Restorative Justice as Regenerative Tribal Jurisdiction

Lauren van Schilfgaarde*

For more than a century, the United States has sought to restrict Tribal governments' powers over criminal law. These interventions have ranged from the imposition of federal jurisdiction over Indian country crimes to actively dismantling Tribal justice systems. Two particular moves—diminishing Tribal jurisdiction and imposing adversarial approaches on Tribal courts—have had particularly devastating impacts on Tribal justice and criminal legal systems. In the contemporary era, these developments have severely constrained Tribal approaches to criminal justice reform. Yet in recent years, we've begun to witness new trends at the Tribal level. Tribes are increasingly embracing Indigenous-based restorative justice models, which have regenerated Tribal jurisdiction and enhanced the well-being of Tribal members. These trends are important both in their own right and as examples of Indigenous antisubordination in criminal justice reform. Indeed, for Tribes, the leading contemporary response to historical oppression is collective "self-determination." True self-determination requires both internal and external legitimacy. As Tribes pursue freedom from settler-colonial constraints, this Article reveals how restorative justice offers opportunities to "Indigenize" Tribal systems while also reclaiming jurisdictional powers for the benefit of Tribes and Tribal members alike.

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* Cochiti Pueblo; Assistant Professor at the UCLA School of Law. I previously served as the San Manuel Band of Mission Indians Director of the Tribal Legal Development Clinic at the UCLA School of Law and as the Tribal Law Specialist at the Tribal Law and Policy Institute. I graduated from the UCLA School of Law in 2012. I am incredibly grateful to Professors Kristen A. Carpenter, Beth A. Colgan, Carole E. Goldberg, K-Sue Park, Angela R. Riley, William Wood, and the Gathering of Indigenous Legal Scholars for their thoughtful edits, comments, and opportunity for feedback. I am additionally grateful to Judge Abby Abinanti, Judge Carrie E. Garrow, Chief Judge B.J. Jones, Judge Lawrence Lujan, Judge Ron Whitener, and Judge Korey Wahwassuck for graciously sharing their time, insight, and expertise. I am indebted to the Tribal court practitioners that are living and breathing Tribal justice every day, pushing the boundaries of innovation and service. Particular thanks to the editorial assistance of the *California Law Review*, including specifically Kayla Clough, Justine DeSilva, and Stephanie Spear. All errors and shortcomings are my own.

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INTRODUCTION

Despite decades of attempts to assimilate Tribal[1] courts into a Western adversarial model and to simultaneously constrict the jurisdiction those Tribal courts exercise, Tribes are resisting. More notable still—this Tribal resistance is strengthening both Tribal courts and their jurisdiction. Tribal resistance in the form of rebuilding customary justice systems that are akin to contemporary restorative justice models is having the effect of not only legitimizing the Tribal judiciary in the eyes of its Tribal community but also facilitating local jurisdictional transfer agreements. As Tribes resist the Western adversarial

1. I intentionally elect to capitalize "Tribe," "Tribal," "Indigenous," and other references to Indigenous Peoples and their governments. *See* GREGORY YOUNGING, ELEMENTS OF INDIGENOUS STYLE: A GUIDE FOR WRITING BY AND ABOUT INDIGENOUS PEOPLES 77 (2018) ("Indigenous style uses capitals where conventional style does not. It is a deliberate decision that redresses mainstream society's history of regarding Indigenous Peoples as having no legitimate national identities; governmental, social, spiritual, or religious institutions, or collective rights."); Angelique EagleWoman (Wambdi A. Was'teWinyan), *The Capitalization of "Tribal Nations" and the Decolonization of Citation, Nomenclature, and Terminology in the United States*, 49 MITCHELL HAMLINE L. REV. 623, 627, 635 (2023).

model in exchange for Healing to Wellness Courts that are rooted in restorative justice approaches, Tribes are gaining access to defendants and are thereby showcasing new paths of juridical development, jurisdictional enhancement, and community healing.

The Tribal court is an adjudicative expression of the inherent sovereign powers of a Tribe.[2] These courts enforce and interpret constitutional, statutory, common, and customary Tribal law; they provide a forum for community dispute resolution, criminal prosecution, and administrative process; and, inter alia, they provide a vehicle for interaction and collaboration with other sovereigns. Yet, Tribal courts are hardly an organic product of Tribal communities.[3] Rather, modern Tribal courts are largely a post-contact development, implemented in response to U.S. federal policy for Tribes to "self-govern" but in the likeness of the colonizer.[4] In fact, a major thrust of the federal Indian policy regime is to impose federal norms on Tribal communities.[5] Tribal courts therefore tend to look far more like state and federal courts than pre-contact traditional Tribal justice systems.[6]

This Article seeks to examine the contexts in which Anglo-adversarial criminal justice has been thrust upon Tribal governments, how that historical arc informs the ways in which Tribes approach criminal justice reform, and the potential that restorative justice has to address current harms in Tribal communities and enhance Tribal justice legitimacy. This Article examines how the implementation of restorative justice has produced opportunities to regenerate jurisdiction and how the use of that power is enhancing the well-being of Native people.

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2. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978) (holding the Double Jeopardy Clause does not bar a federal prosecution subsequent to a Tribal prosecution because the source of an Indian Tribe's power to punish is its inherent Tribal sovereignty).

3. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE, 82–89 (1983) (describing the evolution of Tribal governments, which has been heavily influenced by Western judicial institutions and procedures).

4. *See, e.g.*, Indian Reorganization Act of 1934, Pub. L. No. 73-383, § 16, 48 Stat. 984, 987 (recognizing the right of Tribes to organize for their common welfare, but conditioning the implementation of any ratified constitutions and bylaws upon the approval of the Secretary of the Interior).

5. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 784–85 (2006) (noting that Tribal self-determination is far from a meaningful realization, evidenced most profoundly in the extent to which the federal government regulates Tribal criminal law, including "forc[ing] [T]ribal members to adopt an identity defined by outsiders").

6. Melody L. McCoy, *When Cultures Clash: The Future of Tribal Courts*, 20 HUM. RTS. 22, 23 (1993) ("Thus, today's [T]ribal courts tend to look and act much like the non-Indian courts. This is not surprising. Many similarities are the result of federal Indian policies which long have suppressed [T]ribal self-determination.").

The extent to which Tribal communities can then view their Tribal courts as legitimate is fraught. More difficult still, Tribal court legitimacy[7] is also subject to immense external scrutiny.[8] Despite assimilating to Anglo-adversarial norms,[9] Tribal courts are severely limited in their sentencing authority.[10] The scope of Tribal adjudicatory powers has also been severely limited. For example, in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that Tribes lack any criminal jurisdiction over non-Indians.[11] Other holdings, like the extension of state jurisdiction into Indian country through *Oklahoma v. Castro-Huerta*,[12] Public Law 280[13] and comparable state compacts,[14] and the disestablishment of some reservations, have resulted in the de facto loss of additional Tribal jurisdictional authority. Federal skepticism toward Tribal justice goes so far as to hold Tribal authority hostage in exchange for further Tribal court assimilations

7. *See generally* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018) (identifying three categories of the term "legitimacy": sociological legitimacy, moral legitimacy, and legal legitimacy). The extent to which Tribal courts must navigate legitimacy concerns from within the Tribe and from outside the Tribe can impact both moral and legal legitimacy. However, I use the term "legitimacy" primarily as an invocation of sociological legitimacy—or the view of Tribal courts as worthy of respect and obedience. *See also* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2244 (2019) (reviewing FALLON, *supra*) ("Sociological legitimacy depends on an external perspective: Does the public view the legal system and its institutions as worthy of respect and obedience . . . ?").

8. *See, e.g.*, United States v. Cooley, 141 S. Ct. 1638, 1644–1645 (2021) (holding that Tribes retain inherent power for a Tribal police officer to temporarily detain and search a non-Indian. However, Justice Breyer noted that the search and detention were permissible in part because they subjected the non-Indian only to state and federal laws, and not to Tribal laws that the non-Indian "had no say in creating . . . .").

9. I use the term "Anglo-adversarial" to refer to the specific criminal legal system model utilized within the United States, influenced heavily by Anglo-European legal structures, that has been imposed onto Tribes within a settler colonial framework. *See, e.g.*, Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 263 (1997) ("While each Indian nation may have its own particular court structure and practice rules, all modern [T]ribal court systems have the same common denominator—they are direct descendants of the Anglo-American legal tradition.").

10. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1301–1304) (limiting Tribal self-government powers to Bill of Rights-like protections). *See generally* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007) (arguing that the forcing of one-size-fits-all approach to civil liberties onto Tribes is not only unjustified, but it would seriously endanger Indian differentness). *But see* Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZONA ST. L.J. 889, 909 (2003) (noting that while the injection of Anglo-American rights into Indian country is a threat to Tribal revitalization, there is a growing body of Tribal adherents to individual rights, and Tribes have been resourceful in accommodating the intrusion of individual rights while also preserving values of family, community, and spirituality).

11. 435 U.S. 191, 203 (1978).

12. 142 S. Ct. 2486, 2491 (2022) (holding the federal government and the state have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country).

13. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (extending state concurrent criminal civil adjudicatory jurisdiction in select areas).

14. *See infra* Part I.B.

to the Anglo-adversarial model.[15] As non-Tribal systems encroach on Tribal jurisdiction, Natives are increasingly exposed to the criminal legal systems in non-Tribal local, state, and federal courts.[16]

Meanwhile, criminal justice reform—and specifically reform related to the very model that has been imposed upon Tribes—has garnered significant traction. Though there is not yet consensus regarding the substance of that reform,[17] there is significant agreement on the need for reform.[18] Substantial attention has been paid to the need to alleviate the less powerful role of people of color and other vulnerable communities, primarily through enhanced rights.[19] The incorporation of federal due process rights to the states through the 1960s and 1970s centered this approach.[20] But the rights-based paradigm is incomplete,

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15. *See, e.g.*, Tribal Law and Order Act (TLOA) of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258, 2279–82 (recognizing Tribal authority to impose a punishment of imprisonment for a term of three years, a fine of $15,000, or both, but only if that Tribe provides additional due process protections); Violence Against Women Reauthorization Act (VAWA) of 2013, Pub. L. No. 113-4, § 904, 27 Stat. 54, 120–23 (recognizing Tribal special domestic violence criminal jurisdiction over non-Indians with ties to the Tribe, but only if that Tribe provides all of the TLOA due process protections as well as "the right to a trial by an impartial jury that is drawn from sources that (A) reflect a fair cross section of the community; and (B) do not systematically exclude any distinctive group in the community including non-Indians; and all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating [T]ribe to exercise special domestic violence criminal jurisdiction over the defendant"); H.R. 2471, 117th Cong. (2022) (extending the scope of VAWA 2013's special domestic violence criminal jurisdiction to cover six additional crimes, but preserving the additional due process protections); *see also* Jordan Gross, *Incorporation by Any Other Name? Comparing Congress' Federalization of Tribal Court Criminal Procedure with the Supreme Court's Regulation of State Courts*, 109 KY. L.J. 299, 302 (2021) (detailing how TLOA and VAWA 2013 require Tribes to extend greater procedural protections to defendants in their courts, especially if they are non-Indian, than those required of states under the Supreme Court's Fourteenth Amendment jurisprudence).

16. *See, e.g.*, Theresa Rocha Beardall, *Sovereignty Threat: Loreal Tsingine, Policing, and the Intersectionality of Indigenous Death*, 21 NEV. L.J. 1025, 1055–56 (2021) (framing the phenomenon of the increasingly fatal encounters between Indigenous persons and non-Tribal law enforcement as a "sovereignty threat"); NEELUM ARYA & ADDIE C. ROLNICK, CAMPAIGN FOR YOUTH JUSTICE, A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS 8, 20 (2008); INDIAN L. & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 3 (2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [https://perma.cc/F235-AATB].

17. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262 (2018).

18. Colleen Long & Hannah Fingerhut, *AP-NORC Poll: Nearly All in US Back Criminal Justice Reform*, AP NEWS (June 23, 2020), https://apnews.com/article/police-us-news-ap-top-news-politics-kevin-richardson-ffaa4bc564afcf4a90b02f455d8fdf03 [https://perma.cc/RAL7-T6AP].

19. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1859, 1861 (2019) (examining the limitations of exclusively viewing slavery and Jim Crow segregation as the normative lens for framing subordination within the constitutional framework, for which advocacy has typically focused on enhanced rights for minorities, and instead calling for the inclusion of federal Indian law as an additional paradigm, which in turn requires expanding beyond rights to an enhanced power-based framework).

20. *See, e.g.*, DERRICK BELL, RACE, RACISM, AND AMERICAN LAW, § 1.2, at 7 (2d ed. 1981) (focusing exclusively on racism as a pathology in the American legal process and the trajectory of a civil rights-based litigation strategy to combat racism).

especially as applied to Tribal courts and their revitalization efforts.[21] The intervention of federal power into Indian law has actually furthered majority tyranny through the forced relocation and subordination of Native peoples. Incorporationist, rights-based frameworks are feared in Indian law, rather than celebrated.[22] For Tribes, criminal justice reform must account for the ways in which the adversarial model was thrust upon Tribes, coupled with the significant loss of jurisdiction that Tribes have suffered. Colonization has not only deprived individual rights but also Tribal power.

Tribal justice systems, like federal Indian law within the corpus of public law, have frequently been dismissed as sui generis and thereby consigned to minimal scholarly examination.[23] Yet, as Tribes navigate their own criminal justice reform, Tribes offer an important perspective as to how criminal legal systems operate and how reform can be realized. For Tribes, reform efforts begin with assessing the origins of the criminal legal system coupled with the current needs of the community. The needs of Tribal communities are vast, and the many issues they face include mounting intergenerational trauma and cultural loss coupled with urgent and constant crises of violence, substance abuse, and child maltreatment, among many others. In pursuit of salves for these wounds, Tribes have incorporated diverse and innovative justice approaches, including restorative justice, to help meet the needs of their communities.[24] These approaches include peacemaking,[25] Healing to Wellness Courts,[26] reentry programs, family group conferencing,[27] and other nonadversarial structures. These innovations have proliferated despite extensive pressure to adopt adversarial structures and despite the limited scope of their criminal justice authority. Many Tribes employ restorative justice as a more efficient means of reducing recidivism; additionally, it also serves a restorative purpose for communities facing daunting historical traumas.[28] Tribes point to restorative

21. Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 660–63 (noting that while some legal academics critiqued the utility of rights discourse for the racially suppressed, the emergence of Indigenous rights in international law offers a new opportunity to reapply the rights discourse).

22. Blackhawk, *supra* note 19, at 1798.

23. *Id.* at 1787.

24. Goldberg, *supra* note 10, at 918 (describing Tribal justice systems that have incorporated dual tracks, a Western-style adversarial court and a traditional peacemaking track).

25. Porter, *supra* note 9, at 278.

26. *See generally* Thomas J. Flies-Away & Judge Carrie Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence +*, 2013 MICH. ST. L. REV. 403 (2013).

27. *See generally* Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 COLUM. J. RACE & L. 681 (2021).

28. TRIBAL L. & POL'Y INST., TRIBAL WELLNESS COURT NEEDS ASSESSMENT 13 (2010), https://www.tribal-institute.org/download/BJAReviewWellnessNeedsAssessmentAB.pdf [https://perma.cc/5U3F-VQ4V].

justice as more reflective of their traditional ways and therefore both more internally legitimate and culturally productive as a "nation-building" tool.[29]

The reach of these restorative justice systems, however, are only as great as the limited jurisdictional reach of Tribes. Criminal law is the institution in which communities set out their most important values about how people should treat one another.[30] Due to restrictions on Tribal criminal justice powers, Tribes are denied the power to determine right and wrong for themselves while also being forced to adopt outside norms.[31] Some Tribes have embarked on reasserting Tribal values and norms through the incorporation of restorative justice. In so doing, they have expanded their jurisdictional reach. Tribes are negotiating with local and state governments to transfer jurisdiction of Tribal members from state courts to Tribal courts. In these negotiations, Tribes, rather than proving the legitimacy of their courts as Anglo-adversarial beacons, are instead leveraging their restorative justice approaches to incentivize transfer. States, in a convergence of interests,[32] are agreeing to such transfer requests as an opportunity to avoid supervision responsibilities, enhance the services available to their defendants, and reduce their own recidivism rates. In this regard, Tribes are using their restorative justice modalities to regenerate lost Tribal jurisdiction. In so doing, Tribes are demonstrating meaningful criminal justice reform that accounts for its colonial roots and incorporates enhanced power as a productive tool.

This Article proceeds as follows: Part I will track the historical trajectory of Tribal courts. There is only minimal literature regarding Tribal courts, and it is generally limited to an external examination of the extent to which Tribal jurisdiction is limited by federal law. Part I will focus on the internal operations of Tribal criminal justice as a product of the imposition of adversarial models on Tribal courts and the simultaneous erosion of Tribal jurisdiction. Part II will examine the modern Tribal court and the way in which Tribes have developed restorative justice as a criminal justice reform. Over the past two decades, scholars have been pushing for criminal legal systems to incorporate restorative justice models. But during this time, little attention has been paid to the ways those models are implemented in various Tribal contexts. Highlighting these efforts not only sheds light on the realizability of restorative justice projects

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29. Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS 127, 135 (Wanda McCaslin ed., 2005) (describing Native nation-building as the process by which a Tribe strengthens its own capacity for effective and culturally relevant self-government and for self-determined sustainable community development).

30. Washburn, *supra* note 5, at 783.

31. *Id.* at 784; *see also* INDIAN L. & ORDER COMM'N, *supra* note 16, at 3 ("The comparative lack of localism in Indian country with respect to criminal justice directly contravenes this most basic premise of our American democracy.").

32. *See* Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (describing the judicial activity in racial cases both before and after *Brown* through the principle that "[t]he interest of [B]lacks in achieving racial equity will be accommodated only when it converges with the interests of [W]hites").

generally; it also reveals how those projects enhance sovereignty for Indigenous communities. By sovereignty enhancement, I do not just mean that restorative justice approaches strengthen Indigenous communities' collective communal ties, though some arguably do. I mean that those approaches have facilitated a range of agreements with state entities that effectively instantiates the broadening of the jurisdictional space Tribes have to operate within the criminal justice arena, expanding sovereign reach. Because Tribal criminal systems have been largely disempowered, criminal justice reform necessitates Tribal re-empowerment. Tribes are using restorative justice as an empowerment tool and are successfully negotiating generative jurisdictional agreements with local and state governments. Part III will then examine three case studies that exemplify this trajectory: the Yurok Tribal Court, the Saint Regis Mohawk Tribal Court, and the Sisseton-Wahpeton Oyate Tribal Court.

For Tribes, the contemporary answer to historical oppression is self-determination.[33] Ultimately, self-determination should guide how Tribes form and operate their Tribal justice systems. True self-determination requires both internal and external legitimacy. As Tribes pursue freedom from settler-colonial restraints, restorative justice offers opportunities to "Indigenize" Tribal systems while also regenerating new jurisdiction.

I.
HISTORY OF FEDERAL PRESSURE TO ASSIMILATE TRIBAL COURTS

> It was the [federal] government which initiated Indian judicial systems as we know them today, and which has prescribed requirements for how they must operate.[34]

The inherent sovereignty of Tribes includes the authority to create and administer justice systems.[35] U.S. law has acknowledged that Tribal courts are critical for self-determination as sovereigns distinct from the United States. In *Williams v. Lee*,[36] the U.S. Supreme Court held that an Arizona court lacked adjudicatory authority over a non-Indian claim against an Indian defendant from

33. *Cf.* Joe Singer, *Original Acquisition of Property: From Conquest and Possession to Democracy and Equal Opportunity*, 86 IND. L.J. 763, 774 (2011) (identifying the American land title dilemma as justified through denial and repression, requiring acknowledgement that most property originates with legal transactions with Tribes, which now imposes a legal obligation to respect the contemporary existing sovereignty of Tribes).

34. Hon. Cranston Hawley, *Foreward* to HON. ORVILLE M. OLNEY & DAVID H. GETCHES, INDIAN COURTS AND THE FUTURE: REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT v, v (1978), https://www.ojp.gov/pdffiles1/Digitization/61262NCJRS.pdf [https://perma.cc/MAM4-NP7V].

35. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 235–36 (1994); *see also* Talton v. Mayes, 163 U.S. 376, 383–84 (1896) (recognizing the federal government did not create Tribal courts, as Tribal courts had sovereign powers that existed before the U.S. Constitution).

36. 358 U.S. 217, 223 (1959).

a matter arising in Indian country.[37] The Court reasoned that allowing state court authority over such a matter would infringe on the Tribe's right of self-government.[38] The Court relied upon the expressed commitments of Congress, the Bureau of Indian Affairs, and the Tribe "in strengthening the Navajo [T]ribal government and its courts."[39]

Yet, the extent to which Tribes can meaningfully self-determine the format, substance, and scope of their justice systems has been increasingly restricted by the federal government.[40] Federal intrusion into Tribal governmental structures, including Tribal courts, is part of a large arc of federal Indian policy that has oscillated between diplomacy and conquest.[41] In the twentieth century, the federal government (at least) twice repudiated former conquest initiatives aimed at eradicating Tribal governments.[42] But, in swinging back toward a self-determination framework that no longer seeks the all-out obliteration of Tribes, the federal government has failed to dismantle earlier institutionalizations of colonialism, including intrusions into Tribal judiciaries. Instead, the federal government has merely transformed its subordination tendencies from eradication to more subtle forms of erasure.[43]

Tribal courts experience this phenomenon through numerous pressures to adopt Anglo-adversarial elements and through the loss of jurisdictional authority. Most modern Tribal courts are largely a product of the federal

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37. "Indian country" is a federal legal term, defining Tribal lands for purposes of criminal jurisdiction. *See* 18 U.S.C. § 1151 ("Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

38. *Williams*, 358 U.S. at 223 ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the [T]ribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves.").

39. *Id.* at 222.

40. OLNEY & GETCHES, *supra* note 34, at 2 (noting that despite *Williams v. Lee*, the development and implementation of robust Tribal court systems have not stymied incursions on Tribal authority to self-govern).

41. *See* Blackhawk, *supra* note 19, at 1811 (describing shifts between diplomacy and plenary power governance by the federal government).

42. *See, e.g.*, Indian Reorganization Act of 1934, 25 U.S.C. §§ 1501–1503 (ending allotment, extending existing periods of trust, and providing mechanisms to restore land back into trust); President Richard Nixon, Special Message on Indian Affairs (July 8, 1970) ("This policy of forced termination is wrong . . . . Self-determination among the Indian people can and must be encouraged . . . . The recommendations of this administration represent an historic step forward in Indian policy. . . . In place of policies which oscillate between the deadly extremes of forced termination and constant paternalism, we suggest a policy in which the Federal government and the Indian community play complementary roles.").

43. Blackhawk, *supra* note 19 at 1802 (describing these tendencies as "more quotidian forms of violence").

government and are thereby divorced from methods of traditional dispute resolution.[44] Consequently, Tribal courts may not necessarily incorporate Indigenous worldviews or philosophies.[45]

A. *Institutionalizing Adversarial Justice into Tribes: From Crow Dog to the IRA*

Tribal governments were initially denied any recognition as legally legitimate sovereigns under U.S. law, which was then used to justify the systemic dispossession of Indigenous land and sovereignty.[46] This culminated in the assertion of federal plenary power over Tribes.[47] In *Johnson v. M'Intosh*,[48] Chief Justice John Marshall found Tribes' sovereignty "as independent nations, w[as] necessarily diminished" due to what Justice Marshall characterized as the fundamental principal of European discovery.[49] This perceived "diminishment" in sovereignty has continued to haunt Tribal governments, threatening the federal acknowledgement of Tribal powers and injecting prima facie doubt concerning the legitimacy of those powers.[50] The United States asserted concurrent, or shared, jurisdiction within Indian country almost immediately with the 1790 Trade and Intercourse Act[51] and the 1817 General Crimes Act.[52] Yet despite the decimation of exclusive Tribal territorial jurisdiction, Justice Marshall also found that Tribes' internal sovereignty remained intact.[53] The moment of discovery, or conquest, legally impacted only Tribal external sovereignty, not

44. *See* DELORIA, JR. & LYTLE, *supra* note 3, at 82–89; Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17, 19 (1997) ("The history of [T]ribal dispute resolution predates both state and federal courts.").

45. *See* Zuni, *supra* note 44, at 19 (describing the role of the federal government in the development of various Tribal courts).

46. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2, 33 (1831) (holding that because Tribes "are in a state of pupilage," their sovereignty is tempered and does not rise to the level of foreign nation to satisfy diversity jurisdiction).

47. United States v. Kagama, 118 U.S. 375, 377 (1886).

48. 21 U.S. (8 Wheat.) 543, 590 (1823) (holding that because Indians are "fierce savages," they lack property interests in their land beyond occupancy rights and that Europeans and subsequently Americans, by nature of discovery, possess legal title).

49. *Id.* at 574.

50. *See, e.g.*, Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 181 (5th Cir. 2014) (Smith, J., dissenting) (in holding that the Mississippi Band of Choctaw Indians possess the inherent civil authority to hear a civil action against a non-Indian, Judge Smith expressed doubts about the fairness of such a tribunal: "The elements of Doe's claims under Indian [T]ribal law are unknown to Dolgencorp and may very well be undiscoverable by it"), *aff'd by an equally divided court* 579 U.S. 545 (2016); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022) (upending the presumption against state jurisdiction within Indian country in declaring "Indian country is part of the State, not separate from the State").

51. Act of July 22, 1790, ch. 33, 1 Stat. 137.

52. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383.

53. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 517 (1832) ("Certain it is that our history furnishes no example, from the first settlement of our country, or any attempt on the part of the Crown, to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers who, as traders or otherwise, might seduce them into foreign alliances.").

Tribal internal sovereignty, at least according to the Marshall Court.[54] This dual conception of Tribal sovereignty within federal Indian law persists today: Tribes possess sovereignty, but that sovereignty is volatile.[55]

The federal government did not subsequently intervene significantly in the Tribes' administration of justice, including their traditional dispute resolution systems, until the late nineteenth century.[56] In the early 1880s, Kan-gi-shun-ca (Crow Dog), a Brule Sioux, killed another Brule Sioux, Sinte Gleska (Spotted Tail), on what is now the Rosebud Sioux Indian Reservation in South Dakota. At the time, the Band had not formalized a court system that was recognizable by U.S. federal courts.[57] Instead, disputes were traditionally resolved by the *tiospayes*,[58] or extended families. Invoking traditional custom and practice, the Band resolved the killing by requiring Crow Dog to provide certain necessities for Spotted Tail's family, a type of restitution that restored the loss of Spotted Tail.[59] Characterizing the Band's response as *lawless*, the federal government sought concurrent jurisdiction over Crow Dog.[60]

The U.S. Supreme Court, despite dicta detailing the inferior and savage nature of the Brule Sioux, held that the federal government lacked jurisdiction over Crow Dog, in part because the Tribal treaty rights to exclusive jurisdiction remained intact.[61] Congress immediately reacted with the passage of the Major

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54. Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549, 635–36 (2022) (stating that "[e]arly on, the United States recognized [T]ribes as 'states' or 'nations' entitled to depend upon the United States government's duty to protect their sovereignty. . . . [A] state retains its sovereignty even when it depends upon another state for protection").

55. *See Castro-Huerta*, 142 S. Ct. at 2493 ("[T]he Court no longer view[s] reservations as distinct nations." (citing Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962))).

56. Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 980 (2000) (stating that the federal government did not intervene with the Tribes' administration of legal affairs until 1871); Zuni, *supra* note 44, at 20 (noting that before 1871, "the federal policy was one of respect for [T]ribal self-government and traditional forms of [T]ribal justice").

57. Chief Judge B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 468 (1998).

58. *See, e.g.*, Oglala Sioux Tribe Child and Family Code, Chapter 4, Wakanyeja Na Tiwahe Ta Woope, § 402.1 ("The root of Lakota social structure is the *tiospaye*–extended family. Tiospaye are comprised of tiwahe, immediate families, as well as individuals adopted through formal ceremony. Equality is a prevailing principle of tiospaye life. Responsibilities are dispersed throughout the tiospaye and no one is above the laws. Social classes do not exist and leaders maintain prominence only insofar as they carry out the wishes of the people. Historically, tiospaye were self-sufficient and life revolved around them. However, Federal policies and initiatives that accompanied reservation life promoted the assimilation of the Lakota into mainstream Anglo-American culture and have led to a loss of some of the strengths of the tiospaye lifestyle." (emphasis added)).

59. Jones, *supra* note 57, at 468.

60. *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883) (characterizing the Brule Sioux as "free though savage" with an "inability to understand" the "law[s] of a social state" and describing them as bound by a "savage nature" that measures only as "red man's revenge").

61. *Id.* at 556, 571 (declining to extend federal criminal jurisdiction over Crow Dog because there is no clear congressional intent to abrogate treaty rights, but also because it would extend law "over the members of a community, separated by race, by tradition, by the instincts of a free though savage

Crimes Act.[62] The Major Crimes Act vested, and still vests, federal and territorial courts with concurrent jurisdiction over certain specified "major crimes," largely violent crimes, committed by an Indian in Indian country.[63] It is a paternalistic intrusion into the presumptive jurisdictional autonomy of Tribes.[64] The Major Crimes Act is also a federal indictment of Tribal *capacity* for jurisdictional autonomy. The *Crow Dog* Court, despite holding in favor of the Tribe, was explicit in its assessment that Tribal justice was lacking.[65] The Major Crimes Act was a direct response. Notable in its homogenous treatment of all Tribes (rather than targeting just the Brule Sioux), the premise of the Major Crimes Act is that Tribes do not provide a sufficiently retributive or punitive response to crime.[66] The addition of concurrent federal jurisdiction complicates the administration of Tribal justice and colors the extent to which Tribal justice is perceived as sufficiently legitimate compared to federal prosecution.

The presumptive doubt for Tribal criminal justice injected by the Major Crimes Act has permeated the development of and tolerance for Tribal courts ever since. The extent to which Tribal criminal justice fails to look like Anglo-adversarial justice is not just a debate of form; it is also used as evidence of lawlessness. The *Crow Dog* Court equated Tribal incorporations of restorative

life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code. . . . It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the [W]hite man's morality"); *see also* Jones, *supra* note 57, at 469 (noting the result of the lack of vested federal jurisdiction is that "the Brule band of the Dakota were left to their own principles of justice when determining punishments for those band members who committed crimes against other Indians").

62. 18 U.S.C. § 1153; Alex Tallchief Skibine, *Troublesome Aspects of Western Influences on Tribal Justice Systems and Laws*, 1 TRIBAL L.J. 1, 1 (2000) (recounting Chief Judge B.J. Jones's description for the beginning of U.S. influence on Tribal courts as "Blame it on Crow Dog").

63. 18 U.S.C. § 1153; United States v. Kagama, 118 U.S. 375, 377, 379–83 (1886) (upholding the constitutionality of the Major Crimes Act under the reasoning that Congress has plenary authority over Indian affairs); *see* Sidney L. Harring, *The Distorted History that Gave Rise to the "So Called" Plenary Power Doctrine: The Story of* United States v. Kagama, *in* INDIAN LAW STORIES, 149, 161–69 (Carole Goldberg, Kevin Washburn & Philip P. Frickey eds., 2011) (describing the detailed circumstances leading to the *Kagama* case).

64. *See* Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1655 (1998) (noting that although the Major Crimes Act supports concurrent jurisdiction, in practice external factors frequently impede Tribes "from fully and effectively exercising their criminal jurisdiction, particularly over major crimes").

65. *Ex parte Crow Dog*, 109 U.S. at 571 (characterizing Tribal legal concepts as "the red man's revenge" compared to "[W]hite man's morality"). *But see* DAVID GRAEBER & DAVID WENGROW, THE DAWN OF EVERYTHING: A NEW HISTORY OF HUMANITY 35 (2021) (challenging the dominant narrative that Indigenous peoples lacked legal analysis or debate or that they did not meaningfully contribute novel ideas to Western notions of equality, freedom, and democracy).

66. Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1649 (2016) (noting that while the Major Crimes Act was intrusive, implicit in the Act was an acknowledgement that Tribes retained and exercised criminal jurisdiction over Indians who committed serious crimes).

approaches with nonresponse. To combat this perception of lawlessness, Tribal jurisdiction has subsequently largely been concurrent with nontribal sovereigns, overseen by allegedly more capable Anglo-adversarial criminal legal systems.

Despite conflation with lawlessness and inferiority, numerous Tribes successfully experimented with creating their own Tribal justice systems based on the Anglo-adversarial model.[67] With no apparent tinge of irony, Indian agents then sought to leverage these Tribal institutions for their own objectives.[68] In 1883, the same year as *Crow Dog*, the Secretary of the Interior created the Courts of Indian Offenses.[69] The Courts of Indian Offenses, also known as Code of Federal Regulation Courts (CFR courts), were operated by local Indian agents of the Bureau of Indian Affairs (BIA) as well as Tribal members to keep law and order on the reservation. Adjudication predominately centered on the enforcement of the Code of Federal Regulations' Civilization Regulations, which pertained to regulation of "Indian offenses," or the ways in which Indian people behaved insufficiently White.[70] The explicit goal of the Civilization Regulations was as its name suggests—to civilize; to convince Native Peoples to abandon lifeways seen as barriers to assimilation through the threat of or actual prosecution. "Offenses" included religious dances, reliance on Tribal healers, the destruction of property during funerals, and plural marriages.[71] The CFR courts were adjudicatory vehicles for enforcing assimilation. Traditional justice systems, to the extent they still operated, were either deemed illegitimate or were simply ignored.[72]

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67. *See generally* RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975) (tracing the development of the Cherokee system of law, including their first written law in 1808, and the fusion of Cherokee law with Anglo-American law).

68. Brief for Federal Indian Law Scholars and Historians as Amici Curiae Supporting Respondent at 7, Denezpi v. United States, 596 U.S. 591 (2022) (No. 20-7622) (citing OFF. OF INDIAN AFFS., ANN. REP. OF THE COMM'R OF INDIAN AFFS. TO THE SEC'Y OF THE INTERIOR FOR THE YEAR 1875, at 308 (1875)).

69. *See generally* OFF. OF INDIAN AFFS., ANN. REP. OF THE COMM'R OF INDIAN AFFS. TO THE SEC'Y OF THE INTERIOR FOR THE YEAR 1883 (1883).

70. DELORIA, JR. & LYTLE, *supra* note 3, at 113; MICHAEL MCNALLY, DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT 40–61 (2020) (detailing Civilization Regulations as outlawing dances and feasts, medicine men, funerary giveaways and potlatches, and customary practices of marriage). It is notable that the regulations exempted the so-called "five civilized [T]ribes," which had their own court systems. HIRAM PRICE, COMM'N OF INDIAN AFFS., RULES GOVERNING THE COURT OF INDIAN OFFENSES (1883).

71. Brief for Federal Indian Law Scholars and Historians, *supra* note 68, at 8 (citing PRICE, *supra* note 70).

72. Jones, *supra* note 57, at 469; *see* Thorington, *supra* note 56, at 982 (remarking that the creation of CFR courts "eliminated traditional methods of justice and initiated the intrusion of state law into [T]ribal conflicts"); JUSTIN B. RICHLAND, COOPERATION WITHOUT SUBMISSION: INDIGENOUS JURISDICTIONS IN NATIVE NATION-U.S. ENGAGEMENTS 10 (2021) (referencing GLEN COULTHARD, RED SKINS, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION 30–31 (2014) ("Material structures of settler colonialism remain the taken-for-granted benchmarks of what counts as productive evidence of 'legitimate' Indigenous self-governance. Indigenous norms, knowledge, and relations that are not consonant with theories of labor, capital, and market rationalism at best will be ignored or deemed unworthy of recognition and at worst will be met with violence.")).

In upholding the BIA's authority to create and maintain CFR courts (a power the Department of Interior does not generally enjoy), a federal district court reinforced the federal government's assimilative aspirations by excusing the CFR courts as "mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent [T]ribes to whom it sustains the relation of guardian."[73] The same district court described an Indian reservation as an institution "in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man."[74]

CFR courts were intended to be Tribal courts. But they were not "Tribal" in the sense that the values reflected in the laws promulgated by the BIA were not "Tribal" values. The Civilization Regulations instead were an explicit attempt by the federal government to force Natives to adopt Anglo or "civilized" behaviors and abandon Indigenous or "savage" behaviors.[75] While the methods and terminology of this civilization project would morph over time, these basic assimilative goals persisted. The format of the CFR court performed additional assimilation labor, serving as an inauguration of the Anglo criminal legal system to many Tribal communities. As a regulatory model, the CFR court reinforced criminalization.[76] The structure of CFR courts, including its adversarial format, reliance on a set of codes, and focus on punishment, has had the effect of serving as interim courts for Tribes until they authorize and operate their own courts.[77] Their introduction of the Anglo-adversarial model within Tribal systems proved lasting.[78]

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73. United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

74. *Id.*

75. *But see* Brief for Federal Indian Law Scholars and Historians, *supra* note 68, at 8–9 (noting "the [CFR] courts' reality rarely corresponded to the agents' assimilationist aspirations"); OFF. OF INDIAN AFFS., ANN. REP. OF THE COMM'R OF INDIAN AFFS. TO THE SEC'Y OF THE INTERIOR FOR THE YEAR 1884, at 85 (1884) ("I think it will be difficult to persuade Indian judges to regard and punish as crimes acts which they and their people have from time immemorial looked upon as perfectly proper and right.").

76. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 17 (2007) ("When we govern through crime, we make crime and the forms of knowledge historically associated with it—criminal law, popular crime narrative, and criminology—available outside their limited original subject domains as powerful tools with which to interpret and frame all forms of social action as a problem for governance.").

77. *See* Valencia-Weber, *supra* note 35, at 236. According to the Department of the Interior, these courts exist "to provide adequate machinery for the administration of justice for Indian [T]ribes in those areas of Indian country where [T]ribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where [T]ribal courts have not been established to exercise that jurisdiction." 25 C.F.R. § 11.102 (2008).

78. Jones, *supra* note 57, at 469–70.

Despite its assimilative aims, CFR courts generally failed to expand beyond their original implementation.[79] As institutions housed within the Tribal government, Tribal courts were more prolifically established beginning in 1934. The Indian Reorganization Act of 1934 (IRA)[80] was a significant federal policy shift, transitioning from a policy aimed at eroding Tribal structure through coercive assimilation to encouraging Tribal preservation through self-government.[81] The IRA sought the development of Tribal institutions with which the federal government could collaborate in a government-to-government framework.[82] Rather than promote the revitalization of traditional governance systems, the IRA encouraged Tribes to *reorganize* and institutionalize governance components familiar to Anglo systems.[83] Like the reasoning of *Crow Dog*, the IRA seemingly conflated compatibility with the U.S. government with more universal notions of legitimacy. Many Tribes adopted the model constitutions provided by the federal government pursuant to the IRA, though some Tribes elected against it.[84] Because Tribes needed to receive permission from the Department of Interior to supplant the Code of Federal Regulations with their own code, many Tribes mirrored CFR court law provisions to appease federal officials.[85] Thus, much of the structural assimilation work of the CFR courts was in fact solidified by the IRA.

The IRA was a profound departure from former hostile federal Indian policy by re-elevating Tribes' sovereign status in the eyes of the United States. The IRA recognized that Tribes would engage in sovereign-to-sovereign legal interactions, and even collaborations, with local governmental neighbors, foreshadowing future Tribal restorative justice interjurisdictional collaborations.[86] Thus, the IRA performed significant work in developing modern Tribal government structures, resulting in a proliferation of written Tribal constitutions, codes, and other governing documents. But by encouraging Tribes to adopt the administrative components of American governments, the IRA also produced significant assimilative pressure. It suggested that

79. *See* Denezpi v. United States, 596 U.S. 591, 595 (2022) (stating that "[t]oday, most [T]ribes have established their own judicial systems, thereby displacing the CFR courts" and that "[f]ive CFR courts remain").

80. Pub. L. No. 73-383, 48 Stat. 984 (1934).

81. Vincent C. Milani, *The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control*, 31 AM. CRIM. L. REV. 1279, 1281 (1994).

82. Blackhawk, *supra* note 19, at 1812–13 (noting that the IRA was known as the centerpiece of the Indian New Deal, that it provided a constitutional framework to govern the relationship between the United States and Tribes, and that it promoted a fresh sense of Tribal self-determination, having been developed in consultation with Tribes and requiring Tribal consent before it would apply).

83. Section 16 of the IRA provided that "[a]ny Indian [T]ribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws . . . ." Indian Reorganization Act of 1934, Pub. L. No. 73-383, § 16, 48 Stat. 984, 987 (codified as amended at 25 U.S.C. § 5123(a)).

84. Zuni, *supra* note 44, at 20–21.

85. Jones, *supra* note 57, at 471.

86. Blackhawk, *supra* note 19, at 1813.

collaborative lawmaking could only succeed if Tribes first assumed legitimacy, namely, through Anglo governing attire.

B. P.L. 280 and the Encroachment of State Jurisdiction into Indian Country

Federal plenary power over Indian affairs generally prevents state law enforcement from encroaching on reservations.[87] The federal goal was, and is, to maintain the ability of Tribal communities to remain separate and distinct.[88] Under this legal regime, the substantial exclusion of state criminal jurisdiction reflects constitutional and treaty-based principles establishing a nation-to-nation trust relationship between the United States and the Tribes.[89] These principles, in turn, reflect the reality that states' interests in governing power and resource control often conflict, sometimes bitterly, with Tribes' claims to governance and territory.[90] Tribes thereby resist state jurisdiction, fearing it will erode Tribal justice systems as well as expose Tribal members to indifferent or hostile law enforcement institutions.[91]

But in Public Law 280 (P.L. 280), Congress rejected its protectionist role and accelerated Tribal exposure to state justice systems.[92] In 1953, federal Indian policy, as it has been prone to do, oscillated back to a harmful anti-Indian agenda in what has been called the "termination" era. The United States no longer sought

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87. *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790–1834, at 140–41 (1962). *But see* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2500 (2022) (holding states were never divested of their concurrent criminal jurisdiction over non-Indians for crimes committed against Indians, effectively extending partial P.L. 280-like jurisdiction to all states).

88. Kevin K. Washburn, *American Indians Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1011 (2008). *But see Castro-Huerta*, 142 S. Ct. at 2494 (holding that *Worcester* is no longer applicable and that each Tribe is now considered a part of their surrounding state for purposes of state criminal jurisdiction over non-Indians).

89. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (in which Chief Justice Marshall likened the federal-Tribal relationship to that of a "ward to his guardian"); Seminole Nation v. United States, 316 U.S. 286, 297, 297 n.12 (1942) (holding that the modern federal trust responsibility doctrine includes "exacting fiduciary standards and that payment of money to agents known to be dishonest violated private trust law standards"); President Barack Obama, Memorandum on Tribal Consultation, 74 Fed. Reg. 57, 881 (Nov. 5, 2009) ("The United States has a unique legal and political relationship with Indian [T]ribal governments."), https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president [https://perma.cc/DH79-D47T].

90. United States v. Kagama, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the states where they [Indians] are found are often their deadliest enemies.").

91. CAROLE GOLDBERG & HEATHER VALDEZ SINGLETON, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, viii, 12 (2007) (finding through their qualitative and quantitative research on seventeen reservation sites that reservation residents subject to concurrent state jurisdiction typically rate the availability and quality of law enforcement and criminal justice lower than reservations that are not subject to concurrent state jurisdiction (i.e., subject to P.L. 280)). *But see* Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 82 (2007) (arguing that the political and social circumstances justifying Tribal-state hostility have changed).

92. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.

to promote its participation in the nation-to-nation relationship with Tribes. In what is known as P.L. 280,[93] Congress transferred federal jurisdictional authority in Indian country to several states without the consent of the impacted Tribes. Like prior harmful federal Indian initiatives, Congress would eventually stop extending P.L. 280, at least without Tribal consent.[94] But Congress would not reverse the extent to which P.L. 280 had already been applied. Thus, Tribes remain burdened by the harmful intent of P.L. 280 and the practical restrictions on Tribal powers it effectuated.

In the 1950s, Tribes were seen as a burden on the federal budget.[95] As a component of federal efforts to delete Tribal budgetary obligations, P.L. 280 required six states to assert jurisdiction over Indian country:[96] California, Minnesota (with the exception of the Red Lake Indian Reservation), Nebraska, Oregon (with the exception of the Warm Springs Reservation), Wisconsin (with the exception of the Menominee Reservation, which was subsequently terminated though later re-recognized),[97] and later Alaska.[98] P.L. 280 also allowed any state to opt into P.L. 280's jurisdictional framework.[99] P.L. 280 presently structures law enforcement and criminal justice for 23 percent of the reservation-based population and 51 percent of all Tribes in the lower forty-eight states, and it also potentially affects all Alaska Natives and their Tribes or villages.[100]

For impacted Tribes, P.L. 280 means that state or county law enforcement have replaced the BIA police, and state criminal trials have largely replaced those carried out by the federal government. Perhaps even more important than the transfer of criminal jurisdiction from federal to state governments, however, has been the fact that the reach of non-Tribal criminal justice in Indian country grew longer. Before P.L. 280—and still for non-P.L. 280 Tribes—victimless and minor crimes committed by Indians, such as driving under the influence and

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93. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.

94. Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 401(a), 402(a), 82 Stat. 73, 78–79. No Tribes have provided such consent.

95. DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 8–9 (1st ed. 2012).

96. 18 U.S.C. §§ 1162(a), 1360(a).

97. *Id.*; CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 71–75 (2005).

98. In 1958, Public Law 85-615 added the Alaska Territory. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C. §§ 1162(a), 1360(a)).

99. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588, 590 (repealed and reenacted 1968) (codified as amended at 25 U.S.C. §§ 1321–1322).

100. GOLDBERG & VALDEZ SINGLETON, *supra* note 91, at 1. The impact of P.L. 280 in Alaska is complicated by the extinguishment of all reservations in Alaska except for the Annette Islands Reserve of the Metlakatla Indian Community by the Alaska Native Claims Settlement Act. Pub. L. No. 92-203, 85 Stat. 688 (1971) (current version at 43 U.S.C. §§ 1601–1629h (2012)). Significant misunderstanding continues to permeate Alaska Native sovereignty in relation to the State of Alaska. *See, e.g.*, Letter from Jahna Lindemuth, Alaska Attorney General, to Bill Walker, Governor of Alaska 2 (Oct. 19, 2017) (regarding the legal status of Tribal governments in Alaska).

misdemeanor assaults, were exclusively the responsibility of the Tribes. With the adoption of P.L. 280, such offenses can now also be penalized under state law.[101]

The impacts of P.L. 280 have proven to be an impediment to Tribal court development both in mandatory P.L. 280 states and in optional states where some form of state court jurisdiction was adopted.[102] However, P.L. 280 did not eliminate or limit Tribal criminal jurisdiction.[103] It was drafted and enacted with minimal consultation or coordination with impacted states and no consultation with impacted Tribes.[104] In the first decades after the law's passage, states frequently operated as if Tribal criminal courts and law enforcement agencies did not exist or matter.[105] The impacts of P.L. 280—to alleviate the federal government's nation-to-nation obligations to Tribes, including to serve as protector from hostile state interests—have resulted in confused and resentful states that are unclear with how to engage, if at all, with Tribes.[106]

Consequently, P.L. 280 Tribal courts have been discouraged and are subsequently underdeveloped compared to non-P.L. 280 Tribes.[107] Tribal courts in P.L. 280 jurisdictions are notoriously underfunded, receiving an average of only 6.14 percent of their budgetary needs.[108] Efforts among P.L. 280 Tribes to

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101. GOLDBERG & VALDEZ SINGLETON, *supra* note 91, at 3.

102. Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 741 (2008) (citing Kevin K. Washburn & Chloe Thompson, *A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the Recognition of Tribal Court Judgments with the Recent Arizona Rule*, 31 WM. MITCHELL L. REV. 479, 521 (2004)).

103. *See* Jiménez & Song, *supra* note 64, at 1657–58 (noting the Act's sparse legislative history and the lack of Tribal consent prompted President Eisenhower to remark that he had "grave doubts as to the wisdom of certain provisions"); Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 956 (2012) (noting that while "the consent of the governed has a hallowed place in the United States' system of government," that "paradigm has rarely been followed in federal Indian policy").

104. CHAMPAGNE & GOLDBERG, *supra* note 95, at 11. Note that Tribal advocates have expressed the same criticisms following the *Castro-Huerta* decision, including that it extends concurrent state jurisdiction without the consent of Tribes. *Examining* Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court Ruling on Tribal Sovereignty: Oversight Hearing Before Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res.*, 117th Congress (2022) (questions for the record by Hon. Jonodev Caudhuri, Ambassador, Creek Nation), https://docs.house.gov/meetings/II/II24/20220920/115147/HHRG-117-II24-20220920-QFR043.pdf [https://perma.cc/68NC-XYSC].

105. CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, at 192, 195 (1997).

106. Jones, *supra* note 57, at 472.

107. CHAMPAGNE & GOLDBERG, *supra* note 95, at 20; Jacqueline P. Hand & David C. Koelsch, *Shared Experiences, Divergent Outcomes: American Indian and Immigrant Victims of Domestic Violence*, 25 WIS. J.L. GENDER & SOC'Y 185, 198 (2010) ("The enactment of Public Law 280 has had the naïve consequence of discouraging the development of [T]ribal legal institutions, including courts and police forces despite the fact that it did not inhibit [T]ribal jurisdiction over Indians.").

108. BUREAU OF INDIAN AFFS., REPORT TO CONGRESS ON THE BUDGETARY COST ESTIMATES OF TRIBAL COURTS IN PUBLIC LAW 83-280 STATES 5 (2015), http://www.tribal-institute.org/download/BIATribalCourtsCostEstimatesPL-280States.pdf [https://perma.cc/MCP2-RAG5].

adopt Tribal codes and inject money into Tribal justice systems have been all but stymied.[109] P.L. 280-like jurisdictional transfers operate in numerous other states, in which Congress has conferred civil and/or criminal jurisdiction to various states, with varying degrees of scope.[110] Compared to non-P.L. 280 Tribal courts, Tribal courts in P.L. 280 states and similar de facto jurisdictionally limited areas are more likely to operate smaller and more piecemeal dockets. They are less likely to exercise any criminal jurisdiction.

For states in which P.L. 280 is operative, the transfer of authority was an enhancement of power. But P.L. 280 does not include taxation authority, and states receive no federal financial support for taking on the expanded law enforcement duties.[111] P.L. 280 has consequently been characterized as an unfunded mandate.[112] P.L. 280 states have tended not to build sheriff departments located closer to Tribal communities, establish Tribal liaison positions, or in the case of California, cross-deputize Tribal law enforcement or express other gestures of comity.[113] Seventy years later, the provisions of P.L. 280 remain confusing or unknown, even among P.L. 280 state law enforcement.

While long dormant, P.L. 280 Tribal criminal legal systems are now developing, flexing their retained powers that are resilient against findings of implicit divestment. Moreover, P.L. 280 Tribes possess some nimble features that may better equip them for regenerative opportunities. P.L. 280 Tribes have more experience engaging with their local and state sovereign neighbors.[114] Because their Tribal systems tend to be newer, they have been relieved of

109. *See generally* Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025 (9th Cir. 2013) (holding that the BIA is entitled to deny the P.L. 280 Tribe a 638 self-determination contract to fund law enforcement because it no longer funds law enforcement pursuant to P.L. 280).

110. *See, e.g.*, Pub. L. No. 96-420, § 6, 94 Stat. 1785, 1793 (1980) (asserting state civil and criminal jurisdiction under Maine Indian Claims Settlement Act over Tribes other than Passamaquoddy and Penobscot); Pub. L. No. 103-377, § 6, 108 Stat. 3501, 3505 (1994) (asserting state criminal jurisdiction under Mohegan Nation (Connecticut) Land Claims Settlement Act); Pub. L. No. 100-95, § 9, 101 Stat. 704, 709 (1987) (asserting state and local civil and criminal jurisdiction under Massachusetts Indian Land Claims Settlement Act).

111. GOLDBERG & VALDEZ SINGLETON, *supra* note 91, at 7; *see also* CHAMPAGNE & GOLDBERG, *supra* note 95 (describing the lack of sufficient federal, state, or Tribal dedicated funding to P.L. 280-serving agencies and its consequential impact on the quality of law enforcement services).

112. GOLDBERG & VALDEZ SINGLETON, *supra* note 91, at 7.

113. *See, e.g.*, Cabazon Band of Mission Indians v. Smith, 388 F.3d 691, 692–93 (9th Cir. 2004) (holding the Cabazon Tribe is permitted to use and display emergency light bars while traveling on public roads between the noncontiguous portions of the Tribe's reservation over the objections of the County of Riverside); Bishop Paiute Tribe v. Inyo Cnty., 863 F.3d 1144, 1147–48 (9th Cir. 2017) (holding the federal district court has subject matter jurisdiction to issue a declaratory judgment as to whether the Bishop Paiute Tribe has the authority to "investigate violations of [T]ribal, state, and federal law, detain, and transport or deliver a non-Indian violator [encountered on the reservation] to the proper authorities"); *see also* CAL. PENAL CODE § 830.8(e) (2011) (in which the California Penal Code recognizes only Washoe Tribal law enforcement as eligible for mutual aid agreements but specifically does not confer cross-deputized status).

114. CHAMPAGNE & GOLDBERG, *supra* note 95, at 141–163 (detailing the nature of inter-governmental cooperative agreements between Tribes and local governmental agencies).

decades of assimilative pressures to adopt Anglo-adversarial components. In some ways, P.L. 280 Tribes are more agile.

In June of 2022, the U.S. Supreme Court held in *Oklahoma v. Castro-Huerta* that, despite being duplicative of, and in some sense in contradiction with, P.L. 280, states were never deprived of their concurrent criminal jurisdiction over non-Indians who commit crimes against Indians.[115] In its holding, the Court characterized *Worcester v. Georgia*[116] as being overturned, such that Tribal lands are now considered to be wholly within—as opposed to separate from—state jurisdiction.[117] Tribal leaders and Native American legal scholars have largely interpreted the opinion as an encroachment on Tribal sovereignty without Indigenous free, prior, or informed consent.[118] While it is not yet clear how *Castro-Huerta* will impact criminal dockets within Indian country, it appears to have the effect of extending partial P.L. 280-like jurisdiction to all states.[119]

Castro-Huerta reflects a larger friction between Tribes and states. For over two hundred years, Tribes and states have battled over their jurisdictional contours. P.L. 280 permits some state encroachment in some states. But it notably does not include taxation and other civil regulatory authority, thereby preserving some precious vestiges of Tribal self-government.[120] *Castro-Huerta* questions this divide. *Castro-Huerta*'s holding is limited to criminal jurisdiction over non-Indians for crimes committed against Indians. But its reasoning suggests a willingness to further breach Tribal separateness. Moreover, criminal jurisdiction is not just about processing perpetrators but includes the ability to define criminality, respond to community priorities, and reflect community values. In *Castro-Huerta*, the absorption of state concurrent criminal jurisdiction is an enhancement of *state power*. If the seventy years of P.L. 280 experience suggests anything, it is that this enhancement will be at the expense of Tribes.

115. 142 S. Ct. 2486, 2499–501 (2022).

116. 31 U.S. (6. Pet) 515 (1832).

117. *Castro-Huerta*, 142 S. Ct. at 2493–94.

118. *See generally Examining* Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court Ruling on Tribal Sovereignty*, *supra* note 104.

119. Because the State of Oklahoma initiated the *Castro-Huerta* litigation, in addition to numerous other legal attempts to assert state jurisdiction within Indian country, Oklahoma may seek to exercise its concurrent authority recognized in *Castro-Huerta*, while no other states have expressed similar intents. *See, e.g.*, Adam Kemp, *Oklahoma Wants the Supreme Court to Pull Back Part of Its Historic Ruling on Native Rights*, PBS NEWS HOUR (Apr. 27, 2022), https://www.pbs.org/newshour/nation/the-supreme-court-expanded-tribal-authority-across-oklahoma-now-the-state-wants-to-scale-it-back [https://perma.cc/B3YZ-857A].

120. *See* Bryan v. Itasca Cnty., 426 U.S. 373, 388–93 (1976).

C. The Forced Institutionalization of Individual Rights

In 1968, Congress resoundingly acknowledged that Tribal courts exist through the passage of the Indian Civil Rights Act (ICRA).[121] Congress enacted the ICRA during the civil rights era against the backdrop of the U.S. Supreme Court's incorporation jurisprudence.[122] Constitutional theory generally presumes that minority communities are best protected with national oversight, rights-based frameworks, and judicial solicitude.[123] The ICRA very much endorses this concoction by promoting the rights of individual litigants within Tribal courts. But like the IRA, the ICRA perceives *legitimate* Tribal self-determination only through the lens in which Tribes adopt Anglo modes of governance.[124] While the IRA and the ICRA have generally been celebrated as recognizing Tribal legal systems, they also erode genuine Tribal self-governance.[125]

Because Tribes predate the U.S. Constitution and do not derive their authority from it, they are not subject to the constitutional limitations of the Fifth Amendment.[126] The ICRA attempts to modify that. Under the incorporation doctrine, the U.S. Supreme Court has selectively incorporated federal criminal procedure requirements onto states via the Due Process Clause of the Fourteenth Amendment.[127] Incorporation jurisprudence operates against a backdrop of U.S. Supreme Court distrust of state courts' ability or willingness to protect criminal defendants' rights, particularly in the South.[128]

Congress had a similar distrust of Tribal courts.[129] As part of the Civil Rights Act of 1957, the U.S. Commission on Civil Rights reported in 1961 on the lack of constitutional protections for individual Natives in Tribal court.[130]

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121. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1301–1304).

122. Gross, *supra* note 15, at 302.

123. Blackhawk, *supra* note 19, at 1797.

124. Wahwassuck, *supra* note 102, at 736 (noting non-Indian observers are skeptical of the appropriateness of Tribal courts, especially when non-Indian parties are involved).

125. RICHLAND, *supra* note 72, at 7.

126. Talton v. Mayes, 163 U.S. 376, 383–84 (1896), *abrogated by* United States v. Doherty, 126 F.3d 769, 777 (6th Cir. 1997) ("*Talton* was decided decades before most of the protections of the Bill of Rights were held to be binding on the states through the Fourteenth Amendment . . . . Nonetheless, *Talton* has come to stand for the proposition that neither the Bill of Rights nor the Fourteenth Amendment operate to constrain the governmental actions of Indian [T]ribes.").

127. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925) (in which the U.S. Supreme Court, for the first time, incorporated the First Amendment's protection of freedom of speech into the Due Process Clause of the Fourteenth Amendment); Wolf v. Colorado, 338 U.S. 784 (1949) (incorporating the Fourth Amendment's right against warrantless and unreasonable searches and seizures); Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Fourth Amendment's exclusionary rule); Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the Fifth Amendment's prohibition against double jeopardy).

128. Gross, *supra* note 15, at 325–26.

129. *Id.* at 329–30 (noting Congress and the Court's deep skepticism about Tribal courts' fairness and competence and that dispositions of wrongdoing in Tribal communities can only be valid or trusted if they are the product of procedures that conform to colonialist notions of due process and justice).

130. *Id.* at 328.

After eight years of hearings,[131] the ICRA of 1968 conferred most of the protections set out in the Bill of Rights on Tribes by statute and created a writ of habeas corpus to enforce those rights in federal court,[132] thereby creating a Tribal court version of state court incorporation that includes national oversight and a rights-based framework.[133] The ICRA includes almost every procedural Bill of Rights protection, using language borrowed from the Constitution.[134] The ICRA, however, deviates from the Constitution in implementing a severe sentencing limitation on Tribal courts for any conviction. Originally, sentencing was limited to imprisonment for a term of six months, a fine of $500, or both, and was later expanded to a year, a fine of $5,000, or both.[135] In 2010, Congress expanded the Tribal sentencing limitation to three years, but in doing so, it sought further national oversight over Tribes by requiring participating enhanced-sentencing Tribes to "opt in" to additional criminal procedures.[136] The cumulative impacts are a signal from Congress that Tribes are to be minimally trusted, but the legislature's incorporation of Constitution-like criminal procedure may justify re-recognitions of Tribal inherent criminal authority.

D. Implicit Judicial Restrictions on Tribal Criminal Authority

Beginning in the latter half of the twentieth century and continuing into the twenty-first, the U.S. Supreme Court revived a long-neglected legal doctrine to progressively divest Tribal courts of large swaths of jurisdiction. The seeds of the implicit divestiture doctrine were first introduced by Justice Marshall in *Johnson v. M'Intosh* and *Cherokee Nation v. Georgia*, in which the Supreme Court held that Tribes, without any explicit action by Congress, have implicitly lost aspects of inherent Tribal sovereignty.[137] Since 1831, the doctrine effectively went untouched until it was revived in 1978 by the U.S. Supreme Court in

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131. *Id.*

132. *Id.* at 329; *see* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 203, 82 Stat. 73, 78; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 70–71 (1978) (holding that a litigant's exclusive vehicle for seeking a federal court remedy of an ICRA violation is through a writ of habeas corpus).

133. *But see* Gross, *supra* note 15, at 334 (noting that while on the surface the ICRA appears to simply extend the incorporation doctrine to Tribes, "[a] closer examination . . . reveals that . . . in some instances, the ICRA places more limitations on [T]ribal courts than the [Supreme] Court places on states under the Fourteenth Amendment").

134. *See* 25 U.S.C. § 1302.

135. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202(7), 82 Stat. 73, 77. In 1986, this sentencing limitation was raised to one-year incarceration and a fine of $5,000. Anti-Abuse Act of 1968, Pub. L. No. 99-570, § 4217, 100 Stat. 3207, 3207-146. In 2010, Congress raised the sentencing limitation again to three years. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258, 2279 (codified at 25 U.S.C. § 1302(b)–(c)).

136. *See* 25 U.S.C. § 1302(b)–(c) (recognizing Tribal court authority to subject a defendant to a term of imprisonment greater than one year but not to exceed three years but only if the court provides additional due process protections).

137. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) (holding that Tribes lost the "power to dispose of the soil at their own will, to whomsoever they pleased"); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17–18 (1831) (holding Tribes lost the power of independent external relations with foreign nations).

Oliphant v. Suquamish Indians.[138] *Oliphant* held that all Tribes lack criminal jurisdiction over non-Indians because such an exercise of authority—though not explicitly acknowledged by Congress or treaty—was suddenly "inconsistent with [the Tribes'] status."[139] The doctrine was extended to the exercise of Tribal civil jurisdiction in *Montana v. United States*,[140] impacting Tribes' ability to issue protection orders against nonmembers[141] as well as an array of Tribal governmental powers.

In 2013, in response to *Oliphant* and devastating rates of violence, including sexual violence, in Indian country,[142] Congress provided a partial *Oliphant*-fix[143] to re-recognize Tribal authority to prosecute some non-Indians in certain circumstances.[144] But following the enhanced sentencing opt-in model, Congress premised this small re-recognition of inherent Tribal powers on the condition that participating Tribes opt into further adversarial process requirements.[145]

Through the ICRA, Congress sought to establish a procedural floor for Tribal court defendants, just as it had done for state court defendants in its use of

138. 435 U.S. 191, 203 (1978) (basing the Court's finding of an erosion of Tribal criminal jurisdiction over non-Indians on the federal "unspoken assumption" that Tribes lacked such jurisdiction historically); *see* Rolnick, *supra* note 66, at 1654 (citing 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, 13–14, 36 (1999)) (describing the limited category of implicit divestiture prior to *Oliphant*).

139. *Oliphant*, 435 U.S. at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

140. 450 U.S. 544, 564–65 (1981).

141. *See generally* Kelly Gaines Stoner & Lauren van Schilfgaarde, *Affirmed or Delegated? Finding Inherent Tribal Civil Power to Issue Protection Orders Against All Persons in Light of* Spurr v. Pope, 21 TRIBAL L.J. 1 (2022) (examining whether the federal statutory recognition of the Tribal power to issue protection orders is a delegation of federal power or an affirmation of inherent Tribal power in response to implicit divestiture).

142. ANDRE B. ROSAY, NAT'L INST. OF JUST., U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 43 (2016), https://www.ojp.gov/pdffiles1/nij/249736.pdf [https://perma.cc/B2GV-8WJ6] (finding more than four in five American Indian and Alaska Native women, or 84.3 percent, have experienced violence in their lifetimes).

143. *Oliphant*, 435 U.S. at 203 (holding that Tribes, due to conquest, have been implicitly divested of the authority to prosecute non-Indians. The Court based the erosion of Tribal criminal jurisdiction over non-Indians on the "unspoken assumption" that Tribes lacked such jurisdiction historically); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][b] (Nell Jessup Newton, Felix Cohen & Robert Anderson eds., 2012) (footnote omitted) ("In positing the existence of a historical assumption, shared by all three branches of the federal government, that Indian [T]ribes lack authority to try and to punish non-Indians, the [*Oliphant*] Court relied on selected treaty language, opinions of attorneys general issued in 1834 and 1856, defeated congressional bills and accompanying legislative reports, dictum from an 1878 opinion by a district court judge, and a withdrawn 1970 opinion of the Solicitor of the Department of the Interior.").

144. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23.

145. 25 U.S.C. § 1304(d).

the incorporation doctrine.[146] At the time of the ICRA's passage in 1968, the statute's omission of the right to counsel for indigent defendants did not differ from that of state and federal court defendants under the Constitution.[147] Similarly, some of the procedural rights Congress extended in 2010 and 2013 did not exist in 1968 when Congress enacted the ICRA.[148] But, the ICRA now actually imposes more limitations on Tribal courts than on state courts under the Court's Fourteenth Amendment jurisprudence.[149] The 2010 and 2013 amendments to the ICRA therefore do not simply harmonize Tribal criminal court procedure with federal constitutional criminal procedure; in some instances, they impose great burdens on Tribes seeking to exercise sovereign authority over wrongdoing in their communities.[150]

More fundamentally, however, the ICRA imposes and cements the adversarial model of criminal justice onto Tribes. The ICRA envisions only adversarial Tribal justice systems and presumes that, like states, Tribal courts are vulnerable to oppressive tendencies. The ICRA thereby explicitly compels[151] Tribes to base their judicial systems upon Anglo-American notions of due process, even if the values expressed in the Bill of Rights are not relevant for Native people in relation to their Tribe.[152] The incorporation doctrine was

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146. Gross, *supra* note 15, at 350; *see also* Michael Doran, *Redefining Tribal Sovereignty for the Era of Fundamental Rights*, 95 INDIAN L.J. 87, 117 (2020) (describing the provisions of the Bill of Rights that the ICRA extend to Tribal governments, including freedom of speech, freedom of the press, prohibition against unreasonable searches and seizures, etc.).

147. Gross, *supra* note 15, at 331.

148. *Id.* at 334 n.215 ("[I]n 1968 there was no federal constitutional right to counsel for indigents charged with misdemeanors, and [T]ribal court sentencing authority at the time was limited to misdemeanor penalties—six-months incarceration and a $500 fine. Indian Civil Rights Act of 1968, Pub. L. 90-284, § 202(7), 82 Stat. 73, 77). In 1968, the Supreme Court had not yet defined the Sixth Amendment right to counsel as including the right to 'effective' assistance of counsel. That came in 1984 under *Strickland v. Washington*, 466 U.S. 668, 686 (1984).").

149. *Id.* at 334–48 (analyzing how the authorized incarceration trigger for the right to counsel, the right to law-licensed jurists even in misdemeanor cases, the right to a jury trial even if facing incarceration of six or fewer months, the right to a sentencing limitation that is not tied to proportionality, and the right to habeas corpus with no substantive limitations on federal review are all beyond the rights guaranteed to similarly situated defendants in state court).

150. NAT'L CONG. OF AM. INDIANS, VAWA'S 2013 SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 11–12 (2018), https://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/2N8X-XYTB] (noting the immense expense of implementing VAWA's Special Domestic Violence Criminal Jurisdiction (SDVCJ) and how only a handful of Tribes have therefore opted to use its provisions).

151. For example, by imposing individual rights, the ICRA presupposes the existence of a criminal legal system that is adversarial, susceptible to manipulation by the state, and imposes punishment. *See, e.g.*, 25 U.S.C. § 1302 (prohibiting Tribes from violating the rights of individuals).

152. Jones, *supra* note 57, at 474 (citing Kirke Kickingbird, "*In Our Image . . ., After Our Likeness:" The Drive for the Assimilation of Indian Court Systems*, 13 AM. CRIM. L. REV. 675, 694–95 (1976)); Vine Deloria, Jr., Keynote Address at the 9th National Indian Nations: Justice for Victims of Crime Conference (Dec. 10, 2004) (in describing the impact of the ICRA: "We are being asked to import institutions and procedures that are only foreign to Indian communities, and are not working in [W]hite communities either. . . . [We need] to fight for the concept of community in those reservation communities").

premised on systemic racial and political oppression taking place within the states.[153] While the history of individual defendants in relation to Tribes is rich, it does not necessarily track the racial animus and attendant systemic due process violations of the South or of the individual nation-state paradigm of Western countries.[154] Indeed, a 1991 congressional report on the ICRA revealed that Tribal court weaknesses stemmed not from pervasive bias or incompetence, but rather from low levels of funding.[155] Instead, the ICRA constrains Tribes' ability to organically develop their justice systems, much less to adapt their court practices and process to reflect normative community values.[156]

Destructively, the ICRA conflates the U.S. adversarial system with legal legitimacy. In positing a theory of legal legitimacy regarding Supreme Court decision-making, Richard Fallon emphasizes that legal legitimacy depends in large part on the sociological and moral legitimacy of the surrounding legal system.[157] For Tribal courts, legitimacy imbues another layer, in which Tribes must achieve legal, sociological, and moral legitimacy both from the internal Tribal community and governing systems as well as from the external federal government, which exercises plenary power over such Tribes. The federal government has long rejected moral and sociological Tribal court legitimacy, fearing Tribal courts as biased, lawless, and savage. This perceived moral and sociological illegitimacy has bled into a legal illegitimacy, in which Tribal courts can only regain legitimate status through the adoption of the same legal framework as the federal government.

Municipal courts' perceived lack of neutrality, independence, and formality has been criticized as a troubling aspect incompatible within normative judicial

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153. Gross, *supra* note 15, at 324 (citing Tracey L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 106–07 (2005)) (recognizing the Court's criminal procedure incorporation cases as a branch of "race law" because they arose in the context of federal judicial reaction to institutionalized racism in state criminal legal systems following Reconstruction and in the context of the struggle for civil rights); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating [B]lack suspects and defendants much worse than [W]hite ones. Warren-era constitutional criminal procedure began as a kind of antidiscrimination law.").

154. *See* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 198 (2001) (observing that "[t]he most pernicious aspect of this debate [over Indigenous self-determination], of course, is that [I]ndigenous peoples' collective existence continues to be framed by Western notions of sovereignty and self-determination").

155. U.S. COMM'N ON C.R., THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 72–73 (1991).

156. OLNEY & GETCHES, *supra* note 34, at 3 ("[Indian Tribes] must adhere to concepts of due process and equal protection and assure their members a list of substantive rights borrowed from the United States Constitution, which may be alien to their own traditions of government."); Washburn, *supra* note 5, at 782–84 (noting that while the capacity to define criminality is one of the most important things that governments do, Congress has prohibited Indian Tribes from defining felony offenses via the ICRA).

157. Grove, *supra* note 7, at 2246 (citing FALLON, *supra* note 7, at 83–87).

frameworks.[158] In the same vein, federal courts have besmirched the legitimacy of Tribal courts.[159] But unlike municipal courts, Tribal courts are not similarly part of the constitutional scaffold. The U.S. Constitution was not meant to apply to Tribes such that judicial norms should consequently be recalibrated with both Tribal sovereignty and Tribal law in mind. Nevertheless, the ICRA statutorily imposes some Constitution-like due process protections onto Tribes but with no substantive examination for what, if any, specific due process shortcomings or historical oppression they seek to rectify in Tribal courts.

The ICRA is a gross intrusion into inherent Tribal powers and internal governance.[160] Under the guise of protecting individual litigants in Tribal court, the federal government has dictated to Tribes the ways in which they must operate, primarily in the federal government's own self-image. Through opt-in provisions, Congress paternalistically dangles the surrender of tepid jurisdictional powers in exchange for further Tribal assimilation.[161] Consistent with the assimilative aims of CFR courts and the IRA, the ICRA and the accompanying suppression of jurisdiction case law are simply newer vehicles urging Tribes to "civilize" while failing to appreciate or even acknowledge existing Tribal systems.

II.
MODERN TRIBAL COURTS AND THE NEED TO BE RE-EMPOWERED

As a result of the historical imposition of the Anglo-adversarial model onto Tribes, coupled with severe jurisdictional restrictions and encroachment from state governments, modern Tribal courts are limited in both the ways in which they can operate and the scope of their reach. Therefore, criminal justice reform

158. Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 965, 972 (2021) ("Rather, the positive law governing municipal courts accommodates the pettiness of their cases, their local character, and their presumed lack of resources, by ratcheting down traditional due process requirements.").

159. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 384–85 (2001) ("[A] presumption against [T]ribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not [T]ribal members be 'protected . . . from unwarranted intrusions on their personal liberty.'" (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978))); *see also* Duro v. Reina, 495 U.S. 676, 693 (1990) ("Tribal courts are often 'subordinate to the political branches of [T]ribal governments.'"); Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 181 (5th Cir. 2014) (Smith, J., dissenting) ("Dolgencorp will be forced to defend Doe's claims in an unfamiliar forum without the benefit of constitutional protections.").

160. *But see* David Wolitz, *Criminal Jurisdiction and the Nation-State: Toward Bounded Pluralism*, 91 OR. L. REV. 725, 764–65 (2013) (arguing that the problem with the ICRA is not that it provides too much federal review but that it provides too little).

161. U.S. DEP'T OF JUST. OFF. ON VIOLENCE AGAINST WOMEN, 2019 TRIBAL CONSULTATION REPORT 26 (2019) (summarizing testimony of Arnold Garcia, Lieutenant Governor, Nambé Pueblo on the TLOA and VAWA 2013 procedural trade-off: "Some [T]ribes do not plan to exercise SDVCJ over non-[T]ribal offenders because implementation requires [T]ribes to change their traditional court systems to mirror state courts. Asking [T]ribes to change the way they settle disputes so that they can reclaim jurisdiction over non-Indians is very disrespectful.").

for Tribes necessarily entails a contention with this history and the byproducts of violence and trauma it has produced.

A. An Overview of Modern Tribal Courts

While federal Indian policy toward Tribal courts has compelled Tribes to adopt the Anglo-adversarial model, the accompanying promotion of Tribal courts has established a burgeoning field of judiciaries across Indian country. Today, Tribal courts, like many court systems, are serving multiple and simultaneous duties.[162] They are a community service, providing bureaucratic processing, dispute resolution, and criminal accountability for the Tribal community. They are a protector, ensuring that rights of individual litigants as well as community values are upheld. They are a check, serving as a safeguard against other branches of Tribal government. They are a nation builder, interpreting and building Tribal laws and processes that impact the cultural relevance, resilience, and very survival of the Tribe.[163]

Tribal law and its contributions to the American body of law have long sought greater recognition within legal scholarship.[164] Like municipal courts,[165] Tribal courts continue to be largely ignored by legal scholars, and even basic public information about their dockets and operations is scarce.[166] In 2021, the Bureau of Justice Statistics issued its first report on Tribal courts as mandated by the 2010 Tribal Law and Order Act.[167] Despite the report's noted challenges and data quality issues, we can surmise there are over 300 Tribal courts in operation, with at least 234 Tribal courts operating in the lower forty-eight states.[168]

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162. *See* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 102–03 (3d ed. 2016) (noting that Tribes are "striking a balance between their unique histories and traditions and those acquired during their long (and ongoing) experience with settler colonialism, and working to incorporate both into the norms, structures, and practices that make up the legal systems governing their communities today").

163. Flies-Away & Garrow, *supra* note 26, at 406 n.13 (defining nation-building as "the multifaceted process of empowering human capital to contribute to the nation's organizational (institutional), community infrastructure/environmental, and economic development"); *see also* Joseph Thomas Flies-Away, Judge Carrie Garrow & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Rebuilding*, *in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 115, 115 (Miriam Jorgensen ed., 2007).

164. *See, e.g.*, Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 557 (2021); Justice Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 3 (1997); Zuni, *supra* note 44, at 17.

165. *See, e.g.*, Natapoff, *supra* note 158, at 971; *see also* Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1036–37 (2020).

166. Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 289 (1998) ("Unfortunately, most people, including elites such as journalists and attorneys, know nothing about the existence, much less the day-to-day operation, of [T]ribal courts.").

167. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 251, 124 Stat. 2258, 2297.

168. STEVEN W. PERRY, MICHAEL B. FIELD & AMY D. LAUGER, BUREAU OF JUST. STAT., U.S. DEP'T. OF JUST., TRIBAL COURTS IN THE UNITED STATES, 2014 – STATISTICAL TABLES 6, 11 (2021)

Due to the extensive history of federal pressures on Tribal systems, Tribal court structures tend to mimic the current Anglo-American model.[169] Most Tribes have adopted their own constitutions and codes and have developed their own courts.[170] While Tribal courts vary significantly, the majority include a trial court that tends to be organized like state trial courts.[171] Some Tribes have a multilayered judicial system that consists of multiple courts with multiple judges. Other Tribes may have only a part-time single-judge court. Still other Tribes do not operate their own courts but may be members of a regional inter-Tribal court system that adjudicates cases for multiple member Tribes in a particular region.[172] In addition to courts of general jurisdiction,[173] some Tribes have trial courts with limited jurisdiction, such as gaming courts, Healing to Wellness Courts, and courts that address only domestic violence or child custody issues.[174]

The context in which Tribal courts are developing is fraught with hostile external and internal scrutiny,[175] minimal resources,[176] and an external settler

(finding 234 Tribal court systems in operation in the lower forty-eight states). The survey excluded Tribal court systems in the State of Alaska and any CFR courts due to "data collection challenges." *Id.* at 11. There are 228 federally recognized Tribes within the State of Alaska, albeit with minimal Tribal land status. Within the lower forty-eight, the survey was sent to 249 Tribal courts systems known to the Bureau of Justice Statistics. Between Alaska Native and under-counted lower forty-eight Tribal justice systems, I surmise there are at least seventy additional Tribal courts in operation.

169. McCoy, *supra* note 6, at 22.

170. RICHLAND & DEER, *supra* note 162, at 102.

171. Samantha A. Moppet, *Acknowledging America's First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum*, 35 OKLA. CITY U. L. REV. 267, 299 (2010).

172. *See* INTER-TRIBAL COURT OF APPEALS OF NEVADA, https://web.archive.org/web/20211027035152/https://itcn.org/itcn-court-of-appeals/ [https://perma.cc/6Z7K-P9VU]; *Southwest Intertribal Court of Appeals*, AM. INDIAN L. CENT., INC., https://www.ailc-inc.org/our-work/switca/ [https://perma.cc/3HAF-FPVE]; INTERTRIBAL COURT OF SOUTHERN CALIFORNIA, https://www.sciljc.org/ [https://perma.cc/4MAC-YQ88]; NORTHWEST INTERTRIBAL COURT SYSTEM, https://www.nics.ws/ [https://perma.cc/G6TU-HJK5].

173. *But see* Nevada v. Hicks, 533 U.S. 353, 366–67 (2001) (holding that Tribal courts are not courts of general jurisdiction because "a [T]ribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction," and therefore Tribal courts lack jurisdiction to adjudicate a federal Section 1983 action).

174. Eric L. Jensen & Clayton Mosher, *Adult Drug Courts: Emergence, Growth, Outcome Evaluations, and the Need for a Continuum of Care*, 42 IDAHO L. REV. 443, 444 (2006) (observing that fifty-four Native American drug courts exist in the United States); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1085 (2007) (recognizing the existence of specialized Tribal courts). *See generally* TRIBAL L. & POL'Y INST., U.S. DEP'T OF JUSTICE, TRIBAL HEALING TO WELLNESS COURTS: THE KEY COMPONENTS (2003), http://www.ncjrs.gov/pdffiles1/bja/188154.pdf [https://perma.cc/RBK7-NFSH] (setting forth practices for Tribal justice systems to consider as they create and employ adult drug courts).

175. Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110, 111 (1995) (discussing the two-fold challenge of Tribal courts to maintain credibility and legitimacy).

176. U.S. COMM'N ON C.R., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 51 (2018), https://www.usccr.gov/files/pubs/2018/12-20-Broken-

colonial mindset that Tribal jurisdiction is decaying. Like municipal courts, Tribal courts have been described as lacking integrity.[177] These pressures are reinforced, rather than alleviated, through continued amendments to the ICRA as well as through federal grant funding requirements that require adversarial criminal justice components. When faced with an effective sentencing limitation of one year, Tribes have quickly found building the immense criminal justice infrastructure that the ICRA demands to be unobtainable.[178] The loss of jurisdiction through implicit divestiture has further shrunk the role of the Tribal court.

Because of limitations on Tribal jurisdiction and sentencing authority, coupled with concurrent jurisdiction shared by the federal and/or state systems, Tribal residents have significant interaction with the criminal legal systems of neighboring sovereigns. Native people have high rates of incarceration, including more than double the incarceration rate of White people.[179] Crime victims, witnesses, and defendants often must travel to far-off courthouses for their cases and testimony to be heard.[180] Defendants are frequently not tried by a jury of their peers.[181] Probation, parole, reentry, and other services are located off Tribal lands and likely do not reflect Tribal culture.[182] Yet, Tribal communities are forced to bear the brunt of their sovereign neighbors' mass incarceration.[183]

B. The Work of Modern Tribal Courts to Address Historical Trauma

But unlike municipal courts,[184] Tribal courts and the roles they play in supporting their communities are of notable and critical importance.[185] Tribal courts address community ills, such as sexual assault, child abuse, and domestic

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Promises.pdf [https://perma.cc/TS3U-238H] (finding that funding for Tribal courts is inadequate to allow them to carry out basic judicial duties).

177. Natapoff, *supra* note 158, at 968.

178. NAT'L CONG. OF AM. INDIANS, *supra* note 150, at 29 (noting that despite facing devastating violence, most Tribes have not pursued TLOA's enhanced sentencing authority or VAWA's special domestic violence criminal jurisdiction).

179. Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, PRISON POL'Y INITIATIVE (Oct. 8, 2021), https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/ [https://perma.cc/9PDR-GT9P].

180. INDIAN L. & ORDER COMM'N, *supra* note 16, at 4.

181. *Id.*

182. *Id.*

183. *See* Levin, *supra* note 17, at 272 (citing Jonathan Simon, *Wechsler's Century and Ours: Reforming Criminal Law in a Time of Shifting Rationalities of Government*, 7 BUFF. CRIM. L. REV. 247, 265 (2003)).

184. *See generally* Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. 213 (2021) (calling for the abolition of municipal courts due to their inherent hierarchical structure inextricably bound up with the maintenance of race and class inequities).

185. Jessup Newton, *supra* note 166, at 289 ("[T]hose who examine what is actually occurring in [T]ribal courts cannot help but be impressed with how well the courts function with the few resources at their disposal.").

violence.[186] Even with just the equivalent of misdemeanor powers, many Tribes are compelled to respond to crime because otherwise there would be no response.[187] In many stark and devastating ways, Tribal courts are adjudicating the byproducts of centuries of Native historical trauma. Tribal judges comment on the cycles of harm that appear before their bench in the form of violence, property crime, sexual abuse, child abuse, and substance abuse; these are harms that reoccur generation after generation.[188]

Historical trauma is defined as the "cumulative emotional and psychological wounding across generations, including the lifespan, which emanate from massive group trauma."[189] For Natives, historical trauma extends beyond individual or familial suffering. Rather, the communal historical harms of conquest, disease, and federal Indian policies have produced a "collective emotional and psychological injury both over the life span and across generations."[190] The adverse impacts of these historical traumas have been

186. NAT'L CONG. OF AM. INDIANS, *supra* note 150, at 3 (detailing the efforts of Tribes to incorporate special domestic violence criminal jurisdiction to address domestic violence, dating violence, and the violation of protection orders through Tribal criminal prosecution).

187. *See generally* INDIAN L. & ORDER COMM'N, *supra* note 16 (detailing extensive barriers to criminal accountability in Indian country due to the jurisdictional maze, which includes high declination, or failure to prosecute rates, by federal and state prosecutors for crimes in Indian country); GOLDBERG & VALDEZ SINGLETON, *supra* note 91, at vi-ix (finding that residents on Tribal lands in P.L. 280 jurisdictions perceive law enforcement as less available, slower in response time, less prone to equally attend to minor or serious calls, less beneficial in their patrolling services, less willing to act without authority, and more likely to decline services owing to remoteness); William S. Laufer & Robert C. Hughes, *Justice Undone*, 58 AM. CRIM. L. REV. 155 (2021) (noting the omission of the state's response to crime).

188. Virtual Interview with Judge Abby Abinanti, Chief Judge, Yurok Tribal Court (Oct. 5, 2021); Virtual Interview with Judge B.J. Jones, Former Chief Judge, Sisseton-Wahpeton Oyate Court (Oct. 11, 2021); Virtual Interview with Judge Carrie Garrow, Chief Judge, Saint Regis Mohawk Tribal Court (Oct. 7, 2021); Virtual Interview with Korey Wahwassuck, Former Associate Judge, Leech Lake Band of Ojibwe Tribal Court (Oct. 7, 2021); Virtual Interview with Ron Whitener, Former Chief Judge, Tulalip Tribal Court (Oct. 6, 2021); Flies-Away & Garrow, *supra* note 26, at 406–07.

189. Maria Yellow Horse Brave Heart, Josephine Chase, Jennifer Elkins & Deborah B. Altschul, *Historical Trauma Among Indigenous Peoples of the Americas: Concepts, Research, and Clinical Considerations*, 43 J. PSYCHOACTIVE DRUGS 282, 283 (2011).

190. Alia Hoss, *COVID-19 and Tribes: The Structural Violence of Federal Indian Law*, 2 ARIZ. S. L.J. ONLINE 162, 166 (2020) (citing PEGGY HALPERN, OBESITY AND AMERICAN INDIANS/ALASKA NATIVES 31 (2007)); *see* EUNICE PARK-LEE, RACHEL N. LIPARI, JONAKI BOSE, ARTHUR HUGES, KIRK GREENWAY, CRISTIE GLASHEEN, MINDY HERMAN-STAHL, MICHAEL PENNE, MICHAEL PEMBERTON & JAMIE CAJKA, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., SUBSTANCE USE AND MENTAL HEALTH ISSUES AMONG U.S.-BORN AMERICAN INDIANS AND ALASKA NATIVES RESIDING ON AND OFF TRIBAL LANDS 2 (2018), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/DRAIANTribalAreas2018/DRAIANTribalAreas2018.pdf [https://perma.cc/Y4KH-J3J2] ("Disparities in the prevalence of substance use and mental health issues among AI/ANs may also be viewed as a legacy of historical trauma—that is, the intergenerational impact of massacres; forced relocation; involuntary removal of children to boarding schools; and bans on [N]ative language, traditions, and cultural practices.").

connected to depression, anxiety, suicidality, and substance abuse.[191] Compared to all other racial groups, Natives suffer from high rates of alcohol and substance abuse, mental health disorders, suicide, violence, and behavior-related chronic diseases.[192]

The cycles of trauma not only trickle vertically, impacting future generations, but they also ripple out horizontally, continuously inflicting harm on the wider community. Tribal communities are generally defined by relations, resulting in intricate webs of connections and corresponding obligations. Every member lost to violence and substance abuse is a multitude of lost connections. They are a lost cultural bearer, language speaker, activist, artist, or leader. For most Tribal communities, particularly after centuries of devastation, there is simply no margin to permit the deletion of any member, including by incarceration. The histories of systemic violence against communities of color and the inefficiencies of the existing criminal legal system to address criminality demand a divergent approach.[193] The unique context of Native historical trauma, and the overwhelming evidence of need, produces specific obligations upon the justice systems, including Tribal, that are serving the Native population.

There is consequently a pull to respond more directly to the cycles of harm that Native people face than what the Anglo-adversarial model of punishment provides, regardless of whether those models are operated by federal, state, or Tribal governments.[194] Standard criminal penalties have provided a minimal salve to those with long-term addiction; with underlying emotional, psychological, and social traumas; or who confront the barriers that community members face in their daily lives that foster destructive behaviors.[195]

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191. Heather Tanana, *Learning from the Past and the Pandemic to Address Mental Health in Tribal Communities*, 2 ARIZ. ST. L.J. ONLINE 191, 195–96 (2020) (citing Brave Heart et al., *supra* note 189, at 283).

192. PARK-LEE ET AL., *supra* note 190, at 2–3; *Fact Sheet: Behavioral Health*, INDIAN HEALTH SERV. (Oct. 2016), https://www.ihs.gov/newsroom/factsheets/behavioralhealth/ [https://perma.cc/9367-ZQHA]; Joseph P. Gone & Joseph E. Trimble, *American Indian and Alaska Native Mental Health: Diverse Perspectives on Enduring Disparities*, 8 ANN. REV. OF CLINICAL PSYCH. 131, 131–160 (2012).

193. *See generally* Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161 (2007) (outlining the restorative justice literature and various empirical studies regarding its implementation, noting specifically the movement of restorative justice from an alternative model of criminal justice to a larger political and ethnic conflict-resolution mechanism); Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions*, 2 CRIM. L. & PHIL. 21 (2008) (summarizing the criticism against punitive justice as being ineffective, unneeded, expensive, and unjust); John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727 (1999) (calling to decenter punishment as the goal of criminal justice to allow for more procedurally just and outcome-driven modifications, such as are found within restorative justice); Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974) (showing punitive measures, as well as rehabilitative ones, to be largely ineffective).

194. *See* Flies-Away & Garrow, *supra* note 26, at 407.

195. *See id.* (citing David B. Wexler, *Inducing Therapeutic Compliance Through the Criminal Law*, 14 L. & PSYCH. REV. 43, 45 (1990)).

C. Restorative Justice as Criminal Justice Reform

There is a growing body of legal scholarship critiquing the current structure and operation of the criminal legal system, notably that it is racialized, inefficient, and deeply harmful.[196] Yet, beyond contentions that the system is broken and in need of reform, there is significant debate about the extent and scope that reform should take.[197] Under the umbrella of "criminal justice reform," critiques include overincarceration,[198] overcriminalization,[199] mass

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196. *See generally* Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545 (2017) (arguing that African Americans' vulnerability to police surveillance and contact, which produces both economic exploitation and state violence, is critical to addressing mass incarceration and police violence); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012) (recognizing the utility of the Jim Crow analogy to describe the racial injustices of the criminal justice system but nevertheless calling for an expanded framework to account for mass incarceration's historical origins, the impacts of violent crime, and the impacts of mass incarceration on other racial groups); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010) (arguing that race in the United States functions as a form of social stratification, that mass incarceration is racialized, and that mass incarceration stems from backlash to the civil rights movement); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) (describing the features of African American mass incarceration and the community-level harms it inflicts, concluding that its significant harms far outweigh any utilitarian justification for mass incarceration and it is therefore morally repugnant); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133 (2011) (arguing that low levels of "populist deliberative democracy" in the United States and in part their correlation to happiness and empathy likely contribute to the rise and persistence of mass incarceration).

197. *See* Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein's Monster?*, 126 HARV. L. REV. 1299, 1299 (2013) (reviewing STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012)) ("[T]hat the system is in urgent need of reform marks the limit of scholarly consensus. As soon as one moves to specifics—to analysis of the particular ways in which the system is defective or problematic; to interpretation of why these defects or problems have arisen; and perhaps above all, to elaboration of possible solutions and institutional reforms—one encounters not only the sort of variety that is to be expected in any vibrant field of scholarship, but also fundamental differences of diagnosis and prescription."); *see also* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 48–49 (2020) (noting the distinction between prison abolitionism, which emphasizes the abolition of a particular institution, and penal abolitionism, which emphasizes the abolition of an area of law).

198. *See* Levin, *supra* note 17, at 262 (describing the *over* framing as one that identifies the important and legitimate function of criminal law in the past while arguing that criminal law has since exceeded that function); Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 658–59 (2017) (pointing to the potential in recent widespread interest in decarceration efforts to build a more potent long-term vision for criminal justice reform).

199. *See* Levin, *supra* note 17, at 269; *see also* Langer, *supra* note 197, at 54 (describing criminal law minimalism as the justification of criminal law only to the extent offenses and arbitrary punishment are minimized); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 539 (2012) (describing and critiquing this "quantitative" view of overcriminalization); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 702 (2017) (describing "Congress's penchant for passing too many criminal laws carrying sentences that are too long"); Ellen S. Podgor, *Introduction: Overcriminalization; New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 534 (2012) (providing an overview of the history of an exploding number of criminal statutes and efforts to curb overcriminalization); Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV.

incarceration, and mass criminalization.[200] For Tribes, the imposition of the Anglo-adversarial system introduces another layer as to the role and relevance of the criminal legal system, and it colors how Tribes may approach reform. For some, the Anglo-adversarial system is a problematic intrusion into their traditional systems, and so they may pursue a prison abolitionist ethic, aimed more squarely at addressing mass criminalization and mass incarceration.[201] The adversarial structure, rooted in isolated individualism that fails to center the community and posits rights against the power of the state, is a poor theoretical fit for Tribal values.[202] For others, elements of criminal justice, including policing, prosecution, and punishment, have become core components of the Tribal system,[203] and so reform may aim to enhance their efficacy and correct overcriminalization and overincarceration, rather than abolish them entirely. Critically, Tribal criminal legal system reform extends beyond the over/mass frame to include corrections to the ways in which the criminal justice model was imposed upon Tribes as well as the ways in which criminal justice ineffectively responds to the current needs of Tribal communities. Across the spectrum of motivations, Tribes are already pursuing innovative tweaks to their criminal legal systems.

In federal, state, and local courts, restorative justice has developed as a criminal justice reform largely as a response or antithesis to the perceived deficiencies of the punitive approach.[204] It has been a component of the

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745, 745–46 (2014) (examining areas of law that have been criminalized but should arguably be reserved for the regulatory regime); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712–15 (2005) (defining the "criminalization phenomenon" as a broad array of issues that includes the abuse of the supreme power to implement crimes and the imposition of criminal sanctions without justification).

200. *See* Levin, *supra* note 17, at 263 (describing the *mass* framings as identifying the criminal system—and the way it marginalizes populations, exacerbates power dynamics, and exacerbates distributional inequities—as collectively problematic).

201. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1156 (2015); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 460 (2018); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1604–05 (2017).

202. *See* Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2195 (2013) (arguing that *Gideon* has not improved the situation of accused persons and may even have worsened their plight because it provides the criminal legal system with an undeserved veneer of impartiality).

203. *See* NAT'L CONG. OF AM. INDIANS, *supra* 150, at 25 (noting some Tribes were able to immediately implement VAWA's special domestic violence criminal jurisdiction because they were already providing those due process protections).

204. Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2315 (2013) (arguing restorative justice offers an equally efficacious response as the punitive approach of crime and that it can and should be integrated with the punitive approach within criminal law). *But see* John Braithwaite, *Principles of Restorative Justice*, *in* RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? 1, 1 (Andreas von Hirsh, Julian V. Roberts, Anthony E. Bottoms, Kent Roach, & Mara Schiff eds., 2003) (describing restorative justice as "not simply a way of reforming the criminal justice system [but] a way of transforming the entire legal system").

American criminal legal system for more than three decades[205] while questioning the role of that very system. Should the response to wrongdoing be backward facing (punishment) or future facing (reconciliation and restoration)? Restorative justice perceives wrongful acts as "ruptures in human interaction" that produce needs and responsibilities for the direct participants in the act as well as for the larger society.[206] Restorative justice usually involves direct communication, often with a facilitator, between victim and offender and often includes partial or full representation of the relevant affected community.[207] The exact process, and the extent of its (in)formality, can change depending on the wrongful act, impacted participants, and community needs. With a lens beyond punishment, a defendant is seen beyond just an isolated wrongdoer. They are also a community member. Restorative justice may, in fact, have greater potential than Anglo-adversarial criminal justice to respond to contemporary structural inequalities, such as structural racism.[208]

There are significant critiques, and skeptics are evaluating whether restorative justice is effective. Critics are concerned that the concept of restorative justice lacks clarity, is too encompassing,[209] and represents "epistemological freefall."[210] Does restorative justice reduce recidivism, restore communities, and reintegrate offenders? Is it actually a less costly and more effective deterrent? Is it fair? Restorative justice models have largely been incorporated only as periphery supplements to a preexisting adversarial system, which suggests that courts, including Tribal courts, are not yet ready to wholly supplant traditional criminal justice with restorative justice.[211] But with its slow incorporation, restorative justice is showcasing some small, yet promising, divergent possibilities.

In contrast to non-Tribal criminal legal systems, Tribes are relatively advanced in exploring restorative justice, at least as a supplement to their adversarial structure.[212] Given restrictions on Tribal jurisdiction, Tribes could be

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205. Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1147 (2020).

206. Menkel-Meadow, *supra* note 193, at 162 (citing HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE (2002)).

207. *See id.*

208. Doron Samuel-Siegel, Kenneth S. Anderson & Emily Lopynski, *Reckoning with Structural Racism: A Restorative Jurisprudence of Equal Protection*, 23 RICH. PUB. INT. L. REV. 137, 195–200 (2020).

209. Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 584 (2008).

210. Samuel Jan Brakel, *Searching for the Therapy in Therapeutic Jurisprudence*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 467 (2007).

211. Dancig-Rosenberg & Gal, *supra* note 204, at 2342.

212. Hum. Rts. Council, Access to Just. in the Promotion and Prot. of the Rts. of Indigenous Peoples, ¶ 52, U.N. Doc A/HRC/24/50 (2013) ("Indigenous restorative justice practices have contributed to restorative approaches more generally, demonstrating alternatives to punitive or retribution-based approaches."); Judge L.S. Tony Mandamin, *Peacemaking and the Tsuu T'ina Court*,

embracing restorative justice largely because they lack the power to effectuate other modes of criminal process. In the face of extensive rates of violence and lackluster law enforcement,[213] many Tribes may prefer a criminal law minimalism approach, in which armed public law enforcement, punishment, and imprisonment remain core tools amongst other nonpunitive tools.[214] However, some Tribal codes evince a more robust vision for Tribal restorative justice.[215] Numerous Tribes are now experimenting with restorative justice models.[216] The U.S. Department of Justice, amongst its limited funding grants for Tribal justice systems, identifies "alternative justice courts" such as Healing to Wellness Courts and peacemaking as permissible models to be funded.[217] The Navajo Nation has famously solidified Navajo peacemaking into its justice system.[218] Tribal courts like the Gila River Indian Community of Arizona's Sap Hihim Hekth A'Alga,[219] the Southern Ute Indian Tribe of Colorado's tüüÇai Court,[220]

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in JUSTICE AS HEALING: INDIGENOUS WAYS, *supra* note 29, at 349, 354 ("[I]f an offender decides not to enter peacemaking, then the matter stays in court. If the matter is not accepted into peacemaking or if the offender fails to cooperate with the peacemaking process, then the peacemaker coordinator will return the matter to court.").

213. *See, e.g.*, Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 801, 136 Stat. 840, 895–96 (finding that "American Indians and Alaska Natives are—(A) 2.5 times as likely to experience violent crimes and (B) at least 2 times more likely to experience rape or sexual assault crimes;" that of the crimes U.S. attorneys declined to prosecute, 66 percent involved assault, murder, or sexual assault; and that investigation into cases of missing and murdered Indigenous women is made difficult for Tribal law enforcement due to lack of resources).

214. Langer, *supra* note 197, at 57.

215. *See, e.g.*, CONFEDERATED TRIBES OF COOS, LOWER UMPQUA AND SIUSLAW INDIANS TRIBAL CODE ch. 2-13-1 ("This ordinance is adopted to protect the health, safety, and wellness of [T]ribal members by utilizing Tribal Court to divert offenders with substance abuse issues away from mainstream Court systems and procedures and toward a more holistic approach . . . ."); E. BAND OF CHEROKEE INDIANS CODE OF ORDINANCES § 7C-1 ("[A] comprehensive court program that blends treatment and sanction alternatives to effectively address offender behavior, rehabilitation, and the safety of the community."); 4 HO CHUNK NATION CODE § 15, ch. 1.4 (2022) ("The Wellness Court shall adhere to Ho-Chunk ideals while focusing upon restorative justice and collaborative decision-making."); ONEIDA INDIAN NATION R. OF CRIM. P. 802 ("[I]f it appears to the Nation Prosecutor that diversion of the defendant would be in the interests of justice and of benefit to the defendant and the community, the Nation Prosecutor may propose a diversion agreement . . . .").

216. *See generally* JUSTICE AS HEALING: INDIGENOUS WAYS, *supra* note 29; van Schilfgaarde & Shelton, *supra* note 27.

217. *See, e.g.*, U.S. DEPT. OF JUST., COORDINATED TRIBAL ASSISTANCE SOLICITATION: FISCAL YEAR 2022 COMPETITIVE GRANT ANNOUNCEMENT (2021), https://www.justice.gov/tribal/page/file/1456441/download [https://perma.cc/Z3GM-JU5E].

218. *See generally The Peacemaking Program of the Navajo Nation*, JUD. BRANCH OF THE NAVAJO NATION, www.courts.navajo-nsn.gov/indexpeacemaking.htm [https://perma.cc/UL7M-G49K]; NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE (Marianne O. Nielsen & James W. Zion eds., 2005).

219. *Juvenile Drug Court: "Sap Hihim Hekth A'Alga:" Our Children Walking on a Good Path*, GILA RIVER INDIAN CMTY. CT., http://www.wellnesscourts.org/files/Gila%20River%20Indian%20Community%20Court%20Juvenile%20Drug%20Court%202014%20Presentation.pdf [https://perma.cc/SR8M-LUCY].

220. *Wellness Court: tüüÇai Court*, S. UTE INDIAN TRIBE, https://www.southernute-nsn.gov/tribal-court/wellness-court/ [https://perma.cc/GUQ2-S37L].

the Little Traverse Bay Bands of Odawa Indians of Michigan's Mnodaawin[221] and Waabshki-Miigwan program,[222] and the Ysleta del Sur Pueblo of Texas's Na Peuyam Chibel Court are using Native languages to brand their restorative dockets.[223] Tribal restorative justice models are promoted through national technical assistance programs and conferences.[224]

But as Tribes move to incorporate restorative justice, their work is more than just a response to the deficiencies of the adversarial model.[225] Restorative justice, in its focus on the needs of the defendant and their relation to the community, offers tools more adept at responding to historical trauma. It offers a more potent salve to the specific needs of a community that include systemic, generational harm.

D. Re-Indigenizing Tribal Courts Through Restorative Justice

Restorative justice, which tends to elevate communal obligations and relations over individual rights, is arguably less disruptive to Tribal values than punitive justice. For Tribes, restorative justice is better understood as a reinstallation, rather than a disrupter.[226] Restorative justice offers Tribes the opportunity to more meaningfully respond to the historical trauma needs of their community members as well as to strengthen internal legitimacy by revitalizing methods rooted in more authentic Tribal traditions.[227] A hallmark of Tribal restorative justice is the aim toward the restoration of balance. Balance is a cornerstone for many Indigenous customs and traditions.[228] Traditional justice systems vary significantly,[229] but nevertheless general themes emerge. Legal

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221. *Mnodaawin Peacemaking Circles*, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, https://ltbbodawa-nsn.gov/judicial-branch/peacemaking/ [https://perma.cc/WG7Z-5ZNL].

222. *Waabshki-Miigwan (White Feather)*, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, https://ltbbodawa-nsn.gov/judicial-branch/waabshki-miigwan/ [https://perma.cc/L4XW-CLAZ].

223. *Tribal Court Division*, YSELTA DEL SUR PUEBLO, https://www.ysletadelsurpueblo.org/tribal-services/department-of-tribal-court-records/tribal-court-division [https://perma.cc/5JLZ-Q8ZU].

224. *See, e.g.*, *Indigenous Peacemaking Initiative*, NATIVE AM. RTS. FUND, www.peacemaking.narf.org [https://perma.cc/82Z2-YFYY]; *Tribal Healing to Wellness Courts*, TRIBAL L. & POL'Y PROJECT, www.wellnesscourts.org [https://perma.cc/BR2N-4ET5].

225. Majidah M. Cochran & Christine L. Kettel, *Rehabilitative Justice: The Effectiveness of Healing to Wellness, Opioid Intervention, and Drug Courts*, 9 AM. INDIAN L.J. 75, 90 (2020).

226. *See* Flies-Away & Garrow, *supra* note 26, at 406 (describing Tribal Healing to Wellness Courts as vessels of spiritual revolutions that positively affect individuals, apply recycled ancient Indigenous intellect, and incorporate modern innovation).

227. CHRISTINE ZUNI CRUZ, THE INDIGENOUS LEGAL TRADITION AS FOUNDATIONAL LAW 13 (2012).

228. *See, e.g.*, *id.* (discussing balance in the context of Pueblo legal tradition); *see also* Hum. Rts. Council, *supra* note 212, at ¶¶ 50, 52 ("For many [I]ndigenous peoples, customary norms and laws that govern relationships are accepted as correct and beneficial for generating harmonious relationships and communities. . . . Forms of [Indigenous] restorative justice have been practiced in many regions.").

229. *See* SAMUEL JAN BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE 9 (1978) (noting Tribal justice was historically "dispensed in widely varying ways, matching the wide variety in cultures and life-styles among the [T]ribes"); Milani, *supra* note 81, at 1280 (discussing the varied Tribal dispute mechanisms in existence before Anglo-American influence).

scholar Christine Zuni Cruz reflects on Indigenous law as "[o]ur knowledge of how we are to behave and the responsibilities we have based on our relationships to one another" and how this "assists in maintaining balance within Pueblo society."[230] Restorative justice offers a useful framework to facilitate this return to balance.[231]

Tribes, Tribal courts, and Indian law scholars have long called for increased incorporation of custom and tradition within Tribal justice systems to help transform such systems back into truly Indigenous systems.[232] Such an "Indigenization" process requires examining Tribal concepts and principles of dispute resolution, which complement Indigenous thought.[233] The United Nations Declaration on the Rights of Indigenous Peoples is a standard-setting document supported by approximately 150 countries, including the United States. The Declaration recognizes that Indigenous Peoples have the right to self-determination, including the right to maintain and strengthen their distinct legal institutions.[234] In referencing Article 3 of the Declaration, the Navajo Nation Human Rights Commission stated:

> The most protected and sacred right of all peoples is the right to govern their affairs, make decisions without being coerced by other governments. This is an inherent right of peoples and for the Navajo people it has existed since time immemorial.[235]

The right to self-determination includes the right to maintain and strengthen Indigenous legal institutions, including applying their own customs and laws.[236]

The preeminent Indigenous jurist and theologian Vine Deloria, Jr., envisioned the evolution of Tribal courts to naturally drift toward traditional systems:

> [W]hat I visualized . . . was that [T]ribal courts could become a vehicle for going back to traditional ways. (1) It could invoke more severe penalties. . . . (2) If [T]ribal court opinions were required to articulate traditional law of the community in addition to the Anglo law that's being applied, you would quickly build up a reservoir of knowledge among a lot of people as to how traditionally you would handle things. Once people begin to understand that, you could then transfer some of these transgressions into an Elders' or community forum in which a change of behavior is required and not this sentencing, and jail time,

230. ZUNI CRUZ, *supra* note 227, at 13.

231. *See* Wanda D. McCaslin, *Introduction: Reweaving the Fabrics of Life*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS, *supra* note 29, at 87, 89 ("Indigenous people tend to interpret hurtful actions less individualistically and more as signs of imbalances within the community as a whole—imbalances that affect everyone.").

232. Zuni, *supra* note 44, at 18.

233. *Id.*

234. G.A. Res. 61/295, at 4 (Sept. 13, 2007).

235. *Self-Determination*, NAVAJO NATION HUM. RTS. COMM'N, https://nnhrc.navajo-nsn.gov/selfDetermination.html [https://perma.cc/3AX2-5DDM].

236. Hum. Rts. Council, *supra* note at 212, ¶ 19.

etc.[237]

There is presently a burgeoning revival of customary law and practices.[238] Today's Tribal courts are integrating Tribal values, symbols, and customs into their jurisprudence.[239] This is despite the extensive pressures to incorporate adversarial elements. Tribes are creating more traditional dispute resolution tribunals that coexist with the adversarial courts.[240] These custom-based tribunals rely on a Tribe's traditions and values to resolve disputes and, among other things, are known as peacemaking courts, sentencing circles, and courts of elders.[241] Tribal courts are in a unique position to reclaim Tribal customs and traditions as a manner of resolving disputes and integrating those values and traditional laws into the modern Tribal judiciary.[242]

Because Tribes are drawing from their own laws, customs, traditions, and human rights as understood in Tribal contexts, Tribal restorative justice is fundamentally distinct from just an adversarial antithesis. Tribes have the potential to usher in legal reform that honors Indigenous rights and relations[243] and responds to the needs of the defendant and the community.[244] Some scholars point to Tribal restorative justice as sparking a jurisprudential spiritual revolution that is partly personified in the development of Tribal restorative justice

237. Tribal L. & Pol'y Inst., *TLPI PS Deloria*, YOUTUBE, at 16:21–17:26 (Sept. 2, 2016), https://www.youtube.com/watch?v=eaWGq6ePtfs [https://perma.cc/SNG8-52SW].

238. *See, e.g.*, Kekek Jason Stark, *Anishinaabe Inaakonigewin: Principles for the Intergenerational Preservation of Mino-Bimaadiziwin*, 82 MONT. L. REV. 293, 293–95 (2021) (describing the traditions of Anishinaabe law); Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319, 320 (2008) (exploring the methodology by which modern Tribal courts incorporate customary law into Tribal court jurisprudence).

239. *See, e.g.*, Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incoporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1, 12–15 (2018).

240. *See id.* at 15; Melton, *supra* note 29, at 113 (noting modern Tribal courts "use Indigenous justice methods as an alternative resolution process"); Jones, *supra* note 57, at 475–76.

241. *See, e.g.*, Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 186 (1994) (describing the Navajo Peacemaker Court); Robert Yazzie, *Navajo Peacekeeping: Technology and Traditional Indian Law*, 10 ST. THOMAS L. REV. 95, 98–100 (1997) (providing an overview of peacemaking courts).

242. *See* Jones, *supra* note 57, at 475; Zuni, *supra* note 44 at 17–18 (arguing for the importance of "[p]reserving, strengthening and incorporating" Native concepts of justice and the capacity of Tribal courts to do this work).

243. *See* NATIVE AM. RTS. FUND, UNIV. OF COLO. L. SCH. & UCLA SCH. OF L., TRIBAL IMPLEMENTATION TOOLKIT: PROJECT TO IMPLEMENT THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: IMPLEMENTATION PROJECT 9 (2021) [hereinafter TRIBAL IMPLEMENTATION TOOLKIT], https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf [https://perma.cc/Z3SN-RNJX]; *see also* Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 216–17 (2014).

244. *See* Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 28 (2005) (noting community-based initiatives that leverage the strengths of families and communities, try to respect cultural norms, and engage in partnerships with neighborhood organizations, which are taking hold in some pilot projects).

programs.[245] These Indigenous community spiritual revolutions not only positively affect individuals due to their support of reconnection and healing but also contribute to Tribal nation building by institutionalizing traditional norms, knowledge, and values.[246] Because Tribal restorative justice is directly responding to community needs for both healing and reflection of authentic values, Tribes may be more adept in the day-to-day operation of restorative justice.

E. Re-Empowering Tribal Courts Through Interest Convergence

Assuming Tribes desire to implement restorative justice, the question then becomes: how? Restorative justice could be framed as a benefit to defendants, offering more humane and less punitive responses to criminality. The failure to more meaningfully incorporate restorative justice is comparable to other inhumane and overly punitive aspects of the criminal legal system, mainly the power imbalance between the state and the defendant. Therefore, like other mass- or overincarceration and criminalization reform efforts, restorative justice should be framed as a civil right. As a right, restorative justice could constrain the power of the state.

But as revealed above, the Tribe, as a criminal legal system actor, has additional—and in some cases divergent—motivations for wanting to incorporate restorative justice. Moreover, and more relevant to the potential ineffectiveness of a rights-based framework, Tribes are already severely disempowered. Federal Indian law has established a concerning pattern of diminishing Tribal sovereignty while concurrently pressuring the surviving Tribal systems to assimilate to Anglo-American formats. As Tribes have exercised their power, Tribal systems have been deemed illegitimate.[247] To the extent traditional Tribal restorative systems exist, it is because they have survived assimilative violence.

But federal Indian law also includes notable acknowledgements of Tribal self-determination. Recognition of inherent Tribal sovereignty is a central and exceptional feature of American constitutional law.[248] This recognition has resulted in a plethora of doctrines that rely on collaboration with Tribes, such as

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245. Flies-Away & Garrow, *supra* note 26, at 405.

246. *Id.* at 406.

247. *See, e.g.*, RICHLAND, *supra* note 72, at 4–5 (describing instances in which the United States has failed to recognize Tribal sovereign acts); *see also* Nevada v. Hicks, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring) ("[A] presumption against [T]ribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not [T]ribal members be 'protected . . . from unwarranted intrusions on their personal liberty'" (citation omitted) (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978))); Duro v. Reina, 495 U.S. 676, 693 (1990) ("Tribal courts are often 'subordinate to the political branches of [T]ribal governments . . . .'" (citation omitted) (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 334–35 (1982 ed.))).

248. *See* Blackhawk, *supra* note 19, at 1809–10.

between judiciaries, in the law-making process.[249] This recognition also promotes Tribal authority and with it the potential for meaningful protection against subordination.[250] Many Tribes have assumed power for the betterment of their communities. Tribes have taken on the operation of hospitals, schools, police forces, and other social services that were previously run by federal and state governments.[251] Tribes are engaging in language and cultural revitalization,[252] food sovereignty, land co-management,[253] and innovative environmental protection.[254] Tribal communities are uplifted through empowerment, as is contextually necessary given the historical suppression of Tribal authority.

To the extent that Tribes seek to structurally reform the Anglo-adversarial criminal legal system they now operate within, or simply seek to reduce the extent of incarceration within their communities, they must contend with the delegitimizing forces that have historically thwarted such efforts. Those forces have systematically stripped Tribes of their power. Therefore, the route to criminal legal system reform, and in many ways, the route to revitalizing traditional Indigenous legal systems, requires an enhancement of power. To understand the ways in which the criminal legal system fails to serve Tribes, there must be an appreciation for the ways in which it was thrust upon Tribes and the ways in which restorative justice has been repressed. Tribal traditional justice is not the lack of process, but a reorientation. A rights framework is not the antithesis to Tribal justice. But it might be a false center. Tribal restorative justice practices offer guidance for re-envisioning the structure of the court, the roles of its legal participants, and the obligations we owe to each other in the process.[255]

The empowerment of Tribal courts possesses potential for the revitalization of Tribal justice. Tribes are using restorative justice to not only rebuild internal structures but also to rebuild their jurisdictional reach. Sovereignty, including Tribal sovereignty, does not decay.[256] A power not exercised may await its

249. *See id.*

250. *See id.* at 1810.

251. *See* Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203.

252. Kristen A. Carpenter & Alexey Tsykarev, *(Indigenous) Language as a Human Right*, 24 UCLA J. INT'L L. & FOREIGN AFFS. 49, 80–93 (2020).

253. *See, e.g.*, *Kasha-Katuwe Tent Rocks National Monument Joint Management-Pueblo de Cochiti*, FED. GRANTS, https://www.federalgrants.com/Kasha-Katuwe-Tent-Rocks-National-Monument-Joint-Management-Pueblo-de-Cochiti-18817.html [https://perma.cc/YR2M-TSS3].

254. *See, e.g.*, TRIBAL IMPLEMENTATION TOOLKIT, *supra* note 243, at 38–41.

255. For a discussion on the traditional people-defendant dichotomy, see Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 299 (2019) (questioning the utility of the traditional people-defendant dichotomy by proposing that the community has the capacity to engage in the judicial process but lacks a robust response to the call for extraordinary interventions into our modes of criminal justice).

256. Davis, Biber & Kempf, *supra* note 54, at 634 (citing *In re* Neagle, 39 F. 833, 856 (C.C.N.D. Cal. 1889), *aff'd sub nom.* Cunningham v. Neagle, 135 U.S. 1 (1890)).

moment. Scholar Justin B. Richland frames jurisdiction as the *source* of legal authority and juris(law)-diction(speech)[257] as the *scope* of authority a sovereign triggers in the use of legal language.[258] Tribal juris-diction, as a sovereign act, is a generative act and an *insistence* that Tribes and their sovereignty exist to serve the community.[259] Tribes have continuously showcased their resilience in surviving, including through cooperation with the federal and state governments, without relinquishing their own authority.[260]

Through restorative justice, Tribes engaging in juris-diction rebuild dormant sovereignty and (re)generate new jurisdiction. Tribes are negotiating the transfer of Tribal members from state courts to Tribal courts for the purpose of providing Tribal restorative justice.[261] Tribes have strategically positioned their restorative justice systems to effectively accommodate collaboration with other sovereigns. Tribes anticipate, including through their codes, that their restorative justice will serve as a vehicle for cooperative agreements.[262] Tribes are rebuilding routes for their Tribal members to reconnect to the Tribal community, for the defendants and the community to heal, and for Tribes to enhance their own nations through new jurisdiction. Given the historic trajectory of CFR courts, the IRA, and the ICRA, generative jurisdiction via restorative justice is not a likely outcome. But state neighbors seem to nevertheless recognize an authentic judicial solution in the Tribes.

Professor Bell postulated that the *Brown v. Board of Education* outcome was possible only when the interest of Black people in achieving racial equality converged with the interests of Whites.[263] Similarly, state courts have historically been unwilling to acknowledge Tribal jurisdiction, much less relinquish powers to them.[264] But interests change. Akin to the convergence of interests postulated

257. RICHLAND, *supra* note 72, at 27 (citing ÉMILE BENVENISTE, INDO-EUROPEAN LANGUAGE AND SOCIETY (1973)); *see also* Fletcher, *supra* note 91, at 87 (noting the trend of Tribal-state agreements and the consequential endorsement of Tribal sovereign legitimacy those agreements imbue).

258. RICHLAND, *supra* note 72, at 28.

259. *See id.* at 11.

260. *See id.*

261. *See, e.g.*, KORI CORDERO, SUZANNE M. GARCIA & LAUREN VAN SCHILFGAARDE, TRIBAL L. & POL'Y INST., TRIBAL HEALING TO WELLNESS COURTS: INTERGOVERNMENTAL COLLABORATION 20–21 (2021), https://wellnesscourts.org/files/Tribal%20Healing%20to%20Wellness%20Court%20Intergovernmental%20Collaboration%20May%2020%202021.pdf [https://perma.cc/2GRT-AZFX] (describing a spectrum of Tribal-state collaboration regarding restorative justice programs).

262. *See, e.g.*, NA:TINI-X'WE' NA:XO'-XI'-NAYI-DIN [THE PEOPLE'S GET WELL PLACE] COURT CODE § 4(A) (2002) ("The court is authorized to cooperate with any federal, state, [T]ribal, public or private agency in order to participate in any diversion, rehabilitation or training program and to receive grants-in-aid to carry out the purposes of this code."); JUD. BRANCH/COURTS VHAKV FVTCECVLKE/FVTCECKV CUKO § 6-108 (2000) ("[The court] is hereby authorized to negotiate and enter into on behalf of the Muscogee (Creek) Nation appropriate cooperative agreements with state and local governments for integrating and/or coordinating the Muscogee (Creek) Nation Family Drug Court Program with agencies of such other governments.").

263. *See* Bell, *supra* note 32, at 523.

264. *See* United States v. Kagama, 118 U.S. 375, 384 (1886).

by Professor Bell,[265] there is now a convergence of interests among Tribes and states, and states are now agreeing to make jurisdiction transfers. There are now numerous Tribal-state jurisdictional cooperative agreements.[266] While we can only speculate as to the motivations of participating state courts, their cooperation is contemporaneous with a generally growing appetite for restorative justice. State court cooperation is also contemporaneous with increasing service demands for substance abuse treatment, larger dockets, and decreased state court funding.[267] State systems may recognize the potential in Tribes to offload cases. State partners have noted they find Tribal systems offer welcome supervision, treatment, and culturally literate services that the state cannot offer.[268] Some Tribal-state partners have gone so far as to establish joint jurisdiction courts.[269] The Conference of Chief Justices and State Court Administrators issued a 2019 resolution encouraging Tribal-state collaboration, including specifically the transfer of Tribal members from state jurisdiction to Tribal jurisdiction.[270]

Tribes are having success in generating jurisdiction particularly when that jurisdiction rebuilds a de facto loss.[271] Tribes with de facto jurisdictional limitations include Tribes within P.L. 280 states, diminished reservations, and

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265. *See* Bell, *supra* note 32, at 523.

266. *See* Fletcher, *supra* note 91, at 82 ("By the 1980s, many Indian [T]ribes and states began to realize that the future of [T]ribal-state relations would be negotiation and agreement."); *see, e.g.*, Memorandum of Understanding Between Spirit Lake Tribal Ct., N.D. Indian Affs. Comm'n, N.D. Dep't of Corr. & Rehab., and N.D. Sup. Ct. (Jan. 15, 2020) (facilitating the sharing of information, data collection, and resources regarding delinquent youth); Memorandum of Understanding Between Turtle Mountain Band of Chippewa, N.D. Dep't of Corr. & Rehab., N.D. Indian Affs. Comm'n, and N.D. Sup. Ct. (May 4, 2022) (facilitating the sharing of information, data collection, and resources regarding delinquent youth). For an extensive list of Tribal-state cooperative agreements, see *Cooperative Agreements*, WALKING ON COMMON GROUND, https://www.walkingoncommonground.org/state.cfm?state=&topic=12 [https://perma.cc/C8VY-ELBF].

267. *See, e.g.*, Michael J. Graetz, *Trusting the Courts: Redressing the State Court Funding Crisis*, 143 DAEDALUS 96, 96–99 (2014) (describing the effects of decreased state court funding); Wahwassuck, *supra* note 102, at 745–46 (noting that state courts have disastrous recidivism rates in Minnesota).

268. TRIBAL JUSTICE (Makepeace Productions 2017).

269. Wahwassuck, *supra* note 102, at 747–48 (describing the Leech Lake Tribal Court-Cass County District Court Joint Powers Agreement that provides for a multi-jurisdictional docket in which both judges occupy the bench simultaneously); *see also* Korey Wahwassuck, John P. Smith & John R. Hawkinson, *Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction*, 36 WM. MITCHELL L. REV. 859, 871 (2010) (describing the Leech Lake-Cass County Wellness Court from the judges' perspectives).

270. *See generally* CONF. OF CHIEF JUST., RESOLUTION 1: TO ENCOURAGE GREATER COLLABORATION BETWEEN STATE AND TRIBAL COURTS TO ADDRESS THE OPIOID EPIDEMIC (2019), https://ccj.ncsc.org/__data/assets/pdf_file/0022/23485/02132019-tribal-courts-to-address-opioid-epidemic.pdf [https://perma.cc/UU8U-LN2W].

271. *See* Davis, Biber & Kempf, *supra* note 54, at 632–35 (describing the false equivalence of non-exercise and diminishment of sovereignty, arguing that "[n]ot every instance of non-exercise amounts to a surrender to a sovereignty"; rather, a dormant, or de facto lost power, may await its moment).

other communities in which the state exercises an outsized amount of adjudicatory authority over Tribal members. As Tribal powers have lain dormant due to de facto jurisdictional loss, the exclusive exercise of state jurisdiction has led to a "commonly shared presumption" that Tribal criminal jurisdiction has in fact been lost.[272] For P.L. 280 Tribes, the state's exercise of concurrent jurisdiction has had the positivistic effect of supplanting the role of a Tribal court, at least historically.[273] For Tribes with diminished reservations, the state has fully replaced the Tribe as the adjudicatory authority, and but for the diminishment, Tribal jurisdiction would apply. In these de facto limitations, Tribal court development has had to overcome the loss of jurisdiction and likely the loss of Tribal court funding.

To Professor Bell's point, however, the convergence of interests is volatile.[274] State powers are historically hostile toward Tribal powers.[275] Contemporary municipal and county neighbors may be amenable to Tribal jurisdiction because it does not threaten their own jurisdiction and happens to converge with their need to relieve burdensome dockets while satisfying broader racial reconciliation efforts.[276] But state interests can change again.[277] The State of Oklahoma was neutral to Tribal-federal exercise of criminal jurisdiction within Indian country up until the recognized size of Indian country expanded under the holding of *McGirt.*[278] In *McGirt v. Oklahoma*, the U.S. Supreme Court found that the Muscogee (Creek) Nation's reservation, established by treaties, remained intact and had not been diminished or disestablished.[279] The *McGirt* holding, later reasoned to apply to the Five Tribes, did not regenerate lost jurisdiction so much as clarify that the jurisdiction was never actually lost. Yet in *Oklahoma v. Castro-Huerta*, the State of Oklahoma argued that the State's jurisdiction needed to be expanded to concurrent jurisdiction to compensate for

272. Rolnick, *supra* note 66, at 1644 (noting that the *Oliphant* holding relied in part on the assessment that federal and state criminal jurisdiction in Indian country was exercised to the exclusion of Tribal jurisdiction).

273. *See* GOLDBERG & VALDEZ SINGLETON, *supra* note 91, at 3.

274. *See* Bell, *supra* note 32, at 526–27.

275. *See* United States v. Kagama, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the states where they [Indians] are found are often their deadliest enemies.").

276. *See* Bell, *supra* note 32, at 524–25 (noting that White economic and political interests in supporting desegregation included efforts to combat Communist morality critiques that equality and freedom remained elusive after World War II and concern for the economic rejuvenation of the South). Increasing incorporation of land acknowledgements, the decommission of numerous racist mascots that rely on Native imagery, and comparable efforts to acknowledge past harms inflicted on Tribal communities offer welcome departures, but ultimately require very little on the part of the non-Native actors.

277. *See id.* at 526–27 (describing the retreat in desegregation support).

278. Reply Brief for the Petitioner at 1, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429), 2021 WL 5864525, at *1 (arguing states have authority to prosecute non-Indians who commit crimes against Indians in Indian country and stating that "[t]here is simply no precedent for what this Court did in *McGirt v. Oklahoma*").

279. McGirt v. Oklahoma, 140 S. Ct. 2452, 2468 (2020).

the State's perceived loss of jurisdiction.[280] Jurisdictional transfers to Tribal restorative justice systems may end if they are ever perceived as a threat to state sovereignty. Then, the extent to which regenerated jurisdiction via negotiated transfer agreements is an appeasement to the federal Anglo-adversarial regime is heavily tempered by the volatility in which Tribal and state interests actually converge.

Still, in at least some of these Tribal communities, Tribes are implementing restorative justice not despite jurisdictional pressures but because of them. The extent to which these federal policies have stunted Tribal court growth means that the Tribal courts are newly developed and are intentional in sidestepping the pressures to assimilate to an adversarial model. Despite the pressures for Tribes to adopt the adversarial model, it is the failures of the adversarial model that are motivating states to engage in juris-diction with Tribes. These efforts are worth noting.

III.
GENERATIVE JURISDICTION THROUGH RESTORATIVE JUSTICE: THREE CASE STUDIES

Below are three case studies, representing a geographically, culturally, and legally diverse cross section of the phenomenon in which Tribes are regenerating de facto lost Tribal jurisdiction by transferring state cases to Tribal restorative justice fora. The Yurok Tribe of California is in a P.L. 280 state and has negotiated memorandums of understanding with its two neighboring counties to transfer Tribal members into its Healing to Wellness Court. The Saint Regis Mohawk of New York have a P.L 280-like imposition of state jurisdiction, and they have negotiated with their neighboring local and state courts to transfer jurisdiction of Tribal members into their Healing to Wellness Court and for supervision in lieu of bail. The Sisseton-Wahpeton Oyate of South Dakota have a diminished reservation and have negotiated with the neighboring county to transfer Natives into its Healing to Wellness Court. Their diversity in geography, culture, and legal barriers showcase the varied potential that restorative justice can enable. Through the enhancement of jurisdictional power, Tribes are giving substance to restorative justice, not just as an antithesis to criminal justice but as a revitalization of traditional justice.

A. Yurok Tribe

The Yurok People have always lived on the land along the Pacific Coast and inland on the Klamath River.[281] In the 1800s, non-Native people invaded

280. Transcript of Oral Argument at 38–40, Oklahoma v. Castro-Huerta (2022) (No. 21-429) ("[T]he reason that we are here today is because of *McGirt*. This was not a significant law enforcement issue in the State of Oklahoma . . . because of the relatively small amount of Indian country.").

281. YUROK CONST. pmbl.

Yurok Territory.[282] The Tribe lost at least three-fourths of its People as a result of massacres and disease as well as a substantial part of its lands.[283] In 1851, the Yurok Tribe negotiated the "Treaty of Peace and Friendship" with the United States, but, at the behest of the representatives of the State of California, the U.S. Senate failed to ratify the treaty, as it did with seventeen other treaties negotiated with over one hundred California tribes.[284]

On February 8, 1887, the United States passed the General Allotment Act, which permitted the allotting of Indian reservations and allowing for the sale of any lands not subject to allotment as surplus.[285] The General Allotment Act required the surrender and subdivision of various reservation lands and other Tribally owned common or trust estates. Those subdivided interests would be held in trust for a limited number of years and "allotted" to individuals as an effort to confer the benefits of private land ownership.[286] Allotment was applied to the Yurok Reservation with the result that the Reservation lands are now checkerboarded.[287] P.L. 280 transferred federal criminal jurisdiction and civil adjudicatory jurisdiction to the State of California, impacting the Yurok Tribe.[288]

After a series of increasingly restrictive land provisions, the Klamath River Reserve and Hoopa Valley Reservation were combined in 1891 to create the Hoopa Valley Reservation Extension to be shared by the Yurok and Hupa Peoples.[289] In 1988, the Hoopa-Yurok Settlement Act partitioned the Reservation to establish the Hoopa Valley Reservation and the Yurok Reservation, on the latter of which the Yurok Tribe now resides.[290]

Today, the Yurok Tribe is the largest federally recognized Tribe in California with more than five thousand members.[291] The Yurok Reservation, over which the Tribe exercises criminal, civil, and regulatory jurisdiction, is made up of Yurok Tribal trust land; allotments; privately owned land, including

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282. *Id.*

283. *Id.*

284. BENJAMIN MADLEY, AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846-1873, at 163–72 (2017).

285. General Allotment Act of 1887, Pub. L. No. 49-105, 24 Stat. 388.

286. Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 815 (2019) (recounting historical justifications of allotment and countering contemporary attempts to revitalize allotment as a means to promote economic growth).

287. "Checkerboarding" describes lands within the borders of a reservation that have various land statuses, including trust land, fee land, allotted land, and others. Checkerboarding can create significant practical issues in determining which entity can exercise jurisdiction over Tribal members, non-member Indians, and non-Indians within reservation lands. *See Land Tenure Issues*, INDIAN LAND TENURE FOUND., https://iltf.org/land-issues/issues/ [https://perma.cc/XP7T-9TYK].

288. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.

289. *See* Mattz v. Arnett, 412 U.S. 481, 483–84, 493 (1973) (explaining the establishment of the extension); *see also* Beth Rose Middleton Manning & Kaitlin Reed, *Returning the Yurok Forest to the Yurok Tribe: California's First Tribal Carbon Credit Project*, 39 STAN. ENV'T L.J. 71, 89 (2019) (noting that the Klamath River Reservation included a fraction of Yurok ancestral land).

290. Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (1988).

291. *Our History*, YUROK TRIBE, https://www.yuroktribe.org/our-history [https://perma.cc/K2PX-DNF4].

private timber land; county-owned land; and land owned in fee by the Tribe and its affiliates.[292] The Tribe's Constitution states:

> Until recently there was little crime, because Yurok law is firm and requires full compensation to the family whenever there is injury or insult. If there is not agreement as to the settlement, a mediator would resolve the dispute. Our Indian doctors, Keg-ae, have cared for our people and treated them when they became ill. In times of difficulty village headmen gathered together to resolve problems affecting the Yurok Tribe. . . . Our sacred and vibrant traditions have survived and are now growing stronger and richer each year.[293]

The Yurok Tribe is now drawing upon its traditional systems to build extensive cooperative arrangements with its neighboring counties. As a result of the diversity of land status within the Reservation and the application of P.L. 280, a significant number of Yurok court-involved Tribal members fall within the state court system.[294] Out of concern for these members, including the extent to which they have access to culturally relevant services, the Tribe approached its neighboring counties of Humboldt and Del Norte.

In 2012, the Yurok Tribe signed Memoranda of Understanding (MOUs) with both counties that permit the transfer of cases to the Tribal court.[295] Under these agreements, cases involving Yurok citizens transfer from the county to Tribal court for supervision and linkage to services. These agreements apply to both adult nonviolent criminal and juvenile delinquency cases. The MOU with Humboldt County provides the county court discretion to decide whether to transfer a case to Tribal court. Humboldt County retains jurisdiction, and defendants may be subject to county ankle monitors even when the case is transferred. The Yurok Tribal Court, however, takes the lead on probation and supervision and keeps the county apprised of the defendant's progress with their case plan and any probation violations. For many defendants, this makes both

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292. YUROK CONST. art. I, § 3 ("The jurisdiction of the Yurok Tribe extends to all of its members wherever located, to all persons throughout its territory, and within its territory, over all lands, waters, river beds, submerged lands, properties, air space, minerals, fish, forests, wildlife, and other resources, and any interest therein now or in the future.").

293. *Id.* pmbl.

294. *Yurok Tribe – Criminal Assistance Program – Memoranda of Understanding with Del Norte and Humboldt Counties*, TRIBAL ACCESS TO JUST. INNOVATION, https://tribaljustice.org/places/specialized-court-projects/yurok-tribe-criminal-assistance-program-memoranda-of-understanding-with-del-norte-and-humboldt-counties/ [https://perma.cc/M7EQ-YZ2Z].

295. Memorandum of Agreement Between the Yurok Tribe and Del Norte County to Coordinate Dispositions Involving Adult Yurok Offenders (Aug. 2012) https://wellnesscourts.org/files/Yurok%20DN%20Wellness%20Court%20MOU.pdf [https://perma.cc/4U2F-DR6U]; YUROK TRIBAL COURT, COORDINATED ADULT AND JUVENILE PROBATION PARTIES: YUROK TRIBAL COURT AND COUNTIES OF DEL NORTE AND HUMBOLDT, CALIFORNIA (2009), https://www.courts.ca.gov/documents/Tribal-Resources-JuvDelAgreement-Yurok.pdf [https://perma.cc/JK7S-2GB4]; *see also* CORDERO, GARCIA & VAN SCHILFGAARDE, *supra* note 261, at 20–21.

logistical and cultural sense by alleviating burdensome travel to the county courthouse and allowing them to continue residing within the Tribal community.

As with the MOU with Humboldt County, under the MOU with Del Norte County, the Yurok Tribe shares concurrent jurisdiction over juvenile cases. Adult cases, however, are handled differently. Under this MOU, Del Norte's probation, district attorney, and police departments have agreed to notify the Yurok Tribal Court when they have a formal probation, arrest, citation, or interaction with a Yurok citizen so that the citizen might be diverted to the Tribal Court. Under the MOU, Del Norte County has the option of acknowledging concurrent jurisdiction when Yurok (1) writes a direct citation to Tribal court or (2) petitions for the transfer of the case: "Although the MOUs themselves did not cost the Tribe or State courts anything, the capacity developed through the Wellness Program is primarily responsible for the expansion of jurisdiction and the resulting caseload of non-violent offenders and juveniles on probation."[296]

Due to the established partnerships between the sovereigns, additional agreements have been developed. The Yurok Tribe has partnered with both Humboldt County and Del Norte County to implement joint jurisdiction family wellness courts. The Hoopa Valley Tribe came together with Humboldt County to create a third joint jurisdiction family wellness court. The joint jurisdiction courts are voluntary—Tribal and county child welfare work together to assess and serve the family before a petition is filed. If a child dependency petition is filed by county child welfare in state court, the family is screened for eligibility for the joint jurisdiction court and asked if they would like to participate. The joint courts created with Humboldt County have one court coordinator designated to the program, with the remaining staff largely comprised of a combination of Tribal and county agency professionals. Many team positions are dually filled by each government. Staff appointments are made prior to each hearing. All three courts are formalized using joint powers agreements and an operation manual between the Tribe and county.[297]

B. Saint Regis Mohawk

Unlike other parts of Indian country, the State of New York has regularly claimed the right to exercise jurisdiction over the land of the Six Nations of the Iroquois Confederacy, also known as the Haudenosaunee Confederacy.[298] But in

296. *Yurok Tribe – Criminal Assistance Program – Memoranda of Understanding with Del Norte and Humboldt Counties*, *supra* note 294.

297. *See* CORDERO, GARCIA & VAN SCHILFGAARDE, *supra* note 261, at 31.

298. The Confederacy, or the "Haudenosaunee" (People of the Longhouse), as they call themselves, refers to the historical alliance between the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora Nations. *See New York Indians: Hearings on S. 1683, S. 1686, S. 1687 Before the Subcomm. on Indian Affs. of the S. Comm. on Interior & Insular Affs.*, 80th Cong. 13 (1948) (expressing state officials' concern over a perceived jurisdictional void because the prevailing notion was that the State of New York enjoyed concurrent jurisdiction); J.S. WHIPPLE, GEO. H. FROST, FRANK P.

1942, a federal court decision raised questions about the validity of state jurisdiction.[299] In response, a newly formed New York Joint Legislature Committee on Indian Affairs appealed to Congress to settle this issue. Congress subsequently passed the Act of July 2, 1948, conferring on the State of New York criminal jurisdiction over offenses committed by or against Indians on all reservations in the state.[300] In 1950, Congress conferred civil adjudicatory jurisdiction to New York courts over civil actions and proceedings between Indians or between Indians and other persons.[301]

Generally, the New York delegation statutes have been interpreted to be similar in scope to P.L. 280.[302] This has unfortunately included P.L. 280's debilitating effects on Tribal court development and Tribal self-government.[303] In fact, much of the discussion leading up to the enactment of the New York statutes concerned efforts to undermine Tribal sovereignty and governance, including specific efforts to address Tribal reluctance to sell its land to non-Indians.[304] These concerted efforts led to the steady dispossession and erosion of the Haudenosaunee. In 1954, the New York Joint Legislature Committee on Indian Affairs reflected in its report that "[s]teadily, if slowly, New York Indians are becoming convinced that attainment of their deserved place in contemporary society requires ever-increasing acceptance of the [W]hite man's culture and institutions."[305] Despite these efforts, the Six Nations of the Iroquois Confederacy would begin to reclaim their sovereignty and judicial practices decades later.

The Mohawk are "traditionally the keepers of the Eastern Door of the Iroquois Confederacy."[306] The Tribal government shares jurisdiction with the State of New York, the United States, and the Town of Bombay on the U.S. side of the border, while they share jurisdiction with the Canadian federal government and the provincial governments of Quebec and Ontario on the Canadian side.

DEMAREST, BARNET H. DAVIS & GEO. F. ROESCH , REPORT OF SPECIAL COMMITTEE TO INVESTIGATE THE "INDIAN PROBLEM" OF THE STATE OF NEW YORK 78–79 (1889) (recommending forced assimilation to expedite land dispossession); Judge Carrie E. Garrow, *New York's Quest for Jurisdiction over Indian Lands*, 14 JUD. NOTICE 4, 4–16 (2019) (describing the two hundred years of jurisdictional disputes between the State of New York and the Haudenosaunee People); Robert B. Porter, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 HARV. J. ON LEGIS. 497, 497–99 (1990) (providing a historical analysis of the jurisdictional disputes and the ways in which New York has undermined federal policies of Tribal self-determination).

299. *See* United States v. Forness, 125 F.2d 928, 932 (2d Cir. 1942).

300. Act of July 2, 1948, Pub. L. No. 80-881, 62 Stat. 1224 (codified at 25 U.S.C. § 232).

301. Act of Sept. 13, 1950, Pub. L. No. 81-785, 64 Stat. 845 (codified at 25 U.S.C. § 233).

302. *See, e.g.*, United States v. Cook, 922 F.2d 1026, 1035 (2d Cir. 1991) (analogizing to P.L. 280 for applicability of state law); Bowen v. Doyle, 880 F. Supp. 99, 118–19 (W.D.N.Y. 1995), *aff'd*, 230 F.3d 525 (2d Cir. 2000) (noting that principles under P.L. 280 are applicable in New York).

303. *See* Porter, *supra* note 298, at 559–72.

304. *See* Garrow, *supra* note 298, at 16.

305. *Id.*

306. *History of Tribal Government*, SAINT REGIS MOHAWK TRIBE, https://www.srmt-nsn.gov/history_of_tribal_government [https://perma.cc/AD45-USHK].

The Tribe has built out its judiciary over the last twenty years,[307] which currently includes a Tribal court and a Healing to Wellness Court.[308]

All criminal actions are prosecuted in the New York state court system; the Tribe has no jail facility or community supervision services such as parole or probation.[309] The Tribe, seeking an *alternative* route to jurisdiction, therefore began outreach to its local jurisdictional neighbors. After initially receiving a "lukewarm" reception at the Franklin County Court, the Tribe focused its collaboration efforts on lower-level offenders at the local Bombay Town Court. The majority of the Saint Regis Mohawk Tribal members and residents that find themselves in the criminal legal system go through the Bombay Town Court. In fact, the Bombay Town Court has "one of the largest caseloads" in the state involving Native defendants.[310] Participants of the Wellness Court technically remain within the jurisdiction of the Town of Bombay Court but enter the Wellness Court via a contract, often as a condition of release or sentencing.

The Wellness Court went on to collaborate with the Assistant U.S. Attorney for the Northern District of New York, the U.S. Federal Probation Office, the Franklin County District Attorney's Office, and Franklin County Probation Department.[311]

Motivated by the successful Wellness Court Tribal-state collaboration,[312] the Saint Regis Mohawk Tribe is now engaged in a bail reform project with the Town of Bombay. The nature of the Saint Regis Mohawk jurisdictional landscape means Tribal residents find themselves charged with offenses more frequently within the Town of Bombay Court than within the Tribal Court, and

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307. John C. Carroll, *Proposals for Resolving Reservation Residents' Bail Catch-22: A Case Study of the St. Regis Mohawk Indian Reservation & the Town of Bombay, New York*, 4 AM. INDIAN L.J. 156, 157 (2016).

308. *Tribal Courts*, SAINT REGIS MOHAWK TRIBE, https://www.srmt-nsn.gov/tribal_court [https://perma.cc/77F3-EWS8].

309. *Id.* (noting the Saint Regis Mohawk Tribal Court currently consists of a Traffic and Civil Court as well as the Healing to Wellness Court).

310. CTR. FOR CT. INNOVATION, STATUS REPORT: BOMBAY TOWN COURT/ST. REGIS MOHAWK TRIBE PRETRIAL SUPERVISION REPORT 3 (2016), http://www.nyfedstatetribalcourtsforum.org/pdfs/WTS-SRMT-Bombay-Report.pdf [https://perma.cc/KW3M-NM4R].

311. *The Saint Regis Mohawk Tribe Healing to Wellness Court*, TRIBAL ACCESS TO JUST. INNOVATION, https://tribaljustice.org/places/specialized-court-projects/the-saint-regis-mohawk-tribe-healing-to-wellness-court/ [https://perma.cc/7HBJ-DC44].

312. Gauging the "success" of a restorative justice program such as an intersovereign collaboration can be difficult and complex. The metrics for success can vary, such as whether restorative justice achieves lower recidivism rates than a similarly situated Anglo-adversarial model, whether the defendants perceive their experience to be fair or just, whether the victim and community perceive the process and outcome to be fair or just, and whether the collaboration serves the current and future goals of both sovereigns, among numerous other metrics. Several Wellness Courts have received formal assessments, but they are currently an expensive, time-consuming, and largely out-of-reach option for most courts. *See generally Tribal Healing to Wellness Courts: Data and Evaluation*, TRIBAL L. & POL'Y INST., http://wellnesscourts.org/wellness_court_resources/evaluations.cfm [https://perma.cc/546X-VCA7].

Tribal residents are required to post bail in Town Court.[313] Native defendants are frequently less able to make bail, in part because the land on which they reside, Tribal trust land, is not alienable, and their homes thus have no market value.[314] The Tribe established a pilot project with the Town Court to provide that eligible arrestees be released without bond under the supervision of the Tribe. While on pretrial supervision, participants have access to "a range of culturally-relevant services."[315] Notably, the pilot program is open to all Native arrestees, not just Tribal members or residents. The pilot program includes a formal partnership with the Franklin County Probation Department, which provides for access to criminal history reports, information of new arrests, and other cross-jurisdictional data.[316] While there is debate as to whether probation-like supervision and its intrusive tendencies are sufficient to counter the systemic racial harm of the criminal legal system, this reform is certainly an improvement from incarceration.[317]

The Saint Regis Mohawk Tribe has been compelled to seek creative, and frequently collaborative, solutions to its judicial needs. Its collaborations have ultimately bolstered the jurisdictional authority of the Tribe—allowing the Tribe to participate in proceedings that would otherwise have been exclusive to the State of New York. The Tribe could have simply left its Tribal members to state jurisdiction and thereby saved numerous financial resources. But the Tribe notes that its efforts are meant to ensure the justice system is accountable. The offender must be accountable to their community, including the Tribal community. Conversely, the criminal legal system must be accountable to the community. The Tribe is best positioned to ensure such accountability by exercising its sovereignty, building up its judiciary, and actively pursuing intersovereign collaborations. Consequently, the Tribe is regenerating its de facto lost jurisdiction and is modifying the legal norms for its jurisdictional future.

C. Sisseton-Wahpeton Oyate

The Sisseton and Wahpeton Oyate Tribe consists of two of the four bands of the Isanti division of the Dakota Sioux: the Sisseton ("people of the river") and the Wahpeton ("people of the woodlands"). Both bands speak the "D" dialect, or "Dakota," of the Siouan language.[318] The Sisseton-Wahpeton Bands of the Dakota Sioux primarily inhabited Minnesota but now primarily inhabit the

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313. Carroll, *supra* note 307, at 157–58.

314. *See id.*

315. CTR. FOR CT. INNOVATION, *supra* note 310, at 4.

316. *Id* at. 6–7.

317. *See, e.g.*, Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICHMOND L. REV. 795, 797–800 (2018) (discussing the inequities of the bail system).

318. JENNIE R. JOE, JENNY CHONG, ROBERT YOUNG, DARLENE LOPEZ, CHIEF JUDGE B.J. JONES & GARY GAIKOWSKI, NATIVE AM. RSCH. & TRAINING CTR., FINAL REPORT: PARTICIPATORY EVALUATION OF THE SISSETON WAHPETON OYATE IASAP DEMONSTRATION PROJECT 8 (2008).

Lake Traverse Reservation in South Dakota, North Dakota, and Minnesota.[319] The Lake Traverse Reservation was established as a permanent homeland for the Sisseton-Wahpeton Oyate in 1867.[320] Allotment was applied to the Lake Traverse Reservation in 1891.[321] Tribal historians noted that "when the sale of the land was launched, approximately 3,000 non-Indians camped along the reservation borders for days in order to buy parcels of the five hundred thousand acres."[322] For the next eighty-four years, the Sisseton-Wahpeton Oyate would continue to assert Tribal jurisdiction within the Lake Traverse Reservation's original boundaries.[323]

The State of South Dakota aggressively asserted authority within the Lake Traverse Reservation in the 1970s.[324] In 1975, the U.S. Supreme Court ruled in *DeCoteau v. District County Court* that the Lake Traverse Reservation was disestablished.[325] This ruling was made despite the fact that the 1891 Act did not suggest the boundaries of the Reservation were altered and despite existing federal acknowledgement and support of Tribal assertion of civil and criminal jurisdiction within the 1867 Reservation boundaries.[326] The Court also relied on bombastic contemporaneous non-Indian media accounts that eagerly sought the opening of the Reservation.[327] Scholars contend that the *DeCoteau* decision fails to uphold the rule of law.[328]

Since *DeCoteau*, the Sisseton-Wahpeton Oyate have persistently sought to reacquire individual tracts of land within their historical 1867 boundaries.[329] Yet, the Reservation remains "one of the most fractionated parcels of land in the world."[330] The Tribe maintains that its Tribal territory includes all Tribal lands within the Lake Traverse Reservation boundaries as designated by the 1867

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319. Angelique EagleWoman (Wambdi A. Was'teWinyan), *Re-Establishing the Sisseton Wahpeton Oyate's Reservation Boundaries: Building a Legal Rationale from Current International Law*, 29 AM. INDIAN L. REV. 239, 239–40 (2005).

320. Treaty with the Sioux–Sisseton Wahpeton Bands, Feb. 19, 1867, 15 Stat. 505 (ratified Apr. 15, 1867).

321. Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 989, 1035 (containing the agreement to be ratified and beginning with a recitation from the General Allotment Act).

322. JOE ET AL., *supra* note 318, at 7 (citing ELIJAH BLACK THUNDER, NORMA JOHNSON, LARRY O'CONNOR & MURIEL PRONOVOST, EHANNA WOYAKAPI: HISTORY AND CULTURE OF THE SISSETON WAHPETON SIOUX TRIBE OF SOUTH DAKOTA (1972)).

323. EagleWoman, *supra* note 319, at 247–48.

324. *Id.* at 248.

325. 420 U.S. 425, 444–45 (1975). Disestablishment is the termination of the Indian country status of land.

326. *Id.* at 461–66 (Douglas, J., dissenting).

327. *See* 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, 666–67 (2021).

328. *See id.* at 667 (describing how the Court relied on extraneous accounts in reaching the decision in *DeCoteau*).

329. *See* EagleWoman, *supra* note 319, at 248–50.

330. Hodel v. Irving, 481 U.S. 704, 712–13 (1987) (citing MICHAEL L. LAWSON, HEIRSHIP: THE INDIAN AMOEBA, *reprinted in Hearing on S. 2480 and S. 2663 Before the S. Select Comm. on Indian Affs.*, 98th Cong. 85 (1984)).

Treaty, including for purposes of criminal jurisdiction.[331] Yet, federal recognition of Tribal criminal jurisdiction has been limited since the 1975 *DeCoteau* decision to "the remaining trust allotments and [T]ribal lands as within the 'former' SWO [the Sisseton-Wapheton Oyate] reservation."[332] The result is a checkboard of jurisdiction. The former Chief Judge of the Sisseton-Wapheton Oyate, the Honorable B.J. Jones, characterized the impact of the checkerboard jurisdiction as

> crippl[ing] the United States in fulfilling its fiduciary responsibilities for guardianship and protection of Indians. It is the end of [T]ribal authority, for it introduces such an element of uncertainty as to what agency has jurisdiction as to make modest [T]ribal leaders abdicate and aggressive ones undertake the losing battle against superior state authority.[333]

The Lake Traverse Reservation spans five counties in South Dakota and two counties in North Dakota, leading to interactions with a variety of state officials in both states.[334] State law enforcement officers can arrest Sisseton-Wahpeton Oyate Tribal members within the Lake Traverse Reservation boundaries, charge those arrested in state court, and send those convicted to state prison. Confrontation and criticism of state law enforcement have been noted issues on the Lake Traverse Reservation for years.[335] In a set of particularly egregious instances in 1999, several homicide cases in South Dakota with Native American victims were not prosecuted by state or federal officials. The lack of action resulted in a series of forums held by the State of South Dakota's Advisory Committee to the U.S. Commission on Civil Rights.[336]

A host of social ills plague the Lake Traverse Reservation, including persistent substance abuse, which is linked heavily to historical trauma.[337] A Tribal census from 2003 indicated that "over 60 percent of the Tribe lived in poverty, and 40 percent [were] unemployed." Among the factors cited as contributing to high unemployment rates were alcohol abuse, few job

331. SISSETON-WAHPETON OYATE CODE § 20-02-02 (2015).

332. EagleWoman, *supra* note 319, at 253.

333. JOE ET AL., *supra* note 318, at 11.

334. *See* SISSETON WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION, https://www.swo-nsn.gov [https://perma.cc/FZJ2-A7NF].

335. *See* Angelique EagleWoman (Wambdi A. Was'teWinyan), *Wintertime for the Sisseton-Wahpeton Oyate: Over One Hundred Fifty Years of Human Rights Violations by the United States and the Need for a Reconciliation Involving International Indigenous Human Rights Norms*, 39 WM. MITCHELL L. REV. 486, 530 (2013).

336. S.D. ADVISORY COMM. TO THE U.S. COMM'N ON C.R., NATIVE AMERICANS IN SOUTH DAKOTA: AN EROSION OF CONFIDENCE IN THE JUSTICE SYSTEM (2000), http://www.usccr.gov/pubs/sac/sd0300/main.htm [https://perma.cc/T6Y8-AK8W].

337. *See* Flies-Away & Garrow, *supra* note 26, at 406; *see also* Bonnie Duran, Eduardo Duran & Maria Yellow Horse Brave Heart, *Native Americans and the Trauma of History*, *in* STUDYING NATIVE AMERICA: PROBLEMS AND PROSPECTS 60, 60 (Russell Thornton ed., 1998) (describing intergenerational trauma); EDUARDO DURAN & BONNIE DURAN, NATIVE AMERICAN POSTCOLONIAL PSYCHOLOGY 136–56 (Richard D. Mann ed., 1995) (describing clinical approaches to substance abuse disorders that incorporate traditional practices).

opportunities, lack of education, and inadequate job skills.[338] Roberts County has the highest rate of incarceration of Natives of any county in South Dakota, with 90 percent of those incarcerations related to drug and alcohol abuse.[339]

In 1997, the Tribe received a Healing to Wellness Court planning grant. Its treatment court promotes restorative justice by emphasizing culturally based treatment. The Oyate operate their own substance abuse treatment facility.[340] The Wellness Court served Natives convicted in the Sisseton-Wahpeton Oyate Tribal Court of third offense DUI or class one drug offenses.[341] In 2004, the Tribe met with the state and federal court and law enforcement officials to discuss potential collaboration in its Wellness Court and treatment facility. Through negotiated transfer agreements, the Wellness Court expanded its scope from just Tribal Court convictions to include any Native (including Sisseton-Wahpeton Oyate Tribal members as well as members from Spirit Lake, Rosebud Sioux, and Oglala Lakota) convicted in state court of a felony drug or alcohol offense.[342] This jurisdictional scope includes perpetrators of violent offenses[343] who receive a suspended imposition of sentence or suspended execution of sentence, Oyate members who are paroled from state prison who are still under at least one year of supervised release, and Oyate members convicted in federal court of drug and alcohol offenses who receive supervised time. Successful graduation from the Wellness Court can include expungement of both Tribal and state court records.[344]

The Honorable Chief Judge Jones notes that while recidivism rates remain high, many graduates have been quite successful. Among these graduates are court employees, a spiritual leader in Canada, a Tribal administrator, a Tribal payroll director, and a prison guard.[345] The average graduate has been relieved of 4.5 years of prison time and has had 2.5 children.[346] Judge Jones estimates that 1,200 years of incarceration were avoided through the Wellness Court.[347]

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338. JOE ET AL., *supra* note 318, at iv.

339. CHIEF JUDGE B.J. JONES, SISSETON-WAHPETON OYATE TREATMENT COURT 5, https://www.wellnesscourts.org/files/Sisseton%20Wahpeton%20Oyate%20Treatment%20Court.pdf [https://perma.cc/79YX-7TXN].

340. *See Dakotah Pride Center*, SISSETON WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION, http://www.swo-nsn.gov/departments/human-services-department/dakotah-pride/ [https://perma.cc/VYQ6-LUX9].

341. Jones, *supra* note 339.

342. *Id.*

343. Most U.S. Department of Justice drug court funding, though not the Indian Alcohol and Substance Abuse funding in 1998, restricts the use of funds for violent offenders, as defined by 34 U.S.C. § 10613. 34 U.S.C. § 10612 (limiting the eligibility of violent offenders for programs funded under this subchapter). It is notable, then, that the Sisseton-Wahpeton Oyate, despite limited funds, nevertheless prioritize the inclusion of violent offenders in their Wellness Court.

344. Jones, *supra* note 339.

345. *Id.*

346. *Id.*

347. Telephone Interview with Chief Judge B.J. Jones, Tribal Ct. Judge & Dir., Tribal Judicial Inst. (Oct. 11, 2021) (on file with author).

Two Sisseton-Wahpeton Oyate Tribal police officers "have been cross deputized by the state, allowing them to arrest non-Indians on [T]ribal lands."[348]

Unfortunately, the Sisseton-Wahpeton Oyate Wellness Court is currently not operational, primarily due to the expiration of grant funds. Nevertheless, the Sisseton-Wahpeton Oyate Wellness Court experience is instructive. A fractionated and disestablished reservation meant community members were siphoned into the state criminal legal system, frequently with severe criminal penalties but meager opportunities to address their historical trauma. The Tribe, despite limited jurisdiction, built a Wellness Court. This Wellness Court was then used to leverage jurisdictional transfers, reversing the tide of de facto lost jurisdiction.

CONCLUSION

Meaningful criminal justice reform requires effective diagnosis of the issues with our current system.[349] For Tribes, addressing the failures of the adversarial system goes beyond enhancing rights to combat effectively the abusive power of the state. Enhanced individual rights alone, especially expressed in an adversarial court system, will not improve Tribal criminal justice. Instead, Tribal criminal justice reform must necessarily take into account the ways in which the adversarial system has been forced upon Tribes, the ways in which Tribal norms have been delegitimized, and the ways in which Tribes have been divested of the authority to serve their system-involved members. For Tribes, recovering collective power is one route toward recovery from historical oppression, especially through restorative justice that fosters individual rights in a relational, community context. Tribes are showcasing their capacity to empower themselves through the jurisdiction generated via restorative justice.

Negotiating and generating jurisdiction with state partners can be hugely beneficial for Tribes. The Tribe can serve its Tribal members by helping them to avoid the penal brunt of the state in favor of culturally relevant healing from trauma. In turn, by offering these services in the context of criminal justice, Tribes can counter the disparaging narrative about Tribal courts as ineffective. Expanding the restorative justice docket through negotiated transfers of jurisdiction builds access to defendants whom the Tribes would otherwise not serve. It further signals that both the Tribe and the partnering state trust the competency, fairness, and overall legitimacy of the Tribal restorative process. By taking on cases that the Tribe is otherwise not compelled to financially absorb and displaying how restorative justice can effectively be integrated, Tribes are both building out their Tribal justice system and also serving the neighboring

348. JOE ET AL., *supra* note 318, at x.

349. *See* Levin, *supra* note 17, at 269 (documenting the various issues in the criminal legal system and describing how these issues impact society).

justice systems.[350] Far from seeking a type of independence that would create an isolated community with no ties to the United States whatsoever, Tribes are rebuilding lines of political authority and intergovernmental cooperation and offering new models of antisubordination, paved with healing justice for the individual and collective alike.[351]

350. *See* RICHLAND, *supra* note 72, at 13 (citing JOSEPH WEISS, SHAPING THE FUTURE ON HAIDA GWAII: LIFE BEYOND SETTLER COLONIALISM 184 (2018)).

351. *See generally* VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1974) (highlighting the history of Indian treaty relations with the United States and calling for a reconfiguration of sovereign-to-sovereign relations, including reinstituting treaty making with Tribes).