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"They Trespass Her Body Like They Trespass This Land"[1] Civil and Criminal Jurisdictional Issues Involving Assaults on Tribal Lands by Non-Indians

KATIE P. GROSS*

Introduction

This paper argues: (1) until Congress acts to expand tribal court jurisdiction to include assault crimes committed against Indians by non-Indians who are strangers to victims, victim-advocates should consider pursuing civil remedies in tribal courts, and (2) courts should recognize the tribal courts' authority to hear these civil cases under the second *Montana* exception. The second *Montana* exception provides that tribal courts can exercise jurisdiction over the "conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[2] The health and welfare of a tribe remains threatened if non-Indians can continue to commit assaults against Indians on reservations without repercussion.[3] This paper will first discuss the general history of jurisdictional and sovereignty divides between tribes and the United States government for the purposes of explaining how the law

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1. RYAN RED CORN, TO THE INDIGENOUS WOMAN (2017) https://www.srmt-nsn.gov/_uploads/site_files/ToTheIndigenousWomanPoem.pdf (Accessed January 1, 2019).

2. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

3. There has been some debate as to whether the term Native American or American Indian should be used to refer to people indigenous to what is now the United States. The Supreme Court has historically used both terms, but in the cases cited in this paper the Court almost exclusively uses the term "Indian." The Violence Against Women Reauthorization of 2013 also uses the term "Indian" and "Indian tribe" to refer to the indigenous nations and communities in the United States. Consistent with the Court opinions cited therein and the Violence Against Women Reauthorization of 2013, the terms Indian and non-Indian will be used throughout this paper.

developed into the status quo. This paper will next explore criminal jurisdictional issues that arise when non-Indians commit crimes against Indians on reservations. Finally, this paper will end by exploring civil jurisdiction over non-Indians, particularly looking at how the second *Montana* exception can be applied to provide a remedy to Indian victims of assaults by non-Indians who are strangers.

When a person is assaulted, the perpetrator of the crime is generally subject to prosecution in the state where the crime occurred, subject to the state's applicable criminal statutes. The interest behind this policy is in supporting the right of the state to protect its residents and govern activity within its borders. However, those policy concerns are unmet for Indian tribes trying to protect their members and govern activity within reservation borders when it comes to stranger assaults.[4] When an Indian is assaulted by a non-Indian within an Indian reservation, and that non-Indian is a stranger to the victim, the tribe does not have jurisdiction to prosecute the perpetrator in tribal court. The burden of prosecution then falls to the federal government and the United States Attorney's Office, which has historically had low rates of bringing charges.[5] This is particularly problematic in instances of sexual assault because studies show that a significant percentage of rapists reoffend.[6]

Recently, Congress addressed the issue of assault committed against Indians by non-Indians with the Violence Against Women Reauthorization of 2013, by allowing tribes to exercise jurisdiction over assaults committed against Indians by non-Indians *known* to the victim. Further, the U.S. Attorney's office has tried to address the low charge rates for crimes committed by non-Indians against Indians on tribal lands and increased prosecution rates from 2011 onwards.[7] However, there remains a declination gap and roughly two-thirds of crimes committed by non-Indians against Indians on reservations go uncharged.[8]

With limited criminal jurisdiction in tribal court, and a poor record of prosecution by the federal government, many Indian victims of violent crime on reservations are left with virtually no legal recourse. Given the gap in the ability to prosecute non-Indians who commit stranger assaults against Indians, victim advocates should consider pursuing civil remedies for Indian victims of stranger assaults. In *Montana v United States*, the Supreme Court held that a tribal court may exercise civil jurisdiction over nonmembers when the health or welfare of the tribe is threatened.[9] However, the Supreme Court has not weighed in on whether a tribal

4. A stranger assault refers to an assault committed by a stranger—someone who the victim does not know.

5. U.S. DEPARTMENT OF JUSTICE, DOJ RELEASES SECOND REPORT TO CONG. ON INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS (Aug. 26, 2014) (on file with the Dep't of Just.).

6. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73, 73 (2002).

7. Dept. of Just., *supra* note 5.

8. *Id.*

9. *Montana*, 450 U.S. at 565-66.

court can exercise jurisdiction over a nonmember defendant who is a stranger to the victim-plaintiff. As this paper will discuss, courts should recognize the authority of tribal courts to hear intentional tort cases relating to assaults committed against Indians by non-Indians who are strangers to the victim under the exception laid out in *Montana*.

I. History of the United States Government's Regulation of Indians

It is estimated that there were fifty million people living in North America prior to the arrival of Christopher Columbus and, of those fifty million, five million were living north of what is now Mexico.[10] The arrival of European settlers brought war, famine, disease, and the imposition of foreign forms of government, drastically changing the lives of Indians, with ripple effects lasting for generations. European imperialism and colonialism challenged the property rights of Indians, the style of governance Indians had adopted, and subjected them to violence. The behavior of the early North American settlers set the tone for United States-Indian relations and set a course for the gradual narrowing of rights for indigenous people living in what is now the United States.

During the Revolutionary War, some Indians fought the British side-by-side with colonial Americans.[11] Though not all tribes chose a side during the Revolutionary War, all tribes were undoubtedly impacted by the events that followed. After securing their liberty from the oppressive rule of England, early Americans were not interested in living cooperatively with Indian tribes, nor in recognizing and accepting the independent sovereignty of tribes. Rather, the early American government was interested in occupying all the land within the continental United States, both settled and unsettled, without regard to the millions of indigenous people already present there.[12]

The framers codified the relationship with Indians in the Constitution. The Constitution recognized the right of Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," putting the sovereignty of tribes on par with foreign governments or states, while also claiming the exclusive right to regulate Indians.[13] Later, under Chief Justice John Marshall, the Supreme Court expanded on this definition. Chief Justice Marshall's court clarified the status of the sovereignty of Indian tribes, chipping away at the concept that tribes were independent, sovereign nations, in *Worcester v Georgia* and

10. ALAN TAYLOR, 1 AMERICAN COLONIES: THE SETTLING OF NORTH AMERICA 40 (Eric Foner ed., 2001).

11. AMERICAN INDIANS OF ONEIDA & KENTUCKY, http://oneidakentucky.homestead.com/ nativeamericans.html (Accessed Apr. 2, 2018).

12. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 585 (1823).

13. U.S.C.S. Const. Art. I, § 8.

Cherokee Nation v Georgia. In *Worcester v Georgia*, the Court held that Congress, not states, has the exclusive right to regulate and manage the affairs of Indians.[14] In *Cherokee Nation v Georgia*, the Court further explained the relationship between the United States and tribes as one resembling "that of a ward to his guardian. 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. They and their country are . . . so completely under the sovereignty and dominion of the United States."[15] The Marshall Court began the narrative of tribes as dependents, rather than as separate, sovereign nations and later United States policy built on and exploited that relationship.

Perhaps the most well-known early assault on the sovereignty and rights of Indians occurred under the administration of President Andrew Jackson with the Indian Removal Act, which was signed into law on June 30, 1830.[16] In 1830, following the enactment of the Indian Removal Act, the Choctaws signed a treaty with the United States government and were removed from their lands.[17] The Chickasaws were similarly removed in 1832.[18] In 1836, President Jackson ordered the removal of the Creeks as a military necessity.[19] The Seminoles refused to move and fought the United States military forces from 1835 to 1842 and again in 1855.[20] They ultimately lost their battle and left their lands in 1858.[21] The Cherokee challenged the legality of a treaty they were misled into signing, ultimately arguing their case and the legality of the treaty before the United States Supreme Court.[22] Their legal claim failed and they were forcibly removed by the United States military in what came to be known as the Trail of Tears.[23] Of the 16,000 Cherokees forcibly removed, it is estimated that 3,000 to 4,000 died during the march from cold, disease, and exhaustion.[24] At the end of President Jackson's campaign, more than 46,000 Indians left behind 25 million acres of land after they were removed to territory west of the Mississippi.[25]

14. *Worcester v. Georgia*, 31 U.S. 515, 558-59 (1832) (reversing the judgment that convicted the plaintiff of being a white person living on tribal land; in dicta, Chief Justice Marshall noted that the laws criminalizing living within tribal land were "repugnant to the constitution, treaties and laws of the United States.").

15. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17-18 (1831).

16. RONALD N. SATZ & LAURA APFELBECK, IMPERIALISM AND EXPANSIONISM IN AMERICAN HISTORY 400 (Chris J. Magoc & David Bernstein eds., 1996).

17. *Id.*

18. *Id.* at 401.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

From the founding of the United States through the middle of the 19th Century, the federal government progressively exerted more and more control over Indians, ultimately taking their lands as well as their sovereign rights. By the time the Supreme Court decided *Oliphant* and *Wheeler* in 1978, and held that tribes are not fully sovereign nations with the power to enforce laws against those who commit crimes within the boundaries of their lands, they were continuing the centuries-old legacy of stripping away the autonomy of Indian tribes, while assuring them that this was in the best interest of their "powers of self-government."[26] This patronizing relationship, coupled with the frighteningly high incidence of violence, leaves Indians in a perilous position with limited legal remedies.

II. Scope of Violence Against Indians

As of the 2010 census, 5.2 million people in the United States identified as Indian.[27] There are 567 federally recognized Indian tribes in the United States.[28] Indians had the highest rate of violence committed against them by strangers among all racial and ethnic groups from 1993 to 2010.[29] The rate of violence committed against Indians is more than twice the rate for the United States.[30] A majority of Indian women have experienced violence by a non-Indian at some point in their lifetime. [31] According to a National Institute of Justice study, 84.3 percent of Indian women have been the victim of violence at some point in their lives.[32] 56.1 percent of Indian women have experienced sexual violence in their lives, and 14.4 percent had experienced sexual violence within a year of the study.[33]

26. *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

27. U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 CENSUS BRIEFS (2012).

28. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235 (January 30, 2018).

29. From 1993 to 1998, the rate of violence against Indians was 60.0 per 1,000. From 1999 to 2004, it was 41.3 per 1,000. From 2005 to 2010 it was 28.2 per 1,000. That is almost double the rate of violence against Latinos committed by a stranger, the second most frequently victimized by violence by a stranger. U.S. DEP'T OF J., BUREAU OF J. STATS., NCJ 239424, VIOLENT VICTIMIZATION COMMITTED BY STRANGERS, 1993-2010 (2012).

30. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, DECLINATIONS OF INDIAN COUNTRY MATTERS (2010).

31. André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 NIJ J., 38, 41 (2016) (97 percent of Indian women reported that they were the victim of violence committed by an interracial perpetrator at least once in their lifetime. In contrast, 35 percent of Indian women reported that they were the victim of violence committed by an intraracial perpetrator in their lifetime.).

32. U.S. DEP'T OF J., BUREAU OF J. STATS., NCJ 239424, VIOLENT VICTIMIZATION COMMITTED BY STRANGERS, 1993-2010 (2012).

33. *Id.*

III. Tribal Courts Generally

Due to the constantly evolving relationship between the United States government and Indian tribes, understanding the tribal court's limits in terms of criminal and civil jurisdiction can be complicated. It is worth taking time to understand the background and nuance of the civil and criminal limitations before considering how Indian victims of violent crime may be afforded relief against their non-Indian perpetrators.

In 1934, Congress passed the Indian Reorganization Act, which encouraged tribes to adopt a form of government similar to the United States federal government.[34] To that end, tribes were encouraged to adopt constitutions and laws, subject to approval by the Secretary of Interior.[35] This was the beginning of the modern tribal court system, which varies in structure and substance across Indian tribes.

Contemporary judicial systems adopted by tribes take several forms. Some tribes have adopted courts that resemble the more traditional approaches that tribes historically used to settle claims. For example, the Navajo Tribal Court has a separate branch of their judiciary called the Peacemaker Court, established in 1982 and rooted in Navajo traditions.[36] Claims are first filed in Navajo tribal court and then referred to the peacemaking court.[37] The peacemaking process resembles mediation, with emphasis on spirituality, catharsis, and healing.[38] Other tribes have courts that resemble United States government tribunals.[39] Some tribal judges are attorneys, while some judges are respected members of the tribe with knowledge of tribal traditions in resolving disputes.[40] Some tribes appoint judges and other tribes elect judges.[41] Some tribal courts require bar exams, others require only an admission fee.[42]

In 1968, Congress passed the Indian Civil Rights Act which applies the Bill of Rights to tribal governments, including the right to habeas corpus petitions to challenge the legality of detention by a tribe.[43] As a result of the Indian Civil Rights Act and the subsequent protection of the criminal safeguards delineated under the

34. Indian Reorganization Act, 73 P.L. 383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C.S. § 5101).

35. *Id.*

36. JUD. BRANCH OF THE NAVAJO NATION, PEACEMAKING PROGRAM PLAN OF OPERATIONS (2013).

37. *Id.*

38. *Id.*

39. B.J. JONES, *Role of Indian Tribal Courts in the Justice System, in* INDIAN TOPIC-SPECIFIC MONOGRAPH SERIES 7 (Dolores Subia BigFoot ed., 2000).

40. *Id.*

41. *Id.*

42. *Id.*

43. 25 U.S.C. § 1303.

Bill of Rights, criminal proceedings in tribal court often resemble criminal proceedings in federal and state courts.[44] Defendants charged in tribal court "have the right to be read the charges, the right to confront witnesses against them and to call witnesses to testify for them, the right to remain silent which includes the right not to be compelled to testify in their own defense, the right to not be confined unless the tribe proves the charges against them beyond a reasonable doubt, [and] the right to reasonable bail."[45] Courts are not required to appoint and pay for a public defender for indigent defendants (although many tribal courts still do have public defenders available).[46] Tribal courts are not consistent from tribe to tribe across the country, just as state courts are not consistent from state to state across the country. The constitutional rights of the defendant are protected across jurisdictions, which, in theory, means criminal proceedings across jurisdictions are sufficiently uniform for the administration of justice. Despite the uniformity in constitutional safeguards, the United States government has not entrusted tribal courts with criminal jurisdiction over non-Indian defendants.

IV. CRIMINAL JURISDICTION ON TRIBAL LANDS

Tribal court jurisdiction over non-Indians for crimes committed against Indians was contemplated as early as 1791 when William Blount, governor of the Southwest Territory and superintendent of Indian affairs for the southern district for the United States, signed a treaty with the Cherokee nation establishing the terms that would govern the relationship between the Cherokee and the United States.[47] Under the treaty, any citizen or inhabitant of the United States who commits any crime against "any peaceable and friendly Indian or Indians . . . shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had committed within the jurisdiction of the state or district to which he or they may belong."[48] In 1834, in a report to Congress, the Commissioner of Indian Affairs remarked that tribes are "without laws" with the exception of "two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves."[49] In the same year, Congress passed the Western Territory bill, which created Indian Territory outside of the area settled by United States settlers and explicitly stated that non-Indians were subjected to the jurisdiction of the federal government rather than a tribe, even if that person was living within Indian Territory.[50] In the intervening years, Congress further defined the jurisdiction

44. Jones, *supra* note 39, at 10.

45. *Id.*

46. *Id.* at 11.

47. Treaty of Holston, July 2, 1791, 7 Stat. 39.

48. *Id.*

49. H.R. REP. NO. 474, at 91 (1834), *as cited in Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 197 (1978).

50. H.R. REP. NO. 474, at 13 (1834), *as cited in Oliphant*, 435 U.S. at 201-02.

of tribal courts prosecuting non-Indian defendants for crimes. Under current federal law, "the general laws of the United States as to the punishment of offenses . . . shall extend to the Indian country."[51] That jurisdiction does not extend to crimes committed by non-Indians against Indians on tribal lands.[52]

The most notable Supreme Court case addressing tribal court jurisdiction over crimes is *Oliphant v Suquamish Indian Tribe*. Mark David Oliphant was a resident of the Port Madison Reservation but was not a member of the Suquamish Tribe.[53] He was arrested by tribal authorities during the Suquamish Tribe's annual Chief Seattle Days celebration for assaulting a tribal officer and resisting arrest.[54] Daniel B. Belgrade, also a resident of the Port Madison Reservation and a nonmember, was arrested by tribal authorities for recklessly endangering another person and injuring tribal property after he engaged in a high-speed race on reservation highways and crashed into a tribal police car.[55] Both individuals petitioned the United States District Court for a writ of habeas corpus, arguing that the Suquamish tribal court did not have criminal jurisdiction over them as nonmembers.[56] The District Court denied the petitions and the Court of Appeals for the Ninth Circuit affirmed the denial for Oliphant. Oliphant petitioned the United States Supreme Court for review and the Court held that Indian tribal courts do not have criminal jurisdiction over nonmembers.[57]

Looking to 18 U.S.C. § 1152, the Court held that the Suquamish tribe was to "promptly deliver up any non-Indian offender, rather than try and punish him themselves."[58] The Court held that, absent "affirmative delegation of such power by Congress" tribes cannot exercise criminal jurisdiction over non-Indians.[59] Although tribes "do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government," the Court noted that tribes cannot exercise powers "inconsistent with their status."[60] The Court recognized "the prevalence of non-Indian crime on today's reservations," which the tribes argued made it necessary for tribal governments to prosecute non-Indians. Nevertheless, the Court in *Oliphant* held that it was up to Congress to address violence against Indians and decide whether tribal courts could exercise criminal jurisdiction over non-Indians.[61]

The *Oliphant* opinion was issued on March 6, 1978. Two weeks later, on

51. 18 U.S.C.S. § 1152
52. *Id.*
53. *Oliphant*, 435 U.S. at 194.
54. *Id.*
55. *Id.*
56. *Oliphant*, 435 U.S. at 194.
57. *Id.* at 195.
58. *Id.* at 209.
59. *Id.* at 208.
60. *Id.*
61. *Id.* at 212.

March 22, 1978, the Court issued another significant opinion on tribal sovereignty when it decided *United States v Wheeler*.[62] A member of the Navajo Nation was accused of statutory rape of a 15-year-old girl, was convicted in Navajo court, and then was indicted for the same offense in federal court.[63] He filed a motion to dismiss in the United States District Court, arguing that prosecuting him again would violate the Double Jeopardy Clause.[64] The district court dismissed the case and the appellate court affirmed.[65] The Supreme Court held that the Double Jeopardy Clause did not bar federal prosecution because the Navajo court was acting as an independent sovereign when it punished its member.[66] Thus, as tribal and federal prosecutions were "brought by separate sovereigns," the Double Jeopardy Clause did not bar prosecution by the federal government.[67]

The Supreme Court had narrowed the sovereignty of tribes and tribal courts in *Oliphant* to a "quasi-sovereign" status and yet, just two weeks later, described tribes and tribal courts as "separate sovereigns." While these two holdings appear contradictory, the Court in *Wheeler* explained that "the sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, 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."[68] The Court also addressed the jurisdiction of tribal courts over non-Indians, explaining that "the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[69]

Twelve years later, the Court again addressed tribal court criminal jurisdiction, this time in a case involving a defendant who was Indian, but not a member of the tribe which prosecuted him. The defendant, Albert Duro, was a member of the Torres-Martinez Band of Cahuilla Mission Indians.[70] He was prosecuted for shooting and killing a 14-year-old boy while on the Salt River Pima-Maricopa Indian Reservation.[71] The victim was a member of a third, different tribe, the Gila River

62. *United States v. Wheeler*, 435 U.S. 313 (1978).
63. *Id.* at 315.
64. *Id.* at 316.
65. *Id.*
66. *Id.* at 329.
67. *Id.*
68. *Wheeler*, 435 U.S. at 323.
69. *Id.* at 326.
70. *Duro v. Reina*, 495 U.S. 676, 679 (1990).
71. *Id.*

Indian Tribe of Arizona.[72] Duro was initially charged with murder in a United States District Court, but the indictment was later dismissed by the United States Attorney's Office.[73] Duro was then charged and prosecuted in the Pima-Maricopa Indian Community Court for illegally firing a weapon on the reservation (the tribal court's jurisdiction is limited by federal statute to misdemeanors).[74] Duro filed a petition for habeas corpus to the United States District Court and the court granted the writ.[75] The Court of Appeals for the Ninth Circuit reversed.[76]

The Court used both *Oliphant* and *Wheeler* as a framework in addressing this case. The Court explained that "*Oliphant* established that the inherent sovereignty of the Indian tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation. *Wheeler* reaffirmed the longstanding recognition of tribal jurisdiction over crimes committed by tribe members."[77] The Court held that "the exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties . . . In the area of criminal enforcement, however, tribal power does not extend beyond internal relations among members."[78]

As in *Wheeler*, the Court ended its opinion in *Duro* by noting that any change to the jurisdictional framework would have to be addressed by Congress.[79] Congress responded by amending the Indian Civil Rights Act in 1990 to extend tribal court jurisdiction to all Indians, regardless of which tribe they are a member.[80] While this addresses the specific events of *Duro*, it leaves a jurisdictional gap for crimes committed against Indians by non-Indians.

V. Rates of Prosecution for Crimes Committed Against Indians

Applying all relevant statutes and the holding in *Oliphant*, the prosecution of crimes against Indians by nonmembers falls exclusively to the United States Attorney's Office. When a crime is committed by an Indian against another person, including other tribal members, and that crime includes "murder, manslaughter, kidnapping, maiming, a felony under [18 U.S.C.S. §§ 2241], incest, a felony assault under [18 U.S.C.S. § 113], an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony

72. *Id.*
73. *Id.* at 680.
74. *Id.* at 681.
75. *Id.* at 682.
76. *Id.*
77. *Id.* at 686.
78. *Id.* at 688.
79. *Duro*, 495 U.S. at 698.
80. 25 U.S.C.S. § 1301.

under [18 U.S.C.S. § 661]" within a reservation, the federal government has exclusive jurisdiction to prosecute.[81]

According to a 2010 Department of Justice Report, 10,000 "Indian country matters" were referred to the United States Attorney's Office for prosecution from 2005 through 2009.[82] Of those, 77 percent were violent crimes.[83] Of the 10,000 cases, the United States Attorney's Office resolved approximately 9,000.[84] Of those 9,000 matters, the United States Attorney's Office declined to prosecute half of the claims.[85] Violent crimes were declined by the United States Attorney's Office 52 percent of the time, whereas nonviolent crimes were declined 40 percent of the time.[86] Of the matters referred, 29 percent were assault cases and 26 percent were sexual abuse and related offense cases.[87] The United States Attorney's Office declined to charge 46 percent of assault referrals and 67 percent of sexual abuse and related offense referrals.[88] The most frequently cited reason for declining to pursue a case was "weak or insufficient evidence."[89]

A follow-up Department of Justice report in 2014 addressed the low prosecution rates and the federal government's work to improve them. Despite a continued lack of resources, the United States Attorney's Office was able to lower the rate of declination. In 2011, 37 percent of all Indian submissions for prosecution were declined.[90] In 2012, the declination number fell to 31 percent.[91] In 2013, the Department of Justice was managing the impacts of sequestration, which resulted in a hiring freeze and reduced budgets, and the declination rate increased slightly to 34 percent.[92] The United States Attorney's Office cannot address the unmet needs of Indian crimes without sufficient funding and resources. When the United States Attorney's Office declines to prosecute in cases involving a non-Indian perpetrator, there is no further recourse for the Indian victim within the criminal justice system.

In addition to low prosecution rates by United States Attorney's Offices, law

81. 18 U.S.C.S. § 1153.

82. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, Declinations of Indian Country Matters (2010).

83. *Id* (These statistics may include crimes against Indians that were not committed on a reservation, but for purposes of this paper we are assuming that these trends are consistent on reservations as well).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. U.S. DEPARTMENT OF JUSTICE, DOJ RELEASES SECOND REPORT TO CONG. ON INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS (Aug. 26, 2014) (on file with the Dep't of Just.).

91. *Id.*

92. *Id.*

enforcement presence in Indian lands is limited due to lack of resources. There are fewer law enforcement officers on reservations than in other rural communities.[93] There are fewer law enforcement officers per capita on reservations than in the rest of the nation.[94] According to a Department of Justice study, the typical tribal police department is responsible for an area as big as Delaware with a population of 10,000, and those areas are patrolled by anywhere from one to three police officers.[95] Spending per capita for law enforcement is approximately 60 percent of the national average.[96]

With the lack of law enforcement and prosecution, reservations are exposed to violence without repercussion, and the statistics about violence against Indians by non-Indians bears this out. This is especially alarming when considering sexual violence such as rape. Fifty-six percent of Indian women say they have been the victim of sexual violence.[97] According to several studies, there is a higher chance for rapists to be reoffenders. In their article on rape recidivism, Dr. David Lisak and Dr. Paul Miller share that in a poll of self-reported rapists who were never prosecuted, 120 rapists were responsible for 1,225 separate acts of "interpersonal violence, including rape, battery, and child physical and sexual abuse."[98] Another study reports a 39 percent reoffending rate over a period of 25 years when following rapists undergoing sex offender treatment.[99] Another study following offenders over a four-year period reported a 20 percent reoffend rate.[100] According to the authors, "these figures are widely viewed as underestimates, because a high proportion of sexual crimes are never reported, effectively hiding these crimes from researchers."[101] Clinical psychologist Samuel D. Smithyman recalled a study he conducted while he was a Ph.D. candidate in which he placed an advertisement asking for self-identified rapists to call for an anonymous interview.[102] He received 200 phone calls.[103] Men who are rapists are likely to begin early, associate with other rapists, and are more likely "specialists," with sexual assault as their primary

93. U.S. COMM'N ON CIV. RTS., A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY, 68 (2003).

94. *Id.*

95. Stewart Wakeling et al., *Policing on American Indian Reservations*, NCJ 188095, 9 (2001).

96. U.S. COMM'N ON CIV. RTS., A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 68 (2003).

97. Rosay, *supra* note 31, at 40.

98. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73, 73 (2002).

99. *Id.* at 74.

100. *Id.*

101. Lisak, *supra* note 98, at 74.

102. Heather Murphy, *What Experts Know About Men Who Rape*, N.Y. TIMES, Oct. 30, 2017, https://www.nytimes.com/2017/10/30/health/men-rape-sexual-assault.html.

103. *Id.*

crime.[104] The lack of relief in tribal court for Indian victims of sexual assaults committed by non-Indians, within the context of the low rates of prosecution by the federal government and the psychological profiles of rapists, reveals that tribes are dealing with an issue of epic proportions and without the resources to address it.

Congress has a record of addressing similar jurisdictional loopholes. According to the National Institute of Justice, the only crime perpetrated against Indian women at a higher rate than sexual violence is psychological aggression by an intimate partner—66 percent of women report being the victim of psychological aggression by an intimate partner.[105] The National Institute of Justice also reported that 55.5 percent of Indian women report being the victim of physical violence by an intimate partner.[106] Congress addressed these alarming rates of violence by extending criminal jurisdiction to tribal courts in instances of intimate partner violence in the Violence Against Women Reauthorization Act of 2013.[107] This marked the first time since the Supreme Court decided *Oliphant* that Congress extended criminal jurisdiction for tribal courts over non-Indians. However, the Violence Against Women Reauthorization Act of 2013 does not solve the entire problem; that jurisdictional expansion was limited only to jurisdiction over non-Indians who have a familial or dating relationship with tribal members.

Under the 2013 reauthorization, Congress provided a framework for jurisdiction over intimate partner violence between non-Indians and Indians that occurs within the tribe's jurisdiction, if there are sufficient ties to the tribes and the perpetrator voluntarily and knowingly established those ties.[108] This is known as Special Domestic Violence Criminal Jurisdiction (SDVCJ).[109] As of this year, 18 tribes have exercised SDVCJ and they have reported 143 arrests of 128 non-Indian abusers.[110] Those arrests have led to 74 convictions and five acquittals.[111] The National Congress of American Indians reported that "this examination of the tribes' early exercise of SDVCJ suggests that VAWA 2013 has been a success."[112] The National Congress of American Indians points to the absence of habeas corpus petitions as indicative of the fairness and care exercised by the tribal courts in handling these cases.[113] This is important to note because it undercuts the argument that tribal courts should not have jurisdiction because they would treat defendants unfairly.

104. *Id.*

105. Violent Victimization, *supra* note 32, at 40.

106. *Id.*

107. The Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304 (2018).

108. *Id.*

109. THE NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION (SDVCJ) FIVE-YEAR REPORT (2018).

110. *Id.*

111. With 24 cases pending as of the release of the report.

112. *Supra* note 109.

113. *Supra* note 109.

With the United States Attorney's Office declining to charge a percentage of sexual abuse and related offense referrals due to a lack of funding and resources, there is clearly an unmet need for victims of sexual violence by strangers.[114] Here, the early success in the Violence Against Women Reauthorization Act of 2013's expansion of tribal court criminal jurisdiction in specific, enumerated circumstances is encouraging and could be used as a model for Congressional actions to address the jurisdictional gaps that arise when non-Indians assault Indians. If, as some psychological studies suggest, rapists tend to be repeat offenders, then a lack of enforcement for sexual assault on tribal lands leaves Indian women especially vulnerable to heinous crimes without recourse, should those crimes occur. Congress should consider extending the framework of the Violence Against Women Reauthorization Act of 2013 to apply to sexual assaults committed against tribal members by non-Indians who are not intimate partners. Congress should also provide more funding and resources to the United States Attorney's Office, as well as local law enforcement on reservations.

VI. Civil Jurisdiction on Tribal Lands

Federal courts have original jurisdiction over civil claims that arise from the United States Constitution, laws, or treaties.[115] Tribes have jurisdiction over their members; they can punish offenders who are members of a tribe, determine who may be a member of the tribe, regulate domestic affairs among members, and set out rules of inheritance among members.[116] The Supreme Court has held that "furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes . . . as a necessary implication . . . that tribes have the power to manage the use of its territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes."[117] In *Iowa Mutual Insurance Company v LaPlante*, the Court held that "tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty . . . civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[118]

However, a tribe's jurisdiction over non-Indians has its limits. A tribe's power does not extend "beyond what is necessary to protect tribal self-government or to control internal relations."[119] A tribe's jurisdiction over non-Indians cannot "exceed its legislative jurisdiction, absent congressional direction enlarging tribal-court

114. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, Declinations of Indian Country Matters (2010).

115. 28 U.S.C. § 1331

116. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

117. *N.M. v. Mescalero Apache Tribe*, 462 U.S. 324, 335-36 (1983).

118. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

119. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997).

jurisdiction."[120] A tribe may regulate non-Indian conduct if it impacts the tribe's internal governance and relations.[121]

In *National Farmers Union Ins. Cos. v Crow Tribe of Indians*, the Supreme Court held that "a federal court may determine under 28 U.S.C.S. § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction."[122] The Court, in considering whether a tribal court could exercise subject-matter jurisdiction over non-Indians, further held that the "existence and extent" of the jurisdiction of the tribal court requires "a careful examination of tribal sovereignty."[123] In *United States v Wheeler*, the Court outlined the limits of tribal court jurisdiction and sovereignty, noting that tribes gave up some of their sovereign powers by treaty, and tribal sovereignty was also limited by Congress.[124]

While Congress contemplated tribal jurisdiction over non-Indians for crimes committed against tribal members, there is no equivalent legislation granting federal courts jurisdiction over civil claims between Indians and nonmembers that arise on reservations.[125] The inaction of Congress does not foreclose the exercise of tribal jurisdiction over civil claims.[126] Instead, "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. We believe that examination should be conducted in the first instance in the Tribal Court itself."[127] This policy supports Indian self-governance and allowing for the exhaustion of remedies in Tribal Court.[128]

When claims are brought against non-Indians in tribal court, the non-Indian must first challenge jurisdiction through tribal court (referred to as the exhaustion doctrine).[129] Only when the petitioner exhausted the remedies available in tribal court can he or she appeal jurisdiction to a federal court.[130] The Court noted that there are exceptions to requiring the exhaustion of remedies in Tribal Court.[131] Those exceptions are: when the tribal court acts in bad faith, where the action violates judicial prohibitions, or where there is an inadequate opportunity to challenge jurisdiction.[132]

120. *Id.* at 438.

121. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 335 (2008).

122. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 847 (1985).

123. *Id.* at 855-56.

124. *Wheeler*, 435 U.S. at 323.

125. *Id.*

126. *Id.*

127. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 855-56.

128. *Id.* at 856.

129. *Id.*

130. *Id.* at 857.

131. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at n.21.

132. *Id.*

The seminal case on tribal court jurisdiction over civil claims is *Montana v United States*. *Montana* also outlined the exhaustion doctrine. In *Montana*, the court considered whether the Crow Tribe of Montana had the sole authority to regulate hunting and fishing by non-Indians on tribal lands.[133] The tribe argued that the treaties which created its reservation were the basis of the tribe's inherent sovereign power.[134] The Court held that there are two circumstances in which a tribal court may exercise civil jurisdiction over non-Indians in tribal court.[135] The first circumstance allows a tribe to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[136] Second, a tribe can regulate the "conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[137]

The Supreme Court has not considered whether tribal courts have civil jurisdiction over tort claims against nonmember defendants who are strangers to the victim-plaintiff, and so the Court has not had the opportunity to hear arguments about how that situation may fit into the *Montana* framework. The closest consideration has involved a claim of non-Indian assault by someone known to an Indian victim in *Dollar General.* John Doe, a thirteen-year-old member of the Mississippi Band of Choctaw Indians, was in a job training program that placed him in the Dollar General store as an unpaid employee.[138] The manager at the Dollar General store was Dale Townsend.[139] Doe alleged that he was sexually assaulted by Townsend while he was working at the Dollar General store and sued both Townsend and Dolgencorp, the operator of the Dollar General store, in tribal court.[140] In his claim, Doe argued that Dolgencorp was negligent in hiring, training, and supervising Townsend and was vicariously liable for his actions.[141] Both Dolgencorp and Townsend filed an action in the United States District Court for the Southern District of Mississippi, arguing that the tribal court did not have jurisdiction over the tort claim.[142] The United States Supreme Court issued a split decision, meaning there is still no binding Supreme Court precedent on the topic of civil jurisdiction by tribal courts over nonmembers for tortious conduct.[143]

133. *Montana*, 450 U.S. at 547.

134. *Id.* at 548.

135. *Id.* at 565.

136. *Id.*

137. *Id.* at 565-66.

138. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 170.

143. *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159, 2160 (2016).

Dollar General is not directly on point for cases involving sexual assaults by strangers. The victim in *Dollar General* knew the perpetrator, and they had an employer-employee relationship. While *Dollar General* does not solve the jurisdictional question for assaults committed by non-Indian strangers, courts may recognize jurisdiction through application of the second exception in *Montana*, as clarified by *Plains Commerce Bank.*[144]

In *Plains Commerce Bank*, the Court expanded on this second provision allowing tribal jurisdiction in *Montana*, holding that "the conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community."[145] Quoting a commentator, the Court suggested that "elevated threshold for application of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences."[146] The Court has not yet applied this second exception to a set of circumstance that it has found to be "catastrophic" although the Court noted the sale of Indian land to a third party, while disappointing, does not meet the standard of "catastrophic."[147]

The epidemic of sexual assaults against Indians, coupled with a high declination rate by United States Attorney's Offices arguably rises to the level of "catastrophic." Sexual assault leaves victims with physical injuries, as well as psychological trauma that may never heal. Indian reservations are under-policed due to a lack of resources. Sexual assaults are under-prosecuted by the United States Attorney's Office, also due to lack of resources. A community threatened by external violence and without a remedy when those acts of violence occur is a community that could meet the threshold of conduct "imperil[ing] the subsistence" of that community.[148]

In the absence of Congressional action widening the scope of criminal jurisdiction for tribal courts, the next best route for Indian victims seeking a remedy after being assaulted by a non-Indian who is a stranger may be to bring an intentional tort claim in tribal court and argue that the court has jurisdiction per the second *Montana* exception. This would provide victims with a remedy, recognizing the harm committed against them and potentially providing them with closure. Additionally, recognizing jurisdiction for intentional tort claims could serve as a deterrent. Finally, recognizing civil jurisdiction would restore some sovereignty and dignity that the United States government has eroded through legislation and caselaw since the country's inception.

144. "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

145. *Plains Commerce Bank*, 554 U.S. at 341.

146. *Id.*

147. *Id.*

148. *Id.*

Conclusion

Congress should extend criminal jurisdiction to tribal courts for cases of sexual assault committed against tribal members on tribal lands by non-Indians who are strangers, expanding on the framework provided in the Violence Against Women Reauthorization Act of 2013 for victims of intimate partner violence. Congress should provide more funding to the United States Attorney's Office for prosecutors to dedicate their time to prosecuting crimes committed against Indians by non-Indians. Congress should also provide more funding to grant programs to fund more law enforcement officers on reservations.

Until Congress acts, criminal remedies remain evasive for Indians who are victims of stranger sexual assault by non-Indians. Victim advocates may consider addressing this issue through civil claims, applying the second *Montana* exception (a tribe can regulate the "conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.")[149] There are compelling reasons to recognize tribal courts' jurisdiction over civil claims brought by Indian victims of stranger assaults, and doing so may be the only way to make victims whole under the status quo.

> To doctors without clues
> for say nothing neighbors
> do nothing attorneys
> and quiet parents with no memories
> Thank you.
> You make all of this possible.
> We couldn't fail these women without your help.[150]

149. *Montana*, 450 U.S. at 565-66.

150. Red Corn, *supra* note 1.