THE SPLIT FROM PRECEDENT: AN ANALYSIS OF THE NEGATIVE IMPACT *OKLAHOMA v. CASTRO-HUERTA* WILL HAVE IN INDIAN COUNTRY

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I. Introduction

For many years, the American Indian population has led the charts in rates of substance use disorders compared to other racial and ethnic groups. Combined data from 2003 to 2011 "indicate that American Indians or Alaska Natives were more likely than persons from other racial/ethnic groups to have needed treatment for substance use."[1] Similarly, a study of substance use from 2015 to 2019 revealed that estimates of "illicit drug use among people aged 12 or older were highest for people reporting two or more races and for American Indian or Alaska Native people."[2] Although the 2010 Census found that the American Indian and Alaskan Native population account for only 1.7% of the United States population, the groups continue to have higher numbers of substance use than any other racial or ethnic group that make up larger percentages of the country's population.[3]

The American Indian population additionally has among the highest rates of domestic violence (DV), following only behind those who identify as multiracial.[4] An estimated 51.7% of American Indian women and 43.0% of

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1. *Need for and Receipt of Substance Use Treatment Among American Indians or Alaska Natives*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (SAMHSA): THE NSDUH REPORT (Nov. 2012), https://www.samhsa.gov/data/sites/default/files/NSDUH120/NSDUH120/SR120-treatment-need-AIAN.htm.

2. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (SAMHSA), RACIAL/ETHNIC DIFFERENCES IN SUBSTANCE USE, SUBSTANCE USE DISORDERS, AND SUBSTANCE USE TREATMENT UTILIZATION AMONG PEOPLE AGED 12 OR OLDER (2015-2019), at 13 (2021), https://www.samhsa.gov/data/sites/default/files/reports/rpt35326/2021NSDUHSUChartbook102221B.pdf.

3. Nancy Rumbaugh Whitesell et al., *Epidemiology and Etiology of Substance Use Among American Indians and Alaska Natives: Risk, Protection and Implications for Prevention*, 38 AM. J. DRUG & ALCOHOL ABUSE 376, 376-77 (2012).

4. *Intimate Partner Violence*, THE NAT'L CTR. FOR VICTIMS OF CRIME (2018), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_IPV_508_QC.pdf.

American Indian men experience DV during their lifetimes.[5] These high rates of interrelationship violence among the American Indian population are contributed to by child abuse, violence against women, and elder abuse.[6]

Further, "[p]opulation and clinical studies document an association between intimate partner violence (IPV) and substance use problems."[7] Studies have shown that when seeking help for these issues, cultural identity and spirituality can be important attributions in achieving a providential result.[8] Additionally, incorporating traditional healing approaches into treatment programs can lead to better outcomes for this specific population.[9] These favorable results, occurring when cultural identity and traditional approaches to solutions are incorporated into the healing process, are a prime example of why tribal sovereignty is important to managing the issues of DV and substance use disorders plaguing the Native American population. Tribal sovereignty allows tribes to create programs that are meant to enrich and encourage traditional practices within communities and allows tribes to preserve their culture and traditions in order to enhance public health and safety of tribal citizens in Indian Country. Interferences with tribal sovereignty, such as state imposition, can have the effect of slowing, or even stopping, the betterment of tribal members' quality of life or a tribe's preventative measures for substance use and abuse and domestic violence. It is for these reasons why the *Oklahoma v. Castro-Huerta* decision can be expected to have a negative effect on public health and safety related to substance use disorders and DV on tribal lands within the State of Oklahoma.

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5. Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011*, MORBIDITY & MORTALITY WKLY. REP. (MMWR) SURVEILLANCE SUMMARIES 8, 11 (Sept. 5, 2014), https://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf.

6. Katherine J Sapra et al., *Family and Partner Interpersonal Violence Among American Indians/Alaska Natives*, 1 INJ. EPIDEMIOLOGY, article 7 (Mar. 20, 2014), https://injepijournal.biomedcentral.com/counter/pdf/10.1186/2197-1714-1-7.pdf.

7. Christopher M. Murphy & Laura Ting, *The Effects of Treatment for Substance Use Problems on Intimate Partner Violence: A Review of Empirical Data*, 15 AGGRESSION & VIOLENT BEHAV. 325, 325 (2010), https://perma.cc/265V-8ERS.

8. *Alcohol and Drug Abuse Among Native Americans*, AM. ADDICTION CTRS., https://americanaddictioncenters.org/rehab-guide/addiction-statistics/native-americans (last updated Jan. 3, 2024).

9. *Id.*

This Comment examines the adjudication of crimes on tribal land and the effects that will be inflicted on tribal members when a state is permitted to impose its laws upon sovereign nations, as the recent *Castro-Huerta* ruling allows. Part II analyzes laws preceding and leading up to the Supreme Court's *Castro-Huerta* decision. Part III discusses *Castro-Huerta* and its ruling. Part IV considers early predictions of the negative side effects this type of ruling can have on tribal members and Part V evaluates the truth behind those early predictions. Part VI will assess the possible impact the ruling in *Castro-Huerta* will have on substance use and domestic violence related crimes among tribal members and on tribal land.

II. Law Leading to Castro-Huerta

To understand how the *Castro-Huerta* decision will impact tribes, one must first understand the law leading to the decision. The foundation of federal Indian law was laid in the 1800s. At that time, the Supreme Court declared that tribes were sovereign nations that held a special trust relationship with the federal government that only an act of Congress could alter, and this holds true today.[10] Originally, tribes had full jurisdiction over tribal and nontribal members in Indian Country. However, the Court later declared that because the federal government held the responsibility to protect tribes in certain situations and for certain crimes, the federal government, but not the states, could step in to prosecute crimes occurring in Indian Country.[11] Through different laws and interpretations of the relationship the government holds with the tribes, tribal sovereignty has been strengthened and weakened in different ways over time.

A. Marshall Trilogy

In the early 1800s, Supreme Court Chief Justice John Marshall handed down a series of cases that laid the foundation for federal Indian law. The series includes *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, and is commonly deemed the "Marshall Trilogy." For 200 years the trilogy has been studied and scrutinized, yet it remains as the basic framework of federal Indian law today.

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10. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557-61 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *see also* DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 68 (2001).

11. United States v. Kagama, 118 U.S. 375, 383-85 (1886).

The first case in the trilogy, *Johnson v. M'Intosh*, discusses the doctrine of discovery and how it influenced Indian title.[12] The doctrine of discovery suggests that "explorers' 'discovery' of land in the Americas gave the discovering European nation—and the United States as successor—absolute legal title to, and ownership of, American soil."[13] The Court declared that the United States held title to all of the land it succeeded from other European nations, "subject only to the Indian right of occupancy."[14] This right of occupancy meant that the tribes were "admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion."[15] However, the tribes were not viewed as sovereign, independent nations due to the "original fundamental principle, that discovery gave exclusive title to those who made it."[16] Thus, *Johnson v. M'Intosh* declared that due to European discovery of the land, tribes only maintained the right to use and occupy their original land and "the exclusive power to extinguish that right, was vested in [the United States] government which might constitutionally exercise it."[17]

The second case in the trilogy, *Cherokee Nation v. Georgia*, clarified the status of the tribes as well as the relationship that exists between tribes and the federal government.[18] In describing their status, Marshall penned tribes as "domestic dependent nations."[19] The Court explained that because the tribes occupy land that the United States now asserts title over, "[t]heir relation to the United States resembles that of a ward to his guardian."[20] In describing this relationship further, the Court declared that the tribes look to the federal government for protection, and "any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility."[21] It is from this description of the relationship between tribes and the federal government that scholars believe the trust doctrine took root.[22] This case was

12. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).
13. WILKINS & LOMAWAIMA, *supra* note 10, at 19.
14. *M'Intosh*, 21 U.S. at 585.
15. *Id.* at 574.
16. *Id.*
17. *Id.* at 585.
18. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
19. *Id.* at 17.
20. *Id.*
21. *Id.* at 17-18.
22. *See generally* WILKINS & LOMAWAIMA, *supra* note 10, at 68; *Marshall Trilogy*, UNIV. OF ALASKA FAIRBANKS, https://uaf.edu/tribal/academics/112/unit-1/marshalltrilogy.php.

monumental due to its establishment of tribes as "domestic dependent nations" that the federal government has a responsibility to protect and provide resources to.

The final case of the trilogy, *Worcester v. Georgia*, declared tribes as sovereign nations to which state laws do not extend.[23] The Court elaborated that through treaties and other dealings with the tribes, "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."[24] Further, the Court explained that "[t]he constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."[25] Additionally, because the "treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states . . . [they] provide that all intercourse with them shall be carried on exclusively by the government of the union."[26] Thus, in the final holding of the Marshall Trilogy, the Court held that tribes possess many attributes of sovereignty, and therefore are sovereign nations, independent of state law, over which only the federal government can enact a limiting power. Over the years, many principles of federal Indian law and tribal relations have been altered, but the basic policy of tribal sovereignty from this case has remained.[27]

The Marshall Trilogy laid the foundation that (1) tribes retain the right to use and occupy their original land subject to the federal government; (2) a trust relationship exists in which the tribes are dependent on the federal government for protection; and (3) tribes maintain an inherent sovereignty subject only to the federal government and not to the states.[28]

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23. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
24. *Id.* at 559.
25. *Id.*
26. *Id.* at 557.
27. Williams v. Lee, 358 U.S. 217, 219 (1959).
28. *See Williams*, 358 U.S. at 219; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); *see also* Alexis Zendejas, Note, *Deserving a Place at the Table: Effecting Change in Substantive Environmental Procedures in Indian Country*, 9 ARIZ. J. ENV'T L. & POL'Y 90, 96 (2019).

B. General Crimes Act and Major Crimes Act

1. General Crimes Act

The General Crimes Act (GCA), enacted in 1817, extends "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia" to Indian Country.[29] These extended laws are commonly known as "federal enclave laws." The purpose of the GCA was not to reference the general applicability of criminal law, but instead the "federal criminal law applicable in certain places where federal law is exclusive and state law does not apply."[30] Outside of Indian Country, these laws are applicable in maritime and territorial jurisdictions and include crimes such as arson, assault, theft, sexual offenses, and more.[31]

The primary need for the GCA when it was first enacted was to create a "body of law to punish *all* non-Indian crime in Indian country."[32] Because the Act was meant to create law for non-Indians within Indian Country, the Act did not apply to Indians within Indian country in three scenarios. The three exceptions include: (1) when both the victim and perpetrator are Indian, (2) when the accused perpetrator has already been prosecuted by the tribe, and (3) when a tribe has exclusive jurisdiction granted by a treaty.[33] The Supreme Court has held that crimes committed by non-Indians against non-Indians in Indian Country are not subject to the GCA.[34] Notably, the GCA extends federal law to crimes committed involving both an Indian and non-Indian in Indian Country that a tribe has yet to execute jurisdiction over.

2. Major Crimes Act

The Major Crimes Act (MCA), enacted in 1885, is the jurisdictional statute that grants the federal courts the power to adjudicate serious crimes committed by Indians on tribal land.[35] Offenses encompassed in the MCA include "murder, manslaughter, kidnapping, maiming, a felony under

29. 18 U.S.C. § 1152.

30. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 4.5(b)(2) (3d ed., Oct. 2023 update), Westlaw SUBCRL § 4.5(b)(2) (General Crimes Act).

31. *678. The General Crimes Act – 18 U.S.C. § 1152*, U.S. DEP'T OF JUST. ARCHIVES: CRIM. RES. MANUAL, https://www.justice.gov/archives/jm/criminal-resource-manual-678-general-crimes-act-18-usc-1152 (last visited Jan. 29, 2024).

32. LAFAVE, *supra* note 30.

33. 18 U.S.C. § 1152.

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

35. Major Crimes Act, 23 Stat. 362, 385 (1885).

chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661."[36] In cases where the MCA is applicable, "jurisdiction is *exclusively* federal."[37] This means that "federal jurisdiction over the offenses covered by the Indian Major Crimes Act is 'exclusive' of state jurisdiction."[38] Thus, criminal offenses included in the MCA are only subject to federal or tribal laws except where Congress exercises its plenary power to expressly grant a state jurisdiction.[39] Further, at its enactment, the MCA "provided exclusive federal jurisdiction over qualifying crimes by Indians in '*any Indian reservation*' located within 'the boundaries of *any State*.'"[40] The Act therefore applies to all states, including those that won statehood following its enactment.[41]

The MCA was enacted by Congress following the Supreme Court's ruling in *Ex parte Crow Dog*.[42] Crow Dog was a member of the Brule Sioux Tribe charged with the murder of Spotted Tail, a member of the same tribe, in Indian Country.[43] Crow Dog was sentenced to death by the First Judicial District of the Territory of Dakota and kept in the custody of the United States Marshal.[44] Through a writ of habeas corpus, Crow Dog claimed that because he killed another Indian man in Indian territory, the federal district court had no jurisdiction over his crime under Section 2146 of the Revised Statutes of the United States.[45] The Supreme Court found through section 2145 of the Revised Statutes that "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian Country."[46] However, as Crow Dog had argued, the Supreme Court found that section 2146 precluded 2145. Section 2146

36. 18 U.S.C. § 1153(a).

37. Murphy v. Royal, 875 F.3d 896, 915 (10th Cir. 2017) (emphasis added).

38. Negonsott v. Samuels, 507 U.S. 99, 103 (1993).

39. Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 501 (1979).

40. McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020) (quoting Act of Mar. 3, 1885 (Major Crimes Act), ch. 341, § 9, 23 Stat. 362, 385).

41. *See id.*

42. 109 U.S. 556 (1883); *see* Act of Mar. 3, 1885 (Major Crimes Act), 23 Stat. 362.

43. *Crow Dog*, 109 U.S.. at 557.

44. *Id.*

45. *Id.*

46. *Id.* at 558.

stated, as the General Crimes Act today still holds, that those laws do not extend to

> [crimes committed by one Indian against another person or property of another Indian nor to] any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where by treaty stipulations the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[47]

Under the laws enacted by Congress, "the First District Court of Dakota was without jurisdiction" to prosecute Crow Dog for a murder he committed in Indian Country.[48]

The MCA was then enacted so that the federal government could prosecute these types of major crimes, and was upheld in the Supreme Court's ruling in *United States v. Kagama*.[49] Like Crow Dog, Kagama was an Indian man charged with the murder of another Indian within Indian Country.[50] In this case, the Supreme Court answered the question of whether or not Congress had the power to enact the MCA and extend federal jurisdiction to Indian-on-Indian crime within Indian Country.[51] The Court held that the tribes are located "within the geographical limits of the United States" and "the people within these limits are under the political control of the government of the United States."[52] The tribes are brought under the law of the United States because they have always been regarded "not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people."[53] The reservation on which the crime took place was on land that was bought by the United States.[54] Thus, with its "ownership of the country in which the Territories are," Congress has the power to make laws for the people on its soil and within the reservations.[55] Additionally, through their relationship, it is necessary for the federal government to provide laws that offer protection to the tribes that live within its borders.[56] This duty of protection has only ever been

47. *Id.* (alteration in original).
48. *Id.* at 572.
49. 118 U.S. 375, 385 (1886).
50. *Id.* at 376.
51. *Id.*
52. *Id.* at 379.
53. *Id.* at 381.
54. *Id.*
55. *Id.* at 380.
56. *Id.* at 384.

with the federal government, and never with the states.[57] Because the exercise of this protection has always existed within the federal government, and the federal government has the power to enforce laws over its land and the tribes on its land, the Court declared that Congress had the power to extend federal jurisdiction of crimes between Indians to tribal land.[58]

In recent years, the Supreme Court has deciphered how the MCA's application has changed since its original enactment and how it applies to Indian Country today. In 1909 the Court declared in *United States v. Celestine* that the MCA applies to "crimes committed *within* the boundaries of Indian reservations."[59] The Court further proclaimed that it is only Congress who draws the lines of an Indian reservation and decides the status of that reservation.[60] This holding was then reaffirmed in *Solem v. Bartlett* in 1984.[61] In *Solem*, the Court set out a framework to determine whether or not a tribe's reservation has been explicitly disestablished by Congress, as it is only Congress that can do so. Courts have continued to use this framework to determine where a reservation's boundaries lie and to further determine if certain crimes have occurred within those boundaries and fall under the MCA.[62]

Thus, the Major Crimes Act was intended to subject the enumerated offenses to federal and tribal jurisdiction only, excluding the states from imposing their prosecutorial power over the tribes unless so granted by Congress, regardless of when a state won statehood.

C. Public Law 280

State jurisdiction regarding the prosecution of crimes on tribal land was largely recognized in 1953 with the enactment of Public Law 280. Public Law 280 gave six states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—jurisdiction over crimes committed by or against Indians within Indian Country.[63] Further, upon receiving consent from the tribe, any other state is permitted to opt in to receiving the same

57. *Id.*
58. *Id.* at 384-85.
59. 215 U.S. 278, 284-87 (1909) (emphasis added).
60. *Id.* at 285.
61. 465 U.S. 463, 470 (1984).
62. *See generally* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020); Murphy v. Royal, 875 F.3d 896, 931-32 (10th Cir. 2017).
63. 18 U.S.C. § 1162(a).

jurisdiction.[64] However, it was not until 1968 that the Act was amended to require tribal consent prior to a state's assumption of jurisdiction.[65] States that have elected to receive full or partial jurisdiction since the Act's enactment include Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington.[66] Oklahoma has never opted in or complied with the requirements of Public Law 280 in order to assume jurisdiction in Indian Country.[67]

Prior to the enactment of Public Law 280, the "distribution of power over Indian Country [was] principally shared by the Federal Government and the tribes."[68] By allowing states to receive jurisdiction over tribal land, "Congress disregarded the historical trust relationship that existed between the Federal Government and the Indian tribes."[69] Therefore, it is not surprising that Indian Nations opposed the legislation that permitted states to impose laws on Indian tribes, their sovereignty, and their ability to self-govern.[70]

In addition to the harsh effects Public Law 280 has on tribal sovereignty, it permits the states to play a role in prosecuting crimes that occur on tribal land. It is only through Public Law 280 or through Congress's explicit disestablishment of a tribe or a reservation's boundaries that a state can prosecute crimes occurring in Indian Country.

D. Murphy v. Royal

Despite not opting to receive jurisdiction within Indian Country through Public Law 280, the State of Oklahoma, for many years, improperly prosecuted crimes that occurred on tribal land. In 2017, the Tenth Circuit addressed this issue in *Murphy v. Royal* and declared that unless tribal land has been disestablished by Congress, the State of Oklahoma does not have jurisdiction to prosecute crimes committed by Indians within Indian Country.[71]

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64. 25 U.S.C. §§ 1321(a), 1326; *see Murphy*, 875 F.3d at 936.

65. *Murphy*, 875 F.3d at 936.

66. *Fact Sheet: American Indians and Alaska Natives – Public Law 280 Tribes*, ADMIN. FOR NATIVE AMS., https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-public-law-280-tribes (last visited Jan. 29, 2024).

67. *See McGirt*, 140 S. Ct. at 2478.

68. Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1656-57 (1998).

69. *Id.* at 1664.

70. *See Fact Sheet: American Indians and Alaska Natives – Public Law 280 Tribes*, *supra* note 66.

71. *See generally* Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017).

In 2000, Patrick Murphy, a member of the Muscogee (Creek) Nation, was convicted of first degree murder in McIntosh County, Oklahoma, and was sentenced to death.[72] It was in Murphy's second application for State post-conviction relief that he alleged the State of Oklahoma lacked jurisdiction to prosecute him for this crime "because the Major Crimes Act gives the federal government exclusive jurisdiction to prosecute murders committed by Indians in Indian country."[73] The state district court disagreed with Murphy and held that jurisdiction was proper in his case.[74] The Oklahoma Court of Criminal Appeals (OCCA) affirmed this holding in 2005, claiming that the land that the crime occurred on belonged to the state.[75] Murphy then brought the issue before the Federal District Court on his federal habeas application.[76] The court denied Murphy's claim on the grounds that the OCCA's previous decision had properly applied established federal law.[77] This issue, among others, was then brought before the Tenth Circuit which reversed the ruling, determining that because the crime *did* occur on tribal land, the State of Oklahoma lacked jurisdiction.[78]

The main issue of this case was whether or not Oklahoma had the jurisdiction to prosecute Murphy, which turned on whether the crime actually occurred in Indian Country. "Indian Country" is defined in 18 U.S.C. § 1151 as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the border of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[79]

72. *Id.* at 904-05.
73. *Id.* at 907.
74. *Id.* at 908.
75. *Id.* at 908-09.
76. *Id.* at 910.
77. *Id.*
78. *Id.* at 911, 921.
79. 18 U.S.C. § 1151.

The Major Crimes Act,[80] which Murphy's crime fell under, "applies in all of Indian country, not only reservation land."[81] To determine whether the crime occurred in Indian Country, as Murphy claimed it did, the Tenth Circuit looked to established federal law. The court found clearly established law in the *Solem* framework recognized by the Supreme Court, which analyzes "whether Congress [has] altered a reservation's borders."[82] The *Solem* framework includes three prongs to consider in evaluating a tribe's reservation. The factors in *Solem*, directed to courts examining the disestablishment or diminishment of a reservation, include:

- Prong 1: "[E]xamine the text of the statute purportedly disestablishing or diminishing the reservation."[83]
- Prong 2: "Consider 'events surrounding the passage' of the statute."[84]
- Prong 3: "Consider[] . . . events that occurred after the passage of the relevant statute."[85]

Upon applying these factors, a court must look for Congress's explicit disestablishment or diminishment of a tribe's land in statutory text, how the transaction was negotiated with the tribe, and the later treatment of the land. Further, any ambiguities that exist when looking at these factors must be resolved in the Indians' favor.[86]

In applying this framework, which the OCCA failed to do, the Tenth Circuit found that the State's argument, claiming that Congress disestablished the reservation in question, failed the very first prong of the *Solem* framework.[87] Although the State brought forward eight statutes and argued that the "cumulative force" of the statutes disestablished the reservation, because Congress directly referenced and recognized distinct boundaries of the tribal nation within those statutes, the Court found that in no way could Congress have intended to disestablish the reservation.[88] As a result, the Court found that the eight statutes brought by the State showed

80. *See supra* Section II.B.
81. *Murphy*, 875 F.3d at 917 (citation omitted).
82. *Id.* at 921-22.
83. *Id.* at 920.
84. *Id.* (quoting Solem v. Barrett, 465 U.S. 463, 471 (1984)).
85. *Id.* (quoting *Solem*, 465 U.S. at 471).
86. *Id.* at 921.
87. *Id.* at 937 (Tymkovich, J., concurring).
88. *Id.* at 950-51.

Congress's intent to recognize the tribe rather than to disestablish the tribe.[89] The Court declared that even "[t]he State's arguments about tribal title and governance miss the mark" due to the lack of Congress's intent to diminish in any statute or action.[90]

Moving to the second *Solem* prong of contemporary historical evidence of Congress's intent to disestablish, the State provided evidence that "support[ed] the notion that Congress intended to institute a new government in the Indian Territory and to shift Indian land ownership from communal holdings to individual allotments."[91] However, the Tenth Circuit declared that this was not enough to show "unequivocally or otherwise, that Congress *had* erased or even reduced" the reservation in question.[92] Consequently, the State's argument similarly failed the second prong of the test.

Finally, although the Tenth Circuit entertained the arguments made for the third *Solem* prong, "[w]hen steps one and two 'fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands,' courts must accord 'traditional solicitude' to Indian tribes and conclude 'the old reservation boundaries' remain intact."[93] In applying the *Solem* framework, the Tenth Circuit declared that Congress had not yet disestablished the reservation in question and, therefore, the crime committed occurred within Indian Country.[94] Further, because the crime was committed within Indian Country, the MCA applied and the federal courts had exclusive jurisdiction, not Oklahoma.[95] In reversing *Murphy*, the Tenth Circuit laid out Oklahoma's error in assuming jurisdiction and the state's incorrect application of federal Indian law.

E. McGirt v. Oklahoma

Oklahoma's prosecution of crimes in Indian Country was again addressed in 2020 by the Supreme Court in the landmark *McGirt v. Oklahoma* case. While *Murphy* determined that Oklahoma should use the *Solem* framework to determine if and where a reservation exists in regard to a criminal case, *McGirt* declared that where those reservations do exist, the

89. *Id.* at 951.
90. *Id.* at 953-54.
91. *Id.* at 959.
92. *Id.* (emphasis added).
93. *Id.* at 966 (quoting Solem v. Barrett, 465 U.S. 463, 472 (1984)).
94. *Id.*
95. *Id.*

land remains subject to the Major Crimes Act.[96] Thus, through *McGirt,* the Supreme Court upheld the trust relationship between Oklahoma tribes and the federal government by shielding the tribes from the imposition of state laws. In turn, *McGirt* protected tribal sovereignty and a tribe's ability to self-govern.

Jimcy McGirt, an enrolled member of the Seminole Nation, was prosecuted and convicted in Oklahoma state court for crimes committed on tribal land.[97] In postconviction proceedings, McGirt argued that the state lacked jurisdiction, but this argument was rejected by the Oklahoma state courts despite the recent ruling in *Murphy*.[98] Before the Supreme Court, McGirt argued that under the MCA, because he is a member of the Seminole Nation and the crimes he committed occurred within Indian Country, it was the federal government that had jurisdiction over his case, not the state.[99] As in *Murphy*, Oklahoma attempted to argue that the land in which the crime was committed was no longer a tribal reservation.[100] However, although Oklahoma and its state courts rejected that the land was tribal land, the land in question was the same that the Tenth Circuit decided in *Murphy* as being the reservation established for the Creek Nation.[101]

As the Tenth Circuit found in *Murphy*, the Supreme Court similarly declared in *McGirt* that only "the Acts of Congress" can disestablish a reservation.[102] The Court furthered this by stating, "[I]t's no matter how many other promises . . . the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so."[103] As the State did in *Murphy*, Oklahoma again pointed to events during the allotment era, blows the tribe took throughout history from Congress, and historical practices following the enactment of relevant legislation to prove the disestablishment of the Creek Nation.[104] Similarly, Oklahoma's argument that the reservation was never even established failed due to the history of the reservation's recognition by Congress.[105]

96. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).
97. *Id.* at 2459.
98. *Id.*
99. *Id.*
100. *Id.* at 2460.
101. *Id.*
102. *Id.* at 2462.
103. *Id.*
104. *Id.* at 2463-74.
105. *Id.* at 2474-76.

In another attempt to argue its "proper" jurisdiction over McGirt and alike individuals, Oklahoma asserted that even if the Creek Reservation remained intact, "eastern Oklahoma is and has always been exempt" from the federal law.[106] To support this argument, Oklahoma pointed to Congress's abolishment of tribal courts in 1898.[107] Upon abolishing the tribal courts, Congress transferred criminal cases to the U.S. courts of the Indian Territory.[108] Oklahoma argued, "[S]ending Indians to federal court and all others to state court would be inconsistent with [the] established and enlightened policy of applying the same law in the same courts to everyone."[109] However, this argument failed due to the fact that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history."[110] Further, as mentioned in Part II(b), the MCA "provide[s] exclusive federal jurisdiction over qualifying crimes by Indians in '*any Indian reservation*' located within 'the boundaries of *any State*.'"[111] Consequently, upon Oklahoma attaining statehood in 1907, "the MCA applied immediately according to its plain terms [to Oklahoma]."[112]

Additionally, the Enabling Act that the State relied on to further its argument "sent state-law cases to state court and federal-law cases to federal court."[113] Therefore, under the Enabling Act, crimes arising under the MCA "properly belonged in federal court from day one, wherever they arose within the new State."[114] Despite these Acts preventing the State from prosecuting crimes in Indian Country, Congress has made available to the State opportunities to expand their criminal jurisdiction, such as through Public Law 280, but the State failed to comply with the requirements to do so.[115]

In its final decision the Supreme Court proclaimed that the State of Oklahoma is not exempt from federal law.[116] Until 2020, Oklahoma had been improperly prosecuting Native Americans since its statehood in 1907. In reversing the OCCA's holding that McGirt had been properly prosecuted, the Court declared, "Unlawful acts, performed long enough and

106. *Id.* at 2476.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* (quoting Rice v. Olson, 324 U.S. 786, 789 (1945)).
111. *Id.* at 2477.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* 2478.
116. *Id.*

with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."[117] Therefore, the Court demanded that Oklahoma follow the federal law declared in the MCA after over a century of improperly imposing state law on the recognized tribes. In making this decision, the Court acknowledged that many cases would now have to be transferred from state to federal or tribal jurisdictions, possibly causing disruption and leading to a period of readjustment.[118] However, the Court recognized that it was a necessary process due to the improper authority Oklahoma had forced upon tribes for many years.[119]

III. Oklahoma v. Castro-Huerta

While *McGirt*'s holding was a large win for tribal nations in Oklahoma, it did not last for long. Oklahoma acted quickly in attempt to overturn the holding and was primarily successful in 2022 with the holding of *Oklahoma v. Castro-Huerta*.[120] For over 100 years, it has been understood that the prosecution of crimes in Indian Country shall be within the jurisdiction of the tribes and in certain circumstances within the jurisdiction of the federal government. The only exception to this being where Congress explicitly acts to give a state jurisdiction. The Supreme Court undid over a century worth of this precedent by holding in *Castro-Huerta* that "the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country."[121]

In 2015, Victor Manuel Castro-Huerta, a non-Indian, was charged and convicted by the state of Oklahoma for child neglect of his stepdaughter, a Cherokee Indian, within Indian Country. While Castro-Huerta's appeals were pending in state court, the *McGirt* decision was handed down.[122] Following the decision, Castro-Huerta argued that the State lacked jurisdiction to prosecute him under *McGirt*'s holding and the OCCA agreed, vacating Castro-Huerta's conviction.[123] While his case was pending

117. *Id.* at 2482.

118. *Id.* at 2479-80.

119. *Id.* at 2480-82; *see* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2524 (2022) (Gorsuch, J., dissenting).

120. *Castro-Huerta*, 142 S. Ct. at 2486 (majority opinion).

121. *Id.* at 2491.

122. *Id.*

123. *Id.* at 2492.

in State court, Castro-Huerta was indicted by a federal grand jury and accepted a plea agreement.[124]

On review the Court declared, "States have jurisdiction to prosecute crimes committed in Indian country unless preempted."[125] Thus, the issue of the case became "whether the State's authority to prosecute crimes committed by non-Indians against Indians in Indian country has been preempted."[126] The Court explained that through precedent, there are two ways in which a State's jurisdiction may be preempted in Indian Country: "(i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government."[127] By doing this, the Supreme Court created a test for lower courts to use when determining when a state can prosecute crimes occurring within Indian Country and therefore distinguished it from the *McGirt* decision.

Regarding the first, Castro-Huerta argued that the General Crimes Act (GCA) and Public Law 280 preempt the State's jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country.[128] In response to Castro-Huerta's GCA argument, the Court declared that although federal criminal laws apply in Indian Country, the extension of those laws "does not silently erase preexisting or otherwise lawfully assumed state jurisdiction."[129] Therefore, jurisdiction over Indian Country is not equivalent to that of a federal enclave and federal jurisdiction does not preempt state law.[130] Further, the Court stated that it would not decide what Congress may have implicitly intended through statutory text.[131] This meant that no recodifying of the GCA throughout history preempted state jurisdiction to prosecute crimes committed by non-Indians in Indian Country because it was never stated in clear statutory language, regardless of the differing court holdings and dicta. For these reasons, the Court interpreted the statutory text of the GCA as describing the laws that shall extend "to" Indian Country, and not as an exclusive jurisdiction "over" Indian Country.[132]

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124. *Id.*
125. *Id.* at 2494.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 2496.
130. *Id.*
131. *Id.*
132. *Id.* at 2495.

Regarding Public Law 280, the Court similarly held that the law "does not preempt any preexisting or otherwise lawfully assumed jurisdiction that States possess to prosecute crimes in Indian country."[133] On this issue, Castro-Huerta argued that in passing Public Law 280 Congress assumed the States did not already have concurrent jurisdiction because the law would have otherwise been unnecessary.[134] However, the Court denied this argument stating that the law was significant for purposes other than the present issue.[135] Further, the Court claimed that even if there was surplusage, the law does not preempt the state's authority to prosecute crimes committed by non-Indians in Indian Country.[136]

Finally, in determining whether state jurisdiction would unlawfully infringe on tribal self-government, the Court applied the *Bracker* balancing test.[137] The *Bracker* balancing test originates from *White Mountain Apache Tribe v. Bracker*, a civil case addressing preemption when a state law interferes with a federal regulation or infringes on tribal self-governance regarding taxing on tribal land.[138] The balancing test determines unlawful infringement of tribal self-governance by evaluating tribal, federal, and state interests.[139] If the test determines that state jurisdiction does infringe upon tribal self-government, the state's jurisdiction may be preempted regardless of the federal law's preemption.[140] Prior to *Castro-Huerta*, *Bracker* balancing had only been used in civil disputes, and had never been used to "'balance' away tribal sovereignty in favor of state criminal jurisdiction over crimes by or against tribal members—let alone ordain a wholly different set of jurisdictional rules than Congress already has."[141]

Applying the test, the Court first stated that state jurisdiction to prosecute crimes committed by non-Indians in Indian Country would not affect tribal interests because the state's prosecution would "not involve the exercise of [its] power over any Indian or over any tribe."[142] This is because the only parties would be "the State and the non-Indian defendant."[143] Second, the Court declared that the state's prosecution would not harm federal interests

133. *Id.* at 2499.
134. *Id.* at 2500.
135. *Id.*
136. *Id.*
137. *Id.* at 2501.
138. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
139. *Castro-Huerta*, 142 S. Ct. at 2501.
140. *Id.*
141. *Id.* at 2521 (Gorsuch, J., dissenting).
142. *Id.* at 2501 (majority opinion).
143. *Id.*

because the state would "supplement . . . not supplant federal authority."[144] Further, because state and federal jurisdiction would be concurrent, "a state prosecution would not preclude an earlier or later federal prosecution," and will not harm any federal interest.[145] Finally, the Court recognized the State's interest in "ensuring public safety and criminal justice within its territory, and in protecting all crime victims."[146] Therefore, the Court determined that the State is not barred from prosecuting crimes committed in Indian Country by non-Indians because the prosecution would not harm tribal, federal, or state interests.[147]

Ergo, the Court declared in *Castro-Huerta* that no federal law or principle of tribal self-government preempts Oklahoma's jurisdiction to prosecute crimes committed by non-Indians in Indian Country.[148] Further, the Court declared that not only are tribal nations a part of the state in which they lie, but the states also have partial jurisdiction over them.[149] Through this ruling, the Court overturned the sovereignty tribes have retained for over 200 years and the many promises made by the federal government to protect the tribes from state interference.[150]

IV. Early Predictions of the Negative Side Effects State Jurisdiction Can Have over Tribal Land

Sovereignty plays an important role in how tribal governments are able to protect their members. In order to manage its own affairs and members, a tribe must have the power to create, regulate, and practice its own laws and customs. These matters become confused when split between federal, state, and tribal governments. The split jurisdiction ordered in *Castro-Huerta* not only works to collapse tribal self-sufficiency, but also takes away tribal rights to protect members from non-Indians' involvement with and acts against members.[151] Therefore, a negative effect can be predicted from this sort of ruling and has been warned against throughout history.

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144. *Id.*
145. *Id.*
146. *Id.* at 2501-02.
147. *Id.* at 2501.
148. *Id.* at 2502-03.
149. *Id.* at 2502.
150. *Id.* at 2505 (Gorsuch, J., dissenting).
151. *See* Brief for Cherokee Nation et al. as Amici Curiae Supporting Respondent Castro-Huerta, Oklahoma v. Castro-Huerta, 140 S. Ct. 2486 (2022) (No. 21-429) [hereinafter Cherokee Nation Amicus Curiae Brief].

A. President Truman's Veto of Senate Bill 1407

In 1949, President Truman vetoed Senate Bill 1407 due to its attempt to extend state law and court jurisdiction to a reservation that was under federal and tribal jurisdiction.[152] Truman reasoned that although the bill was meant to offer support to the prospective tribe, the extension of state jurisdiction is "heavily weighted with possibilities of grave injury to the very people who are intended to be the beneficiaries."[153] In beginning his argument, Truman recognized that in state court "there is much less assurance of protection for Indian rights."[154] Further, Truman acknowledged the respect for tribal self-determination that is rooted in our Nation's fundamental principles.[155] Upon analyzing these factors, Truman agreed with the federal government's repeated recognition that "so long as Indian communities wished to maintain, and were prepared to maintain, their own political and social institutions, they should not be forced to do otherwise."[156]

Although state criminal and civil laws had been extended to other tribal nations at this time, Truman discerned that those particular tribes "were prepared to *and wished* to be governed by State and local law."[157] While decades have passed, states continue to desire and attempt this sort of extension of their laws upon tribes despite the tribes' wishes. However, Truman's conclusion that "[i]t would be unjust and unwise to compel [tribes] to abide by State laws written to fill other needs than theirs" remains true.[158]

The following year Truman signed a bill that was identical to Senate Bill 1407 but excluded the extension of state law and court jurisdiction. The new bill offered the same support to the Tribes but permitted them to continue their sovereign practices. The bill helped the Tribes to "achieve greater economic stability, [provided] better educational opportunities,

152. Harry S. Truman, Veto of Bill Establishing a Program in Aid of the Navajo and Hopi Indians (Oct. 17, 1949), *in* HARRY S. TRUMAN LIBR. & MUSEUM, https://www.trumanlibrary.gov/library/public-papers/233/veto-bill-establishing-program-aid-navajo-and-hopi-indians (last visited Jan. 31, 2024) [hereinafter Truman Veto].

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* (emphasis added).

158. *Id.*

and . . . lead to the improvement of their health."[159] Additionally, the bill allowed the Tribes to have greater control and power over their funds and management of affairs.[160]

In vetoing Senate Bill 1407, President Truman supported tribal sovereignty and warned of the negative impact that a State's interference can have upon a tribe. The federal government has a trust relationship with the tribes, including a duty of protection. The states do not have such a duty. With this support from the federal government and without state interference, tribes can achieve self-sufficiency and offer greater protection to their members.

B. President Eisenhower's Response to Public Law 280

As mentioned in Section II.C, Public Law 280 was passed in 1953.[161] Although he signed and approved the bill, President Eisenhower expressed "grave doubts" that he had regarding certain aspects of the bill.[162] Similar to President Truman, Eisenhower was concerned with how Public Law 280 would affect tribal self-government. Specifically, Eisenhower objected to the power the bill gave to states to impose their laws and jurisdiction over tribal land without consulting the tribes.[163] Eisenhower recognized that although progress was being made, "much greater progress will result through full consideration being accorded [to] our Indian citizens."[164] Further, Eisenhower encouraged the states to consider the wishes of the tribes residing within before extending jurisdiction as the bill permitted.[165]

President Eisenhower proclaimed that a tribe's wishes and desires to self-govern should be ascertained and that there should be final federal approval before a state enforces its law in Indian Country.[166] Without these steps, the progression of relationships with tribal nations and the tribes'

159. Harry S. Truman, Statement by the President Upon Signing Bill for the Aid of the Navajo and Hopi Indian Tribes (Apr. 19, 1950), *in* HARRY S. TRUMAN LIBR. & MUSEUM, https://www.trumanlibrary.gov/library/public-papers/91/statement-president-upon-signing-bill-aid-navajo-and-hopi-indian-tribes (last visited Jan. 31, 2024).

160. Truman Veto, *supra* note 152.

161. *See supra* Section II.C.

162. Dwight D. Eisenhower, Statement by the President Upon Signing Bill Relating to State Jurisdiction over Cases Arising on Indian Reservations (Aug. 15, 1953), *in* THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-bill-relating-state-jurisdiction-over-cases-arising (last visited Jan. 31, 2024).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

self-efficiency will be slowed or halted. Therefore, in pronouncing his doubts concerning the bill, President Eisenhower confirmed the idea that State interference with tribal self-government can halt a tribe's progress towards self-sufficiency and ability to protect its members.

V. The Truth Behind the Early Predictions

As Truman and Eisenhower recognized, halting the development of a sovereign can have effects on the well-being of its members. Disruptions within a community, such as the ones that have been pushed onto tribes, can further cause disruption in the psychosocial development of the community's members. While an individual is growing and developing important virtues, they are "establish[ing] important life skills for functioning socially and as an individual."[167] Psychosocial development and how it effects an individual's personality and ability to function are best explained through Erik Erickson's eight stages of development. Each stage is "influenced by biological, psychological, and social factors throughout the lifespan."[168] The stages that occur from infancy to later adulthood, and are believed to be initiated from crisis, include (1) trust vs. mistrust; (2) autonomy vs. shame and doubt; (3) initiative vs. guilt; (4) industry vs. inferiority; (5) identity vs. role confusion; (6) intimacy vs. isolation; (7) generativity vs. stagnation; and (8) ego integrity vs. despair.[169] As individuals grow and enter into each of these stages, they will learn and develop one of the virtues that are associated with each stage.[170] It is important to note that "[r]esolution [of one stage] is not required to move onto the next stage."[171] Thus, as one grows, previously learned values can be questioned and reintegrated.[172]

Development through these stages can have an effect on the recovery process one has when they experience different issues that occur throughout their life.[173] For example, "the initial stage of trust vs. mistrust parallels the

167. *Addiction and Psychosocial Development in Early Childhood*, TRANSFORMATIONS TREATMENT CTR., https://www.transformationstreatment.center/resources/friends-and-family/addiction-and-psychosocial-development-in-early-childhood/ (last visited Sept. 8, 2023).

168. Gabriel A. Orenstein & Lindsay Lewis, *Eriksons Stages of Psychosocial Development*, NAT'L HEALTH INST.'S NCBI BOOKSHELF (Nov. 7, 2022), https://www.ncbi.nlm.nih.gov/books/NBK556096/?report=printable.

169. *Addiction and Psychosocial Development in Early Childhood*, *supra* note 167.

170. *Id.*

171. Orenstein & Lewis, *supra* note 168.

172. *Id.*

173. *See id.*

mental illness recovery stage concerning the acceptance of the mental illness and trusting the idea of recovery."[174] As a result, the development of these psychosocial stages can be detrimental to how an individual functions. The more disruption that occurs within a community and, in return, within one's life, the more members within that community can be expected to have poor or incomplete psychosocial development. Thus, the disarrangement and interference with tribal governments and their ability to protect their members likely has and will continue to impact the psychosocial development of tribal members as they feel the reverberations of the attacks against their Nation's sovereignty and within their community.

A. Why Substance Use Disorders Are Common Among Native Americans

Despite comprising only 1.7% of the United States' total population, Native Americans experience very high rates of substance use compared to larger groups.[175] Since European arrival to America, Native Americans have experienced mistreatment, violence, persecution, and still to this day the loss of the right to govern themselves. It should not be surprising that this history, attributed to by "social isolation, poverty, education, high incarceration rates, and inadequate access to health care," has led to high rates of substance use disorders among the population.[176] Native Americans have the highest rates of substance use disorders for several different substances including alcohol, marijuana, cocaine, inhalants, and hallucinogens.[177] Additionally, a 2018 drug use and health survey found the following:

- 10% of Native Americans have a substance use disorder.
- 4% of Native Americans have an illicit drug use disorder.
- 7.1% of Native Americans have an alcohol use disorder.
- Nearly 25% of Native Americans report binge drinking in the past month.

174. *Id.*

175. *Alcohol and Drug Abuse Among Native Americans*, *supra* note 8.

176. *Substance Abuse & Native Americans*, THE RED ROAD, https://theredroad.org/issues/native-american-substance-abuse/ (last visited Sept. 10, 2023).

177. *Alcohol and Drug Abuse Among Native Americans*, *supra* note 8.

- Native Americans are more likely to report drug abuse in the past month (17.4%) or year (28.5%) than any other ethnic group.[178]

Studies have shown that there is a relationship between poor psychosocial development and substance use disorders.[179] These studies have further stipulated that the early use of substances can be an indicator to poor psychosocial development.[180] When evaluating use among Native Americans, research has shown "higher rates of use and earlier initiation among AI/AN adolescents compared with other US adolescents."[181] This evidence among adolescents shows early evidence that there is potential correlation between the disruption in tribal communities and the rates of substance use and abuse among Native Americans.

American Indian and Alaskan Native scholars suggest that successful development among the population was stunted by the early trauma experienced by the tribes.[182] More specifically, scholars have noted the effects that federally mandated boarding schools had on children and their families:

> [F]ederally mandated boarding schools that removed children far from their families and denied them the language, dress, and customs of their cultures resulted in "lost" generations who neither received the parenting they needed nor learned parenting skills necessary to raise their own children, and who were cut off from cultural practices that supported successful development.[183]

The scholarship suggests that the federally mandated boarding schools were major contributors in stunting psychosocial development in the children required to attend and further led to the higher risk of substance use disorders among Native Americans. Additionally, "[h]istorical experiences of dispossession and subjugation and ongoing discrimination have been associated with increased risk symptom onset" in relation to certain substance use disorders.[184] It is now believed that the historical

178. *Id.*

179. *Addiction and Psychosocial Development in Early Childhood*, *supra* note 167.

180. *Id.*

181. Whitesell et al., *supra* note 3.

182. *See id.*

183. *Id.* (footnote omitted).

184. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISION: DSM-5, at 556 (5th ed. 2022), https://perma.cc/QGT6-LGAW (from the chapter titled "Substance-Related and Addictive Disorders").

trauma and historical trauma response to these events is a major contributing factor to the high rates of substance use disorders among the population.[185]

Historical trauma is explained as being the "cumulative emotional and psychological wounding, over the lifespan and across generations, emanating from massive group trauma experiences," and historical trauma response "is the constellation of features in reaction to this trauma."[186] When a generation of victims of historical trauma go untreated, that trauma is then passed onto subsequent generations.[187] An example of this can be seen through the long-lasting traumatic effects of the federally mandated boarding schools. The boarding schools deprived families of traditional parenting roles, and further "impair[ed] their capacity to parent within an indigenous healthy cultural milieu."[188] The "non-nurturing and ineffective parental disciplinary practices [and] absence of family rituals" that result from this then increase the risk of trauma exposure and substance abuse of children.[189] A common result of this is the attempt to use substances "to self-medicate to reduce the emotional pain" of the trauma.[190] Further, "[f]irst-degree relatives of trauma survivors with PTSD manifest a higher prevalence of substance use disorders as well as mood and anxiety disorders."[191] Additionally, studies have confirmed that there is "compelling evidence" in specifically studied tribes that "thoughts about historical losses and their associated symptomatology are common and that the presence of these thoughts are associated with high degrees of Native American Heritage and cultural identification, and substance dependence."[192] Therefore, the evidence is clear that centuries worth of

185. *See* Whitesell et al., *supra* note 3; *see also* Cindy L. Ehlers et al., *Measuring Historical Trauma in an American Indian Community Sample: Contributions of Substance Dependence, Affective Disorder, Conduct Disorder and PTSD*, 133 DRUG & ALCOHOL DEPENDENCE 180, 186 (2013); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (SAMHSA), TIP 61: BEHAVIORAL HEALTH SERVICES FOR AMERICAN INDIANS AND ALASKA NATIVES (2009), https://store.samhsa.gov/sites/default/files/d7/priv/tip_61_aian_full_document_020419_0.pdf [hereinafter SAMHSA, TIP 61].

186. Maria Yellow Horse Brave Heart, *The Historical Trauma Response Among Natives and Its Relationship with Substance Abuse: A Lakota Illustration*, 35 J. PSYCHOACTIVE DRUGS 1, 7 (2003).

187. *Id.* at 9.

188. *Id.*

189. *Id.*

190. *Id.* at 11.

191. *Id.*

192. Ehlers et al., *supra* note 185, at 186.

mistreatment and oppression of the Native American culture has led to disruption in the community, generational trauma, and high rates of substance abuse. Unfortunately, Native American communities often lack the resources needed for proper substance use disorder treatment.[193] "Studies have shown that cultural identity and spirituality are important issues for Native Americans seeking help for substance abuse, and these individuals may experience better outcomes when traditional healing approaches (such as powwows, drum circles, and sweat lodges) are incorporated into treatment programs."[194] Consequently, for a change to be seen in the rates of substance use disorders among Native Americans and the crimes that often result, it is important that Native American offenders have the opportunity to use traditional healing approaches when entered into treatment programs, Healing to Wellness programs, or Drug Court programs.

B. Why Domestic Violence Is Common Among Native Americans

The Native American population experiences domestic violence at much higher rates than other U.S. populations.[195] In fact, the incidence rate of DV against Native American women is so high that in 2005 Congress enacted legislation specifically to target serial offenders within Indian Country.[196] Domestic violence can be described as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."[197] This violence can come in many forms, including "physical, sexual, emotional, economic, psychological, or technological actions or threats of actions or other patterns of coercive behavior that influence another person within an intimate partner relationship."[198] Data shows that "[m]ore than four in five American Indian and Alaska Native adults (83 percent) have experienced some form of violence in their lifetime."[199] Further, more than 38% of female victims are

193. *Alcohol and Drug Abuse Among Native Americans*, *supra* note 8.

194. *Id.*

195. *See supra* Part I.

196. United States v. Bryant, 579 U.S. 140, 142-43 (2016).

197. *Domestic Violence*, U.S. DEP'T OF JUST.: OFF. ON VIOLENCE AGAINST WOMEN (OVW) (Mar. 17, 2023), https://www.justice.gov/ovw/domestic-violence (last updated Dec. 6, 2023).

198. *Id.*

199. *Five Things About Violence Against American Indian and Alaska Native Women and Men*, U.S. DEP'T OF JUST.: NAT'L INST. OF JUST., 1 (May 2023), https://www.ojp.gov/pdffiles1/nij/249815.pdf.

unable to receive necessary services such as medical care and legal services following an abusive event.[200]

The high rates of violence against Native Americans are not new. "Indigenous peoples have faced violence and the tragedy of a missing or murdered loved one for generations tracing back to the first instances of physical and cultural violence committed against them from the start of colonization."[201] Domestic violence was not common in tribal communities before colonization.[202] Prior to colonial contact, many Native societies honored and respected women for their life-giving powers.[203] However, as colonization continued and tribal societies were attacked, there was a degradation of Native women.[204] Through assimilation and the repeated exposure to the values of colonizers, the dynamics in Native relationships began to change.[205] Much of the sweeping and far-reaching change in Native culture and family dynamics can be attributed to the boarding schools that Native children were forced to attend. These schools attempted to change Native "customs, dress, occupations, language, religion[,] and philosophy."[206] Indian children were taken from their families to attend these boarding schools from 1879 until the 1950s and suffered horrific abuse.[207] While at these schools, children "learned lessons of self-hatred, and domestic and sexual violence, and brought these ways back into their communities."[208] The labeling and abuse that Native communities experienced at the hands of colonizers and that Native children endured at the boarding schools reflect tactics commonly used by domestic batterers to control and abuse their victims.[209] This displays the direct relation between the rates of domestic violence among Native American populations today and the violence they experienced for generations. Similar to the high rates

200. *Id.*

201. *PSAs Highlight Domestic Violence Awareness Among Native Americans*, ADMIN. FOR CHILD. & FAMS. (Jan. 17, 2022), https://www.acf.hhs.gov/media/press/2022/psas-highlight-domestic-violence-awareness-among-native-americans.

202. *Understanding the High Rates of Violence Against Native Americans*, STRONGHEARTS NATIVE HELPLINE, https://strongheartshelpline.org/about/understanding-the-high-rates-of-violence-against-native-americans (last visited Jan. 31, 2024).

203. JENNY GILBERG ET AL., ADDRESSING DOMESTIC VIOLENCE IN NATIVE COMMUNITIES: INTRODUCTORY MANUAL 4 (Holly Oden ed., 2003).

204. *Id.* at 6.

205. *See id.*

206. *Id.* at 7.

207. *Id.* at 15.

208. *Id.*

209. *Id.* at 5.

of substance use disorders, "Native and non-Native domestic violence experts agree that the prevalence of violence in Indian Country is a modern effect of the historical trauma that [the Native American] people continue to experience."[210] Destructive behaviors were taught at the boarding schools and those behaviors and the historical trauma from those experiences continue to elicit a historical trauma response through tribal communities and contribute to the high rates of domestic violence in the community.

As mentioned above, for an individual to develop virtues and to grow and function in society, proper development through the psychosocial stages of life is essential. Not surprisingly, studies have shown that the more a child is exposed to domestic violence, the lower level of psychological adaptability they have.[211] Additionally, "problems at one stage [of development] will [have an] impact on development at subsequent stages."[212] Thus, as a result of decades worth of abuse, Native communities are stuck in a cycle of violence that continues to hinder their development and growth.

Data shows that "most American Indian and Alaska Native victims [of violence] have experienced at least one act of violence committed by an interracial perpetrator (97 percent of women and 90 percent of men)."[213] The significant amount of interracial violence against Native American men and women offers support to the importance of a tribe's sovereign right to criminally prosecute non-Indian perpetrators. As sovereigns, tribal nations and their members have been subject to abuse and control for too long. Tribes must be given the opportunity to unlearn the violence that was forced upon them for generations and to heal through their native practices. This means that tribes, as sovereign nations, should enjoy the right to criminally prosecute non-Indian perpetrators to protect their members, make peace as their traditional practices call for, and to, in turn, begin to combat the high levels of violence that plagues their communities.

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210. *Understanding the High Rates of Violence Against Native Americans*, *supra* note 202.

211. S. Al Majali & H. Alsrehan, *The Impact of Family Violence on the Social and Psychological Development of the Child*, 24 UTOPÍA Y PRAXIS LATINOAMERICANA 199 (2019), https://www.redalyc.org/journal/279/27962050025/27962050025.pdf.

212. Suzanne G. Martin, *Children Exposed to Domestic Violence: Psychological Considerations for Health Care Practitioners*, HOLISTIC NURSING PRAC., Apr. 2002, at 7, 9.

213. *Five Things About Violence Against American Indian and Alaska Native Women and Men*, *supra* note 199.

VI. Castro-Huerta *Will Prevent the Rates of Substance Use Disorders and DV Among Tribes from Improving*

When states are permitted to impose their laws over tribes and tribal land, a tribe's sovereignty is disregarded. While substance use disorders and DV are not issues specific to tribes, they plague tribal communities at much higher rates due to a history of mistreatment that is specific to tribes. Symptoms of historical trauma, such as that experienced by tribes, manifests in many different ways, including through substance use and violent behaviors.[214] Because of their distinctive history, tribal governments are best suited to manage and find solutions to these issues that are now stemming from their past. The healing and justice seeking traditions of tribes are vastly different from that of the dominant culture in the United States. For these reasons, tribes are best suited to prosecute crimes that occur in Indian Country and to bring justice in a way that will best allow their community to heal. The option that *Castro-Huerta* allows, for a state to over-step and prosecute crimes in Indian Country, will act as a roadblock for tribal communities and their healing processes.

A. Tribal Sovereignty and Justice Through Healing

A sovereign can be defined by its "powers of self-government, self-definition, self-determination, and self-education."[215] To best understand tribal sovereignty, there are three principles to be cognizant of:

> (1) Indian tribes had an inherent sovereignty that preceded the arrival of Europeans on the American continent; (2) conquest resulted in the loss of external sovereignty, but it did not independently affect the internal sovereignty of the tribes; and (3) tribes retain internal sovereign power, unless it has been qualified either by treaty or by explicit congressional action.[216]

As sovereigns, tribes retain the right to create laws that govern within their communities and to implement practices of healing through their justice systems.

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214. NAT'L AM. INDIAN CT. JUDGES ASS'N (NAICJA), REPORT ON HOLISTIC AND TRADITIONAL JUSTICE ROUNDTABLE 8 (2016) [hereinafter NAICJA].

215. WILKINS & LOMAWAIMA, *supra* note 10, at 249.

216. WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 36:2 (3d ed., Nov. 2023 update), Westlaw MODCONLAW § 36:2.

In opposition to the dominant society, tribes have typically maintained a holistic view of understanding justice.[217] The holistic approach focuses on underlying issues in a community and how those problems can be resolved.[218] Often referred to as "natural laws," the holistic view of how to bring justice and to make things right is guided by the spiritual realm.[219] Therefore, traditional tribal governments typically respond to crimes and seek justice differently than state or federal governments. While state and federal governments place an "emphasis on the punishment of the deviant as a means of making that person conform, or as a means of protecting other members of society," tribal governments tend to focus on "restor[ing] the peace and equilibrium within the community, and to reconcile the accused with his or her own conscience and with the individual or family who has been wronged."[220] This belief of restoring an imbalance in the community originates from early Indigenous practices of sharing stories and passing beliefs down through generations that focused on relationships within a community.[221] With this strong focus on community relationships, it follows that when an individual deviates from their duty as a community member, they act as if they are not tied to those who they harm, and as a consequence, the offender and everyone harmed requires a positive reconnection.[222] These differing views of justice arise from contrasting fundamental beliefs and views stemming from religion.[223]

Although there have been many attempts to weaken tribal sovereign powers, tribes retain the power to create their own laws and codes under which tribal courts are created and operate.[224] Today, many contemporary tribal communities have different justice systems and forums for handling disputes.[225] While some of these justice systems reflect the American justice system, others reflect Indigenous practices with mechanisms such as "family and community forums, traditional courts, quasi-modern courts, and modern tribal courts."[226] Tribes may also resolve conflicts with

217. *See* Gloria Lee, *Defining Traditional Healing*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS 98, 100 (Wanda D. McCaslin ed., 2005).

218. NAICJA, *supra* note 214, at 5.

219. Lee, *supra* note 217, at 100.

220. *Id.*

221. NAICJA, *supra* note 214, at 3.

222. *Id.*

223. Lee, *supra* note 217, at 102.

224. B.J. JONES, ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM 2 (2000).

225. Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS, *supra* note 217, at 108, 108-11.

226. *Id.*; *see also* NAICJA, *supra* note 214, at 7.

restorative and reparative justice methods that reflect traditional practices such as peacemaking, sentencing circles, and traditional mediation.[227]

An example of how some of these traditional forums work is that the accused and the accused's family will participate in giving verbal accounts of the offender's misconduct.[228] This verbal, face-to-face exchange holds offenders accountable because "[t]hey must face the people whom they have hurt, explain themselves, ask for forgiveness, and take full responsibility for making amends."[229] Additionally, this process "empower[s] victims to confront their offenders and to convey their pain and anguish" and "to discern the offenders' sincerity and to move toward forgiveness and healing."[230] While the victim is not required to forgive their offender, it is encouraged so that the victim may begin healing.[231] Offenders are then required to "perform outward acts to show they are taking responsibility for their behavior," and "those who were affected by the offender's behavior are the ones who decide which punitive sanctions are needed."[232] Because everyone that was affected by the offender's action is involved in this process, it can be very uncomfortable and emotional.[233] However, because the community is involved in resolving the issue and ensuring compliance, the process is successful in "provid[ing] protection, and . . . retain[ing] ownership of the problems."[234]

Oklahoma Drug Court programs and Tribal Healing to Wellness Court programs can be compared to display direct differences in how the sovereigns approach incorporating treatment services into cases involving substance use disorders. Oklahoma Drug Courts and Tribal Healing to Wellness Courts share components such as integrating treatment services into the justice process, taking approaches that ensure due process rights, identifying eligible participants early in the legal process, monitoring progress through frequent and random alcohol and drug tests, incorporating ongoing involvement with the court team and judge, frequent evaluation to measure achievement of program goals, continuing education, and the

227. JONES, *supra* note 224, at 6.
228. Melton, *supra* note 225, at 115.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 116.
233. *Id.* at 117.
234. *Id.*

development of partnerships with relevant community organizations.[235] Differences between the treatment courts exist in the incentives and sanctions used to encourage participant compliance, the incorporated treatment and rehabilitation services, and the structure of phases throughout the program.[236] For example, the Citizen Potawatomi Nation structured the phases of the Nation's Healing to Wellness program to have a "Native American focus."[237] The Healing to Wellness program consists of five phases: phase one, symbolized by the badger; phase two, symbolized by the coyote; phase three, symbolized by the bear; phase four, symbolized by the deer; and phase five, symbolized by the eagle.[238] While progressing through these stages, participants will engage in different requirements that "include drug testing, 12-step meetings, behavioral health counseling and participation in sweat lodges, talking circles, weekly updates, job reports and twice-daily call-ins."[239] Thus, cultural context and spirituality are incorporated into participants' progress towards sobriety.[240] These holistic methods that embody culture and tradition are not approaches available to participants in Oklahoma Drug Court programs.[241] While there are areas in which state and tribal treatment programs are similar, the incorporation of culture, tradition, and spirituality sets tribal treatment programs apart in ways that offer better outcomes for tribal members.

Moreover, there is a vast difference in how tribes seek justice compared to the dominant society. Traditional tribal practices not only pursue justice, but also healing for the victim, others affected such as the victim's family, and the community. This holistic practice formed from traditional cultural teachings and beliefs.[242] Because of this, in many Indigenous communities, law is described as living or as a way of life.[243] Traditional law "is performed within ceremonies and within relationships" and "exists in

235. OKLA. DEP'T OF MENTAL HEALTH & SUBSTANCE ABUSE SERVS., FY20 OKLAHOMA TREATMENT COURT MANUAL 3-4 (n.d.) [hereinafter FY20 OKLAHOMA TREATMENT COURT MANUAL].

236. *Id.*

237. *Healing to Wellness Court Helps Transform Risky Lives into Rewarding Ones*, CITIZEN POTAWATOMI NATION – PEOPLE OF THE PLACE OF THE FIRE (May 1, 2018), https://www.potawatomi.org/blog/2018/05/01/healing-to-wellness-court-helps-transform-risky-lives-into-rewarding-ones/.

238. *Id.*

239. *Id.*

240. *Id.*

241. FY20 OKLAHOMA TREATMENT COURT MANUAL, *supra* note 235, 3-4.

242. Lee, *supra* note 217, at 100.

243. *Id.* at 109; NAICJA, *supra* note 214, at 6.

songs, stories, and interactions."[244] Through this, tribal law becomes a way of life that reflects culture. As sovereigns, tribes retain the power to create laws and practices that maintain the health and safety of their members in ways that incorporate their culture. Accordingly, tribes retain the sovereign power to enforce practices that seek the best form of justice and healing for communities and members.

B. Tribal Justice Systems Will Lead to the Best Results

To improve issues such as substance use disorder and DV within tribal communities, resolutions to treatment must have a focus on the tribe's history, generational and historical trauma, and cultural perspectives.[245] Consequently, the practices of the American justice system are not best suited to improve these issues or to influence behavioral changes within the community. The high rates of substance use and DV among tribal communities are believed to have resulted from the consequences of culture loss.[246] Because the "loss of traditional cultural practices may have exacerbated the effects of historical trauma," the effects of this trauma, such as the high rates of DV and substance use disorder, may be reduced by creating a stronger connection to traditional cultures and practices.[247] Therefore, specific treatment interventions that include traditional cultural practices will have the best impact in tribal communities.[248]

As sovereign nations, each tribal government has its own unique history with the federal government that required the tribe to develop and create tribal criminal codes specific for its community.[249] Because of this, treatment providers and governments that are seeking potential punishment for issues such as DV and substance use need to have an understanding of the "governance systems in treatment referrals, planning, cooperative agreements, and program development."[250]

While not all tribal members identify with or practice cultural traditions, "culturally responsive services offer those who do a chance to explore the

244. NAICJA, *supra* note 214, at 6.

245. Press Release, Substance Abuse & Mental Health Servs. Admin. (SAMHSA), SAMHSA Treatment Guidance on Native Populations Highlights Cultural Considerations, Best Practices (Feb. 12, 2019), https://www.samhsa.gov/newsroom/press-announcements/20 1902120930 [hereinafter SAMHSA Press Release].

246. SAMHSA, TIP 61, *supra* note 185, at 9; *see also* Whitesell et al., *supra* note 3; *Understanding the High Rates of Violence Against Native Americans*, *supra* note 202.

247. SAMHSA, TIP 61, *supra* note 185, at 20.

248. *See* SAMHSA Press Release, *supra* note 245.

249. *See* SAMHSA, TIP 61, *supra* note 185, at 6.

250. *Id.*

impact of culture (including historical and generational traumas), acculturation, discrimination, and bias," and how those factors influence their behaviors.[251] In many tribal communities and in their traditional beliefs, substance use and other issues are not viewed or defined as diseases, moral maladies, or character flaws.[252] Instead, the issue is viewed as a weakness in one of the individual's four elements—spiritual, emotional, physical, and mental—caused by "being out of balance or out of center."[253] As a result, the best way to influence a change would be to approach the issue with a holistic view that incorporates the four elements rather than the typical American justice system sentence.[254]

"Indigenous justice uses respect, consensus, solidarity, mutuality, interdependent relationships, reciprocity, and even love as the means to heal in traditional justice methods."[255] In this way, tribal courts and practices are based on healing while Western law is based on punishment.[256] Indian justice system practices work for tribal communities because they do not center around punishment; instead, they work to heal or rebalance individuals involved in certain matters and to heal issues that are resulting from generational trauma.[257]

There are 574 federally recognized tribes in the United States.[258] Traditions, customs, practices, language, culture, and more range among all these tribes.[259] Studies have shown that traditional healing approaches related to cultural identity and spirituality lead to better outcomes for individuals seeking help in tribal communities.[260] Thus, when confronting issues such as substance use disorder and DV, by implementing traditional customs of healing through their justice systems, tribal governments and practices will lead to better results than when a state oversteps to prosecute crimes in Indian Country.

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251. *Id.* at 7.

252. *See id.* at 8; *see also* Lee, *supra* note 217, at 98-99.

253. Lee, *supra* note 217, at 98; *see also* SAMHSA, TIP 61, *supra* note 185, at 8.

254. *See* SAMHSA, TIP 61, *supra* note 185, at 8.

255. James W. Zion, *Punishment vs. Healing: How Does Traditional Indian Law Work?*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS, *supra* note 217, at 68, 70.

256. *Id.*

257. *See id.*

258. *Tribal Leaders Directory*, U.S. DEP'T OF THE INTERIOR BUREAU OF INDIAN AFFS. (Jan. 28, 2022), https://www.bia.gov/service/tribal-leaders-directory.

259. *See Alcohol and Drug Abuse Among Native Americans*, *supra* note 8.

260. *Id.*

C. Outcome of Castro-Huerta

Congress has explicitly recognized that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments."[261] Congress has additionally conceded that "traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes[.]"[262] That being so, Congress has directly acknowledged the importance of tribal culture and identity within the justice system and the direct role and impact it has on the public health and safety of tribal members and those within Indian Country. As previously mentioned, substance use disorder and DV are two public health issues that seriously affect tribal communities.[263] Therefore, through Congress' reasoning, the tribal justice system plays an important role in ensuring that issues such as these are pursued with practices that will best reflect tribal customs and heal, or make whole again, those that are impacted by the issues.

Despite Congress' recognition of the importance of the tribal justice system and executive acknowledgement of the negative impact state judicial imposition can have on tribal communities,[264] the Supreme Court's ruling in *Castro-Huerta* allows state courts to balance and decide their interests over a tribe's in prosecuting certain crimes committed against Indians in Indian Country, absent federal preemption.[265] However, "there is much less assurance of protection for Indian rights" in state courts compared to tribal and federal courts because "[s]tates do not enjoy [the] same unique relationship with Indians" that the federal government does.[266] Additionally, Oklahoma has a poor record of protecting Indians in Indian Country.[267] For example, "in 2019 the State only 'cleared' about 36% of reported murders, rapes, robberies, and aggravated assaults in the State – in

261. 25 U.S.C. § 3601(5).

262. *Id.* § 3601(7).

263. *See supra* Part I. *See generally Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION (CDC) (Oct. 9, 2021), https://www.cdc.gov/violenceprevention/intimatepartnerviolence/index.html; *Substance Misuse*, AM. PUB. HEALTH ASS'N, https://www.apha.org/topics-and-issues/substance-misuse (last visited Sept. 24, 2023).

264. *See supra* Sections IV.A-.B.

265. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2494 (2022).

266. Truman Veto, *supra* note 152; Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 501 (1979).

267. *See* Cherokee Nation Amicus Curiae Brief, *supra* note 151, at 22-25.

64% of reported cases, *the State did not successfully prosecute anyone*."[268] Further,

> During that period the murder rate for Indian women in Oklahoma County was more than double – 16.7 per 100,000. On Reservations, where the State long exercised criminal jurisdiction before *McGirt*, it was often worse: in Craig County on the Cherokee Reservation, 17.29 per 100,000 Indian women; in Okmulgee County on the Creek Reservation, 24.09 per 100,000; and in Latimer County on the Choctaw Reservation, a horrifying 80.97 per 100,000.[269]

Unfortunately, and as the Supreme Court has previously recognized, this is a common occurrence among states.[270] States are either "unable or unwilling to fill the enforcement gap" when it comes to imposing punishments on violent crimes occurring on tribal land that they have jurisdiction over.[271] Repeatedly, "[s]tates have not devoted their limited criminal justice resources to crimes committed in Indian country."[272] Reports have additionally shown that there are negative consequences when states are vested with broad criminal jurisdiction in Indian Country.[273] For example, the allowance of state jurisdiction in Indian Country often "leads to a decrease of federal investment in tribal justice systems."[274] Thus, when states are given criminal jurisdiction, not only do crimes frequently go unpunished, but the federal government often additionally fails to step in and offer protection to Native American crime victims. This decrease in funding is a result of the belief that once a state is given jurisdiction over Indian Country, the state would then protect the tribal citizens residing within.[275] In contrast, post-*McGirt*, the federal government *had* stepped in to offer funds and worked with tribal and state partners to adapt to the ruling.[276]

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268. *Id.* at 23.
269. *Id.* at 24.
270. *See* United States v. Bryant, 579 U.S. 140, 146 (2016).
271. *Id.*
272. *Id.*
273. Cherokee Nation Amicus Curiae Brief, *supra* note 151, at 25.
274. *Id.* at 25-26.
275. Brief for Nat'l Indigenous Women's Resource Ctr. et al. as Amici Curiae Supporting Respondent at 11, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429) [hereinafter NIWRC Amicus Curiae Brief].
276. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2524 (2022) (Gorsuch, J., dissenting).

However, unlike the federal government, "States do not have a trust duty to recognize and protect Tribal Nations and their citizens."[277] Although the Supreme Court balanced in Oklahoma's favor the interest in protecting Indian crime victims, history has, in contrast, shown a lack of the State's interest.[278] Therefore, this new change and allowance of state jurisdiction in Indian Country can be expected to have limited benefits and will prevent public health and safety improvement in Indian Country.

VII. Conclusion

It has long been understood that absent a congressional action, states lack jurisdiction over crimes in Indian Country.[279] As early as 1823, the law of the land was that tribal nations retain the right to their land subject only to the federal government.[280] Not only was it known that tribes reserve the right to occupy and use their land, but it was additionally declared early in U.S. history that tribes maintain inherent sovereignty over their land and only the federal government could limit that power.[281] Further, it has been recognized for centuries that it is the federal government, not the states, that has a duty to protect tribal nations and their citizens.[282] Accordingly, for 200 years the law has held that it is only Congress or an act of Congress that can limit a tribe's power over its land and citizens.[283]

Similarly, early in U.S. history, laws were created that extended federal criminal law and jurisdiction to Indian Country.[284] Even though these acts extended federal law and jurisdiction to Indian Country, limits were set so that tribal power was not completely limited in regard to criminal acts occurring on a tribe's reservation. For example, three exceptions to the extension of federal law to Indian Country exist in the General Crimes Act , and the Major Crimes Act only applies to the crimes enumerated within the Act.[285] This understanding of exclusive federal and tribal jurisdiction in

277. NIWRC Amicus Curiae Brief, *supra* note 275, at 10-11.

278. *Castro-Huerta*, 142 S. Ct. at 2502 (majority opinion); *see* Cherokee Nation Amicus Curiae Brief, *supra* note 151, at 22-25; NIWRC Amicus Curiae Brief, *supra* note 275, at 25-30.

279. *See supra* Part II; Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 470-71 (1979).

280. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

281. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

282. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

283. *See supra* Section II.A.

284. *See supra* Section II.B.

285. *See supra* Section II.B.

relation to crimes in Indian Country was first congressionally hindered in 1953.[286] Public Law 280 permitted states to extend their criminal jurisdiction to Indian Country despite the lack of a trust relationship to protect tribes and their members.[287]

Despite having seventy years to do so, the State of Oklahoma has failed to comply with and receive jurisdiction through Public Law 280. Although the state is not a Public Law 280 state, Oklahoma extended its jurisdiction into and prosecuted crimes arising in Indian Country for many years.[288] The State argued not once, but twice, that tribal land in Oklahoma had been disestablished by Congress in attempt to justify its improper prosecutions in Indian Country.[289] However, both the Tenth Circuit and the Supreme Court remained true to foundational beliefs that congressional intent is needed to disestablish a reservation and have found that no intent existed.[290] Since this ruling, tribal nations in Oklahoma have been progressive in implementing adjustments and dedicating resources needed to respond to and protect tribal members from crime within Indian Country.[291] By deciding in *Castro-Huerta* that the State can again stretch its jurisdiction into Indian Country, the Supreme Court turned its back on the long-standing promise that "States could play no role in the prosecution of crimes by or against Native Americans on tribal lands."[292]

Allowing Oklahoma to use the *Castro-Huerta* analysis in Indian Country after tribes have been working to develop their self-sufficiency in response to the *McGirt* ruling will disrupt the development and progress that has been made. This is something that has been warned against by the executive branch in response to previous congressional attempts.[293] These attacks on tribal sovereignty, self-governance, and self-sufficiency unfortunately are a reoccurrence throughout the history of the relationship between the United States and tribal nations. The reverberations of these attacks are visible in the public health and safety issues that have resulted after centuries-worth of mistreatment and the historical trauma that still exists in many tribal communities.

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286. *See supra* Section II.C.
287. *See supra* Section II.C.
288. *See supra* Section II.D.
289. *See supra* Sections II.D-.E.
290. *See supra* Sections II.D-.E.
291. Cherokee Nation Amicus Curiae Brief, *supra* note 151, at 4-19.
292. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2508 (2022) (Gorsuch, J., dissenting).
293. *See supra* Sections IV.A-.B.

As individuals grow and travel through life, different virtues are learned that influence how one functions.[294] Disruptions within one's life can lead to incomplete development of these psychosocial stages.[295] It then follows that constant and colossal disruptions within a community will cause a multitude of the community members to experience poor or incomplete psychosocial development. Two common issues that have resulted from stunted psychosocial development influenced by the historical trauma experienced by tribal communities include substance use disorders and domestic violence. As mentioned in part V(a), "[h]istorical experiences of dispossession and subjugation and ongoing discrimination have been associated with increased risk symptom onset" in relation to certain substance use disorders.[296] Not only is historical trauma commonly manifested through substance use, but also through violent behavior.[297]

For years studies have shown that Native Americans suffer from substance use disorders and domestic violence at higher rates than other racial and ethnic groups.[298] Experts in areas for both substance use disorders and domestic violence agree that the prevalence of these issues in Indian Country are the result of the historical trauma that tribal members experience.[299] While the state and federal governments typically seek to punish individuals who commit drug and violence related crimes that result from these issues, tribal governments focus on healing the individual and the community members effected.[300]

The holistic practice of justice through healing derives from early practices and beliefs in the Native American culture.[301] These traditions are now practiced in tribal courts, family and community forums, peacemaking or sentencing circles, or traditional mediation in tribal communities.[302] Studies have shown that for tribal members, incorporating traditional healing approaches into treatment programs leads to better outcomes.[303] Thus, to see a larger change and an improvement within tribal communities in relation to these issues, tribal nations must be given the opportunity to

294. *See supra* Part V.
295. *Id.*
296. AM. PSYCHIATRIC ASS'N, *supra* note 184, at 556.
297. *See supra* Part VI; NAICJA, *supra* note 214, at 8.
298. *See supra* Part I.
299. *See supra* Section V.B.
300. *See supra* Section VI.A.
301. *See supra* Section VI.A.
302. *See supra* Section VI.A.
303. *Alcohol and Drug Abuse Among Native Americans*, *supra* note 8.

make these options available to Native American offenders and victims. This cannot be done if states are permitted to step into Indian Country and punish an offender despite a tribe's ability to take action in the way its leaders deem fit for the offense. The permission that *Castro-Huerta* gives Oklahoma to prosecute crimes within Indian Country will act to slow the healing of the affected tribal nations.

As sovereigns, tribal nations have a profound interest in and a responsibility to protect their reservation, their relationships with non-Indians within their reservation, and their members from crime occurring on their reservation.[304] Evidence shows that Oklahoma's prosecution of crime in Indian Country pre-*McGirt* did everything but protect Native Americans from crime.[305] The State failed to punish offenders in Indian Country at high rates, and its prosecution of crimes, despite having improper jurisdiction, acts as an example of "contemporary justice initiatives directed at Indians."[306] As has been recognized for centuries, tribes are sovereign nations with inherent self-regulatory and self-governing powers.[307] With their distinct and unique histories, tribes have the best understanding of their government systems, programs, and treatment practices that will help to heal their community and community members. It is in the tribal nations' best interest that their members are protected from crime and are given the opportunity to heal. These are two things that Oklahoma has historically not offered to tribal nations. As the Supreme Court has recognized, "The 'complex patchwork of federal, state, and tribal law' governing Indian country has made it difficult to stem the tide" of certain issues, such as these, that are experienced by tribal members.[308] Thus, the interference that will result from concurrent state jurisdiction, as permitted from the *Castro-Huerta* ruling, will predictably have a negative effect on tribal communities and will prevent the betterment of public health and safety issues such as substance use disorder and domestic violence.

Native Americans lead the charts for rates of substance use disorders and domestic violence; this can be correlated back to years' worth of generational trauma. There is an imbalance in the tribal community that

304. *See* Cherokee Nation Amicus Curiae Brief, *supra* note 151, at 19.

305. *See id.* at 24.

306. Zion, *supra* note 255, at 70; *see supra* Section VI.C.

307. *See* WILKINS & LOMAWAIMA, *supra* note 10, at 249; *see also supra* Sections II.A, VI.A.

308. United States v. Bryant, 579 U.S. 140, 145 (2016) (citation omitted) (quoting Duro v. Reina, 495 U.S. 676, 680 n.1 (1990)).

desperately needs to be given the opportunity to heal. Tribal nations have the ability to and are the only sovereign that can restore the peace and equilibrium within their communities through traditional beliefs and practices. *Castro-Huerta* will only act to slow the healing process of tribal communities. While the Court was once thankful to "wash [its] hands clean of the iniquity of oppressing the Indians and disregarding their rights," it can no longer say that its hands are clean.[309]

309. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2527 (2022) (Gorsuch, J., dissenting).