13

Criminal Justice Crisis

Indians are victims of violent crimes at twice the rate of any other racial group in the United States.[1] Violence against Indian women has reached particularly severe levels; indeed, Congress has described violence against Indian women as an "epidemic."[2] In 2010, Congress reported 34% of Indian women will be raped, and 39% will be the victim of domestic violence during their lifetimes.[3] The prevalence of sexual violence in some parts of Indian country causes mothers to discuss with their daughters what to do when – not if – raped. On some reservations, Indian women are murdered at rates ten times the national average.[4] The prevalence of violence against Indians has led to the missing and murdered Indigenous women and girls crisis. As macabre as these statistics are, they likely underrepresent the actual level of violence Indians experience. Historic law enforcement neglect leads many Indians to believe contacting the police is futile. And if the police are not contacted, the crime is unlikely to appear in criminal data.

In addition to its frequency, violence against Indians is unique because of its racial dynamics. Crime is an overwhelmingly intraracial affair in the

[1] Jennifer L. Truman & Lynn Langton, Bureau of Just. Stat., Criminal Victimization, 2013, at 6 (2014), www.bjs.gov/content/pub/pdf/cv13.pdf [https://perma.cc/WT3A-KDRE]; Alexandra Thompson & Susannah N. Tapp, Bureau of Just. Stat., Criminal Victimization, 2022, at 16 (2023), https://bjs.ojp.gov/document/cv22.pdf. [https://perma.cc/E3PU-487Q].

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

[3] *Id*, § 202(a)(5)(B-C).

[4] Savanna's Act, S. 1942, 115th Cong. § 2(a)(1) (2017); S. REP. No. 112–153, at 7–8 (2012).

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United States. Consequently, black perpetrators commit the majority of crimes against black victims, and white perpetrators usually target white victims. However, more than 90 percent of Indian victims identify their perpetrator as a non-Indian.[5] The high rate of interracial crimes involving Indians can partially be explained by Indians composing roughly 1 percent of the United States population and non-Indians making up the majority population on many reservations. Notwithstanding, the rate of non-Indian violence against Indians is particularly jarring when Indian country's legal regime is considered.

13.1 INDIAN COUNTRY'S PECULIAR JURISDICTIONAL REGIME

Unlike other jurisdictions in the United States, local law enforcement agents are not the primary police force in Indian country. Rather, tribes depend on the federal government and surrounding state for policing. This is a consequence of the federal government's long-running intervention in tribal affairs. Among the first laws passed by the United States was a provision authorizing the United States to prosecute non-Indians who committed crimes against Indians in the tribal territory, and Congress made this provision permanent in 1817.[6] In 1881, the Supreme Court held states have exclusive jurisdiction over Indian country crimes involving only non-Indians.[7] The Supreme Court reaffirmed this principle in 1896[8] and 1946.[9] In 1885, Congress granted the federal government jurisdiction over "major" crimes involving only Indians.[10] Most recently, Congress granted some states criminal jurisdiction over Indian country crimes within their borders in 1953.[11]

Despite the federal interventions, inherent tribal criminal jurisdiction was left untouched. To be sure, the aforementioned laws were substantial intrusions upon tribal sovereignty, and the federal government abolished

[5] André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 NAT'L INST. JUST. J. 38, 42 (2016).
[6] General Crimes Act of 1817, ch. 92, 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152 (2024)).
[7] United States v. McBratney, 104 U.S. 621 (1881).
[8] Draper v. United States, 164 U.S. 240 (1896).
[9] New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).
[10] Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2024)).
[11] Act of August 15, 1953, Pub. L. No. 83–280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326, 28 U.S.C. § 1360 (2024)).

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tribal courts on some reservations during the late 1800s. Nonetheless, the Supreme Court and other federal courts upheld tribal assertions of jurisdiction over non-Indians in the early 1900s.[12] Tribal courts were officially sanctioned by the United States in 1934 and no limits were placed on them; however, resource constraints limited the de facto capacity of tribal courts. Not until the Indian Civil Rights Act of 1968 (ICRA)[13] were external limits imposed on tribal authority: a maximum penalty of six months in jail with a $500 fine and only after providing defendants with procedural safeguards aligned with the United States Bill of Rights.[14] Even after ICRA, tribes presumptively possessed jurisdiction over all persons on their land because the foundational principle of federal Indian law is tribes retain all sovereign powers they have not explicitly relinquished. This presumption was challenged by Mark David Oliphant.

13.2 *OLIPHANT* V. *SUQUAMISH INDIAN TRIBE*: FACTS AND CONSEQUENCES DON'T MATTER

Oliphant was a non-Indian resident of the Port Madison Indian Reservation, a thirty-minute ferry ride west of Seattle. Oliphant attended the Suquamish Indian Tribe's Chief Seattle Days celebration on the reservation in August of 1973. At the celebration, Oliphant got drunk and became disorderly. Tribal police were the only law enforcement agency available because neither the BIA nor Kitsap County would provide police for the duration of the event despite thousands of non-Indians attending. Thus, tribal police responded to the call about Oliphant's drunken antics. Oliphant refused to cooperate with tribal police and proceeded to assault the officer. He was arrested but was soon out of jail on pretrial release. Oliphant obtained counsel not to argue his innocence; rather, Oliphant claimed he should be immune from tribal authority because he was a non-Indian.

Oliphant's contesting tribal jurisdiction was part of a larger social movement. Thanks to the tribal self-determination policies ushered in by President Nixon, tribes began asserting their sovereignty. The exercise of tribal rights resulted in resource competition with states. For example,

[12] Adam Crepelle, *Tribal Law's Indian Law Problem: How Supreme Court Jurisprudence Undermines the Development of Tribal Law and Tribal Economies*, 29 VA. J. SOC. POL'Y & L. 93, 124–25 (2022).

[13] Indian Civil Rights Act of 1968, Pub. L. No. 90–284, Tit. II, §§ 201–203, 82 Stat. 73, 77 (codified as amended at 25 U.S.C. §§ 1301–1304 (2024)).

[14] 25 U.S.C. § 1302 (2024).

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tribes in Washington boldly asserted their treaty fishing rights, which clashed with state fishing law. Every fish Indians caught meant one less fish for non-Indians. Similarly, tribes claimed their inherent sovereignty barred states from imposing taxes within reservations, and this imperiled state coffers. Against this backdrop, the recognition of tribal criminal jurisdiction over non-Indians would validate tribal sovereignty in other realms.[15]

Therefore, Oliphant's attorney filed a habeas corpus petition under the ICRA to suppress the tribal charges. The federal district court ruled against Oliphant as did the Ninth Circuit Court of Appeals. In response to Oliphant's contention that tribes can only prosecute non-Indians with congressional approval, the Ninth Circuit explained Oliphant had it backwards. The Ninth Circuit noted the bedrock principle of federal Indian law was tribes retain all inherent sovereign powers they have not been expressly divested of. Like every other nation, tribes historically claimed the right to punish all persons who committed crimes on their land. Accordingly, the question was not whether Congress had conferred prosecutorial power to tribes but whether Congress had unequivocally stripped tribes of this inherent sovereign power.

As it began its analysis of the treaties and acts of Congress, the Ninth Circuit stated it would follow the long-standing rule that legislation and treaties are to be construed in favor of tribes. The Ninth Circuit first looked to the 1855 Treaty of Point Elliott, of which the Suquamish was a party. No language in the treaty denied tribes criminal authority over non-Indians. The agreement between the Suquamish and the United States ceded tribal land but no sovereign powers. The Ninth Circuit then examined federal statutes authorizing federal and state jurisdiction over Indian country crimes. Though these laws infringed upon tribal sovereignty, Congress did not declare these laws divested tribes of criminal jurisdiction over non-Indians. Not only had tribes never lost this power but the Ninth Circuit believed the federal government's current policy of tribal self-governance required tribes to have jurisdiction over non-Indian criminals. Furthermore, the Ninth Circuit thought denying tribes criminal jurisdiction over non-Indians would leave Indians vulnerable to non-Indian criminals. Although states and the federal government had jurisdiction over Indian country crimes, they often failed to exercise it.

[15] 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 271 (Carole Goldberg et al. eds., 2011).

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Hence, preventing tribes from prosecuting non-Indians who the states and federal government refused to prosecute would give non-Indians carte blanche to terrorize reservations. For these reasons, the Ninth Circuit held tribes can prosecute non-Indian criminals.

The Supreme Court sided with Oliphant, in *Oliphant* v. *Suquamish Indian Tribe*. The Court's opinion is infamous for its factual errors and questionable legal reasoning. The Court asserted, "The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon."[16] In support of this claim, the Court quoted an 1834 report from the Commissioner of Indian Affairs stating, "[T]he Indian tribes are without laws, and the chiefs without much authority to exercise any restraint."[17] Instead of "formal judicial process," the Court asserted tribes relied on religious and social pressure to solve disputes through restitution rather than punishment. The Court's statement is both factually incorrect and ethnocentric.

Tribes had their own laws prior to European contact. Each tribe was different and had its own unique rules. Notwithstanding, it is safe to assume all tribes forbade people from assaulting their citizens. Tribes resisted European invasion and would have punished Europeans who perpetrated crimes upon their citizens; in fact, early treaties between the United States and Indian tribes explicitly affirmed tribes' sovereign right to prosecute non-Indians.[18] Furthermore, the United States knew tribes were prosecuting non-Indians well into the mid 1800s. The United States even turned over white fugitives to tribes for criminal prosecution.[19] In the same 1834 report that claimed "Indian tribes are without laws," the report declared tribes have criminal jurisdiction over *all persons* who freely choose to reside on tribal land because "they must be considered as voluntarily submitting themselves to the laws of the tribes."[20] Accordingly, the Court's historical research was incorrect or the truth was intentionally omitted.

Next, the Court examined the 1830 Treaty of Dancing Rabbit Creek[21] between the United States and the Choctaw. The Court relied on language

[16] *Id.* at 196–97.
[17] *Id.* at 197 (1978) (quoting H.R. Rep. No. 23–474, at 91 (1834)).
[18] 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, 562 (2021).
[19] *Id.*
[20] H.R. Rep. No. 23–474, at 18 (1834); Elizabeth Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in* McGirt v. Oklahoma, U. Chic. L. Rev. Online, https://lawreviewblog.uchicago.edu/2020/08/13/mcgirt-reese/ [https://perma.cc/4PYC-MW3D].
[21] Treaty with the Choctaw, Sept. 27, 1830, 7 Stat.333.

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at the end of the treaty where the Choctaw "express *a wish* that Congress *may grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations."[22] Whether this provision is sufficient to deny the Choctaw criminal jurisdiction over non-Indians is debatable. What is not debatable is that particular Choctaw treaty is the only treaty of the nearly 400 between tribes and the United States containing this language.[23]

Aside from the Court's emphasis on a single clause in one particular treaty, the Court nowhere mentions how or why the Treaty of Dancing Rabbit Creek is relevant to the Suquamish. The Suquamish had their own treaty with the United States. Moreover, the treaties were signed a generation apart in entirely different historical contexts. Given the issue before the Court, the circumstances surrounding the Suquamish seem germane. The United States originally presented a treaty to the Suquamish that contained language explicitly divesting the Suquamish of criminal authority over non-Indians. This document was rejected by the Suquamish, and the clause preventing the tribe from prosecuting non-Indians was removed in the subsequent treaty, the treaty ultimately signed by the Suquamish. The Suquamish claimed this clause was removed because the tribe wanted to retain criminal power over non-Indians. Justice Rehnquist rejected the notion, asserting there must have been a different reason – though he did not provide one.[24] This reasoning flies in the face of foundational principles of treaty construction, which requires ambiguities to be liberally construed in favor of tribes.

The Court then turned to the only case it could find supporting the proposition tribal courts lack criminal authority over non-Indians. The case was decided in an 1878 territorial court.[25] Tribal jurisdiction over non-Indians was also beyond the scope of the case; hence, the territorial court's commentary should have carried little weight.[26] The century-old musings of a territorial court are usually not given much credence in contemporary courts, but the Court noted the author of the opinion was Judge Isaac Parker. The Supreme Court believed Judge Parker's frequent exposure to cases from the Indian Territory made him an expert on the matter. However, the Supreme Court's footnote renders this a dubious proposition.

[22] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197 (1978) (emphasis in original).
[23] Crepelle, *Lies, Damn Lies, and Federal Indian Law*, *supra* note 18, at 559.
[24] *Oliphant*, 435 U.S. at 206 n.16.
[25] *Ex parte* Kenyon, 14 Fed. Cas. 353 (C.C.W.D. Ark. 1878).
[26] *Id.*; Oliphant v. Schlie, 544 F.2d 1007, 1011 (9th Cir. 1976).

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Footnote 10 in *Oliphant* may be the most bewildering citation in Supreme Court history. The citation begins by noting the character of Judge Parker's docket then adding, "Judge Parker's views of the law were not always upheld by this Court."[27] In other words, the Supreme Court was admitting Judge Parker was not considered among the finest legal minds of his day. Indeed, two-thirds of his decisions were overturned by higher courts,[28] an astounding figure considering approximately 90 percent of lower court decisions are affirmed on appeal.[29] Relying on Judge Parker is the legal equivalent of cheating off an "F" student.

Nonetheless, Justice Rehnquist, author of the majority opinion, attempted to justify his reliance on Judge Parker by claiming Judge Parker was held in "the universal esteem in which the Indian tribes which were subject to the jurisdiction ...."[30] To reach this conclusion, Justice Rehnquist quoted a passage from the book *He Hanged Them High: An Authentic Account of the Fanatical Judge Who Hanged Eighty-Eight Men*,[31] a subtitle he curiously omitted from his citation. Quoting from the book, Justice Rehnquist stated, "[T]he principal chief of the Choctaws, Pleasant Porter, came forward and placed a wreath of wild flowers on the grave [of Judge Parker]."[32] One Indian placing flowers on a grave is a thin reed to glean the views of every Indian under Judge Parker's jurisdiction. Plus, placing flowers on the grave could have meant any number of things – it could have been genuine sorrow; it could have been a political gesture; it could have meant good riddance. Placing weight upon this gesture also begs the question: If two Indians defiled the grave of Judge Parker, would his views on Indians carry less weight? After all, the defilers outnumber flower bearers. And making reliance on this book and the alleged gesture all the more flummoxing is the glaring error in the passage – Pleasant Porter was not Choctaw: He was Chief of the Creek Nation. Tribal citizenship matters, and the failure to properly affiliate

[27] *Oliphant*, 435 U.S. at 200 n.10.

[28] William H. Rehnquist, *Isaac Parker, Bill Sikes and the Rule of Law*, 6 U. Ark. Little Rock L. Rev. 485, 489 (1983); *Isaac Parker – Hanging Judge of Indian Territory*, Legends of Am., www.legendsofamerica.com/ar-isaacparker/ [https://perma.cc/G9BH-82LR]; *Isaac C Parker*, U.S. Nat'l Park Serv., www.nps.gov/people/isaac-c-parker.htm [https://perma.cc/46K6-CQE2].

[29] Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 Emory L.J. Online 1035 (2019).

[30] *Oliphant*, 435 U.S. at 200 n.10.

[31] Homer Croy, He Hanged Them High: An Authentic Account of the Fanatical Judge Who Hanged Eighty-Eight Men (1952).

[32] *Oliphant*, 435 U.S. at 200 n.10 (quoting *Id.* at 222).

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Chief Porter raises questions about whether Indians actually held Judge Parker in high regard.

Footnote 10 contains another red flag. Justice Rehnquist stated, "It may be that Judge Parker's views as to the ultimate destiny of the Indian people are not in accord with current thinking on the subject ...."[33] In plain speak, people in the contemporary United States would consider Judge Parker's beliefs ethnocentric. Indeed, Judge Parker hoped to "civilize" Indians, meaning he was not for outright genocide;[34] rather, he hoped to obliterate Indian culture, eradicate tribal governments, and transform Indians into white people. A person who desires the destruction of tribal governments and culture is unlikely to support tribal sovereignty. Notwithstanding, Justice Rehnquist considered Judge Isaac Parker the greatest source to gauge metes and bounds of inherent tribal sovereignty.

The Supreme Court's opinion relied on other questionable legal authorities to support its holding that tribal courts lack criminal jurisdiction over non-Indians. Justice Rehnquist cited a 1960 Senate Report and a 1970 Solicitor of the Department of the Interior opinion that concluded tribes lack criminal jurisdiction over non-Indians.[35] Standing on their own, these sources are reasonable. However, a footnote follows both authorities. The footnote following the Senate Report states the 1977 congressional Policy Review Commission determined "[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians."[36] Likewise, the footnote following the Solicitor opinion notes, "The 1970 opinion of the Solicitor was withdrawn in 1974 but has not been replaced. No reason was given for the withdrawal."[37] A possible reason for the differing assessments of tribal sovereignty could be the United States' executive and legislative branches had begun moving from policies of tribal termination toward tribal self-determination. Hence, the Court's authorities conflicted with current federal policy.

Unsurprisingly, the Supreme Court cited many of the canonical federal Indian law cases. While these cases depict Indians and tribes in an

[33] *Id.*

[34] Guy Nicols, Leo Allison, & Thomas Crowson, Judge Isaac C. Parker Myths and Legends Aside, http://npshistory.com/brochures/fosm/parker-myths-legends.pdf [https://perma.cc/XQ2Z-JYLL].

[35] *Oliphant*, 435 U.S. at 200–01, 204–05.

[36] *Id.* at 205 n.15.

[37] *Id.* at 200 n.11.

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unfavorable light,[38] none of these cases denied tribes authority over non-Indians. In addition to the canons, the Court referenced the 1891 case of *In re Mayfield*,[39] about whether the federal government can put Indians in jail for adultery, and quoted a passage stating tribal self-government powers extend only so far "as was thought to be consistent with the safety of the white population with which they may have come in contact."[40] The Supreme Court also quoted the infamous passage from *Ex parte Crow Dog* – noting prosecuting Indians in federal court would be judging them "by superiors of a different race" – to demonstrate it would be unfair to try non-Indians in tribal courts.

But the comparison between the circumstances in *Oliphant* and *Crow Dog* was specious. The Court in *Crow Dog* believed Indians – who had never experienced United States law – could not fairly be tried and sentenced to death by it. Though Oliphant may not have known Suquamish law jot for jot, it is hard to imagine that he would have been surprised to discover punching tribal cops violated tribal law. Plus, the maximum penalty Oliphant could have suffered under tribal law was capped at six months in jail and a $500 fine – likely the most lenient penalty for this crime of any jurisdiction in the United States. And curiously, the Supreme Court omitted "superiors" from its *Crow Dog* quotation, sanitizing the racial undertones of *Crow Dog*. Likening the prosecution of Crow Dog to Oliphant seems disingenuous.

The Supreme Court acknowledged there was no clear evidence tribes had ever been divested of jurisdiction over non-Indians. Following the canons of federal Indian law, this should have meant tribes retained the ability to prosecute non-Indians. But the Supreme Court decided to rewrite federal Indian law by declaring:

> "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.[41]

[38] For examples of these cases, see Chapter 5 for a discussion of Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Chapter 6 for discussions of Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Chapter 7 for discussions of United States v. Rogers, 45 U.S. (4 How.) 567 (1846); *Ex parte* Crow Dog, 109 U.S. 556 (1883); United States v. Kagama, 118 U.S. 375 (1886); and Chapter 9 for a discussion of Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

[39] *In re* Mayfield, 141 U.S. 107 (1891).

[40] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 204 (1978).

[41] *Id.* at 206.

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During his time on the Supreme Court, Justice Rehnquist was opposed to tribal interests. For example, in *United States* v. *Sioux Nation*,[42] eight Supreme Court Justices held the United States had unlawfully taken the Black Hills from the Sioux in the ignominious sell or starve "agreement" of 1876. The majority quoted the lower court's assessment of the United States' treatment of the Sioux: "A more ripe and rank case of dishonorable dealings will never, all probability, be found in our history, which is not, taken as a whole, the disgrace it now pleases some persons to believe."[43] Contrarily, Justice Rehnquist believed no injustice was foisted upon the Sioux. In his lone dissent, Justice Rehnquist quoted a source asserting, "[The Sioux and other Plains Indians] lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching."[44] Thus, Justice Rehnquist claimed the Sioux "did not lack their share of villainy either."[45]

Even for Justice Rehnquist, commanding present-day lawyers to incorporate the anti-Indian bias of the 1700s and 1800s into contemporary federal Indian law is jarring. Anti-Indian sentiments were rampant in eighteenth- and nineteenth-century United States; indeed, even the historic "Friends of the Indian" were ethnocentric by present standards. Using this guideline, tribal sovereignty will forever remain shackled by the unjust past. The Supreme Court's reliance on antiquated views of Indians to discern the power of contemporary tribal governments is all the more troublesome because the legislative and executive branches have categorically rejected those outmoded views and embraced a policy of tribal self-determination.

The final paragraph of *Oliphant* admitted there was little real danger of non-Indian rights being violated in tribal courts. The Supreme Court noted tribal courts "resemble in many respects their state counterparts"; plus, tribal courts are bound by the ICRA. Hence, parties in tribal courts receive procedural safeguards analogous to those in other United States courts. The Supreme Court also recognized that non-Indian crime is a severe problem on Indian reservations but brushed this concern aside, stating Congress can solve the problem if it wishes.

[42] United States v. Sioux Nation of Indians, 448 U. S. 371 (1980).
[43] *Id.* at 388 (quoting United States v. Sioux Nation, 207 Ct. Cl. 234, 241, (1975)).
[44] *Id.* at 437 (Rehnquist, J., dissenting).
[45] *Id.* at 435.

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Oliphant prevents tribes from performing the most essential of government functions – protecting the people within their borders from all violent criminals. By denying tribes the ability to prosecute non-Indians, *Oliphant* leaves tribes largely powerless to protect their citizens from most of the United States' population. Consequently, *Oliphant* does not treat tribes as sovereign governments. Instead, *Oliphant* acts as though tribes are an inferior social organization that cannot administer justice in an impartial manner.

13.3 *DURO* V. *REINA*: STRETCHING *OLIPHANT* FURTHER

The Supreme Court extended *Oliphant*'s reasoning in 1990 in *Duro* v. *Reina*.[46] Albert Duro, a citizen of the Torrez-Martinez Band of Cahuilla Mission Indians, lived on the Salt River Indian Reservation and worked for the Salt River Pima-Maricopa Indian's (Salt River) construction company. Duro allegedly shot and killed a fourteen-year-old boy on the Salt River Indian Reservation. The boy was enrolled in the culturally related and nearby Gila River Indian Tribe. Duro was arrested by federal agents following the murder; however, the United States Attorney refused to prosecute the case. Not wanting the crime to go unpunished, Salt River brought criminal charges against Duro. Duro responded by playing the *Oliphant* card, arguing tribes lack criminal jurisdiction over nonmember Indians.

The federal district court agreed with Duro; the Ninth Circuit Court of Appeals reversed, upholding tribal jurisdiction; and the Supreme Court sided with Duro. As in *Oliphant*, the Supreme Court admitted there was no clear evidence tribes had ever been divested of criminal jurisdiction over nonmember Indians. This was irrelevant. The Supreme Court emphasized tribes' extraconstitutional status as well as the fact Duro was ineligible for citizenship in Salt River. The Court explained: "Petitioner is not a member of the Pima-Maricopa Tribe, and is not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority."[47] Consequently, the Court held Duro was functionally a non-Indian for tribal jurisdiction purposes. Although political participation is not a requirement for prosecution by other United States governments,[48] the Supreme Court chose to foist this prerequisite upon tribes.

[46] Duro v. Reina, 495 U.S. 676 (1990).
[47] *Id.* at 688.
[48] *Id.* at 707 (Brennan, J., dissenting).

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Tribes universally denounced *Duro* for the practical law enforcement problems caused by the decision. Under *Duro*, a Navajo could not be prosecuted by the Hopi Tribe for committing a crime on the Hopi Reservation – which is problematic because the Navajo Reservation surrounds the Hopi Reservation. Indeed, the *Duro* Court seemed to view tribes as racial groups who exist isolated from one another, but this view was as wrongheaded as it is impractical. For example, the Mississippi Band of Choctaw Indians hosts a powwow on its reservation. Indians from twenty tribes attend the event. Every one of those individuals would be able to commit all the petty crimes they desired with no fear of legal recourse thanks to *Duro*. States realized the magnitude of this problem and joined the effort to lobby for a legislative *Duro* reversal, and within six months of the decision, Congress enacted a temporary *Duro*-fix. The *Duro*-fix became permanent in 1991.[49] The constitutionality of the *Duro*-fix was challenged, and the Supreme Court affirmed the law in 2004.[50] Hence, tribes now have the ability to prosecute all Indians who commit crimes on their land.

13.4 MINOR PUBLIC SAFETY IMPROVEMENTS

Congress' next significant effort to address Indian country crime was the Tribal Law and Order Act of 2010 (TLOA).[51] TLOA requires United States Attorneys with Indian country in their district to appoint a tribal liaison in hopes of fostering cooperative efforts between tribes and federal prosecutors. Likewise, United States Attorneys are "authorized and encouraged to appoint Special Assistant United States Attorneys"[52] to help with Indian country prosecutorial efforts, particularly of minor crimes.[53] Due to United States Attorneys' high declination rates for Indian country cases, TLOA mandates United States Attorneys collect and report data relating to Indian country crime. TLOA grants tribes greater access to criminal databases and increased funding for tribal

[49] A temporary Duro-fix was embedded in a U.S. Dep't of Defense bill. See Dep't of Defense Appropriations Act of Nov. 5, 1990, Pub. L. No. 101–511, Sec. 8077(b-d), 104 Stat. 1856, 1892–1893. Because the provision expired Sept. 30, 1991, a permanent Duro-fix was passed on Oct. 28, 1991. See Act of Oct. 28, 1991, Pub. L. No. 102–137, 105 Stat. 646. *See also* United States v. Lara, 541 U.S. 193, 198 (2004).

[50] *See* United States v. Lara, 541 U.S. 193, 215–16 (2004).

[51] Tribal Law and Order Act of 2010, Pub. L. No. 111–211, Title II, § 201, 124 Stat. 2261.

[52] *Id.* § 213, § 13(d)(1)(A).

[53] *Id.* § 213, § 13(d).

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law enforcement. Most significantly, TLOA increased tribal sentencing authority from one year to three years per offense, with the ability to stack sentences for a maximum of nine years in jail. The maximum fine tribes can issue increased from $5,000 to $15,000 thanks to TLOA. Strings are attached though.

In order to issue an enhanced sentence, tribes must comport with congressionally imposed requirements. TLOA requires tribes to provide defendants with the right to counsel as well as pay for attorneys for indigent defendants. The public defender must be licensed by a jurisdiction that "applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys."[54] Enhanced sentencing also requires the presiding tribal court judge to be licensed and have "sufficient legal training to preside over criminal proceedings."[55] Tribes must also publish all criminal laws and record the trial if they are to issue enhanced sentences.

While a step in the right direction, TLOA is essentially virtue signaling. It enabled the president and Congress to say they took action to improve public safety in Indian country. This is certainly true; nevertheless, TLOA misses the mark. Non-Indians commit a large portion of crimes in Indian country, and TLOA does not allow tribes to prosecute non-Indians. Also worth noting, Congress was well aware of tribes' financial constraints. Congress knew most tribes could not afford to implement TLOA. Additionally, some tribes refuse to implement TLOA because they view its procedural mandates as a further attempt to colonize tribal justice systems. Thus, TLOA does little to solve Indian country's crime problem.

Congress went a bit further in passing the Violence Against Women Act of 2013 (VAWA).[56] VAWA allows tribes to prosecute non-Indians who commit dating violence, domestic violence, or violate a protective order. Defendants in VAWA prosecutions must be in some sort of intimate relationship with the victim, reside in the Indian country of the prosecuting tribe, or be employed in the Indian country of the prosecuting tribe. Tribes cannot prosecute non-Indians without satisfying TLOA's requirements. VAWA also requires tribal jury systems to incorporate non-Indians. Significantly, VAWA includes a broad catch-all provision declaring tribes shall provide defendants with all rights

[54] *Id.* § 234(c)(2).
[55] *Id.* § 234(c)(3)(A).
[56] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat. 54 (codified as amended at 25 U.S.C. § 1304 (2024)).

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needed to make VAWA comply with the Constitution. This is progress, but unfortunately, VAWA barely scratches the surface of non-Indian victimizations of Indians.

Although VAWA's jurisdictional grant is narrow, this provision of VAWA faced enormous opposition. Much of it was based on the belief that tribal governments are inherently biased against non-Indians. In fact, Senator Chuck Grassley declared, "Under the laws of our land, you've got to have a jury that is a reflection of society as a whole, and on an Indian reservation, it's going to be made up of Indians, right? So the non-Indian doesn't get a fair trial."[57] Notably, Indian defendants seldom have an Indian on the jury when they are tried in state and federal court. Neither Senator Grassley nor other VAWA opponents expressed any problem with this scenario.

Other tribal jurisdiction opponents couched their argument in terms of constitutional rights. Tribal sovereignty predates the formation of the United States, and tribes never consented to the Constitution. Accordingly, tribes are not bound by the Constitution. Opponents of tribal jurisdiction interpreted this to mean non-Indian rights are likely to be violated in tribal courts. This is false. Tribes are bound by ICRA. ICRA provides protections analogous to those in the Bill of Rights – even the Supreme Court in *Oliphant* noted ICRA largely eliminates fears of non-Indians being denied due process in tribal court. VAWA requires tribes to provide non-Indian defendants with all rights needed to satisfy due process under the United States Constitution, so VAWA protects non-Indian constitutional rights. Constitutional rights should not be taken lightly, but it is worth noting that some constitutional rights are suspended within 100 miles of the United States border.[58] This means approximately two-thirds of the United States' population is perennially living without full constitutional rights.[59] Tribal courts bound by ICRA seem formidable compared to suspended rights.

The strongest argument in support of tribal criminal jurisdiction over non-Indians is the performance of VAWA-implementing tribes. Tribes have arrested more than 100 non-Indians for domestic violence, dating

[57] Jennifer Bendery, *Chuck Grassley on VAWA: Tribal Provision Means "The Non-Indian Doesn't Get a Fair Trial,"* HuffPost (updated Feb. 21, 2013), www.huffpost.com/entry/chuck-grassley-vawa_n_2735080 [https://perma.cc/EF87-RBKJ].

[58] Deborah Anthony, *The U.S. Border Patrol's Constitutional Erosion in the "100-Mile Zone,"* 124 Penn. St. L. Rev. 391 (2020).

[59] *The Constitution in the 100-Mile Border Zone*, ACLU, www.aclu.org/other/constitution-100-mile-border-zone [https://perma.cc/C4T4-BGNE].

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violence, and protective order violations. More than seventy of these non-Indian defendants have pled guilty in tribal court, which is comparable to plea rates in other United States jurisdictions. The high plea rate in tribal courts is particularly impressive considering their limitations. State and federal prosecutors often induce pleas by threatening elevated charges; however, tribal courts cannot use this tactic because the maximum penalty is three years per offense. Despite the obstacles to tribal prosecutions, not a single non-Indian defendant has alleged unfairness in a tribal court. In fact, some tribes urged defendants to challenge their tribal prosecutions in federal court. The non-Indian defendants declined on the grounds they received a fair shake in tribal court.

Tribal criminal jurisdiction over non-Indians was expanded in VAWA 2022.[60] Now, tribes can prosecute non-Indians who engage in stalking, sex trafficking, sexual violence, and child violence. Furthermore, VAWA 2022 permits tribes to prosecute non-Indians who assault law enforcement officers and obstruct justice. The jurisdictional expansion is accompanied by the same procedural requirements as VAWA 2013.[61] Although tribal jurisdiction is expanding, tribal jurisdiction still has a long way to go before tribes can uphold their governmental duty to protect their citizens from *all* criminals within their borders.

13.5 THE JURISDICTIONAL QUAGMIRE

Limited tribal jurisdiction means tribes depend on states and the federal government for law enforcement. Every crime in Indian country is punishable by a government; however, determining which government is the proper authority to prosecute a crime can be challenging.[62] Generally, tribes only have criminal jurisdiction over Indians. The federal government has jurisdiction over major crimes in Indian country when an Indian is the perpetrator. The federal government also has jurisdiction if the crime involves an Indian victim and non-Indian perpetrator or vice versa. States have exclusive jurisdiction over crimes involving only non-Indians. The

[60] Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117–103, Title VIII, Div. W, 136 Stat. 840.

[61] The requirements for VAWA 2013 are discussed *supra* beginning at note 56 and the accompanying text. See VAWA 2022, *supra* note 60 at §§ 804, 812, 813 for the requirements under VAWA 2022.

[62] Arvo Q. Mikkanen, Dep't of Just., Indian Country Criminal Jurisdictional Chart (2022), www.justice.gov/d9/pages/attachments/2020/08/10/indian_country_criminal_jurisdictional_chart_-_october_2022_version.pdf [https://perma.cc/DY39-GKQT].

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Supreme Court's 2022 decision in *Oklahoma* v. *Castro-Huerta* grants Oklahoma, and possibly other states, criminal jurisdiction over crimes involving a non-Indian perpetrator and an Indian victim.[63]

Since jurisdiction turns on whether a person is an Indian, courts must determine if a person is an Indian. This can be very complicated. "Indian" has more than two dozen definitions under federal law. The go-to test in criminal cases comes from *United States* v. *Rogers*,[64] and requires a person to possess both Indian blood and government recognition as an Indian. Indian blood is usually fairly easy to establish, but using a person's blood to assess which law applies seems to be the epitome of racism – which should be unsurprising since the *Rogers*' test was contrived by a notoriously racist judge, Chief Justice Roger Taney. In 2015, a federal judge critiqued the continued use of *Rogers* to determine "Indian" status in the twenty-first century, exclaiming, "Reliance on pre-civil war precedent laden with dubious racial undertones seems an odd course for our circuit law to have followed, especially in light of the Supreme Court's much more recent holdings in *Mancari* and *Antelope*."[65] Notwithstanding, *Rogers*' "blood" criterion remains embedded in federal Indian law.

Determining whether an individual has government recognition as an Indian, the other factor of the *Rogers* test, can easily become a vexing task. As an example, the federal government acknowledges the citizens of the United Houma Nation (UHN) are Indians "without doubt or question."[66] The federal government, nevertheless, refuses to recognize the UHN as "a tribe of Indians,"[67] but federally recognized tribes do consider the UHN a bona fide tribe. Hence, it is equally plausible that the Houma are or are not Indians for criminal jurisdiction purposes. Additionally, Indians may relinquish their tribal citizenship prior to or after committing a crime. If these factors were not amorphous enough, different courts use different tests to gauge Indian status, meaning a person may be an Indian in the Eighth Circuit but not the Ninth Circuit. Simply figuring out whether a person is an Indian can take months.

[63] Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022).
[64] The case is discussed fully in Chapter 7.
[65] United States v. Zepeda, 792 F.3d 1103, 1118 (9th Cir. 2015) (Kozinski, J., concurring)
[66] Off. of Fed. Acknowledgment, U.S. Dep't of the Interior, Summary Under the Criteria and Evidence for Proposed Finding Against Federal Acknowledgment of the United Houma Nation, Inc., 25 (1994), www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/056_uhouma_LA/056_pf.pdf [https://perma.cc/ZTQ6-6U63].
[67] *Id.* at 16, 40, 94–95.

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What qualifies as "Indian country" can be ambiguous too. For example, it was widely believed that all the reservations in Oklahoma had been disestablished for more than a century. The Supreme Court said otherwise in the 2020 case of *McGirt* v. *Oklahoma*.[68] As a result, nearly half of Oklahoma consists of reservation land. *McGirt* is an extreme example, but due to the General Allotment Act, Indian country is frequently checkerboarded, alternating and intermixed parcels of land under state or tribal authority. Which government has jurisdiction can change with each step. Law enforcement agents are often forced to rely on GPS to figure out their jurisdiction, but even this may be insufficient, as exhibited by *McGirt*.

Jurisdictional confusion creates a strong disincentive for state and federal agents to pursue Indian country crimes. State and federal agents can arrest and prosecute offenders without having to quibble over whether the parties are Indian outside of Indian country. Hence, law enforcement is much more efficient outside of Indian country. There are consequences of getting the jurisdictional inquiry incorrect too. If the wrong law enforcement agency prosecutes the defendant, the defendant may be released for lack of jurisdiction. This means officers who spent hundreds of hours working on the case wasted their time. Plus, some of the evidence may not be usable in another jurisdiction due to differing evidentiary rules. Liability may also arise if the wrong government prosecutes the case. As a result of liability concerns, some state law enforcement agencies openly refuse to patrol checkerboard reservations.[69]

Jurisdictional issues are compounded by Indian country's police shortage. Indian country has less than half the boots on the ground as comparable rural jurisdictions. A 2001 report by the National Institute of Justice described the average reservation police force as having one to two officers patrolling an area the size of Delaware.[70] Delaware has far more police agencies than most reservations have cops.[71] Fewer police officers

[68] McGirt v. Oklahoma, 591 U.S. 894 (2020).

[69] Mary Hudetz, *Amid a Crime Wave on Yakama Reservation, Confusion over a Checkerboard of Jurisdictions*, Seattle Times (updated Feb. 18, 2020), www.seattletimes.com/seattle-news/times-watchdog/amid-a-crime-wave-on-yakama-reservation-confusion-over-a-checkerboard-of-jurisdictions/ [https://perma.cc/E82X-MKGF].

[70] Stewart Wakeling et al., Nat'l Inst. of Just., U.S. Dep't of Just., Policing on American Indian Reservations: A Report to the National Institute of Justice 9 (2001), www.ncjrs.gov/pdffiles1/nij/188095.pdf [https://perma.cc/M4NV-B5UY].

[71] *Delaware Law Enforcement Agencies*, GoLawEnforcement, https://golawenforcement.com/state-law-enforcement-agencies/delaware-law-enforcement-agencies/ [https://perma.cc/D8SV-U3LQ].

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lead to slower response times, and response time is especially significant in Indian country because of Indian country's jurisdictional framework. All a criminal has to do is reach the reservation border, then the pursuing officer's ability to detain and arrest becomes a mystery. Criminals know this; hence, police claim criminals laugh as they cross reservation borders. This bizarre state of affairs prompted the Washington Supreme Court to state Indian country's jurisdictional scheme creates an "incentive for intoxicated drivers to race for the reservation border."[72]

Law enforcement difficulties created by the jurisdictional maze and police shortage are exacerbated by Indian country's abysmal infrastructure and cultural barriers. State and federal law enforcement are often located more than 100 miles from Indian country. Once state and federal agents reach Indian country, they discover Indian country's roads are largely unpaved; indeed, the roads have been described by the United States Commission on Civil Rights as "the most 'underdeveloped, unsafe, and poorly maintained road networks in the nation.'"[73] Traveling in Indian country gets more complicated because reservation homes often lack addresses. This means GPS will be largely useless. Even if the crime scene has an address, Indian country's shoddy communication infrastructure may prevent GPS's use as well as the officer's ability to call for backup. Assuming the crime scene is reached, evidence collection may be difficult due to Indian country's poor medical care, including a lack of rape kits. Even if law enforcement can reach the crime scene, they may not be welcomed by the tribal community. Indians are often distrustful of state and federal agents because of cultural barriers as well as past and ongoing abuses.

In addition to these obstacles to criminal justice, federal law enforcement officers have no reason to prioritize Indian country crime. Federal prosecutors are usually more interested in high-profile cases, like terrorism and white-collar crimes. The Indian country docket does not fit this bill. In fact, federal prosecutors have allegedly been fired for focusing on Indian country crimes. Federal judges have also stated they do not like Indian country cases, and this discourages prosecutors from pursuing reservation crimes.

Some states have jurisdiction over all reservation crimes due to federal legislation, such as Public Law 280. Indians fair even worse when

[72] State v. Eriksen, 172 Wn.2d 506, 514, 259 P.3d 1079 (2011).

[73] U.S. Comm'n on Civil Rights, Broken Promises: Continuing Federal Funding Shortfall for Native Americans 168 (2018), www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf [https://perma.cc/ZZ74-AR9Z].

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states have criminal authority over reservation crimes. States are often uninterested in Indian country because Indians are usually a small, poor minority. An elected sheriff probably will not win elections by concentrating on reservation safety. Moreover, states cannot tax tribal lands, so there is an actual disincentive to police Indian country. State law enforcement usually are not members of tribal communities either. Accordingly, they have no incentive to focus on Indian country crimes when crimes are occurring in the agent's own community. In fact, there are accounts of state police ignoring Indian victims and using their authority to harass Indians. Several studies show tribes subjected to state jurisdiction experience higher crime rates than tribes under federal jurisdiction.[74]

Racism likely contributes to high rates of violence against Indians as Indians experience elevated victimization rates outside of Indian country too. When Indians are victimized, police are slow to respond, and when Indians are accused, police are more likely to kill Indians than members of any other race.[75] Likewise, police often assume Indian women were intoxicated when they were victimized and may deem Indians less worthy of protection than other United States citizens. The media is largely indifferent to crimes against Indians as missing Indian women and girls seldom make headlines.

The above factors combine to make Indian country a prime place for non-Indian criminals to target Indian victims; in fact, the United States Commission on Civil Rights has declared, "Native Americans have become easy crime targets."[76] Some federal prosecutors are apathetic to Indian country crime, and if a non-Indian victimizes an Indian, only the federal government has jurisdiction in most states. Hence, non-Indian criminals have a logical reason to select Indian victims in Indian country. The available evidence suggests non-Indian criminals have figured this out. Indian country crime rates soar during oil booms and hunting season, times when non-Indians enter reservations in large numbers.

[74] Troy A. Eid et al., Indian Law and Order Comm'n, A Roadmap for Making Native America Safer 5, 11, 17 (2013); Carole Goldberg & Heather Valdez Singleton, Final Report: Law Enforcement and Criminal Justice Under Public Law 280, at 23, 26, 112, 335–39 (2008).

[75] Adam Crepelle, *The Law and Economics of Indian Country Crime*, 110 Geo. L.J. 569, 579 (2022).

[76] U.S. Comm'n on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country 68 (2003), www.usccr.gov/pubs/na0703/na0731.pdf [https://perma.cc/8L7Y-NM59].

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Indian women get the worst of the non-Indian influx as reservations have become known as "rape tourism" destinations.

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Being unable to prosecute all persons on their land severely limits tribes' ability to function as governments. Without the power to punish the non-Indian criminals who harm their citizens, tribes are largely demoted from sovereigns to social clubs. One could argue criminal power is unique because a prosecution deprives a person of their physical liberty. However, *Oliphant* has been extended to the civil realm too. As a result, *Oliphant* hampers tribes' capacity to enforce contracts, zone their property, and uphold tribal safety standards. This diminished jurisdiction has deleterious effects on tribal economies.

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