The Law and Economics of Crime in Indian Country

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INTRODUCTION

The role of race in law enforcement was before the United States Supreme Court in its 2021 Term. The case did not stem from the Black Lives Matter movement; rather, the case arose from a tribal police officer's encounter with a white man.[1] Joshua Cooley pulled over on the state highway that crosses the Crow Reservation.[2] Officer James Saylor of the Crow Nation Police Department stopped to check on the vehicle because cellular service was unreliable on the reservation, and he did not want to leave the driver stranded; he did not suspect foul

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1. *See* United States v. Cooley, 919 F.3d 1135, 1139 (9th Cir. 2019), *vacated*, 141 S. Ct. 1638 (2021); Kaitlyn Nicholas, *Supreme Court to Hear Case with Implications for Policing in Indian Country*, YELLOWSTONE PUB. RADIO (Mar. 22, 2021, 7:37 PM), https://www.ypradio.org/tribal-affairs/2021-03-22/supreme-court-to-hear-case-with-implications-for-policing-in-indian-country [https://perma.cc/9L5A-84ZH] ("The defendant is Joshua James Cooley, a white man.").

2. *Cooley*, 919 F.3d at 1139.

play.[3] After Saylor knocked on the truck's tinted window, it cracked open revealing a small child and a weary-eyed driver who "seemed to be non-native."[4] Cooley stated he was passing through the reservation after meeting either Thomas Shoulder Blade or Thomas Spang.[5] Saylor knew both men and believed Spang was involved with narcotics.[6] Suspicions raised, Saylor continued asking questions.[7] Cooley grew frustrated, slowly lowered his hand, and froze into a "'thousand-yard' stare."[8]

Saylor's training told him this was a sign of danger.[9] He drew his pistol and ordered Cooley to raise his hands.[10] Cooley obeyed.[11] After obtaining Cooley's driver's license, Saylor tried to have dispatch search Cooley's name, but poor service prevented transmission.[12] Saylor proceeded to inspect the vehicle and spotted a pistol where Cooley had lowered his hand moments earlier.[13] Saylor ordered Cooley out of the vehicle.[14] After Saylor patted him down, Cooley emptied his pockets, revealing bags of the type commonly used to transport meth.[15] Cooley and the child were placed in the police car where Saylor contacted the Crow Police Department and the Bighorn County Sheriff *because Cooley did not look Indian*.[16] While waiting for backup, Saylor went to turn off Cooley's truck.[17] He discovered a pipe and meth.[18] The Bureau of Indian Affairs (BIA) police and local sheriff arrived sometime later.[19] The BIA officer asked Saylor to search the truck,[20] and he discovered more meth.[21] Cooley was arrested and charged with multiple federal crimes.[22]

Cooley's defense did not focus on innocence or probable cause. Instead, Cooley built his defense on the premise that Saylor, and every other tribal police officer, lacked authority to search and seize non-Indians.[23] The federal district

3. *See id.* ("'A lot of travelers go through that particular stretch of highway,' Saylor testified, 'and they will pull over because of various reasons, tired, bathroom, et cetera.'").
4. *Id.* (quoting Saylor).
5. *Id.*
6. *Id.*
7. *See id.*
8. *Id.* at 1139–40.
9. *Id.* at 1140.
10. *Id.*
11. *Id.*
12. *Id.*
13. *See id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *See id.* ("The motion argued that Saylor was acting outside the scope of his jurisdiction as a Crow Tribe law enforcement officer when he seized Cooley, in violation of the Indian Civil Rights Act of 1968 ('ICRA').").

court agreed, stating Saylor knew Cooley was not an Indian as soon as he saw him.[24] The Ninth Circuit affirmed, though it noted appearance is not enough to determine whether a person is an Indian.[25] The Ninth Circuit stated Saylor should have asked Cooley whether he was an Indian.[26] In a unanimous opinion, the Supreme Court held tribal police had the authority to detain Cooley,[27] but the Court's reasoning was the bigger surprise.

Rather than address the complications of tribal criminal jurisdiction, the Court relied on tribal civil jurisdiction to conclude tribes have the inherent right to detain non-Indians engaged in conduct that "*threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe*."[28] This seemingly broad tribal authority had only been successfully invoked once at the Supreme Court.[29] However, the victory may be pyrrhic because the Court did not recognize tribal authority at all. The Court merely held tribes can detain non-Indians for apparent violations of state and federal law—not tribal law.[30] Additionally, the Court did not define what "detain" means, an issue that has long complicated Indian country law enforcement.[31] In the end, *Cooley* did not solve much of anything.[32] Public safety on reservations still turns on whether a person is an Indian.

Basing law enforcement authority on whether someone is an Indian may seem bizarre;[33] nevertheless, issues involving Indian status and jurisdiction routinely

24. United States v. Cooley, No. CR 16–42–BLG–SPW, 2017 WL 499896, at *4 (D. Mont. Feb. 7, 2017) ("Officer Saylor determined Cooley was non–Indian when Cooley initially rolled his window down."), *aff'd*, 919 F.3d 1135 (9th Cir. 2019), *vacated*, 141 S. Ct. 1638 (2021).

25. *Cooley*, 919 F.3d at 1142 ("Officers cannot presume for jurisdictional purposes that a person is a non-Indian — or an Indian — by making assumptions based on that person's physical appearance.").

26. *See id.* at 1143 ("A law enforcement officer can, of course, rely on a detainee's response when asked about Indian status. But Saylor posed no such question to Cooley." (citation omitted)).

27. United States v. Cooley, 141 S. Ct. 1638, 1641 (2021).

28. *Id.* at 1643 (quoting Montana v. United States, 450 U.S. 544, 566 (1981)).

29. Tribes can theoretically assert civil jurisdiction over non-Indians engaged in activities that threaten the tribes' economic or political welfare; however, the Supreme Court has held this expansive exception is nearly impossible to meet. *See* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 333 (2008) ("[W]ith only 'one minor exception, we have never upheld . . . the extension of tribal civil authority over nonmembers *on non-Indian land*.' The exception is *Brendale v. Confederated Tribes and Bands of Yakima Nation* . . . ." (citations omitted)).

30. *Cooley*, 141 S. Ct. at 1644–45 ("Saylor's search and detention, however, do not subsequently subject Cooley to tribal law, but rather only to state and federal laws that apply whether an individual is outside a reservation or on a state or federal highway within it.").

31. *See infra* text accompanying notes 225–36.

32. *See* Press Release, Big Horn Cnty. Att'y, Big Horn County Attorney Public Statement in Response to U.S. Supreme Court Decision in *United States v. Joshua James Cooley* (June 1, 2021), https://bloximages.newyork1.vip.townnews.com/montanarightnow.com/content/tncms/assets/v3/editorial/b/2b/b2bf349b-e852-5982-a747-d195a2854aaa/60b6d690d766f.pdf.pdf [https://perma.cc/A24Y-9VF5] (noting *Cooley* affirmed settled law).

33. United States v. Cruz, 554 F.3d 840, 842 (9th Cir. 2009) ("At first glance, there appears to be something odd about a court of law in a diverse nation such as ours deciding whether a specific individual is or is not 'an Indian.'").

reach the Supreme Court.[34] Less than a year before *Cooley*, the Supreme Court decided the landmark case of *McGirt v. Oklahoma*.[35] Jimcy McGirt, an enrolled citizen of the Seminole Nation of Oklahoma, violated a child.[36] Over twenty years ago, Oklahoma prosecuted and convicted McGirt of the crime.[37] However, a clever attorney in a separate case noticed the crime was committed within the treaty boundaries of the Creek Reservation.[38] If the situs of the crime was the Creek Reservation, Oklahoma lacked jurisdiction over McGirt because states lack criminal jurisdiction over Indians on reservations.[39] The Supreme Court was unable to locate any explicit textual evidence that Congress ever intended to eliminate the Creek Reservation.[40] Consequently, the crime scene was part of the Creek Reservation leaving Oklahoma sans jurisdiction to punish McGirt, so McGirt had to be prosecuted for the same exact crime in federal court a generation later.[41]

Like *Cooley*, *McGirt* reveals the perilous state of Indian country criminal jurisdiction.[42] Whether the tribe, the state, or the United States is the proper government to prosecute a case in Indian country turns on whether the parties to the crime were Indian as well as whether the land qualifies as Indian country.[43] In the words of the Supreme Court, Indian country criminal jurisdiction "is governed by a complex patchwork of federal, state, and tribal law."[44] Following *McGirt*, individuals apprehended by police have unsurprisingly begun playing the Indian[45]

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34. *E.g.*, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (per curiam); *Plains Com. Bank*, 554 U.S. at 320; United States v. Lara, 541 U.S. 193, 196 (2004); Nevada v. Hicks, 533 U.S. 353, 355 (2001).

35. 140 S. Ct. 2452 (2020).

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

37. *Id.*

38. Garrett Epps, *Who Owns Oklahoma?: The Supreme Court Must Decide the Fate of a Murderer—and Whether Roughly Half of Oklahoma Is Rightfully Reservation Land.*, ATLANTIC (Nov. 20, 2018), https://www.theatlantic.com/ideas/archive/2018/11/murphy-case-supreme-court-rules-muscogee-land/576238/ ("The federal-public-defender lawyer to whom [the case] came, Lisa McCalmont, was a noted legal foe of the death penalty; she was also a geologist, and understood the complexity of mineral rights and land titles. She realized that Oklahoma might not have had jurisdiction over the crime.").

39. *McGirt*, 140 S. Ct. at 2459 (citation omitted).

40. *See id.* at 2482 ("If Congress wishes to withdraw its promises, it must say so.").

41. *See id.* at 2474; *see also* 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/FW9W-S94N] (publicizing the verdict in McGirt's federal trial).

42. *See generally* 18 U.S.C. § 1151 (defining "Indian country" for the purposes of criminal procedure).

43. *See* ARVO Q. MIKKANEN, U.S. ATT'Y'S OFF., W. DIST. OF OKLA., INDIAN COUNTRY CRIMINAL JURISDICTIONAL CHART (2010), https://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf [https://perma.cc/EA9S-3KA5].

44. Duro v. Reina, 495 U.S. 676, 680 n.1 (1990).

45. This Article uses the term "Indian" rather than "Native American" to denote the Indigenous peoples of the United States—Native Hawaiians excepted. "Indian" is used because it is the proper legal term, *see* 25 U.S.C. § 1301(4) (naming the United States' Indigenous peoples "Indians" in a Title of the U.S. Code, and consistently using that terminology), and "Indian" is often the preferred term of Indians themselves, *see, e.g.*, Cyrus Ben, *Welcome from the Tribal Chief of the Mississippi Band of Choctaw*

status card to thwart law enforcement.[46] In 2010, Congress found that Indian country's jurisdictional scheme makes Indian country less safe;[47] in fact, Congress acknowledged that Indian country's wild jurisdictional framework is exploited by criminals and problematic for law enforcement.[48]

Unfortunately, Congress's assessment makes sense. Police and prosecutors do not want to spend time investigating whether a person is an Indian or not. Law enforcement is not designed to solve ethnographic riddles. Law enforcement is supposed to keep the public safe. Nevertheless, Indian country's enigmatic legal regime requires law enforcement to decipher the Indian status of victims and offenders. Cracking this code takes time and resources; plus, the wrong answer can lead to liability issues as well as the exclusion of evidence.[49] These are powerful incentives for law enforcement to avoid pursuing Indian country matters because the law enforcement process is much simpler outside of Indian country. The disincentive is so potent that some law enforcement agencies have openly declared they will not police the Indian country that lies within their jurisdiction.[50]

On the other hand, criminals revel in the delays and uncertainties created by Indian country's jurisdictional maze.[51] Reservations have become "rape tourism"

Indians, MISS. BAND OF CHOCTAW INDIANS, http://www.choctaw.org/ [https://perma.cc/J38D-E48B] (last visited Dec. 27, 2021); POARCH CREEK INDIANS, http://pci-nsn.gov/westminster/index.html [https://perma.cc/GN9J-EHZG] (last visited Dec. 27, 2021); S. UTE INDIAN TRIBE, https://www.southernute-nsn.gov/ [https://perma.cc/ZR6B-DVQY] (last visited Dec. 27, 2021); SALT RIVER PIMA-MARICOPA INDIAN CMTY., https://www.srpmic-nsn.gov/ [https://perma.cc/L8MY-H6CC] (last visited Dec. 27, 2021).

46. *See, e.g.*, Acee Agoyo, *'Shame on You': Authorities Warn Criminals Not to Make False Claims About Indian Status*, INDIANZ (Aug. 12, 2020), https://www.indianz.com/News/2020/08/12/shame-on-you-authorities-warn-criminals.asp [https://perma.cc/4DN3-47XX].

47. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(4)(A), 124 Stat. 2261, 2262.

48. *Id.* § 202(a)(4)(B)–(C).

49. *See* Elizabeth Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in* McGirt v. Oklahoma, U. CHI. L. REV. ONLINE (Aug. 13, 2020), https://lawreviewblog.uchicago.edu/2020/08/13/mcgirt-reese/ [https://perma.cc/9PYA-TXS6] ("In Indian Country, all of these actors must navigate this jurisdictional maze on top of their job, knowing that the result of the maze may mean they are the wrong person for the job or that the whole case could get thrown out.").

50. *See, e.g.*, Mary Hudetz, *Amid a Crime Wave on Yakama Reservation, Confusion over a Checkerboard of Jurisdictions*, SEATTLE TIMES (Feb. 18, 2020, 9:49 AM), https://www.seattletimes.com/seattle-news/times-watchdog/amid-a-crime-wave-on-yakama-reservation-confusion-over-a-checkerboard-of-jurisdictions/ (quoting Washington State Patrol Captain Shane Nelson explaining that his agency suspended patrols of over fifty miles of highway within the Yakama Reservation to avoid liability issues).

51. *See id.* ("There seems to be consensus on the ground that criminals do take advantage of the jurisdictional confusion." (quoting Robert Anderson, director of the University of Washington's Native American Law Center)); AMY L. CASSELMAN, INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN 6 (2016) ("As a result of this complicated system of jurisdiction, sexual predators have learned that Indian country is the most opportune place to prey on women."); AMNESTY INT'L USA, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 33 (2007), https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf [https://perma.cc/V55U-VZBP] ("[N]on-Native perpetrators often seek out a reservation place because they know they can inflict violence without much happening to them."

destinations.[52] Fleeing criminals literally laugh as they cross reservation borders.[53] Due to this jurisdictional maelstrom, the United States Commission on Civil Rights has declared "Native Americans have become easy crime targets."[54] Consequently, Indians suffer crime at rates higher than any other group of Americans.[55]

A basic law and economics analysis of Indian country's jurisdictional framework suggests high crime rates should be expected. Law and economics focuses on efficiency and incentives.[56] Criminal law has been one of the most widely used applications of law and economics.[57] With few exceptions,[58] federal Indian law has escaped the notice of law and economics. This Article is the first to apply a law and economics framework to crime in Indian country.

As a disclaimer, the law and economics approach used in this Article is not intended to detract from the systemic racism underpinning federal Indian law. Without doubt, federal Indian law remains shockingly racist;[59] in fact, federal

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(alternation in original) (quoting Andrea Smith, Assistant Professor of Native Studies, University of Michigan)).

52. CASSELMAN, *supra* note 51, at 45 ("It's rape tourism, right here in Oklahoma, South Dakota, Alaska, and any place where the confusing mess of jurisdictional issues allow perpetrators to hide." (quoting *How to Rape a Woman and Get Away with It*, NATIVE AM. NETROOTS (July 22, 2008), http://nativeamericannetroots.net/diary/130 [https://perma.cc/SF7T-ZLA8])); Clare Church, *Most Rapes of Native American Women Go Unpunished; Communities and Police Debate Solutions*, CIVIC IDEAS (June 20, 2016), https://civicidea.com/2016/06/20/most-rapes-of-native-american-women-go-unpunished-communities-and-police-debate-solutions/ [https://perma.cc/VJ59-4KYW] ("According to reports from Vice, Native American Roots, Amnesty International and the Daily Kos, some sexual offenders seek out reservations due to the gaps in jurisdiction, in a phenomenon that is known as rape tourism." (citations omitted)); Matt, *Where Disproportionate Need Meets Unequal Access: Plan B in Native American Communities*, PLANNED PARENTHOOD ADVOCS. OF ARIZ. (Oct. 17, 2012), http://advocatesaz.org/2012/10/17/where-disproportionate-need-meets-unequal-access-plan-b-in-native-american-communities/ [https://perma.cc/C3DX-CF9M] ("The situation of virtual amnesty for non-Native perpetrators has created a scourge that some have dubbed 'rape tourism.'").

53. AMNESTY INT'L USA, *supra* note 51, at 39 ("It's only about a mile from town to the bridge. Once they cross the bridge [to the Standing Rock Sioux Reservation], there's not much we can do. . . . We've had people actually stop after they've crossed and laugh at us. We couldn't do anything." (alterations in original) (quoting Duane Mohr, Sheriff of Walworth County, South Dakota)).

54. U.S. COMM'N ON C.R., A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 67 (2003), https://www.usccr.gov/files/pubs/na0703/na0204.pdf [https://perma.cc/B47R-FPFW].

55. *See infra* Part I.

56. JEFFREY L. HARRISON, LAW AND ECONOMICS IN A NUTSHELL 2–3 (6th ed. 2016); Paul H. Rubin, *Law and Economics*, LIBR. OF ECON. & LIBERTY, https://www.econlib.org/library/Enc/Lawand Economics.html [https://perma.cc/Y5AR-LTUG] (last visited Dec. 27, 2021).

57. Rubin, *supra* note 56 ("Criminal law has been the subject of the most extensive empirical work in law and economics . . . .").

58. *See, e.g.*, Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J.L. & ECON. 39 (1994); Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMPAR. L. 29 (2008); Shawn E. Regan & Terry L. Anderson, *The Energy Wealth of Indian Nations*, 3 J. ENERGY L. & RES. 195 (2014).

59. Carole Goldberg & Kevin K. Washburn, *The Indian Law Canon as Narrative: Stories of Legal Strategy and Native Persistence*, *in* INDIAN LAW STORIES 1, 2 (Carole Goldberg et al. eds., 2011) ("For a legal system that offers itself to the world as a paragon of rule of law and respect for human rights (the

Indian law's ongoing use of racist principles has resulted in censure from the Inter-American Commission on Human Rights[60] and the United Nations.[61] Many Indian law principles are so bigoted that citing them presents serious ethical concerns for the contemporary lawyer.[62] However, racism is a common topic in the federal Indian law literature.[63] This Article's law and economics framing is intended to demonstrate that even if racism was not a factor, Indian country's criminal jurisdiction scheme would fail due to its extreme inefficiencies. These inefficiencies—particularly tribes' diminished criminal jurisdiction—are consequences of the outright imperial state of present-day federal Indian law.[64]

The remainder of the Article proceeds as follows. Part I discusses violent crime data relating to Indians as well as why the data likely underrepresent the actual magnitude of crime in Indian country. Part II provides an overview of how Indian Country's criminal jurisdiction rules developed. Part III presents a summary of how economic theory relates to crime. Part IV explores Indian country criminal justice through a law and economics lens. This exploration reveals a criminal justice framework that is complex, inefficient, and ripe for exploitation by violent criminals. Part V offers three solutions to improve public safety in Indian country: expanding tribal criminal jurisdiction over non-Indians, providing Indian country with additional law enforcement resources, and strengthening tribal economies.

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scar of slavery having been healed, presumably, by the balm of civil rights), Indian Law presents a jarring contradiction."). *See generally* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) (revealing the continuing impact and legal validity of racist language in the Supreme Court's Indian law jurisprudence); Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's* Brown v. Board of Education, 38 TULSA L. REV. 73, 75 (2002) (arguing that the Supreme Court "relies on decisions founded on racist premises" and "continues to employ racist rationales for judicially divesting tribes of power").

60. *Report Nº 75/02*, INTER-AMERICAN COMM'N ON HUM. RTS. (Dec. 27, 2002), https://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm [https://perma.cc/56DS-3FKS] (recommending the United States "[r]eview its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII and XXIII of the Declaration").

61. U.N. Comm. on the Elimination of Racial Discrimination, 59th Sess., 1475th mtg. at 9, U.N. Doc. CERD/C/SR.1475 (Aug. 22, 2001).

62. Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 533 (2021).

63. *See generally* WILLIAMS, JR., *supra* note 59; Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 593 (2009) (proposing "a new understanding of the way racism works in Indian law and policy").

64. *See* Eastern Band of Cherokee Indians v. Torres, No. CR 03-1443, 2005 WL 6437828, at *7 (E. Cherokee Sup. Ct. Apr. 12, 2005) (Philo, J., concurring) (per curiam) ("Suffice it to say the conquerors continue to make the law."); CASSELMAN, *supra* note 51, at 132 ("Today, when a non-Native man crosses an invisible line to enter Indian country, he enters a colonial space whose very construction depended on the large-scale rape of Native women by white men."); Crepelle, *supra* note 62, at 571 ("Principles of justice are not the determinative factor in contemporary federal Indian law cases; instead, federal Indian law cases often hearken to the Melian Dialogue wherein mighty Athens told Melos, '[R]ight, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.'" (alteration in original) (quoting THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 352 (Robert B. Strassler ed., Richard Crawley trans., 1998))).

I. CRIME IN INDIAN COUNTRY

While each tribe is unique,[65] one can safely assert that crime is a significant problem in much of Indian country.[66] Violence against Indian women is particularly concerning as they experience rape and intimate partner violence at the highest rate in the United States.[67] Over half of Indian women will be the victim of sexual or intimate partner violence during their lifetime.[68] According to a National Institute of Justice Report, 39.8% of Indian women were the victim of some form of violence during the year 2015.[69] Sexual violence is so prevalent on some reservations that Indian mothers talk with their daughters about *what to do when raped*.[70] However, violence against Indian women includes more than sexual and intimate partner violence.[71] The murder rate of Indian women on some

65. *See* Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 808–09 (2019).

66. Bridget Bennett, *Reservation Crime Would Nearly Double South Dakota Stats*, DAKOTA NEWS NOW (Mar. 20, 2017, 10:33 PM), https://www.dakotanewsnow.com/content/news/Reservation-crime-would-nearly-double-South-Dakota-stats–416659913.html [https://perma.cc/5T6K-TN7W] (reporting that, according to an FBI source, South Dakota's "murder statistics would nearly double if reservations were included"); Elena Saavedra Buckley, *Feds Fail to Prosecute Crimes in Indian Country*, HIGH COUNTRY NEWS (Nov. 29, 2018), https://www.hcn.org/articles/tribal-affairs-feds-fail-to-prosecute-crimes-in-indian-country ("Federal crime data has long suggested that Indian reservations have higher rates of violent crime than the national average, especially when it comes to violence against women."); Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, ATLANTIC (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/.

67. NCAI POL'Y RSCH. CTR., POLICY INSIGHTS BRIEF: STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN 3 (2013), http://www.ncai.org/attachments/PolicyPaper_tWAjznFslemhAffZgNGzHUqIWMRPkCDjpFtxeKEUVKjubxfpGYK_Policy%20Insights%20Brief_VAWA_020613.pdf [https://perma.cc/G79H-P8UV] (documenting that thirty-four percent of Indian women will be raped in their lifetimes, and that thirty-nine percent of Indian women will be victims of intimate partner violence, higher than the rates for white, Black, and Asian women); *see also* André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NAT'L INST. JUST. J., Sept. 2016, at 38, 40 tbl.1 (presenting results of a study revealing that 84.3% of Indian women will experience some form of violence in their lifetimes, compared to 71% of non-Hispanic white women).

68. *See* Rosay, *supra* note 67.

69. *Id.*

70. *See* SARAH DEER, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 5 (2015) ("Through my work in Native communities, I heard more than once, *I don't know any woman in my community who has not been raped*."); Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 456 (2005) ("Many of the elders that I have spoken with in Indian country tell me that they do not know any women in their community who have not experienced sexual violence."); Rachel Cain, *Supreme Court Upholds Tribal Court Ruling in Domestic Violence Case*, THINKPROGRESS (June 15, 2016, 8:15 PM), https://archive.thinkprogress.org/supreme-court-upholds-tribal-court-ruling-in-domestic-violence-case-9a21f05a01a4/ [https://perma.cc/VV53-C344] (discussing the prevalence of sexual violence against American Indian women, and quoting American Indian sexual assault victims' advocate Lisa Brunner stating, "[o]ur reality is not if [a Native woman is] raped, but when"); Kavitha Chekuru, *Sexual Violence Scars Native American Women*, AL JAZEERA (Mar. 6, 2013), https://www.aljazeera.com/indepth/features/2013/03/201334111633172507.html [https://perma.cc/34HS-CV44].

71. *See, e.g.*, NCAI POL'Y RSCH. CTR., *supra* note 67 ("17 percent of American Indian and Alaska Native women reported being stalked during their lifetimes, compared to eight percent of White women, seven percent of African American women, and five percent of Asian women." (emphasis omitted)).

reservations exceeds ten times the national average,[72] and Indian women are going missing at crisis levels.[73] These figures have led Congress to declare that violence against Indian women "has reached epidemic proportions."[74]

Although violence against Indian women has received the most attention,[75] Indians experience violence at the highest rate in the United States regardless of age, sex, or gender.[76] Indian males have the highest violent victimization rate in the United States[77] with more than four out of five Indian men being victimized during their lifetime.[78] Indian children are victims of violence at rates higher than children of any other race,[79] and on some reservations, nearly every child will be a victim of or exposed to violence.[80] A consequence of this violence is Indian children and American combat veterans from the Middle East suffer post-traumatic stress disorder at the same rate.[81] These factors contribute to Indian children being twice as likely as children of other races to die before the age of twenty-four.[82]

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72. Savanna's Act, S. 1942, 115th Cong. § 2(a)(1) (2017); S. REP. NO. 112-153, at 7–8 (2012).

73. ANNITA LUCCHESI & ABIGAIL ECHO-HAWK, URB. INDIAN HEALTH INST., MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS 2 (2018), https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf [https://perma.cc/6BXY-FYC5]; *The Search: Missing and Murdered Indigenous Women*, AL JAZEERA (May 8, 2019, 2:01 PM), https://www.aljazeera.com/program/fault-lines/2019/5/8/the-search-missing-and-murdered-indigenous-women [https://perma.cc/UCJ6-KJK4]; Press Release, Jon Tester, U.S. Sen., Tester's Bill to Study Missing & Murdered Indigenous Women Crisis Clears House & Moves to Senate (Apr. 9, 2019), https://www.tester.senate.gov/?p=press_release&id=6717 [https://perma.cc/DHP6-6EV8]; Press Release, Catherine Cortez Masto, U.S. Sen., Cortez Masto, Murkowski Reintroduce Savanna's Act (Jan. 28, 2019), https://www.cortezmasto.senate.gov/news/press-releases/cortez-masto-murkowski-reintroduce-savannas-act [https://perma.cc/8QGT-Z4UH].

74. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(5)(A), 124 Stat. 2261, 2262.

75. *See, e.g.*, Exec. Order No. 13898, 84 Fed. Reg. 66059 (Nov. 26, 2019) (establishing a task force to address the crisis of missing and murdered Indigenous women).

76. JENNIFER L. TRUMAN & LYNN LANGTON, BUREAU OF JUST. STAT., CRIMINAL VICTIMIZATION, 2013, at 6 (2014), https://www.bjs.gov/content/pub/pdf/cv13.pdf [https://perma.cc/WT3A-KDRE].

77. STEVEN W. PERRY, BUREAU OF JUST. STAT., A BJS STATISTICAL PROFILE, 1992-2002: AMERICAN INDIANS AND CRIME 7 (2004), https://www.bjs.gov/content/pub/pdf/aic02.pdf [https://perma.cc/33RX-JQP2]; *see also* Rosay, *supra* note 67, at 41 tbl.2 (noting 34.6% of Indian men were victims of violence during the past year compared to 25.7% of non-Hispanic white men).

78. Rosay, *supra* note 67, at 40.

79. ATT'Y GEN.'S ADVISORY COMM. ON AM. INDIAN/ALASKA NATIVE CHILD. EXPOSED TO VIOLENCE, DOJ, ENDING VIOLENCE SO CHILDREN CAN THRIVE 6 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf [https://perma.cc/CTC4-R8HL]; CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 20–21 (2018), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2018.pdf [https://perma.cc/5WMX-EVWA].

80. *See* ATT'Y GEN.'S NAT'L TASK FORCE ON CHILD. EXPOSED TO VIOLENCE, DOJ, REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 35 (2012), https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf [https://perma.cc/WU2D-M4XP] ("On the Pine Ridge Indian Reservation in South Dakota, for example, 70 percent of adults are unemployed, and substance abuse, homelessness, rape, violence, and child abuse are everyday occurrences — nearly all of the children on this reservation will experience or witness violence.").

81. ATT'Y GEN.'S ADVISORY COMM. ON AM. INDIAN/ALASKA NATIVE CHILD. EXPOSED TO VIOLENCE, *supra* note 79, at 38.

82. Alison Burton, *What About the Children? Extending Tribal Criminal Jurisdiction to Crimes Against Children*, 52 HARV. C.R.-C.L. L. REV. 193, 210 (2017).

The statistics are grim and have been for decades;[83] nevertheless, the data likely understate the actual level of violence Indians endure.[84] Indians are often included in the "other" category in race and ethnicity data reporting;[85] thus, Indians are invisible in the data. A reason for this is Indians compose less than two percent of the entire U.S. population,[86] so Indian sample sizes are too small to provide reliable data.[87] Indians also routinely disappear in statistics because data collectors, relying on mere observation, erroneously label Indians as white; in fact, since 1979, nearly half of death certificates for Indians have mislabeled their race.[88] Additionally, criminal justice data is inaccurate because Indians often do not report crimes due to law enforcement's long history of failing to respond.[89] Indians may be further deterred from calling law enforcement because Indians face a dramatically elevated risk of being killed by the police; indeed, many

83. *See* LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUST. STAT., AMERICAN INDIANS AND CRIME, at iii (1999), https://bjs.gov/content/pub/pdf/aic.pdf [https://perma.cc/NBE4-R4FK]; PERRY, *supra* note 77.

84. *See* DEER, *supra* note 70, at 5–6 (noting that some widely cited crime surveys exclude homeless people, a group in which Indians are overrepresented); Adam Crepelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 KAN. J.L. & PUB. POL'Y 236, 238 (2017) ("The true figure is likely much, much higher because Indian victims often do not report violent crimes."); Lyndsey Gilpin, *Native American Women Still Have the Highest Rates of Rape and Assault*, HIGH COUNTRY NEWS (June 7, 2016), https://www.hcn.org/articles/tribal-affairs-why-native-american-women-still-have-the-highest-rates-of-rape-and-assault ("Experts say these record numbers still underestimate the number of women affected by violence, and the infrastructure for women to report and handle incidents is underfunded.").

85. *See, e.g.*, RACHEL E. MORGAN & BARBARA A. OUDEKERK, BUREAU OF JUST. STAT., CRIMINAL VICTIMIZATION, 2018, at 10 tbl.9 (2019), https://www.bjs.gov/content/pub/pdf/cv18.pdf [https://perma.cc/B5Z6-WVWN].

86. TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 4 tbl.1 (2012), https://www.census.gov/history/pdf/c2010br-10.pdf [https://perma.cc/M65C-SBPM].

87. HEATHER WARNKEN & JANET L. LAURITSEN, CTR. FOR VICTIM RSCH., WHO EXPERIENCES VIOLENT VICTIMIZATION AND WHO ACCESSES SERVICES?: FINDINGS FROM THE NATIONAL CRIME VICTIMIZATION SURVEY FOR EXPANDING OUR REACH 10 (2019), https://ncvc.dspacedirect.org/bitstream/item/1270/CVR%20Article_Who%20Experiences%20Violent%20Victimization%20and%20Who%20Accesses%20Services.pdf?sequence=1 [https://perma.cc/WLS2-QVVX] ("Although the [National Crime Victimization Survey] gathers race and ethnicity information for other groups such as American Indian and Alaska Natives, Asian, Native Hawaiian, and other Pacific Islanders, and persons of two of more races, the NCVS sample size is not large enough to provide similarly reliable long-term trends for these populations.").

88. Kate Wheeling, *How Mortality Data Fails Native Americans*, PAC. STANDARD (June 14, 2017), https://psmag.com/news/how-mortality-data-fails-native-americans [https://perma.cc/F3HM-8AV4].

89. *See* INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 4 (2013) (stating Indian victims often do not trust state or federal authorities, so they do not report crimes); Deer, *supra* note 70 ("When I travel to Indian country, however, advocates tell me that the Justice Department statistics provide a very low estimate, and rates of sexual assault against Native American women are actually much higher."); AMNESTY INT'L USA, *supra* note 51, at 2 (quoting an Indian sexual violence survivor stating rapes and beatings are usually not reported to the police); *Journey Through Indian Country, Part 2: Making an Impact on the Reservation*, FBI: NEWS (June 7, 2012), https://www.fbi.gov/news/stories/journey-through-indian-country-part-2 [https://perma.cc/2G9E-TEJS] (stating Indian country residents think contacting law enforcement is pointless because they expect the "authorities will do little to help them").

sources report Indians are killed by police at higher rates than other groups.[90] Accordingly, the true level of Indian victimization is probably significantly higher than what the statistics reveal.[91]

II. TRIBAL SOVEREIGNTY AND CRIMINAL JUSTICE

Tribal jurisdiction is complicated because of federal Indian law's colonial origins.[92] Indian tribes existed as sovereigns long before European arrival;[93] thus, tribal justice systems long predate the formation of the United States.[94] As fully functioning sovereigns, tribes punished all persons who perpetrated misdeeds on their land.[95] The newly formed United States treated the Indian territory as foreign land; hence, American citizens were required to obtain passports prior to

90. *See* MATTHEW HARVEY, CTR. FOR INDIAN COUNTRY DEV., FATAL ENCOUNTERS BETWEEN NATIVE AMERICANS AND THE POLICE 3 (2020), https://www.minneapolisfed.org/~/media/assets/articles/2020/fatal-encounters-between-native-americans-and-the-police/fatal-encounters-between-native-americans-and-the-police_march-2020.pdf?la=en%20%20 [https://perma.cc/3R3X-FEKL] ("Using Centers for Disease Control (CDC) data . . . Native Americans had the highest population-adjusted rates of fatal encounters with law enforcement of any minority group from 1995 to 2015."); Brita Belli, *Racial Disparity in Police Shootings Unchanged over 5 Years*, YALENEWS (Oct. 27, 2020), https://news.yale.edu/2020/10/27/racial-disparity-police-shootings-unchanged-over-5-years [https://perma.cc/N95F-H4TC] ("In the case of armed victims, Native Americans were killed by police at a rate three times that of white people . . . . Black people were killed at 2.6 times the rate of white people . . . and Hispanics were killed at nearly 1.3 times the rate of white people . . . ."); Teran Powell, *Native Americans Most Likely to Die from Police Shootings, Families Who Lost Loved Ones Weigh In*, WUWM 89.7 FM: MILWAUKEE'S NPR (June 2, 2021, 12:52 PM), https://www.wuwm.com/2021-06-02/native-americans-most-likely-to-die-from-police-shootings-families-who-lost-loved-ones-weigh-in [https://perma.cc/DJ9D-SVQ5] ("Looking at the CDC's fatal injury data on firearm deaths between 2009 and 2019 from legal intervention, meaning injuries inflicted by police, Native people were 2.2 times more likely to be killed by police than white people and 1.2 times more likely than Black people.").

91. Crepelle, *supra* note 84; Deer, *supra* note 70; Gilpin, *supra* note 84.

92. *See* Crepelle, *supra* note 62, at 540.

93. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."); Williams v. Lee, 358 U.S. 217, 218 (1959); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542–43 (1832).

94. Eugene K. Bertman, *Tribal Appellate Courts: A Practical Guide to History and Practice*, 84 OKLA. BAR J. 2115, 2116 (2013) (noting that Indian tribes had fora for dispute resolution prior to the arrival of Europeans); B.J. JONES, ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM 4 (2000), https://perma.cc/8ZH4-ZWM5 (acknowledging that America's Indigenous people had dispute resolution systems before Europeans arrived on the continent); ROBERT V. WOLF, CTR. FOR CT. INNOVATION, WIDENING THE CIRCLE: CAN PEACEMAKING WORK OUTSIDE OF TRIBAL COMMUNITIES? 1 (2012), https://www.courtinnovation.org/sites/default/files/documents/PeacemakingPlanning_2012.pdf. [https://perma.cc/KXV9-EZKW] (noting tribal justice systems existed before European arrival in America).

95. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 161 (7th ed. 2020) ("In colonial days, the Indian territory was entirely the province of tribes, and they had jurisdiction in fact and theory over all persons and subjects present there."); G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty,"* 76 MARQ. L. REV. 401, 420 (1993) (noting that tribes could exercise criminal jurisdiction over non-Indians prior to the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

entering Indian lands.[96] Tribal nationhood resulted in the United States and tribes entreating.[97] In early treaties, the United States expressly recognized tribal jurisdiction over non-Indian offenders in Indian country,[98] and tribes authorized the United States to punish Indians who harmed U.S. citizens in tribal territory.[99]

However, the United States' early Indian policy was not conducted exclusively through treaties. Congress authorized federal criminal jurisdiction over crimes committed by American citizens against Indians on tribal lands in the Indian Trade and Intercourse Act of 1790.[100] In 1817, Congress passed the General Crimes Act which further extended the United States' criminal jurisdiction into Indian territory.[101] The Supreme Court began divesting tribes of their full inherent sovereignty in 1823.[102] In *Johnson v. M'Intosh*, the Court declared the United States as the rightful sovereign of all that would become the United States by virtue of the doctrine of discovery,[103] an international law principle that deemed lands inhabited by Indigenous people vacant.[104] Eight years later in *Cherokee Nation v. Georgia*,[105] the Court declared tribes to be "domestic dependent nations" rather than full sovereigns, meaning tribes' relationship with the United States is like "that of a ward to his guardian."[106] A year later, the Court held that

96. *E.g.*, Treaty of Peace and Friendship, U.S.-Creek Nation, art. VII, Aug. 7, 1790, 7 Stat. 35 [hereinafter Treaty with the Creeks]; Treaty of Peace and Friendship, U.S.-Cherokee Nation, art. IX, July 2, 1791, 7 Stat. 39 [hereinafter Treaty with the Cherokees].

97. *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 17 (1984) ("It is in the treaties that one sees best the acceptance by Europeans of the nationhood of the Indian groups that became a fixed principle in the national policy of the United States . . . ."); Ian Pajer-Rogers, *The Politics of Survival: Indian and European Collaboration in Colonial North America*, UNIV. N.H. INQUIRY J., Spring 2005 ("Thus, as Indian tribes and nations allied with various English companies against other similar alliances, Indian nations were embarking on their own rudimentary arms race."); *The New World: A Stage for Cultural Interaction*, TEACHINGHISTORY.ORG, https://teachinghistory.org/history-content/ask-a-historian/25447 [https://perma.cc/XRT2-252C] (last visited Jan. 1, 2022) ("The Iroquois quickly signed an alliance and trade treaty with the English.").

98. *See, e.g.*, Articles of a Treaty, U.S.-Chickasaw Nation, art. IV, Jan. 10, 1786, 7 Stat. 24 [hereinafter Treaty with the Chickasaws] ("If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands hereby allotted to the Chickasaws to live and hunt on, such person shall forfeit the protection of the United States of America, and the Chickasaws may punish him or not as they please."); *see also* Treaty with the Creeks, *supra* note 96, art. VI; Treaty with the Cherokees, *supra* note 96, art. VIII.

99. *See, e.g.*, Treaty with the Chickasaws, *supra* note 98, art. V ("If any Indian or Indians, or persons residing among them, or who shall take refuge in their nation, shall commit a robbery or murder, or other capital crime, on any citizen of the United States, or person under their protection, the tribe to which such offender or offenders may belong, or the nation, shall be bound to deliver him or them up to be punished according to the ordinances of the United States in Congress assembled: Provided, that the punishment shall not be greater, than if the robbery or murder, or other capital crime, had been committed by a citizen on a citizen."); *see also* Treaty with the Creeks, *supra* note 96, art. VIII; Treaty with the Cherokees, *supra* note 96, art. X.

100. Ch. 33, § 5, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177).

101. 18 U.S.C. § 1152.

102. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

103. *Id.* at 587–88.

104. *See* Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 334–35 (2011).

105. 30 U.S. (5 Pet.) 1 (1831).

106. *Id.* at 17.

state power stops where Indian country begins, but tribal sovereignty is subordinate to federal sovereignty.[107] This precedent provided the United States with legal authority to circumscribe tribal sovereignty.

Tribes were supposed to govern themselves free from federal interference on reservations,[108] but this was not to be. In 1846, the Supreme Court held tribes were not free to determine whether an individual qualified as Indian for criminal purposes; rather, the Court mandated individuals possess Indian blood to qualify as an Indian.[109] In 1883, the Court held that tribes have exclusive jurisdiction over intertribal crimes in *Ex parte Crow Dog*,[110] and the federal government quickly sought to alter this by creating Courts of Indian Offenses to eradicate indigenous justice systems.[111] Also in response to *Crow Dog*,[112] Congress enacted the Major Crimes Act (MCA) in 1885 which authorized the federal government to prosecute seven felonies involving only Indians in Indian country.[113] The Supreme Court was unable to find any constitutional provision supporting the

107. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.").

108. McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020) ("And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves."); Andrew Jackson, President of the U.S., First Annual Message to Congress (Dec. 8, 1829) (transcript available at *December 8, 1829: First Annual Message to Congress*, MILLER CTR.: PRESIDENTIAL SPEECHES, https://millercenter.org/the-presidency/presidential-speeches/december-8-1829-first-annual-message-congress [https://perma.cc/2CR8-877G]) ("As a means of effecting this end I suggest for your consideration the propriety of setting apart an ample district west of the Mississippi, and without the limits of any state or territory now formed, to be guaranteed to the Indian tribes as long as they shall occupy it, each tribe having a distinct control over the portion designated for its use. There they may be secured in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes.").

109. United States v. Rogers, 45 U.S. (4 How.) 567, 572–73 (1846).

110. 109 U.S. 556 (1883).

111. Courts of Indians Offenses are commonly known as CFR courts. *See* Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 805 (2014) (stating that CFR courts were designed to stamp out tribal culture and governing systems); *see also* JONES, *supra* note 94, at 4–5 ("A majority of these courts and the Codes under which they operated did not reflect Native values and customs, but instead were efforts to change those values into the values the dominant society found important."); *1883: Courts of Indian Offenses Established*, NATIVE VOICES, https://www.nlm.nih.gov/nativevoices/timeline/364.html [https://perma.cc/B4YW-JNKH] (last visited Jan. 1, 2022) (noting CFR courts were designed to prosecute practitioners of traditional Indian ways and convert Indians to Christianity).

112. Keeble v. United States, 412 U.S. 205, 209 (1973) ("The Major Crimes Act was passed by Congress in direct response to the decision of this Court in *Ex parte Crow Dog* . . . ."); Crepelle, *supra* note 84, at 241 (stating the Major Crimes Act was a result of the Supreme Court's decision in *Crow Dog*).

113. Ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153). The original Act of 1885 extended federal jurisdiction into Indian country for the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. The current code has been amended to include additional crimes.

MCA;[114] nevertheless, the Court upheld the legislation based upon Indians' status as wards of the United States.[115] In another decision during this era, the Court held that states have exclusive jurisdiction over Indian country crimes that only involve non-Indians[116] because "the non-ward status of the accused and the victim divests the federal government of any interest in prosecution despite the occurrence of the crime in Indian country."[117]

The United States amplified its efforts to eradicate tribal sovereignty in 1887 with the General Allotment Act (GAA).[118] The GAA was championed by the so-called "Friends of the Indians," usually well-intentioned white people who had never visited a reservation.[119] The GAA had two aims: open reservation lands to white settlers and transform Indians into farmers like their new white neighbors.[120] Congress expanded its allotment policy into the Indian territory in Oklahoma in 1898, and the legislation also included a provision abolishing the courts of the Five Civilized Tribes.[121] Although tribes challenged allotment as a violation of their treaty rights, the Supreme Court ruled that Congress possessed the authority to unilaterally abrogate treaties with tribes.[122] By all accounts, allotment was an extreme disaster for tribes because it cost them approximately ninety million acres of their best land.[123]

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114. United States v. Kagama, 118 U.S. 375, 378–79 (1886).

115. *Id*. at 383–84.

116. United States v. McBratney, 104 U.S. 621, 624 (1882); *see also* Draper v. United States, 164 U.S. 240, 247 (1896) (relying on *McBratney*); New York *ex rel*. Ray v. Martin, 326 U.S. 496, 499 (1946) (same).

117. Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 525 (1976).

118. Ch. 119, §1, 24 Stat. 388.

119. Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1565 (2001) ("The Dawes Act culminated almost two decades of popular advocacy and Congressional lobbying by earnest Eastern reformers who called themselves the 'Friends of the Indian.'"); *see also* CANBY, JR., *supra* note 95, at 24 ("There is little question that the leadership for passage of the Dawes Act came from those sympathetic to the Indians.").

120. DeCoteau v. Dist. Cnty. Ct., 420 U.S. 425, 462 (1975) (Douglas, J., dissenting) ("The purpose was not to alter or change the reservation but to lure white settlers onto the reservation whose habits of work and leanings toward education would invigorate life on the reservation."); Mattz v. Arnett, 412 U.S. 481, 496 (1973) ("Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.").

121. Curtis Act of 1898, ch. 517, § 28, 30 Stat. 495, 504–05. This was named the Curtis Act after Charles Curtis, author of the act. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2476 (2020) ("A year later, Congress abolished tribal courts and transferred all pending criminal cases to U. S. courts of the Indian Territory." (citing Curtis Act §§ 28, 30)); M. Kaye Tatro, *Curtis Act (1898)*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry.php?entry=CU006 [https://perma.cc/K6ZJ-59EF] (last visited Jan. 1, 2022).

122. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

123. CANBY, JR., *supra* note 95, at 24, 26; Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 522 (2013); *Land Tenure History*, INDIAN LAND TENURE FOUND., https://iltf.org/landissues/history/ [https://perma.cc/U8U4-7R45] (last visited Sept. 26, 2021) ("[T]he Act stated that 25 years after the allotment was issued, Indian allottees would be given complete, fee simple ownership of the land.").

Allotment ended in 1934 with the passage of the Indian Reorganization Act (IRA).[124] The IRA was designed to empower tribal self-government;[125] accordingly, the IRA authorized the creation of tribal courts.[126] However, the IRA's anti-assimilation ideology[127] was short-lived because Congress shifted toward tribal termination post World War II.[128] The United States terminated its relationship with over 100 tribes[129] and attempted to relocate Indians from their rural reservations to large urban centers.[130] For those Indians that remained on reservations, Congress sought to cure alleged reservation "lawlessness"[131] by extending state criminal law and civil adjudicatory authority over tribal territory

124. Ch. 576, 48 Stat. 984 (codified as amended in scattered sections of 25 U.S.C.).

125. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" (citation omitted)).

126. *See* 25 U.S.C. § 5123; Bertman, *supra* note 94 (observing that the IRA encouraged tribes to "create or re-establish their own courts and judicial systems"); Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1765 (2016) (noting that the IRA was an "attempt[] to depart" from the policies that led to CFR courts, which "were blunt tools of assimilation" that criminalized many traditional tribal practices); B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 470–71 (1998) (noting the IRA approved of tribes creating their own court systems, but that many tribal legal systems resemble the U.S. legal system because federal approval is needed to establish a tribal legal system); *The History of the Tribal Courts*, MASHANTUCKET (W.) PEQUOT TRIBAL NATION, https://www.mptn-nsn.gov/tchistory.aspx [https://perma.cc/76WZ-53FJ] (last visited Jan. 1, 2022) (stating the IRA encouraged tribes to set up their own legal systems).

127. *The Indian Reorganization Act–75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affs.*, 112th Cong. 3–4 (2011) ("For the first time in the Nation's history, the Federal Government codified in a general statute the idea that tribal citizenship was compatible with national citizenship and that Indian-ness would have a continuing place in American life." (statement of Frederick E. Hoxie, Swanlund Chair and History Professor, Univ. of Ill.)); CANBY, JR., *supra* note 95, at 27; Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 972 (1972) ("The IRA reaffirmed the principles of tribal self-government.").

128. Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 413, 440 (2019) ("The era of the Indian New Deal came to a close in the aftermath of the Second World War and was replaced by the assimilationist tribal termination policy.").

129. Adam Crepelle, *Standing Rock in the Swamp: Oil, the Environment, and the United Houma Nation's Struggle for Federal Recognition*, 64 LOY. L. REV. 141, 150–51 (2018); William J. Lawrence, *In Defense of Indian Rights*, *in* BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 391, 396 (Abigail Thernstrom & Stephan Thernstrom eds., 2001); Alysa Landry, *Harry S. Truman: Beginning of Indian Termination Era*, INDIAN COUNTRY TODAY (Sept. 13, 2018), https://indiancountrytoday.com/archive/harry-s-truman-beginning-of-indian-termination-era [https://perma.cc/8965-WRWT] ("Within the first decade of the termination era, policies that Truman supported terminated more than 100 tribes, severing their trust relationships with the federal government.").

130. *See* Indian Relocation Act of 1956, Pub. L. No. 959, 70 Stat. 986.

131. Bryan v. Itasca Cnty., 426 U.S. 373, 379 (1976) ("The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." (citation omitted)); M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 695 (2012); Erin E. White, *Fresh Pursuit: A Survey of Law Among States with Large Land Based Tribes*, 3 AM. INDIAN L.J. 227, 229 (2014) ("Congress, perceiving a particular lawlessness in Indian Country, enacted Public Law 83-280 (Public Law 280) in 1953.").

in 1953 with Public Law 83-280 (PL 280).[132] PL 280 was intended to reduce federal expenditures, so the federal government failed to supply states with funds to police the newly acquired lands.[133] Nor did PL 280 grant states authority to tax tribal lands.[134] Without funding for reservation policing, PL 280 states often chose not to patrol the reservations within their borders.[135] Then in 1968, Congress limited tribal sentencing power to six months in jail and a $500 fine.[136]

Despite the United States' assaults on tribal criminal law, no federal legislation has ever diminished tribal criminal jurisdiction over non-Indians in Indian country.[137] Indeed, tribes presumably possessed criminal jurisdiction over non-Indians because tribes had never relinquished this power.[138] This presumption was challenged when a drunken Mark Oliphant punched a tribal police officer on an Indian reservation.[139] Oliphant did not contest his guilt; instead, he argued the tribal court lacked jurisdiction over him because he was not an Indian.[140] Both a federal district court and the Ninth Circuit Court of Appeals rejected this argument,[141] but the Supreme Court agreed with Oliphant.[142] The Court's opinion rests on dubious historical, legal, and moral grounds;[143] nonetheless, it has

132. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a).

133. CAROLE GOLDBERG, DUANE CHAMPAGNE & HEATHER VALDEZ SINGLETON, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 7 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf [https://perma.cc/ZCG3-H6Q5] ("While this failure to authorize or appropriate federal funds for Public Law 280 states is understandable given Congress' goal of reducing the federal budget, it left local governments in a difficult situation.").

134. 18 U.S.C. § 1162(b); 28 U.S.C. § 1360(b).

135. Leonhard, *supra* note 131, at 698–99 (discussing states' financial concerns about PL 280, and law enforcement being "virtually nonexistent" on reservations in mandatory PL 280 states); Laurence Armand French, *Policing American Indians: A Unique Chapter in American Jurisprudence*, INDIGENOUS POL'Y J. (2015), https://perma.cc/XEM9-4GY3 (noting PL 280 states "were not pleased with this unfunded mandate and tended to neglect and harass their Indian charges"); Eric Lichtblau, *California Shorted on Tribal Police Funding*, L.A. TIMES (Oct. 28, 1999, 12:00 AM), https://www.latimes.com/archives/la-xpm-1999-oct-28-mn-27258-story.html (discussing the underfunding of tribal law enforcement in California, a mandatory PL 280 state, and state law enforcement's neglect of reservations).

136. *See* INDIAN L. & ORD. COMM'N, *supra* note 89, at 21.

137. *See, e.g.*, Walker v. Rushing, 898 F.2d 672, 675 (8th Cir. 1990) ("Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority." (citation omitted)); State v. Schmuck, 850 P.2d 1332, 1344 (Wash. 1993).

138. United States v. Wheeler, 435 U.S. 313, 323 (1978) ("But until Congress acts, the tribes retain their existing sovereign powers."); United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."); Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 104 (2017).

139. Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of* Oliphant v. Suquamish Indian Tribe, *in* INDIAN LAW STORIES 261, 264 (Carole Goldberg et al. eds., 2011).

140. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978).

141. Oliphant v. Schlie, 544 F.2d 1007, 1014 (9th Cir. 1976), *rev'd*, *Suquamish Indian Tribe*, 435 U.S. 191.

142. *Suquamish Indian Tribe*, 435 U.S. at 212.

143. Crepelle, *supra* note 62, at 558; Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 610

divested tribes of criminal jurisdiction over non-Indians.[144]

Oliphant remains binding precedent[145] and has been extended beyond the issue in the case. The Court has applied *Oliphant*'s reasoning to limit tribes' civil jurisdiction over non-Indians on tribal land.[146] For example, it is now unclear whether a tribe can hold non-Indians who enter a contractual relationship with a tribe civilly liable for sexual assault that stemmed from the contractual relationship with the tribe.[147] The Court has also applied *Oliphant* to limit tribal criminal jurisdiction to exclusively the tribe's own citizens.[148] This meant Indians were immune from criminal prosecutions if they committed a "non-major" crime in the Indian country of a tribe other than their own.[149] However, Congress quickly enacted legislation overturning the decision,[150] and the Supreme Court confirmed the legislation's constitutionality in 2004.[151]

Tribal criminal authority has slowly expanded since then.[152] Congress enacted the Tribal Law and Order Act (TLOA) in 2010, which increased tribal sentencing power from a one-year maximum to a nine-year maximum possible sentence.[153] Tribes can also impose a maximum fine of $15,000 under TLOA.[154] In 2013, Congress partially reversed *Oliphant* with the Violence Against Women Reauthorization Act's (VAWA) special domestic violence criminal jurisdiction provision.[155] VAWA enables tribes to prosecute non-Indians who commit dating violence, domestic violence, or violate a protective order in Indian country.[156]

(1979) ("A close examination of the Court's opinion reveals a carelessness with history, logic, precedent, and statutory construction that is not ordinarily acceptable from so august a tribunal.").

144. *See Suquamish Indian Tribe*, 435 U.S. at 204.

145. *Oliphant* has been partially overturned by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended at 25 U.S.C. § 1304).

146. Montana v. United States, 450 U.S. 544, 565 (1981) ("Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." (footnote omitted)).

147. *See* Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167, 174, 177 (5th Cir. 2014), *aff'd by an equally divided court*, Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159 (2016).

148. Duro v. Reina, 495 U.S. 676, 679 (1990). For example, the Chickasaw Nation would be unable to prosecute citizens of the Choctaw Nation or any other tribe under *Duro*.

149. *See* Nell Jessup Newton, Comment, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 109–10 (1992); Eric B. White, Note, *Falling Through the Cracks After* Duro v. Reina*: A Close Look at a Jurisdictional Failure*, 15 U. PUGET SOUND L. REV. 229, 230 (1991) ("Thus, the decision in *Duro* needlessly creates a jurisdictional gap over nonmember Indians committing minor crimes against other Indians on reservation land and leaves open the very real possibility that neither the federal nor the state governments will move in to fill that gap.").

150. *See* 25 U.S.C. § 1301(2).

151. *See* United States v. Lara, 541 U.S. 193, 210 (2004).

152. 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, 68 (2020) ("[I]n recent years tribal jurisdiction has been on an upward swing.").

153. *See* 25 U.S.C. § 1302(a)(7)(D).

154. *Id.* § 1302(a)(7)(C).

155. *See id.* § 1304(c).

156. *Id.*

Tribes have charged over 100 non-Indians under VAWA without any issues;[157] accordingly, efforts are underway to further broaden tribal criminal jurisdiction over non-Indians.[158] Moreover, tribes have unilaterally pushed the boundaries of their jurisdiction by successfully prosecuting their own citizens for crimes committed outside of the tribe's land[159] and by prosecuting foreign citizens.[160] The Supreme Court has also verified that tribal court convictions count as valid predicate offenses in state and federal court proceedings.[161] Progress is being made.[162]

Although tribal criminal jurisdiction has increased in recent years, criminal jurisdiction in Indian country remains complex.[163] The Indian status of victim and offender, the status of land where the crime was committed, and the nature of the crime all must be deciphered before a successful Indian country prosecution may occur.[164] This complexity makes Indian country law enforcement inefficient, and economics can help explain the inefficiencies of complex systems. Thus, the next Part explores economic concepts relevant to law enforcement.

III. THE ECONOMICS OF CRIME

Economics is the study of choices.[165] People exist in a world of scarcity—limited time, money, and other resources—so people cannot have everything they

157. *See* NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 19 (2018), http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/A3MK-84BH].

158. *See* Violence Against Women Act Reauthorization Act of 2021, H.R. 1620, 117th Cong. §§ 901–03 (2021).

159. *See* Kelsey v. Pope, 809 F.3d 849, 852 (6th Cir. 2016).

160. *See, e.g.*, Eastern Band of Cherokee Indians v. Martinez, 15 Am. Tribal L. 45 (E. Cherokee Sup. Ct. 2018); Eastern Band of Cherokee Indians v. Torres, No. CR 03-1443, 2005 WL 6437828 (E. Cherokee Sup. Ct. Apr. 12, 2005); *see also* NAT'L CONG. OF AM. INDIANS, *supra* note 157, at 12 (noting tribes implementing VAWA have prosecuted eight non-U.S. citizens).

161. United States v. Bryant, 136 S. Ct. 1954, 1959 (2016).

162. In addition to minor jurisdictional expansions, Secretary of the Interior Deb Haaland has created a Missing & Murdered Unit within the BIA to help improve safety for Indian women. *See* Press Release, U.S. Dep't of Interior, Secretary Haaland Creates New Missing & Murdered Unit to Pursue Justice for Missing or Murdered American Indians and Alaska Natives (Apr. 1, 2021), https://www.doi.gov/news/secretary-haaland-creates-new-missing-murdered-unit-pursue-justice-missing-or-murdered-american [https://perma.cc/9R5T-FGTP]; Cecilia Nowell, *Violence Against Indigenous Women Is 'a Crisis.' Deb Haaland's New Missing & Murdered Unit Could Help, Advocates Say.*, LILY: POL. (Apr. 21, 2021), https://www.thelily.com/violence-against-indigenous-women-is-a-crisis-deb-haalands-new-missing-murdered-unit-could-help-advocates-say/ [https://perma.cc/Z69G-U3LV].

163. Adam Crepelle, *Shooting Down* Oliphant: *Self-Defense as an Answer to Crime in Indian Country*, 22 LEWIS & CLARK L. REV. 1283, 1316 (2018) ("Criminal jurisdiction in Indian country is unduly complicated."); Crepelle, *supra* note 84, at 239 ("Indian country criminal jurisdiction is a bewildering mess."); INDIAN L. & ORD. COMM'N, *supra* note 89, at 15 ("[C]riminal jurisdiction in Indian country is an indefensible maze of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations.").

164. Laura E. Pisarello, *Lawless by Design: Jurisdiction, Gender and Justice in Indian Country*, 59 EMORY L.J. 1515, 1516–17 (2010).

165. ROBERT L. SEXTON, EXPLORING ECONOMICS 3 (8th ed. 2020) ("Precisely defined, economics is the study of the choices we make among our many wants and desires given our limited resources."); *What Is Economics?*, LIBR. OF ECON. & LIBERTY, https://www.econlib.org/library/Topics/College/

desire.[166] Each choice involves a trade-off, sacrificing an opportunity to pursue something else.[167] When making choices, many economists assume individuals act in their own rational self-interest.[168] This means individuals are driven by incentives and respond to external stimuli with rational decisionmaking.[169] Thus, keeping everything else constant, if the price of a good drops, people will purchase more of it, and conversely, a price increase will result in lower consumption.[170] But the cost of an item is not just the price; rather, the transaction itself has costs such as filling out forms, searching for the item, and traveling to the transaction site.[171] Decisions also often produce externalities, benefits or costs that impact individuals other than the intended consumer.[172]

The basic economic theory of crime treats criminal activity as a negative externality;[173] that is, criminal activity is something to be deterred because of its effects on nonconsenting parties.[174] Many economists assume criminals are rational and weigh their expected gain versus the probable costs of the offense.[175] The benefits of a crime can be any number of things including monetary gain in theft or merely the rush of breaking the law.[176] Costs of the crime include preparation to commit the offense and evade detection as well as the possible consequences if caught.[177] Sanctions consist of both formal punishments, including

whatiseconomics.html [https://perma.cc/2DHN-W6HR] (last visited Jan. 1, 2022) ("Economics is about making choices.").

166. *Scarcity*, LIBR. OF ECON. & LIBERTY, https://www.econlib.org/library/Topics/College/scarcity.html [https://perma.cc/FJ2L-EAJ8] (last visited Jan. 1, 2022).

167. *See* Paul M. Johnson, *Trade-off*, GLOSSARY OF POL. ECON. TERMS, http://webhome.auburn.edu/~johnspm/gloss/trade-off.phtml [https://perma.cc/YHJ9-75CC] (last visited Jan. 1, 2022).

168. SEXTON, *supra* note 165, at 6–7. *But see, e.g.*, Robert J. Shiller, *Do Stock Prices Move Too Much to Be Justified by Subsequent Changes in Dividends?*, 71 AM. ECON. REV. 421, 433–34 (1981) (finding that stock market volatility since the 1920s was greater than could be plausibly explained by any rational view of the future).

169. STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 16 (2009) ("We all learn to respond to incentives, negative and positive, from the outset of life."); SEXTON, *supra* note 165, at 44.

170. Al Ehrbar, *Supply*, LIBR. OF ECON. & LIBERTY, https://www.econlib.org/library/Enc/Supply.html [https://perma.cc/FRQ2-2AHJ] (last visited Jan. 1, 2022).

171. *See* HARRISON, *supra* note 56, at 85.

172. SEXTON, *supra* note 165, at 213.

173. *See* HARRISON, *supra* note 56, at 249.

174. *See* Talia Fisher, *Economic Analysis of Criminal Law*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 38, 50–51 (Markus D. Dubber & Tatjana Hörnle eds., 2014); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 8 ("In economic analysis, crime can be characterized as an externality.").

175. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 183–84 (1968); HENRY N. BUTLER, CHRISTOPHER R. DRAHOZAL & JOANNA SHEPHERD, ECONOMIC ANALYSIS FOR LAWYERS 384 (3d ed. 2014) ("Thus, the economic model of criminal behavior assumes that the decision to commit a crime is the result of a cost-benefit analysis that individuals undertake either consciously or subconsciously."); Richard H. McAdams & Thomas S. Ulen, *Behavioral Criminal Law and Economics* 14 (Univ. of Chi. L. Sch. John M. Olin L. and Econ. Working Paper No. 440, 2008) ("Deterrence theory also assumes that potential offenders rationally (though not necessarily consciously) consider and weigh the costs and benefits of committing a crime.").

176. BUTLER ET AL., *supra* note 175, at 385.

177. *See id.*

incarceration and fines, and also informal sanctions, such as the social stigmas associated with the particular crime.[178] Economists have found that the swiftness and certainty of the penalty are more important crime deterrents than the severity of the punishment.[179] This is likely due to criminals having a high future discount rate, meaning they usually value their present much more than their future.[180]

Despite criminals' generally high future discount rate, studies suggest criminals rationally respond to incentives.[181] Criminals tend to select their victims based upon the likelihood that their crime can be successfully completed;[182] likewise, increasing the number of police officers has been shown to decrease crime rates by ratcheting up the odds of apprehension.[183] Studies also tend to show that unemployment is directly linked to crime rates as unemployed persons usually have less to lose by committing a crime than employed individuals.[184] Criminals respond rationally to three-strikes laws by committing violent crimes with greater propensity on their third offense because, regardless of the offense, the third strike brings a harsh sentence.[185] Law enforcement officers respond to incentives too and have been shown to prioritize policing activities that generate revenue.[186]

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178. *See id.*

179. *See id.* at 402 ("The majority of empirical studies suggest that the deterrent effect of the certainty of punishment far outweighs the deterrent effect of the severity of punishment.").

180. *Id.* at 386.

181. *See* Yu Aoki & Theodore Koutmeridis, *How Criminals Respond to Economic Incentives: Evidence from the 1995 Earthquake in Kobe, Japan*, ROYAL ECON. SOC'Y (Apr. 15, 2019), https://www.res.org.uk/resources-page/how-criminals-respond-to-economic-incentives-evidence-from-the-1995-earthquake-in-kobe-japan.html [https://perma.cc/5WCR-KJGD]; W. Kip Viscusi, *Market Incentives for Criminal Behavior*, *in* THE BLACK YOUTH EMPLOYMENT CRISIS 301, 305 (Richard B. Freeman & Harry J. Holzer eds., 1986) ("The most important implication of this study is that economic incentives do exert a powerful influence on criminal behavior.").

182. Greg Pogarsky, Sean Patrick Roche & Justin T. Pickett, *Offender Decision-Making in Criminology: Contributions from Behavioral Economics*, 1 ANN. REV. CRIMINOLOGY 379, 380 (2018) ("Incentive-driven behavior is evident, for example, in target selection for property or personal victimization and in the updating of sanction risk perceptions based on offending and punishment experiences." (citations omitted)); *see* Crepelle, *supra* note 84, at 260.

183. BUTLER ET AL., *supra* note 175, at 391. *But see* Amina Khan, *In New York, Major Crime Complaints Fell When Cops Took a Break from 'Proactive Policing*,' L.A. TIMES (Sept. 26, 2017, 3:00 AM), https://www.latimes.com/science/sciencenow/la-sci-sn-proactive-policing-crime-20170925-story.html.

184. BUTLER ET AL., *supra* note 175, at 392.

185. *See* Radha Iyengar, *I'd Rather Be Hanged for a Sheep Than a Lamb: The Unintended Consequences of 'Three-Strikes' Laws* 24 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13784, 2008); Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89, 106 (2001); Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 447 (1997) ("Three Strikes gives the felon with two strikes little incentive to shift from robbery to theft.").

186. Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2116 (2007) ("The explicit motivation for the DOJ-sharing provision was to provide law enforcement at all levels with an incentive to pursue drug crimes."); Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 356 (2017) ("Law enforcement makes forfeiture revenue generation a priority . . . ."); Jordan Weissmann, *How Ferguson Highlights the Dangers of For-Profit Policing*, SLATE (Aug. 18, 2014, 3:00 PM), https://slate.com/business/2014/08/ferguson-police-department-the-economic-incentives-that-make-cops-harass-black-residents.html.

There are many critiques of the economic analysis of crime. One is that economists often refer to the "optimal number of crimes."[187] Most non-economists intuitively know the optimal number of rapes and murders is zero.[188] Moreover, criminals vary from the general population in a number of significant ways, so standard rationality assumptions do not necessarily apply to criminals.[189] Many crimes stem from impulses, such as the heat of passion or addiction; hence, rational processes do not factor heavily into all criminal behaviors.[190] The classical economic analysis of crime also assumes perfect knowledge, meaning criminals will know to modify their behavior according to changes in the probability of punishment.[191] However, adjusting sanction levels does not always appear to impact criminal behavior.[192]

IV. THE LAW AND ECONOMICS OF CRIME IN INDIAN COUNTRY

For rational criminals, Indian country is an attractive venue.[193] First of all, Indian country's immensely complex jurisdictional scheme works to the benefit

187. *See* HARRISON, *supra* note 56, at 265; Becker, *supra* note 175, at 194 ("Moreover, the determination of the optimal number of offenses and severity of punishments is somewhat simplified by the use of fines.").

188. *See* Fred S. McChesney, *Boxed In: Economists and Benefits from Crime*, 13 INT'L REV. L. & ECON. 225, 225 (1993) ("In short, economists' models seem foolish to the real world when they treat criminals' gains as welfare-relevant, but their attempts to exclude such benefits seem unconvincing and unprincipled to themselves.").

189. McAdams & Ulen, *supra* note 175, at 12 ("[E]ven if one takes behavioral biases to be true of the average member of the population, we know that criminals differ from the average in many ways; so, absent experiments focused on criminals, we cannot assume the applicability of the behavioral literature to this unusual subpopulation."); Keith N. Hylton, *Economic Theory of Criminal Law*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF ECONOMICS AND FINANCE (Jonathan H. Hamilton et al. eds., 2019), https://doi.org/10.1093/acrefore/9780190625979.013.344 [https://perma.cc/2SDW-B8HY] ("Most criminal defendants have low levels of education, low impulse control, and a tendency to discount the future heavily." (footnotes omitted)).

190. *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1117 (2000) ("Behaviors that are motivated by addictions bear a strong resemblance to behaviors that are motivated by visceral cravings . . . . [M]uch like harmful addictions, visceral cravings can overpower actors, causing them to act in ways that fail to maximize utility."); *Crime of Passion*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/crime_of_passion [https://perma.cc/2J9S-3L44] (last visited Jan. 1, 2022) ("The provocation defense serves to recognize that some reactions can be provoked spontaneously, without giving one the opportunity to reflect on his or her actions.").

191. Murat C. Mungan, *The Law and Economics of Fluctuating Criminal Tendencies and Incapacitation*, 72 MD. L. REV. 156, 172–73 (2012).

192. *Id*. at 173.

193. Crepelle, *supra* note 152, at 59 ("In Indian country, non-Indians are essentially above the law." (footnote omitted)); Matthew Handler, Note, *Tribal Law and Disorder: A Look at a System of Broken Justice in Indian Country and the Steps Needed to Fix It*, 75 BROOK. L. REV. 261, 299–300 (2009) ("[T]he consequences of prohibiting tribal governments from exercising criminal jurisdiction over non-Indian offenders stretch beyond merely creating a jurisdictional safe haven for drug traffickers."); Pisarello, *supra* note 164, at 1515 ("[I]f you want to rape or kill somebody and get away with it, do it on an Indian reservation." (alteration in original) (citation omitted)); Jessica Rizzo, *Native American Women Are Rape Targets Because of a Legislative Loophole*, VICE: NEWS (Dec. 16, 2015, 11:00 AM), https://www.vice.com/en_us/article/bnpb73/native-american-women-are-rape-targets-because-of-a-legislative-loophole-511 [https://perma.cc/XVU2-3CJF].

of criminals.[194] Criminal jurisdiction is usually simple: offender commits a crime, police arrest the offender, and the offender is prosecuted where the crime occurred.[195] This is not how it works in Indian country. As noted above, determining which law enforcement agency must prosecute the crime requires discerning whether the victim and offender are Indians, the type of crime committed, as well as the status of the land at issue.[196] This makes Indian country law enforcement incredibly inefficient; in fact, tribal and non-Indian law enforcement agencies will gather at an Indian country crime scene to argue about jurisdiction rather than solve the crime.[197] As a result, the Indian Law and Order Commission described Indian country's jurisdictional scheme as "the antithesis of effective government."[198]

Basing jurisdiction on Indian status forces the odd legal question—who is an Indian?[199] While there are over two dozen definitions of "Indian" under federal law,[200] jurisprudence requires individuals to possess both Indian blood and recognition as an Indian to qualify as an Indian for jurisdictional purposes.[201] Indian blood can usually be determined relatively easily.[202] However, discerning

194. DeCoteau v. Dist. Cnty. Ct., 420 U.S. 425, 467 (1975) (Douglas, J., dissenting) ("Jurisdiction dependent on the 'tract book' promises to be uncertain and hectic. . . . The contest promises to be unseemly, the only beneficiaries being those who benefit from confusion and uncertainty.").

195. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." (citation omitted)); Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1031 (2018) (noting that subjective territorial jurisdiction "has long enjoyed the Supreme Court's full-throated support"); MELISSA TATUM, PROSECUTING CRIME IN INDIAN COUNTRY, *provided in* Gabriel Mac, *A Fistful of Dollars*, MOTHER JONES (Nov.–Dec. 2010), https://www.motherjones.com/politics/2010/11/vigilante-justice-oklahoma-indian-reservations/ [https://perma.cc/NE2A-TNMW].

196. INDIAN L. & ORD. COMM'N, *supra* note 89, at 9 ("The jurisdictional problems often make it difficult or even impossible to determine at the crime scene whether the victim and suspect are 'Indian' or 'non-Indian' for purposes of deciding which jurisdiction—Federal, State, and/or Tribal—has responsibility and which criminal laws apply.").

197. AMNESTY INT'L USA, *supra* note 51, at 33 ("When an emergency call comes in, the sheriff will say 'but this is Indian land.' Tribal police will show up and say the reverse. Then, they just bicker and don't do the job. Many times, this is what occurs. And it doesn't always get resolved, which means no rape [sexual assault evidence] kit, etc." (alteration in original) (quoting Juskwa Burnett, support worker for Indian sexual assault survivors)).

198. INDIAN L. & ORD. COMM'N, *supra* note 89, at 9.

199. Indian classifications are constitutionally permissible because tribal sovereignty elevates Indian status from a racial to a political classification. *See* United States v. Antelope, 430 U.S. 641, 646 (1977) ("Indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe.").

200. CASSELMAN, *supra* note 51, at 49; Hallie Bongar White, Kelly Gaines Stoner & James G. White, *Creative Civil Remedies Against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427, 433 (2008).

201. United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005); State v. Reber, 2007 UT 36, ¶ 21, 171 P.3d 406, 409–10; State v. LaPier, 790 P.2d 983, 986 (Mont. 1990); Goforth v. State, 644 P.2d 114, 116 (Okla. 1982); *see* United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846).

202. *See* Mohn v. Zinke, 688 F. App'x 554, 555 n.2 (10th Cir. 2017); Davis v. United States, 192 F.3d 951, 956 (10th Cir. 1999) ("Certificates of Degree of Indian Blood ('CDIBs') are issued by the BIA and are the BIA's certification that an individual possesses a specific quantum of Indian blood."); Paul

whether someone is recognized as Indian can be a complex matter.[203] For example, the federal government admits the citizens of the United Houma Nation (UHN) are unquestionably Indian,[204] yet the federal government does not consider the UHN an "Indian tribe."[205] Indians may also disavow their tribal citizenship prior to or after committing a crime.[206] Accordingly, determining whether an individual qualifies as an "Indian" for criminal jurisdiction purposes can take months.[207] Further complicating matters, different federal courts use different tests to discern Indian status,[208] so a person may qualify for Indian status in one federal circuit but not in another.[209]

Whether Cooley was an Indian only mattered because he was within Indian country.[210] Adding the element of "Indian" status increases transaction costs for prosecutors operating in Indian country. Indeed, basing jurisdiction on whether people are Indian can result in separate trials in separate court systems for the same exact offense. For example, if a non-Indian harms both an Indian and a non-Indian during the same transaction, one prosecution must occur in federal court and another must occur in state court.[211] State and federal law enforcement do not receive any extra compensation for tackling Indian country crimes; therefore, the Indian status element creates additional burdens that law enforcement does not have to bear in other jurisdictions, while generating no offsetting benefit to law enforcement. Consequently, the legal system disincentivizes Indian country policing and prosecutions.

Spruhan, *CDIB: The Role of the Certificate of Degree of Indian Blood in Defining Native American Legal Identity*, 6 AM. INDIAN L.J. 169, 170 (2018).

203. Crepelle, *supra* note 152, at 69–70 ("[C]ourts often struggle when deciding whether a person is recognized as an Indian.").

204. OFF. OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST FEDERAL ACKNOWLEDGMENT OF THE UNITED HOUMA NATION, INC. 25 (1994), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/056_uhouma_LA/056_pf.pdf [https://perma.cc/ZTQ6-6U63] ("Indian ancestry can be verified for the petitioner without doubt or question.").

205. *Id*. at 27 ("Thus the UHN presents a unique situation. They are a distinct settlement with verifiable Indian ancestry, which has existed continuously since 1830. . . . But there is no documentation that allows an identification of the UHN members with the Houma or any other historical tribe. We conclude the petitioner does not meet criterion 83.7(e).").

206. CASSELMAN, *supra* note 51, at 53 ("In some cases, suspects have exploited *Oliphant* and the Duro Fix by strategically enrolling or disenrolling themselves from their Native nations to manipulate jurisdiction and sidestep prosecution.").

207. *Id*. at 53–54; *see* INDIAN L. & ORD. COMM'N, *supra* note 89, at 11.

208. *Compare* United States v. Cruz, 554 F.3d 840, 845–46 (9th Cir. 2009) (reiterating that, in determining whether someone is recognized as Indian, the factors of tribal enrollment, government recognition, enjoyment of tribal benefits, and social recognition should be considered in descending order of importance), *with* United States v. Stymiest, 581 F.3d 759, 763–64 (8th Cir. 2009) (holding that those factors need not "be tied to an order of importance" and that "there is no single correct way to instruct a jury on this issue").

209. ANGELIQUE TOWNSEND EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 49 (2013) ("[T]he Eighth Circuit test is much broader, allowing the inclusion of a person for federal criminal prosecution as an Indian when the same person may not be eligible as an Indian for tribal citizenship or federal services.").

210. *See* United States v. Cooley, 141 S. Ct. 1638, 1643–44 (2021).

211. *See* INDIAN L. & ORD. COMM'N, *supra* note 89, at 11.

Indian country jurisdiction is further obfuscated by the status of the land itself because it is often unclear what constitutes Indian country. Indian country was once plainly demarcated from state jurisdiction,[212] and in many cases, this remains true today.[213] However, allotted reservations are commonly checkerboarded, meaning fee simple land is mixed with trust land.[214] Checkerboarding leads to law enforcement chaos because whether the tribe, state, or federal government has jurisdiction can change with each step;[215] thus, law enforcement officers must patrol reservations with a GPS in hand simply to determine whether a plot of land is under their authority.[216] This bizarre circumstance prompted Justice Douglas to declare that checkerboarding benefits only "those who benefit from confusion and uncertainty."[217]

McGirt v. Oklahoma demonstrates the boundaries of Indian country may not be clear even if common knowledge says otherwise,[218] and litigating the

212. *See* An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 161, § 1, 4 Stat. 729, 729 (1834).

213. For example, if a person is in a tribal casino, the individual is clearly within Indian country because tribal casinos can only exist in Indian country. *See* 25 U.S.C. § 2703(4); CONG. RSCH. SERV., R42471, INDIAN GAMING: LEGAL BACKGROUND AND THE INDIAN GAMING REGULATORY ACT (IGRA) 10–11 (2012). However, tribes can own casinos outside of Indian country. *See Poarch Band of Creek Indians Plans $90 Million Expansion of Casino Hotel*, INDIANZ.COM (Dec. 4, 2019), https://www.indianz.com/IndianGaming/2019/12/04/poarch-band-of-creek-indians-plans-90-mi.asp [https://perma.cc/KXM2-UEE3]; *Poarch Band of Creek Indians Seeks Commercial Casino in Illinois*, INDIANZ.COM (Oct. 3, 2019), https://www.indianz.com/IndianGaming/2019/10/03/poarch-band-of-creek-indians-seeks-comme.asp [https://perma.cc/NQU5-DGJV].

214. *See* Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358 (1962) (discussing the jurisdictional problems caused by the "impractical pattern of checkerboard jurisdiction"); Ute Indian Tribe of the Uintah v. Myton, 835 F.3d 1255, 1262 (10th Cir. 2016) (discussing "checkerboard" jurisdiction); Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENV'T L.J. 195, 200 (2015) (noting the Dawes Act "resulted in 'checkerboard' patterns of landownership within many Indian reservations in the western United States").

215. *See* DeCoteau v. Dist. Cnty. Ct., 420 U.S. 425, 467 (1975) (Douglas, J., dissenting); Bryan T. Andersen, South Dakota v. Yankton Sioux Tribe*: Sewing a Patchwork Quilt of Jurisdiction*, 3 GREAT PLAINS NAT. RES. J. 99, 112–13 (1998) (discussing the "patchwork quilt" jurisdiction of Charles Mix County, South Dakota).

216. *See* Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1731 (2012) (citing Michael Riley, *1885 Law at Root of Jurisdictional Jumble*, DENV. POST (Nov. 9, 2007, 3:51 PM), http://www.denverpost.com/lawlesslands/ci_7422829); *cf.* Melissa L. Tatum, *Law Enforcement Authority in Indian Country*, 4 TRIBAL L.J. 1, 16 (2004) ("[I]f a tribal officer's authority is restricted to the tribe's criminal jurisdiction, then there are many situations, specifically those involving non-Indians, where the police would have no authority to arrest the offender."); JUD. COUNCIL OF CAL., TRIBAL COURT-STATE COURT FORUM MEETING 2 (2015), https://www.courts.ca.gov/documents/forum-20150611-materials.pdf [https://perma.cc/5KAM-KHQ5] ("Law enforcement jurisdiction varies by the location of the offense (on or off reservation land) . . . .").

217. *DeCoteau*, 420 U.S. at 467 (Douglas, J., dissenting).

218. *See* 140 S. Ct. 2452, 2460 (2020) (alluding to the decision's significance and noting that, contrary to common assumptions, Oklahoma "has no right to prosecute Indians for crimes committed" in a large swath of the state including most of Tulsa). While *McGirt* rightfully received significant media attention, reservation boundary disputes are not uncommon. *See, e.g.*, Nebraska v. Parker, 136 S. Ct. 1072, 1078 (2016); United States v. Jackson, 853 F.3d 436, 438 (8th Cir. 2017); Cayuga Indian Nation of N.Y. v. Seneca County, 260 F. Supp. 3d 290, 293 (W.D.N.Y. 2017).

boundaries of Indian country can take years.[219] Law enforcement officers who spend hundreds of hours building a case may have to start from scratch if it turns out the case is outside of their jurisdiction.[220] This land status wild card provides law enforcement with a disincentive to pursue crimes on any land that may be classified as Indian country. The disincentive created by checkerboarding is so strong on the Yakama Reservation that Washington police officers refuse to patrol the reservation.[221]

Basing criminal jurisdiction on Indian status casts a cloud over police capacity to seize and arrest offenders à la *United States v. Cooley*.[222] A police officer's ability to arrest is usually tied to prosecutorial power;[223] hence, tribes probably cannot arrest non-Indians on a reservation while state authorities probably cannot arrest Indians on a reservation.[224] Nevertheless, police have the ability to detain offenders who are beyond their jurisdiction and transfer the perpetrator to the proper authority.[225] This is an unsatisfying solution because the line between arrest and detention is often hazy.[226] An unlawful arrest can result in evidence

219. For example, *Sharp v. Murphy* arose out of a crime committed by Mr. Murphy in 1999. *See* Murphy v. State, 47 P.3d 876, 879 (Okla. Crim. App. 2002). The issue involving Indian country was finally resolved by the U.S. Supreme Court in 2020. *See* Murphy v. Royal, 875 F.3d 896, 904 (10th Cir. 2017), *aff'd sub nom*. Sharp v. Murphy, 140 S. Ct. 2412 (2020).

220. *See* Sara Whaley, *Case Against Alleged Serial Robber in Tulsa Dismissed in Continued Fallout over SCOTUS Ruling*, FOX23: NEWS (July 28, 2020, 10:26 PM), https://www.fox23.com/news/local/case-against-alleged-serial-robber-tulsa-dismissed-continued-fallout-over-scotus-ruling/2C43SFUCHVB2BMX5K22C7VTTMI/ [https://perma.cc/4LQL-7BHT] ("Tulsa police robbery detectives say they spent hundreds of hours on the case, but now will have to do most of the work again if federal prosecutors decide to charge Murphy – starting from scratch as if the state charges never even happened."); *see also* CASSELMAN, *supra* note 51, at 54 ("[I]f one sovereign entity does collect evidence, it may be thrown out by another agency that may have different standards for chain of custody, search warrants, and evidence collection.").

221. Hudetz, *supra* note 50 ("Tribal leaders from Yakama Nation pleaded for more federal help to curb drug trafficking and property crime. And they denounced the Washington State Patrol's 2016 decision to stop patrolling the 1,765-square-mile reservation – an area larger than the size of Rhode Island – due to liability concerns amid a shifting web of jurisdictions.").

222. *See* 919 F.3d 1135, 1140 (9th Cir. 2019), *vacated*, 141 S. Ct. 1638 (2021) ("The motion argued that Saylor was acting outside the scope of his jurisdiction as a Crow Tribe law enforcement officer when he seized Cooley, in violation of the Indian Civil Rights Act of 1968 . . . .").

223. State v. Eriksen (*Eriksen III*), 259 P.3d 1079, 1081 (Wash. 2011) ("As a general rule, 'a valid arrest may not be made outside the territorial jurisdiction of the arresting authority.'" (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.07 (2005))); State v. Barker, 25 P.3d 423, 426 (Wash. 2001) ("At common law, an officer outside his or her jurisdiction did not acquire authority to arrest merely because probable cause existed."); Crepelle, *supra* note 163, at 1316–17.

224. *See* Riley, *supra* note 216; Tatum, *supra* note 216; Louise Erdrich, Opinion, *Rape on the Reservation*, N.Y. TIMES (Feb. 26, 2013), https://www.nytimes.com/2013/02/27/opinion/native-americans-and-the-violence-against-women-act.html; JUD. COUNCIL OF CAL., *supra* note 216, at 1, 3 (noting that tribal law enforcement on only seventeen of California's nearly 100 reservations and rancherias can arrest non-Indians).

225. United States v. Cooley, 141 S. Ct. 1638, 1643 (2021) ("To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats.").

226. *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 84 (5th ed. 2008) ("Determining whether a given detention is an arrest can often be a difficult endeavor.").

suppression during trial,[227] and the Supreme Court has justified the exclusionary rule on the basis that it deters over-aggressive policing.[228] Additionally, a prolonged detention can lead to a false imprisonment lawsuit.[229] Looming liability produces a disincentive for police officers to detain individuals they cannot lawfully arrest.[230]

Detention issues are foggiest in fresh pursuit cases; in fact, the Washington Supreme Court has recognized that Indian country's jurisdictional scheme creates an "incentive for intoxicated drivers to race for the reservation border."[231] That is, non-Indians who commit crimes in Indian country flee from the reservation to avoid detention by tribal police while Indians who commit crimes within state jurisdiction flee to Indian country.[232] Most state courts that have addressed the issue have held that state law enforcement officers have the authority to pursue Indian suspects onto tribal land.[233] These state court decisions, however, raise concerns about tribal sovereignty and rest on legally uncertain grounds.[234] Conversely, whether tribal police can engage in fresh pursuit beyond tribal borders is an unsettled question,[235] which is evinced by the Washington State Supreme Court

227. *Id.* at 75 ("[T]he legality of an arrest is often of crucial importance in determining the admissibility of evidence.").

228. Herring v. United States, 555 U.S. 135, 141 (2009) ("[W]e have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future." (citation omitted)); United States v. Janis, 428 U.S. 433, 454 (1976) ("If . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted."); United States v. Calandra, 414 U.S. 338, 348 (1974) ("In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."). However, there are questions about the exclusionary rule's effectiveness at deterring unlawful police behavior. *See Calandra*, 414 U.S. at 348 n.5 ("There is some disagreement as to the practical efficacy of the exclusionary rule . . . ."); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 594 (2011).

229. Elise Helgesen, Note, *Allotment of Justice: How U.S. Policy in Indian Country Perpetuates the Victimization of American Indians*, 22 U. FLA. J.L. & PUB. POL'Y 441, 453 (2011).

230. Hudetz, *supra* note 50 ("[Washington State Patrol] feared the liability if, for example, a trooper pulled over a drunken driver who is Native American, and therefore couldn't make an arrest, said Capt. Shane Nelson. If that driver were released and got in an accident down the road, he said, the department could be faulted for allowing the driver to remain behind the wheel. 'If they leave, what's the liability?' he said. 'To ensure we don't get into that situation, we are choosing not to be proactive.'").

231. *Eriksen III*, 259 P.3d 1079, 1083 (Wash. 2011).

232. AMNESTY INT'L USA, *supra* note 51, at 39 ("Flights by criminals occur in both directions – away from and to tribal land."); *see* Agoyo, *supra* note 46; Crane-Murdoch, *supra* note 66.

233. *Developments in the Law—Indian Law, Fresh Pursuit from Indian Country: Tribal Authority to Pursue Suspects onto State Land*, 129 HARV. L. REV. 1685, 1688–89, 1689 n.29 (2016) [hereinafter *Fresh Pursuit*].

234. *See* Judith V. Royster & Rory SnowArrow Fausett, *Fresh Pursuit onto Native American Reservations: State Rights "to Pursue Savage Hostile Indian Marauders Across The Border," An Analysis of the Limits of State Intrusion into Tribal Sovereignty*, 59 U. COLO. L. REV. 191, 194–95 (1988) ("The fundamental premise of this article is that fresh pursuit onto a Native reservation, unless specifically authorized by the tribe and carried out in full compliance with tribal law, is a violation of inherent tribal sovereignty.").

235. *Fresh Pursuit*, *supra* note 233, at 1688 ("It is currently unclear in many states whether tribal police have the authority to engage in fresh pursuit onto state land."). *Cooley* suggests tribal police can

hearing the same reservation fresh pursuit case three separate times.[236]

Indian country's jurisdictional problems are exacerbated by a dire shortage of police officers. Studies tend to show that increasing the number of police in an area reduces the crime rate,[237] and Congress found that Indian country has less than half the number of police patrolling it as the average rural jurisdiction.[238] For perspective, some tribal police forces have three officers patrolling an area the size of Delaware.[239] This paltry number of police leads to slower response times and a greater likelihood of criminals successfully completing their misdeeds.[240] Lack of boots on the ground reduces the deterrent effect of criminal law; hence,

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detain non-Indians in fresh pursuit beyond the reservation border, but *Cooley* did not directly address the question. Thus, uncertainty remains.

236. *See* State v. Eriksen (*Eriksen I*), 216 P.3d 382 (Wash. 2009); State v. Eriksen (*Eriksen II*), 241 P.3d 399 (Wash. 2010); *Eriksen III*, 259 P.3d 1079.

237. *See* Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 22 (2017) ("The literature has reached a consensus that increases in police manpower reduce crime, at least for a population-weighted average of US cities."); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 789 (2010) ("With respect to the role of the police, many scholars have concluded—although there is some dispute about this—that at least some of the decline in crime rates can be attributed to an increase in the number of police and the increased certainty of punishment associated with that increase."); *see also* Aaron Chalfin, Benjamin Hansen, Emily K. Weisburst & Morgan C. Williams, Jr., *Police Force Size and Civilian Race* 14 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28202, 2020), https://www.nber.org/papers/w28202?utm_source=npr_newsletter&utm_medium=email&utm_content=20210419&utm_term=5326149&utm_campaign=money&utm_id=49355949&orgid=&utm_att1=money [https://perma.cc/28HV-KLGJ] ("[O]ur finding that index crime arrests fall with police manpower, and disproportionately fall for Black civilians, is consistent with the idea that police hiring has the potential to create a 'double dividend' for society by generating reductions in both crime and incarceration for serious offenses." (citations omitted)).

238. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(3), 124 Stat. 2261, 2262.

239. STEWART WAKELING, MIRIAM JORGENSEN, SUSAN MICHAELSON & MANLEY BEGAY, DOJ, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 9 (2001), https://www.ncjrs.gov/pdffiles1/nij/188095.pdf [https://perma.cc/KW5T-HZMM] ("[T]he figures are roughly equivalent to an area the size of Delaware, but with a population of only 10,000 that is patrolled by no more than three police officers (and as few as one officer) at any one time—a level of police coverage that is much lower than in other urban and rural areas of the country."); *see also* AMNESTY INT'L USA, *supra* note 51, at 43 ("As of February 2006, the Standing Rock Police Department consisted of six or seven patrol officers and two investigators to patrol 2.3 million acres of land."); Ian MacDougall, *Should Indian Reservations Give Local Cops Authority on Their Land?*, ATLANTIC (July 19, 2017), https://www.theatlantic.com/politics/archive/2017/07/police-pine-ridge-indianreservation/534072/ ("A little over 30 tribal police officers patrol Pine Ridge, a swath of the Great Plains more than twice the size of Rhode Island.").

240. *See* Jeff Asher, *Fewer Crimes Get Counted When Police Are Slow to Respond*, ABC NEWS: FIVETHIRTYEIGHT (Jan. 29, 2018, 1:19 PM), https://fivethirtyeight.com/features/fewer-crimes-get-counted-when-police-are-slow-to-respond/ ("Most big police departments shrank during the last recession, and there is evidence that lower staffing levels mean dispatchers have fewer officers available to respond to incidents when they occur, which results in longer response times."); Daniel J. Chacón, *Officer Shortage Slows Response Time in Santa Fe*, SANTA FE NEW MEXICAN (Oct. 1, 2018), https://www.santafenewmexican.com/news/local_news/officer-shortage-slows-response-time-in-santa-fe/article_7a3f42b8-fc5e-56e0-b8f9-dc92d144b7a5.html; Edgar Mendez, *Milwaukee Police Slow to Respond to Violent Crime Calls*, ASSOCIATED PRESS (Aug. 11, 2018), https://apnews.com/3214ec7736514fb7a187c7f451db8fc0 [https://perma.cc/7UNY-RJZZ] ("The shortage of police officers is another reason response times are slow, [Milwaukee Police Association President Mike] Crivello said, blaming Mayor Tom Barrett.").

rational criminals will capitalize on Indian country's low police presence relative to non-Indian jurisdictions.

Indian country law enforcement difficulties are also amplified by transaction costs that are not directly related to criminal justice. Tribes' inability to prosecute non-Indians means state and federal agents are often required in reservation law enforcement.[241] Non-Indian police forces are commonly over 100 miles from Indian country.[242] Moreover, Indian country's roads are often in horrendous condition, which can decrease travel speed and increase the risk of accidents.[243] Plus, Indian country residences often have no address,[244] so law enforcement cannot rely on a GPS to guide them to their destination.[245] Poor communication infrastructure on reservations can prevent law enforcement interaction with backup[246] as occurred in *Cooley*.[247] The inability to communicate with other police increases the danger of responding to calls in Indian country. When law enforcement reaches the crime scene, cultural barriers between Indians and non-Indian

241. Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 683, 718 (2021); Crepelle, *supra* note 152, at 72 ("Indian country's jurisdictional scheme often requires non-Indian law enforcement to participate in policing reservations . . . .").

242. MATTHEW L.M. FLETCHER, AM. CONST. SOC'Y FOR L. & POL'Y, ADDRESSING THE EPIDEMIC OF DOMESTIC VIOLENCE IN INDIAN COUNTRY BY RESTORING TRIBAL SOVEREIGNTY 6 (2009), https://www.acslaw.org/wp-content/uploads/2018/05/Fletcher-Issue-Brief.pdf [https://perma.cc/TQH4-U2L7]; *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/H34U-GYVK]; *cf.* Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 115 (1995) ("[F]ederal courts are often located far from Indian reservations . . . .").

243. *Enhancing Tribal Self–Governance and Safety of Indian Roads: Hearing Before the S. Comm. on Indian Affs.*, 116th Cong. 21 (2019) (statement of Hon. Joe Garcia, Head Councilman, Ohkay Owingeh Pueblo Council) ("Altogether, the 42,000 miles of roads in Indian Country are still among the most underdeveloped, unsafe, and poorly maintained road networks in the nation . . . ."); U.S. COMM'N ON C.R., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 168 (2018), https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf [https://perma.cc/RD2F-7AGN]; Crepelle, *supra* note 241, at 727–28.

244. Matt Vasilogambros, *For Some Native Americans, No Home Address Might Mean No Voting*, SALT LAKE TRIB. (Oct. 6, 2019, 6:54 PM), https://www.sltrib.com/news/2019/10/06/some-native-americans-no/ ("The Navajo Nation has 50,000 unaddressed homes and businesses, creating complications for hundreds of thousands of people."); Camila Domonoske, *Many Native IDs Won't Be Accepted at North Dakota Polling Places*, NPR (Oct. 13, 2018, 1:18 PM), https://www.npr.org/2018/10/13/657125819/many-native-ids-wont-be-accepted-at-north-dakota-polling-places [https://perma.cc/XCT4-KCLF] ("Many Native American reservations, however, do not use physical street addresses."); Katie Reilly, *North Dakota's Voter ID Law Disproportionately Affects Native Americans. Here's How They're Mobilizing to Fight It*, TIME (Nov. 2, 2018, 6:46 PM), https://time.com/5442434/north-dakota-voting-law-native-american-activism/ (noting that a North Dakota law that "requires voters to present identification that displays a street address . . . disproportionately affects Native Americans on reservations, where street addresses are not common").

245. *See Journey Through Indian Country, Part 1: Fighting Crime on Tribal Lands*, *supra* note 242 ("On many reservations there are few paved roads or marked streets. Agents might be called to a crime scene in the middle of the night 120 miles away and given these directions: 'Go 10 miles off the main road, turn right at the pile of tires, and go up the hill.'").

246. *Id.* ("In some areas, crime scenes are so remote that cell phones and police radios don't work.").

247. United States v. Cooley, 919 F.3d 1135, 1140 (9th Cir. 2019) ("Saylor attempted to call in Cooley's license number to dispatch but failed, as he was unable to connect."), *vacated*, 141 S. Ct. 1638 (2021).

law enforcement may lead to communication difficulties.[248] Physical evidence of crimes is also more difficult to collect due to Indian country's terrible medical care[249] and other factors such as bureaucratic inefficiency.[250] Each of these issues is peripheral to criminal justice yet increase transaction costs relative to law enforcement outside of Indian country.[251]

State and federal law enforcement agents have no incentive to prioritize Indian country crime, so they make the rational choice to focus on crimes outside of Indian country. There is no extra compensation for the more tedious task of pursuing Indian country crime. Non-Indian law enforcement officers often live far from Indian country; thus, they often have no stake in the community's welfare.[252] Additionally, states tend to have hostile histories with tribes.[253] States fail to provide police for reservations[254] and often actively impede Indian country law

248. Crepelle, *supra* note 84, at 242–43; 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.").

249. *See* NANCY RITTER, DOJ, THE ROAD AHEAD: UNANALYZED EVIDENCE IN SEXUAL ASSAULT CASES 2 (2011), https://ncjrs.gov/pdffiles1/nij/233279.pdf [https://perma.cc/JD3U-PQTH] (noting that many Indian country residents "do not know how to obtain or use a [sexual assault kit], and . . . have no access to a sexual assault nurse examiner"); Laura Sullivan, *Rape Cases on Indian Lands Go Uninvestigated*, NPR (July 25, 2007, 4:00 PM), https://www.npr.org/templates/story/story.php?storyId=12203114 [https://perma.cc/9DS4-8XH4] (reporting that the Indian Health Service hospital on the Standing Rock Sioux Reservation lacked rape kits and sufficient time to perform rape exams); Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES (May 22, 2012), https://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html?pagewanted=all (discussing the lack of sexual assault kits and personnel trained to perform rape examinations at Indian Health Service hospitals).

250. Chrystal Begay & Tinesha Zandamela, *Sexual Assault on Native American Reservations in the U.S.*, BALLARD BRIEF (Jan. 2018), https://ballardbrief.org/read/sexual-assault-on-native-american-reservations-in-the-us [https://perma.cc/GC9N-SE6V] ("Some of the issues surrounding evidence collection could be attributed to the fact that police departments work differently for each tribe; some tribes work with tribal police and federal law enforcement officers and some work with only one or the other.").

251. *See generally* Lucas Downey, *Transaction Costs*, INVESTOPEDIA (Mar. 31, 2019), https://www.investopedia.com/terms/t/transactioncosts.asp [https://perma.cc/HU5E-Q3YZ] ("Another type of transaction cost is the time and labor associated with transporting goods or commodities across long distances."); Renos Vakis, Elisabeth Sadoulet & Alain de Janvry, *Measuring Transactions Costs from Observed Behavior: Market Choices in Peru* 18 (Univ. of Cal., Berkeley, Dep't of Agric. & Res. Econ. Working Paper No. 962, 2003), https://are.berkeley.edu/~esadoulet/papers/TC-wp.pdf [https://perma.cc/EH2B-H2N6] ("We find that in addition to proportional costs such as the distance to reach a market or access to good roads, fixed transactions costs like information about prices, relationships with potential buyers, or bargaining abilities are also important determinants of market selection.").

252. *See* Washburn, *supra* note 248, at 1011.

253. *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 they are found are often their deadliest enemies."); *About ICWA*, NAT'L INDIAN CHILD WELFARE ASS'N, https://www.nicwa.org/about-icwa/ [https://perma.cc/H4GU-KPP4] (last visited Jan. 4, 2022) ("The Indian Child Welfare Act (ICWA) was enacted in 1978 in response to a crisis affecting American Indian and Alaska Native children, families, and tribes. Studies revealed that large numbers of Native children were being separated from their parents, extended families, and communities by state child welfare and private adoption agencies."); Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATLANTIC (Jan. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167/ ("ICWA was passed in 1978, in an

enforcement efforts.[255] Indians are usually politically powerless minorities in the surrounding state, so states have no political incentive to protect them.[256] States cannot tax tribal lands either;[257] hence, states do not have a financial incentive to provide even basic law enforcement services to Indian country.

Similarly, federal prosecutors routinely fail to pursue Indian country crimes even when they have the legal authority to do so.[258] Given their limited resources, United States Attorneys are usually more interested in high-profile crimes, not the types of crime that plague Indian country.[259] Moreover, the distance from the federal courthouse to the reservation makes it much more difficult to obtain

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effort to put an end to the long history of states forcibly placing Native children with white families or sending Native children to abusive boarding schools.").

254. United States v. Bryant, 136 S. Ct. 1954, 1960 (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." (citations omitted)).

255. Cabazon Band of Mission Indians v. Smith, 388 F.3d 691, 692 (9th Cir. 2004) ("Before the Tribe's suit, Defendants repeatedly stopped and cited the Tribe's police officers for violating California's Vehicle Code whenever the officers traveled on nonreservation roads to respond to emergency calls from different portions of the reservation."); Smith v. Parker, 996 F. Supp. 2d 815, 833 (D. Neb.) ("Thurston County refused to join any cross-deputization efforts despite the willingness of the Nebraska State Patrol to participate in such an agreement [with the Omaha Tribe]."), *aff'd*, 774 F.3d 1166 (8th Cir. 2014), *aff'd sub nom.* Nebraska v. Parker, 136 S. Ct. 1072 (2016); Internal Law Enforcement Services Policies, 69 Fed. Reg. 6321, 6321 (Feb. 10, 2004) ("It is common for tribes to have difficulty getting local or State law enforcement to respond to crimes on the reservations."); U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-23, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: ADDITIONAL OUTREACH AND NOTIFICATION OF TRIBES ABOUT OFFENDERS WHO ARE RELEASED FROM PRISON NEEDED 35 (2014) ("[S]tates are not consistently notifying these tribes about registered sex offenders who plan to live, work, or attend school on tribal lands upon release from state prison . . . .").

256. GOLDBERG ET AL., *supra* note 133, at 6; Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1436 (1997) (noting that state and local officers in PL 280 jurisdictions are prone to abuse their authority because Indians are usually minority populations with little political power); Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 ALB. L. REV. 885, 905 (2015) (noting that PL 280 states inequitably enforce laws when Indians are perpetrators and victims); Washburn, *supra* note 248, at 1019–20.

257. 18 U.S.C. § 1162(b); 28 U.S.C. § 1360(b).

258. 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* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 212(a)(4), 124 Stat. 2261, 2267; DOJ, DUTIES IMPOSED ON UNITED STATES ATTORNEYS BY THE TRIBAL LAW AND ORDER ACT OF 2010 (2010), https://www.justice.gov/sites/default/files/usao-az/legacy/2010/10/14/Tribal%20Law%20and%20Order%20Act%20of%202010%20Summary.pdf [https://perma.cc/8P2P-HU5E]; DOJ, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 39 (2018) [hereinafter INVESTIGATIONS AND PROSECUTIONS], https://www.justice.gov/otj/page/file/1231431/download [https://perma.cc/S6ZU-T2WY] (describing examples of successful Indian country prosecutions).

259. CASSELMAN, *supra* note 51, at 55; Cary Aspinwall & Graham Lee Brewer, *Half of Oklahoma Is Now Indian Country. What Does That Mean For Criminal Justice There?*, MARSHALL PROJECT (Aug. 4, 2020, 6:00 AM), https://www.themarshallproject.org/2020/08/04/half-of-oklahoma-is-now-indian-territory-what-does-that-mean-for-criminal-justice-there [https://perma.cc/L5YU-JM53] (describing an Indian country child neglect case as an atypical crime for the U.S. Attorney for the Northern District of Oklahoma to prosecute, because "the federal government generally devotes its prosecutorial resources to uncovering drug rings, human trafficking and multimillion-dollar financial crimes"); Washburn, *supra* note 248, at 1013.

witnesses during trials.[260] Federal prosecutorial neglect of Indian country crimes may also be connected to some federal judges' disdain for Indian country criminal cases.[261] Low state and federal prosecutorial enthusiasm for Indian country cases signals to criminals they are less likely to be indicted in Indian country than in other jurisdictions.

Systemic racism likely subverts state and federal law enforcement interest in pursuing Indian country crimes and crimes against Indians outside of Indian country. Evidence shows that Indians experience high rates of violence outside of Indian country,[262] where no jurisdictional disincentive for law enforcement exists. Nonetheless, Indian women go missing in urban areas without receiving any law enforcement response or media attention.[263] The hypersexualization of Indian women likely leads non-Indian predators to perceive Indian women as easy victims.[264] This incentivizes non-Indians to target Indian women for sex crimes; furthermore, as recently as the 1960s, the rape of Indian women was punished less severely under federal law than the rape of non-Indian women.[265] Cultural stereotypes may also lead law enforcement to view Indians as less worthy of protection than non-Indians.[266] For example, Amnesty International found

260. Buckley, *supra* note 66 ("In major crimes like murder or child abuse, which are managed by federal agencies, victims and witnesses often have to travel long distances to testify in federal court."); Washburn, *supra* note 248, 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.").

261. *See* United States v. Swift Hawk, 125 F. Supp. 2d 384, 384 (D.S.D. 2000) ("As I have stated previously in other cases, I did not realize, prior to taking office as an Article III judge, that I would be presiding over drunk driving cases."); Philip P. Frickey, *Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 63 n.305 (1999) (quoting "reported remarks from Justices about how federal Indian law disputes are 'peewee' cases, even 'chickenshit cases'").

262. *See* LUCCHESI & ECHO-HAWK, *supra* note 73, at 6, 18.

263. *See id*. at 18–20 (presenting findings that media outlets are unwilling to "commit to sustained coverage" of missing and murdered Indian women, and pointing to 153 missing and murdered women absent from law enforcement records).

264. *See* Sarah Deer, *(En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States*, 31 YALE J.L. & FEMINISM 1, 3 (2019) ("The rates of violence are an extension of the historical mistreatment and dehumanization of Native women. These practices have continued well into the twenty-first century in the form of hypersexualized images of Native women, often associated with 'sexy' Indian Halloween costumes and movies like Disney's *Pocahontas*."); Garet Bleir & Anya Zoledziowski, *Murdered and Missing Native American Women Challenge Police and Courts*, CTR. FOR PUB. INTEGRITY (Oct. 29, 2018, 12:43 PM), https://publicintegrity.org/politics/murdered-and-missing-native-american-women-challenge-police-and-courts [https://perma.cc/63V6-U7FN].

265. *See* Gray v. United States, 394 F.2d 96, 98–99 (9th Cir. 1968) ("Congress has seen fit to diminish the penalty to be imposed upon an Indian who is convicted of rape upon another Indian in Indian Country, by enacting the specific provisions contained in 18 U.S.C. § 1153, which mitigate the penalty that otherwise would be imposed under 18 U.S.C., Section 2031. . . . We cannot say that such a statute denies its beneficiaries due process of law."); Recent Case, Gray v. United States, *394 F.2d 96 (9th Cir. 1968)*, 82 HARV. L. REV. 697, 698 (1969).

266. BARBARA PERRY, POLICING RACE AND PLACE IN INDIAN COUNTRY: OVER- AND UNDERENFORCEMENT 49 (2009) ("Underlying the stigmatization of Native Americans is a cluster of stereotypes that generally paint Native Americans as morally and intellectually inferior."); Bleir & Zoledziowski, *supra* note 264 ("It's not unusual for women of color generally to be perceived as inferior

that police usually assume Indian women were drinking at the time they experienced sexual violence.[267] Systemic disregard for Indian victims creates an incentive for criminals to target Indians versus individuals of other backgrounds even outside of Indian country.

All of the above provide a potent incentive for criminals to target Indian country.[268] The odds of federal prosecution for Indian country crimes are comparatively low, and tribes generally cannot prosecute non-Indians.[269] States have authority to prosecute non-Indians who commit crimes against non-Indians;[270] however, states, absent federal law, cannot prosecute non-Indians who victimize Indians.[271] Therefore, rational non-Indian criminals will select Indians as their victims for reservation crimes. The available data support this assumption as Indians experience elevated victimization rates when non-Indians enter Indian country in large numbers, such as hunting season and oil booms.[272] Non-Indians know they are above the law in Indian country and are known to call the police on themselves to prove it.[273] Due to Indian country's inefficient jurisdictional scheme, the Supreme Court's 1846 statement has become true: the non-Indians

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to white people as a class and inferior to white women as a sort of subclass." (quoting Barbara Perry, Professor at the University of Ontario Institute of Technology)).

267. AMNESTY INT'L USA, *supra* note 51, at 47 ("A number of the cases brought to Amnesty International's attention indicated that police often automatically assume that Indigenous women had been drinking when they were targeted for sexual violence.").

268. *See* CASSELMAN, *supra* note 51, at 130 ("This climate of criminal impunity in Indian country is highly racialized, privileging non-Native identity while simultaneously oppressing Native identity.").

269. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

270. New York *ex rel.* Ray v. Martin, 326 U.S. 496, 499–500 (1946); Draper v. United States, 164 U.S. 240, 247 (1896); United States v. McBratney, 104 U.S. 621, 624 (1882).

271. *E.g.*, 18 U.S.C. § 1162; Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 6(a), 94 Stat. 1785, 1793.

272. Bleir & Zoledziowski, *supra* note 264; Erdrich, *supra* note 224; Kathleen Finn, Eric Gajda, Thomas Perin & Carla Fredericks, *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J.L. & GENDER 1, 2–3 (2017); Lailani Upham, *Oil Booms, So Does Violence*, CHAR-KOOSTA NEWS (Sept. 11, 2019), http://www.charkoosta.com/news/oil-booms-so-does-violence/article_0386cf00-0949-11e9-a5df-6ba0e817e8a3.html [https://perma.cc/LH8B-9V6D].

273. *See* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1582 (2016); *see also* Lorelei Laird, *Indian Tribes Are Retaking Jurisdiction over Domestic Violence on Their Own Land*, A.B.A. J. (Apr. 1, 2015, 6:02 AM), https://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own [https://perma.cc/LL3M-L6LF] (describing the experience of a Southern Ute tribal member and domestic violence survivor, whose husband called the police after beating her "to show [her] that no one could stop him"); Emily Weitz, *Native American Women Have Been Saying a Lot More Than #MeToo for Years*, VICE (Nov. 23, 2017, 5:00 PM), https://www.vice.com/amp/en_us/article/evbeg7/native-american-women-have-been-saying-a-lot-more-than-metoo-for-years [https://perma.cc/58CF-8SWU] ("Even if you called the police, often they didn't respond. When they did, they would say, 'Oh it's not our jurisdiction, sorry.'" (quoting Deborah Parker, former Vice Chairwoman of the Tulalip Tribes of Washington)).

who live amongst tribes "will generally be found the most mischievous and dangerous inhabitants of the Indian country."[274]

Although tribes have jurisdiction over Indians, Indians still have an incentive to perpetrate crimes in Indian country. Most tribes cannot afford to implement enhanced sentencing.[275] This means the maximum sentence most tribes can impose is a single year in jail.[276] Hence, Indian criminals end up being sentenced to one year in jail by tribal courts for heinous crimes such as raping children.[277] The inability to sentence for more than one year allows individuals to accrue "over 100 tribal-court convictions," and many for extremely serious acts of domestic violence.[278] While swiftness and certainty are more important crime deterrents than severity, one year behind bars is simply inadequate for child rape and other macabre crimes.[279] Interestingly, Indians tend to serve longer jail sentences than non-Indians for committing the same exact offense because Indians are uniquely subject to federal jurisdiction.[280] However, the rarity of federal prosecution[281] means more stringent penalties fail to deter many would-be offenders.

V. SOLUTIONS

The United States must take action to make Indian country a less attractive forum for criminals. The United States has trust and treaty obligations to ensure safety on Indian reservations,[282] and in recent years, Congress has enacted

274. United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846). This is not to say every non-Indian who lives in Indian country is a criminal. However, the current state of the federal Indian law makes non-Indians uniquely problematic for tribal law enforcement.

275. *See SDVCJ Today: Currently Implementing Tribes*, NAT'L CONG. OF AM. INDIANS (Feb. 2021), http://www.ncai.org/tribal-vawa/get-started/currently-implementing-tribes [https://perma.cc/AW46-6UH4] ("There are currently 27 Tribes implementing VAWA Special Domestic Violence Criminal Jurisdiction (SDVCJ) across the United States."); Adam Crepelle, *Protecting the Children of Indian Country: A Call to Expand Tribal Court Jurisdiction and Devote More Funding to Indian Child Safety*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 225, 235 (2021) (naming "[f]inancial constraints" as the reason for the low number of implementing tribes).

276. 25 U.S.C. § 1302(a)(7)(B).

277. *See* Crepelle, *supra* note 275, at 234–35.

278. United States v. Bryant, 136 S. Ct. 1954, 1963 (2016).

279. *See* U.S. COMM'N ON C.R., *supra* note 243, at 42 ("This increased sentencing authority for tribal courts arose out of concerns that the one-year limit on prison sentences did not serve as an effective deterrent against criminal activity, and forced tribes to rely on the federal government to prosecute more serious crimes.").

280. INDIAN L. & ORD. COMM'N, *supra* note 89, at 119 ("Federal sentencing guidelines systematically subject offenders in Indian country to longer sentences than are typical when the same crimes are committed under State jurisdiction."); BJ Jones & Christopher J. Ironroad, *Addressing Sentencing Disparities for Tribal Citizens in the Dakotas: A Tribal Sovereignty Approach*, 89 N.D. L. REV. 53, 54–55 (2013); Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 CALIF. L. REV. 1409, 1416–17 (2011) (discussing how Indians are much more likely than non-Indians to be prosecuted in federal court and are therefore likely to receive harsher sentences).

281. *See* INVESTIGATIONS AND PROSECUTIONS, *supra* note 258, at 2–3.

282. MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 181–82 (2016); Note, *A Bad Man Is Hard to Find*, 127 HARV. L. REV. 2521, 2521 (2014).

legislation aimed at improving public safety in Indian country.[283] Congress is the primary force in Indian affairs;[284] however, the executive branch also has broad authority in Indian affairs.[285] The President, as head of the executive branch, has the authority to improve public safety in Indian country.[286] Thus, both the President and Congress have the capacity to clarify jurisdiction and increase law enforcement funding for Indian country.[287]

Although the Supreme Court has no authority over funding, the Supreme Court can help untangle Indian country's jurisdictional knot. The Court has long eschewed forum shopping and the inequitable administration of justice.[288] The Court has also declared that jurisdictional rules should be simple and clear.[289] The Court even laments Indian country's vexing jurisdictional rules[290] though the Court itself bears much of the responsibility for the jurisdictional mess.[291] The Court's decision in *McGirt v. Oklahoma* was a tremendous affirmation of tribal sovereignty,[292] so there were high hopes for *United States v. Cooley*.[293]

283. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(1), 124 Stat. 2261, 2262; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

284. United States v. Lara, 541 U.S. 193, 200 (2004) ("First, the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" (citations omitted)).

285. *See* 25 U.S.C. § 9.

286. Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition*, 73 DENV. U. L. REV. 141, 176 (1995) ("Until the courts clarify their position, it appears as if the recognition and de-recognition power is possessed concurrently by the legislature and the executive."). Presumably, the power to recognize a tribe as a sovereign includes the power to set boundaries of that sovereign's authority.

287. *See* 31 U.S.C. § 1105 (providing for the President's role in submitting a budget to Congress).

288. Hanna v. Plumer, 380 U.S. 460, 468 (1965) ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.").

289. Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) ("Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions." (citation omitted)); Lapides v. Bd. of Regents, 535 U.S. 613, 621 (2002) ("Motives are difficult to evaluate, while jurisdictional rules should be clear." (citation omitted)).

290. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 219–20 (2005) ("A checkerboard of alternating state and tribal jurisdiction in New York State . . . would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." (alteration in original) (quoting Hagen v. Utah, 510 U.S. 399, 421 (1994))).

291. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 73 (1995) ("Thus, if the Court were willing, it could recognize and affirm the territorial sovereignty of the tribes without doing violence to non-Indian rights. But the Court has chosen instead to further the legacy of allotment.").

292. *See, e.g.*, Press Release, Tom Udall, Vice Chairman, S. Comm. on Indian Affs., Udall Statement on Supreme Court Decision in *McGirt v. Oklahoma* (July 9, 2020), https://www.indian.senate.gov/news/press-release/udall-statement-supreme-court-decision-mcgirt-v-oklahoma [https://perma.cc/9ZK2-4CAZ] ("[T]oday's ruling is a historic step forward to safeguard Tribal sovereignty for decades to come.").

293. Seaborn Larson, *Supreme Court Case Tests Reach of Tribal Law Enforcement, Stemming from Bust on Crow Reservation*, GREAT FALLS TRIB. (Dec. 28, 2020, 10:13 AM), https://www.greatfallstribune.com/story/news/2020/12/28/supreme-court-case-tests-reach-tribal-law-enforcement-montana/4059974001/ ("'(The Cooley case) may be a next step in the court's, for lack of a better word, rediscovery of the foundational concepts of federal Indian law, like respect for tribal sovereignty,' said [Professor] Monte Mills . . . .").

Unfortunately, the Court's *Cooley* decision did nothing to simplify Indian country jurisdiction—arrest and prosecutorial authority remain tied to a person's Indian status. As a result, Indian country's public safety remains imperiled by an inefficient jurisdictional scheme.

Public safety in Indian country can be improved in three ways. One is by strengthening tribal sovereignty and affirming tribal jurisdiction over non-Indian offenders. Another is by dedicating more state and federal resources to Indian country crime control. Public safety in Indian country can also be improved by enhancing tribal economies.

A. JURISDICTIONAL FIX

The most obvious means of disincentivizing crime in Indian country is to reaffirm tribes' inherent power to prosecute all persons within their borders. This decreases law enforcement transaction costs because Indian country jurisdiction would be simple—break the law on the reservation and justice will be served on the reservation. More efficient prosecutions will likely lead to more prosecutions,[294] meaning criminals are more likely to be deterred from committing crimes. Swiftness and certainty of punishment are the biggest deterrents of crime;[295] thus, criminals' incentive to target Indian country will be significantly reduced. And if tribes are liberated from the antiquated constraints on their sentencing power, tribes will be able to administer punishments suitable for serious crimes. Removing the jurisdictional constraints removes one of criminals' primary incentives to target Indian country.

Additionally, tribes have the greatest incentive to prosecute crimes on their land because reservation crime directly impacts the tribe.[296] This incentive suggests tribes will be more diligent in pursuing perpetrators. Plus, tribal police are usually closer to the crime scene than non-Indian law enforcement, so tribal police should be able to respond to calls more quickly than non-Indian law enforcement. Faster response times reduce criminals' chances of evading justice.[297] As a result, tribal law enforcement may be more likely to catch criminals

294. This assumes tribes have the resources to perform the prosecution and implement an "adequate" sanction. This is addressed in detail below. *See infra* Section V.C.

295. NAT'L INST. OF JUST., DOJ, FIVE THINGS ABOUT DETERRENCE 2 (2016), https://www.ojp.gov/pdffiles1/nij/247350.pdf [https://perma.cc/A2N3-MWC3]; BUTLER ET AL., *supra* note 175, at 402 ("The majority of empirical studies suggest that the deterrent effect of the certainty of punishment far outweighs the deterrent effect of the severity of punishment.").

296. Stacy Leeds, *What the Landmark Supreme Court Decision Means for Policing Indigenous Oklahoma*, SLATE (July 10, 2020, 3:07 PM), https://slate.com/news-and-politics/2020/07/supreme-court-mcgirt-oklahoma-tribal-courts.html ("No population has a higher stake in ending violence within Indian Country than do Indigenous people and Indigenous governments.").

297. *See* Asher, *supra* note 240 ("I analyzed 2016 data from three cities, New Orleans, Detroit and Cincinnati, and found that as response times go up, the likelihood that a crime will be found goes down." (footnote omitted)). *But see* Joel F. Shults, *Do Police Response Times Matter?*, POLICE1 (July 1, 2019), https://www.police1.com/community-relations/articles/do-police-response-times-matter-8pDUo0L5OxmerFAb/ [https://perma.cc/28YG-G56F].

than non-Indian law enforcement.[298] Increasing the odds of detection makes Indian country a less attractive venue for criminals.

Evidence supports the theory that expanding tribal jurisdiction reduces crime in Indian country. Under the 2013 Violence Against Women Reauthorization Act (VAWA), tribes can prosecute non-Indians who commit dating violence, domestic violence, or violate a protective order.[299] This jurisdictional grant is extremely limited; nevertheless, VAWA-implementing tribes have noticed significant public safety benefits from VAWA.[300] The potential to prosecute non-Indians has resulted in the citizens of VAWA-implementing tribes contacting police with greater frequency.[301] When tribal citizens contact the police, there is a greater likelihood of the criminal being punished. This reduces criminals' incentive to target Indian country and increases public safety in Indian country.

Furthermore, the reasons to restrict tribal jurisdiction are incredibly weak. The United States recognized tribes' inherent authority to prosecute non-Indians in early treaties, and the United States was aware that tribes were prosecuting non-Indians well through the mid-1800s.[302] The fear of tribes prosecuting non-Indians seems to be principally based on the idea that tribal courts cannot treat non-Indians fairly.[303] However, the evidence overwhelmingly suggests tribal courts treat non-Indians fairly.[304] Tribes have arraigned over 100 non-Indians under VAWA, and not a single non-Indian has alleged unfair treatment by a tribe.[305]

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298. This assumes tribal law enforcement has adequate resources. This is discussed further below. *See infra* Section V.C.

299. 25 U.S.C. § 1304(c)(1)–(2).

300. Riley, *supra* note 273, at 1605.

301. *Id.*

302. FLETCHER, *supra* note 282, at 349; Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1086 n.400 (2015); Sarah Deer & Mary Kathryn Nagle, *Return to* Worcester*:* Dollar General *and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 HARV. J.L. & GENDER 179, 197–98 (2018); Paul Spruhan, *"Indians, in a Jurisdictional Sense": Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, 1 AM. INDIAN L.J. 79, 79 (2012) (noting Jacob West, a white man, was sentenced to hang by a Cherokee court, and a federal court refused to grant West habeas corpus in 1844).

303. *In re* Mayfield, 141 U.S. 107, 115–16 (1891) ("The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization."); Jennifer Bendery, *Chuck Grassley on VAWA: Tribal Provision Means 'the Non-Indian Doesn't Get a Fair Trial,'* HUFFPOST: POL. (Feb. 21, 2013, 5:33 PM), https://www.huffpost.com/entry/chuck-grassley-vawa_n_2735080 [https://perma.cc/DF9U-DX2F].

304. Brief for Respondents at 7, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496) ("Nonmember litigants routinely appear before—and prevail in—the Choctaw Courts. . . . Over 85% of the suits involving nonmembers resulted in a settlement or a win for the non-Indian party."); Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1094 (2005); Alexander S. Birkhold, *Predicate Offenses, Foreign Convictions, and Trusting Tribal Courts*, 114 MICH. L. REV. ONLINE 155, 159 (2016); M. Gatsby Miller, Note, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction over Nonmembers in Civil Cases*, 114 COLUM. L. REV. 1825, 1839 & n.85 (2014) (concluding that, while concerns about bias are "not trivial," the "validity of these concerns is unclear" because "tribal courts, on the whole, are fair to nonmembers").

305. Crepelle, *supra* note 152, at 77–78.

Even congressional opponents of tribal jurisdiction have admitted there is no longer any logical reason to limit tribal jurisdiction over non-Indians to certain offenses.[306] Accordingly, efforts are underway to further expand tribal criminal jurisdiction over non-Indians.[307]

Many concerns about the fairness of tribal courts also relate to misperceptions of tribal justice systems.[308] Non-Indians often assume tribal courts are teepees when in reality most tribal courts physically resemble their non-Indian counterparts.[309] Tribal laws and court procedures also usually match those of non-Indian courts.[310] Then there is the belief that tribal courts dole out cruel punishments as seen in old, not so historically or politically correct, western movies. However, tribes are often more interested in healing the community than punishing offenders.[311] Tribes commonly prefer peacemaking or alternative dispute resolution to incarceration.[312] While peacemaking is not appropriate for every crime or offender,[313] the Indian Civil Rights Act prevents tribes from implementing cruel or unusual punishments.[314] In fact, the maximum punishment most tribes can administer is one year in jail and a $5,000 fine.[315]

Tribal courts also have a tremendous incentive to treat non-Indians fairly. Congress's plenary power over tribes[316] gives it the capacity to unilaterally

306. S. REP. NO. 112-153, at 48 (2012) ("While the present bill's jurisdiction is limited to domestic-violence offenses, once such an extension of jurisdiction were established, there would be no principled reason not to extend it to other offenses as well.").

307. Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Cong. §§ 901–03 (2021).

308. *See* Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring) ("Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges."); Strate v. A–1 Contractors, 520 U.S. 438, 459 (1997) (describing a Mandan Hidatsa Arikara court as an "unfamiliar court"); Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d. 167, 181 (5th Cir. 2014) (Smith, J., dissenting) (opining that details of Choctaw law "may very well be undiscoverable").

309. *Cf.* Adam Crepelle, *The Time Trap: Addressing the Stereotypes that Undermine Tribal Sovereignty*, 53 COLUM. HUM. RTS. L. REV. 189, 209–25 (2021) (discussing how antiquated stereotypes impact present day tribal sovereignty); Crepelle, *supra* note 62, at 572 ("[M]any Americans are under the impression that American Indians still live in teepees."); Full Frontal with Samantha Bee, *Indian Bummer*, YOUTUBE, at 1:40–2:24 (June 20, 2016), https://www.youtube.com/watch?v=kD7TGp8XML4 (parodying non-Indians' misperception that tribal justice systems are "charmingly backwoods").

310. *See* Full Frontal with Samantha Bee, *supra* note 309, at 2:27–2:42; Crepelle, *supra* note 152, at 83 ("Tribal laws are no great mystery—tribes criminalize conduct that damages people and property." (footnote omitted)).

311. Crepelle, *supra* note 152, at 93–94.

312. *Id.*

313. *See* M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 170 (2016) ("At its best, however, restorative justice may offer an alternative to criminal court only in a narrow range of cases—cases in which the facts of the crime are uncontested, the participants accept their roles as 'victim' and 'offender,' and the process dangers can be minimized.").

314. 25 U.S.C. § 1302(a)(7)(A).

315. *Id.* § 1302(a)(7)(B).

316. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." (citation omitted)); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian

abrogate tribal sovereignty.[317] Indeed, there is a long history of federal assaults on tribal sovereignty.[318] For a recent example, the federal government stripped the Mashpee Wampanoag Tribe of its land without provocation during a pandemic.[319] Tribes know well that they have many enemies.[320] A single act of prosecutorial misconduct in a tribal court will likely lead to massive public outcry by tribal opponents.[321] The results of the uproar will likely be severely deleterious for tribes. Therefore, tribal courts have an incredibly potent incentive to operate fairly—as they have so far in VAWA cases.[322] This incentive to treat persons fairly is a reason why tribal courts should be allowed to assert jurisdiction over all persons who commit crimes within their borders.

B. MORE COPS

Even without altering the jurisdictional scheme, Indian country public safety can be improved by increasing the number of police officers. This may seem paradoxical given the current calls to defund the police,[323] especially when Indians are disproportionately the victims of police killings.[324] Nevertheless, when the federal government increased police numbers on four reservations to match comparable off-reservation police numbers, reservation violent crime rates dropped by thirty-five percent from 2009 to 2011.[325] More cops on the ground resulted in increased crime reporting which decreased criminals' odds of avoiding

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Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." (citations omitted)); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U. S. 463, 501 (1979) ("It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes." (citation omitted)).

317. *See* United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) ("The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it."); Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 310 ("[T]ribes are perpetually defending against as-applied assaults on the basic premise of their legitimacy as governments with sovereign powers over people and territory.").

318. *See supra* Part II.

319. Rory Taylor, *Trump Administration Revokes Reservation Status for Mashpee Wampanoag Tribe Amid Coronavirus Crisis*, VOX (Apr. 2, 2020, 10:30 AM), https://www.vox.com/identities/2020/4/2/21204113/mashpee-wampanoag-tribe-trump-reservation-native-land [https://perma.cc/78QE-JZNY].

320. *See* Anna V. Smith, *Why Don't Anti-Indian Groups Count as Hate Groups?*, HIGH COUNTRY NEWS (Oct. 8, 2018), https://www.hcn.org/issues/50.20/tribal-affairs-why-dont-anti-indian-groups-count-as-hate-groups; Crepelle, *supra* note 129, at 162 ("Oil companies have long opposed the Houma's federal recognition.").

321. *See generally* MONT. HUM. RTS. NETWORK, THE CASE FOR CATEGORIZING ANTI-INDIAN GROUPS AS HATE GROUPS: EXPLOITING HISTORICAL BIGOTRY, TRYING TO TERMINATE AMERICAN INDIAN SOVEREIGNTY (2018), https://mhrn.org/wp-content/uploads/2018/07/FINALAntiIndianGroups.pdf [https://perma.cc/L3N3-HYLY] (documenting an organized anti-Indian movement that aims to end all forms of tribal jurisdiction).

322. *See supra* note 305 and accompanying text.

323. *See* Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What it Means*, CNN (June 17, 2020, 10:32 AM), https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html [https://perma.cc/Q8BJ-8DES]; Josiah Bates, *How Are Activists Managing Dissension Within the 'Defund the Police' Movement?*, TIME (Feb. 23, 2021, 3:45 PM), https://time.com/5936408/defund-the-police-definition-movement/.

324. HARVEY, *supra* note 90, at 3, 11; Belli, *supra* note 90; Powell, *supra* note 90.

325. INDIAN L. & ORD. COMM'N, *supra* note 89, at 64.

punishment;[326] thus, increasing the number of boots on the ground has similar deterrent value within Indian country as outside of it. Despite the tremendous success of the police surge, the federal government discontinued the reservation police funding after 2011.[327] As long as funding Indian country policing is not a priority for the federal or state governments,[328] Indian country will remain an attractive venue for crime.

One way to ameliorate the police shortage is through cooperative agreements. Cooperative agreements allow tribal and state police to make arrests under the laws of each jurisdiction,[329] so law enforcement agencies no longer have to quibble over which is the proper authority to arrest a criminal.[330] Cooperative agreements decrease transaction costs for officers, eliminating their disincentive to engage in Indian country policing efforts. Cooperative agreements also result in swifter response times.[331] If cops arrive timely, criminals are more likely to be deterred from targeting Indian country. Additionally, reservation residents usually support cooperative agreements.[332]

However, cooperative agreements are not always possible. Some state and local law enforcement agencies have antagonistic relationships with tribes.[333] Even if states and tribes have amicable relationships, bureaucracy may stifle the formation of cooperative agreements.[334] Additionally, states and tribes may have different philosophies toward law enforcement, so cooperative agreements can

326. *See id*. at 64–65.

327. *See id*. at 65 ("[T]he Commission hastens to note that HPPG's results can neither be replicated nor sustained on very many other Tribal reservations due to the extremely limited Federal and State funding options currently available to Indian country.").

328. *See id*.

329. *Id*. at 104 (noting that tribes and local law enforcement have successfully entered into agreements allowing tribes to enforce state criminal laws); GOLDBERG ET AL., *supra* note 133, at 29 (noting that cooperative agreements can allow tribal officers to enforce state laws and also allow state officers to enforce tribal law); *Fresh Pursuit*, *supra* note 233, at 1695 ("Through cross-deputization agreements, governments can delegate law enforcement authority to officers of another jurisdiction."); *id*. (noting the most common form of cooperative agreement is one-way and only allows tribes to enforce state laws).

330. *See* CASSELMAN, *supra* note 51, at 27 ("With the attacker still hiding in the woman's closet, four different law enforcement agencies argued on the front lawn about whose case it was." (citing Laura Sullivan, *Legal Hurdles Stall Rape Cases on Native Lands*, NPR (July 26, 2007, 5:00 PM), https://www.npr.org/templates/story/story.php?storyId=12260610 [https://perma.cc/R29A-LCSS])); AMNESTY INT'L USA, *supra* note 51, at 27 ("In many areas there may be dual jurisdiction. The end result can sometimes be so confusing that no one intervenes . . . .").

331. DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 153 (2012).

332. *See id*. at 159.

333. *See* AMNESTY INT'L USA, *supra* note 51, at 39 ("Amnesty International also received reports of unwillingness to enter into such agreements by state police departments."); Crepelle, *supra* note 275, at 240–41.

334. *Cf*. INDIAN L. & ORD. COMM'N, *supra* note 89, at 101 (noting there are issues that hinder the formation of state-tribal law enforcement agreements, and stating there are "unconscionable administrative delays and impediments in the processing and approval of [Special Law Enforcement Commissions]").

interfere with traditional tribal law enforcement methods.[335] Cooperative agreements may also make tribes liable for lawsuits arising from the agreement,[336] and this cost may be too much for some tribes to bear. While cooperative agreements can address policing concerns, cooperative agreements cannot circumvent Indian country's bizarre jurisdictional rules.[337] The deterrent value of arresting offenders is undercut if prosecutors remain reluctant to tackle Indian country crime.[338]

Resource constraints have led some to suggest arming tribal citizens. Seth Fortin proposed creating tribal citizen militias to combat reservation crime.[339] Others have asserted that robust tribal self-defense laws may be a substitute, though less than ideal, for the lack of police.[340] Because tribes are not bound by the Second Amendment, tribes are in a unique position to fashion their own firearm and self-defense laws.[341] Tribes theoretically possess the power to mandate their citizens carry weapons.[342] There is precedent for compulsory gun ownership in the United States as the Militia Act of 1792 required all white males between eighteen and forty-five years old to own a musket.[343] Sardonically, fear of Indian attack was an impetus for the Militia Act.[344] Moreover, there is evidence

335. CHAMPAGNE & GOLDBERG, *supra* note 331 (noting that cooperative agreements "encourage a crime-control, professional model of policing rather than an Indian police model"). *See generally* MAHA JWEIED, DOJ, EXPERT WORKING GROUP REPORT: NATIVE AMERICAN TRADITIONAL JUSTICE PRACTICES (2014), https://www.justice.gov/sites/default/files/atj/legacy/2014/10/09/expert-working-group-report–native-american-traditional-justice-practices.pdf [https://perma.cc/H4P9-8V6H] (discussing traditional tribal justice practices currently in use); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 133 (1995) (contrasting Indigenous justice systems with the U.S. justice system).

336. *See* CHAMPAGNE & GOLDBERG, *supra* note 331, at 144; INDIAN L. & ORD. COMM'N, *supra* note 89, at 105.

337. *See* Crepelle, *supra* note 241, at 712–13.

338. *Cf.* Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 569 (2009) ("In some cases, federal or state authorities take days to initiate an investigation.").

339. Seth Fortin, *The Unextinguished Militia Power of Indian Tribes*, 2 AM. INDIAN L.J. 210, 259 (2013) (noting a lack of law enforcement funding could make mustering a tribal militia an attractive option for some tribes).

340. Tweedy, *supra* note 256, at 887.

341. *Id.* at 899.

342. *See generally* Fortin, *supra* note 339, at 266–69 ("The appeal of a 'universal' militia . . . is that by its very nature it represents the people. . . . Of course, there are many possible in-between models . . . .").

343. Ch. 33, § 1, 1 Stat. 271, 271.

344. *See* Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96 ("That for the purpose of protecting the inhabitants of the frontiers of the United States from the hostile incursions of the Indians, the President is hereby authorized to call into service from time to time, such part of the militia of the states respectively, as he may judge necessary for the purpose aforesaid . . . ."); *see also* Adam Mendel, Comment, *The First AUMF: The Northwest Indian War, 1790–1795, and the War on Terror*, 18 U. PA. J. CONST. L. 1309, 1309 (2016) ("On September 29, 1789, while various state militias were involved in hostilities with the Indian tribes and with very little attention, Congress passed a bill to reorganize the federal military and allow President Washington to call upon state militias to protect the frontier from Indian incursions."); Dylan Springer, *A Brief History of the Insurrection Act*, ST ANDREWS L. REV. (June 30, 2020), https://www.standrewslawreview.com/post/a-brief-history-of-the-insurrection-act [https://perma.cc/J8PB-TN8A] ("In 1791, a United States Army detachment pursuing war against Native Americans in the

suggesting armed self-defense reduces crime rates by increasing the risk posed to would-be criminals.[345]

While no tribe has mandated concealed carry, strong self-defense laws on reservations make more sense than similar laws in most other jurisdictions because delayed police response times, fueled by long distances, combined with jurisdictional chaos, leave self-defense as a low transaction cost option.[346] Several tribes have already enacted self-defense laws and protect the right to bear arms.[347] State gun laws probably have no effect on Indians within the boundaries of Indian country either because firearms cannot be categorically prohibited by states.[348] Accordingly, tribes have broad authority to enact concealed carry policies suited to the needs of their citizens. Given the prevalence of non-Indian crime on some reservations, mandating concealed carry for tribal citizens may be worth exploring.

C. IMPROVE TRIBAL ECONOMIES

Each tribe is different. Nevertheless, crime is probably significantly worse on impoverished reservations compared to economically thriving tribes.[349] Poor tribes struggle to hire police;[350] indeed, the inability to afford the mandated procedural safeguards is a predominant reason why tribes have not implemented VAWA.[351] Plus, tribes with fewer financial resources likely have less political clout with non-Indian governments. For example, a tribe that employs a few

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Northwest Territory . . . suffered a catastrophic defeat. . . . Informed of reports of the military's inadequacy, Congress responded by passing the Militia Act of 1792 . . . .").

345. *See* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 58 tbl.4.1, 59 (3d ed. 2010); Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL'Y 649, 673 (2007) ("[I]f firearms availability does matter, the data consistently show that the way it matters is that more guns equal *less* violent crime."). *But see* Melinda Wenner Moyer, *More Guns Do Not Stop More Crimes, Evidence Shows*, SCI. AM. (Oct. 1, 2017), https://www.scientificamerican.com/article/more-guns-do-not-stop-more-crimes-evidence-shows/.

346. *See* Crepelle, *supra* note 163, at 1321–22.

347. *Id.* at 1313.

348. *See id.* ("State criminal/prohibitory gun laws can apply in Indian country; however, states cannot ban handgun ownership because of the Court's *McDonald* decision.").

349. Jennifer H. Weddle, *Nothing Nefarious: The Federal Legal and Historical Predicate for Tribal Sovereign Lending*, FED. LAW., Apr. 2014, at 58, 60 ("There may be no greater contributor to the disproportionately high rates of violent crime in Indian Country than the systematic lack of an adequate and sustainable revenue base to sustain tribal governmental infrastructure and operations.").

350. *See* AMNESTY INT'L USA, *supra* note 51, at 42 ("The US Departments of Justice and of the Interior have both acknowledged that there is inadequate law enforcement in Indian Country and identified lack of funds as a central cause."); *Tribal Law Enforcement*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/enforcement.htm [https://perma.cc/E69A-23Y5] (last visited Jan. 5, 2022) ("Inadequate funding is an important obstacle to good policing in Indian Country. Existing data suggest that tribes have between 55 and 75 percent of the resource base available to non-Indian communities.").

351. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-658R, TRIBAL LAW AND ORDER ACT: NONE OF THE SURVEYED TRIBES REPORTED EXERCISING THE NEW SENTENCING AUTHORITY, AND THE DEPARTMENT OF JUSTICE COULD CLARIFY TRIBAL ELIGIBILITY FOR CERTAIN GRANT FUNDS 3 (2012), https://www.gao.gov/assets/600/591213.pdf [https://perma.cc/RPU5-F2HZ] (noting ninety-six percent of tribes stated they were not implementing enhanced sentencing due to financial constraints).

thousand non-Indians is providing significant value to non-Indian governments.[352] Non-Indian governments have an incentive to prevent crime on reservations that are contributing to the state economy.

Unemployment is also associated with crime.[353] Tribal unemployment rates routinely exceeded fifty percent even before COVID-19.[354] Tribal economies struggle because of an incredibly dense federal regulatory regime that applies only in Indian country.[355] These federal regulatory obstacles increase transaction costs relative to off-reservation business opportunities; thus, private businesses make the rational choice to avoid Indian country regulatory obstacles. Businesses operating in Indian country also must pay state and local taxes on top of tribal taxes, so the effective tax rate on the reservation is higher than off reservation.[356] Plus, tribal civil jurisdiction can be even more vexing than tribal criminal jurisdiction—simply determining where to file a breach of contract case can take years.[357] Indian country infrastructure is often in bad shape, too.[358] Businesses rationally avoid all these problems by operating outside of Indian country.[359] These impediments prevent tribal economies from flourishing. Stale economies can lead to crime problems.

Tribal economies can be strengthened by respecting tribal sovereignty. This means eliminating the federal regulations that only apply in Indian country. For example, there is no reason why energy development in Indian country should

352. *See, e.g.*, *Spotlight on Our Tribes: The Coushatta Tribe of Louisiana*, NAT'L CTR. FOR AM. INDIAN ENTER. DEV., https://www.ncaied.org/post/spotlight-on-our-tribes-the-coushatta-tribe-of-louisiana [https://perma.cc/WQY6-F2UT] (last visited Jan. 5, 2022) (observing that the Coushatta Tribe's casino-resort is among the top ten employers in Louisiana and is "responsible for almost 70% of the total workforce in Allen Parish"); *Businesses*, MISS. BAND OF CHOCTAW INDIANS, http://www.choctaw.org/businesses/ [https://perma.cc/V9ML-98RS] (last visited Jan. 5, 2022) ("With an annual payroll of more than $100 million, the Tribe is one of the 10 largest private employers in Mississippi."); *Jobs & Careers*, SHAKOPEE MDEWAKANTON SIOUX CMTY., https://shakopeedakota.org/careers/scott-county-mn-jobs/ [https://perma.cc/PHA3-3YJZ] (last visited Jan. 5, 2022) ("With approximately 4,100 employees, the SMSC and the SMSC Gaming Enterprise are collectively the largest employer in Scott County.").

353. Chalfin & McCrary, *supra* note 237, at 33 ("[M]ore recent and carefully identified papers tend to find evidence of a fairly robust relationship between both unemployment and wages and crime."); SANDRA AJIMOTOKIN, ALEXANDRA HASKINS & ZACH WADE, THE EFFECTS OF UNEMPLOYMENT ON CRIME RATES IN THE U.S. 11 (2015), https://smartech.gatech.edu/bitstream/handle/1853/53294/theeffectsofunemploymentoncimerates.pdf [https://perma.cc/4BXY-7ATS].

354. *See Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affs.*, 111th Cong. 1 (2010) (statement of Sen. Byron L. Dorgan, Chairman, S. Comm. on Indian Affs.).

355. *See* Crepelle, *supra* note 241, at 686; Adam Crepelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government*, 54 U. MICH. J.L. REFORM 563, 569 (2021).

356. Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1016–18 (2020).

357. *See* Crepelle, *supra* note 241, at 688.

358. Crepelle, *supra* note 355, at 604 ("No businesses means no businesses to tax, and, without tax revenue, tribes struggle to provide the infrastructure necessary to attract businesses to Indian country.").

359. Crepelle, *supra* note 241, at 706; Crepelle, *supra* note 355, at 604 ("State taxation, on top of the complex federal regulatory regime, scares businesses away from Indian country.").

take forty-nine bureaucratic steps when the same energy production can occur outside of Indian country in four.[360] Respecting tribal sovereignty means prohibiting states from taxing commerce occurring on tribal lands.[361] Allowing tribes to tax enables tribes to fund themselves like every other government in the United States and is the only way tribes can truly become self-sufficient.[362] Recognizing tribal jurisdiction over all events arising within Indian country simplifies tribal jurisdiction and will provide businesses with much more certainty.[363] Additionally, the federal government must honor its treaty obligations to fund Indian country infrastructure.[364] Economic development will provide tribes with the resources they need to protect their citizens.

CONCLUSION

Unfortunately, the facts of *Cooley* are not unique. While patrolling the Fort Berthold Indian Reservation, tribal police officer Nathan Sanchez discovered a disheveled sixteen-year-old girl on the side of the road.[365] Sanchez approached the frantic girl.[366] The girl said she was raped.[367] Then she ran.[368] Officer Sanchez chased after the girl—who was white.[369] Upon catching the girl, Sanchez attempted the comfort her and wrapped her in a blanket.[370] Among the first questions Sanchez was forced to ask the victim: "Was the man who raped [you] Indian?"[371]

That law enforcement officers and victims must ask and answer this question in the twenty-first century United States is an outright disgrace. As former Coushatta Tribe of Louisiana Chairman David Sickey says, "Violence does not discriminate, and neither should our laws."[372] Until this changes, the laws and institutions underpinning criminal justice in Indian country will remain

360. Crepelle, *supra* note 355, at 566.

361. Crepelle, *supra* note 356, at 1032 ("Prohibiting state taxes of Indian country will allow tribes to recruit businesses to their land, levy taxes, and operate as the nations they are and always have been.").

362. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 201 (1985) ("The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs."); Crepelle, *supra* note 355, at 605.

363. Crepelle, *supra* note 241, at 734 ("Crafting a bright line rule for tribal jurisdiction adds certainty and will facilitate private sector growth in Indian country.").

364. *See* U.S. COMM'N ON C.R., *supra* note 243, at 11.

365. Crane-Murdoch, *supra* note 66.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *World Premiere - Four Directions and Nevada Tribes' Native American Presidential 2020 Forum, Las Vegas.*, ALTER-NATIVE MEDIA, https://perma.cc/RJ8J-3FGX (last visited Oct. 2, 2021).

fundamentally flawed.[373] Jurisdictional rules are supposed to be simple,[374] and local communities are supposed to be the primary law enforcement authority.[375] Hence, territoriality is the governing principle of law enforcement throughout the United States.[376] Indian country should be no different. Although *Cooley* presented an opportunity to clarify Indian country's jurisdictional scheme, the Supreme Court chose to continue the inefficient status quo. Until something changes, economics projects high crime for Indian country.

373. *See* Washburn, *supra* note 248, at 1023 ("[T]he institutions of criminal justice in Indian country are deeply flawed and are failing to function in a manner consistent with American criminal justice values or modern policing theory.").

374. Grable & Sons Metal Prods., Inc., v. Darue Eng'g & Mfg., 545 U.S. 308, 321 (2005) (Thomas, J., concurring) ("Jurisdictional rules should be clear.").

375. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 713 (2006) ("In the United States, criminal justice is an inherently local activity as a matter of constitutional design; American criminal justice systems are carefully designed to empower local communities to solve internal problems and to restore peace and harmony in the community.").

376. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." (citation omitted)); O'Sullivan, *supra* note 195 (noting that subjective territorial jurisdiction "has long enjoyed the Supreme Court's full-throated support"); TATUM, *supra* note 195.