ARTICLES

MAKING RED LIVES MATTER: PUBLIC CHOICE THEORY AND INDIAN COUNTRY CRIME

by
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American Indians are victims of violence at higher rates than members of any other racial group. Nevertheless, Indian victims receive little media attention. Aside from the prevalence of violence against Indians, the violence is unique because of the rules governing Indian country law enforcement. Tribes, absent compliance with federally mandated procedural safeguards, cannot prosecute non-Indian criminals. While state or federal law enforcement have jurisdiction over reservation crimes involving non-Indian perpetrators, they often fail to respond. Hence, non-Indians know they can target Indians with little fear of reprisal. This Article argues the rules governing Indian country crimes were not designed to benefit Indians, and tribes should consider civil disobedience as a means of changing federal Indian law. In particular, this Article suggests tribes consider violating Supreme Court precedent by prosecuting the non-Indian criminals state and federal prosecutors fail to pursue.

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I. INTRODUCTION

When Gabby Petito went missing, social media and the national news entered a frenzy.[1] The Federal Bureau of Investigation (FBI) immediately joined the search for Gabby.[2] The FBI coordinated with federal, state, and local law enforcement to find Gabby. A week later, the search team discovered Gabby's deceased body.[3] A federal court issued a warrant for the arrest of Brian Laundrie—her boyfriend, road trip companion, and likely the last person to see her alive—three days later.[4] Law enforcement's quest to find Laundrie led them to swampy Florida. Searchers had to brave alligators, snakes, and other unsavory critters.[5] Due to their persistence, Laundrie's remains were found less than two months after the FBI started its investigation.[6] He died of a self-inflicted wound but possessed a notebook that included a confession to murdering Gabby.[7] At the conclusion of the case, the FBI stated, "The FBI's primary focus throughout the investigation was to bring justice to Gabby and her family. The public's role in helping us in this endeavor was invaluable as the investigation was covered in the media around the world."[8]

Gabby's disappearance revealed a stark contrast in the way law enforcement, media, and the general public respond to missing whites versus people of color.[9] In Wyoming, where Gabby's body was found, 10 indigenous people were missing while the search for Gabby was in progress.[10] Over 700 indigenous people had been

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[1] Salvador Hernandez, *Brian Laundrie Claimed Responsibility for Gabby Petito's Death in a Notebook Found Near His Body*, BUZZFEED NEWS, https://www.buzzfeednews.com/article/salvadorhernandez/brian-laundrie-gabby-petito-admission (Jan. 23, 2022, 9:39 AM).

[2] Press Release, FBI Denver, Final Investigative Update on Gabrielle Petito Case (Jan. 21, 2022), https://www.fbi.gov/contact-us/field-offices/denver/news/press-releases/fbi-denver-provides-final-investigative-update-on-gabrielle-petito-case.

[3] *Id.*

[4] *Id.*

[5] Eric Levenson, *Florida Nature Reserve's Swampy Landscape Made the Search for Brian Laundrie Treacherous*, CNN, https://www.cnn.com/2021/10/21/us/carlton-reserve-brian-laundrie/index.html (Oct. 21, 2021, 7:57 PM).

[6] Press Release, FBI Denver, *supra* note 2.

[7] *Id.*

[8] *Id.*

[9] Scott Stump, *Gabby Petito Case Raises Question: Why Don't Missing People of Color Get More Attention?*, TODAY (Sept. 24, 2021, 5:31 AM), https://www.today.com/news/gabby-petito-case-raises-question-dont-missing-people-color-get-attent-rcna2247.

[10] WYO. SURV. & ANALYSIS CTR., UNIV. OF WYO., MISSING & MURDERED INDIGENOUS PEOPLE: STATEWIDE REPORT WYOMING 2 (2021), https://wysac.uwyo.edu/wysac/reports/View/7713.

reported missing in Wyoming during the past decade.[11] The Wyoming Survey & Analysis Center found missing indigenous women were much less likely to receive media attention than missing whites.[12] Similarly, a report from the Urban Indian Health Institute determined there were 5,712 cases of missing and murdered indigenous women and girls (MMIWG) reported in 2016.[13] Despite the FBI's primary role in Indian country law enforcement,[14] the United States Department of Justice logged only 116 of the aforementioned cases.[15]

MMIWG is not the only crime problem afflicting Indians[16] the general public ignores. Thirty-four percent of Indian women are raped during their lifetime, the highest of any race.[17] In some parts of Indian country,[18] Indian women are murdered at rates exceeding ten times the national average.[19] Indian children endure abuse at higher rates than children of any other race, and "[d]ue to the high rates of violence they experience, Indian youth suffer from post-traumatic stress disorder at the same rate as American veterans who endured combat in Iraq and Afghanistan."[20]

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[11] *Id.* at 2.

[12] *Id.* at 23–24.

[13] *See* URBAN INDIAN HEALTH INST., SEATTLE INDIAN HEALTH BD., MISSING & MURDERED INDIGENOUS WOMEN & GIRLS 2 (2018), https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf. This report uses "MMIWG" and thus that acronym is used in this Article rather than MMIWG2S, but its use is not meant to disregard Two Spirit people who also go missing.

[14] Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 718 (2006) [hereinafter Washburn, *American Indians*] ("The FBI has investigative jurisdiction over all the crimes listed in the Major Crimes Act.").

[15] *See* URBAN INDIAN HEALTH INST., *supra* note 13, at 2.

[16] "Indian" is used in this Article to denote the indigenous peoples of present-day North America. "Indian" and "Indigenous" are used interchangeably, but this Article uses the term "Indian" rather than "Native American" because it is the proper legal term as well as the preferred term of many Indians. *See, e.g.*, MISSISSIPPI BAND OF CHOCTAW INDIANS, https://www.choctaw.org (last visited June 24, 2023); S. UTE INDIAN TRIBE, https://www.southernute-nsn.gov (last visited June 24, 2023); QUINAULT INDIAN NATION, http://www.quinaultindiannation.com (last visited June 24, 2023).

[17] NCAI POL'Y RSCH. CTR., NAT'L CONG. OF AM. INDIANS, POLICY INSIGHTS BRIEF: STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN 3 (2013), https://www.ncai.org/resources/ncai_publications/policy-insights-brief-statistics-on-violence-against-native-women.

[18] The definition of Indian country can be found at 18 U.S.C. § 1151.

[19] POL'Y RSCH. CTR., NAT'L CONG. OF AM. INDIANS, RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 1 (2018), https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief__FINAL_2_1_2018.pdf.

[20] Adam Crepelle, *Protecting the Children of Indian Country: A Call to Expand Tribal Court Jurisdiction and Devote More Funding to Indian Child Safety*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 225, 230 (2021).

Indians are victims of violence at twice the rate of any other racial group.[21] Though police violence against African-Americans has spawned an international movement,[22] Indians are killed by police at rates even higher than African-Americans.[23] And while crime in the United States is overwhelmingly intra-racial,[24] over ninety percent of violent victimizations perpetrated against Indians are committed by non-Indians.[25] These grim statistics are all the more macabre because the federal rules governing Indian country crimes are premised on colonial ideals designed to undermine tribal sovereignty.[26]

Federal law has long been used to oppress Indians, but a new level was reached in 1978. That year, the Supreme Court prohibited tribes from prosecuting non-Indians in *Oliphant v. Suquamish Indian Tribe*.[27] Non-Indian criminals know this and seek out reservations to perpetrate crimes against Indians.[28] While either state or federal law enforcement has authority over every non-Indian crime committed

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[21] *See* BUREAU OF JUST. STAT., NCJ 247648, CRIMINAL VICTIMIZATION, 2013 9 (2014).

[22] *See* BLACK LIVES MATTER, https://blacklivesmatter.com (last visited June 24, 2023); *see also* Jen Kirby, *"Black Lives Matter" Has Become a Global Rallying Cry Against Racism and Police Brutality*, VOX (June 12, 2020, 7:30 AM), https://www.vox.com/2020/6/12/21285244/black-lives-matter-global-protests-george-floyd-uk-belgium; Aleem Maqbool, *Black Lives Matter: From Social Media Post to Global Movement*, BBC NEWS (July 10, 2020), https://www.bbc.com/news/world-us-canada-53273381.

[23] U.S. COMM'N ON CIVIL RIGHTS, BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 31 (2018), https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf ("Native Americans are also being killed in police encounters at a higher rate than any other racial or ethnic group.").

[24] *2019 Crime in the United States*, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-6.xls (last visited June 24, 2023).

[25] André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 NAT'L INST. OF JUST. J. 38, 42 (2016); Grace Segers, *Trump Signs Executive Order Creating Task Force on Missing and Murdered Native Americans*, CBS NEWS, https://www.cbsnews.com/news/trump-native-americans-president-to-sign-executive-order-for-task-force-on-missing-murdered-native-americans (Nov. 26, 2016, 1:14 PM) ("According to the National Institute of Justice, 97 percent of Native American women who have experienced violence were victimized by non-Native American perpetrators."); Adam Crepelle, *Tribal Courts, The Violence Against Women Act, and Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction To Improve Public Safety In Indian Country*, 81 MONT. L. REV. 59, 63 (2020) [hereinafter Crepelle, *Tribal Courts*] ("[M]ost Indian victimizations are committed by non-Indians.").

[26] *See* AMY L. CASSELMAN, INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN 8 ("Therefore, I argue modern jurisdictional conflicts in Indian country are not only *legacies* of colonialism, but actively *maintain* and *inscribe* colonial violence on the bodies of Native women." (emphasis in original)).

[27] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

[28] Adam Crepelle, *The Law and Economics of Crime in Indian Country*, 110 GEO. L.J. 569, 589–600 (2022) [hereinafter Crepelle, *Law & Economics*].

on a reservation,[29] they generally have no duty to protect people.[30] Federal prosecutors have historically declined to prosecute the vast majority of Indian country crimes that reach their desk,[31] and some state law enforcement agencies have openly declared they will not police the Indian country within their borders.[32] Quite simply, Indian country's law enforcement regime was designed to fail, and nobody seems to care. Public choice theory helps explain why.

Public choice theory applies economic principles to politics and the public sector; hence, public choice theory assumes politicians are simply concerned with their own self-interest. For politicians, self-interest is getting elected. Indians are not much help on this front. Indians are approximately one percent of the population[33] and have the highest poverty rate in the United States.[34] Thus, prioritizing Indian issues is unlikely to improve politicians' electoral chances. State and federal law enforcement have incentives too. Prioritizing Indian country crime is unlikely to help a state or federal law enforcement officer advance professionally because *tribal communities are not their community*.[35] Compounding the political disincentive, policing Indian country is far more difficult than patrolling other areas due to Indian country's vexing jurisdictional regime.[36] Tribes' only hope for a safer future is to change the system, and given the decades-long failure to fix Indian country's broken criminal justice system, this Article suggests tribes openly defy *Oliphant*.

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[29] Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 683, 717–18 (2021) [hereinafter Crepelle, *How Federal Indian Law Prevents*]; Crepelle, *Tribal Courts*, *supra* note 25, at 65–67, 82.

[30] *See* Adam Crepelle, *Holding the United States Liable for Indian Country Crime*, 31 KAN. J.L. & PUB. POL'Y 223, 245 (2022) [hereinafter Crepelle, *Holding the United States Liable*]; Sarah Deer, *Bystander No More?: Improving the Federal Response to Sexual Violence in Indian Country*, 2017 UTAH L. REV. 771, 776 (2017) ("Unfortunately, granting federal officials the authority to prosecute major crimes does not mandate that they do so."); Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).

[31] U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, DECLINATIONS OF INDIAN COUNTRY MATTERS 3 (2010) ("USAOs [United States Attorney's Offices] declined to prosecute 50 percent of the 9,000 matters.").

[32] *See, e.g.*, Mary Hudetz, *Amid a Crime Wave on Yakama Reservation, Confusion Over a Checkerboard of Jurisdictions*, SEATTLE TIMES (Feb. 18, 2020, 9:49 AM), https://www.seattletimes.com/seattle-news/times-watchdog/amid-a-crime-wave-on-yakama-reservation-confusion-over-a-checkerboard-of-jurisdictions ("[T]he Washington State Patrol (WSP) suspended its patrols in April 2016 on more than 50 miles of Highway 97 and other routes through the reservation.").

[33] U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 4 (2012).

[34] U.S. CENSUS BUREAU, ACSBR/11-17, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011 3 (2013); U.S. CENSUS BUREAU, CB17-FF.20, AMERICAN INDIAN AND ALASKA NATIVE HERITAGE MONTH: NOVEMBER 2017 (2017).

[35] Crepelle, *Law & Economics*, *supra* note 28, at 597.

[36] *Id.* at 589–91.

Civil disobedience is the conscientious and peaceful contravention of an existing law.[37] People engage in civil disobedience because they would rather bear legal penalties than comply with a mandate that spurns their sense of justice.[38] This idea is ancient. Over 2,000 years ago, Antigone, the namesake of Sophocles' classic play, freely chose to suffer the consequences of defying the King's command in order to bury her brother.[39] One of the inaugural American acts was the Boston Tea Party, a flagrant and nonviolent violation of existing law.[40] Henry David Thoreau believed, "[I]f [the law] is of such a nature that it requires you to be the agent of injustice to another, then I say, break the law."[41] Accordingly, he practiced civil disobedience to oppose slavery and the Mexican War.[42] Most famously, Martin Luther King, Jr. engaged in civil disobedience in pursuit of African-American equality before the law. Sitting in a Birmingham jail, King wrote, "[O]ne has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that 'an unjust law is no law at all.'"[43] Tribes should heed the advice of Thoreau and King and defy the law to make red lives matter.

Civil disobedience is nothing new for Indians; in fact, the United States' first major civil rights case arose from Indian civil disobedience.[44] Chief Standing Bear of the Ponca Tribe is well-known in Indian country but often overlooked by the American mainstream.[45] However, Chief Standing Bear deserves a place among the United States great civil rights leaders.[46] After the United States violated a treaty

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[37] *See* United States v. Schoon, 971 F.2d 193, 195–96 (9th Cir. 1991).

[38] *See* United States v. Dorrell, 758 F.2d 427, 435 (9th Cir. 1985) (Ferguson, J., concurring) ("Moral motivations have frequently prompted citizens to violate laws they personally consider unjust.").

[39] SOPHOCLES, ANTIGONE (Francis Storr, trans., 1912) (2022).

[40] *Dorrell*, 758 F.2d at 435 (Ferguson, J., concurring).

[41] HENRY DAVID THOREAU, CIVIL DISOBEDIENCE: RESISTANCE TO CIVIL GOVERNMENT 17 (Floating Press 2009) (1849).

[42] *Henry David Thoreau*: *What I Have to Do…*, BILL OF RTS. INST., https://billofrightsinstitute.org/activities/henry-david-thoreau-what-i-have-to-do-handout-a-narrative (last visited June 25, 2023).

[43] Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), *reprinted in* 26 U.C. DAVIS L. REV. 835, 840 (1993).

[44] Mary Kathryn Nagle, Standing Bear v. Crook: *The Case for Equality Under Waaxe's Law*, 45 CREIGHTON L. REV. 455, 456–58 (2012).

[45] Johnny D. Boggs, *Standing Bear's Trials to Indian Rights*, TRUEWEST MAG. (Mar. 19, 2019), https://truewestmagazine.com/article/standing-bears-trials-to-indian-rights ("But Standing Bear still doesn't get enough attention."); *see also* Joseph Morton, *Chief Standing Bear, Who 'Changed the Course of History,' Is Honored with Statue in U.S. Capitol*, OMAHA WORLD-HERALD (Sept. 19, 2019), https://omaha.com/news/national/chief-standing-bear-who-changed-the-course-of-history-is-honored-with-statue-in-u/article_30785e76-59aa-5418-a31d-db8b4e768923.html.

[46] *Chief Standing Bear: A Hero of Native American Civil Rights*, U.S. CTS. (Oct. 29, 2020), https://www.uscourts.gov/news/2020/10/29/chief-standing-bear-hero-native-american-civil-

with the Ponca and sought their removal, Chief Standing Bear boldly told federal officials:

> I want you to go off my land. If you were treating a white man the way you are treating me, he would kill you, and everybody would say he did right. I will not do that. I will harm no white man, but this is my land, and I intend to stay here and make a good living for my wife and children. You can go.[47]

His protest failed to prevent the forced removal of his tribe.[48] Removal killed a quarter of the Ponca, including all but one of Chief Standing Bear's children.[49] Chief Standing Bear's dying son asked to be buried in the ancestral Ponca lands.[50] Though the United States prohibited Indians from leaving reservations, Chief Standing Bear chose to defy federal law in order to honor his vow to his son.[51] Chief Standing Bear's dignified resistance to colonial oppression forever transformed federal Indian policy.[52]

Following his civil disobedience, Chief Standing Bear used facts, morality, and emotion to win his court case—establishing Indians are human beings.[53] Tribes can do the same to battle *Oliphant*. Publicly disobeying *Oliphant* will challenge the core of federal Indian policy. The *Oliphant* challenge will likely reach the United States Supreme Court. Throughout the proceeding, tribes should argue *Oliphant* was wrongly decided based upon precedent. More importantly, tribes should assert *Oliphant* is based upon racist lies.[54] Lies devised to justify the dispossession and subjugation of America's indigenous inhabitants. Lies now overwhelmingly refuted by

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rights ("The remarkable story of Chief Standing Bear . . . established him as one of the nation's earliest civil rights heroes.").

[47] THOMAS HENRY TIBBLES, THE PONCA CHIEFS: AN INDIAN'S ATTEMPT TO APPEAL FROM THE TOMAHAWK TO THE COURTS 8 (Boston, Lockwood, Brooks & Co. 1879).

[48] *Id.* at 11–12, 25 (explaining how the Ponca "were taken to the Indian Territory").

[49] TIBBLES, *supra* note 47, at 14; LAWRENCE A. DWYER, STANDING BEAR'S QUEST FOR FREEDOM: THE FIRST CIVIL RIGHTS VICTORY FOR NATIVE AMERICANS 41, 43 (Bison Books ed., Univ. of Neb. Press 2022) (2019); JOE STARITA, "I AM A MAN:" CHIEF STANDING BEAR'S JOURNEY FOR JUSTICE 72 (2008).

[50] TIBBLES, *supra* note 47, at 26.

[51] *Id.* ("I could not refuse the dying request of my boy. I have attempted to keep my word.").

[52] Christina Rose, *Native History: Court Rules Standing Bear is a Man with Rights*, INDIAN COUNTRY TODAY, https://www.indiancountrytoday.com/archive/native-history-court-rules-an-indian-is-a-man-with-rights (Sept. 13, 2018) ("Indian Reform followed as Tibbles and Standing Bear toured major cities to speak out against the abuses in Indian Territory.").

[53] Nagle, *supra* note 44, at 455–56.

[54] Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 558–63 (2021) [hereinafter Crepelle, *Lies, Damn Lies*].

historical, archeological, and scientific evidence. Lies with no place in a nation that prides itself on the impartial administration of justice.[55]

Rebelling against *Oliphant* will force the United States to confront an embarrassing reality. Nearly 150 years after Chief Standing Bear was declared a person, the same legal rationale used to dehumanize Indians continues to be wielded to delegitimize tribal governments. Indeed, tribes have been legally classified as "domestic dependent nations" since 1831, meaning "they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[56] This bigoted, paternalistic language was integral to the Supreme Court's conclusion that tribes have been implicitly divested of criminal authority over non-Indians.[57] *Oliphant* goes beyond institutionalized racism; rather, *Oliphant* and the jurisprudence it relies upon are racism masquerading as law.

Not only do *Oliphant* and other racist precedents subvert tribal sovereignty, they contaminate the nature of justice in the United States. George Washington and other members of the founding generation believed the world would judge the United States based upon its treatment of Indians.[58] Their prediction has come true as international bodies, including the United Nations, have described contemporary federal Indian law as wholly incompatible with modern notions of justice.[59] The principles of stare decisis render federal Indian law toxic to the entire United States' legal system.[60] As the great Indian law scholar Felix Cohen wrote, "Like the miner's

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[55] *Id.* at 570.

[56] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[57] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

[58] COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON: THE FIRST PRESIDENT, THE FIRST AMERICANS, AND THE BIRTH OF THE NATION 328 (2018) ("How the United States treated Indians would affect how other nations viewed American democracy."); *Letter from Henry Knox to George Washington, 7 July 1789*, NAT'L ARCHIVES, https://www.founders.archives.gov/documents/Washington/05-03-02-0067 (last visited June 25, 2023).

[59] *See* Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L./V/II.17, doc. 5, rev. 1 ¶ 173 (2002) (recommending the United States "[r]eview its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII and XXIII of the Declaration"); U.N. Comm. on the Elimination of Racial Discrimination, 59th Sess., 1475th mtg. at 9, U.N. Doc. CERD/C/SR.1475 (Aug. 6, 2001); James Anaya (Special Rapporteur), U.N. Hum. Rts. Council, *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples*, 7–9, U.N. DOC. A/HRC/21/47 (July 6, 2012); *see generally* Crepelle, *Lies, Damn Lies*, *supra* note 54, at 557–58 (pointing out that the Inter-American Commission on Human Rights and the United Nations Committee on the Elimination of Racial Discrimination have both criticized the U.S policies regarding Indians).

[60] ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA xxv (2005).

canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."[61]

The remainder of this Article proceeds as follows: Part II provides an overview of public choice theory, Part III chronicles the development of federal Indian policy, Part IV applies public choice theory to Indian country crime, and Part V discusses civil obedience as a means to make red lives matter.

II. PUBLIC CHOICE THEORY

Public choice theory assumes public servants are just as human as everyone else.[62] According to public choice theory, public officials are not primarily interested in serving society. Instead, it assumes politicians and government employees are rational actors pursuing their own self-interest.[63] This means public servants are primarily concerned with keeping their jobs and secondarily interested in public service.[64] In the words of Professor Donald Dripps, "The first duty of a politician is to get elected, and the second is to get re-elected."[65]

Vowing to crack down on crime has been a successful political strategy for American politicians since at least 1960.[66] This makes sense. Nobody wants to be a crime victim; plus, the majority of people see themselves as more likely to be a victim than a criminal.[67] Consequently, being "tough on crime" furthers the electoral

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[61] Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

[62] William F. Shughart II, *Public Choice*, ECONLIB, https://www.econlib.org/library/Enc/PublicChoice.html (last visited June 25, 2023) ("But public choice, like the economic model of rational behavior on which it rests, assumes that people are guided chiefly by their own self-interests and, more important, that the motivations of people in the political process are no different from those of people in the steak, housing, or car market.").

[63] *Id.* ("[B]ureaucrats strive to advance their own careers; and politicians seek election or reelection to office. Public choice, in other words, simply transfers the rational actor model of economic theory to the realm of politics.").

[64] *Id.*; Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1080 (1993) ("The only essential tenet of public choice theory is that politicians, like other people, tend to promote their self-interest.").

[65] Dripps, *supra* note 64, at 1080.

[66] *How the Political Ground Shifted on Criminal Justice Reform*, NBC NEWS (Feb. 24, 2015, 10:21 AM), https://www.nbcnews.com/politics/politics.

[67] Brandon Buskey, *When Public Defenders Strike: Exploring How Public Defenders Can Utilize the Lessons of Public Choice Theory to Become Effective Political Actors*, 1 HARV. L. & POL'Y REV. 533, 533 (2007) ("Unfortunately, state policy makers tend to believe they can get away with such negligence, since few citizens are likely to shed a tear over the travails of criminal defendants.").

cause,[68] and being called "soft on crime" is likely to harm one's political career.[69] These factors create an incentive for politicians to increase rather than decrease penalties. For example, a California legislator admitted to voting for a mandatory minimum sentencing law though she ordinarily deemed such laws ill-advised because the law was a reaction to public outcry.[70]

Public choice theory assumes law enforcement officers act in their rational self-interest rather than for the public good.[71] District attorneys and sheriffs are democratically elected.[72] United States Attorneys (USAs) and police commissioners are appointed by the political branches of government.[73] Whether elected or appointed, failure to respond to political incentives may cost law enforcement officers their jobs.[74] Many prosecutors, including unelected Assistant USAs and state prosecutors, also have political ambitions.[75] Hence, they pursue high profile cases to grab headlines and

[68] John Ehrett, *Public Choice and the Mandatory Minimum Temptation*, 35 YALE L. & POL'Y REV. 603, 608 (2017) ("The 'tough on crime' norm thereby engenders a race-to-the-bottom where criminal justice reform is concerned: electoral dynamics are such that voters, in many cases, will swiftly punish any deviation from this norm.").

[69] *Id.* at 608 ("Accordingly, a legislator who champions criminal justice reforms, with the aim of reducing mass incarceration, unavoidably opens himself to the criticism that he's being too 'soft' on criminals.").

[70] *Id.* at 604–05.

[71] *See* Buskey, *supra* note 67, at 535.

[72] Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012) ("The United States is the only country in the world where citizens elect prosecutors."); Alan Neuhauser, *Running for a Badge: Why Does the U.S. Still Elect Sheriffs?*, U.S. NEWS (Nov. 4, 2016, 10:32 AM), https://www.usnews.com/news/politics/articles/2016-11-04/joe-arpaio-david-clarke-and-why-the-us-still-elect-sheriffs ("While communities in the U.S. and in virtually every nation appoint their police chiefs, experts say, most American communities with a sheriff elect someone to hold the position. In fact, some state constitutions even require it."); *When Does Each County Elect Its Prosecutor and Sheriff?*, THE APPEAL, https://www.theappeal.org/political-report/when-are-elections-for-prosecutor-and-sheriff (last visited June 25, 2023) (listing states with elected prosecutors and sheriffs).

[73] *See* 28 U.S.C § 541(a); Barbara Bean-Mellinger, *What Is a Police Commissioner's Job?*, CHRON., https://work.chron.com/police-commissioners-job-25236.html (Aug. 20, 2018) (noting that some police commissioners are appointed by mayors).

[74] *Prosecutor*, BRITANNICA, https://www.britannica.com/topic/prosecutor (Apr. 19, 2023) ("On the federal level, district attorneys are, in effect, members of the executive branch of the government; they are usually replaced when a new administration comes into office. Prosecutors, whether elected or appointed, are often subject to political pressures.").

[75] Wendy Sawyer & Alex Clark, *New Data: The Rise of the "Prosecutor Politician,"* PRISON POL'Y INITIATIVE (July 13, 2017), https://www.prisonpolicy.org/blog/2017/07/13/prosecutors ("Of those in office at any point between 2007 and 2017, 38% of state attorneys general, 19% of governors, and 10% of U.S. senators had prosecutorial backgrounds."); Micah Schwartzbach, *What Factors Influence Prosecutors' Charging Decisions?*, NOLO, https://perma.cc/65PC-CLUF (archived October 5, 2021) ("Political ambition may also influence prosecutors.").

slam dunk cases to build their public safety bona fides.[76] Incentives may lead prosecutors to continue a case merely to preserve their reputation.[77] These same features motivate prosecutors who desire to work for private firms.[78] Non-attorney law enforcement also have incentives unrelated to public safety, such as generating departmental revenue through issuing tickets.[79]

Given the public's rightful concern with safety, it should be no surprise that law enforcement agents are among the most influential lobbying groups.[80] Examples abound. Civil asset forfeiture laws permit police and prosecutors to take and keep private property without even charging the property owner with a crime.[81] Despite public outrage over several high profile cases of forfeiture abuse,[82] law enforcement

[76] Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 480–81 (2017).

[77] *Id.* at 481 ("For example, once a prosecutor has charged a defendant or otherwise publicly asserted that a defendant is guilty, dropping the charges may be viewed as a public concession that the prosecutor previously made a mistake.").

[78] Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61, 74 n.44 (2007); Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 556 (2020) ("Appointed leaders in the federal criminal justice system—namely, the Attorney General and the ninety-four U.S. Attorneys who report to him or her—may be motivated by lucrative job prospects in the private sector (the so-called revolving door), other government service as lawyers, or political or judicial office.").

[79] Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES, https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html (Nov. 2, 2021) ("A hidden scaffolding of financial incentives underpins the policing of motorists in the United States, encouraging some communities to essentially repurpose armed officers as revenue agents searching for infractions largely unrelated to public safety.").

[80] Paige Fernandez & Nicole Zayas Fortier, *Protect People, Not Police Lobbyists*, ACLU (June 1, 2021), https://www.aclu.org/news/criminal-law-reform/protect-people-not-police-lobbyists ("Police lobbyists exert largely unseen yet enormous power over elected officials and over the state of public safety in the U.S."); Tom Perkins, *Revealed: Police Unions Spend Millions to Influence Policy in Biggest US Cities*, THE GUARDIAN (June 23, 2020, 6:15 AM), https://www.theguardian.com/us-news/2020/jun/23/police-unions-spending-policy-reform-chicago-new-york-la; Michael Tracey, *The Police Lobby Has Far Too Much Power in American Politics*, VICE (Dec. 4, 2004, 11:00 AM), https://www.vice.com/en/article/nnqyeg/the-pernicious-power-of-police-unions ("Given their track record of successfully weighting legal processes in favor of officers, the police lobby tends to be very confident, so much so that its leaders exhibit little compunction about openly disparaging the rare politician who goes against them.").

[81] Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 315 (2017) [hereinafter Crepelle, *Probable Cause*] ("Civil asset forfeiture enables law enforcement to seize property and keep it for their own use without arresting anyone, much less charging or convicting anyone of a crime.").

[82] *E.g.*, Bennis v. Michigan, 516 U.S. 442 (1996) (upholding the forfeiture of a wife's interest in a car after her husband was busted for having sex with a prostitute in the car).

has thwarted most every attempt at forfeiture reform.[83] Law enforcement successfully block efforts for greater transparency, like reporting requirements.[84] More criminal laws provide police and prosecutors opportunities to flex their muscle; thus, they usually oppose efforts to repeal laws.[85] Likewise, prosecutors prefer laws with harsher penalties because this gives them more leverage in negotiations. Increasing the number of criminal laws as well as the length of sentences increases the demand for prison guards. Therefore, prison guards, a highly influential lobbying group, unsurprisingly oppose reforms intended to reduce the number of inmates.[86]

Law enforcement incentives and majority rule combine to place the criminal justice system's weight on the poor and minorities.[87] At all stages of the system, minorities are disproportionately represented in statistics ranging from stop and frisk[88] to incarceration,[89] to the death penalty.[90] In fact, Oregon and Louisiana had jury systems specifically designed to make it easier to convict minorities until

[83] Crepelle, *Probable Cause*, *supra* note 81, at 332 ("Since law enforcement still reaps the proceeds of forfeitures, it continues to block state level civil asset forfeiture reform efforts.").

[84] Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1879 (2015) ("In Maryland, for example, law enforcement groups vehemently opposed efforts to institute even modest reporting requirements for police use of SWAT."); Sukey Lewis, Thomas Peele, Annie Gilbertson & Maya Lau, *'Delaying the Inevitable': Many Police Agencies Withhold Records in New Era of Transparency*, KQED (June 30, 2019), https://www.kqed.org/news/11758000/delaying-the-inevitable-many-police-agencies-withhold-records-in-new-era-of-transparency.

[85] *See, e.g.*, Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & POL'Y 716, 730–32.

[86] John Myers, Column, *Once an Electoral Juggernaut, California's Prison-Guard Union Steps Back into the Spotlight*, L.A. TIMES (Sept. 23, 2018, 12:05 AM), https://www.latimes.com/politics/la-pol-ca-road-map-prison-guards-union-20180923-story.html. Indeed, the prison guard lobby is so powerful in California that it was able to gain California Governor Gavin Newsom's support for exemption from the COVID-19 vaccine mandate although a vaccine mandate otherwise applies in the state. *See* C.J. Ciaramella, *In Governor Newsom's California, COVID-19 Rules Are for Those Without Political Power*, REASON (Oct. 15, 2021, 3:25 PM), https://www.reason.com/2021/10/15/in-gavin-newsoms-california-covid-19-rules-are-for-those-without-political-power.

[87] Barry Friedman & Elizabeth G. Jánszky, *Policing's Information Problem*, 99 TEX. L. REV. 1, 3 (2020) ("There's also little in the way of hard analysis of distributional costs: policing regularly falls most heavily on communities of color and on the poor, imposing a tax for keeping the rest of us safe that often fails to enter our calculus at all.").

[88] Crepelle, *Probable Cause*, *supra* note 81, at 350 ("Likewise, stop and frisk has been repeatedly shown to disproportionately target minorities.").

[89] *U.S. Incarceration Rates by Race and Ethnicity, 2010*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/graphs/raceinc.html (last visited June 25, 2023).

[90] Colleen Long, *Death Penalty Cases Show History of Racial Disparity*, ASSOCIATED PRESS (Sept. 15, 2020), https://www.apnews.com/article/united-states-lifestyle-race-and-ethnicity-discrimination-racial-injustice-ded1f517a0fd64bf1d55c448a06acccc; *Race*, DEATH PENALTY INFO. CTR., https://www.deathpenaltyinfo.org/policy-issues/race (last visited June 25, 2023).

2020.[91] Despite whites and minorities using illicit drugs at the same rate, minorities are much more likely to be incarcerated for drug use.[92] Indeed, several drugs are prohibited solely for their association with certain races.[93] Law enforcement tend to be unresponsive when minorities are crime victims and overzealous when they allegedly perpetrate crimes.[94] As a result, minorities often distrust law enforcement.[95]

III. PUBLIC SENTIMENT AND FEDERAL INDIAN POLICY OVER TIME

Federal Indian policy has been driven by popular sentiment since the United States' founding; in fact, "Indian-hating" was a formative element in the American identity.[96] Indian resistance to invasions of their lands was a reason the American colonists broke with Britain,[97] and fear of Indian military capacity served as a catalyst for ratification of the Constitution because a strong central government was needed to battle Indians.[98] Nonetheless, the newly formed United States' military

[91] Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020) ("In fact, no one before us contests any of this; courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective nonunanimity rules.").

[92] Crepelle, *Probable Cause*, *supra* note 81, at 350 ("Although blacks, whites, and Hispanics use drugs at approximately the same rate, blacks and Hispanics are much more likely than whites to be incarcerated for a drug crime.").

[93] Crepelle, *Probable Cause*, *supra* note 81, at 349 n.254.

[94] Friedman & Jánszky, *supra* note 87, at 13; *id.* at 28 ("That's not entirely fair because—as Stuntz himself recognizes—policing (like crime) unquestionably falls more heavily on marginalized communities. For decades, police have stopped, searched, surveilled, and arrested a population that is disproportionately comprised of racial minorities. Even at large numbers, this is a community that historically has had less voice.").

[95] *Id.* at 13–14 ("Minority populations consistently express dissatisfaction with their police departments for delayed response times, lack of focus on major crimes, and an overall view that police are not committed to protecting their communities.").

[96] Bryan Rindfleisch, *Pontiac's Rebellion*, GEO. WASH. PRESIDENTIAL LIBR., https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/pontiacs-rebellion (last visited July 1, 2023) ("In addition, what emerged in the colonies was a culture of 'Indian-hating'—or the 'anti-Indian sublime'—in which Europeans of different religions, ethnicities, and political affiliations rallied together, despite their dissimilarities, against a Native 'Other.'").

[97] *French and Indian War/Seven Years' War, 1754-63*, U.S. DEP'T OF ST., OFF. OF THE HISTORIAN, https://www.history.state.gov/milestones/1750-1775/french-indian-war (last visited July 1, 2023) ("British attempts to limit western expansion by colonists and inadvertent provocation of a major Indian war further angered the British subjects living in the American colonies."); *The Indians' War of Independence*, GILDER LEHRMAN INST. OF AM. HIST., https://www.ap.gilderlehrman.org/essay/indians%27-war-independence (last visited July 1, 2023) (describing how Indian fortitude "destroyed every British fort west of the Appalachians" which led to the Royal Proclamation of 1763 and the resulting discontent of the colonists).

[98] Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1058–59 (2014) ("Knox's invocation of 'murdering savages' to justify a stronger federal government became a common trope in Federalist arguments for ratification.").

was not strong enough to seize Indian lands by force.[99] As a result, the United States chose to acquire tribal lands by treaties.[100] Each treaty between the United States and tribes secured tribal lands against white intrusion; however, white settlers disregarded the treaties.[101] The United States had limited ability to enforce the treaties because it lacked a standing army.[102] Moreover, Congress represented the white settlers, and they wanted Indian land.[103] Congress was unlikely to use force to protect Indians, who were not even legally entitled to personhood until 1879,[104] from white encroachments.[105]

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[99] 33 J. CONTINENTAL CONG., 388 (1787) ("[I]t is to be apprehended that the finances of the United States are such at present as to render them utterly unable to maintain an Indian war with any dignity or prospect of success."); Letter from Henry Knox to George Washington (Jan. 4, 1790), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-04-02-0353 (last visited July 1, 2023) ("The present military arrangement of the United States consists of one Battalion of Artillery of two hundred and forty noncommissioned and privates, and one regiment of Infantry of five hundred and sixty non commissioned and privates—This force for the following objects is utterly inadequate . . . ."); Francis Paul Prucha, *Introduction*, *in* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900 1 (Francis Paul Prucha ed., 1973).

[100] *Letter from George Washington to James Duane, 7 September 1783*, NAT'L ARCHIVES, https://www.founders.archives.gov/documents/Washington/99-01-02-11798 (last visited July 1, 2023).

[101] Crepelle, *Holding the United States Liable*, *supra* note 30, at 229–30 ("Accordingly, the United States entered nearly four hundred treaties with tribes, and every treaty secured tribal lands against white encroachment. Enforcing this treaty pledge was difficult because whites usually had no qualms about swindling Indians in commercial transactions nor did they consider it a crime to kill Indians. Thus, treaties did not stop whites from invading Indian lands, presenting the specter of an Indian war.").

[102] U.S. CONST. art. I, § 8, cl. 12; *see also* NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, REGULAR VS. VOLUNTEER SOLDIERS: U.S. VIEWPOINTS, https://www.nps.gov/common/uploads/teachers/lessonplans/U.S.%20Viewpoints%20on%20the%20Standing%20Army%20Before%20the%20U.S.-Mexican%20War.pdf (noting the lack of standing army during the U.S.-Mexican War from 1846–1848).

[103] Desire for Indian lands west of the Proclamation of 1763's boundaries helped trigger the American Revolution. *See* Jennifer Monroe McCutchen, *Proclamation Line of 1763*, GEORGE WASHINGTON'S MOUNT VERNON, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/proclamation-line-of-1763 (last visited July 1, 2023). This desire did not abate after the Revolution. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Jane Elsmere, *The Notorious Yazoo Land Fraud Case*, 51 GA. HIST. Q., 425, 425–26 (1967).

[104] United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 700 (C.C.D. Neb. 1879) (No. 14,891).

[105] Adam E. Zielinski, *Allies and Enemies: British and American Attitudes Towards Native Americans During the Revolution*, AM. BATTLEFIELD TR., https://www.battlefields.org/learn/articles/allies-and-enemies (last visited July 1, 2023) ("And it just was not politically possible for an American standing army to forcibly throw off citizens moving west.").

White desire for Indian lands resulted in three cases that form the foundation of Indian rights to this day.[106] In 1823, the Supreme Court issued its opinion in *Johnson v. M'Intosh*.[107] The case arose because the federal government banned private purchases of Indian lands.[108] This prohibition provided the United States with a monopsony, enabling it to purchase Indian lands at the lowest price possible.[109] Once acquired, the United States could sell lands previously owned by Indians to raise money and encourage western expansion.[110] However, Americans disregarded the law and continued to purchase lands directly from Indians.[111]

In a unanimous opinion, Chief Justice John Marshall held the federal government had exclusive rights to acquire Indian lands.[112] The Court reached this conclusion by resorting to the doctrine of discovery, an international law decreeing lands not yet inhabited by Christians rightfully belong to the first Christian nation to encounter them.[113] Chief Justice Marshall knew the doctrine of discovery was utter nonsense, writing:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[114]

The opinion contains disparaging depictions of Indians which Chief Justice Marshall knew were false.[115] Chief Justice Marshall attempted to justify the decision by noting "the magnitude of the interest in litigation."[116] Following the Court's opinion in *Johnson,* no attempts were made to validate private purchases of Indian

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[106] The three cases are collectively known as the Marshall Trilogy and include Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[107] *Johnson*, 21 U.S. (8 Wheat.) at 543.

[108] Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177); *see also* DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 71–72 (7th ed. 2016).

[109] Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1105 (2000).

[110] *See Johnson v. McIntosh 1823*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/law/legal-and-political-magazines/johnson-v-mcintosh-1823 (last visited May 5, 2023).

[111] GETCHES ET AL., *supra* note 108, at 71–72; *see also Johnson*, 21 U.S. (8 Wheat.) at 543.

[112] *Johnson*, 21 U.S. (8 Wheat.) at 586.

[113] *Id.* at 573.

[114] *Id.* at 591.

[115] Crepelle, *Lies, Damn Lies*, *supra* note 54, at 542.

[116] *Johnson*, 21 U.S. (8 Wheat.) at 604.

land.[117] Thus, *Johnson* protected federal financial interests and had support of those seeking federal land grants.

Johnson resolved the issue of Indian land ownership, but the question remained about what to do with tribal lands within state borders. Georgia believed tribes had no right to exist within its borders and long desired the Cherokee Nation's lands.[118] Cherokee lands were fertile; plus, the Cherokee Nation was ideally situated for a railroad line into western states.[119] In 1828, gold was discovered in the Cherokee Nation and Andrew Jackson, a longtime opponent of tribal sovereignty, was elected president.[120] These events inspired Georgia to enact legislation extending its laws over Cherokee lands and declaring all laws promulgated by the Cherokee "to be null and void and of no effect, as if the same had never existed."[121] President Jackson lent support to Georgia by urging Congress to pass the Indian Removal Act, which it did in 1830.[122]

Seeking to enforce its treaty right to its land, the Cherokee Nation filed an original action in the United States Supreme Court alleging Georgia had no authority over its land.[123] Chief Justice Marshall empathized with the Cherokee writing, "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined."[124] The legality or morality of Georgia's actions was not before the Court; rather, the only issue was whether the Cherokee Nation constituted a foreign nation under Article III of the Constitution.[125] Although Chief Justice Marshall admitted the argument for treating the Cherokee as a

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[117] Kades, *supra* note 109, at 1113.

[118] S.R. of Nov. 28, 1826, 1826 Leg. Sess. 206–08 (Ga. 1826) (adopting resolutions aimed at extinguishing title to Cherokee lands); S.R. of Dec. 27, 1827, 1827 Leg. Sess. 249 (Ga. 1827) ("That all the lands appropriated and unappropriated, which lie within the conventional limits of Georgia, belong to her absolutely; that the title is in her; that the Indians are tenants at her will, and that she may at any time she pleases, determine that tenancy, by taking possession of the premises—and that Georgia has the right to extend her authority and laws over her whole territory, and to coerce obedience to them from all descriptions of people, be them white, red or black, who may reside within her limits.").

[119] THEDA PERDUE & MICHAEL D. GREEN, THE CHEROKEE REMOVAL: A BRIEF HISTORY WITH DOCUMENTS 72–73 (3d ed. 2016).

[120] Dan Bryan, *Indian Removal and the Trail of Tears*, AM. HIST. USA (Mar. 26, 2012), https://www.americanhistoryusa.com/indian-removal-and-trail-of-tears.

[121] PERDUE & GREEN, *supra* note 119, at 76; *see also* S.R. of Dec. 20, 1828, 1828 Leg. Sess. 89 (Ga. 1828) ("That all laws, usages, and customs made, established and in force, in the said territory, by the said Cherokee Indians be, and the same are hereby on, and after the first June, 1830, declared null and void.").

[122] Indian Removal Act of 1830, ch. 148, 4 Stat. 411; *see also* John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521, 533 (2008).

[123] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[124] *Id.* at 15.

[125] *Id.* at 15–16.

foreign nation was "imposing," he instead described the Cherokee as a "domestic dependent nation."[126] Sans status as a foreign nation, the Court was unable to hear the Cherokee Nation's claim.[127]

A spin on the case reached the Court a year later.[128] Georgia prohibited whites from entering the Cherokee Nation without a state license and arrested several missionaries for violating the law.[129] Two of the missionaries, Samuel Worcester and Elizur Butler, argued the Georgia law violated the Constitution.[130] Since Worcester and Butler were white men, the Court had jurisdiction over the case.[131] Chief Justice Marshall held the Georgia law was illegal, declaring, "The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."[132] However, the populist President Jackson refused to enforce the decision, ultimately precipitating the Trail of Tears.[133] Interestingly, the ongoing nullification crisis[134] in South Carolina prompted President Jackson to actively negotiate for the release of Worcester and Butler.[135] President Jackson needed to resolve the Cherokee–Georgia conflict quickly, so he could champion legislation authorizing the use of force against South Carolina for refusing to follow federal law.[136]

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[126] *Id.* at 16–17.

[127] *Id.* at 20.

[128] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[129] *Id.* at 542.

[130] *Id.* at 536.

[131] *Id.* at 542; Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the* Cherokee Cases, *in* INDIAN L. STORIES 61, 74 (Carole E. Goldberg et al. eds., 2011) ("The arguments in *Worcester v. Georgia* began on February 20, 1832, with Wirt setting forth the jurisdictional basis of this suit between a state and a citizen of another state. The court raised no question of jurisdiction and moved directly to the merits of the case.").

[132] *Worcester*, 31 U.S. (6 Pet.) at 520.

[133] *See* Ellen Holmes Pearson, *A Trail of 4,000 Tears*, BREWMINATE (May 31, 2018), https://www.brewminate.com/a-trail-of-4000-tears ("It is estimated that of the approximately 16,000 Cherokee who were removed between 1836 and 1839, about 4,000 perished."); *The Trail of Tears*, PBS, https://www.pbs.org/wgbh/aia/part4/4h1567.html (last visited July 1, 2023) ("Over 4,000 out of 15,000 of the Cherokees died."); *The Trail of Tears—The Indian Removals*, U.S. HIST., http://www.ushistory.org/us/24f.asp (last visited July 1, 2023).

[134] For an explanation of the nullification crisis, see Julie Silverbrook, *The Nullification Crisis*, BILL OF RTS. INST., https://www.billofrightsinstitute.org/essays/the-nullification-crisis (last visited July 3, 2023).

[135] Stephen G. Breyer, *Reflections of a Junior Justice*, 54 DRAKE L. REV. 7, 9 (2005) ("Andrew Jackson woke up to the problem and he ended up saying to the governor of Georgia, 'You must release Worcester.' They had a negotiation and Worcester was let out of jail."); *see also* Ronald A. Berutti, *The Cherokee Cases: The Fight to Save the Supreme Court and the Cherokee Indians*, 17 AM. INDIAN L. REV. 291, 307 (1992).

[136] Edwin A. Miles, *After John Marshall's Decision:* Worcester v. Georgia *and the Nullification Crisis*, 39 J.S. HIST. 519, 541 (1973); Silverbrook, *supra* note 134.

The United States' failure to honor treaties forced tribes onto reservations.[137] Reservations were usually lands whites did not want.[138] While the land may not have been prime, it was guaranteed to tribes for all time.[139] Plus, tribes were assured the right to govern themselves free from outside interference.[140] This was a bargain the United States gladly made because seizing land by force was costly.[141] However, the United States' military capacity drastically increased in the years following the Civil War, so the United States ceased entering treaties with tribes.[142] The United States turned to taking tribal lands by force.[143]

Although the United States had a numerical and technological advantage, tribes on the Great Plains proved themselves formidable adversaries.[144] Accordingly, the military deemed it more efficient to destroy the Indians' food source than fight

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[137] Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 413, 428 (2019) [hereinafter Crepelle, *Decolonizing Reservation*].

[138] LEWIS MERIAM, INST. FOR GOV'T RES., ED 087573, THE PROBLEM OF INDIAN ADMINISTRATION 5 (1928) ("In justice to the Indians it should be said that many of them are living on lands from which a trained and experienced white man could scarcely wrest a reasonable living."); WILLIAM C. CANBY JR., AMERICAN INDIAN LAW IN A NUTSHELL 26 (7th ed. 2019) (noting lands left after allotment were "desert or semidesert").

[139] *See* Treaty with the Sioux Indians art. XV, U.S.–Sioux, Apr. 29, 1868, 15 Stat. 635 ("The Indians herein named agree that when the agency house and 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 with the Navajo Indians art. XIII, U.S.–Navajo Nation, June 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 . . . ."); United States v. Shoshone Tribe of Indians, 304 U.S. 111, 113 (1938) ("The Indians agreed that they would make the reservation their permanent home.").

[140] Andrew Jackson, First Annual Message to Congress (Dec. 8, 1829), *in Presidential Speeches*, UVA MILLER CTR., https://www.millercenter.org/the-presidency/presidential-speeches/december-8-1829-first-annual-message-congress ("As a means of effecting this end I suggest for your consideration the propriety of setting apart an ample district west of the Mississippi, and without the limits of any state or territory now formed, to be guaranteed to the Indian tribes as long as they shall occupy it, each tribe having a distinct control over the portion designated for its use. There they may be secured in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes.").

[141] Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J.L. & ECON. 39, 55 (1994).

[142] *Id.* at 67; *see also* 25 U.S.C. § 71.

[143] Anderson & McChesney, *supra* note 141, at 57–58.

[144] 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, 320 (2017) ("Tribes on the Great Plains often had strong warrior cultures which made seizing their lands immensely difficult for the government.").

them, so the Army actively encouraged the slaughter of the buffalo.[145] Buffalo populations were already dwindling due to demand for buffalo tongue—a delicacy in American restaurants—and hides for clothing.[146] After tongues and hides were removed, the remainder of the buffalo was often left to rot.[147] Bills were proposed in multiple states to protect buffalo, but the Army actively opposed them.[148] For example, General Philip Sheridan testified against a Texas bill to protect buffalo declaring:

> These men have done more in the last two years and will do more in the next year to settle the vexed Indian question than the entire regular army has done in the last forty years. They are destroying the Indians' commissary. And it is a well-known fact that an army losing its base of supplies is placed at a great disadvantage. Send them powder and lead, if you will, but for lasting peace, let them kill, skin, and sell until the buffalos are exterminated. Then your prairies can be covered with speckled cattle.[149]

Legislation was introduced to protect the buffalo from extinction at the federal level too. A bill designed to restrict buffalo hunting passed the House and Senate in 1874, but President Grant, a former Army General, pocket vetoed the bill.[150]

Empowered by a national urge to seize Indian lands and destroy tribal cultures, the Bureau of Indian Affairs (BIA)[151] began plotting to expand its power over reservation Indians in the 1870s.[152] Crow Dog's murder of Spotted Tail, both Sioux Indians on the Great Sioux Reservation, provided federal agents with such an opportunity. The murder had been resolved pursuant to Sioux custom—restitution

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[145] *Id.* at 320–21.

[146] Kathy Weiser, *Buffalo Hunters*, LEGENDS OF AM., https://www.legendsofamerica.com/we-buffalohunters (June 2021).

[147] *Id.* ("Unfortunately, once these hides and tongues were taken from the carcasses, the edible buffalo meat was often left to rot on the Plains.").

[148] M. Scott Taylor, *Buffalo Hunt: International Trade and the Virtual Extinction of the North American Bison*, 13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 12969, 2007).

[149] Weiser, *supra* note 146; Taylor, *supra* note 148, at 43.

[150] Taylor, *supra* note 148, at 13 ("The only serious piece of federal legislation was passed by both houses in 1874 only to be killed by a pocket veto by President Grant.").

[151] The U.S. agency responsible for relationships with Indians was known by many names before it was officially dubbed the Bureau of Indian Affairs in 1947. *See Bureau of Indian Affairs*, U.S. DEP'T OF THE INTERIOR, https://www.bia.gov/bia (last visited July 3, 2023). This Article will use "BIA" for clarity.

[152] Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 798–99 (2006) [hereinafter Washburn, *Federal Criminal Law*] ("In 1874, a bill was introduced in Congress that attempted to extend federal jurisdiction to Indians who committed serious crimes against other Indians."); John Rockwell Snowden, *Ex Parte Crow Dog*, ENCYC. OF THE GREAT PLAINS, http://plainshumanities.unl.edu/encyclopedia/doc/egp.law.016 (last visited July 3, 2023).

rather than punishment.[153] While the matter was resolved among the Sioux, whites were enraged by the outcome because Spotted Tail was friendly to the United States.[154] Thus, the local USA prosecuted Crow Dog in federal court where Crow Dog was sentenced to hang.[155] Crow Dog appealed his conviction to the Supreme Court which sided with him.[156] Guilt was not the issue; rather, Congress had passed no law authorizing federal jurisdiction over exclusively Indian crimes taking place on reservations.[157] Furthermore, the Court reasoned it would be unfair to try Indians in federal Court because:

> [The United States] tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[158]

As a result, Crow Dog was a free man.[159]

The United States swiftly responded to the Supreme Court's ruling.[160] The BIA created Courts of Indian Offenses to punish indigenous culture.[161] Congress passed the Major Crimes Act (MCA) in 1885, which for the first time in United States history, authorized the federal government to prosecute reservation crimes involving only Indians.[162] Congress justified the MCA on the grounds Indians were

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[153] INDIAN L. & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 117 (2013) ("The matter was settled according to long-standing Lakota custom and tradition, which required Crow Dog to make restitution by giving Spotted Tail's family $600, eight horses, and a blanket.").

[154] Crepelle, *Lies, Damn Lies*, *supra* note 54, at 549–50.

[155] *Ex parte* Crow Dog, 109 U.S. 556, 557 (1883).

[156] *Id.* at 572.

[157] *Id.*

[158] *Id.* at 571.

[159] *Id.* at 572.

[160] Keeble v. United States, 412 U.S. 205, 209 (1973) ("The Major Crimes Act was passed by Congress in direct response to the decision of this Court in *Ex parte Crow Dog*, 109 U.S. 556 (1883).").

[161] Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 805 (2014) (stating that CFR courts [Courts of Indian Offenses] were designed to stamp out tribal culture and governing systems); B.J. Jones, *Role of Indian Tribal Courts in the Justice System*, CTR. ON CHILD ABUSE & NEGLECT (March 2000), http://www.nrc4tribes.org/files/Role%20of%20Indian%20Tribal%20Courts-BJ%20Jones.pdf; *1883: Courts of Indian Offenses Established*, NATIVE VOICES, https://www.nlm.nih.gov/nativevoices/ timeline/364.html (last visited July 3, 2023) (noting CFR courts were designed to prosecute practitioners of traditional Indian ways and convert Indians to Christianity).

[162] Major Crimes Act, ch. 341, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153).

too incompetent to prosecute serious offenses and to expedite Indian assimilation.[163] Within a year of the MCA's enactment, an Indian was prosecuted for killing an Indian on a reservation.[164] As with Crow Dog, guilt was not the issue. Instead, the defendant claimed the United States lacked constitutional authority to pass the MCA.[165] The Supreme Court sided with the defendant;[166] nevertheless, the Court ruled constitutional authority was not needed when legislating in Indian affairs because Indians are a weak and dependent people.[167]

With its newly discovered extraconstitutional power, Congress passed the General Allotment Act (GAA) in 1887, which broke reservations into 160-acre parcels for each Indian head of household and placed Indian lands in trust for 25 years.[168] The GAA was a perfect response to a peculiar combination of non-Indian interests. Many whites in the eastern United States considered themselves "Friends of the Indians."[169] While incredibly ethnocentric, many of the Friends sincerely believed destroying tribal culture in favor of white, Christian ways was in the Indians' best interest.[170] Thus, the group championed termination of tribal sovereignty and Americanization of Indians.[171] Whites out west often cared little for Indian welfare

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[163] Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 230 (1989) ("[The Major Crimes Act of 1885] was consistent with the whole general trend of Indian policy, the move from a policy based on treaty rights recognizing Indian sovereignty to one of dependency and forced assimilation.").

[164] *See* United States v. Kagama, 118 U.S. 375, 376 (1886).

[165] *Id.* at 376.

[166] *Id.* at 378–79, 385 ("But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.").

[167] *Id.* at 383–84.

[168] General Allotment Act, ch. 119, 24 Stat. 388 (1887), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106–462, § 106(a)(1), 114 Stat. 2007; *see also* Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 521 (2013).

[169] Prucha, *supra* note 99, at 1 ("In the last two decades of the nineteenth century American Indian policy was dominated by a group of earnest men and women who unabashedly called themselves 'the friends of the Indian.'").

[170] *Id.* ("They had great confidence in the righteousness of their cause, and they knew that God approved. Convinced of the superiority of the Christian civilization they enjoyed, they saw no need to inquire about positive values in the Indian culture, nor to ask the Indians what they would like.").

[171] *Id.* ("With an ethnocentrism of frightening intensity, they resolved to do away with Indianness and to preserve only the manhood of the individual Indian. There would then be no more Indian problem because there would be no more persons identifiable as Indians."); *id.* at 3 ("These

and would support any policy aimed at opening Indian lands to settlement.[172] Both friends and foes of Indians saw the GAA as a means to reduce to federal expenditures by eventually eliminating the BIA.[173] Nevertheless, the BIA supported allotment because administering it required increased budgets.[174]

The GAA was nearly universally opposed by Indians.[175] Indians fought to get the best possible price for their lands[176] and challenged the GAA as a violation of their treaty rights.[177] The Court denied the Indians' claim because "Congress possessed a paramount power over the property of the Indians."[178] The Court declared:

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made . . . . If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.[179]

Thus, Indians had no recourse as their treaty rights were trampled. Although one of the avowed purposes of the GAA was to make Indians farmers, the land

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humanitarian reformers and their friends in government decided that the Indians were to be individualized and absolutely Americanized."); *id.* ("The goal was complete assimilation . . . .").

[172] *See* Fred S. McChesney, *Government as Definer of Property Rights: Indian Lands, Ethnic Externalities, and Bureaucratic Budgets*, 19 J. LEGAL STUD. 297, 317–18 (1990); Emily Greenwald, *Allotment*, ENCYC. OF THE GREAT PLAINS, http://plainshumanities.unl.edu/encyclopedia/doc/egp.na.002 (last visited May 5, 2023) ("Development-oriented westerners supported the idea, hoping that allotment would free up 'surplus' lands for settlement, mining, ranching, and forestry.").

[173] McChesney, *supra* note 172, at 303.

[174] *Id.* at 323 ("The Act's supposed benefits to Indians, and thus to whites, could only be acquired through lengthy bureaucratic proceedings, which, in the shorter run, would require augmentation of the Indian Office employment and budgets."); Russel Lawrence Barsh, *The BIA Reorganization Follies of 1978: A Lesson in Bureaucratic Self-Defense*, 7 AM. INDIAN L. REV. 1, 12 (1979) ("During the 'allotment period,' the Bureau's budget grew at an annual rate five times faster than it had during the "treaty period' that preceded it."). For a contrary interpretation, *cf.* Matthew T. Gregg & D. Mitchell Cooper, *The Political Economy of American Indian Allotment Revisited*, 8 J. BUS. & ECON. RSCH. 89, 90 (2010).

[175] Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1604–05 (2001).

[176] GETCHES ET AL., *supra* note 108, at 205–08 (discussing how Quanah Parker directed negotiations when the Kiowa, Comanche, and Apache were confronted with an assault on the Treaty of Medicine Lodge Creek and with allotment); McChesney, *supra* note 172, at 313 ("And far from being defrauded, many tribes (Crow, Flathead, Northern Cheyenne) had shown themselves hard bargainers for their lands . . . .").

[177] *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[178] *Id.* at 565.

[179] *Id.* at 568.

allotments Indians received were unsuitable for agriculture.[180] Fertile lands went to whites.[181] The GAA cast Indians into dire poverty and robbed Indians of 90 million acres of their best land.[182]

Public perception of Indians began to change in the early 20th century. Sac and Fox Indian Jim Thorpe won two gold medals for the United States during the 1912 Olympics.[183] Despite his dominance, the International Olympic Committee violated its own rules in order to strip Thorpe of gold medals for playing professional sports.[184] Many of Thorpe's Olympian peers had openly broken this rule, so the IOC's discriminatory enforcement of the rule raised awareness of the injustices Indians endured.[185] Notwithstanding the discrimination they suffered, a quarter of Indian men enlisted to serve the United States during World War I.[186] They served valiantly, volunteering for particularly dangerous missions; hence, Indians were killed in action at five times the rate of other American troops.[187] Choctaw and Cherokee also used their indigenous tongues—which the United States was actively trying to eliminate—to transmit codes.[188] Indian women worked as nurses and

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[180] CANBY, *supra* note 138, at 26; Jeffrey Ostler, "*The Last Buffalo Hunt" and Beyond: Plains Sioux Economic Strategies in the Early Reservation Period*, 21 GREAT PLAINS Q. 115, 120 (2001).

[181] Solem v. Bartlett, 465 U.S. 463 (1984).

[182] S. REP. NO. 112-66, at 4 (2012) ("The federal allotment policy resulted in the loss of over 100 million acres of tribal homelands."); CANBY, *supra* note 138, at 26; Rennard Strickland, *Friends and Enemies of the American Indian: An Essay Review on Native American Law and Public Policy*, 3 AM. INDIAN L. REV. 313, 314 (1975); *Land Tenure Issues*, INDIAN LAND TENURE FOUND., https://iltf.org/land-issues/issues/ (last visited July 8, 2023); *General Allotment Act*, AM. EXPERIENCE, PBS, https://www.pbs.org/wgbh/americanexperience/features/1900-allotment-act (last visited July 8, 2023).

[183] Sally Jenkins, *Why Are Jim Thorpe's Olympic Records Still Not Recognized?*, SMITHSONIAN MAG. (July 2012), https://www.smithsonianmag.com/history/why-are-jim-thorpes-olympic-records-still-not-recognized-130986336.

[184] *Id.*

[185] *Id.*; *see also* Kenisha Liu, *When Greatness Isn't Enough: Olympian Jim Thorpe's Struggle Against Discrimination*, GARNETTE REP. (July 16, 2020), https://thegarnettereport.com/educational/olympian-jim-thorpe-discrimination.

[186] *American Indian Veterans Have Highest Record of Military Service*, NAT'L INDIAN COUNCIL ON AGING, INC. (Nov. 8, 2019), https://www.nicoa.org/american-indian-veterans-have-highest-record-of-military-service.

[187] *Id.*; *Why We Serve, Native Americans in the United States Armed Forces*, NAT'L MUSEUM OF THE AM. INDIAN, https://americanindian.si.edu/static/why-we-serve/topics/world-war-1 (last visited July 8, 2023).

[188] Denise Winterman, *World War One: The Original Code Talkers*, BBC NEWS (May 19, 2014), https://www.bbc.com/news/magazine-26963624; *Code Talkers*, CHOCTAW NATION OF OKLA., https://www.choctawnation.com/history-culture/people/code-talkers (last visited July 8, 2023); *Cherokee Code Talkers and Allied Success in WWI*, N.C. DEPT. OF NAT. & CULTURAL RES. (Aug. 21, 2016), https://www.ncdcr.gov/blog/2016/08/21/cherokee-code-talkers-and-allied-success-in-wwi.

helped raise money to support the war effort.[189] Indians served in the military to defend their homelands and the right to become United States citizens.[190]

Indians earned citizenship through intrepid military service,[191] and in 1924, all Indians were granted birthright citizenship in the United States.[192] Four years later, the Institute for Government Research published a report, commonly known as the Meriam Report, with the infamous opening line, "An overwhelming majority of the Indians are poor, even extremely poor . . . ."[193] The Meriam Report exposed the United States to the fraught conditions Indians endured and was highly critical of the GAA.[194] Thus, the Meriam Report helped inspire the Indian Reorganization Act of 1934 (IRA).[195] The Supreme Court described the IRA's purpose as "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[196]

The IRA remains controversial.[197] It ended allotment by placing tribal lands in perpetual trust status, largely considered a victory for tribal sovereignty.[198] Nonetheless,

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[189] Danielle DeSimone, *A History of Military Service: Native Americans in the U.S. Military Yesterday and Today*, USO (Nov. 8, 2021), https://www.uso.org/stories/2914-a-history-of-military-service-native-americans-in-the-u-s-military-yesterday-and-today.

[190] Alicia Ault, *The Remarkable and Complex Legacy of Native American Military Service*, SMITHSONIAN MAG. (Nov. 11, 2020), https://www.smithsonianmag.com/smithsonian-institution/remarkable-and-complex-legacy-native-american-military-service-180976264 ("'This is a deep patriotism, a belief that, despite all that has happened, the United States can be better, and we want to be part of that,' says [Kevin] Gover.").

[191] Act of Nov. 6, 1919, ch. 95, 41 Stat. 350.

[192] Act of June 2, 1924, ch. 233, 43 Stat. 253; *American Indians' Service in World War I, 1920*, GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/history-resources/spotlight-primary-source/american-indians-service-world-war-i-1920 (last visited July 8, 2023).

[193] MERIAM, *supra* note 138, at 3.

[194] *Id.* at 7 ("It almost seems as if the government assumed that some magic in individual ownership of property would in itself prove an educational civilizing factor, but unfortunately this policy has for the most part operated in the opposite direction.").

[195] *See* Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–44).

[196] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (quoting H.R. REP. NO. 1804-73 at 6 (1934)).

[197] *Indian Reorganization Act (Indian New Deal)*, COLO. ENCYC., https://coloradoencyclopedia.org/article/indian-reorganization-act-indian-new-deal (last visited July 8, 2023) ("[W]hatever its actual merits, the IRA was destined to prove controversial among Indigenous nations because it was designed by a federal government that had spent generations deceiving, dispossessing, and murdering Indigenous people.").

[198] This is the first piece of legislation designed with the premise tribes should exist. *See To Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes*: *Hearings on S. 2047 Before the S. Comm. on Indian Aff.*, 74th Cong. 27 (1935) (statement of Hon. John Collier, Comm'r of Indian Aff.) ("Mr. DONAHEY: Is this the first time there has been an act to embody that principle of Indian home rule? Mr. COLLIER: The Wheeler–Howard Act (Act of

the IRA and trust status can be explained by non-Indian preferences.[199] By the time the IRA was passed, Indians' most valuable acreage had already been allotted, and land and agricultural prices were generally falling.[200] Hence, westerners were no longer as hungry for the remaining Indian property.[201] The BIA was the greatest proponent of the IRA because continued allotment would have eliminated the agency's existence;[202] that is, continued allotment would have ended trust status, essentially ending tribal governments.[203] Locking Indian land in trust status for eternity ensured the BIA would always have a raison d'être.[204] Furthermore, the IRA increased the BIA's influence over Indian life.[205]

Support for Indian rights soon faded. Following World War II, the United States adopted a policy of tribal termination.[206] Termination was allegedly done for the benefit of Indians;[207] however, termination was primarily about non-Indian interests. Ending tribal status was supposed to result in lower federal expenditures on Indian programs.[208] Accordingly, over 100 tribes' sovereign status was abrogated

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June 18, 1939 [sic], 48 Stat. L. 984) embodies it, and this act carries the same thing over to the Indians [in Oklahoma]"); Indian Reorganization Act, 48 Stat. at 984.

[199] McChesney, *supra* note 172, at 335 ("By 1920, however, only the Indian bureaucrats had interests strongly affected by allotment, and those interests dictated an end to privatization.").

[200] *Id.* at 319–20 ("Also, the best Indian lands would have already been allotted by that time.").

[201] *Id.* ("Westerners' interest also declined, particularly after the spurt of allotments in 1917–1920, because the value of Western land fell with the steep decline in livestock and agricultural prices after that period.").

[202] *Id.* at 325 ("In the long run, therefore, allotment would eventually work against the interests of the bureaucrats since its avowed purpose was complete eradication of federal control over Indians.").

[203] *Trust Land*, NAT'L CONG. OF AM. INDIANS, https://www.ncai.org/policy-issues/land-natural-resources/trust-land (last visited July 8, 2023) ("Self-governance and tribal sovereignty, in practice, are closely associated with sovereignty over and management of tribal lands.").

[204] Barsh, *supra* note 174, at 12 ("This added a new layer of permanent administration to the agency, while all staff and activities established by the General Allotment Act were continued for the benefit of the remaining allottees."); McChesney, *supra* note 172, at 325 ("Ending allotments and freezing ownership for allottees still under federal trusteeship guaranteed that bureaucratic control would continue.").

[205] Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 566 (1971) ("In fact, the 1934 Act strengthened the role of the BIA in tribal affairs . . . ."); Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1184 (1983).

[206] Crepelle, *Decolonizing Reservation*, *supra* note 137, at 440–42.

[207] H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) ("[T]o end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship . . . .").

[208] Kenneth R. Philp, *Stride Toward Freedom: The Relocation of Indians to Cities, 1952-1960*, 16 W. HIST. Q. 175, 180 (1985); Walch, *supra* note 205, at 1188.

with the stroke of a pen.[209] The lands of terminated tribes were removed from trust status thereby subjecting the lands to state taxation[210] and non-Indian exploitation.[211] Congress also passed legislation designed to make reservation trust lands more accessible to oil companies in 1955.[212]

Similarly, federal officials enticed, and often coerced, Indians living on reservations to relocate to cities.[213] For those Indians that remained on reservations, Congress extended state law over reservations in five states[214] and allowed other states to assume jurisdiction over the reservations within their borders with Public Law 83-280 (PL 280).[215] PL 280 benefitted Congress by reducing federal expenditures on Indian law enforcement,[216] and states benefitted by claiming authority over additional territory.[217] The BIA benefitted too as its authority and budget significantly increased because its services were allegedly needed to help Indians integrate into mainstream society.[218]

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[209] Walch, *supra* note 205, at 1185–86.

[210] Philp, *supra* note 208, at 180; Walch, *supra* note 205, at 1189 ("Termination resulted in the sale of some former reservations, in whole or in part, which required relocation of the Indians living there. . . . [T]hey became liable for state income, property, and sales taxes.").

[211] Burnett, *supra* note 205, at 570 ("The Klamaths promptly lost most of their timberlands and farmlands, which a Portland bank acting as trustee sold to the government and to private users following what appeared to be little consultation with the tribe.").

[212] 25 U.S.C. § 415; Skull Valley Band of Goshute Indians v. Davis, 728 F. Supp. 2d 1287, 1305 n.30 (D. Utah 2010) ("Congress' 'major purpose' in enacting the ILTLA 'was to increase Indian income by opening Indian land to market forces and encouraging long-term leasing for commercial purposes.'") (quoting Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN L. REV. 1061, 1074 (1974)).

[213] Indian Relocation Act of 1956, Pub. L. No. 84-959, 70 Stat. 986 (1956) (incentivizing reservation Indians to receive training and education off the reservation).

[214] Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326, 28 U.S.C. § 1360).

[215] *Id.* The territory of Alaska was given PL 280 jurisdiction in 1958 and it retained this jurisdiction once it became a state in 1959. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][a] (LexisNexis 2005).

[216] NAT'L INST. OF J., NCJ NO. 222585, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 7 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf.

[217] McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) ("Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just imagine if they did. . . . It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.").

[218] Barsh, *supra* note 174, at 12–13; Cohen, *supra* note 61, at 386–90.

The Civil Rights Movement gained greater attention during the 1960s,[219] and tribes were beneficiaries of the increased push for minority rights.[220] The Senate began a formal inquiry into Indian civil rights in 1961.[221] The investigation uncovered widespread abuse of Indian rights.[222] Although the investigation determined federal and state officials were the primary culprits,[223] the Senate chose to focus its attention on tribal governments.[224] According to Senator Sam Ervin, Indians were "the minority group most in need of having their rights protected"[225] because tribal governments are not bound by the United States Constitution.[226] Thus, the Senate passed the Indian Civil Rights Act (ICRA) in 1968, extending most of the Bill of Rights to tribal governments.[227] Indians generally welcomed greater civil rights protection, but they believed focusing on tribal governments missed the problem.[228]

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[219] *See* Exec. Order No. 11,399, 3 C.F.R. 105 (1968); Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 1 PUB. PAPERS 335, 337 (Mar. 6, 1968) ("Indians must have a voice in making the plans and decisions in programs which are important to their daily life."); Letter from John F. Kennedy, U.S. Sen., to Oliver La Farge, President, Ass'n of Am. Indian Aff. (Oct. 28, 1960) (describing his administration's position towards American Indians).

[220] Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of* Oliphant v. Suquamish Indian Tribe, *in* INDIAN LAW STORIES 261, 263 (Carole Goldberg et al. eds. 2011) ("Tribes and tribal activists added their distinct voices to the growing national interest in addressing discrimination and inequality . . . .").

[221] *A Short History of Indian Civil Rights*, MINN. PUB. RADIO (Apr. 2001), http://news.minnesota.publicradio.org/projects/2001/04/brokentrust/history/history10.shtml.

[222] Burnett, *supra* note 205, at 584 ("Subcommittee counsel indicated that a principal reason for investigating Indian rights was the large number of complaints about civil liberties violations by federal, state, and local agencies.").

[223] Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1706 (2012) ("Indian law advocate Alvin Ziontz points out, '[t]he greatest volume of complaints voiced in the hearings concerned enforcement of state criminal laws by local authorities and communities near Indian reservations.'") (quoting Alvin J. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 4 (1975)).

[224] Burnett, *supra* note 205, at 575.

[225] *Id.* (quoting Letter from Lawrence M. Baskir, Chief Couns. and Staff Dir., Subcomm. on Const. Rts. of the Sen. Comm. on the Judiciary, to Donald L. Burnett, Jr. (Mar. 5, 1970) (on file with the Harvard Legislative Research Bureau); *id.* ("Senator Ervin was later to claim, '[e]ven though the Indians are the first Americans, the national policy relating to them has been shamefully different from that relating to other minorities'") (quoting 114 CONG. REC. 393 (1968).

[226] Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (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).

[227] 25 U.S.C. § 1302.

[228] KEITH RICHOTTE, JR., FEDERAL INDIAN LAW AND POLICY: AN INTRODUCTION 464 (2020).

Despite its laudatory name, ICRA's focus was not benefitting Indians. After all, ICRA did nothing to protect tribes from the states and feds—the lead violators of Indian rights.[229] ICRA also made Indians *less safe* by severely limiting tribal criminal punishments to a mere six months in jail and a $500 fine;[230] in fact, federal law during the 1960s expressly provided lighter penalties for raping Indian women than non-Indian women.[231] ICRA did not extend the right to bear arms to Indians either, though this right has been deemed fundamental by the United States Supreme Court.[232] ICRA was merely a pet project of Senator Ervin. A staunch opponent of African-American Civil Rights,[233] Senator Ervin viewed highlighting the plight of Indians as a way "to embarrass his northern liberal colleagues, who were allegedly less interested in the first Americans than in the politically powerful black community."[234] Senator Ervin hoped Indians would eventually be assimilated into the surrounding state.[235]

President Richard Nixon brought the push for Indian civil rights into the national forefront in the 1970s.[236] A vice president during the termination era, Nixon seemed an unlikely supporter of tribal sovereignty.[237] Nonetheless, President Nixon became the most enthusiastic supporter of tribal sovereignty to ever occupy the White House.[238] Nixon was a Quaker,[239] and Quakers have a long history of supporting

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[229] Riley, *supra* note 223, at 1706 ("So repeated violations of individual rights by the state or federal governments were not due to a lack of constitutional nexus and authority; rather, they were the product of neglect or indifference.").

[230] INDIAN L. & ORDER COMM'N, *supra* note 153, at 21.

[231] Gray v. United States, 394 F.2d 96, 98 (9th Cir. 1967) ("Appellants point out that an Indian who rapes an Indian female 'shall be imprisoned at the discretion of the court,' while an Indian convicted of rape upon a non-Indian female 'shall suffer death, or imprisonment for any term of years or for life.'").

[232] Riley, *supra* note 223, at 1708–09; Adam Crepelle, *Shooting Down Oliphant: Self-Defense as an Answer to Crime in Indian Country*, 22 LEWIS & CLARK L. REV. 1284, 1312–13 (2018).

[233] *Sam Ervin: A Featured Biography*, U.S. S., https://www.senate.gov/senators/FeaturedBios/Featured_Bio_ErvinSam.htm (last visited July 9, 2023).

[234] Burnett, *supra* note 205, at 576.

[235] *Id.* ("During the hearings, he revealed his inclination to try to duplicate the North Carolina assimilation experience on a national level.").

[236] FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 365–67 (abr. ed. 1986) [hereinafter PRUCHA, THE GREAT FATHER].

[237] *See Richard M. Nixon*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/richard-m-nixon (last visited July 9, 2023).

[238] Rob Capriccioso, *Barack Obama and Richard Nixon Among Best Presidents for Indian Country*, INDIAN COUNTRY TODAY, https://indiancountrytoday.com/archive/this-presidents-day-we-highlight-the-best-presidents-for-indian-country (Sept. 13, 2018).

[239] *See generally* H. LARRY INGLE, NIXON'S FIRST COVER-UP: THE RELIGIOUS LIFE OF A QUAKER PRESIDENT (2015).

indigenous rights.[240] Nixon's college football coach and mentor was also an Indian.[241] Nixon observed the discrimination Coach Wallace Newman endured because of his Indian ancestry.[242] As a result, Nixon was personally interested in Indian affairs.[243]

Soon after taking office, Nixon eschewed the tribal termination policy and advocated for a federal policy of tribal self-determination.[244] Congress adopted Nixon's policy when it passed the Indian Self-Determination and Education Assistance Act (ISDEAA) five years later.[245] Every president and Congress since has embraced tribal self-determination[246] because tribal autonomy reduces tribal reliance on federal funds.[247] As always, the BIA maintained significant control over tribes

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[240] *Rights of Indigenous Peoples*, QUAKERS IN THE WORLD, https://www.quakersintheworld.org/quakers-in-action/158/Rights-of-Indigenous-Peoples (last visited July 9, 2023).

[241] Dean Chavers, *Richard Nixon's Indian Mentor*, INDIAN COUNTRY TODAY, https://www.indiancountrytoday.com/archive/richard-nixons-indian-mentor (Sept. 13, 2018) ("[Wallace Newman] was a full-blood Luiseno Indian from the La Jolla Reservation.").

[242] *Id.* ("Nixon said many times that if Newman had a chance, he would have achieved great things in college football and pro football. But because he was an Indian, he was shunted to the back of the pack for playing and coaching. Instead of getting USC or UCLA, he got little Whittier College, a place with just a few hundred students.").

[243] *Id.* ("As a Quaker, Nixon had a natural interest in Indian affairs, which he frequently discussed with his dad, Donald Nixon. He advocated for Newman to be head of Indian affairs in the Eisenhower administration, when he was Vice President, and again when he was President.").

[244] Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970).

[245] *See* Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301–5423).

[246] *See, e.g.*, Presidential Statement on Signing the Indian Self-Determination and Education Assistance Act Amendments of 1988, 2 PUB. PAPERS 1284 (Oct. 5, 1988); Presidential Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662 (June 14, 1991); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004); EXEC. OFFICE OF THE PRESIDENT, 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS (2017), https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf; Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. 91 (Jan. 26, 2021); Alysa Landry, *Jimmy Carter: Signed ICWA into Law*, INDIAN COUNTRY TODAY, https://www.ictnews.org/archive/jimmy-carter-signed-icwa-into-law (Sept. 13, 2018) ("During his presidential campaign in 1976, Carter's staff reached out to the National Congress of American Indians and the National Tribal Chairmen's Association. Carter met briefly with some leaders and his staff drafted a position paper that endorsed Indian self-determination policy, already in force.").

[247] Presidential Statement on Indian Policy, 1 PUB. PAPERS 96, 97 (Jan. 24, 1983) ("It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government."); Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works* 22 (Harv.

despite the self-determination policy. The president of the National Tribal Chairmen's Association described the ISDEAA as "an extraordinary example of the institutional power and capacity of some Federal Bureaucracies to preserve and protect themselves against the will of the people they serve."[248]

The tribal self-determination policy led to clashes with vested non-Indian interests,[249] and *Oliphant v. Suquamish Indian Tribe* epitomizes this point.[250] The case arose when a drunken Mark Oliphant punched a tribal police officer at the Chief Seattle Days celebration on the Port Madison Reservation.[251] When the tribe proceeded against him in tribal court, Oliphant challenged the tribal court's jurisdiction over him not based upon any wrongdoing but simply because he was a non-Indian.[252] Oliphant's refusal to submit to tribal jurisdiction was part of a larger social phenomena. In the surrounding state of Washington, anti-Indian sentiment was boiling as tribal sovereignty resulted in competition for resources.[253] Nationally, some groups within the Indian Civil Rights Movement had become militant,[254] and tribes themselves began to more boldly assert their sovereignty.[255] Non-Indians

Kennedy Sch., Working Paper No. RWP10-043, 2010) ("Late Senator Barry M. Goldwater of Arizona, frequently cited as 'Mr. Conservative,' and the Republican presidential candidate in 1964, is still remembered by tribes in Arizona as a strong and early supporter of nascent pushes by tribal leaders for economic self-sufficiency and local tribal self-rule.").

[248] *Implementation of Public Law 93-638—The Indian Self-Determination and Education Assistance Act Before the S. Comm. On Indian Affs.*, 95th Cong. 263 (statement of Joseph B. De La Cruz, President, Nat'l Tribal Chairmen's Ass'n and Quinault Indian Nation), *quoted in* PRUCHA, THE GREAT FATHER, *supra* note 236, at 380.

[249] Krakoff, *supra* note 220, at 263.

[250] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[251] *Id.* at 194; Krakoff, *supra* note 220, at 264.

[252] *Id.*

[253] Krakoff, *supra* note 220, at 263.

[254] Jason Pierce, *American Indian Activism and the Siege of Wounded Knee*, BILL OF RTS. INST., https://www.billofrightsinstitute.org/essays/american-indian-activism-and-the-siege-of-wounded-knee (last visited July 9, 2023) ("American Indian activism became more militant in the mid-1960s, with the rise of the 'Red Power' movement, which took its name from the growing "Black Power" movement."); *AIM Occupation of Wounded Knee Begins*, HIST., https://www.history.com/this-day-in-history/aim-occupation-of-wounded-knee-begins (Sept. 20, 2021) ("AIM was founded in 1968 by Russell Means, Dennis Banks, and other Native leaders as a militant political and civil rights organization."); *American Indian Movement*, ENCYC. BRITANNICA, (Feb. 27, 2023), https://www.britannica.com/topic/American-Indian-Movement.

[255] *E.g.*, Michael D. LaFaive, Patrick Fleenor & Todd Nesbit, *Tax-Exempt Cigarette Sales on Indian Reservations*, MACKINAC CTR. FOR PUB. POL'Y (Dec. 3, 2008), https://www.mackinac.org/10038; Gale Courey Toensing, *Early Pioneers of Indian Gaming Had Same Goal: To Help Their People*, INDIAN COUNTRY TODAY, https://www.indiancountrytoday.com/archive/early-pioneers-of-indian-gaming-had-same-goal-to-help-their-people (Sept. 13, 2018) (recounting the Mescalero Apache Nation's success in employing "red capitalism" to manage their own resources

feared an affirmation of tribal criminal jurisdiction over non-Indians would result in even greater extensions of tribal sovereignty, unsettling the existing non-Indian authority over Indians.[256]

Although black letter law required upholding tribal jurisdiction over Oliphant—as the district court and Ninth Circuit concluded—the Supreme Court went out of its way to rule tribes lack criminal jurisdiction over non-Indians.[257] The Court got basic facts and legislative history wrong.[258] Only one case supported the Court's conclusion, and the supporting passage was dicta.[259] Moreover, the author of the only supporting opinion was, by the Court's own admission, frequently overturned and an opponent of tribal sovereignty.[260] The Court also turned to other plainly racist, nineteenth-century jurisprudence,[261] including the unabashedly paternalistic *In re Mayfield* which declares tribal self-governance cannot jeopardize "the safety of the white population with which they may have come in contact . . . ."[262] Despite its prestidigitation, the Court openly admitted at no point in time were tribes ever stripped of jurisdiction over non-Indians.[263] Instead, the Court devised a new doctrine by holding tribes had been implicitly divested of criminal jurisdiction over non-Indians.[264] Following *Oliphant,* tribes would enter a nearly four decade losing streak in the Supreme Court.[265]

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and develop a ski resort and golf course); Franke Wilmer, *Indian Gaming: Players and Stakes*, 12 WICAZO SA REV. 89, 90 (1997) ("In the 1970s the first bingo halls opened on reservations.").

[256] Krakoff, *supra* note 220, at 266 ("To many non-Indians, including powerful politicians in Washington, an affirmation of tribal powers to prosecute non-Indians seemed like a step that could lead to unfettered tribal authority throughout the region.").

[257] *Oliphant*, 435 U.S. at 212, *overruling in part* Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976).

[258] *See, e.g.*, Peter C. Maxfield, Oliphant v. Suquamish Tribe: *The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 402, 440–41 (1993).

[259] *Oliphant*, 435 U.S. at 199–200 (citing *Ex parte* Kenyon, 14 F. Cas. 353, 355 (W.D. Ark. 1878) (No. 7,720)).

[260] Crepelle, *Lies, Damn Lies*, *supra* note 54, at 559 n.257, 559–60.

[261] United States v. Kagama, 118 U.S. 375 (1886); *Ex parte* Crow Dog, 109 U.S. 556 (1883); United States v. Rogers, 45 U.S. (6 How.) 567, 572 (1846); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 516 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

[262] *In re* Mayfield, 141 U.S. 107, 115 (1891).

[263] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 204 (1978).

[264] *Id.*

[265] Delilah Friedler, *How Native Tribes Started Winning at the Supreme Court*, MOTHER JONES (Aug. 5, 2020), https://www.motherjones.com/crime-justice/2020/08/how-native-tribes-started-winning-at-the-supreme-court. The losing streak may be starting again. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

One of the most devastating losses tribes suffered occurred in the 1990 case of *Duro v. Reina*.[266] The facts are a slight twist on *Oliphant*: Albert Duro, a citizen of the Torres-Martinez Band of Cahuilla Mission Indians, allegedly shot and killed a fourteen-year-old citizen of the Gila River Indian Tribe on the Salt River Pima-Maricopa Indian Community Reservation (SR).[267] SR instituted a criminal proceeding against Duro after the federal government refused to prosecute.[268] Duro argued as a non-citizen of the prosecuting tribe, he stood in the same shoes as a non-Indian.[269] Although tribal courts had always possessed criminal jurisdiction over all Indians,[270] the Supreme Court held in *Duro*, "For purposes of criminal jurisdiction, petitioner's relations with this Tribe are the same as the non-Indian's in *Oliphant*."[271] The Court's decision literally left Indians immune from criminal prosecution if Indians committed a non-major crime on reservations other than their own;[272] however, the Court dismissed this argument averring, "[T]he proper body to address the problem is Congress."[273]

Duro was a severe blow for tribal sovereignty, but it was quickly reversed by legislation.[274] While tribal sovereignty still lags far behind that of states, it has generally been on an upward trend in recent years.[275] This is largely due to gaming providing tribes with the resources to protect their interests.[276] Noteworthily, tribal sovereignty is typically at its apex not in regard to tribal lands but specifically over Indians.[277] This is particularly true with tribal jurisdiction. The next Part explores how public choice theory explains Indian country's ongoing public safety crisis.

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[266] Duro v. Reina, 495 U.S. 676 (1990).

[267] *Id.* at 679.

[268] *Id.* at 680–81.

[269] *Id.* at 681–82.

[270] 137 CONG. REC. 10,712 (1991) [hereinafter CONG. REC. 1991] (statement of U.S. Rep. George Miller) ("Prior to the Duro case, tribal courts had always been the recognized forum for all Indians on the reservation when it came to criminal misdemeanors without regard to membership.").

[271] *Duro*, 495 U.S. at 688.

[272] CONG. REC. 1991, *supra* note 270, at 10,712 (statement of U.S. Rep. George Miller) ("No other courts were equipped to or had the legal authority to handle these nonmember Indians.").

[273] *Duro*, 495 U.S. at 698.

[274] *See infra* notes 284–86 and accompanying text.

[275] Crepelle, *Law & Economics*, *supra* note 28, at 585, 585 n.152.

[276] *Profits Give Tribes Financial, Political Power*, LAS VEGAS REV.-J. (May 27, 2007, 9:00 PM), https://www.reviewjournal.com/news/profits-give-tribes-financial-political-power ("As gaming tribes gain economic power, some have attempted to exert influence in the political arena.").

[277] Williams v. Lee, 358 U.S. 217, 220 (1959) ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

IV. PUBLIC CHOICE THEORY AND INDIAN COUNTRY CRIME

Public choice theory assumes lawmakers' primary concern is getting elected and staying in office,[278] and the history of Indian criminal legislation supports this theory. Congress swiftly responded to the Supreme Court's decision in *Crow Dog*.[279] In *Crow Dog,* the crime involved only Indians on a reservation.[280] Extending criminal law over offenses between reservation Indians aligned with the prevailing federal policy of assimilating Indians.[281] There was no constitutional authority for the legislation supplanting *Crow Dog* according to the Supreme Court; however, the law was upheld because of Indians' dependent status.[282] That is, the non-Indian majority was free to disregard the Constitution when dealing with the Indian minority. Bureaucrats also seized upon *Crow Dog* as an opportunity to expand their power by creating Courts of Indian Offenses.[283]

Like *Crow Dog*, *Duro* was also quickly overturned by Congress. A temporary *Duro*-fix was enacted within six months of the decision being issued and a permanent *Duro*-fix became law in October of 1991.[284] Though tribes universally decried *Duro*, non-Indian interests explain its sudden reversal.[285] Legislatures in states with sizeable Indian populations passed resolutions urging Congress to overturn *Duro*, and the International Association of Police Chiefs supported the *Duro*-fix too.[286] These constituencies saw firsthand the havoc caused by *Duro*'s jurisdictional void;[287] moreover, the *Duro*-fix was likely to save state and local governments money.[288]

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[278] *See supra* text accompanying notes 63–65.

[279] *See supra* text accompanying notes 160–62.

[280] *Ex parte* Crow Dog, 109 U.S. 556, 557 (1883).

[281] *See supra* text accompanying note 163.

[282] United States v. Kagama, 118 U.S. 375, 378–79, 383–84 (1886).

[283] *See supra* note 161 and accompanying text.

[284] A temporary *Duro*-fix was embedded in a U.S. Department of Defense bill. *See* Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93 (1990). Because the provision expired Sept. 30, 1991, a permanent *Duro*-fix was passed on Oct. 28, 1991. *See* Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 64 (amending Pub. L. No. 101-511, § 8077, 104 Stat. 1892); *see also* United States v. Lara, 541 U.S. 193, 197–98 (2004).

[285] CONG. REC. 1991, *supra* note 270, at 10,712 (statement of U.S. Rep. George Miller) ("[V]irtually all tribes support [H.R. 972].").

[286] *Id.* (statement of U.S. Rep. George Miller).

[287] *Id.* (statement of U.S. Rep. George Miller) ("No provision in Federal or State law covered nonmember Indians and many tribes were facing chaos and a crisis in public safety. No other courts were equipped to or had the legal authority to handle these nonmember Indians.").

[288] *Id.* at 10,714 (letter from Robert Reischauer of the Cong. Budget Off.) ("This bill would result in no cost to state or local governments, and may result in some savings to these governments.").

Restoring tribal jurisdiction over all Indians reduced the workload of federal prosecutors[289] and saved federal dollars too.[290] But the first reason to support the *Duro*-fix according to its chief legislative proponent, Representative George Miller, was "it only affects Indians."[291] Miller was able to gain support for the *Duro*-fix by making clear non-Indians would not be subjected to tribal criminal jurisdiction.[292]

As with the *Duro*-fix, the 2010 Tribal Law and Order Act (TLOA) passed with little opposition. TLOA unanimously passed the Senate as a noncontroversial amendment to the Indian Arts and Crafts Act.[293] The only opposition to TLOA in the House arose from the procedure by which TLOA reached the House.[294] TLOA was widely supported because everyone desires public safety and no one questioned the severity of Indian country's crime problem.[295] As Representative Herseth Sandlin stated, "A vote against this bill is a vote to keep the status quo, a status quo where it's estimated that one in three American Indian women and Alaska Native women will be raped in their lifetime."[296] Additionally, Representative Tom Cole made voting for TLOA easy by noting the Act did not increase federal spending nor did it subject non-Indians to tribal jurisdiction.[297] TLOA did not diminish state jurisdiction over reservations either.[298] Cole admitted, "This bill isn't a cure-all but

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[289] H.R. REP. NO. 102-61, at 3 (1991) ("Although victimless misdemeanors such as driving while under the influence of alcoholic beverages and misdemeanors like simple assault committed against the person and property of non-Indians can be prosecuted in Federal Court, it is often very impractical and inefficient to handle such prosecutions in this fashion.").

[290] CONG. REC. 1991, *supra* note 270, at 10,712 (statement of U.S. Rep. George Miller) ("Finally, it saves the Federal Government approximately $10 million per year. If this bill does not go through, the Federal Government will have to fill the jurisdictional gap with courts established . . . .").

[291] *Id.*

[292] *Id.* at 10,713 (statement of U.S. Rep. Jon Kyl) ("Based on that understanding, Mr. Speaker, I wish to express my support of the bill.").

[293] 156 CONG. REC. H5862 (daily ed. July 21, 2010) [hereinafter CONG. REC. 2010] (statement of U.S. Rep. Nicholas Rahall, II) ("On June 23, 2010, the Senate passed H.R. 725 by unanimous consent without changes to the House-passed text. However, the Senate did add the language of the Tribal Law and Order Act of 2010 introduced by Senator Dorgan.").

[294] *Id.* at H5863 (statement of U.S. Rep. Richard "Doc" Hastings) ("There is considerable bipartisan support for what this bill aims to do, and yet today it is being considered before the House using a process and procedure that elicits opposition.").

[295] *Id.* at H5864–65 (recognizing the need for this bill to address safety and security in Indian country).

[296] *Id.* at H5864.

[297] *Id.* (statement of U.S. Rep. Tom Cole) ("This bill not only reauthorizes existing programs at existing or last appropriated levels—in other words, there's no new spending in this bill—it provides enhanced sentencing authority so the tribes may impose longer sentences on Native Americans, not on nontribal citizens or non-Native Americans.").

[298] *Id.* at H5867 (statement of U.S. Rep. Daniel E. Lungren) ("I would like to ask the distinguished chairman of the Committee on Natural Resources, Mr. Rahall, to make clear that

it's an important start moving in the right direction."[299] As non-Indians commit over ninety percent of crimes against Indians,[300] TLOA almost entirely ignores the actual issue. Hence, TLOA is better described as virtue signaling than a meaningful attempt to solve Indian country's crime problem.

Unlike *Duro,* an *Oliphant*-fix has proven elusive because *Oliphant* impacts non-Indians.[301] Accordingly, tribes need non-Indian support to overturn *Oliphant*. Due to the high levels of violence experienced by Indian women, tribes were able to partner with domestic violence and women's rights groups to advocate for expanded jurisdiction over domestic violence offenses.[302] This alliance enabled tribes to partially overturn *Oliphant* in the Violence Against Women Reauthorization Act of 2013 (VAWA).[303] VAWA recognized tribal jurisdiction over non-Indians only for three crimes relating to domestic violence,[304] and even this limited recognition of tribal jurisdiction faced intense opposition.[305] Consequently, tribes must comport with TLOA's strict procedural safeguards plus ensure non-Indians are represented

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nothing in the Tribal Law and Order Act retracts jurisdiction from the State governments and nothing in the act will grant criminal jurisdiction in Indian country to an Indian tribe that does not currently have criminal jurisdiction over such land.").

[299] *Id.* at H5864.

[300] *See supra* note 25 and accompanying text.

[301] CONG. REC. 1991, *supra* note 270, at 10,712 (statement of U.S. Rep. George Miller) ("There are many reasons to support [H.R. 972]. First, it only affects Indians . . . ."); CONG. REC. 2010, *supra* note 293, at H5864 (statement of U.S. Rep. George Miller) (noting enhanced sentencing authority does not apply to "nontribal citizens or non-Native Americans"); *see also* S. REP. NO. 112-153, at 38 (2012) ("Self-government is not government over 'all persons'—including non-Indians. Because tribes lack this power, it is untrue to say that Congress can recognize and affirm it.").

[302] 159 CONG. REC. H786 (daily ed. Feb. 28, 2013) (statement of U.S. Rep. John Conyers) ("More than 1400 local, state, tribal, and national organizations have expressed their strong support for passage of the Violence Against Women Reauthorization Act of 2011 (S.47), including national service providers and victim advocates, law enforcement organizations, and faith-based organizations."); *Friends of VAWA Coalition Calls on the House to Defeat the Substitute to S. 47 and Pass the Bipartisan Senate Bill*, LEADERSHIP CONF. ON CIV. & HUMAN RTS. (Feb. 27, 2013), https://www.civilrights.org/resource/friends-of-vawa-coalition-calls-on-the-house-to-defeat-the-substitute-to-s-47-and-pass-the-bipartisan-senate-bill.

[303] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended at 25 U.S.C. § 1304).

[304] 25 U.S.C. § 1304(c).

[305] Tom Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, ENGAGE, July 2012, at 40 ("Rarely has federal legislation involving tribal jurisdiction garnered the kind of front-page publicity that arose when the House rejected the tribal special domestic violence jurisdiction in the Senate bill. Contentious debate also arose, mostly aired through the news media, with political and policy objections and counter-objections focusing on, among other topics, whether tribal courts could and should properly try non-Indians for crimes committed in Indian country.").

in tribal juries.[306] When imposing these safeguards on tribes, Congress knew few tribes could afford to implement VAWA and assert jurisdiction over non-Indians.[307] To date, only 31 of the 574 federally recognized tribes have implemented VAWA.[308]

Some opponents of tribal criminal authority over non-Indians couch their argument as a constitutional issue. Tribes were not parties to the Constitutional Convention;[309] therefore, the Bill of Rights does not apply in tribal courts.[310] Some opponents of tribal jurisdiction take this to mean non-Indian rights will be eviscerated in tribal courts,[311] especially since non-Indians cannot vote in tribal elections.[312] However, this is deceptive because tribes are bound by ICRA, which provides similar protections to the Bill of Rights.[313] Even the Supreme Court in *Oliphant* acknowledged ICRA protects non-Indian rights against abuse from tribal courts.[314] Plus, VAWA explicitly forbids tribes from exercising criminal jurisdiction over non-Indians unless tribes comport with the United States Constitution.[315] Non-Indians also have the right to challenge their tribal detention in federal court.[316] Over 100 non-Indians have encountered the tribal criminal justice system, and not a single

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306 25 U.S.C. § 1304(d).

307 25 U.S.C. § 3651(8); U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-252, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS 21 (2011) ("Further, officials at 11 of the 12 tribes we visited noted that their tribal courts' budgets are inadequate to properly carry out the duties of the court . . . .").

308 *Currently Implementing Tribes*, NAT'L CONG. OF AM. INDIANS, https://www.ncai.org/tribal-vawa/get-started/currently-implementing-tribes (May 2022).

309 *See supra* note 226 and accompanying text.

310 United States v. Bryant, 579 U.S. 140, 149 (2016).

311 *See* Thomas Jipping, *Serious Flaws in the Violence Against Women Act Reauthorization Bill*, HERITAGE FOUND. (July 22, 2019), https://www.heritage.org/crime-and-justice/report/serious-flaws-the-violence-against-women-act-reauthorization-bill ("As a result, a 'non-Indian subject to tribal jurisdiction would enjoy few meaningful civil-rights protections.'") (quoting S. REP. NO. 112-153, at 48).

312 United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) ("There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe."); Duro v. Reina, 495 U.S. 676, 694 (1990) ("Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.").

313 *Bryant*, 579 U.S. at 149; *Duro*, 495 U.S. at 681 n.2.

314 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

315 Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304(d)(4).

316 25 U.S.C. § 1303.

one has alleged any mistreatment.[317] The evidence suggests concerns over the rights of non-Indians in tribal courts are more baseless fear than fact.[318]

Constitutional rights are certainly a serious matter, but it is notable those concerned about constitutional rights in tribal courts ignore the myriad instances when American citizens are tried or have their constitutional rights suspended. For example, American citizens routinely unknowingly waive their constitutional rights in state and federal criminal prosecutions.[319] Moreover, over 200 million American citizens do not enjoy full constitutional rights because they live within 100 miles of the United States border.[320] American citizens also are routinely prosecuted in foreign courts without the protection of the Constitution.[321] The Supreme Court has even affirmed the extradition of American citizens to foreign tribunals that do not offer criminal procedural safeguards in line with the United States Constitution.[322] Voluntarily entering a territory is all the consent needed for prosecution by every government but Indian tribes.[323]

Opposition to tribal court jurisdiction over non-Indians is also rooted in the belief that tribal courts cannot treat non-Indians fairly.[324] In fact, Senator Chuck Grassley objected to tribal jurisdiction over non-Indians because, "[u]nder the laws of our land, you've got to have a jury that is a reflection of society as a whole, and on an Indian reservation, it's going to be made up of Indians, right? So the non-

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[317] Crepelle, *Tribal Courts*, *supra* note 25, at 77–78.

[318] *Id.* at 81 ("The constitutional arguments against tribal courts prosecuting non-Indians lack force.").

[319] Note, *Constitutional Waivers by States and Criminal Defendants*, 134 HARV. L. REV. 2552, 2553–54 (2021) ("[W]hile it is easy for criminal defendants to waive their rights, it is nearly impossible for states to do so.").

[320] *The Constitution in the 100-Mile Border Zone*, ACLU (Aug. 21, 2014), https://www.aclu.org/other/constitution-100-mile-border-zone.

[321] *E.g.*, *Legal Assistance and Arrest of a U.S. Citizen*, U.S. EMBASSY & CONSULATES IN MEX. (Apr. 2, 2021), https://mx.usembassy.gov/arrest-of-a-u-s-citizen ("If you break local laws in Mexico, your U.S. citizenship will not help you avoid arrest or prosecution.").

[322] Charlton v. Kelly, 229 U.S. 447, 476 (1913) ("Therefore, since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy, even though Italy should not, by reason of the provisions of her municipal law, be able to surrender its citizens to us.").

[323] Letter from Kevin Washburn, Dean & Prof. of L., et al., to Patrick Leahy, U.S. Sen., et al., at 4, 6–7 (Apr. 21, 2012), https://turtletalk.files.wordpress.com/2012/04/vawa-letter-from-law-professors-tribal-provisions.pdf.

[324] Brendon Derr, Rylee Kirk, Anne Mickey, Allison Vaughn, McKenna Leavens & Leilani Fitzpatrick, *Pathways to Justice*, INDIANZ (Sept. 2, 2021), https://www.indianz.com/News/2021/09/02/howard-center-for-investigative-journalism-child-sexual-abuse-in-indian-country-goes-unprosecuted-4 ("Resistance to expansions of tribal court sovereignty, such as in the Violence Against Women Act, arise out of concerns that non-Indians will be treated unfairly by tribal court systems.").

Indian doesn't get a fair trial."[325] VAWA explicitly prevents tribes from excluding non-Indians jurors,[326] and non-Indians are the majority population on most reservations.[327] Nonetheless, the limited tribal jurisdiction makes it unlikely that tribal courts can compel non-Indians to participate in tribal juries.[328]

The double standard for tribal and non-tribal juries is glaring. Many non-Indians believe tribal juries—composed predominantly of Indians—will take the opportunity to exact revenge for historic injustices perpetrated by non-Indians.[329] Like their state and federal counterparts, tribal courts occasionally err,[330] but the lion's share of evidence suggests tribal courts treat non-Indians fairly.[331] Contrarily, non-Indian courts have long histories of discriminating against Indians.[332] Indians

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[325] Jennifer Bendery, *Chuck Grassley on VAWA: Tribal Provision Means 'The Non-Indian Doesn't Get a Fair Trial,'* HUFFPOST (Feb. 21, 2013), https://www.huffpost.com/entry/chuck-grassley-vawa_n_2735080.

[326] Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304(d)(3)(B).

[327] Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 325 (2014); *Demographics Dashboard on US Native Lands*, NATIVE LAND INFO. SYS., https://www.nativeland.info/dashboard/demographics-dashboard-for-us-native-lands (last visited June 24, 2023); *see also* Washburn, *American Indians*, *supra* note 14, at 761.

[328] *See, e.g.*, Joseph Chilton, *The Jurisdictional "Haze": An Examination of Tribal Court Contempt Powers over Non-Indians*, 90 N.C. L. REV. 1189, 1189–1211 (2012); *see also* Hallie Bongar White, Kelly Gaines Stoner & James G. White, *Creative Civil Remedies Against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427, 431 (2008).

[329] Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 73 (1995); Sierra Crane-Murdoch, *Is the Violence Against Women Act a Chance for Tribes to Reinforce Their Sovereignty?*, HIGH COUNTRY NEWS (June 12, 2013), https://www.hcn.org/issues/45.10/is-the-violence-against-women-act-a-chance-for-tribes-to-reinforce-their-sovereignty.

[330] Lawrence Hurley, *Liberal Justice Sotomayor Says U.S. Supreme Court 'Mistakes' Can Be Fixed*, REUTERS (June 16, 2022, 9:49 PM), https://www.reuters.com/legal/government/liberal-justice-sotomayor-says-us-supreme-court-mistakes-can-be-fixed-2022-06-16 ("Institutions are made up by humans. Because we are human, by necessity we make mistakes. It is the nature of the human enterprise . . . .").

[331] *See, e.g.*, *Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the S. Comm. on Indian Aff.*, 110th Cong. 30–34 (2008) (statement of Theresa M. Pouley, C.J., Tulalip Tribal Court); Brief for Respondents at 7, Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496) ("Nonmember litigants routinely appear before—and prevail in—the Choctaw Courts."); *id.* ("Over 85% of the suits involving nonmembers resulted in a settlement or a win for the non-Indian party."); NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 18–20 (2018), https://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [hereinafter FIVE-YEAR REPORT]; Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 352 (1998).

[332] *E.g.*, Act of Dec. 26, 1826, Ga. Gen. Assemb. Acts 218; Act of Dec. 20, 1828, § 9, Ga. Gen. Assemb. Acts 88, 89; *see also* Transcript of Oral Argument at 16, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429) ("Then—then I would ask you, why would we not

continue to face racial discrimination.[333] When Indians are tried in state and federal court, rarely is an Indian on the jury.[334] Nevertheless, Indian claims that non-Indian juries cannot treat Indian defendants fairly have been categorically rejected in state and federal courts.[335] Congress has expressed no concern about protecting Indians from non-representative state and federal juries.

At their core, objections to tribal jurisdiction over non-Indians are rooted in a "them versus us" dynamic.[336] Indians are a small, poor minority, so Indian rights are not a top priority for Congress.[337] Indians often face state-imposed barriers to voting in national elections; hence, Indian issues struggle to gain legislative traction.[338] Indian political struggles are further amplified by anti-Indian racism[339] which results in resistance to Indian rights matched only by opposition to desegregation legislation according to the Supreme Court.[340] Thus, Indian rights are routinely trampled. The Supreme Court's interpretation of tribal power over non-Indians versus the Congress' power over Indians evinces this point.

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take into account in that balancing test you'd have us do the identity of the victim as going to tribal sovereignty given the history in this country of states abusing Indian victims in their courts?"); discussion *infra* Part V.A.

[333] NICK ESTES, MELANIE K. YAZZIE, JENNIFER NEZ DENETDALE & DAVID CORREIA, RED NATION RISING: FROM BORDERTOWN VIOLENCE TO NATIVE LIBERATION 6–10 (2021) (analyzing current discrimination facing Indians living on reservations surrounded by non-Indian cities).

[334] Alana Paris, *An Unfair Cross Section: Federal Jurisdiction for Indian Country Crimes Dismantles Jury Community Conscience*, 16 NW. J.L. & SOC. POL'Y. 92, 92–94 (2020).

[335] Castillo, *supra* note 327, at 312; Gede, *supra* note 305, at 42 ("[T]he CRS [Congressional Research Service] report acknowledges the irony that Indians themselves hauled into federal court often fail to have this right respected."); Washburn, *American Indians*, *supra* note 14, at 762.

[336] *See* Arash Emamzadeh, *The Psychology of "Us-vs-Them,"* PSYCH. TODAY (Aug. 9, 2019), https://www.psychologytoday.com/us/blog/finding-new-home/201908/the-psychology-us-vs-them (explaining the them-versus-us dynamic).

[337] For a thorough discussion of the complexities of defining who is an Indian and can be counted as such, see Crepelle, *Law & Economics*, *supra* note 28, at 590–91, 598. *See also* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 23, at 15–18, 21 n.72 (acknowledging the U.S. Census Bureau has "challenges . . . in achieving an accurate count of this population").

[338] Matt Vasilogambros, *For Some Native Americans, No Home Address Might Mean No Voting*, STATELINE (Oct. 4, 2019), https://stateline.org/2019/10/04/for-some-native-americans-no-home-address-might-mean-no-voting.

[339] Derr et al., *supra* note 324 ("'Racism and prejudice towards tribes in our states is alive and well,' said Brendan Johnson, the former U.S. attorney for South Dakota. 'The idea that you could have a, you know, Native American jury or Native American judge sitting in judgment of you, some people just, you know, they can't accept that.'").

[340] Washington v. Wash. Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696 n.36 (1979) ("'The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . ., the district court has faced the most concerted

The Constitution grants Congress limited and enumerated powers.[341] Notwithstanding, Congress continues to assert extraconstitutional plenary power over Indian tribes[342] though its roots lay directly in imperialist ideals and a belief in Indian inferiority.[343] Despite the ongoing push for racial justice as well as many members of Congress claiming to be ardent constitutionalists, no member of Congress is seeking to repudiate the plenary power doctrine. Likewise, among the federal judiciary, only Justice Clarence Thomas has openly acknowledged[344] the complete constitutional vacuity of Congress' plenary power over tribes.[345] And though *Oliphant* has been soundly rebuked for its errors, a full *Oliphant* reversal may never reach Congress.[346] After all, *non-Indians benefit by being immune from tribal jurisdiction while the cost of non-Indian immunity is born exclusively by Indians.*

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official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.'") (quoting Puget Sound Gillnetters Ass'n v. U.S. District Court, 573 F.2d 1123, 1126 (9th Cir. 1978)).

341 U.S. CONST. amend. X. *See generally* THE FEDERALIST NO. 84 (Alexander Hamilton).

342 United States v. Sandoval, 231 U.S. 28, 34 (1913); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375 (1886); *Ex parte* Crow Dog, 109 U.S. 556, 558 (1883).

343 WILLIAMS, *supra* note 60, at 72; Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 163 (2002) ("Indeed, this section demonstrates how the so-called federal Indian plenary power doctrine under which Congress claims complete, virtually unlimited, legislative control over any matter involving Indians, including the very continued existence of the Indian tribes, merely constitutes a racist American relic of 'white man's burden' arguments employed to justify American colonialism."); Crepelle, *Lies, Damn Lies*, *supra* note 54, at 553–56 (describing how the Court and practitioners alike continuously cite archaic, prejudiced precedents).

344 Justice Gorsuch has not openly opined on the matter; however, his opinions in *McGirt v. Oklahoma* and *Wash. St. Dep't of Licensing v. Cougar Den, Inc.* suggest he may have problems with the plenary power doctrine. *See also* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505–27 (2022) (Gorsuch, J., dissenting); United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring) ("The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.").

345 United States v. Bryant, 579 U.S. 140, 160 (2016) (Thomas, J., concurring) ("Over a century later, *Kagama* endures as the foundation of this [plenary power] doctrine, and the Court has searched in vain for any valid constitutional justification for this unfettered power."); Adoptive Couple v. Baby Girl, 570 U.S. 637, 659 (2013) (Thomas, J., concurring); United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring) ("I cannot agree with the Court . . . that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.'").

346 L. Scott Gould, *The Congressional Response to* Duro v. Reina*: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 92, 150–51 (1994) ("Racism in far less subtle forms would almost certainly attend a congressional fix of *Oliphant*.").

Since Indian issues are not a top priority for Congress, it is unsurprising that tribes receive less federal funding than other United States jurisdictions.[347] The funding shortage is staggering—55 to 75 percent less than non-tribal governments.[348] Consequently, Indian country has less than half the police officers as comparable non-Indian rural communities.[349] Tribal courts face significant funding shortages too;[350] hence, only a few dozen tribes have implemented VAWA and TLOA.[351] Tribes depend on federal funding because federal law prevents tribes from levying taxes to support their law enforcement and other governmental services.[352] Furthermore, the United States is treaty-bound to provide law enforcement services to Indian tribes.[353] The lack of federal funding is all the more problematic because moderate increases in reservation law enforcement funding have been shown to substantially reduce reservation crime rates.[354] Despite the effectiveness of raising tribal police funding to match other jurisdictions, the Congressionally-created Indian Law and Order Commission noted the federal government lacks the political will to allocate sustained funding for Indian country law enforcement.[355]

Finances are not the only hindrance to Indian country public safety. The primary prosecutor of Indian country crimes is the USA's office.[356] Federal prosecutors are usually interested in prosecuting high profile crimes, such as large drug busts, white collar crimes, and terrorism.[357] Federal prosecutors want to tackle high profile cases in order to boost their resumes when they enter the private sector or politics.[358] Indian country cases seldom generate much media attention;[359] plus, they are more

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[347] U.S. COMM'N ON CIVIL RIGHTS, *supra* note 23, at 17–18, 58.

[348] *Id.* at 58.

[349] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, Title II, § 202(3), 124 Stat. 2262.

[350] Adam Crepelle, *Getting Smart About Tribal Commercial Law: How Smart Contracts Can Transform Tribal Economies*, 46 DEL. J. CORP. L. 469, 489 (2022).

[351] U.S. COMM'N ON CIVIL RIGHTS, *supra* note 23, at 43 ("Also, according to GAO, the overwhelming majority of tribes (86 of the 109 tribes surveyed) cited funding limitations as a major obstacle to implementing their newly enhanced sentencing authority."). *See also supra* notes 307–08 and accompanying text.

[352] Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1000 (2020); Crepelle, *How Federal Indian Law Prevents*, *supra* note 29, at 685–88.

[353] U.S. COMM'N ON CIVIL RIGHTS, *supra* note 23, at 33 ("The safety and wellbeing of Native Americans is a long-standing responsibility for the federal government, initiating from treaty obligations to provide for welfare of Native American peoples.").

[354] *Id.* at 32.

[355] INDIAN L. & ORDER COMM'N, *supra* note 153, at 65.

[356] Crepelle, *Holding the United States Liable*, *supra* note 30, at 259.

[357] Washburn, *American Indians*, *supra* note 14, at 732.

[358] Ouziel, *supra* note 78, at 556.

[359] Washburn, *American Indians*, *supra* note 14, at 732.

difficult to prosecute due to distance, cultural barriers, and jurisdictional confusion.[360] Accordingly, focusing on Indian country crime is not a winning recipe for federal prosecutors—they have allegedly been fired for prioritizing Indian country criminal cases.[361] Additionally, federal prosecutors are not part of the tribal community.[362] As Kevin Washburn, a former federal prosecutor, noted, "Federal Indian country prosecutors are less likely to feel any pressure to be accountable to either type of community will."[363] This helps explain federal prosecutors' high declination rate for Indian country crimes.[364]

Federal prosecutors' lack of enthusiasm for Indian country crimes exacerbates an already rough policing environment. As noted above, tribal law enforcement agents are drastically underfunded, and this results in low staffing numbers as well as poor equipment and training.[365] Resource and jurisdictional constraints make policing exceedingly dangerous for tribal officers.[366] Tribal officers also must rely on state and federal agents when non-Indians are crime suspects.[367] This often results in agents clashing over which government has authority.[368] This assumes a non-Indian law enforcement agency even responds. For example, the FBI is responsible for investigating most Indian country crimes due to Indian country's peculiar jurisdictional rules.[369] However, FBI agents are typically uninterested in the mundane

[360] Crepelle, *Law & Economics*, *supra* note 28, at 589–601.

[361] Crepelle, *Holding the United States Liable*, *supra* note 30, at 259.

[362] Washburn, *Federal Criminal Law*, *supra* note 152, at 844 ("Federal law enforcement officials and prosecutors do not view Indian country as their 'home,' but as a place that they visit only from time to time to exercise outside authority.").

[363] Washburn, *American Indians*, *supra* note 14, at 731.

[364] U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, DECLINATIONS OF INDIAN COUNTRY MATTERS 3 (2010).

[365] *E.g.*, Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 1032 (9th Cir. 2013) ("The Reservation comprises about 40,000 acres of secluded and hilly land that is patrolled by a single full-time tribal law enforcement officer who is often asked to pay for training and equipment out of his own pocket.").

[366] *Law Enforcement in Indian Country, Hearing Before the S. Comm. on Indian Aff.*, 110th Cong. 6 (2007) (statement of W. Patrick Ragsdale, Dir., Bureau of Indian Aff.) ("[Indian country] police officers are placed in great danger because backup is sometimes miles and hours away, if available at all.); *id.* at 40 (statement of Chadwick Smith, Principal Chief, Cherokee Nation) ("The officers are placed in greater danger because of the distance and the unreliability of communications."); Joseph J. Kolb, *'Outmannned & Outgunned:' Tribal Police Officers Face Dangerous Challenges*, FOX NEWS (Mar. 14, 2017, 11:13 AM), https://www.foxnews.com/us/outmanned-outgunned-tribal-police-officers-face-dangerous-challenges.

[367] Crepelle, *Law & Economics*, *supra* note 28, at 590–91.

[368] *Id.* at 590.

[369] Washburn, *American Indians*, *supra* note 14, at 719.

crimes occurring in Indian country[370] because solving reservation crimes is not their path to prominence.[371] As a result, federal agent self-interest subverts Indian safety.

Tribes fare even worse when state prosecutors and police have criminal jurisdiction over their land. States and tribes often have long histories of animosity.[372] States also have a financial incentive to disregard Indian country law enforcement because states cannot tax tribal lands.[373] On top of this, Indians are usually significant minorities in the state and municipality surrounding their reservations, so states have no political incentive to protect Indians in Indian country.[374] Indians' lack of political power results in Indians experiencing high rates of crime and law enforcement being unresponsive even outside of Indian country.[375] Likewise, state law enforcement abuse of Indians on reservations is common and crimes committed by non-Indians against Indians often go unpunished.[376] Crimes committed on reservations in PL 280 states often garner no response from the surrounding state.[377] Unfortunately,

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[370] *Id.* at 718 ("Given the FBI's many other responsibilities, such as counterintelligence, terrorism prevention, and the investigation of other serious offenses, such as organized crime and complex narcotics conspiracies, Indian country crimes rarely rank high among the FBI's priorities.").

[371] *Id.* at 719 ("Because Indian country tends not to be a prestigious posting, the agents in the RAs are often rookies or 'first office agents' who seek transfer as soon as they are eligible, leading to sometimes high turnover among the FBI personnel dealing with Indian country offenses.").

[372] *See, e.g.*, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting) (recounting Oklahoma's history of "chafing" at being restricted from asserting its power over tribes); McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) ("It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them."); United States v. Kagama, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.").

[373] *See* Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, 589 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326, 28 U.S.C. § 1360); INDIAN L. & ORDER COMM'N, *supra* note 153, at xiv ("Nor is much help forthcoming from State governments; they have found it difficult to satisfy the demands of what is essentially an unfunded Federal mandate.").

[374] GOLDBERG ET AL., *supra* note 216, at 6; Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1436 (1997). *See* 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); Kevin K. Washburn, *American Indians Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1019–20 (2008).

[375] *See, e.g.*, NCAI POL'Y RSCH. CTR., *supra* note 17, at 2, 8.

[376] *See* Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, TRIBAL L. & POL'Y INST., https://www.tribal-institute.org/articles/gardner1.htm (last visited July 28, 2023).

[377] United States v. Bryant, 579 U.S. 140, 146 (2016) ("Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country."); Los Coyotes Band of Coahuila & Cupeño Indians v. Jewell,

the discrimination Indians face in PL 280 jurisdictions[378] is reminiscent of the discrimination blacks endured in the Jim Crow South.[379] This should be no surprise as the majoritarian political incentives are the same.

The institutional disincentives to protect Indians are a consequence of the United States' racist past. Individual states and the federal government long incentivized the killing of Indians through the payment of bounties for scalps.[380] By the 20th century, the United States shifted from murder to other means of ridding itself of the "Indian problem," including boarding schools,[381] child removal,[382] and forced sterilization of Indian women.[383] The United States has disavowed these vile policies, but the cultural norms they created live on. Consequently, less value is placed on Indian lives. This helps explain why even in cities—where no jurisdictional issues exist—Indians experience higher rates of violence than non-Indians and

729 F.3d 1025, 1033 (9th Cir. 2013) ("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.").

[378] To be clear, this is not to say state police are less racist against Indians in non-PL 280 jurisdictions than PL 280 jurisdictions. However, state police lack criminal jurisdiction over Indians on reservations on non-PL 280 reservations, so they lack the authority to abuse Indians on non-PL 280 reservations.

[379] Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1222 (2020) ("Juries in the post-Civil War South reflexively acquitted white 'defendants who committed crimes against African-Americans and white Republicans,' yet the prosecution of such cases is easily defended.") (quoting Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 UNIV. CHI. L. REV. 867, 890 (1994)); Hylton & Khanna, *supra* note 78, at 75 ("Perhaps the best known example of this in United States history is law enforcement in the South during the Jim Crow period, which involved numerous instances of prosecutors refusing to enforce the law against white citizens, while using the threat of criminal punishment to coerce black citizens.").

[380] Henry J. Young, *A Note on Scalp Bounties in Pennsylvania*, 24 PA. HIST. 207, 207 (1957) ("It is abundantly clear that Pennsylvania's government proclaimed general bounties for Indian scalps on three occasions, in 1756, in 1764, and finally in 1780."); *Bounties*, *The US-Dakota War of 1862*, MINN. HIST. SOC'Y, https://www.usdakotawar.org/history/aftermath/bounties (last visited July 15, 2023).

[381] *See* Ranjani Chakraborty, Vox, *How the US Stole Thousands of Native American Children*, YOUTUBE (Oct. 14, 2019), https://www.youtube.com/watch?v=UGqWRyBCHhw ("What started there, at the Carlisle Indian Industrial School, was nothing short of genocide disguised as American education.").

[382] Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATLANTIC (Jan. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167; *Indian Adoption Project*, ADOPTION HIST. PROJECT, https://pages.uoregon.edu/adoption/topics/IAP.html (Feb. 24, 2012).

[383] Brianna Theobald, *A 1970 Law Led to the Mass Sterilization of Native American Women. That History Still Matters*, TIME, https://www.time.com/5737080/native-american-sterilization-history (Nov. 28, 2019, 11:47 AM).

why the media ignores the countless missing Indian women while it fixates on missing white women.[384]

V. CIVIL DISOBEDIENCE AS AN ANSWER TO *OLIPHANT*

Tribes should consider violating *Oliphant* as an act of civil disobedience. Civil disobedience is transgressing the law as a form of protest and is undertaken because the civil disobedient believes the existing law is unjust.[385] Although civil disobedience involves breaking the law, those committing the violation firmly believe in the rule of law.[386] Thus, civil disobedients willingly accept the consequences of their actions. They do so because they believe complying with the existing law contaminates their soul[387] and degrades society's moral fiber.[388] Civil disobedience is a way for the marginalized to exclaim their belief the existing state of affairs is unjust. Civil disobedience is an optimistic action as it hopes to inspire change[389] and has a long history in the United States.[390]

This Part discusses the history of Indians' use of civil disobedience and how it can be used to challenge *Oliphant*. Section A focuses on Chief Standing Bear's struggle to be treated as a *person* before the law. Section B explores how civil obedience in the face of *Oliphant* may work.

A. Civil Disobedience in Indian Country

Although Indians' resistance to colonization often involved force, Indians have also resisted colonization through nonviolent means.[391] Indians openly disregarded laws designed to limit liberty during the early years of the United States.[392] A more

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[384] *See* Zach Sommers, *Missing White Woman Syndrome: An Empirical Analysis of Race and Gender Disparities in Online News Coverage of Missing Persons*, 106 J. CRIM. L. & CRIMINOLOGY 275, 278–83 (2016); NCAI POL'Y RSCH. CTR., *supra* note 17, at 2.

[385] United States v. Schoon, 971 F.2d 193, 195–96 (9th Cir. 1991); United States v. Dorrell, 758 F.2d 427, 435–36 (9th Cir. 1985) (Ferguson, J., concurring).

[386] *Dorrell*, 758 F.2d at 435–36 (Ferguson, J., concurring).

[387] Edward L. Glaeser & Cass R. Sunstein, *A Theory of Civil Disobedience* 4 (Nat'l Bureau of Econ. Res., Working Paper No. 21338, 2015) ("In a sense, Thoreau seems to believe that cooperating with the government would pollute his soul. He prefers prison time to such pollution.").

[388] *Dorrell*, 758 F.2d at 435–36 (Ferguson, J., concurring).

[389] *Id.* at 436.

[390] King, *supra* note 43, at 841 ("In our own nation, the Boston Tea Party represented a massive act of civil disobedience.").

[391] *See, e.g.*, TIBBLES, *supra* note 47, at 8 (recounting Chief Standing Bear's resistance to military commands to vacate his property).

[392] JEDIDIAH MORSE, A REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES ON INDIAN AFFAIRS 56 (1822) ("[T]he number of these establishments is too limited to accommodate

well-known example is the Cherokee Nation's nonviolent opposition to Georgia. The Cherokee Nation chose to assert its rights in court rather than use force against Georgia's unjust actions.[393] After the Supreme Court wielded racist stereotypes to deny the Cherokee entry into United States courts,[394] Samuel Worcester and Elizur Butler boldly defied Georgia in order to provide the Cherokee Nation with a vehicle to vindicate its rights. Worcester and Butler had the courage to accept the consequences of defying Georgia law. Their courage helped establish the foundations of tribal sovereignty in the United States' legal system.

Ponca Chief Standing Bear practiced civil disobedience to assert his tribe's rights.[395] The Ponca entered a treaty with the United States in 1858 whereby the tribe relinquished most of its land in exchange for 96,000 acres and the United States pledged "[t]o protect the Poncas in the possession of the tract of land reserved for their future homes, and their persons and property thereon, during good behavior on their part."[396] Nonetheless, the United States gave the Ponca's treaty-guaranteed land to the Sioux in 1868.[397] The Ponca pled with the United States to return their lands but to no avail. By 1877, federal troops forcibly removed the Ponca to present-day Oklahoma.[398] The journey was harsh. Many Ponca died en route to Oklahoma, including Chief Standing Bear's daughter.[399] The land the Ponca were placed upon was inhospitable, so Chief Standing Bear appealed to the President. Consequently, the Ponca were relocated.[400]

Conditions at their new home were little better. The timing of the move left the Ponca unable to plant crops;[401] thus, there was little food on the reservation.

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but very few of the Indians, as but few of them will travel far to get their supplies, if it can be avoided.").

[393] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[394] *Id.* at 15–19; *id.* at 38 (Baldwin, J., concurring) ("[T]he Indians acknowledge their dependent character; hold the lands they occupy as an allotment of hunting grounds."); *id.* at 48 (Baldwin, J., concurring) ("The Indians were considered as tribes of fierce savages; a people with whom it was impossible to mix, and who could not be governed as a distinct society."); *id.* at 23 (Johnson, J., dissenting) ("Independently of the general influence of humanity, these people were restless, warlike, and signally cruel in their irruptions during the revolution.").

[395] TIBBLES, *supra* note 47, at 14 ("I will take a small party and start back to my old home. If the soldiers come after us I will not fight. They can do what they please with us. Whatever they do, it can't be worse than to stay here.").

[396] Treaty with the Ponca, U.S.–Ponca, art. II, Mar. 12, 1858, 12 Stat. 997.

[397] *Ponca History*, PONCA TRIBE OF INDIANS OF OKLA., https://perma.cc/9V9Q-9XTC (archived Mar. 2, 2022).

[398] *Id.*

[399] *Id.*

[400] *Id.*

[401] STARITA, *supra* note 49, at 97 ("But for the second year in a row, [the Ponca] had arrived at a new home too late to break ground and plant crops and so they were again forced to rely on government rations through the fall and winter of 1878.").

Hunger left the tribe susceptible to malaria.[402] Many Ponca perished.[403] Chief Standing Bear's son was among the deceased.[404] His son's final wish was to be buried in the land where he was born.[405] In direct violation of federal orders, Chief Standing Bear led a contingent of 30 Ponca back to their ancestral lands in Nebraska.[406]

Brigadier General George Crook, a veteran of Indian wars, was ordered to arrest Chief Standing Bear.[407] The Ponca did not resist General Crook's command.[408] General Crook was moved by the Ponca's plight and contacted a reporter to raise awareness of the injustice.[409] Two private lawyers soon represented Chief Standing Bear,[410] and they filed a writ of habeas corpus on Chief Standing Bear's behalf.[411] The United States opposed Chief Standing Bear's habeas petition on the legal theory that "an Indian is not a person within the meaning of the law."[412]

Whether Chief Standing Bear qualified as a "person" was the issue before the Omaha federal district court.[413] Judge Elmer Dundy cast serious doubt on the matter at the beginning of his opinion describing Indians as a "generally despised race" and a "wasted race."[414] Personal feelings aside, Judge Dundy declared his decision must be guided by "principles of law."[415] Judge Dundy ruled "[t]hat an Indian is a 'person'

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[402] *Id.* at 101 ("'The season thus far since our arrival here has been a very sickly one . . . coming from a northern latitude, where such diseases are unknown, with their systems unacclimated [sic], the malaria has been peculiarly fatal to them, and many deaths have resulted.'") (quoting WILLIAM H. WHITEMAN, COMM'R OF INDIAN AFFAIRS, ANNUAL REPORT TO THE SECRETARY OF THE INTERIOR (1878)).

[403] *Id.*

[404] *Id.* at 104; TIBBLES, *supra* note 47, at 25.

[405] TIBBLES, *supra* note 47, at 26; *Chief Standing Bear*, NAT'L PARK SERV., https://www.nps.gov/mnrr/learn/historyculture/standingbear.htm (last visited July 15, 2023).

[406] PONCA TRIBE OF INDIANS OF OKLA., *supra* note 397 ("Because the Ponca were not to leave their reservation without permission, Standing Bear and his small group of followers were labeled as a renegade band.").

[407] TIBBLES, *supra* note 47, at 42.

[408] PONCA TRIBE OF INDIANS OF OKLA., *supra* note 397 ("However, Gen. Crook caught up with Standing Bear and his Ponca followers, took them into custody without incident . . . .").

[409] Brigit Katz, *Chief Standing Bear, Who Fought for Native American Freedoms, Is Honored with a Statue in the Capitol*, SMITHSONIAN MAG. (Sept. 25, 2019), https://www.smithsonianmag.com/smart-news/chief-standing-bear-who-fought-native-american-freedoms-honored-statue-capitol-180973208 ("Crook went to the media, which spread the story of . . . Standing Bear and his fellow prisoners nationwide . . . .").

[410] TIBBLES, *supra* note 47, at 39; DWYER, *supra* note 49, at 73–74.

[411] DWYER, *supra* note 49, at 79; TIBBLES, *supra* note 47, at 40.

[412] PONCA TRIBE OF INDIANS OF OKLA., *supra* note 397.

[413] United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) (No. 14,891).

[414] *Id.* at 695.

[415] *Id.*

within the meaning of the laws of the United States . . . ."[416] To reach this conclusion, Judge Dundy turned to the dictionary: "Webster describes a person as 'a living soul; a self-conscious being; a moral agent; especially a living human being; a man, woman, or child; an individual of the human race.' This is comprehensive enough, it would seem, to include even an Indian."[417]

Judge Dundy further explained, "[I]t would indeed be a sad commentary on the justice and impartiality of our laws to hold that Indians, though natives of our own country, cannot test the validity of an alleged illegal imprisonment in this manner . . ."[418] Thus, Chief Standing Bear was set free.[419] Chief Standing Bear's battle for basic dignity was a landmark victory for the civil rights of all Americans.[420]

While few civil rights struggles can match Chief Standing Bear's, Indians have engaged in other acts of civil disobedience. The Poarch Band of Creek Indians refused to be denied admission to white schools by blocking school buses during the 1930s.[421] In the 1960s and 70s, Nisqually Indian Billy Frank, Jr. led "fish-ins" in an effort to assert tribal fishing rights in the state of Washington.[422] Frank and his compatriots openly fished in defiance of Washington's laws.[423] The Indians peacefully endured destruction of their property, physical violence, and arrest.[424] Frank himself was arrested more than 50 times.[425] The fish-ins forced the Justice Department to intervene and culminated in a monumental legal victory for Indian rights

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[416] *Id.* at 700.

[417] *Id.* at 697.

[418] *Id.*

[419] TIBBLES, *supra* note 47, at 128. ("A few days after the decision, Gen. Crook received an order from the Secretary of War ordering the discharge of Standing Bear and his companions.").

[420] Gillian Brockell, *The Civil Rights Leader 'Almost Nobody Knows About' Gets a Statue in the U.S. Capitol*, WASH. POST (Sept. 20, 2019, 2:56 PM), https://www.washingtonpost.com/history/2019/09/20/civil-rights-leader-almost-nobody-knows-about-gets-statue-us-capitol; *Dedication of Ponca Chief Standing Bear of Nebraska*, U.S. H. REP., https://www.house.gov/feature-stories/2019-9-19-dedication-of-ponca-chief-standing-bear-of-nebraska (last visited July 15, 2023).

[421] *Hearing on S. 1168, S. 1224, & S. 1249 Before the S. Select Comm. on Indian Aff.*, 98th Cong. 28 (1983) (summary of the Poarch Band of Creeks' petition for acknowledgement) ("One parent organized a boycott of the Indian school and another blocked the passage of the white school bus through the Poarch Community until the driver allowed the Creek children to board."); *History*, POARCH CREEK INDIANS, https://www.pci-nsn.gov/wordpress/about/history (last visited July 15, 2023); DENISE E. BATES, THE OTHER MOVEMENT: INDIAN RIGHTS AND CIVIL RIGHTS IN THE DEEP SOUTH 22–24 (2012).

[422] *The Life and Legacy of Billy Frank Jr.*, https://billyfrankjr.org (last visited July 15, 2023).

[423] CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 33–34 (2000).

[424] *Id.* at 34, 38–40.

[425] *The Life and Legacy of Billy Frank Jr.*, *supra* note 422.

throughout the country.[426] More recently, civil disobedience helped transform the Standing Rock Sioux Tribe's opposition to an oil pipeline into international news.[427] Though the fate of the Dakota Access Pipeline is yet to be determined,[428] the protesters have claimed significant legal victories against the pipeline.[429]

B. Defying Oliphant

A tribe deciding to violate *Oliphant* must be aware of the consequences. Tribes possess sovereign immunity from lawsuits,[430] so the non-Indian defendant will not be able to sue the tribe for damages.[431] However, it may be possible for tribal officials to be sued in their individual capacity under the *Ex parte Young* doctrine.[432] The tribal officials involved with the prosecution would be the tribal judge and prosecutor. Under a long line of precedent, judges and prosecutors enjoy absolute immunity for actions taken in their official capacity.[433] This does not mean consequences may not exist. Congress can use its plenary power to strip the tribe of its sovereignty or

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[426] *Id.*

[427] *See generally* Sierra Crane-Murdoch, *Standing Rock: A New Moment for Native-American Rights*, NEW YORKER (Oct. 12, 2016), https://www.newyorker.com/news/news-desk/standing-rock-a-new-moment-for-native-american-rights.

[428] *See The Dakota Access Pipline (DAPL)*, HARV. L. SCH., https://eelp.law.harvard.edu/2017/10/dakota-access-pipeline (last visited July 15, 2023) (suggesting that while the Dakota Access Pipeline is currently in operation, "the Standing Rock Sioux Tribe can file a new challenge after the [environmental impact statement] is completed," a draft of which was expected "in the spring of 2023").

[429] Will Peischel, *A Judge Handed the Standing Rock Tribes a Big Win in Their Dakota Access Pipeline Fight*, MOTHER JONES (July 6, 2020), https://www.motherjones.com/environment/2020/07/a-judge-just-handed-the-standing-rock-tribe-a-big-win-in-their-dakota-access-pipeline-fight.

[430] *See* C & L Enters. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001); Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751 (1998); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); Three Affiliated Tribes v. Wold Eng'g, P.C., 476 U.S. 877 (1986); Puyallup Tribe, Inc. v. Wash. Dep't of Game, 433 U.S. 165 (1977).

[431] Crepelle, *Tribal Courts*, *supra* note 25, at 92–93.

[432] Hengle v. Treppa, 19 F.4th 324, 346 (4th Cir. 2021) ("We agree with the Second and Eleventh Circuits that this 'plain statement' by the Supreme Court 'blessed *Ex parte Young*-by-analogy suits against tribal officials for violations of state law.'") (quoting Gingras v. Think Finance, Inc., 922 F.3d 112, 121 (2d Cir. 2019).

[433] *See* Mireles v. Waco, 502 U.S. 10–11 (1991) (per curiam) ("Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial."); Imbler v. Pachtman, 424 U.S. 409, 420 (1976); Zenon v. Guzman, 924 F.3d 611, 616 (1st Cir. 2019); IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 2:5 (2022).

slash its funding.[434] The executive branch could reprimand the tribe too.[435] A tribe must be aware that it is venturing into the unknown by commencing the prosecution.

Tribes should have criminal jurisdiction over all persons on their land, but the lack of criminal jurisdiction is such a severe problem because neither the states nor the feds prioritize Indian country crime.[436] Accordingly, the tribe seeking to commit civil disobedience should issue a press release once it detains a non-Indian criminal[437] declaring it shall commence prosecution unless the state or federal government pledges to act.[438] The tribe's announcement should emphasize the tribe is openly violating Supreme Court precedent due to Indian country's ongoing public safety crisis.[439] The press release should explain the public safety crisis is a direct consequence of the Supreme Court's *Oliphant* decision. The tribe's statement should further elucidate *Oliphant*'s factual errors and reliance on racist stereotypes.[440] As a result, the press release should declare the tribe has chosen to violate *Oliphant* because it refuses to sit by while violent non-Indian criminals prey upon its citizens. The tribe refuses to let violent criminals escape justice solely because they lack Indian blood.[441] Watching helplessly as non-Indians wantonly victimize Indians offends the tribe's sense of justice. Permitting this state of affairs to continue pollutes the tribe's moral fiber and undermines the rule of law.

Though all governments should have the power to prosecute all persons who perpetrate crimes on their land, a VAWA-implementing tribe would have an exceptionally compelling argument to prosecute all non-Indians. VAWA-implementing tribal courts comply with western notions of justice;[442] in fact, VAWA tribes satisfy more stringent procedural requirements than other American governments.[443] VAWA tribes are already prosecuting non-Indians,[444] and it makes no sense to believe tribes can treat non-Indians fairly for enumerated offenses under VAWA but

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[434] Crepelle, *Law & Economics*, *supra* note 28, at 602 n.284.

[435] *Id.* at 602.

[436] *See supra* note 370 and accompanying text.

[437] *See generally* United States v. Cooley, 141 S. Ct. 1638 (2021) (holding a tribal police officer has authority to detain a non-Indian if the health and welfare of the tribe is in danger).

[438] The tribe could initiate a prosecution even if the state or federal authorities already have because tribes are separate sovereigns. United States v. Lara, 541 U.S. 193, 210 (2004). However, given tribes limited resources, dual prosecution may not be practical.

[439] Crepelle, *Holding the United States Liable*, *supra* note 30, at 241–42, 260.

[440] Crepelle, *Lies, Damn Lies*, *supra* note 54, at 559–67.

[441] Under federal law, Indian blood is a required element of Indian status. United States v. Rogers, 45 U.S. (6 How.) 567, 572–73 (1846). Though non-Indians were historically assimilated into tribes as full Indians, lack of Indian blood is now dispositive of Indian status.

[442] Crepelle, *Law & Economics*, *supra* note 28, at 605.

[443] *See supra* text accompanying note 306.

[444] Crepelle, *Tribal Courts*, *supra* note 25, at 82.

not other violent crimes. Senators opposed to VAWA have admitted as much.[445] Accordingly, a VAWA-implementing tribe has particularly strong legal and logical arguments to overrule *Oliphant.*

What happens after the non-Indian detention and media notification is unclear. One option is the tribe convicts the non-Indian and nothing happens.[446] Non-Indians have been convicted by tribes under VAWA[447] and have the right to challenge their tribal detention in federal court.[448] However, no non-Indian has appealed a tribal conviction because the tribe provided them with a fair trial.[449] Non-Indians simply accepting their tribal conviction would be a tribal victory, but it seems unlikely. The previous VAWA convictions received little attention, and this prosecution's goal is to generate attention. Assuming the publicity effort has any success, the tribal prosecution will not be the end of the matter.

If a non-Indian defendant decides to challenge the tribe's jurisdiction, the defendant has a direct path to federal court through the Indian Civil Rights Act's habeas corpus provision.[450] Ordinarily, those contesting tribal jurisdiction must exhaust their tribal remedies prior to entering federal court,[451] but exhaustion does not apply when tribes are flagrantly acting beyond their jurisdiction.[452] A non-Indian criminal defendant would have no difficulty meeting this exception because the tribe is advertising its breach of *Oliphant*.[453] This means the case will enter the federal court swiftly.

The federal district court and appellate court will almost certainly follow *Oliphant*. Nevertheless, lower courts could anticipatorily overrule[454] *Oliphant* based

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[445] S. REP. NO. 112-153, at 48 (2012).

[446] Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L.J. 115, 120 (2017) ("Tribes ignore precedent and do what they want all the time and often no one cares or even notices.").

[447] FIVE-YEAR REPORT, *supra* note 331, at 1.

[448] 25 U.S.C. § 1303; Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304(e).

[449] FIVE-YEAR REPORT, *supra* note 331, at 1 ("There has not been a single petition for habeas corpus review brought in federal court in an SDVCJ [Special Domestic Violence Criminal Jurisdiction] case.").

[450] 25 U.S.C. § 1303.

[451] Carrie E. Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 WM. & MARY BILL RTS. J. 137, 148 (2015) ("Federal courts 'generally recognize[ ] that a petitioner must fully exhaust tribal court remedies before a federal court can review challenges to his detention.'") (quoting Acosta-Vigil v. Delorme-Gaines, 672 F. Supp. 2d 1194, 1196 (D.N.M. 2009).

[452] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985).

[453] Garrow, *supra* note 451, at 151 ("Federal courts follow this procedure and do not require exhaustion of tribal court remedies when the petitioner is a non-Indian.").

[454] Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Actions by United States Court of Appeals*, 51 FORDHAM L. REV. 53, 61–63 (1982).

upon developments in the law supporting tribal sovereignty in criminal justice since the case was decided.[455] This seems highly unlikely because the Supreme Court routinely cites *Oliphant* to degrade tribal sovereignty.[456] What happens in the lower court is largely irrelevant because the loser will seek certiorari.

The Supreme Court would not be obligated to hear the *Oliphant* challenge,[457] but the tribal publicity effort may force the Court's hand. As Americans become aware of *Oliphant*'s problems, they may grow interested in the case. The United States legal system is designed to deliver justice by discovering the truth.[458] *Oliphant* is loaded with factual errors and racist lies about Indians.[459] Although Indian safety and sovereignty may not be a top concern for most Americans, the quality of justice in the United States is something that impacts all Americans. The doctrine of stare decisis allows a single line of dicta to mutate into a jurisprudential monster that consumes the case's holding.[460] Indeed, *Oliphant* relied on a single line of dicta as the only direct support for its holding.[461] Thus, framing a challenge to *Oliphant* as a bellwether for the quality of justice in the United States may generate public interest in Indian rights.

Assuming the Supreme Court accepts the *Oliphant* challenge, the Court could attempt to strike a middle ground, as Chief Justice Marshall did by denoting tribes as "domestic dependent nations" rather than full sovereigns in *Cherokee Nation*.[462] However, there are only two choices from an institutional credibility perspective: the Court can continue down the colonial road though the world knows the emperor has no clothes,[463] or the Court can admit *Oliphant* is an ignoble vestige of the

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[455] *See* Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304; United States v. Cooley, 141 S. Ct. 1638 (2021).

[456] Crepelle, *Lies, Damn Lies*, *supra* note 54, at 557, 568–69.

[457] *Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited July 16, 2023) ("In fact, the Court accepts 100–150 of the more than 7,000 cases that it is asked to review each year.").

[458] Polk Cnty. v. Dodson, 454 U.S. 312, 318 (1981) ("[Our] system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."); Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error . . . .").

[459] Crepelle, *Lies, Damn Lies*, *supra* note 54, at 558–63, 565.

[460] WILLIAMS, *supra* note 60, at 23.

[461] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 199–200 (1978).

[462] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[463] E. Band of Cherokee Indians v. Torres, 2005 WL 6437828, at *8 (E. Cherokee Sup. Ct.) ("The federal appellate opinions holding that Indian tribal courts may not try non-Indians for criminal acts committed on then [sic] reservations are founded on only two principles, and those two principles are: 1. Might makes right, and 2. Indians cannot be trusted to treat non-Indians fairly.").

nation's justice system.[464] If the Court desires to escape the perception that it is a partisan institution,[465] the Court must embrace the truth. The Court's embrace of truth caused "separate but equal" to fall.[466] Embracing the truth will also lead to *Oliphant*'s fall.[467] If the Court embraces the truth, the restraints on tribal sovereignty will begin to crumble. If the Court accepts the moral responsibility to right an unjust law, tribes will once again be able to protect their citizens from all violent criminals.

But even if the effort to reverse *Oliphant* fails, flagrantly flouting *Oliphant* will force an awkward conversation about the morality of law in the United States. The United States has proudly overruled racist precedent against other minorities;[468] indeed, the idea of citing *Dred Scott*[469] for even a nonracial constitutional premise is beyond taboo.[470] Similarly, the United States' population has grown increasingly sensitive to racially-tinged language. As a result, the United States is changing bigoted place names[471] and eliminating stereotyped Indian mascots.[472] Nonetheless, the Supreme Court continues to cite racist cases about Indians without the slightest

[464] Cobell v. Norton, 229 F.R.D. 5, 7 (D.D.C. 2005); Cobell v. Kempthorne, 455 F.3d 317, 326 (D.C. Cir. 2006) ("Alas, our 'modern' Interior department has time and again demonstrated that it is a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.").

[465] *See generally* James D. Zirin, Opinion, *The Supreme Court's Partisanship is Becoming Increasingly Difficult to Deny*, THE HILL (Oct. 4, 2021, 10:30 AM), https://www.thehill.com/opinion/judiciary/575076-the-supreme-courts-partisanship-is-becoming-increasingly-difficult-to-deny.

[466] Brown v. Bd. of Educ., 347 U.S. 483, 483–94 (1954) ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.").

[467] Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 610 (1979) ("A close examination of the Court's opinion reveals a carelessness with history, logic, precedent, and statutory construction that is not ordinarily acceptable from so august a tribunal.").

[468] Morgan, *supra* note 446, at 117 ("Fortunately, our value system has changed and these cases are no longer the law and carry no weight as legal precedent. In fact, they often are taught as cautionary tales about how not to treat minority groups.").

[469] Dred Scott v. Sandford, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend XIV.

[470] Crepelle, *Lies, Damn Lies*, *supra* note 54, at 531.

[471] Press Release, U.S. Dept. of the Interior, Secretary Haaland Takes Action to Remove Derogatory Names from Federal Lands (Nov. 19, 2021), https://www.doi.gov/pressreleases/secretary-haaland-takes-action-remove-derogatory-names-federal-lands.

[472] Matthew Impelli, *The Cleveland Indians Have Changed Their Name, Here's Where Other Teams Stand with Names*, NEWSWEEK (July 23, 2021, 2:20 PM), https://www.newsweek.com/cleveland-indians-have-changed-their-name-heres-where-other-teams-stand-names-1612659.

qualm.[473] Several laws and regulations governing Indians are unapologetically racist.[474] The United States cannot seriously hold itself out as a beacon of human rights and the rule of law while it simultaneously wields colonial ideology against its indigenous inhabitants.[475]

VI. CONCLUSION

The Supreme Court showed public sentiment outweighs the law in matters of Indian rights during its 2022 term. In *Oklahoma v. Castro-Huerta*, Oklahoma sought to prosecute reservation crimes involving a non-Indian perpetrator and an Indian victim.[476] Oklahoma's position flagrantly violated the Constitution as well as over 200 years of federal policy.[477] Most damning, Oklahoma averred it lacked jurisdiction over this class of crimes in 2020.[478] Absent legal authority,[479] Oklahoma spent millions of dollars on a media campaign[480] portraying the reservations within its borders as "criminal dystopias."[481] The state's outlandish argument prompted Justice Gorsuch to ask, "[A]re we to wilt today because of a social media campaign?"[482] Five Justices answered "yes,"[483] leading Justice Gorsuch to write *Castro-Huerta* "surely marks an embarrassing new entry into the anticanon of Indian law."[484]

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[473] Crepelle, *Lies, Damn Lies*, *supra* note 54, at 553–56.

[474] Adam Crepelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government*, 54 U. MICH. J.L. REFORM 563, 583–91 (2021).

[475] The Court in *Oliphant* made clear it based its diminution of Indian rights on antiquated ideals. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 ("'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.").

[476] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2492 (2022).

[477] *Id.* at 2501 (Gorsuch, J., dissenting).

[478] Brief for Respondent at 3, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526) ("The State would lack jurisdiction to prosecute any crime involving an Indian (whether defendant or victim) in eastern Oklahoma.").

[479] *Castro-Huerta*, 142 S. Ct. at 2511 (Gorsuch, J., dissenting) ("But this declaration comes as if by oracle, without any sense of the history recounted above and unattached to any colorable legal authority.").

[480] Kelsey Vlamis, *Oklahoma Spent Millions on a Legal and PR Campaign to Paint Reservations as 'Lawless Dystopias' and Persuade the Supreme Court to Weaken Tribal Sovereignty, Experts Say*, BUS. INSIDER (July 4, 2022, 6:40 AM), https://www.businessinsider.com/oklahoma-tribal-land-as-lawless-dystopias-for-scotus-sovereignty-experts-2022-7.

[481] *Castro-Huerta*, 142 S. Ct. at 2510 (Gorsuch, J., dissenting).

[482] Transcript of Oral Argument at 61, *Castro-Huerta*, 142 S. Ct. at 2486.

[483] *Castro-Huerta*, 142 S. Ct. at 2487.

[484] *Id.* at 2521 (Gorsuch, J., dissenting).

Castro-Huerta shows tribes should consider publicly defying *Oliphant.* By violating *Oliphant*, tribes will announce the status quo is unacceptable. Tribes will not endure a system that permits one-in-three Indian women to be raped. Tribes will not tolerate a regime that permits Indian women and girls to be murdered and go missing at crisis levels. Tribes will not stand by as state and federal law enforcement let non-Indian criminals escape justice. *Oliphant* is the embodiment of an unjust law and should be no law at all. Tribes must defy *Oliphant* to make red lives matter.