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Tribes, Vaccines, and COVID-19: A Look at Tribal Responses to the Pandemic

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TRIBES, VACCINES, AND COVID-19: A LOOK AT TRIBAL RESPONSES TO THE PANDEMIC

*Adam Crepelle**

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INTRODUCTION

The COVID-19 virus has taken the lives of over half a million United States citizens.¹ Although the COVID-19 virus affected people of all walks of life, Indian country² was hit particularly hard.³

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1. See *Covid Data Tracker Weekly*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> [<https://perma.cc/D684-89EJ>].

2. See 18 U.S.C. § 1151.

3. See Brady Halbleib, *Native American Tribes Hit Especially Hard by COVID-19*, 2NEWS OKLA. (Nov. 13, 2020, 8:11 PM), <https://www.kjrh.com/news/local-news/native-american-tribes-hit-especially-hard-by-covid-19> [<https://perma.cc/PU5G-SMYB>]; see also Nora Mabie, *Native American Tribes Have Been Hit Harder by*

In fact, the sparsely populated Navajo Nation had a higher rate of COVID-19 cases than any state in the United States.⁴ Indians⁵ were much more likely to contract the COVID-19 virus than white United States citizens and died from the virus at nearly triple the rate.⁶ Nevertheless, this death rate is likely an underestimate because “Indians” are often misidentified or excluded from data.⁷

COVID-19. Here's Why., GREAT FALLS TRIB. (Aug. 17, 2020, 3:02 PM), <https://www.greatfallsribune.com/story/news/2020/08/05/why-native-americans-impacted-harder-covid-19-montana-united-states/5573737002/> [https://perma.cc/BAC3-NAJK]; *Indigenous Americans Hit Harder by COVID-19: CDC Report*, AL JAZEERA (Aug. 19, 2020), <https://www.aljazeera.com/news/2020/8/19/indigenous-americans-hit-harder-by-covid-19-cdc-report> [https://perma.cc/D9ZJ-M49Z].

4. See *Chair McCollum Statements at Hearing on Indian Health Service COVID-19 Response*, HOUSE COMM. ON APPROPRIATIONS (June 11, 2020, 12:23 PM), <https://appropriations.house.gov/news/statements/chair-mccollum-statement-at-hearing-on-indian-health-service-covid-19-response> [https://perma.cc/JN4R-EU9R] (“According to the UCLA American Indian Studies Center, five Tribes are experiencing more instances of coronavirus per 100,000 citizens than any state, including New York.”); see also ADAM CREPELLE & ILIA MURTAZASHVILI, MERCATUS CTR. GEO. MASON U., COVID-19, INDIAN RESERVATIONS, AND SELF-DETERMINATION 1 (2021), https://www.mercatus.org/system/files/murtazashvili_and_crepelle_-_policy_brief_-_cfr_series_-_covid_and_indian_reservations_-_v1.pdf [https://perma.cc/A39M-RCE7] (“The Navajo Nation’s COVID-19 infection rate is higher than that of any US state — even New York.”).

5. Indian is used in this Essay to denote the indigenous peoples of present-day North America. This Essay uses the term “Indian” rather than “Native American” because it is the proper legal term as well as the preferred term of many Indians. See, e.g., MISS. BAND CHOCTAW INDIANS, <https://www.choctaw.org> [https://perma.cc/899M-SCGQ] (last visited June 8, 2021); S. UTE INDIAN TRIBE, <https://www.southernute-nsn.gov> [https://perma.cc/8CS5-RQV8] (last visited June 8, 2021); QUINAULT INDIAN NATION, <http://www.quinaultindiannation.com> [https://perma.cc/QEN3-3EXR] (last visited June 8, 2021).

6. See Will Feuer, *CDC Quietly Adjusted Covid Death Data, Shows Higher Relative Toll on Black, Hispanic People*, CNBC (Dec. 4, 2020, 4:47 PM), <https://www.cnbc.com/2020/12/04/revised-cdc-data-shows-higher-relative-black-hispanic-covid-death-rate.html> [https://perma.cc/975Q-XVYQ] (“The updated analysis also shows that American Indians or Alaska Natives have died at a rate 2.6 times that of White Americans.”); see also Nada Hassanein et al., *Native American Tribes Receive COVID-19 Vaccines, and Health Officials Work to Ease Fears About Taking It*, USA TODAY (Jan. 14, 2021, 12:18 PM), <https://www.usatoday.com/story/news/health/2021/01/14/american-indian-tribes-covid-19-vaccines-ihs-coronavirus/3942879001> [https://perma.cc/V32E-3BBL] (“A CDC study found that among 23 states with data on race, American Indian and Alaskan Native people were 3.5 times more likely to be diagnosed with the coronavirus than white people and four times as likely to be hospitalized.”).

7. Randall Akee & Sarah Reber, *American Indians and Alaska Natives are Dying of COVID-19 at Shocking Rates*, BROOKINGS (Feb. 18, 2021), <https://www.brookings.edu/research/american-indians-and-alaska-natives-are-dying-of-covid-19-at-shocking-rates/> [https://perma.cc/ZC26-HA5E] (“Despite these

Despite countless obstacles, tribes have taken definitive actions to protect their citizens. Tribes implemented mask mandates, curfews, and other safety measures at the first sight of the virus.⁸ However, tribes' greatest accomplishment was their COVID-19 vaccine rollout as tribes vaccinated their citizens faster than states.⁹ Tribes have been so successful vaccinating their own citizens that they have disseminated the COVID-19 vaccine to non-Indians,¹⁰ and even

limitations, we think these data provide important insight into mortality disparities and, if anything, may understate AIAN death rates for two reasons"); *see also* Jourdan Bennett-Begaye, Sunnie R Clahchischiligi & Christine Trudeau, *Broken System Can't Keep Track of Native Deaths*, INDIAN COUNTRY TODAY (June 8, 2021), <https://indiancountrytoday.com/news/broken-system-cant-keep-track-of-native-deaths> [<https://perma.cc/GD4V-RNX5>].

8. *See infra* Part IV.A.

9. *See* Alex Brown, *Indian Country Reaches 1M Vaccine Doses*, PEW CHARITABLE TRS. (Apr. 6, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/04/06/indian-country-reaches-1m-vaccine-doses> [<https://perma.cc/Y78E-TCDA>] ("While most states floundered early in their vaccine distribution, tribes administered their doses quickly, prioritizing elders with culturally important knowledge."); *see also* Joaqlin Estus, *Tribes Are Racing Ahead of Vaccination Curve*, INDIAN COUNTRY TODAY (Feb. 16, 2021), <https://indiancountrytoday.com/news/tribes-are-racing-ahead-of-vaccination-curve> [<https://perma.cc/5YGN-AP76>] ("We're doing better than most states and counties in the country," said Abigail Echo-Hawk, director of the Urban Indian Health Institute in Seattle "We have a system in place and as public health communities, I keep telling all of my friends in the state and federal levels like you should have asked an Indian. I had to do this a long time ago," she said.").

10. *See* Shawna Chen & Russell Contreras, *Native American Tribes Lead the Way on Coronavirus Vaccinations*, AXIOS (Mar. 11, 2021), <https://www.axios.com/covid-vaccine-native-americans-internet-access-6f1ebc15-987f-4c2a-bf1f-7dcffce7ce8f.html> [<https://perma.cc/AAG3-6SZB>] ("Despite severe technological barriers, some tribes are vaccinating their members so efficiently, and at such high rates, that they've been able to branch out and offer coronavirus vaccines to people outside of their tribes."); *see also* Pat Dooris, *Oregon Tribes Say They Have Enough Vaccine, but Many Members Are Skeptical*, KGW8 (Mar. 15, 2021, 6:42 PM), <https://www.kgw.com/article/news/health/coronavirus/vaccine/oregon-tribes-abundant-vaccine-but-many-members-skeptical/283-1008ff7f-2530-47b4-8b40-cda89c415cbe> [<https://perma.cc/3JTS-PYQJ>] (recounting numerous tribes in Oregon inoculating non-tribal community members); Hannah Furfaro, *Teachers Crying Tears of Gratitude as Washington Tribes Help Speed COVID-19 Vaccines to Them*, SEATTLE TIMES (Mar. 18, 2021, 9:39 AM), <https://www.seattletimes.com/education/lab/tribal-governments-in-washington-help-speed-teacher-vaccination-effort> [<https://perma.cc/5VZN-NMBN>] ("The Lummi Nation is one of several tribal governments in Washington state helping hasten the vaccine rollout for educators here. The Suquamish Tribe is expected to vaccinate about 500 North Kitsap School District employees. The Port Gamble S'Klallam Tribe also provided North Kitsap school employees with doses. In Seattle this week, special-education teachers and instructional aides received vaccines through the Seattle Indian Health Board, easing the path for those who may have otherwise struggled to secure an appointment."); Iris Samuels, *US Tribe Shares Vaccine with Relatives, Neighbors in Canada*, ABC NEWS (May 5, 2021, 6:14 PM),

players in the National Basketball Association turned to tribes for COVID-19 vaccines.¹¹ While tribal institutions have increasingly proven themselves more effective than their state and federal counterparts,¹² tribes' success with vaccines came as a surprise.

Due to tribes' unique legal status,¹³ Indians have rights to healthcare through treaties and the federal-tribal trust relationship.¹⁴ The Indian Health Services (IHS) is a manifestation of this relationship.¹⁵ The IHS was established in 1955.¹⁶ Today, there are 109 federally operated IHS facilities, while tribes themselves use federal funds to operate over 600 healthcare facilities.¹⁷ There are also 41 urban Indian organizations that contract with the IHS to provide healthcare to Indians who reside away from tribal service areas.¹⁸ The IHS provides a variety of healthcare services to Indians, including primary and emergency care.¹⁹ However, the IHS is

<https://abcnews.go.com/Health/wireStory/montana-tribe-gifts-vaccines-neighbors-border-77499386> [<https://perma.cc/9HCM-PPBV>].

11. See *Statement from the Portland Trail Blazers*, NBA (Mar. 22, 2021), <https://www.nba.com/blazers/statement-portland-trail-blazers> [<https://perma.cc/5DMT-2FH9>].

12. See Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 201 (2017) (“As tribal governmental powers have increased and tribes have entered contracts to perform more federal functions, tribal governments have proven more institutionally competent than the federal government in serving Indian people.”).

13. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (“The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence.”).

14. See *Basis for Health Services*, INDIAN HEALTH SERV. (Jan. 2015), [https://www.ihs.gov/newsroom/factsheets/basisforhealthservices/#:~:text=The%20trust%20relationship%20establishes%20a,as%20Indians%2C%20including%20health%20care.&text=111%2D148\)%5D%20provide%20specific,health%20care%20of%20Indian%20people](https://www.ihs.gov/newsroom/factsheets/basisforhealthservices/#:~:text=The%20trust%20relationship%20establishes%20a,as%20Indians%2C%20including%20health%20care.&text=111%2D148)%5D%20provide%20specific,health%20care%20of%20Indian%20people) [<https://perma.cc/R2KP-FBT3>].

15. See *About IHS*, INDIAN HEALTH SERV., <https://www.ihs.gov/aboutihs> [<https://perma.cc/SG2Z-STAX>] (last visited Sept. 15, 2021).

16. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-20, INDIAN HEALTH SERVICE: ACTIONS NEEDED TO IMPROVE OVERSIGHT OF FEDERAL FACILITIES' DECISION-MAKING ABOUT THE USE OF FUNDS 5 (2020), <https://www.gao.gov/assets/gao-21-20.pdf> [<https://perma.cc/R84R-M2ZR>].

17. See *id.*

18. See *Urban Indian Organizations*, INDIAN HEALTH SERV. [hereinafter *Urban Indian Organizations*], <https://www.ihs.gov/urban/urban-indian-organizations> [<https://perma.cc/5Z5Q-HFC7>] (last visited June 8, 2021); see also *Office of Urban Indian Health Programs*, INDIAN HEALTH SERV. [hereinafter *Office of Urban Indian Health Programs*], <https://www.ihs.gov/urban> [<https://perma.cc/MZ9L-C739>] (last visited June 8, 2021); *History*, INDIAN HEALTH SERV. [hereinafter *Office of Urban Indian Health Services History*], <https://www.ihs.gov/urban/history> [<https://perma.cc/CAG9-HX4W>] (last visited June 8, 2021).

19. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-20, *supra* note 16, at 5.

infamously underfunded.²⁰ This has contributed to massive health disparities between Indians and the general population.²¹ These disparities have made Indians extremely susceptible to the COVID-19 virus. Notwithstanding the historic troubles, the IHS rose to the moment and helped tribes effectively distribute vaccines.

Tribes' experience disseminating the COVID-19 vaccine can provide lessons for future state and municipal inoculation campaigns. Tribes' experience with the COVID-19 virus also raises numerous questions about tribal sovereignty and medicine.²² This Essay examines tribal COVID-19 vaccine campaigns and explores how tribal sovereignty relates to other pandemic response measures, such as business shutdowns and mask mandates.

The remainder of this Essay proceeds as follows. Part I explains why tribes were particularly susceptible to the COVID-19 virus. Part II provides background information on Indians' historical relationship with western medicine and pharmaceutical research. Part III examines the effectiveness of the tribal COVID-19 vaccine distribution strategies. Part IV explores how tribal sovereignty impacts public health measures other than vaccine distribution.

I. WHY TRIBES WERE ESPECIALLY VULNERABLE TO THE COVID-19 VIRUS

Populations with preexisting conditions were particularly vulnerable to the COVID-19 virus,²³ and Indians have among the worst health statistics in the United States. Indeed, Indians suffer

20. See Sahir Doshi et al., *The COVID-19 Response in Indian Country: A Federal Failure*, CTR. FOR AM. PROGRESS (June 18, 2020, 9:08 AM), <https://www.americanprogress.org/issues/green/reports/2020/06/18/486480/covid-19-response-indian-country> [<https://perma.cc/9PU8-QFMH>] (“Before COVID-19, the IHS was already so underfunded that expenditures per patient were just one-fourth of the amount spent in the veteran’s health care system and one-sixth of what is spent for Medicare.”); see also Mary Smith, *Native Americans: A Crisis in Health Equity*, 43 HUM. RTS., 2018, at 14, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/native-american-crisis-in-health-equity [<https://perma.cc/2LK9-EVQ3>] (“For example, to match the level of care provided to federal prisoners, funding would have to nearly double, according to an analysis by the National Congress of American Indians.”).

21. See *Disparities*, INDIAN HEALTH SERV. (Oct. 2019), <https://www.ihs.gov/newsroom/factsheets/disparities/> [<https://perma.cc/EN8W-U54U>]. See *infra* Part I for a discussion of the disparities and their causes.

22. See *infra* Part IV.

23. See *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 14, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/PMJ5-TQHZ>].

from virtually every health malady at higher rates than the general population.²⁴ For example, Indians contract tuberculosis at seven times the rate of the white population.²⁵ Respiratory ailments, like tuberculosis, are a particularly potent combination with the COVID-19 virus.²⁶ Indians also have diabetes at triple the rate of the U.S. population,²⁷ and diabetes severely amplifies the health hazard presented by the COVID-19 virus.²⁸

Poor health statistics are closely related to material poverty.²⁹ Indians have the highest poverty rate in the United States,³⁰ and

24. See *Disparities*, *supra* note 21.

25. See *Profile: American Indian/Alaska Native*, OFF. MINORITY HEALTH, <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62> [<https://perma.cc/JP3X-SLB3>] (last visited Oct. 4, 2021) (“The tuberculosis rate in 2019 was almost 7 times higher for American Indians/Alaska Natives, with an incidence rate of 3.4, as compared to 0.5 for the white population.”).

26. See Ya Gao et al., *Association Between Tuberculosis and COVID-19 Severity and Mortality: A Rapid Systematic Review and Meta-Analysis*, J. MED. VIROLOGY, 2020, at 1, 3, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7405273/pdf/JMV-9999-na.pdf> [<https://perma.cc/LAH3-EZ7D>] (“In conclusion, people with tuberculosis are not more likely to get COVID-19, but pre-existing tuberculosis has a higher chance of developing serious complications from COVID-19.”); see also *Treating TB in the Time of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 23, 2021), <https://www.cdc.gov/globalhealth/stories/2020/tb-covid.html> [<https://perma.cc/DS4R-U5DF>].

27. See INDIAN HEALTH SERV., INDIAN HEALTH DISPARITIES (2019), https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/factsheets/Disparities.pdf [<https://perma.cc/8ND7-VU5V>]; see also *Native Americans with Diabetes*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 10, 2017), <https://www.cdc.gov/vitalsigns/aian-diabetes/index.html> [<https://perma.cc/UKB9-VLQX>] (“Native Americans (American Indians and Alaska Natives) have a greater chance of having diabetes than any other US racial group.”).

28. See Emma Barron et al., *Associations of Type 1 and Type 2 Diabetes with COVID-19-Related Mortality in England: A Whole-Population Study*, 8 LANCET DIABETES ENDOCRINOL 813, 813 (2020), <https://www.thelancet.com/action/showPdf?pii=S2213-8587%2820%2930272-2> [[https://www.thelancet.com/journals/landia/article/PIIS2213-8587\(20\)30272-2/fulltext](https://www.thelancet.com/journals/landia/article/PIIS2213-8587(20)30272-2/fulltext)] [<https://perma.cc/E5NB-TCNL>] [<https://perma.cc/H4Z4-DXCA>]; see also *How Does COVID-19 Affect People with Diabetes?*, MAYO CLINIC (Apr. 6, 2021), <https://www.mayoclinic.org/diseases-conditions/coronavirus/multimedia/how-does-covid-19-affect-people-with-diabetes/vid-20510584> [<https://perma.cc/X2LQ-7Y9S>] (“It’s not that people with diabetes are more prone to COVID, but if they develop COVID, the disease is much more severe and seems to progress quicker.”).

29. See ORG. FOR ECON. CO-OPERATION & DEV. & WORLD HEALTH ORG., POVERTY AND HEALTH 14 (2003), <https://www.oecd-ilibrary.org/docserver/9789264100206-en.pdf?expires=1635457572&id=id&accname=guest&checksum=C8AB86395175C967FC8F0FDEFBA60C29> [<https://perma.cc/7JMA-M42L>] (“The poor suffer worse health and die younger.”); see also *Poverty and Health*, WORLD BANK (Aug. 25, 2014), <https://www.worldbank.org/en/topic/health/brief/poverty-health>

Indians who live on reservations are even poorer.³¹ Poverty results in 40% of reservation housing being deemed substandard compared to 6% outside of Indian country; likewise, approximately one-third of Indian country homes are overcrowded.³² Moreover, 48% of reservation housing lack access to safe water.³³ Overcrowded houses with inadequate water supplies are prime places for communicable diseases like COVID-19 to spread.³⁴

[<https://perma.cc/QDR2-E7SW>] (“Poverty is a major cause of ill health and a barrier to accessing health care when needed.”).

30. See *American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 6, 2017), <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html> [<https://perma.cc/925N-P8ZU>].

31. See *Making Indian Country Count: Native Americans and the 2020 Census: Hearing Before the S. Comm. on Indian Affs.*, 115th Cong. 26 (2018) (statement of James T. Tucker, Pro Bono Voting Rights Counsel, Native American Rights Fund) (“Native Americans have the highest poverty rate of any population group, at 26.6 percent. On federally recognized Indian reservations in Alaska Native villages, that rate is 38.3 percent.”); see also Adam Crepelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government*, 54 U. MICH. J.L. REFORM 563, 570 (2021).

32. See Craig Harris & Dennis Wagner, *HUD: Housing Conditions for Native Americans Much Worse Than Rest of U.S.*, AZCENTRAL (Jan. 19, 2017, 2:10 PM), <https://www.azcentral.com/story/news/local/arizona-investigations/2017/01/19/new-hud-reports-find-housing-conditions-worse-among-native-americans/96783368> [<https://perma.cc/MKN6-PZ9S>] (“Overcrowding and other physical-condition problems were present in 34 percent of households in tribal areas, compared with 7 percent of all U.S. households.”); see also *Housing & Infrastructure*, NAT’L CONG. AM. INDIANS, <https://www.ncai.org/policy-issues/economic-development-commerce/housing-infrastructure> [<https://perma.cc/LLA9-URG3>] (last visited June 7, 2020) (“Forty percent of on-reservation housing is considered substandard (compared to 6 percent outside of Indian Country) and nearly one-third of homes on reservations are overcrowded.”).

33. See Democratic Staff of H. Comm. on Nat. Res., *Water Delayed Is Water Denied: How Congress Has Blocked Access to Water for Native Families* (2016), https://naturalresources.house.gov/imo/media/doc/House%20Water%20Report_FIN_AL.pdf [<https://perma.cc/4KFE-873V>] (“Over a half million people — nearly 48% of tribal homes — in Native communities across the United States do not have access to reliable water sources, clean drinking water, or basic sanitation.”).

34. See *Chair McCollum Statements at Hearing on Indian Health Service COVID-19 Response*, *supra* note 4; see also Molly Hudson, *Tribes Welcome COVID-19 Relief Funds, Say Deep-Rooted Problems Remain*, KOLD NEWS 13 (Mar. 24, 2021, 9:19 AM), <https://www.kold.com/2021/03/24/tribes-welcome-covid-relief-funds-say-deep-rooted-problems-remain/> [<https://perma.cc/WN9E-9JMY>] (“‘Many tribal communities lack proper water delivery systems, sanitation facilities and other disparities, which create the perfect storm,’ said Rep. Bruce Westerman, R-Ark., and ranking member of the committee.”); Savannah Maher, *Overcrowding Makes It Hard for Native Americans to Socially Distance*, NPR (Apr. 7, 2020, 5:02 AM), <https://www.npr.org/2020/04/07/828688372/overcrowding-makes-it-hard-for-native-americans-to-socially-distance> [<https://perma.cc/BX6Q-8VZP>].

Once someone contracts the COVID-19 virus, accessing medical care can be difficult on a reservation. Indians who reside on reservations usually must make long drives to see healthcare providers.³⁵ Indian country's roads are consistently ranked among the United States' worst.³⁶ As Indian country's roads are often unpaved, inclement weather can render ground transportation impossible.³⁷ Reservation houses also often lack physical addresses, so emergency responders have difficulty identifying their destination.³⁸ Even if addresses exist, telecommunications infrastructure is lacking in Indian country.³⁹ Hence, a Global Positioning System will be useless.⁴⁰ Reservation housing has the lowest rate of internet access in the United States, so telemedicine is not an option for many reservation residents either.⁴¹

35. Misha Friedman, *Health Care's Hard Realities on the Reservation: A Photo Essay*, KAISER HEALTH NEWS (Apr. 13, 2016), <https://khn.org/news/health-cares-hard-realities-on-the-reservation-a-photo-essay/> [<https://perma.cc/5NN9-YXNM>] (“On the reservation, IHS facilities often don’t have services that people elsewhere expect, such as emergency departments or MRI machines. And those limited facilities can be hours away by car.”).

36. See, e.g., *Enhancing Tribal Self-Governance and Safety of Indian Roads: Hearing Before the S. Comm. on Indian Affs.*, 116th Cong. 21 (2019) (statement of Hon. Joe Garcia, Head Councilman, Ohkay Owingeh Pueblo Council) (“Altogether, the 42,000 miles of roads in Indian Country are still among the most underdeveloped, unsafe, and poorly maintained road networks in the nation . . .”).

37. Complaint at 13, *Cheyenne River Sioux Tribe v. Trump*, No. 1:20-cv-01709, 2020 WL 8714324 (D.D.C. 2020) [hereinafter *Cheyenne River Sioux Tribe Complaint*], <https://turtletalk.files.wordpress.com/2020/06/2020-06-23-crst-v.-trump-complaint.pdf> [<https://perma.cc/294Y-FPR9>] (“The Cheyenne River Sioux Tribal government has 1,700 miles of road to maintain, much of which is unpaved. The Tribe receives federal funding to maintain only 300 miles of road. During certain times of the year, wet conditions and melting snow make some roads nearly impassable.”).

38. See Adam Crepelle, *The Law and Economics of Crime in Indian Country*, GEO. L. REV. (forthcoming) (manuscript at 29) (on file with author); see also *Journey Through Indian Country: Part 1: Fighting Crime on Tribal Lands*, FBI (June 1, 2012), <https://www.fbi.gov/news/stories/journey-through-indian-country-part-1> [<https://perma.cc/H34U-GYVK>] (“On many reservations there are few paved roads or marked streets. Agents might be called to a crime scene in the middle of the night 120 miles away and given these directions: ‘Go 10 miles off the main road, turn right at the pile of tires, and go up the hill.’”).

39. Inquiry Concerning Deployment of Advanced Telecomms. Capability to All Ams. in A Reasonable & Timely Fashion, 33 FCC Rcd. 1660 (2018).

40. See Crepelle, *supra* note 38 (manuscript at 29).

41. See Allie Barton, *As Providers Turn to Telehealth During COVID-19, Calls Rise for More Resources in Indian Country*, CRONKITE NEWS (Aug. 10, 2020), <https://cronkitenews.azpbs.org/2020/08/10/telehealth-pandemic-resources-indian-country/> [<https://perma.cc/4K9U-CNH7>] (“In an attempt to remedy gaps in coverage during COVID, the FCC is dispersing \$200 million to health care providers to buy technology needed for telehealth visits and improve broadband connectivity”); see

Inadequate roads, healthcare, and numerous other obstacles to healthy communities are a direct result of the federal government failing to uphold its trust and treaty obligations to tribes.⁴² Despite having trust and treaty obligations to tribes, the United States persistently underfunds tribal governments.⁴³ Additionally, federal law undermines tribal economic development efforts.⁴⁴ For example, federal law prevents Indians from mortgaging their trust land without federal approval.⁴⁵ The inability to get a mortgage contributes to reservation housing shortages, thereby producing overcrowded homes. The inability to obtain a mortgage on reservation lands makes accessing capital in Indian country exceedingly difficult; hence, Indian country has virtually no private sector.⁴⁶ This helps explain Indian country's perennially high unemployment rate, and without job opportunities, poverty and poverty-related health maladies will persist.

II. VACCINES, PHARMACEUTICAL EXPERIMENTS, AND INDIANS

Tribes have an over 200-year history with vaccines.⁴⁷ In 1797, Chief Little Turtle of the Miami Tribe became the first Indian to receive a

also Darrah Blackwater, Opinion, *For Tribal Lands Ravaged by COVID-19, Broadband Access Is a Matter of Life and Death*, AZCENTRAL (May 9, 2020, 3:17 PM), <https://www.azcentral.com/story/opinion/op-ed/2020/05/09/arizona-tribal-lands-need-broadband-access-help-fight-covid-19/5177693002/> [https://perma.cc/6ES5-P6D8] (“They are instead fearful for their lives and the lives of their loved ones who lack access to solutions like telehealth or online counseling during this time of isolation.”); Avi-Asher Schapiro, *Coronavirus Crisis Threatens Internet Opportunity for Native Americans*, REUTERS (July 27, 2020, 9:49 PM), <https://www.reuters.com/article/us-health-coronavirus-usa-rights-trfn/coronavirus-crisis-threatens-internet-opportunity-for-native-americans-idUSKCN24T06B> [https://perma.cc/XH8R-3CQX].

42. See Doshi et al., *supra* note 20 (“At the root of all these vulnerabilities are the broken promises that the federal government made to tribes in the constitutional process of signing treaties to acquire their lands.”).

43. U.S. COMM’N ON CIV. RTS., *A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY* 114 (2003), <http://www.usccr.gov/pubs/na0703/na0731.pdf> [https://perma.cc/8L7Y-NM59].

44. See Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 683, 705 (2021).

45. 25 U.S.C. § 5135.

46. See Crepelle, *supra* note 44, at 685.

47. See J. Diane Pearson, *Medical Diplomacy and the American Indian: Thomas Jefferson, the Lewis and Clark Expedition, and the Subsequent Effects on American Indian Health and Public Policy*, 19 WICAZO SA REV. 105, 106 (2004) (“Imperial medicine . . . was practiced as a matter of global colonization before the Lewis and Clark expedition. Reports indicate that as early as 1780, Catholic missionaries used live smallpox virus to inoculate nearly seven thousand Native Americans near

federally sanctioned vaccine.⁴⁸ The vaccine was for smallpox,⁴⁹ which caused incalculable harm to tribes.⁵⁰ During the Jefferson Administration, vaccines were used as part of the U.S. tribal diplomacy efforts.⁵¹ Accordingly, smallpox vaccines were a diplomatic tool wielded by Lewis and Clark on their expedition to the Pacific.⁵² To further tribal diplomatic efforts, Congress passed the Indian Vaccination Act in 1832.⁵³ Congress appropriated additional funds for Indian vaccination efforts in 1839.⁵⁴

Although some Indians were reluctant to get vaccinated, Indians usually accepted vaccines.⁵⁵ Indians witnessed their tribes and others being ravaged by smallpox; thus, Indians viewed vaccines as an important tool to protect their people.⁵⁶ In fact, indigenous healers incorporated western vaccine techniques into their traditional medical practices.⁵⁷ The United States used its Indian vaccination efforts to demonstrate the nation's high-minded Indian policy to the world.⁵⁸ However, the U.S. vaccine campaign was not always successful or well-intentioned.⁵⁹

Valladolid, Guatemala, and that another sixty to seventy thousand were inoculated in southern Mexico.”).

48. *See id.* at 106.

49. *See id.*

50. *See* Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 315, 316–17 (2017) (“Smallpox was the deadliest of the old-world diseases, and it reduced tribal populations by up to 90 percent.”).

51. *See* Pearson, *supra* note 47, at 108.

52. *See id.* at 109.

53. *See* Indian Vaccination Act, ch. 75, 22 Congress, Public Law 22-75, 4 Stat. 514 (1832).

54. *See* Act of March 3, 1839, ch. 71, 25 Congress, Public Law 25-71, 5 Stat. 323, 328.

55. *See* Pearson, *supra* note 47, at 107.

56. *Id.* at 122 (“As the *curanderos* in Mexico had realized, the American chiefs had to have known that stopping the dreaded smallpox was an important medical advance that they could accept for the benefit of their nation.”).

57. *Id.* at 107 (“Most important, when given the opportunities to understand the process and to receive the necessary training, native *curanderos* incorporated vaccination and new medical techniques into their practices.”).

58. *Id.* at 109 (“Jefferson’s medical diplomacy to American Indians also kept the apparently benevolent intentions of the United States in the news at home and abroad.”).

59. *See* Betty Pfefferbaum et al., *Learning How To Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 AM. INDIAN L. REV. 365, 369 (1996) (“Services were provided to Indians often with an eye towards the value to the non-Indian communities.”); *see also* J. Diane Pearson, *Lewis Cass and the Politics of Disease: The Indian Vaccination Act of 1832*, 18 WICAZO SA REV. 9, 17 (2003) (“Vaccination funds were not always employed for the exclusive vaccination of

Vaccines did not always stop the smallpox spread for a variety of reasons. One reason is the vaccination techniques of the 1800s were relatively weak and ineffective by contemporary standards.⁶⁰ Moreover, the vaccine involved infecting persons with a moderate case of smallpox, and the vaccinated person could transmit smallpox prior to overcoming the disease.⁶¹ U.S. agents also based tribal vaccination distribution on strategic concerns; that is, vaccines went to tribes the United States deemed economically important or allies of the United States.⁶² Throughout the years, providing Indian healthcare has remained a federal responsibility, though how this duty is fulfilled has changed over time.⁶³ Not until 1955 did the IHS

American Indians. Henry R. Schoolcraft spent \$800 of the initial \$12,000 fund to help defray the costs of a federal cartographic and geological survey of Chippewa country.”); *id.* at 18 (“Cass’s decision to deny vaccination to Upper Missouri River tribes was economically motivated and that Cass ‘more likely’ had realized that the fur trade on the Upper Missouri River was no longer profitable due to increasing costs and incidents of violence.”); *id.* at 20 (“American Indians located north of the Mandans, including the Assinboins, the Blackfeet, and the Crees, were excluded from vaccination because Secretary of War Cass, as noted in his article published in the *North American Review* in 1826, considered them beyond the pale of civilization.”).

60. See Pearson, *supra* note 59, at 25 (“The smallpox situation was so bad in the new territory that by spring of 1838 the army sent an enlisted man to vaccinate the entire Choctaw nation. One wonders how effective these vaccinations were, however, since historian Grant Foreman noted that the epidemic still raged among the western Chickasaws, Choctaws, Creeks, Seminoles, Cherokees, and troops at Fort Gibson by the end of 1838.”); see also *Section 2: Smallpox Among Indian Tribes*, N.D. STUDIES [hereinafter N.D. STUDIES], <https://www.ndstudies.gov/gr8/content/unit-ii-time-transformation-1201-1860/lesson-4-alliances-and-conflicts/topic-1-smallpox-epidemics-1781-1837-1851/section-2-smallpox-among-indian-tribes> [https://perma.cc/8WSQ-TFFC] (last visited Sept. 17, 2021) (“Sometimes vaccine [sic] was not effective and the children became sick anyway.”).

61. See Pearson, *supra* note 47, at 106 (“While developing immunities to the disease, the recipient developed a mild case of smallpox that was contagious to others.”).

62. See N.D. STUDIES, *supra* note 60 (“Secretary of War Lewis Cass, who administered the program, decided that the vaccination program would be extended to tribes that were friendly to the United States, those with important economic roles, and those tribes (Cherokee, Choctaw, Chickasaw, Creek, and Seminole) that were being forced out of southern states to relocation sites in the West.”); see also Aaron Kunkler, *Snoqualmie Tribe, Partners, to Open Eastside’s First Community-Based Mass Vaccination Site on April 12*, BELLEVUE REP. (Apr. 7, 2021, 9:29 AM), <https://www.bellevuereporter.com/news/snoqualmie-tribe-partners-to-open-eastsides-first-community-based-mass-vaccination-site-on-april-12/> [https://perma.cc/WDT4-5DK2] (“In the 1860’s, the Snoqualmie people and other Northwest Natives experienced great loss as white settlers adopted a smallpox vaccine policy that discriminated against Natives,” Snoqualmie Tribal Chairman Robert De Los Angeles said.”).

63. See Pfefferbaum et al., *supra* note 59, at 391–97.

assume its current form within the Department of Health and Human Services.⁶⁴

The following year, Congress passed the Indian Relocation Act of 1956.⁶⁵ The impetus for this legislation was to eliminate tribes and assimilate Indians into the United States mainstream.⁶⁶ Accordingly, the Indian Relocation Act coerced Indians to leave their rural reservations for major urban areas.⁶⁷ Indians were promised jobs and assistance until they got on their feet; however, the United States failed to deliver on this promise which caused extreme hardship for numerous Indian families.⁶⁸ Leaders in urban Indian communities sought ways to improve the healthcare urban Indians received.⁶⁹ These efforts resulted in Congress funding the first program for urban Indians in 1966.⁷⁰ Today, the 41 Urban Indian Health Organizations provide healthcare services to urban Indians through IHS funding.⁷¹ Although the IHS funds Urban Indian Health Organizations, the IHS has been chronically underfunded and thus, performed subpar.⁷²

64. *Id.* at 382 (“What is now the Indian Health Service (IHS) was created in 1955 as a special branch of the PHS.”).

65. Pub. L. No. 84-959, 70 Stat. 986.

66. See Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 221 (1986) (“Many Indians, however, doubted the sincerity of efforts to ‘Americanize’ them by terminating their federally recognized status as sovereign, self-defining peoples.”); Donald Lee Fixico, *Termination and Relocation: Federal Indian Policy in the 1950’s v (1980)* (Ph.D. dissertation, University of Oklahoma), <https://shareok.org/handle/11244/4767> [<https://perma.cc/7YH7-824F>] (“Emphasis on education, acquiring materialistic items of white American culture, and competing with other Americans for jobs and positions in society were viewed as Americanization of Indians.”).

67. See Gabrielle Mandeville, *Sex Trafficking on Indian Reservations*, 51 TULSA L. REV. 181, 185 (2015).

68. See Crepelle, *supra* note 44, at 701.

69. See *Urban Indian Organizations*, *supra* note 18; *Office of Urban Indian Health Programs*, *supra* note 18; *Office of Urban Indian Health Services History*, *supra* note 18.

70. See *Urban Indian Organizations*, *supra* note 18; *Office of Urban Indian Health Programs*, *supra* note 18; *Office of Urban Indian Health Services History*, *supra* note 18.

71. *About Us*, INDIAN HEALTH SERV., <https://www.ihs.gov/urban/aboutus/> [<https://perma.cc/PB6H-A376>] (last visited Sept. 18, 2021).

72. See Maggie Fox, *Care at Native American Health Facilities Called ‘Horrible and Unacceptable’ in Senate Hearing*, NBC NEWS (Feb. 3, 2016, 9:04 PM), [senate-hearing-n510826](https://www.nbcnews.com/health/indian-health-care-at-native-american-health-facilities-called-horrible-and-unacceptable-in-senate-hearing-n510826) [<https://perma.cc/YJ3S-HN2D>]; see also Dan Frosch & Christopher Weaver, *‘People Are Dying Here’: Federal Hospitals Fail Tribes*, WALL ST. J. (July 7, 2017, 10:16 AM), <https://www.wsj.com/articles/people-are-dying-here-federal-hospitals-fail-native-americans-1499436974> [<https://perma.cc/MQV4-669Z>];

Similarly, the IHS has been involved in several scandals. Indians have experienced medical mistreatment outside of the IHS too.⁷³ Mishandling of the Havasupai Tribe's genetic material is likely the most well-known tribal medical research breach of trust.⁷⁴ The case arose when researchers at Arizona State University (ASU) obtained the Tribe's consent to draw blood to study diabetes between 1990 and 1992.⁷⁵ Researchers used the Havasupai blood samples to study diabetes, but also to research schizophrenia, inbreeding, and other topics.⁷⁶ Most distressing for the Havasupai, their genetic material was used to study the migration of ancient humans from Asia to North America, and this line of research directly contradicts the Havasupai creation story.⁷⁷ Upon learning of the research malfeasance, the Havasupai banished ASU professors and employees from the Tribe's reservation.⁷⁸ The Havasupai and ASU then unsuccessfully attempted to reach a settlement; therefore, the Tribe filed suit.⁷⁹ In 2010, Havasupai reached a settlement wherein ASU returned the blood samples, paid \$700,000 in damages, helped the Tribe with scholarships, and assisted the Tribe's effort to obtain federal healthcare funding.⁸⁰

Tribes' relationships with medical researchers have improved in recent years. The IHS established an institutional review board (IRB) in 1991, and an increasing number of tribes have created their own IRB.⁸¹ Additionally, efforts are underway to foster mutually beneficial relationships between tribes and research institutions,⁸² such as Johns Hopkins Bloomberg School of Public Health's Center

Tom Coburn: Substandard, Rationed Care at IHS, INDIANZ (Nov. 9, 2009), <https://www.indianz.com/News/2009/017336.asp> [<https://perma.cc/4AVK-58NC>].

73. See Felicia Schanche Hodge, *No Meaningful Apology for American Indian Unethical Research Abuses*, 22 ETHICS & BEHAV. 431, 434 (2012).

74. See generally *Havasupai Tribe v. Ariz. Bd. of Regents*, 204 P.3d 1063 (Ariz. Ct. App. 2008).

75. See *id.* at 1066–67.

76. See *id.* at 1067.

77. See *id.* (“The latter body of work is contrary to the Havasupai belief that, as a people, they originated in the Grand Canyon.”).

78. See *id.*

79. See *id.* at 1068.

80. See Robyn L. Sterling, *Genetic Research Among the Havasupai: A Cautionary Tale*, 13 AM. MED. ASS'N. J. ETHICS 113, 115 (2011).

81. See Deborah J. Morton et al., *Creating Research Capacity Through a Tribally Based Institutional Review Board*, 103 AM. J. PUB. HEALTH 2160–61 (2013).

82. See *id.* at 2161.

for American Indian Health.⁸³ Including Indians in medical experiments and clinical trials is vitally important because genetic variations between Indians and the general population result in different reactions to treatments.⁸⁴ For this reason, tribes made efforts to include their citizens in clinical trials of COVID-19 vaccines.⁸⁵ The Coushatta Tribe of Louisiana even partnered with a pharmaceutical company to develop COVID-19 tests.⁸⁶

III. TRIBAL VACCINE DISTRIBUTION

Tribal COVID-19 vaccine policies were successful because of tribal sovereignty.⁸⁷ Federally recognized tribes are fully functioning governments with a direct government-to-government relationship with the United States.⁸⁸ Accordingly, tribes, as well as tribally affiliated health providers, were eligible to receive doses of the COVID-19 vaccine directly from the United States via the IHS, but also had the option to receive vaccines through the surrounding state's distribution channel.⁸⁹ This was a difficult choice.⁹⁰ The IHS

83. See *Our Mission*, CTR. FOR AM. INDIAN HEALTH, <https://caih.jhu.edu/about/our-mission/> [<https://perma.cc/SQZ8-8DCB>] (last visited Oct. 4, 2021).

84. See Alison Fohner et al., *Pharmacogenetics in American Indian Populations: Analysis of CYP2D6, CYP3A4, CYP3A5, and CYP2C9 in the Confederated Salish and Kootenai Tribes*, 23 PHARMACOGENET GENOMICS 403, 412 (2013) (“Because high frequency novel variants were not found, we can infer that differences in drug metabolism in the CSKT population may be due to differences in common allele frequencies.”).

85. See Felicia Fonseca, *Fast Rollout of Virus Vaccine Trials Reveals Tribal Distrust*, ASSOC. PRESS NEWS (Jan. 4, 2021), <https://apnews.com/article/us-news-flagstaff-arizona-clinical-trials-coronavirus-pandemic-712d482a83cb49464745fca7f8b93692> [<https://perma.cc/P832-BNFM>].

86. *Coushatta Tribe and Vivera Pharmaceuticals Join Forces in Fight Against COVID-19*, NEWSFILE CORP. (Mar. 24, 2020), <https://www.newsfilecorp.com/release/53712> [<https://perma.cc/HN64-3DY3>].

87. See Crepelle, *supra* note 31, at 582 (“This means individual Indians are citizens of their tribe — not mere members of a club or corporation.” (citation omitted)).

88. See Memorandum of Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (Apr. 29, 1994) (“The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes.”); see also Memorandum on Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 5, 2009) (noting the government-to-government relationship between tribes and the United States).

89. See Latoya Hill & Samantha Artiga, *COVID-19 Vaccination Among American Indian and Alaska Native People*, KFF (Apr. 9, 2021), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/covid-19-vaccination-american-indian-alaska-native-people/> [<https://perma.cc/FY9R-RUU3>] (“The federal

has a less than stellar track record.⁹¹ While many states and tribes have positive relationships today,⁹² states often have a history of animosity towards tribes,⁹³ and tensions continue to flare sometimes.⁹⁴ Indeed, some states and tribes feuded over COVID-19 pandemic policies.⁹⁵

Ultimately, 351 tribally affiliated health facilities chose to receive COVID-19 vaccine doses from the IHS.⁹⁶ This choice worked well as tribal health centers were distributing COVID-19 vaccines before states.⁹⁷ Increased funding in response to the pandemic likely helped as the IHS received a \$9 billion boost from the federal government to help with the COVID-19 pandemic response.⁹⁸ Moreover, the IHS worked with Operation Warp Speed, a public-private partnership the federal government led to develop and administer a safe COVID-19 vaccine,⁹⁹ and tribes to plan a vaccine dissemination strategy.¹⁰⁰ Due

government is allocating COVID-19 vaccines directly to the IHS, and Tribal health programs and Urban Indian Organizations choose whether to receive vaccines directly from the IHS or through their respective state distribution mechanisms.”).

90. See Danielle Kaeding, *Facing Uncertainty, Wisconsin Tribe Switches to Indian Health Service for Vaccine Shipments*, WIS. PUB. RADIO (Jan. 25, 2021, 5:10 AM), <https://www.wpr.org/facing-uncertainty-wisconsin-tribe-switches-indian-health-service-vaccine-shipments> [<https://perma.cc/9CAR-E6PK>].

91. See *supra* notes 72–76 and accompanying text.

92. See Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 82 (2013) (“By the 1980s, many Indian tribes and states began to realize that the future of tribal-state relations would be negotiation and agreement.”).

93. See *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.”).

94. See Adam Creppelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 413, 449 (2019) (“Nevertheless, many states continue to have adversarial relationships with tribes.”).

95. See *infra* Part IV.

96. See Hill & Artiga, *supra* note 89.

97. See Siobhan Wescott, MD, MPH, *Discusses Vaccination in Native American Communities*, AM. MED. ASS’N (Apr. 1, 2021) [hereinafter AM. MED. ASS’N], <https://www.ama-assn.org/delivering-care/population-care/siobhan-wescott-md-mph-discusses-vaccination-native-american> [<https://perma.cc/5Q8A-CHUN>] (“And actually, I got my vaccines two and a half weeks sooner through the Indian Health Service than I would have through North Dakota as a professor at the university.”).

98. See *Coronavirus (COVID-19)*, INDIAN HEALTH SERV. (June 7, 2021), <https://www.ihs.gov/coronavirus/> [<https://perma.cc/3A88-JD32>] (“The IHS has received a historic investment of more than \$9 billion . . . to provide resources for IHS, tribal, and urban Indian health programs to address long-standing health inequities experienced by American Indians and Alaska Natives by ensuring a comprehensive public health response to the ongoing COVID-19 pandemic.”).

99. See generally *Coronavirus: Operation Warp Speed FAQ*, U.S. DEP’T DEF., [<https://perma.cc/8C2B-25WC>] (last visited Sept. 20, 2021).

to diligent preparations, the IHS was ready to receive vaccines as soon as the Food and Drug Administration granted emergency approval.¹⁰¹ As Dr. Siobhan Wescott, the co-director of the Indians into Medicine Program at the University of North Dakota School of Medicine & Health Sciences, stated, she was unsure what explained the IHS's strong performance but "whoever was in charge at IHS really did their job beautifully."¹⁰²

Access to COVID-19 vaccines was only part of the battle. Tribal health centers had to determine which groups to vaccinate first. After healthcare and long-term care facility workers, the Centers for Disease Control and Prevention (CDC) recommended prioritizing individuals 75 years and older.¹⁰³ Tribes greatly cherish elders, and some tribal providers vaccinated elders before healthcare workers.¹⁰⁴ Tribal healthcare providers also used community standards for determining senior status rather than the CDC's 75-year threshold¹⁰⁵ because many tribes have life expectancies of approximately 50 years.¹⁰⁶ Similarly, many tribes prioritized speakers of the tribe's

100. INDIAN HEALTH SERV., COVID-19 VACCINE ALLOCATION BY IHS AREA (2020),

https://www.ihs.gov/sites/coronavirus/themes/responsive2017/display_objects/documents/COVID-19VaccineAllocationbyArea.pdf [<https://perma.cc/AJJ3-HNYT>].

101. *See id.* ("The IHS anticipates that vaccines will be shipped to IHS within 24 hours of a vaccine receiving emergency use authorization from the FDA.")

102. AM. MED. ASS'N, *supra* note 97.

103. *See How CDC Is Making COVID-19 Vaccine Recommendations*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 30, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations-process.html> [<https://perma.cc/B2LC-ESTG>].

104. *See* Alex Brown, *Racing to Save Languages and Cultures, Native American Tribes Rapidly Roll Out Vaccines*, IN THESE TIMES (Feb. 18, 2021), <https://inthesetimes.com/article/native-american-covid-vaccine-rollout> [<https://perma.cc/2UB2-BZ9D>] ("Many tribes have moved to prioritize Elders, though some are sticking to guidelines issued by the federal Centers for Disease Control and Prevention, which put health care and frontline workers before some older groups.")

105. *See* Harmeet Kaur, *Tribal Health Providers Have Figured Out the Key to Covid-19 Vaccine Success. Here's Their Secret*, CNN (Feb. 26, 2021, 8:16 AM), <https://www.cnn.com/2021/02/09/us/tribal-health-providers-covid-vaccine-trnd/index.html> [<https://perma.cc/Q2W7-DRW8>] ("Our life expectancy is so much lower than the general population that we have to be able to make the decision that maybe a 55-year-old is in fact an elder, if you're in a tribe where the life expectancy is 58," Bohlen said.")

106. *See* Clara Caufield, *Native Sun News Today: Northern Cheyenne Life Span Falling Short*, INDIANZ (Jan. 26, 2017), <https://www.indianz.com/News/2017/01/26/native-sun-news-today-northern-cheyenne-8.asp> [<https://perma.cc/UWS5-7J99>] ("The average American life expectancy is 78 while Northern Cheyenne's is potentially 55."); *see also* Patrick

language — usually elders — in an effort to save this aspect of tribal culture.¹⁰⁷ After vaccinating elders, tribes offered COVID-19 vaccines to various other groups, including non-Indians.¹⁰⁸

With priorities established, tribes had to develop plans to get COVID-19 vaccines into people's arms and logistics were challenging.¹⁰⁹ The Pfizer and Moderna vaccines must be stored at subzero temperatures,¹¹⁰ and many tribal facilities lacked freezers with the capacity to hold these vaccines.¹¹¹ Even if tribal facilities

Strickland, *Life on the Pine Ridge Native American Reservation*, AL JAZEERA (Nov. 2, 2016), <https://www.aljazeera.com/features/2016/11/2/life-on-the-pine-ridge-native-american-reservation> [https://perma.cc/LDR2-YAKG] (“Life expectancy — 48 years for men, 52 for women — is the second-lowest in the western hemisphere, behind only the Caribbean country Haiti.”); *UW Extension Billboards Promote Health, Fitness on Wind River Indian Reservation*, UNIV. WYO. (Mar. 13, 2020), <https://www.uwyo.edu/uw/news/2020/03/uw-extension-billboards-promote-health-fitness-on-wind-river-indian-reservation.html> [https://perma.cc/8K2F-UULW] (“The average life expectancy of Native Americans in Fremont County is about 55 . . .”).

107. Harmeet Kaur, *Only About 2,000 People Speak the Cherokee Language Fluently. The Tribe Is Saving Some Vaccine Doses for Them*, CNN (Jan. 12, 2021, 2:53 PM), <https://www.cnn.com/2021/01/12/us/choke-tee-nation-language-speakers-vaccine-trnd/index.html> [https://perma.cc/KLV8-9CUB]; see also Sarah Polus, *Sioux Tribe Prioritizing Vaccine for Speakers of Native Language*, HILL (Jan. 2, 2021, 11:04 PM), <https://thehill.com/homenews/news/532392-sioux-tribe-giving-vaccine-priority-to-speakers-of-native-language> [https://perma.cc/2MUD-X4LQ]; Manola Secaira, *What WA Can Learn from Native Communities' Vaccination Plan*, CROSSCUT (Mar. 22, 2021), <https://crosscut.com/news/2021/03/what-wa-can-learn-native-communities-vaccination-plan> [https://perma.cc/XS2H-DY47] (“Among the SIHB’s [Seattle Indian Health Board] first priorities for vaccination were elders, Native language speakers and other keepers of culture.”).

108. See Alex Brown, *In Hard-Hit Indian Country, Tribes Rapidly Roll Out Vaccines*, PEW CHARITABLE TRS. (Feb. 9, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/02/09/in-hard-hit-indian-country-tribes-rapidly-roll-out-vaccines> [https://perma.cc/GFX8-4KWB] (“The tribe has vaccinated its Elders and health care workforce, and it’s now offering vaccines to members 55 and older, as well as teachers and tribal government employees.”).

109. See Kelly Cannon, *Practical Hurdles, Cultural Distrust in Native Communities Could Hamper Vaccine Distribution*, NBC NEWS (Nov. 20, 2020, 5:00 AM), <https://www.nbcnews.com/news/us-news/practical-hurdles-cultural-distrust-native-communities-could-hamper-vaccine-distribution-n1248308> [https://perma.cc/DRL4-S4FF] (“‘We have to really double and triple down on our logistics to make sure that we are able to hit very tight time windows,’ the official said.”).

110. See *id.*

111. Jennifer Solis, *Nevada Tribes ‘Doing a Great Job’ at Vaccine Rollout*, NEV. CURRENT (Mar. 10, 2021, 11:48 AM), <https://www.nevadacurrent.com/2021/03/10/nevada-tribes-doing-a-great-job-at-vaccine-rollout/> [https://perma.cc/N23E-ZM5H] (“In the first week of distribution, when Pfizer was the only vaccine approved, the more remote tribes had trouble accepting the vaccine because they couldn’t store it at the required temperatures

possess proper freezers, unsteady power supplies are common in Indian country,¹¹² and a temporary power outage can ruin COVID-19 vaccines. Plus, scheduling COVID-19 vaccination appointments presented challenges because many tribal citizens lack cars and phones.¹¹³ Also, many tribal citizens simply were not sure where to go to get vaccinated.¹¹⁴ However, tribal healthcare providers are used to dealing with the aforementioned issues.¹¹⁵

Tribes did not complain about their lack of infrastructure; rather, tribes found solutions to protect their community members from the COVID-19 virus. For example, the Rosebud Indian Reservation lacked a freezer capable of storing the vaccines at the beginning of the pandemic.¹¹⁶ Callie Raymond, a nurse at the IHS in South Dakota, made 200 mile-round trips to inoculate Rosebud residents.¹¹⁷ Likewise, tribal citizens like Lila Kills in Sight, volunteered to transport people to and from COVID-19 vaccination sites.¹¹⁸ Some tribal citizens were able to get COVID-19 vaccine information through tribal social media.¹¹⁹ Others received their information

while traveling hundreds of miles. ‘The Pfizer vaccine is stored at ultracold temperatures which requires a special freezer and none of our Nevada sites had such a freezer,’ said Lund.”); *see also* AM. MED. ASS’N, *supra* note 97 (“It’s not a good name but a lot of it is just pure logistical planning, especially because the first two vaccines required a very cold freezer that isn’t necessarily available at all Indian Health Service sites.”).

112. *See* Cannon, *supra* note 109 (“Power supply is always a concern, brownouts are common, and generators are a luxury.”).

113. *See* Kirk Siegler, *Why Native Americans are Getting COVID-19 Vaccines Faster*, NPR (Feb. 19, 2021, 5:00 AM), <https://www.npr.org/2021/02/19/969046248/why-native-americans-are-getting-the-covid-19-vaccines-faster> [<https://perma.cc/7R8P-SVGX>] (“Some tribal members don’t have cars, let alone cellphones.”).

114. *See* Brian Bull, *Native Americans Embrace COVID-19 Shots to Protect Families and Culture*, KLCC (Mar. 18, 2021, 3:50 PM PDT), <https://www.klcc.org/post/native-americans-embrace-covid-19-shots-protect-families-and-culture> [<https://perma.cc/YPJ4-24AQ>] (“But 40 percent report having trouble knowing where to go.”).

115. *See* Siegler, *supra* note 113 (“Public health officials here are also practiced with immunizing people in tough conditions.”).

116. *See id.*

117. *Id.* (“Before the hospital got its own ultra-cold storage unit, Raymond was driving 100 miles one way to the Pine Ridge Reservation to pick up the Pfizer shots.”).

118. *Id.* (“Lately, she has been helping pick up elders and others who need rides to get to the hospital for the vaccines.”).

119. *See* Brian Bull, *‘Moccasin Telegraph’ Finds New Life as Source of Vaccine Information*, INDIAN COUNTRY TODAY (Mar. 21, 2021), <https://indiancountrytoday.com/news/moccasin-telegraph-finds-new-life-as-source-of-vaccine-information> [<https://perma.cc/5AYD-WA96>].

through the phone, tribal outreach programs,¹²⁰ or by word-of-mouth, colloquially known as the “moccasin telegraph.”¹²¹

Most Indians were willing to get the COVID-19 vaccine¹²² and believed getting vaccinated was a duty to their community.¹²³ Nevertheless, 25% of Indians were reluctant to receive the vaccine.¹²⁴ For one, the vaccine’s “Warp Speed” development was a major source of vaccine hesitancy among Indians¹²⁵ — as it was for the U.S. population in general.¹²⁶ This led many Indians to worry about side effects.¹²⁷ Another cause of hesitancy was the historical and recent medical misdeeds perpetrated on Indians by healthcare providers.¹²⁸

120. See Brown, *supra* note 9 (“They used call centers and existing outreach programs to contact their members.”).

121. Press Release, Maria Cantwell, Sen. Maria Cantwell’s Comments (as prepared) before National Conference of American Indians (Nov. 26, 2001), <https://www.cantwell.senate.gov/news/press-releases/senator-maria-cantwells-comments-as-prepared-before-national-conference-of-american-indians> [<https://perma.cc/8BUQ-ZWTK>] (“The Moccasin Telegraph is a rich tradition.”); see also Bull, *supra* note 119.

122. See URB. INDIAN HEALTH INST., RESULTS FROM A NATIONAL COVID-19 VACCINATION SURVEY: STRENGTHENING VACCINE EFFORTS IN INDIAN COUNTRY 13 (2021).

123. *Id.* at 20 (“Seventy-four percent of all participants believed getting vaccinated is their responsibility to their community.”); see also *infra* notes 134–35.

124. URB. INDIAN HEALTH INST., *supra* note 122, at 13 (“Among all participants, the majority (75%) reported they would receive a COVID-19 vaccine if it were available and 25% reported they would not . . .”).

125. *Id.* at 25 (“When asked about reasons behind vaccine hesitancy, a greater proportion (71%) of those unwilling to get vaccinated were worried that the vaccine moved through clinical trials too quickly, as compared to those willing (38%) . . .”).

126. DELPHI GRP. AT CARNEGIE MELLON UNIV., COVID-19 SYMPTOM SURVEY: TOPLINE REPORT ON COVID-19 VACCINATION IN THE UNITED STATES 1 (2021), https://www.cmu.edu/delphi-web/surveys/CMU_Topline_Vaccine_Report_20210312.pdf [<https://perma.cc/W7RK-GLFK>] (“Among vaccine-hesitant adults, the percentage of individuals who are concerned about experiencing a side effect is high and has remained stable over time.”).

127. See, e.g., Fred de Sam Lazaro & Sam Lane, *Health Officials Try to Rebuild Trust of Vaccines Among Indigenous Americans*, PBS NEWS HOUR (Feb 19, 2021, 6:45 PM), <https://www.pbs.org/newshour/show/health-officials-try-to-rebuild-trust-of-vaccines-among-indigenous-americans> [<https://perma.cc/PE3H-QYMG>] (“Flammond, who’s 67 and has underlying health conditions, is concerned about having an allergic reaction to the shot, a side effect seen in a relatively small number of cases with the Pfizer and Moderna vaccines.”).

128. See URB. INDIAN HEALTH INST., *supra* note 122, at 34 (“Despite hesitancy towards the vaccine due to historical and current abuse from healthcare and government institutions . . .”); see also Fonseca, *supra* note 85 (“‘There’s this historical distrust when it comes to any type of experimenting,’ [Annette Brown] said. ‘It’s just experience, I don’t know that there are many families out there who haven’t been touched by some sort of experimentation (or) biological attacks on tribal

The fast rollout, plus historical abuse, led some Indians to fear they were being used as COVID-19 vaccine “guinea pigs.”¹²⁹ Additionally, some Indians had religious and cultural objections to the COVID-19 vaccine.¹³⁰

Tribes used a variety of strategies to surmount vaccine hesitancy. Building confidence in the vaccine was the foremost tactic, and tribes did this through education campaigns.¹³¹ Tribal leaders, elders, and medical experts were all involved in disseminating information about the vaccine to tribal communities.¹³² Vaccination messaging that included references to community responsibility and cultural preservation were usually effective.¹³³ Likewise, many tribes attacked vaccine hesitancy by emphasizing inoculation as a means of defending the community by evoking tribes’ warrior traditions.¹³⁴ High

communities.”); Melissa Seigny, *Native Americans Express Skepticism over COVID-19 Vaccine*, NPR (Dec. 21, 2020, 3:44 PM), <https://www.npr.org/2020/12/21/948873771/native-americans-express-skepticism-over-covid-19-vaccine> [<https://perma.cc/7QSW-8SK8>] (“There’s been a long legacy of research abuses, says Christine Ami, an anthropologist at Dine College on the reservation.”).

129. See Fonseca, *supra* note 85 (“Right away, tribal members accused their government of allowing them to be guinea pigs, pointing to painful times in the past when Native Americans didn’t consent to medical testing or weren’t fully informed about procedures.”).

130. Solis, *supra* note 111 (“We’ve had some sites report back religious reasons and cultural and spiritual reasons and concerns in addition to concerns about side effects . . .”).

131. *Id.* (“[R]elying on traditional practitioners and those who are from the culture to help us provide education that is culturally appropriate was critical . . .”).

132. URB. INDIAN HEALTH INST., *supra* note 122, at 32 (“Effective ambassadors for COVID-19 vaccines build public confidence in their safety and effectiveness. Among all participants, the greatest proportion (63%) suggested healthcare providers would be the most effective ambassadors. Elders, Native community leaders, and Tribal leaders were also among the top ambassadors . . .”).

133. *Id.* at 4 (“The stories told through data illustrate the primary motivation for receiving a COVID-19 vaccine was Indigenous cultural values of community responsibility and service to the future generations.”).

134. E.g., some tribal vaccine messaging included the phrase “warrior up.” See URB. INDIAN HEALTH INST., *supra* note 122, at 1 (“We have to protect our old ones and 7 generations to come. It’s a big responsibility. Warrior up.”); see also *Warrior Up*, ILLUMINATIVE, <https://illuminatives.org/warriorup/> [<https://perma.cc/4EKB-M5CS>] (last visited Sept. 20, 2021); *Our Smallest Warriors, Our Strongest Medicine: Overcoming COVID-19*, CTR. FOR AM. INDIAN HEALTH, <https://caih.jhu.edu/programs/strongmedicine> [<https://perma.cc/CVT5-DDL9>] (last visited June 10, 2021); *Everyday Warriors: Native Stories of COVID-19*, URB. INDIAN HEALTH INST. (Dec. 23, 2020), <https://www.uihi.org/everyday-warriors/> [<https://perma.cc/472R-M5SY>].

COVID-19 death rates among tribes made framing inoculation as a means of protecting elders very effective.¹³⁵

Moral and intellectual appeals do not sway everyone, so tribes used financial incentives to increase vaccination rates. The incentives were generally modest. For example, the Red Lake Nation provided \$30 gift cards to tribal citizens.¹³⁶ Similarly, the Sokaogon Chippewa Community provided \$100 free play at the tribe's casino to tribal citizens as well as tribal employees.¹³⁷ The Cherokee Nation offered tribal government employees \$300 to get vaccinated to help nudge the Cherokee Nation towards herd immunity.¹³⁸ The Spokane Tribe of Indians gave \$100 to its vaccinated citizens; plus, the Spokane Tribe operated a lottery whereby vaccinated tribal citizens, employees, and other community members could win \$500.¹³⁹

The Norton Sound Health Corporation (NSHC), a tribally-owned health facility designed to serve Alaska Natives,¹⁴⁰ offered the most elaborate incentives to vaccine recipients who also completed a COVID-19 survey.¹⁴¹ Ten percent of those who completed the survey

135. See Nora Mabie, *Montana Tribes Having Success Distributing COVID-19 Vaccines*, U.S. NEWS (Mar. 27, 2021, 8:10 AM), <https://www.usnews.com/news/best-states/montana/articles/2021-03-27/montana-tribes-having-success-distributing-covid-19-vaccines> [<https://perma.cc/XR2F-VNGS>] (“‘Each death is a tragedy. Because we had such a high death rate on the reservation, once vaccines were available, we were quick to get shots. Everyone wants to protect our elders,’ [Chairman Frank White Clay of the Crow Tribe] said.”).

136. See *Red Lake Nation Offers Incentives to Encourage Vaccinations*, BEMIDJI PIONEER (Mar. 11, 2021, 6:08 PM), <https://www.bemidjipioneer.com/newsmd/coronavirus/6930081-Red-Lake-Nation-offers-incentives-to-encourage-vaccinations> [<https://perma.cc/YW8N-C2R6>].

137. See *Vaccine Incentive for Tribal Members and Employees*, SOKAOGON CHIPPEWA CMTY. (Mar. 4, 2021), <http://sokaogonchippewa.com/vaccine-incentive-for-tribal-members-and-employees/> [<https://perma.cc/Y79C-SYM9>].

138. See *Cherokee Nation Offering Incentives for Vaccinated Tribal Employees*, MUSKOGEE PHX. (May 18, 2021), https://www.muskogeephoeix.com/news/ Cherokee-nation-offering-incentives-for-vaccinated-tribal-employees/article_0af64881-f7e4-599d-8e8f-a30ab9459f9b.html [<https://perma.cc/XT3N-42ZN>].

139. See Kaitlin Riordan, *Spokane Tribe Offers Cash Incentives to Vaccinated Members*, KREM2 (May 10, 2021, 2:51 PM), <https://www.krem.com/article/news/health/coronavirus/vaccine/spokane-tribe-offers-cash-incentives-to-vaccinated-members/293-a9cb9282-9821-480b-b13e-791d272a5a09> [<https://perma.cc/87YS-FXWY>].

140. See *Mission, Vision and Values*, NORTON SOUND HEALTH CORP., <https://www.nortonsoundhealth.org/about-us/mission-vision-and-values/> [<https://perma.cc/JE88-9N3Q>] (last visited June 10, 2021).

141. See Press Release, Norton Sound Health Corp., *Two COVID-19 Cases Found in Region* (Mar. 31, 2021), <https://www.nortonsoundhealth.org/press-release-two-covid-19-cases-found-in-region/> [<https://perma.cc/4A8E-QBWK>].

won \$100.¹⁴² One member of each of the 16 communities served by the NSHC received a \$500 grocery gift card, and another member of each community received a \$500 fuel voucher.¹⁴³ One individual received \$8,000 towards a four-wheeler or other all-terrain vehicle,¹⁴⁴ a major award considering there are more four-wheelers than cars in some parts of Alaska.¹⁴⁵ For the grand prize, NSHC offered four round-trip plane tickets to any United States destination plus \$3,000 cash.¹⁴⁶

While tribes were able to implement a variety of vaccine distribution strategies, not all Indians are enrolled in federally recognized tribes. Rather, several bona fide Indians belong to tribes that lack federal recognition.¹⁴⁷ For example, although the United States claims the United Houma Nation (UHN) is not a real Indian tribe, the United States admits “Indian ancestry can be verified for the [UHN] without doubt or question.”¹⁴⁸ But despite being authentic Indians, the UHN has no ability as a tribe to protect its citizens from the COVID-19 pandemic or anything else.¹⁴⁹ Thus, the UHN could only help its citizens by coordinating with local, nontribal COVID-19 vaccine sites.¹⁵⁰ Several other tribes also lack recognition and share the UHN’s struggle.¹⁵¹

142. *See id.*

143. *See id.*

144. *See id.*

145. *See Alaska Tribal Health Groups Distribute Vaccine Far and Wide*, MOD. HEALTHCARE (Apr. 19, 2021, 8:53 PM), <https://www.modernhealthcare.com/providers/alaska-tribal-health-groups-distribute-vaccine-far-and-wide> [<https://perma.cc/HJ66-XFLF>] (“[F]our-wheelers can outnumber cars and basic necessities cost a premium because of shipping.”).

146. *See* Press Release, Norton Sound Health Corp., *supra* note 141.

147. For information on tribal federal recognition, see Lorinda Riley, *When a Tribal Entity Becomes a Nation: The Role of Politics in the Shifting Federal Recognition Regulations*, 39 AM. INDIAN L. REV. 451 (2015).

148. BUREAU INDIAN AFFS., U.S. DEP’T OF INTERIOR, UHN-V001-D005, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST FEDERAL ACKNOWLEDGMENT OF THE UNITED HOUMA NATION, INC. 33 (1994), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/056_uhouma_LA/056_pf.pdf [<https://perma.cc/ZTQ6-6U63>].

149. *See* Adam Crepelle, *Standing Rock in the Swamp: Oil, the Environment, and the United Houma Nation’s Struggle for Federal Recognition*, 64 LOY. L. REV. 141, 143 (2018) (“Without federal recognition, the Houma can do nothing as their homeland and holy places wash away.”).

150. *See* Brown, *supra* note 108 (“For now, the tribe’s role is limited to helping Elders coordinate appointments and providing transportation when possible.”).

151. *See* Brown, *supra* note 9 (“Some 245 tribes lack federal recognition, leaving them without the same health care rights. Some of those tribes, such as the Chinook Indian Nation in the Pacific Northwest, have not been prioritized for vaccines.”).

IV. TRIBES AND MEDICAL SOVEREIGNTY: BEYOND VACCINES

Although federally recognized tribes have the power “to make their own laws and be ruled by them,”¹⁵² tribes’ ability to enforce COVID-19 policies against non-Indians is unclear.¹⁵³ The uncertain scope of tribal jurisdiction over non-Indians leads to frequent jurisdictional challenges,¹⁵⁴ and tribal COVID-19 regulations have been no exception.¹⁵⁵ While many states and tribes were able to reach agreements on COVID-19 policies,¹⁵⁶ tensions did flare. The remainder of this Part explores how tribal sovereignty applies to non-Indian parties in the battle against COVID-19.

A. Mask Mandates and Social Distancing Guidelines

Several tribes implemented mask mandates, curfews, and other social distancing measures to slow the spread of the COVID-19

152. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

153. See Matthew L.M. Fletcher, *Indian Lives Matter: Pandemics and Inherent Tribal Powers*, 73 STAN. L. REV. ONLINE 38, 38 (2020) (“While tribal governments have power to govern their own citizens, nonmembers are everywhere in Indian country, and the courts are skeptical of tribal authority over nonmembers.”); see also Katherine Florey, *Toward Tribal Regulatory Sovereignty in the Wake of the COVID-19 Pandemic*, 63 ARIZ. L. REV. 399, 437 (2021) (“*Montana’s* limits on tribal regulation were never grounded in preexisting law and, from the start, have caused needless difficulties for tribes, as the Covid-19 response makes manifest.”).

154. See, e.g., *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); WILLIAM C. CANBY, JR., *INDIAN LAW IN A NUTSHELL* 259 (7th ed. 2020) (“Frequently, when a nonmember (usually a non-Indian) is sued in tribal court, he or she will bring an action in federal court either to challenge the tribal court’s jurisdiction or to attempt to litigate the underlying dispute in federal court.”); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1191 (2010) (“Nonmember defendants challenge even seemingly clear examples of legitimate tribal jurisdiction . . .”).

155. See Florey, *supra* note 153, at 419 (“Even in a situation as extreme as the COVID-19 pandemic, when tribal powers as to nonmembers are presumably at their apex, and when the interest at stake — limiting the spread of a potentially deadly disease — is clearly one that extends to nonmembers, there exist numerous examples of nonmembers failing to heed tribal authority.”).

156. See, e.g., Press Release, Off. of Governor Ned Lamont, State of Conn., Lamont Administration, Mashantucket Pequot, Mohegan Tribal Nations Strike Historic Agreement to Support COVID-19 Prevention Efforts (Mar. 16, 2020), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/03-2020/Lamont-Administration-Mashantucket-Pequot-Mohegan-Tribal-Nations> [<https://perma.cc/57XC-F7HK>]; Richard Hoppe, *Arizona Guard, Gila River Indian Community Partner for Mass COVID-19 Vaccination Event*, U.S. DEP’T DEF. (Mar. 3, 2021), <https://www.defense.gov/Explore/Features/Story/Article/2519642/arizona-guard-gila-river-indian-community-partner-for-mass-covid-19-vaccination/> [<https://perma.cc/9QNV-4WL4>].

virus.¹⁵⁷ Tribes will face few obstacles enforcing their COVID-19 measures against Indians;¹⁵⁸ however, tribes face significant barriers when enforcing their COVID-19 measures against non-Indians. Tribes can only assert criminal jurisdiction over non-Indians for domestic violence-related offenses,¹⁵⁹ so tribal criminal law is largely useless for non-Indian COVID-19 rule breakers. Tribes are also presumed to lack civil jurisdiction over the non-Indians within Indian country.¹⁶⁰ However, tribes can assert civil jurisdiction over non-Indians who enter a consensual relationship with the tribe or its citizens.¹⁶¹ Alternatively, tribes' civil jurisdiction extends to non-Indians engaged in conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."¹⁶²

Both civil jurisdiction exceptions have historically been construed extremely narrowly.¹⁶³ While no one is forced to enter Indian

157. See Alan Shelton, *A COVID-19 Community Update from Dr. Shelton*, PUYALLUP TRIBE INDIANS, <http://puyallup-tribe.com/COVID19/covid.php> [<https://perma.cc/DK6D-9GKZ>] (last visited June 11, 2021) ("We must continue to mask, keep 6 feet apart, wash our hands frequently, and stay at home as much as possible."); Taylor Rizzari, *Turtle Mountain Band of Chippewa Implements Curfew, Amendment to Mask Mandate to Combat COVID-19*, KX NEWS (Nov. 5, 2020, 9:12 PM), <https://www.kxnet.com/news/local-news/turtle-mountain-band-of-chippewa-implements-curfew-amendment-to-mask-mandate-to-combat-covid-19/> [<https://perma.cc/AMQ3-AZL8>]; Jeremy Turley, *Spirit Lake Tribe Mandates Masks, Curfew as COVID-19 Spreads on Reservation*, GRAND FORKS HERALD (July 30, 2020, 5:24 PM), <https://www.grandforksherald.com/newsmd/coronavirus/6597513-Spirit-Lake-Tribe-mandates-masks-curfew-as-COVID-19-spreads-on-reservation> [<https://perma.cc/XP2D-PLED>].

158. See Crepelle, *supra* note 94, at 470 n.268 ("Following *Lara*, it is presumable that a tribe's sovereign power to criminally prosecute nonmember Indians translates into the power to exercise civil jurisdiction over nonmember Indians as well as Indian owned corporations.").

159. See 25 U.S.C. § 1304; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

160. *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 330 (2008) ("Given *Montana's* 'general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,' efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid . . .'" (internal citations omitted)).

161. See *Montana v. United States*, 450 U.S. 544, 565 (1981) ("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." (citation omitted)).

162. *Id.* at 566.

163. See Adam Crepelle, *The Time Trap: Addressing the Stereotypes That Undermine Tribal Sovereignty*, COLUM. HUM. RTS. L. REV. (forthcoming 2022) (manuscript at 24) (on file with author) ("The *Montana* jurisdictional basis seem to cover a wide breadth of conduct; alas, the exceptions almost never apply." (citations

country,¹⁶⁴ voluntarily entering Indian country is not enough to establish a consensual relationship between a tribe and a non-Indian.¹⁶⁵ Thus, jurisdiction based upon voluntary presence within tribal territory will not afford a tribe jurisdiction over non-Indian COVID-19 rule breakers.¹⁶⁶

On the other hand, the health and welfare jurisdictional prong seems like a promising basis to enforce COVID-19 civil regulations on non-Indians.¹⁶⁷ Historically, this provision has been nearly impossible to satisfy,¹⁶⁸ but the Supreme Court recently recognized tribal law enforcement authority over non-Indians in order to protect tribal health and welfare in *United States v. Cooley*.¹⁶⁹ The ability to detain non-Indian criminals is certainly necessary to tribal health and welfare,¹⁷⁰ and so is the ability to enforce public health measures in

omitted)); see also Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 83–85 (2002).

164. See Fletcher, *supra* note 153, at 45 (“No one is ever forced to enter Indian country.”).

165. See Philip H. Tinker, *In Search of a Civil Solution: Tribal Authority to Regulate NonMember Conduct in Indian Country*, 50 TULSA L. REV. 193, 202 (2014) (“Cases following *Montana* have shown this to be a narrow exception, and parties advancing tribal jurisdiction under a consensual relationship theory have a heavy burden to establish the parties to the litigation entered into the type of relationship necessary to satisfy this test.”).

166. See Paul Spruhan, *COVID-19 and Indian Country: A Legal Dispatch from the Navajo Nation*, NW. U. L. REV. (May 5, 2020), <https://northwesternlawreview.org/uncategorized/covid-19-and-indian-country-a-legal-dispatch-from-the-navajo-nation/> [<https://perma.cc/4K88-LW2Z>] (“While states apply their general police powers to all people present in their borders, tribes must constantly fight for legitimacy when doing the same.”).

167. See Florey, *supra* note 153, at 406 (“Of course, measures to control a deadly pandemic to which a tribe’s population is especially vulnerable would certainly seem to meet anyone’s definition of the sort of needed-to-avert-catastrophe regulation that *Montana* permits.”).

168. Tinker, *supra* note 165, at 206 (“Most recently, the Court in *Plains Commerce Bank v. Long Family Land and Cattle Company* continued the trend of revising the *Montana II* exception to preclude tribal jurisdiction under whatever set of facts the case before it presented.”).

169. 141 S. Ct. 1638, 1645 (2021) (“But we have also repeatedly acknowledged the existence of the exceptions and preserved the possibility that ‘certain forms of nonmember behavior’ may ‘sufficiently affect the tribe as to justify tribal oversight.’ Given the close fit between the second exception and the circumstances here, we do not believe the warnings can control the outcome.” (citations omitted)).

170. See *id.* at 1643 (“Second, we said that 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.’ The second exception we have just quoted fits the present case, almost like a glove. The phrase speaks of the protection of the ‘health or welfare of the tribe.’” (citations omitted)).

the face of a deadly global pandemic.¹⁷¹ Therefore, tribes should be able to assert civil jurisdiction over the non-Indians who violate tribal COVID-19 measures.

If for some reason a federal court determines tribes cannot enforce their COVID-19 policies against non-Indians, tribes do have the right to exclude non-Indians from tribal lands.¹⁷² The Supreme Court has explained the power to exclude non-Indians “necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation.”¹⁷³ Although a non-Indian may have entered Indian country prior to the implementation of COVID-19 rules, the non-Indian will be subject to the new tribal rules while on tribal land.¹⁷⁴ Not only can tribes exclude non-Indians from their land, tribes can also exclude pollutants.¹⁷⁵ The COVID-19 virus may very well qualify as a pollutant.¹⁷⁶ Accordingly, tribes can take measures to bar both non-Indians and COVID-19 from their lands.

171. See Fletcher, *supra* note 153, at 47 (“The answer should be an easy one. Yes, even a single nonmember who is a COVID-19 carrier violating a tribal quarantine order is a terrible danger to a tribal community”).

172. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (“Nonmembers who lawfully enter tribal lands remain subject to the tribe’s power to exclude them.”).

173. *Id.*

174. See *id.* at 145 (“A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power. The fact that the tribe chooses not to exercise its power to tax when it initially grants a non-Indian entry onto the reservation does not permanently divest the tribe of its authority to impose such a tax.”).

175. *Nance v. EPA*, 645 F.2d 701, 715 (9th Cir. 1981) (“Just as a tribe has the authority to prevent the entrance of non-members onto the reservation, a tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants onto the reservation.” (citations omitted)).

176. See Elise Allen, *Does COVID-19 Fall Under Insurers’ Pollution Exclusions?*, LAW360 (Apr. 8, 2020, 5:40 PM), <https://www.law360.com/articles/1258620> [<https://perma.cc/JPH7-GV5L>] (“Under a similar analysis, the COVID-19 virus would also likely be found to be a contaminant within the meaning of a pollution exclusion.”); see also John Buchanan & Suzan Charlton, *Virus and Pollution Exclusions in Coronavirus-Related Business Interruption Claims*, AM. BAR ASS’N (Aug. 27, 2020), <https://www.americanbar.org/groups/litigation/committees/insurance-coverage/articles/2020/virus-pollution-exclusions-coronavirus/> [<https://perma.cc/CS2T-RYEA>] (“And some may purport to exclude ‘pollutants’ or ‘contamination’ in a form that is expressly defined to include ‘virus’ as a ‘pollutant’ or ‘contaminant.’”); *Biological Pollutants’ Impact on Indoor Air Quality*, EPA, <https://www.epa.gov/indoor-air-quality-iaq/biological-pollutants-impact-indoor-air-quality> [<https://perma.cc/594Z-55J5>] (last visited June 10, 2021) (“Biological contaminants include bacteria, viruses, animal dander and cat saliva, house dust, mites, cockroaches, and pollen.”).

B. Highway COVID-19 Checkpoints

The Cheyenne River Sioux (CRS) and Oglala Sioux COVID-19 checkpoints on roads crossing their lands are likely the most well-known state-tribal COVID-19 clash. South Dakota was perhaps the most laissez-faire state in terms of its response to the COVID-19 virus.¹⁷⁷ Although South Dakota stayed open, tribes within the state knew their populations were extremely vulnerable to the COVID-19 virus.¹⁷⁸ Tribal susceptibility to COVID-19 was exacerbated by there being a measly eight hospital beds on the CRS reservation for a population of approximately 10,000.¹⁷⁹ Thus, CRS Chairman Harold Frazier believed it was imperative to take prophylactic measures against the COVID-19 virus.¹⁸⁰ Checkpoints along reservation roads were one of those measures.¹⁸¹ South Dakota Governor Kristi Noem attempted to pressure the CRS and Oglala into removing the

177. See Adam McCann, *States with the Fewest Coronavirus Restrictions*, WALLETHUB (Apr. 6, 2021), <https://wallethub.com/edu/states-coronavirus-restrictions/73818> [<https://perma.cc/A64R-9H2R>]; see also *South Dakota Is the State with the Fewest Coronavirus Restrictions, Study Finds*, MED (June 24, 2020, 7:00 AM), <https://www.midwestmedicaledition.com/2020/06/24/318548/south-dakota-is-the-state-with-the-fewest-coronavirus-restrictions-study-finds> [<https://perma.cc/4NGW-GNR3>]; Ayla Ellison, *10 States with the Most, Fewest COVID-19 Restriction*, BECKER'S HOSP. REV. (July 21, 2020), <https://www.beckershospitalreview.com/rankings-and-ratings/10-states-with-the-most-fewest-covid-19-restrictions-0721.html> [<https://perma.cc/4T5G-VU7P>].

178. See Eric Ortiz, *As South Dakota Takes Hands-Off Approach to Coronavirus, Native Americans Feel Vulnerable*, NBC NEWS (Nov. 25, 2020, 6:00 AM), <https://www.nbcnews.com/news/us-news/south-dakota-takes-hands-approach-coronavirus-native-americans-feel-vulnerable-n1248868> [<https://perma.cc/QS83-648C>] (“Bald Eagle said many tribal members were previously diagnosed with underlying health conditions, such as diabetes and heart disease, and had limited access to health care on the reservation, which is partly in one of the most impoverished counties in the country.”).

179. See Cheyenne River Sioux Tribe Complaint, *supra* note 37, at 14 (“The Tribe’s IHS facility in Eagle Butte, South Dakota, has only eight in-patient beds, six ventilators, two negative pressure rooms, inadequate staff, and zero respiratory therapists to care for the Reservation’s 10,000 resident Tribal members.”).

180. See Mary Auld, *COVID-19 Restrictions Put Tribal Sovereignty to the Test*, MONT. PUB. RADIO (Oct. 30, 2020, 6:45 PM), <https://www.mtpr.org/post/covid-19-restrictions-put-tribal-sovereignty-test> [<https://perma.cc/M49A-M8H6>] (“It is tough because once it starts spreading it could easily get out of control. We know that our best tool is prevention. Hopefully it works and we keep this virus at a minimum.”).

181. See *id.* (“Cheyenne River Sioux Tribal Chairman Harold Frazier says checkpoints along with mandatory stay-at-home orders and a mask mandate are intended to protect reservation residents from contracting COVID-19.”).

checkpoints,¹⁸² so the CRS filed suit in federal court seeking injunctive and declaratory relief.¹⁸³

The CRS removed the checkpoints prior to the court deciding the case because the CRS gained access to the vaccine.¹⁸⁴ Accordingly, the question remains: Were the CRS and Oglala COVID-19 roadside checkpoints legal? The CRS and Oglala claim a 1990 Eighth Circuit Court of Appeals decision prohibits states from asserting jurisdiction over public highways traversing tribal lands.¹⁸⁵ A 1997 Supreme Court decision seems to recognize state authority over public highways on tribal lands when only non-Indians are involved in the tortious conduct.¹⁸⁶ Nevertheless, a footnote in the opinion expressly acknowledges tribal authority “to patrol roads within a reservation.”¹⁸⁷ Following the Court’s recent federal Indian law decisions, the tribal checkpoints are likely lawful.¹⁸⁸ Indeed, 17 members of the South Dakota legislature wrote a letter to Governor Noem articulating the legality of the checkpoints.¹⁸⁹

182. See Kalen Goodluck, *Tribes Defend Themselves Against a Pandemic and South Dakota’s State Government*, HIGH COUNTRY NEWS (Oct. 2, 2020), <https://www.hcn.org/articles/indigenous-affairs-covid19-tribes-defend-themselves-against-a-pandemic-and-south-dakotas-state-government> [https://perma.cc/N7FC-D9QM] (“By early May, South Dakota Gov. Kirsti Noem, R, explicitly told the tribes to remove their checkpoints or face the consequences.”).

183. See Cheyenne River Sioux Tribe Complaint, *supra* note 37, at 3.

184. See Arielle Zions, *Cheyenne River Sioux Tribe Ends COVID-19 Checkpoints*, RAPID CITY J. (Apr. 30, 2021), https://rapidcityjournal.com/news/local/cheyenne-river-sioux-tribe-ends-covid-19-checkpoints/article_627a9c80-88c0-554a-b1cf-858138ba055d.html [https://perma.cc/7HSU-7JLS].

185. See *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1166 (8th Cir. 1990) (“Absent tribal consent, we hold the State of South Dakota has no jurisdiction over the highways running through Indian lands in the state.”).

186. See *Strate v. A-1 Contractors*, 520 U.S. 438, 455–56 (1997) (“Forming part of the State’s highway, the right-of-way is open to the public, and traffic on it is subject to the State’s control.”).

187. *Id.* at 456 n.11.

188. See Matthew L.M. Fletcher, *Muskrat Textualism*, 115 NW. U. L. REV. (forthcoming 2022) (manuscript at 59), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3767096 [https://perma.cc/7FUT-HJW5] (“In the last decade, the Supreme Court has embarked on a shift prioritizing Muskrat textualism that properly situates the Court as interpreter of the law rather than the maker of the law.”).

189. See Cory Allen Heidelberg, *17 Legislators Defend Tribal Coronavirus Checkpoints*, DAKOTA FREE PRESS (May 11, 2021), <https://dakotafreepress.com/2020/05/11/17-legislators-defend-tribal-coronavirus-checkpoints/> [https://perma.cc/PTN5-ZDDE].

C. Casino and Other Tribal Enterprise Closures

Most states implemented lockdowns to prevent the spread of COVID-19, and these pandemic control measures caused well-documented economic hardships.¹⁹⁰ While state law is presumed to be inapplicable in Indian country,¹⁹¹ states do assert significant control over tribes' ability to open a casino within a state's borders;¹⁹² however, states have little authority over tribal casino operations once the casino opens.¹⁹³ This presented tribes with a conundrum.

Tribes do not have a tax base because the Supreme Court allows states to tax Indian country commerce.¹⁹⁴ Tribal casinos act as a substitute for taxes as tribal casino revenues go to fund tribal schools, courts, fire departments, and other government functions.¹⁹⁵

190. See David J. Lynch, *Raging Virus Triggers New Shutdown Orders and Economy Braces for Fresh Wave of Pain*, WASH. POST (Nov. 14, 2020, 6:03 PM), <https://www.washingtonpost.com/business/2020/11/14/coronavirus-shutdown-orders-economy/> [https://perma.cc/VAH9-YXVK].

191. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (holding the laws of Georgia "have no force" inside the Cherokee Nation); see also 42 C.J.S. *Indians* § 92 (2021) ("A state is preempted by operation of federal law from applying its own laws to land held by the United States in trust for the tribe."); Christine L. Swanick & Wilda Wahpepah, *When the "Lights Go Out on Broadway?" will the Lights on Tribal Slot Machines Be Next? What do State Covid-19 Emergency Actions Mean for Tribal Gaming Operations?*, NAT'L L. REV. (Mar. 17, 2020), <https://www.natlawreview.com/article/when-lights-go-out-broadway-will-lights-tribal-slot-machines-be-next-what-do-state> [https://perma.cc/GYN8-RD9D] ("State governments have limited jurisdiction over tribes and their activities, and as a general rule States lack legal authority to govern tribal activities on tribal land.").

192. See Adam Creppelle, *The Tribal per Capita Payment Conundrum: Governance, Culture, and Incentives*, 56 GONZ. L. REV. 483, 492–93 (2021).

193. See Elliot Spagat, *Some California Tribal Casinos Ring in 2021 as Virus Spreads*, ASSOC. PRESS NEWS (Dec. 31, 2020), <https://apnews.com/article/gavin-newsom-california-coronavirus-pandemic-san-diego-54f5b5e5fe5637215e3fd48152145dab> [https://perma.cc/5QMZ-997Y] ("Tribal casinos operate under federal law on federally protected land, known as rancherias in California, so they're not required to fall in line with Newsom's orders."); see also *Tribal Casinos in Washington Closing Due to Coronavirus*, Q13 FOX (Apr. 6, 2020), <https://www.q13fox.com/news/tribal-casinos-in-washington-closing-due-to-coronavirus> [https://perma.cc/QA72-8V36] ("As sovereign nations, the tribes are not bound by the orders of Gov. Jay Inslee, who has shut down schools, bars and restaurants in the state and limited the size of public gatherings.").

194. See Adam Creppelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1028–32 (2020).

195. See Letter from Tribal Chairs of Eight Tribes to Gavin Newsom, Governor of Cal., & Greg Cox, Chairman, San Diego Cty. Bd. of Supervisors 2 (May 8, 2020) [hereinafter Letter from Tribal Chairs], <https://s3.documentcloud.org/documents/7228977/TribalLetterReopening.pdf> [https://perma.cc/VCK5-Y8B4] ("Tribal government gaming is the only lifeline for

Additionally, tribal casinos and related ventures employ thousands of people, predominantly non-Indians.¹⁹⁶ Shutting casino doors cut off tribal governments' primary revenue stream and left heaps of people without jobs.¹⁹⁷ The decision was even more difficult because state lockdowns did not apply to tribes¹⁹⁸ — transforming operational tribal casinos into oases of fun.¹⁹⁹ Shutting down during a captive market made casino closures even more costly for some tribes.

Some tribes, such as the Navajo Nation, kept their casinos closed months into 2021.²⁰⁰ Several other tribes opened much sooner and implemented a variety of safety measures.²⁰¹ Tribal casinos used

essential government functions on each of our reservations including, but not limited to: police, fire, medical, education, child care, housing, water and wastewater, eldercare, environmental protection, recreation and more.”); *see also* *Chez Oxendine, Tribal Casinos Grapple with COVID-19's Second Wave*, TRIBAL BUS. NEWS (Dec. 7, 2020), <https://tribalbusinessnews.com/sections/gaming/13262-tribal-casinos-grapple-with-covid-19-s-second-wave> [<https://perma.cc/8GVP-HACC>] (“The financial impact is great in that a large majority of our income comes from our casino revenue and a smaller part through grants or other businesses,” Romanelli told Tribal Business News. “We have to reduce key services to our membership, which impacts those most in need, such as elders.”).

196. *See* Letter from Tribal Chairs, *supra* note 195, at 2 (“Collectively, tens of thousands of San Diegans rely on our economic activity to support their families, dependents and communities — and an innumerable number of small-and medium-sized businesses depend on us for purchase of various goods and services.”); *see also* Lynda V. Mapes, *Tribal Governments, Hobbled by Casino Closures Related to Coronavirus, Eye Reopening*, BELLINGHAM HERALD (May 5, 2020, 5:00 AM), <https://www.bellinghamherald.com/news/coronavirus/article242487776.html> [<https://perma.cc/RBZ8-6D3D>].

197. *See* *Tribal Casinos in Washington Closing Due to Coronavirus*, *supra* note 193 (“Closing the tribal casinos is significant because they fund many tribal government operations, and have thousands of employees.”).

198. *See* Swanick & Wahpepah, *supra* note 191.

199. *See, e.g.*, Spagat, *supra* note 193.

200. *See* *Navajo Nation Plans to Reopen Casinos on Monday as COVID-19 Declines*, 8 NEWSNOW (Mar. 12, 2021, 3:14 PM), <https://www.8newsnow.com/news/national-news/navajo-nation-plans-to-reopen-casinos-on-monday-as-covid-19-declines/> [<https://perma.cc/UN4T-DLU4>].

201. *See* Susan Haigh, *Tribes Reopen Casinos amid the Coronavirus Pandemic, Despite State Objections*, USA TODAY (June 15, 2020, 1:36 PM), <https://www.usatoday.com/story/travel/news/2020/06/14/tribal-casinos-reopen-amid-coronavirus-outbreak-despite-state-opposition/3187325001/> [<https://perma.cc/W89H-M3PG>] (“Connecticut’s two federally recognized tribes, the Mashantucket Pequot Tribal Nation and the Mohegan Tribe, are not alone in reopening doors early as the nation reemerges from the shutdown — though both say they are being careful about reopening.”); *see also* Steve Horn, *Tribal Casinos Weigh Dueling Risks of COVID-19, Economic Ruin*, VISALIA TIMES DELTA (Aug. 31, 2020, 1:06 PM), <https://www.visaliatimesdelta.com/story/news/2020/08/31/tribal-casinos-weigh-dueling-risks-covid-19-economic-ruin/5662206002/> [<https://perma.cc/9D5R-4QFW>] (noting the Coeur d’Alene Tribe opened its casino in mid-May of 2020. “While Standing Rock has kept its casinos open, the Navajo Nation has kept its four casinos

temperature kiosks, imposed mask mandates, reduced the number of gaming machines open to help social distance, and limited the number of casino workers.²⁰² While many tribes suffered from lost casino revenue,²⁰³ COVID-19 protocols may have made some casinos more profitable thanks to reduced operating costs as well as more dedicated gamers appearing during the COVID-19 pandemic.²⁰⁴ Tribes in northern California even hosted socially distanced New Year's Eve parties.²⁰⁵ Data on the effectiveness of tribal casino safety protocols is not readily accessible,²⁰⁶ but some tribal casinos were linked to COVID-19 outbreaks.²⁰⁷

closed since March 17"); Spagat, *supra* note 193 ("California's self-governed tribal casinos have largely left safety rules unchanged since reopening in the spring as the government has stiffened restrictions on other businesses in most of the state.").

202. See Lynda V. Mapes, *Some Tribal Casinos Reopen amid Coronavirus Pandemic, Despite Washington State's Stay-Home Order*, SEATTLE TIMES (May 13, 2020, 4:12 PM), <https://www.seattletimes.com/seattle-news/some-tribal-casinos-reopen-amid-coronavirus-pandemic-despite-washington-states-stay-home-order/> [<https://perma.cc/3AGX-47L6>] ("At properties that have opened, customers will see a range of changes due to the novel coronavirus, including turned-off machines to enforce social distancing, plexiglass shields and wider aisles, in addition to deep cleaning."); see also Frank Vaisvilas, *'We're Not Kidding Around': Wisconsin Tribal Businesses Require Face Masks amid COVID-19*, GREEN BAY PRESS GAZETTE (June 11, 2020, 10:53 AM), <https://www.greenbaypressgazette.com/story/news/2020/06/11/coronavirus-wisconsin-casinos-tribal-businesses-require-facemasks/5337039002/> [<https://perma.cc/HN8Z-ZLPJ>] ("He said the management is also doing its best to maintain the 6-foot distance guideline and that only about 28% of the slot machines are in operation to encourage social distancing.").

203. See Adam Minter, *As Covid Shuttters Casinos, Indian Country Reels*, BLOOMBERG (Aug. 4, 2020, 11:30 AM), <https://www.bloomberg.com/opinion/articles/2020-08-04/as-covid-shuttters-casinos-indian-country-reels> [<https://perma.cc/2TMD-Y4U4>].

204. See *Wipfli Releases 23rd Annual Cost of Doing Business Report for Tribal Gaming*, WIPFLI (Oct. 14, 2021), <https://www.wipfli.com/news/2021/tr-2021-indian-gaming-cost-of-doing-business-report> [<https://perma.cc/YAU4-2Y7U>] ("However, during the recovery phase, many tribal casinos reopened without traditional loss leaders like buffets, which operate with higher operating and wage costs, and this had led to increased overall profitability.").

205. See Sam Stanton, *New Year's Eve Parties at Some Tribal Casinos Still on as California COVID Cases Spike*, SACRAMENTO BEE (Dec. 30, 2020, 10:15 AM), <https://www.sacbee.com/news/local/article248132965.html> [<https://perma.cc/V3AF-7EK8>] ("Out of an abundance of caution, Thunder Valley is closing to the general public on New Year's Eve and limiting the number of guests that will have access to the casino to 6,000, which is less than 20% of attendance on a typical NYE at Thunder Valley' . . .").

206. See generally Stephanie Russo Carroll et al., *Indigenous Data in the Covid-19 Pandemic: Straddling Erasure, Terrorism, and Sovereignty*, SOC. SCI. RES. COUNCIL (June 11, 2020), <https://items.ssrc.org/covid-19-and-the-social-sciences/disaster-studies/indigenous-data-in-the-covid-19-pandemic-straddling-erasure-terrorism-and-sovereignty/> [<https://perma.cc/K3CQ-7RYQ>]; Camille von Kaenel & Jennifer

D. COVID-19 Treatments

Tribes and states can also differ on what treatments are available for the COVID-19 virus. For example, some states experimented with hydroxychloroquine as a COVID-19 treatment,²⁰⁸ while others banned the drug.²⁰⁹ Tribes within the borders of these states did not have any issues with this medication; however, tribes have battled with states over marijuana legality.²¹⁰ Thus, disputes over medical options available on and off the reservation are foreseeable.

Within Indian country, treatment legality depends on whether a person is an Indian. States have no jurisdiction over Indians in Indian country,²¹¹ so Indians can partake in treatments legal under tribal law

Bowman, *Tribal Casinos Keep COVID-19 Details Private While Juggling Economics, Safety*, KPBS (Oct. 16, 2020, 5:34 AM PDT), <https://www.kpbs.org/news/2020/oct/16/tribal-casinos-covid-19-economics-safety/> [<https://perma.cc/25CV-TQAK>] (“Tribes are generally protective of their data, including during the pandemic, said Vanessa Cresci, research and public health director at the California Rural Indian Health Board.”).

207. See Amanda Ulrich, *Tribal Casinos Remain Open as Southern California Adjusts to COVID-19 Stay-At-Home Order*, DESERT SUN (Dec. 12, 2020, 6:05 PM), <https://www.desertsun.com/story/money/business/tourism/2020/12/12/tribal-casinos-remain-open-socal-adjusts-shutdown-order/6495025002/> [<https://perma.cc/G6K3-S2VU>] (“Six separate outbreaks of three or more cases have occurred at Riverside County casinos in the last six months, county officials confirmed to The Desert Sun this week.”).

208. See Andrew Joseph, *Utah Went All-In on an Unproven Covid-19 Treatment, Then Scrambled to Course-Correct*, STAT (May 18, 2020), <https://www.statnews.com/2020/05/18/utah-hydroxychloroquine-scramble-course-correct/> [<https://perma.cc/7ATZ-356U>]; see also Shannon Marvel, *South Dakota’s Trial of a Controversial COVID-19 Drug Has Been Discontinued*, MITCHELL REPUBLIC (June 5, 2020, 1:14 PM), <https://www.mitchellrepublic.com/newsmd/coronavirus/6523704-South-Dakotas-trial-of-a-controversial-COVID-19-drug-has-been-discontinued> [<https://perma.cc/F3CW-VKPU>].

209. See Trish Riley & Sarah Lanford, *States Act to Protect Consumers Against Unproven COVID-19 Drugs and Safeguard Supplies as FDA Approves Limited Use*, NAT’L ACAD. FOR ST. HEALTH POL’Y (Mar. 30, 2020), <https://www.nashp.org/states-act-to-protect-consumers-against-unproven-covid-19-drugs-and-safeguard-supplies/> [<https://perma.cc/U2G9-XY7A>] (“At least 11 states have acted to limit the dispensing of chloroquine and hydroxychloroquine – prescription drugs that have been cited as providing protection against coronavirus (COVID-19) without adequate clinical evidence to support that claim.”).

210. See Adam Creppelle, *Tribes & Cannabis: Where Things Stand*, AM. GAMING LAW., Spring 2017, at 24, https://www.imgl.org/sites/default/files/media/publications/tribes-and-cannabis_creppelle_agl_spring2017.pdf [<https://perma.cc/UZ3F-BP5A>].

211. Public Law 280 would be an exception to this. See CAROLE GOLDBERG & HEATHER VALDEZ SINGLETON, NAT’L INST. OF JUST., PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY — RESEARCH PRIORITIES (2005), <https://www.ojp.gov/pdffiles1/nij/209839.pdf> [<https://perma.cc/9DZR-UYPX>].

even though the treatment is illegal under state law. However, non-Indians are bound by state laws relating to victimless crimes in Indian country.²¹² This means non-Indians must follow state treatment rules even in Indian country. While tribal jurisdiction over non-Indians is extremely limited, tribes can prohibit medicines on their land despite the medicine being legal in the surrounding state.²¹³ Tribes enforce the penalty through civil forfeiture,²¹⁴ which operates on the legal fiction the property is guilty of the offense rather than the person.²¹⁵ Consequently, non-Indians must abide by state and tribal guidelines while in Indian country, but Indians only need to follow tribal law.

Off reservation, the legal landscape is much clearer. Tribes will categorically have no jurisdiction over non-Indians who engage in treatments contrary to tribal law outside of Indian country. The only possible exception to this would be if the treatment caused some sort of environmental contamination to the tribe's Indian country,²¹⁶ which seems highly unlikely to arise from a medical treatment. Contrarily, states can enforce their criminal laws upon Indians who are outside of Indian country.²¹⁷ The exception to this rule is treaties.²¹⁸ Some treaties provide Indians with rights that extend beyond the tribe's reservation,²¹⁹ but a state criminal prohibition on the treatment would likely trump the Indian's right to partake in a

212. See *United States v. McBratney*, 104 U.S. 621, 624 (1881); see also GOLDBERG & VALDEZ SINGLETON, *supra* note 211, at 6.

213. See Ray Stern, *Medical-Marijuana Law Doesn't Apply on Loop 101 from About McKellips to 90th Street; Pot Patient Says Car Seized by Tribal Cops*, PHX. NEW TIMES (Jan. 6, 2012, 5:57 PM), <https://www.phoenixnewtimes.com/news/medical-marijuana-law-doesnt-apply-on-loop-101-from-about-mckellips-to-90th-street-pot-patient-says-car-seized-by-tribal-cops-6640930> [<https://perma.cc/NJ9H-BAAE>].

214. See *id.*

215. See Adam Creppelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J. L. & POL'Y 315, 341–42 (2017).

216. See Adam Creppelle, *The Reservation Water Crisis: American Indians and Third World Water Conditions*, 32 TUL. ENV'T. L.J. 157, 166 (2019) (“Under environmental tribes-as-states provisions, it is absolutely clear that tribes have the authority to exclude pollutants from their reservations.”).

217. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973) (“Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.”).

218. See *generally* *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019).

219. See *generally* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

treatment that violates state law.²²⁰ Thus, state law is the rule outside of Indian country.

CONCLUSION

Though socioeconomic factors left Indians particularly vulnerable, tribes knew COVID-19 would not discriminate. Thus, tribes did all they could to protect everyone in their communities, and they succeeded. Tribes have been widely recognized as leaders in COVID-19 responsiveness, oftentimes acting before and more resolutely than the surrounding state. Likewise, tribal vaccine distribution campaigns outperformed states. While tribal sovereignty over non-Indians is limited, tribes offered COVID-19 vaccines to everyone. The United States is safer because tribes opened their doors to non-Indians. Hopefully, tribes' success handling the COVID-19 pandemic will inspire greater respect for tribal sovereignty.

220. *See* *Emp. Div. v. Smith*, 494 U.S. 872, 921 (1990) (holding states can deny Indians who used peyote for religious reasons unemployment benefits).