Using Consent to Expand Tribal Court Criminal Jurisdiction

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In June of 2022, the Supreme Court reversed two hundred years of precedent in Oklahoma v. Castro-Huerta*, holding in a 5-4 opinion that states have concurrent criminal jurisdiction over crimes committed by non-Indians against Indians in Indian country. In conducting the preemption analysis, Justice Kavanaugh's majority opinion reasoned that while states have a strong interest in prosecuting crimes in Indian country in order to keep the community safe, tribes had functionally no interest because they generally lack criminal jurisdiction over non-Indians. The Court then reasoned that the lack of a tribal interest could not preempt the state interest. This Article suggests that, despite the general prohibition on tribes asserting criminal jurisdiction over non-Indians that was discovered by the Supreme Court in its 1978* Oliphant *opinion, tribes can assert criminal jurisdiction over non-Indians who consent to the jurisdiction in tribal court. The argument extends to both affirmative and implied consent and draws its authority from both pre-*Oliphant *scholarship and precedent, as well as from recent developments by the Court, Congress, and dicta from the Ninth Circuit. If tribes are able to regularly assert some criminal jurisdiction over non-Indians, then when lower courts apply* Castro-Huerta *in the future, there will be a strong tribal interest to preempt state criminal jurisdiction in Indian country.*

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INTRODUCTION

As Professor Allison Dussias has adroitly noted: "everywhere [one] has been, one consents to criminal jurisdiction by presence in the jurisdiction, and anyone who does not know this should stay home."[1] When a non-Indian enters tribal lands, they should be deemed to have impliedly consented to be bound by the tribe's criminal code. If non-Indians commit a crime in violation of tribal law

1. Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 87 (1993) (quotation altered to avoid the use of gendered language).

while on tribal land, they should be subject to tribal court criminal jurisdiction on the basis of implied consent.

Discussions of the subject matter jurisdiction of state courts in criminal matters are exceedingly rare because it is presumed that states have jurisdiction to enforce their criminal laws within their territory.[2] There are sporadic cases where a state attempts to enforce its criminal laws outside its territory,[3] or where a state prosecutor brings criminal charges against a defendant for a crime that is not sanctioned under the laws of the state.[4] Only in these limited circumstances do courts talk about the scope of a state's criminal subject matter jurisdiction.

The one notable exception to this otherwise limited discussion is when a state attempts to assert criminal jurisdiction over a crime that occurs in Indian[5] country. The first challenge to a state's criminal jurisdiction over crimes occurring on tribal land reached the Supreme Court in 1832.[6] The Supreme Court is far from resolving the matter of a state's criminal subject matter jurisdiction. This has recently resulted in a pair of 5-4 opinions that bring state criminal subject matter jurisdiction to the forefront of federal Indian law.[7]

In 2020, the Court recognized that Indian country had always included large portions of Oklahoma, explaining that "[o]n the far end of the Trail of Tears was a promise"[8] and that "[t]oday we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word."[9] *McGirt* ultimately denied the State of Oklahoma criminal jurisdiction to

2. Jordan Gross, *Through a Federal Habeas Corpus Glass, Darkly—Who is Entitled to Effective Assistance of Counsel in Tribal Court Under ICRA and How Will We Know if They Got It*, 42 AM. INDIAN L. REV. 1, 35 (2017) ("[S]tates have criminal jurisdiction over anyone who violates state law within their geographic boundaries.").

3. Terrence Berg, *www.wildwest.gov: The Impact of the Internet on State Power to Enforce the Law*, 2000 B.Y.U. L. REV. 1305, 1341 & n.148 (2000) (discussing the limited criminal jurisdiction of a state asserting its power over an out-of-state defendant for a crime committed over the internet with in-state effects).

4. State v. Lasecki, 946 N.W.2d 137, 143 (Wis. 2020) ("A court lacks such subject matter jurisdiction, however, when the State charges an individual with a nonexistent crime.").

5. The word "Indian" is a legal term of art and is regularly used in the law and by lawyers to describe many of America's Indigenous people. The term is used to codify the definition of "Indian country" at 18 U.S.C. § 1151 and is used to determine which tribes share in a government-to-government relationship through the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (1994). But for a discussion of how the term "Indian" is more problematic in an international context, see H.P. GLENN, LEGAL TRADITIONS OF THE WORLD 60 n.1 (5th ed. 2014).

6. *See generally* Worcester v. Georgia, 31 U.S. 515 (1832) (holding that the State of Georgia lacked criminal jurisdiction over a crime committed by a non-Indian on lands reserved by treaty for the Cherokee Nation).

7. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (2022).

8. *McGirt*, 140 S. Ct. at 2459.

9. *Id.*

prosecute an Indian man accused of committing his crimes on an Indian reservation.[10]

In June 2022, the Court disrupted two centuries of precedent[11] and held that despite *McGirt*, Oklahoma could prosecute a non-Indian who committed a crime against an Indian on an Indian reservation.[12] Justifying the majority opinion, Justice Kavanaugh explained that while state action in Indian country could be preempted "if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government,"[13] when a state prosecutes a non-Indian for a crime against an Indian victim, the prosecution "does not involve the exercise of state power over any Indian or over any tribe. The only parties to the criminal case are the State and the non-Indian defendant."[14] Without a tribal interest, the majority concluded that there was no justification for denying Oklahoma subject matter jurisdiction to prosecute the non-Indian offender, despite the fact that the victim was an Indian and the crime occurred on an Indian reservation.

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10. *Id*. at 2480 ("In any event, the magnitude of a legal wrong is no reason to perpetuate it. When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise.").

11. The prohibition against a state criminally prosecuting a non-Indian for a crime involving Indians in Indian country was first firmly established in *Worcester v. Georgia*, 31 U.S. 515, 562–63 (1832). In *Worcester*, the Supreme Court held that Georgia could not extend its criminal jurisdiction over a pair of non-Indian missionaries accused of violating a Georgia law requiring a state license to reside within the Cherokee Nation. For an excellent academic discussion of this principle, see Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549, 576–86 (2022). Justice Gorsuch, dissenting in the case, explained the majorities abandonment of precedent:

> In 1831, Georgia arrested Samuel Worcester, a white missionary, for preaching to the Cherokee on tribal lands without a license . . . Speaking for this Court, Chief Justice Marshall refused to endorse Georgia's ploy because the State enjoyed no lawful right to govern the territory of a separate sovereign . . . Worcester proved that, even in the "[c]ourts of the conqueror," the rule of law meant something.
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> Where this Court once stood firm, today it wilts. After the Cherokee's exile to what became Oklahoma, the federal government promised the Tribe that it would remain forever free from interference by state authorities. Only the Tribe or the federal government could punish crimes by or against tribal members on tribal lands. At various points in its history, Oklahoma has chafed at this limitation. Now, the State seeks to claim for itself the power to try crimes by non-Indians against tribal members within the Cherokee Reservation. Where our predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's. Respectfully, I dissent.

Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting).

The choice to include the longer quote here in the footnote was deliberate. Justice Gorsuch has been praised not only for his understanding of the doctrine of Indian law, but also for his rhetoric in Indian law cases. *See* Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 1000–03 (2022).

12. *Castro-Huerta*, 142 S. Ct. at 2491 ("We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.").

13. *Id*. at 2501.

14. *Id*.

The Kavanaugh majority bolstered its justification that no tribal interest was involved in *Castro-Huerta* because, "with exceptions not invoked here, Indian tribes lack criminal jurisdiction to prosecute crimes committed by non-Indians such as Castro-Huerta, even when non-Indians commit crimes against Indians in Indian country."[15] To support that proposition, the Court cited its 1978 opinion in *Oliphant v. Suquamish Indian Tribe*, which held that a tribe's inherent criminal jurisdiction over non-Indians had never been explicitly removed by Congress, but had been implicitly divested.[16]

Under the analysis provided by *Castro-Huerta*, the Court gives no weight to the tribal interest in the safety of its reservation when the tribe does not or cannot assert jurisdiction over non-Indians. In the absence of a judicial or congressional reversal of *Oliphant*, this Article argues that Indian tribes wishing to maximize the exercise of their inherent criminal powers should create tribal legal structures that encourage non-Indian persons to consent to tribal court criminal authority. While consent will not solve all of the problems created by *Oliphant*, it would be considerably harder for the five-member *Castro-Huerta* majority to suggest that tribes have no interest in the criminal prosecution of non-Indians if non-Indian defendants regularly consented to criminal prosecution in tribal court.

To build upon this proposition, Part I of this Article discusses the basic criminal jurisdictional rules for tribal courts. It looks first at the judicially imposed limitations from *Oliphant* and its progeny, and then explores the recent congressional developments that have recognized a broader scope of inherent tribal authority. This analysis shows that the clear direction of both judicial precedent and congressional intent is toward a more expansive understanding of the inherent criminal power of Indian tribes. Part II builds upon these inherent tribal powers by exploring a tribe's right to exclude even non-Indians from tribal lands, and how this right to exclude has had important cross-applications into the inherent criminal powers of tribal courts and law enforcement. If tribes have the right to exclude non-Indians from reservation borders, then they have an important bargaining chip with which to encourage non-Indians to ultimately consent to tribal court criminal jurisdiction: consent or face expulsion from tribal lands.

The Article then expounds upon its primary thesis, that even when tribal courts lack inherent criminal jurisdiction over non-Indians they can nonetheless assert that authority on the basis of consent. Part III uses Ninth Circuit dicta to suggest that not only does *Oliphant* not bar the assumption of criminal jurisdiction on the basis of consent, but also that non-Indians can affirmatively give informed consent for the assertion of criminal jurisdiction over them by tribal courts. Part IV builds on the argument by exploring the possibility of

15. *Id.*

16. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.").

resuscitating implied consent as the basis of tribal court criminal jurisdiction, using Supreme Court precedent from civil cases that developed post-*Oliphant*. It argues that non-Indians who not only enter the reservation, but who also enter land owned by or held in trust for the tribe, have impliedly consented to the criminal jurisdiction of the tribal sovereign by virtue of their presence. Finally, the Article makes some brief concluding remarks and contextualizes how a robust consent regime would undermine the logic of *Castro-Huerta*'s deference to state criminal power in Indian country.

I.
THE CRIMINAL JURISDICTION OF TRIBAL COURTS

Indigenous peoples have always had rules, norms, and customs that form the basis of an autochthonous legal tradition.[17] The practice of this law takes many forms, from peacemaking[18] to banishment.[19] Former Navajo Chief Justice Robert Yazzie describes Navajo justice from within a chthonic tradition as "the

17. GLENN, *supra* note 5, at 60–94; *see* Grant Christensen, *Indigenous Perspectives on Corporate Governance*, 23 U. PA. J. BUS. L. 902, 919–20 (2021) ("Glenn suggests that Indigenous legal thought belongs not to the common law or civil law, but to its own inherent legal tradition. In English the Indigenous legal tradition has come to be called 'chthonic' or 'autochthonous' from the Greek 'chthon' meaning earth because the origin of the law has developed from the people where they have always lived. Glenn describes autochthonous law as the original legal tradition; '[s]ince all people of the earth are descended from people who were chthonic, all other traditions have emerged in contrast to chthonic tradition.' Autochthonous law finds its origins in tradition, custom, practice, and teaching. It has been preserved and passed down orally through generations and has manifested itself through stories and ceremonies.").

18. *See* Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenizes Tribal Child Welfare*, 11 COLUM. J. RACE & L. 681, 684–85 (2021) ("Moreover, continued utilization of adversarial and individual-centric principles in family matters tends to harm children more than help them, and this is true in both Indigenous and non-Indigenous settings . . . These harms could be avoided, and child welfare outcomes actually supported and enhanced, if tradition-based systems of dispute resolution--frequently called 'peacemaking,' among other names, but which we will call "circle processes"--were employed in the child welfare context."); Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 240 (1997) ("For the Haudenosaunee, peace was not simply the absence of war, it 'was the law' and an affirmative government objective. So dominant was this philosophy that its pursuit affected the entire range of international, domestic, clan, and interpersonal relationships of the Haudenosaunee."); Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1006 (1997) (citing *Reno Speaks at Indian Crime Forum*, SAN DIEGO UNION-TRIB., Jan. 25, 1997, at B2) ("The tribal system heals rather than determining guilt. Community-based peacemaking, according to tribal tradition, seeks to resolve problems instead of processing cases in lengthy adversarial proceedings.").

19. *See* Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems: A Postscript on Quair v. Sisco*, 37 N.M. L. REV. 479, 486 (2007) ("Banishment as Cultural Justice remains a conceptually useful framework for the review and resolution of such multifaceted tribal disputes, as well as for tribes to assess their own practices. This construct recognizes the cultural value of traditional tribal systems as well as the value of their customary commitment to 'fair and honest' dealings."); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1103 (2007) ("In some cases, banishment is employed in its traditional sense, as a means of healing and conciliation; in others, it is a reaction to the modern realities of tribal jurisdiction and reservation life.").

product of the experience of the Navajo People."[20] The origins of chthonic law are also different from the Anglo-European tradition. Yazzie writes: "Navajos say that 'life comes from beehaz'aanii,' because it is the essence of life. The precepts of beehaz'aanii [law] are stated in prayers and ceremonies which tell us of hozho—'the perfect state.' Through these prayers and ceremonies we are taught what ought to be and what ought not to be."[21]

With different origins, it follows that the structure of the bodies that exercise judicial power within Indigenous communities may also vary considerably from the Western tradition. In 1883, the Supreme Court held that there was no subject matter jurisdiction for a federal court to hear a criminal case brought by a federal prosecutor against Crow Dog for the murder of Sin-ta-ge-le-Scka (Spotted Tail).[22] Instead, the Brule Sioux settled the matter internally. The families agreed to a payment of $600, eight horses, and a blanket.[23]

During roughly the same period, the Cherokee were operating a tribal court whose structure broadly mirrored that of federal or state courts in the United States. In 1896, the U.S. Supreme Court held that the Cherokee Tribal Court could try a Cherokee man for the murder of another Cherokee person that occurred on Cherokee lands using a grand jury of five persons, even though the U.S. Constitution would have required more.[24] The Court reasoned that when Indian tribes exercise judicial powers to enforce their own criminal codes, they are exercising powers not delegated from the United States but rather their own

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20. Hon. Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 175 (1994).

21. *Id.*

22. *Ex parte* Crow Dog, 109 U.S. 556, 572 (1883) ("The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized state or territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals.") (citing United States v. Joseph, 94 U.S. 614, 617 (1876)).

23. Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 796 n.131 (2001). *Crow Dog* is just one example of how Indigenous justice systems differ in their criminal procedures and penalties from western ones. The rise of peacemaking courts focused on restorative justice led by Indigenous leaders (instead of only law-trained judges) with the encouraged participation of the entire community (instead of just the interested parties and a limited jury) give Indigenous justice systems a very different approach from western courts. For some excellent discussion of these differences, see Porter, *supra* note 18, at 274–96; Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1094–100 (2007) (discussing how Peacemaking is at odds with a western approach to criminal justice but accomplishes the societal goals embodied in Indigenous culture).

24. Talton v. Mayes, 163 U.S. 376, 381–82 (1896) ("The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee Nation is, therefore, clearly not an offence against the United States, but an offence against the local laws of the Cherokee Nation. Necessarily, the statutes of the United States which provide for an indictment by a grand jury, and the number of persons who shall constitute such a body, have no application, for such statutes relate only, if not otherwise specially provided, to grand juries impaneled for the courts of and under the laws of the United States.").

inherent powers as sovereigns.[25] These sovereign powers are located outside the limits of the U.S. Constitution, and so while tribes are welcome to adopt rules consistent with the Constitution, they are not required to do so.[26] Thus, tribal courts or tribunals reflected and embodied the culture and laws each served.

Until *Oliphant*, despite the varied structures of tribal justice, many Indian tribes asserted criminal jurisdiction over all persons within their borders using various tribal justice structures based on their "retained national sovereignty."[27] Even more tribes asserted criminal jurisdiction over persons who were non-Indian by birth, but who were subsequently adopted into the tribe.[28]

For decades, *Oliphant v. Suquamish Indian Tribe*,[29] decided by the Supreme Court in 1978, limited the authority of tribal courts to assert their general criminal jurisdiction over non-Indian persons. Only recently are the Court and Congress beginning to recognize the scope of a tribe's inherent powers in the wake of *Oliphant*. The rest of this Section focuses first on the judicially-imposed limitations of tribal court criminal jurisdiction, and next on the process of re-recognizing and restoring the inherent criminal power of Indian tribes over non-Indian persons. As these two subsections make clear, the restoration-through-recognition process has so far been a limited one, leaving Indian tribes bereft of their full sovereign powers.

A. Judicially Imposed Limitations on Tribal Court Criminal Jurisdiction: Limitations and Reprieves

Mark David Oliphant and Daniel B. Belgarde are both non-Indians who visited the Suquamish Indian Reservation during the Tribe's Chief Seattle Days celebration.[30] While on the Reservation, Oliphant got into an altercation with tribal law enforcement and was criminally charged with assaulting a tribal officer

25. *Id.* at 384 ("It follows that, as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment.").

26. *Id.*

27. 435 U.S. 191, 196 (1978) ("The Suquamish Indian Tribe does not stand alone today in its assumption of criminal jurisdiction over non-Indians. Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians. Twelve other Indian tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians. Like the Suquamish these tribes claim authority to try non-Indians not on the basis of congressional statute or treaty provision but by reason of their retained national sovereignty.").

28. *In re* Mayfield, 141 U.S. 107, 115 (1891) (Congress adopted the Act of May 2, 1890, 26 Stat. 81, which permitted the many Indian tribes in Oklahoma to retain criminal and civil jurisdiction over persons made members of the tribe by adoption: "That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties.").

29. *See* 435 U.S. 191, 211–12 (1978).

30. *Id.* at 194. For an academic discussion of *Oliphant*, see Adam Crepelle, *Shooting Down* Oliphant*: Self-Defense as an Answer to Crime in Indian Country*, 22 LEWIS & CLARK L. REV. 1283 (2018); Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993).

and resisting arrest.[31] Belgarde engaged in a high speed chase on the Reservation, which only ended when he collided with a tribal police vehicle.[32] He was arrested by tribal police and charged under the Tribal Code with 'recklessly endangering another person' and injuring tribal property.[33] Both Oliphant and Belgarde sought the assistance of the U.S. District Court for the Western District of Washington, filing for writs of habeas corpus on the basis that the Suquamish Tribal Court lacked criminal jurisdiction over them because they were non-Indians.[34]

Justice Rehnquist wrote the *Oliphant* opinion for a 6-2 majority. The opinion held that tribal courts lack criminal jurisdiction over non-Indian persons, not because any treaty or statute enacted by Congress has taken away the power,[35] but because the exercise of criminal jurisdiction over non-Indians has been impliedly divested by virtue of their incorporation into the United States.[36]

Oliphant has done untold and unrecounted harm to tribal sovereignty and to law enforcement in Indian country.[37] Indian law scholars repeatedly call for an *Oliphant*-fix: either a judicial reversal or a Congressional response.[38] Unfortunately for tribal sovereignty, *Oliphant* remains good law.[39]

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31. *Oliphant*, 435 U.S. at 194.

32. *Id.*

33. *Id.*

34. *Id*. at 195–96.

35. *Id*. at 204 ("Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians.").

36. *Id.* at 210 ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.' H.R. REP. NO. 474, 23d Cong., at 18 (1st Sess. 1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.").

37. For a discussion of the harm caused by *Oliphant*, see NAT'L CONG. of AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 3–4 (2018), https://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/5GUR-HMQ8] (90 percent of female and 85 percent of male victims of intimate partner physical violence report being attacked by a non-Native perpetrator).

38. M. Brent Leonhard, *Closing a Gap in Indian Country Justice:* Oliphant, Lara*, and DOJ's Proposed Fix*, 28 HARV. J. RACIAL & ETHNIC JUST. 117, 120–24 (2012); N. Bruce Duthu, Crow Dog *and* Oliphant *Fistfight at the Tribal Casino: Political Power, Storytelling, and Games of Chance*, 29 ARIZ. ST. L.J. 171, 176 (1997); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 177–79 (2006); Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 589–604 (2009); Marie Quasius, *Native American Rape Victims: Desperately Seeking an* Oliphant-*Fix*, 93 MINN. L. REV. 1902, 1935–40 (2009); Robert Laurence, Martinez, Oliphant *and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411, 415–27 (1988); Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 720–26 (2013).

39. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2501 (2022) (citing *Oliphant*, 435 U.S. at 195) (approving of *Oliphant* as controlling law and stating "[t]hat is because, with exceptions not invoked here, Indian tribes lack criminal jurisdiction to prosecute crimes committed by non-Indians such as Castro-Huerta, even when non-Indians commit crimes against Indians in Indian country").

After *Oliphant*, the Court continued to erode the inherent criminal power of Indian tribes. In 1984, Albert Duro, an enrolled member of the Torres-Martinez Band of Cahuilla Mission Indians, shot and killed a minor who was an enrolled member of the Gila River Indian Tribe of Arizona, while on the Salt River Pima-Maricopa Indian Community.[40] Duro was charged by the Salt River tribal prosecutor with illegally firing a weapon on the reservation in the Pima-Maricopa Indian Community Court.[41] Duro contested the tribal court's jurisdiction over him, arguing that *Oliphant* should be expanded to prevent tribal courts from asserting their inherent authority over non-member Indians who commit crimes in Indian country.[42]

Writing for a 7-2 majority, Justice Kennedy agreed that the inherent criminal power of Indian tribes did not extend over non-member Indians: "[w]e hold that the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership."[43] The Court explained that because Duro was not a member of the Salt River Pima-Maricopa Indian Community, he had the same status as a non-Indian; he could not serve on a tribal jury, hold elected office, or vote in a tribal election for persons who would draft the criminal code.[44] Kennedy ultimately reasoned that because non-members and non-Indians lack political rights in tribal affairs, the same inherent limitation of tribal sovereign authority applies to them and so Indian tribes cannot assert their criminal jurisdiction over non-members.[45]

The *Duro* opinion was such an intrusion on tribal sovereignty, and so disruptive to law enforcement in Indian country, that it took barely six months

40. Duro v. Reina, 495 U.S. 676, 679 (1990).

41. *Id.* at 681–82. Some readers might question why Duro wasn't charged with murder, or at least an offense more serious than the illegal discharge of a firearm. In 1984 the tribal court could impose no more than six months in jail and/or a $500 fine for a violation of the Tribal Code because of restrictions in the sentencing power of tribal courts contained in the Indian Civil Rights Act. The Act has since been amended to provide tribal courts with felony jurisdiction. *See* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1616 (2016) (explaining that in 2010 the Tribal Law and Order Act (TLOA) expanded the maximum sentence tribes could impose to three years per offense and nine years per event and that "[u]ndoubtedly, where TLOA felony sentencing is utilized, it can make a significant difference in the sentence of the defendant and, quite possibly, in the lives of victims or potential victims, particularly if the defendant is a repeat offender").

42. *Id.* at 682. The District Court accepted Duro's argument, explaining that "[u]nder this Court's holding in *Oliphant v. Suquamish Indian Tribe*, tribal courts have no criminal jurisdiction over non-Indians. The District Court reasoned that, in light of this limitation, to subject a nonmember Indian to tribal jurisdiction where non-Indians are exempt would constitute discrimination based on race."

43. *Id.* at 679.

44. *Id.* at 688 ("In the area of criminal enforcement, however, tribal power does not extend beyond internal relations among members. Petitioner is not a member of the Pima-Maricopa Tribe, and is not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority. For purposes of criminal jurisdiction, petitioner's relations with this Tribe are the same as the non-Indian's in *Oliphant*. We hold that the Tribe's powers over him are subject to the same limitations.").

45. *Id.*

for Congress to statutorily intervene. The *Duro* opinion was issued by the Supreme Court on May 29, 1990, and on November 5, 1990, President H. W. Bush signed a congressional reversal of the opinion.[46] Affectionately known as the *Duro*-fix, the law changed a portion of the Indian Civil Rights Act (ICRA) to define "the powers of self-government" exercised by Indian tribes to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[47] As Professor Philip Frickey explained: "Congress intended the *Duro* fix to allow inherent tribal authority to operate anew."[48]

Whether the *Duro*-fix could restore the inherent power of Indian tribes remained an open question until 2004. In 1998, an Eighth Circuit panel suggested that the *Duro*-fix was a delegation by Congress of the power to criminally prosecute non-member Indians, and so was not really the restoration of a tribe's inherent power.[49] Writing in 1999, Professor Frickey argued that the Eighth Circuit panel had fundamentally misunderstood both *Duro* and the nature of the federal common law.[50] Frickey explained that before European colonialism, tribes exercised a general "police power" over all persons within their territory.[51] *Duro* was an articulation of the federal common law that preempted the tribal exercise of that police power, and the *Duro*-fix was Congress exercising its constitutional right to say what the law is, in order to clarify that the federal common law does not bar an Indian tribe from exercising its general police powers.[52]

The Supreme Court ultimately agreed with Professor Frickey in *United States v. Lara* and held that Congress could recognize an inherent tribal power

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46. The change was included in the Defense Appropriation Act of 1991, 104 Stat. 1856, 101 P.L. 511 (Nov. 5, 1990). For a well-researched student note on the *Duro*-fix, see Will Trachman, *Tribal Criminal Jurisdiction After* U.S. v. Lara*: Answering Constitutional Challenges to the* Duro *Fix*, 93 CALIF. L. REV. 847 (2005). For an excellent academic discussion of Congress' decision to overturn the Supreme Court, see Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993).

47. 25 U.S.C. § 1301(2); *see also* Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 774 (2014) ("In 1990, Congress enacted what is called 'the *Duro* fix,' amending the Indian Civil Rights Act to define tribal 'powers of self-government' to include criminal jurisdiction over 'all Indians.'").

48. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 468 (2005).

49. United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998), *rev'd by an equally divided en banc panel*, 165 F.3d 1209 (8th Cir. 1999).

50. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 67–68 n.322 (1999) ("This is the way that we understand federal preemption of the local police power. It should also be the way that we evaluate the *Duro* fix. Before European discovery of this continent, tribes had the local police power. The federal common-law decision in *Duro* preempted that police power over nonmember Indians; the *Duro* fix simply lifted the federal common-law preemption from the tribe's police power. The prosecution of nonmember Indians is now, and always has been, an exercise of inherent tribal authority—it was just that, for a time, this authority was preempted by federal common law.").

51. *Id.*

52. *Id.*

without turning it into a delegated power.[53] Billy Jo Lara was an enrolled member of the Turtle Mountain Band of Chippewa who lived with his wife and children on the Spirit Lake Reservation in North Dakota.[54] After several incidents of serious misconduct, the Spirit Lake Tribe issued an order excluding Lara from the Reservation.[55] Lara refused to leave peaceably, and he struck an officer during his forced removal.[56] Unfortunately for Lara, the officer worked for both the Tribe and for the Bureau of Indian Affairs and both sovereigns wanted to prosecute.[57] Lara was first prosecuted in the Spirit Lake Tribal Court for committing violence to a policeman, pled guilty, and served 90 days in jail.[58]

After the tribal court conviction, the United States filed criminal charges against Lara in the U.S. District Court for the District of North Dakota for the federal crime of assaulting a federal officer.[59] Lara argued that the tribal crime of violence to a policeman is a lesser included offense of the federal crime, and so the federal prosecution violated his Fifth Amendment rights under the Double Jeopardy Clause.[60] In response, the federal government relied upon the dual sovereignty doctrine, reasoning that because the two prosecutions were made by separate sovereigns, there could be no violation of Lara's constitutional rights.[61] Lara countered by relying upon *Duro*. He argued that tribes lacked the inherent criminal jurisdiction over non-member Indians, and so when Congress enacted the *Duro*-fix, it delegated to tribes the authority to criminally prosecute persons like him.[62] Essentially, Lara suggested that because the Spirit Lake Tribe exercised a delegated federal power when it prosecuted him in tribal court, the United States could not use a federal power a second time to prosecute him in federal court.[63]

The Court upheld his federal conviction. Justice Breyer, writing for the majority, agreed with the United States and held that the dual sovereignty doctrine applied to permit both the tribal and the federal prosecutions.[64] The Court reasoned that "Congress has the power to relax the restrictions imposed by

53. United States v. Lara, 541 U.S. 193, 210 (2004) ("[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians. We hold that Congress exercised that authority in writing this statute.").

54. *Id*. at 196.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. United States v. Lara, 541 U.S. 193, 197 (2004).

60. *Id.* ("Key elements of this federal crime mirror elements of the tribal crime of 'violence to a policeman.' And this similarity between the two crimes would *ordinarily* have brought Lara within the protective reach of the Double Jeopardy Clause.").

61. *Id.* ("But the Government, responding to Lara's claim of double jeopardy, pointed out that the Double Jeopardy Clause does not bar successive prosecutions brought by *separate sovereigns*, and it argued that this 'dual sovereignty' doctrine determined the outcome here.").

62. *Id*. at 198.

63. *Id.*

64. *Id*. at 210.

the political branches on the tribes' inherent prosecutorial authority" which "is consistent with our earlier cases,"[65] and that prior cases like *Duro* only reflected the Court's understanding of a tribe's inherent criminal powers "at the time the Court issued its decisions."[66] Because it was clear that Congress intended the *Duro*-fix to recognize the inherent power of tribes, instead of delegating federal power to them, Spirit Lake was not exercising a delegated federal power when it prosecuted Lara. Therefore, no double jeopardy violation occurred when the federal government subsequently sought to prosecute Lara for a violation of federal law.[67]

Lara was an important turning point for judicial construction of the inherent criminal power of tribes. While the Supreme Court has not returned to the question of the inherent criminal jurisdiction of tribal courts, it has twice tangentially recognized expanded inherent criminal powers: first for tribal officers and then for tribal governments.

In *United States v. Cooley*,[68] the Court held that the inherent powers of tribal law enforcement include the power to stop, with probable cause, anyone suspected of committing a crime on the reservation. Tribal police also retain the power to detain and search non-Indian persons until state or federal law enforcement arrive to make an arrest because a tribe's inherent authority includes the power to respond to conduct that threatens or has some direct effect on the tribe.[69] Because a non-Indian in possession of firearms, drugs, and drug paraphernalia is suspected of committing a crime that would have a direct effect on the reservation, the officer's need to detain the non-Indian meets the legal standard "almost like a glove."[70] It is clear that tribal police have the power to stop and detain non-Indians even if the tribal court could not have criminally prosecuted them.[71]

In 2022, the Supreme Court further recognized and reaffirmed the inherent right of tribes to make their own laws and be governed by them. In *Denezpi v.*

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65. *Id.* at 205.

66. *Id.* at 206.

67. *Id.* at 199. Justice Breyer discussed Congress's intent, concluding that the purpose of the *Duro*-fix was explicitly not to delegate to Indian tribes a new power but to recognize one they have always possessed. "[T]he statute's legislative history confirms that such was Congress' intent." *Id.* (citing H.R. REP. NO. 102-261, at 3–4 (1991) (Conf. Rep.) ("The Committee of the Conference notes that . . . this legislation is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations.").

68. United States v. Cooley, 141 S. Ct. 1638 (2021).

69. *Id.* at 1643 (citing Montana v. United States, 450 U.S. 544, 566 (1981) ("[W]e said that a 'tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation *when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe*.'")).

70. *Id.*

71. *Id.* at 1646 ("In short, we see nothing in these provisions that shows that Congress sought to deny tribes the authority at issue, authority that rests upon a tribe's retention of sovereignty as interpreted by *Montana*, and in particular its second exception. To the contrary, in our view, existing legislation and executive action appear to operate on the assumption that tribes have retained this authority.").

United States,[72] the Court held that when the United States prosecutes an Indian in a federally operated Court of Indian Offenses[73] for a violation of tribal law, and then prosecutes the same person in a federal court for a violation of federal law, there is no violation of the Double Jeopardy Clause because the sources of criminal law are independent: "Denezpi's single act led to separate prosecutions for violations of a tribal ordinance and a federal statute. Because the Tribe and the Federal Government are distinct sovereigns, those 'offence[s]' are not 'the same.' Denezpi's second prosecution therefore did not offend the Double Jeopardy Clause."[74]

The Court took its cues from Congress and the *Duro*-fix in 2004 when it decided *Lara*. Since then, it has not decided a case squarely involving the criminal jurisdiction of tribal courts. However, the Court has twice nodded with approval at the greater assumption of inherent criminal police powers by tribal sovereigns. This tacit approval may in part stem from the work of Congress, which, since the *Duro*-fix, has regularly given its approval for the assumption of greater criminal authority by Indian tribal sovereigns over non-Indian offenders.

B. Congressional Recognition of Inherent Tribal Criminal Jurisdiction

Congress took its first step toward the acceptance of greater inherent tribal criminal authority with the *Duro*-fix in 2004. Both the House and the Senate understood they were not delegating a federal power to Indian tribes but were instead legislatively lifting the federal common law barrier imposed by the Court in the *Duro* opinion. The Chair of the Senate Committee on Indian Affairs, Senator Daniel Inouye, made it clear that the "premise [of the legislation] is that the Congress affirms the inherent jurisdiction of tribal governments over nonmember Indians."[75] Representative George Miller, the House manager of the bill, agreed that the statute "is not a delegation of authority but an affirmation that tribes retain all rights not expressly taken away" and that the bill "recognizes an inherent tribal right which always existed."[76] Congress has continued to recognize greater inherent criminal powers for Indian tribes.

72. 142 S. Ct. 1838 (2022).

73. *Id.* at 1846. Courts of Indian Offenses (CFR Courts) were established in 1883 by the Department of the Interior to create judicial bodies that would enforce a set of federal regulations in Indian country. Over time they evolved to enforce tribal law as well as federal regulations and were mostly displaced in the late twentieth century by courts run by tribes themselves. In 2022, just five of these courts remain, serving just 16 of the 574 federally recognized tribes.

74. *Id.* at 1849.

75. 137 CONG. REC. 9446 (1991).

76. *Id.* at 10712.

1. Congressional Curtailment and Partial Restoration of Tribal Sentencing Powers

Since *Lara* was decided in 2004, Congress has expanded its recognition of the inherent criminal powers of Indian tribes three times.[77] To understand the importance of this enhanced recognition, some context is important. In 1968, the Indian Civil Rights Act placed some crippling limits on the criminal sentencing authority of tribal courts.[78] Originally, tribal courts were given only misdemeanor jurisdiction[79]—with the authority to impose a maximum penalty of no more than six months in prison and/or a $500 fine for each offense.[80] In 1986, Congress raised these limits, but still functionally restricted tribes to misdemeanor authority[81] with maximum penalties of one year in jail and/or $5,000 in fines.[82] Finally, in 2010, Congress enacted the first of its significant recognitions of inherent tribal criminal power: the Tribal Law and Order Act (TLOA).[83] The TLOA gave tribal courts functional felony jurisdiction[84] for the

77. The three statutes are: (1) Tribal Law and Order Act, 124 Stat. 2258 (July 29, 2010) (now codified at 25 U.S.C. § 1302), (2) Violence Against Women Reauthorization Act of 2013, 127 Stat. 54 (Mar. 7, 2013), and (3) Violence Against Women Reauthorization Act of 2022, 136 Stat. 49 (Mar. 15, 2022) (The tribal court provisions of VAWA are now codified at 25 U.S.C. § 1304).

78. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1304 (1968).

79. Misdemeanor jurisdiction is jurisdiction over offenses with a maximum penalty not to exceed one year of incarceration. *See* Eric Wolpin, *Answering Lara's Call: May Congress Place Nonmember Indians Within Tribal Jurisdiction Without Running Afoul of Equal Protection or Due Process Requirements?*, 8 U. PA. J. CONST. L. 1071, 1088 (2006) ("The ICRA, as first enacted, limited tribal judiciaries to imposing terms of no longer than six months in jail. By restricting the scope of tribal sentences, Congress essentially limited tribal jurisdictions to imposing only misdemeanor-type penalties.").

80. Gross, *supra* note 2, at 2 ("ICRA limited tribal courts' sentencing authority to misdemeanor-type penalties–six months' imprisonment and a fine of $500, later raised to one year and $5,000 – even for the most serious tribal offenses.").

81. Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 582 (2009) ("All violations of tribal law are by definition misdemeanor offenses under the ICRA.").

82. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, tit. IV, § 4217, 100 Stat. 3207 (1986) (substituting "for a term of one year and a fine of $5,000, or both" for "for a term of six months and a fine of $500, or both").

83. Tribal Law and Order Act, Pub. L. No. 111-211, 124 Stat. 2258 (July 29, 2010) (now codified at 25 U.S.C. § 1302). For an academic discussion of TLOA, see David Patton, *Tribal Law and Order Act of 2010: Breathing Life into the Miner's Canary*, 47 GONZ. L. REV. 767 (2011); Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317 (2013).

84. Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 201 (2017) (describing the TLOA as restoring felony jurisdiction to tribal courts: "Congress and the executive branch have restored tribal powers, for example, by broadly recognizing tribal felony criminal jurisdiction over American Indians").

first time by expanding tribal sentencing authority to a maximum of three years per offense[85] and nine years per criminal proceeding.[86]

Admittedly, the expanded sentencing powers of the TLOA come with some additional limitations. Unlike state and federal governments, tribal governments are not bound by the U.S. Constitution.[87] As Chief Justice Roberts recently wrote: "Tribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.' The Bill of Rights does not apply to Indian tribes."[88] While the Indian Civil Rights Act requires tribes to provide many identical rights to those found in the Bill of Rights,[89] and others that are similar to those rights,[90] not all procedural rights are guaranteed in tribal law.[91] For example, a criminal defendant in a tribal proceeding has the right to *request* a jury trial instead of an automatic right to a trial by jury,[92] and while since

85. 25 U.S.C. § 1302(a)(7)(C) ("No Indian tribe in exercising powers of self-government shall – impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both.").

86. *Id.* § 1302(a)(7)(D) ("No Indian tribe in exercising powers of self-government shall – impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years.").

87. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 59 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority . . . Even in matters involving commercial and domestic relations, we have recognized that 'subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves,' may 'undermine the authority of the tribal cour[t] . . . and hence . . . infringe on the right of the Indians to govern themselves.'") (quoting Fisher v. Dist. Court, 424 U.S. 382, 387–88 (1976); Williams v. Lee, 358 U.S. 217, 223 (1959) (alterations in original)).

88. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008) (citing United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring)).

89. When the right guaranteed by ICRA is identical to the right in the Bill of Rights, the two should be interpreted identically. United States v. Becerra-Garcia, 397 F.3d 1167, 1171 (9th Cir. 2005) (using the Fourth Amendment right as an example and stating that ICRA "imposes an 'identical limitation' on tribal government conduct as the Fourth Amendment. Thus, we analyze the reasonableness of the stop under well developed Fourth Amendment precedent, which nets the same result as an analysis under ICRA.").

90. Philipp C. Kunze, *Remaining Silent in Indian Country: Self-Incrimination and Grants of Immunity for Tribal Court Defendants*, 93 WASH. L. REV. 2139, 2159–60 (2018) ("Much of the language of the ICRA is similar, though not necessarily identical, to that of the Bill of Rights . . . The U.S. Supreme Court has not resolved the issue of what precedent to apply to (nearly) identical language between ICRA and the Constitution. As such, it has fallen to the lower federal courts to determine the constitutional boundaries of ICRA.").

91. Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 899 n.60 (2003) ("Notable omissions are the guarantee of a republican form of government, the prohibition against an established religion, the requirement of free counsel for an indigent accused, the right to a jury trial in civil cases, the provisions broadening the right to vote, and the prohibitions against denial of the privileges and immunities of citizens.").

92. For an academic discussion of the difference between the right to a jury trial and the right to request a jury trial, see Grant Christensen, *Civil Rights Notes: American Indians and Banishment, Jury Trials, and the Doctrine of Lenity*, 27 WM. & MARY BILL OF RTS. J. 363, 384–90 (2018). For a judicial critique requiring tribes to at least inform a criminal defendant of their right to request a jury trial, see Alvarez v. Lopez, 835 F.3d 1024, 1029 (9th Cir. 2016) ("It hardly undermines tribal sovereignty to

Gideon v. Wainright a criminal defendant in state or federal court who is facing incarceration has the right to an attorney, under ICRA the criminal defendant in tribal court only has the right to obtain counsel at their own expense.[93] In order to sentence a criminal defendant in a tribal court to more than one year in prison, the TLOA requires that the tribal court provide heightened procedural rights, including: the right to effective assistance of counsel provided at the tribe's expense, the right to a tribal judge licensed to practice law by any jurisdiction in the United States, the right to have the tribe make its criminal laws, rules of evidence, and criminal procedure publicly available, and the right to maintain a record of the proceedings.[94]

Professor Angela Riley has documented her conversations with tribal leaders surrounding the enhanced federal requirements imposed by the TLOA and other federal statutes on tribal courts.[95] She notes that some leaders analogized the federal requirements as being consistent with traditional practice and custom, while others expressed concern at the assimilative and homogenizing effects of the federal requirements. For example, Riley wrote about a Pascua Yaqui leader who views the expanded procedural requirements as being consistent with Yaqui custom: "Historically, law enforcement functioned largely through ceremonial societies and clan affiliations. Having someone speak on your behalf and ensuring fairness are both 'deeply rooted in Yaqui indigenous tradition and practice,' and are based in tribal cultures that 'pre-date the U.S. Constitution and the Bill of Rights and are rooted in beliefs that are arguably as old as English Common Law.'"[96] The Yaqui leader explained that the enhanced criminal procedures required by Congress were consistent with tribal values: "The new program is consistent with Yaqui tradition and culture, namely protecting our people and providing fairness to the accused."[97]

In contrast, Riley also highlighted tribal leaders who were concerned their tribes might "lose the features of their own justice traditions" if they adopted all of the changes mandated by Congress in order to access the enhanced sentencing powers:[98] "The Chief Justice of the Tulalip Tribes located this concern, in particular, in some of the TLOA requirements around defendants' due process

require that the Community inform defendants of the nature of their rights, including what must be done to invoke them.").

93. 25 U.S.C. § 1302(a)(6) ("No Indian tribe in exercising powers of self-government shall – deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense."). For an excellent discussion and critique of the right to counsel under ICRA, see Samuel Macomber, *Disparate Defense in Tribal Courts: The Unequal Right to Counsel as a Barrier to Expansions of Tribal Court Criminal Jurisdiction*, 106 CORNELL L. REV. 275, 287–95 (2020).

94. 25 U.S.C. § 1302(c).

95. *See* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1595–607 (2016).

96. *Id.* at 1600.

97. *Id.*

98. *Id.*

rights, and the fear that those changes in tribal court procedure 'will push Tribal courts to be more like federal courts, and this is not typically a welcomed push.'"[99] For tribes and scholars who view the enhanced procedural requirements as anathema to tribal justice structures, the TLOA presents a choice where greater sentencing authority comes at the expense of greater assimilation.[100] This is a choice that can only be made by the tribal sovereign.

For Indian tribes that already provide the procedural guarantees required by the TLOA, and for those tribes willing to adopt them, the Act dramatically expands the sentencing authority of tribal courts. Tribes have kept this enhanced sentencing authority even as Congress has recognized the inherent powers of Indian tribes to criminally prosecute non-Indian persons for certain crimes in Indian country.

2. Recognized Jurisdiction Over Non-Indians

In the 2013 reauthorization of the Violence Against Women Act (VAWA), Congress took an incremental step toward abrogating *Oliphant*. For the first time since *Oliphant* erected a federal common law barrier to the assertion of tribal court criminal jurisdiction over non-Indians, Congress recognized the inherent authority of tribes to criminally prosecute non-Indians, but only for acts of domestic violence, dating violence, and violation of a protective order.[101] The Act created Special Domestic Violence Criminal Jurisdiction[102] for tribal courts over the three named offenses provided that: (1) the non-Indian defendant had some connection to Indian country, (2) the tribal court followed all of the enhanced procedures required by the TLOA, and (3) the jury not systematically exclude any distinctive group in the community, including non-Indians.[103] Tribes had to affirmatively opt in to assert jurisdiction, but those who did found new tools to fight domestic violence in Indian country and have succeeded in prosecuting hundreds of non-Indians for violence occurring on reservations.[104]

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99. *Id.*

100. For a discussion of how even well-intentioned federal policy can have an assimilative effect on Indigenous governance, see Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 COLUM. J. RACE & L. 681, 696–702 (2021) (looking at how the Indian Child Welfare Act, despite being the "gold standard" for protecting children, starts with a set of western biases that encourage tribal child welfare systems to assimilate to some western values and traditions).

101. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013). For an excellent discussion of the requirements and limitations of the 2013 reauthorization, see Jordan Gross, *Let the Jury Fit the Crime: Increasing Native American Jury Pool Representation in Federal Judicial Districts with Indian Country Criminal Jurisdiction*, 77 MONT. L. REV. 281, 293 (2016).

102. For the most recent discussion of Special Tribal Domestic Violence Jurisdiction before the 2022 reauthorization, see Jordan Gross, *Taking Stock: Open Questions and Unfinished Business Under the VAWA Amendments to the Indian Civil Rights Act*, 73 HASTINGS L.J. 475, 480 (2022).

103. 25 U.S.C. § 1304(d).

104. *See* Adam Crepelle, *Tribal Courts, The Violence Against Women Act, and Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction to Improve Public Safety in Indian Country*, 81

On March 15, 2022, Congress again reauthorized VAWA and added even greater recognition of the inherent criminal powers of Indian tribes.[105] In making its factual findings to justify the 2022 reauthorization, Congress noted that tribal governments needed the inherent power to criminally prosecute non-Indians because 96 percent of Native women and 89 percent of Native men who are victims of sexual violence have experienced sexual violence by a non-Indian perpetrator.[106] 66 percent of federal declinations to prosecute crimes reported in Indian country involved cases of assault, sexual assault, or murder, creating a prosecutorial vacuum tribes could fill.[107] Congress further found that since 2013, a majority of cases prosecuted by tribes under VAWA have involved children as witnesses or victims to the violence,[108] and so a recognition of the inherent authority of tribes over crimes involving children would substantially make reservation communities safer.[109]

The 2022 Act removed the requirement that the defendant have a preexisting connection to Indian country, expanded the number of crimes subject to tribal courts' inherent criminal jurisdiction over non-Indians, and recognized the inherent power of tribal courts to prosecute certain non-Indian on non-Indian crimes for the first time.[110] In recognition that the inherent criminal jurisdiction of a tribal court over a non-Indian is no longer solely focused on domestic violence crimes, the term "special Tribal criminal jurisdiction" (STCJ) replaced the old term, "Special Domestic Violence Criminal Jurisdiction."[111] As of 2022,

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MONT. L. REV. 59, 77–86 (2020) (discussing the successes and limitations of the 2013 VAWA expansion as of 2018).

105. *See* Violence Against Women Reauthorization Act of 2022, 136 Stat. 49 (March 15, 2022) (The tribal court provisions of VAWA's reauthorization are now codified at 25 U.S.C. § 1304.).

106. *Id.* § 801(a)(3).

107. *Id.* § 801(a)(9).

108. *Id.* § 801(a)(5).

109. *See id.* § 801(a)(4). Tribes that have used their expanded jurisdiction have made their reservation communities safer. *Id.* ("Indian Tribes exercising special domestic violence criminal jurisdiction over non-Indians pursuant to section 204 of Public Law 90–284 (25 U.S.C. 1304) (commonly known as the "Indian Civil Rights Act of 1968"), restored by section 904 of the Violence Against Women Reauthorization Act of 2013 (Public Law 113–14, 127 Stat. 120), have reported significant success holding violent offenders accountable for crimes of domestic violence, dating violence, and civil protection order violations.").

110. 25 U.S.C. § 1304 (2022); Allison Randall, *OVW Celebrates Violence Against Women Reauthorization* (Mar. 17, 2022), https://www.justice.gov/ovw/blog/ovw-celebrates-violence-against-women-act-reauthorization [https://perma.cc/XP8M-X4LX] ("OVW is grateful that VAWA 2022 builds on VAWA 2013 by restoring tribes' jurisdiction to prosecute non-Indian perpetrators of sexual violence, sex trafficking, stalking, child violence, assault of tribal justice personnel, and obstruction of justice on tribal lands."). Allison Randall is the Principal Deputy Director of the Office on Violence Against Women.

111. *See* 25 U.S.C. § 1304(b)(1) ("[T]he powers of self-government of a participating tribe, including any participating tribes in the State of Maine, include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise *special Tribal criminal jurisdiction* over all persons.") (emphasis added).

the National Congress of American Indians reports that 31[112] of the 574 federally recognized tribes[113] currently assume special Tribal criminal jurisdiction under VAWA.

Taken together, the 2013 and 2022 VAWA expansions have dramatically reconfigured Congress's preexisting recognition of the inherent criminal jurisdiction of Indian tribes. As tribal courts continue to demonstrate that they can fairly prosecute non-Indians for crimes that occur in Indian country, Congress will continue to expand its recognition of Indian tribes' inherent criminal powers. In following this trend, Indian tribes should look for opportunities to further assert their inherent authority over non-Indians. For crimes that do not fall within one of the expanded VAWA categories, Indian tribes should build upon their right to exclude in order to encourage non-Indian defendants to consent to their tribal courts' criminal jurisdiction.

II.
THE RIGHT TO EXCLUDE

Tribes are sovereign governments,[114] with a separate government-to-government relationship with the United States.[115] Among the most fundamental attributes of sovereignty is the right to exclude,[116] although an Indian tribe's inherent powers go much further than merely the power to exclude non-members

112. *Currently Implementing Tribes*, NAT'L CONG. AM. INDIANS, https://www.ncai.org/tribal-vawa/get-started/currently-implementing-tribes [https://perma.cc/DYN8-54CL].

113. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs; 88 Fed. Reg. 2112 (Jan. 12, 2023) (listing the 574 federally recognized tribes).

114. That tribal governments and the United States are peers, or separate sovereigns, is now well established. *See* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 140–41 (2006) ("Congressional and Executive Branch commitment to the federal policy of tribal self-determination has, for some commentators, strengthened or wavered, prompting commentators to suggest that we have entered new eras of federal Indian policy—government-to-government relations or self-reliance.").

115. Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S. Ct. 2434, 2452 ("'[T]he United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes.'") (citing Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1765 (2017) ("Consent through treaties and other agreements is a central part of the government-to-government relationship between Indian Nations and the United States.").

116. Ernesto Hernandez-Lopez, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345, 1372 n.129 (2007) ("The traditional international law perspective was that states possessed the absolute right to exclude aliens as an attribute of sovereignty, and this right was inherent to a state's power of self-preservation."). The Ninth Circuit has explained this power in the context of the tribal sovereign. "In many cases, a tribe's decision to temporarily exclude a member will be another expression of its sovereign authority to determine the makeup of the community," suggesting that the power to exclude applies to tribal members and non-members alike. Tavares v. Whitehouse, 851 F.3d 863, 876 (9th Cir. 2017).

from their territory.[117] Tribal sovereigns in the United States have always retained this inherent, and virtually absolute, right. Because the right to exclude is an inherent power derived from the core sovereignty of the tribal government, "[a] tribe needs no grant of authority from the federal government in order to exercise this power" and needs no permission from the United States before excluding even non-members.[118] Tribes have the right to exclude even the governor of the state from their territory;[119] to exclude non-Indians from hunting or fishing on tribal lands, or alternatively to condition their presence upon obtaining a tribal permit or license;[120] to exclude non-Indian businesses that refuse to pay validly levied tribal taxes;[121] to exclude persons in possessions of marijuana or other drugs;[122] to exclude persons accused of fraud or breach of their fiduciary duties to the tribe;[123] and to exclude individuals even if they have a contractual relationship with the tribe.[124]

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117. *See* United States v. Cooley, 141 S. Ct. 1638, 1644 (2021). In *Cooley*, the Court recognized the inherent power of tribal law enforcement to stop, search, and detain a non-Indian suspected of committing a crime even when the tribal court would not have criminal jurisdiction over the non-Indian. *Id.* (citing Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408, 425 (1989)) ("But tribes 'have inherent sovereignty independent of th[e] authority arising from their power to exclude.'").

118. State v. Schmuck, 850 P.2d 1332, 1340 (Wash. 1993).

119. *See, e.g.*, Adam Crepelle, *Tribes, Vaccines, and Covid-19: A Look at Tribal Responses to the Pandemic*, 49 FORDHAM URB. L.J. 31, 58 (2021) (discussing the right of tribes in South Dakota to operate checkpoints that would exclude non-Indians); Jeremy Fugleberg, *Can Oglala Sioux Tribe Ban Gov. Kristi Noem from Reservation? Here's What the Law Says*, ARGUS LEADER (May 7, 2019), https://www.argusleader.com/story/news/business-journal/2019/05/07/oglala-sioux-tribe-ban-gov-noem-pine-ridge-reservation/3661748002/ [https://perma.cc/CU5C-BF7G] ("The Oglala Sioux Tribe has the legal right to ban South Dakota's governor from stepping foot on the Pine Ridge Reservation.").

120. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331 (1983) (citing *Montana v. United States*, 450 U.S. 544, 557 (1981)) ("[A]s to 'land belonging to the Tribe or held by the United States in trust for the Tribe,' we 'readily [agreed]' that a Tribe may 'prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits.'").

121. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) ("[A] hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax."). The Court in *Merrion* found the right to tax in other sovereign powers, not just the right to exclude. *See* Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 728 (1994) ("The Court held that this power did not derive solely from a tribe's sovereign ability to exclude non-Indians from its lands, but rather from the tribe's sovereign 'power to govern and to raise revenues to pay for the costs of self-government.'").

122. Wilson v. Horton's Towing, 906 F.3d 773, 779 (9th Cir. 2018) (citing Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 898, 899 (9th Cir. 2017)) (holding that the Tribe could exercise civil authority over a non-Indian found with more than one ounce of marijuana in his vehicle in violation of the tribal ordinance because "on tribal lands, a tribe generally retains the inherent sovereign 'right to exclude,' together with regulatory and adjudicative authority that flows from that right").

123. Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 895 (9th Cir. 2019) (holding that the Tribe had the right to assert jurisdiction over a tribal employee accused of fraud and breach of her fiduciary duty because it has the right to exclude the employee from the reservation, stating that "a tribe's inherent sovereign power to exclude nonmembers from tribal land is an independent source of regulatory power over nonmember conduct on tribal land").

124. Water Wheel Camp Rec. Area, Inc. v. Larance, 642 F.3d 802, 814 (9th Cir. 2011) (permitting the Colorado River Indian Tribe to assert authority over a non-member who entered into a

For years courts have utilized a tribe's right to exclude to justify the actions of tribal law enforcement in Indian country. These cases form a legal and intellectual basis for arguments regarding consent based criminal jurisdiction. Perhaps the most notable work on a tribe's right to exclude comes from the late Utah Law Professor Alex Tallchief Skibine in his *The Tribal Right to Exclude Others from Indian-Owned Lands*.[125] Professor Tallchief Skibine recognized that some tribes have a treaty with the United States that provides a right to exclude non-members from their lands, but argued that even tribes without treaties, "as sovereign nations, have the inherent power to control their borders."[126] Tallchief Skibine argued for an expansive interpretation of the tribal right to exclude, weaving together Supreme Court precedent to convincingly argue that whenever a tribe has an unbroken right to exclude, the exercise of state authority in Indian country is improper.[127] Only when state interests override this power to exclude, like when a state law enforcement official enters the reservation to execute a validly issued warrant,[128] do questions of state power potentially preempt a tribe's inherent authority.[129]

The applications of the right to exclude utilized in current federal precedent establishes a firm foundation upon which to expand the inherent criminal power of Indian tribes. For example, the right to exclude has been used by the Ninth Circuit to justify a police stop.[130] In *Ortiz-Barraza*, the defendant was stopped by a Tohono O'odham police officer within the boundary of the Reservation after the officer suspected that the vehicle might be smuggling marijuana.[131] The tribal officer ultimately found more than one thousand pounds of marijuana, and

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contract with the tribe and then failed to comply with required payments and taxes); *id*. ("In this instance, where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction.").

125. Alex Tallchief Skibine, *The Tribal Right to Exclude Others from Indian-Owned Lands*, 45 AM. INDIAN L. REV. 261 (2020).

126. *Id*. at 261. Professor Tallchief Skibine does suggest that a tribe that traces its right to exclude to a treaty may have stronger interests to subsequently challenge the assertion of jurisdiction by the state, but that all tribes should have an inherent right to exclude as a basic attribute of their sovereignty.

127. *Id*. at 264 ("The first step in this analysis asks courts to determine whether a tribe has retained its right to exclude. If the tribe has retained this right, this is the end of the inquiry and the tribe has jurisdiction.").

128. *Id*. at 268–71 (citing Nevada v. Hicks, 533 U.S. 353, 355–57 (2001)) (accepting that Supreme Court precedent suggests that an Indian tribe cannot exclude a state law enforcement officer acting within the scope of his duty to execute a validly issued state warrant).

129. *Id*. at 264 ("If the tribe has not retained this right, step two requires courts to apply the *Montana* framework in determining whether one or both of the exceptions to *Montana*'s general rule apply to preserve tribal jurisdiction."). The *Montana* framework refers to the Supreme Court's 1981 opinion in *Montana v. United States*, 450 U.S. 544 (1981), in which the court held that when on non-member fee land a tribe's inherent power over non-members is limited unless the assertion of tribal power is necessary to protect tribal self-government or control internal relations.

130. *See* Ortiz-Barraza v. United States, 512 F.2d 1176, 1178 (9th Cir. 1975).

131. *Id*. The original case, decided by a Ninth Circuit panel in 1975, used a former name for the Tohono O'odham Tribe that is now considered somewhere between pejorative and offensive. I have therefore replaced the name used in the case with the name now preferred by the Tribe.

subsequently took the non-Indian driver to the Tribe's detention facility until he could be transferred to the Drug Enforcement Administration.[132]

In the subsequent criminal proceedings the defendant objected to the search by the tribal officer, arguing that the Tribe had no authority over him as a non-Indian. The Ninth Circuit disagreed; it held tribal law "clearly establish[es] the authority of a tribal police officer . . . to investigate any on-reservation violations of state and federal law, where the exclusion of the trespassing offender from the reservation may be contemplated."[133] The Ninth Circuit was explicit that the Tribe's criminal authority was derived from its right to exclude; "the power to regulate is only meaningful when combined with the power to enforce. That principle may be applied in the instant case. The power of the [Tohono O'odham] to exclude non-Indian state and federal law violators from the reservation would be meaningless were the tribal police not empowered to investigate such violations. Obviously, tribal police must have such power."[134]

The concept of consent-based criminal jurisdiction survived *Oliphant*. In 2005, the Eighth Circuit held that tribal officers are exercising an inherent tribal power when they search a non-Indian's vehicle located on the reservation[135] after obtaining reasonable and articulable suspicion "that criminal activity may be afoot."[136] Tribal officers may also restrain non-Indians who disturb public order on the Reservation.[137] The Tenth Circuit has gone even further, tying a tribe's right to exclude to its authority to affirmatively investigate non-Indians for unauthorized access to firearms if their possession occurs on the Reservation.[138] The upshot of these cases is that multiple federal circuits have considered and approved a consent basis for criminal jurisdiction.

State courts have similarly upheld the criminal authority of tribal law enforcement to stop, detain, and search non-Indians located on the reservation, tracing that authority at least in part to a tribe's inherent right to exclude. The Minnesota Supreme Court has held that tribal officers have the authority to stop a non-Indian on the Reservation, conduct a breathalyzer test, and if intoxicated, remove the non-Indian by holding the non-Indian in tribal custody until they can

132. *Id*. at 1179.

133. *Id*. at 1180.

134. *Id*.

135. United States v. Terry, 400 F.3d 575, 579 (8th Cir. 2005) (citing Duro v. Reina, 495 U.S. 676, 696–97 (1990)) ("The Supreme Court has recognized that tribal law enforcement authorities possess 'traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands,' and therefore have 'the power to restrain those who disturb public order on the reservation, and if necessary to eject them.'").

136. *Id*. at 580.

137. Stanko v. Oglala Sioux Tribe, 916 F.3d 694, 698 (8th Cir. 2019) ("Tribal law enforcement authorities possess traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands and therefore have the power to restrain [non-Indians] who disturb public order on the reservation, and if necessary to eject them.").

138. United States v. Green, 140 F. App'x 798, 800 (10th Cir. 2005) ("Moreover, tribal authorities may investigate unauthorized possession of firearms on gaming premises which is proscribed by tribal law.").

be turned over to state authorities.[139] A Texas state appellate court even permitted tribal officers to search for weapons and drugs off the Reservation as long as the original police stop occurred in Indian country.[140] At least one federal judge has compared a tribe's inherent power to detain a non-Indian as equivalent to a criminal arrest; "the tribal officers detaining and ejecting a violator from the reservation or detaining and transporting a violator to the proper authorities are functional equivalents to an 'arrest.'"[141]

When confronted with questions about the role of a tribal officer, courts have consistently concluded that Indian tribes, and by extension their law enforcement officers, have the power to police the reservation and confront even non-Indians suspected of crimes. Courts have recently gone so far as to include not merely the power to stop and detain, but to functionally "arrest" the non-Indian.[142] The next step is to allow tribes to hold non-Indians suspected of committing crimes in Indian country accountable under tribal law. Consent provides tribes with that power.

III.
AFFIRMATIVE CONSENT TO CRIMINAL JURISDICTION

Consent to criminal jurisdiction provides a new way for a tribe to use its inherent authority to keep its community safe despite the restrictions imposed by the Supreme Court's decision in *Oliphant*.[143] While the principle of consent to criminal jurisdiction might have been a dead letter in 1978 in the wake of the

139. State v. Thompson, 937 N.W.2d 418, 421–22 (Minn. 2020) ("Officer Bendel detained and investigated Thompson and ejected him from the Red Lake Reservation pursuant to the tribal authority to detain and remove recognized by the Supreme Court and other federal courts . . . He conducted a preliminary breath test and field sobriety tests with Thompson's consent. And he contacted the Beltrami County Sheriff . . . Officer Bendel was acting within his proper authority to detain and transport Thompson. Thompson's detention was therefore lawful.").

140. Texas v. Astorga, 642 S.W.3d 69, 73 (Tex. App. 2021). The tribal police officer signaled the stop on the Reservation, but Astorga did not pull over until he had left the Reservation. "There is no dispute here that Officer Alarcon had the authority to enforce the Tribe's Traffic Code on property adjacent to the reservation if the violation initially occurred on tribal land." *Id.* Upon seeing open containers in the vehicle, the tribal officer ordered the vehicle occupants out of the car and conducted a search, which the Texas Appellate Court found complied with the law—even though the vehicle's occupants were non-Indians and the stop was continuing outside of the Reservation—because it was within the scope of the tribal officer's authority under tribal law. "Based on the presence of the open containers, Officer Alarcon ordered Astorga to step out of his vehicle to conduct a further investigation. Officer Alarcon testified that upon seeing the open containers, he believed it necessary to determine whether Astorga had been driving under the influence, which is also a civil violation of the Tribe's Traffic Code." *Id.*

141. United States v. Ramirez, No. EP-18-CR-01661-DCG, 2019 WL 96589, at *3 n.5 (W.D. Tex. Jan. 3, 2019).

142. *Id.*

143. *See Oliphant*, 435 U.S at 195–96 ("Respondents do not contend that their exercise of criminal jurisdiction over non-Indians stems from affirmative congressional authorization or treaty provision. Instead, respondents urge that such jurisdiction flows automatically from the 'Tribe's retained inherent powers of government over the Port Madison Indian Reservation.'").

Oliphant opinion,[144] as the discussion above indicates, both Congress and the judiciary have come a long way in the last forty years. New dicta from the federal appellate courts, coupled with a trend toward expanding the inherent jurisdictional reach of tribal courts from both Congress (TLOA, VAWA) and the Supreme Court (*Lara*, *Cooley*, *Denezpi*), suggest *Oliphant* is ripe for a judicial or congressional abrogation.[145] Until then, this Article suggests that consent can be the bridge to greater tribal sovereignty in tribal court criminal jurisdiction.

A. Oliphant *Can Be Overcome*

There is no logistical or normative reason that Indian tribes cannot assume criminal jurisdiction over non-Indians. If tribes have the inherent right to exclude non-Indians, they ought to have the concomitant power to condition their entry or presence upon compliance with tribal criminal laws. "Perhaps the most basic principle of Indian law is the principle that those powers which are lawfully vested in the tribe are not powers delegated by Congress, but rather inherent powers that have never been extinguished."[146] Consistent with that principle, dozens of tribes actively criminally prosecuted non-Indian persons at the time *Oliphant* was decided.[147] Because Congress had never explicitly removed the right to criminally prosecute, tribes exercised their inherent authority to criminally charge non-Indian persons.

Since *Oliphant*, the Court has moved away from the policy-based rationale guiding implicit divestiture. Instead, the Court has adopted a textual approach to federal Indian law questions that express statements by Congress will be given their clear meaning with any ambiguities resolved in favor of the Indian tribe.[148] Understanding this change provides support for a consent-based assertion of tribal court criminal jurisdiction.

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144. *See id.* at 208 (The Court did not consider the role of consent but held that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.").

145. There have been many distinguished legal arguments calling for an end to *Oliphant*. For a list of those collected by the author, see *supra* n.30.

146. William R. Baldassin & John T. McDermott, *Jurisdiction over Non-Indians, An Opinion of the "Opinion,"* 1 AM. INDIAN L. REV. 13, 20 (1973). This position is not unusual among scholars or courts. *See* United States v. Winans, 198 U.S. 371, 381 (1905) (A "treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.").

147. Baldassin & McDermott, *supra* note 146, at 13 ("A number of Indian tribes have recently amended their constitutions and law and order codes so as to authorize the exercise of criminal jurisdiction over all offenses occurring on the reservation, regardless of the offender's or the victim's race."); *see also Oliphant*, 435 U.S. at 196 (discussing how at least 33 tribal courts in 1978 assumed criminal jurisdiction over non-Indians).

148. *See* Matthew L.M. Fletcher, *Textualism's Gaze*, 25 MICH. J. RACE & L. 111, 123 (2020) ("The Court usually requires a clear expression of the intent to divest a tribe of powers, either by Congress or the tribe. In the first tribal powers case that arguably resulted in an implied divestiture, *Oliphant v. Suquamish Indian Tribe*, the Court engaged with dozens of texts to reach the conclusion that Indian tribes do not possess the power to prosecute non-Indians. None of these texts were controlling Acts of Congress. Ultimately, the Court concluded that while none of the texts were dispositive, the texts collectively evidenced an assumption by all branches of the federal government, and Indians tribes, too, that tribes never possessed the power to prosecute non-Indians.").

Legal scholarship from the pre-*Oliphant* era provides some prescient insight into the jurisdictional foundations of tribal court criminal jurisdiction. As an increasing number of tribes began to assert their inherent criminal authority over non-Indian persons, the question of the limits and origins of tribal criminal power were raised at a national level among early Indian law scholars. The progenitor of this scholarship was a reaction to a 1970 opinion from the Solicitor of the Department of the Interior.[149] The Solicitor issued a three-page opinion suggesting that Indian tribes could not generally assume criminal jurisdiction over non-Indians.[150] The opinion letter was based primarily upon a single District Court opinion from the Western District of Arkansas in 1878 and the Indian Country Crimes Act which says that the United States disclaims jurisdiction under that statute over Indian on Indian crime occurring in Indian country or over crimes for which an Indian has already been punished by the law of the tribe.[151] The Arkansas District Court opinion had held that a federal court could grant a writ of habeas corpus to a non-Indian who had been convicted in Cherokee tribal court of theft, but did not opine further on the criminal jurisdiction of tribal courts.[152] There was considerable disagreement among contemporaneous Indian law scholars with the conclusion and weak reasoning put forward by the Solicitor: "[T]he exercise of tribal jurisdiction over non-Indians is not a dead issue, as the Solicitor would have us believe. It is in fact one of the most important issues in Indian law today."[153]

*1. Themes from Pre-*Oliphant *Legal Scholarship Are Now Reflected in Jurisprudence*

Professors William Baldassin and John McDermott had a trenchant response to the Solicitor.[154] Writing in 1973 in the inaugural volume of the *American Indian Law Review*, Baldassin and McDermott explained that contrary to the Solicitor's reading of tribal power, tribes have retained inherent criminal jurisdiction over non-Indians: "[T]he entire history of judicial treatment of Indian tribes militates against the position taken by the Solicitor. The right of

149. Memorandum from Mitchell Melich, Solicitor, Dep't of the Interior, to Walter J. Hickel, Sec'y of the Interior, Criminal Jurisdiction of Indian Tribes Over Non-Indians, M-36810, 77 I.D. 113 (Aug. 10, 1970).

150. *Id.* at 115 ("While we have not made an exhaustive survey of treaties with respect to provisions granting criminal jurisdiction over non-Indians, and therefore subject to the possibility that in a rare instance such jurisdiction may have survived, the answer to the question posed by the members of the National Council on Indian Opportunity must be that Indian tribes do not possess criminal jurisdiction over non-Indians, such jurisdiction lies in either the state or [f]ederal governments.").

151. 18 U.S.C. § 1152 ("This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe.").

152. *Ex parte* Kenyon, 14 Fed. Cas. 353, 354 (W.D. Ark. 1878).

153. Baldassin & McDermott, *supra* note 146, at 13.

154. *See id.*

self-government has been a consistent theme in Supreme Court decisions."[155] The Article presents a commonly accepted narrative of tribal power, that in the "first instance," Indian tribes possess the same inherent powers as any other sovereign,[156] and that subsequent incorporation into the United States resulted only in the loss of external powers (i.e., the power "to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe").[157] The natural conclusion is that a tribe retains inherent criminal powers over non-Indians who commit crimes in Indian country unless Congress acts to restrict the exercise of this inherent power, but such restrictions must "clearly manifest" Congress's intent to limit these powers.[158]

Professors Baldassin and McDermott were not lone voices in the pre-*Oliphant* era. Before *Oliphant*, Indian law scholars generally believed that Indian tribes' inherent powers permitted criminal jurisdiction over non-Indians. Lawrence Davis, Assistant General Counsel for the Navajo Nation, writing in the inaugural issue of the *Arizona Law Review* in 1959, explained that Indian tribes, by virtue of their incorporation into the United States, "lost their authority to have relations with any other civilized nation" but "did not thereby lose any of their other governmental powers."[159] Criminal jurisdiction remains among those inherent powers, and so the "judicial jurisdiction of the Indian tribes over criminal offenses committed within Indian country is plenary, save to the extent that it has been limited by federal statute."[160] Davis concluded by suggesting that tribal court criminal jurisdiction over non-Indians is a natural extension of their sovereignty: "These perfectly legitimate objectives of local self-government should be enforceable by the Indian authorities not only against their own members but also against those persons who accept their hospitality and then abuse it."[161]

Tim Vollmann, writing in 1974, concluded that "[t]he principle of inherent tribal sovereignty appears to give tribes the power to punish offenses committed by non-Indian intruders against their own people."[162] Vollman noted that while many federal statutes have qualified the Indian tribes' authority over their

155. *Id*. at 16.
156. *Id.*
157. *Id.*
158. *Id*. at 16–17.
159. Laurence Davis, *Criminal Jurisdiction Over Indian Country in Arizona*, 1 ARIZ. L. REV. 62, 64 (1959). For a second, contemporaneous source taking the same position, see Murray L. Crosse, *Criminal and Civil Jurisdiction in Indian Country*, 4 ARIZ. L. REV. 57, 57 (1961). Crosse was the Field Solicitor for the Department of Interior at the time of his writing. He opined that Indian tribes have lost their authority "to have relations with other nations" but have not lost any "other intern (sovereign) governmental powers." *Id.*
160. *Id*. at 89.
161. *Id*. at 93–94.
162. Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 393 (1974).

territory, "none has explicitly usurped tribal jurisdiction over non-Indian offenses."[163]

F. Browning Pipestem, writing in 1978 before *Oliphant* was decided, observed that "perhaps the most basic principle of all Indian law, supported by a host of decisions, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished*."[164] Noting that Congress has never taken away criminal jurisdiction in Indian country, Pipestem concluded that Indian tribes are "vested with civil and criminal jurisdiction over Indian country within their original reservation boundaries as a matter of residual internal sovereignty."[165]

This framework has been endorsed by the Supreme Court as recently as 2020, although in a case that was tangentially related to the inherent criminal jurisdiction of tribal courts, *McGirt v. Oklahoma*.[166] Jimcy McGirt was criminally prosecuted, convicted, and sentenced, by an Oklahoma state court[167] for a crime he committed on land that he claimed was part of the Muscogee (Creek) Reservation and that Oklahoma claimed was state land because the Reservation had been diminished.[168] Oklahoma argued that Congress had diminished the Reservation and so the area where McGirt committed his crimes was no longer Indian country, vesting criminal jurisdiction in the State of Oklahoma.[169] McGirt argued that the Reservation had never been diminished because when Congress allotted the Reservation, it intended to open up settlement on tribal lands to non-Indian settlers, but did not use words in the relevant allotment legislation signaling it also intended to diminish the Reservation's boundaries.[170] Justice Gorsuch, writing for a 5-4 majority, agreed with McGirt and held that the Reservation had never been diminished, and therefore that Oklahoma had no criminal jurisdiction to prosecute an Indian committing a crime in Indian country.[171]

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163. *Id.*

164. F. Browning Pipestem, *The Journey from* Ex Parte Crow Dog *to* Littlechief*: A Survey of Tribal Civil and Criminal Jurisdiction in Western Oklahoma*, 6 AM. INDIAN L. REV. 1, 8 (1978).

165. *Id.* at 23.

166. 140 S. Ct. 2452, 2482 (2020).

167. *Id.* at 2459.

168. *Id.* at 2460 ("Oklahoma has put aside whatever procedural defenses it might have and asked us to confirm that the land once given to the Creeks is no longer a reservation today.").

169. *Id.* at 2459 ("Years ago, an Oklahoma state court convicted [McGirt] of three serious sexual offenses. Since then, he has argued in postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation of Oklahoma and his crimes took place on the Creek Reservation. A new trial for his conduct, he has contended, must take place in federal court. The Oklahoma state courts hearing Mr. McGirt's arguments rejected them, so he now brings them here.").

170. *Id.*

171. *Id.* at 2482 ("The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation."). For an academic

The *McGirt* majority tells the same story about the rights of Indian tribes and the role of Congress in restricting those powers. Once a reservation is created, it remains a reservation unless it has been specifically diminished by a subsequent act of Congress: "'[O]nly Congress can divest a reservation of its land and diminish its boundaries.'"[172] Justice Gorsuch's majority makes clear that the courts should not be restricting those rights recognized by Congress:

> [C]ourts have no proper role in the adjustment of reservation borders. Mustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution. Faced with this daunting task, Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges—facing no possibility of electoral consequences themselves—will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives.[173]

Tribes may be subject to restrictions on their inherent powers, but those restrictions should come from Congress, and from Congress only. Courts commit judicial overreach when they impose restrictions that Congress never intended.[174] Professor Matthew Fletcher, now at Michigan, has written powerfully about the courts' role in interpreting Indian law. He called adherents "muskrat textualists,"[175] explaining that these "judges defer to acts of Congress and federal regulations governing Indian affairs, leaving policy preferences for or against tribal, state, or federal interests to the side. Muskrat textualists are faithful to the text, when there is one, and defer to the default interpretative rules, such as the clear statement rules, when there is no controlling text."[176] Among these default interpretations is that "inherent tribal powers remain extant absent a clear statement (or expression) of intent by Congress to abrogate or modify them."[177]

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discussion of the substantial impact of *McGirt*, see Jonodev Chaudhuri, *Reflection on McGirt v. Oklahoma*, 134 HARV. L. REV. F. 82 (2020); Elizabeth A. Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in McGirt v. Oklahoma*, 87 U. CHI. L. REV. ONLINE 1 (2020); Bethany R. Berger, *McGirt v. Oklahoma and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. Online 250 (2021).

172. *McGirt*, 140 S. Ct. at 2462 (citing Solem v. Bartlett, 465 U.S. 463, 470 (1984)).

173. *Id.*

174. *See* Fletcher, *supra* note 11, at 1000–03.

175. *Id.* at 999–1000 (The term "Muskrat Textualism" comes from "the aadizookaan (sacred stories) of the Anishinaabeg . . . The muskrat is the symbol of the humility, courage, and thoughtfulness that guided the Anishinaabeg back from near extinction. Tribes should no longer be viewed as helpless birds; they should be viewed as courageous muskrats.").

176. *Id*. at 1000.

177. *Id*. at 978.

2. As Common Law, Oliphant *Can Be Modified to Allow Consent Based Criminal Jurisdiction*

The above discussion shows two things. First, that prior to *Oliphant*, there was no congressional statute or constitutional provision that explicitly took away the right of Indian tribes to criminally prosecute non-Indians.[178] The *Oliphant* majority conceded as much.[179] That makes the decision in *Oliphant* an example of the federal common law.[180] Second, that set against this common law decision is almost two centuries of precedent suggesting both that Indian tribes retain all of those inherent powers not explicitly withdrawn by Congress,[181] and that courts should not use their power to place restrictions on Indian tribes.[182]

The Supreme Court has admitted that its decision in *Oliphant* only reflected the Court's view of the tribes' retained sovereign status "at the time the Court issued its decision"[183] and "did not set forth constitutional limits"[184] that would prohibit their alteration. Because the limitations imposed by the Supreme Court on the criminal jurisdiction of tribal courts are governed solely by the common

178. *See* Fletcher, *supra* note 148, at 123 ("The Court usually requires a clear expression of the intent to divest a tribe of powers, either by Congress or the tribe. In the first tribal powers case that arguably resulted in an implied divestiture, *Oliphant v. Suquamish Indian Tribe*, the Court engaged with dozens of texts to reach the conclusion that Indian tribes do not possess the power to prosecute non-Indians. None of these texts were controlling Acts of Congress. Ultimately, the Court concluded that while none of the texts were dispositive, the texts collectively evidenced an assumption by all branches of the federal government, and Indians tribes, too, that tribes never possessed the power to prosecute non-Indians.").

179. *See* 435 U.S. 191, 204 (1978) ("Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians.").

180. *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 59–61 (1999) (discussing *Oliphant* as an example of federal common law). The Supreme Court has recognized that tribal courts' criminal jurisdiction is a question of federal common law decided by the Supreme Court because Congress has not addressed the issue. United States v. Lara, 541 U.S. 193, 207 (2004) (citing Milwaukee v. Illinois, 451 U.S. 304, 313–15 (1981) ("[R]ecognizing the federal common law component of Indian rights, which common law federal courts develop as a necessary expedient when Congress has not spoken to a particular issue.") (internal quotation marks omitted)).

181. *See* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1177–78 (1990) ("Since *Cherokee Nation* and *Worcester*, the Court has frequently invoked a tradition of preserving Indian rights from both state and congressional encroachment, unless Congress has spoken clearly to the contrary."); Kristen E. Burge, Comment, *ERISA and Indian Tribes: Alternative Approaches for Respecting Tribal Sovereignty*, 2000 WIS. L. REV. 1291, 1299–300 (2000) ("Indian tribes retain those aspects of sovereignty not explicitly withdrawn by Congress.").

182. Fletcher, *supra* note 11, at 969–72.

183. United States v. Lara, 541 U.S. 193, 206 (2004).

184. *Id.* at 205.

law,[185] the precedent is subject to reevaluation by other courts when new arguments or new information presents itself.[186]

Set against the common law is a clear trend, in both Congress and the courts, in favor of the expansion of inherent tribal power in the area of criminal jurisdiction and law enforcement.[187] Today, a court confronted with interpreting new or novel applications of tribal criminal authority must consider the judicial and congressional policies in favor of both tribal sovereignty[188] and the greater trust these institutions have placed in tribal courts[189] in order to keep reservation communities safe. This opens a space for tribal courts to assert criminal jurisdiction over non-Indians by consent.

B. Consent as the Solution

Consent is not a concept one associates with criminal jurisdiction and police powers. Typically, only the jurisdiction where the crime occurred has prosecutorial authority.[190] A person accused of committing a crime in Iowa cannot consent to have New Mexico prosecute them just because proceedings in New Mexico might be more convenient or because the accused might be found there. Instead, Iowa must ask New Mexico to extradite the accused so that they may be prosecuted in an Iowa court for a crime that violated Iowa law and took place in Iowa territory.[191]

While consent generally has no role in determining criminal jurisdiction in most of American jurisprudence, American Indian law is unique.[192] "It is almost

185. Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 432 (2013) ("[F]ederal law continues to prohibit tribal court criminal jurisdiction over non-Indians. Over time, federal statutes and common law have expanded the federal and state presence in Indian country, while paring back the scope of acknowledged tribal authority.").

186. *See* Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 946–47 (1986) ("The prevailing standard seemingly gives the judiciary power to make federal common law when it will . . . the judiciary can always achieve the same result by picking one of the cluster of possible authorities and interpreting it as sufficient alone to support the federal common law rule.").

187. *See supra* Parts I–II.

188. Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 792 (2014) ("[T]he Court has repeatedly limited inherent tribal sovereignty even as Congress, through proposals such as those in VAWA, has seen fit to expand tribal sovereignty.").

189. Congress has been expanding tribal authority through TLOA and the reauthorization of VAWA in 2013 and 2022, while the Court has regularly expanded tribal authority since Justice Gorsuch joined the bench in 2017. For a discussion of these expansions, see *supra* Part I.B.

190. Gross, *supra* note 2, at 35.

191. *See* Puerto Rico v. Barnstad, 483 U.S. 219, 231 (1987) (holding that a State or Territory can use the federal courts to enforce an extradition request from the Governor of a sister State or Territory).

192. State v. Marek, 777 P.2d 1253, 1256 (Idaho App. 1989) ("We agree that Indian law questions are largely sui generis, requiring special sensitivity."). Indian law scholars sometimes push back against the term *sui generis* but still treat Indian law as unique. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1789, 1876 (2019) ("Rather than declaring federal Indian law as sui generis and consigning it to a tiny backwater, scholars of public law

always a mistake to seek answers to Indian legal issues by making analogies to seemingly similar fields. General notions of civil rights law and public land law, for example, simply fail to resolve many questions relating to American Indian tribes and individuals. The extraordinary body of law and policy holds its own answers, which are often wholly unexpected to those unfamiliar with it."[193] Indeed, as discussed below, consent is extremely important for tribal civil jurisdiction and is a familiar basis for asserting tribal subject matter jurisdiction.[194] Consent is already universally accepted as the basis for courts to assert personal jurisdiction.[195] The Supreme Court has noted that tribal jurisdictional matters invoke both personal and subject matter jurisdiction, so consent as a basis for criminal jurisdiction doctrinally addresses both forms of jurisdiction.[196] In the case of Indian country, tribal courts are attempting to assert jurisdiction over persons who committed crimes within their territorial borders, yet outside their inherent territorial jurisdictional power due to *Oliphant*.

Tribes should be able to seek the affirmative consent of non-Indians to assert criminal jurisdiction over them for crimes that occurred within the jurisdictional territory of the tribal government. Consenting to criminal jurisdiction takes the matter outside of the traditional *Oliphant* prohibition.

A non-Indian who makes an informed choice to proceed with tribal court criminal proceedings is agreeing that the tribe has jurisdiction over them by participating in the tribal forum, and may avail themselves of the due process protections provided by ICRA to all criminal defendants in tribal court proceedings.[197] This is similar to American courts that allow individuals to waive fundamental rights (like personal jurisdiction) in civil proceedings.[198] To be sure,

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must recognize the centrality of federal Indian law to their field. Across a range of substantive areas, the constitutional law, development, and history of the United States has been shaped by its interaction with Native Nations and Native peoples."); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 8 (2003) ("I suggest that attempting to preserve federal Indian law as '*sui generis*' is a mistake because Indian law has not been completely *sui generis* for quite some time. In fact, the Rehnquist Court's anti-tribal decisions are better explained as a failure to properly integrate federal Indian law into the rest of the Court's jurisprudence.").

193. Davis v. Muellar, 643 F.2d 521, 530 (8th Cir. 1981) (McMillian, C.J., dissenting).

194. Montana v. United States, 450 U.S. 544, 565 (1981).

195. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356–57 (1927).

196. *See* Nevada v. Hicks, 533 U.S. 353, 367 n.8 (2001) ("[J]urisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction.").

197. Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography, and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 809 (1996) ("[T]he non-Indian has ICRA 'personhood' to protect him, her, or it against abuses of tribal civil justice, 'abuses' defined from a largely dominant-society perspective. It is the thesis of this article that with the ICRA in place to give protection in federal court to congressionally mandated civil rights, the dominant society's courts should be less reluctant to allow tribal law to reach non-Indians.").

198. *See, e.g.*, Samuel P. Jordan, *Hybrid Removal*, 104 IOWA L. REV. 793, 804 n.69 (2019) (citing Ins. Corp. Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703–04 (1982) ("[P]ersonal jurisdiction is waivable because it 'flows . . . from the Due Process Clause' and 'protects an individual liberty interest.'")). The Ninth Circuit has likewise observed in dicta that a non-member may waive

there can be no violation of a non-Indian's right not to be subject to a tribal criminal proceeding, as subject matter jurisdiction relates to a court's authority, not the right of a litigant. Yet consent to tribal criminal jurisdiction is more than a mere waiver. When a non-Indian voluntarily consents to a tribal court's criminal jurisdiction, such consent provides a basis for criminal subject matter jurisdiction.[199] From the earliest treaties, tribal courts were entrusted to criminally prosecute non-Indian persons.[200] One can view such treaties as the United States consenting to subject its citizens to tribal criminal jurisdiction. Congress's expansion of VAWA in 2013, and again in 2022, broke the taboo against tribal court criminal jurisdiction and shows that Congress is increasingly comfortable with tribal court criminal forums for non-Indian defendants when the crime occurs in Indian country.[201]

Why would a non-Indian consent? Because Indian tribes retain the right to exclude.[202] Persons with a connection to the reservation have a strong interest in maintaining their political, commercial, and personal relations with individuals and businesses located in Indian country.[203] When a non-Indian commits a crime

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personal jurisdiction to a tribal court's jurisdiction as a condition of enrolling at the tribal college. Smith v. Salish & Kootenai Coll., 378 F.3d 1048, 1157 (9th Cir. 2004), *rev'd on other grounds*, 434 F.3d 1127 (9th Cir. 2006) (en banc).

199. *Montana*, 450 U.S. at 565; *Salish & Kootenai Coll.*, 434 F.3d at 1137 ("The Court, however, has never defined Indian tribal 'subject matter jurisdiction' with the same precision as we use that term when speaking of subject matter vested and circumscribed by Article III."); *id.* at 1138 ("[T]he Court's 'consensual relationship' analysis under *Montana* resembles the Court's Due Process Clause analysis for purposes of personal jurisdiction.").

200. Consider, for example, the Treaty of Hopewell with the Cherokee. It contained a provision forfeiting the protection of the United States for non-Indians who wrongfully settled on Cherokee lands, and permitting the Cherokee to punish the non-Indians under their rules. "If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands westward or southward of the said boundary which are hereby allotted to the Indians for their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty, such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please." Treaty of Hopewell art. 5, Nov. 28, 1785, 7 Stat. 18.

201. For discussion of congressional acquiescence to the greater use of inherent tribal authority, see *supra* Part I.B.

202. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 (1982) ("Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.").

203. The importance of a connection to the reservation has been recognized in multiple formats. For an academic discussion, see Grant Christensen, *Civil Rights Notes: American Indians and Banishment, Jury Trials, and the Doctrine of Lenity*, 27 WM. & MARY BILL OF RTS. J. 363, 378–84 (2018) (discussing the importance of the connection to the Reservation in the context of tribal banishment). For a judicial discussion of the connection an individual might have to the reservation, see Tavares v. Whitehouse, 851 F.3d 863, 887 (9th Cir. 2017) (Wardlaw, J., concurring in part and dissenting in part) (discussing why access to an Indian reservation may be important for those who live within or near its borders); *id.* (stating in Judge Wardlaw's dissent that "Tavares is banned from 'all Tribal properties and/or surrounding facilities.' This total physical exclusion affects Tavares's daily life in many ways: she cannot walk her grandchildren to school, attend tribal meetings, ceremonies, and events, or join her family and friends for any purpose on tribal land. A former leader of the UAIC, she no longer can 'participate in the ceremonies and events of the Tribe's culture and heritage.' Instead, she 'ha[s] had to sit outside the fence and look on, as if [she] were [a] criminal[] or untouchable[].' Tavares

in Indian country, that criminal behavior often threatens the safety of the tribal community even if no Indian person was involved in the crime.[204]

The incentive to consent comes from the alternative but concomitant power to exclude. If a non-Indian who is suspected of committing a crime in Indian country refuses to consent to tribal criminal jurisdiction then the tribe has two powerful alternatives to explore: (1) it can exclude the non-Indian from the reservation, potentially cutting them off from family, friends, property, and employment and/or (2) the tribe can turn the non-Indian over to state and federal authorities who have criminal jurisdiction to prosecute the offense.[205] Faced with these choices, a non-Indian may very well rationally decide that it is better to submit to a tribal court's criminal authority. Note the use of the "and" in and/or: there is no reason a tribe couldn't both exercise its power to exclude and turn the non-Indian offender over to another sovereign for criminal prosecution. Such consequences create ample incentive for non-Indians to consent.

1. Non-Indian Consent to Tribal Court Criminal Jurisdiction Is Lawful

Consent as an affirmative basis for tribal assertion of criminal jurisdiction has been recently tested and conditionally approved in dicta from the Ninth Circuit.[206] The case emerged from the Northern Cheyenne Tribe in Montana. Rule 9(B)(3) of the Northern Cheyenne Code of Criminal Rules provides, in part:

> If the defendant is a non-Indian, the Court shall explain his right to assert lack of personal jurisdiction of the Court over the defendant in a criminal action. If the defendant affirmatively elects to waive personal jurisdiction, the action shall proceed as if the defendant were an Indian. If the non-Indian defendant does not affirmatively waive the lack of personal jurisdiction, the action shall become a civil action to exclude the defendant from the Reservation . . . The defendant may assert or waive lack of jurisdiction at any time prior to the start of trial.[207]

Sherri Roberts, a non-Indian who lived within the exterior boundaries of the Northern Cheyenne Reservation, was charged with trespass in Northern

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has demonstrated a severe restraint on her liberty not shared by other members of the tribe, which satisfies her burden of showing that she is in 'custody,' and thus in 'detention.'").

204. United States v. Cooley, 141 S. Ct. 1638, 1643 (2021) (citing State v. Schmuck, 850 P.2d 1332, 1341 (Wash. 1993) ("To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats. Such threats may be posed by, for instance, non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation. As the Washington Supreme Court has noted, '[a]llowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe.'")).

205. *Id.* at 1644 (citing Duro v. Reina, 495 U.S. 676, 697 (1990) ("Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.")).

206. Roberts v. Elliott, 693 F. App'x 630, 631 (9th Cir. 2017).

207. *In re* Roberts Litig., 97 F. Supp. 3d 1239, 1241 (D. Mont. 2015).

Cheyenne Tribal Court after she failed to vacate tribally owned property.[208] Ms. Roberts appeared in tribal court with her retained tribal court advocate and, after being advised of her right to assert lack of personal jurisdiction, affirmatively consented to the Tribe's criminal authority.[209] When she subsequently failed to appear for two different required status conferences, the Northern Cheyenne Tribal Court issued bench warrants for her arrest.[210]

Bureau of Indian Affairs (BIA) Officers are charged with executing orders and warrants on the Northern Cheyenne Reservation.[211] Pursuant to those bench warrants, Ms. Roberts was arrested twice by BIA Officers and held at the BIA detention facility.[212] She ultimately brought a *Bivens* action[213] against the officers alleging violations of her Fourth and Fifth Amendment rights.[214] Her complaint reasoned that, as a non-Indian, the tribal court had no criminal jurisdiction over her and so, the bench warrants were unlawfully issued. Roberts claimed that when she was arrested pursuant to unlawfully issued warrants, the BIA Officers had violated her constitutional rights and were therefore subject to civil liability.[215]

The District Court gave summary judgment to the officers on the basis of qualified immunity,[216] and the Ninth Circuit affirmed.[217] The Ninth Circuit explained that: "The Supreme Court has not addressed the interaction between *Oliphant*'s rejection of inherent criminal jurisdiction over non-Indians and a non-Indian's ability to waive the question of personal jurisdiction before the tribal court in criminal matters. The extent to which a non-Indian may consent to tribal jurisdiction is not settled law."[218] The panel reasoned that when the BIA officers arrested Ms. Roberts pursuant to a facially valid warrant, they did not violate any

208. *Id.*

209. *Id.* ("Roberts was advised of her right to assert lack of personal jurisdiction at the time of her arraignment and elected to waive that objection and consented to the Tribal Court's jurisdiction.").

210. *Id.*

211. *Id.* at 1242.

212. *Id.*

213. *Id.* A *Bivens* action is named after Bivens v. Six Unknown Named Agents of FBI, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that individuals could recover against agents of the United States for violations of their constitutional rights even in the absence of a statute conferring such a right. *See also* Carlson v. Green, 446 U.S. 14, 18 (1980) ("*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."). For an academic discussion of *Bivens* proceedings, see Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 WASH. U. L. REV. 1473 (2013); Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010); James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009); Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989).

214. *In re Roberts*, 97 F. Supp. 3d at 1242.

215. *Id.*

216. *Id.* at 1244.

217. Roberts v. Elliott, 693 F. App'x 630, 630 (9th Cir. 2017).

218. *Id.* at 631.

clearly established constitutional law and so were entitled to qualified immunity.[219]

The court also explicitly addressed the issue of consent by validating, in dicta, that a non-Indian may lawfully consent to criminal jurisdiction in a tribal court. The Ninth Circuit reasoned that even if the BIA officers knew that Ms. Roberts was a non-Indian at the time of her arrest, they would not have been acting unreasonably when they enforced the bench warrant precisely because "the tribal court rules provide for waiver of lack of personal jurisdiction over non-Indians." Therefore, the officers had no reason to suspect that the tribal court would have lacked the authority to issue the warrants.[220]

The court also affirmed the dismissal of Ms. Roberts's claim against the United States for false arrest and false imprisonment under the Federal Tort Claims Act.[221] Under Montana law, a plaintiff seeking to recover for false arrest or false imprisonment must prove unlawful restraint. The panel explained that Ms. Roberts could not prove that the restraint was unlawful because it was made pursuant to a facially valid warrant:

> The bench warrant was issued pursuant to the tribal judge's correct determination that Roberts failed to appear at a status conference, which established probable cause to arrest her. Even if Roberts is correct that the warrant was not actually valid, that does not dispute the facial validity of the warrant in the eyes of the arresting officers for the purpose of the tort analysis.[222]

The court consistently emphasized that the BIA officers reasonably relied on the tribally issued warrant as the basis for Ms. Roberts arrest.[223] But even if knowledge that Ms. Roberts was a non-Indian sufficiently rebuts probable cause, the Ninth Circuit has implicitly recognized that a non-Indian person can, at least under some circumstances, consent to the criminal jurisdiction of a tribal court. The *Roberts* opinion provides federal appellate court authority for the proposition that *Oliphant*'s prohibition on tribal court criminal jurisdiction over non-Indians does not reach non-Indians who have affirmatively consented to criminal authority. Using *Roberts* as a model, tribes have a whole new set of potential tools to enforce their criminal laws over recalcitrant non-Indians.

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219. *Id*. ("Because the BIA Officers did not violate clearly established constitutional law when they arrested Roberts pursuant to a facially valid warrant issued by the tribal court, they are entitled to qualified immunity. The officers' good faith reliance on the facially valid warrant was not unreasonable.").

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* ("The officers' good faith reliance on the facially valid warrant was not unreasonable.").

2. The Consequences of Consent, Lessons Learned from Tribal Civil Jurisdiction

The *Roberts* opinion from the Ninth Circuit is most important for its recognition that the "[t]he Supreme Court has not addressed the interaction between Oliphant's rejection of inherent criminal jurisdiction over non-Indians and a non-Indian's ability to waive the question of personal jurisdiction before the tribal court in criminal matters."[224] While the Northern Cheyenne Tribal Code provides one model for tribes to consider, where a non-Indian can affirmatively consent to the tribal court's criminal jurisdiction after discussing the consequences of consent and the alternative of exclusion with an advocate, tribes should not feel limited to that method alone.

In the civil context the Supreme Court has recognized that non-Indians may be subject to the tribe's inherent regulatory and adjudicatory powers when they enter consensual relations with the tribe. In *Montana*, the Court explained, "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[225] *Montana* was decided just three years after *Oliphant*, and even then the Supreme Court was backing away from its prohibition on Indian tribes asserting their authority over non-Indians.[226]

Montana provides an interesting opportunity to extend criminal jurisdiction by consent. Admittedly, *Montana* is a decision about the limits of a tribe's civil regulatory powers, but in the opinion the Court talks about applying the same "general principles" from *Oliphant*, a criminal jurisdiction case.[227] Seen through this lens, a tribe might regulate through "other means" such as a criminal proceeding in tribal court or the activities of non-Indians who consent through "commercial dealings, contracts, leases, or other arrangements."[228]

Understood this way, the Northern Cheyenne Tribal Code provides an example of an "other arrangement," which is a form of voluntary and informed consent made before a tribal judge in tribal court after consulting with a tribal advocate. This opens many other possibilities for tribes to seek affirmative consent of non-Indians to criminal jurisdiction. Since tribes can condition the right of non-Indians to hunt or fish on the reservation upon the non-Indian

224. *Id.*

225. Montana v. United States, 450 U.S. 544, 565 (1981). For a discussion of the role of consent in Indian law but outside of the criminal law context, see L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 854–72 (1996).

226. *See id.* at 549, 565 (showing that the Court considered extending the strict prohibition on tribal regulation of non-Indian persons from *Oliphant* to civil cases in *Montana* but choose not to do so).

227. *Id.* at 565 ("The Court recently applied these *general principles* in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians.") (emphasis added)).

228. *Id.*

obtaining a tribal license,[229] tribal licenses can include a condition that non-Indian licensees must consent to the tribe's criminal authority.

Similarly, a tribe should be able to obtain affirmative consent from non-Indians to be bound by its criminal code by including consent to tribal criminal jurisdiction as a term in commercial contracts. In *Roberts*, the trespass action grew out of Ms. Roberts' "occupancy of Tribal lands" and her refusal "to vacate the property."[230] Courts have held that tribes have civil jurisdiction over non-Indians when they lease land from an Indian tribe,[231] enter into an agreement to supervise tribal children in a job training program,[232] obtain a permit from the tribe,[233] sign a consent decree with a tribe,[234] or agree to a revenue sharing contract.[235] Any of these documents could conceivably have a provision affirmatively consenting to tribal court criminal jurisdiction as a condition of the agreement. Put simply, tribes could say, "We won't allow you to lease our land, or open a business in our territory, or obtain cheap labor by training our youth, unless you in turn agree to be bound by the tribe's criminal code."

The use of consent to a tribe's criminal authority is therefore an intuitive extension of its civil powers because actions committed by non-Indians may be both civil and criminal. In *Roberts*, the defendant was accused of trespass, which is both civil and criminal misconduct.[236] Similarly, courts have repeatedly extended a tribe's civil authority to include criminal misconduct by permitting tribal officers to perform routine traffic stops where the driver's Indian status is

229. *Id*. at 557 ("[I]f the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits.").

230. *In re* Roberts Litig., 97 F. Supp. 3d 1239, 1241 (D. Mont. 2015).

231. Water Wheel Camp Rec. Area, Inc. v. LaRance, 642 F.3d 802, 817 (9th Cir. 2011) ("Regarding claims related to Water Wheel, the district court correctly found that the corporation's long-term business lease with the CRIT for the use of prime tribal riverfront property established a consensual relationship and that the tribe's eviction action bears a close nexus to that relationship. The corporation had full knowledge that the leased land was tribal property and that under the lease's terms, CRIT laws and regulations applied to the land and Water Wheel's operations. The tribe clearly had authority to regulate the corporation's activities under Montana's first exception.").

232. Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 174 (5th Cir. 2014) ("The nexus component of the tribal jurisdiction question, however, centers on the nexus between the alleged misconduct and the consensual action of Dolgencorp in participating in the YOP.").

233. FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 933 (9th Cir. 2019) ("FMC entered a consensual relationship with the Tribes, both expressly and through its actions, when it negotiated and entered into an permit agreement with the Tribes, requiring annual use permits and an annual $1.5 million permit fee to store 22 million tons of hazardous waste on the Reservation. As the district court noted, FMC then 'affirmed its consensual relationship with the Tribes by signing the Consent Decree, which required FMC to obtain Tribal permits.'").

234. *Id*.

235. Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc., 715 F.3d 1196, 1204 (9th Cir. 2013) ("Even if the tribal court were to apply Montana's main rule, GCSD's consensual relationship with SNW or the financial implications of the agreement likely place it squarely within one of Montana's exceptions and allow for tribal jurisdiction.").

236. *In re* Roberts Litig., 97 F. Supp. 3d 1239, 1241 (D. Mont. 2015).

unknown.[237] The Texas Court of Criminal Appeals recently held that a tribal officer "had the authority to enforce the Tribe's Traffic Code on property adjacent to the reservation if the violation initially occurred on tribal land." After stopping the non-Indian and finding an open container of alcohol, a tribal officer could commence a search of the non-Indian because driving with an open alcohol container is a civil infraction under the tribal code.[238] If a tribe can regulate a non-Indian's behavior through its civil code without jeopardizing their civil rights, it seems reasonable that the tribe can proceed criminally against the non-Indian with their explicit consent.[239]

Admittedly, consent may be limited in time and scope. In the civil context, there must be a "nexus" between the agreement and the activity of consenting parties in order for activity to be regulated or adjudicated.[240] When a business signs a contract with a consent to criminal jurisdiction clause, consent may be limited to crimes associated with the contract or its performance with a substantial connection to the reservation. A non-Indian who signs a lease that contains a consent to criminal jurisdiction clause may be only consenting to tribal court criminal jurisdiction for acts associated with the lease, and not for any criminal activity they may engage in while on the reservation. However, even these limited extensions of tribal court criminal jurisdiction substantially empower tribal courts and would represent an important step toward the ultimate goal of full criminal jurisdiction over all persons and property on tribal land and within a tribe's reservation borders.

Finally, once a non-Indian explicitly consents to the criminal jurisdiction of a tribal court, that consent may not be withdrawn without the defendant

237. The most recent and noteworthy case is United States v. Cooley, 141 S. Ct. 870 (2020), however, tribal police officers have been permitted to stop an unknown drivers for decades. *See generally* State v. Schmuck, 850 P.2d 1332, 1396 (Wash. 1993) (permitting a tribal officer to stop and detain a non-Indian driving in Indian country); Ortiz-Barraza v. United States, 512 F.2d 1176, 1181 (9th Cir. 1975) (same); State v. Thompson, 937 N.W.2d 418, 421 (Minn. 2020) ("Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.").

238. Texas v. Astorga, 642 S.W.3d 69, 73 (Tex. App. 2021).

239. A non-Indian, whether civilly or criminally in front of a tribal court, is entitled to the same protections as any other party before the court, and at a minimum is entitled to the protections afforded by ICRA. ICRA provides merely a floor not a ceiling on a defendant's procedural rights, and tribal law–including tribal constitutions–may afford any non-Indian defendant procedural protections that may exceed those found in state or federal court.

240. Strate v. A-1 Contractors, 520 U.S. 438, 456–57 (1997) (finding no tribal authority to adjudicate a dispute between the wife of a tribal member and a non-Indian business operating under a contract with the tribe on the reservation because there was no nexus between the contract and the dispute: "The first exception to the Montana rule covers 'activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.' The tortious conduct alleged in Fredericks' complaint does not fit that description. The dispute, as the Court of Appeals said, is 'distinctly non-tribal in nature.' It 'arose between two non-Indians involved in [a] run-of-the-mill [highway] accident.' Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a 'consensual relationship' with the Tribes, 'Gisela Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident.'" (internal citation omitted)).

showing extraordinary circumstance; for example, the consent was only given under fraud, intimidation, or duress. There is a long-established preference for certainty and finality in judicial practice, and it would be a waste of judicial resources to proceed through a criminal trial only to have the defendant withdraw consent at an advanced stage.[241] Functionally, consent to criminal jurisdiction is a waiver of personal jurisdiction.[242] Once a defendant waives personal jurisdiction, the waiver may not be revoked[243] because "[a] defendant's submission to the personal jurisdiction of a given court *after* being notified of the claims being asserted against it presents no significant due process issues."[244]

IV.
IMPLIED CONSENT TO CRIMINAL JURISDICTION

Asserting criminal jurisdiction on the basis of affirmative consent looks at instances where a non-Indian makes an explicit acknowledgement of their willingness to be bound by the tribe's criminal code. In contrast, implied consent refers to consent through physical presence or consent through an affirmative action where the known consequences include being subject to tribal court authority. Admittedly, implied consent to criminal jurisdiction over non-Indians is going to be harder to establish than affirmative consent.[245]

Courts have long accepted a tribe's right to exclude[246] and have permitted tribes to condition the entry to an Indian reservation by a non-Indian only upon compliance with tribal rules.[247] Consistent with its power to exclude, the Supreme Court has long held that "[w]hen a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry."[248] The argument for implied consent follows from this authority. While

241. *See* Walter Heiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 559, 560 (1998) (discussing the jurisdictional goals of certainty, predictability, and conservation of judicial resources).

242. *In re* Roberts Litig., 97 F. Supp. 3d 1239, 1241 (D. Mont. 2015) (describing Ms. Roberts's procedural objection as a waiver of personal jurisdiction).

243. Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 705 (1982) (holding that in the federal system a party that has waived personal jurisdiction may not raise personal jurisdiction as a defense); Petrowski v. Hawkeye-Sec. Ins. Co., 350 U.S. 495, 496 (1956) (holding unanimously that a party that waives jurisdiction may not then raise personal jurisdiction as a challenge to the Court's authority).

244. John Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. ST. L.J. 65, 77 (2021).

245. *See supra* Part III.A.1 (discussing *Oliphant* and the creation of a common law principle against tribal court criminal jurisdiction over non-Indians).

246. *See supra* Part II (discussing the long-established principle that Indian tribes may exclude non-Indians from tribal lands).

247. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation.").

248. *Id.*

there is no document or sworn deposition, when a non-Indian enters the land of an Indian tribe, knowing that the tribe asserts criminal jurisdiction over non-Indian persons on tribal land, there has been an implied consent to the assertion of tribal court criminal jurisdiction.

A. Origins of Implied Consent

Non-Indians giving implied consent to tribal court criminal jurisdiction on the basis of physical presence has an established legacy in both scholarly argument and judicial precedent. Legal scholar Tim Vollmann noted that tribes asserted this argument with the express approval of the Department of Interior more than fifty years ago:

> Since federal prosecutors are often slow to prosecute misdemeanors committed on reservations many miles away, an intolerable situation is created. Many tribes have complained of non-Indian vandalism and dumping of trash, which activities go unpunished. To counter this, the Salt River and Gila River Indian communities in southern Arizona took matters into their own hands in 1972 and passed the following ordinance: 'Any person who enters upon the [community] shall be deemed to have implied consented to the jurisdiction of the Tribal Court and therefore [shall be] subject to prosecution in said Court for violations of [the tribal code].' The ordinance was approved by local Bureau of Indian Affairs officials, and the Commissioner of Indian Affairs did not invalidate it, waiting instead for a judicial ruling on its validity. Since that time the communities have successfully exercised jurisdiction over non-Indian traffic offenders without judicial challenge.[249]

Vollmann recognized that the doctrine of "implied consent" requires that the power to prosecute non-Indian offenders lies within "the residual sovereignty of tribal governments."[250] However, writing from 1974, Vollmann lacked the perspective that has come with half a century of precedent developing the federal common law.

Importantly for the argument in favor of implied consent, the exercise of criminal jurisdiction through a posted notice was at least preliminarily approved by the Department of Interior.[251] Approval from the Department of Interior is not required for a tribe to exercise its inherent powers,[252] but the assertion of criminal jurisdiction over non-Indians is certainly easier when there is some federal

249. Vollmann, *supra* note 162, at 394.

250. *Id.* at 394.

251. *Id.*

252. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 200–01 (1985) (holding that the Navajo Nation had the inherent authority to tax a non-Indian business operating on the reservation even without obtaining approval from the Secretary of Interior to tax non-Indians and without adopting a Constitution under the IRA assuming the power to tax to the Nation).

support for that authority.[253] For example, in *Quechan Tribe v. Rowe*, a tribal ordinance required non-Indians to obtain a tribal permit before hunting on the reservation.[254] Perhaps uniquely, the Tribe enforced its ordinance through its criminal authority by declaring any non-Indian found on the reservation and hunting without a permit is "subject to arrest by a tribal officer, who is to take the trespasser before the tribal court . . . ."[255] When the tribal ordinance was challenged, the Ninth Circuit made clear that the ordinance was criminal in nature. The Ninth Circuit noted that the ordinance declares that "[u]pon conviction" the tribal court must award damages and observed that the ordinance "defines trespass in much the same manner as Ordinance 5-60 but provides that trespassers are to be referred to federal officials for prosecution."[256]

When a group of youths entered the Quechan Reservation with rifles intending to engage in dove hunting, their weapons were confiscated by a tribal officer and they were excluded from the Reservation, but they were not arrested.[257] The youths challenged their exclusion, arguing that the tribal officer violated their rights as non-Indians because the officer had no right to exclude them.[258] The Tribe brought a suit seeking a declaratory judgment that it could enforce its ordinance against non-Indians.[259] The Ninth Circuit held that the Tribe could enforce its ordinance on the basis of its right to exclude. The court explained, "In the absence of treaty provisions or congressional pronouncements to the contrary, the tribe has the inherent power to exclude non-members from the reservation."[260] It reasoned that the right to exclude included "the rights to determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; to expel those who enter the reservation without proper authority or those who violate tribal, state or federal laws; to refer those who violate state or federal laws to state or federal officials; and to designate officials responsible for effectuating the foregoing."[261]

Quechan Tribe is an important pre-*Oliphant* precedent because it recognized the implied rights of an Indian tribe. While the officer in *Quechan Tribe* did not arrest the youths, and so the legality of implied criminal jurisdiction

253. *See* Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 410–11 (9th Cir. 1976).

254. *Id.* at 409–10 ("Article XI of those Bylaws authorizes the adoption of tribal ordinances 'for the control of hunting and fishing on the reservation' . . . To that end the tribe has enacted three ordinances. Ordinance number QT-4 prohibits the use of rifles on the reservation and requires non-members of the tribe to obtain tribal permits before pursuing game on the reservation.").

255. *Id.* at 410.

256. *Id.*

257. *Id.*

258. *Id.* ("The youths reported the incident to the Imperial County sheriff's office, whose officers arrested Buker for grand theft of the weapons. Buker was released after two hours and the charges against him were dismissed.").

259. *Id.* ("The Quechan Tribe filed this action against the arresting officers seeking declaratory and injunctive relief on the ground that the threat of future arrests prohibited the tribe from enforcing its tribal game ordinances.").

260. *Id.* (citing Williams v. Lee, 358 U.S. 217, 219 (1959)).

261. *Id.* at 411.

was not directly before the Court, the Court recognized without deciding that it is possible that a tribe could create a criminal code to govern the conduct of non-Indians who enter tribal lands.[262] "As a matter of general Indian law, tribal courts are residuals of each tribe's semi-sovereign existence, having criminal jurisdiction over all persons and offenses within the tribes' domains, to the extent that such jurisdiction is not inconsistent with treaties, agreements or federal enactments."[263] This kind of general precedent, even in dicta, finds that by virtue of their presence in Indian country, a non-Indian has impliedly consented to the criminal authority of an Indian tribe and provides a legal basis for implied consent generally.

B. Implied Consent by Entry Upon Tribal Land

Admittedly, *Oliphant* poses a problem to physical presence as a basis for implied consent. This section argues normatively that implied consent forms an adequate basis for which Indian tribes may assert criminal authority over non-Indian persons. It recognizes that *Oliphant* stands in marked contrast to this principle, and therefore attempts to thread a very delicate jurisdictional needle by limiting implied consent not over the entire reservation, but instead over tribal lands located in Indian country.

Montana, after all, only dealt with the authority of the Crow Tribe to prohibit non-Indians from hunting and fishing on land owned by the State of Montana.[264] Any conclusion that a tribe's inherent power to criminally prosecute non-Indians for actions occurring outside non-Indian fee land in Indian country is itself dicta and subject to reevaluation.

If *Oliphant* can be narrowed by contemporaneous precedent drawn from civil authority there emerges a hole within which the inherent criminal jurisdiction of Indian tribes over tribal lands remains. To understand this jurisdictional exception, it is first necessary to briefly define tribal land and explore the role of allotment and lands held in trust by the federal government. After dividing the reservation into tribal and non-tribal lands, *Oliphant*'s prohibition can be read, against contemporaneous Supreme Court precedent, to limit tribal court criminal jurisdiction only to non-Indian fee lands. There emerges a space, consistent with *Quechan Tribe*, and bolstered by recent judicial and congressional expansions of inherent tribal power, where Indian tribes can continue to assert their criminal authority over non-Indians.

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262. *Id.* ("It is argued on behalf of the tribe that its tribal court has the inherent authority to assert criminal jurisdiction over non-members of the tribe who violate tribal laws while on the reservation. This power is said to be found in general Indian law. We need not refer to general Indian law to resolve the question in this case.").

263. *Id.* at 411 n.4.

264. *See* Montana v. United States, 450 U.S. 544, 547 (1981).

1. Allotment and the Division of the Reservation

Originally, when reservations were created by statute or treaty, all land was tribal land. Moreover, all of the land within a reservation's borders was held by the United States, reserved by an Indian tribe or tribes for their use,[265] or owned in fee by the Indian tribe.[266] While maps today often portray Indian reservations as one continuous block of territory set aside for use by the tribe, in reality, the ownership of land within the outer boundary of the reservation is considerably more complicated.[267]

In the late nineteenth century, the congressional policy related to Indians shifted.[268] The original focus was on the removal of Indian tribes, typically westward, while American colonists moved in to forge new settlements on formerly tribal land.[269] As a result of the removal policy, many tribes signed treaties promising them large reservations in exchange for giving up their claim to some or all of their traditional lands.[270] After the Civil War, American settlers pressured law makers to even open up reserved tribal land to further non-Indian settlement.[271] This pressure culminated in a formal change to American Indian policy and the rise of the Allotment Era.[272]

In 1887, Congress enacted the General Allotment Act (GAA).[273] The Act provided a framework for Indian reservations to be surveyed, with specific tracts

265. Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383, 404 (2014) (discussing Indian land ownership before and after interaction with European settlers).

266. *Id*. ("Indeed, even as allotment was being implemented, there were discrete incidents of Indian Office agents recognizing pre-existing tenure systems. For example, in the process of selecting allotments for individual Indians, agents "usually recognized" the claims of any Indians who had already occupied or improved particular tracts of land.").

267. Professor Jessica Shoemaker is one of the leading scholars of Indian property law and at the vanguard of the field. For a detailed discussion of the complexities of land in Indian country, see her excellent work; Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 521–25 (2017).

268. Angelique EagleWoman (Wambdi A. Was'teWinyan), *Permanent Homelands Through Treaties with the United States: Restoring Faith in the Tribal Nation-U.S. Relationship in Light of the McGirt Decision*, 47 MITCHELL HAMLINE L. REV. 640, 659 (2021) (discussing the Removal and Reservation eras which were precursors to the Allotment Era which began during the late 1800s).

269. *See* Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 978 n.84 (2011) ("[T]he Removal Era, which lasted from approximately 1835 to 1861. During this era, the United States entered into treaties concerned primarily with removing Eastern tribes to Western territories to make way for white settlement.").

270. *See id*. ("The Indian Removal Act of 1830 authorized the President to provide Eastern tribes with lands west of the Mississippi in exchange for their Eastern homelands.").

271. Allison M. Dussias, *Squaw Drudges, Farm Wives, and Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 674 (1999) ("In practice, specific reservations were selected for allotment in response to white pressure for Indian lands in particular areas.").

272. *See id*. at 674–75.

273. Pub. L. No. 49-105, 24 Stat. 388 (1887). The General Allotment Act is sometimes called the Dawes Act or the Dawes Severalty Act after Senator Henry Dawes of Massachusetts who pushed for the enactment of the legislation. For an academic overview of the Dawes Act and its implications, see

of land being assigned to individual members of the tribe. The remaining unclaimed lands—those not set aside for use by the tribe or assigned to an individual tribal member—were declared "surplus" and were generally opened to non-Indian settlement.[274] As non-Indians moved on to the reservation, the nature of the reservation changed. Allotted reservations were no longer entirely Indian places; instead, they were interspersed or "checkerboarded" with alternating Indian and non-Indian parcels.[275]

The GAA did not automatically allot any reservation; instead, it created a framework for the allotment process to move forward.[276] Not all reservations were allotted.[277] Some Indian tribes continue to control virtually the entire reservation.[278] But for reservations that went through the allotment process, the question of the reservation's continuing status has frequently been referred to the courts. Collectively, Indian tribes lost almost 90 million acres of land.[279] The general rule is that once "a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."[280]

Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and* Cobell v. Salazar, 46 GONZ. L. REV. 609 (2010).

274. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 29–43 (1995) (discussing the role of surplus lands in the Allotment process).

275. *Id*. at 17 n.91 (describing Indian lands as "broken up and checkerboarded" during the Allotment process). Professor Royster also explains why the allotment process was often termed a checkerboard. "Non-Indian settlement interspersed with Indian allotments, assimilation advocates believed, would promote interaction between citizens and Indians and encourage the allottees to adopt white ways." *Id*. at 13.

276. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 778 (2006) ("Take, for example, the so-called allotment/assimilation era . . . starting in earnest in 1887 with adoption of the General Allotment Act, which created a framework for the allotment of parcels of reservation lands to individual Indians to convert them to independent farmers.").

277. Douglas R. Nash & Cecelia E. Burke, *The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act*, 5 SEATTLE J. SOC. JUST. 121, 125 (2006) ("It is important to note that not all reservations were allotted, and often those selected for allotment contained natural resources desired by the government or westward settlers.").

278. Grant Christensen, *A View from American Courts: The Year in Indian Law 2017*, 41 SEATTLE U. L. REV. 805, 883 (2018) (citing United States v. Jackson, 853 F.3d 436 (8th Cir. 2017)) (noting that for example, the Red Lake Reservation in Minnesota remains a "closed reservation" with virtually all of the reservation land held communally).

279. Royster, *supra* note 274, at 13 (recognizing that approximately 60 million acres of land on Indian reservations was lost as surplus land, and that an additional 27 million acres that were individually allotted to Indians had be lost to non-Indians or to state/local government before the Allotment Era ended and the Indian Reorganization Act provided new protections for these lands).

280. Solem v. Bartlett, 465 U.S. 463, 470 (1984) (citing United States v. Celestine, 215 U.S. 278, 285 (1909)), *cited with approval in* McGirt v. Oklahoma, 140 S. Ct. 2452, 2468 (2020); *see also* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain.").

Both the Supreme Court[281] and lower courts[282] have read allotment acts either as diminishing or failing to diminish an Indian reservation. If Congress did not intend to diminish a reservation's boundaries, a reservation remains intact even if it contains many non-Indian parcel holders. Thus, these allotted reservations are a mixture of land owned by the United States in trust for the tribe and its members[283] and parcels that are owned in fee by non-Indians. The non-Indian parcel owners may be individuals,[284] corporations,[285] or even states.[286] The 2020 *McGirt* case provides an interesting example. In *McGirt* the Supreme Court held that the Muscogee (Creek) Reservation was not diminished and so the entire reservation remained intact.[287] That Reservation includes a large portion of Tulsa, Oklahoma and has tens of thousands of land parcels held by non-Indians.[288]

The goal for most Indian law advocates is to ultimately overturn *Oliphant* and either congressionally or judicially recognize that a tribe's inherent criminal authority applies over all persons who violate the tribal criminal code on its reservation. Until that preferred outcome is achieved, recognizing implied

281. *See Solem*, 465 U.S. at 474 (finding the Cheyenne River Sioux Reservation was not diminished); Hagen v. Utah, 510 U.S. 399, 421 (1994) (holding that the Uintah Indian Reservation was diminished); *Yankton Sioux Tribe*, 522 U.S. at 342 (holding that the Yankton Sioux Reservation was diminished); Nebraska v. Parker, 577 U.S. 481, 494 (2016) (holding that the Omaha Indian Reservation was not diminished); *McGirt*, 140 S. Ct. at 2482 (holding that the Muscogee (Creek) Reservation was not diminished).

282. For just a few examples from lower courts, see Penobscot Nation v. Frey, 3 F.4th 484, 507 (1st Cir. 2021) (holding that the Penobscot Indian Reservation did not include the land under an adjacent river); Oneida Nation v. Vill. of Hobart, 968 F.3d 664, 668 (7th Cir. 2020) (holding that the Oneida Reservation in Wisconsin was not diminished); United States v. Jackson, 853 F.3d 436, 438 (8th Cir. 2017) (holding that the Red Lake Reservation was not diminished).

283. *See* Jessica A. Shoemaker, *Emulsified Property*, 43 PEPP. L. REV. 945, 962 (2016) (discussing the different kinds of land ownership in Indian country, noting that today in Indian country there is land held in trust by the United States for Indian tribal governments and for individual Indians, and that land continues to pass into and out of trust status through various mechanisms even today).

284. *See* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 320 (2008) (non-Indian bank sold a parcel of property located on an Indian reservation to a non-Indian purchaser).

285. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 648 (2001) (Atkinson Trading Co. owned a hotel and store in fee on land located within the boundaries of the Navajo Nation).

286. *See* Montana v. United States, 450 U.S. 544, 569 (1981) (holding that the land under the Little Big Horn River on the Crow Reservation belonged to the State of Montana).

287. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) ("The federal government promised the Creek a reservation in perpetuity . . . Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.").

288. *Id*. at 2479 ("[T]he Creek Reservation alone is hardly insignificant, taking in most of Tulsa and certain neighboring communities in Northeastern Oklahoma. But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today.").

consent to criminal jurisdiction is merely a step toward full recognition of a tribe's inherent power.

2. Implied Consent Over Tribal Lands Is Consistent With (Most) Precedent

The Supreme Court has repeatedly found that a tribe's "inherent sovereignty" extends beyond just their members to encompass "their territory."[289] Just four years after *Oliphant*, although in the tax context, the Supreme Court explained in *Merrion* that a tribe's inherent powers include the ability to place restrictions on a non-Indian as a condition of their presence on tribal lands. The Court held, "Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation."[290] Nothing in *Merrion* suggested that the Court's holding was limited to taxation. If anything, the Court's use of the phrase "such as" suggests that there are many other conditions that a tribe may impose upon a non-Indian in exchange for permission to enter or remain on tribal lands.

Implied consent to the criminal jurisdiction of tribal courts should be among those conditions that a tribe may impose upon a non-Indian in exchange for permitting their entry or continued presence on tribal lands. "When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry."[291] The condition of entry is compliance with the entire Tribal Code, including any and all criminal provisions. Tribes that want to impose implied consent as a condition to entry are giving non-Indians a choice. They can either enter and remain on tribal lands while being subject to tribal law, including tribal court criminal jurisdiction; or the non-Indian can refuse to enter the tribal lands. This choice is no more violent nor more discriminatory than the State of Maine giving persons a choice to either enter Maine, and be subject to its criminal law, or to not enter Maine.

This construction of the right to enter tribal lands makes intuitive sense. When an individual enters a new jurisdiction, they agree to be bound by the rules of that jurisdiction.[292] Indian reservations are perhaps unique because within

289. *See Atkinson*, 532 U.S. at 650 ("[T]he inherent sovereignty of Indian tribes was limited to 'their members and their territory.'"); United States v. Wheeler, 435 U.S. 313, 323 (1978) (citing United States v. Mazurie, 419 U.S. 544, 557 (1975)) ("We have recently said: 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.'").

290. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982).

291. *Id.*

292. This proposition of law is practically axiomatic and serves as the baseline of much of criminal law and international law. For an interesting discussion of this agreement, where the Mississippi River was shared by both Mississippi and Arkansas and so entry upon the river subjected persons to both Mississippi and Arkansas criminal law, see State v. Cunningham, 59 So. 76, 77–78 (Miss. 1912).

many reservations, there is land that is owned by the tribe or by the United States in trust for the tribe, and if the reservation has been allotted, there is land owned in fee by non-members or the state. Within the reservation, implied consent to a tribe's criminal jurisdiction should apply when a non-Indian enters land owned by the tribe or its members or held in trust for the tribe by the United States. If the non-Indian does not want to be bound by tribal law, they can easily avoid it by not entering tribal land.

Recognizing implied consent therefore separates a reservation into tribally controlled and non-tribally controlled parcels, and imposes implied consent to the criminal jurisdiction of the tribe only against non-Indians who enter tribally controlled lands. This is consistent with Supreme Court precedent suggesting that a tribe's inherent sovereignty extends to its "territory"[293] and with the inherent tribal powers discussed in *Merrion*, holding that tribes may limit the entry or continued presence of non-Indians on tribal lands to those who agree to comply with tribal conditions,[294]—in this case an implied agreement to be bound by the criminal laws of the tribe. If "a man's home is his castle,"[295] then surely a tribe's lands are within its sovereignty.

a. Explaining Oliphant

An astute reader may recognize that the heading of this subsection is that "Implied Consent Over Tribal Lands Is Consistent with *(Most)* Precedent." The obvious elephant in the room is *Oliphant*, which purports to remove a tribe's inherent criminal jurisdiction over non-Indians. A part of *Oliphant* is easily distinguishable.

In *Oliphant*, two non-Indian defendants objected to the tribe's assertion of criminal jurisdiction.[296] Daniel Belgard was arrested after a high-speed chase on a highway running through the Suquamish Indian Reservation that ended when he collided with a tribal police vehicle.[297] The Court held that the Tribe lacked criminal jurisdiction over Belgard.[298] While it is the strong position of both this author and this Article that the *Oliphant* decision was not properly decided, its conclusion is still consistent with the recognition of implied consent over non-Indians on tribal lands. On highways running through an Indian reservation, a

293. *See Atkinson*, 532 U.S. at 650; *Wheeler*, 435 U.S. at 323.

294. *See Merrion*, 455 U.S. at 144.

295. Minnesota v. Carter, 525 U.S. 83, 96 (1998) ("The axiom that a man's home is his castle, or the statement attributed to Pitt that the King cannot enter and all his force dares not cross the threshold has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition.") (Scalia, J., concurring).

296. 435 U.S. 191, 194 (1978).

297. *Id.*

298. *Id.* at 212.

tribe may have the right to stop, detain, and search a non-Indian.[299] However, the full panoply of a tribe's sovereignty has likely been reduced.[300] A highway within "Indian country" is not considered "tribal lands" because highways are managed in whole or in part by the federal government or a state. Therefore, persons like Daniel Belgard would not have been construed to have impliedly consented to the Suquamish Tribe's criminal jurisdiction because he was not on tribal lands.

b. Precedent in Context

Admittedly, the second defendant in *Oliphant* appears to be almost impossible to distinguish from the implied consent argument because he was arrested after striking a tribal officer while on tribal land.[301] While the Ninth Circuit clearly found that the Tribe had inherent criminal jurisdiction over Oliphant for violating the Tribal Code on tribal lands,[302] the Supreme Court reversed. Looking at only *Oliphant*, implied consent finds little judicial support.

Fortunately, *Oliphant* is almost fifty years old and new precedent exists providing a legal basis for the recognition that non-Indians may impliedly consent to the criminal jurisdiction of a tribal court by entering tribal territory.[303] Most important is *Lara*'s recognition that the Court's common law precedents on tribal court criminal jurisdiction only represent the Court's opinion "at the

299. *See* United States v. Cooley, 141 S. Ct. 1638, 1641 (2021) (holding that a tribal police officer was exercising a tribe's inherent criminal power when he stopped, searched, and detained a non-Indian suspected of drug activity on a public highway running through the Crow Reservation in Montana).

300. *See Strate*, 520 U.S. at 442 (holding that a highway running through the reservation was within Indian country but was not part of the tribal lands over which a tribe's inherent right to adjudicate extended because the Tribe had lost the general power to exclude persons from it absent certain facts or circumstances).

301. The fact that Oliphant's crime and accompanying arrest occurred on tribal land within the Suquamish Indian Reservation is not a consideration explicitly mentioned by the majority opinion, but it is referenced by the Ninth Circuit in the opinion below. "[W]hat is the Jurisdiction of an Indian tribe over non-Indians who commit crimes while on Indian tribal land within the boundaries of the reservation? Oliphant was arrested on the Port Madison Indian Reservation in the state of Washington by Suquamish tribal police on August 19, 1973, and charged before the Provisional Court of the Suquamish Indian Tribe with assaulting an officer and resisting arrest." Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

302. *Id.* at 1013 ("Not only does the law relating to Indian tribes support the jurisdiction here in question; practical considerations also support it.").

303. There is a whole line of mostly Ninth Circuit cases that argue that presence on tribal land is alone sufficient to confer at least tribal civil jurisdiction and so no analysis beyond the location of the regulated activity is necessary to positively determine tribal authority. *See* Water Wheel Camp Rec. Area v. LaRance, 642 F.3d 802, 814 (9th Cir. 2011) (holding that defendant's presence leasing tribal lands alone is sufficient for jurisdiction); *id.* ("[W]here the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering Montana."); Elliott v. White Mountain Apache, 566 F.3d 842, 849–50 (9th Cir. 2009) (finding that the Tribe can assert landowners right to exclude a nonmember from tribal lands without needing to consider the exceptions in *Montana*).

time the Court issued its decisions."[304] Since *Oliphant*, the Court has overruled precedent and held that a tribe's criminal authority extends to all Indians, regardless of whether they are members of the tribe.[305] Congress has similarly recognized and affirmed a tribe's inherent criminal power over non-Indians for an expanding set of crimes.[306] This recognition includes the inherent power of a tribe to criminally punish a non-Indian for "assault of tribal justice personnel,"[307] which means that if *Oliphant* were to come before the Court today, the Suquamish Tribe would likely have had criminal jurisdiction over Oliphant.

With both judicial and legislative action, the precedential power of *Oliphant* to limit the criminal jurisdiction of tribal courts should be reexamined. A tribe wanting to challenge *Oliphant*'s bright-line prohibition might start by enacting an implied consent ordinance similar to those experimented with by the Gila River and Salt River Pima Indian communities in the 1970s[308] or the Quechan Tribe's hunting and fishing prohibitions, which are to be applied to non-Indians and enforced through the Tribe's criminal code in tribal court.[309] Obtaining implied consent from non-Indians as a condition for entry to tribal lands is an important step forward both for the preservation of tribal sovereignty and for the advancement of tribal court criminal jurisdiction over non-Indian offenders.

CONCLUSION

We are currently experiencing a reflexive moment in Indian law. The Supreme Court has stepped back from its absolutist position on the inherent criminal power of Indian tribes articulated in *Oliphant*, recognized that tribes have inherent criminal jurisdiction over non-member Indians,[310] and acknowledged that tribal law enforcement has the authority to stop, search, and

304. United States v. Lara, 541 U.S. 193, 206 (2004).

305. *Id*. at 210 ("[W]e hold . . . that the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute non-member Indians. We hold that Congress exercised that authority in writing this statute.").

306. *Supra* Part I.B.2.

307. *See* Angela R. Riley & Sarah Glenn Thompson, *Mapping Dual Sovereignty and Double Jeopardy in Indian Country Crimes*, 122 COLUM. L. REV. 1899, 1916 (2022) ("For a participating tribe to exercise STCJ over an assault of tribal justice personnel, however, the assault must involve an alleged violation of law during or related to the enforcement of a covered crime over which the tribe exercises STCJ."). It should be noted the obstruction of justice is one of the enumerated crimes, and so assault on a tribal officer engaged in a police stop is certainly within the inherent criminal power of an Indian tribe.

308. *See* Vollmann, *supra* note 162, at 394.

309. Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 409 (9th Cir. 1976).

310. *See* United States v. Lara, 541 U.S. 193, 210 (2004) (reversing the Court's own opinion in *Duro* and holding that a tribe's inherent criminal power extends over all Indians who commit crimes in Indian country, even those who are not members of the tribe). For an academic discussion of how *Lara* expanded the inherent criminal powers of tribal courts, see Grant Christensen, *The Extraterritorial Reach of Tribal Court Criminal Jurisdiction*, 46 HASTINGS CONST. L.Q. 293, 306 (2019); Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 333–34 (2018) ("The Duro fix, upheld by Lara, means that Congress has the power to recognize and affirm inherent tribal jurisdiction, even after the Court has ruled against such jurisdiction.").

detain non-Indian persons suspected of committing crimes on the reservation, even if the land is not owned or controlled by the tribe.[311] Congress has also broken the *Oliphant* taboo and twice recognized that the inherent criminal authority of an Indian tribe includes the authority to arrest and prosecute non-Indians for an increasing number of crimes, including some non-Indian on non-Indian crimes.[312]

Read against the slow but inexorable recognition and restoration of the inherent criminal authority of tribal courts, it appears to this author that *Oliphant*'s days are numbered. While it would almost certainly require an act of Congress or a new decision from the Supreme Court to retire *Oliphant* permanently, this Article takes the position that, consistent with existing precedent, tribes can maximize their sovereignty and fully utilize their inherent criminal authority by seeking the consent of non-Indian law breakers.

Perhaps even more importantly, the assertion of criminal jurisdiction over non-Indians will necessarily change the interest balancing used by the 5-4 majority opinion in *Castro-Huerta*.[313] The majority concluded that states and Indian tribes have concurrent criminal authority over non-Indians in Indian country, and it recognized that criminal jurisdiction was subject to a form of interest balancing. However, since Indian tribes do not generally assert criminal jurisdiction over non-Indians, there is no tribal interest to weigh against the state interest.[314] If tribes use consent to regularly assert their criminal jurisdiction over non-Indians, future courts will be required to weigh the tribal interest against the state interest. If tribes are regularly using their criminal authority through consent, then the addition of state jurisdiction is likely to infringe on the right of Indian tribes "to make their own laws and be ruled by them."[315] Therefore, state

311. United States v. Cooley, 141 S. Ct. 1638, 1638 (2021) (holding that a tribal police officer was exercising a tribe's inherent criminal power when he stopped, searched, and detained a non-Indian suspected of drug activity on the Crow Reservation). For an academic discussion of *Cooley*, see Mikaela Koski, *Tying a Tribal Officer's Hands: Tribal Law Enforcement Authority Under* United States v. Cooley, 126 PENN ST. L. REV. 275 (2021); Adam Crepelle, *The Law and Economics of Crime in Indian Country*, 110 GEO. L.J. 569, 593–601 (2022).

312. *See supra* Part I.B.2 (discussing Congress's reauthorization of the Violence Against Women Act in 2013 and 2022, and specifically the 2022 reauthorization's recognition of inherent criminal jurisdiction over crimes like assault of a tribal law enforcement officer which is the first time there has been broad recognition of tribal court criminal jurisdiction over a crime potentially by a non-Indian against a non-Indian).

313. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022) ("We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.").

314. *Id*. at 2501 ("[A] state prosecution of a non-Indian does not involve the exercise of state power over any Indian or over any tribe. The only parties to the criminal case are the State and the non-Indian defendant. Therefore, as has been recognized, any tribal self-government 'justification for preemption of state jurisdiction' would be 'problematic.'").

315. Williams v. Lee, 358 U.S. 217, 220 (1959). For a discussion of how infringement may be used to give tribal courts jurisdiction over non-Indians who enter tribal lands, see Grant Christensen, *Creating Bright-Line Rules for Tribal Court Jurisdiction Over Non-Indians: The Case of Trespass to Real Property*, 35 AM. INDIAN L. REV. 527, 571–73 (2010).

jurisdiction should be preempted under the same balancing analysis applied in *Castro-Huerta*.

This Article suggests that Indian tribes can obtain consent to tribal court criminal jurisdiction from non-Indians either explicitly or implicitly and that tribes could assert this authority if they choose. The explicit form through affirmative consent is the safer option. Modeled off of the *Roberts* case from the Ninth Circuit,[316] when non-Indians violate the norms of the tribal community, the tribe could bring alternative civil and criminal charges against the perpetrator. The non-Indian then has a choice, either affirmatively consent to the tribe's criminal authority or face a civil proceeding where the tribe seeks to exclude them from the reservation. While not all non-Indians will consent, those that do will have provided an important jurisdictional basis for the future full recognition of tribal court criminal authority.

In the alternative or simultaneously, Indian tribes can try to assert criminal jurisdiction over non-Indians who commit offenses on tribal lands on the basis of implied consent. The groundwork for implied consent was firmly established before *Oliphant* was decided. The Ninth Circuit had accepted the premise of criminal jurisdiction on the basis of physical presence in *Quechan Tribe*[317] and the Bureau of Indian Affairs had even preliminarily approved changes to multiple tribal codes to assert that criminal power.[318] By limiting *Oliphant* to its facts and drawing upon more recent Supreme Court precedent, there is a legal basis for tribes to assert criminal jurisdiction over all non-Indians who enter tribal lands on the basis of implied consent.

316. Roberts v. Elliott, 693 F. App'x 630, 631–32 (9th Cir. 2017).

317. *See* Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976).

318. Vollmann, *supra* note 162, at 394 ("The ordinance was approved by local Bureau of Indian Affairs officials, and the Commissioner of Indian Affairs did not invalidate it, waiting instead for a judicial ruling on its validity.").