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Recentering Tribal Criminal Jurisdiction

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ABSTRACT

The boundaries of modern tribal criminal jurisdiction are defined by a handful of clear rules—such as a limit on sentence length and a categorical prohibition against prosecuting most non-Indians—and many grey areas in which neither Congress nor the Supreme Court has specifically addressed a particular question. This Article discusses five of the grey areas: whether tribes retain concurrent jurisdiction to prosecute major crimes, whether tribes affected by Public Law 280 retain concurrent jurisdiction to prosecute a full range of crimes, whether tribes may prosecute Indians who are not citizens of any tribe, whether tribes may prosecute their own citizens for crimes that occur outside of Indian country, and how much authority and flexibility tribes have to address juvenile delinquency as they see fit.

Many courts have employed an "outside in" approach to these questions, one which begins by assessing the scope of federal and state criminal jurisdiction and then attempts to discern the minimum degree of tribal criminal power necessary to fill the gap left by federal and state authority. Because many tribal criminal justice systems have long devoted most of their resources to filling this gap (prosecuting only minor crimes committed by tribal citizens within Indian country), it may seem to a court that any further exercise of jurisdiction is unnecessary and new, leading to a limited vision of tribes' retained criminal jurisdiction. This approach prevents engagement with tribal jurisdiction and substantive criminal law on their own terms, leaving courts and legislators to rely on generalizations and assumptions rather than carefully considering the purpose and scope of, and limitations on, tribal criminal jurisdiction.

In the past few decades, however, courts have followed the lead of tribes and legal scholars by employing an "inside out" approach, which centers tribes by asking only whether a particular power is an element of tribes' sovereignty and whether it has been taken away. When a court employs an inside out approach, neither the scope of federal and state jurisdiction nor the common practices of tribal criminal courts bear directly on the scope of modern tribal criminal power. Tribal criminal jurisdiction is examined standing alone, which may lead to consideration of why criminal jurisdiction is necessary for sovereignty, the multiple functions such jurisdiction serves, and the various forms it may take. As applied to the questions discussed here, the result is a much broader vision of tribes' retained criminal power. This Article explains why the inside out approach is the more appropriate one and how the analytical shift is attributable in large part to the work of Carole Goldberg. By addressing five specific grey areas of tribal jurisdiction, this Article demonstrates how the use of an inside out methodology—a clear alternative to the implicit divestiture approach employed most famously in *Oliphant v. Suquamish Indian Tribe*—can have significant consequences for the future of tribal criminal jurisdiction.

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INTRODUCTION

American Indian tribes retain all sovereign powers that have not been explicitly divested by treaty or statute, or held by a court to have been lost as a result of tribes' status as domestic dependent nations.[1] Some of the most important questions in federal Indian law arise in the grey areas in which neither Congress nor the U.S. Supreme Court have considered whether tribes retain a particular power. Tribes take steps to self-govern, and federal courts sometimes review their actions, leading to decisions that either clearly affirm or curtail that power.[2] Analysis of these grey areas usually takes one of two forms. An "outside in" analysis treats the scope of modern tribal power as a practical question about the minimum degree of authority tribes require in order to self-govern. Overlapping federal, state, and local authority matter when a court employs this approach: It is less likely to determine that a tribe needs a particular power if another government is serving the same function. Historical practice also matters: When tribal governments do not exercise a particular sovereign power for a long period of time, a court may assume it is not required.

An "inside out" analysis, on the other hand, asks whether a particular power is an aspect of tribes' inherent sovereignty and, if so, whether it has been extinguished or limited by Congress or the Supreme Court. It centers tribes, focusing on the range of purposes served by tribal jurisdiction, emphasizing the unique situation of modern tribal courts, and employing the legal rule that tribes retain any sovereign power not explicitly divested by Congress or clearly limited by the Supreme Court. Instead of asking why tribes need a particular criminal power, what tribal courts usually do, or what minimum level of jurisdiction they need in order to fill gaps in law enforcement left where the federal or

1. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] (Nell Jessup Newton et al. eds., 2012).

2. For example, Congress has affirmed tribes' power to prosecute Indians, but has prescribed rules governing the manner in which tribal courts must conduct criminal trials and the punishments they may impose. 25 U.S.C. §§ 1301–04. The Supreme Court has affirmed tribes' power to tax entities doing business in tribal territory, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137–38 (1982), and to freely determine citizenship rules, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56, 71–72 (1978); Roff v. Burney, 168 U.S. 218, 223 (1897), but it has held that tribes no longer have the power to freely alienate land to anyone but the U.S. government, Johnson v. M'Intosh, 21 U.S. 543, 574 (1823), or to criminally prosecute non-Indian people who commit crimes in tribal territory, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

state governments have not been able to ensure public safety, this approach assumes that tribes are like other sovereigns and asks whether there is a reason why they should not have a specific power. The powers of other governments are significant only by analogy: If a particular power is an aspect of national or state sovereignty, it is likely an aspect of tribal sovereignty as well. The historical practice of tribal courts does not necessarily determine the outer boundaries of their present-day jurisdiction.

The latter approach is more faithful to the foundational principles of federal Indian law and will often result in a holding that tribes retain broad powers. The former approach has historically been more common and usually results in a narrow interpretation of modern tribal power. The difference between these two approaches, and the effect of methodological choice on substantive outcome, is especially apparent in the area of criminal jurisdiction. An "outside in" analysis of unresolved questions about tribal criminal jurisdiction has led federal courts (and sometimes Indian law scholars and tribal courts) to adopt an artificially narrow vision of modern tribal criminal power. An "inside out" approach, on the other hand, reveals few clear limits on tribal criminal jurisdiction, leaving tribes with much broader criminal power.

Describing tribal criminal jurisdiction in 1976, Robert Clinton wrote that while it "is generally limited [in practice] to relatively minor crimes committed by Indians on the reservation, the potential reach of such jurisdiction may be substantially broader."[3] It makes sense that tribal criminal courts in 1976 would have exercised their power cautiously and judiciously. A web of federal and state actors nearly suffocated tribal criminal justice systems for more than a century.[4] Operating in the shadow of federal and state authority and reeling from the impact of two separate eras of federal policies that were especially destructive to tribal criminal justice systems,[5] tribal criminal courts through the 1970s likely limited their reach to ensure that scarce resources were directed at the most pressing problems. As Professor Clinton noted, however, changing assertions of tribal power raised the "more interesting legal question" of what tribal courts could do "should the tribes choose to enlarge their jurisdictional base"[6] into grey areas such as the

3. Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 557–60 (1976).

4. Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 82–84 (forthcoming 2016) (describing federal and state dominance in the criminal area).

5. *See* Rolnick, *supra* note 4, at 62–66 (explaining that tribal justice systems were undermined by the extension of federal power into local criminal matters during the Allotment and Assimilation Era, and by the extension of state power into Indian country during the Termination Era).

6. Clinton, *supra* note 3, at 557.

prosecution of major crimes, the prosecution of non-Indians, and jurisdiction over crimes committed outside of Indian country.[7]

As Professor Clinton predicted, tribes have prioritized building effective and responsive criminal justice institutions, an effort that has sometimes involved enlarging their jurisdictional base. These courts operate in a landscape long dominated by federal and state criminal justice machinery,[8] however. Judicial and scholarly analyses consequently have tended to focus on federal laws and federal actors (and to a lesser extent state laws and state actors). Tribal jurisdiction has often been treated only as one part of the "maze," or web, that governs criminal justice in Indian country.[9] In this web, tribal courts function primarily as gap fillers, their jurisdiction extending only so far as is necessary to cover the areas in which federal or state courts lack the jurisdiction, resources, or political will to effectively meet public safety needs. Such an "outside in" approach to criminal justice questions begins with the top layers of the jurisdictional web and considers tribal jurisdiction last, if at all.

While misguided, this approach is understandable: In order to determine how the justice system works on any given reservation, one must first discern the precise extent of federal, tribal, and state authority there, and any rules governing the interaction between them. Federal criminal jurisdiction is an important piece of this puzzle on many reservations, so even the leading scholars of criminal justice in Indian country have tended to focus first and most extensively on the federal role.[10] Several scholars have developed careful critiques of state and

7. *Id.*

8. INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 1 (Nov. 2013), www.aisc.ucla.edu/iloc [https://perma.cc/2U3P-Q25Z].

9. Robert Clinton coined the term "jurisdictional maze," Clinton, *supra* note 3, at 504, and scholars commonly describe Indian country criminal jurisdiction as a "maze." *See, e.g.*, Richard W. Garnett, *Once More Into the Maze:* United States v. Lopez*, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. REV. 433, 441–42 nn.57–60 (1996) (citing articles that use the maze analogy or similar terms); *see also* INDIAN LAW & ORDER COMM'N, *supra* note 8, at 9 (describing the delivery of criminal justice services on reservations as a "jurisdictional maze"); AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf [https://perma.cc/JS52-DTCA]. While this is an accurate metaphor to describe the experience of trying to determine who has authority when a specific crime has been committed, I have used the term "web" because it better captures the top-down history of Indian country criminal justice, in which federal and state laws have been layered unevenly atop tribal criminal justice systems. *See* Rolnick, *supra* note 4, at 83–84.

10. Kevin K. Washburn, for example, has written extensively about how federal criminal jurisdiction operates in Indian country and the negative effects of that jurisdiction on tribal governments. While he has called for greater tribal control over criminal justice, he has not written as much about tribal criminal law or tribal courts. *See, e.g.*, Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006). Even Robert Clinton, in his comprehensive analysis of

federal criminal jurisdiction in Indian country, which emphasize the importance of tribal jurisdiction and local control, but even these critiques tend to identify the reasons that tribal jurisdiction is better without engaging thorny questions about its scope.[11]

The problem with this outside in approach is that it treats criminal justice in Indian country as primarily a matter of federal and state laws, with tribal criminal laws covering only less serious crimes that are not important enough to merit federal or state attention. It asks only where tribal criminal courts are needed to fill gaps left by the other governments and what kinds of cases they most commonly hear as they struggle to fill those gaps. The result is a severely curtailed picture of the criminal power of tribal governments. When this approach is employed, a frequent answer to questions about the scope of modern criminal jurisdiction is that tribal courts need only enough power to prosecute tribal citizens for minor crimes that occur in Indian country.[12] More fundamentally, the outside in approach prevents engagement with tribal jurisdiction and substantive criminal law on their own terms, leaving courts and legislators to rely on generalizations and assumptions rather than carefully considering the purpose and scope of, and limitations on, tribal criminal jurisdiction.

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criminal jurisdiction in Indian country, began his discussion with federal jurisdiction. Clinton, *supra* note 3, at 505–48; *see also* Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 953–71 (1975) (beginning historical discussion with analysis of treaties and federal statutes). Chapter 9 of Felix Cohen's Handbook of Federal Indian Law, which covers criminal jurisdiction, includes multiple subsections on federal and state jurisdiction but only a single section on tribal jurisdiction. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 9.04.

11. *See, e.g.*, Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 707–29 (2006) (presenting data highlighting the shortcomings of state criminal jurisdiction in Indian country and proposing options for minimizing or repealing such jurisdiction); 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, 1014–27 (2008); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 832–53 (2006) [hereinafter Washburn, *Federal Criminal Law*] (describing problems with the application of federal criminal law in Indian country and calling for greater tribal self-determination in criminal justice, particularly minimizing or repealing federal criminal laws); Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 782–85 (2006) (explaining that lack of true tribal self-determination in the area of criminal justice "denies the tribe the ability to determine its own identity").

12. I use the term "minor crime" to refer to all crimes that are not specifically enumerated in the federal Major Crimes Act, 18 U.S.C. § 1153 (2012). I do not intend it as a commentary on the relative seriousness of any offense. I avoid use of the terms "misdemeanor" and "felony" because those terms are circular in definition, with the length of resulting sentence determining whether something is a misdemeanor or a felony. Because tribal court sentencing authority is restricted for all crimes, the length of sentence distinction is a useless point of reference.

Within two years of Professor Clinton's article, the Supreme Court curtailed the possibility that tribes could prosecute non-Indians. This decision, *Oliphant v. Suquamish Indian Tribe*,[13] stands as an example of the worst possible result of outside in reasoning. Many tribes had renewed efforts to prosecute non-Indians who were committing crimes in Indian country.[14] When the question whether tribes retained their power to do so reached the Supreme Court, the Court focused mostly on its findings that tribes had rarely prosecuted non-Indians during the previous century and that federal actors had never acknowledged the existence of such jurisdiction.[15] It described in detail the laws extending federal jurisdiction to crimes committed by non-Indians on reservations.[16] Building on these observations, the Court held that "[b]y submitting to the overriding sovereignty of the United States, . . . tribes . . . necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[17] The Court's holding that tribes were implicitly divested of their criminal power over non-Indians living in their territory was fueled by its historical assessment that federal and state governments had been handling non-Indian crime to the exclusion of tribal governments for many decades, resulting in a "commonly shared presumption" against the continued existence of tribal criminal jurisdiction to which the Court accorded "considerable weight."[18] *Oliphant* illustrates the stark consequences of an outside in approach that fails to center tribal jurisdiction and tribal criminal justice systems, focusing instead on federal and state power and relying only on assumptions about tribal power. The result was a categorical rule, ironclad for over thirty years,[19] that no tribe could prosecute

13. 435 U.S. 191 (1978).

14. *See* Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of* Oliphant v. Suquamish Indian Tribe, *in* INDIAN LAW STORIES 261, 263, 284 (Carole Goldberg et al. eds., 2011). According to the Court, thirty-three of the 127 tribes exercising criminal jurisdiction at the time claimed jurisdiction to prosecute non-Indians, and twelve more had enacted laws that would authorize them to assume such jurisdiction. *Oliphant*, 435 U.S. at 196.

15. Non-acknowledgement was not surprising because early federal treaties and statutes create federal jurisdiction to hear cases arising out of non-Indians' conduct affecting Indians on reservations, *see supra* note 28 (describing the General Crimes Act); they did not address how far tribal jurisdiction might extend.

16. *Oliphant*, 435 U.S. at 201–04.

17. *Id.* at 210.

18. *Id.* at 206.

19. Congress in 2013 restored tribes' inherent jurisdiction to prosecute a limited category of non-Indian domestic violence offenders whose victims are Indian women. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, sec. 904, § 204(b), 127 Stat. 121–22 (codified at 25 U.S.C. § 1304 (2013)); *see infra* note 25 (describing that law). The *Oliphant* Court allowed for the possibility that a particular tribe may retain treaty-guaranteed rights to prosecute

a non-Indian person. Until at least the 1990s, the other grey areas identified by Professor Clinton—extraterritorial jurisdiction and jurisdiction over major crimes—likewise seemed to hold little promise for a significant expansion of tribal jurisdiction beyond the realm of minor crimes committed by Indians on the reservation as courts continued the long-dominant outside in approach of treating tribal courts as gap fillers, underestimating the scope of tribal criminal jurisdiction, and paying insufficient attention to tribal courts.

Much has changed in recent years. Leading casebooks and treatises now embrace an inside out approach. They address complex questions of tribal criminal jurisdiction on their own terms, rather than focusing almost exclusively on gaps in federal and state authority. This shift is no doubt attributable to many factors: more law schools teaching federal Indian law, more scholarship offering critical analysis of the issue, better resources, the work of a generation of Indian law scholars and advocates, and the tenacity of tribes in pushing boundaries. Carole Goldberg's work has been instrumental in guiding this shift. From her close examination of Public Law 280,[20] then a little-studied law that extended state jurisdiction into Indian country, to the centrality of tribal law in her teaching[21] to her work untangling the jurisdictional web as a member of the Indian Law and Order Commission,[22] Professor Goldberg has consistently centered tribal governments in jurisdictional analyses. Her casebook, *Native Nations and the Federal System*, radically shifted the analytical approach taught in many Indian law courses by presenting tribal perspectives first,[23] organizing jurisdictional questions by sovereign, and leading with a discussion of tribal authority.[24] This shift has had profound effects in the law governing tribal criminal jurisdiction.

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non-Indians, *id.* at 196, but I am not aware of any tribe that has successfully claimed such a right in federal court since *Oliphant*.

20. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 535–94 (1975).

21. Professor Goldberg is the lead author of *Native Natives and the Federal System*, a federal Indian law casebook that begins with and emphasizes tribal viewpoints on the nature of tribal power. She created and taught an advanced seminar in Tribal Law and a Tribal Legal Development Clinic at UCLA School of Law.

22. *See* INDIAN LAW & ORDER COMM'N, *supra* note 8, at 193.

23. *See* CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 1–8, 225–26 (6th ed. 2010) (presenting treaty excerpts and statements from tribal leaders to illustrate the tribes' understanding of the federal-tribal relationship and tribal governing authority). In contrast, two other leading casebooks open with non-tribal perspectives—an overview of federal Indian law, excerpts from academic articles, and a history of colonial perspectives and the doctrine of discovery. *See* ROBERT A. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 1–21 (2d ed. 2008); DAVID H. GETCHES ET AL., CASE AND MATERIALS ON FEDERAL INDIAN LAW 1–73 (5th ed. 2005).

24. Rather than organizing the discussion of jurisdiction by issue, the authors present a complete discussion of tribal power, including the scope of tribal criminal jurisdiction, in chapter three before

Although Indian country criminal jurisdiction is marked by several clear rules,[25] the grey areas loom larger today as tribes assert broader jurisdiction. The *Oliphant* Court's rule of implicit divestiture has been expanded in cases concerning tribal civil jurisdiction, reaching toward a general presumption that tribes have lost all power to deal with outsiders.[26] The grey areas of criminal jurisdiction have received less attention. There is a danger that courts will employ an outside in approach to all these unanswered questions, which will often lead to a rule that tribes have lost all aspects of criminal jurisdiction beyond the power to prosecute consenting members for minor crimes that occur on the reservation, and indeed some courts have so held.[27]

More recently, though, courts have followed the lead of tribes, scholars, and advocates by employing an inside out approach to determine the boundaries of tribal criminal jurisdiction. This approach offers an alternative to the Supreme Court's jurisprudence on implicit divestiture in that it addresses each exercise of jurisdiction carefully without assuming that any particular aspect of jurisdiction has been lost simply because no federal court has addressed it. The result in each case is a rule of retained tribal criminal power that reaches much more broadly than is often assumed. While Congress and the Court have certainly restricted tribal criminal power much more than any other government's criminal power,[28] what remains is much more expansive than was envisioned half a century ago.

reviewing state and federal authority, including criminal jurisdiction, in chapter four. *See* Carole E. Goldberg et al., *supra* note 23, at 227–73, 337–55, 517–46. *Compare* Getches et al., *supra* note 23, at 470–527 (presenting material on federal and state criminal jurisdiction before a discussion of the scope of and limits on tribal jurisdiction), *with* Anderson et al., *supra* note 23, at 310–32, 411–12, 522–31, 593–625 (also presenting material on federal and state criminal jurisdiction before a discussion of the scope of and limits on tribal jurisdiction).

25. *See infra* note 28 (discussing bright line limits on tribal criminal jurisdiction), text accompanying notes 30–31, 47, 115–118 (discussing the scope of federal criminal jurisdiction in Indian country) and notes 48, 75, 79, 119–120 (discussing the scope of state criminal jurisdiction in Indian country).

26. *See supra* note 70 (citing civil implicit divestiture cases).

27. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 693 (1990) ("The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members.").

28. The primary examples are 25 U.S.C. § 1302 (2012), stating that tribes may not sentence offenders to more than one year in jail or prison per offense, but authorizing sentences up to three years in some cases, and the bright line rule of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that tribes may not prosecute non-Indians, as modified by 25 U.S.C. § 1304 (2013) (authorizing tribal prosecution of non-Indian domestic violence offenders in limited circumstances).

This Article focuses on five unresolved[29] questions regarding the scope of tribal criminal jurisdiction to illustrate the effect of a shift from an outside in analysis that views tribes as gap fillers to an inside out analysis that centers tribes. In addition to the two unanswered questions described by Professor Clinton (extraterritorial jurisdiction and the power to prosecute major crimes), the Article discusses three additional questions about the outside boundaries of tribal power: whether tribes affected by Public Law 280 retain concurrent criminal jurisdiction, whether tribes may prosecute Indians who are not tribal citizens, and whether and to what extent tribes may address juvenile delinquency. These are grey areas that implicate fundamental questions about the scope of criminal jurisdiction. Whom can tribes prosecute and for which crimes? What are the geographical limits of their jurisdiction? How much freedom do tribes have to address crime as they see fit? A review of how courts have approached (or might approach) each question illustrates the difference between the two approaches. It also demonstrates how methodological choice affects results. In each instance, an outside in approach leads to a rule of no tribal jurisdiction or a severely constrained understanding of the scope of modern tribal power. An inside out approach, on the other hand, in which principles of retained sovereignty are faithfully applied to each question, results in an expanded view of tribal jurisdiction.

Two of the questions discussed in this Article have received considerable attention in recent years: concurrent jurisdiction over major crimes and concurrent criminal jurisdiction for tribes affected by Public Law 280. The Article contrasts the way these questions were analyzed prior to the late twentieth century with how courts and scholars have approached them more recently. The result in each case has been widespread agreement among scholars and lower federal courts (still unconfirmed by Congress or the Supreme Court) that tribes retain concurrent jurisdiction in both circumstances. The remaining questions have received less attention: the extent of criminal jurisdiction over non-citizen Indians, extraterritorial criminal jurisdiction, and juvenile delinquency jurisdiction. Here, the Article contrasts the assumptions that most often guide the limited analysis of each issue with the result of a considered analysis that centers tribes. In each instance, centering tribes leads to a conclusion of broader retained jurisdiction.

29. Unresolved in this context means that neither Congress nor the Supreme Court has directly addressed them.

I. CONCURRENT JURISDICTION OVER MAJOR CRIMES

In 1885, Congress passed the Major Crimes Act,[30] which created federal criminal jurisdiction over crimes committed by Indian people in Indian country. Prior to its passage, the federal government had exercised jurisdiction only over crimes between Indians and non-Indians,[31] which implicated the relations between the United States and the tribes, while purely internal matters were considered the exclusive province of each tribe. The Supreme Court confirmed as much in 1883 when it held that Kan-gi-shun-ca (Crow Dog), a Lakota Indian, could not be prosecuted in federal court for assassinating Sinte Gleska

30. Major Crimes Act, ch. 394, § 9, 23 Stat. 385 (1885) (codified at 18 U.S.C. §§ 1153, 3243). The original Act provided that "[a]ny Indian who commits against the person or property of another Indian or other person" one of seven enumerated offenses "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." In its current form, the Act lists thirteen separate crimes: murder, manslaughter, kidnapping, maiming, felony sexual abuse, incest, felony assault (including assault with intent to commit murder, assault with a dangerous weapon, and assault resulting in serious bodily injury), assault against a minor under the age of sixteen, felony child abuse or neglect, arson, burglary, robbery, and felony theft (theft in which the property taken is worth over $1000 and is taken directly from the person of another). 18 U.S.C. § 1153 (2012). Some of the listed crimes actually encompass multiple different substantive offenses so that "it is now something of a fool's errand to attempt to count the number of offenses" enumerated by the Act, but the modern version "encompasses three to four times as many offenses as in 1885." Washburn, *Federal Criminal Law*, *supra* note 11, at 826.

31. Act of June 25, 1948, Pub. L. No. 80-772, 62 Stat. 757, ch. 645 (codified at 18 U.S.C. § 1152 (2012)) ("[T]he general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."). The first of such provisions appeared in the Indian Trade and Intercourse Acts, *see, e.g.*, Act of May 19, 1796, ch. 30, § 15, 1 Stat. 469, 473 (providing for federal court jurisdiction over specific crimes occurring on Indian lands and arising out of the relationship between Indians and settlers); Act of March 30, 1802, ch. 13, § 15, 2 Stat. 139, 144 (same); Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729, 733 ("[S]o much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force within the Indian country . . . [except that those laws] shall not extend to crimes committed by one Indian against the person or property of another Indian."), and later appeared in the Revised Statutes of 1878, tit. 28, p. 374 R.S. §§ 2145–46 ("[T]he general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction over the United States . . . shall extend to the Indian country . . . [except that] the preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing an offense within the Indian country who has been punished by the local law of the tribe . . .") (second alteration in original). Later iterations of the Act have included an explicit statement that the law "shall not extend to offenses committed by one Indian against the person or property of another Indian," so intra-Indian offenses did not fall under federal jurisdiction. *See* 18 U.S.C. § 1152 (2012) (exception contained in current statute); *see also Ex parte* Crow Dog, 109 U.S. 556, 571–72 (1883) (stating that the exception appeared in earlier laws). *See generally* Clinton, *supra* note 3, at 522 n.88–89 (discussing history of federal jurisdiction over Indian lands and collecting statutes).

(Spotted Tail), a Lakota leader, on the Brulé Sioux Reservation.[32] The Court, recognizing the longstanding exception by which crimes between Indians were reserved exclusively to tribal jurisdiction, refused to imply a repeal of that exception from ambiguous language in a treaty.[33]

Federal agents, characterizing tribal justice systems as "savage" and unable to ensure a measure of civilization, advocated for a change in law that would bring internal crimes under the jurisdiction of federal courts.[34] The result was the Major Crimes Act.[35] Implicit in the Act's passage was an acknowledgement that tribes possessed and exercised criminal jurisdiction over Indians who committed serious crimes. The premise of the Act was that tribal jurisdiction was not effective at controlling crime because it was not sufficiently retributive or punitive. For example, to restore peace after the murder of Sinte Gleska, the tribal council sent peacemakers to the families of both killer and victim, who agreed to an exchange of $600, eight horses, and one blanket.[36] A draft version of the bill that became the Major Crimes Act would have provided that defendants covered by the Act be charged in federal courts "and not otherwise," but the provision was removed from the final bill in order to preserve tribes' inherent jurisdiction.[37]

Yet, courts for some time interpreted the Act's creation of federal jurisdiction and silence regarding tribal jurisdiction as an implicit extinguishment of tribal power to prosecute major crimes, or a confirmation that such power never existed. Arriving at this conclusion requires relying on outside in reasoning. Another government handles major crimes among reservation Indians, and tribes throughout most of the twentieth century did not often focus their

32. *Crow Dog*, 109 U.S. at 572.
33. *Id.* at 570–71.
34. *Id.* at 134–38.
35. Major Crimes Act, § 9, 23 Stat. 362 (1885) (codified at 18 U.S.C. §§ 1153, 3243). In *United States v. Kagama*, a case involving the murder of one Hoopa Indian by another, the Court upheld the law as a valid exercise of Congressional power over Indian affairs, despite the fact that it was one of the first instances of federal involvement in internal tribal affairs involving individual Indian people. United States v. Kagama, 118 U.S. 375 (1886). Like the Lakota, the Hoopa and Yurok also had a functional system for resolving disputes and addressing crimes, but this system was not satisfactory to the Indian agents. 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 et al. eds., 2011).
36. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 110 (1994). According to Harring, "Brule law effectively and quickly redressed the killing and restored harmony, a point that even the U.S. Supreme Court later recognized." *Id.*
37. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 9.04 (citing 16 Cong. Rec. 934–35); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 n.14 (1978) (citing same).

formal criminal justice machinery on prosecuting these crimes. According to the outside in approach, tribes have no need to exercise this power and have not historically done so; hence, it no longer exists. In a case that arose half a century after the Act's passage, a council of members of the Tule River tribe decided to execute a local doctor, who was accused of systematically poisoning his patients after more than twenty of them died in his care, and appointed four tribal members to carry out the death sentence.[38] The doctor was shot and killed by the appointed group.[39] Apparently assuming that the Act had deprived tribes of their inherent jurisdiction to determine guilt and impose punishment, a federal court convicted the executioners of manslaughter and sentenced them to five years each in prison.[40] The opinion, barely three paragraphs long, did not directly analyze the scope of tribal jurisdiction at all, noting only that before the Act, "the government of the United States had . . . permitted the Indians preserving their tribal relations to regulate and govern their own internal and social relations" and describing the Act as "a radical change in that policy."[41]

Relying on that case, the Department of the Interior issued an opinion in 1934 stating that the Act had extinguished tribal jurisdiction.[42] The Department made this finding despite citing the general rule that Indians tribes retain all original sovereign powers that have not been clearly limited,[43] and acknowledging that the Major Crimes Act did not expressly divest tribes of jurisdiction.[44] More important in the Department's view was its observation that the law "has been construed for many years as removing all jurisdiction over the enumerated crimes from the Indian tribal authorities."[45] The opinion described tribal court jurisdiction only in terms of jurisdictional gaps, noting that "[t]he lacunae in this brief criminal code of ten commandments are serious, and indicate the importance of tribal jurisdiction in the field of law and order," and listing more than two dozens crimes over which neither federal nor state courts had jurisdiction.[46]

38. United States v. Whaley, 37 F. 145 (C.C.S.D. Cal. 1888).
39. *Id.* at 145.
40. *Id.* at 146.
41. *Id.* at 145.
42. Powers of Indian Tribes, 55 Interior Dec. 14, 59–60 (1934).
43. *Id.* at 57.
44. *See id.* at 59.
45. *Id.* at 59–60.
46. *Id.* at 60.

Over the next half century, given the significant imposition of federal[47] and state[48] criminal jurisdiction into Indian country and federal policies that undermined tribal justice systems, tribal courts focused their limited resources mainly on prosecuting offenses not being addressed by other governments.[49] When the question of retained tribal power to prosecute Indians for major crimes bubbled up to the Supreme Court several times in the same year, the idea of concurrent tribal jurisdiction was greeted with some skepticism. In *United States v. John*, the Court declined to resolve the question whether tribes retained jurisdiction over major crimes, calling the issue "disputed."[50] In *United States v. Wheeler*, the Court similarly acknowledged but declined to resolve the question.[51] In *Oliphant v. Suquamish Indian Tribe*, the Court, citing dicta from two more recent lower court decisions, suggested that Congress "may well have given the federal courts exclusive jurisdiction" over major crimes by Indians.[52] The Court found it unnecessary to address the question directly,[53] but its suggestion cast a shadow of doubt. Decades later, the court still called it an "open question."[54]

Tribes are often described as having "misdemeanor jurisdiction."[55] On all reservations, either the federal or state government has jurisdiction over at least

47. Together, sections 1152 and 1153 of Title 18 of the U.S. Code cover all crimes committed by Indians against non-Indians, all crimes committed by non-Indians against Indians, and major crimes between Indians. *See* 18 U.S.C. §1152 (2012); *see also* 18 U.S.C. § 1153 (2012). During the Allotment and Assimilation Era in the late nineteenth and early twentieth centuries, tribal justice systems were undermined by the extension of federal power, including passage of the Major Crimes Act and the creation of Courts of Indian Offenses, federal administrative courts in which Indian people were prosecuted and punished, often for lifestyle-related offenses and engaging in outlawed traditional practices. The Major Crimes Act was an attempt to bring American-style criminal justice to Indian country, and the Courts of Indian Offenses were instruments of assimilation "more in the nature of a school" to civilize Indian people. *See* Rolnick, *supra* note 4, at 62 nn.44–46.

48. During the Termination Era, Congress again undermined tribal criminal justice systems to serve the larger purposes of assimilating Indian people and dismantling tribal governments, but this time it did so by extending state criminal law into Indian country. By the end of the twentieth century, over half the tribes in the lower forty-eight states and all 229 Alaska Native villages were subject to state criminal jurisdiction as a result of Public Law 280. DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 14–15 (2012). Still more tribes are subject to state criminal jurisdiction as a result of land claim settlements entered into during the late twentieth century. *See* Rolnick, *supra* note 4, at 86 n.163.

49. Clinton, *supra* note 3, at 560.

50. United States v. John, 437 U.S. 634, 651 n.21 (1978).

51. United States v. Wheeler, 435 U.S. 313, 325 n.22 (1978).

52. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 (1978) (citing Felicia v. United States, 495 F.2d 353, 354 (8th Cir. 1974); Sam v. United States, 385 F.2d 213, 214 (10th Cir. 1967)).

53. *Oliphant*, 435 U.S. at 203 n.14.

54. Duro v. Reina, 495 U.S. 676, 680 n.1 (1990).

55. This is likely a consequence of both the federal law limiting tribes to one-year sentences, *see supra* note 28, and the widespread assumption for many years that federal jurisdiction under the Major

those crimes listed in the Major Crimes Act.[56] As a practical matter, tribes may prefer to let another government take the lead for serious crimes, especially given the scarce resources, lack of personnel, and restrictions on sentence length faced by many tribal courts. Because many tribes are the only sovereign with jurisdiction over Indians who commit minor crimes, they may understandably choose to focus their resources on those crimes. Yet, this combination of untested judicial assumptions and the exercise of only limited authority by tribal courts in practice nearly cost tribes their power to address serious crimes in their own courts.[57]

More recently, however, courts have refused to rely on assumptions and have instead applied an inside out analysis to the question of tribal jurisdiction over major crimes. The Ninth Circuit directly addressed the question of concurrent jurisdiction over major crimes in 1995 in a case called *Wetsit v. Stafne*.[58] Georgia Leigh Wetsit, a tribal citizen, was convicted of manslaughter in the Fort Peck tribal court after she stabbed her husband.[59] The tribal court sentenced her to one year in prison, ordered her to pay a $2500 fine, and ordered her to participate in mental health and domestic violence programs.[60] She argued

Crimes Act was exclusive. *E.g.*, TRIBAL COURT HANDBOOK FOR THE 26 FEDERALLY RECOGNIZED TRIBES IN WASHINGTON STATE (Ralph W. Johnson & Rachael Paschal eds., 1992), http://www.msaj.com/papers/handbook.htm [https://perma.cc/GL4X-R7P9] (referring to the restoration of "tribal criminal misdemeanor jurisdiction over all Indians"); Sheila Stogsdill, *Oklahoma Crime: Jurisdiction in Indian Country Involves Federal, Tribal, State Governments*, OKLAHOMAN (Apr. 22, 2012), http://newsok.com/article/3668428 [https://perma.cc/J9LB-4LEE] ("Tribal law enforcement departments have jurisdiction over victimless and misdemeanor crimes committed on tribal land."). Even Congress seemed concerned primarily with tribal prosecution of minor crimes when it passed a law restoring tribal criminal jurisdiction over nonmember Indians. *See, e.g.*, H.R. Rep. No. 101-938, at 132 (1990) (Conf. Rep.) (referring to tribal jurisdiction as "criminal misdemeanor jurisdiction"). *See generally supra* Part III.

56. The extent of concurrent federal and state jurisdiction is described at notes 30–31, 47–48, 75, 79, 115–120. Generally speaking, in non-Public Law 280 states, federal courts have concurrent jurisdiction over major crimes committed by Indians in Indian country. If Public Law 280 applies, state courts have concurrent jurisdiction over all crimes committed by Indians in Indian country. H.R. 1063, 83rd Cong. (1953).

57. The outside in analysis of jurisdiction is characterized by a "use it or lose it" rule that echoes how the defense of laches has been employed in the civil realm to divest tribes of important rights. *See, e.g.*, Nebraska v. Parker, 136 S. Ct. 1072, 1082 (2016) (holding that the boundaries of the Omaha Reservation had not been diminished, but raising the question whether "equitable considerations of laches and acquiescence may curtail the Tribe's power to tax [area retailers] in light of the Tribe's century-long absence from the disputed lands"); City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 221 (2005) (equitable considerations of laches, acquiescence, and impossibility prevent tribe from asserting its immunity from state taxation on tribally owned land that was within the boundaries of the tribe's historic reservation but had been illegally sold and was therefore occupied by non-Indians).

58. 44 F.3d 823, 825 (9th Cir. 1995).

59. *Id.* at 824.

60. *Id.* A jury had acquitted her on charges of voluntary manslaughter in federal district court, *id.*, but prosecution for the same crime by tribal and federal authorities does not create a double jeopardy

that the tribe was without jurisdiction to prosecute her for manslaughter because manslaughter is an offense exclusively reserved to federal jurisdiction by the Major Crimes Act.[61] In support of her argument, Westsit cited *Whaley* and several other cases in which lower federal courts had described the Major Crimes Act as limiting tribal power without any further analysis.[62] In light of the assumptions that long governed this area, her argument may have seemed like a safe one.

The court disagreed. It characterized a tribe's power to prosecute its members for crimes committed in its territory as an aspect of the tribe's inherent sovereignty.[63] It relied primarily on *United States v. Wheeler*, in which the Supreme Court affirmed that tribes had not given up their power to prosecute their members for tribal offenses "by virtue of [their] dependent status."'[64] In the Ninth Circuit's view, the question whether tribes retained their inherent power to prosecute members for any crime had been answered by *Wheeler*. Although the prosecution in *Wheeler* was for a crime not included in the Major Crimes Act,[65] the court noted that it cited with approval *Talton v. Mayes* (a century-old case), which held that a tribe could criminally punish a tribe member for murder and did so acting "as an independent sovereign."[66] Together, *Talton*

problem as long as both courts are exercising inherent jurisdiction. *See* United States v. Wheeler, 435 U.S. 313, 329–30 (1978).

61. *Wetsit*, 44 F.3d at 824.

62. *See* Brief of Appellant Georgia Leigh Wetsit at *14–18, Westsit v. Stafne, 44 F.3d 823 (9th Cir. 1995) (citing Felicia v. United States, 495 F.2d 353, 354 (8th Cir. 1974); Sam v. United States, 385 F.2d 213, 214 (10th Cir. 1967); Iron Crow v. Ogalala Sioux Tribe, 129 F. Supp. 15, 18 (D.S.D. 1955), *aff'd*, 231 F.2d 89 (8th Cir. 1956); Glover v. United States, 219 F. Supp. 19, 20 (D. Mont. 1963); United States v. La Plant, 156 F. Supp. 660, 662 (D. Mont. 1957)).

63. *Wetsit*, 44 F.3d at 825. The Tribe was represented by attorney Reid Chambers, one of Carole Goldberg's early Indian law colleagues at UCLA, and James Kawahara, one of Professor Goldberg's former students. In the Tribe's brief, they reminded the court that the Act did not expressly retract tribal authority to punish major crimes and that "this, standing alone, compels rejection of Appellant's contention[.]" Brief of Appellant Georgia Leigh Wetsit, *supra* note 62, at 17. They also argued that *Wheeler*, in which a tribal court and a federal court had both prosecuted the defendant for crimes arising from the same set of events, and *Talton v. Mayes*, which affirmed a tribal murder conviction just a few years after passage of the Act, resolved the question. *Id.* at 22–26; *see also* Talton v. Mayes, 163 U.S. 376 (1896).

64. 435 U.S. 313, 326 (1978).

65. The tribe prosecuted Wheeler for contributing to the delinquency of a minor, whereas the federal government prosecuted him for "carnal knowledge of [a] female under sixteen years of age [who is not married to the defendant]," which is listed in the Major Crimes Act. *Id.* at 315 n.3. The *Wetsit* court also relied on *Duro v. Reina*, another case in which the Court had affirmed inherent tribal power to prosecute tribal members, but one that similarly involved tribal prosecution for an offense not enumerated in the Major Crimes Act. Duro had been charged with murder in federal court, but the indictment was dismissed. He was later charged with illegally firing a weapon in tribal court. Duro v. Reina, 495 U.S. 676, 680 (1990).

66. *Wheeler*, 435 U.S. at 329 (citing Talton v. Mayes, 163 U.S. 376 (1896)).

and *Wheeler* left little doubt for the Ninth Circuit that tribes had always possessed the inherent power to prosecute and punish their members for violation of the tribe's criminal laws, and that even the Supreme Court agreed that the power persisted.

The centrality of *Wheeler* in the court's reasoning is also significant for analytical reasons. *Wheeler* is often cited today for the rule that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[67] Issued the same year as O*liphant v. Suquamish Indian Tribe*,[68] the Court's most significant decision about loss of inherent tribal sovereignty, *Wheeler* offered a counterweight to the *Oliphant* Court's unprecedented[69] holding that tribes had lost some inherent powers without any explicit action by Congress to extinguish them. The *Wheeler* rule confirmed that, unless a particular power could be characterized as one that had been implicitly divested,[70] retention of all inherent sovereign powers remains the

67. *Id.* at 323.

68. 435 U.S. 191 (1978).

69. Before *Oliphant*, the Court had only twice held that tribes had lost aspects of their sovereignty through implicit divestiture, rather than through express language in a treaty or statute. The Court had held that tribes lost the "power to dispose of the soil at their own will, to whomsoever they pleased." Johnson v. M'Intosh, 21 U.S. 543, 574 (1823). In addition, the Court held that tribes lost the power of independent external relations with foreign nations. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17–18 (1831). Besides those powers, the exercise of which could potentially threaten the existence of the United States as a nation, tribes were thought to possess any power that had not been affirmatively taken away. *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 13–14, 36 (1999) (describing the limited category of implicit divestiture prior to *Oliphant* and noting that the Court "reopened a category of diminished tribal authority that had been thought closed forever since the Marshall Court"). In *Oliphant*, the Court reversed this approach, asking instead whether Congress had ever affirmed the existence of tribal criminal jurisdiction over non-Indians and whether tribes had historically exercised such jurisdiction. Finding little evidence of historical exercise or congressional or executive confirmation of the power, the Court held that it had been lost. 435 U.S. at 197–209 ("While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.").

70. *Wheeler*, 435 U.S. at 326 ("The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe" or those that otherwise involve a tribe's "external relations."). After *Wheeler*, implicit divestiture has been invoked primarily in cases involving tribal civil jurisdiction over outsiders. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008) (holding that tribal court lacked jurisdiction over discrimination claim involving the sale of nontrust land from one nonmember to another); Nevada v. Hicks, 553 U.S. 353, 359 (2001) (holding tribal court did not have jurisdiction to hear claims against state police officers for activities that occurred on tribal land while carrying out a search warrant to investigate an off-reservation crime); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001) (holding that tribe could not tax non-Indian business in non-Indian fee land within reservation); Strate v. A-1 Contractors, 520 U.S. 438, 454–55 (1997) (holding that tribal courts may not hear cases arising out of a car accident involving two

default answer. This rule has special force in an area that was historically the province of tribal governments, such as internal criminal prosecutions.

Instead of assuming away tribal jurisdiction over major crimes, the *Wetsit* court understood that, as sovereigns, tribes enjoyed broad power to pass criminal laws and punish people who violated them. Absent a clear statement by Congress or the Supreme Court that tribes lost this power with regard to major crimes, that authority persists in modern times, regardless of how often tribes elect to exercise it. Significantly, the court's opinion lacked any sustained discussion of federal and state criminal jurisdiction. Without this familiar invocation of the "jurisdictional maze,"[71] with its emphasis on practical coverage and filling gaps, it is clear that the only authorities curtailing tribes' inherent criminal power were *Oliphant* and the Indian Civil Rights Act,[72] neither of which were implicated by the case. Employing an inside out approach, the court understood that congressional silence on tribal jurisdiction over major crimes, like tribal inactivity, does not equate to loss of jurisdiction. Authorities today largely agree with the Ninth Circuit's view.[73]

II. CONCURRENT JURISDICTION UNDER PUBLIC LAW 280

Tribes subject to state jurisdiction under Public Law 280 faced a similar question about the persistence of concurrent tribal jurisdiction. Passed in 1953 at the height of what is known as the Termination Era,[74] Public Law 280 delegated

nonmembers of the tribe that occurred on a highway right-of-way crossing tribal trust land); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 441–45 (1989) (holding that tribe cannot apply zoning regulations to nonmembers who live in "open" portion, where tribal and member land was broken up by many tracts owned in fee by nonmembers); Montana v. United States, 450 U.S. 544, 566–67 (1981) (holding that tribe cannot regulate hunting and fishing by nonmembers on nonmember-owned fee land).

71. *See supra* note 9 (describing "maze" metaphor).

72. The Indian Civil Rights Act limits the penalties that tribes may impose in criminal proceedings and requires tribal courts to ensure certain due process protections in carrying out criminal trials. 25 U.S.C. § 1302. *See infra* notes 263–273 and accompanying text (describing the Act's limits on tribal court jurisdiction).

73. *Accord* Wetsit v. Stafne, 44 F.3d 823, 825–26 (1995) (noting that its holding reflected the "conclusion already reached by distinguished authorities on the subject"); *see, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 9.04 (noting earlier judicial and regulatory opinions to the contrary but concluding that the Wetsit court's conclusion is "the correct one"); *see* Anderson et al., *supra* note 23, at 326; Getches et al., *supra* note 23, at 377–81; Goldberg et al., *supra* note 23, at 528–37; *see also* United States v. Gallagher, 624 F.3d 934, 942 (9th Cir. 2010); United States v. Arcoren, No. CR. 89-30049, 1999 WL 638244, at *6 (D.S.D. 1999). *But see* United States v. Red Bird, 287 F.3d 709, 714 n.6 (8th Cir. 2002) (declining to decide the issue and noting that the Supreme Court has not yet decided it).

74. From approximately 1940 through 1962, federal Indian policy was guided by the goal of assimilating Indians and ending the federal-tribal relationship. *See* H.R. Con. Res. 108, 83rd

criminal jurisdiction over Indian country from the federal government to specific states.[75] The law provided that neither the Indian Country Crimes Act[76] nor the Major Crimes Act[77] would apply in the areas of Indian country affected by it,[78] so it was in a sense a delegation of authority from the federal government to the states. However, the scope of jurisdiction actually granted by Public Law 280 was broader than that previously exercised by the federal government. Most notably, because the Act extended all state criminal laws to offenses committed by Indians in Indian country, it gave states jurisdiction over all crimes between Indians, not just enumerated major crimes.[79] Whereas tribal criminal jurisdiction continued to be acknowledged as necessary to fill the gap in federal jurisdiction left by sections 1152 and 1153, there was no gap left in Public Law 280 states.

The outside in approach to the question whether tribes retained concurrent jurisdiction is evident not in specific cases but in the overall culture of lack of support and respect for tribal justice systems in Public Law 280 states. Although the Act itself was silent regarding tribal jurisdiction, Professor Goldberg has thoroughly documented how the law undermined tribal criminal justice systems.[80] In

Cong., 67 Stat. B132 (1953) (setting forth Congressional policy of assimilation). In addition to extending state criminal jurisdiction over some Indian lands, *see supra* note 48, Congress unilaterally terminated the federal-tribal relationship with over one hundred tribes and established a relocation program to encourage Indian people to move from reservations to cities. *See* Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 984–85 (2011) (describing specific laws and policies of the Termination Era).

75. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. §1162 (2012), 25 U.S.C. §§ 1321–26 (2012), and 28 U.S.C. § 1360); *see also* Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545 (transferring jurisdiction to Alaska). It specifically provides that six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) "shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory." Act of Aug. 15, 1953, ch. 505, 67 Stat. 588. Specific reservations were exempted from the Act and continued to be subject to federal criminal jurisdiction. The Act also authorizes additional states to accept jurisdiction over Indian country. 25 U.S.C. § 1321–26. Although the original Act did not require tribal consent to future assertions of state jurisdiction, Act of Aug. 15, 1953, ch. 505, § 7, 72 Stat. 590, it was amended in 1968 to require tribal consent. Pub. L. 90-284, tit. IV § 401, 82 Stat. 78 (1968).

76. 18 U.S.C. § 1152 (2012); *see supra* note 31.

77. 18 U.S.C. § 1153 (2012); *see supra* note 30.

78. 18 U.S.C. § 1162 (2012).

79. CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, at 165 (1997).

80. *Id.* at 11–12, 200–01 (describing how Interior's varying interpretations of Public Law 280's effect on tribal criminal jurisdiction, along with other Department policies, led to "confusion about the jurisdictional authority" of California tribal courts and difficulty accessing federal funding); CHAMPAGNE & GOLDBERG, *supra* note 48, at 20 ("In practice, however, the frequent denial of federal funding support for tribal law enforcement and criminal justice in Public Law 280 states has

the first decades after the law's passage, states frequently operated as if tribal criminal courts and law enforcement agencies did not exist or did not matter.[81] Federal agencies likewise relied on the existence of state authority to justify withholding base funding for law enforcement and criminal justice from tribes subject to Public Law 280.[82] According to this view, dominant for over two decades, tribal criminal jurisdiction is not needed because states have assumed all law enforcement and criminal prosecution authority for Indian country within their borders.[83] If an outside in approach is employed, the statute itself can be read to signal nonexistence of tribal jurisdiction; it addressed only federal and state criminal jurisdiction, treating these two as mutually exclusive, but erasing tribal criminal justice systems in the process. Indeed, the Department of the Interior on several occasions took the position that the Act extinguished tribal criminal jurisdiction.[84] The Associate Solicitor for Indian Affairs suggested in 1971 that tribes retained jurisdiction to regulate (including by issuing licenses and imposing criminal penalties for) tribal hunting and fishing rights, which were expressly preserved by the statute. By emphasizing the treaty-protected nature of those rights, the Associate Solicitor implied that any jurisdiction not explicitly preserved by a treaty might be foreclosed by the application of state law and state jurisdiction.[85]

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retarded the development of those agencies as compared with similar institutions [in other states].").

81. *See* GOLDBERG-AMBROSE, *supra* note 79, at 192, 195 (describing arguments made by California and Alaska that tribal courts were divested of authority by Public Law 280); *see also* Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1201, 1206 (C.D. Cal. 1998) (describing state attempts to regulate tribal police officers' use of sirens and lights on pockets of non-tribal land connecting portions of the reservation).

82. CHAMPAGNE & GOLDBERG, *supra* note 48, at 118–22 (finding disparity between Public Law 280 tribes and non-Public Law 280 tribes in funding received from the BIA for tribal justice systems); GOLDBERG-AMBROSE, *supra* note 79, at 192 (describing "general belief and policy" of the BIA that California tribes had no jurisdictional authority); Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1636 (1998) (describing how tribes affected by Public Law 280 face "uneven administration of justice in terms of respect for their authority, their eligibility for state and federal funding, the effectiveness of their justice systems, and the level of participation and cooperation with state and federal systems").

83. *See* 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, 472 (1998) (describing how tribes subject to Public Law 280 were frequently assumed to lack criminal jurisdiction).

84. Opinions of the Solicitor, Memorandum from the Solicitor to the Commissioner of Indian Affairs, M-36241 (Sept. 22, 1954), http://thorpe.ou.edu/sol_opinions/p1626-1650.html#m-36241; *see also* Opinion of the Solicitor, Criminal Jurisdiction P.L. 280 (Nov. 14, 1978), *reprinted in* 6 INDIAN L. REP. H1, H1–H2 (1979) (citing a 1954 letter from Assistant Secretary Lewis to Minneapolis Area Director and a 1961 Memorandum of the Solicitor).

85. 78 INTERIOR DEC. 101, 102 (1971).

Carole Goldberg published her pathbreaking article on Public Law 280 in 1975,[86] and the Supreme Court subsequently analyzed the statute in two major decisions. These decisions, *Bryan v. Itasca County*,[87] and *California v. Cabazon Band of Mission Indians*,[88] considered whether Public Law 280 granted states civil regulatory jurisdiction along with criminal jurisdiction. The Court in each case employed an inside out analysis, in which the law's infringement on tribal sovereignty was read to be only as broad as Congress had clearly authorized, an approach that was shaped in part by Professor Goldberg's 1975 article.[89] In the wake of these developments, a 1978 Solicitor's Opinion affirmed the continued criminal jurisdiction of tribes affected by Public Law 280.[90] The opinion acknowledged the Department's prior statements suggesting that the law extinguished tribal criminal jurisdiction,[91] but admitted that "the position seems never to have been the subject of any considered legal analysis and now appears to be in conflict with principles enunciated in recent decisions of the Supreme Court."[92] Citing *Wheeler*, *Oliphant*, and *Bryan*, the Solicitor concluded that "such a fundamental sovereign power as law enforcement authority may not be withdrawn by statutory implication when such an implication is not necessary to the objective of the statute."[93]

It was not until the 1990s that courts squarely addressed the law's effect on tribal criminal jurisdiction and, as in the case of major crime jurisdiction, federal courts of this era followed an inside out approach instead of assuming that tribal jurisdiction had been lost. One of the first cases to recognize the continuing existence of criminal jurisdiction for tribes affected by Public Law 280 was *Walker v. Rushing*, decided by the Eighth Circuit in 1990.[94] Ann Walker, a citizen of the Omaha Tribe of Nebraska, challenged the tribe's jurisdiction to prosecute her for homicide after she struck and killed two other tribal members while

86. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 540–44 (1975) (exploring P.L. 280's history and issues concerning its implementation, including the question of state regulatory authority). Although the article did not squarely address the question of retained tribal criminal jurisdiction, *id.* at 545 n.53 (citing 1971 Solicitor's Opinion and noting that "whether tribal courts may survive PL-280 as a general matter, so long as they apply state law or rules consistent with state law, has never been tested"), Professor Goldberg followed an inside out approach when analyzing of other aspects of the law.

87. 426 U.S. 373 (1976).

88. 480 U.S. 202, 208 (1987).

89. *See Bryan*, 426 U.S. at 388 nn.13–14 (citing article).

90. Sol. Op., 6 INDIAN L. REP. at H-3.

91. *Id.* at H-1 (citing 1954 and 1961 opinions suggesting that the law extinguished tribal jurisdiction, but also citing 1976 and 1978 opinions affirming tribal criminal jurisdiction).

92. *Id.* at H-2.

93. *Id.* at H-3.

94. 898 F.2d 672 (8th Cir. 1990).

driving. Nebraska had been granted criminal jurisdiction over the Omaha reservation as one of the six mandatory states included in Public Law 280's initial grant of jurisdiction to states.[95] In 1969, the Nebraska legislature partially retroceded its criminal jurisdiction over the Omaha reservation back to the federal government, but the state retained jurisdiction over "offenses involving the operation of motor vehicles on public roads or highways."[96]

While the lower court had ruled against tribal jurisdiction on the theory that the Major Crimes Act (which applied post-retrocession) divested the tribal court of jurisdiction to prosecute homicides,[97] the Eighth Circuit Court of Appeals correctly recognized that Walker's offense fell under state, rather than federal, jurisdiction because Nebraska had not retroceded jurisdiction over motor vehicle offenses.[98] Turning to the question whether Public Law 280 divested the tribe of jurisdiction, the court employed the basic rule that "limitations on an Indian tribe's power to punish its own members must be clearly set forth by Congress."[99] Finding "[n]othing in the wording of Public Law 280 or its legislative history [that] precludes concurrent tribal authority," the court held that the tribe retained concurrent jurisdiction.[100]

The Ninth Circuit reached the same conclusion a year later in a case involving the status of lands conveyed in fee to Alaska Native entities by the Alaska Native Claims Settlement Act (ANCSA). After concluding that ANCSA lands qualified as Indian country and that Alaska Native villages had the sovereign power to adjudicate child custody disputes arising on their lands,[101] the court considered Alaska's argument that Public Law 280 had divested the tribes of whatever jurisdiction they may have possessed. Reviewing the text and legislative history of the law, the court concluded that it was "not a divestiture statute."[102] Although it was enacted during the Termination Era, the court

95. *Id.* at 673.
96. *Id.* at 673–74.
97. *Id.* at 672–73.
98. *Id.* at 674.
99. *Id.* at 675.
100. *Id.*
101. Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991). The Supreme Court reversed this aspect of the court's holding in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). Because the Court determined that ANCSA lands did not qualify as Indian country at all, the question whether Public Law 280 divested Alaska Native entities of jurisdiction over Indian country was moot for all but the one remaining reservation in Alaska. *See* Booth v. State, 903 P.2d 1079, 1084 (Alaska Ct. App. 1995) (holding that the state and the Metlakatla Indian Community have concurrent jurisdiction over crimes committed on the Annette Islands Reserve, the only reservation left after ANCSA, under an amendment to Public Law 280 specifically reaffirming the Metlakatla Community's continued jurisdiction).
102. *Venetie*, 944 F.2d at 560.

noted that it "plainly was not intended to effect total assimilation of Indian tribes."[103] The court noted that certain tribes were exempted from the law's coverage where Congress deemed their tribal justice systems satisfactory enough to alleviate concerns about the "lack of adequate criminal law enforcement on some reservations."[104] Citing *Bryan* and *Cabazon*, as well as Professor Goldberg's article analyzing the statute, the court concluded that "Public Law 280 was designed not to supplant tribal institutions, but to supplement them."[105]

Today, there is widespread agreement among scholars that tribes retain concurrent jurisdiction even if subject to Public Law 280.[106] In addition to the three federal courts that initially affirmed the existence of concurrent tribal jurisdiction,[107] a number of courts since have cited this rule as if it were settled law.[108]

III. JURISDICTION OVER NON-CITIZENS WITHIN TRIBAL TERRITORY

The previous Parts described unresolved questions about which crimes tribes may prosecute, particularly when another sovereign has jurisdiction over those same crimes. Another grey area concerns the question of *whom* tribes may prosecute. The *Oliphant* Court's holding that tribes lost criminal jurisdiction over non-Indians[109] has never been squarely rejected by Congress and so continues to

103. *Id.* (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987)).
104. *Id.*
105. *Id.* at 560.
106. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 6.04[3][c] (describing the "nearly unanimous view" but noting that this "consensus . . . has developed relatively recently"); GOLDBERG-AMBROSE, supra note 79, at 158–63; Jiménez & Song, *supra* note 82, at 1667–91 (1998) (demonstrating that Public Law 280 did not divest tribes of criminal jurisdiction).
107. Native Village of Venetie I.R.A. Council, 944 F.2d at 560; Walker v. Rushing, 898 F.2d 672, 675 (8th Cir. 1990); Rosebud Sioux Tribe v. South Dakota, 709 F. Supp. 1502, 1512 n.17, 1515–16 (D.S.D. 1989), *vacated on other grounds*, 900 F.2d 1164 (8th Cir. 1990), *cert. denied*, 114 L.Ed. 2d 98 (1991) (citing the 1982 version of Felix Cohen's *Handbook of Federal Indian Law* for the conclusion that state jurisdiction granted by Public Law 280 was concurrent with tribal jurisdiction); *see also* Booth v. State, 903 P.2d 1079, 1084 (Alaska Ct. App. 1995) (holding that the state and the Metlakatla Indian Community have concurrent jurisdiction over crimes committed on the Annette Islands Reserve).
108. K2 America Corp. v. Roland Oil & Gas, LLC, 653 F.3d 1024, 1028 n.5 (9th Cir. 2011); TTEA v. Yselta del Sur Pueblo, 181 F.3d 676, 685 (5th Cir. 1999); Conf. Tribes of the Colville Reservation v. Superior Court of Okanogan Cty., 945 F.2d 1138, 1140 n.4 (9th Cir. 1991); State v. Schmuck, 850 P.2d 1332, 1343 (Wash. 1993) (citing to *Walker* and to opinions of Wisconsin and Nebraska state attorneys general that Public Law 280 did not divest tribes criminal jurisdiction); Mashantucket Pequot Tribe v. Sebastian, 4 Mash. Rep. 112, 116 (Mashantucket Pequot Tribal Court 2003) (relying on *Walker* to hold that Mashantucket Pequot Indian Claims Settlement Act, which was modeled after Public Law 280, did not divest the tribe of criminal jurisdiction when it granted such jurisdiction to the state).
109. Oliphant v. Suquamish Indian Tribe, 453 U.S. 191, 211 (1978).

function as a clear rule limiting tribal power.[110] Twelve years later, in a case called *Duro v. Reina*, the Court extended its *Oliphant* logic to hold that tribes had been divested of criminal jurisdiction over all non-citizens, whether Indian or non-Indian.[111] Congress responded quickly this time, however, passing legislation to confirm that tribes retain criminal jurisdiction over "all Indians."[112] That law, known as the "*Duro* fix," clearly established that tribes can prosecute non-member Indians,[113] but what makes someone an Indian for purposes of subjecting them to tribal jurisdiction remains a grey area. Depending on the methodology it employs, a court could interpret this category to include only those people over whom the federal government lacks jurisdiction and whose prosecution would not raise equal protection concerns (usually citizens of one tribe who commit crimes in the territory of another), or it could interpret it more expansively to include anyone, regardless of citizenship status, who is a member of the tribal community in which the crime is committed.[114]

An outside in approach would conceptualize tribal jurisdiction in terms of the gaps left by other governments. On reservations not affected by Public Law 280, the federal government exercises criminal jurisdiction in Indian country only as authorized by statute, and federal law covers three situations. The General Crimes Act extended federal enclave laws into Indian country, authorizing federal officials to respond to a full range of crimes,[115] but it only applies to so-called "interracial crimes" (those between Indians and non-Indians).[116] The Major Crimes Act extended federal jurisdiction to specific enumerated crimes between Indians.[117] Finally, the federal government also has jurisdiction over general federal crimes, as it does everywhere,

110. Congress passed a very limited partial fix in 2013 when it restored tribes' inherent jurisdiction to prosecute certain non-Indian domestic violence offenders, *see supra* note 19, but the general rule still holds outside this narrow context.

111. Duro v. Reina, 495 U.S. 676, 694 (1990).

112. *See infra* notes 129–130.

113. The law affirms tribal criminal jurisdiction over "all Indians." *See* 25 U.S.C. § 1301(2) (2012). It was passed in direct response to the *Duro* decision, so it is clear that Congress meant to include more than just enrolled citizens of that tribe in the definition of "all Indians."

114. The analysis described in this section originally appeared in Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 391–408 (2016).

115. *See supra* note 31. Although federal enclave laws do not necessarily define the full range of crimes that might be covered under state law, the Assimilative Crimes Act permits federal courts to look to the relevant state's criminal law to fill any definitional gaps. 18 U.S.C. § 13 (2012).

116. By its terms, the law does not apply to crimes committed "by one Indian against the person or property of another Indian." 18 U.S.C. § 1152 (2012). It also contains exceptions for crimes by Indians where the offender has already been punished by the tribe and for situations where a treaty has reserved exclusive jurisdiction to the tribe. *Id.*

117. 18 U.S.C. § 1153 (2012); *see supra* note 30 (describing the Act and listing crimes).

regardless of whether the act occurred on federal land.[118] This intersecting network of coverage leaves two gaps. First, according to a longstanding, judicially created exception to the General Crimes Act, the federal government lacks jurisdiction over crimes between non-Indians that occur in Indian country.[119] States, however, may investigate and prosecute these crimes.[120] Second, the federal government lacks jurisdiction over minor crimes between Indians. Prior to *Duro*, tribal courts prosecuted these crimes,[121] but the Court's holding meant that no government could thereafter prosecute them.

Congress was clearly concerned with the consequences of such a gap. The Congressional record includes many references to tribes' loss of "misdemeanor jurisdiction" over nonmember Indians.[122] The record describes the large population of nonmember Indians living on many reservations,[123] and the periodic presence of even more nonmember Indians for powwows, Pueblo Feast Days, and other public cultural events.[124] Lawmakers,[125] law

118. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 9.02[3][a] n.150. Federal jurisdiction over these crimes exists because the crime implicates a federal interest, usually interstate commerce, whereas Indian country jurisdiction exists because the crime occurred in Indian country, which is treated as federal land.

119. *See* Draper v. United States, 164 U.S. 240, 247 (1896); United States v. McBratney, 104 U.S. 621, 624 (1881); *see also* U.S. Dep't of Justice, U.S. Attorney's Manual, tit. 9, § 678 (2014), [https://perma.cc/ESS8-NB8M].

120. The rationale for the exception outlined in *Draper* and *McBratney* was that federal jurisdiction would infringe on state sovereignty. Although the rationale has been largely rejected, the rule nevertheless stands, perhaps in part because of practical concerns. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 9.03[1].

121. Clinton, *supra* note 3, at 557 n.281; *see also* H.R. Rep. No. 101-938, at 132–33 (1990) (Conf. Rep.) (finding that tribes had been exercising criminal jurisdiction over nonmember Indians for over two hundred years).

122. H.R. Rep. No. 101-938, at 132–33 ("Non-tribal member Indians own property on Indian reservations, their children attend tribal schools, their families receive health care from tribal hospitals and clinics."); Impact of Supreme Court's Ruling in *Duro v. Reina*: Hearing on S. 962, S. 963 Before the S. Select Comm. on Indian Affairs, 102d Cong. 24, 137 (1991) (statement of Wayne Ducheneaux, President, National Congress of American Indians).

123. H.R. Rep. No. 101-938, at 133; *see* Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 109 n.7 (1992) (describing various factors that led to the presence of significant numbers of nonmember Indians on most reservations).

124. The Chief Judge of the Confederated Salish and Kootenai Tribes explained that "thousands of non-member Indians gather on the Reservation each summer for annual pow-wows." Hearing on S. 962, S. 963, *supra* note 122, at 146 (statement of Donald Dupuis); *see also id.* at 181 ("Th[e] number of non-member Indians and others increase tremendously on occasions of special events such as Shalako (the Zuni New Year's celebration).").

125. *See* The Duro Decision: Criminal Misdemeanor Jurisdiction in Indian Country, Hearing on H.R. 972 Before the Committee on Interior and Insular Affairs, 102d Cong. 33, at 23 (1991) (statement of Rep. Bill Richardson expressing concern about a jurisdictional void).

enforcement professionals,[126] tribal officials,[127] and legal advocates[128] worried about public safety on reservations, arguing that the Court's ruling left no government with the power to prosecute minor crimes committed by Indians against other Indians. A one-year temporary fix passed within months,[129] and the *Duro* fix was made permanent the next year.[130]

Likely because of concern over the law enforcement gap, the new law defined the population of people now subject to tribal jurisdiction in terms that mirrored the population of people who would be subject to federal jurisdiction but for the exception for minor crimes. The 1990 amendment restoring jurisdiction over "all Indians" added a definition of "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies."[131] Thus, after passage of the *Duro* fix, tribes could prosecute all the same people who would be subject to federal prosecution under the Major Crimes Act if they committed a covered offense.

A person is subject to federal prosecution under the Major Crimes Act as long as he or she is of Indian descent and is politically recognized as an Indian[132] by the federal government or a tribal government.[133] This definition is drawn

126. *Id.* at 31–32 (stating the International Association of Chiefs' position in support of the bill).

127. Hearing on S.962, S. 963, *supra* note 122, at 119 (statement of Ronnie Lupe, Chairman of the White Mountain Apache Tribe of the Fort Apache Reservation).

128. Hearing on S. 962, S. 963, *supra* note 122, at 137 (statement of Wayne Ducheneaux, President of the National Congress of American Indians).

129. Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, tit. VIII, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2)).

130. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (removing the original sunset date of Sep. 30, 1991 to extend the fix indefinitely).

131. 25 U.S.C. § 1301(4) (2012).

132. United States v. Rogers, 45 U.S. 567, 572–73 (1846) (establishing basic test for Indianness under federal criminal laws). For cases applying the *Rogers* test for prosecutions under sections 1152 and 1153, see, for example, United States v. Zepeda, 792 F.3d 1103, 1118 (9th Cir. 2015); United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005) (quoting United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996)) (finding test to consider "degree of Indian blood" and "tribal or government recognition as an Indian"); United States v. Prentiss, 273 F.3d 1277, 1280–82 (10th Cir. 2001); United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976). For a comparison of the test across circuits, see generally Daniel Donovan & John Rhodes, *To Be or Not To Be: Who Is an "Indian Person"?*, 73 MONT. L. REV. 61 (2012) (analyzing variation among the Eighth, Ninth, and Tenth Circuit approaches and considering how each test has been applied in specific cases); Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 HARV. J. RACIAL & ETHNIC JUST. 241 (2010) (comparing the Ninth Circuit's approach in *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009), with the Eighth Circuit's approach in *United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009)).

133. *See Bruce*, 394 F.3d at 1224–25 (holding that federal recognition is not required and noting that the deference to tribal recognition "stems from the recognition that one of an Indian tribe's most basic

from the 1845 case *United States v. Rogers*.[134] The case involved a white man who had married a Cherokee woman, lived in Cherokee territory, and had become a naturalized citizen under Cherokee law.[135] The victim in the case was another white man who was also a naturalized citizen through intermarriage.[136] Despite significant evidence that the tribe recognized Rogers as a member, the Court held that he could not escape federal prosecution under an exception to then-existing federal law barring federal prosecution of crimes committed by one Indian against another Indian.[137] Regardless of the tribe's view as to membership, the Court held that a person must also possess some degree of Indian blood in order to be considered Indian under federal law.[138] Although *Rogers* concerned the classification of a person who was a tribal community member but not descended from any tribe, it is the source of the modern rule that defines an Indian as someone who has some degree of Indian ancestry and is politically recognized as an Indian by the tribe or by the federal government.

Tribal citizenship is one way to demonstrate political recognition by a tribal government.[139] Federal courts agree, however, that a person may be an Indian for Major Crimes Act purposes even if he or she is not formally enrolled in any tribe.[140] For example, Ninth Circuit courts consider four factors, listed in declining order of importance: "1) tribal enrollment; 2) government recognition formally and informally through the receipt of assistance reserved only to Indians;

powers is the authority to determine questions of its own membership"); *Dodge*, 538 F.2d at 786–87 (noting that courts consider "recognition by a tribe or society of Indians or by the federal government").

134. *Rogers*, 45 U.S. at 572–73.

135. Bethany R. Berger, *"Power Over This Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957, 1960 (2004).

136. *Id.*

137. *Rogers*, 45 U.S. at 572–73.

138. *Id.* at 573. Varying degrees of Indian blood have been found to be sufficient under federal law, and because some tribes require only descent from an enrolled member, but not a particular quantum of Indian blood, it would be problematic for federal courts to impose a blood quantum floor that would effectively exclude some enrolled members.

139. Every circuit to have considered the issue has held that formal tribal citizenship alone is sufficient to meet the political recognition prong of the test. *See, e.g.*, United States v. Zepeda, 792 F.3d 1103, 1115 (9th Cir. 2015); United States v. Stymiest, 581 F.3d 759, 764 (8th Cir. 2009); United States v. Drewry, 365 F.3d 957, 961 (10th Cir. 2004); St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988); United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984); United States v. Lossiah, 537 F.2d 1250, 1251 (4th Cir. 1976).

140. United States v. LaBuff, 658 F.3d 873, 877 (9th Cir. 2011); United States v. Bruce, 394 F.3d 1215, 1224–25 (9th Cir. 2005) (citing numerous cases holding that lack of enrollment is not determinative and rejecting dissent's proposal to adopt enrollment as the single determining factor); United States v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005); *Drewry*, 365 F.3d at 961; United States v. Broncheau, 597 F.2d 1260, 1262–63 (9th Cir. 1979) (holding that enrollment is not an absolute requirement for proving Indianness); *Ex parte* Pero, 99 F.2d 28, 31 (7th Cir. 1938).

3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life."[141] Courts in the Eighth Circuit consider a non-exhaustive list of five factors, with no one factor (besides formal enrollment) being accorded more importance than the others:[142] (1) enrollment, (2) governmental recognition through receipt of assistance, (3) tribal recognition via tribal court prosecution, (4) enjoying the benefits of tribal affiliation, and (5) social recognition as an Indian, including self-identification.[143] Courts in the Seventh Circuit use a totality of the circumstances approach, with relevant factors including tribal recognition, federal recognition, residence on a reservation, and "whether a person holds himself out as an Indian."[144] The Tenth Circuit also uses a "totality-of-the evidence" approach.[145] Despite some variation, all of these tests acknowledge that membership in a tribal political community may be informal.[146] In other words, the Indian jurisdictional category for purposes of federal criminal law includes more than just formal citizens of the tribe.

Because the *Duro* fix, which affirmed tribal jurisdiction, took its definition directly from a statute creating federal jurisdiction, it can be difficult to disaggregate questions about whom a tribe can prosecute from questions about whom the federal government can prosecute. Notwithstanding the different issues implicated by the two questions, though, it seems clear that tribes can at least prosecute a person who is not enrolled in any tribe as long as that person satisfies the *Rogers*

141. *Zepeda*, 792 F.3d at 1114; *LaBuff*, 658 F.3d at 877; United States v. Cruz, 554 F.3d 840, 846 (9th Cir. 2009); *Bruce*, 394 F.3d at 1224 (quoting United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995)) (listing factors relevant to determining Indianness as a defense to a prosecution under § 1152).

142. Lewis, *supra* note 132, at 242 (noting that the Eighth Circuit's factors are "illustrative" while the Ninth Circuit's factors are "exhaustive").

143. *See Stymiest*, 581 F.3d at 763.

144. *See Torres*, 733 F.2d at 456 (approving jury instruction listing these factors but advocating a "totality of circumstances" approach).

145. United States v. Diaz, 679 F.3d 1183, 1187 (10th Cir. 2012).

146. Courts have considered receipt of tribal services or benefits, prior exercise of jurisdiction by a tribal court, formal non-citizen status under tribal law, cultural and social participation, social recognition, residence on the reservation, and self-identification or self-presentation. *E.g.*, *Stymiest*, 581 F.3d at 764–65 (considering self-presentation, prior tribal court prosecution, social recognition); *Cruz*, 554 F.3d at 846–47 (considering prior tribal prosecution, descendant status, reservation residence, and lack of participation in cultural activities); United States v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005) (considering self-presentation and reservation residence); United States v. Drewry, 365 F.3d 957, 961 (10th Cir. 2004) (holding that participation in tribal summer program and social life and prior tribal child welfare involvement were sufficient to support a finding that the victims were Indian in a prosecution of a non-Indian defendant under § 1152); United States v. Dodge, 538 F.2d 770, 787 (8th Cir. 1976) (considering self-presentation); United States v. Driver, 755 F. Supp. 885, 889 (D.S.D. 1991), *aff'd* 945 F.2d 1410 (8th Cir. 1991) (considering lack of social participation a factor in holding that defendant was not an Indian).

test as set forth in the factor tests employed by federal appellate courts. Yet, federal and tribal courts considering the legality of tribal prosecutions under the *Duro* fix law have repeatedly assumed that a person is Indian only if he or she is a formal citizen of a tribe, an assumption that makes the scope of tribal criminal jurisdiction narrower than the scope of federal criminal jurisdiction.

One reason that courts have tended to equate Indianness with formal tribal citizenship is that judicial analyses of the *Duro* fix law have focused on the legality of federal power, rather than the question of whom tribes can fairly prosecute. One question is whether Congress has the power to restore inherent tribal jurisdiction over nonmember Indians. The Supreme Court resolved this question in *United States v. Lara*.[147] Billy Jo Lara, who was enrolled in the Turtle Mountain Chippewa tribe but was related to the Spirit Lake tribe through marriage and residence,[148] argued that he could not be prosecuted by a federal court after being prosecuted by the Spirit Lake court for the same crime because the *Duro* fix had simply delegated a federal power to tribes, so the later federal prosecution was barred by double jeopardy rules.[149] The Supreme Court held that Congress had the power to restore an inherent power previously held by tribes, as opposed to simply delegating a new power, and that it meant to do so.[150] The Court's analysis, therefore, focused on the breadth of Congress' power over Indian affairs, which it viewed as encompassing the question of who would be included in the Indian category.[151] Billy Jo Lara could be prosecuted in federal court because his prior tribal prosecution was rooted in the tribe's inherent sovereignty, so he was not put in jeopardy twice by the same sovereign.

Another question, one that has not been resolved by the Supreme Court, is whether Congress can permissibly subject individual Indians to special jurisdictional rules without running afoul of equal protection guarantees.[152] In *Means v.*

147. 541 U.S. 193 (2004).
148. *Id.* at 196.
149. *Id.* at 197–98.
150. *Id.* at 198–200.
151. *Id.* at 203 (describing past Congressional actions terminating or recognizing the Indian tribal status of certain entities).
152. Billy Jo Lara also raised due process and equal protection arguments. He argued that a tribe's prosecution of any nonmember Indian would violate the U.S. Constitution because the statute's reference to "all Indians" involves a classification that is "race based and without justification," as well as because tribes lack the power to try a group of U.S. citizens who were not politically included in the tribe. *Id.* at 209. As the Court noted, success on these arguments would render Lara's tribal court prosecution invalid, but they would not transform it into a federal prosecution. Because the case arose when Lara challenged his subsequent federal prosecution on double jeopardy grounds, only his argument that the tribe was exercising a delegated federal power in its earlier prosecution would affect the outcome in his federal case. *Id.*

Navajo Nation,[153] Russell Means, a citizen of the Oglala Sioux Tribe who had lived for a decade on the Navajo reservation with his Navajo wife,[154] was charged in a Navajo Nation court after he threatened and battered his father-in-law, an Omaha tribal member, and another Navajo man.[155] Means challenged the tribal court prosecution, arguing that, to the extent the *Duro* fix law permitted the Navajo Nation to prosecute him because he was an "Indian," it amounted to an illegal racial classification.[156] The Ninth Circuit disagreed, holding that the law was not unconstitutional as applied to Means.[157] As in *Lara*, the court's main concern was the power of Congress over Indians, although Means's argument forced the Ninth Circuit to more squarely address whether Congress could carve out a class of "Indian" people for special legal treatment.

While it seemed clear to all the parties that a tribe's prosecution of its own citizens (clearly supported by federal common law[158]) did not present a constitutional problem, whether Congress could subject an Indian who was not a tribal citizen to tribal prosecution simply because that person was an "Indian" was a harder question. Nearly thirty years earlier, however, the Supreme Court had upheld the laws that subjected Indian people to federal criminal jurisdiction as a legitimate exercise of Congress's power over Indian affairs,[159] reasoning that "respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur D'Alene Tribe."[160] This case made the court's task in *Means v. Navajo Nation* much easier because Means was an enrolled citizen of the Oglala Sioux Tribe and thus easily qualified as an Indian under federal law for a "non-racial" reason.[161] The Supreme Court in *Lara* seemed to envision a similar scope for the Indian legal category when it characterized the *Duro* fix law as an attempt by

153. 432 F.3d 924 (9th Cir. 2005).
154. *Id.* at 927.
155. *See id.*; *see also* Means v. Dist. Court of Chinle Judicial Dist., 2 Am. Tribal Law 439, 444–45 (Navajo 1999) (Navajo Supreme Court decision setting forth facts and holding that tribal court had jurisdiction to prosecute Means).
156. A similar argument was raised and rejected in *Morris v. Tanner*, 288 F. Supp. 2d 1133, 1141–43 (D. Mont. 2003), but in that case the tribe's law required that a person be "an enrolled member of a federally-recognized tribe" in order to be prosecuted in tribal court. *Id.* at 1137. Because that tribe's law expressly required citizenship, the court did not have occasion to consider whether tribal citizenship is always a prerequisite for tribal criminal prosecution.
157. *Means*, 432 F.3d at 937.
158. *See* United States v. Wheeler, 435 U.S. 313, 322 (1978); Talton v. Mayes, 163 U.S. 376, 380 (1896).
159. *See* United States v. Antelope, 430 U.S. 641, 642–43 (1977).
160. *Id.* at 646.
161. *Means*, 432 F.3d at 934–35 (emphasizing Means's tribal citizenship).

Congress to restore tribal criminal jurisdiction over "Indian members of a different tribe."[162]

This assumption that the *Duro* fix restored criminal jurisdiction over Indians who are citizens of tribes other than the prosecuting tribe provides an easy rejoinder to an equal protection challenge in light of *Morton v. Mancari*,[163] widely cited for the idea that federal classifications involving Indians are "political, rather than racial," in part because they are based on a person's membership in a politically recognized Indian tribe, rather than on a person's racial Indianness.[164] It also mirrors the concerns expressed during Congressional consideration of the *Duro* fix about Indians from other tribes who lived or worked in a second tribe's territory or who visited for cultural events.[165] Nearly every case in which a federal court has been asked to review the legality of a tribe's exercise of criminal jurisdiction over a nonmember Indian involved a defendant who was enrolled in another tribe. Indeed, in most cases in which tribal courts prosecute nonmember Indians, the defendants are probably enrolled citizens of other tribes. Courts thus have had little occasion to consider whether formal citizenship in a tribe is an absolute

162. United States v. Lara, 541 U.S. 193, 198 (2004).

163. 417 U.S. 535 (1974).

164. *E.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) (citing *Mancari* for the proposition that Indian treaty rights do not violate equal protection principles because "the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians'"); Fisher v. Dist. Court, 424 U.S. 382, 390–91 (1976) (relying on *Mancari* to hold that exclusive tribal jurisdiction over an adoption that involved only tribal members domiciled on the reservation is not impermissible racial discrimination even if it denies tribal members access to a state forum because "disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government"); Moe v. Conf. Salish & Kootenai Tribes, 425 U.S. 463, 480 (1976) (relying on *Mancari* to reject an argument that tax exemptions for Indians on reservations violate equal protection principles); Am. Fed'n of Gov't Emps. v. United States, 330 F.3d 513 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1088 (2003) (upholding exceptions to restrictive federal contracting rules for Indian- or Alaska Native-owned firms under *Mancari* standard). For a thorough analysis of *Mancari* and the "political, rather than racial" rule in federal Indian law, see generally Rolnick, *supra* note 74.

165. *See supra* notes 122–128 (describing legislative history). *But see* Hearing on S. 962, S. 963, *supra* note 122, at 137 (statement of Wayne Ducheneaux, President, National Congress of American Indians) (describing nonmember Indian category as including Indians enrolled in other tribes and Indians not enrolled anywhere); *id.* at 218 (statement of Professor Nell Jessup Newton) (advocating elimination of language defining Indian in terms of membership and referring to Indians who are not enrolled anywhere, a group she described as "much larger than many people realize"); Hearing on H.R. 972, *supra* note 125, at 153–58 (oral and written testimony of Professor Richard Collins) (explaining that formal enrollment does not necessarily reflect the traditional view about who is part of a tribal community).

requirement for prosecution as an Indian under the *Duro* fix.[166] An outside in focus on filling gaps and justifying federal actions does not invite a deeper analysis about whom tribes may punish and why.

The question whether tribes have criminal jurisdiction over people who are not enrolled in any tribe finally came before the Nevada district court in 2014.[167] Christopher Phebus was a citizen of the Las Vegas Paiute Tribe until he was involuntarily disenrolled as a result of an internal review of enrollment criteria.[168] After his disenrollment, he continued to live on the reservation as a member of the community, contesting his disenrollment through appeals to the tribal court and tribal council.[169] During this time, he was convicted of a crime and sentenced to six months in jail by the tribal court.[170] The tribe's appellate court vacated his conviction, holding that the tribe lacked criminal jurisdiction.[171] The court reasoned that, as a result of the disenrollment, Phebus no longer qualified as an "Indian" under federal laws defining the limits of tribal jurisdiction, and held that "Indian" in the context of tribal prosecution includes only enrolled tribal citizens.[172]

The tribal court's statement misread federal common law, which clearly does not require enrolled citizenship to qualify as Indian. Tribal communities include many people who are not formally enrolled citizens. This may be true for several reasons: Some people are descended from tribal members but do not meet the minimum blood quantum requirements of their tribes;[173] some tribes are matrilineal or patrilineal, so they only permit members of a certain gender to enroll their children in the tribe;[174] some people who are eligible for citizenship

166. Despite their reliance on the defendant's tribal citizenship to justify prosecution, federal courts have acknowledged that tribal citizenship is not a requirement for demonstrating political Indianness. *See* United States v. Antelope, 430 U.S. 641, 647 n.7 (1977); *Means*, 432 F.3d at 934–35.

167. Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d 1221 (D. Nev. 2014).

168. *Id.* at 1225; *see also* Lynnette Curtis, *Cast Out of Paiute Tribe, Disenrolled Confront Struggles*, LAS VEGAS REV.-J. (Apr. 22, 2012, 1:59 AM), http://www.review journal.com/news/las-vegas/cast-out-paiute-tribe-disenrolled-confront-struggles [http://perma.cc/3CUN-A47A] (discussing the background and aftermath of the decision that led to Phebus' disenrollment).

169. *Phebus*, 5 F. Supp. 3d at 1225; Interview with Tribal Attorney Patrick Murch (Mar. 28, 2014).

170. *Phebus*, 5 F. Supp. 3d at 1226.

171. *Id.*; *see also* Phebus v. Las Vegas Paiute Tribe, No. CA13-001 (Las Vegas Paiute Ct. App. June 10, 2013).

172. *Phebus*, No. CA13-001, at 3.

173. *See, e.g.*, JILL DOERFLER, THOSE WHO BELONG: IDENTITY, FAMILY, BLOOD, AND CITIZENSHIP AMONG THE WHITE EARTH ANISHINAABEG xii, 61–90 (2015) (describing how White Earth constitutional revision was driven in large part by a desire to change the one-fourth blood quantum requirement for citizenship); MELISSA L. TATUM ET AL., STRUCTURING SOVEREIGNTY: CONSTITUTIONS OF NATIVE NATIONS 46 (2014).

174. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52 n.2 (1978) (citing ordinance enacted in 1939 and in effect for over seventy years disallowing membership in Santa Clara Pueblo to children

simply have not followed the official procedures to enroll; and some people are not descended from that tribe at all but are related through marriage or adoption. Some of these people are enrolled in other tribes (for instance, a child of parents from two different tribes may be enrolled in one parent's tribe, but not in the other), but some are not enrolled anywhere.[175]

Christopher Phebus's vacated conviction exemplifies the danger of an outside in analysis that fails to interrogate the scope of tribal jurisdiction on its own terms. Following the shortcuts taken by federal courts, which relied on tribal citizenship as the easiest way to define and uphold the Indian legal category and avoid an equal protection challenge, the Las Vegas Paiute Court of Appeals assumed that a person could not qualify as an Indian under federal law and therefore could not be prosecuted under the *Duro* fix if he was not a tribal citizen. But this understanding of who counts as a nonmember Indian is too narrow. The *Duro* fix statute itself refers to the federal law rule for determining Indianness,[176] which clearly recognizes that a person who is not enrolled in any tribe may nevertheless be an Indian.

An inside out analysis that centers tribal law helps to clarify who might be included in this nonmember Indian category. In a recent article, I analyzed tribal statutory and common law in order to gain insight into how tribes articulate the proper scope of their jurisdiction under tribal law.[177] Some tribal criminal codes employ a "community recognition" test to determine Indianness for purposes of tribal criminal jurisdiction.[178] This test asks whether the defendant is considered to be an Indian by the community. It acknowledges that community recognition may be expressed in a variety of ways, including informal indices of belonging. It rejects the federal government's overreliance on citizenship, political participation, or receipt of governmental services as the appropriate determinant of belonging, at least for purposes of criminal jurisdiction.[179] A community

born of female members and male nonmembers); *Genealogy*, SENECA NATION OF INDIANS, http://www.sni.org/Culture/Genealogy.aspx [https://perma.cc/96D2-FSJ2] ("[T]he mother must be an enrolled member in order for the children to be enrolled.").

175. Some may be members of a tribe that is not formally recognized by the U.S. government. Members of those tribes may not qualify as Indians for most federal law purposes and thus could be treated the same way as non-Indians if the standard used relied on enrollment in a recognized tribe. *E.g.*, United States v. Maggi, 598 F.3d 1073, 1080 (9th Cir. 2010) (maintaining that an enrolled member of Little Shell Band of Chippewa was not an Indian for purposes of federal prosecution because the tribe was not recognized), *overruled in part*, United States v. Zepeda, 792 F.3d 1103 (9th Cir. 2015); LaPier v. McCormick, 986 F.2d 303, 305 (9th Cir. 1993).

176. *See* 25 U.S.C. § 1301(4) (2012) (defining Indian with reference to 18 U.S.C. § 1153).

177. *See* Rolnick, *supra* note 114, at 391–408.

178. *See id.* at 389.

179. *Id.* at 391–408.

recognition standard could permit the exercise of criminal jurisdiction over people affiliated with the governing tribe who may not be eligible for enrollment because they do not meet blood quantum requirements or because the tribe determines eligibility for enrollment based on descent from either the mother or the father and the defendant is descended from the other parent.[180] It could also permit prosecution of adopted or intermarried people even if those people are not eligible for citizenship or particular tribal rights.[181] It acknowledges that a person may be connected to a tribal community in a variety of ways, from legal rights and benefits to residence, family ties, and cultural and social participation.

The standard provides an alternative basis for upholding tribal court jurisdiction to that used in *Lara* and *Means*.[182] Although the federal courts in those cases focused on the defendants' status as enrolled citizens of other tribes, both were also members of the local tribal community.[183] They were married to tribal members, had family within the tribe, and lived and worked in the community.[184] Their crimes arose out of their relationships with other tribal community members.[185] Indeed, Means's Oglala citizenship was irrelevant to the Navajo court, which based its jurisdiction instead on his relationship to the Navajo Nation, as governed by Navajo common law.

> While there is a formal process to obtain membership as a Navajo, that is not the only kind of "membership" under Navajo Nation law. An individual who marries or has an intimate relationship with a Navajo is a *hadane* (in-law). The Navajo People have *adoone'e* or clans, and many of them are based upon the intermarriage of original Navajo clan members with people of other nations. The primary clan relation is traced through the mother . . . . A *hadane* or in-law assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted within the Navajo

180. *See, e.g.*, E. Band of Cherokee Indians v. Lambert, No. CR 03-0313, 2003 WL 25902446, at *3 (E. Cherokee Ct. May 29, 2003) (holding that the tribe could prosecute a first descendant of a tribal member who was herself ineligible for membership in part because first descendants "are participating members of this community and [are] treated . . . as such").

181. *E.g.*, Means v. Dist. Court of Chinle Judicial Dist., 2 Am. Tribal Law 439, 450 (Navajo 1999) (holding that the tribe could prosecute a person who was not enrolled in the tribe but who held the status of *hadane*, or in-law, under Navajo common law).

182. United States v. Lara, 541 U.S. 193 (2004); Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005).

183. *See supra* notes 148, 154–155 (discussing *Lara* and *Means*).

184. *Id.*

185. *See supra* notes 291–292.

> Nation, there are reciprocal obligations to and from family and clan members under Navajo common law.[186]

Community recognition is an alternative way to define the Indian legal category, one that retains the political aspect of Indian classifications[187] without focusing narrowly on one form of community affiliation. Although it does not provide a bright line rule, it permits tribal courts to develop more detailed standards that reflect community norms.[188] In most cases, a community recognition standard would broaden the scope of tribal criminal jurisdiction as compared to a citizens-only standard.[189] Indeed, if Indianness for purposes of tribal criminal jurisdiction were defined only according to community recognition, without reference to the *Rogers* rule, tribes would be permitted to prosecute recognized community members regardless of ancestry.[190]

In response to the tribal appellate court's ruling in *Phebus*, the Las Vegas Paiute Tribe asked the Nevada district court to issue a declaratory judgment that jurisdiction was proper.[191] The federal court granted it in part, holding that a tribal court may prosecute anyone who would qualify as an Indian under federal law, including people who are not enrolled.[192] The court observed that the *Duro* fix referred to the federal standard (drawn from *Rogers*) for determining Indianness under the Major Crimes Act.[193] Turning to the Ninth Circuit's cases

186. *Dist. Court of Chinle*, 2 Am. Tribal Law at 450.

187. *See* Rolnick, *supra* note 114, at 423 ("At its most basic level, the 'Indian' legal category refers to indigenous groups recognized as having a government-to-government relationship with the United States, and the people with sufficiently strong connections to those recognized groups to be fairly within the reach of laws arising out of that relationship.").

188. Rolnick, *supra* note 114, at 403–08.

189. *But see* Rolnick, *supra* note 114, at 445–46 (noting that a community recognition standard could in some cases result in no jurisdiction whereas another standard would have permitted it and explaining that the idea of a community recognition standard is not intended to foreclose the possibility that tribes may also exercise criminal jurisdiction over strangers who are citizens of other tribes under a different rationale, as set forth in the federal cases discussed here).

190. The Navajo *hadane* doctrine is not limited to people of Indian descent. *See Dist. Court of Chinle*, 2 Am. Tribal Law at 450. Congress employed a standard similar to community recognition when it restored to tribes criminal jurisdiction over non-Indians who have sufficient "ties to the [prosecuting] Indian tribe" and commit crimes of domestic or dating violence against Indian people. 25 U.S.C. § 1304. In a recent concurring opinion, Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit seemed to assume that tribes include members who are not of Indian descent. He advocated eliminating the descent prong of the *Rogers* test for federal jurisdiction purposes and applying the Major Crimes Act to all tribal members "irrespective of their race," a change he believed would address his concern regarding equal protection. *Zepeda*, 792 F.3d at 1106; *see* Rolnick, *supra* note 114, at 422–27.

191. Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d 1221, 1226 (D. Nev. 2014).

192. *Id.* at 1230–31.

193. *Id.* at 1236.

applying the standard, the court correctly held that a non-citizen may still be an Indian.[194]

Although the district court's opinion is the product of a considered analysis, it still failed to center tribes. The court suggested that it would never be permissible for a tribal court to prosecute someone after severing his formal citizenship in that community unless he also had a tie to a different tribal community.[195] Had the court considered the possibility of a community recognition test under tribal law, rather than considering only Ninth Circuit case law, it might have acknowledged that a person may still be considered a community member after being involuntarily disenrolled if he or she continues to live and participate in the community.[196] By removing the specter of a federal restriction, however, the court opened the door for the tribal courts to consider issues like fairness, due process, and involuntary disenrollment as matters of tribal law. In *Phebus*, such an analysis could have led the tribal appellate court to hold that the tribe retained jurisdiction because of Phebus's non-citizenship ties, or it could have led to a holding that it was unfair under Las Vegas Paiute law for the tribe to prosecute Phebus after disenrolling him. Either outcome, however, would have been rooted in the work of tribal criminal law rather than in overbroad assumptions about federal limitations on tribal power.

IV. EXTRATERRITORIAL JURISDICTION

Criminal jurisdiction is most often described as an aspect of a sovereign's control over territory.[197] A tribe's territory is usually understood to mean the "Indian country" controlled by that tribe, but the two are not necessarily coterminous. Indian country is statutorily defined to include lands within the boundaries of that tribe's reservation, lands held in trust for the tribe or its members, including individual allotments, and lands that qualify as "dependent Indian communities,"[198] a limited category of lands owned by tribes in fee but treated like trust land. Any land owned or governed by a tribe that does not fall

194. *Id.* at 1229–31.

195. *Id.* at 1232 ("[T]he Court has no problem ruling that equal protection principles prevent a tribe's prosecution of a non-member whose only putative tribal affiliation is with the prosecuting tribe itself and where that tribe has in fact rejected or revoked the person's membership.").

196. *See* Rolnick, *supra* note 114, at 406.

197. ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT 56 (2010) ("The territorial scope of a state's criminal law is commonly regarded as a manifestation of its sovereignty."). Because of this, most sovereigns are recognized as having criminal jurisdiction over anyone who commits a crime within that sovereign's territory, regardless of that person's citizenship or residence.

198. 25 U.S.C. § 1151 (2012).

within this statutory definition is not Indian country. Indian country does not include most Alaska Native lands and does not include land (even land adjacent to the reservation) that a tribal government might buy on the open market and own outright.

Indian country is a term defined by federal law to describe the limits of federal criminal jurisdiction.[199] Indian country is also significant as a limit on state jurisdiction because it describes land within the boundaries of a state over which the federal government has authority, which preempts state authority.[200] No specific federal statute defines Indian country as a limit on tribal jurisdiction, although tribal criminal jurisdiction is often assumed to exist only in Indian country. It is possible, for example, that tribally owned fee land adjacent to a reservation could be considered part of that tribe's territory for purposes of defining the scope of its criminal jurisdiction, but not qualify as Indian country under the federal criminal statute.

In 1976, Professor Clinton questioned whether tribes retain jurisdiction to prosecute people otherwise subject to tribal jurisdiction for crimes committed outside Indian country.[201] For example, a tribe might wish to exercise criminal jurisdiction over an offense that occurred in tribal territory that does not qualify as Indian country, or it might wish to do so in order to reach offenses committed extraterritorially but affecting the tribe or its members.[202] Professor Clinton raised this question in the wake of a 1974 Ninth Circuit opinion upholding the Confederated Tribes and Bands of the Yakama Indian Nation's prosecution of Alvin and Mary Settler for fishing in violation of tribal fishing regulations.[203] The violations occurred outside the reservation boundaries at one of the tribe's "usual and accustomed fishing places," where the tribe retained treaty-protected rights to hunt and fish.[204] That case, *Settler v. Lameer*, raised the possibility that tribes retain some extraterritorial criminal jurisdiction, but whether it stood for

199. *Id.*

200. In matters of Indian country criminal jurisdiction, federal jurisdiction usually preempts state jurisdiction over the same offender/offense, and vice versa. *See, e.g.*, *supra* note 119 (describing judicially created exception to federal criminal statutes reserving jurisdiction over non-Indians on non-Indian crimes to states exclusively) and notes 76–78 (explaining that Public Law 280 substituted state for federal jurisdiction, at least in the mandatory states).

201. *See supra* notes 3–7.

202. In the international criminal context, sovereigns exercise extraterritorial criminal jurisdiction over citizens and nationals who commit crimes abroad; over crimes that harm their citizens or their nationals; over crimes that impact national security or important governmental functions; and over universally condemned offenses, such as terrorism. *See* Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* 2 INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS 85, 108, 116 (M. Cherif Bassiouni ed., 3d ed. 2008).

203. Settler v. Lameer, 507 F.2d 231, 242 (1974).

204. *Id.* at 233–34.

the idea that tribes in general retain extraterritorial criminal power was not clear.[205] The case was unique because it involved tribal enforcement of off-reservation hunting and fishing rights, so the crime occurred on land that, while not Indian country, was subject to a special form of treaty-protected tribal property right.[206]

In the decades since Professor Clinton raised the question, *Settler*'s significance has faded. In its place, some authorities adopted the untested assumption that tribal criminal jurisdiction is limited to Indian country. The effect of such a rule is no small matter. Over two hundred Alaska Native governments exercise authority over regions that are not considered Indian country under federal law.[207] The State of Alaska has long taken the position that its criminal authority is exclusive.[208] Other tribes have only very small pockets of trust land,[209] still others retain traditional rights to lands outside of their reservations,[210] and many tribal communities cover a span much larger than their official reservation of trust land.[211] For these tribes, limiting criminal jurisdiction to lands that qualify as Indian country could significantly restrict their ability to deal with offenders. In addition, such a rule would certainly prohibit tribes from prosecuting crimes committed outside tribal territory but affecting important tribal interests.

After *Settler* and prior to 2015, only two federal courts had considered whether tribes' retained power to prosecute their members for internal criminal matters[212] extends to offenses committed outside of Indian

205. Clinton, *supra* note 3, at 558–59.
206. *Settler*, 507 F.2d at 235–38.
207. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 523 (1998). *But see* Geoffrey D. Strommer, Stephen D. Osborne & Craig A. Jacobson, *Placing Land Into Trust in Alaska: Issues and Opportunities*, 3 AM. INDIAN L.J. 508, 511–17, 520–23 (2015) (describing proposed regulations to permit the Secretary of the Interior to take land into trust for Alaska Native villages and the consequences of this for "Indian country" status and criminal jurisdiction).
208. Indian Law & Order Comm'n, *supra* note 8, at 44–45.
209. *See, e.g.*, Delen Goldberg & Jackie Valley, *Las Vegas' Smallest Sovereign Nation*, LAS VEGAS SUN (July 20, 2015, 2:00 AM), http://lasvegassun.com/news/2015/jul/20/las-vegas-smallest-sovereign-nation [https://perma.cc/BC84-MV4C] (describing initial reservation of the Las Vegas Paiute Tribe as a "31-acre plot").
210. *See* GREAT LAKES INDIAN FISH & WILDLIFE COMM'N, A GUIDE TO UNDERSTANDING OJIBWE TREATY RIGHTS 3–4 (2014) (displaying a map of ceded lands, outside reservation boundaries, within which Ojibwe signatory tribes exercise treaty-protected rights to hunt, fish, and gather, and where tribal regulation of those rights applies); *see also* Settler v. Lameer, 507 F.2d 231, 237–38 (1974) (holding that a tribe's power to regulate hunting and fishing in treaty-protected lands includes the right to prosecute members for violation of the tribe's laws).
211. *See, e.g.*, JAMES M. MCCLURKEN, OUR PEOPLE, OUR JOURNEY: THE LITTLE RIVER BAND OF OTTAWA INDIANS 270–72 (2009) (describing the Band's service area, where half its members reside, as extending beyond reservation boundaries and encompassing parts of nine Michigan counties).
212. *See* United States v. Wheeler, 435 U.S. 313 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

country.[213] In the 2011 case *Fife v. Moore*, a federal district court in Oklahoma held that the Muscogee (Creek) Nation could not prosecute tribal members for thefts that occurred on fee land outside of Indian country.[214] The court relied primarily on the federal statute defining Indian country and on several statements in federal cases referring to federal and tribal jurisdiction as being limited to Indian country.[215]

In *Kelsey v. Pope*, a Michigan court in 2014 relied on *Fife* to reach the same conclusion that tribes may not exercise criminal jurisdiction outside Indian country, even over a tribal citizen engaged in official tribal business.[216] The Little River Band of Ottawa Indians had convicted Norbert Kelsey, a former tribal council member, of sexual assault after he inappropriately touched a tribal employee during a meeting of tribal elders at the Band's community center. Although Kelsey was both a citizen and a government official who committed a crime relating to his leadership role while in a government building, he argued that the Band lacked jurisdiction because the community center was not located within reservation boundaries and thus was not Indian country.[217] The federal district court agreed, and granted Kelsey's habeas petition.[218]

While poorly reasoned, these opinions derive support from general statements in treatises and articles suggesting that tribal criminal jurisdiction exists only in Indian country.[219] Both courts employed an outside in approach by emphasizing the lack of evidence that tribes regularly exercised extraterritorial jurisdiction and the lack of external confirmation of such jurisdiction.

213. *See supra* text accompanying note 198 (defining Indian country).
214. *See* Fife v. Moore, 808 F. Supp. 2d 1310, 1314–15 (E.D. Okla. 2011).
215. *Id.* at 1314–15.
216. *See* Kelsey v. Pope, No. 1:09-CV-1015, 2014 WL 1338170, at *3–4, *17 (W.D. Mich. Mar. 31, 2014), *rev'd and vacated*, 809 F.3d 849 (6th Cir. 2016).
217. *Id.* at 852.
218. *Id.*
219. The magistrate's recommendation in *Kelsey*, adopted as part of the district court's opinion, relies on a statement from a respected Indian law treatise that tribal jurisdiction is "generally confined to crimes committed within the geographical limits of its reservation . . . ." *Kelsey*, 2014 WL 1338170, at *14 (quoting WILLIAM CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 175 (4th ed. 2004)). No authority is given for the statement in the treatise about territorial limitation; in fact, it is followed by examples of jurisdiction beyond Indian country, including *Settler* and "certain cases of juvenile delinquency." Canby, *supra*, at 175. Similarly, the most recent edition of *Cohen's Handbook of Federal Indian Law* includes the statement, "tribes possess the power to exercise at least concurrent jurisdiction over all crimes committed by an Indian against the person or property of another Indian in Indian country," COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 9.04, which could be read to suggest a territorial limitation. Elsewhere, however, the 2012 Handbook recognizes that tribes retain broad authority over members, including criminal jurisdiction, and that a tribe's membership-based jurisdiction is not necessarily limited by territory. *Id.* at §§ 4.01[2][d]; 6.02[1].

As a result, both courts concluded that tribes do not have extraterritorial criminal jurisdiction.[220] These courts limited the application of *Settler* to situations in which tribes employed criminal sanctions to enforce regulations concerning their members' exercise of reserved rights in areas outside of Indian country but recognized by treaties.[221]

The issue that has generated the most scholarly debate regarding tribal criminal jurisdiction has been the Court's holding in *Oliphant* that tribes have less than full territorial criminal jurisdiction. Arguments that Congress ought to restore full territorial jurisdiction to tribes rely on the longstanding link between territory and criminal jurisdiction.[222] In light of this focus on territory, scholars have been comparatively unconcerned with the question of jurisdiction beyond tribal territory, and examples abound of Indian law scholars and courts describing tribal jurisdiction as extending only to Indian country, when in fact the question had never been judicially addressed.[223]

In January 2015, the United States Court of Appeals for the Sixth Circuit in *Kelsey v. Pope*[224] reversed the Michigan district court's holding that tribes cannot exercise extraterritorial criminal jurisdiction.[225] Whereas the district court interpreted the absence of evidence or confirmation regarding tribes' exercise of extraterritorial jurisdiction as indicating that such jurisdiction did not exist,[226] the Sixth Circuit approached the question as one about the scope of retained sovereign rights.[227] Following the inside out approach advocated by the Little River Band, the court devoted several pages of its opinion to discussing whether membership-based criminal jurisdiction was an aspect of tribes' inherent sovereignty.[228] In determining that it was, the court relied primarily on the language of *Wheeler* and *Duro*, acknowledging that those cases involved on-reservation crimes but refusing to read in a territorial limitation just because the Supreme Court had

220. The magistrate in *Kelsey* adopted this view despite the fact that it "[could not] find any federal limitation over the exercise of tribal criminal authority over crimes committed by Indians on land which is owned in fee by the Tribe." 2014 WL 1338170, at *8.

221. *Id.* at *14. The *Fife* court did not even acknowledge *Settler*.

222. For the most recent example, see INDIAN LAW AND ORDER COMM'N, *supra* note 8, at 23 (proposing that federal law be amended to permit tribes to opt out of federal criminal jurisdiction and have their full territorial jurisdiction restored).

223. The courts in *Fife* and *Kelsey* seized on several such statements as evidence of widespread agreement that tribes lack extraterritorial jurisdiction. *See supra* notes 215, 219.

224. 809 F.3d 849 (6th Cir. 2016).

225. *Id.* at 863.

226. *See* Kelsey v. Pope, No. 1:09-CV-1015, 2014 WL 1338170, at *3 (W.D. Mich. Mar. 31, 2014), *rev'd and vacated*, 809 F.3d 849 (6th Cir. 2016).

227. *See Kelsey*, 809 F.3d at 855 (beginning jurisdictional analysis with a discussion of inherent tribal sovereignty).

228. *Id.* at 855–59.

only encountered tribal prosecutions of on-reservation crimes.[229] The court also rejected the district court's analysis in *Fife v. Moore*, which it viewed as having "place[d] too great an emphasis" on the fact that the crime in *Wheeler* occurred on the reservation.[230] In effect, the Sixth Circuit chided the *Fife* court for its outside in approach, which considered only what tribes had done in most cases and too easily dismissed any potential for more expansive jurisdiction. Finally, the Court held that Congress had not expressly limited tribes' membership-based criminal jurisdiction, and it refused to hold that the power had been implicitly divested.[231]

It is too soon to tell whether the Sixth Circuit decision will stand, although Kelsey's request for rehearing was denied.[232] The opinion, however, is remarkable for its careful inside out analysis of criminal jurisdiction as an aspect of inherent tribal sovereignty. It relies almost exclusively on authority that speaks directly to the scope of tribal criminal jurisdiction. Like the *Wetsit* opinion, it does not include a discussion of the jurisdictional web governing Little River Band territory, nor does it describe membership-based criminal jurisdiction as something tribes need because no other government could have prosecuted Kelsey. In fact, the court devoted less than one page of its opinion to a discussion of federal criminal statutes, and it reviewed them only to determine whether they should be interpreted as divesting tribes of their membership-based criminal powers.[233] Moreover, the court did not narrow its holding to the unique circumstances of Kelsey's crime, which involved a tribal government official in the course of tribal business and occurred on tribally owned fee land adjacent to a reservation. The court adhered to "the baseline assumption that, 'until Congress acts, tribes retain their historic sovereign authority'" and held that tribes retain broad criminal jurisdiction over their members, including the power to prosecute them for extraterritorial crimes.[234]

Kelsey also contains a cautionary tale about the danger of untested assumptions: Arguing against tribal jurisdiction, the defendant pointed to a statement in the 1942 version of *Felix Cohen's Handbook of Federal Indian Law* that described tribal criminal jurisdiction as applying only within Indian

229. *Id.* at 859.
230. *Id.*
231. *Id.* at 859–63.
232. Order Denying Reh'g, *Kelsey*, 809 F.3d at 855 (Feb. 8, 2016) (on file with author); *see also* Pet. for Cert., Kelsey v. Bailey, No. 16-5120 (filed July 7, 2016) (on file with author).
233. *Kelsey*, 809 F.3d at 862.
234. The *Kelsey* court did note that "certain applications of extra-territorial criminal jurisdiction might well be incompatible with the tribes' status as dependent sovereigns—that is, where they tangentially impact tribal self-governance or fail to implicate core internal relations," but it held that Kelsey's conduct clearly did affect tribal self-governance and declined to narrow its holding to encompass only the specific circumstances presented in the case. *Id.*

country.[235] Territory and criminal jurisdiction are often tied together, and most tribal prosecutions do involve crimes committed within Indian country, but that statement was not the product of considered reflection on the question of extraterritorial power.[236] Had the court not rejected Kelsey's attempt to invoke "hornbook" law, however, a single statement in a treatise could have further limited tribes' criminal power more than seventy years later.

V. JUVENILE DELINQUENCY JURISDICTION

Another grey area concerns the scope of juvenile delinquency jurisdiction, which many tribes exercise but which neither Congress nor the federal courts have carefully considered. The outside in approach to criminal justice in Indian country is compounded in this area by a general lack of attention to delinquency among Indian law scholars. Even the few articles and reports focused specifically on juvenile justice tend to treat it as a subset of criminal jurisdiction, assuming that the same rules, criticisms, and solutions apply.[237] Partly as a consequence of this inattention, tribal juvenile justice systems have developed in response to non-tribal priorities instead of being driven by tribal priorities.[238]

Juvenile justice is a unique area, however, with specific laws that govern its jurisdictional web. The Federal Juvenile Delinquency Act (FJDA) establishes federal jurisdiction over acts of juvenile delinquency and sets forth the procedures for prosecuting any juvenile "alleged to have committed a[]" "violation of a law of the United States . . . prior to his eighteenth birthday which would have been a crime if committed by an adult."[239] Without the FJDA, the federal courts would

235. *Id.* at 859 n.6.

236. As the Sixth Circuit noted, the 1942 Handbook relied only on an 1886 administrative opinion. *Id.* The 2012 Handbook (of which Professor Goldberg was an editor) includes more in-depth consideration of non-territorial jurisdiction, *see supra* note 219, and "points to the opposite conclusion." *Kelsey*, 809 F.3d at 859 n.6; *see also* Brief of Appellant at 31–32, *Kelsey*, 809 F.3d 849 (2016) (No. 14-1537).

237. *E.g.*, ATTORNEY GENERAL'S ADV. COMM. ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 112 (2014); INDIAN LAW AND ORDER COMM'N, *supra* note 8, at 155; Ryan Seelau, *The Kids Aren't Alright: An Argument to Use the Nation- Building Model in the Development of Native Juvenile Justice Systems to Combat the Effects of Failed Assimilative Policies*, 17 BERKELEY J. CRIM. L. 97, 106 (2012).

238. Rolnick, *supra* note 4, at 182. The analysis described in this section originally appeared in Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2016).

239. 18 U.S.C. § 5032 (2012) (referring to any "juvenile alleged to have committed an act of juvenile delinquency"); 18 U.S.C. § 5031 (2012) (defining "juvenile delinquency" as "violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult").

have no juvenile delinquency jurisdiction and could try juveniles only if they were charged with adult crimes in district court. The FJDA does not create any separate substantive offenses, so in order for a juvenile to be prosecuted under it, the juvenile must have committed an offense defined elsewhere by federal criminal law.[240] If an Indian juvenile commits any offense defined by federal law, including Indian country offenses, the FJDA applies.[241]

The FJDA embodies an outside in approach to juvenile justice in that it largely ignores the existence of tribal juvenile jurisdiction. The statute aims to keep juveniles out of federal court, so it strongly defers to state jurisdiction: A prosecutor may not proceed against a juvenile in federal court until the Attorney General certifies that the state lacks or is unwilling to take jurisdiction over the case, the state does not have adequate programs or services for the juvenile in question, the juvenile has committed a serious violent offense or a drug offense, or there is a substantial federal interest involved.[242] Yet, it does not require the Attorney General to similarly defer to tribal prosecution.[243] Instead, the certification requirement is met in Indian country cases by a certification that the state lacks jurisdiction over Indian country.[244] By failing to acknowledge tribal juvenile courts and focusing only on the relationship between federal and state courts, the law leaves room for duplicative federal prosecutions that can undermine the efforts of tribal juvenile courts.[245]

Recent critiques of juvenile justice in Indian country similarly begin with a focus on federal and state systems, emphasizing the harm done to Native youth

240. *See* § 5032.

241. *See* United States v. Male Juvenile, 280 F.3d 1008, 1017–19 (9th Cir. 2002) (maintaining that a violation of § 1153 constitutes "violation of a law of the United States," even if the enumerated crime is defined by reference to state criminal law); United States v. Allen, 574 F.2d 435, 437–38 (8th Cir. 1978).

242. § 5032. There is an exception for offenses that carry a maximum term of six months or fewer when committed with the special maritime or territorial jurisdiction of the United States. *See* Rolnick, *supra* note 4, at 124 (explaining that the FJDA continued a longstanding preference for keeping juveniles out of the federal system whenever possible).

243. *See Male Juvenile*, 280 F.3d at 1014–17; United States v. Juvenile Male, 864 F.2d 641, 644–46 (9th Cir. 1988); *Allen*, 574 F.2d at 438–39; Rolnick, *supra* note 4, at 104 n.253, 126; *see also* Amy J. Standefer, Note, *The Federal Juvenile Delinquency Act: A Disparate Impact on Native American Juveniles*, 84 MINN. L. REV. 473, 483–85 (1999) ("[D]espite Congress's desire to keep juveniles in the state or local system, the federal government may assume jurisdiction over Indian juveniles charged with serious offenses without obtaining tribal consent."). Post-1990 amendments to the FJDA at least acknowledge tribal sovereignty by preventing certain adult transfer provisions from applying to Indian country juveniles absent tribal consent, *see* Rolnick, *supra* note 4, at 104–05, but the law still fails to acknowledge the role of tribal juvenile courts.

244. *See Allen*, 574 F.2d at 438–39.

245. *See* Rolnick, *supra* note 4, at 104 n.251 (citing cases in which federal courts sentenced juveniles to incarceration terms after a tribal court had already ordered probation and treatment).

by those systems.[246] This harm is real. Youth prosecuted in the federal system spend more time locked up than their counterparts in state systems, because federal sentences are longer and the federal system does not include diversion, parole, and other alternatives.[247] Because the federal government does not run any juvenile facilities, Native youth are placed in state or local facilities under contract agreements, often far from home.[248] Where states have Indian country jurisdiction, Native youth end up submerged in state juvenile justice systems, where they are often treated more harshly, but are rarely provided programs or support tailored to their unique needs.[249] Moving toward an approach that centers tribal courts, recent critiques seek to strengthen and expand tribal juvenile justice systems and correspondingly narrow the role of non-tribal governments in Indian country.[250]

Yet, even while strengthened tribal jurisdiction is offered as a promising solution to the juvenile justice crisis, the tendency toward an outside in analysis has resulted in little sustained attention to the jurisdictional boundaries of tribal juvenile courts and the unique opportunities and obstacles they face.[251] Failure to acknowledge tribal governments as the primary drivers of Indian country juvenile justice has had serious consequences. For example, in a recent analysis of federal funding and juvenile incarceration trends in Indian country from 1998 to 2013, I found that tribes operating their own juvenile justice systems are in many cases mirroring the dominant approach of federal and state governments by investing in juvenile prison construction and incarcerating juvenile offenders for relatively

246. *See* ATTORNEY GENERAL'S ADV. COMM., *supra* note 237, at 120; INDIAN LAW & ORDER COMM'N, *supra* note 8, at 166–67.

247. *See* ATTORNEY GENERAL'S ADV. COMM., *supra* note 237, at 120; INDIAN LAW & ORDER COMM'N, *supra* note 8, at 155, 160; NEELUM ARYA & ADDIE C. ROLNICK, A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS, 24–26 (2009).

248. *See* ATTORNEY GENERAL'S ADV. COMM., *supra* note 237, at 120; INDIAN LAW & ORDER COMM'N, *supra* note 8, at 155, 160.

249. *See* INDIAN LAW & ORDER COMM'N, *supra* note 8, at 157; ARYA & ROLNICK, *supra* note 247, at 20–24; *see also* ATTORNEY GENERAL'S ADV. COMM., *supra* note 237, at 116 ("Programming offered in state juvenile justice systems is not meeting the needs of AI/AN youth and in some cases is harming these youth.").

250. *See* ATTORNEY GENERAL'S ADV. COMM., *supra* note 237, at 111 (criticizing the "complex jurisdictional system" and describing a vision for a "more effective, tribally driven juvenile justice system"); INDIAN LAW & ORDER COMM'N, *supra* note 8, at 159 (recommending removing Native children from federal and state jurisdiction whenever possible with the goal of "releasing Tribes from dysfunctional Federal and State controls and empowering them to provide locally accountable, culturally informed self-government").

251. *See* Rolnick, *supra* note 4, at 113–14 (explaining that tribal juvenile jurisdiction is treated as an "afterthought").

minor offenses.[252] One explanation for this is that tribes have been following the money as they strengthen their juvenile systems. Federal funding for facility construction, facility operation, and delinquency programming strongly favored incarceration—as opposed to treatment, restorative justice, or alternative programs—during this time period.[253] Tribal justice systems have been planned and built in response to the models and financial priorities of other governments, rather than according to the tribe's needs and philosophies.[254] To a large extent, they have been built from the outside in to fill gaps left by, and to adopt the structures of, other governments.

A truly inside out approach to Indian country juvenile justice would not begin by mirroring federal and state systems. It would begin by examining both the potential scope of tribal juvenile jurisdiction and the range of choices available to tribes in determining how to implement that power, with federal and state jurisdiction significant only to the degree they can support tribal choices. A simple way to implement this approach would be amend the Federal Juvenile Delinquency Act to require federal courts to defer to tribal prosecution in the same way they defer to state prosecution.[255]

A more significant intervention would be to avoid the assumption that juvenile delinquency jurisdiction is just like adult criminal jurisdiction, or that it is criminal at all. While juvenile delinquency jurisdiction is often assumed to be a subcategory of criminal jurisdiction,[256] criminal and juvenile jurisdiction are not necessarily identical, and the differences have important implications. Juvenile delinquency jurisdiction—disciplining, controlling, teaching, and caring for children—is a key aspect of tribes' inherent authority,[257] so tribes today retain their jurisdiction to address juvenile delinquency except to the extent that it has

252. *See* Addie C. Rolnick, *Locked Up: Fear, Racism, Prison Economics and the Incarceration of Native Youth*, 40 AM. INDIAN CULTURE & RES. J. 55, 61–67 (2016).

253. *Id.* at 66.

254. Rolnick, *supra* note 4, at 114–17. Of course, even in the absence of outside pressure, some tribes might choose to incarcerate juveniles for relatively minor offenses. As sovereigns, they are free to make such a judgment and to engage and respond to criticisms that their people may have of that policy choice. *See id.* at 71 ("[E]ven if tribal policy choices seem unwise, they embody legitimacy and reflect . . . community values in a way that outsider-imposed policy choices never can.").

255. *See* Rolnick, *supra* note 4, at 132–33 (proposing such an amendment).

256. *See* Rolnick, *supra* note 4, at 88 n.173 (describing commentators' tendency to view juvenile jurisdiction as a species of criminal jurisdiction).

257. *See* Elizabeth S. Scott, *The Legal Construction of Childhood*, *in* A CENTURY OF JUVENILE JUSTICE 113, 116 (Margaret K. Rosenheim et al. eds., 2002) (describing the parens patriae power of the state over children as the source of American state authority over juvenile delinquency); *see also Preface to* A CENTURY OF JUVENILE JUSTICE, at xiii (Margaret K. Rosenheim et al. eds., 2002) (contending that the juvenile court "plays an important role in the governments of most developed nations").

been limited or divested by federal law. Whether juvenile jurisdiction has been limited and to what extent is complicated by the fact that the scope of modern tribal criminal jurisdiction is different from the scope of modern tribal civil jurisdiction, and juvenile jurisdiction falls in a grey area between criminal and civil regulatory jurisdiction.

If a tribe retains the power to criminally punish adults, a power that is broader than many assume, it also retains the power to adjudicate juvenile delinquents absent some express language to the contrary. As described in Part III, tribes have criminal jurisdiction over tribal members[258] and "nonmember Indians,"[259] and the latter category likely includes unenrolled community members as well as anyone enrolled in another federally recognized tribe.[260] Tribes thus have jurisdiction over juvenile offenders who are tribal citizens as well as those who might otherwise qualify as Indians.[261] Their jurisdiction may reach beyond reservation borders in certain cases, as described in Part IV.[262] If a tribe chooses to approach juvenile delinquency as a species of child welfare (instead of as a species of criminal law), the scope of that jurisdiction may be even less constrained.

Because of the differences between juvenile courts and criminal courts, the limits that federal law clearly imposes on tribal criminal jurisdiction are less significant in juvenile cases than in adult cases. The Indian Civil Rights Act (ICRA) requires tribal courts to comply with most of the same basic due process requirements applicable to federal and state courts.[263] If a juvenile defendant in tribal court faces adversarial proceedings and a potential deprivation of liberty on par with that faced by an adult criminal, as juveniles do in non-tribal systems, the tribe must guarantee most of the same rights that are required in its criminal court. In the context of state juvenile courts, the Supreme Court has held that nearly all of the procedural rights guaranteed to adults are also required in juvenile

258. United States v. Wheeler, 435 U.S. 313, 322 (1978); Talton v. Mayes, 163 U.S. 376, 380 (1896).

259. *See supra* note 113.

260. Rolnick, *supra* note 114, at 390–429.

261. *See* Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d 1221, 1229–31 (D. Nev. 2014). *See generally* Rolnick, *supra* note 114, at 370–86 (establishing that tribes have criminal jurisdiction over people who are not tribal citizens and describing alternative tests for Indianness).

262. *See supra* Part IV.

263. The Bill of Rights does not apply to tribal governments. *See Wheeler*, 435 U.S. at 329; *Talton*, 163 U.S. at 384. But the Indian Civil Rights Act, a federal law passed in 1968, requires tribal courts to comply with most of the limitations applicable to federal and state courts. Pub. L. No. 90-284, tit. II, § 202, 82 Stat. 77 (1968) (codified as 25 U.S.C. § 1302(a)). The law was directed primarily at concerns about potential unfairness to Native defendants in tribal criminal proceedings. Although it applies to all actions by tribal governments, it is most important as a limitation in criminal cases, where it can be enforced through a habeas corpus petition brought in federal court by any tribal defendant. *See* 25 U.S.C. § 1303 (2012).

proceedings, including the right to notice of charges,[264] the privilege against self-incrimination,[265] the right to confront and cross-examine witnesses,[266] the right to proof beyond a reasonable doubt,[267] and the protection against double jeopardy.[268]

For sentences of one year or less, tribes are not required to provide indigent defendants with free attorneys.[269] In addition, neither states nor the federal government are required to guarantee the right to a jury trial in juvenile proceedings.[270] Thus, while ICRA guarantees the right to a jury trial for any offense that could result in imprisonment,[271] it can be argued that this right does not extend to tribal juvenile proceedings because the Sixth Amendment, after which the ICRA jury trial requirement was modeled, has not been interpreted to cover state juvenile proceedings.[272] Juveniles appearing before tribal courts, then, have all the rights enjoyed by adults in state criminal systems except that they do not have a right to free legal counsel and may not have a right to a jury trial.

The ICRA also restricts sentence length.[273] The effect of the sentence limitation on juvenile adjudications is not entirely clear, however, as juveniles are not

264. *In re* Gault, 387 U.S. 1, 33–34 (1967).
265. *Id.* at 47.
266. *Id.* at 56.
267. *In re* Winship, 397 U.S. 358, 368 (1970).
268. Breed v. Jones, 421 U.S. 519, 541 (1975).
269. *See* 25 U.S.C. § 1302(a)(6) (2012).
270. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) ("The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner.").
271. *See* § 1302(a)(10) (2012) (stating that tribes may not "deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons").
272. The effect of *McKeiver* on tribal juvenile proceedings has never been addressed by a federal court.
273. Tribes in most cases may not sentence offenders to more than one year of imprisonment or impose a fine of more than $5000. 25 U.S.C. § 1302(a)(7)(B) (2012). However, tribes may elect to sentence offenders to up to three years imprisonment and impose fines of up to $15,000 per offense. *See* 25 U.S.C. § 1302(b) (2012). In order to be eligible for a sentence of more than one year, the defendant must have been convicted of a crime that would subject him to more than one year of incarceration in state court (§ 1302(b)(2)), or must have a prior conviction for the same or a comparable offense in any court (§ 1302(b)(1)). This change was implemented by the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 234(a), 124 Stat. 2279 (2010). Tribal courts may also stack sentences for multiple offenses for a total of up to nine years' imprisonment. *See* 25 U.S.C. § 1302(a)(7)(D) (2012). This provision codified a Ninth Circuit case upholding the Pascua Yaqui Tribe's practice of sentence stacking. *See* Miranda v. Anchondo, 654 F.3d 911 (9th Cir. 2011). In order to impose total sentence of more than one year, tribes must ensure that their laws and procedures mirror non-tribal systems even more closely. Specifically, they must provide free public defenders, ensure that judges are law-trained and certified, make criminal laws publicly available, and maintain a record of the proceeding, including an audio recording of the trial. 25 U.S.C. § 1302(c) (2012). The Supreme Court in *Gault* declined to require state juvenile courts to keep a trial transcript of confidential juvenile proceedings or to

always sentenced to a term of years. Instead, some juvenile courts employ indeterminate sentencing in which a juvenile may be sentenced to a broad range of years or is placed under juvenile court jurisdiction for the duration of his or her minority.[274] Where a young offender in tribal court faces potential incarceration of up to one year for a single offense, either because tribal law specifies a term of one year or because the juvenile will age out of juvenile court jurisdiction within a year, there is no question that the sentence would comply with the ICRA. Where a juvenile faces a determinate sentence of greater than one year or where he or she was remanded to tribal custody for an indeterminate period (and will not age out of juvenile court jurisdiction for many years), however, the ICRA may require that tribal courts specify an outside limit on any term of incarceration in a way that a state court would not be required to do.[275] Of course, a tribe that has opted into the enhanced sentencing provisions would have more flexibility to retain jurisdiction over a juvenile who has been adjudicated delinquent without running afoul of federal law.

American juvenile courts have their roots in the idea that children are less culpable and more open to reform, and therefore require a system focused on rehabilitation and treatment, rather than retribution and punishment.[276] Juvenile justice policy has at times favored a more criminal approach,[277] but the past two decades have seen courts and legislatures reemphasize the idea that children

hold that juveniles have a right to appeal, because the Court had not held that the Constitution guaranteed to even adult criminal defendants a right to appellate review. *In re* Gault, 387 U.S. 1, 58 (1967). Thus, although the ICRA requires a trial recording when defendants face more than a year of incarceration, this requirement may not apply to juvenile proceedings, even where the juvenile faces more than a year of incarceration.

274. In early juvenile courts, "[d]ispositions were indeterminate, nonproportional, and continued for the duration of the child's minority. The delicts that brought the child before the court affected neither the intensity nor the duration of intervention because each child's 'real needs' differed, and no limits could be defined in advance." Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 477 (1987); *see also* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 825, 848–50 (1988) [hereinafter Feld, *Punishment, Treatment, and the Difference It Makes*] (describing the role of indeterminate sentencing in the early juvenile court and the structure of indeterminate and/or flexible sentencing laws across states). *But see* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 83 (1997) (finding that nearly half of all states had adopted determinate or mandatory minimum sentencing laws a decade later); Feld, *Punishment, Treatment, and the Difference It Makes*, *supra*, at 851–62 (noting a growing trend among states toward determinate sentencing laws in juvenile court).

275. This could be done by using determinate sentencing or by using indeterminate juvenile court jurisdiction with the qualification that the juvenile court may not include in its disposition more than one year of confinement in a locked facility.

276. Rolnick, *supra* note 4, at 72–73.

277. *Id.* at 74–75.

are different, relying on research on adolescent brains to conclude that children are less culpable and more amenable to rehabilitation and treatment.[278] While juvenile courts today share many similarities with criminal courts,[279] the historical development of state juvenile courts and current thinking regarding adolescent development at least raise questions about whether juvenile delinquency jurisdiction is appropriately categorized as criminal or civil regulatory jurisdiction. Outside of the tribal context, this is more a policy debate than a legal one. Juveniles are entitled to most of the same due process protections during their adjudication as adults are, and all that remains is how best to address their offenses. For tribes, though, this question is much more significant because civil regulatory jurisdiction is not limited by the same statutes and cases limiting tribes' exercise of criminal jurisdiction.

The question whether a tribe's exercise of juvenile delinquency jurisdiction will be considered criminal or civil hinges mainly on how the tribe conceives of and exercises its power over children. Delinquency is in many ways an extension of child welfare: Many of the same children who are involved in the child welfare system end up in the delinquency system,[280] and research indicates that harm suffered by children is a significant risk factor for later delinquency.[281] A tribe could choose to treat its young people as children in need of care by placing young offenders in rehabilitative, educational, or treatment programs and by eliminating or significantly reducing the criminal aspects of delinquency adjudications (for example, incarceration or other deprivation of liberty, use of juvenile records to enhance adult sentences, and collateral consequences involving the loss of rights such as voting, child custody, or access to housing). The precise character, and therefore scope, of tribal juvenile jurisdiction would be determined by a tribe's choices about how to address delinquency. These choices would in turn be guided by the tribe's philosophies of child-rearing and discipline and by the needs of youth and community members. A system like this is more likely to be viewed

278. *Id.* at 75–76.

279. *See* Barry C. Feld, *Criminalizing of the American Juvenile Court*, *in* READINGS IN JUVENILE JUSTICE ADMINISTRATION, *supra*, at 356, 359–66; Gary B. Melton, *Taking* Gault *Seriously: Toward a New Juvenile Court*, *in* READINGS IN JUVENILE JUSTICE ADMINISTRATION 343, 351–54 (Barry C. Feld ed., 1999).

280. CTR. FOR JUVENILE JUSTICE REFORM, ADDRESSING THE NEEDS OF MULTI SYSTEM YOUTH: STRENGTHENING THE CONNECTION BETWEEN CHILD WELFARE AND JUVENILE JUSTICE 1 (2012) ("[C]hildren involved in the child welfare system are at risk of 'crossing over' to the juvenile justice system and . . . many juvenile justice–involved youth later become involved in the child welfare system.").

281. *See* Mary C. Marsiglio et al., *Examining the Link Between Traumatic Events and Delinquency Among Juvenile Delinquent Girls: A Longitudinal Study*, 7 J. CHILD & ADOLESCENT TRAUMA 217, 217–19 (describing social science research on the connection between trauma and delinquency).

as an exercise of a tribe's power to care for its children. That power is an exercise of civil jurisdiction, and it is not governed by the same rules that govern tribal criminal power.

If all, or most, of a tribe's exercise of juvenile jurisdiction can be categorized as civil regulatory jurisdiction, a tribe may retain jurisdiction over juvenile justice even if it lacks such jurisdiction over adult criminals. The limits described above would not apply.[282] Sentence length is not a limitation in a system that does not involve incarceration or a similar deprivation of liberty. Indian status may matter, but there is no categorical rule against a tribe's exercise of power over non-Indians within their territory.[283] Territorial limits would not apply. Indeed, courts have specifically recognized that tribes retain civil jurisdiction over certain matters involving their members, including domestic relations and child custody, even outside Indian country.[284] Moreover, Congress has specifically confirmed tribes' extraterritorial power over their children in child welfare matters.[285] In addition, because the Supreme Court has held that Public Law 280 did not transfer civil regulatory jurisdiction to states,[286] those states subject to the law would not be able to regulate delinquency matters unless delinquency was an area over which the state specifically assumed jurisdiction.[287]

It is not entirely clear how a court would view a tribe's argument that delinquency jurisdiction is noncriminal. Although the juvenile justice system is nominally distinct from the criminal justice system under federal and state laws, most juvenile courts today operate very much like criminal courts, and most of the youth adjudicated in juvenile court have the same procedural protections as adults in criminal court. If presented with the question, a federal court might

282. *See supra* notes 263–275 and accompanying text.

283. The rule in the civil context, even when stated in its broadest form, is that tribes may regulate and adjudicate civil matters involving non-Indians (and nonmember Indians) as long as the nonmember entered into a consensual relationship with the tribe or its members, or his or her actions have a direct effect on the health, welfare, political integrity, or economic security of the tribe or its members. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328–30 (2008); Nevada v. Hicks, 553 U.S. 353, 359 (2001); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997); Montana v. United States, 450 U.S. 544, 566 (1981). While it is not easy to meet these criteria, a non-Indian juvenile's commission of an offense on tribally owned land that would be a crime if committed by an adult, particularly if the victim is a member of the tribe, is something that the tribe could potentially regulate under this standard.

284. *See, e.g.*, John v. Baker, 982 P.2d 738 (Alaska 1999) (holding that tribes retain membership-based, as opposed to territory-based, jurisdiction over child custody disputes).

285. *See* 25 U.S.C. § 1911 (2012).

286. *See* Bryan v. Itasca Cty., 426 U.S. 373 (1976).

287. For example, Washington's law accepting Indian country jurisdiction specifically includes an acceptance of juvenile delinquency jurisdiction. RCW § 37.12.010.

determine, for example, that tribal juvenile proceedings are subject to exactly the same procedural and jurisdictional limitations as tribal criminal proceedings. No federal court has fully considered the scope of modern tribal juvenile jurisdiction, however, in part because tribal juvenile courts tend to resemble criminal courts, especially in that they employ incarceration. If a tribe were to choose not to incarcerate juveniles, it could more persuasively argue that its delinquency jurisdiction were civil.

Whether all delinquency matters can be characterized as civil jurisdiction remains an unanswered question, but there is one area of delinquency jurisdiction that is clearly noncriminal—status offenses. Status offenses are acts for which youth may be found delinquent but which would not be illegal if they were committed by adults.[288] These include: running away, some offenses involving sexual activity by a minor, possession or consumption of alcohol by a minor, and catchall offenses like incorrigibility or child in need of supervision.[289] Federal law prohibits locking up youth for these offenses, and they are generally treated today as noncriminal matters.[290] A tribe's adjudication of status offenses should clearly be governed by the rules concerning civil regulatory jurisdiction, not criminal power.

An inside out approach, which asks why tribes need to exercise delinquency jurisdiction and what they seek to achieve with its exercise, could have important consequences for funding and policy as well. If tribes are free to determine the purpose, scope, and substance of their own juvenile delinquency systems, they might choose to design systems that look very different from their state counterparts. Only by carefully designing their own systems can tribes ensure that they will not inadvertently reproduce an outside model that prioritizes incarceration. Congress and federal agencies could redirect funding to support the specific needs of tribal juvenile systems, prioritizing alternative approaches and reducing overreliance on incarceration.

288. *See* COAL. FOR JUVENILE JUSTICE & TRIBAL LAW & POLICY INST., AMERICAN INDIAN/ALASKA NATIVE YOUTH & STATUS OFFENSE DISPARITIES: A CALL FOR TRIBAL INITIATIVES, COORDINATION & FEDERAL FUNDING 1 (2015).

289. *See* Thalia González, *Reclaiming the Promise of the Indian Child Welfare Act: A Study of State Incorporation and Adoption of Legal Protections for Indian Status Offenders*, 42 N.M. L. REV. 131, 132 n.7 (2012).

290. *See* 42 U.S.C. § 5633(a)(13) (2012) (conditioning federal juvenile justice assistance on a state's agreement not to incarcerate status offenders).

CONCLUSION

Tribal courts hear criminal and juvenile cases involving a range of offenses. Russell Means assaulted his father-in-law.[291] Billy Jo Lara resisted a police officer who was trying to remove him from the reservation after he violated an exclusion order that was issued after he was arrested for public intoxication.[292] Norbert Kelsey, a tribal government official, sexually harassed a tribal employee.[293] Ann Walker killed two people in a car accident.[294] Georgia Leigh Westsit stabbed her husband.[295] Christopher Phebus threatened to throw a rock through the window of the police chief's office.[296] The defendants' stories and the circumstances of their crimes defy easy categorization. Russell Means and Billy Jo Lara, longtime members of their respective tribal communities via marriage, residence, and community involvement, were not citizens of the prosecuting tribes.[297] Norbert Kelsey, in his capacity as a government official, was attending a tribal function that happened to be located outside of Indian country.[298] Ann Walker lived on the Omaha Reservation in Nebraska, where the state had jurisdiction over her crime.[299] Georgia Leigh Westsit had already been acquitted by a federal court of her crime.[300] Christopher Phebus lived in the community from which he was descended and where he was formerly recognized as a citizen, but he was no longer considered a citizen of his tribe because of a change in tribal law.[301] In the grey areas in which the scope of their criminal jurisdiction is still an open legal question, it is important for tribes not to prematurely assume that federal law limits their power over a diverse cast of defendants and a full range of crimes that may occur in complex circumstances. Avoiding these assumptions requires that each new question be addressed using an inside out analysis, which focuses on why tribes need jurisdiction over a particular person or offense and how they have chosen to exercise that jurisdiction, rather than envisioning tribal courts as simply mimicking state and federal courts in order to fill in jurisdictional gaps.

Centering tribes also directs the conversation toward tribal law and policy. It invites tribes to explore the full range of possible approaches to criminal and

291. Means v. Navajo Nation, 432 F.3d 924, 927 (9th Cir. 2005); *see supra* note 155.
292. United States v. Lara, 324 F.3d 635, 636 (8th Cir. 2003).
293. Kelsey v. Pope, 809 F.3d 849, 861–62, 866 (6th Cir. 2016); *see supra* note 217.
294. Walker v. Rushing, 898 F.2d 672, 673 (8th Cir. 1990).
295. *See supra* note 59.
296. Las Vegas Paiute Tribe of Indians v. Phebus, 5 F. Supp. 3d 1221, 1226 (D. Nev. 2014).
297. *See supra* notes 148 and 154.
298. *Kelsey*, 809 F.3d at 853–54; *see supra* note 217.
299. *See supra* notes 95–96.
300. *See supra* note 60.
301. *Phebus*, 5 F. Supp. 3d at 1225; *see supra* notes 168–170.

juvenile justice. In the juvenile context, for example, an inside out approach can enable tribes to build and reform their juvenile systems in keeping with tribal priorities, including reducing or eliminating incarceration. Furthermore, if imposed federal laws do little to limit tribal criminal and juvenile jurisdiction, tribal law and policy becomes more important as the primary source of jurisdictional limits. The most recent example of this phenomenon involves public defenders in tribal courts. Federal law does not require tribes to provide free counsel to indigent Indian defendants who face a term of incarceration of one year or less.[302] Congress and the Court have declined to change this law.[303] The absence of a federal limit has had the effect of centering tribes because tribal law is now the only possible source of a public defender requirement. Some tribes guarantee a right to counsel as a matter of tribal law,[304] and Indian law scholars increasingly urge tribes to do so.[305] Access to defense counsel continues to be a concern for tribes, advocates, and scholars, but it is being addressed through changes to tribal law, rather than through federal restrictions on tribal jurisdiction. This is how it ought to be. Tribes retain a great deal of their inherent criminal and juvenile jurisdiction. Without federally imposed limitations, tribal law and policy, including decisions about how to ensure fairness and effectively address crime, how best to allocate tribal resources, and whether to invite review of undecided federal legal issues, are the main factors in determining how far a specific tribe wishes to extend the reach of its laws.

302. 25 U.S.C. § 1302(a)(6) (2012).

303. The Supreme Court reaffirmed it in 2016 when it held that the use of uncounseled tribal court convictions to enhance a federal sentence, a practice specifically authorized by a 2013 law making repeated domestic assault a federal felony, Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA Reauthorization Act), Pub. L. 109–162, §§901, 909, 119 Stat. 3077, 3084 (codified as amended at 18 U.S.C. § 117(a)), is consistent with the Fifth and Sixth Amendments. United States v. Bryant, No. 15-420, slip op. at 16 (June 13, 2016) ("Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions. Therefore, the use of those convictions in a federal prosecution does not violate a defendant's right to due process.").

304. *See, e.g.*, Tulalip Tribal Code § 2.25.070(3)(b); *see also* Barbara Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 356 n.248 (describing additional examples).

305. *See, e.g.*, Creel, *supra* note 304, at 356–58 (urging tribes to reevaluate the role of defense counsel and ensure that indigent defendants have counsel in adversarial proceedings); *see also* Kevin K. Washburn, *Reconsidering the Commission's Treatment of Tribal Courts*, 17 FED. SENTENCING REP. 209, 212 (2005) (arguing that the Federal Sentencing Commission should consider prior tribal court convictions for sentence enhancement purposes and, rather than categorically excluding uncounseled convictions, the Commission should allow tribes to opt out of having their convictions used to enhance sentences under the guidelines).