American Indian Law Review

Volume 44 | Number 1

2019

Thickening the Thin Blue Line in Indian Country: Affirming Tribal Authority to Arrest Non-Indians

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* J.D., Stanford Law School, 2019. I am indebted to Gregory Ablavsky, for introducing me to the subject of federal Indian law and for his unwavering mentorship throughout the development of this Note. I am also grateful to Matthew Fletcher and Christopher Mirasola for invaluable feedback on previous drafts. Finally, thank you to the editors of the *American Indian Law Review* for improving this Note at every stage—especially Matthew Irby, Madalynn Martin, Allison Christian, and Ridge Howell. All mistakes are mine.

First-place winner, *American Indian Law Review* 2018-2019 Writing Competition.

Introduction

On December 24, 2014, Officer Daniel Johnson of the Bishop Paiute Tribal Police Department[1] received a call from a tribal member that the man's ex-wife was causing a disturbance at his home.[2] Officer Johnson knew the suspect well; he had responded to eight calls involving her in the past nine months.[3] Officer Johnson drove to the man's home, which was located within the Bishop Paiute reservation. While en route, he requested assistance from the sheriff in nearby Inyo County.[4] Officer Johnson did so for one reason: the suspect was not Indian.[5] This mattered because Indian tribes cannot prosecute non-Indians in their courts.[6]

Officer Johnson approached the suspect and directed her to leave because tribal and state protective orders prohibited her from visiting the home.[7] She refused. Officer Johnson then tried to arrest the suspect for violating her protective orders, as well as tribal trespass and nuisance ordinances.[8] When she resisted, he deployed his taser.[9] Minutes later, a sheriff arrived and helped Officer Johnson handcuff the suspect.[10] Ultimately, she was released after her ex-husband expressed that he did not want to press charges.[11] A mine-run domestic disturbance, the event ended unremarkably.

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1. The Bishop Paiute Tribe is a federally recognized Indian tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235, 4236 (Jan. 30, 2018). Located in the Eastern Sierra Nevada Mountains, it is the fifth largest tribe in California with approximately 2000 enrolled members. *About the Bishop Paiute Tribe*, BISHOP PAIUTE TRIBE, http://www.bishoppaiutetribe.com/about-us.html (last visited Jan. 7, 2019). Although the tribe has no criminal code, it has established a civil law system, including nuisance, trespass, and public safety ordinances. *See Tribal Ordinances*, BISHOP PAIUTE TRIBE, http://www.bishoppaiutetribe.com/tribal-ordinances.html (last visited Jan. 7, 2019).

2. Bishop Paiute Tribe v. Inyo Cty., No. 1:15–cv–00367–DAD–JLT, 2018 WL 347797, at *1 (E.D. Cal. Jan. 10, 2018).

3. Complaint at 22, Bishop Paiute Tribe v. Inyo Cty., No. 1:15–cv–00367–DAD–JLT (E.D. Cal. Mar. 6, 2015), ECF No. 1 [hereinafter Bishop Paiute Tribe Complaint].

4. *Bishop Paiute Tribe*, 2018 WL 347797, at *1.

5. *See id.* A note on terminology: This Note uses the terms "Indian," "Native," and "Native American" interchangeably to refer to the indigenous peoples of the United States.

6. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

7. *Bishop Paiute Tribe*, 2018 WL 347797, at *1.

8. *Id.*

9. *Id.*

10. *Id.* at *2.

11. *Id.*

What happened next, however, is extraordinary.[12] Two weeks later, the Inyo County District Attorney charged Officer Johnson with false imprisonment, impersonating a public officer, assault with a stun-gun, and battery.[13] To add insult to injury, Inyo County sent a letter to the Tribe ordering its police to "cease and desist all law enforcement of California statutes."[14] The County asserted that tribal police "do NOT have legal authority, notwithstanding Bishop Paiute Tribal authority, to enforce any state or federal law within or outside tribal property."[15] The letter threatened additional prosecutions if tribal police did not comply with the order.[16]

In response, the Tribe sued Inyo County's sheriff and district attorney in federal court to enjoin the prosecution of Officer Johnson.[17] The Tribe also sought declaratory relief, asking the court to rule that the prosecution of Officer Johnson "violates federal common law" and that the Tribe's police "have authority on its Reservation to stop, restrain, [and] investigate violations of tribal, state, and federal law" committed by non-Indians.[18] The case settled in May 2019,[19] after the Tribe's complaint survived multiple rounds of motions to dismiss, one of which involved a trip to the Ninth Circuit.[20]

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12. Disputes between tribes and local governments over tribal police powers are nothing new. *See, e.g.*, Cabazon Band of Mission Indians v. Smith, 388 F.3d 691 (9th Cir. 2004). But the criminal prosecution of a tribal police officer is. *See* Press Release, Bishop Tribal Council, Bishop Paiute Tribe Supports Tribal Police Officer (Feb. 17, 2015), http://www.bishoppaiutetribe.com/press-releases.html#feb17 (denouncing the prosecution of Officer Johnson as "unprecedented").

13. *Bishop Paiute Tribe*, 2018 WL 347797, at *2.

14. Bishop Paiute Tribe v. Inyo Cty., 863 F.3d 1144, 1149 (9th Cir. 2017).

15. *Id.*

16. *Id.* at 1149–50.

17. Bishop Paiute Tribe Complaint, *supra* note 3, at 9–11, 46.

18. *Id.* at 44–45.

19. Minutes, Bishop Paiute Tribe v. Inyo Cty., No. 1:15-cv-00367 (E.D. Cal. May 6, 2019), ECF No. 93.

20. The case's winding procedural history underscores the complexity of the underlying legal issues. The district court *sua sponte* dismissed the Tribe's complaint on the ground that it failed to plausibly allege a justiciable case or controversy. Bishop Paiute Tribe v. Inyo Cty., No. 1:15–CV–00367-GEB-JLT, 2015 WL 4203986 at *4 (E.D. Cal. July 13, 2015). The Tribe appealed, and the Ninth Circuit reversed, ruling the Tribe's claims presented a federal question and were justiciable because the Tribe's interest in exercising its sovereign authority to detain non-Indians was impinged by the County's prosecution of Officer Johnson. *See Bishop Paiute Tribe*, 863 F.3d at 1151–55. On remand, the County moved to dismiss the Tribe's claims, but the district court rejected this challenge. Bishop Paiute Tribe

A county prosecuting a tribal police officer for doing his job is a foreseeable consequence of the confusion surrounding law enforcement in Indian Country. Described by Indian law scholars as a "maze,"[21] "web,"[22] and "crazy quilt,"[23] the current scheme of criminal jurisdiction scatters the prosecutorial authority typically reposed in a single sovereign among three—tribes, states, and the federal government.[24] Supreme Court case law and federal statutes provide some guidance, but "grey areas loom larger."[25] The authority of tribal police to investigate, detain, and arrest non-Indians is one such murky area.[26] The Supreme Court has held that tribes cannot prosecute non-Indians in tribal court,[27] but it has also recognized tribes' "power to restrain those who disturb public order on the reservation, and if

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v. Inyo Cty., No. 1:15–cv–00367–DAD–JLT, 2018 WL 347797, at *10 (E.D. Cal. Jan. 10, 2018).

21. Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976) (coining the now-infamous term "jurisdictional maze").

22. Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 84 (2016) (discussing the "web of criminal jurisdiction").

23. Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 387 (1974). Practitioners share this view too. As an Assistant U.S. Attorney for the Northern District of Oklahoma put it, determining criminal jurisdiction in Indian country is like "solving a Rubik's cube while blindfolded and underwater." David Harper, *Justice Department Prosecuting More Indian Country Crimes*, TULSA WORLD (Nov. 4, 2013), https://www.tulsaworld.com/ news/local/ justice-department-prosecuting-more-indian-country-crimes/article_f66f7c27-48a9-5051-8bb8-54fc69302411.html.

24. *See infra* Section I.A.

25. Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1646 (2016).

26. *See* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1633–35 (2016) (identifying tribal authority to arrest non-Indians as an area of "confusion"); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.07 (Nell Jessup Newton et al. eds., 2012) (observing that the presence of federal, state, and tribal officers in Indian country "create[s] difficult jurisdictional issues and conflicts" and that "numerous challenges have arisen regarding the authority of tribal officers to investigate crimes and make arrests involving non-Indians"). One final terminological note. As species of seizure, both detentions and arrests are creatures of constitutional law. *See* Terry v. Ohio, 392 U.S. 1, 16–19 (1968); *see also* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 3.5, 3.8(b) (4th ed. 2018). An officer can conduct a brief investigatory stop if the officer reasonably suspects the person is engaged in criminal activity. *Id.* § 3.8(b). An arrest, however, requires probable cause. *Id.* § 3.3(a). Because there is no bright-line rule distinguishing the two, this Note advocates for clarifying the authority of tribal police to make arrests, as this necessarily includes the lesser power to conduct investigatory stops.

27. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

necessary, to eject them."[28] The result of these mixed messages is that tribal prosecutorial authority is often conflated with tribal law enforcement authority, giving rise to the belief that tribes cannot investigate or arrest non-Indians.[29]

This is no small problem. Unsure of their authority, tribal officers may hesitate to respond forcefully to crimes involving non-Indians.[30] Yet non-Indians comprise the majority of the population living on tribal lands[31] and account for most of the crime therein.[32] Indeed, both the Department of Justice[33] and the National Congress of American Indians[34] have expressed

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28. Duro v. Reina, 495 U.S. 676, 697 (1990), *superseded by statute*, 25 U.S.C. §1301(2) (2012), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

29. *See* Bressi v. Ford, 575 F.3d 891, 896 (9th Cir. 2009) ("In the absence of some form of state authorization . . . tribal officers have no inherent power to arrest and book non-Indian violators."); *S. 1763, S. 872, and S. 1192: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 10 (2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice) [hereinafter Statement of Thomas J. Perrelli] ("Tribal police officers who respond to a domestic-violence call, only to discover that the accused is a non-Indian and therefore outside the tribe's criminal jurisdiction, often mistakenly believe they cannot even make an arrest."); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 203–04 (6th ed. 2015) ("In general, powers of policing and arrest follow the criminal jurisdiction of the three governments . . . ."); Deborah Sullivan Brennan, *Tribes Seek More Power for Their Police Forces*, L.A. TIMES (Dec. 27, 2000), http://articles.latimes.com/2000/dec/27/news/mn-5107 ("[I]n incidents involving non-tribal members or state penal code violations, [California tribal police] must conduct citizen's arrests, then wait for sheriff's deputies to finish the job.").

30. For an egregious example, see *Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country?: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 44 (2011) (statement of Troy A. Eid, Chairman, Indian Law and Order Commission) [hereinafter *Tribal Law and Order Act One Year Later*] (recounting how, after stopping an intoxicated non-Indian motorist, a tribal officer drove the non-Indian to his home instead of making an arrest).

31. The 2010 Census found that of the 4.6 million persons living in Indian country, 3.5 million identified as non-Indian. TINA NORRIS ET AL., U.S. CENSUS BUREAU, CENSUS BRIEFS NO. C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 (Jan. 2012), https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

32. *See infra* Section I.B.1.

33. Statement of Thomas J. Perrelli, *supra* note 29, at 10.

34. Letter from Jefferson Keel, President, Nat'l Cong. of Am. Indians, to Kevin Washburn, Assistant Sec'y for Indian Affairs, U.S. Dep't of Interior, and Hilary Tompkins, Solicitor, U.S. Dep't of Interior 1 (July 24, 2013), http://tloa.ncai.org/files/NCAI%20Washburn-Tompkins%20letter_%20arrest%20authority_071013.pdf (arguing that non-intervention by tribal police in crimes involving non-Indians "creates a vicious cycle in which the victims stop reporting crime because they believe that the tribal police are unable to stop the violence").

concern that the reluctance of tribal officers to arrest non-Indians contributes to the violence plaguing Indian Country. Although many have called for a restoration of tribal criminal jurisdiction over non-Indians,[35] none have sought to clarify tribal police powers notwithstanding the current limits on tribal courts.[36]

This Note takes up that task. It proceeds in four parts. Part I provides an overview of criminal jurisdiction in Indian Country to highlight the difficulty of determining whether tribal, federal, or state authorities have prosecutorial authority over a given crime. This Part then examines the consequences of this jurisdictional morass for Native American communities and the effect that it has on tribal law enforcement capabilities.

Part II considers how courts have addressed claims that tribal police lack authority to detain non-Indians. Although the Washington Supreme Court recognized the power to detain non-Indians as an aspect of inherent tribal sovereignty, federal courts have treated it as an extension of tribes' right to exclude trespassers. That approach has led the Ninth Circuit to curb tribal arrest authority where the tribe cannot exclude non-Indians, such as highways within the reservation.[37] After assessing the Ninth Circuit's approach, Part II proposes two solutions to reform the doctrine. Courts could hold that the exclusion power is independent of tribal landowner status—if tribes can exclude non-Indians from the reservation entirely, it follows that they can make arrests anywhere within the borders of their domain. Alternatively, courts could find that arrest authority falls within the power of tribes to regulate non-Indians whose on-reservation conduct threatens the health and welfare of the tribe. While either route would clarify tribal arrest authority, both face formidable countervailing Supreme Court precedent.

Next, Part III considers two available avenues to clarify the arrest authority of tribal law enforcement—citizen's arrest law and cooperative

35. *See, e.g*, Combatting Non-Indian Domestic Violence and Sexual Assault: A Call for a Full Oliphant Fix, Nat'l Cong. of Am. Indians Res. #SPO-16-037 (2016), http://www.ncai.org/attachments/Resolution_orvkZwEdbgGeAHMvJqyzAWvdDwRXttpGCTmoRcxCStvLSHnXNGv_SPO-16-037%20final.pdf; INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 23–27 (2013); Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553 (2009).

36. *See* Riley, *supra* note 26, at 1635 (calling for "creative solutions to solve the problem of [tribal] arrest authority" in the absence of a complete *Oliphant*-fix).

37. *See infra* Section II.B (discussing Bressi v. Ford, 575 F.3d 891 (9th Cir. 2009), and United States v. Cooley, 919 F.3d 1135 (9th Cir. 2019)).

agreements. It argues, however, that neither is an adequate solution. The former hamstrings tribal police and may expose officers to significant liability; the latter provides only localized relief and is often unattainable or unreliable.

Finally, following a well-trodden path in Indian law scholarship,[38] Part IV proposes a legislative fix to clarify and affirm tribes' arrest authority. In particular, it makes three suggestions for drafting a legally-sound and politically-palatable statute. The law should: (1) recognize tribal arrest authority as an inherent aspect of tribal sovereignty, not a delegation of federal authority; (2) stipulate that evidence collected by tribal police is covered by the Indian Civil Rights Act (ICRA); and (3) create a federal remedy for injuries stemming from the excessive use of force by tribal police. While no panacea, such a statute would improve public safety on the reservation by empowering tribal police to protect their communities from non-Indian criminals.

I. Prosecutorial Authority in Indian Country

To appreciate why tribal arrest authority is muddled, it is necessary to first understand prosecutorial authority in Indian Country. It is truly *sui generis*.[39] Generally, criminal jurisdiction is an exercise in geography; the sovereign possesses the power to punish any offense committed within its territory.[40] But tribes do not enjoy the full panoply of sovereign powers,

38. *See, e.g.*, Alison Burton, Note, *What About the Children? Extending Tribal Criminal Jurisdiction to Crimes Against Children*, 52 HARV. C.R.-C.L. L. REV. 193 (2017) (calling on Congress to extend VAWA to cover child abuse); Ennis, *supra* note 35, at 572 (proposing a federal statute to overturn *Oliphant*); Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 336 (advocating for a federal "Tribal Sovereignty Affirmation Act"); Developments in the Law, *Fresh Pursuit from Indian Country: Tribal Authority to Pursue Suspects onto State Land*, 129 HARV. L. REV. 1685, 1700–01 (2016) (proposing federal legislation authorizing tribal police to pursue non-Indians outside the reservation if the engagement began in Indian country).

39. Indeed, this could fairly be said about the field of Indian law writ large. *See* United States v. Kagama, 118 U.S. 375, 381 (1886) ("[The] relation of Indian tribes . . . to the people of the United States, has always been an anomalous one, and of complex character."); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 802 (2007) ("American Indian tribes do not neatly fit into existing legal paradigms because they inhabit a strange sovereign space in the U.S. legal system, one which they alone occupy.").

40. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909), *overruled on other grounds by* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400 (1990) ("[T]he 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."); David Wolitz, *Criminal Jurisdiction and the Nation-State: Toward Bounded Pluralism*, 91 OR. L. REV.

relegated instead to being "domestic dependent nations."[41] One consequence of this status is that the Supreme Court and Congress have disaggregated geography from criminal jurisdiction in Indian Country and replaced that simple principle with a welter of rules which assign prosecutorial authority to various sovereigns depending on the crime's factual circumstances.

A. "A Journey Through the Jurisdictional Maze"[42]

1. Where, Who, and What: The Criminal Jurisdiction Variables

Determining which sovereign can prosecute the defendant turns on three factors: (1) the crime's location; (2) the Indian status of the perpetrator and victim; and (3) the nature of the crime. Depending on these elements, a case may fall within the exclusive purview of one sovereign—or two may share concurrent jurisdiction.

The threshold question is whether the offense occurred in "Indian Country" because only then is tribal jurisdiction a possibility.[43] A term of art defined in 18 U.S.C. § 1151, Indian Country includes: (a) Indian reservations; (b) dependent Indian communities; and (c) Indian allotments to which Indian title has not been extinguished.[44] First, a reservation is public land that the federal government has set aside for a tribe.[45] Notably, because § 1151(a) covers "all lands" within a reservation, Indian Country includes public roads and property owned by non-Indians located within the

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725, 731 (2013) (observing that under the "traditional model" of criminal jurisdiction, "one could determine which criminal code, which prosecutor's office, and which court system had jurisdiction simply by finding the location of the crime within a particular sovereign state").

41. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *see also* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) (holding that tribes' "rights to complete sovereignty, as independent nations, [were] necessarily diminished" by European conquest).

42. Clinton, *supra* note 21, at 503.

43. *See* CANBY, *supra* note 29, at 194 ("The jurisdiction of a tribe is generally confined to crimes committed within the geographical limits of its reservation and, presumably, any of its dependent Indian communities."); *cf.* Fife v. Moore, 808 F. Supp. 2d 1310, 1314–15 (E.D. Okla. 2011) (enjoining tribal prosecution of tribal citizens where the crime occurred on fee land outside the reservation). But perhaps this is changing. *See* Kelsey v. Pope, 809 F.3d 849, 863 (6th Cir. 2016) (holding tribe could exercise criminal jurisdiction over a tribal citizen for a sexual assault allegedly committed at the tribe's off-reservation community center). For an argument that tribal criminal jurisdiction should have extraterritorial reach, see Rolnick, *supra* note 25, at 1673–79.

44. 18 U.S.C. § 1151 (2012).

45. *See Frequently Asked Questions*, U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFF., https://www.bia.gov/frequently-asked-questions (last visited Nov. 5, 2018); *cf.* United States v. Celestine, 215 U.S. 278 (1909).

reservation.[46] Second, a dependent Indian community refers to land that has been set aside for the use of the tribe and is under federal superintendence.[47] Finally, Indian Country includes parcels of land held in trust by the federal government for an Indian, regardless of whether the land is located within reservation boundaries.[48]

If the crime occurred in Indian Country, the next task is to determine if either the perpetrator or victim are "Indian." A matter of federal common law,[49] who qualifies as an Indian for criminal jurisdiction purposes turns on a two-prong test that considers "(1) the degree of Indian blood; and (2) tribal or governmental recognition as an Indian."[50] The first prong "requires ancestry living in America before the Europeans arrived . . . ."[51] The second prong demands that the person be recognized as an Indian by either the federal government or a federally recognized tribe.[52] Recognition depends on a plethora of factors, including tribal enrollment, use of Indian services, enjoyment of tribal benefits, and participation in tribal life through residence on the reservation and attendance at social events.[53] In the absence of tribal enrollment, which is often treated as dispositive evidence of tribal affiliation,[54] the inquiry boils down to whether the person is

46. 18 U.S.C. § 1151(a).

47. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998).

48. 18 U.S.C. § 1151(c).

49. The term's origin reaches back to *United States v. Rogers*, where the Supreme Court held that a Caucasian man who had become a naturalized Cherokee citizen was not an Indian for the purposes of federal law. 45 U.S. (4 How.) 567, 572–73 (1846). In so ruling, the Court concluded that being Indian requires a degree of Indian descent and political recognition as Indian. *Id.*

50. United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979); *see also* United States v. Zepeda, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc) ("[P]roof of Indian status . . . requires only two things: (1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and (2) proof of membership in, or affiliation with, a federally recognized tribe.").

51. United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005).

52. *Id.* at 1224.

53. *Id.* Unsurprisingly, this prong is not applied consistently across the courts of appeals, with the Ninth Circuit examining only these four factors "in declining order of importance," *Zepeda*, 792 F.3d at 1114, and the Eighth Circuit considering these and other factors in no particular rank-order, United States v. Stymiest, 581 F.3d 759, 763–66 (8th Cir. 2009). For additional background on the *Rogers* test and critique of it, see Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49 (2017).

54. *See Stymiest*, 581 F.3d at 764 (stating that if "the defendant is an enrolled tribal member . . . that factor becomes dispositive"); United States v. Torres, 733 F.2d 449, 455 (7th Cir. 1984); United States v. Lossiah, 537 F.2d 1250, 1251 (4th Cir. 1976). *But see*

acknowledged as an Indian by the relevant community.[55] Given that both parts of the inquiry are fact-intensive, it is perhaps an understatement to say that defining "exactly who is and who is not an Indian is very imprecise."[56]

The final step is to determine the crime that occurred. This element has two prongs: first, whether there is a victim; and second, if so, the severity of the offense. As discussed below, jurisdiction may change depending on whether the perpetrator committed a victimless crime—i.e., driving while intoxicated—because federal law does not cover such offenses.[57] The severity of the crime may also be relevant: if both the perpetrator and victim are Indian, then the federal government has jurisdiction only over "major" crimes like murder or kidnapping. The tribe with which both parties are affiliated retains exclusive jurisdiction of all other intra-Indian crimes.[58] Armed with the proper tools, it is now time to enter the maze.

2. Tribal, Federal, and State Jurisdiction

Tribal: As a general matter, tribes lack jurisdiction over non-Indians but can punish any Indian for violations of tribal law. The prohibition against prosecuting non-Indians stems from *Oliphant v. Suquamish Indian Tribe*,[59] perhaps the most reviled decision in Indian law.[60] There, the Supreme Court held that, like the powers to alienate land and engage in foreign relations,

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Bruce, 394 F.3d at 1225 (opining that "enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status"); United States v. Prentiss, 273 F.3d 1277, 1282–83 (10th Cir. 2001) (holding that stipulation that victims belonged to pueblo was insufficient to prove Indian status absent evidence that Indian blood was a requirement for tribal membership).

55. *See* United States v. Cruz, 554 F.3d 840, 849 (9th Cir. 2009); *Stymiest*, 581 F.3d at 762.

56. United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976).

57. *See infra* notes 94–95 and accompanying text.

58. *See infra* notes 84–96 and accompanying text.

59. 435 U.S. 191 (1978).

60. Criticism of *Oliphant* pervades the canon. *See, e.g.*, Russell Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 610 (1979) ("A close examination of the Court's opinion reveals a carelessness with history, logic, precedent, and statutory construction that is not ordinarily acceptable from so august a tribunal."); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 34–39 (1999) (arguing that *Oliphant* "lack[s] coherence"). In fact, in a 2009 poll on Turtle Talk, a widely read Indian law blog, readers identified *Oliphant* as the Supreme Court decision that most undermines tribal sovereignty. *See First Turtle Talk Poll Results—Oliphant Biggest Frustration*, TURTLE TALK (Mar. 9, 2009, 9:42 AM), https://turtletalk.wordpress.com/2009/03/09/first-turtle-talk-poll-results-oliphant-biggest-frustration/.

tribes were implicitly divested of criminal jurisdiction over non-Indians by submitting to the sovereignty of the United States.[61] Although the Court acknowledged that its ruling would impair a tribe's ability to maintain public safety on its land, it left it to Congress to decide "whether Indian tribes should finally be authorized to try non-Indians."[62]

Forty years later, *Oliphant* remains the law of the land with one (small) exception.[63] Through the 2013 reauthorization of the Violence Against Women Act (VAWA), Congress extended to tribes "special domestic violence criminal jurisdiction over all persons" in Indian Country.[64] Though helpful, this jurisdiction is highly circumscribed: either the victim or the perpetrator must be an Indian,[65] the perpetrator must have "ties" to the tribe,[66] and the statute only covers three crimes.[67] Thus, while the VAWA constitutes a partial "*Oliphant*-fix," tribal criminal law remains generally unenforceable against non-Indians.

In contrast, a tribe has criminal jurisdiction over all Indians within its territory. The Supreme Court has long recognized that tribes have "the inherent power to prescribe laws for their members and to punish infractions of those laws."[68] When a tribe enforces tribal law against one of its own members, it is therefore exercising "primeval sovereignty, [which] has never been taken away from [it], either explicitly or implicitly, and is attributable in no way to any delegation . . . of federal authority."[69]

In addition, tribes can prosecute nonmember Indians, albeit as a result of congressional action. Following *Oliphant*, the Court held in *Duro v. Reina*[70] that criminal jurisdiction over nonmember Indians was inconsistent with tribal sovereignty.[71] "[I]n the criminal sphere[,] membership marks the

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61. *Oliphant*, 435 U.S. at 209–10.

62. *Id.* at 212.

63. *See* United States v. Bryant, 136 S. Ct. 1954, 1960 n.4 (2016) ("Tribal governments generally lack criminal jurisdiction over non-Indians who commit crimes in Indian country.").

64. 25 U.S.C.A. § 1304(b)(1) (Westlaw through Pub. L. No. 116–25).

65. *Id.* § 1304(b)(4)(A).

66. *See id.* § 1304(b)(4)(B).

67. Those crimes are violations of protective orders, dating violence, and domestic violence. *Id.* § 1304(c).

68. United States v. Wheeler, 435 U.S. 313, 323 (1978); *accord* Talton v. Mayes, 163 U.S. 376, 380 (1896).

69. *Wheeler*, 435 U.S. at 328.

70. 495 U.S. 676 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2012), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

71. *Duro*, 495 U.S. at 685.

bounds of tribal authority,"[72] the Court explained, because only members can participate in tribal government affairs like voting or holding elected office.[73] As in *Oliphant*, the Court invited Congress to deal with the fallout.[74] This time, however, Congress acted. The same year *Duro* was decided, Congress amended ICRA to clarify that tribes have inherent sovereign authority to prosecute "all Indians."[75] The "*Duro*-Fix" was later upheld in *United States v. Lara*,[76] in which the Court held that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians."[77]

Federal: Federal criminal jurisdiction over Indian Country stems from two statutes: the General Crimes Act (GCA)[78] and the Major Crimes Act (MCA).[79] The GCA makes federal criminal law generally applicable to Indian Country.[80] Although broad, the GCA contains three limitations: (1) it does not cover crimes committed by an Indian against another Indian[81]; (2) it exempts from federal jurisdiction Indians who have already been punished by their tribe or where the exercise of jurisdiction is precluded by treaty[82]; and (3) as a matter of federalism, the federal government cannot prosecute a non-Indian if no Indians are involved.[83] The MCA narrows the GCA's carve-outs by granting the federal government jurisdiction over an Indian who commits one of fourteen enumerated "major" crimes, regardless of whether the victim is an Indian or whether the tribe sanctions the perpetrator.[84]

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72. *Id.* at 693.

73. *Id.* at 688.

74. *Id.* at 698 ("If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.").

75. Defense Appropriations Act for FY 91, Pub. L. No. 101-938, § 8077(b)–(d) (1990) (amending 25 U.S.C. § 1301(2) (2012)).

76. 541 U.S. 193 (2004).

77. *Id.* at 210.

78. 18 U.S.C. § 1152 (2012).

79. *Id.* § 1153.

80. *Id.* § 1152.

81. *Id.*

82. *Id.*

83. United States v. McBratney, 104 U.S. 621, 624 (1881).

84. 18 U.S.C.A. § 1153 (Westlaw through Pub. L. No. 116-25). The fourteen crimes are murder, manslaughter, kidnapping, sexual abuse, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under the age of sixteen, felony child abuse or neglect, arson, burglary, and robbery.

State: State criminal jurisdiction is narrow in theory but broad in fact. As a matter of black-letter law, state criminal law does not penetrate reservation boundaries.[85] But there are two significant exceptions. First, states possess exclusive jurisdiction over a non-Indian who commits a crime in Indian Country that is either victimless or against a non-Indian.[86] In such cases, the tribe lacks jurisdiction per *Oliphant*, and the federal government has no authority under the GCA or MCA. Second, Congress transferred criminal jurisdiction over Indian territory to state authorities in six states and provided a mechanism by which other states could exercise this power.[87] Known as Public Law 280, the statute markedly altered the jurisdictional landscape. Participating states can prosecute minor crimes committed by Indians—crimes that would otherwise be the exclusive purview of the tribes. And there is an entirely different cast of characters at play: county police, district attorneys, and state courts replace the Bureau of Indian Affairs (BIA), Department of Justice, and federal judiciary. But most impressive is the law's reach—as of 2000, it extended state criminal jurisdiction to nearly a quarter of the reservation-based tribal population.[88] Having mapped the maze, this Note pivots to examine the consequences of divvying up criminal jurisdiction among three sovereigns.

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85. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 26, § 9.03 ("As a general rule, states lack jurisdiction in Indian country absent a special grant of jurisdiction."); *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561–62 (1832) (vacating Georgia's conviction of a missionary for entering Cherokee territory without a state license on the ground that the Cherokee Tribe is "a distinct community" where "the laws of Georgia can have no force").

86. *See McBratney*, 104 U.S. at 624; *see also* Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984) ("Within Indian country, State jurisdiction is limited to crimes by non-Indians against non-Indians, and victimless crimes by non-Indians.") (citations omitted); *cf.* United States v. Langford, 641 F.3d 1195, 1197–1200 (10th Cir. 2011) (holding that only the state has criminal jurisdiction over non-Indian who participated in a cock fighting ring on a reservation).

87. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2018)). California, Oregon (except the Warm Springs Reservation), Wisconsin, Nebraska, and Minnesota (except the Red Lake Reservation) are the mandatory Public Law 280 states. Alaska (except the Metlakatla Reservation) became a mandatory Public Law 280 state upon statehood. *Id.* To date, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington are voluntary Public Law 280 jurisdictions. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 26, § 6.04 n.272. For more on Public Law 280 generally, see Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for The Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006).

88. Goldberg & Champagne, *supra* note 87, at 697.

B. The "Maze of Injustice"[89]

1. The Harm to Native Communities

The criminal jurisdiction maze has led to a "public safety crisis" in Indian Country.[90] The statistics are stark. Historically, Native Americans are more likely than any other ethnic group to be the victims of violence,[91] and in a recent survey, four in five respondents reported having experienced violence in his or her lifetime.[92] Native women especially suffer. The murder rate of Indian women is ten times the national average in some areas,[93] and they are more than twice as likely to be raped as Caucasian women.[94] Non-violent crime is also woefully high in Indian Country.[95] For example, between 2008 and 2010, tribal officials reported 54,000 property crimes to the FBI.[96]

Non-Indians are largely to blame. According to the Department of Justice, 86% of reported rapes and sexual assaults experienced by Native women were perpetrated by non-Native men.[97] And a 2016 survey of approximately 4000 Native Americans found that, of those who had experienced violence during their lifetime, 97% of Indian women and 90% of Indian men reported having been victimized by a non-Indian.[98] In contrast, only 35% of female victims and 33% of male victims reported having been victimized by an Indian.

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89. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 1 (2007) [hereinafter MAZE OF INJUSTICE].

90. INDIAN LAW & ORDER COMM'N, *supra* note 35, at iii.

91. STEVEN W PERRY, U.S. DEP'T OF JUSTICE, NO. NCJ 203097, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE 1992–2002, at 5–6 (Dec. 2004), https://www.bjs.gov/content/pub/pdf/aic02.pdf [hereinafter PERRY, BJS STATISTICAL PROFILE].

92. ANDRE B. ROSAY, NAT'L INST. OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN 3 (Sept. 2016), https://www.ncjrs.gov/pdffiles1/nij/249822.pdf.

93. RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 5 (2008).

94. Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 741, 741–46 (Jul. 21, 2017).

95. *See* STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, TECH. REP. NO. NCJ 239077, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2012, at 9 (Oct. 2012), https://www.bjs.gov/content/pub/pdf/tcdca12.pdf.

96. *Id.*

97. PERRY, BJS STATISTICAL PROFILE, *supra* note 91, at 9.

98. ROSAY, *supra* note 92, at 4.

Because of *Oliphant*, Native victims must rely on state or federal authorities to prosecute non-Indian offenders. But justice is rarely served. Understaffed and insufficiently funded, law enforcement agencies struggle to maintain public safety in Indian Country, areas which are often remote and sparsely populated.[99] Investigations—if they occur—proceed slowly.[100] In the meantime, witnesses disappear, evidence spoils, and perpetrators escape. As a result, prosecutors often decline to file charges.[101] Even when prosecutors bring charges, the abysmal convictions rate only makes things worse. It turns Indian Country into a safe haven for non-Indian criminals,[102] deters the reporting of crime,[103] and breeds distrust among Native Americans towards federal and state law enforcement.[104]

2. The Harm to Tribal Law Enforcement Authority

Beyond its toll on tribal members, the status quo hinders the ability of tribal police to maintain public safety on the reservation. Tribal police may be reluctant to investigate or pursue a suspect unless it is clear that the tribe has prosecutorial jurisdiction for fear that their action will dissuade federal

99. *See* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 719 (2006) ("[A]gent[s] handling Indian country investigations often work alone in rural settings and may travel hundreds of miles of reservation roads in the course of a week's work."); MAZE OF INJUSTICE, *supra* note 89, at 42 ("The US Departments of Justice and of the Interior have both acknowledged that there is inadequate law enforcement in Indian Country and identified lack of funds as a central cause.").

100. *See* MAZE OF INJUSTICE, *supra* note 89, at 43 ("Women on the Reservation who report sexual violence often have to wait for hours or even days before receiving a response . . . . Sometimes they receive no response at all."); Goldberg & Champagne, *supra* note 87, at 711–14 (finding police response rates worse in Public Law 280 states than tribal lands under federal control).

101. *See*, *e.g.*, MAZE OF INJUSTICE, *supra* note 89, at 66–67 (describing the high rate of declined cases by federal prosecutors). In 2015, federal prosecutors declined roughly 40% of cases received. *See* OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, REVIEW OF THE DEPARTMENT'S TRIBAL ENFORCEMENT EFFORTS PURSUANT TO THE *TRIBAL LAW AND ORDER ACT OF 2010*, at 10 tbl. 2 (Dec. 2017), https://oig.justice.gov/reports/2017/e1801.pdf.

102. *See* Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, ATLANTIC (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/ ("Every officer could recount being told by a non-Indian, 'You can't do anything to me.'"); Louise Erdich, *Rape on the Reservation*, N.Y. TIMES (Feb. 26, 2013), https://www.nytimes.com/2013/02/27/opinion/native-americans-and-the-violence-against-women-act.html (describing how the *Oliphant* rule "attract[s] non-Indian habitual sexual predators to tribal areas").

103. *See* MAZE OF INJUSTICE, *supra* note 89, at 4.

104. *See* INDIAN LAW & ORDER COMM'N, *supra* note 35; Washburn, *supra* note 99, at 735–40 (detailing the cultural barriers facing federal prosecutors in Indian country).

or state involvement.[105] Yet in many cases, it is impossible for the first responders to the scene to determine whether the offense occurred in Indian Country *and* whether the suspect is an Indian, the two prerequisites for tribal jurisdiction.[106] For starters, the line dividing state land and Indian Country can be blurry.[107] Tribes and states frequently dispute not just the precise contours of the reservation,[108] but whether huge swathes of land are classified as Indian Country.[109] Further adding to the complexity, Indian Country is not static. For instance, an Indian could take their allotment out of trust to sell it or to obtain a mortgage, transforming the property into state land.[110] Indianness is even more difficult to discern.[111] As the Ninth

105. *See* MAZE OF INJUSTICE, *supra* note 89, at 42 ("In some instances federal authorities may reportedly not pursue cases in which tribal police have begun an investigation. Officers from one tribal law enforcement agency told Amnesty International that they were reluctant to take steps to preserve evidence at a major crime scene for this reason."); *Tribal Law and Order Act One Year Later*, *supra* note 30, at 69 (statement of Jacqueline Johnson-Pata) ("[Jurisdictional] cloudiness creates a loss of time and money, but what it also does in the law enforcement arena, it brings in inaction because it is easier sometimes not to have those questions.").

106. *See* INDIAN LAW & ORDER COMM'N, *supra* note 35, at 9.

107. *See* Michael Riley, *1885 Law at Root of Jurisdictional Jumble*, DENVER POST (Nov. 9, 2007 3:51 PM), https://www.denverpost.com/2007/11/09/1885-law-at-root-of-jurisdictional-jumble/ ("[A] change by a few feet in the location of a crime can determine whether it's under state, tribal or federal authority.").

108. *See*, *e.g.*, United States v. Wilson, 699 F.3d 235, 238–39 & n.1 (2d Cir. 2012) (acknowledging that the St. Regis Mohawk and New York contest whether the land on which the vehicle stop occurred was outside the reservation's borders but finding the issue inapposite because one of the tribal officers was cross-deputized as a federal officer).

109. *See* Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017), *cert. granted sub. nom.* Carpenter v. Murphy, 138 S. Ct. 2026 (2018) (No. 17-1107) (holding that three million acres of eastern Oklahoma is Indian country such that the state lacked criminal jurisdiction over an Indian defendant); *see also* Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962) (vacating state burglary conviction of an Indian upon finding that Congress had not diminished the reservation); State v. Frank, 2002-NMSC-026, 132 N.M. 544, 52 P.3d 404 (affirming state conviction of Indian because situs of crime was not a dependent Indian community).

110. *Cf. Cross-deputization Helps Solve Jurisdictional Issues*, INDIAN COUNTRY TODAY (June 4, 2007), https://newsmaven.io/indiancountrytoday/archive/cross-deputization-helps-solve-jurisdictional-issues-Aki_R6e-sUySuxyHn-TwFQ/ ("You respond to a call and if the incident occurred in the house, it's state jurisdiction. If it happened in the driveway, it's tribal jurisdiction. So it does become very complicated . . . ." (quoting Jason O'Neal, Chief of the Chickasaw Police Department)).

111. *See* MAZE OF INJUSTICE, *supra* note 89, at 34 ("[I]t may take weeks or months to determine if it's Indian land or not; investigators usually cannot determine this, they need

Circuit acknowledged, "[a] person can have significant Native American ancestry and nonetheless not be an Indian" under federal law, while "a person can be an Indian for tribal law enforcement purposes even if that person does not have any of the physical characteristics associated with Native American heritage."[112] *United States v. Keys*[113] is illustrative of this challenge. There, it took tribal police several days to determine whether the suspect was an Indian after a search of the National Crime Information Center database revealed four notations labeling him Caucasian but also two listing him as Indian.[114] Worse yet, if it is clear that the suspect is a non-Indian, many tribal officers believe that they cannot intervene in an ongoing crime or make an arrest.[115] In fact, as recently as 2013, the BIA reportedly instructed tribal police that they had no authority over non-Indians.[116]

The status quo is untenable. Abrogating *Oliphant* is certainly one remedy. But, in the interim, this Note advances another, albeit more modest, proposal: clarify and affirm the authority of tribal law enforcement to arrest non-Indians who commit crimes in Indian Country. This Note now turns to explore several avenues to achieve that goal.

II. Tribal Authority to Arrest Non-Indians

The Supreme Court has addressed the ability of tribal police to arrest non-Indians only in passing. In *Duro v. Reina*,[117] it opined:

> [Tribes] possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands. Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their

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attorneys to do it by going through court and title records to make a determination." (quoting Assistant U.S. Attorney (name withheld))).

112. United States v. Cooley, 919 F.3d 1135, 1142–43 (9th Cir. 2019).

113. 390 F. Supp. 2d 875 (D.N.D. 2005).

114. *Id.* at 878. Only after calling every tribe in North Dakota to check enrollment lists, did the officers conclude that the tribe was without jurisdiction. *Id.*

115. *See* Letter from Jefferson Keel, *supra* note 34.

116. *Id.*

117. 495 U.S. 676 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2012), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

> power to detain the offender and transport him to the proper authorities.[118]

This three-sentence exposition leaves much to be desired. Is the "undisputed power to exclude" an aspect of tribes' criminal or civil authority, or does it flow from the reservoir of inherent sovereignty? Is the term "tribal lands" coextensive with § 1151's definition of "Indian Country"? What acts "disturb the public order"? How long can tribes "detain the offender" before they must "transport him" to a non-tribal jurisdiction?

Federal and state courts have struggled to apply *Duro* to tribal arrests of non-Indians. In particular, the Ninth Circuit's approach has added a new set of hedges to the criminal jurisdiction maze, which, this Note posits, are impossible to navigate and undermine public safety. After analyzing and critiquing the case law, this Part offers two jurisprudential solutions to clarify tribal arrest authority.

A. Tribal Arrest Authority as an Exercise of Tribal Sovereignty

In *State v. Schmuck*,[119] the Washington Supreme Court held that tribal police authority over non-Indians is not merely an expression of tribes' power of exclusion, but a power flowing from their "general authority as sovereign."[120] A redux of *Oliphant*, the Suquamish tribal police in *Schmuck* stopped David Schmuck, a non-Indian, for speeding on a public road within the reservation.[121] After smelling alcohol, the officer performing the stop asked Schmuck if he would consent to field sobriety tests.[122] When Schmuck refused, the officer told him he was not free to leave until Washington State Patrol arrived.[123] Schmuck relented and agreed to perform the tests, which he failed. He was arrested by a state trooper who

118. *Id.* at 696–97.

119. 850 P.2d 1332 (Wash. 1993) (en banc).

120. *Id.* at 1341.

121. *Id.* at 1333–34. *Oliphant*'s petitioners—Mark Oliphant and Daniel Belgrade—both faced prosecutions in Suquamish tribal court. The police arrested Mark Oliphant for resisting arrest and assaulting an officer while drunk at the Tribe's Chief Seattle Day festival. Later in the same year, they arrested Daniel Belgarde for reckless endangerment after a high-speed chase ended with him crashing into a tribal police car. And who should the police find as a passenger in Belgrade's car, but none other than Oliphant? *See* Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty? The Story of* Oliphant v. Suquamish Indian Tribe, *in* INDIAN LAW STORIES 270–71 (Carole Goldberg et al. eds., 2011).

122. *Schmuck*, 850 P.2d at 1334.

123. *Id.*

arrived twenty minutes later.[124] Convicted of driving while intoxicated, Schmuck appealed on the ground that the initial traffic stop and subsequent detention were illegal because he was non-Indian.[125]

The court rejected his claims and upheld the arrest. Regarding the stop, the court found that this power was "[f]undamental" to enforcing the tribe's traffic code.[126] In its view, a rule limiting stops to only tribal members "would put tribal officers in the impossible position of being unable to stop any driver" for the simple reason that "[o]nly by stopping the vehicle could he determine whether the driver was an Indian."[127] This would "seriously undercut the Tribe's ability to enforce tribal law, . . . render the traffic code virtually meaningless, . . . [and] 'run contrary to the well-established federal policy of furthering Indian self-determination.'"[128]

With respect to the detention, the court found that the tribal officer's conduct comported with *Duro* because he "detained Schmuck and promptly delivered him up" to state authorities.[129] The fact that Schmuck was driving on a public road did not alter the calculus. First, the court noted that the federal definition of "Indian Country" covers all land within an Indian reservation, "including rights-of-way."[130] Second, it observed that "the Tribe's authority to stop and detain is not necessarily based *exclusively* on the power to exclude non-Indians."[131] Rather, it "may also be derived from the Tribe's general authority as sovereign."[132] The court acknowledged that, under the Supreme Court's decision in *Montana v. United States*,[133] tribes generally lack jurisdiction over nonmembers on non-Indian land within the reservation.[134] But *Montana* carved out two exceptions to that rule, one of which is that tribes may regulate non-Indians whose "conduct threatens or has some direct effect on the . . . health or welfare of the tribe."[135] The *Schmuck* court reasoned that detaining non-Indian motorists fell within the sweep of this exception because "[a]llowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure

124. *Id.*
125. *Id.* at 1334–35.
126. *Id.* at 1337.
127. *Id.*
128. *Id.* (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978)).
129. *Id.* at 1339–40.
130. *Id.* at 1341 (quoting 18 U.S.C. § 1151(a) (2012)).
131. *Id.* (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982)).
132. *Id.*
133. 450 U.S. 544 (1981).
134. *Schmuck*, 850 P.2d at 1341.
135. *Id.* (quoting *Montana*, 450 U.S. at 544) (emphasis omitted).

Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe."[136] Thus, the court concluded that tribal police have "*inherent* authority to stop and detain a non-Indian who has allegedly violated state and tribal law on the reservation until he or she can be turned over to state authorities for charging and prosecution."[137]

B. Tribal Arrest Authority as an Exercise of the Tribal Exclusion Power

1. Decisions Affirming Tribal Arrests of Non-Indians

In contrast to *Schmuck*, the Ninth and Eighth Circuits have treated tribes' authority to stop, investigate, and detain non-Indians within Indian Country as an exercise of their power to exclude.[138] In the Ninth Circuit case, *United States v. Becerra-Garcia*,[139] tribal rangers with the Tohono O'odham Tribe stopped Efrain Becerra-Garcia and detained him after discovering twenty undocumented immigrants crammed in his van.[140] Becerra-Garcia pleaded guilty to transporting illegal aliens[141] and then appealed, arguing the stop was *per se* unreasonable under the Fourth Amendment because the rangers lacked authority to seize him under federal, state, or tribal law.[142]

The court declined to adopt his bright-line rule.[143] "Intrinsic in tribal sovereignty is the power to exclude trespassers from the reservation," and this "necessarily entails investigating potential trespassers."[144] Accordingly,

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136. *Id.*

137. *Id.* at 1342 (emphasis added).

138. The Tenth Circuit addressed the issue in an unpublished opinion. *See* United States v. Green, 140 F. App'x. 798, 800 (10th Cir. 2005) (summarily dismissing non-Indian defendant's claim that Creek Nation tribal police lacked authority to stop, citing *Duro v. Reina*, 495 U.S. 676 (1990)). Additionally, the Ninth Circuit actually beat the *Duro* Court to the punch, ruling in 1975 that tribal police could stop and investigate non-Indians for violations of state or federal law. *See* Ortiz-Barraza v. United States, 512 F.2d 1176, 1181 (9th Cir. 1975). As in *Duro*, the panel opinion relied on the tribe's exclusion power to justify the arrest. *Id.* at 1180.

139. 397 F.3d 1167 (9th Cir. 2005).

140. *Id.* at 1169–71.

141. *Id.* at 1170.

142. Appellant's Opening Brief at 15–21, United States v. Becerra-Garcia, 397 F.3d 1167 (9th Cir. 2005) (No. 03-10654), 2005 WL 1067010.

143. *Becerra-Garcia*, 397 F.3d at 1175. With respect to the Fourth Amendment, the court observed that although the Fourth Amendment does not apply to tribal law enforcement, ICRA "imposes an 'identical limitation' on tribal government conduct as the Fourth Amendment." *Id.* at 1171 (quoting United States v. Wheeler, 435 U.S. 313, 329 (1978)). As such, the court applied Fourth Amendment jurisprudence to determine whether the evidence derived from the stop was admissible. *Id.*

144. *Id.* at 1175.

"[t]he claim that the rangers lack specific tribal authority to stop vehicles does not transform this otherwise reasonable stop into an unreasonable one."[145] Because Becerra-Garcia did not dispute the lower court's finding that the rangers had reasonable suspicion to stop him, the court affirmed his conviction.[146]

The Eighth Circuit applied "the rule of *Duro*" in *United States v. Terry*[147] to reach a similar result. In *Terry*, tribal police apprehended Randy Terry on the Oglala Pine Ridge Reservation "for driving while intoxicated, spousal abuse, violating liquor ordinances, and disorderly conduct."[148] Unsure whether Terry was an Indian, the tribal police called the local sheriff to retrieve him.[149] The sheriff asked if the tribe could hold Terry overnight because the county only had one part-time deputy, and he was located eighty miles away.[150] The next morning, before the sheriff arrived, Terry waived his *Miranda* rights and spoke to a tribal investigator.[151] Charged with domestic violence and possessing a firearm as a felon, Terry entered a conditional guilty plea and then appealed the denial of his suppression motion.[152] Citing *Oliphant*, he posited that "[j]ust as state police do not have authority to arrest an Indian in Indian country, tribal police have no authority to arrest a non-Indian."[153]

The court disagreed. *Duro*, not *Oliphant*, was the controlling authority, as the Oglala merely sought to arrest Terry, not prosecute him.[154] And the initial seizure fell squarely "within the rule of *Duro*" because the officers summoned the county sheriff upon realizing Terry was likely a non-Indian.[155] But the court hedged on whether *Duro* permitted the tribe to hold Terry overnight. Rather than relying on the tribe's inherent sovereignty, the court justified Terry's stint in tribal jail on the ground that the officers held

145. *Id.*

146. *See id.* at 1174–75.

147. 400 F.3d 575, 580 (8th Cir. 2005).

148. *Id.* at 578.

149. *Id.* at 578–79. The tribal officer suspected that Terry was "probably not Indian because it would be unlikely that an Indian from Pine Ridge would be subject to a Nebraska protection order," as was Terry. *Id.* at 597.

150. *Id.* at 579.

151. *Id.*

152. *Id.* at 577–78.

153. Appellant's Brief at 8, *Terry*, 400 F.3d 575 (No. 04-2595), 2004 WL 2731072 (citation omitted).

154. *Terry*, 400 F.3d at 580.

155. *Id.*

him "pursuant to the express instructions and authority of [the sheriff]."[156] Finding the detention reasonable, the court held that the district court did not err in admitting the evidence.[157]

Lower courts have applied *Becerra-Garcia* and *Terry* to the seizure of non-Indians by tribal police, but the decisions are relatively fact-bound. One court denied a defendant's motion to suppress in which he alleged that his status as a non-Indian rendered his detention unreasonable.[158] The court disposed of his claim with a citation to *Terry* and concluded that the seizure was reasonable because tribal police contacted state and federal authorities after the arrest and only held the defendant for five hours.[159] In contrast, another court distinguished *Terry* to hold the interrogation of a non-Indian defendant by tribal officers constituted an unreasonable detention.[160] The facts of the case, however, all but compelled this outcome—the defendant spent two days in tribal jail before the interrogation, the officers knew he was not Indian prior to questioning, and the officers told the defendant he would be released afterward regardless of what he said.[161]

Thus, while *Schmuck* provides one doctrinal avenue to recognizing tribal arrest authority, the federal courts have instead opted to ground tribal arrest authority on tribes' power to exclude trespassers.

2. Decisions Constraining Tribal Authority to Arrest Non-Indians

Although the decisions above suggest that tribal law enforcement officers enjoy robust power over non-Indians, the exclusion-based approach has drastically cabined tribal arrest authority by making it contingent on the status of the land where the seizure occurs. This doctrinal aberration got its start in *Bressi v. Ford*.[162] That case began when Thomas Bressi, a non-Indian, refused to provide identification to Tohono O'odham tribal police while stopped at a roadblock that the tribe had erected on a highway running through the reservation.[163] In response, the officers handcuffed Bressi and detained him until he signed state citations for failing to provide

156. *Id.*

157. *Id.* at 580–81 (evidence recovered from car was lawful under plain view or automobile exception); *see id.* at 582 (statements were voluntarily made to tribal investigator).

158. United States v. Peters, No. 3:16-cr-30150-RAL, 2017 WL 1383676, at *2–3 (D.S.D. Apr. 13, 2017).

159. *Id.*

160. United States v. Keys, 390 F. Supp. 2d 875, 883–84 (D.N.D. 2005).

161. *Id.* at 884.

162. 575 F.3d 891, 899 (9th Cir. 2009).

163. *Id.* at 894.

a driver's license and failure to comply with a police officer's orders.[164] After a failed prosecution by the state, Bressi filed suit in federal court against the tribal officers, all of whom had been deputized to enforce Arizona law, under 42 U.S.C. § 1983,[165] a statute that creates a private cause of action against any "person who, under color of" state law deprives a citizen of their federal constitutional rights.[166]

The district court granted summary judgment in favor of the officers,[167] but the Ninth Circuit reversed.[168] Writing for the panel, Judge Canby first observed that "the fact that the roadblock was set up on a state highway" made things "complicated."[169] The state highway was part of Indian Country under § 1151.[170] "The tribe therefore has full law enforcement authority over its members and nonmember Indians on that highway."[171]

But then there was *Strate v. A-1 Contractors*.[172] There, the Supreme Court held that *Montana*'s presumption against tribal civil jurisdiction over non-Indians on non-Indian land within the reservation applied to a tribal court lawsuit concerning an accident between non-Indians on a public highway running through the reservation.[173] In reaching this decision, the *Strate* Court concluded that the highway where the accident occurred was effectively non-Indian land because the tribe had consented to its construction, received payment for the road from the state, and had "retained no gatekeeping right" over it.[174] Consequently, "[s]o long as the stretch [of highway running through the reservation] is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude."[175]

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164. *Id.*

165. *See id.* at 893–94. Bressi also brought a claim under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that the tribal officers were federal agents because the roadblock was also manned by U.S. Customs and Border agents. *Id.* at 898. The Ninth Circuit affirmed the district court's dismissal of this claim on the basis that the presence of federal officers did not transform the tribal police into federal actors. *Id.*

166. 42 U.S.C. § 1983 (2012).

167. *Bressi*, 575 F.3d at 895.

168. *Id.* at 898.

169. *Id.* at 895.

170. *Id.* at 896.

171. *Id.*

172. 520 U.S. 438 (1997).

173. *See id.* at 454–56.

174. *Id.* at 456.

175. *Id.*

Bressi, citing *Strate and Duro*, thus held that because "[t]he usual tribal power of exclusion of nonmembers does not apply" to reservation highways, "tribal officers have no inherent power to arrest and book non-Indian violators" on such roads.[176] But the court acknowledged that strict adherence to this rule posed "obvious practical difficulties" because "a tribal officer who observes a vehicle violating tribal law on a state highway has no way of knowing whether the driver is an Indian or non-Indian."[177] It is therefore reasonable for tribal officers to stop non-Indian motorists because the imposition on the motorist is relatively minor and the officer usually possesses some evidence that tribal law has been violated.[178]

However, roadblocks are a different story. These stops are *per se* "suspicionless" and are more likely to sweep up non-Indians.[179] Striking a compromise, the court stated:

> [A] roadblock on a public right-of-way within tribal territory, established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of inquiry, that can establish whether or not they are Indians. When obvious violations, such as alcohol impairment, are found, detention on tribal authority for delivery to state officers is authorized. But inquiry going beyond Indian or non-Indian status, or including searches for evidence of crime, are not authorized on purely tribal authority in the case of non-Indians.[180]

Applying this new rule, the court concluded the district court erred in dismissing Bressi's § 1983 claim against the tribal officers.[181] The seizure was not an exercise of tribal authority because the officers "did not confine themselves to inquiring whether or not [Bressi] was or was not an Indian."[182] "Once they departed from, or went beyond, the inquiry to establish that Bressi was not an Indian, they were acting under color of state law," and so the United States Constitution applied.[183] The court remanded

176. *Id.* at 896.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 896–97.
181. *See id.* at 897–98. The court found that the district court did not err in dismissing Bressi's *Bivens* claim because the tribal police officers were not acting under color of federal law. *See id.* at 898.
182. *Id.* at 897.
183. *Id.*

the case to the district court to determine whether the officers were entitled to qualified immunity.[184]

Bressi's special rule for roadblocks metastasized into a broad limit on tribal arrest authority whenever a non-Indian is on non-Indian land in *United States v. Cooley*.[185] *Cooley* involved a routine traffic stop.[186] While patrolling the reservation, a Crow Nation police officer checked on a truck idling on the side of the highway.[187] The officer questioned the driver, Thomas Cooley, about his travel plans, during which he noticed two semiautomatic rifles in the front passenger seat.[188] When Cooley began fishing around in his pockets, the officer drew his gun and ordered him out of the car.[189] Before the stop was over, the officer recovered a handgun, glass pipe, and a bag containing methamphetamine.[190]

In federal court, Cooley argued that the contraband were inadmissible because the tribal officer had no authority to seize him.[191] The district court agreed.[192] It recognized that "tribal police have the authority to investigate on-reservation violations of state and federal law by non-Indians" pursuant to the tribe's right to exclude.[193] But it then pivoted to *Bressi*, which it read as holding that "a tribal police officer commits an unreasonable seizure when he detains a non-Indian on a public right of way that crosses the reservation unless there is an apparent state or federal law violation."[194] Although *Bressi* did not articulate what satisfies this "'apparent' standard," the district court reasoned that, as a "carefully drawn exception borne of practical necessity," it was "more stringent than particularized suspicion and probable cause."[195]

Reviewing the stop, the court first found—without explanation—that the officer "determined Cooley was non-Indian when Cooley initially rolled his window down."[196] It then recounted the facts the officer had accumulated

184. *See id.* at 898.
185. 919 F.3d 1135, 1143 (9th Cir. 2019).
186. United States v. Cooley, No. CR 16-42-BLG-SPW, 2017 WL 499896, at *1 (D. Mont. Feb. 7, 2017), *aff'd*, 919 F.3d 1135 (9th Cir. 2019).
187. *Id.*
188. *Id.* at *2.
189. *Id.*
190. *Id.*
191. *Id.* at *3–4.
192. *Id.* at *5.
193. *Id.* at *3.
194. *Id*.
195. *Id.*
196. *Id.* at *4.

prior to drawing his gun: "bloodshot and watery eyes, no odor of alcohol, possible but unconfirmed slurred speech, two semi-automatic rifles, wads of cash in Cooley's pocket, and answers to questions that seemed untruthful to him."[197] None of this, "whether taken individually or cumulatively, establish[ed] an obvious state or federal law violation."[198] Accordingly, because the tribal officer "exceeded the scope of his authority when he detained Cooley," the court suppressed the evidence as the fruits of an unreasonable seizure.[199]

Although the Ninth Circuit quibbled with the district court's reasoning, it affirmed.[200] The panel first recounted the "nuanced" landscape of tribes' authority to investigate and arrest non-Indians.[201] Under *Duro*, "tribal officers can investigate crimes committed by non-Indians on tribal land and deliver non-Indians who have committed crimes to state or federal authorities."[202] But under *Strate*, tribes cannot exclude non-Indians from state or federal highways, and thus, under *Bressi*, tribes "also lack the ancillary power to investigate non-Indians who are using such public rights-of-way."[203] *Bressi*, the court concluded, was not just about roadblocks. Rather, it "set[] forth general principles governing the scope of tribal officers' authority to seize and question on a public right-of-way within an Indian reservation non-Indians and those whose Indian status is unknown."[204] Thus, just as *Bressi* created law from whole cloth, so too did *Cooley*: "Continuing to detain — and searching — a non-Indian without first attempting to ascertain his status is beyond authority of a tribal officer on a public, nontribal highway crossing a reservation."[205]

Expanding *Bressi* to traffic stops all but ensured Cooley would prevail. The tribal officer, the court observed, "never asked Cooley whether he was an Indian or otherwise ascertained that he was not."[206] Here, it rejected the district court's conclusion that the officer determined Cooley was non-Indian based on his looks.[207] "Indian status is a political classification," the

197. *Id.*
198. *Id.*
199. *Id.*
200. United States v. Cooley, 919 F.3d 1135, 1143–44 (9th Cir. 2019).
201. *Id.* at 1141.
202. *Id.*
203. *Id.*
204. *Id.* at 1142 n.3.
205. *Id.* at 1143.
206. *Id.* at 1142.
207. *Id.*

court admonished.[208] What the officer should have done, the court explained, was ask Cooley whether he was an Indian.[209] Accordingly, the court ruled that the officer "exceed[ed] his legal authority as a Crow officer" because when he seized Cooley and searched his car "he had not asked Cooley whether he was an Indian."[210]

C. Clarifying Tribal Arrest Authority Through the Courts

1. The Ninth Circuit's Exclusion-based Theory Is Flawed

Bressi and *Cooley* highlight the failure of the federal judiciary to coherently set forth rules governing tribes' authority to investigate and arrest non-Indians. Problems—both doctrinal and practical—abound.

On the merits, *Bressi* is wrong that "tribal officers have no inherent power to arrest and book non-Indian[s]" on public roads within the reservation because the "usual tribal power of exclusion of nonmembers does not apply there."[211] First, it improperly conflates tribal civil jurisdiction with tribal criminal jurisdiction. To support this rule, *Bressi* cited *Strate*, the case in which the Supreme Court held a tribal court could not hear a lawsuit involving an accident on a state highway because the road was non-Indian land and, under *Montana*, tribes generally lack civil jurisdiction over the conduct of non-Indians on non-Indian land.[212] But the concerns motivating *Montana* do not apply to the criminal sphere. *Montana* holds that tribes' semi-sovereign status means that tribes can regulate non-Indians on non-Indian land only to the extent "necessary to protect tribal self-government or to control internal relations."[213] Circumscribing civil jurisdiction based on land status makes good sense because the exercise of civil jurisdiction—zoning ordinances or hunting regulations, for example—is principally about regulating how land is used. And often the activities that a non-Indian conducts on his own land will "bear[] no clear relationship to tribal self-government or internal relations."[214] In contrast, criminal jurisdiction, by definition, implicates the sovereign's dignity and the welfare of its members. Thus, there is always a "clear relationship" between a crime committed in Indian country and the tribe. It is therefore

208. *Id.*
209. *Id.* at 1143.
210. *Id.*
211. Bressi v. Ford, 575 F.3d 891, 895–96 (9th Cir. 2009).
212. Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).
213. Montana v. United States, 450 U.S. 544, 564 (1981).
214. *Id.*

deeply mistaken to look to *Montana's* test for civil jurisdiction to define the boundaries of tribal criminal authority.

Second, *Bressi* overlooked critical language in *Strate* that cuts against its rule. Specifically, the Supreme Court in *Strate* observed in a footnote that it did not "question the authority of tribal police to patrol roads within a reservation, *including rights-of-way made part of a state highway*, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law."[215] That the Supreme Court cited *Schmuck* for this proposition further undermines *Bressi*'s reliance on *Strate*. Finally, *Bressi*'s rule flies in the face of 18 U.S.C. § 1151(a), which makes clear that land status within a reservation is irrelevant for the question of Indian Country criminal jurisdiction. Indeed, the statute explicitly identifies "rights-of-way[s] running through the reservation" as Indian Country.[216]

But even taking *Bressi* at face value, its rule is both unworkable and dangerous. It limits detentions occurring on non-Indian land to "the amount of time, and the nature of inquiry, that can establish whether or not [suspects] are Indians."[217] But trying to determine Indian status—which turns on Indian blood quantum and political recognition as an Indian—in the field is a fool's errand. Regarding the first prong, there is no consensus on the minimum amount of Indian blood to qualify as an Indian. Some courts consider 1/8 Indian blood sufficient,[218] while others require a higher blood quantum threshold.[219] Being 14/64 Native American was good enough for one court,[220] but another rejected 12/64.[221] One state appellate court has even accepted 11/256—or just 4.29%—Indian blood as enough to satisfy the blood quantum requirement.[222] Predicting the second prong, which turns on a totality-of-the-circumstances analysis, is no easier.[223] The

215. *Strate*, 520 U.S. at 456 n.11 (emphasis added) (citing State v. Schmuck, 850 P.2d 1332, 1341 (Wash. 1993) (en banc)).

216. 18 U.S.C. § 1151(a) (2012).

217. *Bressi*, 575 F.3d at 896–97.

218. United States v. Bruce, 394 F.3d 1215, 1227 (9th Cir. 2005).

219. *See, e.g.,* Vialpando v. State, 640 P.2d 77, 80 (Wyo. 1982) (concluding that 1/8 blood quantum is not a "'substantial amount of Indian blood' to classify appellant as an Indian").

220. United States v. Driver, 755 F. Supp. 885, 888 (D.S.D. 1991).

221. *In re* Gravais, 402 F. Supp. 2d 1219, 1225 (E.D. Wash. 2004).

222. State v. Nobles, 818 S.E.2d 129, 136 (N.C. Ct. App. 2018).

223. *See, e.g.*, United States v. Loera, 190 F. Supp. 3d 873, 883–84 (D. Ariz. 2016) (finding that defendant failed the recognition prong despite attending tribal funerals and religious ceremonies, receiving tribal medical services, living on the reservation, and having a son who was an enrolled member).

district court's conclusion in *Cooley* that the officer "determined Cooley was a non-Indian when Cooley initially rolled his window down" thus belies credulity.[224] How could the officer calculate Cooley's Indian blood quantum or evaluate his tribal contacts on the side of the road? For the court to make this finding, it had to assume something it dare not put in print: that Indianness is skin deep. While the Ninth Circuit repudiated this approach, its suggestion that the officer ask the suspect if they are Indian (and rely on the answer) is no better. Not only does this assume the suspect will answer truthfully, but a court could differ with the suspect's self-assessment of their Indian identity. In making tribal police authority contingent on both Indian status and land status, *Bressi* requires a tribal police officer to navigate the criminal jurisdiction maze each time she performs a stop.

Moreover, the rule limiting tribes to investigating non-Indians only for "obvious" or "apparent" violations is an ad hoc and vague standard. Consider the test's application in *Cooley*. Once the officer "determined" Cooley was non-Indian, the officer lost his ability to detain Cooley unless it was "apparent" that Cooley was breaking the law. The district court found that when the officer drew his gun, he had observed "[Cooley's] bloodshot and watery eyes, no odor of alcohol, possible but unconfirmed slurred speech, two semi-automatic rifles, wads of cash in Cooley's pocket, and answers to questions that seemed untruthful to him."[225] According to the district court, these observations did not amount to an "obvious" violation of the law.[226] But what does? The district court didn't say, suggesting only that this standard is "notably higher than 'probable cause.'"[227] The Ninth Circuit steered clear of the question too.[228] The lack of a meaningful standard is doubly cruel, as it both asks tribal police to hit a moving target while also empowering the courts to judge with the benefit of hindsight.

More problematically, the *Bressi* standard is sharply at odds with the Fourth Amendment, which permits detentions so long as supported by "reasonable suspicion," a standard that merely requires the officer to have "articulable facts that criminal activity 'may be afoot'" at the time of the

224. United States v. Cooley, CR-16-42-BLG-SPW, 2017 WL 499896, at *4 (D. Mont. Feb. 7, 2017), *aff'd*, 919 F.3d 1135 (9th Cir. 2019).

225. *Id.*

226. *Id.*

227. *Id.* at *3.

228. United States v. Cooley, 919 F.3d 1135, 1143 (9th Cir. 2019) (holding the seizure unlawful because the officer did not "first attempt[] to ascertain his [Indian] status").

seizure.[229] Indeed, under the facts of the case, a state or federal officer could unquestionably detain Cooley and search his car;[230] a tribal officer, however, must let Cooley go as soon as it is determined that he is a non-Indian. In setting such a high bar, *Bressi* subverts the crime-prevention function of tribal law enforcement, effectively shielding competent non-Indian criminals from scrutiny in Indian Country.

Worst of all, courts have not confined *Bressi* to its original subject matter. To its credit, *Bressi* specified that its rule was for "suspicionless stop[s] of non-Indians" because of the greater intrusion imposed by a roadblock on non-Indian motorists relative to a traffic stop.[231] In *Cooley*, however, the Ninth Circuit transformed *Bressi* into a general prohibition against detaining non-Indians on public roads.[232] If read for all its worth, *Cooley* thus creates a *per se* limit on tribal arrest authority that applies throughout the reservation, not just highways. As with state roads, tribes are presumed to lack civil jurisdiction, including the exclusion power, over non-Indians on fee land within the reservation.[233] As a result of the General Allotment Act,[234] countless reservations are a "checkerboard" of trust land

229. United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)); *see also* United States v. Arvizu, 534 U.S. 266, 274 (2002) ("Although an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity [for reasonable suspicion] need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.") (internal quotation marks and citations omitted).

230. *See, e.g.*, United States v. French, 468 F. App'x. 737, 739 (9th Cir. 2012) (park ranger had reasonable suspicion to stop the suspect after he observed the suspect "had bloodshot and watery eyes, slurred her speech, smelled of alcohol, and seemed agitated and upset"); United States v. Washington, 338 F. App'x. 316, 318 (4th Cir. 2009) (officer had reasonable suspicion to detain driver upon noticing he "had bloodshot, watery eyes and was shaking").

231. Bressi v. Ford, 575 F.3d 891, 896 (9th Cir. 2009).

232. *Cooley*, 919 F.3d at 1142 n.3.

233. Montana v. United States, 450 U.S. 544, 557–65 (1981) (distinguishing tribes' inherent authority to condition the entry of non-Indians on tribal lands from entry on non-Indian lands, and holding the latter is circumscribed); *see also* South Dakota v. Bourland, 508 U.S. 679, 689 (1993) (noting that under *Montana*, "when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands"); Water Wheel Camp Recreational Area Inc. v. LaRance, 642 F.3d 802, 808–12 (9th Cir. 2011) (canvassing Supreme Court case law distinguishing the extent of tribal jurisdiction over tribal land versus non-Indian land).

234. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 1991.

and non-Indian fee land.[235] As such, a broad reading of *Bressi* would diminish tribal police power throughout much of Indian Country, creating safe havens for criminals. At bottom, *Bressi*'s reasoning is deeply flawed and *Cooley*, an illegitimate extension of *Bressi*, highlights the harm of its rule. Because neither logic nor Supreme Court precedent compels this result, the Ninth Circuit's approach should be discarded or, at a minimum, cabined to roadblocks as *Bressi* envisioned.

2. Possible Jurisprudential Fixes

There are two ways out of this chaos.[236] First, courts could recognize that the tribe's power to exclude, and hence its arrest authority, is independent of the tribe's status as a property owner.[237] Several sources support the conclusion that tribes' exclusion power spans the reservation. For one thing, international law has long recognized the ability to control the flow of goods and persons across borders as a core aspect of sovereignty.[238] Indeed, all three branches of the federal government have acknowledged that tribal sovereignty encompasses the right to exclude.[239] Additionally, Supreme

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235. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 648, 650 n.1 (2001) (noting that roughly ninety million acres of land within reservations was acquired by non-Indians pursuant to the General Allotment Act); Ute Indian Tribe of the Uintah v. Myton, 835 F.3d 1255, 1262 (10th Cir. 2016) ("[C]heckerboard jurisdiction is a fact of daily life throughout the West, the result of many different congressional commands . . . ."). *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (discussing the effects of allotment on federal Indian law).

236. Admittedly a third approach exists—affirm tribal arrests in accordance with the plain language of *Duro*. This is what the Minnesota Court of Appeals did recently after trying to make sense of *Bressi*, *Schmuck*, and *Terry*. *See* State v. Thompson, 929 N.W.2d 21, 32–34 (Minn. Ct. App. 2019).

237. *See* Jeremy Wood, *Tribal Exclusion Authority: Its Sovereign Basis with Recommendations for Federal Support*, 6 AM. INDIAN L.J. 197, 240–42 (2018), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1186&context=ailj. For an application of this approach, see United States v. Nichols, No. CR-14-30038-MAM, 2014 WL 4185360 (D.S.D. Aug. 20, 2014).

238. EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY, bk. I, § 90, at 133 (Bela Kapossy & Richard Whatmore ed., 2008) (1758) ("Every state has consequently a right to prohibit the entrance of foreign merchandises . . . .").

239. *See, e.g.*, Treaty Between the United States and the Dwamish, Suquamish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22. 1855, 12 Stat 927 (setting aside land for Indian reservations and recognizing that "no[] . . . white man [would] be permitted to reside upon the same [land] without permission of the said tribes"); Roff v. Burney, 168 U.S. 218 (1897) (acknowledging Chickasaw could withdraw citizenship

Court case law supports a broad exclusion power. In *Merrion v. Jicarilla Apache Tribe*, the Court recognized the exclusion power as "a hallmark of Indian sovereignty."[240] To cabin this power to only that "possessed by any individual landowner or any social group," the *Merrion* Court explained, would "denigrate[] Indian sovereignty."[241] Likewise, in *Duro*, the Court reaffirmed that tribes can expel "those who disturb public order on the reservation."[242] Its use of "*reservation*" rather than "*tribal land*" suggests that the power does not dissipate simply because the offender is standing on fee, rather than trust, land. Finally, Congress's decision to treat all land within reservation boundaries as Indian Country reaffirms that property ownership does not constrain tribes' ability to police their territory.

In the alternative, federal courts could fully embrace *Schmuck*'s gesture to *Montana*,[243] and uphold tribal arrest authority as an exercise of tribes' regulatory power.[244] While *Montana* voiced the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers," it created two exceptions.[245] Tribes can assert jurisdiction over a non-Indian "who enter[s] consensual relationships with the tribe or its members" as well as a non-Indian whose "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[246] Tribes have a compelling case that the power to arrest falls squarely within the second *Montana* exception. The epidemic of violence in Indian Country "directly" affects the health and wellbeing of tribal members and, by extension, the tribe.[247] In the context of drunk driving, for example, "[a]llowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians

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and banish naturalized members); Oscar L. Chapman, Assistant Sec'y, Opinion, 55 Interior Dec. 66 (Oct. 25, 1934) (including the authority to "remove or to exclude from the limits of the reservation nonmembers of the tribe" as an inherent power of tribes).

240. 455 U.S. 130, 141 (1982).

241. *Id.* at 146.

242. Duro v. Reina, 495 U.S. 676, 697 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2012), *as recognized in* United States v. Lara, 541 U.S. 193, 197–98 (2004).

243. *See* State v. Schmuck, 850 P.2d 1332, 1341 (Wash. 1993) (en banc).

244. *See* Wood, *supra* note 237, at 242–46 (discussing the relationship between the exclusion power and *Montana* generally).

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

246. *Id.* at 566.

247. For a persuasive application of this argument, see Brief of Amici Curiae National Indigenous Women Resource Center Supporting Respondents at 17–29, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496), 2015 WL 6467637.

or non-Indians would certainly be detrimental to the health or welfare of the Tribe."[248]

Unfortunately, both paths are a steep climb. The Court retreated from *Merrion*'s robust vision of the tribal power to exclude in *Strate*, characterizing a tribe's power to exclude as a "land owner's right" that depends on whether the tribe possesses a "gatekeeping right" over the property.[249] It will be even more difficult to cram the square peg of tribal arrest authority into the round hole of *Montana*. For one thing, grounding tribal arrest authority in *Montana* entails mixing doctrinal apples and oranges, which, as *Bressi* illustrates, may generate more confusion than clarity. Moreover, the approach taken in *Schmuck* may no longer be viable, as the Supreme Court has narrowed the second *Montana* exception: The non-Indian's activities "must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community."[250] While violent conduct arguably satisfies that test, the Supreme Court has never upheld an exercise of tribal jurisdiction under this exception.

In sum, most courts treat tribal arrest authority as an exercise of the tribes' power to exclude. But because the exclusion power has subsequently been limited to a property right, the checkerboard character of Indian Country poses to transmogrify *Duro's* simple rule into an unwieldy mess. Given the considerable obstacles to either expanding the exclusion power or finding a new doctrinal home for tribal arrest authority, stakeholders should look outside the courts for a solution.

III. Existent but Flawed Solutions

There are two approaches currently available to clarify tribal authority to arrest non-Indians: the common law doctrine of citizen's arrest and cooperative agreements between tribal and non-tribal governments. Both, however, have serious drawbacks that preclude either from lifting the fog of uncertainty.

248. State v. Schmuck, 850 P.2d 1332, 1341 (Wash. 1993) (en banc).

249. Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997).

250. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008) (quoting Montana v. United States, 450 U.S. 544, 566 (1981)).

A. Citizen's Arrest Law

In an effort to portage the rough waters of Indian law, litigants[251] and courts[252] have sought to frame a tribal officer's seizure of a non-Indian as a citizen's arrest. That doctrine permits a private person to use force to apprehend and detain a wrongdoer under certain circumstances.[253] The law varies dramatically from state to state.[254] In particular, jurisdictions differ in what crimes trigger the arrest power and the quantum of probable cause a citizen must possess for a lawful arrest.[255] A Californian, for example, would be remiss to attempt a citizen's arrest while visiting Massachusetts. California allows citizen's arrests for a handful of misdemeanors, in addition to felonies, and it allows arrests for felonies not committed in the citizen's presence if she acts with "reasonable cause."[256] In contrast, a citizen's arrest in Massachusetts is lawful only if the arrestee "in fact has committed a felony."[257] Without diving deeper into the nuances of citizen's arrest law, the upshot is that the only arrest authorized by every jurisdiction is one in which the private person watches the arrestee commit a felony.[258]

Despite the initial appeal of using this doctrine to escape jurisdictional headaches, the costs outweigh the upside. As an initial matter, relying on

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251. *See, e.g.*, State v. Thompson, 929 N.W.2d 21, 26 (Minn. Ct. App. 2019) (noting that the state argued tribal officer's arrest of intoxicated non-Indian "is justified by the citizen's-arrest statute"); State v. Branham, 2004-NMCA-131, ¶ 17, 136 N.M. 579, 584, 102 P.3d 646, 651 (rejecting state's claim, raised for the first time on appeal, that tribal officer conducted a citizen's arrest); Brief for Respondent at 15–20, State v. Ericksen, 259 P.3d 1079 (Wash. 2011) (No. 80653-5), 2008 WL 6194060 (arguing that tribal officer's arrest was valid as a citizen's arrest).

252. *See* State v. Chavez, 96 P.3d 1093, 1095–97 (Ariz. Ct. App. 2004); State v. Kieffer-Roden, 2009 OK CR 18, ¶¶ 10–12, 208 P.3d 471, 473–74 (holding tribal officer's arrest of non-Indian for driving while intoxicated was a valid citizen's arrest); State v. Davidson, 479 N.W.2d 513, 515–16 (S.D. 1992) (per curiam); *see also* State v. Eriksen, 259 P.3d 1079, 1084 (Wash. 2011) (en banc) (Alexander, J., dissenting) (arguing that the court should affirm the defendant's conviction on the ground that the tribal officer's stop of a non-Indian motorist outside of the reservation was a lawful citizen's arrest).

253. *Arrest*, BLACK'S LAW DICTIONARY (10th ed. 2014). For an in-depth examination of the doctrine's common law origins, see M. CHERIF BASSIOUNI, CITIZEN'S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE 9–13 (1981).

254. See Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest*, 25 CORNELL J.L. & PUB. POL'Y 557, 565–72 (2016), for a canvassing of state citizen's arrest laws.

255. *See id.* at 573–77.

256. CAL. PEN. CODE § 837 (Deering, LEXIS through 2019 Sess.).

257. Commonwealth v. Lussier, 128 N.E.2d 569, 575 (Mass. 1955).

258. *See* Robbins, *supra* note 254, at 572.

citizen's arrest law would significantly constrain the authority of tribal officers. A tribal officer in Massachusetts, for instance, would be unable to arrest drunk drivers because that is a misdemeanor offense.[259] And even in jurisdictions like California, which permit misdemeanor arrests, that power is generally restricted to "breach[es] of peace,"[260] an ill-defined category of offenses.[261] Given these limitations, shackling tribal arrest authority to citizen's arrest law would only perpetuate the notion that non-Indians are above the law in Indian Country.

Treating tribal arrests as citizen's arrests would also strip tribal police of both tribal and official immunities, potentially exposing them to tort liability in state court. Because a tribe's sovereign immunity shields it from suit, a person injured by a tribal officer within Indian Country is generally limited to suing the officer in her individual capacity.[262] Further, the plaintiff is usually limited to seeking relief in tribal court.[263] In *Williams v.*

259. Commonwealth v. Grise, 496 N.E.2d 162, 164–65 (Mass. 1986) (holding citizen's arrest for DUI was unauthorized); *accord* Commonwealth v. Limone, 957 N.E.2d 225, 229 (Mass. 2011).

260. For example, the citizen's arrest laws of Arizona, Mississippi, Indiana, and Texas all contain this limitation. *See* ARIZ. REV. STAT. § 13-3884 (LexisNexis 2018) (allowing a citizen's arrest only for misdemeanor "amounting to a breach of peace"); MISS. CODE ANN. § 99-3-7 (West 2018) (authorizing citizen's arrest for an officer or private citizen for "a breach of the peace threatened or attempted in his presence"); IND. CODE. ANN. § 35-33-1-4 (West 2018) (permitting an arrest for misdemeanors that are a breach of peace if "the arrest is necessary to prevent the continuance of the breach of peace"); TEX. CODE CRIM. PROC. ANN. art. 14.01(a) (2018) (specifying citizen's arrest for crimes that are "against the public peace").

261. Robbins, *supra* note 254, at 574–75. For instance, a Texas appellate court fractured over whether a drunk driver who repeatedly crossed the dividing line and bumped into the curb amounted to a "breach of peace." *See* Kunkel v. State, 46 S.W.3d 328, 330–32 (Tex. App. 2001).

262. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers"); *see also* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788–89 (2014) (affirming the principle of tribal sovereign immunity); *cf.* Linneen v. Gila River Indian Cmty., 276 F.3d 489, 492 (9th Cir. 2002) (affirming dismissal of lawsuit against tribe and tribal officers stemming from an allegedly unlawful detention); Young v. Duenas, 262 P.3d 527, 529 (Wash. Ct. App. 2011) (dismissing wrongful death suit against tribe and tribal officers).

263. In the eyes of some, the absence of a non-tribal forum "means that [non-Indian] plaintiffs have *no* formal judicial remedy." Lamere v. Superior Court, 31 Cal. Rptr. 3d 880, 882 n.2 (Cal. Ct. App. 2005). This view is deeply misguided. *See, e.g.*, D'Ambra v. Maikshilo, No. GDTC-T-10-105-PMG, 2014 WL 8662640 (Mohegan Gaming Disputes Trial Ct. Apr. 28, 2014) (awarding arrestee over $32,000 in damages in excessive force action against tribal officer).

Lee, the Supreme Court held that state courts lack jurisdiction over civil claims against member-Indians arising from on-reservation conduct.[264] The door to federal court is likewise closed: the plaintiff cannot bring a *Bivens* or § 1983 action because tribal officers are not bound by the Constitution,[265] and ICRA only creates a cause of action for habeas relief.[266] This generally holds true even if the tribal officer has been deputized to enforce state or federal law; that alone is insufficient to transform a tribal officer into a federal or state actor.[267] And even if the officer is amenable to suit in a non-tribal court—say because the officer was non-Indian or the alleged tort occurred outside the reservation—the Supreme Court has advised that tribal actors are entitled to qualified immunity.[268]

Swapping *Duro* for citizen's arrest law, however, would strip officers of these protections and delay the administration of justice. For one thing, citizen's arrests are risky business; if the state's law does not authorize the seizure, the arrestee can turn around and sue the arrestor for false imprisonment.[269] And because a person effectuating a citizen's arrests is, by definition, acting in her private capacity, a tribal police officer who arrests a non-Indian arguably would not be entitled to tribal immunity. Admittedly, these concerns may seem largely theoretical given that *Williams* requires

264. 358 U.S. 217, 223 (1959); *cf.* Crawford v. Couture, 2016 MT 291, 385 Mont. 350, 384 P.3d 1038 (holding state court lacked jurisdiction to hear non-Indian's tort claims against tribal police officers stemming from on-reservation arrest).

265. *See* Santa Clara Pueblo v. Martinez, 436 U.S. at 56 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *cf.* Pistor v. Garcia, 791 F.3d 1104, 1114 (9th Cir. 2015) ("[A]ctions under Section 1983 cannot be maintained in federal court for persons alleging a deprivation of constitutional rights under color of tribal law.") (quoting Evans v. McKay, 869 F.2d 1341, 1347 (9th Cir. 1989)); Dry v. United States, 235 F.3d 1249, 1255 (10th Cir. 2000) (dismissing *Bivens* claim against tribe and tribal officers for want of subject matter jurisdiction); Boney v. Valline, 597 F. Supp. 2d 1167, 1186 (D. Nev. 2009) (same).

266. *Santa Clara Pueblo*, 436 U.S. at 71.

267. *See* Herbert v. United States, 438 F.3d 483, 484–85 (5th Cir. 2006) (tribal officer was not amenable to suit under the FTCA notwithstanding the officer holding a BIA commission); Trujillo v. United States, 313 F. Supp. 2d 1146, 1151 (D.N.M. 2003) (despite tribal-federal compact, tribal officers were not federal agents for purposes of the FTCA); *accord Boney*, 597 F. Supp. 2d at 1172–81 (collecting cases). *But see* Evans, 869 F.2d at 1347–49 (reversing dismissal of § 1983 claim against deputized tribal officers because plaintiffs had sufficiently pleaded that their arrest was performed under color of state law).

268. *See* Lewis v. Clarke, 137 S. Ct. 1285, 1291–92 & 1285 n.2 (2017) (suggesting that tribal gaming employees sued in their individual capacity can raise personal immunity defenses).

269. *See* BASSIOUNI, *supra* note 253, at 60–62; Robbins, *supra* note 254, at 564, 573.

lawsuits against Indians for on-reservation conduct to be brought in tribal court, and those courts are not bound by state law. But the shield that *Williams* created is beginning to show cracks; at least one state court has asserted jurisdiction over tort claims involving Indian defendants for on-reservation conduct because it occurred on non-tribal land.[270] This raises the possibility that tribal police could be held to answer in state court for arrests which occur on fee land within the reservation. And in any event, shoehorning tribal arrests into this confusing common law doctrine will only further incentivize non-Indian defendants to challenge their prosecutions in state or federal court.

Finally, beyond the practical concerns, reducing the authority of tribal law enforcement to that of a private citizen denigrates tribal sovereignty. Tribal police are a "reflection of tribal rights to shape and enforce their own laws" who convey "the intent of a tribal government to protect and serve its own citizens."[271] Accordingly, turning to citizen's arrest law relegates tribal police to private security guards and tribes to private organizations—an analogy the Supreme Court has expressly rejected.[272] Indeed, the *Schmuck* court refused to turn to citizen's arrest law, precisely because this "conflict[ed] with Congress' well-established policy of promoting tribal self-government."[273] Given these many pitfalls, tribes have wisely refrained from arguing that their officers are merely active citizens. Instead, tribes have sought to cloak their officers in federal or state authority.

B. Cooperative Agreements

Given the confused state of the law, tribes have sought to strengthen their law enforcement authority by entering into cooperative agreements with

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270. *See* C'Hair v. Dist. Court of Ninth Judicial Dist., 2015 WY 116, ¶ 52, 357 P.3d 723, 738 (Wyo. 2015) (holding it could exercise jurisdiction over personal injury suit against tribal member for on-reservation accident that occurred on a state highway because tribe has a "diminished regulatory interest on a state highway"). Another state court recently held *Williams* did not foreclose jurisdiction over a civil lawsuit brought by the state of California against an Indian for on-reservation business activities, reasoning the suit "d[id] not infringe tribal sovereignty" and the defendant's conduct—selling cigarettes—extended beyond the reservation's boundaries. People *ex rel.* Becerra v. Huber, 244 Cal. Rptr. 3d 79, 86–90 (Ct. App. 2019).

271. EILEEN LUNA-FIREBAUGH, TRIBAL POLICING: ASSERTING SOVEREIGNTY, SEEKING JUSTICE 8 (2007).

272. United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations' . . . .").

273. State v. Schmuck, 850 P.2d 1332, 1342 (Wash. 1993) (en banc).

local, state, and federal counterparts.[274] Through a compact, non-tribal governments may agree to deputize tribal officers who meet certain training standards to enforce federal or state law on the reservation.[275] When a state or county is a party, the agreement is often reciprocal, enshrining non-tribal police with the authority to police Indian Country.[276]

Contracting can make Indian Country safer and promote tribal sovereignty.[277] First, deputizing tribal officers serve as a potent antidote to jurisdictional paralysis by making clear that tribal law enforcement authority is not bound by the limits *Oliphant* places on tribal prosecutorial jurisdiction. Second, deputizing state officers can benefit tribal communities by increasing the number of police patrolling the reservation.[278] Third, compacts encourage states and tribes to pool resources, share information, and pursue federal funding for joint efforts.[279] Finally, advocates tout cooperative agreements as a means to enhance tribal sovereignty.[280] Besides empowering tribal law enforcement, these

274. Joel H. Mack & Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295, 1298 (1993). The federal and state compacting processes differ greatly. On the federal side, the Indian Self Determination and Education Assistance Act (ISDEAA) authorizes the BIA to contract with tribes to provide services on the reservation, including the enforcement of federal criminal law. *See* 25 U.S.C. § 5303 (2012). In contrast, state compacting varies by jurisdiction. Fourteen states grant authority to tribal police to act as state peace officers upon satisfying certain requirements; in the other eighteen states with Indian country this authority is at the discretion of local governments. *See* Matthew Lysakowski & Priya Sarathy Jones, *Tribal Law Enforcement Authority to Enforce State Laws*, 18 POLICE PRAC. & RES. 49, 55–57 (2017).

275. *See* Lysakowski & Jones, *supra* note 274, at 57; *see also* Hannah Bobee et al., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputization* 11–12 (Indigenous Law & Policy Center, Working Paper No. 2008-01, 2008) (describing cross-deputization agreements).

276. *See* Bobee et al., *supra* note 275, at 18–19 (noting that of the ten tribes in Michigan that have tribal police departments, nine have reciprocal deputization agreements with local agencies).

277. *See id.* at 22–24; Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, FED. LAW., Mar./Apr. 2006, at 38, 42–43; Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 929–32 (1999) [hereinafter *Intergovernmental Compacts*]; Mack & Timms, *supra* note 274, at 1310–11.

278. *See, e.g.*, *Cross-deputization Helps Solve Jurisdictional Issues*, *supra* note 110 (describing how a cross-deputization agreement enabled the closest police officer to respond to a shooting on tribal lands).

279. Mack & Timms, *supra* note 274, at 1307.

280. Fletcher, *supra* note 277, at 42 ("[A]greements improve tribal sovereignty by allowing tribes to exercise a de facto form of sovereignty over checkerboarded lands.");

agreements serve as an acknowledgement of tribes' status as coequal sovereigns and reduce inter-governmental tensions through diplomatic, rather than legal, channels.

Cooperative agreements, however, are no panacea. First, cross-deputization agreements may simultaneously result in over— and under—policing. On the one hand, they expose Indians to racial profiling and the heavy-handed tactics of non-tribal police forces who are frequently poorly trained and openly hostile to Native communities.[281] On the other, non-tribal authorities may give short shrift to crimes occurring in a jurisdiction not their own.[282]

Second, deep-seated animosity and the vagaries of politics can make compacting a nonstarter or prompt one party to unilaterally suspend the agreement.[283] Distrust on both sides of the aisle has been cited as the largest obstacle to forging deputization agreements.[284] And even once the agreement is in place, it may not be durable. For example, in *Schmuck*, the court observed that the tribal officer who arrested the defendant was not deputized because Washington's Kitsap County revoked its agreement with the Suquamish.[285] More recently, California's Humboldt County dissolved a cross-deputization agreement with the Hoopa Valley Tribe in 2015 after several months of fighting over funding and officer qualification standards.[286]

Finally, the piecemeal implementation of these agreements may fail to strengthen tribal arrest authority. In many cases, deputization is often contingent on the tribal officer obtaining a commission from the non-tribal government, a costly and burdensome process.[287] For example, before a

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Mack & Timms, *supra* note 274, at 1310–11; *Intergovernmental Compacts*, *supra* note 277, at 929–31 (detailing how cooperative agreements reduce inter-governmental tension and empower Native communities without having to submit to costly and protracted litigation in the court of a competing sovereign).

281. BARBARA PERRY, POLICING RACE AND PLACE IN INDIAN COUNTRY: OVER- AND UNDERENFORCEMENT 47–59 (2009).

282. *Id.* at 61–72; *see also* Washburn, *supra* note 99, at 730–34.

283. LUNA-FIREBAUGH, *supra* note 271, at 44; MAZE OF INJUSTICE, *supra* note 89, at 39. For example, efforts in Idaho and Wyoming to grant peace officer status to tribal police failed in 2011 and 2013, respectively. Lysakowski & Jones, *supra* note 274, at 57.

284. *See* Bobee et al., *supra* note 275, at 13–14; Fletcher, *supra* note 277, at 43.

285. State v. Schmuck, 850 P.2d 1332, 1344 n.1 (Wash. 1993) (en banc).

286. *See* Lee Romney, *In Humboldt County, Tribe Pushes for Bigger Law Enforcement Role on Its Lands*, L.A. TIMES (Oct. 20, 2015), https://www.latimes.com/local/california/la-me-tribal-law-enforcement-20151020-story.html.

287. *See, e.g.*, 25 C.F.R. § 12.21(b) (2019) ("Tribal law enforcement officers operating under a BIA contract or compact are not automatically commissioned as Federal officers;

tribal officer can enforce federal law pursuant to a deputization agreement with the BIA, the officer must receive a Special Law Enforcement Commission (SLEC).[288] This requires a FBI background check, meeting the state's Peace Officer standards, and attending a firearms training.[289] The SLEC expires every three years, after which the officer must reapply to the BIA and the tribe must re-certify the officer's qualifications.[290] Worse, the BIA often takes a year or more to process an application.[291] The result is that, despite the tribe having entered into a cooperative agreement with the BIA, only a handful of officers may be able to enforce federal law.[292] At bottom, while cooperative agreements can serve as a localized remedy, they cannot serve as a sweeping solution to solidify tribal law enforcement authority over non-Indians.

IV. A Statutory Solution

Congress has previously demonstrated a willingness to remedy law enforcement gaps in Indian Country through expanding tribal jurisdiction. It overturned *Duro* by amending ICRA to give tribes criminal jurisdiction over "all Indians."[293] And, more recently, it partially closed the *Oliphant*-gap by giving tribes limited criminal jurisdiction over non-Indians under VAWA.[294] Using these statutes as a template, Congress should pass legislation to recognize the power of tribal law enforcement to arrest non-Indians in Indian Country for crimes committed therein. To be both legally sound and politically feasible, such a law should contain three features.

First, Congress should explicitly recognize tribes' authority to arrest non-Indians as an exercise of tribal sovereignty, not a delegation of federal power. The distinction is critical. If arrest authority is a delegated

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however, they may be commissioned on a case-by-case basis."); Bobee et al., *supra* note 275, at 23 ("For political reasons or general distrust, a sheriff may decline to deputize a tribal official. If a sheriff declines to deputize tribal officers, they have no authority to enforce state laws against non-Indians.").

288. BIA Internal Law Enforcement Services Policies, 69 Fed. Reg. 6321 (Feb. 10, 2004).

289. *Id.* at 6322.

290. *Id.*

291. INDIAN LAW & ORDER COMM'N, *supra* note 35, at 103.

292. *See* Bobee et al., *supra* note 275, at 16 (detailing how "financial constraints or the personal characteristics of the [tribal officer]" make it "difficult or impossible" to obtain a commission). As of 2017, the BIA reported that 92 of 178 tribal law enforcement agencies have at least one officer who holds a SLEC. *See* Lysakowski & Jones, *supra* note 274, at 58.

293. 25 U.S.C. § 1301(4) (2012).

294. *Id.* § 1304(b)(4)(B).

congressional power, then when a tribal police officer arrests a non-Indian, she would be acting under color of federal law and, therefore, subject to the Constitution's restraints. Conceptually, this would be a significant infringement on tribal sovereignty, as it would transform tribal police into federal officers whenever a non-Indian is arrested. On a more practical level, it would empower an arrestee to sue tribal officers in federal court under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[295] which creates an implied cause of action to remedy constitutional injuries inflicted by federal actors.[296] Likewise, because the tribal officer would be a federal actor, the United States would be liable for the officer's tortious conduct under the Federal Tort Claims Act.[297] In contrast, if tribes' arrest authority is simply an exercise of tribal inherent sovereignty, then the officer is acting under color of tribal law; they are subject to ICRA and liable only according to tribal law as interpreted by tribal courts.

Congress should have no difficulty finding the right words for this task having done so twice before. First, to overturn *Duro*, Congress amended ICRA to "recognize[] and affirm[]" in each tribe "the inherent power" to prosecute nonmember Indians.[298] When the Supreme Court reviewed this statutory fix in *United States v. Lara*,[299] it took Congress "at its word,"[300] recognizing that it "d[id] not purport to delegate the Federal Government's own *federal* power" but instead "enlarge[d] the *tribes'* own 'powers of self-government.'"[301] Second, Congress used almost identical language in VAWA, which "recognized and affirmed" that "the powers of self-government of a participating tribe include the inherent power . . . to exercise special domestic violence criminal jurisdiction over all persons."[302]

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295. 403 U.S. 388 (1971).

296. *Id.* at 397.

297. The FTCA waives the United States' sovereign immunity for intentional torts where the perpetrator is a federal law enforcement officer. 28 U.S.C. § 2680(h) (2012). An astute observer might point out that the Indian Self Determination Act allows recovery under the FTCA if the alleged injury was inflicted in furtherance of a self-determination contract. *See* 25 U.S.C. § 5321 (2012). In practice, however, federal courts have consistently refused to find that tribal police were federal actors for the purposes of the FTCA. *See* Boney v. Valline, 597 F. Supp. 2d 1167, 1178–82 (D. Nev. 2009) (collecting cases).

298. *See* 25 U.S.C. 1301(2) (2012).

299. 541 U.S. 193 (2004).

300. *Id.* at 211 (Kennedy, J., concurring in the judgment).

301. *Id.* at 198 (quoting 25 U.S.C. § 1301(2)).

302. 25 U.S.C.A. § 1304(b)(1) (Westlaw through Pub. L. No. 116-29).

Congress should employ this same language to ensure courts treat tribal arrest authority as an exercise of tribes' inherent sovereignty.

Opponents may counter that Congress cannot alter the "metes and bounds of tribal autonomy."[303] Indeed, this question fractured the Court in *Lara*. There, it was asked to decide whether the federal prosecution of a nonmember Indian following a tribal prosecution violated the Double Jeopardy Clause, a question which turned on whether the *Duro*-fix was a delegation of federal power or a restoration of tribal sovereignty.[304] Seven Justices concluded that the *Duro*-fix was best viewed as the latter, and therefore the federal prosecution did not implicate the Fifth Amendment.[305] But there was no consensus over whether Congress could tinker with the jurisdictional scheme. Five Justices thought ICRA's "limited" alteration of tribal criminal jurisdiction was a valid exercise of Congress' plenary power over Indian affairs.[306] But four disagreed: Justice Kennedy questioned whether Congress could subject nonmembers to tribal courts,[307] Justice Thomas argued Congress' plenary power and tribal sovereignty were "schizophrenic,"[308] and Justices Souter and Scalia contended the *Duro*-fix was a delegation of federal power because Congress could not reinvest tribal courts with jurisdiction that tribes previously surrendered.[309]

There are, however, several reasons why this attack misses the mark when lodged against a statute clarifying tribal arrest authority. Most obviously, the law would not subject non-Indians to tribal prosecutorial jurisdiction. Non-Indians arrested by tribal police will still be turned over to non-tribal law enforcement, and non-tribal prosecutors will decide whether to pursue charges in non-tribal court in accordance with non-tribal law. For the same reason, the equal protection and due process concerns swirling around in *Lara* are inapposite.[310] But more importantly, unlike the *Duro*-fix

303. *Lara*, 541 U.S. at 205.

304. *Id.* at 199 ("We assume, as do the parties, that Lara's double jeopardy claim turns on the answer to the dual sovereignty question. What is the source of the power to punish nonmember Indian offenders, inherent tribal sovereignty or delegated federal authority?") (brackets and internal quotation marks omitted).

305. *Id.* at 210 (Breyer, J., majority opinion); *id.* at 211 (Kennedy, J., concurring in the judgment); *id.* at 216 (Thomas, J., concurring in the judgment).

306. *Id.* at 210.

307. *Id.* at 211–12 (Kennedy, J., concurring in the judgment).

308. *Id.* at 219 (Thomas, J., concurring in the judgment).

309. *Id.* at 227–31 (Souter, J., dissenting).

310. *Id.* at 205 (declining to consider Lara's equal protection or due process arguments). Specifically, Lara argued that the Due Process Clause forbids Congress to authorize the prosecution of a nonmember Indian in a forum lacking the full panoply of criminal

or VAWA, this statute does not purport to alter the current scope of tribal sovereignty. Rather, it would merely codify and clarify *Duro's* recognition that tribes can detain and expel non-Indians.

Second, the statute should require that evidence obtained by tribal police comports with ICRA for it to be admissible in state or federal court. Critics of this law are likely to charge that tribal police, free from the constraints of the Constitution, will collect evidence against non-Indians in ways that would otherwise violate the Fourth or Fifth Amendment and then turn it over to state or federal prosecutors. While a fair concern, it can easily be put to rest with thoughtful drafting.

To be sure, the fear that expanding tribal arrest authority will expose non-Indians to prosecutions based on illegally obtained evidence is not frivolous. Although the Supreme Court has not addressed this issue directly, its decision in *United States v. Bryant*[311] suggests that evidence obtained by tribal authorities is admissible in federal and state court even if the seizure would be unconstitutional had non-tribal police performed it. The defendant in *Bryant* attacked his conviction under a provision of VAWA, which makes it a federal crime to commit a domestic assault within Indian Country if the person has two or more prior domestic violence convictions, because his predicate offenses were uncounseled tribal court convictions.[312] Specifically, he argued that, because the prior convictions would have violated the Sixth Amendment's right to counsel had they been obtained in state or federal court, they could not be used to prove an element of the federal crime.[313] The Court, however, had no trouble affirming his conviction: ICRA, not the Sixth Amendment, applied to tribal proceedings, and ICRA requires that a defendant receive counsel only if the term of imprisonment exceeds one year.[314] Thus, *Bryant* supports the proposition that federal and state courts can consider tribally-obtained evidence irrespective of the Fourth Amendment.

Moreover, as a general matter, the exclusionary rule does not apply to evidence collected by foreign officials because doing so would not serve

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constitutional protections, *id.* at 207–08, and that the *Duro*-fix was an unjustified race-based distinction, *id.* at 209.

311. 136 S. Ct. 1954 (2016).

312. *Id.* at 1965–66 (discussing 18 U.S.C. § 117(a) (2012)).

313. *Id.* at 1958.

314. *See id.* at 1962, 1965–66. *Compare* U.S. CONST. amend. VI, *with* 25 U.S.C. § 1302(c) (2012).

the deterrence purpose for which it was designed.[315] That is, because the suppression of evidence in an American forum is unlikely to influence the conduct of foreign police, courts can admit evidence that concededly would be barred if obtained domestically. Given that tribes are separate sovereigns, this doctrine, and its reasoning, arguably applies to tribal police with equal force. And while the courts of appeal have recognized exceptions to this rule, they are exceedingly narrow, offering defendants scant protection.[316]

But these concerns can easily be alleviated by requiring that tribally obtained evidence comport with ICRA to be admissible in federal or state court. ICRA imposes on tribal governments most of the provisions enumerated in the Bill of Rights.[317] And whereas the ICRA's right to counsel differs from the Sixth Amendment (hence *Bryant*), ICRA contains provisions verbatim to the Fourth and Fifth Amendments.[318] Because of this, federal and state courts have held that ICRA imposes "identical limitation[s]" on tribal police as the Fourth and Fifth Amendment, including the exclusionary rule.[319] *People v. Ramirez* is instructive.[320] There, tribal police saw the defendant sitting in his car and, "[w]ith little further ado," searched it.[321] The California Court of Appeals affirmed the trial court's suppression of drugs recovered from the search, explaining that "by act of Congress, Indian tribal governments have no more power to conduct unreasonable searches and seizures than do the federal and state

315. United States v. Janis, 428 U.S. 433, 455 n.31 (1976). Some have characterized this rule as an "international silver platter doctrine." Michael P. Scharf, *Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?*, 65 WASH. & LEE L. REV. 129, 152 (2008).

316. *See, e.g.*, United States v. Lee, 723 F.3d 134, 140 (2d Cir. 2013) (recognizing suppression of foreign-obtained evidence is required if the foreign official's conduct "shocks the conscience," when the foreign official cooperated with American officers such that the foreign official was a "virtual agent" of the United States, or when foreign and American cooperation was done to circumvent the American officer's constitutional obligations).

317. *See* 25 U.S.C. § 1302(a).

318. *See id.* § 1302(a)(2) ("No Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures."); *id.* § 1302(a)(4) (protecting the right against compelled testimony).

319. United States v. Becerra-Garcia, 397 F.3d 1167, 1171 (9th Cir. 2005); *see* People v. Ramirez, 56 Cal. Rptr. 3d 631, 635–41 (Cal. Ct. App. 2007); State v. Madsen, 760 N.W.2d 370, 374–77 (S.D. 2009).

320. *Ramirez*, 56 Cal. Rptr. 3d at 631.

321. *Id.* at 635.

governments under the Fourth Amendment."[322] Although it acknowledged that ICRA contains no exclusionary rule, the court held that it did so implicitly, pointing out that when Congress enacted ICRA, the Supreme Court spoke of the rule as constitutionally mandated and that it benefits tribes by deterring tribal police from engaging in conduct that will hinder non-tribal prosecutions.[323] Thus, Congress need not choose between supporting tribal arrest authority or the Bill of Rights. Rather, Congress can achieve both goals by including in the legislation that the admissibility of evidence in non-tribal courts is contingent on satisfying ICRA.

Third, the statute should create a remedy for injuries inflicted by tribal police. As explained above in Part III.A, sovereign immunity shields the tribe from lawsuits, and tribal officers are generally only liable in tribal court for on-reservation tortious conduct.[324] Yet, because this statute encourages tribal officers to engage with non-Indians, simple math indicates that it will increase the likelihood that non-Indians will be injured by tribal police. Congress should therefore include a federal cause of action against tribal officers in their individual capacity but also expressly extend to them the doctrine of qualified immunity.

This approach sensibly balances the interests of the tribe, the non-Indian victim, and the tribal officer by putting tribal police on equal footing with their state and federal counterparts. Limiting the remedy to suing the officer in his or her individual capacity respects tribal sovereign immunity and treats tribes like the federal government and the states.[325] Such a remedy also advances the interests of the non-Indian victim by giving them the option to pursue relief in a familiar forum.

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322. *Id.* at 637.

323. *See id.* at 638–40.

324. *See supra* Section III.A and notes 259–65.

325. The United States enjoys ironclad immunity from suit, and a waiver of this protection must be "'unequivocally expressed' in statutory text." FAA v. Cooper, 566 U.S. 284, 290 (2012) (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)); *see also* United States v. Lee, 106 U.S. 196, 204 (1882) (acknowledging it as "established law of this country" that "the United States cannot be lawfully sued without its consent in any case"). The FTCA is one such waiver, although it contains a number of significant limitations. *See* 28 U.S.C. § 2680 (2012). The act excludes from the waiver of immunity any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function," *id.* § 2680(a), exempts from liability a slew of intentional torts such as assault, *id.* § 2680(h), and does not extend to constitutional violations, FDIC v. Meyer, 510 U.S. 471, 476–78 (1994). As for the states, the Eleventh Amendment provides a broad shield against private suits. *See* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1499 (2019) (overturning Nevada v. Hall, 440 U.S. 410 (1979), to hold that states are immune from suit in the courts of other states); *see also* Hans v. Louisiana, 134 U.S. 1 (1890).

Moreover, this remedy levels the playing field among deputized tribal officers, non-deputized tribal officers, and non-tribal police. As it stands now, non-deputized tribal officers are reachable only in tribal court, where they may be able to assert tribal sovereignty. In contrast, deputized tribal officers can be subject to suit in federal court,[326] and, if sued in their individual capacity, cannot avail themselves of the tribe's immunity.[327] Yet, there exists "no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles."[328] At the same time, tribal officers should not receive less protection than their non-tribal counterparts, who receive qualified immunity from suit.[329] Although the Supreme Court has suggested tribal officers receive such protections, the issue remains unsettled.[330] Accordingly, Congress should make clear that tribal officers are entitled to the same qualified immunity defenses that cover non-tribal officers.

Conclusion

The lawsuit between the Bishop Paiute Tribe and Inyo County demonstrates how prosecutorial jurisdiction and law enforcement authority are all too often confused in Indian Country. And despite *Duro's* recognition that tribes can detain non-Indians, the Court's decision to yoke arrest authority to the exclusion power poses significant administrability

326. Pistor v. Garcia, 791 F.3d 1104, 1115 (9th Cir. 2015) (observing tribal officer acting under color of state law can be subject to § 1983 claim); Bressi v. Ford, 575 F.3d 891, 897–98 (9th Cir. 2009) (holding deputized tribal officers acted under color of state law when they cited the plaintiff for a violation of state law and thus were subject to suit under § 1983); Allender v. Scott, 379 F. Supp. 2d 1206, 1216–18 (D.N.M. 2005) (substituting the United States for tribal officer defendants under the FTCA after concluding the officers were federal employees because the arrest, carried out under state law, was performed in furtherance of the tribe's ISDEAA contract).

327. *See* Lewis v. Clarke, 137 S. Ct. 1285, 1291–92 (2017) (holding tribal employee sued in their individual capacity for negligence in federal court is not shielded by tribe's sovereign immunity).

328. Maxwell v. Cty. of San Diego, 708 F.3d 1075, 1089 (9th Cir. 2013).

329. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (establishing the two-part test for qualified immunity). Of course, whether the common law doctrine of qualified immunity is legally justified or normatively desirable is a different question. *See generally* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018). But its flaws do not justify selectively extending it to cover some officers but not others based on their uniform.

330. *See Lewis*, 137 S. Ct. at 1292 n.2 (suggesting tribal employee can raise personal immunity defenses).

problems for both police and courts. Tribal police do not have the luxury of navigating jurisdictional labyrinths at the crime scene; Native communities cannot afford it.

Congress should eliminate this confusion by recognizing the inherent sovereignty of tribes to arrest all persons within their territory. Doing so will not raze a path through the jurisdictional maze, nor will it obviate the need for collaboration among tribal, state, and federal law enforcement. But it will empower tribal police and put an end to the perception that non-Indians are above the law in Indian Country. The power to protect its members lies at the core of tribal sovereignty. In the criminal context, this, at minimum, encompasses the authority to investigate crimes and make arrests.