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REPAIRING THE JURISDICTIONAL “PATCHWORK”¹ ENABLING SEXUAL ASSAULT ON INDIAN RESERVATIONS

REEMA SOOD*

You told me about all the Indian women you counsel
who say they don’t want to be Indian anymore
because a white man or an Indian one raped them . . .
Sometimes I don’t want to be an Indian either . . .
It’s knowing with each invisible breath
that if you don’t make something pretty
they can hang on their walls or wear around their necks
you might as well be dead.²

During a conversation with Sunrise Black Bull,³ a project coordinator for White Buffalo Calf Woman Society⁴ and a member of the Rosebud Sioux tribe, Sunrise described her recent trip to the grocery store. Sunrise works for an organization that offers advocacy services to survivors of sexual assault, including a 24-hour crisis center, support during medical examinations for rape kits, and coordination with law enforcement.⁵ Sunrise answers calls day and night from her relatives—she uses the term relative instead of client because it more closely aligns with Lakota values and instills trust.⁶ In the parking lot, she encountered a recently retired tribal police officer, who greeted her with a simple,

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*J.D. Special thanks to Leigh Goodmark, the Honorable Douglas R. M. Nazarian, and my husband, Simon Graf.

¹ *Duro v. Reina*, 495 U.S. 676, 681 n.1 (1990).

² See ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* 13 (Duke Univ. Press 2015) (quoting CHRYSSTOS, *FUGITIVE COLORS* (Vancouver Press Gang 1995)).

³ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017). I use Sunrise’s first name at times due in part to the rapport that we formed and a belief that she would not like to be referred to formally.

⁴ The White Buffalo Calf Woman Society was founded in 1977 by Tillie Black Bear, sometimes referred to as a “grandmother of the domestic violence movement.” The advocacy organization, located on the reservation, was the first of its kind. SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA XIII* (Univ. of Minn. Press 2015).

⁵ *Id.*

⁶ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

“Keep raising hell.”⁷ As she strolled into the store, she was quickly reminded of her purpose. Just about every woman that she saw shopping was one of her relatives, a woman she had seen in crisis following a traumatic sexual assault.⁸

Sexual assault traumatizes survivors. Rape “breaks the spirit, humiliates, tames, [and] produces a docile, deferential, obedient soul.”⁹ Rape degrades,¹⁰ oppresses,¹¹ and instills fear.¹² It does not relent, as the lingering effects of rape remain in a victim’s life for a long time: “resolution of the trauma is never final; recovery is never complete.”¹³ And rape affects more than just the survivor: it spreads to the survivor’s community.¹⁴

Tribes disproportionately face this challenge.¹⁵ Indian women are the most targeted demographic for sexual assault crimes.¹⁶ While 1.9 out of every 1000 women in general experiences sexual assault in their lifetime, for Indian women that number is closer to 7.2 per every 1000 women.¹⁷ Addressing this current problem requires an analysis of the historical treatment of Indian women¹⁸ and the complex jurisdictional issues¹⁹ that contribute to their particularly high rate of sexual assault.²⁰ Congress enacted the Tribal Law and Order Act of 2010 and the

⁷ *Id.*

⁸ *Id.*

⁹ DEER, *supra* note 4, at 11 (quoting Claudia Card, *Rape as a Weapon of War*, 11 HYPATIA 5, 6 (1996)); see Reema Sood, Comment, *Biases Behind Sexual Assault: A Thirteenth Amendment Solution to Under-Enforcement of the Rape of Black Women*, 18 U. MD. L.J. RACE RELIGION GENDER & CLASS 405, 405–06 (2018).

¹⁰ DEER, *supra* note 4, at 11.

¹¹ See BELL HOOKS, *AIN’T I A WOMAN?* (1981); Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1 (2006).

¹² SMITH, *supra* note 2, at 7 (“Rape is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.”) (quoting SUSAN BROWNMILLER, *AGAINST OUR WILL* (Bantam Books 1986)) (internal punctuation omitted).

¹³ DEER, *supra* note 4, at 12 (quoting JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC ABUSE TO POLITICAL TERROR* (Basic Books 1992)).

¹⁴ DEER, *supra* note 4, at 109.

¹⁵ Mary K. Mullen, Comment, *The Violence Against Women Act: A Double-Edged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence*, 61 ST. LOUIS U. L.J. 811, 814 (2017).

¹⁶ *Id.*; DEER, *supra* note 4, at 4.

¹⁷ DEER, *supra* note 4, at 4.

¹⁸ See *infra* Section I-A.

¹⁹ See *infra* Part II.

²⁰ See *infra* Section I-C.

Violence Against Women Reauthorization Act of 2013²¹ to rectify this long-standing injustice. However, these laws are inadequate solutions due to poor implementation, an overly complicated jurisdictional infrastructure, and the history of racist, sexist exploitation of Indian women.

I argue that Native American women have long suffered from a system that has failed to address ongoing sexual assault crimes, primarily perpetrated by non-Indians, on Indian land. I connect the historical treatment of Indian women to their modern experience of sexual degradation and assault.²² I further contend that the regulations that have been put in place to “protect” Native American women are overly complex and ineffective.²³ I address the seminal cases that created the foundation for the broken and confusing jurisdiction over Native American reservations.²⁴ I dispute the efficacy of the Major Crimes Act, the General Crimes Act, Public Law 83-280, and the Indian Civil Rights Act of 1968 in protecting Native American women from the persistent threat of rape.²⁵ I express the jurisdictional conundrum presented by the Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*.²⁶ Further, I investigate the more recent statutory solutions by assessing the Tribal Law and Order Act of 2010 and the Violence Against Women Reauthorization Act of 2013²⁷ through discussions with organizations that actively provide aid and relief to Indian women.²⁸ Lastly, I discuss potential remedies to the problems faced by Native American women.²⁹ Namely, the use of civil torts to give voice to the victims, the reversal of *Oliphant*, and the goal of tribal self-determination.³⁰

²¹ See *infra* Part III.

²² See *infra* Part I.

²³ See *infra* Part II.

²⁴ See *infra* Section II-A.

²⁵ See *infra* Section II-B.

²⁶ See *infra* Section II-C.

²⁷ See *infra* Section III-A.

²⁸ See *infra* Section III-B.

²⁹ See *infra* Section III-C.

³⁰ See *infra* Part IV.

I. HISTORICAL EXPERIENCE OF NATIVE AMERICAN WOMEN

A. *Degradation of Native American Women*

Sexual assault rates and violence against Native women did not just drop from the sky. They are a process of history.³¹

Prior to the invasion of colonial settlers, many Native American tribes, such as the Iroquois and the Cherokee, were matriarchal.³² Perhaps in part because of this societal structure, sexual assault within Native American communities was low.³³ In fact, some elders believe that sexual violence was introduced by the White race during colonization.³⁴ Between 1492 and 1787, Native Americans fared relatively well during a phase known as “tribal independence,” maintaining their tribal structure without colonial interference.³⁵ The British did not immediately subjugate Native Americans and remove their tribal authority; instead, tribes were treated as independent, foreign sovereign nations.³⁶ The British Crown worked to protect Native Americans from the actions of the colonists from afar, primarily to avoid internal wars.³⁷ Separated from the concerns of the Crown, colonists diverged from the standards of treatment advocated by the British Crown and slowly began a period of encroachment on Native land that continued for hundreds of years.³⁸ Unfortunately, the British were not able to protect Native American women from the settlers, who systematically used rape as an instrument of conquest against Indian tribes.³⁹

³¹ *Native Women: Protecting, Shielding, and Safeguarding our Sisters, Mothers, and Daughters: Hearing Before the Comm. on Indian Affairs*, 112th Cong. 69 (2011) (statement of Sarah Deer, Amnesty International Assistant Professor, William Mitchell School of Law) (quoting Jacqueline Agtuca, Alaska Native Women’s Conf., Anchorage, Alaska, (May 24, 2005)).

³² Mullen, *supra* note 15, at 813.

³³ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

³⁴ Mullen, *supra* note 15, at 813.

³⁵ STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 4 (Eve Cary ed., S. Ill. Univ. Press, 3d ed. 2002) (1983).

³⁶ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 12 (4th ed. 2004). The British could have been acting pragmatically rather than in full belief that Native American tribes were equals. *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ SMITH, *supra* note 2, at 10.

Rape was used as a tool against Indians to further the interests of colonialism and racism.⁴⁰ Settlers formulated perverse and disturbing biases towards Native women during the colonial period.⁴¹ In an experience that mirrors slave owners' treatment of Black women,⁴² settlers overly sexualized and dehumanized Indian women.⁴³ In one account from 1613, a settler demonstrated early biases and misconceptions about tribal culture, saying of Indian women, "[t]hey live naked in bodie, as if their shame of their sinne deserved no covering: Their names are as naked as their bodie"⁴⁴ In another illustrative account, a settler stated:

When I was in the boat I captured a beautiful Carib woman I conceived desire to take pleasure I took a rope and thrashed her well, for which she raised such unheard screams that you would not have believed your ears. Finally we came to an agreement in such a manner that I can tell you that she seemed to have been brought up in a school of harlots.⁴⁵

As this account demonstrates, colonizers viewed Native women as inherently "rapable."⁴⁶ Their goal was not only to degrade and demoralize Native women, but to use the act of rape as a tool⁴⁷ in the widespread killing of Indians.⁴⁸ In yet another report, a settler accounted:

I heard one man say that he had cut a woman's private parts out, and had them for exhibition on a stick I also heard of numerous instances in which men had cut out the private parts of females, and stretched them over their saddle-bows and some of them over their hats.⁴⁹

⁴⁰ SMITH, *supra* note 2, at 10.

⁴¹ SMITH, *supra* note 2, at 10.

⁴² See discussion *infra* Section I-B.

⁴³ SMITH, *supra* note 2, at 10.

⁴⁴ SMITH, *supra* note 2, at 10 (quoting an account by Alexander Whitaker, a Virginia Minister).

⁴⁵ SMITH, *supra* note 2, at 15 (quoting KIRKPATRICK SALE, *THE CONQUEST OF PARADISE* (Plume 1991) (1990)).

⁴⁶ SMITH, *supra* note 2, at 10.

⁴⁷ DEER, *supra* note 4, at 32.

⁴⁸ SMITH, *supra* note 2, at 15–16.

⁴⁹ SMITH, *supra* note 2, at 15 (quoting SAND CREEK MASSACRE: A DOCUMENTARY HISTORY (Sol Lewis, 1973)).

The colonizers justified the assault of Native American women by viewing them as promiscuous,⁵⁰ the same model followed by slave owners in their treatment of Black women.⁵¹ By doing so, the attackers shifted the culpability to the women suffering from their rampant attacks, who were viewed as so inherently sexual as to negate the settlers’ actions.⁵² Settlers used sexual violence against Indian women to further their conquest over the Indian people.⁵³

The destruction of Native American lives is difficult to recount, but their historical treatment remains pertinent and connected to their ongoing problems today. Colonizers’ repugnant thoughts and treatment of Native American women led to a cultural stereotype that painted Natives Americans as weak.⁵⁴ The combination of a perceived weakness⁵⁵ amongst Native Americans in conjunction with the unfortunate stereotype that Native American women were sexually promiscuous mirrors the experience of Black women during slavery.⁵⁶

B. Corollary: The Experience of Black Women During Slavery

The experience of Indian women parallels the experience of Black women during slavery in powerful ways.⁵⁷ Sexual violence itself has been used against minority groups for centuries.⁵⁸ Few boundaries existed for White slave owners over the treatment of Black slaves. In fact, for much of history, raping a Black woman was not criminalized,⁵⁹ similar to the experience of Indian women prior to 1885.⁶⁰ Masters raped and dehumanized Black women without any legal recompense, furthering their own economic interests by increasing their number of slaves as the women gave birth to children of forcible rape.⁶¹ Many slave owners had easy access to vulnerable female slaves; masters frequently

⁵⁰ SMITH, *supra* note 2, at 15–16.

⁵¹ HOOKS, *supra* note 11, at 36.

⁵² SMITH, *supra* note 2, at 15–16.

⁵³ *Native Women: Protecting, Shielding, and Safeguarding our Sisters, Mothers, and Daughters: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 69 (2011) (statement of Sarah Deer, S. Comm. on Indian Affairs).

⁵⁴ DEER, *supra* note 4, at 10.

⁵⁵ DEER, *supra* note 4, at 10.

⁵⁶ SMITH, *supra* note 2, at 10.

⁵⁷ See generally Sood, *supra* note 9, at 408–11 (expanding on the historical devaluation of Black women’s bodies).

⁵⁸ SMITH, *supra* note 2, at 16.

⁵⁹ HOOKS, *supra* note 11, at 35; Pokorak, *supra* note 11, at 10.

⁶⁰ PEVAR, *supra* note 35, at 144 (noting the passage of the Major Crimes Act which criminalized rape for Indian offenders, but not non-Indian offenders).

⁶¹ HOOKS, *supra* note 11, at 16; Pokorak, *supra* note 11, at 10.

forced young Black girls to sleep in the same bedroom.⁶² Children of slaves, regardless of the race of the father, automatically became slaves themselves.⁶³ Slave owners exploited this cruel fact to grow their slave population.⁶⁴ Black women were attacked and demoralized by their White masters, increasing White male power and wealth.⁶⁵ In contrast, colonizers used rape in the genocide of Indian people.⁶⁶ Colonizers wanted Indian land, whereas slave owners sought additional property.⁶⁷

Violations of Black womens' bodies and personhood were permitted for more than two centuries with a number of justifications, including the lower status of Black people and a false narrative of Black sexual promiscuity.⁶⁸ White slave owners began to view Black women as sexually lascivious and lewd.⁶⁹ Much like the stereotype of Indian women, Black women were portrayed as lustful and salacious, so enticing that White slave owners could not be held accountable for their actions.⁷⁰ Black women were not considered people and therefore were incapable of being assaulted.⁷¹ In systematically raping female slaves, White masters achieved two goals: increase their power and dehumanize their property.⁷² The mentality of White slave owners created a lasting stereotype of Black women.⁷³

The experience of Black slaves parallels the long history of sexual assault of Native American women. Rape has historically been used as a method of controlling and weakening people to further racism and colonialism.⁷⁴ Stereotypes create a cultural climate in which rape and other sexual violence against these minority groups is tacitly accepted.⁷⁵ Long-cultivated biases remain deeply embedded in our public consciousness and these minority groups continue to be targeted for sexual assault crimes to this day.⁷⁶

⁶² HOOKS, *supra* note 11, at 25.

⁶³ Pokorak, *supra* note 11, at 9–10.

⁶⁴ Pokorak, *supra* note 11, at 10.

⁶⁵ HOOKS, *supra* note 11, at 16.

⁶⁶ SMITH, *supra* note 2, at 15.

⁶⁷ Pokorak, *supra* note 11, at 9–10; Smith *supra* note 2, at 10.

⁶⁸ HOOKS, *supra* note 11, at 36.

⁶⁹ Pokorak, *supra* note 11, at 9.

⁷⁰ Pokorak, *supra* note 11, at 10; Smith *supra* note 2, at 10.

⁷¹ See *Dred Scott v. Sandford*, 60 U.S. 393, 405 (1857).

⁷² Pokorak, *supra* note 11, at 10.

⁷³ HOOKS, *supra* note 11, at 36.

⁷⁴ SMITH, *supra* note 2, at 15, 21.

⁷⁵ DEER, *supra* note 4, at 5.

⁷⁶ See Hooks, *supra* note 11 (detailing the ways in which stereotypes formed during slavery have survived in similar form today).

C. *Modern Problem: The Systemic Rape of Native Americans*

Due to a tangle of jurisdictional problems created by centuries of U.S. mismanagement of Native American lands, Native American women are particularly susceptible to sexual assaults committed by non-Indians on tribal land,⁷⁷ and constitute the most targeted demographic in the United States.⁷⁸ The statistics concerning sexual assault of the Native American population are jarring. Although the available statistics differ slightly, they overwhelmingly indicate that Indian women are disproportionately targeted for sexual assault crimes.⁷⁹ In 1999, the Bureau of Justice Statistics (BJS) released a report entitled *American Indians and Crime* which created a stir within Congress and across the nation.⁸⁰ It is difficult to collect accurate data about Native Americans,⁸¹ but the report indicates that one out of every three Native American women will be raped during her lifetime.⁸² However, the arguably more shocking detail outlined in the BJS report was that eighty-eight percent of attackers were non-Indians: namely, White and Black men.⁸³ Of that eighty-eight percent, seventy percent were White.⁸⁴ According to a 2007 report by Amnesty International, Native American women are 2.5 times more likely to be raped than other women.⁸⁵ In her 2015 book, Sarah Deer, a Native

⁷⁷ SMITH, *supra* note 2, at 31; *Native Women: Protecting, Shielding, and Safeguarding our Sisters, Mothers, and Daughters: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 69 (2011) 68–69 (2011) (statement of Sarah Deer, S. Comm. on Indian Affairs) (“There is a complex interrelation between Federal, State, and tribal jurisdiction that undermines tribal authority and often allows perpetrators to evade justice.”).

⁷⁸ DEER, *supra* note 4, at 4.

⁷⁹ BUREAU OF JUST. STAT., OFF. OF JUST. PROGRAMS, U.S. DEP’T OF JUST., *AMERICAN INDIANS AND CRIME* (1998) [hereinafter *BJS Report*] available at <https://www.bjs.gov/content/pub/pdf/aic.pdf>.

⁸⁰ *Id.*

⁸¹ DEER, *supra* note 4, at 2 (describing the difficulties of obtaining accurate statistics regarding Native American peoples due in part to relatively small sample sizes).

⁸² ATT’Y GEN. ADVISORY COMM. ON AM. INDIAN AND ALASKA NATIVE CHILD. EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE 38 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf; DEER, *supra* note 4, at 1; *Native Women: Protecting, Shielding, and Safeguarding our Sisters, Mothers, and Daughters: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 1 (2011) (statement of Sen. Daniel K. Akaka, Chairman, Senate Committee on Indian Affairs.).

⁸³ *BJS Report* at 7.

⁸⁴ DEER, *supra* note 4, at 6; MULLEN, *supra* note 15, at 814.

⁸⁵ Amnesty Int’l, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA*, at 2 (2007), available at <https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf>.

American legal scholar and MacArthur fellow,⁸⁶ assessed 7.2 per 1000 Indian women suffer from sexual assault. The statistic among all women, she continued, pales in comparison at approximately 1.9 per 1000.⁸⁷ According to a legal resource provided by the Tribal Law and Policy Institute issued in 2017, 56.1% of Native American women have suffered from sexual violence in their lifetime.⁸⁸ Despite these staggering numbers, the victimization of Native American women has been normalized in our society.⁸⁹

Many Native American women live in a state of fear surrounding the possibility of becoming a target of sexual violence and their stories deserve our collective attention. In one public service announcement, an Indian woman said, “While I’m pregnant, I can keep our baby safe by not drinking, smoking, or using drugs. But how are we going to keep her safe after she’s born?”⁹⁰ In an interview, Sunrise Black Bull of the White Buffalo Calf Woman Society described that Native women are constantly concerned about non-Natives on their land because outsiders know they can commit rape without punishment.⁹¹ She explained that her organization, White Buffalo Calf Woman Society, reviews D.O.J. statistics, but she personally feels that the frequently quoted “one of three” figure⁹² is inaccurate. The Indian Law Resource Center reports that fifty percent of American Indian and Alaska Native women have experienced sexual violence.⁹³ Based on her experience working on the Rosebud Sioux reservation, Sunrise believes that the number of women that suffer from sexual violence is closer to two out of every three.⁹⁴

⁸⁶ MacArthur ‘genius grant’ winner welcomes boost to work on Native American domestic violence, MPR NEWS (Sep. 17, 2014), <https://www.mprnews.org/story/2014/09/17/daily-circuit-genius-grant>.

⁸⁷ DEER, *supra* note 4, at 4.

⁸⁸ MAUREEN WHITE EAGLE ET AL., TRIBAL LEGAL CODE RESOURCE: SEXUAL ASSAULT AND STALKING LAWS 1 (Tribal L. and Pol’y Inst. 2017).

⁸⁹ DEER, *supra* note 4, at 5.

⁹⁰ *Native Women: Protecting, Shielding, and Safeguarding our Sisters, Mothers, and Daughters: Hearing on S.112-311 Before the S. Comm. on Indian Affairs*, 112th Cong. 2 (2011) (public service announcement by the Minnesota Indian Women’s Sexual Assault Coalition, Senate Committee on Indian Affairs).

⁹¹ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

⁹² ATT’Y GEN. ADVISORY COMM. ON AM. INDIAN AND ALASKA NATIVE CHILD. EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE 38 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf.

⁹³ *Safe Women, Strong Nations*, INDIAN L. RES. CTR., <http://indianlaw.org/safewomen> (last visited Nov. 26, 2017).

⁹⁴ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

On November 20, 2017, Sunrise gave a training session about sexual harassment to a group of fifty or sixty people.⁹⁵ During that session, she described to the group how trauma can be internalized and lead to physical manifestations of poor health.⁹⁶ Sunrise was approached by a sexual assault survivor after the presentation who had never heard that trauma can manifest itself physically.⁹⁷ That Friday, the woman died from breathing problems in front of her six children.⁹⁸ She was thirty-two years old.⁹⁹

Sunrise described another relative who recently returned to White Buffalo for help.¹⁰⁰ The young woman described that she had recently been raped again: the ninth time she had been sexually assaulted since 2014.¹⁰¹ Rooted in systemic biases, the sexual devaluation of Indian women has persisted for hundreds of years, enabled by a weak jurisdictional system that still offers little protection to Native women.

II. JURISDICTIONAL LABYRINTH

The federal government historically justified its control over Indian reservations through a few primary theories. First, the United States asserted control over the Indians by citing the Doctrine of Discovery.¹⁰² Under the Doctrine of Discovery, “Indian people do not hold their lands in fee simple absolute, but instead only hold a right to occupy their land.”¹⁰³ The Doctrine of Discovery relied on the theory that Indians did not have a concept of land ownership, instead using resources and occupying space without the notion of legal title.¹⁰⁴ This contrived and illegitimate doctrine¹⁰⁵ allowed the United States to enact policies that

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

¹⁰¹ *Id.*

¹⁰² MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 21 (West Acad. Pub., 1st ed. 2016).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 22.

¹⁰⁵ *See id.* at 21–22 (“This theory dominated the imagination of legal scholars and Indian affairs policy makers even today, but never had firm historical or practical basis The origins of federal Indian law and policy are layered with fictions heaped on more fictions – all intended to provide political and legal justifications for the massive dispossession of entire groups of Indigenous people and cultures from their lands and resources.”).

subjected Indians to strict regulations limiting their capacity for trade and taking much of their land over time.¹⁰⁶ Second, the Commerce Clause¹⁰⁷ in the U.S. Constitution gives the federal government wide control over Indian tribes.¹⁰⁸ The Commerce Clause reads, “Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁰⁹ The Supreme Court frequently cited the Commerce Clause as the authority behind the United States’ control over Indian tribes.¹¹⁰ Lastly, the United States relied on a theory called the “trust relationship,”¹¹¹ which contended that the federal government had both the duty to “protect” tribes as well as the power to govern them.¹¹² Congress continues to maintain plenary power over Indian tribes, is capable of “modify[ing] or eliminat[ing] tribal rights,”¹¹³ and can “assist or destroy an Indian tribe as it sees fit.”¹¹⁴

In this section, I outline the cases that give historical context to the United States’ treatment of Indians.¹¹⁵ Next, I provide an overview of the major legislative actions that continue to affect criminal jurisdiction on tribal lands, pointing out who each law primarily affects and what that means for the Indians subject to these jurisdictional laws.¹¹⁶ Lastly, I discuss the seminal case of *Oliphant v. Suquamish*, which in 1978 created the red line that Indian tribes are not permitted to try criminal cases against non-Indians.¹¹⁷

A. Foundational Cases Governing Indian Treatment

Three cases constitute what is called the “Marshall trilogy” that largely established the relationship between the United States and Indian tribes:¹¹⁸ *Johnson v. M’Intosh*,¹¹⁹ *Cherokee Nation v. Georgia*,¹²⁰

¹⁰⁶ *Id.* at 21.

¹⁰⁷ U.S. CONST. art. I, § 8, cl. 3.

¹⁰⁸ PEVAR, *supra* note 35, at 58.

¹⁰⁹ U.S. CONST. art. I, § 8, cl. 3.

¹¹⁰ PEVAR, *supra* note 35, at 58.

¹¹¹ PEVAR, *supra* note 35, at 59.

¹¹² PEVAR, *supra* note 35, at 59.

¹¹³ PEVAR, *supra* note 35, at 79 (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)).

¹¹⁴ PEVAR, *supra* note 35, at 79.

¹¹⁵ See *infra* Section II-A.

¹¹⁶ See *infra* Section II-B.

¹¹⁷ See *infra* Section II-C.

¹¹⁸ FLETCHER, *supra* note 102, at 30.

¹¹⁹ 21 U.S. 543 (1823).

¹²⁰ 30 U.S. 1 (1831).

and *Worcester v. Georgia*.¹²¹ In *Johnson v. M’Intosh*, a property case, the Supreme Court compared the authenticity of (1) a land sale by Indians to individuals, and (2) a conflicting claim for title made nearly forty years later after the United States sold the same land to a purchaser.¹²² The Supreme Court tried to decide who the rightful owner was between Johnson, the original purchaser who bought the land from Indian sellers in 1775, and M’Intosh, who had purchased the land from the United States in 1818.¹²³ The Supreme Court held that the title of lands, granted to individuals by Indian tribes in 1773 and 1775, cannot be “sustained in the courts of the United States.”¹²⁴ The Court cited the Discovery Doctrine as the “original foundation of title to land on the American continent,” completely nullifying any rights for Indians over property in the United States.¹²⁵

In the second Marshall trilogy case, *Cherokee Nation v. Georgia*, the majority of the Supreme Court held that Indian tribes do not qualify as “foreign state[s]” under the Constitution,¹²⁶ and are instead “denominated domestic dependent nations” within the United States.¹²⁷ At the same time, Chief Justice John Marshall¹²⁸ indicated that the Cherokee Nation, represented in court by a former Attorney General of the United States,¹²⁹ was “a distinct political society, separated from others, capable of managing its own affairs and governing itself.”¹³⁰ Prior to the lawsuit, the Cherokee Nation had gone to great lengths to successfully adopt the United States’ style of law enforcement, its constitutional model, and its trade system.¹³¹ Nonetheless, Chief Justice Marshall felt that the Indian tribes were inferior to the United States and did not allow

¹²¹ 31 U.S. 515 (1832).

¹²² *Johnson*, 21 U.S. at 550; FLETCHER, *supra* note 102, at 22.

¹²³ *Johnson*, 21 U.S. at 550; FLETCHER, *supra* note 102, at 23.

¹²⁴ *Johnson*, 21 U.S. at 605.

¹²⁵ RICHARD SMITH COXE, A DIGEST OF THE DECISIONS IN THE SUPREME COURT, CIRCUIT COURTS, AND DISTRICT COURTS OF THE UNITED STATES 255 (Philip H. Nicklin, Law Bookseller 1829).

¹²⁶ *Cherokee Nation v. Georgia*, 30 U.S. 1, 20 (1831); FLETCHER, *supra* note 102, at 30.

¹²⁷ *Cherokee Nation*, 30 U.S. at 17; FLETCHER, *supra* note 102, at 33.

¹²⁸ At the time of writing this opinion, Chief Justice Marshall was reportedly in failing health, potentially impacting the direction he chose in this decision. FLETCHER, *supra* note 102, at 35.

¹²⁹ FLETCHER, *supra* note 102, at 31.

¹³⁰ *Cherokee Nation*, 30 U.S. at 16.

¹³¹ FLETCHER, *supra* note 102, at 31 (indicating that the Cherokee Nation operated better at that point in time than the State of Georgia).

them to have the power of a “foreign state” under the U.S. Constitution,¹³² weakening their status as an independent nation.

Justice Thompson issued a dissenting opinion that heavily disputed Chief Justice Marshall’s opinion.¹³³ According to Justice Thompson, “it is not perceived how it is possible to escape the conclusion, that they form a sovereign state They have been admitted and treated as a people governed solely and exclusively by their own laws, usages, and customs within their own territory, claiming and exercising exclusive dominion over the same . . . , still claiming absolute sovereignty and self government over what remained unsold.”¹³⁴

After the Supreme Court’s 1831 decision in *Cherokee Nation*, Georgia passed a series of laws to decimate the rights of the Cherokee Nation.¹³⁵ In the year that followed, Chief Justice Marshall’s wife Polly passed away, and at the age of seventy-six, his health began to decline.¹³⁶ His poor condition notwithstanding, Chief Justice Marshall issued a twenty-eight-page decision in the final Marshall trilogy case, *Worcester v. Georgia*,¹³⁷ that adopted much of Justice Thompson’s dissenting opinion in *Cherokee Nation*.¹³⁸ Chief Justice Marshall wrote of the Cherokee Nation’s tribal authority:

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 The very term “nation,” so generally applied to them, means “a people distinct from others” The Cherokee nation, then, is a distinct community, occupying its own territory . . . 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 [C]ongress. The whole intercourse between the United States and this nation,

¹³² *Cherokee Nation*, 30 U.S. at 20.

¹³³ *Id.* at 53–54 (Johnson, J., dissenting).

¹³⁴ *Id.* at 53.

¹³⁵ *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹³⁶ FLETCHER, *supra* note 102, at 34.

¹³⁷ 31 U.S. 515 (1832).

¹³⁸ FLETCHER, *supra* note 102, at 34–35.

is by our constitution and laws, vested in the government of the United States.¹³⁹

Chief Justice John Marshall’s transformative opinion regarding tribal authority would unfortunately not last.¹⁴⁰ President Andrew Jackson oversaw the genocide of Indian peoples, including the Cherokee Nation, soon after this decision was issued.¹⁴¹ Nonetheless, the governing principles of the Marshall trilogy are echoed in the United States’ subsequent legislative and judicial actions.¹⁴²

B. Federal Statutory Interference

Criminal jurisdiction over tribal lands is one of the most intricate and convoluted jurisdictional problems in our country’s law.¹⁴³ In *Duro v. Reina*, the Supreme Court said that jurisdiction in tribal lands “is governed by a complex patchwork of federal, state, and tribal law.”¹⁴⁴ In this section, I will outline the General Crimes Act,¹⁴⁵ the Major Crimes Act,¹⁴⁶ Public Law 83-280,¹⁴⁷ and the Indian Civil Rights Act of 1968.¹⁴⁸

1. General Crimes Act

The General Crimes Act was passed in 1817¹⁴⁹ and essentially extended federal law to criminal acts committed in Indian Country,¹⁵⁰ provided that the acts would be crimes in any place subject to exclusive jurisdiction by the United States under its general laws.¹⁵¹ This extension of the body of federal laws to crimes on tribal land had a few key exceptions: “(1) crimes committed by one Indian against the person or property of another Indian; (2) crimes that by treaty remain under

¹³⁹ *Worcester*, 31 U.S. at 559-61.

¹⁴⁰ FLETCHER, *supra* note 102, at 37; PEVAR, *supra* note 35, at 7 (outlining the history of the Andrew Jackson’s removal policies towards tribes from 1828 to 1887, forcing tribes to move further West).

¹⁴¹ FLETCHER, *supra* note 102, at 37 n.125; PEVAR, *supra* note 35, at 7.

¹⁴² FLETCHER, *supra* note 102, at 37.

¹⁴³ PEVAR, *supra* note 35, at 142–62 (outlining the general rules governing criminal jurisdiction over tribal lands).

¹⁴⁴ 496 U.S. 676, 681 n.1 (1990).

¹⁴⁵ See *infra* Section II-B.1.

¹⁴⁶ See *infra* Section II-B.2.

¹⁴⁷ See *infra* Section II-B.3.

¹⁴⁸ See *infra* Section II-B.4.

¹⁴⁹ CANBY, *supra* note 36, at 156.

¹⁵⁰ PEVAR, *supra* note 35, at 144.

¹⁵¹ ABIGAIL BOUDEWYNS ET AL., AMERICAN INDIAN LAW DESKBOOK § 4:9.

exclusive tribal jurisdiction; and (3) crimes for which the Indian defendant has already been punished under tribal law.”¹⁵² As such, the General Crimes Act expressly does not apply to crimes between Indians,¹⁵³ potentially showing Congressional intent in the early 1800s to preserve tribal sovereignty.¹⁵⁴ The primary function of the General Crimes Act was to transfer criminal laws into Indian Country to prosecute non-Indians,¹⁵⁵ but time has shown that the laws are inconsistently applied and the federal government rarely tries non-Indians for crimes committed in Indian country.¹⁵⁶

There is a narrow exclusion to the Indian on Indian crime exception. In *United States v. Markiewicz*, the Court of Appeals for the Second Circuit held that federal criminal jurisdiction could extend to Indian on Indian crimes if the crime itself is particularly federal in nature and the act of extending the law would protect a federal interest.¹⁵⁷

2. *Major Crimes Act*

The Major Crimes Act (MCA) allows for the most serious crimes committed by Indians on Indian lands to be tried by the federal government.¹⁵⁸ The law was enacted by Congress in 1885 in response to a seminal Supreme Court case,¹⁵⁹ *Ex Parte Crow Dog*.¹⁶⁰ In that case, an Indian man, Crow Dog, appealed his death sentence after he was found guilty of murdering another Sioux Indian, Spotted Tail, on the basis that the federal government had no jurisdiction over the crime of murder between two Indians on tribal land.¹⁶¹ The Supreme Court analyzed the existing statutory authority and found that the “general policy of the government towards the Indians” was to not be involved in these kinds of cases on tribal land.¹⁶² Instead, the Court looked to Congress for “a clear expression of [intent]” to intervene in cases traditionally governed

¹⁵² 18 U.S.C. § 1152 (2016); PEVAR, *supra* note 35, at 144.

¹⁵³ CANBY, *supra* note 36, at 155.

¹⁵⁴ PEVAR, *supra* note 35, at 144.

¹⁵⁵ CANBY, *supra* note 36, at 160.

¹⁵⁶ SMITH, *supra* note 2, at 32.

¹⁵⁷ 978 F.2d 786, 800 (2d Cir. 1992); *see also* *United States v. Begay*, 42 F.3d 486 (9th Cir. 1994).

¹⁵⁸ CANBY, *supra* note 36, at 20.

¹⁵⁹ PEVAR, *supra* note 35, at 144.

¹⁶⁰ 109 U.S. 556 (1883); *see* CANBY, *supra* note 36, at 20; *see also* DEER, *supra* note 4, at 35.

¹⁶¹ *Crow Dog*, 109 U.S. at 557.

¹⁶² *Id.* at 572.

by tribal law.¹⁶³ This statement indicates that the Court believed that Congress had the power to confer additional power over tribal lands.¹⁶⁴

Congress’ response was swift. Members of Congress believed that Native Americans should be subject to federal jurisdiction for particularly egregious crimes.¹⁶⁵ The 1885 passage of the Major Crimes Act greatly increased federal jurisdiction over tribal land.¹⁶⁶ The federal government then had authority over several crimes including murder, manslaughter, kidnapping, and rape.¹⁶⁷ The MCA has expanded since 1885 to include additional crimes, such as sexual abuse of minors, assault with a dangerous weapon, robbery, and incest.¹⁶⁸

Notably, the MCA only applies to “[a]ny Indian who commits against the person or property of another Indian *or* other person [certain crimes].”¹⁶⁹ It expressly does not apply to crimes committed by non-Indians,¹⁷⁰ and could be thought of as a method for the federal government to target Indians. The MCA has had negative impacts on Native American communities, especially when it comes to rape prosecutions.¹⁷¹ Although tribes exercise concurrent jurisdiction,¹⁷² tribal communities tend to rely on state or federal authorities to investigate and prosecute rape.¹⁷³ Additionally, tribal law is underdeveloped in the area of sexual assault crimes specifically because of the United States’ jurisdictional control over sexual assaults committed by Native defendants.¹⁷⁴ Unfortunately, the faith of Native Americans in the U.S. government to investigate these crimes has been misplaced: U.S. prosecutors decline to pursue seventy-five percent of crimes committed on tribal lands.¹⁷⁵

¹⁶³ *Id.*

¹⁶⁴ PEVAR, *supra* note 35, at 148.

¹⁶⁵ PEVAR, *supra* note 35, at 144.

¹⁶⁶ 18 U.S.C. § 1153 (2020).

¹⁶⁷ PEVAR, *supra* note 35, at 144–45.

¹⁶⁸ PEVAR, *supra* note 35, at 145.

¹⁶⁹ 18 U.S.C. § 1153(a) (2020) (emphasis added).

¹⁷⁰ DEER, *supra* note 4, at 36.

¹⁷¹ SMITH, *supra* note 2, at 32.

¹⁷² DEER, *supra* note 4, at 36.

¹⁷³ SMITH, *supra* note 2, at 32.

¹⁷⁴ SMITH, *supra* note 2, at 32.

¹⁷⁵ SMITH, *supra* note 2, at 32.

3. *Public Law 83-280*

Public Law 83-280,¹⁷⁶ commonly referred to as PL-280, adds a complicating wrinkle to the interplay between the federal government and tribal authorities over criminal jurisdiction. PL-280 was passed in 1953 and allowed six “mandatory” states to have exclusive jurisdiction over crimes committed on tribal land, with some exceptions for particular tribes.¹⁷⁷ Congress allowed federal power to shift to the states in these instances, abrogating federal authority.¹⁷⁸ The remaining states were allowed to “option” into sole criminal jurisdiction over tribal land.¹⁷⁹ According to the Supreme Court, states that elect to utilize the option and take criminal jurisdiction over tribal land have the power to limit the scope of that jurisdiction to particular regions within the state.¹⁸⁰

The mandatory PL-280 states with exclusive criminal jurisdiction on Native American lands are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.¹⁸¹ Ten additional states have utilized the option built into PL-280, with varying levels of jurisdictional scope over reservations by state.¹⁸² This law authorizes certain states to exercise control over tribe members, but tribes retain concurrent jurisdiction over their own tribe members for crimes committed on tribal land.¹⁸³ This introduces the possibility for Indians to be tried twice for the same crimes, in state courts and in tribal courts.¹⁸⁴ In PL-280 states, criminal jurisdiction covers crimes committed by non-Indians and Indians alike.¹⁸⁵ Unfortunately, due to poor understanding of the jurisdictional complexity regarding PL-280, “many tribal governments have historically been denied funding to develop tribal justice systems due to a misconception that Public Law 280 had stripped tribal governments of

¹⁷⁶ 18 U.S.C. § 1162 (2020); 28 U.S.C. § 1360 (2020).

¹⁷⁷ PEVAR, *supra* note 35, at 143.

¹⁷⁸ *Public Law 280*, TRIBAL L. AND POL’Y INST., <http://www.tribal-institute.org/lists/pl280.htm> (last visited Nov. 20, 2017).

¹⁷⁹ PEVAR, *supra* note 35, at 144.

¹⁸⁰ *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 488 (1979); PEVAR, *supra* note 35, at 124.

¹⁸¹ PEVAR, *supra* note 35, at 124–25.

¹⁸² PEVAR, *supra* note 35, at 124–25 (indicating that Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington have opted into PL-280 and listing the various geographical limitations the states selected).

¹⁸³ PEVAR, *supra* note 35, at 156.

¹⁸⁴ PEVAR, *supra* note 35, at 157.

¹⁸⁵ *State Jurisdiction Over Offenses Committed by or Against Indians in the Indian Country*, Pub. L. No. 83-280.

jurisdiction.”¹⁸⁶ State authorities do not work well with tribal authorities due in part to prejudice and power differentials.¹⁸⁷ Racism pervades in PL-280 states and affects the willingness of state police to investigate crimes committed against Indians.¹⁸⁸ According to a 2017 NPR poll, “[thirty-six] percent of Native Americans living in majority-Native areas say they avoid calling the police because of a fear of discrimination, and nearly half say they or a family member feels he or she has been treated unfairly by the courts.”¹⁸⁹ Some of the tension between the state authorities and the tribes may arise from the competition over local resources.¹⁹⁰ Still, rape victims feel afraid to come forward and do not believe that anything will happen after they report assaults to the state authorities.¹⁹¹

Lastly, state police and prosecutors have a poor understanding of jurisdiction in PL-280 states,¹⁹² which contributes to the problem of under-investigation and under-prosecution. PL-280 states do not receive specified funding from the U.S. to support local police and prosecutors,¹⁹³ which leads to a conflict over resources between state crimes and crimes committed on reservations. The structure in PL-280 states is poorly designed and lacks accountability, often leaving reported cases in the wind.

4. *Indian Civil Rights Act*

The Indian Civil Rights Act (ICRA)¹⁹⁴ was passed by Congress in 1968.¹⁹⁵ Congress transferred several individual rights from the U.S. Constitution, including the First, Fourth, Fifth and Sixth Amendments, onto tribal lands.¹⁹⁶ However, Congress also instituted severe caps on

¹⁸⁶ SARAH DEER ET AL., FINAL REPORT: FOCUS GROUP ON PUBLIC LAW 280 AND THE SEXUAL ASSAULT OF WOMEN, TRIBAL L. AND POL’Y INST. 2 (2007), <http://www.tribal-institute.org/download/Final%20280%20FG%20Report.pdf>.

¹⁸⁷ *Id.* at 9.

¹⁸⁸ Telephone Interview with Jeremy NeVilles-Sorell, Training and Res. Dir., Mending the Sacred Hoop (Nov. 27, 2017).

¹⁸⁹ Melodie Edwards, *For Native Americans Facing Sexual Assault, Justice Feels out of Reach*, NPR (Nov. 14, 2017, 5:00 AM), <https://www.npr.org/2017/11/14/563059526/for-native-americans-facing-sexual-assault-justice-feels-out-of-reach>.

¹⁹⁰ DEER, *supra* note 186, at 9.

¹⁹¹ DEER, *supra* note 186, at 10.

¹⁹² DEER, *supra* note 186, at 7.

¹⁹³ DEER, *supra* note 186, at 7.

¹⁹⁴ 25 U.S.C. §§ 1301–1303 (2016).

¹⁹⁵ DEER, *supra* note 4, at 39.

¹⁹⁶ DEER, *supra* note 4, at 39.

punishments that the tribal courts could order.¹⁹⁷ Due to a mistrust of tribal courts and a general belief that they had a tendency to abuse power, Congress limited the maximum jail term a tribal court could issue to six months.¹⁹⁸ The ICRA was amended to increase the possible jail term to one year,¹⁹⁹ but that restriction still heavily limits the capacity of tribal governments to punish guilty defendants proportionately to the crimes they have committed.

In order to utilize the term increase, the Indian Civil Rights Act outlines rights that Indian tribes must grant to criminal defendants, which have since been incorporated into the Violence Against Women Reauthorization Act of 2013,²⁰⁰ including the following: (1) effective assistance of counsel; (2) public defenders for indigent defendants; (3) trained tribal judges licensed to practice in the U.S.; (4) public availability of tribal criminal laws; and (5) proper records of trials.²⁰¹ Tribal governments have experienced serious difficulty implementing the mandates of the ICRA, so much so that the term increase is not a practical reality.²⁰²

C. *Oliphant v. Suquamish Indian Tribe*

Oliphant v. Suquamish Indian Tribe,²⁰³ decided in 1978, is one of the most influential Supreme Court decisions regarding tribal

¹⁹⁷ DEER, *supra* note 4, at 40.

¹⁹⁸ DEER, *supra* note 4, at 40.

¹⁹⁹ 25 U.S.C. § 1302(a)(7) (2016); DEER, *supra* note 4, at 40.

²⁰⁰ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904(d)(2), 127 Stat. 54, 122 (2013).

²⁰¹ 25 U.S.C. § 1302(c) (2020) (“(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding— (A) has sufficient legal training to preside over criminal proceedings; and (B) is licensed to practice law by any jurisdiction in the United States; (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.”).

²⁰² Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017); Telephone Interview with Jeremy NeVilles-Sorell, Training & Res. Dir., Mending the Sacred Hoop (Nov. 27, 2017).

²⁰³ 435 U.S. 191 (1978).

jurisdiction. In *Oliphant*, the Suquamish Indian Tribe of Washington had enacted a legal code that extended the tribe’s criminal jurisdiction over both Indians and non-Indians on their tribal land.²⁰⁴ Mark David Oliphant was arrested by tribal police and charged with assaulting an officer and resisting arrest.²⁰⁵ In a lateral case, Daniel Belgrade was arrested following a high-speed chase by tribal authorities.²⁰⁶ Oliphant and Belgrade filed writs of habeas corpus and argued that the Suquamish Indian Provisional Court did not have criminal jurisdiction over non-Indians that commit crimes on tribal lands.²⁰⁷

The Suquamish argued that it had jurisdiction that stemmed from its “retained inherent powers of government over the Port Madison Indian Reservation.”²⁰⁸ In the majority opinion, Justice Rehnquist states that “few Indian tribes maintained any semblance of a formal court system,” instead utilizing a system of social and religious pressure rather than formal adjudicative processes.²⁰⁹ Justice Rehnquist provides two telling references in his opinion. First, he referenced a 144-year-old report in which an Indian Affairs agent stated, “Indian tribes are without laws, and the chiefs without much authority to exercise any restraint.”²¹⁰ Second, he borrowed some of the arguments of *Johnson v. M’Intosh*²¹¹ to show that the United States has supreme authority, and that as a result tribal sovereignty is “necessarily diminished.”²¹² Although he acknowledged that some Indian courts had become more “sophisticated,” Justice Rehnquist unceremoniously concluded that Congress would need to implement changes if it wanted tribes to have jurisdiction over non-Indians.²¹³ *Oliphant* decidedly removed tribes’ capacity to maintain criminal jurisdiction over non-Indians.²¹⁴

Justice Thurgood Marshall offered a powerful dissenting opinion.²¹⁵ Although it was brief, Justice Marshall wrote:

I agree with the court below that the ‘power to preserve order on the reservation . . . is a sine qua

²⁰⁴ *Id.* at 193.

²⁰⁵ *Id.* at 194.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 196 (quoting the argument of the Respondents, Suquamish Indian Tribe).

²⁰⁹ *Oliphant*, 435 U.S. at 197.

²¹⁰ *Id.* (quoting H.R. REP. NO. 23-474, at 91 (1834)).

²¹¹ 21 U.S. 543 (1823).

²¹² *Oliphant*, 435 U.S. at 209 (quoting *Johnson*, 21 U.S. at 574).

²¹³ *Id.* at 211–12.

²¹⁴ DEER, *supra* note 4, at 6–7.

²¹⁵ *Oliphant*, 435 U.S. at 212 (Marshall, J., dissenting).

non of the sovereignty that the Suquamish originally possessed.’ In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a *necessary aspect of their retained sovereignty* the right to try and punish all persons who commit offenses against tribal law within the reservation. Accordingly, I dissent.²¹⁶

Justice Thurgood Marshall’s dissenting opinion harkens back to Chief Justice John Marshall’s change of heart in the 1832 case *Worcester v. Georgia*:²¹⁷ underscoring the importance of inherent tribal sovereignty. This was unfortunately lost on the majority of the Court, but it remains a favorable theory for future solutions to the problems presented both by *Oliphant*²¹⁸ and by the incredibly complex jurisdictional system.

Oliphant has resulted in non-Indian criminals increasingly targeting Native Americans.²¹⁹ Non-Indians that commit sexual assault against Indian women on tribal land cannot be subjected to tribal courts.²²⁰ If tribal courts even attempt to exercise jurisdiction over such cases, they could be held liable and risk federal review.²²¹ According to Amy Casselman, an adjunct professor at San Francisco State University,²²² attackers have used online chat rooms and forums for guidance on how to rape women and avoid prosecution.²²³ Some of these forums point to the inherent weaknesses of tribal criminal jurisdiction, indicating that non-Indians can “do whatever [they] want [on reservations]” and tribal authorities are unable to act.²²⁴ Although sexual assault committed by non-Indians falls under state or federal jurisdiction,²²⁵ the

²¹⁶ *Id.* (emphasis added).

²¹⁷ 31 U.S. 515 (1832).

²¹⁸ *Oliphant*, 435 U.S. at 191.

²¹⁹ DEER, *supra* note 4, at 41; SMITH, *supra* note 2, at 31 (“[B]ecause of complex jurisdictional issues, perpetrators of sexual violence can usually commit crimes against Native Women with impunity.”).

²²⁰ DEER, *supra* note 4, at 7.

²²¹ DEER, *supra* note 4, at 41.

²²² S.F. STATE UNIV., Amy Casselman, <https://faculty.sfsu.edu/~amycass/> (last visited Nov. 25, 2017).

²²³ Jessica Rizzo, *Native American Women are Rape Targets because of a Legislative Loophole*, VICE (Dec. 16, 2015), https://www.vice.com/en_us/article/bnpb73/native-american-women-are-rape-targets-because-of-a-legislative-loophole-511.

²²⁴ *Id.*

²²⁵ See *supra* Sections II-B.1. and II-B.3.

description illustrates the tribal authorities’ forced limitation in investigating crimes against their own people.

III. MODERN LEGISLATIVE SOLUTIONS

A. *Tribal Law and Order Act of 2010 and the Violence Against Women Reauthorization Act of 2013*

1. *Tribal Law and Order Act of 2010*

The Tribal Law and Order Act of 2010 (TLOA) increased the capacity for tribal governments to order sentences for criminal offenses.²²⁶ Under the Indian Civil Rights Act (ICRA), tribes were initially limited to sentences of six months, less than the punishment for misdemeanor offenses in most states.²²⁷ The ICRA was amended to allow for maximum sentences of one year.²²⁸ Section 234 of the TLOA increased the maximum sentence to three years,²²⁹ with the potential to stack up to three sentences for a maximum term of nine years.²³⁰ Tribes are able to utilize the TLOA increase in cases where criminal defendants have been “previously convicted of the same or comparable offense by any jurisdiction in the United States” or are “prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.”²³¹ Further, tribal courts need to provide defendants with “the right to effective assistance of counsel” and defense attorneys at the tribe’s expense,²³² as well as all of the rights guaranteed to criminal defendants under the ICRA.²³³ Many tribes lack the resources to implement these requirements.²³⁴

²²⁶ DEER, *supra* note 4, at 101.

²²⁷ DEER, *supra* note 4, at 40.

²²⁸ 25 U.S.C. § 1302(a)(7)(B) (2016); DEER, *supra* note 4, at 40.

²²⁹ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234(a)(7)(C), 124 Stat. 2258, 2280 (2010); DEER, *supra* note 4, at 101; Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 436 (2014).

²³⁰ Ennis & Mayhew, *supra* note 229, at 436.

²³¹ Ennis & Mayhew, *supra* note 229, at 436.

²³² Ennis & Mayhew, *supra* note 229, at 437.

²³³ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234(a), 124 Stat. 2258, 2279–80 (2010).

²³⁴ DEER, *supra* note 4, at 42–43.

2. *Violence Against Women Reauthorization Act of 2013*

The Violence Against Women Act (VAWA) was reauthorized on March 7, 2013, by President Barack Obama.²³⁵ The reauthorization expanded tribal authority, allowing Indian tribes to exercise criminal jurisdiction over non-Indians in domestic violence cases, dating violence cases, and violations of protective orders.²³⁶ Indian tribes were granted the power to exercise their own jurisdiction against non-Indians if the crime was committed on tribal land.²³⁷ Other limitations to the jurisdiction over non-Indians under VAWA include that the non-Indian defendant “(1) reside[] within the Indian country of the tribe, (2) is employed within the Indian country of the tribe, or (3) is the spouse, intimate partner, or dating partner of a tribal member or other Indian residing within the Indian country of the tribe.”²³⁸

Indian tribes were expressly forbidden from exercising jurisdiction over non-Indians since the *Oliphant* decision, so although VAWA’s policy change for tribal sovereignty was incremental,²³⁹ it signified a first step toward reversing *Oliphant*. However, in order for tribal governments to utilize the power outlined in VAWA, they need to comport with certain federal protections.²⁴⁰ This includes:

[A]ll other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant [and the] right to a trial by an impartial jury that is drawn from sources that (A) reflect a fair cross-section of the community; and (B) do not systematically exclude any distinctive group in the community, including non-Indians²⁴¹

²³⁵ Ennis & Mayhew, *supra* note 229, at 421.

²³⁶ Ennis & Mayhew, *supra* note 229, at 421; Mullen, *supra* note 14, at 811.

²³⁷ DEER, *supra* note 4, at 102.

²³⁸ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 204(b)(4)(B), 127 Stat. 54, 122 (2013); Ennis & Mayhew, *supra* note 229, at 439.

²³⁹ Ennis & Mayhew, *supra* note 229, at 421.

²⁴⁰ Ennis & Mayhew, *supra* note 229, at 422.

²⁴¹ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 204(d)(3)–(4), 127 Stat. 54 (2013) (internal punctuation omitted).

Additionally, in order for a tribe to exercise the expanded jurisdiction under VAWA, it needs to comply with all requirements set forth in the Tribal Law and Order Act of 2010, and in turn the Indian Civil Rights Act.²⁴²

B. *Efficacy of TLOA and VAWA*

While TLOA and VAWA²⁴³ represent positive incremental changes, there have been numerous problems with their use. First, implementation on reservations has proved difficult, completely undercutting the efficacy of the legislation.²⁴⁴ For example, tribes face tremendous challenges educating tribe members about available relief, and neither TLOA nor VAWA are well understood within tribes.²⁴⁵ While improvements have been made legislatively, tribes still need to adopt and adhere to internal policies that would allow them to pursue any additional benefits the laws offer, which creates a substantial barrier to these purported solutions.²⁴⁶

Getting tribal leaders to meet the necessary federal requirements is a hurdle that few tribes have been able to surpass.²⁴⁷ Sunrise Black Bull of the Rosebud Sioux tribe detailed her ongoing efforts to inform the Rosebud tribal council about the additional protections offered by TLOA and VAWA.²⁴⁸ Unfortunately, despite asking tribal council to adopt procedures to allow the tribe to benefit from the laws, the council has continuously refused to vote on the issue, often failing to even reach the quorum required to make such decisions.²⁴⁹ Sunrise described a recent council meeting²⁵⁰ in which she and another Rosebud Sioux tribe

²⁴² Tribal Court Clearinghouse, *Introduction to the Violence Against Women Act*, TRIBAL L. & POL’Y INST., tribal-institute.org/lists/title_ix.htm (last visited Nov. 27, 2018).

²⁴³ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234(a)(2), § 202(a)(7)(C), 124 Stat. 2258, 2280 (2010); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 204(d)(3), 127 Stat. 54 (2013).

²⁴⁴ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ See Ennis & Mayhew, *supra* note 229, at 422 n.9 (explaining the failure to implement the requirements due to a lack of funding).

²⁴⁸ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

²⁴⁹ *Id.*

²⁵⁰ Although Council meetings are posted online by a YouTube account called Rosebud Sioux Tribe at <https://www.youtube.com/channel/UCrUgHaUYJ08gyvo9hjSkpPQ/videos>, the council meeting does not appear to have been uploaded. Sunrise Black Bull stated that it occurred in mid-October 2017.

member chastised the council for not moving forward with necessary internal protocols shouting, “Enough is enough.” The meeting, which was televised live to the rest of the reservation, forced the tribal council to respond in real time with a promise that it would begin the necessary strategic planning for implementation.²⁵¹ Although the tribal council made assurances during that meeting, it remains unclear whether it will begin necessary implementation procedures.

Coordination with tribal council is a problem that deeply affects whether U.S. legislation can help Natives living on reservations. In the Rosebud Sioux tribe, tribal council members serve three-year terms.²⁵² According to Sunrise, the constant turnover on the council poses an ongoing challenge as she attempts to convince them to adopt policies that would help Native women.²⁵³ She believes that many of the council members have either been victimized themselves or are perpetrators that are unwilling to institute positive changes from within: “How can you move forward when your lenses are blurred?”²⁵⁴

Sunrise’s concerns were echoed by Jeremy NeVilles-Sorell, Training and Resource Director of Mending the Sacred Hoop, an organization funded by the Department of Justice that works primarily as a training arm with tribal governments “to address violence against Indian women.”²⁵⁵ In its operations, Mending the Sacred Hoop coordinates with tribal and state authorities to provide them with the guidelines necessary to implement TLOA and VAWA.²⁵⁶

One of Mr. NeVilles-Sorell’s primary concerns as a training specialist on tribal law and order codes is that tribal councils experience constant turnover and are controlled in large part by family politics, severely impeding the likelihood that the tribe will meet federal requisites.²⁵⁷

Beyond internal politics, there are further barriers for tribal governments to implement these legislative powers. The process of updating these codes can cost between \$25,000 - \$35,000.²⁵⁸ Mr. NeVilles-

²⁵¹ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Telephone Interview with Jeremy NeVilles-Sorell, Training & Res. Dir., Mending the Sacred Hoop (Nov. 27, 2017); Mending the Sacred Hoop, *About Us*, <http://mshoop.org/about-us/history/> (last visited Nov. 27, 2017).

²⁵⁶ *Id.*

²⁵⁷ Telephone Interview with Jeremy NeVilles-Sorell, Training & Res. Dir., Mending the Sacred Hoop (Nov. 27, 2017).

²⁵⁸ *Id.*

Sorell feels that the cost creates a difficult hurdle to passing internal tribal law and order codes that accurately address the issue of violence against women.²⁵⁹ Further, even if individual tribes raise enough money to develop appropriate codes, the codes need to be approved by the tribal government before they can be fully enacted.²⁶⁰ The Hopi, he explained, were one of the first tribes to develop a full tribal law and order code that was compliant with federal guidelines.²⁶¹ However, due to internal politics and poor community education about the proposed tribal law and order code, it was never actually passed by a majority of the voting members of the tribe to be implemented.²⁶² Additionally, the federal government has been authorizing fewer and fewer grants for Indians in the last few years, which impacts the capacity of non-profit organizations to assist tribes with federal compliance.²⁶³ Around five years ago, the government offered approximately 100 federal grants.²⁶⁴ This year, the number has dropped to around 30 grants.²⁶⁵

Even when tribes have met the compliance requirements necessary to utilize TLOA and VAWA, Mr. NeVilles-Sorell described how racism negatively impacts enforcement in sexual violence cases involving Indian women.²⁶⁶ In a recent Minnesota case, an Indian woman was picked up by police from the side of the road.²⁶⁷ She had noticeable strangulation markings on her throat and was rendered unconscious.²⁶⁸ After she recovered from her injuries, she told the Minnesota state police that she had been physically abused by her non-Native spouse who lived off the reservation.²⁶⁹ The Indian woman obtained a peace order under VAWA against the non-Indian that attacked her, but the state police refused to serve him on the grounds that he could not be located.²⁷⁰ His home was directly across the street from the police station.²⁷¹

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Telephone Interview with Kimberley, Training Coordinator, Nat'l Indian Women's Health Res. Ctr. (Dec. 1, 2017). Kimberley declined to provide her last name.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Telephone Interview with Jeremy NeVilles-Sorell, Training & Res. Dir., Mending the Sacred Hoop (Nov. 27, 2017).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

Another difficulty in increasing tribal self-governance is that the federal government is not providing sufficient funding to maintain their court systems and prisons.²⁷² The federal government offers grants to agencies like Mending the Sacred Hoop, but not enough direct money to tribes to assist them with paying for these expanded criminal systems.²⁷³ For example, the sentence cap increase in TLOA is a large step towards allowing tribes to sentence criminals more proportionately to their crimes, but it creates significant pressure on poor tribes that cannot afford to maintain convicts in their jail system.²⁷⁴

IV. REMEDIES

A. *Civil Torts*

Although civil jurisdiction has not been a prominent focus of scholars or criminal justice advocates,²⁷⁵ Indian women could use civil tort actions to deter sexual violence on reservations while simultaneously providing themselves with a viable means of redress. On tribal land, “federal courts are not courts of general jurisdiction.”²⁷⁶ There are no statutory limitations in terms of the relief that tribal courts may grant, and they maintain “exclusive jurisdiction over a suit by any person against an Indian for a claim arising in Indian country.”²⁷⁷ *Montana v. United States*²⁷⁸ limited tribal authority in civil cases over non-Indian defendants with two exceptions:

- (1) that a tribe could regulate ‘activities of non-members who enter consensual relationships with the tribe or its members,’ as through commercial dealings, and
- (2) that a tribe could exercise ‘civil authority over the conduct of non-Indians on fee lands within its

²⁷² Telephone Interview with Jeremy NeVilles-Sorell, Training & Res. Dir., Mending the Sacred Hoop (Nov. 27, 2017).

²⁷³ *Id.*

²⁷⁴ Melodie Edwards, *For Native Americans Facing Sexual Assault, Justice Feels out of Reach*, NPR (Nov. 14, 2017, 5:00 AM), <https://www.npr.org/2017/11/14/563059526/for-native-americans-facing-sexual-assault-justice-feels-out-of-reach>.

²⁷⁵ See CANBY, *supra* note 36, at 185–231 (offering a description of the layout of civil jurisdiction in Indian country).

²⁷⁶ CANBY, *supra* note 36, at 217.

²⁷⁷ CANBY, *supra* note 36, at 199.

²⁷⁸ 450 U.S. 544 (1981).

reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.²⁷⁹

Indian women, through the express power over Indian defendants and through utilization of the second *Montana* exception,²⁸⁰ could sue perpetrators of sexual assault, Indian or non-Indian, for traditional torts like assault, battery, intentional infliction of emotional distress, and potentially false imprisonment if the tortious conduct occurred on tribal land. While no particular legal remedy can make a sexual assault survivor whole after their experience, civil tort actions can provide a victim with a more viable option than the current criminal system.²⁸¹

The criminal system presents several problems to victims who are interested in their own individual view of justice.²⁸² The civil system also would allow sexual assault survivors more control over their cases, whereas the criminal system can sometimes force victims to testify against their will in the context of crimes committed against the state.²⁸³ Sexual assault survivors do not necessarily wish to go through the traditional criminal system, which many view as not representative of their own interests.²⁸⁴ The civil system presents a more individualistic response,²⁸⁵ wherein victims can choose whether to move forward in filing a complaint as well as the direction that their case should take.

Dollar General Corp. v. Mississippi Band of Choctaw Indians,²⁸⁶ a 2016 case concerning civil tort litigation following a sexual assault, presents an interesting new development in tribal sovereignty. A Dollar General store on the Mississippi Choctaw reservation hired a

²⁷⁹ CANBY, *supra* note 36, at 203 (quoting *Montana*, 450 U.S. 544, 565–66 (1981)).

²⁸⁰ *Montana*, 450 U.S. at 566.

²⁸¹ See Leigh Goodmark, “*Law and Justice are Not Always the Same*”: *Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. UNIV. L. REV. 707, 718 (2015) (“People subjected to abuse cannot expect to have their experiences validated by the criminal justice system.”) (discussing the problems with a criminal justice model in the context of intimate partner abuse).

²⁸² See generally *id.* (presenting the non-criminal model of community justice forums as an alternative to traditional criminal justice systems).

²⁸³ *Id.* at 718.

²⁸⁴ See DEER, *supra* note 186, at 6 (indicating that Indians have low trust in state criminal justice systems from a 2007 focus group).

²⁸⁵ See Goodmark, *supra* note 281, at 727 (“Confining people subjected to abuse to one vision of justice is disempowering.”).

²⁸⁶ 136 S. Ct. 2159 (2016), *aff’g* 746 F.3d 167 (5th Cir. 2014) Subsequent citations will use the Fifth Circuit decision because the Supreme Court issued only a memorandum affirming the Fifth Circuit decision by an equally divided court. *Id.* at 2160.

thirteen-year-old worker through a tribe-operated youth opportunity program.²⁸⁷ During the child's employment, the Dollar General store manager sexually molested him.²⁸⁸ John Doe, the victim of the attack, brought an action in tort against Townsend, a non-Indian, in tribal court.²⁸⁹ Defendants Dollar General Corp. and Townsend filed a complaint in the U.S. District Court for the Southern District of Mississippi alleging that the tribal court lacked jurisdiction.²⁹⁰ When the District Court disagreed, the corporate Defendants appealed to the Fifth Circuit.²⁹¹

The Fifth Circuit held that the tribal court had jurisdiction over the *Doe* case.²⁹² Citing Native American tribes' inherent sovereign immunity, as well as the non-Indian's implicit consent to tribal jurisdiction, the court held that *Oliphant* need not be applied in the civil context and that the *Doe* case could be tried by the tribal authorities.²⁹³ According to Judge Jerry Smith's dissenting opinion, the decision marked:

[T]he first time . . . a federal court of appeals [has upheld] Indian tribal-court tort jurisdiction over a non-Indian . . . without a finding that jurisdiction is "necessary to protect tribal self-government or to control internal relations." The majority's alarming and unprecedented holding far outpaces the Supreme Court, which has *never upheld* Indian jurisdiction over a nonmember defendant.²⁹⁴

The Supreme Court of the United States affirmed the Fifth Circuit decision by an equally divided court without issuing an opinion,²⁹⁵ potentially pointing to a swing towards favoring tribal sovereignty even in cases with non-Indian defendants.

Despite the positive interpretation of the Supreme Court and Fifth Circuit, a potential problem with the civil system alternative is that not all perpetrators can pay the damages awarded to the victim. In some ways, that can limit the potential appeal for a civil attorney to take a

²⁸⁷ *DolgenCorp v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 169–70.

²⁹¹ *Id.* at 167.

²⁹² *Id.* at 169.

²⁹³ *DolgenCorp*, 746 F.3d at 177.

²⁹⁴ *Id.* at 177–78 (Smith, J., dissenting) (emphasis added) (citations omitted).

²⁹⁵ *Dollar Gen. Corp. v. Choctaw*, 136 S. Ct. 2159 (2016).

sexual assault case. Lawyers would need to act in part as an activist, individually devoted to enacting social change through cases that may or may not lead to large awards for damages. In the past, lawyers who have been interested in enacting new rape laws and developing new codes have not necessarily translated into a cohesive “public interest bar” on sexual assault issues.²⁹⁶ Attorneys that work on these civil cases should be interested in how they can create social change while simultaneously helping the individual survivor recover from the trauma of assault.

B. *Reversal of Oliphant v. Suquamish*

Tribal authority will continue to be heavily impaired until the Supreme Court’s decision in *Oliphant*²⁹⁷ is successfully reversed or overridden by Congress.²⁹⁸ As discussed above, *Oliphant* forbids tribes from exercising jurisdiction over crimes committed by non-Indians on tribal land.²⁹⁹ In order for tribes to be able to adequately address the rampant issue of sexual violence against Indian women, either the Supreme Court or Congress must allow them to have power over non-Indian offenders. Without this, non-Indians will continue to believe, perhaps rightfully so, that there are no consequences for their actions.³⁰⁰ If Congress is to create legislation that grants tribes criminal jurisdiction for these crimes, it should also increase its funding allocation to the maintenance of tribal governments, in accordance with the trust responsibility that the United States has adopted towards tribes.³⁰¹

²⁹⁶ ROSE CORRIGAN, *UP AGAINST THE WALL: RAPE REFORM AND THE FAILURE OF SUCCESS* 26 (NYU Press 2013).

²⁹⁷ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

²⁹⁸ See generally *Native Women: Protecting, Shielding, and Safeguarding our Sisters, Mothers, and Daughters: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 75 (2011) (statement of Sarah Deer, Assistant Professor, William Mitchell School of Law) (discussing the effect of *Oliphant v. Suquamish Indian Tribe* on tribal authority).

²⁹⁹ *Oliphant*, 435 U.S. at 212.

³⁰⁰ See Jessica Rizzo, *Native American Women are Rape Targets because of a Legislative Loophole*, VICE (Dec. 16, 2015), https://www.vice.com/en_us/article/bnpb73/native-american-women-are-rape-targets-because-of-a-legislative-loop-hole-511 (discussing the fact that non-Indians are aware of this loophole); Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Women’s Soc’y (Nov. 27, 2017).

³⁰¹ See CANBY, *supra* note 36, at 39–49; PEVAR, *supra* note 35, at 32–45 (outlining the trust responsibility).

C. Working Towards Self-Determination and the Removal of Intervention

Beyond the common goal of increasing criminality and expanding the criminal justice system,³⁰² there is potential for healing through traditional tribal values. On the Rosebud reservation, Lakota ceremonies are used to help tribe members shed some of their internalized trauma.³⁰³ Sun Dances can be opportunities not only for self-healing through the ritual and sacrifice of the fast, but also for the community to become involved in traditional methods of punishment.³⁰⁴ For example, in the past, men who had been banished from the tribe could approach tribal leaders during the Sun Dance to seek forgiveness.³⁰⁵ Tribe leaders would tie several buffalo skulls to the men. As they danced for days in the hot sun, the weight of the skulls would trail behind them, symbolic and physical manifestations of their wrongdoing.³⁰⁶ After enough time passed, tribe leaders would declare the moral debt paid and the men could return to their community.³⁰⁷

During a recent Sun Dance, Rick Two Dogs,³⁰⁸ a well-known medicine man of the Oglala Sioux tribe, told a story about traditional punishment.³⁰⁹ A Lakota man at Fort Laramie had gotten drunk and raped his daughter after returning home.³¹⁰ The matriarchal Tokala Sioux society³¹¹ collected the man and put him in the center of a circle. Similar to the *nari adalats* of India,³¹² a panel of grandmothers within

³⁰² See Goodmark, *supra* note 281, at 732.

³⁰³ Telephone interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ Dennis M. Searles, *Bad Medicine*, LA TIMES (Nov. 13, 1994), http://articles.latimes.com/1994-11-13/news/mn-62010_1_medicine-man (contrasting “true” medicine men like Rick Two Dogs against phony shamans that emerged following the release of the movie *Dances with Wolves*).

³⁰⁹ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017) (describing a conversation she had with a medicine man named Rick Two Dogs near the beginning of November 2017).

³¹⁰ *Id.*

³¹¹ CANKU LUTA, *Who Are Tokalas*, <http://www.canku-luta.org/tokalas.html> (last visited Nov. 27, 2017) (describing “Tokalas” as Lakota warriors).

³¹² Goodmark, *supra* note 281, at 733 n.159 (“Village collectives, seeing violence as a significant community concern but recognizing that the formal legal system would not adequately address the issue, created *nari adalats* The women use their status as community members to inform their work . . . deploying ‘their knowledge of local practices, customs, and social networks to gather evidence and negotiate agreements.’”).

the tribe listened to what happened and ordered his punishment: to be buried alive.³¹³ U.S. soldiers stationed at Fort Laramie looked on as the punishment was carried out, without intervening.³¹⁴ Although this may seem like a stark punishment, sexual crimes of that nature rarely occurred when the community governed.³¹⁵

Informal systems could assist Indians as an alternative method of seeking justice, especially considering the failure of the criminal system to deliver.³¹⁶ Rick Two Dogs’ story is harsh, but represents the informal powers that tribes formerly maintained.³¹⁷ Due in large part to the United States’ systematic destabilization of Indian tribes’ internal power structure, many tribal members are disconnected from the stories that make up their collective history:³¹⁸

Today we have lost a lot of the traditions, values, ways of life, laws, language, teachings of the Elders, respect, humility as Anishinabe people because of the European mentality we have accepted. For the Anishinabe people to survive as a Nation, together we must turn back the pages of time. We must face reality, do an evaluation of ourselves as a people – why we were created to live in harmony with one another as Anishinabe people and to live in harmony with the Creators creation.³¹⁹

One of Sunrise Black Bull’s initiatives for 2018 was a reeducation program for the young men in the Rosebud Sioux Tribe.³²⁰ According to Sunrise, the loss of tribal values deeply impacts the capacity for

³¹³ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Women’s Soc’y (Nov. 27, 2017).

³¹⁴ *See id.* (describing a conversation she had with a medicine man named Rick Two Dogs near the beginning of November 2017).

³¹⁵ Telephone Interview with Jeremy NeVilles-Sorell, Training & Resource Director, Mending the Sacred Hoop (Nov. 27, 2017).

³¹⁶ Goodmark, *supra* note 281, at 732.

³¹⁷ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017) (describing a conversation she had with a medicine man named Rick Two Dogs near the beginning of November 2017).

³¹⁸ SMITH, *supra* note 2, at 20.

³¹⁹ SMITH, *supra* note 2, at 20 (quoting *Anishinabe Values/Social Law regarding Wife Battering*, Indigenous Woman I, no. 3 (n.d.)).

³²⁰ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

the community to “rule” as it once did.³²¹ It also led to a lack of respect amongst the tribal boys for women within their once matriarchal society.³²² Many tribes have lost touch with their cultural values, in part because of Indian boarding school systems and aggressive phases of assimilation conducted by the federal government.³²³ For tribes to work towards a community-based model once again, their own tribal members may need to go through a healing and restoration process to revive lost tribal values and practices.³²⁴ Still, the community-based justice model has apparently worked for tribes as a deterrent for sexual assault³²⁵ and it is a viable option that would restore both tribal sovereignty and traditional tribal values.

V. CONCLUSION

Indian women suffer from demoralizing, harmful sexual violence at the highest rate³²⁶ in the U.S. because of centuries old racist biases stemming from colonialism,³²⁷ and the federal government has failed to rectify the problem.³²⁸ Although TLOA and VAWA represent significant steps towards resolving the ongoing victimization of Indian women, their implementation falls short of their potential. Overturning *Oliphant*³²⁹ would constitute a significant stride towards tribal sovereignty. Outside of the criminal system, civil torts can help victims of sexual assault regain their voice through individualized control over their own cases.³³⁰ The revival of tribal customs and practices would connect tribes to the community-based systems they once used to deter these acts of sexual violence, reinvigorating their lost culture and reinforcing their own inherent power.³³¹ The United States is not honoring its end of the trust relationship³³² and must take immediate action to offer tribes greater authority over the cases that affect them most.

³²¹ *Id.*

³²² *Id.*

³²³ DEER, *supra* note 186, at 11.

³²⁴ Telephone Interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

³²⁵ SMITH, *supra* note 2, at 20 (quoting *Anishinabe Values/Social Law regarding Wife Battering*, Indigenous Woman 1, no. 3 (n.d.)).

³²⁶ *BJS Report* at 3, 7, 13.

³²⁷ SMITH, *supra* note 2, at 8.

³²⁸ SMITH, *supra* note 2, at 32.

³²⁹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

³³⁰ Goodmark, *supra* note 281, at 717–18.

³³¹ Telephone interview with Sunrise Black Bull, Project Coordinator, White Buffalo Calf Woman Soc’y (Nov. 27, 2017).

³³² PEVAR, *supra* note 35, at 59.