

5-24-2021

Beyond A Sliver Of A Full Moon: Acknowledging And Abolishing White Bias To Restore Safety & Sovereignty To Indian Country

Mary T. Hannon
DePaul University

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/ailj>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Law Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Hannon, Mary T. (2021) "Beyond A Sliver Of A Full Moon: Acknowledging And Abolishing White Bias To Restore Safety & Sovereignty To Indian Country," *American Indian Law Journal*: Vol. 9 : Iss. 2 , Article 4. Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol9/iss2/4>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in American Indian Law Journal by an authorized editor of Seattle University School of Law Digital Commons.

Beyond A Sliver Of A Full Moon: Acknowledging And Abolishing White Bias To Restore Safety & Sovereignty To Indian Country

Cover Page Footnote

DePaul University College of Law, J.D., expected May 2021; DePaul University, M.S., 2014 (Chemistry); DePaul University, B.S., 2013 (Chemistry). I would like extend special thanks to the editors of the American Indian Law Journal, as well as to both Assistant Dean Allison I. Ortlieb of DePaul University and my uncle, Bob Malone of Taos, NM, for their time and encouragement to publish this Article. Through this process, I have gained a deep respect for the First Nations and I hope to continue serving as a vocal ally as I enter into my legal career.

BEYOND A SLIVER OF A FULL MOON: ACKNOWLEDGING & ABOLISHING
WHITE BIAS TO RESTORE SAFETY & SOVEREIGNTY TO INDIAN COUNTRY

Mary T. Hannon*

INTRODUCTION	258
I. BACKGROUND	261
A. <i>A Historical Framework: The Origins and Creation of the Jurisdictional Maze</i>	262
1. A History of Tribal-Federal Relations: The Rise and Fall of a “Measured Separatism”	262
2. Major Crimes Act to Oliphant: Involuntary Assimilation and the Continuing Assault on Tribal Sovereignty	268
3. <i>McGirt v. Oklahoma</i> : A Glimmer of Hope.....	271
II. CONTEMPORARY TRIBAL CRIMINAL JURISDICTION: THE VIOLENCE AGAINST WOMEN ACT, REAUTHORIZATIONS THEREOF, AND CURRENT LEGISLATION.....	272
A. <i>The Violence Against Women Act Reauthorization Act of 2005 (VAWA 2005)</i>	272
B. <i>The Violence Against Women Act Reauthorization Act of 2013 (VAWA 2013)</i>	273
C. <i>The Violence Against Women Act Reauthorization Act of 2019 (VAWA 2019)</i>	276
III. ANALYSIS	276
A. <i>VAWA 2019 Fails to Sufficiently Protect Indigenous Women</i>	277
1. Returning to the Historical Context: Acknowledging the White Bias.....	277
2. A Hard Look at the Modern Bias Against the First Nations.....	282
B. <i>Congress Must Statutorily Abrogate the Oliphant Decision</i>	283
IV. IMPACT	286
A. <i>Impact on Indigenous Women</i>	286
B. <i>Impact on Non-Indian Defendants</i>	287
C. <i>Impact on Tribal Court System and Tribal-Federal Relations</i>	288
V. CONCLUSION.....	290

* DePaul University College of Law, J.D., expected May 2021; DePaul University, M.S., 2014 (Chemistry); DePaul University, B.S., 2013 (Chemistry). I would like extend special thanks to the editors of the American Indian Law Journal, as well as to both Assistant Dean Allison I. Ortlieb of DePaul University and my uncle, Bob Malone of Taos, NM, for their time and encouragement to publish this Article. Through this process, I have gained a deep respect for the First Nations and I hope to continue serving as a vocal ally as I enter into my legal career.

INTRODUCTION

In the United States, violence against indigenous women is unprecedented.¹ According to the Indian Law Resource Center, greater than 80% of indigenous women have experienced violence of some kind, while greater than 50% of women have experienced sexual violence.² The reported rates against indigenous women are at least ten times higher than the rest of the United States.³ Most of these women never see their abusers brought to justice.⁴

For nearly 35 years following the Supreme Court's decision in *Oliphant v. Suquamish Tribe*, which held that tribal courts do not have criminal jurisdiction over non-Indians, even if the crime occurs on tribal land, the United States upheld a jurisdictional scheme which stripped tribal courts of criminal authority over non-Indians, and thereby precluded tribal courts from participating in the hearing and resolution of disputes regarding violence against indigenous women.⁵ In fact, until the Violence Against Women Act (VAWA) was reauthorized in 2013, tribal courts could not prosecute non-Indian perpetrators for any crime committed on tribal land.⁶ At last, VAWA 2013 took one step in restoring criminal jurisdiction to tribal courts by providing the courts with Special Domestic Violence Criminal Jurisdiction (SDVCJ).⁷ Upon passage of VAWA 2013, one survivor of abuse, Lisa Brunner, stated:

We have always known non-Indians can come onto our lands and they can beat, rape and murder us and there is nothing we can do about it.... Now, our tribal officers have jurisdiction for the first time to do something about certain crimes. But it is just the first sliver of the full moon that we need to protect us.⁸

As of 2018, five years following the reauthorization of VAWA with the provisions of the SDVCJ, at least eighteen tribes have opted-in the special jurisdiction, leading to 143 arrests of 128

¹ Throughout this Article, various terms referring to the indigenous population in the United States are used. For example, the terms “indigenous,” “Native American,” and “Indian” should be understood to be used interchangeably. Similarly, the terms “Indian Country” and “First Nations” should be understood to be interchangeable. While the federal government uses the terms “Indian” and “Indian Country,” the author appreciates and understands that “indigenous” and “First Nations” may be more preferred by some members of these populations.

² *Ending Violence Against Native Women*, INDIAN LAW RESOURCE CENTER, <https://indianlaw.org/issue/ending-violence-against-native-women> [<https://perma.cc/FL4F-LXK7>] (last visited Mar. 26, 2020).

³ *Id.*

⁴ *Id.*

⁵ *Id.*; See *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

⁶ *Violence Against Women Act (VAWA) Reauthorization 2013*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0> [<https://perma.cc/9ABJ-Z5GA>] (last updated Mar. 26, 2015).

⁷ *Special Domestic Violence Criminal Jurisdiction*, NATIONAL CONGRESS OF AMERICAN INDIANS, <http://www.ncai.org/tribal-vawa/sdvcj-overview> [<https://perma.cc/V9SU-RHN8>] (last updated June 2019).

⁸ *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report*, NATIONAL CONGRESS OF AMERICAN INDIANS (Mar. 20, 2018), http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [<https://perma.cc/X2DD-WBWP>].

non-Indian abusers.⁹ Of these arrests, seventy-four led to convictions, four to acquittals, while the remaining were pending as of publishing of the five-year report.¹⁰ While implementation of SDVCJ has been overwhelmingly positive, it has also revealed areas where further resources and assistance are needed. Of particular note, the breadth of SDVCJ is limited – as evidenced by its name – to incidents of domestic violence or dating violence between romantic or intimate partners, only.¹¹

In particular, SDVCJ fails to include provisions protecting the children involved in 58% of all criminal domestic violence incidents.¹² Further still, VAWA 2013 fails to allow tribal courts to charge non-Indians for crimes including, but not limited to, assault of law enforcement, stalking, sexual contact (absent a domestic or dating relationship), endangering the welfare of a minor, false imprisonment, violence against a victim’s family, and drug possession.¹³ Not only does SDVCJ lack jurisdictional breadth, but for some tribes, the implementation of the jurisdiction is prohibitively expensive, making it difficult to provide the resources necessary for effective implementation.¹⁴ In particular, in order to implement or opt-in to SDVCJ, a tribe must meet the statutory requirements set out in VAWA, which include for example, guaranteeing all rights under the Indian Civil Rights Act (ICRA); ensuring all judges presiding over SDVCJ cases have the necessary training; making all criminal laws, rules of evidence, and rules of criminal procedure publicly available; and, providing indigent defendants with effective assistance of counsel.¹⁵ Satisfying these statutory requirements often requires that interested tribes revise existing tribal codes, policies, procedures, and sometimes even constitutions – a process that is not only lengthy, but also costly for the tribes.¹⁶

On April 4, 2019, the United States House of Representatives passed H.R. 1585, the bill setting forth the fourth reauthorization of VAWA, which, if enacted, would expand tribal jurisdiction further to include sexual violence, sex trafficking, stalking, criminal child abuse, and violence against tribal law enforcement.¹⁷ As federal legislators have tended to unraveling the jurisdictional maze that has plagued the indigenous population for decades, the members of the tribes themselves have partnered with their state leaders to take action themselves.¹⁸ For example,

⁹ *Id.*

¹⁰ *Id.*

¹¹ Joshua B. Gurney, *An “SDVCJ Fix”—Paths Forward in Tribal Criminal Jurisdiction*, 70 HASTINGS L. J. 887, 899-900 (2019).

¹² *See supra* note 8.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *VAWA 2013’s Special Domestic Violence Criminal Jurisdiction (SDVCJ)*, NATIONAL CONGRESS OF AMERICAN INDIANS, https://www.ncai.org/tribal-vawa/overview/VAWA_Information_-_Technical_Assistance_Resources_Guide_Updated_November_11_2018.pdf [<https://perma.cc/T8DG-5NQZ>] (last visited Feb. 7, 2021).

¹⁶ *Id.*

¹⁷ Lacina Tangnaqado Onco, *Victory: The Violence Against Women Act Passes House with Tribal Provisions*, FRIENDS COMMITTEE ON NATIONAL LEGISLATION (Apr. 4, 2019), <https://www.fcnl.org/updates/victory-the-violence-against-women-act-passes-house-with-tribal-provisions-2036> [<https://perma.cc/Z7BM-S4CJ>].

¹⁸ Melodie Edwards, *7 States Step Up Efforts to Fight Violence Against Indigenous Women*, NATIONAL PUBLIC RADIO (July 23, 2019, 5:01 AM ET), <https://www.npr.org/2019/07/23/743659569/7-states-step-up-efforts-to-fight->

tribes have lacked access to federal and state databases to track and locate victims of crimes. Of 5,712 cases of missing and murdered indigenous women reported in 2016, only 116 were entered in a Department of Justice database.¹⁹ Responding to these dire statistics, seven states – Wyoming, New Mexico, Montana, Minnesota, Arizona, California, and Nebraska – have adopted task forces in an effort to take early steps in identifying and locating indigenous victims of crimes.²⁰

However, neither VAWA 2019 or tribal task forces can fully rectify the damage left in the wake of *Oliphant*, even considering the U.S. Supreme Court’s recent decision in *McGirt v. Oklahoma*, rendered on July 9, 2020, which upheld that states do not have criminal jurisdiction over crimes committed by Indians on Indian land.²¹ Specifically, VAWA 2019 still fails to recognize the inherent power and sovereignty of tribal courts, a right which the United States has ostensibly recognized since the colonization of this country, but which has been continuously stripped over nearly two centuries of judicial and legislative actions. Until tribal criminal jurisdiction is returned to tribal courts indigenous women will continue to be entrapped within a complex jurisdictional scheme that makes it difficult – if not impossible – to receive justice for the harms committed against them.

This Article is divided into three Parts. Part I will provide a contextual jurisdictional history of how the prosecution of crimes against indigenous people have been shaped and continuously limited by judicial and legislative action. Part I concludes with the introduction of VAWA 2013, and the proposed VAWA 2019 revisions, introduced by Congress to help restore some semblance of authority to the tribal courts. Part II will critically evaluate the role of the federal government, that is, the legislature and judiciary alike, in the historical stripping of tribal sovereignty, and will shed light on the role that bias has played in the creation and development of Indian law doctrine. Part II will argue for the abrogation of *Oliphant* and restoring criminal jurisdiction to tribal courts as a means of abolishing the systemic bias present in Indian law. Part III will analyze the impacts such an action would entail through the lens of indigenous women, including any impacts that would be felt by non-Indian defendants. Part III will further consider the benefits and difficulties tribal courts will face in assuming jurisdiction over all defendants, regardless of race or tribal affiliation, and will ask whether the institutional bias against indigenous people and the first nations can ever truly be eliminated. Finally, Part III will consider whether the bias can ever truly be eliminated in view of the nuanced tribal-federal relationship.

violence-against-indigenous-women [https://perma.cc/9RWJ-9F3G].

¹⁹ Chris Aadland, ‘A really good first step’: Task force could help state understand missing and murdered Indigenous people problem, CASPER STAR TRIBUNE (July 22, 2019), https://trib.com/news/state-and-regional/a-really-good-first-step-task-force-could-help-state/article_390a28f0-b05e-5648-b960-c46fde40abea.html [https://perma.cc/3Z9D-BASA].

²⁰ Edwards, *supra* note 18.

²¹ *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (holding that the State of Oklahoma did not have the jurisdiction to prosecute McGirt, who was charged with several sexual offenses. The Court abided by its prior precedent, discussed herein, that jurisdiction for such crimes was limited to tribal and federal jurisdiction).

I. BACKGROUND

As of November 2018, the Native American population in the United States was estimated to be about 6.8 million – or about 2.03% of the entire population.²² Among Native American women, over 80% have experienced violence, and more than 50% have experienced sexual violence.²³ On some reservations, the murder rate of indigenous women is more than ten times higher than the national average.²⁴ Yet, due to an “unworkable, race-based criminal jurisdictional scheme” shaped and crafted by the United States federal government over the past several decades – perpetuating ideologies and biases dating back to the colonization of this country – the majority of these women never see their abusers brought to justice.²⁵ Not only can tribal courts not exercise jurisdiction over many of these abusers, as described in more detail in this Article, but the federal government itself frequently declines to prosecute these cases, often citing to “weak or insufficient evidence,” “no federal offense evident” or “witness problems.”²⁶ In fact, between the years 2005 and 2009, the U.S. Attorney’s Office declined to prosecute about 52% (or about 4,000 cases) of the violent crimes from Indian Country that were reported to them.²⁷

²² *American Indian and Alaska Native Heritage Month: November 2018*, UNITED STATES CENSUS BUREAU (Oct. 25, 2018), <https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2018/cb18ff09-aian.pdf> (inclusive of those who identify as American Indian or Alaska Native, either alone or in combination with one or more other races).

²³ *Annual Estimates of the Resident Population by Sex, Single Year of Age, Race Alone or in Combination, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2018*, UNITED STATES CENSUS BUREAU, <https://factfinder.census.gov/aces/tables/services/jsf/pages/productview.xhtml?src=bkmk> (last updated June 2019); *Ending Violence Against Native Women*, INDIAN LAW RESOURCE CENTER, <https://indianlaw.org/issue/ending-violence-against-native-women> [<https://perma.cc/RX9C-JVS8>] (last visited Mar. 26, 2020).

²⁴ *Ending Violence Against Native Women*, INDIAN LAW RESOURCE CENTER, <https://indianlaw.org/issue/ending-violence-against-native-women> [<https://perma.cc/RX9C-JVS8>] (last visited Mar. 26, 2020).

²⁵ *Id.* By a “race-based” jurisdictional scheme, it is meant that the race of each of the perpetrator and the victim (*i.e.*, Indian or non-Indian) will dictate which of the tribe, the state, and/or the federal government has jurisdiction to prosecute the crime. In Indian law, being “Indian” typically refers to a political identity, as opposed to a racial identity. For example, in *Morton v. Manciacari*, 417 U.S. 535 (1974), the Court noted that the Bureau of Indian Affairs did not discriminate against non-Indian employees by implementing hiring preferences for Indian employees. The Court noted that the preference was “granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.” The technical distinction between viewing Indian-status as a racial identity versus a political identity contributes to the unworkable schemes within Indian Law, particularly within the context of criminal jurisdiction.

²⁶ David C. Maurer, *U.S. Department of Justice Declinations of Indian Country Criminal Matters* (Dec. 13, 2010), available at <https://www.gao.gov/new.items/d11167r.pdf> at p. 3.

²⁷ *Id.* The term “violent” does not have any specific criteria. A crime is considered to be “violent” or “nonviolent” at the discretion of the prosecutor and may vary among districts.

A. A Historical Framework: The Origins and Creation of the Jurisdictional Maze

In order to understand the contemporary relationship between Indian Country²⁸ and the federal government, we must first consider the complex and nuanced foundations upon which tribal sovereignty within the federal government has been built. In particular, we must understand how Indian reservations came to be under the idea of a “measured separatism,” which guaranteed sovereignty to the indigenous people as the result of negotiated treaties and settlements between the tribes and the federal government.²⁹

1. A History of Tribal-Federal Relations: The Rise and Fall of a “Measured Separatism”

Upon the colonization of what is now the United States of America, European settlers and early legislators guaranteed to the indigenous people certain rights as the result of negotiated treaties.³⁰ These treaties gave rise to the “measured separatism” between the tribes and the federal government, which insulates the tribes from encroachment, but also ultimately subjects the tribes to the power of the United States.³¹ In many ways, the colonization of Indian Country has continued into more modern history, via both legislative and judicial action.³² However, at the outset, from about 1774 until about 1832, the federal government negotiated treaties with Native Americans under the notion of a “bargained-for” exchange in which the Indian tribes agreed to make peace and relinquish land, while the federal government agreed to extend certain services to Indian Country, such as funding and protection.³³ Despite the power imbalance between the tribes and the federal government in reaching many of these agreements, the treaties were intended to recognize Indian land as free from the “incursion of both the state and non-Indian settlers.”³⁴ In effect, these treaties were made to recognize the inherent rights of the indigenous as a sovereign people, rights that were passed down to them from their ancestors, who had their own inherent rights that required no validation from the European colonizers.³⁵

²⁸ As provided in 18 U.S.C. § 1151, the term “Indian Country” means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

²⁹ FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 16 (1995).

³⁰ *Id.*

³¹ *Id.*

³² See generally Jessica Allison, *Beyond VAWA: Protecting Native American from Sexual Violence Within Existing Tribal Jurisdictional Structures* 90 U. COLO. L. REV. 225 (2019).

³³ POMMERSHEIM, *supra* note 29 at 17; see also *American Indian Treaties*, NATIONAL ARCHIVES <https://www.archives.gov/research/native-americans/treaties> [<https://perma.cc/UPH7-VF6T>] (last reviewed Oct. 4, 2016).

³⁴ POMMERSHEIM, *supra* note 29 at 17.

³⁵ *Native American Rights*, <https://law.jrank.org/pages/8754/Native-American-Rights.html> [<https://perma.cc/YW7H-XPPL>] (last visited Mar. 26, 2020).

As a result of these treaties, Native Americans occupy a unique legal position in the United States – even today. While they are citizens of the United States and can enjoy the benefits associated with that status, they are also concurrently members of a self-governing tribe, whose law and order predate the arrival or encroachment of any colonizer.³⁶ It is important to recognize, however, that these initial treaties, which essentially established the Indian reservations as we understand them to exist today, were fueled by a cultural and racial bias that viewed the First Nations as inherently inferior. This bias was, and continues to be, interwoven throughout the tribal-federal relationship. The belief that “non-Indians could not live harmoniously with Indians,” espoused by the federal government resulted in separate allocations of land for the Indian people.³⁷

a. The Trade and Intercourse Acts of 1790, 1799, and 1802

The Trade and Intercourse Acts of 1790, 1799, and 1802 were among the first federal actions to create a jurisdictional buffer between Indians and non-Indians.³⁸ Through these Acts, Congress took control over all Indian affairs, pursuant to its rights to regulate commerce with Indian tribes in Article one, Section 8 of the United States Constitution. In recognizing and realizing the provisions of these Acts, the government maintained control over any contact between Indians and non-Indians.³⁹ For example, neither non-Indians nor the states could purchase land from individual Indians or tribes without the approval of the federal government.⁴⁰ The federal government also exerted control over the regulation of trade among Indians, including the prohibition of the sale of alcohol.⁴¹ In fact, non-Indian settlers were required to have a passport to even cross the sovereign Indian lands.⁴² Furthermore, and significant to the analysis of this Article, the federal government maintained criminal jurisdiction in these reservations, ceding some of it to the states.⁴³ Through the Trade and Intercourse Acts, Congress provided that a state could punish crimes committed by non-Indians against Indians under the laws of the state.⁴⁴

³⁶ See POMMERSHEIM, *supra* note 29 at 17.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See 25 U.S.C. § 177; see also *An Act to Regulate Trade and Intercourse With the Indian Tribes (1790)*, UNIVERSITY OF OREGON, https://pages.uoregon.edu/mjdennis/courses/hist469_trade.htm [<https://perma.cc/8QAP-XSGQ>] (last visited Mar. 26, 2020) (providing full text of the original act).

⁴¹ *Id.*

⁴² *American Indian Treaties*, *supra* note 33.

⁴³ POMMERSHEIM, *supra* note 29 at 17.

⁴⁴ *Jurisdiction: Bringing Clarity out of Chaos, in A ROADMAP FOR MAKING NATIVE AMERICA SAFER*, https://www.aisc.ucla.edu/iloc/report/files/Chapter_1_Jurisdiction.pdf [<https://perma.cc/BJ6A-ADHY>]; see also 1 Stat. § 137 (1790); 1 Stat. § 743 (1799); 2 Stat. § 139 (1802). While the Trade and Intercourse Act of 1790 provided a state could punish crimes committed by non-Indians against Indians under the laws of the state, the General Crimes Act of 1817 later modified the states jurisdiction in such cases. See *infra*, note 64.

b. The Marshall Trilogy

In a series of Supreme Court decisions, referred to as the “Marshall Trilogy,” the Court acknowledged the inherent powers of the tribes.⁴⁵ These cases – *Johnson v. M’Intosh*; *Cherokee Nation v. Georgia*; and *Worcester v. Georgia* – each authored by Chief Justice John Marshall, established federal primacy in Indian affairs⁴⁶, excluded the states from invoking their laws in Indian Country⁴⁷, and acknowledged the inherent power of the tribes to self-govern.⁴⁸ Specifically, in *Johnson*, the Court affirmed federal authority over Indian affairs, which barred all land and commercial transactions with Indians absent consent from the United States government, pursuant to the Trade and Intercourse Acts.⁴⁹

In *Cherokee Nation*, the Court had to determine whether a state could impose its laws on Native Americans in response to Georgia’s attempt to force the Cherokee people off of the state’s land.⁵⁰ Rather than applying a substantive analysis on the factual issue, a deeply split Marshall Court⁵¹ concluded that because Cherokee Nation did not qualify as a “foreign state,” but rather as a “domestic dependent nation,” the Court lacked jurisdiction over the tribe.⁵² In his majority opinion, Marshall wrote of the Cherokee:

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 considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory and an act of hostility.⁵³

The *Cherokee Nation* decision effectively established that Indian Country was not susceptible or bound by the laws of the states in which these “domestic dependent nations” resided.⁵⁴

⁴⁵ Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, AMERICAN BAR ASSOCIATION (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/ [https://perma.cc/44XJ-GAN9].

⁴⁶ *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

⁴⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁴⁸ *Worcester v. Georgia*, 31 U.S. 515 (1832); Fletcher, *supra* note 45.

⁴⁹ *Johnson*, 21 U.S. at 543; *see also infra* note 80.

⁵⁰ *Cherokee Nation*, 30 U.S. at 1.

⁵¹ Only Marshall and one other Justice, J. Gabriel Duvall, signed onto the majority opinion. Each of Justices William Johnson and Henry Baldwin concurred in the outcome, but wrote individual opinions against Indian interests. Justice Smith Thompson wrote the dissenting opinion, which Justice Joseph Story joined.

⁵² *Cherokee Nation*, 30 U.S. at 17. The issue involved a claim under Article III of the Constitution, which provides the Supreme Court with original jurisdiction over claims between a State of the citizens thereof, and foreign states, citizens, or subject.

⁵³ *Id.* at 17-18.

⁵⁴ *See id.*

The last case of the Marshall Trilogy, *Worcester v. Georgia*, is credited for building the foundations of the doctrine of tribal sovereignty.⁵⁵ In *Worcester*, the plaintiff, a missionary living with the Cherokee who helped establish the *Cherokee Phoenix*,⁵⁶ worked with the Cherokee Nation to utilize the courts to push back against the westward expansion of the states. The state of Georgia had passed a law prohibiting all white men, such as Worcester, from living on Native American land without a license.⁵⁷ While the law was intended to prevent white men from encroachment on Indian territory, Worcester, joined by eleven other missionaries and supported by the Cherokee, published a resolution against the law reasoning that the law effectively forced the Cherokee Nation into relinquishing its inherent sovereignty to govern its own land.⁵⁸ When the law took effect, Worcester and the eleven other men were arrested and convicted.⁵⁹ Worcester appealed to the Supreme Court.⁶⁰ In ruling in favor of Worcester, the Court held that state laws have “no force” in Indian Country and that only the federal government had the authority to deal with Indian nations.⁶¹ In the last case of this trilogy, Marshall wrote:

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States.⁶²

Thus, the Court made absolutely clear that the laws of the states have no impact on Indian Country.⁶³

c. General Crimes Act to *Crow Dog*, and Congress’s Response

While Justice John Marshall penned opinions still referenced today by advocates of indigenous rights, Congress drafted laws to expand federal control over the tribes of Indian

⁵⁵ See generally Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy* 82 N.D. L. REV. 627 (2006).

⁵⁶ The first Native American newspaper.

⁵⁷ In accordance with the provisions of the Trade and Intercourse Acts.

⁵⁸ Richard Mize, *Worcester, Samuel Austin (1778-1859)*, THE ENCYCLOPEDIA OF OKLAHOMA HISTORY AND CULTURE, <https://www.okhistory.org/publications/enc/entry.php?entry=WO020> [<https://perma.cc/B2TN-N56D>] (last visited Mar. 26, 2020).

⁵⁹ Tim Alan Garrison, *Worcester v. Georgia (1832)*, NEW GEORGIA ENCYCLOPEDIA (Apr. 27, 2004), <https://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832> [<https://perma.cc/SVN9-2TNL>].

⁶⁰ *Id.*

⁶¹ *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁶² *Id.* at 561.

⁶³ *Id.* Significantly, however, President Andrew Jackson refused to enforce the Court’s decision, resulting in the forceful removal of Cherokee Nation from Georgia via the Trail of Tears. See *Trail of Tears*, HISTORY (Nov. 9, 2009), <https://www.history.com/topics/native-american-history/trail-of-tears> [<https://perma.cc/A5RJ-65JR>].

Country. In 1817, the Second Congress of the United States passed the General Crimes Act which extended federal criminal jurisdiction to cover some crimes committed by Indians against non-Indians (*e.g.*, federal crimes of general applicability such as assault of a federal officer), as well as all crimes committed by non-Indians against Indians in Indian Country.⁶⁴ Notably, the Act did not grant federal jurisdiction over crimes committed by Indians against Indians, which remained in the purview of tribal law and custom.⁶⁵

This measured separatism, at least as it applied to the tribe's criminal jurisdiction over its own people against its own people, came to a screeching halt by 1885, however, when Congress passed the Major Crimes Act in response to the Supreme Court's decision in *Ex Parte Crow Dog*.⁶⁶ In *Crow Dog*, an Indian man, known as Crow Dog, shot and killed another Indian man, Spotted Tail, on Indian land.⁶⁷ Crow Dog petitioned the Supreme Court for a writ of *habeas corpus*, arguing that the crime with which he was charged and convicted was not illegal under the laws of the United States, and that the district court had no jurisdiction to try him under the provisions of the General Crimes Act, which reserved crimes by Indians against Indians to the tribes.⁶⁸ The district court had found that the murder of Spotted Tail was a crime of general applicability (*i.e.*, that it violated the general federal statute against murder, which was extended to Indian Country by the General Crimes Act) and therefore claimed jurisdiction.⁶⁹ The Supreme Court granted the writ of *habeas corpus*, holding that there was no federal jurisdiction over the crimes committed by Indians against Indians, in accordance with the provisions of the General Crimes Act.⁷⁰ In its opinion, the Supreme Court left no doubt of its conviction that the tribe should be exclusively responsible for handling such matters:

It is a case where, against an express exception in the law itself, that law . . . is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which . . . 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

⁶⁴ 18 U.S.C. § 1152; WILLIAM CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 148-49 (4th ed. 2004).

⁶⁵ CANBY, *supra* note 64.

⁶⁶ 18 U.S.C. § 1153; *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

⁶⁷ *Crow Dog*, 109 U.S. at 556.

⁶⁸ *Id.* at 557.

⁶⁹ *Id.* at 557-58.

⁷⁰ *Id.* at 572.

prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.⁷¹

Reacting to the Supreme Court's defense of tribal jurisdiction of crimes by Indians against Indians, Congress promptly passed the Major Crimes Act, thereby expanding federal jurisdiction over seven – later amended to sixteen – distinct crimes committed by Indians in Indian Country, regardless of the race of the victim.⁷² These crimes include, in part, murder, manslaughter, rape, kidnapping, incest, felony child abuse or neglect, assault with intent to kill, arson, burglary, and robbery.⁷³

The constitutionality of the Major Crimes Act did not go unchallenged, and was first tested in *United States v. Kagama*. In *Kagama*, the defendant and his son, Mahawaha, were charged in the murder of their neighbor, Iyousa, with whom the defendant had recurring property disputes.⁷⁴ The murder occurred on the Indian reservation.⁷⁵ Despite the local district attorney's decision not to prosecute, consistent with the practice of not intervening in crimes between Indians, the U.S. Attorney for Northern California forcefully prosecuted the case under the authority of the Major Crimes Act.⁷⁶ In a unanimous decision, the Supreme Court upheld the Major Crimes Act.⁷⁷ The Court justified that this expansion of federal jurisdiction over Indians was constitutional due to the dependent status of the tribes as wards of the federal government.⁷⁸ In so holding, the Major Crimes Act became the first systemic intrusion of the federal government into the internal affairs of the tribes.⁷⁹ The measured separatism had crumbled.

Following *Kagama* and the Major Crimes Act, the level of control of Congress over Indian life continued to evolve. In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Supreme Court coined the unilateral control of Congress over tribes as its “plenary authority,” (*i.e.*, plenary power) which had been “exercised by Congress from the beginning, and [had] always been deemed a political one, not subject to be controlled by the judicial department of the government.” The decision, rooted in paternalism and bias, viewed the tribes as “weak,” “helpless,” and wholly dependent on the federal government. From this dependence, said the Court, arose the “duty of protection,” and therefore Congress's power to unilaterally limit, modify, or eliminate any rights possessed by the tribes.⁸⁰ The plenary power doctrine, which has continued to expand over time,

⁷¹ *Id.* at 571.

⁷² 23 Stat. 362, 385 (1885).

⁷³ 18 U.S.C. § 1153 (2018).

⁷⁴ MARK STUART WEINER, *AMERICANS WITHOUT LAW: THE RACIAL BOUNDARIES OF CITIZENSHIP* 36 (2006).

⁷⁵ *United States v. Kagama*, 118 U.S. 375 (1886). At trial, after the Supreme Court had rendered its opinion, it was revealed that the crime occurred just outside the boundaries of the reservation to the north. The dispute decided by the Supreme Court was only on the issue of subject-matter jurisdiction, following which the trial was held.

⁷⁶ Sidney L. Harring, *The Story of United States v. Kagama*, in *INDIAN LAW STORIES* 150 (Carole Goldberg, Kevin K. Washburn, & Phillip P. Frickey, eds., 2011).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ CANBY, *supra* note 64 at 149-50; *see generally Kagama*, 118 U.S. 375 (1886).

⁸⁰ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903); *Indian Trade and Intercourse Act*, CHICKASAW TV VIDEO NETWORK, <https://www.chickasaw.tv/events/indian-trade-and-intercourse-act> [<https://perma.cc/JX7Z-TT4V>] (last visited Mar. 26, 2020); *see also Federal Indian Law for Alaska Tribes*, U OF ALA. FAIRBANKS,

was a stark deviation from the principles of inherent tribal authority espoused in the Marshall Trilogy. While “there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian Tribes without their consent manifested through treaty,” the Supreme Court introduced this new doctrine that has manifested in Congress the authority to create binding legislation without tribal consent.⁸¹

2. Major Crimes Act to Oliphant: Involuntary Assimilation and the Continuing Assault on Tribal Sovereignty

Following the Major Crimes Act, a series of federal acts continued to undermine and destroy the traditional tribal culture and institution. In particular, the General Allotment Act of 1887, also known as the Dawes Act, created individual parcels of Indian land held in trust by the federal government.⁸² Passed under the administration of President Grover Cleveland, the Act was motivated by the federal government’s interest in assimilating the First Nations and encouraging them to undertake farming and agriculture.⁸³ To do so, tribal land needed to be broken up into individual plots.⁸⁴ The Dawes Act was described by President Theodore Roosevelt as “a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual.”⁸⁵ The Dawes Severalty Act authorized the government, via the Bureau of Indian Affairs, to hold 160 acres of tribal land in trust for a period of twenty-five years for each head of household.⁸⁶ At the end of the twenty-five years, individuals who took up residence on the allotment of land, away from their tribes, were granted United States citizenship.⁸⁷ In 1906, however, before the twenty-five year trust had expired, allotments of land were authorized for fee transfer to Indians deemed to be “competent” under the Burke Act, which amended the Dawes Act.⁸⁸ Competency was determined, in part, by whether the individual was one-half degree Indian blood or less.⁸⁹ According to the Burke Act, any Indian who took up residence away from the tribe and “adopted the habits of civilized life” was declared a citizen and received with that status all of its immunities and privileges.⁹⁰ As a result of the Dawes and Burke Acts, each rooted in the presumed inferiority of indigenous people, their humanity, and their culture, tribal land was

https://www.uaf.edu/tribal/112/unit_1/usconstitutionandcongress%20.php#:~:text=The%20power%20that%20Congress%20has,eliminate%20powers%20that%20tribes%20possess [https://perma.cc/C3GS-8G32] (last visited Feb. 7, 2021).

⁸¹ Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 139 (2002).

⁸² *Jurisdiction: Bringing Clarity out of Chaos*, *supra* note 44; see 25 U.S.C. § 331 (1887).

⁸³ *The Dawes Act*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/dawes-act.htm> [https://perma.cc/8E8U-WHZW] (last visited Feb. 7, 2021).

⁸⁴ *Id.*

⁸⁵ POMMERSHEIM, *supra* note 29 at 19.

⁸⁶ *Id.*

⁸⁷ M. Kaye Tatro, *Burke Act (1906)*, THE ENCYCLOPEDIA OF OKLAHOMA HISTORY AND CULTURE <https://www.okhistory.org/publications/enc/entry.php?entry=BU010> [https://perma.cc/M72S-3ZSU] (last visited Mar. 26, 2020).

⁸⁸ *Id.*

⁸⁹ POMMERSHEIM, *supra* note 29 at 20.

⁹⁰ Tatro, *supra* note 87.

reduced from 138 million acres in 1887 to 52 million acres in 1934.⁹¹ Moreover, the reservations became “checkerboards” of tribal, individual Indian, individual non-Indian, and corporate land.⁹²

While the Indian population continued to undergo an involuntary assimilation in their day-to-day lives due to the loss of their land, the convoluted interactions between the federal, state, and tribal courts became even more muddled. In 1953, Congress passed Public Law 280 without consent from the tribes.⁹³ Public Law 280 mandated the transfer of jurisdiction from the federal government to state governments in six states – California, Minnesota, Nebraska, Oregon, Washington, and Alaska⁹⁴ – granting these states both civil and criminal jurisdiction over the tribal lands within their borders.⁹⁵ While Public Law 280 increased the role of states in moderating and prosecuting criminal activity on Indian land, it allocated no federal funding for the states and it resulted in confusion for law enforcement agencies and courts, to the detriment of tribes.⁹⁶ Moreover, Public Law 280 was passed in spite of ample Indian testimony that was overwhelmingly in opposition to the law.⁹⁷ The law, purporting to “free” tribes from federal supervision, was in effect an attempt to terminate tribes by assimilation.⁹⁸ Indeed, the land of many small tribes was sold to the highest bidder, effectively ending tribal sovereignty and forcing tribes to rely on the states for education, land use, and other economic and social services.⁹⁹ As Congress only mandated this transfer of power in six states, Public Law 280 failed to provide uniform guidance for the tribal courts and Native Americans in states where passage was merely optional, thereby adding to the complexity of the already convoluted jurisdictional scheme.¹⁰⁰

In 1978, the assault on sovereign tribal criminal jurisdiction continued and intensified. In a split and landmark decision in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court further stripped tribal courts of jurisdiction over their lands and people.¹⁰¹ The Court held that tribal courts lack any jurisdiction over non-Indian offenders for crimes committed on Indian land.¹⁰² In *Oliphant*, the plaintiff, who was petitioning for a writ of *habeas corpus*, was a non-Indian living as a permanent resident with the Suquamish tribe on Port Madison Indian Reservation in northwest Washington.¹⁰³ In August 1973, Oliphant was arrested and charged by tribal police with assaulting

⁹¹ POMMERSHEIM, *supra* note 29 at 20.

⁹² *Id.* at 20-21; *Jurisdiction: Bringing Clarity out of Chaos*, *supra* note 44.

⁹³ Public Law 280 has since been codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321—26.

⁹⁴ Upon grant of Alaska’s statehood in 1959.

⁹⁵ *Public Law 280*, TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/lists/pl280.htm> [<https://perma.cc/AU7C-42NZ>] (last visited Mar. 26, 2020).

⁹⁶ *Public Law 280*, *supra* note 95.

⁹⁷ Troy R. Johnson, *The State and the American Indian: Who Gets the Indian Child?* 14 WÍČAZO ŠA REV. 197, 203-04 (1999).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Ada Pecos Martin & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AMERICAN INDIAN DEVELOPMENT ASSOCIATES, LLC, <http://www.aidainc.net/Publications/pl280.htm> [<https://perma.cc/VT4E-RYBE>] (last visited Mar. 26, 2020).

¹⁰¹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

¹⁰² *Id.*

¹⁰³ *Id.* at 194.

a tribal officer and resisting arrest during an annual celebration, called Chief Seattle Days.¹⁰⁴ Oliphant's petitions for the writ of *habeas corpus* were denied by the lower courts.¹⁰⁵ In particular, the Ninth Circuit upheld tribal criminal jurisdiction over Oliphant, a non-Indian who committed a crime on Indian land as an important part of its tribal sovereignty.¹⁰⁶ "Surely the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a *sine qua non* [*i.e.*, an essential condition] of the sovereignty that the Suquamish originally possessed," stated the court.¹⁰⁷

However, the Supreme Court disagreed in a controversial split decision.¹⁰⁸ In its majority opinion, the Court cited an "unspoken assumption" of Congress that tribal criminal jurisdiction did not extend to non-Indians, and argued that tribes "must depend on the Federal Government for protection from intruders."¹⁰⁹ In so holding, the Court analogized to *Crow Dog*, asserting that, just as the Court in *Crow Dog* found it would be unfair to subject Indians to an "unknown code" imposed by people of a different "race [and] tradition" from their own, it would be just as unfair to subject Oliphant, a non-Indian to the codes of the tribe.¹¹⁰ Although separated from the expressly racist language of the Court in *Crow Dog* by ninety-five years, the Court's parallel analysis in *Oliphant* demonstrates the pervasiveness of the bias against the First Nations within the most powerful institutions of the United States. In a decision that reflected the Court's bias, it was decided that exclusive tribal jurisdiction over crimes not enumerated in the Major Crimes Act was narrowly limited to crimes by Indian offenders against Indian victims, only.¹¹¹ The tribes' inherent authority to regulate and govern its own land and people – in accordance with their early treaties with the federal government – had been disrespected and ignored.

By 1990, the lack of jurisdiction over crimes not enumerated in the Major Crimes Act was temporarily rendered more exclusive by the Supreme Court.¹¹² In *Duro v. Reina*, the Court concluded that tribal courts had no jurisdiction over the crimes of nonmember Indians.¹¹³ As a result of this decision, a "jurisdictional void" was created, where for certain crimes, none of the federal, state, and tribal governments had the power to prosecute nonmember Indian offenders.¹¹⁴ Thus, Congress quickly amended the Indian Civil Rights Act to incorporate the power of the tribal courts to "exercise criminal jurisdiction over all Indians" in recognition of its sovereignty.¹¹⁵ This

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), *rev'd sub nom.* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

¹⁰⁷ *Id.* at 1009.

¹⁰⁸ See Tom Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, 13 ENGAGE 40 (2012).

¹⁰⁹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 (1978).

¹¹⁰ *Id.* at 210-11.

¹¹¹ *Id.*

¹¹² *Duro v. Reina*, 495 U.S. 676 (1990).

¹¹³ *Id.*

¹¹⁴ Benjamin K. Cordiano, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades after Duro v. Reina Note*, 6 CONN. L. REV. 265, 265 (2008).

¹¹⁵ 25 U.S.C. § 1301 (2018).

amendment, known as the “*Duro*-fix,” has since been upheld by the Supreme Court, therefore overturning the decision of *Duro*.¹¹⁶

Thus, by the end of the 20th century, the “inherent power” and sovereignty granted to the Native Americans via the mutually agreed upon treaties with the European colonizers had fractured into an unworkable and prejudiced scheme which failed to prioritize any interests of First Nations.

3. *McGirt v. Oklahoma*: A Glimmer of Hope

On July 9, 2020, the Supreme Court rendered its long-awaited decision in *McGirt v. Oklahoma*, a dispute regarding the jurisdiction of the state of Oklahoma over its indigenous population.¹¹⁷ In its 5-4 holding, the Court honored the 19th century treaties made between the federal government and the First Nations, although it also upheld the plenary power doctrine by recognizing that the inherent authority of the tribes can only be disestablished through a “clear expression of congressional intent.”¹¹⁸ Here, petitioner Jimmy McGirt, a member of the Seminole Nation whose crimes were committed on the Muscogee (Creek) Nation Reservation, asserted that the state had no jurisdiction to prosecute him under the laws of the state, and that he must be granted a new trial in federal court based on the provisions of the Major Crimes Act (MCA).¹¹⁹ Specifically, his appeal turned on whether his crimes were committed on the land of “Indian Country,” thereby granting jurisdiction to the federal government and the tribe, or if, as Oklahoma argued, they occurred on state land.¹²⁰

Holding that the crime occurred on the Creek Reservation, the majority stated that the Creek Nation was promised a reservation *in perpetuity*.¹²¹ Noting the previous restrictions and expansions Congress had made on tribal authority, Justice Gorsuch wrote, “As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking.”¹²² Absent express withdrawal of the promised reservations from the First Nation by Congress, the Court upheld the jurisdictional scheme subjected to the First Nations under the MCA.¹²³ Although this holding does little to demystify the jurisdictional maze, or to restore full tribal authority to the First Nations themselves, the passionate opinion from the Court reinvigorates and initiates a new momentum in the fight for elimination of the institutional bias against the First Nations built into the present-day framework of the country. Indeed, while the decision in *McGirt* has little, if any, impact on the day-to-day lives of non-Indian citizens living on Indian territory, as noted by two indigenous female scholars, it does “preserve the right of the Muscogee Nation’s Lighthorse Police [*i.e.*, Muscogee Nation’s law enforcement] to protect the lives of Native women

¹¹⁶ U.S. v. Lara, 541 U.S. 193 (2004).

¹¹⁷ *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

¹¹⁸ *Id.* at 2457; *see also* 7 Stat. 418.

¹¹⁹ *McGirt*, 140 S. Ct. at 2457; *see supra* notes 77, 78, 111, and accompanying text.

¹²⁰ *McGirt*, 140 S. Ct. at 2459.

¹²¹ *Id.* at 2482.

¹²² *Id.* at 2482.

¹²³ *Id.*

living within the Muscogee Nation’s borders.”¹²⁴ Moreover, although this decision did not ultimately render McGirt accountable for his crimes, it marked an important recognition of tribal sovereignty by a federal institution. This tribal sovereignty is “inextricably linked” to the safety and lives of indigenous women.¹²⁵ Indigenous women could briefly exhale – the decision provided a renewed sense of agency for them to hold abusers accountable under tribal law.

II. CONTEMPORARY TRIBAL CRIMINAL JURISDICTION: THE VIOLENCE AGAINST WOMEN ACT, REAUTHORIZATIONS THEREOF, AND CURRENT LEGISLATION

More recently, Congress has improved its efforts in recognizing and protecting victims of violence in Indian Country. In particular, the Violence Against Women Reauthorization Act of 2005 (VAWA 2005) first introduced specific provisions directed to the safety of indigenous women.¹²⁶

A. *The Violence Against Women Act Reauthorization Act of 2005 (VAWA 2005)*

The Violence Against Women Act was first signed into law by President Bill Clinton in 1994 and was subsequently reauthorized in 2000.¹²⁷ In 2005, Congress prepared another reauthorization (VAWA 2005) which contained, for the first time, a title specifically directed to the “Safety for Indian Women.”¹²⁸

Signed into law by President George W. Bush on January 5, 2006, VAWA 2005 passed each of the House and Senate with nearly unanimous support.¹²⁹ It was the first act of Congress explicitly recognizing, and acting in response to, the epidemic of violence faced by Native American women.¹³⁰ In particular, Title IX of VAWA 2005 noted in its findings that “1 out of every 3 Indian (including Alaska Native) women are raped in their lifetimes;” that “Indian women experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 Hispanic women, and 1 per 1,000 Asian women;” and that “the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of women.”¹³¹ In fact, Congress explicitly provided that the purpose of this new title was “to strengthen the capacity of

¹²⁴ Mary Kathryn Nagle & Sarah Deer, *McGirt v. Oklahoma: A Victory for Native Women*, GEO. WASH. L. REV. ON THE DOCKET (Oct. Term 2019).

¹²⁵ *Id.*

¹²⁶ VAWA 2005 Reauthorization Act, H.R. 3171, 109th Cong. §§ 901-905 (2005).

¹²⁷ *Introduction to the Violence Against Women Act*, TRIBAL COURT CLEARINGHOUSE, https://www.tribal-institute.org/lists/title_ix.htm [<https://perma.cc/M84L-JVHR>] (last visited Mar. 26, 2020).

¹²⁸ *The Violence Against Women Act – Title IX: Safety for Indian Women*, TRIBAL COURT CLEARINGHOUSE, http://www.tribal-institute.org/lists/vawa_2013.htm [<https://perma.cc/36HA-Z7N2>] (last visited Mar. 26, 2020); *see also* VAWA 2005, *supra* note 126.

¹²⁹ Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, 109th Cong.

¹³⁰ *Introduction to the Violence Against Women Act*, *supra* note 127.

¹³¹ Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, 109th Cong. § 901.

Indian tribes to exercise their sovereign authority to respond to violent crimes committed against women.”¹³²

Title IX of VAWA 2005 included numerous provisions for the promotion of safety of Native American women, such as the authorization for tribal law enforcement agencies to access national criminal information databases, increased punishment through federal prosecutions for repeat domestic violence offenders who have at least two tribal convictions, and authorization for the Bureau of Indian Affairs (BIA) officers to arrest, without a warrant, persons reasonably believed to have committed certain domestic violence offenses.¹³³ Moreover, it authorized the consolidation of VAWA tribal grants to create a single VAWA tribal grant program designed to enhance the tribes’ ability to respond to crimes against women and to enhance safety training and education.¹³⁴ This consolidated program allowed tribes to submit a single application for most of the tribal grant programs offered by the United States Department of Justice (DOJ). It further created a tribal unit in the Office on Violence Against Women and a Deputy Director for Tribal Affairs.¹³⁵ Additionally, VAWA 2005 mandated annual tribal-federal VAWA consultation between the DOJ and tribal governments.¹³⁶

Despite the acknowledgement that the relationship between the federal government and tribal governments was “unique,” and that the federal government has a responsibility for assisting tribes, VAWA 2005 did nothing to address the jurisdictional maze created by the decades of legislation and judicial decisions that came before it. That is, VAWA 2005 did not authorize tribal courts to exercise their inherent jurisdiction over non-Indian offenders for any crime, thus maintaining the status quo of *Oliphant*. Thus, the safety of women in Indian Country was still determined by the race, or Indian status, of her abuser. Should that abuser be a white man, she could not rely upon her Nation’s law enforcement or government to protect her.

B. The Violence Against Women Act Reauthorization Act of 2013 (VAWA 2013)

Thirty-five years after the Supreme Court rendered its decision in *Oliphant*, which remains, in relevant part, good law¹³⁷, Congress took the first steps to restore the “inherent power” of tribal courts to exercise criminal jurisdictions via the third reauthorization of the Violence Against

¹³² *Id.*

¹³³ *Introduction to the Violence Against Women Act*, *supra* note 127.

¹³⁴ *Tribal Affairs*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/ovw/tribal-affairs#:~:text=The%20Grants%20to%20Indian%20Tribal,and%20develop%20education%20and%20prevention> [<https://perma.cc/NF2R-PWD5>] (last visited Feb. 7, 2021).

¹³⁵ *The Violence Against Women Act, 1994-2013*, National Indigenous Women’s Resource Center, <https://www.niwrc.org/sites/default/files/documents/Resources/VAWA%20Factsheet.pdf> [<https://perma.cc/A7FL-K483>] (last visited Mar. 26, 2020).

¹³⁶ *Id.*

¹³⁷ The *Oliphant* decision was briefly superseded by *U.S. v. Lara*, 541 U.S. 193 (2004), which further limited tribal criminal jurisdiction only to Indian defendants of the same tribe. *Lara*, however, was statutorily abrogated by an amendment to the Indian Civil Rights Act that relaxed restrictions on the bounds of the “inherent” tribal authority recognized by the United States. See *supra* note 116. Thus, the effect of the Court’s holding in *Oliphant* on criminal tribal jurisdiction still stands today.

Women Act (VAWA 2013). However, this “inherent power” as provided by VAWA 2013 was limited to a specific and enumerated number of situations.¹³⁸ Significantly, VAWA 2013 was the first federal act – by either Congress or the judiciary – that acknowledged and responded to the fractured and unworkable jurisdictional maze left in the wake of *Oliphant*.¹³⁹

VAWA 2013, which was signed into law on March 7, 2013, by President Barack Obama, granted tribal courts “Special Domestic Violence Criminal Jurisdiction” (SDVCJ) over a limited number of crimes, regardless of the race or Indian status of the offender.¹⁴⁰ This specialized jurisdiction affirmed the inherent sovereign authority of tribal governments to exercise criminal jurisdiction over certain non-Indians who violate qualifying protection orders or commit domestic or dating violence against Indian victims on tribal lands.¹⁴¹ However, the law specifies that a participating tribe may exercise special domestic violence criminal jurisdiction over a defendant *only if* the defendant (1) resides in the Indian Country of the participating tribe; (2) is employed in the Indian Country of the participating tribe; or (3) is a spouse, intimate partner, or dating partner of a member of the participating tribe or an Indian who resides in the Indian Country of the participating tribe.¹⁴² Moreover, as noted by the name, these select defendants could only be tried in tribal court if their crime was an incident of domestic violence between romantic or intimate partners, only.¹⁴³ Accordingly, the special jurisdiction does not allow tribal courts to prosecute offenders who are strangers or even acquaintances of the victim, and significantly, does not allow tribal jurisdiction over crimes such as criminal child abuse, stalking, alcohol and drug use, and false imprisonment – crimes that can all frequently arise in settings of domestic violence.¹⁴⁴

The table provided below, adapted from the Tribal Court Clearinghouse and a report by the Indian Law and Order Commission, summarizes the current framework of criminal jurisdiction of the federal, state and tribal courts over crimes occurring on tribal land, as of the passing of VAWA 2013.¹⁴⁵

Status	Major Crime*	All Other Crimes	Major Crime*	All Other Crimes
	Public Law 280		Non-Public Law 280	
Indian offender Indian victim	State/Tribal	State/Tribal	Federal/Tribal	Tribal
Indian offender Non-Indian victim	State/Tribal	State/Tribal	Federal/Tribal	Federal [†] /Tribal

¹³⁸ See *supra* note 7.

¹³⁹ *Introduction to the Violence Against Women Act*, *supra* note 127.

¹⁴⁰ 25 U.S.C. § 1304.

¹⁴¹ *Id.*

¹⁴² See *Violence Against Women Act (VAWA) Reauthorization 2013*, *supra* note 6.

¹⁴³ *Id.*

¹⁴⁴ Allison, *supra* note 32 at 239.

¹⁴⁵ *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL COURT CLEARINGHOUSE, <https://www.tribal-institute.org/lists/jurisdiction.htm> [<https://perma.cc/36LR-J3BP>] (last visited Mar. 26, 2020); *Jurisdiction: Bringing Clarity out of Chaos*, *supra* note 44 at 7.

Non-Indian offender Indian victim‡	State	State	Federal	Federal†
Non-Indian offender Non-Indian victim	State	State	State	State

*As defined by the Major Crimes Act.

†Under authority of the General Crimes Act

‡Tribal jurisdiction for crimes under VAWA 2013 if tribe has opted for SDVCJ.

As a result of SDVCJ, Congress restored tribal sovereignty to a small, though meaningful, degree. By the end of 2018, at least twenty-two tribes had implemented this special jurisdiction, leading to 143 arrests of 128 non-Indian abusers.¹⁴⁶ Of these arrests, seventy-four (about 50%) led to convictions, and five (about 3.5%) led to acquittals.¹⁴⁷ However, as Jessica Allison aptly notes in her analysis of the SDVCJ provisions of VAWA 2013, “the fact that only twenty-two of the 573 federally recognized tribes have implemented VAWA 2013 demonstrates that there remain barriers to eradicating sexual violence in Indian Country.”¹⁴⁸

One such barrier to the implementation of SDVCJ by the tribal courts is the prohibitive expense and need for resources.¹⁴⁹ This is not a burden unique to the implementation of this special jurisdiction – tribal justice systems have been underfunded for decades.¹⁵⁰ As described by the Pascua Yaqui Tribe:

In addition to the direct costs of complying with the prerequisites (indigent defender systems, jury trials, incarceration, etc.), substantial indirect costs are also likely to be required. For example, who will review and propose changes to your laws and procedures? Who will train law enforcement, prosecutors, judges, court staff and defense counsel on the new laws and procedures and how they work? What funding will be required to make these changes? To pay for any additional prosecutors, judges, defense counsel, and court staff? To pay to publish the laws and regulations? To process the licensing and educational requirements? To implement the jury selection process? To pay for incarceration? Where will these funds come from? Is that source of funding stable and reliable?¹⁵¹

¹⁴⁶ Allison, *supra* note 32 at 239; *VAWA 2013’s Special Domestic Criminal Jurisdiction Five-Year Report*, *supra* note 8.

¹⁴⁷ *VAWA 2013’s Special Domestic Criminal Jurisdiction Five-Year Report*, *supra* note 8. As of the publishing of the five-year report, the remaining sixty-four arrests were still pending.

¹⁴⁸ Allison, *supra* note 32.

¹⁴⁹ *SDVCJ Today*, NATIONAL CONGRESS OF AMERICAN INDIANS, <http://www.ncai.org/tribal-vawa/the-first-five-years/findings/implementation-revealed-serious-limitations-in-the-law#3.5> [<https://perma.cc/VR3A-9RLZ>] (last visited Mar. 26, 2020).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

To minimize these expenses, various tribes have collaborated to create share strategies and information about SDVCJ implementation.¹⁵² For example, the few tribes that have implemented SDVCJ have largely relied on the models and support of fellow tribes, as well as the use of contract defense attorneys.¹⁵³ Although VAWA 2013 authorized \$5,000,000 for each of fiscal years 2014 through 2018 for SDVCJ implementation, the Office on Violence of Women (OVW) has awarded a total of \$5,684,939 in competitive grant funds, allocated amongst fourteen different tribes to support their implementation of SDVCJ.¹⁵⁴ Ultimately, only four implementing tribes—Tulalip, Little Traverse Bay Band, Eastern Band of Cherokee Indians, and Standing Rock—received any of these grant funds.¹⁵⁵ Yet none of these tribes have used any of these funds to prosecute, likely because these funds were exhausted by the mere steps needed to effectively implement the special jurisdiction (*e.g.*, training, revising tribal codes, etc.).¹⁵⁶

C. The Violence Against Women Act Reauthorization Act of 2019 (VAWA 2019)

On April 4, 2019, the United States House of Representatives took another step in expanding upon the SDVCJ provided in VAWA 2013, by passing the fourth reauthorization of VAWA (VAWA 2019).¹⁵⁷ Responding to some of the limitations of VAWA 2013, the 2019 reauthorization proposes to expand tribal jurisdiction further to include additional violent crimes.¹⁵⁸ However, VAWA 2019 still significantly and unnecessarily limits the inherent authority of the tribes by failing to grant tribal courts jurisdiction over all criminals, regardless of their race or that of their victims. This failure, like all those before it, is rooted in the underlying bias against the First Nations and a deep, perhaps unconscious, belief in the inferiority of these Nations and their courts as compared to those of the federal government. As of the writing of this Article, VAWA 2019 is calendared for an unspecified date in the Senate.¹⁵⁹

III. ANALYSIS

The rationale of the decisionmakers at each of the stages of creation of the tribal court jurisdictional maze has been rooted in bias against indigenous people and the First Nations. Evidence of this bias and disdain for indigenous culture and history has been peppered throughout decisions rendered in the highest echelons of our judicial system, and in statements of the most advanced legislative body in this country. But this bias is pervasive. It is still present in the modern-day interactions between tribes and the federal government, in each of the judiciary and

¹⁵² *VAWA 2013's Special Domestic Violence Criminal Jurisdiction (SDVCJ)*, *supra* note 15.

¹⁵³ *SDVCJ Today*, *supra* note 149.

¹⁵⁴ *Id.* After allocation, each tribe received at most \$495,000.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See Violence Against Women Act Reauthorization of 2019, H.R. 1585, 116th Cong. §§ 901-05 (2019).

¹⁵⁸ *Onco*, *supra* note 17.

¹⁵⁹ See <https://www.congress.gov/bill/116th-congress/house-bill/1585/text> [<https://perma.cc/32SJ-CHR9>] (last visited Aug. 21, 2020).

the legislature. Armed with the recognition of this bias, this Article argues for the abrogation of the decision rendered in *Oliphant* as one means of acknowledging and abolishing this bias. Despite the provisions drafted specifically for Indian Country, VAWA 2013 and 2019 have simply not gone far enough to restore safety to indigenous women and the First Nations.

A. VAWA 2019 Fails to Sufficiently Protect Indigenous Women

As noted above, the United States House of Representatives passed the Violence Against Women Reauthorization Act of 2019 (H.R. 1585) on April 4, 2019, after a largely party-line vote with 230 Democratic and thirty-three Republican representatives voting in favor of the bill.¹⁶⁰

In relevant part, the bill broadens the Special Domestic Violence Criminal Jurisdiction granted to tribal courts by the VAWA 2013 reauthorization and uses a new term to describe this expanded jurisdiction: “Special Tribal Criminal Jurisdiction.” This new jurisdiction amends SDVCJ to include jurisdiction over stalking, sex trafficking, sexual violence, domestic violence (expanding the definition from VAWA 2013), assault of a law enforcement or correctional officer, and obstruction of justice.¹⁶¹ While these expanded authorizations are necessary and will help restore some semblance of sovereignty to tribal courts and Indian Country, Congress must pass legislation allowing tribal courts to have absolute criminal jurisdiction over their lands and their people, without caveats to the types of crimes involved. That is, Congress must, at the very least, statutorily abrogate the *Oliphant* decision.

Yet, Congress will never take such action until it recognizes and acknowledges that the complex jurisdictional scheme created throughout the history of this country has been built on centuries of white bias and prejudice against Native American tribes, citizens, culture, and tradition. In particular, Congress must confront the harmful and dangerous belief that Native Americans lack sufficient competence or authority to govern their own lands, and it must recognize the role this belief has played in the restriction of rights and scope of tribal court jurisdiction and sovereignty throughout history.

1. Returning to the Historical Context: Acknowledging the White Bias

The expansion of criminal tribal jurisdiction to absolute – or at least *nearly* absolute – jurisdiction over Indian lands would not be unheard of in the history of this country. In fact, the passage of time has only led to the erosion of tribal jurisdiction through various Congressional and Supreme Court interferences. At the time of European discovery – or invasion – of America, tribes were, of course, completely sovereign “by nature and necessity,” in that they conducted and regulated their own affairs acting independently and without any external power that was required

¹⁶⁰ *Final Vote Results for Roll Call 156*, UNITED STATES HOUSE OF REPRESENTATIVES (Apr. 4, 2019), <http://clerk.house.gov/evs/2019/roll156.xml> [https://wr.perma-archives.org/public/qna2-5pzg/im_/https://clerk.house.gov/evs/2019/roll156.xml].

¹⁶¹ Violence Against Women Act Reauthorization of 2019, H.R. 1585, 116th Cong. §§ 901-05 (2019).

to legitimize their authority.¹⁶² Upon their invasion of the new world, however, the Europeans claimed dominion over all territories, seemingly limiting this pre-existing tribal sovereignty, and leaving, in many cases, the Supreme Court to resolve the resulting uncertainties.¹⁶³

The Supreme Court has never had a Native American justice in their ranks, let alone a justice with any substantial Native American education or knowledge. In fact, there have only been three Native American federal judges in the history of our country: Billy Michael Burrage (former chief judge of all three districts of the U.S. District Courts for Oklahoma), Diane Joyce Humetewa (current judge for the U.S. District Court for the District of Arizona; former judge of the Hopi Appellate Court, Keams Canyon, Arizona), and Frank Howell Seay (former chief judge of the U.S. District Court for the Eastern District of Oklahoma).¹⁶⁴ Similarly, only twenty-two Native American individuals have ever served in Congress, and the first ever Native American Cabinet secretary, Debra Haaland, was sworn into office under President Joe Biden on March 17, 2021.¹⁶⁵ So, it comes as no surprise that each of the Supreme Court, Congress, and the Executive Branch has been a large factor in the creation and perpetuation of the jurisdictional maze dictating and limiting a tribal court's sovereignty over its own lands and people.

In the 1800s, Chief Justice Marshall had several opportunities to evaluate the status of Indian tribes, and for the most part, recognized the sovereignty of the tribes as separate “states” within the country:

So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society separated from others, capable of managing its own affairs and governing itself, has, in the opinion of the majority of the judges, been completely successful.¹⁶⁶

And when faced with the opportunity a year later, Marshall reiterated this status:

The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, 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 claimed¹⁶⁷

¹⁶² CANBY, *supra* note 64 at 76.

¹⁶³ *Id.*

¹⁶⁴ *American Indian Judges on the Federal Courts*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges/search/american-indian> [<https://perma.cc/4WWZ-2MMR>] (last visited Mar. 26, 2020).

¹⁶⁵ See JERRY D. STUBEN, *Native Americans and Political Participation: A Reference Handbook* (2006). Four of the twenty-two representatives have served in the Senate, while the remaining eighteen have been members of the House.

¹⁶⁶ *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831).

¹⁶⁷ *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

Thus, under the Marshall Court, and after the conclusion of the Marshall Trilogy, tribes were viewed as sovereign and free from all state intrusion on that sovereignty in all but two ways: (1) requirement that tribes can only convey land to the federal government; and (2) lack of ability to deal with foreign powers.¹⁶⁸

Following the Marshall Trilogy, however, the decisions rendered by the Supreme Court took a dark turn, which some have argued “memorialize[] the darkest decades for Indian people in American history.”¹⁶⁹ Specifically, in *Crow Dog*, the Court held that the federal court had no jurisdiction over an Indian man who murdered another Indian man in Indian Country.¹⁷⁰ While on its face, this outcome aligns with the tribal courts’ desired scope of criminal jurisdiction, the rationale the Court used to reach that decision gives crystal clear insight into the explicit bias against the competence of the indigenous. For example, although ultimately holding in favor of Indian Country handling its own internal criminal matters, the Court held, in an opinion penned by Justice Stanley Matthews and wrought with a profoundly explicit bias:

It is a case where, against an express exception in the law itself, that law . . . is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts *of a free though savage life*, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, *which . . . 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.¹⁷¹

Thus, the Court held not in favor of the tribe because it viewed the tribe as a separate state capable of handling its own affairs, but rather because it believed that the “savage” tribe of “red men” would have been unable to understand the law of the white man.

Congress acted swiftly, distraught with the Court’s recognition of tribal sovereignty in *Crow Dog*. Within two years following the decision, the Major Crimes Act was passed, stripping tribal courts of criminal jurisdiction over seven distinct crimes committed by Indians in Indian

¹⁶⁸ CANBY, *supra* note 64 at 78-79.

¹⁶⁹ Fletcher, *supra* note 45.

¹⁷⁰ *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

¹⁷¹ *Id.* at 571 (emphasis added).

Country, regardless of the race of the victim. In particular, the original Major Crime Act provided that:

[A]ll Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.¹⁷²

The legislative history of this act explicitly demonstrates that the legislatures, just like the Court in *Crow Dog*, saw Native Americans as uncivilized savages. In particular, in the debate to pass the Major Crimes Act, quoted above, Rep. Cutcheon of Michigan stated, “I do not believe we shall ever succeed in civilizing the Indian race until we teach them regard for law, and show them that they are not only responsible to the law, but amenable to its penalties.”¹⁷³ Furthermore, during the congressional debate, the term “or other person” was added following “another Indian” to ensure that all Indians were to be prosecuted in federal court for any of the crimes committed, regardless of the race or status of the victim.¹⁷⁴ Notably, the bill was passed to provide the federal government with concurrent criminal jurisdiction, which it shared with the tribe. It was not until *Oliphant*, over 150 years later, that criminal tribal jurisdiction over non-Indians was judicially removed.¹⁷⁵

In the *Oliphant* decision, the Court announced the third limitation¹⁷⁶ on tribal sovereignty: the exercise of criminal jurisdiction over non-Indians was inconsistent with the domestic, dependent status of the tribes.¹⁷⁷ In rendering this decision, the Court pointed to 200 years of federal legislation, which it argued “assum[ed] that Indian tribal courts are without inherent jurisdiction to try non-Indians, and must depend on the Federal Government for protection from intruders.”¹⁷⁸ Therefore, the Court held that, absent any express legislation from Congress

¹⁷² 16 Cong. Rec. 934 (1885).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See generally, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

¹⁷⁶ POMMERSHEIM, *supra* note 29 at 17.

¹⁷⁷ CANBY, *supra* note 64 at 81.

¹⁷⁸ *Oliphant*, 435 U.S. at 205, n. 15.

permitting tribal courts to exercise criminal jurisdiction over non-Indians, the courts had no such power.

However, at the time of the decision, tribes had previously been recognized as sovereign “domestic dependent nations,” in part by the Marshall Court. Therefore the relevant inquiry was whether the federal government had passed any legislation *preventing* tribes from acting within its inherent sovereignty – not whether the federal government provided any legislation *permitting* the tribes to act.¹⁷⁹ Thus, by rendering its decision in *Oliphant*, the Supreme Court opened the dangerous door to the discovery and enforcement of “inherent” limitations on tribal sovereignty, the effects of which have reverberated in countless decisions that have come down from the high Court in the twentieth and twenty-first centuries.

For example, as a result of *Oliphant*, tribes lost the power to regulate liquor sales on tribal land and to regulate hunting and fishing by non-Indians on non-Indian-owned land within its reservations.¹⁸⁰ These decisions were based in the Court’s narrow view that the tribes retained inherent power only to protect self-government and to control “internal relations” defined as including “the power to punish tribal offenders, . . . to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.”¹⁸¹

The jurisdictional maze has only gotten more complicated as Congress reacts to decisions handed down by the high court. In 1990, the Supreme Court further narrowed tribal jurisdiction by holding that tribes did not have criminal jurisdiction over nonmember Indians on their reservations – that is, the Court changed course from the pattern of Congressional legislation basing criminal jurisdiction on the defendant’s status as an Indian, regardless of the tribe.¹⁸² Congress swiftly overruled the Court by defining tribal powers of self-government to include the “exerciser [of] criminal jurisdiction over all Indians.”¹⁸³ However, passing the legislation raised the question of whether by acting, Congress had conferred power on to the tribes to punish nonmember Indians, or if it had simply recognized an inherent tribal power to assert such criminal jurisdiction.

Based on Congress’s reactionary approach to decisions from the Supreme Court, it remains to be seen how Congress decides to act in the wake of *McGirt v. Oklahoma*, which, despite having no impact on resolving the jurisdictional maze, provided a glimmer of hope that overcoming the bias against the First Nations within our government could be achieved. However, the decision, which expressly granted Congress the sole authority to withdraw the promises it made to the First Nations in the 19th century, could have detrimental effects if Congress were to side with the Governor of Oklahoma, who asserts that the decision will “disrupt Oklahoma’s criminal justice system and free dangerous criminals.”¹⁸⁴

¹⁷⁹ CANBY, *supra* note 64 at 79, 81.

¹⁸⁰ *Montana v. United States*, 450 U.S. 544 (1981); *Rice v. Rehner*, 463 U.S. 713 (1983).

¹⁸¹ *Montana*, 450 U.S. at 564.

¹⁸² *Duro v Reina*, 495 U.S. 676 (1990).

¹⁸³ 25 U.S.C. § 1301(2).

¹⁸⁴ Cruz, et. al., *The Oklahoma decision reveals why Native Americans have a hard time seeking justice*, THE WASH. POST (July 22, 2020), <https://www.washingtonpost.com/politics/2020/07/22/oklahoma-decision-reveals-why-native-americans-have-hard-time-seeking-justice/> [<https://perma.cc/7UZA-PMS7>].

2. A Hard Look at the Modern Bias Against the First Nations

Although the opinions and debates on the House and Senate floors have lost the explicit and blatant disregard for the status of Native Americans as citizens of the United States that were once prevalent in those of the 19th and early 20th century, the bias against Native Americans still exists in the opinions and actions of the courts and legislature today. The modern existence of an implicit bias¹⁸⁵ against Native Americans by the general public of the United States provides sufficient evidence in and of itself that the federal government does not view tribal courts as having the competence to handle its own internal affairs.

In 2017, National Public Radio (NPR) conducted a study to evaluate discrimination against Native Americans in the United States.¹⁸⁶ The study found that Native Americans reported discrimination against them in each of the institutional and individual contexts.¹⁸⁷ For example, about 30% of Native Americans reported they had been discriminated in their employment – *e.g.*, when applying for jobs or in their pay – and about the same amount reported they had been they discriminated against by the police and/or by the courts.¹⁸⁸ The study concluded that, overall, 75% of Native Americans believe there is institutional and individual discrimination against indigenous people in the U.S. today.¹⁸⁹

This bias is not just recognized by the general Native American population. It has also infiltrated the way state and federal courts view the competence and ability of tribal courts. Though the definition of “competence” has advanced significantly since the days of the Burke Act, in which the competence of a Native American was determined based on the amount of Indian blood they had or didn’t have,¹⁹⁰ there have been documented incidents in which tribal courts have been subject to that same discrimination.

In December 2010, tribal judge Claudette White from Southern California attempted to file a petition order for a Native women who had been attacked, and whose attacker was still at large.¹⁹¹ In response to hearing that Native women had been having issues registering issued protection orders with the county, Judge White delivered it to the sheriff herself, hoping to ease the process.¹⁹² At this time, VAWA 2013 had not been passed, so when Judge White appeared in front of the sheriff deputy, she was told that nothing could be done.¹⁹³ Judge White immediately contacted a

¹⁸⁵ See, *e.g.*, *Implicit Bias in the Law*, UNIVERSITY OF CONNECTICUT SCHOOL OF LAW <https://libguides.law.uconn.edu/implicit#s-lg-box-13817521> [<https://perma.cc/GFM8-XMPR>] (last visited Mar. 26, 2020) for one analysis of the role of “implicit bias” in the law.

¹⁸⁶ DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF NATIVE AMERICANS, NATIONAL PUBLIC RADIO (Nov. 2017), <https://www.npr.org/documents/2017/nov/NPR-discrimination-native-americans-final.pdf>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ POMMERSHEIM, *supra* note 29 at 20.

¹⁹¹ Emma Cueto, *In Indian Country, A ‘Maze of Injustice’ Persists for Women*, LAW360 (Sept. 15, 2019), <https://www.law360.com/articles/1197831> [<https://perma.cc/4XMF-4TWZ>].

¹⁹² *Id.*

¹⁹³ *Id.*

California state judge, Judge Juan Ulloa, and asked him to speak to the officers. Judge White recounts, “As soon as I put him on, their attitudes changed . . . You know, ‘Yes judge, right away, judge.’ Completely different from the way they were treating me.”¹⁹⁴ Although the tribal courts and California state courts soon worked out a system to get protective orders issued by tribal courts registered with the sheriff, the system remains imperfect, and undermines the authority of the tribal court to have to receive a sign-off from a state court.¹⁹⁵ As Judge White acknowledges, “Those are all steps that are not required under the law . . . But that’s the end-run we’re required to create to protect our members.”¹⁹⁶

Where tribal courts lack jurisdiction under VAWA 2013, for example, in a criminal child abuse case, the tribes must request and rely upon FBI intervention. The FBI, however, has limited resources and its agents are often overburdened and located far away from the reservations. As of the end of 2018, the FBI had only 140 special agents and 40 victim specialists assigned to assist in cases within Indian Country, which includes over 1,000,000 people.¹⁹⁷ Thus, it is unsurprising that between the years 2005 and 2009, the U.S. Attorney’s Office declined to prosecute about 52% (or about 4,000 cases) of the violent crimes from Indian Country that were reported to them.¹⁹⁸

B. Congress Must Statutorily Abrogate the Oliphant Decision

While the passage of VAWA 2019 would substantially expand the ability of tribal judges like Judge White to protect the women of her tribe, it does not go far enough in restoring the full extent of inherent tribal sovereignty as it pertains to criminal tribal jurisdiction. Until such inherent authority is restored, tribal courts will always have to jump through hoops to demonstrate and effectuate authority and competence. Restoration of this inherent authority can and must necessarily be achieved by the statutory abrogation of the Supreme Court’s 1978 decision in *Oliphant*.

The analysis of the Court in its *Oliphant* decision expressly abandoned the long-standing principles of Indian law. Prior to *Oliphant*, the Supreme Court had interpreted the boundaries of tribal jurisdiction and sovereignty by relying on clear congressional statements abrogating tribal jurisdiction over non-Indians.¹⁹⁹ Rather than maintaining the *status quo*, the Court adopted an “unspoken assumption” theory which fatally stripped all tribal courts of all criminal jurisdiction over non-Indian defendants. Citing to outdated and irrelevant lower court decisions,²⁰⁰

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Emma Cueto, *In Indian Country, A ‘Maze of Injustice’ Persists for Women*, LAW360 (Sept. 15, 2019), <https://www.law360.com/articles/1197831> [<https://www.law360.com/articles/1197831>].

¹⁹⁸ Maurer, *supra* note 26.

¹⁹⁹ *See, e.g.*, U.S. v. Kagama (upholding the Major Crimes Act, which expressly removed exclusive tribal jurisdiction over various enumerated crimes).

²⁰⁰ *See, e.g.*, *Ex parte Kenyon*, 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (holding that Cherokee Nation did not have jurisdiction over a white man, who was married to a Cherokee woman and who took his wife’s mare and colt out of Cherokee territory upon her death. The tribal court had convicted him of larceny).

congressional reports, and other questionable evidence in support, the Court concluded that because of the “implicit divestiture doctrine,”²⁰¹ tribal courts, in fact, never had jurisdiction over non-Indian defendants in the first place.²⁰² Notably, the *Oliphant* Court stated, at the end of the opinion:

We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to anyone tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. 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.*²⁰³

Thus, not only did the Court briefly acknowledge the sophistication of some tribal courts (and impliedly, the *unsophistication* of others – additional evidence of the bias against these courts), the Court left open the door to Congress to pass legislation to restore criminal tribal jurisdiction over non-Indians.

Other than VAWA, Congress has not remained completely silent on the inherent rights of tribes. In 1978, after the *Oliphant* decision was rendered, Congress passed the Indian Child Welfare Act (ICWA).²⁰⁴ ICWA was enacted in response to the removal of indigenous children from their homes by state child welfare systems and private adoption agencies.²⁰⁵ A 1969 survey by the Association of American Indian Affairs found that at least twenty-five percent of *all* Indian children were separated from their families and placed in white, non-Indian homes and boarding schools.²⁰⁶ Between 1969 and 1974, that percentage increased to at most thirty-five percent of *all* Indian children.²⁰⁷ In passing ICWA, Congress sought to protect the relationship between Indian children and Indian families and custom and to preserve inherent tribal authority:

²⁰¹ The divestiture doctrine is based on the proposition that simply because of the contact with the Europeans upon the European colonization of the United States, *e.g.*, via the treaties, tribes inherently lost some rights in the process. *See Allison, supra* note 32 at 237.

²⁰² Geoffrey C. Heisey, *Oliphant and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction* 73 IND. L. REV. 1051, 1065 (1998); *see also Allison, supra* note 32 at 236-37.

²⁰³ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 211-12 (emphasis added).

²⁰⁴ *See* U.S.C. §§ 1901-63.

²⁰⁵ *About ICWA*, National Indian Child Welfare Association, <https://www.nicwa.org/about-icwa/> [<https://perma.cc/QHX3-F4XU>] (last visited March 27, 2020).

²⁰⁶ Indian Child Welfare Act, H.R. 12533, 95th Cong. (1978); *see Indian Child Welfare Act*, Association of American Indian Affairs, <https://indian-affairs.org/indian-child-welfare-act.html> [<https://perma.cc/ZQ2S-5UDX>] (last visited March 27, 2020).

²⁰⁷ Mary C. McMullen, *Preserving the Indian Family: Focus on the Indian Child Welfare Act*, 2 Children's Legal

[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes with will reflect the unique values of Indian culture.²⁰⁸

ICWA has not gone unchallenged. Most recently the Fifth Circuit upheld ICWA, holding against the states of Texas, Louisiana, and Indiana which claimed that protections for Indian children and families constituted illegal racial discrimination, and that ICWA's federally mandated state court standards illegally "commandeer" state courts and agencies to carry out a federal scheme.²⁰⁹ However, after so concluding, the court reheard the case *en banc* in January 2020.²¹⁰ As of the writing of this Article, the court had not yet rendered its final opinion.

ICWA and VAWA are but two relatively modern responses to the pervasive prejudice against the First Nations that still exist today. The passage of these legislations has undoubtedly benefited Indian culture, but not enough to correct the hardships the government and its agencies have bestowed upon them over time.

Each of these responses fails to acknowledge or address the use of education as a weapon forced assimilation of Indian children into Western civilization.²¹¹ Schools that were designed by the federal government to "inoculate Indian children with the virtues and values of Western civilization and to eliminate the traces of Indian cultures."²¹² Schools that resorted to corporeal punishment of children, imprisoned disobedient students in school jails, cut the traditionally long hair of Indian children, and forced instruction in English.²¹³

Each of these responses fails to acknowledge the mysterious and forced sterilization of approximately 25% of Indian women of child-bearing age beginning in 1962.²¹⁴ Women who signed consent forms to undergo emergency Caesarian-section deliveries, only to later discover they had also consented to tubal ligations or hysterectomies.²¹⁵ Or women who only consented to such procedures out of fear of losing welfare benefits.²¹⁶ Or even women who consented to such procedures after being convinced they were unfit mothers.²¹⁷

Rights J. 32 (1981).

²⁰⁸ H.R. 12533, 95th Cong. (1978); *Indian Child Welfare Act*, Association of American Indian Affairs, <https://indian-affairs.org/indian-child-welfare-act.html> [<https://perma.cc/AB8E-QNBH>] (last visited March 27, 2020).

²⁰⁹ *See Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).

²¹⁰ *See Brackeen v. Bernhardt*, 942 F.3d 287 (5th Cir. 2019).

²¹¹ "Beginning in 1878 the federal government developed an

²¹² *Johnson, supra* note 99 at 205.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*; see Claudia Driefus, *Sterilizing the Poor*, 39 THE PROGRESSIVE 12, 17 (1975).

²¹⁶ *Johnson, supra* note 99 at 205

²¹⁷ *Id.*; see Meg Devlin O'Sullivan, *Informing Red Power and Transforming the Second Wave: Native American women and the struggle against coerced sterilization in the 1970s*, 25 WOMEN'S HISTORY REV. 965 (2016).

In the forty-two years that have passed since *Oliphant*, violence against indigenous women has only gotten worse. While Senate approval of VAWA 2019 will fill some of the gaps left in the wake of VAWA 2013, such as providing the ability for tribal courts to prosecute mere acquaintances or even strangers who commit violent crimes against Native women – which constitutes the vast majority of sexual assault cases – it does not go far enough to recognize and resolve the systemic biases that have limited tribal jurisdiction and doubted tribal competence since before the Marshall era.

IV. IMPACT

Abrogating the *Oliphant* decision would not come without challenges, but would be a significant first step in acknowledging white bias and entrusting the First Nations with the authority they are owed. Restoring criminal tribal jurisdiction over non-Indians could have both advantageous and disadvantageous impacts on the law and order of Indian Country, and more specifically, on indigenous women. It would undoubtedly face backlash upon reaching the Senate floor, particularly with respect to the due process of the non-Indian defendant. Though this change would have broad implications regarding the tribal court system and the tribal-federal relationship, abandoning the principles of the *Oliphant* decision is necessary to properly confront the modern manifestations of white supremacy that continue to oppress indigenous peoples.

A. Impact on Indigenous Women

First and foremost, the abrogation of *Oliphant* would allow more indigenous women to have their day in court and to see the perpetrators of their harm finally brought to justice. In addition to these basic moral and ethical advantages of restoring criminal tribal authority over non-Indian defendants, the abrogation of *Oliphant* would improve the socioeconomic effects associated with the current justice system.

Native American reservations often reside in remote areas of vast, sprawling states. Take for instance the Blackfeet Indian Reservation, which sits at the eastern edge of the Rocky Mountains in northwest Montana.²¹⁸ Travel to the local tribal court from the reservation amounts to about 1.5 miles.²¹⁹ In contrast, the closest federal court is 127 miles from the reservation – more than a 2-hour drive away.²²⁰ Fort Peck, home to two separate First Nations – the Assiniboine and Sioux Tribes – is similarly situated in Montana and requires at least a 9-hour round trip drive in

²¹⁸ See generally *Our Lands*, Blackfeet Nation, <https://blackfeetnation.com/lands> [https://perma.cc/P89K-MXWV] (last visited March 27, 2020).

²¹⁹ Cara Bayles, *Reservation Residents Face a Long Road to Justice*, LAW360 (Sept. 15, 2019, 8:02 PM EDT), https://www.law360.com/access-to-justice/articles/1197796/reservation-residents-face-long-road-to-justice?nl_pk=9a56f5be-b2d6-4c06-a10d-38bec63613a2&utm_source=newsletter&utm_medium=email&utm_campaign=access-to-justice [https://perma.cc/ZJ3T-9BJJ].

²²⁰ *Id.*

good weather.²²¹ These situations are not rare, impacting indigenous women from Montana to Wyoming to Arizona, in reservations both large – like Blackfeet – and small – like Fort Peck.

These distances can have drastic effect on victims of violent crimes who wish to see their abusers brought to justice. On top of emotional invasion of their mind and bodies, these women must also bear the financial costs of traveling long distances – including fuel, lodging, food, and the like – in order to see their day in court.²²² While some FBI programs exist to provide some compensation or transportation to witnesses and victims from reservations to federal court, these resources are stretched thin.²²³ “Taking a trip to Billings or Great Falls is not something you just do,” explained Fawn Williamson, a victim-and-witness specialist on the Fort Belknap reservation in Montana.²²⁴ When a U.S. attorney requested her to appear in court with the defendant on a Tuesday, following a subpoena issued the previous Friday, she had to decline due to the time commitment and financial burden imposed.²²⁵

By restoring criminal jurisdiction over non-Indian defendants to the tribal courts, not only will those Native Americans involved in the trial (*e.g.*, petitioners, witnesses, jurors, etc.) have easier access to the court, but so would any Native American involved in any crime occurring in Indian Country. The beneficial effects of the proposed resolution go beyond just crimes against women and extend to all crimes committed against any individual.

While some may argue that in some cases the particular federal court is more accessible than the tribal court, the proposed resolution (*i.e.* the abrogation of *Oliphant*) is not to restore *exclusive* criminal jurisdiction to the tribal courts. Rather, the federal and tribal courts would have concurrent jurisdiction over these cases. Therefore, in the 52% of cases where the federal government declines to prosecute these non-Indian defendants, the tribal court would be able to step in and provide victims with means to justice.²²⁶

B. Impact on Non-Indian Defendants

In the debates on the House floor, the largest opposition to the amendments passed by VAWA 2019 are those relating to the “due process concerns” of the non-Indian defendant.²²⁷ Although the VAWA 2019 opposition did not elaborate on these concerns, it is likely that these concerns draw parallels to those concerns raised during the debates on VAWA 2013 and the SDVCJ provisions. In particular, in 2013, the opposition questioned whether tribal courts would

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Cara Bayles, *Reservation Residents Face a Long Road to Justice*, LAW360 (Sept. 15, 2019, 8:02 PM EDT), https://www.law360.com/access-to-justice/articles/1197796/reservation-residents-face-long-road-to-justice?nl_pk=9a56f5be-b2d6-4c06-a10d-38bec63613a2&utm_source=newsletter&utm_medium=email&utm_campaign=access-to-justice [https://perma.cc/4Z4P-744J].

²²⁶ Maurer, *supra* note 26.

²²⁷ Cueto, *supra* note 191.

adhere to constitutional protections granted to defendants, such as trial by a jury of your peers. That is, at the time of the 2013 passage, the opposition appeared to be concerned with the jury being composed of all Native American individuals.

This argument is wrongfully wrought with the bias discussed at length in this Article against Native American people. It necessarily assumes the fact that a Native American juror would not be able to be an impartial and objective observer. Moreover, it ignores the fact that non-Native American people live on reservations. Advocates of VAWA 2013 argued as such, and noted that tribal juries are not racially homogenous.²²⁸ Notably, the passage of VAWA 2013 was, in part, contingent on the tribal courts honoring the constitutionally required protections for defendants.²²⁹

C. Impact on Tribal Court System and Tribal-Federal Relations

The implementation of the restoration of criminal jurisdiction to the tribal courts would undoubtedly have benefits, but could also induce hardships – at least initially – on tribal courts. Among the most obvious benefits would be that the authority and competence of tribal judges, like Judge White, would no longer be systemically undermined by any requirement to have state or federal oversight of their actions.²³⁰ Tribal court systems would be free to file orders and render decisions in criminal suits without the worry of that action not being recognized as binding, and without the competence of the judge – or the entire system – being called into question. That is, the abrogation of *Oliphant* would necessarily require Congress to at least implicitly acknowledge the bias against tribal court systems.

However, implementing this change may bear a substantial financial burden on the tribal courts – particularly the courts of smaller Nations with less robust judiciaries. Like the SDVCJ provisions, implementation of a broader statutory scheme will be expensive, and will require funding, access to resources, support, and services to assist in the effective implementation. Tribal courts, which have been operating under limited jurisdiction for over forty years, may be understaffed and ill-equipped to deal with an influx of new dockets and investigations.

Thus, in making this statutory change, Congress will need to allocate funds to the tribal court systems, as it did with SDVCJ, to help ease these changes. But as the bearer of the funds, Congress will undoubtedly maintain oversight into the distribution and allocation of the assistance, which makes ample room for the bias to remain. There are currently 574 federally recognized tribes in the United States.²³¹ This number is not wholly inclusive of all tribes present in the United States, such as the majority of Alaska Native tribes and Native Hawaiian tribes, the latter of which

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Federal and State Recognized Tribes*, National Conference of State Legislatures (last updated Mar. 2020) <https://ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> [<https://perma.cc/PD92-P5KR>].

are ineligible for federal recognition.²³² The receipt of federal assistance and access to federal services is contingent on a tribe's recognition by the federal government, and in order to secure federal recognition, a tribe must accede to some level of federal oversight and control.²³³ The current federal recognition process is "badly broken" and in some cases, has taken over 30 years to consider a tribe's application.²³⁴ Further, the already limited federal funding allocated to recognized tribes, in combination with prosperity in gaming on some reservations, has encouraged some tribes to remove individual members from the tribes in a process known as disenrollment: "The logic is simple: Reducing the number of tribal members means more money for those who remain."²³⁵ In some smaller tribes with affluent gaming profits, monthly payments of \$15,000 or more are made to members.²³⁶

Tribal disenrollment presents an interesting obstacle for those arguing in favor of full tribal sovereignty, in which the tribes would be free of incursion from the federal government. That is, to enforce full tribal sovereignty would be to permit tribes to engage in disenrollment as a function of its internal civil jurisprudence. Tribes could legally strip its members of their Indian identity and access to tribal resources, such as health care and educational grants.²³⁷ In cases where members are receiving substantial monthly payments from the tribe, the effects of disenrollment are upending.

The federal government's oversight of tribal disenrollment has not always been constant. Throughout the twentieth century, the federal government asserted authority and control over tribal disenrollment practices.²³⁸ However, in 2010, the government assumed a hands-off approach, citing to the inherent authority of the tribes.²³⁹ This approach resulted in rampant disenrollment of members until about 2016, when many tribes ended the practice and reinstated disenrolled members.²⁴⁰ Nevertheless, tribes still engage in this process, to the detriment of many individuals, and critics have noticed that the rise and fall of disenrollment is closely tied to the federal government's behavior toward the practice.

Full tribal sovereignty – and thus full abolishment of white bias against tribes – may not be reasonably achievable within the current, modern tribal-federal relationship. There will always

²³² 25 C.F.R. § 83.1 (defining "indigenous" as "native to the continental United States in that at least part of the petitioner's territory at the time of first sustained contact extended into what is now the continental United States").

²³³ *Id.* § 83; *Federal Recognition*, National Congress of American Indians, <https://ncai.org/policy-issues/tribal-governance/federal-recognition> [<https://perma.cc/9M9X-4DYH>] (last visited March 27, 2020).

²³⁴ *Federal Recognition*, National Congress of American Indians, <https://ncai.org/policy-issues/tribal-governance/federal-recognition> [<https://ncai.org/policy-issues/tribal-governance/federal-recognition>] (last visited March 27, 2020).

²³⁵ Jaime Dunaway, *The Fight Over Who's a "Real Indian"*, SLATE (June 12, 2018, 4:05 PM), <https://www.slate.com/news-and-politics/2018/06/native-american-disenrollments-are-waning-after-decades-of-tribes-stripping-citizenship-from-members.html> [<https://perma.cc/A7TJ-NPVR>].

²³⁶ James Dao, *In California, Indian Tribes with Casino Money Cast Off Members*, NY TIMES (Dec. 12, 2011), <https://www.nytimes.com/2011/12/13/us/california-indian-tribes-eject-thousands-of-members.html> [<https://perma.cc/U9LZ-4ZEG>].

²³⁷ Dunaway, *supra* note 235.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Dao, *supra* note 236.

be nuances and individual considerations. As no two Nations are alike, the tribal, state, and federal courts and legislatures must work together to create schemes that are sustainable within each reservation, state, and region. While these schemes are developed, Congress must act to abrogate *Oliphant* in order to take a first step in restoring tribal criminal jurisdiction and safety to First Nations. The outcome will be worth it. As noted by Professor Sarah Deer, “There’s really no excuse for [Congress refusing to eliminate the jurisdictional maze] in this day and age to have these limits on tribal jurisdiction . . . It’s demeaning and it’s dangerous.”²⁴¹

V. CONCLUSION

The judicial and legislative history of the United States has gradually and continuously assaulted the rights and inherent authority of Native Americans to govern and regulate their own lands. Although fueled by the desire to maintain independent and separate control, rather than respect for customs and traditions, the initial treaties made between the Native Americans and the European colonizers recognized and granted this inherent authority to the tribes. Ever since, numerous Supreme Court decisions and reactive legislative decisions, shaped and evident of bias against the Native American people, have stripped the tribes of any semblance of control over their lands.

Violence against Native American women is unprecedented, and oftentimes committed by non-Indian offenders, who are well aware that little to nothing will be done to hold them accountable. By stripping tribal courts of jurisdiction over these defendants, the Supreme Court in *Oliphant* turned a blind eye to the inherent authority of Indian Country and invoked more power in the federal court, who more often than not declines to prosecute these cases. The system is fractured.

The first step in restoring authority to tribal courts is to recognize and wholeheartedly acknowledge the bias and prejudice that has been the fuel to the assault on tribal jurisdiction, since as early as 1883.²⁴² Once Congress can accept the fact that the assault on Native Americans has included both legislative and judicial assaults, just as much as it has been a violent or sexual assault against Native American women, it can take the first steps to repair these harms. Statutorily abrogating the *Oliphant* decision will restore law and order to Indian Country and will allow Native American victims of violence to have greater access, power, and ability to see their abusers brought to justice.

²⁴¹ *Federal and State Recognized Tribes*, *supra* note 231.

²⁴² Of course, this bias predates 1883, but it was at this time that the bias transitioned from a mere popular opinion to the rationale provided in the pages of a U.S. Supreme Court opinion.