SOVEREIGN INJUSTICE: WHY NOW IS THE TIME TO GRANT TRIBAL NATIONS TRUE AUTONOMY IN CRIMINAL PROSECUTIONS

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ABSTRACT

Generally speaking, if a murder takes place in Oklahoma, the district attorney's office can prosecute the perpetrator, and the state court can, upon conviction, select among a wide range of sentences to bring justice to the victim. But if a murder takes place within Indian Country in Oklahoma, a tribal prosecutor has a different set of options. In the event that both the victim and alleged perpetrator are Natives, the prosecutor can charge the perpetrator in tribal court, where he or she will face a maximum of three years imprisonment for the alleged crime. In the alternative, the prosecutor can refer such a case to the U.S. Attorney's Office in hopes that federal prosecutors have the resources and motivation to intervene and pursue a longer sentence.

In this way, federal Indian policy creates discrepancies and injustices among Natives by stripping them of their sovereign autonomy. This Note explains how a crime between two Natives taking place on Native land stands at the crossroads of two sovereigns but is ultimately under the authority and discretion of the United States government. It then argues that Congress's rigid sentencing restrictions on tribal nations prosecuting crimes under the Indian Civil Rights Act interferes with a tribal nation's guaranteed right to self-determination and thus, must be eliminated under international law. In an effort to preserve this guaranteed right, this Note proposes an overdue amendment to Section 1302(b) of the Indian Civil Rights

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Act which restricts a tribal court's ability to hand down a sentence greater than three years irrespective of the crime.

TABLE OF CONTENTS

INTRODUCTION 192
I. HISTORY OF NATIVE AMERICAN LAW 197
II. THE RIGHT TO SELF-DETERMINATION 202
A. *Enforceability Under International Law* 204
B. *The Evolution of the Right to Self-Determination in International Law* 206
C. *The Right to Self-Determination as a Fundamental Tenet of Federal Indian Law* 208
III. THE JURISDICTIONAL MAZE 210
A. *Doctrinal Incoherence* 210
B. *Federal v. Tribal Jurisdiction* 211
C. *State v. Tribal Jurisdiction* 216
D. *The Jurisdictional Test* 217
IV. INADEQUACIES OF THE CURRENT SYSTEM 219
A. *The Statistics* 219
B. *Reliance on State & Federal Prosecutors* 221
V. AMEND THE INDIAN CIVIL RIGHTS ACT 223
VI. CONCERN FOR THE UNITED STATES 224
A. *The Muscogee (Creek) Nation* 225
B. *Tribal Court Competence* 228
C. *Universal Consensus* 229
CONCLUSION 231

INTRODUCTION

Always I kept going back to the day I dug the trees out of the foundation of our house. How tough those roots had clung. Maybe they had pulled out the blocks that held our house up. And how funny, strange, that a thing can grow so powerful even when planted in the wrong place. Ideas too, I muttered. Ideas.
—Louise Erdrich[1]

1. LOUISE ERDRICH, THE ROUND HOUSE 293 (2012).

Patrick Murphy, an enrolled member of the Muscogee (Creek) Nation, was living with Patsy Jacobs in August of 1999.[2] On the night of August 28, 1999, Murphy murdered George Jacobs, Patsy's ex-husband and fellow member of the Muscogee (Creek) Nation, on a rural road in Henryetta, Oklahoma.[3] In 2000, a jury in Oklahoma state court convicted Murphy of murder and sentenced him to death.[4] Murphy climbed his way up the procedural ladder, and the Supreme Court of the United States granted his petition for certiorari on May 21, 2018.[5] However, *Carpenter v. Murphy* was not before the Supreme Court of the United States because of Patrick Murphy's death sentence or George Jacobs's access to justice; rather, the soil under which this gruesome act occurred was the focal point of this case.[6]

Lisa McCalmont, the federal public defender who filed Murphy's federal habeas corpus petition, was an established legal adversary of the death penalty.[7] With her peculiar background in geology, she examined the crime scene and discovered that the actual crime scene location did not match law enforcement records.[8] The actual location was just over a mile away on the same road.[9] This small discrepancy is what carried Murphy all the way to the Supreme Court of the United States.[10] Murphy argued that the state of Oklahoma lacked jurisdiction to prosecute him because the crime scene is part of

2. Murphy v. Royal, 875 F.3d 896, 904 (10th Cir. 2017), *aff'd*, Sharp v. Murphy, 140 S. Ct. 2412 (2020) (per curiam).

3. *See id.* at 904–05.

4. *Id.* at 904. *See also* Murphy v. State, 47 P.3d 876, 879 (Okla. Crim. App. 2002).

5. Royal v. Murphy, 138 S. Ct. 2026 (2018) (granting certiorari).

6. *See* Carpenter v. Murphy, 139 S. Ct. 626, 626 (2018) (requesting supplemental briefs on the issue of territorial boundaries of Indian Country in Oklahoma).

7. *See* Garrett Epps, *Who Owns Oklahoma*?, ATLANTIC (Nov. 20, 2018), https://www.theatlantic.com/ideas/archive/2018/11/murphy-case-supreme-court-rules-muscogee-land/576238/.

8. *See id.*

9. *See id.*

10. *See* Murphy v. Royal, 875 F.3d 896, 910 (10th Cir. 2017), *aff'd*, Sharp v. Murphy, 140 S. Ct. 2412 (2020) (per curiam).

an Indian allotment, making it Indian Country.[11] Thus, the Major Crimes Act of 1885 prohibited the State of Oklahoma from prosecuting a crime committed in Indian Country as the federal government has "exclusive federal jurisdiction."[12] The Court had to determine whether the reservation borders of the Muscogee (Creek) Nation drawn in Oklahoma in 1866 remained Indian Country.[13] If the land is indeed Indian Country, the state of Oklahoma lacked criminal jurisdiction to prosecute Murphy, and a considerable amount of land in Oklahoma actually falls within the borders of the Muscogee (Creek) Nation including the city of Tulsa.[14]

In oral argument, the late Justice Ginsburg focused on the consequences with regard to criminal justice, taxation, and regulatory authority if the Court were to confirm the reservation boundaries over half of Oklahoma.[15] Justice Breyer commented in reference to Justice Ginsburg's concern:

> There are 1.8 million people living in this area. They have built their lives not necessarily on criminal law but on municipal regulations, property law, dog-related law, thousands of details. And now, if we say really this land . . . belongs to the tribe, what happens to all those people? What happens to all those laws?[16]

Even the textualists on the bench could not circumvent the history and congressional intent that clearly indicated this land

11. *Id.*

12. Epps, *supra* note 7.

13. *See* Carpenter v. Murphy, 139 S. Ct. 626, 626 (2018) (requesting supplemental briefs on the issue of territorial boundaries of Indian Country in Oklahoma).

14. Epps, *supra* note 7.

15. Transcript of Oral Argument at 35, Carpenter v. Murphy, 139 S. Ct. 626 (2018) (No. 17-1107) https://www.supremecourt.gov/oral_arguments/audio/2018/17-1107 ("Mr. Kneedler, before you sit down, you said very quickly the ramifications of the court of appeals decision in areas other than criminal jurisdiction. You mentioned tax, I think. Can you—can you state again what is the effect of this decision on areas other than state versus federal jurisdiction?").

16. *Id.* at 44.

was still part of the Muscogee (Creek) Nation.[17] Rather than focusing on congressional intent, Justice Roberts questioned the future stability of established businesses on the land and stated: "What if the tribe decides not to allow the type of business in which you're engaged, such as alcoholic beverages?"[18] In the Justices' minds, the stakes were high and the Court requested reargument for the 2019-2020 term.[19] On July 9, 2020, the Supreme Court held in a similar case, *McGirt v. Oklahoma*, that the state of Oklahoma lacked jurisdiction to prosecute a Native whose crime took place on Native land, and thus confirmed that eastern Oklahoma is part of Indian Country.[20]

Even though *Murphy* was centered around criminal jurisdiction over the death of a Native victim, Judge Matheson—the judge presiding over Murphy's case in the U.S. Court of Appeals for the Tenth Circuit—failed to mention the tribe's ability to prosecute Murphy in his exhaustive opinion.[21] The federal government had concurrent jurisdiction with tribal

17. *See id.* at 39–44 (discussing congressional intent to maintain tribal sovereignty shown in language of 1901 allotment of land to Creek tribe, 1906 joint resolution from Congress that preserved tribal authority); 55–60 (citing examples signifying exercise of recent tribal authority including: deputization agreements across counties, exercise of arrest authority, building and maintenance of roads, tribal hospitals).

18. *Id.* at 50.

19. *See Sharp v. Murphy (No. 17-1107)*, SUP. CT. U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1107.html. Rearguments commonly involve important issues and are rarely requested. Some of the most memorable cases include *Brown v. Board of Education* and *Roe v. Wade*. Thus, pushing this case to the next term gives its significance substantial weight. *See* Stephen Wermiel, *SCOTUS for Law Students: Rearguments*, SCOTUSBLOG (Oct. 31, 2014, 8:00 AM), https://www.scotusblog.com/2014/10/scotus-for-law-students-rearguments/.

20. The case that ultimately decided the status of eastern Oklahoma land was *McGirt v. Oklahoma*. Both petitioners in *Murphy* and *McGirt* argued that the state of Oklahoma lacked jurisdiction to prosecute their crimes; however, Justice Gorsuch recused himself from *Murphy* because he dealt with the case in a lower court. Presumably, there was a tie in *Muprhy* and so the Justices used *McGirt* to rule on the identical legal issue. The result was a 5-4 opinion in favor of the Muscogee (Creek) Nation. *See generally* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (holding that the state of Oklahoma lacked jurisdiction to prosecute a member of the Seminole Nation whose crimes took place on the Creek Reservation because only the federal government can prosecute Indians for major crimes committed in Indian territory pursuant to 18 U.S.C. § 1153(a)).

21. *See* Murphy v. Royal, 875 F.3d 896, 903 (10th Cir. 2017) (summarizing Murphy's case arising from the controversy between the state of Oklahoma and the federal courts), *aff'd*, Sharp v. Murphy, 139 S. Ct. 626 (2018) (2020) (per curiam).

governments over Murphy's crime.[22] The state of Oklahoma not only usurped the power available to the federal government by deciding Murphy's fate, but it also took this power from the Muscogee (Creek) Nation. Because of the state's action, the Muscogee (Creek) Nation could not prosecute Murphy for a murder which took place on its land and between two of its own members.[23]

This oversight in jurisdictional authority, coupled with the fact that most of the Supreme Court Justices' concerns centered around the non-Native residents of Oklahoma, is symbolic of the tense and complex relationship the United States has with federal Indian law.[24] This case reshaped into a battle over United States' interests, and left the quasi-jurisdictional authority tribal nations possess over crimes occurring in Indian Country inconsequential. However, to some extent, failing to recognize tribal authority over the death of Jacobs is understandable. Under the restrictions imposed by Congress onto tribes, the Muscogee (Creek) courts would be limited to sentencing Murphy to a maximum of three years for his murder charge.[25] When compared to a federal court's sentencing power, this maximum sentence is illegitimate and unacceptable.[26] Thus, the lower courts understandably neglected to mention the Muscogee (Creek) Nation's toothless power.[27] The Supreme

22. *See* Major Crimes Act of 1885, 18 U.S.C. § 1153.

23. *See Murphy v. Royal*, 875 F.3d at 905–08 (noting that the Oklahoma District Court had held that the land on which the murder took place was state land and thus the tribe could not assert jurisdiction).

24. *See* Keith Richotte Jr., *The Third Branch of the Third Sovereign: A Brief History of Tribal Courts and Their Perception in the Supreme Court*, 49 CT. REV.: J. AM. JUDGES ASS'N 6, 12 (2013) ("Whenever non-Native interests have been at stake, the Supreme Court has shown little, if any, respect toward tribal courts.").

25. *See* Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(b).

26. *See* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 557 n. 218, 562 (1976); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 691 (2009).

27. For example, although it was directed to do so by the state court of appeals, during a one-day evidentiary hearing, the Oklahoma state district court refused to analyze whether the

Court's most recent rulings in *McGirt* and *Murphy* provide incentive for criminal justice reform in Indian Country. Now that Indian Country in Oklahoma spans 19 million acres and consists of 1.8 million people, it is time for reform and recognition of tribal sovereignty.[28]

This Note explains the current law and will later argue why Congress must amend Section 1302(b) of the Indian Civil Rights Act in order to avoid interfering with tribal nations' right to self-determination. Part I provides the historical background required to understand the relationship between United States law and tribal sovereignty and why tribal sovereignty is crucial for self-determination. Part II parses the relevant background on international law and the concept of self-determination for Indigenous peoples. Part III lays out the "jurisdictional maze" of federal Indian criminal law and its hindrance to a tribal nation's right to self-determination. Part IV depicts the inadequacies in the current system and asserts the urgent need for reform. Part V provides the proposed amendment to congressional legislation that will effectively untangle the "jurisdictional maze" in Indian Country and drive federal courts to acknowledge tribal jurisdiction in cases like *Murphy*. Lastly, Part VI rejects the overwrought concerns of tribal abuse of authority on tribal land.

I. HISTORY OF NATIVE AMERICAN LAW

An historical look at tribal sovereignty is essential for understanding why tribal nations' right to self-determination must be guaranteed.[29] A tribal nation's sovereignty is critical because it allows us to view tribal nations similarly to any other nation in the world. By placing tribal nations on a level playing

murder location was a part of the Creek Reservation or part of a dependent Indian community. *See Murphy*, 875 F.3d at 908.

28. *See* Julian Brave Noisecat, *The* McGirt *Case Is a Historic Win for Tribes*, ATLANTIC (July 12, 2020), https://www.theatlantic.com/ideas/archive/2020/07/mcgirt-case-historic-win-tribes/614071.

29. *See Developments in the Law—Indian Law*, 129 HARV. L. REV. 1652, 1654 (2016) ("Any study of Indian law will be influenced by its long and complicated history.").

field with other independent nations, the treatment of tribes can be examined in the context of international law.[30] Thus, understanding the history of tribal sovereignty is essential to discerning where tribal nations fit within the international law context.

Tribal sovereignty is best explained using three foundational Marshall Court decisions often referred to as the "Marshall Trilogy."[31] These decisions were laced with ambiguous and contradictory foundational principles that left a considerable amount of room for interpretation and ultimately resulted in erratic federal Indian policy.[32] However, the Marshall Trilogy's unpredictable character and contradictory precedent is best understood when linked to the complicated relationship history between the United States and tribal nations.[33]

The first opinion, *Johnson v. M'Intosh*, delivered in 1823, is most notable for incorporating the discovery doctrine into United States law.[34] Historically, *M'Intosh* was an attempt to clean up the loose ends of the Early Treaty Era (1776-1830).[35] The discovery doctrine gave the discovering nation exclusive rights to Native land and erased tribal sovereignty in land ownership.[36] Further, Marshall identified the tribal nations as

30. *See id.* at 1661.

31. *See* Tweedy, *supra* note 26, at 664 ("Widely termed the 'Marshall Trilogy' because Chief Justice Marshall authored them, the first Supreme Court Indian law cases . . . are crucial to understanding the federal law framework that governs the exercise of tribal sovereignty.").

32. *See id.* (highlighting Marshall's failure to set definitive substantive limits on the federal government's guardianship power over Indians). *See also* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, AM. BAR ASS'N (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/short_history_of_indian_law/ (describing the shifts in federal Indian policy among and between the three major branches of the federal government throughout history).

33. Cherokee Nation v. Georgia, 30 U.S. 1, 32 (1831) (Baldwin, J., concurring) ("[T]he reasons for the judgment of the court seem to me more important than the judgment itself.").

34. *See* Johnson v. M'Intosh, 21 U.S. 543, 587–88 (1823).

35. *American Indian Treaties*, NAT'L ARCHIVES, https://www.archives.gov/research/native-americans/treaties (Oct. 4, 2016). *See generally* Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1088–93 (2000) (describing the purchase treaties that the United States entered with various Illinois tribes for the same lands as the plaintiffs in *M'Intosh*).

36. *See M'Intosh*, 21 U.S. at 604–05.

"occupants," such that land could only be conveyed to the discovering sovereign, and the federal government could take this land without Fifth Amendment restrictions.[37]

By 1830, the United States had a dominant military force, and the rhetoric about Indians shifted to philosophies based on tribal destruction which in turn sparked the inception of the Removal Era (1830-1871).[38] This era involved forced relocation and separatism of tribal nations, most of which was justified under the second opinion, *Cherokee Nation v. Georgia*.[39] In 1831, *Cherokee Nation* established that tribal nations were no longer foreign states, but rather "domestic dependent nations" whose relationship resembled that of a "ward to his guardian."[40] This case represents the inception of the federal trust doctrine in federal Indian law, under which the United States was entrusted with the responsibility to act on the behalf of tribes.[41] This doctrine imposed greater responsibility onto the federal government and prohibited state interference in tribal affairs.[42] Although Marshall articulated the concept of tribal self-determination and autonomy in *Cherokee Nation*, he failed to set substantive limits to the United States' guardianship power.[43] This lack of guidance in *Cherokee Nation* made regulating tribal sovereignty and federal guardianship extremely difficult.[44]

The United States went even further to stifle tribal sovereignty during the Allotment Era (1871-1934) with its

37. *See id.* at 574.

38. *See* Doug Kiel, *American Expansion Turns to Official Indian Removal*, NAT'L PARK SERV., https://www.nps.gov/articles/american-expansion-turns-to-indian-removal.htm (Aug. 14, 2017).

39. *See id.*

40. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

41. *See Federal Trust Doctrine First Described by Supreme Court*, U.S. DEP'T JUST., https://www.justice.gov/enrd/timeline-event/federal-trust-doctrine-first-described-supreme-court (May 14, 2015).

42. *See id.*

43. *See Cherokee Nation*, 30 U.S. at 20; *see also* Raymond Cross, *The Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine?*, 39 TULSA L. REV. 369, 377 (2003) (criticizing Marshall's failure to more completely define his twin conceptions of the federal trust duty and Indian self-determination).

44. *See* Cross, *supra* note 43, at 377 n.36.

assimilative policies and "[k]ill the Indian in him, and save the man" mentality.[45] However, during the Indian Reorganization Era (1934-1953), the Marshall Court's incorporation of tribal sovereignty in *Worcester v. Georgia* was reintroduced and led to changes in Indian policy once again from destruction of Indian culture to reinvestment and revival of Indian culture.[46] In *Worcester*, Marshall clarified his notion of these twin concepts of tribal sovereignty and federal guardianship from *Cherokee Nation* by changing the tribal nations' status from "domestic dependent nations" to "distinct political communities, having territorial boundaries, within which their authority is exclusive."[47] This shift in status suggested that *M'Intosh* and *Cherokee Nation* did not usurp the inherent sovereignty of tribal nations. Rather, Marshall's opinion held that the United States—more specifically Congress—could continue to regulate Indian affairs while also maintaining a tribal nation's right to govern itself.[48] Marshall's *Worcester* opinion compelled the state and federal governments to "respect and honor the inherent rights of the Indian peoples," and thus, it stressed the importance of tribal sovereignty.[49]

The Marshall Trilogy's back and forth from tribal sovereignty to tribal dependency left federal Indian law with contradictory

45. Captain Richard Pratt, founder of the first Indian boarding school in Carlisle, Pennsylvania, used this phrase to advocate for assimilation by expanding U.S. land ownership and extinguishing tribal presence and practice. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, *in* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIEND OF THE INDIAN" 1880–1900 260–71 (Francis Paul Prucha, ed., 2013).

46. *See Developments in the Law—Indian Law*, *supra* note 29, at 1654–55 ("After an aggressive policy of breaking down reservations, Congress in 1934 adopted the goal of self-determination for tribes with the Indian Reorganization Act (IRA). The IRA ended the federal government's land grab on reservations and instead empowered the Secretary of the Interior to take land into trust for the benefit of Indian tribes; it also offered tribes the opportunity to reorganize their governments with federally approved constitutions, allowed tribes to create corporate arms, and instituted an Indian hiring preference in federal agencies that handled Indian affairs.").

47. Worchester v. Georgia, 31 U.S. 515, 557 (1832).

48. *See id.* at 561–62.

49. Cross, *supra* note 43, at 377.

precedent and policy.[50] These inconsistent decisions created a downward spiral for future Supreme Court cases, and now federal Indian law is composed of a wide range of opposing ideas and trends.[51] Further, the ability to rely on any of the Marshall Trilogy cases in a present argument demonstrates the incoherence of federal Indian law.[52] Keeping the historical context in mind, it is easier to comprehend how the United States could transition from the Termination Era (1953-1960s)[53]—an era similar to the Allotment Era—to the Self-Determination Era,[54] where the United States presently sits. These two eras represent polar opposite ideas of tribal sovereignty: one based on a tribe's status as domestically dependent and in need of cultural reform, and the other based on tribal leadership and inherent sovereignty.[55]

In the Self-Determination Era, Congress adheres to the notion that the "United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes."[56] While the United States

50. *See* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 694 (2006) ("The seeds of federal government recognition of tribal sovereignty are there, but so are the seeds of state intrusion into Indian Country.").

51. *See generally* Laurie Reynolds, *Jurisdiction in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359 (1997).

52. *See* Fletcher, *supra* note 50, at 628–29 ("The arguments, concepts, and notions in [the Marshall Trilogy] resonate today, about 170 years after the last of the decisions. The argumentation of these Justices incorporates the seeds of the entire catalog of the current doctrine making up American Indian law. The foundations of the current debates over plenary power, state authority in Indian Country, the special canon of construction for Indian treaties, implicit divestiture, the trust doctrine, the political status of Indians and Indian tribes, and others are all to be found within the Marshall Trilogy.").

53. In 1953, Congress reversed course, choosing "an effort to terminate the sovereignty of tribes and eliminate the legal distinctions between Indians and non-Indians." Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law,* 78 U. CAL. L. REV. 1137, 1138 n.7 (1990).

54. *See id*.; Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 248 (2009).

55. *See* Gover, *supra* note 54, at 248.

56. Native American Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. § 4301(6).

promotes the right to self-determination for tribal nations,[57] there remains a debate as to what actions truly facilitate self-determination and what actions interfere with this right.[58] As this Note will demonstrate, the Indian Civil Rights Act's sentencing restrictions is one example of Congress interfering with the right of self-determination; therefore, amending this legislation is vital to tribal sovereignty.[59] Furthermore, an amendment is required under the United Nations' Declaration on the Rights of Indigenous Peoples.[60]

II. THE RIGHT TO SELF-DETERMINATION

The early Supreme Court cases used international law extensively for the creation of federal Indian law.[61] For example, the discovery doctrine, Native property rights, and the idea of tribal sovereignty, all stem from international norms.[62] By the twentieth century, the Court had stopped relying on international law, which remained unused in federal Indian law

57. *See infra* Part II.

58. *See infra* Part III.

59. *See infra* Part V.

60. *See* U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP]. The United States officially announced its support for UNDRIP on January 12, 2011. *See Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP'T OF STATE (Jan. 12, 2011) [hereinafter *U.S. Announces Support for UNDRIP*], https://2009-2017.state.gov/s/srgia/154553.htm ("Today, in response to the many calls from Native Americans throughout this country and in order to further U.S. policy on indigenous issues, President Obama announced that the United States has changed its position. The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force. It expresses both the aspirations of indigenous peoples around the world and those of States in seeking to improve their relations with indigenous peoples. Most importantly, it expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.").

61. *See supra* Part I. *See also* FELIX S. COHEN, 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.07(1) (2020) [hereinafter COHEN'S HANDBOOK 2020] (explaining how American Indian law emerged from international law norms). Courts require "any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [courts have] recognized" such as violation of safe conducts, infringement of the rights of ambassadors, and piracy. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

62. COHEN'S HANDBOOK 2020, *supra* note 61, at § 5.07(1).

until recent years.[63] Presently, international organizations and nations worldwide focus on issues affecting Indigenous peoples on a global scale.[64] This emerging international focus on Indigenous rights caused a gradual shift in consensus surrounding international norms, in turn, driving developments in federal Indian law.[65]

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides a framework that can enable the social and legal reform necessary for preserving tribal nations' right to self-determination.[66] In 2007, the U. N. General Assembly adopted UNDRIP after an exhaustive drafting period.[67] UNDRIP, proving to be worthy of the wait, affirms the tribal right to self-determination, including the right to autonomy.[68] Not surprisingly—as these four countries would be the most affected by UNDRIP, and presently sit with the most damning colonial history—the United States, Canada, Australia, and New Zealand voted against it despite UNDRIP's overwhelming international approval.[69] The United States did not join the world community in accepting UNDRIP until December 16, 2010.[70] Although the United States' endorsement represents a progressive step forward in social and legal reform,

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE 67 (2013).

67. Glen Anderson, *A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession?*, 49 VAND. J. TRANSNAT'L L. 1183, 1231 (2016).

68. *Id.*

69. Aliza Gail Organick, *Listening to Indigenous Voices: What the UN Declaration on the Rights of Indigenous Peoples Means for U.S. Tribes*, 16 U.C. DAVIS J. INT'L L. & POL'Y 171, 173 (2009).

70. *See* Barack Obama, President, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2020), https://obamawhitehouse.archives.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference); Karla General, *Words Into Action: The UN Declaration on the Rights of Indigenous Peoples and Its Impact in the United States in 2014*, TURTLE TALK BLOG (Dec. 17, 2014), https://turtletalk.blog/2014/12/17/words-into-action-the-un-declaration-on-the-rights-of-indigenous-peoples-and-its-impact-in-the-united-states-in-2014/.

there are still doubts about UNDRIP's enforceability in the United States.[71]

A. *Enforceability Under International Law*

Customary law,[72] a form of international law, may carry the same binding force as treaties.[73] Certain nations follow these laws because they consider themselves legally obligated to do so.[74] For the United States, customary international law is a standard of federal common law that courts use either on the "same level of normative strength" as congressional legislation, or on a level just below.[75] There are two requirements to establish a customary international law: (1) there must be a general practice or acceptance among states; and (2) the states must follow it out of a sense of legal obligation to do so.[76] Scholars, treatises, and courts evaluate and determine the

71. *See* Eric Chung, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations*, 126 YALE L.J. 170, 172 (2016) (explaining that the U.S. Senate often uses declarations to circumvent the binding nature of a treaty and the resulting unintended consequences).

72. There are three ways international law can be applied within U.S. courts: "as part of a treaty ratified by the United States, as part of customary international law applied as federal common law, and as an interpretive aid in the construction of United States constitutional or statutory law." COHEN'S HANDBOOK 2020, *supra* note 61, at §5.07(4)(a)(i). The two primary sources of international law are treaties or conventions and customary international law derived from usages and practices of nations. ECHO-HAWK, *supra* note 66, at 71.

73. Unlike treaties which only apply to the states that are parties to said treaties, customary law may be binding to all nations and actors regardless of whether the nations have agreed to be bound. *See Customary International Humanitarian Law: Questions & Answers*, INT'L COMM. OF THE RED CROSS (Aug. 15, 2005), https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm#a6.

74. ECHO-HAWK, *supra* note 66, at 71.

75. *Id. See also* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.").

76. *See* Christian Dahlman, *The Function of Opinio Juris in Customary International Law*, 81 NORDIC J. INT'L L. 327, 327–28 (2012).

settled rules of customary international law that eventually become "norms."[77] Thus, the need for widespread consensus is integral for the creation of these international norms.[78] Under this standard, the Supreme Court requires norms to be "specific, universal, and obligatory."[79] Once this standard is met, the courts are "bound to identify, clarify, and apply [this] customary international law."[80] For example, in *Filartiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit held that acts of torture were violations of customary international law and acknowledged that "the law of nations . . . has always been part of the federal common law."[81] While the creation of customary international law is difficult and time consuming, occasionally this creation can be accelerated with the involvement of human rights and even more so when the UN General Assembly convenes.[82]

Unlike treaties or customary international law, a declaration by itself, such as UNDRIP, is *not* legally binding.[83] A declaration is considered more of an "aspirational statement" that is not directly enforceable in courts even if accepted by the United States.[84] Declarations, rather, "represent the dynamic development of international legal norms."[85] Consequently, the

77. ECHO-HAWK, *supra* note 66, at 71.

78. *See id.* at 80.

79. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

80. *See* Jordan J. Paust, *International Law as Law of the United States: Trends and Prospects*, 1 CHINESE J. INT'L L. 615, 628 (2002).

81. 630 F.2d 876, 884–85 (2d Cir. 1980).

82. *See id.* at 882; Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L.J. 439, 448 (2010) ("[B]oth U.S. domestic courts and international tribunals have relied on General Assembly resolutions as evidence of emergent customary rules."); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 719 (9th Cir. 1992) ("[A] resolution of the General Assembly of the United Nations . . . is a powerful and authoritative statement of the customary international law of human rights."). *See also* ECHO-HAWK, *supra* note 66, at 80 (explaining that human rights groups can accelerate the international law-making process with the help of modern communication systems).

83. *See Siderman de Blake*, 965 F.2d at 719.

84. COHEN'S HANDBOOK 2020, *supra* note 61, at § 5.07(1).

85. Maia Wikler, *A Necessary Resource: The United Nations Declaration on the Rights of Indigenous Peoples*, RAVEN (Jan. 20, 2020), https://raventrust.com/a-necessary-resource-the-united-nations-declaration-on-the-rights-of-indigenous-peoples/.

United States is reluctant to recognize its endorsement of UNDRIP as anything more than a gesture of support.[86] However, specific parts such as Articles III and IV of UNDRIP independently constitute customary international law and are therefore binding on the United States.[87]

B. *The Evolution of the Right to Self-Determination in International Law*

In Articles III and IV of UNDRIP, self-determination is a guaranteed right.[88] The right to self-determination is also enshrined in the International Covenant on Civil and Political Rights ("ICCPR"), which is binding on the United States.[89] The International Court of Justice has described self-determination as the "need to pay regard to the freely expressed will of peoples."[90] However, there was debate over the meaning of "peoples" and whether Indigenous peoples were included in this definition.[91]

By 1992, self-determination was a norm applicable to *all* peoples as a rule of customary international law, but the term "all peoples" did not yet include Indigenous peoples.[92] Four years later, S. James Anaya, Dean of the University of Colorado School of Law and an internationally-recognized human rights

86. *See U.S. Announces Support for UNDRIP*, *supra* note 60 (asserting the federal government's position that UNDRIP is not legally binding even while announcing support for the U.N. Declaration).

87. *See* Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11 HUM. RTS. L. REV. 609, 625 (2011).

88. *See* UNDRIP, *supra* note 60, at art. 3 ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

89. International Covenant on Civil and Political Rights, Dec. 15, 1966, S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 1717 (signed on behalf of the United States on Oct. 5, 1977, ratified by Senate on Apr. 2, 1992); *see also* Saul, *supra* note 87, at 625 (discussing that because the self-determination rules are enshrined in the ICCPR, a vast majority of countries are bound by it).

90. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, para. 59 (Oct. 2016).

91. *See* S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131, 138 (1993).

92. *See* Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 86 (1992).

scholar,[93] performed an in-depth analysis of self-determination as it relates to Indigenous peoples in his leading treatise, *Indigenous Peoples in International Law*.[94] Anaya concluded that self-determination must be applied to *all* peoples and universally acknowledged as a customary international law and even *jus cogens*, a preemptory norm.[95] Anaya further stated that it is "no longer acceptable for the states to incorporate institutions or tolerate practices that perpetuate an inferior status or condition of indigenous individuals, groups, or their cultural attributes."[96] Additionally, Anaya asserted that the "self-governance norm" is comprised of two parts: (1) governmental and administrative autonomy for Indigenous communities; and (2) effective participation in all decisions affecting them by the larger institutions of government.[97] In 2004, Anaya confirmed his earlier findings,[98] and more leading treatises followed his lead and acknowledged that the right of self-determination applied to tribal nations.[99] Finally, in 2010, the International Law Association[100] examined the norms expressed in UNDRIP and explicitly distinguished six customary rules of binding force in international law, including

93. *See Faculty Directory*, COLO. L., https://www.colorado.edu/law/dean-s-james-anaya (last visited Sept. 21, 2020) ("Dean Anaya is an internationally recognized scholar and author in the areas of international human rights and issues concerning indigenous peoples. He served as the United Nations Special Rapporteur on the rights of indigenous peoples from 2008 to 2014.").

94. *See generally* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996) [hereinafter ANAYA 1996] (surveying indigenous rights in customary international law).

95. ECHO-HAWK, *supra* note 66, at 82 (citing ANAYA 1996, *supra* note 94).

96. ANAYA 1996, *supra* note 94, at 98.

97. *Id.* at 110–11.

98. In 2004, Dean Anaya updated his 1996 survey with additional data and case law that confirmed this self-government norm for indigenous peoples. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 129–94 (2004).

99. *See, e.g.*, COHEN'S HANDBOOK 2020, *supra* note 61, at §§ 5.07(3)(a)–(c) (finding that self-determination is indisputably a fundamental right under international law and a settled norm for all people and nations, but subsequently finding that the application of this right was still emerging).

100. The International Law Association has consultative status as an international non-governmental organization with several of the United Nations specialized agencies. *See About Us*, INT'L L. ASS'N, https://www.ila-hq.org/index.php/about-us/aboutus2 (last visited Nov. 4, 2020).

the right to self-determination.[101] UNDRIP, and the scholarship around it, served as a crucial turning point for tribal nations' right to self-determination because it expressly provided this right and described it in language almost identical to that used in other formal United Nations documents addressing self-determination.[102]

As an international law norm, self-determination can be used as an interpretive aid in the construction of United States constitutional or statutory law and as a persuasive tool for creating congressional legislation.[103] For example, the Tribal Law and Order Act, which expanded the sentencing restrictions imposed by the Indian Civil Rights Act, was partly created from an Amnesty International report and UN Committee on the Elimination of Racial Discrimination recommendation signifying "that failure to adequately address sexual violence in Indian [C]ountry was a human rights violation."[104] Congress recognized the inadequacy of one year sentences for crimes that would normally result in more severe punishment and in turn, amended the Indian Civil Rights Act from an option of one year to three year sentences.[105]

C. *The Right to Self-Determination as a Fundamental Tenet of Federal Indian Law*

The guaranteed right of self-determination to all Indigenous peoples under international law also serves as a fundamental tenet of federal Indian law and reflects the present era: the Self-

101. *See* INT'L L. ASS'N, THE HAGUE CONFERENCE: RIGHTS OF INDIGENOUS PEOPLES INTERIM REPORT 6, 10–12 (2010) [hereinafter HAGUE CONFERENCE REPORT].

102. *See* COHEN'S HANDBOOK 2020, *supra* note 61, at § 5.07(3)(b)(ii); *see also* HAGUE CONFERENCE REPORT, *supra* note 101, at 11 ("UNDRIP provides a platform for indigenous peoples and States worldwide to address the right of indigenous peoples to self-determination.").

103. COHEN'S HANDBOOK 2020, *supra* note 61, at § 5.07(5).

104. *Id.* at § 5.07(5) n.234.

105. *See* BJ JONES, MICHELLE RIVARD PARKS, MICHAEL MERNER, MITCH ENRIGHT & EKTA PATEL, TRIBAL JUST. INST., INTERSECTING LAWS: THE TRIBAL LAW AND ORDER ACT AND THE INDIAN CIVIL RIGHTS ACT 5 (2016), https://bja.ojp.gov/library/publications/intersecting-laws-tribal-law-and-order-act-and-indian-civil-rights-act.

Determination Era.[106] Federal Indian law recognizes that Indian tribes are "governmental entities with the power to govern their territories and members."[107] Thus, this present era limits the United States' interference in tribal self-governance and tribal sovereignty,[108] to which the United States has not objected.[109] For example, the initial denial of UNDRIP transformed into an endorsement, leaving the State Department to note that UNDRIP has "both moral and political force."[110]

Even though the United States denies the binding force of UNDRIP as a whole, its continued recognition of tribal self-determination demonstrates its acceptance of this right as a principle of customary international law.[111] Since President Nixon's 1970 message to Congress that ended the Termination Era,[112] United States policy has sustained the principle of tribal self-determination. For example, the Indian Self-Determination and Education Assistance Act[113] and the Tribal Self-Governance Act[114] stress the importance of tribal sovereignty and tribal self-governance, which each President has since reaffirmed.[115] Administratively, United States agencies have revised their

106. *See* Clare Boronow, *Closing the Accountability Gap for Indian Tribes: Balancing the Right to Self-Determination with the Right to a Remedy*, 98 VA. L. REV. 1373, 1378 (2012).

107. *Id.*

108. *Id.*

109. *See id.* at 1385–86.

110. *See U.S. Announces Support for UNDRIP*, *supra* note 60 and accompanying text.

111. Boronow, *supra* note 106, at 1386.

112. *See* Special Message to Congress on Indian Affairs, 1970 PUB. PAPERS 564–67 (July 8, 1970).

113. *See* Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5302.

114. *See* Tribal Self-Governance Act of 1994, 25 U.S.C. § 5361.

115. *See* President Donald Trump & Rick Perry, Sec'y of Energy, Remarks at a Tribal, State, and Local Energy Roundtable (June 28, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-secretary-energy-rick-perry-tribal-state-local-energy-roundtable/ (asserting a need to remove the paternalistic hand of the federal government from tribes); Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation, 74 FED. REG. 215, 57881–82 (Nov. 5, 2009) (reaffirming commitment "to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications . . . ."); Memorandum for the Heads of Executive Departments and Agencies on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004).

policies to align with UNDRIP.[116] These new policies reflect the United States' efforts to maintain tribal sovereignty. Thus, endorsing the Declaration validates this right to tribal self-determination.

III. THE JURISDICTIONAL MAZE

Current federal policy on criminal jurisdiction within Indian Country interferes with a tribe's right to self-determination. An examination of the jurisdictional relationships between state, federal, and tribal courts illuminates the complexity of this process and clarifies why the courts in *Murphy* disregarded tribal jurisdiction.

A. *Doctrinal Incoherence*

A Washington State Attorney General once said, "[o]ne reason that the State of Washington and its Indian citizens have frequently been in court is because no one truly understands exactly what position an Indian tribe occupies within the federal system."[117] Ladonna Harris, a Native American and a Comanche activist, similarly stated: "We are part of the federal system, not part of the states. Our political relationship is not well-known and is little understood, which causes a great deal of problems."[118] One scholar characterized Indian law as "doctrinal incoherence" where conflicting principles aggregate into "competing clusters of inconsistent norms."[119]

This "doctrinal incoherence" is better understood when looking to the non-Indian interests involved and the constant oscillating shift from assimilation to restorative policies within

116. *See* General, *supra* note 70.

117. Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOLEDO L. REV. 617, 628 (1994) (quoting INDIAN SELF-GOVERNANCE: PERSPECTIVES ON THE POLITICAL STATUS OF INDIAN NATIONS IN THE UNITED STATES OF AMERICA 94 (Rudolph Ryser ed., 1989)).

118. *Id.* (quoting RETHINKING COLUMBUS 71 (Rethinking Schools, Inc. ed., 1991)).

119. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997).

the history of federal Indian law.[120] One negative consequence of doctrinal incoherence is that tribes face what is termed the "jurisdictional maze."[121] Between the sporadic usurp of tribal nations' authority and the federal government's periodic pushes for tribal independence, there is confusing and conflicting jurisdictional procedure that federal, state, local, and tribal authorities must decipher before any action is taken in the criminal realm.[122]

B. *Federal v. Tribal Jurisdiction*

The Major Crimes Act of 1885 was enacted in response to the United States Supreme Court case, *Ex parte Crow Dog*.[123] In *Crow Dog*, the perpetrator and victim were members of the Sioux Nation.[124] Crow Dog was accused of killing another Native American on the Great Sioux Reservation in present-day South Dakota.[125] The United States stepped in once the tribal court determined a sentence of restitution for defendant Crow Dog.[126] However, after a federal district court found Crow Dog guilty and sentenced him to death, the Supreme Court held that the federal court lacked subject matter jurisdiction.[127] Without a "clear expression of the intention of Congress," the Court was reluctant to expand jurisdiction to the federal courts.[128] In

120. *See* discussion *infra* Part I; *see also* Sarah Krakoff, *All Responses: The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47, 50 (2005) ("cases involving conflicts with non-Indians dominate the Court's Indian law agenda").

121. Clinton, *supra* note 26, at 576.

122. *See Developments in the Law—Indian Law*, *supra* note 29, at 1707 ("Criminal jurisdiction in and around the borders of Indian country is a maze of uncertainty that law enforcement officers of numerous jurisdictions must navigate every day across the United States. When an officer is engaged in fresh pursuit, she does not have the time to ponder the intricacies of the labyrinth.").

123. Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J. L. & SOC. CHALLENGES 1, 25 (2009).

124. *Ex parte* Crow Dog, 109 U.S. 556, 557 (1883).

125. *Id.*

126. *Id.*

127. *Id.* at 572.

128. *Id.*

response, Congress enacted the Major Crimes Act, that provided the U.S. federal courts' concurrent jurisdiction over certain offenses committed within Indian Country.[129] This Act was later upheld in the Court's *United States v. Kagama* decision, that held neither states or tribes were capable of exercising jurisdiction over major crimes committed within Indian Country.[130]

The Major Crimes Act allows for United States courts to prosecute major offenses within Indian Country such as murder, manslaughter, kidnapping, and maiming.[131] The Act initially expanded federal criminal jurisdiction over seven major crimes, and over time this number increased to sixteen.[132] To sustain the concept of "dual sovereignty," in *United States v. Wheeler*, the Supreme Court noted that the double jeopardy clause did not bar prosecution of the same defendant by both tribal and federal courts and thus acknowledged concurrent jurisdiction between the federal and tribal courts.[133]

Although the Major Crimes Act did not technically bar tribal courts from prosecuting offenses within Indian Country, the Act added several moving parts which ultimately complicated the process and sparked confusion among the federal and tribal prosecutors. For example, "many tribal prosecutors do not pursue offenders who commit any of the enumerated . . . offenses included in the Major Crimes Act because of confusion

129. *See* Major Crimes Act, 18 U.S.C. § 1153; James D. Diamond, *Practicing Indian Law in Federal, State, and Tribal Criminal Courts: An Update About Recent Expansion of Criminal Jurisdiction over Non-Indians*, AM. BAR ASS'N CRIM. JUST., Winter 2018, at 8, 11, *reprinted in* Matthew L.M. Fletcher, *Jim Diamond on Practicing Indian Law in Federal, State, and Tribal Criminal Courts*, TURTLE TALK BLOG (Jan. 24, 2018), https://turtletalk.blog/2018/01/24/jim-diamond-on-practicing-indian-law-in-federal-state-and-tribal-criminal-courts.

130. United States v. Kagama, 118 U.S. 375, 383–84 (1886).

131. 18 U.S.C. § 1153.

132. Diamond, *supra* note 129, at 11 (listing the sixteen offenses that are now covered: "murder, manslaughter, kidnapping, maiming, felony sexual abuse, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under the age of 16, felony child abuse, arson, burglary, robbery, felony embezzlement, and theft").

133. United States v. Wheeler, 435 U.S. 313, 329–30 (1978).

as to whether they have the authority to do so."[134] On the other hand, the United States Attorney's Office declines to prosecute a considerable amount of crimes within Indian Country, which leaves most victims to fall into a jurisdictional gap with no access to justice—known as the "jurisdictional maze."[135]

In the midst of this jurisdictional confusion the Supreme Court held in *Oliphant v. Suquamish Indian Tribe* that Indian tribal courts did not have inherent criminal jurisdiction to try and to punish non-Indians and therefore may not assume jurisdiction unless specifically authorized by Congress.[136] Without express authorization from Congress to prosecute non-Indians, the only remedy for tribal police is to refer to federal prosecutors.[137]

In addition to the jurisdictional exception for non-Indian perpetrators and the enumerated crimes left for the federal prosecutor's taking, Congress enacted the Indian Civil Rights Act of 1968 to impose additional restrictions on tribal courts.[138] The Indian Civil Rights Act originally provided that tribal courts could not "impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both."[139] However, in 2010 Congress enacted amendments to the Indian Civil Rights Act—referred to as the Tribal Law and Order Act of 2010—providing that "[a] tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000[.]"[140] For example, if a Native woman is murdered within Indian Country by another Native and the U.S. attorney declines to prosecute, the tribal courts could sentence this perpetrator to a

134. Pacheco, *supra* note 123, at 28.

135. *Id.*

136. Oliphant v. Squamish Indian Tribe, 435 U.S. 191, 212 (1978).

137. Pacheco, *supra* note 123, at 29.

138. *See* Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1302–1303.

139. *Id.* at § 1302(a)(7)(B).

140. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258, § 234(a)(1)(b) (amending 25 U.S.C. § 1302). *See also* Diamond, *supra* note 129, at 11.

maximum of three years in prison for the crime. As a result, there is minimal deterrence for criminals committing crimes within Indian Country and the victims remain invisible to the United States court system.[141]

This minimal deterrence resulted in a large number of violent crimes occurring in Indian Country. When the Department of Justice indicated in 2004 that Native Americans were 2.5 times more likely to experience rape or sexual assault as compared to other races in the United States combined, Congress responded with a renewed version of the Violence Against Women Act (VAWA).[142] VAWA is a "collection of funding program[s], initiatives and actions designed to improve criminal justice and community-based responses to violence against women, including sexual violence, in the USA."[143] Enacted in 1994, the original version of VAWA generated new federal offenses and funded training programs for officers required to address the crimes as well as community services to support the victims.[144]

In 2013, President Obama signed into law the reauthorization of VAWA, which recognized that tribal courts had jurisdiction over criminal cases brought by tribes against non-Natives.[145] However, in order for tribes to take advantage of VAWA's jurisdictional provisions, most are required to amend their tribal law and hire new judges and public defenders.[146] Further, these judges and defense attorneys must be licensed to practice

141. Pacheco, *supra* note 123, at 30.

142. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-163, §§ 901–909, 119 Stat. 2960 (2005) (amended 2013); Pacheco, *supra* note 123, at 2.

143. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 82 (2007) [hereinafter AMNESTY INT'L REPORT], https://www.amnestyusa.org/wp-content/uploads/2017/05/mazeofinjustice.pdf.

144. *See* Diamond, *supra* note 129, at 9.

145. *Id*. *See also* Barack Obama, President, and Joseph Biden, Vice President, Remarks at Signing of the Violence Against Women Act (Mar. 7, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/03/07/remarks-president-and-vice-president-signing-violence-against-women-act ("And today, because members of both parties worked together, we're able to . . . [r]eauthoriz[e] the Violence Against Women Act . . . .").

146. Diamond, *supra* note 129, at 9.

law in the United States.[147] Tribes must also comply with the Indian Civil Rights Act and guarantee "all other rights whose protection is necessary under the Constitution of the United States" in order to exercise the criminal jurisdiction VAWA allots.[148] Even with the extensive restrictions imposed, VAWA has been utilized to prosecute non-Indians in domestic violence cases within states such as Arizona, North Dakota, Montana, Oregon, South Dakota, and Washington.[149] In 2013, the Justice Department announced its pilot program using tribes from these selected states, and since then more and more tribes have been approved to exercise this special domestic violence jurisdiction.[150]

The Major Crimes Act, the Indian Civil Rights Act, and VAWA, highlight the complexity of the federal-tribal relationship. This complexity raises federal prosecutor declination rates and strips tribal courts of the ability to prosecute most violent crimes committed within Indian Country.[151] Further, even if a tribe successfully pushes through the hurdles required to obtain special criminal jurisdiction under VAWA, the highest punishment a tribal court can impose

147. Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(c)(1)–(3) (requiring defense attorneys to satisfy Sixth Amendment requirements and judges presiding over criminal proceedings in tribal courts to have sufficient legal training and be licensed to practice in the United States).

148. *Id.* at § 1304.

149. *See* Diamond, *supra* note 129, at 9.

150. *See id.* at 9–10. The reauthorized version of VAWA also addressed three additional "purposes" it hoped to fulfill:

> (1) to decrease the incidence of violent crimes against Indian women; (2) to strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indian women; and (3) to ensure that the perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior.

Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 902 Stat. 2960, 3078 (2005). In order to fulfill these promises, Congress appropriated $940,000 to data collection regarding crimes against Native women in the FY2008 Omnibus Appropriations Act. *See* Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1907 (2008). *See also* Pacheco, *supra* note 123, at 36 (calling for tribal justice systems and police forces to receive a greater allocation of federal funding).

151. *See* Pacheco, *supra* note 123, at 15 (describing how violent crimes against women were punished under traditional Native American Law).

for a crime is three years imprisonment.[152] However, as seen with the tribal usage of special criminal jurisdiction under VAWA, tribal nations are capable and willing to handle more extensive criminal matters within Indian Country.

C. *State v. Tribal Jurisdiction*

The states had no jurisdiction over crimes occurring on Indian land until 1953 when Congress enacted Public Law 280, also referred to as the "Act of August 1953."[153] Under Public Law 280—a federal delegation statute that conferred jurisdiction to five, later six, states—the government shifted its jurisdictional authority under the General Crimes Act and Major Crimes Act onto specific states.[154] In the states where Public Law 280 applies, offenses otherwise subject to federal jurisdiction may be subject to state jurisdiction.[155] These Public Law 280 states are either required to exercise jurisdiction or have the option to exercise jurisdiction over crimes committed within Indian Country.[156]

The six "mandatory" Public Law 280 states include: California, Minnesota (excluding the Red Lake Reservation), Nebraska, Oregon (excluding the Warm Spring Reservation), Wisconsin, and Alaska (excluding Indian Country on the Annette Islands).[157] The "optional" Public Law 280 states are broken up into two categories. The first category requires that states "assume such jurisdiction by amending their constitutions," and includes: Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington.[158] The second "optional" category allows states to

152. 25 U.S.C. § 1302(b).
153. 18 U.S.C. § 1162.
154. Pacheco, *supra* note 123, at 31.
155. *Id*.
156. *See id.*
157. 18 U.S.C. § 1162(a).
158. Confederated Tribes of Colville v. Wash., 446 F. Supp. 1339, 1348 (E.D. Wash. 1978), *aff'd in part*, *rev'd in part on other grounds*, 447 U.S. 134 (1980). *See also* Pacheco, *supra* note 123, at

"take jurisdiction over reservations by enactment of state legislation" and includes all remaining states.[159] Public Law 280 does not explicitly bar tribal courts from exercising jurisdiction where the crime is committed between two tribal members in Indian Country, but Congress once again adds an additional set of courts into the mix of this jurisdictional mess.[160]

In essence, Public Law 280 gives states the authority to impose its criminal laws upon tribes without necessarily having the permission of the tribes.[161] Interestingly, because most tribes do not pay local or state taxes, there is little incentive for states to disperse the funds needed to actually exercise jurisdiction. Thus, there is a lack of justice in Indian Country.[162]

D. *The Jurisdictional Test*

For a crime occurring in Indian Country, the first determination, and often the most difficult, is jurisdiction-based.[163] The terms "Indian Country" and "Indian" are integral to understanding criminal jurisdiction as it relates to tribes.[164] As discussed above, either the federal, state, or tribal authorities

32 ("These eight states are distinct because, prior to P.L. 280, their legislatures had enacted, either in their Enabling Acts or in their state constitutions, certain disclaimers to exercising jurisdiction over Indian lands within their borders."); FED. L. ENF'T TRAINING CTRS., INDIAN LAW HANDBOOK 66–71 (2d ed. 2017), https://www.fletc.gov/site-page/legal-division-handbook-pdf.

159. Pacheco, *supra* note 123, at 32 (quoting NAT'L ASS'N OF ATT'YS GEN., COMM. ON THE OFFICE OF ATTORNEY GENERAL, LEGAL ISSUES IN INDIAN JURISDICTION 13 (1976)).

160. *See id.* at 31.

161. *Cf. id.* at 33 (emphasizing the 1968 amendment to Pub. L. 280 required that states obtain tribal consent but did not retroactively apply to states that had already taken jurisdiction without consent).

162. *See id.* at 35 ("This lack of enthusiasm and incentive is reinforced by the fact that P. L. 280 is an unfunded mandate.").

163. AMNESTY INT'L REPORT, *supra* note 143, at 34 ("If it's a parcel of property in a rural area, it may take weeks or months to determine if it's Indian land or not; investigators usually cannot determine this, they need attorneys to do it by going through court and title records to make a determination."); *see also Developments in the Law—Indian Law*, *supra* note 29, at 1687 ("Tribal courts' jurisdiction over crimes committed in Indian country is governed by competing claims of federal, tribal, and state sovereignty manifested in a complex array of laws that create a system of jurisdiction based on location, type of crime, race of the perpetrator, and race of the victim.") (citations omitted).

164. Diamond, *supra* note 129, at 10.

have jurisdiction depending on the type of crime, the location of the crime, and the race of both the perpetrator and victim. Before reaching this determination, there must be an analysis of what constitutes "Indian Country" and who is categorized as an "Indian" for purposes of jurisdiction.[165] For example, a crime scene sits waiting with evidence and witnesses, but before this essential information is collected, the tribal, state, and federal officers must determine who has the authority to analyze it.

The term "Indian Country" was first defined in the Indian Country Crimes Act and continues to apply to most federal Indian law.[166] With limited exceptions, Indian Country includes: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government . . . (b) all dependent Indian communities . . . and (c) all Indian allotments, [where] the Indian titles to which have not been extinguished . . . . "[167]

As for the term "Indian," there is no single statute that gives a distinct definition for federal Indian law purposes.[168] However, in *United States v. Rogers*, the Supreme Court created a widely accepted test to determine who can be categorized as an "Indian."[169] This test considers factors such as tribal recognition through formal enrollment as well as Indian descent.[170] When a tribe does not have an enrollment list, other factors are considered, such as "whether the person holds himself or herself out to be an Indian, lives on an Indian reservation, attends Indian schools, or receives tribal or federal benefits for being an Indian."[171] This taxing process leaves authorities feeling stretched in numerous directions and victims feeling helpless when the identity of the perpetrator is

165. *See id.*

166. *See id.*

167. Indian Country Crimes Act of 1976, 18 U.S.C. § 1151.

168. Diamond, *supra* note 129, at 11.

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

170. Diamond, *supra* note 129, at 10.

171. *Id*. at 10. For an example of an Indian Country citizenship analysis, see *United States v. A.W.L.*, No. 96-4035, 1997 U.S. App. LEXIS 17916, at *1 (8th Cir. July 16, 1997).

unknown. Thus, one substantial contributing factor to the violent crime occurring within Indian Country is this jurisdictional maze.

IV. INADEQUACIES OF THE CURRENT SYSTEM

This Part highlights Congress's ineffective responses to the visible problems with criminal jurisdiction in Indian Country. The current system has had numerous negative effects on federal, state, and tribal systems. That is, in part, because these remedies, such as the Tribal Law and Order Act, continue to interfere with tribal sovereignty and a tribe's right to self-determination.

A. *The Statistics*

The rate at which American Indian and Alaska Native (AI/AN) women are murdered is nearly three times that of non-Hispanic white women.[172] More than half of AI/AN women have experienced sexual violence in their lifetime.[173]Indeed, the vast majority (96%) of these female victims experienced sexual violence at the hands of a non-Native perpetrator.[174] The lack of justice within Indian Country will not improve and crime rates will not decline until Congress recognizes tribal sovereignty. Congress's attempts to alleviate crime in Indian Country has unsurprisingly worsened the procedural complexity and hindered these victims' access to justice.[175]

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172. NAT'L CONG. AM. INDIANS, RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 2 (2018) [hereinafter NCAI POLICY UPDATE], http://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief__FINAL_2_1_2018.pdf .

173. *Id.* at 1–2.

174. *Id.*

175. *See* Pacheco, *supra* note 123, at 2–3, 22 (describing the lack of funding as a result of well-intentioned acts of Congress).

Although data is sparse, the data available shows the need for reform to the current system.[176] Native American children—a population disregarded in VAWA's special criminal jurisdiction—are exposed to domestic violence and other forms of violence at the highest rates among all races in the United States.[177] This exposure to violence leads to "increased rates of altered neurological development, poor physical and mental health, poor school performance, substance abuse, and overrepresentation in the juvenile justice system."[178] Native American children experience nearly 50% higher rates of child abuse compared to non-Native children.[179] Native children are also 2.5 times more likely to experience trauma compared to their non-Native counterparts.[180] Finally, this trauma creates post-traumatic stress disorder at a rate of 22%, the same as veterans returning from Iraq and Afghanistan.[181]

Though limited, this data suggests the need for reform to the current system. Further, Congress has stressed the risk of safety to those in Indian Country by stating: "the complicated jurisdictional scheme that exists in Indian Country [] has a significant negative impact on the ability to provide public safety to Indian communities; [and] has been increasingly exploited by criminals . . . ."[182] In an effort to combat this problem, the Tribal Law and Order Act further relaxed the sentencing restrictions on tribal courts from one-year

176. *See generally* NCAI POLICY UPDATE, *supra* note 172 (describing, inter alia, the high rates of violence against American Indian and Alaska Native women, and the rates of violence against these women relative to non-Hispanic white women).

177. U.S. DEP'T JUSTICE, ATTORNEY GENERAL'S ADVISORY COMMITTEE ON AMERICAN INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE 6 (2014) [hereinafter AG'S AI/AN CHILDREN TASK FORCE], https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf.

178. *Id.*

179. NEELUM ARYA & ADDIE ROLNICK, A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS 5 (2008), https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2005&context=facpub.

180. *See* AG'S AI/AN CHILDREN TASK FORCE, *supra* note 177, at 38.

181. *Id.*

182. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258, § 202(a)(4).

imprisonment to three-years imprisonment,[183] but this was not enough.

B. *Reliance on State & Federal Prosecutors*

The tribal limitations discussed above result in a need for heightened response from federal and state prosecutors when tribal courts are not able to effectively prosecute or sentence serious crimes.[184] However, the federal declination rate[185] for crimes committed in Indian Country is high.[186] The United States Attorney's Offices with Indian Country responsibility had a declination rate of 39% in 2018 and cited the main reason for declination as "insufficient evidence."[187] Further, U.S. Attorneys, FBI field offices, and federal courthouses are normally hundreds of miles from Indian Country, which poses yet another barrier to criminal justice in Indian Country.[188]

As for the states, Public Law 280 sets an expectation for the states to provide criminal justice services in Indian Country but does not provide additional funding to the states and eliminates funding to the tribal justice systems.[189] The Indian Law & Order Commission Report found that Public Law 280 states were even less cooperative than the federal government with tribal governments.[190] The current state-tribal relationship as well as

183. *See id.* § 234(a)(1)(b).

184. *See* Kelly Gaines Stoner & Lauren Van Schilfgaarde, *Addressing the Oliphant in the Room: Domestic Violence and the Safety of American Indian and Alaska Native Children in Indian Country*, 22 WIDENER L. REV. 239, 255 (2016).

185. A declination is when a prosecutor exercises his or her "discretion *not* to pursue formal indictment." Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 224 (2003).

186. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 3 (2010); U.S. DEP'T JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 2–3, 36 (2018), https://www.justice.gov/otj/page/file/1231431/download.

187. INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS, *supra* note 186, at 3.

188. Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DISCOURSE 88, 92 (2013).

189. AMNESTY INT'L REPORT, *supra* note 143, at 29.

190. *See* INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 11 (2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.

federal-tribal relationship hinders a tribal court's ability to effectively prosecute and obtain justice for this abnormally large victim pool within Indian Country.

There is an unsettling number of Native women who have lost faith in the criminal justice system because of the jurisdictional complexities in Indian Country and the sour relationships among tribal, state, and federal officials. Amnesty International shared one particular chilling story from the Standing Rock Sioux Reservation. One day, a Native mother returned home to discover her sixteen-year-old daughter "lying half-naked and unconscious on the floor."[191] She took her daughter to a hospital in South Dakota to have a sexual assault forensic examination performed while the suspected perpetrator fled to Rapid City, South Dakota—which is outside the jurisdiction of the Standing Rock Police Department.[192] The perpetrator eventually returned to the Reservation months later and was held by tribal police for ten days.[193] However, the mother and daughter were unaware of his custody until they called the Standing Rock Police Department to check on the status of the case.[194] Only after traveling to Fort Yates, North Dakota—the tribal headquarters of the Standing Rock Sioux Tribe—and requesting information in person, did the mother and daughter learn that the suspect would go before a tribal court.[195]

The mother hoped that the case would be referred to federal authorities because she knew a federal court could hand down a lengthier sentence.[196] Yet, FBI and BIA agents did not arrive until months after the attack.[197] The agents came to question the victim, who was not home, but her mother told them where

191. AMNESTY INT'L REPORT, *supra* note 143, at 30.
192. *Id.*
193. *Id.*
194. *Id.* at 30, 32.
195. *Id.* at 32.
196. *Id.*
197. *Id.*

they could find her.[198] However, neither she nor her daughter heard from them again.[199] Sixteen months after the attack, federal prosecutors finally picked up the case, and the perpetrator entered into a plea bargain.[200] These negative experiences with the criminal justice systems are all too common for victims of crime in Indian Country.

V. AMEND THE INDIAN CIVIL RIGHTS ACT

The history of Federal Indian policy teaches us that minute changes to legislation with complex caveats do not fix the drastic rate of crime occurring in Indian Country.[201] These policies are fallacious notions of tribal sovereignty that continue to inhibit tribal courts' ability to seek justice for a crime committed on their own land. This ineffectual policy reform can only be explained by the federal government's distrust of tribal court abilities.[202] But, this preconceived idea that tribes are inferior and incapable of handling their own matters is outdated and must evolve with the rest of the world. Legislators have an obligation under the UNDRIP to revise Section 1302(b) of the Indian Civil Rights Act and give tribal courts the authority to impose sentences that can effectively deter criminality in Indian Country.[203]

198. *Id.*

199. *Id.*

200. *Id.*

201. *See Developments in the Law—Indian Law*, *supra* note 29, at 1705 ("The jumbled mess that is jurisdiction relating to Indian [C]ountry greatly needs the attention of a Congress with an eye toward comprehensive solutions. However, history indicates that by practical necessity Congress has enacted reform in Indian country by inches, not miles, and to address specific crises, not widespread disarray.").

202. *See, e.g.*, Stacy L. Leeds, *[dis]Respecting the Role of Tribal Courts?*, 42 AM. BAR ASS'N: HUM. RTS. MAG. (June 1, 2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-3/dis-respecting-the-role-of-tribal-courts/ ("[C]autionary approaches to tribal court power are rarely based on allegations of due process violations in the cases at hand, but on speculation that future litigants might someday encounter civil liberty infringements, should judicial authority be fully embraced.").

203. *See* UNDRIP, *supra* note 60, at arts. 3–4; *see also supra* Part II.A for the discussion of the government's obligations and their enforceability under UNDRIP.

This revision to 25 U.S.C. § 1302(b) would remove the phrase "but not to exceed 3 years."[204] The amended provision would thus state:

> A tribal court may subject a defendant to a term of imprisonment greater than 1 year for any 1 offense . . . if the defendant is a person accused of a criminal offense who . . . is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

This improvement will legitimize congressional support for tribal nations' right to self-determination and will allow for tribes to control the violence in their own communities. Once the sentencing restrictions are removed and tribal courts are granted authority comparable to the federal government, tribes will finally have the long overdue autonomy to self-govern.[205] While this one amendment would not eliminate all of the foreseeable barriers, it would provide an incentive for tribal nations to put time and effort into meeting the requirements of VAWA. In other words, the ability to seek adequate justice for victims in Indian Country by imposing greater sentences strengthens the value of special criminal jurisdiction allotted under VAWA. Congress has yet to amend 25 U.S.C. § 1302(b) and afford tribal nations this inherent right to self-govern because of the outdated perception that tribes are incapable of adequately handling their own affairs.

VI. CONCERN FOR THE UNITED STATES

By focusing on the voices of those most affected by Congress's lack of federal Indian policy reform, we can

204. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258, § 234(a)(1)(b) (amending 25 U.S.C. § 1302). *See also* Diamond, *supra* note 129, at 11.

205. *See* UNDRIP, *supra* note 60, at arts. 3–4 (guaranteeing Indian tribes the right to self-determination).

understand the urgency and overall approach of this much needed congressional action. The stagnant view that most Americans have of tribes and tribal abilities must change. The concerns that the United States courts tend to exhibit when extending tribal authority are rooted in the country's colonial history. The Muscogee (Creek) Nation (MCN)—the nation involved in the *Murphy* case—provides just one example of a present-day tribal government system that functions very similarly to that of the federal government.

A. *The Muscogee (Creek) Nation*

On January 26, 2019, Principal Chief James Floyd delivered the Muscogee (Creek) Nation's State of the Nation Address at the National Council Quarterly Session.[206] It was the 40th anniversary of the ratification of the Muscogee (Creek) Nation's Constitution that reaffirmed the Nation's sovereignty.[207] At the start of Chief Floyd's career in 1978, there were fewer than 100 employees in the Nation.[208] During his speech, Chief Floyd proudly stated that, as of January 26, 2019, the Nation employs over 5,000 people and has a payroll exceeding $169 million.[209] The Nation's Permanent Fund had also grown to more than $372 million.[210] Additionally, the opening of the Creek Nation Community Hospital and the Eufaula Indian Health Center transformed the healthcare system for the Muscogee Nation.[211] Chief Floyd celebrated the passage of the Stigler Act Amendments of 2018,[212] and recognized the Muskogee (Creek)

206. Chief James Floyd, Principal Chief, Muscogee (Creek) Nation, State of the Nation Address (Jan. 26, 2019), https://www.mcn-nsn.gov/muscogee-creek-nation-principal-chief-james-floyd-delivers-state-of-the-nation-address/ (includes video & transcript).

207. *Id.*

208. *Id.*

209. *See id.*

210. *Id.*

211. *See id.*

212. "The legislation is specific to the allotted tribal member lands of the five civilized tribes of Oklahoma- Choctaw, Chickasaw, [Muscogee] (Creek), Cherokee, and Seminole. It amends the Stigler Act of 1947 by removing the one-half degree Indian blood quantum requirement

Nation District Court's prosecution of the first non-Native domestic violence offender under VAWA.[213]

When referencing VAWA, Chief Floyd stated: "I want everyone, citizen and non-citizen alike, to know we are serious about combating domestic violence and will take action to the fullest extent of the law to eliminate it."[214] On this note, he also commended the staff within the Office of the Attorney General for its work on the *Carpenter v. Murphy* case and criminal prosecutions within the tribe's boundaries.[215] In closing, Principal Chief Floyd circled back to the source of this progression: the Nation's strength is the strength of its people.[216] He stated: "[m]any of you know that we started with few resources but we have always had our greatest resource, our people. It is your strength that flows through us and your struggles to overcome that ensure us today. It is our people that have always kept us moving forward."[217]

The Muscogee (Creek) Nation has a governmental structure strikingly similar to that of the United States.[218] The Nation has a Constitution laying out the three branches of government and the rights and privileges of its citizenry.[219] The executive power is vested in a Principal Chief of the Muskogee (Creek) Nation who holds office during a term of four years upon election by a majority vote.[220] The Nation is divided into eight districts with two elected representatives for each district in the Muscogee

needed to retain the restricted status of inherited allotted tribal member lands and brings parity to probate related matters in Oklahoma." Press Release, U.S. Senate Comm. Indian Affs., Chairman Hoeven Announces Senate Passage of Stigler Act Amendments of 2018 (Dec. 13, 2018), https://www.indian.senate.gov/news/press-release/chairman-hoeven-announces-senate-passage-stigler-act-amendments-2018.

213. Chief James Floyd, *supra* note 206.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *See generally* MUSCOGEE (CREEK) NATION CONST. (establishing an executive branch headed by the Principal Chief, a legislative branch comprised of representatives from each Muscogee district, and a judicial branch vested with all the judicial powers of the nation).

219. *See id.*

220. *Id.* at art. V, § 1(a).

(Creek) National Council.[221] This Council holds all legislative power.[222] Lastly, and most importantly, the judicial power of the Muskogee (Creek) Nation is vested in a single supreme court comprised of seven members appointed by the Principal Chief and subject to a majority approval by the National Council.[223]

If a case falls outside the jurisdiction of the Supreme Court, the District Court hears the matter and parties have the opportunity to appeal to the Supreme Court.[224] To be eligible to be appointed as a District Court judge, an individual must "be a graduate of an accredited law school, a member of the Muscogee (Creek) Nation Bar Association, a member of a state bar association, and admitted to practice law before the federal courts in Oklahoma."[225] Generally, in practice, the Muscogee judicial branch follows the Muscogee (Creek) Nation Code of Laws set forth by the legislative branch.[226]

The Muscogee (Creek) Nation is organized, self-sufficient, and has a synonymous framework to that of the United States, but there is one main difference. Under Title 14, Section 1-601(B)(2) of the Nation's Code, the tribe states that the maximum punishment for any person convicted of a felony is "not more than one (1) year" imprisonment.[227] This provision—an adherence to Section 1302(b) of the Indian Civil Rights Act—interferes with the Muscogee (Creek) Nation's ability to effectively use its own governmental framework and usurps this tribe's right to determine its own criminal justice model.[228]

221. *Id.* at art. VI, § 1.

222. *Id.* at art. VI, § 2.

223. *Id.* at art. VII, § 2.

224. *See* MUSCOGEE (CREEK) NATION CODE ANN. tit. 26 §§ 2-101, 2-105; MUSCOGEE (CREEK) NATION CONST., art. VII, § 6.

225. MUSCOGEE (CREEK) NATION CODE ANN. tit. 26 § 3-101(A).

226. *See* MUSCOGEE (CREEK) NATION CODE ANN. tit. 27 § 1-103(A).

227. MUSCOGEE (CREEK) NATION CODE ANN. tit. 14 § 1-601(B)(2).

228. Not only is the Indian Civil Rights Act restricting a tribe's ability to effectively prosecute under the United States criminal justice model, but it also restricts a tribe from creating its own criminal justice model. *See, e.g.*, Rebecca Clarren, *Native American Peacemaking Courts Offer a Model for Reform*, INVESTIGATE W. (Nov. 30, 2017), https://www.invw.org/2017/11/30/native-american-judge-shows-peacemaking-courts-offer-a-model-for-reform/ (noting that

B. *Tribal Court Competence*

Even though tribal governments like the Muscogee (Creek) Nation continue to flourish, Congress refuses to release its restrictions on tribal self-governance. Aside from centuries-long disbelief in tribal capabilities, one reason for restricting tribal jurisdiction is the assumption that tribal courts lack experience and resources to adequately protect defendants.[229] However, this concern has not evolved with the significant tribal court improvements that have taken place over the past five decades.[230] Presently, tribal nations[231] like the Muscogee (Creek) Nation facially and substantively resemble other American judiciaries.[232] Many tribes have adopted sophisticated case management software, hired court staff, and continue to host websites with published statutes and case

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Native communities are known for traditional models of dispute resolution including the restorative justice model that has gradually gained popularity outside of Indigenous communities).

229. *See* Stoner & Van Schilfgaarde, *supra* note 184, at 260.

230. *See* Richotte Jr., *supra* note 24, at 12 ("[T]he 'on the ground' activities of tribal courts strongly suggest that they operate with at least the same level of fairness, thought, and balance as other American courts and that they are succeeding in the difficult task of functioning for those whose cases are before them under the types of stresses no other court system faces. By examining tribal courts and their decisions for what they are, and not for what they have been imagined to be for well over a hundred years, state and federal court judges could go a long way in establishing the legitimacy of their tribal brethren and solving the continuing problems of law enforcement in Indian Country.").

231. As of 2018, at least eighteen tribal nations were utilizing VAWA's special criminal jurisdiction which involved revising criminal codes and court procedures to resemble U.S. courts. *See* NAT'L CONG. AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 42–60 (2018) [hereinafter VAWA FIVE-YEAR REPORT]; *see also* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW 37–39 (2009) (surveying the Navajo Nation's common law and jurisprudence—the Navajo Nation is a clear leader in tribal court development).

232. In Alaska, for example, a survey was administered to get a better understanding of tribal judicial and legislative systems. Of the tribes that responded, 95.4% have constitutions, 55.6% include a Bill of Rights, and 78% have a written code, of which 71.8% are considered "modern, Western-style" written codes. Ryan Fortson & Jacob A. Carbaugh, *Survey of Tribal Court Effectiveness Studies*, 31 ALASKA JUST. F., Fall 2014/Winter 2015, at 1, 15, https://scholarworks.alaska.edu/bitstream/handle/11122/6575/ajf.313b.survey-tribal-courts.pdf.

law.[233] Tribal courts are progressing while American officials continue to lack faith in their abilities.[234]

When tribal governments' jurisdictional freedoms are expanded, such as in VAWA, they are finally given autonomy in matters relating to their local and internal affairs. As of March 20, 2018, eighteen tribes are known to be exercising the special jurisdiction under VAWA and those tribes made arrests resulting in convictions with not a single petition for habeas corpus review in federal court.[235] The implementation of this domestic violence jurisdiction was also found to increase collaboration among local, state, and federal governments, as well as motivate the tribes to update and refine tribal criminal codes.[236] Within five years of VAWA's enactment, implementing tribes used this jurisdictional authority to focus on the "well-documented crisis of inter-racial violence against women in Indian Country."[237] Thus, when given the autonomy to regulate internal affairs tribal nations succeed.

C. *Universal Consensus*

Congress is aware that despite the availability of abundant natural resources on Indian lands and a rich cultural legacy that accords great value to self-determination, self-reliance, and independence, Native Americans suffer higher rates of unemployment, poverty, poor health, substandard housing,

233. THE INDIAN CIVIL RIGHTS ACT AT FORTY 228–29 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012); *see also* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 74 (2013) ("In recent years, more and more tribal courts have made their codes, ordinances, and court rules—as well as written opinions—available online. Joining the hard-copy *Indian Law Reporter*, which publishes selected tribal court opinions, are Westlaw, Lexis, and Versus Law.").

234. *See* Richotte Jr., *supra* note 24, at 9 ("The lack of faith that American officials have shown tribal courts—not to mention tribal societies, ways of thought, and world views—throughout the years has been one of the biggest roadblocks to establishing and maintaining the authority of tribal adjudication.").

235. VAWA FIVE-YEAR REPORT, *supra* note 231, at 1.

236. *Id.*

237. *Id.* at 3.

and associated social ills than those of any other group in the United States.[238]

Further, Congress has recognized that "jurisdictional complexities in Indian Country" are part of the reason for the staggering rates of violence against Native women.[239] The U.S. Court of Appeals for the Ninth Circuit summarized in a 1993 report that "[j]urisdictional complexities, geographic isolation, and institutional resistance impede effective protection of women subjected to violence within Indian [C]ountry."[240] In 2012, the Senate Committee on Indian Affairs stated:

> Criminals tend to see Indian reservations and Alaska Native villages as places they have free reign, where they can hide behind the current ineffectiveness of the judicial system. Without the authority to prosecute crimes of violence against women, a cycle of violence is perpetuated that allows, and even encourages, criminals to act with impunity in Tribal communities and denies Native women equality under the law by treating them differently than other women in the United States.[241]

VAWA is a step in the right direction but concerns over tribal government inadequacy are creating a painfully slow progression. With all three branches of the United States government acknowledging the jurisdictional disorder and need for reform, the only missing component, one that has caused significant barriers to tribal nations for centuries, is recognition of tribal sovereignty and autonomy.

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238. Native American Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. § 4301(8).

239. *See* VAWA FIVE-YEAR REPORT, *supra* note 231, at 3.

240. HON. JOHN C. COUGHENOUR, HON. PROCTOR HUG, JR., HON. MARILYN H. PATEL, TERRY W. BIRD, DEBORAH R. HENSLER, M. MARGARET MCKEOWN, JUDITH RESNIK & HENRY SHIELDS, JR., THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE 147 (1993). For a discussion on the findings of the "relationship between . . . legislation, federal court jurisdiction, and gender" see *id.* at Part IX.

241. S. REP. NO. 112-265, at 7 (2012).

Other than the dire need for reform to jurisdictional procedures involving tribes, it would also be in the United States' best interest to amend the Indian Civil Rights Act. Federal and state prosecutors do not have the time or resources to manage crime in Indian Country.[242] Further, one of the only proven solutions to improving the lives and conditions of tribal nations is policy based on self-determination.[243] The United States has continually harmed tribal nations through its sporadic policies using war, treaties, assimilation, allotment, reorganization, and termination.[244] The issues of marginalization and poverty did not begin to improve until the United States government adopted a policy of tribal self-determination.[245] In the criminal sphere, the United States has yet to adopt policy that is rooted in this guaranteed right.

CONCLUSION

A tribal nation's right to self-determination is a solution to the considerable amount of violent crime committed within Indian Country. This proposed amendment to the Indian Civil Rights Act would advance the untangling of the jurisdictional maze making criminal procedure simpler for the United States and tribal nations. With this reform, the Muscogee (Creek) Nation could effectively handle cases like *Carpenter v. Murphy*, and United States courts would no longer disregard tribal jurisdiction. It is time for Congress to uphold its obligation under the U.N. Declaration on the Rights of Indigenous Peoples and demonstrate to the rest of the world the benefits of

242. *See* Pacheco, *supra* note 123, at 29–31, 34 (noting the high burden and limited resources of federal prosecutors and the lack of additional funding for state prosecutors under P.L. 280).

243. *See* Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy That Works* 15 (HKS Faculty Research Working Paper Series, Paper No. RWP10-043, 2010) ("[F]ederal promotion of tribal self-government under formal policies known as 'self-determination' is turning out to be [. . .] the only strategy that has worked."); Laura M. Seelau & Ryan Seelau, *Making Indigenous Self-Determination Work: What the Nation Building Principles and Three Case Studies from Chile Teach Us About Implementing Indigenous Human Rights*, 39 AM. INDIAN L. REV. 137, 143 (2015).

244. *See* Seelau & Seelau, *supra* note 243, at 143–44.

245. *See id.* at 144.

empowering Indigenous Nations and respecting their right to self-determination.