"Indian Status" on Trial: Race, Stereotypes, and Determinations of Guilt in Indian Status Prosecutions

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For 140 years, the Major Crimes Act ("MCA") has authorized federal criminal jurisdiction over certain enumerated crimes committed by Indians in Indian country. Although Congress specifically said that the MCA applies to crimes committed by an "Indian"—and defined "Indian" in literally dozens of other contexts—Congress has never said who is an "Indian" for purposes of the MCA. In the absence of such a definition, federal courts have developed standards to determine Indian status for purposes of the MCA. Although there is some variation among the Circuit Courts, generally speaking the prosecution must prove that the defendant has some degree of Indian blood and is recognized as an Indian by the federal government or an Indian Tribe. But the courts have also decided that Indian status is a factual (not a legal) question, and therefore have left the determination of Indian status to juries.

The authors are the first to explore how jurors make such determinations. This Article situates their research in the legal scholarship. Initially, study participants assessed photos and names of Indians to determine their stereotypicality. We then presented mock jurors with a summary of evidence presented at a mock MCA trial, with the defendant's photo and name manipulated (high-stereotype, low-stereotype, or not presented), to determine whether stereotypes would influence mock jurors' determinations of Indian status and/or guilt. Although the authors hypothesized that mock jurors presented with a high-stereotype photo and/or name would be more likely (compared with low-stereotype or null conditions) to find that the defendant is an Indian, such was not the result. However, the study yielded two interesting and unexpected results: (1) Exposing mock jurors to certain stereotypes increased the likelihood that a mock juror would find that the

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defendant had committed the underlying crime (simple assault); and (2) a noticeable percentage of mock jurors who said that the defendant was not an Indian nevertheless found the defendant guilty, directly contradicting the jury instructions. This Article raises substantial questions about Congress's choice not to define "Indian" for purposes of the MCA, and about whether jurors should decide who is an "Indian" for purposes of federal criminal jurisdiction in Indian country.

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INTRODUCTION

> At first glance, there appears to be something odd about a court of law in a diverse nation such as ours deciding whether a specific individual is or is not "an Indian." Yet, given the long and complex relationship between the government of the United States and the sovereign tribal nations within its borders, the criminal jurisdiction of the federal government often turns on precisely this question—whether a particular individual "counts" as an Indian—and it is this question that we address once again today.[1]

It is hard to feel sorry for Matthew David Stymiest, who was convicted of assault resulting in serious bodily injury.[2] It was a brutal beating.[3] On or about November 18, 2007,[4] Stymiest and his friends were at a party in rural South Dakota.[5] During the party, Juan Hernandez argued with and assaulted his pregnant girlfriend, Marilyn Roubideaux, and then left.[6] Stymiest, whose girlfriend was Roubideaux's sister,[7] followed Hernandez out, and upon returning said that he had "just fucked up Juan."[8] Waylon Black Lance, who was hosting the party, later found Hernandez "about two hundred yards from the trailer, gasping for air, and choking on his blood from significant head and rib injuries that caused traumatic brain injury, respiratory failure, and fluid overload."[9]

But there is another side to Stymiest's story. Because the assault occurred on the Rosebud Sioux Indian Reservation,[10] if either Stymiest or Hernandez was

1. United States v. Cruz, 554 F.3d 840, 842 (9th Cir. 2009) (footnote omitted).
2. United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009).
3. *Id.*
4. This date is taken from Mr. Stymiest's petition for writ of habeas corpus. Petition for Writ of Habeas Corpus at 7, Stymiest v. Rosebud Sioux Tribe, No. 14-CV-03001 (D.S.D. Mar. 21, 2014).
5. *Stymiest*, 581 F.3d at 762.
6. *Id.*
7. *Id.* at 765.
8. *Id.* at 762.
9. *Id.* (internal quotation marks omitted).
10. *Id.* The federal statute that defines "Indian country" for purposes of federal criminal jurisdiction includes, in part, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . ." 18 U.S.C. § 1151.

an Indian,[11] the assault was a federal offense.[12] Stymiest told Rosebud Sioux Tribe police officers that he was an Indian, specifically, that he was a member of the Leech Lake Band of Ojibwe in Minnesota.[13] It was a lie, which Stymiest later claimed to have made "incorrectly thinking that it would be to his benefit . . . ."[14] The truth was that Stymiest was not a member at Leech Lake—in fact, he was not eligible for membership at Leech Lake or any other Indian tribe.[15]

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11. In this Article, we use "Indian" instead of "Native American" or "Indigenous," and "tribe" instead of "nation" or "tribal nation," because those are the words used in the U.S. Constitution and in the relevant statutes. *See* U.S. CONST. art. I, § 2, cl. 3 (excluding "Indians not taxed" from apportionment); *id.* amend. XIV, § 2; *id.* art. I, § 8, cl. 3 (delegating to Congress "[p]ower . . . [t]o regulate [c]ommerce . . . with the Indian Tribes"); 18 U.S.C. § 1151 (defining "Indian country"); 18 U.S.C. § 1153 (creating exclusive federal jurisdiction over enumerated crimes when committed by "[a]ny Indian . . . within the Indian country"). And we use "member" instead of "citizen" to describe an Indian's relationship with her tribe because that is the term that most often appears both in federal statutes and regulations, *see* Hoss, *Federal Statutory and Regulatory Definitions of "Indian,"* 110 IOWA L. REV. ONLINE 135, 137–54 (2025) (cataloging scores of federal statutory and regulatory definitions of "Indian" without a single reference to tribal citizens), https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2025-03/ILROnline-110-Hoss.pdf., and in most tribes' constitutions. *See, e.g.,* IOWA TRIBE OF KAN. AND NEB. CONST. art. II, [CONST. & BYLAWS OF IOWA TRIBE OF KAN. AND NEB. (amended 2013)] (referring to tribal "membership"); KIOWA INDIAN TRIBE CONST. art. IV, [CONST. OF THE KIOWA INDIAN TRIBE OF OKLA. art. IV (amended 2017)] (same); MCT CONST. art II, [CONST. OF THE MINN. CHIPPEWA TRIBE, art II (amended 1964)] (same); *but see* CHEROKEE NATION CONST. art. IV, [CONST. OF THE CHEROKEE NATION art. IV (amended 1999)] (referring to tribal "citizenship"); MUSCOGEE (CREEK) NATION CONST. art. III [MUSCOGEE (CREEK) NATION CONST. art. III (amended 2021)] (same).

12. *See* 18 U.S.C. § 1153 (establishing federal jurisdiction when an "Indian" commits certain enumerated crimes "within the Indian country"); 18 U.S.C. § 1152 (extending general laws of the United States over crimes committed within "Indian country," but excepting, inter alia, "offenses committed by one Indian against the person or property of another Indian"); *see also* Jessie Young, *Criminal Law and Indian Identity*, *in* SE-AH-DOM EDMO, JESSIE YOUNG, ALAN PARKER & ROBERT MILLER, AMERICAN INDIAN IDENTITY: CITIZENSHIP, MEMBERSHIP, AND BLOOD 95, 95 (2016) ("When a crime is committed in Indian country, the legal status of both the defendant and the victim is the decisive issue that determines which court—tribal, federal, or state—may exercise jurisdiction."). Although nothing in the text of the General Crimes Act ("GCA") exempts non-Indian-on-non-Indian crimes from its ambit, the Supreme Court has held the Act to be inapplicable when no Indians are involved. United States v. McBratney, 104 U.S. 621, 623 (1882).

13. *Stymiest*, 581 F.3d at 764–65. Leech Lake is one of the six component reservations of the Minnesota Chippewa Tribe ("MCT"). *See* CONST. OF THE MINN. CHIPPEWA TRIBE pmbl. (amended 1964)]; *see also* Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 91 Fed. Reg. 4102, 4101 (Jan. 30, 2026) (listing Leech Lake as one of the six component reservations of the Minnesota Chippewa Tribe). Technically speaking, Stymiest's tribal membership, were he eligible, would be with both Leech Lake and the Minnesota Chippewa Tribe. *See* MCT CONST. art. II; *Enrollment Office*, LEECH LAKE BAND OF OJIBWE, https://www.llojibwe.org/admin/enrollment.html (last visited Apr. 14, 2026) (explaining that applications approved at Leech Lake are "forwarded to the Tribal Executive Committee (TEC) of the Minnesota Chippewa Tribe (MCT) for final determination"). Because the case law refers only to Leech Lake, and not to the MCT, this Article will do the same.

14. Petition for Writ of Habeas Corpus, *supra* note 4, at 3. Stymiest had also falsely claimed to be an emergency medical technician. *Id.*

15. *Stymiest*, 581 F.3d at 765. Stymiest's grandfather, Harry Greene, was a Leech Lake member; however, both Stymiest's mother, Debra Eason, and Stymiest lacked the requisite one-quarter blood quantum necessary for membership. *Id.* For MCT and Leech Lake membership requirements, see MCT CONST. art. II, § 1(c); LEECH LAKE BAND OF OJIBWE, *supra* note 13. For an explanation of how blood quantum came to define Indian status, see Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 4 (2006).

Nevertheless, Stymiest had sought recognition as an Indian for years: his (non-Indian) adoptive parents tried to enroll Stymiest in a tribe "so he could receive educational benefits but were unsuccessful because he lacked the necessary quantum of Indian blood."[16] He moved to the Rosebud Reservation and told people he met that he was an Indian.[17] And in multiple visits to Indian Health Service facilities he identified himself as a Leech Lake member.[18] And when prosecuted for lesser offenses by the Rosebud Sioux Tribe, which lacked jurisdiction to prosecute non-Indians,[19] Stymiest never contested the Tribe's jurisdiction.[20] Stymiest, who had spent some time living with his grandfather, a Leech Lake member who "share[d] his heritage" with Stymiest,[21] seemed to want people to see him as an Indian. But he didn't qualify for membership at Leech Lake.[22] He didn't qualify for benefits under the Indian Reorganization Act,[23] the Indian Self-Determination and Education Assistance Act ("ISDEAA"),[24] or any of the dozens of statutes that define "Indian" the same way that the ISDEAA does.[25] If he has children, neither he nor they will have the rights provided by the Indian Child Welfare Act ("ICWA") unless their mother is an Indian.[26]

Stymiest was, however, just Indian enough to be convicted in federal court as an Indian. He was Indian enough to be convicted as an Indian not because Congress or the President has determined that he was an Indian,[27] nor because some tribe did so. Stymiest was convicted[28] in federal court because a jury determined that he was an Indian.[29]

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16. *Stymiest*, 581 F.3d at 765.

17. *Id.*

18. *Id.*

19. The Supreme Court has held that Indian tribes generally lack jurisdiction to prosecute non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). Moreover, the Rosebud Sioux Tribe's ("RST") code prohibited the Tribe from prosecuting non-Indians, although RST prosecutor Jamie Ayers testified at Stymiest's trial that "it is possible for a non-Indian to be prosecuted and convicted in tribal court if he does not object." *Stymiest*, 581 F.3d at 765.

20. *Stymiest*, 581 F.3d at 765.

21. *Id.* (alteration in original).

22. *See supra* note 15 and accompanying text.

23. *See* 25 U.S.C. § 5129 ("The term 'Indian' . . . include[s] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.").

24. *See id.* § 5304(d) ("'Indian' means a person who is a member of an Indian tribe.").

25. *See* Hoss, *supra* note 11, at 137–40.

26. *See* 25 U.S.C. § 1903(3) ("'Indian' means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43."); *id.* § 1903(4) ("'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.").

27. United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) (stating that the MCA "does not define Indian").

28. *Id.* ("The jury found him guilty.").

29. *Id.* at 763 (explaining that Indian status in MCA prosecution "is an element of the crime that must be submitted to and decided by the jury."); *see also* Jury Instructions, No. 10, United States v. Stymiest, No. CR 08-

Let us say that again: Stymiest was convicted in federal court because *a jury* determined that he was an Indian.[30]

The statute under which Stymiest was convicted, most often referred to as the Major Crimes Act ("MCA"),[31] creates exclusive federal jurisdiction over certain enumerated crimes[32] when committed by an "Indian" within "Indian country."[33] The second part of that equation—what constitutes "Indian country"[34]—has received a great deal of attention since the Supreme Court held in *McGirt v. Oklahoma* that Congress never disestablished the Muscogee (Creek) Nation's reservation in eastern Oklahoma[35] and, therefore, that the reservation remains "Indian country" for purposes of the MCA.[36] Since then, the state courts in Oklahoma have relied on *McGirt* to find that other reservations covering most of the eastern half of Oklahoma also remain intact.[37] Little

30006 (D.S.D. June 13, 2008) (requiring jury to find that "[t]he defendant is an Indian" to convict); *id.* No. 12 (same for lesser included offense); *id.* No. 13 (instructing jury on Indian status element).

30. *See* Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 512 (2020) ("In the criminal jurisdiction context, the United States prosecutes 'Indians' for Indian country crimes. This requires proving to a jury that a defendant is an Indian beyond reasonable doubt." (footnote omitted)); Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49, 58 (2017) ("[Indian status] was an element of the crime that must be submitted and decided by a jury.").

31. Young, *supra* note 12, at 97. The statute sometimes is referred to as the Indian Major Crimes Act ("IMCA"). *See* Negonsott v. Samuels, 507 U.S. 99, 102 (1993).

32. *See infra* Subpart.I.B.2.

33. *See supra* note 12. There is no question that the MCA is "exclusive" with respect to the states. *Negonsott*, 507 U.S. at 103 ("[F]ederal jurisdiction over offenses covered by the Indian Major Crimes Act is 'exclusive' of state jurisdiction." (collecting cases)). Whether that jurisdiction is also exclusive of tribal jurisdiction is a more complicated, and still unresolved, question. Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1651 (2016).

34. 18 U.S.C. § 1151 (defining "Indian country").

35. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) ("The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation.").

36. *See generally id.* (holding that the Creek Reservation remains "Indian country" because Congress never explicitly disestablished it).

37. State *ex rel.* Matloff v. Wallace, 497 P.3d 686, 689 (Okla. Crim. App. 2021) (reaffirming recognition of Cherokee, Chickasaw, and Choctaw Reservations); Grayson v. State, 485 P.3d 250, 254 (Okla. Crim. App. 2021) (reaffirming recognition of Seminole Nation Reservation).

surprise, then, that *McGirt* and its progeny have caught the attention of both scholars[38] and practitioners.[39]

The other element of the MCA—Indian status—has received its share of attention from scholars,[40] practitioners,[41] and especially students.[42] But these

38. *E.g.*, Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2049, 2051 (2021); Angelique EagleWoman (*Wambdi A. Was'teWinyan*), *Permanent Homelands Through Treaties with the United States: Restoring Faith in the Tribal Nation-U.S. Relationship in Light of the* McGirt *Decision*, 47 MITCHELL HAMLINE L. REV. 640, 677–84 (2021); Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300, 307 (2021); Elizabeth Kronk Warner & Heather Tanana, *Indian Country Post-*McGirt*: Implications for Traditional Energy Development and Beyond*, 45 HARV. ENV'T. L. REV. 249, 250 (2021); Elizabeth Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in* McGirt v. Oklahoma, U. CHI. L. REV. ONLINE (Aug. 13, 2020), https://lawreviewblog.uchicago.edu/2020/08/13/mcgirt-reese; Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. ONLINE 250, 252 (2020), https://pennlawreview.com/2021/11/24/mcgirt-v-oklahoma-and-the-past-present-and-future-reservation-boundaries; Maggie Blackhawk, *On Power and the Law:* McGirt v. Oklahoma, 2020 SUP. CT. REV. 367, 368 (2020).

39. *E.g.*, Kirke Kickingbird, *The Jurisdictional Landscape of Indian Country After the* McGirt *and* Castro-Huerta *Decisions*, 48 HUM. RTS. 10, 10 (2023); Stephen H. Greetham, *Lessons Learned, Lessons Forgotten: A Tribal Practitioner's Reading of* McGirt *and the Thoughts on the Road Ahead*, 57 TULSA L. REV. 613, 613–14 (2022); Lauren King, *The Indian Treaty Canon and* McGirt v. Oklahoma*: Righting the Ship*, 56 TULSA L. REV. 401, 401 (2021); Riyaz Kanji, David Giampetroni & Philip Tinker, *Reflections on* McGirt v. Oklahoma*: A Case Team Perspective*, 56 TULSA L. REV. 387, 387–88 (2021); Joel West Williams, *The Far End of the Trail of Tears:* McGirt v. Oklahoma, 68 FED. LAW. 12, 12 (2021); Jonodev Chaudhuri, *Reflection on* McGirt v. Oklahoma, 134 HARV. L. REV. F. 82, 82 (2020).

40. *E.g.*, Skibine, *supra* note 30, at 55–64; *see also* Suzianne D. Painter-Thorne, *A Strange Kind of Identity Theft: How Competing Definitions of "Indian" May Deny Individual Identity*, 14 CONN. PUB. INT. L.J. 29, 30 (2014) (discussing Indian identity); P.S. Deloria & Robert Laurence, *What's an Indian: A Conversation About Law School Admissions, Indian Tribal Sovereignty and Affirmative Action*, 44 ARK. L. REV. 1107, 1107–08 (1991) (discussing Indian status more broadly than just the MCA).

41. *E.g.*, Young, *supra* note 12; Daniel Donovan & John Rhodes, *To Be or Not To Be: Who Is an "Indian Person"?*, 73 MONT. L. REV. 61, 61 (2012); Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 241, 241 (2010) [hereinafter Lewis, *Do You Know*]; Brian L. Lewis, *So Close, Yet So Far Away: A Comparative Analysis of Indian Status in Canada and the United States*, 18 WILLAMETTE J. INT'L L. & DISP. RESOL. 38, 39 (2010); Weston Meyring, *"I'm an Indian Outlaw, Half Cherokee and Choctaw": Criminal Jurisdiction and the Question of Indian Status*, 67 MONT. L. REV. 177, 179 (2006); Quintin Cushner & Jon M. Sands, *Blood Should Not Tell: The Outdated "Blood" Test Used to Determine Indian Status in Federal Criminal Prosecution*, FED. LAW., Apr. 2012, at 31, 31; Clay R. Smith, *"Indian" Status: Let a Thousand Flowers Bloom*, ADVOC., Mar. 2003, at 18, 18; *see also* Sterling Paulson, *Convenience and Necessity in the Inconsistent Legal Treatments of Indian Status*, 7 IND. J.L. & SOC. EQUAL. 48, 54 (2019) (discussing Indian status more broadly than just the MCA); Margo S. Brownell, Note *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 283 (2000) (same).

42. *E.g.*, Joshua Zoeller, Note, *Status to Be Determined: Analyzing Indian Status Within the General Crimes Act in a Post-*Castro-Huerta *Landscape*, 68 ST. LOUIS U.L.J. 189, 193 (2023); Avery Locklear, *Are You Native American?*, 100 N.C. L. REV. 118, 148 (2022); Kaylee Snyder, Note, State v. Nobles*: Chance to Settle Needless Jurisdictional Turbulence*, 45 AM. INDIAN L. REV. 361, 361 (2021); Clint Summers, *Rethinking the Federal Indian Status Test: A Look at the Supreme Court's Classification of the Freedmen of the Five Civilized Tribe of Oklahoma*, 7 AM. INDIAN L.J. 193, 194 (2018); Luke Emmer Miles, Note, *A Tale of Two Statutes:* Zepeda *and the Ninth Circuit's Descent into Jurisdictional Madness*, 39 AM. INDIAN L. REV. 269, 269 (2014); Jacqueline F. Langland, Note, *Indian Status Under the Major Crimes Act*, 15 J. GENDER RACE & JUST. 109, 109 (2012); Lindsey Trainor Golden, Note, *Embracing Tribal Sovereignty to Eliminate Criminal Jurisdiction Chaos*, 45 U. MICH. J.L. REFORM 1039, 1042 (2012); Katharine C. Oakley, Comment, *Defining Indian Status for the*

works mostly have focused on the legal standards for determining Indian status, and largely have overlooked the role of the jury, with almost no consideration of how juries *actually* determine Indian status.[43] This Article and its companion piece[44] are the first steps in our effort to remedy this deficiency. They are the first scholarly works to seriously consider the role of the jury in MCA prosecutions.[45] We accept the courts' tests as we find them and ask, instead, how jurors implement those standards.[46] And while the answers we discovered are valuable,[47] many important questions remain, which the Authors plan to tackle in future research.

This Article proceeds in four Parts. The first two Parts detail the legal background that frames the authors' research. Part I traces the development of federal criminal jurisdiction in Indian country.[48] At the Founding, the United States had jurisdiction in Indian country only where it had negotiated for such in a ratified treaty. Later, Congress asserted criminal jurisdiction within Indian country, initially over non-Indians, and then over Indians who committed crimes against non-Indians. But when federal prosecutors sought to exercise criminal jurisdiction over an Indian for killing a fellow tribe member on their reservation, the U.S. Supreme Court held that no treaty or act of Congress gave prosecutors such authority. Motivated by that court decision, Congress passed a law asserting federal criminal jurisdiction over certain Indian-on-Indian crimes within Indian country—a law that was upheld by the Supreme Court, and that remains in force today.

Part II explores the law of Indian status.[49] Congress has defined "Indian" in dozens of statutes, and the Executive has done so in regulations, but those definitions are limited to their specific statutory and regulatory purposes. Congress has not defined "Indian" for purposes of the Major Crimes Act, and the Courts have filled that gap with their own common law tests to determine Indian status, often with confounding results.[50]

Purpose of Federal Criminal Jurisdiction, 35 AM. INDIAN L. REV. 177, 177 (2010); Kevin Meisner, Comment, *Modern Problems of Criminal Jurisdiction in Indian Country*, 17 AM. INDIAN L. REV. 175, 175 (1992); Joseph R. Lux, Note, *When is an Indian Not an "Indian?"*—State v. Daly, 36 S.D. L. REV. 419, 424 (1991); Scott W. Wilson, Comment, *Criminal Jurisdiction in Montana Indian Country*, 47 MONT. L. REV. 513, 513 (1986).

43. *See infra* notes 371–374 and accompanying text.

44. Kimberly Schweitzer & Dan Lewerenz, *The Role of Stereotypes in Jurors' Indian Status Determinations and Guilt Decisions*, 15 BEHAV. SCIS. 824, 825 (2025).

45. To date, the scholarship surrounding the Indian status under the MCA has tended to focus instead the legal standards that courts have employed to determine Indian status, *see infra* Subparts.II.B.1–2, with most recommending some "better" alternative, *see infra* note 374 and accompanying text. Two other articles offer practice tips for courts and attorneys handling Indian status cases. *See* Donovan & Rhodes, *supra* note 41, at 92–96; Smith, *supra* note 41, at 18–21.

46. *See infra* Part.III.

47. *See infra* Part.IV.

48. *See infra* Part.I.

49. *See infra* Part.II.

50. Courts also have a disturbing history of deviating from legislative definitions. *See infra* note 216.

Part III describes our experiment.[51] Initially, we survey the social science surrounding race,[52] stereotypes, and juries. We explain why we designed our experiment around stereotypical physical appearance (specifically the face) and stereotypical names, and how we identified and selected photos and names to test.

The experiment itself proceeded in two Parts. First, we used a pilot study to determine which photographs and names we should use in the principal study (and also asked additional questions, both to disguise from survey participants what we were looking for, and to ensure that other biases did not unintentionally cloud the results of our principal study). Second, our principal study presented mock jurors with the transcripts of closing arguments summarizing evidence in a hypothetical Major Crimes Act prosecution. Mock jurors were randomly assigned to see either a photograph of the defendant that the pilot study had identified as consistent with their stereotypes of Indians, a photograph of the defendant identified as inconsistent with their stereotypes of Indians, or no photograph of the defendant. Likewise, mock jurors were randomly assigned to read and hear the name of the defendant as a name the pilot study had identified as consistent with their stereotypes of Indians, or a name identified as inconsistent with their stereotypes of Indians, or no name. This 3x3 between participants design allowed us to test the effects of the two stereotype variables independently and together. Mock jurors then were presented with jury instructions and asked to answer the questions on a modified verdict form (as well as some additional questions).

Part IV reports and discusses the results of our experiment.[53] We were surprised to find that the stereotypes we thought might influence jurors' determinations of Indian status and guilt did not do so. But that is not the end of the story. Our data showed that stereotypicality *did* affect mock jurors' determinations of whether the defendant committed the underlying crime: simple assault. The data also showed that a significant percentage of mock jurors failed to follow instructions. Specifically, although they were instructed that they could only find the defendant guilty if the prosecution proved beyond a

51. *See infra* Part.III.

52. Although "race" is the term used in most of the social science literature, in the context of Indian status the word is more complicated. The U.S. Supreme Court has described Indians in racial terms, and has done so specifically in the context of determining who is (and isn't) an Indian for purposes of federal criminal jurisdiction. *See* United States v. Rogers, 45 U.S. (4 How.) 567, 572–73 (1846) (Taney, C.J.). For more on *Rogers*, see *infra* Subpart.II.B.1. Yet the Court also has held that when Congress "singles out Indians for particular and special treatment" in carrying out its "unique obligation toward the Indians," it does so based on Indians' political, legal status, not their race. Morton v. Mancari, 417 U.S. 535, 553 n.24, 554–55 (1974). That is why, even though "[t]he concept of equal treatment under the law is central to the ideals of the American system of justice," Edwin L. Hall & Albert A. Simkus, *Inequality in the Types of Sentences Received by Native Americans and Whites*, 13 CRIMINOLOGY 199, 199 (1975), laws that single out Indians for federal criminal jurisdiction do not constitute invidious racial discrimination that would run afoul the Constitution's guarantee of equal protection. United States v. Antelope, 430 U.S. 641, 647–50 (1977).

53. *See infra* Part.IV.

reasonable doubt that the defendant was an Indian, approximately 10 percent of mock jurors who said that the prosecution had not proven the defendant's Indian status beyond a reasonable doubt nevertheless said they would have found the defendant guilty. Both our findings and the limitations of our study suggest a need for additional research.

This Article concludes by outlining avenues for additional research.[54]

I. FEDERAL CRIMINAL JURISDICTION IN INDIAN COUNTRY[55]

It has been said that "[t]he exercise of criminal jurisdiction over Indians and Indian country is a 'complex patchwork of federal, state, and tribal law,' which is better explained by history than by logic."[56] This Part summarizes that history.[57] Subpart I.A describes the earliest assertions of federal criminal jurisdiction in Indian country, which did not presume to include—and for many decades expressly excluded—jurisdiction over Indians within their own communities.[58] Subpart I.B then examines the assertion of federal criminal jurisdiction *over Indians* within Indian country,[59] first through the failed attempt to prosecute a murder within the Great Sioux Reservation,[60] and then through the enactment of the Major Crimes Act, which the Supreme Court upheld.[61]

But first, we define a critical term: "Indian country." Congress has used this as a term of art since 1834, when it defined Indian country to include:

> [A]ll that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river [*sic*], and not within any state to which the Indian title has not been extinguished.[62]

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54. *See infra* Conclusion.

55. Although federal criminal jurisdiction is the norm in Indian country, Congress has authorized some States to exercise criminal jurisdiction over some or all of the Indian country within their borders. *See generally* John J. Francis, Stacy L. Leeds, Aliza Organick & Jelani Jefferson Exum, *Reassessing Concurrent Tribal-State-Federal Criminal Jurisdiction in Kansas*, 59 KAN. L. REV. 949 (2011) (discussing the Kansas Act's grant of concurrent state criminal jurisdiction over Indian country); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975) (discussing Public Law 280, a 1953 statute that transferred civil and criminal jurisdiction, excluding MCA jurisdiction, over reservation Indians from the federal government to five states: California, Minnesota, Nebraska, Oregon, and Wisconsin).

56. United States v. Bruce, 394 F.3d 1215, 1218 (9th Cir. 2005) (quoting Duro v. Reina, 495 U.S. 676, 680 n.1 (1990)). The defendant, Violet Bruce, was convicted of assault of a person under age sixteen under the General Crimes Act, *id.* at 1217, which does not reach Indian-on-Indian crimes, *see* Young, *supra* note 12. Bruce sought to argue as an affirmative defense that both she and the alleged victims were Indians. *Bruce*, 394 F.3d at 1222.

57. For the definitive history, see Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 988–91 (1975).

58. *See infra* Subpart.I.A.

59. *See infra* Subpart.I.B.

60. *See infra* Subpart.I.B.1.

61. *See infra* Subpart.I.B.2.

62. Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729, 729.

But this "broad, and vague" definition[63] left unanswered questions: Were allotted lands within a reservation still "Indian country" for purposes of federal criminal jurisdiction? The Supreme Court answered yes.[64] What about Indian lands not held in trust by the United States, but held by a tribe in fee simple? Again, yes.[65] Indian trust lands outside of a reservation? Still Indian country.[66] What about lands, held for Indian communities, given some designation other than "reservation"?[67] Once again, still Indian country.[68] That case law is incorporated into the current definition of Indian country:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all the land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[69]

Thus, although disputes still arise about whether a crime occurred in Indian country,[70] the geographical element of the federal government's Indian criminal jurisdiction is relatively uncomplicated.

The Indian status element—not so much.

A. JURISDICTION OVER OUTSIDERS

For roughly its first century, the United States did not presume to exercise criminal jurisdiction over Indians in Indian country.[71] Although the Constitution

63. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.05[2], at 53 (Nell Jessup Newton & Kevin K. Washburn eds., 2024).

64. United States v. Celestine, 215 U.S. 278, 288–90 (1909).

65. United States v. Sandoval, 231 U.S. 28, 48 (1913).

66. United States v. Pelican, 232 U.S. 442, 449–51 (1914).

67. The question arose in the context of the Reno Indian Colony in Nevada. United States v. McGowan, 302 U.S. 535, 539 (1938).

68. *Id.* at 538–39 ("Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a 'reservation' or 'colony.' . . . When we view the facts of this case in the light of the relationship which has long existed between the Government and the Indians—and which continues to date—it is not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian country.' We conclude that § 247 of Title 25 does apply to the Reno Colony." (footnotes and citations omitted)).

69. 18 U.S.C. § 1151. The meat of this definition was enacted by Congress in 1948. *See* Act of June 25, 1948, ch. 645, § 1151, 62 Stat. 683, 757. The proviso at the beginning of this definition was added in 1949 and refers to a slightly narrower definition of "Indian country" for two sections of the criminal code addressing liquor in Indian country. Act of May 24, 1949, ch. 139, § 25, 63 Stat. 89, 94.

70. *E.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2478–82 (2020) (affirming that lands within the boundaries of the Muscogee (Creek) Nation are Indian country).

71. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 798 (2006).

delegated to Congress the principal authority for Indian affairs,[72] Congress inherited from England a policy of non-interference in tribes' internal affairs.[73]

That is not to say that Congress was idle. One of the earliest statutes enacted by the new Congress,[74] the 1789 Northwest Ordinance,[75] provided that "[t]he utmost good faith shall always be observed towards the Indians," and that "laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."[76] One year later, Congress first asserted federal criminal jurisdiction in Indian country, just not over Indians.[77] Instead, this first of the Trade and Intercourse Acts[78] prohibited "citizen[s] or inhabitant[s] of the United States" from committing "any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians" within the Indians' homelands.[79] Offenders were subject to federal criminal procedure[80] and to "the same punishment . . . as if the offence had been committed within the jurisdiction of the state or district to which [the offender] may belong."[81] Thus, the first Trade and Intercourse Acts "d[id] not purport to regulate the internal affairs of tribal nations or otherwise impinge upon tribal sovereignty directly. Rather, the targets of the acts are American citizens and others under American jurisdiction."[82]

B. JURISDICTION OVER INDIANS

Throughout much of the Nineteenth Century, the United States balanced the federal law enforcement interest in Indian country with tribal authority over internal disputes. Congress eventually did, in 1817, assert federal criminal jurisdiction over crimes committed by Indians.[83] It provided that "any Indian, or other person" who committed a crime "within any town, district, or territory, belonging to any nation or nations, tribe or tribes," would be subject to the same

72. *See* U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause).

73. Clinton, *supra* note 57, at 953; *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 547 (1832) ("[The king] never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.").

74. Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 940 n.77 (1995).

75. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

76. *Id.* at 52.

77. Trade and Intercourse Act of 1790, ch. 33, § 5, 1 Stat. 137, 138.

78. This first Trade and Intercourse Act was reauthorized four times. Trade and Intercourse Act of 1793, ch. 19, 1 Stat. 329; Trade and Intercourse Act of 1796, ch. 30, 1 Stat. 469; Trade and Intercourse Act of 1799, ch. 45, 1 Stat. 743; Trade and Intercourse Act of 1802, ch. 13, 2 Stat. 139; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 63, § 2.05[2], at 52 (describing the history of the Trade and Intercourse Act). Because these statues prohibited trade and intercourse with the Indians without federal approval, the acts are also known as the Non-Intercourse Acts. KEITH RICHOTTE, JR., THE WORST TRICKSTER STORY EVER TOLD: NATIVE AMERICA, THE SUPREME COURT, AND THE U.S. CONSTITUTION 92–93 (2025).

79. Trade and Intercourse Act of 1790 § 5.

80. *Id.*

81. *Id.*

82. RICHOTTE, *supra* note 78, at 93 (footnotes omitted).

83. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383; Washburn, *supra* note 71, at 793.

punishment "provided by the laws of the United States for the like offences [sic]."[84] That statute, however, expressly exempted "any offence [sic] committed by one Indian against another, within any Indian boundary."[85] This provision is, per Professor Washburn, "the last resort to be used in cases where the Indian tribe refused to provide justice," consistent with "the understanding that tribes were separate and distinct self-governing entities."[86]

In 1834, Congress updated the Trade and Intercourse Acts[87] for the last time.[88] This version extended all federal criminal laws into Indian country,[89] and also carried forward the 1817 Act's exemption for Indian-on-Indian crime.[90] This general idea—that the federal government had criminal jurisdiction over crimes by Indians against non-Indians, and over crimes by non-Indians against Indians, but *not* over crimes by Indians against Indians—was reaffirmed when Congress codified the Revised Statutes in 1874 and 1875.[91] Then, the federal government focused its law enforcement efforts on "preventing violence between Indians and non-Indians."[92]

By the 1870s, however, federal officials were eager to expand federal criminal jurisdiction in Indian country to include Indian-on-Indian crimes. In 1874, Congress considered a bill that would have allowed federal prosecution for certain Indian-on-Indian crimes in Indian country as a tool of assimilation.[93] Senators were skeptical, and the bill failed.[94] But the Secretary of the Interior continued to ask Congress to give federal prosecutors authority to charge Indian-

84. § 1, 3 Stat. at 383.

85. *Id.* § 2.

86. Washburn, *supra* note 71, at 793.

87. Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729.

88. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 63 (describing 1834 act as "the final version of this foundational statute").

89. Trade and Intercourse Act of 1834 § 25 ("*And be it further enacted*, [t]hat so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country . . . .").

90. *Id.* ("*Provided*, [t]he same shall not extend to crimes committed by one Indian against the person or property of another Indian."); *see also* James Winston King, Note, *The Legend of* Crow Dog*: An Examination of Jurisdiction over Intra-Tribal Crimes Not Covered by the Major Crimes Act*, 52 VAND. L. REV. 1479, 1485 (1999) (discussing the exemption for Indian-on-Indian crime).

91. 28 Rev. Stat. §§ 2145–46 (addressing federal criminal jurisdiction and exempting "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe" and cases where "the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively"). In this version, Congress inadvertently failed to exempt Indian-on-Indian crimes. *See Ex parte* Crow Dog, 109 U.S. 556, 558–59 (1883). But the exemption was restored in a corrective act the following year. Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 318 ("Section two thousand one hundred and forty-six is amended by adding, at the end of the first line, the following words: 'crimes committed by one Indian against the person or property of another Indian, nor to.'").

92. Washburn, *supra* note 71, at 796.

93. Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 195 (1989) (federal officials believed "the coercive power of the criminal law" would advance assimilation efforts).

94. Washburn, *supra* note 71, at 799.

on-Indian crimes.[95] Ultimately, what changed Congress's mind was a high-profile murder on the Great Sioux Reservation.

1. Crow Dog's Case

Crow Dog's case[96] is universally acknowledged to be a turning point in the Indian country criminal jurisdiction scheme.[97]

Spotted Tail and Crow Dog have been described as "political rival[s]"[98] on the Great Sioux Reservation. In the period after the Great Sioux War,[99] both men took on roles as peacekeepers.[100] Spotted Tail was so favored by the United States that, in 1876, federal officials proclaimed him to be "head chief of all the Sioux bands," although his tribesmen did not necessarily recognize the title.[101] Three years later, federal officials appointed Crow Dog as a captain of the tribal police force on the Rosebud Indian Reservation.[102] But in a community that traditionally governed itself by council and through consensus,[103] Crow Dog and others grew frustrated over what they saw as Spotted Tail's top-down leadership style,[104] including his unilateral decisions both to send Rosebud children to the Carlisle Indian Industrial School[105] and to recall his own children a year later.[106] When Crow Dog, in his role as captain of the police, objected to Spotted Tail's

95. Harring, *supra* note 93, at 224.

96. *Ex parte Crow Dog*, 109 U.S. 556.

97. *See, e.g.*, Anthony G. Gulig & Sidney L. Harring, *"An Indian Cannot Get a Morsel of Pork . . . ." A Retrospective on* Crow Dog*,* Lone Wolf*,* Blackbird*, Tribal Sovereignty, Indian Land, and Writing Indian Legal History*, 38 TULSA L. REV. 87, 89 (2002) (describing *Crow Dog* as "seminal"); King, *supra* note 90, at 1486 (calling *Crow Dog* "[t]he most important case affecting the development of Indian criminal justice").

98. Richmond L. Clow, *The Anatomy of a Lakota Shooting: Crow Dog and Spotted Tail, 1879-1881*, 28 S.D. HIST. 209, 209 (1998); *see also* RICHOTTE, *supra* note 78, at 1 ("The motivation for the killing was assuredly political in nature—both men vied for leadership authority within the community—but it may have had personal elements as well.").

99. *See, e.g.*, Zia Akhtar, *Curse of the Black Hills: Breach of Treaty and Due Process Under the 5th Amendment*, 15 INT'L J. HUM. RTS. 397, 399 (2011) ("This was because in 1876, the year of the Great Sioux War, the discovery of gold in the [Black H]ills led to the invasion by the miners who were often accompanied by cavalry detachments."); Sarah Krakoff, *The Last Indian Raid in Kansas: Context, Colonialism, and Philip P. Frickey's Contributions to American Indian Law*, 98 CALIF. L. REV. 1253, 1281 (2010) ("During the Great Sioux War, the Northern Cheyenne fought alongside the Lakota, and some Northern Cheyenne fled to live with the Lakota first after the Battle at Little Big Horn, and again after Mackenzie burned the Northern Cheyenne villages.").

100. Clow, *supra* note 98, at 212. Crow Dog was critical in dissuading his tribesmen from avenging the murder of Crazy Horse. *Id.* Spotted Tail was favored by the United States, who saw him as a counterweight against Sitting Bull and Crazy Horse. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 168 (1983).

101. Clow, *supra* note 98, at 212 n.8.

102. *Id.* at 213.

103. *Id.* at 210.

104. *Id.* at 214–17.

105. *Id.* at 214. Founded in 1879, Carlisle was the first of the Federal Government's off-reservation Indian boarding schools. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1831 (2019); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 63, § 2.08[1][b], at 78. For more on Indian boarding schools, see generally DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE 1875-1928 (1995).

106. Clow, *supra* note 98, at 214–15.

having collected (and apparently kept for himself) leasing fees owed by non-Indian ranchers, Spotted Tail sought to have Crow Dog removed from his position.[107] Crow Dog later accused Spotted Tail of taking under-the-table payments from the railroads, and the reservation agent accused Crow Dog of trying to fragment the Great Sioux Nation.[108] Crow Dog was removed from the reservation police force for a second time, and later said he feared for his life.[109]

The disagreements between Crow Dog and Spotted Tail came to a head in the summer of 1881. After a tribal council meeting that August, at which Crow Dog and others were critical of Spotted Tail, Crow Dog shot and killed Spotted Tail.[110] Lakota custom held that personal conflicts, even murders, were to be resolved among the parties.[111] Nevertheless, because of the prominence of the individuals involved, a council was convened to determine what might make for appropriate restitution.[112] The council recommended, and Crow Dog delivered to Spotted Tail's family, a gift of eight horses, a blanket, and some cash[113]—restitution that was "designed to end the dispute and return peace to the community."[114] Spotted Tail's family accepted the gift,[115] which was consistent with Lakota notions of justice.[116]

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107. Clow, *supra* note 98, at 217; GEORGE E. HYDE, SPOTTED TAIL'S FOLK: A HISTORY OF THE BRULÉ SIOUX 281–82 (1961).

108. Clow, *supra* note 98, at 219–20.

109. *Id.* at 221.

110. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 1 (1994); Clow, *supra* note 98, at 223. The historical record is unclear as to whether Crow Dog acted in self-defense. *Id.*

111. Clow, *supra* note 98, at 224.

112. *Id.* Some have described this as a "tribal court" proceeding. *E.g.*, Locklear, *supra* note 42, at 122 ("[T]he matter was resolved in tribal court."). More likely, the forum more closely resembled a traditional tribal council than a modern court, and its decision was more a recommendation than a binding judgment. Clow, *supra* note 98, at 224.

113. HARRING, *supra* note 110; Clow, *supra* note 98 at 224. The amount of cash is disputed. *Compare* HARRING, *supra* note 110 ($600 cash), *with* Clow, *supra* note 98, at 224 ($50 cash). Professor Richotte, citing Harring's figure of $600, calls it "an astounding sum that testified to the significance of the family's and community's loss." RICHOTTE, *supra* note 78, at 2. Professor Washburn, too, goes with $600, which he says, "must have been a small fortune at the time . . . ." Washburn, *supra* note 71, at 801.

114. Clow, *supra* note 98; *see also* RICHOTTE, *supra* note 78, at 5 ("[F]or the Sicangu Lakota, and for many tribal nations, the focus of the criminal justice system was not on punishing the offender but rather on making the victim (or the victim's family) as whole as possible. Restoring a sense of balance and harmony within the community was the foremost goal and best accomplished through restitution rather than punishment."); Young, *supra* note 12, at 97 (restitution "restored tribal harmony").

115. HARRING, *supra* note 110, at 105; Clow, *supra* note 98, at 224 ("Spotted Tail's [spirit], his family, and justice all were supposed to be satisfied." (alteration in original) (quoting ESTELLINE BENNETT, OLD DEADWOOD DAYS 252 (1935)); *see also* Young, *supra* note 12, at 97 ("As far as both of the families were concerned, the matter was closed.").

116. Clow, *supra* note 98, at 200. Crow Dog's case prompted many Lakota to trade their firearms for farming equipment—almost literally beating swords into plowshares—in what Clow described as a "show of unity" and a "return[ ] . . . to their own political tradition." *Id.* at 227.

The federal government was not satisfied.[117] The clerk to the reservation agent had Crow Dog arrested on federal charges, asserting that the Fort Laramie Treaty provided the federal government with criminal jurisdiction.[118] Outsiders characterized the killing as "a cold-blooded political assassination," and insisted that Crow Dog should be tried in the territorial courts.[119] In March 1882, Crow Dog was tried in the territorial court in Deadwood, convicted of murder, and sentenced to death by hanging.[120]

Crow Dog's bid for post-conviction relief ultimately reached the U.S. Supreme Court.[121] Government and law enforcement officials in the Dakota Territory immediately began raising the money necessary to defend the case,[122] which they saw as a test case for their assertion of federal criminal jurisdiction over intratribal crimes.[123] Although the Revised Statutes in effect at the time expressly exempted from federal jurisdiction both crimes committed by one Indian against the person or property of another Indian and "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe,"[124] the United States argued that the Sioux Indians had consented to federal criminal jurisdiction both by treaty[125] and by treaty

117. DELORIA & LYTLE, *supra* note 100, at 168–69. U.S. Supreme Court Justice Ketanji Brown Jackson, when she served on the U.S. Sentencing Commission, often discussed the contrasting notions of justice in Crow Dog's case. *See* Memorandum from Joel West Williams, Senior Staff Att'y, Native Am. Rts. Fund, on The Nomination of Ketanji Brown Jackson to the Supreme Court of the United States: An Indian Law Perspective, to Tribal Leaders & Nat'l Cong. of Am. Indians–Project on the Judiciary 4 (Mar. 17, 2022).

118. Clow, *supra* note 98, at 226. Professor Washburn questions whether the federal officials pushing Crow Dog's prosecution believed their own assertions of jurisdiction. Washburn, *supra* note 71, at 800 (citing Harring, *supra* note 93, at 204).

119. Clow, *supra* note 98 (quoting HYDE, *supra* note 107, at 334). In addition, some Dakota Territory residents hoped to exploit outrage over the *Crow Dog* decision to expand the authority of the future State of South Dakota over Indian lands. *See* Richmond L. Clow, *A Dream Deferred: Crow Dog's Territorial Trials and the Push for Statehood*, 37 S.D. HIST. 46, 49 (2007) ("Off the reservation, boosters of statehood for South Dakota viewed the case as a possible way to assert jurisdiction over the Lakotas and open their reservation lands to non-Indian settlement and development.").

120. *Ex parte* Crow Dog, 109 U.S. 556, 557 (1883); Washburn, *supra* note 71, at 801; Clow, *supra* note 98, at 226.

121. *Ex parte Crow Dog*, 109 U.S. at 557.

122. HARRING, *supra* note 110, at 126.

123. RICHOTTE, *supra* note 78, at 4.

124. *See supra* note 91 and accompanying text.

125. *Ex parte Crow Dog*, 109 U.S. at 562. The relevant treaty provision stated:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws . . . .

Treaty with the Sioux Nation, Sioux Nation-U.S., art I., Feb. 16, 1869, 15 Stat. 635, 635. For more on "bad man" provisions in Indian treaties, see Note, *A Bad Man Is Hard to Find*, 127 HARV. L. REV. 2521, 2521 (2017).

substitute.[126] The Court was not persuaded.[127] Neither the treaty nor the treaty substitute expressly repealed the exemptions in the Revised Statutes (and prior acts dating back to 1817) for Indian-on-Indian crime and for crimes already punished by an Indian tribe.[128] "To justify such a departure," the Court wrote, "requires a clear expression of the intention of Congress, and that we have not been able to find."[129]

So Crow Dog would go free,[130] but that was not the end of the story. "In a nation that takes pride in its 'separation of powers' among 'three coequal branches of our Government,'"[131] sometimes those branches find themselves in conversation with one another. Professor Keith Richotte, Jr., describes Crow Dog's case as just such a conversation: the Executive declared that it wanted authority to prosecute Indians for intra-tribal crimes; the Court said that the Executive could have that authority only if Congress expressly gave it to him.[132] And Congress was listening.

2. The Major Crimes Act

The Supreme Court's decision in *Crow Dog* set the stage for the federal criminal jurisdiction scheme that continues to this day. "Pressure on Congress came from two different directions"[133]: both from those who saw Lakota justice as inimical to the assimilationist project that characterized federal policy toward

126. *Ex parte Crow Dog*, 109 U.S. at 568. In 1871, Congress unilaterally declared an end to Indian treatymaking. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71). Thus, thereafter Congress conducted Indian affairs instead through the statutory process of bicameralism and presentment. Nevertheless, the federal government continued to negotiate the terms of the federal-tribal relationship with Indian tribes, and the statutes that resulted are what scholars often refer to as "treaty substitutes." *See, e.g.*, FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 311–13 (1994); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 8, 64, 101 (1987). Here, the statutory language relied upon by the United States, in a treaty substitute with the Sioux, provided: "[A]nd Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life." Act of Feb. 28, 1877, ch. 72, art. VIII, 19 Stat. 254, 256.

127. *Ex parte Crow Dog*, 109 U.S. at 568–72.

128. *Id.* at 570.

129. *Id.* at 572.

130. Gulig & Harring, *supra* note 97 ("[Crow Dog] lived a long life, on a far corner of the Brule reservation, proclaiming the superiority of traditional Indian ways, resisting allotment as long as he could, and denouncing the American assault on tribal life."); *see also* HARRING, *supra* note 110, at 132–33 (discussing Crow Dog's freedom).

131. Dan Lewerenz, *Federal Indian Law in a Time of Judicial Self-Aggrandizement*, 77 STAN. L. REV. ONLINE 121, 123 (2025) (quoting Clinton v. Jones, 520 U.S. 681, 699 (1997)); *see also* Blackhawk, *supra* note 105, at 1815 (asserting that separation of powers is "[a]t the heart of our constitutional theory").

132. RICHOTTE, *supra* note 78, at 8 ("Justice Matthews was very much 'talking' to Congress through this opinion. . . . [I]t is difficult to understand Matthews's assertion it would take a 'clear expression of the intention of Congress' for the Supreme Court to find jurisdiction as anything other than an open invitation to Congress to change the circumstances."); *see also* Washburn, *supra* note 71, at 803 (explaining that the Court's ruling "opened a door," and effectively "invited Congress to enact law creating such jurisdiction").

133. King, *supra* note 90, at 1487.

Indians,[134] and from those who were "shocked" that the Court ordered the release of a killer based on what could be seen as a technicality.[135] Congress responded[136] to the Supreme Court's decision[137] by attaching to a Post Office funding bill[138]—without any public hearing or discussion[139]—a provision now known as the Major Crimes Act, which subjected Indians to U.S. Territorial laws for seven major crimes: "murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny."[140] Consistent with other statutes of its era, the Major Crimes Act "intruded upon the inner workings of tribal nations and sought to reshape Native lives, perspectives, and governance."[141]

Again, the question ended up at the Supreme Court, which affirmed the MCA just a year after it was enacted.[142] *United States v. Kagama* concerned the murder of an Indian named Iyouse[143] by two other Indians[144] on the Hoopa Valley Reservation in northern California.[145] The defendants did not deny that

134. *Id.* at 1487–88; *see also* RICHOTTE, *supra* note 78, at 2–4 (describing the use of the Major Crimes Act to achieve assimilationist purposes); DELORIA & LYTLE, *supra* note 100, at 169. For a description of the allotment and assimilation era, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 63, § 2.08, at 77–103.

135. Gulig & Harring, *supra* note 97; King, *supra* note 90, at 1488; DELORIA & LYTLE, *supra* note 100, at 170. Crow Dog was depicted as having escaped punishment entirely. HARRING, *supra* note 110, at 136–37.

136. It took the high-profile killing of Spotted Tail to persuade Congress to extend federal criminal jurisdiction over Indian-on-Indian crimes in Indian country; the Executive Branch needed no such persuasion. HARRING, *supra* note 110, at 134 ("Since 1874, the BIA had been attempting to persuade Congress to extend federal jurisdiction over certain serious crimes committed among Indians but had been singularly unsuccessful.").

137. Keeble v. United States, 412 U.S. 205, 209 (1973) ("The Major Crimes Act was passed by Congress in direct response to the decision of this Court in *Ex parte Crow Dog*." (citation omitted)); *see also* Lewis, *Do You Know*, *supra* note 41, at 247 ("*Ex Parte Crow Dog*'s outcome was the impetus for the Major Crimes Act."); Gulig & Harring, *supra* note 97, at 90 n.18 ("The Major Crimes Act of 1885 was Congress's response to the United States Supreme Court's *Crow Dog* decision."); King, *supra* note 90, at 1480 ("Alarm in Congress over the perceived gap in law enforcement led to the Major Crimes Act . . . .").

138. Act of Mar. 3, 1885, ch. 342, 23 Stat. 385.

139. Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1077, 1080, 1082 (2010).

140. *Id.* at 1076 n.42. Since then, the MCA has been amended several times, including to add the crimes of kidnapping, maiming, felony murder, incest, felony assault, assault of a minor, and felony child abuse or neglect. 18 U.S.C. § 1153. Some have described the MCA as divesting tribes of jurisdiction over these crimes. *E.g.*, King, *supra* note 90, at 1488 ("The [MCA] took jurisdiction from the tribes for enumerated 'serious' crimes and conferred it on the federal government."). However, because nothing in the MCA's text expressly divests tribes of their inherent jurisdiction, a better view is that tribes retain concurrent jurisdiction. *See* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 559 n.295 (1976).

141. RICHOTTE, *supra* note 78, at 144.

142. *Id.* at 9 ("Congress passed the Major Crimes Act, but this in and of itself did not settle the question of American jurisdiction over Native individuals on tribal lands. Eventually the constitutionality of the Major Crimes Act would be tested.").

143. 118 U.S. 375, 376 (1886). Iyouse was also known as "Ike." *Id.*

144. Kagama, a.k.a. "Pactah Billy," was charged with the murder; Mahawaha, a.k.a. "Ben," was charged with aiding and abetting. *Id.*

145. Or so says the Court. *Id.* Professor Richotte says otherwise. RICHOTTE, *supra* note 78, at 9 ("[T]he dispute did not take place on tribal lands but on state lands, meaning that the federal government should not have been able to assert jurisdiction under the Major Crimes Act.").

they had killed Iyouse,[146] but argued instead that the federal government had no jurisdiction over the crime because all involved were Indians.[147] The Court considered each of the Constitution's references to Indians.[148] After first finding that the Apportionment Clause[149] was of little assistance, the Court turned to the Commerce Clause.[150] The United States argued that the MCA was an exercise of Congress's power to regulate Indian commerce.[151] But the Court said that only "a very strained construction" could bring a criminal law unrelated to "trade and intercourse" within the bounds of the Commerce Clause.[152] Although the Court found no text in the Constitution authorizing the United States to impose federal criminal law on Indian-on-Indian crime in Indian country, the Court nonetheless held that the MCA was constitutional.[153]

If our federal government is not one with general powers of governance, but rather one of limited and enumerated powers,[154] and if those enumerations must be expressed in the Constitution,[155] how could that be?[156] First, the Court bent precedent to its breaking point. Recall that the Court in *Cherokee Nation* had held that Indian tribes were neither States nor Foreign Nations, but rather "domestic dependent nations."[157] So when the *Kagama* court wrote that "these tribes were neither States nor nations,"[158] it had not yet strayed. But two pages

146. *Kagama,* 118 U.S. at 375 ("The questions certified arise on a demurrer . . . .").

147. *Id.* at 375–76.

148. *Id.* at 378–79.

149. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

150. *Kagama*, 118 U.S. at 378.

151. *Id.* ("This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes.").

152. *Id.* at 378–79.

153. *Id.* at 383–84.

154. Nat'l Fed. of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 534 (2012) ("The Federal Government 'is acknowledged by all to be one of enumerated powers.' That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers." (citation omitted) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819))); *see also* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578 (2014) ("The federal government is a government of limited and enumerated powers. Every law student learns this formula."); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 237–41 (1984) (discussing the application of the doctrine of enumerated powers in Indian affairs); *cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–95 (1824) ("[T]he enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated . . . .").

155. *NFIB*, 567 U.S. at 534–35 ("The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.'" (quoting *McCulloch*, 17 U.S. at 405)).

156. One possible answer is that the support for the enumeration theory is not as strong as it appears. *See, e.g.*, Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971, 973–79 (2024) (challenging the originalist case for enumerationism); Primus, *supra* note 154, at 588–89 (describing Congressional powers derived not from text, but from constitutional structure, and arguing that "it is more accurate to say that Congress can act only on the basis of its *delegated* powers, which is a larger set than its *enumerated* powers." (emphasis in original)).

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

158. *Kagama*, 118 U.S. at 382.

later, the Court twisted the word "dependent" in a way that Chief Justice Marshall could never have anticipated, writing that tribes were "communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights."[159] This description of Indian tribes bears no resemblance to the political actors that Chief Justice Marshall described in *Cherokee Nation*[160] and *Worcester*.[161] Next, the Court asserted that the MCA was necessary for the protection of the Indians themselves.[162] The Court concluded Congress's power to regulate internal tribal affairs arose from the Indians' very need.[163] Nearly a century later, when the Supreme Court wrote that "Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country,"[164] it did not cite the Constitution itself as authority; rather, it cited *Kagama*.[165]

This mélange of whole cloth and racism[166] is the reason that the Major Crimes Act continues in effect today.

* * *

And so we have our jurisdictional scheme for Indian country: If an Indian commits a major crime and the victim is also Indian, then the Major Crimes Act applies.[167] If a non-Indian commits a crime against an Indian, the General Crimes Act ("GCA") gives the federal government jurisdiction;[168] same if an

159. *Id.* at 384.

160. *Cherokee Nation*, 30 U.S. at 16 ("[The Cherokee Nation] ha[s] been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community.").

161. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556–57 (1832) ("From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States.").

162. *Kagama*, 118 U.S. at 384 ("[Tribes] 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."); *see also* RICHOTTE, *supra* note 78, at 14–15 ("explaining that the *Kagama* Court justified its decision by asserting that the United States needed "to save [the Indians] from themselves and others," and therefore "that the Major Crimes Act is valid even though there is no constitutional basis for the law.").

163. *Kagama*, 118 U.S. at 384 ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen."); *see also* RICHOTTE, *supra* note 78, at 89–90 (explaining that the idea that the United States has plenary power in Indian affairs arises from assertions of Indians' inferiority and dependence).

164. United States v. Antelope, 430 U.S. 641, 648 (1977).

165. *Id.* Credit to Professor Richotte for this observation. RICHOTTE, *supra* note 78, at 101.

166. RICHOTTE, *supra* note 78, at 23.

167. 18 U.S.C. § 1153.

168. *Id.* § 1152. That jurisdiction is now understood to be concurrent with the State. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022).

Indian commits a crime against a non-Indian (with some exceptions).[169] And if a non-Indian commits a crime against another non-Indian in Indian country, then state law applies.[170]

Which means that courts, in those cases, often are tasked with determining whether someone—a defendant, or a victim, or both—is an Indian.

II. WHO IS AN "INDIAN"?

It is hard to know how many Indians there are in the United States. The U.S. Census Bureau estimated that in 2024 there were approximately 4.4 million persons in the United States who identified only as American Indian or Alaska Native.[171] The number rises to some 7 million when persons who identify as American Indian or Alaska Native in combination with one or more other races are included.[172] But who, precisely, are these numbers counting?

Sociologist Eva Marie Garroutte identifies four different (but, at times, overlapping) methods of determining (for lack of a better word) Indianness:[173] legal,[174] biological,[175] cultural,[176] and self-identification.[177] The Census Bureau's count is based on self-identification: The Bureau simply asks respondents how they identify themselves; it does not ask for any verification of, for example, tribal membership or Indian ancestry or cultural practice.[178] And

169. 18 U.S.C. § 1152; *see also* United States v. Prentiss, 256 F.3d 972, 974 (10th Cir. 2001) (en banc) (per curiam) ("[GCA] establishes federal jurisdiction over interracial crimes only (i.e., when the defendant is an Indian and the victim is a non-Indian, or vice versa)."). In some cases, the federal Government charges a defendant both as an Indian under the Major Crimes Act *and*, in the alternative, as a non-Indian under the General Crimes Act. *E.g.*, United States v. King, No. 25-5014, Slip op. (10th Cir. Apr. 21, 2026); United States v. Pemberton, 405 F.3d 656, 658 (8th Cir. 2005); United States v. Driver, 755 F. Supp. 885, 887 (D.S.D.), *aff'd*, 945 F.2d 1410 (8th Cir. 1991).

170. United States v. McBratney, 104 U.S. 621, 624 (1882).

171. The estimate of 4.4 million was derived from the base population of 340,110,988, and the Census Bureau's estimate that 1.3 percent of the U.S. population identifies only as American Indian or Alaska Native. *Quick Facts*, U.S. CENSUS BUREAU (July 1, 2024) [hereinafter CENSUS BUREAU, *Quick Facts*], https://www.census.gov/quickfacts/fact/table/US/PST045224. Five years earlier, the Census Bureau had estimated a base population of 328,239,523, which included 4,188,092 persons who identified only as American Indian or Alaska Native. *See 2019 Population Estimates by Age, Sex, Race and Hispanic Origin*, U.S. CENSUS BUREAU (June 25, 2020) [hereinafter CENSUS BUREAU, *2019 Population Estimates*], https://www2.census.gov/programs-surveys/popest/tables/2010-2019/national/asrh/nc-est2019-sr11h.xlsx.

172. *See* CENSUS BUREAU, *2019 Population Estimates*, *supra* note 171.

173. EVA MARIE GARROUTTE, REAL INDIANS: IDENTITY AND THE SURVIVAL OF NATIVE AMERICA 11 (2003).

174. *Id.* at 14–37.

175. *Id.* at 38–60.

176. *Id.* at 61–81; *see also* FERGUS M. BORDEWICH, KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY 66–67 (1997) (discussing the difficulty of defining an Indian due to "generations of intermarriage and adaptation"). Garroutte describes "[c]ultural definitions of Indianness" as "conceptually fuzzy" and "difficult to formulate." GARROUTTE, *supra* note 173, at 63.

177. GARROUTTE, *supra* note 173, at 82–98; *see also* Deloria & Laurence, *supra* note 40, at 1108 (discussing "enrollment in a federally recognized Indian tribe" and "self-identifi[cation]" as categories of Indian identity).

178. Bill Piatt, Moises Gonzales & Katja Wolf, *Law Schools Harm Genízaros and Other Indigenous People by Misunderstanding ABA Policy*, 49 N.M. L. REV. 236, 243 (2019); Russell Thornton, *Tribal Membership Requirements and the Demography of 'Old' and 'New' Native Americans*, 16 POPULATION RSCH. & POL'Y REV. 33, 34 (1997); BORDEWICH, *supra* note 176, at 66.

scholars estimate that only about half of the people who self-identify as Indians to the Census Bureau are members of federally recognized tribes.[179]

This Part tackles a subject that has been described as "naggingly elusive,"[180] and "the question at the core of Federal Indian law."[181] Here, we discuss *legal* determinations of Indianness, for it is the law—either federal Indian law or tribal law[182]—that singles out Indians for special treatment. As most Indians are acutely aware, Indian status is "tied to nearly every major life decision—birth, death, marriage, education, medical services, housing, criminal and civil proceedings, public safety, artistic expression, public health, child welfare, and religious freedom."[183] That is particularly true in the context of criminal law.[184] The unique legal status of Indians as recognized by the federal

179. Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 558 (2021); Eric Beckenhauer, Note, *Redefining Race: Can Genetic Testing Provide Biological Proof of Indian Ethnicity?*, 56 STAN. L. REV. 161, 167 (2003); *but see* BORDEWICH, *supra* note 176, at 67 (explaining that in mid-1990s approximately 1 million people met some federal definition of Indian, while approximately half a million "ethnic Indians" did not).

180. BORDEWICH, *supra* note 176, at 66.

181. Brownell, *supra* note 41, at 275. Professor Fletcher, who led the American Law Institute's creation of the first *Restatement of the Law of American Indians*, wrote that defining "Indian" was one of the project's most difficult tasks. Matthew L.M. Fletcher, *The Restatement of the Law for American Indians: The Process and Why It Matters*, 80 MONT. L. REV. 1, 2–4 (2019).

182. Professor Reese does an excellent job articulating the differences between the two fields. *See generally* Reese, *supra* note 179.

183. Se-ah-dom Edmo, *The Rhetoric of Indian Identity*, *in* AMERICAN INDIAN IDENTITY: CITIZENSHIP, MEMBERSHIP, AND BLOOD, *supra* note 12, at 49, 51; *see also* Adrienne Keene, *Love in the Time of Blood Quantum*, *in* THE GREAT VANISHING ACT: BLOOD QUANTUM AND THE FUTURE OF NATIVE NATIONS 3, 6 (Kathleen Ratteree & Norbert Hill eds., 2017) (reporting an Ojibwe woman's anxiety that if she has children with a non-Indian, those children might not be eligible for tribal membership); *cf.* GAIL K. SHEFFIELD, THE ARBITRARY INDIAN: THE INDIAN ARTS AND CRAFTS ACT OF 1990, at 32 (1997) ("Federal Indian law is pervasive; 'Law dominates Indian life in a way not duplicated in other segments of Indian society.'" (quoting FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW vii (Rennard Strickland & Charles F. Wilkinson eds., 1982)); Carole Goldberg-Ambrose, *Of Native American and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1124 (1994) ("[T]he experience of native peoples in the United States is entwined with law to an unusual degree."); Deloria & Laurence, *supra* note 40, at 1108 ("Various federal entitlements are based on [tribal] enrollment.").

184. United States v. Bruce, 394 F.3d 1215, 1222 (9th Cir. 2005) ("[T]he question of who is an Indian bears significant legal consequences.").

government[185] has been affirmed by Congress,[186] the Executive,[187] and the Courts.[188]

Who qualifies for this special status?[189] As explained in this Part, that depends on the circumstances. Subpart II.A shows how Congress and the Executive have defined "Indian" in literally dozens of statutes and regulations, using a variety of different definitions to govern a variety of different situations.[190] Alas, neither Congress nor the Executive has provided a definition

185. A separate, but related, question concerns the constitutionality of State determinations of Indian status. *See* Fletcher, *supra* note 30, at 553.

186. *See, e.g.*, Native American Housing and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (codified at 25 U.S.C. § 4101(2)) ("The Congress finds that . . . there exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people."); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. § 1901(2)) ("Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds . . . that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources."); Indian Health Care Improvement Act, Pub L. No. 94-437, 90 Stat. 1401 (1976) (codified at 25 U.S.C. § 1602) ("Congress hereby declares that it is the policy of this Nation, [to] fulfill[ ] . . . its special responsibilities and legal obligation to the American Indian people . . . .").

187. *See, e.g.*, Exec. Order 13,175, 65 Fed. Reg. 67249 (Nov. 9, 2000) ("The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes."); Memorandum from the Solicitor, U.S. Dep't of the Interior, on Reaffirmation of the United States' Unique Trust Relationship with Indian Tribes and Related Indian Law Principles, to the Secretary, U.S. Dep't of the Interior 1 (Jan. 18, 2017) ("This Opinion reaffirms the longstanding federal Indian law principles concerning the unique legal relationship between the United States and Indian tribes.").

188. Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) ("[T]his Court has already held that [Indian] treaties confer enforceable special benefits on signatory Indian tribes, and has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians.'" (citations omitted) (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974))); United States v. Antelope, 430 U.S. 641, 645 (1977) (explaining that because "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution," the Court has repeatedly sustained such legislation against unlawful racial discrimination claims); Fisher v. Dist. Ct. of the Sixteenth Jud. Dist. of Mont., 424 U.S. 382, 390–91 (1976) ("[tribal court jurisdiction over an adoption proceeding involving tribal member] does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government."); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsrv., 425 U.S. 463, 479–80 (1976) (forcing states to respect Indian tax immunity in federal law does not create an equal protection issue); *Mancari*, 417 U.S. at 554–55 ("On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment." (collecting cases)); *cf.* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) ("[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else."). In 2023, the Court declined an opportunity to overrule this line of cases when it held that the plaintiffs in *Haaland v. Brackeen* lacked standing to bring their equal protection claims. 143 S. Ct. 1609, 1637–41 (2023).

189. Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 1 (2012) ("No one can rationally devise a boundary line between who is an American Indian and who is not.").

190. *See infra* Subpart.II.A.

of "Indian" for purposes of the Major Crimes Act.[191] In the absence of instruction from the political branches, as Subpart II.B demonstrates, the courts have resorted to common law to develop their own standards for who is, and is not, an Indian.[192] First, the Supreme Court opined on who *is not* an Indian for purposes of federal criminal jurisdiction in Indian country,[193] and then the lower courts used that framework to determine who *is* an Indian.[194] Ultimately, the determination of whether an individual defendant is an Indian for purposes of federal criminal jurisdiction in Indian country rests with the jury.[195]

A. STATUTORY AND REGULATORY DEFINITIONS

"There is no single definition of 'Indian'" for purposes of federal Indian law[196]—far from it. One article[197] frequently cited on the subject[198] reported that, "[a]ccording to a 1978 congressional survey, federal legislation contained thirty-three definitions of Indian."[199] A more recent survey of the U.S. Code found more than seventy code sections defining "Indian," not counting sections defining related terms such as "Urban Indian," "Native American," "Alaska Native."[200] And while seventy code sections defining "Indian" is not the same as seventy different definitions—Professor Hoss lists thirty-four code sections

191. *See* 18 U.S.C. § 1153 (no definition of "Indian"); United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) ("The statute does not define Indian . . . .").

192. *See* infra Subpart.II.B.

193. United States v. Rogers, 45 U.S. (4 How.) 567 (1846); *see infra* Subpart.II.B.1.

194. *See infra* Subpart.II.B.2.

195. *See infra* Subpart.I.B.3.

196. SHEFFIELD, *supra* note 183, at 84.

197. Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461 (1991).

198. *See* Meyring, *supra* note 41, at 185 (citing O'Brien, *supra* note 197); Christine Metteer, *The Trust Doctrine, Sovereignty, and Membership: Determining Who Is Indian*, 5 RUTGERS RACE & L. REV. 53, 65 (2003) (same); Brownell, *supra* note 41, at 278 (same); Monica Haymond, Note, *Who's In and Who's Out: Congressional Power over Individuals Under the Indian Commerce Clause*, 102 VA. L. REV. 1589, 1617 (2016) (same); Beckenhauer, *supra* note 179, at 164 (same); *see also* Miles, *supra* note 42, at 289 (citing Brownell, *supra* note 41, at 278).

199. O'Brien, *supra* note 197, at 1481. O'Brien does not identify the survey, and I and others have been unable to find it. *E.g.*, Hoss, *supra* note 11, at 135 & nn. 4–6.

200. Hoss, *supra* note 11, at 137–51. Hoss also found in the Code of Federal Regulations dozens of code sections defining the same terms. *See generally id.* (conducting the search under both federal statutes and regulations). And Hoss acknowledges that her list likely is incomplete. *Id.* at 136 ("I reviewed several thousand provisions and, while I tended toward overinclusion, I inevitably excluded some relevant provisions."). For example, the Bald and Golden Eagle Protection Act allows the Secretary of the Interior to permit taking bald and golden eagles for, inter alia, "the religious purposes of Indian tribes." 16 U.S.C. § 668a. Interior's regulation implementing this provision, 50 C.F.R. § 22.60, does not appear on Hoss's list, mostly likely because it does not contain any variation of the words "define," "mean," or "refer." Hoss, *supra* note 11, at 136 n.8. However, the regulation serves as a definition setting forth who is entitled to receive this religious exemption from the Bald and Golden Eagle Protection Act, namely, members of federally recognized tribes. *See* 50 C.F.R. § 22.60 (2022) ("We will issue a permit only to members of Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs listed under 25 U.S.C. 479a-1 engaged in religious activities who satisfy all the issuance criteria of this section.").

defining "Indian" as "a member of an Indian tribe,"[201] making that the most common definition[202]—there is nevertheless a great deal of variability in the definitions.

Many, if not most, of these definitions are crafted to achieve a specific purpose.[203] For example, in enacting the Indian Self-Determination and Education Assistance Act,[204] Congress found that "the prolonged Federal domination of Indian service programs" had prevented tribes from developing as effective service providers for their communities,[205] and thus crafted a scheme that would allow tribes to reclaim their roles as service providers.[206] Little wonder such a statute, with its focus on tribes, would define "Indian" purely by reference to tribal membership.[207] The fact that most definitions, like that in the ISDEAA, turn on tribal membership simply reflects that Indian tribes most often are the focus of Congressional action.[208]

However, a different definition was needed for the Indian Reorganization Act ("IRA").[209] One purpose of the IRA was to allow Indians residing together on a reservation to organize a tribal government.[210] A statute that begins from

201. Hoss, *supra* note 11, at 137–39; *see also* BORDEWICH, *supra* note 176, at 67 ("For the most part, however, the federal government now defines an Indian as someone who is an enrolled member of a recognized tribe.").

202. *See* Se-ah-dom Edmo, *The Problems of Modern Indian Identity: Intersectionality, the American Dream, the Myth of Scarcity, Disenrollment, and Belonging*, *in* AMERICAN INDIAN IDENTITY: CITIZENSHIP, MEMBERSHIP, AND BLOOD, *supra* note 12, at 25, 25–26 ("[T]he U.S. Congress has been more inclined to equate Indianness with tribal citizenship . . . ."). *Compare* Hoss, *supra* note 11, at 137–40 (describing statutory and regulatory sections defining "Indian" as "a member of an Indian tribe"), *with id.* at 140–51 (describing statutory and regulatory sections providing other definitions).

203. SHEFFIELD, *supra* note 183, at 4.

204. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 5301–5423).

205. 25 U.S.C. § 5301(a)(1).

206. *Id.* § 5302(b).

207. *Id.* § 5304(d) ("'Indian' means a person who is a member of an Indian tribe."). ISDEAA then defines "Indian tribe" to include both federally recognized tribes and Alaska Native corporations. *Id.* § 5304(e); *see also* Yellen v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 2434, 2440 (2021) (explaining the addition of Alaska Native corporations to ISDEAA's definition of "Indian tribe").

208. Tribes, in turn, define membership in a variety of different ways. Eva Marie Garroutte, *The Racial Formation of American Indians: Negotiating Legitimate Identities Within Tribal and Federal Law*, 25 AM. INDIAN Q. 224, 224–27 (2001). About two-thirds of tribes require that members have at least some minimum degree of blood, either specifically from that tribe or in combination with other Indian blood, with most of the remaining tribes requiring only lineal descendancy from a tribal member. *Id.* at 224–25; *see also* Fletcher, *supra* note 189, at 4 ("Indian tribes tend to define tribal membership according to either (a) blood quantum or (b) lineal descendancy."); Thornton, *supra* note 178, at 36–37 (explaining that tribal membership is often defined by blood quantum); Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 251 (2009) (same); Jessie Young, *Tribal Citizenship and Indian Identity*, *in* AMERICAN INDIAN IDENTITY: CITIZENSHIP, MEMBERSHIP, AND BLOOD, *supra* note 12, at 113, 115 ("Generally, all tribal nations require some degree of Indian descent.").

209. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101–5144).

210. 25 U.S.C. § 5123(a); *see also* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 832 (1996) ("Central to the Act was a congressional policy which encouraged tribal self-determination. Tribes were invited to incorporate and adopt constitutions and bylaws . . . . Many did."); *cf.* Morton v. Mancari, 417 U.S. 535, 542 (1974) ("The overriding purpose of that particular Act

the premise that some Indians may not have yet organized tribal governments cannot limit its definition of "Indian" to tribal members, and so the IRA defines "Indian" to include not only tribal members but also "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all persons of one-half or more Indian blood."[211]

Congress frequently uses tribal membership as a baseline for Indian status, then defines "Indian" in a way that serves the purposes of the particular act.[212] For example, when Congress was crafting the Indian Child Welfare Act ("ICWA"),[213] which contains provisions designed specifically to protect Indian children and their parents from the moment of birth,[214] it knew that an act that reached only children who were tribal members would leave many Indian children unprotected until their tribal membership status was perfected.[215] Thus, ICWA defines its operative term, "Indian child," to include both children who are tribal members already, and those who are "eligible for membership in an Indian tribe" so long as one of the child's parents is a tribal member.[216] Likewise, the Indian Arts and Crafts Act ("IACA")[217] defines "Indian" to include members of federally recognized *and* state-recognized tribes,[218] because the Act is not an expression of a government-to-government relationship but instead is "about who can legally sell his or her arts or crafts as 'Indian-produced.'"[219] Because of these variations, many individuals who qualify as Indians under one statute may not qualify under others.[220]

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was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.").

211. 25 U.S.C. § 5129. The IRA further defines "tribe" to include "the Indians residing on one reservation." *Id.*

212. Young, *supra* note 208, at 121.

213. Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–1963).

214. *E.g.*, 25 U.S.C. § 1913(a) ("Any consent [to foster care placement or termination of parental rights] given prior to, or within ten days after, birth of the Indian child shall not be valid.").

215. H.R. REP. NO. 95-1386, at 17 (1978) ("The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.").

216. 25 U.S.C. § 1903(4). For decades the courts of several states invented reasons to ignore that definition. *See* Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at 20,* in the Matter of A.J.S.*, and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 686 (2010). The 2016 Final Rule should put an end to that. 25 C.F.R. § 23.103(c) ("In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents . . . or the Indian child's blood quantum."); *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38779, 38799, 38801–02 (June 14, 2016) (eliminating "existing Indian family" exception).

217. 25 U.S.C. §§ 305–305f.

218. *See id.* § 305e(a)(1)(A) (defining "Indian" to include "a member of an Indian tribe"); *id.* § 305e(a)(3)(A)–(B) (defining "Indian tribe" to include both federally recognized and state-recognized tribes). IACA's definition of "Indian" also includes persons "certified as an Indian artisan by an Indian tribe." *Id.* § 305e(a)(1)(B).

219. SHEFFIELD, *supra* note 183, at 5.

220. BORDEWICH, *supra* note 176, at 67.

Alas, Congress *still* has not defined "Indian" for purposes of the Major Crimes Act.[221] And those other statutory and regulatory definitions, each intended to achieve its own particular ends, are of little help in determining who is an Indian for purposes of federal criminal jurisdiction.[222] That leaves the matter in the hands of the courts.

B. ADJUDICATION OF INDIAN STATUS

Because Congress has not defined "Indian" for purposes of federal criminal jurisdiction in Indian country, when there is a dispute about whether a criminal defendant is an Indian, it falls to the courts to resolve that dispute. In most Major Crimes Act prosecutions, Indian status is not in doubt.[223] In fact, many defendants simply stipulate that they are Indians.[224] But where Indian status is contested, things can get messy. The government must allege that the defendant is an Indian,[225] putting before the court "a tangled issue of fact."[226] And the

221. United States v. Begay, 33 F.4th 1081, 1088 (9th Cir. 2022) ("[T]he Act does not define the term 'Indian . . . .'"); *see also* Lewis, *Do You Know*, *supra* note 41 ("The statute does not say."); King, *supra* note 90, at 1488 (quoting the MCA in substance). Congress *has* defined "Indian" for purposes of *Tribal* criminal jurisdiction. 25 U.S.C. § 1301(4). But their definition is of little help, as it simply incorporates the various judicial approaches to Indian status. *Id.* ("'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.").

222. State v. Bonaparte, 759 P.2d 83, 85 (Idaho Ct. App. 1988) (explaining in an appeal of state criminal conviction of a defendant claiming Indian status, "the criteria governing social program eligibility do not embody the objectives of criminal jurisdiction").

223. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 63, § 11.02[1][b][ii], at 743 ("As a practical matter, Indian or non-Indian status is frequently not contested and is established by stipulation at a plea hearing or trial."). Even so, the matter of Indian status can still muck up a case. *E.g.*, United States v. Whipple-Wright, No. 24-CR-30050, 2025 WL 486942, at *1 (D.S.D. Feb. 13, 2025) (suppressing defendant's statement admitting that she was an Indian because she had not been advised of her *Miranda* rights).

224. *E.g.*, United States v. Martin, 777 F.3d 984, 994 (8th Cir. 2015).

225. United States v. Brown, 705 F. Supp. 3d 1289, 1292 (N.D. Okla. 2023) (dismissing three counts against defendant because the indictment failed to allege Indian status); *see also* Paulson, *supra* note 41, at 56 ("[W]hen the government prosecutes an individual under the Major Crimes Act, they must allege in the indictment and prove beyond a reasonable doubt at trial that the defendant is indeed 'Indian.'").

226. Paulson, *supra* note 41, at 56; *see also* United States v. Prentiss, 273 F.3d 1277, 1282 (10th Cir. 2001) ("[T]he issue of how one ought to determine Indian status under the federal statutes governing Indian country is extraordinarily complex and involves a number of competing policy considerations."); LaPier v. McCormick, 986 F.2d 303, 304 (9th Cir. 1993) ("The boundaries of this federal jurisdiction, however, are not as clearly defined as one might hope or expect. Among other things, 'the ambiguous definitions currently used for determining who is an Indian' complicate what should be a rather routine analysis." (citation omitted) (quoting Clinton, *supra* note 140, at 576)); Donovan & Rhodes, *supra* note 41, at 93 (identifying facts defense counsel should know if contesting Indian status); Clinton, *supra* note 140, at 513 ("[T]he question of Indian status for purposes of criminal jurisdiction is perplexing."). For example, consider *United States v. Loera*, in which the defendant, charged as a non-Indian under the GCA, moved to dismiss on the grounds that he was an Indian. 190 F. Supp. 3d 873, 876 (D. Ariz. 2016). The undisputed findings of fact in that motion addressed, among other things, where the defendant was born, his Indian blood quantum, who raised him and where, the locations of schools he attended and his receipt of "breakfast and lunch through the Tribal Nutrition Program" at those schools, classes he took at the Fort Mojave Cultural Department, juvenile detentions and adult arrests by Fort Mojave police and their adjudication in Fort Mojave Tribal Court, his failed efforts to enroll with the Fort Mojave Indian Tribe, the enrollment status of several of his family members, his eligibility for and receipt of health care services at the Fort Mojave Indian Health Center, the number of words he knows in the Fort Mojave language,

courts have determined that the question of a defendant's Indian status is not a legal question—which would be determined by the judge—but instead is a factual question to be determined by the jury.[227]

The first significant case to address Indian status for purposes of federal criminal jurisdiction in Indian country predates the Major Crimes Act. In *United States v. Rogers*,[228] Indian status was not an element of the crime—it was a defense.

1. *United States v. Rogers*

Although at least one commentator suggests the question of Indian identity is a new one,[229] it is one the courts have engaged with for approximately 180 years. William S. Rogers was charged with murder in the stabbing death of his brother-in-law Jacob Nicholson within the Cherokee Nation, in what was then Indian Territory and is now eastern Oklahoma.[230] Rogers was charged under the 1834 Trade and Intercourse Act, which extended federal criminal jurisdiction into Indian country.[231] But the Act contained an exception for crimes committed by one Indian against another within their own territory.[232] In his defense, Rogers argued that the alleged crime fell within the exception, as both he and Nicholson were Cherokee Nation citizens.[233] Although neither had been born Cherokee, both had accompanied the Cherokee Nation west as part of their military escort on the Trail of Tears. Both had married Cherokee women, thereby acquiring Cherokee citizenship; and both intended to remain with the Cherokee and not return to the United States.[234]

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which of his tattoos do (or don't) "reference[ ] . . . the Fort Mojave Reservation" and which are (and are not) "reminiscent of Native American culture in general," his participation in Indian (but not Fort Mojave) religious practices, how often he played Indian traditional games and accessed Fort Mojave recreational facilities, where he worked, his son's blood quantum with the Fort Mojave Indian Tribe, his residence (which he does not own) on the Fort Mojave Reservation, Fort Mojave Indian Tribe decisions *not* to prosecute him because he is not a member, his ineligibility for elected office with the Fort Mojave Indian Tribe, the Tribe's power to remove him from the Reservation, and the absence of anything in the record "to indicate the Bureau of Indian Affairs considers Defendant to be an Indian." *Id.* at 876–79. After six pages of legal analysis, the court determined that the defendant was not an Indian. *Id.* at 879–85.

227. *See infra* Subpart.II.B.3.

228. 45 U.S. (4 How.) 567 (1846).

229. BORDEWICH, *supra* note 176, at 65 ("Until quite recently, scarcely anyone thought to ask what is fast becoming an increasingly pertinent question: just who is an Indian?").

230. Bethany R. Berger, *"Power over This Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957, 1960 (2004); RICHOTTE, *supra* note 78, at 58.

231. *Supra* notes 77–78 and accompanying text.

232. *Supra* note 12 and accompanying text.

233. 45 U.S. at 571.

234. Berger, *supra* note 230, at 1965. From before their removal, the Cherokee Nation had admitted to citizenship White men who married Cherokee women, although such a man had no control over his wife's property and lost his citizenship if they were divorced. LAWS OF THE CHEROKEE NATION ADOPTED BY THE COUNCIL AT VARIOUS PERIODS 10–11 (1852) (Act of Nov. 2, 1819). Intermarriage with enslaved Black persons was prohibited. *Id.* at 38 (Act of Nov. 11, 1824). Upon reconstituting the National Council in the Indian Territory, the Cherokee Nation again legalized intermarriage and afforded citizenship to White men who married Cherokee women. *Id.* at 92–94 (Act of Nov. 10, 1843); *see also* Nofire v. United States, 164 U.S. 657, 658 (1897) ("The

The Court, apparently, did not see this as a difficult issue. The decision was announced only one week after it was argued,[235] with only one opinion for the Court.[236] The opinion was written by then-Chief Justice Roger Taney, perhaps "the most reviled" Justice in the Court's history,[237] some eleven years before he wrote the infamous *Dred Scott* decision,[238] and has been described as "replete with fabrications of law and fact."[239] The Court acknowledged that the alleged crime occurred within the territory of the Cherokee Nation, but dismissed this fact as irrelevant because that territory was "assigned to them by the United States," and "[t]he native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments . . . ."[240] The Court then asserted that "Congress may by law punish any offence [sic] committed [within Indian lands], no matter whether the offender be a white man or an Indian," without citation to any authority.[241] Finally, addressing Rogers's defense and the Trade and Intercourse

Cherokee statutes make it clear that all white men legally married to Cherokee women and residing within the Nation are adopted citizens."). After the Civil War, the Cherokee Nation also incorporated formerly enslaved persons residing within the Nation. Treaty with the Cherokee Nation, Cherokee Nation-U.S., art. IX, July 27, 1866, 14 Stat. 799 (agreeing that persons formerly enslaved by the Cherokee, and freed Blacks residing in Cherokee Nation, "and their descendants, shall have all the rights of native Cherokees"); Paulson, *supra* note 41, at 49 ("All Native Born Cherokees, all Indians and Whites Legally Members of the Nation by Adoption, and all Freedmen who have been liberated by Voluntary Act of their Former Owners or by Law, as well as Free Colored Persons who were in the Country at the Commencement of the Rebellion, and are now residents therein . . . and their Descendants who Reside within the Limits of the Cherokee Nation, shall be taken, and deemed to be, Citizens of the Cherokee Nation." (quoting CONST. OF THE CHEROKEE NATION, art. III, § 5 (amended 1866 version))). One recent estimate suggests the Cherokee Nation alone has 25,000 citizens who are descendants not of Cherokees by blood, but of Cherokee Freedmen. Summers, *supra* note 42, at 195. Cherokee Nation was not unique in adopting outsiders—both Indian and non-Indian—into their political, social, and cultural communities. *See, e.g.*, John Rockwell Snowden, Wayne Tyndall & David Smith, *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 NEB. L. REV. 171, 199 (2001) (describing Winnebago Tribe of Nebraska's incorporation of both Indian and non-Indian outsiders); Treaty with the Choctaw and Chickasaw Nations, art. XXXVIII, July 2, 1866, 14 Stat. 769 (granting citizenship to White persons who marry into the Choctaw and Chickasaw Nations and submit to their laws). The Kiowa Indian Tribe of Oklahoma recognizes as members persons who "possess at least one-fourth degree Kiowa Indian and/or Kiowa Captive blood." CONST. OF THE KIOWA INDIAN TRIBE OF OKLA. art. IV, § 1(b); *see also In re* Dependency & Neglect of A.L., 442 N.W.2d 233, 235 (S.D. 1989) (holding Indian Child Welfare Act applies to "the biological child of Caucasian parents" who was adopted by a Cheyenne River Sioux Tribe member and enrolled with the Tribe).

235. Berger, *supra* note 230, at 1965–66.

236. *Rogers*, 45 U.S. at 567.

237. RICHOTTE, *supra* note 78, at 57.

238. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). For a discussion of the infamy of the *Dred Scott* decision, see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 406–12 (2011).

239. Berger, *supra* note 230, at 1962.

240. *Rogers*, 45 U.S. at 572. *But see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559–60 (1832) ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.").

241. *Rogers*, 45 U.S. at 572.

Act's exemption for Indian-on-Indian crime, the Court held—again, without citation to any authority—that:

> [A] white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians . . . .[242]

Chief Justice Taney's fixation on biological race was to be expected. Americans generally have long used ancestry to classify those deemed inferior,[243] and specifically have used ancestry to determine who is an Indian.[244] As he would do a decade later in *Dred Scott*, "Taney essentially equated the categories of race and citizenship."[245] And he did so, ostensibly, to protect the Cherokee and other Indians from dangerous outsiders.[246]

The courts now had a rule to determine who is an Indian *exempted* from federal criminal jurisdiction in Indian country. They would later use that same rule to determine who was *subject* to such jurisdiction.

2. Indian Status in the U.S. Circuit Courts of Appeals

Recall that *Rogers* concerned a defendant who was recognized by an Indian tribe as one of its citizens, but who the Court held was not an Indian for purposes

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242. *Id.* at 572–73. Garroutte hones in on the Court's statement that "a man who at *mature age* is adopted in an Indian tribe does not thereby become Indian," GARROUTTE, *supra* note 173, at 69 (quoting Rogers, 45 U.S. at 572), and Garroutte argues that it "leaves room for the possibility that an adoptee who is raised in an Indian culture from his youth might be considered an Indian under law." *Id.* Technically speaking, she is correct. However, in applying *Rogers* over the course of nearly a century, the U.S. Circuit Courts of Appeals have articulated a standard that forecloses Garroutte's hypothetical. *See infra* Subpart.II.B.2 (discussing courts' holding that Indian status requires at least some Indian blood).

243. *See* Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592, 593–603 (2007) (discussing the "one-drop rule").

244. BORDEWICH, *supra* note 176, at 73.

245. RICHOTTE, *supra* note 78, at 58. Professor Fletcher called *Rogers* "[t]he first important decision involving race and American Indians . . . ." Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295, 300 (2011).

246. *Rogers*, 45 U.S. at 573 ("It can hardly be supposed that Congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country."). Professor Berger rightly notes that this presaged the Court's decision in *Kagama*: The Court in both cases insisted it was acting in the Indians' best interests. *Compare id.*, *with* United States v. Kagama, 118 U.S. 375, 384 (1886) ("From [the Indian tribes'] very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power."). And Professor Berger points out that the principal authority for the Congressional power affirmed in *Kagama* was not the Constitution itself, but instead was *Rogers*. Berger, *supra* note 230, at 1964 ("When Congress decided to test the limits of its power over Indian tribes forty years [after *Rogers*], *Rogers* became the core precedent justifying this extension of federal power.").

of federal criminal jurisdiction in Indian country.[247] In other words, *Rogers* was about determining who *was not* an Indian. Through the remainder of the nineteenth century, when it came to Indian status, courts looked to *Rogers* for that purpose, and that purpose alone.[248]

That changed in 1938, when the courts for the first time determined that a person who *was not* a member of an Indian tribe nevertheless *was* an Indian for purposes of federal criminal jurisdiction in Indian country.[249] *Ex parte Pero* was an appeal by the State of Wisconsin of a U.S. district court judgment granting a writ of habeas corpus to two men convicted of murder in the Wisconsin state courts.[250] The petitioners argued that, because the crime was committed on the Bad River Indian Reservation and they were Indians, under the Major Crimes Act[251] their crimes were "subject to the exclusive jurisdiction of the United States."[252] Because the MCA did not define "Indian," the Court looked to *Rogers* and its holding that Indian status "was confined to those who by the usages and customs of the Indians are regarded as belonging to their race."[253] Paul Moore had never been enrolled with any Indian tribe.[254] But he was 3/4 Indian by blood—the child of a full-blooded mother and a 1/2-blood father, both of whom "and their relatives resided on the reservation and were known to the other Indians as Chippewa Indians."[255] The district court had concluded that Moore was an Indian, notwithstanding his unenrolled status, and the circuit court affirmed.[256]

And thus the U.S. Circuit Courts of Appeals began what one commentator has called their "descent into jurisdictional madness."[257] The courts generally agree that, in light of *Rogers*, there are two components to Indian status: (1) Indian ancestry, and (2) recognition as an Indian.[258]

If only it were that easy.

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247. *See supra* Subpart.II.B.1.

248. Young, *supra* note 12, at 101 ("For nearly 90 years following the *Rogers* decision, federal courts only used *Rogers* to determine who *was not* an Indian and not to determine who *was* an Indian.").

249. *Ex parte* Pero, 99 F.2d 28, 35 (7th Cir. 1938).

250. *Id.* at 29. When Pero and Moore were convicted in 1927, Wisconsin's courts believed they had jurisdiction over reservation crimes, *id.* at 30 (citing Wisconsin v. Doxtater, 2 N.W. 439 (Wis. 1879)), although they later determined they did not, *id.* (citing Wisconsin v. Rufus, 237 N.W. 67 (Wis. 1931)).

251. At the time, the MCA was codified at 18 U.S.C. § 548 (1934).

252. *Ex parte Pero*, 99 F.2d at 29.

253. *Id.* at 30. The Court also surveyed other court decisions determining Indian status for purposes other than federal criminal jurisdiction. *Id.* at 30–31.

254. *Id.* at 30.

255. *Id.*

256. *Id.* at 31–32. Pero, too, was held to be an Indian. *Id.* at 35. Because his enrollment status was not reported in the opinion, and because our research focused on determinations of Indian status for persons who are not tribal members, we will say no more about Pero.

257. Miles, *supra* note 42, at 269.

258. *See* United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979) ("The test, first suggested in *United States v. Rogers* and generally followed by the courts, considers (1) the degree of Indian blood; and (2) tribal or governmental recognition as an Indian." (citation omitted)); Skibine, *supra* note 30, at 56.

Take the ancestry component: Just how much Indian blood must one have in order to be an Indian?[259] No court has ever definitively said,[260] and the ambiguous language the courts use[261] offers little guidance to lower courts or juries. Recall that Matthew David Stymiest was 3/32 Indian by blood.[262] Although he conceded that he had the requisite blood quantum to be considered Indian,[263] the court made it clear that if he had challenged on this ground he would have failed.[264] And in an earlier Eighth Circuit case, the court had presumed that a person with 11/128[265] Indian blood "has the requisite quantum of Indian blood under the first part of the *Rogers* inquiry."[266] In *Maggi*, the Ninth Circuit sidestepped the question of whether 1/64 Indian blood was sufficient for Indian status when it held instead that the defendant was not recognized as an Indian.[267] And shortly before this Article went to print, the Tenth Circuit affirmed a jury's determination that a Cherokee Nation citizen with a blood quantum of 1/1024 was an Indian.[268] However, the Utah Supreme Court has expressed doubt that a person with 1/16 Indian blood[269] has sufficient blood quantum to be considered Indian.[270] And the Wyoming Supreme Court has held that a person with 1/8 Indian blood[271] does not have the requisite blood quantum to be considered Indian.[272] Presumably that means that if Stymiest were to

259. Miles, *supra* note 42 ("How much Indian blood does it take to be authenticated as a real, live Indian?").

260. Skibine, *supra* note 30; *see also* Meyring, *supra* note 41, at 187–93 (collecting cases and comparing blood quanta); United States v. Maggi, 598 F.3d 1073, 1083 (9th Cir. 2010) ("We have little guidance as to the quantum of evidence necessary to sustain Indian status jurisdiction."), *overruled by* United States v. Zepeda, 792 F.3d 1103 (9th Cir. 2015). There also is an ambiguity about the source of Indian blood. For several years, the Ninth Circuit required that the Indian blood come from a federally recognized tribe. *Maggi*, 598 F.3d at 1080 (explaining that the conviction of one defendant "must be vacated" "[g]iven the absence of evidence of any blood from a federally recognized tribe"). That rule was rescinded approximately five years later. United States v. Zepeda, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc) ("We therefore overrule *Maggi* and . . . hold that proof of Indian status under the IMCA requires . . . proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe . . . ."). The other circuits are silent on the subject.

261. *See Zepeda*, 792 F.3d at 1106; United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) (requiring "some Indian blood"); United States v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001) (same); United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984) (approving jury instruction that called for finding "some degree of Indian blood").

262. *Stymiest*, 581 U.S. at 762.

263. *Id.* ("The parties agree that the first *Rogers* criterion is satisfied because Stymiest has three thirty-seconds Indian blood.").

264. *Id.* at 766 ("Without question, he has the requisite Indian blood . . . .").

265. For those who read legal scholarship because they don't want to do math, 11/128 is slightly less than 3/32 (which would be 12/128).

266. United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995), *abrogated by* United States v. Stymiest, 581 F.3d 759 (8th Cir. 2009).

267. United States v. Maggi, 598 F.3d 1073, 1080–81 (9th Cir. 2010).

268. United States v. King, 172 F. 4th 1188, 1193–97 (10th Cir. 2026) (discussing victim's Indian status).

269. Again, for purposes of comparison, 1/16 is the equivalent of 2/32, so slightly less than Stymiest's blood quantum.

270. State v. Reber, 171 P.3d 406, 410 (Utah 2007).

271. The equivalent of 4/32, so slightly more than Stymiest's blood quantum.

272. State v. Vialpando, 640 P.2d 77, 80 (Wyo. 1982) ("We hold that one-eighth Indian blood is not a substantial amount of Indian blood to classify appellant as an Indian." (internal quotation omitted)).

commit a major crime on an Indian reservation in Utah, he would be subject to State jurisdiction—notwithstanding the fact that he has already been adjudicated to be an Indian in federal court—because his blood quantum falls below what Utah has determined to be a threshold for Indian status. A harder question concerns persons who are members of federally recognized tribes and have a blood quantum lower than 1/8.[273]

The ancestry component is easy compared to the recognition piece. The courts developed multi-factor tests to determine whether a person is recognized as Indian, and those tests do not always match up.[274]

Start with the two circuits that hear the most Indian status cases: the Eighth and Ninth Circuits.[275] The Eighth Circuit has said "there is no single correct way to instruct a jury" on Indian status.[276] Courts within that circuit consider several factors to determine recognition as an Indian,[277] including whether the person is a tribal member, whether they have received federal government benefits provided specifically to Indians, whether they have received benefits from a tribe, and whether they are socially recognized as an Indian.[278] But courts may add other factors.[279] Initially, those factors were considered "in declining order

273. Professor Lewerenz, for example, is identified on his tribal enrollment card as having a blood quantum of 1/16 (although genealogical records suggest it should be higher). And the child at the center of *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), famously has 3/256 Indian blood, *id.* at 641, the same blood quantum that Stymiest's great-grandchildren would have if none of the other great-grandparents had any Indian ancestry.

274. Donovan & Rhodes, *supra* note 41, at 66–79 (describing and distinguishing various circuit court approaches); Zoeller, *supra* note 42, at 196–201 (same); Locklear, *supra* note 42, at 128–29 (same); Snyder, *supra* note 42, at 363–65 (same). *See generally* Lewis, *Do You Know*, *supra* note 41 (expressing a preference for the Eighth Circuit's approach over the Ninth Circuit's).

275. *See* Donovan & Rhodes, *supra* note 41, at 64.

276. United States v. Stymiest, 581 F.3d 759, 764 (8th Cir. 2009). Since *Stymiest* was decided, the Eighth Circuit has promulgated a model jury instruction for Indian status cases. Jud. Comm. on Model Jury Instructions for the 8th Cir., 6.18.1153, *Indian Person Defined* (2014).

277. *E.g.*, *Stymiest*, 581 F.3d at 763–64 (describing and affirming trial court's jury instruction).

278. *Id.* at 763; United States v. Lawrence, 51 F.3d 150, 152–54 (8th Cir. 1995). These factors were drawn from *St. Cloud v. United States*, 702 F. Supp. 1456, 1460–62 (D.S.D. 1988). *See Lawrence*, 51 F.3d at 152 ("The Court's 'recognition' analysis was guided by consideration of four factors it first enunciated in *St. Cloud*." (citation omitted)); *see also Stymiest*, 581 F.3d at 763 (citing *St. Cloud*, 702 F. Supp. at 1461). The petitioner in *St. Cloud* had 29/32 Indian blood (15/32 Yankton Sioux and 7/16 Ponca), had been a Ponca Tribe member, lived on the Lower Brule Sioux Indian Reservation with a wife and children who were members of that Tribe, and received some medical and counseling services from that Tribe. 702 F. Supp. at 1458. However, the federal government had terminated its government-to-government relationship with the Ponca Tribe. *Id.* at 1458. For an explanation of the termination policy, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 63, § 2.10[3], at 116–18; DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960, at 91–110 (1986). Although the court acknowledged that St. Cloud met all of the requirements to be considered an Indian, *St. Cloud*, 702 F. Supp. at 1462, ultimately it held that the termination of the government-to-government relationship with his Tribe meant that he could not be considered an Indian for purposes of federal criminal jurisdiction, *id.* at 1464–66.

279. Jud. Comm. on Model Jury Instructions for the 8th Cir., *supra* note 276 ("This list is not exhaustive. Additional factors are relevant as well, and can be added to the instruction depending on the facts of the case being tried."); *see also Stymiest*, 581 F.3d at 763 (including additional factors, such as "tribal recognition formally or informally through subjecting the defendant to tribal court jurisdiction," and "whether the defendant holds himself out as an Indian").

of importance,"[280] but more recently the court has negated that.[281] And "[n]o one factor is dispositive,"[282] unless one is.[283]

The Ninth Circuit's approach is "similar" to, "but distinct" from that of the Eighth Circuit.[284] The test in the Ninth Circuit has evolved. As first articulated in *United States v. Bruce*,[285] the test was identical to the Eighth Circuit's, taking its language directly from *Lawrence*, including the declining order of importance.[286] Five years later, the court "added a gloss to both prongs of the *Bruce* test,"[287] requiring that both the Indian blood and the recognition as Indian be connected to a federally recognized tribe.[288] Five years after that, the court sitting *en banc* walked back part of *Maggi*'s gloss.[289] Now, in the Ninth Circuit, "proof of Indian status under the [MCA] requires only two things: (1) proof of some quantum of Indian blood, and (2) proof of membership in, or affiliation with, a federally recognized tribe."[290] With federal recognition now incorporated into the rule, the recognition prong in the Ninth Circuit is as follows:

> On the second prong, the court should instruct the jury that it has to find beyond a reasonable doubt that the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense. . . . The criteria are, in declining order of importance: (1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe.[291]

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280. *Lawrence*, 51 F.3d at 152; *St. Cloud*, 702 F. Supp. at 1461.

281. *Stymiest*, 581 F.3d. at 764.

282. Jud. Comm. on Model Jury Instructions for the 8th Cir., *supra* note 276.

283. *See Stymiest*, 581 F.3d at 764 ("[If] the defendant is an enrolled tribal member . . . that factor becomes dispositive.").

284. Donovan & Rhodes, *supra* note 41, at 73; *see also id.* at 66–73 (discussing Ninth Circuit approach).

285. 394 F.3d 1215 (9th Cir. 2005).

286. *Id.* at 1224 ("When analyzing this prong, courts have considered, in declining order of importance, evidence of the following: '1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life.'") (quoting United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995)). In fact, in the Ninth Circuit, it is error for the court to fail to instruct the jury of the declining order of importance of the four factors used to determine whether there has been tribal or federal government recognition of the defendant as a Native American. United States v. Cruz, 554 F.3d 840, 851 n.17 (9th Cir. 2009).

287. United States v. Zepeda, 792 F.3d 1103, 1106 (9th Cir. 2015) (en banc).

288. United States v. Maggi, 598 F.3d 1073, 1080–81 (9th Cir. 2010).

289. *Zepeda*, 792 F.3d. at 1106.

290. *Id.* at 1113. In addition, the Ninth Circuit specifies that the person in question must have been an Indian "at the time of the offense with which the defendant is charged." *Id.*

291. *Zepeda*, 792 F.3d. at 1114. In adding this federal recognition requirement, the Ninth Circuit also has assigned the judge to determine whether the group to which a defendant claims affiliation is federally recognized.

Three other U.S. Circuit Courts of Appeals have decided Indian status cases, although fewer and with less detail than the Eighth and Ninth Circuits. In *United States v. Lossiah*,[292] a member of the Eastern Band of Cherokee Indians ("EBCI") appealed his MCA conviction for murder in the stabbing death of a Seneca man, arguing (among other things) that there was insufficient evidence to prove that he was an Indian.[293] The Fourth Circuit noted that an exhibit introduced into evidence without objection showed Lossiah to be an EBCI member with "three-fourths degree of Eastern Cherokee blood."[294] Although the court did not articulate a legal standard, it held that the evidence submitted "was adequate proof that defendant was a Cherokee Indian."[295]

In *United States v. Torres*,[296] the Seventh Circuit affirmed the MCA convictions of two Menominee Indians for murder, conspiracy, and kidnapping.[297] Appellants Tony Fish and Ramon Torres argued, among other things, that there was insufficient evidence to prove they were Indians,[298] and that the jury instruction on Indian status was improper.[299] The court first found ample evidence in the trial court record that both defendants were Indians.[300] And while the appeals court set forth only the basic two-part standard for proof of Indian status,[301] it approved the trial court's more-specific jury instruction, which resembled the Eighth and Ninth Circuit standards.[302]

In the Tenth Circuit, as in the Ninth, the test has evolved somewhat. In *Scrivner v. Tansy*,[303] hearing an appeal from the district court's denial of a writ

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Id. The Ninth Circuit, too, has published pattern jury instructions. 9th Cir. Jury Instructions Comm., 24.14, *Determination of Indian Status for Offenses Committed Within Indian Country* (2023).

292. 537 F.2d 1250 (4th Cir. 1976).

293. *Id.* at 1250–51.

294. *Id.* at 1251.

295. *Id.*

296. 733 F.2d 449 (7th Cir. 1984).

297. *Id.* at 451.

298. *Id.* at 454.

299. *Id.* at 456.

300. *Id.* at 455–56. Menominee Tribe records placed in evidence showed Fish to have an Indian blood quantum of 25/64, and Torres to have an Indian blood quantum of 11/32. *Id.* at 455. The Tribe's records also showed both men to be enrolled Menominee Tribe members who had received from the Tribe benefits available only to members. *Id.* at 455–56.

301. *Id.* at 456 ("'The test, first suggested in *United States v. Rogers*, and generally followed by the courts, considers (1) *the degree of Indian blood;* and (2) *tribal or governmental recognition as an Indian*.'" (citation omitted) (quoting United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979))).

302. The instruction read, in relevant part:

> To be considered an Indian, a person must have some degree of Indian blood, and must be recognized as an Indian. In considering whether a person is recognized as an Indian, you may consider such factors, whether a person is recognized as an Indian by an Indian tribe, or society of Indians. Whether a person is recognized as an Indian by the federal government, whether a person resides on an Indian reservation, and whether a person holds himself out as an Indian. It is not necessary that all of these factors be present, rather you as jurors must consider the totality of circumstances in determining as a factual matter whether each defendant is an Indian.

Id.

303. 68 F.3d 1234 (10th Cir. 1995).

of habeas corpus,[304] the court wrote: "For a criminal defendant to be subject to [the MCA], the court must make factual findings that the defendant '(1) has some Indian blood; and (2) is 'recognized' as an Indian by a tribe or by the federal government.'"[305] The court repeated this simple standard several years later in *United States v. Prentiss*.[306] Then in *United States v. Drewry*,[307] in determining whether the victims were Indians in a GCA prosecution, the court again cited this simple standard, but also applied the four *Lawrence* factors to determine whether the victims were recognized as Indian.[308] A decade later, in an unpublished opinion, the Tenth Circuit again cited *Prentiss*'s simple standard, and again looked to the Eighth Circuit to articulate the recognition prong.[309] But neither the Tenth Circuit itself, nor any of the district courts within its jurisdiction, have followed *Drewry* in this regard.

All those circuits agree on the basic standard: Indian status requires some Indian blood and recognition as an Indian.[310] But the details get more difficult. No circuit has definitively said how much Indian blood suffices to meet the first prong.[311] As for recognition as an Indian, only the Eighth and Ninth Circuits have clearly articulated standards, and they are not the same.[312] Is federal recognition an essential component?[313] Are some factors to be weighed more

304. *Id.* at 1237. Scrivner was convicted in a New Mexico court of armed robbery, conspiracy, kidnapping, and false imprisonment for a crime that occurred on the Navajo Reservation. *Id.* at 1237–38. In his petition for habeas corpus, he argued, among other things, that the state court lacked jurisdiction because he was an Indian and the crime occurred in Indian country. *Id.* at 1238. Although he did not argue his alleged Indian status at trial, it was asserted to, and denied by, the state habeas court. *Id.* at 1241.

305. *Id.* at 1241 (quoting United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995)). The state court, in hearing his habeas petition, had determined that Scrivner was not an Indian, *id.*, and the Tenth Circuit without further articulating the standard or commenting on the evidence, simply held that Scrivner had received "a full and fair hearing before the state court" and denied his petition, *id.*

306. 273 F.3d 1277, 1280 (10th Cir. 2001) (quoting *Scrivner*, 68 F.3d at 1241).

307. 365 F.3d 957 (10th Cir. 2004), *vacated by* Drewry v. United States, 543 U.S. 1103 (2005).

308. *Id.* at 960–61.

309. United States v. Nowlin, 555 F. App'x. 820, 823 (10th Cir. 2014) (citing United States v. Stymiest, 581 F.3d 759, 763 (8th Cir. 2009)).

310. *See supra* note 258 and accompanying text.

311. *Supra* note 260 and accompanying text.

312. *See supra* note 284 and accompanying text.

313. It is in the Ninth Circuit. *See supra* notes 288–291 and accompanying text. But no other circuit has opined on the question. In fact, a district court in the Eighth Circuit accepted a guilty plea from a man whose affiliation was with a group *not* federally recognized at that time. John Jerald Daly initially was charged with burglary in a South Dakota state court. State v. Daly, 454 N.W.2d 342, 343 (S.D. 1990). The alleged burglary was within the Rosebud Indian Reservation, and after Daly moved to dismiss on the grounds that he was an Indian subject to exclusive federal jurisdiction, the state court dismissed the charges. *Id.* A few months later, Daly was charged with, and pleaded guilty to, the same burglary in the U.S. District Court for the District of South Dakota; he was sentenced to forty-one months in prison. *Id.* But Daly is a Lumbee Indian. *Id.* And the Lumbee were not yet a federally recognized tribe. Cindy D. Padget, *The Lost Indians of the Lost Colony: A Critical Legal Study of the Lumbee Indians of North Carolina*, 21 AM. INDIAN L. REV. 391, 391 (1997) (analyzing Lumbee case for federal recognition). Some years later, the Ninth Circuit held that a Lumbee Indian was not an Indian for purposes of federal criminal jurisdiction. LaPier v. McCormick, 986 F.2d 303, 304–06 (9th Cir. 1993). It was not until late 2025 that Congress recognized the Lumbee Tribe. Lumbee Fairness Act, Pub. L. 119-60, § 8803 (Dec. 18, 2025) (extending federal recognition to the Lumbee Tribe of North Carolina); Indian Entities Recognized, *supra* note 13, at 4102-04 (including Lumbee on list of federally recognized tribes); *see*

heavily than others?[314] Because the legal standards for determining Indian status are different in different jurisdictions,[315] "a person may qualify for Indian status in one federal circuit but not in another."[316] In fact, because Indian status "is a fact-based inquiry that plays out on a case-by-case basis," and "[j]uries resolve the issue on an ad hoc one-time basis,"[317] a defendant might find himself adjudicated as an Indian by one jury and not by another.

And because that determination ultimately is in the hands of a jury,[318] "a person may qualify as an Indian in one courtroom but not another."[319]

3. Indian Status and the Jury

Although Indian status now is considered to be a question of fact to be resolved by the jury, it was not always so. While the trial court in *Torres* submitted the question of Indian status to the jury in the early 1980s,[320] not all courts did so.

In *United States v. Lawrence*,[321] the defendant was charged under the General Crimes Act with abusive sexual contact.[322] Thus, to sustain federal jurisdiction the prosecution needed to prove that the alleged victim was an Indian. Before trial, the defendant moved to dismiss for lack of jurisdiction, arguing that the alleged victim was not an Indian.[323] Because "[the] federal courts do not have jurisdiction over offenses committed within Indian country unless either the defendant or the alleged victim is an Indian,"[324] first the district court and then the Eighth Circuit held that "the determination of Indian or non-Indian status is a conclusion of law."[325] The district court determined that the

also Kristin Wright, *North Carolina's Lumbee Tribe Receives Full Federal Recognition After 137-Year Effort*, NPR (Dec. 20, 2025, at 15:57 ET), https://www.npr.org/2025/12/20/g-s1-103223/lumbee-tribe-federal-recognition-137-years.

314. Again, the Ninth Circuit says yes. *See supra* note 286 and accompanying text. The Eighth Circuit says no, unless the person in question is a tribal member. *See supra* notes 280–281 and accompanying text. The other circuits have not weighed in.

315. *See supra* notes 275–309 and accompanying text.

316. Adam Crepelle, *The Law and Economics of Crime in Indian Country*, 110 GEO. L. REV. 569, 591 (2022); Young, *supra* note 12, at 101 ("[A]n individual who is determined to be an Indian by one court may not be by another court of a different jurisdiction because of case law in the respective jurisdictions . . . ." (footnote omitted)). Notwithstanding these different approaches among the circuits, the Supreme Court has repeatedly refused to decide these cases. *E.g.*, Zepeda v. United States, 578 U.S. 945, 945 (2016) (denying certiorari); Stymiest v. United States, 559 U.S. 1055, 1055 (2010) (same).

317. Donovan & Rhodes, *supra* note 41, at 95.

318. *See infra* Subpart.II.B.3.

319. Adam Crepelle, Timothy Purdon & Brendan Johnson, *Passing the Buck: The Perils of* Oklahoma v. Castro-Huerta, 101 DENV. L. REV. 261, 270 (2024); *see also* Skibine, *supra* note 30, at 95 (decrying "the inherently unpredictable jury determinations on" Indian status).

320. *See supra* note 299 and accompanying text.

321. 51 F.3d 150 (8th Cir. 1995).

322. *Id.* at 151.

323. *Id.*

324. *Id.*

325. *Id.*

alleged victim was non-Indian and granted the motion to dismiss;[326] the Eighth Circuit affirmed.[327] The case never made it to a jury.

This approach changed after the U.S. Supreme Court decided *United States v. Cotton*.[328] Among the questions before the Court in *Cotton* (which *was not* an Indian case) was whether the indictment's failure to allege facts that could result in a sentencing enhancement was a jurisdictional defect.[329] The Court itself had, over the centuries, confused the issue by using the word "jurisdiction" "to describe everything from filing deadlines, to the elements of a particular cause of action, regardless of whether Congress had directed the provision at the adjudicatory authority of the federal courts."[330] The *Cotton* court held that "the term 'jurisdiction'" does not encompass factual disputes, but instead "means . . . 'the court's statutory or constitutional *power* to adjudicate the case.'"[331]

After *Cotton*, the Eighth Circuit reconsidered its approach to Indian status—not its approach to the Indian status determination itself, but its approach to *who* makes the Indian status determination and when. In 2003, the Eighth Circuit affirmed the conviction of Guy Randy White Horse on a charge of aggravated sexual abuse under the General Crimes Act.[332] The GCA, however, expressly excludes from its ambit Indian-on-Indian crime.[333] On appeal, White Horse argued, *inter alia*, that he was an Indian and, therefore, the district court lacked jurisdiction over his case.[334] The Eighth Circuit cited *Cotton*, and held that "Mr. White Horse's assertion that he is an Indian is relevant to the matter of proof but irrelevant on the matter of jurisdiction."[335] Upon finding that White Horse was not prejudiced by the decision to charge him as a non-Indian, and then denying his other claims for relief, the court affirmed his conviction.[336]

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326. A stipulation of facts and testimony at an evidentiary hearing established that the alleged victim was 11/128 Indian from the Oglala Sioux Tribe. *Id.* at 151–52, 152 n.3. Based on that fact, the district court presumed that the alleged victim had sufficient Indian ancestry to satisfy the Indian blood requirement. *Id.* at 152. However, the district court determined that the alleged victim was not recognized as Indian by either the federal government or any Indian tribe. *Id.* at 152–54.

327. *Id.* at 154.

328. 535 U.S. 625 (2002).

329. *Id.* at 629. The lower court had held that "because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional, and 'a defendant cannot be "held to answer" for any offense not charged in an indictment returned by a grand jury,' a court is without 'jurisdiction to . . . *impose a sentence* for an offense not charged in the indictment.'" United States v. Cotton, 261 F.3d 397, 404–05 (4th Cir. 2001) (citations omitted) (quoting United States v. Tran, 234 F.3d 798, 808 (2d Cir. 2000)), *rev'd by Cotton*, 535 U.S. 625 (2002).

330. Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2079–80 (2015).

331. *Cotton*, 535 U.S. at 630 (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 89 (1998)).

332. United States v. White Horse, 316 F.3d 769, 771 (8th Cir. 2003).

333. 18 U.S.C. § 1152 ("This section shall not extend to offenses committed by one Indian against the person or property of another Indian . . . .").

334. *White Horse*, 316 F.3d at 771–72.

335. *Id.* at 772.

336. *Id.* at 775–76.

Two years later, the Eight Circuit affirmed the conviction of Arnold James Pemberton on three counts of assault with a dangerous weapon arising from an incident on the Red Lake Indian Reservation in Minnesota.[337] Pemberton was charged under both the GCA as a non-Indian and, in the alternative, under the MCA as an Indian,[338] and initially pleaded not guilty. At the change-of-plea hearing, however, "Pemberton testified that he was not an enrolled member of any tribe but considered himself an Indian,"[339] and he signed a plea agreement pleading guilty to the counts charging him as an Indian under the Major Crimes Act and dismissing the counts charged under the GCA.[340] On appeal, Pemberton argued that there was insufficient evidence to prove that he was an Indian and, therefore, the district court lacked jurisdiction.[341] Citing *Cotton* and *White Horse*, the Eighth Circuit wrote that "the alleged dispute over Pemberton's Indian status did not deprive the district court of jurisdiction,"[342] then held both that there was no deficiency in the indictment,[343] and that there was sufficient evidence to prove Pemberton's Indian status.[344] In the Eighth Circuit,[345] at least, a defendant's Indian status was to be determined by the jury.[346]

337. United States v. Pemberton, 405 F.3d 656, 658 (8th Cir. 2005).

338. *Id.* Pemberton later testified that both of his parents were Indians, and that his mother was an enrolled tribal member. *Id.* In addition, the presentencing report identified Pemberton as an Indian and said that he lived on and attended both elementary school and high school on the Red Lake Indian Reservation. *Id.* at 658–59.

339. *Id.* at 658.

340. *Id.*

341. *Id.* at 659.

342. *Id.*

343. *Id.* ("[T]he indictment charged all the necessary elements, including his Indian status under § 1153(a), . . . [and] his guilty plea was sufficient to establish the factual predicate necessary for the district court to find that he was an Indian under § 1153(a).").

344. *Id.* at 660 (citing Pemberton's description of himself as an Indian, his description of his parents as Indians and of his mother as an enrolled tribal member, and his time living and attending school on the Red Lake Indian Reservation).

345. The Ninth Circuit, too, appears to have changed its approach after *Cotton*, although it did not leave as clear a paper trail as the Eighth Circuit did. The first reference in the Ninth Circuit to Indian status being a jury issue was in *United States v. Bruce*, 394 F.3d 1215, 1217 (9th Cir. 2005). In *Bruce*, a defendant charged as non-Indian under the GCA asserted in a motion for a judgment of acquittal that she was an Indian and, because the victim also was an Indian, she could not be convicted under the GCA. *Id.* at 1217–18. The district court denied her motion and refused to submit the question of her Indian status to the jury. *Id.* at 1218. The Ninth Circuit held that Bruce had put forth evidence sufficient to present her Indian status defense to the jury and vacated her conviction. *Id.* at 1217, 1231.

346. *White Horse* raises a different issue: whether the federal government can excuse itself from having to prove Indian status by charging defendants under the GCA instead of, or in addition to, the MCA. *Compare* United States v. White Horse, 117 F. Supp. 769, 772 (8th Cir. 2003) (holding that an Indian defendant was not prejudiced by decision to charge under the GCA instead of the MCA), *with Bruce*, 394 F.3d at 1230–31 (holding that mischarging an Indian under the GCA was not harmless error and vacating conviction). By charging White Horse as a non-Indian, the prosecution effectively relieved itself of a burden of proof—it did not have to prove White Horse's Indian status as an element of the crime—and shifted it to White Horse, who would have to raise Indian status as an affirmative defense. Another question of prosecutorial fairness arises when prosecutors charge a defendant under both the MCA as an Indian *and* under the GCA as a non-Indian, as the federal government did in *Pemberton* and *Driver*. *See supra* note 169. Although this practice raises serious constitutional questions, it is beyond the scope of this Article.

Once Indian status was determined to be a jury question, courts had to instruct jurors how they were to determine Indian status. In *Stymiest*, the district court began with a general instruction that the jurors were to "apply th[e] law to the facts as you find them from the evidence before you."[347] The court then instructed the jurors to "perform this duty without bias or prejudice."[348] Instructions about the nature of an indictment, the burden of proof beyond a reasonable doubt, and the evaluation of evidence followed.[349] Next, the court enumerated the elements of the crime charged,[350] including the element that "[t]he defendant is an Indian," which appeared both in the instruction for the principal charge[351] and a lesser-included offense.[352] The court then further explicated the Indian status element, effectively instructing the jury to follow the *St. Cloud* factors.[353] Of the remaining instructions,[354] the only one relevant to this Article cabined the effect of a stipulation.[355]

Although the district court in *Stymiest* appears to have drafted its own jury instruction on Indian status, since then the Eighth and Ninth Circuits have drafted model Indian status instructions for use by their district courts.[356] In both instances, those model instructions mirror the case law in the circuit,[357] although, as previously noted, that case law is not entirely consistent from jurisdiction to jurisdiction.[358] Notably, however, both sets of instructions also instruct jurors *not* to consider "any person's race, color" or other personal characteristics, and not to be "influenced" by "bias," including "unconscious bias."[359] Although the Fourth, Seventh, and Tenth Circuits have heard Indian status cases, and the First,

347. Jury Instructions, *supra* note 29, No. 1.

348. *Id.* No. 2.

349. *Id.* No. 3–9.

350. *Id.* No. 10–12.

351. *Id.* No. 10.

352. *Id.* No. 12.

353. *Compare id.* No. 13 (listing the *St. Cloud* factors), *with* St. Cloud v. United States, 702 F. Supp. 1456, 1460–61 (D.S.D. 1988) (analyzing the factors).

354. Jury Instructions, *supra* note 29, No. 13–21.

355. *Id.* No. 17 ("[The prosecution and defense had] stipulated that the place where the alleged incident is claimed to have occurred is in Indian country. The defendant has not, by entering this . . . stipulation, admitted his guilt of the offense charged, and you may not draw any inference of guilt from the stipulation.").

356. *See supra* notes 276, 291 and accompanying text.

357. *Compare* Jud. Comm. on Model Jury Instructions for the 8th Cir., *supra* note 276 ("*Two*, that the defendant is recognized as an Indian person by a tribe or the federal government, or both."), *with* United States v. Stymiest, 581 F.3d 759, 763 (8th Cir. 2009) ("The second element is whether Matthew Stymiest is recognized as an Indian by the tribe or by the federal government or both."); 9th Cir. Jury Instructions Comm., *supra* note 291 ("Second, the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense."), *with* United States v. Zepeda, 792 F.3d 1103, 1114 (9th Cir. 2019) ("[T]he court should instruct the jury that it has to find beyond a reasonable doubt that the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense.").

358. *See supra* notes 315–316 and accompanying text; *cf.* Eid & Doyle, *supra* note 139, at 1098 ("The variation in jury instructions on Indian status demonstrates the potential confusion of asking predominantly non-tribal jurors to weigh any number of factors to determine whether the defendant is Indian.").

359. Jud. Comm. on Model Jury Instructions for the 8th Cir., 3.02, *Duty of Jury* (2021); 9th Cir. Jury Instructions Comm., 1.1, *Duty of Jury* (2019).

Second, Sixth, and Eleventh Circuits also have Indian country within their jurisdictions, it appears none of those courts has published a pattern jury instruction on Indian status.[360]

* * *

So Congress has defined "Indian" for a variety of purposes, but not for the purpose of determining who is subject to the federal government's exclusive criminal jurisdiction in Indian country.[361] *Rogers* has given us a basic framework for determining who is an Indian: an Indian must have some Indian ancestry, and must be recognized as an Indian.[362] The U.S. Circuit Courts of Appeals (at least some of them) have refined that framework.[363] These courts have put the determination of Indian status in the hands of individual juries, with at least some circuits providing model instructions to guide those jury deliberations.[364]

Do juries follow those instructions?

III. THE EXPERIMENT: INDIAN STATUS ON TRIAL[365]

Does a defendant's race influence jury determinations? On this question, social science does not provide a clear answer. Some studies suggest that mock jurors generally exhibit bias against racial groups not their own.[366] As with much of the research on race, most studies focus on Black-and-White dynamics,

360. *See Pattern Criminal Jury Instructions for the District Courts of the First Circuit*, 1st Cir. Comm. on Pattern Jury Instructions (2024); *Pattern Jury Instructions (Criminal Cases)*, Comm. on Pattern Jury Instructions, Dist. Judges Ass'n 5th Cir. (2024); *Pattern Criminal Jury Instructions*, 6th Cir. Comm. on Pattern Crim. Jury Instructions (2025); *The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit*, Comm. on Fed. Crim. Jury Instructions of the 7th Cir. (2023); *Criminal Pattern Jury Instructions*, Crim. Pattern Jury Instruction Comm. of the U.S. Ct. of Appeals for the 10th Cir. (2025); *Eleventh Circuit Pattern Jury Instructions, Criminal Cases*, Jud. Council of the U.S. 11th Jud. Cir. (2024). There is no Indian country within the Third Circuit or the D.C. Circuit, so it is no surprise that those Circuits' pattern jury instructions have no instruction for Indian status. *See Model Criminal Jury Table of Contents and Instructions*, Comm. on Model Crim. Jury Instructions 3d Cir. (2024); Barbara E. Bergman, Crim. Jury Instructions for the District of Columbia (2025). The Second and Fourth Circuits have no pattern jury instructions. *Jury Instructions Research Guide: United States Courts of Appeals*, ECKSTEIN L. LIBR. RSCH. GUIDES, MARQ. UNIV. L. SCH. (Sep. 16, 2025, at 14:25 PT), https://libraryguides.law.marquette.edu/c.php?g=318617&p=3680634.

361. *See supra* Subpart.II.A.

362. *See supra* Subpart.II.B.1.

363. *See supra* Subpart.II.B.2.

364. *See supra* Subpart.II.B.3.

365. For a more technical explanation of our methods, see Schweitzer & Lewerenz, *supra* note 44, at 830–32.

366. Michael R. Leippe, Amanda N. Bergold, Nikoleta Despodova, Christopher Gettings & Donna Eisenstadt, *Decision Importance and Black and Hispanic Jurors' Judgments of Outgroup and Ingroup Defendants in a Trial Simulation*, 28 PSYCH. CRIME & L. 1024, 1039 (2022) ("Across experiments, three highly-identifiable racial/ethnic groups of participants and defendants—Blacks, Hispanics, and non-Hispanic Whites—were studied. Outgroup discrimination was similar among all groups when decision importance was high. . . . Consistent with social identity theory's major dictums, favoring the ingroup over the outgroup and discriminating against outgroup members seem to occur no matter what groups are in the roles of evaluators and targets." (citation omitted)). Social identity theory is one of three leading theories (with aversive racism theory and racial justice) seeking to explain jurors' racial biases. *See* Elizabeth Ingriselli, Note, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1695–98 (2015).

finding that mock jurors are more likely to find Black defendants guilty than they are White defendants.[367]

There is much less research on whether an Indian's race affects mock jurors' perceptions of guilt. American Indians make up a disproportionate share of the American prison population.[368] And some studies suggest that mock jurors may be more likely to find Indian defendants guilty than they are other defendants, although the results are nuanced.[369]Those studies, however, focus on Indianness as a racial condition, and not on Indian status in the context of federal criminal jurisdiction.[37o] The legal scholarship on Indian status in federal criminal cases mostly glosses over the role of the jury in Indian status

367. Tara L. Mitchell, Ryann M. Haw, Jeffrey E. Pfeifer & Christian A. Meissner, *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 L. & HUM. BEHAV. 621, 629 (2005) ("[T]he analysis of research on this issue indicates a small, but significant, effect for racial bias in both verdict . . . and sentencing . . . decisions."); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERS. & SOC. PSYCH. BULL. 1367, 1378 (2000) ("[T]he present studies suggest that White jurors (and by extension White police officers, White judges, White lawyers, etc.) still demonstrate bias in cases where racial issues are not emphasized, justifying Black jurors' skepticism about the fairness of the criminal justice system."). *But see* Dennis J. Devine & David E. Caughlin, *Do They Matter? A Meta-Analytic Investigation of Individual Characteristics and Guilt Judgments*, 20 PSYCH. PUB. POL'Y & L. 109, 125 (2014) (finding defendant's race has little to no overall effect on mock juror verdicts).

368. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, PRISON POL'Y INITIATIVE 35 (Mar. 11, 2025) https://www.prisonpolicy.org/factsheets/pie2025_allimages.pdf (showing statistics that Indians make up 1 percent of the U.S. population, but 3 percent of those in correctional facilities). The Federal Bureau of Prisons reports similar numbers for the federal prison population. *Statistics: Inmate Race*, FED. BUREAU OF PRISONS (Apr. 18, 2026), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp.

369. Cindy Struckman-Johnson, Michael G. Miller & David Struckman-Johnson, *Effects of Native American Race, Intoxication, and Crime Severity on Judgments of Guilt*, 38 J. APPLIED SOC. PSYCH. 1981, 1988 (2008) (revealing that mock jurors are generally no more likely to find Indian defendant guilty than White defendant, but "a three-way interaction of race, intoxication, and crime [severity] . . . supports our prediction that an intoxicated Native American defendant who commits a deadly crime will receive the highest guilty rating"); Logan Ewanation & Evelyn Maeder, *The Influence of Witness Intoxication, Witness Race, and Defendant Race on Mock Juror Decision Making*, 60 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 505, 506 (2018) (collecting studies); *see also* Kimberley A. Clow, James M. Lant & Brian L. Cutler, *Perceptions of Defendant Culpability in Pretrial Publicity: The Effects of Defendant Ethnicity and Participant Gender*, 5 RACE & SOC. PROBS. 250, 256 (2013) (stating that mock jurors generally no more likely to find Canadian Aboriginal defendants guilty than Black or White defendants, but female mock jurors more likely to find Aboriginal defendants guilty). Here, we use "Aboriginal" because the source material does, and because in Canada the term "Indian" can be considered pejorative. *See* GREGORY YOUNGING, ELEMENTS OF INDIGENOUS STYLE: A GUIDE FOR WRITING BY AND ABOUT INDIGENOUS PEOPLES 57–58 (2d ed. 2025).

370. *See supra* note 369.

determinations,[371] or merely mentions a the jury in a particular case or cases,[372] if juries are mentioned at all.[373] Most of the scholarship, instead, advocates for a particular construction of "Indian" in the Indian country statutes.[374]

We wanted to know whether mock jurors' stereotypes about Indians would affect Indian status determinations and/or guilt determinations in a hypothetical trial scenario. This Part describes how we set about answering that question.

We conducted our experiment in two phases. In the first phase, our pilot study, we presented participants with ten different faces and ten different names to determine which the participants thought most resembled their stereotype of an Indian face or name[375] (taking care to do so in a way that did not introduce other potential biases into our research).[376] After selecting exemplars of both high-stereotypical and low-stereotype Indian faces, and high-stereotype and low-stereotype Indian names, we presented mock jurors in our principal study

371. *E.g.*, Young, *supra* note 12 (mentioning only that judges and juries make Indian status determinations); Summers, *supra* note 42, at 211–12, 212 n.125 (stating factors for jury to consider in recognition prong); Langland, *supra* note 42, at 116 (stating that Indian status is a jury question determined by refence to *Rogers* test); Golden, *supra* note 42, at 1063 n.185 (stating that Indian status is a jury question). *But see* Donovan & Rhodes, *supra* note 41, at 95–96 (discussing reasons to waive jury trial when Indian status is at issue); Skibine, *supra* note 30, at 85 (discussing role and unpredictability of juries). Two articles have a more substantial discussion of the jury role in determining Indian status. Locklear, *supra* note 42, at 133–34; Snyder, *supra* note 42, at 365–68, 372–75. But both articles focused not on federal criminal jurisdiction, but on the Indian status determination made by the North Carolina Supreme Court in *State v. Nobles*. 838 S.E.2d 373 (N.C. 2020). Those articles contained more fulsome discussions of the jury's role because a central question in *Nobles* was whether the defendant's Indian status was a question of law for the judge or a question of fact for the jury. *Id.* at 381–83.

372. *E.g.*, Meyring, *supra* note 41, at 197, 205; Paulson, *supra* note 41, at 59; Miles, *supra* note 42, at 275, 286; Oakley, *supra* note 42, at 191.

373. *E.g.*, Lewis, *Do You Know*, *supra* note 41 (failing to mention the role of the jury); Smith, *supra* note 41 (failing to mention the role of the jury). Some even suggest that Indian status is determined by judges. *See, e.g.*, Miles, *supra* note 42, at 283. The Ninth Circuit, which was the principle subject of Miles's Note, reserves a role for the judge in the judicial status equation, *see supra* note 290 and accompanying text, and although a defendant can always choose a bench trial that would put the Indian status determination in the judge's hands, the determination of Indian status still principally belongs to the jury.

374. The most common recommendation, either on its own or in combination with others, is that courts limit Indian status to members of federally recognized tribes. *E.g.*, Skibine, *supra* note 30, at 86 ("[F]ederal criminal jurisdiction over 'Indians' should be limited to enrolled tribal members *unless* the tribe on whose land the crime was committed has come up with precise standards letting federal judges and juries know who else qualifies as an Indian for the purposes of federal criminal jurisdiction."); Oakley, *supra* note 42, at 209–10 (arguing for a "bright-line" rule that only enrolled tribal members be recognized as having Indian status); *see also* Locklear, *supra* note 42, at 138–47 (arguing for repeal of the MCA or, in the alternative, using tribal membership as a "bright-line" to determine Indian status); Snyder, *supra* note 42, at 383 (arguing for a "bright-line" approach that makes a tribe's recognition of the defendant dispositive); Summers, *supra* note 42, at 196, 226–28 (arguing for the elimination of the "Indian blood" prong of the Indian status analysis); Golden, *supra* note 42, at 1065 (arguing for amendments to the MCA, and that courts should recognize as Indian only persons enrolled in a federally or state-recognized tribe). *But see* Meyring, *supra* note 41, at 230 (arguing that courts should "focus less on formal enrollment" in favor of an approach that centers "Indian tribal identification in the socio-political sense"). Two commentators advocate for a uniform approach: one prefers that of the Eighth U.S. Circuit Court of Appeals, Lewis, *Do You Know*, *supra* note 41, at 276 (arguing for a "uniform test" for Indian status, and criticizing the Ninth Circuit's approach), while the second argues for uniformity without saying which approach the courts should choose. Young, *supra* note 12, at 109–10.

375. For why we chose faces and names, see *infra* Subpart.III.A.

376. *See infra* Subpart.III.B.

with a hypothetical trial scenario, manipulating the defendant's name and photo each mock juror was presented with, and asked mock jurors to determine both the defendant's Indian status and whether the defendant was guilty of the crime alleged.[377]

Participants for both the pilot study and the principal study were recruited through Prolific, an online participant recruitment platform where individuals sign up to complete tasks for money.[378] All materials were approved by our university's Institutional Review Board.

A. INDIANS, FACES, NAMES, AND STEREOTYPES

As one scholar has observed, "[i]n the United States, those who have not grown up on reservations, or been immersed in other ways in tribal culture, nonetheless often have very fixed ideas of what an Indian looks like," ideas often "based on stereotypes and misinformation."[379] We decided to test how some of those stereotypes—specifically, the defendant's physical appearance and name—might affect mock jurors' determinations of Indian status and, ultimately, of guilt.

The first variable we tested was the defendant's physical appearance, which "constitutes the first impression that a jury may have of a defendant . . . in a trial,"[380] and which often is "the most visible aspect of one's race."[381] The social science literature has long demonstrated how people categorize others based on physical, including facial, appearance.[382] And more than just race—

377. *See infra* Subpart.III.C.

378. Prolific is "an internet survey platform that has become one of the most reputable in social sciences . . . ." Omar Vasquez Duque, *Taking Behavioral Antitrust Seriously: On Default Agreements as Exclusive Dealing and the Debiasing Potential of Default Randomization*, 84 MD. L. REV. 143, 169 (2024). Other investigators working at the intersection of law and psychology have used Prolific to recruit participants. *E.g.*, Joseph J. Avery, DongWon Oh, Lauren Feldman, Reuven Cooper & Joel Cooper, *Criminal Stereotypes of Muslim and Arab Americans and the Impact on Evaluations of Ambiguous Criminal Evidence*, 51 J. LEGAL STUD. 177, 194 (2022).

379. Renee Ann Cramer, *The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success in Gaming and Acknowledgment*, 31 LAW & SOC. INQUIRY 313, 328–29 (2006); *see also* S. Elizabeth Bird, *Introduction: Constructing the Indian: 18030s-1990s*, *in* DRESSING IN FEATHERS: THE CONSTRUCTION OF THE INDIAN IN AMERICAN POPULAR CULTURE 1, 4 (1996) (discussing the attitudes of White people toward Indian stereotypes); Hall & Simkus, *supra* note 52, at 203 ("The native American offender is at a disadvantage because of . . . negative stereotypes with which he is associated . . . .").

380. Evelyn M. Maeder, Susan Yamamoto & Paula Saliba, *The Influence of Defendant Race and Victim Physical Attractiveness on Juror Decision-Making in a Sexual Assault Trial*, 21 PSYCH. CRIME & L. 62, 62 (2015).

381. GARROUTTE, *supra* note 173, at 48 (quoting Devon A. Mihesuah, *Commonality of Difference: American Indian Women and History*, *in* NATIVES AND ACADEMICS: RESEARCHING AND WRITING ABOUT AMERICAN INDIANS 37, 42 (Devon A. Mihesuah ed. 1998)).

382. Nicholas O. Rule & Shelbie L. Sutherland, *Social Categorization from Faces: Evidence from Obvious and Ambiguous Groups*, 26 CURRENT DIRECTIONS IN PSYCH. SCI. 231, 231 (2017) ("For decades, researchers have demonstrated that people use particular cues to categorize others based on age, race, and sex . . . ."); Tiffany A. Ito & Keith B. Senholzi, *Us Versus Them: Understanding the Process of Race Perception with Event-Related Brain Potentials*, 21 VISUAL COGNITION 1096, 1097 (2013) ("An early investigation on the automatic social categorization of faces focused on the processes associated with race and gender perception."); Keith B. Maddox,

people assume all sorts of things just from the appearance of someone's face.[383] Specifically, one's perception of race derived from brief exposure to a photograph can cause the viewer to make assumptions about the criminality of the person in the photo.[384]

Some Indians may be recognizable as Indians because of their appearance,[385] specifically their facial appearance.[386] And being identifiable as Indian can have negative consequences in a variety of contexts,[387] including in the criminal justice system.[388] But American Indian phenotypes vary widely due at least in part to a long history of intermarriage with non-Indians.[389] As a result, a person trying to determine whether someone is Indian based on physical appearance might have a harder time doing so with some Indians than others.[390] We wanted to know whether mock jurors making Indian status determinations

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Perspectives on Racial Phenotypicality Bias, 8 PERS. & SOC. PSYCH. REV. 383, 383 (2004) ("The phenotypic facial characteristics we possess determine the racial category memberships that are ascribed to us.").

383. Ito & Senholzi, *supra* note 382, at 1096 ("Emotional state, behavioural intentions, occupational status, marital success, and a number of traits such as competence, trustworthiness, and aggressiveness are all readily inferred from faces." (collecting studies)); Jonathan B. Freeman, Andrew M. Penner, Aliya Saperstein, Matthias Scheutz & Nalini Ambady, *Looking the Part: Social Status Cues Shape Race Perception*, 6 PLOS ONE, no. 9, 2011, at 1, 1 ("Another's facial and hair cues (e.g., skin color, texture) provide diagnostic information used for race categorization.").

384. Maddox, *supra* note 382, at 390 (describing association of skin color and perceived criminality). *See generally* Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS. L. REV. 745 (2018) (describing studies using photographs in which a person's skin color was "the most important feature when deciding on someone's race," and photographs showing darker skin tone were rated higher for criminality).

385. Michelle R. Jacobs, *Urban American Indian Identity: Negotiating Indianness in Northeast Ohio*, 38 QUALITATIVE SOCIO. 79, 83 (2015) ("[A]ppearance is central to American Indian racial categorization. People claiming Indian identities are expected to look and act in certain ways . . . ." (citations omitted)); GARROUTTE, *supra* note 173, at 48 ("Indian people with high blood quanta frequently have recognizable physical characteristics."); Hall & Simkus, *supra* note 52, at 203 ("The native American offender is at a disadvantage . . . because of his increased visibility.").

386. Debra L. Merskin, *What Does One Look Like?*, *in* DRESSING IN FEATHERS: THE CONSTRUCTION OF THE INDIAN IN AMERICAN POPULAR CULTURE, *supra* note 379, at 281, 283 ("There are particular physical characteristics attributed to 'Indianness'—coarse, straight black hair; ruddy complexion; high cheekbones; a pronounced nose.").

387. GARROUTTE, *supra* note 173, at 48–49.

388. Indians have long complained that they are targeted by law enforcement because of their appearance. *See, e.g.*, MARY CROW DOG WITH RICHARD ERODES, LAKOTA WOMAN 22–23, 64–65 (1990).

389. BORDEWICH, *supra* note 176, at 78, 329. This is borne out in the high numbers of persons who identify as "multiracial" and claim Indian ancestry. KIM PARKER, RICH MORIN, JULIANA MENASCE HOROWITZ & MARK HUGO LOPEZ, MULTIRACIAL IN AMERICA: PROUD, DIVERSE AND GROWING IN NUMBERS 10 (2015), https://www.pewresearch.org/wp-content/uploads/sites/3/2015/06/2015-06-11_multiracial-in-america_final-updated.pdf ("[B]iracial adults with a white and American Indian background comprise half of the country's multiracial population—by far the country's largest multiracial group . . . ."); Raj Ghoshal, *Racial Appraisals by White, Black, Hispanic, and Multiracial Americans*, 11 SOCIO. RACE & ETHNICITY 477, 487–88 (2024) (explaining that among study participants, "Native American was the second-most represented identity among Multiracial respondents").

390. Jacqueline M. Chen & David L. Hamilton, *Natural Ambiguities: Racial Categorization of Multiracial Individuals*, 48 J. EXPERIMENTAL SOC. PSYCH. 152, 153 (2012) ("[M]ultiracial targets are ambiguous in that they are relatively unfamiliar stimuli and challenge the perceiver's well-practiced monoracial classification system.").

would be influenced by defendant photographs that were more, or less, stereotypically Indian.

The second variable we decided to test was the defendant's name.[391] Again, social science tells us that having a name associated with a particular racial or ethnic group can affect the way a person perceives other race-related characteristics.[392] And as with phenotype, a person's reaction to another's name, and specifically to the racial connotations of someone's name, can have serious effects,[393] including within the criminal justice system.[394] One study found that an Indian-sounding name (in the study, "Odakota" or "Lakota") increased the likelihood that a subject would identify the person with that name as Indian.[395]

Traditional Indian names come in two forms: either in the Indian language, like the Comanche name Tahdooahnippah;[396] or translated into a European language, such as the Shoshone-Bannock surname Racehorse.[397] Historically, such names often stood out, and former Commissioner of Indian Affairs Thomas J. Morgan derided the former as "unusually long and difficult" to pronounce, and the latter as "usually awkward and uncouth."[398] And, of course, for centuries

391. *See* Miles, *supra* note 42, at 269 ("What makes a person an Indian? Do they need a name like Sitting Bull or is Jim Thorpe enough?"); Struckman-Johnson et al., *supra* note 369, at 1983 ("[The experiment varied race by describing the defendant as having a traditional Native American surname or a White European name.").

392. Ariela Schachter, René D. Flores & Neda Maghbouleh, *Ancestry, Color, or Culture? How Whites Racially Classify Others in the U.S.*, 126 AM. J. SOCIO. 1220, 1229 (2021) ("Names can also function as ethnoracial cues." (citation omitted)); Denia Garcia & Maria Abascal, *Colored Perceptions: Racially Distinctive Names and Assessments of Skin Color*, 60 AM. BEHAV. SCI. 420, 433 (2016) ("Observers rate a person's face darker when that person's name is distinctively Hispanic versus non-Hispanic . . . .").

393. Perhaps the best-known example of this phenomenon is the body of studies demonstrating that employers, when presented with fake job candidates who are identical except for their names, are more likely to invite for an interview a candidate with a name associated with White people than a candidate with a name associated with Black people. One such study, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004), has been cited in almost 250 law review articles in just over twenty years.

394. *See generally* Dushiyanthini (Toni) Kenthirarajah, Nicholas P. Camp, Gregory M. Walton, Aaron C. Kay & Geoffrey L. Cohen, *Does "Jamal" Receive a Harsher Sentence Than "James"? First-Name Bias in the Criminal Sentencing of Black Men*, 47 L. & HUM. BEHAV. 169 (2023) (finding that racial associations with first names can bias sentencing decisions).

395. Schachter et al., *supra* note 392, at 1239 ("We also found a small positive effect of common Native names . . . .").

396. Forrest Tahdooahnippah is the elected Chairman of the Comanche Nation, *Comanche Business Committee*, COMANCHE NATION, https://www.comanchenation.com/bc-*business*/page/chairman (last visited Apr. 23, 2026), and an Assistant Professor of Law at the Mitchell Hamline School of Law, *Faculty, Staff, and Administration*, MITCHELL HAMLINE SCH. OF L., https://mitchellhamline.edu/biographies/person/forrest-tahdooahnippah (last visited Apr. 23, 2026).

397. Vanessa Racehorse, a Shoshone-Bannock Tribes member, is an Associate Professor of Law at the University of Colorado Law School. *Colorado Law, About, Vanessa Racehorse*, UNIV. OF COLO. BOULDER: COLO. L., https://lawweb.colorado.edu/profiles/profile.jsp?id=1164 (last visited Apr. 12, 2026). The name sometimes is spelled Race Horse. *E.g.*, Ward v. Race Horse, 163 U.S. 504 (1896).

398. Daniel F. Littlefield, Jr. & Lonnie E. Underhill, *Renaming the American Indian: 1890-1913*, 12 AM. STUD. 33, 35 (1971) (quoting Memorandum from T.J. Morgan to Indian Agents and Superintendents of Schools, *Cheyenne and Arapaho—Language and Names* (Mar. 19, 1890)).

many Indians have had European surnames.[399] The first treaty between the Cherokee Nation and the nascent United States has examples of all three forms.[400] We wanted to know whether mock jurors making Indian status determinations would be influenced by defendant names that were more, or less, stereotypically Indian.

We used our pilot study to determine which photographs and names mock jurors might be most likely to stereotype as Indian.

B. THE PILOT STUDY[401]

Our first task was to determine which names and which photos were stereotypically Indian so that we could then determine whether mock jurors presented with a stereotypically Indian name and/or a stereotypically Indian photo would be more likely to determine that a defendant was Indian than a mock juror presented with a less-stereotypical photo and/or name. In doing so, we also had to ensure that other variables, such as a defendant's perceived age, attractiveness, social class, and likelihood of criminal history would not cloud our data. This was the task of our pilot study.

Our pilot study began with 103 participants; however, twenty-eight participants who failed one or more attention-check questions were removed from the data. Of the remaining seventy-five participants, fifty (66.67%) identified as White, five identified as Black (6.67%), eleven identified as Asian (14.67%), and nine identified as mixed (12.00%); none identified as American Indian or Alaska Native.[402] Their average age was approximately thirty-six years and eight months. Participants were paid one dollar and seventy-five cents to complete the pilot study, which took approximately ten minutes to complete.

To study the effect of a defendant's appearance on the determination of Indian status, we collected, from publicly available sources, ten mug shots of men who had been charged as Indians under the Major Crimes Act.[403] To study the effect of names on Indian status and guilt determinations, we began with the 1890 Indian Census,[404] identifying all of the names of male Indians in Indian Territory and Oklahoma Territory in that report. We then selected ten names that included indigenous language surnames (Sarcoxie, Tyuby), translated surnames

399. One of the authors of this Article, for example, has the German surname Lewerenz. His Iowa Tribe ancestors going back five generations are Murphys.

400. Treaty with the Cherokee Nation, Cherokee Nation-U.S., Nov. 28, 1785, 7 Stat. 18, 20–21 (listing signatories which include Koatohee (Cherokee name), Yellow Bird (translated name), and Benjamin Hawkins (European name)).

401. The description and results of our pilot study are reported at Schweitzer & Lewerenz, *supra* note 44, at 830.

402. This is not surprising, given that persons identifying as American Indian or Alaska Native make up only about 1.3 percent of the U.S. population. CENSUS BUREAU, *Quick Facts*, *supra* note 171.

403. Photographs shown to the subjects are available on our Open Science Framework (OSF) page, *Pilot Photos*, OSF, https://osf.io/6w5gj/files/osfstorage?view_only=55149050aa9440beaf9e69df98245c8e (last visited Apr. 23, 2026).

404. *1890 Census: Volume 10. Report on Indians Taxed and Indians Not Taxed in the United States (Except Alaska)*, U.S. CENSUS BUREAU (Mar. 27, 2025), https://www.census.gov/library/publications/1894/dec/volume-10.html.

(Tall Chief, Black Coyote, Six Killer), and European surnames (Brown, Christie, Faulkner, McDaniel, Thompson).[405] Participants were presented (in random order) with each of the ten names and each of the ten photos and asked to rate on a scale of 0–100 how closely each matched their idea of an Indian. In addition, we asked a variety of other questions (for example, with each photo and name we asked the subjects to estimate the person's age, attractiveness, social class, and likelihood of criminal history) intended both to hide from participants precisely what we were looking for, and to ensure that variables we were not testing for would not cloud our data. For example, a person's perception of another's "wealth, poverty, or a criminal record" can influence what the person perceives the other's race to be.[406]

The participants' answers allowed us to select two photos and two names for our principal study. Pilot study participants rated two photos as highly stereotypical of Indians, and three photos as less stereotypical.[407] We selected for the principal study one high-stereotype photo and one low-stereotype photo that were both rated roughly the same on age, attractiveness, social class, and criminal history.[408] Pilot study participants rated two names (Tall Chief and Black Coyote) as highly stereotypical of Indians, and three names (David Faulkner, George McDaniel, and Will P. Thompson) as less stereotypical.[409] We selected Black Coyote and George McDaniel for the principal study because they most closely matched each other across the other variables of age, attractiveness, social class, and criminal history.[410]

Now we could test our hypothesis.

C. THE PRINCIPAL STUDY[411]

We recruited 954 participants for the principal study, but removed from the data fifty-seven who most likely would not have been eligible for jury service (for example, because of a felony conviction or because they were not U.S. citizens) and seventy-seven who failed one or more attention-check questions during the experiment, leaving 825 participants in the results. Of those 825 mock jurors, 589 (71%) identified as White, 114 (14%) as Black, 63 (7.63%) as mixed-race or other, 57 (6.91%) as Asian, and 2 (0.25%) as American Indian or Alaska Native.[412] Their average age was approximately forty-one years old.

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405. OSF, *supra* note 403 (click "Supplemental Table 1 and 2").

406. Ghoshal, *supra* note 389, at 497; Freeman et al., *supra* note 383, at 2, 7 (explaining visual cues associated with low-status versus high-status occupation correlated with subject's racial categorizations).

407. OSF, *supra* note 403 (click "Supplemental Table 1 and 2").

408. *Id.*

409. *Id.*

410. *Id.*

411. A more detailed description of our principal study is reported at Schweitzer & Lewerenz, *supra* note 44, at 831–38.

412. Our pool of mock jurors had a lower percentage of persons identifying as American Indian or Alaska Native than the general population, *see* CENSUS BUREAU, *Quick Facts*, *supra* note 171 (explaining that 1.3 percent of U.S. population identifies as American Indian or Alaska Native). Our pool nevertheless may be

Participants heard audio of closing arguments and the jury instruction in a hypothetical Major Crimes Act prosecution for an alleged assault on the hypothetical Crest Lake Indian Reservation. They were also provided with a transcript so they could read along. Participants were randomly assigned to hear (and read) one of three versions—with either the high-stereotype name (Black Coyote), the low-stereotype name (George McDaniel), or no name ("the Defendant")—and were randomly assigned to see either the selected high-stereotype photo, the low-stereotype photo, or no photo, as depicted in Table 1, below.

Table 1

		Defendant Photo Stereotypicality		
		High-Stereotype	**Low-Stereotype**	**No Photo**
Defendant Name	**Black Coyote**	Photo=High Name=High	Photo=Low Name=High	Photo=None Name=High
	George McDaniel	Photo=High Name=Low	Photo=Low Name=Low	Photo=None Name=Low
	The Defendant	Photo=High Name=None	Photo=Low Name=None	Photo=None Name=None

The arguments summarized evidence both for and against a finding of Indian status, and both for and against the underlying charge of simple assault.[413] Evidence against a finding of Indian status included testimony that the defendant was not an enrolled member of, and was not eligible for membership in, any federally recognized Indian tribe;[414] that he sought, paid for, and obtained State hunting licenses instead of taking advantage of tribal hunting privileges;[415] and

representative of Major Crimes Act jury pools. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 747–51 (2006) (detailing underrepresentation of Indians on federal juries); *cf.* Eid & Doyle, *supra* note 139, at 1105 (observing that not just juries, but jury pools often lack "meaningful Native American representation"); Alana Paris, Note, *An Unfair Cross Section: Federal Jurisdiction for Indian Country Crimes Dismantles Jury Community Conscience*, 16 NW. J.L. & SOC. POL'Y 92, 94 (2020) (arguing that Indians subject to federal criminal jurisdiction are unable to get a jury that represents a fair cross section of their community). Professor Washburn speaks from personal experience, having prosecuted Indian country cases. *See* Kevin K. Washburn, *American Indians, Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1011 (2008). For a persuasive argument that the underrepresentation of Indians on federal juries is unconstitutional, and for a recommended remedy, see Jordan Gross, *Let the Jury Fit the Crime: Increasing Native American Jury Pool Representation in Federal Judicial Districts with Indian Country Criminal Jurisdiction*, 77 MONT. L. REV. 281 (2016).

413. We wanted to make sure that the Indian status defense was not the only defense out of concern that, if it was, a vote to acquit might be perceived as letting a criminal go free on a technicality. *See* Donovan & Rhodes, *supra* note 41, at 94 ("If the evidence of the alleged crime is strong . . . a jury may be reluctant to acquit even if the Indian status evidence is weak.").

414. *See* United States v. Cruz, 554 F.3d 840, 846–47 (9th Cir. 2009) (lacking membership and ineligibility for membership as evidence against Indian status).

415. *See id.* at 852 (failing to utilize tribal hunting privileges as evidence against Indian status).

that he attended middle school and high school at State schools off the reservation.[416] Evidence in support of a finding of Indian status included the defendant's blood quantum of 3/32 Indian,[417] and that the defendant lived on the reservation,[418] attended an on-reservation elementary school run by the Bureau of Indian Education,[419] and received medical care as a child from an Indian Health Service ("IHS") clinic.[420] The jury instructions were drawn from the Eighth Circuit Pattern Jury Instructions, including the general duty of the jury,[421] the instruction for simple assault,[422] and the instruction for Indian status.[423] Listening to the arguments and instruction took participants approximately twenty-seven minutes.

For our experiment, we used a modified version of a verdict form. A standard verdict form simply asks the jury to answer whether the defendant is guilty or not guilty.[424] Because we were interested not only in mock jurors' ultimate determinations of guilt, but also in mock jurors' determinations of Indian status, our jury form was more specific:

> One, did the prosecution prove, beyond a reasonable doubt, that on or about July ninth (9th), 2022, [Black Coyote / George McDaniel / the defendant] assaulted Marvin Thomas?
>
> - Yes
> - No
>
> Two, did the prosecution prove, beyond a reasonable doubt, that the assault happened on the Crest Lake Indian Reservation?
>
> - Yes
> - No
>
> Three part 1, did the prosecution prove, beyond a reasonable doubt, that [Black Coyote / the defendant / George McDaniel] has some degree of Indian blood?
>
> - Yes
> - No

416. United States v. Loera, 190 F. Supp. 3d 873, 877–78 (D. Ariz. 2016) (attending off-reservation schools as evidence against Indian status).

417. *See* United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) (using blood quantum of 3/32 as evidence of Indian status).

418. *See id.* at 765 (living on reservation as evidence of Indian status).

419. *See* United States v. Nowlin, 555 F. App'x. 820, 824 (10th Cir. 2014) (attending Indian schools as evidence of Indian status).

420. *See Stymiest*, 581 F.3d at 765 (using the receipt of IHS services as evidence of Indian status).

421. Jud. Comm. on Model Jury Instructions for the 8th Cir., *supra* note 359 (stating, in part, "You should not be influenced by any person's race, color [or] ethnicity . . . .").

422. Jud. Comm. on Model Jury Instructions for the 8th Cir., 6.18.113(5), *Simple Assault (18 U.S.C. § 113(A)(5))* (2022).

423. Jud. Comm. on Model Jury Instructions for the 8th Cir., *supra* note 276.

424. *See* Verdict, United States v. Stymiest, No. CR 08-30006 (D.S.D. June 13, 2008).

> Three part two, did the prosecution prove, beyond a reasonable doubt, that [Black Coyote / the defendant / George McDaniel] is recognized as an Indian person by a tribe or the federal government or both?
>
> - Yes
> - No
>
> Considering both the first part and the second part of three, then, did the prosecution prove, beyond a reasonable doubt, that [Black Coyote / the defendant / George McDaniel] is an Indian?
>
> - Yes
> - No
>
> Finally, considering each of the elements above, did the prosecution prove, beyond a reasonable doubt, that [Black Coyote / the defendant / George McDaniel] committed the crime alleged in the indictment?
>
> - Yes
> - No[425]

As with the pilot study, in the principal study we also asked participants additional questions both to disguise what we were investigating, and to identify additional variables that might cloud our data. Participants were asked, separate from the Indian status determination, if they thought that the Defendant was racially Indian. Finally, participants provided some demographic data about themselves. Participants took approximately thirty-seven minutes to complete the principal study, and upon completion were given a code to receive seven dollars.

For the most part, the results were not what we expected—but they nevertheless provide valuable information about Indian country prosecutions.

IV. THE RESULTS: STEREOTYPES, INDIAN STATUS, AND GUILT[426]

We predicted that mock jurors in our experiment presented with a stereotypically Indian photo or name would be more likely to answer "Yes" when asked whether the defendant has some degree of Indian blood, whether the defendant is recognized as an Indian, whether the defendant is an Indian, and whether the defendant is guilty of the crime charged; we predicted this effect would be amplified for mock jurors presented with both a stereotypically Indian photo and a stereotypically Indian name.

This Part summarizes the results of our experiment. First, we discuss the results of our experiment.[427] Then we identify unanswered questions and avenues for further research.[428]

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425. OSF, *supra* note 403 (click "Verdict Form").

426. For a more technical examination of the results of our study, see Schweitzer & Lewerenz, *supra* note 44, at 832–38.

427. *See infra* Subpart.IV.A.

428. *See infra* Subpart.IV.B.

A. WHAT WE LEARNED

Degree of Indian Blood. When asked whether the prosecution had proven beyond a reasonable doubt that the defendant had some degree of Indian blood, approximately 84 percent of mock jurors answered yes. This result was surprising because the prosecution had offered evidence that the defendant had an Indian blood quantum of 3/32, and the defense had not disputed that, meaning that approximately 16 percent of mock jurors disputed an undisputed fact.

Contrary to our expectations, we found that neither the stereotypicality of the defendant's photo nor the stereotypicality of the defendant's name affected mock jurors' determinations of Indian blood.

Recognized as an Indian by a Tribe or the Federal Government. When asked whether the prosecution had proven beyond a reasonable doubt that the defendant was recognized as an Indian, approximately 35 percent of mock jurors answered yes.

This is where we saw the only example of stereotypes appearing to have the effect we predicted. Among participants who saw the low-stereotype photo, those who also were presented with a high-stereotype name (Black Coyote) were significantly more likely to say that the defendant was recognized as an Indian (42%) than were those presented with the low-stereotype name (George McDaniel, 26%). No other photo-and-name combination had a significant effect, nor did any other comparisons.

Indian Status. When asked whether the prosecution, considering both of the two previous elements, had proven beyond a reasonable doubt that the defendant was an Indian, approximately 39 percent of mock jurors answered yes.

Again, contrary to our expectations, our variables did not predict mock jurors' determinations of Indian status. The overall result was notable, however, because it shows that at least some mock jurors either did not understand, or chose not to follow, the jury instructions. Although participants were instructed that the prosecution needed to prove beyond a reasonable doubt that the defendant was recognized as an Indian in order to find that the defendant was an Indian,[429] fifty participants (just over 6%) answered "Yes" to Indian status after answering "No" to recognition. In addition, although participants were instructed that the prosecution needed to prove beyond a reasonable doubt that the defendant had some degree of Indian blood in order to find that the defendant was an Indian,[430] seven participants (slightly less than 1%) answered "Yes" to Indian status after answering "No" to Indian blood.

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429. Jud. Comm. on Model Jury Instructions for the 8th Cir., *supra* note 276 ("The [prosecution] must prove: . . . *Two*, that the defendant is recognized as an Indian person by a tribe or the federal government, or both.").

430. *Id.* ("The [prosecution] must prove: *One*, that the defendant has some degree of Indian blood.").

Indian Race. Although not a part of the verdict form, we also asked participants whether they thought the defendant was racially Indian. Approximately 55 percent of mock jurors answered yes.

Here, the defendant's appearance made a difference. Participants who were shown the highly stereotypical photo were significantly more likely (42%) to answer that the defendant was racially Indian than were those shown the low-stereotype photo (27%).

Assault. When asked whether the prosecution had proven beyond a reasonable doubt that the defendant committed a simple assault,[431] approximately 57 percent said yes.

We made no prediction about how our variables would affect mock jurors' assault determinations. The results were interesting:

- Mock jurors who answered that the prosecution had proven the defendant's Indian status were significantly more likely to also answer that the prosecution had proven the defendant committed assault.
- Participants who answered that they thought the defendant was racially Indian were marginally more likely to answer that the prosecution had proven the defendant committed assault.
- Mock jurors who answered yes to Indian status, who believed the defendant to be racially Indian, or who saw the low-stereotype photo were significantly more likely to answer that the prosecution had proven the defendant committed assault.

Verdict. When asked whether, considering all the elements above excluding Indian race, the prosecution had proven beyond a reasonable doubt that the defendant was guilty of simple assault within the federal government's exclusive Indian country criminal jurisdiction, approximately 38 percent said yes.

We correctly predicted that mock jurors who answered "Yes" to Indian status were more likely to find the defendant guilty—in a Major Crimes Act prosecution, Indian status is, after all, one of the elements of the crime.[432] But, as with Indian status, we found that some mock jurors found the defendant guilty even though they said the prosecution had not proven each of the elements of the crime: specifically, of the 315 mock jurors who found the defendant guilty, forty-three (13.65%) answered "no" when asked whether the prosecution had proven that the defendant was an Indian. We also found that mock jurors who believed that the defendant was racially Indian were more likely to find the

431. Recall that, in an MCA prosecution, the underlying offense (in our study, simple assault) is but one aspect of the crime charged, which also requires proof of Indian status and that the offense occurred within Indian country. *See* 18 U.S.C. § 1153.

432. Jud. Comm. on Model Jury Instructions for the 8th Cir., *supra* note 276 ("The [prosecution] must prove: . . . *Two*, that the defendant is recognized as an Indian person by a tribe or the federal government, or both.").

defendant guilty. But neither the photos nor the names independently influenced guilt determinations.

* * *

We predicted that stereotypical photos and names would increase the likelihood that mock jurors would determine that a defendant is Indian and, consequently, that they would find the defendant guilty. For the most part, that did not pan out.

But the results of our study are nonetheless valuable. For one thing, they appear to provide empirical support for one of the practice tips offered in the *Montana Law Review*. Defense attorneys Daniel Donovan and John Rhodes, who represented some of the defendants in the Ninth Circuit cases discussed in this Article,[433] write that defendants in Indian status cases should consider waiving their right to a jury trial in favor of a bench trial, out of concern that the Indian status arguments might put off a jury.[434] Our finding that mock jurors who answered "Yes" to Indian status were more likely to also answer "Yes" to the assault question suggests—even if for different reasons than Donovan and Rhodes offer—that defendants in Indian status cases may have difficulty with juries.

B. WHAT WE STILL DON'T KNOW

Although this study yielded a great deal of valuable data, the specific questions that we asked and the many issues that were beyond the reach of our study leave a number of unanswered questions.

Degree of Indian Blood. In our hypothetical case, the prosecution provided evidence that the defendant had a blood quantum of 3/32 Indian, and the defense effectively conceded the point. Thus, we found it surprising that so many mock jurors—approximately one in six—answered that the prosecution had not proven that the defendant had "some degree of Indian blood." As demonstrated above, some courts have held that a defendant's blood quantum is too low to qualify him as an Indian for purposes of federal criminal jurisdiction.[435] Might our mock jurors be making the same calculation? Might they have determined that, even if 3/32 technically *is* "some degree of Indian blood," it was not enough for them to consider the defendant an Indian, and so they answered "No" on the

433. Donovan was defense counsel in *United States v. Maggi*, 598 F.3d 1073, 1075 (9th Cir. 2010), and Rhodes was defense counsel in *United States v. Bruce*, 394 F.3d 1215, 1217 (9th Cir. 2005). Donovan & Rhodes, *supra* note 41, at 61 nn. *–**.

434. Donovan & Rhodes, *supra* note 41, at 94–95. Defendants in Indian status cases might also consider asking for a special verdict on Indian status. Frequently used in civil trials, special verdicts allow jurors to answer specific factual questions. Avani Mehta Sood, *Reaching a Verdict: Empirical Evidence of the Crumbling Conventional Wisdom on Criminal Verdict Format*, 98 N.Y.U. L. REV. 1265, 1270 (2023) (citing FED. R. CIV. P. 49). Frequently used in civil trials, special verdicts are disfavored in criminal trials. *Id.* at 1270-71. In an Indian status case, a defendant whose Indian status is in question could ask that the trial begin with a special verdict on Indian status alone, proceeding to the underlying crime only if the jury returned a finding that the defendant is, in fact, and Indian.

435. *See supra* notes 260–273 and accompanying text.

Indian blood question?[436] Or might they simply have felt torn between one jury instruction that expressly instructed them not to think about race and another that expressly asked them to consider the defendant's ancestry?[437] We hope that our future research might allow us to ask follow-up questions to tease out the answer.

Recognized as an Indian by a Tribe or the Federal Government. Our research showed little effect of stereotypical photos and names on mock jurors' determinations of whether a defendant is recognized as Indian. But some research suggests that other indicators of Indigeneity, in particular facility with an Indian language, is a better predictor than physical cues as to whether people will categorize a person as Indian.[438] There is a wide array of evidence that has been offered as evidence of Indian status, and we do not know what evidence is more (or less) persuasive to jurors. Thus, there are plenty more variables to test.

Indian Status. One of our most important findings is that almost 7 percent of mock jurors answered "Yes" to Indian status after previously answering "No" to one (or both) of the two necessary conditions for finding Indian status. What does that mean? Our judicial system operates on the assumption that jurors understand and follow instructions, particularly in criminal cases.[439] But social science research does not bear that out.[440] And jurors might have a particularly hard time when presented with seemingly conflicting instructions.[441] Might some alternative formulation of the jury instructions improve performance?

Assault. Our findings on the assault question beg for additional research. One scenario we did not test was to determine what percentage of mock jurors, presented with our hypothetical but stripped of the Indian status question, would have found the defendant guilty of simple assault. Without that control, the data

436. And, if so, what might that say about how the American public perceives Indians of low blood quantum?

437. *Compare* Jud. Comm. on Model Jury Instructions for the 8th Cir., *supra* note 359 (stating, in part, "You should not be influenced by any person's race, color [or] ethnicity . . . ."), *with* Jud. Comm. on Model Jury Instructions for the 8th Cir., *supra* note 276 ("The [prosecution] must prove: . . . *One*, that the defendant has some degree of Indian blood.").

438. Schachter et al., *supra* note 392, at 1239 ("We find that skin color is a weaker predictor of Native American classification . . . . Speaking Navajo is more powerful, increasing Native American classification by 20 points."); *see also* United States v. Loera, 952 F. Supp. 2d 862, 869 (D. Ariz. 2016) (describing how the defendant knew little of the "Fort Mojave Indian language" as evidence against Indian status, even while acknowledging that "very few Fort Mojave Indians speak the language").

439. *See* Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985) ("The Court presumes that jurors, conscious of the gravity of their task, attend closely to the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.").

440. Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237, 248 (2006) ("Lawyers and judges have suspected for some time, however, that many jurors do not understand their instructions. These suspicions are confirmed by numerous reported cases in which jury confusion peeks through. Recent social science research has demonstrated empirically that juror comprehension of instructions is appallingly low."). *See generally* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988) (arguing that most jurors try to follow instructions but frequently fail to understand them).

441. *See supra* note 437 and accompanying text.

we generated suggest that the defendant's Indian identity contributed to mock jurors' evaluation of the assault charge. Might focusing on the Indian status question make jurors more likely to see the defendant as guilty of the underlying crime?[442]

And there are several other variables we have not yet touched on. In a Major Crimes Act prosecution, Indian status is an element of the crime, with the burden of proof on the prosecution; but in a General Crimes Act prosecution, or in State court, Indian status is more often an affirmative defense, with the burden of proof on the defendant. Might jurors calculate Indian status differently based on who is alleging it and why? In other words, might a federal court jury in a Major Crimes Act prosecution look at a set of facts and conclude that the defendant is an Indian and convict him on that basis, while a federal court jury in a General Crimes Act prosecution or a State court jury look at the same facts and conclude that the same defendant is not Indian and convict him on that basis? Does the race (or perceived race) of the victim matter?[443]

And, depending on the outcomes of such research, should courts reconsider their practice of deciding who is an Indian? After all, "Congress—not a federal appellate court—is authorized to define the elements of a criminal offense. It is likewise up to Congress to correct any awkwardness in the interrelation of the acts it promulgates."[444] Congress has found the wherewithal to define "Indian" in dozens of other places in the U.S. Code.[445] Maybe Congress should finally do so for purposes of federal criminal jurisdiction in Indian country.

CONCLUSION

Of course, all of this comes too late for Matthew David Stymiest, who completed his term of federal incarceration on May 5, 2016.[446] And even having been convicted as an Indian and sentenced to prison, now that he is out, Stymiest is no more *legally* Indian than he was when he went in: He remains ineligible for tribal membership at Leech Lake,[447] and that excludes him from most federal

442. Donovan and Rhodes suggest that it might. Donovan & Rhodes, *supra* note 41, at 94–95.

443. In one sense, it does not: Under the Major Crimes Act, if an Indian commits one of the enumerated crimes, neither the race nor the Indian status of the victim matters. 25 U.S.C. § 1153 (subjecting to federal jurisdiction "[a]ny Indian who commits" an enumerated crime "within the Indian country" "against the person or property of another Indian *or any other person*" (emphasis added)). But some research suggests that the defendant's race affects mock juror determinations of guilt and sentencing. Robert ForsterLee, Lynne ForsterLee, Irwin A. Horowitz & Ellen King, *The Effects of Defendant Race, Victim Race, and Juror Gender on Evidence Processing in a Murder Trial*, 24 BEHAV. SCI. & L. 179, 181–82 (2006).

444. United States v. Bruce, 394 F.3d 1215, 1231 (2005) (citation omitted).

445. *See supra* Subpart.II.A.

446. *See Find an Inmate*, FED. BUREAU PRISONS, https://www.bop.gov/inmateloc (last visited Apr. 23, 2026).

447. *See* MCT CONST. art. II, § 1(c); LEECH LAKE BAND OF OJIBWE, *supra* note 13.

definitions of Indian.[448] Ironically, even the Bureau of Prisons lists him as "White."[449]

But Stymiest's case—from which we drew many of the facts for our own hypothetical Major Crimes Act prosecution[450]—provides a good vehicle to question operation of the federal justice system in Indian country. And if we can better understand this "tangled issue of fact"[451] that Congress has left for the courts, then maybe we can straighten it out and make the system fairer for everyone.

448. *See* BORDEWICH, *supra* note 176, at 67 (explaining that most federal statutes that define Indian do so by reference to tribal membership).

449. *See* FED. BUREAU PRISONS, *supra* note 446 (following a search by name for first: "Matthew" and last: "Stymiest," and set race to "White," whereas a search for the same name with the race set to "American Indian" returns 0 results).

450. *See supra* notes 418–419, 421 and accompanying text.

451. United States v. Prentiss, 273 F.3d 1277, 1282 (10th Cir. 2001).