

## SHOOTING DOWN OLIPHANT: SELF-DEFENSE AS AN ANSWER TO CRIME IN INDIAN COUNTRY

by  
Adam Crepelle\*

*Crime is a dire public safety problem in Indian country as Indians suffer violent crime at twice the rate of any other racial group. Indian country's unique and confusing jurisdictional scheme combined with a shortage of police leave Indians easy targets for those looking to commit crimes. A largely unexplored answer to crime in Indian country is self-defense. This Article posits that the United States self-defense jurisprudence may make self-defense the most practical solution to crime in some parts of Indian country.*

*The Article discusses the history of self-defense laws and the relationship between self-defense laws and firearms. The Article next discusses the evolution of self-defense laws in the United States. The Article then provides an overview of the historical relationship between Indians and guns as well as gun rights and self-defense laws in Indian country today. An examination of criminal justice in Indian country follows along with a discussion of issues that may confront tribal self-defense laws.*

I.	INTRODUCTION.....	1286
II.	SELF-DEFENSE AND FIREARMS .....	1286
	A. <i>A Right Both Natural and Divine</i> .....	1287
	B. <i>Historical Laws on Self-Defense and Arms</i> .....	1289
	C. <i>The Supreme Court on the Second Amendment</i> .....	1293
	1. <i>The First Three Second Amendment Cases</i> .....	1293
	2. <i>Second Amendment and Self-Defense</i> .....	1295
	3. <i>Second Amendment and Selective Incorporation</i> .....	1296
III.	SELF DEFENSE IN THE UNITED STATES.....	1298
	A. <i>The Supreme Court on Self-Defense</i> .....	1298
	1. <i>Stand Your Ground</i> .....	1299
	2. <i>Reflection and the Reasonable Man</i> .....	1301
	B. <i>Self-Defense Laws</i> .....	1302
IV.	INDIANS, GUNS, AND RESISTANCE .....	1308
	A. <i>History</i> .....	1308

---

\* Visiting Assistant Professor, Southern University Law Center. I would like thank Professor Robert Williams for his comments on this Article.

	<i>B. Firearms in Contemporary Indian Country</i> .....	1312
	<i>C. Self-Defense for Tribes</i> .....	1313
V.	SELF-DEFENSE CONSIDERATIONS FOR INDIAN COUNTRY .....	1316
	<i>A. Criminal Justice in Indian Country</i> .....	1316
	<i>B. Self-Defense Considerations for Indian Country</i> .....	1321
VI.	CONCLUSION .....	1330

## I. INTRODUCTION

Violence against Indian<sup>1</sup> women has received considerable attention;<sup>2</sup> indeed, all three branches of government have acknowledged the staggering rates of violence suffered by Indian women.<sup>3</sup> In 2013, the United States took a minor but significant step towards remedying the problem by passing the Violence Against Women Reauthorization Act (VAWA).<sup>4</sup> The Act is important because, for the first time since the Supreme Court's 1978 decision in *Oliphant v. Suquamish Tribe*, the VAWA enables tribes to prosecute non-Indian criminals.<sup>5</sup>

However, the VAWA's jurisdictional grant is extremely narrow as the VAWA only allows tribes to prosecute non-Indians in very limited situations,<sup>6</sup> and crime in Indian country<sup>7</sup> includes much more than the

<sup>1</sup> When used in this paper, the term "Indian" is used to connote persons of both American Indian and Alaska Native ancestry. Indian is used in this article instead of Native American because Indian is a legal term. *See, e.g.*, 25 U.S.C. § 305e (2010).

<sup>2</sup> *See, e.g.*, Brittney Bennett, *Law Was Meant to Let American Indians Prosecute Violence; Is It Working?*, USA TODAY (Mar. 25, 2017), <https://www.usatoday.com/story/news/2017/03/25/american-indian-women-violence/99538182/>; Lyndsey Gilpin, *Why 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>; Cecily Hilleary, *Advocates Seek Justice for Abused Native American Women*, VOICE OF AMERICA (Feb. 19, 2018), <https://www.voanews.com/a/advocates-seek-justice-abused-native-american-women/4261220.html>.

<sup>3</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(5)(A)–(C), 124 Stat. 725, 725-5 (2010); *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016) (citing a litany of dating data finding Indian women suffer appalling rates of violence); President Barack Obama, Remarks by the President Before Signing the Tribal Law and Order Act (July 29, 2010), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/remarks-president-signing-tribal-law-and-order-act> (“[T]hat when one in three Native American women will be raped in their lifetimes, that is an assault on our national conscience; it is an affront to our shared humanity; it is something that we cannot allow to continue.”).

<sup>4</sup> *See* Violence Against Women Reauthorization Act, Pub. L. No. 113-4, § 40801(b)(2)(A)(i)–(iii), 127 Stat. 83 (2013).

<sup>5</sup> *Oliphant v. Suquamish Indian Tribe et al.*, 435 U.S. 191, 212 (1978) (holding Indian tribes have been implicitly divested of criminal jurisdiction over non-Indians).

<sup>6</sup> Lorelei Laird, *Indian Tribes are Retaking Jurisdiction Over Domestic Violence on Their Own Land*, ABA J. (APR. 2015), [http://www.abajournal.com/magazine/article/indian\\_tribes\\_are\\_retaking\\_jurisdiction\\_over\\_domestic\\_violence\\_on\\_their\\_own](http://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own)

VAWA's narrow definition of domestic violence.<sup>8</sup> According to the Bureau of Justice Statistics, Indians suffered violence at twice the rate of any other racial group in 2013.<sup>9</sup> The true rate of crime against Indians may actually be much higher because Indians often do not notify law enforcement of crimes due to law enforcement's historic failure to solve Indian country crimes.<sup>10</sup> Despite the severity of crime in Indian country, Congress consistently fails to take conclusive action to address the problem.

Tribes have few options to address crime on their land. One largely unexplored solution is self-defense. In recent years, self-defense laws have received increased scrutiny,<sup>11</sup> but the data remains inconclusive on

---

("Drafters wrote the law narrowly, leaving out related crimes like sexual assault or child abuse."); Kyndall Noah et al., *Violence Against Women Act: A Gap in Protection for Children*, 1 JOURNAL ON RACE, INEQUALITY, & SOCIAL MOBILITY IN AMERICA, <https://doi.org/10.7936/K77P8XT8> (2017) ("And even if VAWA is applied, it is specific to protect adult females from acts of domestic violence but does not protect children..."); Allison Burton, *What About the Children? Extending Tribal Criminal Jurisdiction to Crimes Against Children*, 52 HARV. C.R.-C.L. L. REV. 193, 206 (2017) ("VAWA tightly constrains tribal jurisdiction.").

<sup>7</sup> Defined by 18 U.S.C. § 1151 (2016) as all land within an Indian reservation that is under federal jurisdiction, Indian allotments that have not been extinguished, and dependent Indian communities.

<sup>8</sup> See Matthew Brown, *Horrific Crimes on Montana Indian Reservation Draw Prison Sentences*, BILLINGS GAZETTE (July 26, 2017), [https://billingsgazette.com/news/state-and-regional/montana/horrific-crimes-on-montana-indian-reservation-draw-prison-sentences/article\\_79249588-68da-5f03-98a9-b2a9c5ff7fba.html](https://billingsgazette.com/news/state-and-regional/montana/horrific-crimes-on-montana-indian-reservation-draw-prison-sentences/article_79249588-68da-5f03-98a9-b2a9c5ff7fba.html); Bill Donovan, *Slight Increase in Violent Crimes on Reservation*, NAVAJO TIMES (Mar. 30, 2017), <https://navajotimes.com/reznews/slight-increase-violent-crimes-reservation>; Ian MacDougall, *Should Indian Reservations Give Local Cops Authority on Their Land?*, THE ATLANTIC (July 19, 2017), <https://www.theatlantic.com/politics/archive/2017/07/police-pine-ridge-indian-reservation/534072/> ("In 2016, the homicide rate on Pine Ridge nearly doubled, putting it on par, per capita, with the deadliest cities in America.").

<sup>9</sup> JENNIFER L. TRUMAN & LYNN LANGTON, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2013, at 6 (2014), <https://www.bjs.gov/content/pub/pdf/cv13.pdf>.

<sup>10</sup> Adam Crepelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 KAN. J.L. & PUB. POL'Y 236, 238 (2017) ("The true figure is likely much, much higher because Indian victims often do not report violent crimes. Violence often goes unreported because crimes committed by non-Indians against Indians have historically gone unpunished."); Rory Flay, *A Silent Epidemic: Revisiting the 2013 Reauthorization of the Violence Against Women Act to Better Protect American Indian and Alaska Native Women*, 5 AM. INDIAN L.J. 230, 238 (2016) ("Statistics are an inadequate representation of the issue of sexual violence in Indian Country. This is due to the underreporting of sexual crimes to tribal officials and federal authorities."); Justin Peters, *Violent Crime on Indian Reservations Is Up, but Prosecutions Are Down*, SLATE (Mar. 8, 2013), [http://www.slate.com/blogs/crime/2013/03/08/morning\\_star\\_brown\\_violent\\_crime\\_on\\_indian\\_reservations\\_is\\_up\\_but\\_prosecutions.html](http://www.slate.com/blogs/crime/2013/03/08/morning_star_brown_violent_crime_on_indian_reservations_is_up_but_prosecutions.html) (quoting the N.Y. Times' statement that "crime on reservations may actually be 10 times or more higher than official rates because people seldom report violence.").

<sup>11</sup> Michael Bratton, *Lucas County Prosecutors Talk Self-Defense Rights After Man Stops*

whether self-defense laws increase or decrease crime. However, self-defense laws make more sense for Indian country than most other United States jurisdictions. Indian country is often located far from law enforcement; moreover, there simply are not enough police officers in Indian country.<sup>12</sup> This means even if police officers are called, Indian victims will likely have to wait a substantial period of time before law enforcement arrives.<sup>13</sup> And assuming law enforcement arrives, jurisdictional confusion may prevent the officer from acting.<sup>14</sup> Consequently, self-defense laws may be the most practical public safety measure in Indian country.

The remainder of the paper proceeds as follows. Part II discusses the historical roots of self-defense and the right to bear arms. Part III looks at the development of self-defense laws in the United States. Part IV explores the relationship between Indians and guns. Part V examines criminal justice in Indian country and how self-defense laws may apply within Indian country.

## II. SELF-DEFENSE AND FIREARMS

This Part explores the historical origins of self-defense and its relationship to guns. It begins with an examination of the theological and philosophical basis of self-defense. Then it traces the legal evolution of self-defense from ancient Greece to the colonial United States. Next, it examines Supreme Court precedent on the Second Amendment.

---

*Hatchet Attack*, ABC (June 13, 2018), <http://www.13abc.com/content/news/Lucas-County-prosecutors-talk-self-defense-rights-after-man-stops-hatchet-attack-485451981.html>; Trish Mehaffey, *Iowa's 'Stand-Your-Ground' Law Faces Another Test*, THE GAZETTE (June 15, 2018), <http://www.thegazette.com/subject/news/government/iowas-stand-your-ground-law-faces-another-test-20180615>; WTHR.com Staff, *Prosecutors Cite Self-Defense Laws, Won't File Charges in Fatal KFC Shooting*, WTHR (June 6, 2018), <https://www.wthr.com/article/prosecutors-cite-self-defense-laws-wont-file-charges-in-fatal-kfc-shooting>.

<sup>12</sup> See *infra* Part V.

<sup>13</sup> See, e.g., Tristan Ahtone, *A Broken System: Why Law and Order is Faltering on the Rez*, ALJAZEERA AMERICA (Dec. 13, 2013), <http://america.aljazeera.com/articles/2013/12/19/commission-federalgovtisreasonforlittlejusticeinindiancountry.html> (noting it can take over a week for police to respond to calls in Alaska Native villages); *Law Enforcement in Indian Country: Hearing Before the S. Comm. On Indian Affairs*, 110th Cong.36 (2007) (statement of Bonnie Clairmont, Victim Advocacy Program Specialist, Tribal Law and Policy Institute) (“So American Indian and Alaska Natives must rely on law enforcement officers outside of their communities, such as the Bureau of Indian Affairs and the Federal Bureau of Investigation authorities. Response time in many instances is very slow.”).

<sup>14</sup> See *infra* Part V.

*A. A Right Both Natural and Divine*

Self-defense is a basic legal concept that is universally acknowledged.<sup>15</sup> This may be because self-defense has long been considered the first law of nature.<sup>16</sup> The great Roman legal scholar Cicero declared self-defense need not be written down or taught because self-defense is “in-born in our hearts.”<sup>17</sup> Hugo Grotius surmised, “This right of self-defense, it should be observed, has its origin directly, and chiefly, in the fact that nature commits to each his own protection . . . .”<sup>18</sup> Natural law philosopher Samuel von Pufendorf claimed society is founded upon the principle of self-defense.<sup>19</sup> The most famous natural law philosopher, John Locke, argued that “[s]elf-defence is a part of the law of nature; nor can

---

<sup>15</sup> Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 621 (1996) (“Unlike other defenses, the permissibility of self-defense has hardly been the subject of controversy. Philosophers and lawyers have tended to agree not only that it is permissible, but about the sorts of cases to which its permissibility applies.”); Susanne Sreedhar, *Defending the Hobbesian Right of Self-Defense*, 36 POLITICAL THEORY 781, 781 (2008) (“[M]ost everyone agrees that there is a right of self-defense.”); Eugene Volokh, *Medical, Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1819 (2007) (“The right [to lethal self-defense] has thus been as broadly accepted as the rights to bear and raise children and to live with one’s family members, and it is more broadly accepted than the right to an abortion and even the right to use contraceptives were at the time the Supreme Court found them to be constitutionally protected.”).

<sup>16</sup> ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENTS OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA (reprint 1969) (1803), <http://press-pubs.uchicago.edu/founders/documents/amendIIIs7.html> (“The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible.”); William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*, UNIV. OF CHI. PRESS (1979), [http://press-pubs.uchicago.edu/founders/print\\_documents/amendIIIs4.html](http://press-pubs.uchicago.edu/founders/print_documents/amendIIIs4.html) (“Self defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of a society.”); Saul Cornell, *Natural Rights, Common Law, and the English Right of Self-Defense*, INSIGHTS ON LAW & SOCIETY (Fall 2013), [https://www.americanbar.org/groups/public\\_education/publications/insights\\_on\\_law\\_and\\_society/14/fall-2013/natural-rights-common-law-and-the-english-right-of-self-defens/](https://www.americanbar.org/groups/public_education/publications/insights_on_law_and_society/14/fall-2013/natural-rights-common-law-and-the-english-right-of-self-defens/) (“Early modern English political theorists and jurists often described the right to defend oneself as the first law of nature.”).

<sup>17</sup> Rebekah Skiba, *Returning to the Roots of the Castle Doctrine: Why Recent Stand Your Ground Laws Are in Line with the Natural Law*, 10 S. J. POL’Y & JUST. 71, 73 (2016).

<sup>18</sup> HUGO GROTIUS, *THE LAW OF WAR AND PEACE* (1625), <https://lonang.com/library/reference/grotius-law-war-and-peace/gro-201/>.

<sup>19</sup> SAMUEL PUFENDORF, *TWO BOOKS OF THE ELEMENTS OF UNIVERSAL JURISPRUDENCE* 327 (Thomas Behave ed., William Abbott Oldfather trans., Liberty Fund Inc. 2009) (1931); see David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235, 242 (2008) (“Samuel von Pufendorf, who extended and elaborated Grotius’s work on international law and political philosophy, called self-defense the foundation of civilized society.”).

it be denied the community, even against the king himself . . . .”<sup>20</sup> Even Thomas Hobbes, an exponent of kings possessing unbridled power, believed individuals maintained “an inalienable right of self-defense.”<sup>21</sup> Countless philosophers have concluded that self-defense is a part of the natural law.<sup>22</sup>

Natural law is closely associated with Catholic theology,<sup>23</sup> and the Catholic Church accepts self-defense as a reason for killing<sup>24</sup> in spite of its otherwise staunch pro-life position.<sup>25</sup> Numerous religions accept self-defense as a valid basis for taking a human life. The Quran prohibits murder<sup>26</sup> but permits the killing of another in self-defense.<sup>27</sup> Self-defense

---

<sup>20</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT (A. Millar et al. eds., 1764) (1689).

<sup>21</sup> Sreedhar, *supra* note 15, at 782.

<sup>22</sup> See, e.g., THOMAS AQUINAS, THE SUMMA THEOLOGIAE OF ST. THOMAS AQUINAS, (Fathers of the English Dominican Province trans., 2d ed. 1920) (“Therefore this act, since one’s intention is to save one’s own life, is not unlawful, seeing that it is natural to everything to keep itself in ‘being,’ as far as possible.”); ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 298 (Thomas G. West ed., Liberty Fund 1996) (1698) (“Nay, all laws must fall, human societies that subsist by them be dissolved, and all innocent persons be exposed to the violence of the most wicked, if men might not justly defend themselves against injustice by their own natural right, when the ways prescribed by publick authority cannot be taken.”).

<sup>23</sup> E.g., STEPHEN J. POPE, BOS. COLL., NATURAL LAW IN CATHOLIC SOCIAL TEACHINGS; George M. Regan, C.M., *Natural Law in the Church Today*, 13 THE CATH. LAW. 21, 21 (1967); *Catechism of the Catholic Church*, LA SANTA SEDE, [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s1c3a1.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c3a1.htm) (last visited Aug. 25, 2018) (“The natural law expresses the original moral sense which enables man to discern by reason the good and the evil, the truth and the lie”).

<sup>24</sup> *Catechism of the Catholic Church*, LA SANTA SEDE, [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s1c3a1.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c3a1.htm) (last visited Aug. 25, 2018) (“Legitimate defense can be not only a right but a grave duty for one who is responsible for the lives of others.”); Skiba, *supra* note 17, at 88 (“[T]he Catholic Church supports the act of self-defense from a natural law perspective, so long as the intent of the defender is to protect themselves and not to kill their aggressor.”).

<sup>25</sup> E.g., *Catechism of the Catholic Church*, *supra* note 23 (“*Human life is sacred* because from its beginning it involves the creative action of God and it remains for ever in a special relationship with the Creator, who is its sole end. God alone is the Lord of life from its beginning until its end: no one can under any circumstance claim for himself the right directly to destroy an innocent human being.”); *Id.* (“Since the first century the Church has affirmed the moral evil of every procured abortion.”).

<sup>26</sup> E.g., Surat I-maidah 5:32 (“We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption in the land – it is as if he had slain mankind entirely.”).

<sup>27</sup> *What Is Self-Defense? What Does Islam Say About Killing a Person in Self-Defense?*, QUESTIONS ON ISLAM, <https://questionsonislam.com/article/what-self-defense-what-does-islam-say-about-killing-person-self-defense>; *Justifiable Homicide*, ISLAM & QURAN (June 2, 2014), <http://www.islamandquran.org/fatwas/justifiable-homicide.html>; 21932: *Islamic Ruling on Self-Defense*, ISLAM QUESTION & ANSWER (Jan. 29, 2002), <https://islamqa.info/en/21932>.

may even be a Muslim's obligation under the Quran.<sup>28</sup> In fact, the Prophet Muhammad declared that, "Whoever his property desired (unlawful) and fight to protect it and was killed, died as a martyr."<sup>29</sup> Christians are taught to turn the other cheek;<sup>30</sup> however, there are Bible verses that support self-defense.<sup>31</sup> Similarly, the 10 Commandments prohibit murder—not killing.<sup>32</sup> The Talmud, the source of Jewish laws and rabbinic commentaries,<sup>33</sup> commands: "If someone comes to kill you, rise and kill him first."<sup>34</sup> Though Buddhism is often portrayed in an extremely pacifist light, Buddhism allows individuals to defend themselves.<sup>35</sup> The Bhagavad Gita also allows individuals to use force to defend themselves.<sup>36</sup>

### B. *Historical Laws on Self-Defense and Arms*

In addition to religions, societies throughout the ages have recognized self-defense as an individual right. Ancient Greece considered self-defense a form of lawful homicide.<sup>37</sup> Under Rome's Justinian Code, the law stated:

---

<sup>28</sup> Sulaiman Olayiwola, *Defense Mechanism in Criminal Liability Under Islamic Law*, 4 INT'L J. INNOVATIVE LEGAL & POL. STUD. 19, 27 (2016) ("The principle of self defence is well known in Islamic law in that it is an obligatory duty of Muslim to protect one's life and life of others as well as to protect his properties and properties of others from any source of assault.").

<sup>29</sup> *Id.*

<sup>30</sup> Luke 6:29; Matthew 5:39.

<sup>31</sup> Luke 11:21; Exodus 22:2-3; Nehemiah 4:14.

<sup>32</sup> Rabbi Dovid Bendory, *The Ten Commandments, Killing, and Murder: A Detailed Commentary* (2012), JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP, <http://jpfo.org/rabbi/6th-commandment.htm>; Dennis Prager, *You Can Kill, But Don't Murder*, NAT'L REVIEW (Dec. 2, 2014), <https://www.nationalreview.com/2014/12/you-can-kill-dont-murder-dennis-prager/>.

<sup>33</sup> *About Talmud*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/about-talmud/>; *The Talmud*, REFORM JUDAISM, <https://reformjudaism.org/talmud>.

<sup>34</sup> *Sanhedrin 72a: The William Davidson Talmud*, SEFARIA, <https://www.sefaria.org/Sanhedrin.72a.4?lang=bi&with=all&lang2=en> (last visited Oct. 27, 2018).

<sup>35</sup> *The Dhammapada*, BHUDDA NET, <https://www.buddhanet.net/e-learning/buddhism/dp12.htm> (last visited Oct. 27, 2018) ("166. Let one not neglect one's own welfare for the sake of another, however great."); Paul Fleischman, *The Buddha Taught Nonviolence, Not Pacifism* (Spring 2002), BARRE CTR. FOR BUDDHIST STUD.; Gil Fronsdal, *On Non-Harming*, INSIGHT MEDITATION CTR., ("The canonical explanation of this rule explicitly allows a monastic to hit a person (or animal) in self-defense if they are not angry or displeased.").

<sup>36</sup> *Bhagavad Gita, Chapter 1, Verse 36-37*, BHAGAVID GITA, <https://www.holybhagavad-gita.org/chapter/1/verse/36-37> (last visited Sept. 11, 2018) (noting self-defense "is not considered a sin.").

<sup>37</sup> Michael Gagarin, *Self-Defense in Athenian Homicide Law*, 19 GREEK ROMAN & BYZANTINE STUD. 111, 111 (1978) ("We know that one possible defense against a charge of homicide in Athens was a plea of simple self-defense."); *Ancient Greek Law*:

We grant to all persons full authority to defend themselves, so that where any soldier or nocturnal depredator enters upon the land of a private person, or stops him on the public highway, intending to attack him, everyone shall have permission to immediately subject him to proper punishment, and he shall suffer the death which he threatened, and undergo what he expected to inflict, for it is better to take advantage of the opportunity than to obtain retribution after death.<sup>38</sup>

Self-defense was acceptable under Imperial China's legalist and Confucian principles.<sup>39</sup>

Originally, England only timidly recognized self-defense; that is, individuals who claimed self-defense would be convicted but could appeal to the King for a pardon.<sup>40</sup> Pardons were routinely granted by the King,<sup>41</sup> and by 1330, British courts recognized self-defense along with the corollary right to use weapons in self-defense.<sup>42</sup> The culmination of the Glori-

---

*The Five Homicide Courts*, UNION LEGAL NETWORK, <http://unionlegalnetwork.com/post/101854294235/ancient-greek-homicide-courts> (“Examples of lawful homicide included killing a man caught lying with one’s wife, self-defense, and accidentally killing a fellow soldier in war.”).

<sup>38</sup> The Enactments of Justinian, Book III (Samuel Scott trans., 1932), THE ROMAN LAW LIBRARY, tit. 27, [https://droitromain.univ-grenoble-alpes.fr/Anglica/CJ3\\_Scott.htm#27](https://droitromain.univ-grenoble-alpes.fr/Anglica/CJ3_Scott.htm#27).

<sup>39</sup> Fredrick Tse-Shyang Chen, *The Confucian World Order*, 1 IND. INT’L & COMP. L. REV. 45, 58 (1991) (“The Confucians would permit the use of force for self-defense, both individual and collective.”); David B. Kopel, *Self-Defense in Asian Religions*, 2 LIBERTY U. L. REV. 107, 123 (2007) (noting that in Confucianism, “In no way was the right of personal protection considered inconsistent with the duty to treat other people with benevolence.”).

<sup>40</sup> See Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 572 (1903) (“Self-defense merely was no excuse, but ground for pardon; but it was an excuse in equity, and the equitable defense was at last accepted at law.”); Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS. 85, 89 (2017) (“Those who killed in self-defense had to submit a request for pardon to the king or to his ministers.”); Alicia M. Kuhns, *Why Maryland Should Stand Its Ground Instead of Retreat*, 48 U. BALT. L.F. 17, 18 (2017) (“In early England, a man convicted of homicide who claimed self-defense could not be acquitted unless the murder was done in the execution of law. This left citizens who acted in self-defense with one option to avoid execution, receiving a pardon from the King.”).

<sup>41</sup> Kuhns, *supra* note 40, at 18 (noting “the pardoning process began to become a formality and eventually self-defense became a defense” in early England); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1341 (2009) (“Private lethal self-defense was a capital crime which required conviction and sentence, but for which the defender could seek, and was routinely granted, pardon from the sovereign.”).

<sup>42</sup> Kopel, *supra* note 39, at 236 (“Although previous Parliaments had not enacted a statute specifically to protect the right of armed self-defense, British case law since 1330 had long recognized an absolute right to use deadly force against home invaders.”).



ous Revolution resulted in the English Bill of Rights<sup>43</sup> which affirmed the right of Protestants to “have arms for their defence suitable to their conditions and as allowed by law.”<sup>44</sup> William Blackstone in his authoritative *Commentaries on the Laws of England* stated the right to bear arms was “of the natural right of resistance and self-preservation.”<sup>45</sup> Blackstone went on to note arms may be used in defense when the law fails.<sup>46</sup> The rights of Englishmen existed in England’s American colonies by virtue of the First Charter of Virginia.<sup>47</sup>

Firearms were common in colonial America; in fact, freemen were required to own a gun for the purpose of self-defense.<sup>48</sup> Thus, despite the expense of firearms during the colonial era,<sup>49</sup> firearms were exempt from

---

<sup>43</sup> *English Bill of Rights*, HISTORY.COM, <https://www.history.com/topics/english-bill-of-rights> (noting the English Bill of Rights was part was an ingredient in the replacing James II on the throne); *Bill of Rights*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Bill-of-Rights-British-history> (“[T]he Bill of Rights provided the foundation on which the government rested after the Glorious Revolution.”); Edward Vallance, *The Glorious Revolution*, BBC (Feb. 17, 2011), [http://www.bbc.co.uk/history/british/civil\\_war\\_revolution/glorious\\_revolution\\_01.shtml](http://www.bbc.co.uk/history/british/civil_war_revolution/glorious_revolution_01.shtml).

<sup>44</sup> *English Bill of Rights 1689*, YALE L. SCH. AVALON PROJECT, [http://avalon.law.yale.edu/17th\\_century/england.asp](http://avalon.law.yale.edu/17th_century/england.asp).

<sup>45</sup> William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*, (1979), [http://press-pubs.uchicago.edu/founders/print\\_documents/amendII4.html](http://press-pubs.uchicago.edu/founders/print_documents/amendII4.html).

<sup>46</sup> *Id.*

<sup>47</sup> *The First Charter of Virginia, April 10, 1606*, YALE L. SCH. AVALON PROJECT, [http://avalon.law.yale.edu/17th\\_century/va01.asp](http://avalon.law.yale.edu/17th_century/va01.asp) (“Also we do, for Us, our Heirs, and Successors, DECLARE, by these Presents, that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.”).

<sup>48</sup> *District of Columbia v. Heller*, 554 U.S. 570, 601 (2008) (“Many colonial statutes required individual arms-bearing for public-safety reasons . . . .”); James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1782 (2002) (“[G]uns were required by law to be supplied by adult males as part of their militia service”); *Arms and the Man*, THE ECONOMIST (July 1, 1999), <https://www.economist.com/node/218080> (“From the time of the earliest settlement on the James river, the English colonies required every freeman to own a gun for self-defence.”).

<sup>49</sup> Lindgren & Heather, *supra* note 48, at 1791 (“[G]uns were not a luxury good, but rather a relatively expensive staple that only a third of the poorest estates could afford, but that a solid majority (70%) of middle and upper class estates owned.”); Gary Wills, *Spiking the Gun Myth*, N.Y. TIMES (Sept. 10, 2000), <https://archive.nytimes.com/www.nytimes.com/books/00/09/10/reviews/000910.10willot.html> (“[M]ost Americans were farmers, with no time to maintain expensive guns for hunting when domestic animals (chickens and pigs) were the easily available sources of protein.”).

seizure by creditors.<sup>50</sup> The non-seizeability of firearms means probate records, which are widely regarded as the best source of information for personal property ownership in colonial America according to James Lindgren and Justin Heather, may have excluded firearms.<sup>51</sup> Nevertheless, firearms appear in colonial wills more frequently than other personal items—including the Bible.<sup>52</sup>

Guns served multiple purposes in the colonies. Firearms were used to provide food through hunting.<sup>53</sup> Firearms were also used for defensive purposes; hence, many colonial constitutions ensured that freemen had arms for militia service.<sup>54</sup> Though no colonial constitution explicitly granted individuals the right to use arms in defense, self-defense was widely accepted as a result of the colonies adoption of the English common law.<sup>55</sup> In fact, John Adams famously used self-defense to defend the soldiers who committed the Boston Massacre.<sup>56</sup> The Redcoats' attempts to confiscate American arms and ammunition helped precipitate the American colonies' break with Britain.<sup>57</sup>

---

<sup>50</sup> Lindgren, *supra* note 48, at 1782 (“[I]n at least one state’s statutes (Virginia’s), guns were not subject to distress or execution by law.”).

<sup>51</sup> *Id.* at 1782.

<sup>52</sup> *Id.* at 1781 (“In early American probate inventories, guns are much more commonly owned than cash of any kind or Bibles and religious books—and nearly as common as all books combined.”).

<sup>53</sup> Ryan Notarangelo, *Hunting Down the Meaning of the Second Amendment: An American Right to Pursue Game*, 61 S.D. L. REV. 201, 213 (2016) (“Rather, the use of arms for hunting was necessary for the American colonialists. According to some accounts of colonial America, to bear arms for the purpose of hunting was among the most necessary activities for survival.”); Tim Saenger, *Colonial Farming and Food: Famine to Prosperity*, NCPEDIA (2013) (“In colonial America, before the grocery store, men and women had to hunt, gather, or cultivate food, and at times wait for shipments from Europe, in order to survive.”).

<sup>54</sup> *America’s Colonial Gun Laws*, DEMOCRATIC UNDERGROUND (Oct. 17, 2017), <https://upload.democraticunderground.com/1002968396> (listing colonies with their laws).

<sup>55</sup> Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 499 (2004) (“The right of individual self-defense was well-established under common law, but was legally distinct from the constitutional right to bear arms included in the various state constitutions. The failure to include an explicit protection for such a right was hardly anomalous: many protections under common law were not included in bills of rights during the Founding Era.”).

<sup>56</sup> John Adams, *Adams’ Argument for the Defense: 3-4 December 1770*, FOUNDER’S ONLINE, <https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016> (last visited September 11, 2018) (“I shall now, read to you a few authorities on this subject of self-defence . . .”).

<sup>57</sup> David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 308 (2012) (“The American War of Independence—as it was commonly called at the time—began on April 19, 1775, when 700 Redcoats under the command of Major John Pitcairn left Boston to seize

C. *The Supreme Court on the Second Amendment*

The Second Amendment in full reads, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Perhaps no sentence has been the source of more legal confusion in recent years. By the Supreme Court’s own admission, the legislative history of the Second Amendment is “of dubious interpretative worth . . . .”<sup>58</sup> Accordingly, this section will not attempt to interpret Second Amendment history but will instead summarize the Supreme Court’s Second Amendment cases.

1. *The First Three Second Amendment Cases*

The Court first addressed the Second Amendment in 1876 in *United States v. Cruikshank*.<sup>59</sup> The case arose out of the infamous Colfax Massacre in 1873, which resulted in the deaths of approximately 100 African Americans.<sup>60</sup> Some of the whites involved in the atrocity were indicted for violating the rights of the black citizens. In the case, the Supreme Court considered whether the rights the white murderers violated were rights granted by the Constitution. The Court explained that the United States’ authority is “defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people.”<sup>61</sup> The Court ruled that the white mob did not violate the Constitution because none of the rights alleged to have been violated were granted by the Constitution—the rights preexisted it.<sup>62</sup> Speaking specifically to the Second Amendment, the Court explained, “This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”<sup>63</sup>

Ten years later, the Court was faced with another Second Amendment case. *Presser v. Illinois*<sup>64</sup> stems from the nineteenth century crack-down on the labor movement. German laborers formed a militia to de-

---

American arms at Lexington and Concord.”).

<sup>58</sup> *District of Columbia v. Heller*, 554 U.S. 570, 571 (2008).

<sup>59</sup> *United States v. Cruikshank et al.*, 92 U.S. 542, 542 (1875).

<sup>60</sup> Danny Lewis, *The 1873 Colfax Massacre Crippled the Reconstruction Era*, SMITHSONIAN.COM (Apr. 3, 2016), <https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746/>; Louis Gates, Jr., *What Was the Colfax Massacre?*, THE ROOT (July 29, 2013), <https://www.theroot.com/what-was-the-colfax-massacre-1790897517>; LeeAnna Keith, *Colfax Massacre*, KNOWLOUISIANA.ORG (Mar. 15, 2011), <http://www.knowlouisiana.org/entry/colfax-massacre> (noting the Colfax Massacre “claiming the lives of at least seventy and perhaps as many as 150 men. Nearly all of the victims were African American.”).

<sup>61</sup> *Cruikshank*, 92 U.S. at 551.

<sup>62</sup> *Id.* at 557 (“They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.”).

<sup>63</sup> *Id.* at 553.

<sup>64</sup> *Presser v. Illinois*, 116 U.S. 252, 252 (1886).

fend themselves from corporate funded law enforcement.<sup>65</sup> The laborers planned to march in a parade while armed; however, Illinois passed a law requiring government permission to march while armed.<sup>66</sup> The laborers challenged the law for violating the Second Amendment and other constitutional provisions. The Court disagreed and upheld the law. Regarding the laborers' Second Amendment claim, the Court ruled that the Second Amendment binds the federal government—not the states.<sup>67</sup>

The Court's third landmark Second Amendment case, *United States v. Miller*,<sup>68</sup> began when two bank robbers were caught carrying an unregistered sawed-off shotgun.<sup>69</sup> The bandit duo was arrested for violating the National Firearms Act, but the district court dismissed the case holding that the Act violated the Second Amendment.<sup>70</sup> Overruling the district court, the Supreme Court stated that possessing a sawed-off shotgun bears no relationship to the maintenance of a militia.<sup>71</sup> The Court interpreted the Second Amendment's purpose as defending the nation against foreign invasions and domestic uprisings.<sup>72</sup> The Court noted militias were an alternative to standing armies which the Founding Fathers' disdained.<sup>73</sup> After this, the Court quoted various state militia laws.<sup>74</sup> The Court concluded by observing that "Most if not all of the States" guarantee the right to own a gun.<sup>75</sup> Although the protection afforded by these state laws varies, "none of them seem to afford any material support for the challenged ruling of the court below."<sup>76</sup>

---

<sup>65</sup> Stephen P. Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943, 950 (1999) ("These police attacks fueled the perceived need for a workers' self-defense society to defend freedom of assembly and other constitutional rights."); Mimi Cowan, *The Second Amendment and the 1879 Illinois Militia Law, WE'RE HISTORY* (Nov. 5, 2014), <http://werehistory.org/1879-illinois-militia/>.

<sup>66</sup> *Presser*, 116 U.S. at 264 ("We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms.").

<sup>67</sup> *Id.* at 265 ("But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States.").

<sup>68</sup> *United States v. Miller et al.*, 307 U.S. 174, 174 (1939).

<sup>69</sup> Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 49 (2008).

<sup>70</sup> *United States v. Miller*, 26 F.Supp. 1002, 1003 (W.D. Ark. 1939).

<sup>71</sup> *United States v. Miller et al.*, 307 U.S. 174, 178 (1939).

<sup>72</sup> *Id.* at 178.

<sup>73</sup> *Id.* at 178–79.

<sup>74</sup> *Id.* at 180–82.

<sup>75</sup> *Id.* at 182.

<sup>76</sup> *Id.* at 182.

## 2. *Second Amendment and Self-Defense*

*District of Columbia v. Heller*<sup>77</sup> is widely viewed as the Court's most controversial Second Amendment case. In 2001, the District of Columbia passed a law effectively prohibiting individuals from carrying firearms and requiring firearm owners to store their guns either disassembled or with a trigger lock.<sup>78</sup> The Petitioner claimed that the law deprived D.C. residents of the right to utilize firearms for self-defense in contravention of the Second Amendment. A majority of the Court agreed declaring: "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."<sup>79</sup> This conclusion was reached through textual interpretation and a historical analysis of the Second Amendment as well as various analogous state laws. Despite finding that the right to bear arms belongs to individuals, the Court explained that limits may be placed on the right such as banning felons from owning guns.<sup>80</sup> Interestingly, the majority used the popularity of handguns as support for the contention that gun ownership for self-defense purposes is a constitutional right.<sup>81</sup> The majority concluded by acknowledging that gun violence is a serious problem but stated that gun related crime does not erase constitutional rights.<sup>82</sup>

There were two dissenting opinions. Justice Stevens's dissent was joined by three Justices. These Justices surmised that the Second Amendment was drafted to prevent the federal government from abolishing state militias and had nothing to do with utilizing guns for self-defense.<sup>83</sup> The Court's holding in *United States v. Miller*<sup>84</sup> was pivotal to Justice Stevens's dissent as Miller affirmed a law restricting gun ownership, and "hundreds of judges have relied on the view of the Amendment we endorsed there."<sup>85</sup> Justice Stevens pointed out that no new evidence had surfaced to change the Second Amendment's meaning since Miller was decided, so the Court should abide by Miller.<sup>86</sup>

Justice Breyer also authored a dissenting opinion that was joined by three Justices. Justice Breyer reiterated Justice Stevens' thesis that the Second Amendment was adopted to secure state militias rather than

---

<sup>77</sup> *District of Columbia v. Heller*, 554 U.S. 570, 570 (2008).

<sup>78</sup> *Id.* at 575.

<sup>79</sup> *Id.* at 595.

<sup>80</sup> *Id.* at 626–27.

<sup>81</sup> *Id.* at 628–29.

<sup>82</sup> *Id.* at 636.

<sup>83</sup> *Id.* at 637 (Stevens, J., dissenting) ("Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.").

<sup>84</sup> *United States v. Miller et al.*, 307 U.S. 174, 174 (1939).

<sup>85</sup> *Heller*, 554 U.S. at 638.

<sup>86</sup> *Id.* at 639.

safeguard an individual right to self-defense.<sup>87</sup> However, Justice Breyer's dissent focused on whether the Second Amendment inhibits governments from imposing reasonable gun regulations.<sup>88</sup> Justice Breyer supported his position by noting that gun regulation was common in colonial America.<sup>89</sup> He explained that self-defense was an aspect of the Second Amendment but not its end all be all.<sup>90</sup> Justice Breyer further critiqued the majority opinion on the basis that the holding will be difficult for courts across the country to apply.<sup>91</sup> Furthermore, Justice Breyer saw no difficulty reading a self-defense exception into the D.C. firearm law and was "puzzled by the majority's unwillingness to adopt a similar approach."<sup>92</sup> Justice Breyer went on to cite a litany of data correlating firearms with violence<sup>93</sup> and concluded that the D.C. policy legitimately attempts to further public safety.<sup>94</sup> Thus, Justice Breyer believed that the D.C. law did not disproportionately burden the Second Amendment.<sup>95</sup>

### 3. *Second Amendment and Selective Incorporation*

*McDonald v. City of Chicago* is the Court's most recent pronouncement on the Second Amendment.<sup>96</sup> The case is factually similar to *Heller*.<sup>97</sup> Chicago enacted a law banning handguns as a crime control measure.<sup>98</sup> The petitioners claimed the ban robbed them of their right to self-defense.<sup>99</sup> Petitioners brought the suit in the wake of the Court's *Heller* decision claiming that the Chicago ordinance violated the Second and Fourteenth Amendments.<sup>100</sup>

The Court held that the Chicago law violated the United States Constitution. The plurality began its opinion by noting that the Fourteenth Amendment transformed the nation's notions of federalism.<sup>101</sup> The plurality noted the Court's three early Second Amendment cases held that "the Second Amendment applies only to the Federal Government."<sup>102</sup> However, the plurality distinguished these early cases on the grounds that

---

<sup>87</sup> *Id.* at 706 (Breyer, J., dissenting).

<sup>88</sup> *Id.* at 683.

<sup>89</sup> *Id.* at 683.

<sup>90</sup> *Id.* at 687.

<sup>91</sup> *Id.* at 688.

<sup>92</sup> *Id.* at 692.

<sup>93</sup> *Id.* at 694.

<sup>94</sup> *Id.* at 705.

<sup>95</sup> *Id.* at 722.

<sup>96</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

<sup>97</sup> *Id.* at 3026.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 3027.

<sup>101</sup> *Id.* at 3028.

<sup>102</sup> *Id.* at 3030.

the Fourteenth Amendment incorporated the Bill of Rights to the states.<sup>103</sup> The plurality found that the Second Amendment was selectively incorporated because self-defense is a fundamental right and the right to keep and bear arms was deemed fundamental by the Second Amendment's drafters.<sup>104</sup> The plurality buttressed this position by referencing debates about the Fourteenth Amendment's ratification and finding self-defense was considered fundamental to the liberty of every man.<sup>105</sup> The plurality flatly rejected Chicago's argument that self-defense is not essential to civilized society by pointing to foreign countries.<sup>106</sup> The plurality responded to this contention by stating that several constitutional rights are unique to the United States such as the rights against self-incrimination and to a jury trial.<sup>107</sup> Moreover, the plurality stated that several constitutional rights, like the exclusionary rule, have public safety implications.<sup>108</sup>

Justices Scalia and Thomas authored concurring opinions. Justice Scalia accepted the plurality's reasoning but concurred in order to address Justice Stevens's dissent.<sup>109</sup> Justice Scalia rejected Justice Stevens's views on the theory of incorporation alleging that Justice Stevens's method is too subjective.<sup>110</sup> Justice Scalia argued that the "historically focused method" is superior to the "living Constitution" lens when analyzing laws.<sup>111</sup> Justice Thomas joined the plurality view on the Fourteenth Amendment making the Second Amendment binding on states; however, he concurred because he thought the plurality's reasoning was too winding.<sup>112</sup> Justice Thomas believed that the Fourteenth Amendment's Privileges and Immunities Clause rather than its Due Process Clause makes the Second Amendment applicable to states.<sup>113</sup>

There were two dissents. Justice Stevens dissented claiming that the issue was not whether the Second Amendment had been incorporated because this issue was resolved in the Court's early Second Amendment cases.<sup>114</sup> For Justice Stevens, the issue was whether possession of a func-

---

<sup>103</sup> *Id.* at 3036.

<sup>104</sup> *Id.* at 3036–37.

<sup>105</sup> *Id.* at 3041.

<sup>106</sup> *Id.* at 3044.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 3045.

<sup>109</sup> *Id.* at 3050 (Scalia, J., concurring).

<sup>110</sup> *Id.* at 3051 ("Justice STEVENS proceeds to urge readoption of the theory of incorporation articulated in *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937)").

<sup>111</sup> *Id.* at 3057–58.

<sup>112</sup> *Id.* at 3058–59 (Thomas, J., concurring).

<sup>113</sup> *Id.* at 3059.

<sup>114</sup> *Id.* at 3088 (Stevens, J., dissenting).

tional firearm was a fundamental right.<sup>115</sup> Justice Stevens claimed that the incorporation of provisions of the Bill of Rights was necessary to ensure fairness, and incorporating the Second Amendment does not further this end.<sup>116</sup> Justice Stevens argued the reason for this is, “[t]he handgun is itself a tool for crime; the handgun’s bullets are the violence.”<sup>117</sup> According to Justice Stevens, the Second Amendment was adopted as a federalism provision to protect state militias from federal encroachment.<sup>118</sup>

Justice Breyer also authored a dissent, and it was joined by Justices Ginsburg and Sotomayor. Justice Breyer contended that there is “nothing in the Second Amendment’s text, history, or underlying rationale” making it deserving of status as a fundamental right.<sup>119</sup> Justice Breyer opened his dissent by pointing out that the historical basis of the Court’s *Heller* decision has been the subject of much criticism.<sup>120</sup> The dissent stated self-defense is not an essential facet of justice in the United States; therefore, the Fourteenth Amendment does not incorporate the Second.<sup>121</sup> Additionally, Justice Breyer contended that the usefulness of state militias has vanished, so there is no reason to incorporate the Second Amendment’s militia clause.<sup>122</sup> Justice Breyer also claimed self-defense had nothing to do with why the Second Amendment was ratified.<sup>123</sup> Moreover, Justice Breyer asserted that incorporating the Second Amendment deprives local governments of legislative power.<sup>124</sup>

### III. SELF-DEFENSE IN THE UNITED STATES

Self-defense and firearms are closely linked in the United States. This Part begins with a discussion of two highly influential Supreme Court decisions in self-defense cases. Next, this Part delves into self-defense laws in the contemporary United States.

#### A. *The Supreme Court on Self-Defense*

Though the Supreme Court has heard many self-defense cases,<sup>125</sup> two stand apart as the most influential. Below, the Court’s opinions in the two cases are summarized.

---

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 3095.

<sup>117</sup> *Id.* at 3110.

<sup>118</sup> *Id.* at 3119.

<sup>119</sup> *Id.* at 3120 (Breyer, J., dissenting).

<sup>120</sup> *Id.* at 3121.

<sup>121</sup> *Id.* at 3122–23.

<sup>122</sup> *Id.* at 3124.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 3129.

<sup>125</sup> David B. Kopel, *How the United States Supreme Court Confronted a Hanging Judge*



*1. Stand Your Ground*

Decided in 1895, *Beard v. United States* is the hallmark case on self-defense.<sup>126</sup> The case arose in Indian country but involved only non-Indians.<sup>127</sup> The Jones brothers were acquainted with Babe Beard because he had raised one of the Jones boys.<sup>128</sup> While raising Edwards Jones, Beard also acquired control of the Jones' cow.<sup>129</sup> The Jones brothers wanted the cow back and publicly declared their intention to kill Beard if he would not relinquish it.<sup>130</sup> Upon returning home from a trip to town with a shotgun in hand as was his custom, Beard discovered the Jones brothers were on his property and engaged in a spat over the cow with Mrs. Beard.<sup>131</sup> Beard ordered the Jones brothers to leave the property; however, the oldest Jones brother marched towards Beard and appeared to have a pistol in his pocket.<sup>132</sup> Beard ordered the eldest brother to stop, but he continued forward.<sup>133</sup> The elder Jones brother attempted to draw his pistol, and Beard reacted by cracking him over the skull with his shotgun.<sup>134</sup> Another Jones brother was a few steps behind the eldest with his hand in his pocket apparently concealing a pistol.<sup>135</sup> Beard neutralized him by clubbing him.<sup>136</sup> Beard spotted the last Jones brother lurking behind a fence on the Beard property.<sup>137</sup> Beard leaped the fence, tackled the brother, and disarmed him.<sup>138</sup>

The blow Beard delivered to the eldest brother shattered his skull.<sup>139</sup> Beard attempted to provide medical care until a doctor arrived; nevertheless, the Jones brother died from the wound.<sup>140</sup> The doctor advised Beard to flee the scene.<sup>141</sup> Beard replied that he had done nothing wrong because he had merely acted in self-defense.<sup>142</sup> Though Beard had a reputa-

---

*in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293, 299 (noting 13 Supreme Court cases involving self-defense from 1893 to 1921).

<sup>126</sup> *Beard v. United States*, 158 U.S. 550 (1895).

<sup>127</sup> *Id.* at 550–51.

<sup>128</sup> *Id.* at 551–52.

<sup>129</sup> *Id.* at 552.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 552–53.

<sup>135</sup> *Id.* at 553.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 553–554.

<sup>142</sup> *Id.* at 554.

tion for being peaceful and law-abiding,<sup>143</sup> he was convicted of manslaughter, sentenced to eight years in jail, and fined five hundred dollars.<sup>144</sup> Beard appealed his conviction on grounds that Judge Parker had erroneously instructed the jury that self-defense was inapplicable in this case.<sup>145</sup>

As it often did,<sup>146</sup> the Supreme Court reversed Judge Parker's self-defense instruction.<sup>147</sup> The Court noted that there was no evidence that Beard provoked the attack; in fact, the Court acknowledged that Beard agreed to turn the cow over to the brothers if they followed the proper legal protocol.<sup>148</sup> The Court also noted that Beard told the brothers to get off his property.<sup>149</sup> But the Court was strongest in its rebuttal of Judge Parker's jury instruction that Beard had a duty to retreat from the Jones brothers while on his own property.<sup>150</sup> The Court went on to examine the duty to retreat in self-defense in the United States and found that necessity is the test of whether an individual is justified in taking a life. The Court declared:

The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.<sup>151</sup>

Accordingly, the Court reversed and remanded the case.<sup>152</sup>

---

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 551.

<sup>145</sup> *Id.* at 556 (“The law of self-defence [sic] does not apply to a case of that kind, because he cannot be the creator of a wrong, of a wrong state of case, and then act upon it. Now, if either one of these conditions exist, I say, the law of self-defence [sic] does not apply in this case.”).

<sup>146</sup> *Oliphant v. Suquamish Indian Tribe et al.*, 435 U.S. 191, n10 (1978) (“Judge Parker's views of the law were not always upheld by this Court.”); Kopel, *supra* note 124, at 298 (“But according to the Supreme Court of the 1890s, too much [of] what Judge Parker did was not the law”).

<sup>147</sup> *Beard*, 158 U.S. at 558.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 559.

<sup>151</sup> *Id.* at 564.

<sup>152</sup> *Id.* at 564.

## 2. *Reflection and the Reasonable Man*

In 1921, the Court decided another influential self-defense case in *Brown v. United States*.<sup>153</sup> Brown and Hermes had a lengthy and troublesome relationship.<sup>154</sup> Indeed, Hermes had allegedly twice used a knife to attack Brown and threatened that either he or Brown would die during their next encounter.<sup>155</sup> Brown responded to the threat by arming himself.<sup>156</sup> While working as the superintendent of an excavation for a post office, Brown was charged by a knife-wielding Hermes.<sup>157</sup> Brown fled about 25 feet to where he had placed his pistol.<sup>158</sup> Hermes slashed as he charged.<sup>159</sup> Four trigger pulls by Brown ended Hermes' earthly existence.<sup>160</sup> Brown was convicted of second degree murder<sup>161</sup> and challenged his conviction because the judge instructed the jury that Brown had a duty to retreat.<sup>162</sup>

Justice Holmes authored the majority opinion. Justice Holmes ardently rejected the duty to retreat as antiquated and irrational, asserting that whether a defendant retreats is merely circumstantial evidence.<sup>163</sup> Modern law, he quipped, is more in line with human nature, pronouncing:

Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.<sup>164</sup>

Justice Holmes went on to explain that though Brown was not on his own property, Brown "was at a place where he was called to be, in the discharge of his duty."<sup>165</sup> Justice Holmes admitted there was evidence that Brown fired his final shot while Hermes was on the ground.<sup>166</sup> Even if the final shot was intentional and unnecessary to preserve Brown's life, Justice Holmes wrote that self-defense is still a viable claim so long as the shot was fired in the heat of passion, and Brown "believed that he was

---

<sup>153</sup> *Brown v. United States*, 256 U.S. 335 (1921).

<sup>154</sup> *Id.* at 342.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 341.

<sup>162</sup> *Id.* at 342–43.

<sup>163</sup> *Id.* at 343.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 344.

<sup>166</sup> *Id.*

fighting for his life.”<sup>167</sup> Justices Pitney and Clarke dissented but assigned no reasons.<sup>168</sup>

### B. *Self-Defense Laws*

Self-defense is a commonly accepted principle because it is grounded in the natural right of self-preservation.<sup>169</sup> Accordingly, self-defense laws exist in every state,<sup>170</sup> and states generally define self-defense as a necessary and justifiable use of force to defend oneself from unprovoked and imminent violence.<sup>171</sup> The heart of all self-defense laws is necessity; that is, the claimant must believe the exercise of force is essential to prevent a serious crime such as rape or murder.<sup>172</sup> The claimant’s belief that

---

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Jonathan Markovitz, “A Spectacle of Slavery Unwilling to Die”: Curbing Reliance on Racial Stereotyping in Self-Defense Cases, 5 UC IRVINE L. REV. 873, 874–75 (2015) (“Most people would agree that, where defendants have resorted to violence because they were faced with the choice to kill or be killed, their actions *should* be seen as socially acceptable. We generally do not believe that people should be forced to submit passively to unprovoked violence.”); Kopel, *supra* note 19, at 250 (“The right of self-defense is *not* culturally contingent, and it does not depend on national law. The right of self-defense is a universal, fundamental, natural and inherent human right.”); Judge Andrew P. Napolitano, *Why I Will Always Defend the Second Amendment and the Right to Self-Defense*, FOX NEWS (June 16, 2016), <http://www.foxnews.com/opinion/2016/06/16/judge-napolitano-why-will-always-defend-second-amendment-and-right-to-self-defense.html> (“We know from reason, human nature and history that the right to defend yourself is a natural instinct that is an extension of the right to self-preservation, which is itself derived from the right to live.”).

<sup>170</sup> 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 132 (“Every American jurisdiction provides a justification of self-defense in one form or another.”); AM. BAR ASS’N, NATIONAL TASK FORCE ON STAND YOUR GROUND LAWS 1 (Sept. 2015), [https://www.americanbar.org/content/dam/aba/images/diversity/SYG\\_Report\\_Book.pdf](https://www.americanbar.org/content/dam/aba/images/diversity/SYG_Report_Book.pdf) (“Self-defense is available in all states as a criminal defense and applies to both non-deadly as well as deadly encounters.”).

<sup>171</sup> *E.g.*, LA. REV. STAT. ANN. § 14:19 (2018); TEX. PENAL CODE § 9.31(a) (2017); N.Y. PENAL LAW, § 35.15(1) (McKinney 2017).

<sup>172</sup> *E.g.*, MODEL PENAL CODE § 3.04 (AM. LAW INST. 1985) (“[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”); 5 CONN. PRAC., CRIMINAL JURY INSTRUCTIONS § 6.1 (4th ed. 2017); Cynthia Ward, “Stand Your Ground” and Self-Defense, 42 AM. J. CRIM. L. 89, 94–95 (2015) (“[I]n both Retreat and Stand Your Ground jurisdictions, self-defense claims are frequently permitted not only in cases where the defender honestly and reasonably believed that the assailant had the conscious purpose of killing, but also in cases where defenders used deadly force to retaliate against an aggressor who was attempting to commit a serious felony (such as burglary, kidnapping, robbery, or rape) upon the person or property of the defendant.”).

the use of force in defense was necessary need not be true but “must be *honest and reasonable*.”<sup>173</sup> Sincerity of belief is relied upon as an attempt to harmonize society’s interest in preserving life with the reality that police may not be available to intervene in a timely manner.<sup>174</sup> The defendant carries the burden of proof when claiming self-defense.<sup>175</sup>

Today, there are variations in self-defense laws. The key distinction is usually whether the claimant is required to retreat or is entitled to stand her ground and defend herself.<sup>176</sup> Historically, the common law required individuals to retreat prior to utilizing force to defend themselves.<sup>177</sup> Nevertheless, in one’s home, the common law has long recognized an individual’s right to slay an intruder without retreating.<sup>178</sup> This is commonly

---

<sup>173</sup> Ward, *supra* note 172, at 95; CRIMINAL LAW (Univ. of Minn. Libraries Publishing ed. 2015), *available at* <http://open.lib.umn.edu/criminallaw/chapter/5-2-self-defense/> (“The defendant cannot claim self-defense unless a reasonable person in the defendant’s situation would believe that self-defense is necessary to avoid injury or death.”); State v. O’Neil, 99 A.3d 814, 823 (N.J. 2014) (“We thus concluded that ‘[b]ased on the Code’s own language, a person who kills in the honest and reasonable belief that the protection of his own life requires the use of deadly force does not kill recklessly.’”).

<sup>174</sup> Ward, *supra* note 172, at 96 (“[T]he element of necessity operates to balance the two important social policies expressed by the Retreat and No Retreat rules in self-defense law: the need, on the one hand, to prevent violent self-help (and the possible chaos it might produce); and, on the other hand, the perceived need to permit self-help in cases where innocent life is endangered by an immediate threat and law enforcement is not present to defeat that threat.”); Benjamin Levin, *Note, A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 528 (2010) (“The duty to retreat can be seen as a statement of societal values that held the preservation of human life and the prevention of violence paramount.”).

<sup>175</sup> People v. Dupree, 486 N.W.2d 693, 696 (Mich. 2010) (“[W]e hold that the traditional common law affirmative defense of self-defense may be interposed to a charge of being a felon in possession of a firearm, MCL 750.224f.”); Markovitz, *supra* note 169, at 886 (“Traditionally, self-defense is an affirmative defense.”); *Affirmative Defense*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/affirmative\\_defense](https://www.law.cornell.edu/wex/affirmative_defense) (“Self-defense, entrapment, insanity, and necessity are some examples of affirmative defenses.”).

<sup>176</sup> J.P. Neyland, *A Man’s Car is His Castle: The Expansion of Texas’ “Castle Doctrine” Eliminating the Duty to Retreat in Areas Outside the Home*, 60 BAYLOR L. REV. 719, 721 (2008) (“A primary issue throughout jurisdictions is whether a person has a duty to retreat before resorting to the use of deadly force.”).

<sup>177</sup> CRIMINAL LAW, *supra* note 173 (“Early common law stated that the defendant had a duty to retreat to the wall before using deadly force against an attacker.”); AM. BAR ASS’N, *supra* note 170, at 1 (“Prior to the enactment of Stand Your Ground laws, most states followed the traditional common law self-defense rule, which imposed a duty to retreat before using force in self-defense, if safe retreat was available.”).

<sup>178</sup> Kopel, *supra* note 39, at 236 (“British case law since 1330 had long recognized an absolute right to use deadly force against home invaders.”); Markovitz, *supra* note 169, at 883–84 (“The castle doctrine is a centuries-old doctrine from English common law that relaxes the standards for self-defense. . . . The doctrine removes the duty to retreat when someone is attacked in their home and reasonably believes lethal force

known as the “castle doctrine” and has been part of the United States legal system for years.<sup>179</sup>

The United States veered from the common law retreat tradition in the mid-1800s and allowed individuals to use force to thwart an attack without imposing any duty to retreat so long as the self-defense claimant was where he had a right to be and was not the initial aggressor.<sup>180</sup> The absence of a duty to retreat has been described by courts as the “true man” doctrine<sup>181</sup> and the “American rule.”<sup>182</sup> The Supreme Court has af-

---

is necessary for self-defense.”); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1306 (2009) (“A man could lawfully kill a home invader because, within the home, the man was a proxy sovereign.”).

<sup>179</sup> STEVEN JANSEN & M. ELAINE NUGENT-BORAKOVE, EXPANSIONS TO THE CASTLE DOCTRINE: IMPLICATIONS FOR POLICY AND PRACTICE 4 (2007) (“[S]tates have long acknowledged the right of individuals to defend their homes through the Castle Doctrine.”); Lacey N. Wallace, *Castle Doctrine Legislation: Unintended Effects for Gun Ownership?*, 11 JUST. POL’Y J. 1, 4 (2014) (“As with many aspects of English common law, this notion of a Castle Doctrine took hold in the early United States and gained favor through the 1800’s.”).

<sup>180</sup> *Runyan v. State*, 57 Ind. 80, 84 (1877) (“Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defence [sic]. The weight of modern authority, in our judgment, establishes the doctrine, that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable.”); Andrea Headley & Mohamad G. Alkadry, *The Fight or Flight Response: A Look at Stand Your Ground*, 5 RALPH BUNCHE J. PUB. AFF. 1, 1 (2016) (“In the 19th century, most of America began to deviate from English common law practices, as seen by the abandonment of the duty to retreat from life-threatening situations in public spaces.”); Levin, *supra* note 174, at 529 (“Despite the significant precedent establishing a duty to retreat in the English and Anglo-American common law, there was a dramatic movement to abandon the duty in the United States during the late nineteenth century.”).

<sup>181</sup> *Beard v. United States*, 158 U.S. 550, 561 (1895) (“[A] true man who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or to do him enormous bodily harm.”); *Tennessee v. Pruitt*, 510 S.W.3d 398, 419 (Tenn. 2016) (“The ‘no duty to retreat rule,’ also known as the ‘true man’ doctrine, holds that ‘one need not retreat from the threatened attack of another even though one may safely do so.’”); *People v. Toler*, 9 P.3d 341, 342 (Colo. 2000) (“The ‘true man’ doctrine stands for the proposition that a ‘true person,’ or someone who is without fault, does not have to retreat from an actual or threatened attack even if he could safely do so before the person may use physical force in self-defense.”).

<sup>182</sup> *Cooper v. United States*, 512 A.2d 1002, 1004 (D.C. 1986) (“This formulation expressed an emphasis consistent with the so-called ‘American rule,’ which holds that one is not required to retreat whether he is attacked in his home or elsewhere, but may stand his ground and defend himself.”).

firmed the no-retreat rule for over a century,<sup>183</sup> and most states have formally adopted the no-retreat rule, commonly known as stand your ground laws.<sup>184</sup>

Stand your ground laws have been the source of much controversy in recent years.<sup>185</sup> This is the result of several high-profile cases, most notably Florida's Trayvon Martin case<sup>186</sup> though the state's stand your ground law was not invoked during the trial.<sup>187</sup> In the aftermath of the trial, the American Bar Association created a task force to study stand your ground laws. The task force concluded that stand your ground laws increase homicide rates and are unnecessary to self-defense claims.<sup>188</sup> The National Bureau of Economic Research (NBER) published a working paper in 2012 stating that stand your ground laws resulted in approximately 30 additional white males murdered per month in 2010 as well as increased firearm injuries.<sup>189</sup> Nevertheless, the NBER paper did acknowledge the increased homicide rate accompanying the enactment of stand your ground laws "may partly be driven by the killings of assailants."<sup>190</sup> A 2017 Rand Corporation analysis found there is moderate evidence linking stand your ground laws to increased homicide rates but insufficient evidence to connect stand your ground laws with other crimes, suicide rate,

---

<sup>183</sup> *See Beard*, 158 U.S. at 564 (1895).

<sup>184</sup> AM. BAR ASS'N, *Task Force*, *supra* note 170, at 2 (noting 33 states had stand your ground laws in 2014); "Stand Your Ground" Laws, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/> ("A majority of states now have 'shoot first' laws").

<sup>185</sup> *E.g.*, German Lopez, *What "Stand Your Ground" Laws Actually Do*, VOX (Dec. 12, 2016), <https://www.vox.com/policy-and-politics/2016/12/12/13875124/stand-your-ground-castle-doctrine-law>; Ta-Nehisi Coates, *How Stand Your Ground Relates to George Zimmerman*, THE ATLANTIC (July 16, 2013), <https://www.theatlantic.com/national/archive/2013/07/how-stand-your-ground-relates-to-george-zimmerman/277829/>; Dahlia Lithwick, *"Stand Your Ground" Nation*, SLATE (Feb. 25, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/02/\\_stand\\_your\\_ground\\_nation\\_from\\_trayvon\\_martin\\_to\\_jordan\\_davis\\_how\\_our\\_understanding.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/_stand_your_ground_nation_from_trayvon_martin_to_jordan_davis_how_our_understanding.html).

<sup>186</sup> ABA Bar Ass'n, *Task Force*, *supra* note 170, at 2 (noting the Trayvon Martin case brought stand your ground laws to the national forefront).

<sup>187</sup> JOHN R. LOTT, JR., HEARING ON "STAND YOUR GROUND" LAWS: CIVIL RIGHTS AND PUBLIC SAFETY IMPLICATIONS OF THE EXPANDED USE OF DEADLY FORCE: TESTIMONY BEFORE THE U.S. SENATE JUDICIARY COMMITTEE'S SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS (Oct. 29, 2013), [http://johnrlott.tripod.com/Lott\\_SYG\\_Senate\\_Testimony\\_Rev\\_Oct\\_29.pdf](http://johnrlott.tripod.com/Lott_SYG_Senate_Testimony_Rev_Oct_29.pdf) ("Despite the ruckus over the law after the Zimmerman acquittal, his defense team never raised the 'Stand Your Ground' law as a defense.").

<sup>188</sup> ABA Bar Ass'n, *Task Force*, *supra* note 170, at 1.

<sup>189</sup> Chandler B. McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries*, NBER Working Paper 18187, at 1, 7 (June 2012), <http://www.nber.org/papers/w18187.pdf>.

<sup>190</sup> *Id.* at 24.

or defensive gun use.<sup>191</sup> On the other hand, John Lott, Jr., perhaps the most famous gun rights proponent, has concluded that stand your ground laws “lowered murder rates by about 9 percent and that overall violent crime rates also declined.”<sup>192</sup> Walter Olson of the libertarian Cato Institute notes that the homicide rate and violent crime dropped in Florida from 2005, the year stand your ground became the law, and 2010.<sup>193</sup>

Aside from whether stand your ground laws reduce crime, the most contentious aspect of stand your ground laws is whether the laws have a racially disparate effect. A 2013 study published by the Urban Institute concluded that, in stand your ground states, a justifiable homicide is nearly twice as likely to result from a white on black homicide than a white on white homicide; whereas, a black on white homicide is half as likely to produce a justifiable homicide as a white on black homicide.<sup>194</sup> A well-known study by the *Tampa Bay Times* found that individuals who killed a black person prevailed in 73% of stand your ground cases while those who killed a white person succeeded in 59% of stand your ground claims.<sup>195</sup> However, in a 2013 Senate Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Human Rights testimony, John Lott, Jr. expressed criticism of the claim that stand your ground laws are racist.<sup>196</sup> Lott noted that most crime is intra-racial and that, when claiming the stand your ground defense, blacks were acquitted 69% of the time compared to 62% of the time for whites.<sup>197</sup> Lott also explained that variables beyond race are at play in the cases (such as whether witnesses were present during the confrontation), and that these factors impact the outcome of cases.<sup>198</sup> Furthermore, the NBER paper that found stand your ground laws resulted in more homicides also concluded there is “no evidence to indicate that these laws cause an increase in homicides among blacks.”<sup>199</sup>

---

<sup>191</sup> *The Effects of Stand-Your-Ground Laws*, RAND CORP., <https://www.rand.org/research/gun-policy/analysis/stand-your-ground.html>.

<sup>192</sup> LOTT, JR., *supra* note 187.

<sup>193</sup> Walter Olson, *In Defense of ‘Stand Your Ground’ Laws*, CATO AT LIBERTY (Mar. 22, 2012), <https://www.cato.org/blog/defense-stand-ground-laws>.

<sup>194</sup> JOHN K. ROMAN, URBAN INSTITUTE, RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA 9 (July 2013), <https://www.urban.org/sites/default/files/publication/23856/412873-Race-Justifiable-Homicide-and-Stand-Your-Ground-Laws.PDF>.

<sup>195</sup> Susan Taylor Martin, *Florida ‘Stand Your Ground’ Law Yields Some Shocking Outcomes Depending on How Law Is Applied*, TAMPA BAY TIMES (June 1, 2012), <http://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133>.

<sup>196</sup> LOTT, JR., *supra* note 187.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> McClellan & Tekin, *supra* note 189, at 7.



A relatively new self-defense law is the battered woman syndrome.<sup>200</sup> This defense was born from the sad reality that many women are abused by their male domestic partners.<sup>201</sup> Women typically cannot overcome men in physical combat. Thus, women who have long been abused by their partner sometimes attack their partner while he is sleeping or otherwise vulnerable and often with extreme force; accordingly, the battered woman is not considered to be in immediate peril when she strikes her abuser.<sup>202</sup> For example, battered women such as Francine Hughes have set their slumbering husbands on fire.<sup>203</sup> Self-defense in the traditional sense is not an option in this situation. Battered woman's syndrome

---

<sup>200</sup> Cara Cookson, *Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont*, 34 VT. L. REV. 415, 428 (2009) ("Several Vermont Supreme Court opinions issued over the last 20 years reference BWS in ways that reveal a progression in how the court conceptualizes women's responses to abusive relationships, without providing for its proper use."); Christina England, *The Battered Women's Syndrome: A History and Interpretation of the Law of Self-Defense as it Pertains to Battered Women Who Kill Their Husbands*, 3 VAND. UNDERGRADUATE RES. J., at 3 (2007); Lenore E. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 322 (1992) ("In the late 1970s and early 1980s, what became known as the *battered woman self-defense* achieved acceptance within the case law of numerous states.") ("Many court cases dating mostly from the mid-1970's during the second wave of the women's movement tried to include the "battered women's syndrome" in the self-defense plea, and gradually over the past few decades, important precedents have been set permitting expert witness testimony in the courtroom to explain this psychological theory as it pertains to the case."); Lenore E. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 322 (1992) ("In the late 1970s and early 1980s, what became known as the *battered woman self-defense* achieved acceptance within the case law of numerous states.").

<sup>201</sup> See, e.g., Jimmie E. Tinsley, *Criminal Law: The Battered Woman Defense*, 34 AM. JUR. PROOF OF FACTS 2d § 1 (2018) ("In recent years increasing attention has been given to the fact that these stereotypical notions frequently do not comport with reality. . . . The man most likely to abuse a woman is her husband . . ."); Alanna Vagianos, 30 *Shocking Domestic Violence Statistics that Remind Us It's an Epidemic*, HUFFPOST (Oct. 23, 2014), [https://www.huffingtonpost.com/2014/10/23/domestic-violence-statistics\\_n\\_5959776.html](https://www.huffingtonpost.com/2014/10/23/domestic-violence-statistics_n_5959776.html); Olga Khazan, *Nearly Half of All Murdered Women Are Killed by Romantic Partners*, THE ATLANTIC (July 20, 2017), <https://www.theatlantic.com/health/archive/2017/07/homicides-women/534306/>.

<sup>202</sup> Stephanie Duiven, *Battered Women and the Full Benefit of Self-Defense Laws*, 12 BERKELEY WOMEN'S L.J. 103, 106 (1997) ("The situations in which battered women kill often are not ones in which the danger from the abuser clearly appears to be 'imminent.'"); Misty Murray, *People v. Humphrey: The New Rules of Self-Defense for Battered Women Who Kill*, 27 SW. U. L. REV. 155, 157 (1997) ("Battered women experts argue that the prior acts of violence by the abuser against the battered woman, which often trace back to many years of repeated abuse, must be taken into account in determining the reasonableness of the battered woman's perception that she was in danger of an imminent attack.").

<sup>203</sup> Vicki Dozier, *Francine Hughes Wilson, Abused Michigan Wife Who Inspired 'The Burning Bed,' Dies at 69*, LANSING ST. J. (2017), <https://www.lansingstatejournal.com/story/news/local/2017/03/30/francine-hughes-wilson-who-inspired-burning-bed-dies-69/99834400/>.

hinges on psychological changes stemming from the woman suffering years of abuse, and many jurisdictions recognize battered woman's syndrome.<sup>204</sup> Essentially, battered woman's syndrome enables an abused woman to claim self-defense by demonstrating her action was the result of a reasonable fear of imminent danger due to her past experiences with her partner.<sup>205</sup>

#### IV. INDIANS, GUNS, AND RESISTANCE

This Part explores the seldom discussed relationship between Indians and guns. First, this Part provides a general history of how the gun transformed American Indian culture. Then this Part summarizes the legal framework for gun and self-defense laws in Indian country today.

##### A. History

European arrival brought many drastic changes for America's indigenous people. Well-known is the horrendous depopulation brought about by old-world diseases.<sup>206</sup> Although horses are commonly associated with American Indians in popular culture, Europeans brought horses to the Americas.<sup>207</sup> Europeans also brought a vast array of previously un-

---

<sup>204</sup> Kendall Hamilton, Comment, *Virginia's Gap Between Punishment and Culpability: Re-Examining Self-Defense Law and Battered Woman's Syndrome*, 49 U. RICH. L. REV. 327, 330 (2014) ("Today, many jurisdictions recognize BWS and have adopted BWS as an umbrella term for all domestic-abused-related disorders."); Michelle Strucke & Kate Hajjar, *Battered Woman Syndrome*, CORNELL UNIV. L. SCH., [https://courses2.cit.cornell.edu/sociallaw/student\\_projects/BatteredWomanSyndrome.htm](https://courses2.cit.cornell.edu/sociallaw/student_projects/BatteredWomanSyndrome.htm) (last visited Aug. 19, 2018) ("[Battered woman syndrome] is currently available in seventy-six percent of states . . .").

<sup>205</sup> Hamilton, *supra* note 204, at 340; see Cookson, *supra* note 200, at 421 ("BWS testimony functions within the existing framework of common law self-defense, not as a separate affirmative defense.").

<sup>206</sup> Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. C.R. & SOC. JUST. 315, 316 (2017) ("Diseases from Europe brought immeasurable harm to American Indian societies."); Lois N. Magner, *The Impact of European Diseases on Native Americans*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/impact-european-diseases-native-americans> (last visited Aug. 19, 2018); *American History Myths Debunked: The Indians Weren't Defeated by White Settlers*, INDIAN COUNTRY TODAY (Aug. 18, 2017), <https://indiancountrymedianetwork.com/history/events/american-history-myths-debunked-the-indians-werent-defeated-by-white-settlers/>.

<sup>207</sup> *American Indian Horse History*, AM. INDIAN HORSE REGISTRY, <http://www.indianhorse.com/about/american-indian-horse-history/> (last visited Aug. 19, 2018) ("It is generally agreed by historians that the Spanish brought the horse to the new world in the 1500s."); Danny Lewis, *A Brief History of America's Complicated Relationship With Wild Horses*, SMITHSONIAN.COM (Sept. 20, 2016), <https://www.smithsonianmag.com/smart-news/brief-history-americas-complicated-relationship-horses-180960493/>

known items to the American Indians—cotton clothing, metal goods, and glass. Arguably, the European manufacture that had the greatest impact on Amerindian culture was the gun.

The first gunshot in North America may have been by Samuel de Champlain in 1609 when he used his arquebus to help the Huron, Ottawa, and Montagnais defeat the Mohawk in battle.<sup>208</sup> The flash, bang, and smoke produced by the weapon would certainly have had a psychological effect on people who had never been exposed to such a sight; nonetheless, Indians immediately recognized the gun's death-dealing potential.<sup>209</sup> This sparked an obsession with guns that would radically transform American Indian society throughout the Americas.<sup>210</sup>

Indians did not know how to produce firearms, ammunition, or gun powder.<sup>211</sup> Hence, Indians had to trade for guns. Trade was nothing new to the Americas as indigenous people had long established and well-developed trading networks.<sup>212</sup> But the gun trade was different. Indians began to engage in mass enslaving campaigns against other Indians to serve as currency for the purchase of guns.<sup>213</sup> The armed Indians had a major military advantage over those without guns; hence, unarmed Indians sought weaker nations to enslave in order to arm themselves.<sup>214</sup> Addi-

---

(“Wild or domesticated, the immediate ancestors of all horses in the western hemisphere can trace their ancestry back to the creatures European explorers and colonists brought with them in the 15th and 16th centuries.”).

<sup>208</sup> David Kopel, *Native Americans and Gun Violence*, DAVEKOPEL.ORG (2002), <http://www.davekopel.org/2A/EncyGunsInAmerSociety/Native-Americans-and-Gun-Violence.htm>.

<sup>209</sup> DAVID J. SILVERMAN, THUNDERSTICKS 23 (2016) (“[E]arly clashes with the French served less to intimidate the Iroquois than captivate them about what they could accomplish with European weaponry.”).

<sup>210</sup> David Kopel, *Perspective, The American Indian Foundation of American Gun Culture*, WASH. POST (Nov. 21, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/21/the-american-indian-foundation-of-american-gun-culture/?utm\\_term=.c6836ddb2f93](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/21/the-american-indian-foundation-of-american-gun-culture/?utm_term=.c6836ddb2f93) (“Yet those firearms were quickly integrated into an arms culture that had already existed in America for centuries and that would eventually become the arms culture of American of all races.”).

<sup>211</sup> SILVERMAN, *supra* note 209, at 15.

<sup>212</sup> Joseph Austin & Adam Crepelle, *All Roads Lead to Chaco Canyon: Revitalizing International Trade Between Native Nations*, TRIBAL BUS. J., <http://tribalbusinessjournal.com/roads-lead-chaco-canyon/> (last visited Aug. 27, 2018) (“Native Nations in the western hemisphere once had expansive trade networks that extended from Canada to South America. Evidence can be found in the historic trade hubs like Paquime, Cahokia, Etzanao, and Chaco Canyon.”); ROBERT J. MILLER, RESERVATION CAPITALISM 22 (2012) (prior to European arrival, “Indians and their governments participated in extensive trade networks that crisscrossed North America.”).

<sup>213</sup> SILVERMAN, *supra* note 209, at 57 (“Competition for captives [to sell as slaves] and control of European markets galvanized intertribal arms races in the Southeast as they had in the North.”).

<sup>214</sup> *Id.* at 49.

tionally, guns enabled Indians to become more efficient hunters which enabled musket-wielding Indians to produce more furs than Indians equipped with only bows and arrows.<sup>215</sup> Thus, gun-toting tribes had an economic advantage over those without firearms, which in turn provided a military advantage. Guns became so essential to some tribes that they forgot how to manufacture and hunt with bows and arrows by the early 1700s.<sup>216</sup> Many tribes also utilized firearms for ceremonial purposes.<sup>217</sup>

When it came to guns, Europeans considered Indians “connoisseurs.”<sup>218</sup> Indians wanted specific firearms and got them.<sup>219</sup> In fact, gun manufacturers in Europe began designing firearms to meet American Indian specifications by the mid-1600s.<sup>220</sup> Indians wanted lighter weapons than standard European arms because lighter arms enabled quicker and more efficient movement which was needed for Indian-style warfare.<sup>221</sup> Indians also developed ammunition designed to hunt specific game. Some Indians soon became more proficient with firearms than the Europeans themselves, and this was a source of great concern for the European powers.<sup>222</sup>

Fears of armed indigenous resistance caused most of the American colonies to enact laws prohibiting the armament of Indians.<sup>223</sup> For example, one of the initial laws passed by the Jamestown colony was “[t]hat no man do sell or give any Indians any piece, shot, or powder, or any other arms offensive or defensive, upon pain of being held a traitor to the colony and of being hanged as soon as the fact is proved, without all re-

---

<sup>215</sup> *Id.* at 86.

<sup>216</sup> *Id.* at 9 (noting for some tribes near the Hudson Bay “[i]t only took a generation or two before Indians claimed that their young people had become so accustomed to hunting with these weapons, and so out of practice at using and manufacturing bows and arrows, that they would starve without ammunition and gunsmithing services”); Donald E. Worcester & Thomas F. Schliz, *The Spread of Firearms Among the Indians on the Anglo-French Frontiers*, 8 AM. INDIAN Q. 103, 112–13 (1984) (“The northern Crees soon came to rely on English firearms so completely that by 1716 they had entirely abandoned the use of bows and arrows.”).

<sup>217</sup> SILVERMAN, *supra* note 209, at 31 (noting the Iroquois were including guns in ceremonies by the 1640s); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1727 (2012) (discussing how some tribes, such as the Navajo Nation, have ceremonial use clauses in their gun ordinances).

<sup>218</sup> SILVERMAN, *supra* note 209, at 246.

<sup>219</sup> *Id.* at 53.

<sup>220</sup> *Id.* at 28.

<sup>221</sup> *Id.* at 28.

<sup>222</sup> *Id.* at 31 (“[A]s early as the 1640s French and Dutch colonists sounded the alarm about Iroquois warriors who used guns ‘as well as our Europeans’ and could even be said to ‘excel many Christians.’”).

<sup>223</sup> Clayton E. Cramer, *Colonial Firearms Regulation: An Honest Account*, TALON’S POINT (May 4, 2015), <https://talonspoint.wordpress.com/2015/05/04/colonial-firearms-regulation-an-honest-account/> (“Most colonies did, however, pass laws restricting possession of firearms by blacks and Indians.”).

demption.”<sup>224</sup> Due to anxiety over the possibility of an Indian attack, Virginia required men to bring firearms to church during the early 1600s.<sup>225</sup> Even the ban on slaves possessing firearms was lifted if the slave was using the gun to shoot an Indian.<sup>226</sup> Despite the colonies’ efforts, the gun laws did not work.<sup>227</sup> Indians were usually able to acquire arms with little trouble.<sup>228</sup>

The United States’ victories in the various Indian wars are commonly thought to be the result of superior American firepower, but Professor David J. Silverman questions this thesis in his masterful book, *Thundersticks*. As one example, Silverman notes that the Seminoles were able to resist removal despite facing the much larger United States army because the Seminoles were well-armed.<sup>229</sup> The Seminoles replenished their ammunition supplies by snatching munitions from the United States military as well as participating in international trade with Cuba and the Bahamas.<sup>230</sup> In fact, the United States unsuccessfully called in the Navy to disrupt the Seminoles arms supply.<sup>231</sup> The Seminoles were far from the only Indian nation to utilize the gun to resist colonization. Ultimately, Indians failed to defeat the United States due to the United States’ vast numerical superiority, the United States’ malicious destruction of indig-

---

<sup>224</sup> Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55, 57 (2017).

<sup>225</sup> *Id.* at 75 (“[M]en were required to bring their firearms to church for fear of Indian attacks.”).

<sup>226</sup> *Id.* at 78–79 (“Early in the country’s history, slave owners found it not only useful, but necessary, to arm slaves in early conflicts with Native Americans.”); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL’Y 17, 17 (1995) (“In Louisiana, the fear of Indian attack and the importance of hunting to the colonial economy necessitated that slaves sometimes possess firearms. The colonists had to balance their fear of the Indians against their fear of their slaves.”).

<sup>227</sup> SILVERMAN, *supra* note 209, at 17 (“Euro-American governments typically banned the sale of munitions to Indians, but usually to little effect.”); David Kopel, *Perspective, The American Indian Foundation of American Gun Culture*, THE WASH. POST (Nov. 21, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/21/the-american-indian-foundation-of-american-gun-culture/?utm\\_term=.c6836ddb2f93](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/21/the-american-indian-foundation-of-american-gun-culture/?utm_term=.c6836ddb2f93) (“The colonists enacted many laws to attempt to control the Indian arms trade, but they were exercises in futility.”).

<sup>228</sup> SILVERMAN, *supra* note 209, at 40–41 (noting colonial competition provided Indians with ample opportunities to acquire arms); James A. Warren, *Native Americans Invented Our Gun Culture—and Yes, We Stole That, Too*, THE DAILY BEAST (Mar. 4, 2017), <https://www.thedailybeast.com/native-americans-invented-our-gun-cultureand-yes-we-stole-that-too> (“And when and where the chief colonial power in one region or another placed an embargo on arms sales to Indians—a not infrequent development—itinerant black market traders and Native American middlemen were happy to be of service.”).

<sup>229</sup> SILVERMAN, *supra* note 209, at 190–91.

<sup>230</sup> *Id.* at 191–92.

<sup>231</sup> *Id.* at 212.

enous food sources, and European diseases—often purposefully spread by the United States.<sup>232</sup> Professor Silverman asserts, “The fact that southern Plains Indians like the Comanches and Kiowas fought against these odds for as long as they did is evidence that their arms were a means to mount a heroic defense of what was theirs, not a Trojan horse for their colonization.”<sup>233</sup>

### B. *Firearms in Contemporary Indian Country*

Given the importance of firearms to American Indians for the past 400 years, it should be no surprise that guns are common in Indian country today.<sup>234</sup> What is surprising is that the residents of Indian country are the only people in the United States who lack the constitutional right to bear arms because Indian tribes are not bound by the United States Constitution.<sup>235</sup> The Indian Civil Rights Act (ICRA) offers individuals in Indian country many protections similar to the Bill of Rights, but the ICRA contains no Second Amendment analogue.<sup>236</sup> In fact, Supreme Court Justices in *Heller* suggested that one of the purposes of the Second Amendment was to enable whites to defend themselves against Indians.<sup>237</sup> Although racist federal gun laws applied to Indians until 1979,<sup>238</sup> tribes’ extraconstitutional status gives tribal governments tremendous flexibility to devise their own gun laws.<sup>239</sup> Professor Angela Riley has observed that,

---

<sup>232</sup> *Id.* at 248.

<sup>233</sup> *Id.* at 248.

<sup>234</sup> Crepelle, *supra* note 10, at 251.

<sup>235</sup> *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781–82 (1991) (noting that tribes surrendered no powers at the Constitutional Convention); *Talton v. Mayes*, 163 U.S. 376, 385 (1896) (holding the Bill of Rights does not apply to Indian tribes).

<sup>236</sup> The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (2012).

<sup>237</sup> *District of Columbia v. Heller*, 554 U.S. 570, 725 (2008) (Breyer, J., dissenting) (noting any self-defense purpose the Second may have served is not relevant to today’s urban lifestyle and was instead intended to provide a mechanism for settlers to defend themselves against frontier dangers like “fighting with Indian tribes”); Transcript of Oral Argument at 8, *D.C. v. Heller*, 554 U.S. 570 (2008) (No. 07-290), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2007/07-290.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2007/07-290.pdf) (Justice Kennedy stating the Second Amendment was designed to enable “the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves bears and grizzlies and things like that”).

<sup>238</sup> Ann E. Tweedy, “*Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?*” *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 732 (2011) (discussing laws that prohibited the sale of firearms to Indians “within any district or county occupied by uncivilized or hostile Indians” and without the “permission of the superintendent, which will be granted only for clearly established lawful purposes.”).

<sup>239</sup> Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1716 (2012) (“As the only sovereigns not bound to protect an individual right to bear arms as set forth in *Heller* and *McDonald*, tribal governments may define gun rights completely free of

“Today, a rather small but growing number of tribal constitutions expressly provide that the Indian nation may not infringe on the individual right to bear arms.”<sup>240</sup>

The primary constraint for tribal gun laws on the reservation would be federal restrictions. State criminal/prohibitory gun laws can apply in Indian country; however, states cannot ban handgun ownership because of the Court’s *McDonald* decision.<sup>241</sup> Conflict may arise when individuals who lawfully possess a firearm under tribal law leave the reservation with their firearms in tow. Indeed, states have opposed much less controversial tribally authorized regulatory schemes, like license plates and law enforcement light bars, when the tribal licensee enters state jurisdiction.<sup>242</sup> Thus, litigation over tribal gun laws is easy to envision.

Though tribal governments are not bound by the Supreme Court’s decisions in *Heller* and *McDonald*,<sup>243</sup> the key principle of the cases—that individuals have a right to possess handguns for self-defense—is one that tribes should consider. *Heller* and *McDonald* may offer the best jurisprudential antidote to *Oliphant*.

### C. Self-Defense for Tribes

American Indians have long practiced self-defense;<sup>244</sup> in fact, tribes’ historic desire for guns was largely fueled by their need to defend themselves against Europeans.<sup>245</sup> Today, tribal codes contain provisions for self-defense, and contrary to the contention of some, tribal laws are essentially identical to run-of-the-mill United States self-defense laws.<sup>246</sup> For ex-

---

state and federal constitutional restraints.”).

<sup>240</sup> *Id.* at 1722.

<sup>241</sup> Crepelle, *supra* note 10, at 258 (2017) (“States cannot ban handgun ownership—they can only regulate it.”).

<sup>242</sup> *Prairie Band of Potawatomi Nation v. Wagon*, 476 F.3d 818, 820 (10th Cir. 2007); *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 692 (9th Cir. 2004).

<sup>243</sup> *Riley*, *supra* note 239, at 1716.

<sup>244</sup> *E.g.*, ROBERT M. UTLEY & WILCOMB E. WASHBURN, *INDIAN WARS* 27 (1987) (“For the Indians, this revenge was not merely casual retribution for specific injustices. It represented a strong moral principle in Indian life. To fail to repay an injustice was not charity or mercy, but itself injustice.”); JOHN REED SWANTON, *INDIAN TRIBES OF THE LOWER MISSISSIPPI VALLEY AND ADJACENT COAST OF THE GULF OF MEXICO* 170 (1911) (noting a Natchez religious leader stated that to “please the Supreme Spirit it was necessary to observe these points: To kill no one except in defense of one’s own life . . .”).

<sup>245</sup> Angelique EagleWoman (Wambdi A. WasteWin), *Tribal Nations and Tribal Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 *WASHBURN L.J.* 805, 811 (2010) (“[T]ribal leaders often negotiated for firearms and weaponry to even the playing field when marauding non-Indians attacked their villages or groups of traders stole goods at gunpoint.”).

<sup>246</sup> *E.g.*, *Nevada v. Hicks*, 533 U.S. 353, 385 (2001) (Souter, J., concurring)

ample, the Standing Rock Sioux Tribe (SRST) and the Chitimacha Tribe of Louisiana tribal codes state, “The use of reasonable force is a defense when a person reasonably believes that such force is immediately necessary to protect himself or herself.”<sup>247</sup> Both tribes authorize the use of deadly force if the defendant “reasonably believes such force is necessary” to prevent serious bodily harm or death.<sup>248</sup> Both tribes also allow force to be used in defense of others<sup>249</sup> and the defense of property.<sup>250</sup> Many other tribes have self-defense laws with language that is nearly identical to the language quoted above.<sup>251</sup>

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR)’s tribal code contains detailed self-defense provisions in the section titled “Justification.”<sup>252</sup> The section begins by stating justification is a defense “[i]n any prosecution for an offense”<sup>253</sup> Very appropriately, the Code has a section titled “Choice of Evils” explaining physical force is justified when:

1. That conduct is necessary as an emergency measure to avoid imminent public or private injury; and 2. [t]he threatened injury

---

(claiming tribal law is anomalous because it is based traditional tribal values “would be unusually difficult for an outsider to sort out.”); *Dolgencorp v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 181 (5th Cir. 2014) (Smith, J., dissenting) (expressing fear that Dollar General—who consented to Mississippi Choctaw tribal court jurisdiction—would be subject to “Choctaw law [that] expressly incorporates, as superior to Mississippi state law, the ‘customs . . . and usages of the tribes.’”); Reply Brief for Petitioners at 21, *Dollar General Corp. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014) (No. 13-1496) (contending it is impossible to know how to apply tribal law).

<sup>247</sup> CHITIMACHA TRIBE OF LA., TITLE III – CRIMINAL OFFENSE CODE § 109, <http://www.chitimacha.gov/sites/default/files/CCCJ%20Title%20III%20-%20Criminal%20Offenses%20Code.pdf>; Standing Rock Sioux Tribe, Title IV-Criminal Offenses/Sex Offenders, § 4-205(a), <https://www.standingrock.org/content/title-iv-4-criminal-offensessex-offenders>.

<sup>248</sup> SRST, 4-208; Chitimacha, Sec. 112.

<sup>249</sup> CHITIMACHA TRIBE OF LA., § 110; Standing Rock Sioux Tribe, § 4-206.

<sup>250</sup> CHITIMACHA TRIBE OF LA., § 111; Standing Rock Sioux Tribe, § 4-207.

<sup>251</sup> *E.g.*, NOTTAWASEPPI HURON BAND OF THE POTATWATOMI § 8.6-5, <https://ecode360.com/29879423>; SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, TRIBAL CODE § 71.401(d) (2018), <https://www.saulttribe.com/images/downloads/government/tribal%20code/Chapter-071.pdf>; SISSETON-WAHPETON SIOUX TRIBE, CODE OF LAWS § 24-01-25, 26, 27 (2005), [https://www.narf.org/nill/codes/sisseton\\_wahpeton/Chapter24.pdf](https://www.narf.org/nill/codes/sisseton_wahpeton/Chapter24.pdf); FORT PECK ASSINIBOINE AND SIOUX TRIBES tit. 7, § 113 (2017), <https://static1.squarespace.com/static/594c44e12cba5ec4cb294563/t/598b45cb3e00be40831cc4a8/1502299607844/CCOJ-Complete+7-5-17-protected.pdf>; THE SNOQUALMIE TRIBE, AN ACT RELATING TO THE SNOQUALMIE TRIBE CRIMINAL CODE § 18.4, [http://www.snoqualmietribe.us/sites/default/files/criminal\\_code\\_7.1\\_compresses.pdf](http://www.snoqualmietribe.us/sites/default/files/criminal_code_7.1_compresses.pdf).

<sup>252</sup> CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, CRIMINAL CODE § 4.12 (amended 2016), [http://ctuir.org/system/files/Criminal%20Code\\_0.pdf](http://ctuir.org/system/files/Criminal%20Code_0.pdf).

<sup>253</sup> *Id.* at § 4.12.



is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the section defining the offense in issue.<sup>254</sup>

The CTUIR tribal code then states that physical force can be used by a private individual to defend himself, a third party, or private property.<sup>255</sup> Individuals are also authorized to use force to prevent a person from seriously physically harming herself or committing suicide.<sup>256</sup> The CTUIR code goes on to explicitly limit the amount of force used in defense against “what he reasonably believes to be the use or imminent use of unlawful physical force, and he may use a degree of force which he reasonably believes to be necessary for the purpose.”<sup>257</sup> Force, however, cannot be used as a defense under the CTUIR code if the individual is the initial aggressor or provokes an attack to injure another person.<sup>258</sup> The code also prohibits justification from being used as a defense if the force resulted from “combat by agreement not specifically authorized by law.”<sup>259</sup> The CTUIR code limits deadly force in self-defense to situations involving “major crime[s]” that are (or may be) violent and as well as to resist the burglary of a dwelling.<sup>260</sup> Even the contours of using physical force to make a citizen’s arrest are set forth in the CTUIR code.<sup>261</sup>

Many tribes do not have provisions explicitly authorizing self-defense, but some tribal codes allude to self-defense in other laws. Though the Eastern Band of Cherokee has no self-defense provision in its criminal code, the code does authorize the sale of handguns on the Cherokee Reservation if “the weapon is necessary for self-defense or protection of the house.”<sup>262</sup> The Siletz Tribal Code does not define self-defense; nevertheless, the tribal code states “In any prosecution for an offense, justification is a defense which, if raised, the Siletz Indian Tribe must disprove beyond a reasonable doubt.”<sup>263</sup> Likewise, the Seminole Nation of Oklahoma does not define self-defense, but the tribal code states

---

<sup>254</sup> *Id.* at § 4.14(A).

<sup>255</sup> *Id.* at § 4.15(D).

<sup>256</sup> *Id.* at § 4.15(C).

<sup>257</sup> *Id.* at § 4.16.

<sup>258</sup> *Id.* at § 4.17(A–B).

<sup>259</sup> *Id.* at § 4.17(C).

<sup>260</sup> *Id.* at § 4.18(A–B).

<sup>261</sup> *Id.* at § 4.25.

<sup>262</sup> EASTERN BAND OF CHEROKEE INDIANS CODE OF ORDINANCES § 144-2, *available at* [https://library.municode.com/nc/chokeee\\_indians\\_eastern\\_band/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH144FI\\_S144-2HASA](https://library.municode.com/nc/chokeee_indians_eastern_band/codes/code_of_ordinances?nodeId=PTIICOOR_CH144FI_S144-2HASA).

<sup>263</sup> CRIMINAL CODE OFFENSES AND PUNISHMENTS, SILETZ TRIBAL CODE § 12.002, *available at* [http://www.ctsi.nsn.us/uploads/downloads/TribalOrdinances/12-001\\_Criminal\\_Code\\_offenses\\_and\\_punishments.pdf](http://www.ctsi.nsn.us/uploads/downloads/TribalOrdinances/12-001_Criminal_Code_offenses_and_punishments.pdf).

that an individual shall not be denied a protective order for acting in self-defense.<sup>264</sup> The Seminole Nation of Oklahoma also weaves self-defense language into its “assault and battery with a deadly weapon” law.<sup>265</sup> Interestingly, the Grand Traverse Band of Ottawa and Chippewa Indians recognize self-defense in its education code which permits “[a] person employed by or engaged as a volunteer or contractor by the school board” to use reasonable force, for among other things, “self-defense or defense of another.”<sup>266</sup>

## V. SELF-DEFENSE CONSIDERATIONS FOR INDIAN COUNTRY

The analysis of tribal codes indicates that many tribes do not have explicit self-defense provisions.<sup>267</sup> This does not mean that an individual who defends herself on the land of a tribe that has no self-defense laws cannot claim self-defense. As discussed above, self-defense is a universally recognized right; accordingly, tribal courts likely provide a common law right of self-defense in this situation.<sup>268</sup> Nonetheless, the absence of self-defense provisions in tribal codes suggests that tribal councils should consider filling this gap in the law. This Part examines the two major problems contributing to high rates of crime in Indian country, the jurisdictional gap and the inadequate number of police. Next, this Part discusses various self-defense laws and how the laws may apply in Indian country.

### A. *Criminal Justice in Indian Country*

Criminal jurisdiction in Indian country is unduly complicated. To determine which law enforcement agency has jurisdiction over a crime, one must ask: Was the land where the crime occurred Indian country? Was the victim an Indian or non-Indian? Was the perpetrator an Indian or non-Indian? And what was the crime?<sup>269</sup> A law enforcement officer’s

---

<sup>264</sup> SEMINOLE NATION OF OKLAHOMA, CRIMINAL OFFENSES AND TRAFFIC OFFENSES § 307(b)(1) (2017), available at <http://sno-nsn.gov/Government/GeneralCouncil/CodeofLaws/Seminole%20Nation%20Code%20PDFs%202017%20June%20Update.pdf>.

<sup>265</sup> *Id.* at Title 6, § 104(c)(1) (“A person is guilty of assault, battery, or assault and battery with a dangerous weapon if he or she, with intent to do bodily harm and without justifiable or excusable cause. . .”) (emphasis added).

<sup>266</sup> GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, 16 GTBC § 213(d)(2) (2018), [https://www.narf.org/nill/codes/grand\\_traverse/Title\\_16.pdf](https://www.narf.org/nill/codes/grand_traverse/Title_16.pdf).

<sup>267</sup> See *supra* notes 262–66 and accompanying text.

<sup>268</sup> E.g., Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 353 (“In the absence of statutory law, the Navajo Nation courts use Navajo common law as primary and substantive law to resolve legal issues.”).

<sup>269</sup> ARVO Q. MIRKANEN, U.S. ATT’Y OFF., INDIAN COUNTRY CRIMINAL JURISDICTION

ability to arrest is usually equal to that of his agency's jurisdiction; for example, a Kansas cop typically lacks authority to arrest perpetrators in Oregon. Limits on tribal court jurisdiction mean tribal police often only have the ability to detain offenders—which can easily become an unlawful arrest if the offender is detained for too long a period.<sup>270</sup>

Answers to the above questions are often unclear. The status of land matters because tribes only have jurisdiction over Indian country.<sup>271</sup> Land classification would seem to be a straightforward; nevertheless, land classification can often be extremely complicated in Indian country as fee land and trust land are frequently interwoven in a checkerboard pattern.<sup>272</sup> In fact, different portions of a single tract of land can be under tribal jurisdiction while other portions of the land fall under state jurisdiction.<sup>273</sup> Land classification can be so complex that law enforcement agents must consult maps and GPS prior to making an arrest.<sup>274</sup> This seemingly extreme step still may not suffice to answer the question as litigation over whether land qualifies as Indian country is common.<sup>275</sup> Whether the land where the crime occurred qualifies as Indian country can be the sole issue in a criminal case, and resolving the issue can take years.<sup>276</sup>

---

CHART (August 2017), <https://www.justice.gov/usao-wdok/page/file/1049076/download>.

<sup>270</sup> Crepelle, *supra* note 10, at 244 (2017) (“[T]ribes retain the ability to ‘detain’ non-Indians and exclude them from tribal lands. This means that tribal police can merely effectuate a ‘citizen’s arrest’ of non-Indians which, if prolonged, can give rise to a false imprisonment suit.”).

<sup>271</sup> *Plains Commerce Bank v. Long Family Land*, 554 U.S. 316, 327 (2008) (noting tribal sovereignty “centers on the land held by the tribe and on tribal members within the reservation.”).

<sup>272</sup> *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (discussing the jurisdictional problems caused by the “impractical pattern of checkerboard jurisdiction”); *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1262 (10th Cir. 2016) (noting the jurisdictional difficulties arising from “‘checkerboard’ jurisdiction”); Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENVTL. L.J. 195, 200 (2015) (noting the Dawes Act “resulted in ‘checkerboard’ patterns of landownership within many Indian reservations in the western United States.”).

<sup>273</sup> Crepelle, *supra* note 10, at 271 (“Tribes have jurisdiction over trust land, but states can have jurisdiction over fee land located within an Indian reservation. Therefore, portions of a single piece of property can be under tribal jurisdiction while other segments fall under state jurisdiction.”).

<sup>274</sup> *Id.*

<sup>275</sup> *E.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016); *Cayuga Indian Nation of New York v. Seneca County, New York*, 260 F.Supp.3d 290 (W.D. NY Apr. 30, 2017); *United States v. Joseph Joshua Jackson*, No.15-1789 (8th Cir. Oct. 19, 2017).

<sup>276</sup> *Murphy v. Royal*, 875 F.3d 896,903 (10th Cir. 2017), *cert. granted*, 86 U.S.L.W. 3581 (May 21, 2018) (No. 17-1107).

The history of Indian law explains the relevance of whether an Indian is a victim or an offender. The federal government first distinguished between Indians and non-Indians in the Trade and Intercourse Act of 1792 by extending federal criminal law over non-Indians in Indian country.<sup>277</sup> In 1881, the Supreme Court ruled states had sole jurisdiction over Indian country crimes involving only non-Indians.<sup>278</sup> Congress extended federal criminal jurisdiction to Indian country crimes involving only Indians in 1885,<sup>279</sup> and despite finding no constitutional authority for the law, the Supreme Court affirmed the Major Crimes Act in 1886.<sup>280</sup> However, some states obtained the ability to exercise criminal jurisdiction over Indian country within their borders in lieu of federal jurisdiction in 1953 pursuant to Public Law 83-280.<sup>281</sup> Then in 1978, the Supreme Court in *Oliphant v. Suquamish Tribe* held that Indian tribes had been implicitly divested of the ability to exercise criminal jurisdiction over non-Indians.<sup>282</sup> The Court noted in the opinion that the holding is bound to cause problems for law enforcement in Indian country, but the Court said the problems caused by the decision are for Congress to solve.<sup>283</sup> Notwithstanding *Oliphant*, tribes maintain criminal jurisdiction over all Indians within their borders;<sup>284</sup> nevertheless, most tribes can only impose a maximum sentence of one year.<sup>285</sup> Tribes that meet certain statutory requirements can sentence offenders to a maximum of nine years in jail.<sup>286</sup>

Furthermore, determining whether someone is an Indian is a dicey matter because “Indian” has many different definitions under federal

---

<sup>277</sup> Act of July 22, 1790, ch. 33, § 5, 1 Stat. 137,138 (1848) (regulating trade and intercourse with the Indian tribes).

<sup>278</sup> *United States v. McBratney*, 104 U.S. 621, 624 (1881).

<sup>279</sup> Act of Mar. 3, 1885, 23 Stat. 362 (codified as amended at 18 U.S.C. §§ 1153, 3253 (2012)).

<sup>280</sup> *United States v. Kagama*, 118 U.S. 375, 383–385 (1886) (rejecting the Commerce Clause as a source of authority for the Major Crimes Act but upholding the law because “[t]hese Indian tribes *are* the wards of the nation.”).

<sup>281</sup> Act of Aug. 15, 1953, ch. 505, 67 Stat. 280 (1953) (codified as amended at 18 U.S.C. § 1162 (2012)); 28 U.S.C. § 1360 (1976).

<sup>282</sup> *Oliphant v. Suquamish Tribe et al.*, 435 U.S. 191, 211 (1978).

<sup>283</sup> *Id.* at 212.

<sup>284</sup> *United States v. Lara*, 541 U.S. 193, 210 (2004) (“[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians.”).

<sup>285</sup> 25 U.S.C. § 1302(a) (7)(B) (2012); *see also* United States Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Department of Justice Could Clarify Tribal Eligibility for Certain Grant Funds* (May, 30 2012), at 3, <https://www.gao.gov/assets/600/591213.pdf> (noting 96% of the tribes who responded to the study were not exercising enhanced sentencing under the Tribal Law and Order Act of 2010 due to concerns such as financial constraints).

<sup>286</sup> 25 U.S.C. § 1302(a) (7) (D) (2012).

law.<sup>287</sup> According to the Supreme Court, being “Indian” requires an individual to have Indian blood and government recognition as an Indian.<sup>288</sup> Whether an individual has Indian blood can usually be disposed of fairly easily; contrarily, proving an individual has government recognition can take months of analysis.<sup>289</sup> Different federal courts use different tests to determine whether someone qualifies as an Indian;<sup>290</sup> in fact, an individual may meet the definition of an Indian in one federal circuit but fail to qualify as an Indian in another.<sup>291</sup> And as a result of federal law being applied to Indians in Indian country, Indians often receive harsher sentences than non-Indians for committing the same exact crime as a non-Indian.<sup>292</sup> Hence, Indian defendants have argued they are not Indian to evade federal prosecution.<sup>293</sup>

---

<sup>287</sup> E.g., Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 340 (2015) (“Tribes generally lack jurisdiction over non-Indians, while they retain jurisdiction over ‘all Indians,’ including their own citizens as well as ‘nonmember Indians,’ but neither Congress nor the federal courts have carefully considered who is included in this category.”); Paul Spruhan, *Warren, Trump, and the Question of Native American Identity*, HARV. L. REV. BLOG (Feb. 27, 2018), <https://blog.harvardlawreview.org/warren-trump-and-the-question-of-native-american-identity/>; Alexander Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV’T L. REV. 49, 49 (2017) (“Criminal jurisdiction in Indian Country is mostly determined by four federal laws, none of which have a specific definition of ‘Indian.’”).

<sup>288</sup> *United States v. Rogers*, 45 U.S. 567, 573 (1846).

<sup>289</sup> Crepelle, *supra* note 10, at 244 (“[D]etermining whether a government recognizes an individual as an Indian is complex and can take months.”).

<sup>290</sup> Compare *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009), with *United States v. Cruz*, 554 F.3d 840, 845 (9th Cir. 2009) (using different tests to determine whether the defendant qualifies as an Indian for criminal jurisdiction purposes).

<sup>291</sup> See Angelique Townsend Eaglewoman & Stacy L. Leeds, *MASTERING AMERICAN INDIAN L.* 49 (2013) (stating that “the Eighth Circuit test is much broader, allowing the inclusion of a person for federal criminal prosecution as an Indian when the same person may not be eligible as an Indian for tribal citizenship or federal services.”).

<sup>292</sup> See INDIAN LAW AND ORDER COMM’S, *A ROADMAP FOR MAKING NATIVE AMERICA SAFER*, 119 (2013), [https://www.aisc.ucla.edu/iloc/report/files/Chapter\\_1\\_Jurisdiction.pdf](https://www.aisc.ucla.edu/iloc/report/files/Chapter_1_Jurisdiction.pdf) [hereinafter, COMM’N] (“Related analyses indicate that Federal sentencing guidelines systematically subject offenders in Indian country to longer sentences than are typical when the same crimes are committed under State jurisdiction.”); B.J. Jones & Christopher J. Ironroad, *Addressing Sentencing Disparities for Tribal Citizens in the Dakotas: A Tribal Sovereignty Approach*, N.D. L. REV. 53, 68 (2013); Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 CAL. L. REV. 1409, 1416–1417 (2011) (discussing how Indians are much more likely than non-Indians to be prosecuted in federal court, and are therefore likely to receive harsher sentences).

<sup>293</sup> E.g., *United States v. Cruz*, 554 F.3d 840, 843 (9th Cir. 2009); *United States v. Stymiest*, 581 F.3d 759, 762–763 (8th Cir. 2009).

These jurisdictional issues have been partially addressed by the VAWA. The VAWA authorizes tribes meeting certain procedural requirements to prosecute non-Indian criminals.<sup>294</sup> However, tribes' ability to prosecute non-Indians is extremely limited as the non-Indians may be prosecuted only if the non-Indian: 1) resides or works in the prosecuting tribe's Indian country, or 2) is dating, married to, or in an intimate relationship with a citizen of the prosecuting tribe or an Indian who resides in the prosecuting tribe's Indian country.<sup>295</sup> This means non-Indian criminals with no connection to the prosecuting tribe remain above tribal jurisdiction.<sup>296</sup>

Jurisdiction is but one problem. The ratio of law enforcement agents to people in Indian country is far below the national average as there are approximately 3,000 federal and tribal law enforcement agents patrolling Indian country's 56 million acres.<sup>297</sup> The ratio of officers to land in Indian country is roughly two officers for an area the size of the State of Delaware.<sup>298</sup> Additionally the nearest state or federal courthouse is often over 100 miles from Indian country.<sup>299</sup> The situation is further complicated by

---

<sup>294</sup> 25 U.S.C. § 1304(a)(6) (2013).

<sup>295</sup> 25 U.S.C. § 1304(b)(4)(B) (2013).

<sup>296</sup> Allison Burton, *What About the Children? Extending Tribal Criminal Jurisdiction to Crimes Against Children*, 52 HARV. C.R.-C.L. L. REV. 193, 206 (2017) ("VAWA tightly constrains tribal jurisdiction. The jurisdiction is limited to protective order violations, dating violence (defined as violence committed by an individual in a 'romantic or intimate' relationship with the victim), and domestic violence (defined as violence committed by a spouse, intimate partner, co-habitant, or person who shares a child with the victim)."); Maura Douglas, *Sufficiently Criminal Ties: Expanding VAWA Criminal Jurisdiction for Indian Tribes*, 166 U. PA. L. REV. 745, 773 (2018) ("The jurisdictional grant was originally intended only in 'very limited circumstances,' and currently it can only be exercised if tribes meet certain procedural criteria and if the prosecution can establish the requisite connections between the tribe, non-Indian offender, and the victim."); NATIONAL CONGRESS OF THE AMERICAN INDIAN, VAWA'S 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION (SDVCJ) FIVE-YEAR REPORT 31 (Mar. 20, 2018), [http://www.ncai.org/resources/ncai-publications/SDVCJ\\_5\\_Year\\_Report.pdf](http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf) [hereinafter, "NCAI, VAWA"] ("SDVCJ is a very limited recognition of tribal jurisdiction.").

<sup>297</sup> Crepelle, *supra* note 10, at 247.

<sup>298</sup> Stewart Wakeling et al., U.S. DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS 9 (2001), <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf> ("the figures are roughly equivalent to an area the size of Delaware, but with a population of only 10,000 that is patrolled by no more than three police officers (and as few as one officer) at any one time—a level of police coverage that is much lower than in other urban and rural areas of the country."); Ian MacDougall, *Should Indian Reservations Give Local Cops Authority on Their Land?*, ATLANTIC (July 19, 2017), <https://www.theatlantic.com/politics/archive/2017/07/police-pine-ridge-indian-reservation/534072/> ("A little over 30 tribal police officers patrol Pine Ridge, a swath of the Great Plains more than twice the size of Rhode Island.").

<sup>299</sup> See Matthew L.M. Fletcher, AM. CONST. SOCIETY FOR L. & POL'Y, ADDRESSING THE EPIDEMIC OF DOMESTIC VIOLENCE IN INDIAN COUNTRY BY RESTORING TRIBAL

Indian country's abysmal infrastructure, which often means that if a crime is reported, the police and prosecutors must travel down unpaved roads to an unnamed street to a residence with no address.<sup>300</sup> Even if non-Indian law enforcement arrive at the Indian country crime scene, historic mistreatment and cultural differences can lead to mistrust and poor communication between the non-Indian officer and the Indian victims and witnesses.<sup>301</sup> Indian country medical facilities also usually lack rape kits and personnel trained to respond to sexual assaults; hence, poor evidence collection makes sex crimes prosecution more difficult.<sup>302</sup>

### B. *Self-Defense Considerations for Indian Country*

Self-defense is a last resort against crime; unfortunately, self-defense is often the only tool available to the residents of Indian country. Indian country suffers from a dire shortage of law enforcement personnel, so police response times in Indian country are often delayed.<sup>303</sup> This means

---

SOVEREIGNTY, 6 (2009), <https://www.acslaw.org/files/Fletcher%20Issue%20Brief.pdf> (noting that distance is a factor in Indian country law enforcement, and that non-Indian law enforcement in PL-280 states are often “hundreds of miles away” from Indian country); *Journey Through Indian Country Part 1: Fighting Crime on Tribal Lands*, FBI (June 1, 2012), <https://www.fbi.gov/news/stories/journey-through-indian-country> (noting that non-Indian law enforcement often has to travel over 100 miles on unpaved roads to unmarked streets when responding to Indian country calls); Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 115 (1995) (stating “[s]ince federal courts are often located far from Indian reservations, active prosecutions of nonfelony domestic violence, child abuse, weapons offenses, vehicle violations, substance abuse, and theft is limited.”); Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 20, 2012), <https://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html> (“But Tao Etpison, former chief judge of the Tonto Apaches in Arizona, said federal prosecutors typically live, work and try cases hundreds of miles from Indian Country.”).

<sup>300</sup> Riley, *supra* note 239, at 1738 (noting that many Indian country homes often have no addresses); FBI, *supra* note 299, at 2 (discussing that Indian country often has unpaved roads and unnamed streets, so FBI agents are often given directions like, “Go 10 miles off the main road, turn right at the pile of tires, and go up the hill.”).

<sup>301</sup> Hannah Bobee et al., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputization* 13, (Indigenous Law & Policy Center Working Paper No. 2008-01, 2008) (“non-tribal police departments can be insensitive to tribal cultural or lack of cultural awareness.”); Andrew G. Hill, *Another Blow to Tribal Sovereignty: A Closer Look at Cross-Jurisdictional Law-Enforcement Agreements Between Indian Tribes and Local Communities*, 34 AM. INDIAN L. REV. 291, 301 (2010) (“Even with the implementation of multicultural-training and diversity-awareness programs, it will be difficult to erase the cultural differences between Indians and non-Indians.”); MacDougall, *supra* note 8 (“Ongoing reports of racial profiling and disparate treatment by police in the bordering counties, tribal members told me, have only hardened the suspicion of non-tribal police on Pine Ridge.”).

<sup>302</sup> Crepelle, *supra* note 10, at 250.

<sup>303</sup> E.g., Don Davis, *Mille Lacs Band Rallies for Police*, GLOBE (Nov. 20, 2017),

Indians will often be alone with their attacker for a long period prior to the police arriving, and as a result of *Oliphant*, a non-Indian law enforcement agency will usually be involved in tribal policing. This is problematic because non-Indian government agents have historically abused Indians.<sup>304</sup> Indians are frequently profiled and targeted by non-Indian law enforcement;<sup>305</sup> in fact, Indians are killed by police at a higher rate than any other racial or ethnic group.<sup>306</sup>

The VAWA partially reversed *Oliphant* and decreases tribal reliance on non-Indian law enforcement. Nonetheless, many tribes cannot afford to implement the procedural safeguards required to implement the VAWA jurisdiction.<sup>307</sup> Some tribes will not implement the VAWA because

---

<https://www.dglobe.com/news/crime-and-courts/4362757-mille-lacs-band-rallies-police>; Joseph J. Kolb, 'Outmanned & Outgunned: Tribal Police Officers Face Dangerous Challenges', FOX NEWS (Mar. 14, 2017), <http://www.foxnews.com/us/2017/03/14/outmanned-outgunned-tribal-police-officers-face-dangerous-challenges.html> ("Navajo Nation Police Chief Philip Francisco told Fox News that it is not unusual for one officer to be responsible for patrolling 1,000 miles."); Ashley Nerbovig, *Daines: Police Must Improve Response to Missing, Murdered Native Women*, INDEPENDENT RECORD (May 5, 2017), [https://helenair.com/news/state-and-regional/daines-police-must-improve-response-to-missing-murdered-native-women/article\\_8ad78713-633d-5f5f-90ae-c9ad282ed720.html](https://helenair.com/news/state-and-regional/daines-police-must-improve-response-to-missing-murdered-native-women/article_8ad78713-633d-5f5f-90ae-c9ad282ed720.html).

<sup>304</sup> SARAH DEER, *THE BEGINNING AND END OF RAPE* 52 (2015) ("It is a hard truth that some of the federal agencies entrusted with providing safety and support to Native people have tolerated, concealed, or excused the behavior of employees who rape during or prior to their employment with the agency."); Crepelle, *supra* note 10, at 243 (noting historic abuses of Indians by state law enforcement in PL-280 jurisdictions); Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 ALB. L. REV. 885, 905 (2015) ("Even in cases where states are responsible for prosecuting on-reservation crime, there is evidence that states have often not diligently performed this function and that they appear to discriminate against Indian victims and alleged Indian perpetrators.").

<sup>305</sup> Debra Loevy, *Police Violence Against Native Americans*, LOEVY & LOEVY (Oct. 27, 2015), <https://www.loevy.com/blog/police-violence-against-native-americans/>. See also Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009); Sarah Beccio, *Racism Hurts Native Americans Too*, HUFFPOST (Sep. 12, 2014), [https://www.huffingtonpost.com/sarah-beccio/racism-hurts-native-ameri\\_b\\_5812452.html](https://www.huffingtonpost.com/sarah-beccio/racism-hurts-native-ameri_b_5812452.html); Mary Annette Pember, *Driving While Indian: A Refresher Course*, HUFFPOST (May 6, 2016), [https://www.huffingtonpost.com/mary-annette-pember/driving-while-indian-a-re\\_b\\_7216960.html](https://www.huffingtonpost.com/mary-annette-pember/driving-while-indian-a-re_b_7216960.html).

<sup>306</sup> Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN (Nov. 13, 2017), <https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html>.

<sup>307</sup> NCAI, *VAWA*, *supra* note 296, at 29 ("3-5. SDVCJ IS PROHIBITIVELY EXPENSIVE FOR SOME TRIBES"); Catherine M. Redlingshafer, *An Avoidable Conundrum: How American Indian Legislation Unnecessarily Forces Tribal Governments to Choose Between Cultural Preservation and Women's Vindication*, 93 NOTRE DAME L. REV. 393, 409 (2017) (noting some tribes may find the costs of implementing VAWA prohibitive); Concetta R. Tsosie de Haro, *Federal Restrictions on Tribal Customary Law: The Importance of Tribal Customary Law in Tribal Courts*, 17 TRIBAL L.J. 1,11 (2017).



these tribes believe the VAWA is a further attempt to colonize tribal courts and civilize Indian people.<sup>308</sup> Furthermore, the VAWA does nothing to protect Indians from non-Indian criminals with no prior connection to the tribe. Given these realities, self-defense is the most practical—often the only—protection Indian country residents have.

A potential problem with tribal self-defense laws, especially tribal stand your ground laws, is that tribal law only applies in tribal court.<sup>309</sup> Prosecution and acquittal in tribal court does not bar subsequent prosecutions by a state or the federal government.<sup>310</sup> It would be a terrible irony indeed for a state or the federal government to prosecute an Indian woman for shooting an aspiring non-Indian rapist after neglecting to prosecute wrongs perpetrated against Indians by non-Indians on the reservation for generations. However, such a situation is easy to envision. California, for example, has some of the nation's strictest gun laws,<sup>311</sup> usually opposes tribal interests,<sup>312</sup> and has criminal jurisdiction over Indi-

---

<sup>308</sup> Redlingshafer, *supra* note 307, at 410 (“VAWA cannot necessarily be as smoothly implemented in tribes where the culture and legal tools do not so neatly align with those of the federal system.”); Mary K. Mullen, *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, 812 (2017) (“I argue that, while VAWA grants Native Americans more power over non-native perpetrators, it does so with the expectation that tribal courts will conform to Anglo-American criminal procedure, creating further assimilation of tribal courts and robbing Native Americans of their cultural uniqueness.”).

<sup>309</sup> Tweedy, *supra* note 304, at 905 (noting tribal self-defense laws “would only be recognized as a defense in tribal court”).

<sup>310</sup> *United States v. Wheeler*, 435 U.S. 313, 329–330 (1978) (“Since tribal and federal prosecutions are brought by separate sovereigns, they are not ‘for the same offence,’ and the Double Jeopardy Clause thus does not bar one when the other has occurred”); *United States v. Lara*, 541 U.S. 193, 210 (2004) (“[T]he Spirit Lake Tribe’s prosecution of Lara did not amount to an exercise of federal power, and the Tribe acted in its capacity of a separate sovereign. Consequently, the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with the present prosecution for a discrete *federal* offense.”).

<sup>311</sup> See *Annual Gun Law Scorecard*, GIFFORDS L. CTR TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/scorecard/> (ranking California’s gun laws the nation’s strongest); Matthew Hartvigsen, *10 States with the Strictest Gun Laws*, DESERET NEWS (Apr. 17, 2013), <https://www.deseretnews.com/top/1428/0/10-states-with-the-strictest-gun-laws.html> (ranking California number one for strictest gun laws); Amber Phillips, *California Has the Nation’s Strictest Gun Laws. Here are the Other Strictest and Loosest States.*, WASH. POST (Dec. 4, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/12/04/california-has-the-nations-strictest-gun-laws-here-are-the-other-strictest-and-loosest-states/?utm\\_term=.417239a44640](https://www.washingtonpost.com/news/the-fix/wp/2015/12/04/california-has-the-nations-strictest-gun-laws-here-are-the-other-strictest-and-loosest-states/?utm_term=.417239a44640).

<sup>312</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–22 (1987) (holding California could not criminalize tribal gaming since California permitted gaming within its borders.); *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1033 (9th Cir. 2013) (“With the passage of Public Law 280, California obtained criminal jurisdiction over the Reservation, and the Tribe is

an country within its borders thanks to PL 280.<sup>313</sup> Indians using guns against non-Indians will almost certainly raise California's ire and trigger the state prosecution of the Indian self-defense claimant.

Despite the potential for other sovereigns to attempt prosecution, self-defense is an interesting answer to *Oliphant* because federal Indian law jurisprudence continues to operate on the presumption that Indians are savages.<sup>314</sup> Moreover, the Supreme Court continues to cite cases that describe Indians as warriors. *Cherokee v. Georgia* held that Indians did not have standing to seek redress against wrongs in court because “[t]heir appeal was to the tomahawk;”<sup>315</sup> likewise, *Johnson v. McIntosh* remains binding law in the United States and the case describes Indians “as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.”<sup>316</sup> Therefore, the use of self-defense by Indians is in perfect harmony with Supreme Court precedent.

The Court's tropes about Indians combined with its recent Second Amendment decisions indicate that self-defense is permissible for Indians in Indian country. The question becomes must the retreat rule be adopted or are Indians allowed to stand their ground? This question can be bypassed by resorting to the castle doctrine which negates the duty to retreat in one's home. Tribal self-defense laws only pertain to Indian country, and Indian country is intended to be the perpetual home of tribal citizens.<sup>317</sup> This means the reservation is the Indian's castle; hence, an

---

entitled to the same law enforcement services as any other community in the county. According to the Tribe, the promise of Public Law 280 has been largely empty, and the sheriff's response to complaints of criminal activity on the reservation is slow or non-existent.”); Ian James, *Supreme Court Won't Hear California Water Agencies' Appeal in Tribe's Groundwater Case*, DESERT SUN (Nov. 27, 2017), <https://www.desertsun.com/story/news/environment/2017/11/27/supreme-court-wont-hear-water-agencies-appeal-tribes-groundwater-case/897469001/>.

<sup>313</sup> 18 U.S.C. § 1162(a).

<sup>314</sup> Comm. on the Elimination of Racial Discrimination on Its 59th Session; U.N.Doc. CERD/C/SR/1475, at 9 (Aug. 22, 2001); Robert A. Williams, *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (Robert Warrior & Jace Weaver eds., University of Minnesota Press 2005); Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's Brown v. Board of Education*, 38 TULSA L. REV. 73, 75 (2013) (“This analysis will demonstrate how racism, at times shockingly blatant, remains pervasive in decisions from Lone Wolf through the 2001 Term of the United States Supreme Court.”).

<sup>315</sup> *Cherokee v. Georgia*, 30 U.S. 1, 18 (1831).

<sup>316</sup> *Johnson v. McIntosh*, 21 U.S. 543, 590 (1823).

<sup>317</sup> *See United States v. Shoshone Tribe*, 304 U.S. 111, 113 (1938) (“The Indians agreed that they would make the reservation their permanent home.”); Treaty Between the United States and the Sioux and Arapaho, art. 15, Apr. 29, 1868, 15 Stat.635 (“The Indians herein named agree that when the agency-house or other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere”); Treaty Between the United States of America and the Navajo Tribe of

Indian should have the right to stand her ground in Indian country. Additionally, a publication by the National District Attorneys Association notes the castle doctrine has been expanded in recent years for many reasons including lack of faith in the criminal justice system and decreased sense of public safety.<sup>318</sup> Indian country residents have abundant reasons to abandon faith in the criminal justice system and non-Indian criminals are a massive public safety concern in Indian country.<sup>319</sup> In light of Indian country being the Indians' perpetual home and recent expansions of the castle doctrine, Indians should be able to stand their ground in Indian country.

Battered woman's syndrome is particularly interesting from a tribal self-defense law perspective. Battered woman syndrome relies upon a pattern of abuse to justify the defendant's action. Since 1492, Indian women have consistently suffered outrageous violations of their bodily sanctity at the hands of Europeans and Americans.<sup>320</sup> In fact, Columbus and his crew proudly raped the indigenous inhabitants of Hispaniola.<sup>321</sup> From Indian removal to the late 1800s, many American Indian women were raped by non-Indians and were forced to trade sex for food.<sup>322</sup> Several of the so-called Indian revolts in the 1800s were the consequence of non-Indians sexually abusing Indian women.<sup>323</sup>

---

Indians, art. XIII, Jun.1, 1868, 15 Stat. 667 ("The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home"); *Save the Valley, LLC, v. The Santa Ynez Band of Chumash Indians*, CV 15-02463-RGK, 2015 WL 12552060, at 2 (C.D. Cal. July, 2, 2015) ("in the 1938 quitclaim deed Plaintiff attached to its Complaint, the Church transferred the Parcel to the Secretary of the Interior of the United States for the express purpose of 'the establishment of a permanent Indian Reservation for the perpetual use and occupancy of the Santa Ynez band of Mission Indians . . . .'").

<sup>318</sup> JANSEN & NUGENT-BORAKOVE, *supra* note 179, at 4.

<sup>319</sup> Steven W. Perry, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 9 (2004), <http://www.bjs.gov/content/pub/pdf/aic02.pdf> (noting that over two-thirds of violent crimes committed against Indians are perpetrated by non-Indians).

<sup>320</sup> Richard Solomon, *Sexual Practice and Fantasy in Colonial American and the Early Republic*, in U. J. Undergraduate Res. 24, 28 (2017).

<sup>321</sup> David Cutler, *Teaching Kids About Thanksgiving or Columbus? They Deserve the Real Story*, PBS NEWS HOUR (Nov. 15, 2017), <https://www.pbs.org/newshour/education/teaching-kids-about-thanksgiving-or-columbus-they-deserve-the-real-story> ("On his second voyage, in 1493, Columbus rewarded his men with native women to rape."); Dylan Matthews, *9 Reasons Christopher Columbus Was a Murderer, Tyrant, and Scoundrel*, VOX (Oct. 12, 2015), <https://www.vox.com/2014/10/13/6957875/christopher-columbus-murderer-tyrant-scoundrel> ("Columbus kidnapped a Carib woman and gave her to a crew member to rape"); Lisa Marie Segarra, *Everything You Need to Know About Indigenous Peoples Day*, TIME (Aug. 31, 2017), <http://time.com/4923164/indigenous-peoples-day-columbus-day/> ("Columbus himself is considered responsible for the rape and murder of those indigenous people.").

<sup>322</sup> DEER, *supra* note 304, at 65.

<sup>323</sup> *Id.* at 33.

To attempt to understand the mindset of American Indian women, Professor Sara Deer states:

Imagine living in a world in which almost every woman you know has been raped. Now imagine living in a world in which four generations of women and their ancestors have been raped. Now imagine that not a single rapist has ever been prosecuted for these crimes. That dynamic is a reality for many Native women—and thus for some survivors, it can be difficult to separate the more immediate experience of their assault from the larger experience that their people have endured through a history of forced removal, displacement, and destruction.<sup>324</sup>

The macabre sexual violence endured by past generations of Indian women is visible in the DNA of contemporary American Indians.<sup>325</sup> Accordingly, the long history of sexual violence suffered by Indian women should make them strong candidates for the battered woman's syndrome defense.

The racial dynamics of stand your ground present another intriguing aspect of tribes implementing such laws. Status as an Indian is a key facet of every Indian country prosecution. The Supreme Court has held that Indians can receive harsher penalties than non-Indians for committing the same exact crime without violating the Equal Protection Clause.<sup>326</sup> Furthermore, the federal judiciary has affirmed laws that impose more lenient sentences for the rape of an Indian woman than a non-Indian woman.<sup>327</sup> The Supreme Court justifies the differing treatment of Indians and non-Indians on the basis that "Indian" is a political rather than racial classification.<sup>328</sup>

Given that tribes can prosecute Indians but are prohibited from prosecuting non-Indians, can tribes enact laws authorizing Indians to stand their ground and to use deadly force against non-Indians but forbidding robust defense against Indians? Supreme Court jurisprudence is

---

<sup>324</sup> *Id.* at 12.

<sup>325</sup> Mary Annette Pember, *Trauma May Be Woven into DNA of Native Americans*, INDIAN COUNTRY TODAY (Oct. 3, 2017), <https://indiancountrymedianetwork.com/news/native-news/trauma-may-be-woven-into-dna-of-native-americans/>.

<sup>326</sup> *United States v. Antelope*, 430 U.S. 641, 647 (1977).

<sup>327</sup> *Gray v. United States*, 394 F.2d 96, 99 (9th Cir. 1968); Alpheus Thomas Mason, *Constitutional Law—Equal Protection of the Laws—Federal Statute Imposing Less Severe Penalty Upon American Indian Who Rapes an Indian Woman Than Upon Other Rapists Is Constitutional—Gray v. United States*, 394 F.2d 96, 82 HARV. L. REV. 697, 698 (1969).

<sup>328</sup> *Fisher v. District Court of the Sixteenth Judicial District of Montana*, 424 U.S. 382, 390 (1976) ("The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law."); *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974).

clear that such a law would not transgress the Equal Protection Clause. The distinction would be political—not racial. Moreover, tribes have a strong policy rationale for distinguishing between Indians and non-Indians in their criminal codes as long as *Oliphant* remains the law of the land.

An additional factor that tribes should consider before enacting stand your ground laws is these laws are associated with increased gun ownership,<sup>329</sup> and there are risks related to increased gun ownership. A plethora of research suggests that increasing the number of firearms in a population increases the crime rate.<sup>330</sup> Gun control proponents contend that higher rates of gun ownership are tied to higher rates of suicide.<sup>331</sup> As the number of guns increases, critics claim the number of accidental gun deaths increases too.<sup>332</sup> Stricter gun control laws have been correlated with fewer gun related fatalities according to gun control advocates.<sup>333</sup>

<sup>329</sup> Harlan Pittell, “Stand Your Ground” Laws and the Demand for Legal Firearms (May 7, 2014) (unpublished Policy Analysis & Management Honors Thesis, Cornell University), available at [https://ecommons.cornell.edu/bitstream/handle/1813/36335/Pittell\\_Thesis.pdf;sequence=2](https://ecommons.cornell.edu/bitstream/handle/1813/36335/Pittell_Thesis.pdf;sequence=2) (“Results indicate that the passage of SYG laws led to a significant increase in the demand for firearms.”).

<sup>330</sup> Devin Hughes & Mark Bryant, *We Have All the Data We Need: Stronger Gun Laws Would Save Lives*, L.A. TIMES (Feb. 26, 2018), <http://www.latimes.com/opinion/op-ed/la-oe-hughes-bryant-gun-violence-research-20180226-story.html>; Ian Millhiser, *More Guns Mean More Crime*, THINKPROGRESS (Oct. 2, 2017), <https://thinkprogress.org/more-guns-mean-more-crime-37ae003e8bb5/>; Melinda Wenner Moyer, *More Guns Do Not Stop More Crimes, Evidence Shows*, SCIENTIFIC AM. (Oct. 1, 2017), <https://www.scientificamerican.com/article/more-guns-do-not-stop-more-crimes-evidence-shows/>.

<sup>331</sup> Andrew Anglemyer et al., *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members: A Systematic Review and Meta-Analysis*, 160 ANN. INTERN. MED. 106 (2014), <http://annals.org/aim/fullarticle/1814426/accessibility-firearms-risk-suicide-homicide-victimization-among-household-members-systematic>; Lisa Chedekel, *Firearm Ownership Tied to Suicide Rates*, B.U. SCH. OF PUB. HEALTH (May 19, 2016), <http://www.bu.edu/sph/2016/05/19/firearm-ownership-closely-tied-to-suicide-rates/>; Karin Kiewra, *Guns and Suicide: A Fatal Link*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (Spring 2008), <https://www.hsph.harvard.edu/news/magazine/guns-and-suicide/>.

<sup>332</sup> David Hemenway et al., HARV. T.H. CHAN SCH. OF PUB. HEALTH (2010), <https://www.hsph.harvard.edu/hicrc/firearms-research/gun-threats-and-self-defense-gun-use/>; Center for Injury Research and Prevention, *Gun Violence: Facts and Statistics*, CHILDREN’S HOSPITAL OF PHILA. RES. INSTITUTE (May, 2018) (“Those people that die from accidental shooting were more than three times as a likely to have had a firearm in their home than those in the control group.”); Meredith Wadman, *Accidental Gun Killings Surged After Sandy Hook School Shooting*, SCIENCE (Dec. 7, 2017), <http://www.sciencemag.org/news/2017/12/accidentalgun-killings-surged-after-sandy-hook-school-shooting>.

<sup>333</sup> Libby Isenstein, *The States with the Most Gun Laws See the Fewest Gun-Related Deaths*, THE ATLANTIC (Aug. 28, 2015), <https://www.theatlantic.com/politics/archive/2015/08/the-states-with-the-most-gun-laws-see-the-fewest-gun-related-deaths/448044/>; German Lopez, *The Research Is Clear: Gun Control Saves Lives*, VOX

Similarly, critics assert that the number of times guns are used by private citizens to prevent a crime are far outweighed by the number of times firearms are used for unlawful purposes.<sup>334</sup>

Though several studies show a direct relationship between the number of guns and violent crime, there is no scientific consensus on the issue. The National Academy of Sciences study of guns and violence found no direct correlation between violent crimes and the number of guns in a population.<sup>335</sup> Indeed, there are studies showing higher rates of gun ownership reduce crime,<sup>336</sup> and from 1993 to 2013, gun ownership in the United States increased while violent crime rates decreased.<sup>337</sup> Regarding the relationship between guns and suicide, gun ownership advocates assert that the data indicate, “[t]here is simply no relationship evident between the extent of suicide and the extent of gun ownership.”<sup>338</sup> There is

---

(Oct. 4, 2017), <https://www.vox.com/policy-and-politics/2017/10/4/16418754/gun-control-washington-post>; John W. Schoen, *States with Strict Gun Laws Have Fewer Firearms Deaths. Here's How Your State Stacks Up*, CNBC (Feb. 27, 2018), <https://www.cnbc.com/2018/02/27/states-with-strict-gun-laws-have-fewer-firearms-deaths-heres-how-your-state-stacks-up.html>.

<sup>334</sup> Moyer, *supra* note 330, at 25; VIOLENCE POLICY CTR., FIREARM JUSTIFIABLE HOMICIDES AND NON-FATAL SELF-DEFENSE GUN USE (May 2017), <http://www.vpc.org/studies/justifiable17.pdf>; Samantha Raphelson, *How Often Do People Use Guns in Self-Defense?*, NPR (Apr. 13, 2018), <https://www.npr.org/2018/04/13/602143823/how-often-do-people-use-guns-in-self-defense>.

<sup>335</sup> NAT'L RESEARCH COUNCIL, COMM. TO IMPROVE RESEARCH INFORMATION AND DATA ON FIREARMS, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 2 (Charles F. Wellford et al. eds., 2004) (“[T]he committee found no credible evidence that the passage of right-to-carry laws decreases or increases violent crime . . . . The committee found that the data available on these questions are too weak to support unambiguous conclusions or strong policy statements.”).

<sup>336</sup> JOHN LOTT, JR., MORE GUNS, LESS CRIME 57 (3d ed. 2010) (asserting individual firearm ownership is a social good); Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL'Y 649, 673 (2007) (“[I]f firearms availability does matter, the data consistently show that the way it matters is that more guns equal less violent crime.”); David B. Kopel, *The Costs and Consequences of Gun Control*, 784 CATO INSTITUTE POLICY ANALYSIS 17 (Dec. 1, 2015), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa784.pdf> (“It would be inaccurate to claim that the entire reason that crime has declined in recent decades is because Americans have so many more guns, but it would be accurate to say that having more guns is not associated with more crime. If anything, just the opposite is true.”).

<sup>337</sup> Larry Bell, *Disarming Realities: As Gun Sales Soar, Gun Crimes Plummet*, FORBES (May 14, 2013), <https://www.forbes.com/sites/larrybell/2013/05/14/disarming-realities-as-gun-sales-soar-gun-crimes-plummet/#148184bf3f7c>; Mark J. Perry, *Chart of the Day: More Guns, Less Gun Violence Between 1993 and 2013*, AEIDEAS (Dec. 4, 2015), <http://www.aei.org/publication/chart-of-the-day-more-guns-less-gun-violence-between-1993-and-2013/>.

<sup>338</sup> Kates & Mauser, *supra* note 336, at 691; *see also*, R. Douglas Fields, *Fact Check, Gun Control and Suicide*, PSYCHOLOGY TODAY (Jul. 24, 2016), <https://www.psychologytoday.com/>

no question that more guns means more gun accidents—just as more bicycles means more bicycle accidents—but accidental gun deaths have been falling rapidly, by nearly 50 percent since 1999.<sup>339</sup>

The relationship between guns and crime is murky, but the causes of crime in Indian country are quite clear. Vast distances, poor infrastructure, a shortage of police officers, and jurisdictional confusion make Indian country a good place for bad guys to avoid law enforcement. Armed self-defense answers all of these concerns. First of all, armed self-defense implies that the individual is carrying the firearm. This means the individual is able to respond to the crime instantaneously. Merely drawing a gun causes criminals to disengage from their misdeed over 90 percent of the time; plus, criminals are more fearful of encountering an armed victim than the police.<sup>340</sup> Furthermore, an individual defending herself against a rapist will not quibble over jurisdictional charades, nor should she. As Justice Holmes famously wrote in *Brown*, “Detached reflection cannot be demanded in the presence of an uplifted knife.”<sup>341</sup> The sorry state of criminal justice in Indian country means strong self-defense laws may offer the best response to crime on some reservations while *Oliphant* remains the law of the land.

Self-defense is not an ideal solution to crime, but self-defense is the only hope where law enforcement has failed. To enhance the effectiveness of self-defense laws, tribes should consider offering firearms training courses. Limited resources may make funding such courses difficult; however, tribes may be able to incorporate firearms training into cultural events—as noted above, self-defense is an American Indian tradition. Tribes should also publicize that their citizens are prepared to defend themselves. Non-Indian criminals are drawn to Indian country because the criminals know they are unlikely to suffer repercussions for crimes

---

us/blog/the-new-brain/201607/fact-check-gun-control-and-suicide; Marc Gius, *The Effects of Gun Ownership Rates and Gun Control Laws on Suicide Rates*, 42 N.Y. ECON. REV. 35, 42 (2011).

<sup>339</sup> Kurtis Lee, *Amid Rising Gun Violence, Accidental Shooting Deaths Have Plummeted. Why?*, L.A. TIMES (Jan. 1, 2018), <http://www.latimes.com/nation/la-na-accidental-gun-deaths-20180101-story.html>; Brooke Singman, *Accidental Gun Deaths Hit Record Low, Even Amid Recent Boom in Firearms Sales*, FOX NEWS (Mar. 30, 2017), <http://www.foxnews.com/politics/2017/03/30/as-gun-sales-rise-accidental-gun-deaths-drop-to-record-levels-report-says.html>; Wadman, *supra* note 332 at 3 (“Decades of U.S. national data show a steady downward trend in accidental firearm deaths—from 1.55 per 100,000 people in 1948 to 0.18 per 100,000 in 2014. That has held true even as the number of guns in circulation has grown enormously, from 0.36 per person in 1948 year to 1.13 in 2014 . . .”).

<sup>340</sup> Crepelle, *supra* note 10, at 253; Kates & Mauser, *supra* note 336, at 671 (noting criminals are most fearful of encountering an armed victim in states with high gun ownership rates).

<sup>341</sup> *Brown v. United States*, 256 U.S. 335, 343 (1921).

committed in Indian country.<sup>342</sup> When Indians start shooting back, non-Indian criminals will cease to see Indian country as a consequence free zone.<sup>343</sup> At least it worked for the Lumbee.<sup>344</sup>

## VI. CONCLUSION

Though expanding tribal criminal jurisdiction to include non-Indians and providing more resources for Indian country law enforcement are clear solutions to public safety in Indian country, the United States is unlikely to make a serious effort to address either anytime soon. Accordingly, tribes must act with the limited options available. Self-defense is one of such options. Indeed, the Supreme Court's opinions in *McDonald*, *Heller*, *Beard*, and *Brown* may provide the best jurisprudential answer to *Oliphant*. Self-defense is the ultimate act of self-determination.

---

<sup>342</sup> See Tribal Law and Order Act of 2010, § 202(a)(4)(B), 124 Stat. 2262.

<sup>343</sup> See Justin Peters, *Study Suggests Attackers Choose Victims Based on the Way They Walk*, SLATE (Apr. 9, 2013), [http://www.slate.com/blogs/crime/2013/04/09/journal\\_of\\_interpersonal\\_violence\\_study\\_suggests\\_attackers\\_choose\\_victims.html](http://www.slate.com/blogs/crime/2013/04/09/journal_of_interpersonal_violence_study_suggests_attackers_choose_victims.html) (summarizing a study finding criminals identify then target victims who they perceive as easy targets); see also Chuck Hustmyre & Jay Dixit, *Marked for Mayhem*, PSYCHOLOGY TODAY (Jan. 1, 2009), <https://www.psychologytoday.com/articles/200901/marked-mayhem> (noting criminals usually select victims that they can easily overpower); Raj Persaud, *Don't Walk This Way – How Your Steps Tell Psychopaths Who to Attack*, HUFFINGTON POST (Jan. 22, 2015), [http://www.huffingtonpost.co.uk/dr-raj-persaud/dont-walk-this-way-how-yo\\_b\\_6509478.html](http://www.huffingtonpost.co.uk/dr-raj-persaud/dont-walk-this-way-how-yo_b_6509478.html) (stating research shows that criminals use body language cues indicating vulnerability when selecting victims).

<sup>344</sup> Dean Chavers, *Battle of Hayes Pond: The Day Lumbees Ran the Klan Out of North Carolina*, INDIAN COUNTRY TODAY, (Jan. 18, 2017), <https://newsmaven.io/indiancountrytoday/archive/battle-of-hayes-pond-the-day-lumbees-ran-the-klan-out-of-north-carolina-RN9W5-vJUKsXc6TqZWO9g/>; Nicholas Graham, *Lumbee Indians Face the Ku Klux Klan*, NCPCEDIA (2005), <https://www.ncpedia.org/history/20th-Century/lumbee-face-klan>; Susan Wright, *The KKK Are Coming to North Carolina for an After-Election Celebration*, RED STATE (Nov. 11, 2016), <https://www.redstate.com/sweetie15/2016/11/11/kkk-coming-north-carolina-election-celebration/>.