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Getting *Cooley* Right: The Inherent Criminal Powers of Tribal Law Enforcement

Grant Christensen[*]

While the Supreme Court regularly decides cases defining the limits of the criminal jurisdiction of tribal courts, when it heard United States v. Cooley *in 2021 it had not decided a case about the procedural powers of tribal law enforcement in more than a century. Across more than five decades lower courts at all levels struggled to decide whether the inherent criminal powers of tribal law enforcement are coterminous with the jurisdiction of tribal courts or whether tribal officers may have their own set of inherent powers distinct from the power to prosecute. This Article examines the inconsistent split in authority that existed before* Cooley *and anticipates the future misreading of inherent criminal power by lower courts. It argues that now that the Court has divorced the inherent criminal power of tribal law enforcement from the criminal jurisdictional power of tribal courts, tribal officers may stop, detain, search, and investigate anyone whose criminal conduct poses a danger to the health and welfare of the tribal community. The Article bolsters its application by using the first cases*

 Assistant Professor of Law at Stetson University College of Law and formerly Professor of Law and Affiliated Professor of American Indian Studies at the University of North Dakota. Professor Christensen also serves as an Appellate Judge for the Fort Peck and Assiniboine Sioux Tribes. A special thanks to Tomer Stein and Anne Mostad-Jensen for helping to instigate this Article.

*decided by lower courts in the post-*Cooley *era as artifacts to examine the full implications of the recognition of inherent criminal power exercised by tribal law enforcement.*

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> "On the far end of the Trail of Tears was a promise. *** '[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.' Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word."[1]

INTRODUCTION

Two years ago, Supreme Court Justice Neil Gorsuch began his majority opinion in *McGirt v. Oklahoma* with reference to a promise made by the United States.[2] The Court ultimately held that the territory secured by the Muscogee (Creek) Nation by treaty with the United States was still an Indian reservation, despite the fact that non-Indians had subsequently acquired land within its exterior boundaries.[3] The Court reasoned that once a reservation had been created the presumption is that it remains intact.[4] While Congress could diminish its borders, its intent to do so must be clear. No act of Congress clearly manifested its intent to alter the borders of the Muscogee (Creek) Reservation, and so the reservation remains.[5] That holding had direct consequences for criminal law. Because the reservation remained intact, the State of Oklahoma had no jurisdiction to prosecute Jimcy McGirt, a

[1] McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

[2] *Id.* That tribal governments and the United States are peers, or separate sovereigns, is now well established. *See* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 140-41 (2006) [hereinafter *The Supreme Court*] ("Congressional and Executive Branch commitment to the federal policy of tribal self-determination has, for some commentators, strengthened or wavered, prompting commentators to suggest that we have entered new eras of federal Indian policy — government-to-government relations or self-reliance.").

[3] *McGirt*, 140 S. Ct. at 2482 ("The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation.").

[4] *Id.* at 2462 ("'[O]nly Congress can divest a reservation of its land and diminish its boundaries.' So it's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so." (citing Solem v. Bartlett, 465 U.S. 463, 470 (1984))).

[5] *Id.* at 2468 ("But whatever the confluence of reasons, in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation. In the end, Congress moved in the opposite direction.").

citizen of the Seminole Tribe of Oklahoma, who had been convicted in state court of three sexual offenses occurring on tribal lands.[6]

McGirt is the most significant in a line of recent cases[7] where the Court has pivoted toward recognition of inherent tribal sovereignty as the source of tribal power instead of looking at tribal authority as the remnant of powers not assumed by Congress or given to the states.[8] In 2019 the Court recognized that the 1855 treaty with the Yakama exempted its members from the State of Washington's fuel import tax.[9] Writing for the plurality, Justice Stephen Breyer explained, "Washington's fuel tax 'acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve."[10]

Justice Gorsuch, joined by Justice Ruth Bader Ginsburg, went further in their concurrence. "Our job in this case is to interpret the treaty as the Yakamas originally understood it in 1855 — not in light of new

[6] Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 1005 (2022) [hereinafter *Muskrat Textualism*] ("State governments such as Oklahoma do not possess criminal jurisdiction over Indians within Indian Country without authorization from Congress. Therefore, the state's prosecution and conviction of the respondent, Jimcy McGirt, a Seminole Nation member who had committed a crime in Creek Indian Country, was invalid."). For an excellent discussion of the case and its consequences, for McGirt and for Indian country, see Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. ONLINE 250, 254 (2021); *see also* Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300, 306-07 (2021) (situating *McGirt* in the larger narrative of federal Indian law and exploring its particular implications for the Five Tribes of Oklahoma).

[7] After this Article was accepted for publication, the Supreme Court decided *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022). On a 5-4 vote the Court recognized an expanded role for state criminal prosecution of non-Indians who commit crimes against Indians in Indian country. *Id.* at 2491. The question of the inherent power of tribal law enforcement or tribal courts was not before the Court in that case.

[8] Also, after this Article was accepted for publication, the Supreme Court decided another case that further strengthens the argument that we are in the middle of a renaissance for inherent tribal authority. In *Denezpi v. United States*, the Court held that when a criminal defendant is prosecuted by the United States in a CFR Court and then subsequently prosecuted in a federal court for criminal activity from the same incident, it does not violate the Indian defendant's Double Jeopardy rights because the prosecution under tribal law is prosecution of a violation of a separate sovereign. Denezpi v. United States, 142 S. Ct. 1838, 1849 (2022). This is an extension of the Dual Sovereignty Doctrine first articulated in *Talton v. Mayes*, 163 U.S. 376 (1896), and, although it only applies to the five CFR Courts still in existence, it is further recognition by the Supreme Court of the inherent authority of tribes to make their own laws and be governed by them.

[9] Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1015-16 (2019).

[10] *Id.* at 1013 (quoting Tulee v. Washington, 315 U.S. 681, 685 (1942)).

lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact."[11] The concurrence explained that the Yakama understood the treaty right to move goods in common with the people of the territory as implying that their access to markets would be free from state imposed taxation.[12]

Just two months later, the Court overturned an 1896 precedent and held that citizens of the Crow Tribe could exercise their treaty rights in the Bighorn National Forest. Justice Sonia Sotomayor, writing for the majority, emphasized that "[a] treaty is 'essentially a contract between two sovereign nations'"[13] and that "Indian treaties 'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.'"[14] Finally, in 2021 a unanimous Court recognized that "tribes 'have inherent sovereignty independent of th[e] authority arising from their power to exclude'"[15] and that among the inherent powers "tribes have retained" is the right to stop, search, and detain non-Indians who are suspected of committing crimes in Indian country.[16]

This new line of cases has created the need for Indian[17] law scholars to reexamine prior scholarship and judicial precedent. A new approach predicated upon the respect for the inherent powers of tribal

[11] *Id.* at 1019 (Gorsuch, J., concurring).

[12] *Id.* at 1016-17 ("To some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else. But that is not how the Yakamas understood the treaty's terms. To the Yakamas, the phrase '"in common with" . . . implie[d] that the Indian and non-Indian use [would] be joint but [did] not imply that the Indian use [would] be in any way restricted.'" (quoting Yakama Indian Nation v. Flores, 955 F. Supp. 1229, 1265 (1997))).

[13] Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019) (quoting Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979)).

[14] *Id.* (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 206 (1999)).

[15] United States v. Cooley, 141 S. Ct. 1638, 1644 (2021) (quoting Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408, 425 (1989) (plurality opinion)). For an interesting discussion of the importance of plurality opinions in helping to articulate the marketplace of ideas, see Tomer S. Stein, *Copyright and Dissent*, 28 TEX. INTELL. PROP. L.J. 157, 174-76 (2020).

[16] *Cooley*, 141 S. Ct. at 1646.

[17] The word "Indian" is a legal term of art and is regularly used in the law and by lawyers to describe many of America's Indigenous people. The term is used to codify the definition of "Indian country" at 18 U.S.C.S. § 1151 (2018) and is used to determine which tribes share in a government-to-government relationship through the Federally Recognized Indian Tribes List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791. But for a discussion of how the term "Indian" is more problematic in an international context, see H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 60 n.1 (5th ed. 2014).

government is in some ways a return to early Indian law jurisprudence,[18] but is so markedly different from cases decided by the Rehnquist Court that it merits a complete reexamination.[19] At times it is difficult to imagine judicial language more protective of tribal sovereignty than that embedded in recent majority opinions.

Justice Gorsuch has not been shy in unambiguously marking this shift, requiring any diminution of tribal sovereignty to be made by the elected branches of government and leaving to the courts the power and the duty to protect inherent tribal power. In *McGirt* he held:

> Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges — facing no possibility of electoral consequences themselves — will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives.[20]

In *Cougar Den*, he similarly reasoned:

> Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded

[18] *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 381-82 (1896) (holding that an Indian tribal court exercises a tribe's inherent criminal powers and so is not bound by the Constitution's requirement to use a grand jury); *Ex parte* Crow Dog, 109 U.S. 556, 567-68 (1883) (There is no criminal jurisdiction in a federal court to prosecute the crime committed by an Indian against another Indian of the same tribe. Tribes were responsible to criminally enforce the conduct of their own citizens.); Worcester v. Georgia, 31 U.S. 515, 561 (1832) (holding that the state of Georgia did not have authority to extend its criminal laws onto tribal land). For an academic discussion of the respect for inherent tribal sovereignty in early Supreme Court jurisprudence, see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 399 (1993).

[19] *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 278 (2001) [hereinafter *Beyond Indian Law*] ("Analysis of the opinions of the Rehnquist Court, corroborated by research into the internal memoranda and draft opinions of some members of the Court, shows the willingness of the Justices to chart Indian policy instead of leaving it to Congress."). *See generally* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) (a historical analysis of racist language and stereotypes found in past Supreme Court decisions). Also, see a particularly strong student note arguing for changes to the Rehnquist Court's treatment of tribal criminal jurisdiction. Samuel E. Ennis, Note, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553 (2009).

[20] McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020).

> to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.[21]

Professor Matthew Fletcher has perhaps gone furthest in documenting this transformation.[22] His newest work, *Muskrat Textualism*, builds upon the Court's recent jurisprudence on inherent tribal power to suggest that the new and better approach to federal Indian law is to give statutes and treaties their clear meaning, while exercising judicial restraint to refrain from answering questions constitutionally assigned to another branch of government. Professor Fletcher describes the Court as moving from a canonical textualism[23] — where justices can deviate in Indian law cases from their presumptive rules to achieve their policy preferences[24] — to a form of judicial minimalism that he calls "Muskrat Textualism."[25] This new view of Indian law gives Indian treaties and statutes their plain meaning but incorporates judicial

[21] Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1021 (2019).

[22] *See, e.g.*, Fletcher, *Muskrat Textualism*, *supra* note 6 (depicting a summary of the Supreme Court's shifting attitudes toward inherent tribal power). Professor Fletcher has also done some excellent work documenting the *sui generis* nature of Indian law at the Supreme Court. *See, e.g.*, Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009) [hereinafter *Factbound*]; Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579 (2008) [hereinafter *Supreme Court's Indian Problem*]. Also, see his other recent work on textualism in Indian law. Matthew L.M. Fletcher, *Textualism's Gaze*, 25 MICH. J. RACE & L. 111 *passim* (2020).

[23] While I use the phrase canonical textualism to describe this idea, Professor Fletcher pulls the phrase canary textualism from a classical conception of Indians as the canary in the coalmine derived from work by Felix Cohen. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953) ("Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.").

[24] Fletcher, *Muskrat Textualism*, *supra* note 6, at 974-75 ("Canary textualist judges view Indians and Indian tribes as passive recipients of federal law and policy, with little or no input in the process. These judges invoke the federal plenary power over Indian affairs to enforce the legal and political inferiority of Indian tribes.").

[25] *Id.* at 999-1000 (The term "Muskrat Textualism" comes from "the *aadizookaan* (sacred stories) of the Anishinaabeg . . . . [T]he muskrat is the symbol of the humility, courage, and thoughtfulness that guided the Anishinaabeg back from near extinction. Tribes should no longer be viewed as helpless birds; they should be viewed as courageous muskrats.").

deference when ambiguity arises.[26] That deference opens up space to treat tribes as actors instead of passive participants in Indian law and recognizes the inherent powers of individual tribes acting as sovereigns.[27]

Fletcher is not the only scholar to remark on this trend toward greater recognition of tribal sovereignty by the Court. In the last two years: Jim Grijalva has written on the role of inherent sovereignty and the expanded power of tribes over non-Indians on questions of water regulation;[28] Elizabeth Kronk Warner and Heather Tanana have written about the importance of inherent tribal sovereignty to expanded energy development;[29] Stacy Leeds and Lonnie Beard have written about the inherent powers of tribes to tax non-Indians;[30] Alex Tallchief Skibine has a new article reiterating the implications of inherent tribal sovereignty and the tribal right to exclude non-Indians from the reservation;[31] Michalyn Steele has a phenomenal article emphasizing the role of tribes as independent actors and the importance of inherent tribal sovereignty to building strong Native governance;[32] and Elizabeth

[26] *Id.* at 1000 ("These judges defer to acts of Congress and federal regulations governing Indian affairs, leaving policy preferences for or against tribal, state, or federal interests to the side. Muskrat textualists are faithful to the text, when there is one, and defer to the default interpretative rules, such as the clear statement rules, when there is no controlling text.").

[27] *See id.* at 1019-20 (explaining that in the criminal law context, when "an Indian tribe exercising misdemeanor jurisdiction over a non-Indian criminal has provided greater criminal procedure protections to that defendant than they are entitled to under federal or state law. That court would be justified in confirming the power of the tribe to prosecute the non-Indian. Not all tribes. That tribe").

[28] James M. Grijalva, *Ending the Interminable Gap in Indian Country Water Quality Protection*, 45 HARV. ENV'T L. REV. 1, 23-25 (2021).

[29] Elizabeth Kronk Warner & Heather Tanana, *Indian Country Post-*McGirt*: Implications for Traditional Energy Development and Beyond*, 45 HARV. ENV'T L. REV. 249, 252 (2021) ("Perhaps most importantly, the decision confirms that tribes, equipped with their inherent sovereignty, are well poised not only to lead energy development into the foreseeable future, but also to do so in a manner that confronts historical inequities and promotes environmental justice."); *see also* Elizabeth Ann Kronk Warner, *Renewable Energy Depends on Tribal Sovereignty*, 69 U. KAN. L. REV. 809 (2021).

[30] Stacy Leeds & Lonnie Beard, *A Wealth of Sovereign Choices: Tax Implications of* McGirt v. Oklahoma *and the Promise of Tribal Economic Development*, 56 TULSA L. REV. 417, 421 (2021).

[31] Alex Tallchief Skibine, *The Tribal Right to Exclude Others from Indian-Owned Lands*, 45 AM. INDIAN L. REV. 261, 286-94 (2021) [hereinafter *The Tribal Right*].

[32] Michalyn Steele, *Indigenous Resilience*, 62 ARIZ. L. REV. 305, 338-46 (2020).

Reese has written powerfully on the importance of the recognition of tribal law by courts and scholars.[33]

The inherent criminal power of tribes is at the forefront of this reexamination. Not only has the Court's decision in *McGirt* substantially expanded the bulwark against judicial erosion of tribal criminal powers on the reservation,[34] but lower courts have also expanded inherent criminal power. The Sixth Circuit held that tribes can exercise their inherent criminal power over tribal members even outside of the reservation,[35] the Second Circuit recognized the inherent criminal power of an Indian tribe to enforce its criminal code to the exclusion of local criminal ordinances,[36] and the Tenth Circuit held that Courts of Indian Offenses operate pursuant to a separate sovereign authority than the federal courts.[37] Most importantly, in *United States v. Cooley* the U.S. Supreme Court reversed the Ninth Circuit and recognized the inherent power of tribal law enforcement to stop, search, and detain non-Indians with probable cause.[38]

This Article places itself at the intersection of growing scholarship on judicial deference to tribal sovereignty and the role of a tribe's inherent criminal powers. It argues that state and federal courts must follow the

[33] Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 578 (2021) ("I include this examination of the long-standing marginalization of Indians in the hope that, after acknowledging these deep-seated delegitimizing constructions that have informed both law and legal discourse, we can reject them. The current omission of tribal law from the mainstream is not because tribal law is inherently unworthy of our attention, but because of this history. As the body of more accurate scholarship on tribal law grows — and as tribes themselves grow in size, governing capacity, and visibility — these old assumptions and their continued influence on how we see and think of tribes become increasingly inappropriate.").

[34] For some of the recent important scholarship on the inherent criminal power of tribal courts, see, for example, Seth Davis, *Tribalism and Democracy*, 62 WM. & MARY L. REV. 431 (2020); 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 (2020); Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638 (2016).

[35] Kelsey v. Pope, 809 F.3d 849, 852 (6th Cir. 2016) (holding that the Little River Band of Ottawa Indians Tribal Court had criminal jurisdiction over a tribal council member accused of committing a crime against a non-member Indian on land owned in fee by the tribe located off the reservation). *See generally* Grant Christensen, *The Extraterritorial Reach of Tribal Court Criminal Jurisdiction*, 46 HASTINGS CONST. L.Q. 293 (2019) [hereinafter *The Extraterritorial Reach*] (providing an academic discussion of the importance of *Kelsey*'s holding).

[36] Cayuga Nation v. Tanner, 6 F.4th 361, 364 (2d Cir. 2021).

[37] United States v. Denezpi, 979 F.3d 777, 782 (10th Cir. 2020), *aff'd*, 142 S. Ct. 1838, 1849 (2022).

[38] United States v. Cooley, 141 S. Ct. 1638, 1641 (2021).

lead begun by recent Supreme Court precedent and recognize tribal law enforcement as exercising a separate set of inherent tribal powers than tribal courts. With *McGirt* in 2020[39] and *Cooley* in 2021,[40] the U.S. Supreme Court is signaling a new approach to criminal law cases based upon the inherent criminal powers of Indian tribes. The Court has granted two more criminal law cases from Indian country during the 2022 term,[41] making it clear that *McGirt* and *Cooley* are just the beginning of a fundamental reimagination of the jurisprudence of tribal criminal law and procedure.

Specifically, this Article builds upon the Court's 2021 decision in *Cooley* to argue that the inherent criminal powers exercised by tribal law enforcement are demonstrably greater than the criminal jurisdiction of tribal courts. It argues that as long as tribal law enforcement has a reasonable suspicion a crime has been committed — followed if necessary by probable cause — tribal officers have the inherent power to stop, search, and detain non-Indians before turning them over to state or federal officers to be formally arrested and charged. The exercise of these inherent powers does not violate a non-Indian's statutory or constitutional rights.

To bolster this conclusion and strengthen the argument, the Article looks at lower court interpretations of *Cooley* in the first year after it was decided and finds that although a majority of cases have applied *Cooley* to recognize the inherent criminal power of tribal officers, the Texas Appellate Court has deviated meaningfully from that precedent. This Article argues that lower courts, now facing a split in interpretation on *Cooley*'s meaning, should avoid the Texas precedent as it undermines the principles of tribal sovereignty now championed[42] by the Supreme Court.

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[39] McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[40] *Cooley*, 141 S. Ct. at 1638.

[41] During the 2022 term the Supreme Court has decided two more criminal law cases from Indian country, making a total of four cases over the last three years. The two new cases decided in 2022 are *Denezpi v. United States*, 142 S. Ct. 1838 (2022) (affirming the inherent power of tribes to create their own criminal codes) and *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) (which is more important for Indian country generally, but less relevant to the position of this Article, because it finds an expanded role for states in policing crime committed by non-Indians in Indian country but leaves untouched the inherent powers of tribes).

[42] The author acknowledges that the Supreme Court has just recognized a greater role for state criminal prosecution in Indian country. *See Castro-Huerta*, 142 S. Ct. at 2486. Justice Kavanaugh's opinion, however, does not limit the inherent power of Indian tribes. In fact, the majority's opinion recognizes the inherent power of tribes "this Court has recognized that even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the

To make these arguments, Part I examines the split in authority regarding the inherent criminal power of tribal law enforcement before the *Cooley* decision. It looks at the principles of criminal law that existed at the time *Cooley* was decided and explores the different approaches to tribal criminal procedure taken by courts before 2021. Part II looks at the *Cooley* case itself. It examines the Ninth Circuit precedent, the dissent from the decision to rehear the case *en banc*, and the unanimous Supreme Court holding that reversed the panel decision.

Part III begins the discussion of interpreting the *Cooley* precedent by examining how several state and federal courts have applied *Cooley* consistent with the Court's recognition of the inherent criminal powers of tribal law enforcement. Part IV then explores the Texas Appellate Court's decision in *Texas v. Astorga* and argues that the opinion has misapplied the *Cooley* precedent in ways that are not only regressive and detrimental to tribal sovereignty, but also inconsistent with the new approach to the inherent criminal power of tribal officers articulated by the Supreme Court. Part V reconciles these post-*Cooley* precedents and serves as a guide to courts, advocates, and scholars by demonstrating that the inherent powers of tribal law enforcement exceed a tribe's criminal jurisdiction. The final Part makes some short concluding observations.

I. COURTS DIVIDED

While the Supreme Court has regularly heard cases involving the criminal jurisdiction of tribal courts,[43] it rarely hears cases involving

exercise of state jurisdiction would unlawfully infringe upon tribal self-government." *Id.* at 2500-51. The Court concludes that no infringement occurred in this case because tribes lack the authority to criminally prosecute most non-Indians who commit crimes against Indians anyway, and so allowing states to share that power with the federal government concurrently does nothing to undermine inherent tribal power. *Id.* at 2501. "The only parties to the criminal case are the State and the non-Indian defendant. Therefore, as has been recognized, any tribal self-government 'justification for preemption of state jurisdiction' would be 'problematic.'" *Id.* (citing CONF. OF W. ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK § 4.8 (2021)).

[43] *See, e.g.*, United States v. Lara, 541 U.S. 193, 193-94 (2004) (reversing *Duro v. Reina* and holding that tribal courts have inherent criminal jurisdiction over non-member Indians); Duro v. Reina, 495 U.S. 676, 679 (1990) (holding that tribal courts lack inherent criminal jurisdiction over non-member Indians); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 191 (1978) (holding that tribal courts do not have inherent criminal jurisdiction to prosecute non-Indians). For an academic discussion of these jurisdictional issues, see Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 675-79 (2013) and Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 102-11 (2004).

criminal procedure.[44] Before *Cooley*, it had not decided a case about the powers of tribal law enforcement in Indian country since 1900.[45] Among the most basic tenants of Indian law is that as sovereign governments, tribes retain all inherent powers that have not been lost.[46] The Supreme Court has clarified that tribes could lose their inherent power either explicitly by an act of Congress, or implicitly by virtue of their status as domestic dependent nations.[47] While the appropriateness of this implicit divestiture has been castigated by Indian law scholars for decades,[48] it remains an unfortunate piece of the Court's jurisprudence.[49]

To situate the inherent powers of tribal law enforcement into the structure of inherent tribal powers recognized by courts, this Section first provides a brief introduction to the jurisprudence of inherent tribal criminal power. It then builds upon this foundation to introduce the

[44] Before *Cooley* in 2021 the last criminal procedure case that raised an issue of criminal procedure was *United States v. Wheeler*, 435 U.S. 313, 313 (1978), which held that tribal and federal courts are separate sovereigns and therefore a prosecution by each for the same set of facts does not violate the Double Jeopardy clause of the Fifth Amendment.

[45] *See* Elk v. United States, 177 U.S. 529, 537 (1900) (holding that federal agents for a tribal agency could not perfect a warrantless arrest against a tribal police officer who killed another Indian in self-defense).

[46] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (2d ed. 1942) ("Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. . . . . The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty."); *see also* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192 (2002) ("Tribes retain those attributes of inherent sovereignty not withdrawn either expressly or necessarily as a result of their status.").

[47] *See Oliphant*, 435 U.S. at 208 ("[T]he tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status*.'").

[48] *See* N. Bruce Duthu, Crow Dog *and* Oliphant *Fistfight at the Tribal Casino: Political Power, Storytelling, and Games of Chance*, 29 ARIZ. ST. L.J. 171, 176 (1997); Ennis, *supra* note 19, at 589-604; Fletcher, *The Supreme Court*, *supra* note 2, at 177-79; Robert Laurence, Martinez, Oliphant *and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411, 415-27 (1988); Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an* Oliphant-*Fix*, 93 MINN. L. REV. 1902, 1935-40 (2009).

[49] *See* United States v. Cooley, 141 S. Ct. 1638, 1643 (2021) ("Tribes also lack inherent sovereign power to exercise criminal jurisdiction over non-Indians.").

split in authority that confronted the Court in *Cooley*; are the inherent powers of tribal law enforcement limited in a such a way that they cannot exceed the jurisdiction of the tribal court? Together this discussion should familiarize the reader with the legal landscape as it stood in 2021 before the Court's *Cooley* decision and contextualize why it was so important for the Supreme Court to take the case in order to resolve a split in authority among lower courts.

A. A Tribe's Inherent Criminal Power in Indian Country

Indian tribes are sovereign governments[50] that maintain a government-to-government relationship with the United States.[51] Their sovereign status is greater than that of states because they have not voluntarily surrendered any of their inherent powers to the federal government. As the Tenth Circuit has explained, "Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers [except] to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."[52] Justice Elena Kagan has offered one of the most trenchant commentaries on tribal sovereignty:

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[50] *See generally* N. Bruce Duthu, *Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty Through the Lens of Native American Literature*, 13 HARV. HUM. RTS. J. 141 (2000) (exploring the theme of sovereignty through law and Indigenous literature); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004) (exploring the legal origins of tribal sovereignty and early interpretations of tribal sovereigns within the framework of American federalism); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003) (exploring the work of the Rehnquist Court to limit tribal sovereignty); Melissa L. Tatum, *Symposium Foreword*, 40 TULSA L. REV. 1 (2004) (delivering a beautiful articulation of the inherent powers of tribal governments).

[51] There are many sources recognizing the inherent government-to-government nature of federal-tribal relations. For the most recent Supreme Court recognition, see Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2444 n.4 (2021) ("Federal acknowledgement or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3] (2012))). For a powerful commentary on this relationship from a former Supreme Court Justice, see Sandra Day O'Connor, Remarks, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997) ("Today, in the United States, we have three types of sovereign entities — the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country.").

[52] NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192 n.6 (10th Cir. 2002) (citing Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959)).

"While each State at the Constitutional Convention surrendered its immunity from suit by sister States, 'it would be absurd to suggest that the tribes' — at a conference 'to which they were not even parties' — similarly ceded their immunity."[53]

While the Supreme Court has not often discussed criminal procedure, it has often thought about the inherent criminal jurisdiction the tribal sovereign exercises. As far back as 1896 the Court recognized that tribes exercise their inherent criminal powers when they enact and enforce criminal ordinances over their members.[54] In *Talton v. Mayes*, Talton was a Cherokee Indian indicted and convicted of murder by the Cherokee Tribal Court using a grand jury of five persons.[55] He argued at the United States Supreme Court that a grand jury of five violated his Fifth Amendment right to a grand jury under the U.S. Constitution.[56] The Court disagreed. It reasoned that the U.S. Constitution only applied to the Cherokee Tribal Court's criminal proceedings if, when prosecuting Talton, the Cherokee court was exercising powers delegated to it by Congress.[57] The Court held that Cherokee Nation exercised the inherent power of self-government when it made and enforced its criminal laws against a tribal member for conduct on tribal land. Tribes are "a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the State within whose limits they resided."[58]

Courts have regularly reasserted this position on inherent criminal authority. Eighty years after *Talton*, the Supreme Court was asked whether a criminal prosecution first by a tribal court and then by the

[53] Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 789-90 (2014) (citing in part Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991)).

[54] *See* Talton v. Mayes, 163 U.S. 376, 381-82 (1896) ("The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation is, therefore, clearly not an offence against the United States, but an offence against the local laws of the Cherokee nation. Necessarily, the statutes of the United States which provide for an indictment by a grand jury, and the number of persons who shall constitute such a body, have no application, for such statutes relate only, if not otherwise specially provided, to grand juries empaneled for the courts of and under the laws of the United States.").

[55] *Id.* at 378-79.

[56] *Id.*

[57] *Id.* at 382 ("The case in this regard therefore depends upon whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress.").

[58] *Id.* at 384 (citing Kagama v. United States, 118 U.S. 375, 381 (1886)).

United States for the same underlying criminal conduct violated the Double Jeopardy rights of an Indian defendant.[59] In *United States v. Wheeler*, a unanimous Supreme Court allowed the two prosecutions on the basis of the dual sovereignty doctrine.[60] It reasoned that when a tribe criminally prosecuted a tribal member, it was relying on its inherent criminal powers to create and enforce its own law on tribal land.[61] That power predated the creation of the United States, and therefore the two different prosecutions did not place the defendant's liberty twice in jeopardy for the same offense.[62] The Court announced a broad recognition of a tribe's inherent criminal power; the power of tribal self-government includes "the power to prescribe and enforce internal criminal laws."[63] That position has been recently reaffirmed in dicta in a case out of Puerto Rico contradistinguishing the inherent sovereignty enjoyed by Indian tribes to the limited powers of self-government exercised by American Territories.[64]

While tribes clearly retain inherent criminal power over their members, the Court has been less certain that the power extends to non-members. In 1978, the same year the Court reaffirmed tribal inherent criminal power in *Wheeler*, the Court also limited the power over non-

[59] *See* United States v. Wheeler, 435 U.S. 313, 314 (1978) ("The question presented in this case is whether the Double Jeopardy Clause of the Fifth Amendment bars the prosecution of an Indian in a federal district court under the Major Crimes Act, 18 U.S.C. §1153, when he has previously been convicted in a tribal court of a lesser included offense arising out of the same incident.").

[60] *Id.* at 313. The dual sovereignty doctrine holds that a single act that violates the laws of different sovereigns may be prosecuted once by each sovereign without offending the defendant's right to be free from double jeopardy under the Fifth and/or Fourteenth Amendment. The Supreme Court adopted the doctrine in *Bartkus v. Illinois*, 359 U.S. 121, 136, 139 (1959). For a discussion of the doctrine, see Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 769-78 (2009); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 289-99 (1992).

[61] *Wheeler*, 435 U.S. at 322 ("It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members.").

[62] *Id.* at 328 ("[T]he power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority.").

[63] *Id.* at 326.

[64] Puerto Rico v. Sánchez Valle, 579 U.S. 59, 70 (2016) ("The 'ultimate source' of a tribe's 'power to punish tribal offenders' thus lies in its 'primeval' or, at any rate, 'pre-existing' sovereignty: A tribal prosecution, like a State's, is 'attributable in no way to any delegation . . . of federal authority.'" (citing *Wheeler*, 435 U.S. at 320, 322, 328)).

Indians.[65] Despite a short but powerful dissent,[66] the majority in *Oliphant v. Suquamish Indian Tribe* held that Indian tribes lack inherent criminal power over non-Indian persons as a consequence of their incorporation into the United States.[67] The majority reasoned that exercising criminal jurisdiction over non-Indians would be inconsistent with their status as domestic dependent nations.[68] It is from this *Oliphant* decision that subsequent courts trace their confusion over the power of tribal law enforcement officers.

Twelve years after *Oliphant*, the Court further restricted the inherent criminal power of Indian tribes. In *Duro v. Reina*, the Court was asked whether the inherent criminal jurisdiction of a tribal court extended to a non-member Indian.[69] In a sharply divided opinion Justice Anthony Kennedy wrote for the majority: "A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. *Oliphant* recognized that the tribes can no longer be described as sovereigns in this sense."[70] The majority held that "[i]n the area of criminal enforcement, however, tribal power does not extend beyond internal relations among members."[71]

Duro was decided on May 29, 1990. It took barely six months for Congress to overturn the decision by statute.[72] Congress amended the

[65] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.").

[66] *See id.* at 212 (Marshall, J., dissenting). Justice Marshall, joined by Chief Justice Burger, dissented. Unusually, the dissent was only a paragraph long. For the dissent the answer was simple and did not require extensive discussion. Tribes have a right to keep the reservation community safe and thus have the inherent power to punish offenders who commit crimes on the reservation. "In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation." *Id.*

[67] *Id.* at 191 (majority opinion) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.").

[68] *Id.* at 210 ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.").

[69] 495 U.S. 676, 679 (1990) ("We address in this case whether an Indian tribe may assert criminal jurisdiction over a defendant who is an Indian but not a tribal member.").

[70] *Id.* at 685.

[71] *Id.* at 688.

[72] The change was included in the Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, 104 Stat. 1856, 1890-91 (1990) (codified as 25 U.S.C. § 1301(2) (2018)). For an excellent academic discussion of Congress's decision to overturn the Supreme Court, see Alex Tallchief Skibine, Duro v. Reina *and the*

Indian Civil Rights Act by redefining the "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[73] Now commonly referred to as the "*Duro*-fix",[74] Congress was careful to phrase the amendment as "recogniz[ing] and affirm[ing]" the inherent power of Indian tribes to assert criminal power over all Indians because it wanted to make clear that it was not "delegating" a federal power to the tribe.[75]

The tension between the Court's opinion in *Duro*, and Congress's recognition and affirmation of a tribe's inherent criminal power over all Indians in the *Duro*-fix, was resolved by the Court in *United States v. Lara*.[76] Lara was a member of the Turtle Mountain Band of Chippewa Indians who was living on the Spirit Lake Reservation when he was banished after repeated misconduct.[77] During his removal he struck the arresting officer who happened to be cross deputized as both tribal law enforcement and a federal agent with the Bureau of Indian Affairs.[78] Lara

Legislation that Overturned It: A Power Play of Constitutional Dimensions, 66 S. CAL. L. REV. 767, 767-72 (1993). For a well-researched student note on the *Duro*-fix, see Will Trachman, Note, *Tribal Criminal Jurisdiction After* U.S. v. Lara*: Answering Constitutional Challenges to the* Duro *Fix*, 93 CALIF. L. REV. 847, 847-52 (2005).

[73] 25 U.S.C. § 1301(2) (1990).

[74] Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 774 (2014) ("In 1990, Congress enacted what is called 'the *Duro* fix,' amending the Indian Civil Rights Act to define tribal 'powers of self-government' to include criminal jurisdiction over 'all Indians.'").

[75] United States v. Lara, 541 U.S. 193, 199 (2004). Justice Breyer discussed Congress's intent, concluding that the purpose of the 1990 statute was explicitly not to delegate to Indian tribes a new power but to recognize one they have always possessed. "The statute's legislative history confirms that such was Congress' intent." *Id.* at 193; *see, e.g.*, H.R. REP. NO. 102-261, at 3-4 (1991) (Conf. Rep.); U.S. CODE CONGRESSIONAL & ADMINISTRATIVE NEWS 370, 379-80 (1991) ("The Committee of the Conference notes that . . . this legislation is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations."); *accord* H.R. REP. NO. 102-61, at 7 (1991); *see also* S. REP. NO. 102-168, at 4 (1991) ("[R]ecogniz[ing] and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians."); 137 CONG. REC. 9446 (1991) (statement of Sen. Inouye) (the "premise [of the legislation] is that the Congress affirms the *inherent* jurisdiction of tribal governments over nonmember Indians" (emphasis added)); *id.* at 10712-14 (statement of Rep. Miller, House manager of the bill) (the statute "is not a delegation of authority but an affirmation that tribes retain all rights not expressly taken away" and the bill "recognizes an inherent tribal right which always existed"); *id.* at 10713 (statement of Rep. Richardson, a sponsor of the amendment) (the legislation "reaffirms" tribes' power).

[76] *See Lara*, 541 U.S at 206-07.

[77] *Id.* at 196.

[78] *Id.* at 196-97.

was charged and convicted by the Spirit Lake Tribe for assaulting a policeman and was then charged in federal court with assaulting a federal officer.[79] Essentially Lara had thrown one punch but was prosecuted by both the tribe and the United States. In his federal prosecution Lara argued that the second set of criminal charges violated his Fifth Amendment right to be free from Double Jeopardy.[80] He reasoned that because in *Duro* the Court had held that tribes lack inherent criminal power over non-member Indians like him, that Congress's restoration of criminal jurisdiction to tribal courts must be a delegation of federal power.[81]

The Supreme Court disagreed. Justice Breyer wrote for the majority, reasoning that *Wheeler*, *Oliphant*, and *Duro* represented "the Court's view of the tribes' retained sovereign status *as of the time* the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances."[82] The majority suggested that congressional policy greatly influences the Court in its interpretation of Indian law, and because federal statutes have clarified Congress's understanding of inherent tribal power, the Court's opinion in *Duro* is also subject to reevaluation.[83] With the addition of the *Duro*-fix, the Court held that although *Duro* may have represented the Court's best thinking about a tribe's inherent powers at the time it was decided, it was now reasonable to conclude that a tribe's inherent criminal jurisdiction extends over all Indian persons.[84] It therefore upheld the federal prosecution of Lara for attacking a federal officer because the dual sovereignty doctrine clarified that his rights were not being placed twice in jeopardy by the same sovereign.[85]

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[79] *Id.* at 197.

[80] *Id.* at 198. Lara was successful below. In a 7-4 vote *en banc* the Eighth Circuit agreed with Lara and held that "the Tribal Court, in prosecuting Lara, was exercising a *federal* prosecutorial power; hence the 'dual sovereignty' doctrine does not apply; and the Double Jeopardy Clause bars the second prosecution." *Id.*

[81] *Id.* at 197-98.

[82] *Id.* at 205.

[83] *Id.* at 207 ("*Wheeler*, *Oliphant*, and *Duro*, then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes. And that fact makes all the difference.").

[84] *Id.* at 206-07.

[85] *Id.* at 210 ("[T]he Spirit Lake Tribe's prosecution of Lara did not amount to an exercise of federal power, and the Tribe acted in its capacity of a separate sovereign. Consequently, the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with the present prosecution for a discrete *federal* offense.").

Lara was the last Supreme Court case interpreting the inherent criminal powers of an Indian tribe decided by the Court before *Cooley*.[86] Since *Lara* was decided, Congress has greatly expanded the criminal power of Indian tribes.[87] It enacted the Tribal Law and Order Act ("TLOA") in 2010,[88] which substantially reduced Congressional limitations on the sentencing power of tribal courts, allowing maximum sentences of nine years' incarceration — up from just one year under the modified Indian Civil Rights Act.[89] When Congress reauthorized the Violence Against Women Act ("VAWA") in 2013, it added a provision recognizing the inherent sovereign power of an Indian tribe to prosecute even non-Indians for violations of domestic violence, dating violence, and violation of a protection order.[90] VAWA's recognition of the Special Domestic Violence Criminal Jurisdiction of tribal courts has been hailed by tribes and Indian law advocates as the first time since *Oliphant* that tribes will be able to criminally prosecute non-Indians.[91]

[86] Since 2004, the Court had decided a few other criminal cases but on questions not relevant to our discussion here. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (holding that the Muscogee (Creek) Reservation was not diminished and so a non-member Indian could not be criminally charged by the State of Oklahoma for criminal offenses committed within its borders even if those offenses occurred on non-Indian fee land); United States v. Bryant, 579 U.S. 140 (2016) (holding that an uncounseled tribal court conviction could be used as a predicate offense for purposes of federal criminal prosecution as long as the tribal court afforded the defendant all of the rights required by the Indian Civil Rights Act).

[87] *See* Adam Crepelle, *Tribal Courts, the Violence Against Women Act, and Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction to Improve Public Safety in Indian Country*, 81 MONT. L. REV. 59, 68-69 (2020) (describing the expansion of the inherent criminal powers of tribal courts as being on an "upward swing" since *Duro* was overturned, and explicitly referencing both TLOA and VAWA as examples of that expansion); Angela Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1571 (2016) [hereinafter *Crime and Governance*] (describing the acceptance of the expansion of the inherent criminal powers of Indian tribes as "enormous victories[,]" while also recognizing that the expanded powers come with some conditions that assimilate tribal courts by making them appear more like state and federal courts).

[88] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (codified as amended at 25 U.S.C. § 1302 (2018)).

[89] For an academic discussion of TLOA, see Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317 (2013); David Patton, *Tribal Law and Order Act of 2010: Breathing Life into the Miner's Canary*, 47 GONZ. L. REV. 767 (2011).

[90] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-21 (codified as amended at 25 U.S.C. § 1304 (2018)).

[91] Jessica Allison, *Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures*, 90 U. COLO. L. REV. 225, 228 (2019) ("For the first time since *Oliphant*, the Violence Against Women Reauthorization Act of

On March 15, 2022, Congress further bolstered its support for the inherent criminal power of Indian tribes when it reauthorized VAWA.[92] The new statute adds additional recognition for the inherent criminal jurisdiction of Indian tribes over crimes committed by non-Indians, including for the first time non-Indian on non-Indian crime in Indian country.[93] The term, Special Domestic Violence Criminal Jurisdiction, has been simplified to special Tribal criminal jurisdiction — reflecting the wider scope of a tribe's inherent powers.

There can be little debate that in the years since *Lara* was decided Congress has been increasingly respectful and even solicitous of tribal courts — recognizing inherent criminal jurisdiction over non-member Indians (*Lara*), greater penalties for persons convicted by tribal courts (TLOA), and even jurisdiction over non-Indians (VAWA). Greater powers for tribal law enforcement to enforce tribal law over larger classes of persons necessarily followed from the expanded jurisdiction. Despite Congress signaling its approval for greater criminal power for Indian tribes, lower courts have split on how expansively to read the inherent criminal powers of tribal police officers. The discussion below explores the different approaches courts have taken in the absence of any clarity from the Supreme Court.

B. A Split in Authority

After *Lara* courts have been relatively comfortable applying the presumptive rules created by *Wheeler*, *Oliphant*, and *Lara*. Indian tribes have inherent criminal power over all Indians, regardless of whether they are tribal members, for crimes committed on the reservation; but tribes lack criminal jurisdiction over non-Indians without a recognition of their inherent power from Congress. This uneasy consensus[94] resolved the basic contours of tribal court jurisdiction but left open a critically important but relatively unaddressed question[95] — what are

2013 (VAWA 2013) recognizes tribes' inherent sovereignty to prosecute non-Indians for certain domestic and sexual violence crimes.").

[92] Violence Against Women Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat. 840 (codified as amended at 34 U.S.C. § 12291 (2018)).

[93] *Id.* at 898-900. The 2022 Act added inherent authority over assault of Tribal justice personnel, child violence, obstruction of justice, sexual violence, sex trafficking, and stalking. *Id.*

[94] *Id.*

[95] No Supreme Court case directly answered this question, but there has been some dicta in even civil jurisdiction cases about the proper role of tribal officers. The incorporation of this dicta into the Court's decision in *Cooley* is discussed at greater length *infra* Part III.B.

the inherent powers of tribal law enforcement? Is a tribal officer's power only as broad as the jurisdiction of the tribal court? If so, what should a tribal officer do if they suspect a crime has been committed but are uncertain of the Indian status of the perpetrator? Is a tribal officer's power broader than that of the tribal court? If so, what is the proper test for the inherent criminal powers of a tribal officer and why should those powers be different than the power of the tribal court?

Lower courts struggled with these questions both before and after the *Duro*-fix and the *Lara* opinion. Although it has been clear that the U.S. Constitution does not apply to Indian tribes since at least the 1896 opinion in *Talton v. Mayes*, since 1968 Congress has required tribes to afford some basic individual rights to all persons. The Indian Civil Rights Act guarantees the right to Due Process of Law[96] and the right "to be secure in their persons, houses, papers, and effects against unreasonable search and seizures."[97] However the Supreme Court has clarified that the only remedy a federal court has to protect an individual who has been denied these rights by an Indian tribe is the writ of habeas corpus.[98] ICRA has created a system where individuals who believe their rights have been violated by the agent of an Indian tribe should seek redress from the tribe itself.[99] This balance, created by Congress and upheld by the Court, is designed to respect tribal sovereignty by permitting federal interference into tribal self-governance only in cases where an individual's liberty has been restricted in contravention of the rights secured by ICRA.[100]

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[96] 25 U.S.C. § 1302(a)(8) (2018).

[97] *Id.* § 1302(a)(2).

[98] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (holding that a Santa Clara Pueblo woman who was denied the ability to enroll her children as tribal members, when a similarly situated Santa Clara man would have been permitted to enroll his children, could not use ICRA and the federal courts to enforce her right to the equal protection of laws); *see also* Hunter Cox, *ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the* Post-Oliphant *World?*, 5 AM. INDIAN L.J. 596, 618-22 (2017) (explaining that the holding in Santa Clara Pueblo v. Martinez has resulted in few ICRA habeas cases reaching the merits of § 1303 habeas petitions).

[99] *See Santa Clara Pueblo*, 436 U.S at 65-66 ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief.").

[100] *See id.* at 70 ("[T]he ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303. These factors, together with Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware

Despite the importance of determining the scope of the inherent power of tribal officers, the Supreme Court waited until 2021 to take its first case. Before *Cooley* lower courts each adopted their own interpretation of the inherent criminal power of Indian tribes resulting in a split in authority between jurisdictions.[101] Professor Matthew Fletcher, in his meticulously researched work *Factbound and Splitless*,[102] suggests that because most Indian law cases tend to arise in just three circuits (Eighth, Ninth, and Tenth), cases of incredible importance to Indian country may get overlooked by the Court because a split among multiple circuits is less likely.[103] My own research looking at the more than 600 Indian law opinions decided by state and federal courts during 2017 confirms the concentration of Indian law in Circuits with larger Native populations; more than three-quarters of all Indian law opinions decided by circuit courts that year were in the Ninth or Tenth Circuit.[104]

Whatever the reason for the Court's reticence, before the Supreme Court finally accepted and decided *Cooley* lower courts had different interpretations of the inherent criminal power of tribal law enforcement. While there were nuances between the different jurisdictions, lower courts generally fell into two camps: (1) those that interpreted the scope of tribal law enforcement to be coextensive with the jurisdiction of a tribal court and therefore had no authority over non-Indians, and (2) those that held that tribal law enforcement needed to exercise some power over non-Indians in order uphold the sovereign's obligation to keep the reservation community safe.

1. Position 1: Tribal Officers May Only Stop Non-Indians to Determine Their Indian Status

Prior to *Cooley*, some courts had read the Supreme Court's jurisprudence on the inherent power of criminal tribes as mandating

of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303.").

101 The split in authority is discussed in detail in the sections that follow. *See infra* Sections II.B.1–.2.

102 Fletcher, *Factbound*, *supra* note 22, at 956 ("In general, the study found few splits in authority regarding federal Indian law, perhaps because the vast majority of the cert petitions in the sample were from just three circuits — the Eighth, Ninth, and Tenth Circuits. Cert petitions labeled 'splitless' are usually relegated to the dustbin.").

103 *Id.* at 956-57.

104 *See* Grant Christensen, *A View from American Courts: The Year in Indian Law 2017*, 41 SEATTLE U. L. REV. 805, 810 (2018) (58 of 74 federal appellate opinions on Indian law were decided by just the Ninth and Tenth circuits).

that tribal law enforcement could not exercise any substantive authority if the tribal court would lack jurisdiction over the offense. The Ninth Circuit had been the most consistent advocate for this view. While its precedent recognized that law enforcement could not know in advance whether someone was an Indian, the scope of a tribe's inherent power over non-Indians was limited to ascertaining the Indian status of a suspected criminal and could often be achieved by asking a single question. "In order to permit tribal officers to exercise their legitimate tribal authority, therefore, it has been held not to violate a non-Indian's rights when tribal officers stop him or her long enough to ascertain that he or she is, in fact, not an Indian."[105]

Courts that adopted this approach to a tribe's inherent criminal power often found that tribal officers exceeded their authority when they stopped a non-Indian and proceeded with any investigative purpose other than ascertaining the accused's Indian status. In *Bressi v. Ford* the Ninth Circuit held that tribal law enforcement's inherent criminal power during a suspicionless traffic roadblock on a public highway was limited to a determining the Indian status of each person stopped.[106] Although the roadblock was authorized by tribal law,[107] "inquiry going beyond Indian or non-Indian status, or including searches for evidence of crime, are not authorized on purely tribal authority in the case of non-Indians."[108] The Ninth Circuit has reciprocally given state officers the same limited power; the ability to stop a vehicle on an Indian reservation for the limited purpose of determining whether the driver was a non-Indian.[109] Such a stop is limited to asking a single question — is the driver an Indian?[110]

The Washington Supreme Court has applied a different, but similar, restriction on the inherent power of tribal officers. In *State v. Ericksen*,

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

[106] *Id.* at 896-97 ("[A] roadblock on a public right-of-way within tribal territory, established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of inquiry, that can establish whether or not they are Indians.").

[107] *Id.* at 894 ("The Nation's tribal law allows roadblocks to check for sobriety, drivers' licenses, registration, and possession of alcohol." (citing Tohono O'odham Nation v. Ahill, No. CR12-1762-88 (Jud. Ct. Tohono O'odham Nation Oct. 23, 1989))).

[108] *Id.* at 897.

[109] *See* United States v. Patch, 114 F.3d 131, 134 (9th Cir. 1997) ("Here, Schwab needed to make only a brief stop to ascertain Patch's identity. Such a stop would be a brief, limited detention to ask one question. Like the stop in *Terry*, its purpose would further a legitimate law enforcement objective: to determine whether the suspect was a tribal member.").

[110] *Id.*

the Washington Supreme Court held that tribal officers who observed a vehicle break the law on the reservation lacked authority to stop the vehicle if it left the reservation before stopping.[111] "While the territorial limits on the Lummi Nation's sovereignty create serious policy problems, such as the incentive for intoxicated drivers to race for the reservation border, the solution does not lie in judicial distortion of the doctrine of inherent sovereignty."[112] The Court's refusal to extend to tribal law enforcement the power of fresh pursuit severely undercuts the ability of tribal police to keep their reservation communities safe, and in fact makes the community more dangerous as drivers are incentivized to race to a reservation's boundary to escape liability.

Similarly, the Nebraska Supreme Court restricted the inherent powers of tribal officers by distinguishing them from state police.[113] In *Young v. Neth*, a tribal officer observed a vehicle standing beside several mailboxes that had been knocked from their posts on the Iowa Indian Reservation.[114] The officer turned on his lights to initiate a stop, but the vehicle fled. After a chase of eight or nine miles the vehicle finally pulled over — but was now located outside of the Reservation.[115] An administrative hearing was held and the driver, a non-Indian, had his license revoked for driving under the influence.[116] The driver appealed, arguing that because the tribal officer lacked jurisdiction outside of the reservation his license should not have been suspended. The Supreme Court of Nebraska agreed. It determined the scope of a tribal officer's power as being no greater than the jurisdictional power of the tribal court. "Because it is settled law that the Indian tribes may not assert criminal jurisdiction over a non-Indian for a misdemeanor crime committed on the reservation, a fortiori, the Indian tribes may not do so outside the reservation."[117]

In coming to its conclusion, the Court relied on other Nebraska precedent, which similarly conflated the inherent power of a tribal officer with the jurisdictional power of the tribal court.[118] In *State v. Cuny*, tribal police officers from the Pine Ridge Police Department observed a vehicle traveling south but being operated in the northbound

111 *See* State v. Eriksen, 259 P.3d 1079, 1084 (Wash. 2011).
112 *Id.* at 1083.
113 *See* Young v. Neth, 637 N.W.2d 884, 886 (Neb. 2002).
114 *Id.*
115 *Id.*
116 *Id.* at 887.
117 *Id.* at 889.
118 *See* State v. Cuny, 595 N.W.2d 899, 902-03 (Neb. 1999).

lane.[119] Tribal officers initiated the stop on the Reservation but the vehicle did not pull over until it had crossed out of the Reservation and into the State of Nebraska. A field sobriety test conducted by the tribal officers confirmed that the driver was under the influence of alcohol.[120] Tribal police identified the driver as a non-Indian and detained her until Nebraska state officers arrived to conduct the arrest.[121] Cuny was charged with a DUI but moved to suppress all evidence against her because she was subject to an unlawful investigatory stop and search because the tribal officers lacked authority over her. The trial court denied her motion and she was convicted after a jury trial.[122] The Supreme Court of Nebraska reversed. Explaining that the powers of tribal law enforcement could be no greater than the jurisdiction of the tribal court, the Nebraska Supreme Court neatly disposed of the case: "Once the Pine Ridge police officers left the reservation and entered Nebraska, they were outside the territorial limits of their jurisdiction. . . . As such, their stop and detainment, or arrest, of Cuny was unlawful."[123]

While each of the above cases deals with a different set of facts, the reasoning deployed by the various courts is consistent. In each case, the court has either assumed or concluded that the inherent power of a tribal officer is no larger than the inherent criminal jurisdiction of the tribal court. As illustrated by the facts of the cases described in this section, limiting the power of tribal officers to the jurisdictional power of the tribal court often places reservation communities at risk. In *Ericksen*, the Washington Supreme Court was willing to deny tribal authority to stop a vehicle outside of the Reservation, creating an incentive for drivers to flee (recklessly) for the Reservation's border rather than comply with tribal officer instructions to pull over.[124] In *Cuny* the Nebraska Supreme Court threw out criminal proceedings even when a state officer arrived, performed their own sobriety test, read the defendant their rights, and transported the defendant to the county police station.[125] These cases illustrate the inherent dangers of assuming that a tribal officer's policing authority is limited to the reach of the tribal court's criminal jurisdiction.

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[119] *Id.* at 901.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 902.

[123] *Id.* at 902-03.

[124] *See* State v. Eriksen, 259 P.3d 1079, 1083-84 (Wash. 2011).

[125] *See Cuny*, 595 N.W.2d at 903-04.

2. Position 2: Tribal Officers May Stop, Detain, and Search Non-Indians

While the first set of courts viewed the inherent power of tribal law enforcement to be coterminous with the jurisdiction of the tribal court, a second set of authority emerged in other jurisdictions and recognized the inherent criminal power of tribal officers as distinct from, and in many ways greater than, the inherent power of the tribal court. Just like the first group of authority, this second set of cases does have some variation within it, both in the courts' conclusions about the origins of the inherent criminal power and in the nature of the decision because each arose from a distinct set of facts.

What can generally be said of this line of authority is that courts recognize that even when a tribal court would not have criminal jurisdiction over the defendant, a tribal law enforcement officer with reasonable suspicion can stop and detain a non-Indian until state or federal law enforcement arrives. Opinions have varied as to whether tribal officers are permitted to collect evidence in plain sight, to affirmatively conduct a warrantless search of the defendant and/or their vehicles, or to perform field sobriety or chemical tests to determine intoxication on non-Indian drivers. These cases are fairly uniform in their conclusion that tribal officers have the power to "stop" a defendant who has been observed violating the law, and to "detain" a defendant until state or federal law enforcement with the authority to arrest arrives, but courts are further divided on the tribal officer's authority to "search" defendants.

Perhaps surprisingly, the most cited of this second set of cases also comes from the Washington Supreme Court.[126] In *State v. Schmuck*, a Suquamish Tribal Police Officer observed a pickup exceeding the speed limit within the boundary of the Port Madison Indian Reservation.[127] After pulling the vehicle over, the tribal officer identified the driver as a non-Indian and so detained the driver until the Washington State Patrol could respond. The state trooper performed a field sobriety test, advised Schmuck of his rights, and transported him to the county jail.[128] Schmuck was charged and convicted of driving under the influence in state court. He appealed his conviction, alleging that because he was a non-Indian the tribal officer had no authority to stop or detain him.[129]

[126] *See* State v. Schmuck, 850 P.2d 1332 (Wash. 1993).

[127] *Id.* at 1333.

[128] *Id.* at 1334.

[129] *Id.* ("We address three issues presented for review. First, does an Indian tribal officer have inherent authority to stop a non-Indian driving a motor vehicle on a public

The Washington Supreme Court distinguished the power to criminally prosecute a non-Indian from the power to stop and detain a non-Indian.[130] It reasoned that because an officer could not ascertain whether the driver was an Indian until the vehicle was stopped, the officer had the right to stop the vehicle as long as there was probable cause to believe a crime had been committed; "The alternative would put tribal officers in the impossible position of being unable to stop any driver for fear they would make an unlawful stop of a non-Indian. Such a result would seriously undercut the Tribe's ability to enforce tribal law and would render the traffic code virtually meaningless."[131] The court then proceeded to parse the *Oliphant* opinion. It held that while Indian tribes cannot "try and punish" a non-Indian, *Oliphant* did not hold that tribes lost the inherent power "to detain offenders and turn them over to governmental authorities who do have authority to prosecute."[132]

A number of other courts have adopted *Schmuck*'s suggestion that tribal law enforcement may stop and detain non-Indians. The Tenth Circuit has suggested that a tribal officer aware of a non-Indian's firearms offense may seize the evidence and detain the non-Indian until

road within the reservation to investigate a possible violation of tribal law? Second, does a tribal officer have inherent authority to detain a non-Indian motorist who has allegedly violated state and tribal law while on the reservation until he or she can be turned over to state authorities for charging and prosecution? Third, if an Indian tribe does have such inherent authority, has that authority been divested by the State's enactment of RCW 37.12.010 assuming criminal and civil jurisdiction over the operation of motor vehicles on Indian territory and reservations?"). Washington has assumed some criminal power over non-Indian owned fee lands in Indian country pursuant to Public Law 280 which is why the Court asked the third question. While not relevant to thesis of this paper, Public Law 280 presents other interesting jurisdictional questions in the states to which it applies. For a discussion of the intersection between Public Law 280 and law enforcement in Indian country, see Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006); Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627 (1998); Kevin K. Washburn & Chloe Thompson, *A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the Recognition of Tribal Court Judgments with the Recent Arizona Rule*, 31 WM. MITCHELL L. REV. 479, 519-23 (2004).

[130] *See Schmuck*, 850 P.2d at 1335 ("Indian tribal courts do not have inherent jurisdiction to try and punish non-Indians who commit crimes on their land. . . . Thus, the question presented is not whether the Suquamish Indian Tribe had authority to *prosecute* Schmuck, but rather, whether the Tribe had authority to *stop* and *detain* Schmuck until he could be turned over to state governmental officials who did have authority to prosecute.").

[131] *Id.* at 1337.

[132] *Id.* at 1339.

federal authorities arrive to perfect the arrest.[133] The District of South Dakota held that it was reasonable for a tribal officer to detain a non-Indian even overnight if distance or other conditions prevented a state officer from responding immediately.[134] The Minnesota Supreme Court held that a Red Lake tribal officer could perform a field sobriety test and then detain a non-Indian before turning the defendant over to state authority at the county line.[135]

An early Ninth Circuit opinion came to a similar conclusion but took a different approach as to the source of a tribe's inherent power.[136] In *Ortiz-Barraza v. United States*, a Tohono O'odham tribal police officer conducted a search of a non-Indian's trailer and discovered more than one-thousand pounds of marijuana.[137] The defendant sought to have the discovery of the marijuana suppressed, alleging that the tribal officer lacked the authority to stop and search him. The Ninth Circuit upheld the search. It reasoned that among a tribe's inherent powers is the right to exclude anyone from the reservation and that "the power to regulate is only meaningful when combined with the power to enforce."[138] Applying that principle it concluded that the power to "exclude non-Indian state and federal law violators from the reservation would be meaningless were the tribal police not empowered to investigate such violations. Obviously, tribal police must have such power."[139]

Ortiz-Barraza located the inherent power of tribal law enforcement as part of the tribe's right to exclude. This line of authority would seem to

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[133] *See* United States v. Green, 140 F. App'x 798, 800 (10th Cir. 2005) ("Having personally observed the gun and knowing Mr. Green's background as a felon, we have no doubt that the cross-deputized officer had probable cause to conclude that the gun was evidence of a crime. Thus, no warrant was required for law enforcement to seize the gun.").

[134] *See* United States v. Peters, No. 16-CR-30150, 2017 U.S. Dist. LEXIS 56754, at *7 (D.S.D. Mar. 15, 2017) ("Federal and state courts (including the Eighth Circuit) have likewise regularly upheld tribal police actions, including stopping, investigating and detaining non-Indians suspected of criminal conduct. Here, tribal officers initially detained and then advised Peters that he was under arrest and would be taken to jail and held there on federal charges. His detention was not lengthy or prolonged by an exploratory interview and was not otherwise unreasonable under the circumstances.").

[135] *See* State v. Thompson, 937 N.W.2d 418, 421-22 (Minn. 2020) ("Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.").

[136] *See* Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975).

[137] *See id.* at 1177-79.

[138] *Id.* at 1179-80 ("[I]ntrinsic in the sovereignty of an Indian tribe is the power to exclude trespassers from the reservation.").

[139] *Id.* at 1180.

more firmly secure a tribe's right to search non-Indians than the right to stop and detain because it provides a stronger basis for the tribal power. While a tribe may lack the inherent power to criminally prosecute a non-Indian, it can enforce its civil ordinances against non-Indians on the reservation.[140] When a tribe enacts civil ordinances related to drug use or possession, the operation of motor vehicles, weapons possession, hunting and fishing, domestic relations, and others — it gains the power to search a non-Indian whenever law enforcement has probable cause to believe one of its civil ordinances has been violated, to civilly sanction them, and to exclude them from the reservation.[141]

The panel that authored *Ortiz-Barraza* is not the only court that has relied upon the tribe's right to exclude in order to justify at least limited power by tribal officers over non-Indians. The Eighth Circuit held that a tribal officer could detain a non-Indian suspected of committing an act of domestic violence, and could conduct a warrantless search to preserve evidence located in plain sight.[142] The Western District of Oklahoma has held that the tribe's right to exclude empowers tribal law enforcement to detain and search a non-Indian suspected of criminal activity at a tribal casino.[143] The Wyoming Supreme Court similarly

[140] *See* Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 791 (2014) ("I would argue that even prior to the modern era of federal Indian law, Indian tribes routinely asserted civil jurisdiction over nonmembers on tribal lands. As one court wrote in 1900, Indian tribes controlled entrance onto Indian lands, and therefore could 'impose conditions.'").

[141] *See* Philip H. Tinker, *In Search of a Civil Solution: Tribal Authority to Regulate NonMember Conduct in Indian Country*, 50 TULSA L. REV. 193, 210 (2014). The entire article makes the point that tribes may use civil rules to accomplish quasi-criminal regulation of non-Indians in Indian country. Among the more cogent contributions: "the dispositive threshold question is whether the tribal enforcement action is a civil regulatory sanction or a criminal punishment. The federal courts have not, it appears, addressed this question directly. In principal, however, tribal governments should be able to use civil means, governed by carefully drafted tribal codes, to regulate the conduct of non-members, consistent with the limitations on tribal jurisdiction imposed by the federal courts." *Id.*

[142] *See* United States v. Terry, 400 F.3d 575, 580-81 (8th Cir. 2005) ("We conclude that the Oglala tribal officers' detention of Mr. Terry falls within the rule of *Duro*. . . . Furthermore, we cannot say that the tribal officers held Mr. Terry for an unreasonable amount of time in the circumstances, since Sheriff Daggett was eighty miles away on a rainy night and his only deputy was unavailable.").

[143] Ouart v. Fleming, No. CIV-08-1040-D, 2010 U.S. Dist. LEXIS 30051, at *17 (W.D. Okla. Mar. 26, 2010) ("Although Mr. Hart was not an Indian, his non-Indian status did not preclude Fleming and Irwin from responding to a dispatch report concerning a public disturbance at the Casino, located on Indian land within their jurisdiction as Tribal police officers. As a matter of law, Fleming and Irwin were

held that a tribe's right to exclude included the right to stop and detain a non-Indian before handing the defendant over for prosecution by the state.[144]

C. An Irreconcilable Split

As the preceding discussion makes clear, courts have broadly struggled to determine the scope of the inherent power of tribal law enforcement. With cases going back almost fifty years, it is surprising that it has taken the Supreme Court so long to agree to hear a case to resolve the growing split in legal authority. Is tribal law enforcement limited to exercising only those powers consistent with tribal jurisdiction? If not, do tribal police have the inherent powers to stop, detain, and search non-Indians if they have probable cause? Or, are those powers a necessary extension of a tribe's right to exclude persons from their borders? In 2021 the Supreme Court answered these questions in *United States v. Cooley*.

II. RESOLVING THE SPLIT: *UNITED STATES V. COOLEY*

The U.S. Supreme Court has broad discretion[145] over its docket, and in recent terms has granted review to less than one-hundred cases a term.[146] There is a library of well researched scholarship describing the kinds of cases that attract the Court's attention,[147] but the existence of

authorized to respond to the reported disturbance, to eject the offending individual from Indian land, or detain and transport him to the proper jurisdiction, regardless of his non-Indian status.").

144 Colyer v. State, 203 P.3d 1104, 1110 (Wyo. 2009) ("Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them." (citing Duro v. Reina, 495 U.S. 676, 697 (1990))).

145 Fletcher, *Factbound*, *supra* note 22, at 934 ("The power to choose a few select cases among several thousand petitions each year is an awesome power."); Megan Reilly, *Is the Supreme Court's Virtually Complete Discretion in Certiorari Decisions as Afforded by Congress in the Supreme Court Case Selections Act of 1988 Ethical, and What Potential Ethical Ramifications Stem from Such Control?*, 29 GEO. J. LEGAL ETHICS 1299, 1299 (2016) ("An area in which both criticism and ethical questions come into play is that of the large discretion afforded the Court by the Supreme Court Case Selections Act of 1988 . . . . The Justices of the Supreme Court have virtually unlimited discretion in choosing the Court's docket. As the Supreme Court's Rule 10 notes, 'review on a writ of certiorari is not a matter of right, but of judicial discretion.'").

146 Fletcher, *Factbound*, *supra* note 22, at 939 ("What is known is that the Court grants cert in only a handful of cases — often less than 100 a year — out of over several thousand petitions filed each Term.").

147 *See generally* Gregory A. Caldeira, John R. Wright & Christopher J. W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549,

a split in authority among lower courts is certainly among the most salient factors.[148] As tribal law enforcement becomes more active and tribes continue to assert their police powers in Indian country, the number of lower court cases addressing the scope of tribal officers' authority has grown. It was perhaps inevitable that the Supreme Court would eventually have to clarify the issue.

On November 20, 2020, the Court granted certiorari to *United States v. Cooley*,[149] a case out of the Ninth Circuit that had conflated the power of tribal officers with the jurisdiction of the tribal court. Some discussion of the case and the Ninth Circuit's treatment of it is justified before examining the Supreme Court's reversal of the panel opinion.

A. In the Ninth Circuit

United States v. Cooley turned an ordinary police stop into a Supreme Court discussion of the inherent sovereignty of tribal governments. James Saylor, a highway safety officer with the Crow Police Department, investigated a vehicle stopped on the side of a route running through the Crow Reservation.[150] Joshua James Cooley, seated in the driver's seat, lowered the tinted driver's side window six inches and informed the Officer that everything was alright and that he had just pulled over because he was tired.[151] Officer Saylor noticed that Cooley's eyes were watery and bloodshot and observed two semiautomatic weapons on the

550 (1999) ("[A]bove and beyond the usual forces in case selection, justices engage in sophisticated voting, defined as looking forward to the decision on the merits and acting with that potential outcome in mind, and do so in a wide range of circumstances."); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 414 (2004) ("The weight of the evidence, however, now favors the view that the Justices do act strategically in their decision making at the certiorari stage."); John F. Krol & Saul Brenner, *Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation*, 43 W. POL. Q. 335, 335 (1990) ("[J]ustices vote to grant cert, in part, because they want to reverse the decision of the lower court. This kind of behavior is known in the literature as the error-correcting strategy.").

148 Fletcher, *Factbound, supra* note 22, at 956 ("[T]he best way to convince the Court to grant cert in a particular case is to identify a circuit split or a conflict with Supreme Court precedent."); *see also* Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 707 (2018) ("The Court uses a set of proxies — principally, the existence of a circuit split — to identify legally important cases in which to grant certiorari."); Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 729 (1997) (discussing the role of circuit splits to attract the Courts attention to questions of tribal civil jurisdiction).

149 141 S. Ct. 870 (2020).

150 United States v. Cooley, 919 F.3d 1135, 1139 (9th Cir. 2019).

151 *Id.*

passenger side seat.[152] When Officer Saylor asked Cooley for identification, Cooley twice produced sets of small bills from his pocket and after putting his hand in his pocket a third time "[h]is breathing became shallow and rapid" and Cooley "'stared straight forward out of the windshield of his truck ***' Saylor testified that such a 'thousand-yard' stare is, to him, an indication that a suspect is possibly about to use force. So, while Cooley's hand was in his pocket, Saylor unholstered his pistol, drew the pistol to his side, and ordered Cooley to stop what he was doing and show his hands."[153]

After being ordered out of the vehicle Officer Saylor noticed a loaded semiautomatic pistol near Cooley's right hand and a pat down search yielded several small empty plastic bags that in the Officer's experience are often used in the use or sale of methamphetamines.[154] At that point Officer Saylor placed Cooley in the back of his patrol car, asked for assistance from Crow Tribal Police and Bighorn County officers, and upon returning to Cooley's truck to turn off its engine observed a glass pipe and a bag that appeared to contain methamphetamine.[155] After County and Bureau of Indian Affairs agents arrived at the scene, the BIA officer directed Officer Saylor to conduct an additional search of the truck which yielded more methamphetamine.[156]

Cooley was charged in federal court with one count of possession with intent to distribute methamphetamine and one count of possession of a firearm in furtherance of a drug trafficking crime.[157] He moved to suppress the evidence collected by Officer Saylor on the basis that Cooley is a non-Indian and so Officer Saylor lacked the authority to stop and search him after he had concluded that Cooley was probably not an Indian person.[158] The District Court granted the motion, reasoning that a tribal officer could not detain a non-Indian person on state or federal rights of way unless it was "apparent at the time of the detention that the non-Indian has been violating state or federal law."[159]

A panel of the Ninth Circuit agreed and upheld the suppression of evidence. The panel limited the inherent authority of tribal officers to two broad categories based on prior Supreme Court precedent: (1) the ability to enforce the tribe's criminal laws against all Indians on tribal

152 *Id.* at 1139-40.
153 *Id.* at 1140.
154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.*
158 *See id.*
159 *Id.* at 1141.

lands, and (2) the power to exclude non-Indians from the reservation. It reasoned that while a tribe may investigate a non-Indian who is suspected of committing a crime on tribal land,[160] on a public right of way running through an Indian reservation a tribal officer's power is limited to ascertaining whether a person is an Indian.[161] If the individual is not an Indian, the inherent criminal powers of the officer stop there and no further inquiry or search may be conducted without state or federal authorization.[162] Because Officer Saylor's investigation was not focused on determining Cooley's Indian status, and the search of Cooley's person and vehicle occurred initially without any state or federal authorization, Officer Saylor had conducted an unlawful search and so the evidence obtained must be suppressed.[163]

The United States appealed the panel decision to the Ninth Circuit *en banc*.[164] *En Banc* appeals are a seldom used[165] intermediary step between accepting the decision of an appellate panel and appealing a case to the U.S. Supreme Court.[166] If granted, an *en banc* review is conducted by all

[160] *Id.* ("[A] tribe may exclude non-Indians from tribal land. Therefore, tribal officers can investigate crimes committed by non-Indians on tribal land and deliver non-Indians who have committed crimes to state or federal authorities." (citing Duro v. Reina, 495 U.S. 676 (1990)) "Thus, 'tribes retain considerable control over non-member conduct on tribal land.'" (citing Strate v. A-1 Contractors, 520 U.S. 438 (1997))).

[161] *Id.* at 1142 ("[T]ribal authorities may stop those suspected of violating tribal law on public rights-of-way as long as the suspect's Indian status is unknown. In such circumstances, tribal officials' initial authority is limited to ascertaining whether the person is an Indian.").

[162] *Id.* ("The detention must be 'a brief [and] limited' one; authorities will typically need 'to ask one question' to determine whether the suspect is an Indian. If, during this limited interaction, 'it is apparent that a state or federal law has been violated, the [tribal] officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities.'" (citations omitted)).

[163] *See id.* at 1143-45 ("Although Saylor had been questioning Cooley for a significant period . . . he had not asked Cooley whether he was an Indian. Yet, still not having ascertained whether Cooley was an Indian, Saylor detained Cooley and twice searched his truck. Continuing to detain — and searching — a non-Indian without first attempting to ascertain his status is beyond the authority of a tribal officer on a public, nontribal highway crossing a reservation.").

[164] *Id.* at 1216.

[165] *See* Michael E. Solimine, *Due Process and En Banc Decisionmaking*, 48 ARIZ. L. REV. 325, 325 (2006) ("Only a few are decided by all of the circuit judges sitting en banc. Since 2000, the courts of appeals have been deciding about 27,000 cases on the merits each year. In the same period, on average only about seventy-five cases have been decided en banc each year.").

[166] *See generally id.* at 339-40 ("Do, or should, the courts of appeals take into account the likelihood of Supreme Court review in deciding whether to rehear a case en banc? There appear to be at least three articulated positions. One is that a case likely to be reviewed should not be reheard en banc, since it will be reviewed anyway and en banc

active (non-senior) members of the circuit.[167] The one exception is the Ninth Circuit.[168] The Ninth Circuit has twenty-eight active judges and so it would be logistically difficult to coordinate an appeal heard by all members.[169] Instead, when a petition to hear a case *en banc* is filed with that court it gets circulated to all active judges.[170] If any judge asks for a vote, then a vote of all active, non-recused judges is taken.[171] Whenever a majority of judges vote in favor of hearing the case *en banc*, an eleven member panel is created constituting the Chief Judge and ten additional judges selected by lot.[172]

In the *Cooley* case, a vote was taken, but a majority of active judges on the Ninth Circuit did not agree to hear the case *en banc*.[173] Four judges dissented from the decision not to rehear the case. In an opinion written by Judge Collins, and joined by Judges Bea, Bennett, and Bress, the dissenters argued powerfully that the panel decision was wrongly decided. They reasoned that forty years of precedent suggested that tribal officers have the power to detain a non-Indian reasonably

review will simply delay the process. A second position is that a panel decision should be reviewed en banc if Supreme Court review is unlikely, but the case is still important to a circuit, and en banc review is the last chance for judges to weigh in. A third position is that important cases, even those likely to be reviewed by the Court, ought to be reviewed en banc as well. The argument here is that important cases are just that and deserve full treatment by the circuit, even if subsequent Supreme Court review is likely.").

167 Grant Christensen, *Predicting Supreme Court Behavior in Indian Law Cases*, 26 MICH. J. RACE & L. 65, 103 (2020) ("Less than one half of one percent of all federal appellate court cases are decided *en banc* (i.e. by the entire set of active federal appellate judges).").

168 Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 317 (2006). Judge Rymer is a judge on the Ninth Circuit Court of Appeals. *Id.*

169 *Id.* ("An unfull bench works because we say it works. It works in the sense that lawyers and judges are willing, as a practical matter, to accept the decisions of a limited en banc panel as authoritative. There is, after all, no realistic alternative in the Ninth Circuit because its court of appeals is (or is thought to be) too big to convene in a true en banc.").

170 *Id.* at 318 ("If a petition is filed, and any judge so requests, the panel circulates its recommendation to the full court. Any judge may call for en banc consideration, and if a call is made, a vote is taken. The vote tally is confidential. If it fails, the panel resumes control and enters an order denying rehearing en banc. If it succeeds, the Chief Judge enters an order so indicating, and the en banc panel is drawn.").

171 *Id.*

172 *Id.* at 319 ("Circuit Rules provide for a limited en banc court of eleven, consisting of the Chief Judge, who sits on all en bancs, and ten drawn by lot from the active judges and eligible senior judges.").

173 United States v. Cooley, 947 F.3d 1215, 1216 (9th Cir. 2020).

suspected of violating state or federal law anywhere on the reservation and subject the non-Indian to *Terry* style investigation.[174]

Having failed to convince the Ninth Circuit to hear the case *en banc*, the United States appealed the panel decision to the U.S. Supreme Court. The Court granted certiorari[175] and reversed the Ninth Circuit in 2021.

B. The Supreme Court Opinion

The unanimous Supreme Court opinion, written by Justice Breyer, reaffirmed the inherent criminal powers of Indian tribes and recognized the power of tribal law enforcement to act as necessary to keep their communities safe.[176] The opinion centered on the inherent power of Indian tribes. The Court did not overrule its 1978 decision in *Oliphant* that tribal courts lack the inherent sovereign power to criminally prosecute non-Indians,[177] but separated the inherent authority of tribal law enforcement officers from the jurisdiction of tribal courts.

Breyer's opinion drew upon Court precedent from both its prior civil and criminal jurisprudence. In 1981, shortly after the *Oliphant* opinion, the Court was asked to extend *Oliphant*'s blanket prohibition on tribal criminal jurisdiction over non-Indians to civil authority.[178] The Court refused to do so. Instead, it reasoned that tribes may exercise their inherent civil authority over non-Indians on tribal lands located on the

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[174] *Id.* at 1220 (Collins, J., dissenting) ("[T]ribal police officers have the authority to conduct on-the-spot investigations of the sort authorized under *Terry v. Ohio*. Under this well-settled law, the tribe's conceded lack of criminal jurisdiction over such non-Indians does *not* deprive the tribe of the authority to conduct *Terry*-style investigations of non-Indians and, if probable cause arises, to then turn the non-Indian suspect over to the appropriate state or federal authorities for criminal prosecution." (citations omitted)). For an academic discussion of *Terry* and its progeny, see Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 347-49 (2015); Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 428 (2004); Thomas B. McAffee, *Setting Us Up for Disaster: The Supreme Court's Decision in* Terry v. Ohio, 12 NEV. L.J. 609, 616 (2012). For a discussion of *Terry* as applied to Indian law cases after *Cooley*, see Mikaela Koski, Comment, *Tying a Tribal Officer's Hands: Tribal Law Enforcement Authority Under* United States v. Cooley, 126 PENN ST. L. REV. 275, 293-94 (2021); Alex Treiger, Comment, *Thickening the Thin Blue Line in Indian Country: Affirming Tribal Authority to Arrest Non-Indians*, 44 AM. INDIAN L. REV. 163, 187-88 (2019) (winner of the 2018-19 Indian Law Writing Competition).

[175] United States v. Cooley, 141 S. Ct. 870 (2020).

[176] *See* United States v. Cooley, 141 S. Ct. 1638, 1646 (2021).

[177] *Id.* at 1643 ("Tribes also lack inherent sovereign power to exercise criminal jurisdiction over non-Indians." (citing Oliphant v. Suquamish Tribe, 435 U.S. 191, 212 (1978))).

[178] *See* Montana v. United States, 450 U.S. 544, 565 (1981).

reservation,[179] but presumptively lack civil jurisdiction over non-Indians on non-tribally controlled land. A tribe can overcome that presumption, and therefore extend their inherent power over non-Indians, if the tribe could show that it was necessary to protect tribal self-government or control internal relations.[180]

To help courts determine when the exercise of tribal power is necessary to protect tribal self-government or control internal relations, the Court provided two exceptions to the general rule that tribes lack inherent power over non-Indians. First, tribes may exercise their powers over non-Indians who enter consensual relationships with the tribe: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[181] Second, a tribe may also exercise its inherent power "to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[182]

The Court in *Cooley* reasoned that the second exception fits the power utilized by tribal officers to investigate suspected criminal activity in Indian country "almost like a glove."[183]

> To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats. Such threats may be posed by, for instance, non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation.[184]

The alternative, Justice Breyer explained, would be that after determining a drunk driver was a non-Indian, the tribal officer would

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[179] *Id.* at 557 ("[T]he Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe . . . .").

[180] *See id.* at 564 ("[I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." (citations omitted)).

[181] *Id.* at 565.

[182] *Id.* at 566.

[183] United States v. Cooley, 141 S. Ct. 1638, 1643 (2021).

[184] *Id.*

be forced to let the driver get back in the car and continue operating the vehicle.[185] Because drunk drivers pose a threat to Indians and non-Indians on public roads, the exercise of a tribe's inherent power to stop such a driver is perfectly consistent with the exercise of power over non-Indians whose conduct has a direct effect on the health or welfare of the tribe.[186]

The Court bolstered its conclusion by reference to dicta in *Montana*'s progeny of cases. The most analogous is *Strate v. A-1 Contractors*.[187] In *Strate*, the Court held that the tribal court of the Three Affiliated Tribes of the Fort Berthold Reservation lacked civil adjudicatory jurisdiction over a civil action brought by a non-Indian driver against a non-Indian landscaping company that had left equipment sitting on a public road running through the reservation resulting in a traffic accident.[188] The Court added that its opinion did not foreclose the authority of tribal officers on public roadways located in Indian country. "We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law."[189] Four years after *Strate* the Court reaffirmed that *Strate* "did not question the ability of tribal police to patrol the highway."[190]

Finally, Justice Breyer appealed to the principles of the Court's Indian law jurisprudence to further bolster the holding. He noted that among the reasons the Court had previously limited the authority of tribal courts over non-Indians is that non-Indians do not belong to the tribe and so they have no say in the enactment of the criminal laws that would be applied to them.[191] The Court reasoned Officer Saylor's search and detention of Cooley did not subject Cooley to any tribal criminal laws, but only to state and federal laws "that apply whether an individual is outside a reservation or on a state or federal highway within it."[192]

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185 *Id.*

186 *See id.*

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

188 *Id.* at 442.

189 *Id.* at 456 n.11.

190 *Cooley*, 141 S. Ct. at 1644 (citing Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651 (2001)).

191 *Id.*; *see also* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 337 (2008) (noting that nonmembers "have no part in tribal government" and have "no say in the laws and regulations that govern tribal territory"); Duro v. Reina, 495 U.S. 676, 693 (1990) (noting the concern that tribal-court criminal jurisdiction over nonmembers would subject such defendants to "trial by political bodies that do not include them").

192 *Cooley*, 141 S. Ct. at 1644-45.

Permitting tribal officers to conduct initial investigations of non-Indians suspected of violating state or federal criminal law protects the public without triggering the concerns raised in cases where a tribal court asserts criminal jurisdiction over the non-Indian.[193]

The unanimous *Cooley* opinion represents a clear recognition by the Supreme Court of the inherent powers of tribal officers. By recognizing that a tribal officer may assert power over a non-Indian even if the tribal court would lack criminal jurisdiction the Court has recognized that tribal officers, no less than their state or federal counterparts, play a critical role in keeping their communities safe.[194] These communities are not restricted only to Indians or tribal members, and tribal officers act not only to protect those who vote in tribal elections but to protect everyone in their community. This principle, clearly articulated by the Court, should be the guiding principle lower courts use when subsequently interpreting the authority of tribal law enforcement.

C. A Return to the District Court

The Supreme Court's decision in *Cooley* only decided that Officer Saylor had the authority to detain Cooley if he had probable cause, and then conduct a search consistent with Cooley's Fourth Amendment rights before turning him over to State or Federal authorities for arrest and prosecution. The Supreme Court did not determine whether Officer Saylor had probable cause for the search. After years of litigating the question of the inherent criminal power of tribal officers the case returned to the United States District Court for the District of Montana to reconsider Cooley's motion to suppress. This time the District Court was focused on whether Officer Saylor had probable cause for the search.[195]

In January 2022, the district court concluded that Officer Saylor had probable cause based upon his observation of Cooley's behavior and the presence of weapons. "When a police officer possesses a reasonable belief, based on specific and articulable facts, that the suspect poses a danger to the officer's safety and that the suspect has immediate access to weapons, that officer may justifiably seize and search the suspect and

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193 *Id.* at 1645.

194 For an excellent discussion of how judges use persuasion, including appeals to the purpose or principles which underlie an opinion in order maintain consistency, see Anne E. Mullins, *Subtly Selling the System: Where Psychological Influence Tactics Lurk in Judicial Writing*, 48 U. RICH. L. REV. 1111, 1131-37 (2014).

195 United States v. Cooley, No. CR 16-42-BLG, 2022 WL 74001, at *1 (D. Mont. Jan. 7, 2022).

the passenger compartment of the suspect's vehicle."[196] The District Court held that Officer Saylor had reasonable cause to fear for his safety, which justified the search; the observation of two semi-automatic weapons through the window provided the Officer with knowledge that Cooley had access to weapons, Cooley failed to quickly comply with a request to produce identification, and Cooley's change in behavior manifesting in shallow breathing and a hollowed out stare coupled with his hand in his pocket were signs in the Officer's experience that could constitute pre-assault behavior.[197]

The District Court accordingly denied Cooley's motion to suppress, and the evidence obtained by Officer Saylor was admitted against him in his federal criminal proceeding.[198]

III. HELPFUL APPLICATIONS OF *COOLEY*

In the year since *Cooley* was decided, a handful of lower courts have faithfully applied its underlying principle that tribal officers may stop, detain, and search non-Indian persons even if they could not arrest them. Building up a catalog of cases recognizing the inherent criminal power of tribal officers is helpful precedent to secure and broaden these powers, even before judges who might be initially hesitant to recognize them. This Part briefly collects and discusses a few of these cases to serve as an important juxtaposition to the behavior of the Texas Appellate Court discussed later.

In perhaps the most factually analogous case, the North Dakota Supreme Court unanimously upheld the power of a tribal officer to stop and search a non-Indian on a state highway.[199] Benjamin Suelzle was stopped on the Fort Berthold Reservation by a federal officer who was working for the tribal drug enforcement agency.[200] The officer testified that the basis for the stop was that "[t]he vehicle swerved over the white fog line and the yellow center line multiple times. And around that time dispatch advised that the license plate that the vehicle was bearing was coming back as expired."[201] After stopping the vehicle, the officer observed Suelzle's behavior, which in her experience indicated the

196 *Id.* at *5.

197 *Id.*

198 *Id.* ("Because Officer Saylor had sufficient grounds to conduct the *Terry* search, the contraband discovered need not be suppressed. . . . The evidence Officer Saylor discovered during the vehicle search established probable cause of violations of federal and state law for an arrest." (citations omitted)).

199 State v. Suelzle, 965 N.W.2d 855, 857 (N.D. 2021).

200 *Id.*

201 *Id.*

driver was likely impaired. The officer asked Suelzle whether he was an enrolled member of a federally recognized Indian tribe, and he replied that he was not.[202] The officer detained Suelzle until an officer from the McKenzie County Sheriff's Office arrived to make the arrest.[203] The tribal officer did not arrest Suelzle herself because though she believed Suelzle was a non-Indian violating state law on the reservation and therefore posed a threat to the community, she did not believe she had criminal jurisdiction over Suelzle.[204] Suelzle was convicted in state court.

On appeal to the North Dakota Supreme Court Suelzle argued that any evidence obtained should be excluded because the officer lacked the authority to initiate the stop. Citing *Cooley*, a unanimous North Dakota Supreme Court disagreed. It reasoned that the officer had probable cause to initiate the stop because a potentially intoxicated driver posed a threat to the entire community.[205] The tribal officer therefore could exercise the tribe's inherent authority to hold Suelzle for a reasonable amount of time until a state officer arrived. "We see no relevant distinctions between this case and *Cooley*. In light of the Supreme Court's decision in *Cooley*, we conclude the federal law enforcement officer working as an agent for the tribal drug enforcement agency had jurisdiction to detain Suelzle for a reasonable time while awaiting a state officer."[206]

State v. Suelzle is perhaps even more interesting because it arose on the Fort Bethold Reservation, the same reservation where in *Strate v. A-1 Contractors*[207] the Supreme Court had held that the tribal court lacked civil jurisdiction over the civil tort claims brought by the wife of a tribal member against a non-Indian company doing business on the

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[202] *Id.* at 858.

[203] *See id.* ("Because the stop occurred within the exterior boundaries of the Fort Berthold Indian Reservation, Suelzle was asked if he was a member of a federally recognized tribe. Suelzle responded no and the federal law enforcement officer contacted the McKenzie County Sheriff '[b]ecause of the indicators that I saw that he was possibly impaired and he was non-enrolled.' The federal law enforcement officer acknowledged she had no authority to arrest Suelzle, a non-Indian, on the reservation." (citations omitted)).

[204] *See id.*

[205] *Id.* at 860 ("Such threats may be posed by, for instance, non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation. . . . '[a]llowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe.'" (citing United States v. Cooley, 141 S. Ct. 1638, 1643 (2021))).

[206] *Id.* at 860.

[207] Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

reservation. *Suelzle* therefore emphasizes the disaggregation of tribal jurisdiction from the power of tribal officers.

Other courts have likewise faithfully upheld the inherent powers of tribal officers recognized and reaffirmed by *Cooley*. In *Hartsell v. Schaaf*, the Northern District of Indiana used *Cooley* to recognize the power of Pokagon Tribal Police officers to stop, detain, and search a non-Indian patron at a tribal casino.[208] Tribal police used video surveillance to track an individual who had been identified as passing counterfeits bills at the tribal casino.[209] The counterfeiter got into a vehicle driven by Hartsell, passed him what appeared to be a rifle covered by fabric, and the two men drove away.[210] When they returned to the casino Hartsell was handcuffed on the casino floor and led to a secure room where he was searched. The search revealed a narcotic smoking pipe and methamphetamines.[211]

Hartsell brought a § 1983 claim against the officers, alleging that the search violated his rights under the Fourth Amendment. The officers moved to dismiss the claim. The Court began its discussion of the merits by observing that if the officers were acting under the authority of tribal law, Hartsell's claim will be defeated.[212] It cited *Cooley*, recognizing that a tribal officer's inherent power includes the "authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime."[213] The Court recognized that the tribal officers had been cross deputized by the St. Joseph's County Police Department. State officers, unlike tribal officers, can be sued in a § 1983 claim if they violate a plaintiff's constitutional rights.[214] It therefore denied the motion to dismiss, reasoning that a determination of whether the officers were acting under tribal or state law required consideration of materials that were not in the pleadings.[215]

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[208] Hartsell v. Schaaf, No. 20-CV-505-JD, 2021 WL 3620064, at *2 (N.D. Ind. Aug. 16, 2021).

[209] *Id.* at *1.

[210] *Id.*

[211] *Id.*

[212] *Id.* at *2 ("As long as defendants were independently acting within their inherent tribal authority, and not relying on authority from the Cross Deputization Agreement, then they are not state actors and cannot be held liable under § 1983.").

[213] *Id.*

[214] *See id.* ("If, however, the officers went outside the bounds of what their inherent tribal authority permits, then their authority was derived from the Cross Deputization Agreement, which makes them state actors and subject to the constraints of the United States Constitution.").

[215] *Id.*

The District of South Dakota has also faithfully applied *Cooley* to recognize the inherent authority of tribal officers to search non-Indians. In *Bergeson v. McNeece* the plaintiff alleged that a police officer from the Sisseton-Wahpeton Sioux Tribe unlawfully detained him after he identified himself as a non-Indian.[216] Bergeson claimed that "'[w]hen the Tribal Police make a stop and are alerted that the occupant is not a tribal member they are to stand down, not call Roberts County Sheriffs department (sic) to come out to issue an illegal citation while illegally arresting the non tribal (sic) member.'"[217] The District Court dismissed the complaint. Citing *Cooley*, the court explained: "The United States Supreme Court has rejected the claim that tribal police officers cannot search and detain a non-member who is suspected of violating federal or state laws 'to which those non-Indians are indisputably subject.'"[218]

Finally, *Cooley* was just used by the Northern District of Oklahoma in a reverse application, upholding the right of state officers to search a tribal member committing a crime in Indian country.[219] In *United States v. Sherwood*, officers of the Tulsa Police Department responding to 911 calls concerning gunfire stopped and instigated the search of a vehicle and its occupants.[220] The search revealed a loaded Ruger LCR revolver, a loaded Lorcin semiautomatic pistol, digital scales, and multiple plastic bags containing residue of methamphetamine. Sherwood was read his *Miranda* rights, arrested, and charged with multiple drugs and weapon offenses in state court.[221]

Sherwood is a member of the Muscogee (Creek) Nation and the search occurred on the Muscogee Reservation. States ordinarily lack criminal jurisdiction over Indians who commit their crime in Indian country,[222] so Sherwood asked the court to suppress the evidence

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[216] Bergeson v. McNeece, No. 21-CV-01026, 2021 WL 5853548, at *1 (D.S.D. Dec. 9, 2021), *appeal dismissed sub nom.* Bergeson v. South Dakota, No. 21-3926, 2022 WL 2294044 (8th Cir. Jan. 3, 2022).

[217] *Id.*

[218] *Id.* at *2.

[219] United States v. Sherwood, No. 20-CR-0307-001, 2021 WL 5050357, at *3 (N.D. Okla. Nov. 1, 2021).

[220] *Id.* at *1-5.

[221] *Id.* at *5.

[222] Solem v. Bartlett, 465 U.S. 463, 465-66 (1984) (holding that because Bartlett was an Indian and committed his crime in Indian country, the State of South Dakota had no jurisdiction over him); *see also* Carole Goldberg, *In Theory, in Practice: Judging State Jurisdiction in Indian Country*, 81 U. COLO. L. REV. 1027, 1033 (2010) ("[T]he Supreme Court has upheld exclusive tribal jurisdiction over legal disputes directly implicating tribal members in several twentieth-century decisions."); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 775-76 (2006).

obtained by Tulsa officers as the product of an unlawful search. The search took place prior to the U.S. Supreme Court's decision in *McGirt v. Oklahoma*, which recognized that the Reservation had never been diminished.[223] Prior to *McGirt* state officers regularly assumed criminal jurisdiction over Indian defendants for all conduct that did not occur on trust land.[224]

The *Sherwood* court ultimately found the search by Tulsa Police officers to be lawful and denied the motion to suppress. It reasoned that even if the officers did not have jurisdiction based upon the *McGirt* decision, at the time of the search the officers acted in good faith and so there was no jurisprudential reason to exclude the evidence.[225] The Court applied *Cooley* to further bolster its conclusion. It reasoned that if in *Cooley* tribal officers had the power to stop and search a non-Indian suspected of violating state or federal law, and could detain the individual until they could be turned over and arrested by an officer with jurisdiction, then state officers could stop and search an Indian suspected of violating tribal or federal law.[226] Because Tulsa Police officers had authority to conduct the search, suppression of the evidence obtained was unnecessary.[227]

IV. UNFORCED ERRORS: *TEXAS V. ASTORGA*

In marked contrast to the other careful applications of *Cooley*, the Texas Appellate Court has recently mangled the Court's recognition of the inherent powers of tribal law enforcement.[228] Astorga, a non-Indian,

[223] McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020).

[224] *Sherwood*, 2021 WL 5050357, at *9-10 ("The Court found that Oklahoma '"maintained unquestioned jurisdiction for more than 100 years" over land now-recognized as "Indian country" under both federal and tribal jurisdiction,' and no reasonable law enforcement officer would have questioned whether he was acting within his jurisdiction by executing a search warrant for the property of a tribal member within Tulsa County. Even if the police officers were later found to be acting outside of their jurisdiction due to *McGirt*, the police officers were acting with a good faith belief that they were acting within their jurisdiction at the time of the search.").

[225] *Id.* at *11-12.

[226] *Id.* at *10 ("The Supreme Court found that tribal police officers have the authority to conduct limited detentions and searches of non-tribal members to investigate potential violations of state and federal law and possibly transport the non-tribal member to the appropriate law enforcement agency. Rather than support defendant's argument, the Supreme Court's decision supports a finding that DeGeorge would have had the authority to stop and detain Indians found on a public roadway within the city of Tulsa to assess potential violations of tribal or federal law." (citing United States v. Cooley, 141 S. Ct. 1638 (2021))).

[227] *Id.* at *24-25.

[228] Texas v. Astorga, 642 S.W.3d 69, 73 (Tex. App. 2021).

was on the Ysleta del Sur Pueblo's Reservation when he made a turn without signaling. Failing to use a turn signal is a civil infraction, and an officer from the Pueblo initiated a stop.[229] Although Astorga did not stop until he was outside of the Reservation, the tribal officer had the authority to continue the stop; the officer "had the authority to enforce the Tribe's Traffic Code on property adjacent to the reservation if the violation initially occurred on tribal land."[230]

Having had probable cause to stop the vehicle, tribal officers are permitted to search an individual's person and those areas which may be easily reached to ensure officer safety. During the stop tribal officers observed an open container of alcohol, which is also a civil infraction under the tribal code. While collecting the open container, officers observed a clear glass pipe which based upon their training and experience they believed to have contained methamphetamine.[231] The tribal officers read Astorga his *Miranda* rights and transported him to tribal police headquarters for processing.[232] During an interview at tribal police headquarters a passenger in the vehicle indicated Astorga was concealing methamphetamines in his groin area. A search of this area produced a bag containing a crystal-like substance, which was positively identified as methamphetamine.[233] The tribal officers at this point contacted the El Paso Police Department and Astorga was arrested and charged by the state.[234] According to the El Paso Police Department's report of the arrest, one of the tribal officers had informed Astorga that he was "under arrest" for possession of drug paraphernalia prior to the state officers' arrival.[235] State officers actually arrested him for possession of a controlled substance.[236]

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[229] *Id.*

[230] *Id.*

[231] *Id.* at 74.

[232] *Id.*

[233] *Id.* ("[W]hile Astorga was in the jail cell, his female passenger informed one of the tribal officers that Astorga was concealing methamphetamine in his 'groin' or 'genital area.' The tribal officers then asked Astorga to remove his pants, and the officers observed a 'bulge' in his underwear, which Astorga attributed to a 'hernia.' Not believing his story, the tribal officers asked Astorga to take off his underwear, and at that time, the officers observed a baggie containing a 'crystal-like' substance; upon testing, the tribal officers determined that the substance was methamphetamine.").

[234] *Id.* at 74-75 ("Astorga was subsequently indicted in state court on one count of the first-degree felony offense of possession of a controlled substance, methamphetamine, with the intent to deliver, in an amount more than 4 ounces but less than 200 ounces . . . .").

[235] *Id.* at 75.

[236] *Id.*

During criminal proceedings Astorga asked for suppression of all evidence obtained by tribal officers and a dismissal of the charges against him because, as a non-Indian, tribal police had no authority to transport him to the tribal police headquarters or conduct the search of his person. The trial court granted Astorga's motion to suppress because the tribal officers lacked the authority to arrest him.[237] It held that "the tribal officers had no authority to arrest Astorga for those violations, and at most they could issue civil citations and to thereafter release him."[238] The State of Texas appealed.

The Texas Appellate Court applied *Cooley* and upheld the suppression of evidence. It concluded "that although the initial detention and pat-down search at the scene of the traffic stop may have been authorized under *Cooley*, the State has failed to show that the tribal officers' subsequent actions stayed within the bounds of what *Cooley* allows."[239] The court focused on events that occurred after discovering the glass pipe. Prior to the pipe's discovery tribal officers use of evidence in plain sight, and anything collected during the pat-down search of Astorga's person, formed the basis of civil violations of the tribal code for which the officers had the authority to issue fines.[240]

The Texas Appellate Court read *Cooley* as prohibiting tribal law enforcement from continuing its investigation once the tribal officers suspected that Astorga had violated state or federal law.[241] The court concluded that the detention of Astorga was improper because tribal officers transported him to tribal headquarters and conducted the more detailed search of his person without the permission of state law enforcement.[242] Despite the fact that the tribal officer's search of Astorga's underwear was predicated upon information from his passenger and that fact that the search may have been necessary to preserve evidence of the crime, the court upheld its suppression.

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[237] *Id.* ("The trial court granted Astorga's motion to suppress. . . . [T]he court concluded that despite any testimony to the contrary, Officer Alarcon did in fact unlawfully arrest Astorga.").

[238] *Id.*

[239] *Id.* at 80-81.

[240] *Id.* at 79, 81.

[241] *Id.* at 82 ("[T]he tribal officers could have contacted the EPPD or other state officers to determine if they wished to take custody of Astorga for the alleged drug paraphernalia offense. And if they had done so, they would have neatly fit the fact pattern in *Cooley* by temporarily detaining Astorga at the scene until EPPD officers arrived. But this is not what happened.").

[242] *Id.*

> [I]f the arrest or detention following the conclusion of the traffic stop was improper, the evidence garnered at the tribal police headquarters is tainted and must be excluded. When, as here, a defendant is found to be in custody as the result of an illegal arrest or detention, both the Fourth Amendment and state law require evidence found as the result of the illegal arrest to be excluded.[243]

On February 9, 2022, the Texas Court of Criminal Appeals denied review over the objection of two of its members.[244]

V. A TRIBE'S INHERENT CRIMINAL POWER

What does *Cooley* mean and how can the post-*Cooley* cases be reconciled? First and foremost, *Cooley* means that the inherent powers of tribal law enforcement are divorced from the inherent criminal jurisdictional power of the tribal court.

Second, as lower courts examine the inherent criminal power of tribal officers, they must contextualize the responsibility of tribal law enforcement. Tribal government has an obligation to keep the reservation community safe.[245] With that responsibility comes the power to police their community, and by necessity, to investigate and deter crime committed by Indians and non-Indians alike.[246] As *Cooley* makes clear, at a minimum this includes the power to stop a non-Indian and, if the tribal officer has probable cause to suspect the individual has committed a crime but is not an Indian, to detain them until state or federal officers arrive.[247] There is no sound reason to limit that detention to the site of the vehicle or the stop; consistent with their

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[243] *Id.* at 84.

[244] *In re* Astorga, No. PD-0883-21, 2022 Tex. Crim. App. LEXIS 100, at *1 (Feb. 9, 2022).

[245] The Supreme Court has repeatedly found that the safety of the reservation community is at the core of inherent tribal powers. *See* United States v. Cooley, 141 S. Ct. 1638, 1641 (2021) ("[A] tribe retains inherent sovereign authority to address 'conduct [that] threatens or has some direct effect on . . . the health or welfare of the tribe.'" (citing Montana v. United States, 450 U.S. 544, 566 (1981))); United States v. Wheeler, 435 U.S. 313, 326 (1978) ("[T]he powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type.").

[246] *Cooley*, 141 S. Ct. at 1641 (holding that a tribal officer could stop a non-Indian, and with probable cause that a crime had been committed, detain the non-Indian until state law enforcement arrived).

[247] *Id.*

inherent power a tribal officer may detain a non-Indian at tribal police headquarters,[248] in a tribal vehicle,[249] or at a tribal detention facility.[250]

Finally, as long as tribal officers respect the constitutional rights of the accused,[251] they have the inherent power to conduct a warrantless search of the person or property of a non-Indian. Tribal officers acting in their tribal capacity are not bound by the U.S. Constitution.[252] They are however bound by the Indian Civil Rights Act ("ICRA"),[253] which prohibits a tribe or its agents from "violat[ing] the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures."[254] While rights under ICRA are not required to be interpretated identically as those in the Constitution,[255] tribal officer's routinely give *Miranda* warnings[256] and conduct themselves in a manner consistent with any state or federal law enforcement officer — including the respect for a defendant's constitutional rights.[257]

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[248] *See* United States v. Keys, 390 F. Supp. 2d 875, 884 (D.N.D. 2005) (permitting a non-Indian to be held and questioned by tribal police at the tribal police station).

[249] *See Cooley*, 141 S. Ct. at 1641 (permitting a non-Indian to be held in a tribal police vehicle).

[250] United States v. Terry, 400 F.3d 575, 578-79 (8th Cir. 2005) (permitting a non-Indian to be held in a tribal jail).

[251] Thomas P. Schlosser, *Case Law on American Indians*, 9 AM. INDIAN L.J. 434, 508 (2021) ("[T]ribal officers can be sued individually for violating the constitutional rights of non-Indians while on tribal lands . . . ." (citing Stanko v. Oglala Sioux Tribe, 916 F.3d 694, 698 (8th Cir. 2019))).

[252] Koski, *supra* note 174, at 284-85 ("Although Indians are American citizens, the Bill of Rights accompanying the United States Constitution does not apply to Indian tribal governments. . . . When a tribal law enforcement officer conducts a search or a seizure, the ICRA Fourth Amendment counterpart provision applies.").

[253] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 273.

[254] 25 U.S.C. § 1302(a)(2) (2018).

[255] *See* Trachman, *supra* note 72, at 889 ("Some courts, particularly when evaluating whether tribal law deprives individuals of equal protection or due process rights, acknowledge that tribal law must be interpreted with sensitivity to the specific tribal context in which it arose.").

[256] For an example of tribal officers giving *Miranda* warnings, see United States v. Doherty, 126 F.3d 769, 772-73 (6th Cir. 1997) (federal *Miranda* warnings given prior to a federal interview); Southern Ute Tribe v. Henry, No. 17-APP-0065, 15 NICS App. 35, at *36, *38 (S. Ute Tr. Ct. App. Sept. 8, 2017) (requiring that tribal law similarly required a defendant be given notice of their right against self-incrimination).

[257] *Id.*

A. The Inherent Criminal Powers of Tribal Law Enforcement Are Different than the Inherent Powers of the Tribal Court

The most important distinction *Cooley* made was that tribal law enforcement may exercise inherent criminal powers over individuals even when the tribal court would lack criminal jurisdiction to prosecute a potential defendant. *Cooley* represents the next era of inherent criminal power in Indian country. If *Oliphant* was the nadir, conscripting inherent tribal power over non-Indians absent a delegation by Congress,[258] and *Lara* was a correction, permitting the exercise of inherent power even without a delegation,[259] then *Cooley* is a transformation.[260] By using the *Montana* approach to inherent power,[261] an approach never before applied by the Supreme Court to criminal cases,[262] the door has been opened to reimagine our understanding and construction of a tribal sovereign's criminal tools.

Montana suggested that the inherent power of an Indian tribe on tribal land was nearly absolute.[263] Indian tribes have the power to exclude non-Indians from tribal lands,[264] to prevent non-Indians from hunting or fishing on tribal land,[265] or to condition the exercise of rights by non-

[258] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that there is no inherent criminal power for an Indian tribe to prosecute a non-Indian).

[259] United States v. Lara, 541 U.S. 193 (2004) (holding that tribes have inherent criminal power to prosecute non-member Indians for criminal violations of the tribal code).

[260] United States v. Cooley, 141 S. Ct. 1638 (2021) (separating the inherent power of tribal law enforcement from the jurisdictional power of tribal courts).

[261] For a discussion of the inherent powers of Indian tribes and the *Montana* exceptions, see Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010); Judith V. Royster, Montana *at the Crossroads*, 38 CONN. L. REV. 631 (2006).

[262] Christensen, *The Extraterritorial Reach*, *supra* note 35, at 305 ("While the *Kelsey* opinion clearly implies that a tribe's inherent criminal power extends only when necessary to promote tribal self-governance or internal relations, the Supreme Court has never placed a similar limit on a tribal court's *criminal* jurisdiction.").

[263] Montana v. United States, 450 U.S. 544, 564 (1981) (a tribe has all inherent power "necessary to protect tribal self-government or to control internal relations").

[264] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) ("[T]he Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management."); Skibine, *The Tribal Right*, *supra* note 31, at 287 (discussing the right to exclude in *Merrion*, "Justice Marshall took the position that the tribal power to tax could be derived from either inherent tribal sovereignty or the right to exclude, which includes other lesser rights such as regulating the terms under which anyone not excluded can remain on tribal lands").

[265] *Montana*, 450 U.S. at 557 ("[T]he Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the

Indians on compliance with tribal rules like bag or catch limits.[266] In contrast to these expansive rights on tribal land, *Montana* suggested that a tribe's inherent regulatory power over non-Indians on non-tribal lands was more limited. Tribes had those powers necessary to protect tribal self-government or control internal relations.[267] How are lower courts to know whether a power is necessary? The Court clarified that a tribe's inherent powers exist when there is a consensual relationship between the non-Indian and the tribe[268] and when non-Indian's conduct will have a direct effect on the political integrity, economic security, health, or welfare of the tribe.[269]

As the *Cooley* opinion suggests, the exercise of law enforcement powers fit the principles of *Montana* "like a glove."[270] The implications of *Cooley* extend well beyond its facts. Non-Indians who operate a vehicle while intoxicated or under the influence of narcotics pose an immediate threat to the health and welfare of the tribe because of the high propensity that the operator will lose control of the vehicle or not react swiftly enough in the event of a stalled vehicle or pedestrian in the road. But even outside the context of a vehicle, non-Indians who commit acts of physical violence — against Indians or non-Indians — pose the same threat to the tribal community.

Consider the implications. The National Congress of American Indians has compiled a series of powerful anecdotes about the consequences of limited tribal law enforcement powers as part of a

Tribe, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits."); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 338 (1983) (holding that an Indian tribe can regulate non-Indian hunting and fishing on reservation lands; a "[t]ribe's authority to regulate hunting and fishing pre-empts state jurisdiction").

266 *Id.* at 331 (citing *Montana*, 450 U.S. at 557).

267 *See supra* note 262 and accompanying text.

268 *Montana*, 450 U.S. at 565 ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."). For a discussion of the *Montana* exceptions, see generally Reid Peyton Chambers, *Reflections on the Changes in Indian Law, Federal Indian Policies and Conditions on Indian Reservations Since the Late 1960s*, 46 ARIZ. ST. L.J. 729, 746-54 (2014); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 221-30 (2002).

269 *Montana*, 450 U.S. at 566 ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

270 United States v. Cooley, 141 S. Ct. 1638, 1643 (2021).

review of VAWA's expanded power. One particularly troubling case illustrates the importance of the *Cooley* opinion's recognition of the power of tribal police:

> In 2014, a non-Indian man attacked his Indian wife in a public parking lot of a gas station. During the assault in the car, he also bit her. When she ran out of the car and rushed into a women's restroom to seek shelter, he followed her and continued to assault her. The police were called, and tribal and state officers arrived at the scene. In any other case, the man would have been arrested and charged. However, because the assault took place on the Sisseton-Wahpeton Oyate's reservation land and the defendant was a non-Indian, only the federal government had jurisdiction. So, the tribal and state police who responded did the best they could do. They held the man in custody and painfully told the woman all they could do is try to "give her a head start."[271]

Post-*Cooley* it is clear that tribal law enforcement has other options.[272] The assault of a tribal member by a non-Indian clearly threatens the health and welfare of the tribe. Certainly, the threat is at least as great as a non-Indian parked in a vehicle with methamphetamine. The Sisseton-Wahpeton officers could do much more than just give the victim "a head start."[273] While VAWA would permit prosecution in the tribal court because of the pre-existing relationship between the parties,[274] in a situation involving non-Indians or where VAWA was inapplicable, tribal officers could detain the perpetrator until federal officers responded. *Cooley* recognizes the appropriateness of an expanded toolkit for tribal officers.

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[271] NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 14-15 (2018), https://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/6784-M6KF].

[272] *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022) (recognizing that in this scenario, the state law enforcement may have been able to intervene because this was a crime committed by a non-Indian against an Indian in Indian country). *Cooley* recognizes that tribal law enforcement may also have been able to intervene and hold the non-Indian until he could be handed over to the federal government for prosecution under the Indian Country Crimes Act. *Cooley*, 141 S. Ct. at 1644. However, the generally recognized limits of state authority in 2014, and the limits imposed on tribal law enforcement before *Cooley*, left both jurisdictions powerless.

[273] NAT'L CONG. OF AM. INDIANS, *supra* note 271, at 14-15.

[274] *See id.* at 15 ("Ultimately, after VAWA's passage, Sisseton-Wahpeton Oyate was able to bring the man who beat his wife in the parking lot to justice. When he beat his wife again, the tribal government was finally able to arrest and charge the man with assault. He eventually pled guilty in tribal court.").

Non-Indians may pose many other threats to the health and welfare of tribal communities; possession or use of illegal firearms, persons suspected of human trafficking, the manufacture, use, or sale of drugs. After *Cooley*, it is clear that tribal officers, even if they could not arrest the non-Indian offenders, no longer need to be reticent about stopping or searching persons violating state or federal law just because the tribe could not prosecute them. These expanded criminal powers should greatly bolster law enforcement in Indian country.

B. Tribal Officers Have the Inherent Power to Stop and Detain Non-Indians

Having clarified that tribal law enforcement possesses those powers necessary to protect the health and welfare of the reservation community, it becomes obvious that the Texas Appellate Court in *Astorga* misapplied the law. The Texas court limited the officer's exercise of inherent criminal power to enforce the Tribe's Peace Code.[275] When tribal officers transported the non-Indian defendant to tribal headquarters, searched him after a tip from his passenger, and then told him he was under arrest prior to the arrival of state law enforcement, the appellate court reasoned that tribal law enforcement had exceeded the tribe's inherent criminal power.[276] The Texas Appellate Court has unmistakably misread *Cooley*.

First, just because a tribal officer uses the term "arrest" when they do not themselves have the power to formally arrest a non-Indian does not mean that the tribal officer has exceeded their authority or violated the rights of the accused. The Eighth Circuit has held that when a tribal officer claimed to "arrest" a non-Indian so they could be turned over to state law enforcement, there was no attempt to actually assert criminal jurisdiction over the defendant and so no violation of the defendant's rights.[277] The *Astorga* court fixated on the tribal officer's use of the word

[275] *See* State v. Astorga, 642 S.W.3d 69, 79 (Tex. App. 2021), *petition for discretionary review refused* (Feb. 9, 2022) ("In other words, the Peace Code recognizes the right of other jurisdictions, such as the State of Texas, to exercise criminal jurisdiction over offenses committed on the Pueblo. It does not, however, elaborate on what tribal officers have the authority to do when confronted with a situation in which they suspect a non-Indian individual has committed a state law offense on the Pueblo.").

[276] *Id.* at 78, 82-83 (Indian tribes "lack inherent authority to exercise criminal jurisdiction over non-Indians, even for offenses committed on tribal land").

[277] United States v. Terry, 400 F.3d 575, 580 (8th Cir. 2005) ("Although Sergeant Ten Fingers testified that he 'arrested' Mr. Terry 'to be detained for the Shannon County Sheriff' on a number of tribal charges, we do not think that the record indicates that tribal officers ever required or even intended to require Mr. Terry to submit to the criminal jurisdiction of the Oglala Tribe.").

arrest to invalidate the tribe's detention and search when in reality the tribal officer had already called state law enforcement and was merely indicating to Astorga that he was about to imminently be arrested by the State of Texas.[278]

Second, there is nothing unusual about tribal law enforcement transporting a non-Indian to a secondary location or detaining them in that secondary location. Astorga had violated the laws of the Pueblo.[279] While the offense occurred on the reservation, Astorga did not stop and surrender to tribal authority until he was outside of the reservation boundary.[280] It is perfectly reasonable for tribal law enforcement, suspecting a violation of state law had been committed by observing the glass pipe in plain sight, to prefer to detain Astorga at tribal police headquarters. While it is true that in *Cooley* the defendant was not transported until a state officer had arrived and approved of Cooley's transport, there is nothing in the *Cooley* opinion that suggests that tribal officers may only transport non-Indians with state or federal permission. Lower courts have previously found that no violation of the defendant's rights occur when tribal law enforcement transport the defendant[281] or even hold them overnight.[282]

Among the most important principles that comes out of *Cooley* is that the Supreme Court is treating tribal law enforcement like their state and federal siblings — each tasked with the responsibility of keeping their communities safe. A state officer is clearly within their rights if they hold a suspected federal offender not at the site of arrest, but at the local police station, while awaiting a federal officer to come assume custody. *Cooley* stands for nothing more revolutionary than tribal officers may exercise the same inherent power. *Astorga*'s assumption that the tribal officers have somehow exceeded their inherent authority by relocating the accused to the tribal police station is over-limiting tribal power and

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[278] *See Astorga*, 642 S.W.3d at 75, 82-83 (The tribal officer informed the defendant that he was "under arrest" after finding the concealed drugs.).

[279] *See id.* at 75 ("[T]he report indicates that he issued two civil citations to Astorga under the Tribe's Traffic Code for the turn-signal and open container violations and also cited Astorga for possession of illegal drugs under the Peace Code.").

[280] *Id.* at 73 ("Officer Alarcon initiated a traffic stop, but Astorga did not stop until he had travelled onto a public roadway off the Pueblo, located in the City of El Paso.").

[281] *E.g.*, United States v. Peters, No. 16-CR-30150, 2017 WL 1383676, at *2-3 (D.S.D. Apr. 13, 2017) (permitting tribal detectives to transport a non-Indian criminal defendant).

[282] *See Terry*, 400 F.3d at 579-80 (upholding overnight detention of a non-Indian in a tribal jail where state law enforcement officials found it inconvenient to take custody of him until the next morning).

is objectively inconsistent with the greater respect and authority for tribal officers recognized by the Supreme Court.

C. Tribal Officers May Search Non-Indian Persons and Property Consistent with Their Inherent Power

The final error made by the Texas Appellate Court was the suggestion that tribal officers are unable to conduct limited searches of non-Indians after determining that the non-Indian would be handed over to state officers for prosecution.[283] This conclusion is directly rebutted by the Supreme Court in *Cooley*, where the tribal officer was permitted to use evidence located in plain sight as probable cause to search Cooley's vehicle after he was detained but before state law enforcement arrived.[284] In *Astorga* the tribal officer, with probable cause after receiving a tip from the suspect's passenger, did a thorough search of his person and discovered a bag of methamphetamine concealed in his underwear.[285]

The search of a person, including genital inspection, is a reasonable search under the Fourth Amendment when the officer has probable cause and the search is conducted in a reasonable manner.[286] Information from a passenger that another person in the vehicle is in possession of an illegal substance is sufficient to provide probable cause for a search.[287] A visual inspection of the defendant in his underwear,

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[283] *See Astorga*, 642 S.W.3d at 84 ("When, as here, a defendant is found to be in custody as the result of an illegal arrest or detention, both the Fourth Amendment and state law require evidence found as the result of the illegal arrest to be excluded.").

[284] *See* United States v. Cooley, 141 S. Ct. 1638, 1641-42, 1644 (2021) ("[W]e recognized in *Duro* that '[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.' The authority to search a non-Indian prior to transport is ancillary to this authority that we have already recognized." (quoting Duro v. Reina, 495 U.S. 676, 697 (1990))).

[285] *See Astorga*, 642 S.W.3d at 74 ("[W]hile Astorga was in the jail cell, his female passenger informed one of the tribal officers that Astorga was concealing methamphetamine in his 'groin' or 'genital area.' The tribal officers then asked Astorga to remove his pants, and the officers observed a 'bulge' in his underwear, which Astorga attributed to a 'hernia.' Not believing his story, the tribal officers asked Astorga to take off his underwear, and at that time, the officers observed a baggie containing a 'crystal-like' substance; upon testing, the tribal officers determined that the substance was methamphetamine.").

[286] *See* Ornelas v. United States, 517 U.S. 690, 693 (1996). Both the reasonable suspicion and probable cause components of a warrantless search are elements capable of *de novo* appeal. *Id.* at 691.

[287] California v. Acevedo, 500 U.S. 565, 570 (1991) (an informant that suggested a vehicle contains drugs gives law enforcement probable cause to search the vehicle "if

followed by the removal of his underwear after an unaccounted for bulge is discovered in the place where law enforcement had been told drugs were hidden, is not an unreasonable manner.[288] Conducting the inspection in the privacy of the tribal police headquarters is in fact preferable to conducting the search on the side of the road.[289]

Moreover, the Fourth Amendment permits law enforcement to collect evidence from an individual's person if there is a legitimate concern that the evidence may otherwise be lost.[290] Drug evidence concealed on a defendant qualifies as evidence that may be collected by officers without a warrant in order to preserve it.[291] Officers may also perform a thorough search of an individual who is being detained to ensure that there are no concealed weapons or any other threat to officer safety in an area the accused might reach.[292] This search can go beyond a mere

the police have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct either an immediate or a delayed search of the vehicle").

[288] *Cf.* State v. Riley, 226 N.W.2d 907, 909 (Minn. 1975) (permitting the warrantless visual search of a man's penis while in law enforcement custody). There aren't terribly many cases involving the warrantless visual inspection of a man's groin.

[289] *See id.* at 909 (In *Riley*, the inspection took place in a police interrogation room which afforded considerably more privacy than an inspection of the suspects genital area on the street where he was initially identified.).

[290] Missouri v. McNeely, 569 U.S. 141, 149 (2013) ("As is relevant here, we have also recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence." (citing Cupp v. Murphy, 412 U.S. 291, 296 (1973))).

[291] *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (allowing drug evidence to be seized from a suspects person in a search initially designed to search for weapons: "A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect").

[292] Chimel v. California, 395 U.S. 752, 762-63 (1969) ("[I]t is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' — construing that

pat-down in order to identify any potential threat to the officer.[293] Finally, it is certainly true that methamphetamines pose a significant risk to (have a direct effect upon) the health and welfare of tribal communities.[294] Under *Montana* the inherent powers of an Indian tribe include those powers necessary to address these effects. By necessity that includes the ability to search an individual and seize the drugs when tribal law enforcement has probable cause to suspect they have entered the reservation.

While tribal officers are not inherently bound by the Fourth Amendment, they are bound by ICRA which protects individuals from unlawful searches and seizures.[295] Other courts have suggested that because the language of ICRA parallels that of the Fourth Amendment, the limitations should be interpreted similarly.[296] Certainly evidence obtained by a tribal officer in violation of the Fourth Amendment rights of the defendant would be inadmissible in any state or federal criminal proceeding,[297] but tribal officers are used to complying with constitutional standards even if they are not otherwise bound by them.[298] For example, tribal officers will often read suspected criminal defendants two sets of rights related to the right against self-incrimination — one that complies with tribal rules and another that

phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.").

[293] *See id.* at 763.

[294] *See* Christopher B. Chaney, *Overcoming Legal Hurdles in the War Against Meth in Indian Country*, 82 N.D. L. REV. 1151, 1152-57 (2006); Elizabeth Ann Kronk, *The Emerging Problem of Methamphetamine: A Threat Signaling the Need to Reform Criminal Jurisdiction in Indian Country*, 82 N.D. L. REV. 1249, 1251-54 (2006).

[295] Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 800-01, 809 n.66 (2007) ("Indian tribes are the only governmental bodies within the United States not bound by the U.S. Bill of Rights. Unease over tribes' extra-constitutional status motivated Congress to enact the Indian Civil Rights Act (ICRA) in 1968, which extends provisions similar to those contained in the U.S. Bill of Rights to Indian tribes. But ICRA has not alleviated concerns over potential violations of civil liberties by tribal governments.").

[296] *See* United States v. Becerra-Garcia, 397 F.3d 1167, 1171 (9th Cir. 2005) ("Yet the Fourth Amendment does not apply because the constitution does not directly apply to the conduct of tribal governments."); United States v. Peters, No. 16-CR-30150, 2017 WL 1383676, at *2 (D.S.D. Apr. 13, 2017) ("A tribal police officer's detention of a non-Indian must be reasonable under Fourth Amendment standards.").

[297] *See Becerra-Garcia*, 397 F.3d at 1171 ("Even so, a federal statute imposes precisely the same constraints on tribal governments as the Fourth Amendment, so Fourth Amendment law comes into play.").

[298] *See id.*; *see also* Treiger, *supra* note 174, at 198 ("[T]ribal officers are not bound by the Constitution.").

complies with the Constitution.[299] These tribal officers are aware that they need to extend to the defendant their constitutional rights in case the evidence obtained is going to subsequently be used in a state or federal proceeding.[300]

Cooley does not delegate to tribal law enforcement any new power; it merely recognizes the inherent power tribal officers have always possessed. It turns out that tribal officers have always had general law enforcement powers necessary to protect their tribal community. Because these powers include the right to detain an individual until state or federal law enforcement arrive, and to perform warrantless searches consistent with the defendant's Fourth Amendment rights, Cooley's conviction was upheld.[301] The Texas Appellate Court dangerously misapplied *Cooley* in construing the law enforcement powers of tribal officers to be something less than the powers ordinarily entrusted and exercised by their state and federal counterparts. The Texas Court of Criminal Appeals should have accepted the case and reversed. Future courts should take note that the Supreme Court has recognized the inherent power of tribal law enforcement to act whenever necessary to address a direct effect on the health and welfare of the reservation community. The detention of drug smugglers who enter the reservation, and the search for the narcotics concealed on a non-Indian's person (consistent with their Fourth Amendment rights), are certainly among a tribe's inherent criminal powers articulated by the *Cooley* majority.

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[299] *See* United States v. Boise, No. CR 07-477-RE, 2008 WL 4609992, at *1 (D. Or. Oct. 10, 2008) (Tribal officer read a defendant both a tribal and federal waive of rights); *see also* United States v. Evanston, No. CR 09-8018-PHX, 2009 WL 3748578, at *7 (D. Ariz. Nov. 5, 2009) (holding that when a defendant is read both a tribal and federal waiver of rights, it is incumbent upon law enforcement to ensure that the defendant is aware in the difference of their rights before proceeding).

[300] *See Boise*, 2008 WL 4609992, at *1 (The case provides an example where tribal law enforcement explain their intentional decision to comply with both tribal and constitutional obligations so as to protect the rights of the Defendant in the event of future prosecution by either sovereign. "Detective Samuel explained that because Boise could be prosecuted in federal and/or tribal court, he would read Boise both the Miranda and Tribal Advice of Rights Forms. He also told Boise that he would explain the difference between the two forms.").

[301] *See* United States v. Cooley, 141 S. Ct. 1638, 1646 (2021) ("In short, we see nothing in these provisions that shows that Congress sought to deny tribes the authority at issue, authority that rests upon a tribe's retention of sovereignty as interpreted by *Montana*, and in particular its second exception. To the contrary, in our view, existing legislation and executive action appear to operate on the assumption that tribes have retained this authority.").

CONCLUSION

Indian law is in the middle of a quiet revolution on the understanding and articulation of the inherent powers of Indian tribes. In 1978, the landscape looked bleak. The Supreme Court had just decided *Oliphant* and with a single opinion Indian tribes lost their inherent power to criminally punish non-Indians who violated tribal law.[302] The Rehnquist Court built upon this early reversal and steadfastly refused to expand the inherent powers of the tribal sovereign.[303]

A tribal powers renaissance began in about 2010. Building on the Court's acceptance of the *Duro*-fix Congress recognized the power of Indian tribes to assume felony level criminal jurisdiction[304] and recognized the inherent power of Indian tribes to criminally prosecute non-Indians for offenses related to domestic violence.[305] With the arrival of Justice Gorsuch in 2017, the Supreme Court has changed its

[302] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978); Samuel Macomber, Note, *Disparate Defense in Tribal Courts: The Unequal Right to Counsel as a Barrier to Expansion of Tribal Court Criminal Jurisdiction*, 106 CORNELL L. REV. 275, 281 (2020) ("The U.S. Supreme Court formalized limitations on tribal court criminal jurisdiction over non-Indians in its 1978 decision, *Oliphant v. Suquamish Indian Tribe*. *Oliphant* held that tribes could not exercise criminal jurisdiction over non-Indians without an express congressional delegation of authority. *Oliphant's* limitation on tribal court criminal jurisdiction left much of law enforcement in Indian country to federal or state agencies. Ultimately, both federal and state law enforcement have failed.").

[303] *See* Fletcher, *Supreme Court's Indian Problem*, *supra* note 22, at 584 ("In the last twenty years under the Rehnquist Court, for example, it is harder and harder to find Indian law Supreme Court decisions relying upon foundational principles of Indian law, especially those rooted in the Constitution."); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1632-64 (1996) (specifically discussing the role of Chief Justice Rehnquist and the rise of subjectivism in Indian law). *See generally* Getches, *Beyond Indian Law*, *supra* note 19 (discussing the discouraging and bleak legacy of the Rehnquist Court on Indian law in general and criminal law in Indian country in particular).

[304] *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258, 2270 (Section 234 of the Tribal Law and Order Act now codified at 25 U.S.C. § 1302 (2018)). TLOA expanded the misdemeanor jurisdiction of tribal courts (a limitation of one year imprisonment) to felony level jurisdiction beyond (a maximum of three years per offense and nine years per event). *Id.* at 2280; *see also* Riley, *Crime and Governance*, *supra* note 87, at 1616 (2016) ("Undoubtedly, where TLOA felony sentencing is utilized, it can make a significant difference in the sentence of the defendant and, quite possibly, in the lives of victims or potential victims, particularly if the defendant is a repeat offender.").

[305] Riley, *Crime and Governance*, *supra* note 87, at 1571 (VAWA "recognizes — for the first time since 1978 — tribes' inherent criminal jurisdiction over non-Indians who commit acts of domestic violence, dating violence, or intimate partner violence against an Indian in Indian country if certain criteria are met").

approach to Indian law cases.[306] This new approach, described by Professor Fletcher as a form of judicial deference to the inherent power of tribes and judicial restraint to the textual interpretation of treaties and statutes, is remaking Indian law.[307]

This Article has made the argument that criminal law and procedure in Indian country are among the primary beneficiaries of this new approach. With the advent of *McGirt* and *Cooley* the stage is set for Indian tribes to powerfully assert their inherent powers. *Cooley* was notable not just for its respectful treatment of tribal law enforcement, but for clarifying that the inherent criminal powers of tribal law enforcement are not limited to the inherent criminal jurisdiction exercised by tribal courts.

In the year since *Cooley* was decided, most courts have gotten the message. The inherent criminal powers of law enforcement have for the most part been respected and deferred to by courts at both the state and federal level. The Texas Appellate Court has attempted to read *Cooley* more narrowly than the Supreme Court intended. It attempts to show a way forward for courts intent on limiting the power of tribal law enforcement in ways that jeopardize the health and safety of reservation communities. If its narrow interpretation of *Cooley* is adopted in other places tribal law enforcement will be required to release non-Indian offenders — including drug offenders, with nothing more than a civil citation.

The better reading of *Cooley*'s treatment of the inherent power of tribal law enforcement is found by returning to the principles of tribal sovereignty. Tribal law enforcement officers are to be treated like their state or federal brethren. When they have probable cause, tribal law enforcement is within its authority to conduct a search of a non-Indian, to identify and preserve evidence of a crime, and to detain non-Indian criminals until their state and/or federal counterparts can perfect the arrest. Tribal police are not asking for the right to act contrary to the statutory or constitutional rights of the accused. They are merely asking to assume the same inherent law enforcement powers that the federal and state sovereigns bestow upon their officers. *Cooley* makes clear that this is the nature of the inherent criminal power of Indian tribes. Courts should recognize that tribal officers acting pursuant to a tribe's inherent criminal power have the same investigative abilities as agents from other branches of law enforcement.

306 *See* Fletcher, *Muskrat Textualism*, *supra* note 6, at 999-1028.

307 *See id.*