Jurisdictional Transparency and Native American Women

Emily Mendoza*

While lawmakers have long known that Native American women experience gender-based violence at higher rates than any other population, lawmakers historically have addressed these harms by implementing jurisdictional changes: removing tribal jurisdiction entirely, limiting tribal jurisdiction, or returning jurisdiction to tribes in a piecemeal fashion. The result is a "jurisdictional maze" that law enforcement officers, prosecutors, and courts are unable to successfully administer to bring perpetrators to justice. This Article is the first to identify what I call "jurisdictional transparency"—or clear, easily ascertainable rules governing courts' jurisdiction—as a core value of the American legal system and will argue that a lack of jurisdictional transparency over criminal prosecutions in Indian country contributes to the excessive rates of domestic violence, sexual assault, and rape against Native American women. Because arguments for or against sovereignty are divisive and often put a swift end to productive dialogue, this has often led to the layering of more jurisdictional rules on top of the current system. Jurisdictional transparency, on the other hand, advocates an approach that is both more fundamental and more attainable: allocating criminal jurisdiction in Indian country in a way that can be easily determined at the outset of a case.

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* Denver Law Review Editor and 2020 J.D. Candidate at the University of Denver Sturm College of Law. I would like to thank Professor Margaret Kwoka for her guidance throughout the development of this Article.

The Article begins by examining jurisdictional rules in other contexts while highlighting the federal courts' continuous demand for clear jurisdictional rules in the interest of judicial efficiency and public access to the courts. With this backdrop, the Article then illuminates the discrepancy between such transparency demands and the opaque jurisdictional rules in Indian Country, using key case examples to demonstrate the system's failures. Finally, the Article proposes a solution that is reflected in numerous facets of the law: jurisdictional transparency. Such a solution has a procedural guise capable of penetrating a polarized political climate while lifting the opacity that has prevented thousands of Native American women from accessing justice.

INTRODUCTION

She watched her daughter slowly piecing together a puzzle. The young girl sat cross legged on the floor of the main bedroom in their house—a house perched on a small hill, just within the boundaries of the reservation. The daughter clumsily placed each piece onto the puzzle, rotating the pieces one way, then the other, sometimes turning her head upside down and right side up again, pressing down firmly, until finally . . . click.

Watching her child work, the mother could only think of her own puzzle—a puzzle she feared her daughter would also be forced to try to solve one day. But this puzzle wasn't a jigsaw; it was a labyrinth, with nothing but dead ends. She was raped at age ten, assaulted again at eighteen, and now, at thirty-four, she found herself victimized by sexual violence yet again. Now an adult, she knows

what was done to her was wrong, and that the perpetrator should be held accountable. But it turns out that invoking the legal process is harder than she thought. When she reported the most recent incident, the police on the reservation noted it, but they said something about not having authority. Dead end. Instead, the police told her, the feds would handle the case, yet she heard nothing from them. Dead end. She knew what happened, she knew who did it, and she had upsetting reminders of the assault strewn across her body. What more did she need? "Where do I go now?" she wondered.

While not specific to a particular case, a version of this story is told over and over again by Native American women seeking to invoke the protection of the justice system.[1] Tribal governments, once complete sovereigns, currently face jurisdictional standards that are impenetrably complex. While legislatures and courts have been attempting to remedy jurisdictional and institutional deficiencies, the practical effect has been a confusing, multi-layered system that operates to the detriment of Native American women.[2] The jurisdictional maze in and of itself causes confusion and delays that deny Native American women access to justice. To be sure, other barriers to justice are cause for concern, including a lack of resources on the reservation. But even for those Native American victims of domestic violence, sexual assault, and rape who can invoke the justice system, jurisdictional barriers leave many victims without recourse.

Reformers seeking to address jurisdictional barriers for Native American women often approach this issue through a sovereignty framework, with two opposing solutions at the forefront. One approach views the federal government as responsible for remedying the situation in Indian country. Under this approach, the federal government should increase funding to tribal governments, pursue more prosecutions, and become more involved with reducing crime in Indian country.[3] Another approach calls for a complete return of jurisdiction to tribes, allowing tribal governments to prosecute all people who commit crimes on their land.[4] Yet, these two diametrically opposed proposals would both

1. Though the above story is an amalgamation of many women's stories, it is partially based on a real account. Maren Machles et al., *1 in 3 American Indian and Alaska Native women will be raped, but survivors rarely find justice on tribal lands*, USA TODAY (Oct. 18, 2019), https://www.usatoday.com/story/news/nation/2019/10/18/native-american-women-sexual-assault-justice-issue-tribe-lands/3996873002/.

2. There is no universally agreed upon set of terms for indigenous populations, though I intend to use language thoughtfully and deliberately throughout this Article. I will use "Native people" and "Native women" to refer to both American Indian and Alaska Native populations. I will refer to "Indian country"—a legally recognized term—in reference to lands of American Indian and Alaska Native populations, most commonly Indian reservations. And, I will refer to the authorities in Indian country as "Tribal."

3. PBS Newshour, *Tribal Justice: Prosecuting Non-Natives for Sexual Assault on Reservations*, PBS (Sept. 5, 2015, 1:08pm), https://www.pbs.org/newshour/show/tribal-justice-prosecuting-non-natives-sexual-assault-indian-reservations ("Congress should have required federal prosecutors to take on domestic violence crimes on reservations more vigorously.").

4. Amanda Mae Kahealani Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J.L. & SOC. CHALLENGES 1, 39 (2009).

require drastic changes to current practice that would be politically fraught and difficult to achieve. I argue, instead, that by focusing on basic procedure as a potential first step for remedying such failure, the particular problems posed by the jurisdictional maze can be alleviated. Moreover, these solutions may provide a long-lasting foundation for any further jurisdictional changes.

Throughout United States history, each branch of the federal government has had its hand in complicating tribal jurisdiction. Persistent and fragmentary dismantling of tribal sovereignty has led to a lack of, what I will refer to as "jurisdictional transparency." Jurisdictional transparency is a concept, if not a term, that is evident in U.S. jurisprudence: the notion that jurisdictional rules should be clear and understandable in the interest of judicial efficiency, predictability, and accessibility.[5] However, jurisdictional transparency—applied in almost every facet of U.S. law[6]—is lacking when it comes to tribal criminal jurisdiction. Where procedural rules are unclear, parties struggle to vindicate substantive rights. Thus, rather than exploring sweeping solutions to tribal criminal jurisdiction, this Article calls for something less stimulating, but equally important: jurisdictional transparency.

When one looks to on-the-ground efforts to assist Native American women, questions of sovereignty and governance are not the primary issues; rather,

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5. See Elizabeth Y. McCuskey, *Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. 387, 388 (2012) ("[jurisdictional clarity's] ultimate goal is efficiency – that trial courts not labor too long on jurisdiction and, most important, that litigants can accurately predict the correct forum and choose to spend their money litigating the merits of their claim, rather than where it will be heard.").

6. Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 10 n. 27 (2011) ("*See*, e.g., Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 320-22 (2005) (Thomas, J., concurring) (urging a return to the simpler Holmes test for statutory "arising under" jurisdiction); Grupo Dataflux v. Atlas Global Group, 541 U.S. 567, 582 (2004) ("Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful."); Holmes Group v. Vornado Air Circulation Sys., 535 U.S. 826, 829-32 (2002) (extending the well-pleaded complaint rule to the exclusive patent jurisdiction of the Federal Circuit because a contrary rule "would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine, which serves as a "quick rule of thumb' for resolving jurisdictional conflicts" (quoting Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 11 (1983))); Lapides v. Bd. of Regents of Univ. System of Ga., 535 U.S. 613, 621 (2002) (explaining, in adopting a bright-line waiver test for state sovereign immunity, that "jurisdictional rules should be clear"); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 549-56 (1995) (Thomas, J., concurring in judgment) (seeking a clear test for admiralty jurisdiction); Missouri v. Jenkins, 495 U.S. 33, 50 (1990) (expressing a concern for "the stability and clarity of jurisdictional rules"); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 350 n.27 (1985) (Brennan, J., dissenting) ("Jurisdictional rules must be clear cut and cannot turn on indefinite notions of "importance' or "wide-ranging impact.' "Litigants ought to be able to apply a clear test to determine whether, as an exception to the general rule of appellate review, they must perfect an appeal directly to the Supreme Court.'" (quoting Heckler v. Edwards, 465 U.S. 870, 877 (1984))); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 510 & n.7 (1975) (Rehnquist, J., dissenting) (seeking clarity for the finality rule in appellate jurisdiction and asserting that "clarity is to be desired in any statute, but in matters of jurisdiction, it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case" (quoting United States v. Sisson, 399 U.S. 267, 307 (1970))).").

support workers frantically seek pathways to ensure basic safety and security.[7] But once (or if) a victim reaches a secure environment, they are quickly faced with opaque jurisdictional rules that prevent them from pursuing justice.[8] Field studies and anecdotal evidence suggest that these rules confuse not only Native women but also support workers, government employees, and law enforcement officials.[9] For Native women facing gender-based violence, the primary question isn't whether their nation should retain more or less sovereignty. The question is: Who can help me pursue justice? The answer: it depends.

This Article proceeds in four parts. Part I will explore the United States' core preference for jurisdictional transparency in contexts beyond tribal criminal jurisdiction. Part II will highlight social challenges that are exacerbated by the lack of jurisdictional transparency, most prominently revealed in the excessive rates of gender-based violence on Indian reservations. It will also provide a brief legal history that gave rise to the jurisdictional maze that exists in Indian County. Part III will focus on the lack of jurisdictional transparency in the current state of the law. Specifically, it will highlight the perplexities of the multi-layered and complex jurisdictional standards through case examples. In Part IV, I argue that jurisdictional transparency is a necessary step in confronting the issues facing Native women. While shifts in jurisdiction may ultimately be required, no such fix can be sustainable without first addressing the issue of jurisdictional transparency. Importantly, if the legislative or judicial branch were to shift jurisdiction without creating transparency, it would only be another added layer to the current jurisdictional maze.

I.
JURISDICTIONAL TRANSPARENCY BEYOND TRIBAL CONTEXTS

The United States has a strong preference for jurisdictional clarity.[10] Where there is uncertainty over jurisdiction, courts are burdened with litigants fighting over the propriety of the forum rather than the merits of the case.[11] Jurisdictional

7. *See generally* AMNESTY INTERNATIONAL USA, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007).

8. Terminology is important during discussions of sexual violence. I recognize that rape, sexual assault, and domestic violence are distinct issues, each with challenging and unique contours; however, for purposes of this Article, I will discuss them collectively under the umbrella of gender-based violence. I also use the term "victim" in this Article, not to discount the experience of those who use the term "survivor," but rather to recognize the systemic oppression of Native women that has, after all, victimized the population. Lastly, I refer exclusively to female victims of sexual violence in this Article because this is the primary population impacted; however, I do not intend to disregard the experience of male or two-spirit individuals.

9. *See* AMNESTY INTERNATIONAL, *supra* note 7; INDIAN LAW AND ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER (CH.1: 3) (Nov. 2013), available at: https://www.aisc.ucla.edu/iloc/report/files/Chapter_1_Jurisdiction.pdf.

10. *See e.g.*, Louisville & N.R. Co. v. Mottley, 211 U.S. 149 (1908); Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010).

11. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 3 (2002).

questions that are not resolved at the outset of litigation due to lack of clarity can be raised later on, only to unravel the litigation that has already taken place.[12] Rather than postponing trial for threshold questions, or worse, litigating a case only to dismiss it based on such a threshold question, clear jurisdictional rules allow litigants to easily establish the propriety of a forum and thus focus on the merits.[13] Further, clear jurisdictional rules create predictability.[14] A lack of jurisdictional clarity hinders judicial efficiency, and in turn, interferes with the public's access to the courts. With this, the Supreme Court often cites to jurisdictional clarity as a necessary component of procedure.[15]

In *Louisville & Nashville Railroad v. Mottley,*[16] the Supreme Court set the groundwork for clear jurisdictional rules, requiring that the basis for federal question jurisdiction appears on the face of a well-pleaded complaint.[17] The *Mottley* rule—or the well-pleaded complaint rule—demonstrates the Court's preference for clear, simple, and ascertainable jurisdictional standards. The Supreme Court has continuously reaffirmed the *Mottley* rule in issues of federal question jurisdiction,[18] and has expanded its demand for clear jurisdictional

12. Dodson, *supra* note 6, at 7.

13. Jack H. Friedenthal et al., CIVIL PROCEDURE 22 (2d ed. 1993) ("The well-pleaded complaint rule fulfills a useful and necessary function. Given the limited nature of federal subject matter jurisdiction, it is essential that the existence of jurisdiction be determined at the outset, rather than being contingent upon what may occur at later stages in the litigation.").

14. Hertz Corp., 130 S. Ct. at 1193.

15. Dodson, *supra* note 6, at 10 n. 27 ("*See*, e.g., Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 320-22 (2005) (Thomas, J., concurring) (urging a return to the simpler Holmes test for statutory "arising under" jurisdiction); Grupo Dataflux, 541 U.S. at 582 ("Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful."); Holmes Group, 535 U.S. at 829-32 (extending the well-pleaded complaint rule to the exclusive patent jurisdiction of the Federal Circuit because a contrary rule "would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine, which serves as a "quick rule of thumb' for resolving jurisdictional conflicts" (quoting Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 11 (1983))); Lapides, 535 U.S. at 621 (explaining, in adopting a bright-line waiver test for state sovereign immunity, that "jurisdictional rules should be clear"); Jerome B. Grubart, 513 U.S. at 549-56 (Thomas, J., concurring in judgment) (seeking a clear test for admiralty jurisdiction); Jenkins, 495 U.S. at 50 (expressing a concern for "the stability and clarity of jurisdictional rules"); Walters, 473 U.S. at 350 n.27 (Brennan, J., dissenting) ("Jurisdictional rules must be clear cut and cannot turn on indefinite notions of "importance' or "wide-ranging impact.' "Litigants ought to be able to apply a clear test to determine whether, as an exception to the general rule of appellate review, they must perfect an appeal directly to the Supreme Court.'" (quoting Heckler v. Edwards, 465 U.S. 870, 877 (1984))); Cox Broad. Corp., 420 U.S. at 510 n.7 (Rehnquist, J., dissenting) (seeking clarity for the finality rule in appellate jurisdiction and asserting that "clarity is to be desired in any statute, but in matters of jurisdiction, it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case" (quoting United States v. Sisson, 399 U.S. 267, 307 (1970))).").

16. Louisville & N.R. Co. v. Mottley, 211 U.S. 149 (1908).

17. *See* Mottley, 211 U.S. at 149.

18. Erwin Chemerinsky, FEDERAL JURISDICTION 304 n.53 (Wolters Kluwer, 2016) ("*See e.g.*, Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S.1, 9–10 (1983); Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494 (1983). Subsequently, in Holmes Group, Inc., 535 U.S. at 826, the Supreme Court held that a federal counterclaim, even a compulsory counterclaim, does not

standards in cases of removal or declaratory judgment.[19] Issues of federal question jurisdiction must by clear on the face of the complaint; anticipation of a federal question is insufficient.[20] This preference for jurisdictional transparency is evinced in numerous contexts beyond federal question jurisdiction since *Mottley*, ranging from clarity in assertions of admiralty jurisdiction to patent jurisdiction.[21]

Civil complaints brought under the federal question statute are not the only circumstance in which jurisdictional clarity is favored. The Court has broadly declared that "[a]dministrative simplicity is a major virtue in a jurisdictional statute"[22] and that "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case."[23] Other jurisdictional statutes have been subject to the same rules. For example, in the Federal Circuit, a patent law claim must clearly appear on the face of a well-pleaded complaint.[24] Yet, as described in much more detail below, in issues of tribal criminal jurisdiction, a claim depends on numerous elements which may not be clear until the end of a trial.[25] This divergence from jurisdictional transparency is not harmless. The opaqueness leaves courts burdened with unnecessary forum-centric litigation; prosecutors are often complacent because of the unpredictability, and victims are left without access to the courts.

II.
EVOLUTION OF THE JURISDICTIONAL MAZE

The federal government, tribal governments, and state governments have each had varying levels of jurisdiction over crime in Indian country—dependent on who committed the crime, against whom, where the crime took place, and the nature of the crime—throughout the nation's history.[26] This storied history, fraught with questions of sovereignty and self-governance, is essential to understanding the current jurisdictional and institutional maze that often leaves Native American women without access to justice.[27]

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provide for 'arising under' jurisdiction. The Court explained that this would allow a defendant to defeat the plaintiff's choice of forum and prevent determination of jurisdiction based on the complaint.").

19. Skelly Oil Co. V. Phillips Petroleum Co., 399 U.S. 667; Franchise Tax Bd. V. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

20. *See* Mottley, 211 U.S. at 149.

21. Dodson, *supra* note 6, at 11–12.

22. Hertz Corp. v. Friend, 130 S. Ct. at 1193.

23. *Id.*

24. Holmes Group v. Vornado Air Circulation Sys., 535 U.S. at 834.

25. Margaret H. Zhang, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. PA. L. REV. 243, 259 (2015).

26. *See* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016).

27. Some scholars explore the issue of rape as a tool for conquest by taking a closer look at the history of colonization; however, this is beyond the scope of this Article. Luhui Whitebear, *VAWA*

A. Gender-Based Violence and Native American Women

Rates of domestic violence, rape, and sexual assault perpetrated against Native American women are extremely high in comparison to other populations.[28] The National Institute of Justice conducted a study which revealed that 56% of American Indian and Alaska Native women experienced sexual violence in their lifetime, and 55% experienced physical violence by an intimate partner.[29] The Department of Justice also issued a report indicating that Native American and Alaska Native women are 2.5 times more likely to experience rape or sexual assault as compared to non-indigenous women.[30] Importantly, an estimated 86% of reported sexual assaults are perpetrated by non-Native men.[31] And, in a Bureau of Justice study, nearly four out of five American Indian victims of rape or sexual assault identified their perpetrator as white.[32] These numbers reflect a rampant problem facing Native American women, but the statistics do little to reflect the brutality and cruelty that accompanies each individual incident.[33]

Crimes against Native American women are often gruesome,[34] yet rates of prosecutions for these crimes do not parallel that of other federally prosecuted crimes. In fact, the rate of prosecutions for crimes committed against Native American women falls well below the average.[35] Federal prosecutors declined to prosecute about 67% of sexual assault cases from Indian country in fiscal years 2005–2009.[36] And, between 1997 and 2006, federal prosecutors rejected nearly

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Reauthorization of 2013 and the Continued Legacy of Violence Against Indigenous Women: A Critical Outsider Jurisprudence Perspective, 9 U. MIAMI RACE & SOC. JUST. L. REV. 75, 80 (2019).

28. Amy L. Casselman, INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN 5 (Andrew Jolivette ed., Peter Lang Vol.1) (2016).

29. André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NAT'L INST. OF JUSTICE (June 1, 2016), https://nij.ojp.gov/topics/articles/violence-against-american-indian-and-alaska-native-women-and-men.

30. Steven W. Perry, *American Indians and Crime: A BJS Statistical Profile*, BUREAU OF JUSTICE STATISTICS (Dec. 1, 2004), https://www.bjs.gov/content/pub/pdf/aic02.pdf.

31. AMNESTY INTERNATIONAL, *supra* note 7, at 4.

32. Perry, *supra* note 30; Jessica Greer Griffith, *Too Many Gaps, Too Many Fallen Victims: Protecting American Indian Women from Violence on Tribal Lands*, 36 U. PA. J. INT'L L. 785, 791 (2015).

33. Jessica Rizzo, *Native American Women are Rape Targets Because of a Legislative Loophole*, VICE (Dec. 16, 2015, 9:00am), https://www.vice.com/en_us/article/bnpb73/native-american-women-are-rape-targets-because-of-a-legislative-loophole-511 ("I and all the Indian women I know want to know, however, who those other two women are who haven't been assaulted—because we've never met them. The truth is that it's been open season on Indian women for a very, very long time.").

34. AMNESTY INTERNATIONAL, *supra* note 7, at 5 ("Rape is always an act of violence, but there is evidence to suggest that sexual violence against American Indian and Alaska Native women involves a higher level of additional physical violence. Fifty per cent of American Indian and Alaska Native women reported that they suffered physical injuries in addition to the rape; the comparable figure for women in general in the USA is 30 per cent.") (citations omitted).

35. Michael Riley, *Promises, Justice Broken*, THE DENVER POST (May 7, 2016, 4:58pm), https://www.denverpost.com/2007/11/10/promises-justice-broken/.

36. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, DECLINATIONS OF INDIAN COUNTRY MATTERS 3 (2010), available at: https://www.gao.gov/new.items/d11167r.pdf.

two-thirds of the reservation cases brought to them by the FBI and Bureau of Indian Affairs investigators, more than twice the rejection rate for all federally prosecuted crime.[37] With this, commentators suggest that Indian country is a "lawless land" where criminals can get away with just about anything.[38]

Beyond the headlines and social commentary suggesting Indian country is without law, perpetrators are demonstrably aware of the jurisdictional gaps. For example, police have documented incidents of perpetrators running across the boundaries of reservation territory, only to turn around and laugh at the police who could no longer act.[39] Further, on the dark web, a chat-room forum titled "How to rape a woman and get away with it" included multiple suggestions for non-Indian men to specifically target Native women on reservations.[40] These incidents suggest that even worse than failing to address high rates of crime against Native American women, the lack of prosecution of such crimes resulting from jurisdictional complexities may in fact contribute to the high crime rate in Indian country.[41]

B. Early Case Law

Before colonization, many Native American tribes had established systems of law and governance.[42] Initially, the federal government viewed tribes as complete sovereigns, but it quickly rejected this notion. In *Cherokee Nation v. Georgia*,[43] the Cherokee Nation argued that it was entitled to sue in federal court as a foreign state because the tribe had exclusive rights to self-governance and control over their own land.[44] The Court concluded that tribes were nothing more than "domestic dependents," and thus did not fall within the Court's jurisdiction as sovereign entities.[45] In reaching this conclusion, Justice Marshall noted that the tribe voluntarily ceded control to the United States, and he likened the United

37. *See* Riley, *supra* note 26.

38. Gavin Clarkson, *Reservations Beyond the Law*, LA TIMES (Aug. 3, 2007, 12:00am), https://www.latimes.com/la-oe-clarkson3aug03-story.html; Sierra Crane-Murdoch, *On Indian Land, Criminals can Get Away with Almost Anything*, THE ATLANTIC (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/; Lyndsey Gilpin, *Native American Women Still Have the Highest Rates of Rape and Assault*, HIGH COUNTRY NEWS (June 7, 2016), https://www.hcn.org/articles/tribal-affairs-why-native-american-women-still-have-the-highest-rates-of-rape-and-assault; Rizzo, *supra* note 33; Laura Sullivan, *Rape Cases on Indian Lands Go Uninvestigated*, NPR (July 25, 2007, 4:00pm), https://www.npr.org/templates/story/story.php?storyId=12203114.

39. AMNESTY INTERNATIONAL, *supra* note 7, at 39 (quoting a county sheriff who said, "It's only about a mile from town to the bridge. Once they cross the bridge [to the Standing Rock Sioux Reservation], there's not much we can do. . . .We've had people actually stop after they've crossed and laugh at us. We couldn't do anything.").

40. Rizzo, *supra* note 33.

41. Pacheco, *supra* note 4, at 2.

42. Maura Douglas, *Sufficiently Criminal Ties: Expanding VAWA Criminal Jurisdiction for Indian Tribes*, 166 U. PA. L. REV. 745, 753 (2018).

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

44. *Id*; *see also* Cleveland, *supra* note 11, at 36.

45. Cherokee Nation, 30 U.S. at 17.

States' control over Indian country to that of a guardian.[46] His underlying rationale was evident: conquest. The decision left the Cherokee Nation without recourse against laws forcing them off of their land,[47] but the tribe sued again.

The second suit, *Worcester v. Georgia*,[48] favored the Cherokee people, and the Court reaffirmed tribal autonomy by ruling that Georgia law carried no force over the Cherokee territory; however, the opinion focused less on the issue of sovereignty and focused more on issues of federalism.[49] With two separate legal doctrines shaping Indian law at the time—international law doctrines of sovereignty on one hand, and constitutional doctrines of federalism and enumerated powers on the other—confusion was already settling in.[50] Furthermore, the executive branch failed to heed the Supreme Court's view, adding to deep division over the status of the Tribes. Shortly after the *Worcester* decision favoring the Cherokee Nation, President Andrew Jackson ordered the National Guard to remove the Cherokee people from their land.[51] President Jackson's rationale was much more explicit:

> They have neither the intelligence, the industry, the moral habits, nor the desire of improvement which are essential to any favorable change in their condition. Established in the midst of another and a superior race, and without appreciating the causes of their inferiority or seeking to control them, they must necessarily yield to the force of circumstances and ere long disappear.[52]

This forced removal would come to be known as the Trail of Tears.[53]

C. Past Legislation and Jurisprudence

From the beginning, the United States held a widespread sentiment that Native Americans were incompetent to handle crime because tribal justice models were often more restorative than retributive.[54] In response to this

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46. *Id.*
47. *Id.* at 20.
48. Worcester v. Georgia, 31 U.S. 515 (1832).
49. *See* Worcester, 31 U.S. 515; Cleveland, *supra* note 11 at 41.
50. Cleveland, *supra* note 11 at 41.
51. Riley, *supra* note 26, at 1577.
52. Levi Rickert, *US Presidents in Their Own Words Concerning American Indians,* Native News Online (Feb. 16, 2020), https://nativenewsonline.net/currents/us-presidents-words-concerning-american-indians/
53. Elianna Spitzer, *Cherokee Nation v. Georgia: The Case and Its Impact*, THOUGHTCO. (May 5, 2019), https://www.thoughtco.com/cherokee-nation-v-georgia-4174060.
54. Riley, *supra* note 26, at 1578 (explaining that in the case of *Ex Parte Crow Dog*, the tribe punished a man for murder by requiring him to apologize to the victim's family, and give them money, blankets, and horses.) Many tribes use a restorative justice approach; however, there is a debate about whether a restorative justice approach is appropriate for crimes of gender violence due to the existing power dynamic that makes peacemaking processes more challenging. *See generally*, Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999); C. Quince Hopkins et al., *Responding: Two New Solutions: Applying Restorative Justice To Ongoing Intimate Violence: Problems And Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289 (2004); *The Honorable Robert Yazzie, The Sacred and the Profane: Second Annual Academic Symposium In Honor*

sentiment, Congress passed the Major Crimes Act (MCA) in 1885,[55] expanding the federal government's control over Indian territory by granting the federal government concurrent jurisdiction over seven enumerated crimes if they were committed by a Native person on Native land and the crime was against a person or the property of a person.[56] Notably, rape was included on this list.[57]

Some scholars assert that the MCA effectively prevented tribes from prosecuting the enumerated offenses,[58] while others contend that tribes retained concurrent prosecutorial authority.[59] Without engaging in this dispute, it is important to recognize that the MCA instilled enough doubt in the scope—or mere existence—of tribal jurisdiction to lead to significant debate. One court, citing to the original language of the MCA,[60] concluded that murder fell squarely within federal jurisdiction.[61] While both the victim and the defendants were Indian, the court did not acknowledge the possibility that tribal governments retained concurrent jurisdiction.[62] Even statements issued from the Department

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Of The First Americans And Indigenous Peoples Around The World: "Hozho Nahasdlii"--We Are Now In Good Relations: Navajo Restorative Justice, 9 ST. THOMAS L. REV. 117 (1996).

55. Major Crimes Act, 18 U.S.C. §1153 (2012).

56. *Id.*

57. 18 U.S.C. § 1153(a).

58. Griffith, *supra* note 32, at 796 ("By authorizing federal jurisdiction over major crimes occurring on tribal lands, the MCA also greatly reduced the internal sovereignty of American Indian tribes. Although most case law appears to indicate that tribes have concurrent jurisdiction over crimes enumerated in the MCA, legal scholars have noted 'the practical impact [of the enactment of the MCA] . . . is that fewer tribes pursue prosecution of crimes such as murder and rape' and 'rape cases have become the domain of the federal government.'"); Jessica Allison, *Beyond VAWA: Protecting Native Women from Sexual Violence within Existing Tribal Jurisdictional Structures*, 90 U. COLO. L. REV. 226, 233 (citing Sarah Deer, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 21-22 (2015)("Despite the fact that the MCA did not explicitly divest tribes of jurisdiction over these crimes, the practical effect has been that many tribes have not prosecuted a single person for the enumerated offenses, including rape, for over one hundred years.")).

59. Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1650 (explaining how the original version of the MCA stated that the listed crimes would be prosecuted in federal courts "and not otherwise").

60. United States v. Whaley, 37 Fed. 145, 146 (S.D. Cal 1888) (quoting the MCA: "That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts, and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crime within the exclusive jurisdiction of the United States.").

61. *Id.* at 146.

62. *Id.* Notably, this murder was carried out at the direction of a tribal council, whose members conferred about an Indian doctor's culpability and decided that the doctor should be executed. It was the executors who were charged with murder in *Whaley*.

of the Interior, which sought to resolve confusion on the issue, were unclear, indecisive, and in some parts, contradictory.[63] With such ambiguity, tribal prosecutors infrequently pursued prosecutions, believing that they did not have the authority to do so, or believing that the federal government would handle the matter.[64]

The MCA, and subsequent confusion over jurisdiction, left many crimes unprosecuted.[65] It was one of the first dramatic legislative interruptions to tribal jurisdiction, and most interestingly, instead of clearly removing jurisdiction from tribal governments, it introduced opacity that reduced the ability of tribes to exercise jurisdiction. The MCA was not just an early intrusion of federal jurisdiction into Indian territory, as it is still in place today.[66]

The next major jurisdictional shift came in 1953 when the federal government delegated its criminal jurisdiction over Indian territory to some states through Public Law 83-280 (Public Law 280).[67] Though the law was passed to address "lawlessness on the reservations," it was enacted without the consent of tribes and did not allocate any additional resources to the states.[68] In fact, the Bureau of Indian Affairs cut funding to support tribal authorities before states affected by Public Law 280 even had systems in place to handle the added jurisdiction.[69] Further, the scope of non-tribal jurisdiction in Public Law 280 states was broader than that of states with concurrent federal–tribal jurisdiction because in Public Law 280 states, *all* state criminal offenses applied to Indians on Indian land, not just crimes enumerated in the MCA.[70]

As with the MCA, significant debate followed the passage of Public Law 280 because it was unclear whether tribes retained concurrent jurisdiction.[71] Public Law 280 referenced both federal and state jurisdiction but was silent on the issue of tribal jurisdiction.[72] With that, state jurisdiction was viewed as all-

63. *See* Rolnick, *supra* note 59, at 1650; 1934 DOINA LEXIS 260, 55 I.D. 14, 1 DOINA 445.

64. Rolnik, *supra* note 59, at 1650 ("Courts for some time interpreted the [Major Crimes] Act's creation of federal jurisdiction and silence regarding tribal jurisdiction as an implicit extinguishment of tribal power to prosecute major crimes, or a confirmation that such power never existed.").

65. Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 461 (2005).

66. Sarah Deer, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 35–36 (University of Minnesota Press) (2015).

67. Pub. L. No. 83-280 (1953) (codified as amended at 18 U.S.C. § 1162 (2018)); Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U.L. REV. 1627, 1659 ("[T]he statute, as originally introduced, was concerned with law enforcement problems in the State of California exclusively. The Senate eventually decided to extend the statute's coverage to the other 'mandatory' states believed to share similar law enforcement problems.").

68. Deer, *supra* note 66, at 38; Jimenez & Song, *supra* note 67, at 1657 n. 171 ("describing tribal discontent with Public Law 280's affront to tribal autonomy . . . and the Federal Government's deviation from past practices of engaging in extensive consultations with affected states and tribes . . . ").

69. Douglas, *supra* note 42, at 760.

70. Rolnick, *supra* note 59, at 1656.

71. *Id.*

72. *Id.*

encompassing, thus negating any need for tribal jurisdiction.[73] Approximately thirty years after the law took effect, courts finally addressed the question of tribal criminal jurisdiction in Public Law 280 states, concluding that the tribes retained concurrent criminal jurisdiction.[74] Today, it is well-settled that tribes in Public Law 280 states retain their concurrent criminal jurisdiction;[75] however, the lack of clarity and room for misinterpretation in the law assuredly left many Native women without recourse in the interim.

The next significant development, the Indian Civil Rights Act (ICRA),[76] implemented procedural safeguards in tribal courts to reflect those enumerated in the Bill of Rights.[77] The Act was passed in 1968, primarily to protect the rights of defendants in tribal courts, thus imposing many Anglo-American standards.[78] Beyond imposing procedural requirements, the ICRA also significantly limited tribal sentencing authority.[79] Initially, the ICRA limited tribal sentencing authority to a $500 fine and up to six months incarceration regardless of the crime (felonies, misdemeanors, etc.).[80] With this, many Native women preferred for their cases to be handled off the reservation because their own judicial system had such empty jurisdiction.[81] Thus, while tribes retained their concurrent jurisdiction, the limited sentencing authority for crimes, such as murder and rape, continues to serve as a significant disincentive to prosecutions.[82]

Finally, in an even more drastic curtailment of tribal jurisdiction, the Supreme Court in *Oliphant v. Squamish*,[83] concluded that tribes did not have any inherent criminal jurisdiction over non-Indians—the primary perpetrators of violence against Native women.[84] In drawing this conclusion, Justice Rehnquist

73. *Id.* ("In the first decades after the law's passage, states frequently operated as if tribal criminal courts and law enforcement agencies did not exist or did not matter. Federal agencies likewise relied on the existence of state authority to justify withholding base funding for law enforcement and criminal justice from tribes subject to Public Law 280."); Brief for the United States as Amicus Curiae at 26, John v. Baker, 125 P.3d 323 (Alaska 2005) ("[(No. S-11176)("It is the established position of the Department of the Interior that Public Law 280 effected a transfer, from the federal government to certain States, of jurisdiction that the federal government had previously shared with tribal governments, thus leaving room for the *possibility* of concurrent tribal jurisdiction.") (emphasis added).

74. Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990).

75. Ada Pecos & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AMERICAN INDIAN DEVELOPMENT ASSOCIATION, http://www.aidainc.net/Publications/pl280.htm.

76. 25 U.S.C. §§1301–1304 (2018).

77. *Id.*

78. Brenna P. Riley, *Protecting All Women: Tribal Protection Orders and Required Enforcement Under VAWA*, 24 ROGER WILLIAMS U. L. REV. 209, 215 (2019).

79. *Id.*

80. Sarah Deer, *Native People and Violent Crime: Gendered Violence and Tribal Jurisdiction*, 15 DU BOIS REV. SOC. SCI. RESEARCH ON RACE 89, 94 (2018).

81. Allison, *supra* note 56, at 235–36.

82. Deer, *supra* note 80.

83. Oliphant v. Squamish Indian Tribe et al., 435 U.S. 191 (1978).

84. AMNESTY INTERNATIONAL, *supra* note 7, at 4–5 ("According to the US Department of Justice, in at least 86 per cent of reported cases of rape or sexual assault against American Indian and Alaska Native women, survivors report that the perpetrators are non-Native men.").

reasoned that an affirmative delegation of power from Congress was the only way in which tribes could exercise their retained powers.[85] Without such delegation, the tribes were powerless over non-Indians.[86]

Oliphant left Native women with little to no recourse and allowed non-Indians to assault Native women without consequence.[87] A sense of lawlessness engulfed tribes, trust in the justice system waned, and the muddled bounds of tribal jurisdiction thickened. The practical consequences of the *Oliphant* decision are evident in the case of Diane Millich. Diane, a member of the Southern Ute tribe, married a non-Indian man who moved onto the reservation with her.[88] Shortly after their marriage, Diane's husband began abusing her.[89] The county police had no jurisdiction because the couple lived on the reservation,[90] and the tribal police had no jurisdiction because her husband was non-Indian.[91] In one incident, the husband called the tribal police while he was assaulting Diane to prove how untouchable he was.[92] The *Oliphant* decision left Diane in a jurisdictional limbo where no law applied. It would be imprudent to believe her story is unique in the years following the *Oliphant* decision.

D. Recent Legislative Action

At the turn of the twenty-first century, tribal jurisdiction was largely diminished: tribal governments had little jurisdictional authority, limited sentencing power, and a narrow scope of control over their own land. Gaps in the justice system had a particularly evident effect on Native women. Native women began calling for action, and after many years of struggle, legislatures finally responded, most prominently through the Tribal Law and Order Act (TLOA)[93] and Violence Against Women Act (VAWA) 2013.[94]

1. Tribal Law and Order Act

In 2004, the Senate Committee on Indian Affairs began holding hearings to address crime rates in tribal communities, and over time, momentum grew.[95] In

85. *Oliphant*, 435 U.S. at 208.

86. *Id.* at 211.

87. Sarah Deer & Mary Kathryn Nagle, *Return to* Worcester*:* Dollar General *and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 HARV. J.L. & GENDER 180, 181 (2018); Rizzo, *supra* note 33.

88. Emery Cowan County & Business Reporter, *From Victim to Vocal Advocate*, THE DURANGO HERALD (March 26, 2013, 4:06pm), https://durangoherald.com/articles/53324l.

89. *Id.*

90. At the time, county sheriffs did not have jurisdiction over crimes committed against Native American victims on Indian land.

91. *Id.*

92. *Id.*

93. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010).

94. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

95. Deer, *supra* note 80, at 99.

2010, President Obama enacted the TLOA in an attempt to return some authority to the tribes while simultaneously increasing cooperation between federal and tribal governments.[96] Notably, the TLOA expanded tribal sentencing authority which had been chipped away with the ICRA.[97] Now, tribal sentencing authority has been expanded to a maximum $15,000 fine and three years' incarceration;[98] however, the TLOA did nothing to address the limitations on jurisdiction over non-Indians who commit crimes against Native American women established in *Oliphant*.[99]

While TLOA's sentencing provision is often recognized as its most significant contribution, the TLOA also contained critical provisions which increase information sharing between federal and tribal governments.[100] For example, the TLOA created an Office of Justice Services (OJS) which is now responsible for coordinating federal and tribal law enforcement efforts by fostering dialogue between community leaders, training tribal law enforcement on the National Criminal Information Center database, and collecting information on crime in tribal communities.[101] Additionally, the TLOA mandates that federal prosecutors communicate with tribal authorities regarding the status of cases and evidence, explain reasons for declination of prosecutions, and report data on crimes committed in Indian country.[102] Further, the TLOA encourages the appointment of Special Assistant United States Attorneys to liaison and assist in prosecutions.[103] The TLOA has been widely viewed as a step in the right direction for protecting the rights of Native American women; however, advocates recognize that significant changes are still necessary. Jurisdiction remains unclear, resources are scant, and the promising terms of the TLOA have been difficult to implement effectively.

2. Violence Against Women Act (VAWA) 2013

In 2013, President Obama signed the VAWA reauthorization, which was fully enacted in 2015.[104] In a direct response to *Oliphant*, VAWA 2013 returned some jurisdiction over non-Indians to tribes. Specifically, VAWA 2013 created Special Domestic Violence Criminal Jurisdiction (SDVCJ) which allows tribes to prosecute non-Indians for specific domestic violence crimes under specific

96. Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 166–68 (2011).

97. *See generally id.*

98. Deer, *supra* note 80, at 94.

99. Hart, *supra* note 9394, at 181–82.

100. Hart, *supra* note 95, at 166–67.

101. Tribal Law and Order Act § 211.

102. Tribal Law and Order Act § 212.

103. Hart, *supra* note 94, at 167–68.

104. Donovan Slack, *Obama Signs Violence Against Women Act*, POLITICO (March 7, 2013, 2:54pm), https://www.politico.com/blogs/politico44/2013/03/obama-signs-violence-against-women-act-158776.

conditions.[105] Those conditions limit the exercise of tribal jurisdiction to instances where the perpetrator is decidedly non-Indian, the perpetrator has sufficient ties to the reservation via employment or relationship, the crime occurred on reservation land, and the crime constitutes domestic violence, dating violence, or a protection order violation.[106]

While important, this reauthorization still clearly leaves a gap for non-Indian men who do not work on reservations or are not in a relationship with a Native woman.[107] Although advocates pushed for a complete return of tribal criminal jurisdiction, congressmen resisted such a drastic measure for fear that tribal courts would not be "fair" to non-Indian defendants.[108] The VAWA opposition based on this "fairness" objection was primarily focused on fairness in the context of defendants' constitutional rights, though one Republican senator who supported the reauthorization commented that his counterparts seemed to "fear Indians [would] take out 500 years of mistreatment on us through this. It's that kind of fear, veiled in constitutional theories."[109] SDVCJ was the resulting compromise.[110] Along with this compromise, Alaska—a population that sees higher rates of gender-based crimes than any other population—was excluded from the initial VAWA 2013 reauthorization.[111] As discussed in greater detail in Part III, each jurisdictional element of the SDVCJ compromise—together and individually—create barriers for tribal prosecutors seeking justice on behalf of a victim.[112]

105. *See* Dayna Olson, *Protecting Native Women from Violence: Fostering State-Tribal Relations and the Shortcomings of the Violence Against Women Act of 2013*, 46 HASTINGS CONST. L.Q. 821 (2019).

106. NATIONAL CONGRESS OF AMERICAN INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 38 (2018); 25 U.S.C. § 1304.

107. Douglas, *supra* note 42, at 773–74.

108. Deer, *supra* note 80, at 97–98.

109. Rolnick, *supra* note 59, at 1608.

110. Deer, *supra* note 80, at 97–98.

111. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 910, 127 Stat. 54, 126 (2013) ("In the State of Alaska, the amendments made by sections 904 and 905 shall only apply to the Indian country . . . of the Metlakatla Indian Community, Annette Island Reserve.").

112. The House of Representatives passed the Reauthorization of VAWA 2019 with provisions that would expand tribal jurisdiction in both the continental United States and Alaska. Specifically, the proposed changes would broaden SDVCJ to encompass more crimes perpetrated by non-Indians, including dating violence, obstruction of justice, sexual violence, sex trafficking, stalking, and assault of a law enforcement officer. The reauthorization has stalled in the Senate and is unlikely to pass in light of the provisions restricting gun possession for offenders and the continuing concern for non-Indian defendants' civil rights. Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Congress, § 903 (2019); American Bar Association, *Violence Against Women Act Reauthorization Threatened*, ABA (May 16, 2019), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/may2019/vawa_update/

III.
WHO HAS JURISDICTION?

Lack of jurisdictional transparency and disparate application of jurisdictional standards in the tribal context has caused confusion to the detriment of Native American women facing gender-based violence. Here, basic procedural standards are affecting substantive rights, access to justice, and fundamental values of safety and security. Both the historical layering of jurisdictional standards and the current state of law are to blame.[113] What unties the legal framework in this area is opacity and confusion.

Centuries of varying legislative, judicial, and executive action, often disparately applied contingent on tribal resources, leaves tribal, state, and federal prosecutors confused about who has jurisdiction dependent on where the crime took place, the Indian status of the victim and perpetrator, and the types of crimes involved in the incident. Furthermore, the historical discord between branches of the federal government created a lack of trust. And, the ever-evolving layers of exceptions, limits, and expansions of jurisdiction effectively halts any efforts to create a consistent, working system of governance. The current law is not doing much better. The complication of interwoven federal or state jurisdiction with tribal jurisdiction often interferes with investigation and prosecution of crimes against Native American women.

A. Confusion over jurisdiction under SDVCJ

Each element under SDVCJ presents its own problems. In turn, I will address the principal concerns of each element and provide case examples that illuminate each shortcoming. The following examples were picked for their procedural value, but it is worth noting that these anecdotes were selected from a vast number of tragic stories of Native American women who were severely abused or brutally attacked, and subsequently denied any remedy.

1. Qualifying Crime

A threshold jurisdictional question under SDVCJ is whether the crime at issue constitutes domestic or dating violence.[114] Many tribes grapple with this question because they are unsure of whether the violence committed is sufficient to support tribal jurisdiction.[115] The Supreme Court complicated this question

113. Futures Without Violence, *The Facts on Violence Against American Indian/Alaskan Native Women*, available at: https://www.futureswithoutviolence.org/userfiles/file/Violence%20Against%20AI%20AN%20Women%20Fact%20Sheet.pdf. ("The difficulty of determining jurisdiction, and provisions for concurrent jurisdiction of certain cases, can cause conflict and confusion for law enforcement, prosecution, courts, service providers, and crime victims in Indian Country. As a result, non-Indians who commit acts of domestic violence that are misdemeanors on Indian reservations are virtually immune from prosecution in most areas of the country.").

114. NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 106, at 38.

115. *Id.* at 28.

during the Pilot Project period of VAWA 2013 with its decision in *United States v. Castleman*.[116] In *Castleman*, the Court evaluated the extent of violence or physical force required to constitute domestic violence.[117] The majority concluded that "domestic violence" is a term of art which implies "a substantial degree of force."[118] In a concurring opinion, Justice Scalia urged that the literal meaning of "violence" should apply, thus excluding other conduct such as offensive touching.[119] In dicta, the opinion discussed VAWA, peaking the interest of tribal authorities and ultimately leading to confusion over exactly what could constitute domestic violence pursuant to SDVCJ. Importantly, in the tribal context, this question is not one on the merits, it is merely a threshold issue of jurisdiction.

Indeed, tribal authorities have reported that they refrained from prosecutions they might have otherwise pursued because they did not think they could meet the degree of force that *Castleman* demanded for domestic violence.[120] In one case, a woman called the police on her partner who was extremely intoxicated.[121] Her partner was so intoxicated that when he swung to hit the woman, he missed and fell to the ground.[122] Tribal prosecutors, believing they could not establish jurisdiction without actual physical force, declined to prosecute.[123] The man later assaulted the woman.[124] This time, the man was arrested. If this jurisdictional element was clearer, tribal prosecutors could have more easily addressed the situation, and the woman would not have had to suffer another assault.

A second problem with this jurisdictional element is its narrow scope. SDVCJ excludes crimes that often occur in conjunction with domestic violence or dating violence.[125] For example, tribes do not have the jurisdiction to charge sexual contact, stalking, violence against children, or drug possession if the perpetrator is non-Indian.[126] With this, one occurrence of domestic violence may be split into multiple cases—the domestic violence charge in tribal court and the other attendant charges in state or federal court.[127]

The effects of split jurisdiction hinder justice. On the Sault Ste. Marie Reservation, a non-Indian man was dating a woman that was a member of the tribe.[128] The man began inappropriately touching, stalking, and sexually

116. United States v. Castleman, 134 S. Ct. 1405 (2014).
117. *Id*. at 1408.
118. *Id*. at 1410–11.
119. *Id.* at 1417–18 (J. Scalia, dissenting).
120. NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 106, at 28.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *See* 25 U.S.C. § 1304.
126. *See* NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 106, at 23–26.
127. Douglas, *supra* note 42, at 784–85.
128. NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 106, at 24.

harassing the woman's sixteen-year-old daughter.[129] The tribe charged the man, believing the incidences fell within their SDVCJ, through the woman's relationship with the man; however, the judge determined that the tribe did not have jurisdiction over the matter because the crime against the daughter did not constitute domestic or dating violence.[130] That is, even though the woman was in a relationship with the perpetrator, the perpetrator's assault on her daughter was beyond the scope of tribal jurisdiction. As a result, the man went free. But four months later, he was arrested and charged by city police after contacting a fourteen-year-old girl online, kidnapping her, holding her in an off-reservation motel, and repeatedly raping her over the course of twelve hours.[131]

2. Connection between Crime and Indian Country

A second threshold question under SDVCJ is whether the victim is Indian and the crime occurred on Indian land.[132] In general, establishing that the victim is Indian is quite simple; however, the question of whether the crime occurred on Indian land can be complex.[133] This threshold jurisdictional element overlooks practical circumstances in two prominent ways. First, tribal jurisdiction overlays centuries of land treaties, forced resettlement, and allotment that create uncertainty over where Indian country begins and ends. One anonymous Assistant U.S. Attorney in Oklahoma commented, "If it's a parcel of property in a rural area, it may take weeks or months to determine if it's Indian land or not; investigators usually cannot determine this, they need attorneys to do it by going through court and title records to make a determination."[134] With that, law enforcement who arrive at a crime scene may be hesitant to act for fear of operating beyond the bounds of their proper jurisdiction.[135] And, tribal prosecutors may struggle to establish this jurisdictional element because tribal land is not always contiguous or clear.[136]

Second, components of a crime may occur on Indian land; however, in instances of blindfolding, kidnapping, or both, it may become unclear exactly where the crime occurred.[137] Without establishing that the crime occurred on Indian land, it becomes difficult to establish jurisdiction. Again, this is a threshold jurisdictional question, not one of merit.

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129. *Id.*
130. *Id.* at 24-25.
131. *Id.*
132. 25 U.S.C. § 1304
133. *See* AMNESTY INTERNATIONAL, *supra* note 7, at 34.
134. *Id.*
135. Michelle Norris, *Legal Hurdles Stall Rape Cases on Native Lands*, NPR (July 26, 2007, 5:00pm) https://www.npr.org/templates/transcript/transcript.php?storyId=12260610 ("I get there, and there are four different law enforcement agencies on the front lawn with the victim, arguing about, well, this is your case, well, no, you have jurisdiction of this.").
136. AMNESTY INTERNATIONAL USA, *supra* note 7, at 34.
137. *Id.* at 27.

For example, in separate but strikingly similar incidents, two Native American women were raped by three non-Indian men, who in each instance blindfolded the victims, made them take baths, and wore condoms during the rape.[138] Because the women were blindfolded and Oklahoma has an extremely complex jurisdictional patchwork, support workers were concerned that uncertainty over exactly where the crime took place would prevent these women from accessing justice.[139] The women could have been in Indian country on one side of the street, outside the reservation on the next, and back in Indian country on the following street.[140] In this case, the defense would be free to instill doubt as to whether the crime actually took place on Indian land, and in turn, the case could slip through the cracks on this jurisdictional element alone.[141]

3. Connection between Perpetrator and Indian Country

A third threshold question under SDVCJ is whether the non-Indian perpetrator has sufficient ties to the reservation.[142] A prosecutor can establish ties to the reservation by showing the non-Indian perpetrator lives on the reservation, works on the reservation, or is in an intimate relationship with a member of the tribe.[143] This jurisdictional element poses two distinct problems. First, a perpetrator can deny the existence of a relationship with a victim, and thus be released for lack of jurisdiction.

In one striking case, an SDVCJ prosecution reached a jury trial on the Pascua Yaqui Reservation. There, the jury acquitted the man of the domestic violence assault charges on jurisdictional grounds.[144] While there was no

138. *Id.*

139. *Id.*

140. *Id.* at 27, 39.

141. While Public Law 280 states have concurrent jurisdiction and in non-Public Law 280 states the federal government has concurrent jurisdiction, it appears that neither states nor the federal government are picking up these cases that slip through tribal courts. Pacheco, *supra* note 4, at 34–35. (Public Law 280 states, "which themselves are often confused about their role and powers, and have incorrectly assumed that they have exclusive jurisdiction over Indian country, remain hesitant to exert that jurisdiction for several additional reasons. Not only is it a very real possibility that 'state and county law enforcement officials may foster a hostile relationship with tribes, which is detrimental to the relationship between the tribe and law enforcement,' but there is also the fact that tribes do not generally pay state and local taxes, and states therefore 'have little vested interest in providing 'protection' for Indian tribes.' This lack of enthusiasm and incentive is reinforced by the fact that P.L. 280 is an unfunded mandate. Thus, the federal government has, in the case of mandatory P.L. 280 states, forced jurisdiction over Indian country onto these states, thereby increasing their area of policing and jurisdiction, while declining to expend the necessary resources to increase the policing budgets of those states. The result is that this money must therefore come out of state budgets, funded by state taxpayers. What this confusion and lack of funding can mean for Native American women is that their tribes, while still retaining concurrent jurisdiction over certain crimes committed against these women, do not exercise that jurisdiction because they no longer think they have the legal ability to do so.").

142. 25 U.S.C. § 1304 (b)(4)(B)

143. *Id.*

144. NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 106, at 20; Notably, the jury was primarily Indian, providing some indicia that tribal juries can be fair to non-Indian defendants.

question as to whether the incident occurred, the defendant was nonetheless acquitted because the jury was not convinced that a relationship between the defendant and the victim actually existed.[145] If the perpetrator was Indian, the tribal prosecutor would not have had to prove the relationship as part of establishing jurisdiction. Of course, the jurisdiction-based acquittal occurred after the tribe expended significant resources to charge the crime and conduct a trial. The victim, already traumatized from being assaulted, made the difficult decision to sit through a trial and re-traumatization only to have the case dismissed on jurisdictional grounds.

A second problem with SDVCJ's requirement for sufficient ties to a reservation is that the requirement leaves an enormous gap for stranger rape and sexual assault. One Native woman, while working at a casino, was harassed by a group of non-Indian men.[146] As the men became more disruptive and intoxicated, they were escorted out of the casino.[147] As the group was escorted out, one man grabbed the Native woman and began groping her.[148] Because she had never met the man prior to that night, the tribe could not establish jurisdiction.[149] And, even if the prosecutors could establish the existence of some sort of relationship, they would also have to establish that this was a crime of domestic or dating violence—a barrier that would be insurmountable. Without sufficient ties to a reservation, non-Indian men can assault Native women with impunity.[150]

From these anecdotes, it becomes clear that each element of jurisdiction is somewhat ambiguous. Tribal prosecutors can assert jurisdiction, only to have a jurisdictional element collapse a case halfway through, or tribal prosecutors refuse to pursue a case because the jurisdictional elements lack certainty. This lack of jurisdictional transparency can effectively prevent access to justice in distinct ways. In some instances, the land on which the crime takes place is in and of itself a source of jurisdictional confusion, while in other cases, there is no question as to who committed the crime and where it took place, yet the web of jurisdictional complexities effectively prevents prosecutions. Regardless, Native American women are left traumatized, only to have their perpetrators roam free.

While the historical granting of jurisdiction, divestiture of jurisdiction, and piecemeal return of jurisdiction cannot be remedied, contemporary laws can create jurisdictional transparency—rather than more layers of complexity—that will operate to negate continuing adverse impacts.

145. *Id.*
146. *Id.* at 22.
147. *Id.*
148. *Id.*
149. *Id.*
150. Pacheco, *supra* note 4, at 29; Zhang, *supra* note 25, at 257; NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 106, at 22.

IV.
JURISDICTIONAL TRANSPARENCY: FUNDAMENTAL PRINCIPLE, DISCRIMINATELY APPLIED

"Jurisdictional rules must be clear cut and cannot turn on indefinite notions of 'importance' or 'wide-ranging impact.'"[151] "Jurisdictional rules should be clear."[152] "Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful."[153] While calls for jurisdictional transparency ring throughout U.S. procedural jurisprudence, no such mantra appears in the context of tribal criminal jurisdiction. In fact, many tribes report that their decision not to prosecute gender-based violence is attributable to their concern that they will be unable to prove jurisdiction.[154] Without establishing jurisdiction, there is no claim, no case, no trial, and no remedy. In turn, violence against Native women persists, and as the numbers reflect, escalates.

Although there are numerous plausible explanations as to why such a dramatic discrepancy exists between jurisdictional transparency in the tribal context versus other contexts, the federal government's insistence for control and culturally oppressive policies is one undeniable justification. The federal government does not want tribes hauling non-Indians into court regardless of the crime they committed. By creating a narrow—and extremely complicated—jurisdictional exception, the United States can retain its power while reserving little authority for tribal governments. The narrowing of jurisdiction certainly deprives tribes of authority, but the opaque standards further divests tribes of their ability to protect victims.

The U.S. government must follow traditional demands for jurisdictional transparency and create a clear statement of jurisdiction that allows tribal governments to prosecute the widespread domestic violence, sexual assault, and rape occurring in Indian country. While it is impossible to create a clean slate after centuries of wavering tribal criminal jurisdiction, it is possible to create jurisdictional transparency by establishing clear statements of jurisdiction—statements of clarity that appear in so many other contexts. Jurisdictional transparency would avoid unnecessary re-traumatization of victims, preserve judicial resources, and promote meaningful access to the courts.

A clear statement in this context would simplify complex threshold jurisdictional questions that accompany decisions to prosecute gender-based violence in Indian Country. One can imagine a statement that permits tribes to assert jurisdiction over all non-Indians in instances of gender-based violence, including attendant crimes. This statement, by encompassing all non-Indians, eliminates the convoluted element that requires prosecutors to establish

151. Walters, 473 U.S. at 350 n. 27.
152. Lapides., 535 U.S. at 62.
153. Grupo Dataflux, 541 U.S. at 582.
154. *See* NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 106, at 31.

sufficient reservation ties. And, this statement removes the current jurisdictional barriers preventing the prosecution of stranger rape and sexual assault. Additionally, the inclusion of attendant crimes eliminates confusion over which acts within a single domestic violence incident fall within the scope of tribal versus federal or state jurisdiction. With a statement of jurisdiction that is transparent, rather than blurred with layers of intricate elements, cases of domestic violence will not be arbitrarily divided, prosecutors will not be left with their hands tied, and jurisdictional gaps would not allow perpetrators to live above the law.

Establishing jurisdiction is the earliest and most rudimentary step in accessing justice. Thus, jurisdictional transparency should be the first step in remedying such lack of access. I don't argue that full tribal jurisdiction should be restored, nor do I argue that tribes should be divested of criminal jurisdiction; rather, I argue that advocacy for a basic procedural concept—jurisdictional transparency—may be the best first step in remedying harms to Native women in Indian country. Reframing this issue as one not of sovereignty or women's rights, and instead focusing on the less-igniting issue of jurisdictional transparency, may provide a path of less resistance.

Regardless of which argument is presented in Congress or before a court, long-standing concerns about granting tribal governments power will likely surface. In the debates preceding reauthorization of VAWA 2013, this fear was evident.[155] Congressmen argued that tribal governments should not have jurisdiction over non-Indian defendants because a jury of tribal members could not be fair to a non-Indian.[156] Notably, the inverse scenario is decidedly acceptable. Indians who have challenged the use of a white jury (often consisting of members who are unfamiliar with cultural norms) in federal court (often great distances from tribal communities) have never prevailed.[157] Republican Congressmen who resisted VAWA 2013 were centrally concerned with civil rights for non-Indian defendants, thus leading them to vote against VAWA reauthorization.[158] These concerns about tribal systems abusing their authority

155. Deer, *supra* note 80, at 97–98; Frank James, *Some Political Lessons from the Violence Against Women Act Vote*, NPR (Feb. 28, 2013, 5:23pm), https://www.npr.org/sections/itsallpolitics/2013/02/28/173181346/some-political-lessons-from-the-violence-against-women-act-vote.

156. 158 CONG. REC. 5712, 5754 (statement of Rep. Grassley); Deer, *supra* note 80, at 98; Zhang, *supra* note 25, at 247 n. 13 ("*See* S. REP. NO. 112-153, at 48-49 (Minority Views from Sens. Kyl, Hatch, Sessions, and Coburn) (arguing against tribal jurisdiction over non-Indians because non-Indians "would enjoy few meaningful civil-rights protections" and "the absence of separation of powers and an independent judiciary in most tribal governments makes them an unsuitable vehicle for ensuring the protection of civil rights.").

157. United States v. Etsitty, 130 F.3d 420, 425 (9th Cir. 1997); Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 322–25 (2015).

158. Zhang, *supra* note 25, at 247 n. 13; Jennifer Bendery, *Chuck Grassley on VAWA: Tribal Provision Means 'The Non-Indian Doesn't Get a Fair Trial'*, HUFFINGTON POST (Feb. 21, 2013, 5:33pm), https://www.huffpost.com/entry/chuck-grassley-vawa_n_2735080; Rizzo, supra note 33;

to the disadvantage of non-Indian defendants are unfounded. In fact, tribal courts have demonstrated respect for defendants' rights; jury pools on reservations include both Indian and non-Indian people,[159] and tribes consistently provide counsel to defendants.[160]

Beyond the legislative branch, the judiciary's rhetoric evinces a sense of distrust in tribal governments alongside a paternalistic hesitancy to give tribes power. The sentiment was clear when Justice Marshall wrote "[indians] 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."[161] And the sentiment seemingly persists as Justice Rehnquist cites to racially motivated language for authority: "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens . . . "[162] There is no denying the racial undertones—or overtones—of the rhetoric surrounding tribal jurisdiction today and centuries ago.

The United States has settled on the notion that tribes somehow ceded their control and do not have the aptitude to govern their own land. Challenges to this notion face significant opposition because of deeply rooted beliefs. Today, a call for full tribal criminal jurisdiction would likely face this significant and precedented opposition. Thus, rather than yet another layer of jurisdictional complexities, a simple and clear statement of jurisdiction would be a meaningful first step in reform.

Before one can advocate for a grant or divestiture of jurisdiction, it must become clear what jurisdiction is. And, at this moment, a fight for complete return of tribal jurisdiction is likely to result in either a complete shutdown or a compromise that only adds another layer of confusion. Calls for jurisdictional transparency should precede calls for shifts in jurisdiction, just as litigants should address the propriety of a forum before touching the merits.

CONCLUSION

Without knowing where jurisdiction lies, there is no meaningful access to the courts. Native American women are frequently lost in this jurisdictional

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Rolnick, *supra* note 59 at 1608. (Senator Tom Cole from Oklahoma stated, some of his colleagues seemed to "fear Indians are going to take out 500 years of mistreatment on us through this. It's that kind of fear, veiled in constitutional theories[.]")

159. INDIAN LAW RESOURCE CENTER, *Ending Violence Against Native Women*, https://indianlaw.org/issue/Ending-Violence-Against-Native-Women ("The Census Bureau reports that non-Indians now comprise 76% of the population on tribal lands.").

160. *See* Rolnick, *supra* note 59, at 1608–12 (citing VAWA pilot project and congressional debates).

161. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

162. Oliphant v. Squamish, Indian Tribe et al., 435 U.S. 191, 210 (1978); ROBERT A. WILLIAMS, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA, (Univ. of Minn. Press) (2005).

maze, not because they don't know how jurisdiction works but because it seems that everyone is confused about what tribal criminal jurisdiction means. Tribal judges refuse to issue protection orders fearing the matter is beyond their jurisdiction.[163] Federal prosecutors choose not to prosecute because the lines of communication between tribal and federal governments are seemingly blurred.[164] Tribal courts attempt to assert jurisdiction only to have ambiguous jurisdictional standards unravel cases.[165] Jurisdiction should never be this opaque.

As history would demonstrate, tribal criminal jurisdiction does not align with the Courts' widespread demand for jurisdictional transparency.[166] Federal, state, and tribal authorities should be able to parse through jurisdictional standards so that they know who has jurisdiction and when. A call for a complete return of jurisdiction is likely to result in a compromise—a compromise that may disparately apply to different regions, impact only certain crimes, or worse, further divest tribes of their jurisdiction.[167] Jurisdictional transparency isn't a call for complete divestiture or return of jurisdiction. It is a call for basic procedural standards that apply in every other facet of the law. This jurisdictional maze must be disentangled.

163. *See infra* Part I.
164. *See infra* Part I.
165. *See infra* Part II.
166. *See infra* Part I.
167. *See infra* Part IV. Though this Article focusses on jurisdictional transparency, the debate regarding which justice system delivers better outcomes is ongoing. Some argue that the federal government is a better forum for handling the voluminous case load; however, with adequate resources, tribal governments—close to victims and familiar with cultural norms—would be able to deliver outcomes that are sensitive to the needs of both victims and their communities at large.