Note

Two Is Not Always Better than One: Concurrent Criminal Jurisdiction in Indian Country and the Withering of Tribal Sovereignty Following *McGirt* and *Castro-Huerta*

Marina Berardino∗

There is a violence epidemic plaguing the Native American population across the country. Native women are disproportionality victimized by both sexual and non-sexual violence—over eighty-five percent of Native women are expected to be victims of intimate partner violence, stalking, or sexual violence at some point in their life. Most often, the perpetrators are non-Native, which creates jurisdictional issues. In most states, the only sovereign with the authority to prosecute non-Indian-on-Indian crimes is the federal government. Yet, federal law enforcement often does not investigate these crimes, and federal prosecutors ultimately decline to prosecute many sexual assault and domestic violence crimes in Indian Country. The 2013 and 2022 reauthorizations of the Violence Against Women Act (VAWA) allow Tribal governments to exercise "special Tribal criminal jurisdiction" if they satisfy a laundry list of requirements. But, in practice, many Tribes are unable to satisfy the requirements, leaving the federal government as the sole prosecutorial authority.

However, in 2020, the Supreme Court set the stage for criminal jurisdiction in Indian Country to take a major shift. After deciding in McGirt v. Oklahoma *that parts of northeastern Oklahoma are actually the Muscogee (Creek) Reservation and thus*

∗ J.D. Candidate, University of Minnesota Law School, 2024; Managing Editor, *Minnesota Law Review*, Volume 108. Thank you to Professor Kevin Reitz for supervising this Note; to Scott Dewey for his research assistance; to all the *Minnesota Law Review* editors and staffers who helped polish this Note, especially Calvin Lee, Theresa Green, Abby Ward, Earl Lin, Grace Worcester, Cade Geldreich, Aidan McNamara, Shannon Schooley, Callan Showers, and Jaclyn Willems; and to my family and friends for always supporting me throughout law school. Copyright © 2024 by Marina Berardino.

part of Indian Country, defendants convicted by state courts seized the opportunity to challenge the validity of their convictions. Victor Manuel Castro-Huerta, a non-Indian convicted by an Oklahoma state court for neglecting his five-year-old Indian stepdaughter, challenged his conviction on the ground that the crime was committed in Indian Country. Thus, the federal government would possess the sole prosecutorial power. However, the Supreme Court remarkably held in Oklahoma v. Castro-Huerta *that the federal government and states now have concurrent jurisdiction to prosecute crimes committed by non-Indians in Indian Country.*

The Castro-Huerta *decision, viewed in conjunction with the 2022 reauthorization of VAWA and additional measures granting states criminal jurisdiction, further complicates criminal jurisdiction in Indian Country over non-Indian abusers. Now, there are three prosecutorial authorities: the state, federal, and Tribal governments. But past experiences indicate that expanding the number of agencies with prosecutorial power in Indian Country is not always better. Generally, the consensus from tribal leaders is that* Castro-Huerta *is an unwarranted attack on tribal sovereignty that will inhibit the effective prosecution of crime in Indian Country.*

This Note explores potential solutions to address the ongoing injustice following McGirt *and* Castro-Huerta. *Congress needs to restore Tribal governments' authority to promote public safety and provide justice for victims in Indian Country. A simple amendment to the Indian Civil Rights Act can reaffirm that Tribes have criminal jurisdiction to punish non-Indian offenders by recognizing that Tribes can exercise jurisdiction over all* persons located on or within Indian Country. *Another amendment can remove all Tribal sentencing limitations and empower Tribes to adequately protect victims. These amendments will be most effective when Congress also increases appropriations to better fund Tribal criminal justice systems and their fight against the domestic and sexual violence crisis.*

*While the aforementioned solutions would be politically challenging to achieve, there is also an opportunity to improve relationships under the current post-*Castro-Huerta *scheme. Tribes should be the primary gatherers of evidence to address the cultural barriers between Native victims and non-Tribal law enforcement personnel. Additionally, Tribes should collaborate openly with federal and state law enforcement agencies. This*

Note emphasizes that any path forward needs to center Tribal voices and focus on restoring Tribal sovereignty to effectively address the violence epidemic faced by Native women in Indian Country.

INTRODUCTION

When Lisa Brunner was four years old, she saw her stepfather beat her mother for the first time.[1] At her home on the Ojibwe reservation, Brunner watched him grab his shotgun and beat her mother, listening to the "sickening thud of the butt of the shotgun over her head."[2] This was not the only beating.[3] "There were many more beatings over the years, Brunner said."[4] Twenty years later, Brunner was assaulted by her own husband on the same reservation.[5]

Brunner is only one of thousands of Native[6] women with a similar story. A violence epidemic plagues the Native American population in the United States.[7] Native American women are disproportionately victimized by both sexual and non-sexual violence.[8] It is estimated that nearly eighty-five percent of Native women will be victims of violence, and around fifty percent will suffer intimate partner violence, stalking, or sexual violence at some point in their lifetimes.[9] This issue is complicated by the

1. Sari Horwitz, *New Law Offers Protection to Abused Native American Women*, WASH. POST (Feb. 8, 2014), https://www.washingtonpost.com/world/national-security/new-law-offers-a-sliver-of-protection-to-abused-native-american-women/2014/02/08/0466d1ae-8f73-11e3-84e1-27626c5ef5fb_story.html [https://perma.cc/2YXG-YY9S].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. This Note refers interchangeably to American indigenous people as Native and Indian. However, for jurisdictional purposes, the term Indian is used as a legal term with legal consequences.

7. *See* Graham Lee Brewer, *Native American Women Face an Epidemic of Violence. A Legal Loophole Prevents Prosecutions*, NBC NEWS (June 30, 2021), https://www.nbcnews.com/news/us-news/native-american-women-face-epidemic-violence-legal-loophole-prevents-prosecutions-n1272670 [https://perma.cc/ZS4P-M9TH] (calling the violence against Native women by non-Native people an "epidemic").

8. Garet Bleir et al., *Murdered and Missing Native American Women Challenge Police and Courts*, THE CTR. FOR PUB. INTEGRITY (Aug. 27, 2018), https://publicintegrity.org/politics/murdered-and-missing-native-american-women-challenge-police-and-courts [https://perma.cc/8QNJ-8RPP] ("Native American women across the country are being murdered and sexually assaulted on reservations and nearby towns at far higher rates than other American women.").

9. *See* André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and*

fact that most often the perpetrators of domestic violence against Native women are non-Native,[10] from which a plethora of jurisdictional issues arise. Absent express congressional authorization, Tribal governments lack jurisdiction over all crimes committed by non-Indians.[11] Thus, the federal government typically has exclusive jurisdiction over crimes committed by non-Indian offenders against Indian victims within Indian Country.[12] The federal government exercises significant discretion on whether to prosecute non-Indian offenders who inflict tremendous pain on Native women.

Studies show that Native women and girls commonly decline to report violent crimes or sexual assaults committed by non-Indians on the reservations because "they do not believe there will be justice."[13] This is due in part to a lack of trust in the criminal justice system and the ideological and physical divide between reservation authorities and federal prosecutors.[14] Law enforcement does not investigate, and federal prosecutors ultimately decline to prosecute many sexual assault and domestic violence crimes in Native communities.[15]

Sexual Violence Survey, U.S. DEP'T OF JUST. 43–44 (May 2016), https://www.ojp.gov/pdffiles1/nij/249736.pdf [https://perma.cc/W2TY-2KUC] (reporting that 84.3% of Native women have experienced violence in their lifetime, 56.1% have experienced sexual violence, 55.5% have experienced physical violence by an intimate partner, and 48.8% have experienced stalking).

10. *See, e.g.*, Horwitz, *supra* note 1 ("In at least 86 percent of the reported cases of rape or sexual assault of American Indian and Alaska native women, both on and off reservations, the victims say their attackers were non-native men, according to the Justice Department.").

11. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (holding that non-Indians are immune from Tribal court jurisdiction); *see also infra* notes 16–17 and accompanying text (explaining that the Violence Against Women Act gives Tribes special domestic violence criminal jurisdiction over non-Indians for specific crimes committed against Indians so long as tribes meet certain requirements).

12. *See* 18 U.S.C. § 1152 (granting the federal government jurisdiction over crimes between non-Indians and Indians).

13. Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1582 (2016).

14. *Id.* at 1584 ("The political, cultural, and literal distance between reservation communities and federal prosecutors has only fed the lack of trust in the system and fueled an increasing sense of illegitimacy and hopelessness in Indian country.").

15. *See, e.g.*, *Ending Violence Against Native Women*, INDIAN L. RES. CTR., https://indianlaw.org/issue/ending-violence-against-native-women [https://

Recent efforts by Congress seek to address the lack of justice for Native women suffering from violence perpetuated by non-Native men. In 2013 and 2022, Congress reauthorized the Violence Against Women Act (VAWA).[16] These reauthorizations grant Tribes special criminal jurisdiction over certain crimes committed by non-Indians against Indians, including domestic violence, dating violence, assaults of Tribal law enforcement officers on Tribal lands, child abuse, sexual assault, sex trafficking, and stalking.[17] Thus, Tribal governments can exercise special criminal jurisdiction over non-Indian perpetrators of enumerated crimes and supplement federal prosecutorial authority over these crimes, so long as they adhere to certain requirements.

Jurisdiction over crimes with Native victims changed in 2020. The Supreme Court in *McGirt v. Oklahoma* reinforced the concept that Congress is the only entity that can break promises with Tribes[18] and reestablished that parts of northeastern Oklahoma are actually still the Muscogee (Creek) Reservation and

perma.cc/5ZT2-Z2AT] ("[B]etween 2005 and 2009, U.S. attorneys declined to prosecute 67% of the Indian country matters referred to them involving sexual abuse and related matters. Even grimmer, due to the lack of law enforcement, many of these crimes in Native communities are not even investigated.").

16. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 [hereinafter VAWA 2013]; Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat. 840 [hereinafter VAWA 2022].

17. VAWA 2013 § 904 (granting Tribes jurisdiction over domestic violence and dating violence crimes); VAWA 2022 § 804 (granting Tribes jurisdiction over "(A) assault of Tribal justice personnel; (B) child violence; (C) dating violence; (D) domestic violence; (E) obstruction of justice; (F) sexual violence; (G) sex trafficking; (H) stalking; and (I) a violation of a protection order").

18. This concept is rooted in *Lone Wolf v. Hitchcock*, which held that Congress has plenary power over Tribal relations and thus the power to unilaterally abrogate its treaties with Indian Tribes. 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."). It was further developed in cases on the issue of disestablishment and diminishment of reservations. *See, e.g.*, Solem v. Bartlett, 465 U.S. 463, 470 (1984) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries."); Hagen v. Utah, 510 U.S. 399, 410–11, 421 (1994) (following the reasoning from *Solem* and holding that Congress diminished the Uintah Indian Reservation); Nebraska v. Parker, 577 U.S. 481, 490 (2016) (adhering to the test from *Solem* and relying on the requirement of clear congressional intent to find the reservation had not been diminished).

thus part of Indian Country.[19] Now, forty-three percent of Oklahoma, including Tulsa,[20] is deemed Indian Country, which alters the criminal jurisdictional landscape in Oklahoma.[21] As the State of Oklahoma no longer possesses the prosecutorial authority over crimes with Indian victims in a major portion of the state, the federal government experienced an extreme initial influx of cases.[22] While many state actors reacted negatively to this shift in jurisdiction, many Tribal leaders were satisfied with the decision and felt that, while the initial transition was difficult, increased staff and resources from the federal government led to sufficient investigations and prosecutions of lower-level cases.[23]

In the chaotic wake of *McGirt*, the Supreme Court heard another Indian Country case with the capacity to alter the environment in which non-Indian perpetrators of domestic violence and sexual assault crimes against Indian victims are handled in Indian Country. In *Oklahoma v. Castro-Huerta*, the Court held that the federal government and states have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country.[24] Departing from a long precedential history to the contrary, the Court recognized states' "strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims."[25]

This decision, viewed in conjunction with the Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022)

---

19. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (holding that Congress never disestablished the Creek Reservation).

20. As of 2020, Tulsa's population was 413,066, with 4.4% of the population being racially American Indian and Alaska Native. *See QuickFacts: Tulsa City, Oklahoma*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/tulsacityoklahoma [https://perma.cc/C5VB-7QAS]. Thus, *McGirt* altered the jurisdictional landscape in an area with a relatively large population.

21. Oklahoma v. Castro-Huerta, 597 U.S. 629, 647 (2022) ("[A]bout 43% of Oklahoma—including Tulsa—is now considered Indian country.").

22. *See infra* Part III.A.1 (describing the drastic increase in cases handled by the United States Attorneys' Offices in Oklahoma).

23. *See infra* Part III.A.2 (describing Tribes' reactions to the *McGirt* decision and the federal government's increased allocation of resources); *Castro-Huerta*, 597 U.S. at 691 (Gorsuch, J., dissenting) ("[F]ederal prosecutors are now pursuing lower level offenses vigorously too." (citing Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Respondent, *Castro-Huerta*, 597 U.S. 629 (2022) (No. 21-429) [hereinafter Brief for Muscogee])).

24. *Castro-Huerta*, 597 U.S. at 639.

25. *Id.* at 651.

and additional measures granting states criminal jurisdiction,[26] further complicates the issue of criminal jurisdiction in Indian Country regarding which prosecutorial authority has the power to prosecute non-Indian abusers. Now, there are three prosecutorial authorities: state, federal, and Tribal governments. For the enumerated list of crimes in VAWA 2022[27] committed by non-Indian perpetrators in Indian Country, these three entities have overlapping jurisdiction.

But past experiences indicate that expanding the number of agencies with prosecutorial power in Indian Country is not always better. For example, many non-Tribal law enforcement agencies decline to prosecute Indian Country crimes and are often inhibited by inherent challenges present in Indian Country, like cultural barriers and difficulty locating and contacting witnesses or victims.[28] The consensus from Tribal leaders is that *Castro-Huerta* is an unwarranted attack on Tribal sovereignty that will inhibit the effective prosecution of crime in Indian Country and prevent justice for Native women victimized by non-Native abusers.[29]

This Note analyzes the potential impact of *McGirt* and *Castro-Huerta* on the prosecution of domestic violence and sexual assault crimes perpetrated by non-Indians against Indians in Indian Country. Part I offers an overview of the mosaic of criminal jurisdictions in Indian Country, from the founding of the United States to today. It details how Tribal governments prosecute crimes in their own criminal justice systems. Part II explores two recent Indian Country Supreme Court cases, *McGirt v. Oklahoma*[30] and *Oklahoma v. Castro-Huerta*,[31] to provide an understanding of contemporary Indian Country jurisdiction for crimes

26. *See, e.g.*, *infra* notes 61–74, 106–07 and accompanying text (discussing laws granting states criminal jurisdiction and the impacts of the passage of VAWA 2022).

27. VAWA 2022, Pub. L. No. 117-103, § 804, 136 Stat. 840, 898.

28. *See infra* Part III.B.2 (describing barriers to the prosecution of Indian Country crimes by states and the federal government).

29. *See* Oklahoma v. Castro-Huerta *Listening Sessions Summary Report*, U.S. DEP'T OF JUST. & U.S. DEP'T OF THE INTERIOR 5 (Nov. 29, 2022) [hereinafter *Summary Report*], https://www.bia.gov/sites/default/files/dup/tcinfo/castro-huerta_tribal_comment_summary_report_11.29.22_sgs_edits_508.pdf [https://perma.cc/MDM5-HMYB] (detailing Tribal disappointment with the decision and concern that public safety will not improve in its aftermath).

30. 140 S. Ct. 2452 (2020).

31. 597 U.S. 629 (2022).

with non-Indian perpetrators and Indian victims. Part III explores the impact of *McGirt* and *Castro-Huerta* on the ability of prosecutors to achieve justice for Native victims of domestic and sexual violence committed by non-Indians. It first analyzes the immediate effects of *McGirt*, looking at the referral of cases from Oklahoma prosecutors' offices to United States Attorneys' Offices, and then looks at Tribal reactions, which have generally been positive. Part III then explores the initial reactions to the *Castro-Huerta* decision, finding that Tribes are outraged with the decision, and argues that granting concurrent jurisdiction is not the solution to the domestic and sexual violence epidemic in Indian Country. Finally, Part IV discusses possible solutions and recommendations, including potential congressional action that will wholly restore Tribal governments' authority to promote public safety and provide justice for Native victims. This includes amending the Indian Civil Rights Act (ICRA)[32] to restore Tribal jurisdiction over non-Indians in Indian Country, eliminating sentencing restrictions, and amending Public Law 280 (PL-280)[33] to prioritize Tribal consent when expanding jurisdiction to states. It also argues for the need to continue to increase funding and resources to Tribal criminal justice systems to ensure Tribes are equipped to exercise restored authority. This Part also discusses the need for the three prosecutorial authorities to establish collaborative working relationships while waiting for congressional action. This Note concludes that the best way to combat the violence epidemic plaguing Native women is to recenter Tribal voices and restore Tribal authority.

I. CRIMINAL JURISDICTION IN INDIAN COUNTRY

Recently, the Supreme Court made key decisions regarding criminal jurisdiction in Indian Country.[34] The intricacies of criminal jurisdiction in Indian Country developed through treaties, several Supreme Court and lower court decisions, as well as the implementation of certain pieces of legislation. Today, criminal jurisdiction in Indian Country depends on "shifting and sometimes contradictory variables, including where the crime was

32. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1301–1304).

33. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360).

34. *See McGirt*, 140 S. Ct. at 2452; *Castro-Huerta*, 597 U.S. at 629.

committed, whether both the defendant and victim are Indians, and the classification of the alleged crime, among other considerations."[35] This Part begins with the historical context of Tribal relations with the United States in the treaty era, moves to the array of legislative acts and Supreme Court cases that led to the complex mosaic of criminal jurisdiction in Indian Country today, and discusses the two reauthorizations of VAWA with Tribal provisions. This Part concludes with a brief discussion of the structure and practices of Tribal criminal justice systems.

A. HISTORICAL CONTEXT OF TRIBAL RELATIONS WITH THE UNITED STATES

Before European contact, criminal jurisdiction was controlled by Tribal customary law.[36] However, in the post-contact era, rising hostility between Native Americans and settlers led to the introduction of what would become federal jurisdiction into Indian Country.[37] Then, from the United States' founding in 1776 until around 1871, Indian affairs were primarily handled through treaties with the federal government, which emulated the model set during the Spanish, Dutch, and English colonial occupations.[38] For example, the first treaty between the Native Americans and the United States, after the Declaration of Independence, treated the Delaware Nation as a fully sovereign nation and called for mutual cooperation in criminal law enforcement.[39] Many of the early treaties followed a similar pattern, relying on the Tribes' sovereignty and recognizing their

35. Riley, *supra* note 13, at 1575 (footnotes omitted).

36. *Id.* at 1577 (citing K.N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1987)) (describing criminal jurisdiction over Indians before Europeans arrived on the continent and how it changed over the next few centuries).

37. *Id.*

38. Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 953 (1975) (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 33–67 (1942)).

39. Treaty with the Delawares, Delaware Nation-U.S., art. IV, Sept. 17, 1778, 7 Stat. 13, 14 ("[N]either party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice . . . .").

jurisdiction to deal with non-Natives settling and committing crimes on Native lands.[40]

While these early treaties seemingly respected Tribes' sovereignty, it is critical to acknowledge that these treaties impinged on Tribal sovereignty by granting the federal government the power to prosecute more serious crimes committed by Indians against non-Indians.[41] These treaties predicated criminal jurisdiction on the citizenship of the offender and the victim, not just on land sovereignty.[42] The right of Tribal sovereignty over purely Indian affairs was unambiguously guaranteed by most of the treaties entered into after 1855, solidifying that the United States federal government lacked complete jurisdiction over intra-Tribal crimes on reservations.[43] Thus, even though Tribes retained their sovereignty over intra-Tribal crimes in Indian Country, the federal government began to wither Tribal sovereignty by interfering when the crimes were serious and the victim was a non-Indian.

Overall, the treaty era approached the issue of criminal jurisdiction in Indian Country in a variety of ways. While the approaches changed over time, "the changes were not dramatic since many of the relevant treaty provisions merely tracked boilerplate jurisdictional provisions from prior treaties."[44] Jurisdictional issues in Indian Country today are no longer handled by treaties,[45] but the jurisdictional provisions of the early treaties laid the groundwork for how the United States would approach criminal jurisdiction in Indian Country moving forward.[46]

---

40. Clinton, *supra* note 38, at 953–54 (describing early treaties as recognizing Tribes as sovereign powers and viewing their jurisdiction accordingly).

41. *Id.* at 954 (collecting several treaties between the United States and various Tribal nations); *see also* Riley, *supra* note 13, at 1577 ("It was understood that the federal government had a specific federal interest in preventing violent crime involving Indians and settlers.").

42. Clinton, *supra* note 38, at 954.

43. *Id.* at 956–57 (analyzing treaties granting Tribes jurisdiction over internal affairs).

44. *Id.* at 957.

45. The treaty era ended in 1871 when the House of Representatives added a rider to an appropriations bill that ceased to recognize Tribes as independent nations "with whom the United States may contract by treaty." *See* Indian Appropriations Act of 1871, Pub. L. No. 41-120, 16 Stat. 544, 566 (1871).

46. Clinton, *supra* note 38, at 957 (arguing that even though the varied jurisdictional treaty provisions were somewhat ignored, they formed the

B. THE DEVELOPMENT OF INDIAN COUNTRY CRIMINAL JURISDICTION BEYOND THE TREATY ERA

After the treaty era, much of the developments in criminal jurisdiction over Indian Country were handled by legislative and judicial action. For most of United States history, the general rule has been that states do not have jurisdiction in Indian Country if one of the parties is an Indian.[47] Instead, it was a widely shared belief that the "federal government had a specific federal interest in preventing violent crime involving Indians and settlers."[48] In line with this belief, Congress passed the General Crimes Act in 1817.[49] This legislation extended federal criminal jurisdiction to include crimes between Indians and non-Indians while excluding wholly internal crimes (Indian-on-Indian).[50] The Act also did not apply to crimes with Indian offenders who had already been punished by the Tribe or to any case where treaty stipulations had given Tribes the exclusive jurisdiction to such offense.[51] For example, Tribes maintain exclusive jurisdiction over internal misdemeanors.[52] States had no jurisdiction in Indian Country until the Supreme Court decided *United States v. McBratney*, which held that when non-Indians commit crimes against non-Indians in Indian Country, the state retains the exclusive power to prosecute.[53]

---

foundation for how the United States would approach criminal jurisdiction over Indian lands moving forward).

47. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 595–96 (1832) (holding that state laws have no role in Indian Country).

48. Riley, *supra* note 13, at 1577.

49. *See* General Crimes Act of 1817, chap. 92, 3 Stat. 383 (codified at 18 U.S.C. § 1152).

50. *Id.*

51. *Id.*

52. Riley, *supra* note 13, at 1577.

53. United States v. McBratney, 104 U.S. 621, 624 (holding that crimes by non-Indians against non-Indians are in the exclusive jurisdiction of the states); *see also* Riley, *supra* note 13, at 1577 ("*McBratney* introduced a rare and unusual premise—that states could have a role in Indian country jurisdiction—but maintained the ever-important rule that states had no jurisdiction in any situation involving an Indian . . . .").

In 1881, Tribal sovereignty continued to wither in response to the Brûlé Sioux[54] Tribe's implementation of a restorative punishment for the murder of a popular chief, Spotted Tail, by an Indian man named Crow Dog on the Great Sioux Reservation.[55] After hearing about the resolution of the murder, the United States prosecuted Crow Dog and he was convicted of murder in a federal court in Deadwood, South Dakota.[56] But on a writ of habeas corpus to the Supreme Court, the Court concluded that the federal government does not have jurisdiction to prosecute Indian-on-Indian crimes.[57] Crow Dog's acquittal motivated Congress to enact the Major Crimes Act of 1885,[58] which extended the federal government's jurisdiction to certain enumerated major crimes committed by an Indian in Indian Country, regardless of whether the victim is Indian or non-Indian.[59] In essence, the Major Crimes Act strips Tribal jurisdiction for serious crimes, implicitly representing a sense of distrust in Tribal abilities to

54.

> The word "Sioux" is believed to be a French corruption of a derogatory name used by . . . historic enemies of this group of Indian tribes. It is, however, the term used in most treaties and decisions regarding this group, and is also the name given to most of their reservations, so we will use it . . . to avoid confusion. The terms the people called Sioux use to describe themselves are Lakota, Dakota, and Nakota . . . .

ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW 90 n.1 (4th ed. 2019).

55. *See* James Winston King, Note, *The Legend of* Crow Dog*: An Examination of Jurisdiction over Intra-Tribal Crimes Not Covered by the Major Crimes Act*, 52 VAND. L. REV. 1479, 1486 (1999) ("After the murder, Crow Dog's family met with Spotted Tail's family. As Indian tradition prescribed, they reached a compensation agreement to settle the murder. Following tribal law, Crow Dog's family agreed to pay Spotted Tail's family $600 in cash, eight horses, and one blanket." (footnotes omitted)).

56. *Id.* at 1486–87.

57. *See Ex parte* Crow Dog, 109 U.S. 556, 571–72 (1883) ("[O]ffenses committed by . . . Indians against each other were left to be dealt with by each tribe for itself, according to its local customs.").

58. Indian Appropriations Act of 1885, Pub. L. No. 48-341, § 9, 23 Stat. 362, 385 (1885) (codified at 18 U.S.C. § 1153).

59. These crimes include, but are not limited to, murder, assault resulting in serious bodily injury, and most sexual offenses. *Id.*; *SANE Program Development and Operation Guide*: *Tribal Law*, OFF. FOR VICTIMS OF CRIME, https://www.ovcttac.gov/saneguide/legal-and-ethical-foundations-for-sane-practice/tribal-law [https://perma.cc/EB7N-DK9D].

prosecute these crimes in accordance with the American sense of justice.[60]

Congress has since passed other legislation that expands states' jurisdiction to prosecute crimes in Indian Country. In 1953, Congress passed an act to reconcile the tension "between wholly abandoning the Indians to the states and maintaining them as federally protected wards, subject only to federal or tribal jurisdiction."[61] Public Law 280 (PL-280)[62] granted complete criminal jurisdiction over crimes committed by Indians in most or all of Indian Country to five enumerated states, with a subsequent amendment in 1958 adding an additional state.[63] PL-280 took away the federal government's ability to prosecute Indian Country crimes in those states based on the General Crimes Act and the Major Crimes Act, and it authorized those mandatory PL-280 states to prosecute most crimes committed in Indian Country.[64] Generally, PL-280 expanded state jurisdiction while limiting federal criminal jurisdiction in Indian Country in the enumerated states.[65]

While PL-280 only mandatorily applies to six states, other states have the discretion to assume jurisdiction over crimes committed by Indians arising out of Indian Country.[66] They can

---

60. *See* Riley, *supra* note 13, at 1578 (arguing that the Major Crimes Act was enacted to dismantle traditional Tribal justice systems and assimilate Tribes to white society and systems).

61. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 537 (1975).

62. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360).

63. These states were California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.* A 1958 amendment extended the Act to the then territory of Alaska. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545.

64. *See What Is Public Law 280 and Where Does It Apply?*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFS., https://www.bia.gov/faqs/what-public-law-280-and-where-does-it-apply [https://perma.cc/SGJ4-MPPQ] ("Congress enacted Public Law 83-280 . . . to grant certain states criminal jurisdiction over American Indians on reservations and to allow civil litigation that had come under tribal or federal court jurisdiction to be handled by state courts. . . . In addition, the federal government gave up all special criminal jurisdiction in these states over Indian offenders and victims.").

65. *See* Clinton, *supra* note 38, at 969 (describing PL-280 as "significantly" expanding state jurisdiction).

66. *See* Goldberg, *supra* note 61, at 537–38 ("The statute originally . . . offered all other[] [states] civil and criminal jurisdiction over reservation Indians regardless of the Indians' preference for continued autonomy.").

do this through state legislative enactments so long as they obtain the consent of the Native Tribe occupying the part of Indian Country over which the state seeks criminal jurisdiction.[67]

In addition, the Tribal Law and Order Act (TLOA),[68] signed into law in 2010, allows Tribal governments to request that the federal government, through the U.S. Department of Justice (DOJ), reassume criminal jurisdiction in Indian Country in states with PL-280 jurisdiction.[69] If the DOJ grants the request, the federal government can then prosecute Indian Country General Crimes Act and Major Crimes Act cases from the reservation located in a mandatory PL-280 jurisdiction.[70] When the federal government reassumes criminal jurisdiction on PL-280 reservations, state and Tribal jurisdiction does not change.[71] The state retains its PL-280 jurisdiction and Tribal jurisdiction remains unaltered.[72] What results is concurrent jurisdiction where in some instances the federal, state, and Tribal governments have overlapping prosecutorial authority.[73] While PL-280 expanded state jurisdiction in Indian Country to prosecute General Crimes Act and Major Crimes Act cases, it does not explicitly grant state jurisdiction over crimes committed by non-Indians with Indian victims.[74]

Moreover, in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that absent express congressional authorization, Tribes lack jurisdiction over all crimes committed by non-

67. *See* Clinton, *supra* note 38, at 970 (noting that the original PL-280 did not require Tribal consent prior to states assuming criminal jurisdiction, but a 1968 revision required Tribal consent moving forward).

68. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, §§ 201–266, 124 Stat. 2261 (codified in scattered sections of 18, 21, 25, 28, 34, 42 U.S.C.) [hereinafter TLOA].

69. *Id.* § 221; *see* Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 169 (2010) (summarizing TLOA's defining provisions including allowing PL-280 states to request a return to federal jurisdiction).

70. Hart, *supra* note 69.

71. *Id.*

72. *Id.*

73. *Id.*; *see also infra* Part III.B.2 (describing what concurrent jurisdiction looks like in practice).

74. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360) (failing to specify the extension of jurisdiction to crimes committed by non-Indians); *see also* Goldberg, *supra* note 61, at 593 n.260 ("PL-280 does not purport to regulate assertion of jurisdiction over non-Indians.").

Indians in Indian Country, even when the victim is Indian.[75] The Court reasoned that there is a general presumption shared by Congress, the Executive Branch, and lower federal courts, that Tribal courts do not have any power to try non-Indians.[76] Additionally, the Court determined that by submitting to the sovereignty of the United States in exchange for the protection of the United States, Tribes necessarily yield their power to prosecute non-Indians except in a way acceptable to Congress.[77]

This decision has been detrimental to Tribes' ability to maintain control over crimes committed on their land, especially domestic and sexual violence committed by non-Indians.[78] "In Indian country, non-Indians are essentially above the law," making Indians, and particularly Indian women, "prime victims for non-Indian sexual predators."[79] Because Tribes lack the ability to prosecute these perpetrators if the Tribe does not meet VAWA's requirements, they must rely on non-Tribal law

75. 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."). Normally, when a person travels to another jurisdiction, their nationality does not protect them from prosecution, as "jurisdiction in those cases is based on the local sovereign's control over its territory." Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 339 (2014). However, today, this general principle disappears when deciding who exercises prosecutorial authority over non-Indians in Indian Country. *See infra* Part I.C (explaining statutory extensions of Tribal authority over non-Indians within their territory and the barriers to implementing this authority).

76. *Oliphant*, 435 U.S. at 197–208 (discussing that various pieces of legislative history, court decisions, and the relevant treaty contain evidence that there is a general presumption against Tribal jurisdiction over non-Indians).

77. *See id.* at 206–09, 211. To support this contention, the Court pointed to the Treaty of Point Elliott, signed by the Suquamish Tribe, and noted that "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union." *Id.* at 211 (quoting United States v. Kagama, 118 U.S. 375, 379 (1886)).

78. *See* Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, AM. CONST. SOC'Y 5–6 (Mar. 2009), https://www.acslaw.org/wp-content/uploads/2018/05/Fletcher-Issue-Brief.pdf [https://perma.cc/GT93-L6Z9] (describing the aftermath of the *Oliphant* decision that prevented prosecution of non-Indian perpetrators); Riley, *supra* note 13, at 1581–83 (same).

79. Adam Crepelle, *Tribal Courts, the Violence Against Women Act, and Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction to Improve Public Safety in Indian Country*, 81 MONT. L. REV. 59, 59 (2020) (footnotes omitted).

enforcement to police reservations.[80] However, the nearest non-Tribal law enforcement agency is often over 100 miles away from Indian Country, and state and federal prosecutors often do not prioritize Indian Country law enforcement.[81] The difficulties in ensuring Tribal land and Native women are adequately protected by non-Tribal law enforcement is explored further in Part III.

C. REAUTHORIZATIONS OF THE VIOLENCE AGAINST WOMEN ACT WITH TRIBAL PROVISIONS

In response to cries for change after *Oliphant*, Congress finally acted when it reauthorized VAWA in 2013 with Tribal provisions.[82] VAWA 2013 allows Tribes to exercise "special domestic violence criminal jurisdiction" (SDVCJ) over non-Indians so long as various requirements are met.[83] While Tribes acting under VAWA found success,[84] most Tribes were unable to exercise SDVCJ due to issues with satisfying requirements.[85] Thus, in 2022 Congress reauthorized VAWA again with more Tribal provisions.[86] It expanded the list of applicable crimes and removed the requirement that the defendant have ties to the prosecuting Tribe.[87] This Section explores both reauthorizations to better

80. *See id.* at 76–77 (describing the procedural requirements Tribal governments must meet under VAWA to prosecute non-Indian perpetrators).

81. *Id.* at 72 (citing Fletcher, *supra* note 78, at 6).

82. VAWA 2013, Pub. L. No. 113-4, §§ 901–910, 127 Stat. 54, 118–26; *see* Riley, *supra* note 13, at 1589–91 (detailing the lobbying efforts and key testimony that urged Congress to pass VAWA 2013).

83. *See* VAWA 2013 § 204 (authorizing SDVCJ).

84. *See, e.g.*, *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report*, NAT'L CONG. OF AM. INDIANS 1 (Mar. 20, 2018), https://archive.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/Y8HS-9SVR] (noting that as of 2018, the eighteen implementing Tribes achieved seventy-four convictions of non-Indian abusers and that VAWA led to community conversations about domestic violence and provided an impetus to update Tribal criminal codes).

85. *See* Crepelle, *supra* note 79, at 78–79 (noting that only 25 of 573 federally recognized Tribes had implemented VAWA by 2020 and that many Tribes have not implemented it due to costs, its limited scope, and the perception that it promotes further colonization).

86. VAWA 2022, Pub. L. No. 117-103, §§ 801–813, 136 Stat. 840, 895–910.

87. Riley, *supra* note 13, at 1591; *see* VAWA 2022 § 804 (expanding covered crimes to include assault of Tribal justice personnel, child violence, obstruction of justice, sexual violence, sex trafficking, and stalking).

understand the specific dynamics between sovereigns regarding domestic violence crimes.

1. 2013 Reauthorization of the Violence Against Women Act

Oliphant left many Native people frustrated with the withering of their sovereignty and subsequent inability to prosecute crimes committed by non-Natives under Tribal authority.[88] Native people lobbied for a remedy, at least for "crimes disproportionately suffered by Native women at the hands of non-Native men, like domestic violence."[89] Disturbing personal stories about the abuse faced by Native women in Indian Country, like Brunner's,[90] inspired the reauthorization of the Violence Against Women Act that would incorporate Tribal provisions.[91]

Because of the significant problem of domestic violence in Indian Country, Congress reauthorized VAWA in 2013.[92] This reauthorization included Tribal provisions that gave Tribes the ability to combat domestic violence in Indian Country.[93] VAWA 2013 recognized the authority of participating Tribes to exercise SDVCJ over particular defendants, regardless of whether they are Indian or non-Indian, when the defendants "commit acts of

88. *See supra* notes 78–81 and accompanying text (discussing the aftermath of *Oliphant*).

89. Riley, *supra* note 13, at 1589.

90. *See supra* notes 1–5 and accompanying text (describing Lisa Brunner's experiences of violence at the hands of her father and husband in Indian Country). Diane Millich presented another disturbing illustration of the violence faced by Native women. *See Horwitz*, *supra* note 1. Millich, a Native woman living on the Southern Ute Indian Reservation in Colorado, married a non-Native man and suffered routine violence and abuse by him. *Id.* She tried to have Tribal police help, but they continually told her that they had no jurisdiction in the case. *Id.* The violence escalated after Millich filed for divorce, and ultimately ended with Millich's coworker taking a bullet in the shoulder to save her. *Id.* Millich went to Washington, D.C., to tell her story to congressional leaders as she and other Native women lobbied for the passage of the reauthorization of VAWA. *Id.*

91. Riley, *supra* note 13, at 1590.

92. *See Horwitz*, *supra* note 1 (noting that Representative Tom Cole, a Republican of Oklahoma and member of the Chickasaw Nation, helped support the bill in the House of Representatives).

93. Anne Perry, *Conquering Injustice: An Analysis of Sexual Violence in Indian Country and the* Oliphant *Gap in Tribal Jurisdiction*, FED. LAW., Apr. 2018, at 53, 55.

domestic violence or dating violence or violate certain protection orders in Indian country."[94]

In order for the Tribe to exercise this jurisdiction, the non-Indian defendant must have "sufficient ties" to the prosecuting Tribe.[95] This is satisfied by any of the following: residing in the Indian Country of the participating Tribe; being employed in the Indian Country of the participating Tribe; or being a spouse, intimate partner, or dating partner of a Tribal member or of a Native person who resides in the Indian Country of the participating Tribe.[96] Under VAWA 2013, for the first time since *Oliphant*, Tribes were given the ability to exercise criminal jurisdiction over non-Indian offenders.[97] Reacting to its passage, Brunner said, "[Native women] have always known that non-Indians can come onto our lands and they can beat, rape and murder us and there is nothing we can do about it . . . . Now, our tribal officers have jurisdiction for the first time to do something about certain crimes."[98]

To use their special criminal jurisdiction, a Tribe must follow specific steps within its justice system and request approval from the DOJ.[99] While the 2013 reauthorization of VAWA was an important step for Tribes to reassert their authority over crimes on their territory, it had its limitations. Most relevant to

94. *2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)*, U.S. DEP'T OF JUST. (last updated Apr. 7, 2023), https://www.justice.gov/tribal/2013-and-2022-reauthorizations-violence-against-women-act-vawa [https://perma.cc/D2CJ-JFDE].

95. Riley, *supra* note 13, at 1591 & n.138.

96. *Id.* at 1591 n.138.

97. *See* Crepelle, *supra* note 79, at 76 ("VAWA partially reversed *Oliphant* by authorizing tribes to prosecute non-Indians who commit domestic violence, dating violence, or violate protection orders.").

98. Horwitz, *supra* note 1.

99. These steps include following the requirements under TLOA and all of the following:

> (1) [T]ribes may not exclude non-Indians from jury pools and they must show that there is a fair cross section of the community in a tribe's jury pool, (2) tribes must inform detained defendants of their right to file a federal habeas corpus petition, and (3) tribal courts must ensure that 'all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant' are provided.

Perry, *supra* note 93, at 55 (quoting VAWA 2013, Pub. L. No. 113-4, § 904(d)(4), 127 Stat. 122).

this Note, VAWA 2013 did not give Tribes jurisdiction to prosecute ancillary crimes that often happen within the scope of domestic violence, such as child abuse, and it also excluded sexual assault and rape committed by a "stranger."[100] Thus, when Native women in Indian Country were attacked by men who were not their partners, the Tribes were left without the power to prosecute.[101] The federal government, in most cases, possessed the sole discretion on whether to pursue prosecution of these crimes.[102]

2. 2022 Reauthorization of the Violence Against Women Act

While VAWA 2013 seemed like a huge step forward initially, Tribes struggled to actually exercise SDVCJ.[103] Five years after VAWA 2013, only eighteen Tribes were known to be exercising SDVCJ.[104] This is due in large part to a lack of Tribal resources and services to support implementation.[105] In an attempt to address the pitfalls of the 2013 reauthorization, Congress recently reauthorized VAWA again, and President Joe Biden signed it into law on March 15, 2022.[106] Responding to continued lobbying efforts to expand the list of VAWA 2013 crimes, Congress amended the list to also recognize Tribal criminal jurisdiction over assaults on Tribal law enforcement officers on Tribal lands, child abuse, sexual assault, sex trafficking, and stalking.[107] Additionally, Congress changed the name of the newly expanded

100. Riley, *supra* note 13, at 1591–92.

101. Perry, *supra* note 93, at 55.

102. The federal government, however, often declines to prosecute individual cases of rape. *See supra* note 15 and accompanying text (noting that U.S. Attorneys declined to prosecute over two-thirds of the Indian Country sexual abuse matters referred to them between 2005 and 2009).

103. *See* Crepelle, *supra* note 79, at 78–79 (explaining that costs, the limited scope of VAWA, and the perception that VAWA promotes further colonization are factors that prevented the implementation in many Tribes).

104. *See VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report*, *supra* note 84, at 5 (providing a detailed timeline of which Tribes exercised SDVCJ and when).

105. *See id.* at 29–31 (detailing that SDVCJ is prohibitively expensive for some Tribes).

106. *2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)*, *supra* note 94.

107. Press Release, White House, Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA) (Mar. 16, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vawa [https://perma.cc/WXK3-UJJ2].

Tribal jurisdiction from SDVCJ to "special Tribal criminal jurisdiction" (STCJ).[108] The 2022 reauthorization also removed the "sufficient ties" provision,[109] thus no longer limiting Tribal jurisdiction to defendants who live or work on the Tribe's Indian Country or who have a relationship with a Tribal member or non-member Native resident that qualifies under the provision.[110] Thus, the 2022 reauthorization has the potential to shift more power back to the Tribes to exercise widened STCJ over violent crimes committed by non-Indian strangers against Native women. However, Congress must also focus on ways to increase funding to Tribal criminal justice systems to give them the support to exercise STCJ and implement VAWA effectively.

D. TRIBAL COURTS AND THEIR ABILITY TO ENFORCE THE LAW IN INDIAN COUNTRY

While Indian Country criminal jurisdiction is largely divided between the Tribal and federal governments, Tribes often face severe limitations, imposed by the federal government, in their ability to adequately respond to and handle crimes committed by non-Indian and Indian perpetrators in Indian Country. Until 2010, ICRA limited the sentencing authority of Tribes to a maximum of one year imprisonment or a fine of $5,000 per count, regardless of the type of crime.[111] Tribal leaders and advocates lobbied to ease the restraints on Tribal prosecutorial and sentencing authority.[112]

In 2010, Congress passed TLOA, which increased Tribal sentencing power, mandated reporting of federal declination rates, and established the Indian Law and Order Commission

108. VAWA 2022, Pub. L. No. 117-103, § 804, 136 Stat. 840, 900.

109. *See supra* note 95 and accompanying text.

110. *See* VAWA 2022, Pub. L. No. 117-103, § 804, 136 Stat. 840, 901 (redesigning VAWA to allow participating Tribes to exercise its STCJ over defendants who commit covered crimes in Indian Country).

111. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202(7), 82 Stat. 73, 77 (codified at 25 U.S.C. § 1302(a)(7)(B)). Originally, ICRA limited the fines Tribes could impose to a $500 maximum. *Id.* However, in 1986, the maximum fine amount was increased to $5,000. Bj Jones et al., *Intersecting Laws: The Tribal Law and Order Act and the Indian Civil Rights Act*, BUREAU OF JUST. ASSISTANCE 4 (Oct. 2016), https://www.appa-net.org/eweb/docs/APPA/pubs/ILTLOAICRA.pdf [https://perma.cc/99PY-N443].

112. Riley, *supra* note 13, at 1569.

(ILOC).[113] Under TLOA, Tribes can impose punishments of up to three years and fines of up to $15,000.[114] Tribes "can also stack sentences for crimes, with a maximum term of nine years in prison."[115] A Tribe can only impose these enhanced sentences under TLOA if the Tribal court adheres to certain requirements.[116] These requirements concern, among other things, protecting defendants' rights, availability of adequate counsel for defendants, proper qualifications for judges and defense counsel, and consistent recordkeeping of proceedings.[117] TLOA actively "encourages tribes to use 'alternatives to incarceration or correctional options as a justice system response to crime in their communities.'"[118] It also states that Tribes can require defendants to

113. *See id.* at 1585; Michelle Rivard Parks, *Tribal Law and Order Act: Enhanced Sentencing Authority*, TRIBAL JUD. INST. 2–5 (July 2015), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/TLOAESAQuickReferenceChecklist.pdf [https://perma.cc/DDH9-3R3P] (detailing the enhanced sentencing authority in TLOA).

114. Parks, *supra* note 113, at 2.

115. Riley, *supra* note 13, at 1585; 25 U.S.C. § 1302(a)(7)(D).

116. *See* Riley, *supra* note 13, at 1586 ("To exercise the enhanced sentencing authority afforded by TLOA, tribes must follow additional statutory requirements intended to more closely align tribal court proceedings with those of the federal Constitution . . . .").

117. The following is required:

> The defendant is provided effective assistance of counsel at least equal to that under the United States Constitution, and at the expense of the tribes for indigent defendants; [t]he defense counsel [is] licensed by any jurisdiction that applie[s] appropriate licensing standards, ensure[s] competency, and has rules of professional responsibility; [t]he defendant is not subject to excessive bail, excessive fines or cruel and unusual punishment; [t]he presiding judge has sufficient legal training for a criminal proceeding and [is] licensed to practice law in any jurisdiction in the United States; [a]ll criminal laws, rules of evidence, and rules of procedure etc. are publicly available; and [t]he tribe [maintains] a record of criminal proceedings.

Parks, *supra* note 113, at 2; *see also* 25 U.S.C. § 1302(c). Enhanced sentencing is also limited to defendants who have either (1) "been previously convicted of the same or comparable offense by any jurisdiction in the United States" or (2) "[are] being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States." Parks, *supra* note 113, at 3; TLOA, Pub. L. No. 111-211, § 234(a)(3), 124 Stat. 2261, 2280; 25 U.S.C. § 1302(b).

118. Riley, *supra* note 13, at 1586 (quoting Christine Folsom-Smith, *Enhanced Sentencing in Tribal Courts: Lessons Learned from Tribes*, TRIBAL JUD. INST. 1, 1 (2015), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/TLOA-TribalCtsSentencing.pdf [https://perma.cc/HTZ3-9T7L]).

"serve the sentence . . . in an alternative rehabilitation center of an Indian tribe; or . . . serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law."[119]

VAWA 2022 also places requirements on Tribes if they wish to exercise STCJ over certain crimes committed by non-Indians.[120] A participating Tribe must adhere to TLOA requirements outlined above; "protect the rights of defendants under the Indian Civil Rights Act of 1968"; "[i]nclude a fair cross-section of the community in jury pools and not systematically exclude non-Indians"; and "[i]nform . . . defendants ordered detained by a Tribal court of their right to file federal habeas corpus petitions."[121]

While TLOA and VAWA 2022 symbolize a movement in favor of increased Tribal sovereignty and action against the violence epidemic in Indian Country, the statutes also impose greater federal intrusion and more supervision of Tribal criminal processes.[122] These standards imposed on Tribes "draw tribes ever closer to an American model of criminal justice and, concomitantly, potentially further away from distinct, tribal practices that are rooted in Indian difference."[123] Thus, in order to achieve legitimacy in criminal processes, Tribes must emulate the American system, which in turn actually further erodes Tribal sovereignty. This Note explores ways to balance this tension, turning next to an overview of two recent Supreme Court decisions.

II. THE WAXING OF TRIBAL SOVEREIGNTY AND CRIMINAL JURISDICTION AFTER *MCGIRT V. OKLAHOMA* AND ITS WANING AFTER *OKLAHOMA V. CASTRO-HUERTA*

Two recent Indian Country decisions have the capacity to alter the relationships between Tribal, state, and federal governments and their abilities to prosecute non-Indian perpetrators of sexual assault and domestic violence against Indian victims.

119. 25 U.S.C. § 1302(d)(1)(D)–(d)(2).

120. *2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)*, *supra* note 94.

121. *Id.*

122. *See* Riley, *supra* note 13, at 1595.

123. *Id.*

This Part will discuss the restoration of Indian Country in Oklahoma from *McGirt v. Oklahoma*[124] and the granting of nationwide concurrent criminal jurisdiction for crimes with non-Indian perpetrators and Indian victims to the states and federal government in *Oklahoma v. Castro-Huerta*.[125]

A. *MCGIRT V. OKLAHOMA* TRIUMPHANTLY RESTORES INDIAN COUNTRY IN NORTHEASTERN OKLAHOMA AND SHIFTS CRIMINAL JURISDICTION TO THE FEDERAL GOVERNMENT

In 2020, the Supreme Court issued its opinion in *McGirt v. Oklahoma* with Justice Neil Gorsuch writing for the majority.[126] Relying solely on statutory text and treaties, the Court reaffirmed that Congress is the only entity that can break promises to a reservation and reestablished that parts of northeastern Oklahoma are actually part of Indian Country.[127] This decision fundamentally altered criminal prosecution in Oklahoma and set the backdrop for *Oklahoma v. Castro-Huerta* to make its way up to the Court.

In 1996, Jimcy McGirt, an enrolled member of the Seminole Tribe of Oklahoma, "forcibly raped his wife's four-year-old granddaughter . . . at their home" in Tulsa's largest suburb, Broken Arrow.[128] McGirt was convicted in state court of three sexual offenses and sentenced to 1,000 years plus life imprisonment.[129] The Oklahoma Court of Criminal Appeals affirmed his conviction and sentence in 1998.[130] However, in 2018, McGirt sought post-conviction relief from the State on the basis that Oklahoma lacked jurisdiction over his case under the Major Crimes Act because his crimes took place on the Creek reservation and he is an enrolled member of the Seminole Nation.[131] The Oklahoma

124. 140 S. Ct. 2452 (2020).

125. 597 U.S. 629 (2022).

126. *See McGirt*, 140 S. Ct. at 2459.

127. *Id.* at 2482 ("The federal government promised the Creek a reservation in perpetuity. . . . If Congress wishes to withdraw its promises, it must say so.").

128. *See* Brief for Respondent at 4, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

129. *Id.*

130. *Id.*

131. *See McGirt*, 140 S. Ct. at 2459 (stating that McGirt's appeal rested on the Major Crimes Act which "allow[s] only the federal government to try Indians"). McGirt made this argument in light of the Tenth Circuit decision in *Murphy v. Royal*, which held that Congress had not disestablished the Muscogee Reservation in Oklahoma. *See* Murphy v. Royal, 866 F.3d 1164, 1172 (10th Cir.

state courts rejected McGirt's arguments that the crime occurred in Indian Country, and the Supreme Court granted certiorari during the 2020 term.[132]

The crucial question encountered by the Court was whether McGirt in fact committed his crimes in Indian Country.[133] If so, then Oklahoma lacked criminal jurisdiction to prosecute him, and a new trial must take place in federal court, per the Major Crimes Act.[134] The Court began with a determination that Congress established a reservation for the Creek Nation.[135] In a series of treaties from 1832 and 1833, Congress both "solemnly guarantied" the land and "establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians."[136] Additionally, a treaty from 1856 reaffirmed the original creation of a reservation and promised that "within their lands . . . the Creeks were to be 'secured in the unrestricted right of self-government.'"[137] Thus, McGirt's claim depended on whether Congress had disestablished or diminished the original Creek Reservation.

The Court determined that Congress had never withdrawn its promise of a reservation in perpetuity to the Creek Nation, despite many efforts to diminish the reservation.[138] The Court reasoned that it may only consider congressional acts in deciding

---

2017). The Court affirmed *Murphy* in 2020 in a per curiam companion decision to *McGirt*. *See* Sharp v. Murphy, 140 S. Ct. 2412, 2412 (2020) (mem.) (per curiam) (affirming the judgment of the Tenth Circuit for the reasons stated in *McGirt*).

132. *McGirt*, 140 S. Ct. at 2460.

133. *Id.* at 2459.

134. *Id.* (stating that, under the Major Crimes Act, "[s]tate courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country'" (quoting Negonsott v. Samuels, 507 U.S. 99, 102 (1993))).

135. *Id.* at 2462 (stating that the Creek reservation was a reservation "[u]nder any definition").

136. *Id.* at 2460 (alteration in original) (first quoting Treaty with the Creeks, Creek Tribe of Indians-U.S., art. XIV, Mar. 24, 1832, 7 Stat. 366; and then quoting Treaty with the Creeks, Creek Tribe of Indians-U.S., pmbl., Feb. 14, 1833, 7 Stat. 417).

137. *Id.* at 2461 (quoting Treaty with Creeks and Seminoles, Creek and Seminole Tribes of Indians-U.S., art. XV, Aug. 7, 1856, 11 Stat. 699).

138. *Id.* at 2462–74 (describing actions taken by federal and state government to reduce the land in the Creek reservation, which the Court found insufficient to amount to disestablishment of the reservation by Congress).

whether a Tribe still holds a reservation.[139] Congress must "clearly express its intent" to disestablish or diminish a reservation and "commonly [does so] with an 'explicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'"[140] The Court rejected the arguments that events during the allotment era[141] fully terminated the Creek Reservation and that demographics and historical practices within the original boundaries disestablished the reservation.[142] Additionally, the Court refused to balance Tribal interests against those of states or non-Indians by accepting the text of congressional acts as controlling.[143] The Court did not entertain Oklahoma's concern that potentially thousands of convictions would be overturned following a ruling recognizing the continued existence of the reservation.[144] Ultimately, because no act of Congress explicitly expressed an intent to disestablish or diminish the Creek Reservation, the Creek Reservation was still a reservation and thus part of Indian Country.[145] The Oklahoma state court that tried McGirt did not have the jurisdiction to do so under the Major Crimes Act because McGirt was an Indian

139. *Id.* at 2462 ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.").

140. *Id.* at 2463 (quoting Nebraska v. Parker, 577 U.S. 481, 488 (2016)).

141. During the allotment era, Congress pressured Tribes to parcel their lands into smaller lots that would then be owned by individual Tribal members, either motivated by a goal of assimilating Native people or in giving white settlers more space of their own. Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129, 133–34 (2012) (noting that the General Allotment Act (GAA) "was an attempt to forcibly assimilate Indians by breaking up tribal land holdings and distributing allotments of land to individual Indians").

142. *McGirt*, 140 S. Ct. at 2469 ("There is no need to consult extratextual sources when the meaning of a statute's term is clear. . . . The only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning." (second alteration in original) (quoting Milner v. Dep't of the Navy, 562 U.S. 562, 574 (2011))).

143. *Id.* at 2478–81 (rejecting Oklahoma's concerns which included residents being surprised to find out they live on a reservation, the potential of convictions being overturned, and difficulties administering justice); *United States–Muscogee (Creek) Nation Treaty — Federal Indian Law — Disestablishment of Indian Reservations* — McGirt v. Oklahoma, 134 HARV. L. REV. 600, 608 (2020). *But see* Oklahoma v. Castro-Huerta, 597 U.S. 629, 649–51 (2022) (employing a balancing test to find that the interests of exercising state jurisdiction over non-Indian-on-Indian crimes in Indian Country outweigh the Tribal interests).

144. *McGirt*, 140 S. Ct. at 2479–81.

145. *Id.* at 2482.

who committed a major crime against an Indian in Indian Country.[146]

As a result of the decision, almost half of Oklahoma's land is Indian Country and roughly 1.8 million of its residents now reside within Indian Country again.[147] While the decision did not impact the prosecution of crimes with non-Indian perpetrators and victims, its immediate effect eliminated Oklahoma's prosecutorial authority over Indians for crimes committed in the part of northeastern Oklahoma that now includes the Creek Nation reservation. Now, forty-three percent of Oklahoma, including Tulsa, is considered Indian Country.[148] Federal prosecutors became overwhelmed with the influx of federal criminal cases in Oklahoma.[149] It is in this landscape that *Oklahoma v. Castro-Huerta* made its way to the Court in 2022.

B. TRIBES' POST-*MCGIRT* SUCCESS DIMINISHES AS *OKLAHOMA V. CASTRO-HUERTA* MISGUIDEDLY EXPANDS STATES' CRIMINAL JURISDICTION IN INDIAN COUNTRY

In its 2021 term, the Supreme Court granted certiorari to "determine the extent of a State's jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country."[150] In his majority opinion, Justice Brett Kavanaugh uprooted the common understanding from *Oliphant*[151] that only the federal government could prosecute crimes committed by non-Indians against Indian victims in Indian Country. This Section details Justice Kavanaugh's opinion, pointing out where the

146. *Id.* (reversing the judgment of the Court of Criminal Appeals of Oklahoma).

147. *See id.* at 2479 ("Ultimately, Oklahoma fears that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within Indian country.").

148. Oklahoma v. Castro-Huerta, 597 U.S. 629, 647 (2022).

149. *See, e.g.*, Chris Casteel, *FBI Director Warns of Post-McGirt Risks, Asks Senators for More Oklahoma Funding*, OKLAHOMAN (May 26, 2022), https://www.oklahoman.com/story/news/2022/05/26/fbi-director-says-oklahoma-needs-dozens-more-agents-wake-mcgirt/9911444002 [https://perma.cc/2FH7-LGFX] ("In the year following the McGirt decision, felony case filings in the eastern and northern districts of Oklahoma increased by 274 percent and 195 percent, respectively, compared to the previous year . . . ."); *see also infra* Part III.A.1 (describing the dramatic increase in the number of cases handled by United States Attorneys' Offices in Oklahoma).

150. *Castro-Huerta*, 597 U.S. at 629.

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

majority went astray. Then, it discusses Justice Gorsuch's colorful dissenting opinion to illuminate the cracks in the majority's reasoning.

1. Justice Kavanaugh's Majority Opinion Expands States' Abilities to Prosecute Crimes in Indian Country

In this case, an Oklahoma state court convicted Victor Manuel Castro-Huerta, a non-Indian, "for neglecting his five-year-old stepdaughter, an enrolled member of the Eastern Band of Cherokee Indians" living in Tulsa, and sentenced him to thirty-five years of imprisonment.[152] Soon after *McGirt*, the Oklahoma Court of Criminal Appeals vacated the conviction because the non-Indian-on-Indian crime was actually committed in Indian Country, meaning the federal government possesses sole prosecutorial power.[153] The State of Oklahoma argued that the Court of Criminal Appeals was wrong in vacating the conviction because states have inherent authority to prosecute crimes that occur within the state's borders, including crimes committed by non-Indians in Indian Country.[154] Additionally, Oklahoma argued that allowing a state to prosecute crimes committed by non-Indians in Indian Country does not intrude on Tribal or federal interests.[155] Justice Kavanaugh wrongly sympathized with both of Oklahoma's arguments.

The Court held that the "Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country."[156] This holding was based on the Court's reasoning that "Indian country is part of the State, not separate from the State."[157] Accordingly, unless preempted by an act of Congress, states will have jurisdiction over crimes committed in Indian Country.[158] While the General

152. *See* Brief for the Petitioner at 3, 9, *Castro-Huerta*, 597 U.S. 629 (No. 21-429).

153. *Id.* at 3.

154. *Id.*

155. *Id.*

156. *Castro-Huerta*, 597 U.S. at 633.

157. *Id.* at 636.

158. *Id.* ("To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country.").

Crimes Act[159] extends jurisdiction to the federal government for crimes between Indians and non-Indians, the Court reasoned that its text does not provide for *exclusive* federal jurisdiction.[160] It simply provides that "the general laws of the United States as to the punishment of offenses committed . . . within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country."[161] According to Justice Kavanaugh, the test only extends federal law to Indian Country, but it does not impact state jurisdiction over crimes committed within the state's boundary, whether in Indian Country or not.[162] "[T]he General Crimes Act does not say that Indian country is equivalent to a federal enclave for jurisdictional purposes. Nor does the Act say that federal jurisdiction is exclusive in Indian country, or that state jurisdiction is preempted in Indian country."[163] Therefore, the Court dramatically determined that under the General Crimes Act the federal government and states have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country. Additionally, the majority concluded that PL-280 does not preempt any preexisting jurisdiction that states may possess to prosecute crimes in Indian Country.[164] Thus, rooting its analysis in statutory text, the Court rejected Castro-Huerta's arguments and granted concurrent jurisdiction over the narrow set of crimes at issue in the case: crimes with non-Indian perpetrators and Indian victims.[165]

While Justice Gorsuch refused to employ any kind of balancing of state, federal, and Tribal interests in *McGirt*, Justice Kavanaugh employed the *Bracker* balancing test[166] in *Castro-*

159. General Crimes Act of 1817, chap. 92, 3 Stat. 383 (codified at 18 U.S.C. § 1152).

160. *Castro-Huerta*, 597 U.S. at 638–47 (rejecting Castro-Huerta's arguments that the General Crimes Act preempts state authority).

161. 18 U.S.C. § 1152.

162. *Castro-Huerta*, 597 U.S. at 639.

163. *Id.*

164. *Id.* at 648 ("Nothing in the language or legislative history of Pub. L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction." (quoting Three Affiliated Tribes of the Fort Berthold Rsrv. v. Wold Eng'g, P.C., 467 U.S. 138, 150 (1984))).

165. *Id.* at 656.

166. The balancing test Justice Kavanaugh used comes from *White Mountain Apache Tribe v. Bracker* and considers Tribal interests, federal interests, and state interests to determine whether exercising state jurisdiction will

Huerta to further support the Court's holding and disregard of congressional directive.[167] Under the test, the Court determined that "the exercise of state jurisdiction would not infringe on tribal self-government" as Tribes already lack jurisdiction to prosecute crimes with non-Indian perpetrators and Indian victims under the modern jurisdictional landscape.[168] Per *Oliphant*, Tribes do not have the jurisdiction to prosecute crimes committed by non-Indians even when the victim is Indian.[169] Additionally, a state prosecution in this context would "not involve the exercise of power over any Indian or over any tribe" as "[t]he only parties to the criminal case [would be] the State and the non-Indian defendant."[170] However, this assertion ignores the intrusion into the interests of a Tribe to be the sovereign with the power to protect its own people within its own boundaries, especially from non-Indians committing heinous crimes.

The Court further reasoned that concurrent jurisdiction does "not harm the federal interest in protecting Indian victims," as "State prosecution would supplement federal authority, not supplant federal authority."[171] States also have a "strong sovereign interest in ensuring public safety and criminal justice within [their] territory, and in protecting all crime victims," including both non-Indian and Indian victims.[172] Thus, taking each interest into consideration, the Court determined that permitting concurrent jurisdiction would not compromise Tribal or

unlawfully infringe on Tribal self-government, thus warranting preemption of state jurisdiction. 448 U.S. 136, 142–45 (1980).

167. In his dissenting opinion in *Castro-Huerta*, Justice Gorsuch takes issue with the majority's use of the *Bracker* balancing test. *See Castro-Huerta*, 597 U.S. at 686 (Gorsuch, J., dissenting) ("The simple truth is *Bracker* supplies zero authority for this Court's course today. . . . Exactly nothing in *Bracker* permits us to ignore Congress's directive.").

168. *Id.* at 650 (majority opinion).

169. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) ("We granted certiorari . . . to decide whether Indian tribal courts have criminal jurisdiction over non-Indians. We decide that they do not.").

170. *Castro-Huerta*, 597 U.S. at 650.

171. *Id.* at 650–51 ("[B]ecause the State's jurisdiction would be concurrent with federal jurisdiction, a state prosecution would not preclude an earlier or later federal prosecution and would not harm the federal interest in protecting Indian victims.").

172. *Id.* at 651.

federal interests,[173] effectively balancing away Tribal sovereignty in the interest of the states.

2. Justice Gorsuch Attacks the Majority's Ahistorical Reasoning in His Dissenting Opinion

In a colorful dissenting opinion, Justice Gorsuch criticized the majority for making "an embarrassing new entry into the anticanon of Indian law" with a "declaration com[ing] as if by oracle, without any sense of the history [of tribal relations] and unattached to any colorable legal authority."[174] Quoting from *Worcester v. Georgia*, Gorsuch referred to a time when the Court reasoned that the State could not assert jurisdiction over the Cherokee Nation because the Constitution gives the federal government the sole authority to manage Tribal relations.[175] Justice Gorsuch wrote that in cases where a state tries to regulate Tribal affairs, because Tribes have a long standing claim to sovereignty, the Court must search for federal legislation that confers state authority, rather than looking for an act of Congress that displaces state authority.[176] Conducting a comprehensive overview of legislation adopted by Congress from 1834 to 1968 governing criminal jurisdiction of Tribal lands, Justice Gorsuch found that none of them met the demanding standard and thus did not confer on Oklahoma, or any state, the prosecutorial authority sought.[177]

Justice Gorsuch also criticized the employment of a balancing test, just as he did in his majority opinion in *McGirt*.[178]

173. *Id.*

174. *Id.* at 684, 667 (Gorsuch, J., dissenting).

175. *Id.* at 660 (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542, 561–62 (1832)).

176. *Id.* at 669–70. In making this claim, Justice Gorsuch cited several more recent cases where the Court recognized that the usual standards in preemption analysis are unhelpful in the Tribal context. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1989); Moe v. Confederated Salish and Kootenai Tribes of the Flathead Rsrv., 425 U.S. 463, 475–76 (1976).

177. *Castro-Huerta*, 597 U.S. at 670–79 (Gorsuch, J., dissenting) ("The Court's suggestion that Oklahoma enjoys 'inherent' authority to try crimes against Native Americans within the Cherokee Reservation makes a mockery of all of Congress's work from 1834 to 1968.").

178. *Compare id.* at 684 (calling the use and application of the balancing test "mistaken root and branch"), *with* McGirt v. Oklahoma, 140 S. Ct. 2452, 2501 (2020) ("This test mires state efforts to regulate on reservation lands in

Justice Gorsuch argued that "*Bracker* never purported to claim for [the] Court the raw power to 'balance' away tribal sovereignty in favor of state criminal jurisdiction over crimes by or against tribal members."[179] Nonetheless, Justice Gorsuch still ran through a balancing of state, Tribal, and federal interests, and appropriately disagreed with the majority at each step.[180] The assertion that granting states jurisdiction will help Native Americans is paternalistic and disregards the actual desires of the Cherokee.[181] Justice Gorsuch argued that more sets of prosecutors might not always be better, especially in the Tribal context.[182] Justice Gorsuch refused to adopt the majority's characterization of post-*McGirt* Oklahoma as a scene of complete "chaos and criminality," arguing that neither Tribal nor federal authorities think the costs of the adjustment period justify the majority's approach.[183] Ultimately, Justice Gorsuch opined that the Court is not meant to "usurp[]" Congress's role in weighing and establishing the appropriate balance of various interests.[184] He concluded his opinion by stating that the majority "offer[ed] its own consent in place of the Tribe's, and allow[ed] Oklahoma to intrude on a feature of tribal sovereignty recognized since the founding."[185]

By recognizing that states have jurisdiction to prosecute crimes with non-Indian perpetrators and Indian victims in Indian Country, the majority in *Castro-Huerta* chipped away at the already withered sovereignty of Tribes across the country. Criminal prosecutions in Indian Country will look quite different than

significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all.").

179. *Castro-Huerta*, 597 U.S. at 685 (Gorsuch, J., dissenting).

180. *Id.* at 684–95 (applying the *Bracker* balancing test).

181. *See id.* at 687 (arguing that the Cherokee may "not be so eager" for the State to step in because "throughout the Nation's history, state governments have sometimes proven less than reliable sources of justice for Indian victims").

182. Justice Gorsuch also compares the additional set of prosecutors in the present context to giving Texas the ability to impose its laws in California. *Id.* at 688.

183. *Id.* at 689–91 (mentioning that Tribes in Oklahoma have "hired more police officers, prosecutors, and judges" and the federal government has "allocate[d] additional funds for law enforcement," instead of establishing state criminal jurisdiction).

184. *Id.* at 692 ("The Court's decision is not a judicial interpretation of the law's meaning; it is the pastiche of a legislative process.").

185. *Id.* at 696.

the pre-*Castro-Huerta* world. Now, three sovereigns, assuming a Tribe is asserting STCJ under VAWA, have the authority to handle and punish non-Indian abusers. The following Part explores how *McGirt* and *Castro-Huerta* have impacted prosecutions of non-Indian domestic violence and sexual assault perpetrators when a victim is Indian.

III. THE IMPACTS OF *MCGIRT* AND *CASTRO-HUERTA* ON EFFECTUATING JUSTICE IN INDIAN COUNTRY FOR DOMESTIC VIOLENCE AND SEXUAL ASSAULT CASES WITH NON-INDIAN PERPETRATORS AND INDIAN VICTIMS

McGirt and *Castro-Huerta* present the most recent shift in the complex mosaic of criminal jurisdiction in Indian Country, with especially meaningful impacts on the domestic and sexual violence epidemic faced by Native women. This Part begins by describing the immediate effects of *McGirt*, looking first at the impact on United States Attorneys' Offices (USAOs) and then at the positive reactions to the decision from Tribal leaders and members. Next, this Part discusses the changing relationships between Tribes and both state and federal prosecutors in the immediate wake of the *Castro-Huerta* decision. It explores the negative reactions by Tribes to the withering of their sovereignty, and finally explains the inefficiency of concurrent jurisdiction.

A. IMMEDIATE EFFECTS POST-*MCGIRT*

After the mandate and judgment of *McGirt* was issued on August 18, 2020, Jimcy McGirt was convicted in federal court of aggravated sexual abuse and abusive sexual contact in Indian Country, and will spend his life in prison under a new federal sentence.[186] Post-*McGirt* and pre-*Castro-Huerta*, all other crimes committed in Oklahoma involving Indians, as perpetrators or victims, were prosecuted by either federal or Tribal prosecutors, depending on the crime's nature.[187] The United States, as

186. Press Release, U.S. Att'y's Off. E. Dist. of Okla., Jimcy McGirt Found Guilty of Aggravated Sexual Abuse, Abusive Sexual Contact in Indian Country (Nov. 6, 2020), https://www.justice.gov/usao-edok/pr/jimcy-mcgirt-found-guilty-aggravated-sexual-abuse-abusive-sexual-contact-indian-country [https://perma.cc/QQQ5-TPB7].

187. Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of Federal Indian Law Canon*, 51 N.M. L. REV. 300, 344 (2021).

amicus curiae in *McGirt*, warned that a favorable holding for the petitioner would have "grave consequences."[188] The truth of this warning is explored below. The first Subsection discusses the increased case load faced by the USAOs in Oklahoma and the subsequent constraints in prosecuting cases. The second Subsection explores Tribes' positive reactions to *McGirt* and their efforts to work collaboratively with the federal government to effectuate justice for Native victims of domestic violence and sexual assault.

1. Overwhelmed United States Attorneys' Offices

Because the *McGirt* decision "applie[d] retroactively, . . . many municipalities in eastern Oklahoma," now recognized as within the boundaries of Indian Country, "dismiss[ed] thousands of decided cases and referr[ed] those cases to the United States Attorney's Office (USAO) and/or tribal courts."[189] The USAO in the Northern District of Oklahoma hired an additional twenty-four Assistant U.S. Attorneys to help prosecute this "exponential increase in Indian Country cases."[190] The Eastern District increased from eight to forty-one prosecutors, and several magistrate or district court judges from other districts assisted the district in handling cases.[191] In 2021, the Tulsa County District Attorney's Office (TCDA) commissioned a study funded by the DOJ to explore how the USAO, Cherokee Nation, and Muscogee

188. Brief for the United States as Amicus Curiae Supporting Respondent at 38–39, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526) ("A decision in petitioner's favor . . . would require a great increase in the dockets of federal district courts and federal law-enforcement presence and resources.").

189. Jason Pudlo & William Curtis Ellis, McGirt v Oklahoma *Victim Impact Report*, ORAL ROBERTS UNIV. 3 (Aug. 20, 2021) [hereinafter TCDA Report], https://da.tulsacounty.org/docs/08.22.21-McGirt-Final-Report%20-%20Disclaimer%20Added.pdf [https://perma.cc/7U4P-93TY].

190. Press Release, U.S. Att'y's Off. N. Dist. of Okla., 24 Federal Prosecutors Take the Oath of Office in the Northern District of Oklahoma (Sept. 29, 2021), https://www.justice.gov/usao-ndok/pr/24-federal-prosecutors-take-oath-office-northern-district-oklahoma [https://perma.cc/A2KV-NFLQ].

191. *See* Cameron Langford, *Federal Judiciary Calls on Congress to Add New Judgeships in Oklahoma*, COURTHOUSE NEWS SERV. (Sept. 28, 2021), https://www.courthousenews.com/federal-judiciary-calls-on-congress-to-add-new-judgeships-in-oklahoma [https://perma.cc/CB97-L56Z] (showing an increase in hiring of thirty-three new prosecutors and confirming fourteen new federal judgeships).

Nation were handling the cases referred to them.[192] Between July 2020 and May 31, 2021, the state provided post-*McGirt* relief in 1,304 TCDA cases and TCDA referred 1,495 cases to other agencies.[193] The USAO only filed indictments in ten percent of the referred cases.[194] The office filed indictments for fifty percent of the non-violent sexual crime cases referred.[195] The report also verified that the USAO in the Northern District of Oklahoma saw a dramatic increase in cases and filings which is most likely a result of "increases in criminal prosecutions by the USAO and the tribes" and not because of "old cases being referred to the agencies."[196] While the report limited its analysis to cases from Tulsa County, it still provides a useful depiction of the strain faced by agencies due to the influx of cases.

Responding to the increase in cases, the Trump Administration promised more federal financial aid and personnel to help Tribal governments and federal prosecutors.[197] In 2021, the FBI's Oklahoma City Field Office had the "FBI's largest investigative responsibility" as a result of the increase in the number of Indian Country investigations.[198] Since *McGirt*, the field office went from investigating about fifty criminal cases involving Indians annually to handling thousands of Indian Country cases.[199] Because of this change, the FBI had to prioritize certain cases over others, with the ones "involving the most violent

192. *See* TCDA Report, *supra* note 189, at 4 (noting that the report only examines the docket of dismissals and referrals from Tulsa County).

193. *Id.* at 5–6 ("The TCDA referred 780 cases to the USAO Northern District, 417 cases to the Muscogee Nation, and 298 cases to the Cherokee Nation.").

194. *Id.* at 6.

195. *Id.* at 7 (showing most indictments were filed for property and violent crimes). The report was unclear on under which category domestic violence cases would fall.

196. *Id.* at 12.

197. *AG Barr Promises More Federal Aid, Manpower to Help Oklahoma*, AP NEWS (Sept. 30, 2020), https://apnews.com/article/oklahoma-tahlequah-archive-us-supreme-court-tribal-governments-119ef5d394fcbe4cdfb17d6e5732918e [https://perma.cc/2WKV-Y2SZ].

198. *Hearing on the Federal Bureau of Investigation Before the Subcomm. on Com., Just., Sci., & Related Agencies Appropriations for Fiscal Year 2022 of the S. Comm. on Appropriations*, 117th Cong. 13 (2021) (statement of Christopher Wray, Director, Federal Bureau of Investigation) [hereinafter *Hearing on FBI*].

199. *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. On the Judiciary*, 117th Congress (2022) (statement of Christopher Wray, Director, Federal Bureau of Investigation).

offenders who pose the most serious risk to the public" gaining top priority.[200] Thus, certain crimes—assaults, criminal damage to property, and domestic violence—are naturally pushed aside.

The City of Tulsa lamented the post-*McGirt* climate and claimed there existed a "massive prosecution gap" in the city now that the State of Oklahoma could not file charges for crimes committed by non-Indians against Indians under its newly restored status as Indian Country.[201] While the City was most concerned with the lack of prosecution of violent burglaries, gaps in the prosecution of sexual violence committed by non-Indians will continue. This is based in part on past trends in USAOs to decline the prosecution of sex crimes in Indian Country at extremely high rates.[202] Additionally, while this is no new phenomenon, the challenges inherent in the task of determining which law enforcement agency must prosecute a crime are exacerbated under this further complicated jurisdictional maze in Oklahoma. Determining the proper agency "requires discerning whether the victim and offender are Indians, the type of crime committed, as well as the status of the land at issue."[203] This is important to do shortly after the crime is committed, as the best evidence is gathered quickly, especially for sexual assault.[204] Even before *McGirt*, Indian Country's jurisdictional maze was described as "the anthesis of effective government" by the Indian Law and Order Commission due to the difficulty of these

200. *Hearing on FBI*, *supra* note 198, at 13.

201. Brief of the City of Tulsa as Amicus Curiae in Support of Petitioner at 10, Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (No. 21-429) ("Many Indian crime victims simply have no recourse in the criminal justice system after *McGirt*.").

202. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, U.S. DEP'T OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 9 (2010) (finding that federal prosecutors declined to prosecute sixty-seven percent of Indian Country sex crimes); *see also supra* note 15 and accompanying text.

203. Adam Crepelle, *The Law and Economics of Crime in Indian Country*, 110 GEO. L.J. 569, 590 (2022) (citing INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 9 (2013) [hereinafter MAKING NATIVE AMERICA SAFER]); *see also* Crepelle, *supra* note 79, at 69–70 ("[C]ourts often struggle when deciding whether a person is recognized as an Indian.").

204. *See, e.g.*, Megan Ladd & Jesus Seda, *Sexual Assault Evidence Collection*, STATPEARLS (Jan. 29, 2023), https://www.statpearls.com/point-of-care/86173 [https://perma.cc/JT8F-BB47] ("The optimal time frame for a forensic evaluation [after a sexual assault] is within 72 hours of the assault to be able to collect as much DNA evidence as possible.").

determinations.[205] The shifting boundaries of Indian Country also acts as a disincentive for state law enforcement to pursue crimes on land that may be classified as Indian Country, even when doing so will effectuate long term goals of promoting public safety.[206]

2. Tribes React Positively to the Expansion of Indian Country in *McGirt*[207]

Shortly after the decision was published, the Muscogee (Creek) Nation declared that the decision "will allow the Nation to honor our ancestors by maintaining our established sovereignty and territorial boundaries."[208] At the outset, the reaction to the decision was celebratory as Justice Gorsuch, and the rest of the majority, recognized longstanding agreements between the Muscogee Nation and the United States government.[209]

Despite fears from the State of Oklahoma that the decision would have catastrophic effects on the prosecution of various crimes, some Tribal leaders found the transition to be much smoother than anticipated. Judge Gregory H. Bigler of the Muscogee Nation District Court in Oklahoma characterized life as "very similar" to how it was pre-*McGirt*, despite increased caseloads and added attorneys, judges, and clerical staff.[210] Various Tribes fought back against Oklahoma's counter-efforts post-*McGirt* and claimed to work with the United States to properly "effectuat[e] [the] allocation" of criminal jurisdiction with federal law through "increased resources and inter-governmental

205. MAKING NATIVE AMERICA SAFER, *supra* note 203, at 9.

206. *See* Crepelle, *supra* note 203, at 593 (contending that law enforcement officers are disincentivized from "spend[ing] hundreds of hours building a case" if everything can be forced to "start from scratch if it turns out the case is outside of their jurisdiction").

207. It is inappropriate to group all Tribes into one group for purposes of this Subsection. Instead, this Subsection will explore perspectives of various Tribes on the issue of violence faced by Native women and children in the post-*McGirt* climate.

208. Chris Polansky, *Tribes, State, Officials React to Historic SCOTUS Ruling on McGirt v. Oklahoma*, PUB. RADIO TULSA (July 10, 2020), https://www.publicradiotulsa.org/local-regional/2020-07-10/tribes-state-officials-react-to-historic-scotus-ruling-on-mcgirt-v-oklahoma [https://perma.cc/8KC6-2TBC].

209. *See id.* (describing Tribal leaders praising the *McGirt* decision).

210. *Tribal Courts' Response to Expanded Criminal Authority*, AM. BAR ASS'N, https://www.americanbar.org/news/abanews/aba-news-archives/2021/10/mcgirt-v-oklahoma-program [https://perma.cc/L3PD-T6DA].

collaboration[s].”[211] Some Tribes felt content with the actions taken by the federal government, such as hiring more Assistant U.S. Attorneys, sending judges to the Eastern and Northern Districts of Oklahoma, and adding more FBI agents and staff in Oklahoma.[212] However, the federal government was not alone in this effort to increase resources.

Tribes increased their own law enforcement resources and capabilities to address criminal justice needs through increasing funding, hiring additional staff, and increasing the physical infrastructure of their criminal justice systems.[213] Because Tribes can exercise STCJ for certain crimes under 25 U.S.C. § 1304(c), expanding Tribal capacity increases arrests and prosecutions of non-Indians who commit domestic and sexual violence against Indians.[214] Thus, in the wake of *McGirt*, through the expansion of Tribal justice systems, Native victims of domestic and sexual violence may be better able to achieve the justice they have so long been denied, at least in Oklahoma.

While Oklahoma and its amici in *Castro-Huerta* were concerned that certain categories of cases were going unprosecuted, in the year after the Cherokee Nation reservation was affirmed in *McGirt*, it filed 533 domestic violence cases, the majority of which were referred to them by non-Tribal law enforcement.[215] Additionally, the Choctaw Nation filed 329 domestic violence cases and the Seminole Nation filed twenty-three domestic violence cases.[216] As of November 2021, the Creek Nation had filed

211. Brief of Amici Curiae the Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, Muscogee (Creek) Nation, and Seminole Nation of Oklahoma in Support of Respondent at 4, Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (No. 21-429) [hereinafter Brief of Amici Curiae Nations].

212. *See id.* at 6; *see also*, *supra* notes 190–91and accompanying text (stating the number of additional Assistant U.S. Attorneys and judges hired in the Eastern and Northern Districts of Oklahoma).

213. Brief of Amici Curiae Nations, *supra* note 211, at 9–13 (stating that from 2020–2022 the Muscogee Nation more than doubled its police budget and planned three new police stations).

214. *See* 25 U.S.C. § 1304(c) (including the following crimes as covered under STCJ: assault of Tribal justice personnel, child violence, dating violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and violation of a protection order).

215. Press Release, Cherokee Nation, Cherokee Nation Expands Criminal Justice Capabilities (Mar. 10, 2022), https://www.oursovereignland.com/wp-content/uploads/2022/03/CN-One-Year-Criminal-Justice-.pdf [https://perma.cc/4GLR-WXC5].

216. Brief of Amici Curiae Nations, *supra* note 211, at 12–13.

charges in 119 domestic violence cases and secured convictions in over a dozen domestic violence cases referred by the Tulsa Police Department.[217] The Cherokee Nation also continues to work with USAOs to commission Special Assistant U.S. Attorneys who can prosecute cases in both federal and Tribal courts.[218] The Eastern District of Oklahoma also worked with the Muscogee Nation to provide a Special Assistant U.S. Attorney for the Creek Reservation.[219] With an increase in resources and collaboration, "the Tribes—those most affected by all this supposed lawlessness within their reservations—tell us that, after a period of adjustment, federal prosecutors are now pursuing lower level offenses vigorously too."[220] Overall, the Tribes have worked closely with federal prosecutors to expand their prosecutorial capabilities after the affirmations of various reservations.

B. COMPLICATED RELATIONSHIPS BETWEEN TRIBAL, STATE, AND FEDERAL PROSECUTORS AFTER *CASTRO-HUERTA*

In the jurisdictional landscape following *McGirt* and *Castro-Huerta*, three kinds of prosecutors must work together to ensure that Native women victimized by domestic and sexual violence are adequately protected: Tribal, state, and federal. While it may appear that the more prosecutors and resources available, the better the public will be protected, in Justice Gorsuch's *Castro-Huerta* dissent, he asserted that "more state criminal jurisdiction in Indian country is often not a good policy choice."[221] Part of this may stem from the distrust between Tribal communities and local, non-Tribal law enforcement authorities, which leads to difficulties in communication and a lack of respect.[222] Anecdotal findings also indicate that state and local entities are often

217. Brief for Muscogee, *supra* note 23, at 18.

218. *See, e.g.*, Max Bryan, *DOJ Funds Special Attorneys in Cherokee Territory*, SW. TIMES REC. (Oct. 1, 2020), https://www.swtimes.com/story/news/courts/2020/10/01/doj-funds-special-attorneys-in-cherokee-territory/114200998 [https://perma.cc/92PZ-ATAQ] (stating that the DOJ allocated more funding for new special Assistant U.S. Attorney positions).

219. Liz Gray, *U.S. DOJ Seeks to Work with MCN*, MVSKOKE MEDIA (Dec. 2, 2021), https://www.mvskokemedia.com/u-s-doj-seeks-to-work-with-mcn [https://perma.cc/K6W3-PQGV].

220. Oklahoma v. Castro-Huerta, 597 U.S. 629, 692 (2022) (Gorsuch, J., dissenting) (citing Brief for Muscogee, *supra* note 23).

221. *Id.* at 689 (citing MAKING NATIVE AMERICA SAFER, *supra* note 203, at xi, xiv, 11–15).

222. MAKING NATIVE AMERICA SAFER, *supra* note 203, at 13.

unresponsive to Tribal concerns, leaving the Tribes alone to face the violence epidemic plaguing Native women.[223] States also have hostile histories with Tribes and often fail to provide police for reservations.[224] This Section explores these relationships with a focus on how they impact the prosecution of domestic violence and sexual crimes with non-Indian perpetrators and Indian victims. First, the Section details the negative Tribal reactions to *Castro-Huerta* and fears of the further erosion of their sovereignty. Then, it explains the plethora of issues that occur when concurrent jurisdiction is used in practice.

1. Initial Negative Tribal Reactions to *Castro-Huerta*

Tribes did not react positively to the *Castro-Huerta* decision, instead viewing it as a blow to their own sovereignty as states now have jurisdiction in Indian Country unless Congress has specifically preempted it.[225] In September 2022, the DOJ and the Department of the Interior (DOI) hosted listening sessions where they heard from Tribal leaders, advocates, and community members about the impacts of the decision on Tribal

223. *Id.* ("Witnesses from these communities, located mostly in the East and South, testified that State and local officials displayed a pronounced lack of cultural sensitivity, impatience with Tribal government authorities, and an attitude that Tribal members should assimilate with the surrounding non-Indian communities.").

224. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the States where [Indians] are found are often their deadliest enemies."); United States v. Bryant, 579 U.S. 140, 146 (2016) ("States are unable or unwilling to fill the enforcement gap. . . . Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country.").

225. *See, e.g.*, Chris Casteel, *Tribes Urge Lawmakers to Reverse Oklahoma Victory on Jurisdiction*, OKLAHOMAN (Sept. 21, 2022), https://www.oklahoman.com/story/news/2022/09/21/tribes-urge-congress-reverse-supreme-court-castro-huerta-ruling-oklahoma/69503861007 [https://perma.cc/5A4F-H4AC] (referencing statements from Sara Hill, Attorney General for the Cherokee Nation, who testified that the decision represents "a real threat to tribal sovereignty"); Cassidy Mudd, *'Alarming Step Backwards': Tribal Nations Respond to Oklahoma v. Castro-Huerta Decision*, PUB. RADIO TULSA (June 29, 2022), https://www.publicradiotulsa.org/local-regional/2022-06-29/alarming-step-backwards-tribal-nations-respond-to-oklahoma-v-castro-huerta-decision [https://perma.cc/AXR2-KY8L] (referencing Muscogee Nation Principal Chief David Hill's statement that the decision is an "alarming step backwards" for justice on reservations).

communities.[226] In sum, most commenters "expressed dissatisfaction, disappointment, and anger" with the decision and feared that it would lead to decreased public safety in Indian Country as Tribal jurisdiction is minimized.[227] Many commenters expressed concern about concurrent state jurisdiction based on their negative experiences with PL-280 where "in many cases crimes are not prosecuted; state law enforcement agencies lack accountability; and . . . Tribal justice system resources are scarce."[228] While VAWA 2022 expanded recognition of Tribal sovereignty for more crimes than VAWA 2013, the *Castro-Huerta* decision withered this progress by allowing the state to assert a supplemental role in the prosecution of these "covered crimes"[229] that occur in Indian Country. In fact, some Tribal leaders expressed concern that the decision would be weaponized to limit Tribes' ability to exercise STCJ under VAWA 2022.[230] Tribal apprehension to the decision based on past experiences with concurrent jurisdiction was warranted, as will be explored in the following Subsection.

2. Concurrent Jurisdiction in Action: An Inefficient Mess

Expanding the number of entities that can prosecute crimes in Indian Country is not guaranteed to improve the quality, timeliness, or effectiveness of criminal investigations. There are many difficulties when a non-Tribal law enforcement agency attempts to police reservations. Non-Tribal police forces are often far from Indian Country, Indian Country roads can be in poor condition, and many Indian Country residences have no physical addresses, making it difficult for law enforcement to locate witnesses, victims, defendants, or destinations.[231] These challenges,

226. *See Summary Report*, *supra* note 29, at 3 (stating that 425 Tribal leaders, advocates, and community members participated in the listening sessions).

227. *Id.* at 5.

228. *Id.*

229. *See* Press Release, White House, *supra* note 107.

230. *Summary Report*, *supra* note 29, at 4.

231. *See, e.g.*, *Journey Through Indian Country, Part 1: Fighting Crime on Tribal Lands*, FBI (June 1, 2012), https://www.fbi.gov/news/stories/journey-through-indian-country-part-1 [https://perma.cc/QG2G-7MF4] (discussing the experience of FBI agents being called to crime scenes 120 miles away in Indian Country in the middle of the night); Matt Vasilogambros, *For Some Native Americans, No Home Address Might Mean No Voting*, SALT LAKE TRIB. (Oct. 6, 2019), https://www.sltrib.com/news/2019/10/06/some-native-americans-no

coupled with the poor communication infrastructure on many reservations, makes it inherently dangerous for non-Tribal police to respond to calls in Indian Country.[232] Additionally, cultural barriers between Native people and non-Natives can inhibit investigative activities and contribute to communication challenges.[233] These factors combine to create many disincentives for state and local law enforcement to respond to and effectively prosecute crimes committed in Indian Country, whether with Indian victims or perpetrators. This shakes out in practice, as "[i]t is common for tribes to have difficulty getting local or State law enforcement to respond to crimes on the reservations."[234]

Federal prosecutors and law enforcement similarly fail to respond to Indian Country crimes even though they possess much of the legal power to do so.[235] Federal prosecutors struggle to coordinate with witnesses in Indian Country, as oftentimes hundreds of miles separate the federal courthouse from the places where these witnesses reside.[236] Victims and witnesses must travel long distances to make it to federal court to testify,

---

[https://perma.cc/HT49-67BF] ("The Navajo Nation has 50,000 unaddressed homes and businesses, creating complications for hundreds of thousands of people.").

232. *See Journey Through Indian Country, Part 1: Fighting Crime on Tribal Lands*, *supra* note 231 ("In some areas, crime scenes are so remote that cell phones and police radios don't work.").

233. *See, e.g.*, Kevin K. Washburn, *American Indians Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1021 (2008) ("When federal law enforcement officials arrive, a predictable, though unfortunate, reaction by the community in many cases is to oppose the federal authorities. The community circles the wagons, so to speak, around the defendant, and turns against the outsiders, the federal prosecutors, who are threatening to disrupt the community.").

234. Internal Law Enforcement Services Policies, 69 Fed. Reg. 6321, 6321 (Feb. 10, 2004).

235. *See* Sarah Deer, *Bystander No More? Improving the Federal Response to Sexual Violence in Indian Country*, 2017 UTAH L. REV. 771, 776 ("Unfortunately, granting federal officials the authority to prosecute major crimes does not mandate that they do so."); *see also Ending Violence Against Native Women*, *supra* note 15 (noting that many Indian Country crimes involving sexual abuse go uninvestigated by federal law enforcement).

236. *See, e.g.*, Washburn, *supra* note 233, at 1022 ("Because of the hundreds of miles that lie between federal courts and the communities where the crimes occurred, it is sometimes a matter of pure luck as to whether the prosecutor, or the defense attorney, will be able to marshal their witnesses at the appropriate place and time for a trial.").

which builds up pressure and unfamiliarity.[237] This, coupled with the difficultly in locating victims or witnesses in Indian Country,[238] creates disincentives for federal prosecutors to pursue Indian Country cases while there are non–Indian Country cases that are easier to coordinate and prosecute.

Thus, even when equipped with the power to prosecute crimes in Indian Country, non-Tribal law enforcement agencies, whether state or federal, are not seizing each opportunity to further justice for Native women impacted by the domestic and sexual violence epidemic in Indian Country. In practice, concurrent jurisdiction has "create[d] a pass-the-buck dynamic . . . with the end result being fewer police and more crime."[239] Granting concurrent jurisdiction is not the solution to address the crime issues in Indian Country. Rather, policies centering Tribal sovereignty and the actual needs of Native people will better effectuate justice for Native victims. These alternatives are explored in Part IV.

IV. POLICY RECOMMENDATIONS TO RECENTER TRIBAL VOICES AND RESTORE TRIBAL SOVEREIGNTY

The challenges and complications concurrent jurisdiction pose for Tribal governments and Native people are not new. The *Castro-Huerta* decision increased these complications by expanding the number of prosecutorial authorities for every crime in Indian Country involving a non-Indian perpetrator and an Indian victim. This Part explores potential solutions to address these complications and the injustice faced by Native women. First, it discusses broad-sweeping measures Congress should undertake to restore Tribal sovereignty over non-Indian offenders, increase Tribal sentencing abilities, and adequately fund Tribal criminal justice systems. Next, it details how shifting primary evidence gathering responsibilities to Tribes will improve the efficient and effective prosecution of domestic and sexual

237. *See id.* (noting that some Native people living on reservations find it difficult to navigate hundreds of miles to federal courthouses).

238. *See* Vasilogambros, *supra* note 231.

239. Brief of Amici Curiae Former United States Attorneys Michael Cotter et al. at 13, Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (No. 21-429); *see also Castro-Huerta*, 597 U.S. at 689 (Gorsuch, J., dissenting) ("Federal authorities may reduce their involvement when state authorities are present. In turn, some States may not wish to devote the resources required and may view the responsibility as an unfunded federal mandate.").

violence crimes. It also argues that Tribes, states, and the federal government should pursue collaborative, locally focused efforts to address the problems inherent in concurrent jurisdiction in Indian Country. While no single proposed solution will immediately resolve the centuries-long problems of Indian law policies, each is better than doing nothing. Something needs to be done to cure the violence epidemic in Indian Country.

A. Broad-Sweeping Legislative Measures That Recognize Tribal Sovereignty and Help Curb Domestic and Sexual Violence Against Indians

The Court acknowledged in *Castro-Huerta* that Congress can undo the decision and explicitly preempt state authority at any time.[240] After the decision, Tribal leaders urged Congress to take action, as it has a "constitutional role to determine Tribal, federal, and state jurisdiction in Indian country."[241] In the post-*Castro-Huerta* world, there should still be a push for expanding Tribal sovereignty, even if there appears to be less of a jurisdictional void with states' intervention. This Section explores potential legislative paths available to Congress and the states that will address Tribal concerns about concurrent jurisdiction and promote safety and justice for Native women in Indian Country. While these recommendations are quite ambitious, they are still useful to consider when determining what actions to pursue to protect vulnerable Native women.

1. Restore Tribal Governments' Authority to Promote Public Safety and Provide Justice in Indian Country

The Indian Law and Order Commission posits that the public safety crisis, and thus the domestic and sexual violence epidemic, in Indian Country should be remedied through restoring authority to Tribal governments when they request it.[242] Many

---

240. *Castro-Huerta*, 597 U.S. at 695 (Gorsuch, J., dissenting) ("But thanks to this Court's egregious misappropriation of legislative authority, 'the ball is [back] in Congress' court.'" (quoting Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting))).

241. *See Summary Report*, *supra* note 29, at 5.

242. MAKING NATIVE AMERICA SAFER, *supra* note 203, at 17 ("[T]he Commission strongly believes that for public safety to be achieved in Indian country, Tribal justice systems must be allowed to flourish, Tribal authority should be restored to Tribal governments when they request it, and the Federal government in particular needs to take a back seat in Indian country . . . .").

Tribal leaders and advocates feel that coordinated federal, state, and Tribal law enforcement that pays significant deference to the Tribe's needs would support Tribal sovereignty and self-determination.[243] There is a general consensus among the Commission that Tribes are "best positioned to make decisions about their local public safety needs and what is best for their communities," and that the *Castro-Huerta* decision limits Tribal abilities to make these decisions.[244] The following potential legislative solutions will restore Tribal sovereignty, improve Tribes' abilities to adequately promote public safety and protect victims, and re-center Tribal needs in the discussion of criminal jurisdiction in Indian Country.

a. Reaffirm That Tribal Nations Have Criminal Jurisdiction to Punish Defendants Who Commit Crimes on Tribal Lands Through Amending ICRA

One action Congress should take to restore Tribal criminal justice authority is to reaffirm that Tribal Nations have criminal jurisdiction to punish any wrongdoer, whether Indian or non-Indian, who commits a crime in Indian Country.[245] While this seems like a major shift after *Oliphant*, this action merely restores what Tribes were initially able to do for decades.[246] Specifically, Congress can amend ICRA,[247] originally passed in 1968, to address the current public safety crisis of crimes with non-Indian perpetrators and Indian victims in Indian Country. The following change, with added language indicated in bold and omitted language indicated by strikethrough, can be made to 25 U.S.C. § 1301:

243. *See Summary Report*, *supra* note 29, at 5 ("The majority of commenters stated the need for Congressional action to fully restore inherent Tribal jurisdiction in Indian country.").

244. *Id.* at 6.

245. *Id.* at 9–15 (presenting the proposed legislation from the Coalition of Large Tribes).

246. *Compare* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that Tribes do not have the inherent ability to prosecute non-Indians in Indian Country), *with* Williams v. Lee, 358 U.S. 217, 223 (1959) (standing for the pre-*Oliphant* proposition that Tribes have inherent sovereignty to make their own laws and be governed by them, including asserting these laws over non-Indians).

247. *See* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1301–1304).

> For the purposes of this subchapter, the term –
>
> . . . .
>
> (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all ~~Indians~~ **persons located on or within "Indian country" as defined by 18 U.S.C. § 1151**; . . . .[248]

This added language is a step toward restoring Tribal sovereignty by showing congressional respect that Tribal governments are in the best position to address and make decisions about public safety on their land. While this change may seem drastic in 2023, it simply returns Tribal jurisdiction over non-Indians to the pre-*Oliphant* days.

However, under current sentencing limitations, Tribes are not equipped with the proper criminal justice apparatus to effectively punish defendants and pursue justice for victims. ICRA codifies the current sentencing limitations established by TLOA, which restrict Tribal courts to issuing a sentence of three years for certain crimes and nine years total when stacked with other crimes.[249] While some Tribes do not seek incarceration as punishment,[250] these sentencing limitations prevent every Tribe from issuing sentences that are appropriate for major crimes.[251]

These limitations erode Tribal sovereignty by giving Tribes limited choices and places them in tough situations. For example, if a Tribe "wants to access a more appropriate sentence and there is concurrent jurisdiction, it must cede prosecution to the Federal government or a State government."[252] If the state or the federal government fails to investigate or prosecute the case, then a Tribe must issue a sentence that will often be too short to

248. This proposed change is inspired by the Coalition of Large Tribes' proposition. *Summary Report*, *supra* note 29, at 14.

249. *See* 25 U.S.C. § 1302(b), (d).

250. *See, e.g.*, Crepelle, *supra* note 79, at 93–94 ("Indigenous justice systems traditionally focus on restoring harmony to the community rather than retribution." (citing Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997))).

251. *See, e.g.*, MAKING NATIVE AMERICA SAFER, *supra* note 203, at 21 (explaining that Congress's assumption that Tribal courts would only handle misdemeanors gave rise to the limitation on Tribal court sentencing).

252. *See id.*

protect public safety and satisfy victims.[253] However, these issues should be resolved through congressional action. The following amendment to 25 U.S.C. § 1302 would remove all limitations on Tribal sentencing as they currently stand:

> (a) In general – Title II of Public Law 90-284 (25 U.S.C. 1301 et. seq.) (commonly known as the "Indian Civil Rights Act of 1968") is amended by undertaking the following:
>
> **Subparagraphs (B) through (D) of § 1302(a)(7) and § 1302(b) shall be eliminated in their entirety.**[254]

The above changes to ICRA would relax restrictions of Tribal prosecutorial authority over non-Indian offenders and remove sentencing restrictions. This would empower Tribes to exercise criminal jurisdiction on their land, regardless of the offender, in order to more adequately protect Native victims and promote public safety. Through the removal of sentencing limitations, Tribal courts would have "more freedom in crafting remedies to fit the needs and ensure the safety of Native American women victimized by domestic violence."[255]

---

253. *Id.*

254. This amendment is inspired by the Coalition of Large Tribes. Summary Report, *supra* note 29, at 14–15. These changes would eliminate the following text from 25 U.S.C. § 1302(a)(7):

> (B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;
>
> (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or
>
> (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

Section 1302(b) would also be deleted, which provides:

> (b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000
>
> A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who –
>
> > (1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
> >
> > (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

255. Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 228 (2008).

b. Amend PL-280 to Limit States' Criminal Jurisdiction in Indian Country to Circumstances in Which Tribes Give Their Consent

As proposed by Justice Gorsuch in his dissent in *Castro-Huerta*, Congress can make a simple amendment to PL-280 that will preempt state authority to exercise criminal jurisdiction in Indian Country.[256] The following is an example of a potential amendment that will add a new subsection to PL-280 as amended and codified at 18 U.S.C. § 1162:

> **(e) Lack of State Jurisdiction Absent Tribal Consent**
>
> **Except as provided in subsection (a), a State lacks criminal jurisdiction over crimes by or against Indians in Indian country, unless the State complies with the procedures to obtain tribal consent outlined in 25 U.S.C. § 1321, and, where necessary, amends its constitution or statutes pursuant to 25 U.S.C. § 1324.**[257]

This amendment will "ensure that states, other than the six states with mandatory criminal jurisdiction under 18 U.S.C. § 1162(a), have no criminal jurisdiction in Indian country unless they have first obtained tribal consent."[258] This addresses the inherent issues in the *Castro-Huerta* decision that deviates from decades of Indian law and strips Tribal autonomy by forcing state jurisdiction over crimes with non-Indian perpetrators and Indian victims.[259] This amendment will establish the necessary, express congressional preemption of state criminal jurisdiction that Justice Kavanaugh so vehemently adhered to in his majority opinion.[260]

However, reverting to sole federal jurisdiction, in addition to Tribal authority, will not wholly improve the current situation in Indian Country regarding sexual and non-sexual violence perpetrated by non-Native men against Native women. Congress

256. *See* Oklahoma v. Castro-Huerta, 597 U.S. 629, 695 (2022) (Gorsuch, J., dissenting) ("Even the Court acknowledges that Congress can undo its decision and preempt state authority at any time. And Congress could do exactly that with a simple amendment to Public Law 280." (citation omitted)).

257. This proposed amendment reflects that recommended by the Coalition of Large Tribes. *Summary Report*, *supra* note 29, at 15.

258. *Id.*

259. *See supra* Part III.B (describing the effects of the *Castro-Huerta* decision).

260. *See supra* Part II.B.1 (detailing Justice Kavanaugh's majority opinion in *Castro-Huerta*).

must also address the lack of funding and resources in Tribal criminal justice systems.

2. Increase Funding and Resources to Tribal Criminal Justice Systems

Many Tribal criminal justice systems struggle with limited funding and resources, reducing their ability to effectively take criminal investigation and prosecution under their authority.[261] Thus, Congress should increase appropriations to better fund Tribal justice systems and help them equip themselves with the necessary tools to properly confront the public safety crisis caused by the violence perpetrated against Native women. Tribal advocates suggest that increased funding can tremendously help update and develop criminal codes; build and improve detention and rehabilitation facilities; and staff judges, prosecutors, public defenders, clerks, law enforcement officers, and other positions.[262] These appropriations would support Tribal law enforcement in dispensing justice across Indian Country.[263]

Recent Tribal calls for increased funding have been answered by the DOJ. In September 2022, the DOJ announced that it would award more than $246 million in grants to American Indian and Alaskan Native communities in an effort to "improve public safety and serve crime victims."[264] These grants "are designed to help enhance Tribal justice systems and strengthen law enforcement responses, improve the handling of child abuse cases, combat domestic and sexual violence, support Tribal

---

261. *See, e.g.*, *Fiscal Year 2021 Indian Country Budget Request: Advancing Sovereignty Through Certainty & Security*, NAT'L CONG. OF AM. INDIANS 31 (2021), https://archive.ncai.org/resources/ncai-publications/indian-country-budget-request/NCAI_FY_2021_FULL_BUDGET.pdf [https://perma.cc/JL24-MDAT] ("In 2018, the U.S. Commission on Civil Rights found that there continues to be 'systematic underfunding of tribal law enforcement and criminal justice systems, as well as structural barriers in the funding and operation of criminal justice systems in Indian Country' that undermine public safety.").

262. *Summary Report*, *supra* note 29, at 6.

263. *See* MAKING NATIVE AMERICA SAFER, *supra* note 203, at 17 ("When Tribal law enforcement and courts are supported—rather than discouraged—from taking primary responsibility over the dispensation of local justice, they are often better, stronger, faster, and more effective in providing justice in Indian country than their non-Native counterparts located elsewhere.").

264. *See* Press Release, U.S. Dep't of Just., Justice Department Announces More than $246 Million in Grants for Tribal Nations (Sept. 21, 2022), https://www.justice.gov/opa/pr/justice-department-announces-more-246-million-grants-tribal-nations [https://perma.cc/6DCY-83AD].

youth programs, and fund an array of services for American Indian and Alaska Native crime victims."[265] Some Tribal grantees expressed that this kind of funding changes the care they can provide to make profound differences in survivors' lives, especially because Tribes know best what "will bring justice to survivors" and "align with community values."[266]

While this action taken by the DOJ is a step in the right direction, it is still inadequate when looking at the entire needs of Tribal criminal justice systems. The Bureau of Indian Affairs (BIA) reported to Congress that in order to provide a minimum level of service to all federally recognized Tribal nations the following is needed: $1 billion for Tribal law enforcement, $1 billion for Tribal courts, and $222.8 million for existing detention centers.[267] The BIA is funding Tribal law enforcement at twenty percent of estimated need, Tribal detention at forty percent of estimated need, and Tribal courts at only five percent of estimated need.[268] Thus, Native Nations instead have to rely on short-term grants,[269] like the DOJ grant above, to make up for this gap in funding.[270] The recent $246 million DOJ grant is limited for crime victim services, whose importance cannot be overstated, but cannot be used for law enforcement, prosecution, or other criminal justice related purposes.[271] Thus, Congress should commit to fully funding additional Tribal criminal justice initiatives over the next few years. It should be noted that almost every sector of our government could become more effective if only it had more money. However, the situation in Indian Country is dire, as evidenced by the extreme funding deficits that severely limit Tribal criminal justice innovations.

Increased funding will also allow more Tribes to implement VAWA and exercise STCJ over the recently expanded list of

---

265. *Id.*

266. *Id.*

267. *Fiscal Year 2021 Indian Country Budget Request: Advancing Sovereignty Through Certainty & Security*, *supra* note 261, at 31.

268. *Id.*

269. *See id.* at 32 (noting that in order to obtain these grants from the DOJ, Tribes are pitted against each other to compete for them, which severely disadvantages Tribal nations with substantial needs that lack the resources to employ experienced grant writers).

270. *Id.*

271. *Id.*

qualifying crimes.[272] VAWA 2022 reauthorized the grant program from VAWA 2013 that helps support Tribes' exercise of STCJ and authorized a new program to reimburse Tribal governments for the expenses incurred in exercising their jurisdiction.[273] The Act authorizes an annual appropriation of $25 million for both the grants and reimbursements, where no more than forty percent may be used for reimbursements.[274] Congress should fully fund the programs authorized in VAWA 2022 in addition to meeting the other funding needs of Tribal governments, which will allow Tribes to build adequate criminal justice systems capable of meeting local needs.

Telling Congress that Tribes need more funding is easier said than done. However, Tribes will not be able to exercise either STCJ under VAWA or general prosecutorial authority with the amendment to ICRA if their criminal justice systems are inadequately funded. Thus, it is important to continue to advocate for more Tribal funding to best protect Native victims of domestic and sexual violence. But these broad-sweeping legislative measures and increased funding are difficult to achieve and will take time to do so. In the meantime, the multiple prosecutorial authorities need to improve their working relationships to best protect victims and achieve justice.

B. Improving Relationships Between Each Prosecuting Authority Under the Present Jurisdictional Scheme

While Congress works through legislative solutions, federal, state, and Tribal prosecutors must collaborate to determine the most effective means to handle the domestic violence epidemic. *Castro-Huerta* may have solved part of the jurisdictional void in Indian Country, but numerous potential issues can arise throughout the course of an investigation and prosecution of an Indian Country crime when there are three potential prosecutorial authorities. The first issue is determining whether the perpetrator is an Indian or non-Indian, then discerning the status of the victim and what statutorily defined crime was

272. *See supra* Part I.C.2; *see also* Crepelle, *supra* note 79, at 79 (explaining that a major issue with VAWA is cost and that the associated expenses from complying with the requirements hinder its adoption among financially strained Tribes).

273. *See 2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)*, *supra* note 94.

274. *Id.*

committed.[275] Tribal police have the best access to evidence as the first responders to crimes committed in Indian Country and have the least delay in responding to calls, but Tribes will not always end up becoming the power that prosecutes. It is challenging to figure out which prosecutorial authority should respond at the beginning of a case, and Native victims will often not feel comfortable testifying in either state or federal court.[276] The severity of these issues can be mitigated through increased cooperation between Tribal, state, and federal prosecutors.

1. Tribes Should Be the Primary Gatherers of Evidence and Collaborate Openly with Federal and State Law Enforcement Agencies

One possible way to address these challenges is to designate Tribal law enforcement as the primary gatherer of evidence for crimes committed in Indian Country. As discussed previously, state and federal law enforcement agencies often struggle to investigate Indian Country crimes effectively and efficiently.[277] Whether this is because of a lack of care for the crimes occurring in Indian Country or because of the inherent difficulties in responding timely to crimes and locating victims, it is evident that as the current landscape stands, criminal investigations are not being handled properly by non-Tribal authorities. Many of these challenges can be fixed if Tribal law enforcement agencies are able to assume primary responsibility for investigations, regardless of what entity will end up prosecuting the crime down the line. This will also eliminate cultural barriers that inhibit victims from candidly communicating during an investigation, which is especially critical for domestic violence and sexual assault crimes which are victim centered.

275. This is no easy task. Under federal law, an Indian is someone who is an enrolled member of a federally recognized Tribe, with each Tribe having its own membership requirements. *See* DEP'T OF JUST., CRIMINAL RESOURCE MANUAL 686, https://www.justice.gov/archives/jm/criminal-resource-manual-686-who-indian [https://perma.cc/L7XD-2F2X]. There is no formal definition at the state level, and thus states are not necessarily using a specific statute to exercise their authority.

276. This can be due to the compounding effects of physically and culturally feeling distant from federal authorities. *See, e.g.*, Washburn, *supra* note 233, at 1021–22 (discussing negative Tribal reactions to outsiders (federal prosecutors) disrupting their communities and the long physical distances Native Americans must travel to courthouses).

277. *See supra* Part III.B.2.

Importantly, some Tribes are better situated to assume this responsibility right away than others. Many Tribal law enforcement agencies are underfunded and resource constrained.[278] Yet, through grants, Tribal law enforcement agencies are able to slowly improve their capabilities which would allow them to be ready to assume primary responsibility for investigation and evidence gathering. For example, the Office of Community Oriented Policing Services (COPS Office) within the DOJ launched its Coordinated Tribal Assistance Solicitation (CTAS) in 2010 to respond to the criminal justice and public safety needs of federally recognized Tribes more flexibly.[279] Before, Tribes had to submit multiple applications, but now they are able to submit only one application for many of the DOJ's Tribal grant programs.[280] The funding is also tailored to the specific public safety needs of the Tribe.[281] Through this structure, Tribes can more readily access the money they need to position themselves to address the issues involved in having state or federal agencies as the primary investigators.[282]

Increasing funding to Tribal entities will not automatically address the problems with concurrent jurisdiction, but there are other initiatives that will improve investigations of Indian Country crimes. The DOJ can continue to create Special Assistant U.S. Attorney positions that work closely with Tribal prosecutors and have FBI agents more closely cooperate with the relevant Tribal actors when conducting investigations. In December 2022, Attorney General Merrick B. Garland announced that the

---

278. *See, e.g.*, *Rural and Tribal Law Enforcement*, DEP'T OF JUST. 1 (2021), https://www.justice.gov/file/1354601/download [https://perma.cc/AYC2-7MES] (revealing that Tribal law enforcement face significant challenges due to their small size and lack of adequate resources).

279. *See Fact Sheet Purpose Area 1: Public Safety and Community Policing*, CMTY. ORIENTED POLICING SERVS. 1 (2021), https://cops.usdoj.gov/pdf/2022AwardDocs/ctas/PA1_Fact_Sheet.pdf [https://perma.cc/TCM8-QFXN] (explaining how CTAS operates to meet the most serious needs of law enforcement in Indian Country).

280. *Id.*

281. *Id.*

282. In 2022, forty-seven Tribes received a total of $27,721,343 in Tribal Resource Grant Program funding through CTAS. $10,682,088 was for hiring and $17,039,255 was for equipment and training. *See The COPS Office's FY22 Funding Grants Include Awards to 52 Tribal Nations*, DISPATCH CMTY. POLICING (Nov. 2022), https://cops.usdoj.gov/html/dispatch/11-2022/tribal_funding.html [https://perma.cc/HQC3-44MY].

FBI and BIA signed an agreement to establish guidelines for effective and efficient administration of criminal investigations in Indian Country.[283] The agreement requires that all BIA, FBI, and Tribal law enforcement officers receive training about trauma-informed and culturally responsible investigative approaches.[284] The agencies will also create written guidelines that outline both jurisdiction and investigative roles and responsibilities from the BIA, FBI, and Tribal law enforcement agencies.[285] Creating a nationwide agreement and plan will help address the broad cooperation issues faced by many Tribes across the country.

Tribes should also ensure their individual needs are met through locally focused collaborations. One example of what can be done is found in Montana. In 2021,

> [t]he U.S. Attorney's Office for the District of Montana, the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Indian Reservation and the FBI . . . announced the completion of the nation's first Tribal Community Response Plan (TCRP) as part of a pilot project to address cases of Missing and Murdered Indigenous Persons.[286]

Working group meetings included representatives from the USAO and federal, state, Tribal, and local law enforcement agencies. The TCRP facilitated a "coordinated response" to "time sensitive investigations" and developed guidelines to implement throughout the state.[287] The same should be done for domestic and sexual violence crimes, which are equally as time sensitive as cases for missing and murdered people. Locally focused approaches between the relevant USAO, state, and Tribal actors that seek to address the complications in investigating and prosecuting domestic and sexual violence crimes committed by non-Indians against Indians will address the difficulties in creating

283. Press Release, U.S. Dep't of Just., FBI and Bureau of Indian Affairs Sign Agreement to Improve Law Enforcement in Indian Country (Dec. 1, 2022), https://www.justice.gov/opa/pr/fbi-and-bureau-indian-affairs-sign-agreement-improve-law-enforcement-indian-country [https://perma.cc/428V-9VQZ].

284. *Id.*

285. *Id.*

286. *See* Press Release, U.S. Att'y's Off. Dist. Of Mont., Acting U.S. Attorney Leif Johnson, The Confederated Salish and Kootenai Tribes and FBI Announce Completion of Tribal Community Response Plan to Address Missing and Murdered Indigenous Persons (Apr. 1, 2021), https://www.justice.gov/usao-mt/news/acting-us-attorney-leif-johnson-confederated-salish-and-kootenai-tribes-and-fbi-announce [https://perma.cc/N9DS-PNMA].

287. *Id.*

a blanket solution. Locally catered approaches are best, especially when each federally recognized Tribe has varying needs, resources, and capabilities to address the violence epidemic faced by Native women.

2. Tribes Should Strive to Mirror the White Earth Nation and Conduct Frequent Roundtable Discussions with Tribal, State, and Federal Prosecutors

In addition to shifting primary evidence gathering to Tribes and increasing collaborative efforts among Tribes, states, and the federal government, Tribes should strive to emulate what the White Earth Nation has accomplished. PL-280 granted the State of Minnesota jurisdiction in Indian Country.[288] The White Earth Nation in Minnesota was the first Tribe to apply for and receive restoration of federal jurisdiction under TLOA, which was granted in 2013.[289] Today, the Tribe serves as a model for how other Tribes can balance the relationship with, and powers of, Tribal, state, and federal prosecutorial authorities. The White Earth Nation has a positive working relationship with the state prosecutor, Tribal prosecutor, and Assistant U.S. Attorneys working in Indian Country.[290] Frequent roundtable discussions allow key players to candidly discuss who should be the one to

288. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360) (making Minnesota a mandatory PL-280 state).

289. *See* Press Release, U.S. Dep't of Just., United States to Accept Concurrent Jurisdiction Over White Earth Reservation in Minnesota (Mar. 15, 2013), https://www.justice.gov/opa/pr/united-states-accept-concurrent-jurisdiction-over-white-earth-reservation-minnesota [https://perma.cc/3U77-AUSW] ("The Department of Justice has granted a request by the White Earth Nation for the United States to assume concurrent criminal jurisdiction on the 1,300 square mile White Earth reservation in northern Minnesota . . . .").

290. The Pascua Yaqui Tribe of Arizona also has a strong, cooperative relationship with its USAO. *Pascua Yaqui Tribe VAWA Special Domestic Violence Criminal Jurisdiction – Tribal Justice*, TRIBAL ACCESS TO JUST. INNOVATION, https://tribaljustice.org/places/cross-jurisdictional-collaboration/violence-against-women-act-special-domestic-violence-criminal-jurisdiction [https://perma.cc/QT5X-M4KG] ("The tribe works regularly with the . . . U.S. Attorney's Office in Tucson, the U.S. Department of Justice, and the Bureau of Indian Affairs. Because of the jurisdictional overlap, the tribe's positive relationships with state and federal law enforcement have been very beneficial. . . . Tribal law enforcement also participates in a local integrated information sharing system with state and federal law enforcement that makes investigation and prosecution more efficient for everyone.").

prosecute a case when all three, or maybe just the state and federal government, have the authority to prosecute. These roundtable discussions are not temporary nor created only to develop guidelines or programming to address certain crimes. Instead, they are a permanent part of charging decisions and help foster the collaborative environment that is necessary so long as multiple governments have criminal jurisdiction. While it might be idealistic to assume that every Tribe will be able to get along with every set of state and federal prosecutorial authorities, it is important to push for these collaborations so long as concurrent criminal jurisdiction exists in this area.

CONCLUSION

By granting states concurrent jurisdiction with the federal government over crimes committed in Indian Country by non-Indians against Indians in *Castro-Huerta*, the Supreme Court made a grave mistake. Granting criminal jurisdiction to more authoritative bodies is not always better. Many Native women feel that reporting the crimes committed against them is pointless, as justice is rarely achieved when non-Tribal agencies assume jurisdiction. While the federal government saw a sharp increase in Indian Country cases in the wake of *McGirt*, Tribal leaders do not believe that expanding criminal jurisdiction to the states solves the issue. The *Castro-Huerta* decision is yet another instance of the subtle erosion of Tribal sovereignty over the past few centuries.

State law enforcement agencies are often ill-equipped to handle the complications that come with investigating and prosecuting crimes in Indian Country. The best way to protect Native women victimized by domestic and sexual violence in Indian Country is to restore Tribal sovereignty and support Tribal criminal justice systems in their assumption of criminal jurisdiction over this category of crimes. The 2022 reauthorization of VAWA offers an expanded array of crimes over which Tribes can exercise STCJ. However, there are other opportunities that should be seized in this post-*Castro-Huerta* climate.

Congress can pursue legislative measures that preempt state authority and expand Tribal governments' ability to promote public safety and protect victims. Additionally, Congress must sufficiently fund Indian Country to support Tribal courts and other criminal justice tools. Finally, Tribal, state, and

federal government need to strive toward creating a collaborative and candid environment that will ensure crimes are given proper attention in the investigation and charging stages. These potential solutions are only a starting point in the journey towards resolving the disturbing public safety crisis against Native women in Indian Country. There may also be non-legal and non-criminal justice solutions that can help protect Native victims of domestic and sexual violence. Yet, so long as Tribes are continually stripped of their sovereignty and jurisdiction, the domestic and sexual violence epidemic in Indian Country will persist and impact hundreds of thousands of Native American women.