

CONCEALED CARRY TO REDUCE SEXUAL VIOLENCE AGAINST AMERICAN INDIAN WOMEN

*By Adam Crepelle**

I. INTRODUCTION

Although crime rates in the United States have fallen since the 1990s, Indian reservation crime rates have increased over the same time period.¹ The violent victimization rate for Indians² is twice that of any other race,³ and the crime rate on some reservations is 20 times the national average.⁴ Indian crime victimization statistics are outrageous in all categories. However, violence against Indian women may be the most troublesome statistic.

Violence against Indian women recently reached national attention with the passage of the Violence Against Women Reauthorization Act of 2013 (VAWA), which enables tribes to exercise criminal jurisdiction over non-Indians in extremely limited circumstances.⁵ The prospect of tribes exercising criminal jurisdiction over non-Indians was the subject of intense political

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1. Kevin Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C.L. REV. 779, 786 n.31 (2006) (describing American Indian victimization rates as "stunning"); *Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d. 1025, 1029 (9th. Cir. 2013) (stating, "Over the past decade, violent crime has decreased 13 percent nationally, but it has skyrocketed in Indian Country.").

2. When used in this paper, the term "Indian" is used to connote persons of both American Indian and Alaska Native ancestry.

3. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME, SER. NO. NCJ 203097 13-14 (2004), <http://www.bjs.gov/content/pub/pdf/aic02.pdf>.

4. President Barack Obama, *Remarks by the President Before Signing the Tribal Law and Order Act* (July 29, 2010) (transcript available at <https://www.whitehouse.gov/photos-and-video/video/signing-tribal-law-and-order-act#transcript>).

5. M. Brent Leonhard, *Implementing VAWA 2013*, HUMAN RIGHTS MAGAZINE VOL. 40, NO. 4 (2014), http://www.americanbar.org/publications/human_rights_magazine_home/2014_vol_40/vol—40--no--1--tribal-sovereignty/implementing-vawa-201.html (stating VAWA 2013 provides tribes with a limited opportunity to prosecute non-Indians).

controversy.⁶ Multiple tribes are currently exercising VAWA jurisdiction, and no due process issues have been reported to date.⁷

VAWA seeks to improve the safety of Indian women, but it does not remedy the underlying problems that make Indian reservations havens for non-Indian criminals. Substantive solutions to these problems are unlikely to occur anytime soon. Thus, the women of Indian country should use concealed carry to deter sexual predators.

This paper begins by discussing the rates of sexual violence suffered by Indian women. Next, the paper explains two aggravating reasons for the abominable rates of sexual violence against Indian women: jurisdictional confusion and lack of law enforcement resources. Then this paper presents concealed carry as a solution to protect Indian women. Finally, this paper proposes a strategy to encourage Indian women to concealed carry.

II. VIOLENCE AGAINST INDIAN WOMEN

Indian women are victims of rape and other violent crimes at twice the rate of non-Indian women.⁸ President Obama described the rate of violence against Indian women as “an assault on our national conscience.”⁹ Upon finding 34 percent of Indian women will be raped and 39 percent will be victims of domestic violence during their lifetimes, Congress stated the rates of domestic and sexual violence against Indian women are “epidemic.”¹⁰ However, these gloomy statistics likely underrepresent the actual number of

6. Sari Horwitz, *New Law Offers Protection to Abused Native American Women*, WASH. POST (Feb. 8, 2014), https://www.washingtonpost.com/world/national-security/new-law-offers-a-silver-of-protection-to-abused-native-american-women/2014/02/08/0466d1ae-8f73-11e3-84e1-27626c5ef5fb_story.html (noting the opposition of Senators Charles Grassley and John Cornyn to non-Indians being prosecuted in tribal courts); Sarah Childress, *Will the Violence Against Women Act Close a Tribal Justice "Loophole"*, PBS FRONTLINE (Feb. 4, 2013), <http://www.pbs.org/wgbh/frontline/article/will-the-violence-against-women-act-close-a-tribal-justice-loophole/> (noting that republicans' primary objection to VAWA was tribal courts prosecuting non-Indians).

7. *Tribal Implementation of VAWA*, NAT'L CONG. OF AM. INDIANS (2015), <http://www.ncai.org/tribal-vawa/pilot-project-itwg/pilot-project> (last visited Feb. 14, 2017); Justus Caudell, *Sessions Questioned About Voting Record on Colville Supported VAWA*, TRIBAL TRIBUNE (Jan. 11, 2017), http://www.tribaltribune.com/news/article_5cfff92-d82f-11e6-a61a-9fdbfe85698.html (quoting Senator Patrick Leahy, “None of the non-Indians who’ve been prosecuted [under VAWA jurisdiction] have appealed to federal courts.”).

8. NCAI POLICY RESEARCH CENTER, NAT. CONG. OF AM. INDIANS, POLICY INSIGHTS BRIEF: STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN (Feb. 2013), http://www.ncai.org/attachments/PolicyPaper_tWAjznFslemhAffZgNGzHUqIWMPkCDjpFtxeKEUVKjubxfpGYK_Policy%20Insights%20Brief_VAWA_020613.pdf (stating that Indian women “are 2.5 times as likely to experience violent crimes – and at least 2 times more likely to experience rape or sexual assault crimes – compared to all other races.”).

9. Obama, *supra* note 4.

10. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(5)(A–C), 124 Stat. 2262.

Indian women who are subjected to sexual violence. The true figure is likely much, much higher because Indian victims often do not report violent crimes.¹¹ Violence often goes unreported because crimes committed by non-Indians against Indians have historically gone unpunished.¹² On some reservations, sexual violence is so common that mothers and daughters discuss what to do not if, but *when* raped.¹³

Aside from the devastatingly high rate of violent victimization, the victim-offender race relationship is unique for crimes committed against Indian women. Two-thirds of violent crimes committed against Indians are perpetrated by non-Indians; whereas, whites and blacks are victimized by persons of their own race 70 and 80 percent of the time, respectively.¹⁴ Eighty-six percent of sexual assaults against Indian women are committed by non-Indians.¹⁵ On some reservations, Indian women suffer a murder rate 10 times

11. INDIAN LAW AND ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES 4 (2013), http://www.aisc.ucla.edu/iloc/report/files/Chapter_1_Jurisdiction.pdf [hereinafter, COMM'N] (stating Indian victims often do not trust state or federal authorities, so they do not report crimes); Sarah Deer, *Sovereignty of the Soul*, 38 SUFFOLK U.L. REV. 455, 456 (2005) (stating "When I travel to Indian country, however, advocates tell me that the Justice Department statistics provide a very low estimate, and rates of sexual assault against Native American women are actually much higher. Many of the elders that I have spoken with in Indian country tell me that they do not know any women in their community who have not experienced sexual violence."); AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 2 (2007) (quoting an Indian sexual violence survivor stating rapes and beatings are usually not reported to the police); FBI, U.S. DEP'T OF JUSTICE, *Journey Through Indian Country Part 2: Making an Impact on the Reservation*, THE FBI STORY 2012 48, 48 (2012), <https://www.fbi.gov/file-repository/stats-services-publications-fbi-story-fbistory2012.pdf/view> [hereinafter FBI Part 2] (stating Indian country residents think contacting law enforcement is pointless because they expect the "authorities will do little to help them.").

12. Leonhard, *supra* note 5 (noting that domestic violence committed by non-Indians against Indians has long gone unpunished and explaining "If no one gets prosecuted, a victim isn't going to report the crime. Reporting the crime in this situation will make the victims less safe, and both anger and embolden the perpetrator.").

13. Kavitha Chkuru, *Sexual Violence Scars Native American Women*, ALJAZEERA (Mar. 5, 2013), <http://www.aljazeera.com/indepth/features/2013/03/201334111633172507.html>; Sydney Parker, *Native American Mothers Ask: "What Do I Tell My Daughter When She Is Raped?"*, THE GUARDIAN (Mar. 17, 2016), <https://www.theguardian.com/world/2016/mar/17/native-american-rape-reservations-sex-assault>; Rachel Cain, *Supreme Court Upholds Tribal Court Ruling in Domestic Violence Case*, THINK PROGRESS (June 15, 2016), <https://thinkprogress.org/supreme-court-upholds-tribal-court-ruling-in-domestic-violence-case-9a21f05a01a4#91wu1qt6i> (discussing the prevalence of sexual violence against American Indian women and quoting American Indian sexual assault victim's advocate Lisa Brunner stating, "[o]ur reality is not if [a Native woman is] raped, but when.").

14. PERRY, *supra* note 3, at 9; CAL. TRIBAL COURT-STATE COURT FORUM, NATIVE AMERICAN STATISTICAL ABSTRACT: VIOLENCE AND VICTIMIZATION 3 (2012), <http://www.courts.ca.gov/documents/Tribal-NAViolenceVictimStats.pdf>.

15. PERRY, *supra* note 3, at 9; AMNESTY INTERNATIONAL, *supra* note 11, at 4; *Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women: Hearing Before the Comm. On Indian Affairs U.S. S.*, 110th Cong. 79–81 (2007) (statement of the Salt River Pima-Maricopa Indian Community), <http://www.tribal-institute.org/download/septhearing.pdf>; CAL.

the national average.¹⁶

III. FACTORS CONTRIBUTING VIOLENCE AGAINST INDIAN WOMEN

There are two major reasons Indian women endure stunning rates of violence. First is the bizarre jurisdictional structure affecting Indian country's¹⁷ 56 million acres.¹⁸ Second is the lack of law enforcement resources devoted to Indian country. These law enforcement challenges have caused the United States Commission on Civil Rights to declare that "Native Americans have become easy crime targets."¹⁹

A. Criminal Jurisdiction in Indian Country

Indian country criminal jurisdiction is a bewildering mess. The Indian Law and Order Commission (Commission),²⁰ a body of Indian law experts assembled by the President and Congress to study crime in Indian country, acknowledged that every step of the law enforcement process in Indian country is fraught with perplexity.²¹ The Commission's November 2013 report states: "[C]riminal jurisdiction in Indian country is an indefensible maze of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations."²²

As a result of this jurisdictional framework, policing Indian country is a nightmare. Before an individual can be arrested, law enforcement must determine whether the incident occurred inside or outside of Indian country, whether the offender is Indian or non-Indian, and whether the victim is Indian or non-Indian.²³ The nature of the offense also determines whether the tribe, state, or federal government is the proper government to prosecute the case.²⁴

This byzantine scheme is the result of the federal government meddling

TRIBAL-STATE COURT FORUM at 4; Louise Erdrich, *Rape on the Reservation*, N.Y. TIMES (Feb. 26, 2013), http://www.nytimes.com/2013/02/27/opinion/native-americans-and-the-violence-against-women-act.html?_r=0; Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away With Almost Anything*, THE ATLANTIC (Feb. 22, 2013), <http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/>.

16. S. Rep. No. 112-153, at 7-8 (2012).

17. Defined by 18 U.S.C. § 1151 (2016) as all land within an Indian reservation that is under federal jurisdiction and Indian allotments that have not been extinguished.

18. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(3).

19. U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 68 (2003), <http://www.usccr.gov/pubs/na0703/na0731.pdf>.

20. Information about the Commission is available on its website, <http://www.aisc.ucla.edu/iloc/>.

21. COMM'N, *supra* note 11, at 8.

22. COMM'N, *supra* note 11, at 15.

23. ARVO Q. MIKKANEN, DEP'T OF JUSTICE, U.S. ATTORNEY'S OFFICE, INDIAN COUNTRY CRIMINAL JURISDICTION CHART (2010), <http://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf>.

24. *Id.*

with Indian country criminal jurisdiction. During the early years of the United States, tribes exercised criminal jurisdiction over all people within their borders.²⁵ Race became a factor in Indian country criminal jurisdiction with the General Crimes Act of 1817, which granted the federal government jurisdiction over Indian country crimes involving non-Indians.²⁶ The Supreme Court added to the complexity in 1881 when it ruled that states have exclusive jurisdiction over crimes between non-Indians that are committed in Indian country.²⁷

Crimes between Indians in Indian country were exclusively under tribal jurisdiction until the mid-1880s.²⁸ This began to change when Crow Dog murdered Spotted Tail (both Sioux Indians) on the Great Sioux Reservation.²⁹ Pursuant to tribal custom, the family of the murderer compensated the victim's family.³⁰ Americans did not think the tribal punishment fit the crime.³¹ Crow Dog was subsequently prosecuted in federal court and sentenced to death.³² He appealed to the Supreme Court arguing the federal government lacked

25. G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty"*, 76 MARQ. L. REV. 401, 420 (1993) (noting that tribes could exercise criminal jurisdiction over non-Indians prior to the Supreme Court's decision in *Oliphant*); Margaret Zhang, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. PENN. L. REV. 243, 251 (2015) (stating that early treaties between tribes and the United States authorized tribal criminal jurisdiction over non-Indians); See Treaty at Holston, July 2, 1791, § 8, 7 Stat. 39, 40 (stating, "If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please.").

26. 18 U.S.C. § 1152 (2016); COMM'N, *supra* note 11, at 2.

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

28. COMM'N, *supra* note 11, at 117 (noting that the federal government had never claimed federal jurisdiction over Indian country crimes involving only Indians until Crow Dog murdered Spotted Tail); See also, *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (holding state law has no force inside of an Indian nation's borders).

29. COMM'N, *supra* note 11, at 117; David J. Wishart, *Ex Parte Crow Dog*, ENCYCLOPEDIA OF THE GREAT PLAINS (2011), <http://plainhumanities.unl.edu/encyclopedia/doc/egg.law.016>.

30. COMM'N, *supra* note 11, at 117 (stating, "The matter was settled according to long-standing Lakota custom and tradition, which required Crow Dog to make restitution by giving Spotted Tail's family \$600, eight horses, and a blanket."); Wishart, *supra* note 29 (noting that Crow Dog's family compensated Spotted Tail's family with a blanket, \$600, and eight horses); Daniel L. Rotenberg, *American Indian Tribal Death – A Centennial Remembrance*, 41 U. MIAMI L. REV. 409, 413 (1986) (stating that the families of the disputants resolved the matter according to tribal custom).

31. COMM'N, *supra* note 11, at 117 (noting that the public perceived the sentence as far too light, and this led the federal government to prosecute Crow Dog); Anthony G. Gulig & Sidney L. Harring, "An Indian Cannot Get a Morsel of Pork...." *A Retrospective on Crow Dog, Lone Wolf, Blackbird, Tribal Sovereignty, Indian Land, and Writing Indian Legal History*, 38 TULSA L. REV. 87, 89 (2002) (discussing how Crow Dog was penalized according to tribal custom, and many Americans of the day thought the penalty was not harsh enough); Rotenberg, *supra* note 30, at 413 (noting traditional Sioux dispute resolution tactics were used to punish Crow Dog, and "[i]nfluential Americans were not happy with the result.").

32. Wishart, *supra* note 29 (noting Crow Dog was sentenced to death by a federal court); Rotenberg, *supra* note 30, at 413 (stating a federal court sentenced Crow Dog to death).

jurisdiction.³³ The Supreme Court agreed, and it voided Crow Dog's conviction and sentence.³⁴ Congress responded to the perceived light punishment by passing the Major Crimes Act of 1885, granting the federal government jurisdiction over certain felonies involving only Indians in Indian country.³⁵

Although not intended as criminal legislation, the General Allotment Act of 1887 (Allotment Act) has had a tremendous effect on Indian country law enforcement.³⁶ The Allotment Act divided Indian reservations into parcels of land alternating between fee and trust land, commonly referred to as "checkerboarding."³⁷ Tribes have jurisdiction over trust land, but states can have jurisdiction over fee land located within an Indian reservation.³⁸ Therefore, portions of a single piece of property can be under tribal jurisdiction while other segments fall under state jurisdiction.³⁹ The Allotment Act has so complicated the process of determining where these lines fall that law enforcement must consult maps or GPS to determine which government has jurisdiction over a patch of land.⁴⁰

Public Law 83 280 of 1953 (PL 280) was the next major change in Indian country criminal jurisdiction⁴¹ and was the first Congressional attempt to substantially extend state jurisdiction into Indian country.⁴² To cure the

33. Wishart, *supra* note 29 (stating Crow Dog challenged federal jurisdiction at the Supreme Court); Rotenberg, *supra* note 30, at 413 (noting the Supreme Court accepted Crow Dog's case to answer the question of whether federal jurisdiction existed in the case).

34. *Ex parte* Crow Dog, 109 U.S. 556 (1883) (holding the federal government has no jurisdiction over crimes between Indians arising out of Indian country).

35. *Keeble v. United States*, 412 U.S. 205, 209 (1973) (noting, "The Major Crimes Act was passed by Congress in direct response to the decision of this Court in *Ex Parte Crow Dog*, 109 U.S. 556 (1883)."); 18 U.S.C. § 1153 (2016); COMM'N, *supra* note 11, at 117 (noting that members of Congress were "outraged by the Supreme Court's ruling, overturned the decision by enacting the Major Crimes Act of 1885"); *United States v. Kagama*, 118 U.S. 375 (1886) (upholding the Major Crimes Act). This decision has been used to uphold an array of Indian country legislation but is constitutionally questionable. *See United States v. Lara*, 541 U.S. 193, 224 (2004) (Thomas, J., concurring) (stating "[t]he Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty.").

36. 25 U.S.C. § 331 (2016) (repealed 2000); COMM'N, *supra* note 11, at 2.

37. *Checkerboarding*, INDIAN LAND TENURE FOUND. (2017), <https://www.iltf.org/land-issues/checkerboarding> (last visited Aug. 25, 2016).

38. *See Montana v. United States*, 450 U.S. 544 (1981) (holding that tribes generally lack civil jurisdiction over non-Indians on fee lands located within a reservation); *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997) (stating, "absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation..."); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (holding the Navajo could not tax "nonmembers on non-Indian fee land within the reservation...").

39. Bryan T. Anderson, *South Dakota v. Yankton Sioux Tribe: Sewing a Patchwork Quilt of Jurisdiction* 3 GREAT PLAINS NAT. RESOURCES J. 99, 113 (1998) (discussing the "patchwork quilt" jurisdiction of Charles Mix County, South Dakota).

40. *Id.*; Michael Riley, *1885 Law at Root of Jurisdictional Jumble*, DENV. POST (Nov. 13, 2007), http://www.denverpost.com/lawlesslands/ci_7422829 (describing how the change in a few feet alters which government has jurisdiction over the land).

41. 18 U.S.C. § 1162 (2016); 28 U.S.C. § 1360 (1978); COMM'N, *supra* note 11, at 2.

42. CAROLE GOLDBERG AND HEATHER VALDEZ SINGLETON, FINAL REPORT: LAW

perceived lawlessness on some reservations,⁴³ the law required six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) to exercise criminal and civil jurisdiction over Indian country within their borders.⁴⁴ PL 280 also granted states that were not required to exercise jurisdiction over tribes within their boundaries the option to do so.⁴⁵ Since PL 280 was intended to reduce federal costs, no federal funds were provided to PL 280 states to help fulfill their expanded responsibilities.⁴⁶ PL 280 also did not grant states taxing authority over Indian country within their borders.⁴⁷ Consequently, PL 280 operates as an unfunded mandate.⁴⁸ State and local law enforcement in PL 280 states often make the economically rational decision not to patrol reservations within their borders.⁴⁹

Cultural differences between tribes and state law enforcement exacerbate policing challenges in PL 280 states. The Federal Bureau of Indian Affairs (BIA) Police, a law enforcement agency that polices Indian country, include significant numbers of Indian officers who can more easily relate to tribal life.⁵⁰ On the other hand, state law enforcement is typically less empathetic to

ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 3 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf> [hereinafter GOLDBERG & SINGLETON] (stating “[w]ith the passage of Public Law 280 in 1953, Congress for the first time injected state criminal jurisdiction into Indian country on a large scale.”).

43. *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976) (stating “[t]he primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.”); M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 695 (2012); Erin E. White, *Fresh Pursuit: A Survey of Law Among States with Large Land Based Tribes*, 3 AM. INDIAN L.J. 227, 229 (2014) (stating “Congress, perceiving a particular lawlessness in Indian Country, enacted Public Law 83-280 (Public Law 280) in 1953.”).

44. 18 U.S.C. § 1162(a) (2012); 28 U.S.C. § 1360(a) (2012).

45. COMM’N, *supra* note 11, at 2.

46. GOLDBERG & SINGLETON, *supra* note 42, at 5.

47. 18 U.S.C. § 1162(b) (2012); 28 U.S.C. § 1360(b) (2012); *see also* GOLDBERG & SINGLETON, *supra* note 42, at 7 (noting the income of Indians residing in Indian country can be exempt from state taxation if earned on the reservation).

48. Carole Goldberg, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1439 (1997); Elise Helgesen, *Allotment of Justice: How U.S. Policy in Indian Country Perpetuates the Victimization of American Indians*, 22 U. FLA. J.L. & PUB. POL’Y 441, 452 (2011). GOLDBERG & SINGLETON, *supra* note 42, at 7.

49. Leonhard, *supra* note 43, at 698–99 (discussing states financial concerns about PL 280, and law enforcement being “virtually nonexistent” on reservations in mandatory PL 280 states); Eric Lichtblau, *California Shorted on Tribal Funding*, L.A. TIMES (Oct. 28, 1999) <http://articles.latimes.com/1999/oct/28/news/mn-27258> (discussing the underfunding of tribal law enforcement in California, a mandatory PL 280 state, and state law enforcement’s neglect of reservations); Laurence Armand French, *Policing American Indians: A Unique Chapter in American Jurisprudence*, 26 No. 2 INDIGENOUS POL’Y J. (2015) (noting, PL 280 states “were not pleased with this unfunded mandate and tended to neglect and harass their Indian charges.”).

50. Helgesen, *supra* note 48, at 456 (noting that cultural differences between states and tribe create policing difficulties in PL 280 jurisdictions); Goldberg, *supra* note 48, at 1429 (noting local law enforcement try to avoid entering tribal affairs in PL 280 states “because of cultural differences”); GOLDBERG & SINGLETON, *supra* note 42, at 6.

Indian needs, cultures, and customs.⁵¹ Because Indians are usually minorities within their jurisdiction, state abuses of authority are common in PL 280 states, as there is little political incentive for states to appease Indian country populations.⁵² Accordingly, non-Indian crimes against Indians often go unpunished.⁵³ This has caused Indians in PL 280 jurisdictions to resort to “self-help” mechanisms such as blockading a dumpsite, setting up roadblocks, and even murder in some instances.⁵⁴ Historically, reservations in PL 280 states have had higher crime rates than reservations in non-PL 280 jurisdictions,⁵⁵ though reforms in recent years are improving public safety on some PL 280 reservations.⁵⁶

Congress passed the Indian Civil Rights Act of 1968 (ICRA) with the noble purpose of applying Bill of Rights type protections to individuals in Indian country.⁵⁷ However, ICRA had negative implications for tribes in two ways. First, the law infringed upon tribal sovereignty because it was unilaterally imposed by Congress.⁵⁸ Second, ICRA significantly limited tribal sentencing power by imposing maximum penalties of six months in jail and a

51. CAROLE GOLDBERG & DUANE CHAMPAGNE, *A Second Century of Dishonor: Federal Inequities and California Tribes*, http://www.aisc.ucla.edu/ca/Tribes11.htm#_ftnref17 (Mar. 1996) (noting that state and local law enforcement in PL 280 jurisdictions often fail to respect tribal culture).

52. GOLDBERG & SINGLETON, *supra* note 42, at 6; Goldberg, *supra* note 48, at 1436 (noting that state and local officers in PL 280 jurisdictions are prone to abuse their authority because Indians are usually minority populations with little political power); Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 ALB. L. REV. 885, 905 (2015) (noting that PL 280 states inequitably enforce laws when American Indians are perpetrators and victims).

53. ADA PECOS MELTON & JERRY GARDNER, AMERICAN INDIAN DEVELOPMENT ASSOCIATES, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, <http://www.aidainc.net/Publications/pl280.htm> [hereinafter MELTON & GARDNER]. Look to “Lawlessness of the ‘Abuse of Authority’ Type” within the report.

54. MELTON & GARDNER, *supra* note 53 (see “Lawlessness of the ‘Legal Vacuum’ Type”); Goldberg, *supra* note 48, at 1418; GOLDBERG & CHAMPAGNE, *supra* note 51 (chronicling instances of self-help in California, a PL 280 state).

55. Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 571 (2009); Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever Be Made into a Right?* 90 J. Crim. L. & Criminology 1317, 1318 (2000).

56. See COMM’N, *supra* note 11, at 104–05 (noting 2011 reforms in Oregon, a PL 280 state). See generally DUANE CHAMPAGNE & CAROLE GOLDBERG, TRIBAL LAW AND POLICY INSTITUTE, *Promising Strategies: Public Law 280*, [https://www.walkingoncommonground.org/files/Promising%20Strategies%20280%20Final%203-13\(1\).pdf](https://www.walkingoncommonground.org/files/Promising%20Strategies%20280%20Final%203-13(1).pdf) (2013) (discussing ten law enforcement strategies implemented by tribes in PL 280 states, like the policing agreement between the Hoopa Valley Tribe and Humboldt County).

57. See 25 U.S.C. § 1302(a) (2012). See generally *Talton v. Mayes*, 163 U.S. 376 (1896) (holding the Bill of Rights is inapplicable to Indian Tribes).

58. See Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty After the Indian Civil Rights Act of 1968*, 1 J. L. & POL’Y 1, 21–23 (1993) (noting that Congress passed ICRA without the consent of tribal governments, and that the Solicitor for the Department of the Interior “urged Congress” to “impose civil liberties” on tribes).

fine of \$500.⁵⁹ The Tribal Law and Order Act of 2010 (TLOA) extended the maximum sentence to three years in jail and a \$15,000 fine.⁶⁰

In 1978, the Supreme Court delivered a near coup de grace to tribal criminal justice systems by holding that tribes lack criminal jurisdiction over non-Indians within their territory.⁶¹ The Court acknowledged “the prevalence of non-Indian crime on today’s reservations” as well as the fact that its decision could have deleterious effects in Indian country; nevertheless, the Court said the problem is Congress’s to solve.⁶² As a result, tribes are unable to arrest non-Indian criminals within their borders⁶³ though tribes retain the ability to “detain” non-Indians and exclude them from tribal lands.⁶⁴ This means that tribal police can merely effectuate a “citizen’s arrest” of non-Indians which, if prolonged, can give rise to a false imprisonment suit.⁶⁵

Tribes’ inability to assert criminal jurisdiction over non-Indians is further muddled by the fact that determining who is an “Indian” is a complicated process.⁶⁶ “Indian” has several definitions under federal law.⁶⁷ The general test for whether someone is an “Indian” was established by the Supreme Court in *United States v. Rogers* and requires that a person have: 1.) Indian blood and 2.) government⁶⁸ recognition as an Indian.⁶⁹ Prong one is easy to establish, as it is a matter of ancestry. However, determining whether a government recognizes an individual as an Indian is complex and can take months.⁷⁰

59. COMM’N, *supra* note 11, at 21.

60. *Id.*; 25 U.S.C. § 1302(b) (2012).

61. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

62. *Id.* at 212.

63. Angela Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1731 (2012); see Melissa L. Tatum, *Law Enforcement Authority in Indian Country: Challenges Presented by the Full Faith and Credit Provisions of the Violence Against Women Acts*, 4 TRIBAL L.J. 2, 4 (2004) (stating, “after all, if a tribal officer’s authority is restricted to the tribe’s criminal jurisdiction, then there are many situations, specifically those involving non-Indians, where the police would have no authority to arrest the offender”); Erdrich, *supra* note 15; JUDICIAL COUNCIL OF CALIFORNIA, *Tribal Court-State Court Forum Meeting* 3, <http://www.courts.ca.gov/documents/forum-20150611-materials.pdf> (2015) (noting that tribal law enforcement on only 17 of California’s nearly 100 reservations and rancherias can arrest non-Indians).

64. *Duro v. Reina*, 495 U.S. 676, 696–97 (1990).

65. Helgesen, *supra* note 48, at 453; JONATHAN MILLS & KARA BROWN, *LAW ENFORCEMENT IN INDIAN COUNTRY: THE STRUGGLE FOR A SOLUTION* 4, <http://gov.uchastings.edu/public-law/docs/plri/indiancountry.PDF>.

66. Hallie Bongar White et al., *Creative Civil Remedies Against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427, 429 (2008) (“There is no bright line with which to determine who is an Indian for purposes of exercising criminal jurisdiction”); see Ennis, *supra* note 55, at 565 (noting the difficulties of determining Indian status for tribal criminal jurisdiction purposes).

67. White et al., *supra* note 65, at 433 (noting “there are dozens of different definitions of the term ‘Indian’ under federal law.”).

68. *St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D. S. Dakota 1988) (defining “government” for recognition purposes as a tribe or the federal government).

69. *United States v. Rogers*, 45 U.S. 567, 573 (1846). See, e.g., *U.S. v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005); *State v. Reber*, 171 P.3d 406, 409–10 (Utah 2007); *State v. LaPier*, 790 P.2d. 983, 986 (Mont. 1990); *Goforth v. State*, 644 P.2d 114, 116 (Okla. Crim. App. 1982).

70. See COMM’N, *supra* note 11, at 9–11 (discussing a case wherein it took months to

Federal courts use similar but different tests to answer this question.⁷¹ Defendants have tried to eschew their tribal citizenship in an attempt to evade a tribe's criminal jurisdiction.⁷²

Additionally, status as an Indian is necessary for federal jurisdiction over certain crimes in Indian country.⁷³ In fact, Indians can—and often do—receive harsher sentences than non-Indians who commit the same crime as a result of being sentenced under federal rather than state law.⁷⁴ The Supreme Court has ruled no Equal Protection violation occurs when an Indian faces a harsher sentence than non-Indian would for committing the same crime.⁷⁵ Consequently, defendants have asserted that they are not Indian in an attempt to escape federal jurisdiction.⁷⁶

VAWA is the closest Congress has come to fixing the jurisdictional labyrinth. VAWA is a significant step in the right direction but leaves much to be desired. Notably, VAWA only grants tribes jurisdiction over non-Indian offenders for domestic and dating violence and protective order violations.⁷⁷ This means a non-Indian sexual predator with no prior relationship to the Indian victim still eludes a tribe's criminal authority. Notwithstanding the symbolic victory VAWA represents for tribes, a massive jurisdictional hole remains.

Indian country's jurisdictional rules have helped foster the “current reservation public safety crises.”⁷⁸ Criminals are aware of Indian country's

determine whether a deceased victim of a drunk driver was a tribal member).

71. Compare *United States v. Stymiest*, 581 F.3d 759, 763 (8th Cir. 2009), with *United States v. Cruz*, 554 F.3d 840, 845 (9th Cir. 2009) (using different tests to determine whether the defendant qualifies as an Indian for criminal jurisdiction purposes); See Angelique Townsend Eaglewoman & Stacy L. Leeds, *Mastering American Indian Law* 49 (2013) (stating that “the Eighth Circuit test is much broader, allowing the inclusion of a person for federal criminal prosecution as an Indian when the same person may not be eligible as an Indian for tribal citizenship or federal services.”).

72. *White, et al.*, *supra* note 66, at 429; *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F.Supp.3d 1221 (D. Nev. 2014) (the defendant was disenrolled from the tribe and asserted the tribe lacked criminal jurisdiction over him. The district court agreed with the defendant).

73. 18 U.S.C. § 1153(a).

74. See COMM’N, *supra* note 11, at 119 (noting that “Federal sentencing guidelines systematically subject offenders in Indian country to longer sentences than are typical when the same crimes are committed under State jurisdiction.”); Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 Cal. L. Rev. 1409, 416–17 (2011) (discussing how Indians are much more likely than non-Indians to be prosecuted in federal court, and are therefore likely to receive harsher sentences); BJ Jones and Christopher J. Ironroad, *Addressing Sentencing Disparities for Tribal Citizens in the Dakotas: A Tribal Sovereignty Approach*, 89 N.D. L. Rev. 53 (2013).

75. *U.S. v. Antelope et al.*, 430 U.S. 641, 646–47 (1977) (noting Indians are subjected to federal criminal jurisdiction because of their political status rather than their racial status, so federal jurisdiction resulting in harsher sentences than non-Indians would suffer is not the product of “impermissible racial classifications.”).

76. *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009); *United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009).

77. Violence Against Women Reauthorization Act, Pub. L. No. 113-4, § 40801(b)(2)(A)(ii)–(iii), 127 Stat. 83 (2013).

78. COMM’N, *supra* note 11, at 13.

nonsensical law enforcement scheme and take full advantage of it.⁷⁹ Non-Indians know they are virtually untouchable in Indian country,⁸⁰ so it is unsurprising that the rape rate increases on Minnesota reservations during hunting season—a time when non-Indian men enter reservations in increased number.⁸¹ Moreover, non-Indians outnumber Indians in much, possibly most, of Indian country, leaving the majority of individuals out of the jurisdictional reach of tribes.⁸²

B. Lack of Law Enforcement Resources

Indian country is massively under-policed.⁸³ The Commission reported Indian country law enforcement has only half the needed personnel.⁸⁴ A report by the National Institute of Justice (NIJ) found that the average tribal police force has one to three officers patrolling a 500,000 acre areathat contains

79. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(4)(B), 124 Stat. 2262; COMM'N, *supra* note 11, at 17.

80. PBS Newshour, *Tribal Justice: Prosecuting Non-Natives for Sexual Assault on Reservations*, Sept. 5, 2015, <http://www.pbs.org/newshour/bb/tribal-justice-prosecuting-non-natives-sexual-assault-indian-reservations/> (according to Chief Judge of the Tulalip Tribal Court Theresa Pouley, “the confused jurisdiction in Indian country, which leaves those responsibilities oftentimes to the state and federal government, who don’t effectively prosecute those crimes, creates this place where you have a category of people on Indian reservations who are essentially above the law.”); see Serena Marshall, *Battered Indian Tribal Women Caught in Legal Limbo*, ABC NEWS, <http://abcnews.go.com/Politics/battered-indian-tribal-women-caught-legal-limbo/story?id=16365091> (May 17, 2012) (discussing how non-Indian abusive husbands flaunt their ability to beat their wives with impunity).

81. Erdrich, *supra* note 15.

82. Riley, *supra* note 63, at 1730; Duane Champagne, *Non-Indians and Tribal Criminal Jurisdiction*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 23, 2012), <http://indiancountrytodaymedianetwork.com/2012/12/23/non-indians-and-tribal-criminal-jurisdiction-146431> (stating many reservations have more non-Indian than Indian residents); Ennis, *supra* note 55, at 565 (stating Indians composed less than 20 percent of the population on some of the large reservations); Diana Hefley, *Tribal Police to Gain Power to Arrest Non-Indians*, THE DAILY HERALD (Apr. 9, 2008) <http://www.heraldnet.com/article/20080409/NEWS01/218970234#> (noting “the vast majority” of people on the Tulalip reservation are non-Indians).

83. *Examining Bureau of Indian Affairs and Tribal Police Recruitment, Training, Hiring, and Retention: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 1 (2010) (statement of Sen. Tim Johnson, S. Comm. on Indian Affairs), <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg58266>

</pdf/CHRG-111shrg58266.pdf> (noting that a major reason Indian country suffers a high rate of violent crime is “the lack of police officers to stop it.”); *Fresh Pursuit from Indian Country, Tribal Authority to Pursue Suspects onto State Land*, 29 Harv. L.Rev. 1685, n. 35 (2016), <http://cdn>

[.harvardlawreview.org/wp-content/uploads/2016/04/1685-1708-Online.pdf](http://cdn.harvardlawreview.org/wp-content/uploads/2016/04/1685-1708-Online.pdf) [hereinafter *Fresh Pursuit*] (stating “Indian country suffers from a serious problem of underpolicing”); Michael J. Bulzoni, *Indian Country and the Tribal Law and Order Act of 2010*, FBI LAW ENFORCEMENT BULLETIN 24, 30 (May, 2012), <https://leb.fbi.gov/2012/may/leb-may-2012> (noting that a low number of officers are responsible for policing Indian country).

84. COMM'N, *supra* note 11, at 67; Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(3), 124 Stat. 2262.

approximately 10,000 people.⁸⁵ Indian country receives 20.2 percent fewer law enforcement dollars per capita than comparable non-Indian rural jurisdictions and has approximately a quarter of the officers per 1,000 residents as comparable non-Indian high crime jurisdictions.⁸⁶ In total, Indian country's 56 plus million acres are patrolled by fewer than 3,000 tribal and federal law enforcement officers.⁸⁷ Distance compounds the police shortage as Indian country can be over 100 miles from the nearest non-Indian law enforcement office.⁸⁸ Additionally, poor infrastructure makes navigating Indian country troublesome for law enforcement, further delaying response times.⁸⁹

The lack of law enforcement officers may present an even bigger public safety issue than tribes' lack of criminal jurisdiction. Adding police has been shown to reduce crime in Indian country. From 2009 to 2011, increased police presence on four reservations reduced the violent crime rate by 35 percent without altering the jurisdictional rules.⁹⁰ Though effective, resource limitations render the necessary levels of law enforcement personnel impractical as an immediate solution to violence in Indian country.⁹¹

85. STEWART WAKELING, ET AL., POLICING ON AMERICAN INDIAN RESERVATIONS 9 (2001), <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

86. *See id.* at 27.

87. *Examination of Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 2 (2008) (statement of Sen. Byron Dorgan, Chairman, S. Comm. on Indian Affairs) <http://www.indian.senate.gov/sites/default/files/upload/files/September182008.pdf>; Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(3), 124 Stat. 2262.

88. *See Riley, supra* note 63, at 1732 (noting the closest prosecutor can be over 100 miles from Indian country); FBI, *Journey Through Indian Country Part 1: Fighting Crime on Tribal Lands*, FBI (Jun. 1, 2012), <https://www.fbi.gov/news/stories/journey-through-indian-country> [hereinafter *FBI Part 1*] (noting that non-Indian law enforcement often has to travel over 100 miles on unpaved roads to unmarked streets when responding to Indian country calls); Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 115 (1995) (stating "[s]ince federal courts are often located far from Indian reservations, active prosecutions of non-felony domestic violence, child abuse, weapons offenses, vehicle violations, substance abuse, and theft is limited."); MATTHEW L.M. FLETCHER, ADDRESSING THE EPIDEMIC OF DOMESTIC VIOLENCE IN INDIAN COUNTRY BY RESTORING TRIBAL SOVEREIGNTY, 6 (2009), <https://www.acslaw.org/files/Fletcher%20Issue%20Brief.pdf> (noting that distance is a factor in Indian country law enforcement, and that non-Indian law enforcement in PL-280 states are often "hundreds of miles away" from Indian country).

89. *See Riley, supra* note 63, at 1738 (noting that many Indian country homes often have no addresses); *FBI Part 1, supra* note 88 (discussing that Indian country often has unpaved roads and unnamed streets, so FBI agents are often given directions like, "Go 10 miles off the main road, turn right at the pile of tires, and go up the hill."); NAT'L CONG. OF THE AM. INDIAN, INVESTING IN TRIBAL GOVERNMENTS: AN ANALYSIS OF IMPACT AND REMAINING NEED UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT 2 (2010), <http://www.ncai.org/resources/ncai-publications/investingintribalgovernmentsananalysisofarra.pdf> (noting that most jurisdictions receive \$5,000 per road mile while Indian country receives \$500 per road mile).

90. COMM'N, *supra* note 11, at 64.

91. COMM'N, *supra* note 11, at 65; Ennis, *supra* note 55, at 568 (noting the size, geographic isolation, and low population density make policing Indian country difficult and expensive).

Tribal citizen militias have been suggested as a way to buttress depleted Indian country police forces,⁹² but Special Law Enforcement Commissions (SLEC)⁹³ are a more conventional method of improving Indian country policing.⁹⁴ SLEC are agreements between a tribe and a federal law enforcement agency that grant tribal police authority to enforce federal laws in Indian country.⁹⁵ Likewise, SLEC strengthen ties between tribal and federal law enforcement.⁹⁶ Accordingly, TLOA mandates that U.S. Attorneys with Indian country in their district appoint a tribal liaison responsible for helping tribal law enforcement obtain SLEC.⁹⁷

Additionally, tribal police and local law enforcement agencies can enter into cooperative agreements that permit both police forces to enforce the other's laws.⁹⁸ A number of state agencies have entered into cooperative law enforcement agreements with tribes within their borders.⁹⁹ There are many benefits of tribal and municipal law enforcement cooperation, including increased crime control, faster response time, and the ability to share resources.¹⁰⁰ Research shows that a majority of reservation residents and law enforcement personnel found the agreements beneficial.¹⁰¹ Seventy percent of the 67 reservation residents and 11 of the 12 state-county law enforcement

92. Seth Fortin, *The Unextinguished Militia Power of Indian Tribes*, 2 AM. INDIAN L.J. 210, 259 (2013) (noting a lack of law enforcement funding could make mustering a tribal militia an attractive option for some tribes).

93. For more information about entering into a SLEC, see <http://www.bia.gov/cs/groups/public/documents/text/idc012927.pdf>.

94. See COMM'N, *supra* note 11, at 100 (noting that "great promise has been shown in those States where intergovernmental recognition of arrest authority occurs.").

95. See COMM'N, *supra* note 11, at 103; 25 U.S.C. § 2804(e); *Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d. 1025, 1034 (9th. Cir. 2013) (explaining that a SLEC "delegates the BIA's authority to enforce federal criminal law in Indian Country to tribal police officers.").

96. U.S. DEP'T OF JUSTICE, JUSTICE AND INTERIOR DEPARTMENTS LAUNCH NATIONAL CRIMINAL JUSTICE TRAINING INITIATIVE IN CHEROKEE NATION (2012), <https://www.justice.gov/opa/pr/justice-and-interior-departments-launch-national-criminal-justice-training-initiative> (discussing a SLEC training session in Catoosa, Oklahoma).

97. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 13(a)-(b)(7).

98. *Fresh Pursuit*, *supra* note 84, at 1695 (2016), <http://cdn.harvardlawreview.org/wp-content/uploads/2016/04/1685-1708-Online.pdf> (stating, "Through cross-deputization agreements, governments can delegate law enforcement authority to officers of another jurisdiction." Also noting the most common form of cooperative agreement is one-way and only allows tribes to enforce state laws.); GOLDBERG & SINGLETON, *supra* note 42, at 29 (noting that cooperative agreements can allow tribal officers to enforce state laws and also allow state officers to enforce tribal law.); COMM'N, *supra* note 11, at 104 (noting that tribes and local law enforcement have successfully entered into agreements allowing tribes to enforce state criminal laws). 99. See *Cooperative Agreements*, WALKING ON COMMON GROUND, <https://www.walkingoncommonground.org/state.cfm?topic=12#alpha-OK> (listing cooperative agreements between tribes and states); see also, COMM'N, *supra* note 11, at 104-05 (noting Oregon, Arizona, and Michigan have successful cooperative agreements with tribes).

99. See *Cooperative Agreements*, WALKING ON COMMON GROUND, <https://www.walkingoncommonground.org/state.cfm?topic=12#alpha-OK> (listing cooperative agreements between tribes and states); see also, COMM'N, *supra* note 11, at 104-05 (noting Oregon, Arizona, and Michigan have successful cooperative agreements with tribes).

100. DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE 153 (2012).

101. *Id.* at 159.

officers surveyed stated that they would like to see the agreements renewed.¹⁰²

However, there are problems with SLEC and cooperative agreements. Bureaucracy and liability concerns can impede the formation of SLEC and cooperative agreements.¹⁰³ Tribes have sovereign immunity.¹⁰⁴ Therefore, state and local governments will likely require tribes to waive their immunity before entering into a law enforcement agreement with them.¹⁰⁵ This means tribes may be forced to maintain liability insurance for their officers when entering into cooperative agreements—something many tribes may not be able to afford.¹⁰⁶ Further, uncertainty over how the Federal Tort Claims Act applies to tribal law enforcement adds to potential liability issues.¹⁰⁷ Cooperative agreements also result in standard American criminal justice methods being applied on tribal land.¹⁰⁸ Thus, cooperative agreements fail to foster traditional tribal justice models,¹⁰⁹ which focus on restoring harmony to the community rather than punishing the offender.¹¹⁰ Most significantly, the ability to arrest non-Indians does not translate into the ability to prosecute non-Indians—undercutting the purpose of arresting people in the first place.¹¹¹

Jurisdictional confusion and low levels of law enforcement make Indian country prosecutions rare and difficult, as does the fact that state and federal

102. *Id.* at 162.

103. COMM'N, *supra* note 11, at 101 (noting there are issues that hinder the formation of state-tribal law enforcement agreements and stating there are "unconscionable administrative delays and impediments in the processing and approval of SLECs.").

104. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2028 (2014); *See*, William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U.L. REV. 1587, 1589 (2013) (discussing the history of tribal sovereign immunity).

105. CHAMPAGNE & GOLDBERG, *supra* note 100, at 145 (noting that it is "rare" for states to enter into cooperative agreements with tribes that have not waived their sovereign immunity); *Fresh Pursuit*, *supra* note 84 at 1698 (stating that the vast majority of statutes that authorize state law enforcement to enter into cooperative agreements with tribes require tribes to waive their sovereign immunity).

106. CHAMPAGNE & GOLDBERG, *supra* note 100, at 144; COMM'N, *supra* note 11, at 105.

107. *See generally* Thomas W. Christie, *An Introduction to the Federal Tort Claims Act in Indian Self-Determination Act Contracting*, 71 MONT. L. REV. 115, 129–32 (2010) (discussing the complexities of tribal law enforcement liability under the Federal Tort Claims Act); Joseph W. Gross, *Help Me Help You: Why Congress's Attempt to Cover Torts Committed by Indian Tribal Contractors with the FTCA Hurts the Government and the Tribes*, 62 AM. U. L. REV. 383, 421–27 (2012) (noting the problems of applying the Federal Tort Claims Act to tribal law enforcement officers).

108. CHAMPAGNE & GOLDBERG, *supra* note 100, at 153 (noting that cooperative agreements "encourage a crime-control, professional model of policing rather than an Indian police model.").

109. *Id.*

110. *See generally* MAHA JWEIED, EXPERT WORKING GROUP REPORT: NATIVE AMERICAN TRADITIONAL JUSTICE PRACTICES (2014), <https://www.justice.gov/sites/default/files/atj/legacy/2014/10/09/expert-working-group-report--native-american-traditional-justice-practices.pdf> (discussing traditional tribal justice practices currently in use); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 133 (1995), <http://www.tribal-institute.org/articles/melton1.htm> (comparing indigenous justice systems to the American justice system).

111. *See* Ennis, *supra* note 55, at 569.

courthouses can be over a hundred miles from Indian country.¹¹² Attempts at prosecution are further complicated in sex crimes because many Indian country residents lack access to rape kits.¹¹³ Without access to rape kits, evidence of the crime may vanish, rendering prosecution impossible.¹¹⁴ A 2010 Government Accountability Office report found that from 1992 to 2001 the United States Attorney Office (USAO) declined to prosecute 67 percent of Indian country sexual abuse offenses.¹¹⁵ The report also found that USAO declined to prosecute 46 percent of assaults in Indian country.¹¹⁶ Sexual abuse and assault are the most common offenses reported in Indian country.¹¹⁷ These figures do not take into account the untold number of violent victimizations that go unreported.¹¹⁸

VI. PERSONAL SELF-DEFENSE

Indian women residing in Indian country can wait no longer for governmental protection. Instead, Indian women must defend themselves. Self-defense is a natural right,¹¹⁹ and the Second Amendment guarantees

112. See Riley, *supra* note 63, at 1732; FBI *Part 1*, *supra* note 88; Reno, *supra* note 88, at 115; FLETCHER, *supra* note 88, at 6; Ennis, *supra* note 55, at n. 97.

113. NANCY RITTER, THE ROAD AHEAD: UNANALYZED EVIDENCE IN SEXUAL ASSAULT CASES 2 (2011), <https://ncjrs.gov/pdffiles1/nij/233279.pdf> (noting that many Indian country residents "do not know how to obtain or use a [sexual assault kit], and they have no access to a sexual assault nurse examiner."); Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES (May 22, 2012), http://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html?_r=0 (discussing the lack of sexual assault kits and personnel trained to perform rape examinations at Indian Health Service hospitals); Jordan Richard-Craven, *New Legislation on Tribal Rape Cases Highlights the Difficulty of Being a Woman Minority*, STANFORD PROGRESSIVE (Oct. 2010), <http://web.stanford.edu/group/progressive/cgi-bin/?p=945> (discussing the lack of resources Indian Health Services are able to provide to Indian sexual assault victims and that they are often not examined); Laura Sullivan, *Rape Cases on Indian Lands Go Uninvestigated*, NPR (Feb. 9, 2009), <http://www.npr.org/templates/story/story.php?storyId=12203114> (noting the Indian Health Service hospital on the Standing Rock Sioux Reservation does not have rape kits nor does it have time to perform rape exams).

114. *What Is a Rape Kit?*, RAINN, <https://www.rainn.org/articles/rape-kit> (stating that DNA evidence of a rape needs to be collected within 72 hours of the assault); *Your Questions, RAPE RESPONSE SERVICES*, http://www.rrsonline.org/?page_id=951 (maintaining that rape kits should be performed "as soon as possible" after the rape to maximize the chance of obtaining evidence); Karl M. McDonald, *DNA Forensic Testing and Use of DNA Kits in Cases of Rape and Sexual Assault*, FORENSIC MAGAZINE, Jan. 26, 2015, <http://www.forensicmag.com/article/2015/01/dna-forensic-testing-and-use-dna-rape-kits-cases-rape-and-sexual-assault> (stating that the probability of collecting DNA evidence from a rape is greater the sooner a rape kit is performed after the crime).

115. U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS, 9 (2010) <http://www.gao.gov/new.items/d11167r.pdf>.

116. *Id.*

117. *Id.*

118. See COMM'N, *supra* note 11 and accompanying text.

119. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 17, Book III (1625), <http://lf->

individuals have the means to defend themselves.¹²⁰ A program that encourages Indian women to exercise their constitutionally protected natural right of self-defense through the concealed carry of handguns is a feasible and logical solution to violence against Indian women that can be applied in the immediate future.¹²¹

Though Indians faced racially discriminatory barriers to gun ownership until 1979,¹²² firearms are common in Indian country today.¹²³ Several tribes allow concealed carry,¹²⁴ and armed self-defense has been recommended in the absence of effective police forces in the United States.¹²⁵ In the United States, traditions of gun ownership and self-defense are strong. Gun ownership was mandated in early America as a public safety measure.¹²⁶ The government's historical failure to protect African-Americans resulted in "the black tradition of arms."¹²⁷ In modern America, high crime rates prompted Detroit's Police

oll.s3.amazonaws.com/titles/2637/Grotius_RightsWarPeace1625.pdf; JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT, SECOND TREATISE § 233 (1689); WILLIAM BLACKSTONE, BLACKSTONE ON THE ABSOLUTE RIGHTS OF INDIVIDUALS 143–44 (1753), <http://oll.libertyfund.org/pages/blackstone-on-the-absolute-rights-of-individuals-1753>.

120. *District of Columbia v. Heller*, 554 U.S. 570, 594–96 (2008) (stating "[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

121. Tweedy, *supra* note 52, at 887 (2015) (asserting that advocating for greater personal self-defense rights via firearms is a rational response to crimes which often go unpunished in Indian countries).

122. Ann E. Tweedy, "Hostile Indian Tribes ... Outlaws, Wolves, ... Bears ... Grizzlies and Things Like That?" *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 732–33 (2011) (discussing laws that prohibited the sale of firearms to Indians "within any district or county occupied by uncivilized or hostile Indians" and without the "permission of the superintendent, which will be granted only for clearly established lawful purposes.").

123. Fortin, *supra* note 92, at 267.

124. Riley, *supra* note 63, at note 87.

125. Mike McDaniel, *Self Defense and the Realities of Police Response Times*, THE TRUTH ABOUT GUNS (Jul. 16, 2014), <http://www.thetruthaboutguns.com/2014/07/mike-mcdaniel/reflection-self-defense-police/> (discussing law enforcement officers who advocate citizens arm themselves due to slow police response times); Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s Richard Aborn*, 22 FORDHAM URBAN L.J. 441, 443–44 (1995) (noting that those who wish to disarm all Americans fail to account for how peaceful citizens will protect themselves while waiting for police); Rose Hackman, *Police Tell Detroiters to Buy Guns in City Riven by Race Issues and Crime*, THE GUARDIAN (Aug. 17, 2012), <http://www.theguardian.com/money/2014/aug/17/police-guns-detroit-crime-race-cost-issues>; John Donovan, *Why We Will Always Need to Own Guns*, THE FEDERALIST (Jun. 24, 2016), <http://thefederalist.com/2016/06/24/why-we-will-always-need-to-own-guns/> (noting the government cannot stop every potential act of terror and can only respond after the fact; thus, people need the right to arm themselves).

126. Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271 (requiring all white male citizens between 18 and 45 years old to provide themselves with a musket); Riley, *supra* note 63, at 1692 (noting free males between the ages of 18 and 45 were mandated to own guns during the Revolutionary period).

127. NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014) (chronicling the relationship between guns and African-Americans throughout American history); *McDonald v. City of Chicago*, 561 U.S. 742, 857 (2010) (Thomas, J., concurring) (The use of firearms for self-defense was often the only way black citizens could protect themselves

Chief to recommend law abiding citizens arm themselves to deter crime,¹²⁸ and a study on PoliceOne.com shows most law enforcement officers agree with this sentiment.¹²⁹ Similarly, homosexuals organized an effort called the Pink Pistols to defend themselves; their website encourages self-defense by asserting “Armed queers don’t get bashed.”¹³⁰ Firearms have been posited as a solution to sexual assault on college campuses,¹³¹ and concealed carry has been recommended as a solution to school shootings.¹³²

Armed self-defense is a hotly debated topic, and there is plenty of scholarship representing each position.¹³³ A National Academy of Sciences study found no clear relationship between the number of guns in a population and violent crime rates.¹³⁴ However, it is clear that more guns does not equal more crime.¹³⁵ That is, simply increasing the number of guns does not increase

from mob violence.”); Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 356–57 (1991) (maintaining that blacks in the South thought possessing a firearm was necessary for their personal protection during the civil rights movement); Rebecca Onion, *Red Summer*, SLATE (Mar. 4, 2015), http://www.slate.com/articles/news_and_politics/history/2015/03/civil_rights_movement_history_the_long_tradition_of_black_americans_taking.html (noting that blacks have a history of armed self-defense pre-dating Malcom X).

128. Hackman, *supra* note 125.

129. Ron Avery, *Police Gun Control Survey: Are Legally-Armed Citizens the Best Solution to Gun Violence*, POLICE ONE (Apr. 8, 2013), <https://www.policeone.com/Gun-Legislation-Law-Enforcement/articles/6186552-Police-Gun-Control-Survey-Are-legally-armed-citizens-the-best-solution-to-gun-violence/> (noting 91 percent of cops support concealed carry and that the vast majority of police believe armed citizens are a crime reduction asset).

130. *About the Pink Pistols*, PINK PISTOLS, <http://www.pinkpistols.org/about-the-pink-pistols/> (last visited Nov. 3, 2016).

131. S.E. Cupp, *Guns for Women on Campus Make Sense*, CNN (Feb. 23, 2015), <http://www.cnn.com/2015/02/23/opinions/cupp-campus-guns/>; Alan Schwarz, *A Bid for Guns on Campuses to Deter Rapes*, N.Y. TIMES (Feb. 18, 2015), http://www.nytimes.com/2015/02/19/us/in-bid-to-allow-guns-on-campus-weapons-are-linked-to-fighting-sexual-assault.html?_r=0; Max Kutner, *Texas Prepare for Concealed Guns on Campuses*, NEWSWEEK (Jan. 17, 2016), <http://www.newsweek.com/campus-carry-texas-implementation-416644> (noting that guns potential to stop sexual assault was instrumental in getting the campus concealed carry bill passed).

132. Nadia Nedzel, *Concealed Carry, The ONLY Way to Stop School Shootings*, 27 ACAD. QUESTIONS 429 (2014); Avery, *supra* note 131 (noting that 81 percent of police officers polled favored arming teachers).

133. Compare JOHN LOTT, JR., MORE GUNS, LESS CRIME 57 (3d ed. 2010) (asserting individual firearm ownership is a social good); and Tomislav Kovandzic, et al., *Defensive Gun Use*, 26 J. CRIM. JUST. 251, 252 (1998), with John Donohue, *Guns, Crime, and the Impact of State Right-to-Carry Laws*, 73 FORDHAM L. REV. 623 (2004); and Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086 (2001).

134. NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 2 (Charles F. Wellford et al. eds., 2004), <https://www.nap.edu/read/10881/chapter/2> (“[T]he committee found no credible evidence that the passage of right-to-carry laws decreases or increases violent crime The committee found that the data available on these questions are too weak to support unambiguous conclusions or strong policy statements.”).

135. Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL'Y 649 (2007). Recent news articles support this position as well because crime rates decreased as

the rate of gun violence: It is the person holding the gun that matters. For example, most folks would feel safer in a room with Gandhi holding an Uzi than in a room with a barehanded Charles Manson.

Regardless of whether one believes more guns increase or decrease public safety, firearms have a much quicker response to crime than Indian country police.¹³⁶ An armed victim has a better chance of defending herself than an unarmed victim, particularly when the attacker is armed. Compared to members of other races, Indian women are more than twice as likely to encounter an armed sexual predator.¹³⁷ Merely revealing a gun deters criminals over 90 percent of the time,¹³⁸ and criminals may be more worried about encountering an armed victim than a law enforcement officer.¹³⁹ Firearms are relatively inexpensive, especially when compared to the cost of hiring additional police patrols. Furthermore, a firearm user can become proficient with relatively little training.

There are certainly legitimate concerns about increasing the availability of firearms among a population. However, because reducing sexual violence is the objective, only Indian women need to be armed. Women are much less likely to commit a violent crime than men.¹⁴⁰ In 2014, only 11.8 percent of

gun ownership increased. See Larry Bell, *Disarming Realities: As Gun Sales Soar, Gun Crimes Plummet*, FORBES (May 14, 2013), <http://www.forbes.com/sites/larrybell/2013/05/14/disarming-realities-as-gun-sales-soar-gun-crimes-plummet/>; Kellan Howell, *Murder Rates Drop as Concealed Carry Permits Soar: Report*, WASH. TIMES (July 13, 2015), <http://m.washingtontimes.com/news/2015/jul/14/murder-rates-drop-as-concealed-carry-permits-soar-/?page=all>; Mark J. Perry, *Chart of the day: More Guns, Less Gun Violence Between 1993 and 2013*, AEI (Dec. 3, 2015), <https://www.aei.org/publication/chart-of-the-day-more-guns-less-gun-violence-between-1993-and-2013/>.

136. Tristan Ahtone, *A Broken System: Why Law and Order Is Faltering on the Rez*, ALJAZEERA AMERICA (Dec. 19, 2013), <http://america.aljazeera.com/articles/2013/12/19/commission-federalgovtisreasonforlittlejusticeinindiancountry.html> (noting police response time to calls in Alaska Native villages can take up to a week); Sullivan, *supra* note 115 (stating police response time on the Standing Rock Sioux Reservation can range from days to months); *Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 18 (2007) (statement of Bonnie Clairmont, Victim Advocacy Specialist, Tribal Law and Policy Institute, St. Paul, Minnesota), <http://www.indian.senate.gov/sites/default/files/upload/files/June212007.pdf> (stating law enforcement responses to Indian crime is "very slow" oftentimes); Fletcher, *supra* note 88 (noting law enforcement's response to calls in Indian country is often "very long").

137. RONET BACHMAN, ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 37 (Aug. 2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf>.

138. John Lott, Jr., *Why Most of What You See in The Media About Guns Is Wrong*, U.S. CONCEALED CARRY ASS'N (Mar. 1, 2004), <https://www.usconcealedcarry.com/why-most-of-what-you-see-in-the-media-about-guns-is-wrong/> (stating that revealing a firearm stops crime 95 percent of the time); Larry Pratt, *Open Carry Deters Crime*, U.S. NEWS (Apr. 25, 2012), <http://www.usnews.com/debate-club/should-people-be-allowed-to-carry-guns-openly/open-carry-deters-crime> (stating up to 92 percent of criminals are deterred by seeing their would be victim display a gun).

139. Gary Kleck, *Policy Lessons from Gun Control Research*, 49 L. & CONTEMP. PROBS. 35, 46 (1986) (noting that 57 percent of criminals stated they are more concerned about encountering an armed victim than the police).

140. LAWRENCE A. GREENFIELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS,

homicides were committed by women.¹⁴¹ A Department of Justice Special Report found 11 percent of males age 10 years and older are violent offenders; whereas, less than 2 percent of females age 10 years and older are violent offenders.¹⁴² Therefore, arming Indian women is unlikely to cause a significant increase in violent crime rates in Indian country.

Although women may present a low risk of using a firearm to perpetrate a violent crime, there are still inherent risks with adding firearms to a community. For example, an abusive male partner can use a woman's gun against her, making a bad situation much worse. There is also the possibility of a child stumbling upon a loaded gun and accidentally firing it. These risks can be mitigated, possibly even eliminated, with smart guns.

Smart guns, or personalized guns, are guns that will not fire unless the gun recognizes the user. This can be accomplished in two ways. The simplest mechanism is proximity; that is, the gun will not fire unless it is within range of a transmitter—usually radio frequency identification (RFID).¹⁴³ The transmitter can be a bracelet, ring, or even a chip implanted in the user's hand.¹⁴⁴ Another smart gun recognition method is the use of biometrics.¹⁴⁵ Finger and palm print recognition are basic means of biometric identification.¹⁴⁶ Dynamic Grip Recognition is a more complex form of biometric identification. In addition to measuring hand structure, size, and strength, it also recognizes how the individual acts with the gun, recognizing things such as the force used pulling the trigger.¹⁴⁷ Smart guns with RFID are available to the public¹⁴⁸ but have not been well received to date.¹⁴⁹

Even though they come equipped with safeguards designed to limit their use, smart guns are weapons that possess any benefits that a firearm may have. However, the chief advantage of smart guns over traditional firearms is they

U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS 2 (1999), <http://www.bjs.gov/content/pub/pdf/wo.pdf> (NCJ 175688).

141. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, MURDER OFFENDERS BY AGE, SEX, RACE, AND ETHNICITY, 2014 (2014), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded_homicide_data_table_3_murder_offenders_by_age_sex_and_race_2014.xls (Of the 13,897 committed, the murderer's sex was unknown in 3,958).

142. Greenfield & Snell, *supra* note 140, at 2.

143. DEP'TS OF JUSTICE, HOMELAND SECURITY, AND DEFENSE, REPORT TO THE PRESIDENT OUTLINING A STRATEGY TO EXPEDITE DEPLOYMENT OF GUN SAFETY TECHNOLOGY 5 (2016), https://www.whitehouse.gov/sites/default/files/docs/final_report-smart_gun_report.pdf [hereinafter REPORT].

144. *Id.*; *Overview*, TRIGGER SMART (Aug. 20, 2014), <http://www.triggerSMART.com/Pages/TriggerSmart.aspx> (the video beginning at 90 seconds in).

145. REPORT, *supra* note 145.

146. *Id.*; Store, KODIAK INDUSTRIES, <http://kodiakarms.com/product/intelligun/> (last visited Nov. 3, 2016).

147. *Spotlight: Smart Gun Technology Works*, N.J. INST. OF TECH. (Aug. 20, 2014), <http://www.njit.edu/news/spotlight/2005/jan/index.php>.

148. Brendan McGarry, 'Smart' Pistol Hits Shelves in California, KIT UP! (Feb. 19, 2014), <http://kitup.military.com/2014/02/smart-pistol-hits-shelves-california.html>.

149. Cheryl Eddy, *Smart Guns Are Here, but No One Wants to Buy Them*, GIZMODO (Feb. 24, 2016), <http://gizmodo.com/smart-guns-are-here-but-no-one-wants-to-buy-them-1760916506>.

pose little danger of misuse by a third party—from assailants to small children. While an assailant may disarm his victim and wield a traditional firearm against her, smart guns, particularly those that rely on biometric identification, will be very difficult for criminals to operate. Smart gun user identification features should decrease the marketability of firearms on the black market because user recognition mechanisms make transferring smart guns more complicated than traditional firearms.

Another feature of smart guns is that they are designed to be tracked.¹⁵⁰ Tracking mechanisms should make it easy for law enforcement to locate smart guns, making it much easier to locate a missing smart gun than a traditional firearm. Likewise, it should make using smart guns in crime unappealing because it is difficult to hide from law enforcement when the weapon used to perpetrate the crime is broadcasting its whereabouts.

The same features that prevent smart guns from being misused by criminals also serve as a prophylactic against accidental shootings by children.¹⁵¹ This means smart guns offer the benefits of traditional firearms while greatly reducing the odds of a third party misusing the firearm.

Smart guns are not without flaws. Smart guns cannot prevent authorized users from making dumb decisions; indeed, an authorized user can still fire the smart gun while intoxicated or in the heat of passion. The even bigger concern, though, is the potential for the user recognition mechanism to fail and block the authorized user from firing the weapon at the crucial moment.¹⁵² Displaying a gun is often enough to stop an attacker, but threats are not always sufficient. An assailant who continues the attack despite facing the barrel of a gun is likely an extremely dangerous and determined criminal. A functional firearm is the victim's best chance at self-defense in this situation. Adding smart gun technology to a firearm creates an opportunity for a gun to erroneously block the authorized user when it is needed.¹⁵³ However, smart gun manufacturers claim smart guns have an expected failure rate of less than one in 10,000.¹⁵⁴

Despite these problems, arming Indian women with a traditional or smart firearm is the best policy option under the current circumstances. Both the lack

150. REPORT, *supra* note 145, at 10 (stating that smart gun technology provides real time information about the firearm's location).

151. *Id.* at 4 (noting that smart guns reduce the risk of children accidentally discharging a firearm).

152. *Id.* at 14–15 (discussing potential problems with smart gun technology, including "reliability" and "ease and predictability of use").

153. See Jon Stokes, *Will Smart Guns Make Us Less Safe?*, L.A. TIMES (Jan. 17, 2016) (discussing how adding smart gun technology to firearms creates another opportunity for the firearm to fail); Joseph Stienberg, *Why You Should Be Concerned About the New 'Smart Guns' (Whether You Love or Hate Guns)*, FORBES (May 4, 2014), <http://www.forbes.com/sites/josephsteinberg/2014/05/04/smartguns/#3e7653ec3900>.

154. MARK GREENE, A REVIEW OF GUN SAFETY TECHNOLOGIES 13 (2013), http://www.ncdsv.org/images/NIJ_Review-of-gun-safety-technologies_6-2013.pdf (noting that smart gun manufacturer Kodiak Industries asserts its Intelligun system has an expected failure rate of 1 in 10,000).

of police presence and the jurisdictional quagmire in Indian country are unlikely to be resolved anytime soon, but firearms can respond to a criminal instantaneously. Equally important, a bullet is not impeded by the jurisdictional issues that hinder law enforcement in Indian country. Therefore, tribes should develop programs that encourage their female citizens to concealed carry.

V. POLICY IMPLEMENTATION

Indian tribes occupy a unique place in the United States legal system that makes them well suited for a concealed carry program. Tribes are “domestic dependent nations”¹⁵⁵ and are presumed to have all the powers that they have not relinquished.¹⁵⁶ ICRA did not provide an analogue to the Second Amendment¹⁵⁷ perhaps because, as Supreme Court Justices have asserted, the Second Amendment was crafted to enable Americans to defend themselves against Indian tribes.¹⁵⁸ Nevertheless, tribes have the ability to implement their own firearm regulations.¹⁵⁹ A policy that encourages gun ownership, or even mandates gun ownership, is within tribal authority.¹⁶⁰

Funding is an essential part of any program, and there are two potential sources for the concealed carry program. The first source of potential funding is government grants. For example, VAWA could be a vehicle for implementing the concealed carry policy as it allocates funds to tribal governments for developing policies that respond to violence against Indian women.¹⁶¹ Other governmental funding sources are possible as well, such as

155. *Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (stating, “Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.”).

156. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (stating, “But until Congress acts, the tribes retain their existing sovereign powers.”); *Frequently Asked Questions*, U.S. DEP’T OF INTERIOR: INDIAN AFFAIRS, <http://www.bia.gov/FAQs/> (last updated Aug. 25, 2016); Fletcher, *supra* note 88, at 2 (stating, “In other words, unless there is a divesture of tribal authority, Indian tribes may exercise all the sovereign power of government that they would retain if they were nations within the international sphere.”); Fortin, *supra* note 92, at 239 (stating tribes are assumed to have all powers that have not been extinguished by treaty or Congress and concluding that tribes have the ability raise a militia is one of these powers).

157. *See* 25 U.S.C. § 1302(a). ICRA largely parallels the Bill of Rights but does not have an analogue to the Second Amendment.

158. Transcript of Oral Argument at 8, *D.C. v. Heller*, 554 U.S. 570 (2008) (No. 07-290), http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf (Justice Kennedy stating the Second Amendment was designed to enable “the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves bears and grizzlies and things like that”); *D.C. v. Heller*, 554 U.S. 570, 715 (2008) (Breyer, J., dissenting) (noting any self-defense purpose the Second may have served is not relevant to today’s urban lifestyle and was instead intended to provide a mechanism for settlers to defend themselves against frontier dangers like “fighting with Indian tribes”).

159. *A. Riley*, *supra* note 63, at 1721.

160. *Id.* at 1743.

161. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 901(10), 127 Stat. 54, 118.

the Department of Justice's Coordinated Tribal Assistance Solicitation program which awards grants to tribes to improve public safety and prevent violence against women.¹⁶² Government grants to Indian tribes do not violate the Equal Protection clause despite their singling out of Indian women for special treatment.¹⁶³

The second potential funding source is gun interest groups. Smart gun manufacturers could benefit greatly from sponsoring the concealed carry program. If smart guns reduce the violent victimization rate of Indian women, smart gun manufacturers will have a tremendous data point to use in their marketing efforts. Accordingly, smart gun manufacturers may be willing to donate smart guns to support the policy. Likewise, gun rights groups, such as the National Rifle Association (NRA), could sponsor the program.¹⁶⁴ The NRA has a section on its website titled "The Armed Citizen," which highlights examples of citizens using firearms in self-defense.¹⁶⁵ The concealed carry policy for Indian women fits this section perfectly, and the program could be used to highlight some of the safety benefits that stem from lawfully owning a weapon.

Once funds are secured, tribes should be allowed to opt into the concealed carry program in the same way that tribes are allowed to opt into VAWA jurisdiction over domestic and dating violence.¹⁶⁶ Allowing tribes to decide whether to participate in the concealed carry program respects tribal sovereignty¹⁶⁷ and allows tribes to serve as "laboratories of democracy."¹⁶⁸ Not all tribes may want to participate in the program. For example, some tribes may have adequate levels of law enforcement to protect their citizens, and therefore may be uninterested in the program. Nonetheless, tribes whose female members are frequently victimized and lack access to law enforcement should have the choice to enroll in the concealed carry program.

162. Office of Pub. Affairs, *Attorney General Loretta E. Lynch Announces More Than \$107 Million to Improve Public Safety, Victim Services for American Indians and Alaska Natives*, THE U.S. DEP'T OF JUSTICE (Sep. 27, 2016), <https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-announces-more-107-million-improve-public-safety-victim>; See also Report, *supra* note 145, at 13 (stating, "[t]he federal government stands ready to assist state and local governments as these devices [smart gun technology] enter the commercial market.").

163. *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (stating, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed.").

164. The NRA and other gun rights groups have opposed smart guns. The opposition, however, is based on smart gun technology being mandated for all guns rather than the technology itself. See *"Smart" Guns/Personalized Firearms*, NAT'L RIFLE ASS'N-INST. FOR LEGISLATIVE ACTION, <https://www.nraila.org/issues/smart-gunspersonalized-firearms/>.

165. *The Armed Citizen*, NRA, <http://www.americanrifleman.org/the-armed-citizen> (last visited Nov. 3, 2016).

166. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, 120 (codified as amended in scattered sections of 25 U.S.C.).

167. Washburn, *supra* note 1, at 853 (stating, "The mere existence of choice represents improved self-determination.").

168. Tweedy, *supra* note 52, at 899 (discussing how the Second Amendment's inapplicability to Indian tribes gives them a unique ability to craft their own gun laws).

A few tribes interested in the concealed carry program should be selected for a pilot project to determine its effectiveness.¹⁶⁹ Potential conflicts between tribal and state concealed carry laws should be considered when selecting tribes for the pilot project. Nevertheless, states probably cannot dictate tribal gun policy because the Supreme Court has declared that “States have no power to regulate the affairs of Indians on a reservation.”¹⁷⁰ “Regulate” is the key word. A state can prevent a tribe from allowing activities on a reservation that are criminal or prohibited within the state’s borders, but a state has little sway over a tribe if the activity is regulated and only civilly punished under state law.¹⁷¹ States cannot ban handgun ownership—they can only regulate it.¹⁷² Hence, tribal concealed carry policy should be outside of a state’s domain.

Although tribes likely have broad discretion over reservation concealed carry policy for members, complications may arise between tribes and states when participants cross from Indian country into state jurisdiction. For example, litigation has arisen over whether tribal police can have emergency light bars on their vehicles while temporarily driving on a state road.¹⁷³ Litigation has also ensued over whether tribal vehicle registration and titling satisfies state requirements.¹⁷⁴ The tribes prevailed in both cases, but success took years to achieve.¹⁷⁵ Congress can prevent similar conflicts from occurring with the concealed carry pilot project by granting project participants permit reciprocity with the states bordering their reservations.¹⁷⁶

Tribes should also be allowed to adjust the program to meet their needs just as states are allowed to create their own concealed carry laws.¹⁷⁷ Participation in this program will be limited to females over 18 years of age who have no criminal record.¹⁷⁸ Aside from this, tribes will be able to tailor the

169. Washburn, *supra* note 1, at 853 (suggesting that tribal pilot programs are a good way to determine the effectiveness of policies). For example, a few tribes were selected to participate in a pilot program to test tribes’ ability to prosecute non-Indians under VAWA. *VAWA 2013 Pilot Project*, U.S. DEP’T OF JUSTICE, (last updated Mar. 13, 2015), <http://www.justice.gov/tribal/vawa-pilot-2013.html>

170. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

171. *See California, et al., v. Cabazon Band of Mission Indians, et al.*, 480 U.S. 202 (1987) (holding that California could not prohibit tribes from engaging in high stakes gaming because the state authorized various forms of gaming).

172. *See McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010) (holding that the Second Amendment is incorporated to the states through the Fourteenth Amendment).

173. *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004).

174. *Prairie Band of Potawatomi Nation v. Wagnon*, 476 F.3d 818 (10th Cir. 2007).

175. *See Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 694; *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1239 (10th Cir. 2001) (the litigation in *Prairie Band* was initiated in 1999).

176. Concealed carry permit reciprocity is a common practice among states. *See, e.g., Guide to the Interstate Transportation of Firearms* NAT’L RIFLE ASS’N INST. FOR LEGISLATIVE ACTION, <https://www.nraila.org/gun-laws/> (last visited Jun. 14, 2016).

177. *See generally Gun Control: States’ Laws and Requirements for Concealed Carry Permits Vary Across the Nation*, U.S. GOV’T ACCOUNTABILITY OFFICE 18, (2012) <http://www.gao.gov/assets/600/592552.pdf> (noting that states have different training requirements).

178. 18 U.S.C. § 922(b)(1) (2016).

program to fit their needs. The program simply procures firearms for tribes and trains female tribal members to handle the guns. Determining how to distribute the firearms will be up to tribes. Some tribes may wish to arm all members interested in the program while others may wish to arm random female members.

The largest reservation-based population of Indians is the Navajo Nation, which has approximately 170,000 persons identifying as Indian.¹⁷⁹ The second largest reservation-based population of Indians is roughly 17,000.¹⁸⁰ Assuming half are female, the second largest reservation based population of Indian women is about 8,500. The number of members eligible for the program will decrease when age and criminal background are considered. Pistols can be purchased for under \$500.¹⁸¹ This means a million dollar grant can procure over 2,000 handguns—roughly one pistol for every four women on the reservation with the second largest Indian population. Smart guns are currently priced around \$1,800,¹⁸² so a million dollar grant can purchase about 555. This could provide one gun for every 15 females on the reservation with the second highest population of Indian women. It should be noted that these calculations do not take into account age or criminal background, and including these factors reduces the population eligible to participate in the program. Additionally, guns may be even less expensive if bought as a bulk purchase.¹⁸³ Since smart gun manufacturers will likely receive publicity from the sale and program, more than 555 smart gun systems are plausible for one million dollars.

There are a few costs in addition to the firearms themselves, but the costs are low. Firearm distribution must be accompanied with training. A qualified volunteer, whether a law enforcement officer or a private instructor, is necessary to provide the training. Guns require maintenance, and some guns come with cleaning kits.¹⁸⁴ If for some reason the procured guns do not come

179. Tina Norris et al., *The American Indian and Alaska Native Population: 2010*, U.S. CENSUS BUREAU, C201 0BR-10, 14 (2012) <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

180. *Id.*

181. Pat Cascio, *Exclusive: Affordable Self-Defense*, AM. HANDGUNNER, <http://americanhandgunner.com/affordable-self-defense/>.

182. Michael S. Rosenwald, "We Need the iPhone of Guns": Will Smart Guns Transform the Gun Industry?, WASH. POST (Feb. 17, 2014), https://www.washingtonpost.com/local/we-need-the-iphone-of-guns-will-smart-guns-transform-the-gun-industry/2014/02/17/6ebe76da-8f58-11e3-b227-12a45d109e03_story.html (indicating the \$1,800 includes the gun and a transmitter watch).

183. See Andrew Beattie, *The Dark Side of Buying in Bulk*, INVESTOPEDIA, http://www.investopedia.com/articles/pf/07/bulk_buying.asp (noting that the price of an individual unit tends to decrease as more units are purchased); see also Trent Hamm, *The Ultimate Guide to Buying in Bulk*, THE SIMPLE DOLLAR (Jan. 16, 2015), <http://www.thesimpledollar.com/buying-in-bulk/> (explaining that the goal of bulk purchasing is to reduce individual unit cost).

184. See, e.g., *Glock 19 G19 Gen 4 9mm (Black)*, GUNS AM., <https://www.gunsamerica.com/996318980/Glock-19-G19-Gen-4-9mm-Blac.htm> (last visited Jan. 2, 2017).

with cleaning kits, pistol cleaning kits can be purchased for less than \$10.¹⁸⁵ Bullets must accompany the gun distribution and are available for approximately \$0.20 a round.¹⁸⁶ Finally, the firearms must be safely stored. Trigger locks are a gun storage tool that are often given away to promote firearm safety.¹⁸⁷ Trigger locks are available for under \$20, and gun storage cases can be purchased for between \$10 and \$150.¹⁸⁸

Once armed and trained, women will be free to live their lives normally. It is important that tribes participating in the program be publicized because the intention of the policy is to deter criminals. Hopefully, the mere threat to an assailant of being met with a weapon during an attack means that the guns will never have to be used. As the theory goes, if a criminal knows there is a high probability that his victim is armed, he will be less likely to attempt the crime.¹⁸⁹ There is a chance that a criminal will lose the incentive to target women in Indian country because the odds of successfully completing the crime will decrease substantially. Hence, spreading awareness of the policy's implementation is crucial as a means of deterrence.

Participating tribes should be monitored by law enforcement and policy experts in order to measure the efficacy of the concealed carry program. Gauging the program's effectiveness presents a few challenges. Data is generally tough to come by in Indian country,¹⁹⁰ consequently, determining how much the crime rate changes after the program's implementation may be

185. See, e.g., *Pistol Cleaning Kits*, WALMART, <https://www.walmart.com/c/kp/pistol-cleaning-kits> (last visited Jan. 2, 2017).

186. See, e.g., *9mm Ammo*, SPORTSMAN'S GUIDE, <http://www.sportsmansguide.com/productlist/ammo-shooting/handgun-pistol-ammo/9mm-ammo?d=121&c=95&s=959> (last visited Feb. 7, 2017); see also, *.40 S&W Ammo*, SPORTSMAN'S GUIDE, <http://www.sportsmansguide.com/productlist/ammo-shooting/handgun-pistol-ammo/40-sw-ammo?d=121&c=95&s=928> (last visited Feb. 7, 2017).

187. See, e.g., City of Md. Heights, "Project Childsafe Gun Lock Giveaway," <http://www.marylandheights.com/departments/police/programs-services/project-childsafe-gun-lock-giveaway> (last visited Feb. 7, 2017); see also Fremont Police, "Gun Lock Program," <http://www.fremontpolice.org/index.aspx?NID=163> (last visited Feb. 7, 2017); see also Action News 6ABC, "Gun Locks Being Given Away in Philadelphia," <http://6abc.com/news/gun-locks-being-given-away-in-philadelphia/1452542/> (last visited Feb. 7, 2017).

188. B. Gil Horman, "6 Ways to Safely Store Your Firearms," NRA FAMILY (Apr. 14, 2016), <https://www.nrafamily.org/articles/2016/4/14/6-ways-to-safely-store-your-firearms/>.

189. See Justin Peters, *Study Suggests Attackers Choose Victims Based on the Way They Walk*, SLATE (Apr. 9, 2013), http://www.slate.com/blogs/crime/2013/04/09/journal_of_interpersonal_violence_study_suggests_attackers_choose_victims.html (summarizing a study finding criminals identify then target victims who they perceive as easy targets); see also Chuck Hustmyre & Jay Dixit, *Marked for Mayhem*, PSYCHOLOGY TODAY (Jan. 1, 2009), <https://www.psychologytoday.com/articles/200901/marked-mayhem> (noting criminals usually select victims that they can easily overpower); see also Raj Persaud, *Don't Walk This Way- How Your Steps Tell Psychopaths Who to Attack*, THE HUFFINGTON POST (Jan. 22, 2015), http://www.huffingtonpost.co.uk/dr-raj-persaud/dont-walk-this-way-how-ya_b_6509478.html (stating research shows that criminals use body language cues indicating vulnerability when selecting victims).

190. *Policy Research Ctr*, NAT. CONG. OF THE AM. INDIAN, <http://www.ncai.org/policy-research-center/initiatives/data-quality> (last visited May 2016) (discussing the "invisibility" of American Indians in research data under subsection "The Asterisk Nation").

impossible. Even if data is available, a change in the crime rate where the program is implemented does not necessarily mean the program caused the crime rate's change. Nonetheless, members of the community should know whether their community is safer since the program's implementation as well as whether the program is worth keeping. Surveys are a simple way of measuring the community's satisfaction with the program. The results of the surveys and an analysis of the available data will determine the policy's future.

VI. CONCLUSION

Violence against Indian women is an egregious problem, and a concealed carry program may improve the safety of Indian women. However, concealed carry does not address many of the underlying factors that contribute to Indian country's unconscionable violence rates. For example, concealed carry will not reduce the Indian poverty rate—the highest in the nation¹⁹¹—nor will it reduce Indian country's unemployment rate, which has hovered around 50 percent for years.¹⁹²

Though concealed carry is not a panacea, the program will make the women of Indian country less attractive victims for criminals. It is despicable that the women of Indian country must resort to self-defense, but governments have failed to protect them. The federal government is likely to continue underfunding Indian country law enforcement. Indian country's complicated jurisdictional framework is likely to remain intact for the foreseeable future as well. Given these realities, Malcolm X's words are pertinent: "[W]here the government has proven itself either unwilling or unable to defend the lives and the property of Negroes, it's time for Negroes to defend themselves."¹⁹³ For Indian women, the time has come to defend themselves.

191. Suzanne Macartney et al., *Poverty Rates for Selected Groups Detailed Race and Hispanic Groups by State and Place: 2007-2011* 3 (2013); AM. CMTY. SURVEY BRIEFS, <https://www.census.gov/prod/2013pubs/acsbr11-17.pdf>.

192. *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country*, Hearing Before the Sen. Comm. on Indian Affairs, 111th Cong. (2010) <http://www.indian.senate.gov/sites/default/files/upload/files/January2820102.pdf>; Vincent Schilling, *Getting Jobbed: 15 Tribes with Unemployment Rates Over 80 Percent*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 29, 2013), <http://indiancountrytodaymedianetwork.com/2013/08/29/danger-zone-15-tribes-unemployment-rates-over-80-percent-151078>.

193. Malcolm X, *The Ballot or the Bullet*, (Apr. 3, 1964).