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## Taking Stock: Open Questions and Unfinished Business Under the VAWA Amendments to the Indian Civil Rights Act

Jordan Gross

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# Taking Stock: Open Questions and Unfinished Business Under the VAWA Amendments to the Indian Civil Rights Act

JORDAN GROSS<sup>†</sup>

*The primary statutory tool for federal regulation of Tribal court criminal procedure is the Indian Civil Rights Act of 1968 (ICRA). ICRA replicated most of the procedural protections in the Bill of Rights applicable to the States, as then interpreted by the Supreme Court. ICRA also sets out procedures Tribes must extend to criminal defendants in their courts, caps their sentencing authority, and defines their criminal jurisdiction.*

*Some parts of Indian country are the most dangerous places in the United States today, particularly for indigenous women and girls. They are exposed to a higher level of personal violence than any other women in the United States, mostly at the hands of non-Indians. This situation is due, in large measure, to jurisdictional voids in Indian country created by federal law.*

*Congress has amended ICRA four times since 1968. In 2010 it amended ICRA with the Tribal Law and Order Act (TLOA). TLOA authorized Tribes to exercise expanded sentencing authority if they adopt and implement additional criminal procedural protections beyond those required under the 1968 version of ICRA. Congress amended ICRA again in 2013 with the Violence Against Women Re-Authorization Act (VAWA 2013). These amendments provide Tribes a pathway for re-asserting criminal jurisdiction over non-Indians for the first time in generations. VAWA 2013 recognizes Tribes' inherent authority to exercise jurisdiction over all persons who commit crimes in Indian country, but limits the reach of that jurisdiction to crimes involving dating or domestic violence or violations of protection orders. This is labeled "special domestic violence criminal jurisdiction" (SDVCJ). To exercise SDVCJ, a Tribe must adopt the procedural protections required by TLOA, and additional procedural protections required by VAWA 2013.*

*VAWA 2013 cabins SDVCJ in three ways, it: (1) creates an exception for crimes that only involve non-Indians as victims and perpetrators, (2) creates an exception for non-Indian defendants who lack ties to the Tribal community in which they commit their crimes, and (3) limits the offenses to which SDVCJ extends. These exceptions and limitations incorporate facts and circumstances that are often referred to as "jurisdictional."*

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*This Article analyzes whether SDVCJ facts and circumstances are truly jurisdictional requirements—that is, whether their presence or absence has any bearing on a Tribal court's power to hear and resolve VAWA 2013 cases. A second, and closely related, issue this Article examines is whether the existence of these facts and circumstance, whether jurisdictional or not, can be resolved as a matter of law by a court, or whether they are elements that must be submitted to a jury.*

*These are important issues that impact Tribes' ability to prosecute and convict non-Indian defendants, and their willingness to do so. If the facts and circumstances Congress appended to SDVCJ are "over" interpreted as adjudicative jurisdictional elements, this leads to a host of challenges and complications that can make Tribes' exercise of SDVCJ over non-Indians more costly and more cumbersome. This Article offers a more compartmentalized analysis of SDVCJ facts and circumstances and argues that most are not true jurisdictional elements, but, rather, should be treated as merits elements, or possibly even affirmative defenses.*

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## INTRODUCTION

The federal government's relationship with Tribal nations is extra-constitutional because no Tribal nation was a party to the United States Constitution.<sup>1</sup> Thus, neither the U.S. Constitution, nor the Bill of Rights, constrain Tribal governments. Nonetheless, the federal government has asserted the right to regulate Tribal governments' authority to investigate, prosecute, and punish wrongdoing in Indian Country<sup>2</sup> under treaties, statutes and caselaw. The primary statutory tool for federal regulation of Tribal court criminal procedure is the Indian Civil Rights Act of 1968 (ICRA),<sup>3</sup> often referred to as the "Indian Bill of Rights."<sup>4</sup> When enacted, ICRA replicated most of the procedural protections in the Bill of Rights applicable to the states, as then interpreted by the Supreme Court. ICRA, in tandem with decisions by the Supreme Court, sets out procedures Tribes must extend to criminal defendants in their courts, caps their sentencing authority, and limits their criminal jurisdiction over non-Indians who commit crimes in Indian Country.<sup>5</sup>

Congress has amended ICRA four times since it was enacted in 1968. The 1968 version limited Tribes' criminal sentencing authority to six months imprisonment and a fine of \$500. In 1986, Congress amended ICRA to raise the cap to one year and \$5,000.<sup>6</sup> In the interim, in its 1978 decision in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that Tribes lack criminal jurisdiction over non-Indians who commit crimes in Indian Country, absent congressional authorization.<sup>7</sup> Later, in 1990, the Court held that Tribes only possess inherent authority over their own members, and that they cannot exercise criminal jurisdiction over Indians<sup>8</sup> who are not members of their Tribe, absent

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1. See Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 428 (2014) ("Since Indian tribes 'did not participate in the Constitutional Convention and did not 'sign on' by joining the federal union,' they are not bound by the Constitution, absent affirmative congressional action to the contrary. Rather . . . tribal courts generally retain inherent civil and criminal jurisdiction over Indian reservations by virtue of their sovereign status.") (footnotes and citations omitted); see also *Talton v. Mayes*, 163 U.S. 376, 383–84 (1896) (tribes are "distinct, independent political communities" whose governments and courts are not subject to constitutional limitations applicable to federal and state governments) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)).

2. 18 U.S.C. § 1151 is the primary federal law defining Indian Country. See sources cited *infra* note 48.

3. 25 U.S.C. §§ 1301–04. Congress enacted ICRA during the Civil Rights Era as a rider to the Civil Rights Act of 1968. An Act to Prescribe Penalties for Certain Acts of Violence or Intimidation, and for Other Purposes, Pub. L. No. 90-284, 82 Stat. 77–81 (1968) (codified in scattered sections of 18, 25, 42 U.S.C.).

4. *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1345 (1969).

5. Over one-half of the 574 federally recognized tribes in the United States operate formal court systems, which include approximately 174 tribal courts of general jurisdiction that operate independently of the state and federal court systems. STEVEN W. PERRY, BUREAU OF JUST. STATS., CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, at iii (2005).

6. See 1986 Anti-Drug Abuse Act, Act, Pub. L. 99-570, § 4217, 100 Stat. 3207 (amending 25 U.S.C. § 1302(a)(7)(B)).

7. 435 U.S. 191, 212 (1978).

8. The term "Indian" is a federal law term of art, which, as discussed extensively *infra* notes 47–48, does not have a single meaning in federal law.

congressional authorization.<sup>9</sup> In response, Congress immediately amended ICRA to make clear that Tribes do, indeed, possess inherent power over all Indians who commit crimes in Indian Country.<sup>10</sup> Congress left the Court's ruling prohibiting Tribes from exercising criminal jurisdiction over non-Indians without congressional authorization intact until relatively recently.

Parts of Indian Country are the most dangerous places in the United States, particularly for indigenous women and girls. American Indian and Alaska Native women experience higher rates of violence than any other women in the United States. This violence occurs mostly at the hands of non-Indians.<sup>11</sup> This is due largely to the jurisdictional voids in Indian Country created by federal laws and policies. The *Oliphant* Court's decision has contributed to pockets of lawlessness in Indian Country where non-Indians consider themselves above the law. ICRA's limits on Tribes' sentencing authority relegated Tribes' punishment power to misdemeanor penalties, even for the most serious offenses committed in their communities.

Public scrutiny and pressure to address the public safety crisis in Indian Country led Congress to enact significant amendments to ICRA twice in the last decade: in 2010, it amended ICRA with the Tribal Law and Order Act (TLOA); in 2013 it amended ICRA with the Violence Against Women Reauthorization Act (VAWA 2013). TLOA gives Tribes the option to increase their sentencing authority from one year of incarceration to three years, and from \$5,000 in fines to \$15,000. To do so, Tribes must adopt more expansive criminal procedural protections for Tribal court defendants than those required under the 1968

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9. See *Duro v. Reina*, 495 U.S. 676, 684–85 (1990).

10. See 25 U.S.C. § 1301 (“For the purposes of this subchapter, the term . . . (2) ‘powers of self-government’ means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians . . .”). This statute is often referred to as the “*Duro*-fix.” See, e.g., Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 463 (2005).

11. See *Los Coyotes Band of Cahuilla v. Jewell*, 729 F.3d 1025, 1028–30 (9th Cir. 2013) (compiling statistics) (the Ninth Circuit has observed that “Indian Country may be one of the most dangerous places in the United States.”). The disproportionate threat of violence that Native American and Alaska Native women face in the United States, primarily at the hands of non-Indians, is well-documented. See ANDRÉ B. ROSAY, NAT’L INST. OF JUST., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN 39–41 (2016) (of the American Indian and Alaska Native women surveyed, 56.1% experienced sexual violence in their lifetime, and 55.5% experienced physical violence by an intimate partner); STEVEN W. PERRY, BUREAU OF JUST. STATS., AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002, at v (2004), <https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/aic02.pdf> (Native American and Alaska Native people are 2.5 times more likely to experience rape or sexual assault as compared to non-indigenous women of all races, and nearly four out of five American Indian victims of rape or sexual assault identified their perpetrator as white). According to the 2010 census, out of the total 4.6 million people residing in Indian Country, 77% did not identify as American Indian and Alaska Native. See TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 14 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

default provisions of ICRA.<sup>12</sup> VAWA 2013 provides Tribes a pathway for re-asserting criminal jurisdiction over non-Indians for the first time since the Court's 1978 *Oliphant* decision and recognizes Tribes' inherent authority to exercise jurisdiction over all persons who commit crimes in Indian Country. But it limits the reach of that jurisdiction to crimes involving dating or domestic violence, or violations of protection orders. This is labeled "special domestic violence criminal jurisdiction," often shortened to "SDVCJ." To exercise SDVCJ, a Tribe must be a "participating tribe," which means it has adopted the procedural protections set out in TLOA, and additional procedural protections for non-Indian defendants under VAWA 2013.

Congress cabined SDVCJ in three ways. First, it excluded crimes committed by non-Indians against other non-Indians.<sup>13</sup> Second, it excluded non-Indian perpetrators who lack ties to the Tribal community in which they commit their crimes. And third, it limited the types of crimes subject to SDVCJ, including only some types of domestic violence offenses, and some protection order violations. These exceptions and limitations incorporate facts and circumstances that are often treated as jurisdictional requirements.<sup>14</sup>

This Article analyzes two issues. First, whether the existence or absence of SDVCJ facts and circumstances are jurisdictional in an adjudicative sense. That is, whether a Tribal court's power to hear and resolve criminal cases against non-Indian defendants hangs on their proof. The second, and closely related, issue this Article takes up is whether the existence of these facts and circumstances, whether adjudicative requirements or not, are matters of law to be determined by the court, or whether they must be submitted to a jury.

Federal courts have examined many aspects of these questions extensively in the context of state and federal constitutional criminal procedure. As noted, however, Tribal justice is not part of the constitutional scheme. As such, interpretation of ICRA is not bound to federal constitutional jurisprudence. VAWA 2013, however, introduced a wrinkle in this constitutional arrangement with a "catch-all" provision. In prosecuting non-Indians, Section 1304(d) of ICRA requires Tribes to extend "all other rights whose protection is necessary

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12. These protections, discussed *infra*, include effective assistance of counsel, defined by reference to the federal constitutional standard, licensed counsel at Tribal expense for indigent defendants, and staffing cases with law-trained judges. See *infra* note 29 and accompanying text.

13. Under Court precedent, crimes committed by non-Indians in Indian Country that are against other non-Indians, or that are victimless, go to state court. See *infra* note 57 and accompanying text.

14. See NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 31–32 (2018), [http://www.ncai.org/resources/ncai-publications/SDVCJ\\_5\\_Year\\_Report.pdf](http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf) ("SDVCJ is a very limited recognition of tribal jurisdiction. Navigating the boundaries of these new limitations has proven challenging and frustrating for many tribes. For tribes exercising SDVCJ, establishing whether the tribe has jurisdiction over the alleged offense involves answering factual questions. Specifically, to exercise SDVCJ, the tribe must demonstrate the Indian status of the victim, the existence of a qualifying relationship between the defendant and the victim, and whether the defendant has sufficient statutorily enumerated connections to the tribe. Several tribes stated that many of their decisions not to prosecute, or many of their prosecutor-initiated dismissals, were because the prosecutors were not sure that they could prove jurisdiction.") [hereinafter, NCAI, FIVE-YEAR REPORT].

under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction. . . .”<sup>15</sup> On its face, this provision appears to require participating Tribes to afford non-Indian defendants all (unidentified) federal constitutional rights they would enjoy if prosecuted in state or federal court. Section 1304(d) naturally invites consideration of just how much federal constitutional common law VAWA 2013 injects into SDVCJ prosecutions generally. Specifically, it raises the question of when federal common law informs or dictates the resolution of the two primary issues identified above—how to classify SDVCJ facts and circumstances, and whether they must be submitted to the jury.

VAWA 2013’s Indian Country provisions were implemented and adopted in stages. Although Congress enacted VAWA in 2013, the statute’s Indian Country provisions were not implemented until 2015. In the first phase, participation was limited to five Tribes who were required to seek and obtain approval from the U.S. Department of Justice to participate in a pilot project. They included the Assiniboine and Sioux Tribes of Fort Peck, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), the Pascua Yaqui Tribe, the Tulalip Tribes, and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation.<sup>16</sup> There are 574 federally recognized Tribal Nations situated within the United States.<sup>17</sup> As of August 2021, only twenty-seven are exercising SDVCJ.<sup>18</sup> VAWA 2013’s impact has been limited because the resources required to implement it are beyond the reach of many Tribes and federal funding has been limited or slow in coming.<sup>19</sup> This is an opportune time to take stock<sup>20</sup> of the TLOA and VAWA 2013 amendments to ICRA—it follow the ten-

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15. 25 U.S.C. § 1304(d)(4).

16. See U.S. DEP’T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, THE 2016 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT 44 (2016), <https://www.justice.gov/ovw/page/file/933886/download>. The Pascua Yaqui Tribe, the Tulalip Tribe, and the Umatilla Tribes of Oregon were designated as Pilot Project Tribes in February 2014. *Id.* The Sisseton Wahpeton Oyate of the Lake Traverse Reservation and the Assiniboine and Sioux Tribes of the Fort Peck Reservation became Pilot Project Tribes in March 2015. *Id.* Tribes implementing SDVCJ after the Pilot Project phase were not required to seek prior authorization from DOJ to implement VAWA 2013. See *id.*

17. See *Federal and State Recognized Tribes*, NAT’L CONF. OF STATE LEGIS., <https://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> (last updated Mar. 2020) (listing 574 federally recognized Tribes by state within which they are located); see also Jim Robbins, U.S. Recognizes a Tribe That Lost Land in Treaty, N.Y. TIMES, Feb. 1, 2020, at A21 (noting that the Little Shell Tribe of Chippewa Indians of Montana was granted federal recognition in 2020, making it the 574th federally recognized Tribe within the United States).

18. See *infra* Appendix A, for a list of tribes exercising SDVCJ.

19. See NCAI, FIVE-YEAR REPORT, *supra* note 14, at 30, 77. “VAWA 2013 authorized \$5,000,000 for each of fiscal years 2014 through 2018 for SDVCJ implementation.” As of 2018, the federal government had “awarded \$5,684,939 in competitive grant funds to 14 different tribes to support their implementation of SDVCJ. [But only] four implementing tribes—Tulalip, Little Traverse Bay Band, Eastern Band of Cherokee Indians, and Standing Rock—[had] received any of these grant funds.” *Id.* at App. B; see also Seth J. Fortin, Discourse, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. 88, 97 (2013).

20. “Taking stock” means to inventory and appraise resources or prospects. *Take Stock*, DICTIONARY.COM, <https://www.dictionary.com/browse/take--stock> (last visited Jan. 24, 2022).



year anniversary of TLOA's enactment, and the five-year mark for implementation of VAWA 2013's Indian Country amendments to ICRA. It may also mark the start of a new era of expanded Tribal criminal jurisdiction if, and when, Congress enacts the Violence Against Women Re-Authorization Act of 2021. VAWA 2021 was first proposed in 2018, and it was pending in the Senate as of the publication of this Article. If enacted, VAWA 2021 will further expand Tribes' inherent authority to address wrongdoing in their communities.

The intended audience for this Article is practitioners, judges, policymakers, lawmakers, and scholars who have a working knowledge of the contours of Indian Country criminal jurisdiction and are familiar with ICRA's history and background. Its purpose is twofold. First, to analyze important unresolved legal issues concerning the nature and scope of SDVCJ. Second, to highlight questions that will remain open even if Congress adopts pending VAWA legislation. A concrete, novel, and practical function of this Article is to provide a road map for making informed decisions in structuring charging documents, pretrial motions, jury instructions, and special verdict forms in SDVCJ prosecutions.<sup>21</sup>

In researching this Article, I visited some of the Tribal Nations who were among the first to adopt VAWA 2013 jurisdiction. On those visits, I learned about how some Tribes have reformed their procedural codes and court policies to incorporate TLOA and VAWA 2013 requirements. During my visits, I was given the opportunity to engage in conversation with Tribal judges, prosecutors, defense counsel, advocates, and court personnel, and to observe court proceedings, all which helped me better understand how the VAWA 2013 amendments to ICRA intersect with Tribal law and sovereignty interests. In each community, I was graciously welcomed into meetings, courthouses, and offices, to observe how Tribal communities. I am grateful for the many courtesies that were extended to me on my visits and would like to dedicate this Article to the Fort Peck Assiniboine & Sioux Tribes, the Pascua Yaqui Tribe, the Tulalip Tribes, the Confederated Tribes of the Umatilla Indian Reservation, and other Tribal Nations exercising or contemplating opting into VAWA jurisdiction. It is my hope that the research and observations here will help untangle some of the many complexities Congress and the Court have injected into Indian Country criminal jurisdiction.

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21. See NCAI, FIVE-YEAR REPORT, *supra* note 14, at 32 (“[T]ribes take different approaches to clarifying and asserting their jurisdiction. Many tribes provide a simple statement of jurisdiction early on in the proceedings that clearly includes their expanded authority under SDVCJ, and then resolve any specific challenges to their jurisdiction as they arise . . . . However, other tribes . . . create processes that require dealing with jurisdictional questions as a procedural step for all of their SDVCJ prosecutions. These jurisdictional hearings can be time consuming, require the prosecution to collect and develop a separate set of evidence, and may lead to the odd situation where a judge is making findings of fact relevant to jurisdiction—some of which touch upon the merits—long before reaching the merits of the case.”). To my knowledge, there are no publicly available model jury instructions or verdict forms for Tribes to consult in SDVCJ prosecutions. This is an undertaking, that in my view, if done well, would be of tremendous value to tribal judges and practitioners.

### I. ICRA'S TRIBAL COURT CRIMINAL PROCEDURE REQUIREMENTS

The 1968 version of ICRA imposes restraints on Tribes in the investigation, prosecution, and punishment of defendants. Many of these provisions are modeled on protections found in the U.S. Constitution. Some, however, are worded differently from their federal constitutional counterparts, and some were not included.<sup>22</sup> As noted, Congress initially limited Tribes' sentencing authority to six months and \$500—the equivalent of a petty misdemeanor in state or federal court.<sup>23</sup> Congress raised that cap in 1986 to one-year and \$5,000—the equivalent of a gross misdemeanor in state or federal court.<sup>24</sup> In 1978, ten years after Congress enacted ICRA, the Supreme Court held in *Oliphant* that Tribes could not exercise criminal jurisdiction over non-Indians who commit offenses in Indian Country without Congress's express authorization.<sup>25</sup> Because Tribes could no longer prosecute non-Indians as a matter of federal law following *Oliphant*, post-1978 ICRA became relevant only to Tribal court prosecutions of Indian defendants.

The 2010 TLOA amendments to ICRA<sup>26</sup> authorized Tribes to adopt limited felony sentencing authority. Under TLOA, participating Tribes can impose sentences up to three years and \$15,000 in fines in two instances—for (1) repeat offenders, or (2) offenses that would be treated as felonies under state or federal law.<sup>27</sup> TLOA also explicitly authorizes “stacking” qualifying sentences consecutively up to a total of nine years of incarceration.<sup>28</sup> As noted above,

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22. The 1968 version of ICRA covers searches and seizures, warrants, double jeopardy, compelled self-incrimination, speedy and public trials, notice of charges, confrontation of witness, compulsory process, assistance of counsel, excessive bail, excessive fines, and cruel or unusual punishments, equal protection, due process, bills of attainder, ex post facto laws, and jury requirements. *See* 25 U.S.C. § 1302(a)(2)–(9). The U.S. Bill of Rights covers all these items *except* ex post facto laws and bills of attainder; these are located in the original U.S. Constitution, not the amendments. *See* U.S. CONST. art. I, § 9, cl. 3; *see also* Frickey, *supra* note 10, at 478 (identifying “the two primary rights ‘missing’ from [the 1968 version of] ICRA [as] free representation for indigent defendants and a jury that includes nonmembers”).

23. As enacted, ICRA provided: “No Indian tribe in exercising powers of self-government shall . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both . . .” The Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202(7), 82 Stat. 73, 77.

24. Congress amended ICRA in 1986 to increase the maximum sentence to one-year imprisonment or \$5,000 fine or both. Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 4217, 100 Stat. 3207-146.

25. *See Oliphant*, 435 U.S. at 208 (noting that Indian Tribes lack criminal jurisdiction over non-Indians who commit crimes in Indian Country “absent affirmative delegation of such power by Congress”).

26. Indian Arts and Crafts Amendments Act of 2010, Pub. L. No. 111-211, § 234 (codified in 25 U.S.C. § 1302(b)).

27. 25 U.S.C. § 1302(b) provides: “A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.”

28. *Id.* § 1302(a)(7)(D). Before TLOA, some Tribes were stacking multiple offenses to yield cumulative sentences over ICRA's one year cap. *See, e.g.,* *Romero v. Goodrich*, 480 F. App'x 489, 490 (10th Cir. 2012). While TLOA explicitly authorized stacking, it also put an end to unlimited stacking by capping all sentence lengths at nine years. TLOA's stacking authorization, therefore, could be viewed as a limitation on, not an

Tribes must “opt in” to enhanced sentencing under TLOA. This requires Tribes to extend procedural protections to defendants in addition to those required under ICRA’s 1968 default provisions.<sup>29</sup> TLOA’s additional protections and procedures are triggered when a tribal court imposes a sentence over one year. They comprise:

- Ensuring “effective assistance of counsel at least equal to that guaranteed by the United States Constitution.”<sup>30</sup>
- For indigent defendants, providing, at Tribal expense,<sup>31</sup> “the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.”<sup>32</sup>

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expansion of Tribal sentencing authority. See MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 417 (2011); see also Brief for Respondent-Appellant, *Miranda v. Nielsen*, (9th Cir. 2011) (Nos. 10-15308, 10-15167), 2011 WL 507489 at \*23 (concluding that pre-TLOA ICRA did not prohibit stacking). *But see* Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176, 1182 (D. Minn. 2005).

29. Of course, many Tribes were already providing most, or all of the protections required by TLOA and VAWA 2013, and some provide more expansive protections than those required by the U.S. Constitution in state and federal court. See, e.g., M. Brent Leonhard, *Implementing VAWA 2013*, 62 *FED. LAW.* 52, 55 (2015) (before implementing TLOA in March 2011, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) already provided law-licensed public defenders with J.D.s to “anyone who wanted one, regardless of income,” the Tribal Court’s presiding judge, the Honorable William Johnson, is a “long-time member of the Oregon Bar” with (now over) 30 years’ experience with criminal cases, and “long before VAWA 2013,” the CTUIR Tribal Court included non-Indians in its jury pools).

30. 25 U.S.C. § 1302(c)(1).

31. The 1968 version of ICRA provides for a right to assistance of counsel at a defendant’s own expense, not appointed counsel, even for indigents. See generally Jordan Gross, *VAWA 2013’s Right to Appointed Counsel in Tribal Court Proceedings – A Rising Tide That Lifts All Boats or a Procedural Windfall for Non-Indian Defendants?*, 67 *CASE W. RESV. L. REV.* 379 (2016). TLOA requires appointment of counsel if a tribal court “imposes” a sentence greater than one year. *Id.* at 382. As I explain *infra* in detail, the current indigent right to counsel under ICRA is similar, but not identical, to the Sixth Amendment constitutional right to counsel, as extended to the states under the Fourteenth Amendment. *Id.* Under the Court’s right to appointed counsel jurisprudence, states are only required to provide indigent defendants counsel at public expense in two instances: (1) where the defendant is charged with a felony, or (2) where the defendant is charged with a misdemeanor and actually receives a sentence of incarceration or a suspended sentence of incarceration. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”); see also *Argersinger v. Hamlin*, 407 U.S. 25, 25 (1972) (“No accused may be deprived of his liberty as the result of any criminal prosecution, whether felony or misdemeanor, in which he was denied the assistance of counsel.”). It should be noted that Congress enacted ICRA in 1968, five years after the Court held in *Gideon* that the Fourteenth Amendment requires state trial courts to provide appointed counsel to indigents at public expense in all felony cases. See *Gideon*, 372 U.S. at 344. When Congress enacted ICRA, however, the Court had yet to decide whether the *Gideon* felony right extended to misdemeanor prosecutions. See *Argersinger*, 407 U.S. at 25 (holding that states are required to provide defendants with counsel at public expense for misdemeanor charges that have resulted in incarceration for the defendant). As noted, *supra* note 22, in 1968 ICRA only authorized misdemeanor penalties. Thus, the absence of a right to appointed counsel in the 1968 version of ICRA did not result in a different right to counsel in Tribal court because there was no federal constitutional right to appointed counsel in misdemeanor cases at the time.

32. 25 U.S.C. § 1302(c)(2). Congress did not amend the *substance* of the 1968 ICRA default right to counsel provisions with TLOA—it now reads: “No Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b) [sic – “c”]).” *Id.* § 1302(a)(6). Subsections (b) and (c) were added by TLOA, and only apply in TLOA proceedings. The reference to section (b) in 25 U.S.C.

- Staffing TLOA cases with judges who are licensed to practice law and have “sufficient legal training to preside over criminal proceedings.”<sup>33</sup>
- Making criminal laws, rules of evidence, and rules of criminal procedure publicly available.<sup>34</sup>
- Maintaining records of TLOA criminal proceedings, including an audio or other recording of the trial proceeding.<sup>35</sup>

Tribes exercising TLOA sentencing authority must also have access to appropriate long-term incarceration facilities.<sup>36</sup> As with ICRA’s default provisions, TLOA provisions, standing alone, apply only to Indian defendants.

Congress most recently amended ICRA with VAWA 2013.<sup>37</sup> VAWA 2013 partially repudiated the Supreme Court’s 1978 *Oliphant* decision by recognizing Tribes’ inherent sovereign authority to exercise criminal jurisdiction over “any person,” including non-Indians, subject to exceptions and restrictions. To exercise VAWA 2013 jurisdiction, Tribes must extend all the

§ 1302(a)(6) appears to be a typo—section (b) is an enhanced sentencing provisions and section (c) covers the procedural that a tribal court must provide under TLOA when it exercises the enhanced sentencing powers described in section (b), including the right to counsel at public expense for indigents. The “counsel” referenced in ICRA’s 1968 default provisions is not required to be bar licensed. This reflects a well-established practice in some Tribal courts authorizing lay advocates to represent litigants. *See, e.g.*, CROW TRIBAL CT. RULES OF PRO. CONDUCT 1.3(6) (defining “legal counsel,” for the purposes of governing the practice of attorneys and lay advocates, as “an attorney or lay advocate permitted to practice in the Crow Tribal court system”) (Crow App. Ct. 2005), <https://www.ctlb.org/wp-content/uploads/2016/02/CrowTribal-Court-Rules-of-Professional-Conduct.pdf>. The use of lay advocates in Tribal courts is a legacy of federal laws and policies that up until 1961 prohibited law-licensed attorneys from appearing in Tribal courts. *See* 25 C.F.R. §§ 11.9, 11.9CA (1958), repealed by 26 Fed. Reg. 4,360-61 (May 19, 1961).

33. 25 U.S.C. § 1302(c)(3).

34. *Id.* § 1302(c)(4).

35. *Id.* § 1302(c)(5).

36. A Tribe imposing a sentence over one-year for a qualifying offense must meet the following detention criteria – inmates must be housed in: (1) “a tribal correctional facility approved by the Bureau of Indian Affairs (BIA), U.S. Department of Interior, for long-term incarceration, in accordance with guidelines to be developed by the [BIA] (in consultation with Indian tribes);” (2) “the nearest appropriate Federal facility, at the expense of the United States pursuant to a Bureau of Prisons tribal prisoner pilot program described in section 304(c)(1) of [TLOA];” (3) “a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government”; or (4) “an alternative rehabilitation center of an Indian tribe . . . .” Pub. L. No. 111-211, § 234(d) (codified in 25 U.S.C. § 1302(d)). Alternatively, a Tribe can require a TLOA defendant to serve a different form of punishment pursuant to tribal law. *Id.* Pending amendments to TLOA would clarify responsibility for long-term Tribal inmates’ medical care. *See* Tribal Law and Order Reauthorization and Amendments Act of 2019, S. 210, 116th Cong. (2019); *see also* M. BRENT LEONHARD, UMATILLA’S EXPERIENCE WITH TLOA FELONY SENTENCING (2012), <http://www.tribal-institute.org/2012/Pre%20conference%20MBL%20ppt%20pre-conference.pdf>; *Pascua Yaqui Tribe VAWA Special Domestic Violence Criminal Jurisdiction*, TRIBAL ACCESS TO JUST. INNOVATION, <http://www.tribaljustice.org/places/cross-jurisdictional-collaboration/violence-against-women-act-special-domestic-violence-criminal-jurisdiction/https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/TLOAESAQuickReferenceChecklist.pdf>.

37. Pub. L. No. 113-4, 127 Stat. 54 (2013). VAWA 2013 added a section to ICRA titled “Tribal Jurisdiction Over Crimes of Domestic Violence,” authorizing “participating” tribes “to exercise special domestic violence criminal jurisdiction over all persons” (i.e., over Indians and non-Indians) who commit specific offenses in Indian Country. 25 U.S.C. § 1304.

procedural protections required under ICRA’s 1968 default provisions<sup>38</sup> and the TLOA protections listed above.<sup>39</sup> In addition, Tribes must provide VAWA 2013 defendants an impartial jury, as defined by federal constitutional criminal procedure jurisprudence.<sup>40</sup> VAWA 2013 also introduced a “catch-all” provision in Section 1304(d). It requires participating Tribes to extend “all other rights whose protection is necessary under the Constitution . . . in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction . . . .”<sup>41</sup>

An important threshold issue under VAWA 2013 is who can claim its protections—any defendant charged with a VAWA 2013-eligible offense, or just non-Indian defendants? On their face, the VAWA 2013 amendments to ICRA do not clearly differentiate between non-Indian and Indian defendants in a VAWA prosecution. Indeed, Section 1304 recognizes and affirms the “the inherent power of [a VAWA 2013-participating] tribe . . . to exercise special domestic violence criminal jurisdiction over *all persons* . . . .”<sup>42</sup> Section 1304, however, also describes SDVCJ as “the criminal jurisdiction that a participating tribe may exercise under this section *but could not otherwise exercise*.”<sup>43</sup> Since all Tribes can “otherwise exercise” criminal jurisdiction over all Indians, Section 1304 adds nothing to participating Tribes’ jurisdictional reach. Thus, it is a fair reading of VAWA 2013 that SDVCJ defendants were intended (only) to be non-Indians and that VAWA 2013’s heightened procedural protections are only required in Tribal prosecutions of non-Indians.<sup>44</sup>

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38. *Id.* § 1302(a).

39. *Id.* § 1302(c).

40. Section 1304(c) sets out the “Rights of defendants” in VAWA 2013 prosecutions:

In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—(1) all applicable rights under this Act [i.e. the rights set out in the general provisions of ICRA found at 25 U.S.C. § 1302(a)]; (2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title [the TLOA amendments to ICRA]; (3) the right to a trial by an impartial jury that is drawn from sources that—(A) reflect a fair cross section of the community; and (B) do not systematically exclude any distinctive group in the community, including non-Indians; and (4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

*Id.* § 1304(c)(3)–(5). With respect to jury rights, it requires a trial by an impartial jury that is drawn from a fair cross section of the community and that does not systematically exclude any distinctive group in the community, including non-Indians. *Id.* This language tracks exactly (and presumably was designed to capture and incorporate) the Supreme Court’s impartial jury right jurisprudence. *See infra* note 45, and accompanying text.

41. 25 U.S.C. § 1304(d).

42. *Id.* § 1304(b)(1) (emphasis added).

43. *Id.* § 1304(a)(6) (emphasis added).

44. As noted, many Tribes were already extending the protections set out in TLOA and VAWA 2013 to all defendants in their courtrooms, and Tribes can, and do, extend VAWA 2013’s heightened protections to Indian defendants as well as non-Indian defendants. *See, e.g.*, Leonhard *supra* note 29, at 55 (the CTUIR “made all the necessary changes to its Criminal Code to exercise criminal jurisdiction over non-Indian domestic violence cases, and also guaranteed all of the rights of non-Indian defendants to all defendants regardless of citizenship status or level of offense”). As with the TLOA rights discussed above, in 1968, the Court had not yet

SDVCJ is defined and described in Section 1304 of ICRA. Section 1304 limits SDVCJ to certain offenses, committed by certain non-Indians, under certain circumstances. It does this in two places—in Section 1304(a), a definition provision, and in Section 1304(b), a description provision. Section (a) defines the following for purposes of SDVCJ—“dating violence,”<sup>45</sup> domestic violence,<sup>46</sup> Indian country,<sup>47</sup> participating tribe,<sup>48</sup> protection order,<sup>49</sup> special domestic violence criminal jurisdiction,<sup>50</sup> and spouse or intimate partner (which is, in turn, defined by reference to federal statutory criminal law).<sup>51</sup> Section (b) describes the “nature of [tribal court] jurisdiction”<sup>52</sup> as including the inherent power of participating tribes to exercise SDVCJ over “all persons” (that is, not just Indians).<sup>53</sup> It provides that participating Tribes’ jurisdiction is concurrent with that of the other sovereigns,<sup>54</sup> and that nothing in Section 1304 creates or eliminates any Federal or State Indian country jurisdiction, or affects the existing authority of those sovereigns to investigate and prosecute crimes committed in Indian Country.<sup>55</sup>

Section 1304(b) next sets out two “exceptions” to the jurisdiction just described. The first exception is labeled “victim and the defendant are both non-Indians.”<sup>56</sup> It provides: “[a] participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant

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developed the impartial jury right definition that Congress later incorporated into VAWA 2013. *See supra* note 40 and accompanying text. That definition—based on the Court’s fair cross section/systematic exclusion jury selection jurisprudence—was introduced in 1980s. *See Duren v. Missouri*, 439 U.S. 357, 364 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

45. 25 U.S.C. § 1304(a)(1).

46. *Id.* § 1304(a)(2).

47. Section 1304(a)(3) defines “Indian country” by reference to Section 1151 of Title 18, the Federal Criminal Code; to wit:

Except as otherwise provided in sections 1154 and 1156 of this title, the term ‘Indian country’, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

48. Section 1304(a)(4) defines “participating tribe” as “an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.”

49. *Id.* § 1304(a)(5).

50. *Id.* § 1304(a)(6) defines “special domestic violence criminal jurisdiction” as “the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.”

51. *Id.* § 1304(a)(7).

52. *Id.* § 1304(b)(1).

53. *Id.*

54. *Id.* § 1304(b)(2).

55. *Id.*

56. *Id.* § 1304(b)(4)(A). The apparent purpose of this provision was to preserve the Supreme Court’s *McBratney v. United States* jurisdictional “carve out,” under which tribes were said to lack criminal jurisdiction over crimes, including so-called “victimless” crimes, committed by non-Indians in Indian Country. 104 U.S. 621 (1881); *see also infra* note 109 and accompanying text. Note that offenses committed by Indians fall within the tribe’s pre-existing inherent criminal jurisdiction over all Indians, regardless of the Indian status of the victim.

nor the alleged victim is an Indian.”<sup>57</sup> This first exception contains an internal definition of “victim” for offenses involving violations of a protection order. In that context, “victim” means a person specifically protected by the protection order a defendant is alleged to have violated.<sup>58</sup> The second exception is labeled “[d]efendant lacks ties to the Indian tribe.”<sup>59</sup> It provides that “[a] participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant”:

- Resides in the Indian Country of the participating tribe,
- Is employed in the Indian Country of the participating tribe or
- Is a spouse, intimate partner, or dating partner of (1) a member of the participating tribe; or (2) an Indian who is not a member of the participating tribe, but who resides in the Indian Country of the participating tribe.<sup>60</sup>

Finally, Section 1304(c) sets out two categories of conduct subject to SDVCJ. The first is domestic and dating violence. The second is violations of a protection order that:

- Prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person,
- Was issued against the defendant,
- Is enforceable by the participating tribe and
- Is consistent with 18 U.S.C. § 2265(b).<sup>61</sup>

As with other federal Congressional and Court forays into Indian Country criminal jurisdiction, this statutory scheme creates layers of extraordinary complexity. If Indian country jurisdiction, writ large, is a “jurisdictional

57. 25 U.S.C. § 1304(b). As discussed further, for purposes of ICRA, the term “Indian” is defined by reference to federal criminal statutory law. See *infra* note 142, and accompanying text.

58. 25 U.S.C. § 1304(b)(4)(A)(ii).

59. *Id.* § 1304(b)(4)(B).

60. *Id.* Notably, this omits jurisdiction over crimes by non-Indians against Indians who are not *members* of the participating Tribe unless the Indian victim also lives in that community, even if the crime and the non-Indian defendant’s relationship with an Indian victim meet the rest of the statutory criteria. Although SDVCJ is commonly described as granting jurisdiction over intimate partner and domestic violence crimes committed by certain non-Indians against Indians in Indian Country, it is not quite that broad because of this provision since it requires non-member Indians to also have some connection to the participating Tribe – *to wit*: residence in the participating Tribe’s jurisdiction.

61. 25 U.S.C. § 1304(c)(2)(B). 18 U.S.C. § 2265 requires state and Tribal courts to extend full faith and credit to the protection orders of other states and Tribes “as if it were the order of the enforcing State or tribe” as long as it is in compliance with 18 U.S.C. § 2265(b). Section (b) requires, *inter alia*, that the court issuing the protection order have jurisdiction over the parties and matter involved and that they provide notice and an opportunity to be heard to the person against who an order is sought or entered. Subsection (e) recognizes Tribes have full civil jurisdiction to issue protection orders involving “any person” (not limited to Indians), including the authority to enforce any orders through civil contempt proceedings, to exclude violators from their land, and to use other appropriate mechanisms, in matters arising anywhere that is within the authority of that Tribe.

maze,”<sup>62</sup> VAWA 2013 SDVCJ is a maze within a maze. As is apparent from the outline above, the multitude of considerations relevant to a Tribe’s exercise of SDVCJ presents a mix of facts (whether the victim and defendant were in a social relationship of a romantic or intimate nature; whether the defendant has ties to the community) and mixed questions of fact and law (whether a victim or defendant is an “Indian”; whether the crime occurred in the Indian Country of that Indian Tribe).

## II. INTERPRETATIONS AND OPEN QUESTIONS

ICRA’s VAWA 2013 provisions do not create new crimes, nor do they, strictly speaking, add elements to existing crimes. Congress could have created new Indian Country crimes or elements based on the facts and circumstances it has deemed relevant to SDVCJ. It did not. What it did was: (1) describe a jurisdiction that reaches “all persons,” subject to exceptions (*to wit*—crimes involving only non-Indians as defendants and victims; crimes committed by non-Indians who lack ties to the participating Tribe; and crimes committed by non-Indians against Indians who are not members of, and have no ties to, the participating Tribe); and (2) describe, generally, categories of offenses that can fall within a participating Tribe’s SDVCJ (*to wit*—domestic and dating violence, and violations of certain orders of protections). This Article explores two legal issues raised by the structure of SDVCJ. First, are proof of SDVCJ facts and circumstances essential to a Tribal court’s adjudicative power such that their absence deprives a Tribal court of subject matter jurisdiction over prosecution against a non-Indian defendant?<sup>63</sup> The second, related, question is whether SDVCJ facts and circumstances present questions of law (to be decided by the trial court), questions of fact (reserved for the jury), or mixed questions of law and fact (with roles for both the court and the jury)?<sup>64</sup> These questions require an examination of a critical threshold issue—the extent to which interpretation of ICRA’s VAWA 2013 provisions are governed by federal common law. This

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62. This widely-used term was introduced by Professor Clinton in his seminal article on the subject. *See generally* Robert N. Clinton, *Criminal Jurisdiction over Indian Land – A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

63. As a general proposition, true adjudicative jurisdictional elements are for a court to decide, while other elements are for the jury. *See* William M. Carter, Jr., “Trust Me, I’m a Judge”: *Why Binding Judicial Notice of Jurisdictional Facts Violates the Right to Jury Trial*, 68 MO. L. REV. 649 (2003).

64. *See United States v. Gaudin*, 515 U.S. 506, 512 (1995) (issues requiring the application of legal standards to facts, “commonly called a ‘mixed question of law and fact,’ [are] typically . . . resolved by juries”). As others have noted, identifying mixed questions of fact and law can be an “elusive” undertaking. *See* Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 101 (2005) (“Black’s Law Dictionary offers a definition that is perfectly clear and perfectly circular: ‘A question depending for solution on questions of both law and fact but is really a question of either law or fact to be decided by either judge or jury.’”). An example of a mixed question might include where a person is “domiciled” for purposes of diversity jurisdiction, which turns on historical facts such as where the person lives, and whether she lives there fulltime, but “the ultimate decision requires applying these historical facts to the definition of domicile” which requires “the decision-maker to determine whether a particular set of facts falls within a legal definition.” *Id.* at 122.



point is considered first since it informs the two main lines of inquiry outlined above.

A. HOW MUCH FEDERAL CONSTITUTIONAL COMMON LAW DOES VAWA 2013 INJECT INTO SDVCJ PROSECUTIONS?

1. Section 1304(d)'s "All Other Rights" Requirement

As noted, under Section 1304(d) of ICRA, Tribes exercising SDVCJ must provide the VAWA 2013 defendant "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe."<sup>65</sup> Section 1304(d)'s legislative history indicates its purpose was to build in flexibility for participating Tribes to develop procedural rules and policies as they exercise jurisdiction over non-Indians for the first time in generations. In debating this provision, Congress recognized that the question of "which rights are fundamental to our justice system can evolve over time . . . [and that this] provision does not require tribal courts to protect all federal constitutional rights that federal courts are required to protect (for example, the Fifth Amendment's grand-jury indictment requirement, which state courts are also not required to protect)."<sup>66</sup> Rather, Congress intended this provision to provide Tribes "the flexibility to expand the list of protected rights to include a right whose protection the 113th Congress did not foresee as essential" to participating Tribes' exercise of SDVCJ.<sup>67</sup>

It is well established under federal law that Tribes are not required to interpret ICRA provisions with federal constitutional analogs the same way as federal courts interpret the Bill of Rights or other constitutional rights.<sup>68</sup> Nonetheless, some Tribal courts have concluded that if a provision in ICRA is worded exactly the same as its constitutional cousin, Tribal courts should exercise less interpretive flexibility.<sup>69</sup> Congress's TLOA and VAWA 2013

65. 25 U.S.C. § 1304(d)(4).

66. See Prop. Treas. Reg., 78 Fed. Reg. 71,645, 71,649 (Nov. 29, 2013); see also Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 488 (2000) ("[T]ribal courts[, and not federal courts,] have doctrinally developed the meaning of ICRA's substantive provisions.").

67. Prop. Treas. Reg., 78 Fed. Reg. 71,645, 71,649 (Nov. 29, 2013).

68. See sources cited *infra* note 70.

69. See *Swinomish Tribal Community v. Peters*, 15 Am. Tribal Law 377, 380 (Swinomish Tribal Ct. 2018) ("While tribes are not generally bound by Federal and state court's interpretations of the provisions and protections of the U.S. Constitution, where the language of the Indian Civil Rights Act is identical to protections afforded by the Bill of Rights, the tribal court must closely follow the precedent set by these other courts."); see also *Alvarez v. Lopez*, 835 F.3d 1024, 1028–29 (9th Cir. 2016) ("If the rights are 'the same,' then we would employ federal constitutional standards when determining whether or not the Community violated Alvarez's rights under ICRA, [but] [w]here the tribal court procedures under scrutiny differ significantly from those commonly employed . . . courts weigh the individual right to fair treatment against the magnitude of the tribal interest . . . to determine whether the procedures pass muster under ICRA . . . . This balancing test reflects a 'compromise intended to guarantee that tribal governments respect civil rights while minimizing federal interference with tribal culture and tradition.'") (citing *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897,

amendments to ICRA clearly evince Congress's intent that some of ICRA's new procedural protections will incorporate federal constitutional common law. For example, the TLOA right to counsel, incorporated by reference into VAWA 2013, obligates Tribes to guarantee defendants "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution."<sup>70</sup> "Effective assistance of counsel" is a legal term of art reflected in the federal common law as a standard for evaluating whether an attorney's performance has deprived a defendant of their federal Sixth Amendment right to assistance of counsel.<sup>71</sup> As discussed extensively, in another article, this language unequivocally tethers the *quality* of a TLOA and VAWA 2013 Tribal court defendant's legal representation to the federal common law Sixth Amendment *Strickland* standard.<sup>72</sup> Similarly, Congress borrowed from federal constitutional common law to describe a VAWA 2013 defendant's jury right—*to wit*: a jury drawn from a fair cross section of the community using a procedure that does not systematically exclude any distinctive group in the community.<sup>73</sup>

Thus, Congress has provided *standards* that will govern the competence of TLOA and VAWA 2013 counsel, and the composition of VAWA 2013 juries.<sup>74</sup>

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900 (9th Cir. 1988); *Howlett v. Salish*, 529 F.2d 233, 238 (9th Cir. 1976); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 467 (1998).

70. 25 U.S.C. § 1302(c)(1) (emphasis added). The 1968 version of ICRA does not contain an explicit right to effective assistance of counsel, nor does it require that counsel be bar-licensed. It is important to note that, in 1968, the Court had not yet defined the federal constitutional right to counsel to require "effective" assistance of counsel: that came in 1984 under *Strickland v. Washington*. 466 U.S. 668 (1984). *Strickland* resolved a federal circuit split concerning the source and existence of a right to effective assistance of counsel, and the test federal courts would use when reviewing state court convictions to police compliance with the federal constitutional right. *Id.* Since there was no federally recognized right to effective assistance of counsel in 1968, the absence of an explicit federal statutory right to effective assistance of counsel in the 1968 version of ICRA is unremarkable. It should be further noted that when Congress amended ICRA in 2010 with TLOA, it did not make the effective assistance of counsel applicable to all tribal court defendants, just defendants to TLOA-enhanced sentencing. Tribes, of course, can and do regulate and monitor the effectiveness of counsel. However, there is no explicit federal statutory right to effective assistance of counsel under ICRA's 1968 default provisions. Presumably, by not imposing the effective assistance of counsel standard and bar licensure provisions on ICRA's default provisions, Congress intended to leave Tribal courts the option of using lay advocates for non-Indian defendants in non-TLOA prosecutions.

71. *Id.*

72. See Jordan Gross, *Through a Federal Habeas Corpus Glass, Darkly – Who Is Entitled to Effective Assistance of Counsel In Tribal Court and How Will We Know If They Got It?*, 42 AM. INDIAN L. REV. 1 (2017). As also discussed, Congress used a different standard for identifying the circumstances that trigger the right to appointed counsel for indigent tribal court defendants that is not co-extensive with the Court's Sixth Amendment right to appointed counsel jurisprudence. 25 U.S.C. § 1302(c)(5).

73. 25 U.S.C. § 1304(d). Section 1304(d) sets out the procedural rights that must be extended to VAWA 2013 defendants. With respect to jury rights, it requires a trial by an impartial jury that is drawn from a fair cross section of the community and that does not systematically exclude any distinctive group in the community, including non-Indians. This language tracks exactly (and presumably was designed to capture and incorporate) the Supreme Court impartial jury right jurisprudence. See *supra* note 51.

74. Which makes sense since these two rights are, in a sense, "new." As noted, before TLOA there was no right to appointed counsel for indigent Tribal court defendants (and there is still none under ICRA's default provisions); before VAWA 2013 and post-*Oliphant*, federal law had restricted tribal court's jurisdiction over non-Indians. This made a "fair cross section" requirement to ensure Tribes do not exclude non-Indians from jury service in cases involving non-Indians unnecessary.

By using terms of art that bring with them a well-developed body of federal common law, Congress appears to have left little interpretive flexibility for Tribal courts in applying these specific provisions of ICRA.<sup>75</sup> With respect to other procedural rights set out in ICRA that have a federal constitutional analog, but that Congress has not tethered to a Court doctrine, Congress appears to have left the interpretive doctrine intact.<sup>76</sup> In other words, by leaving the rest of the vast and sprawling Fourteenth Amendment jurisprudence universe unmentioned, outside of the provisions above, Tribal courts should be free to interpret ICRA's due process guarantee independently from federal common law.<sup>77</sup>

This observation is subject to the very significant caveat already identified—VAWA 2013's "catch-all" requiring participating Tribes to extend "*all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction . . .*"<sup>78</sup> This provision could be read to further modify the amount of flexibility Tribal courts retain under federal law to interpret ICRA's due process guarantee for purposes of a VAWA 2013 prosecution.<sup>79</sup> But what "all

75. Under the two-part *Strickland* inquiry, a defendant seeking to challenge their conviction based on the denial of effective assistance bear the burden of establishing both that counsel's performance was deficient and that they were prejudiced thereby. 466 U.S. at 687–96. Outside of state capital cases, the Court has shown little appetite for overturning convictions, usually because the prejudice prong is rarely found to be met. Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515 (2009). As a result, courts have found that defendants whose attorneys were sleeping or drunk have received everything the U.S. Constitution promised them. *Id.* at 526 ("Courts rarely reverse convictions for ineffective assistance of counsel, even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable. In short, any lawyer with a pulse will be deemed effective.") (quoting Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 (footnote omitted) (quoting Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786 (1999) (book review)). The irony in the Tribal court context is that although the "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution" may sound like a lot, under the Court's jurisprudence, it may guarantee nothing more than a person with a law license who can fog a mirror.

76. See generally *ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1722 (2016) ("By way of illustration, the TLOA added a provision to ICRA requiring that, in cases involving terms of imprisonment greater than one year, tribes must provide 'the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.' No other provision directly ties the rights in ICRA to those in the Federal Constitution. Under the canon of *expressio unius est exclusio alterius*, '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' At the very least, Congress's express introduction of the federal standard in the instance of effective assistance of counsel removes from ICRA the term-of-art presumption, because such a presumption would render the entire clause superfluous.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

77. See, e.g., *Tom v. Sutton*, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976) ("We note in passing that the courts have been careful to construe the terms 'due process' and 'equal protection' as used in the Indian Bill of Rights with due regard for the historical, governmental, and cultural values of an Indian tribe. As a result, these terms are not always given the same meaning as they have come to represent under the United States Constitution.").

78. 25 U.S.C. § 1304(d).

79. See *ICRA Reconsidered*, *supra* note 76, at 1720 ("The question of who the ultimate determiner of rights should be cannot remain an ominous sword of Damocles, dangling over tribal courts and threatening at any moment to destroy their jurisprudence. If Congress is seeking to provide federal rights in the same way to Indians

other rights” comprises is an open question. As I have observed elsewhere, it is not clear if Section 1304(d) links ICRA criminal procedure in VAWA 2013 prosecutions to the Court’s Fourteenth Amendment due process incorporation jurisprudence. Or, alternatively, whether it creates an additional, and potentially larger or narrower, body of rights for VAWA 2013 prosecutions.<sup>80</sup>

For purposes of this discussion, and to provide a platform for the discussion that follows, I assume Congress intended Section 1304(d) to mean the minimum federal constitutional procedural protections a Tribal court VAWA 2013 defendant could claim if they were being prosecuted in state court. Since Tribal court procedure does not arise “under the Constitution,” this language can only be referring to rights like those required in state and federal prosecution to meet basic due process guarantees under the U.S. Constitution. Under this interpretation of Section 1304(d), one possibility of what Congress intended “all other rights” to entail would be evaluated by reference to what the Court has deemed minimally necessary under the Fourteenth Amendment for the federal system to recognize a state court conviction as sufficiently reliable. Specifically, the procedural protections in the Constitution that have been deemed “among those fundamental rights necessary to our system of ordered liberty.”<sup>81</sup> A problem with this interpretation, however, is that this provision does not say that the “all other rights” are those “whose protection is necessary under the Constitution” to ensure due process in state court. Rather, it reads “whose protection is necessary . . . for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction.”<sup>82</sup> Contrary to the reading above, this could signal an intention that the “all other rights” language be interpreted by reference to Tribes’ inherent power to exercise criminal jurisdiction in their territories.

Section 1304(d) raises a host of secondary issues. For example, if a Tribal court follows federal common law in a VAWA 2013 prosecution of a non-Indian, can it follow a different interpretation of a non-VAWA 2013 ICRA provision in a prosecution of an Indian defendant for the same conduct? If so, does that offend ICRA’s equal protection guarantee? More pragmatically, is that even workable? The point is not that Tribal courts are incapable of juggling two bodies of common law. Tribal and state courts regularly interpret their own constitutions and laws against the backdrop of federal law. But state courts are

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as to non-Indians, it is failing. In the same vein, if Congress instead is trying to empower tribes to protect civil rights in their own way, the uncertainty surrounding ICRA is causing tribes to hesitate and some federal courts to return to federal jurisprudence as a guide to ICRA’s provisions.”).

80. See generally Jordan Gross, *Incorporation by Any Other Name? Comparing Congress’ Federalization of Tribal Court Criminal Procedure with the Supreme Court’s Regulation of State Courts*, 109 KY. L.J. 299 (2021).

81. *McDonald v. Chicago*, 561 U.S. 742, 778 (2010) (Second Amendment right to bear arms enforceable against the states). Note that this may be a moving target and not all Justices agree that the proper vehicle for incorporation is the Fourteenth Amendment’s Due Process clause, rather than its Privileges and Immunities clause. See *id.* (Thomas, J., concurring).

82. 25 U.S.C. § 1304(d)(4).

not doing this for a select group of defendants but, rather, for all defendants in their courts. It is not entirely clear what to make of Section 1304(d)—perhaps it was meant to placate members of Congress uneasy at the prospect of Tribes prosecuting non-Indians in their courts for the first time in decades. Maybe it is one more way to “coax” Tribal court procedure into more conformity with federal common law. More cynically, it could also be read as an opening for federal courts to expand the scope of their habeas review of Tribal court convictions involving non-Indians.

I have posed the question whether the many conditions Congress has placed in the path of participating Tribes’ ability to exercise SDVCJ are adjudicative requirements, and who—the court, the jury, or some combination thereof—can or must determine whether those facts and circumstances are present. These are questions that depend, to a large extent, on how much federal constitutional common law Section 1304(d) brings with it, particularly with respect to the nature of Indian Country criminal jurisdiction. This includes facts such as the Indian Country status of the location of a crime, the Indian status of a victim, whether a non-Indian defendant or a non-member Indian victim have sufficient ties to a Tribal community, and the nature of the offense. These facts and circumstances are sometimes, collectively, treated as jurisdictional prerequisites, or elements of an offense that must be submitted to the jury.<sup>83</sup> I propose a more technical reading of ICRA’s VAWA 2013 facts and circumstances that leads to a different, or at least a more compartmentalized, understanding of the contours of SDVCJ. As discussed below, there is a good argument under federal common law that some SDVCJ facts and circumstances act more like affirmative defenses than elements of a crime. And, even with respect to SDVCJ facts and circumstances that are elements of a VAWA 2013-eligible Tribal offense, it does not follow that a participating Tribe’s legitimate exercise of jurisdiction over non-Indians hinges on them, or even that all of them must be found by a jury, instead of by a court.

## 2. *Criminal Jurisdiction and Elements*

Anglo criminal law, very generally speaking, requires two things for a tribunal to exercise adjudicative power (that is, to issue binding orders) over an alleged violation of the sovereign’s criminal law—jurisdiction over the person and subject matter jurisdiction. To frame the discussion that follows, this section provides a short review of: (1) the nature of criminal jurisdiction in the U.S. legal

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83. See, e.g., NCAI, FIVE-YEAR REPORT, *supra* note 14, at 32, 64 (“[T]ribes such as Pascua Yaqui treat the jurisdictional requirements as elements of the crime, and leave those questions for trial. Two of Pascua Yaqui’s trials, however, demonstrated that this strategy can result in a significant waste of resources. In both cases, the offender was acquitted by a jury on jurisdictional grounds: in one case, because the jury was not convinced that the two individuals had a relationship that meets the intimate partner requirement of SDVCJ, and, in the second case, because the jury was not convinced that the defendant was a non-Indian. The ITWG has discussed at length the issue of whether the non-Indian status of defendants must be specifically alleged and proved. There is no textual basis in the federal statute to suggest that this is required.”).

system, and (2) the different types of elements of a criminal offense. The first concept informs the extent to which Tribal and state courts must conform to federal law in exercising criminal jurisdiction. The second illustrates how the law distinguishes between “adjudicative” requirements, on one hand, and “merits” elements (also called “substantive” elements), on the other.

a. Bases of Criminal Jurisdiction

International law, as reflected in U.S. federal law, recognizes five bases on which a sovereign can assert criminal jurisdiction over wrongdoing. One, territorial criminal jurisdiction, which is based on the locus or effects of a crime within a geographical boundary.<sup>84</sup> Under the territorial principle of jurisdiction, the nationality, citizenship, or status of the perpetrator or victim is irrelevant to the exercise of territorial criminal jurisdiction. Two, nationality jurisdiction, which is based on the allegiance of the citizen-defendant to the prosecuting sovereign.<sup>85</sup> Jurisdiction based on the nationality of the perpetrator can reach crimes committed outside the sovereign’s geographical boundaries. Three, passive personality, which is based on the nationality of the injured person.<sup>86</sup> Four, protective jurisdiction, which is justified by a national interest impacted by a crime and can reach crimes committed outside the sovereign’s geographical boundaries.<sup>87</sup> This might include crimes like treason and espionage. Five, universality. Jurisdiction based on the universality principle rests on the nature of the crime and on the international community’s universal condemnation of the conduct.<sup>88</sup> Examples include crimes against humanity such as genocide and war crimes.<sup>89</sup> The locus of a crime, and the nationality of perpetrator or injured persons are irrelevant to the exercise of criminal jurisdiction under the universality principle.<sup>90</sup>

In the U.S. legal system, criminal jurisdiction over crimes of personal violence is exercised primarily on the territorial principle.<sup>91</sup> Most criminal cases in the United States involve violations of state laws prosecuted by state and local

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84. See *Territorial Rights and Territorial Justice*, STAN. ENCY. OF PHIL. (Mar. 24, 2020), <https://plato.stanford.edu/entries/territorial-rights> (“In the case of territorial rights, the central and fundamental right is the right of jurisdiction, which is the right to create and enforce laws within the domain in question.”); see also AM. SOC’Y INT’L L., *Jurisdictional, Preliminary, and Procedural Concerns*, in BENCHMARK ON INTERNATIONAL LAW § II.A (Diane Marie Amann ed., 2014), [www.asil.org/sites/default/files/benchmark/jurisdiction.pdf](http://www.asil.org/sites/default/files/benchmark/jurisdiction.pdf)

85. AM. SOC’Y INT’L L., *supra* note 84, at § II.A-3.

86. *Id.*

87. *Id.*

88. *Id.* at § II.A-4.

89. *Id.*

90. *Id.*

91. See *United States v. Bowman*, 260 U.S. 94, 98 (1922) (distinguishing between crimes that “affect the peace and good order of the community” like murder, robbery, and arson, which are presumed to be territorial, and other crimes that are “not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated,” which are not presumed to be territorial).

authorities. The jurisdiction of those authorities is defined by state constitutions and laws and, typically, limited to the geographical borders of the prosecuting authority.<sup>92</sup> By way of example, a citizen of Montana who injures a person in North Dakota, is subject to the criminal jurisdiction of North Dakota, not Montana, even if the victim is also from Montana.

The federal government also exercises federal territorial jurisdiction. And it does so in two ways. One, through criminal statutes of national applicability; that is, it asserts territorial criminal jurisdiction within the entire United States over conduct that implicates a national interest. It is an offense against the U.S. government, for example, to rob a federally insured bank, to commit money laundering,<sup>93</sup> or to traffic certain quantities of drugs within the boundaries of the United States.<sup>94</sup> Two, the United States exercises territorial jurisdiction through “enclave” jurisdiction. Federal enclaves include locations such as the territorial waters of the United States, and structures and areas situated within the geographic boundaries of a state in which the federal government claims a law enforcement interest. Examples include federal courthouses, post offices, military bases, and National Parks. In exercising enclave jurisdiction, the federal government asserts the authority to prohibit, prosecute, and punish conduct that would otherwise be subject to the jurisdiction of a local authority, but for the fact that it occurred in a federal enclave.<sup>95</sup>

By way of example, there are no general federal laws prohibiting driving under the influence (DUI) within the United States. But if a DUI is committed in a federal enclave, such as a federal campground or a military base, the United

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92. Criminal jurisdiction over violations of state law is typically prosecuted by county or district attorneys under a delegated authority from the states and their jurisdiction is usually bounded by county or district lines. Thus, State trial court jurisdiction in the United States is typically unitized by county or district.

93. See 18 U.S.C. § 1956(a)(2). Congress has also made it a federal crime to engage in money laundering outside the United States if some aspect of the crime occurs within the United States. *Id.* § 1956(b)(2).

94. This type of jurisdiction is often exercised concurrently with another sovereign. So, for example, if a person distributes a controlled substance in Montana, and that conduct violates both federal and Montana law, both sovereigns can prosecute and punish the conduct under their respective laws.

95. Federal enclaves are areas within states over which jurisdiction has been transferred to the U.S. government by cession or consent. The federal government claims the exclusive authority to determine whether federal or state law will apply in federal enclaves, and whether offenses in federal enclaves will be prosecuted in a federal court. The federal government’s criminal enclave jurisdiction is set out in the federal criminal code at 18 U.S.C. § 7. It provides that the “special maritime and territorial jurisdiction of the United States.” 18 U.S.C. § 7. Buildings and structures such as courthouses and military bases, for example, fall under (3) as “lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.” *Id.* § 7(3). Congress derives its power to legislate in federal enclaves from the U.S. Constitution, Sec. 8, Cl. 17, which provides: “The Congress shall have power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, be Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” U.S. CONST. art. I § 8 cl. 17 (emphasis added).

States claims the authority to prosecute that crime.<sup>96</sup> When the federal government exercises enclave jurisdiction, it will apply federal criminal statutory law, if available. If there is no federal statute on point for a criminal act that occurs within a federal enclave, the federal government can “borrow” from state substantive law. The statute that authorizes the federal government to prosecute defendants in federal court using state law (where no federal criminal law is available) is the Assimilative Crimes Act (ACA).<sup>97</sup> To continue with the DUI example, a defendant charged with driving under the influence within a federal enclave can be prosecuted by the United States under its enclave jurisdiction. If there is no applicable federal DUI law applicable in that federal enclave, the United States will borrow law from the state within which the federal enclave is situated to charge the defendant and instruct the jury.

Another provision in the federal criminal code, the General Crimes Act (GCA),<sup>98</sup> extends enclave jurisdiction to Indian Country. The GCA incorporates and is also referred to as the Indian Country Crimes Act (ICCA).<sup>99</sup> The GCA/ICCA consists of two paragraphs. The first provides that, except as provided otherwise by federal law, Indian Country is subject to federal enclave jurisdiction:

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96. Some enclaves, like National Parks and military bases, have their own DUI laws. *See* 36 C.F.R. § 4.23 (Driving while impaired by alcohol or other substances on land administered by the National Park Service is a Class B misdemeanor); Uniform Code of Military Justice (UCMJ), Section 911: Art. 111 (intoxicated operation of any vehicle, aircraft, or water vessel prohibited). Note, however, that the UCMJ, 10 U.S.C. § 801 et seq., is not an “Act of Congress,” within the meaning of 18 U.S.C. § 13. *See* *United States v. Walker*, 552 F.2d 566 (4th Cir. 1977), cert. denied, 434 U.S. 848 (1977). Thus, military personnel committing crimes within federal enclave jurisdiction can be prosecuted under a state law assimilated by 18 U.S.C. § 13, even if they are also subject to court martial, if there is no other federal law that applies. In federal enclaves outside National Parks and military bases, state DUI laws apply. Note that if a DUI is committed in Indian Country, and the defendant is an Indian, he could be tried in Tribal court under a Tribe’s DUI laws; if the defendant is a non-Indian, he would be subject to state court jurisdiction, rather than federal Indian country jurisdiction. This is because, as explained below, the Court has carved out a common law exception to federal Indian Country jurisdiction over non-Indians for crimes against other non-Indians and so-called “victimless crimes,” including DUIs that do not involve death or injury to another. *See infra* note 111 and accompanying text.

97. 18 U.S.C. § 13. The Assimilative Crimes Act (ACA) makes state law applicable to reserved or acquired by the federal government under its 18 U.S.C. § 7(3) enclave jurisdiction when the act or omission is not made punishable by an enactment of Congress, for example, when no federal statute criminalizing the conduct exists. When Congress enacted the ACA in the early 1800’s, federal statutory law only defined a handful of crimes for federal enclaves, such as murder and manslaughter. *See* 1 Stat. 113. Unlike state courts, federal courts do not have authority to create common law crimes. *See* *United States v. Hudson*, 7 Cranch 32, 34 (1812); *see also* *Williams v. United States*, 327 U.S. 711, 718–19 (1946) (ACA “fill[s] in gaps” in federal law where Congress has not provided them); *United States v. Sharpnack*, 355 U.S. 286, 292–93(1958); *United States v. Press Publishing Co.*, 219 U.S. 1, 16 (1911) (state laws apply to crimes “not previously provided for by [federal statutory] law”); *Franklin v. United States*, 216 U.S. 559, 568 (1910) (state laws are assimilated if “not displaced by specific laws enacted by Congress”). The Assimilative Crimes Act is extended to Indian Country by 18 U.S.C. § 1152. *See* *Williams v. United States*, 327 U.S. 711, 718–19 (1946); *Duro*, 495 U.S. at 680 n. 1.

98. 18 U.S.C. § 1152.

99. The Indian Country Crimes Act was originally codified at chapter 92, 3 Stat. 383 (1817); it is currently codified, as amended, at 18 U.S.C. § 1152. The ICCA carried over provisions of the Indian Trade and Intercourse Acts of the 1790s. For clarity, these provisions are referred to collectively as the GCA/ICCA. 18 U.S.C. § 1152.



Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States [i.e., federal enclave<sup>100</sup>], except the District of Columbia, shall extend to the Indian country.

The second paragraph of the GCA/ICCA sets out three categories of Indian Country offenses that are excepted from federal enclave jurisdiction. Those are: (1) offenses committed by one Indian against another Indian, (2) offenses committed by an Indian that have been punished by the Tribe in whose territory it was committed, and (3) offenses placed within a Tribe's exclusive jurisdiction by treaty:

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Under the GCA/ICCA, if a crime is committed in Indian Country and it falls into one of these exceptions, jurisdiction lies with the Tribe in whose territory the offense was committed unless Congress has placed that Indian Country outside federal enclave jurisdiction.<sup>101</sup> Stated otherwise, an Indian Country crime that is not subject to one of the three GCA/ICCA exceptions falls within the federal government's Indian Country enclave jurisdiction unless Congress has provided otherwise. Thus, if a non-Indian commits a crime against an Indian in Indian Country subject to the GCA/ICCA, jurisdiction lies with the federal government. If an Indian commits a crime against a non-Indian in Indian Country and the crime has not been punished by the Tribe, jurisdiction lies with the federal government. In addition, under decisional law, the Court, has created a common law carve out to Congress's statutory distribution of Indian Country jurisdiction between the Tribes and the federal government. This carve out, referred to as the "*McBratney*" exception, removes crimes committed by non-Indians in Indian Country from federal jurisdiction in two circumstances—where a crime is victimless, and where the victim of a crime is also non-

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100. The statutory language "within exclusive jurisdiction of the United States," has been construed to specify the law that applies to federal enclaves that are within the exclusive jurisdiction of the United States, not to confer exclusive jurisdiction on the United States over crimes committed in Indian Country. *Ex parte Wilson*, 140 U.S. 575, 578 (1891) (under the GCA/ICCA "the jurisdiction of the United States courts was not sole and exclusive over all offenses committed within the limits of an Indian reservation" because "[t]he words 'sole and exclusive,' in [the General Crimes Act] do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it"); *see also* *Donnelly v. United States*, 228 U.S. 243, 268 (1913) ("[T]he words 'sole and exclusive jurisdiction,' as employed in [the General Crimes Act] do not mean that the United States must have sole and exclusive jurisdiction over the Indian country in order that that may apply to it; the words are used in order to describe the laws of the United States, which, by that section, are extended to the Indian country.").

101. Congress placed many parts of Indian Country outside federal enclave jurisdiction when it enacted PL 280.

Indian.<sup>102</sup> According to the Court, those Indian Country crimes fall within state, not federal or Tribal, jurisdiction.

Congress subsequently created statutory exceptions to federal GCA/ICCA Indian Country enclave jurisdiction. In 1885, under the Major Crimes Act (MCA), it extended federal jurisdiction to certain enumerated offenses (primarily serious violent offenses)<sup>103</sup> committed by Indians in Indian Country, regardless of whether the victim is an Indian or non-Indian, and regardless of whether a Tribe has also prosecuted or punished the offense.<sup>104</sup> The MCA extends federal criminal jurisdiction to Indians who commit an enumerated offense in two locations, and specifies the federal law that applies to those prosecutions.<sup>105</sup> For enumerated crimes committed by Indians within the first location—federal territories—the MCA provides those were to be tried in territorial courts and subject to the laws of the territory.<sup>106</sup> For enumerated crimes committed by Indians within the second location—Indian Country situated within a state, the MCA provides those are subject to the laws of the United States, and are to be tried in federal court.<sup>107</sup> In 1953, Congress created another exception to federal Indian Country enclave jurisdiction when it

102. In *McBratney*, the Court held that, absent treaty provisions to the contrary, states, not the federal government, have exclusive jurisdiction over crimes committed in Indian Country by non-Indians against other non-Indians. 104 U.S. at 624. The Court later extended this exception to victimless crimes, such as deriving under the influence and controlled substances offenses. *See Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984) (within Indian Country, state jurisdiction is limited to crimes by non-Indians against non-Indians and victimless crimes by non-Indians). *Riggle v. State*, 151 N.E.3d 766, 771–72 (Ind. Ct. App. 2020) (analyzing 18 U.S.C. §§ 1152, 1153 and upholding the state court’s jurisdiction to try non-Indian defendant for unlawful possession of a syringe because federal law “dictates that state law applies to a criminal offense . . . committed by a non-Indian on tribal land” if the crime is either “committed against a non-Indian victim or is victimless.”); *State v. Thompson*, 929 N.W.2d 21, 31–32 (Minn. Ct. App. 2019) (State has jurisdiction to prosecute a DWI with no particular victim committed by non-Indian defendant on Indian land) (citing William C. CANBY, JR., *AMERICAN INDIAN LAW* 203–04 (6th ed., 2015)); *People v. Collins*, 826 N.W.2d 175, 177 (Mich. Ct. App. 2012) (“state courts . . . have jurisdiction relative to a criminal prosecution in which a non-Indian defendant committed a ‘victimless’ offense on Indian lands or in Indian country.”). As discussed, above, Congress retained the *McBratney* carve-out in VAWA 2013, which excepts Indian Country crimes by non-Indians against other non-Indians from SDVCJ.

103. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153). The original version of the MCA enumerated seven offenses. The current version of the MCA enumerates thirteen offenses. 18 U.S.C. § 1153(a). These are: murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [to wit: sexual abuse], incest, a felony assault under section 113 [to wit: federal enclave assault], an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 [to wit: federal enclave embezzlement and theft]. *Id.* These enumerated offenses are, for the most part, defined by distinct federal statutes. The Court has held that basing federal criminal jurisdiction on a defendant’s “Indian” status does not violate federal constitutional equal protection or privileges and immunities guarantees because the difference in treatment is not race-based but arises from “political status.” *See United States v. Antelope*, 430 U.S. 641, 646–47 (1977); *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

104. The federal government’s MCA jurisdiction over Indians is concurrent with that of the Tribe in whose territory a crime is committed.

105. 18 U.S.C. §§ 1153, 3242.

106. *Id.*

107. *Id.*

transferred some federal Indian Country jurisdiction to states under Public Law 280 (“PL 280”).<sup>108</sup>

This discussion of Indian Country criminal jurisdiction illustrates that although most criminal jurisdiction in the United States conforms to the territorial principle, exceptions and nuances exist, especially when it comes to Indian Country. In Indian Country, criminal jurisdiction is not exclusively or even primarily based on territorial principles. The MCA and the GCA/ICCA, for example, assign the federal government jurisdiction based on the citizenship of the perpetrator or victim. The *McBratney* doctrine, also based on the citizenship of the perpetrator and victim, gives states jurisdiction over crimes committed within the political boundaries of Tribes and otherwise within the federal government’s enclave jurisdiction. Similarly, PL 280 gives some states jurisdiction over crimes committed in the territory of some Tribes, who are separate sovereigns. Indian Country jurisdiction also includes treaty-based extraterritorial jurisdiction based on citizenship. Some Tribes, for example, exercise off-reservation treaty rights to regulate activities by Indians in off-reservation traditional hunting, fishing, and gathering territories.<sup>109</sup> And many Tribes’ treaties with the federal government contain “Bad Men” provisions that require the federal government to arrest and punish “bad men” subject to the authority of the United States (that is, non-Indians) who commit wrongs against the person or property of an Indian. These treaty provisions place corresponding obligations on Tribes to deliver “bad men” among the Indians to the federal government who commit wrongs against the person or property of anyone subject to the authority of the United States.<sup>110</sup> What distinguishes Indian Country criminal jurisdiction is that it often incorporates territoriality principles and citizenship principles, and may hinge on the Indian or non-Indian status of the perpetrator or victim.

#### b. Subject Matter Jurisdiction

In addition to a recognized theoretical basis on which to assert jurisdiction—such as the territoriality principle or nationality principle—a tribunal must also have subject matter jurisdiction over a proceeding. This means a tribunal must have been vested with power, by constitution or statute, to issue binding orders in a particular category of cases. In the United States, every State

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108. PL 83–280; 18 U.S.C. § 1162; 28 U.S.C. § 1360; 25 U.S.C. §§ 1321–1326. As it is commonly referred to, “Public Law or “PL” 280 transferred federal jurisdiction over offenses committed by or against Indians within Indian Country to six states Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin (referred to as “mandatory” Public Law 280 states). Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U.L. REV., 1627, 1657–58 (1998). PL 280 also provided for future transfers of federal jurisdiction in the rest of the Indian Country states upon the adoption of laws accepting Indian Country jurisdiction (“optional” states). *See id.* at 1632–34.

109. *See generally* Guy Charlton, *The Law of Native American Hunting, Fishing and Gathering Outside of Reservation Boundaries in the United States and Canada*, 39 CAN.-U.S. L.J. 69, 73 (2015).

110. *See generally* *A Bad Man Is Hard to Find*, 127 HARV. L. REV. 2521, 2522 (2014).

and many Tribal Nations operate independent court systems. These systems typically contains different types and levels of courts. This includes trial courts, appellate courts, traffic courts, water courts, and tax courts, to name just a few. The primary distinguishing characteristic of a tribunal is whether it is authorized to exercise general jurisdiction or limited jurisdiction. Relevant to the discussion here, Tribal and State trial courts typically exercise general jurisdiction—that is, they are authorized to hear any and all cases unless explicitly limited by their own laws or the laws of the United States. In contrast, all federal courts, including federal trial courts, are courts of limited jurisdiction.<sup>111</sup> Their authority is bounded by the U.S. Constitution and includes only cases or controversies arising under federal law, and cases meeting constitutional and statutory diversity jurisdiction requirements.<sup>112</sup> Further, the U.S. Constitution does not grant Congress general authority to criminalize any wrongdoing, only conduct that implicates a federal interest.<sup>113</sup> Conduct, therefore, only comes within a federal court’s adjudicative power if Congress or the Constitution gives it that power. And if a federal tribunal is exercising jurisdiction pursuant to a federal statute, that statute must fall within one of Congress’s enumerated constitutional powers.<sup>114</sup>

### c. Merits Elements and Jurisdictional Elements

These points flow into the second concept about elements. All crimes contain “merits” elements (also called “substantive” elements). These are the

111. See *United States v. Prentiss*, 206 F.3d 960, 967 (10th Cir. 2000) (“Federal criminal jurisdiction is limited by federalism concerns; states retain primary criminal jurisdiction in our system.”); see also *Application of Poston*, 281 P.2d 776, 784 (Okla. Crim. App. 1955) (“The district courts of Oklahoma are courts of general jurisdiction.”).

112. Federal courts can only hear cases that fall within the Article III Section 2 federal judicial power. U.S. Const. art III § 2. Lower federal courts, additionally, can only exercise the authority Congress grants to them by statute. See 28 U.S.C. §§ 1251(a), 1253, 1331, 1332(a).

113. See U.S. CONST. art. I, § 8; see also *Cohens v. Virginia*, 19 U.S. 264, 418, 428 (1821) (“Congress cannot punish felonies generally . . . it may enact only those criminal laws that are connected to one of its constitutionally enumerated powers, such as the authority to regulate interstate commerce.”); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”) (citing *The Federalist* No. 45, pp. 292–93 (Clinton Rossiter ed., 1961); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)); *Torres v. Lynch*, 578 U.S. 452, 457–59 (2016) (“State legislatures, exercising their plenary police powers, are not limited to Congress’s enumerated powers.”) (citing *Lopez*, 514 U.S. at 567).

114. Congress often relies on its Commerce Clause authority “[t]o regulate Commerce . . . among the several States” to enact federal criminal laws of national applicability. See U.S. Const. art. I, § 8, cl. 3; see also *United States v. Darby*, 312 U.S. 100, 118–19 (1941) (“The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”); *Lopez*, 514 U.S. at 559 (regulated activity must “‘substantially affect’ interstate commerce to be within Congress’ power to regulate it under the Commerce Clause.”). Congress relies on its Section 8 enclave power in legislating for federal enclaves, which authorizes it to “exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” U.S. CONST. art. I, § 8, cl. 17.

facts and circumstances that constitute the specific harm or evil the law seeks to prevent.<sup>115</sup> Merits elements describe things like mental states, acts, and results. Some crimes might also contain additional factors that qualify or aggravate a crime.<sup>116</sup> These elements go to the substance or merits of a particular dispute. In a criminal case, they are facts and circumstances that must be alleged in a charging document, proven beyond a reasonable doubt by the government, and submitted to a jury,<sup>117</sup> unless a defendant waives the right to a jury trial or the offense is one for which there is no right to a jury trial.<sup>118</sup> In addition to merits elements, *federal* crimes may also require proof of a “jurisdictional” element.<sup>119</sup> This additional proof relates to the limited power of federal courts, as contrasted with the plenary power of State and Tribal trial courts. Because Congress has limited constitutional power to criminalize conduct, in addition to defining the merits elements of a crime, it must also establish a connection between the conduct and a federal interest over which it has constitutional authority to legislate.<sup>120</sup>

Federal jurisdictional elements must be charged and found by the factfinder beyond a reasonable doubt. But they are treated differently from merits elements.<sup>121</sup> This is because jurisdictional elements do not go to the defendant’s culpability—they do not bear on the defendant’s intent, motive, or the result of their conduct. Rather, jurisdictional elements go to Congress’s constitutional authority to authorize federal prosecution and punishment of that conduct. Because jurisdictional elements do not go to the defendant’s blameworthiness, there is no requirement that the defendant be aware of the facts or circumstances that brought the conduct within the jurisdictional reach of the federal government. In this sense, federal criminal jurisdictional elements carry strict liability. That means the federal government need only prove that circumstances

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115. *Scheidler v. Nat’l Org. for Women, Inc.*, 547 U.S. 9, 17–18 (2006) (substantive elements define behavior that constitutes a violation of federal law; jurisdictional elements identify the power Congress is relying on to legislate).

116. *See* MODEL PENAL CODE § 1.13 (AM. L. INST. 1985).

117. *See generally* *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

118. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (noting that the Fourteenth Amendment incorporates the Sixth Amendment right to trial by jury for all non-petty offenses, but not petty offenses).

119. The federal jurisdictional “hook” in federal crimes may be the identity or status of a person. An example would be assault on a federal officer. *See* 18 U.S.C. § 111. It might also be the location of the crime, as with enclave jurisdiction. A federal crime might also include both territorial and status jurisdictional elements, such as when the federal government asserts enclave jurisdiction over a crime committed in Indian Country by or against an Indian.

120. *Torres*, 578 U.S. at 467 (“[T]he substantive elements of a federal statute describe the evil Congress seeks to prevent; the jurisdictional element connects the law to one of Congress’s enumerated powers, thus establishing legislative authority. Both kinds of elements must be proved to a jury beyond a reasonable doubt.”) (citing MODEL PENAL CODE § 1.13(10) (AM. L. INST. 1962)); *see also* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 679 (2005) (defining a jurisdictional element as “a fact included in a statute that must be pled and proven . . . in each case, serving as a nexus between a particular piece of legislation and Congress’s constitutional power to enact that legislation and to regulate the conduct at issue”).

121. *See Torres*, 578 U.S. at 467 (“Congress uses substantive and jurisdictional elements for different reasons and does not expect them to receive identical treatment.”).

giving rise to federal jurisdiction existed at the time of the offense; it is not required to prove that the defendant was aware of the circumstances that made the conduct a federal crime.<sup>122</sup>

Requiring the federal government to charge and prove facts and circumstances that establish a nexus between wrongdoing and Congress's constitutional authority to criminalize and prosecute that conduct is not the same thing as vesting a federal tribunal with subject matter jurisdiction. Stated otherwise, if Congress has not overstepped its constitutional authority in granting a federal tribunal jurisdiction over a class of cases, a failure of proof in an individual case does not mean the federal tribunal lacked subject matter jurisdiction over that case in the first instance. It establishes that the defendant did not commit the federal crime with which they were charged; it does not divest a federal tribunal of its adjudicatory authority. Thus, despite their label, jurisdictional elements are not "jurisdictional" in an adjudicatory sense.<sup>123</sup> These distinctions matter because a defendant cannot confer subject matter criminal jurisdiction on a court by stipulation or waiver.<sup>124</sup> In contrast, a defendant can stipulate to the existence of facts and circumstances comprising merits elements.<sup>125</sup> Unlike the federal government, States and Tribes possess inherent

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122. *Id.* at 467–68 (“In general, courts interpret criminal statutes to require that a defendant possess a mens rea, or guilty mind, as to every element of an offense. That is so even when the ‘statute by its terms does not contain’ any demand of that kind. In such cases, courts read the statute against a ‘background rule’ that the defendant must know each fact making his conduct illegal . . . . Except when it comes to jurisdictional elements. There . . . ‘the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.’ So when Congress has said nothing about the mental state pertaining to a jurisdictional element . . . Courts assume that Congress wanted such an element to stand outside the otherwise applicable mens rea requirement. In line with that practice, courts have routinely held that a criminal defendant need not know of a federal crime’s interstate commerce connection to be found guilty.”) (citations omitted). In *Torres*, the Court concluded federal jurisdictional elements can be disregarded when evaluating whether a state and federal crime are comparable offenses for purposes of federal statutes that rely on prior state convictions as predicate offenses for federal criminal liability. *Id.* at 468–69.

123. Howard M. Wasserman, Colloquy Essays, *The Demise of “Drive-by Jurisdictional Rulings,”* 105 NW. UNIV. L. REV. 947, 948–49 (2011) (advocating for a cleaner distinction between “jurisdiction and substantive merits—between rules defining a court’s adjudicative authority and rules determining the validity and success of a substantive claim of right on its merits”).

124. *Id.* at 962 (“Adjudicative-jurisdictional rules are, by definition, nonwaivable. The parties cannot consent to subject matter jurisdiction in federal court or waive an objection to it. Judges at every level have an independent obligation to raise subject matter jurisdiction sua sponte, and the court or a party can raise jurisdiction at any time throughout the litigation process. And as a general though sharply contested proposition, adjudicative jurisdictional rules are rigid and inflexible, and they do not allow for equitable exception or leniency.”); see also *United States v. Parker*, 622 F.2d 298 (8th Cir. 1980); *United States v. Jones*, 480 F.2d 1135, 1138 (2d Cir. 1973).

125. Subject matter jurisdiction must also be distinguished from questions regarding proper venue. *Where* a criminal case must or can be prosecuted within a state is a matter that pertains to venue, not subject matter jurisdiction. Thus, a state trial court of general jurisdiction has subject matter jurisdiction over all violations of state law, regardless of where in the state the violation occurred. Venue specifies the county or district in which a violation of a state law can or must be prosecuted. If a prosecutor files her charges in a county or district court that is not authorized by state law, venue is improper and the charges must be transferred to or re-filed in the proper court. But the fact that *venue* does not lie in that district does not mean that the first court lacked subject matter jurisdiction over the alleged conduct. See MONT. CODE ANN. § 25-2-112 (“Designation of proper place of trial not jurisdictional. The designation of a county in this part as a proper place of trial is not jurisdictional

authority to create laws, including criminal laws, for their communities. As a result, except to the extent required by their own laws or by federal law, States and Tribes are not required to allege or prove their jurisdiction over criminal conduct within their communities.<sup>126</sup>

Facts and circumstances relevant in all Indian Country prosecutions, whether federal, Tribal or State, involve a mix of territorial jurisdiction questions (did the conduct occur in Indian Country?) and status questions (what is the Indian status of the perpetrator and victim?). Under federal law, the *location* of a crime within Indian Country (or other federal enclave) is a jurisdictional element. As with all federal jurisdictional elements, it must be alleged in the indictment and proven beyond a reasonable doubt.<sup>127</sup> But because it is a jurisdictional element, it presents a mixed question of law and fact, with the court determining and instructing the jury whether a location is within Indian Country as a matter of law, and the jury deciding whether the offense occurred at that location.<sup>128</sup> The Indian Country status of the location of a specific crime in an individual case, does not, for the reasons outlined, implicate a federal trial court's general subject matter jurisdiction even though it is treated as a jurisdictional element in federal Indian Country prosecutions.<sup>129</sup> The fact, however, that *federal* courts treat the Indian Country status of the location of a crime as a jurisdictional element, rather than an adjudicative subject matter

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and does not prohibit the trial of any cause in any court of this state having jurisdiction."); *see also* Government of the Canal Zone v. Burjan, 596 F.2d 690, 693 (1979) (noting distinction between the question of which court of a sovereign may try an accused for a violation of its laws and whether the sovereign's law has been violated at all).

126. The Court makes this point in *Torres*, which involved a federal statute that relies on prior criminal convictions as elements of the federal offense. 578 U.S. 452. Under this type of statute, for a state court conviction to "count" it must have a federal analog, which requires federal courts to compare state and federal statutes. In *Torres*, the Court distinguished between substantive (merits) and jurisdictional elements to read a federal aggravated felony provision under federal immigration law to include state analogs even though they do not include the same interstate commerce requirement as their federal counterparts. *Id.* at 1624–25 ("For obvious reasons, state criminal laws do not include the jurisdictional elements common in federal statutes."). As the Court noted in *Torres*, the Assimilative Crimes Act also requires federal courts to "decide when a federal and a state law are sufficiently alike that only the federal one will apply" and in that context it has held that federal "courts should ignore jurisdictional elements." *Id.* at 468; *see also Immigration and Nationality Act Aggravated Felony: Luna Torres v. Lynch*, 130 HARV. L. REV. 477, 480 (2016). ICRA's TLOA enhanced sentencing provisions present a similar issue in that they require Tribal courts to evaluate whether a defendant has a prior conviction for "the same or a comparable offense by any jurisdiction in the United States" or if the prosecution involves an offense "comparable" to a state or federal felony offense. 25 U.S.C. § 1302. Under the *Torres* reasoning, Tribal courts would also disregard jurisdictional elements in making this determination.

127. *See Jones*, 480 F.2d at 1138 (whether the federal government has law enforcement jurisdiction over the site of a crime is a judicial question; whether the act was committed within the borders of the federal enclave is for the jury and must be established beyond a reasonable doubt).

128. *See United States v. Gipe*, 672 F.2d 777, 779 (9th Cir. 1982).

129. *See United States v. Tony*, 637 F.3d 1153, 1157–60 (10th Cir. 2011) (challenges to federal Indian Country jurisdiction are waivable); *United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005); *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003); *United States v. Prentiss*, 256 F.3d 971, 981–82 (10th Cir. 2001) (en banc), overruled on other grounds by *United States v. Cotton*, 535 U.S. 625, 631 (2002).

requirement, does not dictate that State and Tribal<sup>130</sup> courts must do the same. Indeed, a robust debate is emerging in the wake of *McGirt*<sup>131</sup> about whether the Indian Country status<sup>132</sup> of the location of a crime goes to a *state* court's subject matter jurisdiction under federal law.<sup>133</sup>

#### B. ARE SDVCJ FACTS AND CIRCUMSTANCES ADJUDICATIVE REQUIREMENTS, JURISDICTIONAL ELEMENTS, OR SOMETHING ELSE?

The question this leads to is whether the federal common law governing jurisdictional elements and subject matter jurisdiction applies when the other sovereigns—States or Tribes—exercise (or are precluded from exercising) Indian Country criminal jurisdiction. Specifically, whether SDVCJ facts and circumstances in ICRA define VAWA 2013 Tribes' subject matter jurisdiction. Or whether they go to a defendant's liability in a particular case. If SDVCJ factors are jurisdictional in an adjudicative sense, a non-Indian defendant could never consent to a Tribes' criminal jurisdiction or waive jurisdictional defects. And anyone, including a defendant, prosecutor, or a court, could raise a defect in the proof of a SDVCJ factor at any point in a proceeding, including on appeal or habeas review, to defeat a Tribe's subject matter jurisdiction over a non-

130. VAWA 2013 recognizes participating Tribes have criminal jurisdiction over all persons who commit VAWA 2013-eligible offenses in the Indian country of the prosecuting Tribe. As noted, the term "Indian country" as used in ICRA has the same meaning as that used for federal GCA/ICCA and Major Crimes Act jurisdiction.

131. In *McGirt v. Oklahoma*, the Court held that the United States' treaty with the Muscogee (Creek) Nation, one of the "Five Tribes" situated within the State of Oklahoma, reserved parts of Oklahoma as Indian Country, and rejected arguments that Congress had disestablished the Tribes' reservation, notwithstanding the State of Oklahoma's treatment of that land as part of the State. 140 S. Ct. 2452, 2465–66 (2020). The Tribal Nations situated within Oklahoma impacted by the *McGirt* ruling are the Cherokee, Chickasaw, Choctaw, and Seminole Nations. *Id.* at 2456–66.

132. Whether a crime has occurred on Indian land can be complex; not all tribal lands are contiguous, nor are their boundaries always clear as a result of shifts in treaty interpretations and the allotment patterns in some tribal jurisdictions. A discussion of this aspect of SDVCJ is beyond the scope of this Article.

133. See *Bosse v. State*, 2021 OK CR 3 (Okla. Crim. App. 2021), vacated by 2021 OK CR 23 (Okla. Crim. App. 2021). *Bosse*, a non-Indian, filed a successive post-conviction application in Oklahoma State court arguing that because his murder victims were Indian and he committed his crime in a location that has now been identified as Indian Country within the boundaries of the Chickasaw Nation's reservation following *McGirt*, the federal government, not Oklahoma, had jurisdiction over his crimes under the MCA. The Oklahoma Court of Criminal Appeals (the reviewing court of last resort in criminal cases in Oklahoma) initially dismissed his conviction and sentence, holding that the location of *Bosse*'s crime within Indian Country deprived its courts of subject matter jurisdiction. It further held that, under federal law, *Bosse*'s post-conviction challenge could not be procedurally or equitably barred because "subject-matter jurisdiction can never be waived or forfeited." The State of Oklahoma filed a petition for certiorari and sought a stay pending review in the U.S. Supreme Court. The Oklahoma Court subsequently withdrew and vacated its order granting *Bosse* relief and reinstated his conviction, citing to its decision in *State ex. Rel. Matloff v. Wallace*. 2021 OK CR 21. *Wallace* held that *McGirt* does not apply retroactively under State retroactivity principles. The State of Oklahoma subsequently withdrew its pending Petition for Certiorari in *Bosse*. See Derrick James, *State Files to Dismiss Supreme Court Appeal; Files Nine More Appeals*, MCALESTER NEWS-CAPITAL (Sept. 3, 2021), [https://www.mcalesternews.com/news/state-files-to-dismiss-supreme-court-appeal-files-nine-more-appeals/article\\_cbec731c-0cea-11ec-ad0b-9bb5e11c3320.html](https://www.mcalesternews.com/news/state-files-to-dismiss-supreme-court-appeal-files-nine-more-appeals/article_cbec731c-0cea-11ec-ad0b-9bb5e11c3320.html). Whether Indian Country claims present both non-waivable subject matter jurisdictional challenges that are nonetheless subject to procedural retroactively doctrines is an issue that remains to be resolved following *McGirt*.



Indian defendant's case. If, on the other hand, SDVCJ facts and circumstances are merits elements, a defect in their proof would be subject to the same appellate and habeas standards of preservation and review as other elements of a crime.<sup>134</sup> This includes triggering exhaustion doctrines when federal courts review habeas petitions for relief from Tribal court orders.<sup>135</sup>

The following discussion of SDVCJ facts and circumstances illustrates both the complexity and importance of analyzing each separately to ensure that a Tribal court has properly asserted jurisdiction over offenses committed by non-Indians.<sup>136</sup> Getting it wrong can mean a reversal of a defendant's Tribal court conviction. This, in turn, can occasion a delay holding a defendant accountable, and potentially re-traumatize victims if a retrial or dismissal of charges is required.<sup>137</sup> If SDVCJ facts and circumstances are jurisdictional in an adjudicative sense that means a defendant cannot stipulate to their existence, or otherwise confer jurisdiction on a Tribal court by agreement or waiver. Further, if they are elements, determining whether they are jurisdictional elements or merit elements will inform whether their proof presents a mixed question of fact and law. Finally, if a SDVCJ factor is neither an adjudicative requirement nor an essential element of an offense, the burden of production and prima facie proof can be properly assigned to the defendant as an affirmative defense.<sup>138</sup>

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134. See Bethany Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); see also Alexander S. Birkhold, *Predicate Offenses, Foreign Convictions, and Trusting Tribal Courts*, 114 MICH. L. REV. 155, 159 (2015); M. Gatsby Miller, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction over Nonmembers in Civil Cases*, 114 COLUM. L. REV. 1825, 1839 n.85 (2014).

135. See *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010) (2010) (Persons disenrolled from tribal membership were required to exhaust their Tribal remedies before seeking habeas corpus relief in federal court); see also *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 844, 847 (9th Cir. 2009) (noting that non-Indians may bring a federal common law claim under § 1331 to challenge Tribal court jurisdiction, but must exhaust Tribal court remedies; principles of comity require federal court to give the Tribal courts a full opportunity to determine their own jurisdiction in the first instance).

136. It also amply displays the absurd legacy of the Supreme Court's *Oliphant* decision which created a federal common law rule prohibiting Tribes from exercising jurisdiction over non-Indians absent congressional authorization. If nothing else, the discussion that follows should demonstrate why a complete congressional repudiation of *Oliphant*, rather than the partial repudiation in VAWA 2013, is the more sensible public policy.

137. Given the convoluted nature of the definition of "Indian" under federal law, it is possible that a state court could conclude that it lacks jurisdiction over a crime committed in Indian Country because he is an Indian, even if a Tribe or federal court has concluded that he is not.

138. This Article only addresses whether SDVCJ facts and circumstances are jurisdictional in an adjudicative sense. Similar questions are presented by the TLOA/VAWA 2013 requirements regarding the credentials of jurists and defense counsel. TLOA and VAWA 2013 require law-licensed defense counsel judges, as noted above. See *supra*, note 12. If these requirements pertain to a court's subject matter jurisdiction, a TLOA or VAWA 2013 defendant could attack a tribal conviction on appeal or in a federal habeas petition based on a presiding Tribal court jurist's or defense counsel's lack of TLOA credentials even if the defendant knowingly waived these protections and could show no prejudice. See Jill Elizabeth Tompkins, *Defining the Indian Civil Rights Act's "Sufficiently Trained" Tribal Court Judge*, 4 AM. INDIAN L.J. 53, 74 (2015) (noting that an "argument that the lack of a qualified presiding judge divests the court of subject matter jurisdiction may be made with greater force in cases that fall under ICRA's provisions governing the exercise of SDVCJ. Thus, it can be argued that a licensed, trained tribal court judge is a prerequisite to the exercise of SDVCJ"). By way of analogy, a federal civil litigant can consent to trial before a non-Article III jurist (that is, a federal magistrate), as long as the jurist is otherwise qualified under court rules and statutes to hear and dispose of cases and the litigants make a knowing and voluntary waiver. Federal magistrates can also dispose of federal petty

Tribes may wish to assume the burden of charging and proving every fact and circumstance Congress has described and defined for SDVCJ. That, of course, is a matter within their prerogative—a sovereign may always voluntarily assume a higher burden for itself in prosecuting and punishing wrongdoing. Further, some may deem it prudent to take on this extra burden, given the scrutiny under which Tribal justice is often placed. And, frankly, it may just be easier to do so, rather than attempting to pick through and parcel out the multitude of complexities Congress has heaped onto what should be a relatively straightforward undertaking—punishing and deterring acts of violence between and against members of a community. The point here is to present a technical analysis of whether, as a matter of federal law, Tribes are *required* to assume the entire burden of proving all SDVCJ facts and circumstances in order to exercise their inherent sovereign authority over acts of partner and family member violence in their communities.<sup>139</sup>

### 1. *Exceptions to SDVCJ*

Section 1304(b)(1) sets out the “nature of” a participating Tribe’s VAWA 2013 jurisdiction. It describes this jurisdiction as follows: “[n]otwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed [in ICRA], the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.”<sup>140</sup> Congress’s recognition and affirmation of participating Tribes’ jurisdiction over “all persons,” is followed by two exceptions. The first exception is titled “Victim and defendant are both non-Indians,”<sup>141</sup> which is restated as: “if neither the defendant nor the alleged victim is an Indian.”<sup>142</sup> The second exception is titled “Defendant lacks ties to the Indian tribe,”<sup>143</sup> which is restated as “a participating tribe may exercise special

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misdemeanor cases and handle pretrial matters in all other criminal cases without the parties’ consent. It is not clear, however, as a constitutional proposition, whether a federal defendant in a gross misdemeanor or felony matter can consent to trial before a federal magistrate by a waiver of the right to trial before an Article III jurist.

139. On this point, to the extent Section (d) invites federal constitutional common law into the interpretation of ICRA’s VAWA 2013 provisions, it is relevant that the Court has been retreating from a robust and all-encompassing interpretation of “jurisdictional” questions in favor of a more limited interpretation of what truly divests a court of its power over a proceeding. See Wasserman, *supra* note 123 at 947 (“[T]he Supreme Court [has] quietly continued an important multi-Term effort towards better defining which legal rules properly should be called ‘jurisdictional’ . . . [A]n almost uninterrupted retreat from the Court’s admittedly “profligate” and “less than meticulous” use of the word “jurisdiction” and a move towards “discipline” in the use of the term.”).

140. 25 U.S.C. § 1304(b)(1).

141. *Id.* § 1304(b)(4)(A).

142. For purposes of ICRA, the term “Indian” is defined by reference to federal law, as discussed further below this means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian Country to which that section applies. See *infra*, note 152.

143. 25 U.S.C. § 1304(b)(4)(B). This provision preserves the Court’s *McBratney* jurisdictional “carve out” under which tribes are said to lack criminal jurisdiction over crimes involving only non-Indians or so-called “victimless” crimes committed by non-Indians in Indian Country. 104 U.S. 621. Under a literal reading of (b)(3),

domestic violence criminal jurisdiction over a defendant only if the defendant” has a qualifying connection to the Tribe.

Under “well-established” rules of criminal statutory construction, where Congress sets out an exception to liability, the exception should be read “as an affirmative defense and not an essential element of the crime.”<sup>144</sup> Congress set out the defendant and victim’s Indian status, and the defendant’s lack of community ties as *exceptions* to Tribes’ plenary authority to exercise SDVCJ over “all persons.” Under federal common law rules of statutory construction, these two qualifiers—the Indian/non-Indian status of the perpetrator and victim, and the defendant’s lack of community ties—are affirmative defenses to liability under VAWA 2013, not essential elements of a VAWA 2013-eligible tribal offense. That said, federal law, if Tribal courts must follow it, may dictate a more complicated analysis of the first exception.

Consistent with the rule of statutory construction above, in a federal Indian Country GCA/ICCA prosecution, a defendant’s Indian status is treated as an affirmative defense. This issue arises where the federal government asserts GCA/ICCA jurisdiction based on the perpetrator and victim’s different citizenships, and the perpetrator claims the same citizenship as the victim (that is, the victim is an Indian and the defendant asserts he is also an Indian). This fact, if true, would put the defendant’s conduct outside the federal government’s GCA/ICCA Indian Country jurisdiction.<sup>145</sup> In this context, federal courts treat the defendant’s Indian status as an affirmative defense for which he bears the burden of pleading and production.<sup>146</sup> As with other affirmative defenses, if the

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if both the victim and the perpetrator are Indian, as noted above, jurisdiction would fall within a Tribe’s pre-VAWA 2013, non-SDVCJ statutory jurisdiction. As noted, whether that Indian defendant can be prosecuted without the benefit of SDVCJ procedural protections for a SDVCJ-qualifying offense consistent with ICRA’s Equal Protection guarantee is an open issue. In any event, this provision makes clear that a Tribe still cannot exercise jurisdiction over crimes only involving non-Indians under existing federal law.

144. *United States v. Haggerty*, 997 F.3d 292, 299 (5th Cir. 2021) (noting that it is a “well-established rule of criminal statutory construction that an exception set forth in a distinct clause or provision should be construed as an affirmative defense and not as an essential element of the crime”) (citing *United States v. Santos-Riviera*, 183 F.3d 367, 370–71 (5th Cir. 1999)); *see also McKelvey v. United States*, 260 U.S. 353, 357 (1922) (“By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it.”).

145. *United States v. Bruce*, 394 F.3d 1215, 1221–22 (9th Cir. 2005) (“We note that the complex scheme established by Congress creates obvious gaps in federal jurisdiction to punish crimes in Indian country. For example, a non-Indian may be charged under § 1152 [of the GCA/ICCA] when the victim is an Indian; if his victim is a non-Indian, he generally must be charged under state law. An Indian may be charged with a host of federal crimes under § 1152 [of the GCA/ICCA] if his victim is a non-Indian, but generally only with major crimes under § 1153 [the MCA] if his victim is an Indian.”). In *Bruce*, an Indian defendant charged with assault against another Indian in Indian Country argued that because she was an Indian, she should have been tried, if at all, under the MCA, not under GCA/ICCA. *Id.* at 1217.

146. *Haggerty*, 997 F.3d at 302 (“[W]ith respect to crimes prosecuted via § 1152, settled and reconcilable Supreme Court doctrine, as well as principles of statutory construction, demonstrate that, when the victim is Indian, the defendant’s status as Indian is an affirmative defense for which the defendant bears the burden of pleading and production, with the ultimate burden of proof remaining with the Government. Therefore, because

GCA/ICCA defendant comes forward with sufficient evidence to put their Indian status in question, the government must disprove this fact beyond a reasonable doubt.<sup>147</sup> However, a *victim's* Indian status in a GCA/ICCA prosecution is treated as an element of the offense, not an affirmative defense, meaning it must be charged in the indictment.<sup>148</sup> Similarly under the MCA, which gives the federal government criminal jurisdiction, concurrent with Tribes, over enumerated Indian Country crimes committed by Indians (irrespective of the victim's citizenship), most federal courts have concluded that a *defendant's* Indian status at the time of a MCA offense is an element of the offense, not an affirmative defense.<sup>149</sup>

SDVCJ extends to VAWA-eligible crimes committed by a non-Indian against an Indian if the non-Indian has sufficient ties to the prosecuting Tribe. Because a Tribe has jurisdiction over all Indians, whether a defendant is Indian or non-Indian is irrelevant to a participating Tribe's jurisdiction (although it could be relevant *post hoc* if a defendant alleges he was a non-Indian tried as an

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Haggerty did not raise the issue of Indian status at trial as an affirmative defense, the Government met its burden to prove the jurisdictional element of § 1363 (as extended by § 1152) by introducing evidence sufficient to establish that the offense occurred in Indian country.”)

147. *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F. Supp. 3d 1221, 1230 (D. Nev. 2014) (“[A] defendant’s objection in a [GCA/ICCA] case that he is in fact an Indian and cannot therefore be prosecuted under that statute is an affirmative defense that the government need not initially allege. Rather, once a defendant in such a case ‘come[s] forward with enough evidence of her Indian status to permit a fact-finder to decide the issue in her favor,’ the burden of persuasion shifts to the government, which then must disprove the affirmative defense beyond a reasonable doubt.”) (citing *Bruce*, 394 F.3d at 1222–23); *United States v. James*, 980 F.2d 1314, 1317–19 (9th Cir. 1992) (failure to submit question of defendant’s Indian status to jury in prosecution for assault on Indian child under GCA/ICCA was not harmless; government was relieved of burden of proving what would have been element of offense if defendant had been prosecuted as Indian rather than as non-Indian, and her conviction as non-Indian had possibly adverse future consequences outside criminal context); *see also* *United States v. Hester*, 719 F.2d 1041, 1043 (9th Cir.1983) (“It is far more manageable for the defendant to shoulder the burden of producing evidence that he is a member of a federally recognized tribe than it is for the Government to produce evidence that he is not a member of any one of the hundreds of such tribes. We accordingly hold that the Government need not allege the non-Indian status of the defendant in an indictment under section 1152, nor does it have the burden of going forward on that issue. Once the defendant properly raises the issue of his Indian status, then the ultimate burden of proof remains, of course, upon the Government.”). This issue would arise where the government has charged a defendant with an offense against an Indian defendant. If the defendant is also an Indian, they cannot be charged under the GCA/ICCA because that statute creates an exception to enclave jurisdiction for Indian Country crimes where both the defendant and the victim are Indians. In this scenario, if the defendant is, in fact, an Indian, this would remove the defendant’s case from GCA/ICCA jurisdiction, and the defendant would need to be prosecuted, if at all, in federal court under the MCA (if the offense is enumerated under that statute), or in Tribal court. Conversely, if the GCA/ICCA defendant is charged with a crime against a non-Indian under the supposition that the defendant is an Indian, and it turns out that the defendant is, in fact, a non-Indian, that defendant’s case also falls under the exception and can only be prosecuted in state court.

148. *United States v. Reza-Ramos*, 816 F.3d 110, 1120–21 (9th Cir. 2016) (Indian status of victim must be proven under 18 U.S.C. § 1152 and government bears burden of proving that victim is Indian under the GCA/ICCA; in this context, the victim’s Indian status is jurisdictional element).

149. Indian status at the time of the offense is essential element under the MCA. *See Bruce*, 394 F.3d at 1223–24; *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc) (under the MCA “government must prove that the defendant was an Indian at the time of the offense with which the defendant is charged”); *Phebus*, 5 F. Supp. 3d at 1230 (“[W]here positive Indian status is an element of the offense [as in the MCA], the prosecution must allege Indian status in the indictment and prove it to the jury beyond a reasonable doubt, just as it must allege and prove any other substantive element of the offense.”).

Indian and deprived of the additional protections required by VAWA 2013). Whether an SDVCJ *victim's* Indian status is an element of a VAWA 2013 offense is complicated by the fact that in the list of ties to the community that subject a non-Indian to a Tribe's SDVCJ, VAWA 2013 distinguishes between Indian victims based on their Tribal membership. As noted above, a non-Indian perpetrator is subject to SDVCJ if the defendant: (1) resides in the Indian Country of the participating Tribe; (2) is employed in the Indian Country of the participating Tribe; or (3) is a spouse, intimate partner, or dating partner of a member of the participating Tribe, or of an Indian who is not a member of the participating Tribe, but who resides in the Indian Country of the participating Tribe.<sup>150</sup> This creates an exception from SDVCJ for non-resident, non-employee non-Indian defendants who commit crimes against non-resident, Indians who are not members of the prosecuting Tribe, even if the crime and the non-Indian defendant's relationship with the victim meet the rest of the VAWA 2013 statutory criteria. And this presents the question of who must plead and prove a SDVCJ victim's (1) Indian status, (2) Tribal membership, and, (3) if a non-member Indian, the victim's place of residence. Under federal common law,<sup>151</sup> the answer would be a bifurcated one, notwithstanding the fact that Congress has set all of these factors out as exceptions to SDVCJ. If federal common law is followed, in a VAWA 2013 prosecution Tribes might bear the burden of pleading and proving a victim's Indian status, because it puts the victim *within* the Tribe's SDVCJ reach (as noted, the crime would otherwise fall under state jurisdiction pursuant to *McBratney*). But defendants could be assigned the burden of pleading facts that would put an Indian victim *outside* a Tribe's SDVCJ—that is, a non-member Indian victim's residence somewhere other than in the territory of the prosecuting Tribe (in which case the crime would fall under the federal government's GCA/ICCA jurisdiction).

a. Exception One: Victim and Defendant are Both Non-Indians

(i) *Federal Common Law—The Rogers Inquiry*

Regardless of whether Indian status under SDVCJ is an affirmative defense or an element, Tribal courts must determine who is an “Indian” in asserting SDVCJ. ICRA defines “Indian” for purposes of SDVCJ as any person who would be subject to federal criminal jurisdiction under the MCA.<sup>152</sup> ICRA is

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150. *See supra* note 61.

151. Under *Apprendi* and its progeny, the Sixth Amendment right to have all elements of a crime charged, submitted to the jury, and found beyond a reasonable doubt is applicable to the states through the Fourteenth Amendment. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). If SDVCJ facts and circumstances are elements of a VAWA 2013-eligible offense, and to the extent Section (d) imports federal constitutional criminal law on this point, *Apprendi* would dictate that they must be alleged in the charging document and submitted to the jury.

152. 25 U.S.C. § 1301(4). “Indian” means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian Country to which that section applies. 18 U.S.C. § 1153. Section 1153 is the federal Major Crimes Act, Act of Mr. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385; *see also* 18 U.S.C. § 1152 (“This section shall not extend to

simple enough on its face—Tribes must refer to the MCA definition of “Indian” in exercising jurisdiction, including SDVCJ. But, as noted, the MCA does not define “Indian.”<sup>153</sup> The term “Indian” is defined in other places throughout the federal code, and not always in the same way.<sup>154</sup> The lack of a statutory definition of the term “Indian” in the MCA has given rise to a large body of federal common law that continues to evolve.<sup>155</sup>

The Court addressed the issue of who is an “Indian” for federal criminal jurisdiction purposes in *United States v. Rogers* in 1846.<sup>156</sup> The issue in *Rogers* was whether a white man who was adopted into the Cherokee Nation and who had no blood ties to the Tribe was an “Indian” under the Indian Country Crimes Act (which, as noted, places Indian Country crimes by an Indian against a non-Indian, and crimes against an Indian by a non-Indian under federal jurisdiction). The Court concluded that Rogers was not an Indian because Indian status is a racial, not a political, classification. As a result, a person is only an “Indian” for purposes of federal criminal law if he is one “who by the usages and customs of the Indians are regarded as belonging to their race.”<sup>157</sup> From *Rogers* evolved the generally-accepted *federal* test for determining whether a defendant has a relationship with a Tribe sufficient on which to base federal criminal

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offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.”). Section 1152 provides “for the prosecution of crimes committed in Indian Country by non-Indians against Indians.” *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996) (citation omitted).

153. AMERICAN INDIAN LAW DESKBOOK § 2:6 (LegalWorks, 2021) (“In the nineteenth century, Congress enacted the predecessors to the General Crimes Act and the Major Crimes Act. These statutes confer jurisdiction on the federal courts over some criminal offenses committed by or against Indians in Indian country. Congress has never enacted a definition of ‘Indian’ under these statutes, leaving it to the courts to define the term.”) (footnotes omitted).

154. *See, e.g.*, 25 U.S.C. § 2201(2) (defining “Indian” for purposes of Chapter 24 of Title 25 as “(A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner (as of October 27, 2004) of a trust or restricted interest in land; (B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. § 479) and the regulations promulgated thereunder; and (C) with respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to section 2206 of this title, any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that state”).

155. *See* Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV’T. L. REV. 49, 49–51 (2017); Daniel Donovan & John Rhodes, *To Be or Not To Be: Who is an “Indian Person”?*, 73 MONT. L. REV. 61, 62 (2013); Clay R. Smith, *“Indian” Status: Let A Thousand Flowers Bloom*, 46 ADVOC. 18, 18 (2003) (“It would seem logical that ‘Indian’ status—*i.e.*, who constitutes an ‘Indian’ for civil and criminal law purposes—is an issue that [the] law would have resolved cleanly and conclusively long ago . . . . The issue remains unresolved and in many ways grows more complex as time passes. The increasing complexity results largely from a proliferation of federal statutes that, either directly or as implemented by administrative agencies, define ‘Indian’ status differently.”). Congress’s lack of attention to this detail is remarkable considering it enacted the predecessors to the Indian Country Crimes Act and it enacted the Major Crimes Act—the two primary acts governing the federal government’s Indian Country criminal jurisdiction—in the nineteenth century.

156. 45 U.S. 567 (1846). Although the Indian status defendants or victims is an essential element in federal Indian Country prosecutions, the Court has never conclusively defined the term “Indian” for purposes of federal criminal jurisdiction.

157. *Id.* at 573.

jurisdiction. That test turns on proof of: (1) some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized Tribe; and (2) proof of membership in, or affiliation with, a federally recognized Tribe.<sup>158</sup>

Others have written extensively and insightfully about the *Rogers* test and its many curiosities.<sup>159</sup> It is outlined only briefly here because SDVCJ facts and circumstances now require VAWA 2013 Tribal courts to engage in a question that has bedeviled federal courts for a long time. And, as illustrated below, it is not just federal and Tribal courts that wrestle with this issue. States, within which Indian Country subject to the MCA is situated, must also make this determination where there is a question as to a defendant's Indian status. Further, as with the Indian Country status of the location of a federal crime, not every aspect of the Indian status test is a matter for the jury in federal cases. Rather, the question of whether a Tribe is federally recognized is a matter of law for the court.<sup>160</sup> If a court finds that the Tribe of which the government claims the defendant is a member, or with which the defendant is affiliated, is federally recognized, it must instruct the jury that the Tribe is federally recognized as a matter of law.<sup>161</sup> However, the other factors pertinent to affiliation or enrollment are submitted to the jury.<sup>162</sup> To the extent Section 1304(d) imports this federal

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158. See *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009); *Zepeda*, 792 F.3d at 1103 (“[P]roof of Indian status under the IMCA requires only two things: (1) proof of some quantum of Indian blood, . . . and (2) proof of membership in, or affiliation with, a federally recognized tribe.”); see also *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012) (providing the Tenth Circuit’s “totality-of-the-evidence approach,” which can include proof of blood quantum, but only if the Tribe in question requires it); *United States v. Prentiss*, 273 F.3d 1277, 1280–82 (10th Cir. 2001) (discussing the history and application of the *Rogers* test, noting that the first prong can be established by a variety of means, including a certificate of tribal enrollment or tribal roll which requires a certain degree of Indian blood). States may apply a different test; Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177, 177–78 (2010) (noting that state courts apply different tests, such as “significant” Indian blood).

159. Jacqueline F. Langland, *Indian Status Under the Major Crimes Act*, 15 J. GENDER, RACE & JUST. 109, 136 (2012); Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 HARV. J. RACIAL & ETHNIC JUST. 241, 242 (2010); Oakley, *supra* note 158, at 177–78.

160. *Zepeda*, 792 F.3d at 1114 (“[W]e hold that federal recognition of a tribe, a political decision made solely by the federal government and expressed in authoritative administrative documents, is a question of law to be decided by the judge.”). Because the lynchpin of this inquiry is the United States’ recognition of a Tribe, First Nations, Inuit, and Métis people of Canada are treated as non-Indians for purposes of federal criminal law statutes for which the Indian status of the perpetrator or victim is an element (18 U.S.C. §§ 1152 or 1153). See *United States v. Dennis*, No. CR91-99WD (W.D. Wash. June 21, 1991) (dismissing federal case against a Canadian Nootka charged with stabbing his Lummi wife on the Lummi Reservation where they both resided because the defendant had previously secured dismissal of his case in state court on the basis of his status as an Indian; and finding that the state’s effort to re-prosecute the defendant was barred by the state’s failure to appeal the dismissal); see also *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974) (termination of federal recognition of a tribe deprives its members of Indian status for purposes of federal Indian Country criminal jurisdiction).

161. *Zepeda*, 792 F.3d at 1114.

162. *United States v. Reza-Ramos*, 816 F.3d 1110, 1123 (plain error for the court to fail to instruct on each of the two prongs of the Indian status test); *Zepeda*, 792 F.3d at 1114 (the court also must instruct the jury of the “declining order of importance” of the four factors used to determine whether the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense).

jurisprudence into VAWA 2013 Tribal court prosecutions, it may require Tribes to follow federal law not just in adopting a test for determining who is an Indian, but also in their procedural application of that test.

Under the *Rogers* test, some Tribal affiliation is necessary, but not sufficient, to establish Indian status. That is because, in addition to being recognized as an Indian, the person must have a bloodline connection to a Tribe.<sup>163</sup> Thus, a defendant who is a member of a Tribe is not an “Indian” for purposes of federal criminal law absent this bloodline connection.<sup>164</sup> Conversely, enrolled membership in a Tribe is sufficient, but not necessary, to satisfy the second *Rogers* prong. That is because *affiliation with* (as opposed to enrollment in) a Tribe can satisfy the second *Rogers* prong.<sup>165</sup>

With respect to the first *Rogers* inquiry, it is not necessary to show that a person’s “Indian blood” derives from a *federally* recognized tribe—only that there is some ancestral connection to an Indian tribe. The question of *how much* Indian ancestry is necessary to establish the requisite “some” quantum of Indian blood is an open question.<sup>166</sup> Somewhat confusingly, the federally recognized status of a Tribe is dispositive of the second *Rogers* inquiry. Under the second prong, whether the Tribe of which a defendant is alleged to be a member, or affiliated with, has *federal* recognition status is a threshold question.<sup>167</sup> That is,

163. See AMERICAN INDIAN LAW DESKBOOK, *supra*, note 153, at § 2:6; Stymiest, 581 F.3d at 764 (explaining that tribal enrollment “is not essential and its absence is not determinative”); *Bruce*, 394 F.3d at 1225 (recognizing that neither lack of enrollment nor lack of eligibility to enroll is dispositive); *Prentiss*, 273 F.3d at 1283 (“[T]he fact that a person is not a member of a particular pueblo does not establish that he or she is not an Indian.”); cf. *Antelope*, 430 U.S. at 646 n.7 (noting, in dicta, that “enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and maintained tribal relations with the Indians thereon”) (internal quotation marks and citation omitted).

164. *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 140 (D.D.C. 2017). In *Cherokee Nation*, the court held that descendants of the Cherokee Freedmen are entitled to the same citizenship rights as all members of the Cherokee Nation under treaty law. The Supreme Court had previously held that a Freedman was not an Indian for purposes of the *Rogers* test. The Freedmen of the Five Tribes, therefore, are tribal members, but not “Indians” under federal law. Brian Oaster, *What Tribal Sovereignty Means for Freedmen Citizenship*, HIGH COUNTRY NEWS (Mar. 3, 2021), <https://www.hcn.org/articles/tribes-what-tribal-sovereignty-means-for-freedmen-citizenship>.

165. *State v. Salazar*, 461 P.3d 946, 949–50 (N.M. App. 2020) (noting that not all state and federal jurisdictions use the same test, but that no jurisdiction treats lack of enrollment as dispositive, and concluding that “enrollment as a member of a recognized tribe or pueblo is not a mandatory prerequisite for Indian status”) (citing *Bruce*, 394 F.3d at 1224 (internal quotation marks and citation omitted)) (“courts have found tribal enrollment alone sufficient proof that a person is an Indian[,]” but that “a person may still be an Indian though not enrolled with a recognized tribe”).

166. See AMERICAN INDIAN LAW DESKBOOK, *supra*, note 153, at § 2:6 (“From a judicial perspective, the most common minimum to satisfy the blood quantum requirement appears to be one-eighth Indian blood. Such was acceptable to the Eighth Circuit in 1912 and the Ninth Circuit in 2005. Although that amount had been insufficient for the Wyoming Supreme Court in 1982, the Ninth Circuit subsequently described the requirement as ‘some quantum of Indian blood’ . . . . Future litigation over this issue—which involves accommodating tribes settled right to determine membership requirements and the settled ancestry element of Indian status—appears likely. In fact, the blood quantum in determining tribal membership may be ‘the most provocative and potentially explosive issue in Indian Country because it gets to the guts of who, or what, is an Indian.’”).

167. *LaPier v. McCormick*, 986 F.2d 303, 306 (9th Cir. 1993) (member of a Tribe that had never been recognized by the federal government was properly prosecuted in state court as a non-Indian for crime against a



if the Tribe of which a person is alleged to be a member, or to be affiliated with, is not recognized by the *federal* government (as distinguished from recognition by States or Tribes), the person is not an Indian as a matter of federal law for purposes of federal criminal jurisdiction. Where a defendant or victim is not an *enrolled member* of a federally recognized Tribe, what is required to conclude that they are sufficiently *affiliated* with a Tribe for purposes of the second *Rogers* factor is also an open question. With respect to the affiliation inquiry, courts have adopted a variety of approaches,<sup>168</sup> which has resulted in a split of authority among, and between, federal circuit and State courts.<sup>169</sup>

(ii) *Applying Rogers in State and Tribal Court*

The *Rogers* test is the “starting point” for evaluating whether a defendant is an “Indian” for purposes of Tribal court jurisdiction.<sup>170</sup> But that does not mean that *application* of *Rogers* in Tribal or State court necessarily follows federal common law.<sup>171</sup> In *Eastern Band of Cherokee Indians v. Lambert*, for example,

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non-Indian committed on a reservation covered by federal MCA jurisdiction). The U.S. Secretary of the Interior is required to publish lists of federally recognized tribes in the Federal Record under 25 C.F.R. § 83.6(b).

168. Some, but not all, state and federal courts, rely on the “*St. Cloud*” factors, derived from *St. Cloud v. United States*, used in the *second Rogers* inquiry to determine whether a person has been recognized by a tribe or the federal government as an Indian and applied in “declining order of importance”: whether the person is (1) enrolled in a tribe; (2) recognized formally and informally by the government through the extension of assistance reserved only to Indians; (3) enjoying benefits of tribal affiliation; and (4) socially recognized “as an Indian through living on a reservation and participating in Indian social life.” 702 F. Supp. 1456, 1461 (D.S.D. 1988); *see also Zepeda*, 792 F.3d at 1113; *State v. George*, 422 P.3d 1142, 1143–44 (2018) (“To determine whether a defendant is an Indian for jurisdictional purposes courts have applied some variation of a test developed in *United States v. Rogers*, which considers the degree of Indian blood and tribal or government recognition as Indian . . . [As articulated by the Idaho Court of Appeals, the defendant] must have a significant percentage of Indian blood; and . . . be recognized as an Indian either by the federal government or some tribe or society of Indians.”) (citing *State v. Bonaparte*, 114 Idaho 577, 579 (Ct. App. 1988) (*overruled on other grounds in State v. Larson*, 158 Idaho 130 (Ct. App. 2015))).

169. *See State v. Nobles*, No. 34PA14-2, 9 (N.C. Feb. 28, 2020) (reviewing state and federal case law and adopting the application of the *St. Cloud* factors as employed by the Eighth and Tenth Circuits) (citing *State v. Salazar*, No. A-1-CA-36206, 2020 WL 239879, at \*3 n.4 (N.M. Ct. App. Jan. 15, 2020) (“[A] circuit split has emerged about whether certain factors carry more weight than others.”); *see also Nobles v. North Carolina*, Petition for Writ of Certiorari at 19, n. 2 (stating that the North Carolina Supreme Court erroneously counted the Tenth Circuit as a circuit taking a non-exclusive approach to the *St. Cloud* factors – “[b]ecause Nowlin is an unpublished, non-precedential opinion, it did not supersede *Scriver v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995), in which the Tenth Circuit simply looked to whether the defendant was recognized by the tribe as an Indian.”).

170. *See AMERICAN INDIAN LAW DESKBOOK*, *supra*, note 153, at § 2:6 (“The *Rogers* test remains the starting point for determining “Indian” status under the General Crimes Act and the Major Crimes Act. Congress has also recognized inherent tribal criminal jurisdiction over ‘all Indians,’ defined as persons who have ‘Indian’ status under the Major Crimes Act. Congress has thus made the *Rogers* test the starting point for determining “Indian” status for purposes of tribal criminal jurisdiction as well.”).

171. Addie Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 398 (2016) (recommending that Tribes “develop their own factors for implementing the *Rogers* test”); *see also Nobles*, No. 34PA14-2 at 14 (“whether a state or the federal government has exercised jurisdiction over a defendant is not dispositive of whether a tribal court can exercise its jurisdiction. As the Idaho Supreme Court has noted, the fact that a tribal court may have exercised its jurisdiction over certain defendants is not dispositive on the issue of whether a state court possesses jurisdiction over such defendants in a particular case.”) (citing *George*, 422 P.3d at 1146) (“[T]his [c]ourt either has jurisdiction or it does not, and it is not determined by

the parties stipulated that the defendant was recognized as a first descendant of an enrolled member of the Eastern Band of Cherokee Indians (EBCI), a federally recognized Tribe.<sup>172</sup> The defendant contended, however, that the Tribe lacked jurisdiction over her because she was not herself an enrolled member of the EBCI.<sup>173</sup> The Tribal court rejected the defendant's argument that her lack of enrollment in the EBCI was dispositive of her Indian status for criminal jurisdiction purposes, explaining that "membership in a Tribe is not an 'essential factor' in the test of whether the person is an 'Indian' for the purposes of this Court's exercise of criminal jurisdiction."<sup>174</sup> Instead, the EBCI Court concluded that "the inquiry includes whether the person has some Indian blood and is recognized as an Indian."<sup>175</sup>

As noted, it is a settled proposition of *federal* law that the Indian status of the defendant under the MCA, or of the victim under the GCA/ICCA, is a mixed question of law and fact to be submitted to the jury.<sup>176</sup> The Supreme Court of North Carolina diverged from the federal approach in *State v. Nobles*.<sup>177</sup> Mr. Nobles was charged in state court with first-degree murder, robbery with a dangerous weapon, and two counts of possession of a firearm by a felon. He moved to dismiss the charges for lack of subject matter jurisdiction, arguing that he was an Indian,<sup>178</sup> and, therefore, he argued, if any court had jurisdiction over

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whether other agencies have or do not have jurisdiction or exercise discretion in determining whether to prosecute."); *see also Phebus*, 5 F. Supp. 3d at 1233 ("Case law concerning [the federal MCA and GCA/ICCA] statutes does not directly resolve the question of which procedural requirements of proving Indian status apply in tribal courts, because Indian tribes and their courts are not bound by either the federal Constitution or federal procedural rules that Congress has not explicitly applied to them. The . . . fact the ICRA refers to the Major Crimes Act to define 'Indian' is relevant only to the substantive issue of Indian status under a tribal prosecution; it does not necessarily require that an Indian prosecutor prove Indian status beyond a reasonable doubt in tribal court.") (citing *Talton*, 163 U.S. at 376, 382–84 and *Eagle v. Yerington Paiute Tribe*, 603 F.3d 1161, 1164 (9th Cir. 2010)).

172. *See E. Band of Cherokee Indians v. Lambert*, No. CR 03–0313, 2003 WL 25902446, 3 Cher.Rep. 62 (N.C. Cherokee Ct. 2003).

173. *Id.* at \*1.

174. *Id.* at \*3.

175. *See Phebus*, 5 F. Supp. 3d at 1225, 1230–31 (noting that the Las Vegas Tribe of Paiute Indians tribal court had exercised jurisdiction over the defendant even after the Tribal Council had disenrolled him (along with approximately one-fourth of the tribal members), and reasoning that under *Bruce*, 394 F.3d 1215, although *Phebus* was no longer an enrolled member, he was still an "Indian"). The federal court in *Phebus* held that proof of the defendant's identity as an Indian was an element that had to be proven to a jury beyond a reasonable doubt. *Id.* at 1230.

176. Mixed questions of law and fact are those in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982); *see also Keys*, 103 F.3d at 761 (reviewing Indian status de novo).

177. No. 34PA14-2, 1 (N.C. Feb. 28, 2020).

178. Mr. Nobles and the State stipulated that his mother was an enrolled member of the Eastern Band of Cherokee Indians (EBCI), a federally recognized Indian Tribe, and that although he was not an enrolled member of the EBCI, he was a first descendant under Tribal law based on his mother's status. As explained by the court, EBCI membership requires at least a 1/16 blood quantum. EBCI law also recognizes "First Descendant" status for the children of tribal members who do not have the necessary blood quantum for membership, and who, under EBCI law, are not entitled to the same range of tribal benefits as enrolled members but are eligible for benefits not available to those with no EBCI affiliation. *Id.* at 3.

him, it was a federal court. A North Carolina trial court resolved the issue of Mr. Nobles' Indian status pretrial as a matter of law, without submitting it to the jury. The State Supreme Court upheld the trial court.<sup>179</sup> Mr. Nobles sought review in the United States Supreme Court and asked the Court to resolve the circuit split under *Rogers*, and to address whether a defendant's Indian status under federal law is a jury question. The Court declined,<sup>180</sup> leaving the issue unresolved.

*Nobles* raised a second issue—whether a defendant or victim's Indian status is a jurisdictional element in a *state* prosecution. On the second question, and relevant to this discussion, the Supreme Court of North Carolina held that Mr. Nobles' Indian status was *not* a jurisdictional element.<sup>181</sup> Consequently, as the state appeals court had held, the burden was properly on Mr. Nobles to *disprove* his Indian status as a defense to the State's jurisdiction, rather than on the prosecution to *prove* his non-Indian status as a jurisdictional element. *Nobles* distinguished the treatment of this issue in *federal* Indian Country prosecutions, in which a defendant's status as an Indian is essential to the court's subject-matter jurisdiction. In contrast, as the *Nobles* case illustrates, in a *state* court Indian Country prosecution, the defendant's status as a *non*-Indian is essential to the court's jurisdiction.<sup>182</sup>

#### b. Exception Two: Defendant Lacks Ties to the Community

Even if one concludes that a defendant or victim's Indian status is an element in a VAWA 2013 prosecution, that does not mean the same analysis extends to the other facts and circumstances in Section 1304. As noted, the second exception to SDVCJ provides that a participating Tribe may exercise SDVCJ over a defendant only if the defendant:

- Resides in the Indian Country of the participating Tribe,
- Is employed in the Indian Country of the participating Tribe, or
- Is a spouse, intimate partner, or dating partner<sup>183</sup> of (1) a member of the participating Tribe; or (2) an Indian who is not a member of the

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179. The State trial court issued extensive findings of facts in support of its ruling. The State Supreme Court affirmed, holding that the trial court did not err in Mr. Nobles' motion to dismiss or his request to submit the issue to the jury with a special jury verdict. Two others who charged with committing the robbery and murder with Mr. Nobles, Edward Swayney and Ashlyn Carothers, were found to be enrolled members of the EBCI were prosecuted in the EBCI courts. *Id.* at 2.

180. See U.S. Supreme Court Oct. 5, 2020 docket entry, <https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public/20-87.html>.

181. *Nobles*, No. 34PA14-2, at 22–23.

182. See *State v. Nobles*, No. COA17-5163, 24 (N.C. Ct. App. 2018).

183. 25 U.S.C. § 1304(a)(7) (defines “spouse or intimate partner” to have “the meaning given the term in section 2266 of Title 18” of the federal criminal code; to wit: “a spouse or former spouse of the [defendant], a person who shares a child in common with the [defendant], and a person who cohabits or has cohabited as a spouse with the [defendant]” or “a person who is or has been in a social relationship of a romantic or intimate nature with the [defendant], as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship,” or “any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.”).

participating Tribe, but who resides in the Indian Country of the participating Tribe.<sup>184</sup>

It may be tempting to read an exception as a limit on a tribunal's subject matter jurisdiction. After all, Congress is saying that a participating Tribe has jurisdiction generally over a class of cases, but not over a subset of those cases. However, as noted, under federal law, explicit statutory exceptions are treated as affirmative defenses, not jurisdictional elements or preconditions for a tribunal's exercise of subject matter jurisdiction.<sup>185</sup> With respect to these types of facts and circumstances, the Court has held that questions about whom a "statute regulates or protects and what the statute prohibits—is always a merits issue" because these types of questions have "nothing to do with the court's adjudicative jurisdiction."<sup>186</sup>

Under federal law, at best, a defendant's ties to a participating Tribe, or a non-member Indian victim's residence are merits elements, not adjudicatory requirements. That means the absence or failure of proof of these facts and circumstances does not deprive a Tribe of criminal jurisdiction over domestic violence prosecutions involving non-Indian defendants or non-member Indian victims generally. It also means a non-Indian defendant can submit to a Tribe's jurisdiction by stipulating to the existence of community ties. So construed, it also means that facts concerning a defendant's community ties, or a non-member Indian victim's residence, if not stipulated to by the defendant, would be submitted to a jury along with other merits elements, not decided by the Tribal court as a threshold jurisdictional matter. As discussed, in my view, the statutory text supports reading the second exception as giving rise to an affirmative defense, rather than a merits element. And, as discussed, if these facts and circumstances provide a defense, rather than elements of a Tribal VAWA 2013-eligible offense, the burden of pleading and prima facie proof can properly be assigned to the defendant. Further, defenses based on these facts and circumstances can be waived if not timely raised.

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184. 25 U.S.C. § 1304(b)(4)(B). Notably, this excludes jurisdiction over crimes by non-Indians against Indians who are not members of the participating Tribe, unless the victim also lives in that community, even if the crime and the non-Indian defendant's relationship with the victim meet the rest of the statutory criteria. Although SDVCJ is commonly described as granting jurisdiction over specified crimes committed by certain non-Indians against Indians in Indian Country, it is not quite that broad because of this provision, which also requires non-member Indians to have some connection to the Tribe—to wit: residence in that tribe's jurisdiction.

182. See Wasserman, *supra* note 123 at 951 (noting that the "Court[has] recognized more broadly that merits are about who a federal legal rule reaches and what the rule prohibits, and this recognition should control the appropriate characterization of extraterritoriality for other federal laws.").

186. *Id.* at 952 ("[A]ny question of the reach of federal law—of whether Congress asserted regulatory authority to reach and prohibit the challenged conduct by the targeted actors—must be deemed a merits issue. This includes issues such as whether the defendant falls within the statutory definition of persons regulated by the legal rule (persons on whom legal duties are imposed); whether the plaintiff falls within the statutory definition of a protected rights-claimant under the legal rule (persons on whom legal rights or liberties are bestowed); whether the defendant's conduct is of the kind prohibited by the legal rule; and whether the plaintiff has suffered the type of harm to her rights that is made remediable by the applicable legal rule.").

This proposed construction is consistent with federal common law's treatment of the Indian status issue previously discussed. The federal government must allege and prove a defendant's Indian status in an MCA prosecution because a defendant's positive Indian status is an element of an MCA offense.<sup>187</sup> But under the GCA/ICCA, a defendant's Indian status is an affirmative defense. This is because, in that context, it excepts the wrongdoing from federal jurisdiction if the victim is also an Indian.<sup>188</sup> Federal common law also treats Indian status differently under these two statutory schemes because it is impracticable to require the government to allege and prove a negative—that is, that the defendant is *not* an Indian.<sup>189</sup> Thus, with respect to the SDVCJ lack of ties exception, federal common law would place the burden on the defendant to timely object to a participating Tribes' exercise of jurisdiction based on these grounds.<sup>190</sup>

## 2. *Qualifying Offenses*

### a. Nature of the Defendant/Victim Relationship

ICRA sets out two categories of crimes over which a participating Tribe can exercise SDVCJ: (1) domestic violence and dating violence; and (2) violations of certain protection orders. Both categories incorporate statutory definitions that require specific factual findings. Section 1304 (a) provides

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187. *Phebus*, 5 F.Supp.3d at 1229 (citing *James*, 980 F.2d at 1317–19).

188. *See id.* at 1222–23 (Once a defendant in such a case “come[s] forward with enough evidence of her Indian status to permit a fact-finder to decide the issue in her favor,” the burden of persuasion shifts to the government, which then must disprove the affirmative defense beyond a reasonable doubt) (internal quotation marks and citation omitted).

189. *Hester*, 719 F.2d at 1043 (“[T]he Government need not allege the non-Indian status of the defendant in an indictment under section 1152 [the GCA/ICCA], nor does it have the burden of going forward on that issue” because it “is far more manageable for the defendant to shoulder the burden of producing evidence that he is a member of a federally recognized tribe than it is for the Government to produce evidence that he is not a member of any one of the hundreds of such tribes.”).

190. This construction is consistent with state courts' treatment of facts and circumstances alleged by a defendant to put him outside a state's criminal jurisdiction and, instead, within the federal government or a Tribe's Indian Country criminal jurisdiction. *See, e.g., Riggle*, 151 N.E.3d at 777 (“Several courts that have addressed this issue have held that a defendant bears the burden to show facts that would establish an exception to the state court's jurisdiction under the Indian Country Crimes Act.”) (citing *Young v. State*, 2015 WL 567012 (Iowa Ct. App. Feb. 11, 2015) (defendant bears burden to show he was enrolled member of tribe and offense occurred on Indian reservation in order to establish exception to state court's jurisdiction); *State v. Verdugo*, 901 P.2d 1165, 1169 (Ariz. Ct. App. 1995) (defendant bears burden of showing Indian status and that crime occurred in Indian Country to establish lack of state trial court); *State v. St. Francis*, 563 A.2d 249, 252 (Vt. 1989) (defendant bears burden of proving Indian status and that offense occurred within Indian Country outside state's jurisdiction); *Pendleton v. State*, 734 P.2d 693, 695 (Nev. 1987) (defendant bears burden of showing applicability of negative exceptions in jurisdictional statutes); *State v. Cutnose*, 532 P.2d 889, 890 (N.M. Ct. App. 1974) (defendant bears burden of proving lack of state court jurisdiction); *see also Eagle*, 603 F.3d at 1164 (tribe possessed “inherent power of self-government to define its child abuse offense without an Indian status element and to create a procedural rule requiring defendants to raise the jurisdictional issue of Indian status before the Tribe must prove it at trial” even though ICRA limits tribal criminal jurisdiction, by defining the term “Indian” by reference to 18 U.S.C. § 1153).

definitions for “dating violence,”<sup>191</sup> domestic violence,<sup>192</sup> and protection order.<sup>193</sup> “Dating violence” is defined as “violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.”<sup>194</sup> Thus, determining whether a Tribal offense falls within SDVCJ’s “dating violence” category requires finding that the defendant and the victim were in an intimate relationship, which in turn, requires findings regarding the contours of that relationship. “Domestic violence” is defined as “violence committed by a current or former spouse or intimate partner of the victim,<sup>195</sup> by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim” under the Tribe’s domestic- or family- violence laws.<sup>196</sup> Determining whether an offense qualifies as “domestic violence” for purposes of SDVCJ, thus, requires findings that the defendant and victim are “current or former spouses or intimate partners” (as defined by federal criminal law) or that they have a child in common.

Unlike facts and circumstances relevant to a defendant’s lack of community ties, the nature of the defendant and victim’s relationship is not set out as an exception to jurisdiction, but rather, as a set of characteristics pertaining to offenses that are within a participating Tribe’s SDVCJ. In that sense, these factors act more like true elements of the offense, which is how they are treated in federal law. That said, however, at best, these requirements add merits elements to a Tribe’s prosecution burden. They are not, for the reasons discussed above, jurisdictional in an adjudicative sense. As with other facts and circumstances, if proof of an element fails in an individual case, it does not mean

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191. 25 U.S.C. § 1304(a)(1).

192. *Id.* § 1304(a)(2).

193. *Id.* § 1304(a)(5) (defines “protection order” as “(A) . . . any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and (B) includ[ing] any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection”).

194. *Id.* § 1304(a)(1).

195. Section 1304(a)(7) provides that “spouse or intimate partner” has the meaning given the term in section 2266 of Title 18. Section 2266 is the definitional provision for Chapter 110A of the federal criminal code, which covers domestic violence and stalking. Section (7)(A) defines “spouse or intimate partner” to include: “(I) a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or (II) a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.” Sections 1304(a)(1) & (2) incorporate 18 U.S. Code § 2266’s definition of “spouse or intimate partner” verbatim (albeit in two separate provisions), making (a)(7)’s incorporation by reference of 2266 somewhat redundant.

196. 25 U.S.C. § 1304(a)(2).

the Tribe did not have adjudicative jurisdiction over the intimate partner and family violence charges against the defendant in the first instance.

Treating proof of the nature of a defendant and victim's relationship as an adjudicative prerequisite would lead to absurd results. First, a SDVCJ defendant could put subject matter jurisdiction at issue at any time simply by denying the existence of a qualifying relationship with a victim. Further, if a Tribal court's jurisdiction over a non-Indian accused of domestic violence were said to exist only upon proof of a qualifying relationship, that would mean that a non-Indian defendant could never be offered a plea to a lesser offense that did not contain these elements (such as a disorderly conduct charge) because a Tribal court would have no power to accept and enter the plea, or to sentence the defendant on a lesser charge. It would also mean that in a case that went to trial, the defendant would not be entitled to a lesser included offense instruction (such as simple assault) unless the lesser included offense also included the elements of an intimate partner or family relationship. That, in turn, would run afoul of the VAWA 2013 requirement that a defendant be afforded "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe"<sup>197</sup> to the extent there is a federal due process right to a lesser included offense instruction.<sup>198</sup> Further, if a defendant's jury is given a lesser included offense and he is convicted of the lesser offense, that would mean that a Tribal court would be without jurisdiction to accept the jury's verdict, or sentence the defendant for the lesser included offense.<sup>199</sup>

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197. *Id.* § 1304(d)(4).

198. See generally Chris Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445 (1984). Federal defendants have a statutory right to an instruction on lesser included offenses if evidence would permit the jury to find him guilty of the lesser offense and acquit him of the greater. FED. R. CRIM. P. 31(c); 18 U.S.C. Whether a statutory right to a lesser included offense instruction would constitute a right "necessary under the Constitution" is unclear. See *Beck v. Alabama*, 447 U.S. 625, 637 (1980) ("While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this."). The *Beck* Court confined its holding to capital cases. But its rationale would logically extend to noncapital. See 3 CRIM. PRAC. MANUAL § 100:8.

199. The Court considered this precise issue in the context of federal jurisdiction over lesser included offenses in MCA prosecutions. As noted, the MCA authorizes the federal government to prosecute Indians in non-PL 280 jurisdictions for enumerated Indian Country offenses. This raises the question of whether an MCA defendant is entitled to a lesser included offense instruction for offenses that are not enumerated in the MCA. And, if so, whether the court has jurisdiction to sentence the MCA defendant for an offense not contained in the MCA. In *Keeble v. United States*, the Court held that an Indian MCA defendant is entitled to a lesser included offense instruction even if the offense is not listed in the MCA. 412 U.S. 205, 208 (1973). The Court explained this is by virtue of 18 U.S.C. § 3242, which requires that Indians prosecuted under the MCA be "tried in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States." 412 U.S. at 212. *Keeble* has been extended to non-MCA sentencing involving lesser included offenses, with lower courts concluding that federal courts retain jurisdiction over lesser included offenses in MCA prosecutions even if they would not have had jurisdiction over the lesser included offense standing alone (that is, if it had not been charged with the MCA offense). See *United States v. Walkingeagle*, 974 F.2d 551, 554 (4th Cir. 1992) (federal court retained jurisdiction over lesser included misdemeanor after dismissing MCA felony

*b. Defining “Domestic Violence”—The Castleman Issue*

ICRA defines domestic and dating violence for purposes of SDVCJ as “violence committed” within the context of specific relationships.<sup>200</sup> The “violence committed” language raises the issue of whether Congress’s use of the term “violence” limits SDVCJ to Tribal offenses that include some form of physical violence, or whether Tribes may also charge offenses that are designated as domestic or family violence crimes under their codes, but that do not involve physical violence. In other words, is actual physical violence a required element in order for a Tribal family violence offense to be VAWA eligible?

This issue surfaced during the VAWA 2013 pilot period when the Court decided *United States v. Castleman*.<sup>201</sup> In *Castleman*, the Court considered what constitutes a “crime of violence” for purposes of a federal statute making it a federal offense for someone with a state conviction for misdemeanor domestic assault to possess a firearm.<sup>202</sup> The specific issue raised was whether a state common law misdemeanor domestic violence offense qualifies as “domestic violence or assault” even if the offenses do not require proof of physical violence. Or, conversely, whether a state offense needs to include some element of “physical force” to “count” as a predicate offense under the federal firearm statute at issue.<sup>203</sup> The *Castleman* majority concluded that the term “domestic violence” as used in the federal firearm statute incorporated the common law definition of misdemeanor domestic assault and, therefore, a state misdemeanor did not need to include a physical force element to qualify as a predicate offense under the federal statute.

*Castleman* did not involve ICRA. However, it sparked a significant discussion after it was decided concerning whether its reasoning would impact Tribes’ exercise of VAWA 2013 SDVCJ. This was inspired by a comment in a concurrence, and the majority’s response thereto. Justice Scalia, in a concurrence, opined that the literal meaning of “violence” should apply to the statute at issue and that a state domestic violence offense should only “count” if it involved proof of some amount of physical force. Justice Scalia, therefore,

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count); *United States v. Bowman*, 679 F.2d 798, 799 (9th Cir. 1983); *United States v. John*, 587 F.2d 683, 685 (5th Cir. 1979); *United States v. Felicia*, 495 F.2d 353, 355 (8th Cir. 1974).

200. Section 1304(a)(7) defines “spouse or intimate partner” to have “the meaning given the term in section 2266 of Title 18” of the federal criminal code; to wit: “a spouse or former spouse of the [defendant], a person who shares a child in common with the [defendant], and a person who cohabits or has cohabited as a spouse with the [defendant]” or “a person who is or has been in a social relationship of a romantic or intimate nature with the [defendant], as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship,” or “any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.”

201. 572 U.S. 157, 161 (2014).

202. 18 U.S.C. § 922(g)(9) (criminalizing possession of firearms by those convicted of “misdemeanor crimes of domestic violence”).

203. *Castleman*, 572 U.S. at 162, 172–73.



would have excluded domestic violence offenses that do not involve physical force even if a state law labels it “domestic violence.” In response (and in dicta), the majority agreed that its broader reading of “domestic violence” for the firearm statute at issue would not extend to statutes or provisions that make reference to generic “violence.”<sup>204</sup>

This side discussion in *Castleman* referenced VAWA, which, in turn, prompted the question of whether SDVCJ was limited to domestic violence offenses that involve some level of physical force. If so, that would require Tribes to prove additional elements of “force” and “injury” in prosecutions of non-Indians in exercising SDVCJ. In other words, *Castleman* added yet another potential layer of complexity to the extent it can be read to require proof of some amount of physical violence in SDVCJ prosecutions, even where a Tribe’s domestic violence code does not.<sup>205</sup>

### III. WHAT PENDING VAWA LEGISLATION WILL CLARIFY, AND WHAT IT WILL NOT

The original Violence Against Women Act is part of the Violent Crime Control and Law Enforcement Act of 1994 (1994 Crime Bill).<sup>206</sup> The 1994 Crime Bill was the largest crime bill in U.S. history.<sup>207</sup> It has come under scrutiny for its role in contributing to the extraordinarily high incarceration rates in the United States.<sup>208</sup> The 1994 Crime Bill addressed concerns about violent crime generally, and VAWA addressed crimes of violence against women in particular. VAWA’s main components include enhanced investigation, prosecution, and punishment of federal sex offenses; grant funding for state, local, and Tribal law enforcement to enhance their investigation and prosecution of crimes of violence against women; and immigration provisions addressing

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204. Emily J. Sack, *United States v. Castleman: The Meaning of Domestic Violence*, 20 ROGER WILLIAMS U.L. REV. 128, 142 (2015).

205. See NCAI, FIVE-YEAR REPORT, *supra* note 14 at 28 (reporting that some Tribes have refrained from prosecutions because they did not think they could meet the degree of force that *Castleman* appears to require for “domestic violence”); Sack, *supra* note 204, (noting that, apparently adopting this construction, the Department of Justice advised Tribes to prosecute crimes only when they came into the ambit of the “common understanding of the term ‘violence’ in ordinary language” and fell under conduct described in the term “crime of violence” as codified in 18 U.S.C. § 16(a). Section 16(a) defines “crime of violence” as “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . .”). Section 16(b) defines “crime of violence” as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

206. VAWA is Title IV of Pub. L. No. 103-322, the 1994 Violent Crime Control and Law Enforcement Act.

207. See U.S. Dep’t of Just., Violent Crime Control and Law Enforcement Act of 1994 Fact Sheet, (Oct. 24, 1994), <https://www.ncjrs.gov/txtfiles/billsfs.txt>.

208. Lauren-Brooke Eisen & Inimai M. Chettiar, *The Complex History of the Controversial 1994 Crime Bill*, BRENNAN CTR. FOR JUST. (Apr. 14, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/complex-history-controversial-1994-crime-bill>.

domestic violence towards aliens seeking to enter or remain in the United States.<sup>209</sup>

VAWA's grant funding provisions require Congressional re-authorization every five years. VAWA has been reauthorized three times since its original enactment—in 2000,<sup>210</sup> 2005,<sup>211</sup> and, most recently, in 2013.<sup>212</sup> Most VAWA grants were reauthorized from the 2014 fiscal year through the 2018 fiscal year.<sup>213</sup> New VAWA legislation was proposed in 2018. On April 2019, during the 116th Congress, the House passed H.R. 1620, the Violence Against Women Reauthorization Act of 2019, with bipartisan support.<sup>214</sup> A compatible companion Senate Bill was expected to follow soon after. The Senate did not take up consideration of this legislation until November 2019. And rather than one Senate Bill, two competing and very different Senate VAWA Bills were introduced during the 116th Congress—S. 2843 and S. 2920. The 116th Congress recessed without re-authorizing VAWA. The House took up VAWA again during the 117th Congress and passed the lapsed legislation, VAWA 2021.<sup>215</sup> As of the publication of this article, VAWA 2021 was pending in the Senate,<sup>216</sup> where it was expected to again face stiff opposition.<sup>217</sup>

VAWA, of course, is a large piece of national legislation that touches on numerous subjects. Among other things, it impacts federal criminal law relating to firearms, custodial rape, and stalking. Pertinent to this Article, however, pending VAWA legislation contains significant proposed amendments to ICRA that would impact participating Tribes' Indian Country criminal jurisdiction.<sup>218</sup> This is a short overview of the impacts pending VAWA legislation would have on the Indian Country issues discussed in this Article. A full analysis, of course, will need to wait for Congress to actually enact legislation.

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209. LISA N. SACCO, CONG. RSCH. SERV., *THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION 2–5* (2019), <https://fas.org/sgp/crs/misc/R45410.pdf>.

210. In 2000, Congress reauthorized VAWA through the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386.

211. In 2005, Congress reauthorized VAWA through the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162.

212. Authorization for appropriations for the programs under VAWA expired in 2011; however, programs continued to receive appropriations in FY2012 and FY2013. In 2013, the 113th Congress reauthorized VAWA through the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4.

213. See SACCO, *supra* note 209, at 14.

214. H.R. 1620, 116th Cong. (2019).

215. H.R. 1620, 117th Cong. (2021). The provisions pertaining to Indian country are found in Title IX, starting at page 181.

216. See *H.R.1620 - Violence Against Women Act Reauthorization Act of 2021*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/1620/all-actions?overview=closed#tabs> (last visited Jan. 24, 2022).

217. Li Zhouli, *The House Has Renewed the Violence Against Women Act. It Now Faces Major Hurdles in the Senate*, VOX (Mar. 17, 2021), <https://www.vox.com/2021/3/17/22335695/house-violence-against-women-act>.

218. See U.S. DEP'T OF JUST., U.S. DEPARTMENT OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN 2019 TRIBAL CONSULTATION REPORT (2019), <https://www.justice.gov/ovw/page/file/1271686/download> (for the perspective of a number of Tribal Nations on the pending legislation and their recommendations on steps that would promote safety in their communities).

VAWA 2013 only covers offenses against intimate or domestic partners or co-parents. It does not include crimes against children, elders, or other family or household members of the intimate partner. Nor does it include attendant crimes that often accompany domestic violence, such as destruction of property, assaults against peace officers, or drug and alcohol offenses. VAWA 2013 jurisdiction also is not currently an option available to all Tribes. Notably, it excludes most Tribes in Alaska,<sup>219</sup> even though Alaska has the highest concentration of indigenous communities in the United States and<sup>220</sup> even though 229 of the 574 federally recognized Tribes (40%) are located within Alaska.<sup>221</sup> VAWA 2013 also excluded four Tribes in Maine.<sup>222</sup> H.R. 1620 would include Maine and create a pilot project for Tribes in Alaska.

Substantively, among other things, H.R. 1620 would expand VAWA 2013 jurisdiction in two ways, by recognizing Tribal jurisdiction over crimes against additional victims and additional crimes “special domestic violence criminal jurisdiction” would be renamed “special tribal criminal jurisdiction” to reflect these expanded categories. Currently, the statutory definition of “domestic violence” limits SDVCJ to domestic violence committed against an adult with whom the perpetrator is in a domestic or intimate relationship, or with whom the perpetrator shares a child.<sup>223</sup> H.R. 1620 would extend jurisdiction to domestic violence offenses involving children and elders who are related to a victim or

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219. The territory of all but one of the 229 Tribes in Alaska is not included in the definition of “Indian country” for purposes of federal law and VAWA Tribal SDVCJ is currently limited to Indian Country. 25 U.S.C. § 1304(a)(3). VAWA 2013 did not extend to most of Alaska Native communities because the Alaska Native Claims Settlement Act (ANCSA) of 1971 and a 1998 Supreme Court opinion purported to extinguish title to, and sovereignty over, Tribal land for 228 of the 229 tribes in Alaska. As a result, those lands are not held in trust for Tribes by the federal government and they, therefore, fall outside the definition of “Indian country” under federal law. Thus, by definition, Alaska Native Villages were excluded from VAWA 2013 participation. *See Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998). VAWA 2013 contained a “Special Rule for the State of Alaska” in Section 910 which applied sections 904 and 905 of VAWA only to the Metlakatla Indian Community, Annette Island Reserve. That special rule was repealed in 2014 by Public Law 113–275.

220. *See* AMY L. CASSELMAN, *INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN* (Andrew Jolivet & Peter Lang eds., 2016).

221. Andrew Soergel, *Where Most Native Americans Live*, U.S. NEWS & WORLD REP. (Nov. 29, 2019) <https://www.usnews.com/news/best-states/articles/2019-11-29/california-arizona-oklahoma-where-most-native-americans-live> (reporting on figures from the last census, which are widely believed to have undercounted reservation populations; census figures are based on self-identified ethnicity, not Indian status under federal law). According to the U.S. Bureau of Indian Affairs, there are 229 federally recognized Tribes in Alaska, comprising roughly 40% of all federally recognized Tribes in the United States. *Alaska Region: Special Announcement*, U.S. DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFS., <https://www.bia.gov/regional-offices/alaska> (last visited Jan. 24, 2022).

222. Similar to Alaska, Maine has restrictive settlement acts that make Tribes within its borders currently ineligible to exercise VAWA 2013 jurisdiction. *See* U.S. DEP’T OF JUST., U.S. DEPARTMENT OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN 2018 TRIBAL CONSULTATION REPORT 38 (2018), <https://www.justice.gov/tribal/page/file/1161726/download>.

223. “Domestic violence” is currently defined as “violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.” 25 U.S.C. § 1304(a)(2).

perpetrator, or who are members of their household or under their care. It would also include domestic offenses committed in their presence.

H.R. 1620 would extend Tribal jurisdiction over additional Tribal offenses. In some instances, the Tribal offenses would be required to include additional elements set out in H.R. 1620. For example, H.R. 1620 adds the crime of “stalking” as defined by Tribal law, if the violation “would cause a reasonable person to (A) fear for the person’s safety or the safety of others; or (B) suffer substantial emotional distress.”<sup>224</sup> The impact on the person targeted by stalking, therefore, would become an element of a VAWA stalking offense if not already incorporated into a Tribal code. H.R. 1620 would also include the offense of “sexual violence,” as defined by reference to Tribal law.

H.R. 1620 would include a stand-alone offense of “sex trafficking.” The offense is borrowed from existing federal criminal law, and H.R. 1620 sets out the elements that would be required to prove the offense in Tribal court, without referencing or incorporating Tribal law.<sup>225</sup> Thus, the offense of sex trafficking could only be prosecuted by a Tribe under VAWA if it includes the offense in its code verbatim as set out in H.R. 1620. These additional elements and new crimes, to the extent they are not already reflected in a Tribe’s code, would need to be incorporated into participating Tribes’ existing criminal codes in order to comply with the TLOA requirement that Tribes make their criminal laws publicly available prior to charging a defendant.<sup>226</sup>

H.R. 1620 would add assault against a law enforcement or correctional officer in Indian Country to VAWA jurisdiction. It would also add the crime of obstruction of justice, as defined by a Tribe’s code, if the violation “involves interfering with the administration or due process of the Tribe’s laws including any Tribal criminal proceeding or investigation of a crime.” For charges of

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224. The term “stalking” means “engaging in a course of conduct directed at a specific person proscribed by the criminal law of the Indian Tribe that has jurisdiction over the Indian Country where the violation occurs that would cause a reasonable person to (A) fear for the person’s safety or the safety of others; or (B) suffer substantial emotional distress.”

225. “(8) SEX TRAFFICKING.— (A) IN GENERAL.—The term ‘sex trafficking’ means conduct (i) consisting of—

- (I) recruiting, enticing, harboring, transporting, providing, obtaining, advertising, maintaining, patronizing, or soliciting by any means a person; or
- (II) benefitting, financially or by receiving anything of value, from participation in a venture that has engaged in an act described in subclause (I); and
- (ii) carried out with the knowledge, or, except where the act constituting the violation of clause (i) is advertising, in reckless disregard of the fact, that—
  - (I) means of force, threats of force, fraud, coercion, or any combination of such means will be used to cause the person to engage in a commercial sex act; or
  - (II) the person has not attained the age of 18 years and will be caused to engage in a commercial sex act.”

226. Under 25 U.S.C. § 1302(c)(4), to exercise TLOA, and by extension, VAWA authority, a Tribe must “prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government . . . .”

obstruction of justice, assaulting a Tribal law enforcement or correctional officer, sex trafficking, or sexual violence, H.B. 1620 would remove the VAWA exception for crimes in which neither the victim nor the defendant is an Indian. In other words, for these offenses, the Indian status of the defendant or victim would no longer have relevance. If enacted, therefore, this provision would result in a partial repudiation of the *McBratney* common law exception to Tribal court jurisdiction under the GCA/ICCA for crimes committed in Indian Country by a non-Indian against another non-Indian.<sup>227</sup>

#### CONCLUSION

A fundamental aspect of sovereignty is the power to define and punish wrongdoing in territory subject to a sovereign's authority. Outside of Indian Country few things are as straight-forward as criminal jurisdiction in the United States—if you violate a state's criminal law, you are subject to prosecution and punishment by that state, regardless of your citizenship or ancestry. In Indian Country, however, the Court and Congress have created a convoluted tripartite and overlapping jurisdictional scheme, with some criminal matters assigned to the Tribes, some to the federal government, and some to the States, or some combination thereof. This "system," such that it is, has demonstrably dangerous consequences for Indian Country. Legal confusion and loopholes in criminal systems are more than interesting law review fodder, they are magnets for opportunists and predators.

The TLOA and VAWA 2013 amendments to ICRA were intended by Congress to expand Tribes' criminal punishment and jurisdictional reach, a long overdue correction to restrictive federal policies grounded more in fear than fact about Tribes' competence to fairly dispense justice within their borders. As demonstrated in this Article, however, Congress's incremental approach has generated almost as many issues as it has purported to address. Congress's latest proposed installment, reflected in H.R. 1620, is a positive step in that it is at least responsive to specific concerns Tribes have raised about the fractured nature of Indian Country jurisdiction. However, as demonstrated here, even if Congress enacts new VAWA legislation it will have failed to address some of the technical legal issues in the VAWA scaffolding that make prosecuting non-Indians challenging, costly, and uncertain for Tribes. In doing so, Congress has erected yet more roadblocks and disincentives in the paths of Tribes seeking to exercise restored jurisdiction over conduct that threatens the safety of their communities.

Numerous Tribes have been exercising increased TLOA sentencing authority for over a decade now. The first VAWA 2013 pilot project Tribes have now been exercising jurisdiction over non-Indians for more than five years. Notwithstanding the challenges described in this Article and a lack of consistent federal funding to support their efforts, the Tribes that have opted into these

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227. See *supra* text accompanying note 104.

statutory schemes have amply demonstrated that they are capable and supremely qualified to dispense justice within their borders. Although Congress is set to expand VAWA jurisdiction, it will still result in less than full authority for Tribes over wrongdoing in their communities. As long as that remains the status quo, the jurisdictional voids and anomalies in Indian Country will continue to compromise safety and wellbeing in those communities.

## APPENDIX A

Tribes currently exercising SDVCJ, in the order in which they adopted SDVCJ are:

Pascua Yaqui Tribe (Arizona) February 20, 2014; Tulalip Tribes (Washington) February 20, 2014 ; Confederated Tribes of the Umatilla Indian Reservation (CTUIR) (Oregon) February 20, 2014; Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (Montana) March 6, 2015; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation (North and South Dakota) March 6, 2015; Little Traverse Bay Band of Odawa Indians (Michigan) March 7, 2015; Alabama-Coushatta Tribe (Texas) March 7, 2015; Choctaw Nation (Oklahoma) May 9, 2015; Eastern Band of Cherokee Indians (North Carolina) June 8, 2015; Seminole Nation (Oklahoma) July 6, 2015; Sac and Fox Nation (Oklahoma) March 1, 2016; Kickapoo Tribe (Oklahoma) March 15, 2016; Nottawaseppi Huron Band of Potawatomi (Michigan) March 18, 2016; Muscogee (Creek) Nation (Oklahoma) March 28, 2016; Standing Rock Sioux Tribe (North and South Dakota) May 1, 2016; Sault Ste. Marie Tribe of Chippewa (Michigan) December 13, 2016; Chitimacha Tribe (Louisiana) December 13, 2016; Lower Elwha Klallam Tribe (Washington) June 5, 2017; Quinault Nation (Washington) May 1, 2018; Cherokee Nation (Oklahoma) May 17, 2018; Gila River Indian Community (Arizona) August 1, 2018; Port Gamble S'Klallam Tribe (Washington) September 17, 2018; Confederated Tribes of the Chehalis Reservation (Washington) October 24, 2018; Grand Traverse Band of Ottawa and Chippewa Indians (Michigan) October 31, 2018; Suquamish Tribe (Washington) April 10, 2019; Santa Clara Pueblo (New Mexico) August 24, 2020; Swinomish Indian Tribal Community (Washington) January 1, 2021.

Source: National Congress of American Indians (NCAI), *SDVCJ Today*, at: <https://www.ncai.org/tribal-vawa/get-started/currently-implementing-tribes>; see also NCAI, *Five Year Report*, at: [http://www.ncai.org/resources/ncai-publications/SDVCJ\\_5\\_Year\\_Report.pdf](http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf).