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## Legal Barriers to Tribal Jurisdiction over Violence Against Women in Maine: Developments and Paths Forward

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# LEGAL BARRIERS TO TRIBAL JURISDICTION OVER VIOLENCE AGAINST WOMEN IN MAINE: DEVELOPMENTS AND PATHS FORWARD

*Nina Ciffolillo*

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# LEGAL BARRIERS TO TRIBAL JURISDICTION OVER VIOLENCE AGAINST WOMEN IN MAINE: DEVELOPMENTS AND PATHS FORWARD

*Nina Ciffolillo*\* \*\*

## ABSTRACT

After claiming title to the land now widely known as the United States, colonizers and settlers imposed a legal system that denies Indigenous nations agency. The United States government has launched a steady attack on attributes of Tribal sovereignty since its inception. The sexism entangled with colonialism encourages violence against women, and limitations on Tribal jurisdiction leave Indigenous nations without adequate recourse for violence against women on their land. Violence against women has become an epidemic in Indian Country, and most aggressors come from outside the territory. In 2013 when Congress granted tribes limited criminal jurisdiction over nonmembers on Tribal land, the tribes in Maine did not receive a jurisdictional grant and still struggled to adequately address nonmember violence. In March 2020, the Maine State Legislature specified that tribes in Maine would now benefit from the federal grant of jurisdiction. This state legislation, like the legislation at the federal level, is a step in the right direction; however, injustice will continue so long as the United States denies expanded Tribal sovereignty.

## I. INTRODUCTION: TRIBAL JURISDICTION IN THE UNITED STATES AND MAINE

Before colonization in North America, Indigenous nations freely exercised jurisdiction within their territories. Since contact between Indigenous people and Europeans,<sup>1</sup> colonizers and settlers have used their own legal systems to limit the pre-existing nations' ability to govern themselves, thereby denying the nations full sovereignty. The field of federal Indian<sup>2</sup> law began as a response to the issue of

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\*\* This piece is written by a non-Native person and operates within the legal framework of the dominant culture. Especially in fields of law that directly affect Native nations and their constituents, it is imperative to consider perspectives outside the dominant culture and how those perspectives may be informative in legal analyses. This Note relies on systems accepted within the dominant culture's legal system, though it attempts to integrate cross-disciplinary thinking and Indigenous values into its analysis.

1. "Discovery," the term used in United States law and vernacular to describe this initial contact, is an inaccurate term for encountering land that others already inhabit. The Doctrine of Discovery, borrowed from European law, allowed colonizers and their descendants to deem "conquest" a legal means of transferring land. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823).

2. "Indian" is the term United States law uses to describe Indigenous people, nations, and their land. *See, e.g., M'Intosh*, 21 U.S. (8 Wheat.) at 572.

whether Indians could legally sell land to settlers.<sup>3</sup> The Supreme Court answered in the negative, holding that conquest implicitly divested Indigenous nations of certain attributes of their sovereignty.<sup>4</sup> The Court has also held that acts of Congress and treaties can divest additional sovereign powers that would otherwise remain after conquest.<sup>5</sup> Further, Congress can unilaterally abrogate powers and rights that tribes have reserved by treaty.<sup>6</sup> This scheme leaves disenfranchised Indigenous nations vulnerable to continued loss of autonomy and legal protections and susceptible to the politics of the current Congress.

Congress and the Supreme Court have increased hardship for tribes by placing limitations on Tribal jurisdiction and expanding federal jurisdiction. Just two years after the Supreme Court denied federal jurisdiction over intra-Tribal affairs in *Ex parte Crow Dog*,<sup>7</sup> Congress passed a statute, a precursor to the modern Major Crimes Act (MCA), claiming federal jurisdiction over felonies in Indian Country.<sup>8</sup> In 1968, Congress enacted the Indian Civil Rights Act, which in most cases prohibits tribes from punishing crimes with fines greater than five thousand dollars and sentences of imprisonment greater than one year.<sup>9</sup> In *Oliphant v. Suquamish Indian Tribe* in 1978, the Court further limited Tribal jurisdiction, ruling that tribes do not have jurisdiction over non-Indians engaging in criminal activity on Tribal land.<sup>10</sup>

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3. *See id.*

4. *Id.* at 574 (holding that though Indigenous nations were “admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion . . . their rights to complete sovereignty, as independent nations, were necessarily diminished” by European conquest). Sovereign attributes include all the powers of a nation, such as the ability to enter into treaties, to tax, to create and enforce laws, and to determine membership. Stephen Brimley, *Native American Sovereignty in Maine*, 13 ME. POL’Y REV. 12, 13 (2004).

5. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903); *cf. Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 554 (1832) (examining treaty language to determine the remaining rights of the Cherokee Nation).

6. *Lone Wolf*, 187 U.S. at 566 (“The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress . . .”).

7. 109 U.S. 556, 559 (1883).

8. Major Crimes Act, Pub. L. No. 48-341, § 9, 23 Stat. 362, 385 (1885) (defining major crimes to include “murder, manslaughter, kidnapping, maiming, [] incest, . . . felony child abuse or neglect, arson, burglary, robbery,” among others) (current version at 18 U.S.C. § 1153(a) (2018)); *see also Duro v. Reina*, 495 U.S. 676, 681 (1990) (recognizing that under federal law Tribal jurisdiction is “confined to misdemeanors”).

9. Indian Civil Rights Act of 1968, Pub. L. 90-284, § 202, 82 Stat. 73, 77 (current version at 25 U.S.C. § 1302(7) (2018)).

10. 435 U.S. 191, 208, 210 (1978) (holding that “an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress” and that “[b]y 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”). Note that the Court’s imprecision in its use of the racial category “non-Indians” (rather than referring to nonmembers of a tribe) left questions about a Tribe’s ability to prosecute members of other tribes. The

Where tribes cannot prosecute adequately or at all, and the federal or state government chooses not to act, crimes go un- and under-prosecuted.<sup>11</sup> The consequences of this denial of jurisdiction percuss throughout Indian Country, playing a large role in the epidemic of violence against Indigenous women.<sup>12</sup> In the U.S., 96% of perpetrators of sexual violence against Native women are non-Native,<sup>13</sup> and 76% of inhabitants of Tribal land (68% in Alaska) are non-Native.<sup>14</sup> Congress restored some criminal jurisdiction over non-Indian perpetrators of domestic and dating violence when it passed the Violence Against Women Reauthorization Act in 2013, yet tribes still lack jurisdiction over many violent crimes against women.<sup>15</sup>

Until 2020, tribes in Maine did not benefit from the protections of the Violence Against Women Reauthorization Act at all. The four federally-recognized Indigenous nations residing within Maine's borders—collectively known as the Wabanaki Confederacy<sup>16</sup>—have a unique legal relationship with the State of Maine, in which state laws govern. This scheme contrasts with the majority of Tribal-state relationships, which are governed by federal law. When the Penobscot Nation, Passamaquoddy Tribe, Houlton Band of Maliseet Indians, and the United States as trustee of the Tribes sued Maine for unlawfully taking their Tribal land,<sup>17</sup> the State and Tribes entered into a settlement that upended the legal structure governing Tribal-State relations in Maine. The settlement took the form of both state and federal law. The state law counterpart, the Maine Implementing Act (MIA), outlines the relative jurisdictional abilities of the Tribes and the State of Maine, while the

Court eventually extended its *Olyphant* ruling to cases involving Tribal prosecution of Indian offenders who are nonmembers of the tribe in question, *Duro*, 495 U.S. at 679, but Congress disagreed, clarifying that Tribes had jurisdiction over members of any federally recognized tribe, *see* 25 U.S.C. § 1301 (2018).

11. *See* Laura E. Pisarello, Comment, *Lawless by Design: Jurisdiction, Gender and Justice in Indian Country*, 59 EMORY L.J. 1515, 1516 (2010).

12. *Id.* at 1517.

13. NAT'L CONG. OF AM. INDIANS POL'Y RSCH. CTR., RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN WOMEN AND GIRLS (Feb. 2018), [https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA\\_Data\\_Brief\\_FINAL\\_2\\_1\\_2018.pdf](https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief_FINAL_2_1_2018.pdf) [<https://perma.cc/F7V6-W658>] (citing ANDRÉ B. ROSAY, DEP'T OF JUST., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (May 2016), <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf> [<https://perma.cc/G82T-4T28>]).

14. *Ending Violence Against Native Women*, INDIAN L. RES. CTR., <https://indianlaw.org/issue/ending-violence-against-native-women> [<https://perma.cc/S99C-QGST>] (last visited Apr. 13, 2021).

15. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 904-905, 908, 127 Stat. 54. (current version at 34 U.S.C. § 12101 (2018)).

16. *Tribal Facts*, PENOBSCOT CULTURAL & HIST. PRES. DEP'T, [www.penobscotculture.com/index.php/8-about/81-Tribal-facts](http://www.penobscotculture.com/index.php/8-about/81-Tribal-facts) [<https://perma.cc/BJ5Q-2RZ2>] (last visited Apr. 13, 2021); *HOME: The Story of Maine*, WABANAKI COLLECTION, <https://www.wabanakicollection.com/videos/home-the-story-of-maine-people-of-the-dawn> [<https://perma.cc/2V76-685T>] (last visited Apr. 13, 2021). Wabanaki translates to “people of the dawn.” *Id.*

17. Complaint at 2, *United States v. Maine*, No. 1969 (D. Me. filed June 29, 1972). The Tribes at issue in the Settlement Acts are the Passamaquoddy, the Penobscot, and the Houlton Band of Maliseets. I refer to the Penobscot and Passamaquoddy as “the Tribes.” The Houlton Band of Maliseet Indians have fewer protections than the other two tribes under the statutory scheme. *See* 30 M.R.S.A. § 6206-A (2020).

federal Maine Indian Claims Settlement Act (MICSA) gives force to MIA.<sup>18</sup>

MICSA and MIA (together, “the Settlement Acts”) diminished the sovereign capabilities of the Tribes in Maine.<sup>19</sup> MICSA extinguished the Tribes’ claims to title of lands within Maine, excepting those designated by the Settlement Acts as their territory, and generally subjects Tribes in Maine and their members to the laws and jurisdiction of the State.<sup>20</sup> MIA details the extent to which the State has jurisdiction over the Tribes and the extent to which State jurisdiction supplants Tribal jurisdiction.

The Tribes and State disagree on the effect of some provisions, and several of those contested provisions have been interpreted by State and federal courts, resulting in favorable outcomes for Maine. For instance, MIA protects certain attributes of Tribal sovereignty, such as jurisdiction over “internal Tribal matters,”<sup>21</sup> but courts have construed that phrase narrowly.<sup>22</sup> Another contentious provision subjects the Penobscot Nation and the Passamaquoddy Tribe to “all duties, obligations, liabilities and limitations of a municipality.”<sup>23</sup> The State has concluded “that the municipal status replaces [the Tribes’] sovereign status,” though the Tribes argue they intended the municipal status “to be in addition to their sovereignty—granting them access to municipal funding sources for the development and repair of infrastructure on the reservation, for example.”<sup>24</sup>

Wabanaki people involved in settlement negotiations deny that they approved or were even aware of one pair of provisions, MICSA Sections 1725 and 1735, which have excluded the Tribes from federal protections.<sup>25</sup> MICSA Section 1725 prevents any federal law or regulation “generally applicable to Indians” from applying in Maine when that law or regulation (1) “accords or relates to a special status or right of or to any Indian” and (2) “affects or preempts . . . jurisdiction of the state of Maine.”<sup>26</sup> Section 1735 prevents any federal law passed after the Settlement Acts from applying in Maine, when it is (1) “enacted for the benefit of Indians” and (2) could “affect or preempt the application of the laws of the State of Maine” unless the

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18. Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (codified at 25 U.S.C. §§ 1721-1735 (omitted)); An Act to Implement the Maine Indian Claims Settlement, P.L. 1979, ch. 732, § 1 (current version at 30 M.R.S.A. §§ 6201-6214 (2020)).

19. Stephen Brimley, *Native American Sovereignty in Maine*, 13 ME. POL’Y REV. 12, 19-22 (2004).

20. Maine Indian Claims Settlement Act of 1980, §§ 4, 6(a)-(b)(1) (codified at 25 U.S.C. §§ 1723, 1725 (a),(b)(1) (omitted)).

21. 30 M.R.S.A. § 6206(1) (2020).

22. See Joseph G. E. Gousse, Comment, *Waiting for Gluskabe: An Examination of Maine’s Colonialist Legacy Suffered by Native American Tribes Under the Maine Indian Claims Settlement Act of 1980*, 66 ME. L. REV. 535, 555-65 (2014).

23. 30 M.R.S.A. § 6206(1) (2020).

24. Brimley, *supra* note 20, at 18.

25. Susan Sharon, *Maine Lawmakers Consider Changes to Act that Would Alter Tribal-State Relationship*, ME. PUBLIC (Feb. 14, 2020, 5:29 PM), <https://www.maine-public.org/post/maine-lawmakers-consider-changes-act-would-alter-Tribal-state-relationship> [<https://perma.cc/V79F-9M9Q>] (Penobscot Nation Chief Kirk Francis discussing the provisions).

26. Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 6(h), 94 Stat. 1785, 1794 (codified at 25 U.S.C. § 1725(h) (omitted)).

federal law specifies that it applies in Maine.<sup>27</sup> Together Sections 1725 and 1735 have denied Maine Tribes protections, services, and funding that benefit other federally recognized tribes.<sup>28</sup>

Tribal-State negotiations over amending the Settlement Acts ramped up at the beginning of Janet Mills's term as governor of Maine in 2019. On the direction Speaker of the House Sara Gideon and Senate Majority Leader Troy Jackson, the Maine legislature convened a task force charged with proposing changes to MIA in order to restore elements of Tribal sovereignty.<sup>29</sup> Once the task force published its twenty-two recommendations and proposed a bill to implement them, Governor Mills expressed concern with the "sweeping nature" of the bill, apparently perceiving such an increase in Tribal sovereignty as a threat to Maine.<sup>30</sup> At this time, there is hope that negotiations regarding the bill will continue, though the Governor's office has declined to meet with the task force since August 2020. As of the publication of this piece, the bill has been reintroduced in the latest legislative session.<sup>31</sup>

The Tribes and the State did agree on one important aspect of the jurisdictional issue. In March 2020, the Maine legislature passed L.D. 766, a law specifically granting both the Penobscot Indian Nation and Passamaquoddy Tribe limited criminal jurisdiction over non-members within their respective territories when a Tribal governing body exercises jurisdiction under the Violence Against Women Reauthorization Act.<sup>32</sup> Though not sweeping, the State concession represents a historical shift in Maine's attitude toward Tribal self-determination.

Section II of this Note examines the epidemic of violence against Indigenous women in the United States and in Maine, with a focus on the effect of Sections 1725 and 1735 of MICSA on Tribal jurisdiction over violence against women. Section III assesses the potential successes of the new law granting jurisdiction, L.D. 766, and indicates areas for improvement. Ultimately, Section IV argues that an expansion of Tribal sovereignty and strong federal support would help Indigenous nations in Maine address and prevent violence against Indigenous women, and that the Maine Tribes should have maximum jurisdictional capability allowed by federal Indian law.

## II. VIOLENCE AGAINST INDIGENOUS WOMEN AND THE VIOLENCE AGAINST WOMEN

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27. *Id.* § 6(h) (codified at 25 U.S.C. § 1735(b) (omitted)).

28. See Brimley, *supra* note 20, at 17-19.

29. *Joint Order, Establishing the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act*, HP 1307, (129th Leg. 2019), <http://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP1307&item=1&snum=129> [<https://perma.cc/6TYF-4KUT>].

30. Kevin Miller, *Sweeping Recommendations Would Overhaul Maine's Indian Land Claims Act*, PORTLAND PRESS HERALD (Jan. 14, 2020), <https://www.pressherald.com/2020/01/14/reports-recommends-sweeping-changes-to-1980-settlement-act-with-maine-tribes> [<https://perma.cc/YK67-8Q2X>].

31. *Maine Indian Claims Task Force*, ME. STATE LEGISLATURE, <http://legislature.maine.gov/maine-indian-claims-tf> [<https://perma.cc/WUU2-HQXF>] (last visited Apr. 13, 2021).

32. L.D. 776 (129th Legis. 2020); 30 M.R.S.A. § 6206 (2020).

## ACT (VAWA), NATIONALLY AND IN MAINE

*A. On the National Scale*

One of the most salient depictions of the modern effects of racism and jurisdictional failures on Indigenous nations may be the Missing and Murdered Indigenous Women (MMIW) epidemic in Canada and the United States. Indigenous women<sup>33</sup> are at elevated risk of violence, existing at the intersection of marginalized gender and racial identities. Neither the United States nor Canadian federal government adequately protects Indigenous women and girls. In the United States, the federal government has asserted jurisdiction over many of these crimes<sup>34</sup> but has subsequently failed to deter offenders.<sup>35</sup> On top of a disproportionate number of victimized Indigenous women, a disproportionate number of women's cases are cold, not taken seriously, or altogether ignored.<sup>36</sup>

The statistics on violence against Indigenous women are not comprehensive, due in part to underreporting and failures in documentation.<sup>37</sup> Still, the statistics we do have are shocking. In Canada, the documented rate of homicide of Indigenous people in 2019 was more than six times the rate of homicide for non-Indigenous people, and the overall proportion of female victims who were killed by a spouse or intimate partner was eight times greater than that of males.<sup>38</sup> “Murder is the third leading cause of death for Native women” in the United States.<sup>39</sup> Indigenous women in the United States experience violence and harassment at dramatic rates, with 84.3% having experienced violence, 56.1% having experienced sexual violence or physical violence by intimate partners, and 48.8% having been stalked.<sup>40</sup> Indigenous women face a risk of sexual assault or rape that is 2.5 times higher than the rest of the general population.<sup>41</sup> Further, Indigenous women suffer more violent attacks than non-Indigenous women and require hospitalization more often when victimized.<sup>42</sup>

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33. It is unclear what exactly “women” means within the following data—specifically to what extent female-identifying people and whether nonbinary individuals are included—and the precise definition likely varies depending on the study. The risks of violence and sexual assault to nonbinary and transgender individuals should not be underestimated, though less data have been gathered. The arguments in this piece construe “women” broadly, though they are limited by the definitions in the law and in the data. The policy changes recommended are warranted on behalf of Indigenous people all along the gender spectrum.

34. 18 U.S.C. § 1153 (2018).

35. See INDIAN L. RES. CTR., *supra* note 15.

36. *Id.*

37. Jennifer L. Hartman, *Seeking Justice*, VIOLENCE AGAINST WOMEN 1, 3 (2020).

38. *Homicide in Canada, 2019*, STATISTICS CANADA (Oct. 29, 2020), <https://www150.statcan.gc.ca/n1/en/pub/11-627-m/11-627-m2020055-eng.pdf?st=q67xd-2W> [<https://perma.cc/5E6B-6CZC>].

39. *Our Bodies, Our Stories*, URB. INDIAN HEALTH INST., <https://www.uhi.org/projects/our-bodies-our-stories> [<https://perma.cc/99FD-CKYC>] (last visited Apr. 13, 2021).

40. ROSAY, *supra* note 14, at 2.

41. URB. INDIAN HEALTH INST., *supra* note 40.

42. Hartman, *supra* note 38, at 54 (citing Ronet Bachman et al., *Estimating the Magnitude of Rape and Sexual Assault Against American Indian and Alaska Native (AIAN) Women*, 43 AUSTL. & N.Z. J. OF CRIMINOLOGY 199 (2010)).

Comprehensive data on the MMIW epidemic in the United States is extremely hard to come by because the federal government performs limited data gathering.<sup>43</sup> Deputy Bureau Director of the Office of Justice Services at the United States Bureau of Indian Affairs, Charles Addington, explained the importance of data gathering in a speech before the House Subcommittee for Indigenous Peoples of the United States: “significant gaps in data that exacerbate the [MMIW] crisis remain . . . present across multiple sectors but are particularly problematic in the context of criminal justice, in which [f]ederal, state, tribal, and local governments share responsibilities.”<sup>44</sup> Deputy Director Addington suggested that these gaps in data exacerbate the ineffectual handling of cases, and he urged a continued effort to gather data “needed to identify and analyze the criminal justice needs in Indian Country.”<sup>45</sup>

The Federal Bureau of Investigation, in charge of compiling relevant statistics, does not currently track missing persons or domestic violence data in its Uniform Crime Report.<sup>46</sup> In the absence of drastic change, even with a novel partnership between the Bureau of Indian Affairs (BIA) and Department of Justice (DOJ) initiated in February 2019 that aims to gather statistics on Indigenous victims and survivors,<sup>47</sup> data from the federal government are likely to remain limited due to “systematic racism, underreporting, misclassification, and ongoing distrust of law enforcement.”<sup>48</sup>

The Urban Indian Health Institute (UIHI) illustrated the severe dearth in federal data, reporting that “in 2016, there were 5,712 reports of missing American Indian and Alaska Native women and girls, though the US Department of Justice’s federal missing persons database, NamUs, only logged 116 cases.”<sup>49</sup> In its 2019 survey of 71 U.S. cities, UIHI identified 506 MMIW cases, of which 153 did not exist in any law enforcement records—either at the federal or state level.<sup>50</sup> Moreover, because prosecution is a discretionary activity, law enforcement documentation of a case does not necessarily indicate there was any arrest, investigation, or prosecution linked to that case. From 2005 to 2009, the U.S. Attorney’s Office declined to prosecute 67% of sexual abuse and related cases and 46% of assault cases.<sup>51</sup>

The tragic data gathered—and not gathered—on MMIW and violence against

43. *Reviewing the Trump Administration’s Approach to the MMIW Crisis: Oversight Hearing Before the H. Comm. on Nat. Res. Subcomm. for Indigenous Peoples of the U.S.*, 116th Cong. 1-2 (2019) (statement of Charles Addington, Deputy Bureau Director, Office of Justice Services, Bureau of Indian Affs., U.S. Dep’t of the Interior).

44. *Id.* at 1.

45. *Id.*

46. *Id.* at 2.

47. *Id.* The Department of the Interior under the Biden administration has created a new unit to address historic underfunding of the federal response and data-gathering, discussed *infra* Section IV.

48. URB. INDIAN HEALTH INST., *supra* note 40.

49. *Missing and Murdered Indigenous Women & Girls: A Snapshot of Data from 71 Urban Cities in the United States*, URB. INDIAN HEALTH INST. 2 (2019).

50. *Id.* at 6.

51. U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 3, (2010) <https://www.gao.gov/assets/100/97229.pdf> [<https://perma.cc/4M78-PKUZ>] (Letter from David C. Maurer, Dir., Homeland Sec. & Just. to Comm. on Indian Affs.).

Indigenous women illustrate a broader failure to protect Indigenous women. The prevalence of violence against Indigenous women did not predate colonization but is encouraged by a racist and colonialist society.<sup>52</sup> The injustice is particularly alarming when considered in conjunction with the United States' history of limiting Tribal autonomy.

In 2020, the American Bar Association hosted *Sliver of a Full Moon*, a play by Mary Kathryn Nagle that explores legal structures that perpetuate violence against Indigenous women. The actors in the play are survivors of violence who share their own experiences. Diane Millich, a Southern Ute woman recounts:

When I was 26 years old, I lived on my reservation and started dating a non-Indian, a white man. I was in love and life was wonderful. After the bliss of dating for six months we were married. . . . After a year of abuse and more than 100 incidents of being slapped, kicked, punched and living in horrific terror, I left for good. . . . I called the Southern Ute Tribal police, but the law prevented them from arresting and prosecuting my husband. . . . I called so many times, but over the months not a single arrest was made. On one occasion after a beating my ex-husband called the county sheriff himself to show me that no one could stop him. He was right; two deputies came and confirmed they did not have jurisdiction. I was alone and terrified for my safety.<sup>53</sup>

Because of the federally imposed limitations on Tribal government, until 2013, most tribes could not protect members in situations like Diane Millich's, and members facing domestic violence were often without recourse. The Violence Against Women Act (VAWA), as passed in 1994 and successfully reauthorized in 2000 and 2005, did not grant tribes criminal jurisdiction over nonmembers. The 2005 version of VAWA was the first to address Tribal issues. That iteration of VAWA sought to increase safety and justice for Indigenous women by funding research and Tribal law enforcement agencies, yet it maintained federal criminal jurisdiction over nonmembers.<sup>54</sup> In 2010, Congress passed the Tribal Law and Order Act, which "addressed sexual and domestic violence against [Indigenous] women" by providing guidance on investigating and prosecuting sexual assaults and domestic violence cases.<sup>55</sup> But still, not until the 2013 reauthorization of VAWA ("VAWA

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52. Lisa Monchalin et al., *Homicide and Indigenous Peoples in North America: A Structural Analysis*, 46 *AGGRESSION & VIOLENT BEHAV.* 212, 213 (2019) ("The history of colonialism, the legacy of trauma, and the structural violence underlying the theft of land, death by disease, attempted genocide, racism, inequality of income, disparities in wealth, dilapidated housing, mediocre education, rampant unemployment, homelessness, and poor health indicators, among others, serve to provide the conditions in which the extant victimization experienced by Indigenous peoples goes largely unnoticed."). To the contrary, many Indigenous nations were matrilineal and afforded significant power to female elders, and the violence stemming from European contact tended to diminish women's power in diplomacy. *Id.* at 216.

53. Anya Montiel, *Sliver of a Full Moon: Changing Hearts, Minds and Legislation*, 16 *NAT. MUSEUM OF THE AM. INDIAN Mag.*, no. 4, 2015, at 32-33.

54. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §§ 901-909, 119 Stat. 2960, 3077-84; see generally, Hartman, *supra* note 38 (illustrating the iterations of VAWA).

55. Hartman, *supra* note 38 at 58.

2013”) did Congress address the limitations on Tribal jurisdiction. VAWA 2013 partially repealed the rule from *Oliphant*, which denied tribes criminal jurisdiction over nonmembers,<sup>56</sup> creating “a framework for tribes to voluntarily opt-in and exercise criminal jurisdiction over non-Indians who commit certain [dating and domestic violence] crimes against a Native person” and allocating funds to Tribal governments for addressing violence against women.<sup>57</sup>

As playwright and activist Mary Kathryn Nagle indicates in the title of her aforementioned play, because VAWA 2013 left out important jurisdictional capabilities, it provided just a “sliver” of a proper solution.<sup>58</sup> While a beneficial step, VAWA 2013 only granted tribes jurisdiction over dating and domestic violence, for the most part not including sexual violence, sex trafficking, murder, or kidnapping.<sup>59</sup> In addition, because of unique legal Tribal-state relationships, the jurisdictional grant did not apply in Alaska,<sup>60</sup> the state with the highest rate of violence against Indigenous women,<sup>61</sup> and was blocked in Maine under Section 1725 of MICSA. The last attempt to reauthorize VAWA, which would have granted further Tribal criminal jurisdiction and included tribes in Maine and Alaska, failed to pass the Senate in 2019.<sup>62</sup> Meanwhile, the prevalence of violence against Indigenous women in North America remains a serious and pressing issue.

### B. In Maine

Like in the rest of the country, “Native women living in Maine are experiencing sexual violence at a higher rate than their white peers,”<sup>63</sup> but under the MICSA Sections 1725 and 1735, no protections afforded by any iteration of VAWA applied to the Maine Tribes until the passage of L.D 766 in 2020. In 2013, the DOJ initially chose the court of the Penobscot Nation, reputed for its “exemplary restorative justice practices and professional jurisprudence,”<sup>64</sup> as one of six Tribal courts to pilot the expanded Tribal jurisdiction over domestic violence,<sup>65</sup> however, then-Attorney

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56. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, 210 (1978).

57. Hartman, *supra* note 38 at 61; *see* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 901-910, 127 Stat. 54, 118-26.

58. Montiel, *supra* note 54, at 3.

59. 127 Stat. at 120-124.

60. 43 U.S.C. §§ 1601-1629h; Cecily Hilleary, *Alaska Natives to Congress: Expand Violence Against Women Act*, VOICE OF AMERICA (Oct. 12, 2018, 10:30 AM), <https://www.voanews.com/usa/alaska-natives-congress-expand-violence-against-women-act> [<https://perma.cc/G296-6W7B>].

61. INDIAN L. RES. CTR., *supra* note 15.

62. *See* Violence Against Women Reauthorization Act of 2019, H.R.1585, 116th Cong., §§ 901-05 (2019).

63. *Sexual Violence Against Native Women & Girls*, ME. COAL. AGAINST SEXUAL ASSAULT, [https://www.mecasa.org/uploads/1/0/1/7/101776612/sexual\\_violence\\_against\\_native\\_women\\_and\\_girls.pdf](https://www.mecasa.org/uploads/1/0/1/7/101776612/sexual_violence_against_native_women_and_girls.pdf) [<https://perma.cc/QPE5-KVKG>] (last visited Apr. 13, 2021).

64. Sherri Mitchell, *Denial of Tribal Sovereignty is an 'Archaic Remnant of a Racist Past'*, BEACON (Feb. 27, 2020), <https://mainebeacon.com/denial-of-Tribal-sovereignty-is-an-archaic-remnant-of-a-racist-past> [<https://perma.cc/ASV3-V9NS>].

65. Colin Woodward, *Bill Would Allow Maine Tribes to Hold Trials for Non-Indians in Domestic Violence Cases*, PORTLAND PRESS HERALD (Apr. 4, 2020),

General Janet Mills blocked the pilot project in Maine, arguing that enabling the Tribes to prosecute the covered crimes would “affect[] or preempt[]”<sup>66</sup> Maine’s jurisdiction over the crimes, in violation of Section 1725 of MICSA.<sup>67</sup> Speaking in support of the federal 2019 VAWA amendment, which would allow Maine Tribes the jurisdictional authority allowed to most other tribes nationwide, Representative Chellie Pingree of Maine argued that Mills’s choice to block VAWA Tribal jurisdiction was discretionary, stating that “according to the way the Maine Indian Claims Settlement Act has been interpreted by some, Maine has been left out of the law.”<sup>68</sup> If applied in Maine, VAWA 2013 would have allowed Maine Tribes concurrent jurisdiction over dating and domestic violence while leaving Maine’s jurisdiction completely intact.<sup>69</sup>

The State court system in Maine has proven ill-equipped to handle cases of violence against women on Tribal lands. Cases brought in Maine courts have been time-consuming and inefficient, causing women to drop or not pursue them.<sup>70</sup> Maulian Dana, Tribal Ambassador for the Penobscot Nation, claimed, “[w]e’re seeing months to years [women] have to wait in District Court.”<sup>71</sup> Deciding cases in Tribal court would bring more women relief because lighter caseloads allow for quicker movement of cases.<sup>72</sup> Where women do obtain judicial relief, that relief may not protect them adequately. Ambassador Dana explained, “it gets tricky enforcing [protection from] abuse orders with all the different jurisdictions . . . [s]ome [survivors] walk away from the process.”<sup>73</sup> Tribal courts may be in a better position to provide a holistic response. The Penobscot Nation, for example, has family wellness programs in which “spiritual and cultural figures” work with families experiencing domestic violence.<sup>74</sup>

Though no more recent iteration of VAWA has passed, the Penobscot Nation and Passamaquoddy Tribe are now authorized to respond to nonmember violence. In a compromise between Maine Tribes and the State, the Maine Legislature passed L.D. 766, which amends MIA to open up Tribal courts to domestic violence and sexual assault cases against nonmembers.<sup>75</sup> The Penobscot Nation and Passamaquoddy Tribe are currently making progress on implementation, as VAWA and L.D. 766 require that the jurisdictions meet certain state and federal

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<https://www.pressherald.com/2019/04/04/maine-tribes-could-try-non-indians-charged-in-domestic-violence-cases-under-bill-passed-by-u-s-house> [<https://perma.cc/VK7C-D3FJ>].

66. Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 6(h), 94 Stat. 1785, 1794 (codified at 25 U.S.C. § 1725(h) (omitted)).

67. See Woodward, *supra* note 66. Janet Mills would go on to become governor of Maine in 2019.

68. 165 CONG. REC. H2996 (daily ed. Apr. 3, 2019) (statement of Rep. Chellie Pingree).

69. See *An Act Regarding the Penobscot Nation's and Passamaquoddy Tribe's Authority to Exercise Jurisdiction under the Federal Tribal Law and Order Act of 2010 and the Federal Violence Against Women Reauthorization Act of 2013*, L.D. 776, Summary (129th Legis. 2020).

70. Woodward, *supra* note 66.

71. *Id.*

72. *Id.*

73. Woodward, *supra* note 66.

74. *Id.*

75. L.D. 766, Summary (129th Legis. 2020).

protections.<sup>76</sup> Neither the Houlton Band of Maliseet Indians nor the Aroostook Band of Micmacs have independent courts.<sup>77</sup> L.D. 766 operates by extending Tribal jurisdiction in certain areas such that it aligns with federal law.<sup>78</sup> It specifically allows the Penobscot Nation and Passamaquoddy Tribe jurisdiction to prosecute nonmembers for violations of Tribal ordinances.<sup>79</sup> It expands Tribal misdemeanor jurisdiction from penalties of \$5,000 and one year of imprisonment to penalties of \$15,000 and three years' imprisonment, as allowed by the federal Tribal Law and Order Act of 2010.<sup>80</sup> L.D. 766 also grants Tribal jurisdiction concurrent with the State over VAWA cases on Tribal land. Interestingly, the summary provided in L.D. 766 characterizes the law as “*clarifying* that the Penobscot Nation has concurrent jurisdiction with the State” over VAWA cases, rather than granting jurisdiction anew.<sup>81</sup>

### III. PROSPECTS OF PROSECUTING IN MAINE TRIBAL COURTS

Perceptions of Native nations as incompetent persist and serve as significant barriers to the restoration of Tribal sovereignty. Scholar Leroy Little Bear writes that colonialism oppresses and discriminates, “maintain[ing] a singular social order by means of force and law.”<sup>82</sup> As such, colonization integrates systemic racism into the government and popular opinion. Where the government reinforces colonial ideals, it further engrains racism in society. In *Johnson v. M’Intosh*, the foundational case in federal Indian law, the Court rationalized colonization by reasoning that leaving the “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest . . . in possession of their country, was to leave the country a wilderness.”<sup>83</sup> The Court attacked Native sovereignty, displaying a

76. Protections include those deriving from federal and state constitutions as well as those explicit in the Indian Civil Rights Act of 1968. Indian Civil Rights Act of 1968, Pub. L. 90-284, § 202, 82 Stat. 73, 77 (current version at 25 U.S.C. § 1302 (2018)).

77. Woodward, *supra* note 66.

78. L.D. 766 (129th Legis. 2020). For example, Part A amends 30 M.R.S.A. § 6206(3) to grant each tribe “jurisdiction within its respective territory over a person who is not a member of either tribe or nation in accord with and to the extent authorized by federal law.” *Id.*

79. *Id.*

80. *Compare id.*, with 25 U.S.C. §§ 201-266 (2018).

81. L.D. 776, Summary (129th Legis. 2020) (emphasis added). I point to the summary’s language because it represents Maine’s changing interpretation of the Settlement Acts. If the Penobscot Nation already had jurisdiction, as the language suggests, then Maine and Attorney General Mills were wrong in denying jurisdiction up until 2020. In the L.D. 766 summary, the State has acknowledged that jurisdiction of the Penobscot Nation, concurrent with State jurisdiction, does not actually affect or preempt Maine’s jurisdiction at all, and therefore, VAWA 2013 should have applied in Maine.

82. Leroy Little Bear, *Jagged Worldviews Colliding*, in RECLAIMING INDIGENOUS VOICE AND VISION (MARIE BATTISTE ED., 2000), reprinted in WALKING TOGETHER: FIRST NATIONS, METIS AND INUIT PERSPS. IN CURRICULUM (2000).

83. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823). The Court borrows from European precedent and looks past the adept stewardship the Indigenous peoples showed for the land and ecosystems, when it calls the country a “wilderness.” Justice Marshall implicitly prioritizes a Eurocentric view of “progress” and “improvement” of land, while rendering the way of life of the many tribes valueless.

Eurocentric aversion to “leaving the country a wilderness” stewarded by tribes. At the same time, the Court denied its own agency in the decision, using existing European precedent and holding that Tribal sovereign rights and powers were “necessarily diminished” as a result of conquest.<sup>84</sup> That diminution of rights and powers was only “necessary” because settlers perceived Indigenous self-determination as a threat to their own power and control. In particular, settlers saw “Native American possessory customs [as] incompatible with English fee-simple property in land, with its individual rights of use, exclusion, and alienation” such that “to follow one [system] was to overrun and negate the other.”<sup>85</sup> The Court claimed inferiority of Indigenous lifestyle and worldview to justify its assertion of power in the name of civilization and progress.

The government still uses white elitism to excuse colonialism today. Racist stereotypes leading to the assumption that Tribal courts cannot properly handle cases should be dispelled. These claims lack foundation and “[a]n abundance of research . . . shows clearly and undeniably that when native nations exert their sovereignty and take matters into their hands to create local solutions to local problems, they not only succeed but prosper.”<sup>86</sup> Further, any fear of inadequate litigant protections in the Tribal courts should be quelled, as tribes choosing to exercise VAWA jurisdiction must adhere to a myriad of requirements that would be available in state court to protect litigants. These requirements include those in the federal Bill of Rights and those stemming from due process, and jurisdiction under L.D. 766 requires these same protections.<sup>87</sup>

Penobscot attorney Sherri Mitchell maintained in a Maine state legislative hearing that skepticism of Tribal courts is unfounded, highlighting that questions about the capability of Tribal courts continue to be asked, though they were considered and resolved in the federal drafting of VAWA.<sup>88</sup> Instead, Mitchell blamed the doubts about competency on “outdated racist attitudes that call into question the capacity of Tribal nations to fairly disseminate justice.”<sup>89</sup> She explained that “these very same racist attitudes [] allow many within the Maine government to look individual Wabanaki people in the eye and say, it’s not you that I distrust personally, it is just the general idea of Indian sovereignty as a whole that worries me.”<sup>90</sup>

Considering the respected reputation of the Penobscot and Passamaquoddy

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84. *Id.* at 573.

85. Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M’Intosh*, 75 GEO. WASH. L. REV. 330, 366 (2007).

86. Brimley, *supra* note 20, at 23. Brimley references the Harvard Project on American Indian Economic Development, for example, which writes “[w]hen Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care, and social service provision.” *About Us*, HARVARD PROJ. ON AM. INDIAN ECON. DEV., <https://hpaied.org/about/overview> [<https://perma.cc/WTC3-GM88>] (last visited Apr. 13, 2021).

87. 25 U.S.C. §§ 1302(a), 1302(c), 1303, 1304(d) (2018); *see* L.D. 766 (129th Legis. 2020).

88. Mitchell, *supra* note 65.

89. *Id.*

90. *Id.*

courts and their resources for restorative justice, proponents of L.D. 766 argue that litigation by the Passamaquoddy Tribe and Penobscot Nation will cause more just outcomes. The holistic approach that relies on community resources enables more effective “work[] on the issues and the behavioral changes so the individual does not reoffend,” explains the Chief Judge of the Penobscot Nation, Eric Mehnert.<sup>91</sup> Many eagerly await the Nations’ exercise of their new jurisdiction, as the Tribes iron out their compliance with the new law.

#### IV. WEAKNESSES AND POTENTIAL FOR MORE EFFECTIVE SOLUTIONS IN THE U.S. AND IN MAINE

If justice is a goal, where tribes desire autonomy, neither federal nor state governments should impose obstacles. Imposed limitations on Tribal jurisdiction belie a belief, also evident in a long history of oppression, that Indigenous nations cannot govern themselves adequately.<sup>92</sup> Where the courts and Congress deny attributes of sovereignty, tribes are left without power. As genocide, violence, and oppression against Indigenous people have flowed from the legalized conquest of North America, empowering tribes to exercise sovereignty would begin to dismantle such injustices from the root.<sup>93</sup> Returning jurisdiction to tribes can be nuanced; tribes and the federal or state government should work together to restore jurisdiction for each tribe, considering its needs, desires, and infrastructural capacity. Where the federal or state government retains concurrent jurisdiction over the area at issue, as under VAWA 2013, blanket restorations of Tribal jurisdiction may be more practical, as there is minimal risk of a jurisdictional vacuum where a tribe is not yet equipped with sufficient resources.

Returning jurisdiction by statute is important, but foundational weaknesses threaten these successes. Ultimately, the federal political system does not protect the rights of Indigenous people, and the repercussions of colonialism on Indigenous communities cannot be erased without an overhaul of federal Indian law. Congress’s ability to remove rights and protections of federally recognized tribes creates a serious social justice concern. Moreover, as federal Indian law has largely been court-created, it is an unstable field. As case law progresses, tribes tend to lose more protections due to re-characterization of precedent.<sup>94</sup> While courts are bound by precedent, Congress lacks a corresponding limitation. Congress’s plenary power over Indian affairs includes a near unfettered ability to abrogate reserved treaty rights

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91. Woodward, *supra* note 66.

92. See generally FELIX COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 3-108 (2012 ed.) (detailing the history of federal Indian law).

93. See Brimley, *supra* note 20 at 23 (discussing the link between economic development and Tribal sovereignty).

94. Compare, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (characterizing the United States as guardian of tribes), with *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (holding that “[t]he power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so”).

and elements of Tribal sovereignty.<sup>95</sup>

Federal Indian law, as it stands, relies on advocacy in favor of tribes. Federal recognition of rights and powers of Indigenous nations requires that people in positions of authority care about the wellbeing of Indigenous people and that those people act. In addressing violence against Indigenous women, Congress should use its plenary power to pass legislation encouraging restoration of Tribal self-determination and sovereignty. Congress should remove limitations on federal benefits, such as those barriers in Sections 1725 and 1735 of MICSA and provisions affecting Indigenous nations in Alaska. Members of Congress must pass protections and vote against injustices. Judges must interpret precedent in favor of tribes. Advocates must urge increased representation of Indigenous people in the political system, greater sovereignty for Indigenous nations, and more cooperation among the sovereigns.

Avoiding regression and hurdling political barriers begins with building a pro-sovereignty Congress. Electing and appointing Indigenous women to positions of authority is an effective way to battle injustices they face. In 2019, the first two female members of federally recognized tribes to serve in Congress began their terms in the U.S. House of Representatives, one of whom, Deb Haaland of the Laguna Pueblo, has now been confirmed as the head the U.S. Department of the Interior, the executive department in charge of the BIA, under the Biden administration.<sup>96</sup> In October 2020, two bills aimed at addressing the MMIW crisis, Savanna's Act and the Not Invisible Act, became law.<sup>97</sup> Though these laws do not grant additional authority to tribes, they hold the federal government accountable for gathering adequate data and following certain protocols in crime prevention and investigation.<sup>98</sup> Additionally, in her first month of serving as Secretary of the Interior, Deb Haaland created a Missing & Murdered Unit within the BIA "to provide leadership and direction for cross-departmental and interagency work involving missing and murdered American Indians and Alaska Natives."<sup>99</sup> With representation in Congress, tribes are more likely to see legislation aimed at alleviating issues caused by diminished sovereignty as well as laws aimed at restoring sovereignty. A good next step, in terms of specific legislation, would be a reauthorized federal VAWA specifically allowing for jurisdiction in Maine and Alaska and expanding

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95. FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 6-7 (2012 ed.).

96. Coral Davenport, *Deb Haaland Becomes First Native American Cabinet Secretary*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/2021/03/15/climate/deb-haaland-confirmation-secretary-of-interior.html> [<https://perma.cc/7FXN-8V7S>].

97. Press Release, *Haaland: Not Invisible, Savanna's Acts Now Law*, CONGRESSWOMAN DEB HAALAND, available at [https://www.legistorm.com/stormfeed/view\\_rss/1646822/member/3229/title/haaland-not-invisible-savannas-acts-now-law.html](https://www.legistorm.com/stormfeed/view_rss/1646822/member/3229/title/haaland-not-invisible-savannas-acts-now-law.html) [<https://perma.cc/5JBU-XLZ6>] (last visited May 13, 2021).

98. See Savanna's Act, Pub. L. No. 116-165, 134 Stat. 760 (2020); Not Invisible Act of 2019, Pub. L. No. 116-166, 134 Stat. 766 (2020).

99. Press Release, *Secretary Haaland Creates New Missing & Murdered Unit to Pursue Justice for Missing or Murdered American Indians and Alaska Natives*, DEP'T OF THE INT., <https://www.doi.gov/news/secretary-haaland-creates-new-missing-murdered-unit-pursue-justice-missing-or-murdered-american> [<https://perma.cc/HH8F-YJ9Y>] (last visited May 6, 2021).

Tribal criminal jurisdiction over non-Natives.

State laws favoring sovereignty and racial justice would similarly benefit tribes. Because Congress delegated its plenary power in the Settlement Acts, Maine is in a unique position to pass legislation altering the Tribal-State relationship. Though L.D. 766 restores a portion of Tribal jurisdiction, it does not go far enough. L.D. 2094,<sup>100</sup> the 2020 bill proposing acceptance of the task force's recommendations for changes to the Settlement Acts, struggled against opposition.<sup>101</sup> Passing the task force's recommendations would grant Maine Tribes the powers and protections that the federal government affords other federally recognized tribes, significantly improving the situation of the Tribes.

When Governor Mills announced that Tribal-State relations were a priority of her campaign, some proponents of Tribal sovereignty formed new hope, while others remained pessimistic.<sup>102</sup> In a presentation to the University of Southern Maine in 2020, Penobscot historian Maria Girouard expressed a suspicion that the Governor would hold a tight grip on State power.<sup>103</sup> Girouard highlighted that under Mills, the Legislature had convened another State task force rather than utilizing the recommendations of previous legislative task forces on the Settlement Acts or of the Maine Indian Tribal-State Commission, the dispute resolution system created in the Settlement Acts.<sup>104</sup> In early 2020, when Governor Mills admitted concern with the breadth of L.D. 2094, her declaration surprised even the members of the task force, as word of her concern had not surfaced as the recommendations were drafted.<sup>105</sup> Though she “made repairing relations with tribes an early priority after taking office in 2019,”<sup>106</sup> Mills supported “some provisions, while outlining concerns about several others.”<sup>107</sup>

Some Mainers worry about the “uncertainty and [potential] financial costs” of the bill on polluting industries operating near the reservations and resulting disputes.<sup>108</sup> Such trepidations rely on the assumption that Tribes will create unreasonably stringent and expensive environmental regulations. Attorney Sherri Mitchell argues that opposition to the task force's recommendations harkens back to

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100. *An Act to Implement the Recommendations of the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act*, L.D. 2094 (129th Legis. 2020). This bill was reintroduced in April 2021 as L.D. 1626, and its fate remains uncertain as this Note goes to press.

101. See, e.g., Caitlin Andrews, *Janet Mills' Criticism of Maine Tribal Sovereignty Push Surprised Some Who Crafted It*, BANGOR DAILY NEWS (Feb. 18, 2020), <https://bangordailynews.com/2020/02/18/politics/janet-mills-criticism-of-maine-tribal-sovereignty-push-surprised-some-who-crafted-it/> [<https://perma.cc/XYJ8-JJ7J>].

102. *Id.*

103. Maria Girouard, Penobscot Nation Tribal member and historian, Presentation at the Cutler Institute: The Original Meaning and Intent of the Maine Indian Land Claims (Nov. 21, 2019).

104. *Id.*

105. Andrews, *supra* note 102.

106. Caitlin Andrews, *Janet Mills Splits With Top Democrats to Hit 'Sweeping Nature' of Tribal Sovereignty Effort*, BANGOR DAILY NEWS (Feb. 16, 2020), <https://bangordailynews.com/2020/02/14/news/janet-mills-splits-with-top-democrats-to-hit-sweeping-nature-of-tribal-sovereignty-effort/> [<https://perma.cc/2ZEY-A48X>].

107. *Id.*

108. *Id.*

a colonial lust for control over Wabanaki people:

The underlying beliefs that have shaped opposition to the proposed amendments to the Maine Settlement Act are rooted in racially motivated paternalism that publicly calls into question the capacity of Wabanaki peoples to govern themselves. These ideas date back to the late 18<sup>th</sup> century and were espoused by the early advocates of Indian genocide during the removal era. The negative valuations that have been assigned to Wabanaki peoples as a group, based on perceived differences and paternalistic leanings, can no longer be used to legitimize hostility toward us or to deny our sovereignty as nations.<sup>109</sup>

Through Mitchell's lens, paternalism and desire for control stalled L.D. 2094, which would provide Maine Tribes the same rights enjoyed by other federally recognized tribes. Apparently, the opponents of L.D. 2094 in the state legislature had found L.D. 766, the narrower VAWA bill, more palatable. Ample data on the prevalence of violence by non-Natives, the failures of the state court system to remedy the issue, and the effectiveness of VAWA in other Tribal courts may have made this concession easier than passing a "sweeping" grant of sovereign authority.<sup>110</sup> Further, because Tribal jurisdiction under L.D. 766 is concurrent with State jurisdiction, this State concession may aim to sweeten Tribal-State relations without giving up anything but a crowded court docket.

Even though L.D. 766 and VAWA's current iteration do not go far enough, any legislation in favor of Tribal sovereignty is a small rejection of the colonialist attitudes that have fueled injustice in the U.S. since its founding. Rather than perceiving the Maine Tribes' exercise of sovereignty as a threat, Maine should embrace the Tribal-State relationship as cooperation. Conceptualizing the relationship between Maine and the Maine Tribes in terms of its history may help Maine see the logic in relinquishing control over the Tribes. Over the years, federal and state governments have oppressed the Tribes culturally and economically, forced a foreign legal system upon them, and thereby diminished the Tribes' ability to operate sustainably.<sup>111</sup> Where tribes can exercise self-determination, they endure less hardship and require fewer external resources.<sup>112</sup>

Even if Maine desires to retain control over the Tribes, it could do so while allowing the Tribes to exercise greater sovereignty. As implied in the summary of L.D. 766 discussed above, grants of Tribal jurisdiction concurrent with State jurisdiction do not affect or preempt State jurisdiction. Thus, allowing the Maine Tribes more authority does not violate MICSA Sections 1725 or 1735 as they are written. Still, the current condition warrants change. Even if incremental, L.D. 766 and VAWA are examples of worthwhile steps toward reviving Tribal sovereignty, and both have made a concrete difference in the lives of Indigenous women on Tribal lands. Moving forward, justice demands that Maine and the federal government continue to pass and modify legislation to release tribes from their grip, enable tribes

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109. Mitchell, *supra* note 65.

110. See Woodward, *supra* note 66.

111. See Brimley, *supra* note 20, at 23.

112. *About Us*, HARVARD PROJ. ON AM. INDIAN ECON. DEV., <https://hpaied.org/about/overview> [<https://perma.cc/PJ8B-D2FE>] (last visited May 6, 2021).

to exercise sovereignty and self-determination, and to allow for fair nation-to-nation relationships.