HOLDING THE UNITED STATES LIABLE FOR INDIAN COUNTRY CRIME

By: Adam Crepelle[*]

"[A]ll Americans have the right to public safety and security, but it's preeminently a *Federal* responsibility to protect those rights in Indian Country."[1]

I. INTRODUCTION

Police killings of unarmed African Americans have inspired calls to defund the police.[2] Although the number of African Americans killed by police is troubling, Indians[3] are killed by police at higher rates than African Americans or any other racial group in the United States.[4] Rather than seeking to defund the police, Indian tribes have sued the federal government for

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[1] Tom Cole, Rep., Remarks in Support for Tribal Law Enforcement Bill (July 21, 2010) (emphasis added).

[2] Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What it Means*, CNN (June 27, 2020, 10:32 AM), https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html [https://perma.cc/YB2S-8P2W]; Josiah Bates, *How Are Activists Managing Dissension Within the 'Defund the Police' Movement*?, TIME (Feb. 23, 2021, 3:45 PM), https://time.com/5936408/defund-the-police-definition-movement/ [https://perma.cc/8PW4-MAF4].

[3] Indian is used in this Article to denote the Indigenous peoples of present-day North America. This article uses the term "Indian" rather than "Native American" because it is the proper legal term as well as the preferred term of many Indians. *See, e.g.*, MISSISSIPPI BAND OF CHOCTAW INDIANS, https://www.choctaw.org/ [https://perma.cc/899M-SCGQ]; SOUTHERN UTE INDIAN TRIBE, https://www.southernute-nsn.gov/ [https://perma.cc/8CS5-RQV8]; QUINAULT INDIAN NATION, http://www.quinaultindiannation.com/ [https://perma.cc/QEN3-3EXR].

[4] Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN (updated Nov. 13, 2017, 2:51 PM), https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html [https://perma.cc/GH45-ED9P]; Teran Powell, *Native Americans Most Likely To Die From Police Shootings, Families Who Lost Loved Ones Weigh In*, WUWM 89.7 (June 2, 2021, 12:52 PM), https://www.wuwm.com/2021-06-02/native-americans-most-likely-to-die-from-police-shootings-families-who-lost-loved-ones-weigh-in [https://perma.cc/P234-NS2T].

increased law enforcement funding in recent years.[5] This is not because tribes have a particularly pleasant history with the police; in fact, federal law enforcement has been wielded to systemically oppress Indigenous culture for nearly two hundred years.[6] Tribes have not forgotten these historic injustices, but tribes have few other options as their homelands have become criminal havens.[7]

Crime is a massive problem in Indian country.[8] Indian country violent crime rates exceed ten times the national average on some reservations.[9] For example, the Navajo Reservation reports more rapes than San Diego[10] though San Diego's population is nearly ten times that of the Navajo Reservation.[11] On some reservations every single woman has been raped,[12] and Indian women

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[5] Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025 (9th Cir. 2013); Yurok Tribe v. Dep't of the Interior, 785 F.3d 1405 (Fed. Cir. 2015); Hopland Band of Pomo Indians v. Jewell, 624 F. App'x 562 (9th Cir. 2015).

[6] United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) ("In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.").

[7] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(4)(B), 124 Stat. 2261, 2262 (codified in scattered sections of 25 U.S.C. & 42 U.S.C.); Adam Crepelle, *Tribal Courts, The Violence Against Women Act, and Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction to Improve Public Safety in Indian Country*, 81 MONT. L. REV. 59, 59–60 (2020) [hereinafter Crepelle, *Tribal Courts*]; Ellen Wulfhorst, *Fueled by Drugs, Sex Trafficking Reaches 'Crisis' on Native American Reservation*, REUTERS (May 17, 2016, 4:04 AM), https://www.reuters.com/article/us-trafficking-nativeamericans-drugs/fueled-by-drugs-sex-trafficking-reaches-crisis-on-native-american-reservation-idUSKCN0Y818L [https://perma.cc/JR4N-422V].

[8] 18 U.S.C.A. § 1151 (Westlaw through Pub. L. No. 117-102).

[9] Eric Holder, Att'y Gen., Remarks During the White House Tribal Nations Conference (Dec. 3, 2014), https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-during-white-house-tribal-nations [https://perma.cc/AXH5-U85V].

[10] *How This Survivor is Fighting Sexual Assault in Navajo Nation*, PBS NEWS HOUR, https://www.pbs.org/newshour/brief/303003/amber-kanazbah-crotty [https://perma.cc/7LQS-MWFB] (quoting Amber Kanazbah Crotty, "We have more rapes on Navajo Nation than cities like Detroit or San Diego.").

[11] *Compare Fact Sheet*, NAVAJO TOURISM DEP'T, https://www.discovernavajo.com/things-to-know/fact-sheet/ [https://perma.cc/H9RN-ME2R] *with QuickFacts San Diego City*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/sandiegocitycalifornia,US/PST045219 [https://perma.cc/ESZ6-8SFT].

[12] SARAH DEER, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 5 (2015) [hereinafter DEER, BEGINNING & END] ("Through my work in Native communities, I heard more than once, *I don't know any woman in my community who has not been raped*."); Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 456 (2005) ("When I travel to Indian country, however, advocates tell me that the Justice Department statistics provide a very low estimate, and rates of sexual assault against Native American women are actually much higher. Many of the elders that I have spoken with in Indian country tell me that they do not know any women in their community who have not experienced sexual violence."); Rachel Cain, *Supreme Court Upholds Tribal Court Ruling in Domestic Violence Case*, THINKPROGRESS (June 15, 2016, 8:15 PM), https://thinkprogress.org/supreme-court-upholds-tribal-court-ruling-in-domestic-violence-case-9a21f05a01a4/ [https://perma.cc/38PW-A22V] (discussing the prevalence of sexual violence against American Indian women and quoting American Indian sexual assault

are being murdered and going missing at crisis levels.[13] The violence extends beyond crimes against Indian women as Indian men experience violent crime at twice the rate of any other group in the United States,[14] and Indian children experience violence at the highest rate of any children in the United States.[15]

Violence against Indians is unique not only for its high rate, but also because of its racial dynamic. Crime is overwhelmingly intraracial.[16] Hence, the vast majority of violence perpetrated against African-Americans and Caucasians is by a person of the same race.[17] When an Indian is the victim of violence, the criminal is a non-Indian over ninety percent of the time.[18] This is no accident, and there is not much tribes can do about it.

Federal law prohibits tribes from prosecuting non-Indians.[19] If a non-Indian victimizes an Indian, only the federal government has jurisdiction to prosecute the crime.[20] Federal law enforcement officials are usually

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victim's advocate Lisa Brunner stating, "[o]ur reality is not if [a Native woman is] raped, but when."); Kavitha Chekuru, *Sexual Violence Scars Native American Women*, AL JAZEERA (Mar. 6, 2013), https://www.aljazeera.com/features/2013/3/6/sexual-violence-scars-native-americanwomen [https://perma.cc/GL9U-573L].

[13] *See* Proclamation No. 10202, 86 Fed. Reg. 24479 (May 4, 2021) (establishing the fifth of May as Missing and Murdered Indigenous Persons Awareness Day); *Reviewing the Trump Administration's Approach to the MMIW Crisis: Hearing Before the H. Comm. on Nat. Res. Subcomm. for Indigenous Peoples of the United States Oversight Hearing*, 116th Cong. 14–18 (2019) (statement of Charles Addington, Deputy Bureau Dir., Off. of Just. Servs., Bureau of Indian Affs., U.S. Dep't of the Interior).

[14] STEVEN W. PERRY, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., A BJS STATISTICAL PROFILE, 1992-2002: AMERICAN INDIANS AND CRIME 7 (2004), https://www.bjs.gov/content/pub/pdf/aic02.pdf [https://perma.cc/4NHS-4CJH].

[15] ATT'Y GEN.'S ADVISORY COMM. ON AM. INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, U.S. DEP'T OF JUST., ENDING VIOLENCE SO CHILDREN CAN THRIVE 36 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf [https://perma.cc/CTC4-R8HL].

[16] ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008: ANNUAL RATES FOR 2009 AND 2010, 13 (2011), https://bjs.ojp.gov/content/pub/pdf/htus8008.pdf [https://perma.cc/JLX6-C3NC]; RACHEL E. MORGAN, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., RACE AND HISPANIC ORIGIN OF VICTIMS AND OFFENDERS, 2012-15, at 1 (2017), https://bjs.ojp.gov/content/pub/pdf/rhovo1215.pdf [https://perma.cc/HTW8-KUB5].

[17] COOPER & SMITH, *supra* note 16, at 13.

[18] LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST. AMERICAN INDIANS AND CRIME 7 (1999), https://bjs.ojp.gov/content/pub/pdf/aic.pdf [https://perma.cc/V3ZF-5YLW]; André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NAT'L INST. OF JUST. J., Sept. 2016, at 38, 42, https://www.ojp.gov/pdffiles1/nij/249821.pdf [https://perma.cc/E5U5-ZE3G]; H.R. 1620, 117th Cong. § 901 (2021) ("The vast majority of Native victims—96 percent of women and 89 percent of male victims— report being victimized by a non-Indian.").

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

[20] *See* ARVO Q. MIKKANEN, DEP'T OF JUST., INDIAN COUNTRY CRIMINAL JURISDICTIONAL CHART 2 (2020), https://www.justice.gov/usao-wdok/page/file/1300046/download [https://perma.cc/BVR7-S9XH]. Public Law 83-280 is an exception to this rule. It grants states jurisdiction over all Indian country crimes; however, Public Law 280 has been widely criticized and linked to higher crime rates in Indian country. Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. § 1321–26 & 28 U.S.C. § 1360).

uninterested in reservation crimes for a variety of systemic reasons,[21] so non-Indians are free to torment reservation Indians. Non-Indians know this and exploit the system.[22] In fact, non-Indians have been known to report themselves to police simply to flaunt their immunity from prosecution.[23] Similarly, reservation crime rates soar when non-Indians enter Indian country in large numbers, such as during oil booms on tribal land.[24]

Although Congress has long been aware of non-Indian violence against Indians,[25] Congress only began addressing Indian country crime in 2010.[26]

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[21] AMY L. CASSELMAN, INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN 55 (2015); Kevin K. Washburn, *American Indians Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1013-14 (2008); Cary Aspinwall & Graham Lee Brewer, *Half of Oklahoma Is Now Indian Country. What Does That Mean For Criminal Justice There?*, MARSHALL PROJECT (Aug. 4, 2020, 6:00 AM), https://www.themarshallproject.org/2020/08/04/half-of-oklahoma-is-now-indian-territory-what-does-that-mean-for-criminal-justice-there [https://perma.cc/L5YU-JM53] ("It's an unusual crime for that office to try; the federal government generally devotes its prosecutorial resources to uncovering drug rings, human trafficking and multimillion-dollar financial crimes.").

[22] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(4)(B), 124 Stat. 2261, 2262 (codified as amended in scattered sections of 25 U.S.C. & 42 U.S.C.).

[23] Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1603 (2016); *see also* Lorelei Laird, *Indian Tribes Are Retaking Jurisdiction Over Domestic Violence On Their Own Land*, A.B.A. J. (Apr. 1, 2015, 6:02 AM), https://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own [https://perma.cc/5PA5-4LHX]; Emily Weitz, *Native American Women Have Been Saying a Lot More Than #MeToo for Years*, VICE (Nov. 23, 2017, 5:00 PM), https://www.vice.com/amp/en_us/article/evbeg7/native-american-women-have-been-saying-a-lot-more-than-metoo-for-years [https://perma.cc/58CF-8SWU].

[24] Kathleen Finn, Erica Gajda, Thomas Perrin & Carla Fredericks, *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J.L. & GENDER 1, 2–3 (2017); Garet Bleir & Anya Zoledziowski, *Murdered and Missing Native American Women Challenge Police and Courts*, CTR. FOR PUB. INTEGRITY (updated Oct. 29, 2019, 12:43 PM), https://publicintegrity.org/politics/murdered-and-missing-native-american-women-challenge-police-and-courts [https://perma.cc/63V6-U7FN]; Louise Erdrich, *Rape on the Reservation*, N.Y. TIMES (Feb. 26, 2013), http://www.nytimes.com/2013/02/27/opinion/native-americans-and-the-violenceagainst-women-act.html?_r=0 [https://perma.cc/7XFC-THN6]; Lailani Upham, *Oil Booms, So Does Violence*, CHAR-KOOSTA NEWS (Sept. 11, 2019), http://www.charkoosta.com/news/oil-booms-so-does-violence/article_0386cf00-0949-11e9-a5df-6ba0e817e8a3.html [https://perma.cc/7A94-AUHS].

[25] *See* OFF. OF INDIAN AFFS., DEP'T OF THE INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 22 (1856) ("[I]t is to be hoped that the good citizens thereof will make haste to repair the wrong and injury which the red men of Kansas have suffered by the acts of their white neighbors, and that hereafter they will not only treat the Indians fairly, but that all good citizens will set their faces against the conduct of any lawless men who may attempt to trespass upon the rights of, or otherwise injury, the Indian population there."); OFF. OF INDIAN AFFS., EXTRACT FROM THE ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR TO CONGRESS 6 (1859) ("When it became apparent that the reserve Indians lived in daily fear of being murdered [by the settlers of Texas], and that under such circumstances no crop could be raised, permission was given, at the urgent request of the superintendent, that the removal should be made at once."); OFF. INDIAN AFFS., DEP'T OF THE INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 23–24 (1861) ("This so-called 'Indian war' appears to be a war in which the whites alone are engaged. The Indians are hunted like wild and dangerous beasts of prey; the parents are 'murdered,' and the children 'kidnapped.' Surely some plan may be devised whereby the Indians

Congress implemented reporting requirements to entice United States Attorneys to tackle Indian country crime[27] and increased tribal sentencing authority from a one year maximum jail sentence to three.[28] Congress also created the Office of Tribal Justice to improve Indian country public safety.[29] In the Violence Against Women Reauthorization Act of 2013 ("VAWA"), Congress authorized tribes satisfying certain procedural safeguards to prosecute non-Indians who commit dating violence, domestic violence, or violate a protective order.[30] VAWA has drastically improved public safety among implementing tribes; however, far more needs to be done.[31]

Until Congress takes further action, tribes should sue the United States for its failure to prevent reservation crime. Tribes have a *sui generis* trust relationship with the United States.[32] The trust relationship is a special relationship, and a special relationship permits lawsuits against governments for failure to protect. Accordingly, the United States may be found negligent for ignoring Indian country's public safety crisis.[33] Governments can also be held liable for harms suffered by individuals if the government has created the danger.[34] By divesting tribes of the ability to protect their citizens, the United States bears responsibility for the violence inflicted upon Indians.[35] Additionally, tribes have a property right to public safety from the federal government, and individual Indians have a property right to compensation for

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may cease to be the victims of such inhumanity, and the recurrence of scenes so disgraceful rendered impossible."); "White" was the term used by writers from the era. *See* Letter from Henry Knox to George Washington (Feb. 15, 1790), https://founders.archives.gov/documents/Washington/05-05-02-0085#GEWN-05-05-02-0085-fn-0001 [https://perma.cc/G6M5-RD8R] ("But were the dispositions of the Creeks generally favorable to peace, the corrosive conduct of the lawless Whites inhabiting the frontiers may be supposed to bring on partial quarrels—These may be easily fomented, and the flame of War suddenly lighted up without a possibility of extinguishing it, but by the most powerful exertions."); *see also* Letter from George Washington to the United States Senate (Aug. 22, 1789), https://founders.archives.gov/documents/Washington/05-03-02-0303 [https://perma.cc/42R4-UZLW] ("It will further appear by the said papers, that the treaty with the Cherokees has been entirely violated by the disorderly white people on the frontiers of North Carolina.").

[26] *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified as amended in scattered sections of 25 U.S.C. & 42 U.S.C.).

[27] *Id.* § 212(4).

[28] *Id.* § 234(b).

[29] *Id.* § 214.

[30] 25 U.S.C.A. § 1304 (Westlaw through Pub. L. No. 117-102). At the time of this article's publication, President Biden reauthorized VAWA, which expanded tribal jurisdiction a little further. White House, *Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)* (Mar. 16, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vawa/ [https://perma.cc/P3NG-GQVG]

[31] Riley, *supra* note 23, at 1597.

[32] United States v. Kagama, 118 U.S. 375, 381 (1886) ("The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.").

[33] *See infra* Section IV.A.

[34] *See infra* Section III.B.

[35] *See infra* Section II.B, Part IV & text accompanying nn.324–26.

injuries inflicted by non-Indians.[36] Tribes and Indians should pursue these remedies.

The purpose of this litigation is to incentivize the federal government to fix Indian country's broken criminal justice system. Federal neglect of Indian country has been the norm because Indians are a small percentage of the population[37] and have the highest poverty rate in the United States,[38] so Indian voters and issues do not usually move the election needle. Holding the federal government liable for reservation crimes resulting from flagrant federal neglect could change the political calculus. After all, the options are expend taxpayer dollars reimbursing Indian crime victims or spend money improving a broken system. The latter seems the better option.

The remainder of this Article proceeds as follows. Part II provides an overview of the history of Indian county law enforcement. Part III discusses the basis for holding governments liable for law enforcement failures. Part IV applies theories of government liability to Indian country crime.

II. HISTORY OF INDIAN COUNTRY LAW ENFORCEMENT

Tribes were self-governing societies for millennia before Europeans arrived in the Americas.[39] Tribes developed rules and punished those who violated tribal law.[40] European arrival did not change this as tribes took action

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[36] *See infra* Section IV.C.

[37] U.S. CENSUS BUREAU, 2020 CENSUS RESULTS ON RACE AND ETHNICITY 12 (2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2021/redistricting/20210812-presentation-redistricting-jones.pdf [https://perma.cc/BED4-M3ZT] (noting 9.7 million Americans self-identify as "American Indian or Alaska native" alone or in combination). However, this is likely an overestimate as many who self-identify as Indian may not actually be. *E.g.*, INDIANZ, *It's Infuriating: Fake Cherokee Businesses Land Millions of Dollars in Contract* (June 26, 2019), https://www.indianz.com/News/2019/06/26/its-infuriating-fake-cherokee-businesses.asp [https://perma.cc/7UQD-CCRH].

[38] SUZANNE MACARTNEY, ALEMAYEHU BISHAW & KAYLA FONTENOT, POVERTY RATES FOR SELECTED GROUPS DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011 3 (2013), https://www2.census.gov/library/publications/2013/acs/acsbr11-17.pdf [https://perma.cc/7GKF-NXVR]; *American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 6, 2017), https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html [https://perma.cc/J5W7-SVZL].

[39] McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 172 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."); Williams v. Lee, 358 U.S. 217, 218 (1959); Worcester v. Georgia, 31 U.S. 515, 542–43 (1832).

[40] Eugene K. Bertman, *Tribal Appellate Courts: A Practical Guide to History and Practice*, 84 OKLA. BAR J. 2115, 2116 (2013) (noting that Indian tribes had fora for dispute resolution prior to the arrival of Europeans); B.J. JONES, ROLE OF THE INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM 4 (2000), http://www.icctc.org/Tribal%20Courts.pdf [https://perma.cc/8ZH4-ZWM5] (acknowledging that America's indigenous people had dispute resolution systems before Europeans arrived on the continent); ROBERT V. WOLF, CTR. FOR CT. INNOVATION, WIDENING THE CIRCLE: CAN PEACEMAKING WORK OUTSIDE OF TRIBAL COMMUNITIES? 1 (2012), http://www.courtinnovation.org/sites/default/files/documents/PeacemakingPlanning_2012.pdf [https://perma.cc/KXV9-EZKW] (noting tribal justice systems existed before European arrival in America).

against the non-Indians who harmed their citizens.[41] Over time, the United States has systematically denied tribes the right to protect their citizens. This Part traces United States Indian policy from the Founding to the present day. Section A explores the development of the United States' duty to protect Indian tribes, and Section B examines how federal policy has left tribes defenseless against non-Indian criminals.

A. From the United States' Founding to Self-Determination: A Duty of Protection

Citizens of the newly formed United States considered Indians "savages"[42] and "heathens;"[43] nevertheless, the savages' military capacity made it costly to acquire tribal land by force.[44] Accordingly, the United States entered nearly four hundred treaties with tribes,[45] and every treaty secured tribal lands against white encroachment.[46] Enforcing this treaty pledge was difficult[47] because whites usually had no qualms about swindling Indians in commercial transactions[48] nor did they consider it a crime to kill Indians.[49] Thus, treaties did not stop whites from invading tribal lands, presenting the

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[41] WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 161 (7th ed. 2020) ("In colonial days, the Indian territory was entirely the province of tribes, and they had jurisdiction in fact and theory over all persons and subjects present there."); G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty,"* 76 MARQ. L. REV. 401, 420 (1993) (noting that tribes could exercise criminal jurisdiction over non-Indians prior to the Supreme Court's decision in *Oliphant*).

[42] Johnson v. McIntosh, 21 U.S. 543, 590 (1823).

[43] *Id.* at 577.

[44] Letter from George Washington to James Duane (Sept. 7, 1783), https://founders.archives.gov/documents/Washington/99-01-02-11798 [https://perma.cc/4FSU-4HLY].

[45] FRANCIS PAUL PRUCHA, *Introduction*, *in* AMERICAN INDIAN TREATIES: A HISTORY OF A POLITICAL ANOMALY 1 (1994) ("Between 1778, when the first treaty was signed with the Delawares, and 1868, when the final one was completed with the Nez Perces, there were 367 ratified Indian treaties and 6 more whose status is questionable.").

[46] FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 45 (1984) ("Treaties entered into with the Indians for cessions of land had the universal corollary that the unceded lands would be guaranteed against invasion by whites.").

[47] *Id.* at 31 ("But it was not enough to deal only with the Indians, for white settlers and speculators ignored the treaties and guarantees."); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 254 (2007) ("The tribes, President Washington, and Secretary of War Henry Knox all were unhappy over white abuses that continued in defiance of the treaties, and became convinced that enforcement legislation was needed.").

[48] Natelson, *supra* note 47, at 220 ("Abuses included fraud in the sales of goods, exorbitant prices for goods, use of liquor to acquire goods and land at unfairly low prices, extortion, trading in stolen goods, gun-running, and physical invasion of Indian territory.").

[49] COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON 399 (2018) ("He [Timothy Pickering, federal commissioner of President Washington's Iroquois initiative] found it mortifying that most frontier inhabitants considered it no crime to kill Indians in peacetime."); *Id.* at 404 ("Washington knew there was little prospect of peace 'so long as a spirit of land jobbing prevails, and our frontier Settlers entertain the opinion that there is not the same crime (or indeed no crime at all) in killing an Indian as in killing a white man.'").

specter of an Indian war.[50] Indian war was the last thing the United States wanted.[51] Warring with tribes was a massive drain on the federal treasury;[52] plus, warring with tribes—particularly when white treaty violations were the culprit—undermined the United States' credibility as a democracy.[53]

Increasing federal involvement in tribal commerce was Congress's solution to white-Indian violence.[54] Indeed, the Constitution's Commerce Clause grants the federal government control of tribal trade[55] because states failed to protect Indians from the malfeasance of white merchants and marauders.[56] Under the Commerce Clause, Congress enacted the Trade and Intercourse Act of 1790, which required whites to obtain a federal license to trade with Indians in hopes of preventing unscrupulous whites from cheating Indians.[57] Furthermore, the law extended federal criminal jurisdiction into Indian country if an American harmed an Indian.[58] But this was not enough to stem the tide of white settlers,[59] so Congress enacted more laws to help protect Indians from white lawbreakers.[60] The United States even built military-

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[50] PRUCHA, *supra* note 46, at 22.

[51] CALLOWAY, *supra* note 49, at 452 ("Washington recommended what he termed 'rational experiments' for imparting the blessings of civilization and believed, or at least hoped, that the United States would not need to fight Indians if it traded with them.").

[52] *Id.* at 446 ("Between 1790 and 1796 the United States spent $5 million, almost five-sixths of the total federal expenditures for the period, fighting the war against the Northwestern Confederacy."); Letter from George Washington to James Duane, *supra* note 44 ("In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expense, and without that bloodshed . . . ."); Letter from Henry Knox to George Washington, *supra* note 25 ("The untoward circumstances of the case are such, that no degree of success, could render a War either honorable or profitable to the United States.").

[53] CALLOWAY, *supra* note 49, at 328 ("How the United States treated Indians would affect how other nations viewed American democracy."); Letter from Henry Knox to George Washington (July 7, 1789), https://founders.archives.gov/documents/Washington/05-03-02-0067 [https://perma.cc/A4S7-CK8E] ("It would reflect honor on the new government and be attended with happy effects were a declarative law to be passed that the Indian tribes possess the right of the soil of all lands within their limits respectively and that they are not to be divested thereof but in consequence of fair and bona fide purchases, made under the authority, or with the express approbation of the United States.").

[54] PRUCHA, *supra* note 46, at 31 ("To put a stop to the outrages committed against Indians by whites who invaded the Indian country, the act provided punishment for murder and other crimes committed by whites against the Indians in the Indian country.").

[55] U.S. Const. art. I, § 8, cl. 3.

[56] PRUCHA, *supra* note 46, at 32, 42; Natelson, *supra* note 47, at 252–54.

[57] Indian Trade and Intercourse Act of 1790, ch. 33, § 1, 1 Stat. 137 (codified in scattered sections of 25 U.S.C.); PRUCHA, *supra* note 46, at 31 ("These laws, originally designed to implement the treaties and enforce them against obstreperous whites, gradually came to embody the basic features of federal Indian policy.").

[58] Indian Trade and Intercourse Act of 1790, § 5, 1 Stat. at 138.

[59] *Indian Intercourse Bill, [9 April] 1796*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-16-02-0200 [https://perma.cc/M8BM-8E8M] ("In response to problems arising from the 1795 treaty of Greenville and raids by Tennessee settlers on the Cherokee nation in 1791 and 1793, Smith (South Carolina) moved, on 10 December 1795, that the House make further provision to secure the frontiers and to protect Indians from unlawful attack.").

[60] Act of May 19, 1796, Pub. L. No. 4-30, §§ 2–6, 1 Stat. 469, 470–71; Act of March 3, 1799, Pub. L. No. 5-46, §§ 2–6, 1 Stat. 743, 744–45; Act of March 30, 1802, Pub. L. No. 7-13, §§ 2–6,

supported trading posts to impede white abuses of Indians.[61]

However, the federal government's efforts were more about saving face than actually preventing whites from overrunning Indian lands.[62] By 1830, Congress abandoned any pretense of preventing whites from snatching Indian lands and passed the Indian Removal Act.[63] The Indian Removal Act emboldened Georgia to enact laws seizing Cherokee land.[64] The Cherokee responded by filing suit in the United States Supreme Court, but the Court held there was no subject matter jurisdiction.[65] Chief Justice Marshall reasoned tribes were not foreign nations but "domestic dependent nations" and their relation to the United States was "that of a ward to his guardian."[66] The United States' obligation to protect tribes was a key ingredient in the Chief Justice's formulation.[67] The following year, two white missionaries served as plaintiffs for the Cherokee, providing the Court with jurisdiction.[68] Able to address the merits, Chief Justice Marshall rejected Georgia's intrusion into the Cherokee Nation[69] because Congress owed the tribes a duty of protection.[70] President Jackson refused to enforce the decision,[71] leading to the infamous Cherokee

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2 Stat. 139, 140–41; 18 U.S.C.A. § 1152 (Westlaw through Pub. L. No. 117-102).

[61] CALLOWAY, *supra* note 49, at 453; PRUCHA, *supra* note 46, at 36 ("The factory system was very closely associated with the frontier military posts.").

[62] PRUCHA, *supra* note 46, at 47 ("The federal government was sincerely interested in preventing settlement on Indian lands only up to a point, and it readily acquiesced in illegal settlement that had gone so far as to be irremediable."); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV 1559, 1568 (2001) ("Instead of removing whites who invaded Indian lands, the Federal government had repeatedly negotiated treaties of cession from the Indians and effectively ratified the invasions, even when the lands being taken had been reserved by the Indians under previous treaties.").

[63] Indian Removal Act of 1830, ch. 148, 4 Stat. 411.

[64] Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831) ("This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.").

[65] *Id.*

[66] *Id.* at 17.

[67] *Id.* ("They look to our government for protection . . . .").

[68] Worcester v. Georgia, 31 U.S. 515, 538 (1832).

[69] *Id.* at 561 ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.").

[70] *Id.* at 556–57 ("From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate.").

[71] *See* Tim Alan Garrison, *Worcester v. Georgia (1832)*, NEW GA. ENCYC. (Feb. 20, 2018), https://www.georgiaencyclopedia.org/articles/government-politics/worcester-vgeorgia-1832 [https://perma.cc/CMV7-B9WN] ("Georgia ignored the Supreme Court's ruling, refused to release the missionaries, and continued to press the federal government to remove the Cherokee. President Jackson did not enforce the decision against the state and instead called on the Cherokee to relocate or fall under Georgia's jurisdiction."); *Worcester v. Georgia*, ENCYC. BRITANNICA (Feb. 24, 2021), https://www.britannica.com/topic/Worcester-v-Georgia [https://perma.cc/Z4X7-F2PB] ("Pres. Andrew Jackson declined to enforce the Supreme Court's decision,

Trail of Tears.[72]

The Cherokee and hundreds of other tribes were eventually placed on reservations.[73] Reservations were intended to serve as tribes' perpetual homelands,[74] free from outside interference;[75] nevertheless, the federal government asserted extreme control over reservation life.[76] Tribes possessed

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thus allowing states to enact further legislation damaging to the tribes.").

[72] *See* Ellen Holmes Pearson, *A Trail of 4,000 Tears*, TEACHINGHISTORY.ORG, http://teachinghistory.org/history-content/ask-a-historian/25652 [https://perma.cc/5GYZ-LEWG] ("It is estimated that of the approximately 16,000 Cherokee who were removed between 1836 and 1839, about 4,000 perished."); *The Trail of Tears*, PBS, https://www.pbs.org/wgbh/aia/part4/4h1567.html [https://perma.cc/M4PY-ER78] ("Over 4,000 out of 15,000 of the Cherokees died."); *The Trail of Tears—The Indian Removals*, USHISTORY.ORG, http://www.ushistory.org/us/24f.asp [https://perma.cc/JSY8-SKPS] ("About 20,000 Cherokees were marched westward at gunpoint on the infamous Trail Of Tears. Nearly a quarter perished on the way, with the remainder left to seek survival in a completely foreign land.").

[73] CANBY, *supra* note 41, at 22–24; *See* Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 315, 322 (2017) [hereinafter Crepelle & Block, *Property Rights & Freedom*] ("The reservations tribes were placed on by treaties proved ruinous for Amerindians."); Adam Crepelle, *The Time Trap: Addressing the Stereotypes that Undermine Tribal Sovereignty*, 53 COLUM. HUM. RTS. L. REV. 190, 202 (2022) [hereinafter Crepelle, *The Time Trap*] ("By the 1850s, most 'children of the wilderness' were placed on reservations."); Tim Wright, *A Curriculum Project for Washington Schools, A History of Treaties and Reservations on the Olympic Peninsula, 1855-1898*, CTR. FOR THE STUDY OF THE PAC. NW., https://content.lib.washington.edu/curriculumpackets/A_History_of_Treaties_and_Reservations.pdf [https://perma.cc/B39F-NU2E] (discussing territorial governor Isaac Stevens and Commissioner of Indian Affairs George Manypenny's plan to create a reservation system in Oregon and Washington through treaties).

[74] *See* Treaty With the Sioux, art. XV, Apr. 29, 1868, 15 Stat. 635–47 ("The Indians herein named agree that when the agency house or other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere . . . ."); Treaty With the Navajo, art. XIII, June 1, 1868, 15 Stat. 667–72 ("The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home . . . ."); United States v. Shoshone Tribe of Indians, 304 U.S. 111, 113 (1938) ("The Indians agreed that they would make the reservation their permanent home."); Save the Valley, LLC v. Santa Ynez Band of Chumash Indians, No. CV 15-02463-RGK (MANx), 2015 WL 12552060, at *1 (C.D. Cal. July 2, 2015) ("[I]n the 1938 quitclaim deed Plaintiff attached to its Complaint, the Church transferred the Parcel to the Secretary of the Interior of the United States for the express purpose of 'the establishment of a permanent Indian Reservation for the perpetual use and occupancy of the Santa Ynez band of Mission Indians . . . .'").

[75] McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020) ("And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves."); Andrew Jackson, President, First Annual Message to Congress (Dec. 8, 1829) ("As a means of effecting this end I suggest for your consideration the propriety of setting apart an ample district west of the Mississippi, and without the limits of any state or territory now formed, to be guaranteed to the Indian tribes as long as they shall occupy it, each tribe having a distinct control over the portion designated for its use. There they may be secured in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes.").

[76] DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER., CASES AND MATERIALS ON FEDERAL INDIAN LAW 221 (7th ed. 2017) (noting Senator Wheeler likened local Indian agency superintendent powers to that of "a czar"); Carrie McCrery, *Of Horses and Men: Superintendent Asbury's Assault on the Crow*,

treaty rights to food and housing, but the United States failed to honor the bargain.[77] Countless Indians died of starvation as a result.[78] The United States used hunger as a weapon to force tribal land cessions,[79] and white men used hunger to coerce Indian women into sex.[80] White men's sexual abuse of Indian

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TRIBAL COLL. J. AM. INDIAN HIGHER EDUC., Spring 2003 ("When the Office of Indian Affairs sent Superintendent Calvin Asbury to the Crow Indian Reservation in 1919, he settled in like the bone-chilling winds of that Montana winter, slowly dripping the toxic waste of human oppression onto Crow culture. The Crow Tribe remains forever affected by this zealot who deprived them of their personal freedoms and wealth while expanding his own political power."); Tanis Thorne, *The Death of Superintendent Stanley and the Cahuilla Uprising of 1907-1912*, 24 J. CAL. & GREAT BASIN ANTHRO. 233, 244 (2004) ("We complained in the past because the government put a tyrannical man over us who disregarded our wishes and rode over our rights simply because he had the power to do so.").

[77] Tim Giago, *Broken Treaties Remain Among America's Deepest and Darkest Secrets*, INDIANZ (Aug. 11, 2017), https://www.indianz.com/News/2017/08/11/tim-giago-broken-treaties-remain-among-a.asp [https://perma.cc/Y4MG-FRNG]; Rob Capriccioso, *Illuminating the Treaties That Have Governed U.S.—Indian Relationships*, SMITHSONIAN MAG. (Sept. 2014), https://www.smithsonianmag.com/smithsonian-institution/treatiesgoverned-us-indian-relationships-180952443/ [https://perma.cc/MQR2-HLJ7] (quoting Robert Odawi Porter who noted the U.S. has "so many broken treaty promises" with Indian tribes); Rory Taylor, *6 Native Leaders On What It Would Look Like If The US Kept Its Promises*, VOX (Sept. 23, 2019, 8:30 AM), https://www.vox.com/first-person/2019/9/23/20872713/native-american-indian-treaties [https://perma.cc/K2UH-X8X7]; Hansi Lo Wang, *Broken Promises on Display at Native American Treaties Exhibit*, NAT'L PUB. RADIO (Jan. 18, 2015), 4:57 PM), https://www.npr.org/sections/codeswitch/2015/01/18/368559990/broken-promises-on-display-at-native-american-treaties-exhibit [https://perma.cc/5PC2-EGT8].

[78] United States v. Sioux Nation of Indians, 448 U.S. 371, 380 n.11 (1980) ("Professor Hagan stated . . . : 'That starvation and near-starvation conditions were present on some of the sixty-odd reservations every year for the quarter century after the Civil War is manifest.'"); Sarah K. Elliott, *How American Indian Reservations Came to Be*, PUB. BROAD. SERV. (Oct. 18, 2016), https://www.pbs.org/wgbh/roadshow/stories/articles/2015/5/25/how-american-indian-reservations-came-be [https://perma.cc/6VQ9-HTM4] ("The U.S. government had promised to support the relocated tribal members with food and other supplies, but their commitments often went unfulfilled, and the Native Americans' ability to hunt, fish and gather food was severely restricted. Illness, starvation, and depression remained a constant for many."); William Least Heat-Moon, *A Stark Reminder of How the U.S. Forced American Indians Into a New Way of Life*, SMITHSONIAN MAG. (Nov. 2013), https://www.smithsonianmag.com/history/a-stark-reminder-of-how-the-us-forced-american-indians-into-anew-way-of-life-3954109/ [https://perma.cc/MH89-HKCF] ("[T]he people suffered from malnutrition: A quarter of them died of starvation. They couldn't eat paper."); *Indian Reservations*, HISTORY (Mar. 18, 2019), https://www.history.com/topics/indian-reservations [https://perma.cc/AJ4UMDXR] ("Starvation was common [on reservations]. . . .").

[79] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 346–47 (1998); *Sioux Nation of Indians*, 448 U.S. at 388 ("The court also remarked upon President Grant's duplicity in breaching the Government's treaty obligation to keep trespassers out of the Black Hills, and the pattern of duress practiced by the Government on the starving Sioux to get them to agree to the sale of the Black Hills.").

[80] *See* Gabrielle Mandeville, *Sex Trafficking on Indian Reservations*, 51 TULSA L. REV. 181, 184–85 (2015) ("Soldiers often . . . coerce[d] Native women into trading sexual favors for food, clothing, and blankets."); Mary Annette Pember, *Native Girls are Being Exploited and Destroyed at an Alarming Rate*, INDIAN COUNTRY TODAY (Sept. 13, 2018), https://indiancountrytoday.com/archive/native-girls-are-being-exploited-and-destroyed-at-an-alarming-rate?redir=1 [https://perma.cc/9Z5Z-R77L] (quoting an 1885 letter from a U.S. Indian Agent: "There is but little said in their favor regarding their moral standing, and for this there is no doubt but that the

women caused many of the Indian wars;[81] indeed, an 1867 report to Congress found "in a large majority of cases Indian wars are to be traced to the aggressions of lawless white men."[82] The Supreme Court even noted white men "will generally be found the most mischievous and dangerous inhabitants of the Indian country."[83]

Although whites caused most of the violence, Indian on Indian crime was what garnered Congressional attention. Crow Dog, a Sioux Indian, killed another Sioux on the Great Sioux Reservation.[84] The matter was solved internally, pursuant to tribal custom.[85] Sioux law was focused on restitution rather than retribution; thus, Crow Dog served no jail time nor did he receive any corporal punishment.[86] Instead, Sioux law required Crow Dog to

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Government is largely to blame. . . . When I first came here, the soldier had also come to stay. The Indian maiden's favor had a money value and what wonder is that, half clad and half starved, they bartered their honor . . . for something to cover their limbs and for food for themselves and their kin.").

[81] DEER, BEGINNING & END, *supra* note 12, at 33 ("Indeed, many tribally initiated conflicts and 'uprisings' were responses to kidnapping and sexual mistreatment of Indian women."); William Norbert Bischoff, The Yakima Indian War: 1855-1856, at 59 (June 1950) (Ph.D. dissertation, Loyola University), https://core.ac.uk/download/pdf/48610223.pdf [https://perma.cc/6K4N-6UP2] ("In this same report, [Indian subagent Andrew J.] Bolon expressed his conviction that any interference with Indian women would lead to bloodshed. There is no great secret that certain whites regarded Indian women as nothing more than playthings . . . ."); *Id.* at 62 ("One white was killed by the Indians near the mines; and Henri Mattice of Olympia was found dead on the trail to Seattle with his baggage undisturbed beside him. Pandosy maintained that this slaying had nothing to do with the intended uprising, but was due to Mattice's detestable personal conduct. He had criminally assaulted the daughter of Teias and vengeance was taken upon him by Qualchen, the high-spirited nephew of the victim."); Letter from Isaac I. Stevens, Washington Territory Delegate to Congress, to Charles E. Mix, Acting Commissioner of Indian Affairs, regarding the murderers of Indian Agent, Andrew Bolon (Dec. 28, 1857), https://digitalcollections.lib.washington.edu/digital/collection/pioneerlife/id/3579/ [https://perma.cc/7WQG-E4XP] ("Though the treaty promised stated white miners would not be allowed on reservation lands, miners frequently passed through these lands, stealing horses from the tribes and abusing Native American women. The Yakima responded by killing eight white men, including Henry Matisse . . . . Brevet Major Granville O. Haller at Fort Dalles responded by sending forces to fight against the Yakima, leading to the Yakima War (1855-56).").

[82] S. REP. NO. 39-156, at 5 (1867).

[83] United States v. Rogers, 45 U.S. 567, 573 (1846).

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

[85] TROY A. EID, AFFIE ELLIS, TOM GEDE, CAROLE GOLDBERG, STEPHANIE HERSETH SANDLIN, JEFFERSON KEEL, TED QUASULA, EARL RALPH POMEROY III & THERESA POULEY, INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 117 (2013) ("The matter was settled according to longstanding Lakota custom and tradition, which required Crow Dog to make restitution by giving Spotted Tail's family $600, eight horses, and a blanket."); Daniel L. Rotenberg, *American Indian Tribal Death – A Centennial Remembrance*, 41 U. MIAMI L. REV. 409, 413 (1986) (stating that the families of the disputants resolved the matter according to tribal custom); John Rockwell Snowden, *Ex Parte Crow Dog*, ENCYC. OF THE GREAT PLAINS, http://plainshumanities.unl.edu/encyclopedia/doc/egp.law.016 [https://perma.cc/8MSH-A4N2] (noting that Crow Dog's family compensated Spotted Tail's family with a blanket, $600, and eight horses).

[86] SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 104–05 (1994).

compensate the victim's family.[87] He did, so the matter was considered resolved among the Sioux.[88] However, local whites were outraged by the Sioux's handling of the murder.[89] As a result, the local United States Attorney intervened, and Crow Dog was sentenced to hang.[90] Crow Dog appealed to the Supreme Court which overturned the conviction, holding the United States had no jurisdiction over intertribal affairs because it would be unfair to judge "the red man's revenge by the maxims of the white man's morality."[91]

Congress responded to the Supreme Court's decision by passing the Major Crimes Act ("MCA") in 1885.[92] The MCA authorized the federal government to prosecute reservation crimes involving only Indians.[93] One year later, the Supreme Court addressed the constitutionality of the MCA.[94] The Court could not locate any constitutional provision authorizing Congress to enact the MCA.[95] Instead, the Court upheld the MCA because, "These Indian tribes *are* the wards of the nation."[96] The Court noted the United States had rendered the tribes weak and helpless; consequently, the United States owed the tribes a "duty of protection."[97]

Congress enacted the General Allotment Act of 1887 ("GAA") as part of

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[87] EID, ET AL., *supra* note 85, at 117; LEONARD CROW DOG & RICHARD ERDOES, CROW DOG 36 (1995); Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 199 (1989); *ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1712 (2016).

[88] CROW DOG & ERDOES, *supra* note 87, at 36 ("Black Crow and some others went back and forth between the two families, trying to make peace. It was decided that Crow Dog would pay six hundred dollars in blood money to Spotted Tail's relations and also five them many horses and blankets. Somehow Crow Dog's people got the money together, and the thing was settled the old Indian way. But again the whites were not satisfied."); Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 27 (2018) [hereinafter Crepelle, *Tribal Lending*]; B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 468 (1998); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 801 (2006).

[89] Crepelle, *Tribal Lending*, *supra* note 88, at 27 ("Americans of the era were dissatisfied with the punishment."); Anthony G. Gulig & Sidney L. Harring, *"An Indian Cannot Get a Morsel of Pork . . ."A Retrospective on Crow Dog, Lone Wolf, Blackbird, Tribal Sovereignty, Indian Land and Writing Indian Legal History*, 38 TULSA L. REV. 87, 89 (2002); Rotenberg, *supra* note 85, at 413 ("Influential Americans were not happy with the result.").

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

[91] *Id.* at 571.

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

[93] 18 U.S.C.A. § 1153 (Westlaw through Pub. L. No. 117-102).

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

[95] *Id.* at 378 ("This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause . . . .").

[96] *Id.* at 383.

[97] *Id.* at 384 ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

its duty of protection to the Indians.[98] Whites were clamoring for treaty guaranteed Indian lands.[99] The so-called "Friends of the Indians," eastern whites who usually had little to no real life experience with Indians,[100] believed privatizing Indian lands was the best means of protecting Indians.[101] Thus, reservations were broken into 160-acre parcels for each Indian head of household.[102] Lands remaining after Indians received their allotments were opened to white settlers.[103] Not only would white settlers be appeased by gaining access to Indian lands, Friends of the Indians hoped the Indians would abandon their cultures in favor of the ways of their new white neighbors.[104] While Indians overwhelmingly opposed allotment,[105] the Supreme Court held Congress could break treaties with tribes because Indians were under "the control and protection of the United States."[106] Captain Richard Pratt summed up assimilation's protective component by declaring "that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man."[107]

The GAA and assimilation had near apocalyptic consequences for tribes.

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[98] General Allotment Act of Feb. 8, 1887, Pub. L. No. 49-105, ch. 119, 24 Stat. 388, *repealed by* Act of Nov. 7, 2000, Pub. L. No. 106-462, 114 Stat. 1991 (codified as amended in scattered sections of 25 U.S.C.).

[99] C. Blue Clark, *How Bad It Really Was Before World War II: Sovereignty*, 23 OKLA. CITY U. L. REV. 175, 182 (1998) ("Washington, D.C., was too far away for the Indian agent to gain any quick relief from the rising population pressure. Randlett was not able to stem the rising tide of Whites taking advantage of his native wards.").

[100] Bobroff, *supra* note 62, at 1603 ("The 'Friends of the Indian' paid little attention to what Indians thought about allotment. One of the movement's more radical leaders, Rev. Lyman Abbott, bragged proudly in his autobiography that he had never visited an Indian reservation or known more than ten Indians in his life.").

[101] Wilcomb E. Washburn, *The Historical Context of American Indian Legal Problems*, 40 L. & CONTEMP. PROBS. 12, 18 (1976) ("Viewed in the most favorable light, the 'friends of the Indians' sought to save the Indians from destruction by authorizing the government to take from them some of their lands in exchange for a stronger title to the remainder.").

[102] CANBY, *supra* note 41, at 25; Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 521 (2013).

[103] *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 335–36 (1998) ("Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers."); DeCouteau v. Dist. Cnty. Ct. for Tenth Jud. Dist., 420 U.S. 425, 462 (1975) (Douglas, J., dissenting) ("The purpose was not to alter or change the reservation but to lure white settlers onto the reservation whose habits of work and leanings toward education would invigorate life on the reservation."); Mattz v. Arnett, 412 U.S. 481, 496 (1973) ("Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways."); *see also* Pommersheim, *supra* note 102, at 521–22.

[104] Washburn, *supra* note 101, at 18–19 ("The principal force behind the law was the vast corps of Indian rights organizations who convinced themselves that allotment and assimilation were the only solutions to the Indian 'problem.'").

[105] Bobroff, *supra* note 62, at 1604–05 ("Although some Indians argued that obtaining fee patents to their lands would give them the same protection the white man had, the overwhelming majority of Indians opposed dividing tribal lands and breaking up the tribal system.").

[106] Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903).

[107] Richard H. Pratt, *The Advantages of Mingling Indians with Whites, in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE NINETEENTH ANNUAL SESSION HELD IN DENVER, COL., JUNE 23-29, 1892, at 45, 46 (Isabel C. Barrows ed., 1892).

Despite the stated aim of converting Indians into farmers,[108] most of the lands the United States provided Indians were unsuited for agriculture.[109] Indians were not provided with farm implements either;[110] hence, the GAA cast most Indians into dire poverty.[111] Moreover, federal police were ordered "to wipe out all tribal and communal interests and assist in individualizing tribal rights."[112] Congress took other measures for the Indians' "protection,"[113] but the federal government's paternalistic policies merely caused discord among the Indians.[114] The federal government's destruction of tribal institutions left Indian country lawless.[115]

Allotment was a disaster for Indians, so Congress changed approaches in 1934 with the Indian Reorganization Act ("IRA").[116] The IRA's key provision ended the GAA—a good thing; however, the IRA locked Indian lands in trust status.[117] Trust status succeeded in protecting tribal land bases from further diminishment, but the trust status prevented Indians from using their land without first gaining federal approval.[118] The United States also imposed

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[108] CANBY, *supra* note 41, at 24–25; PRUCHA, *supra* note 46, at 227 ("Dissatisfaction with the Dawes Act soon arose, however, when it was realized that the allotment of a homestead to an Indian did not automatically turn him into a practical farmer.").

[109] *Id.* at 26 ("Of the 48 million acres that remained, some 20 million were desert or semidesert."); Crepelle & Block, *Property Rights & Freedom*, *supra* note 73, at 322 (noting that much of the lands tribes retained after allotment was "unsuitable for farming."); Steven J. Gunn, *Indian General Allotment Act (Dawes Act) (1887)*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/indian-general-allotment-act-dawes-act-1887 [https://perma.cc/SE94-LP8X] ("Most allotted lands were not suitable for agriculture.").

[110] Pommersheim, *supra* note 102, at 522 ("It was grossly undercapitalized, sometimes providing less than ten dollars per allottee for implements, seeds, and instructions"); Gunn, *supra* note 109 ("The government made only minimal efforts to provide farming equipment to the indigenous peoples. Its annual appropriations for that purpose were often no more than $10.00 per Native."); R. Douglas Hurt, *Native American Agriculture*, ENCYC. OF THE GREAT PLAINS (David J. Wishart ed.), http://plainshumanities.unl.edu/encyclopedia/doc/egp.ag.052 [https://perma.cc/3XLQ-Q5RM] (noting the United States failed to provide resources to give Indians the opportunity to become successful farmers on their allotments).

[111] LEWIS MERIAM, INST. FOR GOV'T RES., THE PROBLEM OF INDIAN ADMINISTRATION 3 (1928) ("An overwhelming majority of the Indians are poor, even extremely poor. . . .").

[112] Clark, *supra* note 99, at 183.

[113] *Id.* at 184 ("The federal government intruded more and more into the Indians' lives with a variety of measures enacted for their 'protection.'").

[114] *Id.* at 185 ("Outbreaks among Indians in eastern Oklahoma accompanied the trauma of allotment and assimilation.").

[115] ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 154 (2000) ("Collier most likely took this approach in part because he accepted the theory that a legal vacuum existed on most reservations.").

[116] Indian Reorganization Act of 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–29).

[117] *See id.* § 2.

[118] S. REP. NO. 101-216, at 51 (1989) ("The Indian Reorganization Act declared an end to the policy of allotment, but it severely restricted the powers and the autonomy of the new tribal governments which would operate under its authority."); CANBY, *supra* note 41, at 28 (noting tribal self-government existed at the whim of the Secretary of the Interior); Crepelle & Block, *Property Rights & Freedom*, *supra* note 73, at 324 ("The [IRA] . . . did relatively little to improve tribal sovereignty because the Secretary of the Interior was granted power over virtually all tribal

governing structures upon tribes for the Indians' own good.[119] Although the IRA was supposed to foster tribal self-government,[120] the IRA was paternalistic at its core. As Harold Ickes, Secretary of the Interior from 1933 to 1946,[121] declared, "The whites can take care of themselves, but the Indians need some one [sic] to protect them from exploitation."[122]

The IRA failed to bring about tribal self-government,[123] so the United States turned to a policy of tribal termination.[124] Public Law 83-280 ("PL 280")[125] was a cornerstone of the federal government's tribal termination policy.[126] Congress deemed reservations lawless; thus, PL 280 extended state criminal authority over Indian country in five states and the Alaska Territory.[127] Other states were allowed to assert their jurisdiction over tribes if the state so desired.[128] Indians universally opposed the extension of state criminal law over their lands, but the law was enacted anyway for the Indians' own good.[129] Moreover, Congress failed to note the lawlessness stemmed from

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activities."); Crepelle, *The Time Trap*, *supra* note 73, at 205–06 ("Trust status prevented the erosion of tribal land bases, but trust status placed the Secretary of the Interior in charge of all activities on tribal lands.").

[119] Clark, *supra* note 99, at 187–88 ("Throughout the decade, the BIA arbitrarily set up tribal governing councils and their constitutions."); Adam Crepelle, *Decolonizing Reservation Economies: Returning To Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 413, 438–39 (2019) [hereinafter Crepelle, *Decolonizing*].

[120] Morton v. Mancari, 417 U.S. 535, 542 (1974) ("The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973).

[121] *Harold Ickes (1874-1952)*, LIVING NEW DEAL (Mar. 3, 2017), https://livingnewdeal.org/glossary/harold-ickes-1874-1952/ [https://perma.cc/7KGU-6TTE].

[122] PRUCHA, *supra* note 46, at 317.

[123] Crepelle, *The Time-Trap*, *supra* note 73, at 207.

[124] Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L., 683, 700 (2021) [hereinafter Crepelle, *Business Development in Indian Country*] ("Federal Indian policy shifted from supporting tribes to terminating them in the 1950s."); Crepelle, *Decolonizing*, *supra* note 119, at 440 ("The era of the Indian New Deal came to a close in the aftermath of the Second World War and was replaced by the assimilationist tribal termination policy."); *see also* CANBY, *supra* note 41, at 29; DONALD FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960 (1990).

[125] Act of August 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C. & 25 U.S.C.).

[126] NAT'L INDIAN JUST. CTR., MUTUAL SOLUTIONS FOR THE SAFETY OF NATIVE WOMEN IN PUBLIC LAW 280 STATES RESOURCE MANUAL 1 (2010), https://www.nijc.org/pdfs/PL280Manual/MutualSolutionsManualFinal-reducedfilesize.pdf [https://perma.cc/4AYF-X6XR] ("After House Resolution 108 that called for 'freeing' the Indians from the federal dominion, Congress enacted P.L. 280 that served as a "jumpstart" piece of legislation to carry Indian termination forward").

[127] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987) ("Congress's primary concern in enacting Pub. L. 280 was combating lawlessness on reservations."); *see also* Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1632–34 (1998).

[128] Pub. L. No. 83-820, ch. 505, § 7.

[129] Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 376 (1953).

the United States' eradication of tribal justice institutions and the United States' failure to provide resources for Indian country law enforcement.[130] Since its inception, PL 280 has been associated with higher reservation crime rates because states are unenthusiastic about policing lands they cannot tax.[131]

PL 280 and other termination policies were designed to liberate Indians from the shackles of federal wardship;[132] nonetheless, the great Indian law scholar Felix Cohen averred federal bureaucrats used termination as justification for increased power over Indians.[133] Cohen claimed the Bureau of Indian Affairs ("BIA") opposed every effort to release Indians from federal control because the BIA believed Indians needed federal protection.[134] Federal bureaucrats during the 1950s alleged federal laws were needed to protect Indians from purchasing vanilla extract because it contained trace amounts of alcohol.[135] Federal protective paternalism allegedly included the power to set Indian bed times.[136]

The United States began examining Indian rights during the 1960s.[137] Congress discovered a long streak of discrimination and civil rights violations against Indians.[138] While federal officials had a long history of abusing Indians,[139] Congress focused instead on instances of tribal governments

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[130] Jiménez & Song, *supra* note 127, at 1660.

[131] Adam Crepelle, *The Law and Economics of Crime in Indian Country: Why Things Are So Bad*, 110 GEO. L. J. (forthcoming 2022) (manuscript at 18-19) (on file with author) [hereinafter Crepelle, *Law & Economics*] ("Without funding for reservation policing, states often chose not to patrol reservations in PL 280 states.); Adam Crepelle, *Concealed Carry to Reduce Sexual Violence Against Indian Women*, 26 KAN. J.L. & PUB. POL'Y 236, 242 (2017) ("State and local law enforcement in PL 280 states often make the economically rational decision not to patrol reservations within their borders.").

[132] H.R. CON. RES. 108, 83d Cong., 67 Stat. B132 (1953) ("Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship . . . . ").

[133] Cohen, *supra* note 129, at 386 ("An example of the same process closer to home and easier to observe is the intensive power drive which the Bureau of Indian Affairs has been carrying on under the slogan of 'winding up the Indian Bureau.'").

[134] *Id.* at 357 ("Every anti-discrimination bill so far introduced on behalf of Indians has been opposed by the Bureau.").

[135] *Id.*

[136] *Id.* at 360 ("Telling Indians when to go to bed and when to get up is not just a whimsical bit of paternalism.").

[137] *See* Williams v. Lee, 358 U.S. 217, 220 (1959); *see also* Exec. Order No. 11399, 33 Fed. Reg. 4245 (Mar. 6, 1968); Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 1 PUB. PAPERS 335, 337 (Mar. 6, 1968) ("Indians must have a voice in making the plans and decisions in programs which are important to their daily life."); Letter from John F. Kennedy, U.S. President, to Oliver La Farge, President, Ass'n of Am. Indian Affs. (Oct. 28, 1960) (describing his administration's position towards American Indians); Crepelle, *The Time Trap*, *supra* note 73, at 208 ("The Civil Rights Movement hit full steam in the 1960s, and society's attitude towards Indians slowly began to change.").

[138] PRUCHA, *supra* note 46, at 363 ("At the same time there was increasing awareness of discrimination against Indians and of numerous violations of their civil rights.").

[139] MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 250 (2016); Cohen, *supra* note 129, at 360

violating the rights of their citizens.[140] Indians had no constitutional rights against tribal governments because tribes are not parties to the Constitution.[141] Congress's solution to this issue was the Indian Civil Rights Act of 1968 ("ICRA"), which extended most Bill of Rights protections to Indian tribes.[142] Congress also protected Indians from tribal governments by limiting tribal sentencing power to six months in jail and a $500 fine.[143] Notable from a protection perspective, the ICRA did not extend the right to bear arms to Indians,[144] a right the Supreme Court has deemed a natural corollary of the right to defend oneself.[145] Indians generally opposed the ICRA, but Congress viewed the ICRA as part of its duty to protect Indians.[146]

B. Tribal Self-Determination While Rendering Tribes Helpless

In a 1970 special message to Congress, President Nixon disavowed the United States' tribal termination policy in favor of a policy of tribal self-determination.[147] President Nixon advocated for the total transfer of federal Indian programs to the tribes themselves.[148] Although President Nixon's proposal did not become law, the idea conceived the Indian Self-Determination and Education Assistance Act of 1975.[149] Every president and Congress since has embraced tribal self-determination;[150] however, the Supreme Court turned

("Telling Indians when to go to bed and when to get up is not just a whimsical bit of paternalism. It has deep roots in a long tradition under which Indians for many decades were subjected to arrest and even death if they did not behave as white officials wanted them to behave.").

[140] *ICRA Reconsidered: New Interpretations of Familiar Rights*, *supra* note 87, at 1715.

[141] Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991) (noting that tribes surrendered no powers at the Constitutional Convention); Talton v. Mayes, 163 U.S. 376, 385 (1896) (holding the Bill of Rights does not apply to Indian tribes).

[142] *See* 25 U.S.C.A. § 1302 (Westlaw through Pub. L. No. 117-102).

[143] EID ET AL., *supra* note 85, at 21.

[144] Adam Crepelle, *Shooting Down Oliphant: Self-Defense As An Answer to Crime In Indian Country*, 22 LEWIS & CLARK L. REV. 1284, 1312 (2018) [hereinafter Crepelle, *Shooting Down Oliphant*] ("The Indian Civil Rights Act (ICRA) offers individuals in Indian country many protections similar to the Bill of Rights, but the ICRA contains no Second Amendment analogue.").

[145] *Id.* at 1312–13.

[146] Carla Christofferson, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 171 (1991) ("Few Native Americans saw the ICRA as a protection of their individual rights against tribal violations. Instead, most Indians saw it as a federal intrusion into tribal affairs. Congress stated that this 'Indian Bill of Rights' was needed to protect individual Indians against abuses by the tribes because Indians had no federal or state constitutional rights vis-à-vis the tribes.").

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

[148] *Id.*; PRUCHA, *supra* note 45, at 379–80.

[149] Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. ch. 46).

[150] *See, e.g.*, Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); Statement on Signing the Indian Self-Determination Assistance Act Amendments of 1988, 2 PUB. PAPERS 1284–85 (Oct. 5, 1988); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662–63 (June 14, 1991); Statement on Signing the Executive Order on Consultation and Coordination with Indian Tribal Governments, 3 PUB. PAPERS 2487–88 (Nov. 6, 2000); Memorandum on Government-to-

sharply hostile to tribal interests during the same time.[151] Nowhere are the effects of the Supreme Court's post 1970s jurisprudence more impactful than tribal public safety, and the Supreme Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe* is responsible for most of the harm Indians have suffered.[152]

Mark David Oliphant was a non-Indian resident of the Port Madison Indian Reservation.[153] During a tribal celebration, Oliphant got drunk and punched a tribal police officer.[154] The tribe proceeded against Oliphant in tribal court.[155] Oliphant responded by seeking federal court review of his tribal detention under the ICRA.[156] Oliphant's habeas corpus was not based upon any tribal malfeasance; rather, Oliphant believed, as a non-Indian, he should be immune from tribal jurisdiction.[157] The federal district court rejected this reasoning.[158] The Ninth Circuit found no support for Oliphant's position either and stated tribal criminal jurisdiction over non-Indians is a "necessary" part of Congress's tribal self-determination policy.[159] Furthermore, the Ninth Circuit noted prohibiting tribes from prosecuting non-Indian criminals would contradict Congress's long running concern about protecting tribes "from depredations by 'unprincipled white men'"[160] and facilitate "lawless behavior"

Government Relationship With Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004); EXEC. OFF. OF THE PRESIDENT, 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT, A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS (2017), https://obamawhitehous e.archives.gov/sites/default/files/docs/whncaa_report.pdf [https://perma.cc/439W-2QWH]; Alysa Landry, *Jimmy Carter: Signed ICWA into Law*, INDIAN COUNTRY TODAY (Sept. 12, 2017), https://newsmaven.io/indiancountrytoday/archive/jimmy-carter-signed-icwainto-law-GtsQUN5 tRkG1iNzMVHJP8g/ [https://perma.cc/X4HS-9FDQ] ("During his presidential campaign in 1976, Carter's staff reached out to the National Congress of American Indians and the National Tribal Chairmen's Association. Carter met briefly with some leaders and his staff drafted a position paper that endorsed Indian self-determination policy, already in force."); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. NO. 00091 (Jan. 26, 2021).

[151] N. Bruce Duthu, *The New Indian Wars: Tribal Sovereignty, The Courts and Judicial Violence*, 144 FRENCH J. AM. STUD. 78, 81 (2015) ("In contrast to its present posture toward the tribal nations, the Supreme Court historically was often the sole branch of the federal government that behaved in a way that respected, in some significant measure, the rights and interests of Native peoples and their governments.").

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

[153] *Id.* at 194.

[154] *Id.*; 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 264 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011).

[155] *Oliphant*, 435 U.S. at 194.

[156] *Id.*

[157] *Id.*

[158] Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976) ("The district court denied the writ and Oliphant appeals.").

[159] *Id.* at 1013 ("Tribal criminal jurisdiction over non-Indians, as limited by the Indian Bill of Rights, is a small but necessary part of this policy.").

[160] *Id.* at 1011 (explaining the rationale of Section 1152 as an "attempt to protect Indian tribes, who had no established legal system and whose authority was frequently challenged by unsympathetic state governments from depredations by unprincipled white men." (citations omitted)).

on reservations.[161]

The Supreme Court disagreed with the lower courts' reasoning and held tribal courts lack criminal jurisdiction over non-Indians.[162] Although the Court acknowledged the United States had long been concerned about protecting Indians "from the violences of the lawless part of our frontier inhabitants,"[163] the Court believed Indians' protection from non-Indians came exclusively from the federal and state governments.[164] The Court ceded there was no evidence the Suquamish had ever relinquished its inherent sovereign power to prosecute non-Indian criminals in the tribe's territory;[165] nevertheless, the Court said it assumed Congress implicitly divested the Suquamish of this power.[166] To reach this conclusion, the Court relied on two centuries of overtly anti-Indian racism.[167] The Court admitted its decision would likely lead to increased non-Indian crime on reservations but said the problem is for Congress to solve.[168]

Nearly fifty years later, Congress has yet to solve the problem. Congress partially overturned *Oliphant* with VAWA in 2013.[169] Under VAWA, tribes can prosecute non-Indians for dating violence, domestic violence, and protective order violations.[170] However, Congress requires tribes to meet more stringent procedural safeguards than any jurisdiction in the United States when prosecuting non-Indians under VAWA.[171] These procedural safeguards are

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[161] *Id.* at 1014 ("The dignity of the tribal government suffers in the eyes of Indian and non-Indian alike, and a tendency toward lawless behavior necessarily follows.").
[162] *Oliphant*, 435 U.S. at 195 ("We decide that they do not.").
[163] *Id.* at 201.
[164] *Id.* ("Beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137, therefore, Congress assumed federal jurisdiction over offenses by non-Indians against Indians which 'would be punishable by the laws of [the] state or district . . . if the offense had been committed against a citizen or white inhabitant thereof.' In 1817, Congress went one step further and extended federal enclave law to the Indian country; the only exception was for 'any offence committed by one Indian against another.'" (citation omitted)).
[165] *Id.* at 208 ("By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction.").
[166] *Id.* at 204 ("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.").
[167] *Id.* at 206 ("'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."). For more on "the common notions of the day and the assumptions of those who drafted them," see Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529 (2021).
[168] *Oliphant*, 435 U.S. at 212 ("Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians.").
[169] *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of 25 U.S.C. & 42 U.S.C.).
[170] *Id.* § 904. President Biden expanded tribal jurisdiction in the March 2022 reauthorization of VAWA. White House, *supra* note 30.
[171] Matthew L.M. Fletcher, *Failed Protectors: The Indian Trust and Killers of the Flower Moon*, 117 MICH. L. REV. 1253, 1268 (2019) ("Both TLOA and VAWA require Indian tribes to

costly.[172] Congress knew most tribes could not afford to implement VAWA's procedural safeguards,[173] and as of April 2022, only twenty-seven of the 574 federally recognized tribes have implemented VAWA.[174] VAWA's expensive procedural safeguards largely mimic the 2010 amendments to the ICRA, which allow tribes to put offenders in jail for a maximum of three years per offense.[175] Consequently, the limitations on tribal jurisdiction leave tribes dependent on outside law enforcement.

But state and federal law enforcement agents are not interested in Indian country crimes.[176] Indian country is often located over one hundred miles from non-Indian law enforcement agencies; plus, bad roads, homes with no addresses, and poor telecommunications infrastructure make traveling to Indian country unappealing—particularly when crimes need to be solved outside of Indian country.[177] Jurisdiction is also far more complicated in Indian country than outside.[178] For example, determining whether the tribe, state, or federal government has arrest and prosecutorial authority requires discerning whether the victim and offender are Indians, whether the crime scene qualifies as Indian country, and the nature of the offense.[179] These questions are often

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guarantee criminal procedural rights beyond those required for any criminal defendant in any other jurisdiction in the United States.").

[172] MAUREEN L. WHITE EAGLE, MELISSA L. TATUM & CHIA HALPERN BEETSO, TRIBAL LAW & POL'Y INST., TRIBAL LEGAL CODE RESOURCE: TRIBAL LAWS IMPLEMENTING TLOA ENHANCED SENTENCING AND VAWA ENHANCED JURISDICTION 21 (2015), http://www.tribal-institute.org/download/TLOA-VAWA-Guide.pdf [https://perma.cc/XDM4-9KDB] ("Complying with all of these requirements will be expensive, both in time and in money."); NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 29 (2018), http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/A3MK-84BH] ("The primary reason tribes report for why SDVCJ has not been more broadly implemented is a focus on other priorities and a lack of resources. During and beyond the implementation phase, tribes need funding, access to resources, and services to support implementation."); Riley, *supra* note 23, at 1631 ("Costs stand as the greatest barrier to making any kind of meaningful change in criminal justice in Indian country. Tribes contemplating VAWA report that a lack of resources is the primary reason they have not implemented the laws.").

[173] 25 U.S.C.A. § 3651(8) (Westlaw through Pub. L. No. 117-102); U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-252, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS 21 (2011) ("Further, officials at 11 of the 12 tribes we visited noted that their tribal courts' budgets are inadequate to properly carry out the duties of the court.").

[174] *Currently Implementing Tribes*, NAT'L CONG. OF AM. INDIANS, https://www.ncai.org/tribal-vawa/get-started/currently-implementing-tribes [https://perma.cc/T5T3-E2U8].

[175] 25 U.S.C.A. § 1302(b)–(c) (Westlaw through Pub. L. No. 117-102).

[176] Crepelle, *Law & Economics*, *supra* note 131 (manuscript at 13–14, 36).

[177] *Id.* (manuscript at 34–36).

[178] *Id.* (manuscript at 27) ("Criminal jurisdiction is usually very simple: offender commits crime, police arrest him, and the offender is prosecuted where the crime occurred. This is not how it works in Indian country.").

[179] EID ET AL., *supra* note 85, at 9 ("The jurisdictional problems often make it difficult or even impossible to determine at the crime scene whether the victim and suspect are 'Indian' or 'non-Indian' for purposes of deciding which jurisdiction—Federal, State, and/or Tribal—has responsibility and which criminal laws apply.").

complex and can take years to litigate.[180] Contrarily, jurisdiction is a straightforward proposition outside of Indian country.[181] Lamenting Indian country's jurisdictional morass, Justice Douglas stated it benefits only "those who benefit from confusion and uncertainty."[182]

Despite the obvious flaws with the system, Indian country's criminal jurisdiction scheme can work if outside law enforcement takes Indian country crime seriously.[183] States ordinarily lack jurisdiction over crimes involving Indians in Indian country.[184] But even when states have jurisdiction over Indian country crimes under PL 280, states generally lack incentives to pursue crimes against Indians because Indians are generally a small, poor political minority;[185] in fact, Indians often receive no police attention when victimized outside of Indian country.[186] Federal prosecutors usually are not passionate about pursuing the types of crimes afflicting Indian country either.[187] Even if a federal prosecutor is interested in Indian country crime, the prosecutor's boss, the local U.S. Attorney, probably is not. Hence, federal prosecutors have allegedly been fired for focusing on Indian country crime.[188]

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[180] *Land Tenure Issues*, INDIAN LAND TENURE FOUND., https://iltf.org/land-is sues/issues/ [https://perma.cc/4P8Q-CW29] ("Jurisdictional challenges are common on checkerboard reservations, as different governing authorities - county, state, federal, and tribal governments for example - claim the authority to regulate, tax, or perform various activities within reservation borders.").

[181] Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); Julie R. O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1031 (2018) (noting that subjective territorial jurisdiction "has long enjoyed the Supreme Court's full-throated support.").

[182] DeCouteau v. Dist. Cnty. Ct. for Tenth Jud. Dist., 420 U.S. 425, 467 (1975) (Douglas, J., dissenting).

[183] EID ET AL., *supra* note 85, at 64–65 (noting crime dropped on four reservations when the federal government increased law enforcement funding, but the funding was terminated after two years).

[184] *See* MIKKANEN, *supra* note 20.

[185] Crepelle, *Law & Economics*, *supra* note 131 (manuscript at 37) ("Indians are usually politically powerless minorities in the surrounding state; hence, states have no incentive to protect Indians.").

[186] *Id.* at (manuscript at 38) ("Evidence shows that Indians experience high rates of violence even outside of Indian country, and outside of Indian country, there is no jurisdictional disincentive for law enforcement. Nonetheless, Indian women go missing in urban areas without receiving any law enforcement response or receiving media attention.").

[187] AMY L. CASSELMAN, INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN 55 (2015); Kevin K. Washburn, *American Indians, Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1013-14 (2008); Cary Aspinwall & Graham Lee Brewer, *Half of Oklahoma is Now Indian Country. What Does That Mean for Criminal Justice There?*, MARSHALL PROJECT (Aug. 4, 2020, 6:00 AM), https://www.themarshallproject.org/2020/08/04/half-of-oklahoma-is-now-indian-territory-what-does-that-mean-for-criminal-justice-there [https://perma.cc/L5YU-JM53] ("It's an unusual crime for that office to try; the federal government generally devotes its prosecutorial resources to uncovering drug rings, human trafficking and multimillion-dollar financial crimes.").

[188] *Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affs*., 110th

The federal government has left tribes exceedingly vulnerable to non-Indian criminals. In 2010, Congress found non-Indians exploit Indian country's jurisdictional framework.[189] The United States Commission on Civil Rights declared, "Native Americans have become easy crime targets."[190] Former Senator Byron Dorgan asserted, "[T]he current state of affairs can merely be described as a national disgrace and one that we must address."[191] The next Part of this Article examines whether governments can be held liable for failing to prevent crime.

III. HOLDING GOVERNMENTS LIABLE FOR CRIME

Governments usually have no duty to enforce their laws, but there are exceptions to this general rule. Like any other entity, governments and their agents can be held liable for negligence. Similarly, governments can be held liable if the government itself creates the danger. In certain circumstances, individuals can have a property interest in government services, including police protection. This section explores these three grounds for government liability in the public safety context.

A. The Public Duty Doctrine and Negligence

Police exist to protect the public from criminals;[192] however, police are not obligated to respond to individuals' calls for help.[193] Paradoxically, police owe their duty to the general public, and courts have surmised individual victims do not constitute the public.[194] This rationale originated in the 1855

Cong. 69 (2007) (statement of Hon. Byron L. Dorgan, U.S. Sen. from N.D., Chairman) [hereinafter Statement of Hon. Byron L. Dorgan] ("But when I hear someone come to the Congress to say that a U.S. Attorney was threatened to be fired or was on a list to be fired because he or she spent too much time working on Native American issues, I worry about that. I notice that either four of the eight or five of the eight U.S. Attorneys who were in fact replaced were on the committee, the committee that you were on, dealing with Native Americans. Is that purely coincidence?").

[189] Tribal Law and Order Act of 2010, Pub. L. No. 111–211, § 202 (a)(4)(B), 124 Stat. 2261, 2262 (codified as amended in scattered sections of 25 U.S.C. & 42 U.S.C.).

[190] U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 68 (2003), http://www.usccr.gov/pubs/na0703/na0731.pdf [https://perma.cc/8L7Y-NM59].

[191] Statement of Hon. Byron L. Dorgan, *supra* note 188, at 2.

[192] Warren v. District of Columbia, 444 A.2d 1, 4 (D.C. 1981) ("A publicly maintained police force constitutes a basic governmental service provided to benefit the community at large by promoting public peace, safety and good order.").

[193] Richard W. Stevens, *Just Dial 911? The Myth of Police Protection*, FOUND. FOR ECON. EDUC. (Apr. 1, 2000), https://fee.org/articles/just-dial-911-the-myth-of-police-protection/ [https://perma.cc/43XU-YWKT] ("Second, the government and the police in most localities *owe no legal duty to protect individuals from criminal attack.*"); *The Government's Duty to Protect the Lives of its Citizens Under the Due Process Clause*, EXPLORING CONST. CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/stateactionprotect.html [https://perma.cc/U7YJ-NCKF] ("The Supreme Court has generally declined to find that the Constitution imposes affirmative obligations on the government to help citizens.").

[194] Lee C. Baxter, Gonzales v. City of Bozeman: *The Public Duty Doctrine's Unconstitutional*

case of *South v. Maryland*.[195] The case arose from Sheriff South's failure to respond to Mr. Pottle's request for protection.[196] As a result of the Sheriff's neglect, Mr. Pottle was kidnapped and forced to pay $2,500 in exchange for his life.[197] Mr. Pottle sued the Sheriff for neglecting his duties, but the Supreme Court held sheriffs are not liable for failing to protect the citizens in their jurisdiction.[198] This is now known as the public duty doctrine.[199]

The public duty doctrine protects law enforcement officials from liability in most circumstances.[200] For example, the District of Columbia's Court of Appeals held police are not liable for failing to intervene despite being at the scene of ongoing rapes.[201] Statutory language mandating the enforcement of protective orders—along with clear legislative history indicating the legislature's intent to make protective order enforcement mandatory[202]—is not enough to hold police liable for failing to enforce the protective order according to the Supreme Court.[203] The public duty doctrine has also shielded cops from claims of corruption.[204] Police have been shielded from liability in countless other cases by the public duty doctrine.[205]

The public duty doctrine has been widely criticized,[206] yet it endures for

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Treatment of Government Defendants in Tort Claims, 72 MONT. L. REV. 299, 308 (2011) ("Where a 'duty to all equals a duty to no one,' governmental defendants do not owe duties that would exist under traditional tort principles."); John Cameron McMillan, Jr., *Government Liability and the Public Duty Doctrine*, 32 VILL. L. REV. 505, 509 (1987) ("Often referred to as the 'duty to all, duty to no one' doctrine, the public duty doctrine provides that since government owes a duty to the public in general, it does not owe a duty to any individual citizen.").

[195] *See* South v. Maryland, 59 U.S. 396 (1855).

[196] *Id.* at 401.

[197] *Id.* ("The breach alleged is, in substance, 'that while Pottle was engaged about his lawful business, certain evil-disposed persons came about him, hindered and prevented him, threatened his life, with force of arms demanded of him a large sum of money, and imprisoned and detained him for the space of four days, and until he paid them the sum of $2,500 for his enlargement.'").

[198] *Id.* at 403 ("But no instance can be found where a civil action has been sustained against him for his default or misbehavior as conservator of the peace by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections.").

[199] McMillan, Jr., *supra* note 194, at 509 ("The origins of the public duty doctrine may be traced to the United States Supreme Court's decision in *South v. Maryland*.").

[200] 30 AM. JUR. PROOF OF FACTS 2D *Rule of Nonliability for Negligent Failure to Prevent Crime* § 2, Westlaw (database updated Feb. 2022) ("Most states, however, rely on the no-duty rule as a shield against governmental liability for inadequate police protection.").

[201] Warren v. District of Columbia, 444 A.2d 1, 2 (D.C. 1981) ("After rearguments, notwithstanding our sympathy for appellants who were the tragic victims of despicable criminal acts, we affirm the judgments of dismissal.").

[202] Town of Castle Rock v. Gonzales, 545 U.S. 748, 759–60 (2005).

[203] *Id.* at 761 ("Against that backdrop, a true mandate of police action would require some stronger indication from the Colorado Legislature than 'shall use every reasonable means to enforce a restraining order.'").

[204] Danner v. City of Charles Town, No. 14-1214 (W.Va. Sup. Ct., Nov. 20, 2015) (memorandum decision).

[205] Steve Papenfuhs & Eric P. Daigle, *Addressing Cops' Confusion Over 'the Public Duty Doctrine,'* POLICE1 (Jan. 5, 2012), https://www.police1.com/police-jobs-and-careers/articles/addressing-cops-confusion-over-the-public-duty-doctrine-SDnVxWnDhgenqAXO/ [https://perma.cc/E6CM-QJDF].

[206] 30 AM. JUR. PROOF OF FACTS 2D *Criticisms of No-Duty Rule: Suggestions for Change* § 3,

two primary reasons.[207] One reason is imposing liability on municipalities for an insufficient police response would place a significant burden on taxpayers.[208] Police discretion is the other, as permitting courts to second-guess in the moment decisions with the benefit of hindsight would be unfair to police.[209] However, critics contend abolishing the public duty doctrine is unlikely to result in crushing costs to taxpayers,[210] and eliminating the public duty doctrine would provide police with an incentive to better allocate law enforcement resources.[211] Another criticism of the public duty doctrine is its transferring the cost of crime to innocent victims rather than the government that failed to prevent the crime, which strikes most people as unjust.[212]

While the public duty doctrine is a substantial aegis, it can be overcome. The most common way to overcome the doctrine is by establishing a special relationship.[213] A special relationship exists when an individual proves law enforcement singled them out from the general public.[214] Courts have held a

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Westlaw (database updated Feb. 2022) ("The no-duty rule has been subjected to severe criticism, and various suggestions have been made for its abolition or relaxation.").

[207] 18 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53:21 (3d ed.) ("Courts give several reasons for the rule.").

[208] 30 AM. JUR. PROOF OF FACTS 2D *Rule of Nonliability for Negligent Failure to Prevent Crime* § 2, Westlaw (database updated Feb. 2022) ("Probably the primary reason is a fear that imposition of liability based on a duty to protect individuals adequately would result in astronomical financial burdens on municipal governments."); McMillan, *supra* note 194, at 533 ("The second and most basic rationale for the public duty doctrine's application is simply preservation of municipal funds.").

[209] 30 AM. JUR. PROOF OF FACTS 2D *Rule of Nonliability for Negligent Failure to Prevent Crime* § 2, Westlaw (database updated Feb. 2022) ("It has also been argued that to allow recovery based on inadequate police protection would congest the courts and improperly interfere with the discretion necessarily exercised by police departments in allocating resources."); McMillan, *supra* note 194, at 530 ("The first justification is that abrogation of the public duty doctrine will unduly interfere with governmental operations.").

[210] 30 AM. JUR. PROOF OF FACTS 2D *Criticisms of No-Duty Rule; Suggestions for Change* § 3, Westlaw (database updated Feb. 2022) ("The fear that relaxation of the no-duty rule would result in further court congestion and would severely deplete municipal treasuries has also been questioned. In this regard, it has been pointed out that imposition of municipal liability in other areas has not had that effect and that a municipality could minimize its costs by procuring insurance.").

[211] *Id.* ("Such increased attention might in turn result in the adoption of needed reforms and in more efficient allocation of police resources, with a concomitant reduction in crime, particularly crime that is preventable by efficient police work."); McMillan, *supra* note 194, at 530 ("It is submitted, however, that imposing liability on police merely provides an incentive for law enforcement officers to perform their pre-existing job responsibilities adequately.").

[212] 30 AM. JUR. PROOF OF FACTS 2D *Criticisms of No-Duty Rule; Suggestions for Change* § 3, Westlaw (database updated Feb. 2022) ("The no-duty rule leaves the financial burden on the innocent victims of crime, rather than spreading the financial burden throughout society.").

[213] *Id.* ("For a crime victim seeking recovery from a governmental entity, reliance on the special duty exception represents the most promising way to avoid the no-duty rule."); David S. Bowers, *Tort Law – The Public Duty Doctrine: Should It Apply in the Face of Legislative Abrogation of Sovereign Immunity?* – Coleman v. Cooper, 12 CAMPBELL L. REV. 503, 508 (1990) ("The major exception to the public duty doctrine is the special relationship or special duty exception.").

[214] Jenifer K. Marcus, *Washington's Special Relationship Exception to the Public Duty Doctrine*, 64 WASH. L. REV. 401, 401 (1989) ("The 'special relationship' exception allows tort actions for

special relationship can exist under a variety of circumstances.[215] For example, a special relationship can be created by identifying a particular group for protection in legislation.[216] Special relationships can also be established through an express or tacit promise from government agents whereby a group reasonably relies on the government's promise.[217] Once a special relationship is confirmed, the plaintiff must prove negligence.[218]

Negligence requires the plaintiff to prove they suffered an injury because the government failed to uphold its duty to them.[219] Generally, individuals and entities have no affirmative duty to act for another person's benefit,[220] but defendants can be liable for creating a risk and failing to minimize it.[221] For example, if a person accidentally drops a banana peel on the sidewalk, they created a slipping hazard and must pick up the peel.[222] A special relationship can also create an affirmative duty to act.[223] As one torts treatise explains, "Indeed, anyone who assumes what some courts have called a protective relationship will owe a duty of care appropriate to that relationship."[224] Likewise, one who freely assumes a duty to another must execute the duty with reasonable care.[225]

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negligent performance of public duties if the plaintiff can prove circumstances setting his or her relationship with the government apart from that of the general public.").

[215] MCQUILLIN, *supra* note 207, § 53:21 ("Courts have identified a variety of criteria which help identify a special relationship. These criteria include the following . . . .").

[216] McMillan, *supra* note 194, at 516 ("The first situation is where a statute or ordinance indicates a clear legislative intent to protect a specific and identifiable class of persons of which plaintiff is a member."); Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection From Crime*, 90 A.L.R.5th 273 (2001) ("Further, a 'special duty' of protection to a particular class of individuals may be described by a statute or regulation.").

[217] 30 AM. JUR. PROOF OF FACTS 2D *Factors Considered in Determining Existence of Special Relationship–Police Promises Protection* § 7, Westlaw (database updated Feb. 2022) ("In addition, police promises of protection given to a group can create a special duty of protection toward members of that group."); McMillan, *supra* note 194, at 516 ("The second situation is where the plaintiff relied on express or implied assurances made by a governmental agent or entity with whom the injured party had direct contact.").

[218] 30 AM. JUR. PROOF OF FACTS 2D *In General; Scope* § 1, Westlaw (database updated Feb. 2022) ("Even assuming that a special relationship or other theoretical basis of liability *can* be established, the plaintiff must still prove negligence, foreseeability, and proximate cause.").

[219] *Negligence*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/negligence#:~:text=A%20failure%20to%20behave%20with,victims%20of%20one's%20previous%20conduct [https://perma.cc/V7B2-GV3G].

[220] DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 405 (2d ed. 2011) ("Absent special relationships or particular circumstances or actions, a defendant is not liable in tort for a pure failure to act for the plaintiff's benefit.").

[221] *Id.* § 407.

[222] *Id.* ("The same principle has been applied when the defendant knows or should know that he has innocently created a risk to others and the defendant has an opportunity to minimize the risk before harm actually eventuates.").

[223] *Id.* § 408 ("When a legally recognized special relationship exists, the defendant may be under a duty to use reasonable care even when he has neither created the initial risk to the plaintiff nor independently undertaken to rescue or protect the plaintiff.").

[224] *Id.*

[225] *Id.* § 410 ("The general rule that undertakings can create a duty of care is often expressed by

Law enforcement negligence can arise when a government fails to act. Governments have a duty to preserve law and order.[226] Consequently, governments with knowledge that a particular group, such as a minority, is being targeted for crime must take reasonable protective measures.[227] Similarly, if a special relationship exists between a group and a government, the government must take action to prevent harms within the scope of the relationship.[228] Even if the government is unaware of danger to a particular group, a government can be found negligent for failing to take reasonable safety measures. For example, a jury found the Southeastern Pennsylvania Transportation Authority negligent because it failed to illuminate a known high crime area and permitted the station's lone employee to listen to the radio, which prevented the employee from hearing a rape victim's cry for help.[229] While governments are not bound to expend resources safeguarding everyone from crime, a government's failure to address obvious threats can constitute negligence.[230]

B. State-Created Danger Doctrine

Although tribes are not bound by the United States Constitution, the federal government is constrained by the Fifth Amendment when dealing with tribes.[231] The Fifth Amendment nor any other provision of the Constitution mandate government actions because the Constitution is a charter of negative

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saying one who voluntarily assumes a duty must then perform that duty with reasonable care.").

[226] Thurman v. City of Torrington, 595 F. Supp. 1521, 1527 (D. Conn. 1984) ("City officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community."); Huey v. Barloga, 277 F. Supp. 864, 872 (N.D. Ill. 1967) ("City officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community."); WILLIAM. L. CLARK, JR., HANDBOOK OF CRIMINAL LAW 2 (3d ed. 1915) ("Where an act has a tendency to injure the public, it is the duty of the state, as the representative of the public, to take such steps as may be necessary to prevent it.").

[227] *Thurman*, 595 F. Supp. at 1527 ("If officials have notice of the possibility of attacks on women in domestic relationships or other persons, they are under an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community."); *Barloga*, 277 F. Supp. at 872–73 ("If such officials have notice of the possibility of racial disorder and the possibility of attacks upon negroes or other persons, they are under an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community. Their failure to perform this duty would constitute both a negligent omission and a denial of equal protection of the laws.").

[228] *In re* Quarles, 158 U.S. 532, 536 (1895); Swanner v. United States, 309 F. Supp. 1183, 1187 (M.D. Ala. 1970) ("More specifically, this Court now concludes that the United States owed a special duty to use reasonable care for the protection of Jessee Swanner and the members of his household."); Schuster v. City of New York, 154 N.E.2d 534, 537 (N.Y. 1958) ("The duty of everyone to aid in the enforcement of the law, which is as old as history, begets an answering duty on the part of government, under the circumstances of contemporary life, reasonably to protect those who have come to its assistance in this manner.").

[229] Kenny v. Se. Pa., Transp. Auth., 581 F.2d 351, 355 (3d Cir. 1978).

[230] DOBBS ET AL., *supra* note 220, § 346 ("The officer who simply watches a drunk driver go through dangerous antics for a substantial period without attempting to deal with the situation is not allocating resources; he is behaving very negligently indeed.").

[231] *See* Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977).

rather than positive liberties.[232] This means governments ordinarily have no constitutional obligation to protect citizens from harms;[233] nevertheless, the Constitution does mandate governments shield individuals from dangers created by the government itself.[234] This duty springs from both the Fifth and Fourteenth Amendment's due process clauses.[235] The most important case interpreting the state-created danger doctrine is *DeShaney v. Winnebago County Department of Social Services*.[236]

The facts of the case are heartbreaking.[237] The Winnebago County Department of Social Services ("DSS") knew Randy DeShaney was abusing his young son, Joshua; however, DSS did not intervene.[238] Joshua suffered profound brain damage as a result.[239] Randy was convicted of child abuse.[240] Joshua's mother filed a 42 U.S.C. § 1983[241] action against DSS for failing to protect Joshua from a known danger.[242] Both the U.S. District Court for the Eastern District of Wisconsin and Seventh Circuit granted summary judgment for DSS.[243] The Seventh Circuit believed the Fourteenth Amendment did not protect individuals from private harms nor could it discern a direct connection

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[232] Collins v. City of Harker Heights, 503 U.S. 115, 130 (1992) ("In sum, we conclude that the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace and the city's alleged failure to train or to warn its sanitation department employees was not arbitrary in a constitutional sense.").

[233] *Id.*

[234] Nelson v. Driscoll, 983 P.2d 972, 983 (Mont. 1999) ("The state-created danger exception provides that a constitutional duty to protect may be imposed when state actors have affirmatively acted to create plaintiff's danger, or to render him or her more vulnerable to it."); Stefanie T. Scott, Note, *Trying to Touch the Untouchables: The Challenges Faced by Texas Plaintiffs Asserting Failure-to-Protect Suits Against Police Departments*, 27 REV. LITIG. 539, 555 (2008) ("The Supreme Court upheld the state-created danger theory in DeShaney when it acknowledged this exception to sovereign immunity: victims who were put in increased danger by a state actor could successfully bring a Due Process claim against that official.").

[235] Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 6 (2007) ("Essentially, after Gonzales it does not matter if the plaintiff characterizes the claim as substantive due process or procedural due process."); Andrew Johnson, *Life, Liberty, and a Stable Climate: The Potential of the State-Created Danger Doctrine in Climate Change Litigation*, 27 AM. U. J. GENDER, SOC. POL'Y & L. 585, 587 (2019) ("For example, the state-created danger doctrine is one legal pathway that can hold a state or federal government liable for violating a citizen's substantive due process rights.").

[236] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

[237] *Id.* at 191 ("The facts of this case are undeniably tragic.").

[238] *Id.* at 193 ("The caseworker dutifully recorded these incidents in her files, along with her continuing suspicions that someone in the DeShaney household was physically abusing Joshua, but she did nothing more.").

[239] *Id.*

[240] *Id.*

[241] 42 U.S.C.A. § 1983 (Westlaw through Pub. L. No. 117-102); Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 Touro L. REV. 525, 528 (2001) ("Section 1983 is the procedural vehicle that authorizes the assertion of a claim based upon the deprivation of a federal right created by some source of federal law other than Section 1983.").

[242] *DeShaney*, 489 U.S. at 193.

[243] *Id.*

between DSS's action and Joshua's injury.[244]

The Supreme Court agreed. The Court stated, "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[245] Nevertheless, the Court acknowledged governments do owe protections to individuals in unique circumstances.[246] In order for the government's duty to arise, the government must have restricted the individual's capacity to care for themself.[247] That is, curtailing the individual's freedom to act deprives the individual of liberty under the Due Process Clause.[248] The Court explained, "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[249] Three Justices dissented,[250] but *DeShaney* remains the law.

The state-created danger doctrine has the taste of tort; after all, a government failure triggers the claim. However, tort law is focused on harms caused by negligence while the state-created danger doctrine deals specifically with the deprivation of constitutional rights.[251] A government's failure to act does not automatically trigger the state-created danger doctrine.[252] Though courts use varying tests,[253] the successful state-created danger claim must generally establish the government knew or should have known its action created or increased the risk to the plaintiff.[254] Liability usually requires the

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[244] *Id.* at 193–94.

[245] *Id.* at 195.

[246] *Id.* at 198 ("It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.").

[247] *Id.* at 200 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.").

[248] *Id.* ("In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.").

[249] *Id.* at 201.

[250] *Id.* at 203.

[251] Daniels v. Williams, 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that 'would make of the Fourteenth Amendment a font of tort law to be super-imposed upon whatever systems may already be administered by the States.'") (citation omitted).

[252] 18A MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53:278 (3d ed.) ("A failure to interfere when misconduct takes place, and no more, is not sufficient to amount to a state created danger, as would violate substantive due process.").

[253] Chemerinsky, *supra* note 235, at 15 ("Varying circuits have adopted different formulations; not every circuit has announced a multi-part test, but some circuits have done so.").

[254] MCQUILLIN, *supra* note 252, § 53:278 ("(1) state actors created or increased danger to plaintiff and (2) state actors acted with deliberate indifference."); 2 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 14:133 (3d ed.) ("The state-created danger doctrine is typically articulated as imposing an affirmative duty when an act by the state increased the risk that the plaintiff would

government's behavior to demonstrate an indifference to the plaintiff's peril that "shock[s] the conscience."[255]

Plaintiffs rarely prevail in state-created danger claims,[256] but successful state-created danger claims against law enforcement are possible. For example, police releasing an intoxicated person from custody were liable for harms the individual suffered when he was struck by a car under the state-created danger theory because the officers "knew, or reasonably should have known, that Davis was drunk and unable to care for himself."[257] Police can also be held liable under the state-created danger doctrine for actions that embolden criminals, such as indicating the criminal is unlikely to face consequences if the illegal behavior happens again.[258] Accordingly, the Second Circuit has explained, "[P]olice conduct that encourages a private citizen to engage in domestic violence, by fostering the belief that his intentionally violent behavior will not be confronted by arrest, punishment, or police interference, gives rise to a substantive due process violation."[259]

C. Property Rights

There has long been a debate about whether individuals have a property interest in government benefits,[260] and in 2005, the Supreme Court addressed whether an individual could have a property interest in law enforcement services.[261] Jessica Gonzales obtained a restraining order against her estranged husband.[262] The restraining order itself contained an all caps notice to law enforcement commanding officers, "YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER."[263] Despite the restraining order, Jessica's estranged husband snatched their three children from Jessica's front yard.[264] Jessica called the police multiple times, but the police took no action to enforce the order.[265] Eight hours after her initial call to the police, her estranged husband had murdered their children and

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have been exposed to violence, creating a heightened risk for the plaintiff different from any that affects the public at large, when the state knew or should have known that its actions specially and specifically endangered the plaintiff.").

[255] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 855 (1998) ("Regardless whether Smith's behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983.").

[256] Chemerinsky, *supra* note 235, at 1 ("Yet, the government almost always prevails.").

[257] Davis v. Brady, 143 F.3d 1021, 1026 (6th Cir. 1998).

[258] Martinez v. City of Clovis, 943 F.3d 1260, 1277 (9th Cir. 2019) ("Similarly, we hold that the state-created danger doctrine applies when an officer praises an abuser in the abuser's presence after the abuser has been protected from arrest, in a manner that communicates to the abuser that the abuser may continue abusing the victim with impunity.").

[259] Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 437 (2d Cir. 2009).

[260] *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[261] Town of Castle Rock v. Gonzales, 545 U.S. 748, 750–51 (2005).

[262] *Id.* at 751.

[263] *Id.* at 752.

[264] *Id.* at 753.

[265] *Id.* at 753–54.

committed suicide by cop.[266] Jessica filed a § 1983 action alleging the police department had a policy of not enforcing protective orders.[267]

The district court dismissed her claim, finding no due process issue.[268] The Eighth Circuit found Jessica possessed a procedural due process claim to protective order enforcement because Jessica had a legitimate claim to having her protective order enforced when its terms were violated.[269] The Eighth Circuit affirmed en banc.[270] However, the Supreme Court disagreed with the Eighth Circuit, distinguishing between entitlements and benefits.[271] Key to this distinction, the Court noted law enforcement always has broad discretion—even in the face of mandatory statutory language.[272] Plus, the Court pointed out enforcing the order is not always possible.[273] The Court also claimed Jessica's benefit from the protective order was indirect and had no monetary value;[274] therefore, the Supreme Court reversed the Court of Appeals' judgment.[275]

Justice Stevens dissented.[276] He believed the Supreme Court's decision created a barrier to individual entitlements to law enforcement.[277] Justice Stevens explained the protective order clearly had a monetary value because Jessica could have contracted with a private security firm for the same purpose as the order.[278] Justice Stevens believed the statute mandating protective order enforcement "created the functional equivalent of such a private contract."[279] Consequently, Justice Stevens was flummoxed by the majority's inability to discern a property interest in protective order enforcement.[280] Justice Stevens also noted individuals have property interests in several government services and benefits, so a property interest in the government enforcing a restraining order was not a novel concept.[281] In fact, Justice Stevens pointed out several

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[266] *Id.* at 754.
[267] *Id.*
[268] *Id.*
[269] Gonzales v. City of Castle Rock, 307 F.3d 1258, 1266 (10th Cir. 2002), on *reh'g en banc*, 366 F.3d 1093 (10th Cir. 2004), *rev'd sub nom*. *Gonzales*, 545 U.S. 748 (2005) ("In our view, the statute clearly creates a mandatory duty to arrest when probable cause is present. It follows that the holder of an order has a legitimate claim of entitlement to the protection provided by arrest when the officer has information amounting to probable cause that the order has been violated.").
[270] *Gonzales*, 545 U.S. at 754–55.
[271] *Id.* at 756 ("Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.").
[272] *Id.* at 761 ("The deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands . . . .").
[273] *Id.* at 762 ("Even in the domestic-violence context, however, it is unclear how the mandatory-arrest paradigm applies to cases in which the offender is not present to be arrested.").
[274] *Id.* at 766–67.
[275] *Id.* at 768–69.
[276] *Id.* at 773.
[277] *Id.* at 773.
[278] *Id.* at 791.
[279] *Id.* at 773.
[280] *Id.* at 791 ("The fact that it is based on a statutory enactment and a judicial order entered for her special protection, rather than on a formal contract, does not provide a principled basis for refusing to consider it 'property' worthy of constitutional protection.").
[281] *Id.* at 789–90.

state courts recognize individual entitlements to protective order enforcement.[282]

Both the majority and Justice Stevens agreed the Constitution itself does not create a property interest in law enforcement services.[283] Although property interests undoubtedly extend beyond tangible assets,[284] property interests emanate from sources outside of the Constitution, such as state law.[285] A property interest requires an individual have a reliance interest in the thing itself[286] and can exist even if the property lacks a market value.[287] Once a property right exists, the Due Process Clause activates.

IV. FAILURE TO PROTECT: TRIBES' CASE AGAINST THE UNITED STATES

While tribes have long requested federal law enforcement aid, no tribe has ever sued the United States for failure to provide law enforcement. Sovereign immunity long immunized the federal government from suit;[288] plus, Indians had limited access to the judicial system for many years.[289] In 1946, Congress passed the Federal Torts Claims Act ("FTCA") which makes the United States liable for torts to the same extent as private individuals.[290] Indians now have access to the federal court system,[291] and tribal plaintiffs can assert claims the United States has failed to bring as the tribe's trustee.[292] Nevertheless, suing

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[282] *Id.* at 788–89 ("Not only does the Court's doubt about whether Colorado's statute created an entitlement in a protected person fail to take seriously the purpose and nature of restraining orders, but it fails to account for the decisions by other state courts, see *supra*, at [782–783], that recognize that such statutes and restraining orders create individual rights to police action.").

[283] *See id.* at 768, 773.

[284] Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 571–72 (1972) ("The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.").

[285] *Id.* at 577 ("Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

[286] *Id.* ("He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.").

[287] Phillips v. Wash. Legal Found., 524 U.S. 156, 169 (1998) ("We have never held that a physical item is not 'property' simply because it lacks a positive economic or market value.").

[288] KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 1 (2019) ("Until the mid-20th century, however, the principle of 'sovereign immunity'—a legal doctrine that bars private citizens from suing a sovereign government without its consent—prohibited plaintiffs from suing the United States for the tortious actions of federal officers and employees.").

[289] Paul McSloy, *Revisiting the "Courts of the Conqueror": American Indian Claims Against the United States*, 44 AM. U. L. REV. 537, 584 (1994) ("Indian people had been barred from suit against the United States, absent a special jurisdictional act of Congress, until at least 1946.").

[290] 28 U.S.C.A. § 2674 (Westlaw through Pub. L. No. 117-102).

[291] § 1505; United States v. Mitchell, 445 U.S. 535, 540 (1980) ("Under 28 U.S.C. § 1505, then, tribal claimants have the same access to the Court of Claims provided to individual claimants by 28 U.S.C. § 1491, and the United States is entitled to the same defenses at law and in equity under both statutes.").

[292] § 1362; Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 472 (1976) ("Looking to the legislative history of § 1362 for whatever light it may shed on the

the federal government can be procedurally difficult.[293]

One of the difficulties is there are several exceptions to the United States' waiver of sovereign immunity.[294] The most significant is the discretionary function exception.[295] According to the Supreme Court, the discretionary function exception was designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[296] Even an ounce of discretion towards a policy related matter may be enough to preclude an action under the FTCA.[297] However, neglect and disregard do not fit within the discretionary function exception.[298] For example, the Ninth Circuit found the discretionary function exception did not prevent individuals who became sick after visiting a government commissary from suing the United States because the United States had no discretion to sit and watch mold grow in a meat department.[299] Like the mold in the commissary, the United States has sat idly by as crime has exploded in Indian country. The United States should not have the discretion to ignore Indian country crime because the United States has prohibited tribes from protecting their own citizens. Thus, tribes can bring claims against the United States for fostering dangerous conditions in Indian country.

Tribes will be able to develop at least three legal arguments for increased police services from the United States. The special relationship exception is the most common way around the public duty doctrine.[300] Due to the trust relationship, tribes indisputably have a special relationship with the United States. The trust relationship encompasses law enforcement,[301] and the United States has been negligent in fulfilling this aspect of the trust relationship. Additionally, the United States has created the "public safety crisis" on reservations.[302] The United States has stripped tribes of criminal jurisdiction

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question, we find an indication of a congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought.").

[293] LEWIS, *supra* note 288, at 3 ("Additionally, the FTCA requires plaintiffs to comply with an array of procedural requirements before filing suit.").

[294] § 2680.

[295] LEWIS, *supra* note 288, at 18 ("Along with being one of the most frequently litigated exceptions to the FTCA's waiver of sovereign immunity, the discretionary function exception is, according to at least one commentator, 'the broadest and most consequential.'").

[296] Berkovitz v. United States, 486 U.S. 531, 536–37 (1988).

[297] LEWIS, *supra* note 288, at 23 ("As long as the challenged conduct involves the exercise of discretion in furtherance of some policy goal, the discretionary function exception forecloses claims under the FTCA.").

[298] *See id.* at 24.

[299] Whisnant v. United States, 400 F.3d 1177, 1185 (9th Cir. 2005) ("Rather, according to Whisnant's complaint, the government ignored reports and complaints describing the unsafe condition of the meat department, knew or should have known of the dangerous condition, and intentionally or recklessly or both intentionally and recklessly permitted employees and customers to work and shop at the commissary in spite of the health hazards.").

[300] *See supra* nn.213–18 and accompanying text.

[301] *See infra* nn.312–22 and accompanying text.

[302] Kolby KickingWoman, *String of Deaths Prompts Calls for Action From Tribe, Senators,*

over non-Indians;[303] moreover, the United States has enacted policies that cripple tribal economies.[304] By empowering non-Indian criminals and disempowering tribal governments, the United States bears full responsibility for the devastating amount of non-Indian crime in Indian country.[305] Lastly, tribes have a property right to federal law enforcement services.[306] Public safety is a basic component of the trust relationship, and some treaties explicitly provide for public safety on tribal lands.[307] The remainder of this Part expounds upon these three theories.

A. The Public Duty Doctrine and Negligence

Tribes can easily invoke the special relationship exception to the public duty doctrine. Nearly two hundred years ago, Chief Justice Marshall described the relationship between Indian tribes and the United States as "that of a ward to his guardian."[308] If an individual is the beneficiary of a custodial relationship—like a ward to their guardian, the custodian owes a greater duty to the beneficiary than to the general public; thus, custodial relationships are an exception to the public duty doctrine.[309] The guardian-ward relationship between the United States and tribes remains intact, though it is now known as the trust relationship.[310] The trust relationship is also legally enforceable.[311] Accordingly, the trust relationship enables tribes to satisfy the special relationship exception to the public duty doctrine.

The tribal-trust relationship should be a particularly formidable weapon against the public duty doctrine because the trust relationship has always emphasized the United States' duty to provide safety to tribes. In *Cherokee v.*

INDIAN COUNTRY TODAY (Aug. 13, 2020), https://indiancountrytoday.com/news/string-of-deaths-prompts-calls-for-action-from-tribe-senators [https://perma.cc/B35D-G23T]; *Yakama Nation Tribal Council Declares Public Safety Crisis*, NBC RIGHT NOW (Feb. 9, 2018), https://www.nbcrightnow.com/archives/yakama-nation-tribal-council-declares-public-safety-crisis/article_255f1cfe-efc4-5b75-89cf-1da29febb70c.html [https://perma.cc/SNX5-9QY8]; Art Hughes, *Navajo Nation's Public Safety Crisis*, NATIVE AM. CALLING (May 29, 2018), https://nativeamericacalling.com/tuesday-may-29-2018-navajo-nations-public-safety-crisis/ [https://perma.cc/QW59-AYJ3].

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

[304] *See generally* Crepelle, *Business Development in Indian Country*, *supra* note 124, at Part IV.

[305] *See infra* nn.315–27 and accompanying text.

[306] *See infra* Section IV.C.

[307] *See infra* nn.312–22 and accompanying text.

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

[309] DOBBS ET AL., *supra* note 220, § 346 ("Special relationships that generate a duty to take positive acts of reasonable care include the familiar categorical relationships like landowner-invitee, or custodian-ward, and other similar formal relationships listed elsewhere.").

[310] Crepelle, *The Time Trap*, *supra* note 73, at 193 ("While the 'guardian-ward relationship' between the United States and Indian tribes is now referred to as a trust relationship, the premise remains the same—tribes are not competent to govern themselves.").

[311] United States v. White Mountain Apache Tribe, 537 U.S. 465, 474 (2003) ("The 1960 Act goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach."); United States v. Mitchell, 463 U.S. 206, 226 (1983) ("[I]t naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.").

Georgia, the foundational case of the trust relationship,[312] the Supreme Court classified tribes as wards because, "They look to our government [the United States] for protection."[313] A year later, the Supreme Court reaffirmed the United States' duty to protect tribes, noting the federal government's obligation to "restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders."[314] When tribes sold their land to the United States, part of the purchase price was federal protection for Indians.[315] Thus, Congress enacted the Major Crimes Act in 1885 to prevent further violence on reservations.[316] The extraconstitutional act was upheld by the Supreme Court as part of the United States' duty to protect Indians.[317] An extraconstitutional relationship screams of a special relationship.

Public safety remains a fundamental component of the contemporary tribal trust relationship. In recent years, Congress has consistently reaffirmed the federal government's trust responsibility to Indian tribes includes public safety.[318] Federal law charges the Secretary of the Interior with keeping Indian country safe;[319] likewise, the federal Office of Justice Services is responsible for "the safety of Indian communities by ensuring the protection of life and property, enforcing laws, maintaining justice and order."[320] United States Attorney Generals have also recognized the federal government's trust

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[312] Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 10 (2014) ("Marshall laid the groundwork of the trust relationship in the second of his trilogy, *Cherokee Nation v. Georgia*.").

[313] *Cherokee Nation*, 30 U.S. at 17.

[314] Worcester v. Georgia, 31 U.S. 515, 556 (1832).

[315] *Ex parte* Crow Dog, 109 U.S. 556, 569 (1883) ("The corresponding obligation of protection on the part of the government is immediately connected with it, in the declaration that each individual shall be protected in his rights of property, person, and life; and that obligation was to be fulfilled by the enforcement of the laws then existing appropriate to these objects, and by that future appropriate legislation which was promised to secure to them an orderly government.").

[316] Keeble v. United States, 412 U.S. 205, 210 (1973) ("Thus Crow Dog went free. He returned to his reservation, feeling, as the Commissioner says, a great deal more important than any of the chiefs of his tribe. The result was that another murder grew out of that—a murder committed by Spotted Tail, jr.[sic], upon White Thunder. And so these things must go on unless we adopt proper legislation on the subject.").

[317] United States v. Kagama, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

[318] Violence Against Women & Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 901(6), 119 Stat. 2960, 3078 (codified as amended in scattered sections of 42 U.S.C. & 18 U.S.C.) ("[T]he unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women."); Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(1), 124 Stat. 2261, 2262 (codified in scattered sections of 25 U.S.C., 42 U.S.C.) ("[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country.").

[319] 25 U.S.C.A. § 2802(a) (Westlaw through Pub. L. No. 117-102).

[320] *Overview*, U.S. DEP'T OF THE INTERIOR INDIAN AFFS., https://www.bia.gov/bia/ojs [https://perma.cc/GB88-7WUH].

responsibility to keep Indian country safe.[321] Most recently, President Biden reiterated the United States' trust responsibility to protect Indians from crime.[322] Therefore, the United States' special relationship with tribes encompasses public safety, and tribes should be able to hold the federal government liable for its negligent law enforcement.

Tribes should have no trouble establishing negligence. The federal government has repeatedly acknowledged its duty to protect tribes.[323] The federal government has breached this duty by creating nonsensical rules governing Indian country crime[324] and failing to provide basic resources for Indian country law enforcement.[325] The federal government's inattention to Indian country public safety causes Indian country crime, and as with the mold in the commissary, the federal government's neglect and disregard have resulted in damages. Indeed, the congressionally created Indian Law and Order Commission concluded the United States "is fundamentally at fault for this public safety gap."[326] Quite simply, the federal government cannot claim exclusive jurisdiction over Indian country crimes then fail to exercise its exclusive jurisdiction.

Additionally, the federal government owns much of Indian country[327] and forbids tribes from using federally owned trust land without federal

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[321] *Testimony of Attorney General Janet Reno Before the S. Comm. on Indian Affs.*, 105th Cong. (1998), https://www.justice.gov/archive/otj/Congressional_Testimony/attgensiac.htm [https://perma.cc/CBB5-3SX7] ("Our basic responsibility to preserve public safety for the citizens of Indian country derives from the unique trust relationship between federal and tribal governments, as well as from specific statutes, such as the Major Crimes Act and the Indian Country Crimes Act, that provide for federal jurisdiction for serious felonies, such as homicides and sex offenses."); *The Fiscal Year 2017 Department Of Justice Budget Request: Hearing Before the S. Subcomm. on Commerce, Justice, Science, and Related Agencies of the S. Comm. on Appropriations*, 114th Cong. 11 (2016) (statement of Loretta Lynch, U.S. Att'y Gen.) [hereinafter Statement of Loretta Lynch, U.S. Att'y Gen.] ("The United States has a unique legal and political relationship with American Indian tribes and Alaskan Native communities, as provided by the Constitution, treaties, court decisions, and federal statutes. The Department of Justice, in particular, has an important legal and moral responsibility to prosecute violent crime in Indian Country.").

[322] Proclamation No. 10202, *supra* note 13.

[323] *See supra* text accompanying nn.318–22.

[324] Duro v. Reina, 495 U.S. 676, 680 n.1 (1990) ("Jurisdiction in 'Indian country,' which is defined in 18 U.S.C. § 1151, see United States v. John, 437 U. S. 634, 648–649 (1978), is governed by a complex patchwork of federal, state, and tribal law."); Crepelle, *Shooting Down Oliphant*, *supra* note 144, at 1316 ("Criminal jurisdiction in Indian country is unduly complicated.").

[325] Crepelle, *Tribal Courts*, *supra* note 7, at 72–73.

[326] EID ET AL., *supra* note 85, at v.

[327] CTR. FOR INDIAN COUNTRY DEV. OF THE FED. RES. BANK OF MINNEAPOLIS & ENTERPRISE CMTY. PARTNERS, TRIBAL LEADERS HANDBOOK ON HOMEOWNERSHIP 79 (Patrice H. Kunesh ed., 2018) ("Legal title [of trust lands] is held by the federal government."); DEFINITION OF "INDIAN COUNTRY," NAT. RES. CONSERVATION SERV., U.S. DEP'T OF AGRIC., https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_024362.pdf [https://perma.cc/GP5W-WMX3] ("Tribal trust lands are held in trust by the United States government for the use of a tribe. The United States holds the legal title, and the tribe holds the beneficial interest. This is the largest category of Indian land.").

approval.[328] Landowners are subject to liability for harms arising on land when the landowner fails to exercise reasonable care.[329] By any measure, the United States has failed to exercise reasonable care to protect Indians in Indian country. The United States should be held liable for its negligence.

B. State-Created Danger Doctrine

The federal government has created Indian country's dangerous conditions. Despite the trust responsibility to provide public safety, the United States persistently fails to provide even basic levels of funding to Indian country police forces.[330] The funding shortfall is particularly troublesome because increased federal law enforcement is proven to drastically reduce crime in Indian country.[331] Furthermore, United States Attorneys have lost their jobs because they prioritized Indian country public safety,[332] although U.S. Attorneys are Indian country's primary prosecutor.[333] Indian country's quizzical jurisdictional scheme—which Congress knows criminals exploit[334]—is the product of the federal government.[335] As Senator Byron Dorgan stated, "The problem of law enforcement, like many other problems in Indian Country, is one that was created by the Federal Government."[336]

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[328] Jonathan Nez, *Biden's Budget Will Be a Boon to Tribes — As Long as Red Tape Doesn't Strangle Us*, WASH. POST (June 29, 2021, 11:34 AM EDT), https://www.washingtonpost.com /opinions/2021/06/29/biden-budget-tribes-red-tape/ [https://perma.cc/87G2-KXP6].

[329] RESTATEMENT (SECOND) OF TORTS § 344 (AM. LAW INST. 1965).

[330] Adam Crepelle, *Protecting the Children of Indian Country: A Call to Expand Tribal Court Jurisdiction and Devote More Funding to Indian Child Safety*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 225, 238–39 (2021) [hereinafter Crepelle, *Protecting the Children*]; Crepelle, *Business Development in Indian Country*, *supra* note 124, at 717–18.

[331] EID ET AL., *supra* note 85, at 63–67; Crepelle, *Law & Economics*, *supra* note 131 (manuscript at 48).

[332] *See supra* text accompanying n.188; *Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affs*., 110th Cong. 69 (2007) (statement of Thomas Heffelfinger, partner at Best & Flanagan, former U.S. Att'y in Minneapolis, Minn.) ("I can tell you that all of those five people [who were fired] were zealous advocates in their own districts for improving public safety in Indian Country and improving Indian Country's role in our broader homeland security infrastructure."); Rob Capriccioso, *A Look Back on the US Attorney Firings*, INDIAN COUNTRY TODAY (updated Sept. 12, 2018), https://indiancountrytoday.com/archive/a-look-back-on-the-us-attorney-firings [https://perma.cc/E2EL-B77B]; *DOJ Denies US Attorneys Were Fired for Indian Work*, INDIANZ (June 22, 2007), https://www.indianz.com/News/2007/003577.asp [https://perm a.cc/J96G-SBHX].

[333] Statement of Loretta Lynch, U.S. Att'y Gen., *supra* note 321, at 11 ("Federal investigation and prosecution of such matters is often the primary avenue of protection for the victims of these crimes."); U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-252, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS 14 (2011) ("Therefore, tribes must rely on the USAO to prosecute non-Indian offenders.").

[334] Tribal Law and Order Act of 2010, Pub. L. No. 111–211, § 202(a)(4)(B), 124 Stat. 2261, 2262 (codified as amended in scattered sections of 25 U.S.C. & 42 U.S.C.).

[335] Statement of Hon. Byron L. Dorgan, *supra* note 188, at 2 ("We, the Federal Government and the courts, have created a jurisdictional maze in Indian Country that has resulted in a failed system that fails to protect victims and communities.").

[336] *Id.* at 3.

Not only does the federal government neglect Indian country public safety, the United States prevents tribes from protecting their citizens.[337] Tribes can only prosecute non-Indians for domestic violence related crimes,[338] and in order to prosecute non-Indians, tribes must comply with procedural standards that are more stringent than anywhere else in United States.[339] Limited tribal jurisdiction means tribes cannot even arrest non-Indian criminals in most cases.[340] When tribes can assert jurisdiction over a crime, the United States limits tribal sentencing power to one year in jail,[341] or three years if tribes meet federal standards.[342] The federal government does not even guarantee Indians' right to bear arms in self-defense.[343]

The United States has been astonishingly indifferent to Indians' plight. In fact, the federal government's wanton disregard for Indian country public safety has emboldened criminals. Criminals literally laugh as they cross reservation borders,[344] and reservations have become rape tourism destinations.[345] Non-Indian criminals know law enforcement cannot touch them in Indian country, so non-Indian criminals report themselves to police simply to flaunt their immunity.[346] President Obama described the rate of crime in Indian country as "an assault on our national conscience that we can no longer ignore."[347] Despite clearly identifying the magnitude of the problem, no major action has been taken to address Indian country crime. This level of indifference shocks the conscience, and the United States has created the danger. The United States should be liable for violating tribes' due process rights under the state-created danger doctrine.

C. Property Rights

Tribes have a property interest in federal law enforcement. As far back as

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[337] *Id.* at 44 ("The Federal and State Governments are not doing the job, and the Indian tribal governments have no power to respond to anything but misdemeanors committed by Indians.").
[338] 25 U.S.C.A. § 1304 (Westlaw through Pub. L. No. 117-102). The March 2022 VAWA reauthorization, which occurred near the time of this article's publication, expanded tribal jurisdiction a little further. White House, *supra* note 30.
[339] Fletcher, *supra* note 171, at 1268.
[340] United States v. Cooley, 141 S. Ct. 1638 (2021) (holding tribal police officers can detain non-Indians for violations of state and federal law); Crepelle, *Law & Economics*, *supra* note 131 (manuscript at 22).
[341] 25 U.S.C.A. § 1302 (Westlaw through Pub. L. No. 117-102).
[342] *Id.*
[343] Crepelle, *Shooting Down Oliphant*, *supra* note 144, at 1312 ("What is surprising is that the residents of Indian country are the only people in the United States who lack the constitutional right to bear arms because Indian tribes are not bound by the United States Constitution.").
[344] Crepelle, *Law & Economics*, *supra* note 131 (manuscript at 32–33).
[345] *Id.* (manuscript at 6).
[346] *Id.* (manuscript at 40) ("Non-Indians know they are above the law in Indian country and have been known to call the police on themselves to prove it").
[347] Lynn Rosenthal, *The Tribal Law and Order Act of 2010: A Step Forward for Native Women*, PRES. BARACK OBAMA WHITE HOUSE BLOG (July 29, 2010, 5:13 PM), https://obamawhitehouse.archives.gov/blog/2010/07/29/tribal-law-and-order-act-2010-a-step-forward-native-women [https://perma.cc/78SM-HH2Z].

1832, the Supreme Court acknowledged the United States' pledge to protect tribes from non-Indian criminals was an assurance the tribes highly valued.[348] The United States promised protection to tribes in exchange for moving onto reservations,[349] and reservations are supposed to serve as tribes' perpetual homelands.[350] Nonsensical federal policies render reservations criminal havens.[351] The lawlessness on reservations prevents economic development[352] and further exacerbates the crime problem.[353] This makes Indian country inhospitable.[354] Thus, the federal government's failure to provide law enforcement directly violates its oath to provide safety and collaterally transgresses tribes' property rights to their homelands.

Individual Indians also have a property interest in federal law enforcement. Nine treaties explicitly require the United States to reimburse Indians for harms caused by non-Indian criminals.[355] Though "bad men" clauses have seldom served as a cause of action,[356] in 2009, the Federal Court of Claims rendered a $590,755.06 judgment under a bad men provision to an

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[348] Worcester v. Georgia, 31 U.S. 515, 556 (1832) ("To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.").

[349] United States v. Kagama, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

[350] *See supra* n.74 and accompanying text.

[351] Crepelle, *Law & Economics*, *supra* note 131 (manuscript at Part V).

[352] *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm on Indian Affs.*, 110th Cong. 26 (2008) (statement of Hon. Jon Tester, U.S. S. from Mont.) ("I can tell you that the violent crimes I hear about where I live, and I live about 40 miles, 35 miles from a reservation, the violent crimes in our area that I hear about most often happen on that reservation. And that is one of the reasons why we don't have economic development on reservations like we should have; that is one of the reasons why businesses don't move up there; that is one of the reasons why the schools don't do as well; that is one of the reasons why our kids come out and the unemployment rate is higher."); Crepelle, *Business Development in Indian Country*, *supra* note 124, at Part IV.

[353] Crepelle, *Law & Economics*, *supra* note 131 (manuscript at 11–12); Crepelle, *Protecting the Children*, *supra* note 330, at 232–49.

[354] Statement of Hon. Byron L. Dorgan, *supra* note 188, at 2 ("In 2004, 81 percent of members of the Couer d'Alene Tribe did not feel safe in their homes, they have told us. I could go on and on at length about examples of the crisis . . . .").

[355] Note, *A Bad Man is Hard to Find*, 127 HARV. L. REV. 2521, 2521 (2014).

[356] James D. Leach, *"Bad Men Among the Whites" Claims After* Richard v. United States, 43 N.M. L. REV. 533, 535 (2013) ("Only a few Bad Men cases have ever been decided."); *A Bad Man is Hard to Find*, *supra* note 355, at 2533 ("Few judicial opinions have even reached the intriguing interpretive issues arising from the substantive liability provisions of the 'bad men among the whites' clauses."); Montileaux v. Diocese of South Dakota, Episcopal, 5:19−cv−05075−KES, at 5 (W.D. S.D. Feb. 24, 2021) ("The 'bad-men provision' gives Indian plaintiffs who have been injured a right to sue the United States for reimbursement for their loss."); *see also* Cheyenne & Arapaho Tribes v. United States, 151 Fed. Cl. 511, 517–18 (Fed. Cl. 2020) ("bad men" provisions of similar treaties between the United States and Cheyenne and Arapaho tribes create a right of action for individual Indians to sue the United States. The bad-men provision allows individual Indians to file suit against the United States for reimbursement—not against the 'bad men' themselves.").

Oglala Sioux female who had been sexually assaulted by a white man.[357] No statute of limitations is provided in the bad men clauses,[358] and treaty provisions are to be construed liberally in favor of Indians.[359] This means Indians wronged long ago may have claims under bad men clauses and similar provisions. Additionally, a federal statute entitles individual Indians to compensation when harmed by a non-Indian.[360] Even if the United States does not want to pay for Indian safety, it is treaty and statutorily bound to indemnify Indians for damages suffered through federal neglect.

To be sure, the United States has a long and ignominious history of disregarding tribal property rights.[361] The United States possesses the power to *lawfully* violate tribal treaties; however, Congress must make its intent to transgress tribal treaty rights pellucid.[362] Furthermore, the Supreme Court has held the United States cannot strip tribes of their property without providing just compensation.[363] Tribes and individual Indians would be entitled to due process protections prior to being stripped of their property too.[364] As the law stands, the United States has a choice: allocate funds for Indian country public safety or allocate funds to individual Indians for harms suffered by non-Indian criminals.

V. CONCLUSION

The United States is responsible for Indian country's appalling crime rate. Although the United States has a special treaty and trust relationship with tribes, the United States perennially fails to take even basic steps to address Indian country's public safety crisis. This is negligence. Furthermore, the United States has played an active role in undermining Indian country's public safety. By divesting tribes of jurisdiction over non-Indians and limiting tribal sentencing power, the United States has left tribes exceedingly vulnerable to crime. The United States' failure to address Indian country crime has also harmed tribes and individual Indian property rights. Tribes should file suit to hold the United States liable for Indian country crime.

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[357] Elk v. United States, 87 Fed. Cl. 70, 72 (Fed. Cl. 2009).
[358] Leach, *supra* note 356, at 550 ("No case has ever addressed the statute of limitations for a Bad Men claim, but the law seems clear.").
[359] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999) ("We have held that Indian treaties are to be interpreted liberally in favor of the Indians."); Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); Tulee v. Washington, 315 U.S. 681, 684–85 (1942).
[360] 18 U.S.C.A. § 1160 (Westlaw through Pub. L. No. 117-102).
[361] *See* Nick Martin, *Congress Is Still Breaking Treaties and Cheating Indian Country*, NEW REPUBLIC (Sept. 26, 2019), https://newrepublic.com/article/155180/congress-still-breaking-treaties-cheating-indian-country [https://perma.cc/PQG2-2GA3] ("Over a century removed from the inking of the majority of these treaties, the United States government is still failing to hold up its end of the bargain."); Wang, *supra* note 77.
[362] McGirt v. Oklahoma, 140 S. Ct. 2452, 2463 (2020).
[363] United States v. Sioux Nation of Indians, 448 U.S. 371, 421 (1980).
[364] Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 90 (1977).