CHAPTER TWO

FRESH PURSUIT FROM INDIAN COUNTRY: TRIBAL AUTHORITY TO PURSUE SUSPECTS ONTO STATE LAND

Around 1:30 a.m. on August 10, 2005, while on patrol in the Lummi Reservation, Officer Mike McSwain of the Lummi Nation Police Department observed a car driving toward him with its high beams on.[1] As the car approached, the driver, later identified as Loretta Lynn Eriksen, failed to dim her lights in response to McSwain's signaling with his own high beams. The car then drifted over the center line and came within a few feet of his patrol car.[2] After Eriksen's car drifted back into its lane, McSwain turned around, switched on his overhead lights, and followed her car.[3] The vehicle stopped at a gas station off the reservation, and McSwain witnessed a passenger jump out of Eriksen's car and run around the front to the driver's side as Eriksen crawled into the passenger seat.[4] McSwain approached the car and noted that "Eriksen smelled strongly of intoxicants, had bloodshot and watery eyes, and spoke in slightly slurred speech."[5] When asked why she had switched seats, Eriksen claimed that she had not been driving.[6] McSwain ascertained that Eriksen was not a tribal member, called for a Whatcom County deputy sheriff, and detained Eriksen in the back of his patrol car. When the deputy sheriff arrived, he arrested Eriksen, who was later charged with driving under the influence (DUI).[7]

In the district court, Eriksen argued her case should be suppressed because McSwain did not have the authority to stop and detain her outside the bounds of the reservation.[8] In 2009, Eriksen's case reached the Washington Supreme Court, which ruled in a unanimous opinion that McSwain had the inherent sovereign authority, as well as statutory authority under the state's fresh pursuit statute, to stop and detain Eriksen.[9] The court reconsidered the case a year later, and a divided court upheld the conviction only on inherent sovereignty grounds.[10] In 2011, the court reconsidered the case yet again, this time holding that "[t]he Lummi Nation's inherent sovereign powers do not include the

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1 State v. Eriksen (*Eriksen III*), 259 P.3d 1079, 1080 (Wash. 2011).
2 *Id.* at 1079–80.
3 *Id.* at 1080.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 State v. Eriksen (*Eriksen I*), 216 P.3d 382, 384 (Wash. 2009).
10 *See* State v. Eriksen (*Eriksen II*), 241 P.3d 399 (Wash. 2010).

authority to stop and detain outside the tribe's territorial jurisdiction for a traffic infraction."[11] Therefore, the court determined that McSwain was powerless to prevent a suspected drunk driver from continuing on her way once she crossed the reservation border and that the "policy problems" created by such a holding, "such as the incentive for intoxicated drivers to race for the reservation border," must be addressed "by use of political and legislative tools."[12]

While the procedural posture of the *Eriksen* cases is unusual, the court's confusion and changing opinions regarding the tribe's authority to pursue suspects off the reservation are hardly surprising. Law enforcement in Indian country is infamously a "jurisdictional maze," "complicated by the conflicting claims of three sovereigns to law enforcement authority."[13] Adding to the complexity is the fact that the maze is not static; the federal government has changed the jurisdictional landscape numerous times by delegating pieces of its authority to the states[14] and recognizing previously latent inherent tribal authority.[15]

Additionally, the jurisdictional maze is complex in part because most tribes are only recently in a practical position to exert their policing power and criminal jurisdiction.[16] The rise of modern tribal police forces can be traced back to the 1970s, when the federal government began a policy of self-determination that included several acts granting funds to support the creation of tribal police forces.[17] In the last twenty years especially, tribal police departments have experienced rapid growth.[18] As the number of tribal police officers grows, it becomes

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[11] *Eriksen III*, 259 P.3d at 1084.

[12] *Id.* at 1083.

[13] Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976).

[14] *See, e.g.*, 18 U.S.C. § 1162(a) (2012) (transferring federal criminal jurisdiction "over offenses committed by or against Indians" in Indian country in selected jurisdictions); 28 U.S.C. § 1360(a) (2012) (granting states civil jurisdiction over cases "between Indians or to which Indians are parties which arise in the areas of Indian country" in selected jurisdictions).

[15] *See, e.g.*, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 204(b)(1), 127 Stat. 54, 121 (recognizing the "inherent power" of participating tribes "to exercise special domestic violence criminal jurisdiction over all persons").

[16] *Cf.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196–97 (1978) ("The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians . . . is a relatively new phenomenon."). However, certain tribes have long histories of exercising these powers. *See* BARBARA PERRY, POLICING RACE AND PLACE IN INDIAN COUNTRY 36 (2009) (describing late-nineteenth-century Navajo and San Carlos Apache police forces).

[17] *See generally* L. Edward Wells, *Policing Indian Country: Law Enforcement on Reservations*, *in* 1 AMERICAN INDIANS AT RISK 113, 115–21 (Jeffrey Ian Ross ed., 2014) (chronicling important developments and laws impacting tribal policing during the self-determination era).

[18] In 1995, 114 tribal police departments existed in the United States. Eileen Luna-Firebaugh, *More than Just a Red Light in Your Rearview Mirror*, *in* CRIMINAL JUSTICE IN NATIVE AMERICA 134, 139 (Marianne O. Nielsen & Robert A. Silverman eds., 2009). By 2000, there were 171 tribal law enforcement agencies with 2303 full-time, sworn officers. *Id.* In 2008, the latest

more likely that situations will arise that require confronting unresolved jurisdictional issues.[19]

This Chapter addresses one of those murky, uncertain areas of criminal jurisdiction related to Indian country: the authority of tribal police officers to stop and detain criminal suspects pursued from Indian country to state land in "fresh pursuit." Section A reviews tribal law enforcement's criminal jurisdiction and lays out the practical gap in law enforcement stemming from the limitations on tribal officers' authority. Section B explores and rejects the possibility of remedying the law enforcement gap through judicial recognition of tribes' inherent authority to engage in fresh pursuit. Section C examines the primary ways in which state and local actors have addressed the policing gap — through local agreements and state statutes — as well as the barriers impeding these methods from fully addressing the issue. Section D argues that congressional action is needed to best handle the concerns created by tribal officers' inability to engage in fresh pursuit. Section D also considers the political and constitutional hurdles to Congress granting tribal officers this power, and proposes some guiding principles for future legislation on the issue.

A. A Gap in Law Enforcement: Fresh Pursuit out of Indian Country

1. Legal Landscape. — Tribal courts' jurisdiction over crimes committed in Indian country is governed by competing claims of federal, tribal, and state sovereignty manifested in a complex array of laws that create a system of jurisdiction based on location,[20] type of crime,[21] race of the perpetrator,[22] and race of the victim.[23] As this

year for which the Bureau of Justice Statistics has released law enforcement census data, 178 tribal law enforcement agencies employed 3043 full-time, sworn officers. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ NO. 239077, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2012, at 6, http://www.bjs.gov/content/pub/pdf/tcdca12.pdf [http://perma.cc/TD25-S244].

[19] The increasing exertion of tribal sovereignty in the criminal justice sphere is hardly an anomaly. *See* Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47, 48 (2006) ("American Indian nations are now exercising more sovereignty on the ground than at any point since the early nineteenth century."). Many tribes "have their own legal systems, are running educational institutions, are managing a variety of social and human services programs, are engaged in a range of economic development initiatives . . . , and are reaching out to state governments as sovereigns to address problems of mutual governmental concern." *Id.* at 48–49.

[20] 18 U.S.C. § 1151 (2012).

[21] Major Crimes Act, 18 U.S.C. § 1153 (2012) (enumerating crimes over which the federal government has jurisdiction in Indian country committed by an Indian "against the person or property of another Indian").

[22] General Crimes Act, 18 U.S.C. § 1152 (2012) (granting the federal government exclusive jurisdiction over crimes in Indian country committed by non-Indians against the person or property of an Indian).

[23] *Id.*

Chapter is concerned primarily with the authority of tribal police officers in a specific situation, a comprehensive explanation of the entirety of this jurisdictional maze is beyond its scope;[24] relevant here is the extent of tribal police jurisdiction. The dependence of tribal court jurisdiction on the race of the parties involved creates complications when policing in Indian country: officers do not know whether their courts have jurisdiction over a suspect until ascertaining whether the person is an Indian. Therefore, courts have recognized that in order for tribes to effectuate their inherent authority to make and enforce laws over Indians within Indian country, tribal officers must have broader jurisdiction than tribal courts — they must have the authority to make investigatory stops of anyone within Indian country and detain suspects over whom tribal courts do not have jurisdiction until a state officer arrives and takes over.[25] As a result, although tribal officers face uncertainty as to their arrest power, which depends on whether a suspect is Indian, their power to stop and detain any individual in Indian country is much more assured.

However, the current jurisdictional framework is inadequate to handle the issue of fresh pursuit.[26] Fresh pursuit refers to the common law right of law enforcement officers to pursue felons across jurisdictional boundaries.[27] Whether a pursuit is "fresh" depends on the totality of the circumstances, but immediacy and continuousness are universally required.[28] It is currently unclear in many states whether tribal police have the authority to engage in fresh pursuit onto state land. Almost all courts to confront the issue of whether *state* officers have the authority to engage in fresh pursuit of an Indian suspect into

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[24] For a more comprehensive discussion of tribal courts' criminal jurisdiction in Indian country, see generally John F. Cardani, *The Jurisdictional Jungle: Navigating the Path*, *in* CRIMINAL JUSTICE IN NATIVE AMERICA, *supra* note 18, at 114.

[25] *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 456 n.11 (1997) ("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." (citing State v. Schmuck, 850 P.2d 1332, 1341 (Wash. 1993) (en banc))); Duro v. Reina, 495 U.S. 676, 697 (1990) ("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."). State officers have a similar power. *See, e.g.*, United States v. Patch, 114 F.3d 131, 133–34 (9th Cir. 1997).

[26] Judith V. Royster & Rory SnowArrow Fausett, *Fresh Pursuit onto Native American Reservations: State Rights "To Pursue Savage Hostile Indian Marauders Across the Border*,*"* 59 U. COLO. L. REV. 191, 194 (1988).

[27] *Id.* at 239. The related term "hot pursuit" generally refers to the pursuit of a fleeing suspect regardless of crossing jurisdictional boundaries. *Id.* at 194 n.4.

[28] *Id.* at 239. However, some states have interpreted these requirements broadly. *See, e.g.*, Six Feathers v. State, 611 P.2d 857, 861–62 (Wyo. 1980) (upholding a finding that a forty-one-minute delay was not an "unreasonable delay" under South Dakota fresh pursuit law).

Indian country have determined the state officer *has* the power.[29] But only the Washington Supreme Court, in *Eriksen I* and *Eriksen II*, has found tribal officers have that power independent of some other authority.[30] The issue has rarely reached appellate courts,[31] but when it has courts have either found statutory authority[32] or, like the Washington Supreme Court in *State v. Eriksen* (*Eriksen III*),[33] found no authority.[34]

2. Practical Landscape. — Tribal officers' inability or uncertain authority to engage in fresh pursuit creates a practical gap in policing.[35] Fresh pursuits of drunk drivers are particularly concerning. Under the current laws in many states, once a suspect crosses the border tribal officers have no authority to stop a drunk driver from continuing to drive,[36] incentivizing drivers to engage in reckless races for the border that undermine safety both within and without Indian country. Tribal officers are forced to watch drunk drivers continue on their way, powerless to do anything but notify other law enforcement agencies of the crime.[37]

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[29] *See, e.g.*, State v. Lupe, 889 P.2d 4, 5 (Ariz. Ct. App. 1994); State v. Harrison, 238 P.3d 869, 872 (N.M. 2010); State v. Smith, 268 P.3d 644, 648–50 (Or. Ct. App. 2011); State v. Waters, 971 P.2d 538, 542–43 (Wash. Ct. App. 1999). *But see* State v. Cummings, 679 N.W.2d 484 (S.D. 2004). For an argument against state authority for fresh pursuit into reservations, see Royster & Fausett, *supra* note 26. Additionally, in Public Law 280 states, state law enforcement officers do not face a fresh pursuit issue because they have authority in Indian country. *See* 18 U.S.C. § 1162 (2012).

[30] *See supra* p. 1685.

[31] Part of the difficulty with determining how pervasive fresh pursuit problems are in Indian country is that the most common circumstances in which the issue arises lead to relatively low-stakes cases for the defendant. Although practically a serious offense, drunk driving is a misdemeanor, *see, e.g.*, 625 ILL. COMP. STAT. 5/11-501 (2014), and the costs of challenging a conviction on complicated and uncertain legal grounds will likely outweigh the benefits of avoiding a misdemeanor conviction for most defendants.

[32] *See, e.g.*, State v. Nelson, 90 P.3d 206, 210 (Ariz. Ct. App. 2004).

[33] *See* 259 P.3d 1079, 1084 (Wash. 2011).

[34] *See* Young v. Neth, 637 N.W.2d 884, 890 (Neb. 2002).

[35] The problem created is a "practical gap" as opposed to an "actual gap." There is always some police force and court with jurisdiction to stop, arrest, and convict offenders, but the current framework creates a system in which the police who are most prevalent in the area are often not the ones with authority. Indian country suffers from a serious problem of underpolicing, *see* PERRY, *supra* note 16, at 61–62, which is exacerbated by the fact that Indian country is primarily not densely populated, *see* STEWART WAKELING ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NCJ NO. 188095, POLICING ON AMERICAN INDIAN RESERVATIONS 9 (2001), https://www.ncjrs.gov/pdffiles1/nij/188095.pdf [http://perma.cc/Z7T7-V3C5]. As such, when a police officer has to let a driver go because she has left Indian country, the chances of a state police officer being available, nearby, and willing to track down the driver are often slim.

[36] *See, e.g.*, *Eriksen III*, 259 P.3d at 1083; *Young*, 637 N.W.2d at 889–90.

[37] Deborah Sullivan Brennan, *Tribes Seek More Power for Their Police Forces*, L.A. TIMES (Dec. 27, 2000), http://articles.latimes.com/2000/dec/27/news/mn-5107 [http://perma.cc/BNN9-FRKF]; *see also Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country?: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 69 (2011) [hereinafter *Tribal Law and Order Act One Year Later*] (statement of Jacqueline Johnson-Pata, Executive Director, National Congress of American Indians) ("[T]hat [jurisdiction-

Alcohol-related offenses are exceptionally problematic on tribal lands. American Indians and Alaskan Natives have the highest alcohol-related motor vehicle mortality rate of all racial and ethnic populations.[38] In 2012, approximately forty-two percent of fatal crashes involving American Indians and Alaskan Natives were alcohol related, compared to thirty-one percent in the total United States population.[39] The Bureau of Indian Affairs (BIA) estimated that in 2009, fifty-two percent of all traffic fatalities on reservations involved alcohol.[40] That same year only thirty-two percent of traffic fatalities in the United States involved a drunk driver.[41] And, more generally, American Indian and Alaskan Native adult motor vehicle–related death rates are 1.5 times higher than those of whites or blacks.[42] According to the BIA's safety assessment of reservation highways, to combat the widespread problem of DUIs on reservations, enforcement of drinking and driving laws "must be aggressive," and tribes "need to establish a zero tolerance attitude about the behavior."[43] But without the power to engage in fresh pursuit, the ability of tribal law enforcement to fully enforce tribal drunk driving laws is seriously undermined.[44]

B. The Judicial Approach: Inherent Authority

Tribes hold a unique legal status "between foreign and domestic states,"[45] which the Supreme Court has described as that of "domestic dependent nations."[46] Tribes are "separate sovereigns pre-existing the Constitution"[47] that have been "folded into the United States and its

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al] cloudiness creates a loss of time and money, but what it also does in the law enforcement arena, it brings in inaction because it is easier sometimes not to have those questions.").

[38] *Tribal Road Safety: Get the Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 25, 2015), http://www.cdc.gov/motorvehiclesafety/native/factsheet.html [http://perma.cc/7DQ6-LJR7].

[39] *Id.*

[40] BUREAU OF INDIAN AFFAIRS, FY 2014 HIGHWAY SAFETY PLAN 42, www.nhtsa.gov/links/statedocs/fy14/fy14hsps/bia_fy14hsp.pdf [http://perma.cc/7P6Q-HZNK].

[41] NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT-HS-811-385, TRAFFIC SAFETY FACTS 2009 DATA: ALCOHOL-IMPAIRED DRIVING 1, http://www-nrd.nhtsa.dot.gov/Pubs/811385.pdf [http://perma.cc/928H-PL78].

[42] *Tribal Road Safety*, *supra* note 38.

[43] BUREAU OF INDIAN AFFAIRS, *supra* note 40, at 42.

[44] *Cf. Tribal Law and Order Act One Year Later*, *supra* note 37, at 72 (statement of Hon. Theresa M. Pouley, C.J., Tulalip Tribal Court) ("Our law enforcement officers aren't safe. Our Tribal members aren't safe. Our police officers aren't safe. But no citizen of the United States is safe as long as the message we send is run from Tribal police; commit crimes with impunity because you won't be prosecuted because at some subsequent point in time we will find that there wasn't jurisdiction.").

[45] Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 670 (2013).

[46] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[47] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

domestic legal framework."[48] As a result of tribes' dependent status, Congress has exclusive, plenary power over them.[49] Thus, tribes possess all the powers of any other independent nation except those (1) ceded by treaty, (2) withdrawn by Congress, or (3) incompatible with tribes' domestic dependent status.[50] The precise reach of the third category is unclear, but tribes' power is especially strong when its exercise "is necessary to protect tribal self-government or to control internal relations."[51] The further a tribe reaches outside its land and members, the more likely a court will be to determine the tribe's assertion of authority is incompatible with its domestic dependent status.[52] This retained sovereignty is inherent — it is not a delegation of federal power, but an independent source of authority.[53] For example, when a tribe prosecutes, convicts, and punishes a member for violating tribal law it is acting as an independent sovereign, exercising its innate power to govern itself.[54]

The federal courts have been upholding tribal sovereign powers for over a hundred years.[55] This isn't to say that the judiciary has always championed tribal authority,[56] but the Supreme Court has upheld under the inherent authority framework tribes' core governmental powers: the power to tax[57] and the power to assert criminal[58] and civil[59] jurisdiction over all members and, under some circumstances, non-

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48 Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1117 (2004).

49 *See* United States v. Lara, 541 U.S. 193, 200 (2004) (situating Congress's plenary power in the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the Treaty Clause, *id.* art. II, § 2, cl. 2).

50 United States v. Wheeler, 435 U.S. 313, 323 (1978).

51 Montana v. United States, 450 U.S. 544, 564 (1981).

52 *See id.* at 565–66 (laying out a test for tribal courts' civil jurisdiction based on consent or the effect of the activity on internal, tribal self-governance).

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

54 *Id.*

55 *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 384–85 (1896) (holding that the Cherokee Nation's courts are not bound by the Fifth Amendment grand jury requirement because the Cherokee Nation's powers of local self-government are inherent rather than a delegation from Congress).

56 For example, in *Duro v. Reina*, 495 U.S. 676 (1990), the Court held that tribal authority did not extend to tribal courts exercising criminal jurisdiction over nonmember Indians. *Id.* at 688. Congress later overturned *Duro* by recognizing "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over *all* Indians." 25 U.S.C. § 1301(2) (2012) (emphasis added).

57 *See, e.g.*, 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 . . . .").

58 *See, e.g.*, *Wheeler*, 435 U.S. at 328 ("[W]hen the Navajo Tribe exercises [criminal jurisdiction over its members], it does so as part of its retained sovereignty and not as an arm of the Federal Government.").

59 *See, e.g.*, Williams v. Lee, 358 U.S. 217, 223 (1959) (explaining that states could not assert civil jurisdiction over an Indian in a case arising out of events occurring in Indian country because it "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves").

members.[60] Thus, when seeking recognition of tribes' ability to exert their power, it is natural to look to the judiciary to recognize the power under tribes' inherent authority. Under the inherent authority theory, tribes have the power to engage in fresh pursuit out of Indian country as a part of their intrinsic sovereignty, and because (1) that power is not inconsistent with their "domestic dependent" status, (2) tribes have not relinquished it via treaty, and (3) Congress has not abrogated it, the authority still resides with the tribes.[61] The first two *Eriksen* opinions exemplify the inherent authority approach. Both opinions frame the fresh pursuit authority as an extension of the tribe's law enforcement power *within* its reservation.[62] The court explained that "[t]ribes have an inherent power of self-governance, which includes the power to prescribe and enforce internal criminal laws,"[63] and without the power to pursue suspects out of Indian country an offender could race for the border, undermining self-governance and public safety.[64] Therefore, "the fresh pursuit doctrine must apply to tribes because the doctrine is a *necessary means* of actualizing the tribe's inherent power to enforce its internal laws."[65]

Inherent authority to engage in fresh pursuit is very appealing: it respects tribal sovereignty and forecloses state interference with that authority. Indeed, scholars usually argue for this conclusion.[66] However, there are serious flaws with this theory, the most problematic of which is that fresh pursuit is not a part of sovereignty under international or interstate law. Internationally, nations have the customary right of fresh pursuit out of their territorial waters, but pursuit over land borders is permitted only with the express consent of the countries involved.[67] Similarly, states do not have inherent authority to engage in fresh pursuit into other states.[68] Tribes cannot be said to retain the power of fresh pursuit when it does not seem to be a piece of the sovereign pie in the first place. The traditional analysis to determine whether tribes retain the authority to exercise a certain power — determining whether the power has been ceded by treaty, abrogated by Congress, or is incompatible with tribes' dependent status — is irrele-

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[60] *See, e.g.*, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 204(b)(1), 127 Stat. 54, 121 (recognizing tribes' power to "exercise special domestic violence criminal jurisdiction over all persons").

[61] *See* Kevin Naud, Jr., Comment, *Fleeing East from Indian Country:* State v. Eriksen *and Tribal Inherent Sovereign Authority to Continue Cross-Jurisdictional Fresh Pursuit*, 87 WASH. L. REV. 1251, 1274–75 (2012).

[62] *See Eriksen II*, 241 P.3d 399, 406 (Wash. 2010); *Eriksen I*, 216 P.3d 382, 388 (Wash. 2009).

[63] *Eriksen I*, 216 P.3d at 387; *see also Eriksen II*, 241 P.3d at 404.

[64] *See Eriksen II*, 241 P.3d at 407; *Eriksen I*, 216 P.3d at 387.

[65] *Eriksen I*, 216 P.3d at 387; *see also Eriksen II*, 241 P.3d at 405.

[66] *See, e.g.*, Naud, *supra* note 61, at 1274–75.

[67] Royster & Fausett, *supra* note 26, at 254–56.

[68] *Id.* at 249; *see also* State v. Barker, 25 P.3d 423, 425–26 (Wash. 2001).

vant because that inquiry assumes that the power is an aspect of sovereignty. Because fresh pursuit outside of a nation or state's territory is not a part of sovereignty, it cannot be an inherent power retained by the tribes; they have not lost the power because they never had it in the first place. Furthermore, though there is a common law right to *intrastate* fresh pursuit,[69] comparing Indian country to just another municipality within a state would be an untenable affront to tribal sovereignty[70] and incompatible with the legal status of tribes.[71]

Moreover, even if the power to engage in fresh pursuit were an original piece of sovereign power, the case here for inherent authority would be unlikely to prevail in the judiciary. In the first two *Eriksen* opinions, the Washington Supreme Court applied the civil jurisdictional test from *Montana v. United States*[72] to determine whether tribal officers had the inherent authority to stop and detain non-Indians outside of Indian country.[73] The *Montana* test is used to determine a tribe's civil regulatory authority over non-Indians, but the Court has imported it to the civil adjudicatory context as well.[74] It is unclear whether *Montana* is the proper test for inherent authority over non-Indians in a *criminal* context, but because *Montana* is the only test the Court has provided to determine when a power would be inconsistent with tribes' dependent status, the importation of *Montana* to criminal jurisdictional analysis is a natural extension of the current caselaw. In *Montana* the Supreme Court explained that tribes retain inherent sovereign power to exercise civil regulatory jurisdiction over non-Indians on their reservations when jurisdiction relates to activities arising from (1) "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"[75] or (2) conduct "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."[76] But the second *Montana* exception has subsequently been construed extremely narrowly, and language in recent cases suggests the exception might be limited to situations in which "tribal power must be necessary to avert catastrophic

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[69] *See* Royster & Fausett, *supra* note 26, at 244.

[70] *See id.* at 249 ("Use of the intrastate doctrine to justify fresh pursuit arrests on the reservation . . . raises the initial pungent aroma of the state camel under the sovereign tribal tipi. Reliance on this model of fresh pursuit would permit the state to exercise an unwarranted degree of criminal jurisdiction within reservation boundaries, thereby increasing the likelihood of further domestic encroachments on tribal sovereignty.").

[71] *See supra* pp. 1690–91.

[72] 450 U.S. 544, 564–66 (1981).

[73] *Eriksen II*, 241 P.3d 399, 403, 405 (Wash. 2010); *Eriksen I*, 216 P.3d 382, 388 (Wash. 2009).

[74] *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 456–59 (1997).

[75] *Montana*, 450 U.S. at 565.

[76] *Id.* at 566.

consequences."[77] The ability to engage in fresh pursuit out of Indian country certainly affects the safety of the tribe because without it suspects are incentivized to race for the border.[78] Yet the fact that tribes have thus far survived without this power belies the claim that it is "necessary to avert catastrophic consequences."

C. Current Approaches: Incomplete Solutions at the Local and State Levels

The fresh pursuit problem in Indian country has not gone unnoticed; various interested parties have attempted to address the issue in their territories. The primary approaches have been agreements between tribes and local governments or state statutes that confer limited authority on tribal officers outside of Indian country.[79] These solutions have the potential to resolve the fresh pursuit problem and have done so in certain situations, but both have serious practical stumbling blocks that often undermine their ability to entirely manage the problem.

1. Cooperative Agreements. — Tribes can contract around uncertainties in law enforcement authority by entering into cooperative agreements with federal, state, county, or city governments.[80] Agreements may be narrowly tailored to address only the fresh pursuit issue, or more expansive to give tribal officers the authority to arrest offend-

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[77] Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008) (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][c], at 232 n.220 (2005)). It is important to note that the "catastrophic consequences" language in *Plains Commerce* is dicta. *See id.*

[78] *Eriksen II*, 241 P.3d at 407; *Eriksen I*, 216 P.3d at 389; *see also Eriksen III*, 259 P.3d 1079, 1083 (Wash. 2011).

[79] These solutions are not exhaustive. In particular, a few courts have upheld arrests by tribal officers of non-Indians outside of Indian country after a fresh pursuit under a theory of citizen's arrest. *See, e.g.*, State v. Davidson, 479 N.W.2d 513, 515 (S.D. 1992); *see also Eriksen III*, 259 P.3d at 1084–85 (Alexander, J., dissenting) (arguing that the court should have upheld Eriksen's conviction based on the citizen's arrest theory). However, this theory is inadequate in many jurisdictions due to limitations put on citizen's arrests, *see, e.g.*, NEB. REV. STAT. § 29-402 (2008) (limiting citizen's arrests to felonies), damaging to tribal sovereignty, *see* State v. Schmuck, 850 P.2d 1332, 1342 (Wash. 1993) ("There would be a serious incongruity in allowing a limited sovereign . . . to exercise no more police authority than its tribal members could assert on their own. Such a result would seriously undercut a tribal officer's authority on the reservation and conflict with Congress' [sic] well-established policy of promoting tribal self-government."), and possibly ineffective, *see id.* ("Potentially, DWI drivers would simply drive off or even refuse to stop if pulled over by a tribal officer with only a citizen's arrest capability.").

[80] *See* AMERICAN INDIAN LAW DESKBOOK 633 (Clay Smith ed., 4th ed. 2008); *see also* Joel H. Mack & Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295, 1298 (1993) ("Cooperative agreements between an Indian tribe and a state focus on substantive issues with the purpose of solving a particular problem affecting the states and the Indian tribes. . . . [C]ooperative agreements are able to frame the issues that need to be addressed and limit the continual jurisdictional disputes that lead to litigation.").

ers.[81] Through cross-deputization agreements, governments can delegate law enforcement authority to officers of another jurisdiction.[82] The most common form of a tribal cross-deputization agreement is a one-way agreement that empowers tribal officers to enforce state laws over Indians and non-Indians, but some tribes have entered into two-way cross-deputization agreements in which, for example, tribal officers are cross-commissioned as county officers and county officers are given tribal officer status.[83] Through such agreements tribes and local governments can bargain for and clarify the authority of tribal officers to engage in fresh pursuit onto state land.[84]

It is unclear what percentage of tribal officers are authorized to engage in fresh pursuit under cross-deputization or other more limited cooperative agreements. In 2002, of the 165 tribal law enforcement agencies with at least one sworn officer with arrest powers, just over half had some sort of cross-deputization agreement with a neighboring nontribal authority.[85] But there is reason to think these numbers may have increased. Two of the purposes of the Tribal Law and Order Act of 2010[86] (TLOA) were "to increase coordination and communication among Federal, State, tribal, and local law enforcement agencies" and "to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country."[87] To that end, "[t]he Attorney General may provide technical and other assistance to State, tribal, and local governments that enter into cooperative agreements, including agreements relating to mutual aid, hot pursuit of suspects, and cross-deputization . . . ."[88]

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[81] A cooperative agreement cannot circumvent jurisdictional issues, but it can "allow the jurisdictional question to be dealt with in the courtroom and relieve law enforcement officers from having to perform the sometimes difficult analysis of which governmental entity has jurisdiction before an arrest can be made." AMERICAN INDIAN LAW DESKBOOK, *supra* note 80, at 633.

[82] *See* Tassie Hanna, Sam Deloria & Charles E. Trimble, *The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship*, 47 TULSA L. REV. 553, 582 (2012).

[83] *See* A.T. Skibine, Melanie Beth Oliviero & Ed Fagan, *Potential Solutions to Jurisdictional Problems on Reservations*, 6 AM. INDIAN J., June 1980, at 9, 12.

[84] *See, e.g.*, Law Enforcement Agreement, Hannahville Indian Community-County of Menominee, § 21, Dec. 15, 2000, https://www.walkingoncommonground.org/files/Michigan%20Law%20Enforcement%20Agreement%20between%20the%20Hannahville%20Indian%20Community%20and%20the%20County%20of%20Menominee.pdf [http://perma.cc/L648-PFJF].

[85] STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ NO. 205332, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, at 5, http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf [http://perma.cc/B8TJ-RUGX].

[86] Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261–301 (codified in scattered sections of 25 U.S.C.).

[87] *Id.* § 202(b)(2)–(3).

[88] 25 U.S.C. § 2815 (2012).

Cooperative agreements can do a great deal of good in Indian country by adding at least some degree of certainty.[89] There are numerous examples of law enforcement agreements that have increased safety while promoting mutual respect and tribal sovereignty,[90] and many advocates of agreements between tribes and nontribal governments have detailed their benefits.[91] However, some observers criticize cooperative agreements as too dependent on political goodwill, too likely to increase state jurisdictional encroachments, and too temporary to provide long-term clarity in Indian country.[92] For example, California's Humboldt County Sheriff recently unilaterally suspended a twenty-year-old cooperative agreement with the Hoopa Valley Tribe, revoking the peace-officer powers of the Hoopa Valley Tribal Police Department.[93] Dissolution of the agreement came after months of fighting within the tribe and between the tribe and the state.[94] Since the failure of the cooperative agreement, the county has increased its presence on the reservation, dedicating additional deputies to the area with plans to add more.[95] The tribe and county indicate that they are

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[89] *See* Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 FED. LAW., Mar./Apr. 2006, at 38, 42–43.

[90] *See, e.g.*, *Cooperative Agreements*, WALKING ON COMMON GROUND, https://www.walkingoncommonground.org/state.cfm?topic=12 [http://perma.cc/3N2Z-ZDZ3] (listing dozens of cooperative agreements organized by state).

[91] *See, e.g.*, Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 929–31 (1999).

[92] *See, e.g.*, Steven M. Johnson, Note, *Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of* Oliphant, 7 AM. INDIAN L. REV. 291, 308–09 (1979); *see also* Royster & Fausett, *supra* note 26, at 208 n.31; Skibine, Oliviero & Fagan, *supra* note 83, at 12 ("Mutual aid and cross-deputization agreements are viable in the immediate future but they are not reliable as long-term solutions. The agreements are temporary in nature and are dependent on a friendly relationship between tribal authorities and state and county officials. They are subject to change after every local election."); Andrew G. Hill, Comment, *Another Blow to Tribal Sovereignty: A Look at Cross-Jurisdictional Law-Enforcement Agreements Between Indian Tribes and Local Communities*, 34 AM. INDIAN L. REV. 291, 295–305 (2010) (describing agreements that are rendered ineffectual by racial tensions and insufficient resources).

[93] *See Sheriff's Office Revokes Powers of Hoopa Tribal Police Department*, TIMES-STANDARD (Sept. 24, 2015, 10:01 PM), http://www.times-standard.com/article/NJ/20150924/NEWS/150929931 [http://perma.cc/2V2L-XDYW].

[94] *See* Allie Hostler, *Sheriff's Office Moves to Dissolve Key Relationship with Hoopa Valley Tribal Police*, LOST COAST OUTPOST (May 3, 2015, 10:46 AM), http://lostcoastoutpost.com/2015/may/3/sheriffs-office-moves-dissolve-key-relationship-ho [http://perma.cc/KW7S-6YLE].

[95] *See* Thadeus Greenson, *Hoopa PD No More*, N. COAST J. POL., PEOPLE & ART (Sept. 25, 2015, 3:55 PM), http://www.northcoastjournal.com/NewsBlog/archives/2015/09/25/hoopa-pd-no-more [http://perma.cc/5XEF-QQ6R]. Since the failure of the agreement with the county, the Hoopa Valley Tribe has negotiated a cross-deputization agreement with the federal government. *See* Lee Romney, *In Humboldt County, a Tribe Pushes for Bigger Law Enforcement on Its Lands*, L.A. TIMES (Oct. 20, 2015, 3:50 AM), http://www.latimes.com/local/california/la-me-tribal-law-enforcement-20151020-story.html [http://perma.cc/8D7B-CGFW].

open to a renewed agreement, but the degraded trust between the parties makes such an agreement unlikely.[96]

Though cooperative agreements with states rather than with local governments may alleviate some of these problems, this alternative tactic is no panacea. On the one hand, statewide agreements are unlimited in duration, wider in reach, and less susceptible to the whims of local politics.[97] On the other hand, agreements between states and tribes are often complicated or even blocked by longstanding animosity between the governments and statewide hostility from non-Indians.[98]

Therefore, tribes cannot rely exclusively on cooperative agreements to deal with gaps in law enforcement: these agreements are not always possible. Cooperative agreements frequently require "intense and complicated negotiations . . . . Often, many barriers arise during negotiations[,]"[99] which can prove particularly troublesome when relations between tribes and state and local governments are already poor. As seen in the case of the Hoopa Valley Tribe and Humboldt County, "one can attribute the infrequency of cross-deputization agreements to the suspicion and lack of trust that reportedly prevails between tribal police and surrounding law enforcement agencies."[100] Moreover, according to Troy Eid, the Chairman of the Indian Law and Order Commission, "[the Tribal Law and Order Act] is doing little to improve law enforcement cooperation between Indian Tribes and nations, on the one hand, and state and local officials on the other."[101]

2. State Statutes. — Many states have recognized the troubling barriers to policing in and around Indian country and have taken steps to ameliorate the problem by granting some level of state authority to tribal officers. The reach of this power varies among states, ranging from granting specific powers within a reservation to officers of a specific tribe,[102] to explicitly authorizing specific state or local officials to negotiate cooperative agreements[103] or commission tribal officers as

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[96] *See* Romney, *supra* note 95 (quoting the chief judge of the tribe as saying that the "sheriff is acting in very poor faith . . . and even crippling the safety of this community further").

[97] *See* Matthew L.M. Fletcher, Kathryn E. Fort & Wenona T. Singel, *Indian Country Law Enforcement and Cooperative Public Safety Agreements*, MICH. B.J., Feb. 2010, at 42, 44.

[98] *See* Fletcher, *supra* note 89, at 43 (detailing political barriers to intergovernmental negotiations and agreements, including a "long history of animosity and distrust," a "'cowboy mentality' among non-Indian property owners," and economic competition).

[99] Fletcher, Fort & Singel, *supra* note 97, at 44.

[100] EILEEN LUNA-FIREBAUGH, TRIBAL POLICING 41 (2007).

[101] *Tribal Law and Order Act One Year Later*, *supra* note 37, at 44 (statement of Troy A. Eid, Chairman, Indian Law and Order Commission).

[102] *See, e.g.*, ALA. CODE §§ 36-21-122 to -123 (LexisNexis 2013) (granting the Mowa Band of Choctaw Indians certain limited powers over non-Indians on the reservation).

[103] *See, e.g.*, MINN. STAT. § 626.93(4) (2014) (requiring a cooperative agreement with a local government before tribal police are allowed concurrent jurisdiction).

peace officers,[104] to granting all tribal officers who meet certain requirements peace officer status.[105] Most of these statutes leave open the possibility for agreements that grant tribal police authority outside of Indian country whether in fresh pursuit or not,[106] and a few overtly extend grants of power to instances of fresh pursuit.[107] Despite wide variety in the scope and administration of authority, almost all state statutes that grant power to tribal police require that before tribal officers can take advantage of the state's grant of power, they undergo some sort of state training and certification process as well as hold a certain level of insurance, and tribes must assume all liability for the actions of their officers and agree to waive their sovereign immunity in claims arising from that liability.[108]

In certain situations these statutes can alleviate or remedy the practical gap in policing in and around Indian country. For example, in Arizona, tribal police officers who meet certain qualifications and training standards "shall possess and exercise all law enforcement powers of peace officers in [the] state."[109] In *State v. Nelson*,[110] a tribal officer stopped a suspected drunk driver outside of Indian country and detained the suspect until a local police officer arrived and took over the investigation.[111] A state appellate court upheld the validity of the tribal officer's actions, finding that the tribal officer had the authority to stop and detain the defendant under the statute because he met the requisite qualifications and training standards.[112]

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[104] *See, e.g.*, N.M. STAT. ANN. § 29-1-11(B) (2013) (authorizing the chief of the New Mexico state police to "issue commissions as New Mexico peace officers to members of the police or sheriff's department of any New Mexico Indian nation, tribe or pueblo").

[105] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3874(A) (2010) (bestowing peace officer status on "any Indian police officer who is appointed by the . . . governing body of an Indian tribe as a law enforcement officer and who meets the qualifications and training standards").

[106] *See, e.g.*, *id.*; N.D. CENT. CODE § 12-63-02.2(3) (2012) (noting that tribal police may exercise powers of a peace officer "off the reservation, in accordance with the terms and conditions of the special deputy appointment, the employment agreement, or the agreement between the state or political subdivision and the tribe").

[107] *See, e.g.*, N.M. STAT. ANN. § 29-1-11(C)(8); WASH. REV. CODE § 10.93.070(6) (2014); WIS. STAT. § 175.40(2) (2013–2014).

[108] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3874(A) (requiring compliance with qualifications and training standards); KAN. STAT. ANN. § 22-2401a(3)(a) (Supp. 2014) (insurance and waiver of sovereign immunity); MINN. STAT. § 626.93(2) (assumption of liability, insurance, and compliance with data practices); OKLA. STAT. tit. 21, § 99a (Supp. 2016) (certification by Council on Law Enforcement Education and Training); WASH. REV. CODE § 10.92.020(2) (insurance, training, and compliance with reporting procedures); WIS. STAT. § 165.85(4) (training and certification). *But see* NEV. REV. STAT. § 171.1255 (2013) (applying to "a person employed as a police officer by an Indian tribe" with no additional requirements).

[109] ARIZ. REV. STAT. ANN. § 13-3874(A).

[110] 90 P.3d 206 (Ariz. Ct. App. 2004).

[111] *Id.* at 207.

[112] *Id.* at 208–10.

In addition to state statutes that explicitly grant tribal officers authority, at least one state, Oregon, has interpreted its general peace officer statute to include tribal police officers. In *State v. Kurtz*,[113] a tribal officer pursued the defendant off the reservation after observing him commit a traffic violation.[114] The defendant eventually stopped and was charged, inter alia, with resisting arrest by a peace officer.[115] On appeal the defendant argued that the tribal officer was not a "peace officer" under the statute.[116] The statute defined "peace officer" to include enumerated law enforcement positions "and such other persons as may be designated by law."[117] The court determined that tribal law enforcement officers fell under the "other persons" category and were therefore peace officers able to arrest a suspect who committed a traffic violation on the reservation but was not stopped until off the reservation.[118] Shortly after *Kurtz*, the Oregon legislature passed an amendment to its definition of peace officer to include tribal officers who met various training, insurance, and other criteria similar to those in other state statutes.[119]

Similar to local agreements, state statutes can solve the law enforcement gap over a certain area, but unlike local agreements, statutes are usually less subject to the whims of a small number of political actors. However, most state statutes do not fully address the need for fresh pursuit authority. Some states strictly limit their grants of power to inside the reservation boundaries,[120] leaving tribal police in the same situation with regard to fresh pursuit as they would have been without a statute. The statutes that require cooperative agreements or appointment by the chief of the state police before tribal police authority may be expanded adopt all the drawbacks of cooperative agreements. Such systems may result in significant improvements in policing and intergovernmental relations, but they remain just as susceptible to the whims of politics as any other cooperative agreement.[121]

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[113] 249 P.3d 1271 (Or. 2011).

[114] *Id.* at 1272.

[115] *Id.* at 1273.

[116] *Id.*

[117] *Id.* at 1275 (emphasis omitted) (quoting OR. REV. STAT. § 161.015(4) (2009)).

[118] *Id.* at 1280.

[119] *See* 2011 Or. Laws Ch. 644, S.B. No. 412, §§ 1–4 (codified as amended at OR. REV. STAT. § 161.015(4)(f) (2013)).

[120] *See, e.g.*, KAN. STAT. ANN. § 22-2401a(3)(a) (Supp. 2016) (limiting power to "within the exterior limits of the reservation of the tribe"); OKLA. STAT. tit. 21, § 99a(D) (2014) (limiting enforcement power to "lands the title to which is held by the United States in trust for the benefit of either a federally recognized American Indian tribe or an enrolled citizen thereof").

[121] For example, in addition to granting the chief of the New Mexico state police the power to issue peace officer commissions to tribal officers, N.M. STAT. ANN. § 29-1-11(B) (2013), the New Mexico legislature also gave the chief of the state police "the authority to suspend any commission granted . . . for reasons solely within the chief's discretion," *id.* § 29-1-11(C)(3).

Additionally, the statutes that avoid these issues almost all have training, liability, and insurance requirements that often make it impossible for tribal police departments to provide the resources necessary for all, or even some, of their officers to qualify for expanded authority under the statute. For instance, although Washington has a statute that grants tribal law enforcement members peace officer status with the power to arrest in fresh pursuit within the state,[122] the officer in the *Eriksen* cases did not qualify.[123] It is incredibly expensive for a tribe to operate a police department,[124] and for many tribes there is no room in the budget to accommodate the added costs of these statutory requirements. However, at least one state has delegated expanded authority to tribal police without imposing conditions. Nevada allows tribal officers to exercise narrow authority, including the ability to engage in fresh pursuit, without training, liability, insurance, or other requirements.[125]

Finally, as with local agreements, state statutes are not always possible. This is unsurprising considering that states have traditionally had no authority in Indian country,[126] and the relationships between states and tribes have often been fraught.[127] Whether due to political apathy or opposition, a conscious preference for local governments to broker cooperative agreements, or some other reason, many states that have Indian tribes within their borders do not address the authority of tribal officers in their state statutes.[128]

D. Looking Forward: Congressional Action

The current situation in many states, in which tribal police officers may not engage in fresh pursuit out of Indian country, is untenable as a matter of safety and policy. As the Washington Supreme Court has noted, limiting tribal power in this situation "create[s] serious policy problems, such as the incentive for intoxicated drivers to race for the

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122 *See* WASH. REV. CODE § 10.93.070(6) (2014).

123 *Eriksen III*, 259 P.3d 1079, 1083 (Wash. 2011).

124 *See* DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE 113 (2012) (discussing the costs of running tribal courts and a police force).

125 *See* NEV. REV. STAT. § 171.1255 (2013).

126 *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

127 *See* Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 78 (2007) ("Until recent years, tribal and state interests competed in a vigorous (and often vicious) zero-sum game of civil regulation, taxation, and criminal jurisdiction."). Yet according to Professor Matthew Fletcher, there is hope for the future of tribal–state relations. *See id.* at 81–87 (noting the rise in cooperative agreements between tribes and states in the last few decades and arguing this trend reflects a greater respect of tribal sovereignty by state governments).

128 Based on a search of state codes, these states include Alaska, California, Colorado, and South Dakota.

reservation border."[129] Recognition of inherent authority via the courts is not a realistic solution. To be sure, local agreements and state statutes address the problem across many jurisdictions and could do so for many more. The contemporary legal complications surrounding Indian country practically necessitate communication and agreements among tribes, states, and local governments. Fresh pursuit authority should be a part of those conversations, and the possibility of state statutes or local agreements to address the issue deserves full consideration. Yet, as discussed above, these measures are often unavailable, untenable, or unreliable; thus, something else is needed. Uniform, nationwide, and more durable authority enacted to best promote safety and respect the sovereignty of tribes and states is needed to impose a measure of certainty in this murky area of law enforcement. Such a grant of authority can come only from Congress.

1. Reasons for Federal Intervention. — From the founding of the United States, the federal government has mediated the relationship between Indian tribes and the states, with the role of the states in this process severely limited or nonexistent.[130] The historic bar on state interference with Indian affairs has softened over time as the federal government has delegated some of its authority to the states.[131] However, it is still primarily the responsibility of the federal government, not the states, to act in Indian country. In fact, Congress has shown itself increasingly willing to wade into issues of tribal courts' criminal jurisdiction in recent years.[132] Additionally, the relationship between the federal government and the tribes has historically been much less hostile than the relationship between the states and the tribes.[133] Therefore, federal action in this arena would be practically advantageous over state action as well as aligned with the federal government's historical role.

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[129] *Eriksen III*, 259 P.3d 1079, 1083 (Wash. 2011).

[130] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); *Worcester*, 31 U.S. (6 Pet.) at 595–96 (upholding federal supremacy over Indian affairs against Georgia's attempt to assert jurisdiction over the Cherokee Nation). *See generally* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1039–50 (2015) (surveying the historical understanding of federal power over Indian affairs and its interaction with state sovereignty).

[131] *See, e.g.*, Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162(a) (2012)) (delegating federal criminal jurisdiction to certain states).

[132] *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, 127 Stat. 54, 118–26 (codified in scattered sections of 18, 25, and 42 U.S.C.); Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261–301 (codified in scattered sections of 25 U.S.C.).

[133] *See* Hagen v. Utah, 510 U.S. 399, 441 (1994) (Blackmun, J., dissenting) ("[The Indians] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." (alteration in original) (quoting United States v. Kagama, 118 U.S. 375, 384 (1886))).

However, there are political considerations for Congress to contemplate before acting. States will likely see an expansion of tribal authority onto state land, no matter how limited, as impinging on state sovereignty. But the power proposed — to engage in fresh pursuit and detain suspects until state officers arrive and take control — is a narrow one, and the problem addressed — a practical gap in law enforcement that may permit drunk drivers to endanger themselves and others — is a serious one. The proposed legislation would not prevent state law enforcement officers from policing any part of their jurisdiction,[134] grant tribes arrest or adjudicatory jurisdiction over non-Indians, or require any action or expenditure by the state.[135] Moreover, the safety concerns implicated by the gap in law enforcement affect states as well as tribes. Once intoxicated drivers have exited Indian country, they are necessarily threatening the safety of others on state land. Also, by taking advantage of the resources of tribal police departments by arresting drunk drivers already detained by tribal officers, state law enforcement departments can more effectively police their own jurisdictions.

2. Federal Authority. — Congress has the authority to delegate power to tribes,[136] but that power is limited. Whether Congress has the constitutional authority to pass a statute that would give tribal officers the authority to engage in fresh pursuit and detain suspects depends on the interaction between Congress's plenary power over Indian affairs and the states' rights under the Tenth Amendment. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[137] Therefore, unless the power to pass such a statute is rooted in the Constitution, the power belongs to the states.

The Supreme Court has interpreted the Constitution to grant Congress "broad general powers to legislate in respect to Indian tribes, powers that [the Court] ha[s] consistently described as 'plenary and ex-

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[134] *Cf.* Nevada v. Hicks, 533 U.S. 353, 364 (2001) (upholding state law enforcement's authority to enter reservations to execute search warrants against Indians in connection with off-reservation crimes because "[t]he State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government"); State v. Harrison, 238 P.3d 869, 877 (N.M. 2010) ("In the absence of a governing tribal procedure, the exercise of state authority to conduct a criminal investigation in Indian country does not infringe on tribal sovereignty because it does not affect the right of Indians to make their own laws and be ruled by them.").

[135] This last element is significant because under the Court's anticommandeering jurisprudence, Congress cannot force states to perform any action or expenditure. *See generally* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

[136] *See* United States v. Mazurie, 419 U.S. 544, 554–57 (1975) (upholding federal delegation of liquor regulation to tribe).

[137] U.S. CONST. amend. X.

clusive.'"[138] The Court has primarily situated the source of Congress's plenary power over Indian affairs in the Indian Commerce Clause,[139] but has also found supporting authority in the Treaty Clause.[140]

The Supreme Court has not specifically addressed the question of whether the Tenth Amendment limits Congress's plenary power over Indian affairs.[141] However, there are several reasons to believe that *even if* the Tenth Amendment limits Congress's plenary power, a delegation of federal power to the tribes to engage in fresh pursuit out of Indian country onto state lands for the purpose of stopping and detaining suspects would not be proscribed. First, federal delegation of powers to the tribes is not unprecedented. For example, in *United States v. Mazurie*,[142] the Supreme Court affirmed Congress's power to delegate to Indian tribes the authority to regulate the distribution of alcoholic beverages by non-Indians on land held in fee by non-Indians in Indian country.[143] Moreover, the D.C. Circuit upheld as a permissible delegation the Clean Air Act Amendments of 1990,[144] in which Congress delegated authority to tribes to regulate air quality on all land within reservations.[145] While a fresh pursuit law would admittedly be a more expansive congressional delegation in that it would grant off-reservation authority, such an extension would be minimal because the suspected criminal behavior would be observed and the officer's pursuit would begin in Indian country.

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[138] United States v. Lara, 541 U.S. 193, 200 (2004) (quoting Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463, 470–71 (1979)); *see also* Negonsott v. Samuels, 507 U.S. 99, 103 (1993); United States v. Wheeler, 435 U.S. 313, 323 (1978).

[139] *See, e.g.*, *Lara*, 541 U.S. at 200. Yet some recent scholars have offered skepticism over the Indian Commerce Clause's legitimacy as a basis for Congress's plenary power. *See, e.g.*, FRANCIS G. HUTCHINS, TRIBES AND THE AMERICAN CONSTITUTION 68–69 (2000); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007). However, the argument has had no effect on the Court's doctrine. *See Lara*, 541 U.S. at 200 ("The 'central function of the Indian Commerce Clause,' we have said, 'is to provide Congress with plenary power to legislate in the field of Indian affairs.'" (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989))). *But see* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2566–70 (2013) (Thomas, J., concurring); *Lara*, 541 U.S. at 214–15, 224–25 (Thomas, J., concurring) ("Unlike the Court, I cannot locate such congressional authority in the Treaty Clause or the Indian Commerce Clause." *Id.* at 215 (citations omitted)).

[140] *See Lara*, 541 U.S. at 201 ("The treaty power does not literally authorize Congress to act legislatively . . . . But, as Justice Holmes pointed out, treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920))).

[141] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 61 n.10 (1996) (declining to consider the Tenth Amendment issue); Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 636 (2008).

[142] 419 U.S. 544 (1975).

[143] *Id.* at 554–56.

[144] Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401–7671q (2012)).

[145] Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1287–92 (D.C. Cir. 2000); *see also* 42 U.S.C. § 7601(d)(1) (2012).

Second, although the Supreme Court has not confronted the issue, lower courts have heard and rejected Tenth Amendment challenges to arguably more intrusive federal laws promulgated under Congress's plenary power. For instance, although in *Seminole Tribe of Florida v. Florida*[146] the Supreme Court declined to address the Tenth Amendment challenge to the Indian Gaming Regulatory Act's[147] (IGRA) obligation that states negotiate with tribes in good faith,[148] lower courts that have decided the issue have generally rejected Tenth Amendment arguments.[149] Similarly, the Indian Child Welfare Act of 1978[150] (ICWA), which mandates certain procedures the state must follow when dealing with custody cases involving Indian children,[151] has withstood several Tenth Amendment challenges.[152] In comparison with IGRA and ICWA, the proposed fresh pursuit legislation would grant tribes an extremely narrow power[153] and impose only minimally on state sovereignty. The proposed law would put no affirmative obligation on the state and would not diminish the state's authority to police its territory. It would only prohibit the state from stopping tribal officers from exercising the authority delegated to them.

Finally, this would not be the first time that courts have recognized Congress's authority to extend tribal authority outside the reservation. ICWA grants tribal courts concurrent jurisdiction with the state over child custody proceedings involving an Indian child who is domiciled outside of a reservation. In the absence of "good cause to the contrary," the state must transfer the case to the tribe.[154] The Supreme

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146 517 U.S. 44 (1996).

147 Pub. L. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2721 (2012)).

148 *See Seminole Tribe*, 517 U.S. at 61 n.10.

149 *See, e.g.*, Ponca Tribe of Okla. v. Oklahoma, 37 F.3d 1422, 1434 (10th Cir. 1994), *vacated*, 517 U.S. 1129 (1996) (vacating judgment in light of *Seminole Tribe*); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 281 (8th Cir. 1993); Rumsey Indian Rancheria of Wintun Indians v. Wilson, No. CIV-S-92-812 GEB, 1993 WL 360652, at *10–14 (E.D. Cal. July 20, 1993); Yavapai-Prescott Indian Tribe v. Arizona, 796 F. Supp. 1292, 1297 (D. Ariz. 1992).

150 Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)).

151 *See* 25 U.S.C. §§ 1911–1923 (2012).

152 *See In re* A.B., 663 N.W.2d 625, 636–37 (N.D. 2003); *In re* Guardianship of D.L.L., 291 N.W.2d 278, 281 (S.D. 1980). However, several Tenth Amendment challenges have been made against ICWA recently. *See* Civil Rights Class Action Complaint for Declaratory and Injunctive Relief ¶¶ 109–13, Carter v. Washburn, No. 2:15-cv-01259 (D. Ariz. July 6, 2015), https://turtletalk.files.wordpress.com/2015/07/goldwatericwacomplaint.pdf [http://perma.cc/PFS2-M3TF]; Complaint and Prayer for Declaratory and Injunctive Relief ¶¶ 129–33, Nat'l Council for Adoption v. Jewell, No. 1:15-cv-675 (E.D. Va. May 27, 2015), https://turtletalk.files.wordpress.com/2015/08/natlcounciladoption_complaint.pdf [http://perma.cc/8D24-F5TJ].

153 *Cf.* United States v. Lara, 541 U.S. 193, 204 (2003) (listing as a reason Congress has power to expand tribal criminal jurisdiction over nonmember Indians that "the change . . . is a limited one").

154 25 U.S.C. § 1911(b); *see also* Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1021 (2008) (describing ICWA as

Court has also recognized the reach of tribal sovereign immunity to activities the tribe conducts outside Indian country and explicitly has noted it is the prerogative of Congress to alter the immunity.[155]

3. Elements of the Statute. — The jumbled mess that is jurisdiction relating to Indian country greatly needs the attention of a Congress with an eye toward comprehensive solutions. However, history indicates that by practical necessity Congress has enacted reform in Indian country by inches, not miles, and to address specific crises, not widespread disarray.[156] A federal statute granting tribal officers the authority to engage in fresh pursuit is just that: an extremely narrow grant of authority that merely expands the ability that tribal officers already have to stop and detain within Indian country to situations of fresh pursuit. Beyond being more politically palatable, a narrow statute sidesteps the elements of state statutes that make them so difficult for tribes to implement. State statutes almost always place a series of conditions on grants of power, conditions that become increasingly important the more authority that is bestowed. States have a legitimate interest in ensuring that the police officers they delegate state power to are properly trained and insured, but this interest is greatly reduced when the power delegated is a very limited extension of what those officers can already do.

Additionally, the federal statute should be framed as an extension of the power tribal police already possess to enforce laws for the safety and protection of Indians within Indian country, specifically to alleviate the problem of drunk drivers. This narrow justification has two advantages. First, although the fresh pursuit problem undermines safety for non-Indians outside of Indian country, as discussed above, Congress's authority to pass such a statute derives from its plenary power over Indian affairs.[157] While Congress's power over Indian af-

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"[p]erhaps the most far reaching legislation recognizing tribal sovereign interests beyond the reservation borders").

155 Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998) (questioning the wisdom of extending tribal sovereign immunity to off-reservation activity, but refusing to alter the principle and instead "defer[ring] to the role Congress may wish to exercise in this important judgment").

156 For example, Congress has recognized tribal courts' criminal jurisdiction in small pieces: first by recognizing tribal criminal jurisdiction over nonmember Indians, *see Lara*, 541 U.S. at 196, and second, by recognizing tribal criminal jurisdiction over prosecutions of non-Indian defendants in specific cases of domestic violence occurring in Indian country, *see* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54. However, when the legislation has not included an expansion of tribal jurisdiction, reforms have been more comprehensive. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261–301 (codified in scattered sections of 25 U.S.C.) (increasing sentencing authority of tribes without expanding jurisdiction).

157 *See supra* section D.2, pp. 1702–05.

fairs is broad,[158] it is not limitless. Accordingly, for the statute to withstand constitutional scrutiny, it should be justified and framed as an effort to alleviate a specific problem in Indian country undermining the safety of Indians.[159] And second, by focusing on the specific issue of drunk driving in Indian country, tribes may be able to join forces with other lobbying groups such as Mothers Against Drunk Driving to pitch the proposed legislation as addressing a DUI enforcement issue with particular ramifications on Indian country rather than as an exclusively Indian issue.

In thinking about the specifics of a federal statute granting tribal officers the authority to engage in fresh pursuit, the most natural place to look — state statutes that bestow this power — are of little assistance. State statutes that address this issue have done so by granting the more general peace officer authority and are not specifically drafted for the fresh pursuit situation.[160] Therefore, when seeking guidance on the narrower issue of fresh pursuit, the most apt model is not state law regarding tribal policing authority, but the Uniform Act on Fresh Pursuit regarding interstate fresh pursuit.

The Uniform Act on Fresh Pursuit (the Act) is a model statute adopted in nearly all states that allows officers of another state to engage in fresh pursuit across state lines to arrest a suspect,[161] which states:

> A member of a state, county, or municipal law enforcement unit of another state who enters this State in fresh pursuit and continues within this State in fresh pursuit of a person to arrest the person on the ground that the person is believed to have committed a felony in the other state has the same authority to arrest and hold the person in custody as has a member of a duly organized State, county, or municipal corporation law enforcement unit of this State to arrest and hold a person in custody on the ground that the person is believed to have committed a felony in this State.[162]

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158 *See, e.g.*, *Lara*, 541 U.S. at 200.

159 *See supra* section A.2, pp. 1689–90.

160 *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3874(A) (2010) ("While engaged in the conduct of his employment any Indian police officer who is appointed by the bureau of Indian affairs or the governing body of an Indian tribe as a law enforcement officer and who meets the qualifications and training standards adopted pursuant to § 41-1822 shall possess and exercise all law enforcement powers of peace officers in this state."); WASH. REV. CODE § 10.92.020(1) (2014) ("Tribal police officers under subsection (2) of this section shall be recognized and authorized to act as general authority Washington peace officers. A tribal police officer recognized and authorized to act as a general authority Washington peace officer under this section has the same powers as any other general authority Washington peace officer to enforce state laws in Washington, including the power to make arrests for violations of state laws.").

161 Royster & Fausett, *supra* note 26, at 249–50.

162 *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 2-305(a) (LexisNexis 2008).

The Act cannot be directly imported into the Indian law context as is, but it provides a baseline example for specifically addressing the issue. Beyond the obvious swapping of parties to reflect the fact that it would be the federal government granting power to tribal officers entering state land, two additional substantive changes would need to be made. First, the authority granted would need to be cabined at a detainment power rather than sanctioning an arrest power. Second, the limitation of the power to suspected felonies would need to be amended to include both felonies and other specified crimes, because a DUI is not usually a felony[163] and therefore must be specifically enumerated.

E. Conclusion

Criminal jurisdiction in and around the borders of Indian country is a maze of uncertainty that law enforcement officers of numerous jurisdictions must navigate every day across the United States. When an officer is engaged in fresh pursuit, she does not have the time to ponder the intricacies of the labyrinth. Some small flexibility is needed in tribal officers' authority to prevent confusion and overlapping jurisdictions from thwarting effective law enforcement. However, fresh pursuit and the power to detain are not a cure-all even for this specific situation. Detainment has its limits, and if state law enforcement refuses or is unavailable to arrest the suspect, tribal officers are powerless to do anything but release the driver unless there is a cooperative agreement in place granting arrest power. But this limitation is not exclusive to fresh pursuit; the same issue arises when tribal officers detain non-Indians in Indian country. Eid relayed the following example when testifying before the Senate Committee on Indian Affairs:

> One of our officers pulled over a driver, on the reservation, for DUI. The driver was a non-Indian. The State Patrol was unable to respond. The County Sheriff's Office was then requested. They refused to come out. Their watch commander then ordered us to let the suspect go — on the reservation. I took a breath sample in the field prior to the person being released. He blew a .133 BAC. He also had two children in the car with him. Instead of having him drive off as we were ordered to do by the County, one of our officers took the keys from him and gave him a ride so that he wouldn't kill himself, the kids or someone else.[164]

A federal statute authorizing tribal officers to engage in fresh pursuit and detain suspects will not obviate the need for better relationships between tribes and states and between tribes and local governments.

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[163] *See, e.g.*, WASH. REV. CODE § 9.91.020 (stating that driving while intoxicated is a gross misdemeanor).

[164] *Tribal Law and Order Act One Year Later*, *supra* note 37, at 44 (statement of Troy A. Eid, Chairman, Indian Law and Order Commission).

Without mutual respect and cooperation among all law enforcement institutions involved, no change in the law will entirely solve the policing gaps in and around Indian country. A federal statute cannot be a panacea, but it would redress a significant piece of the problem and add a bit of clarity to a legal landscape that desperately needs it.