JUSTICE

IN INDIAN COUNTRY

Exploring jurisdictional complexity in a time of transparency

MEASURES FOR JUSTICE

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Executive Summary

Measures for Justice (MFJ) is leading a movement to change the future of criminal justice by developing tools that help communities, and the institutions that serve them, reshape how the system works. We can do this work only if we have access to data that provide a critical window into how cases are being handled in different communities. But with over 3,000 counties across the country each administering its own means of justice, seeing the full picture of these systems, and how people are affected by them, is a challenge.

MFJ collects data regarding adult criminal cases filed and resolved in state courts. Through these efforts, we've identified gaps in the types of information received that limit our ability to generate a comprehensive picture of how criminal cases are processed by trial courts across the United States. One example of these gaps relates to cases involving American Indians and crimes committed on tribal lands. In an effort to paint a more comprehensive picture of how criminal cases unfold at the local level, MFJ wanted to better understand jurisdictional authority over these cases.

Unfortunately, we quickly learned that disparate and convoluted laws governing criminal case processing deeply complicate the question of jurisdictional authority and act as a significant barrier to understanding the ways in which these cases are processed. A key contributor to this jurisdictional confusion is Public Law 83-280 (PL-280), which reduces the ability of American Indian tribes to independently respond to crimes occurring on Indian land, instead allocating authority to state governments to varying degrees across several states.

Our Use of the Term "Indian"

The term "Indian" or "American Indian" is widely used and accepted within legal frameworks. It is used synonymously with Native American or Indigenous Peoples within the context of PL-280 and other laws pertaining to "Indian country." MFJ recognizes the different terms used to refer to the identities of Native Peoples and respects the various ways individual people identify. For the purpose of this report, we defer to legal scholars and leading organizations, such as the National Congress of American Indians (NCAI), when using language relating to American Indians or Alaska Natives and Tribal Nations.

PL-280 plays a significant role in dictating which institutions respond to criminal offenses and, consequently, what justice looks like for different people across different communities in the United States. The sections that follow shed light on the complexity created by PL-280 and the challenges it poses for data collection and system transparency.

Importantly, the intentions of this report are not to make comparisons or draw conclusions about the effectiveness of these differing approaches to justice, but rather to highlight the importance of data transparency and accessibility for the purposes of evaluating system performance and holding administrators accountable. We argue that this transparency is always key to ensure the fair and effective handling of cases, and this is of particular importance in places where the power to handle criminal matters has expanded beyond federal and tribal governments to the state by way of PL-280.

Introduction

American laws and codes can be intricate and onerous to understand, and perhaps none more so than those governing Indian country. To this day, it is still not always immediately or entirely clear which agency has the authority to preside over crimes committed by American Indians on Indian land, as evidenced by recent U.S. Supreme Court rulings such as *McGirt v. Oklahoma*[1] and *Oklahoma v. Castro-Huerta.*[2]

McGirt v. Oklahoma (2020) overturned the criminal conviction of an American Indian man on the grounds that his offense was committed on the Creek Nation reservation, taking the authority away from the state to prosecute crimes committed by tribal members on Indian land, and instead giving jurisdiction to the federal government and tribal courts.

Oklahoma v. Castro-Huerta (2022) ruled that state governments share jurisdiction with the federal government for criminal offenses committed by non-Indians, even for crimes committed against American Indians on Indian land. *See Appendix A for a deeper dive into factors that influence jurisdiction.*

While jurisdictional debates wage on, one piece of federal legislation in particular has exacerbated the problem of jurisdictional authority: Public Law 83-280 (or "PL-280").[3] Enacted in 1953, PL-280 made significant changes to criminal jurisdiction in Indian country, drastically relaxing the federal government's law enforcement responsibilities while simultaneously strengthening the role of the state to enforce their laws in these communities

While the law's effects are wide-ranging, one consequence in particular—the issue of data collection—is at the forefront of Measures for Justice's concern as we strive towards a world with a fully transparent justice system. Due to this jurisdictional complexity, it is rarely clear who collects and maintains data related to crimes that occurred on a reservation involving American Indians. This makes it particularly difficult for researchers, advocates, and the general public to understand the experiences American Indians have with their local criminal justice system, and conceals any potential differences in case treatment and outcome compared to other groups.

Measures for Justice maintains a National Data Portal containing criminal case processing data from courts across the country. With access to data from several states affected by PL-280, we began to wonder about the implications this particular law has had on the data we have collected and analyzed. Are the data telling the whole story? Whose stories might we be missing? This report provides a summary of PL-280, discusses how it impacts the data that are collected and made available, and outlines the ramifications of the ensuing opacity around these cases.

[1] McGirt v. Oklahoma, 207 L. Ed. 2d 985, 140 S. Ct. 2452 (2020)
[2] Oklahoma v. Castro-Huerta, 213 L. Ed. 2d 847, 142 S. Ct. 2486 (2022)
[3] See https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-Pg588.pdf.

PL-280:
An Expansion of State Power

Before 1953, which agency held prosecutorial jurisdiction over crimes committed within the limits of Indian country was a much simpler question to answer. At that time, federal and tribal governments generally shared jurisdiction for prosecuting criminal offenses committed on tribal lands, and states had no authority. Once PL-280 was enacted, state jurisdiction was expanded to Indian country for the first time. For some states, PL-280 was mandatory. Other states had the choice to opt in or leave jurisdiction with the federal and tribal governments.

Proponents of the legislation argued that PL-280 would allow state governments to absorb criminal cases that might have overwhelmed the federal government. Critics of the bill asserted that this newly acquired authority presented states with an opportunity to further impose influence on the lives of otherwise sovereign tribal citizens. Indeed, in the years since its implementation, a number of harmful consequences have been attributed to PL-280, such as blocking tribes in PL-280 states from funding for law enforcement.[4] Importantly, tribal consent was not required and tribes on these lands were not consulted before the law was enacted.[5]

"Indian country" Defined

For the purpose of this report, "Indian country" means all land held in trust by the federal government for the exclusive right to federally recognized tribes and/or their members. This includes reservation land, fee simple, trust allotments, and the like. For a comprehensive definition, see 18 U.S.C. § 1151.

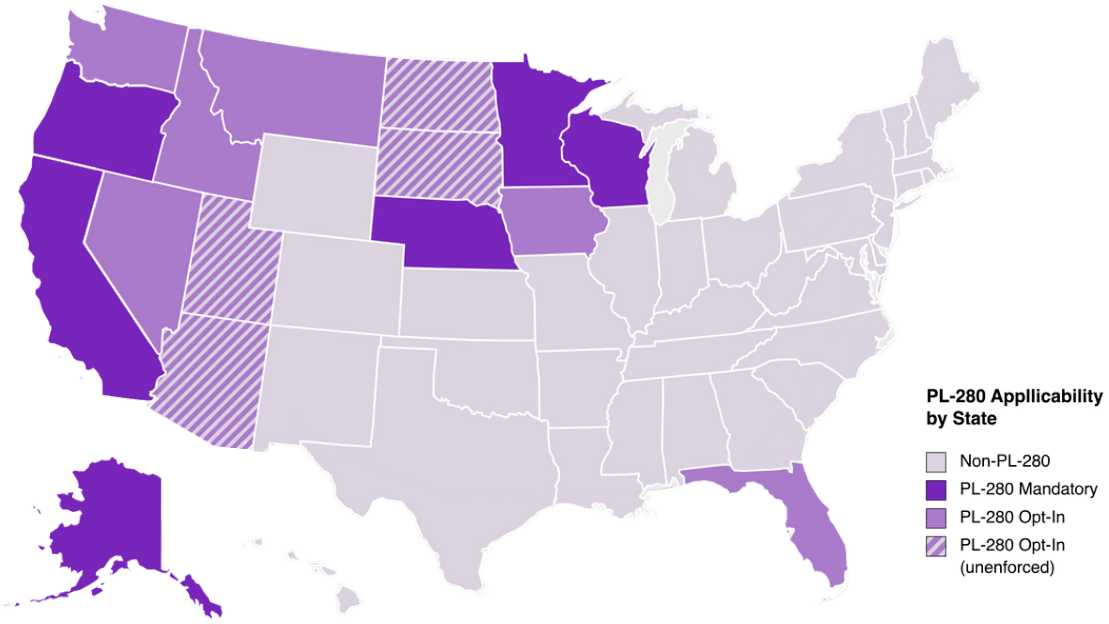
Where and when does PL-280 apply?

For six states the changes PL-280 initiated were mandatory. That is, the states of Alaska,[6] California, Minnesota, Nebraska, Oregon, and Wisconsin were required to assume jurisdiction over criminal cases on Indian lands with few exceptions.[7] Other states were given the option to do so, and since then, ten additional states have assumed criminal jurisdiction to some extent: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington.

These "opt-in" states accepted jurisdictional authority to varying degrees, for example limited to certain offense types. Moreover, while some states, such as South Dakota, have legislatively opted to assume jurisdiction over offenses committed on tribal land, those laws have since been challenged as unconstitutional by state Supreme Courts. These decisions have prevented the enforcement of PL-280 provisions within certain opt-in states and have led to discrepancies between the law on the books and the law in practice. See Figure 1, which depicts these complexities.

[4] National Institute of Justice, "Tribal Crime and Justice: Public Law 280," May 19, 2008, nij.ojp.gov: https://nij.ojp.gov/topics/articles/tribal-crime-and-justice-public-law-280.
[5] ibid.
[6] Though Alaska was not a state at the time PL-280 was enacted, it was mandated by law to assume criminal jurisdiction when it became a state in 1958 (Public Law 85-615), in the same way as these other "mandatory" states.
[7] In some states, the law excepted certain reservations: the Metlakatla Indian Community on the Annette Island Reserve in Alaska; the Red Lake Reservation in Minnesota; the Warm Springs Reservation in Oregon; and the Menominee Reservation in Wisconsin.

Figure 1
Map of PL-280 Applicability by State



Why does PL-280 complicate things?

The United States Constitution acknowledges federally recognized tribes as unique governing bodies and for the most part, affords these tribes independence in regulating internal affairs.[8] American Indian tribes have, historically, defended their right to develop their own system of laws, along with the courts and agencies necessary for carrying out their enforcement. Further, in recent decades, there has been a number of federal policies[9] that shore up tribal self-determination, promoting the notion that tribes have the right to govern themselves. Thus, the state oversight imposed on tribal communities by PL-280 is fundamentally at odds with tribal autonomy as afforded by federal statutes.

In addition to these inherent contradictions, regardless of whether PL-280 is the law in a given state, the tribal status of both the person accused and the victim plays a significant role in which entity holds the authority to prosecute criminal offenses. Generally speaking, in states where PL-280 does not apply, the federal government is responsible for prosecuting cases where a non-Indian defendant committed an offense against an American Indian on tribal land. In places where state jurisdiction has been mandatorily conferred via PL-280, the state has exclusive jurisdiction over these crimes, whereas optional states often share jurisdiction with the federal government. In both instances, there is generally no tribal jurisdiction.[10]

[8] For more information, see https://www.ncsl.org/quad-caucus/an-issue-of-sovereignty.
[9] Examples include: The Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA); The Indian Gaming Regulatory Act of 1988 (IGRA); The Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA); and The Tribal Law and Order Act of 2010.
[10] The Violence Against Women Act (VAWA), which was reaffirmed in 2022, provides participating Tribes authority to exercise jurisdiction over certain offenses, such as domestic violence and dating crimes. For more information see, https://www.justice.gov/tribal/2013-and-2022-reauthorizations-violence-against-women-act-vawa.

Jurisdictional authority is further complicated when we look at cases involving American Indian offenders and Non-Indian victims, as the type of offense also comes into play.[11] Therefore, to appropriately assign cases, law enforcement must assess the "offender / victim status" of the victim and the accused, and prosecutors and court administrators must then act accordingly.

These complications, coupled with myriad legislation and court rulings that create additional confusion, have left federal, state, and tribal governments in constant mediation regarding who is allowed to prosecute which offenses and where. The result is that information related to these cases is tracked in different ways across multiple systems. The implications for data accessibility and transparency are extensive, as researchers are left without access to a centralized source of data that speaks to the impact of our systems on these individuals and communities.

The ***General Crimes Act***, also known as the Federal Enclaves Act, codified at 18 U.S.C. § 1152, was enacted in 1817 and allocates jurisdiction to the federal government to prosecute offenses that occur in Indian country in which the defendant is a non-Indian and the victim is an Indian.

Enacted nearly 70 years later, the ***Major Crimes Act***, codified at 18 U.S.C. § 1153, extended federal jurisdiction for certain offenses committed in Indian country in which the defendant is an Indian.

What can we see in our data?

In our online Data Portal, we populate county-level Performance Measures that look at criminal court case processing across the country. We acquire the data behind these measures from criminal justice agencies responsible for overseeing the processing of criminal cases under the state's jurisdiction. Importantly, MFJ does not collect data from tribal courts or agencies.

Given PL-280's effect on criminal jurisdiction, we were interested in understanding its impact on our Performance Measures, as well as on the availability of case-processing data generally. Our Portal includes data from four of the six mandatory states—California, Minnesota, Oregon, and Wisconsin—and five states that have opted into the PL-280 transfer of jurisdiction—Florida, North Dakota, South Dakota, Washington, and Utah.

Our expectations for what we would observe in data from state criminal courts were as follows:

- At the county level, in states that have conferred jurisdiction by way of PL-280, we would see a consistent number of cases overall regardless of the rate of American Indians in the county population.
- In non-PL-280 states, in counties containing a considerable area that is Indian country with a large representation of federally-recognized tribes and reservation land, we would see fewer cases filed overall relative to other counties in the state containing little Indian country.

[11] For a complete jurisdictional summary, see https://www.justice.gov/archives/jm/criminal-resource-manual-689-jurisdictional-summary.

In addition to drawing on data collected from trial courts in Alabama, North Carolina, Oregon, South Dakota, and Wisconsin, we used geographical data from the Bureau of Indian Affairs (BIA) and from the U.S. Census Bureau to locate the lands of federally recognized tribes. Using ArcGIS, a cloud-based mapping tool, we overlaid that geographical data onto state maps with county boundary lines to visualize which counties contained tribal land.

This process allowed us to assess which states had criminal jurisdiction that might extend over tribal land, whether those states were classed as "mandatory" or "optional" in regard to PL-280, and whether or not any of those states had retroceded[12] their jurisdiction. In the end, we were able to determine which of our states were impacted by PL-280, where tribal lands exist within any of our states, and which of those tribes fell under the provisions of PL-280.

A Look At the County Level

Noting that state level case counts would be too large and varied for a nuanced analysis, we narrowed our focus to case processing trends across counties within states. In the mandatory PL-280 states of Wisconsin and Oregon, we found no significant correlation between a county's percentage of American Indian population and the proportion of cases involving American Indian defendants filed in court. In other words, the proportion of cases involving American Indian defendants remained consistent, regardless of the proportion of the county's population identifying as American Indian. The case counts across counties were also consistent, regardless of the proportion of land in the county that is federally recognized.

This consistency was expected considering the state courts should be accounting for all cases brought in their counties in mandatory states like Wisconsin and Oregon, and thus, reservation land and the number of cases involving American Indians would not be expected to be collected separately from the state court system.

When turning to the non-PL-280 states of Alabama and North Carolina we observed a similar finding, contrary to what we originally expected. However, the extremely low filing rate for criminal cases involving American Indian defendants in counties across Alabama and North Carolina, and the scarcity of federally recognized tribes,[13] left us too little information from which to draw conclusions.

Finally, MFJ looked at the "opt-in" state of South Dakota. Though the state has exercised its right to assume criminal and civil jurisdiction via legislative action, and those laws remain on the books, the courts have not recognized that jurisdiction and the state functionally remains a non-PL-280 state. Here we noted that counties with a high percentage of American Indians reflected lower total case counts, on average, than the rest of the state. South Dakota has 66 counties, 25 of which have at least one federally recognized reservation or tribe, and its population is nearly one-tenth American Indian/Alaskan Native.[14]

[12] Retrocession refers to the process of returning criminal jurisdiction from a state that was previously granted it by PL-280, and restoring federal and tribal jurisdiction to their original forms.
[13] Three of Alabama's 67 counties and six of North Carolina's 100 counties contain land officially recognized by the federal government as tribal land.
[14] According to the 2013 American Community Survey (ACS) 5-Year estimates, South Dakota had a total population of 825,198. Of those, 71,766, or 8.7%, identified as "American Indian Alaskan Native alone" (U.S. Census Bureau).

Take, for example, the county of Oglala Lakota (formerly named Shannon). Oglala Lakota had an estimated total population of 13,829 in 2013, 13,217 of those people, or 95.57%, identified as American Indian/Alaskan Native alone (U.S. Census Bureau, 2013). In MFJ's 2009-2013 cohort of data, Oglala Lakota showed only 39 criminal cases filed in the Circuit Court,[15] while similarly sized counties, Clay and Union, reported 8,208 and 17,659, respectively. We suspect we are seeing so few cases compared to other counties of the same size because the cases involving Indian defendants are not processed through the state courts, but rather largely through the tribal or federal government.

Similarly, in Buffalo County, where the population is nearly 80% American Indian/Alaskan Native, there were only 184 filed criminal cases over that same five year period. This happened while similar sized counties (e.g. Harding, Jerauld, Sully) with much lower American Indian/Alaskan Native populations reported at least 5 times the number of case filings each over the same period.

What can't we see, and why is it hard?

Researchers have continually pointed to a lack of data on the experiences of tribal communities in the United States, particularly as it relates to the criminal justice system.[16] As noted above, MFJ's ability to run further analysis and concretely address these questions using data is similarly limited. Data collection and centralization efforts have been hindered by a lack of prioritization by official sources tasked with collecting this information, as well as cultural and socioeconomic barriers.[17] As a result, we're often left without the information necessary to understand the ways in which tribal communities experience the American criminal justice system, including but not limited to the court system.

These challenges are further exacerbated by inconsistent data collection practices and a lack of standardized definitions across the courts. Many states,[18] and sometimes even courts within a given state, collect race and ethnicity differently. Moreover, the source of this data also varies, with some agencies referencing an arresting agency's perception of race and others asking individuals to self-identify. Considering these barriers in conjunction with the jurisdictional complexity resulting from PL-280, data representing the experiences of American Indians in the criminal justice system may be some of the most difficult to obtain and assess.

[15] In South Dakota, counties are divided among 7 judicial circuits. Circuit Courts serve as courts of general jurisdiction and hear the majority of criminal and civil cases in the State.
[16] National Institute of Justice, "Tribal Crime and Justice: Research Challenges," August 4, 2009, nij.ojp.gov: https://nij.ojp.gov/topics/articles/tribal-crime-and-justice-research-challenges.
[17] Daniel, Roxanne. "Since you asked: What data exists about Native American people in the criminal justice system?" April 22, 2020, Prison Policy Initiative: https://www.prisonpolicy.org/blog/2020/04/22/native/.
[18] For more information, see MFJ's 2020 report, The Power and Problem of Criminal Justice Data: A Twenty State Review.

Conclusion

To better understand the impact of this jurisdictional complexity for data and research, we compared county-level court data received for states with and without PL-280 laws. As expected, in mandatory PL-280 states, there was no significant correlation between a given county's percent of the population that is Native and the number of cases involving American Indian defendants across counties in the state. The same was observed in states without PL-280 on the books, which we suspect has more to do with the limited amount of data than a significant trend. In South Dakota, an opt-in PL-280 state, the data suggest counties with a higher percentage of American Indian population had, on average, lower total case counts compared to the state as a whole. This finding is in line with our expectations, as we anticipated a difference in case counts based on a county's population composition. Yet, the impact of these differences remains opaque.

The complexity of criminal jurisdiction in Indian country, created in part by PL-280, hinders our ability to generate a comprehensive picture of how criminal cases involving American Indians are processed through local systems of justice. With these knowledge gaps, how do tribal citizens hold state officials accountable? How might tribal systems be supported by state and federal governments, especially in times of great stress like was brought on by the COVID-19 pandemic? How do others, particularly those who have not shared the experiences of marginalized groups, understand how justice is being practiced in neighboring communities?

To ameliorate some of these complications, the federal government should work to provide support for tribal systems of justice, including tribal courts. Indeed, in response to the crisis of missing and murdered Indigenous people, a 2021 Executive Order[19] highlighted a lack of resourcing and called for the federal government to commit resources to addressing crimes against American Indians, including supporting data collection and analysis. One example of how this can be done is the Tribal Justice Statistics program resulting from the Tribal Law and Order Act of 2010, which required the Bureau of Justice Statistics to expand crime data collection efforts to tribal systems of justice and support efforts to report this information to national records and information systems.[20] Another example is the Comprehensive Indian Resources for Law Enforcement Project ("CIRCLE Project"), a collaborative effort between the Department of Justice and three tribal communities, in which the tribes received funds for their local justice systems.[21]

[19] Exec. Order No. 14053, 86 Fed. Reg. 220, November 15, 2021, https://www.govinfo.gov/content/pkg/FR-2021-11-18/pdf/2021-25287.pdf.
[20] For more information: https://bjs.ojp.gov/topics/tribal-crime-and-justice#0phvto.
[21] National Institute of Justice, "Indian Country Research: the Comprehensive Indian Resources for Community and Law Enforcement Project Evaluation," April, 2010: https://www.ojp.gov/pdffiles1/nij/229886.pdf.

In undertaking these efforts to improve data collection, agencies should collect more demographic information, including racial and ethnic categories. In doing so, they should be specific when tracking the race of individuals involved in their cases, avoiding classifying an individual's race as "Other" as often as possible. Further, agencies should be more transparent in how and where they are enforcing laws. As we have seen most recently in 2022 with Oklahoma v. Castro-Huerta, laws pertaining to criminal jurisdiction on reservations are constantly changing. While local agencies and courts may have little control over these legislative developments, they do have power over the documentation and accessibility of information related to their handling of criminal cases involving the American Indian community.

Without access to reliable data, communities are left without information to understand the impact of legislative changes or hold justice system representatives accountable. This is especially important given research suggesting American Indians are disproportionately arrested by police relative to their white peers, as well as overrepresented in our nation's jails and prisons.[22] While data collection and transparency alone will not solve the complex challenges that characterize criminal jurisdiction of Indian country, it is an essential step if we are to understand the ways in which American Indians are experiencing state justice systems and establish a full picture of our criminal justice systems.

[22] Daniel, Roxanne. "Since you asked: What data exists about Native American people in the criminal justice system?" April 22, 2020, Prison Policy Initiative: https://www.prisonpolicy.org/blog/2020/04/22/native/.

Appendix A

Table A1. Where jurisdiction has not been conferred on the state

Perpetrator	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Federal jurisdiction under 18 U.S.C. § 1152 is exclusive of state and tribal jurisdiction.
Indian	Non-Indian	If listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. If not listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but not of the tribe, under 18 U.S.C. § 1152. If the offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state law is assimilated under 18 U.S.C. § 13.
Indian	Indian	If the offense is listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. See section 1153(b). If not listed in 18 U.S.C. § 1153, tribal jurisdiction is exclusive.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if an impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be both federal and tribal jurisdiction. Under the Indian Gaming Regulatory Act, all state gaming laws, regulatory as well as criminal, are assimilated into federal law and exclusive jurisdiction is vested in the United States.

[23] Department of Justice Criminal Resource Manual at 689. Archived here.

Appendix A

Table A2. Where jurisdiction has been conferred by Public Law 280, 18 U.S.C. § 1162

Perpetrator	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	"Mandatory" state has jurisdiction exclusive of federal and tribal jurisdiction. "Option" state and federal government have jurisdiction. There is no tribal jurisdiction.
Indian	Non-Indian	"Mandatory" state has jurisdiction exclusive of federal government but not necessarily of the tribe. "Option" state has concurrent jurisdiction with the federal courts.
Indian	Indian	"Mandatory" state has jurisdiction exclusive of federal government but not necessarily of the tribe. "Option" state has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach in an option state if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, tribal, and in an option state, federal jurisdiction. There is no state regulatory jurisdiction.

Appendix A

Table A3. Where jurisdiction has been conferred by another statute

Perpetrator	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Unless otherwise expressly provided, there is concurrent federal and state jurisdiction exclusive of tribal jurisdiction.
Indian	Non-Indian	Unless otherwise expressly provided, state has concurrent jurisdiction with federal and tribal courts.
Indian	Indian	State has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, federal and tribal jurisdiction. There is no state regulatory jurisdiction.

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Measures for Justice recognizes the limitations of this report for providing thorough and comprehensive information on Indian Law throughout the United States, especially when it comes to more localized state legislation. For a list summarizing jurisdictional authority by state, please see Appendix A. We encourage those interested in seeking more information to visit the following sites: National Indian Law Library, National Congress of American Indians, Tribal Court Clearinghouse, the Bureau of Indian Affairs, and state legislatures.

MEASURES FOR JUSTICE