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Native American Rape Victims: Desperately Seeking an Oliphant-Fix

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Note

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Leslie Ironroad lay dying in her hospital bed. She scribbled a statement to a police officer and identified the men who raped her, beat her, and locked her in the bathroom where she attempted to overdose on prescription medicine to escape further harm.[1] No charges were filed.[2] Members of the Standing Rock Sioux Reservation indicate that the police never investigated the men she identified.[3] The Bureau of Indian Affairs (BIA) police officer who took her statement did not follow up on her case because, in his words, "[federal prosecutors] only take the ones with a confession."[4] Prosecutorial inaction forces the BIA police, who at the time of Ironroad's death had five officers for a territory the size of Connecticut,[5] to triage the many calls they receive each week.[6]

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1. *All Things Considered: Rape Cases on Indian Land Go Uninvestigated* (National Public Radio broadcast July 25, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=12203114.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* By 2008, the number had increased to ten, still far short of the level needed for minimally safe staffing. *See Discussion Draft Legislation to Address Law and Order in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 13 (2008) (statement of Ron His Horse Is Thunder, Chair of the Standing Rock Sioux Tribe). Ten officers provide an actual staffing level of two officers on duty per 24-hour period. *Id.* During the summer of 2008, the BIA implemented Operation Dakota Peacekeeper, a temporary surge

Rape of Native American[7] and Alaska Native women[8] occurs at a disproportionately high rate compared to women in other racial and ethnic groups in the United States.[9] Not only are Native women more likely to be raped, they are more likely to have injuries, and their injuries are often more severe.[10] The perpetrators overwhelmingly come from outside the Native American community[11] and their crimes generally go uninves-

of twenty additional law-enforcement personnel to Standing Rock. *Id.* at 9 (statement of Sen. Thune). Following the surge, the BIA hoped to maintain an, albeit still insufficient, total of seventeen officers in Standing Rock. *See Progress and Future of Operation Dakota Peacekeeper: Field Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 26 (2008) (statement of W. Patrick Ragsdale, Dir., Office of Justice Servs., U.S. Dep't of the Interior).

6. *All Things Considered: Rape Cases on Indian Land Go Uninvestigated*, *supra* note 1.

7. Consensus does not exist about terminology collectively to describe tribes in the United States. CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 387 (Vintage Books 2006) (2005). For a brief overview of the origins and problems of the terms "Indian" and "Native American" see MANN, *supra,* at 387–92 ("Appendix A: Loaded Words"). Indian is more commonly used in federal law—e.g. Title 25 of the *United States Code* is entitled "Indians,"— while Native American appears in some scholarly works. This Note uses the terms and their variants interchangeably and prefers Indian or American Indian when referring to federal law, and Native American or Native in other contexts. I do not make legal or ethnological distinctions between the two terms for the purposes of this Note.

8. Men and women both experience rape and sexual assault, however, this Note focuses on Native women because the overwhelming majority of sexual assaults are committed against women. LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 24 (1997).

9. *See* AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 2 (2007); Brenda Norrell, *Native Women Are Prey: Communities and Courts Fail Native Women*, NEWS FROM INDIAN COUNTRY, Dec. 29, 2003, at 9, 9 ("One in three Native American women will be raped in her lifetime.").

10. *See* Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 456–57 (2005) (noting that 90% of Native women report that their aggressors hit them during the assault, compared to 74% of non-Native rape victims). Similarly, 50% of Native women reported injury, compared to 30% of the general population. *Id.* at 457. Additionally, nearly three times more Native women than non-Native women report that their aggressor used a weapon during the rape. *Id.*

11. *See* STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 9 (2004) ("Nearly 4 in 5 American Indian victims of rape/sexual assault described the offender as white."); Deer, *supra* note 10, at 457 (citing studies reporting that white perpetrators commit 70% of rapes involving Native women); *see also* AMNESTY INT'L, *supra* note 9, at 5 (reporting data from Oklahoma and Alaska that suggest that approximately 58% of perpetrators are non-Indian and noting the need for further quantitative study). Compare

tigated and unprosecuted.[12] Thus, even though Native American women are more likely to be sexually assaulted, their aggressors are less likely to be prosecuted. Jurisdictional issues present the main barrier to prosecution and play a large role in the disparity.[13] The situation may worsen: some scholars suggest that the prevalence of such violent incidents may increase as new gambling and tourism initiatives bring non-Indians into closer contact with Native American women living on reservations.[14]

This Note focuses on the jurisdictional difficulties that prevent or limit the prosecution of sexual assault of Native women by non-Indian aggressors. For a variety of institutional and social reasons, the appropriate federal or state authorities[15] prosecute few perpetrators of rape of Native American women.[16] For example, Department of Justice records show that federal prosecutors filed only 606 criminal cases in 2006 for all of Indian country, which includes more than 560 federally recognized tribes.[17] Similar reports exist for tribal governments in Public Law 280[18] states, where state prosecutors have criminal jurisdiction but tribes find the response similarly inadequate.[19]

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these figures to the fact that Native Americans comprise 70% of defendants sentenced under the federal sentencing guidelines for aggravated criminal sexual abuse, statutory rape, and sexually abusive contact. *See* John V. Butcher, *Federal Courts and the Native American Sex Offender*, 13 FED. SENTENCING REP. 85, 85 (2000).

12. *All Things Considered: Rape Cases on Indian Land Go Uninvestigated*, *supra* note 1.

13. *See, e.g.*, AMNESTY INT'L, *supra* note 9, at 27 (describing jurisdictional difficulties in two reported rapes where the blindfolded victims could not identify whether or not the crime occurred on tribal land).

14. *Cf., e.g.*, Jared B. Cawley, *Just When You Thought It Was Safe to Go Back on the Rez: Is It Safe?*, 52 CLEV. ST. L. REV. 413, 429 (2004-05) (suggesting a likely increase in crime rates due to an influx of non-Indians onto reservations for gambling).

15. *See* Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 125–26 (2004).

16. *See* Norrell, *supra* note 9, at 9 (noting the total number of convictions for forcible rape of Native women nationwide in 2003 (54) and the number of rapes reported on a single South Dakota reservation in a single month (40)).

17. N. Bruce Duthu, Op-Ed., *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 11, 2008, at A17.

18. Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588 (codified as amended at 18 U.S.C. §§ 1161–1162 (2006), 25 U.S.C. §§ 1321–1322 (2006), and 28 U.S.C. § 1350 (2000) (popularly known as Public Law 280)).

19. *See* Deer, *supra* note 15, at 126; Mending the Sacred Hoop, *Jurisdictional Issues Complicate Response to Sexual Assault for Tribes Under PL280 Status*, THE RESOURCE (Nat'l Sexual Violence Resource Ctr., Enola Pa.),

While tribal courts technically may prosecute the small proportion of perpetrators who are Native American,[20] the Indian Civil Rights Act[21] (ICRA) limits punishment to one year of imprisonment, a $5,000 fine, or both[22]—far less than the state and federal penalties for the same crimes, which generally exceed eight and twelve years, respectively.[23] Furthermore, even if a tribe asserts jurisdiction, the lack of funding for tribal law enforcement restricts investigation and prosecution.[24] Some tribes even curtail law enforcement activities related to crimes of sexual violence because they believe that they lack the ability to arrest suspects.[25]

Federal statutes and case law set out an unduly complex system wherein criminal jurisdiction over offenses committed in Indian country depends on a number of factors: the type of crime,[26] where it occurred,[27] and the tribal-membership status

Fall/Winter 2003, at 2, 12 (reporting consequences of jurisdictional confusion in Public Law 280 states).

20. Deer, *supra* note 15, at 128 (noting that sexual-assault prosecutions in tribal courts occur, but are rare).

21. Act of Apr. 11, 1968, tit. II, Pub. L. No. 90-284, 82 Stat. 73, 77 (codified as amended at 25 U.S.C. §§ 1301–1303).

22. 25 U.S.C. § 1302(7).

23. Duthu, *supra* note 17. *See also* U.S. SENTENCING GUIDELINES MANUAL § 2A3.1 & ch. 5, pt. A, at 396 (2008) (setting the base sentence range for aggravated sexual assault at 151–188 months).

24. Deer, *supra* note 10, at 463 ("In addition to the multitude of legal barriers restricting tribal governments from taking action against sexual violence, tribal nations are notoriously underresourced."). Deer further notes, "There are fewer law enforcement officers in Indian Country than in other rural areas and significantly fewer per capita than nationwide." *Id.* (citation omitted) (internal quotation marks omitted). Furthermore, in Indian country, per capita spending on law enforcement is approximately 60% of the national average. *Id.*

25. Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1284 (2004).

26. *See, e.g.*, Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (current version at 18 U.S.C. § 1153 (2006) (popularly known as the Major Crimes Act)). The Major Crimes Act distinguishes fifteen crimes as "major" and grants jurisdiction to the federal government over "[a]ny Indian who commits against the person or property of another Indian or other person." *Id.* § 1153(a).

27. For example, Public Law 280 transferred criminal jurisdiction over any person who commits a crime in designated areas of Indian country to state governments in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *See* 18 U.S.C. § 1162. *But see id.* § 1323 (allowing retrocession of jurisdiction to the federal government). Amendments to Public Law 280 also allow other states to assume criminal jurisdiction but require tribal consent. *See id.* § 1321.

of the victim and the perpetrator.[28] Often, the ensuing confusion over jurisdictional issues suffices to deter investigation and prosecution by any authority.[29] Indeed, since the Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*[30] effectively stripped tribes of criminal jurisdiction over non-Indians, tribal law enforcement officials and victim advocates have reported a substantial increase in the number of non-Indian criminals who exploit this gap in jurisdiction and commit crimes on reservations.[31] The failure to prosecute troubles Indian communities,[32] but they lack the political power to oust unsatisfactory state or federal prosecutors.[33] Ultimately, Native American rape victims rarely receive justice.

This Note argues that tribes should exercise criminal jurisdiction over sex crimes involving Native American women and that if an opt-in program[34] existed, tribes with the capacity to prosecute offenders could provide more effective and culturally relevant justice for rape survivors. Part I describes the development of criminal jurisdiction in Indian country and the current legal obstacles that prevent the prosecution of Indians and non-Indians for sexual assault of Native American women. It also explores the potential of modern tribal governments to undertake prosecutions. Part II outlines an opt-in program to evaluate the ability of tribal governments to assume criminal

28. The Major Crimes Act extends federal jurisdiction only to crimes committed by Indians in Indian country. *Id.* § 1153.

29. Ralph Blumenthal, *For Indian Victims of Sexual Assault, a Tangled Legal Path*, N.Y. TIMES, Apr. 25, 2007, at A16.

30. 435 U.S. 191 (1978).

31. Deer, *supra* note 15, at 126; AMNESTY INT'L, *supra* note 9, at 27–28.

32. Avis Little Eagle, *Rape Charge Dropped, Standing Rock Angry*, INDIAN COUNTRY TODAY, Mar. 25, 1996, at A1 (describing the Standing Rock Sioux community's anger over the dismissal of a rape charge on statute-of-limitation grounds because the district attorney had "bungled" the case of a Native woman who was raped, beaten, shot several times in the head and torso, and then chained to the back of a pickup truck and dumped in a river).

33. Most nonfederal prosecutors are elected by citizens of the state and subject to numerous political checks. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 728 (2006) [hereinafter Washburn, *American Indians*]. In contrast, federal prosecutors are appointed by the executive branch and are not accountable to tribal members for their decisions. *Cf.* Kevin K. Washburn, *Federal Criminal Law and Tribal Self–Determination*, 84 N.C. L. REV. 779, 846–47 (2006) [hereinafter Washburn, *Federal Criminal Law*] (noting that, in other contexts, providers of services who are directly accountable to a tribe provide improved delivery of services).

34. Generally, an opt-in program would give tribes the opportunity to undertake criminal jurisdiction, but would not mandate that they do so. *See infra* Part II.C.

jurisdiction over sexual assault and other major crimes and then facilitate the assumption of jurisdiction. This approach considers the strengths and weaknesses of alternative solutions. Finally, Part III argues that law and policy support giving tribes criminal jurisdiction as the best long-term solution for Native American women, tribal sovereignty, and federal and state governments. Ultimately, an opt-in program would eliminate the jurisdictional gap for some Indian tribes and increase their ability to prosecute individuals who commit heinous crimes against Native American women.

I. CRIMINAL JURISDICTION OVER SEXUAL ASSAULT IN INDIAN COUNTRY

Depending on the circumstances, prosecutors from the state, federal, or tribal government might act against the perpetrator of a sexual assault, but often none do because of the jurisdictional maze outlined below. This section details the current jurisdictional confusion, which impedes the prosecution of sexual assaults perpetrated against Native American women, and considers the ability of modern tribal courts to assume greater jurisdiction.

A. THE FEDERAL (OR STATE) GOVERNMENT HAS JURISDICTION OVER MOST CRIMES COMMITTED BY INDIANS IN INDIAN COUNTRY

Indian tribes are sovereign nations; a tribe retains its sovereign powers unless expressly relinquished by the tribe in a treaty or taken from the tribe by a federal statute.[35] Under the terms of early treaties, tribes generally retained the right of self-government, including "maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community."[36] By the terms of many treaties, certain tribes even retained the power to punish non-Indian individuals who intruded on Indian lands and committed a crime.[37] According to

35. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."). *But see Ex parte* Crow Dog, 119 U.S. 556, 572 (1883) (requiring a clear expression of the intention of Congress to abrogate tribal sovereignty).

36. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

37. *See, e.g.*, Treaty of Greeneville art. VI, Aug. 3, 1795, 7 Stat. 49, 52 ("If any citizen of the United States, or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such

some scholars, tribes retained this power in almost every treaty the signed around the time of the drafting of the U.S. Constitution.[38] Nevertheless, Congress passed the General Crimes Act[39] and the Major Crimes Act,[40] which vested jurisdiction over crimes committed in Indian country in the federal government instead of tribal governments.

The General Crimes Act grants criminal jurisdiction to the federal government over crimes "by and against" Indians *except* where: (1) an Indian committed a crime against another Indian or on Indian land, (2) an Indian had already been punished according to the local law of the tribe, or (3) the treaty reserved criminal jurisdiction to the tribe.[41] The rationale for the exceptions was that there was no federal interest to justify an intrusion on tribal sovereignty.[42]

In spite of this, the Major Crimes Act obliterates these exceptions by providing the federal government with jurisdiction over specific crimes, including sexual assault,[43] committed by

citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit.").

38. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 123 n.22 (2002).

39. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383, 383 (current version at 18 U.S.C. § 1152 (2006)). The General Crimes Act expressly recognized existing treaties: "[N]othing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offence committed by one Indian against another, within any Indian boundary." *Id.* § 2.

40. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (current version at 18 U.S.C. § 1153). The Major Crimes Act granted full jurisdiction to the federal government over all Indians, whether an alleged crime occurred in Indian country or not. *Id.*

41. 18 U.S.C. § 1152. The General Crimes Act provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Id.

42. *See* Washburn, *Federal Criminal Law*, *supra* note 33, at 793.

43. The "major crimes" originally covered by the Major Crimes Act included murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. *See* Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. at 385. But,

Indians against other Indians in Indian country.[44] If no federal law exclusively governs the offense, then the federal court determines the choice of law by reference to law of the state within which the offense was committed.[45]

States lack jurisdiction over crimes committed by or against Indians in Indian country unless federal legislation expressly grants authority.[46] Although the Supreme Court characterized states as the "deadliest enemies" of tribes,[47] Congress transferred criminal jurisdiction to several states through Public Law 280 in an attempt to fill a gap in jurisdiction over crimes committed on reservations.[48] But, Congress did not solicit the consent of the tribes or the states and failed to provide funding for the state governments to fulfill their additional responsibilities.[49] Thus, although one motivation for Congress to enact Public Law 280 was to fix the jurisdictional gap on many reservations, it actually increased the gap by allocating prosecutorial responsibility to state governments that lacked the resources to prosecute.[50] Ultimately, Congress transferred crimi-

various amendments (including nearly an entire chapter of the federal criminal code) make it "something of a fool's errand to attempt to count the number of offenses enumerated by the Major Crimes Act." Washburn, *Federal Criminal Law*, *supra* note 33, at 826.

44. The Act states: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely . . . a felony under chapter 109A . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). Chapter 109A of Title 18 of the *United States Code* concerns sexual abuse. *See id.* §§ 2241–2248.

45. *Id.* § 1153(b).

46. CAROLE GOLDBERG & HEATHER VALDEZ SINGLETON, U.S. DEP'T OF JUSTICE, PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY—RESEARCH PRIORITIES 1 (2005), http://www.ncjrs.gov/pdffiles1/nij/209839.pdf.

47. United States v. Kagama, 118 U.S. 375, 384 (1886) ("[Tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.").

48. *See* S. REP. NO. 83-699, at 5 (1953) ("In many States, tribes are not adequately organized to perform that function [law enforcement]; consequently, there has been created a hiatus . . . that could be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility."); s*ee also* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 540–44 (1975) (reviewing the legislative history of Public Law 280).

49. Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State, and Federal Governments*, 31 MCGEORGE L. REV. 973, 1023 (2000).

50. *Cf. id.*

nal jurisdiction to federal and state law enforcement without securing the actual provision of law enforcement and justice.

B. TRIBES DO NOT HAVE CRIMINAL JURISDICTION OVER CRIMES COMMITTED IN INDIAN COUNTRY BY NON-INDIANS

The Supreme Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe*[51] effectively precludes tribal prosecution of non-Indians who sexually assault Native American women.[52] The *Oliphant* case arose from the separate arrests of two non-Indian men on the Port Madison Reservation.[53] The Suquamish Tribe had prominently posted notices at entrances to the reservation to alert all visitors that their entry indicated consent to the criminal jurisdiction of tribal court.[54] Tribal police officers arrested Mark Oliphant and charged him with assaulting a tribal police officer and resisting arrest.[55] A second defendant, Daniel Belgarde, was arrested and charged with recklessly endangering another person and injuring tribal property.[56] After conviction in the tribal court, the two defendants sought a writ of habeas corpus in federal district court,[57] and ultimately the Supreme Court,[58] to determine whether the tribe appropriately exercised criminal jurisdiction over the non-Indian defendants.[59]

1. The *Oliphant* Court Held That Tribes Lack Criminal Jurisdiction over Non-Indian Criminal Conduct Committed on the Reservation

The Supreme Court held that tribes do not have inherent jurisdiction to try or to punish non-Indians[60] for two reasons. First, the Court reasoned that tribal courts lack criminal juris-

51. 435 U.S. 191 (1978).

52. Some scholars contend that tribes retain concurrent criminal jurisdiction. *See* Deer, *supra* note 15, at 127. But, the limitations that ICRA places on a tribe's ability to punish offenders make it unlikely that tribes retain jurisdiction over felonies. *See* Washburn, *Federal Criminal Law*, *supra* note 33, at 817.

53. 435 U.S. at 194.

54. *See id.* at 193 n.2.

55. *Id.* at 194.

56. *Id.*

57. *Id.*

58. *See* Oliphant v. Suquamish Indian Tribe, 431 U.S. 964 (1977) (mem.) (granting certiorari).

59. *Oliphant*, 435 U.S. at 195.

60. *Id.* at 212.

diction unless "explicitly provided by treaty or statute."[61] Further, the Court found implicit divestment of tribal criminal jurisdiction through an "unspoken presumption" among Congress, the executive branch, and the lower federal courts that tribes lack criminal jurisdiction over non-Indians.[62] Applying its reasoning to the Suquamish Tribe, the Court analyzed, inter alia, the Suquamish Tribe's treaty and found that the treaty's silence on the issue of criminal jurisdiction over non-Indians supported its finding of implicit divestment.[63]

Second, the Court reasoned that because criminal justice implicates the deprivation of life and liberty, "citizens [should] be protected by the United States from unwarranted intrusions on their personal liberty."[64] On the Suquamish reservation, non-Indians could not participate in the political process of the tribal government: non-Indians, for example, could not serve on the juries of tribal courts.[65] Furthermore, tribal constitutions do not necessarily draw strict boundaries between separation of powers; tribal courts may be subordinate to the legislative or executive branches of tribal governments. Subordination could theoretically interfere with the ability of the judges to render impartial judgments.[66] Lastly, tribal governments do not provide all of the protections of the Bill of Rights to defendants, and the Court could not justify subjecting U.S. citizens to a judicial system providing lesser protection to defendants.[67]

61. *Id.* at 191.

62. *See id.* at 203.

63. *Id.* at 214–15.

64. *Id.* at 210. The Court applied the same reasoning used to preserve tribal autonomy in *Crow Dog* to diminish tribal autonomy in *Oliphant*. *Compare Ex parte* Crow Dog, 109 U.S. 556, 571 (1883) (stating that Indians should not be subjected to alien federal courts because such courts tried Indians "not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception"), *with Oliphant*, 435 U.S. at 211 ("These considerations [those listed in *Crow Dog*, *supra*], applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes . . . retain the power to try non-Indians according to their own customs and procedure.").

65. *Oliphant*, 435 U.S. at 194.

66. *See* Elizabeth Burleson, *Tribal, State, and Federal Cooperation to Achieve Good Governance*, 40 AKRON L. REV. 207, 215 (2007).

67. *Oliphant*, 435 U.S. at 194.

2. The *Oliphant* Court Relied on Inconclusive Evidence to Determine Tribal Jurisdiction

The *Oliphant* Court relied on several documents to support its conclusion that Indian tribes lack criminal jurisdiction over non-Indian defendants. First, the Court noted that the tribe was relying on a theory of retained inherent powers rather than language in a treaty or congressional grants of authority.[68] After quickly dismissing the possibility of historical support for jurisdiction,[69] the Court quoted the 1830 treaty with the Choctaw Indian Tribe, which guaranteed "the jurisdiction and government of all the persons and property that may be within their limits"[70] The Court noted that a later provision in the treaty stated that the Choctaws "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."[71] The Court held that the provision constituted a request for affirmative congressional authority, which it found inconsistent with the notion that the inherent sovereignty of tribes justifies the exercise of criminal jurisdiction over non-Indians.[72] The Court found further support in two Attorneys General opinions from the mid-1800s that concluded that "the Choctaws did not have criminal jurisdiction over non-Indians absent congressional authority."[73]

The Court next analyzed *Ex parte Kenyon*,[74] an 1878 district-court opinion from Arkansas in which the court granted a non-Indian defendant's writ of habeas corpus, and held that the Cherokee tribal court lacked jurisdiction.[75] Although the *Kenyon* court noted in dictum that to give an Indian tribal court "jurisdiction of the person of an offender, such offender must be

68. *Id.* at 195–96.

69. The Court quoted an 1834 report by the Commissioners of Indian Affairs to the Secretary of War which stated, "the Indian tribes are without laws," *see id.* at 197 (quoting H.R. REP. 23-474 at 90 (1834)), as evidence that tribes historically lacked the ability to exercise jurisdiction over non-Indians. *See id.* The Court then used the Choctaw tribe as an example one of the tribes that had what the Court described as a "sophisticated legal structure" in the 1830s. *Id.*

70. *Id.* at 197 (quoting the Treaty of Dancing Rabbit Creek, art. IV, Sept. 27, 1830, 4 Stat. 333, 333).

71. *Id.* (quoting art. IV, 4 Stat. at 334) (second emphasis added).

72. *Id.* at 197–98.

73. *Id.* at 199 (citations omitted).

74. *Ex parte* Kenyon, 14 F. Cas. 353, 355 (W.D. Ark. 1878) (No. 7,720).

75. *See Oliphant*, 435 U.S. at 200.

an Indian," it ultimately held that the Cherokee court lacked subject matter jurisdiction because the defendant left the reservation and established a new domicile in Kansas.[76] Furthermore, the *Kenyon* court stated that it respected tribal sovereignty and recognized the need to uphold such jurisdiction, "because peace and good order demand that the courts of that country, as well as this court, should possess the full measure of their jurisdiction"[77]—so long as tribes exercise such jurisdiction constitutionally.[78] The *Oliphant* Court relied on the *Kenyon* holding and a 1970 Department of the Interior opinion affirming *Kenyon*, observing only in a footnote that the Department of the Interior opinion was inexplicably withdrawn in 1974 and had not been replaced.[79]

Next, the Court examined the Trade and Intercourse Act of 1790,[80] in which Congress granted federal jurisdiction over offenses by non-Indians against Indians which "would be punishable by the laws of [the] state or district . . . if the offense had been committed against a citizen or white inhabitant thereof."[81] Although the Court noted that the original purpose of the General Crimes Act was to protect Indians from "the violences [*sic*] of the lawless part of our frontier inhabitants," it ultimately found that Congress did not consider the problem of tribal jurisdiction over non-Indians at the time because most tribes lacked formal tribal judicial systems.[82]

In contrast, the Court found that Congress did address the issue in 1834 when it tried to create an Indian territory to be governed by a confederation of Indian tribes, which it ultimately expected to become a state.[83] Although the bill failed to pass

76. *Ex parte Kenyon*, 14 F. Cas. at 355 ("When the members of a tribe of Indians scatter themselves among the citizens of the United States, and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States and of the state where they may reside, and, equally with the citizens of the United States and of the several states, subject to the jurisdiction of the courts thereof.").

77. *Id.* at 354.

78. A court must have "jurisdiction over the person, the act, and the place where it was committed" in order to exert jurisdiction over a criminal act within the limits of the Constitution. *Id.*

79. *Oliphant*, 435 U.S. at 201 n.11.

80. Act of July 22, 1790, ch. 33, 1 Stat. 137.

81. *Id.* at 201 (quoting Act of July 22, 1790, ch. 33, § 5, 1 Stat. at 138) (alteration in original).

82. *Id.*

83. *Id.* at 201–02.

(despite multiple proposals),[84] the *Oliphant* Court found that "Congress was careful not to give the tribes of the territory criminal jurisdiction over United States officials and citizens traveling through the area."[85] Still, a House of Representatives report that accompanied the bill described federal criminal jurisdiction as necessary "for some time" to protect residents both on and off the reservation in the absence of "competent tribunals of justice."[86]

The Court also looked to amendments of the General Crimes Act and the Major Crimes Act to support the "unspoken assumption" that the federal government retained some criminal jurisdiction over Indians.[87] Congress amended the General Crimes Act in 1854 to prohibit the federal courts from prosecuting an Indian who had already been tried in tribal court,[88] and created the Major Crimes Act in order to place Indian defendants who committed certain "major" crimes under federal jurisdiction.[89] After examining the General Crimes Act, the Court inferred that if tribal courts had jurisdiction over non-Indians, there would have been a parallel provision prohibiting the retrial of non-Indians as well.[90] With regard to the Major Crimes Act, the Court argued that acknowledging tribal jurisdiction over non-Indians could create an anomalous situation where tribal courts, if they did indeed possess concurrent jurisdiction over major crimes, could prosecute non-Indians for major crimes that the tribe could not prosecute if committed by a member of the tribe.[91]

The *Oliphant* Court quoted a 1960 Senate report recommending the passage of a proposed statute that prohibited trespass onto Indian land for the purpose of hunting and fish-

84. *Id.* at 202 n.13.

85. *Id.* at 202. The Court observed that the exception for "non-Indians who settled without Government business in Indian territory" probably had the purpose of discouraging settlement on land reserved exclusively for tribes. *Id.* at 202 n.13.

86. H.R. REP. NO. 23-474, at 18 (1834).

87. *Oliphant*, 435 U.S. at 203.

88. Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 269, 270 (current version at 18 U.S.C. § 1152 (2006)).

89. Act of Mar. 3, 1885, ch. 342, § 9, 23 Stat. 362, 385 (current version at 18 U.S.C. § 1153).

90. *Oliphant*, 435 U.S. at 203.

91. *Id.* The Court reserved the question of whether the Major Crimes Act created exclusive federal jurisdiction, *id.* at 203 n.14, but nonetheless assumed in its analysis that the federal government had exclusive jurisdiction. *Id.* at 203.

ing.[92] The Court focused on the committee members' statements—that tribes can enforce tribal law "against Indians only; not against non-Indians" and that "non-Indians are not subject to the jurisdiction of Indian courts"[93]—to confirm its assumption that tribal courts lack jurisdiction over non-Indians. The Court ignored the report's express purpose to advocate for equal protection of Indian property interests as a counterpart to existing federal trespass laws.[94]

In sum, although the Court recognized that its evidence of a historical shared presumption among Congress, the executive branch and the lower courts was "not conclusive,"[95] it nevertheless found that tribal courts as a whole do not have the power to try non-Indians.[96] On the basis of dictum in one district court case, two Attorneys General opinions from the mid-nineteenth century, a 1960 statement by a Senate committee, and a 1970 Interior Solicitor's opinion that was subsequently revoked, the Supreme Court nearly eliminated the power of tribal governments to obtain justice for Native American rape victims.

C. TRIBES *DO* HAVE CRIMINAL JURISDICTION OVER CRIMES COMMITTED BY NONMEMBER INDIANS IN INDIAN COUNTRY

In *Duro v. Reina*,[97] the Court considered whether a tribe could prosecute a nonmember Indian defendant.[98] Albert Duro was a member of the Torrez-Martinez Band of Cahuilla Mission Indians living on the Salt River Indian Reservation, where he killed a fourteen-year-old boy from the Gila River Indian Reservation.[99]

After concluding that neither historical evidence nor precedent provided a clear-cut answer, the Court analyzed Duro's case according to the *Oliphant* theory of implied divest-

92. *Id.* at 204–06 (quoting S. REP. NO. 86-1686, at 2–3 (1960)).

93. *Id.* at 205 (citing S. REP. NO. 86-1686, at 2).

94. *See* S. REP. NO. 86-1686, at 2–3.

95. *Oliphant*, 435 U.S. at 206.

96. *Id.* at 212.

97. 495 U.S. 676 (1990), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat. 1892 (codified as amended at 25 U.S.C. § 1301 (2006)). Congress amended Public Law 101-511 to make the reinstatement of tribal authority over all Indians permanent in 1991. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646.

98. Generally, tribes determine membership requirements. L. Scott Gould, *The Congressional Response to* Duro v. Reina*: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 60 n.23 (1994).

99. *Duro*, 495 U.S. at 679.

ment,[100] opining that tribes surrendered sovereignty and jurisdiction over nonmember Indians as well when they entered into a relationship with the United States for protection.[101] The Court also relied on the reasoning in *Oliphant* when it compared the political status of nonmember and non-Indians with respect to the tribal government.[102] Similar to non-Indians, nonmember Indians cannot participate in the political processes of the tribe—they cannot become members,[103] vote, hold office or serve on the juries of some tribal courts.[104] Thus, the Court concluded that tribal governments lack criminal jurisdiction over nonmember Indians.[105]

While the Court held that tribal governments do not have jurisdiction over nonmember Indians,[106] the ultimate effect, as quickly recognized by Congress, was that no government had jurisdiction over nonmember Indians who committed crimes on another reservation.[107] Thus, Congress responded with the "*Duro*-fix,"[108] which amended ICRA to acknowledge expressly

100. The implied divestment argument in *Oliphant* rests on an "unspoken assumption" among Congress, the executive branch, and the lower federal courts that tribes lacked criminal jurisdiction over non-Indians because it had been withdrawn by implication as a necessary result of tribes' dependent status. *Oliphant*, 435 U.S. at 203.

101. *Duro*, 495 U.S. at 686 (citing *Oliphant*, 435 U.S. at 191); *see also* United States v. Wheeler, 435 U.S. 313, 323, 326 (1978) (discussing the Court's implied divestment reasoning).

102. *See Duro*, 495 U.S. at 688.

103. Duro was not eligible for membership in the Salt River Pima-Maricopa Indian Community. *Id.* at 679.

104. *Id.* at 688.

105. *Id.* at 679.

106. *Id.* at 696 ("[N]onmembers, who share relevant jurisdictional characteristics of non-Indians, should share the same jurisdictional status.").

107. *See* Gould, *supra* note 98, at 71 n.84. Currently, federal statutes generally limit jurisdiction over misdemeanors among Indians to tribes; the federal government generally has jurisdiction over felonies committed among Indians. *See* 18 U.S.C. § 1153 (2006) (granting jurisdiction over specific crimes committed in Indian country to the federal government); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1186–87 (2004) (explaining the allocation of jurisdiction among the Navajo Nation and state and federal governments over various crimes). Further, it would not be feasible for the more than 300 tribes recognized by the federal government to enter into reciprocal jurisdictional agreements to prosecute nonmember Indians. Gould, *supra* note 98, at 77.

108. *See* Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified as amended at 25 U.S.C. § 1301 (2006)). The Supreme Court affirmed the constitutionality of the *Duro*-fix in *United States v. Lara*, 541 U.S. 193 (2004), holding that Congress had reinvested tribal courts with criminal jurisdiction over all members of federally recognized tribes. *Id.* at 207.

that tribes have inherent authority over "*all* Indians,"[109] even though a federal appeals court acknowledged that "[t]he exercise of tribal criminal jurisdiction over nonmember Indians is virtually without historical precedent."[110]

D. MODERN TRIBAL GOVERNMENTS CAN AND DO EXERCISE CRIMINAL JURISDICTION

Although tribes have retained and regained authority in many contexts,[111] tribal court jurisdiction over criminal conduct committed on the reservation remains extremely circumscribed, as described above.[112] This section will describe the jurisdiction exercised by tribal courts, both historically and in modern times, with a focus on criminal jurisdiction.

Historically, a substantial majority of cases in tribal courts involved criminal matters,[113] and at the time of *Oliphant*, many tribes exercised criminal jurisdiction over non-Indians.[114] Several government initiatives helped foster the ability of tribes to exercise such jurisdiction. The Indian Reorganization Act[115] (IRA), enacted by Congress in 1934, acknowledged that tribal courts could apply tribal law (within the limits of the uniform Bureau of Indian Affairs constitution).[116] Further, the Tribal Self-Governance Program helps tribes assume a variety of responsibilities, including law enforcement, by providing compacts and single- and multi-year funding agreements.[117] With

109. 25 U.S.C. § 1301(2) (emphasis added).

110. Duro v. Reina, 821 F.2d 1358, 1360 (9th Cir. 1987), *superseded by* 851 F.2d 1136 (9th Cir. 1988), *rev'd*, 495 U.S. 676 (1990).

111. *See, e.g.*, *Duro*, 495 U.S. at 687 (noting that tribal courts resolve civil disputes involving nonmembers, even non-Indians).

112. *See supra* Part I.A–B.

113. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. REV. 1, 4 (1997).

114. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196 (1978) (noting that of 127 reservation court systems that claim criminal jurisdiction, 45 extend or permit extension of their jurisdiction to non-Indians).

115. 25 U.S.C. §§ 461–479 (2006).

116. *See* William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 76 N.D. L. REV. 551, 572–73 (2000) (discussing the "impos[ition]" of an "Anglo-European adversarial system" through the IRA).

117. *See* OFFICE OF TRIBAL SELF-GOVERNANCE, 2007 TRIBAL LISTINGS BY AREA 3–5 (2007), http://www.ihs.gov/NonMedicalPrograms/SelfGovernance/documents/07%20Tribal%20Listing.pdf (providing a list of tribes participating in the tribal self-governance program and information on the specific compacts and funding agreements).

regard to sexual violence, many tribes have sophisticated criminal codes and resources available to help victims cope with abuse.[118] Given the foundation of the court system established by the IRA and recent funding efforts directed at strengthening tribal sovereignty,[119] at least some tribal legal systems would be ready to assume more extensive criminal jurisdiction if given the opportunity.

Tribal governments vary widely in how they structure their judicial systems and how they adjudicate conflicts.[120] For example, some tribes have oral laws,[121] while others have written laws,[122] and tribes differ in the extent to which they are subject to direct federal authority.[123] For some traditional governments, the method of governance has not changed since the colonization of the American continent, and the governmental structure and procedure are unwritten and passed down orally.[124] Other tribal governments have made a deliberate effort to transform their government (without any input from the federal government) and have a written form of government without being subject to the federal government's approval in the exercise of their powers.[125] Other governments were established pursuant to laws such as the IRA.[126] Under this Act, actions of the tribal government are subject to the federal government's direct authority, and the enforcement of any laws passed by the tribal council are subject to the approval of the United States.[127] In spite of the IRA, not all tribal governments have

118. *See* Radon, *supra* note 25, at 1276, 1303–04.

119. *See generally* Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (codified at 25 U.S.C. §§ 3651–3681) (providing financial support and resources for tribal justice systems). Congress promised to provide $50 million per year for fiscal years 2000 to 2007 for tribal court systems under the Act). Tribal justice systems have not received full funding. *Tribal Courts and the Administration of Justice in Indian Country, Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 11, 14 (2008) (statement of Hon. Roman J. Duran, First Vice-President, Nat'l American Indian Court Judges Assn.).

120. *See generally* Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J.L. & PUB. POL'Y 72 (1997) (analyzing the current state of tribal governance and providing suggestions for its reform).

121. *Id.* at 74–75.

122. *Id.* at 75.

123. *See id.* at 74–76.

124. *See id.* at 74–75.

125. *See id.* at 75.

126. 25 U.S.C. §§ 461–479 (2006).

127. Porter, *supra* note 120, at 76.

followed these paths. For example, the Navajo Nation has no constitution but works within a well-developed legal tradition of written government.[128]

Anglo-American courts differ from tribal courts in that the Anglo-American system focuses on individual rights in an adversarial system and resolves criminal disputes through punishment and removal of the offender from the community.[129] In contrast, many traditional Native American legal systems emphasize restoration of the offender and his or her reintegration into the community[130] through non-adversarial strategies known as tribal peacemaking (TPM).[131] The strategy operates through the use of behavior-altering mechanisms such as anger, shame, embarrassment, and encouragement[132] in the context of an oral ceremony where the victim, the accused, and family members sit in a circle.[133] Although some tribes have been extremely successful at reducing crime rates through TPM,[134] tribes generally do not use TPM in adjudications involving non-Indian or nonmember defendants,[135] and commentators question the effectiveness of TPM in the context of domestic violence.[136]

Tribal judicial systems, however, increasingly incorporate aspects of the Anglo-American system.[137] For example, many tribes now provide independent judicial review, appellate review, and ethical guidelines for practitioners.[138] Further, the Federal Rules of Civil Procedure influence some tribal judges in

128. *Id.*

129. Bradford, *supra* note 116, at 566.

130. *Id.* at 565.

131. *See id.* at 577–79.

132. *Id.* at 580.

133. *Id.* at 581.

134. For example, the Tlingit found that five years after implementing TPM, crime decreased by 35%. *Id.* at 590. However, certain offenders challenge the use of TPM in the modern world. *See id.* at 589–99 (recounting a well-publicized case where the offenders flouted the TPM agreements).

135. *Id.* at 579–80.

136. *See, e.g.*, Rashmi Goel, *No Woman at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases*, 15 WIS. WOMEN'S L.J. 293, 321–28 (2000) (discussing the use and feasibility of TPM in the context of domestic violence and female victims).

137. O'Connor, *supra* note 113, at 5.

138. *See id.*

the courtroom.[139] Even where tribal judges sometimes follow alternative procedures to adapt to local needs, they have found that outside legal counsel have no difficulties in submitting to different procedural rules.[140] Some tribes, such as the Navajo, apply substantive laws in the courtroom as well—with the express caveat that tribal laws do not apply where they violate United States laws.[141] Further, tribal courts often use processes similar to those used by state and federal courts in developing tribal common law.[142] Although ICRA diverges from the Bill of Rights in the extent to which it protects individual defendants, some argue that tribes did not need ICRA because tribal legal systems already had traditions of fairness and justice equivalent to those it imposed.[143]

E. TRIBES EXERCISE EXPANDED CIVIL JURISDICTION OVER CERTAIN SUBJECT MATTER

Since 1970, federal Indian policy has focused on self-determination and renewing tribal self-governance in a variety of contexts. Self-determination policy recognizes the inherent sovereignty of tribes[144] and promises tribes that the federal government will work with tribes on a government-to-government basis.[145] This section will briefly describe two programs—one under the Clean Water Act[146] and one under the

139. *See* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 325 (1998).

140. *Id.*

141. For example, a provision of the *Navajo Nation Code* directs tribal courts to apply "any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws." NAVAJO NATION CODE tit. 7, § 204(a) (1995).

142. *See* Cooter & Fikentscher, *supra* note 139, at 328 (noting that most tribal courts have some, but not all, of the features necessary for the Anglo-American common-law process).

143. *See, e.g.*, Bradford, *supra* note 116, at 574 (explaining that tribes already operated under "[a]ncient and sacred tribal traditions of fairness and justice").

144. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450–450n (2006)) (authorizing the federal government to provide funding to recognized tribes for the purposes of furthering the welfare of the tribes while maintaining their sovereignty).

145. *See* Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (Apr. 29, 1994) (instructing federal agencies to work with tribes on a "government-to-government" basis).

146. 33 U.S.C. §§ 1251–1377 (2000).

Indian Child Welfare Act[147] (ICWA)—where the federal government has transferred jurisdiction over a particular subject matter to tribal governments. The structure of these two initiatives will provide background for the proposal of an opt-in program of tribal criminal jurisdiction described in Part II.

Both ICWA and the Clean Water Act enable tribes to assume additional responsibility in a specific subject area. Congress enacted ICWA to counteract the disproportionate removal and inhumane treatment of Native American children by state and local agencies, and its provisions strongly favor tribal self-determination with regard to custody of Native American children.[148] For example, the Act permits tribes to petition for "reassumption of jurisdiction" over child custody cases being heard in state courts.[149] Similar to the criminal justice system, the American system of adoption disproportionately affects the Native American community and differs from the way the community would have dealt with adoptions before interference by courts.[150]

Likewise, the Clean Water Act (and other environmental statutes) provides for the "Treatment as State" (TAS) program, under which tribes can promulgate and enforce water quality standards that are stricter than federal standards, so long as they follow a certain process and receive EPA approval.[151] Initially passed to fill in the regulatory gaps of federal environmental law, the TAS program relied on established tribal governments, fixed territories, and longstanding commitments to protection of the environment.[152] Indeed, lawsuits filed against tribes demonstrate real differences between tribes and states in

147. 25 U.S.C. §§ 1901–1963 (2006).

148. *See* Catherine M. Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, a Foundation for the Future*, 27 CREIGHTON L. REV. 661, 662–63 (1994) (noting the significance of the Act for its "implicit repudiation of the guardian-ward relationship that the United States had compelled upon native tribal peoples").

149. 25 U.S.C. § 1918 ("Any Indian tribe which became subject to State jurisdiction . . . may reassume jurisdiction over child custody proceedings.").

150. Brooks, *supra* note 148, at 665 ("In devising a system of child placement and adoption designed to distance the child from his or her biological family, American jurisprudence has created a system of child-rearing that is foreign to the American Indian population, upon which the process is used disproportionately frequently.").

151. *See* 33 U.S.C. § 1377(e).

152. William H. Rodgers, Jr., *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 818 (2004).

the enforcement of federal environmental laws in terms of perspective, commitment, and legal posture.[153]

Regulations promulgated under ICWA describe the process that tribes must go through to reassume exclusive jurisdiction for a particular subject area.[154] The application requires the tribe, inter alia, to describe its tribal court system, provide copies of tribal rules and procedures for the exercise of jurisdiction over the subject area, and cite provisions of the tribal constitution that allow tribal jurisdiction over the subject matter.[155] The Assistant Secretary of Indian Affairs reviews each application and approves it if it meets certain requirements.[156] The petition must show that the tribal constitution authorizes such jurisdiction and that the tribe has a procedure for clearly identifying persons who will be subject to the tribe's jurisdiction.[157] The Assistant Secretary must also determine that a tribe appears able to exercise jurisdiction over Indian child custody matters in a manner consistent with due process and the other safeguards embodied in ICRA and that the tribe has shown that sufficient child care services are available for children who are removed from their homes.[158] The Assistant Secretary publishes a notice of approved petitions in the *Federal Register* that clearly defines the territory subject to the re-assumption of jurisdiction, and sends a copy to the tribe and the attorney general, governor and highest court of the state(s) affected by the change in jurisdiction.[159] If the Assistant Secretary does not approve the petition, then the Bureau of Indian Affairs must notify the tribe of its reasons for not approving the petition, offer technical assistance to remedy the defects and allow the tribe to re-petition after correcting the defects in the original plan.[160]

153. *See id.* at 820–23 (discussing three lawsuits filed against tribes for alleged violations of the Clean Water Act and the interests of states and tribes in these cases).

154. *See* Allison M. Dussias, Note, *Tribal Court Jurisdiction Over Civil Disputes Involving Non-Indians: An Assessment of* National Farmers Union Insurance Cos. v. Crow Tribes of Indians *and a Proposal for Reform*, 20 U. MICH. J.L. REFORM 217, 239–40 (1986) (describing the process for reassumption of jurisdiction); *see also* Tribal Reassumption of Jurisdiction over Child Custody Proceedings, 25 C.F.R. § 13 (2008).

155. 25 C.F.R. § 13.11(a).

156. *Id.* § 13.12(a).

157. *Id.*

158. *Id.*

159. *Id.* § 13.14(a)–(b).

160. *Id.* § 13.14(c)–(d).

Similarly, the Clean Water Act allows tribes to apply to the Environmental Protection Agency for TAS status.[161] As a threshold matter, the tribe must prove that it constitutes a governing body that carries out "substantial governmental duties and powers."[162] Second, the tribe must show that the functions that it seeks to regulate pertain to the management and protection of water resources.[163] Last, the tribe must be "reasonably capable," in the Administrator's judgment, of carrying out the functions in a manner consistent with the statute and all relevant regulations.[164] Once a tribe receives TAS status, then it follows the same regulations as a state in promulgating its standards.[165] In what may be the only challenge to a particular standard, the Tenth Circuit in *City of Albuquerque v. Browner*[166] affirmed the Isleta Pueblo Indians' enforcement of a more stringent tribal water-quality standard on the effluent of an upstream wastewater plant and accepted the argument that the tribe's ceremonial use of the river supported the need for a more stringent water-quality standard.[167] Tribes, once given jurisdiction under the Clean Water Act, have promulgated and enforced standards relevant to the special needs of their members. Part II of this Note will propose an opt-in program that would allow tribes to implement more stringent sexual-assault laws and impose greater penalties.

F. THE JURISDICTIONAL MAZE IMPEDES EFFECTIVE INVESTIGATION AND PROSECUTION.

Despite the success of tribal governments with assuming jurisdiction over water quality and adoption, the jurisdictional maze prevents successful prosecution. The effect of *Oliphant* and its progeny is two-fold. First, tribes cannot prosecute non-Indians who rape Native American women in Indian country. Thus, if a non-Indian sexually assaults a Native American person, then federal courts (or state courts, in Public Law 280 states)[168] have exclusive jurisdiction.[169] If a non-Indian rapes a

161. *See* 33 U.S.C. § 1377(e) (2000); *see also* 40 C.F.R. § 131.8 (2008) ("Requirements for Indian Tribes to administer a water quality standards program.").

162. 33 U.S.C. § 1377(e)(1).

163. *Id.* § 1377(e)(2).

164. *Id.* § 1377(e)(3).

165. *See* 40 C.F.R. § 131.4(c).

166. 97 F.3d 415 (10th Cir. 1996).

167. *Id.* at 428–29.

168. *See* 18 U.S.C. § 1162 (2006) (granting several states criminal jurisdic-

non-Indian in Indian country, then the court of the state in which the reservation is located has jurisdiction over the crime, even though it occurred on Indian land.[170] Given that a significant number of offenders are non-Indians,[171] tribes must rely on federal and state prosecutors to obtain justice for most rapes.

Tribes, in contrast, can prosecute only Native Americans who commit crimes that do not constitute major crimes as defined by the Major Crimes Act,[172] and can punish the perpetrators only to the extent permitted by ICRA.[173] Therefore, if an Indian sexually assaults another Indian, then federal courts have jurisdiction under the Major Crimes Act,[174] and tribal courts may have concurrent—but extremely limited—jurisdiction to impose lesser penalties.[175] Although many tribes with large numbers of nonmember Indians have found limited misdemeanor jurisdiction to be essential to self-governance,[176] tribal penalties cannot successfully deter sexual assault when the federal government fails to prosecute felony assaults.

II. AN "OPT-IN" PROGRAM FOR TRIBES TO ASSUME CRIMINAL JURISDICTION IS THE MOST EFFECTIVE SOLUTION

Tribal jurisdiction represents the most effective and the most appropriate option for prosecution of sexual assaults. An opt-in program would provide a gradual transition to full tribal

tion over certain Indian countries located within their state to the same extent as permitted, under state law, for non-Indian country territory).

169. *Id.*; AM. CIVIL LIBERTIES UNION, THE RIGHTS OF INDIANS AND TRIBES 145–58 (Stephen L. Pevar ed., 2002).

170. *See* Draper v. United States, 164 U.S. 240, 247 (1896) (holding that state courts may have jurisdiction over crimes committed by non-Indians against non-Indians in Indian country); United States v. McBratney, 104 U.S. 621, 624 (1882) (holding that federal courts lack jurisdiction over crimes committed by a non-Indian against another non-Indian within a reservation).

171. AMNESTY INT'L, *supra* note 9, at 5.

172. 18 U.S.C. § 1153 (transferring jurisdiction over certain crimes to federal authorities).

173. *See* 25 U.S.C. § 1302(7) (2006) (limiting tribal governments to imposing a punishment of imprisonment longer than one year and/or a fine greater than $5,000).

174. *See* 18 U.S.C. § 1153(a) (granting jurisdiction to the federal government over sexual-abuse crimes).

175. *See* AM. CIVIL LIBERTIES UNION, *supra* note 169, at 148–49.

176. *See* Gould, *supra* note 98, at 72 n.84 (discussing the presence of a jurisdictional "void" if tribes are not allowed to prosecute misdemeanors); *cf.* 18 U.S.C. § 1302(7).

jurisdiction over sexual assault and other criminal matters and would assuage any concerns that non-Indian defendants will not receive due process. As described above, existing programs under ICWA and the Clean Water Act provide a model for a program to allow some tribes to undertake criminal jurisdiction. Ultimately, as Part III asserts, both law and policy support the implementation of an opt-in program as highly beneficial to victims.

A. CONGRESS'S ROLE IN CREATING AN OPT-IN PROGRAM

This Note proposes the creation of an opt-in program that allows tribes to assume criminal jurisdiction over acts committed on the reservation. Accomplishing this goal requires a number of steps. First, ICRA must be amended, as it was for the *Duro*-fix,[177] to include "all persons."[178] This would enable tribes to extend their criminal jurisdiction to include non-Indians. Second, Congress must amend the Major Crimes Act so that it explicitly allows concurrent tribal jurisdiction over sexual assault. Thus, tribes that gain entry into the opt-in program would have the freedom to prosecute, but Native American women from nonparticipating tribes would still receive the protection of the federal government. Third, Congress would have to amend ICRA to allow approved tribal governments to impose punishments appropriate to the crime being prosecuted. In addition, Congress must provide resources for the BIA to administer the opt-in program. This would cover the payment of public defenders in tribal courts and funding for the BIA to help qualified tribes assume criminal jurisdiction and make arrangements for long-term incarceration. Finally, Congress would need to provide for appellate review, whether in the federal courts or in a specialized appellate court.

Congress has the authority to reinvest tribal sovereignty by amending these statutes to allow tribes to opt-in to criminal

177. *See* 25 U.S.C. § 1301(2) (extending jurisdiction to include nonmember Indians).

178. The *Duro*-fix, where Congress extended tribal criminal jurisdiction to nonmember Indians, required nothing more than a simple amendment to ICRA that changed the words "all members" to "all Indians." *See* Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (1990) (amending 25 U.S.C. § 1301(b) (1988) by reinstating until September 30, 1991 tribal criminal jurisdiction to "all Indians"). Congress made the change permanent the next year in the Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified as amended at 25 U.S.C. § 1301) (deleting the sunset provision).

jurisdiction.[179] In a challenge to the *Duro*-fix, the Supreme Court affirmed the inherent, not delegated, authority of tribes to prosecute and punish nonmember Indians.[180] While beyond the scope of this Note, this distinction is important for understanding the source of governmental power.[181] Briefly, when tribal authority is delegated, the source of the power is Congress, and the tribe merely exercises the narrow powers granted by Congress.[182] But when tribal authority is inherent, the source of the power is the tribe and the tribe is not limited to the fulfillment of a narrow congressional directive.[183]

Duro and *Oliphant* held that tribes do not have criminal jurisdiction over nonmember Indians and non-Indians, respectively. The Court relied on similar reasoning in both cases—that prosecution by tribal governments disadvantages nonmember Indians and non-Indian defendants.[184] Yet, with respect to tribal governments, nonmember Indians and non-Indians do not differ other than by race.[185] Congress chose to reinvest inherent tribal sovereignty with respect to nonmembers,[186] and has the authority to implement an "*Oliphant*-fix."[187]

179. *Cf.* United States v. Lara, 541 U.S. 193, 207 (2004). For a discussion of using an opt-in provision for domestic violence, see Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 227–28 (2008).

180. *Lara*, 541 U.S. at 206.

181. *See* Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After* United States v. Lara, 35 ENVTL. L. 471, 473 (2005) (discussing the difference between delegated and inherent power and the sources of such power).

182. *See id.*

183. *See id.*

184. *See* Duro v. Reina, 495 U.S. 676, 694 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

185. *Cf.* G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty,"* 76 MARQ. L. REV. 401, 430 (1993) (explaining that the inclusion of nonmember Indians and the exclusion of non-Indians from "tribal jurisdiction [is] impermissibly based on race"). *But see* Morton v. Mancari, 417 U.S. 535 (1974) (holding that the Bureau of Indian Affairs hiring preference for "Indians" was not a racial classification, but rather a political class related to membership in a federally recognized tribe).

186. *See* 25 U.S.C. § 1301(2) (2006) (extending criminal jurisdiction of tribes to include "all Indians").

187. *Cf.* N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 207–16 (2008) (describing and critiquing draft legislation which would, inter alia, restore inherent tribal sovereignty and effectively overrule *Oliphant* and other recent Supreme Court decisions limiting tribal sovereignty).

Congress must consider certain factors in order to reinvest inherent sovereignty with regard to criminal jurisdiction. First, *Oliphant* prohibits tribes from exercising jurisdiction over non-Indians because of due process considerations.[188] The U.S. Constitution requires that tribal courts extend all of the Bill of Rights protections to non-Indian defendants[189] because regardless of race or tribal affiliation, any defendant is a U.S. citizen, and thus entitled to constitutional protection.[190] Then again, ICRA already imposes nearly all of those requirements on tribal courts,[191] and with additional funding, it would be easy for tribal courts to meet the single remaining requirement that defendants in a criminal trial have the opportunity to have legal counsel provided by the court.[192] The government agency administering the program would require tribes to provide full Bill of Rights protections to criminal defendants. Congress has already shown that it recognizes the problems with criminal justice in Indian country and acknowledges the need to commit funds,[193] and could easily direct funding toward the provision of such legal counsel. Second, ICRA limits the punishment that

188. *See Oliphant*, 435 U.S. at 194 ("[D]efendants [in tribal courts] are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings. However, the guarantees are not identical.").

189. *Cf.* United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) (expressing concern that Congress can subject Lara, a U.S. citizen, "to a sovereignty outside the basic structure of the Constitution").

190. If the source of power for tribal courts is Congress, then the Constitution would bind any court exercising jurisdiction over defendants who are U.S. citizens. *Id.* Whether the authority is a grant from Congress, a relaxation of restrictions, or retained as a part of original tribal sovereignty exceeds the scope of this Note.

191. *See* 25 U.S.C. § 1302 (discussing the rights which cannot be infringed by tribal governments); Larry Cunningham, Note, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2199 (2000) ("The Indian Civil Rights Act of 1968 . . . guarantees basic due process protections to Indians tried in tribal courts; the same protections could easily be extended to non-Indians.").

192. *Compare* Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963) (holding that under the Sixth Amendment, defendants have the right to an attorney, and if they cannot afford an attorney, one will be appointed for them), *with* 25 U.S.C. § 1302(6) (providing that defendants have the right to an attorney, but this attorney must be provided at their "own expense").

193. *See* Office of Violence Against Women, U.S. Dep't of Justice, STOP Violence Against Women Formula Grant Program, http://www.ovw.usdoj.gov/stop_grant_desc.htm [hereinafter STOP Violence] (last visited Apr. 12, 2009) ("STOP formula grants and subgrants are intended for [among other purposes] . . . [d]eveloping, enlarging, or strengthening programs addressing the needs and circumstances of Indian tribes in dealing with violent crimes against women, including the crimes of sexual assault and domestic violence.").

can be imposed by a tribal court,[194] and Congress should amend ICRA to allow tribes to dictate punishments that are commensurate with the seriousness of the crime.

B. THE BUREAU OF INDIAN AFFAIRS' ROLE IN CREATING AN OPT-IN PROGRAM

The BIA's unique experience assessing the capacity of tribal legal systems under ICWA makes it the most appropriate entity to administer an opt-in criminal jurisdiction program.[195] To apply, a tribe would have to demonstrate that it is a federally recognized[196] governing body that carries out substantial governmental duties and powers.[197] Second, the application would show that the tribal constitution authorizes such jurisdiction,[198] and that the tribe has a procedure for clearly identifying persons who will be subject to the tribe's jurisdiction.[199] Third, similar to the determination by the BIA in the re-assumption of jurisdiction program under ICWA, the BIA would determine if the tribe appears able to exercise jurisdiction over criminal matters in a manner consistent with due process and the other safeguards embodied in ICRA.[200] Finally, the tribe would need

194. *See* 25 U.S.C. § 1302(7) (prohibiting tribes from imposing "cruel and unusual punishment" on criminals).

195. In general, the BIA authorizes the creation of—and changes to—tribal governments, constitutions, courts, and tribal codes. *Id.* § 476; *see also id.* § 2 (conferring power to Commissioner of Indian Affairs); Duro v. Reina, 495 U.S. 676, 691 (1990). For example, the BIA, in cooperation with the Department of Justice, oversees the Tribal Courts Assistance Program, which helps tribal governments create and improve tribal judiciaries. Bureau of Justice Assistance, Programs: Tribal Courts Assistance Program (TCAP), http://www.ojp.usdoj.gov/BJA/grant/tribal.html (last visited Apr. 12, 2009); *see also* Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (codified in scattered sections of 25 U.S.C.).

196. Federal recognition is necessary to establish tribal identity. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3], at 138–39 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN'S HANDBOOK].

197. 33 U.S.C. § 1377(e)(1) (2000).

198. Some tribal constitutions limit the scope of tribal jurisdiction to be equivalent to the jurisdiction of the Court of Indian Offenses. *See, e.g.*, MIAMI TRIBE OF OKLA. CONST. art. VIII, § 1 ("[T]he judicial authority of the Tribe shall be exercised by the Court of Indian Offenses."); *cf.* Dussias, *supra* note 154, at 242 (noting that changes to some tribal codes and constitutions would be necessary for federal recognition of tribal jurisdiction in civil cases involving Indians and non-Indians). The Courts of Indian Offenses have jurisdiction over offenses by Indians committed in Indian country. 25 C.F.R. § 11.102(a) (2008).

199. *Id.* at 240 (describing the procedural requirements under ICWA).

200. *Id.*

to show that it has made incarceration arrangements for individuals who receive sentences of greater than one year.[201]

If the BIA approves the petition, then a procedure similar to that of ICWA should be followed to ensure notification of all affected parties. This includes publishing a notice in the *Federal Register* that clearly defines the territory now governed by the tribe, and the sending of a copy of the notice to the tribe, attorney general, governor, and highest court of the state or states affected by the change in jurisdiction.[202] If the BIA does not approve the petition, then it would notify the tribe of the reasons for its disapproval, offer technical assistance to remedy the defects, and allow the tribe to re-petition after correcting the defects in the original plan.[203]

C. AN OPT-IN PROGRAM EFFECTUATES THE INTERESTS OF RAPE VICTIMS AND TRIBES

To start, tribal jurisdiction will enhance the probability that rape victims see justice, because tribal courts provide a more appropriate forum than federal courts for disputes that involve Indians or take place in Indian country. The courthouse is closer,[204] making it easier for victims to present witnesses and evidence,[205] and the definition and prosecution of the crime by members of the community ensures a tailored response that is far more likely to meet the unique needs of a Native American rape victim and the community.[206] There are other efficiency gains as well: tribal law enforcement and tribal courts would operate as a cohesive unit, making it less likely that cases get misplaced in the transfer from tribal to federal government.[207]

201. Some tribes that lack jails make arrangements to pay state or county facilities to accommodate defendants imprisoned by a tribal court. *See* Andrea Smith, *How the Criminal Justice System Uses Domestic Violence Programs Against Native Women*, WOMEN AND PRISON: A SITE FOR RESISTANCE, n.d., http://womenandprison.org/social-justice/andrea-smith.html. The Department of Justice also makes grants available to tribes to plan and construct correctional facilities. Bureau of Justice Assistance, Programs: Correctional Facilities on Tribal Lands Program, http://www.ojp.usdoj.gov/BJA/grant/tribal_correction.html (last visited Apr. 12, 2009).

202. Dussias, *supra* note 154, at 240 (citing 25 C.F.R. § 13.14(a)(3), (b) (1986)).

203. *Id.* at 240–41 (citing 25 C.F.R. §§ 13.14(c), (d), 13.16 (1986)).

204. *Id.* at 233.

205. *Id.*

206. *See* Radon, *supra* note 25, at 1302.

207. *Id.* ("The criminal justice system cannot function when its two main components—police and prosecutors—work in isolation.").

Furthermore, such an approach does not force Native American women to choose between supporting tribal sovereignty and seeking prosecution,[208] and is likely to have broad support within the Native American community.[209]

In particular, an opt-in program would be ideal because tribes differ in their ability and willingness to assume broader jurisdiction.[210] The current system often does not provide Native American rape victims with justice and may encourage self-help remedies from the community.[211] Thus, where the tribal government is willing and able to assume jurisdiction and seek justice on the victim's behalf, the tribe should do so. Before *Oliphant*, many tribes extended criminal jurisdiction to non-Indians, and it is likely that they will wish to do so again if given the opportunity.[212]

On the contrary, jurisdiction should not be transferred to tribal governments that cannot or will not meet certain minimum requirements. Tribes that are unwilling to exercise jurisdiction would probably not bother with the lengthy application process, and an opt-in program would carefully screen tribes for the ability to carry out significant law-enforcement responsibilities. Yet an opt-in program leaves the opportunity available to tribes that cannot currently afford to develop a judiciary but may be able to in the future.[213]

Lastly, allowing tribal jurisdiction would benefit both the federal government and tribal governments. Tribal governments would benefit from improved tribal courts, because broadened jurisdiction is "integral to the internal legitimacy of tribal legal systems and the extent to which tribal communities accept them as valid institutions,"[214] and benefits victims of all crimes committed by non-Indians on the reservation by establishing an alternate forum for prosecution.[215] Also, some argue that transferring jurisdiction over important matters preserves

208. *Id.*

209. For example, the National Congress of American Indians supports increases in tribal sentencing authority, prosecutorial authority, and federal support to enhance tribes' response to violence against Native American women. Norrell, *supra* note 16.

210. Dussias, *supra* note 154, at 237.

211. Cunningham, *supra* note 191, at 2201.

212. Radon, *supra* note 25, at 1292.

213. *See id.* at 1311.

214. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1109–14 (2005).

215. *See* Radon, *supra* note 25, at 1303.

institutional incentives for tribal judges to do their jobs well,[216] and that increased tribal jurisdiction is likely to enhance the day-to-day functioning of the tribal judicial system.[217] Further, self-determination has had, and under an opt-in program will most likely continue to have, the effect of improving the accountability of tribal officials to members.[218] Further, assumption of jurisdiction over cases and responsibility for prosecution by tribes would likely reduce reliance on federal and state resources. Finally, allowing some tribes to prosecute major crimes frees federal prosecutors and courts to proceed more efficiently with the types of cases with which they are most competent.[219]

D. OBSTACLES TO CREATING AN OPT-IN PROGRAM FOR ASSUMING CRIMINAL JURISDICTION

For this Note, the primary concern with regard to an opt-in program for criminal jurisdiction is whether such a solution would meet the needs of Native American rape victims. Some critics might voice concern that tribes would use Tribal Peacemaking (TPM) inappropriately.[220] As discussed above, however, tribes generally do not use TPM where the defendant is not a member, and the vast majority of reported perpetrators are non-Indians. Additionally, a victim's advocate might argue that a tribal court might lack the resources or the willpower to train judges, prosecutors, police, and staff to deal with emotionally fragile sexual assault victims. The proposed opt-in program accounts for such a possibility by requiring the BIA to set standards and provide funding as part of its role in determining which tribal courts it will allow to assume criminal jurisdiction.

The general public's main concerns would likely relate to whether defendants would receive due process in tribal courts and whether tribal courts would be likely to exercise jurisdiction so as not to create a public safety hazard off the reserva-

216. Berger, *supra* note 214, at 1052, 1115–18 ("[I]nstitutional pride leads the judges to carefully scrutinize the facts, law, and morality of the issues before them to fulfill this institutional role and resist temptations to rule based on the status of the parties or political pressure.").

217. *See id.* at 1119–20 (arguing that tribal courts with broader judicial experience function better than tribal courts that deal with more limited issues).

218. Washburn, *Federal Criminal Law*, *supra* note 33, at 832 (citation omitted).

219. Washburn, *American Indians*, *supra* note 33, at 729–30 (arguing that the physical and cultural distances between tribal communities and federal prosecutors undermine the institutional competence of the latter).

220. Bradford, *supra* note 116, at 584–85.

tion. Due process concerns probably depend more on the public's perception of unfairness (despite the sophistication of many tribal courts) than on any proof that tribal courts are likely to be unfair to non-Indian defendants.[221] ICRA closely resembles the Bill of Rights, with the exception of the right to free legal counsel,[222] and some courts even provide greater protections than the Bill of Rights.[223] Some tribes require jurors to be tribal members—but other tribes, like the Navajo, select jurors from a jury pool that reflects a cross-section of the community.[224] Some tribes do implement modes of dispute resolution and tribal laws that differ from state and federal laws,[225] but most tribal courts chose to base their codes and judicial systems on the BIA code and courts,[226] and the supremacy of state and federal laws in district courts has resulted in much confluence between the federal and tribal legal systems.[227] Ultimately, both the theory and the practice of Indian dispute resolution and the TPM concept indicate that it cannot successfully be applied to defendants who are not members of the community, and thus is not applied to them.[228] Therefore, allowing a tribe to prosecute a non-resident (whether non-Indian or a non-member Indian) should not differ from allowing a state to prosecute a citizen of another state for violations of its own laws.[229] Indeed, as one scholar points out, the chances of a rogue tribal

221. Cunningham, *supra* note 191, at 2200. One scholar surveyed ten cases involving ICRA interpretation and found "no indication that tribal courts have succumbed to the temptation to favor the insider at the expense of outsiders." Mark Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 578 (2000).

222. Radon, *supra* note 25, at 1306–08. Congress has already shown its willingness to provide additional funding to tribal courts. Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (codified in scattered sections of 25 U.S.C.). Tribes that qualified for an opt-in program could automatically receive additional funding for defense counsel on an as-needed basis. Indeed, tribes that have benefited from tourism and gambling may not need federal assistance at all.

223. For example, at least one tribe grants a jury trial for all crimes, regardless of severity. Radon, *supra* note 25, at 1308.

224. Burleson, *supra* note 66, at 215–16.

225. For instance, traditional Native legal systems emphasize restoration of the offender and his (or her) reintegration into the community. Bradford, *supra* note 116, at 565.

226. Dussias, *supra* note 154, at 225–26.

227. Bradford, *supra* note 116, at 575.

228. *See id.* at 578–79.

229. *See* Cunningham, *supra* note 191, at 2200–01.

court making decisions in bad faith are similar to the chances of rogue state courts doing the same.[230]

An independent judiciary and the availability of appellate review would further allay many concerns about rogue tribal courts. Independent judicial review is important to the protection of individual rights,[231] but "the ability of tribal councils to remove judges limits the independence of tribal courts."[232] The BIA could play a key role in determining whether a tribe's past functioning indicates that it has independently functioning courts. Appellate review, vested in either a federal court or a specialized tribal appellate court, would further protect individuals' freedom against arbitrary or abusive actions by tribal governments.[233] Although federal appellate review could intrude on tribal sovereignty by imposing federal laws on tribal decisions or by creating the perception that tribal courts are "inferior,"[234] tribal appellate review in tribal courts—with no recourse to the federal judicial system—may feed the paranoia. In contrast, appellate review in the federal courts would not require the creation or funding of any additional courts and would alleviate concerns in the non-Indian community of discrimination against outsiders.

Lack of political support to create such a program is also a valid concern. The Supreme Court has affirmed that tribes have inherent criminal jurisdiction over Indians—but *Oliphant* and *Lara* both make it clear that for tribes to exercise such jurisdiction, Congress must reinvest tribal jurisdiction,[235] as it has done through programs such as the "Re-assumption of Jurisdiction" for the adoption of Indian children and "Treatment

230. *See* Berger, *supra* note 214, at 1096–97.

231. *See* Burleson, *supra* note 66, at 215.

232. *Id.* (citing O'Connor, *supra* note 113, at 5).

233. *See, e.g.*, Ry. Express Agency v. New York, 336 U.S. 106, 112–13 (1949) ("[N]othing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.").

234. Radon, *supra* note 25, at 1309.

235. United States v. Lara, 541 U.S. 193, 210 (2004) ("[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians."); Duro v. Reina, 495 U.S. 676, 698 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that ICRA and the prevalence of crime on reservations are "considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians").

as State" under federal environmental laws.[236] Congress has recognized both the need to protect Native American women from sexual assault[237] and the need for strong tribal governments to counteract the high levels of crime in Indian country.[238] For example, a recent Senate bill proposed that the Homeland Security Act be amended to recognize the inherent sovereignty of tribes with regard to law enforcement and criminal matters.[239] Although this specific bill has not yet passed, recent legislative history with regard to criminal justice and sexual assault suggest that Congress would support an opt-in solution.[240]

On the whole, the greatest obstacle to tribal jurisdiction may not lie in the structure of tribal governments or their adherence to Anglo-American ideals, but simply in the lack of consistent funding and clear direction from Congress. The U.S. Civil Rights Commission conducted a study on tribal implementation of ICRA and found that "while there [are] problems in tribal courts, they [are] primarily due to insufficient funds and the problems of any new court system in establishing its role and the scope of its authority."[241] As with other obstacles discussed in this section, Congress can remedy the lack of fund-

236. *See* Rodgers, *supra* note 152, at 818–19; Pauline Turner Strong, *What Is an Indian Family? The Indian Child Welfare Act and the Renascence of Tribal Sovereignty*, 46 AM. STUD. 205, 224 (2005).

237. *See, e.g.*, STOP Violence, *supra* note 193.

238. *See, e.g.*, Indian Tribal Justice Technical and Legal Assistance Act of 2000 §§ 2–3, Pub. L. No. 106-559, 114 Stat. 2778, 2778–79 (codified at 25 U.S.C. §§ 3651–53, 3661–66 & 3681) (providing funding for tribal governments to strengthen tribal justice systems); Cawley, *supra* note 14, at 434–35.

239. Tribal Government Amendments to the Homeland Security Act of 2002, S. 578, 108th Cong. (2003).

240. *See, e.g.*, Tribal Law and Order Act of 2008, S. 3320, 110th Cong. (2008) (requiring federal authorities to file declination reports when they refuse a prosecution and allowing tribes the option to increase maximum sentences to three years as long as counsel is provided to defendants); 154 CONG. REC. S7158 (daily ed. July 23, 2008) (statement of Sen. Dorgan) ("One of the primary causes for violent crime is the disjointed system of justice in Indian country that is broken at its core. The current system limits the authority of Tribes to fight crime, and requires tribal communities to rely completely on the United States to investigate and prosecute violent crimes occurring on reservations."); S. COMM. ON INDIAN AFFAIRS, 110TH CONG., CONCEPT PAPER FOR AN INDIAN COUNTRY CRIME BILL 15, *available at* http://www.indian.senate.gov/public/_files/IndianCrimeBillCONCEPTPAPER.pdf (recommending a pilot project acknowledging the inherent authority of tribes over any person who commits sexual assault on a reservation).

241. Berger, *supra* note 214, at 1096 (citing U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 29–57 (1991)).

ing through its exercise of plenary power to establish an opt-in program.

III. LAW AND POLICY BOTH INDICATE THAT TRIBES SHOULD HAVE CRIMINAL JURISDICTION

A strong legal and policy basis exists for overturning *Oliphant*. First, the evidence supporting the finding of implicit divestment in *Oliphant*, on which *Duro* relied for its reasoning, is not particularly strong.[242] In both *Oliphant* and *Duro*, the Supreme Court held that tribal criminal jurisdiction had been impliedly divested by tribes' dependent status,[243] and if exercised, such jurisdiction would constitute an "unwarranted intrusion[] on [defendants'] personal liberty."[244]

In analyzing the Choctaw Treaty in *Oliphant*, the Court disregarded a central principle of Indian law: that courts should construe treaties as the tribes would have understood them.[245] In interpreting text from the treaty that stated that "the tribe is guaranteed jurisdiction and government of all the persons and property that may be within their limits,"[246] the Choctaw could reasonably have understood this provision to mean that they would have jurisdiction over any persons who entered their territory, Indian or otherwise.[247] Similarly, the Court relied on a lone 1878 district court opinion, which has garnered little clear support from the federal government.[248]

The Court may also have misinterpreted evidence of congressional intent. For example, it construed the General Crimes Act as evidence of Congress's intent to remove jurisdic-

242. Radon, *supra* note 25, at 1290–93.

243. Duro v. Reina, 495 U.S. 676, 686 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 207–08 (1978).

244. *Duro*, 495 U.S. at 692 (quoting *Oliphant*, 435 U.S. at 210).

245. Peter C. Monson, Casenote, United States v. Washington (Phase II)*: The Indian Fishing Conflict Moves Upstream*, 12 ENVTL. L. 469, 476 n.38 (1982) (citing Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979)); *see also* COHEN'S HANDBOOK, *supra* note 196, § 2.02 (describing the canons of construction of federal Indian law).

246. Radon, *supra* note 25, at 1291 (citation omitted) (internal quotation marks omitted).

247. *See id.* ("If Congress wanted to ensure that tribes would not have the power to try non-Indians, it 'could have expressed that intent more clearly than it did in the 1830 treaty.'") (quoting Peter Maxfield, Oliphant v. Suquamish Indian Tribe*: The Whole Is Greater Than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 412 (1993)).

248. *See id.*

tion from tribes;[249] however, history indicates that the government's only intent was to assure that a forum existed to protect Indians from "the lawless part of our frontier inhabitants"[250] in the absence of tribal courts, which is no longer the case. Likewise, the Court read the 1834 Western Territory bill[251] as Congress's careful attempt to avoid giving criminal jurisdiction to tribes,[252] but observed only in a footnote that the bill did not pass because it lacked support.[253] Ultimately, the Court's decision rested on nothing more than implication. Courts generally avoid extending Congress's plenary power over tribes by implication unless the matter relates closely to a federal statute.[254] Where the evidence was ambiguous, as here, the Supreme Court should have followed the presumption against implied divestment laid out by precedent.

Furthermore, the *Oliphant* holding should not apply to all tribes. For example, at least one treaty explicitly provided that a United States citizen settling on Indian land "shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please."[255] Further support comes from an 1834 House Report, which explicitly notes that "we cannot, consistently with the provisions of some [of] our treaties, and of the territorial act, extend our criminal laws to offences committed by or against Indians, of which the tribes have exclusive jurisdiction."[256] Each tribe negotiated its own treaty with the United States, and many were never expressly abrogated; the federal government simply stopped enforcing them.[257] Indeed, the treaties that provided for criminal jurisdiction were most similar to the type of treaty providing extraterritorial jurisdiction—the exercise of jurisdiction outside a sovereign's territory.[258] Courts have recognized the transfer of power described in

249. *Oliphant*, 435 U.S. at 201 (interpreting the General Crimes Act).

250. *See, e.g.*, George Washington, *Seventh Annual Address*, 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1908, 182, 185 (James D. Richardson ed., 1909).

251. H.R. REP. NO. 23-474, at 36 (1834).

252. *Oliphant*, 435 U.S. at 202.

253. *Id.* at 202 n.13 (noting Congress's failure to pass the bill even after several revisions and resubmissions).

254. Crawford, *supra* note 185, at 414. For example, the Major Crimes Act includes lesser-included offenses. *Id.*

255. Treaty at Holston art. VIII, July 2, 1791, 7 Stat. 39, 40.

256. H.R. REP. NO. 23-474, at 13 (1834).

257. Washburn, *Federal Criminal Law*, *supra* note 33, at 794.

258. *See* Crawford, *supra* note 185, at 416–17.

such treaties as a grant of power from the independent sovereign to the United States,[259] not an implicit divestment of the foreign country's inherent authority. Thus, the lack of a treaty provision granting exclusive jurisdiction to the United States may mean that some tribes still retain such inherent jurisdiction, regardless of specific treaty provisions, because those treaties did not explicitly transfer power from tribes to the United States.[260]

Oliphant and *Duro* both rested on the same "personal liberty" and "implicit divestment" arguments.[261] Since Congress rejected the jurisdictional distinction between member and nonmember Indians in *Duro*,[262] and nothing other than race[263] distinguishes nonmember Indians from non-Indians from the perspective of a tribal court,[264] it logically follows that the Supreme Court should eliminate the distinction between Indians and non-Indians. Indeed, factors such as government participation, membership, or citizenship are usually considered only with regard to extraterritorial jurisdiction while tribal governments here seek only to extend only their territorial jurisdiction.[265]

259. *See id.* The reasoning behind these treaties was that courts in some non-Christian (mostly Muslim and Far Eastern) countries were so inferior that U.S. citizens could not possibly obtain justice there due to bias, religious or otherwise. *See id.*

260. *Id.* at 408 n.54 ("Since treaties represent grants of power from tribes, failure of tribes to grant exclusive jurisdiction to the federal government meant that tribes retained the jurisdiction.").

261. Duro v. Reina, 495 U.S. 676, 686, 692–93 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208, 210 (1978).

262. *Duro*, 495 U.S. at 695–96 (arguing that nonmembers bear more resemblance to non-Indians with regard to their status on the reservation).

263. Native Americans may constitute either a political group, Morton v. Mancari, 417 U.S. 535, 554 (1974) ("The [employment] preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.") or a racial group, Rice v. Cayetano, 528 U.S. 495, (2000) (distinguishing *Morton v. Mancari* and striking down Hawaii's requirement that voters for trustees of indigenous trusts be descended from those who inhabited the Islands prior to 1778 as race based and thus unconstitutional). From the perspective of a tribal court, however, neither a non-Indian nor a nonmember Indian belongs to the tribe.

264. Gould, *supra* note 98, at 70 n.77 (citation omitted). *But see* Means v. Navajo Nation, 432 F.3d 924, 931–35 (9th Cir. 2005) (acknowledging that "Means's equal protection argument has real force" but concluding that the 1990 amendments to ICRA define nonmember Indians on the basis of political affiliation, not race).

265. Crawford, *supra* note 185, at 432.

Finally, the exercise of criminal jurisdiction by federal and state governments in Indian country does not rest on any constitutional authority.[266] The Indian Commerce Clause is insufficient to justify the plenary power on which the *Oliphant* Court rests its finding that tribes are "domestic dependent nations."[267] Even if Congress has the power to regulate commerce with tribes, its authority should not extend to the power to regulate the tribes themselves.[268] Further, weakness and helplessness are insufficient to justify plenary power over nations—just as the federal government does not have plenary power over Ethiopia, however frail and dependent it might be.[269] This is especially true in the era of self-determination, when even the *Oliphant* Court of 1978 recognized that many tribes are neither weak nor helpless[270] nor in need of "fixed laws [and] . . . competent tribunals of justice."[271]

The Supreme Court has, under certain circumstances, recognized tribal courts as the appropriate forums for the exclusive adjudication of disputes that affect the important personal or property interests of either an Indian or a non-Indian.[272] Sexual assault clearly affects "an important personal interest" of the rape victim. Even in *Oliphant*, dissenting Justice Marshall and Chief Justice Burger argued that "[I]n the absence of affirmative withdrawal by treaty or statute . . . Indian tribes enjoy as a necessary aspect of their retained sovereignty the

266. United States v. Kagama, 118 U.S. 375, 378–79 (arguing that "it would be a very strained construction of [the Indian Commerce] clause" to enact laws to punish common-law crimes without any reference to trade and intercourse).

267. *See* United States v. Lara, 541 U.S. 193, 214–15 (2004) (Thomas, J. concurring) (asserting that the Constitution does not grant Congress plenary power to define tribal sovereignty). *See generally* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004) (discrediting suggested bases for Congress's plenary power over tribes, including the Treaty Clause, the Property Clause, and the Indian Commerce Clause).

268. Prakash, *supra* note 267, at 1081.

269. *Id.* at 1103–04.

270. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212–13 (1978) ("[S]ome Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts.").

271. *Id.* at 210.

272. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.").

right to try and punish *all* persons who commit offenses against tribal law within the reservation."[273]

Furthermore, as a matter of policy, the current system does not meet the needs of Native American rape victims or the victims of any other violent crimes committed on reservations. The determination of whether the accused is an "Indian," of whether a piece of land falls within the definition of "Indian land," and ultimately, whether tribal, state, or federal law enforcement should prosecute the sexual assault can result in considerable dispute in practice, thwarting a Native American woman's access to justice.[274] Similarly, the difficulty of determining whether federal, state, or tribal laws apply[275] complicates the tribe's ability to arrest and prosecute where the relevant federal or state prosecutor chooses not to do so. The resulting confusion contributes to the lack of prosecution of rapes committed against Native American women.[276] The current administration of criminal justice in Indian country is also inconsistent with self-determination policy[277] and the extent to which tribes can exercise civil jurisdiction over non-Indians. Both law and policy suggest that Congress should allow tribes to exercise jurisdiction over crimes committed against Native Americans and on the reservation.

273. *Oliphant*, 435 U.S. at 212 (Marshall, J., dissenting) (emphasis added) (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)) (agreeing with the lower court that the "power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed").

274. AMNESTY INT'L, *supra* note 9, at 27–28; Thorington, *supra* note 49, at 977 (listing factors to consider in the determination of a tribe's jurisdiction: "whether the parties are Indian or non-Indian, tribal members or nonmember Indians; whether the incident occurred in Indian country . . . whether the crime is a 'major crime'; and whether the tribe is subject to federal legislation limiting the tribes' jurisdiction").

275. Although many tribes have laws and ordinances that govern the punishment of sexual violence, federal courts prosecuting a crime by or against an Indian according to the General Crimes Act still apply the law "in the same manner as . . . within the exclusive jurisdiction of the United States." 18 U.S.C. § 3242 (2006). Even on Indian land, if a non-Indian commits a crime or is the victim of a crime, federal law applies except where jurisdiction has been ceded to the state. Blumenthal, *supra* note 29.

276. AMNESTY INT'L, *supra* note 9, at 8.

277. For an overview of federal Indian policy in the last fifty years, popularly known as "self-determination," see COHEN'S HANDBOOK, *supra* note 196, § 1.07.

CONCLUSION

Even a glance at the legal system in Indian country reveals a certain irony. Tribes can protect their members from the long-term effects of water pollution but cannot provide any protection against direct, imminent threats such as sexual assault. Although the Supreme Court finds it unfair to subject Indians to federal criminal jurisdiction[278] and non-Indians to tribal criminal jurisdiction,[279] the Major Crimes Act ensures that federal courts retain jurisdiction over Indians but not vice versa.[280] But irony provides little comfort to a Native American woman who has suffered sexual assault and all of its collateral consequences. If the offender is Native American, then she must balance her own desire for reparation or punishment against those of her tribal community. If the offender is non-Indian, then her perpetrator is likely to go unpunished, and nothing stops him from committing the same offense again.

The statutes and cases that form the basis of modern criminal jurisdiction are inconsistent and do not reflect modern federal Indian policy. Tribal governments have demonstrated the capacity and desire to undertake certain types of civil regulatory authority,[281] and many systems include features similar to the Anglo-American system.[282] Providing tribes with the option to opt in to criminal jurisdiction would reduce jurisdictional confusion, provide more culturally relevant justice, respect tribal sovereignty, and help tribal governments achieve the goal of self-determination set by Congress and the executive branch. Ultimately, tribes could experiment according to the preferences and needs of their members in the same way that states serve as laboratories for the development of laws.[283] Although

278. *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883) (arguing that it would be unfair to subject Indians to alien federal courts because such courts try Indians "according to the law of a social state of which they have an imperfect conception").

279. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (arguing that non-Indian citizens should be "protected by the United States from unwarranted intrusions on their personal liberty" by tribal courts).

280. AM. CIVIL LIBERTIES UNION, *supra* note 169, at 147–48.

281. For example, tribes have successfully implemented Treatment-as-State provisions of the Clean Water Act, Rodgers, *supra* note 152, at 818–19, and reassumption of jurisdiction provisions of ICWA. *See* Strong, *supra* note 236, at 224.

282. Dussias, *supra* note 154, at 233–34 (noting that tribal laws generally are not substantially different from Anglo-American laws, and procedures are generally conducted in English).

283. O'Connor, *supra* note 113, at 5–6.

Oliphant and *Duro* articulate important constitutional concerns about fairness to non-Indians, readily achievable procedural adjustments would allow individual tribal governments to meet due process requirements and receive congressional approval to exercise criminal jurisdiction over Indians and non-Indians alike. An opt-in program that transfers criminal jurisdiction to tribes that are ready and willing addresses the concerns expressed by the Court and brings justice to victims of rape.