Tying a Tribal Officer's Hands: Tribal Law Enforcement Authority Under *United States v. Cooley*

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ABSTRACT

American Indian reservations make up more than 56 million acres in the United States. The rules governing enforcement of criminal law in Indian Country are complex. While tribal law enforcement officers have authority within a tribe's reservation, they have reduced authority on public roads that run through the reservations, especially when they interact with an individual who lacks Indian status. The Supreme Court recently ruled on the extent of this reduced tribal law enforcement authority in *United States v. Cooley*.

In 2019, the Ninth Circuit created a rule in *Cooley* that restricted a tribal law enforcement officer's ability to conduct limited stops and related searches on public roads. To continue an interaction with a stopped individual who lacked Indian status, the tribal officer must have observed an "obvious" or "apparent" law violation in the time it took to inquire about the person's Indian status. The novel "obvious" or "apparent" standard, a higher standard of proof than both reasonable suspicion and probable cause, never received further elaboration from the Ninth Circuit. The Supreme Court vacated the Ninth Circuit's *Cooley* decision in June 2021.

This Comment argues Congress should codify the inherent tribal authority recognized by the Supreme Court in *Cooley*. After first discussing tribal sovereignty and authority, this Comment explains competing interpretations articulated in the various *Cooley* decisions, from the district court to the Supreme Court. It then argues that Congress should codify and, therefore, preserve a tribal officer's inherent authority to temporarily stop and search a non-Indian on a public road running through a reservation. The legislation should also clarify the relevant standard of proof for such interactions, and affirm the validity of the second *Montana* exception, related to public safety, in the criminal context.

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I. INTRODUCTION

At 1:00 a.m. one February morning, on a federal highway running through the Crow Indian Reservation in rural southeastern Montana, a pickup truck sat on the side of the road.[1] The truck's headlights were on

1. *See* United States v. Cooley (*Cooley III*), 947 F.3d 1215, 1223 (9th Cir. 2020) (Collins, J., dissenting). This Comment discusses the *United States v. Cooley* line of cases. In 2017, the federal District Court for the District of Montana issued an order granting defendant Joshua Cooley's motion to suppress evidence. *See* United States v. Cooley (*Cooley I*), No. CR 16-42, 2017 U.S. Dist. LEXIS 17276 (D. Mont. Feb. 7, 2017). The district court case will be referred to as *Cooley I*. Next, in 2019 a three-judge panel from the United States Court of Appeals for the Ninth Circuit affirmed the district court decision. *See* United States v. Cooley (*Cooley II*), 919 F.3d 1135 (9th Cir. 2019). The first Ninth Circuit decision will be referred to as *Cooley II*. Then, the Ninth Circuit denied en banc

and its engine running.[2] Crow tribal highway safety officer[3] James Saylor knew the stretch of road was dangerous, so, after driving past the truck, he decided to stop and conduct a welfare check[4] on any occupants.[5]

As Saylor approached, he noticed the truck's dark tinted windows, Wyoming license plates, and truck bed full of items.[6] After tapping on the driver's side of the vehicle, Saylor observed the rear window momentarily roll down, at which time he noticed a small child in the back seat.[7]

Saylor used his flashlight to peer into the front window.[8] A man sat in the driver's seat, and he appeared to give Saylor a thumbs down motion.[9] The driver rolled down the window several inches.[10] Saylor observed that the man, Joshua Cooley, did not have typical Indian[11] physical features[12] and appeared to have "'watery, bloodshot eyes.'"[13]

Cooley explained that he pulled over on the side of the road because he was tired.[14] Based on Saylor's training and experience, he knew both tired drivers and impaired drivers pull over and sometimes park on the shoulder of the road.[15] The possibility existed that Cooley may actually be

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rehearing in 2020; concurring and dissenting opinions were written regarding this decision. *See* United States v. Cooley (*Cooley III*), 947 F.3d 1215 (9th Cir. 2020) (Berzon, J. & Hurwitz, J., concurring); United States v. Cooley (*Cooley III*), 947 F.3d 1215 (9th Cir. 2020) (Collins, J., dissenting). The en banc denial opinions will be referred to as *Cooley III*. Finally, the Supreme Court of the United States granted petition for certiorari, heard oral arguments, and issued a decision on June 1, 2021. *See* United States v. Cooley (*Cooley IV*), 141 S. Ct. 1638 (2021). The Supreme Court case will be referred to as *Cooley IV*.

2. *See* United States v. Cooley (*Cooley III*), 947 F.3d 1215, 1223 (9th Cir. 2020) (Collins, J., dissenting).

3. Indian tribes have the sovereign authority to establish their own law enforcement agencies whose officers enforce tribal laws within the tribe's reservation. *See* discussion *infra* Section II.A.1. A tribal officer who has been cross-deputized has the authority to enforce both tribal law and the law of the state or federal government. *See* United States v. Cooley (*Cooley II*), 919 F.3d 1135, 1141 n.2 (9th Cir. 2019). The discussion that follows only applies to tribal officers, like Saylor, who have not been cross-deputized. *See id.*

4. *See* State v. Spaulding, 259 P.3d 793, 798 (Mont. 2011) (explaining that an officer generally conducts a welfare check to ensure an individual's safety).

5. *See Cooley III*, 947 F.3d at 1223 (Collins, J., dissenting).

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. This Comment uses the term "Indian" because it is a term of art in United States law that refers to indigenous peoples of the continent. *See American Indian Law*, CORNELL L. SCH. LEGAL INFO. INST., https://bit.ly/3aDFEbB (last visited Feb. 20, 2021).

12. *See* discussion *infra* Section II.A.1.a. The driver's appearance was relevant to Saylor's initial assessment of Cooley because although appearance alone is not determinative of status, ultimately whether the individual has Indian status is an important factor for determining jurisdiction. *See Montana Indian Law: Criminal Jurisdiction*, STATE OF MONTANA, https://bit.ly/38kzegF (last visited Nov. 8, 2020).

13. *See Cooley III*, 947 F.3d at 1223 (Collins, J., dissenting).

14. *See id.*

15. *See id.*

impaired rather than tired, so for safety purposes, Saylor determined he would have a conversation with Cooley if he was willing to talk.[16]

During the welfare check, Cooley told Saylor that he had been in Lame Deer, a town only half an hour away from their current location, to buy a vehicle.[17] The name of the individual selling the vehicle was either Thomas Shoulder Blade or Thomas Spang, Cooley could not remember which.[18] As a local officer, Saylor was familiar with both names and knew Spang as an individual associated with drug trafficking.[19] Cooley continued his story, saying the vehicle he had intended to buy broke down, so "Thomas" let Cooley borrow the truck he was currently using.[20]

The story Cooley told did not make much sense to Saylor.[21] Saylor did not know why anyone would buy a vehicle so late at night, and the absence of another adult to help drive the extra vehicle seemed strange.[22] Additionally, Saylor did not know why Thomas would allow Cooley to borrow a truck that contained so many personal belongings.[23] Finally, in Saylor's experience, an individual who lived in Lame Deer would have Montana license plates from the Northern Cheyenne reservation, or none at all—not Wyoming license plates.[24]

Cooley seemed to be slurring his speech, and Saylor asked Cooley to roll down the window farther because Saylor could not hear Cooley over the loud engine.[25] After the window was lowered, Saylor observed a pair of semiautomatic rifles on the front passenger seat.[26] Cooley said the guns also belonged to Thomas, another confusing response because, in Saylor's opinion, no person would leave their firearms in a vehicle lent to a stranger.[27]

Saylor asked Cooley for identification, and as Cooley began to look, he emptied small bills from his pockets.[28] Then, Cooley's actions

16. *See id.*
17. *See id.* at 1223–24.
18. *See id.* at 1224.
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See Cooley III*, 947 F.3d at 1224 (Collins, J., dissenting).
24. *See id.* The city of Lame Deer, Montana, is located in the Northern Cheyenne Indian Reservation, adjacent to the Crow Reservation on which Saylor worked. *See* MONTANA DEP'T OF COM., ECONOMIC CONTRIBUTIONS OF RESERVATIONS TO THE STATE OF MONTANA 2003–2009 92, (2014). The Northern Cheyenne Reservation is located entirely within Montana and is not near the Wyoming border. *See Tribal Nations*, GOVERNOR'S OFF. OF INDIAN AFFS., https://bit.ly/2U9cmIy (last visited Nov. 8, 2020).
25. *See Cooley III*, 947 F.3d at 1224 (Collins, J., dissenting).
26. *See id.*
27. *See id.*
28. *See id.*

changed.[29] Saylor noticed Cooley was "'staring straight forward out of the windshield of his truck, as if he was looking through his son' on his lap."[30] Cooley's "'breathing really became shallow and rapid,'" and he became still.[31] To Saylor, an instructor in use of force, Cooley's actions could be indicating "an imminent assault," expressed through his "thousand-yard stare."[32]

To protect himself from any assault that Cooley's actions were foreshadowing, Saylor drew his weapon, without pointing it at Cooley, and again ordered Cooley to retrieve identification.[33] Cooley produced a Wyoming driver's license.[34] Saylor's hand-held radio had poor reception so he could not call in the license on the spot, and he decided for safety reasons he did not want to go back to his car to call in the license.[35] Instead, Saylor went to the other side of the truck to protect himself from any potential violence, and opened the passenger's side door to ensure there were no other occupants in the vehicle.[36] At this time, Saylor saw a third firearm—a loaded semiautomatic pistol—in the area of the truck Cooley had been reaching when emptying his pockets earlier.[37] Saylor asked Cooley about the pistol, and Cooley responded that he did not know the pistol was there.[38]

Saylor took Cooley and the toddler back to the patrol vehicle in order to run Cooley's driver's license.[39] Before getting into the car, Cooley asked if he could empty his pockets.[40] In the process, Cooley produced small empty baggies that, in Saylor's experience, resembled baggies commonly used for packaging and selling methamphetamine.[41]

After calling for backup, Saylor went to Cooley's truck to turn it off and retrieve the firearms.[42] As Saylor reached in for the keys, he noticed drug paraphernalia including a smoking pipe and a baggie that contained

29. *See id.*
30. *Id.*
31. *Id.*
32. *Id.* A thousand-yard stare occurs when an individual's gaze becomes blank and unfocused. *See Thousand-Yard Stare*, LEXICO POWERED BY OXFORD, https://bit.ly/2M9tJbz (last visited Jan. 22, 2021). The thousand-yard stare is often used to describe combatants or soldiers, and police departments have identified it as an indication that an individual may become violent. *See, e.g.*, WIS. DEP'T OF JUSTICE, CRISIS MANAGEMENT: A TRAINING GUIDE FOR LAW ENFORCEMENT OFFICERS 10 (2007), https://bit.ly/36ihSOK (listing thousand-yard stare as a "specific pre-attack posture").
33. *See Cooley III*, 947 F.3d at 1224 (Collins, J., dissenting).
34. *See id.*
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.* at 1224–25.
39. *See id.* at 1225.
40. *See id.*
41. *See id.*
42. *See id.*

a substance that resembled methamphetamine.[43] Following the arrival of a county deputy and other officers, a search of the pickup revealed more than 50 grams of methamphetamine.[44]

During the subsequent criminal case, the United States District Court for the District of Montana excluded[45] all of the evidence obtained from the vehicle after determining that Saylor lacked the proper authority to detain Cooley.[46] The court reasoned that Cooley's non-Indian status, paired with his travel on a federal highway, created a situation in which Saylor had no authority to seize Cooley during the stop.[47]

In affirming the district court's suppression of the evidence, the Ninth Circuit established a rule creating a narrow authority under which tribal law enforcement officers could only conduct a limited stop of a non-Indian on a public road in a reservation if an "obvious" or "apparent"[48] law violation occurred during a short interaction.[49] Four Ninth Circuit judges disagreed with the rule created in *Cooley* and dissented from the decision to deny rehearing.[50]

The facts and circumstances of the Cooley interaction illustrate a difficult situation for tribal law enforcement officers. Although an officer may have had reasonable suspicion to stop a vehicle—that led to sufficient reasonable suspicion to conduct a related limited search[51]—according to

43. *See Cooley III,* 947 F.3d at 1225 (Collins, J, dissenting).

44. *See id.*

45. *See* United States v. Cooley (*Cooley II*), 919 F.3d 1135, 1140 (9th Cir. 2019). Courts exclude evidence illegally obtained as the result of an illegal search or seizure, a violation of the Fourth Amendment. *See Exclusionary Rule*, CORNELL L. SCH. LEGAL INFO. INST., https://bit.ly/3qXiKRs (last visited Jan. 26, 2021). The purpose of the exclusionary rule is to deter law enforcement officers from committing additional illegal searches, as well as to provide a remedy to the individual whose rights were violated. *See id.*

46. *See* United States v. Cooley (*Cooley I*), No. CR 16-42, 2017 U.S. Dist. LEXIS 17276, at *11 (D. Mont. Feb. 7, 2017).

47. *See id*. at *10–11. Tribal law enforcement officers have limited authority over federal highways running through reservations. *See* discussion *infra* Section II.C.

48. This Comment uses the terms "apparent" and "obvious" interchangeably.

49. *See Cooley III*, 947 F.3d at 1225 (Collins, J., dissenting). According to the Ninth Circuit, a tribal law enforcement officer has the authority to stop a driver whom the officer suspects of violating a tribal law, as long as the driver's Indian status is unknown. *See Cooley II*, 919 F.3d at 1142. The interaction is limited to the officer questioning whether the driver has Indian status. *See id.* If the driver is a non-Indian, the officer can only further detain the individual if, during the limited interaction, it is "obvious" or "apparent" a state or federal law has been violated. *See id.* Absent such a violation, the officer must not detain the individual any longer. *See id.*

50. *See Cooley III*, 947 F.3d at 1220–38 (Collins, J., dissenting).

51. *See* Navarette v. California, 572 U.S. 393, 397 (2014) ("Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence' and 'obviously less' than is necessary for probable cause." (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989))). An officer can conduct a limited search based on reasonable

the Ninth Circuit's *Cooley* rule, if the individual was non-Indian,[52] the road running through the reservation was public, and it was not "obvious" or "apparent" that the person had broken a federal or state law, the officer had no power to act upon that suspicion.[53] Additionally, an officer's authority would be difficult to ascertain, due to the Ninth Circuit's failure to elaborate on the "obvious" or "apparent" standard.[54]

The Ninth Circuit's rule proved problematic because it created only a narrow power for tribal officers to execute limited stops and related investigations on public roads.[55] This rule could have had serious public safety consequences, leaving tribal officers unable to conduct necessary limited stops and investigations of non-Indians driving within a reservation.[56]

The Supreme Court granted the government's petition for certiorari challenging the Ninth Circuit's opinion in November 2020.[57] On June 1, 2021, the Supreme Court unanimously vacated the Ninth Circuit's judgment.[58]

This Comment explains the competing interpretations of tribal authority found in the *Cooley* decisions and recommends Congress codify the inherent authority of tribal law enforcement officers on public roads running through reservations as explained by the Supreme Court.[59] Part II of this Comment discusses tribal sovereignty and the *Cooley* case, taking

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suspicion the individual is armed and dangerous. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (conducting a limited search for weapons is permissible where the officer has a reasonable suspicion, based on personal experience, that criminal activity is taking place and the individual is currently armed and dangerous); *see also* Rodriguez v. United States, 575 U.S. 348, 354 (2015) (analogizing a routine traffic stop with a *Terry* stop).

52. For an explanation about determining an individual's Indian status, *see infra* Section II.A.1.a.

53. *See Cooley III*, 947 F.3d at 1221 (Collins, J., dissenting) ("But if the non-Indian has not committed an 'obvious' violation of state or federal law, then the officer may not detain the person further, conduct *any* investigation of the non-Indian, or conduct any searches." (emphasis in original)).

54. *See* United States v. Cooley (*Cooley II*), 919 F.3d 1135, 1142 (9th Cir. 2019) (acknowledging the Ninth Circuit had not yet elaborated on the "apparent" or "obvious" standard). No further explanation of the standard was given. *See id*. The district court described the "apparent" or "obvious" standard as "notably higher than 'probable cause.'" United States v. Cooley (*Cooley I*), No. CR 16-42, 2017 U.S. Dist. LEXIS 17276, at *8 (D. Mont. Feb. 7, 2017).

55. *See Cooley III*, 947 F.3d at 1220 (Collins, J., dissenting); *see also* Brief for Crow Tribe of Indians et al. as Amici Curiae Supporting Petitioner, United States v. Cooley, 919 F.3d 1135 (9th Cir. 2019) (No. 19-1414), 2020 WL 4353085 at *22–25 [hereinafter Crow Tribe Brief].

56. *See Cooley III,* 947 F.3d at 1220 (Collins, J., dissenting); Crow Tribe Brief, *supra* note 55, at *10–13.

57. *See* Transcript of Oral Argument at 1, United States v. Cooley, 141 S. Ct. 1638 (2021) (No. 19-1414).

58. *See* United States v. Cooley (*Cooley IV*), 141 S. Ct. 1638, 1646 (2021).

59. *See* discussion *infra* Part III.

an especially close look at the various sources of tribal law enforcement authority articulated throughout.[60] Part III of this Comment then discusses the need for clarity of the applicable standard of proof and for cooperation between agencies to address pressing issues such as Missing and Murdered Indigenous Women, a crisis facing reservations in Montana and across the country.[61] Finally, this Comment argues that Congress should codify the recent *Cooley* decision to provide clarity and stability, as well as to ensure tribes retain the powers necessary to address public safety concerns.[62]

II. BACKGROUND

The opinions in the *Cooley* case describe, analyze, and apply several categories of tribal law enforcement authority.[63] As described by the Ninth Circuit judges dissenting from rehearing denial, those sources of authority include a property right to exclude, the power to restrain criminal conduct on tribal land, and a limited investigatory power that is related to the enforcement of tribal law to Indians; the Supreme Court added an inherent power to regulate conduct that threatens the health or welfare of the tribe.[64] The Missing and Murdered Indigenous Women crisis facing reservations implicates tribal law enforcement authority and the ability of tribal officers to respond to violence against people living on the reservation.[65] Indian tribal sovereignty gives a tribe the power to create law enforcement agencies to protect reservation communities.[66]

A. Indian Tribal Sovereignty

Before the arrival of Europeans in North America, Indian tribes were "self-governing sovereign political communities."[67] Accordingly, the United States Constitution recognizes tribes as sovereign governments alongside states and foreign countries.[68] For centuries, tribes have been "qualified to exercise many of the powers and prerogatives of self-government."[69]

60. *See* discussion *infra* Part II.
61. *See* discussion *infra* Sections III.A–B.
62. *See* discussion *infra* Section III.C.
63. *See infra* Section II.D.
64. *See infra* Section II.C.
65. *See infra* Section II.B.
66. *See infra* Section II.A.
67. United States v. Wheeler, 435 U.S. 313, 322–23 (1978).
68. *See* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]").
69. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 327 (2008).

1. Tribes as Sovereign Nations

Tribal powers have been limited by various statutes, executive orders, and treaties with the United States government.[70] Generally, tribal sovereign authority includes the power to determine membership requirements and to create an independent government, including enacting constitutions and laws, as well as establishing courts and systems of law enforcement.[71]

a. Determining Indian Status

Each tribe sets its own requirements for tribal enrollment.[72] Individuals who meet a tribe's specifications may enroll as a member of the tribe.[73] Some enrollment requirements include having a certain percentage of that tribe's "blood" in a person's heritage, being an enrolled member at the time of the creation of the tribe's constitution, or being a child born to an enrolled member while living on the reservation.[74]

The requirements for Indian status relevant for the purpose of determining jurisdiction can differ from a tribe's enrollment requirements.[75] Jurisdictional Indian status "is a political classification, not a racial or ethnic one."[76] As described by the Ninth Circuit, Indian status "requires only two things: (1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and (2) proof of membership in, or affiliation with, a federally recognized tribe."[77] Indian status can be proven through a variety of evidence, such as tribal enrollment, formal government recognition, or social recognition.[78] Therefore, Indian status is unrelated to any specific

70. *See Wheeler*, 435 U.S. at 323; *Tribal Governance*, NAT'L CONG. OF AM. INDIANS, https://bit.ly/3c57ZZt (last visited Jan. 23, 2021).

71. *See An Issue of Sovereignty*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 2013), https://bit.ly/3c6gt2w; *Tribal Governance*, *supra* note 70.

72. *See Trace Indian Ancestry*, U.S. DEP'T OF THE INTERIOR, https://on.doi.gov/3sTqdmo (last visited Jan. 23, 2021).

73. *See id.* An individual who meets the definition of Indian, but is on the lands of a different tribe, is referred to as a "nonmember Indian" on that reservation. *See* Terrill Pollman, *Double Jeopardy and Nonmember Indians in Indian Country*, 82 NEB. L. REV. 889, 890 n.2 (2004).

74. *See, e.g.*, CROW TRIBAL CONST. 2001, art. III; CONST. AND BY-LAWS FOR THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION OF MONT. 1978, art. II; CONST. OF THE HUALAPAI INDIAN TRIBE OF THE HUALAPAI INDIAN RESERVATION, ARIZ. Feb. 14, 1991, art. II.

75. *See* United States v. Cooley (*Cooley II*), 919 F.3d 1135, 1142–43 (9th Cir. 2019).

76. *Id.* at 1142.

77. United States v. Zepeda, 792 F.3d 1103, 1113 (9th Cir. 2015).

78. *See* United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005) (explaining evidence used to prove Indian status using the second prong of a test similar to *Zepeda* can include "(1) tribal enrollment; (2) government recognition formally and informally through

physical characteristics.[79] The ability of a tribal government to act upon an individual is largely determined by the person's Indian and tribal status.[80]

b. Tribal Criminal Authority

A tribe has sovereign authority to enforce tribal criminal law within its tribal lands.[81] However, this authority only extends to tribal members and nonmember Indians.[82] Tribes have no authority to enforce tribal criminal law against non-Indians on tribal lands.[83] While tribal courts cannot make decisions regarding non-Indians, if a non-Indian commits a crime on tribal lands, tribal officers do have the authority to investigate the crime and exclude the non-Indian[84] by delivering the individual to the correct state or federal authority.[85]

2. The Indian Civil Rights Act

Although Indians are American citizens, the Bill of Rights accompanying the United States Constitution does not apply to Indian tribal governments.[86] Rather, the Indian Civil Rights Act of 1968 (ICRA)[87] applies to protect individuals' rights.[88] The ICRA imposes restrictions on tribal governments closely related to those imposed upon federal and state governments by the Bill of Rights and the Fourteenth Amendment.[89]

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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"); *see also* Crow Tribe Brief, *supra* note 55, at * 23 ("The question of who is an Indian for purposes of criminal jurisdiction is not always easy to determine. Rather, the question of Indian status can be litigated . . . .").

79. *See Cooley II*, 919 F.3d at 1142–43.

80. *See* JANE M. SMITH, CONG. RSRCH. SERV., TRIBAL JURISDICTION OVER NONMEMBERS: A LEGAL OVERVIEW 1–2 (2013) (describing a tribe's lack of civil and criminal jurisdiction over nonmembers except in limited circumstances).

81. *See* United States v. Cooley (*Cooley II*), 919 F.3d 1135, 1141 (9th Cir. 2019) (citing United States v. Lara, 541 U.S. 193, 197–99 (2004)).

82. *See id.*

83. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

84. *See* discussion *infra* Section II.C.1.

85. *See* United States v. Cooley (*Cooley II*), 919 F.3d 1135, 1141 (9th Cir. 2019).

86. *See* Duro v. Reina, 495 U.S. 676, 693 (1990) (citing Talton v. Mayes, 163 U.S. 376, 382–83 (1896)).

87. Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301–1304.

88. *See* ICRA § 1302. For example, the Indian Civil Rights Act protects the freedoms of speech and press, ensures due process and equal protection, and prohibits tribal governments from violating double-jeopardy or self-incrimination. *See id.*

89. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57 (1978). For example, the ICRA does not contain provisions analogous to the Second or Third Amendments contained in the Bill of Rights. *See* ICRA § 1302.

One right included in the ICRA mirrors the Fourth Amendment protection[90] against unreasonable searches and seizures:

> No Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.[91]

When a tribal law enforcement officer conducts a search or a seizure, the ICRA Fourth Amendment counterpart provision applies.[92] The protection provided by this ICRA provision parallels Fourth Amendment protections.[93]

B. Missing and Murdered Indigenous Women Crisis

While each reservation is unique, Indian populations across the United States are facing a Missing and Murdered Indigenous Women (MMIW) crisis.[94] On the Crow Reservation in Montana, from 2000–2020, twenty-six Indian women and girls were murdered or have gone missing,[95] one of the highest rates of MMIW in the United States.[96]

Nationally, murder serves as the third leading cause of death among American Indian and Alaska Native women.[97] In some reservation counties, the rate of women being murdered is more than ten times the

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90. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

91. 25 U.S.C. § 1302(a)(2) (2012). *Compare* 25 U.S.C. § 1302(a)(2), *with* U.S. CONST. amend. IV.

92. *See* United States v. Cooley (*Cooley I*), No. CR 16-42, 2017 U.S. Dist. LEXIS 17276, at *9 (D. Mont. Feb. 7, 2017).

93. *See* United States v. Cooley (*Cooley II*), 919 F.3d 1135, 1144–45 (9th Cir. 2019).

94. *See Murdered and Missing Indigenous Women*, NATIVE WOMENS WILDERNESS, https://bit.ly/39gk76G (last visited Jan. 8, 2021); *see also* Brief for National Indigenous Women's Resource Center et al. as Amici Curiae Supporting Petitioner, United States v. Cooley, 141 S. Ct. 1638 (2021) (No. 19-1414), 2020 WL 4369692, at *20–23, 26–31 [hereinafter NIWRC Cert. Petition Amicus Brief].

95. *See* Letter from Families and Allies of Missing and Murdered Indigenous Peoples to County, State, and Federal Officials 2, Sovereign Bodies Inst. (Feb. 24, 2020), https://bit.ly/3q8vjsO.

96. *See id.*

97. *See Inadequate Data on Missing, Murdered Indigenous Women and Girls*, NAT'L INDIAN COUNCIL ON AGING (Jan. 21, 2019), https://bit.ly/2LCX5ie.

national average.[98] American Indian and Alaska Native women are two and a half times more likely to face violent crime than all other ethnicities,[99] and they are "significantly more likely" to have experienced that violence by a non-Indian perpetrator.[100]

MMIW has been described as a "crisis" and an "epidemic."[101] Due to the need for coordination between agencies, investigation and prosecution of Indian Country cases are complex and difficult, compounding problems created by high rates of murder and violence.[102] Families and friends of MMIW victims urge governments at all levels to take further action to address MMIW.[103] In 2019, President Donald Trump signed an executive order that created a task force to address the "ongoing and serious concerns" raised by tribal governments regarding MMIW.[104]

C. Sources of Tribal Authority Over Non-Indians

Tribal authority relating to the investigation and detention of non-Indians within the boundaries of a reservation comes from several sources.[105] The dissenting Ninth Circuit judges in *Cooley* characterized this tribal authority as belonging to three categories: (1) a property right to exclude on tribal land;[106] (2) a power to restrain criminal conduct on non-

98. *See id.*; RONET BACHMAN ET AL., NAT'L INST. OF JUST., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 5 (2008).

99. *See Reviewing the Trump Administration's Approach to the Missing and Murdered Indigenous Women (MMIW) Crisis: Hearing Before the Subcomm. on Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res.*, 116th Cong. 1 (2019) (statement of Charles Addington, Deputy Bureau Director for Office of Justice Services, Bureau of Indian Affairs, U.S. Department of the Interior).

100. ANDRÉ B. ROSAY, NAT'L INST. OF JUST., RESEARCH REPORT: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN 2 (2016).

101. *See, e.g.*, 1A, *The Search for Missing and Murdered Indigenous Women*, NAT'L PUB. RADIO (Aug. 25, 2020), https://n.pr/2MbPR5l.

102. *See Montana Indian Law: Criminal Jurisdiction*, *supra* note 12 (describing how prosecutorial jurisdiction is based on a number of factors including the Indian status of both the perpetrator and the victim, as well as the location of the crime); *Murdered and Missing Indigenous Women*, *supra* note 94 ("The lack of communication combined with jurisdictional issues between state, local, and tribal law enforcement, make it nearly impossible to begin the investigative process.").

103. *See, e.g.*, Letter from Families and Allies of Missing and Murdered Indigenous Peoples to County, State, and Federal Officials, *supra* note 95, at 3–4 (stating "[n]o community should have to continuously grieve the violent or suspicious death or disappearance of relatives, friends, and community members," and emphasizing how "[n]o community should have to carry the cumulative impact of decades of this kind of violence").

104. *See* Exec. Order No. 13898, 84 Fed. Reg. 66,059 (Nov. 26, 2019).

105. *See* United States v. Cooley (*Cooley III*), 947 F.3d 1215, 1226 (9th Cir. 2020) (Collins, J., dissenting).

106. *See id.* at 1226.

tribal land;[107] and (3) a limited investigatory power related to applying tribal law to Indians.[108] The Supreme Court relied heavily on a case discussing a fourth category of tribal civil authority: regulating non-Indian conduct threatening to the "health or welfare of the tribe."[109]

1. Property Right to Exclude on Tribal Land

On tribal land, Indian tribes have a property owner's right to totally exclude[110] non-Indians from the reservation.[111] Based on tribal sovereignty, a tribe can investigate and exclude trespassers.[112]

Public roads cross a significant amount of tribal land, and the Supreme Court discussed how a tribe's property right to exclude relates to those public roads in *Strate v. A-1 Contractors*. The issue in *Strate* was whether tribal courts had civil jurisdiction over a lawsuit related to a car accident between two non-Indians that occurred on a public highway within a reservation.[113] While *Strate* discussed tribal court jurisdiction, it also included a brief explanation about a tribe's right to exclude on public roads crossing a reservation.[114]

A tribe cannot assert its landowner right to exclude non-Indians from a stretch of road in the state highway system.[115] The tribe cannot exclude from the road, even if it crosses a reservation, because the state controls state highways, which the public may use.[116] However, the sentence in *Strate* describing that concept contained a footnote with the following explanation: "We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law."[117]

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107. *See id.* at 1226–28.

108. *See id.* at 1228.

109. *See* United States v. Cooley (*Cooley IV*), 141 S. Ct. 1638, 1643–44 (2021).

110. One fundamental right of a landowner is the right to exclude others from the property, such as by removing or barring from entry. *See* Int'l News Serv. v. AP, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it.").

111. *See Cooley III*, 947 F.3d at 1226 (Collins, J., dissenting).

112. *See* United States v. Becerra-Garcia, 397 F.3d 1167, 1175 (9th Cir. 2005). If an individual has violated a state or federal law, exclusion would include transferring the individual to the authorities with the appropriate jurisdiction to prosecute. *See* United States v. Cooley (*Cooley II*), 919 F.3d 1135, 1141 (9th Cir. 2019).

113. *See* Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

114. *See id.* at 455–56.

115. *See id.* at 456.

116. *See id.* at 455–56.

117. *See id.* at 455–56 n.11. This footnote took on extreme importance in *Cooley III*, with the Ninth Circuit rehearing denial concurrence and dissent articulating differing opinions on how to interpret it. *See* discussion *infra* Sections II.D.2.c–d. The Supreme Court cited the footnote approvingly. *See* United States v. Cooley (*Cooley IV*), 141 S. Ct. 1638, 1644 (2021).

2. Power to Restrain Criminal Conduct on Non-Tribal Land

Tribal sovereignty includes a second, limited power to exclude non-Indians from land within a reservation's boundaries that the tribe does not own, including public highways.[118] Tribes can address criminal activity within a reservation, detaining any non-Indian violators of state and federal law to transfer them to the authorities that do have the power to prosecute.[119]

In *Ortiz-Barraza v. United States*, the Ninth Circuit discussed a tribe's limited power to exclude. In *Ortiz-Barraza*, a tribal officer in Arizona noticed an unknown non-Indian driving a camper through a reservation town.[120] The officer followed the vehicle onto the state highway, and after the driver pulled over on his own, the officer stopped behind the camper.[121] The driver did not speak English, so the officer searched for identification and registration by frisking the driver and searching the truck.[122] Finding nothing, the officer believed the driver must be an undocumented immigrant who was likely transporting something illegal.[123] He then searched the camper, where the officer found over one thousand pounds of marijuana.[124]

The Ninth Circuit held the officer did not act outside the scope of his tribal law enforcement authority.[125] The court added that the tribe's power to exclude non-Indians who violate state and federal law "would be meaningless were the tribal police not empowered to investigate such violations."[126] It did not make any difference to the court's analysis that the events occurred on a state highway.[127] The court noted, "Rights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police."[128]

118. *See* United States v. Cooley (*Cooley III*), 947 F.3d 1215, 1227 (9th Cir. 2020) (Collins, J., dissenting) (noting the limited power to exclude "extends to 'land alienated [rights transferred] to non-Indians,' including 'rights-of-way made part of a state highway'").

119. *See id.* ("Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them." (citing Duro v. Reina, 495 U.S. 676, 697 (1990))).

120. *See* Ortiz-Barraza v. United States, 512 F.2d 1176, 1178 (9th Cir. 1975).

121. *See id.*

122. *See id.*

123. *See id.* at 1179.

124. *See id.* at 1178–79.

125. *See id.* at 1180 (holding the officer had authority "to investigate any on-reservation violations of state and federal law," in instances where the trespassing offender could be excluded from the reservation).

126. *See id.* ("Obviously, tribal police must have such power [to investigate].").

127. *See id.*

128. *Id.*

3. Limited Investigatory Power Related to Applying Tribal Law to Indians

A third category of tribal authority directly relates to a tribal police officer applying tribal law to Indians.[129] When applying tribal law to Indians within a reservation, sometimes the officer does not know whether an individual has Indian status or not.[130] The Ninth Circuit discussed this situation in *Bressi v. Ford*.

In *Bressi*, a tribal law enforcement agency set up a roadblock across a state highway within a reservation in Arizona.[131] The roadblock checked for alcohol and driving under the influence, as well as for driver's licenses and registration.[132] The defendant, a non-Indian, refused to comply with the officer's instructions and was detained at the roadblock for about four hours.[133]

Due to the location of the roadblock on a state highway, the court determined the tribal power of exclusion[134] did not apply.[135] That piece of the highway crossed the reservation, however, so the officers did have the authority to enforce tribal laws against Indians on that road.[136] Due to the practical difficulties in ensuring officers stop only drivers with Indian status, the Ninth Circuit explained a tribal officer does not violate a non-Indian's rights by stopping the individual long enough to determine whether the person has Indian status.[137]

In *Bressi*, the Ninth Circuit held that a suspicionless[138] stop of a non-Indian at a roadblock must be limited to the amount of time it takes for officers to determine whether the individual has Indian status.[139] If the individual lacks Indian status, but a tribal officer finds an "obvious" or "apparent" violation of state or federal law, the officer has the authority to detain the individual for transfer to state officers.[140] Any additional lines of questioning and any searches are outside tribal authority.[141] *Bressi* did

129. *See* United States v. Cooley (*Cooley III*), 947 F.3d 1215, 1228 (9th Cir. 2020) (Collins, J., dissenting).

130. *See* Bressi v. Ford, 575 F.3d 891, 896 (9th Cir. 2009) ("For example, a tribal officer who observes a vehicle violating tribal law on a state highway has no way of knowing whether the driver is an Indian or non-Indian.").

131. *See id.* at 894.

132. *See id.*

133. *See id.*

134. *See* discussion *supra* Section II.C.1.

135. *See Bressi*, 575 F.3d at 895–96.

136. *See id.* at 896.

137. *See id.*

138. At a roadblock, each vehicle traveling on the road is stopped, making it a suspicionless stop. *See id.*

139. *See id.*

140. *See id.* at 896–97. The court did not define an "apparent" or "obvious" law violation. *See id.*

141. *See id.* at 896.

not explicitly overrule *Ortiz-Barraza*.[142] The interaction between *Bressi* and *Ortiz-Barraza* was a main point of disagreement between the Ninth Circuit rehearing denial concurring and dissenting opinions.[143]

4. Civil Authority Over Non-Indian Conduct that Threatens the Health or Welfare of the Tribe

Finally, a tribe has an inherent power to ensure the conduct of non-Indians within a reservation does not endanger the tribe.[144] Tribes retain this power over non-Indians anywhere in the reservation—on lands that belong to the tribe and on lands owned by non-Indians.[145] This tribal authority was explained in *Montana v. United States*.

Montana arose from the Crow Reservation in southern Montana—the same reservation involved in *Cooley*.[146] The issue in *Montana* concerned which entity, the Crow Tribe or the State of Montana, had the authority to regulate hunting and fishing by non-Indians within the reservation on lands owned by non-Indians.[147]

The Supreme Court stated as a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[148] However, the Court continued to list two exceptions to the general rule when "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[149]

The first exception relates to tribal control over business or commercial relationships between tribes or tribal members and non-members or non-Indians.[150] The second exception is relevant here. It states: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[151] Thirty years

142. *See id.* at 895. The Ninth Circuit cited to *Ortiz-Barraza* in explaining the district court's decision and did not say or indicate it was overruling that precedent case in making its own determination. *See id.* at 895 (citing Ortiz-Barraza v. United States, 512 F.2d 1176, 1180 (9th Cir. 1975)).

143. *See infra* Sections II.D.2.c–d.

144. *See* Montana v. United States, 450 U.S. 544, 566 (1981).

145. *See id.* at 565–66.

146. *See id.* at 547.

147. *See id.*

148. *Id.* at 565.

149. *Id.*

150. *See id.* ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

151. *Id.* at 566.

after the *Montana* decision, the Supreme Court relied on this exception when deciding *United States v. Cooley*.[152]

D. Cooley *Case*

During the course of the *Cooley* case, the courts discussed the various explanations of the sources of tribal law enforcement authority.[153] In *Cooley*, the district court relied on *Bressi*'s limited investigatory power to grant Cooley's motion to suppress evidence.[154] The three-judge Ninth Circuit panel also relied on *Bressi* to affirm the district court's judgment.[155] Four Ninth Circuit judges disagreed with the panel's use of *Bressi* and wrote in dissent of the denial of en banc rehearing in the case.[156] In repudiating the panel's rule, the dissenters focused on the *Ortiz-Barraza* power to restrain criminal conduct.[157] The Supreme Court decision in *Cooley* heavily utilized the second *Montana* exception, but also cited to *Strate*, *Ortiz-Barraza* and related cases.[158]

1. District Court for the District of Montana

The United States District Court for the District of Montana made the initial determination to exclude the evidence in Cooley's truck under the ICRA.[159] The court found that Saylor committed an unreasonable seizure because he detained Cooley without evidence of an apparent state or federal law violation, even though Saylor could tell Cooley was a non-Indian.[160] To explain the reasoning behind the decision to exclude the evidence, the district court reviewed the power to exclude and limited power related to applying tribal law to Indians.[161]

The court began by noting that tribal law enforcement has authority to conduct investigations of non-Indian violations of state and federal law that occur within tribal reservation lands.[162] This authority is based on a

152. *See* United States v. Cooley (*Cooley IV*), 141 S. Ct. 1638, 1643–44, 1646 (2021).

153. *See* United States v. Cooley (*Cooley I*), No. CR 16-42, 2017 U.S. Dist. LEXIS 17276, at *6–9 (D. Mont. Feb. 7, 2017); United States v. Cooley (*Cooley II*), 919 F.3d 1135, 1141–42 (9th Cir. 2019); United States v. Cooley (*Cooley III*), 947 F.3d 1215, 1216–19 (9th Cir. 2020) (Berzon, J. & Hurwitz, J., concurring); United States v. Cooley (*Cooley III*), 947 F.3d 1215, 1226–28 (9th Cir. 2020) (Collins, J., dissenting).

154. *See Cooley I*, 2017 U.S. Dist. LEXIS 17276, at *7–12.

155. *See Cooley II*, 919 F.3d at 1142.

156. *See Cooley III*, 947 F.3d at 1220–38 (Collins, J., dissenting).

157. *See id.* at 1228–33.

158. *See* United States v. Cooley (*Cooley IV*), 141 S. Ct. 1638, 1643–44 (2021).

159. *See Cooley I*, 2017 U.S. Dist. LEXIS 17276, at *11.

160. *Id.* at *8–10.

161. *See id.* at *6–7.

162. *See id.* at *6–7 (discussing the property right to exclude on tribal lands (citing Duro v. Reina, 495 U.S. 676, 696–97 (1990) and Ortiz-Barraza v. United States, 512 F.2d 1176, 1180 (9th Cir. 1975))).

tribe's power to exclude non-Indians from tribal lands.[163] The tribal power to exclude is limited, however, and does not extend to public rights of way,[164] owned by or dedicated to the government, running through tribal lands.[165] The court explained that the lack of a right to exclude on public rights of way effectively eliminates the ability of tribal officers to investigate state and federal violations by non-Indians on public roads within a reservation.[166] Despite lacking authority to investigate, there is no requirement that officers ignore obvious violations on public roads by non-Indians.[167]

Relying heavily on *Bressi*, the district court then laid out a very limited interpretation of tribal law enforcement authority for such situations.[168] On a public road crossing a reservation, a tribal officer can stop an individual based on a reasonable suspicion[169] of a violation of tribal law.[170] However, the officer must determine "shortly after stopping the person" whether the individual is an Indian.[171] If the person lacks Indian status, the tribal officer cannot take any further action,[172] unless "'it is apparent that a state or federal law has been violated.'"[173] When such an "apparent" violation has occurred, the tribal officer can only detain the individual for the amount of time it takes to transfer the individual to state or federal law enforcement officials.[174]

The district court had to determine what this "apparent" standard entailed, as the Ninth Circuit had not clarified the meaning of "apparent" or "obvious" in *Bressi* or in subsequent cases.[175] The court explained that

163. *See id.* at *6; *see also* discussion *supra* Section II.C.1.

164. *Right of Way*, BOUVIER'S LAW DICTIONARY (desk ed. 2012) ("[A] right of way is a designation of public land, either owned by a government in fee or subject to an easement or to a dedication of use."). Roads are public rights of way, and it is possible for a right of way to extend slightly past the road itself. *See id.*

165. *See Cooley I*, 2017 U.S. Dist. LEXIS 17276, at *7 (citing Bressi v. Ford, 575 F.3d 891, 895–96 (9th Cir. 2009)).

166. *See id.* ("Tribal police therefore have no authority to investigate violations of state and federal law by non-Indians on a public right of way that crosses the reservation.").

167. *See id.* (citing Strate v. A-1 Contractors, 520 U.S. 438, 455–56 n.11 (1997)).

168. *See* discussion *supra* Section II.C.3.

169. The standard of proof for a traffic stop is reasonable suspicion of criminal activity. *See* United States v. Cortez, 449 U.S. 411, 417–18 (1981) (explaining that a brief traffic stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity").

170. *See Cooley I*, 2017 U.S. Dist. LEXIS 17276, at *7.

171. *Id.* The district court relied on the officer's assumption based on Cooley's appearance to meet this aspect of the test. *See id.* at *10. However, the Ninth Circuit said such assumptions were impermissible and explained that officers must specifically ask individuals about their Indian status. *See* discussion *infra* Section II.D.2.a.

172. *See Cooley I*, 2017 U.S. Dist. LEXIS 17276, at *7.

173. *Id.* (quoting Bressi v. Ford, 575 F.3d 891, 896 (9th Cir. 2009)).

174. *See id.* ("[T]he tribal officer may detain the person for the reasonable time it takes to turn the person over.").

175. *See id.*

"the [apparent] standard is more stringent than particularized suspicion and probable cause."[176] The court based its determination on the Ninth Circuit's interchangeable use of "apparent" and "obvious" within *Bressi*,[177] as well as on the idea that the standard was "a carefully drawn exception borne of practical necessity" to ensure tribal officers did not have to "turn a blind eye" to overt state and federal law violations.[178]

Ultimately, the district court found that a tribal law enforcement officer commits an unreasonable seizure "when he detains a non-Indian on a public right of way that crosses the reservation unless there is an apparent state or federal law violation."[179]

Applying the rule to the facts of Cooley's case, the district court determined Saylor could tell once Cooley rolled down his window that Cooley was non-Indian by his appearance.[180] Further, the circumstances surrounding Saylor's interaction with Cooley did not rise to the level of an apparent violation of state or federal law.[181] The court reasoned that because Saylor discerned Cooley was a non-Indian and no apparent law violation had occurred, Saylor, as a tribal law enforcement officer, lacked the authority to detain Cooley for any amount of time.[182] Relying on Fourth

176. *Id.* "Particularized suspicion and probable cause require considerably less of police officers than an obvious law violation." *Id.* at *7–8.

177. *See Bressi*, 575 F.3d at 896–97. In *Bressi*, the Ninth Circuit described the necessary type of violation in two ways: "apparent that a state or federal law has been violated" and "obvious violation[]." *See id.*

178. *Cooley I*, 2017 U.S. Dist. LEXIS 17276, at *8. The district court further explained, "Construing 'apparent' to require no more than reasonable suspicion or probable cause would undermine *Bressi*'s purpose and grant the tribes power they do not have." *Id.* at *8.

179. *Id.* at *8–9.

180. *See id.* at *10. According to the district court, Saylor determined Cooley lacked Indian-status based solely upon his initial assessment of Cooley's physical appearance. *See id.* The district court's holding regarding the determination of Cooley's non-Indian status is the only significant aspect of the district court decision with which the Ninth Circuit panel disagreed. *See* discussion *infra* Section II.D.2.a.

181. *See Cooley I*, 2017 U.S. Dist. LEXIS 17276, at *10–11 (applying the *Bressi* "apparent" and "obvious" standard).

182. *See id.* An individual is seized when police conduct would indicate to a reasonable person in the same situation that they are not free to leave. *See id.* at *9. The district court determined that Saylor seized Cooley when Saylor drew his weapon, *id.*, and the Ninth Circuit agreed. *See* United States v. Cooley (*Cooley II*), 919 F.3d 1135, 1143 (9th Cir. 2019). Before Cooley was seized, Saylor had observed the following information:

- Cooley had bloodshot eyes and possibly slurred speech;
- Cooley's explanation for what he had been doing did not seem credible based on the circumstances;
- Cooley had mentioned the name of a known drug dealer in retelling his story;
- Two firearms in the front passenger seat;
- A number of small bills of cash in Cooley's pockets; and
- Cooley's demeanor changed to match a violence warning sign Saylor recognized due to his experience as a law enforcement officer.

Amendment jurisprudence[183] due to the amendment's close relationship to the ICRA provision, the district court excluded all of the evidence found after Saylor seized Cooley by drawing his weapon.[184]

2. Court of Appeals for the Ninth Circuit

The government appealed the district court's order to suppress the evidence to the United States Court of Appeals for the Ninth Circuit.[185] Initially, a panel of three judges heard the case.[186] The panel affirmed the district court's decision to suppress the evidence.[187] The government then sought either a rehearing before the same panel or an en banc rehearing.[188] The Ninth Circuit denied both rehearing requests, but four judges wrote a lengthy dissent from the denial.[189] Both the concurrence and the dissent to the denial discuss the various sources of tribal authority to investigate and detain non-Indians.[190]

a. Panel Decision

The Ninth Circuit upheld the district court's decision to exclude the evidence obtained from Cooley's truck.[191] The panel opinion articulated a multi-step rule that embodied a narrow interpretation of tribal law enforcement authority similar to, yet slightly more nuanced than, the district court's application of *Bressi*.[192]

See United States v. Cooley (*Cooley III*), 947 F.3d 1215, 1223–25 (9th Cir. 2020) (Collins, J., dissenting). While not arising to an obvious violation, there was at least enough reasonable suspicion to conduct a limited *Terry* stop and search. *See id.* at 1232 n.8 ("Although the encounter here began, not as a *Terry* stop, but as a 'welfare check' of the occupants of a vehicle sitting by the side of the highway, Saylor's subsequent actions during that encounter rested upon the sort of detention and investigatory authority covered in *Terry*.").

183. *See* United States v. Ramirez-Sandoval, 872 F.2d 1392, 1395 (9th Cir. 1989) (citing Nardone v. United States, 308 U.S. 338, 341 (1939)). The district court used *Ramirez-Sandoval* to determine suppression of the evidence was appropriate under the "fruit of the poisonous tree" doctrine. *See Cooley I*, 2017 U.S. Dist. LEXIS 17276, at *11–12.

184. *See Cooley I*, 2017 U.S. Dist. LEXIS 17276, at *10-11 (holding the evidence from the truck, such as the firearms, drug paraphernalia, and methamphetamine, needed to be suppressed as "fruit of the poisonous tree" of Saylor's search).

185. *See* United States v. Cooley (*Cooley II*), 919 F.3d 1135, 1141 (9th Cir. 2019).

186. *See id.* at 1138.

187. *See id.* at 1148.

188. *See* United States v. Cooley (*Cooley III*), 947 F.3d 1215, 1216. The Ninth Circuit utilizes a "limited en banc court" which consists of eleven active judges who decide an en banc rehearing. *See* FED. R. APP. P. 35-3.

189. *See* Cooley *III*, 947 F.3d at 1220-38 (Collins, J., dissenting).

190. *See id.* at 1216–18 (Berzon, J. & Hurwitz, J., concurring); *id.* at 1226–28 (Collins, J., dissenting).

191. *See Cooley II*, 919 F.3d at 1148.

192. *Compare Cooley II*, 919 F.3d at 1142–43, *with* United States v. Cooley (*Cooley* I), No. CR 16-42, 2017 U.S. Dist. LEXIS 17276, at *7–11 (D. Mont. Feb. 7, 2017).

The Ninth Circuit began by explaining two sources of tribal authority—the power to enforce tribal criminal law and the power to exclude from tribal land.[193] A tribe's sovereign status gives it the power to enforce tribal criminal law on reservation lands against Indians, both tribal members and nonmembers.[194] The power to enforce tribal law does not extend to non-Indians on tribal land, but the power to exclude does encompass non-Indians.[195] This power to exclude gives tribal law enforcement the authority to investigate non-Indians' criminal actions within the reservation, and to subsequently turn those individuals over to state or federal authorities.[196]

However, the power to exclude does not reach public roads that run through tribal land.[197] According to the Ninth Circuit panel in *Cooley*, on public roads, a tribal officer can only stop an individual suspected of violating tribal law if the officer is unaware of the individual's Indian status.[198] After stopping the individual, the officer's "initial authority is limited to ascertaining whether the person is an Indian,"[199] so any detention must be limited to the amount of time it takes to ask one question—*Do you have Indian status?*[200]

If the individual does not have Indian status, the tribal officer can only further detain the person if it becomes apparent "during this limited interaction" that a violation of state or federal law has occurred.[201] Such a detention is limited to turning the person over to the correct state or federal law enforcement agency,[202] and "does not allow officers to search a known non-Indian for the purpose of finding evidence of a crime."[203] The Ninth Circuit acknowledged that it had not articulated the specifics of the *Bressi* "apparent" or "obvious" standard,[204] but then failed to add any clarity to that standard.[205]

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193. *See Cooley II*, 919 F.3d at 1141.

194. *See id.*; *see also* discussion *supra* Section II.A.1.b. Indian tribal governments have the authority to create constitutions and enact laws, including criminal codes. *See, e.g.*, CROW L. AND ORD. CODE, TITLE 8B (2005); *see also* Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975) ("Intrinsic in this sovereignty is the power of a tribe to create and administer a criminal justice system.").

195. *See Cooley II*, 919 F.3d at 1141.

196. *See id.*

197. *See id.*

198. *See id.* at 1142.

199. *Id.*

200. *See id.* at 1142–43 (noting that "[a] law enforcement officer can, of course, rely on a detainee's response when asked about Indian status" (citing United States v. Patch, 114 F.3d 131, 134 (9th Cir. 1997))).

201. *Id.* at 1142.

202. *See id.*

203. *Id.*

204. *See id.* ("We have not elaborated on when it is 'apparent' or 'obvious' that state or federal law is being or has been violated.").

205. *See Cooley II*, 919 F.3d at 1142.

The Ninth Circuit agreed with the district court about the application of the Fourth Amendment exclusionary rule to cases involving evidence obtained through a violation of the similar ICRA provision.[206] The court definitively held the rule applies to ICRA violations.[207]

The Ninth Circuit did not accept the district court's conclusion that Saylor determined Cooley's lack of Indian status based solely on his physical appearance.[208] Because "Indian status is a political classification, not a racial or ethnic one," the court concluded an officer cannot presume an individual is or is not an Indian based on his physical features.[209] Instead, the officer must actually ask about the person's Indian status, and can then rely on the response.[210] Thus, according to the Ninth Circuit, Saylor exceeded his authority to detain Cooley because Saylor detained and searched a non-Indian without first determining Cooley's Indian status—not because he continued to detain a known non-Indian who had not obviously committed a crime, as the district court held.[211]

b. Rehearing Decision

Following the Ninth Circuit panel's decision affirming the district court's suppression of the evidence from Cooley's truck, the government filed two petitions for rehearing: one for a rehearing before the three-judge panel and one for an en banc rehearing before eleven Ninth Circuit judges.[212] The Ninth Circuit denied both petitions.[213]

Two opinions accompanied the denial of en banc rehearing.[214] Two of the three judges on the Ninth Circuit panel that initially decided the *Cooley* matter wrote the concurrence for the en banc denial.[215] The dissent

206. *See id*. at 1145.

207. *See id.* (holding that the exclusionary rule "applies in federal court prosecutions to evidence obtained in violation of ICRA's Fourth Amendment counterpart").

208. *See id.* at 1142.

209. *Id.*

210. *See id.* at 1142–43.

211. *See id.* at 1143. The district court's decision that Saylor exceeded his authority was based on the determination that although Saylor knew Cooley was a non-Indian, Saylor continued to detain Cooley even though Saylor did not have any indication a crime had obviously been committed. *See* United States v. Cooley (*Cooley I*), No. CR 16-42, 2017 U.S. Dist. LEXIS 17276, at *10–11 (D. Mont. Feb. 7, 2017). Because the Ninth Circuit held that Saylor did not know Cooley was a non-Indian based on his appearance, the appellate court based its decision on Saylor exceeding his authority when he had not asked Cooley about his Indian status before detaining him. *See Cooley II*, 919 F.3d at 143.

212. *See* United States v. Cooley (*Cooley III*), 947 F.3d 1215, 1216 (9th Cir. 2020).

213. *See id.* The panel voted to deny the government's rehearing petition, and a vote among all the active, non-recused judges also failed. *See id.*

214. *See id.* at 1216–19 (Berzon, J. & Hurwitz, J., concurring); *id.* at 1220–38 (Collins, J., dissenting).

215. *See id.* at 1216 (Berzon, J. & Hurwitz, J., concurring).

included four judges who were not involved in the first Ninth Circuit decision.[216]

c. Concurrence

Rather than three categories of tribal law enforcement authority, as the dissent contends,[217] the concurrence argues only two categories exist: the power to exclude in *Strate*[218] and the power to enforce tribal criminal law against Indians on tribal lands in *Bressi*.[219] According to the concurrence, the third category, the power to restrain criminal conduct on non-tribal land in *Ortiz-Barraza*, does not exist.[220]

The concurrence read the footnote in *Strate* that affirms the authority of tribal officers to patrol roads within the reservation[221] as being consistent with the rule adopted by the panel in *Cooley*.[222] Additionally, the concurrence argued that *Ortiz-Barraza* was overturned by *Strate* and so is no longer good law.[223] Rather than *Ortiz-Barraza* creating another category of tribal authority, the concurrence contends *Ortiz-Barraza* was based on a tribe's power to exclude.[224] *Strate* held the same power to exclude did not apply to federal or state rights of way, thus overturning *Ortiz-Barraza*.[225]

d. Dissent

The dissent argues the Ninth Circuit panel's decision not only conflicts with precedent, but it also poses a threat to public safety.[226] A tribal officer's ability to conduct limited stops and investigations of non-Indians anywhere on a reservation is described as a rule held for decades

216. *See id.* at 1220 (Collins, J., dissenting).
217. *See* discussion *infra* Section II.D.2.d.
218. *See* Strate v. A-1 Contractors, 520 U.S. 438, 455–56 (1997).
219. *See Cooley III*, 947 F.3d at 1216–17 (Berzon, J. & Hurwitz, J., concurring).
220. *See id.* at 1218 (Berzon, J. & Hurwitz, J., concurring).
221. *See Strate*, 520 U.S. at 455–56 n.11 ("We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law.").
222. *See Cooley III*, 947 F.3d at 1218 (Berzon, J. & Hurwitz, J., concurring).
223. *See id.* at 1219.
224. *See id.*
225. *See id.*
226. *See id.* at 1220 (Collins, J., dissenting). Judge Collins stated:
> The panel's extraordinary decision in this case directly contravenes long-established Ninth Circuit and Supreme Court precedent, disregards contrary authority from other state and federal appellate courts, and threatens to seriously undermine the ability of Indian tribes to ensure public safety for the hundreds of thousands of persons who live on reservations within the Ninth Circuit.

Id.

in the Ninth Circuit.[227] According to the dissent, the *Cooley* panel "replace[d] the easily administered reasonable suspicion standard that has applied for decades under *Ortiz-Barraza* with a novel and complex set of standards, all of which are more demanding than ordinary probable cause."[228]

According to the dissent, there are three categories of law enforcement authority,[229] and the panel "confused" and "jumble[d]" these authorities when creating the *Cooley* rule.[230] The dissenting justices explained that first, in Cooley's case, the panel incorrectly applied the general power to exclude from tribal lands in *Strate*, rather than applying the *Ortiz-Barraza* rule regarding traffic stops of non-Indians.[231] Then, the panel incorrectly determined that *Bressi*'s power to enforce tribal law against tribal members was the only authority applicable to non-Indians on public roads running through reservations.[232]

The dissent describes *Ortiz-Barraza* as controlling, not invalid.[233] According to the dissent, the Supreme Court did not overturn *Ortiz-Barraza* in *Strate*—in fact, the Court reinforced the Ninth Circuit opinion.[234] The dissenters argued that *Strate*'s footnote recognizing the power of tribal officers to patrol roads cannot have been based on any power other than the power recognized in *Ortiz-Barraza*.[235] Additionally, the dissent contends that by noting the ability of tribal officers to conduct traffic stops of non-Indians, the Supreme Court intended such stops to be accompanied by the typical reasonable suspicion standard used for traffic stops, not a higher standard that would require an obvious law violation.[236]

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227. *See id.*
228. *Id.* at 1221.
229. *See* discussion *supra* Section II.C.1–3.
230. *See Cooley III*, 947 F.3d at 1229 (Collins, J., dissenting).
231. *See id.*
232. *See id.*
233. *See id.* at 1233.
234. *See id.* at 1231.
235. *See id.* The dissent explained:

> The power thus expressly reaffirmed by the Supreme Court—namely, a tribal officer's affirmative power to "stop[] a "nonmember" on a state "highway for conduct violating state law"—cannot have been based on the general power to exclude from *tribal lands* . . . , because the highway is not considered to be equivalent to tribal lands, but rather to reservation land that has been alienated to non-Indians. Nor does it rest on the authority to enforce *tribal law* against tribal members . . . , because the Court explicitly described it as a power to conduct traffic "*stop[s]*" of "*nonmembers*" for violations of "*state* law."

Id. (emphasis in original) (citations omitted).
236. *See id.* at 1231–32.

The dissent discussed the public safety concerns created by the *Cooley* rule.[237] On many reservations, non-Indians own large amounts of land and a significant number of non-Indians live on reservations.[238] Additionally, many reservations face increased criminal activity compared to other parts of the country.[239] The dissent described the *Cooley* rule as being "as disturbing as it is mistaken" due to the heightened standard to which tribal officers would be held.[240]

3. Supreme Court of the United States

The Supreme Court addressed the question in *Cooley* on June 1, 2021. Hundreds of tribes from across the United States and various organizations, such as the National Congress of American Indians[241] and the National Indigenous Women's Resource Center,[242] filed amicus briefs in favor of the government's position that tribal officers should have more authority than allowed by the Ninth Circuit's *Cooley* rule.[243] Additionally, the government's position was supported by amicus briefs filed by Indian Law professors, current and former members of Congress, and former United States Attorneys.[244] In a nine-page unanimous decision written by

237. *See id.* at 1236–38. The concurrence, on the other hand, described the dissent's discussion of the safety concerns as "wildly exaggerat[ing] the purported consequences of the panel opinion." *See id.* at 1216 (Berzon, J. & Hurwitz, J., concurring).

238. *See id.* at 1236 (Collins, J, dissenting).

239. *See id.* at 1236–37 (Collins, J., dissenting).

240. *See Cooley III*, 947 F.3d at 1237 (Collins, J., dissenting). The dissent explained, "In light of these factors, the troubling consequence of the panel's opinion will be that tribal law enforcement will be stripped of *Terry*-stop investigative authority with respect to a significant percentage (and in some cases a majority) of the people and land within their borders." *Id.*

241. The National Congress of American Indians was founded in 1944 and is "the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities." *About NCAI*, NAT'L CONG. OF AM. INDIANS, https://bit.ly/37z6T51 (last visited Feb. 20, 2021).

242. The National Indigenous Women's Resource Center is a "Native-led nonprofit organization dedicated to ending violence against Native women and children" that provides national leadership to support grassroots advocacy. *Who We Are,* NAT'L INDIGENOUS WOMEN'S RES. CTR., https://bit.ly/3uhkxU4 (last visited Feb. 20, 2021).

243. Five different amicus briefs on behalf of tribes and Indian organizations were filed to support the United States. *See, e.g.*, Crow Tribe brief, *supra* note 55; NIWRC Cert. Petition Amicus Brief, *supra* note 94. Some of the arguments raised in the briefs include interpretations of treaties, a concern for the law and order on reservations, as well as practical safety considerations. *See* Crow Tribe brief, *supra* note 55; Brief for National Indigenous Women's Resource Center et al. as Amici Curiae Supporting Petitioner, United States v. Cooley, 141 S. Ct. 1638 (2021) (No. 19-1414), 2021 WL 274736 [hereinafter NIWRC Merits Amicus Brief].

244. *See* Brief for Indian Law and Policy Professors as Amici Curiae Supporting Petitioner, United States v. Cooley, 141 S. Ct. 1638 (2021) (No. 19-1414), 2021 WL 242305; Brief for Dennis K. Burke, Former United States Attorney, et al. as Amici Curiae Supporting Petitioner, United States v. Cooley, 141 S. Ct. 1638 (2021) (No. 19-1414), 2021

Justice Stephen Breyer, the Court vacated the Ninth Circuit's judgment and remanded the case for further proceedings.[245]

Following a discussion of the "unique and limited character" of tribal sovereignty, the Court explained that "[h]ere, no treaty or statute has explicitly divested Indian tribes of the policing authority at issue."[246] To assess whether tribes can exercise that policing power through inherent sovereign authority, the Supreme Court looked to the second *Montana* exception, noting it "fits the present case, almost like a glove."[247] The exception discusses non-Indian conduct that "threatens or has some direct effect on . . . the health or welfare of the tribe"[248]—conduct tribal officers could be powerless to investigate under the narrow *Cooley* rule created by the Ninth Circuit.[249]

The Court cited to *Strate* during its analysis of additional cases that repeated or relied on *Montana*'s general principle and exceptions.[250] Notably, footnote eleven was quoted in full to support the retention of "a tribe's inherent sovereign authority to engage in policing of the kind" presented in *Cooley*.[251] Additionally, the Court cited *Duro*, noting that it has recognized a tribal officer's ability to detain an individual to transport them to the authorities with proper jurisdiction over the matter.[252] The Supreme Court explained that although *Duro* justified the tribal authority as coming from the power to exclude, "tribes have inherent sovereignty independent of the authority arising from their power to exclude, and here *Montana*'s second exception recognizes that inherent authority."[253]

The Court emphasized that state or federal laws—not tribal laws—will be applied to non-Indians searched and detained by tribal officers on public roads within reservations.[254] Those are the same "laws that apply whether [a non-Indian] is outside a reservation or on a state or federal

WL 274739; Brief for Current and Former Members of Congress as Amici Curiae Supporting Petitioner, United States v. Cooley, 141 S. Ct. 1638 (2021) (No. 19-1414), 2021 WL 274737.

245. *See* United States v. Cooley (*Cooley IV*), 141 S. Ct. 1638, 1641, 1646 (2021).

246. *Id.* at 1642–43.

247. *Id.* at 1643.

248. Montana v. United States, 450 U.S. 544, 566 (1981).

249. *See Cooley IV*, 141 S. Ct. 1638, 1643 (2021) ("To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats.").

250. *See id.* at 1644.

251. *Id.*; *see* Strate v. A-1 Contractors, 520 U.S. 438, 455–56 n.11 (1997) ("We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law.").

252. *See Cooley IV*, 141 S. Ct. at 1644–45.

253. *Id.* at 1644 (quotations omitted).

254. *See id.* at 1644–45.

highway within it."[255] Additionally, the Supreme Court noted "we have doubts about the workability of the standards that the Ninth Circuit set out."[256]

III. ANALYSIS

Despite the Supreme Court's rejection of the Ninth Circuit's *Cooley* decision, a level of ambiguity still exists regarding tribal officers' inherent authority to temporarily stop and investigate non-Indians on public roads within a reservation. Congress should codify the *Cooley* decision to give some interpretive clarity to the complex topic of criminal law in Indian Country, to recognize that tribal officers retain the authority described in *Cooley*, and to facilitate law enforcement cooperation in Indian Country.

Congress has "the power to recognize, modify, or eliminate aspects of tribal sovereignty."[257] Any legislation that delineates the boundaries of tribal authority would replace any related inherent authority that a tribe has over a subject.[258] In *Cooley*, the Supreme Court found that tribes have the authority to temporarily stop and search non-Indians on public roads in the reservation because Congress had not divested tribes of that power.[259] Congress can pass legislation that recognizes tribes' inherent powers described in *Cooley*, which would provide tribes the added benefit and clarity of codification.[260] A statute codifying the inherent tribal authority, the second *Montana* exception, and the reasonable suspicion standard of proof would ensure tribes retain that authority. Moreover, the authority's codification would set interpretive parameters that a future Supreme Court could not encroach.

A. Increasing Clarity for Tribal Officers and Courts

In the *Cooley* decision, the Supreme Court did not explicitly address what standard of proof must be met for a tribal law enforcement officer to

255. *Id.* at 1645.

256. *Id.* at 1645 (explaining the incentive to lie if asked about Indian status, how an "apparent" standard "introduces a new standard into search and seizure law," and the frequency of possible interpretation issues due to the high number of non-Indians living on reservations).

257. Brief of Current and Former Members of Congress as Amici Curiae Supporting Petitioner, *supra* note 244, at 4–5 (citing United States v. Lara, 541 U.S. 193, 200 (2004) and South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998)).

258. *See Cooley IV*, 141 S. Ct. at 1642–43 ("In all cases, tribal authority remains subject to the plenary authority of Congress.").

259. *See id.* at 1643.

260. *See, e.g.*, Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 337 (2018) (suggesting "tribal sovereignty affirmation legislation" to broadly recognize kinds of inherent tribal authority).

temporarily detain or search a non-Indian.[261] While the Supreme Court rejected the Ninth Circuit's "apparent" or "obvious" standard, it never identified reasonable suspicion as the proper standard for these circumstances.[262] In the Fourth Amendment context, reasonable suspicion is the applicable standard to apply to temporary stops and searches.[263] The ICRA search and seizure section mirrors its Fourth Amendment counterpart, and courts have noted the similarities between the two.[264] Moreover, members of Congress have indicated that the ICRA, like the Fourth Amendment, should require a reasonable suspicion standard.[265]

Any ambiguity that remains after the *Cooley* decision could be eliminated if Congress codified the reasonable suspicion standard of proof for tribal law enforcement officers temporarily detaining or searching non-Indians on public roads running through reservations.[266] A tribal officer, such as Saylor, who pulls over an individual and has reasonable suspicion of criminal activity would unambiguously have the authority to conduct a limited stop and search. A judge, such as the federal district court judge overseeing Cooley's suppression hearing, would have specific Congressional guidance to apply the reasonable suspicion standard when assessing the evidence and circumstances. The additional clarity regarding the standard of proof would assist both officers and the judicial system, removing one layer of complexity from the complicated determinations that underlie Indian Country criminal law.

B. Law Enforcement Cooperation and MMIW

The federal government prosecutes a majority of felonies occurring in Indian Country.[267] After the investigating agency refers the case to the U.S. Attorney's Office (USAO), the USAO decides whether the case should be prosecuted in federal court, if a tribal court should instead preside over the case, or if the case lacks the necessary evidence required

261. *See Cooley IV*, 141 S. Ct. at 1641 (noting only that "[t]he search and detention, we assume, took place based on a potential violation of state or federal law"). Justice Alito's concurrence is the only opinion that mentions reasonable suspicion. *See id.* at 1646 (Alito, J., concurring).

262. *See id.* at 1645.

263. *See supra* notes 51, 169.

264. *See* discussion *supra* Section II.A.3.

265. *See* Brief of Current and Former Members of Congress as Amici Curiae Supporting Petitioner, *supra* note 244, at 11.

266. *See, e.g.*, M. MAUREEN MURPHY, CONG. RSCH. SERV., LSB10608, SUPREME COURT RULES ON AUTHORITY OF TRIBAL POLICE TO STOP NON-INDIANS 4 (2021).

267. *See* BRYON L. DORGAN, ET AL., U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 1 (2010).

for prosecution.[268] From 2005 to 2009, U.S. Attorney's Offices declined to prosecute fifty percent of the Indian Country matters referred to them by law enforcement agencies.[269] "Weak or insufficient admissible evidence" served as the basis for forty-two percent of case declinations.[270]

The first officer on the scene often has the responsibility of preserving evidence and "tak[ing] such other steps as may be required to ensure successful prosecution."[271] Often, reservations have only a small number of officers on duty at one time, which can mean "backup is sometimes miles and hours away, if available at all."[272] In rural areas such as the Crow Reservation in Montana, where the *Cooley* incident occurred, limited resources and personnel make immediate responses to incidents unfeasible, sometimes impossible, for local county or state law enforcement officers.[273] Thus, if a tribal officer is the first officer on the scene, it is imperative they gather enough information to successfully collaborate with state and federal agencies later, as state officers may be unavailable to report rapidly to the scene.[274]

To address MMIW, cooperation between federal, local, and tribal law enforcement agencies is a necessity.[275] For example, in Montana, the U.S. Attorney's Office, the Montana Department of Justice, the Federal Bureau of Investigation, the federal Bureau of Indian Affairs, tribes, and tribal law enforcement all collaborated to create several MMIW response

268. *See, e.g.*, U.S. DEP'T OF JUST., DISTRICT OF MONTANA: 2020 INDIAN COUNTRY LAW ENFORCEMENT INITIATIVE OPERATIONAL PLAN 2–3 (2020) [hereinafter 2020 INDIAN COUNTRY OPERATIONAL PLAN].

269. *See* DORGAN, *supra* note 267, at 3.

270. *Id.*

271. 2020 INDIAN COUNTRY OPERATIONAL PLAN, *supra* note 268, at 3.

272. *Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affs.*, 110th Cong. 6 (2007) (statement of W. Patrick Ragsdale, Director, Bureau of Indian Affairs, U.S. Department of the Interior).

273. The Crow Indian Reservation consists of more than 2 million acres (larger than the size of the states of Delaware or Rhode Island). *See Crow Nation*, GOVERNOR'S OFF. OF INDIAN AFFS., https://bit.ly/39k8sVF (last visited Jan. 26, 2021). Big Horn County, the location of a majority of the Crow Reservation, consists of approximately 5,000 square miles. *See Quick Facts Big Horn County, Montana*, U.S. CENSUS (2010), https://bit.ly/3i0NVIw. Despite the county's size, only 16 full-time officers worked for the Big Horn County Sheriff's Department in 2018. *See Montana Law Enforcement Employees 2018,* MONT. BD. OF CRIME CONTROL 2 (2018), https://bit.ly/3oLlVy5.

274. *See* 2020 INDIAN COUNTRY OPERATIONAL PLAN, *supra* note 268, at 2–3.

275. *See Reviewing the Trump Administration's Approach to the Missing and Murdered Indigenous Women (MMIW) Crisis: Hearing Before the Subcomm. on Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res.*, 116th Cong. 1–2 (2019) (statement of Charles Addington, Deputy Bureau Director for Office of Justice Services, Bureau of Indian Affairs, U.S. Department of the Interior describing the necessity of collaboration for gathering data and disseminating information to the public).

strategies.[276] To facilitate investigations and eventually prosecute MMIW cases, different agencies must have the ability to share information and work together.[277] All involved law enforcement officers must have the ability to fully investigate a crime, including the ability to conduct limited searches and stops based on reasonable suspicion.

The inherent tribal authority discussed by the Supreme Court in *Cooley* enables first-on-the-scene tribal officers to further engage non-Indians suspected of violating state or federal law.[278] As a result, the tribal officer can more effectively gather the necessary evidence to facilitate future prosecution and therefore provide justice for a victim and her family.[279] A solution, or even a partial solution, to MMIW and other public safety concerns on reservations demands collaboration between federal and tribal agencies and the ability of first-on-the-scene tribal law enforcement officers to gather and preserve the necessary evidence for prosecution.

Safeguarding the tribal authority laid out in *Cooley* by codifying the decision and by updating and clarifying the ICRA helps improve the situation by giving tribal law enforcement officers the ability to operate under the same reasonable suspicion standard to which local and federal officers are held under the Fourth Amendment. Regardless of whether an officer works for the federal government, for the state, or for the tribe, if there is reasonable suspicion to temporarily stop and search any individual, the officer would have the authority to act. The evidence gained at an initial encounter has the potential to lead to collaborative investigation and ultimate prosecution.

C. Recommendation

Congress should codify the Supreme Court's recent decision in *Cooley*. The Court recognized how authority for tribal officers to stop and search non-Indians on public roads in reservations has become crucial for public safety in Indian Country.[280]

To safeguard tribal officers' ability to protect the reservation from non-Indian criminal conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," Congress should pass a statute recognizing the validity of the

276. *See* 2020 INDIAN COUNTRY OPERATIONAL PLAN, *supra* note 268, at 8–10. Strategies include the creation of a task force, increased access to databases, and training. *See id.*

277. *See id.*

278. *See* discussion *supra* Section II.D.3.

279. *See* NIWRC Merits Amicus Brief, *supra* note 243, at *23–24 (describing the cooperation necessary to address the MMIW crisis and the negative affect the Ninth Circuit's rule would have on that cooperation).

280. *See* United States v. Cooley (*Cooley IV*), 141 S. Ct. 1638, 1643 (2021).

second *Montana* exception in the criminal context.[281] In doing so, Congress should recognize the inherent tribal power discussed in *Cooley*. The legislation should also officially align the ICRA and Fourth Amendment, making clear that the ICRA requires tribal officers to have reasonable suspicion when making a limited stop of non-Indians driving on public roads through a reservation. Such legislation would recognize and clarify the *Cooley* inherent tribal authority to protect the reservation.[282]

IV. CONCLUSION

Tribal law enforcement jurisdiction on reservations is complex.[283] In *Cooley*, the Ninth Circuit added yet another layer of complexity by subjecting tribal officers to a poorly defined, highly demanding standard.[284] The Supreme Court correctly recognized the pitfalls of the Ninth Circuit's opinion and found that tribes retain the inherent authority to temporarily stop and detain a non-Indian on a public road within a reservation.[285]

Congress should also recognize the inherent tribal authority by codifying the *Cooley* decision.[286] Clarifying the standard of proof will guide tribal officers in how to make valid stops and searches of non-Indians.[287] Under *Cooley*'s inherent authority, tribal officers first on the scene will have the ability to gather necessary information and cooperate with governmental agencies to address public safety, especially the MMIW crisis.[288] Codifying *Cooley* will ensure tribal officers, like Saylor, can continue to exercise the tribe's authority to protect the tribe, regardless of future Supreme Court interpretations.

281. *See* MURPHY, *supra* note 266, at 4.
282. *See, e.g.*, Steele, *supra* note 260, at 337.
283. *See* discussions *supra* Sections II.A.1.b., II.C.
284. *See* discussion *supra* Section II.D.2.
285. *See* discussion *supra* Section II.D.3.
286. *See* discussion *supra* Section III.C.
287. *See* discussion *supra* Section III.A.
288. *See* discussion *supra* Section III.B.