University of Montana

ScholarWorks at University of Montana

Faculty Law Review Articles | Faculty Publications

2021

Incorporation By Any Other Name? Comparing Congress' Federalization of Tribal Court Criminal Procedure with The Supreme Court's Regulation of State Courts

Jordan Gross
Alexander Blewett III School of Law at the University of Montana, jordan.gross@umontana.edu

Follow this and additional works at: https://scholarworks.umt.edu/faculty_lawreviews

Part of the Criminal Procedure Commons, Indigenous, Indian, and Aboriginal Law Commons, and the Supreme Court of the United States Commons

Let us know how access to this document benefits you.

Recommended Citation

Gross, Jordan, "Incorporation By Any Other Name? Comparing Congress' Federalization of Tribal Court Criminal Procedure with The Supreme Court's Regulation of State Courts" (2021). *Faculty Law Review Articles*. 198.
https://scholarworks.umt.edu/faculty_lawreviews/198

This Article is brought to you for free and open access by the Faculty Publications at ScholarWorks at University of Montana. It has been accepted for inclusion in Faculty Law Review Articles by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

INCORPORATION BY ANY OTHER NAME? COMPARING CONGRESS' FEDERALIZATION OF TRIBAL COURT CRIMINAL PROCEDURE WITH THE SUPREME COURT'S REGULATION OF STATE COURTS

Jordan Gross[*]

TABLE OF CONTENTS 299
INTRODUCTION 300
I. COLONIALIST CONTAINMENT OF INDIGENOUS JUSTICE 304
  A. Destabilized Sovereignty 304
  B. Imported Justice 306
  C. Appropriated Jurisdiction 309
II. STATE AND TRIBAL COURT PROCEDURAL REFORM BY FEDERAL FIAT 322
  A. The Supreme Court Federalizes State Court Criminal Procedure 322
  B. Congress Federalizes Tribal Court Criminal Procedure 328
  C. An Illusory Procedural Parity 333
    i. Appointed Counsel 335
    ii. Law-Licensed Judges 337
    iii. Jury Entitlement, Jury Size, Jury Waiver 339
    iv. Proportionality in Sentencing 343
    v. Habeas Corpus 345
III. A FALSE AND FAILED ANALOGY 348
IV. CONCLUSION 357

[*] Professor of Law, University of Montana Blewett School of Law.

Electronic copy available at: https://ssrn.com/abstract=3813968

INTRODUCTION

The Bill of Rights, ratified in 1791, governs a wide range of government conduct. It prohibits specific government actions and grants affirmative rights to individuals. In the criminal arena, these provisions operate in two distinct spaces. First, the investigative phase, before a person is charged with a crime. And, second, the adjudicative phase, after a crime is charged and court procedures are triggered. This Article concerns the law governing the adjudicative stage of the criminal justice process and it examines provisions of the Bill of Rights triggered by criminal charges and their statutory analogs in the Indian Civil Rights Act of 1968.[2] These provisions include prohibitions against subjecting an accused to double jeopardy, self-incrimination, excessive bail, excessive fines, and cruel and unusual punishment, and the affirmative rights to a speedy and public trial, notice of charges, confrontation of witnesses, compulsory process, and the assistance of counsel.

The authority to define, prosecute, and punish crimes in the United States has historically been the purview of local and state governments, not the national government. The Bill of Rights, as enacted, only constrained the national government prosecuting crimes in its own courts; it did not apply to the states. The Fourteenth Amendment, ratified in 1868 following the Civil War, redefined the relationship of the states to the national government and created an opening for federal oversight of states' criminal justice systems. The Fourteenth Amendment, among other things, prohibits any state from depriving any person of life, liberty, or property without due process of law, or denying any person the equal protection of the laws.[3] The Supreme Court initially interpreted the Fourteenth Amendment to allow states to diverge from what the Bill of Rights required from the national government in federal court prosecutions as long as states provided some basic level of fairness to the accused.[4] Today, however, the contours of state court criminal procedure are defined, for the most by the Bill of Rights.

The Bill of Rights requirements were extended to the states by the Supreme Court's "incorporation" jurisprudence.[5] Under incorporation jurisdiction, if the Court determines that a specific provision in the Bill of Rights is implicit in the concept of ordered liberty,[6] it is deemed "incorporated" into the Fourteenth Amendment. As such, it binds the states on the same terms as the national government. The Court decided its first incorporation cases in the 1920s, and they mostly concerned the First Amendment.[7] The Court did not incorporate any criminal procedure provisions of the Bill of Rights until the 1960s.[8] Thus, at the founding, criminal procedure in state and local courts was unregulated by the U.S. Constitution; from 1791 to the 1960s, it was supervised by the Court under a relatively deferential

---

[2] 25 U.S.C. §§ 1301–1304.

[3] U.S. CONST. amend. XIV, § 1.

[4] United States v. Cruikshank, 92 U.S. 542, 554–55 (1875).

[5] Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 70 (1996).

[6] Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).

[7] *See infra* note 160.

[8] *See infra* note 161 and accompanying text.

Electronic copy available at: https://ssrn.com/abstract=3813968

due process standard; since the 1960s the Court has incorporated virtually all of the criminal procedural protections of the Bill of Rights into the Fourteenth Amendment. As a result, the process by which state and local governments prosecute and punish crimes today must adhere to a national, common law code of criminal procedure that sets a uniform "floor" of federal protection for all defendants tried in state or federal court.

At the founding, Indian nations exercised sovereign authority within the territories they controlled, including the power to define and punish wrongdoing. No Indian nation signed the U.S. Constitution. Thus, in contrast to the national government's relationship with the states, its relationship with individual tribal nations is extra-constitutional. Shortly after the U.S. Constitution was ratified, the newly-formed Congress laid claim to federal jurisdiction over wrongdoing committed by non-Indians in some Indian territories, to the exclusion of states. Congress later asserted federal jurisdiction over interracial crimes committed in what has been designated "Indian country."[9] The Court subsequently carved out an exception to federal jurisdiction over crimes committed in Indian country for crimes committed by non-Indians against other non-Indians. Those case, it held, fall within state jurisdiction. After the Court recognized tribes' exclusive jurisdiction over crimes committed by one Indian against another, Congress asserted federal jurisdiction over serious crimes of personal violence committed by Indians in Indian country. Congress subsequently transferred federal criminal jurisdiction over crimes in some Indian country jurisdictions to states. The Supreme Court waded into these murky jurisdictional waters in *Oliphant v. Suquamish Indian Tribe* in 1978.[10] There it held that tribes' criminal jurisdiction was limited to crimes committed by Indians, and that it did not extend to non-Indians absent express Congressional authorization.[11] After *Oliphant*, jurisdiction over crimes committed by non-Indians in Indian country, which was previously exercised by tribes, rested with the states or the federal government unless Congress said otherwise. As a result of these federal interventions, criminal jurisdiction in Indian country today is allocated among states, tribes, and the federal government based on whether a perpetrator or victim is an Indian or a non-Indian, the nature of the offense, and the status under federal law of the Indian country in which a crime occurs.

Deep issues in federal Indian law include the nature of tribes' sovereign authority vis-à-vis the national and state governments, the extent to which a tribe's exercise of authority relies on express Congressional authorization, and whether a tribe's

---

[9] 18 U.S.C. § 1151 is the primary federal law defining "Indian Country." It identifies three types of Indian Country:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.

[10] 435 U.S. 191 (1978).

[11] *Id.* at 208.

Electronic copy available at: https://ssrn.com/abstract=3813968

jurisdiction over conduct occurring within its territory, or affecting its interests, is concurrent with that of the other two sovereigns. Since the 1960s, Congress' stated policy has been to support tribes' self-determination. One way it has expressed this policy is by promoting and encouraging the development of Anglo-European court systems in Indian country. Since the U.S. Constitution has no force in Indian country, criminal procedure in tribal courts is not constrained by the Bill of Rights or the Court's Fourteenth Amendment incorporation jurisprudence. Tribal court criminal procedure is nonetheless heavily regulated by Congress through the Indian Civil Rights Act of 1968 (ICRA).[12] Congress enacted ICRA during the Civil Rights era against the backdrop of the Court's incorporation jurisprudence, and its original version imposed most, but not all, of the criminal procedure provisions of the Bill of Rights on tribal governments using language mirroring the U.S. Constitution. ICRA also limited tribes' sentencing authority to misdemeanor-level penalties, even for the most serious offenses—specifically, the 1968 version of ICRA limited tribal court sentences to six months; a cap Congress raised to one year in 1986.[13]

American-Indian and Alaska Native women are victimized at a rate more than twice that of women of other ethnicities.[14] This violence occurs primarily at the hands of non-Indians, who make up a substantial majority of the residents of Indian country. Jurisdictional loopholes that allow non-Indians to escape prosecution, limited tribal punishment authority, and inadequate federal funding of law enforcement and courts in Indian country have all contributed to this public safety crisis. In response to criticism of the federal government's law enforcement efforts in Indian country and inadequate funding of tribal institutions on the front line of this crisis, Congress amended ICRA with the Tribal Law and Order Act of 2010 (TLOA)[15] and the Violence Against Women Reauthorization Act of 2013 (VAWA 2013),[16] to increase tribal authority over criminal conduct in Indian country. TLOA authorized lifting ICRA's sentencing cap from one to three years for some offenses, and stacking offenses for a total of up to nine years.[17] VAWA 2013 authorized tribes to exercise criminal jurisdiction over some non-Indians for the first time since the Court decided *Oliphant* over twenty-five years earlier.[18]

Unlike the Bill of Rights or ICRA, ICRA's TLOA and VAWA 2013 provisions do not create uniform procedures. Rather, they are "opt in" statutes that authorize individual tribes to exercise greater authority over wrongdoing in their communities if they provide additional procedural safeguards above those required under ICRA's 1968 baselineprovisions, which set the default requirements for tribal courts. Tribes that choose not to, or who cannot afford to adopt the more demanding procedural requirements of TLOA and VAWA 2013 remain subject only to the baseline

[12] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

[13] *Id.* § 202(7), 82 Stat. at 77; Anti-Abuse Act of 1986, Pub. L. No. 99-570, sec. 4217, § 202(a)(7), 100 Stat. 3207, 3207-146.

[14] André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NAT'L INST. JUST. J., Sept. 2016, at 1, 4, https://www.ncjrs.gov/pdffiles1/nij/249822.pdf [https://perma.cc/LCY9-8YU5].

[15] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, sec. 221, §401(a), 124 Stat. 2258, 2271.

[16] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204, 127 Stat. 54, 120–23.

[17] 25 U.S.C. § 1302(a)(7)(D).

[18] *See infra* note 207 and accompanying text.

Electronic copy available at: https://ssrn.com/abstract=3813968

provisions of the 1968 version of ICRA. TLOA and VAWA 2013 purport to capture criminal procedural protections required in state and federal courts under the Bill of Rights that were either left out of the 1968 version of ICRA, or that had been added to the Court's Fourteenth Amendment incorporation catalog after 1968. In several instances, Congress linked TLOA and VAWA 2013's requirements directly to the Court's incorporation jurisprudence, promoting further conformity between tribal court criminal procedure and federal constitutional criminal procedure. In many instances, however, TLOA and VAWA 2013 require tribes to extend greater procedural protections to defendants in their courts, especially if they are non-Indian, than those required of states under the Court's Fourteenth Amendment jurisprudence. TLOA and VAWA 2013, therefore, do not simply harmonize tribal criminal court procedure with federal constitutional criminal procedure, in some instances they impose greater burdens on tribes seeking to exercise sovereign authority over wrongdoing in their communities.

This Article examines the different experience of states and tribes with uniform national standards of criminal procedure imposed by the federal government. Part I describes the federal government's displacement of indigenous justice in service of colonialist political goals, a policy that has contributed to the public safety crisis in Indian country today. Part II explains the constitutional criminal procedure jurisprudence the Court developed for states on which Congress has modeled ICRA's criminal procedure provisions. In TLOA and VAWA 2013, Congress recognized that restoring tribal autonomy over wrongdoing in Indian country must be part of the federal policy response to the violence indigenous peoples experience in Indian country within the United States. Part III asks whether Congress' efforts to further federalize tribal court criminal procedure is aligned with its stated commitment to support tribal self-determination and make Indian country safer. This Article asserts that requiring tribes to adopt even more trappings of Anglo-European justice norms as the exclusive means to access increased authority over wrongdoing in their communities is counterproductive to Congress' stated goals in two ways. First, it constrains tribes' ability to adapt their court practices and processes to reflect their individual community's normative values. This can undermine tribal courts' internal legitimacy and, ultimately, their effectiveness. Second, Congress' approach puts residents in low-resource and rural tribal communities at even greater risk of harm. Some of the additional procedures TLOA and VAWA 2013 require tribes to adopt as a pre-condition to exercising increased authority are extremely costly to implement. Thus, the promise of increased authority and restored sovereignty Congress has held out can only be accessed by tribes that have adequate revenue sources to pay for them, that are willing to re-direct funds from other public services to fund TLOA and VAWA 2013 upgrades, or that are situated near urban areas where they can access additional human and institutional resources in neighboring communities. This leaves low-resource, rural tribal communities in an *Oliphant* world, a world in which all crimes within the tribe's jurisdiction, no matter how serious, are treated as misdemeanors, and where non-Indians can victimize residents of Indian country with relative impunity.

Electronic copy available at: https://ssrn.com/abstract=3813968

I. COLONIALIST CONTAINMENT OF INDIGENOUS JUSTICE

A. *Destabilized Sovereignty*

"Sovereignty" is typically understood to encompass a community's power to make decisions in a given geographic region to the exclusion of all other earthly authorities.[19] Tribal nations situated within the present-day United States were initially acknowledged as sovereign entities whose relationship with the newly-established United States was defined by treaties and governed by international law principles.[20] This was not unlike the original colonial states, which enjoyed sovereign status until they agreed to form a federal union.[21] Tribal nations, however, were not parties to the U.S. Constitution,[22] and they have had a different experience from states in exercising their sovereignty vis-à-vis the national government. Depending on the historical reference point, federal Indian policy has

---

[19] "Sovereignty" is a complex term with multiple meanings and implications. One privilege commonly associated with sovereignty is establishing norms of behavior within a geographic area, and defining the process by which deviations from norms are vindicated. Among other things, it encompasses a community's power to make decisions for itself. *See* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 834–36 (2006); Stephen D. Krasner, *Problematic Sovereignty*, *in* PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES 1, 6–7 (Stephen D. Krasner ed., 2001) (identifying four common uses of the term "sovereignty"—domestic sovereignty, to refer to public authority within a state and power to exert effective control; interdependence sovereignty, to refer to control of cross-border movements; international legal sovereignty, to refer to legal recognition of nation-states; and Westphalian sovereignty, to refer to power to exclude external actors from internal affairs).

[20] Colonial and early federal law treated the relationship between settlers and tribal nations as one between sovereigns governed by international law principles. *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 140–41 (1962); Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 558–59 (1972). Consistent with the status of Indian nations as external sovereigns (and external threats) under international law, Congress assigned responsibility for Indian affairs to the War Department in 1786, shortly after the United States was founded. Burnett, *supra*, at 558.

[21] Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493 (2019) ("After independence, the States considered themselves fully sovereign nations. . . . Under international law, then, independence 'entitled' the Colonies 'to all the rights and powers of sovereign states.'" (first quoting THE DECLARATION OF INDEPENDENCE para. 4 (U.S. 1776); and then quoting McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209, 212 (1808))).

[22] Talton v. Mayes, 163 U.S. 376, 383–84 (1896) (because Indian tribes predated the U.S. Constitution and did not derive their authority from it, they were not subject to the constitutional limitations of the Fifth Amendment); *see also* United States v. Doherty, 126 F.3d 769, 777 (6th Cir. 1997), *abrogated by* Texas v. Cobb, 532 U.S. 162 (2001) ("*Talton* was decided decades before most of the protections of the Bill of Rights were held to be binding on the states through the Fourteenth Amendment . . . . Nonetheless, *Talton* has come to stand for the proposition that neither the Bill of Rights nor the Fourteenth Amendment operates to constrain the governmental actions of Indian tribes.'" (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)) (citations omitted)); Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 428 (2014) ("Since Indian tribes 'did not participate in the Constitutional Convention and did not "sign on" by joining the federal union,' they are not bound by the Constitution, absent affirmative congressional action to the contrary.").

Electronic copy available at: https://ssrn.com/abstract=3813968

reflected hubristic laissez-faire sensibilities,[23] on one extreme, and ethnocidal[24] micro-management, on the other.[25]

Under modern federal law, tribal nations in the United States are domestic sovereigns who, like states, retain significant autonomy within their boundaries, but whose sovereign authority yields to that of the national government.[26] The sovereign authority of tribal nations is "acknowledged under federal law to be aboriginal[,]" that is, it "does not derive from the Constitution, is not necessarily constrained by the Constitution, and predates the Constitution."[27] Tribal sovereignty is "enshrined" in federal law.[28] But "tribal sovereignty is not a delegation of federal authority. Rather, federal law recognizes the aboriginal authority of tribes to self-government."[29] Unlike the states, whose relationship with the national government was framed by the U.S. Constitution and refined by the Tenth Amendment,[30] the federal government's relationship with tribal nations is defined by treaties and a trust obligation.[31]

---

[23] Williams v. Lee, 358 U.S. 217, 220 (1959) (recognizing reservation tribes' authority "to make their own laws and be ruled by them").

[24] Ethnocide (also referred to as cultural genocide), describes "the purposeful weakening and ultimate destruction of cultural values and practices of feared out-groups." Lindsey Kingston, *The Destruction of Identity: Cultural Genocide and Indigenous Peoples*, 14 J. HUM. RTS. 63, 63–64 (2015) (citation omitted) ("Within North America and around the world, indigenous nations continue to face systemic, widespread threats to their fundamental human rights to culture. These identity groups are increasingly conceptualizing such rights violations as 'cultural genocide' . . . .").

[25] Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 311–12 ("The United States has approached tribal sovereignty through an inconsistent and opportunistic lens. It is a complex and curious legacy. . . . The United States has wrestled with how to regard and reconcile coexisting sovereigns within the territory of the United States. The Removal Act purported to induce tribal cooperation to relocate west of the Mississippi River but resulted in the forcible removal and relocation of tribal communities. The General Allotment Act, sanctioned a policy of forced assimilation and effected a catastrophic loss of Indian homelands and territory. The Indian Reorganization Act, proposing a policy of greater self-government was soon followed by the Termination Era, undertaking to terminate the federal-tribal relationship with numerous tribes. Currently, the United States endorses a policy of tribal self-determination, recognizing tribal sovereignty and the right of tribal self-government." (citations omitted)).

[26] *Id.* at 309 ("Underlying many of these legal fights [about the extent of tribal authority] is confusion about the nature of tribal sovereignty. Under current federal law, tribes are not international or Westphalian sovereigns, with the power to exercise traditional external sovereignty. Rather, tribes are domestic sovereigns, retaining significant powers but subject to the ultimate sovereignty of the United States.").

[27] *Id.* at 313–14 (citations omitted).

[28] *Id.* at 314.

[29] *Id.* (citations omitted).

[30] The Tenth Amendment, ratified in 1791 as part of the first ten amendments that form the Bill of Rights, reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[31] Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 201 (2017) ("[T]he [federal] political branches have come to view the content of the [federal government's] trust responsibility [towards tribes] differently. The obligations under the federal trust responsibility have evolved from a paternalistic model in which the federal government provides services and programs and makes decisions for impoverished Native Americans, to an understanding that the trust responsibility obliges the federal government to support and revitalize tribal governments and even advocate and protect tribal sovereign powers.").

Electronic copy available at: https://ssrn.com/abstract=3813968

B. Imported Justice

Today, many tribes look to traditional sources of law to inform their individual community's justice processes, procedurally and structurally. Nonetheless, many tribal justice systems have come to resemble the colonialist justice systems of the state and federal governments.[32] The assimilation of tribal justice structures and procedures is due, in large measure, to external federal statutory mandates, and incentives and disincentives that have either forced or encouraged tribal justice to conform to a colonialist model.[33] By way of example, in 1883, at the behest of the Office of Indian Affairs (now the Bureau of Indian Affairs), the Department of the Interior adopted Law and Order Codes for Indian country.[34] The Law and Order Codes were the precursor to the Code of Indian Offenses.[35] These Codes were federal regulations that regulated, and sometimes criminalized indigenous cultural practices.[36] These provisions of the Code of Indian Offenses were not removed until

---

[32] Melody L. McCoy, *Tribal Courts: Forums for the Future*, NATIVE AM. RTS. FUND (NARF) LEGAL REV., Fall 1987, at 1, 2 ("[T]oday's tribal courts tend to look and act much like the non-Indian courts of states, counties and municipalities. This is not surprising. Many similarities are the result of federal Indian policies which for so long have suppressed tribal self-determination.").

[33] Professor Matthew Fletcher explains that the backdrop against which tribal governments have developed includes the federal government's failure to honor its treaty obligations and a morphing of the understanding of the federal government's treaty obligations:

> The original understanding of the federal-tribal relationship was that the United States agreed to undertake a duty of protection to Indians and tribes. This means that the tribes gave up much of their exterior sovereignty, but they were to retain all the internal governmental powers they possess, like the power to make laws and enforce them within the tribe's territory.
>
> . . . The United States also agreed to manage and protect Indian tribes' resources, such as lands and timber.
>
> However, the duty of protection mutated politically into a guardian-ward relationship . . . . It would also be the premise for the federal government to label Indian people legally incompetent. This way of thinking reached an apex in the 1880s when Congress federalized jurisdiction in Indian Country, broke up reservations into individual allotments, and made boarding school education mandatory.

Rory Taylor, *6 Native Leaders on what it would look like if the US kept its promises*, VOX (Sept. 23, 2019, 8:30 AM), https://www.vox.com/first-person/2019/9/23/20872713/native-american-indian-treaties (last accessed Jan. 14, 2021).

[34] Robert N. Clinton, *Code of Indian Offenses*, OFF. OF ROBERT N. CLINTON, http://robert-clinton.com/?page_id=289 [https://perma.cc/YMH7-C5FZ]. The Office of Indian Affairs was initially housed in the U.S. Department of War, which oversaw the U.S. military. In 1849, Congress moved the Office of Indian Affairs from the War Department to the Department of Interior, which is tasked with managing public lands. *Bureau of Indian Affairs (BIA)*, U.S. DEP'T INTERIOR, INDIAN AFFS., https://www.bia.gov/bia [https://perma.cc/T7B6-3K6L].

[35] Matthew L.M. Fletcher, *The Supreme Court's Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 100 (2007).

[36] The federal Courts of Indian Offenses prosecuted Indians for things like participating in ceremonies in an effort to criminalize and displace tribal spiritual traditions in favor of Christian traditions. Letter from the Hon. Hiram Price, Comm'r of Indian Affs., to the Emps. of the Dep't of the Interior, Off. of Indian Affs. (Mar. 30, 1883), http://robert-clinton.com/wp-content/uploads/2018/09/code-of-indian-offenses.pdf [https://perma.cc/TP66-Y6DL] (discussing the original Code of Indian Offenses). Professor Robert Clinton cautions the Code of Indian Offenses should not be confused with a criminal code as that term is commonly understood, but rather as an instrument of "federal ethnocide." As he explains, when

Electronic copy available at: https://ssrn.com/abstract=3813968

1933.[37] Courts of Indian Offenses, often referred to as "CFR Courts" were created to enforce the Code.[38] At their apex, CFR Courts exercised jurisdiction over approximately two-thirds of the Indian reservations within the United States.[39] A handful of CFR Courts remain in operation today.[40]

When Congress enacted the Code of Indian Offenses, it applied to Indians in Indian territories, except the territory occupied by the Five "Civilized" Tribes.[41] The Five Tribes, the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Indians, occupied the Indian Territory, a region roughly corresponding to the modern-day state of Oklahoma.[42] These tribes were referred to as "civilized" because they were considered by the federal government to be sufficiently assimilated as not to require federal regulatory control.[43] In 1889, Congress created a separate U.S. Court for the Indian Territory occupied by the Five Tribes.[44] This court had original jurisdiction

---

the Code was promulgated, "most of the nomadic plains tribes had been corralled onto reservations" and the bison had been decimated by "federally-sponsored eradication" programs; this made tribal members,

> completely dependent on federal rations . . . . In this context, the penalty prescribed by the Code of Indian Offenses for practicing traditional and customary ways often involved the denial of rations. Thus, the federal government's message to tribal Indians in the late nineteenth century was crystal clear—abandon your traditional culture and comply with the Code of Indian Offenses *or starve*.

Clinton, *supra* note 34.

[37] Clinton, *supra* note 34.

[38] *Id*.

[39] *Id.*

[40] 25 C.F.R. § 11.100 (2019). These courts are located in Colorado, New Mexico, Nevada, Oklahoma, and Utah. *Id.* A list of Indian country courts, including C.F.R. Courts, can be found at: *Tribal Courts*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/justice.htm#CFR%20Courts [https://perma.cc/AKK9-ZQJJ].

[41] *Five Civilized Tribes*, ENCYC. BRITANNICA (Jan. 4, 2019), https://www.britannica.com/topic/Five-Civilized-Tribes [https://perma.cc/AQ5X-SP4V] ("Five Civilized Tribes . . . has been used officially and unofficially since at least 1866 to designate the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Indians in Oklahoma (former Indian Territory) . . . . The word *civilized* was applied to the five tribes because, broadly speaking, they had developed extensive economic ties with whites or had assimilated into American settler culture. Some members of these southeastern tribes had adopted European clothing, spoke English, practiced Christianity, and even owned slaves.").

[42] Brad A. Bays, *Indian Territory*, *in* ENCYCLOPEDIA OF THE GREAT PLAINS (David J. Wishart ed., 2011), http://plainshumanities.unl.edu/encyclopedia/doc/egp.na.050#egp.na.050 [https://perma.cc/64TV-W8ND] ("All of Oklahoma was referred to as 'Indian Territory' until 1890, when Congress partitioned Oklahoma Territory and made 'Indian Territory' the formal name for the Five Civilized Tribes' domain. Indian Territory's relevance to the Great Plains thus spans from the 1820s, when the United States cleared title through treaty cessions by the Quapaws (1818) and Osages (1825) and designated the area as 'Indian Country,' to the Oklahoma land runs, beginning in 1889."). The Court recently held that treaty cessions the federal government purportedly obtained in the Indian Territory invalid in *McGirt v. Oklahoma*, No. 18-9526, slip op. at 1 (July 9, 2020). The result is that a significant portion of Eastern Oklahoma is Indian country under federal law, not part of the state of Oklahoma. This makes that land subject to the criminal jurisdiction of the Creek Nation and U.S. government, not the state of Oklahoma. Tucker Higgins & Dan Mangan, *Supreme Court says eastern half of Oklahoma is Native American land*, CNBC (July 9, 2020, 2:12 PM), https://www.cnbc.com/2020/07/09/supreme-court-says-eastern-half-of-oklahoma-is-native-american-land.html [https://perma.cc/C3PU-FMYE].

[43] ENCYC. BRITANNICA, *supra* note 41.

[44] Act of Mar. 1, 1889, ch. 333, 25 Stat. 783; *U.S. Courts for the Indian Territory, 1889-1907*, FED. JUD. CTR., https://www.fjc.gov/history/courts/us-courts-indian-territory-1889-1907 [https://perma.cc/W9KV-C28C].

Electronic copy available at: https://ssrn.com/abstract=3813968

over all criminal matters except those punishable by death or hard labor, and those arising between "persons of Indian blood."[45] The first category of offenses—those punishable by death or hard labor—was the purview of a federal District Court; the latter—offenses between Indians—fell within the authority of the tribes in the Indian territory. The U.S. Court for the Indian Territory was in operation until 1907.[46]

Many contemporary tribal courts trace their origins to the Indian Reorganization Act (IRA) of 1934.[47] The IRA encouraged Indian tribes to adopt constitutions, establish justice codes, and operate court systems.[48] The IRA required tribes to seek approval from the Secretary of the Interior for many tribal government actions.[49] Many tribes adopted "IRA constitutions" based on templates provided by the federal government and subject to its approval.[50] Notwithstanding its paternalistic approach, the IRA is often regarded as a federal legislative effort to encourage and promote tribal self-determination and self-governance.[51] Contemporary federal policy

---

[45] *U.S. Courts for the Indian Territory*, *supra* note 44.

[46] *Id.*

[47] Indian Reorganization Act of 1934, ch. 576, § 16, 48 Stat. 984, 987 (codified as amended at 25 U.S.C. § 5123).

[48] *Id. See* Sam Thypin-Bermeo, *Political Cooperation and Procedural (In)Justice: A Study of the Indian Reorganization Act*, AM. INDIAN L.J., Fall 2013, at 300, 304 (noting financial incentives and subsidies in the IRA).

[49] Richmond L. Clow, *The Indian Reorganization Act and The Loss of Tribal Sovereignty: Constitutions on the Rosebud and Pine Ridge Reservations*, 7 GREAT PLAINS Q. 125, 125 (1987).

[50] Jane C. Hu, *One woman took a stand against tribal disenrollment and paid for it*, HIGH COUNTRY NEWS (Feb. 1, 2020), https://www.hcn.org/issues/52.2/indigenous-affairs-one-woman-took-a-stand-against-tribal-disenrollment-and-paid-for-it-nooksack [https://perma.cc/AMD4-MG69] ("'[Model] IRA constitutions' . . . [were] circulated to some tribes by the Bureau of Indian Affairs shortly after the passage of the 1934 Indian Reorganization Act, which was designed to return sovereignty and self-governance to tribes. The prescribed constitutions were, unsurprisingly, modeled on colonial concepts of national government: Each tribe would be a 'nation' responsible for determining membership, where members would have voting powers. But the new rules didn't reflect the lives of Indigenous people; unlike the system the BIA recommended, Indigenous people didn't enforce official tribal 'membership,' delineate national borders, or track blood quantum before colonial intervention. IRA constitutions differ from the U.S. Constitution in that they usually lack checks and balances between branches of government. Instead, the tribal council holds all legislative, judicial and executive power."); *see also Developments in the Law – Indian Law*, 129 HARV. L. REV. 1652, 1662 (2016) (identifying that IRA constitutions concentrate nearly all tribal governmental power into the tribal council).

[51] Fletcher, *supra* note 35, at 99 ("Many tribal governments and tribal justice systems have never recovered from these changes forced from outside. Congress attempted to restore a semblance of tribal self-governance by enacting the 1934 Indian Reorganization Act, but the intent and practical operation of this reformist legislation still was to encourage Indian tribes to adopt governments and laws mirroring Anglo-American legal structures.." (citations omitted)). Indian Nations, of course, are not the only pre-colonial community absorbed into the U.S. political system that continues to exist under a unique and complex arrangement, and on unequal footing with the states. The island of Puerto Rico was a Spanish colonial possession for close to four-hundred years before Spain ceded it to the United States at the end of Spanish-American War. Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., art. II, Dec. 10, 1898, 30 Stat. 1754, 1755. By treaty, the U.S. Congress was assigned the power to determine the question of the "civil rights and political status" of the people of Puerto Rico. *Id.* at 1759. In 1950, Congress authorized the people of Puerto Rico to undertake constitutional self-governance and draft a constitution. Puerto Rico v. Sanchez Valle, No. 15-108, slip op. at 2 (June 9, 2016); Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319. Public Law 600 required Puerto Rico's constitution to ensure a republican form of government and provide a bill of rights. *Id.* § 2, 64 Stat. 319. The Puerto Rican people approved a constitution that created the Commonwealth of Puerto Rico in 1952. J. Res. of July 3, 1952, ch. 567, 66 Stat. 327.

Electronic copy available at: https://ssrn.com/abstract=3813968

acknowledges tribal justice systems as an integral and essential feature of tribes' sovereignty, self-determination, and cultural survival that the national government is obligated to fund and support as part of its treaty trust responsibilities to tribal nations.[52] There are currently 574 federally-recognized tribes situated within the United States.[53] In 2002, according to a federal census, about 60% of tribes operated some form of tribal justice system. [54]

C. Appropriated Jurisdiction

Although the Constitution does not extend to Indian country, federal laws of national applicability, such as federal drug and firearm laws, do apply in Indian country in most circumstances.[55] Federal law also includes statutes and doctrines unique to Indian country. The primary federal laws governing criminal law and jurisdiction in Indian country are: The Indian Country Crimes Act (ICCA);[56] the

[52] The Indian Tribal Justice Act of 1993, for example, is based on the following Congressional findings:

> (1) there is a government-to-government relationship between the United States and each Indian tribe;
> (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;
> (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;
> (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;
> (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;
> (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;
> (7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this chapter;
> (8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and
> (9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this chapter.

25 U.S.C. § 3601.

[53] *About Us*, U.S. DEP'T OF THE INTERIOR; INDIAN AFF'S. https://www.bia.gov/about-us [https://perma.cc/FE88-N465] (last visited Feb. 11, 2021).

[54] STEVEN W. PERRY, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, U.S. DEP'T JUST. iii (2002), https://www.bjs.gov/content/pub/pdf/ctjaic02.pdf [https://perma.cc/CX6P-H4RL]; *Tribal Courts*, U.S. DEP'T OF JUST.: BUREAU OF JUST. STAT., https://www.bjs.gov/index.cfm?ty=tp&tid=29 [https://perma.cc/CWU4-844D] (last visited Feb. 11, 2011).

[55] United States v. Mitchell, 502 F.3d 931, 947 (9th Cir. 2007) ("[T]he general rule is that a federal statute of nationwide applicability that is otherwise silent on the question of jurisdiction as to Indian tribes 'will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ."'") (quoting Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985)); United States v. Anderson, 391 F.3d 1083, 1085–86 (9th Cir. 2004); 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 4.5 (3d ed. 2019).

[56] Indian Country Crimes Act, Pub. L. No. 80-772, § 1152, 62 Stat. 683, 757 (1948) (codified as amended at 18 U.S.C. § 1152). ICCA is also known as the Interracial Crime Provision of the General Crimes Act. CONF. OF W. ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK § 4:8 (2020).

Electronic copy available at: https://ssrn.com/abstract=3813968

Indian Major Crimes Act (MCA);[57] Public Law 280;[58] the "*Duro* Fix" statute,[59] (so named because it overturned the Court's 1990 *Duro v. Reina*[60] opinion); and the Indian Civil Rights Act (ICRA) of 1968, as amended by the Tribal Law and Order Act (TLOA) of 2010[61] and the Violence Against Women Reauthorization Act (VAWA) of 2013.[62] These statutes, along with Supreme Court opinions, have created what is often referred to as a "jurisdictional maze" in Indian country.[63] As explained below, federal law in this area earned this moniker because it apportions criminal jurisdiction over Indian country among the three sovereigns based on the Indian/non-Indian status of the defendant and victim, the type of crime committed, and whether the Indian country where the crime is committed is a "Public Law 280 jurisdiction" or a "Major Crimes Act jurisdiction."

One of Congress' first orders of business after the founding was to assert federal control over settlers' interactions with tribal communities, to the exclusion of the states, and to allocate jurisdiction over wrongdoing in tribal communities between the federal government and individual tribes. The Indian Trade and Intercourse Act of 1790 was one of Congress' first laws.[64] It established a federal framework that distinguishes between Indians and non-Indians in determining whether wrongdoing committed in lands controlled by a tribe would be judged according to colonialist or indigenous processes and norms.[65] Under the Act, Congress asserted sole treaty-making authority to regulate interactions between Indians and non-Indians in the United States and its territories.[66] This included the power to prosecute and punish non-Indians who engaged in wrongdoing against "friendly" Indians in Indian territories.[67] Under the Act, those non-Indians were to be prosecuted in a federal court and according to settler procedures.[68] The federal government's assertion of

---

[57] Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153).

[58] Act of Aug. 15, 1953, Pub. L. No. 83-280, § 4, 67 Stat. 588, 589 (codified as amended at 28 U.S.C. § 1360). Congress enacted Public Law 83-280 (also "Public Law 280" or "PL 280") in 1953.

[59] Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (codified as amended at 25 U.S.C. § 1301(2)).

[60] 495 U.S. 676, 685 (1990).

[61] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, sec. 221, § 401(a), 124 Stat. 2258, 2271.

[62] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204, 127 Stat. 54, 120–23 (codified at 25 U.S.C. § 1304).

[63] *E.g.*, Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1977).

[64] Indian Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177 (2018)).

[65] *Id.* § 5.

[66] *Id.* § 1.

[67] *Id.* § 5.

[68] Section 5 of the Act provides that conduct committed by non-Indians against "peaceable and friendly" Indians will be deemed a crime if it would be a crime under state or federal law if committed in a state or federal territory against a non-Indian:

> if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same

Electronic copy available at: https://ssrn.com/abstract=3813968

authority over crimes committed by non-Indians in lands controlled by tribes is reflected in the "Bad Men" provisions in some tribes' treaties.[69] "Bad Men" provisions require tribes to turn over non-Indians who engaged in wrongdoing in their territories to federal authorities.[70]

In 1817, Congress enacted the Indian Country Crimes Act (ICCA).[71] The ICCA is contained within the General Crimes Act.[72] The General Crimes Act established federal "enclave jurisdiction" (also called the "special maritime and territorial jurisdiction of the United States") to extend federal law to locations in which the federal government claims a paramount interest in having its laws enforced.[73] The ICCA establishes federal criminal jurisdiction over crimes that would normally be prosecuted by a local authority (such as crimes against the person), but for the fact that they are committed in a location the national government has designated a federal "enclave."[74] In those locations, the national government asserts the

---

> manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

Id. § 5. Section 6 of the Act provides that the procedures and location of trial would be governed by the Judiciary Act of 1789, which Congress had passed the year before and which established lower federal courts. *Id.* § 6.

[69] *E.g.*, Treaty Between the United States of America and Different Tribes of Sioux Indians, Sioux-U.S., art. 1, Apr. 29, 1868, 15 Stat. 635 [hereinafter Treaty of Fort Laramie].

[70] The Treaty of Fort Laramie between the United States and the Sioux Nations, opened for signature on April 29, 1868, for example, reads:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws . . . .

Id.; *see also Ex parte* Crow Dog, 109 U.S. 556, 567–68 (1883) (noting that "[s]imilar provisions for the extradition of criminals are to be found in most of the treaties with Indian tribes"); Note, *A Bad Man is Hard to Find*, 127 HARV. L. REV. 2521, 2525 (2014).

[71] ICCA was originally codified at ch. 92, 3 Stat. 383 (1817); it is currently codified, as amended, at 18 U.S.C. § 1152. The ICCA carried over provisions of the Indian Trade and Intercourse Acts of the 1790s. It extends the "general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia . . . to the Indian Country." 18 U.S.C. § 1152.

[72] United States v. Bruce, 394 F.3d 1215, 1218 (9th Cir. 2005) (tribal authority over crime in Indian country "continued until shortly after the ratification of the Constitution, when Congress extended federal jurisdiction to non-Indians committing crimes against Indians in Indian territory"); *see also* CARRIE E. GARROW & SARA DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 86 (2004) (identifying that the ICCA, commonly known as the General Crimes Act, extended federal court jurisdiction over crimes committed in Indian country between Indians and non-Indians).

[73] The General Crimes Act reauthorized and clarified existing federal laws pertaining to criminal jurisdiction in Indian country and made clear that the same federal criminal jurisdiction exercised in other federal "enclaves" also extends to Indian country. Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-*Booker, 91 MARQ. L. REV. 723, 737 (2008) ("[T]ribes have jurisdiction over non-major crimes committed by an Indian against a non-Indian, as does the federal government under the General Crimes Act, so long as the Indian defendant has not been punished by the tribe."). The General Crimes Act explicitly reserves tribal court jurisdiction over non-federal crimes committed in Indian country that only involve Indians. *Id.* at 736.

[74] 18 U.S.C. § 1152.

Electronic copy available at: https://ssrn.com/abstract=3813968

prerogative of exercising criminal jurisdiction over wrongdoing committed therein.[75] Federal enclaves include the territorial waters and territorial lands of the United States, national parks and forests, and federal structures and compounds, such as forts and military bases.[76] It also includes Indian country.

Although Indian country falls under federal enclave jurisdiction generally, the ICCA provides for three legislative exceptions to federal enclave jurisdiction over crimes committed in Indian country.[77] One, where the crime is committed by an Indian against another Indian.[78] Two, where a crime is committed by an Indian who has been punished by local tribal law.[79] And, three, any case in which a tribe retains exclusive jurisdiction over an offense by treaty.[80] Thus, outside of treaty provisions, following enactment of the ICCA, in Indian country, tribes had exclusive jurisdiction over crimes committed by Indians against Indians; the federal government and tribes had concurrent jurisdiction over crimes committed by Indians against non-Indians; and the federal government had exclusive federal jurisdiction over crimes committed by non-Indians.[81] Notwithstanding the plain language of the ICCA, in 1882, the Court created a fourth exception to federal Indian country enclave jurisdiction in *United States v. McBratney*.[82] There, the Court held that, absent treaty provisions to

[75] Areas subject to federal enclave jurisdiction are defined in the federal criminal code at 18 U.S.C. § 7. The "laws" extended to Indian country by the ICCA are those federal laws made applicable within the Special Maritime and Territorial Jurisdiction of the United States by statute. Those laws are referred to as the "federal enclave laws." Federal enclave offenses include: arson, *Id.* § 81, assault, *Id.* § 113, maiming, *Id.* § 114, theft, *Id.* § 661, receiving stolen property, *Id.* § 662, murder, *Id.* § 1111, manslaughter, *Id.* § 1112, and sexual offenses, *Id.* §§ 2241–44. When a crime is committed in a federal enclave, but the conduct is not defined by federal law, another federal statute, the Assimilative Crimes Act, *Id.* § 13, allows federal courts to look to state law to define crimes. This feature of federal law is extended to Indian country by virtue of the ICCA. That means that if an act violating one of the federal enclave laws is committed in Indian country and it is not excepted by the ICCA (i.e., it is not a crime committed by one Indian against another Indian or previously punished by a tribe), jurisdiction lies in a federal court, not a state or tribal court. As discussed *infra*, notwithstanding the ICCA, any crime committed by an Indian that is enumerated in the Major Crimes Act is also subject to federal jurisdiction.

[76] 18 U.S.C. § 7(1), (3). Federal enclave jurisdiction also covers some unlikely and unexpected locations such as islands, rocks, and keys containing guano deposits (which "may, at the discretion of the President, be considered as appertaining to the United States"), and space vehicles in flight. *Id.* § 7(4), (6). Modern enclave jurisdiction is highly relevant in the West because federal public lands occupy almost fifty percent of the western states and Alaska. For a map of federal land in the United States, see Quoctrung Bui & Margot Sanger-Katz, *Why the Government Owns So Much Land in the West*, N.Y. TIMES (Jan. 5, 2016), https://www.nytimes.com/2016/01/06/upshot/why-the-government-owns-so-much-land-in-the-west.html [https://perma.cc/E74V-BYTQ] (noting that the U.S. Government owns forty-seven percent of the land in the West).

[77] 18 U.S.C. § 1152 ("This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.").

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] 104 U.S. 621, 624 (1882).

Electronic copy available at: https://ssrn.com/abstract=3813968

the contrary, states, not the federal government, have exclusive jurisdiction over crimes committed in Indian country by non-Indians against other non-Indians.[83]

The Court confirmed this reading of the Indian-on-Indian crime exception to federal enclave jurisdiction under the ICCA in its 1883 opinion in *Ex parte Crow Dog*.[84] There it held that, under the ICCA, federal courts could not exercise enclave jurisdiction over wrongdoing committed by one Indian against another Indian in Indian country.[85] Kan-gi-Shun-ca, known in English as "Crow Dog," was a member of the Brulé Sioux band of the Sioux Nation of Indians.[86] He killed Sin-ta-ge-le-Scka, known in English as "Chief Spotted Tail," a member of his own tribe, in the Dakota Territory.[87] The incident leading to Spotted Tail's death stemmed from a political dispute about the extent to which Spotted Tail, who was popular among settlers, was supporting the United States government and receiving favoritism from it.[88] This special treatment "angered and offended many of the traditional leaders" in his community.[89] The tribe addressed Crow Dog's conduct according to Brulé tradition—the tribal council met, ordered the parties to put an "end to the disturbance," and "arranged a peaceful reconciliation" between the affected families through a property exchange.[90] Notwithstanding the tribal punishment, the federal government sought and obtained a grand jury indictment charging Crow Dog for murder under federal law.[91] He was subsequently convicted and sentenced to death in the Dakota Territorial Court, a federal tribunal.[92]

---

[83] *Id.*; *accord* Draper v. United States, 164 U.S. 240, 247 (1896); United States v. Wheeler, 435 U.S. 313, 325 n.21 (1978); United States v. Antelope, 430 U.S. 641, 643 n.2 (1977); Williams v. United States, 327 U.S. 711, 714 (1946); *see also* Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 196–97 (1989) ("*McBratn*ey[] involved the murder of one white man by another on the Ute Reservation in Colorado. The Court held that the state had criminal jurisdiction over all lands within the state as an attribute of state sovereignty unless the federal government specifically restricted that right upon statehood. This potentially threatened Indians in states that had been admitted to the union without a specific reservation of federal authority over Indians. However, the Supreme Court never intended that, and the case was never extended to Indians. It seemed to be prompted by the very real threat to law and order presented by rough whites who gravitated to Indian reservations because they were free from state authorities there. *McBratney* swept that away. Since the tribes did not have jurisdiction over whites on their reservations, *McBratney* did not deprive Indians of any jurisdiction. Rather, it deprived federal authorities of jurisdiction. Still, the opinion had negative consequences for the tribes because it did give the states concurrent criminal jurisdiction over reservation lands (but not over Indians)." (citation omitted)).

[84] 109 U.S. 556, 571–72 (1883).

[85] *Id.*

[86] *Id.* at 557.

[87] *Id.*; *see also* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 104–05 (1994).

[88] THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION 94 (Bruce Elliott Johansen ed., 1998).

[89] *Id.*

[90] Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. OF RACE & L. 317, 336 n.118 (2013) (citing HARRING, *supra* note 87, at 104–05) ("For the murder, Kan-gi-shun-ca's family was ordered under tribal law to compensate Spotted Tail's family for the loss by offering '$600 in cash, eight horses, and one blanket'").

[91] *Crow Dog*, 109 U.S. at 557.

[92] *Id.*; Univ. of Alaska Fairbanks, *Crow Dog Case (1883)*, FED. INDIAN L. ALASKA TRIBES (Oct. 15, 2019), https://www.uaf.edu/tribal/112/unit_1/crowdogcase.php# [https://perma.cc/4LVV-6LQL] (providing an oral explanation of the case with photos of Crow Dog and Spotted Tail).

Electronic copy available at: https://ssrn.com/abstract=3813968

After being sentenced to death, federal authorities granted Crow Dog permission to travel back to his community, unguarded, to attend to his affairs and ordered him to return to be hanged.[93] Some settlers in Lawrence County, the location of Crow Dog's federal trial, wagered that he would not return.[94] To their surprise, Crow Dog came back, as he agreed to do.[95] His return created "a sensation" among the settlers, "who now looked at him as a paragon of honesty."[96] Among them were the attorneys who volunteered to take up his cause and who filed the federal writ of habeas corpus that resulted in the reversal of his conviction.[97] Crow Dog's act of honoring his word by returning to face execution is a poignant illustration of the profound disconnect between settler and indigenous attitudes towards accountability—Crow Dog returned to face a lethal consequence that had been imposed on him by an outside system, even though his family had made reparations for his conduct under his tribe's law. But many of the settlers, whose law had condemned Crow Dog to die, assumed that he wouldn't return, presumably based on an Anglo-informed assumption that most men will seek to escape an extreme punishment like execution, even if it means engaging in deceit or dishonesty.[98]

The Dakota Territory was an enclave of the United States. Accordingly, the federal government invoked its enclave jurisdiction to indict Crow Dog.[99] At the time, the federal enclave laws made murder in a federal enclave punishable by death.[100] As noted, although Indian country falls under federal enclave jurisdiction, the ICCA contains exceptions for: (1) Indian-on-Indian crimes, and (2) offenses by Indians who have been punished by their tribe, both of which applied to Crow Dog's case. The issue in *Crow Dog* was not whether the federal court or the tribe had jurisdiction over Indians who commit crimes in federal enclaves in the abstract, but whether the United States' treaty with the Sioux Nation—the Treaty of Fort Laramie—signed after Congress enacted the ICCA, implicitly repealed or overrode the Indian country exceptions in the ICCA, at least as to members of the Sioux

---

[93] THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION, *supra* note 88, at 94.

[94] *Id.*; *Crow Dog*, 109 U.S. at 557.

[95] THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION, *supra* note 88, at 94.

[96] *Id.*

[97] *Id.*

[98] This assumption is reflected in modern Anglo-American bail law. The original purpose of bail was to secure the presence of the accused at future proceedings. All of the original constitutions or early laws of the states contained a provision providing for a categorical right to have bail set, except where the defendant was accused of a capital offense. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 916 (2013) (original constitutions of forty-one states contained a "Consensus Right to Bail Clause"—a reference to bail ability by "sufficient sureties, except for capital offenses when the proof is evident or the presumption great"—and eight others protected the right by statute). The exception for capital offenses reflects an assumption, based on a Western understanding of human nature, that there is no amount of bail that can ensure a defendant's return if it may result in his execution.

[99] Federal law at the time provided that "[t]he district courts of the Territory of Dakota [had] the same jurisdiction in all cases arising under the laws of the United States as [was] vested in the circuit and district courts of the United States." *Crow Dog*, 109 U.S. at 559. In addition to enforcing federal law, territorial courts also had authority to enforce local territorial law. *Id.* at 560.

[100] *Id.* at 558 (citing 70 R.S. § 5339 which read "every person who commits murder . . . within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States . . . shall suffer death.").

Electronic copy available at: https://ssrn.com/abstract=3813968

Nation.[101] Concluding that the Treaty of Fort Laramie did not repeal any part of the ICCA, the Court held that the Sioux Tribe had authority to resolve the conflict, and that the federal Territorial Court did not.[102] Accordingly, the Court overturned Crow Dog's federal conviction.[103] *Crow Dog* is a well-reasoned, albeit xenophobic, application of the principles of statutory and treaty construction.[104] It is not, it should be noted, a celebration of tribal sovereignty,[105] nor does it reflect the reverence with which the Court often describes the status of states in the United States federal system.[106]

---

[101] *Id.* at 562 ("The argument in support of the jurisdiction and conviction is, that the exception contained in § 2146 Rev. Stat. is repealed by the operation and legal effect of the treaty with the different tribes of the Sioux Indians of April 29th, 1868, 15 Stat. 635; and an act of Congress, approved February 28th, 1877, to ratify an agreement with certain bands of the Sioux Indians, &c. 19 Stat. 254."); *see also id.* at 570 ("It must be remembered that the question before us is whether the express letter of § 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed. If not, it is in force and applies to the present case. The treaty of 1868 and the agreement and act of Congress of 1877, it is admitted, do not repeal it by any express words. What we have said is sufficient at least to show that they do not work a repeal by necessary implication.").

[102] *Id.* at 570–72.

[103] *Id.* at 572.

[104] *Id.* at 571 ("The nature and circumstances of this case strongly reinforce this rule of interpretation in its present application. It is a case involving the judgment of a court of special and limited jurisdiction, not to be assumed without clear warrant of law. It is a case of life and death. It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according t [sic] the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.").

[105] Harring, *supra* note 83, at 192 ("[W]hile Crow Dog was an important victory, the case was infused with a distorted fact situation that characterized Brule law as 'lawless,' the killing as 'red man's revenge', [sic] and the Brule Sioux as a 'people without law.' This characterization continues to describe the case, undermining its importance as a sovereignty decision, and undermining the whole concept of tribal sovereignty.").

[106] *E.g.*, Gamble v. United States, 139 S. Ct. 1960, 1968 (2019) ("[T]he people, by adopting the Constitution, 'split the atom of sovereignty'. . . . 'When the original States declared their independence, they claimed the powers inherent in sovereignty . . . . The Constitution limited but did not abolish the sovereign powers of the States, which retained "a residuary and inviolable sovereignty."'" (quoting Alden v. Maine, 527 U.S. 706, 751 (1999) and then quoting Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018))).

Electronic copy available at: https://ssrn.com/abstract=3813968

In 1885, in response to *Crow Dog*,[107] Congress enacted the Indian Major Crimes Act (MCA).[108] The MCA established federal jurisdiction over Indians who committed an enumerated offense in two locations, and specified the federal law that would apply to those prosecutions.[109] One, enumerated crimes committed by Indians within federal territories, whether on or off reservation, would be tried in territorial courts and subject to the laws of the territory.[110] Two, enumerated crimes committed by Indians on reservations situated within a state would be subject to the laws of the United States and tried in federal court (in other words, would become subject to enclave jurisdiction).[111] The crimes enumerated in the MCA are crimes of personal violence—like the murder in *Crow Dog*.[112]

Federal MCA jurisdiction requires proof that the defendant is an "Indian." But, unlike ICCA jurisdiction, the Indian/non-Indian status of the victim is irrelevant.[113]

---

[107] For an in-depth treatment of *Crow Dog* and the political and cultural dynamics surrounding enactment of the Major Crimes Act, see Harring, *supra* note 83, at 191–92, 195 ("A closer analysis of *Crow Dog* reveals the extension of criminal law over reservation Indians was the product of a broad national movement toward an assimilationist Indian policy. . . . [A]nalysis of primary documents shows that the Bureau of Indian Affairs cultivated *Crow Dog* as a test case (and tried to create other test cases both before and after *Crow Dog*) to gain precisely the end that was won: criminal jurisdiction over the Indian tribes. The Bureau of Indian Affairs (BIA) had been attempting to get such jurisdiction since 1874 because BIA officials felt that they needed the coercive power of the criminal law to help force the assimilation of the Indians—the forceable application of criminal law as one painful way to learn civics.").

[108] Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. §§ 1153, 3242) ("That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.").

[109] 18 U.S.C. §§ 1153, 3242.

[110] *Id.*

[111] *Id.*

[112] Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153). As noted, the original version of the MCA enumerated seven offenses. *See supra* note 108. The current version of the MCA enumerates thirteen offenses. 18 U.S.C. § 1153(a). The crimes are offenses against the person, such as murder and assault that, if committed in a state jurisdiction, have historically been left to state governments to prosecute and punish. The enumerated offenses in the current version of the MCA are:

> murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [to wit: sexual abuse], incest, a felony assault under section 113 [to wit: federal enclave assault], an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 [to wit: federal enclave embezzlement and theft].

Id. These enumerated offenses are, for the most part, defined by distinct federal statutes. As noted, under the Assimilative Crimes Act, offenses that are not defined by federal law are defined and punished in accordance with the law of the state where the crime was committed. *Id.* § 1153(b).

[113] Under the MCA, a defendant's Indian status is an element of the crime, but the MCA does not provide a statutory definition for the term. This has given rise to an entire body of common law defining

Electronic copy available at: https://ssrn.com/abstract=3813968

As a technical statutory matter, for the crimes enumerated in the MCA, the MCA modified the ICCA's federal enclave jurisdiction exceptions for offenses by one Indian against another and offenses for which prior tribal punishment had been imposed. Its real significance, however, is that it displaced tribes' sovereign and inherent authority to impose their own laws to address serious wrongdoing among their own members free from colonialist justice intervention. For a statute that occasioned such a momentous adjustment in tribal sovereignty vis-à-vis the national government, it was enacted with relatively little discussion.[114]

The constitutionality of the MCA was challenged in *United States v. Kagama*, the first prosecution under the MCA considered by the Court.[115] The United States charged Kagama, an Indian, with the murder of Iyouse, an Indian, committed within the boundaries of the Hoopa Valley Reservation, located within the State of California.[116] The United States also charged Mahawaha, an Indian, with aiding and abetting in the murder.[117] The United States contended that Congress had authority to assert federal jurisdiction over crimes committed by Indians in Indian territories under its power to regulate commerce with tribes under the Indian Commerce Clause.[118] The Court rejected the proposition that the federal government's power to prosecute crimes committed by Indians in Indian country was governed by the Constitution.[119] It looked outside the Constitution instead, and concluded that this

---

the term "Indian" for purposes of the MCA (and other federal Indian country criminal laws) that continues to evolve. Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49, 49–51 (2017). The Court upheld the constitutionality of 18 U.S.C. §§ 1152 and 1153 in *United States v. Antelope* against an equal protection challenge. 430 U.S. 641, 648–49 (1977). In *Antelope*, the Court rejected an argument that the MCA relies on an impermissible racial classification, holding that the statutory scheme "is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a '"racial" group consisting of "Indians". . . .'" *Id.* at 646 (quoting Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974)).

[114] Harring, *supra* note 83, at 230 (1989) ("[T]he Major Crimes Act of 1885 is not difficult to understand. While it was a clear departure from existing practice, it was consistent with the whole general trend of Indian policy, the move from a policy based on treaty rights recognizing Indian sovereignty to one of dependency and forced assimilation. A whole line of introduced legislation, and BIA administrative policy, going back ten years had laid a foundation for the Act. . . . All who have written on the Act have expressed amazement at the ease with which such a departure from existing policy passed through Congress, as an afterthought on the Indian Appropriations bill. The discussion of the Act fills less than five pages of the Congressional Record, and those pages are largely filled with confusion over language. A discussion over a federal law prohibiting the sale of liquor to Indians going on in the same Congress received far more detailed discussion. This lack of attention testifies that while the Major Crimes Act may have been a sharp departure from existing Indian law, it was completely consistent with existing Indian policy.").

[115] 118 U.S. 375, 376–77 (1886).

[116] *Id.* at 376.

[117] *Id.*

[118] *Id.* at 378; U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes[.]"); *see also* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, 40 A.B.A. HUM. RTS. MAGAZINE (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/ [https://perma.cc/PD9D-WS8D] ("Congress quickly passed the Major Crimes Act, expressly authorizing federal criminal jurisdiction in such cases. *Kagama* was the first prosecution under the Act to reach the Supreme Court. For the first time, the Court addressed the source of Congress' constitutional authority over Indian affairs and Indian country.").

[119] *Kagama*, 118 U.S. at 379–80.

Electronic copy available at: https://ssrn.com/abstract=3813968

power derived from United States' trust responsibility to Indian tribes.[120] *Kagama* is significant because, for the first time, the Court fixed the source of Congress' power over Indian country and matters pertaining to tribal nations in a generalized federal interest "in maintaining law and order on Indian lands, and protecting Indian people from states and their citizens" located outside the Constitution.[121]

The MCA provides that Indians who commit enumerated offenses in Indian country "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."[122] This language was clearly intended to exclude *states* from exercising jurisdiction over crimes enumerated in the MCA committed by Indians in Indian country. It is not clear, however, whether Congress also intended the language "within the exclusive jurisdiction of the United States" to extinguish *tribes'* jurisdiction over enumerated crimes committed by Indians in Indian country in favor of exclusive federal jurisdiction, or whether it intended to assert jurisdiction concurrently with tribes.[123] After Congress enacted the MCA, in Indian country, jurisdiction over enumerated crimes committed by an Indian (regardless of the status of the victim) rested with the federal government; to the extent the conduct also violated a tribal law, concurrent jurisdiction rested with the tribe in whose territory the conduct occurred;[124] jurisdiction over a crime committed by a non-Indian against an Indian rested exclusively with the federal government under the ICCA; and jurisdiction over a crime committed by a non-Indian against another non-Indian lay with the state within whose borders the Indian country was located under *McBratney*.[125]

---

[120] *Id.* at 384–85.

[121] Fletcher, *supra* note 118; *Kagama*, 118 U.S. at 383–85.

[122] 18 U.S.C. § 1153(a).

[123] *Id.* According to the U.S. Department of Justice, whether tribal courts have concurrent jurisdiction with federal courts over offenses covered by the Major Crimes Act remains an "open question." U.S. Dep't of Just., Just. Manual, Crim. Res. Manual § 679 (2020) https://www.justice.gov/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153 [https://perma.cc/4PG2-VU6M]. *But see* Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995) (discussing that tribes retain concurrent jurisdiction over crimes enumerated in the Major Crimes Act); Droske, *supra* note 73, at 737 ("Tribes . . . share concurrent jurisdiction with the federal government over Indian defendants who have violated the Major Crimes Act although tribal courts are subject to the sentencing limitations imposed by the Indian Civil Rights Act.").

[124] Tribes covered by the MCA can, and do, independently criminalize, prosecute and punish crimes covered by the MCA under their own laws. The catch, as discussed *infra*, is that under ICRA, tribes cannot impose a punishment over one year in non-TLOA prosecutions, or over nine years in TLOA prosecutions, even for the most serious crimes committed in their communities. 25 U.S.C. §1302(a)(7).

[125] United States v. McBratney, 104 U.S. 621, 624 (1881). Two Indian reservations in the United States straddle state borders. The Standing Rock Reservation is located within the geographic borders of North and South Dakota, and the Navajo Nation lies within the geographic borders of Utah, Arizona, and New Mexico. Bureau of Indian Affairs, *Indian Lands of Federally Recognized Tribes of the United States* (illustration) (June 2016), https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/webteam/pdf/idc1-028635.pdf [https://perma.cc/KL6Q-EHJ5]. This gives rise to a number of jurisdictional anomalies, including the possibility of different states exercising jurisdiction over crimes committed on different parts of the same reservation under different laws, constitutions, and procedural rules. A similar anomaly exists on the federal court level—the boundaries for the federal Circuit Courts of Appeal established by Congress place the Navajo Nation in both the Ninth and the Tenth Circuits. Thus, a split between these circuits on an issue of federal law can subject conduct on the Navajo Nation to different interpretations of the same federal law. *Geographic Boundaries of United States Courts of Appeal and United States District*

Electronic copy available at: https://ssrn.com/abstract=3813968

This jurisdictional scheme was in place for sixty-eight years until Congress passed Public Law 280 (PL 280) in 1953.[126] PL 280 was part of a Congressional policy to terminate reservations and relocate Indians to urban areas with the goal of encouraging assimilation into colonialist society.[127] In doing so, Congress virtually eliminated the federal government's responsibility for law enforcement on reservations covered by PL 280 and offloaded it onto states. Congress enacted PL 280, it should be noted, without the consent of the tribes or states impacted by the law.[128] In states and reservations covered by PL 280, the law eliminated federal MCA and ICCA criminal jurisdiction and associated law enforcement responsibilities[129] and transferred them to individual states.[130] Some states were forced to accept Indian

---

Courts (illustration), https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf [https://perma.cc/G54Z-LWC5].

[126] Troy A. Eid & Carrie Covington Doyle, *Separate But Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1082–83, 1098 n.140 (2010).

[127] In August 1953, Congress endorsed House Concurrent Resolution 108 which is widely regarded as the principal statement of the termination policy:

> [I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship[.]

H.R. Con. Res. 108, 83d Cong. (1953). The same month, Congress enacted PL 280. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 28 U.S.C. § 1360). In states covered by PL 280, except for specific reservations, it eliminated federal jurisdiction over Indian country crimes based on 18 U.S.C. § 1152 (the Indian Country Crimes Act/General Crimes Act) and 18 U.S.C. § 1153 (the Major Crimes Act), and required the state to prosecute crimes in Indian country that would have otherwise been prosecuted by the federal government. 18 U.S.C. §1162.

[128] Until Congress passed PL 280, state court jurisdiction in Indian country was generally limited under *McBratney* to crimes committed by non-Indians that were either victimless or committed against another non-Indian. Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law* 280, 87 WASH. L. REV. 915, 928–29 (2012). As one source observes, "the states were not as eager to control the reservations as the advocates of termination had expected" and, as a result, in some Indian communities, law and order disappeared entirely. Andrew Boxer, *Native Americans and the Federal Government*, HIST. TODAY (Sept. 2009), https://www.historytoday.com/archive/native-americans-and-federal-government [https://perma.cc/84T7-C8Z4]. Amendments to PL 280 in 1968, the same year ICRA was enacted, added a tribal consent requirement and authorized states to return (or "retrocede") jurisdiction to the federal government. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, sec. 403, 82 Stat. 73, 79 (codified as amended at 28 U.S.C. § 1323). The tribal consent requirement only applied to future transfers of jurisdiction to the states; it did not apply to transfers of jurisdiction prior to 1968. No tribal nation has consented to state PL 280 jurisdiction since Congress amendment PL 280 in 1968. Section 221 of TLOA authorizes tribes covered by PL 280 to request that the U.S. Department of Justice (DOJ) re-assume federal criminal jurisdiction on their reservation. Act of July 29, 2010, Pub. L. No. 111-211, sec. 221, § 1162(d), 124 Stat. 2258, 2271–72 (2010) (codified as amended at 18 U.S.C. § 1162). If the DOJ grants the request, the federal government may once again prosecute criminal cases from PL 280 reservations. 28 C.F.R. § 50.25(a)(1) (2020) (authorizing federal criminal jurisdiction in certain areas of Indian country).

[129] PL 280 also impacted tribes' civil jurisdiction, a topic beyond the scope of this discussion. For a comprehensive discussion of PL 280, see Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AM. INDIAN DEV. ASSOCS., LLC, http://www.aidainc.net/Publications/pl280.htm [https://perma.cc/3H4L-X7DL].

[130] PL 280 did not affect federal criminal jurisdiction over federal crimes of general applicability under Title 18 (i.e., federal prosecutions not based solely on territorial jurisdiction), such as: drug offenses,

Electronic copy available at: https://ssrn.com/abstract=3813968

country jurisdiction—called "mandatory" states.[131] Others were allowed to opt in to PL 280.[132] Thus, after 1958, on reservations covered by PL 280, what criminal jurisdiction tribes had at this juncture became concurrent with the states, instead of the federal government.

McBratney notwithstanding, many tribes, courts, and legal authorities assumed that tribes retained jurisdiction to prosecute crimes committed in Indian country by anyone, Indians and non-Indians alike, concurrently with either the state or federal government. In 1978, the Court said otherwise in *Oliphant v. Suquamish Indian Tribe*.[133] *Oliphant*, with little support in history or law, held that tribes could not exercise criminal jurisdiction over non-Indians without Congress' express authorization.[134] According to the *Oliphant* Court, tribes had been implicitly divested of their inherent sovereign power to prosecute non-Indians under the "implicit divestiture doctrine."[135] Under that doctrine, tribes could only exercise criminal jurisdiction over non-Indians if Congress expressly granted them that authority because an exercise of this power would be inconsistent with their status as domestic nations dependent on the U.S. federal government.[136] The Court reasoned that tribes'

---

bank robbery, felon in possession of firearm, mail fraud, embezzlement or theft from tribal organization, theft from a casino, or failure to report child abuse. A DOJ Indian country jurisdiction chart is available at Arvo Q. Mikkanen, *Indian Country Criminal Jurisdictional Chart*, U.S. DEP'T JUST. (Dec. 2010), https://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf [https://perma.cc/7FUY-Z726]. A Tribal Court Clearinghouse chart is available at: *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/jurisdiction.htm [https://perma.cc/N3UR-U8DL].

[131] The "mandatory" PL 280 jurisdictions were Alaska, California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. 28 U.S.C. §1360.

[132] Between 1953 and 1968, a number of other states opted in to PL 280 and elected to assume full or partial jurisdiction over Indian country within their borders. The "optional" PL 280 states are Arizona (1967), Florida (1961), Idaho (1963, subject to tribal consent), Iowa (1967), Montana (1963), Nevada (1955), North Dakota (1963, subject to tribal consent), South Dakota (1957-1961), Utah (1971), and Washington (1957-1963). *American Indians and Alaska Natives - Public Law 280 Tribes*, ADMIN. FOR NATIVE AMS. (Mar. 19, 2014), https://www.acf.hhs.gov/ana/resource/american-indians-and-alaska-natives-public-law-280-tribes [https://perma.cc/RLM8-2BGB].

[133] 435 U.S. 191, 208 (1978) (Indian tribes lack criminal jurisdiction over non-Indians who commit crimes in Indian country "absent affirmative delegation of such power by Congress."). As discussed *infra*, with VAWA 2013, Congress repealed *Oliphant* in part and authorized tribes to exercise limited jurisdiction over some non-Indians for some domestic violence crimes if they meet certain procedural requirements. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 1304, 127 Stat. 54, 120–23 (2013) (codified as amended at 25 U.S.C. 1304).

[134] 435 U.S. at 212.

[135] *Id.* at 210–11; *see also* Alex Tallchief Skibine, *Incorporation Without Assimilation: Legislating Tribal Jurisdiction Over Nonmembers*, 67 UCLA L. REV. DISCOURSE 165, 168 (2019).

[136] Skibine, *supra* note 135, at 168 ("The United States began signing treaties with Indian nations in 1778, and in 1831 the U.S. Supreme Court described the Indian nations existing within the territorial boundaries of the United States as domestic dependent nations. Until 1978 [when Oliphant was decided], Indian nations were thought to possess all the inherent sovereign powers over their territories that had not been taken away by the U.S. Congress or given up in treaties. However, preoccupied by the assertion of tribal jurisdiction over individuals who were not tribal members, the U.S. Supreme Court in 1978 devised what became known as the implicit divesture doctrine. Under that doctrine, Indian tribes are said to have lost all inherent sovereign powers inconsistent with their status as domestic dependent nations. As a result of this doctrine, since 1978, the tribes initially lost all inherent criminal jurisdiction over nontribal members, and . . . a good deal of civil and regulatory jurisdiction as well." (citations omitted)); *see also*

Electronic copy available at: https://ssrn.com/abstract=3813968

exercise of this type of power in the criminal jurisdiction context would undermine the interests of the federal government because it risked "unwarranted intrusions" on the personal liberty of U.S. citizens.[137] The upshot of *Oliphant* was that, as of 1978, only state or federal courts had jurisdiction to prosecute crimes committed by non-Indians in Indian country. In 1990, the Court subsequently held in *Duro v. Reina* that tribes only had jurisdiction over Indians that were members of that tribe, and not Indians who belonged to other tribes (referred to as "non-member" Indians).[138] Congress quickly overrode this holding with a statute commonly referred to as the "*Duro* Fix," which made clear that tribes had jurisdiction over all Indians, not just members of their own tribe.[139]

Oliphant, more than any other federal incursion into tribal sovereignty, is often held up as the origin of the jurisdictional void in Indian country, and a root cause of today's public safety crisis in Indian country.[140] *Oliphant*, in effect, declared non-Indian offenders "off limits" to tribal law enforcement, and left prosecution of non-Indians to state and federal governments who, unlike tribal governments, are not directly answerable to the community in which the crime occurred. Thus, the Court created a situation in which the community most affected by conduct was virtually

---

42 C.J.S. Indians § 168 (2020) ("[A]n Indian tribe has inherent power to exercise criminal jurisdiction over 'all Indians'" (citation omitted)). However, the inherent sovereignty of Indian tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on a reservation unless specifically authorized to assume such jurisdiction by Congress. *Id.* § 169.

[137] *Oliphant*, 435 U.S. at 210. For a comprehensive discussion of the Court's issues with tribal jurisdiction over nonmembers in the civil context, see Skibine, *supra* note 136, at 170–83.

[138] 495 U.S. 676, 679 (1990).

[139] 25 U.S.C. § 1301(2) (recognizing and affirming "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians"). The "*Duro* Fix," for the first time, provided a federal statutory definition of "Indian" to wit: "any person who would be subject to the jurisdiction of the United States as an Indian under [the Indian Major Crimes Act] if that person were to commit an offense listed in that section in Indian country . . . ." *Id.* § 1301(4). This reference to the MCA, however, did not provide a definitive definition of "Indian" since the MCA itself does not define the term. Skibine, *supra* note 113, at 52–53 ("The legislative choice made in 1991 to incorporate by reference the meaning of "Indian" from a previous law which itself did not define the term was puzzling, to say the least, and invited litigation over that issue.").

[140] Mary Hudetz, *US doubles tribal funding to fight violence against women*, AP NEWS (Sept. 19, 2018), https://apnews.com/article/1824f1326e2b49c29e9ad0ffbe4c2990 (last accessed Jan. 15, 2021) ("For decades, tribes largely had been unable to directly access money in a U.S. program aimed at supporting crime victims nationwide—even as federal figures showed more than half of Native American women faced sexual or domestic violence at some point in their lives. On some reservations, Native American women are killed at a rate more than 10 times the national average . . . . Legal experts and victims' advocates blame underfunded police departments that lack the resources to investigate crimes and lingering jurisdictional gaps among federal, tribal and local law enforcement agencies that often result in cases going unprosecuted."). This heightened risk of violence for indigenous persons is not unique to the United States. Indigenous persons and communities face similar risks in Canada and other former colonial nations. *See generally* NAT'L INQUIRY INTO MISSING & MURDERED INDIGENOUS WOMEN & GIRLS, RECLAIMING POWER AND PLACE (2016), https://www.mmiwg-ffada.ca/final-report/ [https://perma.cc/Q3Y4-QFGY] (providing a comprehensive analysis of all forms of violence against women of several tribes); Isabella Higgins & Sarah Collard, *Lost, missing or murdered?*, AUSTL. BROAD. CO. (Dec. 8, 2019 6:18 PM), https://www.abc.net.au/news/2019-12-08/australian-indigenous-women-are-overrepresented-missing-persons/11699974 [https://perma.cc/35A6-5QX3] ("Some of the country's most vulnerable people are going missing, and many are never found. In Canada they're calling it a genocide, but in Australia some states aren't even keeping count.").

Electronic copy available at: https://ssrn.com/abstract=3813968

powerless to address it, and communities with little or no connection to the conduct were relied on to prosecute it. The result was that many crimes of personal violence committed by non-Indians against Indians in Indian country have been under-investigated and under-prosecuted. This void opened up opportunities to commit crimes in Indian country with very low risk of punishment, a fact not-unknown to non-Indian predators.[141] As discussed, *infra*, this was the status quo in Indian country for the next thirty-five years until Congress partially repudiated the *Oliphant* doctrine with its VAWA 2013 amendments to ICRA.

II. STATE AND TRIBAL COURT PROCEDURAL REFORM BY FEDERAL FIAT

A. The Supreme Court Federalizes State Court Criminal Procedure

The history of unequal treatment of racial and ethnic minorities in the United States is deep, long, and frequently brutal. One of the most powerful tools in perpetuating racial oppression in the United States was, and remains, state and local criminal justice systems.[142] Those systems traditionally operated with little federal oversight because the primary right and responsibility to define, investigate, prosecute, and punish wrongful conduct in the United States has historically rested with local and state authorities, not the national government.[143] The Thirteenth, Fourteenth, and Fifteenth Amendments—collectively, the "Reconstruction Amendments"[144]—enacted following the Civil War were "meant to provide former

---

[141] Rosay, *supra* note 14, at 4 (Post-*Oliphant*, "federally recognized tribes had no authority to criminally prosecute non-Indian offenders, even for crimes committed in Indian Country. This essentially provided immunity to non-Indian offenders and compromised the safety of American Indian and Alaska Native women and men."); *see also* Maren Machles, Carrie Cochran, Angela M. Hill, & Suzette Brewer, *A Broken Trust: Sexual Assault and Justice on Tribal Lands*, NEWSY (Sept. 29, 2019), https://www.newsy.com/stories/a-broken-trust-sexual-assault-and-justice-on-tribal-lands/ [https://perma.cc/T7GT-5RZW] (describing ramifications of stripping tribes of criminal jurisdiction over non-Indians); Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away With Almost Anything*, ATLANTIC (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/ [https://perma.cc/A2SH-ASHZ] ("It was as though, tribal officers said, their lack of jurisdiction had encouraged a culture of lawlessness. Every officer could recount being told by a non-Indian, 'You can't do anything to me. . . . Perpetrators think they can't be touched . . . [that they are] invincible.'").

[142] The harnessing of the state criminal justice system to perpetuate vestiges of slavery in the United States is explored in filmmaker Ava DuVernay's documentary "13th." Juleyka Lantigua-Williams, *Ava DuVernay's* 13th *Reframes American History*, ATLANTIC (Oct. 6, 2016) https://www.theatlantic.com/entertainment/archive/2016/10/ava-duvernay-13th-netflix/503075/ [https://perma.cc/ST9Y-7K5K].

[143] Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 508, 516 (1995) (neither the Constitution nor debates among the Framers suggest "that the federal government was to have a significant role in prosecuting crimes affecting the local community.").

[144] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION xix (2019) (explaining that the Thirteenth Amendment abolished slavery; the Fourteenth Amendment "constitutionalized the principles of birthright citizenship and equality before the law and sought to settle key issues arising from the war, such as the future political role of Confederate leaders and the fate of Confederate debt[;]" and the Fifteenth Amendment "aimed to secure black male suffrage throughout the reunited nation.").

Electronic copy available at: https://ssrn.com/abstract=3813968

slaves with access to the courts, ballot box, and public accommodations, and to protect them against violence[.]"[145] The Amendments "greatly enhanced the power of the federal government . . . and forged a new constitutional relationship between individual Americans and the national state . . . . "[146] Even after ratification of the Reconstruction Amendments, however,[147] the national Constitution operated only as a "backdrop limitation" on states' police power.[148] This is due to the Court's narrow construction of the reach of the Reconstruction Amendments and early failure to construe their provisions to provide robust protection to formerly enslaved persons.[149] This "was a choice" by the Justices, made "with little or no reflection on the actual consequences . . . for black Americans" and part of "a sad chapter in the history of race, citizenship, and democracy in the United States."[150] Pertinent to this discussion, the Fourteenth Amendment, in time, however, became the vehicle for an expanded federal role in overseeing state justice systems.

It was not until 1925,[151] one hundred thirty-four years after the Bill of Rights was ratified that it was understood to constrain the actions of individual states.[152] And the mechanism for extending its mandates to the states was the Fourteenth Amendment. The Fourteenth Amendment prohibits states from passing or enforcing laws that abridge the privileges and immunities of U.S. citizens, from depriving any person of

---

[145] *Id.*

[146] *Id*. at xx.

[147] The Civil War ended in 1865. The Thirteenth, Fourteenth, and Fifteenth Amendments were ratified in 1865, 1868, and 1870, respectively. *The Constitution: Amendments 11–27*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/amendments-11-27 [https://perma.cc/MDW4-AYC4].

[148] Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 66–67 ("Although it was federal law, and thus 'supreme,' the Due Process Clause left substantial room for the development and day-to-day operation of state criminal procedure doctrine. In other words, before the [Criminal Procedure] Revolution, federal constitutional law affected the handling of state criminal cases in much the same way that it affected other common kinds of state action, such as the regulation of property rights or the administration of public schools and universities.").

[149] FONER, *supra* note 144, at 128–29 ("In interpreting the Fourteenth Amendment, the Court reduced the 'privileges or immunities' guaranteed to citizens to virtual insignificance . . . . [E]ventually conclud[ing] that segregation legally enforced by a state did not violate the equal rights of black Americans. The justices insisted that the amendment had not significantly altered the balance of power between states and the nation, and proved unreceptive to claims that a state's inaction in the face of violence or other expressions of racial inequality provided justification for federal intervention. Federalism, however, had its limits. Increasingly, the Court construed the Fourteenth Amendment as a vehicle for protecting corporate rights rather than those of the former slaves . . . . The Court employed 'a state-centered approach in citizenship matters and a nation-centered approach in affairs of business.'" (quotation omitted)).

[150] *Id.* at 129, 131.

[151] The proposed Bill of Rights was ratified when two-thirds of the states (ten of the then-fourteen) approved ten of the proposed twelve Amendments to the Constitution on December 15, 1791. *Today in History – December 15*, LIBR. CONGRESS, https://www.loc.gov/item/today-in-history/december-15/ [https://perma.cc/9PPA-35LK].

[152] Latzer, *supra* note 5, at 70 ("Under the incorporation doctrine, certain rights in the Bill of Rights, originally restrictions on only the federal government, become, when 'incorporated' into the Fourteenth Amendment Due Process Clause, restrictions upon the state governments as well." (citation omitted)). Before ratification of the Fourteenth Amendment in 1868 and the development of the incorporation doctrine, the Court specifically held that the Bill of Rights applied only to the federal government. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833). The Court also initially rejected incorporation after ratification of the Fourteenth Amendment. United States v. Cruikshank, 92 U.S. 542, 556 (1875).

Electronic copy available at: https://ssrn.com/abstract=3813968

life, liberty, or property without due process of law, and it requires states to extend the equal protection of the law to all persons.[153] Under the incorporation doctrine, the Court asks if an interest protected by a specific right is implicit in the concept of ordered liberty, and, "as such, enforceable against the States through the Due Process Clause" of the Fourteenth Amendment.[154] The Court's approach has been labeled "selective incorporation" because it is incremental; it considers each protection or right set out in the Bill of Rights individually, rather than wholesale.[155]

Incorporation is commonly understood as the Court's response to the "Mississippi Problem"—the failure of (primarily Southern) states to protect the procedural rights of economically, racially marginalized defendants—mainly poor Black defendants.[156] States and local governments intent on continuing apartheid were often able to accomplish through procedural rules and practices what the substantive law could no longer legitimately do. States and local governments, for example, could not enact or enforce laws that excluded Black men from serving on juries because of their race.[157] But they could use facially-neutral procedural rules and practices to keep them out of the jury pool and off individual juries.[158] The

---

[153] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). The Privileges or Immunities Clause is narrower than the Due Process and Equal Protection Clauses in that it is limited to "citizens," and the latter extends to all "persons." *Id.* An alternative incorporation argument, as yet adopted by a majority of the Court, is that the proper vehicle for extending the Bill of Rights to the states is the Privileges or Immunities Clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring) (stating that Privileges or Immunities Clause is an "eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States"); *see also* McDonald v. City of Chicago, 561 U.S. 742, 813 (2010) (Thomas, J., concurring in part and concurring in the judgment) (taking issue with majority's reliance on the Due Process Clause, rather than Privileges or Immunities Clause, as vehicle for incorporation of Second Amendment). Soon after the Fourteenth Amendment was ratified, however, the Court "effectively reduced the amendment's Privileges or Immunities Clause to insignificance. As a result, when the application of the Bill of Rights to the states later took place, it was almost always under the [Due Process Clause] . . . which suggests procedural fairness, not substantive rights." FONER, *supra* note 144, at 76.

[154] Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).

[155] Latzer, *supra* note 5, at 67–68.

[156] Tracey L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 106–07 (2005) (recognizing the Court's criminal procedure incorporation cases as a branch of "race law" because they arose in the context of federal judicial reaction to institutionalized racism in state criminal justice systems following Reconstruction and in the context of the struggle for civil rights); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones. Warren-era constitutional criminal procedure began as a kind of antidiscrimination law.").

[157] Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (holding that state statute disqualifying blacks from jury service violates federal equal protection).

[158] Nancy S. Marder, *The Changing Composition of the American Jury*, *in* THEN AND NOW: STORIES OF LAW AND PROGRESS 66, 70–71 (Lori Andrews & Sarah Harding eds., 2013) (After Reconstruction, Black men "'virtually disappeared from the southern jury box by 1900, even in counties where they constituted an overwhelming majority of the local population.' [Although state] statutes could no longer prohibit African-American men from serving on the jury after *Strauder*, other practices kept them from the jury box. . . . These practices ranged from color-coding by race the names placed in the wheel from which jurors were selected to the discretion exercised by white jury commissioners in selecting only white

Electronic copy available at: https://ssrn.com/abstract=3813968

working premise of incorporation was "that the state bench was, at its worst racist and incompetent, and merely competent most of the time."[159] Constitutional criminal procedure in the United States can only be understood against the backdrop of the Supreme Court's distrust of state courts' ability or willingness to protect criminal defendants' rights. As discussed below, federal incorporation of Bill of Rights protections into ICRA and limitations on tribal court criminal jurisdiction must similarly be understood to rest on assumptions by the Court and Congress that tribal justice systems are incompetent and cannot be trusted to deal fairly with criminal defendants in general, and non-Indians in particular.

The Court's earliest incorporation cases primarily addressed the guarantees under the First Amendment.[160] In the 1960s and 1970s, over one hundred and fifty years after the Bill of Rights was ratified and one hundred years after adoption of the Fourteenth Amendment, the Warren Court began a process of extending criminal procedural rights in the Bill of Rights to the states through Fourteenth Amendment incorporation.[161] Today, most of the criminal procedure guarantees contained in the

---

men whom they knew to serve as jurors. . . . The practice of discriminatory peremptory challenges, which continues to this day, was another way to keep African-Americans from being selected for petit juries.").

[159] Latzer, *supra* note 5, at 65 ("Incorporation was also predicated upon an assumption—a very negative assumption—about the states, and especially about state courts. The assumption was that some state courts were chronically, and virtually all state courts were occasionally, backward. Without the Supreme Court to stand over them, ready to review and reverse, the state courts would fail to provide the minimal rights that all defendants were entitled to at all times. In short, incorporation was motivated by the Mississippi Problem: the assumption that the state bench was, at its worst racist and incompetent, and merely competent most of the time."); *see also* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 818 (1998) ("[T]he Court's jurisprudence is still haunted by a theory of state autonomy it inherited from nineteenth-century jurisprudence . . . rooted in contempt and distrust for state officials. The implicit premise of this theory . . . was that state officials were parochial, deceitful, and nonuniform policymakers whose incompetence or untrustworthiness disqualified them from exercising any federal functions. In its purest form, such a nationalistic theory barred Congress from delegating federal responsibilities to state officials even when state officials were willing to accept such duties.").

[160] *E.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) (dictum) (freedom of speech); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931) (freedom of press); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (freedom of assembly); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (free exercise of religion); Everson v. Bd. of Educ., 330 U.S. 1, 5–6 (1947) (establishment of religion); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 451 (1958) (freedom of expressive association); Edwards v. South Carolina, 372 U.S. 229, 229–30, 237 (1963) (petition for redress of grievances).

[161] Donald A. Dripps, *Does Liberal Procedure Cause Punitive Substance? Preliminary Evidence from Some Natural Experiments*, 87 S. CAL. L. REV. 459, 463 (2014) ("The Warren Court's criminal procedure revolution had three primary components; the exclusionary rule [under *Mapp*], the right to counsel [under *Gideon*], and *Miranda*."). As Professor Dripps notes, it is important to recognize that many states had already adopted similar or identical protections for defendants before the Court required them. *Id.* ("The impact of the revolution, however, was not uniform across jurisdictions. About half the states had adopted the exclusionary rule before *Mapp*, and a majority of states provided indigent felony defendants court-appointed counsel before *Gideon*. No jurisdiction anticipated *Miranda* exactly, but some jurisdictions were regulating police interrogation more rigorously than others. It is therefore possible to compare the effects of the Warren Court decisions in jurisdictions where their impact was dramatic—indeed 'revolutionary'—with jurisdictions where their impact, although significant, was far smaller."). Although the Court's incorporation process continues, *see, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1394–95 (2020), the core decisions emanated from the Warren Court and were issued within a relatively short time period. Dripps, *supra*, at 473 ("The criminal procedure revolution began with *Mapp* in 1961, reached highwater with *Escobedo* in 1964, and was all but finished by *Miranda* in 1966 or at

Electronic copy available at: https://ssrn.com/abstract=3813968

Fourth, Fifth, and Sixth Amendments have been extended to the states.[162] Following incorporation, the minimum procedural protections states must extend to defendants in criminal investigations and prosecutions is determined primarily, if not exclusively, by reference to the Court's interpretation of the scope of specific guarantees under the Bill of Rights. Where the Court has incorporated a particular provision of the Bill of Rights into the Fourteenth Amendment, a state criminal procedure or process may not fall below the floor of protection required by the Federal Constitution. Individual state criminal processes and procedures may, of course, offer more protection to a criminal suspect or defendant. But they may not offer less than what the Court has identified as the federal constitutional minimum.[163]

---

latest *Berger* and *Katz* in 1967."); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (evidence obtained through unconstitutional searches inadmissible in state prosecutions); Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964) (Sixth Amendment right to counsel extends to police interrogations of suspects); Miranda v. Arizona, 384 U.S. 436, 478–79, 491 (1966) (statements during police interrogation inadmissible due to Fifth Amendment violations); Berger v. New York, 388 U.S. 41, 55–56 (1967) (warrants require particularity because use of electronic devices to capture conversations constitutes a Fourth Amendment "search"); Katz v. United States, 389 U.S. 347, 351 (1967) (Fourth Amendment protects "what [a person] seeks to preserve as private, even in an area accessible to the public . . . .").

[162] *E.g.*, Wolf v. Colorado, 338 U.S. 25, 33 (1949) (unreasonable search or seizure prohibition); *Mapp*, 367 U.S. at 655–66, 671–72 (exclusionary rule); Aguilar v. Texas, 378 U.S. 108, 115–16 (1964) (warrant requirement), *abrogated by* Illinois v. Gates, 462 U.S. 213, 238 (1983); Ker v. California, 374 U.S. 23, 30 (1963) (warrantless search or seizure standard); Benton v. Maryland, 395 U.S. 784, 796 (1969) (double jeopardy); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (self-incrimination); Klopfer v. North Carolina, 386 U.S. 213, 216, 223 (1967) (speedy trial); *In re* Oliver, 333 U.S. 257, 273 (1948) (public trial and notice of accusations); Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) (trial by impartial jury for non-petty offenses); Rabe v. Washington, 405 U.S. 313, 315–16 (1972) (per curiam) (notice of accusations); Pointer v. Texas, 380 U.S. 400, 403 (1965) (confrontation of witnesses); Washington v. Texas, 388 U.S. 14, 18 (1967) (compulsory process); Powell v. Alabama, 287 U.S. 45, 71 (1932) (assistance of appointed counsel in capital cases); Gideon v. Wainwright, 372 U.S. 335, 338, 344 (1963) (assistance of appointed counsel in felony cases); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (assistance of appointed counsel if actually incarcerated for misdemeanors); Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (dictum) (excessive bail); Robinson v. California, 370 U.S. 660, 667 (1962) (cruel and unusual punishment); Baze v. Rees, 553 U.S. 35, 47 (2008) (dictum) (excessive bail); Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019) (excessive fines); *Ramos*, 140 S. Ct. at 1397 (criminal jury unanimity). Specific guarantees the Court has not incorporated include the right to presentment or indictment by a Grand Jury and the right to have a jury selected from residents of the state and district where a crime is committed. Hurtado v. California, 110 U.S. 516, 538 (1884) (grand jury right not incorporated); Caudill v. Scott, 857 F.2d 344, 345–46 (6th Cir. 1988) (per curiam) (right to have a jury selected from residents of the state and district where the crime occurred not incorporated); Cook v. Morrill, 783 F.2d 593, 594 (5th Cir. 1986) (same); Zicarelli v. Dietz, 633 F.2d 312, 313 (3d Cir. 1980) (same).

[163] Latzer, *supra* note 5, at 75 ("By its very nature, incorporation established United States Supreme Court hegemony over the state bench. As the ultimate interpreter of the federal Bill of Rights, the Supreme Court became the final authority regarding the scope and nature of its guarantees; the state courts were to be compelled to conform to national mandates established by the Supreme Court, absent more protective state procedures. In the 1960s, and for the next two decades, as criminal procedure rose to the top of the Supreme Court's agenda, the Court rendered dozens of decisions glossing the Fourth, Fifth, Sixth and Eighth Amendments. Each such decision established an imperative for state proceedings, which the state courts could enlarge, but never deny. Incorporation thus shifted the initiative for developing criminal procedure law from the state courts and state legislatures to the United States Supreme Court."); *see also* Hoffmann & Stuntz, *supra* note 148, at 77, 79 ("Before the 1960s, the states were relatively free to go about their business, making and applying state criminal procedure law (or simply acting according to the discretionary judgments and practices of state or local officials), so long as they did not run afoul of the broad limitations of the Due Process and Equal Protection Clauses. In this way, federal constitutional law

Electronic copy available at: https://ssrn.com/abstract=3813968

Incorporation produced "a detailed, national Code of Criminal Procedure that almost totally supersedes state law."[164] It has ensured a uniform national baseline of criminal procedural guarantees in state criminal investigation and prosecution. And it has been criticized for hindering development of jurisdictionally-tailored approaches to criminal justice reform and innovation on the state and local level.[165] The enforcement mechanism for these rights is the writ of habeas corpus, a tool whose utility in policing state deprivations of federal constitutional rights has been greatly constrained by Congress in the post-Warren Court era.[166] The upshot of Congress' adjustments to habeas corpus law is that state adherence to the procedural mandates imposed by the Court through its incorporation jurisprudence has become much less closely supervised by the federal courts since the mid-1990s.

It is fair to ask whether the federalization of criminal procedure met its goal of producing fairer and more color-blind state and local criminal justice practices in the United States. In 2021, state and local detainees can still disappear into local criminal justice systems for extended periods of time, notwithstanding the Sixth Amendment's speedy trial mandate;[167] state prosecutors still use jury selection procedures to exclude minority jurors from serving;[168] and, throughout the United

. . . provided a vaguely defined 'floor' of constitutional protection below which the states could not fall, but otherwise was not a significant presence in the day-to-day work of state officials and state judges. When the Court incorporated most of the specific criminal procedure guarantees of the Fourth, Fifth, and Sixth Amendments into the Fourteenth Amendment's Due Process Clause . . . it radically transformed the role of federal constitutional law in state criminal cases . . . . [W]herever federal criminal procedure law exists today, that law dominates the landscape.").

[164] Hoffman & Stuntz, *supra* note 148, at 67.

[165] Latzer, *supra* note 5, at 64–65 ("[I]ncorporation forced the states to adopt uniform procedures without regard to local needs. . . . No matter how costly, no matter how inefficient, no matter how difficult to implement, no matter how much injustice they might cause, and no matter how inappropriate to local circumstances they might be, the state courts have had to give effect to these federal procedural rights. These disadvantages of incorporation were acknowledged even in the 1960s, but they were believed to be outweighed by one important value: equality. Whatever the disadvantages in stifling state uniqueness, independence, and freedom to experiment, the advantage of uniform treatment of defendants throughout the United States, at least with respect to the fundamental rights of the Bill of Rights, seemed to justify incorporation." (citation omitted)).

[166] Congress undertook a major overhaul of federal habeas review with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, sec. 104, § 2254, 110 Stat. 1214, 1218 (codified at 28 U.S.C. § 2254(b)(2)). One of the outcomes of this overhaul was to limit the reach of the writ and codify the process federal courts are required to follow in reviewing state and federal prisoners' habeas petitions. 17B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4261.1 (3d ed. 2020) ("Congress made many important changes in habeas corpus in 1996. . . . The changes restrict habeas corpus but they do not virtually eliminate it, as some critics would have preferred." (citations omitted)).

[167] *Report Released Concerning Lengthy Pre-Trial Incarceration in Mississippi*, WLOX (June 20, 2019, 6:15 PM), https://www.wlox.com/2019/06/20/report-released-concerning-lengthy-pre-trial-incarceration-mississippi/ (last accessed Jan. 15, 2020) (notwithstanding the Sixth Amendment speedy trial right, which has been incorporated into the Fourteenth Amendment, "[t]housands of people are held in Mississippi's county and regional jails awaiting indictment and trial" and of "more than 5,700 people incarcerated in local jails as of May 2019[, r]oughly 2,750 of those detainees had been in jail longer than 90 days. More than 800 people have been stuck in county jails over a year.").

[168] Linda Greenhouse, Opinion, *The Supreme Court's Gap on Race and Juries*, N.Y. TIMES (Aug. 6, 2015), https://www.nytimes.com/2015/08/06/opinion/the-supreme-courts-gap-on-race-and-juries.html [https://perma.cc/XS7E-PR7T].

Electronic copy available at: https://ssrn.com/abstract=3813968

States, racial and ethnic minorities are over-represented in the criminal system.[169] The legal defense of the poor, mandated by the Court for felonies and many misdemeanors, is provided by overburdened and underfunded public defenders.[170] Despite incorporation, many contemporary state and local defendants, who are overwhelmingly poor and disproportionately non-White, have been relegated to a lesser justice, not afforded a more equal one.

B. Congress Federalizes Tribal Court Criminal Procedure

Incorporation reached its peak in the 1960s, during the Civil Rights Era. This is the backdrop against which Congress enacted the Indian Civil Rights Act of 1968 (ICRA),[171] a rider to the Civil Rights Act of 1968.[172] An earlier statute, the Civil Rights Act of 1957, had authorized the creation of an independent, bipartisan, fact-finding Commission on Civil Rights. One of the items the Commission focused on in its first report, issued in 1961, was the lack of constitutional protection for individual Indians.[173] After that report issued, Congress, through a subcommittee, spent eight years studying the need to protect "the rights of individual American Indians from being infringed by Indian tribes exercising powers of

---

[169] THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1 (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ [https://perma.cc/AV33-SUUK].

[170] Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon'*, ATLANTIC (Mar. 13, 2013), https://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/ [https://perma.cc/9EPV-DG99] ("Today, there is a vast gulf between the broad premise of the ruling and the grim practice of legal representation for the nation's poorest litigants. Yes, you have the right to a court-appointed lawyer today—the right to a lawyer who almost certainly is vastly underpaid and grossly overworked; a lawyer who, according to a Brennan Center for Justice report published [in 2012], often spends less than six minutes per case at hearings where clients plead guilty and are sentenced. With this lawyer—often just a 'potted plant'—by your side, you've earned the dubious honor of hearing the judge you will face declare that this arrangement is sufficient to secure your rights to a fair trial."); *see also* Sara Mayeux, Gideon v. Wainwright *in the Age of a Public Defense Crisis*, TALKPOVERTY (May 9, 2016), https://talkpoverty.org/2016/05/09/gideon-wainwright-age-public-defense-crisis/ [https://perma.cc/5ZMN-834R] ("Throughout the United States, public defenders have used the word 'crisis' for decades as shorthand for the combination of volatile funding, understaffing, and excessive per-lawyer caseloads that has persistently plagued many defender offices."). Among other unforeseen consequences of increasing the costs of criminal prosecutions is the increasing use of court fees and surcharges levied against criminal defendants to help prop up severely under-funded local court systems. *See generally* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016) (exposing how the use of monetary sanctions for punishing criminals perpetuates socioeconomic and racial inequalities).

[171] 25 U.S.C. §§ 1301–1304.

[172] Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18, 25, 42 U.S.C.).

[173] 5 U.S. COMM'N ON C.R., JUSTICE: 1961 COMMISSION ON CIVIL RIGHTS REPORT 131, 133 (1961) ("The subtleties of the Indian's legal status are nowhere more evident than in the area of the Bill of Rights. For while neither Congress nor the States may infringe the basic civil rights of Indians—in this respect, they enjoy the same status as other citizens—Indians are not so protected against the actions of tribal governments. . . . Comparable limitations could be imposed on tribal governments by constitutional amendment or, very likely, by congressional action.").

Electronic copy available at: https://ssrn.com/abstract=3813968

self-government."[174] ICRA—which conferred some, but not all, of the protections set out in the Bill of Rights on Indians by statute and created a writ of habeas remedy to enforce those rights in federal court—was the response to these concerns.[175] Federal courts initially held that Indians deprived of their ICRA rights had an implied civil cause of action against their tribal government to vindicate those rights.[176] In 1978, in *Santa Clara Pueblo v. Martinez*, however, the Court held that a litigants' exclusive vehicle for seeking a federal court remedy of an ICRA violation was through a writ of habeas corpus.[177] It found that an implied cause of action would upset the balance between individual rights and tribal autonomy Congress had intended to establish in ICRA.[178]

ICRA, among other things, sets a uniform federal procedural minimum tribes must meet in the investigation, prosecution, and punishment of wrongdoing in Indian country. It is Congress' statutory analog to the Court's Fourteenth Amendment incorporation jurisprudence. Thus, as with states, tribal court criminal procedure is heavily regulated by the federal government, but by the national legislature, not the national court.[179] Just as the Court's incorporation doctrine was animated by a distrust of state courts, Congress and the Court's engagement with tribes reveals a deep skepticism about tribal courts' fairness and competence, especially in dealing with non-Indians.[180] The Major Crimes Act and *Oliphant*, discussed above, reflect

---

[174] *The Constitutional Rights of the American Indian: Hearings on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968, and S.J. Res. 40 Before the Subcomm. on Const. Rts. of the Comm. of the Judiciary*, 89th Cong. 2 (1965); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978) ("[Congress'] legislative investigation revealed that . . . serious abuses of tribal power had occurred in the administration of criminal justice."); S. REP. NO. 90-841, at 7 (1967) (defining the purpose of the report to be "recommend[ing] to the Congress a model code governing the administration of justice by courts of Indian offenses on Indian reservations; to protect the constitutional rights of certain individuals . . . ."); Burnett, *supra* note 20, at 577 (analyzing the Subcommittee on Constitutional Rights evaluation of the broad "constitutional neglect" on Indian rights).

[175] *Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affs. of the H. Comm. on Interior & Insular Affs.* 31 (1968) (statement of Rep. Glenn Cunningham) (ICRA "would grant to the American Indians enumerated constitutional rights and protection from arbitrary action in their relationship with tribal governments . . . .").

[176] *E.g.*, Dodge v. Nakai, 298 F. Supp. 17, 25 (D. Ariz. 1968) (describing 42 U.S.C. § 1982 as "a statute which by its terms does not authorize the filing of a civil action, but is merely declarative of the rights of citizens of the United States," and noting that "the fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy." (citation omitted)); McCurdy v. Steele, 353 F. Supp. 629, 638 (D. Utah 1973).

[177] 436 U.S. 49, 70–71 (1978).

[178] *Id.*

[179] Of course, many tribes meet or exceed the Bill of Rights' procedural requirements, just as many states afford criminal defendants in their courts more protection than that required under Fourteenth Amendment jurisprudence. Matthew L.M. Fletcher, AMERICAN INDIAN TRIBAL LAW 417 (2011) ("In general, tribal courts apply a higher standard of care to tribal law enforcement officials, often requiring greater criminal procedure guarantees to tribal criminal defendants than those they would otherwise receive in state or federal courts.").

[180] Skibine, *supra* note 136, at 180, 197 ("[M]any nontribal judges see tribal law as foreign and different than regular American law. . . . For forty years, the Supreme Court has been engaged in a measured attack on tribal sovereignty when it comes to tribal jurisdiction over nonmembers. . . . to protect or shield nonmembers from tribal tribunals out of an inordinate fear that these tribunals will not be fair to nonmembers."); *see also Developments in the Law – Indian Law*, *supra* note 50, at 1716–18 ("As has been shown, throughout

Electronic copy available at: https://ssrn.com/abstract=3813968

this. ICRA and its TLOA and VAWA 2013 amendments, discussed below, perpetuate it. Indeed, the architecture of the current version of ICRA is structured on a normative judgment that dispositions of wrongdoing in tribal communities can only be valid or trusted if they are the product of procedures and processes that conform to colonialist notions of due process and justice.

As noted, the Bill of Rights has no force in Indian country. Thus, ICRA accomplishes by Congressional mandate what the Constitution cannot. It includes almost every procedural protection in the Bill of Rights using language borrowed from the Constitution.[181] ICRA regulates searches and seizures;[182] warrants;[183] double jeopardy;[184] compelled self-incrimination;[185] jury trials;[186] and notice of charges, confrontation of witness, compulsory process, and assistance of counsel.[187] ICRA also regulates bail, fines, and punishments;[188] equal protection and due process;[189] and bills of attainder and ex post facto laws.[190] The only Constitutional procedural rights omitted from the 1968 version of ICRA are the right to appointed counsel for indigents, and the right to an "impartial" jury, a term the Court defined post-1968 as a jury selected from a fair cross section of the community using a process that does not systematically exclude any distinctive group in the community.[191] Congress did not include a right to "impartial" jury in the 1968 version of ICRA presumably to reflect that fact that tribes may limit jury service to members of that tribe.[192] With respect to appointed counsel for indigents, it is important to note that tribes' sentencing authority in 1968 was limited to misdemeanor penalties—six-months incarceration and a $500 fine.[193] At that time, the Court had not yet recognized a federal constitutional right to counsel for indigents

---

European- and federal-Indian relations there has been a history of suspicion of Indian law and self-government. And although Congress came to accept that tribal courts would have jurisdiction over some cases, it became concerned with reports of abuse and the lack of Bill of Rights protections for tribal members. Congress passed ICRA to bring (most of) the Bill of Rights to tribal lands . . . .").

[181] 25 U.S.C. § 1302(a).

[182] *Id.* § 1302(a)(2).

[183] *Id.*

[184] *Id.* § 1302(a)(3).

[185] *Id.* § 1302(a)(4).

[186] *Id.* § 1302(a)(10).

[187] *Id.* § 1302(a)(6).

[188] *Id.* § 1302(a)(7)(A).

[189] *Id.* § 1302(a)(8).

[190] *Id.* § 1302(a)(9). Ex post facto laws and bills of attainder prohibitions are in the original U.S. Constitution, not the Bill of Rights. U.S. CONST. art. I, § 9, cl. 3.

[191] Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 478 (2005) (identifying "the two primary rights 'missing' from [the 1968 version of] ICRA [as] free representation for indigent defendants and a jury that includes nonmembers"). The Court established the fair cross section test for evaluating whether a defendant has been deprived of her Sixth Amendment impartial jury right in *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

[192] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 n.4 (1978) ("The Indian Civil Rights Act of 1968 provides for 'a trial by jury of not less than six persons,' . . . but the tribal court is not explicitly prohibited from excluding non-Indians from the jury even where a non-Indian is being tried." (citation omitted)).

[193] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202(7), 82 Stat. 73, 77 ("No Indian tribe in exercising powers of self-government shall . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both.").

Electronic copy available at: https://ssrn.com/abstract=3813968

charged with misdemeanors.[194] Thus, at the time, the omission of the right to appointed counsel for indigents did not create a right for tribal court defendants different from that of state and federal court defendants under the Constitution.

Congress raised ICRA's sentencing cap in 1986 to one-year incarceration and a fine of $5,000.[195] The next major revisions to ICRA did not come until 2010, when Congress enacted the Tribal Law and Order Act (TLOA). This followed coverage of the danger created by the Indian country criminal jurisdiction gap, especially for indigenous women.[196] TLOA authorized tribal sentences greater than one year, but not more than three years, for a single offense in two instances—where the defendant is a repeat offender, or where the conduct would be subject to felony penalties under state or federal law.[197] TLOA also authorized "stacking" individual sentences—i.e., imposing consecutive, rather than concurrent, sentences for multiple offenses to yield a higher overall sentence to reach a total of nine years of incarceration.[198] Under

---

[194] It is important to note that in 1968, pre-*Gideon*, many states already provided indigent defendants counsel at public expense under their own laws and constitutions. McNeal v. Culver, 365 U.S. 109, 119–22 (1961) (Douglas, J., concurring) (appendix listing thirty-five states then providing appointed counsel for indigents in all felony cases). Colorado subsequently joined that group of states. COLO. REV. STAT. ANN. § 13-10-114.5 (West 2020). Further, by 1968, the Court had recognized a Fourteenth Amendment due process right to counsel in state capital cases and a right to counsel in other felony cases on a case-by-case basis, but not a categorical Sixth Amendment right to counsel in all felony cases. *See* Powell v. Alabama, 287 U.S. 45, 71–72 (1932); *see also* Hamilton v. Alabama, 368 U.S. 52, 53–54 (1961) (holding that arraignment is so critical a stage of Alabama criminal procedure that denial of counsel at arraignment required reversal of conviction, even though no prejudice was shown); Betts v. Brady, 316 U.S. 455, 473 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (holding that the due process does not obligate the states to furnish counsel in every criminal case). Indeed, Congress considered, but rejected, imposing an indigent defense requirement in ICRA because it recognized "that tribal governments simply did not have adequate resources to retain counsel for indigent litigants, and most tribal courts did not use lawyers but instead provided tribal members for advice as needed." John R. Wunder, *The Indian Bill of Rights*, *in* THE INDIAN BILL OF RIGHTS, 1968 at 2, 16 (John R. Wunder ed., 1996).

[195] Anti-Abuse Act of 1986, Pub. L. No. 99-570, sec. 4217, § 202(a)(7), 100 Stat. 3207, 3207-146.

[196] Ralph Blumenthal, *For Indian Victims of Sexual Assault, a Tangled Legal Path*, N.Y. TIMES (Apr. 25, 2007), https://www.nytimes.com/2007/04/25/us/25rape.html [https://perma.cc/J6GX-Q64N]. In 2010, the U.S. Government Accountability Office (GAO) conducted a study of the Department of Justice's prosecution rate in Indian country cases. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 1 (2010). The report was undertaken at the request of Congress following press reports of federal prosecutors declining to prosecute in a high number of Indian country criminal investigations referred to them. *Id.* at 1–2. GAO reported that in fiscal years 2005 through 2009, 10,000 Indian country matters were referred to federal prosecutors; they disposed of 9,000 of the 10,000 matters by filing for prosecution, declining to prosecute, or administratively closing the matter; they declined to prosecute fifty percent of the 9,000 cases disposed of. *Id.* at 3. About seventy-seven percent of the matters referred involved violent crimes. *Id.* The GAO found that declination rates were higher for violent crimes, which were declined fifty-two percent of the time. *Id.*

[197] 25 U.S.C. § 1302(b) provides:

> 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, or both, if the defendant is a person accused of a criminal offense who—(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or (2) 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.

[198] *Id.* § 1302(a)(7)(D). Before TLOA, some tribes were stacking multiple offenses to yield cumulative sentences over ICRA's one-year cap. *E.g.*, Romero v. Goodrich, 480 F. App'x 489, 490 (10th

Electronic copy available at: https://ssrn.com/abstract=3813968

TLOA, a tribe seeking to assert expanded punishment authority must "opt in" and provide the following additional procedural protections above those required by the default provisions in the 1968 version of ICRA:

(1) provide all defendants "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution";[199]

(2) provide indigent defendants, "the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys" at tribal expense;[200]

(3) supply a judge with "sufficient legal training to preside over criminal proceedings" who is "licensed to practice law";[201]

(4) before charging a defendant, make publicly available the tribe's "criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances)";[202]

(5) "maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding."[203]

These additional protections are only triggered if a tribal court imposes a sentence greater than one-year incarceration or a $5,000 fine.[204] Thus, a tribal court can avoid TLOA requirements as long as its total sentence of incarceration does not exceed one year or a fine of $5,000.

Congress amended ICRA again in 2013 as part of the Violence Against Women Re-Authorization Act.[205] The VAWA 2013 amendments to ICRA were enacted in response to concerns about the federal government's failure to adequately prosecute domestic violence crimes in Indian country committed by non-Indians living in, or associated with, Indian communities.[206] VAWA 2013 authorized tribes to exercise

---

Cir. 2012). While TLOA explicitly authorized stacking, it also put an end to unlimited stacking by capping all sentence lengths at nine years. TLOA's stacking authorization, therefore, could be viewed as a limitation on, not an expansion of, tribal sentencing authority. *See* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 417 (2011); *see also* Miranda v. Anchondo, 684 F.3d 844, 852 (9th Cir. 2012) (holding that pre-TLOA ICRA did not prohibit stacking). *But see* Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176, 1182 (D. Minn. 2005) ("[T]he Court is convinced Congress did not intend to subject tribal court defendants to many years' imprisonment—without any right to publicly funded counsel—under the guise of a statute ostensibly extending the benefits of the United States Constitution. The Court therefore interprets the ICRA's phrase "any one offense" to mean "a single criminal transaction.").

[199] 25 U.S.C. § 1302(c)(1). The default provisions of ICRA provide for the right to assistance of (retained) counsel; they do not contain an explicit right to *effective* assistance of counsel because this is a gloss the Court placed on the Sixth Amendment right to counsel post-1968 in Strickland v. Washington, 466 U.S. 668, 686 (1984). *See infra* note 215.

[200] 25 U.S.C. § 1302(c)(2). The default provisions of ICRA do not require that counsel be bar-licensed.

[201] *Id.* § 1302(c)(3).

[202] *Id.* § 1302(c)(4).

[203] *Id.* § 1302(c)(5).

[204] *Id.* § 1302(b).

[205] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204, 127 Stat. 54, 120–23.

[206] Cynthia Castillo, Special Feature, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 314–15 (2014) (citing

Electronic copy available at: https://ssrn.com/abstract=3813968

criminal jurisdiction over some domestic violence offenses committed in Indian country by some non-Indians for the first time since the Court's 1978 *Oliphant* decision held that tribes lacked inherent sovereign authority to exercise criminal jurisdiction over non-Indians. This authority is labeled "Special Domestic Violence Criminal Jurisdiction" or "SDVCJ."[207] VAWA 2013's SDVCJ provisions authorize tribes to exercise jurisdiction over domestic violence, dating violence, and violations of protection orders if the offense involves an Indian victim or an Indian defendant.[208] To fall within SDVCJ, the non-Indian must have some connection to the tribe—such as working or living in the community; or being married to, or in an intimate or dating relationship with an Indian who is a member of the tribe, or with a non-member Indian living in the community.[209] VAWA 2013 explicitly excludes jurisdiction over crimes in which neither the victim nor the defendant are Indians, leaving *McBratney* intact.[210]

C. An Illusory Procedural Parity

To exercise SDVCJ, tribes must provide criminal defendants all the procedural protections required under the 1968 version of ICRA,[211] and all the protections under the TLOA amendments to ICRA discussed above.[212] In addition, tribes must provide VAWA 2013 defendants the right to an "impartial jury," which Congress defined for purposes of VAWA 2013 jurisdiction using language the Court developed to define an impartial jury under the Constitution.[213] In case anything was missed, VAWA

---

under-enforcement of crimes of sexual violence as the impetus for VAWA's 2013 special domestic violence jurisdiction over some non-Indians); *see also* INDIAN L. & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES 18 (Nov. 2013), https://www.aisc.ucla.edu/iloc/report/ [https://perma.cc/QVY7-BA6P] ("The Indian Law and Order Commission has concluded that criminal jurisdiction in Indian country is an indefensible maze of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations.").

[207] 25 U.S.C. § 1304(a)(6); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

[208] 25 U.S.C. § 1304(c)(1)-(2). Proposed amendments to ICRA, which were pending as of the drafting of this article, would expand tribal jurisdiction over sexual assaults, child abuse co-occurring with domestic violence, stalking, sex trafficking, and assaults on tribal law enforcement officers. Act to Reauthorize the Violence Against Women Act of 1994, H.R. 1585, 116th Cong. § 903 (2019).

[209] 25 U.S.C. § 1304(b)(4).

[210] *Id.* § 1304(b)(4)(A)(i).

[211] *Id.* § 1302(a).

[212] *Id.* § 1302(c).

[213] Section 1304(d) sets out the "rights of defendants" in VAWA 2013 prosecutions. It provides:

> In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—
>
> (1) all applicable rights under this Act [i.e., the rights set out in the general provisions of ICRA found at 25 U.S.C. § 1302(a)];
>
> (2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title [the TLOA amendments to ICRA];
>
> (3) the right to a trial by an impartial jury that is drawn from sources that—
>
> (A) reflect a fair cross section of the community; and
>
> (B) do not systematically exclude any distinctive group in the community, including non-Indians; and

Electronic copy available at: https://ssrn.com/abstract=3813968

2013 requires tribes to ensure "all other rights whose protection is necessary under the Constitution . . . in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction. . . ."[214] In this way, Congress has created a portfolio of rights that non-Indians carry with them into tribal court entitling them to the full range of procedural protection they would otherwise, at least theoretically, receive in a state court under the Court's incorporation jurisprudence.

ICRA's TLOA and VAWA 2013 amendments create a three-tiered procedural floor in tribal courts—ICRA's 1968 provisions require most, but not all, of the constitutional procedural protections required under the U.S. Constitution as they existed in 1968.[215] TLOA adds law-trained appointed counsel and law-trained judge requirements. VAWA 2013, aimed specifically at non-Indians now subject to tribal court jurisdiction for the first time since *Oliphant*, incorporates the TLOA requirements, adds an impartial jury right, and requires everything else necessary under the U.S. Constitution "for Congress to recognize and affirm the inherent power" of tribes exercising SDVCJ.[216] ICRA, and its TLOA and VAWA 2013 amendments, on the surface, appear to do no more than harmonize tribal court procedure with the Court's incorporation jurisprudence. A closer examination, however, reveals that Congress has not simply created a tribal court version of state court incorporation. On the contrary, in some instances, ICRA places more limitations on tribal courts than the Court places on states under the Fourteenth Amendment and, in other instances, ICRA provides the VAWA 2013 defendant

> (4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

[214] *Id.* § 1304(d)(4). It is not entirely clear if this provision tethers ICRA criminal procedure for non-Indians to the Court's Fourteenth Amendment state court incorporation jurisprudence, or if it creates an additional, and potentially larger or narrower body of rights linked to federal court constitutional criminal procedure. For example, does it incorporate all the selectively incorporated rights as interpreted by the Court? Or are the Fourteenth Amendment rights different from rights whose protection is necessary for Congress "to recognize and affirm the inherent power of the participating tribal to exercise" VAWA 2013 jurisdiction? *Id.* It also raises the question of how this provision interacts with retroactivity doctrines—does it apply to existing "rights whose protection is necessary under the Constitution" at the time VAWA 2013 was enacted, or at the time of a defendant's crime or sentencing, or at the time the Court recognizes and interprets them as incorporated into the Fourteenth Amendment?

[215] The timing and history of ICRA's amendments are critical to understanding its progression. When Congress enacted ICRA in 1968, some tribal courts assumed they had jurisdiction over anyone, Indian and non-Indian alike, who violated tribal laws on tribal land. It wasn't until the Court held otherwise in 1978 that the federal government restricted tribal court jurisdiction based on citizenship. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). It should further be noted that some of the procedural rights Congress extended with TLOA in 2010 and VAWA in 2013 did not exist in 1968 when Congress enacted ICRA. As noted above, in 1968 there was no federal constitutional right to counsel for indigents charged with misdemeanors, and tribal court sentencing authority at the time was limited to misdemeanor penalties—six-months incarceration and a $500 fine. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202(7), 82 Stat. 73, 77. In 1968, the Supreme Court had not yet defined the Sixth Amendment right to counsel as including the right to "effective" assistance of counsel. That came in 1984 under *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

[216] 25 U.S.C. § 1304(d)(4).

Electronic copy available at: https://ssrn.com/abstract=3813968

(intended to be non-Indian) more than he would be entitled to in state court under the Constitution.

Some of these discrepancies can be attributed to nuances in the timing of the Court's incorporation jurisprudence vis-à-vis Congress' legislative enactments. For example, some procedural rights set out in ICRA's default provisions were explained, altered, or refined by the Court in the incorporation context after ICRA was enacted in 1968 And some aspects of constitutional procedure may not have been relevant in tribal courts in 1968 because their sentencing authority at the time was limited to misdemeanor penalties. Some of the discrepancies, however, that give VAWA 2013 defendants more than TLOA defendants, and sometimes more than state court defendants, are the result of drafting choices; specifically, the language dictating the circumstances that trigger VAWA 2013's additional procedural protections. VAWA 2013 procedural protections are triggered if a term of incarceration of any length *may* be imposed on the defendant as a result of conviction.[217] This is an "authorized incarceration" standard.[218] In contrast, in TLOA prosecutions (limited to Indian defendants), ICRA's enhanced procedural protections are triggered when a tribal court *actually imposes* a sentence greater than one year. This is an "actual incarceration" standard.[219] As explained in detail in an earlier article, and discussed below, the distinction between an "actual" sentence and an "authorized" sentence as a trigger for procedural rights is one of constitutional significance under the Court's incorporation jurisprudence, and one that is clearly delineated in caselaw and commentary.[220] Given this, one can only conclude that Congress either understood the difference, but deliberately created greater rights for non-Indian tribal court defendants, or that it was unaware of this well-understood aspect of constitutional criminal procedure. Whether intentional or inadvertent, neither explanation reflects well on Congress.

What follows are specific examples of disparities between tribal and state court federalized criminal procedure that, more often than not, benefit non-Indian defendants over Indian defendants in tribal court, while sometimes providing non-Indian tribal court defendants more procedural protections than their state court counterparts. These disparities are neither technical nor trivial because they demand resource-intensive procedures and can result in significant public safety and opportunity costs for tribes.

i. Appointed Counsel

Indigent VAWA 2013 tribal court defendants have a more expansive right to counsel at public expense than Indian tribal court defendants under TLOA, and than state court defendants under the Constitution. The starting point for understanding

---

[217] *Id.* § 1304(d)(2).

[218] Jordan Gross, *VAWA 2013's Right to Appointed Counsel in Tribal Court Proceedings—A Rising Tide That Lifts All Boats or a Procedural Windfall for Non-Indian Defendants?*, 67 CASE W. RES.. L. REV. 379, 386, 428–29 (2016) (explaining the difference between an actual incarceration trigger versus an authorized incarceration trigger).

[219] *Id.*

[220] *Id.* at 386.

Electronic copy available at: https://ssrn.com/abstract=3813968

this discrepancy is the familiar "*Gideon* right," and the Court's different application of the right to appointed counsel in felony and misdemeanor cases.[221] *Gideon* involved a felony prosecution. It established that state trial courts must provide indigent felony defendants counsel at public expense under the Sixth Amendment, as extended to states through Fourteenth Amendment incorporation.[222] Under *Gideon*, the right to appointed counsel is triggered by the sentence authorized by the charging statute—a defendant charged with a crime that exposes her to a felony penalty is categorically entitled to counsel at public expense if she is indigent.[223] Subsequent to *Gideon*, the Court considered whether the *Gideon* right extends to indigent state court defendants charged with misdemeanors.[224] In this context, it held that the indigent misdemeanor defendant is only entitled to counsel at public expense if the defendant is *actually* incarcerated for a misdemeanor or receives a suspended sentence of incarceration, as opposed to being charged under a statute that merely exposes the defendant to the *possibility* of incarceration.[225] The federal constitutional right to appointed counsel for misdemeanors, therefore, is not triggered by the punishment authorized by the charging statute. It is triggered by a trial court's actual imposition of a sentence of incarceration or a suspended sentence of incarceration. In adopting an *actual* incarceration trigger for the misdemeanor right to counsel, the Court considered, and rejected, an *authorized* incarceration standard. And it cited concerns for state sovereignty and state resource constraints in making this choice.[226] As a practical matter, this means a state trial court can avoid the cost of assigning counsel to indigents charged with misdemeanors by taking jail time off the table at the outset of a criminal proceeding.

Under the 1968 version of ICRA, indigent defendants have a right to counsel at their own expense; there is no right to *appointed* counsel for indigents.[227] Thus, under ICRA's default provisions, a tribal court can impose a of up to one-year incarceration on an unrepresented indigent defendant without violating his statutory right to appointed counsel.[228] As noted, ICRA's default provisions only apply to Indian defendants. Under TLOA, if a tribal court "imposes" a total term of imprisonment of

---

[221] Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

[222] *Id.* at 339–40, 344.

[223] *Id.* at 344.

[224] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); Alabama v. Shelton, 535 U.S. 654, 657–58 (2002).

[225] *Argersinger*, 407 U.S. at 37 ("[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."); *see also* Scott v. Illinois, 440 U.S. 367, 373 (1979) ("[A]ctual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment . . . actual imprisonment [is] the line defining the constitutional right to appointment of counsel [for misdemeanors].").

[226] *Scott*, 440 U.S. at 373 (holding that any extension of the right "would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States"). Justice Brennan, who joined the majority in the *Argersinger* opinion, dissented. In his view, "the economic burden that an 'authorized imprisonment' standard might place on the States. . . . [was] both irrelevant and speculative," and the "Court's role in enforcing constitutional guarantees for criminal defendants cannot be made dependent on the budgetary decisions of state governments." *Id.* at 384 (Brennan, J., dissenting).

[227] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 601, 82 Stat. 73, 80.

[228] This discrepancy has significant downstream consequences for the unrepresented defendant because uncounseled misdemeanors can be used subsequently as predicate offenses or sentence enhancers as long as they are valid when entered. United States v. Bryant, No. 15-420, slip op. at 1–2 (June 13, 2016).

Electronic copy available at: https://ssrn.com/abstract=3813968

more than one year, it must provide the defendant appointed counsel if he is indigent.[229] By using the verb "imposes," rather than "may impose," Congress created an actual incarceration trigger for TLOA defendants that mirrors the Court's Sixth Amendment misdemeanor jurisprudence. But, unlike his state court counterpart, the TLOA indigent tribal court defendant (which can only be an Indian) is entitled to appointed counsel only if he receives a felony-length sentence; he is not entitled to appointed counsel for a misdemeanor-length sentence. In contrast, the indigent state court defendant is categorically entitled to appointed counsel if he faces a felony charge, even if he does not actually receive a sentence of incarceration; and he has a right to appointed counsel if he is sentenced to even one day in jail for a misdemeanor. A tribal court can forgo appointment of counsel under TLOA, even if it involves felony charges, as long as it does not actually sentence that defendant to a term of incarceration over one year. A state court can do this in misdemeanor cases, but not felony cases.[230]

VAWA 2013, enacted for the benefit of non-Indian tribal court defendants, creates a different appointed counsel right. It is greater than that provided for TLOA defendants, and broader than the Sixth Amendment appointed counsel right. VAWA 2013 requires tribes to provide VAWA 2013 defendants "all rights described in section 1302(c)"—which includes the TLOA right to appointed counsel for indigent defendants—"if a term of imprisonment of any length *may be imposed*[.]"[231] The phrase "may be imposed" is the authorized incarceration trigger the Court explicitly rejected for state misdemeanor cases out of concern for state sovereignty and fiscal constraints. And the phrase "any length" erases the misdemeanor/felony distinction that governs the Sixth Amendment appointed counsel right under the Court's incorporation caselaw. Thus, the indigent VAWA 2013 tribal court defendant is entitled to appointed counsel if the tribal law under which he is charged authorizes incarceration of any length as a punishment, whether it is categorized as a misdemeanor or felony, and regardless of whether the defendant actually receives a sentence that includes incarceration.

ii. Law-Licensed Judges

The default provisions of ICRA do not require that counsel be law-licensed. The TLOA amendments to ICRA (incorporated by reference into VAWA 2013) specify that the right to appointed counsel means the right to law-licensed counsel.[232] They

---

[229] Tribal Law & Order Act of 2010, Pub. L. No. 111-211, sec. 234, § 202(c), 124 Stat. 2258, 2279–80.

[230] Gross, *supra* note 220, at 422–23.

[231] 25 U.S.C. § 1304(d)(2) (emphasis added).

[232] As discussed above, in 1978 the Court held that the exclusive means to challenge an alleged ICRA violation by a tribe was through ICRA's habeas provision, as opposed to through an implied a right of action. "When resolving these cases, judges commonly took a bifurcated approach. For cases involving provisions identical to those in the Bill of Rights, courts generally turned to existing federal constitutional law and procedures." *Developments in the Law – Indian Law*, *supra* note 50, at 1716–17 (citation omitted). Under this early jurisprudence "[a]ssistance of counsel . . . was determined to require licensed attorneys, even when a tribe 'had never allowed professional attorneys to practice in tribal court.'" *Id.* at 1716 & n.67 (quoting Michael Reese, *The Indian Civil Rights Act: Conflict Between Constitutional Assimilation and Tribal*

Electronic copy available at: https://ssrn.com/abstract=3813968

provide that in TLOA and VAWA 2013 prosecutions, tribes must provide indigent defendants "the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys" at tribal expense.[233] ICRA also requires judges presiding in TLOA and VAWA 2013 cases to have "sufficient legal training to preside over criminal proceedings" and be "licensed to practice law."[234] The history of professional licensing and lawyers in tribal court is long and convoluted. Attorneys were prohibited by federal law from appearing in tribal court until 1961 and defendants in tribal court had no federal statutory right to counsel until Congress enacted ICRA in 1968.[235] This gave rise to lay advocacy systems in many tribal courts, overseen through tribal training and licensure requirements. Lay advocates continue to provide affordable representation in many contemporary tribal courts.[236]

The history of lay jurists in state and local courts is equally rich, particularly in rural America communities where, to this day, law-licensed jurists may be few and far between.[237] In many states, courts of limited jurisdiction handle a wide range of civil and criminal matters.[238] These are the busiest courts in the United States, and they are where most people will interact with a court system.[239] Twenty-two states, almost half, authorize staffing these courts with justices of the peace or judges who are not law-licensed attorneys, even in criminal cases[240] There is no federal

Self-Determination, 20 SE. POL. REV. 29, 40 (1992)) ("One tribe had instead employed 'traditional counsel, such as elders or other tribal members conversant with tribal laws and customs, as representatives.'").

[233] 25 U.S.C. § 1302(c)(2).

[234] *Id.* § 1302(c)(3).

[235] Creel, *supra* note 90, at 341 (citing 25 C.F.R. § 11.9 (1958) (repealed by 26 Fed. Reg. 4360–61 (May 19, 1961))). This federal policy dates back to 1824, when Congress established the Bureau of Indian Affairs ("BIA"), which was originally housed in the War Department. *Id.* at 339. Congress transferred the BIA to the Department of the Interior ("DOI") in 1849. *Id.* In 1883, after Congress transferred the BIA to the DOI, the DOI created the Courts of Indian Offenses to "establish and impose an adversarial justice system" in Indian country. *Id.* In establishing these courts, the DOI created a civil and criminal code and "mandated the adversary system on the reservation for criminal matters." *Id.* at 340. From its inception, the Courts of Indian Offenses prohibited participation by attorneys to make sure there would be "[n]o lawyers [to] perplex the judges." *Id.*

[236] *2015 Courses for Lay Advocates and Non-Attorney Prosecutors*, CASE IN POINT (Nat'l Jud. Coll., Reno, Nev.), Sept. 2014, at 33 http://issuu.com/njcmag/docs/case_in_point_2014-2015 [https://perma.cc/HU2N-22NH] ("While there are many ways tribal courts may differ from their state counterparts, one truly unique aspect of tribal justice systems is the use of lay advocates."); *see also* GARROW & DEER, *supra* note 72, at 426 ("Because tribal governments have limited resources, they are often unable to provide defense attorneys for indigent defendants who cannot pay for an attorney. Thus many tribal governments allow and encourage the use of lay advocates. A lay advocate is a nonlawyer who acts as the defendant's counsel. A well-trained advocate can be as effective as an attorney in tribal court.").

[237] George Vecsey, *Justice of the Peace: Vanishing Rural American Under Attack*, N.Y. TIMES, Oct. 27, 1971, at 49.

[238] *Limited Jurisdiction Courts Resource Guide*, NAT'L CTR. STATE CTS., https://www.ncsc.org/limitedjurisdiction [https://perma.cc/GHV9-4FYX].

[239] *Id.* ("Of the 83.2 million cases filed in state trial courts in 2017, an estimated 70 to 75 percent were of a limited jurisdiction nature.").

[240] Matt Ford, *When Your Judge Isn't A Lawyer*, ATLANTIC (Feb. 5, 2017), https://www.theatlantic.com/politics/archive/2017/02/when-your-judge-isnt-a-lawyer/515568/ [https://perma.cc/P5UX-57VE] ("Twenty-eight states require all judges presiding over misdemeanor cases to be lawyers, including large states like California and Florida. In 14 of the remaining 22 states, a

Electronic copy available at: https://ssrn.com/abstract=3813968

constitutional prohibition on this practice. Or, stated otherwise, the Court has never held that a state court defendant has a Fourteenth Amendment due process right to a law-licensed jurist.[241] Some states limit the practice of using non-lawyer judges to misdemeanor cases (which likely makes the practice less suspect to federal courts). But, as noted, the VAWA 2013 provisions of ICRA do not distinguish between felony and misdemeanor punishments. Thus, tribes must provide a VAWA 2013 defendant charged with any crime for which incarceration of any length is authorized a bar-licensed judge, something not required of states under the Fourteenth Amendment.

iii. Jury Entitlement, Jury Size, Jury Waiver

ICRA jury rights are perhaps the least coherent provisions of the statute and the most challenging to un-pack. This is because jury rights are multi-dimensional—they include jury size, unanimity, waiver, composition (i.e., who can be excluded from a jury pool or an actual jury, and where a jury pool must be drawn from), and the question of what triggers the right to a jury. To complicate things, the Constitution provides for both civil and criminal jury trials, and it specifies some of the requirements for those juries, but not others.[242] Further, some aspects of constitutional jury rights have been incorporated into the Fourteenth Amendment, while others have not. ICRA's default provisions, and it TLOA, VAWA 2013 provisions all contain significant and unique variations from each other, and from federal constitutional requirements. Stated otherwise, the Court has not fully incorporated all aspects of the Sixth Amendment right to a jury into the Fourteenth Amendment, nor has Congress aligned ICRA jury rights with each other, or with the Court's incorporation jurisprudence.

---

defendant who receives a jail sentence from a non-lawyer judge has the right to seek a new trial before a lawyer-judge. But [eight] states—Arizona, Colorado, [Montana,] Nevada, New York, Texas, South Carolina, and Wyoming—allow non-lawyer judges to hand down jail sentences for misdemeanors without the right to a new trial before a lawyer-judge. Some states, like Montana, only allow the practice in rural or sparsely populated counties, while others allow it statewide."); *see also* David Carroll, *Should non-lawyer judges be sending people to jail? SCOTUS asked to review*, SIXTH AMENDMENT CTR. (Dec. 12, 2016), https://sixthamendment.org/should-non-lawyer-judges-be-sending-people-to-jail-scotus-asked-to-review/ [https://perma.cc/KG88-ZRP7] (noting that non-lawyer judges are permitted to preside over misdemeanor or ordinance violation prosecutions to promote "cost efficiency or to facilitate justice in more rural jurisdictions.").

[241] In North v. Russell, 427 U.S. 328, 339 (1976), the Court held that the Constitution does not prohibit trying a defendant who faces incarceration by a non-lawyer judge where the defendant has the right to *de novo* review before a judge who is a lawyer. But the Court has not decided whether it is constitutionally permissible to try a defendant before a non-lawyer judge if there is no right to a de novo trial before a judge who is a lawyer. The Court recently had the opportunity to decide this issue in *Davis v. Montana*. Kate Howard, *Petition of the Day*, SCOTUSBLOG (Aug. 17, 2016, 11:14 PM), https://www.scotusblog.com/2016/08/petition-of-the-day-975/ [https://perma.cc/QT6Q-HAPW] (identifying the issue as "[w]hether a criminal defendant charged with an offense punishable by incarceration is denied due process when he is tried by a non-lawyer judge, where the defendant has no opportunity for a de novo trial before a judge who is a lawyer."). It denied certiorari in that case on January 17, 2017. 137 S. Ct. 811 (2017) (Mem.).

[242] U.S. CONST. amends. VI, VII.

Electronic copy available at: https://ssrn.com/abstract=3813968

The Constitution provides for jury trials in civil cases and criminal cases. The Seventh Amendment requires juries in any suit "where the value in controversy shall exceed twenty dollars."[243] In criminal trials, the Sixth Amendment requires an "impartial jury of the State and district wherein the crime shall have been committed[.]"[244] The Sixth Amendment, thus, contains two explicit requirements: (1) an impartial jury (2) that is drawn from a specific location.[245] The location from which a jury pool (also "panel") is drawn is a "vicinage" provision[246] (to be distinguished from a "venue" provision, which is the location where a trial must be held). The Sixth Amendment contains a vicinage requirement; the Seventh Amendment does not. The Court has not incorporated Sixth Amendment's vicinage provision into the Fourteenth Amendment.[247] The Court, however, has interpreted the Fourteenth Amendment equal protection guarantee[248] to prohibit jury selection procedures that intentionally exclude or single out any "recognizable, distinct class" from the jury pool.[249] And it has interpreted the Sixth Amendment impartial jury right to require that criminal jury pools be composed of a "fair cross section" of the community in which a crime is tried.[250] Neither the Seventh, nor the Sixth Amendment, says anything about the size of juries.

---

[243] *Id.* amend. VII.

[244] *Id.* amend. VI.

[245] *Id.*

[246] "Vicinage" is defined as "a neighboring or surrounding district." Its synonyms are: backyard, neighborhood, purlieus, environs, vicinity. *Vicinage*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/vicinage [https://perma.cc/35LN-L5F3]; 4 WILLIAM BLACKSTONE, COMMENTARIES *350 ("Visne" means neighborhood, which, in medieval England, was interpreted as the county where the act was committed).

[247] Caudill v. Scott, 857 F.2d 344, 345–46 (6th Cir. 1988) (per curiam) (recognizing that right to have a jury selected from residents of the state and district where the crime occurred does not apply to the states); Cook v. Morrill, 783 F.2d 593, 595 (5th Cir. 1986) (same); Zicarelli v. Dietz, 633 F.2d 312, 323, 325–26 (3d Cir. 1980) (same).

[248] The Fourteenth Amendment contains an equal protection clause, but it only applies to the states. The Fifth Amendment, which only applies to the federal government, does not contain an equal protection clause. U.S. CONST. amends. V, XIV. In *Bolling v. Sharpe*, the Supreme Court held that the Fourteenth Amendment's equal protection guarantee applies to the federal government through the Fifth Amendment's Due Process Clause, sometimes referred to as "reverse incorporation." 347 U.S. 497, 499 (1954).

[249] Castaneda v. Partida, 430 U.S. 482, 494 (1977); Duren v. Missouri, 439 U.S. 357, 364 (1979).

[250] Taylor v. Louisiana, 419 U.S. 522, 528 (1975) ("[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial" applicable to the states through the Fourteenth Amendment). The fair cross section guarantee is concerned with the composition of the jury pool (also "venire"), not composition of the petit (trial) jury that will hear the defendant's case. There is no requirement that a defendant's petit jury be actually representative of the community, only that the pool of names from which a court draws a petit jury (or, if applicable, a grand jury) represent a fair cross-section of the community. United States v. Van Allen, 208 F. Supp. 331, 334 (S.D.N.Y. 1962); 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE § 15.4(d) (4th ed. 2019) ("The Sixth Amendment right to jury trial requires that a petit jury be drawn from a 'fair cross-section of the community.' This requirement overlaps to a substantial extent with equal protection restrictions upon jury selection, but the two guarantees are distinct. Equal protection prohibits discrimination against a 'cognizable group,' while the fair cross-section requirement prohibits the exclusion of a 'distinct' group that leaves the venire less than reasonably representative. The character of a distinct group for cross-section purposes may be somewhat different than that of a cognizable group for equal protection purposes. Also, equal protection prohibits only intentional discrimination, while a fair cross-section objection can reach the systemic underrepresentation of a distinct group even where there was no intent to underrepresent that group."

Electronic copy available at: https://ssrn.com/abstract=3813968

ICRA, like the Sixth Amendment, requires speedy and public trials.[251] Unlike the Sixth Amendment, ICRA's default jury provisions do not include an explicit "impartial" jury right, or a vicinage requirement. ICRA does, however, require a six-person jury in cases for offenses punishable by imprisonment.[252] But, unlike the Sixth or Seventh Amendments, ICRA contains a "default/waiver" provision—that is, the defendant must affirmatively request a jury, or be deemed to have waived her right. ICRA's TLOA amendment does not require additional jury rights over what the ICRA default provisions provide. ICRA's VAWA 2013 amendments, however, added an impartial jury right that tracks the Court's Sixth and Fourteenth Amendment jury right by requiring VAWA 2013 jury pools to be drawn from a fair cross section requirement, using a process that does not systematically exclude any distinctive group in the community, specifically non-Indians.[253] These multiple variations on the different aspects of state and federal defendants' constitutional and tribal court defendants' jury rights have created some specific and glaring anomalies. Pertinent to the discussion in this Article, this includes providing VAWA 2013 tribal court defendants with more expansive jury rights than those they would enjoy in state or federal court, as discussed below.

The text of the Sixth Amendment requires a jury in "all criminal prosecutions."[254] But the Court has never interpreted the Sixth Amendment to provide a right to a jury in all criminal cases. Under the Court's Sixth Amendment jurisprudence, the right to a criminal jury only attaches in prosecutions for felonies and non-petty misdemeanors (misdemeanors punishable by six months' or more incarceration).[255] Unlike the appointed right to counsel, which attaches in misdemeanor cases that result in an actual or suspended sentence of incarceration, the constitutional right to a criminal jury is triggered by the *authorized* penalty of the charging statute.[256] The use of an authorized, as opposed to an actual incarceration trigger, was a deliberate

(citations omitted)); Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 157–58 (2012) (citing *Castaneda*, 430 U.S. at 494); Holland v. Illinois, 493 U.S. 474, 478 (1990) ("[R]acial groups cannot be excluded from the venire from which a jury is selected. That constitutional principle was first set forth not under the Sixth Amendment but under the Equal Protection Clause."); Peters v. Kiff, 407 U.S. 493, 500 n.9 (1972) ("The principle of the representative jury was first articulated by this Court as a requirement of equal protection . . . .").

[251] 25 U.S.C. § 1302(a)(6) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding the right to a speedy and public trial . . . .").

[252] *Id.* § 1302(a)(10) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.").

[253] *Id.* § 1304(d)(3) ("In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant . . . (3) the right to a trial by an impartial jury that is drawn from sources that—(A) reflect a fair cross section of the community; and (B) do not systematically exclude any distinctive group in the community, including non-Indians . . . .").

[254] U.S. CONST. amend. VI.

[255] Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968). The length of incarceration is determined by reference to the charges, considered in insolation, not the aggregate sentence to which a defendant is exposed if charged with multiple petty misdemeanors. Lewis v. United States, 518 U.S. 322, 323–34 (1996) (holding that jury right does not attach even if defendant faces multiple petty offenses in a single trial if no single charge exposes the defendant to more than six-months' incarceration).

[256] *Duncan*, 391 U.S. at 159.

Electronic copy available at: https://ssrn.com/abstract=3813968

choice by the Court. And in making this choice, it expressly considered, and rejected, importing the right to counsel actual incarceration trigger into its jury right incorporation jurisprudence.[257]

As noted, ICRA provides for a jury in all cases involving an offense "punishable by imprisonment" regardless of length.[258] VAWA 2013 rights are triggered when incarceration of "any length may be imposed."[259] Thus, in this instance, ICRA actually provides for a greater right for all defendants than the Court has provided for state defendants, who are only entitled to a jury if they are facing incarceration of six months or more.[260] In tribal court prosecutions under ICRA's default provisions (but not TLOA and VAWA 2013 provisions), however, a defendant must affirmatively invoke his jury right to trigger it. This is a significant departure from constitutional criminal procedure under which fundamental rights, like the right to a jury, are not waived by passive inaction. Constitutional trial rights, with few exceptions, are personal to the individual defendant and can be waived. But a defendant will only be said to have given up a fundamental right if she makes a knowing, voluntary, and intelligent waiver on the record.[261] Under the default provisions of ICRA, an Indian defendant is entitled to a jury "upon request."[262] That means a defendant's failure request a jury can waive that right.[263] As noted above, under the default provisions of ICRA, that same Indian defendant is not entitled to counsel at tribal expense if charged with a crime that carries a penalty of one year or less. Thus, the indigent Indian defendant charged with a misdemeanor offense is expected to invoke her criminal jury trial right without the assistance of counsel.[264] If that defendant is prosecuted, however, for an offense that authorizes a term of incarceration of any length under VAWA 2013, that defendant (intended to be a non-Indian) will not waive the right to a jury trial by failing to request one.[265]

Neither jury size nor unanimity are mentioned in the Sixth or Seventh Amendments. Federal court practice provides for twelve jurors in all criminal

---

[257] *Id.* at 160.

[258] 25 U.S.C. § 1302(a)(10).

[259] *Id.* § 1304(d)(2).

[260] Congress is aware of this anomaly, but has yet to correct it. On May 11, 2016, Senators Barrasso and the late Senator McCain introduced federal legislation to align ICRA jury rights with the Sixth Amendment. S. 2920, 114th Cong. § 108 (2016) (proposal to amend 25 U.S.C. § 1302(a)(10) by inserting "'for 180 days or more' after 'punishable by imprisonment'" and to amend section 25 U.S.C. § 1304(d)(3) "in the matter preceding subparagraph (A), by striking 'the right' and inserting 'if a term of imprisonment of 180 days or more may be imposed, the right'."). This amendment would put all tribal court defendants on equal footing with state defendants by making the authorized punishment for a charged crime (i.e., anything punishable by imprisonment of six months or more) the trigger for the right to trial by jury. No action has been taken on this provision.

[261] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[262] 25 U.S.C. § 1302(a)(10).

[263] Alvarez v. Lopez, 835 F.3d 1024, 1029 (9th Cir. 2016).

[264] In *Alvarez*, the Ninth Circuit held that tribal courts have an affirmative obligation to advise defendants of their jury trial right. *Id.*

[265] Patton v. United States, 281 U.S. 276, 293, 298 (1930). Which trial rights must be personally waived by the defendant, and which may be waived on her behalf by an attorney acting as her agent, is a live issue. Gonzalez v. United States, 553 U.S. 242, 247–48 (2008). A waiver of fundamental constitutional rights, however, is never inferred by silence; it must be explicit. *Johnson*, 304 U.S. at 464.

Electronic copy available at: https://ssrn.com/abstract=3813968

trials,[266] and at least six in civil trials.[267] Criminal jury size is one of the few areas in which states can deviate from federal practice under the Court's incorporation jurisdiction. The Court has held that states may conduct felony and non-petty misdemeanor criminal jury trials with six jurors, and that they can try petty misdemeanors (i.e., offenses carrying a sentence of up to six months) with no jury at all.[268] As noted, ICRA requires a jury of at least six in all criminal trials for offenses that carry any term of imprisonment, including petty misdemeanors.[269] Thus, although tribes must provide criminal juries where states are not required to, like states, they are not required to seat more than six jurors, even in a felony trial. Until recently, the Court's case law was not clear on whether state court juries (like federal court juries) must return unanimous verdicts in criminal cases. After decades of confusion, the Court clarified that the federal unanimity requirement for criminal juries is incorporated into the Fourteenth Amendment in *Ramos v. Louisiana*.[270] Following *Ramos*, although a state may use a six-person jury, it must be unanimous.

iv. Proportionality in Sentencing

ICRA prohibits tribes from "requir[ing] excessive bail, impos[ing] excessive fines, or inflict[ing] cruel and unusual punishments[.]"[271] This language tracks the Eighth Amendment, which provides that "[e]xcessive bail shall not be required . . . nor cruel and unusual punishments inflicted."[272] The Court interprets the Eighth Amendment Cruel and Unusual Punishments Clause to prohibit certain forms of punishment (like torture[273]) and uncommon punishments (like denationalization[274]). On its face, the Eighth Amendment prohibits: (1) excessive fines and (2) cruel and unusual punishment; it says nothing about excessive punishments. Nonetheless, in a

---

[266] FED. R. CRIM. P. 23(b). A federal court can go below the number of jurors required by Rule 23 with the parties' consent; a federal court can also proceed with 11 jurors without the parties' consent in some instances. *Cf.* Ballew v. Georgia, 435 U.S. 223, 229–30, 239 (1978) (recognizing that juries of twelve in criminal cases were a historical accident and that state courts may have juries of six for criminal cases, but that juries of five persons posed issues of constitutionality).

[267] FED. R. CIV. P. 48; Colgrove v. Battin, 413 U.S. 149, 160 (1973).

[268] *Ballew*, 435 U.S. at 239; Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968).

[269] 25 U.S.C. § 1302(a)(10).

[270] No. 18-5924, slip op. at 4 (Apr. 20, 2020).

[271] 25 U.S.C. § 1302(a)(7)(A).

[272] U.S. CONST. amend. VIII.

[273] "[I]t is generally agreed that the Eighth Amendment absolutely prohibits certain kinds of . . . punishments . . . in modern American society [such as] drawing and quartering[.]"). RONALD J. ALLEN, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON, ANDREW D. LEIPOLD, & TRACEY L. MEARES, CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL 1487 (3rd ed. 2020).

[274] In *Trop v. Dulles*, the Court found that revoking a criminal's citizenship as punishment for an offense constituted a violation of the Eighth Amendment because denationalization results in "the total destruction of the individual's status in organized society." 356 U.S. 86, 101 (1958). An Indian country application of this principle can be found in Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 895 (2d Cir. 1996). In *Poodry*, tribal members who were banished from their tribe's land and disenrolled as tribal members argued that disenrollment was equivalent to denaturalization, and, therefore, constituted cruel and unusual punishment under ICRA. *Id.* at 879. The Second Circuit declined to rule on whether banishment is cruel and unusual punishment under ICRA, but subsequent federal courts have rejected the argument that disenrollment proceedings equate to "punishment" under ICRA cruel or unusual punishments prohibition. *E.g.*, Jeffredo v. Macarro, 599 F.3d 913, 920 (9th Cir. 2010).

Electronic copy available at: https://ssrn.com/abstract=3813968

very narrow range of cases, the Court has found that the Cruel and Unusual Punishments Clause includes a proportionality requirement prohibiting punishments that are excessively disproportionate to the offense committed. Under this proportionality doctrine, the Court has found execution disproportionate for any crime short of reckless or deliberate homicide,[275] for adult defendants with intellectual disabilities[276] and for juvenile offenders.[277] Most recently, the Court extended the doctrine to mandatory life without parole sentences for juveniles.[278] Outside of adult capital cases and juvenile capital and life without parole sentences, the Court has never encountered a state court sentence it considered constitutionally disproportionate to the offense of conviction.[279] This includes a mandatory sentence of life without possibility of parole for a first-time adult felony drug offense.[280] Thus, under the Court's Eighth Amendment jurisprudence, the Constitution places no proportionality constraints on the length or severity of non-capital, non-juvenile state court sentences.

In contrast, ICRA identifies and quantifies excessive punishment when imposed by a tribe, regardless of the crime committed or the procedural and due process protections afforded a defendant. As discussed, Congress limits tribes' punishment authority under the default provisions in ICRA to one-year incarceration and a $5,000 fine.[281] It limits tribes' punishment authority in TLOA prosecutions to three-years' incarceration and a $15,000 fine for a single offense, and nine years for

---

[275] Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that death penalty disproportionate for rape of adult); Tison v. Arizona, 481 U.S. 137, 157–58 (1987) (holding that death penalty disproportionate for felony murder unless defendant acted with at least reckless disregard for human life); Kennedy v. Louisiana, 554 U.S. 407, 435 (2008) (holding that death penalty disproportionate for rape of child).

[276] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[277] Roper v. Simmons, 543 U.S. 551, 570–71 (2005).

[278] Miller v. Alabama, 567 U.S. 460, 489 (2012).

[279] Harmelin v. Michigan, 501 U.S. 957, 1006–07 (1991) (Kennedy, J., concurring in part and in the judgment). The Court routinely upholds state choices in sentencing in the name of federalism and respect for state sovereignty. Contrast this with the federal government's approach to imposition of the death penalty for crimes committed in Indian country. The U.S. government recently resumed federal executions, one of which was an Indian convicted for an offense committed in Indian country. This is over the objection of the community and the tribal government and notwithstanding provisions in the Federal Death Penalty Act, which purports to allow tribes to opt out of the federal death penalty for its citizens. Felicia Fonseca, *Most American Indian tribes opt out of federal death penalty*, AP NEWS (Aug. 21, 2017), https://apnews.com/86b9734f456846e9b0df9faa0237122f/Most-American-Indian-tribes-opt-out-of-federal-death-penalty [https://perma.cc/2EFU-RDZY]; *see also* Christie Thompson, *The Navajo Nation Opposed His Execution. The U.S. Plans to Do It Anyway*, MARSHALL PROJECT (Sept. 17, 2019, 6:00 AM), https://www.themarshallproject.org/2019/09/17/the-navajo-nation-opposed-his-execution-the-u-s-plans-to-do-it-anyway [https://perma.cc/W5UB-YQG6] (explaining the judicial and political process leading to Lezmond Mitchell's execution); Christopher Scragg, *Court upholds death penalty for only Native American on U.S. death row*, CRONKITE NEWS (Apr. 30, 2020), https://cronkitenews.azpbs.org/2020/04/30/court-upholds-death-penalty-for-only-native-american-on-u-s-death-row/ [https://perma.cc/R5MR-5NUY] (explaining that the Ninth Circuit's rejection of Mitchell's appeal and upholding his sentence).

[280] *Harmelin*, 501 U.S. at 994–96. In contrast with the length and severity of sentences of incarceration, the Court has shown much more interest in limiting states' criminal *fines* under the Eighth Amendment's excessive fines prohibition, which is explicit in the text of that amendment. Timbs v. Indiana, No. 17-091, slip op. at 2 (Feb. 20, 2019).

[281] 25 U.S.C. § 1302(a)(7)(B).

Electronic copy available at: https://ssrn.com/abstract=3813968

stacked offenses.[282] Thus, for any offense or combination of offenses under any circumstances committed in Indian country over which a tribe has jurisdiction, even a depraved crime of violence, Congress has defined a tribal sentence over nine years' imprisonment and $15,000 in fines as "excessive" as a matter of law.[283] In contrast, under the Major Crimes Act and PL 280, federal law allows the federal and state governments practically unfettered authority in punishing identical crimes that fall under those sovereigns' Indian country jurisdiction.[284]

v. Habeas Corpus

The federal writ of habeas corpus was originally only available to challenge detention by federal authorities.[285] Federal distrust of post-Reconstruction southern justice led Congress to extend federal court review to state court convictions.[286] Congress undertook a major revision of the federal statutory scheme governing federal court review of state and federal court criminal convictions in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[287] AEDPA greatly circumscribed federal court review of state court convictions by: (1) establishing a one year statute of limitations for filing a federal habeas petition,[288] (2) authorizing federal courts to deny claims on the merits that a petitioner fails to exhaust in state court,[289] (3) prohibiting federal courts from holding an evidentiary hearing if a

[282] *Id.* § 1302(a)(7)(C)–(D).

[283] *See id.*

[284] This matters because Indian defendants fare particularly poorly in federal courts, receiving higher sentences and representing a disproportionate number of federal defendants. Droske, *supra* note 73, at 724. One of the few limitations on federal courts' sentencing authority over Indian defendant/Indian country sentencing is a provision in the Federal Death Penalty Act, 18 U.S.C. § 3598, that allows individual tribes to elect whether their citizens can be sentenced to death by the federal government for violations of the Major Crimes Act, *Id.* § 1153, or the Federal Enclaves (General Crimes) Act, *Id.* § 1152. Only one tribe, the Sac and Fox Nation of Oklahoma, has opted into the federal death penalty for its citizens for crimes committed in Indian country. Fonseca, *supra* note 279. This option does not extend to tribes in PL 280 states, which cannot opt out of state death penalty laws. *Id.*

[285] *Jurisdiction: Habeas Corpus*, FED. JUD. CTR., https://www.fjc.gov/history/courts/jurisdiction-habeas-corpus [https://perma.cc/GLD3-ERSK].

[286] Michael C. Dorf, *A Unanimous Supreme Court Ruling Underscores the Limits of Habeas Corpus as a Remedy for State Prisoners*, VERDICT (May 22, 2013), https://verdict.justia.com/2013/05/22/a-unanimous-supreme-court-ruling-underscores-the-limits-of-habeas-corpus-as-a-remedy-for-state-prisoners [https://perma.cc/MM55-LQ59] (following the Civil War, "[f]earful that the states of the former Confederacy would undermine federal rights—especially the rights of the freedmen and their allies—during Reconstruction, Congress expanded the writ, permitting challenges to state detention as well.").

[287] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 104, § 2254(b)(2), 110 Stat. 1214, 1218.

[288] 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."). Section 2244(d)(2) set out tolling periods, and section 2244(d)(1) provides for four possible starting dates for the limitation period.

[289] WRIGHT & MILLER, *supra* note 166 ("The new statute preserves the requirement of exhaustion of state remedies [contained in the earlier federal habeas statute], but two significant innovations [were] introduced. An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state. In addition, a state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the state, through counsel, expressly waives the requirement." (citations omitted)); *see also* 25 U.S.C. § 2254(b)(1) (recognizing that petitioner can avoid exhaustion only if there is no available

Electronic copy available at: https://ssrn.com/abstract=3813968

petitioner fails to develop facts in state court, except in limited circumstances,[290] (4) barring successive petitions, except in limited circumstances,[291] and (5) imposing a new standard for federal court review of state court determinations of fact and applications of federal constitutional law.[292] AEDPA also requires a certificate of appealability from a court of review before a petitioner may appeal from a district court's denial of habeas relief.[293]

The modern federal statutory habeas scheme for state prisoners is lengthy and complex. This is by design. Congress has placed multiple barriers in the path of state prisoners seeking to challenge their convictions in federal court on federal constitutional grounds to ensure that state courts have the final say in most state court criminal cases, even on questions of federal constitutional law. The most formidable barrier Congress erected is AEDPA's highly deferential federal standard of review. That standard asks not whether the state court erred in applying federal law, but whether the state court decision was contrary to, or involved an objectively unreasonable application of, clearly established federal law as determined by the Court, or was based on an unreasonable determination of the facts.[294] The intent of these revisions was to limit the reach of the writ and codify the process federal courts are required to follow in reviewing state and federal prisoner habeas petitions.[295] Contemporary federal courts' limited authority over state prisoners' claims reflects Congress' recognition of states as separate sovereigns with primary authority over, and a superior interest in, resolving challenges to state court convictions.[296]

---

state remedy or the remedy is ineffective to protect the petitioner's rights. If there is no state remedy because of a procedural default, federal review is still prohibited).

[290] 25 U.S.C. § 2254(e)(1). AEDPA carried over a statutory presumption in the earlier version of the habeas statute requiring federal courts to treat state court fact-findings as presumptively correct unless rebutted by the petitioner by clear and convincing evidence. *Id.*; Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 137–38 (1996).

[291] AEDPA limits the number of times a prisoner may ask for a writ. A successive habeas petition may not be filed in the federal district court unless authorized by a three-judge panel of the Court of Appeals. 25 U.S.C. § 2244(b).

[292] *Id.* § 2254(d).

[293] *Id.* § 2253(c); *see also* WRIGHT & MILLER, *supra* note 166 ("A state prisoner wishing to appeal the denial of habeas corpus had previously been required to obtain a certificate of probable cause. This is now called a certificate of appealability. It may issue only if the applicant has made a substantial showing of the denial of a constitutional right and it must indicate which specific issue or issues satisfy that requirement." (citation omitted)).

[294] 25 U.S.C. § 2254(d) (writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.").

[295] WRIGHT & MILLER, *supra* note 166 ("Congress made many important changes in habeas corpus in 1996. . . . The changes made by the 1996 legislation are the end product of decades of debate about habeas corpus and the drafting in the new statute has been criticized. The changes restrict habeas corpus but they do not virtually eliminate it, as some critics would have preferred." (citations omitted)).

[296] Richardson v. Branker, 668 F.3d 128, 138 (4th Cir. 2012) (citing Harrington v. Richter, 562 U.S. 86, 103 (2011)) ("The limited scope of federal review of a state petitioner's habeas claims . . . is grounded in fundamental notions of state sovereignty.") Because "[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights[,]" section 2254(d) is "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington*, 562 U.S. at 103 (quoting

Electronic copy available at: https://ssrn.com/abstract=3813968

ICRA provides for federal court habeas review of tribal court convictions.[297] It is the exclusive avenue available to litigants to obtain federal court review of alleged violations of ICRA by tribal government actors.[298] ICRA's habeas provision is one sentence long: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention[299] by order of an Indian tribe."[300] Unlike AEDPA, ICRA contains no statutory time limitations on ICRA habeas provision, and no substantive limitations on federal review of tribal court convictions.[301] Federal courts have developed common law habeas doctrines that purport to extend deference to tribal court dispositions of criminal cases.[302] But

Calderon v. Thompson, 523 U.S. 538, 555–56 (1998)). *But see* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 507 (2007) ("Whatever the role for perceived congressional purposes in statutory interpretation, courts—as faithful interpreters of legal texts—may legitimately rely on that perception only to the extent that it is accurate. Based on what we know about AEDPA, the 104th Congress had no interpretively meaningful purposes beyond the words it ratified. . . . 'Comity, finality, and federalism' is now the favored idiom for erroneously invoking a legislative mood; it has become the means by which courts express an illegitimate hostility towards exacting standards of criminal procedure.").

[297] 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."); Bressi v. Ford, 575 F.3d 891, 896 n.6 (9th Cir. 2009) (recognizing the exclusive means to enforce ICRA's civil rights protections in federal court is through a petition for writ of habeas corpus under section 1303—"except for habeas corpus challenges, any private right of action under [the Indian Civil Rights] Act lies only in tribal court.").

[298] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978) (ICRA does not provide any remedy for violations of its rights other than habeas corpus). *Santa Clara Pueblo* was handed down right after Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), which, as discussed *infra*, held that tribes could not exercise criminal jurisdiction over non-Indians unless expressly authorized by Congress.

[299] ICRA uses the term "detention," whereas federal habeas law refers to "custody." ICRA "detention" requirement has been constructed to be analogous to the "in custody requirement" under federal habeas statutes, but there is a circuit dispute on this point. *Compare* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 890–91 (2d Cir. 1996) ("We find the choice of language unremarkable . . . . Congress appears to use the terms 'detention' and 'custody' interchangeably in the habeas context."), *with* Tavares v. Whitehouse, 851 F.3d 863, 876–77 (9th Cir. 2017) ("We view Congress's choice of 'detention' rather than 'custody' in § 1303 as a meaningful restriction on the scope of habeas jurisdiction under the ICRA."); *see also* Andrea M. Seielstad, *The Need for More Exacting Assessment of the Individual Rights and Sovereign Interests at Stake in Federal Court Interpretation of "Detention" Under the Indian Civil Rights Act's Remedy of Habeas Corpus*, 14 TENN. J. L. & POL'Y 63, 101–02 (2019) (identifying the circuit split in defining these terms).

[300] 25 U.S.C. § 1303.

[301] *Developments in the Law – Indian Law*, *supra* note 50, at 1719–20 ("The federal courts acceded to the Supreme Court's determination that no independent federal cause of action exists in ICRA. The question that has remained before the courts is how much deference to show to tribes in interpreting ICRA. Some federal courts have rejected differences of culture as a reason for adjusting habeas review, while others have maintained a practice of deference (at least in part) to tribal interpretations. Those courts that have not deferred have used federal precedents and definitions of rights to inform the meaning of ICRA." (citations omitted)); *see also id.* at 1719 n.91 (citing *Poodry*, 85 F.3d at 900–01) ("[T]here is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to those communities whose distinctive 'sovereignty' our country has long recognized and sustained."); *id.* at 1719 n.92 (citing Alvarez v. Tracy, 773 F.3d 1011, 1021 (9th Cir. 2014) ("[R]esolution of statutory issues under the ICRA will 'frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.'") (citation omitted)).

[302] For example, all federal courts that have addressed the issue, at minimum, require tribal court petitioners to establish that they are "in custody" and that they have exhausted their tribal remedies. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 9.09; *see also* Jeffredo v. Macarro, 590 F.3d 751, 756

Electronic copy available at: https://ssrn.com/abstract=3813968

those limitations have come from the federal courts, not Congress, and are, therefore, subject to revisions, modifications, and inconsistent application.[303]

Lest there be any doubt about Congress' discomfort with the prospect of tribal courts rendering judgment on non-Indians unchecked by federal court supervision, it should be noted that VAWA 2013 includes a habeas stay of detention provision.[304] Under that provision, a VAWA 2013 tribal prisoner who is challenging a sentence of incarceration can ask the federal court who will hear the petition to stay the tribal court order of detention pending federal habeas review.[305] The federal court must grant a stay if it finds a "substantial likelihood that the habeas corpus petition will be granted";[306] and, after notice to alleged victims, if it finds, by clear and convincing evidence that "the petitioner is not likely to flee or pose a danger to any person or the community if released."[307] The ICRA stay of detention provision appears to be much more generous than that available to state prisoners in federal court[308] and it does not appear to extend to non-VAWA 2013 prisoners.[309]

III. A FALSE AND FAILED ANALOGY

It is hard to argue with the premise of the Court's excursion into state court criminal procedure—to foreclose the use of the criminal justice system to perpetuate state-sponsored injustice and discrimination against racial minorities. Recognizing that, in the context of federalism, unchecked deference to local autonomy and state sovereignty too often translates into tolerating oppression of racial and political minorities by the majority, the Court created a new body of race law through its Fourteenth Amendment incorporation jurisprudence. In doing so, it subordinated local autonomy interests to the greater federal interest in protecting the minority from

---

(9th Cir. 2009) ("We therefore have no jurisdiction to hear a petitioner's claim for habeas corpus, unless both [exhaustion and the in custody] conditions are met.").

[303] *See* Seielstad, *supra* note 299, at 101–03.

[304] 25 U.S.C. § 1304(e)(1).

[305] *Id.*

[306] *Id.* § 1304(e)(2)(A).

[307] *Id.* This mirrors the federal bail statute, which requires release pretrial on conditions unless the court finds, based on clear and convincing evidence, that the defendant poses a risk of flight or a danger to the community. 18 U.S.C. § 3142.

[308] A state prisoner challenging a conviction in federal court can request to be released on bail pursuant to FED. R. APP. P. 23(b)–(c). To be released pending a decision on the merits, a petitioner must show a substantial claim of law based on the facts and "some circumstance making [the motion for bail] exceptional and deserving of special treatment in the interests of justice." Dotson v. Clark, 900 F.2d 77, 79 (6th Cir. 1990) (quoting Aronson v. May, 85 S. Ct. 3, 5 (1964) (Douglas, J., in chambers)). "There will be few occasions where a prisoner will meet this standard." *Id.* Because a habeas petitioner "is appealing a presumptively valid state conviction . . . it will indeed be the very unusual case where a habeas petitioner is admitted to bail prior to a decision on the merits in the habeas case." Lee v. Jabe, 989 F.2d 869, 871 (6th Cir. 1993).

[309] Carrie E. Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 WM. & MARY BILL RTS. J. 137, 152–53 (2015) (The concept of citizenship as a "'limiting principle on tribal powers' . . . is found again in the VAWA amendments to ICRA that allow non-Indians to seek a stay of detention when filing a habeas petition. Indians do not receive this same protection. The federal government perceives their right to vote as enough protection against civil rights violations by tribal governments. Fearful of civil rights violations, the government affords non-Indians to use their U.S. citizenship as a cloak and request a stay of detention while their federal habeas petition is pending." (quoting N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 22 –23 (Colin G. Calloway ed., 2008))).

Electronic copy available at: https://ssrn.com/abstract=3813968

the majority. Absent a similar federal interest, requiring tribes to assimilate to federal constitutional criminal procedure is neither a necessary nor obvious proposition in a federal system.[310] Contemporary Indians in Indian country are not similarly-situated to racial and ethnic minorities outside tribal lands.[311] Unlike racial and ethnic minorities excluded from a political process, tribal members in Indian country are both the governors and the governed. The animating force behind the Court's incorporation doctrine—protecting individual minority interests from the majority—is a poor fit for modern federal Indian country policy. Nonetheless, this is the backbone of ICRA.[312]

Further, the concept of protecting an individual from his own community may be particularly ill-suited to any justice norm that does not assign primacy to the individual over the collective. "Sovereignty," in contemporary Western use typically refers to a community's authority to make decisions in a given geographic region with the end of protecting and promoting the rights of individuals.[313] This notion is deeply grounded in a Western tradition that posits "a dichotomy between individuals and the 'state' or 'nation.'"[314] It is a concept that may not fit with some "indigenous understandings of the relationship between individuals and their encompassing cultural and political structures . . . ."[315] It is also a curious choice given colonists' objection to having an external power's rules of criminal procedure forced on them and used as a tool of social and political control. The concerns colonists had regarding misuse of criminal procedures like venue and jury rights were so strong that they were highlighted in the Declaration of Independence and addressed twice

[310] Skibine, *supra* note 136, at 189–90 (noting that there "is a difference between political incorporation and constitutional incorporation" and positing that "tribes [can] be 'incorporated' into the United States federalist system without being totally assimilated into the federal structure. In other words, tribes could be incorporated into the federal system under a third sphere of sovereignty that would allow them to keep their distinctiveness. Indian tribes have already been, at least partially, politically incorporated into the United States. . . . [through] Supreme Court decisions as well as cumulative legislation . . . such as the Indian Citizenship Act of 1924, the Indian Reorganization Act of 1934, the Indian Civil Rights Act of 1968, and the Indian Self Determination and Education Assistance Act of 1975." (citations omitted)).

[311] Maggie Blackhawk, *Federal Indian Law as a Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1798 (2019) ("National constitutional rights have long been used as a tool to further the colonial project against Native peoples – first as a tool of dispossession during the allotment era and more recently as a means to undermine tribal sovereignty by using the force of national rights to disrupt the power of tribal governments. Instead, the national government has best protected Native peoples by bestowing power, not rights, through the recognition of inherent tribal sovereignty. Contrary to the tenets of '[our] father's federalism,' localism has empowered Native Nations through the ability to self-govern." (citations omitted)).

[312] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60–61 (1978) ("We note at the outset that a central purpose of the ICRA . . . was to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" (citations omitted)).

[313] Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 198 (2001) (observing that "[t]he most pernicious aspect of this debate [over indigenous self-determination] is that indigenous peoples' collective existence continues to be framed by Western notions of sovereignty and self-determination.").

[314] *Id.* at 197.

[315] *Id.* at 198.

Electronic copy available at: https://ssrn.com/abstract=3813968

in the Constitution.[316] The 2010 TLOA and VAWA 2013 amendments exemplify, confirm, and perpetuate the presumption of incompetence Congress and the federal courts have historically extended to tribal justice. Demanding even more conformity to colonialist procedural norms as a pre-condition to exercising more sovereignty can only be explained by Congressional assumptions either that: (1) there are no structures in individual tribal communities capable of addressing wrongdoing and disputes, or (2) if there are, the results they produce will not sufficiently (or perhaps consistently) align with mainstream norms of justice to be accorded legitimacy. In the case of VAWA 2013, Congress has undertaken to protect non-Indians from the threat of facing an "unfamiliar" justice, rather than protect non-Indians as a group from an identifiable threat to their civil liberties. What is missing to justify Congress' approach is a documented history of misuse and subversion of the tribal legal system to oppress a politically disempowered non-Indian minority.[317] In this way, ICRA is based on a false analogy.

ICRA is also based on a *failed* analogy. Although Congress did not track the Bill of Rights precisely in ICRA, there is no question it intended to set a procedural floor for tribal court defendants as the Court has done for states.[318] And it is apparent that Congress intended VAWA 2013 provisions to ensure that non-Indian defendants subject to tribal criminal jurisdiction would not be procedurally disadvantaged by

---

[316] Article III requires that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed[,]" and the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. art. III, § 2; *id.* amend. VI. In THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776), the colonists complained that the crown had transported them "beyond Seas to be tried for pretended offences," i.e., removed defendants from the colonies to be tried in distant locations under laws external to the community by unknown jurors. This is not unlike the federal government's practice of removing Indian defendants from Indian country under Major Crimes Act jurisdiction to try them for wrongdoing in Indian country under federal law in federal district courts, none of which sit in Indian country, and all of which are geographically and culturally far removed from the defendants' community. Like colonists removed to Great Britain to stand trial, Indian defendants in federal court are almost certain to be judged by a jury with no Indians on it. Kevin K. Washburn, *The Federal Criminal Justice System in Indian Country and the Legacy of Colonialism*, FED. LAW., Mar.–Apr. 2005, at 40, 41.

[317] U.S. DEP'T OF JUST. OFFICE ON VIOLENCE AGAINST WOMEN, 2019 TRIBAL CONSULTATION REPORT 46 (2019), https://www.justice.gov/ovw/page/file/1271686/download [https://perma.cc/P4CB-QTUA] [hereinafter TRIBAL CONSULTATION REPORT] (summarizing testimony from Glen Gobin, Vice Chair, Tulalip Tribes: "Currently, it seems like non-Native perpetrators have more protections than victims of crime. To move toward a legislative fix for this issue, tribes are expected to provide justification. The fact that tribal people are being hurt and perpetrators are not being held accountable should be sufficient justification. . . . The federal government needs to enhance tribal capacity to protect tribal people, not limit that capacity with onerous requirements and penalties. Tribal systems are often treated as inferior to those of other jurisdictions. Just because a non-Native offender is tried in another jurisdiction does not mean they will receive unfair treatment. Tribes want the same thing as other jurisdictions: to be able to protect their people.").

[318] ICRA, "rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62–63 (1978) (citation omitted). Thus, in ICRA, "Congress accorded a range of procedural safeguards to tribal-court defendants 'similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.'" United States v. Bryant, 136 S. Ct. 1954, 1962 (2016) (quoting *Martinez*, 436 U.S. at 57).

Electronic copy available at: https://ssrn.com/abstract=3813968

being tried in tribal court, rather than a state or federal court. TLOA and VAWA 2013 affirm or restore some tribes' authority to prosecute and punish some crimes committed in Indian country. But they also perpetuate federal colonization of tribal justice by requiring tribes that wish to participate in these statutory schemes to conform even more closely to the federal constitutional criminal procedure code.[319] Currently, therefore, although there is a fair amount of diversity among tribal justice systems "in concept and character,"[320] a high level of conformity to colonialist procedural norms in criminal cases is demanded from tribes that seek to assert their sovereign authority to treat wrongdoing as more than a misdemeanor or exercise criminal jurisdiction over non-Indians. By demanding more of tribes than the Court requires of the states, and linking the exercise of additional power to tribes' acquiescence to colonialist norms, Congress has imposed a procedural surcharge on tribes' exercise of their inherent sovereignty.[321] By tethering ICRA to the Court's incorporation jurisprudence Congress has also, in my view, missed an opportunity to fashion a more flexible approach that leaves space for tribes to employ practices and procedures that reflect their individual community's justice norms, traditions, and aspirations.[322]

---

[319] TRIBAL CONSULTATION REPORT, *supra* note 317, at 26 (summarizing testimony of Arnold Garcia, Lieutenant Governor, Nambé Pueblo on TLOA and VAWA 2013 procedural trade-off: "Some tribes do not plan to exercise SDVCJ over non-tribal offenders because implementation requires tribes to change their traditional court systems to mirror state courts. Asking tribes to change the way they settle disputes so that they can reclaim jurisdiction over non-Indians is very disrespectful.").

[320] *Tribal Courts*, *supra* note 40 (describing some tribal courts as "extensively elaborate," while "others are just beginning to develop a 'Western' judicial system within the context of their individual nations[,]" and noting that "[s]ome tribes prefer the adversarial process, while others emphasize traditional dispute resolution. Many courts apply large bodies of written or positive law and others apply custom and tradition to address controversy and settle disputes."); *see also* Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS 108, 109, 112 (Wanda D. McCaslin ed., 2005), http://www.aidainc.net/Publications/ij_systems.htm [https://perma.cc/YF9G-KS8M] (providing details about the diversity of tribal justice systems).

[321] *Developments in the Law – Indian Law*, *supra* note 50, at 1726–27 ("Respecting and reinforcing tribal culture and norms not only acknowledges tribal sovereignty but also promotes good governance. For years, tribes have been told by others how to run their governments and have reaped few benefits. But when tribes have a government and laws that match their culture, 'the odds of success for tribal development increase.' Tribes and their citizens tend to view such governments as more legitimate, and these governments in turn bring economic returns to the tribes. Moreover, a 'cultural match' approach, in which tribes are permitted to have differing interpretations of rights, avoids the 'one-size-fits-all mentality' that characterized much of the federal relationship with tribes in the past. The diversity of tribal approaches to governance and citizenship should not be eclipsed by federal precedents developed using an outside culture and context, especially when such an effort would likely harm tribes' long-term prospects." (citations omitted)).

[322] *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 227–28 (2011) ("The first, and perhaps the worst, error Warren's Court made was . . . to tie the law of criminal procedure to the federal Bill of Rights instead of using that body of law to advance some coherent vision of fair and equal criminal justice."); *see also* George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 170 (2005) (criticizing doctrines that allow innocence to go ignored). *See generally* DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE (2003) (suggesting that a turn to due process and equal protection doctrine could benefit the criminal justice system).

Electronic copy available at: https://ssrn.com/abstract=3813968

In the United States today, American-Indian and Alaska Native women are victimized at a rate more than twice that of women of other ethnicities.[323] This violence occurs primarily at the hands of non-Indians, who make up a substantial majority of the residents of Indian country nationwide.[324] Congress' limitations on tribes' jurisdiction and punishment authority over non-Indians represents more than a restraint of sovereignty antithetical to local autonomy principles in criminal law.[325] It is bad public policy with immediate, practical implications for tribes' ability to promote public safety in their communities.[326] The power to impose a sentence is not simply the power to incarcerate a defendant. It includes the coercive power to impose non-carceral sanctions, such as a term of probation imposing conditions tailored to addressing underlying factors that may contribute to an offender's conduct. This includes ordering participation in therapy or treatment programs to address substance abuse disorders or parenting deficiencies. Particularly with respect to intimate and family member violence, offenders and their victims are likely to have experienced, witnessed or been exposed to trauma, on an individual level and on an inter-generational level.[327] ICRA's sentencing cap constrains the length of sanctions

---

[323] A 2016 study by the National Institute of Justice found that more than four in five American Indian and Alaska Native women (84.3%) have experienced violence in their lifetime. This includes 56.1% who have experienced sexual violence, 55.5% who have experienced physical violence by an intimate partner, 48.8% who have experienced stalking, and 66.4% who have experienced psychological aggression by an intimate partner. The study also found "American Indian and Alaska Native women are 1.2 times as likely as non-Hispanic white-only women to have experienced violence in their lifetime and 1.7 times as likely to have experienced violence in the past year[,]" and further found that American Indian and Alaska Native men also have high victimization rates. Rosay, *supra* note 14, at 1–2 & tbl.1 (citation omitted).

[324] *Id.* at 4. ("The majority of American Indian and Alaska Native victims have experienced violence at the hands of at least one interracial perpetrator in their lifetime—97 percent of female victims and 90 percent of male victims. Fewer American Indian and Alaska Native victims have experienced intraracial violence in their lifetime—35 percent of female victims and 33 percent of male victims. The study found similar results for all types of lifetime and past-year experiences."). According to the 2010 U.S. Census, out of the total 4.6 million people living in American Indian areas, seventy-seven percent did not identify as American Indian or Alaska Native. U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 14 (2012), https://www.census.gov/history/pdf/c2010br-10-112019.pdf [https://perma.cc/BQR8-MNCJ].

[325] Washburn, *supra* note 316, at 41 ("[T]he basic theory of the purpose of federal prosecutions is turned on its head on Indian reservations. Because federal Indian country jurisdiction is defined geographically, routine local offenses—such as homicides, sex offenses, assaults, robberies, and burglaries, all of which are serious but have few effects outside the locality—become federal, not because of any national or international nexus, but precisely because of the locality in which they occur. The federal justice system thus derogates from the basic norm that local crime should be addressed locally.").

[326] *E.g.*, Mary Hudetz, *Amid a crime wave on Yakama Reservation, confusion over a checkerboard of jurisdictions*, SEATTLE TIMES (Feb. 18, 2020, 9:49 AM), https://www.seattletimes.com/seattle-news/times-watchdog/amid-a-crime-wave-on-yakama-reservation-confusion-over-a-checkerboard-of-jurisdictions/ [https://perma.cc/8SH7-LU8A].

[327] *E.g.*, TRIBAL CONSULTATION REPORT, *supra* note 317, at 8–9 (summarizing testimony of Daphne Joe, Wellness Coordinator, Authorized Designee, Asa'carsarmiut Tribal Council explaining the role of historical trauma in Indian communities: "The federal government must understand the history of violence against women in Alaska Native villages. Traditionally, Alaska Native cultures are based on respect and did not tolerate abuse. However, federal termination policies damaged this way of life. In my grandparents' generation, our homes were invaded, our relatives died from new diseases, and we were punished for speaking our language and living our way of life. People turned to alcohol to mourn these changes. We are still healing from the historical trauma. We must provide shelter for women and children and education for the perpetrators. Federal programs that provide funding to tribes must be based in tribal

Electronic copy available at: https://ssrn.com/abstract=3813968

a tribal court can order as a condition of probation and, in this way, limits the timeframe in which tribes can encourage and, if necessary, compel, defendants to participate in programs or treatment . In the domestic violence context, outside of VAWA 2013 jurisdiction, tribes cannot compel any non-Indian to access resources that might make the non-Indian's family safer and more functional. In this context, tribes must either rely on the state courts, or invoke their authority to exclude the wrongdoers from the reservation, neither of which may be in the best interests of their community.[328] This is especially true where a non-Indian defendant is a parent or partner of a tribal member and when keeping a family intact, or at least nearby, while providing for the victim's safety and the perpetrator's treatment, is the community's objective.

The requirements TLOA and VAWA 2013 place on tribes that wish to access expanded sentencing and restored jurisdiction—specifically, providing law-licensed appointed counsel and judges, and creating deeper jury pools—are resource-intensive.[329] As a result, Congress has effectively limited the restoration of local autonomy over wrongdoing in Indian country to tribes that are financially and logistically able to implement the additional criminal procedures required by TLOA and VAWA 2013.[330] In doing so, Congress has placed a price tag on sovereignty and created two classes of tribes—those with sufficient resources to meet the requirements necessary to access restored authority, and those without—sovereignty haves and have-nots.[331] While the federal government does make funding available

ways of life and must support who we are, rather than change who we are."); *id.* at 15 (summarizing testimony of Emily Kameroff, Emmonak Tribal Council member on the need for funding to support offender rehabilitation: "The village needs culturally relevant rehabilitation programs to help people heal, especially repeat offenders. Our people often return to jail for the same crimes, and nothing is done to heal their broken spirits, so they return to the village feeling resentful. Often, they cannot find work and turn to alcohol and drugs."). The two tribes represented above are Alaska Native Villages, which were excluded from VAWA 2013 participation.

[328] Traditionally, Indian tribes have used banishment rarely and for serious crimes only, and as a "last resort after exhausting customary and traditional methods of social discipline and sanction." Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 92 (2007). Some tribes, however, left with no options under the current federal jurisdictional scheme have resorted to more a robust use of banishment to protect community safety. Renee Ruble, *Banishment Laws Revived Among Indians*, WASH. POST (Jan. 25, 2004), https://www.washingtonpost.com/archive/politics/2004/01/25/banishment-laws-revived-among-indians/68626da3-64a2-434d-9c1d-de8822648a94/ [https://perma.cc/5CT6-DNCL].

[329] Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 511 (1998) ("Although federal courts appear not to have been presented with the issue, the U.S. Commission on Civil Rights heard complaints from tribal officials that jury trials present insurmountable practical and financial problems for tribal courts.").

[330] TRIBAL CONSULTATION REPORT, *supra* note 317, at 17 (summarizing testimony of Carletta Tilousi, Tribal Council Member, and written comments from Muriel Coochwytewa, Chairwoman, Havasupai Tribe: "The Havasupai Tribe is an awardee of OVW [Office on Violence Against Women] funding. OVW asks tribes to change their government structures and protocols to receive funding. To meet the grant requirements, our tribe secured a licensed judge and prosecutor, created an appellate court, and updated the law and order code. These requirements are a burden on tribal governments, whose resources are already stretched very thinly.").

[331] Melodie Edwards, *Native American Tribes Want To Close Loopholes In Violence Against Women Act*, NPR (June 25, 2018, 5:18 PM), https://www.npr.org/2018/06/25/623318932/native-american-tribes-want-to-close-loopholes-in-violence-against-women-act_[https://perma.cc/QA73-R672] ("adopting the Violence Against Women Act hasn't been easy or cheap. It's involved hiring more attorneys and judges

Electronic copy available at: https://ssrn.com/abstract=3813968

to support tribes in exercising TLOA and VAWA 2013 jurisdiction, this funding is neither guaranteed, nor always timely provided. Further, this funding is primarily grant-based, which excludes tribes lacking grant-writing resources or expertise.[332] This
pay-to-participate scheme leaves residents of poorer tribal communities limited options for addressing violence in their communities by Indians, and no options whatsoever for holding non-Indians accountable for wrongdoing under their laws.[333]

The TLOA and VAWA 2013 law-license requirements for appointed counsel and judges are not only costly, they are pernicious from a self-determination perspective. It is an open question whether TLOA requires judges and lawyers to have a law license from a state jurisdiction and to hold a J.D. from a law school, or whether a tribal court license is sufficient.[334] To the extent TLOA requires a state license, this ensures that advocates and jurists in tribal court will be familiar with, if not indoctrinated in, colonialist, adversarial justice norms. As noted, historically and contemporaneously, many tribes have relied on lay advocates to deliver legal assistance to indigent defendants. And lay advocacy evolved in Indian country because, at one point, attorneys were barred from appearing in Indian country courts by federal law. It is not the case that poor criminal defendants in tribal court were going at it on their own before Congress enacted TLOA. But it is the case that requiring law-licensed attorneys for TLOA and VAWA 2013 creates a barrier and a disincentive to charging serious offenses as felonies and to the prosecution of non-

---

and paying for more prison beds. Those high costs have discouraged many tribes from signing on. Only a fraction of the country's tribes have adopted it."); *see also* Mary Hudetz, *Despite past reforms, Native women face high rates of crime*, AP NEWS (Sept. 5, 2018), https://apnews.com/316529000f3c44988969ab22acfb34d7/Despite-past-reforms,-Native-women-face-high-rates-of-crime [https://perma.cc/9RK9-UMAV] (stating that the 2013 Violence Against Women Act "gave tribal authorities the ability to prosecute non-Indians in domestic violence cases. However, only 18 tribes have met the mandates to do so, the National Congress of American Indians reported in March. Those mandates include requiring tribes to provide an attorney to suspects who cannot afford one—a costly ask for cash-strapped nations. 'We can't guarantee that because we don't have the funding to guarantee it,' said Robert LaFountain, a prosecutor on Montana's Crow Reservation, where the per capita annual income of roughly $15,000 is about half the national average.").

[332] TRIBAL CONSULTATION REPORT, *supra* note 317, at 5 (summarizing testimony of Michael Williams, Council Secretary and Treasurer, Akiak Native Community: "Tribes must compete against one another for DOJ and HHS funding. In the end, only tribes with grant writers can successfully apply for funding, while under-resourced tribes go without. Tribes that do receive awards cannot rely on continuity of the funding. As a result, many successful tribal programs fail after the grant cycle ends. Funding is extremely limited for rehabilitation and treatment, which are essential components of public safety and crime reduction.").

[333] *See id.* at 30 (summarizing testimony of Mary Jane Miles, Vice Chairman, Nez Perce Tribe: "The portions of VAWA designed to help tribes do not necessarily align with tribal needs. It seems they were not written by someone who understood tribal communities.").

[334] TLOA requires that tribes provide indigent defendants "assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." 25 U.S.C. § 1302(c)(2). It also requires that judges presiding over TLOA criminal proceedings have "sufficient legal training to preside over criminal proceedings" and be "licensed to practice law by any jurisdiction in the United States." *Id.* § 1302(c)(3). Section 1302(c)(3) does not repeat the requirement that the license be issued by a jurisdiction that "applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility . . . ." *Id.* § 1302(c)(2). This is probably because many states regulate judges separately from licensed attorneys.

Electronic copy available at: https://ssrn.com/abstract=3813968

Indians by making those prosecutions more expensive. It is ironic that, at the same time states are recognizing that the lawyers' monopoly on legal services has encumbered Americans' access to justice and are experimenting with loosening requirements over the practice of law,[335] Congress has pushed tribes away from lay advocacy by requiring appointment of law-licensed attorneys as a pre-condition to exercising TLOA and VAWA 2013 authority. This is particularly short-sighted given the difficulty that poor, rural jurisdictions (which describes many Indian reservations) face in recruiting and retaining professionals, such as doctors and lawyers, to serve their communities.[336]

ICRA ostensibly reflects the principles of tribal self-government and cultural autonomy.[337] But TLOA and VAWA 2013 link the outer reach of tribes' criminal jurisdiction—the power to vindicate violations of its laws in their individual communities—under federal law to tribes' willingness and ability to provide specific colonialist procedural protections to defendants in their courts.[338] And they link the exercise of sovereignty to a Western carceral approach to addressing sexual and physical violence.[339] Participating in TLOA and VAWA 2013 are optional, of course, and tribes are free to develop their own internal forums and practices for addressing acts of violence in their communities, such as diversion programs or wellness courts. The rub, of course, is that tribes cannot compel non-Indians to participate in alternative justice forums unless they can invoke VAWA 2013 criminal jurisdiction. Many tribes situated within the United States are faced with a public safety crisis of overwhelming proportions. But tribes cannot fully protect their communities unless they agree to adopt and pay for criminal court procedures that may not be aligned with their own justice traditions and, as such, may not reflect the community's best option for protecting its residents.[340] The circumstances under which Congress is extracting tribal participation in TLOA and VAWA 2013, while nominally optional, are inherently and extraordinarily coercive.

As of the drafting of this Article, Congress is considering re-authorizing and expanding VAWA's Indian country jurisdiction provisions to allow tribes to exercise jurisdiction over non-Indians in a wider class of crimes attendant to domestic

---

[335] *See* Mary Juetten, *The limited license legal technician is the way of the future of law*, A.B.A. J. (Dec. 8, 2017, 8:30 AM), https://www.abajournal.com/news/article/the_limited_license_legal_technician_story_start_with_why [https://perma.cc/8UMN-C23P].

[336] Grant Gerlock, *With Attorney Shortage, Rural Areas In Search Of Lawyers*, KCUR (Dec. 12, 2016, 4:16 AM), https://www.kcur.org/agriculture/2016-12-12/with-attorney-shortage-rural-areas-in-search-of-lawyers [https://perma.cc/J8LM-BDK4].

[337] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978) (citing S. REP. NO. 841, at 5–6 (1967)).

[338] Fletcher, *supra* note 35, at 117 ("There may always be a fundamental conflict between mainstream values of the melting pot and the measured separatism of Indian tribes, but assimilating Indian tribes into the American legal culture may be a significant step toward destroying tribal cultures within the United States.").

[339] Sarah Deer, *Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty*, WICAZO SA REV., Fall 2009, at 149, 163 (connecting the fight against sexual violence against Native women to the struggle for Native sovereignty, and questioning the efficacy of colonial adversarial and tribal restorative justice approaches in responding to the issue).

[340] For another perspective on this point, see Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016), which discusses concerns with imposing constitutional norms on Indian tribes, but concludes that tribes can absorb some federal constitutional mandates without jeopardizing their distinctiveness.

Electronic copy available at: https://ssrn.com/abstract=3813968

violence incidents.[341] The justifications for further expansion of VAWA jurisdiction over non-Indians is that the public safety crisis in Indian country has not abated since TLOA and VAWA 2013 were enacted. If anything, this indicates that Congress has not moved fast or far enough in restoring tribal sovereignty over wrongdoing in Indian country in such a way that empowers and enables tribes to effectively protect their communities. It also suggests that TLOA and VAWA 2013 are more likely to undermine public safety in Indian country than to promote it in the long run.[342]

Low-resourced tribes face the same, if not more acute, public safety challenges as better-resourced tribes. And rural tribes do not have the same opportunity as tribes located near urban areas to take advantage of partnerships with law schools and local bar associations to expand their capacity to provide legal representation to indigents and training for lawyers and judges.[343] Thus, although poorer, rural tribes may face similar or greater public safety challenges than others,[344] they are the least likely to be able to participate in TLOA and VAWA 2013 because of the challenges in implementing and paying for the procedures required by those statutes. Replicating the Court's federalization of state court criminal procedure (and in some instances, outdoing it) is more likely to replicate the justice and innovation gap that currently exists among states following the Court's federalization of state court criminal procedure. More to the point, creating a structure that only allows tribes with resources to opt-in to greater prosecution and punishment powers does nothing to close the jurisdictional void created by federal Indian country policies in poor or remote reservation communities.

---

[341] *See* Act to Reauthorize the Violence Against Women Act of 1994, H.R. 1585, 116th Cong. (2019).

[342] Hudetz, *supra* note 331 (analyzing that years after Congress gave tribes authority under TLOA 2010 to "hand down longer sentences while mandating that federal officials do more to train tribal police on evidence collection and provide an annual report on Indian Country crime statistics. . . . [t]hose data collection and reporting efforts are still in development, funding for law enforcement training remains limited, and the Justice Department's assistance with public safety on reservations—a role referenced in multiple treaties with tribes—has fallen short of officials' expressed commitment to Indian Country, according to the Justice Department's Office of the Inspector General. . . . [T]he Inspector General also highlighted U.S. attorneys' uneven track record with prosecuting serious violent crimes on reservations, citing data that must be collected under the 2010 law to help improve those prosecution rates. Before the law, the U.S. Government Accountability Office found [sic], U.S. attorneys declined to prosecute half of cases on reservations, leading to concerns that the practice was creating a safe haven for criminals on tribal lands. The latest figures from 2016 show U.S. attorneys declined to prosecute 46 percent of reservation cases, marking only marginal improvement. That included rejecting more than 550 assault and sexual assault cases—more than any other type of crime.").

[343] The Tulalip Tribes, for example, were among the first tribes to opt-into VAWA 2013 jurisdiction. The Tulalip Reservation is located next to a major interstate roughly 40 miles north of Seattle, and they operate a number of highly successful commercial enterprises, including a Resort Casino and a premium outlet mall. TULALIP VISITOR'S GUIDE 2020-2021 (Tulalip Tribes, Tulalip, Wash.), June 2020, at 3–4, 8, 10, https://www.tulaliptribes-nsn.gov/Content/Documents/Tulalip-Visitors-Guide/brochure.html#p=4 [https://perma.cc/UHU5-6BE5].

Even before the Tulalip Tribes opted-in to VAWA 2013, they had partnered with the University of Washington School of Law to provide indigent defense services. *A Road to Recovery*, UNIV. OF WASH. (Nov. 2018), https://www.washington.edu/boundless/tribal-healing-court/ [https://perma.cc/BK96-ARV2].

[344] Although crimes rates in the U.S. have decreased generally, they have increased in rural America. Alan Greenblatt, *In Rural America, Violent Crime Reaches Highest Level in a Decade,* GOVERNING (July 2018), https://www.governing.com/topics/public-justice-safety/gov-crime-rural-urban-cities.html [https://perma.cc/394R-MRQ5].

Electronic copy available at: https://ssrn.com/abstract=3813968

IV. CONCLUSION

The federal legal scheme within which tribal justice systems are situated in the United States is historically overtly hostile to indigenous justice. Current federal policy incentivizes abandonment of indigenous justice practices and encourages tribes to further shape their justice processes on colonialist norms if they want to reassert sovereign powers usurped by the national government. The displacement and suppression of indigenous justice within the U.S. federal system has been extensive. But it is neither an inevitable feature of post-colonial federalism, nor is it irreversible.[345] Geographic-based jurisdiction and local autonomy are the norm in Anglo-European legal systems.[346] And local innovation in law enforcement and criminal justice is held up as a value in the U.S. federal system. Congress could go a long way to addressing the public safety crisis in Indian country by embracing these principles in its Indian country policy, as the Court has in its modern relations with the states. One place to start is to deregulate tribal court criminal jurisdiction and procedure completely and restore tribes' plenary authority over wrongdoing in Indian country.[347] Short of that, Congress should, at a minimum, amend ICRA to fix

[345] While Congress has been encouraging tribes to further westernize their court procedure, many colonialist court systems, presumably dissatisfied with Western adversarial justice approaches, have incorporated traditional indigenous concepts into their colonialist adjudication models. For example, some mainstream courts in Canada and the United States have looked to indigenous justice traditions to account for the different experiences of indigenous persons in colonialist criminal justice systems. These include Canada's specialized federal sentencing procedures for indigenous offenders and specialized courts for indigenous defendants in some U.S. local court systems. Wayne K. Gorman, *The Sentencing of Indigenous Offenders in Canada*, 54 CT. REV. 52, 52 (2018), http://aja.ncsc.dni.us/publications/courtrv/cr54-2/CR54-2Gorman.pdf [https://perma.cc/FSD6-CNM8]; *see also Urban Native American Healing to Wellness Court*, N.M. CTS., https://metro.nmcourts.gov/urban-native-american-healing-to-wellness-court-.aspx [https://perma.cc/VZV5-JFXM] (describing Bernalillo County, New Mexico's Metropolitan Court Urban Native American Healing to Wellness Court).

[346] Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1155 (1971) (describing four foundations of criminal jurisdiction—territorial jurisdiction, Roman jurisdiction, injured forum, and cosmopolitan jurisdiction, and explaining that, under the territorial theory, criminal jurisdiction depends on where a crime occurs. In contrast, under Roman theory, jurisdiction is based on the identity of the perpetrator); *see also* Kevin K. Washburn, Tribute, *American Indians Crime and The Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1014 (2008) ("The first value, not discussed often, but implicit in much of the structure of our criminal justice system, is localism—the notion that criminal justice should be handled locally, especially for local crimes. . . . In Indian country, however, local crimes are federalized. Serious offenses, such as aggravated assaults, sex offenses, homicides, and cases involving juveniles, are prosecuted federally. These cases are almost entirely local offenses with local harms. Many of them are disputes within very small communities . . . . Absent the Indian country location of these offenses, almost all of them would be prosecuted locally.").

[347] Skibine, *supra* note 136, at 195 (summarizing the more important arguments supporting legislation reconfirming tribal jurisdiction over nonmembers: "(1) The implicit divestiture doctrine as interpreted by the Court is demeaning to Indian tribes in that it treats them as second rate or lesser governments . . . [which] has resulted in a loss of respect towards tribal governments. (2) Lack of tribal jurisdiction over non-members has jeopardized the ability of tribal governments to enforce the law on reservations. This has resulted in the inability of tribes to protect their members and other significant tribal interests. (3) Because federal and state courts do not have jurisdiction over all cases arising on the reservations, the lack of tribal jurisdiction has resulted in . . . 'lawlessness.' (4) Congress needs to reassert its constitutionally assigned role in regulating the relations between members and nonmembers." (citations omitted)); *see*

Electronic copy available at: https://ssrn.com/abstract=3813968

the incorporation imbalance described here that results in greater procedural rights for the non-Indian tribal court defendant at an added cost to tribal governments.

The Court has recognized that procedures like providing law-licensed lawyers and judges, and assembling criminal juries burden states' sovereignty interests and undermine the principal of local autonomy in criminal justice matters. The Court has thus declined to impose blanket federal mandates for appointed counsel, law-licensed judges, and juries in all criminal cases. Instead, it has carved out a misdemeanor/felony divide for the right to appointed counsel and for the right to a jury trial, and it has not required state judges to be licensed lawyers. Whether justifiable or not, the Court's felony/misdemeanor distinction reflects a recognition that
across-the-board federal procedural mandates create extraordinary financial burdens for state and local government because misdemeanor cases constitute the bulk of criminal prosecutions in the United States. Requiring states to adopt resource-intensive procedures, thus, inevitably requires them to redirect resources from other state-funded programs and priorities. Ultimately, this limits states' options and introduces ground-level cost-avoidance incentives in the investigation and prosecution of crime. This dynamic is no different for tribes. By demanding more of tribes when they prosecute non-Indians than what the Court has deemed necessary to ensure fairness in state criminal prosecutions, Congress directly and disproportionately burdens tribes' exercise of their inherent sovereignty. Further, making the prosecution of non-Indians more expensive than that of other defendants can compromise community safety by introducing a cost-avoidance incentive into tribes' VAWA 2013 charging and prosecution decisions. There are valid arguments why the national government may have an interest in setting a procedural baseline for tribal courts as it has done for the states. But there is no sound justification in law or policy for requiring tribes to provide more procedural protections to non-Indian defendants than they would be entitled to in state court under the Fourteenth Amendment.

---

also TRIBAL CONSULTATION REPORT, *supra* note 317, at 30–31 (summarizing testimony of Nancy Smit, Tribal Secretary, Nottawaseppi Huron Band of the Potawatomi Tribe: "Non-Native people commit the majority of crimes against AI/AN people, and tribal governments have no power to regulate these people and crimes within much of the checkerboarded land. While SDVCJ [VAWA 2013's Special Domestic Violence Criminal Jurisdiction] was a step toward restoring tribes' authority to protect their communities from outside threats, it falls short of reaffirming the authority that the Oliphant decision took away from tribes. For example, it does not cover . . . crimes that typically co-occur with intimate partner violence, such as crimes against children and police officers and drug and alcohol offenses. In the event of crimes against children, the tribal police can do nothing beyond removing the perpetrator from the reservation. It defies logic that a tribal government may prosecute a non-Native offender for violence against a romantic partner, but is forced to stand idly by if the perpetrator commits the same acts of violence against a child. . . . The Oliphant decision stripped tribal nations of their sovereignty and dignity, rendering tribes almost completely dependent on the federal government to prosecute crimes committed by non-Natives on tribal lands. . . . With proper funding and jurisdiction, most tribes are capable of prosecuting crimes that occur within their territory.").

Electronic copy available at: https://ssrn.com/abstract=3813968