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Tribal Sovereignty and Native American Women's Rights in the Wake of Castro-Huerta

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Tribal Sovereignty and Native American Women's Rights in the Wake of *Castro-Huerta*

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Lastly, I want to acknowledge and stand in solidarity with the countless Native American women who have gone missing or have been murdered, the women who have survived sexual violence, and the tireless advocates who fight for justice on a daily basis. Your resilience and courage are an inspiration.

Abstract:

This thesis will primarily examine the sexual assault crisis Native American women face and the jurisdictional issues that influence whether and how tribes prosecute and punish perpetrators. Federal Indian policy and various Supreme Court cases have increasingly undermined tribal sovereignty over the past few centuries, resulting in tribal governments lacking the ability to respond to sexual violence against their members. Native women who experience sexual violence often find themselves entangled in a complex web of jurisdictional issues, resulting in a lack of clarity about which government body has authority. As a result, their cases are frequently left unprosecuted, denying them access to justice.

Recent legislation has allocated greater sentencing and jurisdictional authority to tribes, and *McGirt v. Oklahoma* (2020) represents a continuation of restoring tribal sovereignty. The Court ruled that the territory designated for the Creek Nation within Oklahoma has maintained its status as "Indian country" as recognized since the 19th century. Despite this positive trend, the Court in *Castro-Huerta v. Oklahoma* (2022) held that Oklahoma has concurrent jurisdiction with the federal government to prosecute crimes committed by non-Natives against Natives on tribal land. *Castro-Huerta* further complicates the jurisdictional confusion because it adds another government entity into the sphere of jurisdiction in Indian country. This thesis analyzes the underlying debate in *McGirt* and *Castro-Huerta* and explains the Native female perspective in the debate. After covering relevant federal Indian policy and law, various solutions that have been recommended will be discussed in depth.

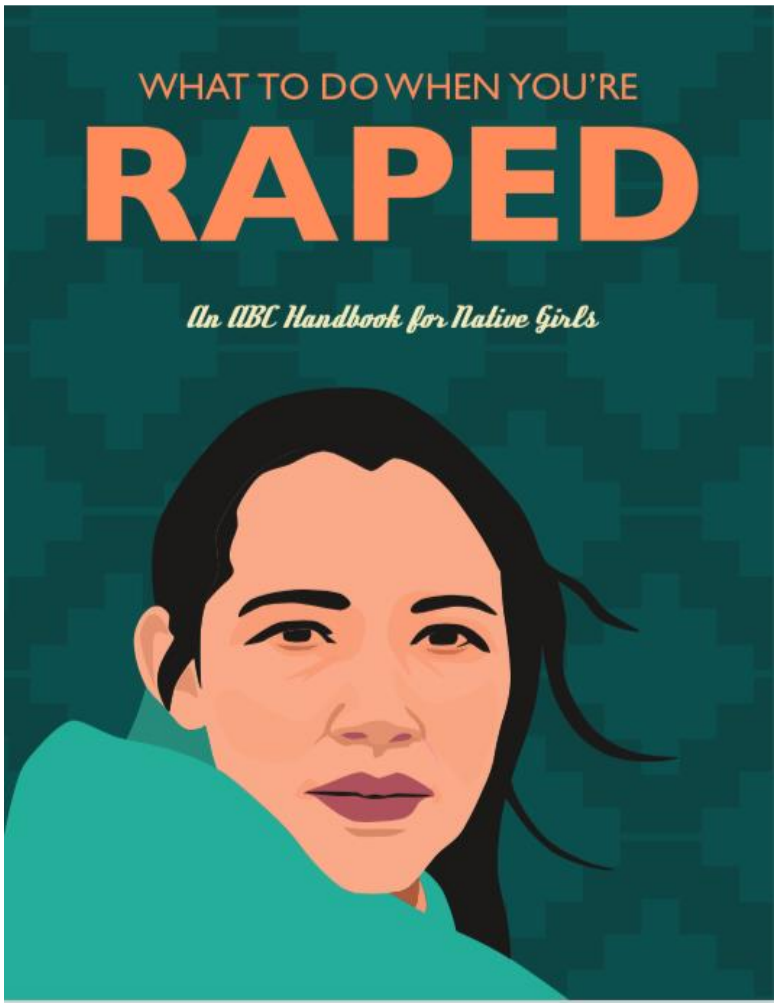
This thesis argues for a short-term solution to prove tribes have the capacity to protect their own members in order to combat the most recent attack on tribal sovereignty and the

welfare of Native women. This thesis also recommends that *Oliphant v. Suquamish Indian Tribe* (1978) should be congressionally overturned, as the Court ruled in this case that tribes lack the right to prosecute non-Natives who commit crimes against Natives on tribal land. In order to truly empower Native women and address their longstanding challenges, it is imperative to emancipate them from the intricate web of jurisdictional constraints, while also upholding the autonomy of tribes. This will enable them to seek justice and recourse after years of being denied both.

A Note on Terminology:

In writing about a sensitive topic such as issues disproportionately affecting Native Americans, it is sometimes difficult to choose appropriate language. This thesis will primarily use "Native," "Native American," and "tribal/tribe(s)," but it will occasionally use the term "Indian" or "Indigenous" to match the sources from which the information is coming from. It is important to note that no term is universally accepted by Native Americans throughout the United States. Many Natives prefer to be identified by the tribe they are a member of. However, when discussing federal Indian law and policy, the scope is often broad, and general terms will primarily be utilized.

Introduction: A Story Too Familiar for Native Women



This is the front cover of a graphic novel designed by Charon Asetoyer, CEO of the Native American Women's Health Education Resource Center, along with graphic designer Lucy M. Bonner. "What to do When You're Raped: An ABC Handbook for Native Girls" was published online in 2016 and was designed so that it could easily be read and understood by all Native American women, ranging from girls to elders.[1] This illustrated guide provides answers

[1] Charon Asetoyer, Lucy M. Bonner, *What to do When You're Raped: An ABC Handbook for Native Girls*, The Native American Women's Health Education Resource Center (Feb. 26, 2016) (ebook), https://search.issuelab.org/resource/what-to-do-when-you-re-raped-an-abc-handbook-for-native-girls.html.

to questions Native American women and girls face regarding what happens *when* they are raped; not *if*. In an alphabetical format, this guide outlines step-by-step what they should do, ranging from receiving emergency contraceptives, getting tested for sexually transmitted diseases, and who to turn to for support. At the end of the guide, under the letter "Y," the page reads, "You have choices."[2] Acknowledging how they will potentially feel violated, the guide states the following:

> If you choose to press charges against the man or men who raped you, there are a lot of legal things you will have to know. Because of the relationship between the reservations, tribal government, and state and federal government, your case will be handled differently than most other American women's, but there are resources available to you to help navigate the different systems.[3]

This is the reality many Native American women face. Amnesty International provides alarming statistics that speak to this epidemic: 56.1 percent of Native women have experienced sexual violence, and 29.5 percent of them have experienced rape.[4] Further, Native women are twice as likely to be raped than non-Native women, and in 86 percent of sexual assault cases, Native women report that the perpetrator was non-Native.[5] Not only do Native women face high rates of sexual violence, but on some reservations, Native women are murdered at a rate more than 10 times the national average, and in 2022 alone, there were 5,491 reports of missing Native women.[6] Due to the stigma surrounding sexual violence and the lack of data collection in Indian

[2] Id. at 19.
[3] Id. at 20.
[4] Amnesty International, *The Never-Ending Maze: Continued Failure to Protect Indigenous Women from Sexual Violence in the USA*, Amnesty International Publications (2022), https://www.amnestyusa.org/wp-content/uploads/2022/05/AmnestyMazeReportv_digital.pdf, 8.
[5] Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA*, *Amnesty International Publications* (2007), https://www.amnesty.org/en/wp-content/uploads/2021/05/AMR510352007ENGLISH.pdf, 4.
[6] Amnesty International, *The Never-Ending Maze*, 25; Federal Bureau of Investigation, 2022 NCIC Missing Person and Unidentified Person Statistics, https://www.fbi.gov/file-repository/2022-ncic-missing-person-and-unidentified-person-statistics.pdf/view.

country, these figures likely underrepresent the extent of sexual violence Native women experience as well as the cases of missing and murdered Native women.

Taking into consideration these alarming statistics, this thesis will primarily examine the sexual assault crisis Native women face and the jurisdictional issues that influence whether and how Native American tribes prosecute and punish perpetrators. Federal Indian policy and various Supreme Court cases have increasingly undermined tribal sovereignty over the past few centuries, resulting in tribal governments lacking the ability to respond to sexual violence against their members. Native women who experience sexual violence often find themselves entangled in a complex web of jurisdictional issues, resulting in a lack of clarity about which government body has authority. As a result, their cases are frequently left unprosecuted, denying them access to justice.

The Tribal Law and Order Act of 2010 and the Violence Against Women Act reauthorizations of 2013 and 2022 have been considered hallmarks in federal Indian policy for their allocation of more criminal jurisdiction and punishment authority.[7] While these Acts present various burdens for tribes that wish to implement their provisions, they ultimately represent positive advancements in federal Indian policy because they provide tribes with some degree of sovereignty. This trend of recognizing tribal sovereignty continued with *McGirt v. Oklahoma* (2020).[8] The Court acknowledged that the territory designated for the Creek Nation within Oklahoma has maintained its status as "Indian country" as recognized since the 19th century. As a result, under the Major Crimes Act, the federal government maintains sole

[7] Tribal Law and Order Act of 2010, P.L. 111-211, 124 Stat. 2258; Violence Against Women Act, Pub. L. No. 109-162, tit. IX, § 901, 119 Stat. 3077 (2013); Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat. 49 (2022).
[8] McGirt v. Oklahoma, 140 S. Ct. 2452, 2456 (2020).

authority to prosecute specific major offenses committed by Native citizens within its territory.[9] Although the Court was initially supportive of tribal sovereignty in *McGirt,* it succumbed to Oklahoma's request to assert jurisdiction over tribal lands, thereby undermining the promised perpetual independence of tribes who were forcibly relocated to land that eventually became recognized as the state of Oklahoma. The Court in *Oklahoma v. Castro-Huerta* held that Oklahoma has concurrent jurisdiction with the federal government to prosecute crimes committed by non-Natives against Natives on tribal land.[10] By doing so, the Court overturned the long-held understanding that states do not have the right to exercise jurisdiction on tribal lands unless Congress grants them the authority to do so.

Castro-Huerta, as it departs from the most recent trend of restoring tribal sovereignty, further complicates the jurisdictional confusion because it adds another government entity into the sphere of jurisdiction in Indian country. To fully comprehend how *Castro-Huerta* amplifies the crisis Native women face, this thesis will proceed in five sections. Chapter 1 will detail the competing claims made by the majority and dissenting opinions of *McGirt* and *Castro-Huerta*, ultimately highlighting the rhetoric employed to justify the intrusion of tribal sovereignty. Chapter 2 will re-examine the two cases from the female perspective and will primarily rely on the amicus briefs submitted to the Court for each case by the National Indigenous Women's Resource Center. Chapter 3 will explore federal Indian policy since the early 1800s in order to showcase the assimilation and paternalism motivations in dismantling tribal sovereignty. Chapter 4 will outline the various other recommendations that have been made since 2020 to resolve the jurisdiction problem, and the Conclusion will ultimately explain, based on the previous solutions,

[9] 18 U.S.C §1153(a).
[10] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2489 (2022).

what can be done to combat the crisis Native women face, especially in the wake of *Castro-Huerta*. The initial step in freeing Native women from the confines of a complex jurisdictional system, while respecting the autonomy of tribes, is crucial for liberating these women from their long-standing struggles and providing them with the opportunity for justice and recourse after years of being denied both.

Chapter 1: *McGirt*, *Castro-Huerta*, and Tribal Jurisdiction

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To understand the difficulties faced today by Native women who are assaulted and murdered, it is necessary to first examine how the United States Supreme Court has most recently issued contradictory rulings regarding tribal jurisdiction. This chapter will review the majority and dissenting opinions of *McGirt v. Oklahoma* (2020) and *Oklahoma v. Castro-Huerta* (2022) to highlight the competing claims about tribal jurisdiction and sovereignty.

1.1 *McGirt v. Oklahoma* (2020): The Majority Opinion

In 2020, the Court delivered its ruling in *McGirt v. Oklahoma*. In a 5-4 decision, the majority held that the land reserved for the Creek Nation within Oklahoma's borders since the 19th century remains "Indian country" under the Major Crimes Act. Thus, in doing so, the Court held that Oklahoma lacked the authority to prosecute Jimcy McGirt, a Native American who committed crimes on the Creek Reservation, and that the federal government has the exclusive jurisdiction to try certain major crimes committed by Native Americans on reservation lands.[11]

Justice Gorsuch wrote the opinion for the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Gorsuch begins the analysis by explaining how the petitioner's appeal relies on the Major Crimes Act because the statute subjects Indians to federal trials for certain crimes committed on tribal reservations. By allowing only the federal government to prosecute these specific cases, Justice Gorsuch notes how "State courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country.'"[12] Therefore, Justice Gorsuch notes that the key question brought in front of the Court was whether or not the crime

[11] McGirt, 140 S. Ct. at 2456.
[12] Id. at 2459 (quoting Negonsott v. Samuels, 507 U.S. 99 at 102-103 (1993)).

McGirt committed fell within Indian country.[13] On the one hand, the petitioner along with the Creek Nation joining as amicus curiae claimed that he satisfied the conditions under the Major Crimes Act because his crimes occurred on land that had been reserved for the Creek Nation since the 19th century. Contrastingly, Oklahoma asked the Court to rule that the land allotted to the Creeks no longer remains Indian land today. Justice Gorsuch thus observes that this case "winds up as a contest between State and Tribe."[14]

Justice Gorsuch commences his analysis by stating the "obvious": the Creek reservation was established by Congress. He references two treaties the United States government signed with the Creek Nation in 1832 and 1833. These treaties guaranteed the Creek Nation a "permanent home" in what would eventually become the state of Oklahoma in exchange for their lands east of the Mississippi River.[15] Justice Gorsuch importantly notes that these treaties did not use the term "reservation" when referring to the Creek's new lands, but that the Court had found similar language in treaties from the same time period that alluded to a reservation.[16] He adds that not only did countless treaties show that the Creeks were promised their land, but that the Creeks "were also assured the right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State," thus proving the Creek's land was recognized as a reservation.[17]

Upon clarifying that Congress originally established a reservation for the Creek Nation, Justice Gorsuch next examines whether the reservation remains intact today. In doing so, he affirms that the only place the Court can seek its answers from are the Acts of Congress because

[13] Id.
[14] Id. at 2460.
[15] Id. (quoting 1833 Treaty, preamble, 7 Stat. 418).
[16] Id. at 2461.
[17] Id. at 2462.

the Constitution grants Congress the sole power of tribal relations.[18] Additionally, Justice Gorsuch explains that while disestablishment has never required particular language, "it does require that Congress clearly express its intent to do so."[19]

Justice Gorsuch then acknowledges Oklahoma's claim that Congress disestablished the Creek Nation during the Allotment Era. Beginning in the 1800s, Congress had attempted "to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members" in order to "create a class of assimilated, landowning, agrarian Native Americans."[20] Despite Oklahoma's claim of disestablishment, Justice Gorsuch highlights how the allotment agreement in 1901 between Congress and the Creek Nation existed because the Creeks had refused to completely cede their territory to the United States.[21] He even observes that the state's argument lacks "a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands… [and] because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment."[22] Thus, this agreement had no impact on the actual boundaries of the Creek Nation and did not, therefore, equate to the disestablishment of the Creek Nation.

Justice Gorsuch not only analyzed the allotment process but also reviewed additional laws from the Allotment Era that were referenced by both the state and the dissent, alleging infringement of tribal sovereignty. Particularly, he references the Five Civilized Tribes Act of 1906 that Congress adopted. While this Act did not completely dissolve the tribal governments, it did "empower[] the President to remove and replace the principal chief of the Creek, prohibit[]

[18] Art. I, §8; Art. VI, cl. 2.
[19] McGirt, 140 S. Ct. at 2463.
[20] Id.
[21] Id.
[22] Id. at 2464.

the tribal council from meeting more than 30 days a year, and direct[] the Secretary of the Interior to assume control of tribal schools."[23] Despite these attacks on tribal sovereignty, Justice Gorsuch observes that "Congress expressly recognized the Creek's 'tribal existence and present tribal governmen[t]' and 'continued [them] in full force and effect for all purposes authorized by law.'"[24] Additionally, Justice Gorsuch recollects how Congress had begun to support tribal nations and governance beginning in the 1920s and enabled them to resume many of their previously suspended functions. The Creek Nation took advantage of this new authority by establishing a new constitution and three separate branches of government. Justice Gorsuch also notes how today, the Creek Nation is democratically governed, operates a police force and three hospitals, commands a budget of over $350 million, and employs over 2,000 people. Moreover, in 1982, the Creek Nation passed an ordinance that reestablished the criminal and civil jurisdiction of its courts.[25] Thus, Justice Gorsuch rejects the state and dissent's claims and concludes that "in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation. In the end, Congress moved in the opposite direction."[26]

Justice Gorsuch also spends a majority of the analysis focusing on the *Solem* test, which the state argues that the Court must follow when considering the question of disestablishment. [27] The state claims that the *Solem* test requires the Court to first examine the laws passed by Congress, then consider contemporary events, and then finally review events and demographics. Justice Gorsuch disagrees with this view and explains that the only proper step in determining

[23] Id. at 2466.
[24] Id. (quoting Five Civilized Tribes Act, § 28, 42, Stat. 148 (1906)).
[25] Id. at 2467.
[26] Id. at 2468.
[27] Solem v. Bartlett, 465 U.S. 463 (1984). The Court held that allowing non-Indians to settle on reservation lands does not constitute the intent to diminish reservation boundaries. Thus, reservation boundaries can only be altered through the acts of Congress.

Congress's work is to follow the original meaning of the law.[28] In regards to the second and third steps of the *Solem* test, Justice Gorsuch highlights *Nebraska v. Parker* (2016) and *South Dakota v. Yankton Sioux Tribe* (1998). These decisions both emphasize "that what value such evidence has can only be *interpretative*–evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law's adoption, not as an alternative means of proving disestablishment or diminishment."[29] Accordingly, the evidence the state and dissent attempt to use under the second and third steps of *Solem* to prove disestablishment is void, and Justice Gorsuch further explains how these steps would only be necessary if the statutory language was ambiguous. He also explains how neither the state nor dissent has provided any case in which the Court has recognized the disestablishment of a reservation without citing a statute stating so. Justice Gorsuch warns that if the Court were to accept their claims, then it would "finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others."[30] He notes that the implicit message conveyed by the state and dissent's arguments is that the Court should weigh the benefits of disregarding the law itself in this particular case. In response, he once again warns that surrendering to these desires would only misconstrue the intent of Congress and approve of the state's illegal practices. This, as Justice Gorsuch defines, "would be the rule of the strong, not the rule of the law."[31]

The state, without support from the dissent, offers two other arguments that Justice Gorsuch quickly considers and rejects. First, Oklahoma claims that Congress never established a reservation and that the Creek Nation is just a "dependent Indian community." However, Justice

[28] McGirt, 140 S. Ct. at 2468.
[29] Id. at 2469; Nebraska v. Parker, 577 U.S. __ (2016); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).
[30] McGirt, 140 S. Ct. at 2470.
[31] Id. at 2474.

Gorsuch clarifies that even 'dependent Indian communities' qualify as Indian country under subsection (b) of 18 U.S.C §1151. So, regardless of the subsection the Creek Nation falls under, Oklahoma still lacks the jurisdiction to prosecute McGirt.[32] Second, the state offers an alternative argument that recognizes that the Creek land is a reservation but that argues that the Major Crimes Act doesn't apply to the eastern half of Oklahoma. On the contrary, Justice Gorsuch reminds his readers that only Congress can regulate Indian affairs and that it has never passed a law granting jurisdiction to the state governments.[33]

In the final section of the opinion, Justice Gorsuch addresses the state and dissent's arguments about the "potentially 'transform[ative]' effects of a loss today."[34] Justice Gorsuch addresses how "Oklahoma fears that perhaps as much as half of its land and roughly 1.8 million of its residents could wind up within Indian country" and how "many of its residents will be surprised to find out they have been living in Indian country this whole time." In response, Justice Gorsuch notes, "[b]ut we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there."[35] Shifting to the consequences that the state and dissent warn of, Justice Gorsuch confronts their fear that the ruling could overturn "an untold number of convictions and frustrate the State's ability to prosecute crimes in the future."[36] He explains how Oklahoma would still be able to prosecute crimes between non-Indian victims and defendants within Indian country due to the Court's previous ruling in *United States v. McBratney* (1882).[37] In addition, Justice Gorsuch highlights how Oklahoma has admitted that only 10-15% of its citizens are Native American; therefore, the Court's ruling would not affect a vast majority of the

[32] Id.
[33] Id. at 2477.
[34] Id. at 2478, (quoting Brief for Respondent at 43).
[35] Id. at 2479.
[36] Id.
[37] United States v. McBratney, 104 U. S. 621, 624 (1882). The Court ruled that the state has jurisdiction to prosecute crimes in Indian Country involving non-Indian victims and defendants.

State's prosecutions.[38] In essence, Justice Gorsuch notes that all the Court's decision "does is vindicate [Congress's] replacement promise" when they adopted the Major Crimes Act and removed some of the Creek's jurisdictional power.[39]

The state and dissent further contend that the increased caseload would burden both federal and tribal courts, a perspective that Justice Gorsuch and the majority approach with more optimism. Particularly, Justice Gorsuch comments how "while the federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn't take a lot of imagination to see how things could work out in the end."[40] He also recalls how the state and tribes have proven to work well together and how several intergovernmental agreements have been negotiated between the two governments. Further, Justice Gorsuch emphasizes how "Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal."[41]

In sum, Justice Gorsuch recognizes that while Congress has restricted the Creek's authority, it "has never withdrawn the promised reservation." Moreover, he realizes that "many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye." By focusing on the intent of Congress as expressed in the relevant statutes and failing to find any ambiguous language signaling Congress's intent of disestablishment, the majority largely rejects that rhetoric. Justice Gorsuch ends the opinion by rightfully noting, "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise

[38] McGirt, 140 S. Ct. at 2479.
[39] Id. at 2480.
[40] Id. at 2480.
[41] Id. at 2481-2482.

would be to elevate the most brazen and longstanding injustices over the law, both rewarding the wrong and failing those in the right."[42]

1.2 *McGirt v. Oklahoma* (2020): The Dissenting Opinion

Although the majority opinion makes several references to the dissenting opinion, it is crucial to thoroughly analyze the dissent's arguments. Chief Justice Roberts wrote the dissenting opinion and was joined by Justices Alito and Kavanaugh. Justice Thomas also joined in part. Chief Justice Roberts argues that the Creek reservation had been disestablished and therefore did not exist when McGirt committed his crimes; thus, Oklahoma rightly prosecuted him.[43]

Chief Justice Roberts begins his opinion by acknowledging how Congress had promised the Creek Nation and other tribes that "their land would never be 'included within, or annexed to, any Territory of State'... and that their new homes would be 'forever secure.'"[44] Nonetheless, he asserts that the Civil War disrupted those promises, as the tribes had entered into treaties of alliance with the Confederacy. Following the War, the United States forged new treaties with tribes that recognized their allegiances and consequently "unsettled the [existing] treaty relations."[45] These new treaties, as a result, required the tribes to relinquish most of their land, but subsequent treaties noted how their remaining land would be set apart for them. Chief Justice Roberts then claims that the remaining land did not last due to westward expansion. He recalls how "[b]y 1900, over 300,000 setters had poured in, outnumbering the members of the Five Tribes by over 3 to 1," and that "coexistence proved complicated."[46] Due to the communal titles of the Five Tribes, none of the new settlers had access to private property ownership, and

[42] Id. at 2482.
[43] McGirt v. Oklahoma, 140 S. Ct. 2452, 2456 (2020) (Roberts, J., dissenting).
[44] Id. at 2483 (quoting Treaty with Creeks and Seminoles, Art. IV, Aug. 7, 1856, 11 Stat. 700 (1856 Treaty) and Indian Removal Act, § 3, 4 Stat. 412; Treaty with the Creeks, Arts. I and XIV, Mar. 24, 1832, 7 Stat. 368).
[45] Id. (quoting 1866 Treaty, Preamble, 14 Stat. 785).
[46] Id. at 2484.

"Congress therefore set about transforming the Indian Territory into a State."[47] Chief Justice Roberts notes how Congress took many steps to accomplish this goal of "creating a homogenous population," including dismantling the tribal governments and making tribe members citizens of the United States.[48] Thus, Chief Justice Roberts reasons that "a century of practice confirms that the Five Tribes' prior domains were extinguished" and that "[t]he State has maintained unquestioned jurisdiction for more than 100 years."[49]

Chief Justice Roberts proceeds to criticize the majority's analysis for deviating from precedents and ignoring the particular steps, as outlined by *Solem*, needed to determine disestablishment. Concerning the first step of the *Solem* test, Chief Justice Roberts argues that intent can be found aside from solely looking at the plain statutory text and that there exists no specific words or phrases to imply disestablishment. He further claims that there exists good reasons why Congress did not plainly express disestablishment in its statutes and that "[r]espect for Congress's work requires us to look at what it actually did, not search in vain for what it might have done or did on other occasions."[50] Rather, Congress enacted a series of statutes leading up to Oklahoma's statehood that "(1) established a uniform legal system for Indians and non-Indians alike; (2) dismantled the Creek government; (3) extinguished the Creek Nation's title to the lands at issue; and (4) incorporated the Creek members into a new political community–the State of Oklahoma."[51] Through these various statutes, Chief Justice Roberts asserts, Congress made clear its intent to disestablish the Creek Nation. In referring to the majority's analysis, he discusses that it "resists the cumulative force of these statutes by

[47] Id.
[48] Id.
[49] Id. at 2485.
[50] Id. at 2489-2490.
[51] Id. at 2490.

attacking each in isolation…[and] does not consider the full picture of what Congress accomplished."[52] This accomplishment, he reminds the readers, was transforming a reservation into a state.

Secondly, Chief Justice Roberts considers the contemporaneous understanding of the statutes enacted by Congress and the subsequent treatment of the lands, as the second step of the *Solem* test requires. He quotes Congress, the Dawes Commission, and the Creeks themselves to prove their understanding of disestablishment.[53] Further, in addition to their words, Chief Justice Roberts maintains that "the contemporaneous actions of Oklahoma, the Creek, and the United States in criminal matters confirm their shared understanding that Congress did not intend a reservation to persist."[54] He references how upon statehood, Oklahoma began prosecuting serious crimes committed by Indians in state courts as opposed to the guidelines under the Major Crimes Act. "Had the land been a reservation, the federal government–not the new State–would have had jurisdiction over serious crimes committed by Indians."[55] Accordingly, Chief Justice Roberts rejects the majority's assertion that Oklahoma has been overstepping its jurisdictional authority for over a century, noting how "it is downright inconceivable that this could occur without prompting objections–from anyone, including from the Five Tribes themselves."[56]

Chief Justice Roberts finally confronts the third step by examining the history of the land and the pattern of settlement. First, he affirms how Congress's treatment of the land in question supports disestablishment, particularly paying attention to how following statehood, Congress subjected restricted lands to state jurisdiction. This action thus "rendered Creek parcels little

[52] Id. at 2494.
[53] The Dawes Commission was tasked in 1893 with convincing the Five Civilized Tribes to cede the tribal title of their lands and divide their lands into allotments; McGirt, 140 S. Ct. at 2495-2496.
[54] Id. at 2496.
[55] Id.
[56] Id. at 2497.

different from other plots of land in the State."[57] Second, Chief Justice Roberts again emphasizes how the state has exercised its jurisdiction for 113 years under the pretense that the reservation had been disestablished and that this act has gone unquestioned by the tribes until *McGirt*.[58] Third, he observes how the population of the lands has remained 85%-90% non-Indian since statehood. He recalls how the Court in *Solem* ruled that "'[w]hen an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments.'"[59] Therefore, in his view, the demographic history of the lands proves the meaning of Congress's actions.

Building on the "extraordinary" burdens of the majority's decision, Chief Justice Roberts also describes how thousands of convictions–including serious crimes–could be overturned. He references the majority's argument that this decision will have little consequence for prior convictions because Native Americans only make up 10%-15% of the land, but he counters it by explaining how "10%-15% of the 1.8 million people in eastern Oklahoma, or of the 400,00 people in Tulsa, is no small number."[60] Chief Justice Roberts further warns that this decision would undermine state authority and would add "an additional, complicated layer of governance over the massive territory here."[61]

In sum, Chief Justice Roberts contends that the second and third steps of *Solem* explain Congress's desire to disestablish the Creek Reservation in the early 1900s, which thus permits the state to prosecute McGirt.

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[57] Id. at 2498.
[58] Id. at 2499.
[59] Id. at 2500 (quoting Solem v. Bartlett, 465 U.S., at 471-472, n. 12).
[60] Id.
[61] Id. at 2502.

1.3 *Oklahoma v. Castro-Huerta* (2022): The Majority Opinion

Two years later, the Court decided *Oklahoma v. Castro-Huerta*. Victor Manuel Castro-Huerta was charged by the state with child neglect and was sentenced to 35 years, but while his appeal was pending, *McGirt* was decided, thus prompting Castro-Huerta to argue that only the federal government could prosecute him. Since he, a non-Indian, committed a crime against his step-daughter, a Cherokee Indian, in what *McGirt* recognized as Indian country, the Oklahoma Court of Appeals agreed that the state lacked jurisdiction to prosecute him and vacated his sentence. However, the Court granted certiorari to determine the extent of state jurisdiction in Indian Country and ultimately held that the federal and state governments have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.[62]

Justice Kavanaugh delivered the opinion of the court, joined by Chief Justice Roberts, and Justices Thomas, Alito, and Barrett. He begins the opinion by noting how the Court granted certiorari in light of *McGirt* and the fact that the vast majority of the two million people that live in eastern Oklahoma are non-Indian. He mentions how after the state vacated Castro-Huerta's conviction, Castro-Huerta was indicted by a federal grand jury and accepted a plea deal to a 7-year sentence. His 28-year sentence reduction, Justice Kavanaugh asserts, "exemplifies a now-familiar pattern in Oklahoma in the wake of *McGirt*."[63] He highlights how state courts have reversed numerous state convictions and how many non-Indian defendants have received lighter sentences or have gone free. Justice Kavanaugh, therefore, argues that *McGirt* has presented "a significant challenge for the Federal Government and for the people of Oklahoma" because "[a]t the end of fiscal year 2021, the U.S. Department of Justice was opening only 22% and 31% of all

[62] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2489 (2022).
[63] Id. at 2492.

felony referrals in the Eastern and Northern Districts of Oklahoma."[64] Justice Kavanaugh concludes the opening section by noting how this case revolves around "public safety and the criminal justice system in Oklahoma."[65]

Justice Kavanaugh next claims that Indian country is part of the state, not separate from it. He notes how the Constitution allows a state to exercise jurisdiction in Indian country unless preempted by federal law "as a matter of state sovereignty."[66] He recalls how *Worcester v. Georgia* (1832) ruled that the Cherokee Nation in Georgia was distinct, but he claims that since "the latter half of the 1800s, the Court has consistently and explicitly held that Indian reservations are 'part of the surrounding State' and subject to the State's jurisdiction 'except as forbidden by federal law.'"[67] To support his argument, he references individual sentences from seven distinct cases, but places particular emphasis on *McBratney*, where the Court determined that the state possesses the authority to try cases involving non-Indian defendants and victims within Indian country.[68] Thus, Justice Kavanaugh attempts to establish through precedent that Indian country is part of the state and that the state has jurisdiction over crimes committed in Indian country unless federal law prohibits it.

Having established the state's jurisdiction over crimes in Indian country, Justice Kavanaugh proceeds to investigate whether this authority has been preempted. He notes how a state's jurisdiction "may be preempted by (i) federal law under the ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government."[69] Regarding the first instance, he rejects Castro-Huerta's argument that both

[64] Id.
[65] Id.
[66] Id. at 2493.
[67] Id. (quoting Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962)); Worcester v. Georgia, 31 U.S. 515, 561 (1832)).
[68] Castro-Huerta, 142 S. Ct. at 2494.
[69] Id.

the General Crimes Act and Public Law 280 preempt the state's power to prosecute crimes committed by non-Indians against Indians in Indian country.[70] He first addresses Castro-Huerta's counterarguments about the General Crimes Act and finds none of them to be convincing. In particular, "the General Crimes Act does not say that Indian country is equivalent to a federal enclave for jurisdictional purposes. Nor does the Act say that federal jurisdiction is exclusive in Indian country, or that state jurisdiction is preempted in Indian country."[71] Thus, Justice Kavanaugh affirms that the General Crimes Act does not preempt state jurisdiction over crimes committed by non-Indians against Indians in Indian country. Moreover, Justice Kavanaugh finds that Public Law 280 also does not preempt state jurisdiction to prosecute crime in Indian country. He dismisses Castro-Huerta's argument that the passage of Public Law 280 would have been meaningless if states already had the inherent authority to prosecute crimes and notes how "[c]ongressional action in the face of such legal uncertainty cannot reasonably be characterized as unnecessary surplusage."[72] Here again, Justice Kavanaugh reasons that state authority is not preempted, even with respect to Public Law 280.

Justice Kavanaugh then explores the second instance of preemption: if state jurisdiction would "unlawfully infringe upon tribal self-government."[73] He applies the *Bracker* balancing test that calls on the Court to consider tribal, federal, and state interests when considering preemption and state jurisdiction.[74] Firstly, Justice Kavanaugh explains how the exercise of state jurisdiction

[70] The General Crimes Act, 18 USC §1152, grants federal jurisdiction for certain offenses committed by Indians against non-Indians and for all offenses committed by non-Indians against Indians; Act of August 15, 1953, Pub. L. No. 280, 67 Stat. 588, codified as amended at 18 U.S.C. § 1162, grants state jurisdiction over Indians on reservations.
[71] Castro-Huerta, 142 S. Ct. at 2495.
[72] Id. at 2500.
[73] Id. at 2501.
[74] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). The Court held that Arizona State taxes that were assessed against a non-Indian contractor working exclusively for a tribe were preempted by federal law. The Court explained how when a state attempts to assert authority over non-Indian activities on reservations, the Court must consider state, federal, and tribal interests.

over a crime against an Indian committed by a non-Indian "would not deprive the tribe of any of its prosecutorial authority."[75] He justifies this stance by referencing *Oliphant* v. *Suquamish Tribe* (1978) because the Court decided that tribes cannot prosecute crimes committed by non-Indians against Indians.[76] He also reasons that "state prosecution of a non-Indian does not involve the exercise of state power over any Indian or over any tribe."[77] Second, Justice Kavanagh proclaims that state jurisdiction in this instance would not harm federal interests in protecting Indian victims, adding how it would instead "supplement federal authority."[78] He highlights how the United States has recognized this notion in the past: "'recognition of concurrent state jurisdiction' could 'facilitate effective law enforcement on the Reservation, and thereby further the federal and tribal interests in protecting Indians and their property against the actions of non-Indians.'"[79] Thus, when considering federal interests, Justice Kavanaugh only views state concurrent jurisdiction as a beneficial tool. Third, he expresses how the state has an interest in ensuring public safety and protecting all victims, both Indian and non-Indian. If the Court were to follow Castro-Huerta's arguments, Justice Kavanaugh believes the Court would be forced "to treat Indian victims as second-class citizens."[80] Therefore, when considering tribal, federal, and state interests, Justice Kavanaugh finds that a state's power to prosecute non-Indians for crimes committed against Indians in Indian country has not been precluded by principles of tribal self-government. Utilizing this balancing test, Justice Kavanaugh favors the interests and preferences of the states over those of the tribes.

[75] Castro-Huerta, 142 S. Ct. at 2501.
[76] Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978). The Court ruled that tribal courts have no criminal jurisdiction over non-Indians.
[77] Castro-Huerta, 142 S. Ct. at 2501.
[78] Id.
[79] Id. (quoting Brief for United States as Amicus Curiae in Arizona v. Flint, O.T. 1988, No. 603, p. 6).
[80] Id. at 2502.

Justice Kavanaugh spends the final section of the opinion summarizing the majority's views with respect to the dissent's arguments. Observing how the dissent emphasizes the history of mistreatment against Native Americans, he responds by stating how the history is irrelevant when considering the legal questions brought in front of the Court. As for the first question about whether or not Indian country is part of or separate from a state, Justice Kavanaugh renounces the dissent's focus on *Worcester*, noting how "this Court long ago made clear that *Worcester* rested on a mistaken understanding of the relationship between Indian country and the States."[81] In response to the second question about whether or not the state has concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country, he reminds his readers that the answer is "straightforward." He concisely summarizes how the Constitution permits state jurisdiction and how jurisdiction would not be preempted.[82]

Justice Kavanaugh ultimately finds that "[t]he dissent's view is inconsistent with the Constitution's structure, the States' inherent sovereignty, and the Court's precedents."[83] He asserts how "States do not need a permission slip from Congress to exercise their sovereign authority" and denies the dissent's focus on treaties from the 1800s, which he believes became void at the start of statehood.[84] Further, Justice Kavanaugh rejects the dissent's claims that the 1906 statute granting Oklahoma statehood created a jurisdictional divide between the state and Indian Country, and he notes that the statute contains no such language.[85] Justice Kavanagh concludes this final section by commenting on how "the dissent employs extraordinary rhetoric in articulating its deeply held policy views about what Indian law should be" but that the

[81] Id.
[82] Id. at 2502-2503.
[83] Id. at 2503.
[84] Id.
[85] Id. at 2504.

"Court's proper role under Article III of the Constitution is to declare what the law is, not what we think the law should be."[86]

1.4 *Oklahoma v. Castro-Huerta* (2022): The Dissenting Opinion

In a lengthy dissent, Justice Gorsuch wrote on behalf of Justices Breyer, Sotomayor, and Kagan, first strongly stating, "[w]here this Court once stood firm, today it wilts."[87] In the opening section of the dissenting opinion, Justice Gorsuch recalls how in *Worcester*, the Court refused to allow Georgia's attempt at gaining power over tribal lands. He acknowledges how the decision set "a foundational rule that would persist for over 200 years. Native American Tribes retain their sovereignty unless and until Congress ordains otherwise." Therefore, Justice Gorsuch determines that "[w]here our predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's."[88]

Justice Gorsuch delves into the historical background of the Cherokee Nation and the intricate dynamics between the federal and tribal governments that preceded *Worcester*. He notes how the Cherokee previously governed what is now known as Georgia, North Carolina, South Carolina, and Tennessee. As colonists began to settle in those areas, they had begun to recognize the Cherokee Nation as both a trading partner and a military threat. In 1730, Great Britain signed a treaty with the Cherokee Nation that allowed the tribe to govern themselves, and the framework of this treaty was replaced by a similar one during the American Revolution. Justice Gorsuch explains the Articles of Confederation aimed to determine the management of Indian affairs, which it achieved by granting Congress that power as well as the authority to regulate trade. At the same time, the delegates undermined that assignment of power by recognizing how

[86] Id.
[87] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, N., dissenting).
[88] Id.

the legislative rights of states could not be violated. The Framers of the Constitution sought to fix this confusion, so they provided the federal government with broad powers over Indian affairs and did not "replicate the Articles' carveout for state power over Tribes within their borders."[89] Justice Gorsuch advances this point by noting how both the Washington Administration and Congress understood and acted upon those views. This background, he claims, was what Chief Justice Marshall faced when deciding *Worcester*. After gold was discovered in the Cherokee territory in the 1820s, the Georgia attempted to seize the Cherokee territory. However, Justice Gorsuch recounted that "[i]n refusing to sanction Georgia's power grab, this Court explained that the State's 'assertion of jurisdiction over the Cherokee nation' was 'void,' because under the Constitution only the federal government possessed the power to manage relations with the Tribe."[90]

Justice Gorsuch proceeds to elaborate on the history of tribal relations by pointing out that shortly after the *Worcester* ruling in 1834, Congress adopted the General Crimes Act.[91] The adoption of the General Crimes Act served two purposes: first, it represented a promise by the federal government to punish crimes committed by and against non-Indians; and second, Congress wanted to guarantee there would be a federal forum for crimes committed by and against non-Indians since *Worcester* held that states lacked criminal jurisdiction on tribal lands. Justice Gorsuch also acknowledges how the Treaty of New Echota was ratified in 1836 following the Cherokee Nation's removal from Georgia. In this treaty, the United States promised that the Cherokee Nation would enjoy an independent home in the West upon its removal from Georgia and would remain free from state interference. While over time, Congress

[89] Id. at 2506.
[90] Id. at 2507 (quoting Worcester, 31 U.S. at 542, 561-562).
[91] As explained in Chapter 3, an earlier version of the Act was adopted in 1817.

enacted some changes, such as adopting the Major Crimes Act, Justice Gorsuch notes that one promise remained true: "States could play no role in the prosecution of crimes by or against Native Americans on tribal lands."[92] This promise remained true because to become a state, Congress made Oklahoma declare that it would not become involved with or restrict Indian self-governance. Additionally, Justice Gorsuch explains how other states sought different arrangements than that of Oklahoma's, and Congress intervened. For instance, Kansas in 1940 asked for and received permission to exercise jurisdiction over crimes involving Native Americans on tribal land, and Congress experimented with similar laws in a few other states. Thereafter, Congress adopted Public Law 280 in 1953.[93] In amending the statute in 1968 to require tribal consent before any state could assume jurisdiction over crimes by or against Indians on tribal lands, Congress also called for states to amend their own constitutions before assuming tribal jurisdiction. Despite this requirement, Justice Gorsuch concludes that "[t]o date, Oklahoma has not amended its state constitutional provisions disclaiming jurisdiction over tribal lands. Nor has Oklahoma sought or obtained consent to the exercise of its jurisdiction."[94] Therefore, since its conception, Oklahoma has lacked jurisdiction over crimes by or against Indians within reservations.

Justice Gorsuch concludes the first section by summarizing Oklahoma's efforts to establish jurisdiction over crimes by or against Indians on reservation land. Rather than requesting jurisdiction and seeking tribal consent under Public Law 280 or convincing Congress to ratify a statute granting it the jurisdiction it desires, Oklahoma has pursued other options. For instance, he notes how non-Indian settlers over the years since Oklahoma's statehood have

[92] Castro-Huerta, 142 S. Ct. at 2508.
[93] Id.
[94] Id. at 2509.

attempted to seize Indian lands, and at the same time, Oklahoma courts wrongfully asserted the power to hear criminal cases involving Native Americans on lands allotted to and owned by tribal members. Even after abandoning its power to prosecute crimes on allotted land, Justice Gorsuch explains how Oklahoma continued to prosecute crimes involving Indians within reservations "on the theory that at some (unspecified) point in the past, Congress had disestablished those reservations."[95] While the Court deciding *McGirt* ultimately rejected that point, "Oklahoma responded with a media and litigation campaign seeking to portray reservations within its State–where federal and tribal authorities may prosecute crimes by and against tribal members and Oklahoma can pursue cases involving only non-Indians–as lawless dystopias."[96] Thus, Justice Gorsuch explains how all of "[t]hat effort has culminated in this case." In reality, he explains that "this case has less to do with where Mr. Castro-Huerta serves his time and much more to do with Oklahoma's effort to gain a legal foothold for its wish to exercise jurisdiction over crimes involving tribal members on tribal lands."[97] Justice Gorsuch also importantly observes how "the defense of tribal interests against the State's gambit falls to a non-Indian criminal defendant" and how the tribes themselves "are relegated to the filing of amicus briefs."[98]

After establishing the reasons and circumstances as to why the Court is deciding this case, Justice Gorsuch explains how the majority's "ahistorical and mistaken statement of Indian law" is a foundational error.[99] He again notes how the policy that tribes are separate and independent sovereigns has remained true since *Worcester*, and he also explains how adhering to

[95] Id.
[96] Id. at 2510.
[97] Id.
[98] Id. at 2510-2511.
[99] Id. at 2511.

the usual standards of preemption, therefore, is unhelpful.[100] Justice Gorsuch reasons that Congress had adopted a series of statutes that have allocated criminal jurisdiction in Indian country and that there is a well-established notion that only Congress can displace tribal authority.

Justice Gorsuch spends the next few sections readdressing some of the statutes that Congress had adopted between 1834 and 1968 as well as the few occasions in which Congress had authorized state jurisdiction on tribal lands. Ultimately, he argues that "[t]he Court's suggestion that Oklahoma enjoys 'inherent' authority to try crimes against Native Americans within the Cherokee Reservation makes a mockery of all of Congress's work from 1834 to 1968."[101] Beginning with the General Crimes Act, he again recounts the purpose of the Act after *Worcester* but also notes how "Congress chose to only extend *federal* law to tribal lands…[o]therwise, Congress recognized, those settlers might be subject to *tribal* jurisdiction alone."[102] Justice Gorsuch then details three instances in which that understanding has been confirmed. First, he notes how the General Crimes Act compares Indian country to federal enclaves, and because states do not have jurisdiction over federal enclaves, they also lack jurisdiction over Indian country. Second, Justice Gorsuch, as he previously stated, contends that nowhere in the text does the General Crimes Act extend state criminal jurisdiction to tribal lands; the Act only extends federal jurisdiction. Third, he indicates how there are some exceptions to the General Crimes Act: "federal law 'shall not extend' to crimes involving only Indians, crimes by Indians where the perpetrator 'has been punished by the local law of the tribe,' or where a treaty grants a Tribes exclusive jurisdiction."[103] Justice Gorsuch infers that because these

[100] Id. at 2512.
[101] Id. at 2517.
[102] Id. at 2513.
[103] Id. at 2514 (quoting 18 U.S.C. §1152).

exceptions prevent the federal government from infringing upon tribal sovereignty, it would be counterintuitive if it allowed the states to "enjoy free reign."

As for the Major Crimes Act, Justice Gorsuch briefly recalls how the statute was enacted in 1885 in response to concerns over how tribal authorities were handling major crimes committed by tribal members in Indian country. However, as he previously noted, the Major Crimes Act only allows the federal government to prosecute Indians for certain crimes committed in Indian country. Equivalent to his reasoning concerning the General Crimes Act, he explains how the adoption of the Major Crimes Act would have been pointless if states already had the jurisdiction to prosecute Indians for crimes committed on Indian land.[104]

Justice Gorsuch next considers the Treaty of New Echota and the Oklahoma Enabling Act. He emphasizes how the Treaty of New Echota promised the Cherokee the right to self-government upon their relocation, but he also adds how "[t]his Court has instructed that tribal treaties must be interpreted as they 'would naturally be understood by the Indians' at ratification."[105] Thus, Justice Gorsuch deduces that the Cherokee understood this treaty as a promise that they would retain the power to prosecute crimes by or against tribal members and that such crimes could only be subject to federal jurisdiction. Additionally, Justice Gorsuch once again discusses the circumstances revolving around Oklahoma's statehood, emphasizing how the Enabling Act ensured that tribes would remain independent from the state.[106]

Addressing the few occasions in which Congress has authorized state jurisdiction in Indian country, Justice Gorsuch reveals how, nonetheless, the instances "still do not come anywhere near granting Oklahoma the power it seeks."[107] He observes that *McBratney* and

[104] Id.
[105] Id. (quoting Herrera v. Wyoming, 587 U.S. —, — (2019)).
[106] Id. at 2515-2517.
[107] Id. at 2517.

Draper v. United States (1896) allowed states to prosecute crimes revolving around only non-Indian citizens.[108] He notes that while those decisions were "aggressive," they still protected the notion that a state's admission to the Union does not automatically grant it the right to prosecute cases involving Indians in Indian country. Thus, in reality, Justice Gorsuch concludes that Congress has only authorized state jurisdiction in Indian country for offenses by or against Indians in very few instances, most notably Public Law 280.[109]

Putting aside the majority's errors, Justice Gorsuch reminds the readers three clear principles that resolve this issue. The first principle he describes is that tribal jurisdiction excludes those of other sovereigns only unless Congress states otherwise. Second, he notes how Congress has only authorized state jurisdiction specifically under the requirements of Public Law 280. Third, he notes once again how Oklahoma has failed to fulfill the requirements of Public Law 280 and therefore lacks jurisdiction to prosecute crimes committed against tribal members within a tribal reservation.[110] Justice Gorsuch then briefly challenges some of the majority's claims, beginning with their claim of how sometime in the 1800s, the Court reversed its views on state jurisdiction in Indian country. He explains how the majority never specifies when this change occurred and instead "seeks to cast blame for its ruling on a grab bag of decisions issued by our predecessors." Particularly, the majority "assemble[s] a string of carefully curated snippets–a clause here, a sentence there–from six decisions out of the galaxy of this Court's Indian law jurisprudence."[111] Ignoring the statutes and precedents that state otherwise, according

[108] Draper v. United States, 164 U. S. 240, 244-247 (1896).
[109] Castro-Huerta, 142 S. Ct. at 2517.
[110] Id. at 2518.
[111] Id. at 2520.

to Justice Gorsuch, has "mark[ed] an embarrassing new entry into the anticanon of Indian law."[112]

In the final section of the opinion, Justice Gorsuch addresses the majority's use of the *Bracker* balancing test in claiming that Oklahoma's interests outweigh those of the Cherokee. Particularly, he notes how "Congress has *already* 'balanced' competing tribal, state, and federal interests–and its balance demands tribal consent."[113] Regarding the assumption under *Bracker* that permitting state prosecution would help Indians, Justice Gorsuch unfolds that "[t]he old paternalist overtones are hard to ignore" and because the Cherokee have never consented to state jurisdiction, "they have rendered themselves as 'second-class citizens.'"[114] He highlights how the majority neglects to consider some of the reasons why the Cherokee have not consented to state jurisdiction. For instance, "throughout the Nation's history, state governments have sometimes proven less than reliable sources of justice for Indian victims," and also how in Oklahoma specifically, "[f]ollowing statehood, settlers embarked on elaborate schemes to deprive Indians of their lands, rents, and mineral rights."[115] Justice Gorsuch also references how in states that do have concurrent jurisdiction under Public Law 280, "[f]ederal authorities may reduce their involvement when state authorities are present. In turn, some states may not wish to devote the resources required and may view the responsibility as an unfunded federal mandate."[116] Thus, this avoidance of jurisdictional responsibility, according to Justice Gorsuch, has caused many tribes to repeal state concurrent jurisdiction.

[112] Id. at 2521.
[113] Id. at 2522.
[114] Id. (quoting Ante, at 2501-2502).
[115] Id. at 2523.
[116] Id.

Justice Gorsuch also considers the second factor the majority considers, the aftermath of *McGirt*; that is, "the only history it seems interested in consulting."[117] He notes how the majority's claim of there being a "law-and-order" crisis amounts to a policy argument; "it is no act of statutory or constitutional interpretation."[118] Justice Gorsuch recalls how the Court in *McGirt* knew there would be a readjustment period but believed it was necessary because the state had "long overreached its authority on tribal reservations and defied legally binding congressional promises."[119] In addition, Justice Gorsuch states that neither tribal nor federal authorities believe the readjustment period prompts the Court's course of action. In particular, tribes have hired more police officers, prosecutors, and judges, and they have even cooperated with the state, having signed numerous cross-deputization agreements that allow local law enforcement to collaborate with tribal police. Congress, instead of granting the state concurrent jurisdiction, has allocated funding to law enforcement in Oklahoma, and the Department of Justice has been working with tribal and state authorities in the state. Justice Gorsuch recounts even more evidence that is contrary to the majority's account: tribal and state relationships have remained strong, violent crimes and lower-level offenses are still being pursued as heavily, and those convicted of federal crimes have received longer sentences than those convicted of similar offenses in state courts. He offers all of these rebuttals because he believes "[t]he Court's decision is not a judicial interpretation of the law's meaning; it is the pastiche of a legislative process."[120]

Justice Gorsuch finally examines the limits of the majority's decision. As he has already noted, the Court disparages Public Law 280's requirements. Moreover, he reminds the readers

[117] Id.
[118] Id. at 2524.
[119] Id.
[120] Id. at 2525.

that the Court references the Cherokee's treaties and the Oklahoma Enabling Act but does not articulate when those treaties were invalid nor where the Enabling Act allows Oklahoma to prosecute cases involving Indians within tribal reservations. Justice Gorsuch revisits the notion of how the Court abandons the rule that congressional authority is necessary for the state to prosecute crimes by Indians in Indian country, and he observes how the majority relies on how states can prosecute crimes involving non-Indians in Indian country to justify its decision. After briefly summarizing how the Court misapplied the *Bracker* balancing test, he suggests that Congress can fix the Court's decision by amending Public Law 280. He advocates that it be changed to say: "A State lacks criminal jurisdiction over crimes committed by or against Indians in Indian Country, unless the State complies with the procedures to obtain tribal consent outlined in 25 U. S. C. §1221, and, where necessary, amends its constitution or statutes pursuant to 25 U. S. C. §1324."[121]

In conclusion, Justice Gorsuch recognizes how "at the bidding of Oklahoma's executive branch, this Court unravels those lower-court decisions, defies Congress's statutes requiring tribal consent, offers its own consent in place of the Tribe's, and allows Oklahoma to intrude on a feature of tribal sovereignty recognized since the founding."[122]

1.5 Analysis: What These Decisions Tell us about the Debate over Tribal Jurisdiction

Although it is crucial to carefully examine these opinions as they provide insight into the relevant history of Native American tribes and laws in Oklahoma, what is even more revealing is the underlying debate between the opposing jurists. As Michael Rusco observes, *Castro-Huerta* "distills into one majority and one dissent the two world views that have competed for control of

[121] Id. at 2527.
[122] Id.

federal Indian law since at least *Worcester v. Georgia*."[123] The arguments present in both decisions in favor of tribal sovereignty, spearheaded by Justice Gorsuch, are rooted in both history and the actual statutory text. However, the opposing arguments neglect much of the history in order to justify the state's illegal actions that have gone unchallenged. In reality, the debate boils down to the question of the state's power, not that of the tribes. *McGirt,* in clearly outlining how the reservation land in Oklahoma remains intact, clearly represented a glimmer of hope for tribes across the country in their pursuit for complete autonomy. Nonetheless, the Court rescinded some of the granted sovereignty two years later in determining that all states have the power to prosecute non-Natives who commit crimes against Natives on tribal land.

The majority in *Castro-Huerta* is focused more on state sovereignty, rather than the inherent and promised sovereignty of tribes. The only time Justice Kavanagh uses the word "sovereignty" is in reference to that of the state.[124] Perhaps more appalling is his suggestion that states have an equal interest in protecting Native citizens from crime. As Justice Gorsuch highlights in his powerful *Castro-Huerta* opinion, in this debate about tribal jurisdiction and the state's attempt to wield more power, the only voice tribes truly have is in their filing of amicus briefs. Especially in the context of Native American women who are sexually assaulted and murdered, the underlying debate showcases how more emphasis is placed on *who* gets to prosecute and *who* gets to punish rather than seeking justice for these women according to their beliefs and desires. This state-power rhetoric has allowed the majority in *Castro-Huerta* to get away with claiming that it somehow has a greater interest in protecting Native American victims than their own tribes do and continues the anti-sovereignty rhetoric that has historically defined

[123] Michael Rusco, "Oklahoma v. Castro-Huerta. Competitive Sovereign Erosion, and Fundamental Freedom," 25 (2022).
[124] Id. at 25-26.

federal Indian law and policy. The implications of this rhetoric will be explored and discussed at length throughout the remainder of this thesis.

Chapter 2: The Indigenous Female Perspective: *McGirt* and *Castro-Huerta*

It is clear that the *McGirt* and *Castro-Huerta* decisions heavily impact Native victims of violence, especially in cases of violence perpetrated by non-Natives. To understand the role and impact these two major cases have on the safety of Native women, this chapter will cover the briefs of amici curiae submitted to the Court for both *McGirt* and *Castro-Huerta* by the National Indigenous Women's Resource Center (NIWRC). Both briefs were co-authored by Mary Kathryn Nagle, a citizen of the Cherokee Nation, and Sarah Deer, a citizen of the Muscogee (Creek) Nation. These women are advocates for the safety of Native women, and Nagle serves as Counsel to the NIWRC.

The NIWRC operates as a non-profit organization dedicated to ending domestic violence and sexual assault against Native women and children. This organization recognizes how they "offer a unique perspective on the relationship between Congress's plenary power over Indian affairs, the inherent sovereign authority of tribal governments to prosecute crimes committed by or against tribal citizens, and safety for Native women and children."[125]

2.1 *McGirt*

For their brief submitted in support of the petitioner, Jimcy McGirt, the NIWRC was joined by tribes and other organizations across the country that share the NIWRC's commitment to ending domestic violence, sexual assault, and other forms of violence against Native women. The NIWRC Amici begin their argument by documenting how Native women and children experience some of the highest rates of violence in the United States, as confirmed by multiple federal reports, Congress, and federal courts. In particular, they share alarming facts "that are

[125] Brief for National Indigenous Women's Resource Center (NIWRC) et al. as Amici Curiae Supporting Petitioner at 1, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

sufficiently stunning as to be almost incomprehensible."[126] Four in five Native Americans are victims of violence, and nearly 90 percent have experienced violence by a non-Indian.[127] Further, over half of Native women report that they have been victims of sexual violence.[128] In ending this section regarding the statistics of violence, the NIWRC Amici explain how Congress has recognized that a major contributor to the high rates of violence against Native women and children is the "inability of Tribal Nations to prosecute the non-Indians who commit the majority of violent crimes against tribal citizens."[129]

The NIWRC Amici also explain how Native women and children are murdered at higher rates than any other population in the United States. They share how, "[a]ccording to the Centers for Disease Control and Prevention ("CDC"), nationally, Native women are murdered at a rate of 4.3 percent, while their white counterparts experience homicide at a rate of 1.5 percent."[130] Additionally, when a Native victim goes missing on tribal lands, the search-and-rescue efforts are frequently delayed due to the jurisdictional barrier, and the fate of the Native woman who goes missing entirely rests on whether or not the land she was last seen on is considered "Indian country" under 18 U.S.C. §1151(a).[131] The NIWRC Amici elaborate how the tribe would have jurisdiction to investigate the crime if the woman had gone missing on reservation land that Congress never disestablished. However, if the land has been disestablished, tribal law enforcement would be required "to undertake a lengthy legal analysis concerning the trust/restricted/fee status of the parcel of land where the victim went missing to determine whether that land constitutes 'Indian country' under 18 USC §1151(a) *before* determining

[126] Id. at 12.
[127] Id. at 12-13.
[128] Id. at 12.
[129] Id. at 13.
[130] Id. at 14.
[131] Id.

whether the Tribe has the requisite jurisdiction to investigate the crime."[132] Thus, the time spent determining who has the jurisdiction to investigate the case could cost the Native woman her life. The NIWRC Amici add how one in four murderers of Native women are never held accountable when the state is assigned jurisdiction, and a third of the murder cases are misclassified as other causes such as natural causes and suicide.[133] They conclude this section about the murder of Native women and children by noting that the disestablishment of reservations could "threaten[] to place criminal jurisdiction over the crimes committed against the most vulnerable victims in the hands of the sovereign least likely to prosecute."[134]

In response to both the high rates of violence against Native women and the Court's decision in *Oliphant*, the NIWRC Amici explain how Congress has responded by partially restoring tribal jurisdiction over non-Indians who commit crimes of domestic violence, dating violence, or violations of protective orders on tribal lands. As previously noted, Congress has recognized that the inability of tribes to prosecute non-Indians for crimes committed on tribal lands is one of the major contributing factors to the high rates of violence against Native women. Thus, in the discussions surrounding the 2012-2013 reauthorization of the Violence Against Women Act (VAWA), the NIWRC Amici note how the high rates of violence against Native women was one of the central focus points. However, due to the complicated history surrounding criminal jurisdiction and tribal law, Congress had to take special care in defining where tribal jurisdiction over non-Indian domestic violence offenders would occur. In doing so, the NIWRC Amici describe how Congress defined the acceptable area as "Indian country" outlined in 18 U.S.C. §1151. Because of this, the NIWRC Amici reason that if the Court were to side with the

[132] Id. at 14-15.
[133] Id. at 15.
[134] Id. at 16.

State of Oklahoma, the VAWA's reference to "Indian country" would have a more confined application than when Congress initially reauthorized VAWA in 2013.[135]

Furthermore, the NIWRC Amici demonstrate that many tribes have implemented VAWA's restored tribal criminal jurisdiction since 2013. For instance, they describe how the Creek Nation's application of the Act is deeply rooted in its culture and tradition because "prior to the Creek Nation's forced removal, non-Indian desire for Creek land resulted in high levels of violence against Creek Nation citizens."[136] As a result of this violence, the Creeks understood the importance of exercising their inherent criminal jurisdiction over all offenders, including non-Indians. In fact, the Creek Nation had outlawed rapes and sexual assault on their lands before Oklahoma statehood and used the term "person" to describe the offender–as opposed to citizen, Indian or Native–to reflect how the law does not solely apply to Creek citizens. The NIWRC Amici explain that as of 2019, a majority of the tribes that implemented VAWA's restored criminal jurisdiction define "Indian country" to include the entirety of their reservations. Thus, they conclude that the judicial disestablishment of reservations would compromise the ability of the tribes to implement VAWA in full and would contradict Congress's intent.

The NIWRC Amici expand on the connection between the term "Indian country" and the ability of tribes to implement VAWA by discussing the *Parker* framework.[137] The Court in *Parker* concluded that a tribe will retain their reservation status unless and until Congress specifically disestablishes the reservation. Accordingly, the reauthorization of VAWA to restore tribal criminal jurisdiction over some crimes "constitutes a constitutional exercise of Congress's exclusive power over Indian affairs–one with which this Court should not interfere."[138] In

[135] Id. at 19.
[136] Id. at 20.
[137] Nebraska v. Parker, 577 U.S. __ (2016).
[138] Brief for NIWRC, 29.

concluding the brief, the NIWC Amici highlight how "[w]hen a Tribe cannot protect its women and children, the entire tribe is placed in jeopardy since women and children perpetuate the existence of all tribal communities."[139] As such, abandoning the *Parker* framework would harm the entire tribe and would magnify the crisis Native women and children face. "The judicial disestablishment of a reservation, therefore, is more than a question of authority or precedent. For far too many Native women and children, it is a question of life or death."[140]

Nagle and Deer view the Court's ruling in *McGirt* as a victory for Native women. In their response submitted to the George Washington Law Review regarding the Court's decision, they recap much of what they argue in the amicus brief, particularly emphasizing how the safety of Native women is linked to the safety of their reservation. They also take time in this response to write about their frustrations at having to still fight for Indigenous sovereignty in addition to the safety of Native women. They note that when a non-Native woman is assaulted, law enforcement does not need to worry about whether or not the perpetrator is a citizen of the victim's state before determining whether or not they would even have the authority to protect her. Similarly, they describe how when the infamous killer, Ted Bundy, murdered women in several states, the fact that he was not a citizen of some of the states did not prohibit those states from prosecuting him. Nagle and Deer ultimately question, "Why is the analysis different when a white man murders a Native woman on tribal lands?"[141]

Additionally, while they focus on the 2013 VAWA reauthorization in the amicus brief, they observe that more recently in 2019, the House passed H.R. 1585, a VAWA reauthorization bill. They note that this bill, advanced through the House as a result of a bipartisan effort, would

[139] Id. at 30.
[140] Id. at 31-32.
[141] Mary Kathryn Nagle, Sarah Deer, Response, "*McGirt v. Oklahoma*: A Victory for Native Women," Geo. Wash. L. Rev. On the Docket (July 20, 2020), https://www.gwlr.org/mcgirt-v-oklahoma-a-victory-for-native-women/.

restore tribal jurisdiction over more crimes by non-Indians such as rape and child sexual abuse. However, had the Court ruled in favor of Oklahoma in *McGirt*, Nagle and Deer note that the bipartisan effort would have been futile. They further argue that the Court's decision to side with McGirt will have minimal impact on the daily lives of non-Indian citizens living within reservations as it does not remove the majority of crimes from Oklahoma's jurisdiction.

In concluding their remarks on *McGirt*, Nagle and Deer address the apparent ironies behind themselves and organizations like the NIWRC supporting McGirt who committed a series of sexual offenses against children. However, they resolve this ostensible contradiction by assuring that while Oklahoma now has lost the jurisdiction to prosecute McGirt, the United States Attorney's Office will most likely indict and prosecute him in federal court in collaboration with the Muscogee Nation's Attorney General. They focus on the larger issue of tribal sovereignty which will ultimately strengthen the enforcement of the law against those who abuse Native women and children.

2.2 *Castro-Huerta*

Deer and Nagle submitted a brief on behalf of the respondent, Victor Manuel Castro-Huerta, in which they were once again joined by tribes and other non-profit organizations across the country. One of the tribes, the Prairie Band Potawatomi Nation (PBPN), offers a unique perspective on this state jurisdiction matter. Located within Kansas, PBPN has been affected by the Kansas Act of 1940. The Act grants concurrent jurisdiction to Kansas on tribal land without the consent of PBPN. Due to state and local law enforcements' misunderstandings of concurrent jurisdiction and an overall lack of accountability to tribes, there have been public safety concerns within PBPN's borders.[142] Another tribe listed as part of the NIWRC Amici, the Yurok Tribe of

[142] Brief for National Indigenous Women's Resource Center (NIWRC) et al. as Amici Curiae Supporting Respondent at 3, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429).

Northern California, shares concurrent jurisdiction with California under Public Law 280. This shared jurisdiction has resulted in a lack of law enforcement services to the reservation from surrounding counties which has forced the Yurok Tribe to declare a state of emergency due to the ongoing Missing and Murdered Indigenous People ("MMIP") crisis.

The NIWRC Amici first maintain that only Congress has the authority to determine who exercises criminal jurisdiction in Indian country. They argue that this congressional authority is needed "to protect Tribal Nations from States, whose actions have historically threatened tribal self-governance and their continued existence."[143] In this respect, the NIWRC Amici note how Congress has granted certain states the jurisdiction that Oklahoma desires, but this model "has only served to place Native women and children in greater jeopardy."[144] It has led to a reduction in funding for tribes due to the assumption that states would safeguard the welfare of tribal citizens. However, paradoxically, these states have experienced a decline in law enforcement provisions. Notably, since Congress amended Public Law 280 in 1968 to require a tribe's consent for concurrent jurisdiction, no tribe has voted in favor of Public Law 280 jurisdiction. Several states such as Texas, Kansas, Louisiana, Nebraska, and Virginia claim that the Court should side with Oklahoma because Natives are victimized at higher rates than non-Indians and are more often than not victimized by non-Indians. The NIWRC Amici acknowledge this statement but argue that assigning states jurisdiction over these crimes will not effectively resolve the crisis: "[e]mpirical evidence undermines Oklahoma's suggestion that granting its request for jurisdiction will increase safety for Native victims of violence."[145] Thus, the NIWRC

[143] Id. at 9.
[144] Id. at 11.
[145] Id. at 18.

Amici insist that Oklahoma's request would worsen the challenges encountered by Native in Indian country who deal with sexual violence.

The NIWRC Amici further note that Congress is already actively engaged in addressing the crisis of violence against Native Americans, and therefore, granting jurisdiction to Oklahoma would be unnecessary. For instance, Congress has addressed non-Native violence against Native victims on reservation lands by restoring partial tribal jurisdiction through the reauthorizations of VAWA. Thus, Oklahoma "is not presenting a public safety problem that Congress has failed to consider or address."[146] The NIWRC Amici further elaborate on how Congress recognizes that restoring tribal jurisdiction over these crimes is preferable to granting states concurrent jurisdiction because "state law enforcement and prosecutors have limited resources and may be located hours away from tribal communities."[147] Congress understands "the simple rationale that the government closest to the victim–i.e. the tribal government–has the most responsibility and accountability to the victim herself."[148] Additionally, they observe how the reauthorization of VAWA in 2013 has resulted in an increase in safety for Native women. Thus, they conclude that the problem is not *McGirt*; the problem is the absence of complete tribal jurisdiction on reservation lands.

In addition to addressing the work Congress has done to combat the crisis, the NIWRC Amici argue that Oklahoma has not prioritized the safety of Native victims. The state has failed to allocate adequate resources to address the crisis of Missing and Murdered Indigenous Women and Girls ("MMIWG") and has refused "to allow Native advocates with subject matter expertise to participate on the State's committees and commissions designed to combat domestic

[146] Id. at 19.
[147] Id. at 20 (quoting from 59 Cong. Rec. E217-03, E218 (daily ed. Feb. 28, 2013) (statement of Rep. Jackson Lee)).
[148] Id.

violence."[149] Further, the NIWRC Amici elaborate on the state's historical lack of effectiveness in protecting women from sexual violence, citing low clearance rates regarding crimes of sexual assault as evidence. Specifically in Oklahoma, "[i]n 2018, only 22% of reported rapes were cleared. In 2019 the rate was 17.6%, and in 2020, the rate was 18%."[150] Thus, the NIWRC argue that granting the state jurisdiction would be counterproductive due to the state's track record of failing to protect Native women.

The NIWRC Amici conclude the brief by reiterating that *McGirt* did not create a public safety crisis. Rather, "the public safety crisis that Native women and children experience stems from hundreds of years of federal law and policy."[151] They add that the continued existence of reservations established by treaties is not the primary cause for Native women and children being at the highest risk of assault, murder, and abuse. Similar to the point they made in the brief submitted on behalf of Jimcy McGirt, the NIWRC Amici insist that Native women and children are victimized at higher rates as a result of "the sovereign with the most significant interest in preserving their safety and welfare, their Tribal Nation, has been stripped of the jurisdiction necessary to protect them."[152]

Following the Court's ruling in *Castro-Huerta*, Nagle testified before the United States House Committee on Natural Resources Subcommittee for Indigenous Peoples of the United States on September 20th, 2022. Recalling how Congress has reinstated a portion of the jurisdiction that was previously removed by *Oliphant* through various amendments to VAWA, Nagle declared how the majority opinion "erroneously ignored Congress' passage of VAWA

[149] Id. at 27.
[150] Id. at 28.
[151] Id. at 30.
[152] Id. at 32.

2022, and the Court ignored Congress' considered judgment."[153] Nagle further testified that the Court's decision now forces Native victims to rely on state and local governments to protect them that are not bound by a treaty trust duty to protect them. In concluding her testimony, she asserted that the Court's decision was motivated by the Governor's agenda to overturn *McGirt*, rather than serving as a deterrent against crimes targeting Native Americans. Nagle warned that "when the dust has settled and the rhetoric has calmed down, it will be Native women and children who pay the price."[154]

2.3 The Alternative Perspective

While most agree that tribal sovereignty is crucial in protecting Native women, it is necessary to highlight how some Native citizens and victims feel as if they are unprotected from criminals without state jurisdiction. Journalist Ray Carter shares the perspectives of those who condemn the *McGirt* ruling in a 2021 article, "*McGirt* Leaves Indian Victims Feeling 'Defenseless.'" Carter includes the perspective of Crystal Jensen, a member of the Cherokee Nation who was victimized by a peeping-Tom neighbor. This neighbor, a non-Indian, was charged by state law enforcement in 2019 and faced possible felony charges. The legal process had been delayed, and during the delay, the Court issued *McGirt*. The neighbor then used *McGirt* to avoid state prosecution because Jensen is Indian and he is non-Indian. Since tribal officials were unable to prosecute the case due to the neighbor's non-Indian status, the federal government was the only option left for prosecution. However, the federal government refused to press charges, prompting Jensen to feel vulnerable and defenseless.[155] Carter also highlights a

[153] Examining Oklahoma v. Castro-Huerta: The Implications of the Supreme Court's Ruling on Tribal Sovereignty: Hearing Before the House Natural Resources Subcomm. on Indigenous Peoples of the United States, Sept. 20, 2020 (Testimony of Mary Kathryn Nagle).
[154] Id.
[155] Ray Carter, "*McGirt* Leaves Indian Victims Feeling 'Defenseless,'" *Oklahoma Council of Public Affairs* December 15, 2021, https://www.ocpathink.org/post/independent-journalism/mcgirt-leaves-indian-victims-feeling-defenseless.

case involving the rape of an Indian female by a non-Indian. The offender was sentenced in 2018 to 44 years by the state, but his sentence became completely vacated following *McGirt,* and the victim was left confused as to "how someone who is not Native can manipulate the system into using [their] being a Native against [them]."[156] The victim also expressed her satisfaction with the state's original verdict. Although it has been clarified that *McGirt* did not create a public safety crisis, these perspectives are important because they prove that the federal government is not always a reliable source of justice for Native victims. Federal declination rates will be discussed more at length in Chapter 3.

2.4 The Omission of Native Women's Perspectives in Jurisdictional Debates: Implications for Safety and Sovereignty

The debate surrounding jurisdiction over tribal lands impacts the lives and welfare of Native women. The jurisdictional gaps and uncertainties serve as significant barriers to Native survivors of violence who seek justice for the crimes committed against them. However, despite this undeniable link between jurisdiction and tribal sovereignty and the safety of Native women, the Native female perspective has been largely left out of the conversation. A simple word search reveals that the terms "woman," "women," and "female" are completely absent in each case's majority and dissenting opinions. The only instance the female viewpoint is remotely referenced in the *McGirt* and *Castro-Huerta* opinions occurs in Justice Gorsuch's dissenting opinion in *Castro-Huerta* when he quotes the Brief for National Indigenous Women's Resource Center et al. as Amici Curiae.[157] However, Justice Gorsuch quotes the Amici regarding Public Law 280 and neglects to mention anything relating to Native women. Further, in Justice Kavanaugh's attempt to use the *Bracker* balancing test to argue that a state's power to prosecute non-Natives

[156] Id.
[157] Castro-Huerta, 142 S. Ct. at 2523.

for crimes committed against Natives in Indian country has not been precluded by principles of tribal self-government, he uses *Oliphant* as partial justification.[158] However, as referenced by the NIWRC Amici, *Oliphant* has been partially overturned as a result of the creation and reauthorization of VAWA. It is no mistake that VAWA, an Act that deals with tribal jurisdiction in the context of safety for Native women, bears no mention at all in any opinion of either case. Amicus briefs hold significantly less weight than the Court opinions do themselves, and, as mentioned in Chapter 1, these briefs are the sole option for tribes to have their voices heard. Consequently, the Native female perspective is then relegated to an even lower ranking on the list of perspectives to be considered in these monumental cases. There is a strong need for the perspectives of Native women to be included and emphasized in these jurisdictional debates as their safety is linked to the status and security of their reservation.

[158] Id. at 2501.

Chapter 3: Federal Statutory Interference and Modern Attempts at Legislative Solutions

While Chapter 1 examined the two most recent Supreme Court cases concerning tribal jurisdiction, this chapter will provide a more comprehensive account of federal Indian policy. This chapter aims to illustrate how these various policies and Supreme Court cases have fueled the complicated relationship between tribes and the federal and state governments. Reema Sood describes a pattern of "federal statutory interference."[159] The General Crimes Act, the Major Crimes Act, the General Allotment Act, Public Law 280, and *Oliphant v. Suquamish Indian Tribe*, will be explained for their roles in violating Indian sovereignty. Amy Casselman, in *Injustice in Indian Country: Jurisdiction, American Law, and Sexual Violence Against Native Women*, describes how Native existence and their pre-contract right to the land has prevented complete colonization. As such, she notes how "[i]n an attempt to remedy the 'Indian problem,' federal Indian policy has vacillated between policies of removal (relocating Native people 'out of the way'), physical genocide (annihilating physical bodies), and assimilation (policies that use cultural genocide to assimilate Native people into the fold of American hegemony)."[160] Thus, federal Indian law exists under the guise of colonization, and the colonial narrative has allowed for the creation and continuance of policies and principles aimed to divest Native people of their land and sovereignty.

This chapter will also detail the most recent attempts at legislative solutions that have sought to combat this "legal violence," as Casselman coins it. The Tribal Law and Order Act of

[159] Reema Sood, "Repairing the Jurisdictional 'Patchwork' Enabling Sexual Assault on Indian Reservations," 20 U. Md. L.J. Race, Religion, Gender and Class 230 (2020).
William C. Canby Jr., *American Indian Law in a Nutshell*, 6th ed. 174 (West Academic Publishing 2014).
[160] Amy L. Casselman, *Injustice in Indian Country: Jurisdiction, American Law, and Sexual Violence Against Native Women*, 28 (Peter Lang 2016).

2010 and the Violence Against Women Act, most recently reauthorized in 2022, have been regarded as positive developments in federal Indian law. However, these provisions still do not grant tribes full autonomy and thus further complicate the jurisdictional issue.

3.1 General Crimes Act (1817)

In 1817, Congress passed the General Crimes Act to provide the federal government with jurisdiction over interracial crimes committed in Indian country. That is, the federal government has the power to prosecute all crimes committed by non-Indians against Indians as well as certain non-major crimes committed by Indians against non-Indians in Indian country. While Congress's intention was most likely to have federal criminal law apply to all crimes committed by non-Indians in Indian country, subsequent Supreme Court rulings disrupted this intention.[161] *McBratney* and *Draper* held that state courts, as opposed to federal courts, possess jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. The result of those two cases is that for a non-Indian to be prosecuted under the General Crimes Act for a crime against an individual, the victim must be an Indian.[162] Additionally, there were three exceptions to the General Crimes Act: crimes committed by Indians against Indians, crimes committed by Indians that have already been punished by the tribe, and crimes for which a treaty grants tribes with exclusive jurisdiction.[163]

3.2 Major Crimes Act (1885)

Despite the first exception to the General Crimes Act which leaves jurisdiction to tribes over crimes committed by Indians against Indians in Indian country, Congress later modified this provision with the enactment of the Major Crimes Act in 1885. This Act originally provided for

[161] William C. Canby Jr., *American Indian Law in a Nutshell*, 6th ed. 174 (West Academic Publishing 2014).
[162] Id. at 176-177.
[163] Id. at 178.

federal criminal jurisdiction over seven major crimes committed by Natives in Indian country, regardless of the identity of the victim, but over time, the original seven offenses have been increased to sixteen offenses.[164] Such offenses include murder, kidnapping, arson, rape, assault with a deadly weapon, and assault resulting in serious bodily injury.[165]

The Major Crimes Act stems from the 1883 Supreme Court case *Ex Parte Crow Dog*.[166] In 1881, a Brulé Lakota man, Crow Dog, shot and killed another member of the tribe on the Rosebud Indian Reservation in Dakota territory (present-day South Dakota). The tribe found Crow Dog guilty of murder and ordered him to pay restitution to the victim's family, but the Dakota Territorial Court prosecuted and convicted Crow Dog, ultimately sentencing him to death. Crow Dog argued his case in front of the United States Supreme Court, and the Court ruled that the Dakota Territorial Court lacked jurisdiction to prosecute Crow Dog since this crime did not involve interracial parties as required by the General Crimes Act.[167] In response to this holding, the Secretary of the Interior urged Congress to pass legislation granting federal courts jurisdiction over cases similar to *Crow Dog* in the future. Disregarding the fact that the tribal court had tried and convicted the case between its own members as they had deemed appropriate, Congress took considered the Secretary of the Interior's concern and passed the Major Crimes Act.[168]

Thus, as Casselman contends, there were two attitudes toward Native Americans and tribes that were central to the creation of the Major Crimes Act. The first attitude was white fear

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[164] Tribal Law and Policy Institute, "General Guide to Criminal Jurisdiction in Indian Country," *The Tribal Court Clearinghouse*, (https://www.tribal-institute.org/lists/jurisdiction.htm); It is ambiguous as to whether this Act provided the federal government with conclusive or exclusive criminal jurisdiction over crimes committed by Natives in Indian country.
[165] Amanda M.K. Pacheco, "Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence," 11 J.L. & Soc. Challenges 1, 26 (2009).
[166] Ex Parte Crow Dog, 109 U. S. 556 (1883).
[167] Casselman, *Injustice in Indian Country*, 28.
[168] Pacheco, "Broken Traditions," 25-26.

over the perceived lawlessness of Native Americans in Indian country, and the second attitude, paternalism, resembled the belief that tribes lack the competence to deal with major crimes. Taken in conjunction, Casselman notes that "Native law was read as an absence of law, and that in order for the federal government to complete its civilizing mission, it was necessary to colonize Native justice systems themselves."[169] Despite these attitudes, enforcement of the Major Crimes Act has been problematic due to overburdened United States Attorneys and their unwillingness to prosecute the less-serious crimes under the Major Crimes Act.[170] Ultimately, this Act, aiding in the assimilation of Native Americans, laid the foundation for further attacks on tribal sovereignty.

3.3 General Allotment Act (1887)

The General Allotment Act, also known as the Dawes Act, enacted during the same period as *Ex Parte Crow Dog* and the Major Crimes Act, did not specifically target tribal criminal jurisdiction.[171] Rather, it played a major role in the modern-day racial composition of tribal reservations. Unsurprisingly, the same assimilation and paternalistic attitudes that created the Major Crimes Act also led to the enactment of the General Allotment Act. The Act called for reservation land that was established as sovereign territory by treaties to be divided into individual parcels by the federal government, in an effort to "mold Native peoples into Euro-American farmers" without the consent of the tribes or Natives themselves.[172] Tribes as entities were viewed as obstacles to the complete assimilation of Native Americans, and the thought behind the Act was to destroy communal tribal living through land privatization. Not only was a goal to bring Natives "into the fold of white American hegemony" and thus "cease to be a

[169] Casselman, *Injustice in Indian Country*, 31.
[170] Canby, *American Indian Law in a Nutshell*, 188.
[171] Pub. L. 49–105, 24 Stat. 388.
[172] Casselman, *Injustice in Indian Country*, 33.

cultural and financial burden on the United States," the primary goal was to allocate Native land for white settlement.[173] After land was divided among individual Natives, the remaining parcels would be allocated to non-Indians for settlement and the construction of railroads and the extraction of natural resources. Thus, reservation land that pre-existed colonization and was protected by treaties became recognized as "leftover," at the disposal of non-Natives to settle and colonize how they pleased. At the conclusion of the Allotment Era, which came with the passage of the Indian Reorganization Act in 1934, Indian land holdings had decreased from originally 138 million acres to 48 million acres.[174] Thus, the invasion of Indian country by non-Native residents has undoubtedly increased interactions between Natives and non-Natives. This increased interaction has formed the basis for subsequent federal Indian policy that was primarily advocated by non-Natives.

3.4 Public Law 280 (1953, Amended 1968)

The mid-1940s marked the "Termination Era," where Congress attempted to terminate tribal status and force assimilation by reducing funding to Indian country, revoking federal recognition of tribes, and also relocating Native Americans to urban areas.[175] It was against this backdrop that Congress enacted Public Law 280 in 1953, amending it in 1968. By granting states concurrent jurisdiction with tribes to prosecute offenses committed by or against Indians in Indian country, Public Law 280 primarily served two goals. Assimilation was undoubtedly an objective, but the added layer was that non-Indians residing on or near reservations, due to allotment, began to perceive a sense of lawlessness in Indian country. Thus, they encouraged state jurisdiction as a remedy.[176] Casselman describes: "Native Justice systems were again

[173] Id.
[174] Id.
[175] Id. at 34-35.
[176] Canby, *American Indian Law in a Nutshell*, 267.

constructed as weak and ineffective, while federal jurisdiction was considered distant and limited."[177] The second goal in mind was to drastically reduce federal supervision and responsibility over tribes due to the federal government's reluctance to allocate any of its financial resources–as it was bound to do by trust treaties–to tribes.[178] As a result, while states already maintained jurisdiction over crimes between non-Indians in Indian country, Public Law 280 extended state power to crimes by or against Indians and provided that the General Crimes Act and Major Crimes Act no longer applied to the states with mandatory Public Law 280 jurisdiction.[179]

As part of Public Law 280, Congress initially provided five, and later six, states with mandatory criminal and civil jurisdiction over Indian country and allowed other states to opt-in for partial or full jurisdiction. The mandatory states included California, Minnesota (except the Red Lake Nation), Nebraska, Oregon (except the Warm Springs Reservation), Wisconsin (except later the Menominee Indian Reservation), and, upon its statehood, Alaska. States that have opted into either partial or full jurisdiction are Nevada, South Dakota, Washington, Florida, Idaho, Montana, North Dakota, Arizona, Iowa, and Utah.[180] The tribes affected by the Act were unable to consent to the increased state control. The Act was met with controversy from both states and tribes since its inception. States opposed how they were provided with the duty of law enforcement in Indian country without the means to pay for it as Congress did not allocate appropriate funds, nor did it make Indian lands taxable by the states. Contrastingly, tribes resented how state jurisdiction was forcibly imposed on them without their consent or consultation. These criticisms were partially rectified by a group of amendments passed as part

[177] Casselman, *Injustice in Indian Country*, 35.
[178] Id.
[179] Canby, *American Indian Law in a Nutshell*, 268-269.
[180] Casselman, *Injustice in Indian Country*, 35.

of the Indian Civil Rights Act of 1968. States were now allowed to retrocede jurisdiction to the federal government, and no states moving forward could acquire jurisdiction without the consent of the tribes. Notably, since these changes, there have been several retrocessions, while no tribe has consented to state jurisdiction.[181]

While the establishment of Public Law 280 accomplished the goal of the Termination Era to dissolve federal relationships with tribes and avoid financial responsibility as well as address non-Native anxiety over perceived lawlessness in Indian country, the Act has brought with it many negative side effects. As an unfunded mandate, state law enforcement in Indian country has become sporadic because generally, state governments refuse to allocate their own funding to tribes. The effect on tribal criminal law remains less clear. Public Law 280 does not explicitly mention tribal law, thereby leading to a widespread misconception over whether states and tribes possess concurrent jurisdiction. Many courts have upheld a tribe's inherent sovereign authority over its own members, but the discontinuation of federal funding to tribes due to Termination Era motivations has prevented tribes from exercising their criminal jurisdiction.[182] Consequently, the implementation of Public Law 280 has introduced a third entity, the state, into the jurisdictional battle over criminal matters in Indian country. As Casselman highlights, "Ironically the result was that the very system that had sought to address fears of lawlessness had, in reality, created a very real sense of lawlessness in Indian country."[183]

3.5 *Oliphant v. Suquamish Indian Tribe* (1978)

Oliphant v. Suquamish Indian Tribe represents one of the most influential and devastating Supreme Court cases regarding tribal jurisdiction. In August of 1973, a non-Native

[181] Canby, *American Indian Law in a Nutshell*, 266.
[182] Pacheco, "Broken Traditions," 34.
[183] Casselman, *Injustice in Indian Country*, 35.

resident, Mark David Oliphant, assaulted a Suquamish tribal police officer and resisted arrest. The Suquamish tribe of Washington, which at the time had a fully-functioning Western-style court system, had an agreement that extended the tribe's criminal jurisdiction over non-Indian perpetrators and thus arrested and charged Oliphant. Oliphant appealed his conviction to local courts, and the courts rejected his appeal citing the tribe's inherent sovereignty. However, in 1978, the Supreme Court of the United States reversed this ruling in a 6-2 decision and held that tribes do not possess the legal right to arrest and prosecute non-Natives who commit crimes on their land.[184] In the majority opinion, Justice Rehnquist borrows some of the arguments made in *Johnson v. M'Intosh* (1823) that suggest that the United States has superiority over tribes and that tribal sovereignty is "necessarily diminished."[185] Further, Justice Rehnquist ends the opinion by addressing the prevalence of non-Indian crime on reservations. However, he reasons that such information is "for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians." Justice Rehnquist adds that the information, therefore, has "little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and punish non-Indians."[186] Alternatively, in his dissent, Justice Thurgood Marshall explains his belief that "Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation."[187]

Removing tribes' capacity to exercise criminal jurisdiction over non-Native offenders undermines the notion of tribal sovereignty. This decision disregarded the right of tribes to

[184] Id. at 37.
[185] Oliphant, 435 U.S. at 209 (quoting Johnson v. M'Intosh, 21 U.S. 543, 574 (1823)). The Court in Johnson v. M'Intosh concluded that Native Americans did not maintain the right to sell their own land to individuals. Only the federal government, the Court reasoned, could purchase Native American land.
[186] Id. at 212.
[187] Id.

govern all activities and maintain law and order on their land. This case also reveals the theme of paternalism that has been ingrained into federal Indian policy. Although the Suquamish Tribe was operating a Western-style criminal justice system, Oliphant, a non-Native community member, avoided liability. Casselman recognizes the irony behind this decision because "even the 'civilizing' project of previous federal Indian policy was not enough to trump the enduring myth of Native savagery."[188] This notorious decision thus opened the gates for non-Natives to commit crimes in Indian country and remain unscathed due to the lack of state and federal accountability. Similarly to Public Law 280, the attempt to address the colonial attitude of perceived lawlessness in Indian country only fostered lawlessness for many female victims living in Indian country.

3.6 Through a Statistical Lens: High Federal and State Declination Rates

As the previous subsections have suggested, even though jurisdiction in Indian country has been allocated to both the federal and state governments due to assimilation and paternalism principles, there have been high declination rates from both governments regarding crimes in Indian country. Declination rates refer to instances where the government declines to prosecute, thus posing significant threats to the safety and welfare of Native women who experience sexual violence. Through their research conducted between October 2002 and September 2003 on sexual violence against Native women in the United States, Amnesty International found that federal prosecutors declined to prosecute 60.3 percent of the sexual violence cases filed. However, since data on sexual violence in Indian country was not compiled, that number includes both Native and non-Native victims. Despite this, Amnesty International explains how the Bureau of Indian Affairs "was consistently among the investigating agencies with the highest

[188] Casselman, *Injustice in Indian Country*, 38.

percentage of cases declined by federal prosecutors."[189] In an attempt to explain this alarming truth, Amnesty International explores how U.S. Attorneys may not be prosecuting cases of sexual violence involving Native victims due to their complicated nature and the potential low probability of conviction.[190] While the report does not provide specific data on the prosecution rates in Public Law 280 states, it does reiterate how the reduction of funding as a result of the shifted jurisdiction has created a contradictory sense of lawlessness in Indian country.[191] For nearly 200 years, disputes over jurisdiction have existed, but it was not until the release of the Amnesty International report and subsequent media coverage that legislators began drafting laws, starting with the Tribal Law and Order Act in 2010.[192]

3.7 Tribal Law and Order Act (2010)

The Tribal Law and Order Act (TLOA) represents an attempt to address the jurisdictional and legal issues that have arisen as a result of the policies and case law aforementioned. The Act was also drafted to decrease violence against Native American women.[193] When drafting TLOA, Congress had three main goals. The first purpose was to hold federal departments more accountable for serving Native people. Second, the Act would provide greater autonomy for tribes, in both Public Law 280 and non-Public Law 280 states, to run their own justice systems. Third, TLOA was designed to increase cooperation and coordination among tribal, state, and federal officials.[194]

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[189] Amnesty International, *Maze of Injustice*, 66.
[190] Id.
[191] Id. at 29.
[192] Casselman, *Injustice in Indian Country*, 81.
[193] Office of Tribal Justice, "Tribal Law and Order Act," *The United States Department of Justice*, (https://www.justice.gov/tribal/tribal-law-and-order-act).
[194] Troy A. Eid et. al, *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States, Indian Law & Order Commission*, (November 2013), https://www.aisc.ucla.edu/iloc/report/files/a_roadmap_for_making_native_america_safer-full.pdf, i.

To accomplish these goals, TLOA included many provisions. The Act allowed for federal grants to be allocated to tribes to enhance their criminal justice systems by hiring and training new police officers, purchasing new equipment, and constructing new detention facilities. TLOA also helped improve information-sharing between tribal, state, and federal governments by establishing a program in which tribes gain access to national crime databases. Additionally, the Department of Justice became required to both publish declination rates for crimes in Indian country and to improve the repertoire of crime data. Standardized procedures in Indian Health Services facilities were also implemented to respond to sexual assault cases, and training became required for law enforcement officers and prosecutors to best aid and support Native survivors. Further, TLOA created the Office of Tribal Justice as well as several federal committees and positions to aid in the communication between tribal, state, and federal governments regarding cases originating in Indian country.[195] The Indian Law and Order Commission was established to examine and draft proposals on how to improve criminal justice in Indian country, and the Commission's work resulted in the creation of the most comprehensive report of crime in Indian country titled, "A Roadmap for Making Native America Safer."[196]

Regarding Public Law 280, TLOA created a provision that would allow tribes in Public Law 280 states to call upon the federal government to assist in instances when the state did not adequately handle crimes in Indian country. Finally, and arguably most importantly, TLOA expanded tribal sentencing authority.[197] The Indian Civil Rights Act of 1968 limited the sentencing abilities of tribes. Tribes were originally only allowed to punish with up to six months of imprisonment and fine up to $500, but a subsequent amendment allowed for maximum

[195] Casselman, *Injustice in Indian Country*, 79-80..
[196] Troy A. Eid et. al, *A Roadmap for Making Native America Safer*, i.
[197] Casselman, *Injustice in Indian Country*, 81-82.

sentences of one year and fines up to $5,000.[198] Nevertheless, with this very limited sentencing authority, tribes retained virtually no power to punish serious crimes and were thus given a reputation of maintaining lower, less serious courts than their federal and state counterparts. To address this issue, TLOA allowed tribes to sentence defendants to up to three years and issue fines of up to $15,000.[199]

Although these provisions and the Act itself signify a departure from traditional federal Indian policy and constitute positive steps towards safeguarding Native women from violence, TLOA contains certain requirements that pose challenges for tribes seeking to implement it. As opposed to previous policies, Native voices were included in the drafting of the Act. Despite this inclusion, the Act was written and signed by non-Native legislators and passed by a Congress that only had one member of Native American ancestry. Thus, lacking adequate representation of Native voices, TLOA was not formulated in a way to truly benefit tribal sovereignty.[200] Further, as Casselman argues, merely reporting on declination rates, while beneficial in raising awareness, does not solve the root issue of sexual violence against Native women. Casselman also contends that the Office of Tribal Justice, which was created to facilitate communication, does not allow for tribes to appoint liaisons who they feel have their community's best interests in mind.[201] Ultimately, this legislation serves as a stark example of how the federal government continues to prioritize its own involvement in crafting solutions for issues it originally caused, rather than truly empowering those affected to have a meaningful role in the process.

[198] Joseph Mantegani, "Slouching Towards Autonomy: Reenvisioning Tribal Jurisdiction, Native American Autonomy, and Violence Against Women in Indian Country," 111 J. Crim. L. & Criminology 313, 324 (2021).
[199] Id. at 328.
[200] Casselman, *Injustice in Indian Country*, 82.
[201] Id. at 83.

The most alarming negative aspect of TLOA, however, is that it forces tribes to adopt Western styles of justice in order to reap its benefits. To be able to exercise their increased authority to make arrests, sentence perpetrators, and access national crime databases, tribal officers must be trained and certified by non-Native law enforcement officers. Native police officers can only arrest non-Native perpetrators after entering into cross-deputization agreements with local authorities–again, another way to force tribes to adhere to Western legal standards as in *Oliphant.* Additionally, while the increased sentencing abilities allocated to tribes provide them with increased sovereignty, tribes must provide defendants with counsel who are licensed to practice in the United States, and the judges also must be licensed in the United States. The counsel and judges must be paid by the tribes themselves.[202] The non-Native justice system is thereby labeled as superior to Native justice systems because Native justice systems are only deemed acceptable when they act "appropriately." The limitations of the Act demonstrate the paternalistic perspective the federal government has historically operated under. The Act, in Casselman's words, "legislated over the problem of jurisdictional conflicts without addressing the underlying issues that shape crime in Indian country."[203] Tribes were given a sense of self-determination while simultaneously being prohibited from exercising such autonomy without changing the nature of their criminal justice systems.

3.8 Violence Against Women Act Reauthorizations (2013, 2022)

A few years after the passage of TLOA, Congress took an approach to more directly address violence against Native women. Whereas TLOA called for further state and federal intervention into the tribal criminal justice systems, the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) centered around tribal courts as the adjudicators for

[202] Id. at 85.
[203] Id. at 54.

justice in their own communities. Viewed as a partial decolonization effort, VAWA 2013 represents a monumental victory for tribes because it amended the Indian Civil Rights Act to allow tribes to prosecute, for the first time since *Oliphant*, non-Native perpetrators. In what was referred to as "special domestic violence criminal jurisdiction" (SDVCJ), participating tribes could prosecute certain defendants, regardless of their Native or non-Native status, for acts of domestic or dating violence and the violation of protection orders in Indian country. Additionally, Congress established an annual appropriation of $5 million for grants to assist tribes with exercising SDVCJ.[204] Thus, this law represented not only anti-violence legislation, but it also acted as a tool to directly help Native women who experience violence, especially from non-Native men.

While VAWA 2013 was monumental for tribal sovereignty and the prevention of violence against Native women, it also had its limitations that further elevated the colonial narrative of federal Indian policy. Although the Act provided tribes with jurisdiction to prosecute non-Natives for crimes against Natives on tribal land for the first time since 1978, the crimes which tribes could prosecute were limited. Sexual assault outside of domestic and dating violence was not included, and the non-Native defendants had to have a specific tie to the tribal community. The defendants would either have to have resided or been employed in the tribal community or have been an intimate partner of a Native person in Indian country.[205] Additionally, while tribes were now granted the authority to prosecute under SDVCJ, if a

[204] Office of Tribal Justice, "2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)," *The United States Department of Justice*, (https://www.justice.gov/tribal/2013-and-2022-reauthorizations-violence-against-women-act-vawa#:~:text=This%20expanded%20recognition%20of%20Tribal,Biden%20on%20March%2015%2C%202022).
[205] Tribal Law and Policy Institute, "Introduction to the Violence Against Women Act," *The Tribal Court Clearinghouse*, (https://www.tribal-institute.org/lists/title_ix.htm#:~:text=The%20Violence%20Against%20Women%20Act%20(VAWA)%2C%20originally%20passed%20in,violence%2C%20in%20the%20United%20States).

defendant has a combination of charges that fall outside of SDVCJ, then the tribe would not be able to prosecute them at all.[206] Further, similar to TLOA, a condition of VAWA 2013 was that a tribal court must provide certain due process protections before prosecuting a non-Native defendant under SDVCJ if there exists a possibility of imprisonment. In addition to providing all of TLOA's due process requirements, VAWA 2013 allowed for defendants to petition their conviction to a federal court for habeas corpus, to have juries consisting of any group in the community, including non-Natives, and to be provided rights guaranteed by the Constitution of the United States.[207] Ultimately, despite the positives of VAWA 2013, Casselman argues that the law prompts the following questions: "Why are tribal governments seen as legitimate authorities to adjudicate crime on their land only in 'special' cases? Whose experience of violence matters and under what circumstances?"[208]

In March 2022, President Biden signed the Violence Against Women Reauthorization Act of 2022 (VAWA 2022). While VAWA 2013 only extended jurisdiction to a select number of crimes and to those non-Natives with ties to the tribal communities, VAWA 2022 expanded those provisions. Utilizing a new term, "special tribal criminal jurisdiction" (STCJ), the Act adds the following crimes: sexual violence, stalking, sex trafficking, child violence, obstruction of justice, and assaults on tribal law enforcement officers. Further, non-Native defendants no longer are required to have ties to the tribal community.[209] VAWA 2022 also reauthorizes the grant program established by VAWA 2013 in addition to authorizing a new reimbursement program

[206] Amnesty International, *The Never-Ending Maze*, 42.
[207] Tribal Law and Policy Institute, "Introduction to the Violence Against Women Act."
[208] Casselman, *Injustice in Indian Country*, 109.
[209] Tribal Law and Policy Institute, "Tribal Provisions of Violence Against Women Act (VAWA) 2022," *The Tribal Court Clearinghouse*, (http://www.tribal-institute.org/lists/VAWA2022.htm).

for expenses related to exercising STCJ. The Act allocates $25 million to be used between the grants and reimbursements.[210]

VAWA 2022 addresses some of the limitations of VAWA 2013, but it still presents barriers to tribes who wish to prevent and respond to sexual violence against their women. Generally speaking, tribes still lack the full autonomy to prosecute non-Indians who commit any crime in Indian country. Tribes also still have to submit to TLOA's due process requirements. As Ashleigh Lussenden notes in "Reimagining the Violence Against Women Act for Tribes in 2022," there remains no indication in VAWA 2022 that tribes will be able to operate their own criminal justice systems as they see fit. Rather, this "all-or-nothing" situation as "an extension of Congress's plenary power" forces tribes to make the difficult choice between protecting their women and retaining their sovereignty.[211]

3.9 A Jurisdictional Maze: Determining Jurisdiction in Indian Country

As demonstrated in this chapter, federal Indian policy is rooted in ideas of assimilation and paternalism. The laws that have been enacted since the 1800s resemble the United States government's undeniable distrust of Indigenous governments to effectively try and prosecute cases themselves. Such policies were created due to white fear over the perceived lawlessness in Indian country and also as an effort to completely destroy the tribal communities themselves. Instead of choosing to enhance tribal criminal justice systems as a solution to their distrust, policies have, instead, been created and implemented that have repeatedly shifted the balance of jurisdictional power away from tribes and toward the federal and state governments. Similar to the rhetoric in both the *McGirt* and *Castro-Huerta* jurisdictional debates, federal Indian policy

[210] Office of Tribal Justice et. al, "2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)."
[211] Ashleigh Lussenden, "Reimagining the Violence Against Women Act for Tribes in 2022," 27 Berkeley J. Crim. L. 141, 160 (2022).

represents both the federal and state governments' desires to achieve more power through jurisdictional control. Tribal criminal justice systems are written off as inferior and meaningless, and the result of that rhetoric is the confusing complexity of federal Indian policy and case law that has been compounded over decades, all without the consent of the tribes themselves.

This complicated body of federal Indian policy creates the jurisdictional maze, and the consequences for Native women who experience sexual violence are especially severe. When a Native woman experiences sexual violence on her land, a myriad of questions must be posed and resolved before the pursuit of justice can even begin. Such questions are: where did the crime exactly occur (Public Law 280 state or non-Public Law 280 state)? What is the identity of the perpetrator (non-Native or Native)? What type of crime was it (non-major or major crime, whether or not it falls under STCJ)? Jurisdiction can only be determined after all of those questions are answered, whereas if a non-Native woman experiences sexual violence on land that does not constitute Indian country, the state automatically has jurisdiction. Moreover, if the Native survivor cannot answer these crucial questions or if the details of the case are unidentifiable in general, as in cases of missing or murdered persons, then the case will likely not be investigated at all. When significant emphasis is placed on jurisdiction, then other crucial elements of the investigation, such as evidence collection and conducting interviews with persons of interest, are often neglected.[212] As alluded to earlier, this intricate process of determining jurisdiction leads to numerous cases without arrests or referrals to state or federal authorities. Even if these cases are referred to either government, the high rates of declination result in these cases coming to a dead end with no further recourse. These detrimental effects shine light on the federal government passing legislation when Indian country "endangers" non-

[212] Casselman, *Injustice in Indian Country*, 54.

Natives while turning a blind eye when it comes to the safety and welfare of Native women. As a result, non-Native men have benefitted from such complications and neglect.

In the post-*Oliphant* era up until the creation of TLOA, VAWA 2013, and VAWA 2022, reservations represented a space where non-Native men can travel to, commit acts of sexual violence against Native women, and leave completely unscathed. Amnesty International stated in their 2007 report that in 86 percent of sexual assault cases, Native women listed the perpetrator as non-Native.[213] Thus, sexual violence against Native women in Indian country is overwhelmingly interracial, largely shaped by the colonial and paternalistic attitudes that have driven jurisdiction legislation over the past two centuries. As Casselman observes, "[t]he ease with which non-Native men may sexually violate Native women sends the message that the bodily integrity of Native women is not to be respected, that crime against Native women simply does not matter, and that Native women by their very racial and gender identities are inherently rapable."[214] This system, thus, awards privileges to non-Natives while simultaneously marginalizing Native Americans. Native women in particular are relegated to a subclass of human existence even lower than that of their tribes.

While TLOA and VAWA reauthorizations are recognized as effective steps in mitigating the problem, they require tribes to comply with strict standards they are often unable to meet. As aforementioned, the Acts force tribes to adopt Western-style systems of justice in order to benefit from their limited provisions. The implementation of the Acts also financially burdens tribes. Despite TLOA's promise to allocate funding and resources to Indian country, Amnesty International reports that "[s]ince 2013, both total funding for the US Attorney's Office resources in Indian country and the number of attorneys responsible for Indian country prosecutions

[213] Amnesty International, *Maze of Injustice*, 4.
[214] Casselman, *Injustice in Indian Country*, 57.

decreased by 40%."[215] As of October 2021, only 16 tribes were exercising TLOA's enhanced sentencing authority, and Amnesty International heard from countless tribal judges and attorneys that the requirements of TLOA were too costly for tribes.[216] This low utilization rate also applies to VAWA 2013. Amnesty International describes that as of February 2021, only 27 tribes were taking advantage of the Act's special jurisdiction and that the immense cost of implementation was preventing other tribes from doing so.[217] Regarding grant allocations under VAWA reauthorizations, the funding has a fixed cap and requires tribes to re-apply for non-guaranteed funding every two years. Without a reliable and constant stream of financial assistance, many tribes have not opted into VAWA.[218] Thus, TLOA and VAWA reauthorizations are successful in that they represent attempts to reduce the problem previous federal Indian policy created, but they concurrently pose significant challenges to tribes who wish to implement their provisions. Not enough time has passed since VAWA 2022 for data to be collected on the rates of sexual violence against Native women by non-Native perpetrators, but given all the problems with the statute, it is unlikely that the rates will decrease.

Declination rates have decreased by 10 percent following the passage of TLOA, but prosecutors are nevertheless still declining to prosecute cases in Indian country.[219] Amnesty International reports that of all the declined cases in Indian country in 2019, the Department of Justice declined to prosecute 79 percent of them because of a lack of evidence, which represents the same line of reasoning described in their 2007 report regarding declination rates.[220] While narrow exceptions were given to tribes to exercise some degree of criminal jurisdiction, federal

[215] Amnesty International, *The Never-Ending Maze*, 41.
[216] Id. at 44.
[217] Id. at 46.
[218] Id. at 45.
[219] Id. at 74.
[220] Id. at 75.

and state authorities continue to decline the cases of sexual violence that are referred to them.[221] Survivors are consequently left with no option for redress. Further, data collection remains a problem, despite TLOA's requirement that the Department of Justice establish a tribal crime data system. As the Department of Justice Office of the Inspector General found in 2017, the Department of Justice and its components "still lack a coordinated approach to overseeing the assistance it provides in Indian country…has not prioritized assistance to Indian country at the level consistent with its public statements or annual reports to Congress…[and] crime data in Indian country remains unreliable and incomplete."[222] Without reliable and up-to-date data, the severity of the crisis Native women face cannot be truly conceptualized, and progress cannot truly be measured without an accurate baseline.

The complexity of federal Indian policy is apparent, and despite their drawbacks, TLOA and VAWA reauthorizations are considered favorable legislative additions in comparison to their predecessors. Putting the troublesome aspects of the Acts aside, they did afford some degree of autonomy to tribes. *McGirt* continued the trend of recognizing tribal sovereignty by finding that Congress never disestablished tribes in Oklahoma. However, *Castro-Huerta* represents a departure from the positive trend and plays into the racist rhetoric that has punctured tribal sovereignty and the safety of Native women. As Justice Gorsuch details in his dissenting opinion, *Castro-Huerta* circumvents the process laid out in Public Law 280 for states to obtain concurrent jurisdiction.[223]

As Native nations possess their own cultures and governments, they are the best candidates to truly seek justice for their women who experience violence. Yet, as made evident

[221] Id.
[222] US Department of Justice, Review of the Department's Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010, December 2017, i, https://oig.justice.gov/reports/2017/e1801.pdf.
[223] Castro-Huerta at 2509 (Gorsuch, N., dissenting).

throughout this chapter, many obstacles prevent tribes from doing so. The next two chapters will detail what other scholars have recommended as possible solutions and will highlight an approach that will also combat the injustices arising from the *Castro-Huerta* decision.

Chapter 4: Suggested Solutions for Jurisdictional Problems

Native women in the United States are over twice as likely to be sexually assaulted than non-Native women. Their perpetrators are predominantly non-Native men. These are not random occurrences.[224] This thesis has explained federal Indian policy and law through the Native female perspective, starting with detailed analyses of the most recent Supreme Court cases, *McGirt* and *Castro-Huerta*, and then discussing the various policies and case law that have contributed to the complex relationship between tribes and the federal and state governments. Tribal sovereignty has been attacked and diminished, and the result of the jurisdictional maze is that Native women who experience sexual violence or become missing and murdered are routinely denied justice. While *McGirt* along with recent Acts such as TLOA and VAWA 2013 and 2022 are mainly seen as positive steps to strengthen tribal autonomy and address the sexual violence crisis Native women face, contrastingly, *Castro-Huerta* fuels the paternalism and assimilation rhetoric of federal Indian policy and law.

Many scholars over time have grappled with these issues, with some purely focusing on jurisdiction and others focusing on the relationship between jurisdiction and sexual violence against Native women. This chapter will explore the various solutions that have been recommended since 2020. While many of these scholarly works do not mention the most recent developments in federal Indian policy and law, they nevertheless offer insightful proposals on what can be done to furnish more autonomy to tribes and alleviate the crisis Native women face.

[224] Amnesty International, *The Never-Ending Maze*, 8, 39.

4.1 Emily Mendoza, "Jurisdictional Transparency and Native American Women" (2020)

Writing in 2020, Emily Mendoza recognizes that past federal Indian policy and law created the jurisdictional maze and that recent legislative solutions have largely exacerbated the confusion. Thus, she advocates for "jurisdictional transparency."[225] She highlights how "[j]urisdictional transparency is a concept, if not a term, that is evident in U.S. jurisprudence: the notion that jurisdictional rules should be clear and understandable in the interest of judicial efficiency, predictability, and accessibility."[226] Despite this clear concept ingrained in United States jurisprudence, Mendoza explains that tribal criminal jurisdiction lacks transparency.

She strongly advocates for jurisdictional transparency to "avoid unnecessary re-traumatization of victims, preserve judicial resources, and promote meaningful access to the courts."[227] To accomplish this transparency, she recommends establishing clear statements of jurisdiction. Referencing VAWA 2013, she claims that a statement could assert that tribes retain jurisdiction over anyone, including non-Indians, who commit gender-based violence.[228] This statement would eliminate the requirement that defendants have ties to reservations and would clear confusion about whether the crime falls under the domestic violence category.[229] While VAWA 2022 partially addresses those concerns Mendoza names, her advocacy for judicial transparency is still noteworthy because its aim to reduce confusion around intricate elements of tribal criminal jurisdiction can still be applied today.

Notably, she considers other approaches that address the jurisdictional barriers Native women face and ultimately rejects them. One approach she describes is making the federal

[225] Emily Mendoza, "Jurisdictional Transparency and Native American Women," 11 Calif. L. Rev. Online 141 (2020).
[226] Id. at 144.
[227] Id. at 162.
[228] Id. Note: this article was written before the passage of VAWA 2022.
[229] Id. at 163.

government take on the responsibility of improving the situation in Indian country by allocating more funds to tribal governments, intensifying prosecution efforts, and increasing overall involvement in reducing crime in Indian country. The other approach she references is restoring full jurisdiction to tribes and allowing them to prosecute anyone who commits crimes on their land.[230] However, she explains that both proposals would "require drastic changes to current practice that would be politically fraught and difficult to achieve."[231] She further specifies that challenges to the United States' assimilationist and paternalistic views have always encountered strong resistance and that any sort of legislative solution would be a compromise and only add another layer of confusion. Therefore, she concludes, "[b]efore one can advocate for a grant or divestiture of jurisdiction, it must become clear what jurisdiction is."[232]

4.2 Reema Sood, "Repairing the Jurisdictional 'Patchwork' Enabling Sexual Assault on Indian Reservations" (2020)

Also writing in 2020, Reema Sood advocates for three potential remedies to address the jurisdictional problem and its effects on Native women.[233] She addresses how TLOA and VAWA 2013 are positive pieces of legislation but fall short in other aspects such as the requirement to adhere to federal guidelines, internal tribal politics, financial burdens for tribes, racism, and the lack of funding from the federal government.[234] She advocates for the use of civil torts, a reversal of *Oliphant*, and healing through tribal values.

While civil jurisdiction has not been a focus in the criminal jurisdiction conversation, Sood first advocates for Indian women use civil tort actions to "provide themselves with a viable means of redress."[235] She references how *Montana v. United States* (1981) limited tribal civil

[230] Id. at 143.
[231] Id. at 144.
[232] Id. at 164.
[233] Sood, "Repairing the Jurisdictional 'Patchwork,'" 230.
[234] Id. at 253-256.
[235] Id. at 256.

authority over non-Indians with two exceptions and that Indian women could utilize the second exception: "that a tribe could exercise 'civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct threat on the political integrity, the economic security, or the health or welfare of the tribe.'"[236] Indian women could sue perpetrators, Indian or non-Indian, under this exception for traditional torts such as assault, battery, intentional infliction of emotional address, and potentially false imprisonment. Sood addresses how the civil system would provide Indian women with more control over their cases especially since the federal and state criminal systems tend to not be representative of their own interests.[237]

A case Sood highlights as an example of what this action would look like is *Dollar General Corp. v. Mississippi Band of Choctaw Indians* (2016).[238] Sood details how a Dollar General Store had hired a thirteen-year-old boy from the Choctaw reservation, and during his employment, his non-Indian manager sexually molested him. The boy subsequently brought an action in tort against the manager in tribal court, and both the franchise and manager filed a complaint to the U.S. District Court for the Southern District of Mississippi claiming that the tribal court lacked jurisdiction over this matter. However, the District Court disagreed, and the Fifth Circuit Court ultimately held that the tribal court did have jurisdiction over this case. The Fifth Circuit had referenced tribes' inherent sovereignty in addition to the manager's implicit consent to tribal jurisdiction, thereby implying that *Oliphant* did not apply in the civil context. The Supreme Court affirmed this ruling without issuing an opinion.[239] Despite this potential for success, Sood ends this section by stating how one limitation of this option is the possibility of

[236] Id. at 256-257 (quoting United States v. Montana, 450 U.S. 544, 566 (1981)).
[237] Id. at 257.
[238] Dollar General Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159 (2016).
[239] Id. at 257-258.

perpetrators not being able to pay the damages awarded to the victim.[240] This possibility would also cause civil attorneys to potentially not take sexual assault cases, but Sood reasons that the attorneys would have to be "devoted to enacting social change through cases that may or may not lead to large awards for damages."[241]

Second, Sood concisely argues for *Oliphant* to be reversed or overridden by Congress. She suggests that non-Indians would still know they are free to commit crimes in Indian country, especially against Indian women, without consequence if *Oliphant* remains in place. In addition, Sood advises that Congress enhance its funding allocation for the upkeep of tribal governments, as part of fulfilling the trust obligation that the United States had assumed towards tribes.[242]

The third remedy Sood supports is the use of traditional tribal values to facilitate healing.[243] Citing several examples of reservations utilizing these values, Sood notes how "[i]nformal systems could assist Indians as an alternative method of seeking justice, especially considering the failure of the criminal system to deliver."[244] While tribal members are vastly disconnected from their history as a result of the United States' deliberate efforts to disrupt the internal power dynamics of Indian tribes, Sood suggests that they "can go through a healing and restoration process to revive lost tribal values and practices."[245] In closing, Sood references how the community-based justice model has acted as a deterrent for sexual assault for tribes and would, therefore, be a feasible option for achieving tribal autonomy and upholding tribal values.[246]

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[240] Id. at 258.
[241] Id. at 258-259.
[242] Id. at 259.
[243] Id. at 260.
[244] Id. at 261.
[245] Id. at 262.
[246] Id.

4.3 Joseph Mantegani, "Slouching towards Autonomy: Reenvisioning Tribal Jurisdiction, Native American Autonomy, and Violence Against Women in Indian Country" (2021)

Joseph Mantegani, writing in 2021, views current and proposed legislation such as TLOA and VWA 2013 as "focus[ing] too much on the terminal stage of day-to-day violence against women–the missing and murdered indigenous women crisis–and inadequately address the day-to-day violence itself."[247] He acknowledges how "there is no one-size-fits-all solution" and instead advocates for three different approaches: overturning *Oliphant,* allocating more resources to tribes, and achieving tribal autonomy.

Similar to Sood, Mantegani advocates for *Oliphant* to be overruled. He asserts that no other solution can be successfully implemented if *Oliphant* still stands.[248] Further, he notes how both tribal and federal officials have denounced the ruling, testifying that its consequences affect tribal sovereignty and any progress toward achieving safety for Native women. This "barrier" prohibits tribes from performing the fundamental task of protecting their own members. This inability, thus, "delegitimizes them in the eyes of their members, exposes them to opportunistic criminals, and creates a cycle of crime and violence that further threatens their autonomy."[249]

Mantegani argues that additional resources will help improve the effectiveness of tribal law enforcement. He argues how there is a shortage of tribal police officers and prosecutors and how inadequate databases and lack of record sharing between tribal, state, and federal governments make it difficult for missing and murdered Native women to be tracked.[250] Additionally, Mantegani indicates that tribes often are stuck having to choose whether to utilize their already-limited resources to even determine if they can investigate a crime due to the

[247] Mantegani, "Slouching towards Autonomy," 355.
[248] Id. at 344.
[249] Id. at 345.
[250] Id.

importance of a perpetrator's race.[251] Beyond the pure financial need for tribes to receive additional resources, Mantegani also stresses how the allocation is morally right. Tribes were stripped of their land, and the federal government is bound by treaties to provide resources to tribes. Moreover, he details how tribes are set up to fail because legislation such as the Indian Civil Rights Act and TLOA shift authority back to tribes without supplementing that authority with sufficient resources. [252]

Aligned with Mendoza's argument for jurisdictional transparency, Mantegani agrees that there is a need to simplify the jurisdictional maze, but he instead supports complete tribal sovereignty as a means for achieving simplification. The lack of tribal autonomy has many consequences, but he first highlights the two main ones: tribes being limited in their punishing capabilities and cross-deputization agreements that truly advance only one entity's law enforcement practices.[253] Even if *Oliphant* becomes overruled and tribes receive sufficient resources, Mantegani notes how tribes need to apply laws in a manner consistent with their own beliefs and practices and without any federal oversight or limitations.[254] Rather, federal "limitations should have the same effect on tribal courts as they have on state courts–operating to keep them within bounds, while still permitting sovereignty."[255] Thus, without the complete ability to prosecute whomever according to their own laws, "tribal authority is impotent."[256]

[251] Id. at 345-346.
[252] Id. at 346.
[253] Id. at 347.
[254] Id.
[255] Id. at 348.
[256] Id.

4.4 Mary Hannon, "Beyond a Sliver of a Full Moon: Acknowledging & Abolishing White Bias to Restore Safety & Sovereignty in Indian Country" (2021)

Mary Hannon, in 2021, observes how the recognition of tribal sovereignty has increased because of *McGirt* and VAWA but also recognizes SDVCJ's shortcomings.[257] Thus, she also argues for a full abrogation of *Oliphant* but elaborates how the change would impact Indigenous women, non-Indian defendants, and the tribal court system and tribal-federal relations in general.

Undoubtedly, a reversal of *Oliphant*, as Hannon describes, would enable a greater number of Indigenous women to witness their assailants be held accountable, but Hannon also specifies how it would improve the devastating socioeconomic effects of the current system. She reports that many reservations are located in remote areas and cites the Blackfeet Indian reservation as an example. This reservation is located on the edge of the Rocky Mountains in northwest Montana, and while the closest tribal court is only 1.5 miles away, the nearest federal court is 127 miles from the reservation.[258] In consequence, with the current system in place, Indigenous women will most likely have to travel far distances to potentially receive justice, thus financially burdening them. While Hannon also notes how in some instances, federal courts are more accessible than tribal courts, the complete reversal of *Oliphant* would restore concurrent jurisdiction to tribal courts, not exclusive jurisdiction. It would provide the option for tribes to prosecute cases involving non-Indian defendants that the federal government had declined to prosecute.[259]

Hannon highlights the main objection to reversal: concerns over the rights of non-Indian defendants. She observes how those who have opposed VAWA did so out of concern of whether

[257] Mary Hannon, "Beyond a Sliver of a Full Moon: Acknowledging & Abolishing White Bias to Restore Safety & Sovereignty to Indian Country," 9 Am. Indian L.J. 257 (2021).
[258] Id. at 286.
[259] Id. at 287.

tribes would adhere to constitutional protections guaranteed to defendants. Such concerns only resemble the bias against tribes and Native Americans and ignore how non-Natives constitute a large percentage of reservation land. Secondly, the enactment of VAWA 2013 demonstrated a compromise by ensuring that defendants retained their constitutional rights.[260]

Hannon finally considers both the beneficial and potential negative consequences of the restoration of criminal jurisdiction to tribal courts. The obvious benefit, she says, would be that tribes could "file orders and render decisions in criminal suits without the worry of that action not being recognized as binding, and without the competence of the judge–or the entire system–being called into question."[261] Namely, Congress would be forced to implicitly acknowledge the prejudice against tribal court systems if *Oliphant* is overturned. Similar to Sood and Mantegani, Hannon calls for Congress to also allocate funding to tribes because of the financial burden they will likely endure as a result of this major statutory change.[262] However, departing from Sood and Mantegani's calls for full tribal autonomy, Hannon argues that "[t]he receipt of federal assistance and access to federal services is contingent on a tribe's recognition by the federal government, and in order to secure federal recognition, a tribe must accede to some level of federal oversight and control."[263] Thus, Hannon, while arguing for the freedom of tribes to prosecute non-Native perpetrators, adds that some sort of compromise would still be necessary for tribes to receive federal assistance.

[260] Id. at 288.
[261] Id.
[262] Id.
[263] Id. at 289.

4.5 Amnesty International, *The Never-Ending Maze: Continued Failure to Protect Indigenous Women from Sexual Violence in the USA* (2022)

As a human rights organization, Amnesty International outlines thirty recommendations in its 2022 report to help reduce violence against Native women. While each proposal is important to consider, only the proposals that directly contribute to this conversation and the specific issues aforementioned in Chapter 3 will be referenced. Similar to the scholars previously discussed in this chapter, Amnesty International similarly advocates for *Oliphant* to be overturned as well as for funding to be allocated to tribes to improve their criminal justice and data collection efforts.

Amnesty International calls on Congress to legislatively overrule *Oliphant* and recognize a tribe's inherent right to concurrent jurisdiction over all crimes committed in Indian country in order to untangle the jurisdictional maze.[264] Referencing the financial burdens TLOA and VAWA place on tribes for them to even benefit from their provisions, Amnesty International also advocates ending grant-based, competitive funding. Obtaining funding should not be complicated; rather, a permanent and constant stream of funding should be allocated to tribes to build and maintain their tribal law enforcement. Amnesty International builds upon this idea of funding by specifically advocating that Congress should also fund data collection and research on violent crimes against Native women.[265] The organization importantly adds that "[t]he methodologies applied must be in full consultation with affected Indigenous peoples, particularly Indigenous women, obtaining their free, prior, and informed consent."[266]

The organization also offers several solutions geared at delivering justice through prosecutions. It first recommends that Congress go beyond TLOA and amend the Indian Civil

[264] Amnesty International, *The Never-Ending Maze*, 79.
[265] Id. at 80.
[266] Id.

Rights Act to allow tribes to sentence perpetrators proportionally to the crimes they committed. Amnesty International also advocates for Native Americans, in particular Native women, to be represented in the agencies responsible for administering justice in Indian country.[267] Amnesty International emphasizes their recommendation made earlier that the federal government should fund data collection efforts regarding violence against Native women. The organization urges the Department of Justice to also keep track of the Indigenous status of the victim and perpetrator as well as the reasons why a case was declined for prosecution. Further, Amnesty International strongly advises that tribes should be consulted "to ensure proper data collection and sustained access to the data" and that "this data be shared with tribes in a timely manner."[268] In concluding their long list of recommendations, Amnesty International suggests that the Department of Justice report yearly on both sexual violence against native women and the criminal justice responses.[269]

4.6 Ashleigh Lussenden, "Reimagining the Violence Against Women Act for Tribes in 2022" (2022)

As referenced in Chapter 3, Ashleigh Lussenden recognizes VAWA 2022 as an improvement from VAWA 2013 for its expanded coverage as well as how it no longer requires non-Native defendants to have connections to the tribal community. However, as quoted in Chapter 3, tribes are compelled to make a challenging decision between safeguarding their women and upholding their autonomy due to the "all-or-nothing" situation.[270] Keeping in mind the limitations of TLOA and VAWA, she proposes a "two-fold, opt-in solution."[271]

[267] Id. at 83.
[268] Id. at 84.
[269] Id.
[270] Lussenden, "Reimagining the Violence Against Women Act," 160.
[271] Id. at 161.

She first advocates for SDVCJ to be extended to all tribes and for tribes to be allowed to have complete control over their criminal justice systems. She notes that under this solution, tribes would not receive any of the grant or reimbursement money offered to tribes that opt into VAWA's implementation.[272] Tribes would also be limited to sentences allowed by the Indian Civil Rights Act, imprisonment of one year or a $5,000 fine per offense, for non-member Indians and non-Indians.[273] Further, "tribes would be required to maintain the ability for a defendant to file a habeas petition after their tribal court options are exhausted or within a reasonable time period if the tribal court has not moved forward with the case."[274] Lussenden believes this avenue of retaining SDVCJ without receiving financial and infrastructural support would permit tribes to protect their members without foregoing their sovereignty. She also believes that "establishing a track record of successful prosecutions that lead to positive outcomes for survivors and offenders and showcase the efficacy and fairness of tribal courts would also set the stage for granting tribes even broader territorial jurisdiction in the future."[275] However, she does realize how some tribes want or need additional assistance to grow and maintain their criminal justice systems, thus leading her to describe the second option.

For tribes that need extra support from the United States government, Lussenden proposes two options: fully implement VAWA 2022 or a compromised option of using either restorative justice or the federal court as a means of justice. For the first option, tribes would accept the grant money and would be allowed to prosecute according to VAWA 2022's SDVCJ, but they would still have to adhere to the various restrictions imposed on them by the federal

[272] Id.
[273] Id. at 161-162.
[274] Id. at 162.
[275] Id.

government.[276] She observes how the cost-benefit analysis of this option could make sense for some tribes, especially if they require financial support. She also notes how tribes can "choose to accept less funding for greater flexibility with more limited oversight or may cease accepting funding altogether and revert back to limited baseline SDVCJ."[277]

After explaining this first opt-in option, Lussenden explains the second opt-in option in which "tribes would have slightly expanded jurisdiction over the default baseline SDVCJ, but have a more limited sentencing power and receive less funding than if they adopted VAWA 2022."[278] The expanded jurisdiction, she explains, could take several forms: "funding and institutional assistance for cross-deputization of tribal police, granting tribal police territorial jurisdiction over anything within their tribes' territory, or granting tribal police jurisdiction over anything that falls under SDVCJ."[279]

Regarding the choice for the path forward, once a defendant appears in front of a tribal court, the tribe would be able to present each party with options to choose from. The parties could choose to participate in the restorative justice approach, they could go through the tribal court process with limited sentencing options under the Indian Civil Rights Act, or the case could be transferred to the federal government.[280] The restorative justice path "would allow tribes to engage in community building, focus on long term solutions to the problem of violence against women in tribal communities, and do so in a way in which tribal culture is prominent in the process."[281] This process would also allow Native women to have more of a voice in their healing process. Additionally, this would be an opt-in program with no incarceration, which

[276] Id.
[277] Id. at 163.
[278] Id.
[279] Id. at 164.
[280] Id.
[281] Id. at 165.

requires the perpetrator's consent, any due process concerns and federal oversight would be eliminated.[282]

However, as Lussenden explains, the tribes and survivors maintain the discretion to still choose the federal jurisdiction option and withhold the choice aspect from the perpetrator if they wish to do so.[283] The parties together could also simply opt for transferring the case to federal jurisdiction, but this would require significant cooperation between tribal and federal governments. She also suggests that this arrangement could require the federal government to utilize higher standards when deciding whether or not to proceed with the case as well as becoming mandated to report their reasoning for declining to prosecute. Ultimately, if the federal government declines to prosecute, then the tribal government could pick up the case while "still preserving the habeas right to ameliorate due process concerns."[284]

Lussenden addresses how the federal government mainly declines to prosecute cases of violence against Native women because of a lack of evidence. She explains that under this option, "cross-deputization of law enforcement, combined with heightened and better funded evidence collection and preservation, will likely increase the number of cases the federal government prosecutes substantially."[285] Additionally, funding could be allocated to build or maintain the tribes' restorative justice programs, court systems, police capabilities, and any other aspect of the criminal justice process. The funding administration under this option would ultimately act as "an intermediate option between receiving no federal support and receiving the

[282] Id.
[283] Id.
[284] Id. at 166.
[285] Id.

full support under VAWA 2022, and tribes could work with the United States to determine what level of oversight is appropriate for the level of financial support being given."[286]

In overview, Lussenden affirms how this option would allow tribes to maintain their independence because it would allow them to dictate for themselves the best avenues for recourse. Native survivors would also be allowed to have more say in their healing process. Ultimately, while Lussenden recognizes that this option has positive and negative aspects, "the ability to opt-in to traditional, non-carceral tribal justice frameworks nods to respecting tribal authority and sovereignty while still providing an Anglo-American carceral option to satisfy worries about effectiveness and fairness for defendants and safety for survivors."[287] Moreover, the data collection element could ultimately prove that tribal governments can prosecute cases with the same efficacy as, if not greater than, the federal court system.[288]

4.7 Michael Rusco, "*Oklahoma v. Castro-Huerta*, Competitive Sovereign Erosion, and Fundamental Freedom" (2022)

Michael Rusco uses the term "competitive sovereign erosion" to reframe Indian policy and law. He defines competitive sovereign erosion as "the incremental loss of authority that results when two governments assert authority over the same people and territory at the same time."[289] Eventually, the government that is unable to enforce its law loses its sovereignty. Rusco connects this concept to how when drafting the Constitution, the Founding Fathers feared that the federal government would assume complete control over the states. Observing that this same dilemma the Founders faced has characterized federal Indian law, Rusco adds how "[t]he fundamental tension in federal law concerning tribes is how federal, tribal and state sovereignty

[286] Id. at 167.
[287] Id.
[288] Id. at 167-168.
[289] Rusco, "*Oklahoma v. Castro-Huerta*, Competitive Sovereign Erosion," 29.

compete, and how the executive, legislative, and judicial branches of each sovereign attempt to resolve that competition."[290] Further, Rusco explains that under competitive sovereign erosion, *Castro–Huerta* is proof that United States federalism is the "root cause of the slow erosion of tribal sovereignty over time."[291] The *Castro-Huerta* decision represents governmental authorities overlapping, thus creating conflicting laws and reducing tribal authority.

Before examining potential solutions to this issue, Rusco explains how tribal citizens' "participation in state political processes and structures likely accelerates competitive erosion."[292] He claims that when tribal citizens vote in state elections or are elected to state office, they actively encapsulate the fusion of tribal and state law and authority, thereby consenting to both systems of government. They would be bound by both laws, but "there is little doubt that tribal law could never supersede state law on state lands."[293] All of this, Rusco contends, validates claims that reservations are part of the surrounding state, not separate from it.[294] However, he takes into account the alternative perspective of how "the consequences of participation are merely theoretical."[295] Those who adopt this perspective claim that recent federal policy supports self-determination, perhaps referring to *McGirt*, but Rusco refutes this by arguing that *Castro-Huerta* dissolved that trend.[296] Instead, as aforementioned, *Castro-Huerta* fits into the pattern of competitive erosion, as it reduces tribal authority and establishes a broad jurisdictional overlap.[297]

[290] Id. at 30.
[291] Id. at 2.
[292] Id. at 34.
[293] Id. at 35.
[294] Id. at 36.
[295] Id. at 37.
[296] Id.
[297] Id. at 39.

While Rusco spends time recognizing the potential benefits of tribal participation in state political processes–such as the rise of the tribal gaming enterprise and tribal populations acting as swing votes in elections–he advocates that lobbying can be an alternative way for tribes to remain politically engaged without consenting to be governed.[298] Lobbying and negotiation do not represent direct political participation, Rusco states, and he also highlights how some scholars have observed that tribal lobbying has had far greater impacts on tribes "than the occasional and erratic court opinion."[299] He builds off of this concept by noting how separation would be a more favorable solution for tribes to strive for, rather than incorporation, since tribes could have the ability to still reap the benefits of participation due to tribal lobbying.

Rusco considers tribal-state separation through respected borders by focusing on the overlap between the two regarding person and place. Separating tribal citizens from the state would require tribes to resolve the dual-citizenship problem. Rusco suggests that this could be achieved "by automatically dis-enrolling, temporarily or permanently, any reservation citizen who registers to vote in state elections, files to run for state office, or serves in elected state office."[300] However, addressing the controversial nature of this proposition, Rusco reasons that those who wish to become citizens of other countries must renounce their U.S. citizenship.[301] He also considers how by not being eligible to vote in state elections, tribal citizens would also not be able to vote in federal elections. Federal participation is important because it largely determines policies and programs that affect tribal life, but Rusco presents three solutions: "1) creation of an alternative, strictly federal registration by states, 2) creation of a process by which

[298] Id. at 45-50.
[299] Id.
[300] Id. at 55.
[301] Id. at 53.

tribal citizens register to vote in federal elections independent of state registration process, or 3) giving up federal suffrage and limiting tribal participation in federal policies to lobbying."[302]

Rusco next considers separating tribal land from state land as a means for achieving tribal-state separation. While dis-enrolling citizens would resolve the dual-citizenship issue, he points out that dis-enrolled citizens could still participate in state elections while living on reservation land as non-Natives living on reservation lands can.[303] To solve these barriers, Rusco states that tribes can adopt laws that prohibit the establishment of state polling locations on tribal lands. To further advance territorial sovereignty, he argues the importance of "severing the legal connection that makes tribal authority within reservations contingent on the ownership status of the land."[304] He ends this section about tribal-state separation via respected reservation borders by predicting non-Native residents would strongly oppose these measures because they would be subjected to the tribal government.[305]

A second option Rusco describes considers separation but not complete disconnection. This option would emphasize how tribal and state authorities overlap regarding subject matter rather than person and place and would aim to provide more authority to tribes. This option would need to be supplemented by an agreement between tribes, states, and the federal government. While Rusco states that detailing a law that segregates authority is beyond the scope of the paper, he does describe how some sort of affirmative law would be necessary "given that federal courts have proven unwilling to maintain a coherent sovereign boundary."[306] Similar to how authority is divided between states and the federal government under the Tenth

[302] Id. at 57.
[303] Id. at 58.
[304] Id. at 59.
[305] Id. at 60.
[306] Id.

Amendment, this option would ultimately provide the state and federal governments with as little power as possible and allow tribes to retain most of the authority.[307]

While Rusco advocates for tribal-state separation either through respected reservation borders or under a reserved rights framework, he also considers what would happen if tribal citizens were to continue to participate in state politics without seeking some degree of power. Under this scenario, tribal autonomy would diminish as a result of competitive erosion. Alternatively, he suggests that tribes could completely incorporate into the surrounding state while finding a way to still maintain some of the advantages they enjoyed prior to incorporation such as legalizing certain types of gaming.[308]

Ultimately, Rusco ends his piece by noting how Indian law resembles the desire people have to maintain sovereignty. "There is no qualitative or quantitative difference between the free will of Indians and non-Indians. What has changed are the non-Indians making decisions about tribal sovereignty, their character, and their commitment to the rule of law."[309]

4.8 Grant Christensen, "Using Consent to Expand Tribal Court Criminal Jurisdiction" (Forthcoming 2023)

Grant Christensen also writes in response to *Castro-Huerta*. While Rusco mainly advocates for tribal-state separation, Christensen, similar to some of the claims made by Sood and Lussenden, notes how "tribes can assert criminal jurisdiction over non-Indians who consent to the jurisdiction in tribal court."[310] The basis of his argument encompasses both affirmative and applied consent, and it is inspired by research and precedents predating *Oliphant*, as well as from more recent advancements made by Congress, the Court, and the Ninth Circuit.

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[307] Id. at 61.
[308] Id. at 62.
[309] Id. at 63.
[310] Grant Christensen, "Using Consent to Expand Tribal Court Criminal Jurisdiction," California Law Review (forthcoming) 1 (2023).

Christensen supports his main argument of consent by asserting that tribes possess the authority to exclude others, which thus exemplifies their autonomy in governing their reservation and confronting non-Indian individuals. The right to exclude is well-established in both treaties and precedents, and he describes *Ortiz-Barraza v. United States* (1975) as an example of a court upholding a tribe's right to exclude.[311] In this case, a non-Indian defendant was stopped by a Tohono O'odham police officer on tribal land, and the officer discovered more than one-thousand pounds of marijuana in the defendant's possession. The defendant was subsequently held in a tribal detention facility until the Drug Enforcement Administration picked him up. The defendant argued that the tribe had no authority over him as a non-Indian, but the Ninth Circuit disagreed due to the principle that tribes possess the power to exclude.[312] Thus, as Christensen observes, "when confronted with questions about the role of a tribal officer, the courts have consistently concluded that Indian tribes, and by extension their law enforcement officers, have the power to police the reservation and confront even non-Indians suspected of crimes."[313] Since tribes have the power to confront non-Indians suspected of crimes on their lands, Christensen argues that consent provides tribes with the additional power of asserting criminal jurisdiction over them.[314]

Christensen first details affirmative consent, looking "at instances where a non-Indian makes an explicit acknowledgement of their willingness to be bound by the tribe's criminal code."[315] Before *Oliphant* was decided, he describes how it was commonly understood that tribes maintained the inherent power to prosecute non-Indians who commit crimes against Indians on

[311] Id. at 16-17; Oritz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975).
[312] Id. at 17.
[313] Id. at 18.
[314] Id.
[315] Id. at 29.

tribal lands unless restricted by Congress.[316] As *Oliphant* deviates from this belief, the decision represents federal common law, and, therefore, other courts can modify the precedent when new arguments or information arise.[317] Thus, Christensen departs from other scholars who advocate for overturning *Oliphant* by arguing that tribal criminal jurisdiction can be exercised over non-Indians who commit crimes in Indian country by virtue of affirmative consent. This would ultimately take "the matter outside of the traditional *Oliphant* prohibition."[318] The expansion of VAWA in 2013 and 2022, Christensen adds, only prove how Congress is becoming more comfortable with tribes asserting authority over non-Indian defendants.

When non-Indians affirmatively consent, they thereby forgo any due process rights, thus raising the question of why defendants would agree to tribal criminal jurisdiction. In response, Christensen recalls how tribes possess the right to exclude and how there are consequences if a non-Indian were not to consent. The non-Indian would either be removed from the reservation, or the tribe would turn the defendant over to state or federal authorities who would have the jurisdiction to prosecute without needing consent.[319] Thus, Christensen asserts that it can be considered beneficial for non-Indians to consent to tribal criminal jurisdiction, and he emphasizes how *Oliphant* does not prohibit such consent.

Similar to Sood's description of implied consent in the civil context, Christensen advances implied consent regarding criminal jurisdiction as another option. This consent differs from affirmative consent because it represents consent "through physical presence," or "through an affirmative action where the known consequences include being subject to tribal court

[316] Id. at 20.
[317] Id. at 23.
[318] Id. at 24.
[319] Id. at 25.

authority."[320] He explores the origins of non-Indians giving implied consent to tribal jurisdiction, and he quotes Tim Vollmann, writing in the University of Kansas Law Review, who describes how the Department of Interior allowed tribes to assert jurisdiction through a means of implied consent over fifty years ago:

> Since federal prosecutors are often slow to prosecute misdemeanors committed on reservations many miles away, an intolerable situation is created. Many tribes have complained of non-Indian vandalism and dumping of trash, which activities go unpunished. To counter this, the Salt River and Gila River Indian communities in southern Arizona took matters into their own hands in 1972 and passed the following ordinance: 'Any person who enters upon the [community] shall be deemed to have implied consented to the jurisdiction of the Tribal Court and therefore [shall be] subject to prosecution in said Court for violations of [the tribal code].' The ordinance was approved by local Bureau of Indian Affairs officials, and the Commissioner of Indian Affairs did not invalidate it, waiting instead for a judicial ruling on its validity. Since that time the communities have successfully exercised jurisdiction over non-Indian traffic offenders without judicial challenge.[321]

Christensen specifies that while permission from the Department of Interior is not required for tribes to exercise their inherent powers, federal support nevertheless helps tribes to assert this jurisdiction. He also cites *Quechan Tribe of Indians v. Rowe* (9th Cir. 1976) as precedent because the Ninth Circuit held that the tribe could enforce its ordinance requiring non-Indians to obtain a tribal permit before hunting on tribal land.[322] The Ninth Circuit ruled that the ordinance was impliedly criminal in nature and reasoned that the tribe could enforce the ordinance based on its right to exclude. Despite *Oliphant,* Christensen contends that "*Quechan Tribe* is important pre-*Oliphant* precedent… [because it] provides a legal basis for implied consent generally."[323]

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[320] Id. at 29.
[321] Id. at 30 (quoting Tim Vollmann, "Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict," 22 Kan. L. Rev. 387, 393 (1974)).
[322] Id. at 31; Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976).
[323] Id. at 31-32.

While *Oliphant* is "the obvious elephant in the room" in this regard, Christensen highlights how there exists new precedents that "provides a legal basis for the recognition that non-Indians may impliedly consent to the criminal jurisdiction of a tribal court by entering tribal territory."[324] For instance, he references how the Court in *United States v. Lara* (2004) held that tribes maintain the inherent authority to prosecute non-member Indians. The Court reasoned that precedents regarding tribal court jurisdiction were only representative of the Court's opinion at the time it decided the cases.[325] Thus, since *Oliphant*, new precedents emerged, and Christensen also references VAWA when noting that Congress has also since recognized a tribe's inherent criminal jurisdiction over non-Indians. Therefore, similar to Mendoza's call for jurisdictional transparency through creating clear statements of jurisdiction, Christensen recommends that tribes start enacting implied-consent ordinances.[326]

In summarizing his argument of consent, affirmative or implied, Christensen emphasizes the majority's reasoning in *Castro-Huerta*. He identifies how the majority supports state jurisdiction over non-Indians committing crimes against Indians in Indian country only after having balanced the interests of the state and the tribes. Ultimately, "because Indian tribes did not generally assert criminal jurisdiction over non-Indians there was no tribal interest to weigh against the state interest in its assertion of jurisdiction."[327] Thus, if tribes were to regularly assert criminal jurisdiction over non-Indians under affirmative or implied consent, "future courts engaged in interest balancing will be required to weigh the tribal interest in asserting this authority over non-Indians against the state interest."[328] In essence, in a way similar to how

[324] Id. at 37.
[325] Id; United States v. Lara, 541 U.S. 193, 210 (2004).
[326] Id.
[327] Id. at 38.
[328] Id.

Lussenden advocates for data collection as a tool for proving that tribes can prosecute cases perhaps greater than the federal government, Christensen employs the same logic with consent. Christensen advocates for tribes to try cases against non-Indians through consent to ultimately prove that they have the capacity, and ultimately a greater interest, in protecting their citizens than state governments.

4.9 Justice Gorsuch, *Castro-Huerta* Dissent (2022)

The final suggestion worth noting is Justice Gorsuch's concluding comments in his dissenting opinion, as aforementioned in Chapter 1. Due to the majority's disregard for Public Law 280's requirement that states seek consent from tribes before asserting jurisdiction in Indian country, he calls for a "simple amendment to Public Law 280." This amendment could say, "A State lacks criminal jurisdiction over crime by or against Indians in Indian Country, unless the State complies with the procedures to obtain tribal consent outlined in 25 U.S.C. § 1321, and, where necessary, amends its constitution or statutes pursuant to 25 U.S.C. § 1324."[329] This suggestion once again is similar to the trend of enacting ordinances or statements that clearly state when a tribe has jurisdiction. This type of congressional amendment has been enacted before in other instances concerning Native American law. For instance, the Court in *Duro v. Reina* (1990) held that tribal courts have no jurisdiction over non-member Indians and thus created a void in which no government had the jurisdiction to prosecute non-member Indian offenders.[330] In less than six months following the decision, President Bush signed a congressional reversal of the opinion.[331] In what is referred to as the *Duro*-fix, Congress amended the Indian Civil Rights Act to clarify that tribes can exercise criminal jurisdiction over

[329] Castro-Huerta, 142 S. Ct. at 2527.
[330] Hannon, "Beyond a Sliver of a Full Moon," 270; Duro v. Reina, 495 U.S. 676 (1990).
[331] Christensen, "Using Consent to Expand Tribal Court Criminal Jurisdiction," 7.

non-member Indians, and this sentiment was upheld in *United States v. Lara* (2004).[332] As this example proves, Congress has the ability to apply Justice Gorsuch's suggestion and amend Public Law 280. By doing so, Congress could reduce the harm of *Castro-Huerta*.

[332] Hannon, "Beyond a Sliver of a Full Moon", 271.

Conclusion: The Future of Native American Women's Rights

The diverse solutions previously discussed in Chapter 4 show how there lacks a singular solution to restore tribal sovereignty and alleviate the problems Native women encounter when they go missing or murdered or experience sexual violence. This is undoubtedly a multidisciplinary, complex issue, where the autonomy of tribes and the perspectives of Native women must be respected and emphasized. Immediate action must first be taken to address the harms of the *Castro-Huerta* decision, and the long-term goal should be to congressionally override *Oliphant.*

1. Short-Term: Addressing *Castro-Huerta*

The majority in *Castro-Huerta*, upon balancing the interests of states and tribes, reason that states have a greater interest in asserting jurisdiction over non-Natives. The majority describes that because tribes generally did not assert such jurisdiction, they have no interest.[333] If tribes can prove they have the capacity to successfully criminally prosecute non-Natives who commit crimes against their members on their lands, then future courts will be forced to weigh tribal interests over those of the states.

a. Restoring the Balance Between State, Federal, and Tribal Authorities by Amending Public Law 280

Castro-Huerta further complicates the jurisdictional issue because it permits states to enter as a third entity over certain crimes committed in Indian country. To address the *Castro-Huerta* decision's most recent attack on tribal sovereignty, per Justice Gorsuch's recommendation, Congress should utilize its plenary authority over tribes. As the decision is

[333] Castro-Huerta, 142 S. Ct. at 2501-2501.

limited to state jurisdiction over non-Natives who commit crimes against Natives in Indian country, Congress should amend Public Law 280 to explicitly outline that a state lacks criminal jurisdiction over such crimes unless the state follows federal procedures for obtaining tribal consent and potentially amends its own constitution or statutes. Thus, in line with Mendoza's advocacy of jurisdictional transparency, this simple legislative fix would be a favorable option for tribes to restore the original balance between tribal, federal, and state authorities.

b. Incorporate Affirmative or Implied Consent to Secure Jurisdiction Over Non-Natives who Visit or Reside on Tribal Lands

Jurisdictional transparency is also evident in consent. Obtaining consent from non-Native perpetrators is another avenue many scholars propose. Sood argues for utilizing implicit consent in the civil context, one of Lussenden's opt-in options requires the non-Native perpetrator to affirmatively consent to tribal jurisdiction, and Christensen argues for both implied and affirmative consent as options tribes can pursue. Affirmative consent is a great option for tribes to utilize, though it requires that offenders willingly accept the jurisdiction of the tribe. Thus, offenders would still have the power to decline tribal jurisdiction. Implied consent, which does not require the offender's approval, is a more favorable choice for tribes because it would cover even more misconduct, thus providing tribes with more power as sovereign nations. Tribes can enact implied consent ordinances similar to the ordinance enacted by the Salt River and Gila River Indian communities. The jurisdiction of tribal land can be explicitly stated in these ordinances, outlining that visitors or residents implicitly acknowledge and consent to tribal jurisdiction. *Oliphant* remains precedent, but as Christensen notes, the case can be limited "to its facts," and "drawing upon more recent Supreme Court precedent in the area of both civil and criminal law, there is a legal basis for tribes to assert criminal jurisdiction over all non-Indians

who enter at least tribal lands on the basis of implied consent."[334] Most importantly, utilizing affirmative or implied consent will allow tribes to administer justice how they see fit, which would undoubtedly contribute to the advancement of recognizing and respecting their inherent tribal sovereignty. As Christensen argues, tribes will be able to prove that they can prosecute non-Natives and also that they ultimately have a greater interest than states in protecting their citizens.

c. Financially Support Tribes

Explicitly requiring tribes to agree to state jurisdiction and incorporating affirmative or implied consent to secure jurisdiction over non-Natives are strong proposals that should be implemented. However, tribes need to be financially able to assert this jurisdiction and operate as sovereign nations. As explained in Chapter 3, the allocation of proper funding to tribes remains an issue. Lussenden advocates for an approach that would provide tribes with the jurisdiction under VAWA without providing them with financial and infrastructural support, and she notes how this option would permit tribes to protect their members without foregoing their sovereignty.[335] In addition to noting how tribes could simply adhere to VAWA's guidelines and receive the outlined funding, she also advocates for another option in which individual tribes would work with the federal government to determine the degree of federal oversight and amount of funding needed.[336]

Despite Lussenden's suggestions, this thesis agrees with Amnesty International that funding should ultimately be allocated on a permanent and regular basis. Chapter 3 discusses how many tribes are unable to implement TLOA and VAWA due to their burdensome financial

[334] Christensen, "Using Consent to Expand Tribal Court Criminal Jurisdiction," 39.
[335] Lussenden, "Reimagining the Violence Against Women Act," 161.
[336] Id. at 167.

costs and because the funding guaranteed under those Acts has not been sufficiently allocated. Therefore, financial support should be readily allocated to tribes without any conditions or obligations. Moreover, as Sood argues, Congress should allocate funding to honor the responsibility and commitment the United States has made to tribes, as part of their trust obligation.[337] Such funding could be directed toward law enforcement aspects such as hiring more police officers and prosecutors and maintaining a better data collection system. Ultimately, if tribes receive funding to bolster their expanded jurisdiction, it will enable them to demonstrate their proficiency as governing bodies.

d. Data Collection: Crime Statistics, Declination Rates, and Successful Litigation in Tribal Courts

It is essential to highlight the importance of enhanced data collection for multiple reasons. First, the accuracy and comprehensiveness of crime data in Indian country continue to be unreliable and inadequate. Gathering more precise and dependable data is imperative, as it is crucial to fully understand the magnitude of the crisis confronting Native women. Without an accurate baseline, measuring progress would be challenging. Second, more accurate data needs to be compiled regarding not only state declination rates, but also concerning federal declination rates. Collecting this data will highlight how the federal and state governments frequently fail to prosecute cases regarding Native American victims, and more specifically, cases of sexual violence against Native women. Third, successful litigation in tribal courts should be tracked to prove tribal governments' ability to achieve justice for their members. Thus, data collection should be increased to more accurately demonstrate the crisis Native women face, to show how federal and state governments fail to prosecute such cases, and to prove that tribes can successfully prosecute and administer justice.

[337] Sood, "Repairing the Jurisdictional 'Patchwork,'" 262.

2. Long-Term: Congressionally Overturn *Oliphant*

While the aforementioned proposals will undeniably help tribes establish their compelling interest in protecting their own members in the wake of *Castro-Huerta*, ultimately, tribes must retain the complete capacity to prosecute anyone who commits a crime against their members on their land. While Mendoza, Hannon, Lussenden, and Rusco in part describe how compromise is still necessary, this thesis departs from that view and aligns with the scholars who advocate for *Oliphant* to be fully congressionally overturned. Tribal sovereignty cannot be partial; compromise is not necessary. Congress has already taken steps to increasingly restore tribal sentencing authority and tribal jurisdiction over non-Native offenders through TLOA and VAWA. Thus, a complete restoration of jurisdiction over non-Native offenders would not be a drastic or unrealistic task. It is undeniable that tribal sovereignty is linked to the safety and welfare of Native women as data shows how Native women who experience sexual violence primarily report their perpetrators to be non-Native. While this proposal will likely encounter various opposition, nevertheless, it should be the ultimate, long-term goal. Tribes must retain full sovereignty to apply laws to anyone consistent with their own beliefs.

Native American tribes have been historically discriminated against, forced to abandon their ancestral lands, and have been repeatedly deprived of their inherent rights. Moreover, they have been denied promises made to them by the United States government upon their forced removal. This history has manifested itself into modern-day jurisprudence regarding jurisdiction, as evident with *McGirt* and *Castro-Huerta*. Despite their lack of voice in policy and court rulings, Native women do have a stake in this jurisdictional debate. TLOA and VAWA, as well as other legislation, undoubtedly represent attempts to address and alleviate the issues Native women face, but as their drawbacks show, more must be done. Justice is a right that Native women deserve, and measures must be taken to minimize the levels of violence they experience.

Above all, it is crucial to incorporate and amplify the viewpoints of tribes and Native women in discussions related to policy and court decisions.

Behind every survivor of sexual violence and every victim who goes missing or murdered, there is an entire tribal community that grieves. Violence committed against Native women inflicts profound trauma and harm on tribes, and survivors or families of victims repeatedly experience intense emotional pain as they navigate the aftermath of violence, seek justice, and search for their missing loved ones. This crisis is unacceptable and cannot continue. No Native woman or girl should be handed a book that outlines what to do *when* they experience sexual violence. Addressing this crisis ultimately requires comprehensive and culturally sensitive responses that prioritize the safety, well-being, and rights of Native women and girls, while upholding tribal sovereignty and self-determination.

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