ADVANCING TRIBAL COURT CRIMINAL JURISDICTION IN ALASKA

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ABSTRACT

Extensive case law already exists in Alaska on the jurisdiction of tribal courts over domestic relations cases, with one of the seminal cases – John v. Baker – *establishing that Alaska tribes have jurisdiction even in the absence of Indian country. A common assumption, though, is that Alaska tribes do not have jurisdiction over criminal offenses. This Article argues that both under the logic of* John v. Baker *and the development of Indian law in the Lower 48, Alaska tribes already possess inherent jurisdiction over criminal offenses within their Native villages. With the gamut of social challenges facing Alaska Natives in rural Alaska, tribes need to be empowered to exercise this jurisdiction.*

INTRODUCTION

There is a deficit of justice in rural Alaska. For thousands of years, Alaska's tribes had a functioning dispute resolution system. But with Western contact and incorporation into the State of Alaska, Alaska Natives have been forced to participate in law enforcement and court systems that are both geographically and culturally remote. Today, rural Alaska faces tremendous challenges addressing its epidemic of violence fueled by drug use and alcohol abuse. The best hope Native communities in rural Alaska have to combat this epidemic is the revival

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of their tribal courts and traditions and the recognition of their ability to be valued participants combating these challenges, including the ability to adjudicate criminal offenses. Tribal court criminal jurisdiction is legally justified and absolutely necessary for the survival of rural Native communities.

A. The Staggering Statistics on Crime and Substance Abuse in Rural Alaska

Alaska Native women face disproportionately high rates of domestic violence. Statewide, 58.6% of women in Alaska will experience intimate-partner violence or sexual violence sometime during their lifetime and 11.8% of women in Alaska experience gender-based violence in any given year.[1] One study found that Alaska Natives comprised 47.2% of the statewide victims of domestic violence (most of these victims were women),[2] even though Alaska Natives only comprised 17.7% of the statewide population.[3] With regard to sexual

1. Council on Domestic Violence & Sexual Assault, *Intimate Partner Violence and Sexual Violence in the State of Alaska: Key Results from the 2010 Alaska Victimization Survey*, UAA JUST. CENTER 2 (2010), http://justice.uaa.alaska.edu/research/2010/1004.avs_2010/1004.07a.statewide_summary.pdf. Of these women, 47.6% will experience intimate partner violence and 37.1% will experience sexual violence. *Id.* The study did not distinguish the race of the victim. These results are roughly consistent with more focused studies on different parts of the state: 50.8% of women in the Yukon-Kuskokwim Delta region and 51.7% in the Bristol Bay region reported being a victim of intimate partner violence or sexual violence during their lifetime. Council on Domestic Violence & Sexual Assault, *Intimate Partner Violence and Sexual Violence in the Yukon-Kuskokwim Delta: Key Results from the 2012 Alaska Victimization Survey*, UAA JUST. CENTER 2 (2012), http://justice.uaa.alaska.edu/research/2010/1103.02.avs_fy12/1103.023a.yk_summary.pdf; Council on Domestic Violence & Sexual Assault, *Intimate Partner Violence and Sexual Violence in Bristol Bay: Key Results from the 2011 Alaska Victimization Survey*, UAA JUST. CENTER 2 (2011), http://justice.uaa.alaska.edu/research/2010/1103.01.avs_fy11/1103.013a.bristolbay_summary.pdf. Nationally, American Indians experience rape and sexual assault at over twice the rate of all other races combined. Steven W. Perry, U.S. Dep't of Justice, *American Indians and Crime: A BJS Statistical Profile 1992-2002*, BUREAU JUST. STAT. 5 (2004), http://www.bjs.gov/content/pub/pdf/aic02.pdf.

2. Marny Rivera et al., Alaska State Troopers Dep't of Pub. Safety & Alaska Dep't of Law, *Descriptive Analysis of Assaults in Domestic Violence Incidents Reported to Alaska State Troopers: 2004*, UAA JUST. CENTER 37 (2008), http://justice.uaa.alaska.edu/research/2000/0601.intimatepartnerviolence/0601.04.dv-assaults.pdf. Seventy percent of the victim reports were from women. *Id.* This report reflects only assaults in domestic violence incidents that were reported to the Alaska State Troopers. *Id.* at 6. Domestic violence incidents reported to municipal police agencies such as the Anchorage Police Department were excluded from the study. *Id.* at 10. However, this is likely to make the report more reflective of experiences in rural Alaska.

3. ALASKA BUREAU OF VITAL STATISTICS, 2005 ANNUAL REPORT 215 (2005),

assaults, including sexual assaults of a minor, 60.5% of the victims are Alaska Native.[4] An Alaska Native woman is sexually assaulted every 18 hours, and Alaska Native women suffer the highest rate of rape in the nation.[5] A study focused on Athabaskan women living in the Interior of Alaska found that 63.7% of them had experienced interpersonal violence sometime in their life, and 18.7% were threatened with a gun.[6] Alaska Natives are 2.5 times more likely to be killed in a homicide than white Alaskans.[7] Another study showed that 36.7% of Alaska Natives report being hit, slapped, punched, shoved, kicked, choked, or otherwise physically hurt by a spouse or partner; however, only 18.5% of non-Natives report similar abuse.[8] These numbers rise to 46.5% and 22.6%, respectively, for women.[9] The vast majority of domestic violence assaults against Alaska Natives (87.3%) are committed by other Alaska Natives.[10]

As compared to non-Natives, Alaska Native children also suffer greatly and disproportionately. Alaska Native women are more than twice as likely as non-Natives to be physically abused by their partner in

available at http://dhss.alaska.gov/dph/VitalStats/Documents/PDFs/2005/annual_report/2005_Annual_Report.pdf.

4. Greg Postle et al., Alaska State Troopers Dep't of Pub. Safety & Alaska Dep't of Law, *Descriptive Analysis of Assaults in Domestic Violence Incidents Reported to Alaska State Troopers: 2003–2004*, RESEARCHGATE 42 (2007), http://www.researchgate.net/publication/228434218_Descriptive_analysis_of_sexual_assault_incidents_reported_to_Alaska_State_Troopers_2003-2004.

5. Alaska Safe Families and Villages Act of 2014, S. 1474, 113th Cong. § 2(a)(3) (as introduced in Senate, Aug. 1, 2013), *available at* https://www.congress.gov/113/bills/s1474/BILLS-113s1474is.pdf (enacted without relevant language as Repeal of Special Rule for State of Alaska, Pub. L. No. 113-275, 128 Stat. 2988 (to be codified at 18 U.S.C. § 2265), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ275/pdf/PLAW-113publ275.pdf).

6. Darryl S. Wood & Randy H. Magen, *Intimate Partner Violence Against Athabaskan Women Residing in Interior Alaska: Results of a Victimization Survey*, 15 VIOLENCE AGAINST WOMEN 497, 501 (2009), *available at* vaw.sagepub.com/content/15/4/497.long.

7. ALASKA NATIVE EPIDEMIOLOGY CTR. & ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, ALASKA NATIVE HEALTH STATUS REPORT 38 (2009), *available at* http://www.anthc.org/chs/epicenter/upload/ANHSR.pdf. The homicide rate for Alaska Natives is 2.9 times higher than the national average. *Id.*

8. Melissa Kemberling & Laura Avellaneda-Cruz, *Healthy Native Families: Preventing Violence at All Ages*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM 29 (3d ed. 2013), *available at* http://www.anthctoday.org/epicenter/publications/alaskanativefamilies/dvsaBulletin_3rd_ed_final.pdf.

9. *Id.*

10. Rivera et al., *supra* note 2, at 44. There is a similar correlation of whites committing sexual assaults against other whites (86.6%). *Id.* The figures for sexual assaults are even higher, with 91.3% of sexual assaults of Alaska Natives being committed by other Alaska Natives. Postle et al., *supra* note 4, at 47.

the months leading up to and during pregnancy.[11] The percent of mothers of three-year-olds who report that their children saw violence or abuse in person was 9.4% for Alaska Natives compared to only 6.1% for non-Natives.[12] Among Alaska Natives, 31.1% report that as a child they witnessed domestic violence against a parent or guardian.[13] In the month of October 2014 alone, there were 617 Alaska Native alleged victims of child maltreatment screened by the Alaska Office of Children Services (out of 1,298 total cases screened)[14] and 141 substantiated cases of child maltreatment against Alaska Native children (out of 237 total substantiated cases).[15] These figures are not an aberration—similar statistics appear for other months.[16] These numbers reveal that about half of child abuse and child neglect victims are Alaska Natives, despite the fact that that group constitutes a far lower percentage of the overall population. It is not surprising, then, that in October 2014 again, 62.0% of the children in out-of-home foster care placement were Alaska Natives—1,464 out of 2,362.[17]

State courts are often difficult for rural Alaskans to access. There are only thirteen cities with an Alaska Superior Court, with two other cities having a District Court but not a Superior Court.[18] A substantial number of other locations have magistrate judges, but their jurisdiction

11. *See* Kemberling & Avellaneda-Cruz, *supra* note 8, at 28 (noting that in 2010, 8.6% of Alaska Native women were abused in the twelve months prior to pregnancy, compared to 3.6% for non-Natives; 6.7% of Alaska Native women were abused during their most recent pregnancy, compared to only 3.1% of non-Natives).

12. *Id.* at 28 (data is for 2010–11).

13. *Id.* at 29 (data is for 2009; only 17.2% of non-Natives reported witnessing domestic violence as a child).

14. *Alleged Victims by Age and Race for OSRs Screened in October 2014*, ALASKA DEPARTMENT HEALTH & SOC. SERVICES, OFF. CHILD.'S SERVICES (2014), http://dhss.alaska.gov/ocs/Documents/statistics/pdf/201410_AllgVctmRaceAge.pdf.

15. *Substantiated Victims by Age and Race for Initial Assessments Completed During the Month of October 2014*, ALASKA DEPARTMENT HEALTH & SOC. SERVICES, OFF. CHILD.'S SERVICES (2014), http://dhss.alaska.gov/ocs/Documents/statistics/pdf/201410_SbsVctmRaceAge.pdf.

16. *See generally Statistical Information*, ALASKA DEPARTMENT HEALTH & SOC. SERVICES, OFF. CHILD.'S SERVICES, http://dhss.alaska.gov/ocs/Pages/statistics/default.aspx (last visited Feb. 18, 2015).

17. *All Children in Alaska OCS Out-of-Home Placement for the Month of October 2014 by Race,* ALASKA DEPARTMENT HEALTH & SOC. SERVICES, OFF. CHILD.'S SERVICES, http://dhss.alaska.gov/ocs/Documents/statistics/pdf/201410_Race.pdf (last visited Apr. 16, 2015). Less than half of these children were placed with Alaska Native families. *Id.*

18. ALASKA COURT SYSTEM, ANNUAL REPORT FY 2014, at 48–61, *available at* http://courts.alaska.gov/reports/annualrep-fy14.pdf.

is limited.[19] Moreover, with most rural villages lacking road access to major population centers, accessing even a magistrate, let alone a larger court, can require substantial effort and resources.

Law enforcement in Alaska is a complicated web of varying personnel. Unlike larger urban areas, few Alaska villages have their own police force; instead, law enforcement is handled primarily by the Alaska State Troopers.[20] Of the 272 communities served by the Alaska State Troopers, 64% are off the road system and accessible only by airplane, boat, or snow machine.[21] Troopers are required to cover service areas that are many thousands of square miles and contain dozens of communities.[22] Responding to calls for service may take hours or even days, especially when frequent bad weather hampers air travel to the village from which the call initiated.[23] These villages are small, typically with only 250 to 300 residents, and "more closely resemble villages in developing countries than small towns."[24]

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19. *Id*. at 9.

20. Rivera et al., *supra* note 2, at 14. Alaska does not have the system of counties found in every other state. Alaska has boroughs, which to some extent operate as the functional equivalent of counties, though these boroughs can stretch over areas larger than many states. *See generally* DAN BOCKHORST, ALASKA DEP'T OF CMTY. & ECON. DEV., LOCAL GOVERNMENT IN ALASKA (2001), *available at* http://commerce.alaska.gov/dnn/Portals/4/pub/Local_Gov_AK.pdf. Some, but not all, boroughs have their own police force, with other boroughs leaving municipalities to handle their own law enforcement. Rivera et al., *supra* note 2, at 14. Moreover, significant portions of Alaska (roughly half the state geographically, but less than 14% of the population) are not part of an organized borough and rely completely on the State for services. BOCKHORST, *supra*, at 2.

21. Rivera et al., *supra* note 2, at 12 (citing Alaska Advisory Comm. to the U.S. Comm'n on Civil Rights, *Racism's Frontier: The Untold Story of Discrimination and Division in Alaska*, UNIV. OF MD. FRANCIS KING CAREY SCH. L. 12 (Apr. 2002), https://www.law.umaryland.edu/marshall/usccr/documents/racisimsfrontier.pdf.

22. Rivera et al., *supra* note 2, at 15–17. The Alaska State Troopers are divided into five detachments; the largest geographic detachment, covering Western Alaska, consists of forty-five Troopers providing primary law enforcement for 40,000 residents spread across 125 communities over 267,000 square miles. *Id.* at 16; *see also* Darryl S. Wood et al., *Police Presence, Isolation, and Sexual Assault Prosecution*, 22 CRIM. JUST. POL'Y REV. 330, 332 (2011) (observing that for areas of primary jurisdiction for the Alaska State Troopers off the road system there is a population density of one resident for every eight square miles).

23. Wood et al., *supra* note 22.

24. Att'y Gen.'s Advisory Comm. on Am. Indian & Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive,* U.S. DEPARTMENT JUST. 131 (Nov. 2014), http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf (citing and quoting Indian Law and Order Comm'n, *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States*, UCLA AM. INDIAN STUDS. CENTER ch. 2, at 38 (Nov. 2013), http://www.aisc.ucla.edu/iloc/report/

Law enforcement in rural Alaska is supplemented by Village Public Safety Officers (VSPOs), who serve as first responders in communities without Alaska State Troopers.[25] As of August 2013, there were 101 VPSOs in 86 communities.[26] VPSOs are funded by the State and trained by Troopers, but are employed by regional nonprofit corporations.[27] Until recently, VPSOs were not allowed to carry firearms.[28] In addition to the VPSOs, there were a total of 109 Village Police Officers and Tribal Police Officers as of August 2011.[29] The purpose of these supplemental officers is *not* to replace Alaska State Troopers, but rather to serve as a "trip wire" for calling in reports to the Alaska State Troopers.[30] Furthermore, at least 75 Alaska villages have no on-site law-enforcement presence.[31] Yet despite this discrepancy between rural law enforcement—VPSOs, Village Police Officers, and Tribal Police officers—and more traditional police forces, there is nothing unconstitutional about the arrangement, at least not under state law.[32]

[hereinafter ILOC Roadmap]).

25. Justice Ctr., Univ. of Alaska Anchorage, *A Brief Look at VPSOs and Violence Against Women Cases*, 28 ALASKA JUST. F. 10, 10 (Summer/Fall 2011).

26. *VPSO Ranks Grow to 101*, STORIES IN THE NEWS (Aug. 10, 2013), http://www.sitnews.us/0813News/081013/081013_vpso.html.

27. Darryl S. Wood, *Officer Turnover in the Village Public Safety Officer Program*, 17 ALASKA JUST. F. 1, 4 (Summer 2000).

28. Following the shooting death of an unarmed VPSO in 2013, a bill was introduced in the Alaska Legislature in 2014 to allow, but not require, VPSOs to carry firearms. Carey Restino, *Bill to Allow VPSOs to Carry Guns Advances to Alaska Senate*, ALASKA DISPATCH NEWS (Mar. 14, 2014), http://www.alaskadispatch.com/article/20140314/bill-allow-vpsos-carry-guns-advances-alaska-senate. The bill was signed into law on July 18, 2014. Pat Forgey, *Alaska VPSOs Get Official State Backing for Firearms Training and Use*, ALASKA DISPATCH NEWS (July 18, 2014), https://www.adn.com/article/20140718/alaska-vpsos-get-official-state-backing-firearms-training-and-use. Two officers recently became the first VPSOs to receive training and be certified to carry firearms. Rachel Waldholz, *First Two VPSOs Graduate from Firearm Training*, KCAW (Apr. 3, 2015), http://www.kcaw.org/2015/04/03/first-two-vpsos-graduate-from-firearm-training/.

29. Justice Ctr., Univ. of Alaska Anchorage, *supra* note 25.

30. Wood et al., *supra* note 22, at 333.

31. *Stand Against Violence and Empower Native Women Act, A Bill to Amend the Omnibus Indian Advancement Act to Modify the Date as of Which Certain Tribal Land of the Lytton Rancheria of California Is Considered to Be Held in Trust and to Provide for the Conduct of Certain Activities on the Land, and Alaska Safe Families and Villages Act of 2011: Hearing on S. 1763, S. 872, and S. 1192 Before the S. Comm. On Indian Affairs*, 112th Cong. 55 (2011) (statement of Joe Masters, Comm'r, Alaska Department of Public Safety).

32. *See* Alaska Inter-Tribal Council v. State, 110 P.3d 947, 967 (Alaska 2005). ("The state cannot realistically post a trooper in every remote village, and indeed plaintiffs conceded below that this is constitutionally unnecessary."). This case also gives an informative history of the VPSO and Village Police Officer programs in Alaska. *Id*. at 951–53.

The vast majority of crimes in rural Alaska that these officers are required to deal with are fueled by alcohol or drugs. A staggering 97% of crimes committed by Alaska Natives involve alcohol or drugs, although that figure includes both urban and rural residents.[33] Substance abuse, mainly alcohol abuse, is involved in 81% of all reports of harm.[34] Studies using Alaska State Trooper data show that in 57% of domestic violence assaults and 43% of sexual assaults, the perpetrator consumed alcohol prior to the assault; illicit drugs were used before 3% and 7% of these crimes, respectively.[35] The Alaska State Troopers themselves have revealed that "[m]embers of Alaska's law enforcement community and others who are part of Alaska's criminal justice system have long known that the greatest contributing factor to violent crimes, including domestic violence and sexual assault, is drug and alcohol abuse."[36]

But alcohol causes harm to the drinker as well as to his or her potential victims. Alcohol abuse is the fifth-leading cause of death among Alaska Natives, with a mortality rate 16.1 times higher than the national rate for whites.[37] Deaths from alcohol abuse increased by 34% from 1980 to 2008.[38] The alcohol-related mortality rate in remote Alaska villages is 3.5 times the national average and the alcohol-related suicide rate is 6 times the national average.[39]

Drug and alcohol use in violation of rural law is troubling. There

33. Alaska Rural Justice & Law Enforcement Comm'n, *Initial Report and Recommendations of the Alaska Rural Justice and Law Enforcement Commission*, STATE ALASKA DEPARTMENT L. 54 n.102 (2006), http://www.law.state.ak.us/pdf/press/040606-ARJLEC-report.pdf.

34. *Id.*

35. Rivera et al., *supra* note 2, at 31; Postle et al., *supra* note 4, at 35. These figures are statewide and not necessarily confined to rural areas. The lower numbers for sexual assault can be explained in part due to the offense being more likely to be committed by minors less likely to drink alcohol.

36. Alaska State Troopers, Alaska Bureau of Investigation Statewide Drug Enforcement Unit, *2013 Annual Drug Report*, ALASKA DEPARTMENT PUB. SAFETY 5 (2013), http://www.dps.state.ak.us/AST/ABI/docs/SDEUreports/2013%20Annual%20Drug%20Report.pdf.

37. Gretchen Day et al., Alaska Native Epidemiology Ctr., *Alaska Native Mortality Update: 2004-2008*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM 4 (Oct. 2011), http://www.anthctoday.org/epicenter/publications/mortality/AlaskaNativeMortalityUpdate2004_2008_17_jan_2012.pdf.

38. *Id.*

39. Alaska Safe Families and Villages Act of 2014, S. 1474, 113th Cong. § 2(a)(2) (as introduced in Senate, Aug. 1, 2013), *available at* https://www.congress.gov/113/bills/s1474/BILLS-113s1474is.pdf (enacted without relevant language as Repeal of Special Rule for State of Alaska, Pub. L. No. 113-275, 128 Stat. 2988 (to be codified at 18 U.S.C. § 2265), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ275/pdf/PLAW-113publ275.pdf).

are currently 108 communities in Alaska, mostly off the road system, that have local laws prohibiting the sale, importation, and possession of alcohol.[40] Despite this, illegal alcohol use and bootlegging remain prevalent. A $10 bottle of alcohol from Anchorage or Fairbanks can sell for $150 to $300 in a remote village.[41] This is more than 10 times the mark-up price for cocaine.[42] And, because of the significant expense to law enforcement to travel to villages off the road system for investigation of what may be seen as relatively minor crimes, illegal alcohol use and bootlegging are frequently unprosecuted.[43]

Also concerning are alcohol and drug use among minors. According to one statewide study, 42.68% of minors ages 12 to 17 in Alaska are assessed to be at great risk of having five or more alcoholic drinks once or twice a week, and 5.39% suffer from alcohol dependence or abuse.[44] Among minors in Alaska ages 12 to 20, 25.44% used alcohol in the month prior to the study, and 18.57% binge drank (had five or more alcoholic drinks on the same occasion) in that month.[45] Marijuana was used by 15.87% of youth ages 12 to 17 in the year preceding the study, and 9.18% in the previous month.[46] Within the Alaska Court System, there were 1,570 total Minor Consuming Alcohol cases during 2011 in courts serving primarily rural areas, and 1,187 guilty pleas or convictions among those cases.[47]

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40. Alaska State Troopers, Alaska Bureau of Investigation Statewide Drug Enforcement Unit, *supra* note 36, at 7. This does not include any tribal laws limiting or banning alcohol.

41. *Id.*

42. *Id.*

43. Emblematic is a statement made to the Indian Law and Order Commission at a public hearing by the city manager of Fort Yukon (off the road system): "Alcohol is probably 95 percent of our problem, but the State says we have no Tribal authority to fight bootlegging locally when they're hundreds of miles away—and only by airplane much of the year. The State and the Feds won't step up . . . ." ILOC Roadmap, *supra* note 24.

44. Table 14 of *2008-2009 NSDUH State Estimates of Substance Use and Mental Disorders*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., http://media.samhsa.gov/data/NSDUH/2k09State/NSDUHsae2009/Index.aspx (follow "PDF" hyperlink in the "Alaska (AK)" row of the Table of Contents at the bottom of the page) (last visited Apr. 5, 2015).

45. *Id.*; *see also Alaska Youth Risk Behavior Survey*, ALASKA DEPARTMENT HEALTH & SOC. SERVICES, DIVISION PUB. HEALTH (2013), http://dhss.alaska.gov/dph/Chronic/Documents/School/pubs/2013YRBS_PreliminaryHighlights.pdf.

46. *2008-2009 NSDUH State Estimates of Substance Use and Mental Disorders*, *supra* note 44.

47. Data provided by Alaska Court System to author (on file with author). Minor Consuming Alcohol cases from courts in Anchorage, Fairbanks, Juneau, and Palmer were excluded from these totals. Some numbers in particular rural courts stick out: there were fifty-six Minor Consuming Alcohol cases and forty-

B. Tribal Criminal Jurisdiction as a Means of Empowering Tribes to Address Problems in Their Community

The dire situation facing rural Alaska Natives has been recognized nationally. In November 2013, the Indian Law and Order Commission (ILOC), pursuant to the Tribal Law and Order Act of 2010, issued a report titled "A Roadmap for Making Native America Safer" ("ILOC Roadmap") to the President and Congress analyzing law enforcement and criminal justice issues on reservations and other areas governed by tribal courts.[48] An entire chapter of the ILOC Roadmap was devoted to Alaska: "Reforming Justice for Alaska Natives: The Time is Now."[49] Alaska was the only state singled out for its own chapter. The ILOC Roadmap, citing some of the studies just discussed and other troubling statistics, justified this attention based on the endemic sexual assault, domestic violence and other public safety issues experienced by Alaska tribes. Many of these tribes are inaccessible by roads, have limited law enforcement presence if any, and lack access to substance abuse services.[50]

All of this raises the issue of the role of rural courts, including tribal courts, in stemming this epidemic of violence and alcohol abuse among Alaska Natives and in rural Alaska. The ILOC Roadmap addresses the very limited role that tribes and tribal courts in Alaska currently play in resolving criminal offenses and determining the resulting punishment.[51] While there are 230 federally recognized tribes in Alaska,[52] the number

three convictions in Chevak (population: 938, of which 464 are under age 21); twenty-nine cases and twenty-five convictions in Emmonak (population: 762, of which 338 are under age 21); forty-one cases and forty convictions in St. Mary's (population: 507, of which 217 are under age 21); and forty-nine cases and forty-three convictions in Unalakleet (population: 688, of which 244 are under age 21). *See id.* (providing case and conviction totals); *List of Counties and Cities in Alaska*, SUBURBANSTATS.COM, https://suburbanstats.org/population/alaska/list-of-counties-and-cities-in-alaska (last visited Feb. 8, 2015) (compiling population data).

48. ILOC Roadmap, *supra* note 24. National recognition also came through a CNN Change the List exposé highlighting the high epidemic of rape in rural Alaska. John D. Sutter, *The Rapist Next Door*, CNN (Feb. 4, 2015), http://www.cnn.com/interactive/2014/02/opinion/sutter-change-alaska-rape/index.html.

49. ILOC Roadmap, *supra* note 24, at ch. 2, at 33–61.

50. *Id.* at ch. 2, at 35–43.

51. *Id.* at ch. 2, at 43–49.

52. *See Alaska Region Overview*, U.S. DEPARTMENT INTERIOR: INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/RegionalOffices/Alaska/ (last visited Apr. 15, 2015) ("[There are] 229 Federally Recognized Tribes under the jurisdiction of the Alaska Regional Office"); *Metlakatla Agency*, U.S. DEPARTMENT INTERIOR: INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/RegionalOffices/

of operating tribal courts in Alaska is unclear.[53] Regardless of their number, however, these tribal courts are largely excluded from exercising jurisdiction over criminal cases. The ILOC Roadmap notes that "the State [of Alaska] has asserted exclusive criminal jurisdiction over all lands once controlled by tribes" and that this "has led to a dramatic under-provision of criminal justice services in rural and Native regions."[54] It follows this with a concerning analysis: "[The State] has also limited collaboration with local governments (Alaska Native or not), which could be the State's most valuable partners in crime prevention and the restoration of public safety."[55]

Tribal courts need to be empowered to be co-equal participants in rural Alaska's criminal justice system. Due to their limited resources, tribes are likely to focus on the relatively lesser offenses, which are generally easier to handle. One study suggests that, despite the geographic challenges, the State of Alaska does just as good a job (if not better) prosecuting sexual assaults in rural Alaska as it does in urban areas.[56] This may be an indictment of the criminal justice system as a whole, but it may also indicate that efforts for increasing tribal court jurisdiction are best focused on some of the lesser crimes—such as alcohol abuse or misdemeanor assault—that lead to more serious acts of domestic violence, rather than on creating jurisdiction geared toward imprisonment.

In other words, the purpose of establishing tribal court criminal jurisdiction is not so that tribes can prosecute cases like the recent killing of two Alaska State Troopers in Tanana.[57] Those cases will certainly be

Northwest/WeAre/Metlakatla/ (showing the agency for the one reservation in Alaska within the Northwest Regional Office).

53. Surveys indicate there exist somewhere between 78 and 152 active tribal courts, but the accuracy of these numbers is questionable. ILOC Roadmap, *supra* note 24, at ch. 2, at 39 (citing *2012 Alaska Tribal Court Directory*, ALASKA LEGAL SERVICES CORP. (2012), http://alaskatribes.org/uploads/2012-tc-directory.pdf); Steven W. Perry, U.S. Dep't of Justice, *Tribal Crime Data Collection Activities, 2014*, BUREAU JUST. STAT. 3 (July 2014), http://www.bjs.gov/content/pub/pdf/tcdca14.pdf.

54. ILOC Roadmap, *supra* note 24, at ch. 2, at 43.

55. *Id*.

56. *See* Wood et al., *supra* note 22, at 342–43 (finding that geographic isolation facilitates case processing because sexual assault cases are more likely to be referred for prosecution).

57. The violence in rural Alaska and difficulties of remote policing are exemplified by an incident that occurred on May 1, 2014 in which two Alaska State Troopers were killed with a semi-automatic rifle by the 19-year-old son of a man that the Troopers had come to the off-the-road-system village to question for allegedly threatening a VPSO with a firearm. Suzanna Caldwell & Tegan Hanlon, *19-Year-Old Arrested for Killing Two Troopers in Tanana; 2nd Man Charged After Standoff*, ANCHORAGE DAILY NEWS (May 2, 2014), http://www.adn.com/

prosecuted vigorously in the State system. However, the individual who initiated these tragic events had a long history of lesser offenses that could have been addressed by the local tribal court before they escalated out of control.[58] Many of these lesser offenses may not have been prosecuted because of the practical difficulties facing law enforcement and the judicial system in rural Alaska. Similarly, the volume of rapes, sexual assaults of adults and minors, and violent physical assaults can be reduced in part through tribal court prosecution of alcohol use and abuse and lesser physical assaults before they escalate to more serious offenses. Minors largely ignored by the state courts can be prosecuted, sentenced, and put on a better path by tribal courts before alcohol and violence take over their lives. Tribal court criminal jurisdiction will by no means be a cure for all that ails rural Alaska Natives, but it is an important tool in this effort. As one Native leader stated, "The most basic priority for allowing tribes to address the impact of violence on Native youth and in tribal communities is to provide tribal governments with the jurisdiction they need to ensure the safety and well-being of tribal citizens."[59]

But to accomplish all of this, tribes in Alaska must become active participants in exercising criminal jurisdiction. This Article argues that

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2014/05/02/3451145/two-alaska-state-troopers-killed.html; Suzanna Caldwell, *Questions Surround Motives of Young Man Accused of Killing 2 Troopers*, ANCHORAGE DAILY NEWS (May 5, 2014), http://www.adn.com/2014/05/05/3456853/questions-surround-motives-of.html. The day before the Troopers were killed, the father had been involved in a dispute about an unpaid bill for a sofa. Lisa Demer & Tegan Hanlon, *Details Emerge in Killing of 2 Troopers in Tanana as State Mourns*, ANCHORAGE DAILY NEWS (May 2, 2014), http://www.adn.com/2014/05/02/3452551/troopers-fatal-shootings-followed.html. When confronted by a VPSO, the father, possibly intoxicated, sped off on an ATV and later pointed a gun at the VPSO from his porch. *Id*. The VPSO called the incident in to the Troopers. *Id*. The tribal court in the Native Village of Tanana is in the process of considering a permanent banishment proceeding against the father along with another man for repeated threats of violence toward members of the tribal council and other village residents. Suzanna Caldwell, *Tanana Moves to Banish Two in Wake of Trooper Shooting*, ANCHORAGE DAILY NEWS (May 8, 2014), http://www.adn.com/2014/05/08/3462047/tanana-moves-to-banish-two-in.html [hereinafter *Tanana Moves to Banish*]; Jerzy Shedlock, *Nearly a Year After Troopers' Killings, Tanana Looks Forward*, ALASKA DISPATCH NEWS (April 21, 2015), http://www.adn.com/article/20150421/nearly-year-after-troopers-killings-tanana-looks-forward.

58. As the ILOC Roadmap concluded, "control and accountability by local Tribes is critical for improving public safety. It brings to the table place-specific knowledge of what may work best to prevent crime and social disorder." ILOC Roadmap, *supra* note 24, at ch.2, at 43.

59. Jacqueline Pata, Exec. Dir., Nat'l Cong. of Am. Indians, Testimony before the Task Force on American Indian/Alaska Native Children Exposed to Violence (June 11, 2014), *quoted in* Att'y Gen.'s Advisory Comm. on Am. Indian & Alaska Native Children Exposed to Violence, *supra* note 24, at 132.

Alaska tribal courts have inherent criminal jurisdiction over tribal members, despite not having reservation land over which to exercise this jurisdiction, and despite the State's assertions to the contrary. Not only is criminal jurisdiction legally justified, it is necessary to combat the epidemics of domestic violence and of alcohol and drug use in rural Alaska.[60]

Part I of this Article offers a sketch of the foundational principles of tribal sovereignty in Supreme Court precedent, followed by an overview of tribal criminal jurisdiction[61] in the Lower 48,[62] which differs from Alaska primarily in that Lower 48 tribes usually have reservation land that sets clear boundaries for the exercise of criminal jurisdiction. Part II turns to Alaska to trace a cursory history of civil jurisdiction for tribal courts in the state, with an emphasis on the Alaska Native Claims Settlement Act and its impact on tribal court jurisdiction. Part III of the Article briefly reviews some of the proposed solutions to the problems of domestic violence and alcohol abuse in rural Alaska, including the solutions proposed by the ILOC Roadmap and Alaska's efforts to refer state cases to tribal courts. Part IV makes the legal argument for initial tribal court criminal jurisdiction in Alaska independent of reservation land or Indian county, addressing both subject matter and personal jurisdiction.

60. The focus of this Article is on legal arguments relating to tribal court criminal jurisdiction in Alaska. There are many practical challenges to Alaska tribes exercising criminal jurisdiction, from Alaska's remote geography and sparse rural infrastructure to the lack of funding for tribal courts and the paucity of information on the support needs of Alaska tribes, but these issues are beyond the scope of this Article. For a brief introduction to these challenges, see Att'y Gen.'s Advisory Comm. on Am. Indian & Alaska Native Children Exposed to Violence, *supra* note 24, at 140–43. This report largely endorsed the five recommendations from the ILOC Roadmap, though it also had a broader focus on recommendations for addressing funding needs and social programs to combat the epidemic of domestic violence and child abuse in rural Alaska. *See generally id.*

61. The latter flows from the former. Indeed, virtually all of Indian law can be seen in one way or another as a discourse on tribal sovereignty.

62. The term "Lower 48," as opposed to "Continental U.S.," is used to describe Indian law in the rest of the United States because, despite the rather large intervening land mass that is Canada, Alaska is still part of the North American continent.

I. NATIVE AMERICAN SOVEREIGNTY AND CRIMINAL JURISDICTION IN THE LOWER 48

A. The Marshall Trilogy

The history of Native American sovereignty, and Native American law in general, begins with the famed Marshall Trilogy—three cases from the early 1800s, all authored by Chief Justice John Marshall, that established the foundations of Native American law and are still frequently invoked today. For present purposes, each case stands for a different key principle. *Johnson v. M'Intosh*[63] advanced the notion of "aboriginal title," which defined and limited the land rights of pre-colonial Native Americans. *Cherokee Nation v. Georgia*[64] affirmed the trust relationship between the federal government and Native Americans. And *Worcester v. Georgia*[65] established the supremacy of federal law over state law for Native American relations.

1. Johnson v. M'Intosh

Johnson v. M'Intosh centered on a dispute over ownership of land in what at the time was the Illinois Country.[66] Johnson and others purchased the land in 1775 from the Piankeshaw Indian tribe.[67] M'Intosh, on the other hand, claimed the United States acquired the land by conquest (by the French and then ceded to the British following the French-Indian War) from the Indian tribes and he, in turn, acquired it through a grant by Congress in 1784.[68] The question before the Court was which of these grants of title should be recognized.[69]

The Court found in favor of M'Intosh's claim, holding that the Native Americans lacked a property interest in the land that allowed them to transfer title to Johnson.[70] The Court reached this conclusion after a long and winding narrative on the history of European settlement

63. 21 U.S. 543 (1823).
64. 30 U.S. 1 (1831).
65. 31 U.S. 515 (1832).
66. *M'Intosh*, 21 U.S. at 560; *see also* Lindsay G. Robertson, *The Judicial Conquest of North America: The Story of* Johnson v. M'Intosh, *in* INDIAN LAW STORIES 29 (Carole Goldberg et al., eds. 2011) (providing general background on the history behind the case).
67. *M'Intosh*, 21 U.S. at 555. Johnson's heirs participated in the case. *Id.* at 561.
68. *Id*. at 554–59.
69. *Id*. at 572.
70. *Id*. at 588–89.

of North America.[71] Under the "doctrine of discovery," the initial European power that discovered a particular territory was granted title to that territory, and other European countries by custom recognized that claim.[72] The doctrine ignored the role of Native Americans entirely.[73] When the United States became independent, it assumed all property rights and titles formerly possessed by the various colonies.[74] This included securing property rights away from the Native Americans.[75]

The Native American inhabitants were left only with "Indian title" or "aboriginal title."[76] According to the Court, if the Indian tribes kept their lands, the country would have remained a "wilderness."[77] The Native Americans only held a right to peacefully occupy their former land, for the doctrine of discovery denied their complete sovereignty as independent nations.[78] Consequently, "their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[79] This limited right to use and occupy their land, but not to own it, placed Native Americans in a perpetually subordinate position to the United States government with regard to land ownership.

2. Cherokee Nation v. Georgia

In the first of two so-called Cherokee or "removal" cases, the Cherokee Nation sought an injunction against Georgia laws that would have essentially annexed the Cherokee lands as state lands.[80] The Cherokees argued they were a sovereign and self-governing nation, and

71. *Id*. at 574–87. The contents of the history are less important than the fact that such a significant portion of the opinion is spent on this history to justify its decision.

72. *Id*. at 573.

73. *See id*. at 588–89 (focusing on the rights of the conquering powers instead).

74. *Id*.

75. *Id.*

76. DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 54 (3d ed. 2012). The right to aboriginal title rests with the tribe as a whole for the "common use and equal benefit of all the members" and not with particular individuals. Cherokee Nation v. Hitchcock, 187 U.S. 294, 307 (1902).

77. *M'Intosh*, 21 U.S. at 590.

78. *Id*. at 574.

79. *Id.*

80. Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831); *see* Rennard Strickland, *The Struggle for Indian Sovereignty: The Story of the* Cherokee Cases, *in* INDIAN LAW STORIES, *supra* note 66, at 61 (providing additional background on the Cherokee cases).

therefore the laws of Georgia did not apply to them.[81] The Court denied the injunction, concluding that the Cherokee Nation was not a foreign nation but rather a "domestic dependent nation" within the United States and was under the protection of the United States.[82] Because of this status, the Court decided the case on standing grounds, holding that the Cherokee Nation could not sue in federal courts.[83] In doing so the Court established, rather paternalistically, that the United States has a federal trust relationship over Native Americans.[84]

3. Worcester v. Georgia

The last case in the Marshall Trilogy addressed whether the laws of the State of Georgia applied in Cherokee lands. Having overcome the standing issue that resolved *Cherokee Nation*, *Worcester* centered on whether Samuel Worcester could be criminally charged and convicted for preaching on Cherokee land in violation of Georgia law.[85] The Court overturned the conviction, holding with clear language that the Cherokee Nation was a distinct community with its own territory and within which state law could have no force.[86] However, the Court reached this conclusion on the grounds that the power asserted by Georgia actually rested with the federal government.[87] In other words, the Court established limited sovereignty for Native American tribes, but only with regard to state governments. Tribes were still, pursuant to the doctrine of discovery, subject to the power and control of the United States.[88] This relationship has persisted, with the federal government

81. *Cherokee Nation*, 30 U.S. at 16.

82. *See id*. at 17 ("[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can . . . be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian.").

83. *Id*. at 20.

84. *See id*. at 17 ("They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.").

85. Worcester v. Georgia, 31 U.S. 521, 536 (1832); *see also* Strickland, *supra* note 80, at 72 (providing additional background on the Cherokee cases).

86. *Id.* at 561.

87. *See id*. at 520 ("The whole intercourse between the United States and [the Cherokee] nation, is by our constitution and laws, vested in the government of the United States.").

88. *See id*. at 519 ("The Indian nations had always been considered as distinct, independent political communities . . . with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed . . . .").

and Congress still holding ultimate authority over tribal relations.[89] States can regulate tribes, however, if they are delegated that authority by the federal government.[90]

B. Federal and State Criminal Jurisdiction in Indian Country

While the Marshall Trilogy sets out the basic foundations of federal Indian law in the United States, the application of these principles to an area such as criminal law is highly complex. The overview here is not exhaustive of all criminal jurisdiction issues facing Native Americans in the Lower 48.[91] Rather, it merely provides a framework for understanding the general parameters of tribal criminal jurisdiction, so that the particular issues facing Alaska tribes can be juxtaposed against this framework. This Section presumes that tribes are exercising jurisdiction over reservation land, which is generally not the case in Alaska.

Understanding criminal jurisdiction in Indian country requires examining the type of crime, the parties involved in the criminal offense, and whether the federal government has assigned its jurisdiction to the states. First and foremost, however, one must understand what the term "Indian country" encompasses.

1. Indian Country

By federal statute, Indian country consists of one of three classifications of land: (a) reservation lands; (b) dependent Indian communities; and (c) Indian allotments.[92] All three imply some sort of federal trust relationship over the land.[93]

A reservation is any body of land with defined boundaries set aside

89. NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 511–12 (2012); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 18 (5th ed. 2009).

90. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 109 (4th ed. 2012).

91. For more extensive treatment of this subject, *see generally* NEWTON ET AL., *supra* note 89, at 735–81; CANBY, *supra* note 89, at 138–257; PEVAR, *supra* note 90, at 127–48.

92. 18 U.S.C. § 1151 (2012). Although this statute directly applies to establishing criminal jurisdiction, the definition of Indian country therein has also been held to apply to civil cases as well. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998).

93. *See* United States v. Sandoval, 231 U.S. 28, 45–46 (1912) ("[L]ong continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders . . . .").

by the federal government, usually through treaty or congressional action, for the benefit of its Indian inhabitants.[94] Land within reservation boundaries is still considered Indian country even if title to the land has passed out of Indian hands.[95]

A dependent Indian community is land which a tribe owns in fee simple, but which has not been formally set aside as a reservation.[96] For land to be considered a dependent Indian community, it must satisfy a two-part test: (1) the land must have been set aside by the federal government to be used as Indian lands; and (2) the land must be under federal supervision.[97]

Whereas reservations and dependent Indian communities are intended for the benefit of tribes as a whole, allotments are tracts of land set aside for the benefit of individual Indians, typically (albeit not exclusively) through the General Allotment Act of 1887.[98] Allotment lands that have not been sold in fee simple remain in federal trust, and there are substantial restrictions on alienation of allotment land.[99] The allotment process left many reservations a checkerboard of differing jurisdictions depending on the ownership of the land.[100]

2. "Major" Versus "Minor" Crimes

In 1883, a Sioux named Kan-gi-shun-ca (Crow Dog in English) was convicted in a federal court in the Dakota Territory for the murder in Indian country of a Sioux chief, Sin-ga-ge-le-Scka (Spotted Tail).[101] The

94. United States v. Celestine, 215 U.S. 278, 285 (1909).

95. Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 357–58 (1962).

96. *See Sandoval*, 231 U.S. at 45–46 (holding that lands occupied by the Pueblo people in New Mexico, and for which they had title while under Spanish rule, were still Indian country because the inhabitants were in need of federal guardianship).

97. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 527.

98. General Allotment Act, ch. 119, 24 Stat. 388 (1887). Also known as the Dawes Act, the General Allotment Act was an attempt to transfer tribal land into individual hands, though in a way that opened up the land to ownership by non-Indians and resulted in the virtual dissolution of large portions of many reservations. NEWTON ET AL., *supra* note 89, at 72–73. Through the General Allotment Act, Indian title to land was reduced from 138 million acres to 48 million acres over the course of less than 50 years. *Id.* at 73. This Act only applied in the Lower 48; a separate allotment act for Alaska was passed in 1906. CASE & VOLUCK, *supra* note 76, at 113. The process of dissolving reservations through the General Allotment Act ceased with the Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984. NEWTON ET AL., *supra* note 89, at 1075.

99. NEWTON ET AL., *supra* note 89, at 195–96, 1046–57.

100. NEWTON ET AL., *supra* note 89, at 73.

101. *Ex parte* Kan-gi-shun-ca (otherwise known as Crow Dog), 109 U.S. 556, 557 (1883) (*Crow Dog*).

Sioux tribal council previously sentenced Crow Dog to restitution, but the federal government viewed this sentence as too lenient.[102] In *Ex Parte Crow Dog*, a decision that implicitly extended the principles of *Worcester*, the Supreme Court held that the federal government did not have jurisdiction to prosecute a crime between two Indians and reversed the conviction.[103] In response, Congress quickly passed the Indian Major Crimes Act in 1885,[104] which asserted federal jurisdiction in Indian country over a series of felony-level crimes where both the offender and victim were Indians.[105]

Crow Dog's case stems from the first exception in the 1854 Indian Country Crimes Act,[106] also known as the General Crimes Act, which extended federal criminal law into Indian country except for crimes committed by one Indian against the person or property of another Indian, crimes for which tribes retained jurisdiction by treaty, and crimes where the Indian defendant had already been punished under tribal law.[107] The exception still remains in the statute, meaning that crimes not included in the Major Crimes Act committed by an Indian against another Indian in Indian country can only be prosecuted within tribal court through its inherent sovereignty.[108] However, because the exception only applies where both the offender and the victim are Indian, non-major offenses committed by Indians against non-Indians can be prosecuted by the federal government through its extension of jurisdiction under the Indian Country Crimes Act.[109]

Because tribes are considered a separate government with inherent sovereignty and not an extension of the federal government, tribal prosecution of an Indian offender does not create double jeopardy, and both the tribe and the federal government can prosecute the offender for

102. ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW CASES AND COMMENTARY 93 (2d. ed. 2010). Crow Dog was sentenced to pay $600, eight horses, and one blanket to the family of the deceased. *Id.*

103. *See Crow Dog*, 109 U.S. at 572 (relying upon treaties with the Sioux in reaching its holding).

104. Ch. 341 § 9, 23 Stat. 362, 385 (1887) (codified as amended at 18 U.S.C. § 1152 (2012)).

105. *Id.* The crimes initially included in the Act were murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. PEVAR, *supra* note 90, at 79. The Act has been modified several times since then and now includes most felony offenses against a person or property. 18 U.S.C. § 1152.

106. Act of Mar. 27, 1854 ch. 26 § 3, 10 Stat. 269, 270.

107. 18 U.S.C. § 1152. For further discussion, see DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 472–74 (6th ed. 2011).

108. 18 U.S.C § 1152.

109. PEVAR, *supra* note 90, at 139–40. The Assimilative Crimes Act, 18 U.S.C. § 13, permits prosecution of state criminal offenses on federal enclaves like reservations. *Id.*

violation of their respective laws.[110] This, however, only applies to major crimes, since the Indian Country Crimes Act includes an exception for non-major crimes whereby the federal government cannot prosecute an Indian who has already been punished by the tribe.[111]

3. Indian Versus Non-Indian Offenders

Normally, when criminal jurisdiction is exercised over a territory, it is exercised over all individuals for crimes committed in that territory regardless of the race of the alleged offender. However, this is not the case with Indian country. In the landmark case of *Oliphant v. Suquamish Indian Tribe*,[112] the Supreme Court held that tribes lacked criminal jurisdiction over non-Indians. Rejecting the argument that tribes could exercise criminal jurisdiction over non-Indians through their inherent sovereignty, the Court looked to the history of treaties with Indians and congressional action regarding the jurisdiction of tribal courts (such as the acts discussed above) to reason that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."[113] Due to their dependence on the federal government, tribes were only "quasi-sovereign" with regard to their lands.[114] Tribes, according to the Court, only occupied their lands with the assent of the federal government.[115] Granting tribes criminal jurisdiction over non-Indians would compromise the "overriding sovereignty of the United States."[116] Though *Oliphant* involved two individuals violating tribal law on the reservation,[117] the opinion does not suggest that it is limited to Indian country. And now, after subsequent litigation and congressional action,[118] any tribe has criminal

110. *See generally* United States v. Wheeler, 435 U.S. 313 (1978) (holding that a Navajo tribal member could be prosecuted both in tribal court for contributing to the delinquency of a minor and in federal court for statutory rape arising from the same event).

111. *See* NEWTON ET AL., *supra* note 89, at 748 (discussing this exception).

112. 435 U.S. 191 (1978).

113. *Id.* at 208.

114. *Id*.

115. *Id.* at 209.

116. *See id.* at 210 ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.").

117. *Id*. at 194.

118. The intervening case of Duro v. Reina, 495 U.S. 676 (1990), *superseded by statute,* 25 U.S.C. § 1301(2) (2012), *as recognized in* United States v. Lara, 541 U.S. 193 (2004), which limited tribal criminal jurisdiction only to tribal members, and the federal statute that overturned *Duro*, will be discussed later. *See infra* text accompanying notes 281–90.

jurisdiction over any Indian, regardless of where the alleged offender is from or to what tribe he or she belongs.

Still, the inability to prosecute non-Indians creates substantial problems when one considers that many non-Indians live on Indian country land and a significant number of crimes against Indians in Indian country are committed by non-Indians.[119] With respect to domestic violence, Congress attempted to address this with the 2013 revisions to the Violence Against Women Act (VAWA).[120] The revisions permit tribes to exercise "special domestic violence criminal jurisdiction" over perpetrators of domestic violence who would otherwise escape their jurisdiction (i.e., non-Indians).[121] To fall under tribal court jurisdiction, the defendant must either (1) reside in Indian country belonging to the tribe, (2) be employed by the tribe on its Indian country, or, most importantly, (3) be a spouse, intimate partner, or dating partner of a tribal member or another Indian who resides in Indian country of the tribe.[122] Defendants under this special jurisdiction are provided additional safeguards not required for Indian defendants for like offenses, namely the right to a jury trial,[123] publicly available criminal laws, and rules of evidence and procedure,[124] as well as the requirement that if a term of imprisonment is imposed, the judge must be a licensed attorney and indigent defendants must be provided an attorney at the expense of the tribal government.[125] Written into the VAWA reauthorization was an exception that exempted Alaska (other than the Metlakatla reservation) from application of this expanded jurisdiction, though the ability of tribal courts to issue civil protective orders was preserved.[126] Commonly known as the "Alaska Exception"

119. M. Brent Leonhard, *Closing a Gap in Indian Country Justice:* Oliphant, Lara, *and DOJ'S Proposed Fix*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 118, 121–28 (2012).

120. The Violence Against Women Act was originally passed as Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796. The 2013 revisions were passed as the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

121. 25 U.S.C. § 1304(a)(6).

122. *Id.* § 1304(b)(4)(B).

123. *Id.* § 1304(d)(3). The jury must be composed of members of the entire community and not just tribal members. *Id.*

124. *Id.* § 1304(d)(2) (referencing *id.* § 1302(c)).

125. *Id.* (referencing *id.* § 1302(c)); *see* PEVAR, *supra* note 90, at 241–52 (explaining the contents of Section 1302(c)). All of these requirements are present for Indian defendants sentenced for more than one year (but less than three) imprisonment, but are not required per se for all domestic violence offenses. *Id.* § 1302(c).

126. S. 47, 113th Cong. § 910 (2013) (referencing 18 U.S.C. § 2265(e) regarding enforcement of protective orders).

to VAWA, this section was repealed in late 2014.[127]

4. Federal Versus State Jurisdiction

The general rule, as seen in *Worcester*, is that federal law has supremacy over state law with regard to Indian law.[128] This means that the federal government is the only authority that may prosecute criminal activity in Indian country if the tribe does not. However, the federal government can delegate this authority to the states, and did just that with Public Law 280 in 1953.[129] That law delegated to designated states whatever federal jurisdiction existed over criminal matters in Indian country in that state.[130] Public Law 280 initially only covered California, Minnesota, Nebraska, Oregon, and Wisconsin, but was amended in 1958 to include all of Alaska except for Annette Island, the location of the Metlakatla reservation.[131]

This transfer of authority applies to both the Major Crimes Act and the Indian Country Crimes Act, essentially withdrawing federal jurisdiction in these areas and substituting state jurisdiction.[132] However, nothing in Public Law 280 strips tribal courts in covered states of their inherent jurisdiction. Indeed, this was recognized by the Ninth Circuit with regard to Alaska in *Native Village of Venetie I.R.A. Council v. Alaska*,[133] which rejected an argument by the State that Public Law 280 divested tribes of their inherent jurisdiction to govern internal relations.[134] The court relied upon the inherent sovereignty of the tribes in reaching this conclusion.[135] Tribes therefore exercise concurrent criminal jurisdiction in states recognized by Public Law 280.[136]

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127. Repeal of Special Rule for State of Alaska, Pub. L. No. 113-275, 127 Stat. 2988 (2014) (to be codified at 18 U.S.C. § 2265), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ275/pdf/PLAW-113publ275.pdf.

128. NEWTON ET AL., *supra* note 89, at 391, 489, 492–96.

129. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. §§ 1162, 1360); *see* PEVAR, *supra* note 90, at 142 (discussing Public Law 280).

130. 18 U.S.C. § 1162(a).

131. *Id.*; CANBY, *supra* note 89, at 261.

132. 18 U.S.C. § 1162(c).

133. 944 F.2d 548 (9th Cir. 1991).

134. *See id.* at 561 ("The [United States Supreme] Court has rejected all interpretations of Public Law 280 which would result in an undermining or destruction of tribal governments.") (citing, *e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207–12, 222 (1987)).

135. *Id.* at 556.

136. *See* Booth v. State, 903 P.2d 1079, 1085 (Alaska Ct. App. 1995) (holding that the State and the Metlakatla Indian Community had concurrent jurisdiction over charges arising from the same actions and that double jeopardy did not apply under federal law, but that state statute prevented separate prosecutions because Metlakatla qualified as a "territory" for purposes of the law). The statute

5. Summary

This admittedly brief and incomplete overview of American Indian law in general provides a few key takeaways. From the Marshall Trilogy we get the underlying principles of much of subsequent American Indian law: American Indians have limited title to their land in the form of "aboriginal title"; the federal government has a trust relationship obligation toward American Indians; and federal Indian law is supreme over that of states. Subsequent litigation and legislation has further refined these principles by providing a definition of Indian country that has served as a primary basis for determining tribal jurisdiction. With regard to criminal law, tribal courts retain exclusive jurisdiction over minor criminal offenses between Indians, but the federal government has jurisdiction over major crimes and non-Indian victims. Moreover, Indian tribes can only prosecute Indian offenders and cannot criminally prosecute non-Indians, except as authorized under VAWA. All of this serves as a background context for understanding later arguments regarding tribal court criminal jurisdiction in Alaska and the unique challenges that exist in Alaska for establishing criminal jurisdiction absent Indian country. Before exploring the arguments for criminal jurisdiction for Alaska tribes, though, it is important to first set out how tribal civil jurisdiction has developed in Alaska, as this history provides the foundation from which the arguments for criminal jurisdiction must arise.

II. TRIBAL CIVIL JURISDICTION IN ALASKA: A HISTORY OF ALASKA NATIVES AND LAND

The history of tribal court jurisdiction in Alaska, and in particular civil jurisdiction, is a history of the relationship between Alaska Natives and their land as seen through the lens of United States and Alaska legislation and case law. This history can be divided into roughly three phases—first, confusion over the legal status of Alaska Natives stemming from the acquisition of Alaska by the United States from Russia; second, the passage of the Alaska Native Claims Settlement Act (ANCSA)[137] and its divestment of Alaska Native jurisdiction over land; and third, the reconstruction of an alternate view of tribal jurisdiction based not on land but on tribal membership. The first two of these phases are discussed in this Part, with the discussion of member-based jurisdiction reserved for the argument in favor of criminal jurisdiction

at issue in *Booth* has since been repealed. § 40, 2008 Alaska Sess. Laws ch. 75.

137. 43 U.S.C. §§ 1601–1629h.

that is ultimately not dependent on the presence of Indian country.

A. Alaska Natives and Aboriginal Title

The history of Russian Alaska is not one of respect for the territorial sovereignty of the original inhabitants. Alaska Natives were ignored, assimilated, and enslaved by the colonizing Russians.[138] When it came time to sell Alaska to the United States, the Treaty of Cession[139] governing the sale divided the indigenous people of Alaska into two broad categories—the "civilized" tribes and the "uncivilized" tribes.[140] Those among the civilized tribes, mainly those Alaska Natives who had adopted Russian culture, could repatriate to Russia or remain in Alaska and obtain United States citizenship.[141] The fate of the "uncivilized tribes"[142] was more ambiguous. The Treaty of Cession said only that these peoples were "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."[143]

The First Organic Act,[144] which established civilian government in Alaska, took a similar stance.[145] Addressing the status of Alaska Natives more directly, the Act stated that "the Indians or other persons in said

138. *See generally* KATERINA G. SOLOVJOVA & ALEKSANDRA A. VOVNYANKO, THE FUR RUSH: ESSAYS AND DOCUMENTS ON THE HISTORY OF ALASKA AT THE END OF THE EIGHTEENTH CENTURY (Richard L. Bland & Katya S. Wessels trans. 2002), *as reprinted in* THE ALASKA NATIVE READER: HISTORY, CULTURE, POLITICS 28–41 (Maria Shaa Tláa Williams ed. 2009). *See also* DOUGLAS W. VELTRA, *Perspectives on Aleut Culture Change During the Russian Period, in* RUSSIAN AMERICA: THE FORGOTTEN FRONTIER 175–83 (Barbara Sweetland Smith & Redmond J. Barnett eds. 1990).

139. Treaty Concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America, U.S.-Russ., June 20, 1867, 15 Stat. 539 [hereinafter Treaty of Cession].

140. *Id.* at art. III. But it might be more appropriate to say that the indigenous inhabitants of Alaska were divided into the "uncivilized tribes" and a non-defined group of everyone else. The Treaty of Cession identifies the "uncivilized tribes" of Alaska but does not identify any other category of Alaska Natives. *Id.*

141. *Id.*; *see* United States v. Berrigan, 2 Alaska 442, 445–46 (D. Alaska 1905) (describing the Treaty of Cession as dividing inhabitants of Alaska into three categories: (1) Russian subjects who wanted to return to Russia; (2) Russian subjects who wanted to remain in Alaska and could be granted citizenship; and (3) the uncivilized tribes).

142. These were defined in a subsequent case as "the independent tribes of pagan faith who acknowledged no restraint from the Russians, and pracised [sic] their ancient customs." *In re* Naturalization of John Minook, 2 Alaska 200, 218 (D. Alaska 1904).

143. Treaty of Cession, *supra* note 139.

144. Act of May 17, 1884, Ch. 53, 23 Stat. 24.

145. CLAUS-M. NASKE & HERMAN E. SLOTNICK, ALASKA: A HISTORY OF THE 49TH STATE 64–65 (1979).

district shall not be disturbed in the possession of any lands *actually in their use or occupation* or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."[146] Essentially, this established aboriginal title to the land reminiscent of *Johnson v. M'Intosh*,[147] where the indigenous inhabitants could use the land but not truly own it. It was not surprising, then, when the Alaska District Court in 1905 held that Alaska Natives could not sell the land they occupied, but that only Congress could do so.[148] The Supreme Court affirmed this position in 1955, when it held that "mere possession" of land by Alaska Natives did not constitute ownership of the land unless specifically recognized by Congress.[149] Since then, the federal government has been able to take Alaska Native land without a need for just compensation under the Fifth Amendment.[150]

Because it was generally believed that the General Allotment Act[151] did not cover Alaska,[152] a separate act in 1906—the Alaska Native Allotment Act[153]—created an allotment process for Alaska by which individual Alaska Natives could obtain legal title to a maximum of 160 acres of unappropriated federal land, provided that the applicant was twenty-one years old and head of a family.[154] However, even though the Alaska Native would hold title, the land would remain in federal trust status and could not be alienated or taxed.[155] Additionally, a 1956 amendment to the Alaska Native Allotment Act further required that allotment applicants show individual use of the land for at least five years.[156] While ANCSA (discussed further below) repealed the Alaska Native Allotment Act, existing and pending allotments were not extinguished.[157] By the date the Act was repealed, 10,000 Alaska Natives had applied for over 16,000 parcels of land covering over 400,000 acres.[158]

146. Act of May 17, 1884, § 8, 23 Stat. at 26 (emphasis added).
147. 21 U.S. 543 (1823).
148. United States v. Berrigan, 2 Alaska 442, 449–51 (D. Alaska 1905).
149. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 285 (1955).
150. CASE & VOLUCK, *supra* note 76, at 71.
151. Ch. 119, 24 Stat. 388 (1887).
152. CASE & VOLUCK, *supra* note 76, at 117.
153. Act of May 17, 1906, ch. 2469, 34 Stat. 197.
154. *Early Alaska Native Land Cases and Acts*, FED. INDIAN L. FOR ALASKA TRIBES (Feb. 4, 2015), https://tm112.community.uaf.edu/unit-2/early-land-cases/.
155. *Id.*
156. Act of Aug. 2, 1956, Pub. L. No. 84-931, 70 Stat. 954 (codified as amended at 43 U.S.C. §§ 270–1 to 270–3).
157. CASE & VOLUCK, *supra* note 76, at 121.
158. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-96-1107T, ALASKA NATIVE ALLOTMENTS: ALTERNATIVES TO ADDRESS CONFLICTS WITH UTILITY RIGHTS-OF-WAY

The rights that Alaska Natives and tribes had with regard to their traditional lands remained unclear even under the Statehood Act in 1958.[159] In Section 4 of the Statehood Act, the State of Alaska agreed to "forever disclaim all right and title to . . . any lands or other property, (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives."[160] This further delayed a determination of Alaska Native land rights because the act asserted that Alaska did not have rights to Native lands but failed to define that term. Consequently, a problem arose when the State selected lands for state use, since the relevant section of the Statehood Act maintained that the State could only select public lands that were "vacant, unappropriated, and unreserved at the time of their selection."[161]

B. ANCSA and Its Aftermath

The state land selection process took several years. The conflict gained increasing importance as the discovery of large oil reserves in Prudhoe Bay necessitated the construction of a pipeline.[162] Matters came to a head in 1966 when the Secretary of the Interior put a freeze on all land selections pending a resolution of Alaska Native land claims.[163] Because Congress could extinguish aboriginal title without compensation, Congress was not required to reach a settlement with Alaska Natives. In 1971, however, it did just that, and ANCSA went into effect on December 18.[164]

ANCSA created a system of twelve regional Native corporations,[165]

4–5 (2006), *available at* http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-06-1107T/pdf/GAOREPORTS-GAO-06-1107T.pdf.; NEWTON ET AL., *supra* note 89, at 340.

159. Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339 (1958). Although Alaska became a state in 1959, the act allowing it to do so was passed in 1958. *Id.*

160. *Id.* § 4, 72 Stat. at 339.

161. *Id.* § 6(b), 72 Stat. at 340.

162. *See* Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 TULSA L. REV. 17, 31 (2007) ("If one views it from the perspective of the state and oil companies intent on development of oil and gas at Prudhoe Bay, ANCSA was a resounding success.").

163. *Id.* at 29.

164. RICHARD S. JONES, CONG. RESEARCH SERV., REPORT NO. 21-127 GOV, ALASKA NATIVE CLAIMS SETTLEMENT ACT OF 1971 (PUBLIC LAW 92-203): HISTORY AND ANALYSIS TOGETHER WITH SUBSEQUENT AMENDMENTS (1981), *available at* http://www.alaskool.org/projects/ancsa/reports/rsjones1981/ancsa_history71.htm.

165. CASE & VOLUCK, *supra* note 76, at 170. There was a thirteenth corporation created for Alaska Natives outside Alaska, but it does not have any land ownership or issue dividends. *Id.*

allotted 45.7 million acres to regional and village Native corporations,[166] and provided for a payment of $962.5 million from combined federal and state sources.[167] Of particular importance for this Article is the fact that the settlement extinguished all Alaska Native claims to aboriginal title—past, pending, and future.[168] ANCSA did not confirm the validity of any aboriginal rights, but nonetheless extinguished any that might exist.

The impact of ANCSA on Alaska Native land claims would not fully play out until 1998 in *Alaska v. Native Village of Venetie Tribal Government*.[169] The Native Village of Venetie attempted to levy $161,000 in business taxes both on a contractor who built a school on land conveyed to a village corporation through ANCSA and on the State of Alaska itself, which Venetie alleged was also partially liable for the tax under a joint venture agreement.[170] The ability to levy a tax on non-members in this way depended upon whether the ANCSA land in question was Indian country.[171] After undertaking the analysis of the three types of Indian country discussed earlier,[172] the Court concluded that ANCSA land was clearly not a reservation or an allotment.[173] The land was also not a dependent Indian community because, as land conveyed for unrestricted use to private, state-chartered Native corporations, the federal government neither set aside the land for the use as Indian land, nor placed it under the superintendence of the federal government.[174] As a result, all land transferred to private hands through ANCSA, which transferred this land in large part by extinguishing all claims to aboriginal title, could not constitute Indian country.[175]

166. *Id.* at 171.
167. *Id.* at 175.
168. *See* 43 U.S.C. § 1603(a) (2012) ("All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any."). Subsequent subsections extinguished aboriginal title based on claims of use and occupancy. 43 U.S.C. §§ 1603(b)–(c).
169. 522 U.S. 520 (1998).
170. *Id.* at 525.
171. *Id.*
172. *See supra* notes 92–93.
173. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 527.
174. *Id*. at 532. It was not sufficient that the tribe was under federal superintendence; the land itself had to be under federal superintendence. *Id.* at 531 n.5.
175. The Court noted that one of the primary purposes of ANCSA was "to effect Native self-determination and to end paternalism in federal Indian relations." *Id*. at 522.

III. PREVIOUSLY-PROPOSED SOLUTIONS TO THE PERCEIVED LACK OF ALASKA NATIVE CRIMINAL JURISDICTION

The statistics provided in the introduction to this Article regarding the dire situation for Alaska Natives in rural Alaska indicate the need to address the rampant alcohol abuse, domestic violence, and crime. Most attempts to remedy these problems presume the need for land-based criminal jurisdiction, consistent with the history of civil jurisdiction in Alaska. While any attempt to expand the jurisdiction of Alaska tribal courts is a step in the right direction, these proposed solutions are narrower in scope than the recognition of inherent criminal jurisdiction for the reasons discussed herein.

A. Indian Law and Order Commission Roadmap

The most recent and most prominent example of attempts to address the problems faced by Alaska Natives is the Indian Law and Order Commission's (ILOC) report titled "A Roadmap for Making Native America Safer" ("ILOC Roadmap").[176] After providing an overview of the difficulties facing Alaska Natives in rural Alaska, the ILOC Roadmap offers five recommendations for increasing rural law enforcement options: amend the Alaska Native Claims Settlement Act (ANCSA)[177] to overturn *Alaska v. Native Village of Venetie Tribal Government*;[178] redefine Indian country to include Alaska allotments and townsites; amend ANCSA to allow land to be put into trust; repeal the Alaska exception to the Violence Against Women Act (VAWA);[179] and affirm the inherent criminal jurisdiction of Alaska tribes.[180]

176. ILOC Roadmap, *supra* note 24.
177. 43 U.S.C. §§ 1601–1629h (2012).
178. 522 U.S. 520 (1998).
179. The Violence Against Women Act was originally passed as Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796. The 2013 revisions were passed as the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54. The Alaska Exception was located at S. 47, 113th Cong. § 910 (2013). Since the ILOC Roadmap was published, the exception has been repealed. Repeal of Special Rule for State of Alaska, Pub. L. No. 113-275, 127 Stat. 2988 (2014) (to be codified at 18 U.S.C. § 2265), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ275/pdf/PLAW-113publ275.pdf.
180. ILOC Roadmap, *supra* note 24, at ch. 2, at 51–55. The nine-member commission, which is comprised of both Republicans and Democrats, summarized its findings by saying that "Alaska's approach to criminal justice issues is fundamentally on the wrong track. The status quo in Alaska tends to marginalize and frequently ignores the potential of tribally based justice systems, intertribal institutions, and organizations to provide more cost-effective and responsive alternatives to prevent crime and keep all Alaskans safer." *Id.* at

1. *Amending ANCSA to Overturn* Venetie Tribal Gov't

The ILOC Roadmap urges Congress to overturn *Venetie Tribal Gov't* "by amending ANCSA to provide that former reservation lands acquired in fee by Alaska Native villages and other lands transferred in fee to Native villages pursuant to ANCSA are Indian country."[181] This proposed solution is almost certainly politically unfeasible because it would require the transfer of significant lands to Alaska tribes, resulting in the ability of tribes to tax on those lands. While this would be positive for the tribes occupying the land, political opposition from businesses operating in Alaska would likely scuttle any chances of such legislation passing.

Moreover, determining exact boundaries for villages would be extremely difficult, if not impossible, because Alaska Native villages do not exist under a unified common ownership. Any given village is likely made up of a patchwork of village-corporation ANCSA land and privately held land.[182] Thus, it is insufficient to simply assert that village-corporation land can be a basis for criminal jurisdiction, because that alone will not create a comprehensive land base for the village. Houses on village corporation land would fall under the created tribal jurisdiction, but homes on privately-owned land still within the village would not.

2. *Clarifying that Native Allotments and Townsites in Alaska are Indian Country*

The ILOC Roadmap next suggests that Congress and the President clarify that Native allotments and townsites in Alaska, which were unaffected by ANCSA, are legally considered Indian country, thus creating a land base for criminal jurisdiction.[183] The ILOC Roadmap notes that one source estimates that there are between four- and six-million acres held in Alaska Native allotments.[184] Legislative or executive action is one possible means of resolution, but this issue is much more likely to be resolved in the courts, as there are no cases holding that Native allotments and townsites in Alaska are *not* Indian

ch. 2, at 44.

181. *Id.* at ch. 2, at 51.

182. *See Early Alaska Native Land Cases and Acts*, *supra* note 154 (providing a map showing ownership of land parcels).

183. ILOC Roadmap, *supra* note 24, at ch. 2, at 52.

184. *Id.* (citing Natalie Landreth & Erin Dougherty, *The Use of the Alaska Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes*, 36 AM. INDIAN L. REV. 321, 346–47 (2012)).

country. But, while courts have ruled that Alaska Native allotments and townsites are exempt from state taxation because of their federal trust status and the acts by which they were created,[185] they have not definitively held that those allotments are Indian country.[186]

Even assuming that Alaska Native allotments and townsites *are* Indian country (or were made such through legislative or executive action), it is difficult to see how criminal jurisdiction could be constructed based on lands to which individuals hold the title. Would jurisdiction be assigned to the nearest tribe and their tribal law? What if the allottee is a member of a different tribe or no longer lives in the area? Or what if the allottee objects to his or her land creating tribal court jurisdiction? Furthermore, allotment lands are usually traditional hunting and fishing lands outside the village, severely limiting their ability to serve as a basis for meaningful criminal jurisdiction.[187] Townsite lands do not exist in every village and often form a patchwork in those they do—much like the village-corporation lands described above.[188] At the very most, deriving criminal jurisdiction from allotments and townsites would be only a partial and fragmented solution and would not be a viable remedy for many villages.

3. Allow ANCSA Corporation Lands to be Transferred to Tribal Governments and Put into Trust

The ILOC Roadmap next suggests increasing the land base for Alaska tribes by transferring ANCSA corporation lands to tribal governments and allowing tribes to put land into trust. While transferring land from Native corporations to tribal governments would likely be helpful for providing an economic base for tribes, it would not by itself create land-based tribal criminal jurisdiction. To the extent that there is any chance that transferring land to tribal governments could itself create criminal jurisdiction, it depends not on amending ANCSA but on amending the definition of Indian country. The Indian country status extinguished by ANCSA is not going to be retroactively restored simply by title being held by a tribal government. As *Venetie Tribal Gov't*

185. People of S. Naknek v. Bristol Bay Borough, 466 F. Supp. 870, 874 (D. Alaska 1979).

186. *See, e.g.*, *id.* at 877 (declining to decide whether the Village of South Naknek is within Indian country); Jones v. State, 936 P.2d 1263, 1265 (Alaska App. 1997) (holding in a criminal case involving hunting regulations that it is not necessary to determine whether Alaska Native allotments are Indian country).

187. *Id.*

188. *See Early Alaska Native Land Cases and Acts*, *supra* note 154 (providing a map showing ownership of land parcels).

makes clear, there are only three statutory definitions of Indian country—reservations, allotments, and dependent Indian communities.[189] ANCSA land transferred to a tribal government would not be a reservation or an allotment. And to be a dependent Indian community, the land must have been set aside by the federal government for use as Indian lands and must be under federal superintendence.[190] By itself, transferring land to a tribal government will not satisfy these two requirements, and no amendment of ANCSA can change this because the Supreme Court has already held the land to be private land.[191] As the Court noted, if this is to change, Congress must modify the definition of Indian country.[192] However, the prospects of Congress amending the definition of Indian country, especially if only to create a new form of Indian country limited to Alaska, are unlikely.

The way to "solve" the Indian country problem for land owned by tribes is to have the land satisfy the two-part test for a dependent Indian community. This requires setting aside the land in question under federal supervision, which can be accomplished by the Department of the Interior taking proposed Indian land into trust status. Until recently, including when the ILOC Roadmap was drafted, this was prohibited by the federal regulation controlling taking land into trust, which restricted the applicable regulations from application in Alaska. However, as the result of litigation by four Alaska tribes and one individual Alaska Native challenging this regulation,[193] the Department of the Interior proposed a rule change removing this restriction on May 1, 2014.[194] Taking land into trust would be on a case by case basis at the discretion of the Secretary of the Interior.[195] As of this writing, the case is on appeal, and a stay has been entered to prevent the Secretary of the Interior from actually taking land into trust, although she can still accept applications.[196] The rule change itself has been adopted.[197]

However, even assuming that Alaska tribes prevail legally on being

189. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998) (citing 18 U.S.C. § 1151 (2012)).
190. *Id.* at 527.
191. *Id.* at 530.
192. *Id.* at 534.
193. Akiachak Native Cmty v. Salazar, 935 F. Supp. 2d 195 (D.D.C. 2013). This decision was based on the fact that the Alaska exclusion for trust status impermissibly varied the privileges and immunities held by Alaska Natives from those held by Native Americans in the Lower 48. *Id.* at 210–11.
194. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24,648, 24,652 (May 1, 2014) (codified at 25 C.F.R. § 151.1 (2014)).
195. *Id.* at 24,651.
196. Akiachak Native Cmty v. Jewell, 995 F. Supp. 2d 7 (D.D.C. 2014).
197. 25 C.F.R. § 151.1.

able to take land into trust, there is also the issue of actually finding land to be taken into trust. Putting land into federal trust means taking it out of the hands of its private owner, be it the tribe, an ANCSA or village corporation, or an individual.[198] Depending on the value of the land, this may be no easy task. Also, regulatory and development hurdles could arise if land is owned and managed by the federal government as opposed to a local tribe or private corporation. And it is almost certain that this would not be an option for every tribe in Alaska, as not every tribe is going to occupy land that will be handed over to the federal government for conversion into Indian country. So, while taking land into trust may be an option for some Alaska tribes, it is not a final answer for all.

4. Revising VAWA to Eliminate the Alaska Exclusion

Up until late 2014, VAWA contained a provision that prevented Alaska from enjoying the Act's grant of expanded jurisdiction over non-Indians for many domestic violence offenses.[199] Fortunately, this offensive provision was recently repealed.[200] But repeal of the Alaska Exception to VAWA is unlikely to make a significant impact on the prosecution of domestic violence offenders in Alaska tribal courts. As discussed earlier,[201] while VAWA extends tribal court jurisdiction to individuals in relationships with tribal members,[202] several of the conditions it imposes are not currently feasible for many Alaska tribes. To review: to exercise this expanded jurisdiction and hand down a punishment that includes imprisonment, tribes are required to provide jury trials[203] before a judge who is also a licensed attorney[204] using publicly available laws and procedures,[205] and to provide the defendant with an attorney at the tribe's expense.[206] The restrictions are lessened if imprisonment is not a potential punishment,[207] but this may yield a

198. Individuals as well as tribes can give up their land to trust status. *Id.* In order to be eligible for trust status, land must be unrestricted. 25 C.F.R. § 151.4.

199. S. 47, 113th Cong. § 910 (2013).

200. Repeal of Special Rule for State of Alaska, Pub. L. No. 113-275, 127 Stat. 2988 (2014) (to be codified at 18 U.S.C. § 2265), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ275/pdf/PLAW-113publ275.pdf.

201. *See supra* text accompanying notes 119–27.

202. 25 U.S.C. § 1304(b)(4)(B)(iii) (2012).

203. *Id.* § 1304(d)(3).

204. *Id.* § 1304(d)(2).

205. *Id.*

206. *Id.*

207. *See id.* (guaranteeing most of the rights described here only if imprisonment is an option). Without the possibility of imprisonment, only the right to a trial by jury remains. *Id.* § 1304(d)(3). However, this itself would be a

system of justice that is weak and ineffective. Furthermore, these lesser protections could likely already be imposed through issuing a protective order, which is a civil remedy tribes already possess.[208]

Only a few Alaska tribes have publicly available laws and procedures, and many of those do not have the extensive criminal laws, rules of evidence, and rules of criminal procedure that seem to be contemplated by VAWA.[209] Most tribes in Alaska do not have judges who are licensed attorneys,[210] as there is an emphasis on tribal elders being placed in adjudicatory roles.[211] Tribal courts in small villages may have trouble finding enough eligible jurors who do not have a conflict of interest with either the offender or the victim. Moreover, tribal courts in Alaska are often meant to be non-adversarial, where all parties can work together to find solutions to a problem. Consequently, not only are judges often not attorneys, but attorneys may not even be allowed to

substantial departure from the more traditional tribal courts that operate in Alaska.

208. *See* Nathaniel Herz, *Begich Hits Republican Rivals on Domestic Violence, Tribal Justice Law*, ALASKA DISPATCH NEWS (Aug. 16, 2014), http://www.adn.com/article/20140816/begich-hits-republican-rivals-domestic-violence-tribal-justice-law (noting that the repeal of the Alaska Exemption to VAWA clarified the civil jurisdiction of Alaska tribes to issue protective orders, but did not necessarily change anything in practice in that regard).

209. *But see, e.g.*, *Governing Documents*, CENTRAL COUNCIL TLINGIT & HAIDA INDIAN TRIBES ALASKA, http://www.ccthita.org/government/legislative/index.html (last visited Mar. 21, 2015) (providing possibly the most complete set of publicly available tribal codes).

210. But to say that tribal court personnel are not "legally trained" would be incorrect. There are a variety of legal trainings available for tribal court judges and personnel. For the past 31 years, the Tanana Chiefs Conference has held an Annual Alaska Tribal Court Development Conference. *Tribal Court Materials*, TANANA CHIEFS CONF., https://www.tananachiefs.org/get-assistance/legal-resources/tribal-court-materials/ (last visited Mar. 22, 2015). Tribal court judges have been invited to participate in the annul training for Alaska Court System judges. ALASKA COURT SYSTEM, ANNUAL REPORT FY 2013, at 23, *available at* http://www.courts.alaska.gov/reports/annualrep-fy13.pdf. There is even a Tribal Management certificate and AAS degree offered by the University of Alaska Fairbanks Interior-Aleutians Campus, College of Rural and Community Development, Department of Indigenous, Community and Tribal Programs. *See Tribal Management*, U. ALASKA FAIRBANKS, http://uaf.edu/catalog/current/programs/tribal_management.html#certificate (last visited Mar. 22, 2015). So while Alaska tribal court judges generally have not attended law school, they are often well-trained.

211. *See, e.g.*, CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA, TRIBAL STATUTES § 06.02.006(E) (2015), *available at* http://www.ccthita.org/government/legislative/GoverningDocs/Title_6_TribalCourts.pdf ("All judges of the Tribal Judicial System shall have the power . . . [t]o request an advisory opinion from the Court of Elders regarding customary and traditional practices or culture.").

argue in court.[212] Because tribes in Alaska do not typically exercise criminal jurisdiction, no tribe in Alaska provides indigent clients with an attorney at tribal expense. Tribes in Alaska could potentially adapt to these increased requirements, but likely only over a long period of time and at the expense of the more culturally attuned procedures that allow tribal courts to differentiate from state courts.

Finally, the VAWA revisions only *expanded* criminal jurisdiction for tribes.[213] They do not create any *new* forms of jurisdiction. In other words, VAWA assumes that tribes already possess criminal jurisdiction. If there is no existing criminal jurisdiction for tribes in Alaska, then removing the Alaska Exception to VAWA is of little practical help. Thus, while the repeal of the Alaska Exception is an important victory, its effects are likely to be more symbolic than real.

5. *Congressional Affirmation of the Inherent Criminal Jurisdiction of Alaska Tribes*

As its last recommendation, the ILOC Roadmap suggests that Congress should affirm the inherent criminal jurisdiction of Alaska tribes over members within the boundaries of the tribe's village.[214] Because of the relative lack of Indian country in Alaska, there are no clear external boundaries for villages by which to define and limit the inherent land-based criminal jurisdiction to which the ILOC Roadmap refers. It is also unclear what role Congress would play here in what is largely a legal question. After all, if criminal jurisdiction is inherent with tribes, then no congressional affirmation should be necessary. The ILOC Roadmap does not explain what it means by this statement, other than by discussing how Public Law 280 does not fit in Alaska because it covers only Indian country, of which there is little in Alaska.[215]

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212. *See* Simmonds v. Parks, 329 P.3d 995, 1015 (Alaska 2014) (discussing how the rule that lawyers may not speak before the Minto tribal courts is not an issue unless tribal remedies have yet to be exhausted); *see also* John v. Baker, 982 P.2d 738, 763 (Alaska 1999) (holding that due process "in no way requires tribes to use procedures identical to [those used in state courts]").

213. Even if a tribe did provide all of the protections just described, it is unclear whether they could exercise this expanded jurisdiction under VAWA because the subsections granting criminal jurisdiction for acts of violence or violations of protective orders require that the criminal act "occur[] in the Indian country of the participating tribe." 25 U.S.C. § 1304(c)(1), (c)(2)(A) (2012). Without Indian country, Alaska tribes might still be restricted from asserting criminal jurisdiction under VAWA. And the repeal of the Alaska Exception to VAWA does not mend this loophole.

214. ILOC Roadmap, *supra* note 24, at ch. 2, at 55.

215. *Id.*

B. Other Proposed Solutions

Even apart from calls to revise jurisdiction, such as those found in the ILOC Roadmap, there are efforts by various state entities to utilize tribal courts or tribal court principles in the prosecution of criminal offenses under state law. For example, within the past few years the Alaska Court System has explored introducing restorative justice principles in rural Alaska through alternate sentencing models.[216] One of these approaches involves incorporating village input into minor criminal cases.[217] While the cases are tried by a State of Alaska Magistrate Judge, and while the State retains jurisdiction over the case, the judge calls together members of the offender's village to discuss the effect of the offender's acts on others in the community and recommend a punishment.[218] Everyone gets to speak, including the offender.[219] The judge then takes these recommendations into consideration when issuing a sentence.[220]

This openness to alternate methods of sentencing has even been recognized recently in several places in the Alaska rules. Alaska Rule of Criminal Procedure 11(i), effective April 15, 2014, allows the referral of criminal cases, with the consent of the victim, the prosecutor, and the defendant, to restorative justice programs such as circle sentencing, and the inclusion of the recommendation of the program in the offender's sentencing agreement.[221] A similar change was also made to Alaska Delinquency Rules 21 and 23.[222] There is also the possibility that the State of Alaska will negotiate inter-tribal agreements with tribal courts to refer certain misdemeanor criminal cases for imposition of a civil remedy in tribal court.

These efforts are encouraging and are steps in the right direction. But they do not satisfy the need for tribes to be able to assert their own initial criminal jurisdiction over the same or similar criminal offenses. Both the Alaska Court System and Department of Law initiatives depend first upon action by a judge, prosecutor, or law enforcement

216. *See* Austin Baird, *Alaska Courts Taking New Approach to Rural Justice*, ANCHORAGE DAILY NEWS (Mar. 17, 2012), http://www.adn.com/article/20120317/alaska-courts-take-new-approach-rural-justice (discussing the use of circle sentencing by state court magistrates in Kake and Galena).

217. *See id.* ("Circle sentencing is about to be used for the first time in a felony case . . . .").

218. Jeff D. May, *Community Justice Initiatives in the Galena District Court*, 31 ALASKA JUST. F. 6, 7 (Fall 2014–Winter 2015).

219. *Id.* at 9–10.

220. *Id.*

221. Alaska R. Crim. P. 11(i) (2014).

222. Alaska Delinquency Rules 21, 23 (2014).

officer whose resources are already being stretched thin. Then, there needs to be a decision to refer the case to tribal court, which introduces discretion and delay. Until tribal courts can initiate their own actions, they will always be dependent on the good graces of others to correct the transgressions of their own members and others who choose to associate with their village. Even if the state initiatives described above increase the overall available resources by bringing tribal courts into the process, it is hard to believe that this alone will completely stem the epidemic of alcohol and drug abuse, child abuse, sexual assault, and other public safety issues in rural Alaska. For problems this dire, all possible solutions need to be on the table. And that includes initial criminal jurisdiction for Alaska tribal courts.

IV. THE ARGUMENT IN FAVOR OF ALASKA TRIBAL COURT CRIMINAL JURISDICTION

Before turning to the legal justification for tribal court criminal jurisdiction in Alaska, it is helpful to briefly review the evolution of Alaska tribal court civil jurisdiction, as this serves as the basis for understanding why criminal jurisdiction is also appropriate. This history reaches its climax, though certainly not its end, with the case of *John v. Baker*.[223] *John* is the seminal case on Alaska tribal court jurisdiction because of how it connected jurisdiction not to land, but to people. Cases subsequent to *John* have built upon and expanded this jurisdiction. Criminal jurisdiction, though, introduces concerns apart from those that exist for civil jurisdiction, as discussed by the previous Alaska Attorney General in response to an Indian Law and Order Commission Report ("ILOC Roadmap").[224] After reviewing the general history of civil jurisdiction for Alaska tribes, these more specific concerns will be explored by digging even deeper into *John*. What will emerge is a criminal jurisdiction sufficiently limited to avoid the charge of boundlessness leveled against it by the former Attorney General and others, but one which still gives tribes sufficient legal authority to engage in criminal prosecutions.

223. 982 P.2d 738 (Alaska 1999).

224. ILOC Roadmap, *supra* note 24. *See generally* Letter from Michael C. Geraghty, Att'y Gen., State of Alaska, to Troy Eid, Chairman, Indian Law and Order Comm'n (Feb. 1, 2013), *reprinted in* ILOC Roadmap, *supra* note 24, at app. G, 233 [hereinafter Geraghty Letter] (discussing how the concept of creating tribal criminal jurisdiction on certain remote parcels does not make sense, and that such expansion will create more problems than it will solve). The positions of the current Alaska Attorney General on these issues are, as of this writing, unclear.

A. *John v. Baker* and Member-Based Jurisdiction

Since the passage of the Alaska Native Claims Settlement Act (ANCSA),[225] there has been a long series of cases debating the jurisdiction of tribal courts in Alaska, primarily surrounding child custody and welfare cases, including those arising from the Indian Child Welfare Act (ICWA).[226] Initially, state courts held that tribal courts did not have jurisdiction to decide a petition declaring an Indian child to be in need of aid because the tribe had not been federally recognized.[227] This confusion over tribal recognition also arose with regard to recognition of tribal court adoptions when the Ninth Circuit upheld the ability of tribal courts in Alaska to have concurrent jurisdiction with state courts over ICWA cases,[228] but remanded for a determination of whether the tribes involved in the suit were in fact sovereign.[229] This confusion over federal recognition was resolved in the early 1990s, first with a list put out by the Department of the Interior in 1993 recognizing the Alaska villages specified in ANCSA as tribes,[230] and then the following year with the Federally Recognized Indian Tribe List Act of

225. 43 U.S.C. §§ 1601–1629h (2012).

226. 25 U.S.C. §§ 1901–1963. ICWA was passed by Congress in 1978 to counteract a long history of Indian children being taken from their homes and being placed for foster care or adoption with non-Indian families. *Id.* § 1901. ICWA applies only to foster care and termination of parental rights proceedings and not to custody disputes between parents. It contains several provisions aimed at preserving Indian families, such as setting heightened evidentiary standards for removing Indian children from them. *Id.* § 1912(e)–(f). If children *are* removed, there are "placement preferences" that require, absent a showing of good cause to the contrary, that Indian children be placed with members of their extended family or with other Indian families. *Id.* § 1915(a)–(b). Tribal courts have exclusive jurisdiction over foster placement and termination proceedings for children that reside on reservations, but even for Indian children who do not live on a reservation, foster placement and termination proceedings can be transferred to tribal court unless one of the parents objects. *Id.* § 1911(a)–(b). For foster placement or termination proceedings in state court, the Indian child's tribe must be allowed to intervene. *Id.* § 1911(c). Federal and state courts are required to recognize tribal court decisions. *Id.* § 1911(d).

227. Native Vill. of Nenana v. State, Dep't. of Health & Social Servs., 722 P.2d 219, 221 (Alaska 1986).

228. Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 555–56 (9th Cir. 1991).

229. *Id.* at 562.

230. CASE & VOLUCK *supra* note 76, at 327, 426 (referencing 58 Fed. Reg. 54,364, 54,368 (Oct. 21, 1993)). The list, sometimes known as the Ada Deer List for the Assistant Secretary of Indian Affairs who published the list, originally included 227 Alaska tribes; it has since been expanded to 230 tribes. *Id.* All of the villages recognized by ANCSA were federally recognized as tribes, though no ANCSA corporations themselves were recognized as tribes. *Id.* at 327.

1994 ("Tribe List Act").[231]

However, the federal recognition of Alaska tribes still left unresolved the question of whether these tribes could exercise jurisdiction and the basis for that jurisdiction. After the decision in *Alaska v. Native Village of Venetie Tribal Government*,[232] 229 federally recognized tribes in Alaska were left without a land base or defined boundaries over which to exercise jurisdiction.[233] ANCSA explicitly extinguished pre-existing land claims and all assertions of aboriginal title.[234] Yet, tribal courts in Alaska still continued to operate and issue decisions on a variety of custody and other cases.

This was the situation that faced the Alaska Supreme Court in *John*. The seminal case in establishing tribal court jurisdiction over civil matters in Alaska, *John* addressed whether a tribe had inherent sovereignty to hear a custody case between tribal members in its courts outside of Indian country.[235] The case differed from earlier federal cases because it involved an action between two parents, rather than a foster care placement or termination issue, and therefore the jurisdictional pronouncements of ICWA did not directly apply.[236]

Without the existence of Indian country or the applicability of ICWA, the Alaska Supreme Court based Alaska tribal court jurisdiction on the central role that regulating domestic relationships among members plays in exercising tribal sovereignty.[237] In essence, jurisdiction rested not just with land, but could also be derived from a tribe's existence as a federally-recognized sovereign with powers over its tribal members.[238] This inherent sovereignty was retained in tribes by nature of being sovereign unless and until removed by Congress.[239] Finding no such divestiture of power, the court concluded that "federal tribes derive the power to adjudicate internal domestic matters, including

231. Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. § 479a).
232. 522 U.S. 520 (1998).
233. *See supra* text accompanying notes 169–75.
234. *See supra* text accompanying note 173.
235. John v. Baker, 982 P.2d 738, 743 (Alaska 1999). The case arose because a father in a child custody dispute failed to inform the Alaska state court of a previous tribal court order granting shared custody. *Id.*
236. *Id.* at 747.
237. *Id.* at 758.
238. *See id.* at 759 ("Decisions of the United States Supreme Court support the conclusion that Native American nations may possess the authority to govern themselves even when they do not occupy Indian country.").
239. *See id.* at 751 ("Modern tribal sovereignty . . . 'exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, . . . Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.'"(quoting United States v. Wheeler, 435 U.S. 313, 323 (1978))).

child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy."[240]

Closely connected with the concept of inherent sovereignty is the adjudication of the internal affairs of members of the tribe. Indeed, the key inquiry for determining jurisdiction "is not whether the tribe is located in Indian country, but rather whether the tribe needs jurisdiction over a given context to secure tribal self-governance."[241] Drawing upon a series of United States Supreme Court cases regarding tribal civil jurisdiction, the court in *John* noted that tribes "have power to make their own substantive law in internal matters, and to enforce that law in their own forums."[242] The court further held that requiring Alaska tribes to possess Indian country "to exercise the same inherent and delegated authorities available to other tribes" would render the federal recognition of Alaska tribes essentially meaningless and the Tribe List Act hollow.[243]

However, the court noted that because of the lack of Indian country, tribal courts in Alaska do not have exclusive jurisdiction over custody cases and instead have concurrent jurisdiction with state courts.[244] But, importantly, the court also held under the principle of comity that when a tribal court does issue a custody order, Alaska state courts should generally give recognition and legal effect to that decision.[245] "Comity is the principle that 'the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect.'"[246]

There are limited circumstances in which a state court is not to recognize the decision of a tribal court. One, understandably, is where the tribe lacks either subject matter or personal jurisdiction over the case.[247] The other is where there is reason to believe that the due process

240. *Id.* at 754.
241. *Id.* at 756.
242. *Id.* (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978)).
243. *Id.* at 753 (quoting Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993)).
244. *Id.* at 759.
245. *Id.* at 763. In ICWA cases, the full-faith-and-credit doctrine applies to state recognition of tribal court decisions. *Id.* at 762. However, because the custody case at issue in *John* did not fall under ICWA, a comity analysis was necessary. *Id.* at 761.
246. *Id.* at 762 (quoting Brown v. Babbitt Ford, Inc., 571 P.2d 689, 695 (Ariz. App. 1977)).
247. *Id.* at 763.

rights of the litigant were denied by the tribal court.[248] As part of any due process analysis when deciding whether to grant comity, the state court is to look at: (1) "whether the parties received notice of the [tribal court] proceedings," (2) whether the parties were granted "a full and fair opportunity to be heard," (3) whether the tribal court judges were impartial, and (4) whether the proceedings were conducted in a regular fashion.[249] The tribal court procedures need not be identical to those of state courts,[250] and state court judges should "respect the cultural differences that influence tribal jurisprudence, as well as recognize the practical limits experienced by smaller court systems."[251] Moreover, a judge cannot deny comity simply because she or he disagrees with the tribal court decision.[252]

John thus recognized the inherent sovereignty of tribal courts in Alaska by finding an alternate basis for jurisdiction other than land—the members of the tribes themselves. Vital to the survival of tribes was the ability to govern internal relations among its members. And, through the comity analysis, tribal courts were elevated to co-equal courts with Alaska state courts.

Subsequent cases from the Alaska Supreme Court have reinforced the independent status of tribal courts. For example, the court has held that ICWA allows the transfer of child custody cases from state to tribal court regardless of whether the tribe had sought to reassume jurisdiction under ICWA,[253] and that the resulting tribal court decisions are entitled to full faith and credit by state courts and agencies.[254] The Alaska Supreme Court has also held that tribes possess sovereign immunity despite not having a land-base.[255] And the court has held that tribal appellate processes need to be exhausted before litigants in tribal court can bring the case in state court.[256] These decisions were made by drawing on the member-based jurisdiction endorsed by *John* and in full recognition of a lack of territorial jurisdiction.

248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 763–64.
253. *In re* C.R.H., 29 P.3d 849, 852 (Alaska 2001).
254. State v. Native Vill. of Tanana, 249 P.3d 734, 751 (Alaska 2011). The court also held in *Native Village of Tanana* that tribes have concurrent jurisdiction over ICWA-defined child custody proceedings independent of the existence of Indian country. *Id.*
255. McCrary v. Ivanof Bay Vill., 265 P.3d 337, 340–41 (Alaska 2011).
256. *See* Simmonds v. Parks, 329 P.3d 995, 1011 (Alaska 2014) (denying recourse to state court where a litigant in an ICWA proceeding in tribal court had not appealed to the tribal appellate court).

B. The Argument for Alaska Tribal Court Criminal Jurisdiction

The dissent in *John* suggested that the logical extension of the Court's decision was to grant Alaska tribes "authority to criminally punish tribal members."[257] This Article agrees with this logical extension.[258] However, this argument, of course, requires further elaboration.

In order to establish tribal court jurisdiction over criminal cases, two things need to be established: subject matter jurisdiction and personal jurisdiction.[259] Indeed, when *John* discussed the comity doctrine, it held that "our courts should refrain from enforcing tribal court judgments if the tribal court lacked personal or subject matter jurisdiction."[260] Subject matter jurisdiction pertains to whether Alaska tribal courts have the "legal authority to hear and decide a particular type of case."[261] Personal jurisdiction pertains to the ability of the court to hear a case involving a particular party.[262] Unlike with subject matter jurisdiction, the lack of which can be an absolute bar to a court hearing a case, personal jurisdiction can be acquired by waiver or consent of the defendant.[263]

1. Subject Matter Jurisdiction

The notion that Alaska tribes do not have subject matter jurisdiction over criminal cases is based on the false premise that the tribes must affirmatively prove this jurisdiction. What *John* and the

257. *John*, 982 P.2d at 781 (Matthews, J., dissenting). The dissent further suggests that the majority would not want to go this far. *Id.* The majority opinion did not respond to this invitation.

258. *But see id.* (citing Solem v. Bartlett, 465 U.S. 463 (1984)) (using *Solem*, which declined to extend tribal court jurisdiction over a tribal member for a crime committed off a reservation, to argue against the extension). The dissent, however, overinterprets *Solem*. The issue in *Solem* was whether land that had been opened to settlement by non-Indians still existed within reservation boundaries for the purpose of establishing federal jurisdiction (as opposed to state jurisdiction) over the alleged criminal act. *Solem*, 465 U.S. at 465. While the Court held that States have jurisdiction over land that has been removed from reservation boundaries, the case says nothing about foreclosing a theory of member-based jurisdiction. *Id.* at 467.

259. Barlow v. Thompson, 221 P.3d 998, 1002 (Alaska 2009) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Nw. Med. Imaging, Inc. v. State, Dep't of Revenue, 151 P.3d 434, 438 (Alaska 2006)).

260. *John*, 982 P.2d at 763 (citing Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997)).

261. *Nw. Med. Imaging, Inc.*, 151 P.3d at 438 (quoting ERWIN CHEMERINSKY, FEDERAL JURISDICTION 257 (3d ed. 1999))

262. Kuk v. Nalley, 166 P.3d 47, 51 (Alaska 2007).

263. Fletcher v. State, 258 P.3d 874, 877 (Alaska Ct. App. 2011).

plethora of other cases already examined uniformly show is that Alaska tribes, as federally recognized tribes, have inherent sovereignty over all areas of governance not removed by the federal government. This means that the burden is not on Alaska tribes to demonstrate the existence of subject matter jurisdiction over criminal cases but on those who would argue against it to show that criminal jurisdiction has been removed. And because *John* based tribal jurisdiction in Alaska on tribal membership as opposed to land, that member-based jurisdiction extends to criminal cases as well. Since this is not a universally accepted proposition, however, it is worth expanding upon.

a. The History of United States Supreme Court Cases Recognizes that Criminal Jurisdiction is Derived from Tribal Membership

The history of tribal criminal jurisdiction has consistently related more to membership than to land. The "doctrine of discovery" and diminishing of Indian land rights to aboriginal title in *Johnson v. M'Intosh*,[264] along with the notion of tribes as "domestic dependent nations" in *Cherokee Nation v. Georgia*,[265] begin the divestiture of tribal rights from a necessary connection to a land base. *Worcester v. Georgia*[266] laid the foundation for the inherent sovereignty of tribes.[267] A more direct application to criminal jurisdiction came in *Ex Parte Crow Dog*,[268] which affirmed that tribes retained jurisdiction over criminal offenses between members when that jurisdiction had not been removed by Congress.[269] While *Crow Dog* did not turn on the issue of the removal or non-removal of land from federal jurisdiction,[270] it affirmed that tribes retain criminal jurisdiction as part of their inherent sovereignty. Notably, the Court expounded upon the virtues of keeping criminal jurisdiction within tribes for crimes between Indians by discussing the importance of being heard by a jury of one's peers within the same culture and traditions in which the offender operates.[271]

264. 21 U.S. 543 (1823).
265. 30 U.S. 1 (1831).
266. 31 U.S. 515 (1832).
267. *See id.* at 518 (determining that the Treaty of Hopewell's use of the term "hunting ground" in describing boundaries did not manifest intent to restrict full use of lands reserved to the Cherokee tribe).
268. 109 U.S. 556 (1883).
269. *See supra* text accompanying notes 101–05.
270. *Crow Dog*, 109 U.S. at 570.
271. *Id.* at 571. In full, the Court said:

> It is a case of life and death. It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a

Two more Supreme Court cases further developed and affirmed, at least implicitly, that criminal jurisdiction for tribal courts rests with people and not land. In the 1978 case of *United States v. Wheeler*,[272] the Court held that an individual who had already been convicted of a crime in tribal court did not face double jeopardy when charged in federal court for a crime arising out of the same events.[273] The Court reached this conclusion by holding that tribes did not exercise criminal jurisdiction as an extension of the federal government but rather through their own inherent sovereignty:

> It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions.[274]

By holding that "an Indian tribe's power to punish tribal offenders is part of its own retained sovereignty," the Court recognized that criminal jurisdiction over tribal members predated the creating of the

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> community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.

Id. (emphasis added). Though unquestionably paternalistic, the emphasis on cultural differences serves as a common justification for tribal courts today. *See, e.g.*, John v. Baker, 982 P.2d 738, 760 (Alaska 1999) ("[B]arriers of culture, geography, and language combine to create a judicial system that remains foreign and inaccessible to many Alaska Natives. These differences have created problems in administering a unified justice system sensitive to the needs of Alaska's various cultures." (internal citations and quotations omitted)).

272. 435 U.S. 313 (1978).

273. *Id.* at 315–16.

274. *Id.* at 322 (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)) (internal citations omitted).

reservation system and thus any reliance on land or territorial restrictions.[275] Though domestic dependent nations, tribes have not forfeited, and Congress has not taken away, tribal authority to govern internal relations, and those internal relations include criminal offenses.[276]

The other key case from 1978 is *Oliphant v. Suquamish Indian Tribe*,[277] which held that tribes do not have jurisdiction to prosecute crimes committed by non-members on reservations.[278] At virtually the same time it affirmed the inherent sovereignty of tribes,[279] the Court also held that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[280] If sovereignty were derived from a tribe's land base, then there would be no sound basis for distinguishing between Indian and non-Indian offenders—the tribe that controlled the land could exercise criminal jurisdiction over all those who came on the land. That is how sovereignty normally works. But by holding that tribes did not have jurisdiction over non-Indians, the Court rested criminal jurisdiction on people rather than on land.

The Court further extended this principle in *Duro v. Reina*,[281] holding that not only could a tribe not exercise jurisdiction over a non-Indian, it could not even exercise jurisdiction over Indians who were not members of that tribe.[282] Once *Oliphant* is accepted as good law, the conclusion in *Duro* follows quite logically. If tribal criminal jurisdiction is based on and justified by internal self-governance, then this jurisdiction should be limited to tribal members.[283] Central to this conclusion was the political connection between members of a tribe and the tribal government that passed and enforced the criminal laws under which the member could be prosecuted.[284] The Court also recognized the importance of cultural differences between tribes in holding that members of one tribe do not necessarily consent to the authority of

275. *Id.* at 328.
276. *Id.* at 323.
277. 435 U.S. 191 (1978).
278. *See supra* text accompanying notes 112–18.
279. *Oliphant* and *Wheeler* were both argued in January and decided in March of 1978, though the decision in *Oliphant* preceded the decision in *Wheeler* by about two weeks.
280. *Oliphant*, 435 U.S. at 210.
281. 495 U.S. 676 (1990), *superseded by statute,* 25 U.S.C. § 1301(2) (2012), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).
282. *Id.* at 688.
283. *Id.* at 686. The Court did not apply this limit to civil cases. *Id.* at 687.
284. *Id.* at 693.

another tribe simply by virtue of being Indian.[285] In response to the objection that its holding would result in an inability to prosecute non-Indians for non-major crimes committed on reservations, the Court noted that this was up to Congress to fix.[286]

The underlying principle behind *Duro*, though, is that criminal jurisdiction for tribes is based upon membership, not on any connection to land. If land were the primary and only determining factor for criminal jurisdiction, or even if it were a substantial factor, then the decision in *Duro* would not make sense. Congress did effectively overturn *Duro* in what is commonly known as "the *Duro* fix" by amending the powers of self-government possessed by Indian tribes to include "criminal jurisdiction *over all Indians*."[287] Nothing in this statute limited this criminal jurisdiction to Indian country. The ability of Congress to determine the inherent powers of tribes was upheld in *United States v. Lara*.[288] Importantly, the Court found this not to be a delegation of federal authority into tribal affairs, which effectively would have brought tribal courts under federal jurisdiction and reinstated double jeopardy.[289] Rather, the Court in *Lara* affirmed the reliance upon a tribe's inherent sovereignty as a source of criminal jurisdiction in the cases just discussed.[290]

b. Membership-Based Criminal Jurisdiction is Required by John v. Baker

Though focused on a family law dispute, the inherent sovereignty of Alaska tribes endorsed by the Alaska Supreme Court in *John* both rests upon and is consistent with an extension of this sovereignty to criminal jurisdiction. If Alaska tribes possessed Indian country, they would be in the same position as tribes from the Lower 48 and their jurisdiction over either family law or criminal cases would not be in question. But because of the relative lack of Indian country, *John* had to determine whether tribal jurisdiction was based on land or on people. The court recognized that the majority of cases from outside of Alaska

285. *See id.* at 695 ("But the tribes are not mere fungible groups of homogenous persons among whom any Indian would feel at home. On the contrary, wide variations in customs, art, language, and physical characteristics separate the tribes, and their history has been marked by both intertribal alliances and animosities.").

286. *Id.* at 698.

287. 25 U.S.C. § 1301(2) (2012).

288. 541 U.S. 193, 200 (2004).

289. *Id.* at 197, 207.

290. *Id.* at 205–06. S*ee generally* Leonhard, *supra* note 117 (describing this legal history in more detail).

assume the existence of reservations,[291] but that the core principles behind these cases create a system of dual sovereignty where a tribe's authority can be derived not only from the land but also from the tribe's members.[292]

In reaching this conclusion, the Court drew upon *Wheeler*, quoting at length from the case to support the notion that "'the powers of self-government, including the power to prescribe and enforce internal criminal laws . . . involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.'"[293] The Court also relied upon *Montana v. United States*[294] and *Duro* to emphasize the "fundamental importance of membership" in determining jurisdiction.[295] Other cases that were relied upon more directly discuss civil jurisdiction, including over domestic relations.[296] At the heart of the Court's reasoning is a focus not on land but on whether the jurisdiction at issue is intertwined with the tribe's inherent powers of self-governance.[297]

Self-governance in *John* meant jurisdiction over custody disputes between parents, based on the notion that the ability to determine tribal membership and regulate domestic relations among members "lies at the core of sovereignty."[298] But there is no indication in *John* that member-based jurisdiction is limited to domestic relations. And nor should there be. Furthermore, the Court's reliance upon criminal law cases (*Wheeler* and *Duro*) in building its argument for member-based sovereignty suggests that the Court's view of sovereignty extends beyond domestic relations alone. Throughout its discussion of member-based sovereignty, the Court repeatedly emphasizes that the determination of tribal authority depends on whether the power at issue pertains to the tribe's "sovereign power to regulate the internal affairs of its members."[299]

Where tribes in rural Alaska face an epidemic of unrestrained

291. John v. Baker, 982 P.2d 738, 754 (Alaska 1999).
292. *Id.* at 754–55.
293. *Id.* at 755 (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)).
294. 450 U.S. 544 (1981).
295. *John*, 982 P.2d at 755.
296. *Id.* at 756–57 (citing and discussing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978); Fisher v. District Court, 424 U.S. 382, 389–90 (1976)).
297. *Id.* at 756, 759.
298. *Id.* at 758.
299. *Id.* at 759. Basing jurisdiction on membership as opposed purely to territory has been compared to the power of governments to regulate the conduct of its citizens even when those citizens are in foreign countries. *See* NEWTON ET AL., *supra* note 89, at 220 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES §§ 402–403 (1987)).

domestic violence, wanton sexual assault of adults and children, and largely unchecked drug and alcohol abuse; where Alaska Native women experience 47.2% of the domestic violence in the state while comprising only 17.7% of the population;[300] where substance abuse is a factor in 81% of reports of harm committed by Alaska Natives;[301] where 42.7% of minors ages 12 to 17, including those in rural areas, are at risk of having five or more alcoholic drinks a week, and where 5.4% suffer from alcohol dependence or abuse;[302] where an Alaska Native woman is sexually assaulted every 18 hours;[303] and where at least 75 rural communities lack any resident law enforcement presence[304]—criminal jurisdiction is crucial to the internal affairs and self-governance that lies at the heart of tribal sovereignty. If tribal subject-matter jurisdiction derives from tribal membership and not a necessary connection to land, then the inherent sovereignty that Lower 48 tribes have for criminal jurisdiction over their own members must also exist for Alaska tribes.

The other key holding of *John* that supports the recognition that tribal courts in Alaska have criminal jurisdiction is the principle that tribes in Alaska retain all of their sovereign power unless removed by Congress.[305] While acknowledging that tribal sovereignty is not absolute, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute."[306] Indeed, the majority in *John* explicitly rejected the dissent's argument that outside of reservation boundaries tribes only possess those powers directly given by Congress.[307] In other words, Alaska tribes need not seek congressional approval for exercise of their sovereign powers. Because adjudication of criminal matters lies within a tribe's sovereign authority and has throughout the history of Indian law jurisprudence, and because this authority has not been

300. Rivera et al., *supra* note 2; ALASKA BUREAU OF VITAL STATISTICS, *supra* note 3. Research Unit of the Bureau of Vital Statistics, *Alaska Bureau of Vital Statistics 2005 Annual Report*, ALASKA DEP'T HEALTH & SOC. SERVS., DIV. PUB. HEALTH 215 (2005).

301. Alaska Rural Justice & Law Enforcement Comm'n, *supra* note 33.

302. *2008-2009 NSDUH State Estimates of Substance Use and Mental Disorders*, *supra* note 44.

303. Alaska Safe Families and Villages Act of 2014, S. 1474, 113th Cong. § 2(a)(3) (as introduced in Senate, Aug. 1, 2013), *available at* https://www.congress.gov/113/bills/s1474/BILLS-113s1474is.pdf (enacted without relevant language as Repeal of Special Rule for State of Alaska, Pub. L. No. 113-275, 128 Stat. 2988 (to be codified at 18 U.S.C. § 2265), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ275/pdf/PLAW-113publ275.pdf).

304. ILOC Roadmap, *supra* note 24, at ch. 2, at 39.

305. John v. Baker, 982 P.2d 738, 751 (Alaska 1999).

306. *Id.* (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).

307. *Id.* at 751–52.

divested by Congress,[308] Alaska tribes retain criminal jurisdiction over their members as part of their authority to self-govern internal affairs.

c. None of the Common Legal Critiques of Criminal Jurisdiction for Alaska Tribes are Legitimate

In responding to the ILOC Roadmap, the State of Alaska made several legal arguments against extending criminal jurisdiction "off reservation" to Alaska tribes.[309] None of these arguments are legally sound or sufficient to deny the recognition of criminal jurisdiction for Alaska tribes.[310]

The State objected to what it calls "a backdoor attempt . . . to redefine Indian country."[311] However, a redefinition would be precisely the opposite of what recognition of tribal-member-based criminal jurisdiction actually accomplishes. An attempt to "redefine Indian country" would assume that jurisdiction is necessarily tied to land, which is one of the flaws in the recommendations of the ILOC Roadmap.[312] But as just shown, tribes in Alaska have subject matter jurisdiction over criminal matters independent of whether or not they possess a land base. No redefinition of Indian country is therefore sought or necessary to give Alaska tribes jurisdiction over criminal offenses.

The State further objects by arguing that expanding tribal jurisdiction outside of reservation boundaries would "mark a fundamental shift in Indian law jurisprudence" because geographic location determines sovereignty for criminal cases.[313] To be sure, member-based criminal jurisdiction would be a novel development in

308. The State's arguments asserting that criminal jurisdiction has been divested by congressional action will be addressed in the next Subsection.

309. Geraghty Letter, *supra* note 224, at app. G, 238.

310. With a change in administration in 2014, the State has released a transition report emphasizing the public safety challenges in rural Alaska and signaling greater openness to working with tribal courts to address these issues. Pub. Safety Transition Working Grp., *Public Safety*, STATE OF ALASKA 1–2, http://gov.alaska.gov/Walker_media/transition_page/public-safety_final.pdf (last visited Feb. 12, 2015). It remains to be seen, though, how this will play out, and the transition report does not address the issue of tribal court criminal jurisdiction separately from discussing referral of cases from state to tribal courts. Even if the new administration and Attorney General does not adopt all of the same arguments, these arguments are likely to be introduced in some form in any lawsuit challenging tribal court criminal jurisdiction in Alaska and are therefore worth addressing preemptively here.

311. Geraghty Letter, *supra* note 224, at app. G, 239.

312. ILOC Roadmap, *supra* note 24, at ch. 2, at 51–55.

313. Geraghty Letter, *supra* note 224, at app. G, 238.

Indian law jurisprudence.[314] But so was member-based jurisdiction for domestic relations in Alaska under *John*.[315] And just like with domestic relations, the long history of federal case law supports the conclusion that criminal jurisdiction can be derived from membership as well as from land.

The State also asserts that it has exclusive jurisdiction over crimes covered by the Indian Country Crimes Act[316] and the Indian Major Crimes Act[317] under Public Law 280.[318] This argument is flawed for several reasons. Both the Indian Country Crimes Act and the Indian Major Crimes Act require the existence of Indian country for their jurisdictional provisions to take effect.[319] For that matter, so does Public Law 280.[320] The Alaska Supreme Court, however, has held that Public Law 280 for the most part does not apply in Alaska because of the relative lack of Indian country.[321] Moreover, even if Public Law 280 did apply, it would not strip tribes of their inherent jurisdiction,[322] which as just seen includes criminal jurisdiction. At most it would create concurrent jurisdiction, which essentially already exists. Thus, the State's arguments here are inapplicable and unavailing.

The State contends that granting criminal jurisdiction to each of Alaska's 230 separate tribes "would create a confusing patchwork quilt of jurisdiction, undermine the clarity of the current system, and complicate the State's ability to police its own territory."[323] It is almost as if the State assumes that some tribes will have bizarre criminal laws making crossing your arms a criminal offense. Tribes are restricted to enforcing their own tribal criminal code, but this makes them no different than tribes with reservations. To be sure, tribes in Alaska

314. In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Court did hold that states possess criminal jurisdiction for crimes committed off the reservation, *id.* at 363, but it has never held that this jurisdiction is exclusive.

315. *See* Simonds v. Parks, 329 P.3d 995, 1008 (Alaska 2014) ("The tribal sovereignty to decide cases involving the best interests of tribal children *recognized* in *John* is inherent, non-territorial sovereignty." (emphasis added)).

316. Act of Mar. 27, 1854 ch. 26 § 3, 10 Stat. 269, 270.

317. Ch. 341 § 9, 23 Stat. 362, 385 (1887) (codified as amended at 18 U.S.C. § 1152 (2012)).

318. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. §§ 1162, 1360); Geraghty Letter, *supra* note 224, at app. G, 238–39.

319. 18 U.S.C. §§ 1152, 1153(a) (2012).

320. *Id.* § 1162(a).

321. John v. Baker, 982 P.2d 738, 748 (Alaska 1999).

322. *See* NEWTON ET AL., *supra* note 89, at 555 ("The nearly unanimous view . . . is that Public Law 280 left inherent civil and criminal jurisdiction of Indian nations untouched.").

323. Geraghty Letter, *supra* note 224, at app. G, 240.

would be enforcing tribal law and not state law.[324] This is a consistent and necessary condition for double jeopardy not applying. Indeed, it is worth keeping in mind that tribal court jurisdiction supplements and does not replace state jurisdiction over criminal offenses, thus enhancing rather than complicating the State's law enforcement capabilities.[325] The ability to adjudicate criminal matters may require many Alaska tribes—which to date have not taken advantage of this aspect of their inherent sovereignty—to develop criminal codes.[326] However, there is no reason to believe that these codes will not be modelled on state laws to address the same public safety violations. Assault and illegal use of alcohol or drugs are likely to be criminal offenses under tribal law just as they would under state law.

The State notes that many villages have large non-Native populations that will complicate enforcement and contends that offenders may receive different criminal punishments depending on their race.[327] That non-Indians cannot be tried by tribal courts is well established,[328] and seemingly acknowledged by the State. Rather, tribal court criminal jurisdiction is limited to members of federally recognized tribes.[329] Essentially, the State is making an implicit equal protection argument. But this argument has been explicitly rejected on multiple occasions—being an Indian and belonging to a tribe is a political classification, not a racial one.[330] By extension, this also addresses the

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324. Potentially, the State could cross-deputize tribal police officers, which would allow those officers to enforce state law. Some have advocated for a form of cross-deputization for many years. *E.g.*, Justin Roberts, *Improving Public Safety in Rural Alaska: A Review of Past Studies*, ALASKA JUST. F. 1, 8 (Winter 2005); ILOC Roadmap, *supra* note 24, at ch. 2, at 50.

325. The State complains that there is "no double jeopardy prohibition in Alaska law." Geraghty Letter, *supra* note 224, at app. G, 240. It is unclear why the State thinks there needs to be this prohibition. The legal nature of double jeopardy is clearly established, and the State would have discretion not to prosecute if there was a concurrent tribal prosecution occurring.

326. Those tribes that decide to exercise criminal jurisdiction will also need to develop the enforcement mechanisms, beyond just tribal courts, to support a criminal justice system. This may prove a daunting task, given the remoteness of many tribes and limited financial resources. Lack of adequate funding for tribal criminal justice efforts is a common point raised in reports on the status of rural Alaska Natives. *E.g.*, ILOC Roadmap, *supra* note 24, at ch. 2, at 50; Att'y Gen.'s Advisory Comm. on Am. Indian & Alaska Native Children Exposed to Violence, *supra* note 24, at 140. Remedying this problem, though, is beyond the scope of this article.

327. Geraghty Letter, *supra* note 224, at app. G, 240.

328. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

329. 25 U.S.C. § 1301(2), (4) (2012). Thus, Alaska tribes could prosecute Alaska Natives who are members of other tribes but who commit criminal offenses within the jurisdiction of that tribe.

330. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("A

implicit argument of needing to consent to and participate in the laws and governance of a tribe to be subject to its jurisdiction. That Alaska tribes may not be able to prosecute non-Natives is certainly a problem, as the State may assume that the existence of a tribal court absolves it of all responsibility, leaving non-Native offenders unprosecuted. But this is hardly a justification for preventing tribal jurisdiction entirely. The State already has an obligation to enforce state laws, and this obligation would continue to exist for both non-Natives and Natives alike. Alaska tribes would enforce tribal criminal law as a complement to state law. A policy by the State not to enforce state law against non-Natives merely because of the existence of possible alternate forms of prosecution would be racist, hypocritical, and politically disastrous. The point of extending criminal jurisdiction to Alaska tribes is to provide more tools for combatting social ills, even if those tools are not as broad as they should be because of Congress's unwillingness to fix the jurisdictional limitations of *Oliphant*.[331]

The State expresses concern that "individuals would be subjected to tribal criminal prosecution and significantly different due process standards without any notice or consent."[332] But as with its other arguments, the State's fears here are without solid legal foundation. The Alaska Supreme Court has repeatedly held, including in *John*, that in order for a tribal court order to be recognized by an Alaska court the tribal court must grant certain due process protections, namely notice and the opportunity to be heard before an impartial tribunal conducting regular proceedings.[333] Where due process is not followed in tribal court, Alaska courts will not recognize the tribal court decision.[334] Differences in procedures in tribal courts should absolutely be expected, considering the cultural differences of the tribe and the practical limitations of being

tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent *political* community." (emphasis added)).

331. *See Oliphant*, 435 U.S. at 212 ("Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians." (citations omitted)). *See also* PEVAR, *supra* note 90, at 132 (discussing the need for an "*Oliphant* fix" to address the high crime rates in Indian country).

332. Geraghty Letter, *supra* note 224, at app. G, 240.

333. John v. Baker, 982 P.2d 738, 763 (Alaska 1999); *see also* Simmonds v. Parks, 329 P.3d 995, 1015–16 (Alaska 2014).

334. *See, e.g.*, Starr v. George, 175 P.3d 50, 55–56 (Alaska 2008) (refusing to recognize tribal court adoption proceedings where the failure to provide notice to the grandparents violated their due process rights).

a small court in a remote location.[335] But all that this means is that due process may be *different* in tribal courts than state courts, *not* that it does not exist. As the court in *John* wrote, "we would ignore the fundamental meaning of sovereignty and insult tribal systems of justice to reason that because tribal law is different it is inferior."[336]

In addition to due process protections, tribal courts hearing criminal cases would also be bound by the restrictions of the Indian Civil Rights Act (ICRA),[337] which the State acknowledges in its response to the ILOC Roadmap.[338] ICRA, which applies to all Indians independent of the presence of Indian country,[339] places limits on the sentences that tribal courts can impose[340] and provides to criminal defendants in tribal courts some of the protections found in the Bill of Rights.[341] ICRA also guarantees the right of habeas corpus if a defendant wants to challenge the sentence handed down by a tribal court on due process, or certain other, grounds.[342] Rather than viewing ICRA as a welcome safeguard, however, the State chooses to interpret the limitations as a blow to tribal court jurisdiction,[343] possibly because the State incorrectly presumes that tribes would have exclusive jurisdiction over criminal matters. The limitations on tribal court jurisdiction imposed by ICRA may result in a restriction on the severity of cases that a tribal court would or could hear. But again, this is not a justification for denying all criminal jurisdiction to Alaska tribes. The situation in rural Alaska is dire enough that every potential source of criminal justice should be valued and embraced.

Finally, the State objects to the lack of clear boundaries to determine the extent of tribal criminal jurisdiction.[344] How to place

335. *John*, 982 P.2d at 763.
336. *Id.* at 764.
337. U.S.C. §§ 1301–1341 (2012).
338. Geraghty Letter, *supra* note 224, at app. G, 239.
339. 25 U.S.C. § 1301(2).
340. *Id.* § 1302(a)(7)(c).
341. *See id.* §§ 1302(a)(2)–(4), (6)–(8), (10) (guaranteeing many of the protections contained within the Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the United States Constitution). Criminal proceedings in which the defendant may be subject to imprisonment by more than a year create additional requirements for the tribal court, such as that the defendant be provided with assistance of counsel at tribal expense, *id.* §§ 1302(c)(1), (2), that the judge be licensed to practice law, *id.* § 1302(c)(3)(B), that the tribe have publicly available criminal laws, rules of evidence, and rules of criminal procedure, *id.* § 1302(c)(4), and that a recording of the proceedings be kept, *id.* § 1302(c)(5).
342. *Id.* § 1303.
343. Geraghty Letter, *supra* note 224, at app. G, 239.
344. Geraghty Letter, *supra* note 224, at app. G, 240.

limits on the reach of tribal court jurisdiction in the absence of reservation or other land-based borders is indeed a challenging topic. However, it is an issue not of subject matter jurisdiction, but rather of personal jurisdiction, to which this Article now turns.

2. Personal Jurisdiction

At first glance, it seems as if member-based jurisdiction would result in boundless criminal jurisdiction for tribes over their members. Conversely, one might fear never really knowing when one became subject to a tribe's criminal jurisdiction. Upon further examination, though, *John* and common sense provide an answer to these concerns.[345]

Though it did not address the issue extensively, the court in *John* stated that the requirement of personal jurisdiction "ensures that the tribal court will not be called upon to adjudicate the disputes of parents and children who live far from their tribal villages and have little or no contact with those villages."[346] This notion of "minimum contacts" is a common requirement when establishing personal jurisdiction, though primarily in civil cases. Drawing upon *International Shoe Co. v. Washington*,[347] the court has elsewhere held that "minimum contacts" for the purpose of satisfying due process is met where maintaining suit in the forum asserting personal jurisdiction "does not offend traditional notions of fair play and substantial justice."[348] The court further held that exercise of jurisdiction is justified "by the relationship among the defendant, the forum, and the litigation" when the controversy at issue "is 'related to' or 'arises out of' a defendant's contacts with the forum state."[349] Where an individual invokes the benefits and protections of a forum's laws, he or she has submitted to the forum's jurisdiction.[350]

The main principle here is that personal jurisdiction derives from submitting to and deriving benefit from a government. In the case of criminal jurisdiction, this is normally tied to the offense occurring within a territory.[351] But it can be translated to member-based jurisdiction as

345. Admittedly, this answer also ties into the issue of subject matter jurisdiction in that it touches on the types of cases that tribal courts can hear. However, when tribal jurisdiction is based on membership and not land, this overlap is to be expected.

346. John v. Baker, 982 P.2d 738, 763 (Alaska 1999).

347. 326 U.S. 310 (1945).

348. *In re* Estate of Fields, 219 P.3d 995, 1008 (Alaska 2009) (quoting *Int'l Shoe Co.*, 326 U.S. at 316).

349. *Id.* at 1009 (quoting Glover v. W. Air Lines, Inc., 745 P.2d 1365, 1367 (Alaska 1987)).

350. S.B. v. State, Dep't. of Health & Soc. Servs., 61 P.3d 6, 14 (Alaska 2002).

351. James L. Buchwalter, *Criminal Jurisdiction of Municipal or Other Local*

well. Tribes can only exercise criminal jurisdiction over offenses that occur within the traditional village over which the tribe governs. The federal recognition of Alaska tribes does not adhere to pre-defined boundaries, but it does depend on a cohesiveness of a people that have traditionally occupied a common geographic location. Tribes are not recognized as loose political entities, but as, for example, the Native Village of Minto, the Native Village of Tanana, the Akiak Native Community, or Northway Village.[352] There is a vital and necessary connection between tribe and place. Even though the boundaries of a Native village may not always exist in the form that one could track down in a recorder's office, tribal governments are almost invariably associated with a particular village.[353] This is especially true when one considers that the geographic isolation of most Alaska villages places practical, natural boundaries on the extent of the land that one could reasonably be considered governed by a village and associated tribal government.[354] And because almost all villages in rural Alaska are associated with a tribe, any Alaska Native living in rural Alaska should and most certainly will know when they are within the reach of a tribe and village. Because Congress has extended tribal court jurisdiction to all American Indians and Alaska Natives, regardless of membership in that particular tribe, tribal courts will have, at the very least, broad criminal jurisdiction over any fellow Alaska Native living in or visiting the village.[355]

Just as associating tribal jurisdiction with a village provides sufficient geographic specificity for potential offenders to be on notice of tribal criminal jurisdiction, there is also no reason to fear an over-

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Court, 102 A.L.R. 5th 525 § 13[a] (2002).

352. *See, e.g.*, Simmonds v. Parks, 329 P.3d 995, 999 (Alaska 2014); State v. Native Vill. of Tanana, 249 P.3d 734, 736 (Alaska 2011); John v. Baker, 982 P.2d 738, 743 (Alaska 1999).

353. *But see* CASE & VOLUCK, *supra* note 76, at 335 (noting that the Central Council of the Tlingit and Haida Indian Tribes of Alaska covers multiple villages). This tribe, though, is the exception that proves the rule.

354. One is tempted to think of Justice Potter Stewart's famous aphorism about pornography—you may not be able to define the village boundaries, but you know them when you see them. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (giving the famous original line). While there may be disputes about whether a particular offense occurred within the criminal jurisdiction of a particular village, those disputes could be settled through a writ of habeas corpus in state court.

355. As a policy matter, a tribe should also be permitted to prosecute someone who attempts to ship banned substances (such as alcohol) to a village, even though that person is doing so from outside the village. The extent to which this action would establish the necessary minimum contacts, however, would need to be resolved through litigation.

extension of tribal criminal jurisdiction outside the general bounds of the village. While Alaska courts are sometimes willing to entertain domestic relations cases where the child at issue does not live in the tribal village asserting jurisdiction, they still require the child to be a member or eligible for membership in the tribe.[356] Furthermore, there is a fundamental difference between jurisdiction over domestic relations and criminal jurisdiction. The former appropriately relies upon membership in the tribe because the purpose is to protect the cultural survival of the tribe.[357] Even outside of an Indian law context, jurisdiction over a custody action depends on jurisdiction over the child.[358] The latter, on the other hand, depends upon the locus of the commission of an offending action. Consistent with commonly accepted principles of criminal jurisdiction, tribes only have jurisdiction over criminal actions that occur in the village over which the tribe has authority, though enforcement jurisdiction could conceivably extend beyond the village.[359] Alaska tribes would have no more jurisdiction over a tribal member who commits a crime outside of the village than Alaska would over an Alaska resident who commits a crime in Texas. This is consistent with the spirit of "minimum contacts" articulated in *John* and other Alaska cases discussing personal jurisdiction in the sense that limiting tribal criminal jurisdiction to offenses occurring in the village is necessary to ensure a connection between the defendant, the forum, and the litigation.[360]

Limited case law exists outside of Alaska regarding whether tribes can exercise criminal jurisdiction over offenses committed off-reservation. This author was only able to find two opinions on this issue.[361] In both cases, tribes were denied the ability to prosecute tribal members for alleged offenses committed outside of the tribe's reservation. However, in both cases the tribe had an existing reservation

356. *See John*, 982 P.2d at 764 (remanding for a determination under tribal law of whether the child at issue was eligible for membership in the tribe).

357. *Id.* at 753.

358. *See*, *e.g.*, ALASKA STAT. § 25.30.300 (establishing initial child custody jurisdiction in Alaska under the Uniform Child Custody Jurisdiction and Enforcement Act).

359. For example, if a tribe issued a protective order and that order was violated outside of the village, the tribe potentially could still be able to criminally prosecute the violation of the protective order. Arguably, though, if the protective order was registered with the State of Alaska, then enforcement would rest with them.

360. *In re* Estate of Fields, 219 P.3d 995, 1009 (Alaska 2009).

361. Those opinions are *Fife v. Moore*, 808 F .Supp. 2d 1310 (E.D. Okla. 2011), and *Kelsey v. Pope*, No. 1:09-CV-1015, 2014 WL 1338170 (W.D. Mich. Mar. 31, 2014), *appeal docketed* No. 14-1537 (6th Cir. Apr. 30, 2014).

that delimited its boundaries. Thus, there was an "on-reservation" with which to contrast the "off-reservation." In light of *John*, the basic parameters of the village would constitute the area over which general criminal jurisdiction could be exercised. The tribe is primarily concerned with maintaining peace and order within the village, and actions within will be the focus of its criminal proceedings.

3. Banishment

Though a civil as opposed to criminal remedy, it is worth briefly discussing banishment,[362] as it touches upon many of the same issues as personal jurisdiction. Namely, tribal banishment in Alaska would seek to exclude an individual from a particular geographic area associated with an Alaska Native tribe. Banishment is often a tool of last resort, but can be used to exclude from a community individuals who pose a continuing threat to health and safety.[363] Indeed, while the tribal court in the Native Village of Tanana initiated the process of banishing two men for threats toward members of the tribal counsel after the tragic events that resulted in the murder of two Alaska State Troopers,[364] it is conceivable that the tragedy could have been avoided in the first place had banishment been a more available option beforehand.

Banishment is a well-established and commonly accepted remedy for American Indian tribes in the Lower 48, at least with regard to tribes with reservation land.[365] The seminal case addressing banishment is *Poodry v. Tonawanda Band of Seneca Indians*,[366] which held that tribal court orders permanently banishing members from a tribe's reservation were severe restrictions on liberty and the equivalent of a criminal sanction, and therefore a suitable basis for habeas corpus relief in federal courts under ICRA.[367] Subsequent cases have emphasized the need for due process protections, including the right to appeal within the tribal

362. For a more extensive overview of the law and legal history of banishment, see Rob Roy Smith, *Enhancing Tribal Sovereignty by Protecting Indian Civil Rights: A Win-Win for Indian Tribes and Tribal Members*, 2012 AM. INDIAN L.J. (TRIAL ISSUE) 41, *available at* http://www.law.seattleu.edu/Documents/ailj/trialissue/AILJTrialIssueWinter2012.pdf; Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85 (Winter 2007) [hereinafter *Banishment*]; Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems: A Postscript on* Quair v. Sisco, 37 N.M. L. REV. 479 (Spring 2007) [hereinafter *Postscript*].

363. *Banishment*, *supra* note 362, at 92.

364. *Tanana Moves to Banish*, *supra* note 57; Shedlock, *supra* note 57.

365. Smith, *supra* note 362, at 41–42; *Banishment*, *supra* note 362, at 107–08.

366. 85 F.3d 874 (2d Cir. 1996).

367. *Id.* at 880.

judicial system when a tribal member is sentenced to banishment, even if the banishment is part of a larger decision to disenroll the tribal member.[368] However, when only tribal enrollment and not banishment is at issue, there is no habeas right because there has been no detention of the individual involved.[369] In all of these cases—even in the ones placing restrictions on the ability of the tribe to banish its members—only the due process protections attendant to banishment have been challenged, not the right of tribes to engage in banishment. Indeed, there are no federal court decisions prohibiting tribes from engaging in banishment from tribal territory.[370]

Though the Alaska Supreme Court has not squarely addressed the legality of banishment,[371] the issue has arisen at the Superior Court level. In 1999, the Native Village of Perryville IRA Council ("Perryville") passed a resolution banishing John Tague, a then-incarcerated tribal member, because of threatening, aggressive, and assaultive conduct.[372] The next year, Perryville filed for a permanent injunction against Tague, which was granted in 2001 by a Superior Court in Anchorage.[373] Tague returned to Perryville in early 2003.[374] When Perryville filed for and obtained in 2003 a writ of assistance requiring that Alaska State Troopers assist in removing Tague from the village, the State took the step of writing a letter to the judge challenging the validity of the tribe's banishment order and consequently the writ of assistance.[375] More specifically, the State claimed that because Perryville did not possess any Indian country, it could not assert its sovereignty through banishment.[376] The judge issued a show cause order requiring Perryville to brief the issue and inviting response from Tague.[377] Both Perryville and the State extensively briefed the legality and enforceability of

368. Quair v. Sisco, 359 F. Supp. 2d 948, 963, 971 (E.D. Cal. 2004).

369. Jeffredo v. Macarro, 599 F.3d 913, 918–19 (9th Cir. 2010).

370. There is even case law to suggest that a tribe can banish non-members from its lands as part of the tribe's inherent civil powers. *E.g.*, Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 478 (9th Cir. 1985).

371. Tribal banishment has, however, been mentioned in passing. *E.g.*, Philip J. v. State, Dep't of Health & Soc. Servs., 264 P.3d 842, 844 (Alaska 2011).

372. Native Village of Perryville IRA Council Res. 99-07 (1999) (on file with author).

373. Native Vill. of Perryville v. Tague, No. 3AN-00-12245 CI (Alaska Super. Ct. 2001) (on file with author).

374. Motion for Writ of Assistance, *Native Vill. of Perryville*, No. 3AN-00-12245 CI (2003) (on file with author).

375. Letter from Gregg D. Renkes, Att'y Gen., Alaska, to Peter Michalski, Superior Court Judge, Alaska (Mar. 18, 2003) (on file with author).

376. *Id.* at 2.

377. Order to Show Cause, *Native Vill. of Perryville*, No. 3AN-00-12245 CI (2003) (on file with author).

Perryville's banishment order; Tague did not file a brief.[378] Toward the end of 2003, the court issued an order upholding the injunction.[379] Part of the reasoning in the order was that Tague was the true party in interest, and because he had not challenged the injunction the court had no basis to vacate it.[380] However, the court also upheld the legality of the injunction, though with mixed results for the tribe's authority—the court noted the "unfairness of subjecting an unwilling non-native citizen to the authority of a native governing body is simply not allowed by the authority claimed by Perryville,"[381] but because Tague was a member of the tribe and because he "had acted in demonstratively dangerous ways to the people of Perryville,"[382] the tribe was justified in issuing a banishment order specific to the small village it occupied.[383]

The ruling in *Native Village of Perryville v. Tague* highlights the complicated legal status of banishments. While the law clearly supports banishment as an option to maintain order, treating banishment as a civil remedy could potentially limit jurisdiction to tribal members. The extension of jurisdiction over all Indians found in criminal cases would not apply in civil cases. After all, there is no basis for believing that a tribe in one village can decide a custody dispute for members of a tribe at the other end of the state when the parents are not members and there are no connections to that tribe. Three possible solutions arise to address nonmember banishment. The first is to attempt to apply the *Montana* test for extending civil jurisdiction over nonmembers. In *Montana v. United States*, the Supreme Court held that tribes may regulate the activities of non-Indians on non-Indian-owned land only where one of two exceptions applied—either where (1) the non-Indian has entered into

378. Brief of Native Village of Perryville in Response to Order to Show Cause, *Native Vill. of Perryville*, No. 3AN-00-12245 CI (2003) (on file with author); Brief for State of Alaska as Amicus Curiae Supporting Neither Party in Response to Order to Show Cause, *Native Vill. of Perryville*, No. 3AN-00-12245 CI (2003) (on file with author); Reply Brief of Native Village of Perryville in Response to Order to Show Cause, *Native Vill. of Perryville*, No. 3AN-00-12245 CI (2003) (on file with author). A combined amicus brief was also filed by several residents of Perryville, the Alaska Network on Domestic Violence and Sexual Assault, the Bristol Bay Native Association, and the Alaska Inter-Tribal Council. Brief of Elizabeth Kosbruk et al. as Amici Curiae Supporting Native Village of Perryville in Response to Order to Show Cause, *Native Vill. of Perryville*, No. 3AN-00-12245 CI (2003) (on file with author).

379. Order, *Native Vill. of Perryville*, No. 3AN-00-12245 CI (2003) (on file with author).

380. *Id.* at 2–3.

381. *Id.* at 3. This language is arguably dicta.

382. *Id,* at 4.

383. *Id.* The court also placed weight in the fact that, although the banishment order was ostensibly permanent, Tague was able to apply to lift the ban every two years. *Id*. at 5.

consensual relations with the tribe, such as through commercial dealings, or (2) the activity of the non-Indian "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[384] However, it is not entirely clear whether either of these exceptions would apply with regards to banishment. Living in a village may not rise to the level of entering a consensual relationship with the tribe. And while any actions that would merit banishment would almost certainly threaten the "health or welfare of the tribe," the first part of this passage limits application to fee lands within the tribe's reservation.[385] The second possible solution is through application of the Violence Against Women Act,[386] which allows tribes "to exclude violators from Indian land" as part of its civil jurisdiction.[387] But this presents two problems: the Act's restriction to Indian country, which at this point does not exist for most tribes in Alaska, and the Act's application only to incidents of domestic violence. The final solution is to consider banishment a criminal penalty rather than a civil remedy. Such an interpretation is supported by *Poodry*,[388] and given the analysis above would address many of the outstanding jurisdiction issues. As a criminal offense, banishment would not be an option for non-Indians, but the scope of jurisdiction might still be more extensive than either of the two other proposed solutions.

CONCLUSION

Establishing criminal jurisdiction for Alaska tribes has been recognized as a vital component of combatting the social ills that plague rural Alaska Natives, especially considering the practical limitations facing law enforcement and the Alaska Court System.[389] But while these reports and accompanying recommendations require intervening action by third parties, such as an unlikely amendment of ANCSA by Congress to extend Indian country status to ANCSA lands, tribal courts can already assert criminal jurisdiction over Alaska Natives by virtue of their inherent sovereignty, as a logical extension of the member-based

384. Montana v. United States, 450 U.S. 544, 565–66 (1981).
385. *Id.* at 566.
386. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.
387. 18 U.S.C. § 2265(e).
388. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 888–89 (2d Cir. 1996).
389. ILOC Roadmap, *supra* note 24, at ch.2, at 51–55; Att'y Gen.'s Advisory Comm. on Am. Indian & Alaska Native Children Exposed to Violence, *supra* note 24, at 135–46.

jurisdiction recognized in *John v. Baker*. Alaska tribes can and should undertake the steps needed to establish their own internal criminal justice systems. The federal government has a trust responsibility to provide funding for and assist in building tribal criminal justice systems. And the State of Alaska would benefit in its law enforcement efforts in rural Alaska by actively supporting tribal court criminal jurisdiction.

Tribal courts in Alaska are not lesser courts, but sovereign courts that should be treated with respect.[390] The Alaska Supreme Court recently held that tribal court custody decisions are due the same respect as judgments from another state.[391] Indeed, the Alaska Supreme Court has consistently upheld not only the sovereignty but also the competency of tribal courts to decide internal affairs among their members. In her State of the Judiciary speech to the Alaska Legislature in 2013, Chief Justice Dana Fabe spoke eloquently of the central role that tribal courts in Alaska can play in administering criminal justice in rural Alaska:

> Tribal courts bring not only local knowledge, cultural sensitivity, and expertise to the table, but also valuable resources, experience, and a high level of local trust. They exist in at least half the villages of our state and stand ready, willing, and able to take part in local justice delivery. Just as the three branches of state government must work together closely to ensure effective delivery of justice throughout the state court system, state and tribal courts must work together closely to ensure a system of rural justice delivery that responds to the needs of every village in a manner that is timely, effective, and fair. In short, we must all work together if we are to meet the tremendous challenge of bush justice. To borrow the nautical expression for rousing help in an emergency, the crisis in our villages demands "all hands on deck."
>
> It is my hope that we can put behind us the days when villagers express doubt and dissatisfaction with our delivery of justice because it happens too far away from them. It is my hope that we can put behind us the days when opportunities

390. *See* Evon Peter, Exec. Dir., Indigenous Leadership Institute, Testimony before the Task Force on American Indian/Alaska Native Children Exposed to Violence (June 11, 2014), *quoted in* Att'y Gen.'s Advisory Comm. on Am. Indian & Alaska Native Children Exposed to Violence, *supra* note 24, at 132 ("The state of Alaska needs a major shift in its policies and approaches to working with Alaska Native tribes and people. We are not an enemy of the state. This is our home and we love it. But we need to be respected and honored as equals.").

391. *See* Simmonds v. Parks, 329 P.3d 995, 1011 (Alaska 2014) (holding that tribal appellate remedies needed to be exhausted before a tribal court decision could be challenged in Alaska state court).

> for mutual assistance, support, and coordination between state and local authorities are lost because no clear lines of communication or cooperation are in place. And it is my hope that we can put behind us the days when minor village problems become major ones because confusion over respective roles means justice responses that are too little, too late.[392]

By being a local solution sensitive to the cultural traditions of the community, tribal courts can play this vital role in delivering rural justice. It is time for tribal courts in Alaska to be empowered to assert their inherent sovereignty and jurisdiction over criminal offenses.

392. Dana Fabe, *State of the Judiciary*, ALASKA COURT SYS. 13 (Feb. 13, 2013), http://courts.alaska.gov/soj/state13.pdf.