# PASSING THE BUCK: THE PERILS OF *OKLAHOMA V. CASTRO-HUERTA*

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ABSTRACT

The Supreme Court's 2022 decision in *Oklahoma v. Castro-Huerta* upended federal Indian law by allowing states to prosecute crimes involving Indians committed in Indian country. *Castro-Huerta* created a concurrent jurisdiction over Indian country crimes involving non-Indians. While concurrent jurisdiction increases the number of law enforcement agents with jurisdiction, it also creates opportunities for those law enforcement agents to shirk responsibility. Neither state nor federal law enforcement is accountable to tribes, so *Castro-Huerta* is likely to create a pass the buck mentality among non-Indian law enforcement. Moreover, there is little to indicate expanding state authority over tribes will benefit Indians. In fact, tribes' experience with state jurisdiction suggests state jurisdiction leads to decreased public safety in Indian country. Lastly, the *Castro-Huerta* decision is a massive infringement upon tribal sovereignty. The decision may exacerbate conflicts between tribes and state, and it also jeopardizes tribes' limited jurisdiction over non-Indian criminals. This Article questions the Court's claim that its decision will improve public safety on reservations.

TABLE OF CONTENTS

INTRODUCTION .....262
I. INDIAN COUNTRY'S JURISDICTIONAL FRAMEWORK.....267
II. THE LEAD-UP TO *CASTRO-HUERTA*.....271
III. THE PERILS OF *CASTRO-HUERTA* .....276
*A. Passing the Buck: Concurrent Jurisdiction* .....276
*B. State Jurisdiction is Unlikely to Benefit Tribes* .....279
*C. Tribal Sovereignty* .....284
IV. THE PATH TO GREATER INDIAN COUNTRY SAFETY .....287
CONCLUSION.....291

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## INTRODUCTION

The Supreme Court's 2021–2022 term was historic and controversial.[1] By reverting to originalism, the Court eschewed long-established precedent to curtail abortion rights[2] and expand access to guns.[3] However, no case broke from precedent harder than the Supreme Court's 2022 decision in *Oklahoma v. Castro-Huerta*.[4] The case involved a single question: can states prosecute non-Indians who commit crimes against Indian[5] victims on reservations?[6] The answer to the question was clearly "no," as Oklahoma—the state bringing the case—admitted two years prior.[7] Notwithstanding, five Supreme Court Justices sided with Oklahoma, and in so doing, upended over two hundred years of federal Indian law.[8]

The *Castro-Huerta* majority claimed to be disrupting the law in the name of promoting public safety,[9] and crime is undeniably a major problem in much of Indian country.[10] Indeed, some reservations have a violent

1. Ariane de Vogue, *Supreme Court Rushes to End a Term Like No Other*, CNN (June 21, 2022, 1:14 PM), https://www.cnn.com/2022/06/20/politics/supreme-court-june-preview/index.html [https://perma.cc/J7GDBVUU].

2. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245, 2284 (2022).

3. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022).

4. 142 S. Ct. 2486 (2022).

5. 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, e.g.*, 25 U.S.C. § 1. Indian is often the preferred term of the Nations themselves. *See, e.g.*, *Welcome from the Tribal Chief of the Mississippi Band of Choctaw Indians*, MISS. BAND OF CHOCTAW INDIANS, http://www.choctaw.org/ (last visited Dec. 28, 2023); *About Poarch Creek Indians*, POARCH CREEK INDIANS, https://pci-nsn.gov/ (last visited Dec. 28, 2023); *Early History*, S. UTE INDIAN TRIBE, https://www.southernute-nsn.gov/ (last visited Dec. 28, 2023); SALT RIVER PIMA-MARICOPA INDIAN CMTY., https://www.srpmic-nsn.gov/ (last visited Dec. 28, 2023); *People of the Quinault*, QUINAULT INDIAN NATION, http://www.quinaultindiannation.com/ (last visited Dec. 28, 2023).

6. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2489 (2022) ("This Court granted certiorari to determine the extent of a State's jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.").

7. *See* Brief for Respondent at 3, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

8. *Castro-Huerta*, 142 S. Ct. at 2505, 2510 (Gorsuch, J., dissenting) ("To succeed, Oklahoma must disavow adverse rulings from its own courts; disregard its 1991 recognition that it lacks legal authority to try cases of this sort; and ignore fundamental principles of tribal sovereignty, a treaty, the Oklahoma Enabling Act, its own state constitution, and Public Law 280. Oklahoma must pursue a proposition so novel and so unlikely that in over two centuries not a single State has successfully attempted it in this Court."); United States v. Lussier, No. 21-cr-145 (PAM/LIB), 2022 WL 17476661, at *14 (D. Minn. Oct. 11, 2022) ("Notwithstanding the majority opinions' departure from almost two hundred years of well settled federal Indian law, the effect of *Castro-Huerta* is limited exclusively to the narrow holding and specific facts of *Castro-Huerta*—'the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country,' provided Congress has not otherwise specifically precluded such state action in Indian Country; *Castro-Huerta*, stands only for the proposition that Congress has not limited the ability of the State of Oklahoma to prosecute non-Indians for crimes committed within Indian country in Oklahoma." (quoting *Castro-Huerta*, 142 S. Ct. at 2504–05)) (citations omitted) (adopting R. & R., No. 21-145 (PAM/LIB), 2022 WL 17466284 (D. Minn. Dec. 6, 2022)).

9. *Castro-Huerta*, 142 S. Ct. at 2492.

10. *See, e.g.*, Background on Tribal Justice & Law Enforcement, NAT'L CONG. OF AM. INDIANS, https://perma.cc/E6TX7J6L (last visited Dec. 28, 2023); Graham Lee Brewer, Native American Women Face an Epidemic of Violence. *A Legal Loophole Prevents Prosecutions*, NBC NEWS (June 30, 2021, 2:30 AM), https://www.nbcnews.com/news/us-news/native-american-women-face-epidemic-violence-legal-loophole-prevents-prosecutions-n1272670; Ellen Wulfhorst, *Fueled by Drugs, Sex Trafficking Reaches 'Crisis' on Native American Reservation*,

crime rate twenty times the national average.[11] Indians experience violence at twice the rate of any other racial group.[12] One in three Indians will be raped,[13] the highest rate of any racial group in the United States.[14] Due to the prevalence of sexual violence in some parts of Indian country, "mothers talk with their daughters about what to do when raped."[15] Indian women and girls are going missing at an alarming rate.[16] Indian children experience violence at higher rates than children of any other race.[17] A consequence of this violence is that Indians are twice as likely to die before reaching the age of twenty-four than children of other races.[18] As grim as these figures are, most experts believe these numbers understate the true level of violence Indians endure.[19]

In addition to the high rate of violence, crimes against Indians are unique because of the racial dynamic. For most other races, violence is overwhelmingly intraracial,[20] whereas non-Indians commit most of the violent crimes perpetrated against Indians.[21] One reason for the high rate of interracial violence against Indians is Indian country's peculiar

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REUTERS (May 17, 2016, 5:04 AM), https://www.reuters.com/article/us-trafficking-nativeamericans-drugs/fueled-by-drugs-sex-trafficking-reaches-crisis-on-native-american-reservation-idUSKCN0Y818L.

11. NAT'L CONG. OF AM. INDIANS, *supra* note 10.

12. *Id.*

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

14. *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/victims-sexual-violence (last visited Jan. 18, 2024).

15. Adam Crepelle, *The Law and Economics of Crime in Indian Country*, 110 GEO. L.J. 569, 576 (2022) [hereinafter Crepelle 2022] (emphasis omitted) (citations omitted).

16. *Id.* at 577 (citations omitted).

17. Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive, U.S. DEP'T OF JUST., at 6 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf; Child Maltreatment 2018, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., at 21 (2018), https://www.acf.hhs.gov/cb/data-research/child-maltreatment.

18. 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) (citing Sari Horwitz, *The Hard Lives — and High Suicide Rate — of Native American Children on Reservations*, WASH. POST (Mar. 9, 2014, 6:38 PM), https://www.washingtonpost.com/world/national-security/the-hard-lives--and-high-suicide-rate--of-native-american-children/2014/03/09/6e0ad9b2-9f03-11e3-b8d8-94577ff66b28_story.html.

19. SARAH DEER, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 5 (2015); Adam Crepelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 KAN. J. L. & PUB. POL'Y 236, 238 (2017) [hereinafter Crepelle 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.").

20. Steven W. Perry, U.S. Dep't of Just.: Bureau of Just. Stat., A BJS Statistical Profile, 1992–2002: American Indians and Crime 9 (2004), https://www.bjs.gov/content/pub/pdf/aic02.pdf.

21. Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, tit. VIII, § 801(a)(3), 136 Stat. 840, 896; PERRY, *supra* note 20, at 9 (noting that approximately two-thirds of violent crimes committed against Indians are perpetrated by non-Indians); André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NAT'L INST. OF JUST. J., Sept. 2016, at 38, 42.

jurisdictional rules.[22] Tribes generally lack jurisdiction over non-Indian criminals.[23] In most instances, when a non-Indian victimizes an Indian on a reservation only the federal government has jurisdiction.[24] Further, the federal government has, historically, been unlikely to pursue most reservation crimes.[25] Some non-Indians exploit this jurisdictional gap.[26] Non-Indians also know the federal government has been unlikely to pursue most reservation crimes.[27] Accordingly, non-Indians have been known to target reservation Indians.[28] *Castro-Huerta*'s majority claimed to expand state jurisdiction over Indian tribes in the name of protecting Indians.[29]

Tribes and Indian country experts do not believe granting states greater power over tribes will make reservations safer. For example, U.S. Attorneys are the primary law enforcement authority in Indian country.[30] In *Castro-Huerta*, a group of former U.S. Attorneys filed an amicus brief opposing the extension of state jurisdiction over reservation crimes, writing, "[Concurrent jurisdiction] creates a pass-the-buck dynamic where the

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22. *Tracking Sex Offenders in Indian Country: Trial Implementation of the Adam Walsh Act: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 3 (2008) (statement of Hon. Byron L. Dorgan, U.S. Sen. from N.D.) ("Our law enforcement hearings have shown that this division in the criminal justice system is a major cause of violent crime problems in Indian Country.").

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

24. Arvo Q. Mikkanen, U.S. Att'y's Off., Indian Country Criminal Jurisdictional Chart 2 (2020), https://www.justice.gov/usao-wdok/page/file/1300046/download.

25. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, DECLINATIONS OF INDIAN COUNTRY MATTERS 3 (2010) ("USAOs declined to prosecute 50 percent of the 9,000 matters."); 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.").

26. *See* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1582 (2016); Lorelei Laird, *Indian Tribes Are Retaking Jurisdiction Over Domestic Violence on Their Own Land*, ABA J. (Apr. 1, 2015, 6:02 AM), https://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own ("After one beating, my ex-husband called the tribal police and the sheriff's department himself, just to show me 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, 10:00 AM), https://www.vice.com/amp/en_us/article/evbeg7/native-american-womenhave-been-saying-a-lot-more-than-metoo-for-years ("Even if you called the police, often they didn't respond. When they did, they would say, 'Oh it's not our jurisdiction, sorry.' And prosecutors wouldn't show up." (quoting Hansi Lo Wang, *For Abused Native American Women, New Law Provides a 'Ray of Hope*,*'* NPR (Feb. 20, 2014, 7:59 PM), https://www.npr.org/sections/codeswitch/2014/02/20/280189261/for-abused-native-american-women-new-law-provides-a-ray-of-hope?utm_campaign=storyshare&utm_source=share&utm_medium=twitter)).

27. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, DECLINATIONS OF INDIAN COUNTRY MATTERS 3 (2010) ("USAOs declined to prosecute 50 percent of the 9,000 matters."); 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.").

28. Crepelle 2022, *supra* note 15, at 574, 600 (quoting 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).

29. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2501 (2022) ("But because the State's jurisdiction would be concurrent with federal jurisdiction, a state prosecution would not preclude an earlier or later federal prosecution and would not harm the federal interest in protecting Indian victims.").

30. *Duties Imposed on United States Attorneys by the Tribal Law and Order Act of 2010*, U.S. DEP'T OF JUST., https://www.justice.gov/sites/default/files/usao-az/legacy/2010/10/14/Tribal%20Law%20and%20Order%20Act%20of%202010%20Summary.pdf (last visited Dec. 29, 2023).

Federal government thinks that funding law enforcement on reservations is the responsibility of the state governments and the states think it is the responsibility of the Federal government, with the end result being fewer police and more crime."[31] Moreover, several states have had jurisdiction over the tribes within their borders for decades and the available evidence shows tribes under state jurisdiction experience more safety problems than those under federal jurisdiction.[32]

Expanded state jurisdiction is unlikely to solve Indian country's crime problems for two key reasons. First, *Castro-Huerta*'s jurisdictional expansion does not provide state law enforcement with any funding for reservation crimes, and without additional resources, states are unlikely to spend their finite resources pursuing Indian country crimes against Indian victims.[33] Second, the expansion of jurisdiction is premised on the belief that states will treat Indian victims fairly.[34] *Castro-Huerta* dismissed the possibility that historic tribal-state hostilities would prevent states from protecting Indian victims in 2022.[35] Alas, the Court ignored ongoing abuse of Indians under state jurisdiction,[36] including state police killing Indians

31. Brief of *Amici Curiae* Former United States Attorneys at 2–3, 13, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429) (citing INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES xiv, 11–15 (2013), https://www.aisc.ucla.edu/iloc/report/).

32. Examining *Oklahoma v. Castro-Huerta*: The Implication of the Supreme Court's Ruling on Tribal Sovereignty, Hearing Before the Subcomm. on Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res., 117th Cong. 5 (2022) [hereinafter Examining *Oklahoma v. Castro-Huerta* Hearing] (written testimony of Bethany Berger, Professor, University of Connecticut School of Law and Harvard Law School) ("Numerous studies—including several commissioned by the federal government—show that state law enforcement makes Native people less safe and stymies development of tribal institutions.").

33. Wayne L. Ducheneaux II, Oklahoma v. Castro-Huerta*: Bad Facts Make Bad Law*, NATIVE GOVERNANCE CTR. (Oct. 25, 2023, 12:25 PM), https://nativegov.org/news/castro-huerta/ ("Public safety is expensive. States who participate in Public Law 280 do not receive additional financial support from the federal government, despite the fact that they are required to take on expanded law enforcement duties. *Castro-Huerta* will likely result in further pressure on state budgets and law enforcement capacity.").

34. *See Castro-Huerta*, 142 S. Ct. at 2502, 2502 n.7 ("Castro-Huerta's argument would require this Court to treat Indian victims as second-class citizens.") ("In any event, it is not evident why the pre-Civil War history of tribal discord with States—unconnected from any statutory text—should disable States from exercising jurisdiction in 2022 to ensure that crime victims in state territory are protected under the State's laws.").

35. *Id.* at 2502 n.7 ("In any event, it is not evident why the pre-Civil War history of tribal discord with States—unconnected from any statutory text—should disable States from exercising jurisdiction in 2022 to ensure that crime victims in state territory are protected under the State's laws.").

36. Adam Crepelle, *Making Red Lives Matter: Public Choice Theory and Indian Country Crime*, 27 LEWIS & CLARK L. REV. (forthcoming 2023) (manuscript at 811) (on file with the author) [hereinafter Crepelle 2023] (citing Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, TRIBAL L. & POL'Y INST., https://www.tribal-institute.org/articles/gardner1.htm (last visited Dec. 29, 2023)).

at a higher rate than members of any other racial group.[37] Experience suggests more state authority will not make Indians safer.[38]

In addition to potentially exacerbating reservation crime, *Castro-Huerta* is a gut punch to tribal sovereignty. *Castro-Huerta* asserts "Indian country is part of the State, not separate from the State."[39] Based upon this entirely ahistorical statement,[40] *Castro-Huerta* declares states presumptively have jurisdiction over the Indian country within their borders.[41] *Castro-Huerta* treats reservations as "glorified private campgrounds" instead of land under the dominion of sovereign tribal governments.[42] *Castro-Huerta* is fundamentally at odds with over two hundred years of federal Indian law and policy.[43] States are currently wielding *Castro-Huerta* to frustrate tribes' effort to govern *their* land.[44]

This Article explains how devastating *Castro-Huerta* is for tribal sovereignty. Part I discusses Indian country's peculiar jurisdictional rules. Part II provides background on how *Castro-Huerta* developed into a landmark case. Part III examines the perils of *Castro-Huerta,* elaborates on why the concurrent state-federal jurisdiction will not benefit tribes, and discusses why states have little interest in serving Indian victims. Part III also illustrates how states will use *Castro-Huerta* to diminish tribal sovereignty. Part IV proposes a solution to the mess made by *Castro-Huerta*: legislation affirming tribal jurisdiction over persons within tribal borders and clearly forbidding states from prosecuting Indian country crimes.

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37. U.S. COMM'N ON C.R., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 31 (2018), www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf ("Native Americans are also being killed in police encounters at a higher rate than any other racial or ethnic group.").

38. *See, e.g.*, CAROLE GOLDBERG, DUANE CHAMPAGNE, & HEATHER VALDEZ SINGLETON, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 20–21, 32–33 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf; Laurence Armand French, *Policing American Indians: A Unique Chapter in American Jurisprudence*, 26 INDIGENOUS POL'Y J. (2015) (noting Public Law 280 states "were not pleased with this unfunded mandate and tended to neglect and harass their Indian charges."); M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 699 (2012) (detailing "virtually nonexistent" law enforcement in various mandatory Public Law 280 states (citing 5 U.S. Comm'n on C.R., Justice: 1961 Commission on Civil Rights Report 148 (1961))); Eric Lichtblau, *California Shorted on Tribal Police Funding*, L.A. TIMES (Oct. 28, 1999, 12:00 AM), http://articles.latimes.com/1999/oct/28/news/mn-27258 (discussing the underfunding of tribal law enforcement in California, a mandatory PL 280 state, and state law enforcement's neglect of reservations).

39. *Castro-Huerta*, 142 S. Ct. at 2493.

40. *See, e.g.*, Worcester v. Georgia, 31 U.S. 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.").

41. *Castro-Huerta*, 142 S. Ct. at 2493 (citing U.S. CONST. amend. X).

42. *Id.* at 2511 (Gorsuch, J., dissenting).

43. *Id.* at 2510 ("Oklahoma must pursue a proposition so novel and so unlikely that in over two centuries not a single State has successfully attempted it in this Court.").

44. *See infra* Part IV.C.

## I. INDIAN COUNTRY'S JURISDICTIONAL FRAMEWORK

Criminal jurisdiction in Indian country is complicated because tribes lack criminal jurisdiction over all persons within their borders.[45] This was not always the case. Prior to European arrival, tribes developed laws and policies to protect their citizens from criminals,[46] and used these laws to punish the early European citizens who violated their laws.[47] In fact, early treaties between the United States and Indian tribes expressly recognized tribal criminal jurisdiction over non-Indians.[48] When tribes were forced onto reservations, tribes continued to prosecute non-Indians.[49] Treaties in the 1860s expressly recognized tribal criminal jurisdiction over non-Indians.[50] To be sure, tribes certainly suffered numerous blows to their sovereignty from the 1870s to 1970,[51] but at no point in time did a treaty or act

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45. Crepelle 2022, *supra* note 15, at 580 (citing Indian Trade and Intercourse Act of 1790, ch. 33, § 5, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177); General Crimes Act, 18 U.S.C. § 1152).

46. B.J. JONES, ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM 4, 6 (2000), http://www.nrc4tribes.org/files/Role%20of%20Indian%20Tribal%20Courts-BJ%20Jones.pdf (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.innovatingjustice.org/sites/default/files/documents/PeacemakingPlanning_2012.pdf (noting that tribal justice systems existed before European arrival in America); Eugene K. Bertman, *Tribal Appellate Courts: A Practical Guide to History and Practice*, 84 OKLA. BAR J. 2115, 2116 (2013) (indicating that Indian tribes had dispute resolution processes and court systems prior to the arrival of Europeans); Adam Crepelle, Tate Fegley, & Ilia Murtazashvili, *Military Societies: Self-Governance and Criminal Justice in Indian Country*, PUB. CHOICE, Sept. 2022, at 1.

47. 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 the 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) (relaying 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)).

48. *See, e.g.*, Treaty with the Chickasaws, Chickasaw Nation-U.S., art. IV, Jan. 10, 1786, 7 Stat. 24, 25 ("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."); Treaty with the Creeks, Creek Nation-U.S., art. VI, Aug. 7, 1790, 7 Stat. 35, 36; Treaty with the Cherokees, Cherokee Nation-U.S., art. VIII, July 2, 1791, 7 Stat. 39, 40.

49. Brief for Amici Curiae Historians and Legal Scholars in Support of Respondents at 13–14, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 579 U.S. 545 (2016) (No. 13-1496) (discussing a congressional report that recognized tribes' right to "jurisdiction over all persons and property" (citing H.R. REP. NO. 23-474, at 18 (1834))).

50. *See, e.g.*, Treaty with the Cherokee Indians, Cherokee Nation-U.S., art. XIII, July 19, 1866, 14 Stat. 799, 803; Treaty with the Choctaws and Chickasaws, art. VIII, Apr. 28, 1866, 14 Stat. 769, 772; Treaty with the Seminole Indians, Seminole Nation-U.S., art. VII, Mar. 21, 1866, 14 Stat. 755, 759; *see also* Brief for Amici Curiae Historians and Legal Scholars, *Dollar Gen. Corp.*, 579 U.S. 545 (No. 13 1496), at 17–18.

51. *See, e.g.*, 25 U.S.C. § 71; General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388, 388; An Act for the Protection of the People of the Indian Territory, and for Other Purposes, ch. 517, 30 Stat. 495 (1898) (extending the substance of the General Allotment Act to Indian country in Oklahoma); H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) ("[T]o end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship . . . ."); Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360) (giving California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation) mandatory criminal jurisdiction over tribal nations) (amended by Act of Aug. 24, 1954, ch. 910, sec. 2, 68

of Congress ever strip tribes of their jurisdiction over non-Indians.[52] The leading principle of federal Indian law is that tribes possess all sovereign powers they have not relinquished; therefore, tribes possess the inherent authority to prosecute non-Indian criminals.[53] Mark Oliphant decided to test this proposition during the 1970s.[54]

Oliphant was a non-Indian who lived on the Port Madison Indian Reservation, home to the Suquamish Indian Tribe, located outside of Seattle, Washington.[55] Oliphant attended a tribal celebration on the reservation.[56] At the celebration, he got drunk and became unruly.[57] There were no county or federal police at the event despite the tribe's request,[58] so Oliphant's drunken antics inspired a call to the tribal police.[59] When tribal police arrived, Oliphant assaulted the officer. As would be expected, Suquamish law prohibited assaulting their police.[60] Accordingly, Oliphant was arraigned in Suquamish court.[61] Oliphant did not contest his guilt; instead, he filed a federal habeas corpus petition alleging the tribal court lacked jurisdiction over him because he was a non-Indian.[62] Both the federal district court and Ninth Circuit rejected his argument.[63] The Ninth Circuit explained the Suquamish Tribe had never surrendered its criminal jurisdiction over non-Indians, so the tribe presumptively had the power to prosecute Oliphant.[64] Furthermore, the Ninth Circuit noted preventing tribes from prosecuting non-Indians would contradict the federal government's policy of promoting tribal self-determination.[65]

The Supreme Court saw things differently and sided with Oliphant.[66] While the Court admitted tribes never relinquished criminal jurisdiction

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Stat. 795, 795 to bring the Menominee Reservation within the provisions of the statute and by Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat 545, to give the territory of Alaska criminal and civil jurisdiction over tribes).

52. 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, 64–65, 67 (2020) [hereinafter Crepelle 2020].

53. *Id.* at 67.

54. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978) ("Petitioner[] argued that the Suquamish Indian Provisional Court does not have criminal jurisdiction over non-Indians.").

55. *Id.* at 192–94.

56. *Id.* at 194.

57. 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, 270 (Carole Goldberg, Kevin K. Washburn, & Philip P. Frickey eds., 2011) ("Mark Oliphant was arrested . . . for disorderly conduct and resisting arrest stemming from a drunken fight.").

58. Oliphant v. Schlie, 544 F.2d 1007, 1013 (9th Cir. 1976), *rev'd*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) ("The only law enforcement officers available to deal with the situation were tribal deputies.").

59. *Schlie*, 544 F.2d at 1009 ("Oliphant was arrested . . . by Suquamish tribal police . . . and charged before the Provisional Court of the Suquamish Indian Tribe with assaulting an officer and resisting arrest.").

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1010.

65. *Id.* at 1012–13.

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

over non-Indians, the Court assumed tribes had been implicitly divested of this power.[67] Interestingly, the Court admitted the Suquamish rejected a treaty relinquishing jurisdiction over non-Indians, but the Court believed there must have been another reason why the jurisdictional surrender was removed from the ratified treaty, though the Court was unsure what that reason might be.[68] The Court claimed tribes asserting jurisdiction over non-Indians was "a relatively new phenomenon"[69] despite evidence of tribes criminally prosecuting non-Indians over a century ago.[70] The Court also noted approximately two-thirds of the land composing the Port Madison Indian Reservation was privately owned by non-Indians;[71] however, it is unclear why private land ownership impacted tribal jurisdiction because all land within a reservation is legally defined as Indian country.[72] Furthermore, the Court declared contemporary Indian law must be governed by the anti-Indian beliefs of the 1700 and 1800s.[73] *Oliphant v. Suquamish Indian Tribe*[74] is much maligned in legal scholarship;[75] nevertheless, *Oliphant* remains binding precedent.[76]

*Oliphant* makes tribes largely dependent upon the state and federal government law enforcement when a crime committed in Indian country involves a non-Indian perpetrator.[77] Tribes have the inherent sovereign right to civilly detain non-Indians for a reasonable time to transfer them to state or federal authorities.[78] The federal government has long had jurisdiction over crimes involving both an Indian and non-Indian, so-called "interracial crimes."[79] Under a questionable interpretation of the equal

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67. *Id.* at 204–10.

68. *Id.* at 206 n.16.

69. *Id.* at 196–97.

70. *See supra* notes 46–50 and accompanying text; *see also* J. MATTHEW MARTIN, THE CHEROKEE SUPREME COURT: 1823–1835, at 7, 74, 91–93 (2021).

71. *Oliphant*, 435 U.S. at 193 n.1.

72. *See* 18 U.S.C. § 1151; McGirt v. Oklahoma, 140 S. Ct. 2452, 2474–76 (2020); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 357–58 (1962).

73. *Oliphant*, 435 U.S. at 206 ("'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.").

74. 435 U.S. 191 (1978).

75. *See, e.g.*, Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 610 (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."); Crepelle 2023, *supra* note 36, at 776 ("*Oliphant* goes beyond institutionalized racism; rather, *Oliphant* and the jurisprudence it relies upon are racism masquerading as law.").

76. *Oliphant* was partially overturned when Congress enacted the Violence Against Women Reauthorization Act of 2013, which allows tribes that meet certain requirements to have jurisdiction over non-Indians for prosecution of domestic violence. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–24 (codified as amended in 25 U.S.C. § 1301).

77. Adam Crepelle, *Holding the United States Liable for Indian Country Crime*, 31 KAN. J. L. & PUB. POL'Y 223, 243 (2022) ("Consequently, the limitations on tribal jurisdiction leave tribes dependent on outside law enforcement.").

78. United States v. Cooley, 141 S. Ct. 1638, 1643 (2021).

79. 18 U.S.C. § 1152.

footing doctrine,[80] states have possessed jurisdiction over Indian crimes involving exclusively non-Indians since 1882.[81] Several states, starting in the 1940s, acquired criminal jurisdiction over all Indian crimes within their borders pursuant to federal legislation.[82]

A notable exception to tribes' lack of jurisdiction over non-Indians is the Violence Against Women Act (VAWA).[83] Under VAWA, tribes can prosecute non-Indians for nine enumerated crimes if tribes meet certain procedural safeguards.[84] Tribes also have criminal jurisdiction over all Indians.[85] As if this were not complex enough, who qualifies as an Indian is often unclear.[86] Indeed, a person may qualify as an Indian in one courtroom but not another.[87]

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80. *See generally* CANBY, *supra* note 47, at 167–69; 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01[3] (Nell Jessup Newton ed., 2023) [hereinafter COHEN'S HANDBOOK] ("The *McBratney* opinion was brief and far from clear. It purported to be based on statutory interpretation, but it is difficult to arrive at the Court's result by any ordinary approach to statutory construction."); DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER, & KRISTEN A. CARPENTER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 555–57 (7th ed. 2017).

81. United States v. McBratney, 104 U.S. 621, 623–24 (1882).

82. *See, e.g.*, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360) (giving California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation) mandatory criminal jurisdiction over tribal nations) (amended by Act of Aug. 24, 1954, ch. 910, sec. 2, 68 Stat. 795, 795 to bring the Menominee Reservation within the provisions of the statute and by Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat 545, to give the territory of Alaska criminal and civil jurisdiction over tribes); Act of June 30, 1948, ch. 759, 62 Stat. 1161 ("confer[ring] jurisdiction on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation"); Act of June 8, 1940, ch. 276, 54 Stat. 249 ("confer[ring] jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations"); Act of July 2, 1948, ch. 809, 62 Stat. 1224 ("confer[ring] jurisdiction on the State of New York with respect to offenses committed on Indian reservations within such State"); Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 ("confer[ring] jurisdiction on the courts of the State of New York with respect to civil actions between Indians or to which Indians are parties"); Act of May 31, 1946, ch. 279, 60 Stat. 229 ("confer[ring] jurisdiction on the State of North Dakota over offenses committed by or against Indians on the Devils Lake Indian Reservation"); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, §§ 6(a), (b)(1), 94 Stat. 1785, 1793 (codified at 25 U.S.C. §§ 1725); Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, § 6, 97 Stat. 851, 855 (1983) (codified at 25 U.S.C. § 1755); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103-377, § 6, 108 Stat. 3501, 3505 (codified at 25 U.S.C. § 1775d); Texas Band of Kickapoo Act, Pub. L. No. 97-429, § 6, 96 Stat. 2269, 2270 (1983) (codified at 25 U.S.C. § 1300b-15).

83. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified in scattered sections of 25 U.S.C., 42 U.S.C.); Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, tit. VIII, 136 Stat. 840, 895–910 (codified in scattered sections of 25 U.S.C., 34 U.S.C.).

84. 25 U.S.C. § 1304.

85. *Id.* § 1301; United States v. Lara, 541 U.S. 193, 198 (2004).

86. Crepelle 2020, *supra* note 52, at 69–70 ("[C]ourts often struggle when deciding whether a person is recognized as an Indian.").

87. *Compare* United States v. Cruz, 554 F.3d 840, 846 (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" (quoting United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005))), *with* United States v. Stymiest, 581 F.3d 759, 764 (8th Cir. 2009) (holding that 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").

## II. THE LEAD-UP TO *CASTRO-HUERTA*

*Castro-Huerta* is a product of the Supreme Court's 2020 decision in *McGirt v. Oklahoma*.[88] Oklahoma convicted Jimcy McGirt, an enrolled citizen of the Seminole Nation of Oklahoma, of molesting a child in 1996.[89] Over a decade later, McGirt challenged his conviction not because of any new evidence or prosecutorial malfeasance.[90] Rather, McGirt argued the Creek Reservation had never been disestablished.[91] If the Creek Reservation remained in existence, this meant McGirt's crime occurred within Indian country. Accordingly, Oklahoma lacked jurisdiction to prosecute McGirt as well as other Indians.[92]

In a separate case, *Murphy v. Royal*,[93] decided in 2017, the Tenth Circuit Court of Appeals held the Creek Reservation had never been disestablished.[94] A concurring opinion by Chief Judge Tymkovich explained en banc review would be futile because the Creek Reservation clearly existed under the Supreme Court's precedent.[95] However, Chief Judge Tymkovich said the "case makes a good candidate for Supreme Court review."[96] The Supreme Court agreed and granted certiorari.[97] Justice Scalia passed away while *Murphy* was pending.[98] After a controversial confirmation process,

88. 140 S. Ct. 2452 (2020).

89. 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.

90. *McGirt*, 140 S. Ct. at 2459–60 (noting the issue before the court was whether Oklahoma had jurisdiction over crimes enumerated in the Major Crimes Act and committed in Indian country and summarizing McGirt's argument that he was an enrolled citizen of the Seminole Nation of Oklahoma who committed a crime on the Creek Reservation, which is within Indian country, because the Creek Reservation still existed ); McGirt's argument that he was an enrolled citizen of the Seminole Nation of Oklahoma who committed a crime on the Creek Reservation, which is within Indian country, because the Creek Reservation still existed.

91. *Id.* at 2459 (summarizing McGirt's argument that he was an enrolled citizen of the Seminole Nation of Oklahoma who committed a crime on the Creek Reservation, which is within Indian country, because the Creek Reservation still existed); *see also Historical Facts Led to Supreme Court Ruling in* McGirt *Case*, CHOCTAW NATION OF OKLA. (Aug. 12, 2020), https://www.choctawnation.com/news/news-releases/historical-facts-led-to-supreme-court-ruling-in-mcgirt-case/ ("Murphy, a Muscogee Indian, later challenged the state's authority, saying the murder occurred within the Muscogee (Creek) Nation, which he claimed still existed, meaning Oklahoma didn't have jurisdiction over him. This was considered a novel legal defense, as most assumed the reservations had ended in 1907." (citing Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017))).

92. *McGirt*, 140 S. Ct. at 2459 (explaining the Major Crimes Act, the basis of McGirt's case, "allow[s] only the federal government to try Indians" and therefore bars any state from prosecuting the Act's enumerated crimes that occur in Indian country).

93. 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom.* Sharp v. Murphy, 140 S. Ct. 2412 (2020) (mem.) (per curiam).

94. *Id.* at 966.

95. *Id.* (Tymkovich, C.J., concurring) ("An en banc court would necessarily reach the same result, since Supreme Court precedent precludes any other outcome.").

96. *Id.* at 968.

97. Royal v. Murphy, 138 S. Ct. 2026 (2018) (mem.).

98. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html; *see* McGirt v. Oklahoma*: The US Supreme Court's Impact on Indian Country*, NATIVE AM. RTS. FUND: LEGAL REV., Summer/Fall 2020, at 1, 4 ("In 2016, Justice Scalia, who voted against tribal interests nearly 87% of the time, was replaced by Neil Gorsuch, a Tenth Circuit judge with significant Indian law background.").

the Senate confirmed Neil Gorsuch as Justice Scalia's replacement.[99] Justice Gorsuch, due to his prior service on the Tenth Circuit, recused himself from *Murphy*,[100] producing a four-to-four split.[101] *Murphy* led McGirt to appeal his conviction on jurisdictional grounds,[102] and the Supreme Court selected McGirt's case as the vehicle to determine whether the Creek Reservation had been disestablished.[103]

In a five-four opinion, the Court sided with McGirt.[104] Justice Gorsuch authored the majority opinion, noting only Congress can disestablish a reservation.[105] Even Oklahoma, which opposed acknowledging the Creek Reservation's existence, ceded Congress had not expressly terminated the Creek Reservation.[106] The *McGirt* majority affirmed the existence of the Creek Reservation could cause jurisdictional issues, but it believed the issues could be resolved through intergovernmental cooperation.[107] Nevertheless, the four dissenting Justices believed the majority opinion "destabilized the governance of eastern Oklahoma."[108]

*McGirt* was a divisive opinion. Tribes and many others celebrated *McGirt* as a sign the Supreme Court may cease undermining tribal sovereignty in order to serve non-Indian interests.[109] But Oklahoma contended that *McGirt* cast the state into jurisdictional turmoil, causing confusion

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99. Leigh Ann Caldwell, *Neil Gorsuch Confirmed to Supreme Court After Senate Uses 'Nuclear Option*,*'* NBC NEWS (Apr. 7, 2017), https://www.nbcnews.com/politics/congress/neil-gorsuch-confirmed-supreme-court-after-senate-uses-nuclear-option-n743766.

100. *Sharp v. Murphy*, BALLOTPEDIA, https://ballotpedia.org/Sharp_v._Murphy#cite_ref-NYT_2-0 (last visited Jan. 17, 2024) ("Justice Neil Gorsuch recused himself because of his previous tenure on the 10th Circuit." (citing Adam Liptak, *Supreme Court Weighs Whether Much of Oklahoma Is an Indian Reservation*, N.Y. TIMES (May 11, 2020), https://www.nytimes.com/2020/05/11/us/supreme-court-oklahoma-indian-reservation.html)).

101. Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2049, 2068 (2021) ("Many assume the case was relisted because there was a four-four tie vote that could not be broken without Justice Gorsuch's involvement, and that the issue was too important to let the Tenth Circuit decision be affirmed by a four-four Supreme Court vote." (citing Ronald Mann, *Justices Call for Reargument in Dispute About Oklahoma Prosecutions of Native Americans*, SCOTUSBLOG (July 2, 2019, 12:08 PM), https://www.scotusblog.com/2019/07/justices-call-for-reargument-in-dispute-about-oklahoma-prosecutions-of-native-americans/)).

102. United States–Muscogee (Creek) Nation Treaty—Federal Indian Law—Disestablishment of Indian Reservations—McGirt v. Oklahoma, 134 HARV. L. REV. 600, 600–01 (2020).

103. Miller & Dolan, *supra* note 101 ("This impasse apparently led the Court to grant certiorari in *McGirt*, which allowed Justice Gorsuch to participate in resolving the issue of the continued existence of the MCN Reservation.").

104. McGirt v. Oklahoma, 140 S. Ct. 2452, 2458, 2482 (2020).

105. *Id.* at 2459, 2462 ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.").

106. *See id.* at 2474 ("About this, Oklahoma is at least candid. It admits the entire point of its reclassification exercise is to avoid *Solem's* rule that only Congress may disestablish a reservation." (citing Solem v. Bartlett, 465 U.S. 463 (1984))).

107. *McGirt*, 140 S. Ct. at 2481.

108. *Id.* at 2482 (Roberts, C.J., dissenting).

109. Elizabeth A. 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/ ("That Thursday morning gave American Indian people a glimpse of what it must be like not to be 'the Indians.'").

over law enforcement, and undermining the state's economy.[110] Though Oklahoma's crime figures and economic disarray claims have yet to be corroborated,[111] Oklahoma granted its Governor, Kevin Stitt, a $10 million litigation fund to challenge *McGirt*.[112] Governor Stitt engaged in a media campaign portraying post-*McGirt* Oklahoma as a "lawless state."[113] Oklahoma also created a website asking Oklahomans to share their *McGirt* horror stories and noted that post-*McGirt*, "State courts no longer have the authority to prosecute crimes committed by or against Oklahomans who are also tribal members."[114]

Oklahoma filed over forty certiorari petitions seeking to overturn *McGirt*.[115] The Supreme Court refused to overturn *McGirt* in every single petition.[116] Nonetheless, the Supreme Court granted one of Oklahoma's petitions.[117] The Court agreed to hear *Castro-Huerta* to address a single

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110. Hicham Raache, *Gov. Stitt Says Supreme Court's McGirt Ruling Created 'Public Safety Threat,' Asks Oklahomans to Share Stories; Cherokee Nation Reacts*, OKLA. NEWS (Apr. 16, 2021, 11:52 AM), https://kfor.com/news/local/gov-stitt-says-supreme-courts-mcgirt-decision-created-public-safety-threat-asks-oklahomans-to-share-stories-cherokee-nation-reacts/ ("The Supreme Court's McGirt decision created a public safety threat for tribal and non-tribal members." (quoting Governor Kevin Stitt (@GovStitt), TWITTER (Apr. 14, 2021, 8:33 AM), https://twitter.com/GovStitt/status/1382341219422932992)); OFF. OF THE EXEC. DIR., OKLA. TAX COMM'N, REPORT OF POTENTIAL IMPACT OF MCGIRT V. OKLAHOMA 2, 21 (2020) [hereinafter OKLA. TAX COMM'N REPORT], https://oklahoma.gov/content/dam/ok/en/tax/documents/resources/reports/other/McGirt%20vs%20OK%20-%20Potential%20Impact%20Report.pdf.

111. *See* Michael K. Velchik & Jeffery Y. Zhang, *Restoring Indian Reservation Status*: *An Empirical Analysis*, 40 YALE J. ON REGUL. 339, 339 (2023); Sarah Johnston & Dominic Parker, *Causes and Consequences of Policy Uncertainty*: *Evidence from* McGirt vs. Oklahoma 1 (L. & Econ. Ctr. at George Mason U. Scalia L. Sch., Research Paper Series No. 22-046, 2022); Rebecca Nagle & Allison Herrera, *Where Is Oklahoma Getting Its Numbers from in Its Supreme Court Case?*, ATLANTIC (Apr. 26, 2022), https://www.theatlantic.com/ideas/archive/2022/04/scotus-oklahoma-castro-huerta-inaccurate-prosecution-data/629674/ ("The problem is that this number [of yearly prosecutions the state of Oklahoma claims they have lost jurisdiction over] seems to have come out of nowhere; Oklahoma doesn't provide any source for it.").

112. Kelsey Vlamis, *Oklahoma Spent Millions on a Legal and PR Campaign to Paint Reservations as "Lawless Dystopias" and Persuade the Supreme Court to Weaken Tribal Sovereignty, Experts Say*, BUS. INSIDER (July 4, 2022, 7:40 AM), https://www.businessinsider.com/oklahoma-tribal-land-as-lawless-dystopias-for-scotus-sovereignty-experts-2022-7#:~:text=Oklahoma%20spent%20%2410%20million%20on%20a%20tribal%20litigation%20fund&text=That%20power%20has%20belonged%20to,In%202021%2C%20Gov..

113. *See* Allison Herrera, *Oklahoma Governor, Tribes at Odds Over* McGirt *Impact Panel*, KOSU (July 13, 2021, 2:58 PM), https://www.kosu.org/local-news/2021-07-13/oklahoma-governor-tribes-at-odds-over-mcgirt-impact-panel.

114. *McGirt v. Oklahoma*, OKLA. MCGIRT V. OKLA. (July 26, 2022) [hereinafter Story Submission], https://oklahoma.gov/mcgirt.html.

115. Allison Herrera, *Supreme Court to Decide Whether to Reconsider Its* 'McGirt v. Oklahoma' *Decision*, KOSU (Jan. 7, 2022, 4:00 AM), https://www.kosu.org/politics/2022-01-07/supreme-court-to-decide-whether-to-reconsider-its-mcgirt-v-oklahoma-decision ("There have been 45 petitions filed with the U.S. Supreme Court asking justices to overturn the ruling or at least allow the state of Oklahoma to have concurrent jurisdiction to prosecute crimes involving non-Native offenders when they occur in Indian Country.").

116. Chris Casteel, *Will U.S. Supreme Court Hear Another Case from Oklahoma Linked to* McGirt *Ruling?*, THE OKLAHOMAN (Sept. 26, 2022, 8:00 AM), https://www.oklahoman.com/story/news/2022/09/26/will-supreme-courts-new-term-include-an-oklahoma-case-tied-to-mcgirt/69493093007/ ("[T]he court rejected the state of Oklahoma's petitions to overturn the McGirt decision. . . . Then, the court ruled in June . . . . That ruling came in the case of *Oklahoma v. Castro-Huerta*.").

117. Oklahoma v. Castro-Huerta, 142 S. Ct. 877, 877–78 (2022).

issue: do states have criminal jurisdiction over non-Indians who commit crimes against Indians in Indian country?[118]

The answer to the question was obviously no. Not only did Oklahoma admit as much on its *McGirt* website,[119] Oklahoma also argued in its *McGirt* brief that by recognizing the Creek Reservation's existence, "The State would lack jurisdiction to prosecute any crime involving an Indian (whether defendant or victim) in eastern Oklahoma."[120] In addition to contradicting itself, there was a dearth of authority for Oklahoma's position.[121] One of the purposes of the United States Constitution was to prevent states from asserting jurisdiction over Indian country,[122] and the Supreme Court declared states lack jurisdiction over Indian country crimes involving Indians on multiple occasions.[123] The total absence of legal support for Oklahoma's position prompted Justice Gorsuch to ask during the

118. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022).

119. Story Submission, *supra* note 114.

120. Brief for Respondent, *supra* note 7.

121. *Castro-Huerta*, 142 S. Ct. at 2505–11 (Gorsuch, J., dissenting); *see infra* notes 122–23 and accompanying text.

122. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."); COHEN'S HANDBOOK, *supra* note 80, at § 1.02[3]; James Madison, *The Federalist No. 42*, *in* THE FEDERALIST WITH LETTERS OF "BRUTUS" 202, 206 (Terence Ball ed., 2003) ("The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the [A]rticles of Confederation, which render the provision obscure and contradictory."); 9 JAMES MADISON, *Vices of the Political System of the United States (Apr. 1787)*, *in* THE PAPERS OF JAMES MADISON 345, 348 (Robert A. Rutland, William M. E. Rachal, Fredrika J. Teute, Charles F. Hobson, Frank C. Mevers & Jeanne K. Sisson eds., 1975) ("2. Encroachments by the States on the federal authority. Examples of this are numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation. Among these examples are the wars and Treaties of Georgia with the Indians."); Stephen Andrews, *In Defense of the Indian Commerce Clause*, 9 AM. INDIAN L.J. 182, 199 (2021) ("As the ratification debates make clear, both federalist and anti-federalist alike assumed that the Constitution gave the federal government greater power over Indian affairs."); *From George Washington to the Seneca Chiefs, 29 December 1790*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-07-02-0080 (last visited Jan. 17, 2024) ("[T]he general government only has the power to treat with the Indian Nations, and any treaty formed and held without its authority will not be binding.").

123. *See, e.g.*, Kennerly v. Dist. Ct. of the Ninth Jud. Dist., 400 U.S. 423, 424 n.1 (1971) ("The statute is illustrative of the detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country."); Williams v. Lee, 358 U.S. 217, 220 (1959) ("But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive."); Williams v. United States, 327 U.S. 711, 714 (1946) ("While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian."); United States v. Ramsey, 271 U.S. 467, 469 (1926); Donnelly v. United States, 228 U.S. 243, 272 (1913) ("This same reason[ing] [which views tribes as the nation's wards and thus subject to federal jurisdiction] applies—perhaps a fortiori—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood."); Worcester v. Georgia, 31 U.S. 515, 561 (1832).

*Castro-Huerta* oral argument, "[A]re we to wilt today because of a social media campaign?"[124]

Despite the feebleness of Oklahoma's legal argument, the Court ruled in Oklahoma's favor. Writing for the majority, Justice Kavanaugh made a completely unprecedented statement: "[A]s a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country."[125] The majority went on to claim state law applied in Indian country unless federal law preempted it[126] and asserted state prosecution of Indian country crimes involving non-Indian perpetrators had no impact on tribal sovereignty.[127] To determine whether Oklahoma could prosecute reservation crimes involving non-Indian perpetrators, the Court purported to balance tribal, state, and federal interests.[128] Nonetheless, the Court said tribal thoughts on reservation safety were not relevant to whether states should be able to prosecute reservation crime.[129] The Court simply declared it was in the tribes' best interest to be subjected to state jurisdiction.[130]

Justice Gorsuch issued a powerful dissent, describing the majority opinion as "an embarrassing new entry into the anticanon of Indian law."[131] But the damage was done. Oklahoma, and possibly other states, were given power over Indian country crimes involving non-Indian defendants.[132] Notably, none of the Justices changed their position from *McGirt*. The outcome of *Castro-Huerta* is explained by Justice Amy Coney Barrett replacing Justice Ruth Bader Ginsburg. Justice Barrett's vote gave Oklahoma the win.[133]

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124. Transcript of Oral Argument at 61, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429).

125. *Castro-Huerta*, 142 S. Ct. at 2491, 2493.

126. *Id.* at 2500–01 ("Applying what has been referred to as the *Bracker* balancing test, this Court has recognized that even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government." (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43 (1980); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333–35 (1983))).

127. *Id.* at 2501 ("*First*, the exercise of state jurisdiction here would not infringe on tribal self-government.").

128. *Id.* ("Under the *Bracker* balancing test, the Court considers tribal interests, federal interests, and state interests." (citing *Bracker*, 448 U.S. at 145)).

129. *Id.* at 2501 n.6 ("To the extent that some tribes might have a policy preference for federal jurisdiction or tribal jurisdiction, but not state jurisdiction, over crimes committed by non-Indians in Indian country, that policy preference does not factor into the *Bracker* analysis.").

130. *See id.* at 2502 ("Castro-Huerta's argument would require this Court to treat Indian victims as second-class citizens. We decline to do so."); *id.* at 2522 (Gorsuch, J., dissenting) ("Start with the assertion that allowing state prosecutions in cases like ours will 'help' Indians. The old paternalist overtones are hard to ignore.").

131. *Id.* at 2505, 2521 (Gorsuch, J., dissenting).

132. *Id.* at 2504–05 (majority opinion).

133. Matt Ford, *Amy Coney Barrett Could Be the Deciding Vote That Affirms the Navajo Nation's Water Rights*, THE NEW REPUBLIC (Mar. 20, 2023), https://newrepublic.com/article/171272/amy-coney-barrett-deciding-vote-affirms-navajo-nations-water-rights ("After Ruth Bader Ginsburg's death and Barrett's confirmation to replace her later that year, however, the balance appeared to shift. Barrett later sided with the four *McGirt* dissenters in a follow-up case, *Oklahoma v. Castro-Huerta*, where the high court gave states broad latitude to prosecute crimes in Indian country despite 200 years of precedent to the contrary."); Matt Irby, *The Supreme Court's Attacks on Tribal*

## III. THE PERILS OF *CASTRO-HUERTA*

*Castro-Huerta* is unlikely to resolve crime problems in Indian country. Sardonically, *Castro-Huerta* will probably make them worse. If both the state and the federal government are responsible for Indian country crime but neither wants to pursue it, *Castro-Huerta* gives both entities an excuse to ignore Indian country.[134] *Castro-Huerta* may expand state jurisdiction, but it comes with no funding.[135] Without additional funding, states are unlikely to spend their scarce resources pursuing reservation crimes.[136] Plus, states often have fraught relationships with tribes.[137] Rather than benefitting Indian victims, *Castro-Huerta* empowers states to trample on tribal sovereignty.[138]

### *A. Passing the Buck: Concurrent Jurisdiction*

The holding in *Castro-Huerta* seems designed to allay the alleged jurisdictional confusion *McGirt* created in eastern Oklahoma.[139] *McGirt* acknowledged reservations exist in eastern Oklahoma, thereby converting the jurisdictional scheme from standard state jurisdiction to Indian country rules.[140] As a result, federal prosecutors became the law enforcement agency responsible for major crimes involving Indian defendants and any crime involving an Indian and a non-Indian.[141] Consequently, the number of federal prosecutions filed in Oklahoma's federal courts rose

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*Sovereignty Are Just Getting Started*, BALLS & STRIKES (July 20, 2022), https://ballsandstrikes.org/scotus/castro-huerta-tribal-sovereignty-attacks/ ("As Indian Law scholars and practitioners awaited the opinion in *Castro-Huerta v. Oklahoma*, the Supreme Court's latest landmark case about Tribal sovereignty in the United States, the only real question was what Justice Amy Coney Barrett would do."); Alex Serrurier, *This Supreme Court Decision Shows How Drastically the Court Has Been Politicized*, ALL. FOR JUST. (July 21, 2022), https://www.afj.org/article/this-supreme-court-decision-shows-how-drastically-the-court-has-been-politicized/ ("In fact, the differing outcome of the cases can be traced to a clear source: Justice Barrett, President Trump's third and final appointee, who joined the majority in *Castro-Huerta*. Unsurprisingly, the 5-4 majority in *McGirt* included Justice Barrett's predecessor, Justice Ginsburg.").

134. COHEN'S HANDBOOK, *supra* note 80, at § 6.04[3][d] ("If both the federal government and the state no longer perceive themselves as shouldering the job of Indian country law enforcement, each set of authorities might pass . . . ." (citing Robert B. Porter, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 HARV. J. LEGIS. 497, 519–22 (1990))).

135. *See Castro-Huerta*, 142 S. Ct. at 2523 (Gorsuch, J., dissenting) ("[S]ome States may not wish to devote the resources required and may view the responsibility as an unfunded federal mandate.").

136. *See id.*

137. Crepelle 2022, *supra* note 15, at 607.

138. Irby, *supra* note 133 ("Although *Castro-Huerta* did not overrule *McGirt*, it enables states to further encroach on tribal sovereignty, and could allow the Court to hollow out Tribes' post-*McGirt* gains by stripping them of civil and regulatory jurisdiction over Indian Country, too.").

139. *See Castro-Huerta*, 142 S. Ct. at 2492 ("The classification of eastern Oklahoma as Indian country has raised urgent questions about which government or governments have jurisdiction to prosecute crimes committed there.").

140. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459, 2474 (2020).

141. Matthew L.M. Fletcher, *In 5-4 Ruling, Court Dramatically Expands the Power of States to Prosecute Crimes on Reservations*, SCOTUSBLOG (June 29, 2022, 12:35 PM), https://www.scotusblog.com/2022/06/in-5-4-ruling-court-dramatically-expands-the-power-of-states-to-prosecute-crimes-on-reservations/.

drastically.[142] Due to the volume of Indian country crimes, federal prosecutors in eastern and northern Oklahoma were overwhelmed and forced to decline many cases.[143]

While the situation in post-*McGirt* Oklahoma is unique, federal prosecutors have a long history of declining large numbers of Indian country cases.[144] One reason for the high declination rate is a resource scarcity.[145] Without funding to hire and train personnel, Indian country first responders are inadequately equipped to conduct investigations into violent crimes and sexual assaults making evidence more difficult to obtain. Another reason is lack of prioritization by federal authorities.[146] Some federal authorities may choose to divert their limited resources to other areas, such as white-collar crime or terrorism.[147] Federal prosecutors have allegedly been fired for prioritizing Indian country crimes.[148] Furthermore, Indian country is often located far from the federal law enforcement officers, and federal agents would rather solve crimes near their office than those committed on a reservation over a hundred miles away.[149] Indian country crimes are also inherently difficult to prosecute due to the jurisdictional issues discussed above.[150] Exacerbating the aforementioned issues, Indians are often distrustful of federal law enforcement due to historic abuse.[151]

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142. *Recent Spike in Federal Criminal Prosecutions on Indian Lands*, TRACREPORTS (July 1, 2021), https://trac.syr.edu/tracreports/crim/653/ ("According to government case-by-case records analyzed by the Transactional Records Access Clearinghouse (TRAC), the number of federal prosecutions of violent crimes in Indian Country jumped after the July 2020 landmark Supreme Court decision in *McGirt v. Oklahoma*.").

143. Curtis Killman, *Feds Decline More Than 5,800 Criminal Cases Since* McGirt *Ruling*, TULSA WORLD (July 10, 2023), https://tulsaworld.com/news/local/crime-and-courts/feds-decline-more-than-5-800-criminal-cases-sincemcgirt-ruling/article_0cf8aa3e-dd0a-11ec-ab20-737a4fd2f591.html ("In the first full fiscal year after the *McGirt* ruling, the number of cases not prosecuted in those two districts increased more than 10-fold, going from 336 cases in fiscal year 2020 to 4,084 cases in fiscal year 2021.").

144. Cary Aspinwall & Graham Lee Brewer, *Half of Oklahoma Is Now Indian Country. What Does That Mean for Criminal Justice There?*, THE 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 ("While the federal prosecutor in Tulsa says his staff is willing to pick up these cases, critics note that the Justice Department has had a long history of documented lapses in handling cases in Indian Country.").

145. Crepelle 2022, *supra* note 15, at 598.

146. *Id.* at 597.

147. *Id.* at 598.

148. *Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affs*., 110th Cong. 69 (2007) (statement of Hon. Byron L. Dorgan, U.S. Sen. from N.D., Chairman) ("But when I hear someone come to the Congress to say that a U.S. Attorney was threatened to be fired or was on a list to be fired because he or she spent too much time working on Native American issues, I worry about that. I notice that either four of the eight or five of the eight U.S. Attorneys who were in fact replaced were on the committee, the committee that you were on, dealing with Native Americans. Is that purely coincidence?").

149. Crepelle 2022, *supra* note 15, at 596.

150. *See supra* Part II.

151. INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 13 (2013), https://www.aisc.ucla.edu/iloc/report/ ("Testimony before the Commission reported distrust between Tribal communities and local, non-Indian criminal justice authorities, leading to communication failures, conflict, and diminished respect.").

*Castro-Huerta*'s granting states concurrent jurisdiction with the federal government is supposed to prevent cases from falling through the jurisdictional cracks.[152] However, concurrent jurisdiction is unlikely to solve Indian country's crime problem.[153] Promoting public safety through concurrent jurisdiction requires a high degree of interagency coordination.[154] When agencies with overlapping jurisdiction fail to communicate, law enforcement can be seriously impaired.[155] This has been the experience in Indian country; Congress identified lack of federal-state coordination as a source of reservation crime.[156] In fact, several tribes have been subjected to concurrent state-federal jurisdiction for decades,[157] and the functional result of this scheme is that tribes have been under exclusive state jurisdiction.[158] If Indian country cases are not U.S. Attorneys' top priority,

152. Press Release, James Lankford, U.S. Sen. for Okla., Lankford: Supreme Court Decision Must Increase Collaboration Between Oklahoma and Tribal Law Enforcement (June 29, 2022), https://www.lankford.senate.gov/news/press-releases/lankford-supreme-court-decision-must-increase-collaboration-between-oklahoma-and-tribal-law-enforcement/ ("The Supreme Court's decision today affirms the responsibility of federal and state officials to work together to pursue justice for victims of crimes on reservation land.").

153. *See, e.g.*, Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 1032 (9th Cir. 2013) ("[T]he [Tribal Law and Order] Act [of 2010] gives tribes in Public Law 280 states the option of requesting that the Attorney General accept concurrent jurisdiction over law enforcement in their territory. . . . Nonetheless, the Act falls short of resolving many of the problems that result in high crime in Indian Country." (citing 18 U.S.C. § 162(d))).

154. Mike Riggs, *How a City with Two Dozen Law Enforcement Agencies Handles a Huge Crisis*, BLOOMBERG (Sept. 25, 2013), https://www.bloomberg.com/news/articles/2013-09-25/how-a-city-with-two-dozen-law-enforcement-agencies-handles-a-huge-crisis.

155. U.S. DEP'T OF JUST. & U.S. DEP'T OF HOMELAND SEC., A JOINT REVIEW OF LAW ENFORCEMENT COOPERATION ON THE SOUTHWEST BORDER BETWEEN THE FEDERAL BUREAU OF INVESTIGATION AND HOMELAND SECURITY INVESTIGATIONS 13–15 (2019), https://oig.justice.gov/reports/2019/e1903.pdf.

156. *See* Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, tit. VIII, § 801(a)(10)(B), 136 Stat. 840, 896.

157. *See, e.g.*, David Germain, *Arrests, Injuries in Indian-Police Clashes*, AP NEWS (July 16, 1992), https://perma.cc/FNY597J9; Johnathan Croyle, *Throwback Thursday: Tax Protest at Onondaga Nation Turns Violent in 1997*, SYRACUSE.COM (May 18, 2017, 1:00 PM), https://www.syracuse.com/vintage/2017/05/throwback_thursday_tax_protest_at_onondaga_nation_turns_violent_in_1997.html; John O'Brien, *State Offers to Pay $3 Million to Protesters Roughed Up By Troopers on Onondaga Nation in 1997*, SYRACUSE.COM (June 3, 2012, 5:00 AM), https://www.syracuse.com/news/2012/06/state_offers_to_pay_3_million.html.

158. *See, e.g.*, Negonsott v. Samuels, 507 U.S. 99, 107 (1993) ("Since Kansas had exercised jurisdiction over offenses covered by the Indian Major Crimes Act, and the Kansas Act was enacted to ratify the existing scheme of *de facto* state jurisdiction over all offenses committed on Indian reservations, it follows that Congress did not intend to retain exclusive federal jurisdiction over the prosecution of major crimes."); *Examining* Oklahoma v. Castro-Huerta *Hearing*, *supra* note 32, at 2 (statement of Mary Kathryn Nagle, Couns., Nat'l Indigenous Women's Res. Ctr.) ("But as we've witnessed with PL 280, the Kansas Act, and the few other instances when Congress has grated States jurisdiction over crimes against Native victims on tribal lands, such a grant of jurisdiction to States inevitably results in a decrease in federal resources, a decrease in prosecutions, and an increase in violent crimes against our Native people."); Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125, 154 (1999) ("While the United States retained its criminal jurisdiction and thereby established a system of concurrent federal-tribal-state jurisdiction over certain offenses, the practical effect of section 232 was to give the State the primary responsibility for criminal law enforcement within *Haudenosaunee* territory.").

concurrent jurisdiction gives them a reason to "pass the buck" to state law enforcement.[159]

### *B. State Jurisdiction is Unlikely to Benefit Tribes*

History shows states have not been eager to pursue crimes committed in Indian country. Several states have possessed jurisdiction over all crimes committed in Indian country within their borders for decades,[160] and the evidence indicates tribes subject to state jurisdiction experience higher rates of crime than those under federal jurisdiction.[161] Lack of funding is a major reason why. Legislation granting states jurisdiction over reservation crimes has not been accompanied by funding; thus, state jurisdiction over reservations usually operates as an unfunded mandate.[162] Moreover, states are not allowed to tax trust lands,[163] so property taxes are unavailable for law enforcement services.[164] States cannot tax tribes or their citizens within Indian country.[165] Thus, states have long lamented the lack of funding for reservation law enforcement.[166] Without the ability to collect levies in much of Indian country, states have a disincentive to devote law enforcement services to Indian country.[167] State jurisdiction, through Public Law 280 (PL 280) and other federal legislation, has been identified as a source of reservation crime.[168]

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159. Brief of *Amici Curiae* Former United States Attorneys, *supra* note 31, at 13 (citing Indian L. & Ord. Comm'n, A Roadmap for Making Native America Safer: Report to the President & Congress of the United States xiv, 11–15 (2013), https://www.aisc.ucla.edu/iloc/report/).

160. *See, e.g.*, statutes cited *supra* note 82.

161. Crepelle 2017, *supra* note 19, at 243 ("Historically, reservations in PL 280 states have had higher crime rates than reservations in non-PL 280 jurisdictions . . . ." (citing 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, 571 (2009); Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever Be Made into a Right?*, 90 J. CRIM. L. & CRIMINOLOGY 1317, 1318 (2000))); *see* INDIAN L. & ORD. COMM'N, *supra* note 151, at 11–17; GOLDBERG, CHAMPAGNE, & VALDEZ SINGLETON, *supra* note 38, at viii–ix.

162. Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 1032 (9th Cir. 2013) ("Public Law 280 has been criticized as an unfunded mandate, by which the federal government abdicated its role in policing Indian Country and transferred that obligation to the states without providing the resources necessary to discharge it." (citing Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 704 (2006))).

163. 18 U.S.C. § 1162(b).

164. Crepelle 2022, *supra* note 15, at 598.

165. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) ("Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country."); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993) ("But our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country.' Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." (citing 18 U.S.C. § 1151)).

166. Charles Vollan, *Public Law 280*, ENCYCLOPEDIA OF THE GREAT PLAINS (2011), http://plainshumanities.unl.edu/encyclopedia/doc/egp.law.044 ("State arguments against the law were almost universally based on the problem of increased cost to local and state governments.").

167. Crepelle 2022, *supra* note 15, at 584, 598.

168. *See* CAROLE GOLDBERG & HEATHER VALDEZ SINGLETON, RESEARCH PRIORITIES: LAW ENFORCEMENT IN PUBLIC LAW 280 STATES 9 (2005),

The ongoing litigation over PL 280 in Lake County, Montana, is illustrative. PL 280 allowed states to assert jurisdiction over Indian country crimes involving Indians, and the federal government no longer exercised jurisdiction once PL 280 was enacted.[169] Montana opted for PL 280 jurisdiction over the Flathead Reservation in 1963, but currently only exercises jurisdiction over felonies on the Reservation.[170] The federal government does not provide funding for this law enforcement service nor does Montana.[171] Accordingly, Lake County spends $4 million per year—nearly a third of its entire annual budget—to fulfill its PL 280 responsibility.[172] As a result, Lake County claims it is "*facing a financial crisis resulting from the need to adequately fund Public Law 280 law enforcement services*."[173] Lake County officials contend the costs of PL 280 enforcement have deprived schools of needed resources[174] and resulted in its jail falling below basic human rights standards.[175] Lake County asserts:

> As is, Lake County has become what criminals consider a "catch and release county." More than 80 felony warrants per month do not result

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https://www.ojp.gov/pdffiles1/nij/grants/209926.pdf ("These case studies led us to conclude that Public Law 280, though enacted to curb perceived 'lawlessness' on reservations, had actually given rise to lawless behavior, because of jurisdictional vacuums and abusive exercise of state power." (citing Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1437–41 (1997))); Liana Hutton, *Public Law 280 and U.S. Indigenous Peoples Law*, MCCAIN INST. (Sept. 27, 2021), https://www.mccaininstitute.org/resources/blog/public-law-280-and-u-s-indigenous-peoples-human-rights/ ("Ironically, Congress passed P.L. 280 because of the lawlessness and apparent crime infesting tribal lands. Unfortunately, this law has become a source of even more lawlessness and crime.").

169. 18 U.S.C. § 1162.

170. Tara Jensen, Mont. Budget & Pol'y Ctr., Jurisdiction, Justice Systems, and American Indians in Montana 2, 5 (2018), https://mbadmin.jaunt.cloud/wp-content/uploads/2018/08/Jurisdiction-Justice-Systems-and-American-Indians-.pdf; Rachel Weiss, Mont. Legis. Servs. Div., Summary of PL 280 Bills in the 2017 Session 1 (2018), https://leg.mt.gov/content/Committees/Interim/2017-2018/Law-and-Justice/Meetings/Jan-2018/Exhibits/ljic-criminal-jurisdiction-pl280-legislation-january-2018.pdf.

171. Eugene Sommers, Matthew Fletcher, & Tadd Johnson, *It's Time to End Public Law 280*, NATIVE GOVERNANCE CTR. (Aug. 9, 2021), https://nativegov.org/news/its-time-to-end-public-law-280/; Matt Baldwin, *Lake County Sues State to Recoup Public Law 280 Funds*, LAKE CNTY. LEADER (July 21, 2022, 12:00 AM), https://leaderadvertiser.com/news/2022/jul/21/lake-county-sues-state-recoup-public-law-280-funds/ ("The state's unwillingness to fund the jurisdiction equals an 'unfunded mandate,' the suit alleges." (citing Complaint at 13, Lake County v. State, No. DV-22-117 (Mont. 20th Judicial Dist. Ct., Lake County, July 14, 2022))).

172. Seaborn Larson, *Lake County Sues State Over Law Enforcement Dispute*, BOZEMAN DAILY CHRON. (July 14, 2022), https://www.bozemandailychronicle.com/townnews/law/lake-county-sues-state-over-law-enforcement-dispute/article_ac2d4147-1237-5960-91f3-d376b9d44998.html ("A state fiscal analysis in 2017 estimated the cost of fulfilling the obligations in Public Law 280 have spun up to over $4 million. The entire county operates on a $12.5 million budget from property taxes.").

173. *Lake County Initiates Withdrawal from Public Law 280 Agreement*, KPAX (Dec. 12, 2022, 8:42 AM), https://www.kpax.com/news/western-montana-news/lake-county-initiates-withdrawal-from-public-law-280-agreement.

174. David Reese, *Cost of Tribal Crime Has Montana County Struggling*, COURTHOUSE NEWS SERV. (Mar. 1, 2017), https://www.courthousenews.com/cost-tribal-crime-montana-county-struggling/ ("The loss of the tax revenue has also hurt local schools, county superintendent of schools Carolyn Hall said.").

175. *Id.* (discussing that the "overburdened" Lake County jail resulted from PL 280); Seaborn Larson, *Lake County Pledges New Jail Facilities in Settlement*, MISSOULIAN (Dec. 2, 2023), https://missoulian.com/lake-county-pledges-new-jail-facilities-in-settlement/article_b2b549b5-81f7-5ab4-89ed-9f210ee719c7.html (summarizing the class action lawsuit filed by Lake County jail inmates, which was subsequently settled).

> in incarceration, but instead result in a ticket and the offender being released on the same day. This is exceptionally dangerous, as criminals charged with illegal drug trafficking and other violent crimes are being set free because the Lake County jail is overwhelmed.[176]

In July 2022, Lake County filed suit against Montana over PL 280 funding.[177] And in January of 2023, Lake County submitted an ultimatum to Montana: pay the cost of the county's obligations under PL 280 or the county will abandon the tribe.[178] Like PL 280, funding does not accompany *Castro-Huerta*'s jurisdictional grant, so it is difficult to see how granting states an additional financial burden will make Indian country safer.[179]

Financial issues aside, *Castro-Huerta* creates significant law enforcement confusion.[180] The Court's opinion notes that states have concurrent jurisdiction "[u]nless preempted."[181] To discern whether state jurisdiction is preempted, courts must apply the "*Bracker* balancing test," which weighs the tribal, state, and federal interests involved in the case.[182] Ironically, four of the Justices in the *Castro-Huerta* majority lamented the *Bracker* balancing test in 2020 because "[t]his test lacks any 'rigid rule'" and creates "significant uncertainty."[183] The 2020 critique remains valid because each tribe is unique.[184] Hence, courts will have to determine whether each state possesses concurrent jurisdiction with the United States over each tribe on a case-by-case basis.[185] Each tribe's novel history plus the whimsical nature of the *Bracker* balancing test means case outcomes can be impossible to predict.

For example, several tribes previously subjected to state jurisdiction have obtained state and federal approval to end—or "retrocede"—state

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176. KPAX, *supra* note 173.

177. Larson, *supra* note 172.

178. Nicole Girten, *Lake County Passes Resolution to Withdraw From Public Law 280*, DAILY INTER LAKE (Jan. 4, 2023, 9:00 AM), https://dailyinterlake.com/news/2023/jan/04/lake-county-passes-resolution-withdraw-public-law-/.

179. *See* Wayne L. Ducheneaux II, Oklahoma v. Castro-Huerta*: Bad Facts Make Bad Law*, NATIVE GOVERNANCE CTR. (July 14, 2022), https://nativegov.org/news/castro-huerta/#:~:text=States%20who%20participate%20in%20Public,budgets%20and%20law%20enforcement%20capacity. ("*Castro-Huerta* will likely result in further pressure on state budgets and law enforcement capacity.").

180. Examining *Oklahoma v. Castro Huerta* Hearing, *supra* note 32 (statement of Bryan Newland, Assistant Sec'y for Indian Affs.) ("The *Castro-Huerta* opinion injects uncertainty into Indian country."); *id.* (statement of Teri Gobin, Chairwoman, Tulalip Tribes) ("*Castro-Huerta* does nothing to increase public safety in Indian country. It only creates confusion.").

181. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2504 n.9 (2022).

182. *Id.* at 2501 ("Under the *Bracker* balancing test, the Court considers tribal interests, federal interests, and state interests." (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980))).

183. McGirt v. Oklahoma, 140 S. Ct. 2452, 2501 (2020) (Roberts, C.J., dissenting) (quoting *Bracker*, 448 U.S. at 142).

184. *See* Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 797 (2019).

185. *Castro-Huerta*, 142 S. Ct. at 2526 n.19 (Gorsuch, J., dissenting) (citing *Bracker*, 448 U.S. at 145).

authority.[186] When retrocession occurred, all parties to the retrocession *knew* the state would no longer be able to prosecute reservation crimes involving non-Indians and Indians.[187] This understanding of retrocession is pellucid because some states expressly reserved authority over particular Indian country crimes post-retrocession.[188] Thus, it seems *Castro-Huerta* should not extend to tribes that have undergone retrocession because state jurisdiction would flout the will of Congress—the primary authority in Indian affairs—as well as state and tribal understandings of retrocession. This issue will almost certainly arise and may have to be litigated on a tribe-by-tribe basis, and over thirty tribes fall into this category.[189] While the litigation is pending, jurisdictional uncertainty may inspire criminal malfeasance.[190]

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186. *See* 25 U.S.C. § 1323 (codifying state jurisdictional retrocession from Public Law 280); Brief for the Sac & Fox Tribe of the Mississippi in Iowa as Amicus Curiae at 7–10, State v. Cungtion, 969 N.W.2d 501 (Iowa 2022) (No. 20-0409) (discussing methods to terminate state jurisdiction over Indian Country, including retrocession through 25 U.S.C. § 1323 and the repeal of statutes granting state jurisdiction); Bernie Azure, *Cost of PL 280 Skyrockets*, CHAR-KOOSTA NEWS (Dec. 16, 2022), http://www.charkoosta.com/news/cost-of-pl-280-skyrockets/article_92a61d60-911f-11ec-b052-c7c4 2ce30ee2.html ("This process was successfully utilized by a number of tribes and states during the 1970's and 1980's, but is rarely used today."). The PL 280 retrocession is inapplicable to tribes subjected to state jurisdiction via earlier acts, but these tribes may still eschew state jurisdiction. *See, e.g.*, Brief for the Sac & Fox Tribe of the Mississippi in Iowa as Amicus Curiae, *supra* note 186.

187. *See* Examining *Oklahoma v. Castro-Huerta* Hearing, *supra* note 32 (statement of Bryan Newland, Assistant Sec'y for Indian Affs.) ("As a result, many Tribes have proactively built up their own law enforcement capacity and have worked with states to successfully retrocede from Public Law 280 - limiting jurisdiction to that of the federal government and the Tribe with the state's support."); *id.* (statement of Teri Gobin, Chairwoman, Tulalip Tribes) ("Retrocession of Public Law 280 reduces state authority on Indian reservations by relinquishing part or all of the state authority obtained under Public Law 280 back to the federal government.").

188. *See, e.g.*, WASH. REV. CODE § 37.12.010 (1963) (retaining Washington state jurisdiction over eight areas, regardless of tribal retrocession); S.B. REP. ESHB 2233 (Wash. 2012), https://apps.leg.wa.gov/documents/billdocs/2011-12/Htm/Bill%20Reports/Senate/2233-S.E%20SBA %20GO%2012.htm ("The federal government has accepted offers by Washington to partially retrocede PL 280 criminal jurisdiction over seven tribes, including early retrocessions in 1969 and 1972. Since 1986, retrocessions have followed a process set in state law, enacted that year and later amended. That law authorizes the Governor to approve requests from any of seven named tribes to partially retrocede PL 280 criminal jurisdiction, contingent upon acceptance by the federal government. Five of the seven named tribes have been partially retroceded PL 280 criminal jurisdiction under this process."); OFF. OF PERFORMANCE EVALUATIONS, IDAHO LEGISLATURE, PUBLIC LAW 280 (2016), https://legislature.idaho.gov/wp-content/uploads/OPE/Requests/PL280%20Scope.pdf ("At least three bills have been introduced in the Idaho Legislature that would have retroceded all or part of the state's jurisdiction.").

189. GOLDBERG, CHAMPAGNE, & VALDEZ SINGLETON, *supra* note 38, at 410–11. Goldberg, Champagne, and Valdez Singleton's work documents the retrocession by thirty-one tribes. *Id.* That count does not include the Duckwater Reservation (40 Fed. Reg. 27501 (June 30, 1975)) and Yakama Nation (80 Fed. Reg. 63583 (Oct. 20, 2015)).

190. *See* DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist., 420 U.S. 425, 467 (1975) (Douglas, J., dissenting) ("The contest promises to be unseemly, the only beneficiaries being those who benefit from confusion and uncertainty."); Brief for Dennis K. Burke, Former United States Attorney, District of Arizona et al. as Amici Curiae Supporting Petitioner at 21, United States v. Cooley, 141 S. Ct. 1638 (2021) (No. 19-1414) ("Because state prosecutors were highly uncertain that there was state jurisdiction over crimes involving Indians on these lands, and federal prosecutors believed there was no federal jurisdiction, these areas resultingly became 'prosecution-free-zones' for these crimes." (quoting Jeremy Pawloski, *Murky Rules Create Lawless Lands*, ALBUQUERQUE J. (Apr. 18, 2004), https://www.abqjournal.com/news/state/163841nm04- 18-04.htm)).

*Castro-Huerta*'s speculative public safety gains are particularly dubious considering the history of tribal-state relations.[191] States have long—often ongoing—histories of discriminating against Indians.[192] Since Indians are usually a small minority population, states tend to be unresponsive to Indian victims[193]—a point ceded by the Supreme Court in 2016.[194] States have actually actively impeded tribal law enforcement.[195] Contrarily, police in states with jurisdiction over reservations regularly persecute

191. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) ("It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them."); 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."); Rabang v. Gilliland, 519 P.3d 234, 239 (Wash. Ct. App. 2022) ("State and federal courts have a long and shameful history of ignoring tribal sovereignty, and we will not add to that history today.").

192. *See, e.g.*, *Hearing on S. 1168, S. 1224, and S. 1249 Before the S. Select Comm. on Indian Affs.*, 98th Cong. 28 (1983) ("One parent organized a boycott of the Indian school and another blocked the passage of the white school bus through the Poarch Community until the driver allowed the Creek children to board."); DENISE E. BATES, THE OTHER MOVEMENT: INDIAN RIGHTS AND CIVIL RIGHTS IN THE DEEP SOUTH 23–24 (2012); CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 32–47 (2000) (detailing Washington state's assaults on tribal fishing rights in the 1960s and 1970s and Billy Frank's efforts to support tribal sovereignty); DENISE E. BATES, BASKET DIPLOMACY: LEADERSHIP, ALLIANCE-BUILDING, AND RESILIENCE AMONG THE COUSHATTA TRIBE OF LOUISIANA, 1884–1984, at 10–11 (2020) (likening a Jim Crow-type system to the widespread discrimination most Indians in the southeast faced and explaining how the Houmas, for instance, were not fully "integrated into white schools . . . until the 1960s").

193. *See* GOLDBERG, CHAMPAGNE, & VALDEZ SINGLETON, *supra* note 38, at 6 ("Indians are a minority in their county electorates, leaving them without effective political control over their sheriffs, district attorneys, and judges."); 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) ("Even in cases where states are responsible for prosecuting on-reservation crime, there is evidence that states have often not diligently performed this function and that they appear to discriminate against Indian victims and alleged Indian perpetrators."); Kevin K. Washburn, *American Indians Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. STATE L.J. 1003, 1019–20 (2008).

194. *See* United States v. Bryant, 579 U.S. 140, 146 (2016) ("Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country." (citing Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1636–37 (1998); SARAH DEER, CAROLE GOLDBERG, HEATHER VALDEZ SINGLETON, & MAUREEN WHITE EAGLE, TRIBAL L. & POL'Y INST., FINAL REPORT: FOCUS GROUP ON PUBLIC LAW 280 AND THE SEXUAL ASSAULT OF NATIVE WOMEN 7–8 (2007), https://www.tribal-institute.org/download/Final%20280%20FG%20Report.pdf)).

195. *See, e.g.*, Cabazon Band of Mission Indians v. Smith, 388 F.3d 691, 692 (9th Cir. 2004) ("Before the Tribe's suit, Defendants [individuals associated with the Riverside County Sheriff's Department] 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. 2014), *aff'd*, 774 F.3d 1166 (8th Cir. 2014), *aff'd sub nom*. Nebraska v. Parker, 577 U.S. 481 (2016) ("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]."); Internal Law Enforcement Services Policies, 69 Fed. Reg. 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 . . . ."); Sommers, Fletcher, & Johnson, *supra* note 171.

Indians[196]—a sad reality evidenced by police killing Indians at a higher rate than members of any other racial group.[197] Given the existing information on tribal-state relations, *Castro-Huerta*'s assertion that state jurisdiction will benefit Indian victims is highly suspect.

### *C. Tribal Sovereignty*

*Castro-Huerta* is a massive infringement on tribal sovereignty,[198] and the tribes' right to self-govern.[199] States have long been barred from taking action on tribal lands if "the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[200] Hence, tribal laws regularly deviate from the surrounding state's laws.[201] But states often vigorously oppose tribal legal diversity,[202] and the Supreme Court has ruled tribes can only legalize activities the surrounding state civilly regulates but not those activities the surrounding state criminally prohibits.[203]

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196. Tweedy, *supra* note 193; *see* Vollan, *supra* note 166 ("In 1957 the state legislature passed a law known as the Indian Bounty Act, supplying state funds for counties with heavy tribal populations and land bases. This act formed the basis of later tribal complaints that county officials unjustly arrested inordinate numbers of Native Americans in order to receive these funds.").

197. *Native Americans 'Disproportional' Victims of Fatal Police Shootings*, THE CRIME REP. (June 30, 2020) (citing LAKOTA PEOPLE'S L. PROJECT, NATIVE LIVES MATTER 1 (2015), https://lakota-prod.s3-us-west-2.amazonaws.com/uploads/Native-Lives-Matter-PDF.pdf), https://thecrimereport.org/2020/06/30/native-americans-disproportional-victims-of-fatal-police-shootings/.

198. Theodora Simon, *Tribal Sovereignty Under Attack in Recent Supreme Court Ruling*, ACLU OF N. CAL. (July 12, 2022), https://www.aclunc.org/blog/tribal-sovereignty-under-attack-recent-supreme-court-ruling ("In June, the Supreme Court issued a devastating ruling in *Oklahoma v Castro-Huerta*, giving states unprecedented power to prosecute crimes in Indian country at the expense of Indigenous people and tribal sovereignty."); Mark Joseph Stern, *Amy Coney Barrett Is in Over Her Head*, SLATE (July 13, 2022, 4:10 PM), https://slate.com/news-and-politics/2022/07/amy-coney-barrett-abortion-supreme-court-blunders.html ("She [Amy Coney Barrett] wrote nothing in *Oklahoma v. Castro-Huerta*, a brutal 5–4 assault on tribal sovereignty.").

199. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2511 (2022) (Gorsuch, J., dissenting) ("Tribes are sovereigns. And the preemption rule applicable to them is exactly the opposite of the normal rule. Tribal sovereignty means that the criminal laws of the States 'can have no force' on tribal members within tribal bounds unless and until Congress clearly ordains otherwise." (quoting Worcester v. Georgia, 31 U.S. 515, 561 (1832))).

200. Williams v. Lee, 358 U.S. 217, 220 (1959).

201. *See Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR, https://www.bia.gov/frequently-asked-questions (last visited Jan. 18, 2024) ("Through their tribal governments, tribal members generally define conditions of membership, regulate domestic relations of members, prescribe rules of inheritance for reservation property not in trust status, levy taxes, regulate property under tribal jurisdiction, control the conduct of members by tribal ordinances, and administer justice."); *see also The Truth About Tribal Lending*, NATIVE AM. FIN. SERVS. ASS'N, https://nativefinance.org/truth-tribal-lending/ (last visited Jan. 18, 2024) (discussing Tribal Nation's "power to engage in commerce, levy taxes, and regulate membership"); Cedar Attanasio, *Tesla Builds 1st Store on Tribal Land, Dodges State Car Laws*, AP NEWS (Sept. 15, 2021, 4:18 PM), https://apnews.com/article/technology-environment-and-nature-business-native-americans-pueblo-65235c11caa91c93ea845108f078b0b9 (explaining the partnership between the Nambé Pueblo and Tesla, which allowed Tesla to "open[] a store and repair" facility on reservation land despite New Mexico state law prohibiting these stores); *Tesla Dealership at Nambé Shows NM Needs to Update Law*, ALBUQUERQUE J. (Sept. 29, 2021), https://www.abqjournal.com/opinion/editorials/editorial-tesla-dealership-at-namb-shows-nm-needs-to-update-law/article_4233c2a5-8ffc-58fd-989e-47810c30bc77.html.

202. *See* Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. STATE L.J 115, 120–21 (2017).

203. *See* Ysleta del Sur Pueblo v. Texas, 142 S. Ct. 1929, 1941 (2022); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209–11 (1987).

This distinction is far from clear,[204] and tribal-state disputes are particularly likely to arise when non-Indians seek the benefits of tribal law.[205]

States have long been eager to rid themselves of the tribes within their borders.[206] Tribes' existence as separate sovereigns historically meant states lacked authority over Indian country.[207] Although the Supreme Court has eroded tribal sovereignty,[208] tribes still maintain their own dominions.[209] Thus, Indian country is often exempt from state law.[210] As a result, states view tribes as obstacles to state sovereignty,[211] so states have sought to rid themselves of tribes[212] as well as impose their will on the tribes remaining within their borders.[213] States have openly defied laws

204. *See, e.g.*, Adam Crepelle, *The Reservation and the Rule of Law: A Short Primer on Indian Country's Complexity*, 70 LA. BAR J. 192, 195 (2022) (describing how cannabis blurs the distinction between what is regulated or prohibited by a state); Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 683, 725 (2021) [hereinafter Crepelle 2021] ("States have attempted to blockade reservations over legalized cannabis while blissfully allowing their citizens to engage in cannabis tourism outside of Indian country." (citing Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 413, 451 (2019) [hereinafter Crepelle 2019])).

205. *See, e.g.*, Crepelle 2021, *supra* note 204, at 724–25 (recounting the conflicts that arise when states challenge tribes over gaming, hunting, and cannabis industries and the resulting effect on tribal economic development).

206. *See* David E. Wilkins, *Tribal-State Affairs: American States as "Disclaiming" Sovereigns*, 28 PUBLIUS: J. FEDERALISM 55, 58 (1998) ("The states have been frustrated by the persistence of tribal nations as separate geographical, political, and racial enclaves within their borders . . . .").

207. *See* Worcester v. Georgia, 31 U.S. 515, 561 (1832) ("The whole intercourse between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States").

208. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973) ("The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.").

209. *See Tribal and Native American Issues: Issue Summary*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/tribal-and-native-american-issues (last visited Jan. 18, 2024) ("There are 574 ethnically, culturally, and linguistically diverse federally recognized Indian Tribes in the United States. These Tribal Nations are distinct political entities whose inherent sovereignty predates the United States and is reflected in their government-to-government relationship with the U.S. government.").

210. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting) ("Across this vast area, the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.").

211. *See, e.g.*, Brief for Respondent, *supra* note 7 ("Petitioner's revisionist history, if accepted, would cause the largest judicial abrogation of state sovereignty in American history, cleaving Oklahoma in half."); Brief for the States of Texas, Kansas, Louisiana, Nebraska, & Virginia as Amici Curiae in Support of Petitioner at 4, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429) ("The amici States agree with Oklahoma that an attribute of state sovereignty is the authority to prosecute non-Indians who commit alleged criminal offenses against Indians in the Indian country that lies within a State's borders."); GETCHES, WILKINSON, WILLIAMS, FLETCHER, & CARPENTER, *supra* note 80, at 116–21 (discussing removal).

212. *See, e.g.*, Indian Removal Act of 1830, ch. 148, 4 Stat. 411; *People & Events: Indian Removal 1814-1858*, ROCKY MOUNTAIN PBS, https://www.pbs.org/wgbh/aia/part4/4p2959.html (last visited Jan. 18, 2024).

213. *See, e.g.*, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360) (giving five states and later the territory of Alaska mandatory authority over tribal nations and allowing other states the discretion to assume jurisdiction as well) (amended by Act of Aug. 24, 1954, ch. 910, sec. 2, 68 Stat. 795, 795 to bring the Menominee Reservation within the

mandating respect for tribal sovereignty[214] and argue tribes lack sovereign powers.[215] *Castro-Huerta* emboldens states to assert even greater authority over tribal lands.[216]

States are already wielding *Castro-Huerta* as a wrecking ball against tribal sovereignty, and Oklahoma is leading the way. Though *Castro-Huerta* specifically did not address state criminal jurisdiction over Indians,[217] Oklahoma claims *Castro-Huerta* presumptively granted it jurisdiction over Indians on reservations.[218] Supreme Court precedent indisputably forbids states from taxing income tribal citizens earn on their tribes' reservation[219] as the Oklahoma Tax Commission acknowledged after *McGirt* writing, "The State is prohibited from imposing tax upon the income of individual members of federally recognized Indian tribes as long as the individual tribal member lives and earns the income from sources within Indian country under the jurisdiction of the tribe to which the member belongs."[220] But following *Castro-Huerta*, the Oklahoma Tax Commission decided the rules had changed, announcing, "Under *Castro-Huerta*, Oklahoma clearly has concurrent jurisdiction, even under the

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provisions of the statute and by Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat 545, to give the territory of Alaska criminal and civil jurisdiction over tribes); Crepelle 2021, *supra* note 204, at 724–25.

214. *See, e.g.*, Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696 n.36 (1979) ("The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . . , the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice." (quoting Puget Sound Gillnetters Ass'n v. U.S. Dist. Ct. for the W. Dist. of Wash., 573 F.2d 1123, 1126 (9th Cir. 1978))); Tim Alan Garrison, Worcester v. Georgia *1832*, NEW GA. ENCYC. (Feb. 20, 2018), https://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832 ("Georgia ignored the Supreme Court's ruling, refused to release the missionaries, and continued to press the federal government to remove the Cherokees. President Jackson did not enforce the decision against the state and instead called on the Cherokees to relocate or fall under Georgia's jurisdiction.").

215. *See, e.g.*, Kirsti Marohn, *Federal Judge Rules Mille Lacs County Illegally Restricted Tribe's Policing Powers on Reservation*, MPR NEWS (Jan. 13, 2023, 1:58 PM), https://www.mprnews.org/story/2023/01/13/judge-rules-mille-lacs-county-illegally-restricted-tribes-policing-powers-on-reservation#:~:text=In%20her%20Jan.,all%20land%20within%20the%20reservation.

216. *Examining* Oklahoma v. Castro-Huerta *Hearing*, *supra* note 32, at 7 (statement of Kevin Killer, President, Oglala Sioux Tribe) ("Perhaps most significantly, states have been empowered to extend their policymaking onto tribal lands.").

217. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2501 n.6 (2022) ("Furthermore, this case does not involve the converse situation of a State's prosecution of crimes committed by an Indian against a non-Indian in Indian country. We express no view on state jurisdiction over a criminal case of that kind.").

218. Brief of Amicus Curiae State of Oklahoma in Support of Appellee City of Tulsa and Affirmance at 6, Hooper v. City of Tulsa, 71 F.4th 1270 (10th Cir. 2023) (No. 22-5034) ("As a result, 'unless preempted, States have jurisdiction over crimes committed in Indian country.' Appellant identifies no federal statute that would preempt the State's presumptive jurisdiction here." (quoting *Castro-Huerta*, 142 S. Ct. at 2494) (citations omitted)).

219. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973).

220. OKLA. TAX COMM'N REPORT, *supra* note 110, at 5.

*McGirt* boundaries, unless otherwise preempted."[221] Other state and municipal governments are weaponizing *Castro-Huerta* against tribes too.[222]

*Castro-Huerta*'s concurrent jurisdiction also poses a threat to recently expanded tribal criminal authority. Because tribes are separate sovereigns, tribes prosecute offenders from their own inherent sovereignty.[223] Therefore, subsequent tribal and federal prosecutions do not constitute double jeopardy because tribes are separate sovereigns.[224] Thirty-one tribes have implemented VAWA's special tribal criminal jurisdiction provision[225] and are able to prosecute non-Indians for nine crimes.[226]

Under *Castro-Huerta*, the state could pile on for a third prosecution. Three prosecutions, by three separate sovereigns, could raise due process concerns.[227] Indeed, it is easy to anticipate a non-Indian acquitted of domestic violence in state and federal court who is subsequently convicted in a tribal court for the same offense arguing due process violations have occurred. When the exercise of tribal sovereignty may imperil non-Indian rights, tribes are bound to lose.[228]

## IV. THE PATH TO GREATER INDIAN COUNTRY SAFETY

Rather than granting states greater jurisdiction over Indian country crimes, those interested in improving Indian country public safety should advocate for expanded tribal jurisdiction over non-Indians. Tribes are the government with the greatest incentive to protect Indians from violence—particularly non-Indian violence.[229] Tribal leaders want their citizens to be

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221. OKLA. TAX COMM'N, ORDER 15–16 (Oct. 4, 2022) (available at https://oklahoma.gov/content/dam/ok/en/tax/documents/resources/rules-and-policies/commission-decisions/income/precedential/2022-10-04-14.pdf).

222. *Examining* Oklahoma v. Castro-Huerta *Hearing*, *supra* note 32, at 8 (statement of Kevin Killer, President, Oglala Sioux Tribe) ("Moreover, it is conceivable that Oklahoma and other states will continue to find new ways to weaponize the *Castro-Huerta* decision to undermine tribal self-determination and the decisions and intent of Congress."). For an example of a county attempting to use *Castro-Huerta* against a Tribe, though this argument proved unsuccessful, see Mille Lacs Band of Ojibwe v. Cnty. of Mille Lacs, No. 17-cv-05155, 2023 WL 146834, at *29 (D. Minn. Jan. 10, 2023) ("But *Castro-Huerta*, on which the County relies, does not confer 'primacy' on states.").

223. *See* Denezpi v. United States, 142 S. Ct. 1838, 1843–44 (2022); United States v. Lara, 541 U.S. 193, 196 (2004); United States v. Wheeler, 435 U.S. 313, 314–15, 322 (1978).

224. *Denezpi*, 142 S. Ct. at 1849.

225. *SDVCJ Today: Currently Implementing Tribes*, NAT'L CONG. OF AM. INDIANS, https://archive.ncai.org/tribal-vawa/get-started/currently-implementing-tribes (last visited Jan. 18, 2024).

226. 25 U.S.C. § 1304(a)(5), (b)(1).

227. *See* John J. Francis, Stacy L. Leeds, Aliza Organick, & Jelani Jefferson Exum, *Reassessing Concurrent Tribal-State-Federal Criminal Jurisdiction in Kansas*, 59 KAN. L. REV. 949, 974–76 (2011) (discussing the possibility of "triple prosecution" as well as an example of "dual prosecutions" in Kansas).

228. *See, e.g.*, *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."); Crepelle 2023, *supra* note 36, at 798–99 (summarizing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

229. *See* 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-

safe, so future generations of their citizens can live and perpetuate their culture.[230] Contrarily, state and federal governments are less interested in protecting Indians, a minority population similar to the experience of Black people in the Jim Crow South.[231] States also take measures to prevent tribes from thriving, such as implementing policies that subvert tribal economies.[232] Many states wish tribal sovereignty would end.[233] Given this reality, tribes are the government most likely to respond to Indian country crimes.

Reaffirming tribes' inherent right to prosecute all criminals is practical. Non-Indians are responsible for much of the violence against Indians,[234] so tribal criminal jurisdiction is largely futile if tribes cannot prosecute non-Indians.[235] Moreover, tribal police are usually better positioned to respond swiftly to Indian country crimes because they are closer to the crime scene than state and federal law enforcement.[236] Granting tribes jurisdiction over all persons eliminates the need for tribal police to transfer non-Indian offenders to state or federal law enforcement; hence, Indian country policing would be much more efficient as the tribe could simply

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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."); PERRY, *supra* note 20 (noting that approximately two-thirds of violent crimes committed against Indians are perpetrated by non-Indians).

230. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34 (1989) ("Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships." (quoting *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the Subcomm. on Indian Affs. & Pub. Lands of the H. Comm. on Interior & Insular Affs.*, 95th Cong. 193 (1978) (Statement of the National Tribal Chairmen's Association)).

231. Crepelle 2023, *supra* note 36, at 807–08, 811–12.

232. *See, e.g.*, Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1011–14 (2020) (summarizing Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046 (W.D. Wash. 2018)).

233. Gregory Ablavsky, *Oklahoma's Bizarro Nineteenth Century in* Castro-Huerta, STAN. L. SCH. (Apr. 26, 2022), https://law.stanford.edu/2022/04/26/oklahomas-bizarro-nineteenth-century-in-castro-huerta/ ("The Court should go back and finish the job, Oklahoma suggests, by privileging states and suppressing tribes."); Brief Amicus Curiae of the States of Oklahoma, Wyoming, Utah, Michigan, Arizona, & Alabama in Support of Petitioners at 4–7, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 579 U.S. 545 (2016) (No. 13-1496) (arguing against tribal jurisdiction over non-Indians on reservations).

234. *See* NCAI POL'Y RSCH. CTR., NAT'L CONG. OF AM. INDIANS, POLICY INSIGHTS BRIEF: STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN 4 (2013), https://www.ncai.org/attachments/PolicyPaper_tWAjznFslemhAffZgNGzHUqIWMRPkCDjpFtxeKEUVKjubxfpGYK_Policy%20Insights%20Brief_VAWA_020613.pdf; Crepelle 2020, *supra* note 52, at 62–63 ("[M]ost Indian victimizations are committed by non-Indians." (citing LAWRENCE A. GREENFELD & STEVEN K. SMITH, U.S. DEP'T OF JUST. 7 (1999), https://bjs.ojp.gov/content/pub/pdf/aic.pdf; ANDRÉ B. ROSAY, NAT'L INST. OF JUST. 4 (2016), https://www.ojp.gov/pdffiles1/nij/249822.pdf); Rosay, *supra* note 21, at 42; Grace Segers, *Trump Signs Executive Order Creating Task Force on Missing and Murdered Native Americans*, CBS NEWS (Nov. 26, 2019, 1:14 PM), https://www.cbsnews.com/news/trump-native-americans-president-to-sign-executive-order-for-task-force-on-missing-murdered-native-americans/ ("According to the National Institute of Justice, 97 percent of Native American women who have experienced violence were victimized by non-Native American perpetrators.").

235. *See* Crepelle 2023, *supra* note 36, at 810–11.

236. *Id.*

commence prosecution.[237] Likewise, the prosecution itself would be much simpler as there would be no need to spend months litigating whether the parties are legally considered "Indians."[238]

Aside from being practical, the reasons for denying tribes jurisdiction over non-Indians are exceedingly weak. The prohibition on tribal courts prosecuting non-Indians is premised on a single case, *Oliphant*.[239] *Oliphant*'s holding is hewn together by withdrawn legal statements, factual errors, and overtly racist jurisprudence.[240] *Oliphant*'s continued existence as valid precedent is an embarrassment to the United States legal system.[241] Furthermore, experience supports recognizing tribal jurisdiction over all persons on their land. Tribes have prosecuted well over one hundred non-Indians under VAWA.[242] Not a single one has alleged any unfairness; consequently, Congress recently expanded tribal jurisdiction over non-Indians to encompass nine crimes.[243] If tribes are capable of prosecuting non-Indians for nine crimes, it is difficult to imagine why tribes cannot prosecute non-Indians for other offenses.[244]

Congress is in the best position to fix the mess *Castro-Huerta* made worse.[245] Congress has addressed Indian country safety in recent years,[246] and overturning *Castro-Huerta* is a minor legislative tweak.[247] In his dissent, Justice Gorsuch proposed amending PL 280 to say, "A State lacks

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237. *See id.* ("Indian country jurisdiction would be simple—break the law on the reservation and justice will be served on the reservation.").

238. *See id.* at 590–91, 603 (discussing the complexities of establishing whether an individual is an "Indian" for jurisdictional purposes as well as the prosecutorial efficiency created when allowing tribes jurisdiction over all individuals on a reservation).

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

240. *See* Barsh & Henderson, *supra* note 75 ("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."); 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, 558–67 (2021); ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 97–113 (2005).

241. Crepelle 2023, *supra* note 36, at 775–77.

242. Crepelle 2020, *supra* note 52, at 77 (citing NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION (SDVCJ) FIVE-YEAR REPORT 10 (2018), https://archive.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf).

243. NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION (SDVCJ) FIVE-YEAR REPORT 19 (2018), https://archive.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf; 25 U.S.C. § 1304(a)(5), (b)(1).

244. *See* 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.").

245. *See* Nora Mabie, *'An Attack on Tribal Sovereignty': Tribal Leaders, Experts Condemn SCOTUS Ruling*, MISSOULIAN (June 30, 2022), https://missoulian.com/news/local/an-attack-on-tribal-sovereignty-tribal-leaders-experts-condemn-scotus-ruling/article_da919d1b-9057-5dcd-afce-760e8f92b2ec.html ("Experts say the patchwork of laws establishing jurisdiction lack a coherent approach and was not created with Native people, their values or their communities in mind. The *Castro-Huerta* case further complicates this system.").

246. *See, e.g.*, Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 202(b), 124 Stat. 2261, 2263; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified in scattered sections of 18 U.S.C., 25 U.S.C., 42 U.S.C.); Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, tit. VIII, § 801, 136 Stat. 840, 895–97.

247. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2527 (2022) (Gorsuch, J., dissenting) ("And Congress could do exactly that with a simple amendment to Public Law 280.").

criminal jurisdiction over crimes by or against Indians in Indian Country, unless the State complies with the procedures to obtain tribal consent outlined in 25 U.S.C. § 1321, and, where necessary, amends its constitution or statutes pursuant to 25 U.S.C. § 1324."[248] Or Congress could go further and reaffirm tribal jurisdiction over non-Indians while reversing *Castro-Huerta*. While simultaneously reversing *Castro-Huerta* and *Oliphant* may seem extreme, even opponents of tribal jurisdiction have ceded there is no longer any logical reason to prohibit tribes from prosecuting non-Indians.[249] An *Oliphant* reversal is also plausible because the "Biden-Harris Plan for Tribal Nations" includes "find[ing] long term solutions to address the Supreme Court's decision in *Oliphant v. Suquamish* that has prevented tribes from prosecuting non-Indian offenders who commit crimes against Indians on Indian lands."[250] Thus, sweeping congressional action is possible.

Although expanded tribal jurisdiction is necessary for reservation safety, it is not sufficient. Rather, increased tribal jurisdiction must be accompanied by the resources to implement it.[251] Despite the rich casino Indian stereotype, many—perhaps most—tribes struggle financially.[252] Consequently, many tribes suffer from dire police shortages, a lack of jails, and other criminal justice essentials.[253] Lack of funding is the major reason why only thirty-one of the 574 federally recognized tribes have implemented VAWA.[254] Tribal budgets could be boosted by a federal cash infusion, which would not be welfare as the federal government is legally obligated by numerous treaties to ensure public safety on reservations.[255] In lieu of funding increases, the United States could lift the federal restraints that undermine tribal economies.[256]

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248. *Id.*

249. *See* 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.").

250. *Biden-Harris Plan for Tribal Nations*, BIDEN HARRIS DEMOCRATS, https://perma.cc/LU86-Q5TH?type=standard (last visited Jan. 18, 2024).

251. *See* Crepelle 2022, *supra* note 15, at 606–07, 609–11 (discussing the importance of financial resources for law enforcement on reservations, leading to a proper number of police officers, among other benefits).

252. Crepelle 2021, *supra* note 204, at 690–92 (summarizing the many factors that lead to a lack of financial security for tribes).

253. Crepelle 2022, *supra* note 15, at 595–97; Joseph Lee, Jessie Blaeser, & Chad Small, *Extreme Heat Will Take an Unequal Toll on Tribal Jails*, SOURCE N.M. (May 12, 2023, 4:30 AM), https://sourcenm.com/2023/05/12/extreme-heat-will-take-an-unequal-toll-on-tribal-jails/.

254. Special Tribal Criminal Jurisdiction Reimbursement, 88 FED. REG. 21459, 21460 (Apr. 11, 2023) (to be codified at 28 C.F.R. pt. 90); Crepelle 2022, *supra* note 15, at 609 (citing 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)).

255. *See* U.S. COMM'N ON C.R., *supra* note 37, at 33 ("The safety and wellbeing of Native Americans is a long-standing responsibility for the federal government, initiating from treaty obligations to provide for welfare of Native American peoples." (citing Morton v. Mancari, 417 U.S. 535, 552 (1974); Worcester v. Georgia, 31 U.S. 515, 548–54 (1832))).

256. *See* Crepelle 2021, *supra* note 204, at 721–24 (summarizing these federal restraints).

## CONCLUSION

The key to Indian country safety is the exact opposite of what *Castro-Huerta* prescribed. Rather than more state authority and less tribal sovereignty, the answer to Indian country crime is less state authority and more tribal sovereignty.[257] This is not a radical idea; in fact, the federal government's avowed policy for the past fifty years has been to promote tribal self-determination.[258] Moreover, the evidence clearly indicates tribal welfare improves when tribal sovereignty increases.[259] *Castro-Huerta* sprints in the opposite direction. *Castro-Huerta* was written to disembowel tribal sovereignty, and a corollary of this assault on tribal existence will be less safety for the denizens of Indian country.

257. INDIAN L. & ORD. COMM'N, *supra* note 151, at vii, ix.

258. *See, e.g.*, Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564, 565–66 (July 8, 1970); Alysa Landry, *Jimmy Carter: Signed ICWA into Law*, INDIAN COUNTRY TODAY (Sept. 13, 2018), https://ictnews.org/archive/jimmy-carter-signed-icwa-into-law ("During his presidential campaign in 1976, Carter's staff reached out to the National Congress of American Indians and the National Tribal Chairmen's Association. Carter met briefly with some leaders and his staff drafted a position paper that endorsed Indian self-determination policy, already in force."); Presidential Statement on Signing the Indian Self-Determination and Education Assistance Act Amendments of 1988, 2 PUB. PAPERS 1284, 1284 (Oct. 5, 1988); Presidential Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662, 662–63 (June 14, 1991); Exec. Order No. 13175, 3 C.F.R. 304, 305 (2001); Memorandum on Government-to-Government Relationship With Tribal Governments, 2 PUB. PAPERS 2177, 2177 (Sept. 23, 2004); EXEC. OFF. OF THE PRESIDENT, 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS 4 (2017), https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf; Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. 1 (Jan. 26, 2021). Laws passed to support tribal self-determination include the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–5423); 25 U.S.C. § 1451; 25 U.S.C. § 2701; 25 U.S.C. § 4301.

259. *Sovereignty Matters*, HARV. PROJECT ON INDIGENOUS GOVERNANCE & DEV., https://indigenousgov.hks.harvard.edu/home#:~:text=Sovereignty%20Matters&text=When%20Native%20nations%20make%20their,care%20and%20social%20service%20provision. (last visited Dec. 22, 2023) ("When Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers—on matters as diverse as governmental form, natural resource management, economic development, health care and social service provision.").