



AMERICAN
CONSTITUTION
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LAW AND POLICY

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in Indian Country by Restoring Tribal Sovereignty**

By Matthew L.M. Fletcher

March 2009

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Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty

By Matthew L.M. Fletcher*

“Every hour of every day an American Indian woman within the authority of a tribal court is the victim of sexual and physical abuse.”¹

American Indian women residing on Indian reservations suffer domestic violence and physical assault at rates far exceeding women of other ethnicities and locations.² American Indian women experience physical assaults at a rate 50% higher than the next most victimized demographic, African-American males.³ About one-quarter of all cases of family violence (violence involving spouses) against American Indians involve a non-Indian perpetrator, a rate of inter-racial violence five times the rate of inter-racial violence involving other racial groups.⁴ In all, 39% of American Indian women report being victims of domestic violence.⁵

Compounding this problem, and likely contributing to it, is the current state of federal Indian law. Non-Indians who commit acts of domestic violence that are misdemeanors on Indian reservations are virtually immune from prosecution in most areas of the country. This is because the Supreme Court has held that tribal governments may not prosecute non-Indians,⁶ and while either the United States or a state may exercise jurisdiction over such crimes, they rarely prosecute these kinds of cases due to lack of resources and other factors. Congress has the authority to fix this gap in the law, but has not done so.

In short, unprosecuted domestic violence committed by non-Indians in Indian Country is a serious problem, without an effective federal or state solution absent an Act of Congress. The Supreme Court has created – and Congress has not done enough to solve – a terrible irony. The law enforcement jurisdiction closest to the crime and with the greatest capacity and motivation for responding quickly, efficiently, and fairly, has been stripped of the authority to react, leaving Indian women to suffer, and crimes of domestic violence to remain unresolved and unprosecuted.

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¹ Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 2, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411).

² *See id.* at 3-4 (citing Lawrence A. Greenfield & Steven K. Smith, U.S. Dep’t of Justice, *American Indians and Crime* (1999); Steven W. Perry, U.S. Dep’t of Justice, *American Indians and Crime 1992-2002* (2004); Calli Rennison, U.S. Dep’t of Justice, *Violent Victimization and Race, 1993-1998* (2001); Patricia Tjaden & Nancy Thoenne, U.S. Dep’t of Justice, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 22 ex. 7* (2000)). The rates of sexual violence, including rape, are at least as startling, but this paper will focus on domestic violence.

³ *See* GREENFIELD & SMITH, *supra* note 2, at vi; Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 188 (2008)

⁴ *See* GREENFIELD & SMITH, *supra* note 2, at 8.

⁵ *See* Hart & Lowther, *supra* note 3, at 188 (citing M.C. Black & M.J. Breiding, *Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence—United States, 2005*, MORBIDITY AND MORTALITY WKLY. REP., Feb. 8, 2008).

⁶ *See* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

This Issue Brief recommends a legislative solution to alleviate this jurisdictional gap by recognizing tribal jurisdiction over non-Indians for domestic violence misdemeanors. The proposal would place the onus on Indian tribes to demonstrate their capacity to prosecute non-Indians in a manner consistent with federal and state courts and require tribes to provide comparable criminal procedure protections to these defendants before they may assert jurisdiction.⁷ This limited proposal offers a reasonable means for tribes to accept this authority and build a track record of success. Ideally, after more and more tribes begin to prove their capacity to prosecute non-Indians for domestic violence, either the Court or Congress will again recognize full tribal authority to provide for law and order on Indian reservations.

Part I of this Issue Brief describes the legal and historical landscape of Indian tribal authority to prosecute Indian Country crimes. Part II sets out the legal rule, created by the Supreme Court without Congressional sanction, denying Indian tribes the authority to prosecute non-Indian criminal perpetrators. Part III offers an incremental solution, in which Congress would reaffirm tribal criminal jurisdiction over non-Indians in certain circumstances. Part IV offers responses to the possible constitutional and criminal procedure issues that may arise under this legislative proposal.

I. Tribal Jurisdiction and Authority

Felix Cohen’s classic restatement of the metes and bounds of tribal sovereignty in his 1942 *Handbook of Federal Indian Law* found that tribal sovereignty – that is, the power and authority of Indian tribes – is inherent and undiminished, unless one of two conditions occurs.⁸ First, the tribe may voluntarily divest itself of some aspect of its sovereignty, such as the power to declare war, in a treaty or in a nation-to-nation agreement.⁹ Second, Congress may take action to affirmatively divest an Indian tribe of some aspect of its sovereignty. One example of such an action was the decision by Congress in 1968 to limit the criminal penalties that may be imposed by tribal courts to no more than six months and \$500 in fines, later raised to one year and \$5000.¹⁰

In other words, unless there is a divestment of tribal authority, Indian tribes may exercise all the sovereign power of government that they would retain if they were nations within the international sphere. Indian tribes retain the power to determine their form of government, the power to determine their citizenship criteria, the power to tax, the power to exclude, the power to prosecute and punish, sovereign immunity from suit in federal and state courts, and so on. To be sure, much of tribal sovereignty has been divested by virtue of the tribes’ status as “domestic

⁷ Indians may be prosecuted by tribes under federal Indian law *without* the full panoply of criminal procedure rights afforded them under U.S. law. *See e.g.*, 25 U.S.C. § 1302(6) (2008) (providing for a right to counsel, but not for appointment of counsel).

⁸ *See* Felix Cohen, *Handbook of Federal Indian Law* 122 (1942).

⁹ *E.g.*, Treaty of Hopewell with the Cherokees, U.S.-Cherokees, art. III, Nov. 28, 1785, 7 Stat. 18 (“The said Indians for themselves, and their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whosoever.”).

¹⁰ *See* 25 U.S.C. § 1302(7) (2000) (“No Indian tribe in exercising powers of self-government shall . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both”).

dependent nations,”¹¹ but robust inherent sovereignty remains. And there are many gray areas where Indian tribes exercise *de facto* sovereignty, often over non-Indians, in areas such as land use, environmental protection, and employment.

Among the powers retained by Indian tribes is the power to establish tribal courts and to prosecute criminal offenders for acts committed within Indian Country.¹² Indian tribal courts have existed in one form or another since at least as early as the 18th century, when the Cherokee Nation of Georgia created Cherokee tribal courts.¹³ Tribal courts received a huge boost when the Supreme Court held in 1959 that state courts do not have jurisdiction over civil disputes arising on Indian reservations.¹⁴ There are now more than 300 tribal courts in the United States, with more and more tribes developing their court systems each year. The presence of tribal courts in Indian Country has coincided with the resurgence of tribal self-determination beginning in the 1960s and 1970s, when Congress shifted federal Indian policy toward allowing Indian tribes to control federal services formerly delivered by the Bureau of Indian Affairs and Indian Health Service. Congress has been a strong supporter of the development of tribal courts in the last few decades as part of its general support for the development of tribal governments.¹⁵ In 1994, Congress recognized tribal court civil jurisdiction to issue protection orders in cases of domestic violence, dating violence, sexual assault, and stalking.¹⁶

Tribal courts are courts of general jurisdiction and tend to mirror federal and state courts in many ways, although with some important differences. One key difference is that tribal court caseloads are far smaller than those of federal and state courts, which means that the amount of time a tribal prosecution takes – through investigation, indictment, trial or plea bargain, and even counting the jail time – is considerably shorter than the time for prosecutions in federal and state courts. The case of Billy Jo Lara, a nonmember Indian (a person who is a member of a federally recognized tribe different from the tribe asserting jurisdiction), is one typical example. In this case, which reached the Supreme Court, *United States v. Lara*,¹⁷ Lara, a member of the Turtle Mountain Band of Chippewa Indians, was convicted of a crime of violence towards a policeman in the Spirit Lake Sioux tribal court and completed a significant jail term *before* the United States Attorney’s Office in Fargo was able to muster resources to secure a grand jury indictment for assaulting a federal officer.

Indian tribes famously exercised a traditional and customary form of tribal law and order, such as in the case of the on-reservation murder of the Lower Brule Lakota leader Spotted Tail

¹¹ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

¹² “Indian Country” is a term of art that includes Indian reservation lands, trust lands, and some other limited tribal lands. See 18 U.S.C. § 1151 (2000).

¹³ See Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Courts* 20-33 (1975).

¹⁴ See *Williams v. Lee*, 358 U.S. 217 (1959). A later decision, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), foreclosed federal court jurisdiction over Indian Civil Rights Act claims (except habeas claims), further boosting the need for tribal court development.

¹⁵ See Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601-3631 (2000)); Indian Tribal Justice Technical and Legal Assistance Act, Pub. L. No. 106-559, 114 Stat. 2778 (2000) (codified at 25 U.S.C. §§ 3651-3681 (2000)).

¹⁶ See 18 U.S.C. § 2265 (2000). However, one federal court recently rejected the attempt by a tribal court to issue and enforce a personal protection order against a non-Indian. See *Martinez v. Martinez*, No. 08-5503 (W.D. Wash. filed Dec. 18, 2008), available at <http://turtletalk.files.wordpress.com/2008/12/dct-order-rejecting-tribal-court-jurisdiction.pdf>.

¹⁷ 541 U.S. 193 (2004).

by his rival Crow Dog. There, the Lakota community chose not to execute or banish the murderer, which would have robbed the community of two of its best leaders in one fell swoop. Instead, the community chose to require Crow Dog to repay the Spotted Tail family with money, tobacco, blankets, and other sacred materials.¹⁸

But in 1883, in response to what local Indian Agents (federal officials charged with supervising Indian tribes and implementing treaty provisions) and politicians believed was insufficient tribal justice in the *Crow Dog* case, Congress extended federal criminal jurisdiction to cover most felonies in Indian Country. As a result, Congress preempted tribal customary and traditional law.¹⁹ Although the congressional statute, called the Major Crimes Act, was intended to respond to the *Crow Dog* case, it has had far-reaching negative effects throughout Indian Country. In part because of the federal law enforcement presence in Indian Country, tribal justice systems collapsed, encouraging Congress to experiment further with extending state criminal jurisdiction into parts of Indian Country in 1953.²⁰ Meanwhile, the Department of Interior created many early tribal courts and tribal law and order codes as a means of coercing compliance with American religious and cultural preferences. Only in the last few decades have tribal governments been able to resume control over most, if not all, of these courts through the federal self-determination contracting process.²¹

The systematic destruction of tribal justice systems in favor of American-style criminal justice has been nothing short of devastating to tribal communities. Dealing with deviant and criminal behavior is a central aspect of every culture, but for a century or longer Indian tribes have not been able to choose how to define or to deal with criminal behavior within their respective territories. Instead, non-Indians in Congress and in state legislatures, as well as non-Indian federal and state judges, prosecutors, investigators, and juries, decide what happens to criminal perpetrators in Indian Country. Sadly, tribal justice systems, which would be able to respond to Indian Country crime in a culturally appropriate and efficient manner, have been stripped of both authority and effectiveness by federal Indian law and policy.

II. “Implicit Divestiture” and the Resulting Law and Order Loophole

As described above, under foundational principles of federal Indian law, Indian tribes, whose sovereignty predates the United States Constitution, exercise all the powers of a sovereign nation except those that have been divested by treaty, agreement, or Act of Congress.²² This remaining authority is significant, with tribes retaining the plenary and exclusive authority, for example, to decide their form of government, adopt citizenship rules, provide for property and descent rules, and establish judicial systems.

¹⁸ See *Ex parte Crow Dog*, 109 U.S. 556 (1883); B. J. Jones, *Tribal Courts: Protectors of the Native Paradigm of Justice*, 10 ST. THOMAS L. REV. 87, 90-91 (1997).

¹⁹ See *United States v. Kagama*, 118 U.S. 375 (1886); 18 U.S.C. §§ 1152-1153 (2000).

²⁰ See 18 U.S.C. § 1162(a) (2000); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975).

²¹ See JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL SYSTEMS 75-99 (2004); 25 U.S.C. § 450a (allowing tribes to take control over various on-reservation federal services, such as tribal courts).

²² See *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

However, in 1978 the Supreme Court unilaterally altered the playing field by adding an additional means by which Indian tribes may be divested of their sovereignty – by Supreme Court decree, or what the Court calls “implicit divestiture.” In *Oliphant v. Suquamish Indian Tribe*,²³ followed by *Duro v. Reina*,²⁴ the Court held that Indian tribes do not have the authority to criminally prosecute any non-tribal citizens despite the fact that Congress has not taken action to divest Indian tribes of this power, and few, if any, Indian tribes had consented in a treaty or other agreement to the divestment of this power.²⁵ The Court held that the federal judiciary has the authority to divest aspects of Indian tribes’ sovereign authority (such as, for example, the power to prosecute non-Indians) if the court concludes that that aspect of sovereignty is “inconsistent with their status” as domestic dependent nations.²⁶

The Supreme Court created a gaping loophole in law enforcement when it implicitly divested Indian tribes of the power to prosecute non-Indians who commit crimes in Indian Country. Large numbers of people who are not tribal citizens reside or conduct business in Indian Country, or have Indian spouses and intimate partners who reside there. Congress closed a portion of this loophole in 1991 when it reaffirmed tribal authority to prosecute Indians who are members of other tribes.²⁷ But Congress has not acted to fix the loophole preventing Indian tribes from prosecuting non-Indians, largely due to opposition from the Department of Justice and from various state governments who generally oppose tribal government activities.

The Supreme Court’s decisions left two sovereigns in charge of tribal law enforcement in relation to non-Indians: the federal and state governments. In general, the federal government has exclusive jurisdiction over Indian Country crimes, except in several states where Congress instructed state governments to assert criminal jurisdiction over Indian Country.²⁸

As a result, the prosecution of domestic violence and sexual assaults of Indian women falls in large part to federal authorities. But federal law enforcement and prosecution of these crimes against Indian women generally are ineffective for a variety of reasons.²⁹ *First*, federal law enforcement resources are limited, and are “stretched too thin to provide the level of support needed in tribal communities to adequately confront this problem.”³⁰ Federal prosecutors filed

²³ 435 U.S. 191 (1978).

²⁴ 495 U.S. 676 (1990).

²⁵ Criticism of *Oliphant* as racist and wrongheaded has been as intense as that of any case in the Supreme Court’s history, including perhaps *Dred Scott v. Sanford* and *Plessy v. Ferguson*. *E.g.*, ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 97-113 (2005); Ezekiel J.N. Fletcher, *Trapped in the Spring of 1978: The Continuing Impact of the Supreme Court’s Decision in Oliphant, Wheeler, and Martinez*, 55 FED. LAW., March-April 2008, at 36, 37-40.

²⁶ *Oliphant*, 435 U.S. at 208.

²⁷ This is the so-called “Duro fix,” named after the *Duro v. Reina* decision. *See* United States v. Lara, 541 U.S. 193, 199-200 (2004) (construing 25 U.S.C. § 1301(2) (2000)).

²⁸ *See* 18 U.S.C. § 1162 (2000) (requiring California, Minnesota, Alaska, Nebraska, Wisconsin, and Oregon to assert criminal jurisdiction in Indian Country); 25 U.S.C. § 232 (2000) (New York); Act of June 8, 1940, ch. 276, 54 Stat. 249 (Kansas).

²⁹ This is not to blame federal prosecutors, who perform outstanding work when they are able. *See, e.g.*, Matthew L.M. Fletcher, *The U.S. Attorney Mess and Indian Country*, INDIAN COUNTRY TODAY, Mar. 30, 2007 (recognizing the efforts of Hon. Margaret Chiara, the former United States Attorney for the Western District of Michigan).

³⁰ Letter from James S. Richardson, Sr., President, Federal Bar Association, to Senate Indian Affairs Committee 2 (July 2, 2008), available at http://www.fedbar.org/GR_indian-affairs_070208.pdf; *see also* Leslie A. Hagen,

only 606 criminal cases in all of Indian Country in 2006 (about one prosecution per tribe), in total.³¹ The National Congress of American Indians estimates that federal prosecutors decline to prosecute approximately 85% of felony cases referred by tribal prosecutors.³² One tribal observer calls the rate of declinations “appallingly high.”³³

Second, federal prosecutors are hamstrung by federal statutory definitions of federal crimes and by concerns over territorial limitations.³⁴ Because federal prosecutors have to prove (or disprove) several factors, including whether the crime occurred within Indian Country, whether the suspect is Indian or non-Indian, and whether the victim is Indian or non-Indian, in addition to definitional requirements, many crimes are not prosecuted due to lack of sufficient evidence.³⁵

Third, federal prosecutions in Indian Country are often hampered by delay due to lack of resources, the distance of the crime from the local United States Attorney’s Office, and difficulty in securing witness cooperation.³⁶ For federal investigations and trials, unlike with tribal court proceedings, reservation residents must travel long distances at great expense and difficulty, a distance that may be impossible to traverse for many Indian people.³⁷

Similar problems arise with respect to *state* criminal prosecutions. Public Law 280, a 1953 Act of Congress intended to turn over federal criminal jurisdiction in some states to the state governments there, eliminated federal criminal jurisdiction in those states, but did not provide resources to allow or even encourage those states to prosecute Indian Country crimes.³⁸ As such, Public Law 280 states and counties rarely establish an on-reservation police presence, resulting in very long response times after calls for service.³⁹ State courts and services are “often hundreds of miles from the victims’ homes and communities.”⁴⁰ “[S]ince tribal members are often a small percentage of county populations, local police and prosecutors have an incentive to

Prosecuting Non-Indian Perpetrators of Domestic Violence, BEDOHGEIMO: A NEWSL. FROM THE U.S. ATT’Y’S OFF., W. DISTRICT OF MICH., Winter 2004, at 5.

³¹ See N. Bruce Duthu, *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 11, 2008; see also AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA, at 9 (1991) (noting that when federal or state governments have jurisdiction over sexual assault cases in Indian Country, “in a considerable number of instances the authorities decided not to prosecute”).

³² *Law Enforcement in Indian Country*, Hearing before the Indian Affairs Committee of the United States Senate, 110th Cong. 46 (June 21, 2007) (prepared statement of Joe Garcia, President, National Congress of American Indians).

³³ *Examining Federal Declinations to Prosecute Crimes in Indian Country*, Hearing before the Indian Affairs Committee of the United States Senate, 110th Cong. 42 (Sept. 18, 2008) (prepared testimony of M. Brent Leonhard, Deputy Att’y Gen., Confederated Tribes of the Umatilla Indian Reservation).

³⁴ See *id.* at 9, 11 (prepared testimony of Drew H. Wrigley, United States Attorney for the District of North Dakota).

³⁵ *Id.* at 37-39 (prepared testimony of Thomas B. Heffelfinger, former United States Attorney for the District of Minnesota).

³⁶ See *id.*

³⁷ See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 711-12 (2006).

³⁸ Pub. L. 83-280, codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2000). See TRIBAL LAW AND POLICY INSTITUTE, FINAL REPORT: FOCUS GROUP ON PUBLIC LAW 280 AND THE SEXUAL ASSAULT OF NATIVE WOMEN 7 (2007), available at <http://www.tribal-institute.org/download/Final%20280%20FG%20Report.pdf>.

³⁹ See Tribal Law and Policy Institute, *supra* note 39 at 7-8.

⁴⁰ Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 6, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411).

give priority to other parts of their territory.”⁴¹ A recent study concludes that on-reservation residents, Indian and non-Indian alike, are deeply dissatisfied with the law enforcement efforts of Public Law 280 states.⁴²

The mishmash of federal, state, and tribal law enforcement authority and jurisdiction over Indian Country has created understandable confusion and conflict, sometimes termed a “jurisdictional maze,” a phrase coined by Professor and tribal judge Robert N. Clinton.⁴³ However complex this “maze” may be, Indian tribes and their closest neighbors, local county and municipal governments, sometimes with the participation of state governments, began negotiating and crafting cross-deputization agreements and mutual aid and assistance agreements to overcome the jurisdictional lines and to avoid conflicts.⁴⁴ In most instances, these intergovernmental agreements have been very successful and have led to other forms of intergovernmental cooperation.

In addition, some tribal courts have asserted civil authority to make up for the lack of criminal jurisdiction over non-Indians. Some tribal courts have exercised their civil contempt powers, their powers to exclude (or banish) individuals from the reservation, and other civil remedies.⁴⁵ These civil remedies alone are far from perfect, however, and are no substitute for criminal prosecution. Moreover, Supreme Court dicta suggests that one day Indian tribes may be found to be “implicitly divested” of *civil* jurisdiction over non-Indians, just as they were divested of criminal authority in *Oliphant*.⁴⁶ The Court’s majority opinion in *Nevada v. Hicks*, written by Justice Scalia, specifically identifies tribal civil jurisdiction over nonmembers as an open, unsettled, question.⁴⁷ If the Court takes this dramatic next step against tribal jurisdiction, tribal courts would no longer possess any authority whatsoever over non-Indians.

Unfortunately, the Supreme Court has thus far been unmoved by the practical consequences of its federal Indian law jurisprudence. Acting as *amici* in *Oliphant* and later in *Duro v. Reina*, Indian tribes and tribal organizations attempted to explain to the Court what might be the practical import of its limitation on tribal authority. The Court acknowledged those arguments, but left the problem to Congress to resolve. Congress has yet to do so.

III. The Legislative Solution: A Limited Recommendation

⁴¹ TRIBAL LAW AND POLICY INSTITUTE, *supra* note 38, at 8.

⁴² See Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 711 (2006).

⁴³ See Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journal Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976). See also AMNESTY INT’L, *supra* note 31.

⁴⁴ *E.g.*, N.M. STAT. ANN. § 29-1-11 (West 2008) (authorizing tribal law enforcement officers to act as state officers in certain circumstances); Deputization Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and Leelanau County, March 19, 1997, http://www.ncai.org/ncai/resource/agreements/mi_grand_traverse_deputization-3-19-1997.pdf. The National Congress of American Indians collects these kinds of agreements on its website.

⁴⁵ See *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1008 (10th Cir. 2007); *Moore v. Nelson*, 270 F.3d 789, 790-91 (9th Cir. 2001); *State v. Esquivel*, 132 P.3d 751, 754 (Wash. Ct. App. 2006).

⁴⁶ *E.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2709; *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981).

⁴⁷ See *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001) (“We leave open the question of tribal-court jurisdiction over nonmember defendants in general.”).

Congress should enact legislation recognizing tribal court jurisdiction over domestic violence and related misdemeanors committed by non-Indians in Indian Country.⁴⁸ This legislation would recognize the inherent authority of Indian tribes to prosecute all persons, regardless of race and citizenship, for domestic violence crimes as defined by state law, when committed in Indian Country. Congress could condition this recognition of tribal sovereignty on a requirement that tribes maintain certain minimal guarantees of fairness, such as the presence of an independent tribal judiciary, the right to appointed counsel, and the right to jury trial in all cases.⁴⁹ This statute could also require Indian tribes to guarantee other important criminal procedure rights.

These criteria would function as an “opt-in” opportunity for tribes; that is the tribes that choose to comply with the criteria would be subject to the statute’s application. This is similar to the statutes that now authorize Indian tribes to take control over government functions formerly administered by the Bureau of Indian Affairs or the Indian Health Service.⁵⁰

Under the proposed system, tribal prosecutions for domestic violence and related misdemeanors would proceed as do other tribal prosecutions. Tribal prosecutions are conducted under tribal law – tribal constitutions, statutes adopted by tribal legislatures, tribal court precedents, and the Indian Civil Rights Act (ICRA).⁵¹ Tribal law usually involves the application of federal criminal substantive and procedural law, supplemented by state law in some instances, and is not much different than state and federal law. Indian tribes provide fundamental criminal procedure protections, often requiring more stringent protections for defendants than would be required under federal or state law.⁵² Because ICRA sets a limit on tribal penalties of no more than one year in jail and a \$5000 fine, tribal criminal jurisdiction is already limited to misdemeanors.⁵³ And, unlike defendants in many federal or state prosecutions, defendants in tribal prosecutions enjoy jury trials before true peers (rather than an entirely non-Indian jury composed of residents of towns and cities far from the reservation, as is the case in almost all federal prosecutions of Indian Country crime), witnesses do not need to travel to faraway cities to testify, and, since tribal court dockets are lighter than outsider courts, the amount of time needed to conclude a tribal prosecution is dramatically shorter. According to N. Bruce Duthu, a law professor and author of *American Indians and the Law*, an important overview of American Indian Law:⁵⁴

⁴⁸ See Hearing on the Constitutionality of Legislation Restoring Tribal Criminal Jurisdiction over Non-Indians before the Senate Committee on Indian Affairs, 110th Cong. 11 (2007) [hereinafter Kanji] (prepared testimony of Riyaz A. Kanji).

⁴⁹ See D. Michael McBride III, *The FBA’s Indian Law Section: Vetting Important Issues Regarding Indian Country*, 55 FED. LAW., March-April 2008, at 4 (describing the similar Federal Bar Association’s proposal).

⁵⁰ 25 U.S.C. § 450a (2000).

⁵¹ See 25 U.S.C. § 1302 (2000) (Indian Bill of Rights).

⁵² *E.g.*, Navajo Nation v. Rodriguez, 8 Navajo Rptr. 604 (Navajo 2004) (requiring the *Miranda* warnings to be given in both English and in Navajo). See generally CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 201-341 (2004).

⁵³ 25 U.S.C. § 1302(7) (2000).

⁵⁴ N. Bruce Duthu, *American Indians and the Law* (2008).

Even if outside prosecutors had the time and resources to handle crimes on Indian land more efficiently, it would make better sense for tribal governments to have jurisdiction over all reservation-based crimes. Given their familiarity with the community, cultural norms and, in many cases, understanding of distinct tribal languages, tribal governments are in the best position to create appropriate law enforcement and health care responses — and to assure crime victims, especially victims of sexual violence, that a reported crime will be taken seriously and handled expeditiously.⁵⁵

It is important to note the limited nature of the recommendations made here. For now at least, I do not recommend expanding tribal authority to punish offenders for more than one year; expanding tribal authority to prosecute non-Indians where the tribe does not offer a right to counsel for indigent defendants; or expansion of tribal authority in cases of more serious violent crimes in Indian Country, such as sexual assaults. There is too much at stake in this area to gamble on granting much broader authority to Indian tribes without giving those tribes a chance to develop a track record of success in the limited area of domestic violence misdemeanors before moving on to larger issues.

IV. Tribal Jurisdiction over Non-Indians: No Constitutional Impediment

As noted above, the Supreme Court in modern times has not approved of tribal court jurisdiction — either criminal or civil — over non-Indians absent an express Act of Congress. Then-Justice Rehnquist's opinion in *Oliphant v. Suquamish Indian Tribe*,⁵⁶ the decision that brought implicit divestiture to the field, did not explain why tribal jurisdiction over non-Indians was a constitutional concern. The *Oliphant* opinion focused on the history of federal-tribal relations, and held that Congress must have assumed that Indian tribes never had criminal jurisdiction over non-Indians. But Justice Rehnquist's history, which relied upon the legislative history of federal legislation that was never enacted, Interior Solicitor opinions later revoked, and one solitary federal district court case, is too sparse to justify the Court's holding. Since that decision, the Court has focused on the question of individual rights to justify the bright-line rule in *Oliphant*.

In *Plains Commerce Bank v. Long Family Land and Cattle Co.*, the Court's most recent judgment against tribal court authority, decided in 2008, Chief Justice Roberts' opinion rejected tribal court civil jurisdiction over a non-Indian-owned bank that had conducted business on the Cheyenne River Sioux Tribe's reservation. The opinion noted two possible reasons why tribal courts should *never* have jurisdiction over non-Indians.⁵⁷ Neither of these concerns is very persuasive, given the modern realities of tribal law and tribal courts.

First, the opinion cited a 19th century case, *Talton v. Mayes*, which stands for the proposition that the United States Constitution, including the Bill of Rights, does not apply to tribal governments.⁵⁸ *Talton* held that Indian tribes predate the Constitution, they were not

⁵⁵ See Duthu, *supra* note 31.

⁵⁶ 435 U.S. 191 (1978).

⁵⁷ 128 S. Ct. 2709, 2724 (2008).

⁵⁸ 163 U.S. 376, 384 (1896).

invited to the constitutional convention, and therefore they did not consent to the Constitution's application. The majority's opinion signals that the Court is concerned that tribal courts might not conform to American constitutional law.

The most obvious and compelling answer to this concern is the fact that Congress, in the ICRA, extended the federal habeas writ over tribal convictions, allowing federal courts to test tribal convictions according to federal constitutional standards.⁵⁹ Federal courts *do* invoke federal constitutional standards in reviewing tribal court convictions.⁶⁰ Moreover, preliminary empirical research of over 100 published tribal court decisions interpreting and applying the substantive provisions of the ICRA, such as "due process" and "equal protection," reveals that tribal courts appear to follow federal and state constitutional law when the underlying dispute involves a nonmember.⁶¹

Second, the opinion asserted that Indian courts "differ from traditional American courts in a number of significant respects."⁶² Here, the majority cited to Justice Souter's separate opinion in a 2001 decision involving the authority of tribal courts over state police officers, *Nevada v. Hicks*, in which Justice Souter raised a wide variety of practical fairness problems in allowing tribal courts to exercise civil jurisdiction over nonmembers. Justice Souter asserted that tribal law was "unusually difficult for an outsider to sort out."⁶³

However, the law adopted and applied by Indian tribes that might be "unusually difficult" for outsiders is inapplicable in cases involving nonmembers. Tribal customary law, rooted in the tribe's traditions, language, and culture, applies only to subject areas such as domestic relations, tribal probate, and other internal tribal matters that, by definition, do not involve nonmembers.⁶⁴ In the *Plains Commerce Bank* litigation, the United States Solicitor General's Office submitted an *amicus* brief explaining that the "unusually difficult" tribal customary law is never invoked in cases involving nonmembers, and that recent empirical research demonstrates that tribal courts are not unfair to nonmembers:

Petitioner and some of its *amici* suggest that tribal common-law claims may present a trap for unwary nonmembers. ... Tribal courts take different forms and draw from varied traditions, but ... many of them look to federal or state law to govern disputes where no established tribal law applies. Indeed, when the Cheyenne River Sioux Tribal Court of Appeals recognized the principle of

⁵⁹ See 25 U.S.C. § 1303 (2000).

⁶⁰ *E.g.*, *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2nd Cir. 1996); *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005).

⁶¹ See Matthew L.M. Fletcher, *Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data*, (Mich. State Univ. Coll. of Law Legal Studies Research Paper Series No. 06-05, March 6, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103474.

⁶² *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2724 (quoting *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring)).

⁶³ *Hicks*, 533 U.S. at 385 (Souter, J., concurring).

⁶⁴ See, e.g., JUSTIN B. RICHLAND, *ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPi TRIBAL COURT* (2008) (describing litigation in Hopi Tribal Court that is conducted in the Hopi language and which does not, and cannot, involve nonmembers as parties).

judicial review, it relied not only on Lakota tradition but also on this Court's opinion in *Marbury v. Madison*.⁶⁵

Justice Souter, along with three other Justices, voted to affirm tribal court jurisdiction over the nonmembers in that case, suggesting that their earlier fears, expressed in *Hicks*, have been sufficiently alleviated.

Finally, the opt-in aspect of the proposal here would require tribes to address other constitutional concerns, such as the fact that ICRA does not require Indian tribes to provide paid counsel to indigent defendants.⁶⁶

A separate area of constitutional concern is the question of whether Congress has authority to subject American citizens to tribal court jurisdiction. The Court's 2004 decision in *United States v. Lara* put to rest the question, as it strongly affirmed Congress's authority to alter the metes and bounds of tribal sovereignty.⁶⁷

V. Conclusion

Violence against women in Indian Country is an epidemic. Yet the Supreme Court has tied the hands of Indian tribes to enforce criminal laws against non-Indians, who often are the perpetrators. Moreover, in many parts of the country, federal and state prosecutors often are not able to act. While it has sufficient constitutional authority to reverse the Court's decision, Congress has not acted to solve this problem. As a result, non-Indian perpetrators are all but immune from prosecution.

Congress should recognize inherent tribal criminal jurisdiction over non-Indians who commit domestic violence and related misdemeanors against Indian victims, so long as Indian tribes meet certain minimum criteria, such as offering counsel for indigent defendants. Tribes that demonstrate success can take that success back to Congress and ask for more authority.

There is no real threat to the civil rights of non-Indians subjected to tribal jurisdiction. Congress long ago extended federal habeas jurisdiction over tribal convictions, guaranteeing that a non-Indian's tribal conviction will still have to pass federal constitutional muster. There is no significant reason not to act to recognize tribal criminal jurisdiction in this manner.

Each day, an Indian woman is victimized by a person who likely will never be prosecuted. It is time to act.

⁶⁵ Brief for the United States as Amicus Curiae Supporting Respondents at 27-28, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411) (ellipses added) (citing *Clemente v. LeCompte*, 22 Indian L. Rep. 6111 (Cheyenne River Sioux Tribe Ct. App. 1994)); Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 734-45, 739 (2006); Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L. J. 1047, 1085 (2005)).

⁶⁶ See *United States v. Lara*, 541 U.S. 193, 208-10 (2004).

⁶⁷ See *Lara*, 541 U.S. at 202; Kanji, *supra* note 48.