

NOTES

OKLAHOMA V. CASTRO-HUERTA LEAVES A DANGEROUS WAKE: WHAT THE ADDED LAYER OF STATE CRIMINAL JURISDICTION MEANS FOR TRIBAL SOVEREIGNTY AND PUBLIC SAFETY IN INDIAN COUNTRY

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ABSTRACT

Enduring and fruitful tribal-state cooperation will only come when states recognize tribal governments as equal, sovereign nations. Unfortunately, Oklahoma v. Castro-Huerta has allowed the potential for Indian Law to be transported back in time to an era where states pushed for “unity” between state-tribal relations, but really only hoped to swallow tribal governments.

Castro-Huerta held for the first time that state governments have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian Country. Ignoring many years of judicial precedent and undermining legislation that sought to bolster tribal sovereignty, the decision muddles an already-confusing patchwork of laws that govern which layer of government has criminal jurisdiction over certain crimes committed in Indian Country.

This Note seeks to disprove the Castro-Huerta Court’s shaky reasoning and explain that in disregarding and misinterpreting centuries worth of Indian Law, the Court’s ruling actually increases public safety concerns in Indian Country while stripping tribes of their inherent sovereignty. Part I provides an overview of the current mechanisms for enforcing criminal law in Indian Country between federal, state, and tribal governments. Part II argues that, contrary to the view of the Castro-Huerta majority, granting states concurrent criminal jurisdiction over certain crimes is likely to deepen tensions in many tribal-state relationships and exacerbate public safety concerns on tribal land. Finally, Part III presents specific initiatives Congress could consider to legislatively modify the Castro-Huerta decision.

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INTRODUCTION	506
I. UNPACKING THE PUZZLE OF CRIMINAL JURISDICTION IN INDIAN COUNTRY	508
A. <i>Federal and Tribal Jurisdiction</i>	508
1. The General Crimes Act	509
2. The Major Crimes Act	509
3. The Indian Civil Rights Act and the Tribal Law and Order Act	510
4. The Violence Against Women Act	511
B. <i>State Jurisdiction and Public Law 280</i>	512
C. <i>McGirt v. Oklahoma and Oklahoma v. Castro-Huerta</i>	514
II. STATE CRIMINAL JURISDICTION WILL INCREASE SAFETY CONCERNS IN INDIAN COUNTRY	518
A. <i>Three Layers of Jurisdiction over One Crime Will Create Confusion on the Ground</i>	519
B. <i>States Are Not Financially Equipped to Take on the Expanded Duties</i>	521
C. <i>States Are Not Motivated to Protect Tribal Citizens</i>	522
III. CONGRESS MUST ACT TO RESTORE TRIBAL SOVEREIGNTY AND PROMOTE PUBLIC SAFETY	524
A. <i>Relevant Statutes Could Be Amended to Include Express Preemption Statements</i>	525
B. <i>Additional “Special Jurisdiction” Carveouts Could Be Established</i>	525
C. <i>Formula-Based Funding Could Replace Competitive Grant Programs</i>	527
CONCLUSION	529

INTRODUCTION

Here, we have a decision . . . where there are three layers of jurisdiction over a single instance Nowhere else in the country is that type of system created to administer justice, and it’s at a time when we need to have certainty [in order to protect] our missing and murdered indigenous people.¹

—National Congress of American Indians,
“Understanding the Case and Discussing Next Steps”

On June 29, 2022, the United States Supreme Court held for the first time in *Oklahoma v. Castro-Huerta* that state governments have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian Country.² The decision largely ignored two hundred years of judicial precedent and directly

1. NATIONAL CONGRESS OF AMERICAN INDIANS, *The Castro-Huerta Decision: Understanding the Case and Discussing Next Steps*, at 09:24–09:55 (YouTube, July 7, 2022), <https://www.youtube.com/watch?v=TJkKoMrp47s> [<https://perma.cc/Z9RM-P9VX>].

2. 597 U.S. 629, 633 (2022).

undermined legislation that sought to bolster tribal sovereignty.³ In his dissent, joined by Justice Breyer, Justice Sotomayor, and Justice Kagan, Justice Gorsuch wrote that “a more ahistorical and mistaken statement of Indian law would be hard to fathom.”⁴

The decision complicates an already muddled patchwork of laws that govern which layer of government has criminal jurisdiction over certain crimes committed in Indian Country. Instead of taking the proper avenues created by Congress to petition for concurrent state criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country, the state of Oklahoma—troubled by the Supreme Court’s decision less than two years prior in *McGirt v. Oklahoma*—concocted a media and litigation campaign portraying Indian reservations as “lawless dystopias.”⁵

The *McGirt* decision, deemed “‘a strong affirmation of the power of treaties’ and ‘one of the most consequential legal victories for Native Americans in decades,’”⁶ affirmed tribal sovereignty within the state of Oklahoma in denying the state the authority to prosecute crimes committed in Indian Country or by tribal members. Nevertheless, Oklahoma was successful in petitioning the Supreme Court to hear the related case of *Castro-Huerta* shortly thereafter. The thrust of Oklahoma’s argument was that the removal of state jurisdiction was contributing to public safety concerns both in Indian Country and in the state otherwise.⁷ In its brief, Oklahoma argued—and the Supreme Court wrongly agreed—that the “overriding need for the State to supplement federal law enforcement in Oklahoma tip[ped] the balance decisively in [Oklahoma’s] favor.”⁸

As will be further elaborated upon in this Note, the Supreme Court’s legal analysis in *Castro-Huerta* stands on shaky ground. This Note seeks to disprove the Supreme Court’s reasoning and explain that in blatantly disregarding and misinterpreting centuries’ worth of Indian Law, the Court’s ruling in *Castro-Huerta* actually *increases* public safety concerns in Indian Country—affecting both Indians and non-Indians—while stripping tribes of their inherent sovereignty. Part I unpacks the current mechanisms for enforcing criminal law in Indian Country between federal, state, and tribal governments. Drawing in part on an analysis of current Public Law 280 (“PL 280”) states, Part II argues that, contrary to the view of the *Castro-Huerta* majority, granting states concurrent criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country is likely to exacerbate public safety concerns on tribal land and deepen tensions in many tribal-state relationships. Finally, Part III presents specific initiatives that Congress could consider to legislatively modify the recent

3. See *infra* Part I.C.

4. *Castro-Huerta*, 597 U.S. at 667 (Gorsuch, J., dissenting).

5. See Kelsey Vlamis, *Oklahoma Spent Millions on a Legal and PR Campaign to Paint Reservations as ‘Lawless Dystopias’ and Persuade the Supreme Court to Weaken Tribal Sovereignty, Experts Say*, BUS. INSIDER (July 4, 2022, 9:40 AM), <https://www.businessinsider.com/oklahoma-tribal-land-as-lawless-dystopias-for-scotus-sovereignty-experts-2022-7> [<https://perma.cc/9FVN-JSCK>].

6. *Oklahoma v. Castro-Huerta: Bad Facts Make Bad Law*, NATIVE GOVERNANCE CTR. (July 14, 2022), <https://nativegov.org/news/castro-huerta/> [<https://perma.cc/LSQ3-SHXH>].

7. See *infra* Part I.C.

8. Reply Brief for Petitioner at 21, *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022) (No. 21-429).

Castro-Huerta decision. These initiatives aim to restore tribal sovereignty and empower tribal governments to effectively police crime that occurs in Indian Country.

I. UNPACKING THE PUZZLE OF CRIMINAL JURISDICTION IN INDIAN COUNTRY

Governed by federal law, the authority to prosecute crimes in Indian Country necessarily depends on the identity of the victim, the identity of the suspect, the nature of the alleged crime, and the location in which the alleged crime took place.⁹ This complexity has caused confusion in lower courts across the country for centuries, prompting periodic interjections by the Supreme Court and Congress to reaffirm and redesign criminal jurisdiction in Indian Country through a patchwork of jurisprudence and legislation.¹⁰ Part I of this Note unpacks the convolution and broadly explains the fundamental principles of Indian Law in the realm of criminal jurisdiction. First, Section A provides a historical overview of landmark federal legislation impacting tribal criminal jurisdiction in Indian Country. Section B then explores the added layer of state jurisdiction in Indian Country introduced in a select number of states through the 1953 congressional enactment of PL 280 and its subsequent amendments in 1968. Finally, Section C explains the present-day tension in Supreme Court jurisprudence, beginning with the *McGirt* decision and culminating in the more recent *Castro-Huerta* decision.

A. Federal and Tribal Jurisdiction

Since its formation, the United States has recognized Indian tribes as distinct governments with inherent sovereign powers.¹¹ A myriad of treaties, federal legislation, and Supreme Court decisions create the legal framework governing the relationship between the federal government and tribal governments.¹²

Article I, Section 8 of the United States Constitution vests Congress with the authority to engage in relations with tribes, an authority that the Supreme Court has expanded to include regulating matters beyond commerce.¹³ The United States Constitution also recognizes, and some of the earliest American jurisprudence confirms, that apart from a few exceptions, Indian tribes are afforded the same powers as federal and state governments to enact legislation, determine membership requirements, regulate internal affairs, and establish law enforcement and court

9. See Kirsten Matoy Carlson, *Dividing Authority Three Ways: Federal-Tribal-State Relations after Oklahoma v. Castro-Huerta*, 53 PUBLIUS: J. FEDERALISM 405, 408 (2023).

10. See *infra* Parts I.A–C.

11. See Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 L. & SOC'Y REV. 1123, 1125 (1994).

12. See Carlson, *supra* note 9, at 406.

13. U.S. CONST. art. 1, § 8, cl. 3; *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 n.7 (1973) (“The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.”).

systems.¹⁴ Only where Congress has expressed clear intent to abrogate the power of tribal governments does federal power displace tribal power.¹⁵

1. The General Crimes Act

In 1817, Congress passed the General Crimes Act, extending federal criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country.¹⁶ While still subject to federal law, Indian tribes—like states—are inherently sovereign nations with the authority to govern themselves and all persons residing within their borders.¹⁷ Accordingly, state governments have historically had “no authority to regulate Indian affairs absent an express congressional delegation or grant.”¹⁸ Federal protection of tribal sovereignty reflects a long history of states refusing to recognize Indian tribes as distinct nations with inherent powers to govern their own affairs.¹⁹ To combat this lack of recognition by states, the Supreme Court decided *Worcester v. Georgia* in 1832, “interpreting the [United States] Constitution as giving Indian jurisdiction exclusively to the federal government and explaining that state law had no force in Indian Country without specific congressional authorization.”²⁰ Excluding a few exceptions,²¹ Congress, the executive branch, and the courts have continued to follow *Worcester*’s holding that states do not have authority in Indian Country absent an express grant from Congress.

2. The Major Crimes Act

Toward the end of the nineteenth century, a series of tribal court cases that, from the federal government’s perspective, resulted in inadequate punishment for serious crimes committed between Indians in Indian Country²² led Congress to enact

14. *An Issue of Sovereignty*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 13, 2013), <https://www.ncsl.org/quad-caucus/an-issue-of-sovereignty> [https://perma.cc/V9L6-GS4A].

15. See Carlson, *supra* note 9, at 407.

16. 18 U.S.C. § 1152; see also 18 U.S.C. § 1151 (defining “Indian [C]ountry” as any Indian reservation or allotment under the jurisdiction of the United States); OFF. FOR VICTIMS OF CRIME, SANE PROGRAM DEVELOPMENT AND OPERATION GUIDE 52 (2015) [hereinafter *Tribal Law Synopsis*] (updated September 2025) (explaining that the federal government also has jurisdiction where the offender is Indian and the victim is non-Indian, the crime falls outside the Major Crimes Act, and the offender has not already been punished by the tribe for the offense).

17. See *Worcester v. Georgia*, 31 U.S. 515, 530 (1832).

18. Carlson, *supra* note 9, at 407.

19. Matthew L.M. Fletcher, *Retiring the Deadliest Enemies Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 73–74 (2013).

20. Carlson, *supra* note 9, at 407.

21. See *United States v. McBratney*, 104 U.S. 621, 623–24 (1881) (holding that despite the lack of express congressional authorization, states may exercise criminal jurisdiction over crimes between non-Indians that occur in Indian Country); *Draper v. United States*, 164 U.S. 240, 242–47 (1896) (affirming *McBratney*).

22. See, e.g., *Ex Parte Crow Dog*, 109 U.S. 556, 557–58, 570–72 (1883) (holding that because Congress had not granted federal jurisdiction over the crime of murder between Indians, the tribal court’s punishment that the perpetrator pay restitution to the victim’s family was sufficient).

the Major Crimes Act, which expressly authorizes federal jurisdiction over certain serious crimes committed on tribal land.

Enacted by Congress in 1885, the Major Crimes Act granted jurisdiction to federal courts, exclusive of states but not tribes, over Indians who commit certain offenses.²³ These offenses include murder, manslaughter, kidnapping, maiming, incest, felony assault, assault against a minor, felony child abuse or neglect, arson, burglary, or robbery, regardless of the victim's status as Indian or non-Indian.²⁴ Functionally, this Act became the source of federal jurisdiction for certain serious crimes that occurred in Indian Country where both the perpetrator and the victim are Indian and whose crimes would therefore not have been covered by the General Crimes Act.²⁵ Tribes retained exclusive jurisdiction over lesser crimes where the perpetrator and victim were Indian and exercised concurrent jurisdiction over many of the crimes in the Major Crimes Act.²⁶

As Indian Law evolved, Congress began a pattern of enacting legislation in response to judicial decisions it deemed unreflective or combative to fundamental principles of tribal sovereignty, as is its duty under the Constitution.²⁷ Notable legislation includes the Indian Civil Rights Act, the Tribal Law and Order Act, and the Violence Against Women Act, all of which reflect Congress' progressive efforts—especially recently—to protect tribal sovereignty from state infringement.

3. The Indian Civil Rights Act and the Tribal Law and Order Act

The Indian Civil Rights Act (“the ICRA”) and the Tribal Law and Order Act (“the TLOA”) both address sentencing authority in tribal court. In 1968, Congress passed the ICRA, which “extended certain federal rights found in the Constitution’s Bill of Rights to Indians in Indian Country.”²⁸ When originally passed, the ICRA limited the tribal court’s sentencing authority to six months in jail and a \$5,000 fine.²⁹ Subsequent amendments to the ICRA increased the maximum possible tribal court sentence to one year in jail and a \$5,000 fine.³⁰ Ten years later, in 1978, the Supreme Court decided *Oliphant v. Suquamish Indian Tribe*, holding that tribal courts lacked the authority to try or punish crimes committed by a non-Indian perpetrator against a non-Indian victim on tribal land.³¹ This ruling created a niche of exclusive federal jurisdiction—or

23. 18 U.S.C. § 1153.

24. *Id.*

25. See *Tribal Law Synopsis*, *supra* note 16, at 52–53.

26. Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever be Made into a Right*, 90 J. CRIM. L. & CRIMINOLOGY 1317, 1318 (2000).

27. U.S. CONST. art. 1, § 8, cl. 3.

28. *Tribal Law Synopsis*, *supra* note 16, at 53.

29. *Id.*

30. See Adam Goodrum, *Meeting the McGirt Moment: Five Tribes, Sovereignty & Criminal Jurisdiction in Oklahoma’s New Indian Country*, 46 AM. INDIAN L. REV. 201, 213–14 (2022).

31. 435 U.S. 191, 195 (1978).

exclusive state jurisdiction in a select number of states where Congress expressly granted authority—for crimes of that nature.³²

In 2010, Congress enacted the TLOA as a response to the rising levels of crime in Indian Country.³³ Once constrained by the ICRA's stringent sentencing caps, this Act expanded felony sentencing for some tribes to a maximum of three years imprisonment for a single offense, with total imprisonment time not to exceed nine years for multiple offenses, and a maximum imposition of three \$15,000 fines per proceeding.³⁴ In order to exercise the expanded sentencing authority, however, tribes must meet certain requirements, such as affording the defendant the right to effective assistance of counsel and maintaining proper records of criminal proceedings.³⁵ While the TLOA is seen as a step in the right direction for tribal sovereignty, tribes have struggled to implement enhanced sentencing authority due in part to a lack of funding, which is further discussed in Part III, Section B of this Note.³⁶

4. The Violence Against Women Act

Congress' enactment of the Violence Against Women Act ("VAWA") in 2013 marked another step forward for tribal sovereignty. Under this Act, tribes have the authority to "investigate, prosecute, and sentence Indians *and non-Indians* for offenses related to violence committed against a spouse or partner as well as for violations of protective orders."³⁷ Enacted decades after *Oliphant*, VAWA recognizes tribes' inherent power to exercise "[s]pecial [d]omestic [v]iolence [c]riminal [j]urisdiction" over certain defendants, regardless of their Indian or non-Indian status, thereby limiting the Court's earlier holding in *Oliphant*.³⁸

In 2022, Congress amended VAWA to recognize "special Tribal criminal jurisdiction" over "an expanded list of 'covered crimes' that includes, in addition to the VAWA 2013 crimes, assault of [t]ribal justice personnel, child violence, obstruction of justice, sexual violence, sex trafficking, and stalking."³⁹

This recognition of tribal authority in VAWA stands in stark contrast to earlier congressional action. As discussed in the next section, Congress' enactment of

32. *Id.* at 211.

33. Goodrum, *supra* note 30, at 213.

34. *Id.* at 214.

35. Letter from Eileen R. Larence, Dir., Homeland Sec. & Just. Issues, to Congressional Requesters 5–6 (May 30, 2012) [hereinafter Eileen Larence Letter], <https://www.gao.gov/assets/gao-12-658r.pdf> [<https://perma.cc/E7T5-D4QZ>].

36. See *No Tribes Can Afford New Federal Sentencing Law*, HERALDNET (May 30, 2012), <https://www.heraldnet.com/news/no-tribes-can-afford-new-federal-sentencing-law/> [<https://perma.cc/ESA5-YKZA>].

37. Goodrum, *supra* note 30, at 214–15 (emphasis added).

38. See *id.*; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

39. *2013 and 2022 Reauthorization of the Violence Against Women Act (VAWA)*, U.S. DEP'T OF JUST. (Apr. 7, 2023), <https://www.justice.gov/tribal/2013-and-2022-reauthorizations-violence-against-women-act-vaawa> [<https://perma.cc/SP4U-SS7G>].

PL 280 marked a significant departure from tribal self-governance, representing the first large-scale insertion of state criminal jurisdiction into Indian Country.⁴⁰

B. State Jurisdiction and Public Law 280

Prior to the enactment of PL 280 in 1953, criminal jurisdiction in Indian Country was nearly uniform: “Indian [C]ountry criminal jurisdiction was largely a matter for the federal government and the tribes themselves, with states limited to jurisdiction over crimes between non-Indians.”⁴¹ As previously discussed, this reflected the long-standing history of states refusing to recognize tribes as sovereigns.⁴² Despite this, Congress enacted PL 280 under its plenary power, largely in response to rising crime rates in Indian Country and as a means of reducing federal expenditures.⁴³ Congress’ original enactment of PL 280 mandated state criminal jurisdiction in Indian Country in five states⁴⁴—later expanded to six with Alaska’s statehood—in place of federal criminal jurisdiction, and allowed other states to opt in by petition if they sought to obtain criminal jurisdiction.⁴⁵ More than 300 tribes located within the borders of these six “mandatory” PL 280 states were affected.⁴⁶ PL 280 was adopted and implemented in these six states without the consent of the affected tribes.⁴⁷

A subsequent amendment to PL 280, passed by Congress in 1968, required states seeking to opt in to state criminal jurisdiction—called “optional PL 280 states”—to obtain consent from the affected tribes in the form of a majority vote.⁴⁸ However, the preexisting PL 280 states were not required to retroactively obtain tribal consent.⁴⁹ The 1968 amendments also allowed states to retrocede jurisdiction back to tribes, meaning tribes would reclaim exclusive jurisdiction over minor crimes and the federal government would reclaim concurrent jurisdiction over major crimes along with tribal governments.⁵⁰ Legislation allowing *tribes* to initiate retrocession from states has not yet been considered by Congress.⁵¹

40. See CAROLE GOLDBERG & HEATHER VALDEZ SINGLETON, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 3 (2007) [hereinafter LAW ENFORCEMENT UNDER PUBLIC LAW 280 REPORT], <https://www.ojp.gov/pdffiles1/nij/grants/222585.pdf> [https://perma.cc/MAT9-24QE].

41. *Id.* at 2.

42. *See id.* at 3.

43. Twetten, *supra* note 26, at 1321.

44. *Tribal Crime and Justice: Public Law 280*, NAT’L INST. JUST. (May 19, 2008), <https://nij.ojp.gov/topics/articles/tribal-crime-and-justice-public-law-280> [https://perma.cc/58QA-BNQR] (establishing California, Minnesota, Nebraska, Oregon, and Wisconsin as the original “mandatory” PL 280 states).

45. LAW ENFORCEMENT UNDER PUBLIC LAW 280 REPORT, *supra* note 40, at 3.

46. JACK UTTER, AMERICAN INDIANS: ANSWERS TO TODAY’S QUESTIONS 155 (1993); Carole Goldberg, *Unraveling Public Law 280: Better Late than Never*, ABA (Sept. 1, 2017), <https://www.americanbar.org/groups/crsj/resources/human-rights/archive/unraveling-public-law-280-better-late-never/> [https://perma.cc/5UXE-ZDRD].

47. LAW ENFORCEMENT UNDER PUBLIC LAW 280 REPORT, *supra* note 40, at 6.

48. *Id.*

49. *Id.* at 6–7.

50. *See* Twetten, *supra* note 26, at 1324 (explaining how pursuant to the 1968 amendments, Minnesota, Wisconsin, Nebraska, Washington, and Nevada each returned at least a portion of state jurisdiction to the federal government).

51. *See* LAW ENFORCEMENT UNDER PUBLIC LAW 280 REPORT, *supra* note 40, at 488.

Functionally, PL 280 meant that state law enforcement replaced the federal Bureau of Indian Affairs' police, and state prosecutorial authority replaced the federal government's authority to prosecute crimes through the General Crimes Act and the Major Crimes Act.⁵² Also, for tribes in affected PL 280 states, minor crimes that were once exclusively the responsibility of tribes could now be penalized under both tribal law and state law.⁵³ Essentially an unfunded mandate, PL 280 "manifested in a refusal to provide funding to the states onto which Public Law 280 forced criminal jurisdiction over Indian lands."⁵⁴

With PL 280 eliminating nearly all federal criminal justice funding for tribes in affected PL 280 states, and with state governments unwilling to commit their own resources, tribes in PL 280 states suffered.⁵⁵ A recent study found that reservations subject to PL 280 were "estimated to be more than 10 times *less* likely to operate tribal justice system services . . . as compared with reservations under federal jurisdiction."⁵⁶ A leading scholar on PL 280, Carole Goldberg, explained that while "tribes had not exactly thrived under the prior regime of federal authority . . . when the states took over, with their alternating antagonism and neglect of native peoples, tribes had to struggle even harder to sustain their governing structures, economies, and cultures."⁵⁷ Today, the same six states hold mandatory jurisdiction over crimes in Indian Country, while ten states have established optional jurisdiction through petitions to Congress.⁵⁸ Tribes in the remaining thirty-four states without PL 280 have a "much greater degree of agency over their policing systems" and can choose to ask the Bureau of Indian Affairs "to administer their police department using federal employees and funding" or "fund . . . their department entirely on their own terms."⁵⁹

A controversial enactment, PL 280 has been met with numerous legal challenges. Those most notable were set forth in *Bryan v. Itasca County*—where the Supreme Court held that PL 280 did not subject affected tribes to the civil regulatory

52. *Id.* at 3.

53. *Id.*

54. Twetten, *supra* note 26, at 1322.

55. Sarah N. Cline, Sovereignty Under Arrest? Public Law 280 and Its Discontents 17, 29 (May 20, 2013) (Masters of Public Policy essay, Oregon State University), <https://ir.library.oregonstate.edu/downloads/5999n518q> [<https://perma.cc/LB9Q-EUKT>] (stating that recent research has "brought forth compelling evidence that [PL 280] has created statistically significant disparities in the development of sovereign justice systems").

56. *Id.* at 27. Notably, this study warned that its results should be interpreted with caution due to the potential for inaccuracies in the self-report data it relied in part upon—a seemingly common disclaimer in Indian Law scholarship incorporating statistical data. *See id.* at 29.

57. CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (1997).

58. STEVEN W. PERRY, U.S. DEP'T OF JUST. BUREAU OF JUST. STATISTICS, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2023 1 (2023), <https://bjs.ojp.gov/document/tcdca23.pdf> [<https://perma.cc/HN5R-E28D>]. The "optional" states which elected to assume full or partial jurisdiction are Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. *See* Carole Goldberg, *Questions and Answers About Public Law 280*, TRIBAL COURT CLEARINGHOUSE, <https://www.tribal-institute.org/articles/goldberg.htm> [<https://perma.cc/Z7QN-AZB5>].

59. Eugene Sommers, Matthew Fletcher & Tadd Johnson, *It's Time to End Public Law 280*, NATIVE GOVERNANCE CTR. (Aug. 9, 2021), <https://nativegov.org/news/its-time-to-end-public-law-280> [<https://perma.cc/FGK2-3YPE>].

powers of state governments⁶⁰—and *Washington v. Confederated Bands & Tribes of the Yakima Nation*—where the Court held that Washington’s assertion of partial jurisdiction over tribal lands pursuant to state law was authorized by PL 280 and that the resulting “checkerboard” jurisdictional system did not violate the Equal Protection Clause of the Fourteenth Amendment.⁶¹ The Supreme Court has never addressed the threshold matter of whether Congress had the authority to enact PL 280 in the first place.⁶²

In 2022, Oklahoma, a non-PL 280 state, sought to obtain criminal jurisdiction not through Congress, but through the courts in *Oklahoma v. Castro-Huerta*.⁶³ Informed by knowledge from PL 280 states that state criminal jurisdiction has historically manifested in inadequate attention to crime in Indian Country and insufficient recognition of tribal sovereignty, tribes in Oklahoma vehemently opposed the idea.⁶⁴ Despite the Supreme Court’s recent *McGirt* decision—a win for tribal sovereignty—the state of Oklahoma prevailed in *Castro-Huerta*, setting an unsupported and dangerous precedent for tribal sovereignty.

C. *McGirt v. Oklahoma* and *Oklahoma v. Castro-Huerta*

The conflict in *McGirt* stemmed from Oklahoma’s long-standing insistence that it had authority to prosecute tribal citizens for crimes committed on lands it believed to be state-held.⁶⁵ In 1997, an Oklahoma state court prosecuted and convicted Jimcy McGirt, a citizen of the Seminole Nation, of three sex crimes.⁶⁶ In his appeal, McGirt argued that pursuant to the Major Crimes Act, his conviction was invalid because the federal government, not the state of Oklahoma, had the sole authority to prosecute tribal citizens alleged to have committed certain serious crimes in Indian Country.⁶⁷ Oklahoma contended it had authority because the crimes were committed on state-held land, in other words, refusing to acknowledge the existence of the Muscogee Creek Nation.⁶⁸ In fact, as the Supreme Court held in 2020 after granting a writ of certiorari,

60. 426 U.S. 373, 390 (1976).

61. 439 U.S. 463, 502 (1979).

62. Kyle S. Conway, *Inherently or Exclusively Federal: Constitutional Preemption and the Relationship Between Public Law 280 and Federalism*, 15 U. PA. J. CONST. L. 1323, 1330 (2013) (explaining also that “only a handful of lower courts have ever even addressed this aspect of the constitutionality of PL-280, and none of them offers a particularly satisfactory analysis”).

63. See *infra* Part C.

64. See Cline, *supra* note 55; Andrea DenHoed, *SCOTUS To Hear State’s McGirt Challenge in Oklahoma v. Castro-Huerta*, NONDOC (Apr. 26, 2022), <https://nondoc.com/2022/04/26/scotus-arguments-oklahoma-v-castro-huerta/> [<https://perma.cc/XC4L-KHX7>] (explaining Cherokee Nation leaders’ positions that “increased tribal jurisdiction would, in fact, be better for public safety,” and that Oklahoma’s preferred path would “undermine tribal sovereignty among the tribes in Oklahoma that have reservation status”).

65. See generally *McGirt v. Oklahoma*, 591 U.S. 894 (2020) (referencing the long-standing dispute of Oklahoma’s claim to tribal land).

66. See Goodrum, *supra* note 30, at 203–04.

67. See *id.* at 204.

68. *McGirt*, 591 U.S. at 918 (“[Oklahoma] thought the eastern half of the State was always categorically exempt from the terms of the federal MCA. So whether a crime was committed on a restricted allotment, a reservation, or land that wasn’t Indian [C]ountry at all, to Oklahoma it just didn’t matter.”).

the disputed lands in eastern Oklahoma belonged to the Muscogee Creek Nation pursuant to an 1833 treaty.⁶⁹ Accordingly, the Supreme Court vacated McGirt's state convictions because the state of Oklahoma did not have jurisdiction to prosecute him.⁷⁰ Beyond affirming tribal sovereignty over the disputed lands and emphasizing that *only Congress* had the authority to remove reservation status, the *McGirt* decision provided much-needed clarification as to which level of government could exercise jurisdiction over certain types of crimes in Oklahoma.⁷¹ Prior to the Court rendering this decision, "suspected criminals in eastern Oklahoma regularly avoided prosecution because law enforcement officials could not determine which government—state, tribal, or federal—had jurisdiction over the land where the crime occurred."⁷² Outraged, the state of Oklahoma claimed that the decision undermined its state sovereignty and threatened public safety in the state.⁷³ After refusing over forty petitions by the state of Oklahoma to overturn the *McGirt* decision,⁷⁴ the Court agreed to hear *Castro-Huerta*, which dealt with a similar issue: whether the state had criminal jurisdiction over non-Indians who were alleged to have committed crimes against Indians in Indian Country.⁷⁵

Oklahoma's sweeping statements that *McGirt* "wreaked havoc" in the state—though they made for catchy headlines—were largely unfounded.⁷⁶ As part of its media campaign to attract the attention of the Supreme Court to grant its petition in *Castro-Huerta*, Oklahoma claimed it lost jurisdiction to over 18,000 prosecutions a year, but "no one could provide any data to support that 18,000 number."⁷⁷ Also, despite the increased caseload that followed *McGirt*, tribal courts had "increased the capacity of their criminal justice systems . . . hired more prosecutors, while also receiving federal funds to hire victim advocates and special prosecutors."⁷⁸ The Court's decision in *Castro-Huerta* ultimately served to interrupt that progress.

Where the Court's *McGirt* decision stood to bolster tribal sovereignty, its *Castro-Huerta* decision in June of 2022 served to unravel that progress completely. In *Castro-Huerta*, Victor Manuel Castro-Huerta, a non-Indian, was prosecuted by the state of Oklahoma for severely neglecting an Indian child, a citizen of the

69. *Id.* at 937–38.

70. Press Release, U.S. Dep't. of Just., Jimcy McGirt Sentenced to Life Imprisonment (Aug. 25, 2021), <https://www.justice.gov/usao-edok/pr/jimcy-mcgirt-sentenced-life-imprisonment> [<https://perma.cc/FHE2-Z4CK>].

71. Carlson, *supra* note 9, at 413.

72. *Id.*

73. *Id.*

74. Derrick James, *Oklahoma AG Wants People Released on McGirt Back in Custody*, CNHI NEWS (Jan. 20, 2022), https://www.theadanews.com/news/local_news/oklahoma-ag-wants-people-released-on-mcgirt-back-in-custody/article_b9fcd4e5-1b96-553e-99d8-97547c97a964.html [<https://perma.cc/YX58-QLJB>].

75. *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 632 (2022).

76. See Allison Herrera & Rebecca Nagle, *Where Do Oklahoma's Numbers Come from in Its Supreme Court Case?*, KOSU (Apr. 26, 2022), <https://www.kosu.org/local-news/2022-04-26/where-do-oklahomas-numbers-come-from-in-its-supreme-court-case> [<https://perma.cc/DS7S-BQNN>].

77. *Id.* (noting also that the fluctuation in Oklahoma's crime rates between 2019 and 2021 was consistent with the nation's fluctuating rates due to the coronavirus pandemic).

78. *Id.*

Eastern Band of Cherokee, while living within the borders of the Cherokee Nation.⁷⁹ After Castro-Huerta was convicted under Oklahoma state law and sentenced to a prison term of thirty-five years in 2015,⁸⁰ the Supreme Court decided *McGirt* in 2020 while Castro-Huerta's conviction was on appeal, rendering state jurisdiction inapplicable within the borders of the Cherokee Nation for such a crime.⁸¹ Castro-Huerta contended on appeal that given *McGirt*, only the federal government had the authority to prosecute him under the General Crimes Act, and the Oklahoma Court of Criminal Appeals accordingly vacated his sentence.⁸² Upon Castro-Huerta's release from state prison, the federal government indicted him for child neglect and ultimately reached a plea agreement that resulted in Castro-Huerta's eventual deportation.⁸³ Meanwhile, the state of Oklahoma appealed Castro-Huerta's state case to the Supreme Court, asking it to reverse its *McGirt* decision or, in the alternative, hold that the General Crimes Act allowed for concurrent state jurisdiction.⁸⁴

Completely departing from the long-standing presumption that Congress must act expressly to allow for state criminal jurisdiction in Indian Country, the Supreme Court held for the state of Oklahoma after granting its petition in *Castro-Huerta*.⁸⁵ It began its analysis by incorrectly qualifying a once firmly known "exception" case, *United States v. McBratney*, as the "leading" case, displacing *Worcester*.⁸⁶ In *McBratney*, the Court held that states have jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian Country.⁸⁷ The *Worcester* holding—that states have no authority in Indian Country absent an express grant by Congress—had long been acknowledged by the Supreme Court as the leading case for criminal jurisdiction questions in Indian Country.⁸⁸ Despite this, the Court craftily used *McBratney* as the foundation for its analysis in *Castro-Huerta*, notwithstanding the holding's limited use as a narrow exception to *Worcester* historically.⁸⁹ Indeed, after the Court decided *Worcester*, Congress "did not choose to exercise its authority to allow state jurisdiction on tribal lands," but rather "chose only to

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

80. See Drew Pollom, *Castro-Huerta: A New Era of Indian Law?*, BARNEWS (July 12, 2023), <https://wabarnews.org/2023/07/12/castro-huerta-a-new-era-of-indian-law/> [<https://perma.cc/2WD5-KB35>].

81. *Castro-Huerta*, 597 U.S. at 634–35.

82. *Id.*

83. *Id.*

84. See *id.* at 633; DenHoed, *supra* note 64.

85. *Id.*

86. *Castro-Huerta*, 597 U.S. at 637–38.

87. See generally *United States v. McBratney*, 104 U.S. 621 (1881).

88. Carlson, *supra* note 9, at 407.

89. See Dan Schweitzer, *Opinion: Oklahoma v. Castro-Huerta*, 21-429, NAT'L ASS'N OF ATT'YS GEN, <https://www.naag.org/attorney-general-journal/opinion-oklahoma-v-castro-huerta-21-429/> [<https://perma.cc/QX8E-PMG7>] (July 7, 2022). *McBratney* dealt with the "murder of one non-Indian by another non-Indian on the Ute Reservation within the borders of Colorado." Eric Ramoutar, *Unprincipled Preemption: Why the Supreme Court Was Wrong in Oklahoma v. Castro-Huerta to Abandon Exclusive Federal Jurisdiction Over Crimes by Non-Indians Against Indians in Indian Country*, 48 AM. INDIAN L. REV. 1, 130 (2024).

extend *federal* law to tribal lands—and even then only for certain crimes involving non-Indian settlers.”⁹⁰

The Court then reframed the question governing criminal jurisdiction disputes and “[i]nstead of asking whether Congress explicitly authorized state authority in Indian Country . . . asked ‘has Congress preempted state authority in Indian Country?’”⁹¹ The Court dismissed Castro-Huerta’s contention that the enactment of PL 280 “would have been pointless surplusage if States already had concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian [C]ountry.”⁹² Ultimately, reframing the question allowed the Court to “read congressional silence [in the General Crimes Act and PL 280] as enabling state governments to . . . abandon[] the presumption that Congress has to take clear and express action to grant state authority in Indian Country.”⁹³ For the first time in a matter pertaining to criminal jurisdiction,⁹⁴ the Court also employed a balancing analysis that weighed tribal interests against state interests.⁹⁵ Barely acknowledging tribal interests, the Court swiftly concluded that state interests in public safety prevailed given that tribal land covered approximately 40% of the state of Oklahoma.⁹⁶

While the state of Oklahoma insisted that the added layer of state criminal jurisdiction would mean increased public safety for *all* persons residing within the state, examining empirical data of tribal-state relations bears a different result. Notably, quantitative studies exploring the impact of PL 280 on tribes have been severely hindered by a lack of reporting on the federal, state, and tribal levels.⁹⁷ Indeed, “while most Indian tribes with law enforcement agencies [have historically reported] their crime statistics in Indian [C]ountry annually to the [Bureau of Indian Affairs] crime analysis division, Public Law 280 tribes [have been] conspicuously absent among those reporting.”⁹⁸

Accordingly, and consistent with the foundation for similar arguments made by Indian Law scholars who have written in opposition to PL 280, the central

90. *Castro-Huerta*, 597 U.S. at 671 (Gorsuch, J., dissenting). Despite the federal government’s authority to prosecute such a crime under the General Crimes Act, the Supreme Court vacated the conviction, reasoning that in the unique circumstance of a state recently having been admitted to the Union—like Colorado recently had been—Congress excepted the “sole and exclusive jurisdiction over [an Indian] reservation” by express words, “and it had chosen not to do so in Colorado.” Ramoutar, *supra* note 89, at 130–131.

91. Carlson, *supra* note 9, at 415.

92. Schweitzer, *supra* note 89.

93. Carlson, *supra* note 9, at 415.

94. *Oklahoma v. Castro-Huerta: Supreme Court Rules About Criminal Jurisdiction on Indian Lands*, WESTLAW PRACTICAL LAW (July 6, 2022) (“Most of the reported cases using the *Bracker* balancing test involve state taxes or trade questions, not serious crimes.”).

95. *Castro-Huerta*, 597 U.S. at 649–51.

96. *Id.* at 651; see sources cited *infra* note 104.

97. See CAROLE GOLDBERG & HEATHER SINGLETON, RESEARCH PRIORITIES: LAW ENFORCEMENT IN PUBLIC LAW 280 STATES 10 (2005), <https://www.ojp.gov/pdffiles1/nij/grants/209926.pdf> [<https://perma.cc/E24Z-7QKF>].

98. *Id.*; see also PERRY, *supra* note 58, at 4 (noting that just recently in 2021 the FBI transitioned to the National Incident-Based Reporting System “to collect more detailed, incident-level crime data from law enforcement agencies”).

argument of this Note in Part II finds its strongest support in empirical data and personal accounts of what concurrent state criminal jurisdiction has meant historically for tribal members. Mentioned above, a recent PL 280 study employing both quantitative and qualitative analyses stated that where “numbers alone may prove insufficient to convict PL 280 of the charges laid against it, human testimony and the archival written word are now called to the stand.”⁹⁹

Part II explores how the additional layer of state criminal jurisdiction in Indian Country will likely create greater confusion on the ground, and that “human testimony” suggests that states will not be motivated to protect tribal citizens when faced with the inevitable choice, considering their lack of overall resources.¹⁰⁰ Contrary to the majority’s opinion in *Castro-Huerta*, this added layer of state criminal jurisdiction, which will take force in the nineteen states with federally recognized tribes where PL 280 does not apply¹⁰¹—not just Oklahoma—will result in increased public safety concerns on tribal land for Indians and non-Indians alike, just as PL 280 did for tribes located in affected states.

II. STATE CRIMINAL JURISDICTION WILL INCREASE SAFETY CONCERNS IN INDIAN COUNTRY

As it applies to layers of criminal jurisdiction, more is not better. Like the state of Oklahoma, some states view the *Castro-Huerta* decision as creating one set of rules for individuals residing within a state and “resolving the legal ambiguity about which government has authority in Indian Country.”¹⁰² What these states fail to recognize, however, is that subsuming tribal governments within states runs contrary to empirical data demonstrating that “empowering tribal governments leads to sustained economic development and improved social conditions for both Natives and non-Natives.”¹⁰³

States like Oklahoma also fail to recognize that “Americans understand [that] different jurisdictions set their own laws, such as when rules of the road shift between state lines.”¹⁰⁴ If a citizen of North Dakota traveled across state lines and committed a crime against a citizen of South Dakota, the citizen of North Dakota could expect to be held accountable by South Dakota. It would be “easy” if one layer of jurisdiction applied to every single person nationwide, but that, of course, contradicts the most fundamental principles of federalism.

The Department of Justice in the state of Oklahoma faced an unprecedented uptick in criminal felony caseloads following the Supreme Court’s decision in *McGirt*, which stripped Oklahoma of, and returned to the federal government, the authority to prosecute

99. Cline, *supra* note 55, at 30.

100. *See id.*

101. PERRY, *supra* note 58, at 2.

102. Carlson, *supra* note 9, at 416.

103. *Id.*

104. Jacob Fischler, *Three Years After Landmark Ruling, Congress Silent on Tribal Jurisdiction in Oklahoma*, NEBRASKA EXAM’R (Aug. 29, 2023, 2:56 PM), <https://nebraskaexaminer.com/2023/08/29/three-years-after-landmark-ruling-congress-silent-on-tribal-jurisdiction-in-oklahoma/> [https://perma.cc/DT3X-MBF7].

non-Indians for certain serious crimes they were alleged to have committed against Indians in Indian Country.¹⁰⁵ Between July 2020 and August 2021, United States Attorneys' Offices in Oklahoma received approximately 6,700 referrals from law enforcement.¹⁰⁶ Post-*McGirt*, the state of Oklahoma had no authority over lands the state's tribes controlled, "covering upwards of 40% of the state's geographic area, at least when it came to enforcement of major crimes."¹⁰⁷

However, Oklahoma's unique predicament required a bespoke Congressional solution, not a blanket decision from the Court that would affect every tribe across the nation. Like Kansas,¹⁰⁸ Iowa,¹⁰⁹ and other states before it, Oklahoma could have asked Congress for state-specific legislation through PL 280 in order to authorize criminal jurisdiction on tribal land, which requires tribal consent.¹¹⁰ While PL 280 initially transferred jurisdiction to states without tribal consent, amendments in 1968 to PL 280 did establish a process that, at the very least, offered greater protection of tribal sovereignty from state infringement by requiring tribal consent for any future assumptions of jurisdiction by states under PL 280. What's more, *Castro-Huerta* interrupted the implementation of federal funding that Oklahoma's United States Attorneys requested to accommodate the increased caseloads resulting from their coordination with tribal governments.

Section A will argue that if PL 280 created confusion and conflict between tribal and state governments, then *Castro-Huerta* complicates matters further by allowing for *three* potential layers of jurisdiction for a single crime without practical guidance. Section B will explain that states are not financially equipped to take on expanded law enforcement duties. Finally, Section C will illustrate how most states, historically and presently, lack the motivation to protect tribal citizens.

A. Three Layers of Jurisdiction over One Crime Will Create Confusion on the Ground

It is important to reiterate that nowhere else in our nation would three levels of government lay a valid claim to jurisdiction over a single crime. The *Castro-*

105. See Goodrum, *supra* note 30, at 204; Darbi E. Robertson, *A Survivor's Tale: How the Northern and Eastern Districts of Oklahoma Survived the Tidal Wave Collision of McGirt v. Oklahoma*, 49 AM. INDIAN L. REV. 291, 298 (2025) (explaining that after SCOTUS decided *McGirt*, the Northern District of Oklahoma "had a 200% jump in criminal cases filed," while the Eastern District of Oklahoma "experienced a spike of 400% more criminal cases filed").

106. Chris Casteel, *DOJ Warns of Eastern Oklahoma Crime Surge in Wake of McGirt Decision*, OKLAHOMAN (Apr. 26, 2022), <https://www.oklahoman.com/story/news/2022/04/24/feds-warn-crime-could-surge-oklahoma-reservations-after-mcgirt-decision-doj/7367764001/?gnt-cfr=1&gca-cat=p&gca-uir=false&gca-epi=z1178xxe1178xxv000058&gca-ft=164&gca-ds=sophi> [https://perma.cc/JU92-UU7T].

107. Fischler, *supra* note 104.

108. Prior to the enactment of PL 280, "in 1940, Kansas asked for and received permission from Congress to exercise jurisdiction over crimes 'by or against Indians' on tribal lands." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 663 (2022) (Gorsuch, J., dissenting) (citing 18 U.S.C. § 3243).

109. See *id.* (explaining that "Congress experimented with similar laws for New York, Iowa, and North Dakota").

110. Fischler, *supra* note 104.

Huerta decision “blurs already hard to navigate jurisdictional lines by increasing the overlap among federal, tribal, and state jurisdictions.”¹¹¹ The decision, though masterful in creating a loophole for state criminal jurisdiction, fails to acknowledge the practical logistics that come with combating increasing crime rates. Although historically reliable information about crime in Indian Country has been scarce, recent statistics suggest a dire need for jurisdictional clarity among law enforcement to combat rising crime rates.¹¹²

Among American Indian and Alaska Native (“AIAN”) persons admitted to state prison across thirty-four states in 2014, “about [eight] in [ten] (84%) had been arrested for a violent offense at least once in their criminal history.”¹¹³ During the ten-year period from 2012 to 2022, “the number of persons held for violent offenses [in tribal jails] increased 34% from 710 to 950 inmates.”¹¹⁴ An alarming 92% of AIAN youth “surveyed between 2008 and 2018 reported ever using any drugs in their lifetime, and 88% reported ever drinking alcohol.”¹¹⁵ Further, as of June 2023, 3.5% of the missing persons “included in the National Missing and Unidentified Person System . . . were identified as AI/AN, which was more than three times their percentage in the U.S. population.”¹¹⁶

Empirical data also proves helpful in considering the on-the-ground feelings surrounding the additional layer of state jurisdiction.¹¹⁷ A report on tribal justice systems mandated under the TLOA explained that although the “exceedingly complicated web of jurisdictional rules” at the federal and state levels is often justified as enhancing safety in Indian Country, “in practice, the opposite has occurred.”¹¹⁸ Now, state actors are thrown into the mix of federal and tribal actors, manifesting “[u]ncertainty over who to call, which police will respond, and who will prosecute a case.”¹¹⁹ Functionally, state and tribal governments now face the same confusion that prompted the Court to clarify jurisdictional authority in *McGirt* in the first place.¹²⁰

111. Carlson, *supra* note 9, at 425.

112. See generally Emily J. Hanson, *Missing and Murdered Indigenous People (MMIP): Overview of Recent Research, Legislation, and Selected Issues for Congress*, CONG. RSCH. SERV., R47010 (Jan. 10, 2022), <https://crsreports.congress.gov/product/pdf/R/R47010/2> [<https://perma.cc/R4CM-2VJS>].

113. PERRY, *supra* note 58, at 1.

114. *Id.* at 6.

115. *Id.*

116. Hanson, *supra* note 112, at 1.

117. PERRY, *supra* note 58, at 4 (noting that the FBI just recently, in 2021, transitioned from its formerly used Uniform Crime Reporting Program to the National Incident-Based Reporting System “to collect more detailed, incident-level crime data from law enforcement agencies”).

118. Hanson, *supra* note 112, at 18.

119. Wayne L. Ducheneaux, *Oklahoma v. Castro-Huerta: Bad Facts Make Bad Law*, NATIVE GOVERNANCE CTR. (July 14, 2022), <https://nativegov.org/news/castro-huerta/> [<https://perma.cc/9ED6-5S4E>].

120. See Carlson, *supra* note 9, at 413 (explaining how prior to the *McGirt* decision, “suspected criminals in eastern Oklahoma regularly avoided prosecution because law enforcement officials could not determine which government—state, tribal, or federal—had jurisdiction”).

Further, state action that conflicts with tribal public safety goals “come[s] at the expense of communities on Indian reservations.”¹²¹ The Court has empowered state governments—without obtaining tribal consent—to accept or decline cases committed by non-Indians against Indians in Indian Country.¹²² Tribal leaders in Oklahoma have already begun to report that “some counties in Oklahoma are not referring cases to tribal courts like they should.”¹²³ A once clear path to state criminal jurisdiction, petitioning to Congress, has been replaced with blanket jurisprudence that does not account for the complexities of each tribal-state relationship and infects already-complicated jurisdictional rules with uncertainty.

B. States Are Not Financially Equipped to Take on the Expanded Duties

Public safety is expensive. Historically, mandatory and optional PL 280 states that have assumed criminal jurisdiction have done so without financial support from the federal government, despite their expanded law enforcement duties.¹²⁴ There is a history of states retroceding criminal jurisdiction over certain tribes within their borders due to their inability to provide adequate funding for the expanded law enforcement and prosecutorial duties.

For example, consider Nebraska's withdrawal of criminal jurisdiction over the Omaha Tribe in 1970.¹²⁵ Nebraska, a mandatory PL 280 state, assumed criminal jurisdiction over all tribes within the state as a result of Congress enacting PL 280 in 1953.¹²⁶ From that point on, the Omaha Tribe experienced a drastic decline in law enforcement conditions.¹²⁷ Specifically, criminal cases involving Indians in Thurston County, where the tribe's reservation is primarily located, increased from 249 in 1954 to 353 in 1958, and the number of Indians being held at the Thurston County jail rose from 93 Indians at some point during 1949 to 334 Indians in 1958.¹²⁸ The catalyst for this rapid increase in crime was the lack of federal funding to handle the increased law enforcement responsibilities.¹²⁹ State responses to Thurston County's appeals for increased funding were described as “woefully inadequate” and “perversely counterproductive.”¹³⁰

121. *Tribal Sovereignty Ruling, Examining Oklahoma v. Castro-Huerta: The Implication of the Supreme Court's Ruling on Tribal Sovereignty: Hearing Before the Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Natural Resources*, 117th Cong. (2022) [hereinafter Statement of Bryan Newland] (statement of Bryan Newland, Assistant Sec'y for Indian Affs., U.S. Dep't of Interior).

122. *Id.*

123. Carlson, *supra* note 9, at 422.

124. Statement of Bryan Newland, *supra* note 121.

125. See LAW ENFORCEMENT UNDER PUBLIC LAW 280 REPORT, *supra* note 40, at 412.

126. See *id.* at 412, 496.

127. See *id.* at 412 (noting also then-Montana representative Arnold Olden's statement identifying the Omaha reservation as “an object lesson in Public Law 280 gone awry”).

128. *Id.*

129. *Id.* at 413.

130. *Id.*

To make matters worse, when the Nebraska Legislature finally passed a bill in 1961 which would “provide funding for up to three additional deputy state sheriffs in the counties affected by PL 280 jurisdiction,” it was conditioned so that “only counties in which 60% of the persons convicted of violating state law were Indians would be eligible.”¹³¹ This created an unjust incentive for counties to arrest more Indians in order to be eligible for the increased state funding.¹³² As a result, after receiving approval from the state, the Omaha Tribe became the first in the nation to retrocede jurisdiction back to the federal government.¹³³

Bruce Botelho, former mayor of Juneau, Alaska, and former Alaska Attorney General, attested that tribes in Alaska, as of Fall 2023, face challenges combating crime due to the state’s failure to adequately fund its own public safety efforts. He explained the irony that, on one hand, the state of Alaska “constantly insists” it is the one true sovereign, while at the same time, “particularly with budget cutbacks, there has been a complete retrenchment of law enforcement . . . so that you could have situations where crimes are committed and it may take two or three days for a state trooper to get to a site.”¹³⁴ As a result, despite lacking a legal basis, “many tribes have established their own . . . Village Police Officers, who may or may not be trained . . . [to] keep the peace.”¹³⁵

Now, with three levels of jurisdiction over certain crimes in Indian Country, it remains to be seen whether the federal government will cut funding—as it did when PL 280 states assumed criminal jurisdiction—thereby leaving states to deal with the expanded responsibilities on their own.

C. States Are Not Motivated to Protect Tribal Citizens

Silent in the *Castro-Huerta* majority opinion is acknowledgement that historically, and in some present cases, states have simply not been compelled to protect tribal citizens. Again, nothing makes this more apparent than accounts from PL 280 states, which support the notion that state jurisdiction has historically not helped to reduce crime rates in Indian Country.¹³⁶

Continuing with the example of the Omaha Tribe of Nebraska, tribal leaders believed that inadequate funding was just one of the reasons why law enforcement experienced a rapid decline after the enactment of PL 280.¹³⁷ In fact, most members of the Omaha Tribe believed that the primary contributor was that authority

131. *Id.*

132. *Id.*

133. *Id.* at 415.

134. Telephone Interview with Bruce Botelho, Former Alaska Attorney General (Oct. 17, 2023) [hereinafter Bruce Botelho Interview].

135. *Id.* (explaining that Alaska state troopers are generally appreciative of the assistance from Village Police Officers because they are “doing the job that they can’t,” and disapproval comes from the higher levels of state government).

136. See Carlson, *supra* note 9, at 421.

137. See LAW ENFORCEMENT UNDER PUBLIC LAW 280 REPORT, *supra* note 40, at 413–14.

became vested in “deeply racist and discriminatory local governments whose ‘officials lacked the fundamental *will* to police the reservation fairly and efficiently.’”¹³⁸ Mr. Botelho also attested to this, explaining that racism and discrimination in local governments persist in many local Alaskan governments.¹³⁹ As a state government, Alaska was historically “very antagonistic towards the . . . very existence of the term ‘tribe,’” and despite a few Alaska court decisions acknowledging some role for tribes, “the overall stance by the executive and legislative branches was that tribes [didn’t] exist.”¹⁴⁰ In his role as chair of the state team on state-tribal relations beginning in 2000, Mr. Botelho led efforts to “demystify and dedemonize tribes among state officials.”¹⁴¹ Aspirations of continued work on these efforts were thwarted after 9/11 occurred, and “any creativ[e] policy initiatives in [the] realm of state government shut down” at that point.¹⁴² In the intervening years, substantial progress has been made, though in fits and starts. He explained that while only a few state legislators in Alaska still question the very existence of tribes, a larger number may continue to question their legitimacy, due at least in part to the “strong racist tendency in Alaska.”¹⁴³

Tribal communities have documented “biases against tribal citizens and in favor of non-Indian perpetrators in state courts when states do prosecute crimes against tribal citizens in P.L. 280 states.”¹⁴⁴ In a discussion that took place shortly after the *Castro-Huerta* decision was rendered, leaders from tribes across the nation expressed “grave concern about concurrent state jurisdiction in Indian [C]ountry based on negative experiences under P.L. 280 where in many cases crimes [were] not prosecuted [and] state law enforcement agencies lack[ed] accountability.”¹⁴⁵ Coupled with the fact that, historically, states have lacked resources to effectively handle increased law enforcement and prosecutorial duties under PL 280,¹⁴⁶ tribal leaders certainly have reason to worry.

It should be noted that the circumstances in Nebraska and Alaska are not representative of all tribal-state relationships. Indeed, many tribes affected by PL 280 have cooperative agreements with state law enforcement that have proved to be effective in combating high crime rates while properly recognizing tribal sovereignty.¹⁴⁷ For example, many tribes have formed cross-deputization agreements with state law enforcement that authorize either entity to “issue citations, make custodial arrests,

138. *Id.* (explaining allegations that Omahas were “subject to physical abuse and discriminatory prosecution” at the hands of state actors).

139. Bruce Botelho Interview, *supra* note 134.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Carlson, *supra* note 9, at 421.

145. BUREAU OF INDIAN AFFS., OKLAHOMA V. CASTRO-HUERTA LISTENING SESSIONS SUMMARY REPORT 5 (2022), 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/E27A-RZQK>].

146. *See supra* Part II.B.

147. *See* Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. REV. 65, 88 (2019).

and otherwise act as enforcement officers in the territory of another entity.”¹⁴⁸ These agreements serve as out-of-court methods for states and tribes to solve jurisdictional issues and encourage open dialogue between police departments.¹⁴⁹

For example, Hoopa Valley Tribal Police officers become cross-deputized with the Humboldt County Police Department in California once they complete certain trainings set forth under California state law, and, conversely, Humboldt County Police officers become cross-deputized “after completion of a course in Hoopa tribal law and history.”¹⁵⁰ These agreements help to foster effective intergovernmental cooperation and contribute to an increase in public safety in Indian Country by helping to “educate nontribal police about how to enforce laws in culturally compatible ways.”¹⁵¹ Notably, these agreements enable a more balanced negotiation of cross-deputization terms and demonstrate that “[t]ribes and local governments do not need to wait on Congress or state legislatures to effect positive changes to policing on reservations.”¹⁵²

Despite some instances of effective cooperation between state and tribal governments, the broad ruling in *Castro-Huerta* creates a dangerous opportunity for states like Alaska—which still fail to fully recognize tribal sovereignty—to continue doing so.

III. CONGRESS MUST ACT TO RESTORE TRIBAL SOVEREIGNTY AND PROMOTE PUBLIC SAFETY

Given the jurisdictional uncertainty surrounding the *Castro-Huerta* decision and Congress’ constitutional duty to protect tribes from state infringement,¹⁵³ it is imperative that Congress takes action to mitigate future damage. Part III suggests ways in which Congress could restore tribal sovereignty and empower tribal governments to effectively police crime and promote safety in Indian Country. First, Section A explores how statutes pertaining to criminal jurisdiction in Indian Country could be amended to include express preemption statements. Then, Section B explains how creating additional “special jurisdiction” carveouts like VAWA would boost tribal sovereignty and better enable tribes to protect all citizens—Indigenous and non-Indigenous—who reside in Indian Country. Finally, Section C suggests that formula-based funding could replace competitive grant programs so that tribal governments are empowered to prioritize award allocations without having to compete against other tribes.

148. *Id.* at 67; *see, e.g.*, MICH. COMP. LAWS ANN. § 28.609(b) (West 2025); N.M. STAT. ANN. § 29-1-11 (West 2025); N.D. CENT. CODE ANN. § 12-63-02.2 (West 2025); CAL. PENAL CODE § 830.6(b) (West 2025).

149. *See* Morrow, *supra* note 147, at 94.

150. DUANE CHAMPAGNE & CAROLE GOLDBERG, PROMISING STRATEGIES: PUBLIC LAW 280 7 (2013).

151. *Id.* at 7–8.

152. *See* Morrow, *supra* note 147, at 94.

153. U.S. CONST. art. 1, § 8.

A. Relevant Statutes Could Be Amended to Include Express Preemption Statements

Despite the long-standing position of the elected branches and the prior acceptance by the 2022 Supreme Court that states lack authority in Indian Country absent an express grant from Congress, the most direct way to limit state criminal jurisdiction in Indian Country after *Castro-Huerta* would be to amend the relevant statutes to expressly establish federal preemption.¹⁵⁴

Rather than attempt to pass a new, broad statute establishing federal preemption, which, given the polarity in our current political climate, would likely be unsuccessful or, at the very least, take a while to implement, the more strategic route for Congress would be to amend statutes already enacted to establish federal preemption. Doing so strategically situates the topic of federal preemption as a narrow amendment to the previously enacted, broader statute, thus limiting the scope of congressional debate.

The Supreme Court's *Castro-Huerta* loophole pointedly signals that the most straightforward remedy for protecting tribal sovereignty in criminal jurisdiction lies with Congress. Congress could amend the General Crimes Act—the source that framed the basis of Oklahoma's legal argument in *Castro-Huerta*—to include language that states that “the federal laws it references are exclusive of state criminal law in Indian [C]ountry.”¹⁵⁵ However, the likelihood of Congress pursuing this route seems low, because although subsequent legislation, such as the Major Crimes Act, Public Law 280, and the TLOA,¹⁵⁶ has modified its scope, the General Crimes Act itself has never been amended.

Alternatively, and perhaps more likely, Congress could seek to amend the more recently enacted statute of PL 280.¹⁵⁷ In doing so, Congress could amend the statutory language to state that “states lack criminal jurisdiction over crimes by or against Indians in Indian [C]ountry *except where* such jurisdiction has been expressly granted by Congress.”¹⁵⁸ In his dissent in *Castro-Huerta*, Justice Gorsuch all but urges Congress to take this course of action, stating that “the ball is back in Congress’ court.”¹⁵⁹ In amending PL 280, Congress would also have the opportunity to assess tribal-initiated retrocessions.¹⁶⁰

B. Additional “Special Jurisdiction” Carveouts Could Be Established

Briefly discussed in Part I, by enacting VAWA in 2013, Congress created special jurisdiction for tribes over domestic violence crimes committed by both Indigenous

154. See MAINON A. SCHWARTZ, CONG. RSCH. SERV., LSB10778, SCOTUS BOLSTERS STATE CRIMINAL JURISDICTION ON TRIBAL LANDS 3 (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10778> [<https://perma.cc/DA4N-ZUK2>].

155. *Id.*

156. See *supra* Part I.

157. SCHWARTZ, *supra* note 155, at 3.

158. *Id.* (emphasis added).

159. *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 695 (2022) (quoting *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting)).

160. See LAW ENFORCEMENT UNDER PUBLIC LAW 280 REPORT, *supra* note 40, at 488.

and non-Indigenous people.¹⁶¹ In establishing this “special jurisdiction” for tribes, Congress “increased the number of felony offenses over which tribal governments may exercise jurisdiction.”¹⁶² The expansion of authority had been highly sought after by tribes who viewed the additional jurisdiction as “essential to sovereignty and self-determination.”¹⁶³ In 2022, Congress amended VAWA to recognize “special Tribal criminal jurisdiction” over “an expanded list of ‘covered crimes’ that includes, in addition to the VAWA 2013 crimes, assault of Tribal justice personnel, child violence, obstruction of justice, sexual violence, sex trafficking, and stalking.”¹⁶⁴

Where the *Castro-Huerta* decision stands to complicate matters for all layers of government, Congress could consider combating this confusion by expressly enacting additional clear-cut jurisdictional carveouts like VAWA. For example, just as VAWA gave specific authority to tribes over certain domestic violence crimes, Congress could pass legislation that gives specific authority to tribes in circumstances outside of domestic violence, such as crimes against children or crimes involving drugs.

The Tulalip Tribes of Washington have already expressed a desire for this sort of legislation, explaining that despite the positive impact the TLOA has had on public safety within the tribe, the authority “to prosecute non-Indians for crimes committed on the reservation beyond what is provided in [VAWA] . . . such as crimes against children and drug offenses,” would better enable them to combat increasing crime rates.¹⁶⁵

The likelihood of Congress creating additional “special jurisdiction” appears promising. As mentioned previously, Congress amended VAWA in 2022 to expand the list of covered crimes over which tribal governments have jurisdiction in the domestic violence area,¹⁶⁶ suggesting that narrow expansions in other criminal areas are not beyond possibility. On the other hand, VAWA had been in place for nine years before Congress took additional steps to expand tribal authority to other crimes within the domestic violence umbrella, suggesting that further expansion is unlikely to be considered for several more years.

Of course, the successful implementation of these carveouts would hinge on adequate funding. If Congress were to have reservations about amending the General Crimes Act and PL 280—enactments that have been around for decades—it may find creating special jurisdiction carve-outs to be a more feasible approach given that the subject matter is more limited in scope.

161. See Goodrum, *supra* note 30, at 214–15.

162. *Id.* at 213.

163. *Id.*

164. 2013 and 2022 Reauthorization of the Violence Against Women Act (VAWA), *supra* note 39.

165. Tribal Law and Order Act at Five Years, INDIAN L. RES. CTR., <https://indianlaw.org/safewomen/tribal-law-and-order-act-five-years> [<https://perma.cc/H8NW-E2E9>] (last visited Nov. 14, 2023).

166. 2013 and 2022 Reauthorization of the Violence Against Women Act (VAWA), *supra* note 39.

C. Formula-Based Funding Could Replace Competitive Grant Programs

With so much uncertainty surrounding what three levels of criminal jurisdiction could mean for tribal funding in the future, Congress could mandate formula-based funding at, for example, the Department of Justice (“the DOJ”).

Congress has the authority to designate criteria that federal agencies must abide by when allocating grant funding. Formula-based funding is one type of allocation “in which Congress sets forth specific criteria or specific amounts to be used to calculate the award amount for eligible recipients.”¹⁶⁷ Conversely, a competitive allocation method “involves [federal agencies] selecting recipients based upon a competitive process, and awards amounts based on the requested funding in successful applications.”¹⁶⁸ Congress may include broad or specific provisions to establish the process federal agencies must follow when deciding whether to deem an application “successful,”¹⁶⁹ and the discretion given to agencies ultimately favors applicants with adequate resources.

Currently, tribes must compete against each other for funding, and final award disbursements are given to tribes at the DOJ’s discretion.¹⁷⁰ As a result, tribes with the financial resources to employ “experienced grant writers end up receiving funding, while the under-resourced tribes may be left without.”¹⁷¹ Further, the life-cycle for these grants is short—often only two or three years—so tribes cannot count on funding for longer periods of time, making it difficult for researchers to pinpoint successful practices in Indian Country.¹⁷² The long-term benefits and drawbacks of a policy implemented as a result of grant funding cannot adequately be studied or understood given that the funding which makes that policy possible disappears after two or three years.

“Tribal governments have been asking for reforms to the DOJ grant making process for years in order to reduce administrative inefficiencies, improve program effectiveness, and increase the ability of tribal governments to leverage available . . . funding.”¹⁷³ In 2012, after repeated requests for formula-based funding from tribal leaders, Congress began “appropriating a fixed amount for ‘tribal assistance’ rather than appropriating funds for specifically authorized tribal programs.”¹⁷⁴ This approach gave tribes considerably more flexibility in working with the DOJ to establish effective practices to combat increasing crime rates,¹⁷⁵ and with that the autonomy to prioritize programs based on the unique needs of a specific tribe. In FY 2017, Congress shifted to a percentage set-aside model, creating a 7% tribal

167. ADAM G. LEVIN, CONG. RSCH. SERV., R47928, CONSIDERATIONS FOR CREATING A NEW FEDERAL GRANT PROGRAM: IN BRIEF (2024), <https://www.congress.gov/crs-product/R47928> [<https://perma.cc/HM7L-UUQ8>].

168. *Id.*

169. *Id.*

170. NAT. CONG. OF AM. INDIANS, WINDS OF CHANGE: INDIAN COUNTRY FY 2020 BUDGET REQUEST 34 (2019), <https://archive.ncai.org/NCAI-FY20-BudgetReport-PREVIEW.pdf> [<https://perma.cc/9PCZ-7PQ7>].

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

set-aside from a larger portion of federal funding for a limited number of programs, which ultimately resulted in an overall decrease in funding for tribes from the prior year's levels due to the fact that "[a]ppropriators carved out several of the largest appropriation lines from the tribal allocation."¹⁷⁶ In FY 2018, Congress returned to the funding model used years prior, resulting in a dramatic funding increase.¹⁷⁷

In replacing competitive grant funding with formula-based funding at the DOJ altogether for tribal appropriations—whether it be a lump-sum model or a percentage-based model—and not just for certain programs, tribes would be better able to determine their own priorities and allocate funds accordingly to an even greater extent.¹⁷⁸ For example, tribes struggling to meet TLOA requirements would have more power to direct formula-based funds toward fulfilling those requirements, enabling them to qualify for the enhanced sentencing authority granted by the statute.¹⁷⁹

Tribes have time and time again “proven that they can best meet the public welfare and safety needs of communities on their reservations.”¹⁸⁰ VAWA “marked a significant turning point in addressing violence against Native women” and reaffirmed “Tribal courts’ authority to prosecute non-Native perpetrators of domestic violence and dating violence against Native women.”¹⁸¹ By creating a path for tribes to exercise jurisdiction in these cases, Congress empowered tribes to “respond to long-time abusers who previously had evaded justice and has given a ray of hope to victims and communities that safety can be restored.”¹⁸² As of 2018, five years after VAWA was enacted, the eighteen tribes known to be exercising VAWA authority reported 143 arrests of 128 non-Indian abusers, with 74 of those arrests leading to convictions.¹⁸³ Beyond arrests and convictions, implementation of VAWA “provided an impetus to more comprehensively update tribal criminal codes,” led to “much-needed community conversations about domestic violence,” and resulted in “increased collaboration among tribes and between the local, state, and federal, and tribal governments.”¹⁸⁴ All to say, when dealt a fair hand, tribal governments are “their own best stewards.”¹⁸⁵

176. *Id.*

177. *Id.* at 32–34 (“This increase reflects the fact that Congress included tribal governments in the annual disbursements from the Crime Victims Fund for the first time and directed \$133.1 million to tribal governments to improve crime victim services on tribal lands.”).

178. *See id.*

179. *See* Eileen Larence Letter, *supra* note 35.

180. *See* Statement of Bryan Newland, *supra* note 121.

181. Chia Halpern Beetso, Virginia Davis & Kelly Stoner, *Empowering Tribal Nations: The Transformative Impact of VAWA 2013 and 2022 on Tribal Jurisdiction*, AM. BAR ASSOC., (Jan. 22, 2024), <https://www.americanbar.org/groups/crsj/resources/human-rights/2024-january/empowering-tribal-nations-impact-vawa-2013-2022-tribal-jurisdiction/> [https://perma.cc/FF2D-MRNL].

182. NAT. CONG. OF AM. INDIANS, VAWA 2013’S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 1 (Mar. 20, 2018), https://archive.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/JU6P-VAK2].

183. *Id.*

184. *Id.*

185. *See* Statement of Bryan Newland, *supra* note 121.

Empowering tribes to establish their own priorities without having to compete against each other for funding would serve to both bolster tribal sovereignty and enable tribes to identify best practices to fight increasing crime rates.

CONCLUSION

Long-lasting, effective tribal-state cooperation will only come when states recognize tribal governments as equal, sovereign nations. Unfortunately, *Castro-Huerta* has allowed the potential for Indian Law to be transported back to a time before the Supreme Court's 1832 *Worcester* decision. That earlier era was one where states pushed for "unity" between state-tribal relations, but really only hoped to swallow tribal governments. What's more, the *Castro-Huerta* Court issued its decision at a time when Congress "has increasingly recognized inherent tribal authority in Indian Country by restoring tribal criminal jurisdiction over non-Indians for specified crimes."¹⁸⁶

Contrary to the rationale behind the majority's opinion in *Castro-Huerta*, the additional layer of state criminal jurisdiction in Indian Country will likely create greater confusion on the ground. History further suggests that, given chronic underfunding, states will simply not be motivated to protect tribal citizens when faced with the inevitable choice. This added layer of state criminal jurisdiction will likely result in increased public safety concerns on tribal land for Indians and non-Indians alike, just as PL 280 did for tribes located in affected states.

In order to restore tribal sovereignty and empower tribal governments to effectively police crime and promote safety in Indian Country, Congress could pursue several courses of action. First, Congress could amend existing statutes such as the General Crimes Act or PL 280 to include express preemption statements. Second, Congress could create additional "special jurisdiction" carveouts like in VAWA to better enable tribes to protect all citizens—Indian and non-Indian—who reside in Indian Country. Finally, Congress could replace competitive grant programs with formula-based funding so that tribal governments are empowered to prioritize award allocations without having to compete against other tribes.

186. Carlson, *supra* note 9, at 416.