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Lawless By Design: Jurisdiction, Gender and Justice in Indian Country

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LAWLESS BY DESIGN: JURISDICTION, GENDER AND JUSTICE IN INDIAN COUNTRY

INTRODUCTION

> [O]ur method of dealing with [murder] was Crow Dog should go take care of Spotted Tail's family, and if he didn't do that we'd banish him from the tribe. But that was considered too barbaric . . . so they passed the Major Crimes Act that said we don't know how to handle murderers and they were going to show us.[1]

> [I]f you want to rape or kill somebody and get away with it, do it on an Indian reservation.[2]

American Indian men and women report more violent victimization than any other racial or ethnic group in the United States.[3] Homicide victimization rates, for example, are two times higher for American Indians than for persons of any other ethnic group.[4] Complex jurisdictional laws hamper attempts to reduce these crimes. In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that tribal governments do not have inherent criminal jurisdiction over non-Indians, even when they commit crimes against tribe members on American Indian reservations.[5] Moreover, while tribes can prosecute Indian defendants, they are not authorized to impose a fine greater than five thousand dollars or a jail sentence that is longer than one year.[6] Such restrictions functionally limit tribal jurisdiction to misdemeanors.[7]

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[1] *Tribal Courts Act of 1991 and Report of the U.S. Commission on Civil Rights Entitled "Indian Civil Rights Act": Hearing Before the Select Comm. on Indian Affairs*, 102nd Cong. 42 (1991) (testimony of Wayne Ducheneaux, President, National Congress of American Indians).

[2] Wetzelbill, *I Was Witness to One on My Reservation*, Comment to *One in Three Native American Women Will Be Raped in Her Lifetime*, DEMOCRATICUNDERGROUND.COM (July 26, 2007, 8:06 PM), http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=389x1446613#1446807.

[3] PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iv (2000).

[4] *See id.* at 23 (discussing the results of a study by the National Center for Injury Prevention and Control).

[5] 435 U.S. 191, 210 (1978).

[6] Indian Civil Rights Act, 25 U.S.C. § 1302(7) (2006).

[7] Duro v. Reina, 495 U.S. 676, 681 (1990) ("The tribal criminal code is therefore confined to misdemeanors.").

Federal and state governments have not filled the vacuum in law enforcement created by this limitation. The federal government has a trust responsibility to police Indian Country,[8] but its jurisdiction is limited to federal and major crimes.[9] Public Law 280 (PL 280) provides fifteen states with jurisdiction over crimes committed in Indian Country.[10] Thus, in PL 280 states, tribal governments have jurisdiction over misdemeanor crimes committed by Indians, state officials can prosecute any crime, and the federal government maintains jurisdiction over federal and major crimes. Yet, despite this array of authorities, few crimes against Indians that occur on reservations are prosecuted.

Due to confusion over jurisdiction, law enforcement response in Indian Country is complex, uncoordinated, and ineffective.[11] Determining jurisdiction over any given crime committed in Indian Country "depends on the identity of the victim and the offender, the severity of the crime, and where

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[8] 18 U.S.C. § 1151 (2006) defines "Indian Country" as

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

There are 4.3 million people in the United States who identify as American Indians in whole or in part. U.S. Census Bureau, WE THE PEOPLE: AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES 2 (2006). There are 562 federally recognized tribes in the United States today, and tribes hold approximately fifty million acres, or around two percent of the United States. Nat'l Congress of Am. Indians, *An Introduction to Indian Nations in the United States*, NCAI.ORG, 13, http://www.ncai.org/fileadmin/initiatives/NCAI_Indian_Nations_In_The_US.pdf (last visited July 30, 2010).

[9] *See infra* Part I.A.

[10] Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162 (2006) and 25 U.S.C. § 1321 (2006)). The "mandatory" states include California, Minnesota, Nebraska, Oregon, and Wisconsin, which were listed in the original statute, *id.*, and Alaska, which assumed jurisdiction upon statehood. Pub. L. No. 85-615, 72 Stat. 545 (1958) (codified at 18 U.S.C. § 1162 (2006)). Public Law 280 provides that other states can choose to assume jurisdiction; these states are called "optional" states. States that have assumed jurisdiction or taken steps to assume jurisdiction include Nevada, NEV. REV. STAT. § 41.430 (2009); Idaho, IDAHO CODE ANN. §§ 67-5101, 5103 (2010); Iowa, IOWA CODE §§ 1.12 to .14 (2010); Washington, WASH. REV. CODE § 37.12.010 (2010); South Dakota, S.D. CODIFIED LAWS §§ 1-1-17 to -18 (2010); Montana, MONT. CODE ANN. § 2-1-301 (2009); North Dakota Const. Art. XIII, § 2 (2010); Utah, UTAH CODE ANN. § 9-9-201 (West 2010); and Florida, FLA. STAT. § 285.16 (2010). Before 1968, states could unilaterally assume jurisdiction , but amendments to PL 280 now require that any state assuming jurisdiction acquire tribal consent. Indian Civil Rights Act, 25 U.S.C. § 1321 (a) (2006).

[11] *See* U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY xii (2003), *available at* http://www.usccr.gov/pubs/na0703/na0204.pdf [hereinafter A QUIET CRISIS] (calling the government's failure "systemic" due to jurisdictional overlap, inadequate collaboration, inefficiency, service delays, and wasted resources).

the crime occurred."[12] In these circumstances, federal and state officials may be unsure about their powers. Thus, non-Indians who commit crimes on tribal lands may go unpunished,[13] making Indian Country residents choice targets for criminals[14] and projecting an image that criminals can attack Indian Country residents with impunity.[15]

This patchwork of legal authority has led to a breakdown of law and order in Indian Country.[16] While this climate endangers the entire American Indian population, women suffer the most. American Indian women are the most victimized group in America;[17] their rate of violent victimization is more than twice that of all women.[18] Indian and Alaska Native women are the most likely group to report rape and physical assault.[19] While violence against women is underreported in every demographic,[20] jurisdictional barriers add one more obstacle between victims and law enforcement in Indian Country. This is particularly devastating to American Indian women since at least 70% of sexual assault perpetrators are non-Indian men.[21]

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[12] *Id.* at 67.

[13] Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 128 (2004).

[14] Victor H. Holcomb, *Prosecution of Non-Indians for Non-Serious Offenses Committed Against Indians in Indian Country*, 75 N.D. L. REV. 761, 761 (1999).

[15] *See id.* at 779 (describing "an alarming picture of increasing violent crime on reservations due to insufficient quality and quantity of protective law enforcement"). Almost instantly after *Oliphant* was decided, advocates argued that the decision would hurt law enforcement in Indian Country. *See, e.g.*, Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 636 (1979) (describing the decision as "depriv[ing] tribal governments of the only power they have to protect themselves: orderly tribal legal process"); A QUIET CRISIS, *supra* note 11, at 67 (arguing that this confusion constitutes an abrogation of the federal government's responsibilities, making Native Americans "easy crime targets").

[16] *See* A QUIET CRISIS, *supra* note 11, at 79.

[17] *See id.* at 67 ("The rate of victimization of Native American women is 50 percent higher than the next highest group, African American males.").

[18] STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME, at v (2004).

[19] TJADEN & THOENNES, *supra* note 3, at iv.

[20] *See id.* at iii–v (describing "many gaps in [the] understanding of violence against women").

[21] *See* Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 457 (2005) (observing that in rapes involving American Indian women, "over 70% of the assailants are white"); *see also* PERRY, *supra* note 18, at 9 ("Nearly 4 in 5 American Indian victims of rape/sexual assault described the offender as white."). The majority of violent crime in Indian Country is perpetrated by non-Indians. *Id.* ("When asked the race of their offender, American Indian victims of violent crime primarily said the offender was white (57%), followed by other race (34%) and black (9%)."). In contrast, violent crime against whites and African Americans is primarily intraracial. *Id.*

To reduce crime, and sexual violence in particular, in Indian Country, Congress should "overturn" *Oliphant* and grant tribes direct criminal jurisdiction over all people—Indian or not—in Indian Country. Congress should also remove sentencing limits and explicitly grant tribal courts authority to adjudicate all crimes. Accordingly, Part I discusses the effects of present legal hurdles to prosecuting those who commit crimes in Indian Country. Part II shows how Congress could remove these legal barriers. Part III addresses possible constitutional concerns about this proposal. Part IV outlines the legal benefits of this proposal, including a more harmonized and modern legal framework that enhances tribal institutions and sovereignty. Part IV also articulates the law enforcement benefits of greater reliance on tribal authorities, and it explains why tribes are better equipped than states to respond to sexual violence and why an indigenous response to rape is crucial to strengthening tribal institutions.

I. CURRENT JURISDICTIONAL LAW GOVERNING CRIME IN INDIAN COUNTRY

The federal government first assumed responsibility for policing Indian Country more than one hundred years ago with the passage of the Major Crimes Act.[22] Today, federal statutes limit the types of crimes that tribal courts may prosecute, and the Supreme Court has imposed limits on whom tribal courts may prosecute. A third actor—the states—may sometimes enforce only some of its laws in Indian Country. These jurisdictional divisions make policing Indian Country a unique challenge[23] and, in particular, thwart the already difficult task of combating sexual violence.

A. Federal Limits: What Tribes May Prosecute

In 1885, Congress passed the Major Crimes Act (MCA), giving the federal government jurisdiction over certain crimes committed in Indian Country, including rape.[24] Congress drafted the MCA in response to an 1883 Supreme

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[22] *See generally* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984) (providing an historical overview of the Major Crimes Act); *see also* Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362 (codified as amended at 18 U.S.C. § 1153 (2006)).

[23] A QUIET CRISIS, *supra* note 11, at 66.

[24] *See* sources cited *supra* note 22. The MCA covers murder, manslaughter, kidnapping, maiming, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault perpetrated against anyone under age sixteen, felony child abuse or neglect, arson, burglary, robbery, any felony under section 661 of title 18 that occurs within Indian Country, and any felony under chapter 109(A), which includes rape. 18 U.S.C. § 1153 (2006).

Court decision limiting federal jurisdiction over members of Indian tribes.[25] Tribal authorities had convicted Crow Dog, an American Indian, of murdering another American Indian in Indian Country, and they demanded restitution instead of incarcerating him.[26] Unsatisfied with this result, the federal government attempted to prosecute Crow Dog in its own courts.[27] The Supreme Court held that the federal courts had no jurisdiction to try Crow Dog.[28] In response, Congress enacted the MCA to empower U.S. courts to impose their own penalties for offenses committed in Indian Country.[29]

There is disagreement over whether tribal governments retain any authority to prosecute crimes listed in the MCA. Commentators argue that the MCA created concurrent jurisdiction between federal courts and tribal governments but did not divest tribes of authority to prosecute these crimes.[30] Yet at least one federal appellate court has read the MCA to exclude tribal jurisdiction over any American Indian defendant charged with any of the MCA-enumerated crimes.[31] The Supreme Court has recognized there is ambiguity in the statute but has so far refused to address it.[32]

A 1968 statute, the Indian Civil Rights Act (ICRA), rendered this question functionally moot[33] by limiting the punishments tribes can impose.[34] For any crime, a tribal court may not sentence a defendant to more than one year in

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[25] *Ex parte* Crow Dog, 109 U.S. 556 (1883); *see also* B.J. Jones, *Jurisdiction and Violence Against Native Women*, *in* SHARING OUR STORIES OF SURVIVAL: NATIVE WOMEN SURVIVING VIOLENCE 233, 237 (Sarah Deer et al. eds., 2008) [hereinafter SHARING OUR STORIES] (noting that the MCA was passed "after the U.S. Supreme Court declared . . . that Indian tribes had the exclusive authority to punish Indians who committed crimes against other Indians within the tribe's lands").

[26] *Ex parte Crow Dog*, 109 U.S. at 557; Jones, *supra* note 25, at 237.

[27] Jones, *supra* note 25, at 237.

[28] *Ex parte Crow Dog*, 109 U.S. at 572.

[29] Some circuits have concluded that the MCA also allows for the prosecution of crimes committed by American Indians against corporations. *See, e.g.*, United States v. Doe, 572 F.3d 1162, 1169–70 (10th Cir. 2009).

[30] *See, e.g.*, Deer, *supra* note 21, at 460 ("Interestingly, the Major Crimes Act itself never explicitly stripped the tribe of jurisdiction over the list of crimes.").

[31] *See, e.g.*, Sam v. United States, 385 F.2d 213, 214 (10th Cir. 1967) (describing a rape case as being "beyond the jurisdiction" of a tribal court).

[32] Duro v. Reina, 495 U.S. 676, 689 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 n.14 (1978).

[33] *See Duro*, 495 U.S. at 681 ("The tribal criminal code is therefore confined to misdemeanors."). However, tribes can still exclude or banish non-Indians from the reservation. *Cf. id.* at 689 (suggesting a defendant could acquiesce to tribal jurisdiction . . . "for example, in return for a tribe's agreement not to exercise its power to exclude an offender from tribal lands"); Brenda Hill, *The Role of Advocates in the Tribal Legal System: Context Is Everything*, *in* SHARING OUR STORIES, *supra* note 25, at 193, 211.

[34] 25 U.S.C. § 1302(7) (2006).

prison and/or impose a fine of more than five thousand dollars.[35] Historically, tribal governments have not been bound by constitutional restraints.[36] In the wake of increasing concern over civil rights in the 1950s and 1960s, Congress passed the ICRA so that Indians could protect themselves[37] "from arbitrary and unjust actions of tribal governments."[38]

The MCA's ambiguous extension of federal jurisdiction may have created a de jure barrier to tribal jurisdiction, while the ICRA's sentencing limits have created a de facto incentive for tribes to focus on minor crimes. While tribal courts may still impose other sanctions for criminal conduct—for example, restitution, probation, or banishment—the ICRA limits the ability of tribes to impose fines and incarceration.[39] Hence, tribal governments focus their limited resources on other crimes while hoping that the federal government will prosecute rape and other offenses enumerated in the MCA.[40]

B. Federal Limits: Whom Tribes May Prosecute

Not only has Congress restricted which crimes tribal courts can prosecute, but the Supreme Court has also restricted the persons whom tribal courts can prosecute. Because tribes were once wholly independent political entities, they have inherent government power that does not come from the federal government.[41] Once incorporated into the United States, tribes kept this source of power but also became dependent sovereigns.[42] Supreme Court cases of the

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[35] *Id.*

[36] *See Duro*, 495 U.S. at 679 (noting that Duro, a nonmember of the tribe, was not "entitled to vote in Pima-Maricopa elections, to hold tribal office, or to serve on tribal juries"); *Oliphant*, 435 U.S. at 194 (explaining that while under the ICRA "defendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings. . . . the guarantees are not identical" (footnote omitted)).

[37] Today we speak only of Indians needing to be protected from abusive tribal governments because non-Indians are not subject to tribal criminal jurisdiction. *Oliphant*, 435 U.S. 191. However, the protections of the Indian Civil Rights Act expressly extend to "persons," not "American Indians." *See* Indian Civil Rights Act, 25 U.S.C. §§ 1301, 1302 (2006).

[38] Christina D. Ferguson, Comment, Martinez v. Santa Clara Pueblo*: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275, 287 (1993) (quoting S. REP. NO. 90-841, at 6 (1967)). However, the ICRA provides fewer and more limited rights than the Constitution. *Duro*, 495 U.S. at 693 (observing that the ICRA "provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts").

[39] Deer, *supra* note 13, at 128.

[40] *See* Deer, *supra* note 21, at 460 ("The practical impact of the Major Crimes Act . . . is that fewer tribes pursue prosecution of crimes such as murder and rape. . . . [Such] cases have become the domain of the federal government.").

[41] United States v. Wheeler, 435 U.S. 313, 319–20, 323 (1978).

[42] *Id.*

past fifty years have established that a tribe's status as a dependent sovereign limits its sovereignty and prevents it from prosecuting or incarcerating non-Indians.[43]

In 1978, the Supreme Court held that as dependent sovereigns, tribes cannot try and convict non-tribe members.[44] In *Oliphant v. Suquamish Indian Tribe*, tribal authorities charged Mark David Oliphant, a non-Indian resident of the Port Madison Reservation, with "assaulting a tribal officer and resisting arrest."[45] Oliphant applied for a writ of habeas corpus, arguing that because he was a non-Indian, the Suquamish Indian Provisional Court did not have criminal jurisdiction over him.[46] The Supreme Court agreed.[47]

The Court found that tribes never expressly relinquished the power to impose criminal penalties on non-Indians.[48] However, "unspoken assumption[s]"[49] and "impli[cations]"[50] in U.S.–Indian treaties show that Indians lost this power.[51] The Court interpreted early treaties to find that tribes lack criminal jurisdiction over non-Indians unless Congress or a treaty provides for it.[52] The Court reasoned that the federal government has long regarded the intrusion of a tribe's authority into the lives and liberties of non-

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[43] *Id.* at 323.

[44] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[45] *Id.* at 194.

[46] *Id.*

[47] *Id.* at 195.

[48] *Id.* at 204.

[49] *Id.* at 203.

[50] *Id.* at 208.

[51] For some critiques of the Court's analysis, see Barsh & Henderson, *supra* note 15, at 617 (stating that *Oliphant* represents "*gestalt* jurisprudence, conjecturing at length about long-dead individuals' unexpressed motivations, passions, and beliefs and exalting this speculation to the status of written law"); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 27 (1993) (arguing that Justice Rehnquist "rel[ies] on a questionable analysis of history and of Indian treaties with the United States"); Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole Is Greater Than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993) (describing the *Oliphant* decision as "reprehensible," and arguing that it "laid the groundwork for the abrogation of tribal sovereignty"); Judith V. Royster, Oliphant *and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL'Y 59, 60 (2003) (calling *Oliphant* an "embarrassment" to the nation's highest court); and Geoffrey C. Heisey, Comment, Oliphant *and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 IND. L.J. 1051 (1998) (analyzing the Court's theories of "unspoken assumption" and "implicit-loss").

[52] *Oliphant*, 435 U.S. at 197 n.8 (citing treaties with various Indian tribes).

Indians as unwarranted and undesirable.[53] The Court explained that Indian sovereignty to determine "external" relations is "necessarily inconsistent" with the status of tribes as dependent sovereigns.[54] As "external" relations are those that involve nonmembers of the tribe,[55] tribal law enforcement has no jurisdiction over non-Indians, even if they live in Indian Country.[56]

In *Duro v. Reina*, the Court extended the analysis from *Oliphant* to find that tribal governments lack criminal jurisdiction over *all* nonmembers, whether Indian or not.[57] The Court recognized that nonmember Indians and non-Indians both lack representation in tribal governments and thus are, at least theoretically, equally vulnerable to discrimination.[58] The Court further reasoned that individuals' right to liberty outweighs the interest of tribal sovereignty.[59] Congress quickly reacted to *Duro* by amending the ICRA[60] to restore "inherent" tribal criminal jurisdiction over nonmember Indians.[61]

The amendment's recognition of *inherent* jurisdiction was challenged fourteen years later in *United States v. Lara*.[62] Lara, an American Indian who had been tried by a tribal court as a nonmember, challenged a subsequent federal prosecution for the same crime.[63] The Court considered whether this second federal prosecution violated the Double Jeopardy Clause[64] and held that in permitting tribes to prosecute certain crimes, Congress did not simply delegate federal prosecutorial power but rather restored inherent tribal power.[65] Because the federal government and tribes acted as separate sovereigns when

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53 Duro v. Reina, 495 U.S. 676, 687–88 (1990) (recognizing that there are "broader retained tribal powers outside the criminal context" but that "[t]he exercise of criminal jurisdiction . . . involves a far more direct intrusion on personal liberties").

54 United States v. Wheeler, 435 U.S. 313, 326 (1978).

55 *See Duro*, 495 U.S. at 686 (finding "implicit divestiture" of sovereignty when its exercise involves "the relations between an Indian tribe and nonmembers of the tribe" (quoting *Wheeler*, 435 U.S. at 326) (internal quotation marks omitted)).

56 *Id.*

57 *Id.* at 685.

58 *Id.* at 693 ("We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens . . . for trial by political bodies that do not include them.").

59 *See id.*

60 Jones, *supra* note 25, at 245.

61 25 U.S.C. § 1301(2) (2006).

62 541 U.S. 193 (2004).

63 *Id.* at 193 (syllabus).

64 *Id.* at 198.

65 *Id.*

prosecuting Lara, the Court concluded that the second prosecution did not violate the Double Jeopardy Clause.[66]

In *Lara*, the Court also implicitly upheld congressional authority to dictate Indian sovereignty.[67] Justice Stevens noted in his concurrence that congressional action in expanding tribal jurisdiction is appropriate because tribal governments were once independent sovereigns.[68] If Congress can allow the states—entities that rely entirely on the federal government's recognition—inherent power,[69] then it can do the same for tribes.[70] Therefore, Justice Stevens concluded, the 1990 amendment to the ICRA was a constitutional exercise of congressional authority.[71]

C. The States: Public Law 280

For many years, the laws governing criminal jurisdiction in Indian Country were relatively uniform across reservations. Before *Oliphant*, tribal governments alone dealt with "less serious crimes,"[72] and only the federal government supplemented tribal law enforcement.[73] This division of authority changed in 1953, when Congress passed PL 280, divesting federal power to a specific list of states ("PL 280 states") that would henceforth have jurisdiction over crimes committed in Indian Country.[74]

Public Law 280 states may enforce their criminal codes in Indian Country within state borders as if it were state territory.[75] Definitions of which laws are "criminal," and thus enforceable in Indian Country under PL 280, and which ones are "regulatory," and thus unenforceable by states,[76] vary from court to court.[77] As passed in 1953, PL 280 did not require tribal or state consent to invoke jurisdiction and the law lacked an accountability mechanism.

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66 *Id.* at 210.

67 *Id.* at 207.

68 *Id.* at 210 (Stevens, J., concurring).

69 *Id.* at 211.

70 *Id.*

71 *Id.*

72 Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 700 (2006).

73 *Id.* at 699.

74 Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162 (2006) and 25 U.S.C. § 1321 (2006)).

75 *Id.*

76 California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

77 *See, e.g.*, *id.*; Confederated Tribes v. Washington, 938 F.2d 146, 149 (9th Cir. 1991).

Consequently, PL 280 has not "improv[ed] law and order in Indian country."[78] Instead, it "has contributed to current problems of lawlessness by creating both jurisdictional vacuums and abuses of authority."[79] Congressional hearings, government reports, and tribal organization surveys suggest that state and local law enforcement, criminal justice officials, and even tribe members are highly dissatisfied with PL 280.[80]

D. The Effect of Jurisdictional Laws on Law Enforcement in Indian Country

Taken together, the MCA, ICRA, PL 280, and Supreme Court cases determining tribal jurisdiction have allowed for serious threats to American Indian women. American Indian victims of sexual assault are less likely than non-Indian victims to receive health and legal services or to see their attackers prosecuted. American Indian women are thus vulnerable to attacks by outsiders who know that enforcement barriers make it unlikely they will ever be punished. While state and federal governments have the legal authority to combat sexual violence in Indian Country, complications inherent in policing external jurisdictions make enforcement much too difficult.

The Department of Justice (DOJ) has attempted to increase federal presence and responsiveness in Indian Country.[81] These attempts include a pilot project to tackle violent crimes in Indian Country with a specific emphasis on sexual assaults on reservations.[82] Recent congressional policy reflects a similar desire to respond to rape in Indian Country.[83] A bill introduced in the 110th Congress, The Tribal Law and Order Act of 2008,[84]

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[78] Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1706 (1998). Adding to the confusion, some commentators interpret federal law as preempting state criminal jurisdiction over non-Indians who commit crimes against Indians. Talib Ellison, *Surviving Racism and Sexual Assault: American Indian Women Left Unprotected*, MOD. AM. (Am. Univ. Wash. Coll. of Law, Wash., D.C.), Fall 2005, at 21, 22.

[79] Arthur F. Foerster, Comment, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. REV. 1333, 1355–56 (1999).

[80] Goldberg & Champagne, *supra* note 72, at 699; *see also Issues of Concern to Southern California Tribes: Hearing Before the Select Comm. on Indian Affairs*, 101st Cong. 122 (1989); *Indian Law Enforcement Improvement Act of 1975: Hearing on S. 2010 Before the Subcomm. on Indian Affairs of the Comm. on Interior & Insular Affairs*, 94th Cong. (1975).

[81] A QUIET CRISIS, *supra* note 11, at 69.

[82] *All Things Considered: Rape Cases on Indian Lands Go Uninvestigated* (National Public Radio broadcast July 25, 2007) (transcript available at http://www.npr.org/templates/story/story.php?storyId=12203114).

[83] Deer, *supra* note 13, at 125–26.

[84] H.R. 6583, 110th Cong. (2008).

would increase resources to combat rape in Indian Country while maintaining the federal government's prosecutorial power.[85]

Unfortunately, more resources alone cannot solve the problems federal and state officials face when searching for evidence or witnesses. Funding cannot change a prosecutorial culture that views Indian reservation crimes as unimportant or unworthy of federal resources.[86] Jurisdictional laws prevent tribal governments from promoting public safety in Indian Country[87] and create insurmountable barriers to law enforcement and other services, thereby exacerbating crime against American Indians.[88] Many victims do not know whether to call 911, the sheriff's department, or local tribal law enforcement to report a crime.[89] Confusion over jurisdiction may lead police and courts to ignore crimes even when they actually have exclusive jurisdiction.[90] This combination of problems robs all American Indians of effective protection against violence, but it is especially problematic for American Indian women, who suffer sexual violence at alarming rates. The current system, which "limits local tribal control, and forces reliance on the Federal Government . . . . is broken."[91]

1. Sexual Violence in Indian Country Remains Rampant

Statistics show that despite efforts by federal and state law enforcement, American Indian women are one of the most vulnerable groups in the United States. They are two-and-a-half times more likely to be victims of sexual violence than non-Indian women.[92] Up to three-fourths of American Indian

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[85] *Id.* §§ 601–05.

[86] *See* BONNIE MATHEWS, U.S. COMMISSION ON CIVIL RIGHTS, INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 154 (1981); Dussias, *supra* note 51, at 39.

[87] Christopher B. Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 BYU J. PUB. L. 173, 180 (2000).

[88] *Law Enforcement in Indian Country, Hearing Before the Committee on Indian Affairs*, 110th Cong. 21 (2007) (statement of Bonnie Clairmont, Victim Advocacy Program Specialist, Tribal Law and Policy Institute).

[89] Darryl Fears & Kari Lydersen, *Native American Women Face High Rape Rate, Report Says; Tribes Often Lack Funds and Policing to Patrol Lands*, WASH. POST, Apr. 26, 2007, at A14.

[90] Goldberg & Champagne, *supra* note 72, at 699.

[91] *Examining Federal Declinations to Prosecute Crimes in Indian Country, Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 1 (2008) [hereinafter *Declinations*] (statement of Sen. Byron L. Dorgan).

[92] BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: VIOLENT VICTIMIZATION AND RACE, 1993–98 (2001) [hereinafter VIOLENT VICTIMIZATION]; PERRY, *supra* note 18, at 5. For example, five per one thousand American Indians age twelve or older are subject to rape or sexual assault compared to two per one thousand in the general population. *Id.*

women are victims of some form of sexual assault,[93] and one-third are victims of rape.[94] Although these numbers are staggering, American Indians, researchers, and providers of health and other support services say that sexual assault in Indian country is actually even higher.[95]

Most rapes against American Indian women are perpetrated by non-Indian men,[96] and most of these assailants are white.[97] One study found that "[n]early 4 in 5 American Indian victims of rape/sexual violence described the offender as white."[98] In addition, American Indians are more likely to be victims of sexual violence and assaults committed by a stranger or mere acquaintance,[99] whereas women in the general population are more likely to be victimized by a current or former husband, cohabiting partner, boyfriend, or date.[100]

2. Enforcement Is Sporadic and Ineffective

The geographic distance between non-tribal law enforcement and Indian Country,[101] as well as a lack of collaboration, communication, and clear lines of authority between tribal and non-tribal authorities, lead to an enforcement vacuum.[102] Tribal officials complain that state law enforcement officials respond slowly and sometimes not at all to crimes of sexual violence.[103] In these cases, tribal authorities cannot step in to close the gap,[104] thereby

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93 NAT'L SEXUAL VIOLENCE RES. CTR., SEXUAL ASSAULT IN INDIAN COUNTRY: CONFRONTING SEXUAL VIOLENCE 1 (2000) (citing NANCY HAWKINS ET AL., MINN. DEP'T OF HUM. SERVICES, AMERICAN INDIAN WOMEN'S CHEMICAL HEALTH PROJECT (1993)).

94 *Id.*

95 *Id.* at 1.

96 PERRY, *supra* note 18, at 9.

97 *Id.*

98 *Id.*

99 *Id.* at v. In 41% of sexual assaults, American Indian victims described the offender as a stranger. *Id.* at 8.

100 TJADEN & THOENNES, *supra* note 3, at 61. Seventy-six percent of women in the general population who reported being raped and/or physically assaulted "were victimized by a current or former husband, cohabiting partner, boyfriend, or date." *Id.*

101 *See* A QUIET CRISIS, *supra* note 11, at 69; Holcomb, *supra* note 14, at 767; Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 711 (2006).

102 *See Law Enforcement in Indian Country*, *supra* note 88, at 21 (statement of Bonnie Clairmont, Victim Advocacy Program Specialist, Tribal Law and Policy Institute) (describing the lack of resources and enforcement problems that affect Indian women who have been sexually assaulted).

103 Goldberg & Champagne, *supra* note 72, at 698.

104 Sumayyah Waheed, *Domestic Violence on the Reservation: Imperfect Laws, Imperfect Solution*, 19 BERKELEY WOMEN'S L.J. 287, 293 (2004).

enabling non-Indian perpetrators of violent crimes to go unpunished.[105] Furthermore, distance reduces any deterrent effect.[106] The simple perception that a state will not exercise its authority is enough to encourage crime in Indian Country.[107]

Confusion over who has jurisdiction would remain despite increased funding. The time required to determine which government should respond to a particular crime scene makes an accessible, timely, and effective legal response impossible.[108] A victim may err when choosing between 911, the sheriff's department, or local tribal law enforcement, in which case her call will be rejected by the agency with instructions to call another.[109] As jurisdictional uncertainties delay or stall crime reporting and subsequent investigations, women are vulnerable to continued assault by those seeking to deter reporting or prevent a successful prosecution.[110] In a typical case, an American Indian woman may call law enforcement after being attacked, only to find that no one will respond.[111]

Moreover, Indian Health Services (IHS) has been unable or unwilling to develop appropriate responses to sexual violence.[112] The nearest IHS facility for some victims may be up to one hundred miles away,[113] and IHS staff members generally do not know how to gather and preserve evidence of a crime.[114] Victims are often turned away or referred elsewhere because their IHS facility lacks a rape kit or employees trained to administer the health exam.[115] The IHS only recently began allocating funding to train employees on forensic examinations for sexual assaults.[116] Official IHS policy is that it

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105 Mending the Sacred Hoop, *Jurisdictional Issues Complicate Response to Sexual Assault for Tribes Under PL 280 Status*, RESOURCE (Nat'l Sexual Violence Res. Ctr., Enola, Pa.), Fall/Winter 2003, at 12.

106 *See* Heisey, *supra* note 51, at 1054.

107 A QUIET CRISIS, *supra* note 11, at 76. In Alaska, for example, one-third of the 226 Native Alaskan villages have no law enforcement, "rendering them virtually defenseless to lawbreakers." *Id.* (quoting Alaska Advisory Comm., *Racism's Frontier: The Untold Story of Discrimination and Division in Alaska*, Apr. 2002, at 39) (internal quotation marks omitted).

108 NAT'L SEXUAL VIOLENCE RES. CTR., *supra* note 93, at 4, 6; Mending the Sacred Hoop, *supra* note 105, at 12.

109 Fears & Lydersen, *supra* note 89, at A14.

110 Mending the Sacred Hoop, *supra* note 105, at 2, 12.

111 *Law Enforcement in Indian Country*, *supra* note 88, at 21.

112 Mending the Sacred Hoop, *supra* note 105, at 2, 12.

113 *Law Enforcement in Indian Country*, *supra* note 88, at 21.

114 Fears & Lydersen, *supra* note 89, at A14; *see also* Deer, *supra* note 21, at 462–63 ("[T]he federal government spends more per capita for health care in federal prisons than for health care on reservations.").

115 *Law Enforcement in Indian Country*, *supra* note 88, at 21.

116 Deer, *supra* note 13, at 126.

cannot establish the commission or absence of a crime, and therefore it performs "only medically related care and treatment."[117] Even so, many facilities do not provide the contraception and sexually transmitted disease treatment that is standard medical care for rape victims.[118]

When American Indian women report rapes, investigators often mishandle these cases. Police in Indian Country frequently treat victims as though they are not telling the truth.[119] Horror stories of victim blaming foster distrust of nontribal law enforcement.[120] Untrained law enforcement personnel may question victims inappropriately, leaving victims feeling responsible for the crime.[121] And confusion over jurisdiction allows police to ignore crimes of abuse against Indian women.[122] When state law enforcement officers respond to Indian Country crimes, a lack of respect and cultural sensitivity can lead to abuses of authority.[123]

Finally, federal[124] and state[125] governments suffer from a bad reputation in Indian Country, making it difficult for them to investigate crimes and find witnesses. The relationship with Indian Country residents is an extension of the past two centuries of federal–tribal relations, during which the federal government has been responsible for many atrocities.[126] Residents are understandably skeptical of increased federal involvement[127] and often are reluctant to approach federal authorities.[128]

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117 Indian Health Manual, Ch. 13, § 13.8(F)(3)(a)(2) (1992), *available at* http://www.ihs.gov/publicinfo/publications/IHSmanual/Part3/pt3chapt13/pt3chpt13.htm ("Rape is a crime, and medical examination cannot conclusively establish the presence or absence of the commission of a crime. It is IHS policy to perform only medically related care and treatment.").

118 *Law Enforcement in Indian Country*, *supra* note 88, at 21.

119 AMNESTY INT'L USA, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 58–59 (2006).

120 *Law Enforcement in Indian Country*, *supra* note 88, at 22.

121 *Id.*

122 Mending the Sacred Hoop, *supra* note 105, at 12.

123 Goldberg & Champagne, *supra* note 72, at 699.

124 Washburn, *supra* note 101, at 735–38.

125 *See* Barsh & Henderson, *supra* note 15, at 633 n.127. In 2000, nearly 1.6 million of those who identified themselves as solely American Indian lived in ten states: California, Oklahoma, Arizona, New Mexico, Texas, North Carolina, Alaska, Washington, New York, and Michigan. PERRY, *supra* note 18, at 3. Of these states, only California and Alaska were mandatory PL 280 states. Pub. L. No. 83-280 (1953) (codified at 18 U.S.C. § 1162 (2006) and 25 U.S.C. § 1321 (2006)). Alaska is the state with the highest proportion of its population, 16%–19%, identifying as American Indian. PERRY, *supra* note 18, at 3.

126 Washburn, *supra* note 101, at 735–36.

127 *Id.*

128 A QUIET CRISIS, *supra* note 11, at 69; NAT'L SEXUAL VIOLENCE RES. CTR., *supra* note 93, at 8.

Public Law 280 exacerbated the already negative relations between states and tribes.[129] State criminal jurisdiction exposes tribe members to hostile state institutions[130] because state law enforcement is not accountable to tribal communities.[131] Because Indians are usually a minority in their county electorates, they generally lack the political influence to remove racist sheriffs, district attorneys, or judges.[132] In addition, the same practical barriers to effective federal law enforcement prevent effective state law enforcement. Thus, resolving jurisdictional conflicts in favor of increased state enforcement will not reduce crime in Indian Country.

State law enforcement personnel frequently lack the cultural knowledge to deal with American Indian issues[133] and are often unaware of reservation residents' discontent.[134] Tribal authorities sometimes fear that state authorities will harass tribe members rather than protect American Indian victims.[135] Excessive force and unwarranted arrests do not reduce crime; instead they do much to damage relations between community members and the police.[136]

The most resounding evidence that state law enforcement in Indian Country fails is the retrocession of state jurisdiction to the federal government. In 1968, Congress amended PL 280 to allow any state to relinquish its jurisdiction over Indian Country.[137] Since then, seven states have retroceded their authority to the federal government.[138] The amendment also requires that any future assertion of state jurisdiction include a vote of consent from the affected tribes.[139] Not a single tribe has consented to state jurisdiction since that time.[140] This suggests that when it comes to combating crime in Indian

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129 Washburn, *supra* note 101, at 775–76 ("Given that the federal system was justified by the notion that local state citizens were the tribe's "deadliest enemies," we might see serious pushback and concern by tribes in response to a proposal to turn criminal authority over to the states.").

130 Goldberg & Champagne, *supra* note 72, at 700.

131 *Id.* at 719.

132 *Id.* at 703.

133 *Id.* at 699.

134 *Id.* at 719.

135 *Id.* at 714.

136 *Id.* at 717.

137 25 U.S.C. § 1323 (2006).

138 Goldberg & Champagne, *supra* note 72, at 707 n.62. Minnesota, Nebraska, Oregon, and Wisconsin—all of which are mandatory states—have undertaken retrocession. Of the optional states, Nevada, Montana, and Washington have retroceded at least some of their jurisdiction. *Id.*

139 25 U.S.C. § 1321(a) (2006).

140 Goldberg & Champagne, *supra* note 72, at 704.

Country, expanding state criminal jurisdiction should be the last option considered.[141]

3. More Prosecutions Are Needed

Many Indian women do not report sexual assaults because such cases are rarely prosecuted.[142] A lack of data makes it difficult to assess the extent of federal investigation and prosecution of these crimes in Indian Country. The DOJ recently refused a request from Congress to provide specific declination rates in Indian Country,[143] but commentators have reported that federal prosecutors decline the vast majority of Indian Country rape cases.[144]

A Syracuse University project suggests the current declination rate for cases of murder and manslaughter is 50%, compared to a 76% declination rate for adult sex crimes.[145] Moreover, most federal sexual abuse convictions that do occur tend to involve child victims rather than adult women.[146] One DOJ official testified that the vast majority of declinations were made simply "because there was no federal crime."[147] This alone cannot explain the 76% declination rate for sexual assault crimes, since under the MCA sexual assault in Indian Country is *always* a federal crime.

One reason for high declination rates may be the geographic distance between courts, federal prosecutors, and Indian Country—the majority of Indian Country crimes occur in isolated rural areas.[148] The distance also deters Indian Country residents from approaching federal authorities. Residents' difficulty in traveling is exacerbated by the fact that many live below the

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141 *Id.* at 724.

142 *Law Enforcement in Indian Country*, *supra* note 88, at 22.

143 *Declinations*, *supra* note 91, at 2 (statement of Sen. Byron L. Dorgan). The DOJ's witness cited confidentiality concerns, public safety issues, and the safety of witnesses or victims as the reasons for refusing to provide declination rates. *Id.* at 19 (statement of Drew H. Wrigley, U.S. Attorney for the District of North Dakota).

144 Andrea Smith, *Sexual Violence and American Indian Genocide*, *in* REMEMBERING CONQUEST: FEMINIST/WOMANIST PERSPECTIVES ON RELIGION, COLONIZATION, AND SEXUAL VIOLENCE 31, 46 (Nantawan Boonprasat Lewis & Marie M. Fortune eds., 1999).

145 *Declinations*, *supra* note 91, at 3 (statement of Sen. Byron L. Dorgan).

146 Deer, *supra* note 13, at 125–26.

147 *Declinations*, *supra* note 91, at 22–23 (statement of Drew H. Wrigley, U.S. Attorney for the District of North Dakota).

148 Washburn, *supra* note 101, at 719; Nicholas Hentoff, *The Natives Are Arrestless*, WASH. MONTHLY, Dec. 1990, at 20, 23.

poverty line.[149] And even when cases are brought to trial, American Indian victims and witnesses often lack the transportation and resources to participate or attend.[150]

Long distances and poor federal–community relations make it undesirable for federal prosecutors to pursue Indian Country cases. Thus, increasing the resources devoted to Indian Country crimes may not increase prosecution rates. According to federal prosecutors, they lack DOJ support in pursuing Indian Country crimes because DOJ officials believe that such investigations require too much time for such a small population.[151] Officials do not appreciate the magnitude of crime in Indian Country and do not understand the fact that it is a federal responsibility to police and prosecute such crime.[152] This work culture means those taking on Indian Country cases generally are new attorneys who do not choose their assignments, but who will choose other types of cases as soon as they can.[153]

4. Concluding Thoughts

State and federal agencies have a history of failing to prosecute crimes of sexual violence,[154] especially when the perpetrator is non-Indian.[155] This leads offenders to believe that even after an arrest, the chance of being prosecuted is low and the punishment minimal.[156] Alarmingly low arrest and prosecution rates send the message that there are few consequences for attacking American Indian women. And in fact, advocates have said that offenders publicly brag about their exploits and blame the victims.[157] With few prospects of improvement under the current system, a new solution is necessary.

Tribal governments have no recourse against underperforming federal or state authorities. While *Cherokee Nation v. Georgia* indicated that tribes "look

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[149] U.S. Census Bureau, WE THE PEOPLE: AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES 12 (2006) ("The ratio of American Indians and Alaska Natives living below the official poverty level in 1999 to that of all people was more than 2."); NAT'L SEXUAL VIOLENCE RES. CTR., *supra* note 93, at 3 ("[M]ost Native Americans live in a state of poverty, with 40% in rural settings.").

[150] Washburn, *supra* note 101, at 711. The distance prevents witnesses from testifying at trial or at probation and parole hearings. Mending the Sacred Hoop, *supra* note 105, at 13.

[151] *Declinations*, *supra* note 91, at 17 (statement of Sen. Byron L. Dorgan).

[152] *All Things Considered*, *supra* note 82.

[153] Washburn, *supra* note 101, at 719.

[154] AMNESTY INT'L, *supra* note 119, at 61–74.

[155] *Law Enforcement in Indian Country*, *supra* note 88, at 22.

[156] NAT'L SEXUAL VIOLENCE RES. CTR., *supra* note 93, at 6.

[157] *Law Enforcement in Indian Country*, *supra* note 88, at 21.

to [the federal] government for protection; rely upon its kindness and its power; [and] appeal to it for relief of their wants," the Court has never recognized that the federal government is legally required to provide these benefits.[158] Only in cases where an enforceable treaty exists is the federal government required to provide law enforcement for a tribe.[159] Furthermore, few statutes require funding for the myriad programs that are supposed to help Indian Country residents.[160] Despite increases in DOJ funding between 1998 and 2003,[161] there is now a downward trend in funding to aid law enforcement in Indian Country.[162]

II. PROPOSAL

Federal and state law enforcement have not and cannot adequately combat crime in Indian Country. Thus, Congress should amend the Indian Civil Rights Act and return to the tribes their inherent sovereign power[163] to try all crimes and convict non-Indians.

In other contexts, Congress has countermanded Supreme Court decisions by passing ameliorative legislation.[164] This has already proven to be a successful strategy in the area of tribal criminal jurisdiction.[165] When the Supreme Court held in *Duro* that tribes had no jurisdiction over nonmember

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158 Holcomb, *supra* note 14, at 765 (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)) (internal quotation marks omitted).

159 *Id.* at 766; A QUIET CRISIS, *supra* note 11, at 67.

160 A QUIET CRISIS, *supra* note 11, at 79. For example, the federal government proposed a sexual assault nurse examiners program that was never funded. *Id.* at 72.

161 *Id.* at 70 (discussing how department expenditures on Indian Country programs increased by 86.7% between 1998 and 2003).

162 *Id.* at 70–79.

163 For an analysis explaining why Congress can restore inherent sovereignty rather than simply delegate federal power, see Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553 (2009).

164 *See, e.g.*, Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc5 (2006) (passed in response to City of Boerne v. Flores, 521 U.S. 507 (1997), in which the Court held that Congress overstepped its power of enforcement); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.) (rejecting the narrow Supreme Court definition of "disability" and thus endeavoring to protect more people from discrimination); The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb4 (2006) (reinstating strict scrutiny review for government actions that indirectly limit individuals' exercise of religion). The Religious Freedom Restoration Act was passed in response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), where two American Indians were fired and denied employment benefits after testing positive for mescaline, a drug contained in the peyote cactus they used in a religious ceremony.

165 *See* United States v. Lara, 541 U.S. 193, 196 (2004).

Indians, Congress reacted by amending the ICRA[166] and extending inherent tribal jurisdiction over nonmember Indians.[167] A similar statute could "overturn" *Oliphant* and extend jurisdiction over non-Indians. Additionally, Congress should address statutory sentencing limits and ambiguous provisions that suggest crime-specific tribal jurisdiction. The most efficient way to accomplish these goals would be to further amend the ICRA. Currently, the relevant portion of the statute reads as follows:

> "[P]owers of self-government" means and includes . . . the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all *Indians*.[168]
>
> No Indian tribe . . . shall . . . inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [1] a fine of $5,000, or both.[169]

Instead, an amended ICRA could provide:

> "[P]owers of self-government" means and includes . . . the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all <u>persons and for any crime committed in Indian Country</u>.
>
> No Indian tribe . . . shall . . . inflict cruel and unusual punishments.

The remainder of this Comment address concerns about—and potential benefits of—this proposed amendment. Part III presents and answers possible constitutional concerns. Part IV contextualizes this proposal within the legal framework of Indian law and explains how such a legal change would help combat sexual violence.

III. TRIBAL JURISDICTION OVER NON-INDIANS UNDER THE U.S. CONSTITUTION

There are two central questions regarding the constitutionality of this proposal. The first is whether Congress has the authority to enact such an amendment. The second is whether the proposal runs afoul of the Due Process

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166 *Id.* at 197–98.

167 Indian Civil Rights Act, 25 U.S.C. § 1301(2) (2006). Congress amended the ICRA to state that "'powers of self-government'. . . means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians*." *Id.* (emphasis added).

168 *Id.* (emphasis added).

169 *Id.* § 1302(7) (emphasis added).

Clause. As to the first question, Congress has plenary power to determine Indian law,[170] a power the Supreme Court has recently reaffirmed.[171] In *Lara*, the Court upheld Congress's amendment of the ICRA in response to *Duro*, stating that the amendment concerned "a tribe's authority to control events that occur upon the tribe's own land."[172] If Congress were to pass the amendment suggested in Part II, extending jurisdiction over non-Indian offenders, it would simply be an enhancement of a tribe's already existing authority to control events on its land.[173]

As to concerns regarding the Due Process Clause, although this question requires a more in-depth analysis, the ultimate answer is that the proposal does not run afoul of the Constitution. Tribal sovereignty and legal authority predate the Constitution, and thus tribes are not bound by the Constitution.[174] The ICRA has extended some of the Constitution's due process limitations to tribal governments, but not all.[175]

Notwithstanding the limited application of the Due Process Clause to tribes, federal legislation and tribal government safeguards are sufficiently robust to protect due process rights of defendants before tribal courts. The ICRA provides these defendants with the right to file a habeas petition before a federal court.[176] The original draft of the ICRA, which extended its guarantees only to "American Indians," was amended to extend to "any person" before the tribal court.[177]

The ICRA also states that "[n]o Indian tribe . . . shall . . . deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."[178] The main difference between tribal juries and federal juries is that conviction by a tribal jury

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170 U.S. CONST. art. I, § 8, cl. 3. See *infra* Part IV.A for an explanation of why Congress is the best actor.

171 *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998).

172 United States v. Lara, 541 U.S. 193, 194 (2004).

173 The Court has identified at least one treaty which allowed for a tribe's criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 199 (1978).

174 *Oliphant*, 435 U.S. at 194 n.3. The federal government still influences the content of tribal constitutions, while doctrines of discovery, treaty-based cessions of authority, and explicit congressional abrogation also operate to constrain tribes. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 819–21 (2007). The ICRA also allows suits against tribal police in federal court. U.S. COMM'N ON CIVIL RIGHTS, AMERICAN INDIAN CIVIL RIGHTS HANDBOOK 39–40 (1972) [hereinafter CIVIL RIGHTS HANDBOOK].

175 CIVIL RIGHTS HANDBOOK, *supra* note 174, at 21.

176 Indian Civil Rights Act, 25 U.S.C. § 1303 (2006).

177 Barsh & Henderson, *supra* note 15, at 631.

178 25 U.S.C. § 1302(10).

requires only a majority vote while federal juries must be unanimous.[179] On the other hand, the Supreme Court has held that state criminal convictions by less than a unanimous jury do not violate the Sixth Amendment,[180] so this difference should not pose an obstacle to tribal jurisdiction.[181] More importantly, however, the ICRA does not require that the jury be "impartial." Some may fear that this allows for race-based exclusions from jury participation. However, tribal juries typically include local non-Indians, so there is little chance of racially segregated juries.[182]

The major flaw of the ICRA is that it does not include the right to *free* counsel.[183] Defendants have a right to counsel, but it is a right to employ counsel "at [their] own expense."[184] Despite this deficiency, Justice Rehnquist, who wrote for the majority in *Oliphant*, said that due to the enactment of the ICRA, any dangers of tribal jurisdiction over non-Indian defendants have largely disappeared.[185] If defendants cannot afford an attorney, a tribal court will usually appoint one to represent them.[186] Conversely, Indians' right to counsel in non-tribal courts is practically illusory. Most Indian Country defendants are indigent and thus are represented by a public defender who must overcome cultural hurdles, frequently needs an interpreter, and may not

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179 CIVIL RIGHTS HANDBOOK, *supra* note 174, at 36.

180 Apodaca v. Oregon, 406 U.S. 404, 406 (1972); Johnson v. Louisiana, 406 U.S. 356, 362 (1972).

181 *Civil Rights Handbook*, *supra* note 174, at 36.

182 Barsh & Henderson, *supra* note 15, at 633 n.127. In contrast, Indians are commonly underrepresented in non-tribal juries. Washburn, *supra* note 101, at 747; *see also* CIVIL RIGHTS HANDBOOK, *supra* note 174, at 33. For example, over one ten-year period, no Indians served on grand juries of Lake County, California, where Indians were more than four percent of the population. *Id.* These all-white juries often administered unjust results. In a state proceeding against two men who raped, beat, and threw an American Indian woman off a bridge, jurors could not agree to convict. *Law Enforcement in Indian Country*, *supra* note 88, at 30. When asked why, one juror replied: "She was just another drunk Indian." *Id.*

183 Another complication, if not a serious deficiency, is the effect adjudication in tribal court has had on the Sixth Amendment right to counsel and the dangers of double jeopardy. *See* Alex M. Hagan, Student Article, *From Formal Separation to Functional Equivalence: Tribal–Federal Dual Sovereignty and the Sixth Amendment Right to Counsel*, 54 S.D. L. REV. 129 (2009). The Eighth Circuit, for example, has held that in some circumstances a tribal court proceeding may trigger a defendant's federal right to counsel even before he or she is charged formally in federal court. United States v. Red Bird, 287 F.3d 709, 714–16 (8th Cir. 2002). This process takes into consideration the nature, importance, and identity of a particular tribal process and the individual's due process rights. Hagan, *supra* note 183, at 133.

184 Indian Civil Rights Act, 25 U.S.C. § 1302(6) (2006). This is mirrored in many tribal constitutions. *See, e.g.*, The Chippewa Cree Tribe Law and Order Code, tit. 3, ch. 6 (1987) ("You have the right to an attorney at your own expense, or to have lay counsel or someone else with you.").

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

186 CIVIL RIGHTS HANDBOOK, *supra* note 174, at 42.

have the resources needed to conduct thorough investigations in Indian Country.[187]

Also, in interstate and international contexts, a foreigner without local representation is still generally subject to a sovereign's criminal jurisdiction. This Comment anticipates a similar situation for non-Indians in Indian Country.[188] The majority in *Lara* implicitly upheld tribal jurisdiction over Indians from a different tribe.[189] In truth, the constitutionality of the extension of jurisdiction over nonmember Indians has never been challenged.[190] Regardless, the intuitive response is that if the Court allows Indian defendants who are U.S. citizens to be tried by tribal courts, a true commitment to civil rights requires that non-Indian defendants face tribal courts as well.[191]

Tribal governments are the primary institutions for maintaining order in Indian Country.[192] Tribal courts and law enforcement play a particularly vital role in developing a strong tribal government.[193] The powers to arrest,

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[187] Washburn, *supra* note 101, at 721–22.

[188] The Supreme Court has explicitly refused to address whether due process rights preempt tribal jurisdiction over non-Indians. United States v. Lara, 541 U.S. 193, 194 (2004). It should also be asked whether insisting on constitutional methods of preserving individual rights ignores the fact that tribal institutions and societies have equally valid, if different, ways of protecting the individual. *See generally* Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009) (exploring how racism against American Indians tends to focus on constructing tribal societies as inferior groups in order to access valuable Native American natural resources). This perspective is bolstered by the fact that the ICRA was intended to "protect" American Indians from their own tribal governments but has instead contributed to the breakdown of law and order in Indian Country. *See generally supra* Part I.

[189] Because the ICRA does not include all the safeguards found in the Bill of Rights, the question remains whether the Constitution bars tribal courts from prosecuting and punishing Indian U.S. citizens. Concurring in *Lara*, Justice Kennedy wrote that the relaxation of constitutional rights for tribe members before their tribal governments "is a historical exception . . . to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe." 541 U.S. at 212 (Kennedy, J., concurring). He criticized the majority in *Lara* because, by extending tribal criminal jurisdiction over nonmembers, the Court subjected U.S. citizens to extra-constitutional sovereigns within national borders. *Id.*

[190] Most Supreme Court jurisprudence on the matter involves federal prosecutions subsequent to tribal ones. To challenge the constitutionality of tribal jurisdiction, a defendant would have to submit a writ of habeas corpus against the tribal proceeding before she found herself in a federal prosecution. *Id.* at 214 (Thomas, J., concurring) ("The proper occasion to test the legitimacy of the Tribe's authority . . . was in the first, tribal proceeding."). The ICRA vests district courts with jurisdiction over these claims. 25 U.S.C. § 1303 (2006). For a defense of legality in the event of such a challenge, see Benjamin J. Cordiano, Note, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades After* Duro v. Reina, 41 CONN. L. REV. 265 (2008).

[191] *See* Duro v. Reina, 495 U.S. 676, 708 (1990) (Brennan, J., dissenting) (discussing concerns over discrimination in tribal courts).

[192] A QUIET CRISIS, *supra* note 11, at 76.

[193] *Id.* For example, by resolving civil disputes, tribal courts foster tribal economic development and self-sufficiency. *Id.* at 78.

prosecute, incarcerate, exile, and exclude are important powers that tribal nations possess as sovereign entities.[194] Given the prevalence of crime in Indian Country, some argue that maintaining order is more important than focusing on whether individuals' political representation sufficiently protects their due process rights.[195] Applying this reasoning, Congress should revitalize tribal sovereignty and amend the ICRA to favor Indian self-determination.

IV. THE BENEFITS OF RESTORING TRIBAL JURISDICTION

This Comment's proposal would impact both the law and its enforcement in Indian Country. First, congressional extension of inherent tribal jurisdiction over all people who commit crimes in Indian Country provides a statutory basis for a territory-based theory of tribal sovereignty. Second, basing criminal codes on territorial jurisdiction rather than tribal membership leads to better criminal codes. These benefits are unachievable without holistic change. A slower and less radical change,[196] though perhaps easier to implement, would suffer from the underlying problem of uncertain legal grounding.

Enforcement benefits of this proposal include more sovereignty for tribal governments and better enforcement of laws in general. To be effective, law enforcement policies in Indian Country must restore tribal sovereignty. The Court has implicitly recognized the importance of tribal law enforcement[197] in preserving American Indian culture.[198] The harshest erosion of tribal

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[194] Riley, *supra* note 174, at 835; *cf.* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 479 (2005) (highlighting the differences between tribes as sovereign entities and private associations).

[195] Michael C. Blumm & Michael Cadigan, *The Indian Court of Appeals: A Modest Proposal to Eliminate Supreme Court Jurisdiction over Indian Cases*, 46 ARK. L. REV. 203, 217–18 (1993).

[196] *See, e.g.*, Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an* Oliphant*-Fix*, 93 MINN. L. REV. 1902, 1906–07 (2009) (advocating for an opt-in program under which the Bureau of Indian Affairs would "evaluate the ability of tribal governments to assume criminal jurisdiction over sexual assault and other major crimes and then facilitate the assumption of jurisdiction"). Quasius also advocates funding public defenders to work in tribal courts and funding qualified tribes to help assume jurisdiction. *Id.* at 1925. While better than the status quo, this solution relies on the BIA and thus is unlikely to avoid the inherent difficulties that plague federal–tribal relations. *See supra* Part I.D. Also, this Comment contends that subjecting non-Indians to tribal courts could spur the federal government to fund tribal institutions. If tribes must secure BIA funding before assuming jurisdiction, it is quite likely that such jurisdiction will never be granted.

[197] Duro v. Reina, 495 U.S. 676, 693 (1990) ("The retained sovereignty of the tribe [through criminal trials] is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members."); United States v. Wheeler, 435 U.S. 313, 331–32 (1978) (noting that tribes have a "significant interest in . . . preserving tribal customs and traditions").

[198] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1987) (discussing Indians' exemption from certain state laws, like taxation); Montana v. United States, 450 U.S. 544, 566 (1981)

sovereignty has occurred in the criminal law context,[199] with disastrous consequences for American Indians. Hampering the tribal response to crime endangers a tribe's members and robs tribal governments of a core aspect of their sovereignty. "Public safety is fundamental to the preservation of communities,"[200] and because Indian communities lack it, many American Indians have lost faith in the criminal justice system.[201] Returning tribal jurisdiction over all who enter Indian land will greatly benefit the law enforcement response in Indian Country.

A strong tribal law enforcement response is particularly important for victims of sexual violence. The most effective programs for healing revive indigenous spirituality, culture, and sovereignty.[202] Such programs are unlikely to develop without enhanced tribal sovereignty and jurisdiction. This Comment's proposal would both increase the frequency of law enforcement response and improve the quality of that response, thereby better helping victims of sexual violence and, ultimately, all American Indians.

A. Legal Benefits

Congress is the appropriate actor to allocate jurisdiction among state, federal, and tribal governments. For the past fifty years, Congress and the Executive Branch have used an Indian self-determination model as the framework for American Indian policy.[203] In contrast, the Court assumes an

("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."); *see also* Foerster, *supra* note 79, at 1354 (discussing the importance of tribal self-governance).

199 Dussias, *supra* note 51, at 37.

200 A QUIET CRISIS, *supra* note 11, at 79.

201 *Id.* at 68.

202 Smith, *supra* note 144, at 41. For examples of successful tribe-oriented responses to social and legal problems, see LEEANNA ARROWCHIS & VALERIE SENECA, NAT'L AM. INDIAN HOUS. COUNCIL, SIX CASE STUDIES: TRIBAL SELF-DETERMINATION UTILIZING NAHASDA ACTIVITIES (2002). The White Mountain Apache tribe had a higher success rate with their housing project than any other in the last few decades. *Id.* at 18. The Menominee Tribe implemented a successful drug rehabilitation program that was culturally structured and implemented. *Id.* at 31–32. Since implementing this program, the tribal crime index has decreased by 17%. *Id.* at 34. In another example, the Alaska Supreme Court upheld a statute extending tribal jurisdiction to cases of child custody involving Indians, even outside the reservation. John v. Baker, 982 P.2d 738, 743–44 (Alaska 1999).

203 *See, e.g.*, The American Indian Religious Freedom Act, 42 U.S.C. 1996 (2006) (preserving Indian sacred sites and religious rights); Pueblo Lands Act of 1924, Pub. L. No. 68-253, 43 Stat. 636 (1924) (providing for compensation of lands taken by white settlers); Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049 (repealed 1978) (waiving sovereign immunity for Indian claims and creating a panel to adjudicate the complaints).

assimilation model of Indian law when deciding cases dealing with American Indian issues.[204] The Court recently went so far as to undercut Congress's power to affect Indian Country.[205] Today, the Court is the principal actor eroding tribal sovereignty,[206] making it unfit to lead the way in empowering tribal governments.[207]

Instead, a federal statute is needed to establish a territory-based theory of tribal sovereignty. Early Supreme Court precedent recognized tribal interests in maintaining authority over both land and people.[208] Recent decisions, on the other hand, highlight the consent of tribe members as the primary basis for tribal sovereignty.[209] Most disturbingly, the Court is moving toward making membership the only basis for tribal sovereignty.[210] This Comment's proposal addresses and revives tribal sovereignty as it is defined in early Court precedent: territory and membership. The territorial basis for sovereignty is true to precedent and leads to better criminal codes.

1. A Modern Definition of Sovereignty

Justice Marshall laid the foundation for the common law jurisprudence of tribal sovereignty.[211] In *The Cherokee Cases*, he introduced the term "domestic dependent nations" to protect tribal interests from aggressive state intrusions.[212] Today, the Court uses the term to weaken tribal interests and authority.

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[204] Foerster, *supra* note 79, at 1338.

[205] Frickey, *supra* note 194, at 452; David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996).

[206] Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 7 (1999); *see also* Dussias, *supra* note 51, at 6.

[207] For another defense of restoring inherent tribal sovereignty, see Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651 (2009).

[208] *See* Worcester v. Georgia, 31 U.S. 515 (1832) (discussing the sovereignty of Indian tribes); Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831) (discussing American Indians' "unquestionable . . . right to use the lands they occupy").

[209] *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978); *see also* Dussias, *supra* note 51, at 4 (discussing the Court's shift); Foerster, *supra* note 79, at 1338 n.24 (summarizing academic literature on the Court's shift).

[210] Dussias, *supra* note 51, at 17.

[211] *See Cherokee Nation*, 30 U.S. at 11 ("These wrongs are of a character wholly irremediable by the common law; and these complaints are wholly without remedy of any kind, except by the interposition of this honorable court."); *see also Worcester*, 31 U.S. 515.

[212] Dussias, *supra* note 51, at 3.

The Supreme Court seemingly has reduced its adherence to precedent in Indian cases.[213] Precedent dictates that courts narrowly construe congressional acts with a presumption against decreasing tribal self-government,[214] but they routinely allow state and federal interests to trump tribal sovereignty.[215] In doing so, courts have stopped treating tribes as nations within a nation.[216] But the Court has not uniformly applied this new approach. The Court treats tribes as sovereigns when they would benefit from being treated as property owners and as private associations when they would benefit from being treated as sovereigns.[217]

Membership is important as a basis for tribal sovereignty because it highlights the importance of preserving tribal culture. But to have a robust basis for tribal sovereignty, the law must also recognize the sovereignty of tribal governments over tribal territory.[218] In *Worcester v. Georgia*, Justice Marshall described Indian nations as "distinct political communities, having territorial boundaries, within which their authority is exclusive."[219] This is a clear endorsement of a territory-based rule barring state interference inside reservation borders.[220]

Admittedly, Justice Marshall vacillated between the bases of membership and territory when discussing tribal sovereignty. However, Justice Marshall's words reflect the reality of his day: segregation meant that membership and territory could be conflated. In the early years of tribal–U.S. relations, Indian Country was more segregated from the general U.S. population than it is

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213 Blumm & Cadigan, *supra* note 195, at 208.

214 *Worcester*, 31 U.S. at 552–54; Barsh & Henderson, *supra* note 15, at 613.

215 *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 181 (1973) (evaluating the facts by weighing federal preemption rather than tribal sovereignty). *See generally* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (allowing states to prohibit Indian religious practices that conflict with the state's interest in controlling drug abuse); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (allowing the federal government to destroy Indian sacred sites to build roads and harvest timber).

216 Blumm & Cadigan, *supra* note 195, at 203.

217 *Id.* at 205; Frickey, *supra* note 194, at 444; Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 55 (1991); *see also* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nations, 492 U.S. 408 (1989) (holding tribes cannot zone fee lands nonmembers own); United States v. Sioux Nation of Indians, 448 U.S. 371, 416 (1980) (allowing the federal government to change the form of trust lands if it provides property of equal value in good faith); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 284–85 (1955) (finding Indian land under aboriginal title is not protected by the Fifth Amendment).

218 *Cf.* Blumm & Cadigan, *supra* note 195, at 233. Jurisdiction for the authors' proposed Indian Court of Appeals would include cases in which a party is a member of a tribe, the dispute occurs in Indian Country, the dispute concerns Indian land, resources, property, or government, or the dispute concerns an Indian reservation. *Id.*

219 Worcester v. Georgia, 31 U.S. 515, 557 (1832).

220 *Id.* at 561.

now.[221] Thus, when the *Cherokee Cases* were decided, segregation was assumed. Even though Justice Marshall did not explicitly discuss the authority of Cherokees over non-Indians within their borders, to say that the Cherokee had power over their members was to say they had power over their land.[222]

The modern Court began its erosion of the territory-based definition of sovereignty in *Williams v. Lee*.[223] Since then, the Court has completely eliminated territory as a basis for sovereignty for the purposes of criminal law.[224] In *Duro*, the Court discussed consent and political membership as the basis for tribal authority to the complete exclusion of territory.[225]

In other areas of law, such as regulatory power, the Court has further eroded the importance of territory to tribal sovereignty.[226] For example, in *McClanahan v. Arizona State Tax Commission*,[227] the Court held that states cannot tax income earned exclusively in Indian Country.[228] But in so deciding, Justice Thurgood Marshall relegated tribal territorial sovereignty to the "backdrop" against which Indian law issues should be decided.[229] This is in contrast to the instruction from precedent that tribal sovereignty is a fundamental interest that the Court should protect barring only clear congressional law to the contrary.[230] In *Montana v. United States*, the Court held that tribal governments can regulate within their territory.[231] Just as in *McClanahan*, this was not a clear victory for proponents of tribal sovereignty. Instead of defining territory to include everything within the outer limits of the

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221 John v. Baker, 982 P.2d 738, 760 (Alaska 1999); David M. Blurton, John v. Baker *and the Jurisdiction of Tribal Sovereigns Without Territorial Reach*, 20 ALASKA L. REV. 1, 21 (2003).

222 Dussias, *supra* note 51, at 11 (citing Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831)).

223 358 U.S. 217 (1959) (holding that a non-Indian could not sue an Indian customer for an overdue debt in state court); Blumm & Cadigan, *supra* note 195, at 204, 210.

224 *See, e.g.*, Duro v. Reina, 495 U.S. 676, 685–86 (1990) (rejecting an Indian tribe's assertion of criminal jurisdiction over a nonmember); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (limiting Indian tribes' criminal jurisdiction).

225 Dussias, *supra* note 51, at 34.

226 *See* Montana v. United States, 450 U.S. 544 (1981) (limiting the rights of tribes to regulate hunting and fishing). The Court has been more generous in the context of civil law, allowing members and nonmembers access to tribal courts for civil disputes. Dussias, *supra* note 51, at 44; *see also* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 12 (1987) (holding that in a civil case a tribal court may be able to assert subject matter jurisdiction over a non-tribe member engaged in commercial relations with Indians on the reservation); Williams v. Lee, 358 U.S. 217 (1959) (reversing dismissal for lack of subject matter jurisdiction of a tribal court to regulate non-tribal affairs).

227 411 U.S. 164 (1973).

228 *Id.* at 165.

229 *Id.* at 172.

230 Blumm & Cadigan, *supra* note 195, at 204, 211.

231 450 U.S. 544, 545 (1981).

reservation, the Court defined territory based on who owned each parcel of land.[232] The tribe could thus not regulate any "non-fee" land portion owned by a nonmember.[233]

In sum, the Court has interpreted Justice Marshall's conflation of territory and identity as supporting a pure identity-based definition of sovereignty.[234] The Court has privileged the portions of Justice Marshall's opinion that speak of membership over territory. But Justice Marshall's opinions reflect the de jure and de facto segregation of his time, and there is no reason to believe that his interchangeable use of the terms "membership" and "territory" endorses one theory of sovereignty over the other.

2. A Better Criminal Code

The basis for sovereignty matters also because a territory-based theory of sovereignty leads to better and more modern laws. When reservations were isolated and geographically removed, an identity-based jurisdictional scheme presented few problems.[235] While Indian Country is still predominately rural, remote, and isolated,[236] it has become more accessible to non-Indians in recent decades.[237] A number of factors have contributed to this trend, including population growth, greater mobility, the dismantling of de jure segregation, and increased geographic, cultural, and racial integration.[238]

Integration means Indian Country is accessible to non-Indians, including those who will commit crimes. As more non-Indians move into tribal territory or onto surrounding lands, laws that depend on the identity of victims or suspects increasingly complicate policing in Indian Country. Identity-based jurisdiction requires tribal law enforcement to deduce a suspect's racial and tribal status based on superficial interactions. This slows down investigations and allows for the release of non-Indian assailants following a determination that there is no tribal jurisdiction. Rejecting a territory-based definition of

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232 *Id.* at 560 n.9.

233 *Id.* at 565; Dussias, *supra* note 51, at 58, 62; *see also* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 409 (1989) (rejecting tribal authority to zone fee lands owned by non-members within the reservation).

234 Holcomb, *supra* note 14, at 780.

235 *See id.*

236 *Id.*

237 *Id.*

238 *Id.*

sovereignty weakens the ability of tribal governments to protect all reservation residents regardless of tribal membership or gender.[239]

Proposals to enhance law enforcement in Indian Country without increasing tribal sovereignty will inevitably disappoint. Without overturning *Oliphant*, tribes will still have less authority over criminal conduct within their territories than other sovereigns have over the same conduct.[240] Outside prosecutions rob tribal leadership of an opportunity to strengthen tribal institutions and sovereignty.[241] Policies placing control in federal rather than tribal authorities constrict tribal sovereignty and increase tribal dependence on the federal government.[242]

B. Enforcement Benefits

Tribal authorities are better suited to fight crime in Indian Country due, in part, to the sheer size of reservation lands, as well as the harsh climate that often prevails in the desert and mountainous terrain that characterizes much of Indian Country.[243] Many tribes have assumed primary responsibility for law enforcement by successfully entering into agreements with state law enforcement officials[244] or by decriminalizing unlawful conduct to impose civil sanctions instead.[245] Tribal courts also currently provide the most "reliable and equitable adjudication" in Indian Country.[246] Despite serious financial constraints, tribal authorities and courts work to bring true justice to the residents of Indian Country by being as protective of civil rights, if not more, as federal courts.[247]

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239 Dussias, *supra* note 51, at 43.

240 *Id.*

241 Washburn, *supra* note 101, at 738.

242 Ellison, *supra* note 78, at 22.

243 A QUIET CRISIS, *supra* note 11, at 76.

244 *E.g.*, Timothy J. Droske, Comment, *The New Battleground for Public Law 280 Jurisdiction: Sex Offender Registration in Indian Country*, 101 NW. U. L. REV. 897, 899 (2007) (noting that the Minnesota Attorney General and Minnesota tribes have entered into political agreements to resolve the issue of predatory offenders residing on tribal reservations).

245 *See* Catherine Baker Stetson, *Decriminalizing Tribal Codes: A Response to* Oliphant, 9 AM. INDIAN L. REV. 51 (1981).

246 A QUIET CRISIS, *supra* note 11, at 76.

247 Robert D. Probasco, *Indian Tribes, Civil Rights, and Federal Courts*, 7 TEX. WESLEYAN L. REV. 119, 152 (2001); Joseph Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003).

As of 2000, there were 171 tribal law enforcement agencies.[248] Some tribal law enforcement agencies serve an area comparable to the largest county or regional police departments in the United States.[249] Despite the difficulties tribal authorities face in policing such large territories, tribally operated agencies provide many services[250] and have improved their transparency, participating in more reporting programs than in the past.[251]

The number of tribal courts is growing, increasing the capacity of tribal courts to hear disputes that arise on reservations.[252] Detention facilities are also growing to accommodate the increased police presence in Indian Country. About one-fourth of tribal law enforcement agencies run jails,[253] and since 2004, fifteen new facilities have opened in Indian Country, bringing the total number of jails to eighty-three.[254] Together, these facilities can hold up to 2,900 inmates, but recently the number of inmates totaled only 2,163.[255] The capacity of these facilities has increased faster than the inmate population.[256]

Greater sovereignty for tribal law enforcement could also decrease state involvement in Indian affairs in PL 280 states. Under PL 280, states are allowed to enforce their criminal, but not their regulatory, laws in Indian Country.[257] In *California v. Cabazon Band of Mission Indians*, the Court

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248 MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS FACT SHEET, TRIBAL LAW ENFORCEMENT, 2000 FACT SHEET 1 (2000).

249 *Id.* at 2. For example, the Navajo Nation Department of Law Enforcement covers 22,000 square miles across three states. *Id.* The police department in Reno, Nevada, has the same number of officers but serves only about 57.5 square miles. *Id.*

250 *Id.* at 1. "Nearly all [tribally operated agencies] (94%) responded to calls for service, and a large majority engaged in crime prevention activities (88%), executed arrest warrants (88%), performed traffic law enforcement (84%), and served court papers (76%). A majority of agencies provided court security (56%) and search and rescue operations (53%)." *Id.*

251 *Id.* at 3. As of 2000, 84% of law enforcement entities in Indian Country reported statistics for crimes ranging from violent offenses to property offenses; this number is up from 71% in 1998. *Id.*

252 Riley, *supra* note 174, at 835.

253 HICKMAN, *supra* note 248, at 1.

254 BUREAU OF JUSTICE STATISTICS, JAILS IN INDIAN COUNTRY (2008) [hereinafter JAILS IN INDIAN COUNTRY].

255 *Id.* In 2003, the U.S. Commission on Civil Rights found that Indian Country jails were inadequate and fell short of basic professional standards. A QUIET CRISIS, *supra* note 11, at 78. However, the increase in capacity mentioned above is ameliorating many of those problems. The reality is that facilities all over the United States are overcrowded. *See id.* Admittedly, there is still a need for more funding of tribal correctional facilities. *Id.*

256 JAILS IN INDIAN COUNTRY, *supra* note 254.

257 California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

developed a test to define which state laws are "criminal" and thus enforceable and which are "regulatory" and thus unenforceable.[258]

A tribe's perceived ability to police its territory sometimes influences courts' application of the *Cabazon* test and tips the balance in favor of defining a state law as "regulatory" and thus unenforceable.[259] If a tribe can enforce laws and codes through its own police, courts, and other dispute resolution mechanisms, then a state statute is more likely to be deemed regulatory.[260] Enhancing the sovereignty of tribal governments could thus influence non-Indian courts to limit the number of laws they deem "criminal" and enforceable under PL 280.

Shifting the primary responsibility for policing Indian Country to tribal law enforcement might also induce the federal government to invest more in tribal institutions. The Department of the Interior has used concurrent jurisdiction as a justification for denying law enforcement and criminal justice funding to tribes.[261] Increasing tribal jurisdiction could force the issue of federal funding to the forefront.

Moreover, subjecting non-Indians to tribal law enforcement and adjudication could also lead to increased federal funding. Complaints of due process abuses have historically had their roots in the financial weakness of tribal courts and the lack of training for their personnel.[262] Tribal courts need more facilities, more personnel, and more technical assistance.[263] The federal government continues to underfund tribal justice systems, signaling that it is not a federal priority to ensure the existence of a fair system of justice in Indian Country.[264] Perhaps if non-Indians were to come before tribal courts, the federal government would provide tribal courts with more of the tools needed to safeguard defendants' rights.

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[258] *Id.*

[259] Foerster, *supra* note 79, at 1356; *see also* Confederated Tribes v. Washington, 938 F.2d 146, 149 (9th Cir. 1991).

[260] Foerster, *supra* note 79, at 1352; *see also Cabazon Band of Mission Indians*, 480 U.S. at 214–15.

[261] Goldberg & Champagne, *supra* note 72, at 701–04; *see also* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1417–18 (1997); Jiménez & Song, *supra* note 78, at 1660–62.

[262] A QUIET CRISIS, *supra* note 11, at 77; Russel Lawrence Barsh & J. Youngblood Henderson, *Tribal Courts, The Model Code, and the Police Idea in American Indian Policy*, 40 LAW & CONTEMP. PROBS. 25, 53 (1976).

[263] A QUIET CRISIS, *supra* note 11, at 77.

[264] *Id.*

Evidence suggests that Indian Country residents are more satisfied with the performance of tribal police than that of state or federal police. Residents report that tribal police are more readily available for emergencies than their non-Indian counterparts.[265] For example, residents of PL 280 states report that tribal police respond about twice as fast as state or county police in the same states.[266] In addition, because tribal officers are more visible, they have a greater deterrent effect on crime.[267]

Local tribal police officers benefit from their pre-existing relationships with community members—relationships that make tribal investigations more effective—and greater knowledge of Indian culture. Indian Country residents also report that, despite sparse funding, tribal police conduct more thorough investigations than state and federal law enforcement.[268] Tribal officers elicit more confessions since they have legitimacy to invoke community and tribal values[269] and can better encourage defendants to take responsibility for actions that disrupt the community.[270]

Tribal police in PL 280 states may already be filling the vacuum left by poor state response.[271] For example, the success of cross-deputization agreements shows that tribal police authority over non-Indians can improve law enforcement in Indian Country.[272] A cross-deputization agreement between tribal and county police will typically grant a tribal police officer the same authority as a county law enforcement officer.[273] This enables tribal police to arrest both Indians and non-Indians for violations of state law,[274] which is very beneficial for tribes.[275] Under some of these agreements, tribes can even enforce "regulatory" laws that are outside the state's scope of authority under PL 280.[276]

Tribal officers are also more accountable to Indian Country populations than state or federal officers. Reservation residents want officers on patrol to

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265 Goldberg & Champagne, *supra* note 72, at 711.
266 *Id.* at 713.
267 A QUIET CRISIS, *supra* note 11, at 76.
268 Goldberg & Champagne, *supra* note 72, at 716.
269 Washburn, *supra* note 101, at 721.
270 *Id.*
271 Goldberg & Champagne, *supra* note 72, at 711.
272 *Id.* at 727.
273 *Id.*
274 *Id.* at 727–28.
275 *Id.* at 728.
276 *Id.*; *see also* Foerster, *supra* note 79, at 1345–46.

be more accountable to the community they police.[277] Greater community control, accountability, and resources produce better results and increase community satisfaction.[278] While outside officials focus on punitive goals,[279] an accountable tribal police force is more likely to also incorporate corrective goals in its strategy for combating crime in Indian Country. A tribal police force can account for cultural and social factors that do not exist in the wider population.[280]

C. Reducing Sexual Violence: Why Tribes Need Major Crimes Jurisdiction

As one commentator has noted, "[t]he struggle for sovereignty and the struggle against sexual violence cannot be separated" because sexual violence is an attack on Indian sovereignty itself.[281] Today, American Indian women are plagued by an epidemic of sexual assaults.[282] While tribal institutions have developed traditional approaches for healing victims of sexual assault and domestic violence, these efforts cannot treat the root of the problem. One prominent underlying cause is the jurisdictional structure of the criminal law, which creates perverse incentives for people to attack American Indian women.[283] Thus, the criminal jurisdictional laws must change to win the struggle against sexual violence. To combat sexual violence in Indian Country, tribal law enforcement officials must have the authority to apprehend both Indian and non-Indian suspects.[284] This would create a much-needed coordinated community response to sexual assault.[285]

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277 Goldberg & Champagne, *supra* note 72, at 714.

278 *Id.* at 723.

279 *Id.* at 728.

280 A QUIET CRISIS, *supra* note 11, at 69.

281 Smith, *supra* note 144, at 44.

282 *See Violent Victimization and Race*, *supra* note 92.

283 For an excellent overview of traditional and contemporary tribal criminal law in relation to sexual assault, see Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J.L. & SOC. CHALLENGES 1 (2009). Pacheco advocates for the same jurisdictional changes as this Comment but approaches the problem from the perspective of tribal law, rather than examining the barriers on the non-Indian side. *Id.*

284 *Law Enforcement in Indian Country*, *supra* note 88, at 23 (statement of Bonnie Clairmont, Victim Advocacy Program Specialist, Tribal Law and Policy Institute).

285 *Id.* at 22. For an alternative solution, see Maire Corcoran, Note, *Rhetoric Versus Reality: The Jurisdiction of Rape, the Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L. 415 (2009). Corcoran advocates for tailored legal solutions for individual tribes rather than "blanket federal policies." *Id.*

Some advocates propose extending tribal jurisdiction over non-Indians without tackling the ICRA's sentencing limits.[286] This would leave sexual assaults within the jurisdiction of the federal government. But in the words of one member of Congress, "[t]he Federal Government has not been listening carefully enough to the advocates for our Native women. . . . Providing the tribes with the law enforcement tools to protect our Native women [is key] to public safety in Indian Country."[287] If tribal law enforcement has authority over offenders but limited ability to punish those who commit crimes of sexual violence, extending tribal jurisdiction over non-Indians will confer less than ideal benefits. Before tribal governments can tackle major crimes like rape, Congress must remove the one-year imprisonment and $5,000 fine limitations in the ICRA.

Tribal law enforcement is the best institution for detecting and prosecuting sexual violence in Indian Country.[288] Federal prosecutions by non-Indian authorities offer only a diluted condemnation of sexual violence.[289] The nature of sexual violence makes trust and cultural sensitivity particularly necessary to counteract feelings of shame and humiliation.[290] A woman must trust law enforcement officials enough to confide and cooperate with them; today, American Indian women have no such trust in the criminal justice system.[291]

Understanding the wider context of historical oppression is necessary to effectively combat sexual assault in Indian Country.[292] Non-Indian anti-rape efforts fail to consider how racism and a legacy of colonialism exacerbate rape.[293] To fully heal from abuse, an American Indian woman can benefit from a strong cultural and spiritual identity that may overcome not only her own personal abuse but also "the patterned history of abuse against her family, her nation, and the environment in which she lives."[294] Otherwise, oppressive conditions and internalized victimization will continue to foster a climate in which sexual abuse is all too commonplace.[295] The most effective programs

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286 *See, e.g.*, Holcomb, *supra* note 14, at 774; Ennis, *supra* note 163; Heisey, *supra* note 51.

287 *Law Enforcement in Indian Country*, *supra* note 88, at 3–4 (statement of Sen. Lisa Murkowski).

288 Royster, *supra* note 51, at 61.

289 Deer, *supra* note 13, at 126.

290 *Law Enforcement in Indian Country*, *supra* note 88, at 22 (statement of Bonnie Clairmont, Victim Advocacy Program Specialist, Tribal Law and Policy Institute).

291 *Id.*

292 NAT'L SEXUAL VIOLENCE RES. CTR., *supra* note 93, at 4.

293 Smith, *supra* note 144, at 32.

294 *Id.* at 41.

295 NAT'L SEXUAL VIOLENCE RES. CTR., *supra* note 93, at 3.

for healing are tribe-oriented and revive indigenous spirituality, culture, and sovereignty.[296]

Tribal jurisdiction over all crimes in Indian Country also would secure a greater amount of tribal sovereignty and empower the entire community.[297] The systematic attack on the American Indian woman has been an historical barrier to tribal sovereignty.[298] Strategies to oppress tribal cultures have consistently included the targeted degradation of American Indian women.[299] Strengthening a tribe's power to enforce laws against all who come within its territory, no matter what the crime, is a basic step toward establishing more holistic territorial sovereignty.[300] Restricting tribal jurisdiction based on the nature of a crime is just as much a rejection of territory-based sovereignty as restricting tribal jurisdiction based on the identity of the offender.

The various cultural and governance roles American Indian women hold in many tribes suggests that if tribal governments acquired jurisdiction they would address the problem of violence against women. Indian traditions generally embrace women in positions of political leadership and respect their right to hold property and enjoy exclusive dominion over production and subsistence activities.[301] Clan mothers have commonly monopolized councils that name and remove chiefs, and these councils have had exclusive authority to declare and end war.[302] Additionally, tribal common property systems often benefit women.[303] Generally, tribes prioritize the safety of Indian women because they recognize that a tribe's health depends on the health and safety of its women.[304]

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296 Smith, *supra* note 144, at 41. Smith does not, however, advocate expanding the criminal justice system as it currently exists. For other examples of successful tribe-oriented responses to social and legal problems, see ARROWCHIS & SENECA, *supra* note 202. Alaskan Native communities have been shown to be especially creative and resourceful and thus better meet the needs of their people. *Id.* at 35.

297 *See* Duro v. Reina, 495 U.S. 676, 685 (1990) ("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."); R. Stephen McNeil, Note, *In a Class by Themselves: A Proposal to Incorporate Tribal Courts into the Federal Court System Without Compromising Their Unique Status as "Domestic Dependent Nations,"* 65 WASH & LEE L. REV. 283 (2008) (arguing for an extension of misdemeanor jurisdiction).

298 NAT'L SEXUAL VIOLENCE RES. CTR., *supra* note 93, at 2.

299 *Id.*

300 *Duro*, 495 U.S. at 687.

301 Robert A. Williams, Jr., *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 GA. L. REV. 1019, 1034 (1990).

302 *Id.* at 1040.

303 *Id.*

304 Mending the Sacred Hoop, *supra* note 105, at 2.

Furthermore, the high rate of female political participation within the Indian community suggests that sexist traditionalism will not co-opt tribal politics. Some argue that cultural relativism allows claims for sovereignty to license dominant members of a group, in this case men, to impose injustice on others in the group, in this case women.[305] But empirically, Indian women are more highly represented in prestigious tribal leadership positions than are non-Indian women in comparable American political institutions.[306] American Indian women have rapidly risen to power in impressive numbers.[307] In 1990, in nearly one-third of the tribal councils in Arizona a majority of elected officials were women.[308] At that time, Wilma Mankiller was the elected leader of the Cherokee Nation, the largest American Indian tribe in the United States.[309] In fact, women were chairpersons in six of the twenty federally recognized tribes in Arizona.[310] This is analogous to having a female president and fifteen female governors in the United States at once.[311]

The level of female participation in tribal governance suggests that violence against women will not be ignored if tribal governments assume more criminal jurisdiction. This is not because female community and political leaders will necessarily align themselves with sexual assault victims, but rather it is because women's high rates of political participation show a societal recognition that women's issues and perspectives are important. A system that values women's issues is more likely to investigate and develop strategies to combat violence against women than a patriarchal system that depends on women's subjugation for its identity.

Many Indian communities in fact see improving gender equality as a requisite for improving tribal sovereignty: gender equality is itself Indianness.[312] Federal and state intrusions into tribal sovereignty have, in the past, worsened the condition of American Indian women by undermining tribal strategies for gender equality. For example, the Indian Reorganization Act of 1934 led directly to a disfranchisement of Indian women and decreased female political participation.[313]

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305 Riley, *supra* note 174, at 818.
306 *Id.* at 844; Williams, *supra* note 301, at 1033.
307 Williams, *supra* note 301, at 1035 n.21.
308 *Id.* There are twenty different tribal councils in Arizona. *Id.*
309 *Id.* at 1036.
310 *Id.*
311 *Id.* at 1035 n.21.
312 *See generally* Smith, *supra* note 144; Riley, *supra* note 174; Williams, *supra* note 301.
313 Williams, *supra* note 301, at 1035 n.21.

Furthermore, while sexism may exist in Indian communities, it manifests itself in different ways than in dominant Western culture.[314] Laws designed to address Western sexism may hurt tribal systems and yet fail to address sexism unique to tribal societies.[315] As the Indian Reorganization Act example shows, federal laws can undermine typical Indian political guaranties based on gender, such as requirements that clan mothers serve on tribal councils.[316]

CONCLUSION

Some Indian scholars argue that sexual violence continues to be a tool of colonization and cultural domination.[317] If this is so, legal barriers to the prosecution of sexual violence contribute to a larger pattern of assaults on tribal sovereignty.[318] The high rates of sexual assault in Indian Country therefore require a more empowered tribal response.[319] As long as tribes depend on external governments to police and prosecute, perpetrators and victims will continue to believe that anyone can get away with rape or murder in Indian Country.[320]

Congress can counteract *Oliphant* by extending tribal jurisdiction over non-Indian defendants. Doing so would empower tribal governments and send a clear message that non-Indians must respect the rule of law. Also, the limitation on the types of punishment that tribal courts may impose hampers the ability of tribal governments to deter or punish crimes that are neglected by state or federal authorities.[321] By amending the ICRA, Congress can expressly provide tribal courts with jurisdiction over major crimes like rape.

Criminal jurisdiction over non-Indians and flexibility in sentencing are essential for tribes to manage internal affairs.[322] Tribal justice systems find

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314 *Id.* at 1022–23, 1033.

315 Riley, *supra* note 174, at 818.

316 *Id.* at 842–44. The Tonawand Band of Seneca Indians demands that eight Clan Mothers appoint the tribe's chief and remove him if he fails his duties. *Id.* The Onondaga also have Clan Mothers who select and can remove the tribal council. *Id.* This Clan Mother system is common to all Haudenosaunee Nations. *Id.* The Navajo Nation and several of the Hopi tribes have lands assigned and owned via matrilineal clans. *Id.*; *see also* Williams, *supra* note 301 (arguing that systems of gendered checks and balances ensure, in theory, that women's voices are heard and respected in policy matters).

317 Smith, *supra* note 144, at 32.

318 *See* Deer, *supra* note 13; B.J. Jones, *supra* note 25.

319 *See generally* Deer, *supra* note 21.

320 *All Things Considered: Rape Cases on Indian Lands Go Uninvestigated*, *supra* note 82.

321 Waheed, *supra* note 104, at 290.

322 Heisey, *supra* note 51, at 1070.

themselves at a crucial point in their development.[323] Empowering tribal law enforcement and courts is a necessary step to addressing the serious problem of crime in Indian Country. Until tribal governments can exercise more authority to prosecute and punish defendants, American Indian women will continue to suffer violence at an alarming and unacceptable rate.

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[323] Jiménez & Song, *supra* note 78.

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