problems, and will not establish any negative precedent for the future.”¹⁴⁴

Proponents of the jurisdictional grant addressed these constitutional concerns with amendments to the original Senate bill. First, they noted that any participating tribes who plan to exercise the special domestic violence criminal jurisdiction only can do so “*contingent* on the ability to provide non-Indian defendants with the rights required under law.”¹⁴⁵ Language to address fears of partial juries and lack of due process was later incorporated into the text of the Act.¹⁴⁶ In short, the Senate Majority responded to concerns that the jurisdictional grant was too expansive by stating that it was “narrowly crafted and satisfies a clearly identified need.”¹⁴⁷

VAWA 2013 further required that all rights guaranteed in the Indian Civil Rights Act must be provided for in any tribal prosecution brought under special domestic violence criminal jurisdiction.¹⁴⁸ These include, but are not limited to, the right to defense counsel, the right to publicly available criminal laws, and the right to seek habeas relief in federal court.¹⁴⁹

These rights would be equally provided for if Congress recognized tribal criminal jurisdiction over non-Indians committing all crimes of sexual violence, as well as concurrent crimes of domestic and dating violence, such as child or elder abuse, against Indian victims in Indian country. By still requiring some ties to the tribe—through residence or employment or a comparable relationship—these non-Indian defendants are sufficiently on notice that a crime committed against an Indian in Indian country can be subject to tribal

¹⁴⁴ S. REP. NO. 112-153, at 37-38 (2012).

¹⁴⁵ *Id.* at 10 n.24.

¹⁴⁶ In the text of the bill considered on April 25, 2012, there was no language discussing specific rights of defendants to an impartial jury of peers; rather, the text said tribes shall provide “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.” 112 CONG. REC. S2715 (daily ed. Apr. 25, 2012). VAWA 2013 as passed specifically discusses constitutional rights of defendants. *See supra* notes 135-136 and accompanying text.

¹⁴⁷ S. REP. NO. 112-153, at 10 (2012).

¹⁴⁸ *See* 25 U.S.C. § 1302(c) (2012) (listing and describing the rights a tribe must afford to a defendant in a criminal proceeding).

¹⁴⁹ *Id.* § 1303. When tribes applied to implement VAWA jurisdiction in the pilot program, they had to complete an application and questionnaire in which the first question is, “will the Tribe provide to the defendant the right to a trial by an impartial jury that is drawn from sources that reflect a fair cross section of the community and do not systematically exclude any distinctive group in the community, including non-Indians?” *See, e.g.*, AMENDED APPLICATION OF THE SISSETON-WAHPETON OYATE, VAWA PILOT PROJECT QUESTIONNAIRE ON TRIBAL CRIMINAL JURISDICTION (Mar. 2, 2015), https://www.justice.gov/sites/default/files/tribal/pages/attachments/2015/03/13/sisseton_wahpeton_app.pdf [https://perma.cc/4PEH-L8DN].

law if Congress authorizes it.¹⁵⁰ And other rights—to an impartial jury, defense counsel, etc.—must still be provided by the participating tribe. Further, no other jurisdictional grants to a sovereign to prosecute violent crimes require a prosecutor to differentiate based on the relationship between the victim and the offender.¹⁵¹ Common understandings of criminal jurisdiction in both federal and international law do not normally require a relationship between (i) the perpetrator and the sovereign in whose territory the offense was committed, and (ii) the perpetrator and the victim.¹⁵²

A potential counterargument here is that by extending the tribal jurisdiction to any non-Indian crime involving sexual violence and all possible charges pertaining to domestic or dating violence, tribal jurisdiction would slowly extend to *all* non-Indian crime. But as federal Indian law is currently understood, Congress has plenary power to recognize or limit tribal powers.¹⁵³ Thus, it is not a question of whether Congress can make such an extension in this circumstance, but whether Congress should. And in this case, there is a clear, identified problem of sexual violence and violent attacks in Indian country against Indian victims, primarily by non-Indian offenders.¹⁵⁴

If Congress passes legislation recognizing tribal jurisdiction to prosecute all non-Indian crimes of sexual, domestic, and dating violence—including ancillary crimes—under VAWA’s mandate, tribal authorities would waste less

¹⁵⁰ Currently, only Congress can expand or retract tribal authority as it pertains to non-Indians. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.”).

¹⁵¹ While some state criminal codes treat marital rape—an offense that inherently requires a relationship between victim and offender—differently than other forms of rape, this does not alter jurisdictional authority. *See, e.g.*, CONN. GEN. STAT. § 53a-70b (2015) (treating sexual assault in spousal or cohabiting relationship as a class B felony, requiring proof of the “use of force”); IDAHO CODE § 18-6107 (2010) (“No person shall be convicted of rape for any act or acts with that person’s spouse, except” if the victim cannot resist due to use of force, a clear, objective threat to use force, or due to an intoxicating or narcotic substance); MICH. COMP. LAWS § 750.520l (1988) (“A person may be charged and convicted [of rape] . . . even though the victim is his or her legal spouse. However, a person may not be charged or convicted solely because his or her legal spouse is under the age of 16, mentally incapable, or mentally incapacitated.”); MISS. CODE ANN. § 97-3-99 (2013) (charging a person who has raped a spouse as “sexual battery,” and only “if the legal spouse engaged in forcible sexual penetration without the consent of the alleged victim”). It is precisely the relationship between the two married parties that resulted in the historical marital rape exemption. *See SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN* 629 (1736) (“But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto the husband, which she cannot retract.”).

¹⁵² *See supra* note 14 and accompanying text (describing how criminal jurisdiction is normally limited by territorial, rather than relational, boundaries, but not both).

¹⁵³ *See supra* notes 36, 40, 57 and accompanying text (discussing Congress’s plenary powers in Indian affairs).

¹⁵⁴ *See supra* Section II.A.

time evaluating any sort of relationship between the parties beyond what is already necessary (i.e., the identity of the parties as Indian or non-Indian) and thus deciding which sovereign possesses jurisdiction.

C. *Inherent Tribal Sovereignty and Sources of Power*

Even with the legislation accounting for non-Indian defendants' constitutional rights, opponents of Section 904 argued it was not clear Congress possessed the constitutional power to recognize tribal inherent power rather than delegate sovereign power to tribes in this regard. When a tribe exercises its inherent sovereign authority, it is not subject to most constitutional constraints, though they can be imposed by statute.¹⁵⁵ Thus, while the relevant VAWA 2013 provisions incorporated defendant rights into the statute, because the criminal authority exercised would be a tribe's inherent power, rather than a delegated power of Congress, it would not guarantee defendants their *full* constitutional rights as would be the case in federal court.

Senator Grassley, in arguing to strike the jurisdictional grant from the Act during Senate debates, protested that "the majority insisted on giving Indian tribal courts criminal jurisdiction over non-Indian Americans for the first time in our country's history."¹⁵⁶ Citing a report from the Congressional Research Service, he reasoned that there were constitutional concerns exacerbated by language referencing "trib[al] criminal jurisdiction as part of their claimed inherent sovereignty,"¹⁵⁷ instead of delegating congressional power to the tribes to prosecute crimes where the Constitution and Bill of Rights would apply.¹⁵⁸

¹⁵⁵ See *Talton v. Mayes*, 163 U.S. 376, 381-83 (1896) (recognizing that even though Congress possesses the right to regulate tribal nations and their use of local power, such local power is not federal in origin, arising from and created by the Constitution); see also *Wheeler*, 435 U.S. at 313-14 (finding that the Fifth Amendment Double Jeopardy Clause does not apply to valid tribal prosecutions because the exercise of tribal power to punish member offenses is an exercise of inherent sovereignty). VAWA 2013 already imposes such restraints by requiring tribes to afford due process in courts before they are able to exercise special domestic violence criminal jurisdiction. VAWA 2013, *supra* note 125, § 904(d) (codified as 25 U.S.C. § 1304(d)).

Tribes are subject to the Thirteenth Amendment, however, because this particular constitutional constraint applies to all actors, not only states or the federal government. CLINTON ET AL., *supra* note 2, at 265.

¹⁵⁶ Press Release, Sen. Chuck Grassley, Support for Alternative VAWA Bill (Apr. 26, 2012), <http://www.grassley.senate.gov/news/news-releases/support-alternative-vawa-bill> [https://perma.cc/JJ79-334R]. But see *supra* subsection I.B.1 (discussing historical evidence of tribal criminal jurisdiction over non-Indians).

¹⁵⁷ Press Release, *supra* note 156.

¹⁵⁸ See JANE M. SMITH & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R42488, TRIBAL CRIMINAL JURISDICTION OVER NON-INDIANS IN THE VAWA REAUTHORIZATION AND THE SAVE NATIVE WOMEN ACT 7 (May 15, 2012) ("If Congress is deemed to have delegated to the tribes Congress's own power to prosecute crimes, the whole panoply of protections accorded criminal defendants in the Bill of Rights will apply. If . . . Congress is permitted to recognize the tribes' inherent sovereignty . . . the Constitution will not apply.").

Several Republican representatives in the House were equally concerned with the language used. For example, Representative Cathy McMorris Rodgers proposed an amendment as a substitute that did not eliminate the grant of jurisdiction, but removed all language regarding “inherent sovereignty” and required more deference to the Attorney General in determining whether to grant such jurisdiction to a tribe.¹⁵⁹ Representative Kevin Cramer voiced his support for the amendment for fear that otherwise, using language of inherent tribal sovereignty would be “giving up the moral high ground for a political slogan that does nothing to protect the victims of violence.”¹⁶⁰

Not all members of the Republican House agreed, however. Representative Thomas “Tom” Cole, a member of the Chickasaw Tribe, wrote a letter read during the debates that emphasized his disagreement with McMorris Rodgers’s bill because it “fail[ed] to recognize existing tribal sovereignty that is enshrined in the Constitution.”¹⁶¹ Ultimately, the substitute language failed to receive enough votes on the floor, and within an hour, the House passed the version of the bill that recognized the jurisdiction as an exercise of inherent sovereign power by a tribe.¹⁶²

In both the House and the Senate, supporters of the provision’s language stating that jurisdiction would be an exercise of inherent sovereign power rather than federally granted power were resolute. First, they cited *Oliphant* as evidence that Congress does have the power to affirmatively extend tribal authority and that many tribes have already been recognized for having the capacity to ensure the procedural protections included in the provisions.¹⁶³ Second, they cited *Lara*, where the Supreme Court upheld congressional authority to recognize tribal criminal jurisdiction over nonmember Indians,¹⁶⁴

¹⁵⁹ See 113 CONG. REC. H769 (daily ed. Feb. 28, 2013) (“A participating tribe is authorized to exercise jurisdiction in accordance with this section over an alleged offender who commits a covered offense.”); see also *id.* (“[T]he Attorney General shall make a determination as to whether the tribe, in exercising special domestic violence jurisdiction, is able to afford, and provides adequate assurances that the tribe will afford, an alleged offender all the rights described.”).

¹⁶⁰ *Id.* at H737 (statement of Rep. Cramer).

¹⁶¹ *Id.* at H772. Sarah Deer, who co-authored the Amnesty International report, “Maze of Injustice,” credited Congressman Cole for being able to reach his fellow Republican colleagues and understand “the plight coming from the perspective of the Native person.” Mary Hudetz, “We’re Not Done”: MacArthur Fellow Sarah Deer Finds Justice for Native American Victims of Violence, WASH. POST (Sept. 22, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/09/22/were-not-done-macarthur-fellow-sarah-deer-finds-justice-for-native-american-victims-of-violence/> [https://perma.cc/D8HV-2YAG] (quoting Sarah Deer).

¹⁶² 113 CONG. REC., at H799-800.

¹⁶³ See S. REP. NO. 112-153, at 9 n.23 (2012) (“The Minority Views . . . erroneously suggest that it is not within Congress’s power to authorize tribal jurisdiction over non-Indians. To the contrary, the Supreme Court has indicated that Congress has the power to recognize and thus restore tribes’ ‘inherent power’ to exercise criminal jurisdiction over all Indians and non-Indians.” (citing *Oliphant*)).

¹⁶⁴ *Id.*; see also *United States v. Lara*, 541 U.S. 193, 200 (2004) (“Congress does possess the constitutional power to lift the restriction on the tribes’ criminal jurisdiction.”).

which had been previously curtailed in *Duro*.¹⁶⁵ Thus by analogy, and considering the historical recognition of both inherent tribal sovereignty and congressional plenary power to regulate Indian affairs, Congress may validly possess the power to recognize tribal jurisdiction over non-Indians in Indian country. Of course, *Lara* did not involve criminal authority over non-Indians, but the Supreme Court has not curtailed criminal jurisdiction of tribes since *Oliphant*, where Justice Rehnquist called upon “Congress to weigh in deciding whether Indian tribes should . . . be authorized to try non-Indians.”¹⁶⁶

One may argue, however, that the limitations in the civil context of tribal sovereignty over non-Indians should likewise apply to extensions of criminal jurisdiction. In *Montana*, for example, the Court approved the exercise of tribal civil jurisdiction over non-Indians no further than what would be necessary to protect tribal self-government or to control a tribe’s internal relations.¹⁶⁷ But this comparison is strained. Beyond the actual type of jurisdiction exercised, what separates the circumstances in VAWA’s jurisdictional grant from the *Montana* line of cases is that here, Congress affirmatively and expressly recognized inherent tribal sovereignty to exercise special domestic violence criminal jurisdiction.

Moreover, the Supreme Court recently reaffirmed the principle of inherent tribal sovereignty in *Puerto Rico v. Sanchez Valle*.¹⁶⁸ Angela Riley recognized the critical importance of the decision, even if it did not directly relate to federal Indian law:

Justice Kagan’s majority opinion, joined by Justice Kennedy, affirmed the inherent sovereignty of Indian tribes and distinguished it from that of Puerto Rico, which, according to the Court, enjoyed only delegated authority from the United States. In doing so, the Court reinforced a vision of robust, inherent tribal sovereignty, full and complete except to the extent those rights have been limited or divested by Congress.¹⁶⁹

¹⁶⁵ See *supra* note 119 and accompanying text.

¹⁶⁶ *Supra* note 120.

¹⁶⁷ See 450 U.S. 544, 565-66 (1981) (“Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations,” including “activities of non-members who enter consensual relationships with the tribe or its members” and if non-Indian conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”). Note, however, that *Montana* was a case involving civil and regulatory jurisdiction related to land owned by non-members. *Id.* at 549.

¹⁶⁸ See 136 S. Ct. 1863, 1872 (2016) (reasoning that “unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that [sovereign] authority in its earliest form”).

¹⁶⁹ Angela R. Riley, *Native Nations and the Constitution: An Inquiry into “Extra-Constitutionality”*, 130 HARV. L. REV. F. 173, 191 (2017) (footnotes omitted).

Ultimately, it remains to be seen how—with changes in the composition of the bench¹⁷⁰—the Supreme Court will address a future challenge to the inherent-versus-delegated authority dispute stemming from Congress’s recognition of tribal jurisdiction in VAWA 2013. But given the plenary power of Congress over Indian affairs,¹⁷¹ the historical record showing some tribal criminal jurisdiction over non-Indians,¹⁷² and the evident problem of sexual and domestic violence in Indian country,¹⁷³ Congress should—within its constitutional power—be able to affirm tribal criminal authority over additional non-Indian crimes in Indian country.

IV. IMPLEMENTING AND EXPANDING TRIBAL CRIMINAL JURISDICTION

Until the Supreme Court emphatically suggests otherwise, then, Congress should possess the legitimate authority to recognize inherent sovereign power of Indian tribes to exercise jurisdiction over non-Indians who commit crimes of sexual violence against Indians *without* a spousal or dating relationship, as well as ancillary crimes committed during acts of domestic or dating violence (such as child abuse or endangerment). Right before VAWA 2013 was put to a vote in the Senate, Senator Patrick Leahy urged Congress to “move beyond partisan politics in order to provide help to victims of domestic and sexual violence,” regardless of the victim’s status as an immigrant or membership in an Indian tribe.¹⁷⁴

If Congress argues that recognizing the special domestic violence jurisdiction (as it currently stands) will address the problem of sexual violence

¹⁷⁰ See Matthew L.M. Fletcher, *Legislating in Light of the Ideology and Politics of the Super-Legislature (On Obama Care and an Oliphant fix)*, TURTLE TALK (June 25, 2012), <https://turtletalk.wordpress.com/2012/06/25/legislating-in-light-of-the-politics-of-the-super-legislature-on-obamacare-and-an-oliphant-fix/> [https://perma.cc/R65C-ALW5] (“[D]uring the VAWA Reauthorization and SAVE Native Women Act debates, Dems assumed the constitutionality of a partial Oliphant fix. Under current law, it’s obviously constitutional. But the Supreme Court can change things. And it does, as Indian law observers know.”). While Justice Gorsuch has not opined on a Supreme Court case involving Indian law as of this writing, he has a generally favorable record towards Indians as a Circuit judge. See generally Matthew L.M. Fletcher, *Neil Gorsuch Indian Law Record as Tenth Circuit Judge*, TURTLE TALK (Feb. 1, 2017), <https://turtletalk.wordpress.com/2017/02/01/neil-gorsuch-indian-law-record-as-tenth-circuit-judge/> [https://perma.cc/FQS3-3SDE].

¹⁷¹ See *supra* notes 36, 40, 57 and accompanying text (discussing congressional plenary power in Indian affairs).

¹⁷² See *supra* subsection I.B.1.

¹⁷³ See *supra* Section II.A.

¹⁷⁴ Press Release, Leahy, Crapo Reintroduce Bipartisan Bill to Reauthorize the Landmark Violence Against Women Act (Jan. 22, 2013), <https://www.leahy.senate.gov/press/leahy-crapo-reintroduce-bipartisan-bill-to-reauthorize-the-landmark-violence-against-women-act> [https://perma.cc/6CZ8-SD2R] (emphasis added); see also 159 CONG. REC. S613, S616 (statement of Sen. Leahy) (“I am proud that our bill seeks to support all victims, regardless of their immigration status, their sexual orientation or their membership in an Indian tribe.”).

in Indian country against Indian women, then an extension to help victims of all forms of domestic and sexual violence will only provide further protection to such victims. As the data discussed in Part II illustrate, non-Indian violence against Indians is not limited to domestic or dating partnerships, but occurs at the hands of strangers and non-spousal relatives as well.¹⁷⁵ This final Part reviews current implementation of tribal jurisdiction, and how and why recognizing tribal jurisdiction for additional non-Indian crime is both feasible and recommended.

A. Implementation of Current VAWA Tribal Jurisdiction

The special domestic violence criminal jurisdiction granted in VAWA 2013 took effect two years after it was enacted, except in cases where tribes requested to participate on an “accelerated basis” through a Pilot Project.¹⁷⁶ Before March 7, 2015, five tribes from five different states were able to participate.¹⁷⁷

The gradual implementation appears to be an overall success, both ensuring that defendants have adequate procedural rights in tribal court and that more victims are receiving access to justice.¹⁷⁸ According to Senator Lisa Murkowski: “All indications suggest that the Special Domestic Violence Criminal Jurisdiction provisions of the Violence Against Women Act are being successfully implemented.”¹⁷⁹

As of March 2017, a total of thirteen tribes had implemented the jurisdiction, resulting in “84 arrests; 19 guilty pleas; 5 referrals for federal prosecution; 1 jury acquittal; 16 dismissals; and 4 pending cases.”¹⁸⁰ In May

¹⁷⁵ See *supra* Section II.A.

¹⁷⁶ § 908(b)(2)(A). Under VAWA 2013, the Attorney General has the power to award grants of \$5,000,000 to be appropriated annually through 2018 to tribal governments in order to strengthen their criminal justice systems. §§ 904(f)–(h). It is not immediately clear how effective this funding will be or if it will be authorized. Given that then-Senator Sessions, one of the strongest opponents of Section 904, is now Attorney General, concern that insufficient funding for resources and training will continue to be a problem in prosecuting crimes of sexual violence may be warranted.

¹⁷⁷ See U.S. DEP’T OF JUSTICE, VAWA 2013 PILOT PROJECT (Mar. 13, 2015), <https://www.justice.gov/tribal/vawa-2013-pilot-project> [<https://perma.cc/8X53-p3AY>] (listing the accepted Pilot Project applications from different tribes in Montana, Oregon, Arizona, South Dakota, and Washington).

¹⁷⁸ See Riley, *supra* note 25, at 1572 (“[I]mplementation has been a success in several respects. Tribes have provided defendants with requisite procedural protections, and the preliminary data reveal that the laws are improving the safety and security of reservation residents.”).

¹⁷⁹ Press Release, Sen. Tom Udall, Udall, Murkowski, Cortez, Masto Bill Would Restore Tribal Jurisdiction over Domestic Violence Incidents on Tribal Land to Children and Law Enforcement (Dec. 14, 2017), <https://www.tomudall.senate.gov/news/press-releases/udall-murkowski-cortez-masto-bill-would-restore-tribal-jurisdiction-over-domestic-violence-incidents-on-tribal-land-to-children-and-law-enforcement> [<https://perma.cc/VX3V-TX5J>].

¹⁸⁰ Rebecca M. Howlett, *The Need to Preserve and Expand Tribal VAWA Jurisdiction*, LAW360 (Mar. 7, 2017), <https://www.law360.com/articles/898989> [<https://perma.cc/7MAJ-ZAB6>].

2017, a jury composed of tribal and non-tribal members became the first to convict a non-Indian defendant for a tribal charge of domestic violence under VAWA 2013 in the Pascua Yaqui Tribal Court.¹⁸¹ And as of this writing, no defendant has challenged one of these tribal charges or convictions via federal habeas relief.¹⁸²

Collaboration and coordination across tribes and between tribal, state, and federal entities has also promoted successful implementation. For example, over forty-five tribes are participating in an Intertribal Technical-Assistance Working Group (ITWG) in order to share best practices on how to implement jurisdiction and safeguard both victim and defendant rights in the process.¹⁸³ Trainings across the country for tribes and with relevant state and federal representatives promote a coordinated response to domestic violence investigations and potential prosecutions while ensuring the integrity of the judicial process.¹⁸⁴

B. *Expanding Tribal Criminal Jurisdiction*

The results and impact of VAWA 2013 are being watched closely by a variety of interested parties. In the Senate, for example, the Committee on Indian Affairs is reviewing feedback from tribes and introducing legislation to “fix the[] gaps” identified.¹⁸⁵ Moreover, now that the pilot project is complete, due to its success, “the push for a full and complete *Oliphant* ‘fix’ has also increased, particularly as evidence mounts that tribes can and do protect the constitutional rights of non-Indian defendants in tribal court.”¹⁸⁶

¹⁸¹ See Debra Utacia Krol, *Pascua Yaqui Tribe First to Use VAWA to Prosecute Non-Indian*, INDIAN COUNTRY TODAY, June 9, 2017, <https://indiancountrymedianetwork.com/news/politics/pascua-yaqui-tribe-first-use-va-wa-prosecute-non-indian/> [<https://perma.cc/3VTU-8DXD>] (describing the conviction of a nineteen-year-old non-Indian who argued with his wife and destroyed her property after she left their door open, and who had previously been on probation for a violation for strangling his wife).

¹⁸² *Id.*

¹⁸³ *Tribal Implementation of VAWA: About ITWG*, NAT’L CONGRESS OF AMERICAN INDIANS, <http://www.ncai.org/tribal-va-wa/pilot-project-itwg/about-itwg> [<https://perma.cc/3TE9-WV45>].

¹⁸⁴ See, e.g., *Tribal Courts Training Sharpens Skills of Participants*, CHAR-KOOSTA NEWS (Oct. 19, 2017), http://www.charkoosta.com/2017/2017_10_19/Tribal_Court_Skills_training.html [<https://perma.cc/TF94-KBPR>] (discussing the success of a grant-funded, “two-day tribal courts skills training” that included mock trials of domestic violence cases for defense attorneys and prosecutors, and feedback from “seasoned trial attorneys from the United States Attorney’s Office, the Federal Defender’s Office, the Montana Department of Justice and tribal court practitioners, and tribal judges”).

¹⁸⁵ Press Release, Sen. Tom Udall, Udall Urges Public Safety Improvements, Additional Resources for Crime and Victim Services in Indian Country (Oct. 25, 2017), <https://www.tomudall.senate.gov/news/press-releases/udall-urges-public-safety-improvements-additional-resources-for-crime-and-victim-services-in-indian-country> [<https://perma.cc/2LZL-V33D>].

¹⁸⁶ Riley, *supra* note 169, at 190; see also NAT’L INDIGENOUS WOMEN’S RESOURCE CTR. & NAT’L CONGRESS OF AMERICAN INDIANS, TRIBAL CONSULTATION VAWA 2013, SECTION 903 11 (Sept. 25, 2017), http://www.niwrc.org/sites/default/files/documents/Resources/consultation_vawa_webinar_final.pdf

Congress should acknowledge the gaps still present in the legislation, and consider expanding its recognition of jurisdiction.

Given the heated debates surrounding the limited grant of jurisdiction, it is hardly surprising that proponents of the provisions argued that the safer approach was to “narrowly” construct the jurisdictional grant so as to “win support in Congress.”¹⁸⁷ There was no proposed amendment or discussion—beyond pointing out how limited the grant of jurisdiction was—arguing for legislation that would cover additional crimes.

Legal scholars and organizations are urging Congress to expand the grant after reviewing the success of the current implementation of the special domestic violence jurisdiction. In an interview, Professor Sarah Deer, a citizen of the Muscogee Creek Nation, pointed out that there is cause for celebration in VAWA 2013, but also noted that the legislation failed to cover child abuse or the “broader topic of sexual assault.”¹⁸⁸ Amnesty International pressed Congress to reaffirm that tribal authorities have jurisdiction over “all offenders who commit crimes on tribal land, regardless of . . . identity.”¹⁸⁹

In addition to extending tribal jurisdiction for all non-Indian sexual assault in Indian country, recognizing jurisdiction over concurrent crimes to domestic and dating violence acts would promote greater intergovernmental efficiencies and justice for all Indian victims. Child abuse and endangerment during domestic and dating violence is perhaps one of the greatest examples to illustrate how VAWA 2013 still perpetuates the jurisdictional conundrum in Indian country. Deborah Parker, the former Vice Chair of the Tulalip Tribes of Washington, testified in front of Congress before VAWA 2013 was enacted, describing her own experience being abused as a child and exemplifying how personal stories humanized the plea for jurisdiction.¹⁹⁰ Parker’s case, if it occurred today, could not be investigated and prosecuted by her tribe, because as a child, she was not in a spousal or dating relationship with her attacker.

This remains true even after the enactment of VAWA 2013. For example, Sharon Jones Hayden, a Tulalip Tribal Prosecutor, described at a 2015 DOJ conference a case where she was able to charge a defendant with domestic violence for beating his wife who was Indian, but could not bring any charges

[<https://perma.cc/N5TS-WFF5>] (noting as a priority issue to discuss with the Attorney General, in annual consultation pursuant to Section 903 of VAWA 2013, the “[n]eed for [a] complete *Oliphant* fix to address sexual assault and other domestic violence appendage crimes”).

¹⁸⁷ Horwitz, *supra* note 11.

¹⁸⁸ Hudetz, *supra* note 161.

¹⁸⁹ AMNESTY INT’L, *supra* note 12, at 12.

¹⁹⁰ *Women Senators, Tribal Leader Discuss Importance of VAWA Improvements*, YOUTUBE (Apr. 25, 2012), <https://www.youtube.com/watch?v=yIV7-XASQy8> [<https://perma.cc/U3DJ-YHQN>] (recounting her own experience with sexual assault as a child, asking Congress why the lives of Indian women “matter less,” while pressing for VAWA authorization to include tribal criminal jurisdiction).

against him for child abuse when he whipped her child with a lamp cord.¹⁹¹ In another case, Hayden, who is specially designated to prosecute cases in federal court, successfully brought federal charges against a non-Indian man who had attacked his girlfriend and her children, including “strangling her, hitting her with a metal pipe, throwing knives and lamps at her, and threatening to kill her and burn the house down with her small children inside.”¹⁹² Because this case was considered so severe, it had been referred to the U.S. Attorney’s Office, otherwise the tribal government would have been unable to charge the defendant for attacking these children, which included forcing a two-year-old to sit in a chair and throwing knives at him.¹⁹³

In fact, multiple bills have been introduced since VAWA 2013 proposing extending (or restoring) tribal jurisdiction over additional crimes. First, Senators Jon Tester and Al Franken introduced a bill called the Tribal Youth and Community Protection Act of 2016 that would have amended VAWA 2013 Section 904 to include tribal jurisdiction over non-Indian crimes of child violence.¹⁹⁴ Second, the Justice for Native Survivors of Sexual Violence Act, introduced in October 2017 by Senators Franken, Lisa Murkowski, and Tom Udall would extend tribal jurisdiction to crimes of “domestic, dating, or sexual violence, sex trafficking, or stalking.”¹⁹⁵ Finally, in December 2017, Senators Udall, Murkowski, and Catherine Cortez Masto introduced legislation to extend tribal jurisdiction to include crimes against children and law enforcement officers.¹⁹⁶ No action has been taken on these bills since they were referred to the Committee on Indian Affairs.

A commonsense extension of tribal criminal jurisdiction, affirmed by Congress, would be to all non-Indian crimes of sexual assault occurring in Indian country and involving an Indian victim, and all ancillary crimes involved in acts of domestic or dating violence, including the child abuse discussed above. Section 904 can be amended to include definitions of sexual assault and rape, and the ancillary crimes committed during domestic and dating violence. The “ties” requirement to the tribe, through residence or

¹⁹¹ Sharon Jones Hayden, Tulalip Tribes, Remarks at Dep’t of Justice Domestic Violence Awareness Month Conference (Oct. 6, 2015), <https://www.justice.gov/opa/video/domestic-violence-awareness-month-program> [<https://perma.cc/VBk8-DEP9>].

¹⁹² Press Release, Dep’t of Justice, Man Who Assaulted Girlfriend and Child on Tulalip Tribal Land Sentenced to Nearly Six Years in Prison (Apr. 15, 2016), <https://www.justice.gov/usao-wdwa/pr/man-who-assaulted-girlfriend-and-child-tulalip-tribal-land-sentenced-nearly-six-years> [<https://perma.cc/ET85-D6C8>].

¹⁹³ Michelle Demmert, Tulalip Tribes, Remarks at Dep’t of Justice Domestic Violence Awareness Month Conference (Oct. 6, 2015), <https://www.justice.gov/opa/video/domestic-violence-awareness-month-program> [<https://perma.cc/VBk8-DEP9>].

¹⁹⁴ Tribal Youth and Community Protection Act, S. 2785, 114th Cong. (2016).

¹⁹⁵ Justice for Native Survivors of Sexual Violence Act, S. 1986, 115th Cong. (2017).

¹⁹⁶ The Native Youth and Tribal Officer Protection Act, S. 2233 115th Cong. (2017).

employment in Indian country or through a spousal or dating relationship to the victim, can remain. Section 904(c)(1), listing the criminal conduct covered, would be amended to include sexual assault and rape, and “domestic and dating violence and associated ancillary crimes.” The same constraints currently in Section 904(d) regarding defendant’s rights would remain the same.

While policymakers feared Section 904 would threaten the current jurisdictional balance, their primary concerns—rights of non-Indian defendants and limiting “tribal sovereignty”—embody a history of federal control over the land, culture, and decisions of Indian tribes. The plenary power over all Indian affairs still delineates Congress’s power to expand, retract, and control tribal authority. In VAWA 2013, Congress has formally recognized both the problem of non-Indian violence against Indian victims and also the power of Congress to affirm tribal sovereignty over these perpetrators. A potential solution to federal overreaching is to continue to gradually localize law enforcement in tribal governments while respecting the constitutional (and international) rights of victims and offenders.¹⁹⁷ Congress should continue to restore tribal sovereignty over the land and people in Indian country in this instance, for sexual assault and rape, domestic and dating violence and ancillary crimes, against all Indian victims in Indian country.¹⁹⁸

CONCLUSION

As history reflects, inherent tribal sovereignty existed well before the ratification of the Constitution and formation of the United States, and some tribes exercised jurisdiction over non-Indians before and after that time.¹⁹⁹ Now that VAWA 2013 is law, and “inherent tribal sovereignty” survived the legislative gauntlets, all Indian persons living in Indian country should be protected from sexual assaults committed by any perpetrator, regardless of race or citizenship, or ties to the victim. Congress’s plenary power as currently formulated may permit the recognition of tribal sovereign authority to

¹⁹⁷ See Riley, *supra* note 25, at 1619-20 (“[O]ne proposed remedy for the current [criminal justice] system—though inciting plenty of debate—is a return to more localized policing and control In many ways, Indian tribes are the original progenitors of local, traditional and restorative justice practices.”).

¹⁹⁸ See DEER, *supra* note 3, at 31 (“Tribal sovereignty is a critical component to addressing gendered violence in tribal communities today, because a sovereign political entity has duties to protect citizens from abusive power.”).

¹⁹⁹ See *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (noting that “the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States” and further explaining that “the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment”).

prosecute non-Indians for the crimes listed in Section IV.B, against an Indian in Indian country. And federal and state governments should continue collaborating with tribal courts to ensure the adequacy of resources and tools to effectively integrate this jurisdiction into their systems.

This Comment has discussed the realities of sexual violence in Indian country, stemming from a deeply troubling history of colonial violence and domination of Indian land and Indian bodies. Just as rape was used as a weapon throughout history, modern political barriers to remedy assaults perpetuate a similar narrative. Congress has the power to redirect that narrative by recognizing special criminal jurisdiction to tribes over non-Indians offenders committing crimes of sexual violence as well as ancillary crimes of domestic and dating violence against Indian victims in Indian country. The arguments presented in the VAWA 2013 debates against any grant of jurisdiction failed, and are similarly unsustainable—or at the very least, are indistinguishable—when applied to eliminating the relationship requirement between the victim and offender. And early evidence of tribal criminal jurisdiction over non-Indians reflects that Rehnquist's generalizations in *Oliphant* did not accurately document the jurisdictional landscape in Indian country. Tribes possessed, and should still possess, the right to protect the health, safety, and welfare of their people. VAWA 2013's jurisdictional grant, albeit narrow, should ultimately galvanize policymakers and advocates to ensure through new legislation that there is redress for all victims, not only those who must rely on evidence of the perpetrator's connection to the victim and to the land.

* * * * *